

KRONMILLER / THE LAWFULNESS
OF DEEP SEABED MINING I



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THE LAWFULNESS OF DEEP SEABED MINING

Volume I

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PREFACE

The purpose of this study is to contribute a disciplined legal analysis to the debate concerning the permissibility of deep ocean mining under international law. The analytical method recognizes that the controversy cannot be objectively considered out of its political, economic and ideological context. The legal arguments of diplomats and publicists on the issue over the past decade have been largely motivated by, and infused with, political, economic and ideological considerations. Nevertheless, the views which have been expressed are susceptible of strict legal analysis.

The study set out in the pages that follow concludes that deep ocean minerals beyond the limits of national jurisdiction are of a juridical character that admits of their appropriation. However, the legal status of the deep seabed and subsoil precludes the claim or exercise of sovereignty, sovereign rights, or ownership over the area itself.

Deep ocean mining is within the ambit of the freedom of the high seas, a general principle of international law. That activity is lawful, so long as it is carried out with reasonable regard to other high seas users and does not involve a claim or exercise of exclusive rights over any area of the deep seabed or subsoil.

The notion that the deep seabed and subsoil are the common heritage of mankind may reasonably be argued to have crystallized in law, but only to the extent that it stands for the proposition that claims or exercises of sovereignty, sovereign rights or ownership over the deep seabed and subsoil are legally impermissible. This is nothing more than the consolidation of the res communis theory and high seas principle, insofar as they preclude appropriation of the

seabed and subsoil beyond the limits of national jurisdiction.

Arguably, the common heritage concept also reflects an emerging rule of customary law that all of mankind must benefit from the development of the mineral resources of the deep seabed. However, the nature of the benefits, pending entry into force of a treaty establishing a new deep seabed regime, remains fundamentally unsettled. Consequently, there is at present no international legal obligation to share revenues or otherwise to provide direct benefits to the international community from unilateral ocean mining. National legislation to encourage and regulate deep seabed mining as a freedom of the high seas is not incompatible with existing or emerging international law.

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Following completion of this study in January 1979, the first meeting of the Eighth Session of the Third United Nations Conference on the Law of the Sea took place in Geneva for six weeks. At that meeting, a preliminary edition of this book was circulated to interested delegations and, although not because of that, the legal controversy over unilateral ocean mining re-emerged. The Group of 77, then composed of 119 developing countries, with the support of the Soviet Bloc, renewed the attack on movement by the western industrialized countries toward commercial development of deep ocean minerals under domestic legislation. The developed countries responded with a concise, if somewhat casual, defense. In the view of this writer, this exchange of views, which occurred entirely in the opening plenary of the Eighth Session, as well as a paper provided to the Conference by a group of legal experts supporting the developing country position that unilateral mining is unlawful, added nothing of significance to the controversy. Nonetheless, records of these statements are set out in appendices, so that the reader may decide for himself whether the legal position of either side was advanced.

Negotiations on the deep seabed regime under the future, comprehensive treaty made some progress toward consensus in the Geneva meeting. The results of this work, which are reflected in the Informal Composite Negotiating Text, Revision 1, (ICNT, Rev. 1) Part XI, and Annexes II and III, failed to provide assured access to deep ocean minerals for State and private enterprises and presented grave institutional difficulties, including excessive discretion in the International Sea-Bed Authority and a system of governance dominated by a one-nation one-vote Assembly. Nevertheless, it must be admitted that the negotiations were serious and did represent progress toward conclusion of a treaty. The relevant provisions of the ICNT, Rev. 1 and an incisive analysis of the U.S. legislation and the seabed negotiations by Richard Darman, distinguished past Vice-Chairman of the United States Delegation to the Law of the Sea Conference, also appear in appendices.

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Deep seabed mining legislation passed the United States House of Representatives, but failed to reach the Floor of the Senate in the 95th Congress, due to extraordinary procedural difficulties. The measure was reintroduced in the 96th Congress as H. R. 2759 in the House and S.493 in the Senate. Once again, the Administration supported enactment of the legislation. There was every reason to believe that ocean mining legislation would be enacted before the end of 1979. H. R. 2759, a statement by its co-sponsor, John B. Breaux, and extensive testimony on the measure, too, are found in the appendices. An excellent 1979 study by the United States Department of Commerce, Cobalt, Copper, Nickel and Manganese: Future Supply and Demand and Implications for Deep Seabed Mining is also appended.

