December 11, 1981

INTERDEPARTMENTAL GROUP MEMORANDUM NO. 8

Policy Study: Law of the Sea

ISSUE FOR DECISION:

Should the United States seek to negotiate changes consistent with US law of the sea objectives at the Third United Nations Conference on the Law of the Sea or withdraw from the negotiations?

I. BACKGROUND

The Third United Nations Conference on the Law of the Sea was convened in 1973, after six years of preparatory work, for the purpose of establishing a widely accepted and comprehensive legal regime for the oceans. The US has been a major participant in these negotiations. A key US objective has been to protect US military interests, specifically to halt extension of coastal State control over ocean areas, and to preserve and strengthen the rights of passage and other uses of the oceans. At the same time, the United States sought to create an international legal and economic regime for seabed mineral exploitation that would give US companies secure tenure and assured rights to conduct deep seabed mining activities.

In ten negotiating sessions of the Conference that have taken place to date, more than 150 States have achieved negotiated compromises with respect to most issues, including coastal State jurisdiction, navigation and overflight rights, fisheries conservation and management, marine scientific research, prevention and control of ocean pollution, continental shelf rights, and the peaceful settlement of disputes.

Until last March, the Conference also was close to agreement on most questions relating to the control and management of deep seabed mineral resources and there was consensus that a final treaty should be adopted in 1981. Final agreement on these matters was prevented when the US announced on March 2, 1981 that it would undertake a thorough review of the Draft Convention on the Law of the Sea. Two Conference sessions followed without further negotiations on deep seabed issues. At the last session in Geneva, August 3-28, however, there was substantial discussion of the problems in the text which the US had identified during the US policy review.

State Dept. review completed

The Conference schedule calls for conclusion of the negotiations in a final eight-week session commencing March 8, 1982. There may be several weeks of advance intersessional discussions. A treaty is very likely to be open for signature by the end of next year, with or without US agreement, although under certain limited circumstances this timetable could slip. Most Conference participants, including the developing countries, the Soviet Bloc, and virtually all of our allies, now are prepared to accept the Draft Convention with relatively little change.

Assured US access to deep seabed minerals has been a consistent but elusive goal in the negotiations. Deep seabed minerals offer a potentially important alternative source of strategic minerals--cobalt and manganese--in addition to nickel and copper. Other minerals of potentially even greater value are only now being identified in the deep seabed. Current world demand and metals markets do not justify commercial-scale development at this time. Nevertheless, multinational consortia have invested substantial amounts to develop technology and to prospect for attractive ore bodies. When economic factors become favorable, deep seabed mining is likely to be an important source of minerals. Consequently, the US has sought to protect its future interest in deep seabed minerals by seeking a legal regime that will allow mineral exploration and exploitation under reasonable terms and conditions. So far it has failed.

Unfortunately, since 1967 doubts have increased concerning the legal rights to mine deep seabed ore bodies outside a universally accepted treaty. While the US and some European states and Japan continue to assert the right to mine the deep seabed as a high seas freedom subject to reasonable regard for the rights of others, this legal claim is regarded by many countries as contrary to international law. This controversy does not extend to the issue of exclusivity of mine sites. Both sides agree that exclusivity can be legally achieved only through international agreement.

US firms have been leading partners in the multinational consortia engaged in deep seabed mining development. In recent years, however, these companies have reduced their proportionate participation. It appears that, in order to operate under the Draft Convention, firms would need government subsidies and incentives, although a rise in metals prices could alter that view. In the absence of US subsidies, US companies could well participate in foreign entities operating under a law of the sea treaty.

