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July 12, 2005

DEPARTMENT OF STATE  
THE LEGAL ADVISER

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CONFIDENTIAL

MEMORANDUM

October 13, 1969

TO: The Secretary

THROUGH: S/S

FROM: L - John R. Stevenson *JRS*

SUBJECT: Law of the Sea - INFORMATION MEMORANDUM

We have begun a worldwide canvass to determine whether a successful Law of the Sea Conference can be held in the near future to adopt articles along the lines of the U.S.-Soviet draft Articles on Law of the Sea (Tab A). In addition to the NATO countries, Japan, Spain, and several Latin American countries with whom we had earlier held discussions, we will canvass an additional 58 countries in all regions. Most countries will be approached through our Embassies; however, 7 countries in Africa will also be visited by State, DOD and Interior experts from Washington during the first half of November, and 9 or 10 countries in East and South Asia will be visited by another team of experts after the first of the year.

Each country canvassed is being given a comprehensive aide memoire explaining our reasons for favoring a Law of the Sea Conference and the history of our activities in this regard to date and is being asked several specific questions about their position on a Conference (Tab B).

After the canvass is completed we hope to be in a position to determine whether a successful Law of the Sea Conference can be called in the near future and what the most appropriate time for such a Conference will be. We anticipate the canvass will reveal the necessity of making drafting changes in the Articles in consultation with our NATO allies and the Soviet Union.

Attachments:  
Tab A - Articles.  
Tab B - Aide Memoire.

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cc: U, J, C, AF, EA, EUR, NEA, ARA, IO, H, E, S/FW

L/E: JGC Carter:ma 10/9/69

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ATTACHMENT A

Aide Memoire

In the summer of 1967, the Soviet Union approached the United States as well as a large number of other countries soliciting views on the possibility of a new international conference on the law of the sea to achieve widespread agreement to a 12-mile limit for the territorial sea and exclusive fisheries zone. The United States responded at that time that its position would be influenced by whether the Soviet Union and others would be prepared to support provisions providing free passage through and over international straits; and we stated that for a successful conference we thought it would be necessary to provide for accommodation of special fishing interests of coastal states beyond 12 miles.

The United States consulted bilaterally with a number of countries regarding the Soviet approach. Most nations consulted agreed with the desirability of seeking to put a stop at 12 miles to claims of exclusive coastal jurisdiction and the importance in this connection of assuring free passage and over through/international straits. A number of countries also agreed that, in order to secure world-wide support for a treaty of this sort, some recognition of the special interests of the coastal States in fisheries beyond 12 miles was necessary.

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Consultations between United States and Soviet experts in the latter half of 1968 resulted in the draft Articles herewith delivered to the Government of \_\_\_\_\_. The Government of the United States is conducting a canvass of many nations to learn whether Articles along the lines of these three draft Articles can be adopted at a new Law of the Sea Conference.

During discussions leading to these draft Articles the United States had the following considerations in mind:

A. There are basically three reasons why there should be a new Law of the Sea Conference in the near future: all countries have a general foreign policy interest in avoiding dissension and possible conflicts that could arise from unilateral assertions of jurisdiction over ocean space in the absence of agreed limits for coastal State jurisdiction; many have security and general commercial interests in assuring free passage through and overflight of international straits, which would be subject to the limitation of "innocent passage" if overlapped by territorial seas; and they also have a general interest in assuring that resources of the oceans are utilized in a rational manner that accommodates the interests of coastal States and distant water States.

expressly

B. Existing treaty law does not/specify clear maximum limits for the permissible breadth of territorial sea and fisheries jurisdiction claims. So far as State practice regarding the breadth of the territorial sea is concerned, approximately 30 States claim 3-mile territorial seas, over 20 claim varying distances from 4 up to 10, approximately 40 States claim 12, and at least 8 states claim a larger distance. Approximately 65 nations claim exclusive fisheries jurisdiction of 12 miles; at least 10 countries claim in excess of that amount; and 24 claim less. The trend since 1958 has been in the direction of more extensive unilateral claims. It seems clear that 12 miles represents the last opportunity for reaching international agreement to a clearly specified limit for territorial sea and exclusive fisheries zone claims. Viewed in practice or in principle the alternative to such agreement, of ever-increasing unilateral claims during an era when expanding technology results in increasing use of the oceans, involves serious consequences for all uses of the high seas and creates the potential for serious conflict.