ACKNOWLEDGMENTS

This study is a research project carried out under contract to the Marine Minerals Division, National Oceanic and Atmospheric Administration, United States Department of Commerce. The paper is also the penultimate iteration of a Ph.D. dissertation for the University of Cambridge, where the greater part of the research and analysis was carried out. The work is thus academic in nature and, although it necessarily reflects substantial independence of thought, its value derives largely from the contributions of others to the course of its development.

I am deeply grateful to Professor R. Y. Jennings, Whewell Professor of International Law, Jesus College, University of Cambridge, for his tireless and most productive supervision of my research and analysis. His enthusiasm for the project and his almost unnerving insight into the law were invaluable to the momentum and direction of my work.

I am also grateful to Professor Clive Parry, Downing College, University of Cambridge, for what seemed at the time a withering barrage of challenges to my analysis. I hope that in examining this paper he finds that his efforts have been to some degree rewarded.

My appreciation also goes to Dr. D. W. Bowett, President of Queens' College. Through him, I came to the University of Cambridge and Queens' College, and it is to the University and the College that I owe ultimate gratitude.

Brian Hoyle, Myron Nordquist, Paul Irwin, Ralph Gillis and Penelope Ferreira all have my thanks for the contributions of their legal and political insights; so, too, do Howard W. Pollock and William C. Brewer, Jr., for their warm encouragement and Amor Lane and Carl Jugel without whose interest the project

would not have been financed. I owe many thanks also to Barbara Neff, my good friend Becky Frank, and Lois Rosen for their hours of tireless effort in putting this project in final form.

Finally, I express my deepest appreciation to my wife, Linda. Lured to Cambridge by my promises of travel, comfort and relaxation, she found herself, instead, behind an antiquated typewriter in a damp and draughty (though otherwise charming), sixteenth century cottage. Throughout, her refuge and mine, when we needed one, and often we did, were our friends at the Ferry Boat and to them any expression of thanks would be too little.

FOREWORD

John M. Murphy
Chairman
House Committee on
Merchant Marine and
Fisheries

John B. Breaux
Chairman
Oceanography
Subcommittee

June 1, 1978

As co-sponsors of H.R. 3350, a bill to promote the orderly development of hard mineral resources in the deep seabed, pending adoption of an international regime relating thereto, we have looked forward to the publication of this timely and significant study. This is, by far, the most exhaustive and sophisticated analysis to emerge to date on the subject of the permissibility of deep seabed mining under international law. It is an objective, academic approach to a highly politicized, but fundamentally legal, issue. It is clear that the author of this study has successfully isolated the legal arguments, while not removing them from their political context.

Based upon our evaluation of an earlier draft of Mr. Kronmiller's analysis, we relied to a very great degree upon his advice in framing the provisions of H.R. 3350 bearing upon international law. These provisions include, inter alia: An assertion of the lawfulness of deep seabed mining as a freedom of the high seas; a disclaimer of the exercise or claim of sovereignty or sovereign rights over, or ownership of, the deep seabed; a definition of the international deep seabed

area; and an affirmation, in operative language, of the criterion of the lawfulness of high seas uses, viz, reasonable regard to the interest of other States in their exercise of the freedom of the high seas. These provisions are the international legal foundation of the legislation and they are fully supported by the thesis of this book.

For too long, the political and economic uncertainties presented by the Law of the Sea Conference have slowed the development of a deep seabed mining capability. We are strongly of the view that it is in the interest of not only the United States, but also, the international community, that deep seabed mining proceed without further delay. It is time for the United States to secure for itself the capability to develop this source of supply of the vital metals, nickel, cobalt, copper and manganese, which is free of foreign political constraints. We have witnessed all too clearly the vulnerability of this nation to political leverage exercised by a few minerals producers. We refer, of course, to oil and the OPEC cartel.

It is also time for the international community to benefit from exploitation of the minerals of the deep seabed. The vast majority of developing countries clearly stand to gain from the implementation of the concept of the common heritage of mankind.

This book will be attacked, there is no doubt of that. These challenges will be, by and large, political in nature, although they may be couched in legal terms.

We are confident that this study will withstand legal scrutiny. It is for the United States, other likeminded developed States and moderate nations of the Third World to confront and dispose of the politics of the issue. Enactment of deep seabed mining legislation which is consonant with international law will stimulate that process by clearly demonstrating the legal, political and

economic bankruptcy of the extremism which has sought to prevent the nations of the developed world from gaining meaningful access to deep seabed minerals.

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