The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries

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I. INTRODUCTION

After two years of active debate, the Congress of the United States enacted the Fishery Conservation and Management Act of 1976 (FCMA)\(^1\) to extend national fishery management jurisdiction to 200 nautical miles. During consideration of the bills that proposed this new limit, Congress conducted nearly three weeks of public hearings, involving five separate committees of the House and Senate. Despite strong opposition by the executive branch, led by the Law of the Sea Office of the National Security Council, President Ford signed the legislation into law on April 13, 1976. On March 1, 1977, fishery law enforcement officials began to enforce the provisions of the Act.

This legislation is significant for two reasons: (1) It establishes, for the first time, comprehensive management of the fisheries of the United States; and (2) it has played a key role in establishing a new customary rule of international law in a relatively short period of time and without major confrontation between nations. As of this writing, every fishing nation that operates a fleet within 200 miles of United States shores has signed a governing international fishery agreement with the United States. Transition to the new regime has been accomplished in an orderly fashion. Nevertheless, the legislation is new and complex. Any new law requires a "shakedown" period, and the FCMA will be no exception. Yet the tools for truly effective management are there. I am proud to have participated in the drafting of this landmark measure.

The purpose of this article is to discuss three things: First, the background which led to the passage of the Act is briefly outlined; second,
the content of the Act is described; and finally, I discuss the significant elements of the debate on the bill, mainly those relating to United States foreign policy.

II. BACKGROUND

The greatness of nations is founded on abundant natural resources. The endurance of great nations depends upon how wisely they manage those resources. Nonrenewable resources—ores, metals, fossil fuels, and uranium—are finite, consumable, and will be depleted over time, even with the most erudite management; however, the renewable natural resources—forests, fisheries, and agriculture—can be managed in perpetuity within the limits of the skill, knowledge, and self-restraint of the user.

If the United States is to maintain world prominence, we must learn to manage our dwindling resources more wisely. This nation faces, in the 1980's and beyond, an era of ever-growing scarcity that will affect the very style and quality of American life. Domestic and foreign policy will inevitably change as our indigenous resources are depleted and we become more dependent on foreign countries for energy, metals, and minerals. To what extent our economic strength and world leadership will decline depends upon how skillfully we can allocate and manage our domestic resources while supplementing our needs with foreign resources.

The analogies I have drawn between the management of land-based resources and the living resources of the sea are limited, however, by the nature of the resources themselves. It is infinitely more difficult to manage mobile, migratory, common property fishery stocks whose habitats are in both domestic and international waters than it is to manage forests or crops subject to a clear and well-established legal regime. The demise of the United States fisheries in the past is more accurately attributable to nonmanagement rather than to mismanagement.

United States fishing interests began to be heard in the Congress by the middle of the 1930's. In 1937 bills were introduced in both Houses of the Congress that would have excluded foreign fishermen from taking salmon from the waters over the Alaskan continental shelf. These bills proposed a drastic departure from international law.

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from the standpoint of both the ownership of the anadromous fish and the seaward extension of sovereign jurisdiction, because the legislation would have extended jurisdiction over half of the Bering Sea east of the international boundary and would have created a line of demarcation 400 miles from the Alaskan mainland. Although a watered-down version of the bills was passed by the Senate in 1937, no further action was subsequently taken by the Congress.

After World War II the oil and fishing interests joined forces to call attention to the significance of the resources of the Continental Shelf and its superjacent waters. The debate culminated in 1945 with the issuance of the so-called Truman Proclamations, which unilaterally set out a declaration of jurisdiction over the Continental Shelf and created a fisheries conservation zone—a contiguous zone of unspecified extent.3 The first proclamation, Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas,4 was made in response to a problem that had been under consideration since 1937: Japanese fishing of salmon off the Alaskan coast but outside the United States territorial sea limits. This stock had been developed and maintained by United States nationals and was in danger of being depleted by foreign fishermen. The proclamation laid down three principles: (1) That the United States may establish conservation zones on the high seas for the purpose of protecting its coastal fisheries from overfishing; (2) that where only American fishermen are concerned, the United States may do this unilaterally; where fishermen of other nations are also concerned, the United States may do this in conjunction with such other nations; and (3) that the United States recognized the right of other nations to take similar steps to protect their coastal fisheries. Most American authorities interpreted this proclamation as a narrowly constructed statement that would inform other countries of the need to initiate negotiations with the United States when their nationals engaged in extensive fishing activities in the high seas off United States coasts. The purpose of such negotiations was to encourage joint cooperation for the conservation of the resource. The proclamation was not an extension of sovereignty over areas of the high seas, nor was it intended as a notice that off-

shore high seas would be closed to foreign fishermen.\textsuperscript{5} Its success in motivating negotiations is suggested by the fact that it was never implemented.\textsuperscript{6} The proclamation, however, was viewed by some foreign countries as justification for unilateral extensions.

The second proclamation, \textit{Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf},\textsuperscript{7} asserted the jurisdiction and control of the United States over the mineral resources of the Continental Shelf. The 1958 United Nations Convention on the Continental Shelf later set into treaty law the principles that had been expressed in the Truman Proclamation thirteen years earlier.

The Truman Proclamations, whatever their net effect in terms of international relations, established a basis for customary international law to evolve through the extension of coastal jurisdiction seaward for the conservation of fisheries and preservation of exclusive fishing rights for the coastal states. Just as they would later react to the 200-mile fishery conservation zone established by the 1976 Act, “strict construction” internationalists objected in earnest to the alleged departure of the United States from “international law” in the form of the Truman Proclamations.

