

# RECENT DEVELOPMENTS

## LAW OF THE SEA — PROPOSED DEEP SEABED HARD MINERAL RESOURCES ACT

### I. *Historical Background*

Federal legislation to authorize United States mining companies to proceed toward exploration and recovery of manganese nodules from the deep seabed<sup>1</sup> is almost certain to be enacted during the 96th Congress. This legislation seeks to promote the orderly development of mineral resources from the deep seabed as an interim measure prior to the enactment of a superseding international treaty. During the 96th Congress, the House of Representatives' passage of the Deep Seabed Hard Minerals Act<sup>2</sup> was the culmination of congressional efforts since 1971 to get a similar bill passed. The Senate version of this bill was reported out of committee but did not reach the floor of the Senate for a vote before the session ended.<sup>3</sup>

Congressional attention was first focused on the exploitation of deep seabed mineral resources in 1967 in reaction to Malta's proposal in the United Nations that an international agency be established to administer and control the development of these resources, which were described as "the common heritage of mankind."<sup>4</sup> Congress responded to this proposal by introducing resolutions, the majority of which were opposed to giving immediate control over the ocean mineral resources to an international authority. Hearings in 1968, 1969 and 1970 by several congressional subcommittees examined various policy considerations

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<sup>1</sup> These manganese nodules are potato-shaped deposits found in extensive quantities on the floor of the deep seabed beyond the limits of national jurisdiction. They contain rich deposits of the commercially important metals copper, nickel, manganese, and cobalt. The United States imports these metals in the following percentages: cobalt and manganese—100%; nickel—71%; copper—15%. At present there are five multinational seabed mining consortia, each with major U.S. industry participation, which are in a position to accelerate their commercial development programs and begin a full-scale commercial recovery around 1985. H.R. REP. NO. 558, Part 1, 95th Cong., 1st Sess. 17 (1977); S. REP. NO. 95-1125, 95th Cong., 2d Sess 35 (1978).

<sup>2</sup> H.R. 3350, 95th Cong., 2d Sess., 124 CONG. REC. H. 7341 (daily ed. July 26, 1978), passed as amended by House, 124 CONG. REC. H. 7382-83 (daily ed. July 26, 1978).

<sup>3</sup> S. 2053, 95th Cong., 2d Sess. (1978), S. REP. NO. 1180, 95th Cong., 2d Sess. (1978).

<sup>4</sup> U.N. DOC. A/6695 (1967).

on the subject. The most active of these subcommittees, the Senate Interior Committee's Special Subcommittee on Outer Continental Shelf chaired by Lee Metcalf, investigated in particular the President's 1970 ocean policy statement calling for a seabed treaty and an international authority, as well as the possibility of an interim policy to insure continued development related to mineral recovery by U.S. nationals.<sup>5</sup> The testimony of representatives of the American Mining Congress at these hearings prompted Senator Metcalf to introduce the first deep seabed hard minerals bill on November 2, 1971.<sup>6</sup> An identical bill was introduced in the House in early 1972 by Representative Downing.<sup>7</sup>

This first bill and subsequent versions in 1973, 1974, and 1975<sup>8</sup> generated considerable discussion from different interests on the subject of ocean mining. None of these bills was ever reported out of committee in the House or Senate, and often the bills never advanced beyond the subcommittee level. This lack of progress can be attributed in large part to the Administration's opposition to any legislation on mining the seabed. Action by the committees was continuously postponed in response to the Administration's argument that enactment of legislation so unilateral in nature would upset or even destroy the ongoing negotiations at the United Nations Conference on the Law of the Sea (UNCLOS).<sup>9</sup>

The U.S. has participated in UNCLOS since 1958. According to a congressional advisor to the U.S. delegation, agreement has been reached in principle regarding the issues of offshore oil and gas rights, fishery management, navigation through straits, marine pollution, limits on territorial seas, and economic zones.<sup>10</sup> These areas of agreement are not insulated from the quandary that has developed over seabed mining, however.

The political and legal status of the seabed is uncertain, primarily because there is no definitive international law governing the issue. The developed and the developing nations assert

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<sup>5</sup> Cong. Res. Service, *Ocean Manganese Nodules 61-66* (Feb. 1976).

