010

THE MINISTER OF STATE

DEPARTMENT OF ENERGY
THAMES HOUSE SOUTH
MILLBANK
LONDON SW1P 4QJ

Direct Line 01-211 3290
Switchboard 01-211 3000

Alistair Harrison Esq
Private Secretary to
Tim Renton Esq MP
Minister of State
Foreign and Commonwealth Office
Whitehall
LONDON
SW1A 2AL

CDP
23/xi

23 November 1984

Dear Alistair.

UN LAW OF THE SEA CONVENTION

will request if required

The Minister has carefully considered the paper attached to Tim Renton's letter of 22 November. He did not feel that the paper gave a reasonable balanced view of the position. In particular it left the impression that all matters of concern to this Department were uncertain, rather than clearly disadvantageous, while all the rest of the text was advantageous, where we think it at best acceptable.

Accordingly I attach a revised version of substantial sections of it. For ease of reference I have sidelined the main changes.

Given the urgency and implications for other Departments I am copying this to the Private Secretaries to the Chief Secretary, Financial Secretary the Attorney General, Lord Advocate, Norman Lamont, David Mitchell, John Stanley, Sir Robert Armstrong, and to the Prime Minister's Office.

Yours Sincerely

Sue Killen

S A KILLEN
Private Secretary

UNLOSC: BALANCE OF ADVANTAGES AND DISADVANTAGES FOR UK: SUMMARY

Preamble: undesirably endorses the concepts of the new international economic order and the common heritage of mankind, neither of which is of benefit to the UK.

Part I: definition of various terms
No definition is disadvantageous.

Part II: the limits of the territorial sea
Innocent passage in the territorial sea and the contiguous zone. Advantageous.

Part III: straits used for international navigation and the question of transit passage
Advantageous, but question about the extent to which customary international law already provides for the rights embodied in the Convention.

Part IV: the (new) concept of the 'archipelagic' state
Same advantages to shipping and aircraft as in Part III but disadvantageous in that it could strengthen the claims of the Faroes in delimitation negotiations with the UK about the continental shelf.

Part V: Exclusive Economic Zone of 200 miles from baselines.
Already established as part of customary international law. It is not clear how far the concept of partial abandonment of offshore installations can also be regarded as established customary law, but the UK will in any event have to act on this before the Convention comes into force.

Part VI: the continental shelf
Generally disadvantageous. This section includes three provisions which could prove very damaging to the UK: the definition of the extent of the continental shelf, the establishment of a Boundary Commission to advise on the outer limit of states' continental shelf (where Iceland and Denmark have already made claims which conflict with our own), and the sharing of oil revenues derived from the continental shelf beyond 200 miles. These are examined in this paper and in the paper by the Law Officers.

Part VII: the high seas.
Advantageous, notably in its provisions regarding unauthorised broadcasting.

Part VIII: regime of islands.
Disadvantageous, in that it weakens the UK's position on delimitation, especially with Ireland. The implications of the provision that rocks which cannot sustain human habitation or economic life (such as Rockall) shall have no continental shelf of their own is examined in the Law Officers' paper.

Part IX: gulfs and basins.

Of no interest to the United Kingdom.

Part X: right of land-locked states to access to and from the sea.

Of no interest to the United Kingdom.

Part XI: deep seabed mining.

The present provisions are objectionable to the United Kingdom.

Part XII: marine environment.

Acceptable.

Part XIII: marine scientific research.

Advantageous.

Part XIV: development of transfer of marine technology

Acceptable.

Part XV: settlement of disputes

Neither advantageous nor disadvantageous.

Part XVI: general provisions (peaceful uses of the seas, archipelagic and historical objects, responsibility and liability for damage)

Neither advantageous nor disadvantageous.

Part XVII: final provisions:

Signature, ratification, entry into force etc. Neither advantageous nor disadvantageous.

