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Interagency Report on The Law of The Sea

ISSUE

In the wake of the adoption of the Law of the Sea Convention on April 30, 1982 over US objection, how should the US pursue its oceans interests, particularly in navigation and overflight and seabed mining?

BACKGROUND

Results of the Conference

At the conclusion of its final session on April 30, the UN Conference on the Law of the Sea (LOS) adopted a comprehensive convention by a vote of 130 to 4 (US, Israel, Turkey, and Venezuela). Seventeen countries abstained, including the UK, FRG, Italy, Benelux, Thailand, and the Soviet bloc except Romania.

We did not achieve changes that satisfy any of the objectives for the deep seabed mining regime set forth in NSDD 20 of January 29. The text adopted by the Conference contains eight minor changes to the seabeds provisions, including an assurance of a permanent seat on the Council for the US (if the US ratified the Convention and continued to be the largest consumer of seabed minerals) but the text otherwise remains essentially the same as that reviewed earlier. The text did not include the many changes supported by the US, including those assuring adequate protections of workers' safety and labor standards.

Consequently the SIG assessment of December 1981 remains the same. The navigation and overflight provisions of the Convention, although in part troublesome, are acceptable in their present form. Other non-seabeds provisions are, with certain limited exceptions, generally consistent with US interests. The deep seabed mining regime contains major elements contrary to US interests.

We were unable to effect significant improvements in the Convention because of unyielding resistance on the part of the Group of 77, which in effect refused to enter into serious negotiations on any of the major US concerns, lack of cooperation by the Soviet bloc, and the perception by many western countries and allies that their interests are well served by the overall text or something close to it even if the deep seabed mining provisions are deficient. Some US allies,

however, worked closely with us (FRG, France, UK, Belgium and Italy). The effort of a group of eleven countries (including Canada, Australia, New Zealand, the Nordic countries and Switzerland) to develop compromise proposals and encourage genuine negotiations on some of the issues of concern to the US failed.

The negotiations at the session did produce a resolution on Preparatory Investment Protection (PIP), designed to allow pre-existing seabed miners to make a transition to the Treaty regime. Intended originally to give priorities for mine sites and production to the five existing pioneer consortia (two US-led, two with major US participation and one all-French), the resolution widened the field of pioneers beyond those five to include national entities from Japan, India, the USSR, as well as some developing country entrants if they are able to meet certain financial qualifications by January 1, 1985. The pioneer miners would still be subject to the provisions of the Convention that we were unable to change and, in this sense, PIP does not resolve any of our major problems with the Convention.

We were able at the Conference to block any significant adverse changes in the non-seabeds provisions of the Convention that serve US interests. Amendments to restrict the use of straits and require prior notification/authorization for warships to pass through territorial seas were defeated or withdrawn.

The following stages remain on the LOS schedule:

-- Drafting Committee: In July and August the final text will be readied for submission to the Conference.

-- Informal Plenary: In a brief three-day meeting in September the Drafting Committee changes will be approved and the Final Act will be prepared for signature.

-- Caracas: In December, the Final Act will be signed by Conference participants authenticating the text of the Convention. At that Session, interpretative statements giving national views of the meaning of textual provisions will be made. The Convention will then be opened for signature.

-- Preparatory Commission: After 50 countries have signed the Convention, the Preparatory Commission will meet (probably in 1983) to begin preparing the rules, regulations and procedures governing seabed mining as well as to administer PIP and prepare for the operations of the International Seabed Authority and the Law of the Sea Tribunal.

Prospects for Signature and Ratification

We anticipate that virtually all countries participating in the Conference, including our allies, will sign the Final Act as this is a legal certification of the accuracy of the text.

As for the substantive step of signing the Convention itself, we anticipate that the requisite 50 countries to establish the PrepCom will sign it shortly after it is opened for signature. The developing countries will sign early and in large numbers. Among our close friends, France, Japan, Canada, Australia, and New Zealand, together with the Nordic countries, are likely to be early signatories. The UK, FRG, Belgium and Italy may wait to sign until they can gauge better the degree of support for the Convention world wide. We expect the Soviet Union and eastern bloc countries to be among the early signatories.

