MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke
Executive Director

DATE: January 5, 1995

SUBJECT: International Fisheries

ESTIMATED TIME
1 HOUR

ACTION REQUIRED

Report from David Balton, U.S. State Department

BACKGROUND

Last September the Council received a status report on the following international fisheries initiatives:

1. UN Convention on the Law of the Sea (UNCLOS)
2. UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks
3. Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean
4. Global Large Scale High Seas Driftnet Moratorium
5. Convention on the Conservation and Management of the Pollock Resources in the Central Bering Sea
6. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

UNCLOS was transmitted to the Senate on October 7, 1994 for advice and consent. Also, we've been notified that the next session of the Straddling Stocks Conference will be in New York on March 27-April 12. As you will recall, the Council's Law of the Sea Committee in September raised concerns about both UNCLOS and the conference, and whether they would infringe upon or degrade highly important, regional agreements such as the convention to protect central Bering Sea pollock. The main concern raised was over dispute settlement, wherein dispute settlement could be left under an international tribunal and the outcome could be less likely to be in our favor than if regional pressures and mechanisms were used. So our main question is now will these U N. initiatives affect some very important regional agreements we have off Alaska such at the Donut convention, and more broadly, the global driftnet moratorium.

I have invited David Balton from the U.S. State Department to inform us about ongoing international initiatives, and to respond to concerns that have been raised over UNCLOS and the Straddling Stocks Conference and potential impacts on our regional management structures. Then I assume we need to forward our comments to the Senate and to the State Department.

Item C-8(a) is a redraft of the minutes of the Law of the Sea Committee. Item C-8(b) has an overview by NMFS of the Straddling Stocks text. Item C-8(c) has responses to questions posed by Senator Murkowski. Item C-8(d) has comments offered by Prof. William Burke of the School of Law at the University of Washington.

Issues and Concerns with UNCLOS and Straddling Stocks Initiatives

The Council's Law of the Sea Committee has developed the following discussion of United Nations Convention on the Law of the Sea-related (UNCLOS) activities and concerns raised regarding Alaska fisheries. The Committee recognizes that UNCLOS contains some important positive aspects such as establishment of EEZs, resolution of navigation and boundary issues, and other constructive initiatives. The discussion below, however, focuses on problems relating solely to fisheries issues of major interest to the Council. This discussion incorporates many of the views expressed in the earlier draft minutes of September 28, 1994. The Committee is comprised of Dave Hanson (Chair), Dave Benton, Dave Benson, Harold Sparck, Greg McIntosh, and Dave Fluharty (new since the Committee last met). CAPT Anderson has attended meetings as an observer.

Background

1. The UN Law of the Sea is expected to go into effect by the end of 1994. The United States is not a party to the Convention at the present time. The Administration is forwarding the Convention to the Senate for advice and consent by the Senate in 1995.

2. UNCLOS embodies a number of important principles relating to management of the world's oceans, including the establishment of the 200-mile zones. It also establishes rules governing fisheries both inside those zones and outside those zones on the high seas.

3. With regard to the high seas, the Convention firmly establishes the right for nations to fish on the high seas, and provides general guidance regarding the need for states to cooperate to conserve living marine resources on the high seas. Most importantly, however, the UNCLOS does not spell out how the coastal states and the distant water fishing states are to cooperate to manage high seas fisheries, and is particularly vague regarding the responsibilities of each. This lack of specific requirements for conservation and management on the high seas is an important factor contributing to overfishing of many stocks.

4. The UNCLOS also requires nations which are parties to the convention to be bound by mandatory and binding dispute resolution mechanisms, including settlement by an international tribunal if necessary. Decisions by such a tribunal are binding.

5. In partial response to the need for more specific measures to be in place for management of fisheries on the high seas, the UNCED conference called for a conference on straddling fish stocks (i.e., stock occurring both inside and outside the EEZ, such as Aleutian Basin pollock) and highly migratory fish stocks (i.e., tunas, billfishes, etc., which occur widely in the EEZs and throughout the high seas).

6. The Conference on the Conservation of Straddling Fish Stocks and Highly Migratory Fish Stocks has had three sessions, and a draft text for a binding convention has been developed. This new convention is intended to govern the management of such stocks and thus is an expanded interpretation of international law. The provisions in UNCLOS and this text would be the standards used by any tribunal established pursuant to UNCLOS to settle disputes. The text has some useful provisions, and some very unconstructive provisions relating to the rights and obligations of nations in the management of these stocks.