C. The importance of assuring free passage through straits in connection with an agreement on a 12-mile territorial sea is based in large part on the fact that a change in recognition of the permissible breadth of the territorial sea from 3 to 12 miles would result in approximately 116 straits, many of which are very important to international navigation, being overlapped entirely by territorial waters. As a result coastal State sovereignty would be subject only to the right of "innocent" passage.

Article 16 of the Territorial Sea Convention, which provides that innocent passage may not be suspended through straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, recognizes no right of overflight.

Moreover

there is no assurance that the coastal State, which is in the position of initially making the judgment, whether a ship's passage is "innocent" will not make an arbitrary judgment.

As the 1967 war in the Middle East demonstrated, closure of an important strait on the basis of an arbitrary judgment can have the most serious consequences. All nations, particularly those dependent upon shipping and those with fleets too small to justify special agreements for passage through important straits, have a great interest in assuring free navigation through and over straits. As we contemplate the future, technological changes affecting the design and power plant even of commercial vessels may give rise to questions regarding the right of innocent passage; as an example, there could be questions about the right of an atomic powered commercial submarine to navigate submerged in territorial waters. Further dissension can be avoided and navigational rights preserved in the future if the international community can now agree to provisions securing a right of free passage through and over international straits.

D. Unilateral assertions of broad fishing jurisdiction do not provide a framework within which much needed resources of the oceans will be rationally utilized for the purpose of feeding the world's population. The United States has been of the opinion that it will not be possible to achieve a

broadly supported treaty on the basis of Articles I and II unless some recognition is made in the treaty of the special interests of the coastal States in fisheries beyond 12 miles. The views of the United States in this regard are influenced by the desirability of providing for an accommodation of the interests of both coastal fishing States and distant water fishing States. Such an accommodation should, in our view, ensure the protection of both coastal and distant water fishing interests, permit questions regarding fishing rights beyond 12 miles to be resolved without complicating reference to the extent of national territory or jurisdiction, and greatly reduce the internal pressures in many States for extension of jurisdiction to the practical exclusion of foreign fleets. The U.S. fishing industry is composed of both coastal State fishing interests and distant water fishing interests. Article III represents an attempt to reconcile these different interests in the area beyond 12 miles from the coastal State. The draft Articles would not alter or affect existing bilateral or multilateral fisheries agreements.

In the course of discussions between United States experts and experts from other countries we have found much support for

efforts to convene a conference to define clearly the maximum permissible limits for unilateral assertions of coastal State jurisdiction, protect navigation through and over straits, and generally add stability to the law of the sea. We have found general acceptance of a limit of 12 miles in Article I if accompanied by an acceptable Article II. We have also found general acceptance of the concept of free transit through and overflight of straits, but not of that language of Article II which provides for a "corridor of high seas". Several experts sought express assurance that existing bilateral and multilateral fisheries agreements effective within the 12-mile zone would not be affected by the articles.

The fisheries article, Article III, has been the source of some difficulty in interpretation and some disagreement regarding the necessity or desirability of dealing with this issue at a Law of the Sea Conference to be held in the near future. The following points are intended to clarify the meaning of this draft article:

a) Paragraph A establishes the principle that high seas fishery problems between coastal and distant water fishing States should be resolved by negotiation, but that if agreement is not reached within six months a coastal State can

apply unilaterally the measures provided for in paragraphs B, C, and D.

b) Paragraph B provides that the coastal State may apply conservation measures in certain circumstances. The provision restates Article 7 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.

c) Paragraph C provides that a coastal State may adopt measures to reserve to itself a part of the allowable catch of a particular stock of fish if it has undertaken substantial investment for the reproduction of this stock (e.g. through the establishment of hatcheries). The part of the allowable catch reserved must not be more than can be justified by the investment and must not prevent other States from fishing for their traditional catch of the stock (e.g. if an investment in / reproduction of a stock of fish increases the allowable catch by 20% the coastal State could reserve this 20% to itself). ("Allowable catch" refers to the part of a particular stock of fish that, on the basis of the evidence available, can be caught in any particular year while maintaining the maximum sustainable yield of the stock for future years.)

