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The Law to Govern Deepsea Mining Until Superseded by International Agreement

JOHN G. LAYLIN*

At present there is no international law, conventional or customary, limiting the freedom to recover the mineral resources of the seabed beyond coastal state jurisdiction,¹ nor is there yet any United States statutory or common law limitation. A United States company may invest millions of dollars finding deposits of manganese nodules and millions more in setting up mining systems and treatment plants adapted to the characteristics of the nodules in this location, only to see others in the exercise of their freedom rushing in and taking the nodules it counted on mining. The United States has no right to legislate against such encroachment by per-

¹ Other than the obligation that this freedom "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." Convention on the High Seas, signed 29 April 1958, effective 30 September 1962.

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sons not subject to its jurisdiction, but it can limit the right of its citizens from taking advantage of the investments in prospecting made by others. It further can, by legislation, regulate the deep seabed mining by all United States citizens or companies to promote conservation and orderly development of the hard mineral resources of the deep seabed, pending adoption of an international regime under the multilateral convention that the U.N. Seabed Committee is seeking to bring about.

If it were possible to achieve international regulation pursuant to a multinational convention before mining operations begin, national legislation to regulate the activities of United States companies would not be necessary. The technique for arriving at broad-based international agreement unfortunately is not keeping pace with that for engaging in deep seabed mining. This is not to say that there has not been progress in determining the elements of a deep seabed mining convention essential to acceptability by the United States and others interested in promoting the conservation and orderly development of the hard mineral resources of the deep seabed. Enough is known now to draft legislation which anticipates and would gear into any convention the United States could accept.

Bills to authorize regulation of deep seabed mining by United States companies have been introduced in both houses of the Congress. The proposed legislation is intended as an interim measure to fit into and be replaced by an international regime to be established pursuant to a multilateral convention.

The proposed legislation provides for reciprocity with countries adopting comparable statutes. This would be accomplished by prohibiting persons subject to the jurisdiction of the United States from encroaching upon mining activities of nationals of other states carried on under similar regulations which would require respect for mining activities authorized by the United States.

Notwithstanding adoption of comparable legislation by a significant number of ocean mining countries, the need for a generally agreed international regime to regulate the activities of the nationals of all countries would continue. National legislation even with widespread reciprocity is at best a stopgap. Such legislation could, however, discourage disorderly development and would hopefully forestall claims of prior rights based upon unregulated activities—claims which could add to the difficulties of setting up an international regime.


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Resolutions adopted by the United Nations General Assembly have disapproved of claims of sovereignty by any state over any portion of the ocean's floor beneath the high seas, that is, beyond territorial waters.\[^3\] This does not give assurance that some states may not assert that activities they or their nationals have carried on conferred a priority of right to continue those activities to the exclusion of all others. Pending agreement by a substantial number of nations, it is desirable that those states having the capability to carry on deep seabed mining by agreement or parallel action put reasonable restraints upon themselves and their nationals that encourage activity but do not permit assertion of rights beyond those necessary to assure progress, equity and order in ocean development.

Recognizing this, a number of students of the problem have suggested that, pending agreement on a permanent international regime, there be agreement on an interim regime. That would, of course, be the best solution. So far, however, there have been no signs that broad agreement could be reached on an interim regime any earlier than on the permanent regime. The thought has been expressed that the likelihood of enactment of legislation such as that introduced in the Congress might provide the necessary incentive to reach early agreement on the international regime.

While the pendency of the proposed legislation did appear to have encouraged some delegates in the Seabed Committee to get down to business at Geneva this past summer, it provoked other to turn from agreement on orderly development to agreement by those lacking the capability to engage through their own nationals in deep seabed mining to prohibit mining by those having the capability (the "Moratorium Declaration").\[^4\] The prospects that

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\[^3\] G.A. Res. 2749 (XXV) (1972). The text of this and related resolutions of the General Assembly, as well as many other documents bearing on the law of the sea and seabed, are collected in S. Oda, The International Law of the Ocean Development (1972), [hereinafter cited as ODA].

\[^4\] The Moratorium Declaration was sponsored by the following thirteen states: Algeria, Brazil, Chile, China, Iraq, Kenya, Libya, Arab Republic, Mexico, Peru, Venezuela, Yemen and Yugoslavia. It was feared that these states would call for a fresh moratorium resolution in the 1972 session of the General Assembly. This was not done. The State Department found this a favorable omen. The Acting Legal Adviser on March 1, 1973 wrote Senator Fulbright:

One other significant development at this General Assembly, fortunately in keeping with the spirit that dominated the nego-
the United Kingdom, U.S.S.R., West Germany, Japan, France or the United States would agree not to engage in seabed mining until a permanent regime has been established are equal to the prospects that the sponsors of the moratorium declaration would enter into an interim agreement promoting orderly development before the permanent regime is set up. In each case the chances are nil.

