Seabed Legislation

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A REPORT ON LEGISLATION:
THE DEEP SEABED HARD MINERAL RESOURCES ACT*

Unilateral deep seabed mining legislation has been introduced in every congressional session since 1972. Although the structure of the different bills has generally been similar, the substantive provisions of each and their progress through the legislative process have varied considerably. Both the Nixon and Ford Administrations opposed the enactment of seabed mining legislation on the premise that such action would have a negative impact on the United Nations Law of the Sea (LOS) Conference.

President Carter appointed Elliott L. Richardson as the United States Ambassador to the LOS Conference and, during the first several months of the new Administration, a review of the U.S. position on the international negotiations and domestic legislation was undertaken.

Pending that review and an assessment of the work of the impending Sixth Session of the LOS Conference, Ambassador Richardson testified before numerous congressional committees in the Spring of 1977 that the Administration did not support legislation at that time. Prompted, in part, by serious violations of procedural due process at the Sixth Session, the Ambassador announced later that Fall that the Administration now advocated mining legislation by the Congress. Testifying before joint hearings held by the Senate Committee on Commerce, Science and Transportation and the Committee on Energy and Natural Resources, Richardson noted that legislation would be needed whether there was a treaty or not. The Ambassador went on to outline some of the elements which the Administration sought to have included within the legislation.

By the time Mr. Richardson had testified, the deep seabed mining bill (H.R. 3350) had already been reported out by the Merchant Marine and Fisheries Committee of the House and was the subject of hearings before the Interior and Insular Affairs Committee. The bill had been jointly referred to Merchant Marine and Interior. Joint re-

* The technical assistance of Mr. Thomas R. Kitsos, Legislative Analyst for the U.S. House of Representatives Committee on Merchant Marine and Fisheries, is gratefully acknowledged.
ferral means, under recent rule changes in the House of Representa-
tives, that each Committee to which a bill had been so referred must
report the legislation before the bill can be brought to the Rules
Committee and subsequently to the floor of the full House.

On November 7, 1977, the Interior Committee completed its
consideration of H.R. 3350 and favorably reported the bill, with
amendments.

The sponsors of the legislation, Congressman John M. Murphy
(D.-N.Y.) and Congressman John Breaux* (D.-La.) were prepared to
work out differences with the Interior Committee version and bring
the bill to the Rules Committee.

Shortly after the second session of the 95th Congress convened
in January, however, the Committee on International Relations re-
quested and received a sequential referral of the legislation. This
meant that the Committee had 30 days to report the legislation. It
asked for and received approval for a one-week extension and re-
ported the legislation with amendments on February 16, 1978.

Among the three different versions of H.R. 3350, nineteen issues
of differences were identified. Of these, seventeen were generally re-
solved subject to the refinement of language. One issue, the question
of executive agency administration of the program, was to be left for a
floor vote.

The remaining issue, however, could not be resolved among the
three Committees or with the Administration and this delayed the
entire process for some eight weeks. The issue related to the estab-
ishment of a revenue sharing fund. Both bills reported by the Mer-
chant Marine and Fisheries Committee and the Interior and Insular
Affairs Committee called for the establishment of such a fund with
the details to be completed by later legislation.

The International Relations Committee, however, reported a
 provision which, in general, called for the structure of the fund to be
established by the Secretary (of the administering department) pur-
suant to regulation, subject to Congressional veto. This provision
caused some concern with the Members of the House Ways and
Means Committee. The concern grew from the fact that the fund
would be financed by some type of levy which would have the effect

* Representative Murphy is the Chairman of the House Merchant Marine and
Fisheries Committee; Representative Breaux is the Chairman of the Committee's
Oceanography Subcommittee.
of being a tax. The Ways and Means Committee has jurisdiction over tax legislation in the House and the International Relations Committee version of the deep seabed mining bill would possibly have circumvented the former's taxwriting responsibility. The provision reported by the other two Committees would have been acceptable because subsequent legislation would have proceeded through a normal hearing and legislative markup process in the Ways and Means Committee.

The revenue sharing problem eventually focused on the question of whether there should be a moratorium on the issuance of permits for commercial recovery to mining companies pending the establishment of a revenue sharing fund by future legislation. Such a moratorium was supported by some Members of the International Relations Committee and by the Administration. However, Congressmen Murphy and Breaux opposed this concept because, they argued, it could have disastrous effects on the opportunity for the mining industry to obtain capital to move toward commercial recovery activities. This was based on the premise that, given the uncertainty of the Congressional process, no investment company could risk providing such capital if permits for commercial recovery were dependent on enactment of a subsequent revenue sharing bill.

All of the key Congressmen and executive agency representatives involved in the issue agreed with the concept of mining companies sharing a portion of their seabed development revenues with the international community pursuant to a LOS treaty. Consequently, when negotiations among Committees and with the Administration resulted in an impasse, the decision was made to ask the Ways and Means Committee to draft a full revenue sharing provision for incorporation in the bill before it went to the floor of the House.