UN LAW OF THE SEA CONVENTION : BALANCE OF INTERESTS IN THE UNITED KINGDOM

This paper considers the various aspects of the Convention, and indicates whether they are advantageous or disadvantageous to the United Kingdom.

1. The Provisions of the Convention

THE PREAMBLE : This refers to the need to adopt a new and generally acceptable Convention on the Law of the Sea which will contribute to the realisation of a just and equitable international economic order which takes into account, the concept of the common heritage of mankind in the deep seabed.

The Preamble consists of recital; while it is not normative, it undesirably endorses the concepts of the new international economic order and the common heritage of mankind neither of which is of benefit to the UK and both of which benefit the developing countries at the expense of the UK and other industrialised countries. These concepts are also spilling over into other UK interests eg our claims in Antarctica.

PART 1 : (Article 1) This defines various terms. No definition is disadvantageous to the UK.

PART II : (Articles 2-33) This deals with the limits of the territorial sea, innocent passage in the territorial sea and the contiguous zone.

This part of the Convention is advantageous to the UK. It deals in a helpful way with the limits of the territorial sea and contiguous zone, the rights of the coastal state and the rights of innocent passage for third parties The UN Law of the Sea Convention has the first specific reference to a right to extend territorial seas to 12 miles (though it is probable that such extensions could be claimed as customary law). This reference is in our interests since it will inhibit claims to a territorial sea of greater extent (eg the 200 miles claimed by certain Latin American states). There are also argued to be advantages to British shipping, not provided elsewhere, which prohibit coastal states from seeking to prescribe construction or manning requirements on foreign ships in the territorial sea. Although it is doubtful whether they would enforce such prescription under international law as it stands. As with other benefits under the Convention we could not claim these as of right unless we ratified, but signature would enable us to quote the Convention in support of other arguments.

PART III : (Articles 34-45) This deals with straits used for international navigation and in particular with the question of transit passage.

This section is considered by the Whitehall Departments concerned to be particularly advantageous to the UK. The idea of transit passage was negotiated by the UK and other maritime states at the Law of the Sea Conference in order to assure continued and in some cases improved freedom of navigation through, and overflight of, international straits whose waters would be entirely taken up by the territorial sea of coastal states under extensions of the territorial sea to 12 miles. Transit passage permits submerged passage by submarine and allows ships to fly their aircraft. It also extends the right of transit passage to military aircraft which do not presently enjoy the right of innocent passage and must obtain diplomatic clearance.

The question of whether this aspect of the Convention is a new concept or can be argued as having become customary international law is considered separately in the Law Officers paper. In precise legal terms, the right of transit passage as defined in the Convention can only be assured by the Convention coming into force and our being a party to it by ratification or accession. Howvever UK maritime interests consider that the exercise in practice of these rights would be significantly facilitated if we signed. The provisions for military aircraft to claim overflight rights of transit passage through international straits are entirely new and thus cannot be considered as customary international law. Britain could, on political rather than narrow legal grounds, encounter difficulties after the signature period has ended as some coastal states (eg Iran and Indonesia) have already stated that the benefit of transit passage should be denied to non-signatories. The UK would be particularly vulnerable in that most other countries which have not signed are either (the US) in a position to obtain these rights by force, or do not have extensive maritime interests at risk.

PART 1V : (Articles 46-54) This deals with the new concept of the 'archipelagic state'. Under this, states (such as Indonesia) which consist of a number of islands are able to claim the waters within the island area as archipelagic seas, and to establish their territorial seas and therefore their claims to continental shelf areas from baselines drawn around the archipelagos as a whole. Thus in the case of the Faroes, this would enable them to claim a much larger area of territorial sea and continental shelf, the latter at the expense of the UK.

Within Part 1V, in order to compensate for the new concept of archipelagic states, the maritime nations negotiated a further concept of 'archipelagic sea lanes passage' which is similar to transit passage. Again, the objective is the establishment of an irrevocable right to free passage for the ships and aircraft of other nations.