II. CONCLUSIONS OF THE INTERAGENCY REVIEW

A. Principal Conclusions

In the course of the policy review, US interests and objectives in the law of the sea have been examined. Against them, the Draft Convention and "no-treaty" alternatives have been weighed. In addition, the negotiability of improvements to the deep seabed mining regime has been assessed. The basic conclusions of the Interdepartmental Group (IG) are:

(1) The navigation and overflight provisions of the Draft Convention are acceptable; any deterioration in the language of these provisions would, however, render this portion of the draft treaty unacceptable to the Department of Defense. These provisions, while not ideal from the United States point of view, would be beneficial as they would provide a foundation for the exercise of important naval and air mobility interests in a non-confrontational manner. This assessment is, in part, predicated on the fact that the Draft Convention provides for navigation and overflight freedoms, including transit on, over, and under international straits overlapped by territorial seas and archipelagic waters. Without these provisions, the assertion of the freedoms guaranteed thereby would require a direct challenge to existing territorial sea claims of 107 states, including many of our allies. Unless international limitations are established, the proliferation of excessive maritime claims almost certainly will continue, thereby requiring costly levels of confrontation and certain political-military risks to conduct routine peacetime military operations. Ambiguities in the text regarding navigation and overflight rights can be protected with interpretive statements and appropriate exercise of our rights as we view them.

The navigation provisions of the Draft Convention take on particular importance for US commercial navigation interests. A widely accepted treaty embodying the provisions of the current Draft Convention would provide a more stable, predictable regime of maritime jurisdiction and navigation rights that are essential to the smooth flow of maritime commerce.

(2) The provisions of the treaty concerning marine scientific research, the continental shelf, ocean energy production, and marine environment protection are generally consistent with US interests and objectives. With respect to fisheries, the Department of State believes that US interests would not be significantly affected one way or another by a treaty, except for salmon and tuna where the effect would be adverse. The Department of Commerce believes that, despite

the treaty provisions on tuna and salmon which in the short term provide less protection for the US than our current legal positions, US fisheries interests would, in the long run, be better served under a treaty.

(3) Major elements of the Draft Convention deep seabed mining regime are clearly contrary to US interests and objectives.

(4) An effort to renegotiate the deep seabeds provisions of the Draft Convention presents the only realistic possibility of achieving a law of the sea treaty acceptable to the US. Returning to the Conference is the only strategy or approach that has been identified which could both prevent deterioration of the navigational provisions while offering an opportunity to achieve an acceptable deep seabed mining regime under the treaty.

(5) The Conference is likely to open the Draft Convention for signature in 1982, even if the US objects, unless the Conference believes that by extending the deadline the US is likely to sign and ratify the treaty. Most Conference participants, including virtually all of our allies, are prepared to complete the Draft Convention with relatively little change. Sixty countries are required to bring the treaty into force and there are more than one hundred and twenty developing countries many of whom have strong interests in bringing the treaty into force. In the event the treaty enters into force, it is impossible to assess with any degree of confidence exactly who the parties to it might be and, therefore, what effect entry into force would have on overall US interests if the US were not a party.

(6) At one extreme, if a comprehensive treaty enters into force and the United States is the only major nation which is not a party to the treaty, commercial-scale deep seabed mining under US licenses almost certainly would not occur on an unsubsidized basis because of serious international legal and political risks.

At the other extreme, in the unlikely event that the treaty did not enter into force for many of the nations interested in deep seabed mining (US, UK, France, FRG, Belgium, Japan, Netherlands, and Italy), the USSR, certain major developing countries, and other industrialized countries, and provided that the US could induce them to join in an alternative regime, investment in commercial-scale deep seabed mining under US and foreign licenses might occur under that regime.

A variety of cases lie between the two extremes outlined above. The IG cannot predict with a reasonable degree of confidence whether commercial-scale investment would occur under any such case. The various industrial consortia hold differing views on this subject.

The IG has reached the following additional conclusions with respect to negotiability:

(1) It would be extremely difficult to satisfy all US objectives listed in Part II(k) below with respect to the deep seabed mining regime. Nevertheless, there is an opportunity to seek and obtain substantial improvements to the Draft Convention's provisions on the deep seabed mining regime. Such improvements could increase US and Western allied influence in the decision-making process while, at the same time, they could neutralize the one-nation, one-vote Assembly and could eliminate, reduce, or mitigate the practical impact of provisions which would otherwise result in the implementation of the principles of the "New International Economic Order" (NIEO). They could also provide an investment climate for US industrial development without subsidization. The improvements are unlikely, however, to alter the fact that the treaty would still be replete with NIEO rhetoric which could still be employed by developing countries to promote their aims in other negotiations.

