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LOS

To: Bud Barr
From: Bob Keeley

Sunday - NY Times - 7/18/82

'Avaricious' Sea Law Sensibly Rejected

To the Editor:

The Times makes two fundamental mistakes in its discussion of the Law of the Sea Treaty [editorial July 13]. The first is to assume that any mining is feasible under the treaty; in reality, the treaty is enormously hostile to private investment, having been drafted to discourage, not encourage, deep seabed mining.

The second is to ignore the very real precedential impact of this treaty on other international economic and political negotiations. It institutionalizes international income redistribution under the control of the third world, mandates transfer of American technology and creates a regime of international democracy for nations that are manifestly anti-democratic.

The Reagan Administration did the only sensible thing in rejecting this avaricious grab for the resources, money and technology of the industrialized nations.

DOUG BANDOW

Washington, July 13, 1982

The writer is former deputy United States representative to the Law of the Sea Conference.

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Statement of

Northcutt Ely *

Before the

Foreign Affairs Committee

of the House of Representatives

On the

Law of the Sea Treaty

June 23, 1982

* Partner, Law Offices of Northcutt Ely, Washington, D.C.

7/26/82

Dear Bill,

This is Mike Ely's statement which he never got the chance to deliver on June 23, 1982. Mike and I have exchanged all sorts of basic data on the LOS treaty. You may wish to use some of the points in Mike's statement which I have outlined in red ink.

Bob Keating

My name is Northcutt Ely. I am a lawyer in general practice, with offices in Washington, D.C.

My testimony relates to the Law of the Sea Treaty, particularly its seabed mining provisions. I appear at the request of the National Ocean Industries Association, but the views that I express are my own.

On January 29 of this year, the President announced that major elements of the draft Convention on the Law of the Sea issued by the Third United Nations Conference on the Law of the Sea ("UNCLOS III") at the close of its tenth session in August of 1981 were not acceptable to the United States. The President's statement made clear that, for the draft Convention to become acceptable, it would have to be changed so that it:

> "(1) will not deter development of any deep seabed mineral resources to meet national and world demand:
>
> "(2) will assure national access to these resources by current and future qualified entities to enhance U.S. security of supply, to avoid monopolization of the resources by the operating arm of the international Authority, and to promote the economic development of the resources;
>
> "(3) will provide a decision-making role in the deep seabed regime that fairly reflects and effectively protects the political and economic interests and financial contributions of participating states;
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> "(4) will not allow for amendments to come into force without approval of the participating states, including in our case, the advice and consent of the Senate;
>
> "(5) will not set other undesirable precedents for international organizations; and
>
> (6) will be likely to receive the advice and consent of the Senate. In this regard, the Convention should not contain provisions for the mandatory transfer of private technology and participation by and funding for national liberation movements."

Note points (4) and (6). First, the treaty now provides (Art. 309) that no reservations or exceptions are permissible unless expressly permitted by other articles of the Convention. The seabed portion (Part XI) contains no such permission. The Senate must take it or leave it. Second, the seabed provisions are to be reviewed in another conference commencing 15 years after the earliest commercial production under the treaty (Art. 155), and amendments ratified by three-fourths of the parties "shall go into effect as to all parties," whether or not they ratify. Such an amendment would thus go into effect as against the United States even if the Senate voted against its ratification.

These provisions alone would make this treaty conspicuously unratifiable. But, despite the President's warning, they remain uncorrected.

At the eleventh session of the Conference, which was held in New York from March 8 to April 30 of this year, the U.S. delegation attempted to negotiate changes in the text which would accomplish the six objectives set forth in the President's statement of January 29. This attempt failed; although the Convention was modified in several peripheral respects, the changes did not conform to any of the six objectives of the President. Consequently, at the close of the eleventh session, the United States voted against adoption of the text.

The Reagan Administration is entitled to the gratitude of the American people for its courage in voting "No." The treaty's adverse effect on this country's future supply of critical strategic minerals is so drastic as to substantially threaten our national security and our mineral economy. The real danger here is to the American people, not simply to the American companies which are preparing to mine the deep seabed. The question is not what is good for mining companies, but what is best for American consumers and the national defense. These companies can, and, if necessary, will, put their money to work in less risky and more profitable projects.

But the departure of the American companies, controlled by American law and policies, would deprive the American economy and national defense of their one remaining opportunity to have permanent access to manganese, cobalt and nickel from sources not controlled by foreign countries, or foreign companies responsive to the policies of foreign governments.

A word about these metals, before returning to the terms of the Law of the Sea treaty. Pardon me if I occasionally lapse into use of its acronym, LOST.

Without manganese, not a pound of steel could be manufactured. Without cobalt, manufacture of a long list of items critical to national defense, such as airplane turbine blades, would be imperiled if not made impossible. Without nickel, stainless steel could not be produced. We are dependent on foreign countries for 99 percent to 100 percent of all of these.

As to manganese, the United States is not only virtually 100 percent dependent on imports, but is dependent for 90 percent of its supply on eight mines located in five countries. These are the Republic of South Africa, Gabon, Australia, India and Brazil. Two-thirds of our total imports come from the two African countries. There have been no major manganese discoveries for a quarter-century. Unless huge new mines are discovered somewhere, it is probable that by the end of the next quarter-century the United States' primary sources of manganese will be the Republic of South Africa and the deep seabed.

As to cobalt, the free world's major supplier is Zaire. The Committee will recall that when Cuban troops invaded Zaire from Angola, cutting off cobalt exports for a time, the price soared from less than $5.00 a pound to $50.00 or more.

As to nickel, while Canada is a major source, more than half of our total supply comes from mines in less-developed countries, and this ratio is increasing.

Copper, the fourth major seabed mineral, does not present such an ominous future, because the United States has large, if low-grade, copper reserves. But environmental constraints are a deterrent to their full exploitation, and the percentage of the American supply of primary copper coming from foreign countries, now about 20 percent, can be expected to increase.

In short, the assurance of continued accessibility of seabed minerals is vital to the American economy and national defense. These factors control the answer to the question of whether the United States should sign a treaty like LOST.

I turn now to some of the reasons why American companies cannot and will not spend a billion dollars per project to go into business under a law of the sea treaty like the present one, and why the control of seabed minerals will therefore be in foreign hands if this treaty comes into force.

There are two groups of reasons. The first is political in nature. The treaty would create a new government controlling two-thirds of the world's surface, aggressively committed to the anti-western principles of the New International Economic Order, substituting a political climate hostile to private investment for the present freedom of the seas. The second group of reasons relate to specific provisions of the Convention that would so restrict the usefulness of the investment as to make it unattractive to private capital even if the political climate were benign.

The treaty would create a political regime in which control would be vested in the Soviet Union and the less-developed countries, and in which American governmental effectiveness would be minimal at best. This is because the treaty would put an end to the principle of the freedom of the seas, now applicable to deep sea mining, and supplant it by a concept of ownership and sovereignty -- misnamed

the "common heritage" -- which would be vested in a new super-government empowered to grant or deny access to the seabed on terms prescribed by the treaty. Those terms, as my annexed analysis of the treaty demonstrates, articulate the philosophy of the centrally planned socialist governments, and the New International Economic Order envisioned by the "third world," not the market economy of the free world.

The Authority would be a government having three branches, like our own, the legislative, executive, and judicial, plus an astonishingly inflated bureaucracy. Let us examine these factors.

