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THE WHITE HOUSE

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WASHINGTON

INFORMATION

January 20, 1970

MEMORANDUM FOR DR. KISSINGER

FROM: Robert E. Osgood *ROO*

SUBJECT: Under Secretaries Committee on Continental Shelf

On January 29 the Under Secretaries Committee is scheduled to meet in order to reach an agreed USG position on the definition of the continental shelf and related questions.

The following discussion, based on the analytical briefs written by State, Defense, and Interior, describes the existing legal regime for the continental shelf and its deficiencies, the issues before the Committee, the U. S. interests upon which these issues are said to impinge, the positions of the departments, and the pros and cons of these positions.

Existing Law

The 1958 Geneva Convention on the Continental Shelf, ratified by the U. S. and 38 other states, defines the continental shelf as extending outward from the territorial sea to a line where the water is 200 meters deep plus an area as far as the "superjacent waters admit of the exploitation of the natural resources." On the shelf, so defined, a coastal state has sovereign and exclusive rights to exploit natural resources, but the Convention specifies that these rights do not affect the high seas status of superjacent waters.

Deficiencies of Existing Law

The adequacy of this Convention is called into question by several factors:

(a) the provision concerning the area of seabeds that can be exploited is ambiguous, and the maximum allowable area of coastal state rights is disputed;

(b) the rapidly advancing technology of seabeds exploitation

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greatly expands the application of this provision and threatens to lead to proliferating unilateral claims;

(c) in practice, the extension of exploitation rights beyond the 550-meter isobath will lead to the exclusion of SOSUS listening devices even if exploitation rights do not become claims to total sovereignty;

(d) with the whole water column (from the subsoil of the seabeds to the surface) coming to be considered as an ecological unit and with the need to control superjacent waters in order to protect jurisdictional claims to the seabed, the expansion of exploitation rights on the seabeds tends to lead to claims of exclusive control in the water column;

(e) the extension of water column exploitation tends to lead to claims of sovereignty in the same area and in the superjacent air space, and both kinds of claims jeopardize the achievement of a proposed law of the sea treaty for the orderly use of seas, narrow straits, and air corridors;

(f) many states, including coastal states, have not signed the Seabeds Convention and may therefore use it as a jumping off point for their own claims.

Issues Before the Under Secretaries Committee

1. What definition of the legal width of the continental shelf under national jurisdiction of coastal states should we seek? Narrow: Out to the 200 meter or, at most, 550-meter isobath (depth from surface to shelf)? Or wide: to the seaward portion of the continental rise? Or some kind of intermediate zone?

2. By what procedure should the definition of the continental shelf be reached: Formal international agreement or unilateral declarations which eventually become customary international law?

3. Pending international determination of the definition of the continental shelf, should we seek a moratorium on further unilateral claims and exploitation beyond the limits stated in the Geneva Convention of 1958 (200 meters isobath) or some other limit?

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Why These Issues Arise Now

For two years the UN Seabeds Committee has been trying to formulate a new seabeds convention. DOD and Interior have not been able to agree on the terms of such a convention or even if there should be a new convention. The Commerce Department has generally sided with Interior. The State Department has taken a middle ground that in some respects satisfies Interior but not DOD. Consequently, this Government has lacked a position (except abstention) that it can take on the continental shelf issues before the UN Seabeds Committee. This makes it difficult for the U. S. to dissuade the UK, Canada, and other states from unilaterally extending their national jurisdiction. Our silence is awkward and may precipitate unilateral claims.

Recently, the need to reach a unified USG position became more acute because: (a) Uruguay proposed a resolution equivalent to a moratorium (favored by DOD) in the Seabeds Committee and the U. S. could only abstain; (b) Secretary Laird, fearing a rash of unilateral American claims far out on the shelf, asked Secretary Hickel to delay issuance of leases for exploitation of the continental shelf beyond the limits of current exploitation; (c) Senators Jackson, Pell, Metcalf have asked State specific questions concerning the location of the boundary, but have received no reply.

