Approved For Release 2009/04/02 : CIA-RDP84B00049R001503800015-4

December 11, 1981

MEMORANDUM TO THE PRESIDENT

Options For The 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

Since 1973, the Third United Nations Conference on the Law of the Sea has been negotiating a treaty which would establish a legal regime covering military and commercial navigation and overflight, deep seabed mineral resource development, the extent and nature of coastal State jurisdiction, fisheries conservation and management, marine scientific research, prevention and control of ocean pollution, continental shelf rights, and the peaceful settlement of disputes. The Conference was expected to conclude negotiations and to open a treaty for signature in 1981.

Serious questions had been raised in the US, however, concerning the adequacy of the Draft Convention, particularly with respect to the regime it would establish for deep seabed mineral resource development. 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."

In March, the US initiated a comprehensive review of its law of the sea policy. The results of that review and an analysis of the available options for pursuing US interests in law of the sea are summarized in this memorandum. This memorandum does not address the issue whether the US should sign or ratify any proposed treaty.

NSC review completed.

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The next session of the Law of the Sea Conference will begin in March, 1982. The Conference expects to complete work on the draft text and adopt the Law of the Sea Convention at that session.

II. PRINCIPAL CONCLUSIONS OF THE INTERAGENCY REVIEW

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 that:

(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. 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 environmental protection are generally consistent with US interests and objectives. With respect

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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 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.

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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 IV 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 impacts 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. However, the improvements are unlikely 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.

III. OPTIONS FOR FUTURE US LAW OF THE SEA POLICY

The Interagency Group proposes two options for consideration:

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, the five objectives set forth in Part IV

The Departments of Commerce, Defense, Energy, Labor, State, Transportation, and Treasury, and the Environmental Protection Agency, and the National Science Foundation, recommend Option II. The Department of Interior does not support Option II as presently drafted.

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A. 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 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;

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-- would virtually eliminate any possibility of a US flag 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.

B. Option II: Continue participation in the Law of the Sea Conference to secure, through negotiations, the five objectives set forth in Part IV

This option would commit the US to make a full effort to achieve improvements in the deep seabeds 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.

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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 potential 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;

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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. US OBJECTIVES UNDER OPTION II

If Option II is selected, the US negotiating effort will be designed to establish a deep seabed mining regime which satisfies the following objectives. The US delegation is to regard the fulfillment of these objectives as mandatory. Satisfying these objectives would among other things, minimize the impact of NIEO principles which could create adverse precedents for other negotiations. Our objectives would be a treaty which:

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

- Second, will assure 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 transfer of private technology, and participation by and funding for national liberation movements.)

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