1981

The Deep Seabed Hard Mineral Resources Act: Legality and Necessity the U.S. Perspective

Thomas P. Beatty
University of Rhode Island

Follow this and additional works at: http://digitalcommons.uri.edu/ma_etds
Part of the Law of the Sea Commons, and the Oceanography and Atmospheric Sciences and Meteorology Commons

Recommended Citation
THE DEEP SEABED HARD MINERAL RESOURCES ACT

LEGALITY AND NECESSITY

THE U.S. PERSPECTIVE

BY

THOMAS P. BEATTY

A MAJOR PAPER SUBMITTED IN FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF
MASTER OF MARINE AFFAIRS

UNIVERSITY OF RHODE ISLAND

1981
In June of 1980, the President of the United States signed into law the Deep Seabed Hard Mineral Resources Act, a piece of national legislation that will most definitely have international repercussions. The developing nations of the world are strongly opposed to unilateralism on the part of any nation, contending the minerals of the deep seabed belong to all nations and, therefore, the benefit from the exploitation of those minerals should likewise be shared by all nations. Why then, against such firm opposition from the less developed countries of the world, did the United States opt for unilateralism instead of waiting for an international agreement to regulate the resources of the deep seabed? This paper proposes to examine whether unilateral exploitation by the United States of the deep seabed beyond the limits of its national jurisdiction is authorized by existing international law, and secondly, is such legislation actually necessary? Are the vital interests of the United States served by such legislation or will the international reaction be detrimental to U.S. interests abroad?

To more clearly understand the situation it is necessary to realize that the law of the sea is not a new problem. Maritime disagreements have been taking place since the days of the Roman Empire. What has taken place recently is the attempt to codify the law of the sea to reduce the likelihood of disputes or, at the very least, the threat of conflict from these disputes. If we look to the late 1950's to the present we will see numerous international endeavors to bring about this codification.

The deep seabed and the mining of the minerals on the ocean floor, has proven to be the most controversial issue at these law of the sea negotiations. The area in dispute covers over fifty per cent of the earth's surface and figures to be an important source of minerals in the future. This,
coupled with ideological differences, has polarized the world such that for
the most part the battle is two-sided; the developed nations versus the
developing nations.

Historically, the initial knowledge surrounding the deep seabed and
the presents of the manganese nodules was obtained following the voyage of
the HMS CHALLENGER, under the leadership of Sir Wyville Thomson, over one
hundred years ago (1872-1876). The nodules retrieved on this voyage were
never analyzed for mineral content for nearly seventy years thereafter.
Following World War II interest in the deep seabed and the minerals con-
tained therein began to expand.

In 1958 the First United Nations Conference on the Law of the Sea,
UNCLOS I, convened. After centuries of disputing the international com-
munity assembled to attempt to codify the laws of the sea. This assemblage
of international representatives was able to produce four conventions deal-
ing with the high seas, fishing and the conservation of living resources,
the continental shelf, and the territorial sea and the contiguous zone.

In 1960 the Second United Nations Conference on the Law of the Sea,
UNCLOS II, met in an attempt resolve the issue of the territorial sea which
had not been settled at UNCLOS I. The Second Conference proved equally
incapable of resolving the question.

In 1965 Ambassador Arvid Pardo of Malta proclaimed the "common heritage
of mankind" principle before the U.N. General Assembly.

In 1969 the U.N. General Assembly passed the Moratorium Resolution
which called for persons and states to refrain from exploiting the resources
of the deep seabed beyond national jurisdiction.

In 1970 the U.N. General Assembly unanimously passed the Declaration
of Principles Governing the Seabed and the Ocean Floor, and the Subsoil

Thereof, Beyond the Limits of National Jurisdiction\textsuperscript{7} which declared the deep seabed to be the "common heritage of mankind" to be exploited for the benefit of mankind as a whole.


In 1974 UNCLOS III is formally convened in Caracas, Venezuela, and is still in progress after nine complete sessions.

In 1980 the United States enacted the Deep Seabed Hard Mineral Resources Act.\textsuperscript{8} This was the first unilateral attempt by a government to permit mining of the deep seabed beyond its own national jurisdiction.