U. S. Interests

The United States has a number of interests that are said to be affected by the definition of the continental shelf.

1. Military: DOD claims that a boundary beyond the 550-meter isobath or unilateral claims to any part of the seabeds would, in practice, exclude the placement of SOSUS, threaten the exclusion of submarines, and jeopardize achievement of a law of the sea treaty, which is needed to assure rights of passage by warships, merchantships, and military airplanes.

2. Commercial exploitation and scientific exploration: Interior and Commerce stress the importance of maximum U. S. access to the rich natural resources (oil, mineral, and fish) of the ocean column beyond the 200-meter isobath. These departments and other groups stress our national interest in gaining maximum sovereign rights of scientific exploration. Others argue, however, that, given the proliferation of unilateral claims by states, our commercial opportunities on the shelves

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adjacent to foreign states are likely to be greater if they depend on an international regime over the area beyond a narrow boundary than if they depend on bargaining with foreign states for leases and risking expropriation of U. S. national enterprises abroad.

3. Scientific research: Government agencies and scientific institutions are finding it increasingly difficult to obtain the consent of coastal states to conduct scientific research on their continental shelves, largely because of suspicion that scientific research may be tantamount to scientific exploration for commercial purposes. The scientific community inside and outside the Government believes that our national interest requires that coastal states be limited to the narrowest possible area of control over scientific research.

4. Avoidance of national disputes: The expansion of commercial exploitation of the seabeds may lead, through the proliferation of unilateral "ocean grabs," to nasty international disputes which the United States, as the principal oceans user, will find difficult to avoid. The fisheries dispute with the CEP countries in Latin America may be a forerunner.

The Department of State is particularly conscious of the unfavorable political consequences that might follow from such disputes. DOD stresses that they can be avoided only by an international agreement.

5. Preserving good relations with the LDCs: The coastal LDCs regard the oceans as a promising area of exploitation from which they do not want to be excluded. At the same time, they feel that this promise is threatened by the most advanced technological and maritime states and by the legal regime for the oceans which represents the interests of these maritime states. Hence, without knowing exactly how their interests would be affected by different legal regimes, the LDCs are inclined to define their rights broadly against more restricted legal regimes that seem to serve the special interests of the U. S. and other major maritime powers. Accordingly, a number of Latin American states have claimed territorial waters out to 200 miles. (It should be noted, however, that the developed states do not lag in making water column claims-- witness Canada's claims to Arctic waters enclosed within a line around archipelagoes and to shelf resources out to the abyssal ocean floor, in spite of the more limited rights accorded coastal states under the Continental Shelf Convention. It should also be noted that U. S. companies are getting LDCs

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to make broad exploitation leases to them and that the American petroleum industry is foremost in pushing for a wide shelf, while the fishing industry pushes for wider and more exclusive fishing zones.)

Therefore, some argue that unless we formulate and conduct our oceans policies with attention to the sensitivities and interests of the LDCs, we are in danger of getting into a rich-poor contest with the LDCs over the exploitation of ocean resources; and that, in any case, we cannot induce enough LDCs to accept the restrictions of national exploitation rights that are necessary for the orderly use of the oceans unless we can show them that such a legal regime is attentive to their interests (i. e., go along with their desire to be bribed).

6. Rational and equitable utilization of deep seabed and ocean resources for economic development and other purposes; One can argue that the U. S. has a general interest in seeing that the resources of the ocean are used for the benefit of mankind, including the poorer countries, rather than merely for the few countries that can exploit them. It can be argued that the beneficiaries of these resources should include the inland as well as the coastal states. The operational consequence of this interest is the establishment of some sort of international regime to regulate exploitation and distribute a fair proportion of the commercial benefits to developing countries.

Department Positions (The initiator of the controversy is Defense. The chief antagonist is Interior. State aspires to be the arbiter.)

A. Defense

Position

1. We should seek a narrow boundary, preferably out to a 200-meter isobath but in no event greater than a 550-meter isobath or 50-mile boundary.
2. This boundary should be determined by formal international agreement.
3. We should support the UN resolution (passed by an overwhelming vote in UNGA) calling for a moratorium on seabed exploitation beyond the limit of national jurisdiction until a formal international agreement is reached.