Although he was immersed in the Carter Administration's income tax reform legislation, Congressman Al Ullman, Chairman of the Ways and Means Committee acceded to a request that he consider a revenue sharing provision in his Committee. It was not until the middle of April when the Ways and Means Committee was able to hold such a hearing and, on April 27, 1978, it favorably considered the concept of revenue sharing in the nature of an excise tax. This provision had been worked on by Members and staff of the taxwriting Committee in conjunction with the Administration and the mining industry and was acceptable to all concerned.

Because of its deep involvement in the tax-reform bill, and other problems related to the precise language of the revenue sharing pro-
vision, it was not until June 7 that the Ways and Means Committee reported its excise tax measure to be added as a separate title in the seabed mining bill.

With the affirmative action of four Committees, the bill was ready for consideration by the full House of Representatives pending the granting of a rule by the Rules Committee. A “rule” structures the type of debate which can be carried out and the form of amendments which are permitted. On June 8, 1978, the Rules Committee granted a rule for H.R. 3350 and a “consensus” bill was prepared for floor consideration. This bill represented the resolution of most of the differences among the three Committees of jurisdiction and the Ways and Means Committee.

However, the schedule for the floor was extremely filled at this particular time. There were numerous appropriation bills and conference reports which were being considered and, in combination with the 4th of July Congressional recess, it was not possible to schedule deep seabed mining legislation until the last part of July. Even then, the work of the House was so intense that debate on the legislation was split over three days.

The rule was debated and approved on July 21, 1978, and two hours of general debate were held on July 24. Finally, on July 26, after consideration of more than a dozen amendments, H.R. 3350 passed by a vote of 312 to 80. It was the first time that the U.S. House of Representatives had passed seabed mining legislation.

During this same period of time, the Senate was considering S.2053, a deep seabed mining bill which had been introduced by Senator Lee Metcalf of Montana. Joint hearings were held by the Senate Energy Committee and the Senate Commerce Committee in September of 1977. A few months later Senator Metcalf passed away and his death delayed the momentum in the Senate with respect to ocean mining legislation.

Senator Bumpers of Arkansas became the Subcommittee Chairman and, after an initial period of organization, helped move S.2053 through the process as the Energy Committee, and shortly thereafter, the Commerce Committee, jointly reported out the legislation on August 18, 1978. The Senate Committee on Foreign Relations received referral of the legislation and, within about three weeks, reported the bill with amendments. Although favorably reported by three Senate Committees, the bill never reached the Senate floor because of procedural and parliamentary problems in the closing days of the 95th Congress. When the Congress adjourned, H.R. 3350 effec-
tively died and deep seabed mining legislation will be reintroduced at the beginning of the 96th Congress. Congressmen Murphy and Breaux have indicated their intention to support once again the establishment of a domestic seabed mining regime pending an international law of the sea.

H.R. 3350 as passed by the House: A Summary

The precise nature of the legislation which will be introduced and the version which emerges at the end of the legislative process is impossible to predict at this point in time. For purposes of delineating the probable substance of a seabed mining bill, the following is a summary discussion of the legislation which passed the House of Representatives during the 95th Congress.

The "Deep Seabed Hard Minerals Resources Act" contains four separate titles plus provisions on finding, purposes and definitions. The bill establishes an interim licensing and regulatory system applicable to United States citizens and business entities incorporated under the laws of the United States by promoting and regulating the development of hard mineral resources of the deep seabed in an environmentally sound manner.

The bill clarifies and makes explicit the fact that, in establishing the deep seabed mining program, the United States is exercising its proper jurisdiction to regulate United States citizens in carrying out resource development activities on the high seas does not assert sovereignty, or sovereign or exclusive rights over, or the ownership of, any area of the deep seabed.

The Secretary of Commerce is provided the authority to administer the program, which commences with the submission of an application by a United States citizen who intends to carry out deep seabed mining. The application is considered by the Secretary and, if approved, leads to the establishment of terms, conditions, and restrictions which are made applicable to a license. Upon acceptance of the terms, conditions, and restrictions by the applicant, the Secretary issues a license to conduct exploratory activities in the deep seabed. The final stage of the process involves the issuance of a permit for commercial recovery.

In the event that the Law of the Sea Conference reaches an agreement on a treaty and such treaty enters into force with respect to the United States, all deep sea mining operations carried out by U.S. citizens will be conducted under the terms of that international agreement. Any provisions of the Act, however, and any regulations
promulgated thereunder, which are not inconsistent with that international agreement shall continue in effect with respect to U.S. citizens.

The bill contains a declaration of congressional intent regarding the structure of any international treaty relating to the deep seabed to which the United States becomes a party. Additionally, the declaration addresses itself to the treatment which U.S. citizens, who have undertaken deep seabed mining activities prior to international agreement, should receive with respect to their operations under such agreement.