One can easily see that nearly a decade passed between the United Nations General Assembly Resolutions of 1969 and 1970 and the U.S. unilateral legislation of 1980. This, along with the fact that nine sessions have been held to date and no agreement has been reached attests to the difficulty of negotiating an international agreement dealing with the exploration and exploitation of the deep seabed. After waiting a decade in hopes of reaching a favorable agreement the U.S. apparently felt the time was right to enact national legislation to permit the deep ocean mining. This action was taken with several purposes in mind, namely, to encourage the successful conclusion of a comprehensive Law of the Sea Treaty;\textsuperscript{9} pending the entry into force of such a treaty, to provide for the establishment of an international revenue-sharing fund;\textsuperscript{10} to establish an interim program to regulate the exploration for and the commercial recovery of hard mineral resources of the deep seabed by U.S. citizens;\textsuperscript{11} to accelerate environmental assessment of such exploration and ensure that such exploration and recovery activities are conducted in such a manner as to encourage the conservation of such resources, protect the quality of the environment,
and promote the safety of life and property at sea; and finally, to encourage the continued development of technology necessary to recover the hard mineral resources of the deep seabed.

With this background in mind, let us proceed to the legal side of the controversy. Was the U.S. enactment of unilateral deep sea mining legislation contrary to existing international law? It has been contended by some that unilateral exploitation of the ocean areas beyond national jurisdiction is not in keeping with existing laws and principles, with the concept of "common heritage of mankind", nor is it consistent with the consensus at the United Nations Conferences on the Law of the Sea. Yet others would argue that the U.S. was well within their legal rights to enact this type legislation under the principle of "freedom of the seas". If we look then at the concept of "freedom of the Seas" as it existed prior to UNCLOS I, we find it to be a historical compromise between res nullius and res communis omnium, that which is owned by no one and that which is common to all.

Roman law concepts can be used in presenting a case for U.S. exploitation. Generally, title to any res nullius can be obtained by satisfying the requirement of occupation. Occupation has two requirements: first, that the claimed thing actually possess res nullius status (i.e. it has no owner, has been abandoned by the former owner, or it has never been owned by anyone), and second, that "effective control" be established by the capture of the res nullius object. Such objects that have been included in the category of res nullius include fish, pearls, free-floating goods from wrecked ships, and manganese nodules themselves. Whereas the surface of the sea and the air were deemed res communis omnium due to the impossibility of satisfying the "effective control" requirement.
When it comes to the actual exploration and exploitation of the deep seabed a different principle emerges, that of freedom of the seas. This concept was set forth by Hugo Grotius in a 17th century work in which he states, "Therefore, the sea is one of those things which is not an article of merchandise, and which cannot become private property. Hence, it follows, to speak strictly, that no part of the sea can be considered as the territory of any people whatsoever."24 Taken at face value it would appear that the freedom of the sea principle would not coincide with the unilateral mining attempt of the U.S. But, I feel just the opposite is true. The proponents of deep seabed mining and the legislators of the U.S. do not intend to claim sovereign jurisdiction over any area of the seabed. The Deep Seabed Hard Mineral Resources Act states that the U.S. "does not thereby exert sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any areas or resources in the deep seabed."25 The freedom of the sea principle prohibits sovereign claims to the seabed, but does not forbid the unilateral exploration and exploitation of the manganese nodules. The nodules then would be considered res nullius not owned by anyone but subject to harvesting by anyone with the technology to accomplish the task.

It should be kept in mind that prior to the 1958 United Nations Conference, this freedom of the sea principle, after three and a half centuries, had developed into customary international law that also prescribed to the norm that insists on "reasonable regard to the interests of other states in their exercise of the freedom of the seas." This must be mentioned so as not to give the impression that this freedom is absolute. The oceans have served man in many ways, as a source of food, as a transportation medium, and a potential source of energy. Any of these opera-
tions may conflict with another at any time. When this does happen there
must be a balance between maintaining the best possible use of the oceans
along with the right of other states to exercise their freedoms.

Therefore, I conclude that the unilateral legislation passed by the
United States is in keeping with the customary international principle set
forth by Grotius in the 17th century, and that the manganese nodules are
res nullius, and may be exploited by anyone. The sea and the seabed must
be classified as res communis and not subject to exclusive control by any
person or state. Just as fishing, the laying of submarine cables, or even
naval exercises can be controlled so as not to interfere with the rights of
others to use the seas, so too can the harvesting of manganese nodules be
controlled.

