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## COMMENTS

### THE EFFECTS OF THE 200-MILE UNITED STATES FISHING ZONE

Marine fishery resources situated on the high seas are categorized by economists as "common property resources."<sup>1</sup> Such resources can be simultaneously exploited by a large number of individuals, no one of whom can acquire an exclusive right to the catch.<sup>2</sup> There is no incentive among fishermen to refrain from exploiting the fish stock since anything one fisherman leaves will be taken by other producers. As long as a positive economic profit exists, the incentive to enter the industry will also exist.<sup>3</sup> With no controls, the fish stock will become depleted and the industry economically inefficient.<sup>4</sup> Obviously, some restrictions and regulations must be imposed on the high seas fisheries through national or international fishery management plans.

Differences arise over the proper goals of a management program.<sup>5</sup> Economists take the position that more effort should be applied to the harvesting of a particular stock only if the value of the extra fish caught is equal to the value of the extra effort.<sup>6</sup> In this view, no production should take place beyond the point where the marginal cost of capturing the fish equals their selling price. This economic equilibrium is known as maximum economic yield.<sup>7</sup>

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1. F. CHRISTY & A. SCOTT, *THE COMMONWEALTH IN OCEAN FISHERIES* 1-16 (1965) [hereinafter cited as CHRISTY & SCOTT]; Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954).

2. CHRISTY & SCOTT, *supra* note 1, at 1-16.

3. Gordon, *supra* note 1, at 128-35; Scott, *The Fisheries: The Objectives of Sole Ownership*, 63 J. POL. ECON. 116, 117 (1955).

4. Gould, *Extinction of a Fishery by Commercial Exploitation*, 80 J. POL. ECON. 1031 (1972); Smith, *On Models of Commercial Fishing*, 77 J. POL. ECON. 181 (1969).

5. J. GULLAND, *THE MANAGEMENT OF MARINE FISHERIES* (1974).

6. CHRISTY & SCOTT, *supra* note 1, at 221-30; Anderson, *Economic Aspects of Fisheries Utilization in Law of the Sea Negotiation*, 11 SAN DIEGO L. REV. 656, 659 (1974); Turvey, *Optimization and Suboptimization in Fishery Regulation*, 54 AM. ECON. REV. 64 (1974).

7. Anderson, *Criteria for Maximum Economic Yield of an Internationally Exploited Fishery*, in *THE FUTURE OF INTERNATIONAL FISHERIES MANAGEMENT* 159

Biologists generally consider the actual physical yield of the fishery more important than the labor and capital inputs and favor fishing a stock to the point beyond which further exploitation would decrease the biological yield.<sup>8</sup> This biological equilibrium or maximum sustainable yield ensures a long term food supply from the ocean provided there are no marked changes in the environment or other factors that affect fish migratory or reproductive habits. Unfortunately, these two objectives will generally be mutually exclusive since the point of maximum economic yield in a fishery is at a lower level of effort and catch than that of maximum sustainable yield.<sup>9</sup>

Whatever the management objective, the tremendous increase in fishing after World War II clearly demonstrated the need for fisheries conservation. Total world catch increased from 10 million metric tons in 1930 to 68 million metric tons by 1968<sup>10</sup> as the demand for fish increased due to world population growth, increased per capita consumption in the developed countries and the use of fish as an intermediate product, fish meal.<sup>11</sup> In addition, new technological developments such as processing and freezing at sea, improved synthetic webbing in net fishing, and the introduction of more frozen fish products added to the overfishing problem.<sup>12</sup>

The technological and population changes that created the need for fisheries conservation also demonstrated the inadequacy of the historically developed rules for ocean use and the necessity for increased regulation in all phases of ocean exploration. An immediate answer to the overfishing problem was sought through the formation of regional commissions and conventions.<sup>13</sup> Among the early attempts at sound fisheries management

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(H. Knight ed. 1975); Crutchfield, *An Economic View of Optimum Sustainable Yield*, in *OPTIMUM SUSTAINABLE YIELD AS A CONCEPT IN FISHERIES MANAGEMENT* (P. Roedel ed. 1975).

8. D. CUSHING, *FISHERIES BIOLOGY, A STUDY IN POPULATION DYNAMICS* 77-106 (1968).

9. Schaefer, *Biological and Economic Aspects of the Management of Marine Fisheries*, 88 *TRANS. AM. FISH. SOC.* 100 (1959).

10. Chapman, *The Theory and Practice of International Fishery Development-Management*, 7 *SAN DIEGO L. REV.* 408, 414 (1970).

11. CHRISTY & SCOTT, *supra* note 1, at 17-55.

12. Chapman, *supra* note 10, at 414-15.

13. Convention Between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, 5 U.S.T. 5, T.I.A.S. No. 2900 (in force Oct. 28, 1953); International Convention for Northwest Atlantic Fisheries, 1 U.N.T. 477, T.I.A.S. 2059 (in force July 3, 1950). For a chronology of fisheries treaties and agreements see A. KOERS, *INTERNATIONAL REGULATION OF MARINE FISHERIES* 77 (1973).

was the effort of the First United Nations Law of the Sea Conference which produced four conventions.<sup>14</sup> Although the Convention on Fishing and Conservation of the Living Resources of the High Seas was ultimately adopted by 34 nations, no nation ever implemented the fishery management plan it envisioned developing.

