

MEMORANDUM

THE WHITE HOUSE
WASHINGTON

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ACTION
March 14, 1975

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Oceans Policy

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MEMORANDUM FOR: THE PRESIDENT
FROM: HENRY A. KISSINGER *HK*
SUBJECT: Instructions for the U. S. Delegation to the Geneva Session of Third U. N. Conference on the Law of the Sea

I. Introduction

In response to NSDM 260, the Chairman, NSC Under Secretaries Committee (NSC/USC) has submitted for your review the recommended instructions for the U. S. Delegation to the Third United Nations Law of the Sea Conference which begins its second substantive session in Geneva on March 17, 1975 (Tab C). Included with the recommended instructions are the Chairman's comments and recommendations (at Tab B), the formal comments of the fifteen U. S. agencies that have participated in the Under Secretaries Committee's work on the law of the sea including the Office of Management and Budget (OMB), and the comments of your Special Representative for the Conference, Ambassador John R. Stevenson (Tab D).

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This memorandum reviews U. S. objectives in the Conference, the recommended instructions on each of the major substantive Conference issues, the positions of the principal U. S. agencies concerned on those aspects of the instructions on which there are interagency disagreements, together with my recommendations. The NSDM for your approval at Tab A would provide policy guidance and the necessary instructions for the U. S. Delegation to the Conference.

As a major ocean user, the United States has important interests at stake in the Conference, including the safeguarding of: U. S. strategic mobility and capabilities; the freedom of navigation for U. S. commercial shipping; worldwide access to fossil fuels and hard minerals; orderly exploitation and conservation of fishery resources; protection of the marine environment from pollution; and access to the oceans for scientific research (including defense research).

The first substantive session of the Conference was held in Caracas from June 20 to August 29, 1974. Although the Caracas session did not produce a treaty or agreed articles in any area, progress toward a comprehensive treaty included:

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-- a general understanding that the law of the sea treaty should include provisions for a 12-mile territorial sea and a 200-mile economic zone. This understanding was supported by more than 100 countries, subject to acceptable resolution of other issues, including unimpeded transit of straits. Accordingly, broad jurisdiction over our coastal fish stocks and the hydrocarbons of the United States' extensive coastal margin area appears virtually assured.

-- there is general international agreement that there should be a new international organization for the mineral resources of the deep seabed beyond national jurisdiction.

Against this progress, a large number of important issues remain to be resolved in the Geneva negotiating session. These include:

-- guarantees for unimpeded transit through, over and under straits used for international navigation;

-- jurisdiction to set and enforce standards for the protection of the marine environment, particularly jurisdiction with respect to vessel-source pollution;

-- rights and duties concerning marine scientific research;

-- rights to mineral resources of the continental margin when such margins extend beyond 200 miles from the coast;

-- the nature, scope, structure and function of the new organization dealing with the resources of the seabed beyond national jurisdiction.

The forthcoming Geneva session is central to the success or failure of the Law of the Sea Conference. The oceans interests of the United States can best be protected -- and in some cases can only be protected -- by a comprehensive multilateral oceans policy. However, there are strong indications that many nations -- including the United States under pressure from the Congress -- are moving toward unilateral action to protect their strategic and economic interests in the oceans by extending claims of national jurisdiction to 200 miles for breadth of territorial sea, fisheries and mineral resource jurisdiction and pollution jurisdiction. Success in achieving the needed progress at Geneva will depend on the necessary accommodation of differing positions among the participants and, in turn, on our ability to present negotiating

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positions that can command majority support by other nations while safeguarding U.S. interests. Virtually all agencies -- together with the Chairman NSC/USC and Ambassador Stevenson -- have stressed the need for the U.S. Delegation to have a realistic negotiating position and sufficient flexibility to encourage substantial progress at Geneva consistent with protection of fundamental U.S. ocean interests. I strongly support this view.

There is general agency agreement on the U.S. position concerning the establishment of a 12-mile territorial sea, with unimpeded transit through, over and under straits used for international navigation; the 200-mile economic zone with broad coastal state jurisdiction over the resources of that area, and; beyond the economic zone, on the establishment of an international regime and machinery to oversee the exploitation of the deep seabeds.