7. Some of the provisions in the new treaty text could have important implications for management of U.S. domestic fisheries inside the 200-mile zone. For example, the text requires that management of highly migratory species be "compatible" throughout their range, both inside and outside 200-mile zones. The text would also set standards for conservation and management of stocks which could apply both inside and outside the 200-mile

zone. In addition, the draft text incorporates many of the dispute settlement provisions of UNCLOS, including binding and mandatory dispute settlement by arbitration and would also require that international regional fishery management agreements be renegotiated if they do not include conflict resolution procedures.

Concerns

1. If the U.S. becomes party to UNCLOS, then the U.S. will be bound by the dispute resolution mechanisms of the convention. If a fishery arises which is detrimental to U.S. interests and the U.S. takes some action regarding that fishery (trade or port sanctions, etc.) then the fishing nation could take the U.S. to the international tribunal for binding arbitration. The language in UNCLOS is sufficiently strong regarding the right to fish on the high seas, and sufficiently vague regarding the responsibilities of fishing states, that the impact of such actions could be to significantly erode the ability to implement U.S. policy and protect U.S. interests.

2. An area of immediate concern is the effect this might have on U.S. policy regarding the voluntary UN moratoria on high seas driftnets. Once UNCLOS is in force, a nation such as Italy or France could declare its intent to resume a modest driftnet fishery. It is easy to envision such an action going to an international tribunal to settle the dispute. If the tribunal were to agree to some form of modest fishery, then the U.S. would be bound by that decision. This would set a precedent which could apply elsewhere, such as in the North Pacific, the South Pacific, or off the Atlantic coast. In this case the U.S. would be in the position of renegotiating bi-lateral or multi-lateral driftnet management arrangements. Past experience showed such agreements to be less than effective at protecting U.S. interests regarding conservation of fish stocks (i.e., swordfish, tuna, illegal salmon pirating, etc.) marine mammals, seabirds, sea turtles, and other species. Experience also clearly demonstrated that such agreements were extremely difficult and expensive to enforce as well. A way to address this concern is to memorialize the high seas driftnet moratoria in a binding agreement.

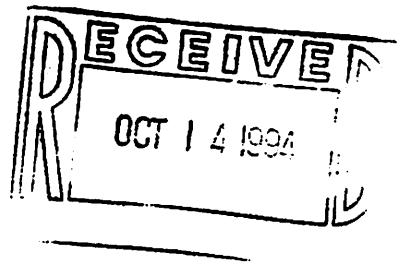
3. Similarly, the U.S. change in position to push for a binding agreement to come out of the Straddling Stocks/Highly Migratory Stocks Conference could be detrimental to U.S. interests unless the U.S. takes an active role in resolving certain key issues, including the applicability of the agreement to fisheries inside the 200-mile zones, the respective obligations of coastal nations and distant water fishing nations to conserve and manage stocks, and the binding arbitration provisions. Successfully amending such provisions, and strengthening other provisions to protect and further U.S. interests in conserving and managing living marine resources is critical if the U.S. is going to become party to this convention as well as UNCLOS.

4. The draft SS/HMS treaty text has significant implications for the Central Bering Sea Convention. The provisions regarding dispute settlement and the obligations of nations not party to regional agreements could weaken the CBS treaty unless they are changed. For example, the text would require that regional fisheries agreements must be renegotiated to include finding dispute settlement procedure if they presently do not (Art. 10(k)). The CBS convention would be subject to renegotiation under this requirement. The draft text also establishes requirements to accommodate new entrants to fisheries (Art. 10(i)). Presently, it is U.S. policy to discourage new entrants to this fishery if and when the Aleutian Basin pollock stocks recover. Attempts to enforce this policy could lead to imposition of the binding dispute settlement provisions under UNCLOS or the SS/HMS treaty.

AGENDA C-8(b)
JANUARY 1995

UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1335 East-West Highway
Silver Spring, MD 20910
THE DIRECTOR

OCT 7 1994



Mr. Clarence G. Pautzke
Executive Director
North Pacific Fishery Management Council
P.O. Box 103136
Anchorage, Alaska 99510

Dear Mr. Pautzke:

I am writing to invite the assistance of the Council, through the Chair and the Executive Director, in advising the Department of State regarding the U.S. position in the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. At the negotiating session that concluded on August 26, the Chairman of the Conference circulated a negotiating text couched in binding, treaty language. This represents a fundamental shift in the process from working toward non-binding principles and guidelines. Because of the potential implications for domestic as well as international conservation and management of the two categories of fish stocks, we need to inform the Councils and invite their participation.