The Second United Nations Law of the Sea Conference was expressly called in 1960 to consider two of the issues left unresolved in 1958—the breadth of the territorial sea and the interests of coastal states in the fishery resources off their coast.<sup>15</sup> No agreements were reached at this meeting, and the compromise measure of a six-mile territorial sea with a further six-mile exclusive fishing zone was defeated by one vote.<sup>16</sup>

The inability to resolve these key issues coupled with further population growth and technological change made some provisions of the 1958 agreements obsolete and gave rise to the Third United Nations Conference on Law of the Sea.<sup>17</sup> After four substantive sessions, the Third Law of the Sea Conference has failed to produce a comprehensive treaty, and the polarized national positions have not been significantly modified in several important areas.<sup>18</sup> In addition to the difficulty of reaching consensus among 140 nations, the slow progress at the Conference has been due to complex social, economic, and political factors that are an integral part of ocean and non-ocean issues as well as the ideological split between the industrial nations and the developing countries.<sup>19</sup> In an attempt to hasten the negotiating process, the Geneva session of the Conference adopted a single negotiating text around which to center further compromise, discus-

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14. Convention on Fishing and Conservation of the Living Resources of the High Seas, 559 U.N.T.S. 285, 17 U.S.T. 138, T.I.A.S. No. 5969 (in force March 20, 1966); Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S. 205, 15 U.S.T. 1606, T.I.A.S. No. 5639 (in force Sept. 10, 1964); Convention on the Continental Shelf, 499 U.N.T.S. 311, 15 U.S.T. 471, T.I.A.S. No. 5578 (in force June 10, 1964); Convention on the High Seas, 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200 (in force Sept. 30, 1962) [hereinafter cited as Convention on the High Seas].

15. Knight, *International Fisheries Management: A Background Paper*, in THE FUTURE OF INTERNATIONAL FISHERIES MANAGEMENT 1, 6-8 (1975) [hereinafter cited as Knight].

16. Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L. L. 751 (1960).

17. United Nations General Assembly Resolution, 2750-C (Dec. 17, 1970).

18. *Hearings Before the National Ocean Policy Study of the Senate Comm. on Commerce on the Geneva Session of the 3d United Nations Law of the Sea Conference*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Hearings on the Geneva Session*].

19. *Id.* at 4-5.

sion, and debate. This negotiating text was revised at the spring 1976 meeting held in New York. Though it does not reflect agreement, parts of it do reflect the dominant trends in the negotiations—especially with respect to fisheries and the exclusive economic zone.

*The Revised Single Negotiating Text—A Summary*

The articles of the Revised Single Negotiating Text (R.S.N.T.) accept the principle of freedom of the high seas.<sup>20</sup> Among those freedoms specifically enumerated is freedom of fishing to be enjoyed “with due consideration for the interests of other States in their exercise of the freedom of the high seas. . . .”<sup>21</sup> The proposed 200-mile exclusive economic zone wherein the coastal state would have the “sovereign rights” to explore and conserve the resources<sup>22</sup> would result in a much smaller area available for high seas fishing. Within the exclusive economic zone, the coastal state would determine the allowable fish catch which should be established to ensure maximum sustainable yield (MSY) modified only by environmental and economic factors.<sup>23</sup> The coastal state would also be responsible for designating the portion of the MSY reserved exclusively for its domestic fishermen.<sup>24</sup> Once these figures have been established, the coastal state would be obligated to give other nations access to any excess of MSY over the allocated domestic catch.<sup>25</sup> In theory, this would create a preferential rather than an exclusive fishing zone, but in reality the distinction would be illusory since decisions on catch limits, domestic fishing capacity, and surplus would be made entirely by the coastal state on the basis of its best scientific information.<sup>26</sup> Foreign fishing access to the zone could be conditioned on compliance with numerous regulations established solely by the coastal state including licensing, fees, technological compensation, gear restrictions, quotas, and seasonal and area limits.<sup>27</sup> The coastal state would also have control of pollution regulations and exclusive jurisdiction over installations, artificial islands, scientific research and any other economic exploitations.<sup>28</sup>

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20. Third United Nations Conference of the Law of the Sea, Revised Single Negotiating Text, art. 76, U.N. Doc. A/C. 62/WP. 8/Rev. 1 pt. II (1976) [hereinafter cited as R.S.N.T.]. See Convention on the High Seas, *supra* note 14.

21. R.S.N.T. art. 76.

22. *Id.* art. 45.

23. *Id.* art. 50.

24. *Id.* art. 51.

25. *Id.*

26. *Id.* arts. 50 & 51.

27. *Id.* art. 51.

28. *Id.* art. 44.

The foundation of the conservation provisions is international cooperation and mutual agreement among interested nations for each of the five categories of fish—*anadromous*,<sup>29</sup> *coastal*,<sup>30</sup> *sedentary*,<sup>31</sup> *catadromous*,<sup>32</sup> and *highly migratory*.<sup>33</sup> For example, nations fishing for highly migratory species would be instructed to cooperate to promote the "optimum utilization" of the species both within and beyond the exclusive economic zone.<sup>34</sup> Similarly when coastal species are found in several economic zones or both within and beyond a zone, the states involved would be instructed to use regional and subregional organizations to arrive at a consensus on management techniques.<sup>35</sup> Conservation measures for *anadromous* species would be the responsibility of the state of origin, and fishing should be conducted only within this state's economic zone unless economic dislocation would result.<sup>36</sup> Beyond the 200-mile zone, however, *anadromous* regulations could be enforced only by agreement among the interested nations. Coastal states where the *catadromous* species spend most of their life cycle would have regulatory authority and fishing should be conducted only in the zones of these states.<sup>37</sup> Where migration occurs through several different zones there must be agreement on the conservation guidelines by the regulatory states if uniform control is to be achieved. The ambiguity in these guidelines for fishery management results from trying to formulate rules agreeable to 140 nations and applicable to numerous diverse fish stocks.

Fishing for *sedentary* species continues under the regime adopted in 1958 at the First Law of the Sea Conference which gives the coastal state "sovereign rights for the purpose of exploring and exploiting [continental

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29. *Anadromous* species are fish that spend the greatest part of their life cycle on the high seas coming inland to fresh water only to spawn. See Knight, *supra* 15, at 33.

30. Coastal species stay at all times within 200 miles of shore. Thus, their migratory cycle occurs within the boundaries of a single state or two or more states.

31. *Sedentary* species are defined by the Convention on the Continental Shelf as organisms which at the harvestable state are either immobile on or under the seabed or unable to move except in physical contact with the seabed or subsoil. Art. 2(4), 499 U.N.T.S. 311, 15 U.S.T. 471, T.I.A.S. No. 5578 (1965).

