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Authority EG 12958
By DR NARA Date 10/27

MEMORANDUM

28808

NATIONAL SECURITY COUNCIL

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ACTION

MEMORANDUM FOR: HENRY A. KISSINGER
FROM: RICHARD T. KENNEDY *for*
ARNOLD NACHMANOFF *for*
MARSHALL WRIGHT *for*
SUBJECT: Brazilian Territorial Sea Claims and
Related Fisheries Problems

The Problem

On May 11 and 12, under White House instructions, a U.S. mission sought to persuade the Brazilian Government to defer, from June 1 until fall, implementation of its new regulations affecting foreign flag fishing vessels operating within its claimed 200-mile territorial sea. The Brazilian Foreign Minister has now replied officially to our demarche stating that these regulations are now a matter of law and the Government of Brazil cannot agree to our requested delay.

State and Defense agree that most of the 300 U.S. shrimp trawlers, which fish regularly within 100 miles of the Brazilian coast, will not stay out of the contested waters. Thus, in the absence of a Brazilian decision to postpone enforcement of its regulations or the negotiation of a modus vivendi, the U.S. and Brazil will be in confrontation on this issue after June 1 with the attendant risk of fines, vessel seizures, and imprisonment of vessel captains. The Foreign Military Sales Act, as amended, requires the suspension of military sales to a foreign country which seizes or fines a U.S. vessel fishing more than 12 miles from the coast.

State and Defense have prepared a paper with five options, some with variants, to deal with the situation (Tab B).

The Interests

The situation brings in to play a complexity of interests:

~~SECRET~~

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

~~SECRET~~

- 2 -

-- Our Oceans Policy: We wish to secure freedom of mobility for U. S. warships and military aircraft. Two hundred mile territorial claims such as those of Brazil, Peru, and Ecuador pose a threat to our global security interests. While these or other nations may at present attempt only to enforce these claims with respect to fisheries or other special interests, they may in the future have the capability and inclination to enforce them with respect to navigation. They may also, by their example, succeed in encouraging other less developed countries to pursue similar claims.

-- Access to the High Seas for U. S. Citizens fishing, exploring for minerals, conducting scientific research or simply navigating.

-- U. S. Relations with Brazil and Latin America: If not dealt with skillfully, strong anti-U. S. nationalism in Latin America could lead to erosion of U. S. influence and leadership in the hemisphere and the world. Brazil is the most important country in Latin America and U. S. private investment there totals \$1.7 billion.

The Issues

In our view, the issue at stake here is that of weighing the danger of confrontation with Brazil against the danger that a willingness to negotiate on fisheries matters will encourage other developing countries to conclude that the best procedure for achieving satisfaction in coastal waters from the maritime powers would be first to make a tough unilateral claim and then negotiate. The latter risk could also affect our negotiating posture for the 1973 Law of the Sea Conference as negotiations with Brazil may be interpreted by other nations as U. S. willingness to deal with unilateral and exclusive claims in a way contrary to our strongly expressed position that these problems be considered in the multilateral context of the Law of the Sea Conference.

There is a subsidiary issue of timing. An Oceans Policy review is currently under way in NSSM 125 which will deal with problems such as this one in an overall context. One proposal which may emerge from the study is a recommended shift in our present fisheries policy to more fully accommodate coastal state fishing interests.

~~SECRET~~

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

~~SECRET~~

- 3 -

This proposal might then be tabled at the Law of the Sea preparatory conference convening in Geneva, July 19. By this fall, therefore, we should have a more thoroughly spelled out oceans policy.

The Options

State and Defense perceive the options confronting U. S. as falling into two broad categories:

-- Further efforts to persuade Brazil to postpone enforcement of its regulations without agreeing to undertake fisheries negotiations or,

-- Negotiation on fisheries to achieve a modus vivendi pending the 1973 Law of the Sea Conference.

The former approach, which Defense favors, would be designed to convince the Brazilians of our resolve, and would aim at solving our oceans policy problems in an overall framework rather than by piecemeal accommodations which might prejudice our law of the sea position. The approach would also involve the highest risk of confrontation with Brazil.