The "Supreme Organ" of the Authority is to be an Assembly, in which the United States would have one vote, among some 155 nations. A majority of votes could be cast by countries containing altogether less than half the population of the United States. The 226 million people of the United States would have exactly the same voting strength in the Assembly as the 26,000 people of Liechtenstein or Monaco, or the 21,000 of San Marino, or the 65,000 of the Seychelles Islands, if they should ratify. This Assembly would differ from the Assembly of the United Nations in that the new Assembly would have legislative powers.

Perhaps the clearest measure of the ignominious role of the United States is found in the composition of the "Council," the executive arm of the Authority. Of 36 seats, the Soviet bloc is expressly guaranteed three by name. The United States is assured none at all. It may perhaps be elected to a seat from time to time by other industrial nations, its competitors, in rotation with them. Otherwise, it must depend on election from time to time as representative of a geographical group designated as "Western Europe and others," our country being one of the "others," along with such countries as Samoa, Grenada, and Sao Tome.

Proponents of the treaty argue that the United States is implicitly assured a seat on the Council by the newly added provision which requires that the Council include among its members "the largest consumer" of "the commodities produced from the categories of minerals to be derived from the Area." But this really assures the United States nothing at all, and may well result in yet another Soviet bloc seat on the Council. The treaty does not prescribe how "the largest consumer" is to be determined. The largest consumer of one mineral is not necessarily the largest consumer of all four. Does the term guarantee a seat to each of them? Or does it refer to some kind of amalgamated consumption of manganese, nickel, cobalt and copper? If so, how is manganese consumption, which is measured in millions of tons, equated with cobalt consumption, which is measured in pounds? World consumption of manganese substantially exceeds that of cobalt, copper and nickel combined. The world's largest consumer of manganese in recent years, according to U.S. Bureau of Mines estimates, has been the U.S.S.R. It is far from clear that the United States is, or will continue to be, "the largest consumer" of the commodities produced from deep seabed minerals, whatever that term may mean.

The Authority is also to have a third branch of government, a judiciary. But this tribunal is forbidden to declare any act of the Assembly ultra vires, or to review any exercise of discretion by an administrative officer.

Of course the Authority must have a bureaucracy, called a Secretariat. An idea of its outlandish size can be gathered from the request of Jamaica, the headquarters country, for immediate U.N. funding for housing 2,000 of the Authority's staff. Another 1,000 are expected to attend meetings of the Assembly. All this to oversee perhaps 20 ocean mining projects, commencing a decade or so in the future. This housing project is to be funded out of the U.N. budget, of which the United States contributes 25 percent.

* Note: $130,000,000 is the estimated cost of the interim LOS Bldg for the Preparatory Commission's work!

I have touched only the high points of a regime that is wholly at variance with American concepts of the freedom of the seas. To us, this means free and non-discriminatory access to the ocean's resources by all the peoples of the world, subject only to the golden rule that one man's activities shall not injure those of his neighbor. And it must not be thought that our giving up the freedom of the seas with respect to the seabed will end the downward slide. If the LOST had proposed to vest in the Authority control of navigation of the very waters overlying the seabed whose freedom we are about to give away so casually, public outcry would stop the give-away in its tracks. But what, after all, is the rational distinction between the status of the bottom of the water column which constitutes the high seas, and the surface of that water column? The treaty can be amended at any time, by a three-fourths vote of its parties. The capitulation with respect to the seabed is supposed to have bought us recognition of navigational rights that we possessed anyway before the treaty was negotiated, such as free passage through straits, which became imperiled for the first time when the Nixon Administration acquiesced in substituting a 12-mile territorial sea for the historic three-mile line, as part of a general treaty. Even if there were real gains, they could be wiped out by an amendment ratified by three-quarters of the signatory states, and such a majority can easily be mustered by the third world. Would we then denounce the Treaty? We will have paid an enormous price for an insecure title.

So much for the over-arching political factors which make the LOST a very unattractive climate for billion dollar investments by American private enterprise.

As to the business features of the treaty: I have analyzed these in some detail in a memorandum annexed to this prepared statement, which I ask to have printed as part of my statement. I can summarize as follows:

To put the problem in a few words, the treaty gives the investor neither the assurance of access to the seabed minerals, nor the assurance of a right to recover them at economic rates of production, nor assurance as to how long that right will survive, notwithstanding the enormous investment required. A substantial part of this investment goes to subsidize a competitor owned by the Authority that regulates and controls the private investor. Private industry must transfer its technology to this competitor, misnamed "the Enterprise." The Authority is instructed to carry out a policy of protection of land-based producers from seabed mineral competition, and to limit seabed production to that end.

In more detail:

A company desiring to explore the seabed is denied access unless it accepts a contract with the Authority. To get a contract, an applicant must tender two mine sites that it has discovered at a cost of many millions of dollars, doing so in advance of any protection at all for its investment. The Authority is to keep one site (the better one, naturally), for the use by its own mining company, the Enterprise. The Enterprise is heavily subsidized. It is not limited to operating in the donated areas reserved for it. It can operate anywhere. The so-called "parallel system" is a misnomer. The private company must turn over its technology at forced sale prices to this competitor. It cannot use any technology that it fails to transfer, even if the transfer is impossible because the technology is owned by a third person who refuses to consent, or because the U.S. government forbids the transfer for reasons of national security, which it well may. Warsaw Pact nations will doubtless be represented on the board of the Enterprise. The Enterprise is free of taxes; private industry must pay burdensome exactions to the Authority as well as taxes to its own country. There is no assurance that the private applicant will get a contract even

to explore, let alone produce, the mineral deposit that it has discovered. The Enterprise, and less-developed countries, have preference for an exploration contract. If the private miner does get a contract authorizing exploration, there is no assurance that it will ever get an essential second piece of paper, called a production authorization, and its investment may stand idle. The LOST gives that warning explicitly. In addition, the treaty imposes production limitations, under an elaborate formula, and the Authority may also enter into commodity agreements which further restrict production from the seabed. The Authority is instructed to protect on-shore producing countries from reduction of their export earnings occasioned by mining of seabed minerals. If these limitations make it impossible to honor all applications for production authorizations, the Authority is to count up the authorizations already issued to nationals of various countries, and make a choice among the new applicants. In so doing, it is to enforce anti-monopoly principles. This is another way of saying that not all of the four American-created consortia can expect to be in production at any one time.

Proponents of the LOST argue that the provisions governing "preparatory investment in pioneer activities"--commonly referred to as "PIP" -- have the effect of "grandfathering" the existing rights of the U.S. consortia into the LOST regime, and free these consortia from the regulatory control of the Authority. An examination of the PIP provisions reveals that this is not the case. To start with, under PIP, each U.S. consortium must tender two mine sites to the Authority's Preparatory Commisison, and the Commission will decide which site the consortium may keep. With respect to the retained site, the consortium's operations must comply in every respect with the relevant provisions of the LOST and with the rules,

regulations and procedures of the Authority, including transfer of technology requirements, production restrictions, and subjection to revision as the result of a review conference, referred to in more detail later. The PIP dies if the government sponsoring the applicant fails to ratify the treaty. Moreover, the company must accept a brand-new and highly burdensome obligation, namely to explore the Enterprise's reserved site for it at cost plus ten percent. The Soviet Union and four other named nations have until 1983, the developing nations until 1985, to qualify for PIP, perhaps in conflict with the true pioneering discoverer. When all this is overcome, the company simply has acquired a preferred place in the line of applicants for a contract under the terms of a treaty which can make it impossible to finance the project. It is somewhat like being assured a priority in line for the guillotine. Such a scheme can hardly be characterized as one which "grandfathers" existing rights of the U.S. consortia, or which insulates such consortia from the powers of the Authority.