32. *Catadromous* species spend the greater part of their life cycle in fresh water but travel to marine water to spawn.

33. Highly migratory species such as tuna are usually found thousands of miles from the coast and thus outside the jurisdiction of any nation. See Knight *supra* note 15, at 34-35.

34. R.S.N.T. art. 53.

35. *Id.* art. 52.

36. *Id.* art. 55.

37. *Id.* art. 56.

shelf] natural resources.”<sup>38</sup> Whereas under the R.S.N.T. the coastal states in theory could be obligated to admit foreign fishing for certain types of species, the regime governing sedentary species would accord the coastal state exclusive jurisdiction.

A nation's rights in its exclusive economic zone could be subject to special sharing provisions for geographically handicapped or underdeveloped countries. Landlocked states could exploit the fishery resources of adjoining states on terms established in regional agreements.<sup>39</sup> Developing coastal states heavily dependent on the living resources under the control of neighboring states would be given access to exclusive economic zones in their region.<sup>40</sup>

The two substantive sessions of the Law of the Sea Conference in New York in 1976 failed to produce a treaty. The final session of the Conference will be held May-June of 1977 with the R.S.N.T. providing the basis for further negotiations. Conference observers are fairly equally divided between those who predict the successful negotiation of a comprehensive treaty at this session and those who foresee a continued lack of consensus.

#### *Background of the United States 200-Mile Fishing Zone*

The Caracas and Geneva Law of the Sea sessions clearly demonstrated that any treaty dealing with fishery management would provide some type of 200-mile zone. Recognizing this eventuality might be delayed for years by the negotiations, Congress made its first serious attempt to extend the United States fishery jurisdiction in 1974. In the Senate three committees—Commerce,<sup>41</sup> Foreign Relations,<sup>42</sup> and Armed Services<sup>43</sup>—held hearings on a 200-mile fishing bill. Only the Foreign Relations Committee reported the legislation unfavorably.<sup>44</sup> The Foreign Relations Committee concluded that such unilateral action would: (1) encourage broad claims by other nations, (2) damage United States security interests,

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38. CONVENTION ON THE CONTINENTAL SHELF. art. 2.

39. R.S.N.T. art. 58.

40. *Id.* art. 59.

41. *Hearings Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce on S. 380, S. 1988, and S. 2388*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *Hearings on S. 380, S. 1988, and S. 2388*].

42. *Hearings Before the Senate Comm. on Foreign Relations on S. 1988*, 93d Cong., 2d Sess. (1974).

43. *Hearings Before the Senate Comm. on Armed Services on S. 1988*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *Hearings on S. 1988*].

44. S. REP. NO. 1166, 93d Cong., 2d Sess. (1974).

(3) disrupt United States relations with distant water fishing nations like Japan and the Soviet Union, (4) risk serious confrontations as in the Iceland-United Kingdom fishery dispute, (5) create an area impossible to police without acceptance by the international community, and (6) be inconsistent with United States legal obligations under other bilateral and multilateral fishery agreements.<sup>45</sup> Despite the Foreign Relations Committee's report and opposition to the bill by the Departments of State and Defense, the Senate passed the bill on December 11, 1974, by 68-27.<sup>46</sup> The House also held hearings on a similar proposal,<sup>47</sup> but failed to take a floor vote before the end of the 93rd Congress.

Efforts to implement a 200-mile zone were renewed in 1975 with hearings on H.R. 200 before a subcommittee of the House Committee on Merchant Marine and Fisheries in March of 1975.<sup>48</sup> Senate Committees on Commerce,<sup>49</sup> Foreign Relations,<sup>50</sup> and Armed Services<sup>51</sup> also held hearings on a bill designed to extend the United States fishery zone, S. 961. Again, the Foreign Relations Committee filed the only unfavorable report, citing many of the same reasons for its opposition as in its 1974 report.<sup>52</sup> H.R. 200 passed the House by a vote of 208-101 on October 9, 1975,<sup>53</sup> and S. 961 passed the Senate on January 28, 1976 by a vote of 77-19.<sup>54</sup> The Senate and House both passed the Conference Committee's compromise bill,<sup>55</sup> and the act was signed into law, April 13, 1976.<sup>56</sup>

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45. *Id.* at 4.

46. 32 *Cong. Q. Weekly Rep.* 3348 (Dec. 14, 1974).

47. *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries on Extending the Jurisdiction of the United States Beyond the Present Twelve Mile Fishery Zone*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment*].

48. *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries on H.R. 200 et al.*, 94th Cong., 1st Sess. (1975).

49. *Hearings Before the Senate Comm. on Commerce on S. 961*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Hearings on S. 961*].

50. *Hearings Before the Subcomm. on Oceans and International Environment of the Senate Comm. on Foreign Relations on S. 961*, 94th Cong., 1st Sess. (1975).

51. *Hearings Before the Senate Comm. on Armed Services on S. 961*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Hearings Before Armed Services Comm. on S. 961*].

52. S. REP. NO. 459, 94th Cong., 1st Sess. (1975).

53. 33 *Cong. Q. Weekly Rep.* 2202 (Oct. 11, 1975).

54. 34 *id.* at 248 (Jan. 31, 1976).

55. *Id.* at 750-51 (Apr. 3, 1976).

56. *Id.* at 937 (Apr. 17, 1976).



The impetus for an expansion of the United States' fishing zone had been developing for a number of years in part due to declining profits and productivity in the United States coastal fishing industry.<sup>57</sup> Large scale foreign fishing operations were blamed for the overfishing problem and the depletion of 11 to 14 fish stocks off the United States coast.<sup>58</sup> Further the international fisheries agreements established to control the overfishing problem had proven ineffective and were not uniformly or stringently enforced.<sup>59</sup> The realization that 20 percent of all marine fisheries in temperate and subarctic shelf areas of the world were located off the United States' coast<sup>60</sup> lead to the recognition of the fisheries as one of the United States' most valuable resources. These considerations called for immediate conservation measures, but hopes for a negotiation of a comprehensive Law of the Sea Treaty establishing a unified management plan diminished after the Caracas and Geneva sessions of the Conference. The growing consensus in Congress was that there was no evidence of any real progress towards accomplishing an international agreement.<sup>61</sup> As a solution Congress enacted the Fisheries Conservation and Management Act of 1976 which was signed into law by President Ford on April 13, 1976.