In 1958 and 1960, consensus concerning the permissible limits of fishery jurisdiction eluded the participants in the United Nations Conference on the Law of the Sea held in Geneva. In fact, the 1960 session focused on the fishery limit question and the limit of the territorial sea. Thus, the United States three-mile territorial sea served until 1966. In 1966 the United States established a fisheries zone of nine miles contiguous to the territorial sea of three miles; within this zone the United States exercised the same exclusive rights with respect to fisheries as it had in its territorial sea, subject, however, to the continuation of traditional fishing by foreign states as might be recognized by the United States.\textsuperscript{8} During Senate hearings the Department of State had no objection from the standpoint of foreign relations to establishing a twelve-mile exclusive fisheries zone. The Legal Adviser noted that, in view of recent developments in international practice,

\begin{itemize}
\item \textsuperscript{5} H. Reiff, \textit{The United States and the Treaty Law of the Sea} 306 (1959).
\item \textsuperscript{6} 4 M. Whiteman, \textit{Digest of International Law} 961 (1965).
\item \textsuperscript{7} Proclamation No. 2667, 3 C.F.R. 67 (1943–1948 Compilation).
\end{itemize}
action by the United States would not be contrary to international law.

Nevertheless, failure of the contiguous zone as a rational unit for managing coastal fisheries has been amply demonstrated and is manifested by the fact that thirty-four countries have abandoned it in favor of conservation zones ranging from 70 to 200 nautical miles seaward. The developing concept of an "economic zone" being debated at the Third United Nations Conference on the Law of the Sea is providing additional momentum to the international movement toward broader resource management zones. At this time, it represents one of the few generally accepted provisions of the Single Negotiating Text developed by the Conference.

A short description of the fisheries off the United States coast and the fishing industry is also necessary to permit a fuller understanding of the new legislation. Although the total annual world landings of fish (edible and nonedible) have tripled since 1938, from approximately 50 billion pounds to over 150 billion pounds, United States landings have increased only from 4.3 to 4.7 billion pounds from 1938 to 1973. But the volume of fish caught off the shores of the United States has also tripled—approximately 4.4 billion pounds were harvested in 1948, compared to 11.8 billion pounds in 1973. Because United States vessel landings remained relatively static during this twenty-five year period, the increase is attributable to the efforts of foreign fishing. Foreign vessels take nearly seventy percent of the commercial catch of United States coastal fisheries.

As has been the case with total landings, United States consumption has also increased during this period, although slightly less dramatically. The United States more than doubled its consumption of fish products from approximately 3.1 billion pounds in 1948 to 7 billion pounds in 1973. Yet the importance of these statistics lies in the fact that since the United States catch has remained relatively constant, the difference represents imported fish, much of which has been taken from waters adjacent to the United States. This has had a significant impact on the United States balance-of-trade deficit, not to mention the economic damage to United States fisheries.

The fact that almost seventy percent of the fish caught off the coasts of the United States is taken by foreign fishermen is not in and

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of itself the most disturbing factor. Rather, it is the fact that foreign fishermen are highly efficient and mobile and can move to other parts of the world if they overfish United States waters. With the use of huge factory vessels and large fleets of smaller fishing boats that deliver their catch to the processing vessels, the foreigners have been virtually vacuuming the seas of precious life and economic value. At the time of the congressional debate, sixteen species of fish were judged by United States scientists to be overfished off our shores. Although not all of the overfishing can be blamed on foreign efforts, the majority can be. If a coastal nation does not take action to protect the fishery resources near its shore, then no one will. And someone must, or the ramifications of such overfishing will have profound impacts on all of mankind and on our citizens whose livelihoods depend on fishing.

III. THE DECISION TO EXTEND JURISDICTION

The United States approach to marine fishery management in the past may be considered haphazard at best. Our federal fishery management legislation resembled a crazy patchwork quilt of pieced-together remnants. Generally its basis was not in resource information, landing statistics, and data, but in weak divided authority and inadequate enforcement among complex jurisdictions. The authorizing legislation itself was merely a collection of single purpose statutes and international agreements loosely coupled through the commonality of fisheries. In reality the states, by virtue of federal inaction and the authority given them by the Submerged Lands Act of 1953, were the only government units with comprehensive fishery management authority.

More than a decade prior to passage of the Submerged Lands Act, the United States Supreme Court in *Skiriotes v. Florida* made clear that a state may regulate activities of its own citizens with respect to a fishery on the high seas when the state has a legitimate interest in the

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10. This legislation included the Northwest Atlantic Fisheries Act of 1950, Tuna Conventions Act of 1950, Bartlett Act, and the Pelly Amendment to the Fishermen's Protective Act.
12. 313 U.S. 69 (1941).
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fishery and there is no conflicting federal law. Until enactment of the 1976 Act, the federal government did no more than act as caretaker or custodian of the waters of the contiguous zone and as a research backup to state conservation efforts. At the same time, our international agreements were doing little to help conserve the fishery stocks on the high seas.

It was with this historical background and the realization that the Law of the Sea negotiations were inextricably bogged down in the debate over the future of seabed mining that the 94th Congress took action. Thirty-six bills were introduced for the purpose of conserving and managing fish stocks. These proposals can be classified into the following seven general approaches: (1) Single interim extension of jurisdiction to 200 miles with control over anadromous fish (H.R. 200); (2) extension of jurisdiction to 200 miles, control over anadromous species, regulation by regional councils, and federal support and final approval authority (S. 961); (3) extension of jurisdiction to 200 miles, control over anadromous species, regulation by regional councils, and federal management and enforcement (H.R. 9840); (4) establishment of a fishing zone to conform with article 7 of the Convention on Conservation of the Living Resources of the High Seas (H.R. 1070); (5) extension of fisheries jurisdiction to the edge of the Continental Shelf (H.R. 2173); (6) a fisheries management program regulated by regional councils without extension of jurisdiction (H.R. 8265); and (7) an embargo on fish imports from countries violating the waters of the contiguous zone (H.R. 80). The Fishery Conservation and Management Act of 1976 is an amalgam of several of the approaches suggested by the various bills.