Even if the pioneer mining company successfully leaps over all of these hurdles, it finds that it has obtained a contract that cannot last longer than 20 years (all contracts expire 25 years after a date which antedates by five years the coming into force of the treaty). Second generation seabed mining companies that attempt to go into this business, say ten years after the first entrants may receive contracts, may get contracts that are only good for as short a time as ten years, far too short to amortize a billion dollar investment. This is because all contracts are to end in any event after a "review conference" which is to be convened 15 years after the date of the earliest commencement of commercial production, by anyone, anywhere. This treaty jargon can all be compressed into a single warning: Watch Out. You are on notice that this is an "interim" regime. We are going to get rid of you, and

substitute a world-wide monopoly by the Enterprise, as soon as we have picked your brains and your pocket, and you are here at our sufferance for not over 20 years at most. The door can thus close against seabed mining by American companies at precisely the time when the United States becomes dependent on the seabed for minerals that this country -- and the west generally -- must have in order to survive.

This is not an attractive scheme for a mining company's management to put before its board of directors or its bankers.

It should not be attractive to American government policy makers. Part XI of the treaty, the seabed mining chapter, if it stood alone, would never be agreed to by the United States as a substitute for the freedom of the seas. If it is to be accepted, it must be on the basis that the United States is prepared to pay a devastating price in order to obtain something deemed more important than the free access to strategic minerals that we are surrendering. That "something" has not yet been identified.

But the question is often asked: Why are some European companies willing to operate under the treaty, if American companies are not? The answer lies in the nature of their other operations, and their relations with their own governments.

Take as an example the fine British companies, British Petroleum, Consolidated Goldfields, Rio Tinto Zinc, and Shell. The British Government granted subsidies to induce British companies to go into deep sea mining. That government owns a majority of the stock of British Petroleum. B.P. owns petroleum concessions in less-developed countries that are infinitely more important to it than is deep sea mining. If mining of the seabed were never to take place, the difference would not be apparent on the bottom line of the company's balance sheet. But if deep sea mining does take place under circumstances that alienate the third world, the

possible consequences to the company must be weighed. B.P. was thrown out of Libya by Qadaffi because of the supposed failure of the British government to prevent the take-over by the Shah of Iran of three Arab islands in the Persian Gulf, which Britain was powerless to prevent. On the other hand, there must be a certain appeal to British pride in Margaret Thatcher's refusal to follow the easy path of expediency in the Falklands crisis. B.P. now owns Standard Oil Co. of Ohio, which in turn owns Kennecott. All of the companies in the Kennecott consortium are now foreign-owned or controlled. Foreign companies also own from 25 percent to 75 percent of the equity in the other so-called American consortia. This adds emphasis to my statement at the beginning that the issue here is not what is good for mining companies, but what is best for the American consumer and the national defense. American national policy must be made in the Congress and the White House, not overseas in the board rooms of foreign companies.

American investors and consumers are entitled to rely on the instructions given by Congress to the American negotiators in the Deep Seabed Hard Mineral Resources Act of 1980, to bring home a treaty that would not impair their investments or the continuing availability of strategic minerals. Those instructions, and the statute's reaffirmation of the principle of freedom of the seas, were all quickly forgotten in the Carter Administration, notwithstanding the fact that this act was approved by a vote of 312 to 80 in the House, and in the Senate by acclamation.

The hopes for an American seabed mining industry, and, more important, the hopes of the American people for a source of strategic minerals free of foreign domination, rest now in the hands of the Reagan Administration. If it signs a treaty

like the present LOST, American companies can be expected to cut their losses and either get out of this business altogether, or to rent out their technology to the new masters of the seabed, as oil companies do in the OPEC countries. But while individual companies can perhaps save themselves in this manner, and indeed some may profit by rising above principle, so to speak, the American public cannot. The hard minerals of the deep seabed offer this country its last chance to convert a resource that was discovered and made usable by American technology into a reserve of critical strategic minerals, free of foreign domination. One OPEC is enough.

Saint Paul admonishes us to stand fast in the evil day, and, having done all, to stand.

I have confidence that the Reagan Administration, with the support of the Congress, will measure up to this responsibility.

INQUIRY
MAGAZINE

DOUG BANDOW
Editor

7/26

Dear Bill:

I just wanted you to see my continuing efforts to fight back the forces of evil and darkness. This will be coming out in the Journal of Social and Political Studies this fall.

Look forward to seeing you on Saturday.

Cheers,

B

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THE UNITED STATES VERSUS THE LAW OF THE SEA

By Doug Bandow

The recent refusal of the Reagan Administration to sign the treaty adopted by the Third United Conference on the Law of the Sea ended a decade-long attempt to reach a consensus agreement on the uses of the oceans. The decision, reached after a year long review and a final negotiating effort in the Spring, has led to predictable criticism from home and threats from abroad. But any other decision would have sacrificed fundamental American interests for the illusory benefits of a fatally flawed international accord.

Despite the lack of public attention which has been paid to the admittedly complex law of the sea (LOS) treaty, the issue is vital. The oceans of the world transport our goods, feed our peoples, expand our scientific knowledge and can provide the natural resources to accelerate our economic growth and reduce our dependence for strategic materials on potentially unstable land-based suppliers.

The resources on the seabed are immense: there may be at least one trillion tons of manganese, cobalt, nickel, and copper, in the Pacific Ocean alone. U.S. scientists have more recently discovered extensive deposits of polymetallic sulfides, which contain sulfer, lead, copper, zinc, and silver.

The effort to write a comprehensive agreement to govern the use of the ocean was sparked by President Truman's 1945 declaration of national jurisdiction over the continental shelf, and the subsequent haphazard extension of such national jurisdiction by other countries around the globe. The First Conference on the Law of the Sea was convened in 1958, and drafted four conventions dealing with jurisdiction and fishing. It was unable, however, to resolve questions of the breadth of territorial seas (traditionally three miles) and exclusive fishing zones. The Second Conference met in 1960, and it also met with failure.

As national claims further expanded, these issues were eventually conjoined with that of deep seabed mining, mining research, and others. The UN declared the seabed to be the "common heritage of mankind" in 1970, and the Third Conference organized in 1973. It took 11 sessions to conclude, the last of which ended on April 30, after approving the treaty by a vote of 130 to four, with 17 abstentions.

regulatory system for deep seabed mining.

The treaty that resulted consumes some 175 pages and is made up of 439 articles. Among its more important provisions are increasing territorial sea limits from 3 to 12 miles, setting 200 mile exclusive economic zones, establishing rules for marine research, navigation, and pollution, and creating a regulatory system for deep seabed mining.

The Dispute over Deep Seabed Mining

The most serious problems with the treaty lie with Part XI, which covers deep seabed mining. The treaty would establish an International Seabed Authority (ISA), to regulate private mining, and an Enterprise, to mine the seabed for the ISA. The ISA would be governed by a one-nation, one-vote Assembly, and a 36-member Council, and would be given wide discretion to discourage private sector mining, and to favor the developing countries and other so-called disadvantaged states.

Some have charged that the U.S. is letting ideology overcome pragmatism, but there are very real philosophical interests at stake. Indeed, treaty proponents at home and abroad have been among the most rabid ideologues: the entire LOS process was an ideological battle to define the "common heritage of mankind." Whether the phrase meant open access, or controlled access, determined the direction of the entire process. Thus, our negotiators effectively foreordained the result of the Conference when they paid scant attention to ideology, essentially leaving the philosophical field to the developing countries and their allies.