A separate title (Title IV) establishes the "Deep Seabed Hard Mineral Removal Tax Act of 1978." This title is the revenue sharing provision of the bill and it is intended to levy an excise tax on the removal of the deep seabed minerals for purposes of establishing a deep seabed revenue sharing trust fund. Monies from the fund are to be used for making U.S. contributions required under the future treaty for purposes of the sharing among nations of the revenues from deep seabed mining.

The bill also contains provisions regarding environmental protection, the establishment of regulations, the criteria for the location of processing plants, public information, reciprocating states, and the applicability of other U.S. laws.

Administrative Procedures

Upon receipt of an application by a United States citizen, the Secretary of Commerce must determine that the applicant is financially responsible and has the technical capabilities to carry out the exploration and commercial recovery activities proposed in the application. The Secretary must also determine that the applicant will not interfere with foreign states in their exercise of the freedom of the high seas under international law, will not engage in any activities which conflict with treaty or convention obligations of the United States, and will not pose an unreasonable threat to the quality of the environment.

Once these determinations are made and the applicant has paid a fee (based on the reasonable administrative costs incurred in processing the application), the application is approved. A "priority of right" for the acceptance of applications is given to those citizens who are engaged in exploration before the date of the enactment of the legislation if the citizen applies for a license within a reasonable period of
time. Other applications will be accepted and considered in chronological order and a priority of right will be given to those first filing. No license may be issued for the same area covered by a pending application. All applications are subject to an antitrust review by the Attorney General and the Federal Trade Commission.

After the approval of an application, the Secretary shall establish terms, conditions, and restrictions with respect to the license for exploration. These terms, conditions, and restrictions must be consistent with the criteria established in the legislation and the regulations promulgated pursuant to it.

The terms, conditions, and restrictions are provided to each applicant in written form by the Secretary and the applicant has 60 days in which to take exceptions to any of those provisions. If the applicant and the Secretary cannot agree on any of the terms, the applicant is entitled to a hearing on the record and, if necessary, judicial review.

When the applicant accepts the terms, conditions, and restrictions established by the Secretary, a license for exploration is issued. Exploration involves any on-site observation and evaluation activity conducted to determine the nature and concentration of hard mineral resources in the deep seabed and environmental, technical and other appropriate factors which must be taken into account to achieve commercial recovery. It also involves the taking of such quantities of the mineral nodules as are necessary for the design, fabrication, installation and testing of equipment intended to be used in commercial recovery. Exploration does not include, and licenses and permits do not encompass, prospecting, scientific research, or the prototype testing of equipment and facilities.

After the issuance of any license or permit, the Secretary may modify any term, condition, or restriction if she finds such modification is necessary to avoid unreasonable interference with the interests of foreign States in their exercise of the freedom of the high seas, avoid a conflict with any treaty or convention obligation of the United States, or protect the quality of the environment. With respect to modification of the environmental terms, conditions, or restrictions, the Secretary must determine that the national interest in securing the minerals from the licensed or permitted area does not outweigh the potential injury to the quality of the environment intended to be remedied by the modification. The Secretary is also instructed, in this determination, to consider whether the proposed modification would result in significant economic loss to the licensee or the permittee.
The procedures for written notice, a hearing on the record, and judicial review applicable to the initial terms, conditions, and restrictions are also applied to any modification.

When the licensee approaches the end of his exploratory activity, he then applies to the Secretary for a permit for commercial recovery. Again, the Secretary, after reviewing the exploratory activity, establishes terms, conditions, and restrictions with respect to the permit and to the commercial recovery activity authorized therein. The same procedures for licenses regarding terms, conditions, restrictions and fees are applicable for the permit and, once accepted by the licensee, the Secretary issues a permit. Permits can only be issued to operators for the areas in which they are engaged in licensed exploration. Provision is also made for the modifications of permit terms, conditions and restrictions.

The Secretary may deny the approval of an application and suspend and revoke licenses and permits under certain conditions. The non-approval of an application may be based on the Secretarial finding that the activities proposed to be undertaken by the applicant do not meet the financial, technical, environmental, or high seas requirements noted above. The Secretary may take action to suspend or revoke a license or permit if the licensee or permittee substantially fails to comply with any of the provisions of the Act, any regulations issued under the Act, or any terms, conditions, or restrictions on the license or permit. Suspension is also authorized if, in the judgment of the Secretary, it is necessary to avoid a conflict with the international obligation of the United States or is in the interest of national security as determined by the President. Provision is made for administrative or judicial review of a denial or proposed suspension or revocation.

The violation of any provision, regulation, term, condition, or restriction of a license or permit is cause for the imposition of a civil or criminal penalty. Civil penalties are not to exceed $50,000 for each violation per day and the willful commission of a violation is a criminal offense punishable by a fine of not more than $250,000 for each day during which the violation continues.

