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DANISH DELEGATION

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cc: M. Gregh  
Lord Coleridge  
M. Guillaume

MINISTRE DE L'INTERIEUR  
GABINET  
28 NOV 1962  
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Comments on the note of the Legal Adviser  
on legal problems involved in the implementation  
of the MARCON and BERCON DELTA Plans (Annex to PO/62/637)

1. Re Section I para 11

The Danish Delegation fully agrees that it is a  
recognized principle of international law that the passage  
of foreign merchant ships through the territorial sea  
shall only be respected by the coastal State, if the  
passage is innocent, i.e. that the coastal State has the  
right to enforce its legislation also against foreign  
ships in passage. It is, however, a question whether a  
mere disregard of minor importance of, for instance, a  
provision of the health legislation of the coastal State  
is sufficient to deprive the passage of its innocent  
character. Article 14, section 4 of the Geneva Convention  
on the Territorial Sea and the contiguous Zone of 1958  
contains the following definition of innocent passage:-

"Passage is innocent so long as it is not  
prejudicial to the peace, good order or security  
of the coastal State. Such passage shall take  
place in conformity with these articles and with  
other rules of international law."

In article 15 it is accordingly decided that  
coastal State must not hamper innocent passage through  
the territorial sea, while article 16 explicitly establishes  
the right of the coastal State to hamper passage which is  
not innocent. In article 17 it is furthermore stated that  
foreign ships, exercising the right of innocent passage

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shall comply with the laws and regulations enacted by the coastal State in accordance with the convention and other principles of international law, and especially the laws and regulations concerning transport and navigation.

It follows from these articles that the coastal State has only the right to hamper passage, if that is inconsistent with the peace, good order or security of the coastal State. If other interests of less far-reaching importance are encroached on by the passage of a foreign ship, the coastal State may - it is true - have the right to try to enforce the said regulations, but it has not the right to hamper the passage. This is, of course, a legal situation which may cause considerable difficulties in each particular case. Particularly, it is a question, how to enforce the laws of the coastal State without hampering the passage.

No matter how this question may be answered in a particular case, the fact remains that stoppage and search of a foreign ship in passage through the territorial sea can only take place on grounds of a well-founded suspicion that the laws of the coastal State are being disregarded. The right to enforce the laws of the coastal State cannot be abused to suspend the passage of the foreign ship on motives of another character.

This point of view is of special importance to Denmark considering the great number of Soviet, Polish and East German ships, which pass the Danish territorial sea in the straits.

Consequently, the delegation reserves its position to the conclusion, which can be drawn from the reflections

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in paragraph 11, and which is stated in paragraph 20 (b) and (c) as regards the territorial sea.

2. Re Section I para 15

The comments in paragraph 15 about the right of passage for foreign warships appear to be acceptable from a Danish point of view, as long as it is definitely recognized that foreign warships are entitled to a right of innocent passage through international straits, for instance, the Danish waters. (Cfr. article 16, section 4 of the above-mentioned Geneva convention:-

"There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State.")

The statements concerning the question in general, i.e. the right of passage in the territorial sea outside the straits, do not - it seems - take into account the debate, which took place at the United Nations' first conference on the law of the sea in Geneva in 1958. At that conference there was profound disagreements on the question. On a whole the Soviet Union and the Afro-Asian countries were of the opinion that foreign warships have no right of passage, while the Western sea powers advocated such a right. Consequently, it seems to be rather difficult for NATO-countries now to deny the existence of the right of passage, as far as the territorial sea outside the straits is concerned. If - as it seems presupposed in paragraph 15 of document PO/62/637 - it might be a question of issuing certain regulations, according to which the territorial sea is closed for warships registered at one or several foreign countries, it appears difficult to get around the

provision in article 16, section 3 in the above-mentioned Geneva Convention:-

"Subject to the provisions of paragraph 4, the coastal State may, without discrimination amongst foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security. Such suspension shall take effect only after having been duly published."

As that provision applies to merchant ships as well as to warships, it seems to exclude suspension or similar measures especially directed against ships registered at specified countries.

3. Re Section II para 26

The Danish delegation shares the doubts implicitly expressed in paragraph 26 in fine, where attention is drawn to the fact that reprisals are normally bilateral in character. In other words, under the hypothesis set out in paragraph 1 (b) it would hardly be justifiable to resort to reprisals which are not of a bilateral character.

4. Re Section III para 31 (b)

The Danish delegation is of the opinion that under the hypothesis set out in paragraph 1 (c), it would be possible to resort to reprisals of a not strictly bilateral character, *cf.* C-M(61)99, paragraph 4 and 5.

Paris, November 20th, 1962.

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