With sixty ratifications necessary to bring the Convention into force and with over 120 developing countries, we expect the Convention eventually to enter into force. It is not possible to say how many countries will eventually ratify the Convention. Many nations which sign may await the outcome of the PrepCom to determine the viability of the seabed provisions. A US decision against signature, an effort to establish an alternative seabed regime, the uncertainty regarding rules and regulations to be prepared by the PrepCom, and the burdensome seabed regime may cause some important allied governments to hold off a decision on ratification which may, in turn, deter certain developing countries. Some developing countries may have difficulty ratifying the Convention for their own domestic, political reasons as well.

The advantages of the non-seabed provisions, a willingness to "grin and bear" the deep seabed mining regime, a concern not to sour relations with developing countries on this, and domestic pressures are key elements in the ratifi-

cation calculus of our allies. In the absence of strong US diplomatic pressure, virtually all western countries are likely in time to join. Even with US pressure, many may participate in the Convention. Ultimate ratification by the Soviet Union is not clear if the US and its allies stay out, but it probably would accede if our allies did, thus isolating the US.

Navigation and Overflight

The US participation in the Third UN Conference on the Law of the Sea stemmed primarily from the US security interest in halting or slowing the extension of state claims to maritime jurisdiction. We were and remain particularly concerned about the breadth of the territorial sea, navigation and overflight through straits, the type of jurisdiction a coastal state could exercise in a 200-mile zone, and the archipelago concept whereby island states seek to include within their territory large maritime areas by drawing lines around their outermost islands.

The package deal in the navigation and overflight provisions in the LOS Convention, if properly interpreted, meets these concerns and is consistent with US interests. A significant element of the package deal was that we would recognize the 12-mile territorial sea (abandoning the 3-mile position) if freedom of navigation and overflight was assured within the some 115 straits worldwide which would then be overlapped by 12-mile territorial seas. Under historical rules of innocent passage through a territorial sea, overflight would be subject to the consent of the coastal state and submarines would be required to transit on the surface. Given the critical importance of straits, such restrictions would unacceptably reduce air mobility and subsurface flexibility and nondetectability. To avoid this, the LOS Treaty provides for the freedom of "transit passage" in, under, and over straits, while recognizing residual territorial sea rights in the straits state. Whether such a "package" approach will be followed by straits states and others remains to be seen.

Many states have already taken action extending jurisdiction to the 12-mile territorial sea, but not with regard to freedom of transit through straits or the right of innocent passage of warships through the territorial sea. Other states have asserted jurisdiction broader than would be authorized by the Convention. Many commentators, including

the American Law Institute, regard the text in these areas as reflective of customary international law. Recently, the International Court of Justice regarded the 200-mile exclusive economic zone (which we do not presently claim or recognize) as having been established in international law.

If the Convention comes into force, even without us, our interests in insuring stability and limiting coastal state claims would be served in this respect. With or without a treaty in force, we will need to exercise our rights firmly as some coastal States will likely assert even more expansive claims. Except in some limited respects relating to the exclusive economic zone, it is unrealistic to expect that we could influence state practice to coalesce around anything other than the principles in the LOS Treaty. Accordingly, we have an interest in insuring that those navigation and overflight principles remain viable.

The US should not immediately announce its willingness to abide by all the jurisdictional elements of the text, particularly as they bear on navigation and overflight. Furthermore, as a matter of leverage, we should not formally give up our present position without attaining some benefits, particularly the benefit of seeing state practice develop toward navigation and overflight principles set out in the text. Therefore, we should not, as a formal matter, immediately recognize the 12-mile territorial sea, the 200-mile exclusive economic zone, the archipelagoes claimed by island States, or other special forms of coastal State jurisdiction bearing on navigation and overflight which we do not already recognize. In the long term, however, our navigation and overflight program should be designed to protect our rights and direct the practice of states toward our interpretation of the navigation and overflight principles of the text. The Department of Defense, in conjunction with State and Transportation, will conduct a review of how our positions and programs should evolve in this respect.

