

DEPARTMENT OF STATE
WASHINGTON

NSC UNDER SECRETARIES COMMITTEE

May 14, 1974


NSC-U/DM-109B

MEMORANDUM FOR THE PRESIDENT

Subject: Recommended Instructions for the
U.S. Delegation to the Third
United Nations Conference on the
Law of the Sea

Pursuant to NSDMS 225 and 240, attached is the
Report of the Interagency Task Force on the Law of
the Sea on this subject.

The Report and the individual agency comments
reflect thoughtful high level attention to this
important matter.

The present memorandum identifies the principal
unresolved issues and in some instances indicates my
own recommendations. Your decisions are requested
with respect to the agreed recommendations and the
unresolved issues.

I. The Importance of the Conference

The United States has vital political, strategic,
economic, environmental and scientific interests in


XGDS-3

DECLASSIFIED
Authority: E.O. 12958
By: M. NARA Date: 05/22/04

[REDACTED]

- 2 -

the oceans. These interests can best be protected-- and in some cases can only be protected--by a comprehensive multilateral oceans treaty to be negotiated at the Third United Nations Conference on the Law of the Sea, which begins its substantive work in Caracas on June 20, 1974.

United States interests include:

- *safeguarding our strategic capabilities;*
- *worldwide access to fossil fuels and hard minerals;*
- *assuring freedom of navigation and trade;*
- *orderly exploitation and conservation of the oceans' living resources;*
- *protection of the marine environment; and*
- *access to the oceans for scientific research.*

Establishing an acceptable and orderly legal regime for the oceans will lessen the possibility of conflict and confrontation and further your policy of building a structure for peace. Success in achieving this goal will depend on our ability to present negotiating positions that safeguard U.S. interests and are likely to promote agreement by other nations.

II. Recommendations Concerning Principal Unresolved Issues

A. The Deep Seabeds

One of the most important choices to be made concerns the structure of the International Seabed Resource Authority. Our present position is to support a nondiscretionary access system (option B) which would assure access by U.S. firms to deep seabed minerals under reasonable conditions. Almost all agencies,

[REDACTED]

DECLASSIFIED
Authority
By: M/NARA Date: 05/22/04
E.O. 12958

[REDACTED]

- 3 -

including State, Defense, Commerce and Interior, support this position and strongly oppose a shift to an approach whereby the international authority would be limited to functioning as a claims registry, information center, and consultative forum which could make recommendations to contracting parties (option C). CIEP, however, favors a shift to option C.

It appears that in light of the high degree of agreement on option B as the primary position, the question of a fallback takes on added importance. Treasury, FEO and OMB support option B, but also support option C as a fallback. Treasury and FEO's support of option B is contingent upon the delegation being instructed to move stepwise to corresponding elements of option C whenever specific features of option B cannot be agreed upon.

CEQ prefers option A providing for an international authority with broad flexibility to regulate deep seabed mining so long as the U.S. and other countries which can be expected to supply the technology and capital exercise sufficient voting control to protect their interests. EPA supports both options A and B while State, Transportation, and Interior favor fallback authority to move to option A.

Ambassador Stevenson recommends giving the delegation the limited authority to move somewhat beyond option B in the direction of option A if we achieve the essence of what we want under option B but there are some matters that cannot be fully agreed at this time. This authority would be conditioned on achieving adequate arrangements for promptly initiating deep seabed production.

I support option B, and oppose a shift to a claims registry, information center and consultative forum approach. In my opinion, such a shift could seriously lessen the chances of agreement without offering additional protection to U.S. deep seabeds interests. Moreover, the present policy has been endorsed by both

[REDACTED]

DECLASSIFIED
Authority: E.O. 12958
By: M/NARA Date: 05/22/04

[REDACTED]

- 4 -

Houses of Congress; any radical shift in direction could weaken Congressional support for our oceans policy. The question of a fallback position is one we will continue to explore with a view to finding a satisfactory solution.

The detailed rules and regulations governing the activities of the International Seabed Resource Authority are being developed within the Government and an agreed position on these rules will be achieved prior to departure of the U.S. Delegation to Caracas.

There is a separate but related negotiating option which would permit the international authority to exploit seabed resources provided that any direct exploitation is appropriately insulated to protect other licensees. There is a split between Interior, AID, and CEQ which favor the authority to utilize this option if needed and Treasury, FEO, Commerce, OMB and CIEP, which oppose this option. Treasury cannot accept the option as even an ultimate fallback.

The principal considerations in deciding this issue seem to be an assessment of the extent to which it is or is not possible to create an international operating arm which would not interfere with national licensees and tactical considerations as to the best way to negotiate a nondiscretionary system for commercial access to seabed minerals. I oppose this option. The delegation should report back from Caracas for further instructions before any further consideration is given to it.

There is also a question as to whether the authority's administrative expenses should be provided by funds generated by licensed exploitation activities or by state contributions. State and Interior support the former approach and Commerce, Treasury, FEO, OMB and CIEP support the latter approach.

Several agencies have raised questions concerning whether the recommendation for deep seabed revenue sharing is sufficiently focused. The Task Force will

[REDACTED]

[REDACTED]

- 5 -

continue to study the relevant base and percentage to determine a more precise figure or range. I believe that it would be useful for the delegation to have the authority recommended. This authority would not be exercised without consultation with the Chairman of the Task Force and the senior representatives of the agencies concerned. To sharpen the issues before Caracas, I have asked that a working group of the Task Force be formed to clarify the alternatives.

B. The Coastal Seabed Economic Area

The principal differences with respect to the coastal seabed economic area relate to delimitation of the outer boundary of the area and to sharing of revenues from the area.

All agencies accept the recommendation that at least tactically the delegation should maintain a low profile on the question of an outer boundary beyond 200 miles. On the merits, however, NSF seems to lean toward a position that it would be in the U.S. interest to draw the boundary at 200 miles; Commerce wants it drawn beyond 200 miles, Treasury, FEO, OMB and CIEP strongly recommend the end of the continental margin for U.S. economic jurisdiction. Interior would like to see further study of the question.

Since all agencies accept the recommendation to maintain a low profile on this issue, it would not appear necessary to make a final determination on the merits at this time. It would, however, be helpful to establish a Task Force working group on this issue to analyze the competing considerations and to make recommendations on whether the delegation should actively work for a 200-mile or broader boundary and where the precise outer boundary should be located. Until such a review is completed NSDM 225 will continue to provide substantive guidance on this question.

[REDACTED]

DECLASSIFIED
Authority: E.O. 12958
By: [Signature]
Date: 05/20/04

[REDACTED]

- 6 -

NSDM 225 stated that the President had considered the Under Secretaries Committee Chairman's memorandum, which contained an understanding that the U.S. should seek in these negotiations to obtain an outer limit for the Coastal Seabed Economic Area of 200-miles or the edge of the continental margin, whichever is further seaward, and that the delegation may decide how best to obtain this objective. NSDM 225 approved the recommended instructions for the delegation.

The second principal difference with respect to the Coastal Seabed Economic Area is whether there should be revenue sharing from the area and, if so, from what part and at what rate. All agencies except OMB and CIEP support revenue sharing from the Coastal Seabed Economic Area. There are further agency differences, however, as to whether revenue sharing should begin at a 12 mile territorial sea (option 2), or 12 miles or 200 meters whichever is further seaward (option 3), or whether it should be authorized at a higher rate beyond 200 miles. Treasury and FEO support for some sharing is contingent upon getting something of a commensurate value from our negotiating partners, and they proposed a new text for the revenue sharing section of the draft instructions. They believe that any revenue sharing initiative should be subject to further guidance from Washington.

Revenue sharing serves a variety of important considerations in the negotiation including serving as a device to promote agreement between broad and narrow boundary proponents. Revenue sharing was an element of your oceans policy statement of May 23, 1970. It has been endorsed by both Houses of Congress and the United States has consistently supported revenue sharing in the preparatory negotiations. Moreover, to change our position at this late date could seriously undercut our credibility in the negotiations.

I believe that the delegation should have authority to adopt any of the approaches recommended in options 2, 3, and 4. It should be made clear that U.S. support for revenue sharing in the Coastal Seabed Economic Area is dependent on reciprocal support for the fundamental

[REDACTED]

DECLASSIFIED
Authority: E.O. 12958
By: M/NARA Date: 05/22/04

- 7 -

U.S. objectives in the Conference. Approval of these three options should also be premised on the condition that determination of a precise rate would only be arrived at after full consultation with the Chairman of the Task Force and the senior representatives of the agencies concerned.

