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Authority EG 12958  
By AR NARA Date 10/27DECLASSIFIED  
PA/HO Department of State  
E.O. 12958, as amended  
July 12, 2005

## MEMORANDUM

THE WHITE HOUSE

WASHINGTON

~~SECRET~~ACTION

MEMORANDUM TO MR. KISSINGER

January 26, 1970

FROM: Robert E. Osgood ROO  
SUBJECT: Potential Clash between Latin American Fishing  
Settlement and Law of the Sea Treaty

Recent events -- (a) Peru's seizure at the beginning of the tuna fishing season of two American fishing boats far beyond the twelve-mile fishing-rights zone that we recognize, and (b) our agreement with the Soviet Union to begin active promotion of a conference to get a new law of the sea treaty -- may mean that two sets of American policies and interests, each with strong adherents in the Government, are on a collision course that can be avoided only by a clear choice of priorities or by extremely adroit diplomacy.

The recent seizures were apparently handled quietly, but there is no assurance that there will not be other seizures that will force the issue of whose definition of jurisdiction and sovereignty shall prevail. Even in this case, a collision course between our Latin American and our law-of-the-sea interests is not inevitable, but it is sufficiently likely to warrant focusing on the situation now, lest we either drift into a crisis inadvertently or foreclose policy options without realizing it.

Latin America

The U. S. is currently engaged in a long-festering dispute with Chile, Ecuador, and Peru arising from their claim to a 200-mile zone of territorial sovereignty off their coasts. In negotiations with the CEP countries we have agreed to set aside our conflicting juridical positions on the territorial sea boundary and the zone of exclusive fishing jurisdiction while we try to reach a practical modus vivendi on fishing activities. If we can agree upon a modus vivendi without prejudicing our position on the territorial sea boundary and thereby foreclosing the prospects for attaining the proposed law of the sea treaty, we shall have reconciled, for the time being, our general military and commercial interests in the orderly use of the oceans with our interests in preserving good relations with the CEP countries. If we get into an open argument with the CEP countries over fishing rights and juridical sea boundaries -- especially if we impose sanctions or physically protect tuna boats -- this will almost surely wreck the present efforts to negotiate a settlement with them.

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At stake in a mutually satisfactory resolution of this dispute are not only good relations with the CEP countries but with Latin America generally and also with a number of coastal states in other parts of the world -- particularly the LDCs who are under the lure of great resources far off their coasts. Having just inaugurated a new cooperative partnership with Latin American countries -- many of them restless under the pressure of nationalist and radical forces -- we might sacrifice even more than the new partnership if our modus vivendi failed and we became involved in acrimonious and possibly armed contention over our right to fish in waters in which the CEP countries claim sovereignty. For such an involvement could undermine the credibility of the President's concept of a less obtrusive American posture throughout the world, to the extent that Latin America is regarded as a testing ground of our new approach to the LDCs. It is unlikely that any credit we might get for upholding the rights of maritime nations against unilateral claims would offset this adverse impression.

#### The Prospective Law of the Sea Treaty

During the last two decades there has been a dramatic acceleration of the rate of proliferating unilateral claims to exclusive exploitation and total sovereignty on the seas (and throughout the whole water column) beyond juridical boundaries that were widely accepted before. This proliferation jeopardizes our substantial national security interest in narrow territorial sea boundaries, free navigation and overflight in the area beyond, and the right to conduct military and commercial activities off foreign shores.

It also jeopardizes our even larger interest in obtaining a new law of the sea treaty. It is unlikely that any agreement short of this treaty (which would, in addition to fixing the territorial sea boundary at 12 miles, provide for free passage through narrow straits and a system of fishing preferences for coastal states) would protect our security or commercial interests. Thus, arrangements for limited jurisdiction beyond territorial boundaries for fiscal, fishing, and other purposes have proved to be notoriously susceptible to expansion in that jurisdiction in waters for one purpose tends to lead to claims of total sovereignty in those waters.

Obtaining a law of the sea treaty has recently been given new urgency by a move on the part of a number of nations in the UN to combine consideration of this treaty with a new continental shelf/deep seabeds treaty -- a move which, if successful, would result in a disadvantageously broad legal regime for the whole water column. Moreover, in the absence of

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a new international convention governing jurisdictional and sovereign rights on the continental shelf and deep seabeds (an issue before the Under Secretaries Committee on January 29), the proliferation of unilateral claims under the ocean is likely to preclude agreement on restricted boundaries to the superjacent waters unless the prospective law of the sea treaty is achieved soon.

For these reasons the U. S. and the USSR have agreed to prepare for a law of the sea treaty conference some time in 1971 by actively canvassing the support of other states.

Advocates of a new law of the sea treaty argue that if the U.S. now permits any country physically to assert with impunity a jurisdictional sea boundary contrary to our rights and internationally agreed juridical definitions, or if the US accedes to an agreement contrary to these rights and definitions, the chance of getting a law of the sea treaty will be destroyed. They argue that if we are not prepared to enforce our rights when they are violated, or to insist upon preserving them in any modus vivendi, this will signify to many coastal states whose signatures to a treaty are essential that they have no incentive to sign a treaty but only to see that they are not left behind in the rush to stake out extensive unilateral claims. If a law of the sea treaty is not achieved, they contend the only alternative to accepting a disastrous erosion of our rights of navigation and fishing on the high seas (and continuing conflicts over these rights) will be to enforce our rights under even more disadvantageous circumstances than now.