We have prepared a brief summary and analysis of the current negotiating text which is enclosed along with the Chairman's text. The Department of State is coordinating a process that would welcome your input and anticipates shaping a U.S. position with the benefit of all comments received by the end of November 1994. Please direct any comments to:

Mr. Larry L. Snead
Director, Office of Management
and Conservation
Department of State
Washington, D.C. 20520-7818

I would also welcome receiving a copy of any comments you may submit. Thank you for your cooperation.

Sincerely,

Gary Matlock

for Rolland A. Schmitten

Enclosures

THE ASSISTANT ADMINISTRATOR
FOR FISHERIES

Status of the United Nations (UN) Conference
on Straddling Fish Stocks and
Highly Migratory Fish Stocks (Conference)

The purpose of this paper is to characterize the origins and status of the Conference negotiating process, describe the current negotiating text (attached), and provide a brief analysis of the implications of the text for the Magnuson Fishery Conservation and Management Act, U.S. domestic fisheries management, and international fisheries management arrangements to which the United States is party.

Negotiating Process

The Conference is an outcome of the UN Conference on Environment and Development and was called for by resolution of the UN General Assembly. It concluded its third substantive session in New York on August 26. General concern with the overcapitalization of the world's fishing fleets, overfishing generally and particularly on the high seas, and concerns over specific fisheries for straddling or highly migratory stocks are the key issues that gave rise to the negotiations. (The Conference has yet to define either term, but the usage of "highly migratory fish stocks" is compatible with the Magnuson Act's definition, and "straddling stocks" is understood to mean those stocks that appear within an EEZ and in the adjacent high seas area.)

The enabling resolution (UNGA 47/192) states that the Conference, drawing on scientific and technical studies by the UN Food and Agriculture Organization, should: identify and assess existing problems related to the conservation and management of straddling fish stocks and highly migratory fish stocks, consider means of improving fisheries cooperation among states, and formulate appropriate recommendations.

Through its first two substantive sessions, in July 1993 and March 1994, the Conference considered several Chairman's negotiating texts couched in terms of non-binding guidelines and principles. The texts represented the Chairman's efforts to reflect a balance between the various views expressed by many countries, including the key issues of whether the final text should be non-binding or binding in character; the role of subregional or regional fisheries conservation and management organizations or arrangements; compatibility of conservation and management measures within areas of national jurisdiction and in the high seas areas beyond; application of the precautionary approach to conservation and management; the need to distinguish between straddling and highly migratory fish stocks but to emphasize the necessity of conserving and managing the stocks in

each category throughout their ranges (the "biological unity" of these stocks); monitoring, surveillance, and compliance; minimum standards for scientific data collection and sharing; and dispute resolution.

At the third substantive session, August 15-26, the Conference produced movement toward consensus on many of these key issues, including the form of the final outcome. In the wake of the U.S. announcement of its willingness to work actively toward a strong and meaningful treaty, most participants have accepted that further work will be carried out on the basis of the attached text, which is drafted in binding terms. It also sets forth the Chairman's view of the evolution of negotiations on matters of substance, including the key ones noted above. Probably none of the approximately eighty countries participating in the Conference is satisfied with all provisions of the text, but evidently all accept it as the vehicle for further negotiations, amendment, and consensus building. Should the Conference, which is scheduled to complete its work in 1995, adopt a treaty, the Administration would need to seek the advice and consent of the Senate to ratification of that treaty.

Current Chairman's Negotiating Text

The text contains a preamble, 47 articles in 13 Parts, and three annexes.

The brief preamble focuses on the need to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through cooperation between coastal states and states fishing on the high seas.

Part I, general provisions, sets forth definitions of key terms used, the objective, application to the high seas and areas of national jurisdiction, and nonprejudice to the provisions of the UN Convention on the Law of the Sea (UNCLOS).

Part II, conservation and management, obligates coastal states and states fishing on the high seas to cooperate in accordance with UNCLOS and to apply the precautionary approach to fisheries management to ensure long-term sustainability of stocks. Conservation and management measures for non-target species are also required. Development and use of selective and environmentally safe fishing gear and techniques are to be promoted. Compatibility of conservation and management measures within and beyond areas of national jurisdiction is required.

Part III, mechanisms for international cooperation, deals with cooperation for conservation and management, subregional or regional fisheries management organizations or arrangements and their functions, and cooperation to strengthen existing organizations or arrangements. It also addresses collection and sharing of data and enclosed and semi-enclosed seas.

Part IV, duties of the flag state, sets forth these duties and requirements to ensure that vessels of the flag state comply with subregional and regional conservation and management measures.

Part V, compliance and enforcement, deals with flag state enforcement, international cooperation in enforcement, and regional arrangements for enforcement.

Part VI, port state enforcement, deals with port state prerogatives regarding foreign flag fishing vessels.

