

Deep Seabed Minerals: Congress Steams to the Rescue

American consumers, like the consumers of all nations, have an immense stake in the minerals of the deep seabed. "Deep seabed," of course, refers to the areas seaward of the limits of national seabed jurisdiction, whether these limits are assumed to be the continental shelf, the continental margin, or a 200-mile zone. The minerals of immediate interest are, as all of us exposed to the subject know, the hard minerals found in the so-called manganese nodules. The nodules themselves are strange potato-shaped little pieces of rock scattered over thousand of square miles of seabed, under 12,000 to 20,000 feet of water. They contain a score or more of minerals, but the ones of greatest value, taking into account their relative percentages in the ore, are manganese, copper, nickel and cobalt.

Again, as is commonly known, these four minerals are essential to American industry. They are of immense present concern to American consumers because we are dependent for all of them on foreign sources, many of them politically undependable.

We now import 100 percent of our manganese, 88 percent of our nickel, 100 percent of our cobalt, 20 percent of our copper. Over 90 percent of those imports originate in nine countries. Our current supplies are thus vulnerable to price-fixing and curtailment through cartels, governmental and private. OPEC has taught a lesson, not only to us but also to these nine dominant hard-mineral producing countries. The Assembly of the United Nations, in its "Charter of Economic Rights and Duties of States," in 1974, spelled out this lesson. It pontificated:

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

Translated, this means that the consumers of the world not only must accept price fixing by more OPECs; it is unlawful for them to dislike it. So says the

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United Nations. Quite naturally, of the nine countries that I mentioned, not one joined the United States in voting against the resolution containing this charter. Cartels, in various degrees of maturity, now exist among producers of petroleum, copper, iron ore, bauxite, tin, cadmium, mercury, phosphate rock, and tungsten. The yellow pages will soon bulge with more.

This brings us to the importance of preserving American access to the minerals of the deep seabed.¹ American companies have developed the technology to recover the manganese nodules, lift them to the surface, transport them to on-shore refineries, process them, and recover their metals, on an economic basis. This is our last great reserve of key minerals, free of control by other nations. The United States Department of the Interior has estimated that by 1990 the United States can totally eliminate all imports of nickel, copper, and cobalt, and can reduce imports of manganese to 23 percent of consumption, provided that the American mining industry proceeds with its deep sea mining operations now. Production at these rates can be sustained indefinitely, so large are the prolific areas. Over 100 separate deposits of nodules have been identified in the Pacific Ocean alone.

There is room enough for every nation that can develop the technology as Americans have done, and that is willing to take the financial risks that American industry is prepared to do. These risks are very large. A typical operation will require \$200 million to \$400 million of capital, divided between ocean mining and on-shore refining. Some five to ten years' lead time is required to map a particular deposit, design and manufacture equipment for that mine site, and design and build a processing plant for those particular ores. Decisions must be made now.

Conceivably, development of deep seabed minerals might go forward under one of three legal regimes.

The first would be *laissez faire*, simply the exercise of the freedom of the seas under existing international law, without the creation of any new governmental regulatory machinery. The second would be a treaty. The third would be reciprocal domestic legislation enacted by the states capable of carrying on deep seabed mining.

First, as to *laissez faire*:

The right to mine manganese nodules of the deep seabed, beyond the limits of the continental margins, is unquestionably one of the freedoms of the high seas, available to all nations so long as other reasonable uses of the ocean are not interfered with. While American companies have spent as much as \$100 million to date in exploration and the design and testing of equipment and processes, they have hesitated to commit themselves to the hundreds of millions more of expenditures which would be required for full-scale commercial development. The reason is that the mining industry, unlike the petroleum industry, is not able to generate all the necessary capital internally, and must borrow heavily to

go into production of deep seabed minerals. The bankers have testified that they are prepared to lend the needed money, but first want some assurance, either through a treaty or domestic legislation, against claim jumping, and, more important, against the possible retroactive effect of an adverse treaty which would bring about limitations on production or fixing of prices and markets, or imposition of prohibitive fees and taxes.