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4. We should propose an international regime for the area beyond the continental shelf boundary which would assure substantial economic benefits for the LDCs.

Rationale

1. A narrow boundary is essential for SOSUS emplacement.

Argumentation:

(a) Interior concedes that military requirements make the right to emplace SOSUS at the 550-meter isobath or closer to shore essential. Defense's point, however, is that areas beyond 550 meters are crucial for SOSUS emplacement. Interior contends that sovereign rights to explore and exploit resources in this area would not interfere with such military uses, since the Geneva Convention limits sovereign rights to the exploitation of resources. Defense argues that, although this is technically correct, it is unrealistic to suppose that nations will permit foreign military use of areas in which they have sovereign exploitation rights.

(b) Interior argues that the way to prevent erosion of U. S. freedom to deploy military devices on the continental shelf is to take a tough stand on our legal rights under the Convention. Defense replies that, although this is theoretically an option, in practice the U. S. has not and will not assert its rights (especially where military devices are concerned) and contest foreign restriction of them at the cost of acrimonious disputes. Furthermore, the Convention is not so universal or unambiguous as to be a strong reed to rely on. The only way to stop the steady erosion of these rights by unilateral action, Defense argues, is to establish a new international agreement and precise boundary.

(c) State proposes that the right to conduct military activities beyond the 200-meter isobath be explicitly protected by treaty. Defense believes that no such right is saleable.

(d) Interior believes that "it is possible and perhaps likely" that "in a relatively few years" the state of the military art

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will permit listening devices to function in water depths much greater than 550 meters. Defense says that the need for placing hydrophone arrays in the areas Interior would place under coastal state jurisdiction is increasing, that substitute systems have failed, and that "for the foreseeable future SOSUS will be the mainstay of U. S. anti-submarine warfare operations."

2. A wide shelf would lead to attempts by coastal states to claim as territorial sea those waters, now recognized as high seas, above the continental shelf, thereby preventing achievement of a law of the sea treaty to protect rights of free navigation and flight.

Argumentation:

(a) Interior contends that the Geneva Convention provides no basis for expanding territorial sea claims and that the way to protect freedom of navigation is through a law of the sea treaty, whereas an attempt to gain a new international agreement on the continental shelf would lead to a conference to consider anew all law of the sea questions in a context that could well result in a treaty inimical to defense and resource interests alike. Defense takes the position that, regardless of the Geneva Convention, there is an historically demonstrable tendency, backed by a certain logic, for claims of exploitation rights on the continental shelf to lead to claims of exploitation rights in the whole water column and for these claims, in turn, to lead to claims of total sovereignty; and that before a law of the sea treaty can be obtained, unilateral claims will have made it unnegotiable. Defense agrees that there is a danger of an omnibus oceans conference; accordingly, in agreement with State and Interior, it supports current efforts to get Soviet cooperation in pushing for a conference confined to a law of the sea treaty on the breadth of the territorial sea and free passage through and over straits as soon as possible. The USSR has just agreed to this.

(b) Defense argues further that a wide shelf would lead coastal states without important mineral deposits on their continental shelves (or without continental shelves) to feel justified in claiming exclusive access to superjacent waters following the example of the CEP countries, which, lacking continental shelves, claimed 200-mile territorial water zones after President Truman proclaimed sovereign exploitation rights on the continental shelf.

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(c) Defense contends that even if a territorial sea limit were defined prior to a continental shelf boundary, coastal states would increasingly prohibit military activities on the shelf on the grounds that they interfere with exploration and exploitation.

3. In order to gain the assent of the necessary number of LDCs to a new Convention defining a narrow boundary, as well as for the sake of general principles of equity, we should establish an international regime to assure substantial economic benefits to the LDCs from exploitation beyond a narrow boundary.