In 1958 the First United Nations Conference on the Law of the Sea met
in an attempt to codify this customary law. There were four conventions
produced at the Conference, but only one, the Convention on the High Seas,
is directly related to the issue of deep seabed mining. Of the thirty-
seven articles of the convention, Articles 1 and 2 are particularly
relevant to this discussion. For this reason I will quote both articles
in their entirety:

Article 1: The term "high seas" means all parts
of the sea that are not included in the territo-
torial sea or in the internal waters of a State.

Article 2: The high seas being open to all nations,
no nation may validly purport to subject any part
of them to its sovereignty. Freedom of the high
seas is exercised under the conditions laid down
by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:

1. Freedom of navigation;
2. Freedom of fishing;
3. Freedom to lay submarine cables and pipelines;
4. Freedom to fly over the high seas.

These freedoms, and others that are recognized by general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas. 28

Nowhere in either article, or in the entire convention, is there a prohibition on exploration and exploitation of the deep seabed. The four freedoms listed in Article 2 are definitive, but are by no means exclusive. The drafters of the convention illustrated this fact by including the "inter alia" clause prior to the enumeration of the freedoms as evidence of the non-exclusivity of the list.

It has also been contended by some opponents of unilateralism that the seabed is not entitled to the freedom of the sea protection as stated in Article 2. However, the article does state that the high seas refers to "all parts of the sea..." thus, I believe including the seabed areas within that category.

Therefore, I must conclude that the Convention on the High Seas did not limit or restrict any nation from undertaking unilateral mining of the deep seabed. Although not specifically mentioned in Article 2, the "free-
The next matter to be discussed is that of the 1969 and 1970 United Nations General Assembly Resolution relevant to deep seabed mining. Both resolutions should be analyzed as to their status as international law and whether they have, over the past decade, replaced or in any way modified customary international law. Examining both resolutions as to their initial legal status, it must be remembered that both are General Assembly resolutions, and as such are not legally binding on any nation. The U.N. Charter is specific as far as the powers of the General Assembly are concerned. Chapter 4 of the Charter grants the Assembly the power to hold deliberations on matters of international importance and render a recommendation on the matter, but the Assembly does not have any legislative authority.

Secondly, has either resolution created or modified accepted customary international law? To determine this, each resolution will be examined in light of the elements required to bring about a change in international law. First, is there evidence of a "habitual act" among nations; second, do states perceive a legal obligation not a "comity"; third, is the new practice accepted by a majority of affected states; and finally, is the new resolution practiced over a reasonable length of time.

The Moratorium Resolution

In 1969 the General Assembly passed this resolution by a vote of sixty-two in favor, twenty-eight against, and twenty-eight abstaining, and eight not voting. The resolution attempted to prohibit a single nation or small group of nations from exploiting the minerals of the deep seabed. Examin-
ing the resolution based on the four criteria above, it must be recognized that the first, the habitual act or usage requirement is mainly theoretical since most states must refrain from the practice because they lack the technology. As for the "legal obligation", the U.S. has stated from the outset and repeatedly over the last decade, that the resolution has no binding legal effect on this country. The majority of affected states did not favor the resolution either. Although only twenty-eight states out of a possible one hundred and twenty-six were not in favor of the resolution, those states included the large industrialized nations most affected by the resolution. The United States, Soviet Union, Great Britian, France, the Netherlands, and Canada were some of the nations not favoring passage of the resolution. Has the Moratorium Resolution weathered the international test of time? Although this factor may vary from case to case, a period of less than ten years, for a practice that was accepted by less that fifty per cent of the then voting members of the United Nations, does not seem to meet the criteria, thereby altering existing norms.

The Declaration of Principles

One year after the Moratorium Resolution, the General Assembly passed the Declaration of Principles Governing the Seabed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, commonly referred to as the Declaration of Principles. The resolution stated that the deep seabed was part of the "common heritage of mankind" and as such was not to be exploited except for the benefit of mankind as a whole and then only with international concensus and under an international regime. The resolution passed the General Assembly by a vote of one hundred and eight in favor, none opposed, and eight abstaining. Because of the over-
whelming support for the resolution the requirement of "habitual act or usage" seems to be at least outwardly satisfied. But the indication that the same overwhelming majority of states recognized the resolution as legally binding is absent. Several industrialized nations, the U.S. among them, supported the Declaration in principle, but made it known that the resolution was in no way legally binding on them. The acceptance criteria may be met politically but not legally. The final criteria, that of time, has also not been met because the resolution is drafted in futuristic terms based on the formation of some kind of international seabed mining regime. Taken literally then, the resolution cannot be violated or practiced until that regime has been formally recognized and established by the proposed Law of the Sea Treaty.