The sponsors of the moratorium declaration include states that believe it to be to their benefit—if not to the benefit of mankind as a whole—to keep the hard minerals which are found on the seabed off the market as long as possible. The longer they can accomplish this the longer they can enjoy increasing profits from the growing demand for, and the diminishing supply of, land-based minerals.

Progress toward a permanent solution will be fostered by convincing those delegates who have been blocking progress that mining activity is not going to be retarded by moratorium declarations or by dilatory tactics in the Seabed Committee meetings or by insisting upon an international regime known to be unacceptable to metals-consuming countries. The mining activity can be orderly or chaotic. It would appear to be of genuine benefit to mankind for all to support timely negotiating progress and reasonable interim regulation—not futile prohibition. And it is to the interest of all

_5._ The President and the State Department have repeatedly stated that the United States adhered for itself and its nationals to the principle of freedom of the high seas. The noteworthy May, 1970, announcement of the President stated:

_... 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._

_Oda, supra note 3, at 344._ As late as March 1, 1973, the Acting Legal Adviser stated in a letter to Senator Fulbright:

_Moreover, we wish to repeat that we continue to adhere to the President's statement that it is neither necessary nor desirable to try to halt exploration and exploitation of the seabeds beyond a depth of 200 meters during the negotiating process, provided that such activities are subject to the international regime to be agreed upon, which should include due protection of the integrity of investment made in the interim period. Our opposition to H.R. 9 in no way alters this._

[Hereinafter cited as March 1973 statement].
for those states that want the activity orderly and the regulations reasonable to lead the way without further delay.

For those who sense that legislation of the kind now before the Congress could prejudice installation of an international regime of benefit to mankind as a whole, the constructive course to pursue is to point out what regulation would be better than that proposed.

The critics thus far have revealed a lack of understanding of its reach which calls for a simple statement of what it does and what it does not do.

The proposed legislation now before the Congress (called hereafter the “interim bill”) authorizes regulation under which persons subject to the jurisdiction of the United States will be required to

1) obtain a license before engaging in mining of the deep seabed;
2) refrain from mining in areas not covered by their licenses;
3) observe in their mining operations regulations designed to protect
   a) the marine environment,
   b) other uses of the sea, including prospecting and mining by persons not subject to the jurisdiction of the United States in the very areas in which they are licensed to mine.

Contrary to the apprehensions of some, the interim bill does not

1) purport to claim any territorial jurisdiction over any area of the deep seabed;
2) confer any rights as against any national other than one under the jurisdiction of the United States;
3) contemplate regulations for protection of the environment less stringent than would be a part of the multilateral convention on the deep seabed.

One critic has assumed that the interim bill is comparable to the Truman Proclamation. In fact, the two have nothing in common.

6. The Administration understands that the interim bills before Congress, the first of which was S. 2801, do not claim any territorial jurisdiction over any area of the seabed but have stated it is apparent that S. 2801 (now H.R. 9), independent of the particular contents or merits of the Bill, has become a symbol to many countries of defiance of the multilateral negotiating process.

Letter of the Acting Legal Adviser to Senator Fulbright, June 1, 1972. This misunderstanding by some of our foreign friends has been fostered by like misunderstanding of some of our own citizens, including our friend Professor H. Gray Knight. See companion article in this issue.

7. The Proclamation issued 28 September 1945 stated:
Truman claimed exclusive rights to continental shelf resources. The interim bill which is concerned with activities beyond the legal continental shelf makes no territorial or other claims to the exclusion of any foreign state or its nationals. All states and their nationals retain throughout the high seas their present freedoms, including the freedom to mine. The only persons subject to regulation by the United States are persons subject to the jurisdiction of the United States.

Although President Nixon in his announcement of May 23, 1970, called for establishment of an interim policy, the Administration has yet to put forward its proposals for implementation. The interim bill was worked out at the Senate Interior Committee’s request by a Committee of the American Mining Congress. Why, one asks, should the mining industry ask to be regulated. Any mining company that wants to recover nodules from the bottom of the high seas is now free to do so. No license is required, yet the industry advocates that it be prohibited from mining the nodules to be found on the surface of the seabed except under a license and in accordance with regulations to be issued by the Secretary of the Interior. The reason industry wants legislation is that the investment required for mining in commercially profitable quantities at depths of as much as 15,000 feet, and for reducing the minerals recovered to saleable copper, nickel and cobalt, is of such a magni-

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The Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coast of the United States as appertaining to the United States, subject to its jurisdiction and control. ODA, supra note 3, at 341.

