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NSC review completed

INTERDEPARTMENTAL REVIEW

LAW OF THE SEA - POLICY AND OPTIONS

Summary

The issue is whether the United States should seek to negotiate changes consistent with US Law of the Sea (LOS) objectives at the UN Conference on Law of the Sea or withdraw from the negotiations.

The conference has been negotiating a treaty since 1973 which would establish a legal regime covering military and commercial navigation and overflight, deep seabed mineral resource development, coastal state jurisdiction, fisheries, marine scientific research, ocean pollution, continental shelf rights, and peaceful settlement of disputes. The conference was expected to conclude negotiations and open a treaty for signature in 1981. However, serious questions in the US, particularly about the deep seabed mining provisions, prevented that. A Senior Interdepartmental Group has now completed its review of the draft LOS convention.

The main conclusions of the review are:

-- The navigation and overflight provisions are acceptable. Any deterioration, however, would render this portion of the treaty unacceptable. A favorable treaty text would serve US interests in discouraging the expansion of coastal state claims adverse to US navigation interests.

-- Major elements of the deep seabed mining provisions are contrary to US interests and objectives. The current text renders the treaty unratifiable. Significant, although perhaps not fully satisfactory, improvements can be negotiated with little risk to other important elements of the treaty.

-- Other provisions are, with certain limited exceptions, generally consistent with US interests.

The review presents two options for consideration: (1) withdraw from the conference prior to the next session, or (2) continue participation in the negotiations to secure the objectives of a regime that:

1. will not deter the development of any deep seabed mineral resources to meet national and world demand;

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

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

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

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

(Satisfying these objectives would also minimize the impact of New International Economic Order principles that could create adverse precedents for other areas.)

Agency Views. The Departments of Commerce, Defense, Energy, Labor, State, Transportation, and Treasury, the Environmental Protection Agency, and the National Science Foundation recommend continued participation in the negotiations to fulfill these objectives. They recognize that, while there is an opportunity to obtain substantial improvements, it will be extremely difficult to satisfy all of the objectives. Fulfillment of these objectives would be considered mandatory by the US delegation in negotiations.

The Department of the Interior does not support the above approach as set forth in the interdepartmental review.

If the decision is to continue negotiations, the agencies agree that the guidelines listed below should be the basis for the US negotiating effort. Since all the guidelines cannot be satisfied to the fullest extent, the agencies have established priorities. If the priority guidelines were substantially satisfied and progress made in the other areas listed, the convention could meet the five objectives set forth above.

The following six guidelines indicate the highest priority kind of improvements:

-- 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 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 decision on important financial/budgetary questions concerning the Authority and the Enterprise. Attaining this objective would not only repair many of the defects in the convention but could also facilitate attainment of most of the other guidelines.

-- The production policies of the Authority should be amended by eliminating or relaxing those production limitations that discourage production of deep seabed mineral resources by private enterprise and that could artificially stimulate competition among potential deep seabed miners.

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

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

-- National liberation movements should not be parties to the treaty or share in any revenues controlled by the Authority.

-- New International Economic Order precedents should be minimized.

Beyond the above guidelines, the agencies attach considerable importance to (1) minimizing the possibility that the Assembly can interfere with the Council's exercise of power; (2) minimizing the possibility that the Authority may expand or abuse its powers; (3) substantially reducing or eliminating discriminatory privileges of the international mining entity, the Enterprise; and (4) reducing financial burdens on the US Government and private operators.

Background

The Third UN Conference on 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 efforts. 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 US 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 that have taken place to date, more than 150 states have achieved negotiated compromises on most issues. Until last March, the conference was also close to agreement on questions relating to the control and management of deep seabed mineral resources. There was consensus that a final treaty should be adopted in 1981. This was prevented when the US announced in March 1981 that it would undertake a thorough review of the draft convention. Two conference sessions followed without negotiations on deep seabed issues. The last session, however, included substantial discussion of problems in the text that have been identified in the US review.

The decision for a review reflected serious questions in the US about the draft convention, particularly the deep seabed resource provisions. The Republican 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 interest in access to raw material and energy resources."

The next session of the conference begins in early March. The conference expects to complete work on the draft text and to adopt a convention at that session. A treaty is very likely to be open for signature by the end of this year, with or without US agreement, although this timetable could slip under certain circumstances. Most conference participants -- including virtually all our allies, the developing countries, and the Soviet Bloc -- 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. These resources offer a potentially important alternative source of strategic minerals, cobalt and manganese, in addition to nickel and copper. Other minerals of potentially 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. 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 interests 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, 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. All 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, they have reduced their proportionate participation. It appears that firms would need government subsidies and incentives to operate under the draft convention, 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 an LOS treaty.