<sup>6</sup> S. 2801, 92nd Cong., 1st Sess. (1971). Metcalf, *Foreward*, 10 *SAN DIEGO L. REV.* 425 (1973).

<sup>7</sup> H.R. 13904, 92nd Cong., 2d Sess. (1972).

<sup>8</sup> H.R. 9, 93d Cong., 1st Sess. (1973); S. 1134, 93d Cong., 1st Sess. (1973); H.R. 12233, 93d Cong., 2d Sess. (1974); H.R. 11879, 94th Cong., 1st Sess. (1975); H.R. 1270, 94th Cong., 1st Sess. (1975); H.R. 6017, 94th Cong., 1st Sess. (1975); S. 713, 94th Cong., 1st Sess. (1975).

<sup>9</sup> Cong. Res. Service, *Ocean Manganese Nodules 66-84* (1976); H.R. REP. NO. 88, 95th Cong., 1st Sess. 22-23 (1977); S. REP. NO. 754, 94th Cong., 2d Sess. 18-19 (1976).

<sup>10</sup> 124 *CONG. REC.* 114, H.7372-3 (daily ed., July 26, 1978) (remarks of Rep. Bedell).

conflicting views on the exploitability of seabed resources.<sup>11</sup> These views are derived from their contrary interpretations of two United Nations Resolutions relating to the seabed. The Moratorium Declaration, a 1969 Resolution, declared that all nations should refrain from initiating any seabed mining operations beyond their territorial limits before an UNCLOS treaty was signed. This measure was sponsored and supported by developing nations<sup>12</sup> and, while staunchly opposed by industrialized nations, was passed in the General Assembly.<sup>13</sup> The U.S. strongly protested passage of this Resolution, claiming that it would lead coastal states desiring to circumvent the Resolution to expand their seabed jurisdictions to include deep seabed mine sites.<sup>14</sup> The U.S. delegation announced that it would not be legally bound by the Moratorium Declaration since it was not international law, but carried only a recommendatory effect.<sup>15</sup>

The U.S. supported General Assembly Resolution 2749 in 1970<sup>16</sup>, which declared the seabed and its resources to be the "common heritage of mankind" and not subject to appropriation or claim or exercise of sovereignty.<sup>17</sup> The Resolution did not specifically define "common heritage," which undoubtedly contributed to its unopposed passage.<sup>18</sup> The developing nations interpreted this declaration to establish the seabed resources as the common property of all mankind, thus making exploitation of these resources outside the context of an international agreement a violation of international law. The U.S. and other industrialized countries maintained to the contrary that seabed mining was a protected right

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<sup>11</sup> The developed nations with the technology to mine the seabed want political control of the International Seabed Authority to be determined partly by the capital contributions of the nations and not solely on a one nation-one vote basis, with assurances of a parallel system of exploitation so that state and private companies can mine the seabed along with the Enterprise, the internationally-operated mining concern which would be established by the International Seabed Authority. The developing nations Group of 77, now numbering 119 states, is diametrically opposed to the developed nations' on the central issues of political control and the system of exploitation. They want control of the authority to be based on a one nation-one vote system, and they want the Enterprise to have the exclusive authority to exploit the resources.

<sup>12</sup> The 'Group of 77'—originally, 77 developing countries.

<sup>13</sup> Resolution 2574 passed 62-28-28.

<sup>14</sup> 24 U.N. GAOR (1833d plen. Mtg.) 1-4, U.N. Doc. A/C.1/PV. 1833 (1969).

<sup>15</sup> *Id.*

<sup>16</sup> G.A. Res. 2749, 25 U.N. GAOR, U.N. Doc. A/RES/2749 (1970).

<sup>17</sup> *Id.* at 22.

<sup>18</sup> Resolution 2749 passed 108-0-14.

under the 1958 Convention on the High Seas,<sup>19</sup> and that the Declaration of Principles was intended simply as a call for an international convention to give content to the common heritage concept.<sup>20</sup> However, the U.S. delegation to the U.N. has subsequently indicated that the particulars of the UNCLOS pact would be more important than the "common heritage" concept itself.

Three negotiating texts have been introduced during the course of UNCLOS negotiations.<sup>21</sup> However, at the close of the most recent sessions<sup>22</sup>, UNCLOS members hardly seemed on the verge of a settlement of the seabed mining issue. The majority of the participants did not share the United States' sense of urgency for a rapid conclusion of a treaty. The sixth and seventh sessions were largely devoid of agreement on new, substantive seabed issues, but instead focused largely on procedural questions.