The result was a collapse of the attempt by the industrialized countries to build an economically workable seabed system upon a philosophical foundation of sand. The Third World (represented by the "Group of 77" or "G-77") used its control of the philosophical high ground to rework the technical, economic, and pragmatic proposals of the West to reinforce its underlying ideology of common ownership of seabed resources and controlled access to the seabed.

Corporate Socialism

Indeed, the ideology eventually ratified by the conference was one far more extreme than even the traditional notion of common ownership with open access to all who wanted to use the resource. Instead, the treaty embodies the doctrine of equal ownership of the resources, irrespective the nation's interest in, contact with, or ability to use them, as well as the right to arbitrarily block others from using them. This doctrine of corporate socialism is extremely dangerous, and perverts the meaning and purpose of property ownership.

The treaty should have provided for a system of private

~~The treaty should have provided for a system of private~~ property ownership for the development of previously unowned natural resources. The best claim for ownership lies with those who, in the Lockean sense, identify the resources and mix their labor and capital with them. Those who take risks to develop the seabed – not political leaders from far distant countries – have the best, and most moral, ownership claim.

Ironically, the system ordained by the treaty violates two other philosophical principles normally held dear by almost all Americans, including treaty supporters. The first is the principle of non-discrimination, to which most of the civil rights laws are directed. The treaty enforces significant discrimination against private miners, requiring them, in many cases, to subsidize the competing Enterprise. The effect is to deny equal opportunity to American citizens.

The second is related, and concerns the traditional abhorrence of monopolies, and particularly government monopolies. The very same measures that discriminate against private miners have the potential of giving the Enterprise monopoly power. Such a monopoly would be far more dangerous than any conceivable private monopoly because it, through the Authority, has the political means to strengthen its economic hold on the minerals market.

However, there are very real pragmatic reasons for opposing the treaty as well. It is popular to ascribe these concerns to simply giving in to the greed of the big mining companies, but nothing could be further from the truth. Seabed mining would benefit American consumers as well as business: economist Jim Johnston, in the Marine Technology Society Journal, estimated that seabed mining would yield economic benefits in the hundreds of millions of dollars in the latter part of this century, increasing to billions in the next century. Economic benefits would also inure to the peoples of the developing countries, since they are mineral consumers, trying to develop.

would also ✓

Moreover, there is reason for concern as to the stability of some of the suppliers of potentially critical minerals for America's defense industry. Zaire, for instance, provides most of our cobalt, which is vital for the aerospace industry. Diversifying our suppliers would lessen the danger of a supply cut-off.

The simplest pragmatic reason for dumping the treaty is that it will prevent, not encourage, deep seabed mining. It is true that some treaty advocates, such as the former Deputy Chairman of the U.S. delegation, believe that no mining will occur in the absence of a treaty, and that American companies will be obliged to go under foreign flag to mine. This argument has cogence only so long as one believes that unsubsidized mining will occur under the treaty.

Disincentive to Private Enterprise

In point of fact, little, if any, purely private mining is likely to occur under the terms of the treaty approved in April. Though Elliot Richardson, for one, who headed the negotiations under President Carter, has written that the Western nations had succeded in creating "a framework for assured access to seabed minerals by our companies on fair and reason-

nations had succeeded in creating "a framework for assured access to seabed minerals by our companies on fair and reasonable terms and conditions ... ," in fact the seabed regulatory system is enormously hostile to mineral development, and appears to be designed to prevent mining. Though almost any regulatory structure, as we have learned to our regret in our domestic economy, will hinder productive activity, misallocate resources, and create inefficiencies, the ISA is almost unique in the degree to which it discourages development.

Access to the seabed is controlled by the ISA, many of the stated objectives of which are affirmatively anti-development. Permission to mine would be subject to votes by the Legal and Technical Commission, which, despite its name, could have its membership stacked, and the Council, which would be dominated by developing countries. Thus, U.S. companies, despite America's disproportionate stake in deep seabed mining, would be dependent on the good will of countries which are its economic competitors or political adversaries for approval to mine.

To merely seek permission to mine, a company would have to obtain an exploration contract, survey two potential minesites at its own expense, allow the ISA to choose one, and then apply for a production authorization. The ISA could turn down the request if it chose to favor another competitor, such as a developing nation or the Enterprise, which wanted the site, or if it found that allowing mining would violate the so-called anti-monopoly and anti-density restrictions on the number of sites any one nation could have, or the overall limitation on mineral production set by the treaty.

Some treaty proponents have placed great faith in the Preparatory Investment Protection resolution, which is intended to protect companies making investments prior to the treaty coming into force some years hence. However, the resolution grandfathers them into this anti-mining treaty, not out of it. Thus, they will be under the jurisdiction of the ISA. Even worse, the resolution only applies to a specified number of companies; new entrants could not even avail themselves of the limited protection provided for existing miners.

Mining is discouraged in other ways as well. The treaty gives the ISA the power to mandate the transfer of mining and processing technology from private companies to the ISA and developing countries. Though compensation is to be paid, such a forced bargaining situation could hardly be expected to yield just compensation. Moreover, the ISA would determine how broadly to define technology, and the company would have no effective redress for the unauthorized disclosure of any of the technology, no matter how sensitive or secret it was. Some treaty proponents have tried to minimize this burden, by arguing that this power is unlikely to be invoked. Even if it is never used, the threat is enough to browbeat business. Indeed, there is no issue that has so angered the American business community, and appropriately so: proprietary technology is their private heritage, not that of the rest of the world, and premature disclosure will discourage technological development across-the-board.

Further, as noted earlier, private miners face significant discrimination by the ISA. They must donate a minesite and transfer technology to the ISA for the Enterprise, their home

discrimination by the ISA. They must donate a minesite and transfer technology to the ISA for the Enterprise, their home countries must finance the Enterprise through loans and loan guarantees, and they are subject to a host of levies that the Enterprise is exempt from, including an application fee, a fixed annual fee, and a production and/or royalty charge.

Finally, even if a private company found this system attractive enough to invest in, believing that it could extract enough minerals over the 20 to 25 year life of the minesite to make the operation pay off in an often uncertain minerals market, the company would have to accept the risk that all of its investment might be prematurely terminated, since the treaty provides for a Review Conference to meet 15 years after the commencement of commercial production under the treaty. A three-fourths vote of the member nations – 80% of which are G-77 members, and another 10% of which are members of the Soviet Bloc – could amend the seabed provisions in any manner desired, with the only recourse for a dissenting nation to denounce the entire treaty, an unlikely step. Given the consistent opposition to any private mining by the Third World (which originally proposed a monopoly Enterprise as the sole miner), it is likely that all private mining would be swept away.

Interestingly, no treaty proponent has offered a defense ~~of this article, the Washington Post incomprehensibly suggested~~

of this article; the *Washington Post* incomprehensibly suggested "why not let the lawyers handle it?", not realizing that the lawyers had handled it, which is why it is in the treaty. In fact, one prominent theretofore treaty proponent last Spring told G-77 negotiators that even he could not support the treaty without a requirement that the U.S. be required to approve any proposed amendments.

An Unfortunate Precedent

An equally compelling pragmatic objection to the treaty is the pernicious precedent which it will pose for future international economic and political negotiations. As noted earlier, the LOS process has been an ideological battleground. Unfortunately, most treaty proponents, aside from those who share the Treaty's socialist theology, simply choose to ignore this point. In reality, the LOS Conference is not an isolated negotiation, but rather, an integral part of an international network of conferences, organizations, and UN resolutions, through which the Third World has been pursuing the New International Economic Order (NIEO).