There are two broad purposes of the FCMA: (1) To extend the jurisdiction of the United States for the purpose of regulating the marine

13. Prior to the enactment of the FCMA, the Alaska Supreme Court in a controversial decision held that that state could regulate both resident and nonresident fishermen in the Bering Sea when the state had a sufficient interest in the fishery. State v. Bundrant, 546 P.2d 530 (Alas. 1976), appeal dismissed sub nom. Uri v. Alaska, 97 S. Ct. 40 (1977).

14. For example, the International Convention for the Northwest Atlantic Fisheries (ICNAF) annually allowed quotas, which caused stocks of cod, yellowtail flounder, and herring on Georges Bank to be steadily depleted. Under the ICNAF provisions, regulations were weak and enforcement often nonexistent. With a few exceptions, most other treaties were similarly ineffective.

15. Only representative bills introduced in the first session of the 94th Congress are listed. Numerous identical or similar bills were introduced in the 93d and 94th Congresses.
fisheries to the newly created fishery conservation zone which adjoins the territorial sea (three-mile limit) and extends seaward out to 200 nautical miles from the coast, and (2) to impose a management regime within the fishery conservation zone to be administered by Regional Fishery Management Councils and the Department of Commerce. Extension of sovereign jurisdiction, coupled with a comprehensive resource management scheme, was in response to what the resource managers saw as a tripartite requirement for wise utilization of fish stocks—management planning, regulation, and enforcement.16

The Act is organized in four titles: Title I states the authority of the United States for fishery management; Title II specifies the relationship between the administration of the domestic legislation and foreign fishing within the fishery conservation zone; Title III establishes a system for developing regional fishery management plans for the purpose of providing a framework for control, regulation, and enforcement; and Title IV contains conforming amendments and incremental changes to existing related laws to make them consistent with the intent of the Act.

Title I establishes the fishery conservation zone (FCZ), which extends seaward from the coast to a distance of 200 nautical miles.17 The integrity of state control over the fisheries within the territorial sea of three nautical miles is in no way altered.18 Within the FCZ the United States will exercise exclusive fishery management authority over all fish19 with the exception of "highly migratory species,"20 defined in the Act as tuna.21 The Act also authorizes the management of anadromous species that spawn in United States waters throughout their migratory range, except when such species are in another nation's jurisdictional waters, as recognized by the United States.22 Sedentary species (for example, coral, crab, lobster, clams, abalone, and sponges) found on the Continental Shelf beyond the 200-mile zone are

19. Id. § 102, 16 U.S.C.A. § 1812.
20. Id. § 103, 16 U.S.C.A. § 1813.
22. Id. § 102(2), 16 U.S.C.A. § 1812(2).
also within the jurisdiction of the United States and are defined as continental shelf fishery resources.\textsuperscript{23}

While part of the impetus for enacting the Fishery Conservation and Management Act of 1976 was the desire to control foreign access to the United States coastal fishery, it was recognized that it was neither practical nor desirable to exclude all foreign fishing from the fishery conservation zone. Emphasis was on conservation and management, not on exclusion. Title II authorizes foreign fishing within the FCZ if (1) a treaty or international fishery agreement is currently in force (such fishing may continue until the instrument expires or is renegotiated),\textsuperscript{24} or (2) the country enters into a governing international fishery agreement (GIFA) with the United States.\textsuperscript{25} In either event, each foreign vessel must be issued a permit annually by the Secretary of State, with the concurrence of the Secretary of Commerce.\textsuperscript{26}

"Reasonable" nondiscriminatory license fees may be charged foreign vessels and are to be based upon the costs of management, research, administration, enforcement, and other factors relating to the conservation and management of the fishery.\textsuperscript{27}

Foreign fishermen, however, will be permitted to take only that portion of the "optimum yield"\textsuperscript{28} not harvested by United States fishermen.\textsuperscript{29} In other words, preference is given to American fishermen in allocating the portion of the stocks that may be harvested annually. The determination of optimum yield and its allocation will be part of

\begin{itemize}
\item \textsuperscript{23} Id. §§ 3(4), 102(3), 16 U.S.C.A. §§ 1802(4), 1812(3).
\item \textsuperscript{24} Id. § 201(b), 16 U.S.C.A. § 1821(b).
\item \textsuperscript{25} Id. § 201(c), 16 U.S.C.A. § 1821(c); For a discussion of Congress role in these agreements, see Note, Congressional Authorization and Oversight of International Fishery Agreements Under the Fishery Conservation and Management Act of 1976, 52 Wash. L. Rev. 495 (1977).
\item \textsuperscript{26} Id. § 201(a), 16 U.S.C.A. § 1821(a).
\item \textsuperscript{28} Optimum yield is defined in the Act as that part of a fishery that will provide "the greatest overall benefit to the nation, with particular reference to food production and recreational opportunities . . . ." FCMA § 3(18)(A), 16 U.S.C.A. § 1802(18)(A) (West Supp. 1977). In arriving at optimum yield, a variety of economic, social, ecological, and biological factors are taken into account. Id. § 3(18), 16 U.S.C.A. § 1802(18).
\item \textsuperscript{29} Id. § 303(a)(4), 16 U.S.C.A. § 1853(a)(4).
\end{itemize}
the responsibilities of the Regional Fishery Management Councils established in Title III.\textsuperscript{30}

The Regional Fishery Management Councils provide the framework for management and conservation under the Act. The Councils are unique among institutions that manage natural resources. They are neither state nor federal in character, although they possess qualities of each. Their powers are derived from the constitutional authority of the federal government, yet the Councils are self-determinant in their own affairs. Enforcement and administration of the Councils' plans and regulations are carried out by the responsible federal agencies.