(2) Negotiations to improve the deep seabed provisions can be conducted with little risk of retaliation against non-seabed provisions important to the US.

B. Military Navigation and Overflight

The navigation and overflight provisions of the Draft Convention are acceptable; any deterioration in the language of these provisions would, however, render this portion of the draft treaty unacceptable to the Department of Defense. These provisions, while not ideal from the United States point of view, would be beneficial as they would provide a foundation for the exercise of important naval and air mobility interests in a non-confrontational manner. This assessment is, in part, predicated on the fact that the Draft Convention provides for navigation and overflight freedoms, including transit on, over, and under international straits overlapped by territorial seas and archipelagic waters. Without these provisions, the assertion of the freedoms guaranteed thereby would require a direct challenge to existing territorial sea claims of 107 states, including many of our allies. Unless

international limitations are established, the proliferation of excessive maritime claims almost certainly will continue, thereby requiring costly levels of confrontation and certain political-military risks to conduct routine peacetime military operations. Ambiguities in the text regarding navigation and overflight rights can be protected with interpretive statements and appropriate exercise of our rights as we view them.

In view of the negotiating environment, any effort to reopen non-seabed portions of the text to achieve improvements likely will result in changes that would be adverse to our military security interests. As it is probable that there will be a widely accepted convention, with or without US participation or support, it is important that our strategy be directed to avoiding this result.

C. Commercial Navigation

The interests of commercial navigation are well served by the Draft Convention, which provides a significantly better measure of predictability and stability than does existing international law. A stable, predictable regime of maritime jurisdiction, navigation rights and regulation of marine pollution is essential to the smooth flow of maritime commerce which is vital to the economy of the United States.

A treaty that incorporates the existing provisions of the Draft Convention relating to commercial navigation, but to which the US is not a party, would also be beneficial to commercial navigation, but would result in less stability and predictability for commercial navigation than would a treaty to which the US is a party. Also, the provisions of the Draft Convention would provide a better climate for investment in marine transportation, particularly transportation of oil, than would alternate arrangements.

D. Commercial Aviation

The interests of commercial aviation are well served by the Draft Convention. Because jurisdiction over airspace is predicated on the jurisdictional status of the waters below, the clarification of maritime jurisdiction, particularly in limiting the territorial sea to twelve miles and in ensuring the right to overflight of straits and archipelagoes, is

important to US international commercial aviation.* A treaty that incorporates the existing provisions affecting commercial aviation, but to which the US is not a party, would also be beneficial to commercial aviation.

E. Fisheries

US interests in coastal and continental shelf fisheries and protection of the fisheries environment are generally well served by the Draft Convention, and US fisheries research interests would be marginally better off with the Draft Convention.

However, the Draft Convention would reduce our present authority under US domestic law over our valuable salmon resources beyond the 200-mile limit, would erode our position favoring international management of highly migratory tuna throughout their range, and would negatively affect our ability to preserve our large and efficient distant water tuna fleet. The Draft Convention also lacks adequate mechanisms to deal with the failure to reach agreement on "straddling stocks" existing both within 200 miles and beyond, and "transboundary stocks" which migrate between the 200 mile zones of two or more countries, which could lead to future conflict or even "creeping jurisdiction".

The Department of State believes that US interests would not be significantly affected one way or another by a treaty, except for salmon and tuna where the effect would be adverse. The Department of Commerce believes that, despite the treaty provisions on tuna and salmon which in the short term provide less protection for the US than our current legal positions, US fisheries interests would, in the long run, be better served under a treaty.

*There is question regarding the jurisdiction for airspace over the 200-mile exclusive economic zone for civil aviation purposes. The Chicago Convention provides for coastal state jurisdiction in airspace over the territorial sea and applicability of international rules in airspace over the high seas. While the Draft Convention provides for freedom of overflight over the economic zone, it does not explicitly provide that the Chicago Convention "Rules of the Air" apply. Since the negotiating history does not indicate an intent to change the jurisdiction for regulation of civil aircraft overflying the economic zone from that for the high seas, the applicability of the "Rules of the Air" to airspace over the economic zone should be made explicit through an interpretive statement at the appropriate time.