The NIEO is essentially based on the erroneous premise that developed nations have grown wealthy by exploiting developing ones, and therefore "owe" reparations. The developing nations want to control international organizations to enforce the redistribution of not only wealth, but also technology, natural resources, and information. Related proposals include the so-called Moon treaty, codes of conduct promulgated by the United Nations Conference on Trade and Development (UNCTAD), press restrictions proposed by the United Nations Educational, Scientific, and Cultural Organization (UNESCO), and business regulations from the World Health Organization (WHO), the United Nations Industrial Development Organization (UNIDO), and the Commission on Transnational Corporations.

The LOS treaty is important for the success of the NIEO because it would, for the first time in history, establish an organization, controlled by the Third World, to redistribute money and technology. It would promote the goal of international democracy for nations that are supremely anti-democratic, the notion of communal control over unowned natural resources, and allow terrorist organizations to share in the benefits of international agreements. Once legitimized, the repressive collectivist restructuring of international relations would become the new norm, leading to additonal demands for redistribution under the control of the Third World.

Navigation Rights

The seabed articles are not the only ones in the treaty, of course; indeed, most treaty proponents argue that they are not the most important ones. For example, Richard Frank, former administrator of the National Oceanic and Atmospheric Administration, argues that "theoretical adverse implications" of the Treaty's precedential effects are insufficient to outweigh the substantive benefits to the U.S. from the navigation articles.

~~There is no doubt that, for years, the U.S. knowingly traded~~

~~the substantive benefits to the U.S. from the navigation articles.~~

There is no doubt that, for years, the U.S. knowingly traded away the seabed provisions for the navigational articles. But that it did so does not mean that it rationally traded them away. Despite the common wisdom that the navigational articles enhance navigational freedom, there is substantial reason to doubt how much the U.S. really gains from the treaty. Navy Secretary John Lehman told the World Affairs Council that:

> " A careful reading of the draft convention also reveals that navigation interests are compelled to rely upon a highly complex assortment of treaty provisions. Informed opinion concerning the correct interpretation of those provisions is — to understate — quite varied."

The problem, of course, is that provisions with different interpretations provide weak protection for America's merchant marine and navy. Indeed, the treaty is ambiguous as to the level of navigational freedom allowed in the 200 mile economic zones, as to which straits are international, and whether or not submerged passage of submarines, a long-time goal of the navy, is allowed. The treaty even unambiguously retreats some from free navigation by allowing the temporary suspension of innocent passage in territorial seas for weapons testing.

But even if the articles were clear, how important would they be? Many observers believe that the treaty provisions will constitute the new customary international law, setting general standards that the U.S. will be able to take advantage of without actually signing the treaty. Some treaty proponents argue otherwise: nations may attempt to make a distinction between the customary international law that governs the U.S., and the treaty law that governs everyone else. But the better view appears to be that the U.S. will gain most of the navigational benefits in any case; thus, the navigational advantages to the U.S. of signing the treaty may in fact be near zero.

Moreover, economic and commercial interests make it likely that straits and archipelagic waterways will remain open to commercial navigation even in the absence of a treaty. Indeed, our experience is that they will remain open even with a war between nations with little respect for international law, such as Iran and Iraq. As for military navigation, given the geographic location and physical depths of the world's straits, and the current state of military technology, only a handful are important, and most are bounded by friendly states.

In any case, guarantees from the treaty are likely to have only a marginal impact. Rights of passage will be respected only so long as both parties believe it to be in their interest to do so. International relations is a history of agreements being ignored or tossed aside when one or another nation changes its mind; the Treaty even allows countries to withdraw.

More important to protect our navigation rights are our bilateral relations with the affected parties, and the existence of any bilateral treaties or informal arrangements. Even more important is our ability to enforce our right, and our willingness to do so.

~~Moreover, it seems fair to assume that neither the U.S. nor a coastal state would allow the presence or absence of rights~~

Moreover, it seems fair to assume that neither the U.S. nor a coastal state would allow the presence or absence of rights in an esoteric treaty signed years before to stand in the way of protecting vital national interests. Only in the marginal cases, where neither side felt that the inconvenience and minor criticism they would receive for breaking the Treaty was worth the benefit of doing so, would the treaty likely have an effect. The effect, though very real - Defense Department personnel are always complaining that the State Department objects to beneficial naval maneuvers to avoid upsetting coastal states — is not critical. Such a marginal benefit does not outwiegh the very real treaty costs of discouraging deep seabed mining, and setting adverse precedents.

Other Considerations

The other provisions of the treaty offer even less reason to sign the treaty. The treaty does provide for ownership of the outer continental shelf, but its provisions for eventual revenue sharing will discourage exploration for the up to two trillion barrels of oil located below the seabed. The boundary provisions have been sharply criticized, and would hurt us in the Gulf of Mexico and the Bering Sea. The articles governing fisheries add little to American and customary international law, and are disadvantageous for American tuna fishers. The pollution articles, often praised by treaty proponents, actually may hinder the ability of coastal states to control maritime pollution, and do nothing about coastal-based sources of maritime pollution, the largest ones. And even treaty proponents admit that the marine research provisions merely

hinder

ponents admit that the marine research provisions merely codify the restrictive system now in place.

Three other arguments have been made for the U.S. to sign the treaty. One is that refusing to sign will cause significant foreign policy damage, giving the Soviet Union and its acolytes an opportunity to make massive propaganda gains. But while it is undoubtedly true that the U.S. will suffer some short-term diplomatic losses, the real questions are how severe and for how long? Just how important is the LOS treaty to most nations? The answer — consider how little interest the treaty has aroused in this country — is probably not much. Botswana will denounce us when it signs the treaty, and then go back to dealing with us. In fact, taking a firm stand against the extravagant demands that have been made on the U.S. may increase America's bargaining power in other contexts, yielding a net long-term diplomatic advantage.

Another contention is that if the U.S. allows "an historic global organization" to proceed without U.S. participation, demonstrating that "American influence, participation and leadership" are unnecessary, the U.S. will suffer the adverse precedent of an irreversible loss of influence. The problem with this argument is that it ignores what happened in the LOS negotiations. The rest of the world already decided that the U.S. was unnecessary; American influence was already lacking. If anything, the ability of the rest of the world to make such a system work without us would make them less likely to attempt to force us to pay and provide the technology for any new global schemes. It seems silly to suggest that the U.S. retains influence when it pays extortionate demands and participates with no power in an organization it opposed.

Finally, the most apocalyptic argument is that our refusal to sign the treaty undermines the pursuit of a stable international order, harms the prospects for international stability and justice, and threatens world peace. This vision rests on the unfounded assumption that an international agreement — any international agreement, however flawed, and whatever the substantive interests we have sacrificed — promotes international stability. In fact, an unfair agreement, such as this one, is more likely to promote friction than eliminate it.

But more important still is the type of global order being created. Order, if it is accompanied by immoral wealth redistribution and inefficient economic regulation, is not desirable. A better order would result from the rejection of the treaty: the spontaneous order that arises from voluntary cooperation and the marketplace. The order of freedom, rather than that of control preferred by the Third World, is a better promoter of world peace.

Once having decided to reject the treaty, the issue is not finished. The U.S. must work to create alternative arrangements to allow seabed mining to occur, if it is economically worthwhile. The first step is to amend the Deep Seabed Hard Mineral Resources Act (1980) to eliminate the prohibition on mining before 1988; our domestic industry should be encouraged, not discouraged, from mining.