Title III enumerates the duties of the Regional Management Councils to be as follows: (1) To develop and amend fishery management plans; (2) to submit periodic reports to the Secretary of Commerce; (3) to review and revise assessments of optimum yield and fishing allowances to foreign licensees; (4) to encourage public participation, through hearings, in the development of fishery management plans and the administration of the Act; (5) to establish scientific and statistical committees and advisory panels; and (6) to undertake other activities necessary for carrying out the Act.\textsuperscript{31}

Although the Councils are to be relatively independent, each Council must operate within the uniform standards promulgated by the Secretary of Commerce that govern the administration of the Act. The principal function of the Councils is to formulate fishery management plans upon which management and conservation regulations are

\textsuperscript{30} Id. § 303(a)(3), 16 U.S.C.A. § 1853(a)(3). The Act creates eight Councils, as follows: New England, Mid-Atlantic, South Atlantic, Caribbean, Gulf, Pacific, North Pacific, and Western Pacific. Id. § 302(a), 16 U.S.C.A. § 1852(a). The Councils are composed of a variable number of members, depending on the regions and the number of states involved. In general, however, the following members are designated by the Act: (1) The principal state official with responsibility for marine fishery management from each state in the region; (2) the regional director of the National Marine Fisheries Service; (3) one “qualified” person per state to be nominated by the Governor and selected by the Secretary of Commerce; and (4) additional “qualified individuals” to be appointed at large by the Secretary of Commerce from nominations by the Governor, the number of which depends on the number of states that are members of the Council. Id. § 302(b), 16 U.S.C.A. § 1852(b). Ex officio nonvoting members include the regional or area director of the United States Fish and Wildlife Service, the Commander of the United States Coast Guard district, the executive director of any existing appropriate Marine Fisheries Commission, and a representative of the Department of State. Id. § 302(c), 16 U.S.C.A. § 1852(c).

\textsuperscript{31} Id. § 302(g)–(h), 16 U.S.C.A. § 1852(g)–(h).
to be based. Such plans are to be developed in accordance with the following national standards:

(1) Conservation and management measures shall prevent over-fishing while achieving . . . the optimum yield from each fishery.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range . . .

(4) Conservation and management measures shall not discriminate between residents of different states . . .

(5) Conservation and management measures shall, where practicable, promote efficiency in the utilization of fishery resources . . .

(6) Conservation and management measures shall take into account . . . the variations among . . . fisheries, fishery resources, and catches.

(7) Conservation and management measures shall . . . minimize costs and avoid unnecessary duplication.32

The plans must contain provisions to govern both foreign and domestic fishing, a description of the fishery, an assessment of present and probable future conditions of the fishery (including both maximum sustainable yield and optimum yield), and an assessment of the extent to which the optimum yield will be harvested and the portion of the optimum yield that can be made available to foreign fishermen.33 The plans may contain optional provisions such as requirements for permits and fees; designation of zones and fishing periods; limits on catch based on size, area, or weight; and a system of limited access.34

While the Regional Council may prepare and submit to the Secretary of Commerce proposed regulations that would implement the management plans,35 it is the Secretary who must promulgate and implement the regulations.36 Management plans must be submitted to the Secretary, who has sixty days to review them and notify the Council of his or her approval, disapproval, or partial disapproval.37 Any disapproval must be accompanied by a statement of reasons therefor.

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32. Id. § 301, 16 U.S.C.A. § 1851.
33. Id. § 303(a), 16 U.S.C.A. § 1853(a).
34. Id. § 303(b), 16 U.S.C.A. § 1853(b).
35. Id. § 303(c), 16 U.S.C.A. § 1853(c).
36. Id. § 305(a), 16 U.S.C.A. § 1855(a).
37. Id. § 304(a), 16 U.S.C.A. § 1854(a).
and suggestions for improvement. The plan is subsequently published in the *Federal Register*, and after hearings and prescribed administrative actions, the plan goes into effect. The regulations are enforced by the United States Coast Guard in conjunction with the National Oceanic and Atmospheric Administration's National Marine Fisheries Service. Both civil and criminal penalties are provided for in the Act, with possibility of forfeiture of vessel, gear, and catch.

Title IV of the Act provides authority to revise the regulations to conform to any agreement that may be reached as a result of the Third Law of the Sea Conference, thereby making the Act an interim measure until an acceptable comprehensive international agreement is reached. In addition, inconsistent provisions of other legislation have been revised to conform to the intent of the new Act. Section 403 amends the Fishermen's Protective Act to make the provisions of that Act conform with the recognition of the United States unilateral extension of its fishery jurisdiction. Similarly, the Title amends the Marine Mammal Protection Act and the Atlantic Tunas Convention Act to extend these laws to the fishery conservation zone.

### IV. DEBATE OVER THE PROPOSED EXTENSION

In my view, this legislation presented a classic confrontation between the executive and legislative branches of our government in the area of foreign affairs. Each branch sought to carry out its particular constitutional mandate. Yet the struggle between Congress and the Executive over foreign policymaking has received little note in either

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38. *Id.*
43. FCMA §§ 404-405.
newspaper or scholarly discussions. I believe it is instructive, therefore, to review the debate over the Act and analyze the prognostications and concerns of both sides.