F. Continental Shelf Resources

US interests in development of continental shelf hydrocarbon resources will be well served whether there is a treaty or whether the US is a party to the treaty. If the US is not a party, no obligation will exist to share revenues from production on the shelf beyond 200 miles. However, the greater degree of clarity provided under the treaty as to the outer limits of the shelf beyond 200 miles is desirable to US firms operating on the outer shelf of the US or of other states despite the obligation to share revenues at a modest rate.

G. Marine Scientific Research

US interests in freedom of marine scientific research are poorly served by existing international practice which is steadily worsening. US interests would also be poorly served by the Draft Convention, but, since the Draft Convention basically codifies existing practice, it would have the advantage of deterring further erosion. In addition, the Draft Convention would provide some standardization for the conduct of marine scientific research that could reduce the potential for arbitrary or capricious behavior by coastal states. US participation would aid our scientists.

H. Marine Environment Protection

US environmental interests are well served by the Draft Convention. Over the past decade, international standards for the protection of the marine environment have been developed with the full participation of, and often at the behest of, the US. These standards would be implemented on a world-wide basis by reference in the Convention, and would generally promote a sound balance of environmental and maritime interests. Also, both the uniform enforcement regime and the system of safeguards provided for in the Draft Convention are very important to operators of commercial vessels, particularly tankers, and to maritime labor unions.

A treaty that incorporates the existing provisions related to protection of the marine environment, but to which the US is not a party, would also generally enhance the level of global protection of the marine environment. However, some effective enforcement rights and some safeguards for commercial navigation not presently recognized under customary international law, but provided for in the Draft Convention, would not be available to the US and its commercial vessel

operators unless either the US becomes a party or these provisions evolve into customary law. Also, if the US does not participate, US leadership in marine environmental protection will be less effective, particularly in fora such as the Intergovernmental Maritime Consultative Organization.

I. Political/International

US interests in global stability would be better served by US participation in the negotiations and accession to the treaty. If widely ratified, the treaty would establish a generally-shared legal framework relating to activities in the oceans which would provide for stability and predictability in international relations, assist in narrowing the scope of bilateral disputes, and ensure that coordination with allies in crisis situations is not hampered by different views concerning sovereignty and jurisdiction. Failure to participate would be viewed negatively by our allies and the developing countries.

The US interest in maintaining a position of leadership in multinational negotiations may be jeopardized if the US withdraws from negotiations in which it has played a major role for more than a decade. In addition, failure to participate in negotiations could have an adverse effect on other unrelated foreign policy areas.

On the other hand, certain aspects of the Draft Convention i.e., the establishment of the Authority as now structured and other elements of the deep seabed regime, are undesirable precedents which will create difficulty for us in other multinational negotiations.

J. Dispute Settlement

The general US interest in promoting international dispute settlement mechanisms for the resolution of international disputes is furthered by the Draft Convention. However, one may question whether the establishment of a Law of the Sea Tribunal, dominated by developing countries, is in the interest of the US. It is clear that the Draft Convention would not require certain issues of importance to the US, such as those relating to military activities, to be submitted to binding dispute settlement. However, because of ambiguities in the text, it is difficult to determine with precision all other issues which would be subject to binding dispute settlement should the US become a party.

K. Deep Seabed Mining

1. Objectives for Evaluation of the Deep Seabed Regime Provisions

The US objectives in a deep seabed mining regime are a regime which:

First, will not deter the development of deep seabed mineral resources to meet national and world demand.

Second, will allow national access to deep seabed mineral resources by current and future qualified entities so as to enhance US security of supply, so as to avoid monopolization of deep seabed mineral resources by the operating arm of the International Authority, the Enterprise, and so as to promote economic development of the resources.

Third, will reserve for the US a decision-making role in the deep seabed institution which fairly reflects the relative weight of US political and economic interests and financial contributions, and effectively protects them.