This lack of progress has led to charges that the Conference is being deliberately stalled by certain UNCLOS members.<sup>23</sup> An early conclusion of a treaty may be seen by the land-based mineral exporting states as contrary to their interests since the treaty may include neither provisions for compensation to them for lost mineral sales revenues nor limits on seabed mineral extraction. In addition, delay might give the developing countries leverage to negotiate for advantageous revenue and technology sharing concessions from the developed countries.

After the sixth session of UNCLOS ended in July of 1977 with the Informal Composite Negotiating Text, which U.S. Ambassador Elliot Richardson termed "fundamentally unacceptable" to the United States,<sup>24</sup> the Carter administration endorsed the passage of domestic legislation. Richardson stated in testimony before two Senate Committees on October 4, 1977 that the Ad-

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<sup>19</sup> See *Deep Seabed Hard Mineral Resources Act: Hearings and Markup on H.R. 3350 before the House Comm. on International Relations and its Subcommittees on International Organizations and on International Economic Policy and Trade*, 95th Cong., 2d Sess. 85 (1978) [hereinafter cited as *Deep Seabed Hearings and Markup*] (statement of Northcutt Ely).

<sup>20</sup> Charney, *United States Interests in a Convention on the Law of the Sea: The Case for Continued Efforts*, 11 VAND. J. TRANSNAT'L L. 39, 54-56 (1978).

<sup>21</sup> Included are the Informal Single Negotiating Text (ISNT) 4 Third U.N. CONF (Third Session, Geneva, 1975) U.N. Doc. A/Conf. 62/WP. 8., Revised Single Negotiating Text (RSNT) 5 Third U.N. CONF (Fourth Session, New York, 1976) U.N. Doc. A/Conf. 62/WP. 10.

<sup>22</sup> The Seventh Session of the Third Conference in New York, Sept. 15, 1978.

<sup>23</sup> Professor Knight is utterly convinced that this is the case in *A Reply to Deep Sea Adventures: Grotius Revisited*, 9 INT'L LAWYER 751 (1975).

<sup>24</sup> H.R. REP. NO. 588, Part 1, 95th Cong., 1st Sess. at 29 (1977).

ministration would support legislation authorizing U.S. mining of the seabed whether or not there were an international treaty.<sup>25</sup> Another major factor spurring Congress toward enactment of legislation was the urgency expressed by the mining consortia for legislative authorization of mining the seabed to justify the capital outlays necessary for continued research and development. Throughout 1978 different versions of the bills progressed through their respective committees in the House and Senate.<sup>26</sup>

Provisions H.R. 3350 and S. 2053 are substantially the same bill in both content and structure, each consisting of a preamble of several sections and four Titles. The preamble first presents findings establishing the need for a domestic interim program to encourage commercial recovery and processing of seabed manganese nodules.<sup>27</sup> The findings and purposes of this legislation also stress: (1) the interim nature of the program and its intended supersession by an international agreement; (2) the necessity of developing the seabed in a manner which protects the environment and promotes the safety of life and property at sea; (3) the encouragement of successful negotiation of a comprehensive international treaty which will define the principle that the mineral resources of the deep seabed are the common heritage of mankind;<sup>28</sup> (4) the establishment in the meantime of a special fund

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<sup>25</sup> H.R. REP. NO. 588, Part 1, 95th Cong., 1st Sess. at 30-37 (1977). *Joint Hearings Before the Subcommittee on Public Lands and Resources of the Committee on Energy and Natural Resources and the Committee on Commerce, Science, and Transportation on S. 2053*, 95th Cong., 1st Sess. 382 (1977) (statement of Hon. Elliot Richardson).

<sup>26</sup> H.R. 3350, 95th Cong., 1st Sess. (1977) was introduced on February 9, 1977 by Representatives Murphy and Breux. It was referred jointly to the Committees on Merchant Marine and Fisheries and on Interior and Insular Affairs. After being reported favorably with amendments by both committees, it was referred to the Committee on International Relations. The Subcommittees on International Organizations and on International Economic Policy and Trade held joint hearings and ordered H.R. 3350 favorably reported to the full committee, which reported it with amendments on February 8, 1978. The Ways and Means Committee next considered the bill and reported it with amendments on June 5, 1978. The bill reached the floor of the House for a vote on July 26, 1978, at which time it passed with amendments by a vote of 312 to 80.