It is also important to view this new law in the context of international law. As will be obvious, discussion of the international legality of the law occupied a significant portion of the legislative branch's time. It raised some very basic questions, with no easy or clear answers: What is international law? How can international law be made responsive, in a timely fashion, to the real problems of the day? What is the difference between law and policy? The debate was not really about a problem. Everyone conceded that a problem existed. It was about the proper solution to the problem. The Fishery Conservation and Management Act of 1976 was, to say the least, a controversial topic in the 94th Congress. The debate engendered by this proposal was skillfully and eloquently presented by my distinguished colleagues on both sides of the issue. The measure was addressed in the Senate alone for the better part of nine days, and in that time the positions of those for and against the legislation were fully and openly discussed. It is clear, however, that some people still do not understand the reasons behind the measure or that it was a proper exercise of our right to protect the vital interests of the United States; that is, the right to prevent United States fishery resources from becoming irretrievably depleted.

The bills, S. 961 and H.R. 200, were erroneously referred to by some as the "200-mile fishery bills." Although certainly they did include a fishery conservation zone seaward of the United States for a distance of 200 miles, I believe such a title places the emphasis of the law in the wrong place. The legislation does not stake out a portion of the seas for the exclusive use of the United States. Rather the main thrust of the legislation is to provide a mechanism and program of conservation and management in order to save and revitalize the valuable fishery resources adjacent to our shores. Time was running out on many vital stocks. This was clear to anyone who understood the situation, and, in fact, this point was not a major contention in the Congress of the United States. Few would question the fact that existing international agreements or treaties, both of the bilateral and multilateral nature, had been almost totally ineffective in preventing further destruction of the fishing industry and the fishery resources themselves. The real debate was over how best to create a fishery
management regime—unilaterally or through international agreement.

Although coastal fishing interests favored adoption of an extended fishing zone, the legislation was opposed by the Administration, the distant water tuna and shrimp fishermen, and some members of Congress. Throughout the congressional development and consideration of the Act, opponents of the legislation emphasized its international implications and impact. Their arguments included the following—that extension by the United States:

—would breed extensions by other countries which would be retaliatory in nature and which might be broader than a fisheries jurisdiction;
—would adversely affect relations with nations fishing off United States shores;
—would seriously damage United States distant water fishing interests, both in the short run and in the Law of the Sea Conference negotiations;
—would be unenforceable;
—would not be compatible with existing international law;
—would undercut United States efforts toward a comprehensive Law of the Sea Treaty and endanger successful negotiation at the Conference of other United States ocean interests;
—would contradict a fundamental United States position against unilateral extensions into high seas areas and the United States position that our interests can best be protected by international agreements rather than by unilateral extensions;
—would violate United States treaty obligations.

First, let me address the question of whether this Act repudiates the international treaty obligations of the United States. Even a cursory reading of section 202 of the Act\(^4\) should make it clear that the law does not abrogate existing United States treaty obligations. Rather it requires that the Secretary of State, in consultation with the Secretary of Commerce, review existing treaties, conventions, and agreements to determine if such international obligations are consistent with the requirements and provisions of the Act. The purpose of the review is to determine if those obligations are consistent with the legitimate interests and obligations of the United States in protecting and conserving

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its natural resources. Article 1.2 of the Convention on Fishing and Conservation of the Living Resources of the High Seas creates in a coastal nation a “duty to adopt” conservation measures in its coastal waters. After reviewing the international agreements, treaties, and conventions for consistency, the Secretary of State is directed to negotiate with the appropriate nation to arrive at new treaties—or governing international fishing agreements (GIFA’s)—that will ensure the conservation and management practices mandated by the law. Again, there is no reference to the fact that international agreements will be repealed. Presumably, other nations will agree with the international recognition that conservation of the living resources of the sea is a desirable and necessary goal. The United States has two options, however, if other nations do not agree with suggested conforming changes to existing treaties: Either it may withdraw from any treaty pursuant to provisions in all treaties for termination, or the executive branch may submit a new treaty to Congress for approval if variation from the Act is desired and supported by those concerned.

Thus, even though preferential treatment will be given to American fishermen, foreign fishermen will be permitted to fish within the conservation zone. The United States then “has a duty” to negotiate with foreign governments for the right of their citizens to fish off our coasts with the obvious proviso that they do so within sound conservation and management practices established by the Regional Councils.

Second, I do not believe that the creation of the 200-mile fishery conservation zone violates international law—either international agreement or custom. Put more precisely, the United States is not inhibited by any specific treaty language from invoking the customary law process of claim and counterclaim as a method of lawmakers. It is true that at the time the Act was debated less than a majority of na-

46. The Committee on Commerce in its report to the Senate on S. 961 clearly emphasized this point: “It should be made clear that S. 961 does not automatically and completely negate either existing treaty rights or traditional fishing activity. Clearly, the United States has a duty to negotiate with those countries whose citizens fish in areas which would come under an extended fishery conservation zone.” S. REP. No. 94–416, 94th Cong., 1st Sess. 26 (1975) (emphasis added), reprinted in SENATE COMM. ON COMMERCE & NAT’L OCEAN POLICY STUDY, 94TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, at 653, 682 (Comm. Print 1976) [hereinafter cited as LEGISLATIVE HISTORY].

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tions had formally claimed a 200-mile limit. But a sizable and growing number had, and no limit had been agreed upon in a treaty.

