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DDI-3384-76

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NSC-U/DM-109J

April 28, 1976

State Dept. review completed

- TO:
- The Deputy Secretary of Defense
 - The Assistant to the President for National Security Affairs
 - The Director of Central Intelligence
 - The Chairman of the Joint Chiefs of Staff
 - The Deputy Secretary of the Treasury
 - The Deputy Attorney General
 - The Under Secretary of Commerce
 - The Under Secretary of the Interior
 - The Under Secretary of Transportation
 - The Director, Office of Management and Budget
 - The Chairman, Council on Environmental Quality
 - The Director, National Science Foundation
 - The Chairman, Council of Economic Advisers
 - The Administrator, Environmental Protection Agency
 - The Director, United States Information Agency
 - The Administrator, Federal Energy Administration
 - The Director, Agency for International Development
 - The Acting Executive Director, Council on International Economic Policy

Subject: Law of the Sea - Request for Instructions on an Article on Vessel Pollution Control in the Arctic

The Acting Chairman has forwarded the attached Memorandum to the President. A copy is provided for your information.

Wreatham E. Gathright
Wreatham E. Gathright
Staff Director

Attachment:

As stated

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DEPARTMENT OF STATE
WASHINGTON

NSC UNDER SECRETARIES COMMITTEE

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NSC-U/DM-109J

April 28, 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Law of the Sea - Request for
Instructions on an Article on
Vessel Pollution Control in
the Arctic

STATEMENT OF PURPOSE

Pursuant to exploratory authority approved by NSDM 260, together with the memorandum from the Assistant to the President for the National Security Affairs of January 27, 1975 on the same subject, the United States Representatives have reached personal and Ad Referendum agreement with Canada and the Soviet Union on the text of an article for the Law of the Sea Treaty on vessel-source pollution control in the Arctic. The three delegations agreed to seek instructions on the Article (although the Soviets appear to already have instructions). The purpose of this memorandum is to request such instructions for the United States delegation pursuant to NSDM 320.

BACKGROUND

In 1970, Canada passed legislation establishing a 100-mile zone off the Canadian Arctic coast pursuant to which Canada applied regulations to control pollution from all vessels in the zone. In order to preserve that legislation, Canada has strongly supported a coastal state right, under

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the law of the sea treaty, to establish and enforce vessel-source pollution control regulations in the economic zone. Canadian representatives have told us privately that this is the most sensitive domestic political issue for Canada in the negotiations and that they must protect their legislation. The United States, of course, has strongly opposed the creation in an LOS treaty of any coastal State right to impose its own vessel pollution control regulations beyond the territorial sea. In addition to this disagreement, Canada has opposed the United States' position of free transit of straits used for international navigation because of its serious concerns with potential pollution problems in the Northwest Passage.

Because of the problems caused in the negotiations by Canadian opposition on these two issues, the United States began exploratory talks with Canada to determine whether the problems could be solved by a specific and limited article in the Law of the Sea Treaty rather than through a general grant of the rights to coastal States. As it became clear that the only practical solution was to devise a special article dealing with the Arctic, the USSR was brought into the discussion since it was clearly impossible to deal directly with an Arctic problem without Soviet cooperation. There have been numerous bilateral exploratory meetings over the past two years culminating in a trilateral meeting on April 6 at which the text of an Article was agreed Ad Referendum. The text of this Article is attached. As part of the agreement on the Arctic Article, the United States has agreed on separate packages of issues with Canada and the Soviet Union. These related understandings are also attached.

THE ARCTIC ARTICLE

A. Area of Application. The Article will apply to areas of the Arctic within the economic zone and territorial sea. While the Arctic is not specified, the Article will apply only to "ice-covered" areas where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment

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could cause major harm to or irreversible disturbance of the ecological balance. This will in fact limit the area to the Arctic Ocean, delineated on the south by: 1) the North Coast of Alaska; 2) the mainland of Canada including all inter-island passages to the north; 3) Baffin Bay and the northern part of Davis Strait eastward to Greenland; 4) a line extending from northeastern Greenland to Svalbard and thence to the Norwegian coast near North Cape; and 5) eastward by the Soviet mainland of the Barents, Kara, Laptev, East Siberian and Chukchi Seas including all inter-island passages to the north. Small areas of coastal waters may extend south of the general area depending upon the interpretation of "most of the year." The Article must not be expanded to include any other area. Antarctica would not, in our view, be included since the US does not recognize claims to sovereignty that have been made there and does not consider that any State exercises sovereign rights over the coastal area.