It would seem that neither resolution has achieved the status of international law, nor has either resolution altered existing laws.

It might be well to move to the next point of controversy, that of the "common heritage of mankind". The dispute persists because what this concept means to the United States as applied to deep seabed mining is completely different from the views held by the developing nations of the world. The concept was first presented by Ambassador Pardo in 1967 and to some it has taken on the status of customary international law.

Common Heritage of Mankind

(U.S. view)

The United States' view of the principle of "common heritage of mankind" is quite different from that held by the Group of 77. As a major industrialized nation and one that imports a large amount of minerals, the common heritage principle is one of first come, first served. This may
be somewhat simplistic but basically correct. The U.S. holds that the principle binds a nation in no way to halt development of deep sea mining techniques and preparations for future mining operations. The minerals of the deep seabed, just like fish, are available to anyone who can harvest the resource and profit from it. This "common heritage" principle, although first brought forth in the 1960's, has not yet been clearly defined and still today has varied interpretations. The United States contends that the "freedom of the sea" clause grants the right to mine the nodules and is more universally accepted as international law.

**Common Heritage of Mankind**

(Third World view)

The Third World, composed of some of the lesser developed countries of the world, subscribe to the policy followed by the Group of 77. These nations contend that the "common heritage of mankind" means the resources of the deep seabed are the common property of mankind, to be exploited only by an international regime, and the benefits distributed accordingly. This concept has achieved the status of customary international law based on the fact it was overwhelmingly accepted by the world community of the United Nations. This principle has been a unification factor for the Third World at the Law of the Sea Conference and one which they seem very reluctant to compromise.

Since the Third Conference on the Law of the Sea was formally convened in 1974, nine sessions have taken place with the tenth session underway at this time. The task facing these representatives was monumental to say the least; the formulation of a comprehensive international convention on the development of the oceans that would be acceptable world-
wide. One of the few remaining controversies to be settled is that of the
deep ocean resources and how they should be exploited. There have been
various methods proposed from unilateralism to strict international reg-
ulation to some sort of mutual compromise. The unilateral approach of
course would permit persons or states to mine the deep seabed beyond nation-
al jurisdiction, supplying their own capital and own technology to harvest
the resources and benefits that are contained therein. The strict inter-
national regulatory approach would call for the cessation of all unilateral
exploration and exploitation of the deep seabed until an international
regime can be formed. Once put into action this international mining com-
pany would control all aspects of the mining operation. This would require
the developed nations to transfer technology to this mining enterprise so
as to accomplish that complete control. The benefits from the exploitation
would be distributed accordingly, paying particular attention to the lesser
developed nations. There was a compromise of sorts between the two in that
a parallel system of exploration and exploitation would be set up. Under
this system a person, state, or consortium would explore two mining sites
and one would be given to the international regime to exploit. Although
great strides have been made, controversies centering around transfer of
technology, primary investment protection, and assured access to the sites
by the U.S. have prevented a deep seabed agreement from being realized.

Although these different points of view have been simply stated, they
nonetheless have accounted for a large part of the debate at the Conference.
Each faction unwilling, or unable, to recognize the position of the other.
It is partly because these factions have been unable to reach some sort
of equitable agreement during the various sessions, and the possibility
that further negotiations might prove fruitless, that the United States
went forward with the unilateral legislation. The unilateral approach seemed to be the best route for the U.S. to pursue. The strategic, economic, and political considerations seemed to outweigh the international disadvantages of the proposed agreement.

Strategic Importance of Unilateral Deep Seabed Mining

With international negotiations on the seabed well into its second decade and this country's increasing reliance on imports for "strategic minerals", many people believe it is now imperative that the U.S. enact unilateral legislation to counter this trend and harvest the minerals of the deep sea area beyond our national jurisdiction. The nodules located in the area are known to contain manganese, copper, cobalt, and nickel, all "critical" minerals as far as the U.S. is concerned. Manganese is essential in the manufacture of steel. But, by the year 2000, according to some analyses, acceptable land-based manganese ores from non-Soviet bloc sources will be available principally from South Africa and Gabon - countries about which there must be considerable political uncertainty. Further, these analyses suggest that non-Soviet bloc countries may begin to experience a manganese deficit as early as 1987. Likewise, nickel is used in the manufacturing of stainless steel, cobalt for high-performance magnets and electro-magnetic devices and various high technology communication systems, while copper is used quite extensively throughout electrical systems.