Fourth, will not allow for amendments to enter into force without the approval of the US, including advice and consent of the US Senate, and will not set other undesirable precedents for international organizations.

Fifth, will be such as to make it likely to receive the advice and consent of the Senate if the President decides to support ratification. (To this end, the treaty would not contain provisions that would create serious political and commercial difficulties, including provisions for the mandatory tranfer of private technology and participation by and funding for national liberation movements.

2. Evaluation of the Seabed Regime Provisions of the Draft Convention

The IG has reviewed the Draft Convention and does not believe that it meets these objectives. For example, the Draft Convention:

(1) artificially limits deep seabed mineral production and provides for discretion and discrimination if there is competition for limited production allocations;

(2) discourages private investment in deep seabed mineral production because of: lack of certainty in the granting of mining contracts, mandatory technology transfer requirements, and burdensome financial requirements;

(3) creates a privileged supranational competitor -- the Enterprise -- whose advantages could make it extremely difficult, if not impossible, for private ventures -- absent national subsidies -- to compete. A supranational monopoly over deep seabed mineral production could thus result;

(4) fails to provide grandfather rights for existing investment in deep seabed mineral development;

(5) establishes a decision-making system so structured that US and other potential deep seabed mineral producers and consumers will be unable effectively to influence important policy and operational decisions;

(6) provides for a review conference which, after five years of negotiation, may adopt amendments to the deep seabed mining regime that would automatically enter into force for the US upon approval by two-thirds of the States Parties.

(7) allows participation by and funding for liberation groups.

3. Guidelines For Seeking Improvements In The Draft Convention To Satisfy The US Objectives Enumerated in Section II(k)(1) above.

The IG has agreed that the following guidelines should be used as the basis for the US negotiating effort. The IG realizes, however, that all of these guidelines cannot be satisfied to the fullest extent and has, therefore, established priorities among them. The IG believes that if the priority guidelines were substantially satisfied and progress made in the other areas listed, the Convention which emerged could meet the five objectives set forth above.

The following six guidelines indicate the kind of improvements to which the group attaches the highest priority:

1. The procedures and decision-making system of the Authority should enable the US, in concert with a few allies, (1) to ensure that qualified deep seabed miners of manganese nodules and other deep seabed minerals, current and future, receive contracts and are allowed to mine; (2) to achieve acceptable rules and regulations applicable to development of all deep seabed minerals; (3) to insulate deep seabed miners from politically motivated interference from the Authority; and (4) to block adverse decisions on important financial/budgetary questions concerning the Authority and the Enterprise.

The attainment of this objective would not only repair many of the defects outlined in the previous sections, but could also facilitate the attainment of most of the following objectives.

2. The production policies of the Authority should be amended by elimination or relaxation of those production limitations which discourage production by private enterprise of deep seabed mineral resources and which could artificially stimulate competition among potential deep seabed miners.

3. The technology transfer provisions should be revised to eliminate the mandatory nature of the transfer of private technology.

4. The provisions on the review conference should be revised so that any amendment to the deep seabed provisions of the treaty must have the the consent of the US before entering into force.

5. National liberation movements should not be parties to the treaty nor share in any revenues controlled by the Authority.

6. NIEO precedents should be minimized.

Beyond these, the group attaches considerable importance to the following areas:

-- establishment of separation of powers between the Assembly and Council to minimize the possibility that the Assembly can interfere with the Council's exercise of power entrusted to it;

-- minimization of the possibility that the Authority may expand or abuse its powers;

-- substantial reduction or elimination of discriminatory privileges of the Enterprise;

-- reduction of financial burdens on the US government and private operators.

III. OPTIONS FOR FUTURE US LAW OF THE SEA POLICY

OPTION I: Withdraw from the Law of the Sea Conference prior to the next session

OPTION II: Continue participation in the Law of the Sea Conference to secure, through negotiations, changes satisfying the five objectives set out in Part II(k)(1)

The IG emphasizes that it is likely that, with or without US participation, the Law of the Sea Conference will conclude its work and open the treaty for signature sometime in 1982 and that the treaty will have an impact on international law and practice. If Option II is chosen, however, and serious renegotiation efforts appear likely to succeed, it is possible that the Conference will delay its work somewhat.