II. Issues Requiring Decision

The key points requiring policy guidance in the recommended instructions, and on several of which there are interagency differences, involve the U.S. position on the following conference issues: reaffirmation of the importance of national security objectives on freedom of navigation; revenue sharing within the 200-mile economic zone and coastal state jurisdiction over continental margin resources beyond 200 miles; coastal state marine pollution jurisdiction; freedom of marine scientific research; and the structure, powers, and functions of the international regime and system for deep seabed mining.

A. Freedom of Navigation. From the very beginning of deliberations relating to the Law of the Sea Conference, it has been both internal U.S. policy and the position taken by the United States in the Conference and its preparator sessions, that protection of our national security interests -- in particular, retention of the maximum degree of freedom of navigation, including unimpeded transit through, over and under straits used for international navigation -- is a fundamental U.S. objective in the Conference. This position is again stressed by the Deputy Secretary of Defense and the Joint Chiefs of Staff in their comments accompanying this memorandum.

In my opinion, the importance of our national security objectives remains unaltered. The recommended instructions have been drafted so as to provide the U.S. Delegation with the necessary flexibility in seeking an international agreement satisfactory to the United States on the question of straits. I recommend that your instructions to the Delegation reaffirm the importance attached to gaining international acceptance of provisions accommodating U.S. national security interests on freedom of navigation, unimpeded transit through, over and under international straits and preservation of other reasonable uses of the seas. The NSDM at Tab A would do this.

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B. Economic Zone. There is virtual interagency consensus favoring establishment of a 200-mile economic zone. The principal issues relate to (1) jurisdiction over continental margin resources in areas beyond 200 miles and (2) to sharing revenues within 200 miles.

1. Resources of the Continental Margin Beyond 200 Miles. International consensus has not yet emerged on the outer boundary of the coastal seabed area -- i. e., whether it should stop at 200 miles or at the edge of the continental margin where it extends further seaward.

The proposed instructions forwarded by the Under Secretaries Committee would authorize the Delegation to agree to a provision granting coastal state control over the resources of the continental margin beyond 200 miles or, if necessary to realize our overall objectives in the Conference, to agree to a cut-off of coastal state jurisdiction at 200 miles. (The instructions for the first session directed the Delegation actively to seek a provision granting coastal state jurisdiction over resources beyond 200 miles.)

All agencies accept the view that the Delegation should maintain a low profile or actively seeking coastal state control over the resources of the continental margin beyond 200 miles. The differences among the agencies is one of emphasis. Treasury, Interior and Commerce favor the most seaward limit and oppose the proposed instructions that would allow the Delegation to accept 200 miles. CIE recommends that other delegations to the Conference take the lead on this issue with the U.S. providing tacit support. Most other agencies, including State and OMB, support the flexibility in the recommended instructions. State and the Chairman NSC/USC believe that the arguments in favor of coastal state control beyond 200 miles, on the one hand, and of limiting coastal state control to 200 miles, on the other, are evenly balanced. While the outer edge of the margin may be slightly preferable it does not affect extensive U.S. control over our coastal resources. I recommend that your instructions to the U.S. Delegation reaffirm the U.S. preference for delimitation of the outer boundary of the economic zone at 200 miles or the edge of the continental margin, whichever is further seaward, while granting the Delegation the flexibility to support the position on coastal state jurisdiction judged to be most advantageous in terms of securing Conference support for all U.S. positions, including coastal resources.

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2. Revenue Sharing. The issue is whether there should be revenue sharing by coastal states with the international community from the economic zone and, if so, in what part and at what rate. Specifically, revenue sharing would provide for the collection of a percentage of revenue from seabed exploitation royalties to be used for international community purposes, particularly economic assistance to developing countries.

The proposed instructions continue existing U.S. delegation authority to support revenue sharing from the production of resources in the economic zone adding, however, that the Delegation should not resist a conference trend for revenue sharing only from areas beyond 200 miles.