It seems unlikely that revenue sharing will be agreed from areas landward of the 200 meter depth curve. Nevertheless, it is important that the conditions established for the Coastal Seabed Economic Area -- other than revenue sharing -- should begin at the seaward limit of the territorial sea.

C. Vessel-Source Pollution

Jurisdiction to control vessel-source pollution has been a particularly difficult issue. Satisfactory resolution of this question is vital for the protection of U.S. navigational interests. Reflecting the importance of the issue, agencies are divided on the minimum acceptable positions.

State favors all four options. Treasury and FEO also favor all four options but propose some additional specific instructions for the delegation which would direct the delegation to work closely with Canada in any effort to achieve an overall settlement on marine pollution issues. Ambassador Stevenson favors all four options with the understanding that options 2, 3, and 4 are essentially fallback options. CIEP opposes all four options. Defense believes that the national interests are best served by continued opposition to a zonal approach but is willing to accept as a fallback a narrow pollution zone in which the coastal state has enforcement authority only of internationally-established discharge and dumping standards provided that coastal states, in return, relinquish claims to impose unilateral standards. All other agencies accept option 1 which provides that coastal states can enforce international discharge and dumping standards in a zone extending to a maximum breadth of 50 nautical miles from the coast,

DECLASSIFIED
Authenticity
Date 05/25/94
By MW

[REDACTED]

- 8 -

subject to an exemption for vessels and aircraft entitled to sovereign immunity and certain other conditions for the protection of shipping. Commerce agrees to option 1 if necessary to agreement and if the zone provisions are nondiscriminatory; Transportation supports it only if its exercise would attain widespread maritime state agreement.

Commerce and Transportation oppose the fallback authority in option 2 to extend this area to 100 miles. And Commerce, Transportation, NSF and Defense oppose option 3 which would extend this authority to setting standards for discharge and dumping as well as enforcing such standards. State, Treasury, FEO and Ambassador Stevenson support option 4 while Commerce gives qualified support and Interior, Transportation, CEQ and EPA oppose the option, which would generally allow the U.S. to support exclusively international vessel construction standards for pollution prevention for foreign ships entering ports.

I believe it is particularly important that the delegation have authority to negotiate a common position among the maritime powers which will fully protect our vital interests in navigational freedom. To achieve this it is important to be able at this time to move the negotiations toward acceptance of the critical distinction between discharge and dumping standards on the one hand and vessel construction and manning standards on the other. This distinction also seems critical to satisfactory resolution of the straits issue.

For these reasons, I recommend that the delegation have authority to accept options 1, 2, 3, and 4 which together constitute a consistent package enabling the delegation to negotiate a common position with other maritime states. I do so, however, on the understanding that options 2 and 3 are fallback positions that should be played out (if at all), with the utmost care, and only if absolutely necessary to reach agreement.

[REDACTED]

DECLASSIFIED
Authority
ED 12958
By: MW
NARA Date: 05/25/04

- 9 -

D. Marine Scientific Research

The U.S. seeks to avoid coastal state authority to require consent for marine scientific research in areas of coastal state resource jurisdiction adjacent to the territorial sea. One of the most contentious issues is whether the delegation should have fallback authority to negotiate a qualified consent regime for marine scientific research in areas of coastal state resource jurisdiction. Under such an approach, coastal state consent would be required before research could be undertaken in areas of coastal state resource jurisdiction. The coastal state would be obliged, however, to grant consent if specified criteria were met.

Defense, Commerce, and NSF strongly support the present position and oppose this fallback. Treasury and FEO support the option and have reservations on the present position. Interior, CEQ, EPA, and State support both the present position and the option. State's support is dependent upon several additional conditions including making every effort to obtain agreement on the present position, reaching agreement on coastal state resource jurisdiction separately from science, and being clear that being outvoted would not be preferable in terms of our principles.

I believe the delegation should have the authority of the option on marine scientific research if, and only if, the Chairman of the delegation determines in consultation with the Chairman of the Task Force and the senior representatives of the agencies concerned, and, subject to the additional State conditions, that failure to reach agreement on scientific research will prevent agreement at Caracas on the range of coastal resource issues, or on an otherwise acceptable comprehensive law of the sea treaty. The fallback position would be discussed either publicly or privately only by the Chairman or Vice-Chairman of the delegation and only after the above determination and the tactical and substantive judgments under the option and additional conditions are made.

DECLASSIFIED
Authority
ED 12958
By: M. NARA Date: 05/22/04

- 10 -

E. Separate Conference Problems

(1) Procedural Recommendations

It is expected that the first week of the Caracas session will be devoted to procedural matters particularly to the adoption of Conference rules governing inter alia voting on treaty articles. This would continue the work of the December organizational session of the Conference, which did not reach agreement on rules of procedure. Several agencies have recommended that since these issues are of major importance for the Conference and the delegation was unable to resolve them in December under the NSDM 240 instructions, the delegation should have additional instructions. Treasury and FEO recommended that the delegation be instructed to suspend participation in the Conference and seek further guidance from Washington if a voting system consistent with certain minimum criteria is not agreed. Commerce has recommended that instructions provide that substantive negotiations be deferred until procedures satisfactory to the U.S. are established. OMB has called for recommendations from the Law of the Sea Task Force on minimum requirements the rules of procedure must meet to permit continued participation in the Conference.

The other agencies and Ambassador Stevenson believe that no new instructions are needed on the procedural issues. These issues have already been addressed in NSDM 240 prepared for the organizational session of the Conference and those instructions would continue in effect at Caracas. Our aim is to seek a balance between overly rigid procedures which would prevent a timely or successful Conference and overly relaxed procedures which risk premature voting on substance harmful to U.S. interests.

(2) Invitation issues

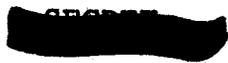
The Department of State is preparing a memorandum with respect to invitational issues which might

DECLASSIFIED
Authority: E.O. 12958
By: M. NARA Date: 05/25/04



arise in the Conference, such as "Provisional Revolutionary Government (South Vietnam)" participation. Prior to the December organizational session the Department initiated a successful campaign to avoid an invitation to the PRG or the GRUNK. The Department is reviewing whether additional initiatives are needed at this time.

Kenneth Rush
Chairman



DECLASSIFIED
Authority: E.O. 12958
By: M. NARA Date: 05/25/04



-12-

T A B S

SUMMARY

Summary of the Chairman, Mr. John Norton Moore, of the Report of the Interagency Task Force on the Law of the Sea on Recommended Instructions for the U.S. Delegation to the Third United Nations Conference on the Law of the Sea.

REPORT

The Task Force Report on the Recommended Instructions.

COMMENTS - I

Comments of the Departments of Commerce and Treasury and the Federal Energy Office regarding the present memorandum.

COMMENTS - II

Comments on the Task Force Report by Ambassador John R. Stevenson, and agency comments to the Chairman of the NSC Under Secretaries Committee regarding the Task Force Report.

[REDACTED]

Summary of Proposed Instructions for the Third
U.N. Conference on the Law of the Sea
Prepared by the Chairman, NSC Interagency Task Force on
the Law of the Sea

A. U.S. Interests in a Comprehensive Ocean Law Treaty

The U.S. has important interests which would be served by a comprehensive ocean law treaty. Among them are:

- (a) protection of navigation in the territorial sea and beyond, particularly the protection of freedom of navigation and overflight on the high seas and in the areas adjacent to the territorial sea which may be subject to coastal state resource jurisdiction;
- (b) protection of unimpeded transit through and over straits used for international navigation;
- (c) coastal state resource jurisdiction to explore and exploit mineral resources of adjacent continental margin areas;
- (d) a fisheries regime which will place coastal and anadromous fisheries under coastal state management with at least preferential rights in the coastal state, which will place highly migratory species under regional or international management and which, to the extent consistent with these goals, will protect traditional fisheries;
- (e) a stable legal regime for deep seabed mining which will ensure access by U.S. firms to deep seabed mineral resources under reasonable conditions for exploitation;
- (f) a jurisdictional basis for sound environmental protection of the world's oceans and appropriate legal obligations and procedures to protect the marine environment and the living resources of the oceans;
- (g) a regime for marine scientific research which will encourage rather than discourage the conduct of research and the dissemination of results;
- (h) a regime which will protect high seas uses including SOSUS which is a vital element in our arms control equation with the U.S.S.R;

[REDACTED]

DECLASSIFIED
Authority: E.O. 12958
Date: 05/23/94

(i) appropriate international standards applicable to coastal state resource jurisdiction which will promote efficient utilization and conservation of the resources and accommodation with other uses and interests;

(j) a widely accepted and reasonably definite legal regime coupled with adequate machinery for the compulsory settlement of disputes in order to minimize conflict and promote stability of expectations and adherence to treaty requirements;

(k) a regime which will protect the integrity of agreements and investment relating to the development of ocean resources;

(l) an agreement which will implement the concept of the common heritage by establishing an international legal regime in the common interest of all nations and by providing revenues for international community purposes, particularly assistance to developing nations;

(m) a regime which will establish exclusive coastal state rights and coastal state duties with respect to the construction, operation and use of deep water ports and other structures that affect coastal state economic interests beyond the territorial sea;

(n) an agreement which will prevent and remove, where consistent with overall U.S. objectives, present or future bilateral ocean use problems damaging to U.S. relations with particular countries, for example, fisheries disputes and archipelago problems; and

(o) a timely agreement which will promote these objectives at the earliest possible time.