S. 2053, 95th Cong., 1st Sess. (1977) was introduced by Senator Metcalf on August 5, 1977. It was referred jointly to the Committees on Commerce, Science, and Transportation and Energy and Natural Resources and reported with amendments by these committees on August 18, 1978. It was then referred to the Committee on Foreign Relations and reported by this committee with amendments on September 11, 1978. Two Senators refused to consent to the time limitation rule for this bill and prevented its reaching the Senate floor for a vote before the session ended on October 15, 1978.

<sup>27</sup> H.R. 3350, 95th Cong., 1st Sess. § 2(a) (1970); S. 2053, 95th Cong., 1st Sess. § 2(a) (1977).

<sup>28</sup> Here, as in the U.N. General Assembly Resolution 2749, no legal definition is given to the "common heritage of mankind", noting, as the Resolution did, that this phrase would be defined in a future comprehensive international Law of the Sea treaty.

whose proceeds will be shared with the international community; and (5) the encouragement of the continued development of necessary technology.<sup>29</sup> The Senate bill also includes an additional section establishing international objectives.<sup>30</sup>

Title I establishes a comprehensive regulatory system which requires any U.S. citizen engaging in the development of these resources to obtain a license for the exploratory phase and a permit for the commercial recovery phase. The House bill provides for administration by the Secretary of Commerce, while the Senate bill gives these duties to the Secretary of the Interior.<sup>31</sup> Title I also includes a disclaimer of any intention to exercise sovereignty or exclusive rights over any area of the seabed.<sup>32</sup>

Beyond certain guidelines and restrictions which he must follow, the Secretary has considerable discretion in the granting of licenses and permits and in setting the terms and conditions under which they are held. He cannot, however, issue a license or permit inconsistent with an international agreement or issue a permit for a specific area to anyone but the licensee for that area.<sup>33</sup> The House bill allows no recovery before January 1, 1980, but the Senate bill extends this restriction to January 1, 1981.<sup>34</sup> Permittees must comply with restrictions requiring mining, processing, and at least one transportation vessel to be documented under the laws of the United States.<sup>35</sup> In addition, the Senate bill requires that mining and processing vessels be constructed in the United

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<sup>29</sup> H.R. 3350, 95th Cong., 1st Sess. § 2(a)(b) (1970); S. 2053, 95th Cong., 1st Sess. § 2(a) and (b) (1977).

<sup>30</sup> S. 2053 § 3.

<sup>31</sup> H.R. 3350 § 3(13); S. 2053 § 4(13). This division over the administrative agency has been a constant battle from the earliest versions of the bill to present. The proponents of the Interior Department claim that its past responsibility for all federal involvement in mineral development, its administration of the Outer Continental Shelf Lands Act and its Ocean Mining Administration Office make it the better administrative agency. Commerce's supporters, on the other hand, assert that it should have the responsibility for ocean mineral resource development because of its proven expertise through its National Oceanic and Atmospheric Administration which has established the Office of Marine Minerals to coordinate programs on the subject and has conducted the DOMES tests since 1975. 124 CONG. REC. H7348 (daily ed. July 26, 1978).

<sup>32</sup> H.R. 3350, § 101. S. 2053, § 3(a). This disclaimer is found in S. 2053 under "International Objectives." The site-specific provisions of prior legislation, such as mapped-out mine sites, were eliminated as inflammatory, suggesting an assertion by the U.S. of a right to exclude all others from the designated mine sites. See *Deep Seabed Hearings and Markup*, *supra* note 19, at 119 (statement of Rep. Bedell).

<sup>33</sup> H.R. 3350 § 103(c)(1)(A) & (B); S. 2053 § 102(c)(1)(A) & (C).

<sup>34</sup> H.R. 3350 § 103(c)(1)(C); S. 2053 § 102(c)(1)(D).

<sup>35</sup> H.R. 3350 § 103(c)(2) & (3); S. 2053 § 102(c)(2).