In presenting these options, the IG considered whether either or both approaches realistically could result in achievement of US objectives with respect to deep seabed minerals. In this regard the success of Option I depends on our ability to establish a viable alternative regime. The IG cannot predict with any reasonable degree of certainty whether it would be possible to establish an alternative regime that would attract investment.

With respect to Option II, the IG has reached no conclusion as to the negotiability of specific changes to the Draft Convention but has formed a general assessment of negotiability based in large part on the results of the last session of the Law of the Sea Conference. The IG has concluded that it would be very difficult, though not impossible, to achieve all US objectives. If renegotiation fails to meet US objectives, the US could still decide not to sign the treaty.

In implementing either option the Republican Platform should be recalled. The Platform stated: "Multilateral negotiations have thus far insufficiently focused attention on US long-term security requirements. A pertinent example of this phenomenon is the Law of the Sea Conference, where negotiations have served to inhibit US exploitation of the seabed for its abundant mineral resources. Too much concern has been lavished on nations unable to carry out seabed mining, with insufficient attention paid to gaining early American access to it. A Republican Administration will conduct multilateral negotiations in a manner that reflects America's abilities and long-term interests in access to raw material and energy resources."

Option I: Withdraw from the Law of the Sea Conference prior to the next session.

This option would represent a determination that the draft law of the sea treaty cannot be renegotiated in a manner that would satisfy US objectives.

Arguments in Favor of Option I

-- would demonstrate an American resolve not to participate in multilateral negotiations in which the terms of the draft agreement (a) do not fairly reflect US political and economic interests and financial contributions or (b) contain NIEO principles which we find unacceptable and which developing

countries could employ to promote their aims in other negotiations;

-- because of the extreme character of this action, it might cause other countries, including US allies, to rethink their commitment to the treaty and eventually decide not to ratify the treaty;

-- avoids the risk that US interests in deep seabed mining might be compromised further through continued negotiation and might increase the effectiveness of a US denunciation of objectionable provisions of the treaty;

-- would appeal to those Americans who feel that US interests should not be subjected to majority votes by developing countries in international organizations.

Arguments Against Option I

-- would eliminate any realistic possibility of improving the Draft Convention and would not capitalize on our currently strong bargaining positon;

-- could lead to the unravelling of important navigational provisions to the detriment of US security interests and, therefore, could reduce US ability effectively to assert its minority view of navigation rights in the face of adverse coastal state claims;

-- would isolate the US from most other countries on this issue and provoke substantial international controversy, including severe criticism from US allies and others for walking away from the negotiating table;

-- would be viewed as a major departure from the traditional US practice of cooperating in efforts to reach multilateral solutions to foreign policy issues, thereby reducing US credibility as a reliable participant in multilateral negotiations and possibly affecting other US foreign policy goals adversely;

-- would virtually eliminate any possibilty of a US domestic deep seabed mining industry, unless the US could convince its allies and other key countries not to ratify the treaty and to join an alternative regime. Otherwise, investors likely would operate under a foreign flag pursuant to the treaty, unless fully indemnified by the government against risk;

-- could result in US allies being unable to pursue and implement a reciprocating states agreement with the US since they would stay in the LOS negotiations and the US would be seeking a permanent, alternative regime rather than a transitional regime consistent with a law of the sea treaty;

-- would offer the Soviets an opportunity to criticize the US in international fora for using "high-handed" tactics;

-- would be opposed by those Americans who do not believe the US should walk out of negotiations and who favor multilateral solutions to major world problems and an international rule of law.

Option II. Continue participation in the Law of the Sea Conference to secure, through negotiations, changes satisfying the five objectives set forth in Part II (k)(1) above.

This option would commit the US to make a full effort to achieve improvements in the deep seabed provisions of the Draft Convention sufficient to produce a treaty that could be signed and ultimately ratified by the US. Detailed instructions for achieving these objectives, including US positions on and proposed amendments to specific treaty provisions, will be developed for review by the Senior Interdepartmental Group which includes all the relevant agencies. Any agency differences will be forwarded no later than February 1 for decision by the President.