Argumentation:

(a) Interior argues that this would give away valuable resources to an inefficient and as yet undefined international regime weighted against U. S. interests. Defense responds that the U. S. will have more control over deep sea resources in an international regime established by treaty than in bilateral dealings with coastal states.

(b) State agrees that concessions to the interests of the LDCs are necessary to gain their adherence to a new Convention but believes that the best way to make these concessions is not to turn over regulation of exploitation to an international body but rather to provide that a proportion of profits in a broad area of national exploitation should be paid to an international community fund. Defense holds that this will not work (see discussion of State's proposal below).

4. A formal international agreement is the only way to prevent the proliferation of unilateral claims to the continental shelf defined broadly and stop the erosion of rights on the high seas.

Argumentation:

State is inclined to agree that a new international treaty is needed; but Interior claims that the outcome of a treaty might not be so favorable as relying on international acceptance of unilateral ex parte declarations over time. It argues that the attempt to get a new Seabeds Convention could result in a treaty as unfavorable to our military as to our resources interests. Defense does not agree.

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5. Without a moratorium on claims beyond national jurisdiction, pending an international agreement, the very prospect of an agreement will accelerate the pace of unilateral claims so as to jeopardize a favorable agreement.

Argumentation:

Defense considers a moratorium very important; but neither Interior nor State proposes a moratorium, and Interior would probably oppose one. State would not oppose a moratorium on exploitation but did oppose the UNGA resolution recommending a moratorium on claims and exploitation.

B. Interior

Position

1. The 1958 Geneva Convention provides an adequate basis for protecting this nation's sovereign rights in exploiting the continental shelf resources throughout the continental shelf, slope, and rise.
2. If a new convention is to be negotiated, it should define the boundary of national jurisdiction for exploitation and exploration to correspond with the entire shelf, slope, and rise.
3. In developing a deep seabeds regime (beyond national jurisdiction, on the ocean floor) we should proceed cautiously and await further study and technological experience rather than commit ourselves to an international regime.

Rationale

1. The Geneva Convention of 1958, as an existing international agreement is preferable to having to depend on some sort of international regime for access to resources on our continental shelf and foreign shelves.
2. Agreement to a narrow shelf would be irrevocable for all time. Having abandoned our claims to the resources of a wide shelf, we could not later reassert them.

Argumentation:

Defense's arguments against this rationale have been covered above. In addition, they argue that it is not lawful under the

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convention to extend the coastal states' jurisdiction to include the slope and rise. With less insistence, State also considers the present legal regime inadequate. It adopts the principle of international benefit from, though not administration of, seabed resources beyond the 200-meter isobath and proposes an international regime for exploration and exploitation beyond the continental shelf. It also believes that Interior's position does not give adequate protection to the interests of other states in the zone of national jurisdiction.

C. State

Position

1. We should seek an international agreement that would establish national jurisdiction over seabed resources to a depth of 200 meters.
2. There should be an international zone beyond this boundary to the seaward edge of the geologic continental rise or to where the continental margin ends if no rise exists (approximately 2500 - 3200 meters).

In this zone:

- (a) the coastal state should have jurisdictional rights to exploration and exploitation but not to the exclusion of the rights of other states to conduct other kinds of activities, including military activities;
- (b) the right of scientific "exploration" will be defined so as to assure freedom for legitimate scientific research;
- (c) standards, including safeguards against pollution and hazards to navigation, are to be enforced by coastal states;
- (d) every coastal state will be obligated to pay an agreed small portion of the value of all mineral production into an international community fund;
- (e) coastal states would agree to certain guarantees against expropriating concessions they had granted and would accept international arbitration in cases of expropriation;

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3. The exploration and exploitation of the resources of the seabed beyond the intermediate zone would be governed by an international regime (the precise nature of which is under study).

Rationale

1. Giving the coastal state exclusive jurisdiction over resources in the intermediate zone would provide a sounder basis for protecting our commercial interests than international administration and machinery.