With the possible exception of broadly extending U.S. resource jurisdiction over continental margin mineral resources, all of these interests are endangered by a continuation of the present trend toward unilateralism and can only be adequately protected in the context of a satisfactory comprehensive oceans law treaty.

(1) Some fundamental objectives

It is of course true that a treaty which institutionalizes a bad ocean regime may be worse than the present drift to unilateralism. Accordingly, it is imperative that the U.S. provide strong leadership toward a good ocean regime. It also follows that the U.S. should not merely accept any treaty no

matter what the substantive content. In this connection the U.S. Delegation has repeatedly made it clear that the U.S. will not accept a treaty which does not protect unimpeded transit through and over international straits or which does not adequately protect navigational and other high seas freedoms in areas beyond the territorial sea. Similarly, it has been made clear that the U.S. will not accept a treaty that does not protect U.S. basic resource interests and does not provide for a deep seabed regime with access by U.S. firms under reasonable conditions for exploitation of deep seabed mineral resources. The U.S. has also emphasized the importance which it attaches to compulsory dispute settlement procedures and to an enduring treaty which will be widely adhered to and respected.

The absence of a discussion above or any statement by the Delegation that a particular interest is of great importance does not necessarily indicate that the interest is of lesser importance. For example, because of a strong trend in the negotiations toward substantially broadened coastal state resource jurisdiction as well as the probability that a balanced posture on resource issues will better promote all U.S. objectives, the Delegation has not found it necessary to make similar statements with respect to ensuring coastal state control of continental margin mineral and coastal fishery resources. Another example is that for security and tactical reasons, we have avoided statements concerning our interest in the protection of SOSUS. Any final decision on the acceptability of an overall treaty must, of course, take into account not only interests publicly stated to be vital to U.S. acceptance but also the overall accommodation of all U.S. objectives. Similarly, any such decisions should realistically compare the proposed resolution of a particular issue with the probable resolution of the issue in the absence of a comprehensive agreement.

(2) Alternative and fallback strategies

The full range of U.S. oceans objectives can be best served by a timely and satisfactory comprehensive oceans law treaty. Bilateral and limited multilateral approaches, which have been the norm in recent years, have not adequately protected U.S. oceans interests. Many issues such as the breadth of the territorial sea require clear resolution if we are to achieve stability of expectations. A bilateral or multilateral approach, however, would require agreement with a large number of states and the resulting politically and economically costly hodgepodge of relationships would be unsatisfactory. Other issues, such as the protection

DECLASSIFIED
E.O. 12958
Authority: [redacted]
By: [redacted]
Date: 05/22/04

of coastal fisheries, may require agreement with states which have little incentive to agree except in an overall comprehensive oceans law settlement.

Moreover, several individual multilateral agreements, perhaps following the 1958 model, would not adequately protect U.S. ocean interests. Important U.S. interests extend over a broad range of issues and a separate treaty approach risks excluding some of those issues. Such a separate approach would also provide less leverage to the U.S. on a number of important objectives, particularly U.S. navigational and coastal fishery objectives, than would a comprehensive single convention. Finally, separate treaties are likely to create a confusing pattern of legal relations between parties to the new conventions and the 1958 Geneva Conventions and could not as satisfactorily contribute to the needed stability of expectations and avoidance of conflict among oceans uses.

If, of course, it does not prove possible to conclude a timely and successful comprehensive oceans law treaty, the U.S. may wish to pursue alternative strategies for particular issues, at least until such time as a successful comprehensive treaty proves feasible. In this connection, the U.S. has publicly stated that if agreement is not reached by the end of 1975, it will consider alternative national legislation as a means of providing a satisfactory investment climate and environmental regulation for U.S. firms interested in deep seabed mining. Similarly, we may need to examine alternative strategies for protection of U.S. coastal fishery stocks if a timely agreement is not concluded. Protection of these or other U.S. interests, if in fact possible, would require agreement among interested and like-minded states if there were to be a complete failure of the Conference.

(3) The role of the Caracas session of the Conference

The United States should attempt to move the Caracas session as close as possible to explicit or implicit agreement compatible with our substantive interests. A timely Conference is important both because of U.S. fishery and deep seabed interests in an early agreement and because of the need to reach agreement before pressures for unilateral action overtake multilateral opportunities. As such, it is important that we approach Caracas prepared to reach final agreement. Informal talk of a 1976 session may be a self-fulfilling prophecy unless the U.S. takes vigorous action to promote negotiations in Caracas. In this respect

our overall posture on all issues will be important in signaling to other nations whether Caracas will be a meaningful session. At the same time, it remains as important as ever clearly to communicate vital U.S. interests which must be accommodated if the Conference is to be successful. Few events would be more damaging than a failure of other nations accurately to perceive vital U.S. interests and the U.S. determination to protect those interests.

B. Substantive Recommendations and Options

1. The deep seabeds (Section H)

Although the deep seabeds discussion appears in Section H in the proposed instructions, it is discussed at this point because of the potentially great overall impact of the U.S. deep seabeds position on the negotiations. That impact is analyzed in the pros and cons to the options presented below.

In his May 23, 1970 Oceans Policy Statement, President Nixon supported the establishment of an international regime and machinery to authorize and regulate deep seabed mining. A principal purpose of that proposal is to provide a stable, internationally agreed legal regime for the mining of the deep seabeds. The U.S. has supported a nondiscretionary access system designed to ensure access by U.S. firms to deep seabed minerals under reasonable conditions for development. This policy has been endorsed by both Houses of Congress and has been closely coordinated with the Soviet Union, the United Kingdom, France and Japan during more than three years of preliminary negotiations.

Option a, the first of four options open to the U.S. provides for an international regime and machinery which would ensure access by interested U.S. firms to deep seabed mineral resources under reasonable conditions for exploitation consistent with these goals. The Delegation would be authorized to accept an international authority with broad flexibility to regulate deep seabed mining, so long as the U.S. and other countries, which can be expected to supply the technology and capital for such mining, exercise sufficient voting control to protect their interests. The arguments for this option are that it would give the U.S. maximum flexibility to achieve its goals, and, since the regime would be controlled by countries which supplied the technology and capital for the mining, protect U.S. interests almost as well as limitations on the authority's powers.

DECLASSIFIED
ED 12958
Authority
By: M/NARA Date: 05/22/04

The arguments against the option are that there are no significant economic conditions which would require an international authority to manage deep seabed resource development, that such an authority would introduce substantial economic inefficiencies and additional transaction costs, and that limitations on the authority's powers would protect U.S. interests better than adequate voting control for the U.S. which would only ensure negative control to prevent unfavorable actions and would probably be as difficult to negotiate as limits on power.

Option b provides for an international regime and machinery which would ensure access by interested U.S. firms to deep seabed mineral resources under reasonable conditions for exploitation. Such a regime and machinery would both provide a stable international investment climate for development of deep seabed mineral resources and preclude a management regime in which there would be discretion to turn down an application for mining rights properly certified by a sponsoring state or to introduce requirements not economically justified. The international machinery would not have the power to control prices or production levels and would only have strictly limited discretion to propose regulations on a few specified matters which would go into effect after Council approval and after submission to states. The treaty itself would set out the essential terms for mining with specific ranges to protect U.S. interests, encourage development, and ensure stability of investment. The authority would be controlled, in all significant respects, by a Council in which the U.S. would be assured of voting control with other similarly interested states sufficient to prevent adverse decisions on important issues. The treaty would protect nonresource uses, establish rules for the prevention of claims to extraordinarily large areas, require U.S. agreement to be bound by treaty amendments, and provide for the integrity of investments and the compulsory settlement of disputes.