There are no significant reserves of cobalt, manganese, or nickel in the United States. However, we are a major copper producer, but our reliance on foreign sources is substantial and our domestic ores are declining in grade. Thus, we are left with the choice of foreign imports or
the deep seabed.

The statistics set out below point out the reliance on foreign imports by the United States:

<table>
<thead>
<tr>
<th>Metal</th>
<th>1976</th>
<th>1977</th>
<th>1978</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cobalt</td>
<td>98</td>
<td>97</td>
<td>97</td>
</tr>
<tr>
<td>Copper</td>
<td>12</td>
<td>13</td>
<td>19</td>
</tr>
<tr>
<td>Manganese</td>
<td>98</td>
<td>98</td>
<td>98</td>
</tr>
<tr>
<td>Nickel</td>
<td>70</td>
<td>70</td>
<td>77</td>
</tr>
</tbody>
</table>

Other strategically and politically relevant issues centered around international licensing and limits on mineral recovery, transfer of technology, investment protection, and access to the mining areas. In deciding on the unilateral approach, the United States "guaranteed" any U.S. citizen or foreign consortium the assured access to the minerals based on reciprocating agreements and freedom of the seas. The "wholesale" transfer of technology that was to occur under an international regime, can more closely be controlled, thereby ensuring U.S. technological superiority in this field. With the national legislation comes a legal framework through which exploration and subsequent exploitation can be achieved. Investors will be more apt to invest large amounts of capital required knowing the venture is now sanctioned by U.S. domestic law.

It is stressed that the unilateral legislation, although interim in design, must meet both the short and long-term requirements of the United States. In the near future, 1982, the Commerce Department may grant U.S. miners licenses to begin site exploration and by 1 January 1988 site exploitation may begin. But what of the potential long-term effects of the unilateral legislation? What are the potential consequences of a breakdown in the law of the sea negotiations or non-agreement on the use
of the deep seabed beyond a nation's jurisdiction?

The possibility of a complete breakdown of the conference without producing some kind of agreement is slim. The time and effort put forth to this point, plus the idea of permitting the law to develop through customary procedures, makes the continuation of the negotiations the better of the two choices.

If, because of unilateralism, the conference fails to reach an agreement on the law of the sea, what actions might be taken by nations to further their economic interests? Some possible actions might include bilateral agreements, limited multilateral agreements, foreign domestic legislation, and the threat or use of force. In any case there might be an alteration in the oceanic scheme as we know it today. It could be expected that developed nations, at least the technologically capable ones, would commence deep ocean mining operations. These operations would probably be sanctioned by domestic law or some reciprocating agreement. Other changes could possibly be foreseen; the extension of coastal states' territorial sea anywhere from twelve to two hundred nautical miles. And if that coastal state happens to have a large continental shelf, claims beyond two hundred miles might become commonplace.

Passage through the various international straits could come into dispute. Control of passage or the outright denial of passage through a strait might also be anticipated. However, one study indicates that the cost of denial of access to straits for merchant shipping would not be great and denial to military vessels would be contingent on a nation's ability and will to restrict another countries naval movements. Alternative routing would produce a higher cost in shipping the goods, but the increase would not be drastic by any means. The same would apply if the
two hundred nautical mile Exclusive Economic Zone were closed to merchant fleets of certain nations.

It could also be expected that fisheries, navigation, oceanic research and environmental protection would also be affected. For example, the establishment of exclusive fisheries for use by only the coastal state; navigation would be hindered by the extension of territorial seas and contiguous zones and control of vessels through straits; the uncertainty of the states of ocean research off the coast of various states; and last but not least, the environment might suffer since the regulation and control of pollution will be left to the coastal state instead of adherence to uniform international standards.

These are again only possibilities, potential reactions if unilateralism causes UNCLOS III not to reach some sort of internationally equitable agreement. If an agreement can be reached all these actions would be negated, but time may be running short. The United States has weighed these factors and passed the domestic legislation, signalling to the developing nations our intent to seek an equitable treaty for the developed nations and the lesser developed countries, but failing to achieve this goal, to continue in the deep ocean endeavor despite the potential economic and political threats from the Group of 77.