To implement this option, it would be essential that the US state its commitment to the multilateral treaty process. The US would have to indicate that, if the renegotiated text meets its objectives, the US Executive Branch would promote ratification. This commitment would not prejudge the decision on whether to sign and ratify the final treaty text. That would depend on a later decision on whether it meets US objectives. If this option is selected, the US negotiating strategy would be designed to minimize the risk that retaliatory measures would be taken involving attempts to amend provisions of the treaty which are favorable to US national security needs, while at the same time pursuing strategies and tactical decisions which could result in a success under Option II. Improvements consistent with US objectives in other areas also may be sought if opportunities arise and if they could be achieved without risking the unravelling of military navigation and other important interests.

This approach carries no assurance that further negotiations would satisfy US objectives. In the event that the US was successful in achieving its objectives and decided to ratify the law of the sea treaty, this would entail an appropriation by the US upon entry into force of at least $300 million for financing the Enterprise and an annual appropriation by the US of $5-10 million for the administrative expenses of the Authority until it became self-financing. Whether ratified or not, costs which are not now quantifiable, would be incurred.

Arguments in Favor of Option II

-- presents the only realistic possibility of achieving a law of the sea treaty that would be acceptable to the US or capable of obtaining the Senate's advice and consent. Returning to the Conference is the only strategy or approach that has been identified which could reduce the risk of deterioration of the navigation provisions while offering an opportunity to achieve an acceptable deep seabed mining regime;

-- would take maximum advantage of the negotiating leverage now available to the US because of the review, would establish an optimum posture for achieving an acceptable treaty, and could attract allied support;

-- would be less likely than Option I to result in an unravelling of the navigation provisions;

-- would give the US greater credibility in any attempt to persuade its allies not to participate in a treaty, if the final text is unacceptable;

-- would avoid the controversy and potentially adverse effects on other foreign policy areas which would be associated with withdrawal from the Conference;

-- would mean that, if after further negotiations in which the US participates, the US decides not to sign or ratify the treaty and the treaty enters into force, the treaty is still likely to be improved and would benefit American companies which may decide to operate under the flag of a treaty party;

-- offers an opportunity to repair the very risky investment climate.

Arguments Against Option II

-- may still result in a treaty which the US could not sign or ratify;

-- involves returning to the negotiations and perhaps gaining concessions, though inadequate, which likely would increase the political pressure, both foreign and domestic, upon the US to sign the treaty and, if the US acceded, to accept similar regimes in the future;

-- would require US acquiescence in a negotiation involving (1) the supervision and regulation by an international organization of the development of deep seabed minerals; and (2) the creation of an international entity (the Enterprise) to mine deep seabed resources in competition with private or State entities.

IV. IMPLEMENTATION OF OPTIONS

A. Implementation of Option I

The IG believes that, if Option I is chosen, the following would be required to implement it effectively.

1. A public relations effort should be carried out which could include a White House announcement of the decision. It should be designed both to obtain domestic political advantages and to minimize domestic and international disadvantage such as the adverse editorial comments that followed announcement in March 1981 of the US review of law of the sea policy.

2. Contingency plans should be executed to protect US non-seabeds interests outside a law of the sea treaty. These plans are being prepared.

3. If the US wishes to attempt to persuade its allies not to ratify the treaty, a high-level, and potentially politically costly, effort should be made.

4. The US would have to develop a strategy for establishing an alternative regime for commercial investment in deep seabed mining.

The prospects for establishing such an alternative regime would be affected by decisions made by US allies. Currently, the IG believes that the prospects are virtually nil for inducing the allies to withdraw from the negotiations with the US. The US would then have to seek to induce the allies not to ratify the treaty.

If the US should succeed in convincing its allies not to ratify the treaty, an effort would have to be undertaken to establish an alternative regime for commercial-scale investment in deep seabed mining. If such a regime were to be established in the face of a law of the sea treaty that comes into force, or is likely to come into force, companies may require financial protections from their governments. If the US fails to convince its allies not to participate in the treaty and decides to establish a unilateral regime under which its nationals would invest in commercial-scale deep seabed mining, the US would have to provide additional financial protections for its miners, because of serious international legal and political risks.