8. The March 1973 statement discloses a sense of obligation to prepare legislation to implement the President’s policy. It states:
In reporting to you that the Administration is opposed to the enactment of H.R. 9, we want to make clear that this does not mean we are unalterably opposed to legislation of any sort, or that we intend to disregard the problem of interim mining. Any of a number of events could occur that would lead us to conclude that legislation was necessary, and we intend to prepare as quickly as possible for that contingency.

Prudence dictates that we also begin at once to formulate a legislative approach on a contingency basis for two reasons. First, it could conceivably become clear during the negotiations that we have no reasonable basis for expecting a timely and successful law of the Sea Conference. Second, we can prepare for provisional entry into force of some aspects of the international seabed regime once it is signed. While the approach in H.R. 9 does not appear to us to be satisfactory, we intend to continue the useful discussions we have been having with industry representatives and members of the public on this issue with a view to formulating such an approach within the Administration.

Similarly, we have had interesting discussions of this problem with other nations.
March 1973 Statement, supra note 5.
tude that long-term financing in the hundreds of millions of dollars is essential. The banks that have been approached have indicated a willingness to lend the required amounts only after there is legis-
lation along the lines proposed.

The proposed interim legislation provides safeguards against three risks, namely losses in recoverable mineral resources result-
ing from:

1) encroachment by persons subject to the jurisdiction of the United States.

The safeguard on this is that all such persons are forbidden to mine in the mining area except the company licensed to operate there.

2) encroachment by persons not subject to the jurisdiction of the United States.

   a) Here the risk of loss is minimized by the program for recipro-
cal protection. Persons not subject to the jurisdiction of the United States but subject to that of states with comparable legis-
lation will be forbidden by their own governments to mine in an area under a license previously issued by the United States or other reciprocating state. There is reason to believe that as a practical matter every country whose nationals are interested in and capable of deep seabed mining will, out of self-interest, pro-
hibit their nationals from encroaching into an area under such a license in return for application of the reciprocity provisions of the proposed statute. It will, as previously indicated, forbid U.S. na-
tionals from encroaching into an area under license by a recipro-
cating state.

   b) As to encroachment by nationals of non-reciprocating states, the proposed statute provides for OPIC-type insurance. Inasmuch as there is reason to believe that the companies with the capabil-
ity of deep seabed mining will be nationals of reciprocating states and so forbidden to encroach, no matter by which state they are licensed, the chances of losses for which insurance benefits are payable will be minimal. The premiums for this insurance not paid out as benefits could be paid into the fund of the interna-
tional authority when established for distribution for the benefit of mankind, particularly the lesser developed countries. In the view of the author, possibly all of the amount paid in as premiums, less only administration expenses, would thus be available for distribu-
tion once the international authority has power itself to forbid encroachment by the nationals of any state.

   c) Limitation on the right of recovery by, or increased burdens imposed pursuant to, the multilateral convention.

The coverage for this OPIC-type insurance, which would be written by a government agency, would include losses attributable to
limitation on the amount of recovery below a level fixed in
the interim license by reason of subsequent:

- shortening of the period covered by the license;
- interruption of production in the licensed area;
- relocation of that area;
- limitation in the annual rate of recovery;
- limitation in the annual rate of sale or price of the constituent
  metals;
- increase in the charges payable by the miner.

Here again the risk of loss by the insurer is within its power to
limit. The United States is able now to anticipate to a considerable
degree the kind of multilateral convention it would be willing to
accept. The regulations under the interim bills could be drafted
now to fit into the regulations in and under the multilateral con-
vention. The variations, if any, are likely to be minor and not
costly. Any premiums not required to be paid out could, less
administrative expenses, be turned over to the fund for distribution
for the benefit of mankind, particularly the people of the developing
countries.

One could argue with the bankers that given the smallness of the
risk, they should not insist on the insurance. Their answer is that
venturing into an activity so unprecedented as deep seabed mining
is itself so risky from a nonpolitical angle that there should not be
added the risks discussed above, all to a large degree of a political
nature.

It should be noted that U.S. companies will be competing with
companies that are state owned, as in the case of a Russian agency
of government, or state subsidized, as in the case with companies in
West Germany and Japan.

