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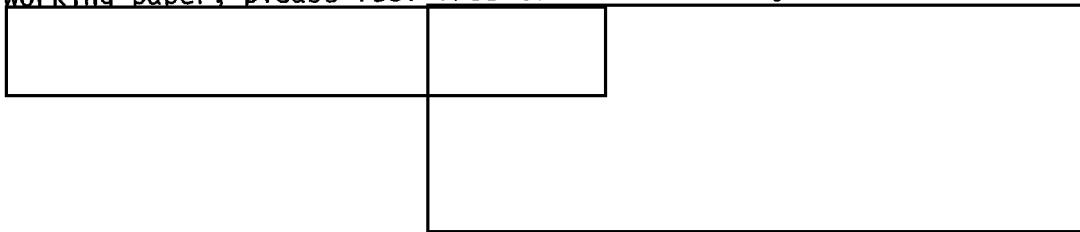
15 March 1977

MEMORANDUM FOR: Jessica Tuchman
National Security Council Staff

SUBJECT : Law of the Sea

1. The attached working paper on the issues still outstanding in the Law of the Sea negotiations may be of interest to you. It is intended not for the experts and the lawyers on the U.S. negotiating team -- it will not educate them in the slightest: it is rather for the generalists in various parts of the government who need a fairly brief guide to a complex subject.

2. If you have any comments or questions on this working paper, please feel free to call either myself

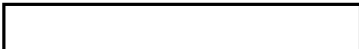


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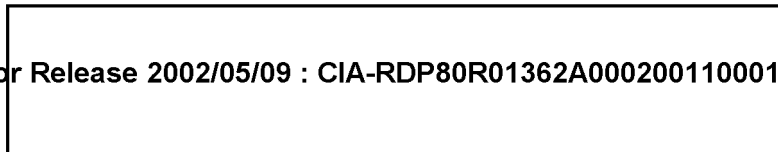
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Deputy Director
Geographic and Cartographic Research

Attachment:
a/s

cc: 
Acting Director, CPS

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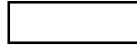
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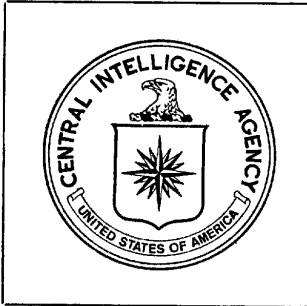
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Outstanding Issues in the Law of the Sea Negotiations

Working Paper

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OUTSTANDING ISSUES IN THE LAW
OF THE SEA NEGOTIATIONS

Introduction

When the Law of the Sea Conference resumes in New York on 23 May for its sixth session since its inception in 1973, a concerted effort is planned to try to resolve the critical issue of deep seabed mining -- a divisive question that is jeopardizing chances for broad international agreement on a comprehensive oceans treaty. The impasse between the developed and the developing countries over this matter came so close to wrecking the conference at the previous session, last August and September, that the delegates agreed to concentrate on this issue during the first few weeks of the upcoming session. In a further effort to facilitate a settlement of the seabed issue, an informal mini-conference of many LOS participating countries was held in Geneva in February-March of this year. It was chaired by Jens Evensen, head of the Norwegian LOS delegation, who has been helpful in bridging opposing viewpoints on other controversial issues.

Also of consequence to the 150 or so participating nations are a number of other outstanding issues. Several key aspects of the projected 200-mile Economic Zone remain contentious, and the provisions for dispute settlement in the LOS are still under discussion.

Deep Seabeds

The establishment of an international legal regime for deep seabed mining beyond the limits of national jurisdiction remains the most contentious of the various outstanding LOS issues. The last New York session adjourned without agreement on this question, and in consequence, the final composition of the proposed International Seabed Authority (ISA) and the extent of its powers to control the exploitation of seabed resources are yet to be determined.

NOTE -- This working paper was prepared by the Office of Geographic and Cartographic Research of the Central Intelligence Agency. Although the subject matter was discussed with representatives of other offices and agencies, no formal attempt at coordination has been taken. The views presented represent the best judgments of the issuing office, which is aware that the complex and controversial issues discussed lend themselves to other interpretations. For further information about this paper, please call 2002/05/09 : CIA-RDP80R01362A000200110001-5

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It is increasingly apparent that negotiations on ocean mining have been overtaken by the North-South controversy over a "new international economic order." Industrialized states are anxious to proceed with the mining of manganese nodules, rich in cobalt, copper, manganese, and nickel. These nodules, found at depths of 2-3 miles, offer the US, Europe, and Japan a potentially significant alternate source of industrial ores that could lessen their dependence on the land-based deposits of Third World nations.