The 1958 Geneva Conventions on the Law of the Sea are often cited as proving that the Act violates international agreements to which we are a signatory. Articles 1 and 2 of the Convention of the High Seas\textsuperscript{47} are often cited as creating a binding rule of international law which restrains a coastal nation from extending its fishery jurisdiction. It is argued that the area beyond three miles (or territorial sea) is high seas and that no coastal nation may inhibit any freedom of the high seas, including freedom of fishing. Because the United States claims and recognizes a territorial sea of only three miles, the logical extension of this argument is that the United States twelve-mile fishery zone under the Bartlett Act\textsuperscript{48} was also illegal. This view, however, fails to recognize developing international law.

The International Court of Justice in the \textit{Fisheries Jurisdiction Case}\textsuperscript{49} pointed out that "the extension of that fishery zone up to a 12-mile limit from the base lines appears now to be generally accepted."\textsuperscript{50} The court also noted that the 1958 United Nations Conference "failed to reach agreement either on the limit of the territorial sea or on the zone of exclusive fisheries."\textsuperscript{51} Therefore, it makes little sense to argue that any of the 1958 Conventions establishes a fishery zone of either three or twelve miles. Because the twelve-mile limit developed since 1958 through the customary law process, there is no definitive prohibition in the 1958 Convention against further extensions.

The Convention on Fishing and Conservation of the Living Resources of the High Seas\textsuperscript{52} provides a procedure authorizing unilateral

\textsuperscript{47} Apr. 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200. These articles provide as follows:

\textit{Article 1}

The term "high seas" means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

\textit{Article 2}

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, \textit{inter alia}, both for coastal and non-coastal States:

(1) Freedom of navigation;
(2) Freedom of fishing . . . .


\textsuperscript{49} United Kingdom v. Iceland (Fisheries Jurisdiction), [1974] I.C.J. 3.

\textsuperscript{50} Id. at 24. See also S. REP. No. 94-416, 94th Cong., 1st Sess. 7 (1975), reprinted \textit{in Legislative History}, \textit{supra} note 46, at 653, 662.


action by the United States to protect or conserve the fishery resources off its shores.\(^5\) Opponents of the Act said that the United States may take unilateral measures to protect fishery resources, but only through the procedure prescribed by that treaty—that is, after six months of negotiations with affected nations. Unfortunately this argument completely ignored the fact that the major fishing effort off our shores was being conducted by countries, such as the Soviet Union, Japan, Poland, East Germany, and Korea, that are neither signatories to nor bound by that treaty. Therefore, it would be futile to proceed under the Convention.

While the 1958 Convention on Fishing is toothless, it nonetheless establishes a precedent for the kind of unilateral action called for in the Fishery Conservation and Management Act. In article 1.2, that Convention states: "All States have the duty to adopt or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."\(^5\)\(^4\) Thus, the United States not only has a right and responsibility under the Convention to take conservation measures to protect the living resources offshore; it has a duty to do so. The Convention addresses the situation in which two or more countries are fishing in the same area in article 4.1:

If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other living marine resources in any area or areas of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement for their nationals the necessary measures for the conservation of the living resources affected.\(^5\)

The FCMA does exactly that, but without a six-month delay. It directs the Secretary of State to undertake negotiations with the representatives of countries that, by treaty or tradition, fish adjacent to the

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\(^5\) The procedure is set out in article 7 of the Convention, which states:

Having regard to the provisions of paragraph 1 of article 6 [coastal State has special interest in maintenance of adjacent living resources], any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months.

\(^5\)\(^4\) (Emphasis added).

\(^5\)\(^5\) (Emphasis added).
United States, with the goal of reaching agreements for the conservation of the resources. The important point is that the very passage of the Act was, if not an invitation itself, an authorization for the Administration to "request" other nations to enter into negotiations. Such requests were made shortly after the passage of the Act. As of March 1, 1977 (more than ten months after enactment), all nations fishing off the United States shores had entered into governing international fishery agreements (GIFA's) with the United States.

Those opposed to the legislation pointed out that as the International Court of Justice in the Fisheries Jurisdiction Case had declared Iceland's fifty-mile extension of its fishery zone invalid under international law, it would have no difficulty finding a 200-mile fishery zone of the United States illegal as well. This argument is unsound because not only is the international law rapidly evolving, but the United States zone is a conservation measure and, unlike Iceland's, is not exclusive. Moreover, Iceland had signed agreements with Great Britain and West Germany which it had ignored. For the purposes of conserving and managing the living resources of the sea, the FCMA invites other nations to enter into new agreements to assure that both United States and foreign fishermen follow sound conservation practices so that these depletable resources are not destroyed. The Fisheries Jurisdiction Case is simply not applicable to our law.

Two additional points need to be emphasized. The first was touched on earlier and deals with the fact that at least sixteen stocks of fish have been over-exploited and seriously damaged. The other point involves the matter of whether international agreements have protected offshore stocks, thereby making the United States legislation unnecessary. In my view, international agreements have been largely ineffective in the conservation of the sea's living resources. One need only look at the effectiveness—or rather the lack of effectiveness—of the International Convention of the Northwest Atlantic Fisheries (ICNAF) to conclude that existing agreements do not conserve fish stocks.

ICNAF was established in a fishing area off the Northwest Atlantic—off New England, Georges Bank, and Grand Banks—when it was still one of the richest and most prolific in the world. What has taken

place since then has been devastating. With the influx of large sophisticated Russian fleets, the area has become overfished. The nations in ICNAF did not take firm action to protect haddock until the stocks were dwindling rapidly. By then action taken was so late that all that could be done was to ban all direct fishing of haddock. But even this action has had little effect because many nations fail to enforce this law. In the cases of Russia and Poland, two of the major offenders, the vessels are owned by the government. It is an inherent conflict of interest to require these nations to police themselves. For example, the Department of Commerce National Marine Fisheries Service, in its investigation of Russian fleet activities, estimated that the Russians had overfished their quota of mackerel in 1975 by 70,000 metric tons. It is interesting that the Russians themselves, claiming a computer error, admitted that they exceeded their mackerel quota by as much as 100,000 metric tons. Because their quota on mackerel was 101,000 metric tons, they therefore admitted overfishing by 100 percent. Such abuses, if past practices are a guide, seemed likely to continue in the future absent stronger enforcement. Thus, it was necessary for the United States, as the coastal nation with the most to lose, to take action to end this abuse of the living resources.