d) Paragraph D provides that a coastal State may reserve to itself a part of the allowable catch of a particular stock of fish where harvest of that stock has substantial importance to the economy of the coastal State or

a region thereof. All measures adopted by the coastal State to this end, other than catch limitations, will be effective only in the zone of activity of small coastal fishing vessels that are based exclusively in ports of the coastal State and are of such a size and character that they cannot be relocated to other areas of the high seas (e.g. they cannot engage in distant water fishing). In recognition of the fact that the stock of fish involved may move out beyond this zone at certain times of the year, and there be subject to being caught by distant water fishing vessels, the coastal State may enforce catch limitations beyond this zone if necessary to assure that the small coastal State fishing vessels can continue to catch the reserved portion of the stock of fish within the zone; however, these catch limitations must <sup>also</sup> be applicable to <sup>other</sup> vessels of the coastal State (i.e. large vessels located in other areas of the coastal State) as well as to foreign vessels.

Particular note is made of the important criteria contained in paragraph D designed to achieve a harmonious balance of economic interests. Paragraph D 3 provides that measures taken by the coastal State may "not prevent other

States from fishing for that part, if any, of the allowable catch (of the stock subject to the coastal State's measures) traditionally taken by them". There would be no discrimination among distant water States with regard to the opportunity to fish for the part of the allowable catch traditionally taken by all distant water States. In addition, the part of the allowable catch reserved by the coastal State's measures cannot be "more than can be justified" by the economic interest upon which the measures are based (paragraph D 2) -- i.e. the coastal State cannot reserve a greater portion of "a particular stock of fish" than that portion whose harvest has "substantial importance for the economy" of the coastal State or a region of the coastal State. These provisions would establish the principle that unilateral coastal State actions can be undertaken to protect the real economic interests of the coastal State but cannot be undertaken without reference to the interests of other States.

e) All coastal State measures adopted pursuant to paragraphs B, C, and D must satisfy the specific criteria referred to in the numbered subparagraphs of these respective paragraphs in order to be effective against third States. If

there is a dispute as to whether these criteria are met, it is to be resolved pursuant to paragraph F, referred to below.

f) Paragraph E makes it clear that beyond the 12-mile limit established by Article I all States may fish on an equal basis for all stocks of fish, or other living marine resources, not subject to coastal State regulations under paragraphs B, C, or D and may also fish for that portion of a regulated stock of fish not reserved to the coastal State under paragraphs C and D.

g) Paragraph F provides for compulsory and binding dispute settlement. Almost all experts consulted strongly support such a provision in a fisheries article.

In recognition of the problems that some experts have raised in connection with the "corridor of high seas" language in Article II and in response to the view that existing or future bilateral and multilateral fisheries agreements should expressly be recognized as valid between the parties, the United States has given favorable consideration to amending Article II and adopting a new final clause as follows:

a) Article II would read in full as follows:

"In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State, all ships and aircraft in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas. Coastal States may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels."

b) A new final clause would read in full as follows:

"The provisions of this Convention shall not affect Conventions or other international agreements already in force specifically relating to particular straits or fisheries."

The United States is conducting a canvass to determine whether the international community believes that a Law of

the Sea Conference should and can be held to adopt articles along the lines of draft Articles I, II and III. We would not favor a conference unless there is reason to believe it will be successful. It has been our position that if such a conference is held it should be held without opening the 1958 Geneva Conventions on the Law of the Sea for amendment. If the responses to this canvass are favorable, we would hope that a conference could be convened as soon as practicable.

In this regard, the Government of the United States would appreciate receiving the general views of the Government of \_\_\_\_\_ concerning these draft articles and the positions expressed in this aide memoire and views of the Government of \_\_\_\_\_ concerning the following specific questions:

1. Should a new Law of the Sea Conference be held to adopt articles along the lines of the three draft articles?
2. Could the Conference be limited to these items?
3. Should a Conference be held to adopt articles along the lines of Articles I and II, with the question of fisheries beyond 12 miles being deferred to a subsequent Conference?
4. Could a Conference limited to Articles I and II be successful?