There are certain restrictions or prohibitions on the Secretary and on U.S. citizens who apply for licenses or permits. No exploration or commercial activity may be carried out except pursuant to a license or permit issued under the Act, pursuant to an authorization by a reciprocating state (discussed below), or under an international agreement which is in force with respect to the U.S. No license or
permit can be issued for areas authorized to persons under agreements with reciprocating states. A license for exploration or a permit for commercial recovery is exclusive against other U.S. citizens and persons operating under the authorization of reciprocating states. The Secretary may not issue any permit which authorizes commercial recovery before January 1, 1980.

The legislation also contains certain stipulations with respect to the registry of vessels used in seabed mining operations. The mining and processing vessel and at least one ore transport vessel per mine site must be documented under the laws of the U.S. Additionally, the bill contains a provision which is intended to make any U.S.-flag ore transport vessel eligible for operational differential subsidies and construction differential subsidies under the Merchant Marine Act of 1936.

Regarding the location of processing plants, the legislation provides that the Secretary shall issue regulations with respect to such location and shall take into account, in this regard, the international nature and foreign policy dimensions of seabed mining, the necessity of maximizing employment opportunities in the U.S. and the national interest in maintaining an adequate domestic supply of deep seabed minerals.

Regulations

Within one year after the date of the enactment of the legislation, the Secretary of Commerce is directed to issue regulations to carry out her responsibilities in administering the deep seabed mining program. The regulations must be consistent with certain criteria and the criteria must be applied uniformly in establishing terms, conditions, and restrictions with respect to each license or permit. These criteria include:

Size of area of exploration or commercial recovery: The Secretary determines and specifies the area of the deep seabed in which exploration or commercial recovery is to take place. The size of the area is to be neither smaller nor larger than necessary to allow for extensive exploration activity (but it may not exceed twice the size of the estimated area in which commercial recovery is to be undertaken) and to satisfy the permittee's production requirements over the term of the permit, taking into account the state of the technology then available for ocean mining and the relevant physical characteristics of the area.
**Duration:** The term of a license is to be sufficient to allow for a thorough survey of the area and the design, construction and testing of prototype mining equipment and prototype processing facilities. The term of a permit is to be of sufficient duration to allow for commercial recovery, including a reasonable period of time for the construction of commercial scale mining and processing systems, and be based upon related factors such as the depletion of the resources within the area, the useful life of the mining equipment and processing facilities, and commercial viability.

**Performance Requirements:** The Secretary is instructed to establish reasonable expenditures for exploration by the licensee taking into account various relevant factors and shall also establish, with respect to each license, a maximum time period after exploration is completed within which commercial recovery must begin. Once such recovery starts, the permittee should assure that recovery is maintained.

**Relinquishment and Surrender:** A licensee or permittee may surrender a license or permit at any time, without penalty. They may also relinquish, in whole or in part, any area of the deep seabed covered by the license or permit.

**Records and Audits:** Provision is to be made for each licensee or permittee to keep records consistent with standard accounting principles which will disclose expenditures for development and onshore processing of hard mineral resources. The Secretary and the Comptroller General of the United States are provided access to any books and records of the licensee or permittee.

**Submission of Data and Information:** Each licensee and permittee is required to submit to the Secretary necessary and reasonable data that the Secretary may need for making a determination with respect to the issuance, denial of application, or revocation of any license or permit.

**Public Disclosure:** Copies of data or information required under the legislation are to be made available to the public upon request, at a reasonable cost. Exceptions to this include data or information relating to trade secrets or other confidential matters or those data prohibited under any provision of law including the exceptions provided in the Freedom of Information Act.

**Prevention of Interference with Reasonable Uses of the High Seas:** Each license and permit is to include restrictions that are appropriate to insure that development operations do not unreasonably
interfere with interests of other nations in their exercise of the freedoms of the high seas, as recognized under the general principles of international law.

Protection of the Environment: Each license or permit shall contain terms, conditions, and restrictions necessary to protect the quality of the environment through the utilization of the best practicable technology economically achievable. The Secretary is to consult with the Administrator of the Environmental Protection Agency (EPA) and take into account information contained in appropriate environmental impact statements.

Monitoring: The Secretary is authorized to place officials of appropriate federal agencies on the vessels of licensees or permittees to obtain information with respect to the carrying out of the Secretary's responsibilities to protect the quality of the environment. Each licensee and permittee is instructed to submit to the Secretary or the Administrator of EPA such information as each requests for purposes of environmental assessment.

At any time, the Secretary may amend regulations as she determines to be necessary and appropriate to provide for the conservation of natural resources, protection of the environment, and the safety of life and property at sea. At least one public hearing must be held on any such proposed amendment.

Environmental Protection

There are various provisions throughout the bill designed to protect the quality of the environment with respect to activities carried out under licenses for exploration or permits for commercial recovery.

A programmatic environmental impact statement on the area of the ocean in which a U.S. citizen is likely to undertake development is to be prepared and published by the Secretary. On the first such area, a programmatic environmental impact statement is to be submitted in draft form within 120 days after the enactment of the bill. A final programmatic environmental impact statement should be prepared and published within 180 days after the publication of the draft statement.