Why do the governments of these countries encourage deep sea-
bed mining? The answer to this question is for them the same as
it is to the question why the United States should insure its nation-
als against offshore political risks. All are industrial countries, for
the most part net importers of copper, nickel and cobalt. The
reliability of their and our traditional land-based sources of supply
is diminishing as the requirements for industrial and strategic pur-
poses are increasing. It is to their interest, as it is to ours and the
interest of most countries, developed or lesser developed, to make
available the resources of the deep seabed. The risk of expropria-
tion or failure of reliable production through political unrest does
not hang, as a sword of Damocles, over the marine sources of sup-
ply.
So far as is known, no U.S. company has asked its government to subsidize its deep seabed mining operations as other governments are doing. The request for insuring—in contrast to subsidizing—is modest and it is in better keeping with the American free enterprise competitive system. It is not believed that with the increasing world demand the added supply from the ocean floors will lower prices, but there is a real possibility that without the marine-based supplies the price of the land-based supplies will rise. That, as has been mentioned, appears to be the hope of some ore exporting nations and their reason for obstructing agreement on a workable international regime. If copper, nickel and cobalt prices can be kept reasonable, the cost to the American taxpayer of insurance that will help assure marine-based supplies at reasonable prices will be more than offset by the savings in the cost of those metals which enter into the manufactured products every consumer buys.

A question sometimes put is this. If legislation such as is proposed is enacted by the United States and the other nations having the capability of recovering deep seabed nodules and of separating the basic metals, will not the incentive for them to promote a multinational convention be lessened. If it is assumed that the program of reciprocity between the industrial advanced nations will prove to be so satisfactory to them that they cease to push for an early multilateral convention on the seabed, there is reason to believe that those countries whose delegates have obstructed agreement on a workable international regime will change course 180 degrees and themselves push for early agreement on a regime acceptable to the industrial nations—on a regime that is truly to the benefit of all of mankind—not the least to the consumers in nations that import the metals to be made available for their own growing industrial needs or in consumer products into which these metals enter.

Administration spokesmen have recently urged the Congress to refrain from enacting interim legislation provided the following schedule is adhered to:

Meetings of the Seabed Committee in March and July-August 1973, preparing for an organizational Law of the Sea Conference in November-December 1973, and a Substantive Meeting of the Conference in April-May 1974, with a possible further conference to complete a Convention in 1974 or 1975.

The implication was strong that the Administration would not oppose some sort of interim legislation if agreement was not reached
prior to the General Assembly session in the fall of 1975. This has been followed up by a proposal in the Seabed Committee by the United States delegate that consideration be given to a provisional international regime effective from the date of signature of the Multilateral Convention for a permanent regime until the necessary ratifications have been deposited. The Seabed Committee has asked the Secretary General to prepare for the July-August meeting a report on precedents for such a provisional regime.

This is all right so far as it goes but it counts too heavily on adherence to the schedule 1973-1975. The lack of progress to the end of March in the Seabed Committee lends little to support confidence in agreement in 1975 or for years thereafter. The position does have the merit of strengthening earlier statements suggesting that the nations wanting agreement will go ahead with one arrangement or another if the present lack of progress continues.

In hearings following the Administration’s March 1973 statement of its position and the delegate’s provisional arrangement proposal, former Secretary of State Dean Rusk on March 27, 1973, testified:

We face the possibility, if I may use the phrase in these halls, of a filibuster by the developing countries which might unfortunately postpone indefinitely a generally agreed international regime with respect to the resources of international seas. I personally feel that the long-range outlook for vital resources is so serious that we should make it clear that an indefinite postponement is not acceptable. Perhaps the dozen or more countries who are now developing the technology for such exploitation should,

9. The March 1973 statement explained:

Let me be quite clear about the timing of this course of action. First, we will commence work on alternative approaches immediately, and will concentrate on the period between signature and entry into force of the treaty; second, we will want to make a continuing assessment of the negotiations to determine if a timely and successful Conference will occur; and third, we will not ask Congress to pass alternative legislation for the period before the conclusion of the Conference if a timely and successful Conference is predictable.

Let me also be clear as to what we mean by a “timely and successful” Conference. We would not regard a Conference as timely unless the schedule referred to in the preamble of the Conference Resolution is adhered to: in other words, a Convention, including arrangements regarding the provisional application of the international seabeds regime, would be opened for signature in 1974 or, at the latest, in 1975. In practical terms, this means not later than the summer of 1975, since many delegates would have to be present when the U.N. General Assembly convenes in September.


11. Resolution adopted March 26, 1973. Technically the resolution was by a subcommittee of the whole which requires, and is assured of, approval by the same members in a plenary meeting.