The interdepartmental review has considered US interests and objectives in the Law of the Sea, the alternatives of not having or not joining any treaty, and the negotiability of improvements to the deep seabed regime. The basic conclusions of the review are:

(1) The navigation and overflight provisions of the draft convention are acceptable; any deterioration in the language of these provisions, however, would render this portion of the treaty unacceptable. These provisions, while not ideal from the US 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 guranteed 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 environmental 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 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 US is the only major nation that is not a party to it, 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 a treaty did not enter into force for many of the nations interested in deep seabed mining (the US, UK, France, West Germany, Belgium, Japan, the Netherlands, and Italy), the USSR, certain major developing countries and other industrialized countries, and if the US could induce them to join an alternative regime, investment in commercial-scale deep seabed mining under US and foreign licenses might occur under such regime. A variety of cases lie between these two extremes. The agencies 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 the matter.

Additional conclusions of the agencies concerning negotiability of changes are:

(1) It would be extremely difficult to satisfy all US objectives (listed in the summary) with respect to the deep seabed mining regime. Nevertheless, there is an opportunity to seek and obtain substantial improvements to the regime now contained in the draft convention. Such improvements could increase US and western allied influence in the decision-making process. At the same time, they could neutralize the one-nation/one-vote Assembly and eliminate, reduce, or mitigate the practical impacts of provisions that would otherwise result in the implementation of principles of the New International Economic Order (NIEO). Such improvements could also provide an investment climate for US industrial development without subsidization. However, the improvements are unlikely to alter the fact that the treaty would still be replete with NIEO rhetoric which could 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.

Further review of the various parts of the draft convention and US interests, as well as an evaluation of the seabed regime provisions as they relate to US objectives, are provided in Annex B.

Options

Two options are proposed for consideration:

1. Withdraw from the Law of the Sea Conference prior to the next session.

2. Continue participation in the Conference to to secure the objectives set forth in the summary through negotiations.

It is likely that, with or without US participation, the conference will conclude its work and open a treaty for signature sometime in 1982 and that treaty will have an impact on international law and practice. If Option 2 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 agencies 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 1 would depend on our ability to establish a viable alternative regime. As noted, the agencies cannot predict with any reasonable degree of certainty whether it would be possible to establish such a regime.

With respect to Option 2, the agencies reached no conclusion as to the negotiability of specific changes to the draft convention. However, the agencies have concluded that it would be very difficult, although not impossible, to achieve all US objectives. This general assessment is based in large part on the results of the last session of the conference. If renegotiation failed to meet US objectives, the US could still decide not to sign the treaty.

Option 1 would represent a determination that the draft convention cannot be renegotiated in a manner that would satisfy US objectives.

Arguments favoring withdrawal from the conference are that it:

-- would demonstrate an American resolve not to participate in multilateral negotiations in which the terms of the draft agreement do not fairly reflect US political and economic interests and financial contributions or contain New International Economic Order principles that we find unacceptable and that developing countries could employto promote their aims in other negotiations;

-- might cause other countries, including US allies, to rethink their commitment to the treaty and eventually decide not to ratify it;

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

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

Arguments against withdrawal from the conference are that it:

-- would eliminate any realistic possibility of improving the draft convention and would not capitalize on our currently strong bargaining position;

-- 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 possibility 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 would likely 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 an LOS treaty;

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

-- would be opposed by 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 2 -- continued participation in the negotiations -- 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 by the Senior Interdepartmental Group which includes all 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, as 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 success under this option. 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 will satisfy US objectives. In the event that the US was successful and decided to ratify the 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 note, costs which are not now quantifiable, would be incurred.

Arguments for continued participation in the negotiations are that it:

-- 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 1 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; and

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

Arguments against continued participation in the negotiations are that it:

-- 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; and

-- 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.

If Option 2 is selected, the US negotiating positions would be designed to fulfill the objectives and be based on the guidelines specified in the summary.

Implementation. The review has also considered implementation of each option and concludes that the following would be required to implement Option 1 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 disadvantages such as the adverse editorial comments that followed announcement in March 1981 of the US review of LOS policy.