*Summary of the Fisheries Conservation and Management Act*

TITLE I—FISHERY MANAGEMENT AUTHORITY OF THE UNITED STATES

The first title of the Fisheries Conservation and Management Act (FCMA) establishes a fishery conservation zone extending seaward from the baseline of the territorial sea for 200 miles.<sup>62</sup> Exclusive management authority is claimed by the United States over all fish within this zone, and beyond 200 miles over all continental shelf species and over those anadromous species not within another nation's territorial sea or economic zone.<sup>63</sup> No exclusive management claim is made for highly migratory species.<sup>64</sup> Enforcement of these provisions was delayed until March 1, 1977.<sup>65</sup>

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57. *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment, supra* note 47, at 9.

58. S. REP. NO. 1079, 93d Cong., 2d Sess. 7 (1974). The fish stock damaged or threatened include: haddock, herring, mackerel menhaden (Atlantic not Gulf), sabelfish, shrimp (Pacific), yellowtail flounder, and halibut. *Id.*

59. *Id.* No. 416, 94th Cong., 1st Sess. 10-11 (1975).

60. *Id.* at 11.

61. 121 CONG. REC. H9914 (1975) (remarks of Rep. Sullivan).

62. Fisheries Conservation and Management Act, § 101, 16 U.S.C. § 1811 (1976) [hereinafter cited as FCMA].

63. *Id.* § 102, 16 U.S.C. § 1812.

64. *Id.* § 103, 16 U.S.C. § 1813. See note 33, *supra*.

65. *Id.* § 104, 16 U.S.C. § 1811.

## TITLE II—FOREIGN FISHING AND INTERNATIONAL AGREEMENTS

Despite the adoption of the act, foreign fishing in the United States zone can continue under fishery agreements in effect on the date the act was passed if the agreements have not expired or been renegotiated.<sup>66</sup> However, the Secretary of State is directed to renegotiate promptly all fishery agreements inconsistent with the act, and it is the "sense of Congress" that the United States should withdraw according to treaty provisions if the agreement is not renegotiated in a reasonable time.<sup>67</sup>

The only other foreign citizens eligible to fish for the resources under United States control will be those from nations negotiating a "governing international fishery agreement" (GIFA) with the United States<sup>68</sup> who subsequently apply for a permit.<sup>69</sup> The governing agreement will outline the basic framework of legal order with which the nation and its vessels must comply, and is a prerequisite for permit applications. Each governing agreement must contain an acknowledgement of the United States' exclusive management authority, acceptance by the nation and its vessels of all conservation regulations, and provisions for the boarding, search, and seizure of any vessel when there is probable cause to believe a violation has occurred, and assumption of responsibility for reimbursing United States citizens for damage or loss to their vessel, gear, or catch caused by a foreign nation's vessel.<sup>70</sup> Further, the nation must promise to develop domestic regulations to ensure that each fisherman complies with the specific provisions of his permit.<sup>71</sup> The Secretary of State is responsible for negotiating GIFAs subject to Congressional disapproval within 60 days.<sup>72</sup> Congress amended the FCMA to provide a one time only waiver of the 60-day period Congress has to review the GIFAs, the 45 days the regional councils can take to study them, and the requirement that a permit be in the wheelhouse of the vessel.<sup>73</sup>

Foreign fishermen will be allowed only that part of the optimum

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66. *Id.* § 201(a),(b), 16 U.S.C. § 1821(a),(b).

67. *Id.* § 202(a)(1),(b), 16 U.S.C. § 1822(a)(1),(b).

68. *Id.* § 201(a),(c), 16 U.S.C. § 1821(a),(c).

69. *Id.* §§ 201(a), 204, 16 U.S.C. §§ 1821(a), 1824.

70. *Id.* § 201(c), 16 U.S.C. § 1821(c).

71. *Id.* § 201(c), 16 U.S.C. § 1821(c).

72. *Id.* §§ 202, 203, 16 U.S.C. §§ 1822, 1823. No agreement is valid until 60 days after it is transmitted to Congress thus giving Congress the opportunity to pass a joint fishery resolution prohibiting the U.S. from entering the agreement. *Id.*

73. Pub. L. No. 95-6, 91 Stat. 14 (1977).

yield<sup>74</sup> not taken by United States vessels and this allotment is discretionary, not mandatory.<sup>75</sup> The Secretaries of State and Commerce are to determine the allocation of this portion among eligible foreign nations by considering each nation's traditional fishing activities, cooperation with the United States in fishery research, identification, and conservation, or any other appropriate factors.<sup>76</sup> However, no foreign fishing will be allowed if the nation does not extend the same fishing privileges to United States vessels.<sup>77</sup>

To take advantage of a foreign fishery allocation each nation that is a party to a GIFA must apply to the Secretary of State for a permit for each fishing vessel. The application must specify the particular vessel to which the permit applies, describe its gear, processing equipment, and the type and amount of fish to be caught.<sup>78</sup> The application will be published in the *Federal Register* and transmitted to the Secretary of Commerce, the appropriate regional councils, and House and Senate subcommittees.<sup>79</sup> After considering comments on the application, the Secretary of Commerce may approve it and establish the restrictions and operating conditions to be followed.<sup>80</sup> Upon disapproval the Secretary of State shall notify the nation of the reasons for the rejection; the nations may then submit a revised application.<sup>81</sup> Payment of fees by the fishing vessel will be required in accordance with a schedule applying nondiscriminatorily to all foreign nations.<sup>82</sup>

If a foreign vessel has been used to commit a prohibited act or if any civil or criminal penalty assessed remains unpaid, the Secretary of Commerce has the power to revoke, suspend, or impose further conditions on the permit.<sup>83</sup> Upon notice of (1) a violation of an existing international fishing agreement, (2) seizure of a United States vessel as the result of an unrecognized jurisdictional claim, or (3) the failure of the United States to

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74. The FCMA defines optimum yield as the amount of fish—"(A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and (B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factor."