The arguments for this option are that it would provide a stable international investment climate for deep seabed mining and would be consistent with U.S. economic objectives as determined by the economic review. It would protect nonresource uses and interests concerning the seabed (including SOSUS); provide protection against large areas being withdrawn by states from commercial development and against threats to U.S. navigational and security interests from expanding coastal state jurisdictional claims; be consistent with the President's Ocean Policy Statement of May 23, 1970, the Resolutions in both Houses of Congress, and the views of the Public Advisory Committee on the Law of the Sea (including members of the hard minerals industry); and provide for

legally recognized exclusive mining rights in a specific area which corporate and banking officials believe to be necessary to justify the large capital investments required, despite the fact that poaching or claim jumping may not be likely, since factors like variations in mineral content in nodules make mine sites nonfungible and require a refining process carefully tailored to each site.

The arguments against the option are that there are no economic conditions which require an international authority to manage the development of deep seabed resources; a system of exclusive mining rights for security of tenure can be provided without creating this type of international organization since there are few firms capable of engaging in mining (which is capital intensive) and potential sites are plentiful; an international organization would create additional transaction costs for deep seabed mining; we have no experience with an international organization able to make regulations binding without the consent of each state; and we run a real risk of creating a system that does not adequately protect our interests.

Option c provides for an international authority limited to functioning as a claims registry, information center, and consultative forum which could make recommendations to contracting parties. Mining claims would be registered on a first-come first-served basis with competitive bidding, if necessary. The treaty would include general obligations on contracting states to ensure that registrants under their sponsorship would move to commercial production within a reasonable period of time, would not claim extraordinarily large areas of the deep seabed, would take reasonable measures to safeguard the environment, and would have reasonable regard for other uses of the deep seabed. States would be responsible for implementing specific measures to meet these obligations; any revenue sharing obligations would be placed on sponsoring states which in turn would determine the best way to obtain the necessary revenues; and the system would provide for compulsory dispute settlement as a safeguard to ensure that national obligations are fulfilled.

The arguments for this option are that it would provide minimum disincentives to development of deep seabed resources on an efficient basis and eliminate discretion which might be used to discriminate against U.S. concerns; that there are no significant economic conditions requiring an international authority to manage the development of deep seabed resources; that there would probably be no conflict over mine sites since there are a large number of primary mine sites, a small number of potential operating firms, and a requirement for high

inter-
b-
ction
would
trol
to
ifficult

achinery
deep
or
provide
ent
ment
an
sponsoring
stified.
o
e strictly
cified
val and
et out
protect
ility of

ould
rested
rtant
tablish

aty
ts and

rovide
bed
ctives
t
including
ithdrawn
ats
ding
h
, the
of
ncluding
r

DECLASSIFIED
Authority: E.O. 12958
Date: 05/20/04

DECLASSIFIED
Authority EO 12958
By: MW NAKA Date 05/22/04

DECLASSIFIED
A/ISS/IPS, Department of State
E.O. 12958, as amended
December 18, 2008

capital investment; that this approach would avoid the more complicated negotiations concerning precise limitations on the authority's power; that the authority created under this approach would provide the flexibility to deal with changing conditions and technology; and that a more powerful organization could result in additional transaction costs.

The arguments against this option are that it is the opinion of the Special Representative of the President for the Law of the Sea Conference, the Chairman of the NSC Interagency Task Force on the Law of the Sea, the broad consensus of the Executive Committee, with a few exceptions, and the private sector Advisory Committee on the Law of the Sea that a decision to support this approach would be inconsistent with obtaining a timely multilateral agreement on the Law of the Sea and would amount to a decision not to seek such agreement, thus jeopardizing all our ocean law objectives, including national security objectives; that it would seriously impair U.S. credibility in view of the President's Oceans Policy Statement of May 23, 1970 and our consistent support in three years of negotiations for a nondiscretionary access system as outlined in option b; that it would not protect U.S. interests as well as option b, since the treaty obligations would be less specific and result in the transfer of more discretion to the compulsory dispute settlement machinery; that it would not provide the requisite security of tenure since there would be no international agreement; and that, since the economic review concluded that a strictly limited system along the lines of option b would not harm U.S. economic interests, there is no reason to jeopardize U.S. objectives by such a radical shift in position.

Option d would provide no international authority for deep seabed mining. This would mean that any legal regime needed for creating exclusive exploitation rights would be established under national legislation in accordance with general obligations in the Law of the Sea Treaty. Specific national systems would be coordinated to the extent feasible through reciprocal agreements among those states licensing exploitation; that any regulations for environmental protection and any specific revenue sharing provisions would need to be established in the treaty or negotiated separately; and that the treaty would reflect general obligations on states on such matters as, among others, avoiding exploitation claims to extraordinarily large areas of the seabed, protecting other uses of the seabed and adherence to dispute settlement procedures.

The arguments in favor of this option are that deep seabed mining could take place under the general framework

of international principles without creating an authority; that conflict over mine sites is unlikely in view of the large number of primary sites, and that even a claims registry system could result both in additional transaction costs and, eventually, in a fullblown international organization.

The arguments against it are that it is the opinion of the Special Representative of the President for the Law of the Sea Conference, the Chairman of the NSC Interagency Task Force on the Law of the Sea, the broad consensus of the Executive Committee, with a few exceptions, and the private sector Advisory Committee on the Law of the Sea, that a decision to support this approach would be inconsistent with attaining a timely multilateral agreement on the Law of the Sea and would amount to a decision not to seek agreement, thus jeopardizing all our ocean law objectives including national security objectives; that it would not provide the requisite security of tenure; that it would seriously impair U.S. credibility in view of the President's Oceans Policy Statement of May 23, 1970 and our consistent support in three years of negotiations for a nondiscretionary access system as outlined in Option b; that, since the economic review concluded that an Option b-type system would not harm U.S. economic interests, there is no reason to jeopardize U.S. objectives; and that it would end U.S. influence in the negotiations which might then proceed to conclude a Treaty inimical to U.S. interests.

Exploitation by the authority

An additional option would authorize support, in the context of a satisfactory deep seabeds regime, for power in the authority to directly exploit seabed resources. The direct exploitation operation would be insulated from the administrative arm, required to compete on equal terms with other licensees for licenses, and subject to the same rules and regulations and to compulsory dispute settlement. International revenues from seabed resources could not be used to subsidize the direct exploitation operation, and there would be no obligation for states to financially support it.

The arguments for the option are that it would enhance the negotiability of a nondiscretionary access system and U.S. commercial interests would not be harmed. The arguments against this option are that there would always be a risk of discrimination by the authority in favor of the direct exploitation operation and that U.S. support for an international organization engaged in direct commercial activities would establish a dangerous precedent.

DECLASSIFIED
Authority
Date 05/23/94
12958

DECLASSIFIED

Authority

EO 12958

By: MW

NARA Date

05/25/04

DECLASSIFIED

A/ISS/IPS, Department of State

E.O. 12958, as amended

December 18, 2008

10

Funding of the authority

The question of funding for the machinery may be an issue at the Conference. Option A presents the existing U.S. position under which the U.S. has stated its support for the authority to use funds generated by licensed exploitation activity for the payment of the authority's administrative expenses and to permit a first call against revenue for the same purposes. Under Option B the U.S. would shift its support to a funding system based on state contributions in accordance with UN practice.

The arguments for option A are that if the authority is financed by direct contributions, the U.S. will in all likelihood end up paying a major share; that taxpayers should not subsidize the industry; that there is no basis for the presumption of greater U.S. influence under option B; and that the bureaucracy will be much smaller, since developing countries will be using income earmarked for them for administrative costs.

The arguments for option B are that since the U.S. would be a major contributor (up to 25%) it would have greater influence over the organization; that a self-financing organization has unpredictable implications; and that, since the organization would be dependent on contributions, it would have a greater interest in avoiding actions that abuse its authority.

Revenue rate and base

Regardless of which options are selected, it is agreed that the international portion of the revenues generated from deep seabed mining beyond national jurisdiction will be used for international purposes. Various approaches may be employed to determine the revenues to be distributed.