The Secretary, in cooperation with the Administrator of EPA, is instructed to undertake a continuing review of the environmental information received during seabed mining operations for purposes of making revisions, as deemed necessary and appropriate, to any final programmatic environmental impact statement.
The bill specifically states that the approval of any application for a license and permit is to be considered a "major federal action" for purposes of the National Environmental Policy Act of 1969 (NEAA). In preparing such specific environmental impact assessments or statements required by NEPA, the Secretary is instructed to take into account information contained in any other environmental impact statement prepared pursuant to the legislation to avoid duplication. Each environmental impact statement which is so required shall be prepared within the six month period following the date on which the application concerned is approved by the Secretary.

As noted above, the Secretary may modify any environmental term, condition, or restriction under certain conditions. Another provision of the bill authorizes the Secretary to issue an emergency order declaring that exploration or commercial recovery activity, if continued, will cause an unreasonable threat to the quality of the environment by creating significant injury to that environment or that such activity is contrary to the national interest. With the exception of such an emergency order, any notice of a proposed suspension or revocation (for whatever reason) shall not affect the continuation of such activities pending a final determination.

Reciprocating States

The President is authorized to designate any foreign nation as a reciprocating state if he finds that such nation has established a deep seabed mining program comparable to the one established by the U.S. legislation. Among other factors, this comparability includes the regulation of the conduct of persons engaged in seabed mining subject to the foreign nation's jurisdiction in a manner which is compatible with that provided for in the U.S. legislation and includes regulatory and enforcement measures for the protection of the marine environment, the orderly and efficient development of the resources, and the safety of life and property at sea. Additionally, the reciprocating states' program must include the establishment of a sufficient special fund for the sharing of seabed mining revenues with the international community pursuant to a treaty.

The reciprocating state must also recognize licenses and permits issued under the U.S. legislation so that no conflict will arise between activities under license or permit. As noted above, once a foreign nation is designated as a reciprocating state, no licenses can be issued under the U.S. program which conflict with similar authorizations issued by the reciprocating state.
Transition to International Agreement (Title II)

The bill contains a statement of congressional intent that any international agreement should provide assured and nondiscriminatory access to the resources of the seabed, under reasonable terms and conditions, to U.S. citizens. For those U.S. licensees or permittees who have begun their mining activities prior to an international agreement, the statement calls for the continuation of such activities under similar terms, conditions, and restrictions as those established under the domestic program and otherwise provide for the continuation of seabed mining operations in a manner that does not unreasonably impair the value of investments made with respect to those operations.

When an international agreement enters into force with respect to the United States, the Secretary (in consultation with the Secretary of State), is instructed to take all necessary measures to insure that the implementations of the agreement protects the integrity of investments previously made by U.S. citizens—to the maximum extent reasonably possible consistent with the provisions of the international agreement. The Secretary is to submit a report to the Congress on any actions she has taken in this regard.

Revenue Sharing (Title IV)*

The title reported by the Ways and Means Committee is cited as the “Deep Seabed Hard Mineral Removal Tax Act of 1978.” This title amends the Internal Revenue Code of 1954 with respect to that chapter relating to excise taxes.

The tax is imposed on any removal of a hard mineral resource from the deep seabed pursuant to a permit. The tax on removal is set at 3.75 percent of the imputed value of the removed resource. Imputed value is defined as 20 percent of the fair market value of the commercially recoverable metals and minerals contained in the resource. For purposes of the tax, manganese, nickel, cobalt, and copper are treated as commercially recoverable.

The tax liability is to be borne by the person to whom the seabed mining permit is issued. The permittee may elect to suspend application of the tax with respect to one or more of the metals if he intends to delay the processing of such metals for at least one year.

* Title III contains provisions on civil penalties, criminal offenses, and miscellaneous provisions.
The tax is imposed, as if there were no suspension, when the permittee processes or sells the suspended metals. The later computation of the tax under this suspension method includes the imposition of an interest charge for the period of suspension.

The funds accrued from the imposition of the tax is placed in a trust fund in the Treasury of the United States. The trust fund is called the "Deep Seabed Revenue Sharing Trust Fund" and the Secretary of the Treasury has administrative responsibility over it. If, within ten years after the enactment of the legislation, an international treaty is in force and effect with respect to the United States, the amounts in the trust fund are to be available (subject to appropriations acts) for making contributions required under such agreement for purposes of sharing revenues from deep seabed mining with the international community. If a treaty is not in effect with respect to the United States by the end of the ten year period, amounts in the fund shall be available for such purposes as the Congress may subsequently determine.

With the exception of the establishment of the revenue sharing program noted above, nothing in the domestic legislation shall affect the application of the Internal Revenue Code nor the application of the customs or tariff laws of the United States with respect to deep seabed mining.