75. FMCA § 201(d), 16 U.S.C. § 1821(d).

76. *Id.* § 201(e), 16 U.S.C. § 1821(e).

77. *Id.* § 201(f), 16 U.S.C. § 1821(f).

78. *Id.* § 204(b), 16 U.S.C. § 1824(b).

79. *Id.*, 16 U.S.C. § 1824(b).

80. *Id.*, 16 U.S.C. § 1824(b).

81. *Id.* § 204(b), 16 U.S.C. § 1824(b).

82. 41 *Fed. Reg.* 55,925 (1976).

83. FMCA § 204(b)(11), 16 U.S.C. § 1824(b)(11).

negotiate access to a foreign exclusive economic zone, the Secretary of the Treasury shall prohibit the importation of all fish products from the particular fishery concerned and may upon recommendation of the Secretary of State prohibit the importation of all fish products from the nation involved.<sup>84</sup>

Congress also expressed the view that the United States government should not recognize the fishery zone of a nation that fails to recognize traditional United States fishing activities, or management of highly migratory species by international agreement, or that imposes restrictions on United States vessels unrelated to conservation.<sup>85</sup>

### TITLE III—NATIONAL FISHERY MANAGEMENT PLAN

The national fishery management plans implemented under the act must be consistent with seven national conservation standards. Conservation measures should: prevent overfishing and achieve the optimum yield for each fishery; be based on the best scientific information; provide for the management of each fish stock as a unit; be nondiscriminatory among citizens of different States; promote efficiency in resource utilization, but no measure should have economic allocation as its sole purpose; allow for variations in fisheries and catches; minimize costs and avoid unnecessary duplication.<sup>86</sup>

Eight regional councils<sup>87</sup> are established by the act to ensure that coastal areas of the United States will have a significant input into the decision making process for fishery management in their geographical area. The responsibilities of the councils include preparing fishery management plans for each fish stock within their jurisdiction, commenting on foreign permit applications, conducting public hearings on possible conservation alternatives, and reassessing optimum yield estimates and foreign fishing allocation.<sup>88</sup> Designated by the act as voting council members are the state officials with principal marine fishery management responsibility, the regional director of the National Marine Fisheries Service and members appointed by the Secretary of Commerce from a list of qualified individuals submitted by the Governor of each state.<sup>89</sup> The

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84. *Id.* § 205, 16 U.S.C. § 1825.

85. *Id.* § 202(e), 16 U.S.C. § 1822(e).

86. *Id.* § 301(a), 16 U.S.C. § 1851(a).

87. The regional management authorities consist of the New England, Mid-Atlantic, South Atlantic, Caribbean, Gulf, Pacific, North Pacific, and Western Pacific Councils. *Id.* § 302(a), 16 U.S.C. § 1852(a).

88. *Id.* § 302(h), 16 U.S.C. § 1852(h).

89. *Id.* § 302(b), 16 U.S.C. § 1852(b).

regional director of the United States Fish and Wildlife Service, the Commander of the Coast Guard District in that area and a representative of the State Department will serve on each council in a nonvoting capacity.<sup>90</sup>

Every fishery management plan must contain foreign and domestic fishing conservation regulations,<sup>91</sup> describe in detail the particular fishery to be regulated,<sup>92</sup> evaluate current and future maximum sustainable yield, determine United States fishing capacity and foreign fishing allocations, and specify the data the Secretary of Commerce should require fishermen to submit.<sup>93</sup> Discretionary provisions may include fee and permit requirements, zonal, seasonal, weight, size, and species limitations, gear restrictions, or other measures necessary for effective conservation and management.<sup>94</sup>

After final formulation, conservation guidelines are submitted to the Secretary of Commerce for review and approval.<sup>95</sup> The councils are entitled to written reasons for a partial or total disapproval by the Secretary and 45 days in which to modify and resubmit the plan.<sup>96</sup> If an initial management plan is not prepared within a reasonable time or if a disapproved plan is not resubmitted, the Secretary of Commerce may prepare his own management plan or amend the rejected one.<sup>97</sup> If the Secretary develops the program, he must transmit a copy to the council for consideration and comment; recommendations of the council must be made within 45 days.<sup>98</sup>

The Secretary of Commerce must promulgate approved fishery management plans in the *Federal Register* and may conduct hearings.<sup>99</sup> After

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90. *Id.* § 302(c), 16 U.S.C. § 1852(c).

91. *Id.* § 303(a)(1), 16 U.S.C. § 1853(a)(1).

92. This description should include information on the vessels involved, types of gear used, species of fish sought, cost of management, expected revenues, recreational interests in the fishery, and the extent of foreign fishing. *Id.* § 303(a)(2), 16 U.S.C. § 1853(a)(2).

93. *Id.* § 303(a)(3),(4),(5), 16 U.S.C. § 1853(a)(3),(4), (5).

94. *Id.* § 303(b), 16 U.S.C. § 1853(b).

95. The plan should be reviewed to determine if it is consistent with the national standards. The Secretary of Commerce is directed to consult with the Secretary of State and the Secretary of the Department in which the Coast Guard is located in conducting this review. *Id.* § 304(b), 16 U.S.C. § 1854(b).

96. *Id.* § 304(a), 16 U.S.C. § 1854(a).

97. *Id.* § 304(c), 16 U.S.C. § 1854(c).