It is recommended that the U.S. Delegation be authorized to support a sharing of revenues from manganese nodule mining in areas beyond national jurisdiction as a royalty on production, at a rate not to exceed 10% of the value of the manganese nodules, or computed pursuant to some other acceptable method such as a carefully circumscribed system of production sharing. Within this framework, the criteria in NSDM 62 for determining the rate of financial obligations at "a level that will make a substantial contribution to development...and at the same time encourage exploration and exploitation of the seabeds" would continue to apply.

Allocation of revenues

Finally, the U.S. approach with respect to the use of revenues is that revenues should be employed for general development assistance, assistance for enumerated types of oceans-related projects, and adjustment assistance. In each instance, flexibility should be retained to determine, in light of U.S. development assistance and other ocean law goals and tactical considerations, which positions would best serve U.S. interests at the Conference.

2. The territorial sea (Section B)

It is widely accepted that the Convention will include agreement on a 12-mile territorial sea. Aside from establishment of the breadth of the territorial sea and agreement on the straits question, the U.S. is opposed to reopening the regime of the territorial sea as defined in the 1958 Convention. If, however, that regime is reopened, the U.S. should work for a more favorable innocent passage regime in the territorial sea.

3. Straits (Section C)

The U.S.'s major opponents on the straits issue -- Spain, Egypt, and the other Arab states, Indonesia, Malaysia, the Philippines, and Tanzania -- support a restrictive innocent passage-type regime, a regime which is unacceptable to the U.S. because of its subjectivity and its prohibitions on submerged transit and overflight. By working with states that have similar straits interests, we hope to form a broad common front on the question of which straits must remain covered by a regime more liberal than innocent passage and what the nature of the regime should be.

Recommendations

It is recommended that the U.S. be authorized to indicate privately to other delegations with similar straits interests our willingness to negotiate with them draft treaty articles which would be mutually acceptable on straits transit.

Straits to be covered

The current U.S. proposal applies a free transit regime to all straits used for international navigation between one part of the high seas and another part of the high seas or the territorial seas of a foreign state. To attain

DECLASSIFIED
Authority: E.O. 12958
By: [Signature]
Date: 05/25/04

Authority EO 12958
By: MN NARA Date 05/25/04

~~SECRET~~

greater flexibility, an exclusion formula (which would exclude certain straits based on specific criteria) might prove advantageous. The formula would provide a regime of nonsuspendable innocent passage in those straits which were excluded.

Recommendations

The U.S. should be authorized to support a regime of nonsuspendable innocent passage through those straits six miles wide or narrower or which, although wider than six miles, do not connect two parts of the high seas. The U.S. should also be authorized to support an exclusion for straits formed by islands within 24 miles of the coast of the same state where, and only to the extent that, a nearby and equally suitable high seas route is available on the seaward side of the islands. (This exclusion would be drafted to ensure that the Soviet Arctic straits are not excluded.)

Nature of regime

The U.S. has proposed that vessels and aircraft, in transit through and over international straits, enjoy the same freedom of navigation and overflight, for the purpose of transit, as they enjoy on the high seas. In all other respects, the straits would be territorial waters under the sovereignty of the coastal state.

Recommendations

The U.S. should continue to emphasize the critical elements of the U.S. straits proposal--unimpeded transit through and over international straits by surface vessels, submerged and surfaced submarines, and military aircraft without a requirement for notification to, or authorization from, the coastal state--while playing down use of the term "free transit."

It is also recommended that the U.S. be authorized to privately assure states bordering the Malacca and Danish straits that we will not transit them submerged because it is clear that this cannot be done safely; support a system whereby the coastal state could design a surface traffic control system for international straits which should be implemented only after approval by the Intergovernmental Maritime Consultative Organization and whereby major user states would be obligated to agree with straits states on an equitable method of joint financing for such systems; support the same vessel pollution regime in straits as

~~SECRET~~

wou
a c
to
ai:
fo:
su:
fl
or
ca
ai
th
(i
co
pr
ca
ai
re
or

F:
a:
o:
i:
s:
s

d
a
w
t
c
v
f
z
t
c
r
l

SECRET

would apply in areas beyond the territorial sea; accept a duty for state aircraft to respond while in the strait to ground communications from the appropriate international air traffic controller on applicable international frequencies for the purpose of verifying course, speed, and altitude; support liability up to and including a rule that the flag state be subject to strict liability for personal injury or property damage to the coastal state or its inhabitants caused by an act of or accident involving a vessel or aircraft entitled to sovereign immunity while exercising the right of the transit in the strait; and support, if necessary (i) the strict liability of the owner or operator of a commercial vessel or aircraft for personal injury or property damage to the coastal state or its inhabitants caused by an act of or accident involving the vessel or aircraft transiting the strait and (ii) flag state responsibility to require its flag vessels to have insurance or other financial security.

4. Archipelagos (Section D)

Archipelago claims have been advanced by, among others, Fiji, Indonesia, Mauritius, and the Philippines. Since the archipelago issue is interfering with progress in other areas of the negotiations, including in particular the straits issue, the U.S. should seek an early solution which meets the security interests of the U.S. and the political and security interests of the claimants.

Recommendations

The U.S. should intensify exploratory efforts to determine whether a solution is possible which would embody, among others, the following points: the archipelago concept would apply only to island states; archipelagic lines, not to exceed 90 (or 120 as a fallback) nautical miles, could be drawn from outermost land point to land point; all enclosed waters would be "archipelagic waters" which would differ from internal waters, territorial waters, or the economic zone; the maximum ratio of water to land would be 5:1; the archipelagic state would have exclusive jurisdiction over activities within the archipelagic waters other than navigation and overflight; transit through and over archipelagic waters would not be subject to notification; the navigation and overflight right would be the right to transit the archipelago in a route which reasonably conforms to the destination outside the archipelago and which would be accomplished without unreasonable delay; all vessels and aircraft may take such measures in transit as are normal for their safety and self-defense; the straits

DECLASSIFIED
E.O. 12958
Authority: [unclear]
Date: 05/22/04

DECLASSIFIED
Authority EO 12958
B: MM NARA Date 05/25/04

DECLASSIFIED
A/ISS/IPS, Department of State
E.O. 12958, as amended
December 18, 2008 14

transit regime, if necessary, could be accepted for the straits portion of the transit; and vessels and aircraft entitled to sovereign immunity would be exempt from pollution standards and enforcement although the archipelago state could establish and enforce nondiscriminatory discharge and dumping standards for commercial vessels. If necessary, we could accept transit through a passage area not less than 75% of the area between the nearest points of land or 100 miles, whichever is less.

5. Coastal resources and an economic zone (Section E)

The major issues are coastal state jurisdiction beyond 200 miles over continental margin seabed resources and coastal and anadromous fisheries, special treatment for highly migratory species through regional or international organizations, limitations and standards governing the exercise of coastal state jurisdiction, and compulsory settlement of disputes. In the context of a satisfactory resolution of these major issues and an overall satisfactory settlement, the U.S. can support coastal state jurisdiction over all resources in a 200-mile economic zone.

Seabed resources of the continental margin

There is a complex matrix of competing costs and benefits to the U.S. inherent in international recognition in the Convention of coastal state seabed resource jurisdiction beyond 200 miles. Based on these considerations and the negotiating situation, the following recommendations are made.

Recommendations

The U.S. Delegation should not oppose proponents of a 200-mile limit, proponents of a margin limit beyond 200 miles or proponents of an intermediate zone beyond 200 miles, but should seek to establish a tactical role of honest broker on the issue. The Delegation should take no position inconsistent with coastal state jurisdiction over Arctic seabed resources extending to the North Pole under a sector approach limited to resource jurisdiction. Precise figures for defining any continental margin limits beyond 200 miles should be developed.

Revenue Sharing

There is a disagreement about whether there should

be
ju

su
op
wi
st
di
it
ar
se
te
ar
cc
ir
sh
of
l:
m:
Co
to
C

l
m
T
m
i
g
r
i
c
t
a
a
s
c
t



be revenue sharing in any area of coastal state seabed jurisdiction and, if so, where and what rate should apply.

Option 1 states that the U.S. should withdraw its support for revenue sharing. The arguments for the option are that revenue sharing involves large sums which will increase through time; that verification of coastal state compliance will be difficult; that it would be a disincentive for exploitation of hydrocarbons; and that it would raise prices. The arguments against the option are that withdrawal of our support for revenue sharing would seriously impair U.S. credibility for the U.S. has consistently and strongly supported this policy since it was announced by President Nixon on May 23, 1970; that developing countries would doubt the seriousness of our proposals in terms of accommodating their interests; that revenue sharing is virtually the only benefit that might be offered to geographically-disadvantaged states which have little to gain from coastal state jurisdiction over seabed minerals and which constitute a blocking third at the Conference; and that revenue sharing sums are unlikely to be excessive since they would apply uniformly to all coastal states.