States.<sup>36</sup> In issuing regulations on the location of processing plants, the Secretary is to take various factors into account, including the foreign policy interests of the United States and the need to maximize employment opportunities in the U.S.<sup>37</sup> Several factors are also specified for the Secretary's determination of the applicants' priority of rights for receiving licenses.<sup>38</sup> To grant a license or permit, the Secretary must determine that the applicant is financially responsible and possesses the necessary technological capability, and that his activities will not unreasonably interfere with the interests of other states in their exercise of the freedoms of the high seas, conflict with any international obligation of the United States, or pose an unreasonable threat to the quality of the environment.<sup>39</sup> The Senate version also stipulates that no situations be created that could lead to a breach of international peace and security involving armed conflict or pose an inordinate threat to the safety of life and property at sea.<sup>40</sup> In addition, the application must be screened for possible antitrust violations before its approval.<sup>41</sup>

There is great flexibility in the regulatory mechanism provided for seabed mining. The Secretary may modify the license or permit to conform with the above criteria, or he may amend the regulations themselves.<sup>42</sup> The Secretary's authority also extends to denying the approval of applications, revoking or suspending licenses and permits, and monitoring the licensee's or permittee's operations.<sup>43</sup>

The House and Senate bills differ on the method of selection for the location and size of the area in which a particular applicant may undertake exploration and recovery. The House bill provides for the Secretary to make these determinations and specifications

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<sup>36</sup> S. 2053 § 102(c)(2).

<sup>37</sup> H.R. 3350 § 103(c)(5); S. 2053 § 102(c)(3).

<sup>38</sup> H.R. 3350 § 103(e); S. 2053 § 103(b).

<sup>39</sup> H.R. 3350 § 103(f)(A)-(C); S. 2053 § 103(e) & § 105(a). The Senate version provides for certification of every application based on public comments and consultation with other relevant agency heads and the applicant's compliance with the requirements of sections 101 through 103. S. 2053 § 103(h).

<sup>40</sup> S. 2053 § 105(a)(3) & (5).

<sup>41</sup> H.R. 3350 § 103(j); S. 2053 § 103(d). The Attorney General and the Federal Trade Commission are charged with the responsibility of antitrust review, although neither can veto an application for possible antitrust violation. H. R. 3350 § 103(j)(5).

<sup>42</sup> H.R. 3350 § 103(i), § 106(c); S. 2053 § 104(c), § 401(c). Amendments in both are limited to providing for conservation of natural resources and protecting the environment and the safety of life and property at sea.

<sup>43</sup> H.R. 3350 § 104, § 106(b)(10); S. 2053 § 106, § 114.

in each license or permit he issues.<sup>44</sup> On the other hand, the Senate bill calls for a work plan to be submitted by each applicant which describes the area to be explored and includes a detailed explanation of the schedule and methods of exploration, anticipated expenditures, and measures to protect the environment. The Secretary approves the size and location of the work plan area selected by the applicant so long as the size is a "logical mining unit" and no adverse effects to the quality of the environment would be created by recovery in this area.<sup>45</sup> Whereas the House bill uses the general language "sufficient duration" as the term for a license or permit,<sup>46</sup> the Senate version provides for specific terms of duration.<sup>47</sup>

Protection of the quality of the environment during ocean mining activities is discussed in numerous provisions of both bills. The Senate bill, however, provides for more extensive environmental regulation. Its principal section on the environment orders the National Oceanic and Atmospheric Administration to expand and accelerate programs assessing the effects on the environment from development of deep sea mineral resources to aid the Secretary's regulatory function.<sup>48</sup> Programmatic environmental impact statements are to be prepared and published by the Secretaries of the Interior and Commerce in consultation with the Administrator of the Environmental Protection Agency and other appropriate federal agencies. These impact statements are required for issuance of every license and permit and are also prepared, if the Secretaries find it necessary, for general areas in which U.S. citizens will undertake exploration and commercial recovery.<sup>49</sup> These environmental impact statements are considered by the Secretaries along with the advice of other relevant agency heads in establishing the environmental regulations imposed on individual licensees and permittees.<sup>50</sup> Under the Senate bill, licenses and permits must also contain regulations for the prevention of waste and the later opportunity to secure the

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<sup>44</sup> H.R. 3350 § 106(b)(1).