98. *Id.*, 16 U.S.C. § 1854(c). However, the Secretary may not include a limited access system without the approval of a majority of voting members of the council present and voting. *Id.*

99. *Id.* § 305(a), (b), 16 U.S.C. § 1855(a), (b).

considering comments, material presented at the hearings and the consistency of the plan with national standards, the Secretary may promulgate implementing regulations.<sup>100</sup> These rules are subject to judicial scrutiny if a petition for review is filed within 30 days of their promulgation.<sup>101</sup> The Secretary has the power to bypass normal procedures and implement regulations for a maximum of 90 days if an emergency in a fish resource exists.<sup>102</sup> While the act specifically states it is not intended to diminish a state's authority within its boundaries, if fishing is conducted both within and beyond the zone for a particular species or if an act or omission of a state will substantially and adversely affect a fishery management plan, the Secretary of Commerce may notify the state and the council of his intent to regulate the fishery.<sup>103</sup>

Enforcement authority is vested in the federal government rather than the councils or the states. In enforcing the act the Secretary of Commerce and the Secretary of the Department where the Coast Guard is located<sup>104</sup> may use all facilities, personnel, and equipment of any state or federal agency (including the Departments of Defense and State).<sup>105</sup> Authorized officers may, with or without a warrant, arrest any person reasonably believed to have committed a violation, board and search any vessel, or seize any catch or vessel in violation of the act.<sup>106</sup> Criminal penalties or civil forfeitures may be assessed after a hearing or trial has found a violation.<sup>107</sup>

#### TITLE IV—MISCELLANEOUS PROVISIONS

If the United States ratifies a comprehensive Law of the Sea Treaty the Secretary of Commerce may make amendments to the implementing regulations to conform with the treaty.<sup>108</sup>

The Fisherman's Protective Act was amended to extend protection to United States vessels operating in a fishery zone recognized by the United

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100. *Id.* § 305(c), 16 U.S.C. § 1855(c).

101. *Id.* § 305(d), 16 U.S.C. § 1855(d).

102. *Id.* § 305(e), 16 U.S.C. § 1855(e).

103. *Id.* § 306, 16 U.S.C. § 1856.

104. The Coast Guard is a branch of the Armed Forces at all times and is a service within the Department of Transportation except when it operates as part of the Navy in time of war or when the President directs. NATIONAL ARCHIVES AND RECORDS SERVICE, UNITED STATES GOVERNMENT MANUAL (1976077).

105. FMCA § 311(a), 16 U.S.C. § 1861(a).

106. *Id.* § 311(b), 16 U.S.C. § 1861(b).

107. *Id.* §§ 308-10, 16 U.S.C. §§ 1858-60.

108. *Id.* § 401, 16 U.S.C. § 1881.

States from seizure based on noncompliance with restrictions unrelated to conservation or more onerous than the regulations the United States imposes on foreign fishermen, or on the failure to consider traditional United States fishing activities, or refusal to allow United States fishermen equitable access.<sup>109</sup>

### *Foreign Reactions*

The initial reaction of foreign nations fishing extensively within 200 miles of the United States coast was to protest the extension of fishery jurisdiction. In a note to the State Department, Japan declared its "regrets" over the legislation and warned that the United States' zone "can not be determined valid under international law."<sup>110</sup> The Soviet Union delivered a "nonpaper" calling the United States' action a direct contradiction to the U.N. L.O.S. Conference.<sup>111</sup> Potential confrontation between the United States and nations refusing to comply with the zone had been a concern of the State Department<sup>112</sup> as well as the National Security Council.<sup>113</sup> The hostilities occurring between Iceland and the United Kingdom over Iceland's fishery zone extension had not been forgotten.<sup>114</sup> Fortunately, however, even states possessing highly developed distant water fishing fleets realized the futility of their protests and the disadvantageous bargaining position a 12-mile zone placed them in when trying to negotiate access to the United States zone.

Thus, Canada,<sup>115</sup> Mexico,<sup>116</sup> Norway,<sup>117</sup> the European Economic Community<sup>118</sup> and the Soviet Union<sup>119</sup> enacted their own 200-mile fishery zones, implicitly ratifying the United States action. Acceptance of the United States' zone has also been demonstrated by the number of nations

109. *Id.* § 403, 16 U.S.C. § 1973.

110. Note from the Embassy of Japan to the U.S. Department of State (Apr. 15, 1976).

111. 2 *Marine Fish Management* No. 6 at 1 (June 1976). Soviet Union officials did not sign a formal diplomatic paper, but expressed their disapproval of the U.S. action just short of a formal diplomatic protest.

112. *Hearings on S. 380, S. 1988, and S. 2388, supra* note 41, at 450, 791.

113. 2 *Marine Fish Management* No. 7 at 1 (July 1976).

114. See Bilder, *The Anglo-Icelandic Fisheries Dispute*, 1973 WIS. L. REV. 37 (1973); Katz, *Issues Arising in the Icelandic Fisheries Case*, 22 INT'L & COMP. L.Q. 83 (1973); Schram, *Iceland's 50 Mile Fisheries Zone*, 2 OC. MGMT. 127 (1974).

115. 2 *Marine Fish Management* No. 6 at 2 (June 1976).

116. Washington Post, August 14, 1976, at 7A.

117. N.Y. Times, Oct. 7, 1976 at 3.

118. Washington Post, Oct. 31, 1976, at 23A.

119. Baton Rouge Morning Advocate, Dec. 11, 1976 at 6A.

that have successfully negotiated GIFAs—a prerequisite to consideration of any foreign application for a fishing permit under the FCMA. Bulgaria, Romania, Taiwan, East Germany, the U.S.S.R., Poland, Spain, South Korea, and the European Economic Community have signed GIFAs.<sup>120</sup> After extensive negotiations Japan has signed a temporary one-year version.<sup>121</sup> Thus, all the major distant water fishing fleets have recognized the United States' authority to regulate the fisheries within 200 miles of its coast. Indications are that another tactic for foreign distant water fishing nations will be the use of joint fishing ventures, companies formed between American businesses and foreign investors, to exploit the fish resources within 200 miles of the United States' coast. A recent example is the agreement between Bellingham Storage Company of Seattle and a Russian agency to take hake caught off the Washington-Oregon coasts, process it in Russian vessels, and transport it to Europe for sale.<sup>122</sup>

The overwhelming response to the United States initiative has been either adoption of similar legislation or acquiescence by signing a GIFA or both. This reaction, in addition to prior 200-mile claims means it is only a matter of time before the 200-mile fishing zone becomes a rule of customary international law.<sup>123</sup> It is probably still too soon to characterize it as such because of the varying rights claimed within 200 miles.