Option 2 provides for revenue sharing, not to exceed 1% of the value of the hydrocarbons extracted, from seabed minerals production seaward of a 12-mile territorial sea. The arguments for this option are that it would include major areas like the Persian Gulf and North Sea, thus increasing total revenues and reducing the rate of sharing; gain votes of geographically disadvantaged states for our nonresource objectives; increase the chances for success in obtaining other international standards from 12 miles out; and provide a larger revenue sharing area which, in turn, allows for a lower sharing rate. The arguments against this option are that revenue sharing is designed as a device for accommodating legal differences on coastal state jurisdiction beyond 200 meters; that opposition to revenue sharing at 12 miles is likely to be great since coastal states have vested rights within 200 meters; and that a significant portion of the recoverable hydrocarbon potential on the U.S. continental margin lies between 12 miles and the 200-meter isobath.

Option 3 states that the U.S. should continue to support revenue sharing, at a rate not to exceed 5% of the value of the hydrocarbons extracted, seaward of the territorial sea or the 200-meter depth curve, whichever is farther seaward. The arguments in favor of option 3 are that all current U.S. production is from areas landward

DECLASSIFIED
Authority: E.O. 12958
Date: 05/22/04
By: [Signature]

of the 200-meter depth curve; revenue sharing is designed in part to accommodate difference on coastal state jurisdiction beyond 200 meters; and more than half of the recoverable hydrocarbon potential on the U.S. margin is landward of 200 meters. The arguments against option 1 are that the U.S. should not take the blame for excluding wealthy, shallow areas from revenue sharing; major oil exploitation is in the Persian Gulf and North Sea at depths less than 200 meters; and the U.S., since it is likely to use deep water technology first, might pay a higher proportion of the total revenues initially under this option.

Options 2 and 3 are not mutually exclusive since the Delegation could use the flexibility of authority under both to seek the greatest negotiating advantage for the U.S. Moreover, an additional option, consistent with option 2 and 3, would allow the U.S. to support a greater rate of revenue sharing for seabed areas under coastal state control beyond 200 miles than those landward of 200 miles. Divergent views on coastal state control of seabed resources beyond 200 miles might best be reconciled by accepting this approach, and this approach could relieve pressure for a high rate landward of 200 miles. On the other hand, this could prove expensive to us, could be a disincentive to exploitation, and could raise prices.

Delimitation and island problems

The issues of boundaries and whether small, isolated islands are entitled to full economic jurisdiction are controversial and we will generally avoid being involved in discussions concerning them. Although both the U.S. and its allies (France and the U.K.) have interests in these issues, the U.S. should remain silent rather than risk identifying the islands issue with big power ambitions.

Fisheries

As stated in earlier instructions, the U.S. objectives are to seek international acceptance of a fisheries settlement that would (i) give coastal states effective regulatory and economic control over coastal and anadromous species throughout their migratory range on the high seas, subject to international standards, and (ii) provide for international regulation for highly migratory species. To develop support for the U.S. position, the U.S. delegation has been authorized to explore and propose to seek the possibility of a compromise which accommodates our fisheries objectives within the framework of a 200-mile

economic zone. At the same time, however, the U.S. should also support coastal state control and preferential rights over coastal and, especially, anadromous species that migrate beyond the zone.

Recommendation

Assuming an obligation to permit foreign fishing to the extent stocks are not utilized up to the allowable catch by the coastal state fishermen, the U.S. Delegation should be authorized to accept a coastal state right to license foreign fishing for stocks under its jurisdiction, subject only to a general limitation that the conditions of the license be reasonable and nondiscriminatory as among foreign fishermen.

In addition, the U.S. should at the appropriate time and if consistent with the overall fisheries settlement indicate that it is prepared to regard joint ventures in coastal state fisheries as entitled to preferential rights, regardless of the flag of the vessel. Furthermore, we should maintain our broad flexibility concerning traditional fishing while continuing to press our objective of including some provisions for traditional fishing in the treaty.

Highly migratory species

Because of their migration patterns, highly migratory species (tuna and whales and other highly migratory fish and marine mammals) cannot be managed in individual 200-mile zones to ensure conservation or equitable allocation of stocks. Accordingly, a regional or international system of management is necessary. However, to achieve our objectives, coastal state political and economic interests may well have to be accommodated within the international or regional framework.

Recommendation

To achieve a satisfactory resolution of the problem of regulating highly migratory species within the framework of international or regional organizations, the U.S. should have the negotiating flexibility to pursue possible accommodations including those concerning fees, preferential rights, licensing, and coastal state enforcement. Any accommodation, however, must not only support our objectives concerning highly migratory species and provide adequate protection for our tuna interests but also be accompanied by a more accommodating approach by the

DECLASSIFIED
Authenticity
ED 12958
Date 05/27/04

assigned
of
margin
option 3
cluding
oil
at
t is lik
gher
his

e the
under
r the
with
greater
stal
l of 200
of seabed
ed by
elieve
On the
ld be a
ses.

olated
n are
nvolved
e U.S. a
n these
risk
tions.

jectives
es
ective

ge on
, and (i
migratory
n, the
d propos
ommodate
a 200-mi

coastal states with regard to our other interests including straits, general navigation, and deep seabed issues.

6. Pollution (Section F)

The current U.S. position includes a general obligation not to pollute the marine environment, requires adherence to international standards for all marine-based sources of marine pollution, provides for the establishment of international standards for such sources of marine pollution and permits the coastal state to apply higher standards to seabed resource activities, drilling, and fixed installations in the exercise of its rights in the Coastal Seabed Economic Area. With respect to vessels, a state may not impose higher standards except on vessels entering its ports or its flag vessels, although it may enforce international standards in its territorial sea, has limited enforcement powers beyond, and can prosecute vessels in its ports for violations of international standards irrespective of where they occur. Under the U.S. position, warships are exempt from the pollution articles.

The most sensitive pollution negotiating problem relates to vessel-source pollution. Many coastal states including Canada and Australia favor rather broad coastal state authority in a zone. Some maritime states have indicated a willingness to accept a coastal state enforcement right of international standards in a zone and standard-setting rights in exceptionally vulnerable areas. However, since the last preparatory session, the 1973 IMCO Conference has produced a good set of international standards and IMCO has been somewhat restructured to allow rapid, effective future action in setting new standards. Four options are presented which would change our existing position. Disapproval of all four options would mean that the U.S. would continue to support and work for adoption of its present position. One or more of the latter three options can be approved in conjunction with Option 1.

Option 1 provides that coastal states may enforce international discharge and dumping standards in a zone extending to a maximum breadth of 50 nautical miles from the coast, provided that vessels and aircraft subject to sovereign immunity would be exempt and that there would

be prompt release of vessels under bond, liability for unreasonable enforcement actions, and compulsory dispute settlement.

The arguments for option 1 are that U.S. must be prepared to move if it is to influence the majority and the outcome of the pollution negotiation. This move will also enable the U.S. to argue for a distinction between discharge and construction controls, thus avoiding coastal state rights regarding construction of vessels, a right which could seriously hamper navigation.

The arguments against option 1 are that existing U.S. proposals have not received adequate consideration by other delegations. It could also result in interference with navigation and would be of limited effectiveness in protecting the environment. Jose Vallarta, of Mexico, Chairman of the Pollution Working Group, has told us that his concept of a final settlement would include an economic zone satisfactory to other countries with no coastal state pollution control zone.

Option 2 would authorize the U.S. to support a maximum zone of 100 nautical miles if option 1 is approved and agreement cannot be reached on a 50-mile limit. The arguments for option 2 are that Canada, a leader in the pollution negotiation, has used the 100 mile figure in her domestic legislation. In addition if agreement is not possible on a 50-mile limit the U.S. would have to support a 100-mile position to prevent the negotiation from going to a 200-mile zone. The arguments against option 2 are that the area of potential interference by coastal states with navigation would be increased and environmental protection would not be significantly increased by an extension from 50 to 100 miles.