Similar arguments to those discussed under transit passage apply in considering whether this concept derives from the Convention or can be considered as being customary law. This is again considered in the paper from the Law Officers. The proposition that it is customary law is likely to be strongly resisted by major archipelagic states such as Indonesia and the Philippines.

PART V : (Articles 55-75) This deals with the Exclusive Economic Zone, whereby states have certain limited rights as regards living resources in the oceans beyond the territorial seas and up to 200 miles from baselines.

The Exclusive Economic Zone concept is advantageous to the UK in that it comprises the right we claim to a 200 mile fishing zone. Such rights however have sufficiently developed in customary international law.

A particular provision of this Part however is new. The recognisition in Article 60.3, that complete removal of abandoned offshore (oil and gas) installations which is required by the 1958 Geneva Convention may not be necessary, is in principle advantageous to the UK since the costs of removal represent a resource loss to the UK.* partial removal, compared with complete removal, could eventually save the Exchequer up to about £2000 million and UKCS licensees up to £1000 million. The question of whether one can present a case for this aspect of the Convention being considered as customary international law, or whether it can only be claimed as stemming from the Convention is discussed in the Law Officers paper. But it should be borne in mind that the UK is likely to have to take decisions on the extent of removal of installations before the Convention comes into force and before any internationally agreed criteria on partial removel can be established. Thus what the UK does in this area will contribute substantially to customary international law.

PART VI : (Articles 76-85) This deals with the continental shelf. There are three concepts contained within it which raise potential difficulties for the UK. These are: (a) definition of the continental shelf; (b) the Boundary Commission; and (c) payments and contributions with respect to exploitation beyond 200 nautical miles.

(a) Definition of the continental shelf. The definition of the margin of the continental shelf, although it consolidates the development of existing customary international law, which is generally advantageous to the UK, towards acceptance of the idea of natural prolongation of land-mass and that the continental shelf can extend beyond 200 miles at least to the foot of the continental slope (an important concept for the UK), does not provide a watertight defence of the UK position. In particular there would remain substantial scope for argument about the nature of the evidence we would adduce in support of our claims. The question of which aspects of the Convention definition of the continental shelf shall be considered as customary law and which as new legal concepts is discussed in the Law Officers paper.

(b) Article 76 of Part Vl provides for a Commission on the limits of the continental shelf to make recommendations to coastal states on the outer limits of their shelf, and for the limits established by a coastal state on the basis of these recommendations to be final and binding. The Commission would not judge bilateral disputes between nations, (and indeed the article relating to the Commission is expressly said not to prejudice delimitation between neighbouring states) but only advise on the outer limit of the continental shelf claimed by an individual country, participation or non-participation by the UK in the Convention would not affect the ability of another state to take the question of its outer limits to the commission. The question of where the outer limit of another country was established could have adverse implications in practice for the UK if the Commission recognise limits of another state inconsistent with our claims. The Commission would have a membership dominated by the G77 which would be unlikely to make it objective. By signing the Convention we would in effect be committing ourselves to accept the Commission's determination on the conflicting claims of Denmark and Iceland over a substantial part of our outer continental margins as well as probable claims by the International Seabed Authority to extensive areas of our Continental Shelf, including areas which we have already designated.

(c) <u>Sharing of Oil Revenues from Exploration of the Continental Shelf beyond 200 nautical miles.</u> The rapid development of deep water technology suggests that exploitation of parts of the outer continental shelf claimed by the UK and in part already designated for hydrocarbon exploration purposes could become a reality within the next 20 years. The sharing of revenue would require the UK to give up between 1-7% in the period following the first 5 years of commercial production. If as seems likely, this percentage was applied to the gross rather than the net revenues, this provision could be very onerous in the UK, since the costs of exploitation are likely to be very high. Since there are no provisions for changing this part of the Convention, signature implies acceptance of the financial obligation in respect of sharing oil revenue. These issues are examined further in the Treasury paper.