12. See note 8 supra.
in that event, get together and make their own arrangements among themselves with due regard for the legitimate interests of the developing countries. I make it clear that this is my personal opinion and should not be interpreted as reflecting any views I have heard expressed by the Executive Branch of our Government.13

Professor L.F.E. Goldie in other hearings on the day following Secretary Rusk’s testimony submitted a scholarly paper giving precedents for states and their nationals to acquire mining rights on the ocean floor under existing international law which they could exercise outside of a conventional international regime or could use to gain special rights under the regime on the basis of a “grandfather clause.”14 Further procrastination by the Congress in making it possible for American private enterprise to compete on the ocean floor with foreign state supported enterprises could work to the disadvantage of United States public interests. He made it clear that he did not advocate the assertion of those rights by the Congress and that the proposed interim legislation does not make or support such an assertion.

My esteemed colleague whose article appears with this associates himself with those who have stated that the interim bill now before the Congress “does not best serve the resource management interests of the United States as a whole.” Some of the writers he cites take this position because of certain mining provisions with which they do not agree. This is not the place to discuss those issues as we are concerned here with the international aspects. I cannot believe he believes the interests of the United States on the international plane will be served by jeopardizing availability of the source of supply of minerals to the United States of which it is a net importer and by worsening our adverse trade balance.

13. Hearings on S. Res. 82 Before the Senate Subcomm. on International Organizations and Movements, 93d Cong., 1st Sess. (1973), a resolution introduced by Senator Pell commending the United States delegation to the Seabed Committee “for its excellent work.” The resolution also endorses the objectives envisioned in the President’s “ocean policy statement of May 23, 1970.”

14. Testimony before the House Committee on Merchant Marine and Fisheries, Subcommittee on Oceanography, March 28, 1973. Dr. Goldie has assembled an impressive array of precedents for the acquisition of mining rights in terra nullius, the outstanding one being the case of the island of Spitsbergen before any state claimed sovereignty over it and the retention of those rights under the “grandfather clause” principle.
The effect of enactment now of interim legislation on the negotiations in the Seabed Committee is a matter of conjecture on which reasonable men can and do disagree. Professor Knight's judgment that it would be adverse is shared by the Administration. The writer's judgment is supported by the general principle that "faint heart ne'er won fair lady" or that it is the timid two are frightened by the barks that get the bites. That the pendency of the interim bills has had a beneficial effect seems self evident. The Administration acknowledges this.

It "contravenes international expectations," Professor Knight states. Fine lawyer that he is, he does not join those writers who say it violates existing rights. The expectations of some it does contravene, and properly so. Those countries that have expected to deny to mankind the benefits of seabed resources by insisting on a moratorium to be followed by an unworkable international authority are bound to be disappointed.

That the United States has already contravened these expectations is evidenced by the following statement made by the United States delegate to the Seabed Committee on August 10, 1972:

The views of my delegation on resource issues have also been stated on a number of occasions. Unfortunately, some delegations appear to have the impression that maritime countries in general, and the United States in particular, can be expected to sacrifice in these negotiations basic elements of their national policy on resources. This is not true. The reality is that every nation represented here has basic interests in both resource and non-resource uses that require accommodation.

Accordingly, we believe it is important to dispel any possible misconceptions that my government would agree to a monopoly by an international operating agency over deep seabed exploitation or to any type of economic zone that does not accommodate basic United States interests with respect to resources as well as navigation.15

Our area of agreement can be enlarged with continuing exchange of views. For instance, an interim measure enacted this year could limit actual exploitation to a period after 1975 and then only if no multilateral agreement had been reached. This would not hurt the development of our recovery capabilities since the earliest that commercial production could begin, if the law were enacted and the necessary financing assured today, would be after 1975. The legislation is needed now because of the long "lead time" necessary to build the ships and recovery equipment and land-based treatment when Norway claimed sovereignty and the United States and others recognized the claim.

plants. Exploration could go forward under regulations which anticipated the provisions of a Convention the United States could support. With the signature of a Convention the regulations of the Secretary of the Interior would be made consistent with it, thus implementing a provisional regime such as the United States delegate has proposed.

Whatever disagreements remain between Professor Knight and this writer, we join in subscribing to the lawyers' friendly adversary process as the method best suited to assist others in reaching their own conclusions. This not only gives the reader a choice but also may lead to suggestions for better alternatives. To promote responsiveness to our points of disagreement we have exchanged early drafts of these companion articles. If we have failed to meet each other head-on it is not for lack of trying.