Besides affecting foreign fishing efforts off the United States coast, the FCMA will have repercussions for American fishermen; however, fishing operations concentrating on highly migratory, sedentary, or anadromous species will in reality be faced with few immediate changes.

#### *Impact on Fishing Operations for Highly Migratory Species*

The American catch of highly migratory species, primarily tuna, is a significant portion of the dollar value of the nation's processed fish products although in terms of percentage of the total fish catch by weight it is fairly small.<sup>124</sup> The tuna fishing industry operates primarily out of California and the local economies of many areas in Southern California are heavily dependent on its success.<sup>125</sup> Since over 90 percent of the

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120. 19 *Ocean Space News* No. 6 at 6 (Feb. 11, 1977).

121. *Id.*

122. 2 *Marine Fish Management* No. 8 at 1 (Aug. 1976).

123. See Lauterpacht, *Sovereignty over Submarine Areas*, 27 *BRITISH Y.B. INT'L L.* 376 (1950), for a discussion of how a rule of customary international law develops.

124. U.S. Dept. of Commerce Pub. No. 67, *Fishery Statistics of the United States 1973*, 37-48 (1976).

125. *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries on*



United States tuna catch is taken off foreign shores,<sup>126</sup> the American Tuna Boat Association strongly opposed a 200-mile fishing bill for fear that other nations would exclude them from the prime tuna fishing areas.<sup>127</sup> This analysis was not persuasive since the countries whose coastal waters are the most popular tuna fishing grounds<sup>128</sup> have claimed 200-mile economic zones for years and have periodically harrassed and seized American tuna vessels in these areas. For example, between 1961 and 1975 Ecuador seized 136 United States tuna boats with 83 seizures involving the payment of fines and other charges for the release of crew members.<sup>129</sup>

In order to encourage American tuna fishermen to continue operating under such adverse conditions, the Fisherman's Protective Act was passed in 1967.<sup>130</sup> The Act provides for government reimbursement for fines, license fees, regulatory fees, or any other direct charges to secure the return of a vessel or crew members where the vessel has been seized by a foreign country on the basis of rights in territorial waters or on the high seas not recognized by the United States.<sup>131</sup> Upon application to the Secretary of State and the signing of an agreement, the owner of an illegally seized fishing vessel can be guaranteed reimbursement for actual costs resulting from damage to or confiscation of the vessel, gear, or equipment,<sup>132</sup> the market value of the fish caught before seizure, confiscated or spoiled during detention,<sup>133</sup> and not more than 50 percent of gross income lost as a direct result of the seizure.<sup>134</sup> Government payments to

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*Extending the Jurisdiction of the United States Beyond the Present 12 Mile Fishery Zone*, 94th Cong., 1st Sess. 614-15 (1975) [hereinafter cited as *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation*].

126. *Id.* at 615.

127. *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation*, *supra* note 125, at 440, 571; *Hearings on S. 380, S. 1988, and S. 2338*, *supra* note 41, at 470, 477, 727.

128. These nations include Chile, Ecuador, Peru, and Nicaragua. *See Hearings on S. 380, S. 1988, and S. 2388*, *supra* note 41, at 741-44.

129. *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation*, *supra* note 125, at 610.

130. 22 U.S.C. §§ 1971-79 (1967).

131. *Id.* §§ 1972(a), 1973(a).

132. *Id.* § 1977(a)(1).

133. *Id.* § 1977(a)(2).

134. *Id.* § 1977(a)(3). This determination is to be based on "value of the average catch per day's fishing during the three most recent calendar years immediately preceding such seizure and detention of the vessel seized, or if such experience is not available, then of all commercial fishing vessels of the U.S. engaged in the same fishery as that of the type and size of the seized vessel." *Id.*

United States tuna boat owners between 1967-1975 for Ecuadorian seizures were estimated at more than \$4 million.<sup>135</sup> It was probably this monetary protection the American tuna associations feared losing with the passage of the 200-mile fishery zone for it would appear to be inconsistent for the United States to adopt a 200-mile fishery zone and continue to oppose those of other countries.

To avoid the appearance of inconsistency, the FCMA exempts coverage of highly migratory species.<sup>136</sup> According to the explanation provided by the Conference Committee on the FCMA, there is no justification for coastal nations having jurisdiction over species that spawn and migrate over great ocean distances.<sup>137</sup> Therefore, the United States considers the only lawful regulations of highly migratory species those established by international fishery agreements.<sup>138</sup> This means that the United States will oppose claims of other countries to control and regulate tuna fishing within 200 miles of their coasts. To encourage American tuna fishermen to continue present operations, the amended Fisherman's Protective Act<sup>139</sup> will provide payments to tuna boat owners for seizures based on the violation of a 200-mile fishery zone encompassing highly migratory species. In theory and current practice the American tuna fisherman will have the same protection as prior to the adoption of the act; whether in years to come the United States will expand its fishery zone to include the regulation of highly migratory species is the new concern of tuna fishermen.

#### *Impact on Fishing Operations for Sedentary Species*

Sedentary species, unlike highly migratory species, are covered by the new 200-mile zone;<sup>140</sup> however, this will probably effect little real change for the sedentary fishing industry. Since the Convention on the Continental Shelf was adopted the United States has claimed the sovereign rights over the natural resources of the continental shelf, including sedentary species, for the purpose of exploiting them. To better protect these resources, the Department of State in December of 1974 published a new

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135. *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation, supra* note 125, at 610.