B. Coastal State Authority. The Article grants to the coastal State the authority to establish and enforce vessel-source pollution control regulations in the area subject only to compulsory dispute settlement. The Department of Transportation believes that such coastal State authority should be subject to binding review by the Intergovernmental Maritime Consultative Organization (IMCO) before regulations take effect. This position was advocated by the US during the negotiations but was unacceptable to Canada and the USSR. It was unacceptable to Canada and the USSR for reasons due, inter alia, to their claims of sovereignty in Arctic areas.

C. Relationship to Straits. Article 39 of Part III of the Single Negotiating Text states that Chapters VI and VII of Part III (Regulation making and Enforcement Against Vessel Pollution) shall not affect the straits regime set out in Part II. This was placed in the text to ensure that the straits regime articles would not be superseded by Part III provisions giving both vessels pollution control regulation-making and enforcement powers in the territorial sea to coastal States. Conversely, the

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Arctic Article is intended to grant such powers for Arctic straits. In other words an Arctic strait would be subject to this article and our right of passage, as well as that of others, would be limited by this article. It will be placed in a separate Chapter so as not to be affected by Article 39.

D. Military Exemption. The military exemption, Article 42 of Part III, will apply to the Arctic Article. (The existing text of the Article will be amended to apply to all pollution control articles in the entire convention.)

E. Compulsory Dispute Settlement. The Compulsory Dispute Settlement provisions of the Convention will apply to the Arctic Article pursuant to Arctic Article 44 of Part III.

F. Safeguards. The text of the Arctic Article requires that any regulations and their enforcement be nondiscriminatory and give due regard to navigation and protection of the marine environment. This due regard clause does not provide specific objective protection for navigational interests in this area. In addition, all of the other enforcement safeguards of Part III will apply to the Arctic Article (flag state pre-emption, quick release of vessels, no imprisonment, liability for unreasonable enforcement, etc.) The Department of Commerce has indicated that the text of the Arctic Article should be changed to strengthen the protection in the last sentence so as to read: "Such laws and regulations shall not have the practical effect of impeding freedom of navigation and shall have due regard for the protection of the marine environment based on the best available scientific evidence." Failing this, the delegation should be instructed to obtain from the Arctic nations an understanding that "due regard for navigation...." in fact will be applied in such a way as to "not have the practical effect of impeding freedom of navigation."

ANALYSIS OF SUBSTANTIVE PROVISIONS AND ISSUES

A. Regulation-Making, Enforcement and Safeguards. Freedom of navigation in the economic zone and innocent passage in the territorial sea (guaranteed in the text in Part II) would apply in the Arctic subject, of

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course, to the regulatory and enforcement powers in the Arctic Article which are complete powers with regard to vessel pollution control. In addition, there will be several articles in the treaty to ensure that actions are nondiscriminatory, that vessels are not tied up for more than a short period following arrest, etc. Canada and the USSR are satisfied with the extent of the authority and with the safeguards.

B. Straits. Canada is satisfied that the Article will give her adequate powers in the Northwest Passage to prevent pollution from commercial vessels. As part of an agreement on an Arctic Article, Canada will not oppose the US position on straits connecting two parts of the high seas. Canada continues to be concerned about straits leading from the high seas to the territorial sea of another state. She is concerned with traffic in the strait of Juan De Fuca, a problem we may solve bilaterally, and with traffic in Head Harbor passage leading to Eastport, Maine. Canada may also remain silent on this point but is not committed to do so, although we will try to secure their committal thereto.

C. Military Exemption. The Canadians have accepted the military exemption. The Soviets had implied earlier in the discussion that they might have difficulty in exempting military vessels and aircraft from the Arctic Article, presumably because they did not want to indicate that United States military vessels and aircraft have a right to navigate in the Arctic north of the Soviet coast. As part of a package, they have accepted the application of the military exemption, Article 42, to all the pollution articles, thus including the Arctic Article without specifying it openly.

D. Compulsory Dispute Settlement. Both Canada and the USSR accept the application of binding third-party dispute settlement procedures to all vessel pollution articles including the Arctic Article. However, we have not yet won the fight in the Conference generally on having compulsory dispute settlement procedures with a binding result.