<sup>45</sup> S. 2053 § 103(a)(2)(B) & (C). The House narrowly defeated an amendment on the floor to provide for a similar work plan. 124 CONG. REC. H7354 (daily ed., July 26, 1978).

<sup>46</sup> H.R. 3350 § 106(b)(2).

<sup>47</sup> S. 2053 § 107.

<sup>48</sup> S. 2053 § 108(h).

<sup>49</sup> S. 2053 § 108(c)(1) & (2), (d). H.R. 3350 § 105(a) & (b) does not provide for the Secretary of Interior's participation.

<sup>50</sup> S. 2053 § 108(b); H.R. 3350 § 106(a).



unrecovered balance of nodules.<sup>51</sup> Moreover, the National Pollution Discharge Elimination provisions of the Clean Water Act<sup>52</sup> are applicable to discharges from deep seabed mining vessels.<sup>53</sup> In making modifications applicable to the original licenses or permits, both bills allow a balancing test to determine whether the national need for hard mineral resources outweighs potential injury to the quality of the environment.<sup>54</sup>

Foreign nations passing similar mining legislation may be designated "reciprocating states" by the President.<sup>55</sup> By entering into bilateral or multilateral treaties with the U.S. and pledging mutual recognition of licensing, other nations may join the U.S. in this interim regime. To attain reciprocating state status, nations must recognize the freedom of the high seas doctrine, prohibit their citizens from engaging in activities conflicting with those of U.S. licensees, and employ adequate enforcement safeguards to that end. Additionally, reciprocating states must establish a revenue sharing fund.<sup>56</sup>

Title II addresses the effect on the bill of an international agreement. Although the bill is termed "transitional" pending the entering of an international Law of the Sea treaty or other multilateral or treaty agreement to which the United States is a party, any provisions in this bill which are not inconsistent with the international agreement shall continue to apply to U.S. citizens.<sup>57</sup>

The non-impairment provision has been perhaps the most hotly contested area in the seabed mining legislation's history. Because of strong opposition to any sort of government financial guarantees to the mining interests, such provisions have been dropped by the House and Senate Committees. However, to give some assurance to mining companies without guaranteeing indemnification, the House approved a grandfather clause which makes it clear that an international agreement should include provisions for nondiscriminatory assured access to the seabeds for American citizens while not impairing the value of their investments.<sup>58</sup> Fear-

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<sup>51</sup> S. 2053 § 110.

<sup>52</sup> Pub. L. No. 95-217, 91 Stat. 1566 (1977).

<sup>53</sup> S. 2053 § 116(d); S. REP. No. 1180, 95th Cong. 2d Sess. 12 (1978).

<sup>54</sup> H.R. 3350 § 104(c)(2); S. 2053 § 105(a)(4).

<sup>55</sup> H.R. 3350 & 107(c); S. 2053 § 117. S. 2053 gives this designation power to the Secretary of the Interior.

<sup>56</sup> H.R. 3350 § 107(a); S. 2053 § 117(a).

<sup>57</sup> H.R. 3350 § 202; S. 2053 § 202.

<sup>58</sup> H.R. 3350 § 202(1)(A) & (B).

ful of creating an impression that the government has a legal and moral duty to compensate firms for investment losses, the Senate Foreign Relations Committee modified the House's language of the grandfather clause.<sup>59</sup> Moreover, while the House version requires the Secretary to take all measures to insure that the integrity of investments previously made by U.S. citizens is protected in the implementation of an international agreement,<sup>60</sup> the Senate version merely suggests that the Secretary secure the continued operation of mineral recovery during the time prior to the agreement's entry into force.<sup>61</sup>

Title III establishes the right of the Secretary to impose penalties for violation of any provision of the Bill or of any term, condition, or restriction of the license or permit.<sup>62</sup> A criminal fine may be imposed if a violation is committed willfully and knowingly,<sup>63</sup> otherwise violations carry a civil penalty.<sup>64</sup>