Some of the lesser-developed countries (LDCs) may now consider seabed mining a pawn in the dialogue over international economics rather than a purely oceans issue. Viewing the nodules as the "common heritage of mankind" they consider the struggle for their control to be a test of LDC capacity to demand the equitable solution of international economic problems. The possibility of an international development fund or direct grants to developing countries, created out of revenues paid to the ISA by seabed miners, may actually be secondary to their interest in meaningful participation in the decision-making processes of a viable ISA.

The Group of 77, the LDC caucus, succeeded in stalemating talks on the seabed issue at last year's summer session in New York by insisting on reopening issues thought to have been settled at the spring meeting. A vocal minority of this group was strongly dissatisfied not only with the substance of the revised negotiating text, but also with the forum in which it was produced -- a select group comprised of industrialized states and the moderate Brazil/Peru/Chile bloc of LDCs.

The negotiating text proposes the establishment of a "dual access" or "parallel system" that would require a mining company to apply to the Seabed Authority for the right to mine two tracts. The Authority would reserve one of the requested tracts for exploitation by its mining subsidiary -- the Enterprise -- or by LDCs and would license the company to mine

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the other. Significantly, the Authority would be required to grant exploitation contracts to bona fide applicants unless they failed to meet specific and exhaustive criteria contained in the treaty.

Striking at the heart of the negotiating text's proposal on guaranteed access, the Group of 77 tabled a draft proposal that would give the ISA discretionary authority to determine whether or not states and private firms could exploit the international area, while placing no restrictions on the measures that could be taken to favor LDCs and the Enterprise.

Throughout the last New York session the Group of 77 emphasized the necessity of absolute control by the ISA over access to the mine sites and the conditions of exploitation; in contrast the industrialized nations stressed the need for guaranteed access by states and their nationals. The Group of 77 argued that the rights of the Enterprise must be primary and are not to be equated with those of states and private entities which do not adequately represent the interests of mankind as a whole.

Former Secretary Kissinger tried to break the deadlock with an offer of US financial and technical support of the Enterprise. He also suggested that a review conference could be held in about 25 years to evaluate the seabed mining regime. His intervention, while welcomed by many delegates, came too late in the session to alter the trend of events.

Since the Group of 77 operates by consensus and speaks publicly with one voice, its proposal on the system of access had to be sufficiently extreme to accommodate the strong views of aggressive members such as Algeria and Tanzania. There are indications, however, that a less strident majority of the group privately held it unnecessary for the ISA to have absolute control over the access system; apparently they believed that a modified parallel access system, with precise checks and balances to prevent arbitrary actions by the ISA and abuses by mining firms, would be a more pragmatic arrangement.

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The major outstanding issue within the Group of 5 (US, UK, USSR, France, and Japan) is the question of national quotas for seabed mine sites. The Soviet Union, departing from a previous position in which it held that no single state should obtain rights to more mine sites than any other state, now leans toward the French quota proposal. By this formula Paris seeks to establish a 20% limit on the seabed area allocated to any state or its nationals within designated 500,000 square kilometer blocks as well as to limit the output of any one state to 35% of total seabed production. The Soviets state that they support a quota concept in order to prevent a foreclosure of future resource options that could result from unfettered exploitation by US and multinational corporations. Moscow also acknowledges that it wants to prevent the geopolitical domination of the deep seabeds by Western states.

The Group of 5 is also in disagreement over the Enterprise and over the judicial procedures of the proposed Seabed Tribunal. France and Japan attach the same importance to guaranteed access as do the US, UK, and the Soviet Union, but they do not support the proposed Enterprise. Furthermore, Moscow, noting its historic opposition to international tribunals, has indicated willingness to accept a deep seabed tribunal only if arbitration is permitted as an alternate means of dispute settlement.

Canada, concerned about the potential disruptive effects of large-scale seabed mining on its domestic nickel industry, is pressing for treaty limitations on seabed production in addition to the tentative compromise on Article 9 of the negotiating text, which protects land-based LDC copper producers for 20 years. Fearing the possibility of American subsidization of uneconomic production, Ottawa proposes that land-based and seabeds producers share the future growth of the nickel industry.

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Still to be resolved is the controversy over the voting mechanism and the distribution of power between the Authority's two principal organs -- the Assembly and Council -- which was postponed as both the Group of 77 and major industrial states agreed not to raise these unresolved issues at the second New York session.

Status of the Economic Zone

Among the major outstanding issues is the juridical status of the projected 200-mile Economic Zone. Is it to retain a traditional high seas status or is it to have some other unique designation? The US and other maritime nations consider it essential to regard the Economic Zone as high seas except for stipulations specified in an LOS treaty. Viewing free movement in this area as crucial to world trade and security, they believe it necessary to protect this right by treaty. Otherwise, they contend, the stage could be set for possible conversion of the zone, in effect, into a 200-mile territorial sea, within which challenges to navigation and overflight could arise.

