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Howard Hughes and the Strange Legal History of the Ocean Floor: Part 1

The Hughes Glomar Explorer (file image)

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In June 1974, a large and bulky ship, the *Hughes Glomar Explorer*, exited Long Beach, California, sailing westward into the Pacific. Boasting an enormous drilling tower, and owned by the notorious and reclusive billionaire, Howards Hughes, the vessel was reportedly intended to recover thousands of tons per week of copper, nickel, manganese and cobalt from the floor of the Pacific. These resources, real enough, exist in potato-sized nodules on the deep sea bed, way beyond any nation's home waters.

Even by Hughes's standards, a project to mine the deep seabed was intriguing. Manganese, a light metal used in a variety of industrial contexts, commands a certain price in world commodity markets – though many doubted whether this could justify the massive costs of building the *Hughes Glomar Explorer*, particularly given how deep the Pacific's seabed can be. Indeed, in the waters off California, the Pacific floor soon drops to depths of 3,000 to 4,000 meters (1.8 to 2.4 miles). Even assuming such a vessel need not reach the deepest parts of the Pacific seabed floor (such as the Mariana Trench, which can be in excess of 10,000 meters, or 6 miles), the required effort, in terms of capital, labor and knowhow, required to reach the manganese nodules would have been both enormous and unprecedented.

Legally too, the notion of mining the deep seabed (or "ocean floor") was a novel topic. Historically, the ocean floor was not the subject of significant commercial use, except for the laying of transoceanic submarine cables. It was only charted in detail in the mid-1870s, by the British vessel HMS Challenger (in whose honor a space shuttle was later named). Even with the laying of transoceanic cables – which began in the 1850s – this area did not receive much legal attention. It was widely accepted that the deep seabed had essentially the same status as the high seas themselves – namely, that each state has the right to travel there, and no state can claim exclusive ownership over its resources. It was thus recognized that the deep seabed was distinct –physically and legally – from the "continental shelf" (the area immediately alongside the coastal areas). A 1958 convention provided that the continental shelf belonged to the appurtenant coastal state – but stopped short of regulating the deep seabed.

New technology changed the focus. In 1960, in a project sponsored by the U.S. Navy, the bathyscaphe *Trieste* reached the ocean floor in part of the Mariana Trench, at a depth of 10,916 meters. In the same decade, both the U.S. and

Soviet navies fielded large submarine fleets, led by nuclear-powered, nuclear-armed boats on permanent rotation (albeit at far shallower depths than the *Trieste*). Technology had by now confirmed that the seabed held potentially significant mineral deposits, as noted above. Yet, legally, the seabed was still a "no man's land."

Things changed in 1967, when at the urging of the Maltese Ambassador to the United States, Arvid Pardo, the United Nations General Assembly established an ad hoc committee to study a legal regime that would ensure "that the exploration and use of the seabed and the ocean floor should be conducted in accordance with the principles and purposes of the Charter of the United Nations, in the interests of maintaining international peace and security and for the benefit of all mankind." Alongside these efforts, a separate U.N. committee became responsible for "seabed-related military and arms control issues."

This had the enthusiastic support of the Nixon Administration. On March 18, 1969, President Nixon supported efforts to ban deployment of nuclear weapons on the seabed, remarking that this would "prevent an arms race before it has a chance to start." And on May 23, 1970, President Nixon proposed that "all nations adopted as soon as possible a treaty under which they would renounce all national claims over the natural resources of the seabed beyond the point where the high seas reach a depth of 200 meters (218.8 yards) and would agree to regard these resources as the common heritage of mankind." President Nixon further called for an international body to regulate mining of the deep seabed.

The first of these initiatives bore fruit almost immediately: in 1971, in recognition that "prevention of a nuclear arms race on the seabed and the ocean floor serves the interests of maintaining world peace," the major powers signed the "Seabed Arms Control Treaty," committing each party to refrain from placing on the seabed "any nuclear weapons or any other types of weapons of mass destruction as well as structures, launching installations or any other facilities specifically designed for storing, testing or using such weapons."