2. Contingency plans should be executed to protect US non-seabeds interests outside a LOS 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. The agencies believe that the current 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, becaue of serious international legal and political risks. As noted, the agencies cannot predict with a reasonable degree of confidence whether commercial-scale investment would occur under any case between the extremes of a comprehensive treaty in which the US is the only major nation outside it or a treaty that did not enter into force for many key nations and where the US induced them into an alternative regime.

With respect to Option 2, the review concludes that the following would be required to implement it effectively:

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 the 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 that would not be confrontational* but that 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. The extent to which US concerns would be accommodated at the conference 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 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, 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.

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

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 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, it is not realistic to expect Soviet support for most 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.

Further discussion of the range of substantive problems and possible solutions that would be addressed in the negotiations implementing Option 2 are set forth in Annex A.

Reciprocating States Agreement. The US is engaged in intense negotiations with other countries interested in deep seabed mining intended to conclude a reciprocal agreement early in 1982 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 LOS 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.

ANNEX A

IMPLEMENTATION OF OPTION 2

The IG has been considering alternative approaches for meeting U.S. objectives set out in Option 2 in the Memorandum to the President. This memorandum identifies the major problems and summarizes several possible solutions that would solve practical problems for U.S. seabed mining and mitigate adverse NIEO precedents. The problems in the seabed mining portion of the Draft Convention are significantly interrelated and many cannot be resolved in isolation. In a number of instances, a specific problem could be resolved by obtaining only one of the range of solutions listed. In other instances, it would be necessary to combine two or more of the alternative "fixes" to achieve satisfactory results.

The range of problems and solutions set forth below is not intended to be exhaustive. Equally effective alternative solutions may emerge during the development of instructions and consultations with U.S. allies and others. Through this process, the details of the solutions will be defined, and the most attractive combination or combinations of acceptable solutions will be identified.

I. DECISION-MAKING SYSTEM OF THE INTERNATIONAL SEABED AUTHORITY

Problem 1

The Draft Convention establishes a 36 member executive Council which would exercise most powers of the Authority. It is fundamentally important that the U.S. and at least two or three of its principal allies be members. The U.S. is not guaranteed a seat and would be required to compete with its allies for Council membership, while the Eastern European Bloc is guaranteed three seats.

Solutions

(1) Name the U.S. as a permanent member;

(2) Reserve seats for the largest investors in seabed mining, the largest consumers of these minerals or the largest contributors to the Authority and Enterprise;

(3) Reserve seats for the states with the largest GNPs, or those with the largest GNPs who are also large investors;

(4) Increase U.S. influence over caucuses which select consumer and investor representatives.

Problem 2

The voting system in the Council does not give the U.S. and its major allies influence commensurate with their interests. The adoption of rules and regulations requires consensus, which gives not only the U.S. but other states a veto. The two-thirds and three-fourths majority voting for other issues gives the U.S. and its allies little blocking power and no affirmative voting power.

Solutions

Ensure that the U.S. can block decisions in concert with two or three of its major allies and can exercise, in concert with a few states of like view, affirmative voting power in rule-making and other key areas through:

(1) Weighted voting (based on production and consumption, financial contributions or similar criteria);

(2) Chambered voting (with veto power in the investor and consumer chambers);

(3) An "inner Council", composed mostly of the U.S. and those states which we believe will most likely vote with us, empowered to decide important questions;

(4) Some combination of the above voting approaches, varying as to the issue involved, but assuring the U.S. and its allies the power to control important decisions.

Problem 3

The all-inclusive, one-nation, one-vote Assembly has broad policy-making powers, is characterized as the "supreme organ" to which other organs are accountable, and is empowered to exercise residual powers of the Authority. Thus, the Assembly could circumvent Council control of the Authority.

Solutions

(1) Subject specific Assembly decisions to weighted or chambered voting that enables the U.S. and its allies to block decisions;

(2) Require Council concurrence with specific Assembly decisions, such as the establishment of policies;

(3) Convert the Assembly into a recommendatory body that meets every two or three years;

(4) Eliminate the Assembly's supremacy and the Council's accountability to it, while simultaneously expanding the Council's powers;

(5) Restrict the scope of the Assembly's policy-making powers and specify that such policies have no binding force;

(6) Specify that the Council and Seabed Disputes Chamber are independent of the Assembly.