Part VII, requirements of developing states, deals with measures to assist developing states in carrying out their rights and duties for the conservation and management of straddling and highly migratory fish stocks. These include financial and technical assistance.

Part VIII, peaceful settlement of disputes, relies on the dispute settlement provisions of UNCLOS but provides for interim measures pending the outcome of a dispute.

Part IX, non-participants, deals with the situation of states whose vessels fish in regulated fisheries but are not members of or cooperating with relevant subregional or regional fisheries management organizations or arrangements.

Part X, abuse of rights, requires states to fulfill in good faith the obligations set forth in the text in a manner consistent with UNCLOS.

Part XI, non-parties to this agreement, requires parties to encourage non-parties to accede to the text.

Part XII, implementation and review, deals with implementation reports from subregional and regional bodies to the Secretary General who, in turn, is required to submit biennial reports to the General Assembly. A review conference will meet four years after the text is adopted.

Part XIII, final provisions, specifies that the text will enter into force 30 days after the 40th ratification and sets forth other provisions.

There are three annexes, dealing with minimum standards for collection and sharing of data, guidelines for the application of precautionary reference points, and arbitration, respectively.

Implications of the Text

The National Marine Fisheries Service (NMFS) does not believe that the Chairman's text, as presently drafted, would require amendment of the Magnuson Act. With respect to the application of the precautionary approach, the Magnuson Act does not mandate fisheries conservation and management actions that recognize scientific uncertainties and data gaps to the degree the Chairman's text would require. But such actions would not be inconsistent with that Act either. In fact, the adoption by the Regional Fishery Management Councils and NMFS of risk-averse decision making in fisheries conservation and management is an application of the precautionary approach. We also see no inconsistencies between the Magnuson Act and the provisions of the Chairman's text dealing with conservation and management, enforcement, and data collection (the United States has proposed to the Chairman that the minimum standard for collection and sharing of data be the items in paragraph 4 of Annex 1).

We note that the U.S. delegation to these negotiations has consistently worked to avoid any inconsistencies between the Magnuson Act and the Chairman's text. NMFS anticipates that the evolving provisions of the Chairman's text, such as those related to the precautionary approach, may imply changes of interpretation as well as practice in domestic fisheries management, but these changes are within the scope of actions authorized by the Magnuson Act and are already occurring for the same reasons the Conference is reaching consensus on a conservative orientation.

Finally, the question arises as to the implications of the Chairman's text for existing international fisheries management arrangements. Clearly, where international management arrangements do not exist for high seas straddling stock or highly migratory fish stock fisheries, states are encouraged to create them in carrying out their duties to cooperate. States whose vessels fish in areas where they are not party to or do not cooperate with existing arrangements are required to become party to or cooperate with such arrangements or to cease the fishing in question. Resource allocation questions will continue to be difficult due to the text's imperative (Article 8, paragraph 3) that states whose vessels fish for pertinent stocks in an area managed under existing international arrangements should become party to or cooperate with such arrangements under the applicable rules of those arrangements. Once party to the arrangements, such states would enjoy corresponding benefits, including the expectation of resource allocations, as set forth in Article 10. However, resource scarcity may frustrate these expectations.

Specific U.S. interests in the stocks under consideration include tuna and other non-cetacean highly migratory fish stocks and pollock in the central Bering Sea. Subregional or regional fisheries management organizations or arrangements exist or are soon to exist in all areas U.S. fishermen fish for these species,

except the areas of the North Pacific not addressed by the Inter-American Tropical Tuna Commission, where fishing occurs for albacore and other tuna. The United States is consulting with Japan regarding the establishment of appropriate arrangements for these areas, and we will enter into discussions with other countries when appropriate. Otherwise, the Inter-American Tropical Tuna Commission, the International Commission for the Conservation of Atlantic Tunas, and the South Pacific Tuna Treaty support U.S. interests in the highly migratory fish stocks covered by those agreements. The Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, which is not yet in force, will protect U.S. interests in that straddling stock.

The Chairman's text would require subregional or regional fisheries management organizations or arrangements to adopt compulsory, binding settlement procedures for disputes. This is a highly contentious issue, and the United States has opposed reopening the agreements establishing such organizations or arrangements to meet this requirement. Otherwise, NMFS does not see inconsistencies between these international fisheries regimes and the Chairman's text; however, changes may be required in the practice of conservation and management, enforcement, and perhaps data collection carried out under these regimes.