Economic Importance of Deep Seabed Mining

The manganese nodules take on economic significance because of their high mineral content, 30% manganese, 1.4% nickel, 1.2% copper, and 0.25% cobalt. As mentioned earlier, these are all essential minerals for the U.S. and all of which, except copper, are largely imported by the U.S. To overcome this mining consortia and investors have looked to the deep
seabed as a new source of mineral supply. Some contend the retrieval of
the nodules is not feasible, while others would have you believe ocean
mining will drastically change the cost of metals in the future. Studies
done by Kennecott Copper Corporation have shown that the cost of recovering
the materials from the deep seabed can be competitive with land-based
sources of the metals but will not displace the present supply sources.  

It has been estimated that deep seabed mining will generate meaning-
ful economic activity. One mining project is estimated to be about a
$1.25 billion investment alone with a continued investment of about $200
million per year per project.  To attract this type of capital there
must be some reasonably stable framework through which development can
take place.

When will ocean mining begin and how profitable will it be? Best
estimates are that ocean mining cannot begin before 1985 and probably
will be even later than that. Since no one has built and operated an
ocean mining plant, our present estimates of economic potential must be
based on data collected, models built and tested, and the engineering
evaluations of the various consortia. It can be reasonably concluded that
since a significant number of major corporations have found their estimates
of the competitiveness of mining manganese nodules sufficiently attractive
to warrant the expenditure of large amounts of research and development
money the venture must be worth pursuing. Some industry statements have
indicated the nickel contained in just two deep sea deposits could almost
equal the total size of the world's land-based reserves of this metal.  
The potential for deep seabed mining was also expressed by Marne A. Dubbs,
Director of Ocean Resources for Kennecott Copper Corporation, "Technological
progress on ocean mining has been excellent - we are ready to go. Economic
In addition to the potential strategic and economic results of U.S. domestic deep seabed mining legislation, the political repercussions must also be examined. I believe there is little doubt the legislation caused anger and disbelief in many developing countries. The reaction was, in many ways, predictable. The President, Congress, and our UNCLOS negotiating team were aware of the various statements emanating from the developing countries concerning U.S. domestic ocean law. What was required was a careful and deliberate weighing of the advantages versus the disadvantages of such legislation. There are those who would contend that unilateralism was the only route to take, while others continually support the international position.

This portion of the paper will analyze the major benefits and the drawbacks of the U.S. ocean law. Let us look initially at the advantages of unilateral legislation from a U.S. perspective.

Transfer of Technology

The first advantage of unilateral legislation is that the United States nationals will not be obliged to transfer any mining technology to the international Enterprise. Although the international treaty would have to specify what technology would have to be transferred, it would probably involve only that technology presently used in the operation and to which the miners have legal right of transfer. However, the U.S. has opposed any form of mandatory technology transfer. Mandatory transfer requirements would carry no assurance of protection of highly proprietary information, or of compensation in the event that information is compromised.

prospects for ocean mining are bright."
Defense-sensitive technologies would be subject to mandatory transfer, in direct conflict with export control constraints under existing federal law.  

Assured Access  
There is a need to ensure U.S. access, on reasonable and equitable terms, to the minerals of the deep seabed. The minerals contained in the manganese nodules are considered "critical minerals" to the United States. Land-based mineral resources appear to be adequate until the end of the century, and the possibilities of cartelization are remote. However, the assured access to these deep sea minerals sought by the U.S. looks as though it will not take place. The unilateral legislation could provide for such access, and it may also improve the chances of the U.S. negotiating a satisfactory access clause within the framework of an international treaty.  

Legal Framework  
Because deep seabed mining is considered a "pioneering" venture, large sums of money must be invested in research and development, and the technological uncertainties and the market risks are high. So in order to attract the required large capital, a stable legal framework must exist. If companies are to invest millions of dollars in this area they must be reasonably assured a future treaty will not negate years of exploration and exploitation under domestic law. In the absence of an international treaty to provide this, domestic law may suffice. The investors would have some legal framework from which to launch their ocean venture.  

Environmental Protection  
Without an international treaty nations could commence mining the
the deep seabed without being subject to environmental regulations. But unilateral legislation could, and the U.S. legislation does, specify certain environmental considerations that must be adhered to before, during, and upon terminating mining operations.