There is strong opposition, however, to designation of the Economic Zone as high seas; in fact, the present draft text specifically states that it is not. Support for this stand stems largely from the desire of many developing coastal states for legal protection against potential infringements of their rights by the powerful maritime nations. While no country argues for the exclusion of such high sea rights as navigation, overflight, and communication, a few territorial extremists want the Economic Zone under recognized national jurisdiction, thereby subordinating such traditional freedoms to coastal state interpretation.

More moderate coastal states have been seeking a compromise that would accommodate both international and coastal state rights and duties in the Economic Zone. In this connection, various approaches have been proposed that either avoid characterization of the nature of the Economic Zone altogether, or else designate it sui generis, i.e., neither territorial waters nor high seas, but having a unique status. Together with

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Careful wording detailing international and coastal state rights in the Economic Zone, an effective dispute settlement procedure concerning freedom of navigation and other traditional high sea rights would be helpful in reaching a suitable compromise on this important issue.

Special Rights for Disadvantaged States

Another outstanding issue involving the Economic Zone concerns certain special rights sought by landlocked and "geographically disadvantaged" states. This disparate group, led by Austria and numbering some 50 countries, basically seeks three objectives: (1) access to the sea and transit rights; (2) a share of revenues derived from any exploitation of the continental margin beyond 200 nautical miles; and (3) access and preferential rights to living resources in the economic zones of neighboring states. In the LOS discussions to date some progress has been made in the achievement of objectives (1) and (2); objective (3), however, remains highly controversial.

Complicating final settlement of these issues is the lack of an agreed definition of a "geographically disadvantaged" state. Hence coastal powers have been understandably reluctant to grant special privileges in waters under their control. As a matter of fact they reacted negatively to the strong pressures exerted by the proponents of special rights at the last New York session.

Fisheries

Coastal states are now writing de facto international fishing law, as one by one, and in groups, they take unilateral measures to extend their fishing zones. Nearly 40 countries have already claimed 200-mile maritime zones, and others have declared jurisdiction over zones ranging in breadth from 100 to 200 miles. Australia, New Zealand, and South Africa are reportedly close to making 200-mile declarations and other coastal states are considering the matter.

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The new fishing laws are in general accord with articles in the negotiating text providing for coastal state jurisdiction over living resources in the Economic Zone. They generally include stipulations establishing the right of the coastal state to manage the fish stocks and to determine the total allowable catch; to harvest that part of the total allowable catch of which it is capable; and to determine the allocation to other states of the unused portion of the allowable catch under set quotas. Several of the states that have taken such unilateral action have indicated willingness to amend their fishing laws to conform to an LOS treaty when and if one comes into existence. Still unresolved is the regulation of fishing for highly migratory species, such as tuna. The negotiating text on this matter is vague. It calls for some sort of cooperative management on the part of the fishing and the coastal states, but implying a degree of coastal state priority.

Continental Margin

There has been a narrowing of differences between the two principal groups concerned with mineral exploitation on the continental shelf beyond 200 nautical miles, but many important questions are still to be resolved. Initially, landlocked and narrow shelf states sought to limit coastal state mineral rights on the shelf to the 200-mile Economic Zone, with any resources beyond that distance to be shared as a part of the "common heritage of mankind." At the same time wide margin states (e.g., Canada, Australia, New Zealand) insisted on complete sovereignty over the mineral resources of the entire continental shelf, unrestricted by distance criterion. A consensus calling for the sharing of revenues derived from the exploitation of mineral resources beyond 200 miles, coupled with a precise definition of the outer edge of the continental margin, has since emerged.

There is strong Third World support for revenue sharing based on gross revenue figures, with the revenue to be paid by wide margin developed states to developing countries, using

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the proposed International Seabed Authority as the dispersing agency. The developed states generally oppose such use of the Authority, preferring instead to work through existing organizations for international development or other regional bodies for this purpose. They also oppose the adoption of a double standard, whereby developing broad margin states would be exempt from revenue sharing payments.

At the last New York session a segment of the Arab Group took a stand against coastal state mineral rights beyond a 200-mile limit, arguing that any exploitation in that area should come under the domain of the International Seabed Authority. The objective, at least in part, may have been multilateral control over possible hydrocarbon deposits on the continental shelves beyond 200 miles. As all of the Arab States did not support this approach, however, it appears that a compromise settlement, involving revenue sharing and precise delimitation of the continental shelf, will prevail. The satisfactory resolution of the broad continental margin issue, with all the intricacies and interests involved, is important in clearing the way to the conclusion of an overall LOS treaty.

