



DEPARTMENT OF STATE

Washington, D.C. 20520

February 22, 1972

MEMORANDUM FOR MR. HENRY A. KISSINGER
THE WHITE HOUSE

Subject: Report on Implementation and Proposed
Modifications of NSDM-62 and NSDM-122.

Enclosed herewith is a report submitted by the Ad Hoc Group established pursuant to NSDM-122 which proposes certain modifications in the positions set forth in NSDM-62 and NSDM-122. This memorandum has been prepared by the Inter-Agency Law of the Sea Task Force acting as the Ad Hoc Group established under NSDM-122. The report is being concurrently submitted to the various agencies for formal clearance.

A handwritten signature in cursive script, reading "John R. Stevenson".

John R. Stevenson
Chairman, Inter-Agency Task Force
on the Law of the Sea

Enclosure

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PA/HO Department of State
E.O. 12958, as amended
July 12, 2005

Attachment

NSC Report

Undated.

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E.O. 12958, as amended
July 12, 2005

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Report on Implementation and Proposed Modifications
of NSDM-62 and NSDM-122

This report is submitted by the Ad Hoc Group established pursuant to NSDM-122 and reports on measures which the U.S. Delegation plans to take at the February/March session of the expanded United Nations Seabed Committee, acting as the preparatory committee for the 1973 Law of the Sea Conference, in implementation of NSDM-62 and NSDM-122. It also proposes certain modifications in the positions set forth in these NSDM's. Further reports will be submitted in the future as necessary.

At the March session other Delegations may, if the U.S. Delegation is not in a position to act, move irreversibly toward positions which are damaging to our interests. Already some States have adopted positions which if widely accepted would seriously threaten these interests. The decision regarding the authority of the Delegation recommended in this report cannot be deferred until some time after March; this could well be too late to influence the course of negotiations on matters important to the U.S. or to maintain the possibility of holding a successful conference in 1973. Accordingly, the Delegation will need to have available at the March session the

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added authority recommended in this report if it is to have sufficient flexibility to advance, or to prevent serious impairment to, U.S. Law of the Sea objectives, including in particular our national security objectives.

General Approach

The U.S. Delegation should continue to indicate in discussions with other delegations that U.S. willingness to accommodate other States' resource interests will depend on their willingness to accommodate U.S. objectives.

For the purpose of the March meeting, the Delegation should work from the tabled Seabed Treaty and Draft LOS Articles and seek to obtain support for U.S. LOS objectives, specified in NSDM 62 and NSDM 122, including in particular free transit through and over international straits. The authority requested herein to make changes in the U.S. position expressed thus far in the international negotiations should be used:

- (a) to obtain our LOS objectives, particularly national security objectives;
- (b) to maintain the viability of the U.S. proposals as a part of an emerging LOS package acceptable to the U.S.;

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(c) to increase the possibility that other States will conclude that a conference in 1973 is in their interest.

Major negotiating concessions, however, should be reserved for our overall national security objectives in freedom of navigation and free transit through and over international straits.

1. Territorial Sea and Straits

The positions set forth in NSDM-122 will continue to govern the Delegation's action. The U.S. Representative will continue to make clear that Articles I (12-mile territorial sea), and II (free transit through and over international straits), constitute basic elements of the President's Oceans Policy and that any treaty to which the United States could be expected to become a party would have to accommodate these objectives.

2. Seabed Proposals

As described in more detail in the report to you of October 14, 1971, on the implementation of NSDM-122, the U.S. trusteeship zone proposal for the coastal seabed area has not received much support and has been widely criticized

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by the developing coastal States. In order to achieve more general acceptance for the most essential aspects of the U.S. trusteeship proposal, particularly with respect to national security objectives, including the protection of freedom of navigation from "creeping jurisdiction" in the zone between the territorial sea and the fully international seabed area, it is recommended that the U.S. Representative be authorized to indicate that the U.S. would be willing to make the following modifications in the U.S. proposals:

(a) Change name of international trusteeship area.

The United States would use a less controversial name not subject to so much misunderstanding as to its legal content or colonial overtones. Any generally acceptable term which would not imply exclusive coastal State controls would be acceptable.

(b) Limits of zone.