The second Nixon proposal – a treaty to regulate the deep sea bed – had a promising start. In 1970 the U.N. General Assembly had passed a resolution to establish a general "Third United Nations Conference on the Law of the Sea" ("UNCLOS III"), to establish a new comprehensive treaty on the law of the sea. UNCLOS III, which first met in 1973, became an ongoing convocation international lawyers and experts from 160 countries, whose mission was to formulate a "Law of the Sea Convention" (or "LOSC").

For much of its nine years of activity, much of UNCLOS III's work consisted of codifying existing rules (e.g., rights of navigation on the high seas and the rights of coastal states to exploit their adjacent continental shelf). But on some issues, such as how and whether the deep seabed could be exploited – which formed "Part XI" of the draft Law of the Sea Convention, UNCLOS III's delegates were grappling with new policy issues.

In early sessions of UNCLOS III, U.S. State Department negotiators favored a system that would give security of title, and a transparent regulatory system, for mining operators seeking to mine the deep seabed. They sought to promptly conclude a treaty along those lines. Meanwhile, some members of Congress, suspicious of this internationalist approach, sponsored unilateral legislation (a Deep Seabed Hard Minerals Act) that would explicitly permit mining under purely national regulations. Despite bills being introduced between 1971 and 1975, none made it out of committee, apparently because of pressure from the Executive (which was negotiating at UNCLOS III).

Other countries' negotiators had a quite different vision of how the deep seabed should be regulated, and in May 1974, a group of developing and landlocked states issued what become known as the "Kampala Declaration," demanding that UNCLOS III take into account the needs of "landlocked and geographically disadvantaged States." This agenda, which was taken up by the so-called "Group of 77" (a coalition of developing states), led their negotiators to urge for a strong central seabed authority with wide rule-making powers over seabed mining. The developing states furthermore viewed the "common heritage of mankind" as meaning that deep seabed minerals were collectively owned by all countries. In the words of one negotiator (a Sri Lankan diplomat), "[i]f you touch the nodules at the bottom of the sea, you touch my property. If you take them away, you take away my property."

Things came to head in July 1977, with the release of the UNCLOS III "Informal Composite Negotiating Text" for the LOSC. This text included a "Part XI" to regulate the deep seabed. Under this text, the deep seabed (defined as "the Area") was declared to the "common heritage of mankind." It would be subject to regulation by a UN body, the International Seabed Authority, which would license commercial exploitation and collect royalties from operators. So far, this was broadly consistent with the U.S. policy. But, as proposed, this "Authority" also would operate its own company, identified as the "Enterprise," to conduct deep seabed mining, alongside commercial operators. "Enterprise" profits then would be distributed among member states on the basis of "equitable sharing," with particular regard for the interests of developing and landlocked states. Member states would be required to transfer their technology to this "Enterprise" and to "developing countries" to allow them to engage in seabed mining alongside established operators.

The then chief negotiator for the United States at UNCLOS III, U.S. Ambassador Elliot Richardson (a former U.S. Attorney-General) declared these features "fundamentally unacceptable," but remained at the UNCLOS III bargaining table, in the hopes of reaching better terms. Meanwhile, members of Congress stepped up efforts to pass domestic legislation to permit deep seabed mining unilaterally, and in late 1977 the Carter Administration indicated it would support this. In 1979, a robust bill allowing the U.S. government to license seabed mining was being

actively considered by Congress.

Thus, in the space of fewer than 10 years, U.S. policymakers had shifted from supporting a multilateral treaty system for seabed mining, overseen by an international body (the Nixon proposal of 1972) to favoring a unilateral regulatory system, with the U.S. regulating U.S. mining activities on the deep seabed. But, as will be seen, this did not prevent the rest of the world from moving forward with a comprehensive treaty, despite growing discomfort with that model within the U.S.

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