The second possibility, a treaty, is a mixed bag. On the one hand, a treaty among the dozen or so nations whose nationals have the technical and financial capability for deep seabed mining might be a very good thing. It presumably would include limitations on the area to be included in a mining claim, set up an international registry office to publicize locations and dates of discovery, give reciprocal recognition to claims formalized in this way, set standards of diligence to deter speculative claims, and perhaps provide a pool into which each nation would deposit contributions related to production under its licenses, for assistance to less-developed countries. Such a treaty—we are still talking about a good treaty, not the one now being negotiated—could prohibit price fixing, production controls, and other forms of agreements in restraint of trade. No elaborate administrative machinery would be required. Let us call this a consumers' treaty.

Or, on the other hand, we could have the kind of treaty currently being proposed by the block of 107 nations that dominate the on-going Law of the Sea negotiations. Their proposals, in various forms, all contain these elements: First, the creation of a new maritime supergovernment, comprising the three branches of government—a two-house parliament, consisting of a council of 30 States and an Assembly of all 150 signatories, a Secretariat, and a Tribunal. Second, vesting in this "apparat" the exclusive authority to carry on deep sea mining, either directly, or, in its discretion, to do so through contracts with mining companies, provided that full authority to control operations and production is retained by the international authority. Various criteria are stated, including the requirement that the revenues of the land-based mineral-producing states must be protected. For convenience, we can refer to this as the anti-consumer concept, or the anti-American treaty. If such a treaty were in existence, all prospects of deep seabed mining would evaporate. No mining company, no bank, could put a dime into a venture subject to these hazards.

And the very fact that such a gremlin is trying to move into the neighborhood will keep investors out until it is exorcised, if that is how one gets rid of gremlins. Unfortunately, the American negotiators for six years now have been cultivating this gremlin instead of chasing it out of town. In 1970 the State Department offered a draft treaty which proposed a council, a secretariat, three commissions, and a tribunal, to control deep seabed mining as well as exploitation of the continental margins. The Group of 107 can say with some justification that the United States, not they, dredged up this sea monster out of

Foggy Bottom. And, before leaving the 1970 draft treaty which got us into this mess, let us remember that it also proposed that all coastal States donate 50 percent to 66 2/3 percent of the government's revenues from the continental margin beyond the 200-meter depth line to this new international organization. Naturally, no one else voted for this, but all seized with delight on the idea of the international parliament, which could control or prevent the achievement of American hard mineral independence.

Congress gave the Nixon administration advance notice that its 1970 treaty proposal was not acceptable. On July 21, 1970, the ranking members of the Senate Committee on Interior and Insular Affairs wrote the Secretary of State:

In the short time that our members have had access to the sixty-six page draft, the Subcommittee is unanimous in expressing grave doubts about so many of its provisions. Therefore, we strongly urge that you prevent its presentation at the United Nations Seabeds Committee session next week at Geneva, and instead respectfully suggest that you direct that it be substantially revised.

The reasons, among others:

Various provisions of the draft treaty would establish an international organization potentially so vast as to make the size of the United Nations pale by comparison. The organization would include an Assembly, a Council, a Tribunal, three Commissions, and a Secretariat. Present leasing activities beyond the 200-meter-depth limit could not generate sufficient revenues to begin to fund such an organization. More importantly though, considering at best such a massive organization as a possible result of many concessions in the international negotiating process, one staggers at the thought of the immensity of the organization which would result from negotiations if the United States opened discussions by supporting the creation of the monolith contained in the draft treaty.

Despite this warning, the draft treaty was submitted anyhow, with no major changes.

The deep seabed mining bills now before Congress, five years later, simply go to show that while the mills of Congress grind slowly, they grind exceedingly fine. I will come to those bills in a moment.

The earnest and diligent group of American negotiators, who have given the treaty negotiations a life of its own, remind me of the movie, "The Bridge on the River Kwai." They have become dedicated to designing and building a top-heavy power structure—the present writer calls the floating Chinese Pagoda—that the national interest dictates should never be built at all.

There are, of course, features of the proposed treaty to which the United States might well agree—for example, freezing territorial sea claims at 12 miles if unimpeded passage through straits and archipelagos is assured; confirming the coastal states' limited resource jurisdiction out to 200 miles and no farther; clarifying pollution control responsibilities and the status of scientific research, and so on. They are mostly in the nature of self-restraints, as were the four 1958 Geneva conventions. Even if there is no treaty or "family" of treaties, to borrow Dean Rusk's expression, these concepts, if widely accepted, will pass into

customary international law. They do not require a new maritime parliament. Neither does deep sea mining. One can agree with his neighbors that the kids won't ride bicycles through their flower gardens, without moving a policeman into the spare bedroom.