Deep Seabed Revenue Sharing Trust Fund

Taxes levied on the recovery of minerals will be used to establish a revenue sharing trust fund. Upon beginning commercial recovery of the nodules, the mining companies pay a certain amount of money based on the amount of minerals recovered. The fund is for the developing countries and will be administered in accordance with the provisions of the act.

Freedom of the Seas

There is a realistic need to develop the seabed resources in a manner that is consistent with U.S. interests in the preservation of certain traditional high seas freedoms. The Deep Seabed Hard Mineral Resources Act states that the United States "does not assert sovereignty or sovereign or exclusive rights over, or the ownership of, any area of the deep seabed." The existing law, as the U.S. sees it, is that any country has the right to mine the resources of the deep seabed, provided it pays reasonable regard to the interests and freedoms of other countries.

Resolve Deep Seabed Mining Issues

The issue of deep seabed mining has plagued the world ever since it was discovered what the nodules were composed of and the technology existed to retrieve them. For over a decade this issue has persisted without resolve. Some believe it may never be settled. With this in mind, the United States enacted unilateral legislation to permit exploration
and exploitation of the deep seabed while an international treaty is still being negotiated. It was hoped this action would serve as an indication that the sooner an international treaty could be negotiated and ratified, the sooner the interim U.S. domestic legislation would be shelved.

The passage of the legislation may strengthen our negotiating position at the conference. The U.S. has previously stated its intent to follow through with domestic legislation, only to have it held up in Congress. But in 1980, the Act passed Congress and was signed by the President as law in mid-1980. The Group of 77 must now realize the United States will not be forced into a treaty against it liking due to prolonged negotiations and needless delays. The U.S. can ill-afford to sign an international compact that does not furnish some sort of industrial and economic guarantees and is in keeping with our national interests.

**No Limit on Mineral Recovery**

Another advantage of the unilateral approach is the absence of the limitations on the amount of minerals to be recovered. Under the international formula a quota would exist on the quantity of minerals to be taken and this quota system would prevail for the initial twenty-five years of the mining operation. No such quota system is included within the U.S. domestic legislation.

**Protect U.S. Legal Position**

With the passage of domestic legislation the U.S. may be strengthening a future legal position. If, for some reason, the United States fails to ratify a treaty and continues mining the deep seabed under domestic law, a precedent may be set for future challenges. There is little doubt this interpretation of "freedom of the sea" would go unchallenged. It would,
however, be to the benefit of the United States to be able to document its mining legislation and show it has been commercially marketing these minerals for some time.

These, then, are what I perceive to be the advantages of unilateral legislation for the United States. Some are only minor factors when put on an international scale, but together these considerations weigh heavy on future supply and demand of critical minerals for this country.

Disadvantages of Unilateral Legislation

We are now confronted with the disadvantages of the unilateral legislation. It has been considered by many that enactment of domestic ocean mining legislation would help resolve the UNCLOS III stalemate and enhance our negotiating position at the conference. Yet, others who do not support the Act feel our bargaining position has become weakened and the law has served to widen the already enormous gap between the developed and developing countries.

Another drawback of this domestic mining law is the ill-feelings it will foster among the lesser developed nations of the world. It is the contention of the Group of 77 that the U.S. has violated the Declaration of Principles and the Moratorium Resolution, both principles they claim to be international law. It is held that the United States, despite attempts to make its domestic legislation resemble the proposed international treaty, is exploiting the seabed for its own benefit. The revenue-sharing provisions, the assertion of non-sovereignty over any area of the seabed, have been met with skepticism and distrust.

The U.S. must also realize that the domestic legislation may assist in bringing about a "no treaty" situation. If this happens, the Group of
77, which now includes about 110 countries, may form their own mining enterprise and file suit against the U.S. mining companies claiming the nodules are part of the "common heritage of mankind". This test of the "freedom of the seas" versus the "common heritage of mankind" may find the U.S. government using its military to protect these ocean miners, or we could see foreign nations deliberately disrupting the mining operations of the U.S. companies to stress their claim that unilateralism is contrary to their conception of international law.

The United States must also realize that the "package deal" of UNCLOS III may be at stake. There is much to be gained through an international treaty such as:  

1. Finalizing of territorial seas at 12 miles;  
2. Guarantees of free transit through and over straits;  
3. Firm definitions of the rights of all nations within a 200 nautical mile economic zone;  
4. Establishment of a system of dispute settlement for conflicts involving ocean issues. 