At one extreme, if a comprehensive treaty enters into force and the United States is the only major nation which is not a party to the treaty, commercial-scale deep seabed mining under US licenses almost certainly would not occur on an unsubsidized basis because of serious international legal and political risks.

At the other extreme, in the unlikely event that the treaty did not enter into force for many of the nations interested in deep seabed mining (US, UK, France, FRG, Belgium, Japan, Netherlands, and Italy), the USSR, certain major developing countries, and other industrialized countries, and provided the US could induce them to join in an alternative regime, investment in commercial-scale deep seabed mining under US and foreign licenses might occur under that regime.

A variety of cases lie between the two extreme alternative situations outlined above. The IG cannot predict with a reasonable degree of confidence whether commercial-scale investment would occur under any such case. The various industrial consortia hold differing views on this subject.

B. Implementation of Option II

The IG believes that if Option II is chosen, the following steps should be taken:

1. A public announcement should be made, committing the US to the treaty negotiation process and setting forth US objectives in further negotiations. Such an announcement could communicate to Conference participants that the US has serious concerns with the Draft Convention but that if US objectives are fully satisfied, the US would sign and seek ratification of the resulting treaty.

2. The US must develop in accordance with the objectives, an opening position which would not be confrontational* but which at the same time would leave enough room to back away and adopt acceptable fall-back positions. US positions on specific provisions and changes and negotiating instructions are being prepared. From the discussions held between the US law of the sea delegation and key conference leaders at the last session of the law of the sea conference in Geneva, it was clear that the Conference was willing to make some changes to the deep seabeds provisions to accommodate US concerns. The extent to which US concerns would be accommodated would depend upon a number of factors, the most important of which probably would be the developing countries' perception of the US position. They would weigh the extent and nature of the US proposed changes against their desire to have US participation in the treaty.

3. The allies should be consulted as soon as possible since it would be essential to have their support. A number of the allies are sympathetic to US concerns and would welcome changes. But their judgment appears to be that, on balance,

*Interior wants it understood that the negotiator should have the flexibility to be confrontational should that be necessary to achieve US objectives.

their interests are better served by preserving the non-seabed provisions of the treaty in their present form even at the price of accepting the deep seabed mining provisions.

4. A prior arrangement should be made with leading developing countries on the outlines and parameters of the negotiations and a commitment sought from them to support the negotiating process.

5. The President of the Conference should be asked to support US efforts.

6. The US should develop an approach for dealing with the Soviet Union. The Soviet Union and its allies also are prepared to accept the present Draft Convention. The Soviets consider the non-seabed parts of the treaty as the most significant and are determined to protect them. To succeed in negotiating improvements on most of the troublesome deep seabed provisions, we do not need active support from the Soviets, but the US would need at least some degree of neutrality on their part. To the extent they perceive that the US is moving toward acceptance of the treaty, they might be be more likely to adopt a neutral attitude since they clearly prefer US participation in a treaty. However, in light of Soviet concerns that the changes the US wants to make may threaten the non-seabed portions of the treaty, it is not realistic to expect Soviet support for most of the US proposals and they are likely to pressure the US to moderate its requirements. The Soviets are further concerned that the US will try to do away with the three Soviet seats on the Council.

Reciprocating States Agreement

The US is engaged in intense negotiations with other countries interested in deep seabed mining intended to conclude early in 1982 a reciprocal agreement concerning recognition of deep seabed mining licenses. These negotiations are authorized by the Deep Seabed Hard Mineral Resources Act and, in accordance with its provisions, must be regarded as transitional to an acceptable law of the sea treaty. Under the Act, the US will be required to begin accepting US deep seabed mining applications and according priorities of right to US deep seabed miners, with or without a reciprocating State agreement, within a "reasonable" time after the September 1981 publication of US deep seabed mining regulations. Thus, even in the absence of an agreement, the US will have to make a decision early in 1982 concerning the unilateral receipt and processing of deep seabed mining applications.