But, obviously, enforcing our rights would bear a heavy political cost at any time. For this reason, throughout the whole period of proliferating claims during 1945-1970, neither the U.S. nor any other state has enforced its rights off the shores of coastal states that have claimed jurisdiction or sovereignty beyond agreed international boundaries.

Perhaps if the U.S. were to generalize a policy of enforcement and secure Soviet, Japanese and other support (including some LDCs), the political costs with respect to Latin America would be diminished. But perhaps this would only compound our difficulties. In any case, I am informed that if the U.S. were to be able to protect all those rights that are currently under challenge or violation -- by escorting tuna boats, running the Indonesian Archipelago without permission, transiting the Philippine etc. -- it would require logistic support that is probably unavailable without direction from the President and provision for funds to support these activities.

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There is another basic problem with such a bold course of action: If we were generally to enforce our rights, we would still have no assurance that a law of the sea treaty would be achieved. The provision for free passage through narrow straits (Article II) is the crucial one for the U.S. and the USSR, but although the U.S. has twice held consultations with key states -- Denmark, Italy, Spain, and Greece -- these countries do not yet support Article II.

Spain is the most important prospective signatory. Some quarters in State and Defense consider free passage through Gibraltar, which would be jeopardized by a 12-mile sea boundary without Article II, more important than all our bases. But Spain is conspicuously withholding acceptance of Article II as a factor to be considered in the context of her relationship to Europe. Moreover, Spain is championing the claims of Latin American rights.

Whether a general policy of escorting American boats in disputed waters, pending attainment of a law of the sea treaty, would promote or obstruct such a treaty must remain doubtful until we know more about the various factors that would be involved in such a policy.

#### Conclusion

1. In all likelihood, the U.S. will continue not to enforce its rights on the high seas against Peru or any other state unless the President makes a major political decision to reverse familiar practice.
2. If, within the next few months, we can reach a modus vivendi with the CEP countries that saves American tuna boats from seizure and does not jeopardize our juridical position on the law of the sea treaty, then our avoidance of an open contest over other possible seizures in the meantime may be a price worth paying even though it would set a bad example for some potential adherents to a treaty.
3. But if the modus vivendi fails, the argument for enforcing our rights in contested waters will be strengthened, since we shall have less to lose in our relations with the CEP countries.

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4. The chances of achieving such a modus vivendi are not bright now. They would be brighter if we were willing to put accommodation ahead of our juridical position on the territorial sea. Therefore, we may face a clear choice of priorities between the law of the sea treaty and gaining a modus vivendi with the CEP countries.

5. If within a year or not much longer we obtain a law of the sea treaty, then some (but by no means those most interested in Latin America) would consider any sacrifice of an accommodation and good relations with the CEP countries that had been necessary to facilitate this treaty a price worth paying. But if the treaty were not obtained, we would have got the worst of both of our objectives.

6. If a law of the sea treaty is not obtained, we are probably in for a difficult period of rapidly eroding rights and proliferating unilateral claims (as after the partial failure of the previous two postwar law of the sea conferences), which will confront us with the option of trying to enforce our rights under worse conditions than now or trying to cope with continual harassment by other means.

These conclusions argue that:

- We should first reassess our chance of achieving a modus vivendi under the existing constraints and then
- decide whether these constraints should be changed and whether a clear choice of priorities between a modus vivendi and fostering the law of the sea treaty is called for.
- At the same time, the Government ought to consider alternative arrangements to the law of the sea treaty that might permit limited jurisdiction to coastal states, yet protect the rights of other states in areas now in contention.
- In any case, from the standpoint of contingency planning as well as policy making we need to know more about the political, logistical, and economic implications of enforcement.

#### What Next?

This subject is too afflicted with strong and divergent views in the government to be usefully studied in an interdepartmental context. According to your July 12, 1969, memorandum, it might properly be presented to the Under Secretaries Committee if it were clearer precisely what issues needed deciding.

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I propose to examine the issues--possibly in conjunction with S/PC, which has expressed an interest in it--with a mind to recommending what, if anything, the Under Secretaries Committee might be asked to do about it. However, I am aware that inquiries from the NSC, although scrupulously detached from a judgment on the issue, can be interpreted as indications of an NSC Staff view. (For example, an inquiry into the implications of enforcement might arouse consternation in some quarters and hope in others.)

RECOMMENDATION:

That you authorize me to study, possibly in conjunction with S/PC, the possible conflict between our efforts to resolve fisheries disputes with the CEP countries and our efforts to get a law of the sea treaty with a view to recommending what action the Under Secretaries Committee might take.

Approve HK

Disapprove \_\_\_\_\_

Another Course \_\_\_\_\_

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