Conclusion

The seabed legislation proposal sparked response by the Group of 77. On September 15, 1978, the Group issued a statement decrying the validity of the U.S. proposal. This statement and Ambassador Richardson's response thereto follow as Appendices A and B respectively.
STATEMENT DECLARING THE POSITION OF THE
GROUP OF 77 ON UNILATERAL LEGISLATION
AFFECTING THE RESOURCES OF THE DEEP SEABED

September 15, 1978

Mr. President,

The Group of 77 wishes to refer to the move for unilateral legislation relating to the exploitation of the resources of the deep seabed being enacted or contemplated in several industrialized countries.

That such an action should come at a time when this Conference has virtually concluded 90% of its difficult and intricate work for a global treaty affecting the ocean space as a whole, must be of concern to all who seek to regulate the future relations in the oceans in an orderly and peaceful manner through a universally agreed treaty. Those involved in these negotiations must know that this Conference has been making steady progress towards a comprehensive treaty which will deal with a broad spectrum of international law of the sea from territorial jurisdiction of States to deep seabed mining beyond national jurisdiction. A task of such magnitude which involves a multitude of national interests as well as often conflicting national and international interests cannot be negotiated overnight. Nor can the negotiations for a multilateral treaty encompassing such a vast area of international law be compared with the relatively simpler processes of national legislation. If our progress appears to be slow, it is because of the vital nature of the issues involved and the desire to ensure that our agreements are universally respected and are durable. It must also be noted that the negotiations that we have been engaged in are further protracted due to the demands of the industrialized countries for the elaboration of a detailed mining code instead of a broad framework for international seabed mining.

That the very same States which have been responsible for unduly prolonging the negotiations should now hastily proceed with unilateral legislation that may conceivably wreck the Conference and destroy the hard won progress made always following the method of consensus and after so much effort is even more incomprehensible. The responsibility of such an unfortunate consequence must rest squarely on their shoulders.
The Group of 77 rejects the entire basis for such legislation—in particular the premise that the right to engage in mining of the resources of the seabed beyond the limits of national jurisdiction is a legal freedom of the high seas. There is not practice, much less custom in the legal sense, of actual exploitation of the seabed beyond national jurisdiction which could be deemed as a legal right or grounds for such exploitation. Nor is there a general treaty authorizing the exploitation of the seabed. The Declaration of Principles embodied in Resolution 2749 (XXV) expressly excludes the unfounded argument of pretending an extension of high seas freedom to the seabeds and subjects the exploration and exploitation of the seabed to the international regime to be established. The situation is therefore exactly the opposite of that which applies to the exploitation of the resources of the high seas. Here, three centuries of custom and innumerable treaties provide the necessary legal sources for maintaining that the freedom of the high seas permits the exploitation of its resources. But regarding the seabed beyond national jurisdiction, there is total lack of sources of international law authorizing its exploitation for the benefit of individual States.

The absence of a previously existing legal regime for the seabed, the Declaration of Principles adopted by way of Resolution 2749 (XXV) of the General Assembly establishing the seabed and its resources as the "common heritage of mankind" acquires a special significance, content and value. It has the effect of creating the basis for the legal regime this Conference was entrusted to formulate. The Declaration of Principles cannot be ignored merely by saying that General Assembly resolutions are not binding and are solely recommendatory in character. The Declaration was not a recommendation simply inviting States to behave in a certain way. It was substantially more than that. It was a solemn pronouncement by the most representative organ of the international community declaring that the resources of the seabed beyond national jurisdiction are the common heritage of mankind as a whole, and that they can only be exploited under an international regime and not unilaterally appropriated.

The Declaration of Principles was adopted without dissent. All groups of States have thus accepted the common heritage principle, the international character of the seabed and its resources beyond national jurisdiction, and thus the inevitable legal consequence of this, namely that unilateral exploitation is incompatible with that principle. The Declaration of Principles therefore is the authoritative expression of international law as to the regime of the sea bed
beyond national jurisdiction. It must be recalled also that the Declaration of Principles was the result of several years of preparatory work and intensive negotiations both in the General Assembly itself and in the Sea Bed Committee. Because of these antecedents, it cannot be dismissed as just another United Nations resolution; to the contrary, it establishes a principle of international law in the precise sense of Article 38 of the Statute of the International Court of Justice and constitutes an authoritative expression of the opinion of the international community on the matter.

It is therefore, clear that no State can legally act in violation of the principles stated in the Declaration of Principles. What is more, every State, in the words of the Declaration, “shall have the responsibility to ensure that activities in the area . . . shall be carried out in conformity with the international regime to be established.” Unilateral exploitation would be a clear violation of international law which entails this corresponding legal responsibility and the fact that no sovereignty is claimed is irrelevant. Unilateral recovery and appropriation of the resources which are the subject of the Declaration is more than claiming sovereignty. It, in fact, amounts to an exercise of sovereignty. The fact of reserving a small, unilaterally decided, portion of the proceeds for developing countries is not equivalent to fulfilling the obligation of exploiting the resources under a regime which is to be established.