Title IV of the House Bill, added by the House Ways and Means Committee, establishes a tax on mineral resources removed from the seabed and a revenue-sharing trust fund to receive the value of this tax.<sup>65</sup> A similar title was reported as a recommendation from the Senate Foreign Relations Committee for addition as an amendment on the Senate floor.<sup>66</sup> The sole difference between the Senate and House versions is in the amount of the tax, the Senate rate being 10% of the "imputed value" of the mineral resources recovered, while the House set a much lower rate of 3.75% of imputed value.<sup>67</sup> The imputed value is defined as 20% of the fair market value of commercially recoverable minerals, yielding an effective rate of 2% under the Senate version and .75% under the House rate. The trust fund, under the management of the Secretary of the Treasury, is to be applied to the anticipated requirement of any international deep seabed treaty that resources from deep seabed mining be shared among nations. This treaty, however, must enter into effect for the United States on or before

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<sup>59</sup> S. 2053 § 201(1)(A) & (B); S. REP. NO. 95-1180, 95th Cong. 2d Sess. 12 (1978).

<sup>60</sup> H.R. 3350 § 202.

<sup>61</sup> S. 2053 § 202.

<sup>62</sup> H.R. 3350 § 301; S. 2053 § 301(1).

<sup>63</sup> H.R. 3350 § 303; S. 2053 § 303.

<sup>64</sup> H.R. 3350 § 302; S. 2053 § 302.

<sup>65</sup> H.R. 3350, Title IV.

<sup>66</sup> S. REP. NO. 1180, 95th Cong., 2d Sess. 6-11 (1978).

<sup>67</sup> S. REP. NO. 1180, 95th Cong., 2d Sess. 8 (1978); H.R. 3350 § 402; An. to 36 I.R.C. (1954), Subch. F. § 449.5(b).

ten years after the bill is enacted into law, or the trust fund may be disposed of for other purposes.<sup>68</sup>

While the essence of H.R. 3350—and to an even greater degree S. 2053—is the harmonious integration of U.S. legislation with an anticipated treaty, several problems arising from the two bills may undercut this policy. While both bills call for establishment of a revenue sharing fund, the House version's effective rate of .75% is likely to be a great deal lower than that eventually called for in a Law of the Sea treaty. The Senate version's rate is more consistent with the 10% rate U.S. negotiators have already proposed at the UNCLOS negotiations.<sup>69</sup>

Another problem area may be the provision for awarding reciprocating state status to those states establishing an interim policy and practice compatible with that of the U.S. If an international treaty is not completed within the next few years, the reciprocating state system may essentially create mini-treaties between the United States and other industrialized nations.<sup>70</sup> The Senate version even cites such *de facto* bilateral treaties in its opening section on "International Objectives" as a desirable alternative to a comprehensive Law of the Sea treaty.<sup>71</sup> Although such treaties are a practical alternative for the United States if a UNCLOS treaty fails, they would contradict the avowed U.S. position favoring international regulation only by a comprehensive treaty.

A pro-industry provision for companies to designate specific mine sites has been modified by the Senate concept of the work plan. The Administration and many internationalists were opposed to specific mine sites because they might imply that the U.S. government, through these companies, was claiming jurisdiction over the seabed.<sup>72</sup> The work plan alternative is supposed to remove any such claim of right. The effectiveness of the work plan in achieving this result has been questioned,<sup>73</sup> however, and Richardson admitted in testimony before the House Committee on

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<sup>68</sup> H.R. 3350 § 403(d) & (e); S. REP. NO. 1180, 95th Cong., 2d Sess. 10 (1978).

<sup>69</sup> 124 CONG. REC. H7371-7373 (daily ed. July 26, 1978) (remarks of Rep. Bedell and Rep. Stark).

<sup>70</sup> McLean, *Unilateral Mining Bills Provoke Sharp Response*, Neptune, Sept. 1978, at 7.

<sup>71</sup> S. 2053 § 3(b)(1).

<sup>72</sup> *Hearings on H.R. 3350 before the House Committee on International Relations*, 95th Cong., 2d Sess. 31-32 (1978) (testimony of Hon. Elliot Richardson); 124 CONG. REC. H7354 (daily ed. July 26, 1978) (remarks of Rep. McClosky).

<sup>73</sup> *Hearings on H.R. 3350 before the House Committee on International Relations*, 95th Cong., 2d Sess. 136 (1978) (testimony of Samuel Levering).