Treasury strongly opposes any revenue sharing in the 200 mile economic zone on the grounds that the practice would result in a large revenue drain and that the trend in the negotiations is away from revenue sharing in the economic zone. Treasury seeks to reverse the Caracas instructions on this point. FEA opposes revenue sharing if the burden of payments is on the producing companies rather than the state. Commerce and Interior accept revenue sharing in the economic zone, but at a small and equitable rate. Both agree that revenue sharing should be used as a quid pro quo in achieving other U.S. objectives. OMB supports the recommended instructions on revenue sharing. State and the Chairman NSC/USC would not object if revenue sharing were limited to the area beyond 200 miles should a trend develop in the Conference to that effect. I concur. I recommend that your instructions to the U.S. Delegation grant the flexibility to accept revenue sharing only beyond 200 miles if a trend develops in that direction in the Conference.

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3. Fisheries. There is a clear trend in the Conference for broad coastal state control over fisheries. There is interagency agreement that the delegation's existing negotiating authority should be continued. This provides for exclusive coastal state management of living resources in the economic zone, subject to duty to conserve and ensure full utilization of such resources. With respect to highly migratory fish species such as tuna -- an important U.S. catch -- the delegation's objective is to ensure that the Conference adopts rules promoting conservation through international bodies entailing the greatest possible protection for the U.S. tuna fleet both inside and outside the economic zone. I concur with the Under Secretaries Committee's recommendation that the recommended instructions on fisheries be approved.

C. Protection of the Marine Environment. There is growing international pressure in the Conference to give states jurisdictional control over broad pollution zones off their coasts. It is generally agreed that some movement will be required at Geneva on the development of marine pollution treaty provisions if the Conference is, at the same time, to move ahead on the navigation and resource issues.

Basic U.S. objectives on the control of vessel source pollution include: agreement by Conference participants to comply with international standards; the right of a state to enforce more stringent standards for its ports, minimization

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of interference with freedom of navigation, an exemption for military vessels; and compulsory dispute settlement.

The recommended instructions contain four options designed to give the United States greater flexibility in negotiating the pollution issue in a manner that will safeguard our environmental interests and at the same time facilitate an overall international agreement:

-- Option I would indicate U.S. willingness to agree to coastal state enforcement of international discharge and dumping standards in a narrow coastal zone, no greater than 50 miles.

-- Option II broadens that zone to 100 miles.

-- Option III would give the coastal state the additional right in its pollution zone to establish and enforce discharge and dumping standards in an area as broad as 100 miles.

-- Option IV would allow the U.S. Delegation to support the right of the coastal state to enforce international discharge standards in an area as broad as 200 miles.

As reflected in the various agency comments at Tab D, there is considerable difference of opinion as to the latitude of fallback authority that should be granted to the Delegation in seeking agreement on the pollution issue while protecting basic U.S. interests. At the Caracas session, the Delegation was authorized to exercise only Option I, and this authority was not used. However in the forthcoming negotiations, the United States will require flexibility on this issue if agreement is to be reached. Providing the Delegation the authority to exercise Options I, II and IV, in the manner prescribed in the proposed instructions, will do this, as in each instance coastal state authority is limited to enforcement of international standards. I believe that approval to exercise Option III should not be granted since that option provides subjective authority to the coastal state that could restrict freedom of navigation and other reasonable uses of the ocean and that could give the coastal state excessive jurisdiction in the economic zone.

I recommend that you authorize the U.S. Delegation to exercise the fallback authority provided for in Options I, II and IV if necessary to the attainment of basic U.S. objectives in the negotiations.

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D. Marine Scientific Research. The United States has pressed for the maximum freedom of scientific research, stressing that such research contributes to all nations' understanding and better use of the oceans. However, many of the developing countries have insisted that the coastal state must first give its consent before scientific research can be performed off its coast. In an effort to satisfy these concerns, the U.S. Delegation has been authorized in the past to propose that marine scientific research be subject to notice to the coastal state, with treaty provisions providing for dissemination of the data from such research that both protect and benefit the coastal state.

The U.S. objective in the area of marine scientific research is to avoid any system which would require the consent of the coastal state for such research in the 200 mile economic zone. As a fallback authority, however, the proposed instructions authorize the Delegation to agree to a regime which would give the coastal state the right to prohibit research which does not meet certain criteria specified in the treaty. As a further fallback, to be used only if necessary to prevent adoption of an even more restrictive regime, the proposed instructions authorize the delegation to accept a qualified consent regime which would require coastal state approval of marine scientific research that meets certain conditions outlined in the treaty.