Commercial navigation stands to benefit from the adoption of the Convention even though the US is not a party. However, the regime for commercial navigation will not be as predictable and stable without US participation in the Convention. This may lead to increased interference by coastal states with the movement of vessels, particularly tankers and other vessels carrying hazardous cargoes, primarily for reasons related to marine pollution. Although it is anticipated that such

problems will generally have to be handled on a case-by-case, country-by-country basis, concerned departments will review this issue to identify potential problems and any preventive measures that can be taken.

Alternatives to the LOS Convention for Seabed Mining

Establishment of a US-flag seabed mining industry outside the Convention will probably require a viable alternative seabed arrangement. Achieving that may well require, at a minimum, that a few key allies (particularly the UK and FRG) not ratify the LOS Convention and take action consistent with the US approach. Even with a major US diplomatic effort it is unclear whether the US can achieve that result. If our allies ratify the Convention, and assuming continued US opposition to it, our choice will be whether and how to proceed unilaterally, depending on the costs and benefits at the time.

At present, the LOS Convention is the only comprehensive, though severely flawed, system purporting to cover all aspects of oceans activity. Seeking an alternative framework could be a lengthy process, requiring a sustained high-level effort to convince as many countries as possible--but most particularly some key allies--that (1) their seabed mining interests would be better served by not ratifying the Convention and by joining a different regime, and (2) their non-seabed mining interests, which they consider to be generally well-served by the Convention, will not suffer significantly if they remain outside the Convention.

The alternative seabed regime we envision would cover all seabed minerals. It would include provisions on resolution of conflicting mine site claims, and allow each state to exercise control over its nationals without regulation by an international authority, significant revenue sharing, or technology transfer requirements.

Pursuant to NSDD 20, we have sought to negotiate a Reciprocating States Agreement (RSA) with the UK, FRG and France which would be interim to an acceptable LOS Convention or an alternative regime. Although a bilateral agreement with the UK may be possible, an RSA with the other major potential seabed mining nations is not achievable in the near term and not achievable at all unless these countries stay out of the LOS Convention. Although many of our allies also have

problems with some of the seabed mining provisions in the Convention, they do not find them as onerous or objectionable as we do. They have insisted that any RSA they sign be interim to the Convention with little, if any, semblance to an alternative regime. It might be possible to negotiate a "pre-RSA" which calls for cooperation on seabed mining issues with the UK and the FRG. While such an agreement would not permit reciprocal recognition of mine sites, it would represent a sign of unity among the industrial allies.

The Commerce Department is under strong domestic pressure from certain elements in Congress and two of the four mining consortia to begin processing applications for seabed mining licenses, unilaterally if necessary. Commerce has repeatedly delayed the date for receiving and processing applications to accommodate our allies in the RSA discussions and has decided to begin processing on June 21. Unilateral processing of mining applications would not preclude subsequent conclusion of an RSA, but it will initiate a process which, in time, could make it more difficult to achieve.

If, in the end, we find ourselves isolated, we could consider seeking to create conditions for US companies to operate under US licenses, although other countries need not recognize such licenses. Unilateral action would place US miners in danger of having their sites legally and politically challenged by applicants and their sponsors under the LOS regime and therefore would make financing more difficult. Moreover, to the extent that opportunities arise for the G-77 countries to retaliate against the mining consortia by denying them contracts in other areas, seabed mining may be more costly. We would argue that our activities were justified under the doctrine of high seas freedoms. It would require that the US seek to resist all challenges--legal and political --to that right, including the likely efforts of the United Nations and the International Court of Justice to deny that such a right exists under current international law. To encourage the large investments needed for profitable mining, it may also be necessary to provide government-sponsored "risk insurance" against legal and political challenges.

It is not clear that we could effectively meet the challenges if we are isolated. Even with risk insurance, some and perhaps all of the US miners may well decide to conduct seabed activities under foreign flag through the Convention, if those entities gain access and find the regime economically viable.