~~The U.S. must also work to convince other industrialized countries not to sign, and eventually ratify, the treaty, while~~

The U.S. must also work to convince other industrialized countries not to sign, and eventually ratify, the treaty, while attempting to forge an agreement with them for mutual claim recognition and dispute resolution – the so-called Reciprocating States Agreement. Should this prove to be impossible, as it currently appears it may be, the U.S. should strive for informal arrangements to include at least dispute resolution for conflicting mining claims. The point the U.S. should make is that the real potential competitor to the other industrialized countries for minesites is the U.S., not the Enterprise; therefore, other countries seeking to mine should deal with the U.S., not the Enterprise.

Finally, the U.S. must focus on the long-term. Though it is likely that most countries will sign the treaty, it is not likely that they all will ratify it. Most of the propaganda value for countries such as France and the Soviet Union will occur when they sign; the hard financial burdens, particularly without the U.S. providing 25%, will begin with ratification. Thus, there is an excellent chance that the ISA, once inaugurated, will only serve as the propaganda shell for a group of countries without the technical ability to mine, and the financial resources to run the system.

America's fundamental philosophical principles and national interests are worth defending. Only an outright refusal to sign the LOS treaty was consistent with those principles and interests. It is now incumbent upon the U.S. to construct a system to promote voluntary cooperation and exchange and encourage seabed development. Only a system of this kind will meet the interests of all of the peoples of the world, as distinct from the interests of the leaders of an ad hoc majority of the world's nation states.

File - LOS

Alternatives to Sea Treaty Won't Work, Experts Say

By Carole Long

Two U.S. experts on the Law of the Sea Treaty have criticized the administration's pursuit of alternatives to the accord.

Elliot L. Richardson, chief U.S. delegate to the Law of the Sea Conference under the Carter administration, and Leigh Ratiner, deputy chairman of the Reagan administration's delegation to the conference, said they do not believe U.S. companies would mine the mineral-rich seabed under the alternatives.

The two men made their remarks at a House Merchant Marine and Fisheries Committee hearing.

The sea treaty, drafted during eight years of negotiations among 151 nations, would establish international rules on deep-seabed mining, navigation and overflight rights, sea boundaries, marine mammal protection and pollution.

Nations will have their first chance to sign the treaty at a conference in December in Caracas, Venezuela. It will go into effect one year after 60 nations ratify it.

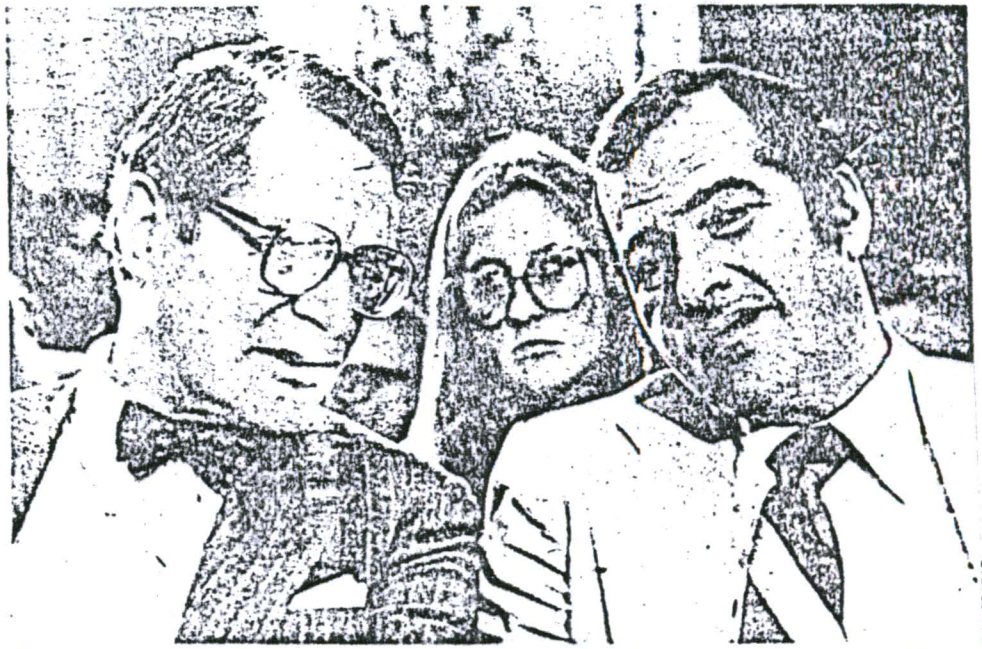
The administration decided in early July not to sign the treaty. Since then, it has begun negotiating a separate multilateral agreement on mining claims rights with the United Kingdom, Germany, Japan and other industrial countries. The accord is known as the Reciprocating States Agreement (RSA).

The administration has also begun processing applications from American-based mining consortia for licenses to conduct seabed-mining exploration. The Deep Seabed Hard Mineral Resources Act, passed in 1980, allows companies to undertake such activity with or without an international agreement on mining.

Richardson said U.S. government surveys, including a recent report by the General Accounting Office, have concluded there will be no "mini-treaty," such as the RSA, because U.S. allies will not sign one.

Ratiner said a U.S. permit issued outside the treaty to allow companies to mine "is a worthless piece of paper which no commercial, publicly owned bank could use as a basis for extending credit."

Bill,
Amazing that Richardson would say this in public testimony!
Bob K.



RON CESAR

Sea-treaty experts Elliot L. Richardson (left) and Leigh Ratiner testified that U.S. firms would have difficulty mining the seabed under the administration's alternatives.

If the treaty is signed and ratified by 60 nations, "such a license or permit would be in conflict with a widely accepted international treaty and would surely be contested in international judicial proceedings," Ratiner said.

In 1980, Richardson urged passage of the seabed act that set up the licensing process. But he said he "never believed there would be a nickel invested in mining under the legislation."

He said he supported that legislation because it was needed as a bargaining chip in negotiations on the Law of the Sea Treaty.

Both Ratiner and Richardson said an American company that wants to mine the deep seabed will have to do so by participating in an expedition run by a foreign country that has signed the treaty.

Ted Kronmiller, deputy assistant secretary of state, disagreed with Ratiner and Richardson. He told committee members that the administration believes U.S. companies will be able to mine under domestic law or with the agreement of other countries.

He said he recently polled the four mining consortia that have applied for licenses to explore, and three said they believed they could operate under the U.S. law.

Ocean Mining Associates, a Virginia-based consortium, said it is prepared to operate outside the treaty and will not mine under a foreign flag, Kronmiller said. The other companies have not yet made a decision.

file LOS

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 5, 1982

The President today announced his intention to nominate Theodore George Kronmiller to have the Rank of Ambassador while serving as Deputy Assistant Secretary of State for Oceans and Fisheries Affairs.

Mr. Kronmiller served in the United States Naval Reserve as Lieutenant from 1970-1979. From 1974-1975 he was an Attorney Advisor on the Appeals Board of the Department of Commerce. From 1975-1976 he was Deputy Head of the Commerce Department Contingent of the United States Delegation to the Third United Nations Law of the Sea Conference. He was with the National Oceanic and Atmospheric Administration from 1975-1978, serving as Attorney Advisor (1975-1976), Consultant to the Marine Minerals Division (1976-1977), and Counsel for International Law (1977-1978). He was with the United States House of Representatives as Counsel of the Subcommittee on Oceanography from 1978-1979, and Counsel of the Subcommittee on Fisheries and Wildlife Conservation and the Environment from 1979-1981. Since 1981 he has been Deputy Assistant Secretary of State for Oceans and Fisheries Affairs in the Department of State.