The Group of 77 therefore, through this Declaration, reaffirms that unilateral legislative action by a State or a Group of States regarding the exploitation of the sea bed beyond the limits of national jurisdiction before a regime is established to administer the use of the Area and its resources as the common heritage of mankind in a manner agreed to by the international community as a whole, would be contrary to the Declaration of Principles. Such legislation, though supported by other States, will not be in accordance with an international regime in conformity with the Declaration of Principles within the framework of an International Convention and would be contrary to international law. Action to exploit the sea bed, or to facilitate its exploitation pursuant to such legislation, would also be contrary to international law.

The Group of 77 cannot accept that any rights may be acquired by any State, person or entity by virtue of such unilateral measures. Those who through their own actions would create a situation which impels them to seek a recognition of such rights at this Conference must clearly know from now that they will be creating an additional
obstacle to the conclusion of a treaty. The Group cannot be expected to alter its long-standing and well-stated position rejecting the recognition of acquired rights. We cannot be expected to give a cloak of legality to what is illegal ab initio.

We feel confident that the legality of such measures is open to challenge at an appropriate time and in the proper forum.

The Group of 77 strongly feels that such unilateral measures would prejudice negotiations and would have a negative impact on them. To think otherwise would be to ignore the Group’s long-standing conviction against such actions. Consequently, the Group cannot remain indifferent in the face of these developments.

The dark cloud created over this Conference by these actions would not only jeopardize the conclusion of the treaty as a whole, but may well precipitate a chaotic situation with regard to the Law of the oceans. The consequences would be far-reaching. No one can expect, in such a situation, to enjoy all the guarantees regarding international uses of the oceans which have already been so arduously negotiated at this Conference. Indeed, the failure of this most important Conference in the history of the United Nations would have a disastrous effect on the entire system of multilateral negotiations under the aegis of the United Nations. Indeed, its repercussions will be felt by the future generations.

These important considerations must weigh heavily on those who, through their shortsightedness and narrow concerns, tend to ignore the long-term interest of creating peaceful and orderly world institutions. It is they and they alone who must bear the full responsibility for such irreparable consequences.

In the interest of the future of this Conference, therefore, the Group of 77 calls upon States to exercise restraint and to refrain from taking unilateral legislative or other actions relating to the exploitation of the resources of the sea bed.

The Group of 77 would wish to reaffirm the inseparability of the different aspects of the Law of the Sea being currently negotiated as well as its commitment to the establishment of a comprehensive Convention on the Law of the Sea.

Finally, the Group of 77 deplores such action and repudiates as wholly illegal any unilateral actions for the exploration and exploitation of the deep seabed and categorically asserts that any such action will not be recognized.
Statement by
Ambassador Elliot L. Richardson
Special Representative of the President for the
Law of the Sea Conference
to the Plenary Meeting

September 15, 1978

Mr. President,

I have asked for the floor in response to the distinguished Chairman of the Group of 77 not to extend the debate on this subject but in the hope of dispelling misunderstanding on certain key points.

First, Mr. President, I want to emphasize that there is no government represented here that is more dedicated than the United States to the conclusion of a broadly acceptable comprehensive Law of the Sea treaty at the earliest possible date. But from the outset of these negotiations, it has also been our consistent position that exploration and exploitation of the deep seabed beyond areas of national jurisdiction are freedoms of the high seas enjoyed by all nations.

Legal restraints may be imposed on national action beyond the limits of the jurisdiction of any state only by their inclusion in rules of international law. With respect to seabed mining we are unaware of any such restraints other than those that apply generally to the high seas and the exercise of high seas freedoms, including the prohibition on sovereignty claims, the exclusive jurisdiction of states over their ships and nationals, and the duty to have reasonable regard for other high seas users. States will become subject to additional restraints when they adhere to a treaty that establishes an international authority to manage and oversee seabed mining. They will then have voluntarily accepted the alteration of those freedoms in the broader interest of creating a stable legal regime for the use and management of the world's oceans and their resources. But we cannot accept the suggestion that other States, without our consent, could deny or alter our rights under international law by resolutions, statements, and the like.

Specific allegations have been made here concerning the incompatibility of national legislation with United Nations General Assembly Resolution 2574D (XXIV) and 2749 (XXV). With respect to the
former, the so-called "Moratorium Resolution," I would first note that, while 62 states voted in favor, the United States and 27 other states voted against, and 28 additional states abstained. Clearly, the resolution cannot be said to have commanded overwhelming support. Moreover, the United States Representative was explicit in his explanation of his government's negative vote:

The prohibition which the draft resolution contains is without binding legal effect; that is the case with almost any General Assembly resolution, and it is certainly the case for any General Assembly resolution purporting to prescribe standards of conduct for States in the oceans.