United States Senate

COMMITTEE ON FOREIGN RELATIONS
WASHINGTON, DC 20510-6225

September 15, 1994

MEMORANDUM

TO: Senator Murkowski

FROM: Senator Pell, Chairman

SUBJECT: Reply to Additional Questions
(Current Status of Law of the Sea Convention)

A reply has been received by the Committee to the additional questions you submitted to David A. Colson, Deputy Assistant for Oceans in the Bureau of Oceans and International Environmental and Scientific Affairs of the Department of State, in connection with the hearing of August 11, 1994, on the Current Status of the Law of the Sea Convention.

A copy of this reply is attached.

Attachment

cc: Ed Hall, Committee Majority Staff
Steve Polansky, Committee Majority Staff
Tom Callahan, Committee Minority Staff
Committee Editors

mjh

QUESTIONS FOR THE RECORD
SUBMITTED BY
SENATOR FRANK H. MURKOWSKI
LAW OF THE SEA HEARING
AUGUST 11, 1994

Question 1: The Law of the Sea (LOS) Convention's provisions include measures allowing parties to initiate binding arbitration procedures. Some observers have suggested that a number of arbitration calls may be made soon after the LOS Convention becomes effective, and may include demands to arbitrate provisions of international agreements already concluded by the United States, such as the United Nations high seas driftnet moratorium or the Bering Sea "Doughnut Hole" agreement. The latter, for instance, built upon the LOS Convention's concept of coastal State "responsibility" to allow the U.S. and Russia to exert control over future overall fisheries harvest levels. However, the LOS Convention does not contain specific delegation of such authority over international waters to coastal States.

Question 1a: Could binding arbitration under the LOS Convention result in a challenge to provisions such as these, or others that you know of in this or other agreements?

Answer: Because each of these undertakings is fully consistent with the LOS Convention, we see no reason to fear that any dispute settlement conducted under the auspices of the Convention could undercut their operation. Moreover, the availability of the Convention's dispute settlement mechanisms would give the United States, as a party to the Convention, an additional means of <u>enforcing</u> the agreements we have worked so hard to achieve.

The LOS Convention recognizes the sovereign right of the coastal State to conserve and manage fishery resources within its exclusive economic zone. The Convention, in conjunction with the salmon treaties we have concluded for the North

Pacific and North Atlantic, also effectively prohibit any high seas salmon fishing for stocks of U.S. origin. Accordingly, the LOS Convention significantly advances our fishery interests as a coastal State and as a State of origin of anadromous stocks.

But the Convention does more. Prior to the Convention, international law recognized an almost unfettered right for States to fish on the high seas. While the LOS Convention acknowledges the right to fish on the high seas, it makes this right subject to a number of new, significant conditions:

(a) other treaty obligations of the State concerned;

(b) the rights, duties as well as the interests of coastal States; and

(c) obligations to cooperate in the conservation and management of high seas living resources.

In furtherance of these provisions, the international community has concluded numerous treaties that regulate or prohibit high seas fisheries. The Doughnut Hole pollock agreement and the North Pacific Anadromous Stocks treaty are only two of the many agreements based on the provisions of the LOS Convention. Indeed, in negotiating these two treaties, the U.S. actively pursued its objectives by using arguments based on the very provisions of the Convention noted above. The driftnet moratorium, while not a treaty, also relies upon, in part, the prohibition on high seas salmon fishing contained in the Convention.

In light of this, it is unlikely that any country would try to challenge these undertakings through dispute settlement under the Convention.

A far more likely scenario is that the United States, as a party to the Convention and in response to fishing activity by other States that undermined these agreements, could seek enforcement of the agreements through dispute settlement under the Convention. This option would be in addition to, not in lieu of, diplomatic and other means at our disposal to end or deter such fishing activity.

Question 1b: In your opinion, could such a challenge by sustained?

Answer: For reasons discussed above, even if some country tried to challenge the Doughnut Hole agreement or the driftnet moratorium through LOS dispute settlement, we believe that a court or arbitral panel could do nothing other than give effect to those undertakings because they are fully consistent with the Convention.

Question 2. The U.N. Conference on Straddling Stocks and Highly Migratory Species -- unlike the efforts noted above -- is not yet completed. It is ultimately expected to result in an agreement that represents broad international policy, and may guide interpretation of the LOS Convention and other agreements. Like the LOS Convention, it will -- as currently envisioned -- be both binding and subject to arbitration.

Question 2a: Could this agreement, if not the LOS Convention, lead to a weakening of provisions adopted in the Doughnut Hole agreement?

Answer: While recognizing that the negotiations in the U.N. Conference are far from over, none of the participants are seeking to weaken the fishery provisions of the LOS Convention or of regional agreements such as the Doughnut Hole agreement. The matters that remain in dispute in the Conference primarily center on how much to strengthen the LOS provisions, and those of certain regional agreements, to promote better conservation and management.