NSF concurs in the proposed instructions. Defense remains opposed to any regime of maritime research which requires consent of the coastal state and therefore opposes the proposed fallback authority. Defense believes that our position on maritime scientific research has greater support today than before Caracas and that we must not support a regime which may interfere with our underwater sound surveillance system or marine scientific research conducted from military ships. State and a number of other Agencies feel that the U.S. position on marine scientific research is still a minority position with little support from the developing nations. I recommend that you grant the U.S. Delegation the fallback authority requested in the proposed instructions, while at the same time underscoring the importance attached by the United States to the avoidance of any system which would require the consent of the coastal state for marine scientific research.

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E. The Deep Seabeds. The majority of conference participants attach great importance to the establishment of a meaningful international organization to deal with mining of the deep seabed beyond national jurisdiction. International agreement on this conference issue is essential to overall international agreement on the law of the sea. The concept of a role for the international community on seabed resources beyond national jurisdiction has been a fundamental part of the law of the sea deliberations in the United Nations since 1967. The United States has endorsed the principle that the seabed beyond national jurisdiction is the common heritage of mankind, we have voted in favor of U. N. resolutions on this issue, and, as early as 1970, the U. S. Delegation to the preparatory negotiations for the conference formally introduced a working paper containing detailed, draft treaty provisions for an International Seabed Resource Authority to oversee deep seabed mining.

While there is general agreement in the negotiations that a new international organization should be established to regulate deep seabed mining in the area beyond national jurisdiction, there is substantial disagreement as to the structure, powers and functions of this organization and the nature of the system which would govern the development of deep seabed resources.

The U. S. objective is to obtain a system which guarantees non-discretionary access by U. S. firms to deep seabed minerals under reasonable conditions, coupled with security of tenure and a reasonable profit return for the mining operator.

State, Defense, Commerce, Interior, FEA and other Agencies support the U. S. objective which is designed to meet the interests of the majority of nations while protecting the fundamental U. S. interest in access to deep seabed mineral resources.

Defense does not oppose granting the delegation additional flexibility, but raises a serious question as to whether it is possible to achieve the basic objective of non-discriminatory access if all the suggested concessions are exercised. Accordingly, OSD cautions that the authority be used sparingly and privately until it appears that an overall treaty is available within the confines of this new flexibility.

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OMB shares the view which has been expressed by several agencies that the various negotiating authorities which the Task Force requests are difficult to evaluate in terms of the amount of effective control which they would grant the international authority. The issue, in OMB's view, is what degree of international control of U. S. access to deep seabed resources should be accepted.

Treasury has proposed an entirely different approach under which (i) individual countries would license and control the ships engaged in deep seabed mining (which Treasury compares to nodule trawlers), (ii) an international organization would be empowered to recommend safety and environmental standards for these vessels, and (iii) revenues raised by the ship licensing fees would be shared with developing countries. Treasury argues that this proposal would reduce the complexity of the negotiations, would provide a forum in which seabed mining could be monitored and, while not providing firms with exclusive mining rights to particular areas of the seabed, would nevertheless create an appropriate investment climate.

This proposal was discussed at a full meeting of the Under Secretaries Committee on February 14, 1975. At that meeting no Agency indicated support for the Treasury proposal as an alternative to the recommended instructions. State believes that the proposal is non-negotiable: it is contrary to the entire history of the negotiation, it would not satisfy the basic objective of the developing countries to participate in the exploitation of the deep seabed as the "common heritage of mankind" and would be opposed by many of the developed countries as well. The proposal could also be expected to be opposed by the U. S. deep seabed mining industry since it does not provide for the granting of exclusive rights to mining sites, a feature which the industry indicates is essential in order to attract investment in deep seabed mining. For these reasons, I concur fully with the interagency views against adoption of Treasury's alternative approach to negotiations on the deep seabed issue.