Mr. Kronmiller was born February 12, 1948, in York, Pennsylvania. He graduated from Duke University (B.A., 1970) and the University of Virginia Law School (J.D., 1973). His foreign language is French.

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United States Department of State

Under Secretary of State
for Political Affairs

Washington, D.C. 20520

August 5, 1982

MEMORANDUM FOR THE SECRETARY

SUBJECT: Law of the Sea

You have recently received a proposed "action plan" on Law of the Sea (LOS) which calls for direct Presidential involvement in trying to get our allies to stay out of the LOS Convention. My own strong feeling is that the President should not spend his political capital on this issue at present for three reasons:

-- There are too many other things on the plate (e.g., sanctions, steel, grain, arms control); neither our LOS interests nor our other interests will be helped by adding further to the existing load.

-- We have not come up, even in our own minds, with a clear conception of what an "alternate regime" will look like. Ideally it would maintain all of those aspects of the LOS Convention which we do not oppose (e.g., navigation and overflight rights, fishing, continental shelf, territorial waters, pollution control, etc.), while writing new rules for deep seabed mining which would suit us. At this point, we have barely addressed the legal and political implications of such an effort, and to drive it with Presidential horsepower now seems premature at best.

-- It won't work anyway and it's not worth the cost. Most of our allies have already said that they do not intend to oppose the LOS Convention. Several have voiced serious problems with some parts of it, but on balance believe that being a part of the international regime is preferable to being outside it. Besides disagreeing on substance, they disagree on procedures and feel that we did not consult adequately and showed unnecessary haste in announcing that we would not sign.

The action plan also recommends that we send a "special presidential envoy" to meet at high levels with allied governments. His objective would be to urge others to defer a decision on signing the Convention and to keep open the option of joining us in an "alternate regime" later. I think this is a good idea and, depending on how his instructions are written, the emissary could help in the consultation process and in formulating our

future policy steps. I think Jim Buckley would be an ideal envoy. He has dealt with LOS since the early days of the Administration, he has outstanding political sense, and he knows the Europeans.

Lawrence S. Eagleburger

file LOS

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THE SECRETARY OF STATE

WASHINGTON

~~CONFIDENTIAL~~

August 10, 1982

MEMORANDUM FOR: THE PRESIDENT

From: George P. Shultz GPS

Subject: Law of the Sea

I am transmitting herewith the proposed action plan for US efforts to establish an alternative deep seabed mining regime, as decided upon by the designated Interagency Group (IG). I agree with the IG's recommended action plan except for the recommendation that you personally initiate contacts with other governments on the action plan.

I believe that you should not become involved at this initial stage because we want to reserve your intervention and capital for later stages in the LOS dialogue and for other major issues. I will urge our allies not to make premature commitments to sign the LOS Convention pending the arrival of a special U.S. emissary in early September.

I recommend that Under Secretary of State Jim Buckley be chosen as your emissary because of his familiarity with LOS issues and with the European leaders he would be calling upon, and because his rank will help underscore presidential interest in the issue.

Attachment:

Proposed Action Plan.

~~CONFIDENTIAL~~

DECL: OADFR

~~CONFIDENTIAL~~

Law of the Sea Policy
Action Plan to Establish an Alternative
Deep Seabed Mining Regime

NSDD 43 directs the Department of State, in coordination with the interested agencies and the NSC, OMB and OPD staff, to prepare an action plan to establish an alternative deep seabed mining arrangement outside the Law of the Sea Convention. Following are the recommendations on near-term actions to establish such an arrangement.

All concerned agencies recommend that we initiate this plan of action immediately.

Our short-term objectives would be to:

- o dissuade our allies from making or announcing a decision to sign the LOS Convention or other action that would prejudice our ability to work out an alternative seabed mining arrangement and, most importantly, not to make any commitment to ratify the LOS treaty.

- o engage in a dialogue with our allies and possibly other countries on the serious problems in the LOS seabed mining regime and, thus, the need for and benefit of an alternative regime; at the same time, elicit their concerns about protection outside of the LOS Convention of their other oceans interests.

Our longer-term objective is to convince our allies and other nations not to ratify the LOS treaty but, instead, to join us in an alternative regime.

If we are to achieve our objectives, the President must be involved in this effort. Head of government to head of government contacts are vital to initiate the action plan and may be necessary again as we implement it. A presidential communication to London, Bonn, Paris, Rome, Brussels, the Hague, and Tokyo should be made as soon as possible. This message would underscore the serious problems of the LOS treaty and forecast the arrival of an emissary.

A presidential envoy would be sent to foreign capitals in early September. He should be of high rank and be prepared to discuss these matters with foreign officials of ministerial rank. The envoy would: be prepared with instructions and supporting materials appropriate to the political level

contacts he will make; seek to obtain a political commitment from our allies to defer decisions on signing the LOS treaty while we explore means of satisfying our law of the sea interests outside of the LOS treaty; outline our problems with the LOS seabed mining regime and our proposals for an alternative deep seabed mining regime; emphasize that such a regime, if widely accepted by the seabed mining states, would create a viable legal and practical alternative; and sound out their concerns on non-seabeds LOS issues to enable us to focus clearly our subsequent contacts. After the emissary's initial visits, further consultations would include appropriate LOS experts.

The emissary should initially visit the Federal Republic of Germany, the United Kingdom, France, Japan, Belgium, Italy and the Netherlands. A second tier of countries might, subsequently, be approached by the same or another appropriate emissary.

By August 14 the preparatory work for the presidential communication and emissary visits will be completed. This would include:

- o a draft communication from the President;
- o instructions for the emissary with talking points; and
- o background material appropriate for the political nature of the emissary's contacts. This paper will include an outline of an alternative regime and background to enable the emissary to sound out the concerns of the allies on non-seabed issues.

Within this period, suggestions on the emissary will be forwarded to the White House.

During the implementation of this action plan we must take advantage of the Secretary of State's and other cabinet officers' contacts with their foreign counterparts to press our LOS concerns. This effort should be coordinated carefully to ensure that cabinet officers are prepared properly and their contacts used to our fullest advantage.

August 12, 1982

OVERCOMING INTERNAL ADMINISTRATION RESISTANCE TO ACQUIRING COMMITMENTS FROM EUROPEAN GOVERNMENTS WITH OCEAN MINING INTERESTS NOT TO SIGN THE LAW OF THE SEA TREATY

Summary

There is agreement within the Administration to seek commitments from the European ocean mining nations (UK, FRG, France, Italy, Belgium and The Netherlands) to defer a decision to sign the LOS treaty in December and to join the U.S. in the meantime in negotiating an alternative ocean mining regime.

In order to achieve this result, it will take Presidential and Cabinet level pressure on their European counterparts. Messrs. Buckley and Eagleburger have convinced Secretary Shultz, who is trying to convince Judge Clark, that higher level effort would be futile and we shouldn't waste our ammunition.

They have already abandoned efforts to recruit support from other developed nations and all developing nations. Thus, if the U.S. fails with the six European nations, President Reagan will be left hanging by his thumbs.

The papers are on Judge Clark's desk. Unless he is persuaded otherwise today, he will likely approve the low level selling effort, which just isn't enough to get the job done.