Delimitation between Opposite and Adjacent States

The projected extension of the territorial sea to 12 miles and the establishment of the 200-mile Economic Zone will further complicate delimitation of sea boundaries between opposite and adjacent states. Disputes already have arisen, for example, between Greece and Turkey, Libya and Tunisia, Venezuela and Colombia, and Ireland and the UK.

In the LOS discussions, debate on the primary method to be used in such delimitation essentially has been between those advocating use of a median or equidistant line and those favoring equity or special circumstances. The negotiating text as it now stands provides for agreement on the principle of equity, taking into account, where appropriate, the median or equidistant line. Efforts at the last LOS session to amend

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the text proved unavailing, and it seems unlikely that there will be much shift, if any, away from text provisions as they now stand.

Dispute Settlement

Substantial progress has been made on the creation of a comprehensive system for the obligatory settlement of disputes relating to the interpretation and application of the projected LOS treaty. Despite broad support for this concept, however, some major problems remain. These mainly revolve around the choice of procedures for dispute settlement and the extent to which they will apply in the Economic Zone. Complicating agreement is the fact that resolution of the principal dispute settlement differences is dependent on major decisions yet to be made on such matters as deep seabed mining, the legal status of the Economic Zone, and the regime for marine scientific research.

Most coastal states are prepared to accept the application of a compulsory dispute settlement system in the Economic Zone to such matters as navigation and pollution, but not to fishing. The USSR, for its part, has conditioned its acceptance on the inclusion of special procedures and on the clear exclusion of maritime boundary disputes. Concerning the legal instruments to be used in settling disputes, the International Court of Justice, arbitration, special procedures, or the proposed LOS Tribunal, the range of preference is broad.

There is controversy over the question of whether there should be a separate tribunal as part of the International Seabed Authority, and if so, over the extent of its powers. Another question concerns the possible extension of dispute settlement procedures to states or bodies not party to the LOS Convention. In this regard various countries have spoken in the interest of national liberation movements recognized by the Arab League or the Organization of African Unity.

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At the forthcoming LOS session much attention will be focused on the resolution of issues bearing on research in the Economic Zone and on the continental shelf. At stake is the character of the system within which researchers will carry out their programmed activities in these waters. The developing nations clearly favor the inherent restrictions encompassed by coastal-state consent requirements as set forth in the present negotiating text, and in this they are supported by the USSR, the Socialist bloc generally, and by a growing number of developed states. In opposition is the United States which continues to hold for a "notification" regime. Under this concept all fundamental research would be authorized, subject only to specific, stipulated limitations and procedures; resource-related research would require the consent of the coastal state.

Marine Pollution

The remaining key issue in LOS pollution discussions concerns the right of coastal states to prescribe vessel design, construction, equipment, and manning standards in the territorial sea. In claiming this right, which is reflective of domestic legislation, the United States stands virtually alone, opposed by all of the other maritime powers. Many developing countries also are opposed because they are anxious to develop their own merchant fleets as rapidly and economically as possible.

Straits

The present negotiating text strikes a good balance between the safety and pollution interests of straits states and the international community. Reflecting a long history of prior negotiation on the subject, the appropriate articles represent a broad consensus, with only a few countries (such as Morocco, Yemen, and Oman) still wishing to impose restrictions on straits passage. Nevertheless the introduction of certain amendment proposals by Malaysia at the last New York session could reopen the issue. Designed to strengthen Malaysia's control

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over navigation and overflight and to further protect its interests against vessel-source pollution, they attracted considerable support.

The maritime nations are prepared to consider cosmetic changes in the straits articles, but they do not want a general reopening of the issue. Also, since Malaysia's concerns center on Japanese supertanker transit of the Malacca Strait, it is hoped that a solution can be achieved through bilateral talks outside the context of the LOS Conference. Considerable progress has been made on this problem during the present intersessional period. Malaysia, Indonesia, and Singapore have reached agreement among themselves on a Traffic Separation Scheme (TSS) and on Under-Keel Clearance (UKC) provisions for the Malacca Strait, and extensive negotiations are now underway with Japan.

Outlook

The conference has reached the point where political decisions on all outstanding issues are required. How these issues are addressed at this session will indicate whether and when a broadly based LOS treaty is feasible. As the President of the LOS Conference, Mr. Amerasinghe, said at the close of the previous session last September, experience in this international endeavor had taught him to be neither optimistic nor pessimistic. He only expressed the hope that when the Conference resumed "in another 8-9 months," the gestation period would have produced something. To that end wide-ranging intersessional discussions have been held, hopefully to pave the way toward agreement in major problem areas when the LOS Conference resumes this May.

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