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The negotiations on this issue at this session are just beginning in earnest. The USSR, traditionally an opponent of compulsory dispute settlement procedures, has publicly accepted the application of binding procedures under the Law of the Sea Treaty to disputes relating to pollution, scientific research, fishing and navigation.

E. Special Area Regulation-Making. A number of delegations have supported a coastal State right to establish regulations controlling vessel discharges in areas of the economic zone which they regard as particularly sensitive. The US has consistently opposed in the LOS negotiations the establishment of any coastal State regulation-setting authority beyond the territorial sea. During this session some countries have linked a settlement on an Arctic Article with a special area Article, arguing that they should have the same or similar rights in special areas that others would have in the Arctic. Canada and the USSR will join us in fighting this linkage and will oppose coastal State regulation-setting beyond the territorial sea. Since the issue of regulation-making in the economic zone has not yet been discussed specifically during this session, it is difficult to determine what effect agreement on an Arctic Article would have. Some countries may strengthen their argument in favor of special area rights. However, we have agreed with the USSR and Canada that, in any case, no new Arctic Article would be surfaced until very late in the session. Ideally, we will be able to convince Chairman Yankov (Bulgaria) of the Third Committee to insert the Article in the revised text without open discussion of the text. (The USSR suggested this.)

F. Other Issues with the USSR. In conjunction with tentative agreement with USSR on the Arctic Article, we have been able to obtain agreement on several other issues. These include Soviet silence on the US proposal for port State enforcement of international discharge regulations and Soviet support for compulsory dispute settlement procedures applicable to pollution disputes with a complete military exemption from compulsory

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dispute settlement. They also include an understanding that both the USSR and the US expect eventually to have a port State discharge enforcement article with no area limitation and a flag State pre-emption article along the line of Article 33 in the latest Evensen text.* The United States, however, remains free to press for certain language changes in Article 33 to provide additional protection for the enforcing coastal or port State. In any case, Article 33 has been generally accepted in the negotiations by the maritime powers and we will attempt to make vigorous efforts to achieve inclusion of additional major protections for US interests.

While the Environmental Protection Agency has no substantive objection to the proposed Arctic

*Article 33 Evensen Text dated March 19, 1976:

Criminal proceedings in respect of any violation of laws and regulations committed by a foreign vessel relating to the prevention, reduction, and control of pollution from vessels which has occurred beyond the territorial sea of the proceeding State shall be suspended upon the taking of criminal proceedings under corresponding charges by the flag State within three months of the first institution of proceedings, provided that the flag State in question has not disregarded its obligations under international law to enforce effectively the applicable international rules and standards in respect of violations committed by its vessels. The flag State shall in due course make available to the first proceeding State a full dossier of the case and the records of the proceedings, whenever it has requested the suspension of proceedings in accordance with the provisions of this Article. When proceedings by the flag State have been brought to a conclusion which correspond to the purpose of effective enforcement, suspended proceedings shall be finally terminated, and, upon payment of any costs incurred in respect of such proceedings, and any compensation adjudged in connection with criminal proceedings in the flag State for damage sustained in the first proceeding state, any bond shall be released.

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Article, it does not believe the Article should be negotiated at the cost to our environmental objectives entailed in paragraph 5 of the related understanding with the USSR and it suggests that the proposed instruction be modified to prevent acceptance of the understanding included in that paragraph. A copy of Russell Train's comments is attached.

TACTICAL SITUATION

A. Other Arctic States. We have consulted with Denmark and Norway who have indicated that the Arctic Article is acceptable to them.

B. Other Maritime States. The European maritime states and Japan have consistently opposed any coastal State right to unilaterally establish vessel-pollution control regulations beyond the territorial sea. However, they have generally indicated a willingness to accept an Arctic Article if the USSR, Canada and the US could agree on such an Article. The UK and Japan have specifically reaffirmed that willingness.

C. Coastal States. As is indicated above, there is still pressure from coastal States for a right to establish vessel discharge regulations in special areas of the economic zone. A discussion of an Arctic Article could increase that pressure somewhat. However, it should be possible to minimize that problem by postponing introduction of a new text for an Arctic Article (there is a text already in the Single Negotiating Text that can provide a focus for discussion in the Committee).