Indeed, many participants in the Conference, including some who did not participate in the conclusion of the Doughnut Hole agreement, have held up that agreement as a model of sound fisheries management and enforcement for straddling stocks.

Accordingly, we see no risk that the negotiations in the Conference will in any way weaken the provisions of the Doughnut Hole agreement. The U.S. delegation to the Conference certainly would never tolerate any such weakening.

Question 2b: Could amendments to the Straddling Stocks agreement be made at this time that would recognize that more stringent standards may be adopted in regional agreements?

Answer: There is already general consensus among the participants in the Conference that any agreement to be concluded will represent an effort to set minimum standards and will recognize the need to set more stringent standards on a region-by-region basis where, as in the Bering Sea, more stringent standards are needed to conserve the stock or stocks in question.

Question 2c: Would you support making those changes?

Answer: We will continue to support recognition of the need to set more stringent standards on a region-by-region basis.

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October 17, 1994

Rick Lauber
Chairman, North Pacific Fisheries Management Council
via FAX 917-271-2817

Dear Mr. Lauber:

I told you at the short discussion we had at the Burke Museum reception for the Council that I would be sending you some comments on the issues involved in connection with U.S. ratification of the LOS treaty. What I had in mind was some general comments on this in relation to US fishing interests within the US fishery management zone. Last week I got a copy of the minutes of the Council's LOS Committee and I have written some comments on the views expressed in these minutes. These comments deal with issues relating to high seas fisheries, which were the main burden of the Committee's views too. These are what is contained in the accompanying memo.

Because there may be issues worth mentioning in relation to fisheries within the US EEZ, these current comments are not complete, but I judge that you are moving at a fairly rapid pace on the this so I am sending you these incomplete comments now. I will be doing more on this, particularly on issues about EEZ fishing, as time goes by and will send you some more material as I move along. I know you have to make progress on this as a Council, but I'll send whatever I write for whatever use it may have, if any.

Sincerely,

William T. Burke
Professor of Law

October 17, 1994

Memorandum on fisheries matters related to ratification of the 1982 Convention on the law of the sea

In this context, one obvious point at the outset of considering any sector of United States interests in the law of the sea is that it is the interests of the United States as a whole that are stake in deciding on ratification of the treaty. From the standpoint of the fisheries sector, this same point applies, i.e., it is the overall fisheries interests of the United States that matter. But this requires an assessment of the impact of the treaty on particular regions and fisheries, as in the North Pacific or in the specific instance of the salmon industry. Past United States policies have rested on an aggregated assessment of regional and specific fishery interests, as illustrated by the so-called species approach employed in the negotiation of the 1982 treaty.

For United States fishery interests as a whole, and particularly those involved in the initiation of new fisheries in areas of high seas, I believe the most desirable policy is to support fishery developments subject to needed conservation measures, as established by the best available current scientific information and theory. New fisheries need to be monitored and studied carefully from the outset in order to identify emerging conservation problems as they arise. This may and probably would require special reporting procedures for exploratory fishing and for the first stages of a developing fishery. The Commission on Conservation of Antarctic Living Marine Resources has initiated

this approach and there is some experience with it in that context.

This approach is preferable to the view (expressed in the Draft Minutes of the North Pacific Council's LOS Committee) which would not allow a fishery even to begin until it is "proven not to be adverse". What is "adverse" is not defined in the Minutes nor is it suggested how proof is to be established in the absence of actual fishing. In essence, this approach amounts to presumptive moratoria on any new high seas fishing. If this policy had been in place within the United States, many fisheries would have been difficult if not impossible to develop and, at the least, very costly to undertake. The effect of such a policy is to discourage innovation and entrepreneurship without identifiable significant benefit.

The United States interest in this subject is the same as other nations' interest, namely to have in place a governance mechanism with sufficient resources and management skills as will enable conservation measures to be applied as needed, without harmful delay. For straddling stocks on the high seas, such principles have been proposed in the United Nations meeting, but it is not yet clear that a satisfactory resolution has been achieved. The proposal in the Five-power draft convention (Canada, et.al.) would vest authority in coastal states to take action (subject to immediate international consultation on agreed measures) in the event new or exploratory fisheries begin on stocks straddling their EEZ limit.

I believe the precautionary approach formulated in the Draft Agreement now before the United Nations Straddling Stock conference is superior to the idea of simply reversing the burden of proof which is advocated in the Minutes of the Council's LOS Committee.