The U.S. Representative would continue to support the present U.S. proposal for an inner boundary of the zone of the outer limit of the territorial sea (which under the U.S. proposal would be 12-miles with free transit through and over international straits) or the 200 meter depth line, whichever is further seaward. Pursuant to

NSDM-122, the U.S. Representative indicated at last summer's session of the Seabed Committee, a willingness to consider a mileage outer boundary as well as an outer boundary with alternative formulations which would involve mileage, depth or geological limits. He should reiterate this position and may indicate that the mileage alternative could be as great as 200 miles. Some delegations may wish to have an alternative depth or geological limit for the outer boundary of the coastal zone because their continental margin extends substantially beyond 200 miles. There are only a few such countries, e.g., Argentina, Canada, India, New Zealand and the U.S.S.R. If it appears that it would be to the U.S. advantage in achieving its negotiating objectives, the U.S. Representative may indicate in private conversations that the U.S. is prepared to accept a 200 mile boundary with an alternative to include the continental margin either by a depth limit or a precise geological limit. The U.S. continental margin extends beyond 200 miles in some areas of the Atlantic, Gulf of Mexico and off Alaska and the U.S. would benefit, in terms of seabed resource control, from either a depth or geological alternative boundary formulation.

(c) Nature of coastal State jurisdiction in zone.

Coastal States would be delegated the exclusive right to explore and exploit seabed resources in the zone

in accordance with treaty provisions. The rights of the coastal State would be exclusive in the sense that they would not depend on occupation, or on effective exploitation, and if the coastal State did not explore or exploit the seabed resources, no other State could explore or exploit them without the coastal State's consent.

The principal change from the present U.S. proposal in the nature of the resource jurisdiction delegated to the coastal State in the zone is that this jurisdiction would not be subject to international resource development standards as such, i.e., there would be no mining code provision governing matters such as the length of the term, the size of areas licensed, and the licensing procedures. Thus each coastal State could, if it so desired, extend its national licensing procedures to this area. International limits on the coastal State would be restricted to standards such as those set forth in (d) which do not govern resource management as such but rather are included to protect other uses of the area and the marine environment.

Jurisdiction and control over all natural resources of the seabed and subsoil in the zone would be delegated to the coastal State. Living resources of the sedentary species would be included in the above category except

that, consistent with the present U.S. draft seabed proposal, sedentary species would not be subject to revenue sharing. Sedentary species could alternatively be treated as non-migratory fisheries or as a separate fisheries category under the U.S. fisheries proposal.

Modifications of the U.S. position regarding the nature of coastal State seabed resource jurisdiction in the zone would be made in the context of explaining the continuing concern of the U.S. with creeping jurisdiction, i.e., the use of resource jurisdiction to exercise control over other uses of the area. Accordingly, the U.S. Delegation would stress the importance of the basic concept of our draft convention -- that coastal State rights in the zone are delegated by the treaty and are limited to what is delegated and not merely by the express international elements set forth in (d); there would be no residual coastal State sovereignty in the zone. In this connection, the U.S. Delegation should point out that compulsory dispute settlement is a necessary concomitant of coastal State delegated rights.

- (d) International standards and compulsory dispute settlement in the zone.

The Delegation should stress that the following international standards are to be applicable in the zone as

express treaty limitations on the resource jurisdiction delegated to the coastal State. Coastal State compliance with these standards would be subject to compulsory adjudication:

1. Openness of the zone to other uses (subject to reasonable regard for exploration and exploitation activities).
2. Avoidance of unjustifiable interference with other uses of the marine environment and the area.
3. Protection of the marine environment from damage caused by seabed exploration and exploitation, including the prevention of damage to living resources.
4. Protection of human life and safety.
5. No effect on the legal status of the superjacent waters or that of the air space above these waters.*
6. Revenue sharing with the international community (with income tax jurisdiction over exploitation operations in the zone remaining in the coastal State).
7. Protection against expropriation without adequate compensation.