Arguments in Favor:

-- Agreement on this Article will ensure that a moderate Article is in the text. Without agreement, a Soviet drafted Article could be inserted without our consent through the Bulgarian Chairman of the Third Committee.

-- Because of the limited area of application, the Article will have little effect on navigation

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particularly since in most of the area commercial navigation requires the active cooperation of the coastal State.

-- With agreement, Canada will no longer oppose our position on transit of straits. This is particularly important because of Canadian Ambassador Beesley's Chairmanship of the Conference Drafting Committee, as well as his knowledge and facility for raising difficult and embarrassing questions.

-- Application of the military exemption Article, Article 42, to the Arctic Article will give us another argument that US military vessels and aircraft have a right to navigate in the Arctic north of the Soviet coast.

-- The acceptance by the USSR of compulsory dispute settlement with regard to pollution disputes will assist us in our attempts to obtain a compulsory dispute settlement system in the treaty.

-- Canadian assistance to the US position on no coastal State regulation-making beyond the territorial sea will be important, since Canada has been a major opponent on this issue.

-- Soviet collaboration on certain pollution issues will strongly assist us in obtaining important US objectives such as port State enforcement rights against violations of international discharge regulations.

-- Application of the various safeguards in the Article and in the pollution part of the treaty will prevent unreasonable actions by the coastal State. The safeguards include a nondiscrimination requirement, vessel release provisions, flag State pre-emption, etc. P

-- The Article reduces the temptation for the Canadians and Soviets to seek language in the straits articles excluding their Arctic straits from the straits regime.

-- The Article could provide substantial environmental protection in the Arctic, including

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that off the Alaskan coast, through coastal State regulations if substantial marine traffic ever occurs. It has always been impossible to obtain internationally agreed regulations for the Arctic because of Soviet unwillingness to negotiate such regulations.

-- The ability of the USSR and Canada to control merchant shipping under the Arctic Article may over time reduce their insistence that all use of Arctic areas generally is subject to a restrictive coastal State regime.

Arguments Against:

-- Notwithstanding the safeguards, it is possible that the absence of a strong normative standard could encourage the coastal States to misuse their authority and hamper commercial navigation, particularly by tankers.

-- Acceptance of a coastal State right to establish vessel pollution control regulations in this situation could undercut the growing acceptance of IMCO as the organization through which such regulations should be established.

-- Acceptance of the Arctic Article could undercut the US position favoring exclusively international vessel pollution regulations beyond the territorial sea, possibly resulting in strong demands by coastal States for regulation-making rights at least for vessel discharges in special areas of the economic zone.

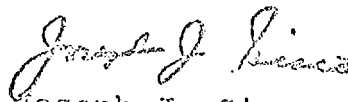
-- Acceptance of the Arctic Article will undercut the US objective of a strong system of port State enforcement in view of the understanding with the USSR that we expect the treaty to contain a flag State pre-emption article of this type in the latest Evensen text. However, it is likely that such a flag State pre-emption Article would be included in the final text.

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RECOMMENDATION

Noting the comments of the Department of Commerce and EPA, the Members of the Under Secretaries Committee who have responded recommend that the US Delegation be authorized to accept the Arctic Article as herein forwarded as part of the related understandings with Canada and the USSR.


Joseph J. Sisco
Acting Chairman

Attachments:

Arctic Article
Related Understanding with Canada
Related Understanding with the USSR

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TAB A

ARTICLE _____

The coastal State has the right to establish and enforce nondiscriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection of the marine environment based on the best available scientific evidence.

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TAB B

RELATED UNDERSTANDINGS WITH CANADA

1. Canadian support for the US position on straits connecting one part of the high seas to another part of the high seas.
2. Canadian support for the US position of no coastal State vessel pollution standard-setting in any part of the economic zone except for the Arctic.
3. Canadian support for a military exemption (Article 42) applicable to all of the pollution articles including the Arctic Article.
4. Canadian support for compulsory dispute settlement procedures applicable to the Arctic Article.
5. It was noted that the US and Canada have similar attitudes with respect to coastal State authority to establish vessel pollution control regulations in the territorial sea subject to innocent passage and port state jurisdiction to take enforcement action regarding violations of the international discharge standards regardless of where the violation occurs.