With the exception of Treasury, the Agencies concerned generally agree with the proposed instructions providing for a non-discretionary licensing system operated by an international authority which would grant mining operators exclusive rights to mine in specified areas of the deep seabed. The system would be designed to guarantee access by U. S. and other mining operators to deep seabed minerals under reasonable conditions. The

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proposed instructions grant the Delegation the authority, if necessary to achieve basic U.S. objectives, to agree to a number of proposals intended to meet concerns expressed by developing countries and others. This includes a system which would permit exploitation by the international authority in joint ventures with the mining operators; a parallel system providing for direct exploitation by the international organization and exploitation by nations or private firms under licenses granted by the international organization; a system of payments to the international organization in the form of royalties or profit sharing; and a provision for tax credits or tax exemption for deep seabed mining operators.

I concur with the Chairman, NSC Under Secretaries Committee's recommendations on instructions for the deep seabeds. I recommend that your instruction to the U.S. Delegation reaffirm the basic U.S. objectives in negotiations on the intended organization and system for deep seabed mining in the ocean beyond national jurisdiction: an organization and system guaranteeing non-discriminatory access by U.S. firms to deep seabed minerals under reasonable conditions coupled with security of tenure, and with fair and reasonable profit or rate of return to deep seabed mining operators.

Understandably, the negotiation of issues relating to the deep seabed area beyond national jurisdiction is complicated by the newness of the subject and the need in the conference to find an approach that balances the interests of those countries ready to mine the area and those wanting to ensure that any mining operations take place in an agreed international framework. The deep seabed mining industry is very young, very few countries have the technology required at present, and for the foreseeable future, it will be far smaller in scope than oil and gas exploitation from the continental margin. The basic requirement in shaping the Delegation's instructions is to provide the latitude needed for international agreement on the general shape of the organization while ensuring that any treaty provisions contain the safeguards necessary to protect U.S. deep seabed mining interests now and in the future. Within this general framework, guidance is required on specific issues that may be the subject of negotiations relating to the regime for the deep seabeds:

1. Parallel System of Exploitation. The proposed instructions would give the Delegation authority to agree to a parallel system under which the international organization would be able to exploit deep seabed resources directly while at the same time licensing states and their nationals to undertake such exploitation.

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State and the Chairman NSC/USC favor this proposal, believing that the Delegation must have the authority to agree to a provision of this kind in the treaty that would meet the demands of the developing nations to participate directly in exploitation. Further, State feels that adequate safeguards can be developed to protect U.S. interests in guaranteed access to deep seabed resources, for example, by including in the treaty a provision to the effect that licenses will be granted to states and their nationals on terms no less favorable than the terms applicable to the international authority.

Interior opposes this recommendation as leading to a gradual takeover of mining operations by the international organization. They and Commerce both share concern that the recommendation inadequately separates the regulatory arm from operating arm of the international organization. Treasury is concerned that the parallel system has the potential for excluding producers from the deep seabed once the organization has the technology and resources to operate independently, and that the safeguards to prevent this are not adequately spelled out. CIEP also indicates opposition to this authority because of a concern that the operating arm of the international organization would receive preferential treatment over independent producers. CIEP believes that the recommended authority on a parallel system of exploitation should be approved on an exploratory basis only.

I concur with the Chairman's NSC/USC analysis and recommend that the proposed instructions be amended to authorize the U.S. Delegation to agree to a parallel system of exploitation in the treaty that safeguards access of states and their nationals to the resources of the deep seabed on an equal basis with the international organization.

2. Commission to License Complaints. The proposed instructions would give the Delegation authority to support establishment of a commission to receive complaints concerning potential harm to developing-country land-based mineral producers of seabed minerals production and empowered to propose to the international organization preventive or corrective measures, subject to appropriate safeguards.

State supports this authority. Treasury, Commerce, CIEP and Interior generally believe that such a commission could ultimately freeze seabed production. They would support a commission with limited powers, specifically one that would not have the authority to impose tariffs, set prices on limit production. The Chairman NSC/USC concurs with these

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opposing views. No other agencies expressed disagreement with granting the proposed authority.

I believe that the regulatory powers of the commission should be kept to the minimum necessary to reach a treaty agreement. Accordingly, I recommend that the U. S. Delegation be instructed to seek limitations on any regulatory authority of the commission, particularly in areas of tariffs, prices and production.