An additional argument against the legislation was that unilateral action by the United States would destroy the efforts of the Third Law of the Sea Conference (LOS III) and would lead to broader claims by other nations. The history of the Law of the Sea negotiations is one of limited success and no final settlement. Since LOS III began formal sessions in 1974, the Administration has continually assured the Congress that, given one more opportunity, significant progress and even a satisfactory treaty would be forthcoming. Indeed, the preferable solution to the problem of fishery conservation would be through general agreement at the Law of the Sea Conference; however, protection of United States fishery resources became a matter of urgency. With the prospect of general agreement being several years in the future, it was Congress obligation to act expeditiously.

57. As I said on the Senate floor during the deliberations on this bill: “No one argues the point that probably the best way to do it would be to have a Law of the Sea Conference and a treaty which we thought was feasible and workable. That would be a better way to do it, of course. But we have waited and waited and waited and waited.” 121 Cong. Rec. S23,075 (daily ed. Dec. 19, 1975).
Even with the enactment of the FCMA, it is hoped that a feasible and workable agreement can emerge from the LOS III. This is demonstrated by the interim nature of this legislation. Its provisions require that the regulations promulgated under the Act must be revised to conform to an LOS treaty ratified by this country.\textsuperscript{58} The Act should work as a catalyst on the Conference. In the ten months since enactment of the Act, there has been no indication that this action by the United States has harmed the negotiations in any significant way. Some countries have even admitted that it has aided in moving some otherwise recalcitrant delegates.

Finally, there is no basis for the argument that this law will lead to broader claims by other countries. There is general acceptance at the Conference of a "200-mile economic zone." This Act creates a fishery conservation zone only, one with less scope than an economic zone. Its terms set no precedent justifying large territorial claims that are not favored by the world community.

Although the opponents of the legislation argued that it would possibly lead to increased military confrontations with foreign nations, there have been absolutely no indications that military conflicts will result. All the nations involved in fishing adjacent to our shores have signed GIFA's with the United States pursuant to the Act. Since these countries have indicated their willingness to renegotiate their agreements with the United States, no conflict is likely. I certainly hope that such conflicts never develop; however, we must not shun our duty to protect the interests of the United States. Because this legislation is a legitimate exercise of United States rights under international law, speculative fears of possible military confrontations should not deter us from our proper course. To do otherwise would be a retreat from our basic obligations to posterity.

V. IMPACT ON INTERNATIONAL LAW

The Act has been adopted and implementation is now under way. Has the international impact been as negative as we were led to believe? Has the United States position in the international community

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\textsuperscript{58} FCMA § 401, 16 U.S.C.A. § 1881 (West Supp. 1977). For a discussion of the relationship between the Act and the proposed LOS treaty text, see Jacobson & Cameron, supra note 42.
\end{footnotesize}
suffered? The answer to both questions, in my opinion, is no. Rather, time will show that this Act has contributed and will contribute positively to the development of the law of the sea.

Although it is true that during 1976 eight countries extended their fisheries jurisdiction to 200 miles and that the members of the European Community decided to operate after January 1, 1977, under a similar jurisdiction vis-à-vis nonmember countries, these extensions cannot be attributed solely, if at all, to the United States extension. Like the United States, other countries have also encountered difficulties in protecting their fishery resources. Furthermore, while five of the eight extensions are part of a claimed economic zone, the countries involved define coastal state jurisdiction within the framework of the proposed treaty text of the Law of the Sea Conference. Thus, it would appear that the Conference itself has assisted in generating increasing support for and in legitimating a 200-mile economic zone, including the extension of coastal state jurisdiction over fisheries resources.

The response to the FCMA by countries whose nationals fish off our shores has, on the whole, been positive. Governing international fisheries agreements recognizing the United States extension and management program have been concluded and approved by the Congress with six nations, and as of February 17, 1977, GIFA's had been concluded and signed with the remaining countries involved in fishing off United States shores. A reciprocal fishing agreement between the United States and Canada has been signed and is now awaiting Senate approval. In addition, the United States and Cuba have recently initialed an agreement. Thus, the nations fishing off United States shores have accepted the extension of jurisdiction and, in addition

59. Japan, having recently decided to expand its territorial limits to 12 miles, is expected to extend its fishery jurisdiction to 200 miles in the near future. See Seattle Post-Intelligencer, Mar. 30, 1977, at A-2, col. 4.

60. The Act has had some negative impact on United States distant water fishing interests. Bilateral negotiations, however, could improve the situation for shrimpers and for California-based tuna fleets. An agreement with Mexico providing access for American fishermen in Mexico's zone was signed on November 26, 1976. A treaty with Brazil has, since 1972, provided for access by American shrimpers to Brazilian jurisdiction. The difficulties encountered by United States tuna fleets have not been resolved.

61. These nations are Bulgaria, Romania, Republic of China, German Democratic Republic, USSR, and Poland.

62. These GIFA's involve the Republic of Korea, Spain, Japan, and the European Community. The agreement with Mexico is not a GIFA because it relates to United States fishing in the Mexican 200-mile zone.
to entering into agreements with the United States, are also submitting applications for permits to fish within the fisheries zone.