<u>PART VII:</u> (Articles 86-120) This deals with the high seas.

This part of the Convention is regarded as advantageous to the UK. It provides regulations which meet our needs. Much represents existing customary or conventional law. The Department of Trade and Industry regard Article 109 dealing with unauthorised broadcasting from the high seas as giving advantages not obtainable from other sources. Signature would enable the UK to refer to the inclusion of the concept in the Convention as part of justification of national action though only ratification would enable us to claim co-operation from other states on the basis of the Article. For the same reason, we cannot claim the benefit of Article 108 (Illicit Traffic in Narcotic Drugs).

<u>PART VIII:</u> (Article 121) (Regime of Islands) paragraph three of article 121 on the regime of island states that rocks which cannot sustain human habitation or economic life shall have no continental shelf of their own.

This provision is disadvantageous to the UK, since if we could claim a territorial sea and continental shelf in respect of Rockall, this would strengthen our position considerably in continental shelf delimitation negotiations, particularly with Ireland. In this respect Article 121(2) of the new convention is far more specifically unhelpful to us than customary international law or the 1958 Convention These issues are further discussed in the Law Officers paper. British Geological Survey (BGS) would like to emphasise the importance of making sure that no concession is made over the status of St Kilda or similar islands (eg North Rona) that do not at present have a population as part of national territory.

PART IX : (Article 122-123) This deals with gulfs, basins or seas surrounded by two or more states and connected to another sea or ocean by a narrow outlet.

This part is not of interest to the UK and carries no disadvantage or advantages for us.

PART X : (Articles 124-132) This deals with the right of access of land-locked states to and from the sea.

It is not of interest to the UK and carries no disadvantages or advantages.

PART XI : (Articles 133-191) (and Annexes III and IV) : These establish a regime to govern deep seabed mining of polymetallic nodules and any other resources (though not fish in the suprajacent waters) in the 'Area' ie the seabed and ocean floor beyond the limits of national jurisdiction, which is declared to be the common heritage of mankind. It envisages the creation of the International Seabed Authority to organise and control activities in the 'Area' in accordance with the parallel system which provides for an industrial arm of the Authority, ie the Enterprise, to

/compete

23 NOV 1984

CC

DEPARTMENT OF TRANSPORT
2 MARSHAM STREET LONDON SW1P 3EB
01-212 3434

My ref: M/PSO/12659/84

Your ref:

Alistair Harrison Esq
Private Secretary to the
Parliamentary Under Secretary
of State
Foreign and Commonwealth Office
Whitehall
LONDON
SW1A 2AL

MBPM
EDD
26/xi

26 November 1984

Dear Alistair,

will request if required

I told you on Friday that our Ministers were content for the paper attached to Mr Renton's letter of 22nd November to go forward.

They have now seen Sue Killen's letter of 23rd November with suggested amendments to the paper from the Department of Energy. Most of the amendments are acceptable, but not I am afraid the paragraph which deals with articles 2-33 of the Convention (limits of the territorial sea, innocent passage and the contiguous zone).

The suggested revision of this passage casts unreasonable doubt on the advantages to the UK of a provision which prohibits coastal states from seeking to prescribe construction or manning requirements on foreign vessels in their territorial sea. The fourth and fifth sentences should therefore read:

> "There are also advantages to British shipping, not provided elsewhere, in prohibiting coastal states from seeking to prescribe construction or manning requirements on foreign ships in the territorial sea (although it is perhaps debateable whether they would enforce such prescriptions under international law as it stands)."

I am copying this to the Private Secretaries to the Chief Secretary, the Financial Secretary, the Attorney General, the Lord Advocate, Mr Lamont, Mr Buchanan-Smith, Mr Stanley and Sir Robert Armstrong; and to the Prime Minister's office.

Yours sincerely,

Anthony Poulter

A J POULTER
Private Secretary

Foreign Pol PT2

law of the sea

26 NOV 1984