In line with this approach, Defense favors Option B-2, whereby we would advise Brazil that we are prepared to make an immediate public announcement of President Medici's visit to Washington (now scheduled for September 28) provided Brazil will postpone enforcement of their regulations. The other option acceptable to Defense is C-1, which would entail direct and immediate contact between Presidents Nixon and Medici in which we would endeavor to persuade him to reconsider his decision but without proposing arbitration.

State recommends the latter of the two basic approaches described above and recommends that we should seek to avert seizures and avoid confrontation by making a commitment to negotiate next fall in return for Brazil's postponing enforcement of her fishing regulations until then. If Brazil insists that in order to postpone enforcement of her fishing regulations she must be able to enter into immediate negotiations with the U. S., State believes we should be prepared to begin negotiations now on a modus vivendi. State believes we should at the very least explore the possibility of an agreement that does not prejudice our law of the sea position in either its legal or bargaining aspects.

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- 4 -

Accordingly, State favors (in order of desirability in terms of protecting our world-wide bargaining leverage on law of the sea matters):

-- Option D, which would attempt to persuade Brazil to avoid seizures until fall by obtaining Brazilian agreement to call multi-lateral negotiations on shrimp fisheries which would include other states whose vessels fish for shrimp off Brazil;

-- Option E, which would attempt to persuade Brazil to avoid seizures until fall by announcing bilateral U.S. -Brazil fishing negotiations for the fall; or if the Brazilians insist on immediate negotiations, then

-- Option F, which would entail an immediate standstill agreement with Brazil which could be on the basis of payment of licenses into an escrow account under protest or agreement for third-party jurisdiction with disbursement or adjudication to be determined in accordance with principles established at the 1973 Law of the Sea Conference. (Defense believes Brazil would reject this proposal as prejudicial to her law of the sea position, which is that she can determine the width of her territorial seas unilaterally.)

Our Recommendation

We believe that a course should be selected which minimizes the risk of vessel seizures but still allows us time to deal with the Brazilian question in the overall context of our oceans policy. We believe these objectives are most likely to be met by informing Brazil that we are prepared to enter into negotiations with Brazil on fishing matters this fall after the preparatory seabed conference is completed in Geneva (Option E). In association with this option we would also consider consultations with other countries whose vessels fish off the Brazilian coast in an effort to concert our positions, and the desirability of a letter from President Nixon to President Medici depending on the Brazilian response.

The course of action outlined above has the advantage that, in the judgment of State and Defense, there is considerable likelihood that Brazil would find it acceptable and that Brazil might consider the announcement of negotiations in the fall as adequate justification for postponing any seizures in the interim period. Meanwhile, we would have time to formulate a negotiating position consistent with our overall oceans policy review. Our agreement to discuss fisheries matters at a specific time could be used to impress the Brazilians with our reasonableness and should avert vessel seizures in the interim.

DECLASSIFIED
PA/HO Department of State
E.O. 12958, as amended
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DECLASSIFIED

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~~SECRET~~

- 5 -

As a fall back position, we should also be prepared to enter into earlier and even immediate discussions with the Brazilians if they insist that negotiations cannot wait until this fall. In such a case, however, we would stress the exploratory nature of these discussions, emphasize to the Brazilians that we are currently seeking to formulate a position on these very matters within our own government, and thus draw out the discussions until at least after the completion of NSSM 125.

We believe the course of action favored by the Defense Department involves unnecessary risks of confrontation with Brazil with potentially adverse consequences for our bilateral and hemispheric relations. Moreover, although we understand the reasoning behind its position, Defense has advanced little solid evidence to support its view that any move to negotiate with Brazil will have a decisive impact on the positions of other nations. Lastly, a confrontation with Brazil and the ensuing crisis atmosphere would certainly do more damage to the chances for broad international agreement on a Law of the Sea Conference than would the mere fact of entering into ^{negotiations with} Brazil on the fisheries matter. In effect, our Law of the Sea interest and our bilateral interest are probably identical in this instance: to avoid crisis.

We have prepared a draft NSDM along the lines of our suggestion as well as a memorandum for the President outlining the problem and seeking his approval of the NSDM.

RECOMMENDATION

That you sign the memorandum to the President at Tab 1.

_____ Approve

_____ Disapprove