International Legal Implications

LOS Conference President Tommy Koh has said he would seek a General Assembly Resolution requesting an advisory opinion from the International Court of Justice (ICJ) on the legality of an RSA if such an agreement is adopted. The US could not prevent the Court from issuing such an opinion. Although the opinion would be advisory in nature and not binding on states, it would be widely regarded as an authoritative statement of international law.

In addition, there is the possibility that another state might seek to bring the US before the Court. In order to avoid the compulsory jurisdiction of the Court and a possible binding adverse judgment, the US would have to rely on the Connally Reservation to the US acceptance of the compulsory jurisdiction of the Court and assert that this is a matter "essentially within the jurisdiction of the United States". Such an assertion would likely be legally and politically controversial since others would argue that the question of the legality of activity on the high seas is a question of international law and is not essentially within the domestic jurisdiction of the US. Such an assertion could also result in the Court finding the Connally Reservation invalid either as asserted or in toto. The Court might either proceed to decide the case over our objection or decide that the US had not in fact acceded to the Court's compulsory jurisdiction.

Although the US can currently make credible legal arguments in support of its position on the merits of seabed mining outside of the Convention, widespread acceptance of the Convention and its entry into force would make the US case more difficult. The likely outcome of any proceeding is placed further in doubt in view of the composition of the 15-member ICJ, which has 9 members from developing and Communist states.

Fisheries, Continental Shelf, Marine Pollution and Marine Scientific Research

We had also been prepared to accept other provisions of the LOS Convention text relating to fisheries, the continental shelf, marine pollution and marine scientific research as part of the overall package. Recognizing that the Convention contains desirable elements, there were aspects which we do not like and which we only accepted in the negotiating context.

At this stage, we do not believe that we need to take a formal position on these provisions of the Convention. Many of our non-seabeds interests are protected by the Convention even though the US does not sign it. To the extent they are not protected, we may be able to protect our interests through bilateral or regional approaches to the various issues rather than through the LOS Convention.

We are likely to find that in some instances, particularly in fisheries, we will want to continue to do things arguably not consistent with specific provisions of the LOS Convention. Specifically, we would want to maintain our requirement that foreign nations fishing off our coast provide us with commensurate economic benefits for US fishery interests. Further, we would want to maintain our positions on salmon and tuna to ensure the protection of these resources and our affected industries. We should seek to develop favorable conditions for conduct of US marine scientific research in foreign coastal waters, improving whenever possible on restrictive provisions of the Convention and being prepared to consider acceptance of coastal state jurisdiction over marine scientific research out to 200 miles in order to achieve this objective. The interested agencies will keep these and other related problems under review.

ISSUES FOR DECISION

There are five major issues: (1) whether the United States should sign the LOS Convention as adopted by the Conference; (2) when should that decision be made; (3) whether the United States should participate in the concluding phases of the LOS Conference or stay out; (4) should the United States sign the Final Act and participate in the Preparatory Commission; and (5) how should we deal with the possibility of improving the LOS Convention between now and the closing of the Conference in December.

Issue 1: Should the United States decide to sign the LOS Convention as adopted by the Conference?

A decision not to sign would (1) be consistent with the fact that the Convention does not meet any of the seabed objectives set forth in NSDD 20; (2) give us some chance of establishing an alternative seabed mining regime, even though that will be very difficult; (3) not preclude our benefiting from some of the navigation provisions of the Convention, if

the US is successful in influencing the practice of States in a direction consistent with the US interpretation of the text; and (4) be welcomed by those in Congress and industry who oppose the Convention.

The disadvantages of a decision not to sign are that if we are not successful in developing support for an alternative regime, the US (1) could find itself isolated in the law of the sea with few, if any, supporters; (2) would encounter substantial criticism and may possibly face an adverse International Court decision; (3) could well have no US-flag seabed mining industry; and (4) could face increased challenges to its exercise of navigation rights to the degree that the US acts inconsistently with the LOS seabed provisions. Staying outside the Treaty could also detract from our ability to benefit from provisions meeting our interests by maintaining they represent customary international law and would reduce US influence in the development of seabed mining rules and regulations (which may affect the availability of seabed minerals to world markets).

Issue 2: Should a decision on signing be made now or be deferred?