3. Training Programs. The proposed instructions would give the Delegation authority to accept proposals to cooperate in establishing programs to facilitate the training and participation of developing country nationals in ocean mining, provided that such proposals do not unacceptably interfere with incentives to develop seabed resources. State supports this authority.

While agreeing to U. S. cooperation in this respect, Commerce raises concerns over cost and management of the program. CIEP and OMB believe that training programs should not result in an unwanted transfer of technology. No other agency expressed disagreement with the proposed authority. I share CIEP and OMB's views and recommend that your instructions to the U. S. Delegation indicate that we should seek to avoid any agreement on training that could lead to unwanted transfer of technology in any joint ventures involving developing countries.

4. Joint Ventures with Developing Countries. The proposed instructions would give the Delegation authority to support reasonable requirements for offering developing countries and their nationals the right to participate in joint ventures with developed countries and their nationals.

State supports this authority. Commerce believes that the proposal is too vague to appraise adequately and expresses particular concern over the possible mandatory aspects of any such provisions. Treasury feels that this proposal is useful provided that the terms of mandatory participation do not become too costly for the companies. In this connection, Treasury, joined by Interior, urges that LDC participation should be limited to a modest minority interest (e. g. , about 10 percent), without conveying management prerogatives. AID suggests that any financial assistance given LDC's to participate in joint ventures should have demonstrable

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development impact and conform to other established development assistance criteria. The Chairman NSC/USC believes that Treasury's suggestion of a 10 percent upper limit on mandatory equity participation by developing countries in joint ventures with developed countries and their nationals is wise. I believe that Treasury's suggestion is well taken and merits support. Accordingly, I recommend that the instructions to the U. S. Delegation on this issue indicate that the U. S. objective in negotiations should be to limit developing nation participation in joint ventures along the lines recommended by Treasury as expressed in Deputy Secretary Ingersoll's forwarding memorandum.

5. Tax Credits or Tax Exemptions. The proposed instructions would give the Delegation authority to accept provisions for tax credits to operators for payments for mining rights, or provisions prohibiting the levying of national taxation on deep seabed mining activity taxed by the international organization.

Interior believes that this authority is essential to gain support for a successful treaty.

State, Treasury and CIEP oppose this authority. Commerce believes that this issue requires further study. Ambassador Stevenson feels that provision for a treaty obligation not to levy national taxation on deep seabed mining activities would endanger the treaty in the Senate, but a U. S. policy of providing tax credits for payments to the international organization similar to that offered U. S. mining companies operating in foreign countries would be acceptable. In general, agencies opposing this authority consider that the question of tax credits or exemptions is a subject which should not be determined by treaty but rather left to individual states. The Chairman NSC/USC supports the views of the opposing agencies.

I believe that Treasury, CIEP and Ambassador Stevenson are correct in their concerns that a treaty obligation not to levy national taxation on deep seabed mining activity could endanger ratification in the Senate. Further, I agree with State that the question of granting tax credits is not a proper subject for a multinational treaty and should be left to the determination of individual states within the context of their national tax systems. For these reasons, I recommend deletion of authority for the U. S. Delegation to agree to a treaty obligating states not to levy national taxation or to grant tax credits with respect to deep seabed mining operations.

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In view of the complexity of the deep seabeds issue in the Conference, I recommend that you include in the instructions the requirement that the Chairman of the U.S. Delegation inform the Chairman, NSC Under Secretaries Committee concerning the entire package of proposed seabed measures before any final agreement.

F. Conference Backstopping. Finally, I recommend that, as in the past, you assign responsibility to the Chairman, NSC Under Secretaries Committee for backstopping the Law of the Sea negotiations and that you direct the Chairman of the U.S. Delegation to report to you on the results of the negotiations upon the conclusion of the Geneva session of the Conference. The NSDM at Tab A would do this.

RECOMMENDATION:

That you approve the NSDM at Tab A providing guidance to the U.S. Delegation for the forthcoming session of the U.N. Law of the Sea Conference.

Approve *[Signature]* Disapprove _____

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