II. REVIEW CONFERENCE

Problem

A Review Conference convened 15 years after seabed mining begins would have a broad mandate to amend the Convention. Amendments could be adopted by a two-thirds vote and would enter into force for the U.S. upon ratification or accession by the same majority. If the U.S. opposed the amendments, its only choice would be to denounce the entire Convention.

Solutions

(1) Condition the entry into force of amendments upon their ratification by all States Parties, all states which have sponsored existing contracts, or all of the major consuming states; (The latter two approaches would be adequate provided that the U.S. was a member of those categories.)

(2) Require Council approval of amendments by consensus (together with a guaranteed U.S. seat);

(3) Require the Review Conference to adopt amendments only on the basis of consensus, concurrence of all sponsoring states, or concurrence of all major consuming states;

(4) Delete the Review Conference provision entirely.

III. SYSTEM FOR ACQUIRING AND MAINTAINING ACCESS

Problem 1

The Draft Convention does not assure that qualified U.S. applicants will obtain contracts to mine the deep seabed. A Legal and Technical Commission, that will probably be dominated by developing countries, has the power to grant or deny access on the basis of highly discretionary judgments.

Solutions

(1) Assure the U.S. and its allies adequate influence in the composition and decision-making procedures of the Commission;

(2) Include objective qualification standards that eliminate the Commission's discretion to disapprove qualified applicants, impose time-limits on its review of applications, and provide rejected applicants prompt access to commercial arbitration; alternatively, the treaty could set out all of the detailed regulations governing access, together with these procedural protections;

(3) Require the Authority to issue contracts to all applicants and replace the present qualification standards with objective diligence standards to be applied during exploration and development.

Problem 2

The Authority's powers to regulate seabed mining are inadequately circumscribed. The high risk of politically motivated interference will deter private investment.

Solutions

(1) Make extensive, technical amendments to remove ambiguity and establish objective criteria for Authority actions;

(2) Rely on U.S. influence in an improved Council and Legal and Technical Commission;

(3) Transfer supervision and enforcement functions from the Authority to states which sponsor contractors;

(4) Specify that the Authority may only impose requirements on contractors which are authorized in rules and regulations, assuming adequate U.S. influence in rule-making;

(5) Specify that the Authority may impose no new requirements on contractors after a contract is issued;

(6) Make all disputes between a contractor and the Authority subject to commercial arbitration.

Problem 3

By requiring that all seabed mineral development be carried out pursuant to Authority regulations, the Draft Convention enables other states to block the adoption of regulations and, thus, deter the development of minerals other than nodules.

Solutions

(1) Confine the deep seabed portion of the convention to nodules;

(2) Grant States Parties the right to develop other minerals in the absence of Authority regulations and provide grandfather rights for such investments after regulations are adopted;

(3) Obtain adequate affirmative voting strength for the U.S. and its allies in rule-making.

IV. RULES, REGULATIONS AND PROCEDURES

Problem

The details of the program for regulating seabed mining will be spelled out in the rules, regulations and procedures of the Authority. While these regulations could be prepared by a Preparatory Commission prior to a decision with respect to U.S. signature or ratification, important issues should be resolved in the treaty itself. Further, the procedure for adopting and amending regulations must adequately protect U.S. interests.

Solutions

(1) Improve the decision-making system of the Council as indicated above;

(2) Negotiate establishment of a Preparatory Commission to be made up of states which have signed the final act of the Conference, including a decision-making system patterned after approaches discussed above for the Council, in order to ensure that the rules, regulations and procedures will be available for review before a decision is taken on ratification of the Convention.

(3) Include in the Convention itself the Authority's initial set of rules, regulations and procedures.

V. TECHNOLOGY TRANSFER

Problem

During an interim period, the Enterprise (the mining arm of the Authority) is empowered to compel seabed mining contractors to sell their technology to it, if the Enterprise finds that it is unable to acquire such technology on the open market on fair and reasonable terms. This right is extended to developing countries under certain circumstances. Morever, the mandatory transfer obligation is extended indirectly to third party suppliers of such technology. These provisions could have serious precedential consequences. Further, it will be necessary to withhold some technology for national security reasons.

Solution

(1) Delete mandatory technology transfer entirely;

(2) Eliminate mandatory technology transfer for private miners or their suppliers, but empower a Conference or Commission of States Parties to facilitate the transfer of technology to the Enterprise;

(3) Eliminate mandatory technology transfer, but require State Parties to prevent their companies from colluding to deny the Enterprise access to technology; or allow the Enterprise, upon a showing of such collusion, to obtain technology as part of a commercial arbitration award;

(4) Eliminate sanctions for invoking national security as grounds for not transferring technology.