August 12, 1982

OVERCOMING INTERNAL ADMINISTRATION RESISTANCE TO ACQUIRING COMMITMENTS FROM EUROPEAN GOVERNMENTS WITH OCEAN MINING INTERESTS NOT TO SIGN THE LAW OF THE SEA TREATY

Problem

Following President Reagan's decision, announced on July 9, not to sign the Law of the Sea Treaty, various interested Departments were directed to formulate a plan to obtain international support for the President's decision to operate outside the treaty. At the interagency working level, an action plan was outlined as directed. Its central strategy is to concentrate U.S. diplomatic efforts on seeking the support of European governments which have either passed ocean mining legislation similar to the U.S. law, or which have companies active in ocean mining. Such European nations include the United Kingdom, France, West Germany (which have enacted ocean mining laws) and the Netherlands, Belgium and Italy (which have not yet enacted

ocean mining laws, but which have companies active in two of the four international consortia which have applied for ocean mining exploration licenses pursuant to U.S. law).

Australia, Canada, Norway and other developed nations, plus the Soviet Union, with land-based nickel, copper, cobalt and manganese mining operations, are aggressively promoting signature and ratification of the treaty, because they recognize it would deter competition from seabed miners producing these four metals. The drafters of the proposed U.S. action plan have also written off hopes of obtaining support for the President's decision among third world nations, because of their ideological commitment to the treaty as a crucial step in the establishment of the New International Economic Order.

Hence, working level Administration strategists feel that so long as a sizable majority of the European ocean mining nations decline to sign or ratify the treaty that there will be very few other nations with the technology, economic interest, and available capacity who are likely to seek authorization to mine the seabed pursuant to the

treaty. They reason that with most of the U.S. and European ocean mining companies operating outside the treaty, the threat to their operations, flowing from a treaty which has entered into force, but which their governments have refused to ratify, can be effectively minimized. On the other hand, the threat to U.S. companies operating outside the treaty would be significantly increased through the signature and ratification of the treaty by a sizable majority of the aforementioned six European ocean mining nations.

Accordingly, their action plan recognized the need for concentrated political fire power, including calls from President Reagan to these six European Chiefs of State, supplemented by U.S. Cabinet level interventions with their European counterparts. The strategy assumes that there is not much utility in trying to obtain commitments from other developed and developing nations in rejecting the treaty.

A memorandum from Larry Eagleburger to Secretary Shultz dated August 5 (attached) has provided the principal thrust for lessening the likelihood of our obtaining a commitment from a sizable majority of the six European ocean mining nations to defer any decision to sign or ratify the treaty.

Without aggressive interventions by the President, Secretary Shultz and other U.S. Cabinet officials, directed at their European ocean mining counterparts, the European perception will likely be that (1) President Reagan has chosen to limit his intervention to a lower level, and (2) that their signature of the treaty will not, in all likelihood, be viewed as personally offensive to the President.

Mr. Eagleburger's three arguments in justification of limiting the scope of the U.S. effort in seeking selected European support of the President's decision on the treaty are highly debatable. First, regarding his contention that there are "too many other things on the plate", there always have been, and there always will be, a number of other highly contentious matters on the foreign policy plate. To imply that the Law of the Sea issue should be subordinated to other existing international problem areas is to concede that the isolation of President Reagan from the rest of the world on the Law of the Sea Treaty issue would be an easily tolerable result. To specifically assert that our other interests will not be helped by adding further to the existing load is to suggest that the President's decision on

the Law of the Sea Treaty should be sacrificed for such other interests.

Secondly, to suggest that it would be premature to invoke Presidential horsepower on the LOS issue until the Administration develops "a clear conception of what 'an alternate regime' will look like", demonstrates ignorance of the facts. It is well understood at the interagency working level that a minimally acceptable, bare-bones, alternative ocean mining regime need only involve the enactment by nations interested in ocean mining of statutes which would be compatible with the existing U.S., French, U.K. and West German ocean mining laws. These laws provide a mechanism for the negotiation of an alternative regime limited to the reciprocal recognition by such nations of each other's exploration licenses and ocean mining permits for existing ocean miners, as well as providing a mechanism for the allocation of future such licenses and permits to new entrants. All of the existing aforementioned ocean mining nations are fully aware of these fundamental positions, all of which have already been incorporated into prior drafts of a Reciprocating States Agreement. Far more essential than wasting precious time on tinkering with existing past

drafts, is to engage nations with ocean mining interests in ongoing discussions leading toward the negotiation of such an alternative regime. The ad referendum agreement arrived at last month in Brussels with the European ocean mining nations provides an ample mechanism for continuing international discussions leading toward the consummation of an acceptable alternative regime.

Additionally, the contention that "it won't work and it's not worth the cost" directly challenges a decision already made by the President, not only not to sign the treaty, but to recruit the support of other nations in developing an alternative regime. Further, with respect to the contention that it will not work, it must be recognized that among the European ocean mining nations, support for the treaty is strongest at the sub-Cabinet level because that is the level of those nations' representatives who negotiated the Law of the Sea Treaty and who are enamored with their own creation. The prime minister and foreign minister level representatives among most European governments have not been directly involved in LOS negotiations. Thus, they are at the level most susceptible to aggressive Presidential and Secretarial level

interventions intended to persuade them of the pitfalls affecting our mutual interests which would result from the signature or ratification of the Law of the Sea Treaty.

As to the assertion that "it's not worth the cost", President Reagan publically stated precisely the contrary on both January 29th and July 9th. His clearly stated rationale addressed not only the importance to the U.S. of secure access to strategic ocean minerals but, with equal poignance, derided the creation of a new multinational institution, i.e. , The International Seabed Authority (which would not only be damaging to U.S. international political and economic interests, but would establish undesirable precedents facilitating the creation of additional such institutions inimical to U S. interests).

Finally, there was the implicit statement that the Europeans believe that their being outside the treaty will provide no means of assuring protection under international law for commercial and military navigation, fishing, scientific research and other ocean uses. This argument can be dismissed by our correctly asserting that the same rules of customary international law that now govern such ocean

uses which are, for the most part, also reflected in the LOS treaty, will continue to be applicable regardless of which nations ratify or refuse to ratify the treaty.

A failure to obtain commitments from European ocean mining nations to remain outside the treaty would serve as a deterrent to U.S. companies making investment commitments to operate under U.S. law. If such investments are not made, there will be no means of assuring "national access to these resources by current and future qualified entities to enhance U.S. security of supply", a goal specifically enunciated by the President in his January 29 decision. Conversely, the commitment of a sizable majority of European ocean mining nations to join the U.S. in operating outside of the treaty would facilitate investor confidence among U.S. and European ocean mining companies in operating under the existing domestic legal regime.

The American Mining Congress has testified that it fully supports the President's decision and that U.S. ocean mining companies are continuing to proceed under U. S. law. The American Petroleum Institute, the Chamber of Commerce, the National Association of Manufacturers, the NOIA, and

other leading industry groups also support the President's decision. Several member companies of these organizations are ready to assist the President in seeking European industrial support for operating outside the treaty.

Conclusion

The NSC staff is in receipt of the above mentioned working level action plan calling for forceful Presidential intervention and of the Eagleburger memorandum and related correspondence. Absent a direction to the contrary, Judge Clark is likely soon to approve the lower level approach.

Unless lower level U.S. consultations with European ocean mining nations are buttressed by aggressive interventions by the President and Cabinet members, accompanied by carefully selected "carrots and sticks", the likely result will be nearly total U. S. isolation from the rest of the world, and the entry into force of a treaty which, by its very terms, is likely to deter, if not prohibit, U.S. investment in strategic ocean minerals.