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TAB C

RELATED UNDERSTANDING WITH THE USSR

1. USSR support for the US position on no coastal State pollution control regulations beyond the territorial sea except in the Arctic.
2. USSR support for a total military exemption from all the pollution provisions in the convention including the Arctic Article.
3. USSR support for a requirement of immediate release of an arrested vessel on posting of financial security and for no imprisonment for pollution violations.
4. USSR support for compulsory dispute settlement applicable to all pollution disputes, including those under the Arctic Article, with no possibility of a State ratifying the Convention without accepting this, provided that the State can choose the mechanism (tribunal, arbitration, etc.). There will also be a total military exemption to all dispute settlements.
5. An understanding that we both expect to eventually have a port state discharge enforcement article with no area limitation and a flag state pre-emption Article of the type in the latest Evensen text.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

APR 27 1976

THE ADMINISTRATOR

Dear Mr. Robinson:

We have your memorandum of April 26, 1976 requesting EPA concurrence or comments on the Arctic "package" recently negotiated on an ad referendum basis with Canada and the USSR.

EPA is of the view that the understanding with the USSR, referred to in paragraph 5 of Tab C, means, in practical effect, that we will no longer oppose a strong flag state preemption provision; and -- at least as far as the USSR is concerned -- that we will cooperate in achieving inclusion of such a provision in the revised single negotiating text. We regard paragraph 5 of the Tab C as undesirable.

A basic and long-standing goal of the U.S. in Committee III has been to achieve an effective system of universal port state enforcement of international discharge standards; our equally long-standing goal of defeating a flag state preemption article is therefore an integral part of our environmental strategy in Committee III.

To the extent it retreats from our stance on flag state preemption, inclusion of the understanding expressed in paragraph 5 of Tab C in a "package deal" on the Arctic undercuts that strategy. There is, we believe, substantial irony that the U.S. now proposes to compromise a principal environmental objective (an effective port state enforcement regime) in order to induce the USSR to permit us to accommodate a Canadian objective in the Arctic. While ostensibly "environmental", that objective in fact provides few environmental benefits, and permits unilateral coastal state standard-setting in at least one area outside the

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territorial sea. EPA must defer to others with respect to the appropriateness of concluding two agreements, Tabs B and C, both of which contain understandings on port state enforcement, but only one of which -- that with the Soviets -- acknowledges our expectations concerning the trade-off -- flag state preemption.

Accordingly, while we have no substantive objection to the proposed Arctic article, we do not believe it should be negotiated at the cost to our environmental objectives entailed in paragraph 5 of Tab C, and we suggest that the proposed instruction be modified to prevent acceptance of the understanding included in that paragraph.

In making this request, we note that our understanding with the Soviets on port state enforcement and flag state preemption is not of direct relevance to the central issues in the Arctic "package". Although EPA was not aware at the time of the discussions with the Soviets on flag state preemption, we do not believe that our receding from our position on this point is a sine qua non to negotiation of an Arctic article, and we fail to see why the U.S. should foreclose its options on this point at this time. Reasonable men may differ as to the likelihood of finding a flag state preemption clause in the final treaty text, but surely U.S. behavior is one major factor bearing on the outcome of this aspect of the Committee III negotiations.

Finally, we note that if and when there is a widely-accepted LOS text, the time will come when the environmental benefits of such a text must be explained. Without attempting at this time to prophecy what those benefits might be, we strongly fear the emergence of a vessel source pollution regime which does little more, in practical terms; than to carry forward the existing 1954 Convention on the Prevention of Pollution of the Sea by Oil, enforceable, for all practical purposes, only by the flag states involved. If that occurs,

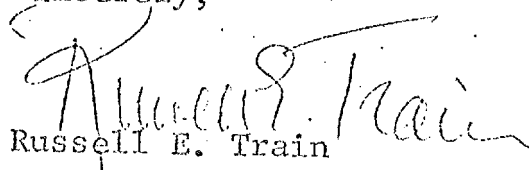
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the claim will be made that, in spite of U.S. efforts in LOS, IMCO and elsewhere, vessel source pollution will proceed (or increase) on a "business-as-usual" basis for the foreseeable future.

Sincerely,


Russell E. Train

Honorable Charles W. Robinson
Chairman
NSC Under Secretaries Committee
Department of State
Washington, D.C. 20520