VI. PRODUCTION LIMITATIONS AND RELATED POLICIES

Problem 1

The production policies contained in the Draft Convention are inconsistent with a free market economic philosophy. These policies include limiting seabed production in order to protect landbased producers against competition from the seabed.

Solutions

(1) Recast the production policies to eliminate offending concepts and specify that any Authority role in protecting landbased producers is limited to explicitly identified mechanisms;

(2) Add new policy goals emphasizing that seabed development should be governed by free market forces;

(3) Add new policy goals which require the Authority at all times to exercise its powers so as permit rather than deter seabed development;

(4) Eliminate the risk that these policies will deter seabed development by other amendments which strengthen the U.S. role in decision-making and reduce the Authority's regulatory discretion.

Problem 2

The ceiling imposed on seabed production levels could impede seabed minerals development, if the level of production reaches the limit allowed, and in that case may not accommodate the existing consortia interested in seabed mining. Moreover, the procedure for administering this limit enables the Authority to discriminate against bona fide U.S. miners.

Solutions

(1) Delete the production ceiling entirely;

(2) Delete the ceiling and substitute a prohibition on the subsidization of exports of seabed minerals (or all exports of these minerals, whether produced on land or from the seabed);

(3) Delete the ceiling and substitute a residual power in the Council, pursuant to a highly qualified majority vote, to impose controls upon a finding that developing country landbased producers have been injured by seabed production;

(4) Delete the ceiling and substitute a right on the part of seriously injured developing country landbased producers to exercise a first call on the Authority's funds after Administrative expenses;

(5) Increase the ceiling to ensure that it would have no practical effect.

VII. DISCRIMINATION IN FAVOR OF THE ENTERPRISE

Problem 1

The Draft Convention requires industrialized states to finance the major share of the first mining project of the Enterprise, but grants them little or no control over the terms and conditions of such financing, or over Enterprise operations.

Solutions

(1) Specify these terms and conditions in the treaty;

(2) Assuming adequate U.S. influence in the development of regulations, specify that terms and conditions will be established in such regulations;

(3) Empower the Council to decide these questions, if the U. S. has adequate influence in the Council;

(4) Grant major contributors direct control of the Enterprise through guaranteed seats and weighted voting on its Governing Board;

(5) Require specific Enterprise actions to be approved by the Council, together with adequate U. S. influence on the Council;

(6) Establish the Enterprise as an autonomous commercial entity, independent of the Authority, and specify a procedure whereby major contributors would run the Enterprise in case of default.

Problem 2

The Enterprise would enjoy significant discriminatory advantages over other seabed miners and might gain monopoly control over the most attractive seabed deposits after the existing consortia obtain contracts.

Solutions

(1) Limit the Authority's right to reserve deposits discovered by private seabed miners for use by the Enterprise;

(2) Limit the Enterprise's power to compel the sale of seabed mining technology;

(3) Specify that the Enterprise must comply with the same rules, regulations and procedures as other operators;

(4) Limit other discriminatory advantages, such as its exemption from penalties, a temporary tax-holiday, and special privileges and immunities.

VIII. LIBERATION MOVEMENTS

Problem

The Draft Convention provides that "peoples who have not attained full independence or other self-governing status" may share in the economic and financial benefits and exercise rights under the treaty. Furthermore, the final clauses of the treaty have not yet been negotiated to determine what entities other than states may be party to the convention.

Solutions

(1) Properly define "people who have not attained full independence or other self-governing status" so as not to include national liberation movements;

(2) Ensure that only states, qualifying regional economic integration organizations, and associated States, may become parties and share in the financial and economic benefits.

IX. GRANDFATHER RIGHTS

Problem

U. S. seabed mining companies have already spent millions of dollars in preparation of seabed mining, but the Draft Convention does not presently protect the prior investment and equitable interests developed by these companies.

Solution

Negotiate a preparatory investment system which will be binding on the Authority and will adequately protect the U.S. seabed mining interest. The details of this solution will depend upon the final provisions of the deep seabed regime.

ANNEX B

FURTHER INTERDEPARTMENTAL GROUP (IG) COMMENTS
ON THE DRAFT CONVENTION AND US INTERESTS/OBJECTIVES

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.

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.

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.

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

*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.

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. This 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.

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.

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.

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.

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.

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.

Deep Seabed Mining

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.

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.