The Delegation would also stress that the Council of the Authority is to be empowered to fix non-discriminatory

*Freedom of navigation in the waters beyond a 12-mile territorial sea and overflight of these waters would be protected elsewhere in the treaty.

minimum standards (the coastal State could apply higher standards) regarding the use of the seabed resource zone in the following fields:

1. Protection of the marine environment from seabed pollution (including non-commercial deep drilling).

2. Prevention of unjustifiable interference by the coastal State in exercise of its resource jurisdiction with navigation in the superjacent waters.

With regard to revenue sharing within the zone, it would also be appropriate for the Council to be authorized to establish accounting and other procedures within the limits specified in the Treaty.

With respect to the fully international seabed area (the area beyond the coastal State seabed resource zone), the U.S. Representative will generally pursue previously established positions, but shall take into account, when consistent with the protection of our principal interests, the comments and criticisms made by other nations and experts in the field. For example, the U.S. will continue to oppose an international operating agency and measures that would eliminate protection against developing country control of the Council, but could indicate that

developing countries should have greater control over the disposition of international revenues.

3. Fisheries Proposals

In our October 14, 1971, report to you on implementation of NSDM-122 at the July/August 1971 session of the Seabed Committee, we reported in detail on the fisheries proposal made at that session. In general, the discussion of fisheries jurisdiction reflected three different points of view: First, exclusive coastal State fishing rights over a broad zone, often expressed as 200-mile exclusive resource jurisdiction; second, freedom of fishing on the high seas and the continuation of existing international and regional fishing commissions; and third, a species approach such as proposed by the U.S. under which coastal States would be accorded preferential rights over fisheries on the high seas adjacent to their coasts with respect to coastal species of fish (such as cod and shrimp) and anadromous species (such as salmon) spawning in their rivers and swimming far to sea, but not with respect to highly migratory species such as tuna.

A significant number of developing countries, as well as Australia and France, expressed considerable interest in the first approach, with the LDC's strongly advocating

the right of coastal States to use and manage the living resources adjacent to their coasts. Many developing coastal States emphasized the need for a zone of jurisdiction to protect the living resources off their coasts from over-exploitation by distant-water factory fleets. The LDC's were also critical of conservation efforts of existing regional and international fishing arrangements.

The principal advocates of freedom of fishing on the high seas were, in addition to the landlocked countries, States with predominant distant-water fishing interests such as the U.K., Japan, the Soviet Union and the Eastern European bloc. These countries have not supported our present fisheries article, believing it goes too far in the direction of coastal States. Their opposition to any further major concessions to coastal States in New York in March is virtually certain.

Since last summer's meeting of the Seabeds Committee the Organization of African Unity has officially called for an extension of fishing limits to where a water depth of 600 meters is reached. At the meeting of the Afro-Asian Legal Consultative Committee in Lagos last month, the developing countries continued to indicate their support

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for a 200-mile exclusive resource zone, although certain of them indicated that if the zonal concept were accepted they would be favorably disposed to accept international elements such as international standards for access and license fees.

The U.S. draft fisheries article received little support. It was referred to by some delegations as forming a basis of discussion but was not itself the subject of much specific discussion. Although not all countries have expressed views on the subject, it is our opinion that the principal reasons for the lack of support for the fisheries article presented by the United States are (1) the widespread opposition expressed by developing coastal States (and shared by the U.S. coastal fisheries industry) to the provisions promoting the establishment of regional or international fishing organizations and providing for coastal State jurisdiction over coastal species only when such organizations are not established; (2) coastal fishing States' objections to retention of protection for traditional fishing (on a negotiated basis); and (3) a broad trend among developing countries in favor of a coastal State exclusive fishing zone.

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The U.S. Representative will restate our flexibility on resource issues in accordance with NSDM 122. Pursuant thereto, the U.S. Representative should be authorized to discuss and, if the Delegation so decides, to indicate the United States is prepared to accept modifications along the following lines in its fisheries proposals. The timing of the following scenario will be dependent upon the negotiating situation, including the response of other nations to our moves and upon the initiatives made by other States. The elements, which may be utilized alone or in combination by the U.S. Delegation, follow:

(a) Coastal State regulatory and enforcement jurisdiction

Coastal States would be given clear regulatory and enforcement jurisdiction with respect to the coastal and anadromous species adjacent to their coasts, and could designate regulatory areas based on the location of the stocks. Coastal State jurisdiction over trial and punishment could be included, but this could be indicated separately for tactical reasons.