International Relations that the change from specific mine site to work plan was largely cosmetic.<sup>74</sup>

Despite the conscious efforts of Congress to enact legislation compatible with an anticipated Law of the Sea treaty, the developing nations Group of 77 views any such legislation as having "no validity in international law," so that "activities conducted thereunder cannot be purported to acquire any legal status."<sup>75</sup> The deep seabed is one of the remaining unresolved issues delaying the conclusion of a comprehensive Law of the Sea treaty. Opponents of the Deep Seabed Hard Minerals Resources Act fear that the Act, by unilaterally imposing a U.S.-initiated interim regime, may generate a severe reaction at UNCLOS and destroy the progress already made.<sup>76</sup> In addition, the legislation might eliminate most of the incentive for the U.S. to conclude an UNCLOS pact, which would probably include much less favorable terms.<sup>77</sup> The Act's supporters claim, on the other hand, that it will serve to express U.S. displeasure over UNCLOS stagnation and break the deadlock on seabed rights.<sup>78</sup>

There are several possible avenues that hostile reaction by such factions as the Group of 77 could take. There could be protests in an international forum, the passage of United Nations resolutions, a request for an International Court of Justice advisory opinion, suits in United States and foreign courts against the mining companies, and economic or political retaliation against the countries and companies connected with the mining. Another tactical option is to link deep seabed mining to such other international issues as OPEC's oil policies, or to Law of the Sea issues such as the navigation rights for which the United States has been bargaining.<sup>79</sup> Finally, the developing nations might decide to set aside the gentleman's agreement among UNCLOS participants requiring a consensus, and adopt by a two-thirds vote a treaty unacceptable to the industrialized nations. These industrialized nations would then be likely to regulate mining among themselves through mini-treaties, creating great confusion in the international law of seabed mining.

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<sup>74</sup> *Id.* at 35 (testimony of Hon. Elliot Richardson).

<sup>75</sup> United Nations Press Release, SEA/327, August 28, 1978 at 3.

<sup>76</sup> Deep Seabed Hearings and Markup, *supra* note 32, at 346 (statement by Barbara Weaver).

<sup>77</sup> *Id.* at 344 (statement by Rep. Gerry Studds).

<sup>78</sup> *Id.* at 94 (statement by Rep. John Murphy).

<sup>79</sup> Charney, *United States Interests in a Convention on the Law of the Sea: The Case for Continued Efforts*, 11 VAND. J. TRANSNAT'L L. 66-67 (1978).

Whatever the effect, the overwhelming sentiment in the United States opposes further delay in authorizing mining of the seabed. If the seabed is to be mined in the near future, there are several strong arguments for legislation to regulate this mining. First, bankers providing the huge capital outlays for mining consortia's research and development of the necessary technology are demanding assurances of security for the ocean mining before they will grant additional loans. The mining consortia themselves are hesitant to continue their plans and investments at the pace that their current research and development programs require in the absence of a legal framework providing for licenses and permits.<sup>80</sup> In addition, the Administration maintains the domestic legislation is necessary even after an international treaty is ratified to regulate U.S. mining during the transition period before the treaty enters into force, and thereafter to assure compliance with it.<sup>81</sup>

*Betsy Cox  
Frank Brogan*

## ADDENDUM

Near the close of the first session of the 96th Congress, the Senate passed the Deep Seabed Hard Minerals Act.<sup>82</sup> The House bill,<sup>83</sup> however, is still pending before two subcommittees of the Foreign Affairs Committee which are waiting for the results of the 9th Session of the Third UNCLOS.<sup>84</sup> If the House bill comes up for a floor vote in the near future, the Deep Seabed Act could well become law by the end of the 96th Congress.

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<sup>80</sup> S. REP. NO. 1180, 95th Cong., 2d Sess. at 6 (1978).

<sup>81</sup> *Hearings Before the Subcommittee on Arms Control, Oceans and International Environment of the Senate Committee on Foreign Relations*, 95th Cong., 2d Sess. (1978) (testimony of Hon. Elliot Richardson).

<sup>82</sup> S. 493, 96th Cong., 1st Sess., passed as amended by Senate, 125 CONG. REC. S. 8554 (daily ed. December 14, 1979).

<sup>83</sup> H.R. 2759, 96th Cong., 1st Sess. (1979).

<sup>84</sup> After the first part of UNCLOS ends on April 4, 1980, Ambassador Richardson will testify before the Foreign Affairs Committee with his prognosis and possible recommendations on the legislation. The subcommittees are then expected to mark up the bill and report it.