Although it is too early at this time to evaluate the effectiveness of enforcement of the 200-mile extension, the Act has had the effect of putting the United States a step ahead in preparing for and implementing some of the economic zone jurisdiction envisioned by the Law of the Sea Conference. As Rozanne L. Ridgway, the Deputy Assistant Secretary of State for Oceans and Fisheries Affairs, observed while addressing the Senate Foreign Relations Committee on February 3, 1977:

The Fishery Conservation and Management Act has put the U.S. in the lead in the move toward coastal state jurisdiction over fisheries. Our Act is the first of its kind, including as it does not only the simple extension of jurisdiction but new machinery for the exercise of that jurisdiction. We are being closely watched by other nations as they also move towards extended jurisdiction and expect the United States to provide the example.

References have been made throughout this article to state practice and the relationship between such practice and the development of law of the sea. Professor Colombos has observed: "Custom is the most important source of the international law of the sea and the usages of the great maritime States must therefore always exercise a weighty influence on its development." In this regard, the comments by the Canadian government in 1970, when responding to a United States statement opposing Canadian extension of its territorial sea to twelve miles and establishment of exclusive fisheries zones in areas of the high seas beyond twelve miles, are particularly illustrative of United States practice and the development of international law:

The Canadian Government cannot accept in particular the view that international law provides no basis for the proposed measures. For many years, large numbers of states have asserted various forms of limited jurisdiction beyond their territorial sea over marine areas adjacent to their coasts. The position of the USA Government is that the waters beyond a three-mile limit are high seas and that no state has a right to exercise exclusive pollution or resources jurisdiction on the high seas beyond a three-mile territorial sea. The Canadian Govern-

ment does not accept this view which indeed the USA itself does not adhere to in practice. For example, as early as 1790, at a time when the international norm for the breadth of the territorial sea was without question three miles, the USA claimed jurisdiction up to twelve miles for customs purposes and enacted appropriate enforcement legislation, which is still in force. Since 1935 the USA has claimed the authority to extend customs enforcement activities as far out to sea as 62 miles, in clear contradiction of applicable international law. In 1966 the USA established exclusive fisheries jurisdiction beyond its three-mile territorial sea extending out to twelve miles from shore, and the USA has just passed analogous legislation asserting exclusive pollution control jurisdiction beyond its three-mile territorial sea and up to twelve miles.

It is a well-established principle of international law that customary international law is developed by state practice. Recent and important instances of such state practice on the law of the sea are, for example; the Truman proclamation of 1945 proclaiming USA jurisdiction over the continental shelf and the unilateral establishment in 1966 by USA of exclusive fishing zones. Overwhelming evidence that international law can be and is developed by state practice lies in the fact that in 1958, at the time of the first of recent failures of the international community to reach agreement on the breadth of the territorial sea, some 14 states claimed a 12-mile territorial sea, whereas by 1970 some 45 states have established a territorial sea of 12 miles or more. Indeed, the three-mile territorial sea, now claimed by only 24 countries, was itself established by state practice.64

The Third Law of the Sea Conference is the first time the world community has attempted to develop a comprehensive law of the sea through the treaty process. The four conventions adopted by the 1958

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The customs waters of the United States are defined as four leagues (12 nautical miles) from the coast, 19 U.S.C. § 1701(a) (1970), and the customs enforcement area is limited to no more than 50 nautical miles from the outer limit of the customs waters (62 miles total), id. § 1709(c). The original four leagues law was enacted as Act of Aug. 4, 1790, ch. 35, §§ 11–13, 1 Stat. 145, as amended by Act of Mar. 2, 1799, ch. 22, §§ 25–26, 1 Stat. 627. The 62-nautical-mile limit, as well as the four league definition of customs waters, is found in the Anti-Smuggling Act of 1935, Pub. L. No. 238, §§ 1(a), 201, 49 Stat. 517. The 1966 legislation establishing a nine-mile contiguous zone for fishing is the Bartlett Act, Pub. L. No. 89–658, 80 Stat. 908 (1966). The 1970 legislation extending pollution control jurisdiction to 12 miles is the Water and Environmental Quality Improvement Act of 1970, Pub. L. No. 91–224, 84 Stat. 91.
Conference on the Law of the Sea were largely codifications of existing international law. While observing that the conference approach is "an exercise in futility for the reason that throughout history the origins of the conventional LOS are found primarily in customary law," E.W. Seabrook Hull has suggested that the enactment and implementation of interim legislation "could provide the responsible unilateral seed from which customary international LOS traditionally emerges." It is anticipated that the Fishery Conservation and Management Act of 1976 will assist in the development of a meaningful and functional law of the sea for many years to come.

VI. SOME CLOSING OBSERVATIONS

It has been asserted that the Fishery Conservation and Management Act of 1976 is a seminal example of how Congress flouts international law. I believe this statement to be not only unfair but totally inaccurate. Great care was taken to construct a bill that was in complete keeping with the developing consensus in the Law of the Sea Conference. That that effort was successful is evidenced by unanimous approval of the United States law by the nations fishing off our shores. No treaties have been broken, and an issue that has been the spark for more than its share of confrontations has been resolved.

I suspect that few internationalists will write of the achievements brought about by the Fishery Conservation and Management Act. But the goal of any legal system is both order and relevance. Narrow fishery management limits did not serve us well in the competition for the world's fishery resources. This is a fact. But a new attempt is upon us, and the United States now has the responsibility of making the new system work. I firmly believe that it will handle that responsibility successfully and that future generations will be better off because of it.