Regarding other North Pacific concerns, the Council Committee suggests that the dispute settlement provisions could cause problems with the management of central Bering Sea pollock stocks. Who would cause such problems is left unsaid, except that a non-party might "trigger this dispute settlement process". In the absence of some specification of who would do this and why, this is purely speculative and carries little weight. Unfounded speculation such as this is no basis for opposing a treaty that is otherwise fully consistent with and supportive of United States interests in fisheries and other important matters, including national security.

To be more specific in this connection, one wonders what management decisions under the recently ratified pollock agreement would be called into question (and by whom) as inconsistent with the LOS treaty or unauthorized by it. The obligation of the United States and other states under this treaty is to cooperate and to negotiate to provide for conservation and management of pollock in the high seas of the central Bering Sea. The United States has all the authority and control under the LOS treaty that is needed to manage pollock within its jurisdiction. Thus far, the record shows that the states concerned with pollock

fisheries in the donut region have cooperated, have negotiated, and, as a result, have established arrangements for conservation and management. Apparently the principles of this agreement are agreeable to all the states fishing in the region as well as the two coastal states. Who is expected to challenge these arrangements and on what grounds? Somebody needs to offer some plausible scenario before such a question needs to be considered seriously.

The pollock agreement also calls for individual national quotas to be decided by the member states for allocation among themselves. If a non-member were to challenge this by seeking a quota, then presumably a question might arise if the member states concerned refused either to grant a quota or to permit fishing by the non-member.

At present, the general view is that the LOS treaty does not deal with this problem adequately and it is for this reason, in part, that the current negotiations are underway in the UN Conference on straddling stocks. The draft agreement of August 23, 1994 does provide an answer and it is one that is entirely favorable to the United States. Under this agreement, a non-member state which does not participate or cooperate in conservation of pollock, has no right to participate in the fishery [article 8(4)]. If this state were to join the pollock agreement, or otherwise participate and cooperate in conservation, it is not necessarily entitled to a quota in the pollock fishery or allowed to fish. The draft agreement establishes factors which are to guide a decision on this [article 16], the first and probably

most important being "the status of the stock(s) and the existing level of fishing effort in the fishery".

Should there be a dispute about allocation of the pollock fishery, the dispute could be submitted to a third-party dispute settlement tribunal, either one established by the parties as they see fit or using the mechanisms provided in the 1982 LOS treaty. The approach is consistent with the general principle that no one should be the judge in his own cause, a policy principle that is seldom questioned in a democratic society. It is certainly relevant that the United States long ago accepted this approach in high seas fisheries disputes in a treaty currently in force (although no longer entirely relevant to straddling stock disputes). A dispute settlement process that appears unfairly weighted toward a single state or regional interest is not likely to command any significant support in international negotiations, including one would hope that of the United States.

I see no reason to be apprehensive about the possibility of a dispute settlement procedure being employed in the central Bering Sea pollock fishery. The prospect of a dispute is quite remote and the emerging principles applicable to such a question make it unlikely that new entrants will very readily be granted, or win, a right of access to the fishery. In any event, it should not be forgotten that this same dispute settlement procedure would be available to benefit U.S. fishermen who might seek access to high seas fisheries in other parts of the world, such as the Northwest Atlantic Ocean.

The minutes of the LOS Committee also refer to the current driftnet moratorium which might be changed as a result of a dispute settlement process. The view is expressed that this might lead to loss of protection of salmon stocks which the Committee seems to think is now afforded by the UN resolutions and U.S. law. These views are based on several misunderstandings.

First, apart from the driftnet fishery by Taiwan vessels which targeted salmon and is unlawful under all applicable laws including Taiwan, the other driftnet fishing by Japan, Korea and Taiwan, had no significant biological impact on salmon of North American origin. Regarding the Japanese squid driftnet fishery, this is the unequivocal conclusion of the June 1991 international scientific review of the 1990 observations of this fishery. Thus, by the only confirmed scientific data available, the supposed protection offered by the driftnet resolutions is unnecessary. The data on the Korea and Taiwan squid driftnet fisheries show even less salmon interceptions than the Japanese. The cost of this unnecessary measure has been the complete elimination of a fishery valued at about $600 million and the loss of employment for at least 8000 people.

The real protection for salmon in the North Pacific follows from the 1982 LOS treaty itself, not from the misconceived UN driftnet resolutions. The LOS treaty specifically prohibits all high seas fishing for salmon, excepting only where economic dislocation is caused. The dispute settlement provisions of the treaty are not a threat to protection of North American salmon,

rather they offer a way to shield these fish from high seas predation. Any attempt to initiate a fishery targeting on North Pacific salmon would be a violation of the LOS treaty. A dispute over whether such harvesting is allowed by the treaty could be settled by the dispute settlement process in the treaty and there is no reason to doubt how that would turn out for any state foolish enough to attempt such a fishery.