(b) Traditional fishing rights

Coastal States would have the right to phase-out or terminate with compensation, distant-water

traditional fishing with respect to coastal and anadromous species to the extent the coastal State's capacity increased. (A five-year phase-out period might adequately balance the coastal and distant-water interests involved.)

(c) Licensing of foreign fishing

Although distant-water fishing States would have a right of access to under-utilized coastal and anadromous species, coastal States would have the right to license, subject to international standards for reasonable user fees and non-discriminatory access to the fishery, foreign fishing with respect to coastal and anadromous species which the coastal States does not have the capacity to catch. (The non-discrimination requirement should not preclude special reciprocal and other arrangements between States in the region. We are also prepared to accept reasonable and non-discriminatory licensing and user fees established by regional or international organizations for oceanic species.)

(d) Effect of coastal State regulations during arbitration

The power of the arbitral commission to delay the implementation of coastal State regulations during arbitration would be reduced or limited.

(e) International register of fishery experts

Introduce the concept of establishing an international register of fishery experts from which any developing State may select an advisory group to assist in designing and carrying out fishery management programs that will enable it to apply the provisions of the modified Article to its best advantage. (The expenses of such advisory groups would be covered by a percentage of the user fees collected by coastal States and oceanic management groups.)

(f) Zonal approach with species elements

Coastal States would manage coastal species (but not highly migratory species, e.g., tuna) in a zone extending from a 12-mile territorial sea out to a distance of up to 200 miles and would also manage anadromous species (e.g., salmon), originating in the coastal State's rivers, both

within the zone and beyond it, throughout their migratory range on the high seas.

The zonal approach in (f) is potentially far-reaching in its effect on our negotiating position with respect to navigation, scientific research, and pollution and with respect to tuna and salmon. Our willingness to accept a zonal approach might encourage nations that support a resource zone to support our national security objectives; on the other hand there is a risk that our acceptance of a zone for fisheries jurisdiction might encourage coastal states to seek further rights that might adversely affect our navigation interests.

Moreover, there is a difference of opinion as to whether the zonal approach will facilitate, or prejudice, our attempt to obtain special treatment for tuna and salmon. On the one hand by approaching jurisdiction over all fisheries on a species approach it is more logical to create special rules with respect to salmon and tuna; in addition, a move to a zonal approach now could make it very difficult to maintain special rules for salmon and tuna throughout the negotiations. On the other hand, the interests of other states in a zonal approach may be such that they would be willing to concede special rules for tuna and salmon in exchange for U.S. willingness to accept a zone; in addition, without U.S.

participation and support, the leaders in formulating a zonal approach to fisheries could more likely become irrevocably committed to an exclusive zone without special rules for tuna and salmon.

Both coastal and distant water U.S. fishermen are currently united behind the species approach. The tuna and salmon industries in particular would vigorously oppose a zonal approach as prejudicing the chances of obtaining necessary special rules regarding control over tuna and salmon, unless as a result of their assessments of the negotiating situation and discussions with U.S. Government experts, they became convinced of possible advantage in moving to a zonal approach in order to obtain such rules.

For these reasons, the Delegation, while authorized to discuss this option (taking care to avoid any prejudice to our effort to sell the species approach), should move to indicate its acceptance only after a conscientious effort to sell the species approach steps in the scenario, the most careful consideration of the negotiating situation, and after it is determined to the Delegation's satisfaction that such a move is necessary to obtain U.S. objectives. The precise tactics in indicating support for a zonal approach of this kind should be the responsibility

of the Delegation subject to the following general limitations: the U.S. Representative should not take the initiative in making this proposal but rather should indicate, preferably in private consultations, the U.S. Government's willingness to support proposals of others along these lines.

The Delegation should, under all of the approaches listed above, insist on treaty standards ^{which} limiting ^{and which are} the exercise of coastal State jurisdiction ^A subject to compulsory arbitration. These standards should include protection of other uses of the marine environment (e.g., navigation), necessary rules for tuna and salmon, conservation of fish stocks, and maximum utilization of fisheries in the zone (subject to reasonable coastal State conditions regarding access).