Some U.S. legislators, such as Senator Paul McCloskey, believe a new comprehensive international law of the sea is far more valuable to the U.S. than is the early use of U.S. technology to obtain new sources of nickel, cobalt, and copper. It has also been theorized that without a treaty the mining consortia may be reluctant to proceed with seabed mining operations knowing the potential investment and the possibility of future conflicting claims to the minerals.
The developed nations of the world, in particular the United States, and the developing countries have valid arguments either for the unilateral approach to deep seabed mining or for the development of an international regime. The information presented thus far gives indications that the United States' actions surrounding unilateral legislation were in keeping with presently accepted principles of international law. Although the U.S. is on strong legal ground, we may find the political footing very tenuous. The lesser developed countries' perception that the domestic mining act is contrary to accepted norms may be as detrimental as if it really were illegal. Many of these nations view the U.S. as the constant recipient of the earth's wealth giving other nations little or no chance to share in the benefits. So the major question might then be: Is unilateral legislation worth the possible risks for the U.S., and can we overcome any of the adverse political actions from abroad that are results of such actions?

Although not an expert in this area, and not in possession of the vast amount of material accumulated during the Law of the Sea negotiations, I, therefore, render a layman's opinion that the United States has taken the most advantageous route to deep seabed mining with the passage of the Deep Seabed Hard Mineral Resources Act during the Carter presidency and the "second look" the Reagan administration is affording the final UNCLOS III negotiations. We have, as a nation, adopted legislation to create a 200 nautical mile exclusive fishing zone that is internationally recognized. We have formulated a policy of challenging maritime claims that are not consistent with presently accepted international law, thereby preserving our Navy's mobility worldwide; and the passage of the domestic ocean mining legislation has all but achieved our major goals at UNCLOS III through
domestic, not international legislation.

What remains in the negotiating text are unnecessary and damaging concessions, multiple ambiguities, and a blueprint for developing the so-called "common heritage" principle which will result in stifling U.S. technology for the production of vital resources from areas such as the oceans. 46

I feel the advantages of the unilateral course of action outweigh the possible political repercussions that might be forthcoming. It has become evident the mineral needs of the world are increasing while the world's supply is dwindling. An alternate source, one that will meet anticipated world requirements, can be found on the deep seabed in the form of manganese nodules. It would be ludicrous not to take advantage of this new mineral supply.

It seems that the initial reaction to U.S. domestic deep ocean mining legislation was not as hostile as some had predicted. Many other developed nations waited to see the reaction among the developing nations, and have since passed or are in the process of drafting some sort of similar legislation. It is not as though the U.S. had never participated in any negotiations and single-handedly enacted domestic legislation. We have effectively participated in all sessions without, however, reaching an agreement suitable to our national security and economic interests. The negotiations have gone on for more than seven years and compromises have been made on many fundamental issues. Accordingly, the time may be ripe for the United States to gracefully decline further participation in the process of eroding its maritime and resource acquisition powers. 48

Paul B. Engo of Cameroon, chairman of the committee dealing with the deep seabed issue, conceded "the text is not perfect to cover all the
countries' interests; everyone had to give something and no one is entirely happy. \(^{49}\) I do not believe in advocating ratification of a treaty just for the sake of having some sort of international agreement that will be difficult at best to enforce and not really in the best interests of the United States.
Footnotes


9. Ibid., sec. 2(b)1, p.2.

10. Ibid., sec. 2(b)2, p.2.

11. Ibid., sec. 2(b)3, p.2.

12. Ibid., sec. 2(b)4, p.2.

13. Ibid., sec. 2(b)5, p.2.


17. Ibid., 1469.

19. Ibid., citing P. Corbett, Law and Society in the Relations of States 95, 95-96 (1951).

20. Ibid., citing H. Grotius, Mare Liberum, "When the slave says: 'The sea is certainly common to all persons', the fisherman agrees; but when the slave adds: 'Then what is found in the common sea is common property', he rightfully objects, saying: 'But what my net and hooks have taken, is absolutely my own'".


22. Ibid.

23. Ibid.


31. U.S., Congress, Senate, Committee on Foreign Affairs, Deep Seabed Hard Minerals, A Hearing before the Committee on Foreign Relations, United States Senate on S. 493. 96th Cong., 1st sess., 1979, p. 188.

32. Ibid.


36. Ibid., p. 19.


39. Ibid.


43. Ibid.


45. Ibid., p. 227.


49. Ibid.
Bibliography