There is agreement that an early decision not to sign the Convention would be a clear signal that the Administration is adhering to the objectives embodied in NSDD 20; that countries already expect that the US will not sign; and that deferring decision would provoke some strong criticism from conservative and other elements opposed to the LOS Convention.

There is disagreement, however, on what effect an early decision and announcement will have on our efforts to conclude an RSA with our allies and eventually develop an alternative regime for deep seabed mining. Those favoring a decision not to sign now, and an announcement after consulting our allies on it, believe that this is the best way to counter pressures on our allies to accede to the LOS Convention and that it will not jeopardize our RSA efforts. Those favoring deferring a decision not to sign believe that our ability to wean our allies away from the Convention into an alternative regime will increase over time and that an early US decision and announcement will prematurely confront our allies with a choice in which they are more likely to embrace the Convention.

Issue 3: Should the US discontinue all further participation in the Law of the Sea Conference process or take part in the Drafting Committee and informal plenary and the Caracas Session?

The advantages of some participation are that it would (1) provide the most effective and possibly only means of assuring that no changes adverse to US interests were made in the navigation and other non-seabed text of the Treaty during the Drafting Committee and informal plenary; (2) enable us to make interpretive statements on the text of the Treaty to counter adverse interpretive statements as a basis for legal arguments supporting US positions; (3) keep open the option of participating in or observing the process of developing rules and regulations, in which further precedents contrary to US interests could emerge; (4) suggest that the US remains committed to multilateral negotiations as a means of resolving international political, economic and legal issues; and (5) avoid the risk of incurring criticism for failure to protect US navigation interests.

On the other hand, refusal to participate in the Conference activities would clearly demonstrate US resolve not to associate itself with an agreement that contains elements inconsistent with important US principles and interests. Further, participation at any level by the US at these meetings would (1) be incorrectly seen by some as a weakening of our resolve not to accept the Convention; and (2) provoke criticism from conservative and other interests opposed to the Convention. Some question the value of interpretive statements to protect legal arguments.

There is again agency disagreement on what effects participation in these meeting would have on efforts to conclude an RSA and work toward an alternative seabed mining regime. Some believe that participation will impede achieving an RSA and and make it more difficult for our allies to move toward alternative approaches. Others believe that not participating will highlight US differences with the Convention in a manner that could make it more difficult for our allies to join us in an RSA or, particularly, anything that smacks of an alternative regime.

Issue 4: Should the US sign the Final Act at Caracas and participate in the Preparatory Commission?

Signature of the Final Act authenticates the texts of the Treaty and resolutions adopted by the Conference; it is the normal diplomatic practice for states participating in a conference and does not prejudice a state's position regarding signature of the Treaty. Signature of the Final Act would allow the US to participate in the deliberations of the Preparatory Commission as a non-voting participant. On the other hand, signature might be misconstrued, particularly by domestic groups, as evidence of lack of resolve not to sign.

Participation in the Preparatory Commission, even in a non-voting capacity, could provide an opportunity to influence the drafting of the rules to govern seabed mining which will be applicable to US companies operating under foreign flag as well as foreign firms, thereby contributing to our ability to influence whether seabed minerals will be available to world markets. Of course the rules could not be inconsistent with the clearly unacceptable text even though some important problems could be mitigated. Participation would however, pose some of the same risks as those discussed in connection with participation in the Drafting Committee and plenary. In particular, it could lead others to conclude that our policy toward the Convention is more than likely to change over the long-run.

Decision on this issue could be delayed until fall when we will have a better fix on our likely influence in LOS forums.

Issue 5: Should the United States encourage efforts to amend the text of the LOS Convention?

This is a false option.

Some other countries (e.g., France, New Zealand and Norway) have hinted that the LOS Convention may be amended in a few areas favorable to the US. Some individuals outside government have argued that US efforts now should concentrate on getting such changes. All agencies, however, believe that there is no chance of achieving US objectives, and that encouraging such activity could undercut our RSA efforts. The President's Special Representative for the Law of the Sea Conference believes that there is no chance for improving the Convention in any way and that exploring such "indications" would damage the US ability to achieve alternative arrangements.