Option 3 authorizes the U.S. to support a coastal state right, in addition to the right in option 1, to establish and enforce discharge and dumping standards in the zone higher than the international standards, provided that the coastal state could neither discriminate between vessels of differing nationalities nor set standards which would have the practical effect of preventing navigation. The arguments for option 3 are that it would deal with the most visible and politically sensitive problem; would strongly enhance our ability to prevent coastal state construction standard-setting and would provide additional environmental protection particularly from oil tankers if adopted for an area broader than 50 miles. The arguments against option 3 are that the

DECLASSIFIED
Authority: E.O. 12958
By: [Signature]
Date: 05/25/04

environmental benefits would not be great; coastal state rights to set higher standards could undercut efforts to achieve higher international standards; and the already high international standards should be tried before they are increased.

Option 4 would allow the U.S. to support exclusive international vessel construction standards for pollution prevention for foreign ships entering ports but allow port states to apply internationally agreed standards prior to their effective date or entry into force, subject to consultations with appropriate members of Congress and their staff. The arguments for the option are that it would remove the inconsistency between U.S. opposition to coastal state residual authority to set construction standards and U.S. support for port state authority to set such construction standards. It may also help obtain maritime state support on other aspects of the vessel pollution issue. The arguments against the option are that certain Congressmen would find it difficult to accept relinquishment of this right embodied in U.S. legislation since most tankers entering U.S. ports are not covered by the new IMCO construction standards, and since, under the IMCO Convention, a few major flag states can block amendments. Moreover, port states, unlike coastal states, are likely to act reasonably so as not to disrupt their own trade.

Recommendation

Although the options reflect the areas of greatest concern, it is recommended, in any case, that the U.S. be authorized to explore privately the concept of a "Ship-rider" approach to enforcement of tanker discharge standards, pursuant to which a ship-rider would be placed aboard each tanker and be required to report any illegal discharges to the next port-of-call or the flag state which would have to take enforcement action against the vessel. In addition, the U.S. should be authorized to explore privately coastal state standard setting, subject to IMCO approval, of construction standards for well-defined areas with special ecological and navigational problems.

7. Scientific research (Section G)

As a result of economic, military, and scientific interest, the U.S. has a major interest in assuring the maximum freedom of marine scientific research. The U.S. has proposed, as an alternative to coastal state consent, a series of obligations upon the researcher and his flag

state to respect coastal state resource interests in waters and seabed areas beyond the territorial sea where the coastal state exercises jurisdiction. These obligations include advance notification, participation, data sharing, assistance in interpreting data, and compliance with applicable international environmental standards.

To date, the response to the U.S. proposal from both developed and developing countries has been disappointing. It is agreed, however, that there should not be an early change in the U.S. position, but that we should make every effort to persuade others of its merits. In dealing with developing countries, the U.S. should also explore the possibility of fostering regional training centers for scientists, providing selected developing countries with research vessels, offering a significant contribution (\$50 million over 10 years) for regional centers and research vessels, and expanding the coastal state's right of participation by providing for the coastal state's scientists to participate in the research -- all appropriately linked to support for protection of marine scientific research. In discussion with developed countries, attention should be focused on the similarities of our research interests.

While it is agreed that there should not be an early change in the U.S. position, there is disagreement as to whether the Delegation should be authorized to accept a form of coastal state consent. An option is presented on this issue.

Option

If it is determined that there is no basis for agreement without a consent requirement and that an accommodation would better serve U.S. research interests than being outvoted, the U.S. is authorized to negotiate a consent requirement in areas of coastal state resource jurisdiction, provided that the coastal state is required to grant consent if specified criteria are met and provided, also, that consent must be presumed in the absence of a denial of consent within a fixed period of time.

The arguments for the option are that a consent requirement such as stated in the option would be a significant improvement over the existing Continental Shelf Convention in that consent could not be denied if specific criteria are met, and consent is presumed in the absence of a denial. It may prove necessary to move soon in view of the opposition to the present U.S. approach if we are to have any influence in avoiding a worse regime. Moreover,

REPORT

DECLASSIFIED
Authority: E.O. 12958
By: M. NARA Date: 05/25/04

US [REDACTED]

military reserach can only be protected by careful drafting which may require participation in drafting of the consent regime.

The arguments against are that it broadens the consent regime of the Shelf Convention to the water column as well as the shelf, and in areas where the continental shelf is less than 200 miles wide expands the consent requirement beyond the shelf. A consent regime is inconsistent with our objective of limiting coastal state jurisdiction, and even though carefully worded, provides the coastal state with a practical right of denial in individual cases. A change in position could draw attention to our interest in military research and cause difficulties in preserving it. Coastal states should have little more reason to support the option than our present position and thus a change in position could ultimately facilitate movement to a more stringent consent regime.

8. Compulsory settlement of disputes (Section I)

Although no change is required in the instructions concerning compulsory dispute settlement, a clarification is needed. Since the U.S. draft proposal omitted reference to dispute settlement in the territorial sea and straits and since the underlying problem in these areas relates to warships and state aircraft, an adjustment should be made.

Recommendation

It is recommended that compulsory dispute settlement apply to all parts of the Convention, but it would not apply to any dispute regarding a vessel or an aircraft entitled to sovereign immunity under international law without the express consent of the flag state.

[REDACTED]

TAB A

SUMMARY OF EXISTING POSITIONS AND
NEGOTIATING AUTHORITY

This summary outlines existing U.S. positions and negotiating authority. It is intended as an aid to the reader and is not intended to alter existing authority.

The territorial sea

The U.S. has proposed a 12-mile maximum limit for the territorial sea conditioned on a satisfactory regime for straits. We have made no proposals to alter innocent passage or the regime of the territorial sea, with the exception of transit rights in straits in accordance with our straits proposal. (NSDM 122; August 3, 1971 Article).

Straits

The U.S. straits article proposed that vessels and aircraft in transit through straits used for international navigation enjoy the same freedom of navigation and overflight, for the purposes of transit, as they have on the high seas. The article authorizes coastal states to establish corridors suitable for transit by vessels and aircraft. (NSDM 122; August 3, 1971, 1971 Article). The U.S. has described this as a limited right to transit a strait, not a right to conduct other activities.

The U.S. delegation is authorized to support international safety and pollution standards in straits. We have proposed mandatory respect for IMCO traffic separation schemes in areas where they apply, that state aircraft transiting straits shall normally respect ICAO standards, recommended practices, and procedures as they apply to civil air on the high seas and strict liability for damage caused by failure to respect the IMCO or ICAO rules; treaty language to this effect has not been introduced. The delegation is instructed to reserve on the question of upper monetary limits for strict liability. It is authorized to support mandatory adherence to ICAO standards, recommended practices, and procedures as they apply to civil aircraft on the high seas with an exception for special circumstances of operational necessity, if State and DOD representatives agree that the existing formulation is inadequate. (NSDM 177).

DECLASSIFIED
Authority: E.O. 12958
By: M/NARA Date: 05/22/04

Authority EO 12958
By MM NARA Date 05/25/04

With respect to enforcement, the report of June 20, 1972, approved by NSDM 177, stated the following:

"Under our straits proposal, a vessel that is not in transit in a strait is immediately subject to arrest or, in the case of warships, may be asked to depart for violation of coastal state laws and regulations. We believe the coastal states would logically have similar rights of implementation and enforcement of internationally agreed traffic safety and pollution standards in their territorial sea in straits."

Efforts to form a broader common front and a common understanding on language with states having similar interests, an attempt to ascertain how an exception for straits less than six miles wide would enhance our straits objectives, a position of nonopposition to the U.S.S.R. (except for its treatment of the Strait of Tiran) and other articles not incompatible with our interests, were authorized by NSDM 225.

We are authorized to make it clear that our territorial sea and straits objectives are basic elements of the President's Oceans Policy and that any treaty to which the United States could be expected to become a party would have to accommodate these objectives. (NSDMs 122 and 177). Statements to this effect have been made.

While in the last analysis the issue is one of substance and not labels, we are continuing our opposition to the innocent passage in straits proposals of our opponents and innocent passage as currently defined. (NSDM 225).

Archipelagos

While maintaining our nonrecognition position, we are authorized to undertake, without commitment, private exploratory discussions with Indonesia and other archipelago states indicating U.S. willingness to cooperate in considering possible formulations of archipelago claims that might satisfactorily accommodate U.S. marine resource and navigation interests, including those presented in the report of June 20, 1972 (resource jurisdiction with preservation of the residual high seas rights and free transit through and over international straits; corridors for free transit).

Pollution from vessels

We have proposed articles providing for exclusively international standards for vessel-source pollution, but with a flag state and port state right to impose higher standards. Warships and other vessels entitled to sovereign immunity would not be required to adhere to those standards. We are authorized to accept, but have not proposed, higher coastal state standards in the territorial sea outside straits. (NSDM 225).