The United States voted for the "Declaration of Principles" embodied in UNGA Resolution 2749 along with 107 other states. None was opposed and 14 abstained. While proclaiming the deep seabed resources the "common heritage of mankind," this resolution did not purport to prohibit access to these resources. Indeed, it is clear from the text of the resolution and from statements made at the time of its adoption that it was not intended to constitute an interim deep seabed mining regime, but rather was intended to be a general basis for subsequent negotiation of an internationally agreed regime. Thus, one delegate said that the resolution was "only a basis for the preparation of a regime and must not be interpreted as an interim regime," while another commented that "it is balanced and comprehensive enough to serve as the foundation and framework for an international regime for the seabed beyond national jurisdiction, without attempting to go so far as to substitute either for the regime itself or the international agreement which must give it force and effect." A third, the delegate of the Soviet Union, noted that "adoption of the declaration by the General Assembly cannot create legal consequences for states in view of the well-known fact that decisions of the General Assembly have simply the force of recommendations." The United States Representative in explaining our affirmative vote noted our view that the principles constituted a basis for subsequent negotiation of a definitive agreement containing an internationally agreed upon regime. He said:

The text of the draft declaration before us clearly points the way towards an internationally agreed regime and will be the most useful basis for treaty negotiations. It is because we are confident that this session of the General Assembly will take appropriate decisive action for convening a new law of the sea conference to reach agreement, among other things, on a new seabed regime with precise limits that it is possible to approach the principles with the
conviction that definitive agreement will soon be reached on the matters dealt with in the declaration. Accordingly, it is possible for delegations to compromise on certain aspects of the principles that may be somewhat vague or ambiguous, or imperfectly worded or punctuated, and hence might not be satisfactory if they were to be the final word. The United States is persuaded by the many delegations which have spoken so eloquently regarding the need to preserve this delicately balanced compromise, despite the fact that it is not entirely satisfactory, in order that we may move forward to a conference to establish an internationally agreed regime.

Until last year, successive United States Administrations refrained from supporting Congressional efforts to provide a statutory framework for seabed mining, largely because they considered such proposed legislation premature, particularly in view of the hope which then existed for early success in the Third United Nations Conference on the Law of the Sea. Our position has never been that such legislation might be contrary to international law, but rather that, in view of the existing state of research and development work, legislation could safely be deferred while the negotiations continued. Adhering to this position, a succession of government witnesses in Congressional hearings over a period of years counselled restraint and urged Congress to await success in the negotiations.

In October 1977, the Executive Branch of the United States Government informed two Senate Committees that it was prepared to support movement of appropriate deep seabed mining legislation through Congress. I do not wish to pretend that this shift in position was unrelated to my government’s sense of disappointment with the results of the Sixth Session of the Conference, specifically the texts of Part XI and related annexes issued as part of the Informal Composite Negotiating Text.

Of decisive importance, however, is the fact that the deep seabed mining industry is fast approaching the point where difficult decisions on very large additional investment will have to be made. These decisions will have to take into account a broad range of uncertainties, including the risks inherent in a new industry, instability in the metal markets, the nature of an international legal regime and when, if ever, it may be established. And each year of delay in reaching international agreement on a deep seabed mining regime has made it more necessary to find some interim framework that can define the seabed mining industry’s legal obligations and secure its members’ rights as against each other.
Negative decisions on further investments would clearly result in an end to the development of seabed mining technology, the dispersal of technology teams, and the reallocation by concerned firms of financial and personnel resources to areas other than seabed mining. The necessity of starting over again when an adequate legal framework was eventually put in place would add substantial costs to an already expensive undertaking and would greatly delay the actual commencement of mining. These are consequences that we must prevent if we can reasonably do so, since we are dealing with the means of access to resources which, as times goes on, will become increasingly important. This, in sum, is why legislation is needed now. This is why legislation cannot any longer be deferred.

The United States Government has consistently and publicly taken the position that the development of seabed mining technology should be encouraged, precisely in the interests of making new resources available to mankind. In commenting on the "Moratorium Resolution" in 1969, the United States Representative said:

The draft resolution proceeds on a premise which is unsound and self-defeating: that the development of seabed exploitation, and accordingly the development of technological capacity for such exploitation, should be retarded . . . . [W]hose interests, if anybody's, would such retardation serve? . . . If development does not move forward to the point where commercially viable exploitation of seabed resources is possible on a significant scale, there will be no exploitation of seabed resources and no benefit to anyone, developed or developing, coastal or landlocked, east or west, north or south.

Finally, I would point out that support of legislation has made it possible for the Executive Branch of the United States Government to work with the Congress in framing legislation that would be compatible with our primary goal—the negotiation of a comprehensive Law of the Sea treaty. As I said in my statement of August 28, the legislation is now fundamentally consonant with the aims of this Conference. With good will and hard concentration on the task before us, we can reach agreement on a seabed regime well before exploitation could possibly occur under the terms of national legislation. That is our fervent hope.

Thank you, Mr. President.