I would add that the North Pacific Anadromous Stock Convention forbids high seas fishing for salmon as well as excessive bycatch of salmon in other fisheries.

In light of the preceding remarks, it is evident that opposition to the LOS treaty because of its dispute settlement provisions has no basis. To the contrary, the availability of such mechanisms is a reason to support the treaty.

These remarks are applicable also to the view in the Minutes that new high seas fisheries might be initiated that would take salmon and, if challenged in a dispute settlement proceeding, would escape by rulings "less likely to be in our favor than if regional pressures and mechanisms were used." The basis for this distrust of objective dispute settlement is unclear, especially in view of the evident international concern over the conservation of these stocks, the prohibition of targeting on these stocks on the high seas, and the principle that significant bycatches of salmon on the high seas are inconsistent with the duty to conserve these species.

Entirely apart from the salmon provisions of the LOS treaty, which I believe might also be interpreted to permit

states of origin to regulate fishing that takes significant bycatches of salmon on the high seas, that treaty also effectively addresses the incidental catch of salmon on the high seas in the Part VII provisions on high seas fishing. The latter provision obligates all states to conserve and to cooperate in conserving fisheries on the high seas. It is universally accepted, I believe, that any significant high seas bycatch of salmon is inconsistent with conservation of those stocks.

In this sense the provisions of the North Pacific Anadromous Stocks Convention are relevant because they provide in Annex II that "Fisheries for non-anadromous fish shall be conducted in such times, areas and manners as to minimize the incidental taking of anadromous fish to the maximum extent practicable to reduce such incidental catch to insignificant levels." This specific agreement confirms the general principle that significant bycatch of salmon on the high seas is not consistent with the duty to conserve these species. This general principle provides a basis for applying articles 66 and 116 of the LOS treaty to fishing for non-anadromous stocks that take significant bycatches of anadromous stocks on the high seas. It may be argued that the effect of these articles is that high seas fishing that takes significant bycatches of salmon on the high seas is subject to the regulation of states of origin.

Whether a particular amount of bycatch is or is not significant may well be disputed. As noted above, the United States has in one instance already acquiesced in the submission of that

question to international scientific review. The result was a determination that the scale of the bycatch from the 1990 Japanese squid driftnet fishery was not significant, but it was also acknowledged that specific runs might be harmed if the bycatch were concentrated on that run.

One final observation concerns the idea of making the global driftnet moratorium mandatory through incorporation in an international agreement with that effect. I find it difficult to believe that the United States fishing industry would support general application of the standard-less calculations that led to the adoption of the driftnet resolutions by the General Assembly, a body without any known expertise in fisheries matters. The most distinctive, and alarming, feature of the UN approach is the absence of any standard for deciding on termination of a fishery. If the bycatch rates in the now-terminated Taiwan and Korean squid driftnet fisheries are considered to be the standard of measurement for determining an unacceptable rate of bycatch, it would follow that very few fisheries would be permitted to continue to operate, including those within national jurisdiction. If high seas fisheries are to be judged on alleged excessive bycatch, it is not evident why EEZ fisheries should be exempt from similar judgment about excessive bycatches. Even the rate in the Japanese driftnet fishery for 1990, as shown by observations, reached the level of 38% only because pomfret (which comprised 34 million of the 41 million animals in the bycatch in a total catch of 106 million animals) could not be transshipped legally under

Japanese law. As it is, even a 38% bycatch rate is lower than the rate in numerous fisheries within our EEZ.

Except for political support, these resolutions have little reason for existence. Without reference to any standard of acceptability, they eliminated an entire industry, a very valuable fishery, and thousands of jobs, without adequate supporting data on excessive bycatch or other justification. It is not that the North Pacific squid driftnet (or other) fishery should escape regulation, but that it should be regulated rather than simply eliminated. Continuance should have been, and now should be, allowed but subject to reduction of effort, a 100% observer program, and the introduction of improved time and area restrictions. Such principles and approach, suitably modified, should be generally adopted for high seas driftnet fishing.

In the meantime, these resolutions might encourage some group to begin to advocate similar action on domestic fishing operations that take what they might consider excessive bycatch, citing what was done in the United Nations on driftnets. In this sense these resolutions are a time bomb that you and the North Pacific Council members might want to watch rather carefully. This is one of the reasons some of us have been vocal in our opposition to these resolutions. I would be interested to hear where we have gone astray and these concerns are unjustified.

William T. Burke