The report of July 1, 1973, proceeded on the assumption of coastal state enforcement authority in the territorial sea, based on the provisions of the existing Territorial Sea Convention. We made no specific proposal in this regard. Beyond the territorial sea, we proposed a system of high seas monitoring coupled with port state enforcement, as well as coastal state enforcement authority in cases of imminent danger or pursuant to a dispute settlement order against a flag state for gross and persistent failure to apply international standards. We proposed no zone or precise geographic limitation on the exercise of these coastal state rights. (NSDM 225).

Compulsory dispute settlement and liability for unreasonable enforcement actions have been proposed.

Seabeds pollution

We have consistently proposed and supported adherence to international standards to prevent pollution from seabeds exploration and exploitation on the continental margin and the deep seabeds. (NSDMs 62, 122, 157). We are authorized to propose that a standard of strict liability apply to clean-up costs and pollution damage from seabeds exploration and exploitation. (NSDM 177). Compulsory dispute settlement has been proposed.

Resources generally

The report approved by NSDM 177 authorized us to ensure that other delegations understand that the establishment by international agreement of limited coastal state jurisdiction over fisheries and over the mineral resources of the continental margin subject to international standards and compulsory dispute settlement, as well as reasonable and secure investment conditions for U.S. private industry on the deep seabed, are basic U.S. objectives, and to correct any mistaken impression that we are willing to sacrifice our basic resource objectives in order to

COMMENTS - 1

ago
-
e

DECLASSIFIED
Authority: E.O. 12958
Date: 05/22/04

Authority EO 12958
By: MN NARA Date 05/25/04

achieve our territorial sea and straits objectives. Statements to this effect have been made.

Coastal seabed economic area (continental shelf)

Our new articles reflect the evolution of the substance of our authorized positions of exclusive coastal state rights over exploration and exploitation, subject to international standards and compulsory dispute settlement to protect other uses, prevent pollution from resource related activities, drilling and installations affecting its economic interests, protect foreign investment, and provide for some revenue-sharing for international community purposes. (NSDMs 62, 122, 157, 225).

We are authorized to support a 200-mile outer limit of the coastal seabed economic area, and an alternative depth or geological limit to embrace the continental margin where it extends beyond 200 miles. (NSDMs 122, 157, 225). We are authorized to support 12 miles alone, or in combination with 200 meters, as the inner limit of the zone, provided that revenue sharing could apply to a smaller area (e.g. seaward of 200 meters) or exclude existing leased areas if the zone begins at 12 miles. (NSDM 225). No specific area or amount for revenue sharing has been specified in the Coastal Seabed Economic Area articles. The relevant criteria expressed in NSDM 62 (also applicable to the deep seabeds) are as follows: "These royalties should be at a level that will make a substantial contribution to development, make participation in the treaty attractive to the necessary signatories, and at the same time encourage exploration and exploitation of the natural resources of the seabeds."

Deep seabeds

Under NSDM 62, the international regime would contain "international rules concerning pollution, liability, protection of navigation, work requirements, scientific research and other freedoms of the seas, settlement of disputes, expropriation, and similar matters, with "internationally agreed royalties...disbursed to an international community fund, principally for purposes of economic assistance to developing countries that are participants in the treaty" and "international machinery will be established to license and regulate exploration and exploitation of natural resources and collect the international royalties from this area." The substance of this position was incorporated in the President's May 1970 Oceans Policy

~~SECRET~~

Sta
Aug

sta
are
ope
aga
cou
col
(N
on
th
it
af
so
au
pr

Fi

fc
na
(
ov
m:
s:
u:
(
f
i
f
i
i
2
c
i
s

[REDACTED]

Statement, and the U.S. presented a detailed draft treaty in August 1970 based on this guidance.

Alterations in the treaty that do not go to the substance of our position were authorized in NSDM 122. We are authorized to continue opposing an international operating agency and measures that would eliminate protection against developing country control of the Council, but could indicate that developing countries should have greater control over the disposition of international revenues (NSDM 157). We are authorized to place primary emphasis on achieving practical protection of our interests rather than on cosmetics and terminology (NSDM 172). While making it clear that price and production controls adversely affect U.S. interests, we are authorized to pursue some sort of assistance arrangements by the international authority in the event of adverse economic impact on land producers (NSDM 177).

Fisheries

NSDM 177 states our basic fisheries authority as follows: "The delegation should continue to seek international acceptance of U.S. fisheries positions that (1) give the coastal state effective regulatory control over coastal species and over salmon throughout their migratory range on the high seas, subject to international standards and review regarding conservation and maximum utilization of coastal and anadromous fisheries, and (2) that provide for international regulation of tuna fishing." In pursuit of these objectives, authority to indicate privately U.S. willingness to support a possible fisheries compromise based on a fixed zonal approach is included (NSDM 177). The report approved by NSDM 225 indicated that we would not wish a zone to be narrower than 200 miles. NSDM 225 authorized "package" discussions with coastal states along these lines, in which we would not indicate opposition to a 200-mile economic zone if our substantive interests were accommodated.

With respect to coastal and anadromous species, reasonable coastal state licensing and fees (NSDMs 122 and 157), special reciprocal and other arrangements between states in a region irrespective of nondiscrimination requirements (NSDM 157), coastal state designation of regulatory areas (NSDM 157), and gradual phase out or compensation in connection with traditional distant water fishing (NSDMs 122 and 157) are authorized.

[REDACTED]

DECLASSIFIED
Authority: E.O. 12958
By: [Signature] Date: 05/25/04

DECLASSIFIED
Authority EO 12958
By MM NARA Date 05/25/04

DECLASSIFIED
A/ISS/IPB, Department of State
E.O. 12958, as amended
December 18, 2008

With respect to tuna, NSDM 122 authorized the delegation to explore proposals for accommodation, including reasonable licensing arrangements, but it should not take an affirmative position without referral to Washington. The report approved by NSDM 157 indicated the acceptability of reasonable and nondiscriminatory licensing and user fees established by regional or international organizations for tuna.

Sedentary species of fish (e.g. King Crab) would be subject to coastal state control. They could be treated either as seabed resources in the coastal seabed economic area, or as nonmigratory fisheries or a separate category under the U.S. fisheries proposal (NSDM 157).

Compulsory settlement of disputes has been proposed.

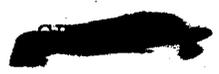
Scientific research

In areas of coastal state resource jurisdiction beyond the territorial sea, we are authorized to propose (and have largely proposed) that research be subject to notice to the coastal state, a right of coastal state participation, availability of all data and samples, open publication of results, technical assistance in conducting research and interpreting the significance of data and results, reasonable regard for other uses of the marine environment, and conformity with international environmental standards and coastal state drilling regulations (NSDMs 177 and 225). We are authorized to support projects that will give developing states the ability to interpret and use scientific data, to augment their scientific research expertise, and to have research equipment available, funded by revenues from the seabeds, by developed state contributions through multilateral funding programs, or both. (NSDM 177). Our deep seabeds proposals provide for international cooperation, availability of data and samples, open publication of results, and adherence to international environmental and drilling standards.

Provisional application

We have proposed provisional application of the deep seabeds and fisheries portions of a treaty, and indicated our willingness to consider provisional application of other aspects of an LOS treaty; we are authorized to support provisional application of other aspects of our LOS treaty package, in the light of its effect on our substantive objectives and relevant tactical circumstances, including our interests in promoting signature and prompt ratification of the entire treaty package. (NSDM 225).

Di
pr
ir
tc
as
ur
in
ai
di
(N
ne
ar
We
wi
or
ar



~~SECRET~~

Dispute settlement

Our substantive position with respect to all our proposals regarding areas beyond the territorial sea includes compulsory dispute settlement. We are authorized to place major emphasis on compulsory dispute settlement as a general principle applicable to all disputes arising under the Law of the Sea Treaty (subject to the sovereign immunity of warships, other government vessels and state aircraft, and leaving our options open regarding compulsory dispute settlement in the territorial sea and straits). (NSDM 225).

As to procedures, we are authorized to propose a new Law of the Sea Tribunal, specialized commissions, arbitral panels, or a combination of these. (NSDM 225). We have in essence proposed discretion to choose procedures with an LOS tribunal available in the absence of agreement on other procedures and in cases of urgency, and with arbitration for private investment disputes.

COMMENTS - 1

DECLASSIFIED
Authority: Ed 12958
By: M/NARA Date: 05/23/04