Argumentation:

(a) Defense contends that, as time goes on, our commercial interests off foreign shores will be better protected by international administration than by bilateral deals with ambitious and nationalistic coastal states, and that jurisdictional claims on the seabeds will lead to claims to the superjacent waters. State does not deal with this argument but seems to share Interior's skepticism about international administration. Interior will approve the exclusive jurisdiction feature and may accept an international payoff as a much less obnoxious alternative to international administration.

(b) Defense claims that proposal of an intermediate zone would be a clear indication to the rest of the world that the U. S. seeks a wide continental shelf and would encourage other countries to follow suit. State claims that the explicit protection of the rights of other states in the international zone and the restriction of national authority in the zone to "jurisdiction" rather than "sovereign rights" will guard against this tendency. Defense regards this alteration in terminology as a futile cosmetic device.

2. U.S. military, scientific and commercial interests will be protected by the specific limitations on national jurisdiction in the intermediate zone.

Argumentation:

Defense claims that neither freedom of military activities or of scientific research in a jurisdictional zone is practically negotiable; therefore, in a conference these provisions would be discarded, leaving only a wide continental shelf. Interior probably will not object to this provision. As a fall-back position in a conference Defense might possibly accept an intermediate zone with these restrictions as a last minute compromise in

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order to foreclose more dangerous terms, but it would add a clear guarantee of freedom of the seas in superjacent waters.

3. The agreement of coastal states to pay a small royalty to a designated international agency for development purposes will serve our international interests and be an inducement to LDCs to sign a treaty.

Argumentation:

Defense agrees that international payoffs are better than no concession to the LDCs but holds that international administration is essential to check the proliferation of unilateral claims. Interior will be indifferent to this provision but will greatly prefer it to international administration.

Decisive Questions

From an international standpoint one can argue that the United States, as the major maritime power setting an example for others, ought to be concerned about the rational and orderly use of ocean resources for the greatest benefit of mankind, including the poorer nations. From a national standpoint, too, it can be argued that we have an interest in preventing disputes over resources by other nations as well as disputes to which we are a party.

From a narrower hard-nosed national point of view, however, the critical considerations are these:

(a) If we were not concerned about the adverse effects of commercial activities on the continental shelf on our military activities (listening devices and free navigation), we would not be greatly concerned about unilateral extensions of national jurisdiction and sovereign rights except as they impeded our access to the resources off other nations' coasts.

(b) If we were not interested in the maximum rights of exploitation off our own coasts, we would be less concerned about defining the legitimate area of sovereign rights and national jurisdiction narrowly.

Therefore, the core of the argument in the Government is between those most concerned about military security and those most concerned about commercial exploitation.

The larger interests of the international community come into the argument for three reasons: (a) as support of the arguments for a narrow boundary; (b) as a concession to the LDCs in order to induce them to accept a new agreement; (c) as a response to our feelings of international obligation and enlightened self-interest in the orderly use of the world's resources with a minimum of international friction.

In deciding on what position, if any, this Government ought to take in the UN Seabeds Committee, much depends on how one weights these three kinds of interests. But our decision should also depend on the answers to some critical questions of factual judgment that are in controversy:

1. Is there, in fact, a strong tendency for national jurisdiction over resources on the continental shelf to lead to similar claims of jurisdiction in superjacent waters, and for claims of exploitation rights to lead to claims of total sovereignty?
2. In order to stop this alleged process is the effective assertion of our rights to free navigation and seabed military activities a politically feasible or prudent alternative to seeking an international agreement?
3. In the long run will our exploitation of shelf resources be conducted under more favorable circumstances if national jurisdiction is defined broadly or narrowly?
4. Is the attempt to gain a new international agreement for the seabeds likely to succeed on the basis of restricted sovereignty and concessions to the international community, or is it likely to lead to an agreement less advantageous than the present regime from both the military and commercial points of view?
5. Are lasting guarantees of the rights of other nations -- including military activities -- within a zone of national jurisdiction over resources practically obtainable?
6. Will the prospects of a narrow boundary be foreclosed in the absence of American support for a moratorium? Would a moratorium indefinitely impede exploitation of the continental shelf? If a moratorium is advisable, should it apply to claims in addition to exploitation?