And it must be borne in mind that whereas the Assembly of the United Nations, which has been churning out anti-American resolutions on its production line, only pretends to be a parliament—to borrow Ambassador Moynihan's expression—the new seagoing parliament would be a real one, with power to legislate and to enforce its legislation. It would not be subject to any veto, its charter would be non-repealable, and indeed the treaty could be amended by a two-thirds vote of the signatory States at any time to give the new apparatus more powers. We could and would object to legislation we did not like, but it would be instant international law; and countries that did not conform would be international outlaws—or so the anti-American chorus would happily chant. Why should we do this to ourselves? Why impose new barriers to American access to vitally needed minerals?

It seems unnecessary to add that the odds against our making believers of the 107 countries that want this anti-American treaty, and converting them to the cause of writing a consumers' treaty, are exactly 107 to 1. That, coincidentally, was the vote against us on a resolution in the United Nations Assembly condemning our country for its presence in Guam. On that vote, our allies all abstained.

This was one of a long series of such showdowns, in which a hundred or more countries, most of them beneficiaries of millions of dollars of American foreign aid, voted solidly against us. Whatever justification there may have been for the naivete which prompted the 1970 draft State Department treaty, we should have grown up by now. As Mr. Moynihan told us, in his article "The United States in Opposition" in *Commentary Magazine* (quoting a Chinese statement in 1974):

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

Mr. Moynihan goes on:

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

He speaks of the

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

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

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

never been thought especially important. Taking seriously a Third World speech about, say, the right of commodity producers to market their products in concert and to raise their prices in the process, would have been the mark of the quixotic or the failed.

Perhaps it is time to take Ambassador Moynihan's advice:

What then does the United States do?

The United States goes into opposition. (His emphasis.)

This, it would seem, is the advice that Congress is about to take.

During the week of March 15, 1976, deep sea mining legislation moved a step forward in both houses of Congress.

On March 16 the Subcommittee on Oceanography of the Committee on Merchant Marine and Fisheries reported favorably H.R. 11879, and on March 18 the Senate Committee on Interior and Insular Affairs reported out S. 713. The bills differ in several respects, but they have the same purpose and the same constitutional basis. That basis is the Commerce Clause, the power of Congress to control the activities of United States nationals and vessels engaged in foreign commerce on the high seas. Congress does not grant any real estate; no one owns the deep seabed. The purpose of these bills is to assure continuing American access to the minerals of the seabed, as a freedom of the seas, and free of foreign domination, control, or veto. The technique is as follows.

The bills would set up a system of licensing of American individuals and corporations, and prohibit deep sea mining by such American nationals except pursuant to a license to be issued under the Act. By this device, Congress would impose controls, not now existing, on the exercise of the freedom of the seas, but they are established by an American legislature, not a foreign one. These controls, among others, would relate to the area to be claimed, diligence requirements, environmental safeguards, the obligation to process and refine all recovered minerals in the United States and to conform to the Jones Act, which requires transportation in United States vessels. Only United States nationals, including United States corporations, would be eligible for licenses, but foreign investments in United States corporations would not disqualify them. The operation, at sea and on shore, would of course be subject to all applicable United States laws, including those relating to taxation, anti-trust, export of strategic minerals, environmental standards, judicial review, and so on.

In return, the United States would recognize the miner's title to the minerals he recovers and afford his operations diplomatic protection. It would assure him compensation if the United States should later enter into a treaty which diminishes his rights or increases his obligations. If commercial insurance against harassment and claim jumping is not obtainable, the United States, for appropriate premiums, would provide insurance, comparable to that given against expropriations on land. The legislation would offer reciprocal treatment to licenses issued by nations that enact similar legislation and which respect our own government's licenses.

These movements in Congress should go forward to early enactment. They state the essential requirements for the recovery of American mineral independence. The bills are a plain signal to our own negotiators as well as to our opponents. They run almost exactly counter to the disastrous "single negotiating text" that came out of the treaty negotiations at Geneva, and counter to the continuing objectives of the nations that control the negotiations now in progress. The so-called compromises, the "glimmer of hope," that the American negotiators have disclosed to Congress in the last few weeks simply reconfirm these carnivorous objectives.

It is high time for Congress to rescue the executive department from the tar baby which it helped design and to which it still clings.