136. FCMA § 103, 16 U.S.C. § 1813 (1976).

137. CONF. COMM. REP. NO. 711, 94th Cong., 2d Sess. 43 (1976).

138. S. REP. NO. 1079, 93d Cong., 2d Sess. 22-23 (1974). United States of America Draft Articles for a Chapter on the Economic Zone and Continental Shelf, U.N. Doc. A/Conf. 62/C. 2/L.47, art. 17 (Aug. 8, 1974).

139. FCMA § 403, 22 U.S.C. § 1973 (1976). See the text at note 109, *supra*.

140. See the statement of Findings, Purposes and Policy in *id.* § 2(b), 16 U.S.C. § 1801(b).

set of guidelines providing for the search and arrest of any foreign vessel taking continental shelf fishery resources except as provided by bilateral agreements.<sup>141</sup> To determine when an illegal taking has occurred, vessels can be boarded when they are engaged in fishing above the continental shelf with gear designed to catch continental shelf resources or fishing above the continental shelf with bottom gear that can be expected to catch continental shelf resources.<sup>142</sup>

These new rules were controversial because they were designed to apply to foreign vessels outside of the U.S. 12-mile exclusive fishery zone. Foreign nations would undoubtedly have considered such a seizure a violation of the right to freedom of high seas fishing established in 1958 by the Geneva Convention on the High Seas.<sup>143</sup> The adoption of the 200-mile fishing bill ended speculation over the legality and enforceability of these sedentary fishing regulations by shifting the emphasis to the legality of the FCMA.

According to some international law scholars, the unilateral extension of a nation's fishery jurisdiction is a violation of international law which forbids unilateral or exclusive claims to ocean space beyond the 12-mile contiguous zone.<sup>144</sup> In response to claims that the act is consistent with developing international trends, the International Court of Justice (I.C.J.) decision in the Icelandic Fisheries Case is frequently cited.<sup>145</sup> The I.C.J., in evaluating Iceland's 50-mile unilateral fishery claim, noted existing international law did not grant coastal states the right to extend their jurisdiction unilaterally.<sup>146</sup> Phillip Jessup, former Justice of the I.C.J., in speaking of the U.N. L.O.S. Conference admitted

there has been much support for agreement on a 200 mile economic zone, but it is generally recognized that this is a proposal for new law which can be valid only on the basis of general agreement through treaty.<sup>147</sup>

Supporters of the legislation maintain that the FCMA is legally acceptable.<sup>148</sup> The law of the sea is a combination of treaty law and

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141. 50 C.F.R. § 295.1-.6 (1976).

142. *Id.*

143. 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200 (effective Sept. 30, 1962).

144. *Hearings Before Armed Services Comm. on S. 961, supra* note 51, at 212-14.

145. *Id.* at 212.

146. International Court of Justice Fisheries Jurisdiction Cases (United Kingdom v. Iceland) I.C.J. (1974).

147. *Hearings Before Armed Services Comm. on S. 961, supra* note 51, at 213.

148. Memorandum of Warren G. Magnuson, *id.* at 151-58.

customary international law—the latter often developing as the result of unilateral claims. Since the Geneva Conferences of both 1958 and 1960 failed to establish the extent of the coastal states' fishery jurisdiction, customary international law was decisive.<sup>149</sup> Almost 40 countries have extended their fishery jurisdiction beyond 12 miles and there is general agreement that any new L.O.S. Treaty will provide for some type of 200-mile economic zone.<sup>150</sup> In light of the problems faced by the fishing industry the FCMA is justified as a reasonable action and thus acceptable in international law.<sup>151</sup> If this view of the FCMA ultimately prevails, sedentary conservation rules will clearly be permissible within 200 miles and the only remaining issue will be their enforceability on the continental shelf extending beyond 200 miles.

### *Impact on Fishing Operations for Anadromous Species*

Anadromous species spend the greatest part of their life cycle on the high seas coming inland only to spawn. The anadromous species of greatest importance to the United States is Pacific salmon, although river herring, shad and Atlantic salmon are of significance to commercial and recreational fishermen.<sup>152</sup> Landings of salmon at Pacific coast ports in 1973 were 221.6 million pounds, valued at \$127.6 million.<sup>153</sup> This was a 4 percent decrease in quantity from 1972, but an increase of 78 percent in value.<sup>154</sup> The quantity decrease was due in part to a virtual failure of salmon runs in the Bristol Bay area of Alaska because of a kill of young fish in the cold winters of 1970-72 aggravated by the Japanese catch of salmon on the high seas.<sup>155</sup>

Even though salmon migrate over large areas of the high seas, the United States has always favored regulation by the coastal state of origin because of the unique life cycle of the anadromous specie.<sup>156</sup> In keeping with this philosophy, the FCMA provides for the regulation of all anad-

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149. *Id.*

150. *Hearings on the Geneva Session, supra* note 18, at 2-5.

151. *Hearings Before Armed Services Comm. on S. 961, supra* note 51, at 154. See H. SMITH, *THE LAW AND CUSTOM OF THE SEA* 29 (1959).

152. W. Yonkers, *Fisheries Uses of the Sea* in LOCAL IMPACTS OF THE LAW OF THE SEA 68 (1973) [hereinafter cited as Yonkers].

153. U.S. Dept. of Commerce Pub. No. 67, *Fishery Statistics of the United States 1973* 235-49 (1976).

154. *Id.* at 235.

155. *Id.*

156. See United States of America Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, U.N. Doc. A/Conf. 62/C. 2/L.47, art. 18 (Aug. 8, 1974).

romous species within 200 miles of the United States coast and throughout their migratory range except during the time they are within another nation's territorial sea or fishery conservation zone.<sup>157</sup>

Control and regulation by the state of origin is logical for several reasons. Salmon return only to the stream of their origin to spawn. High seas fishing cannot selectively catch salmon from different origin points because there is no method for distinguishing salmon from different streams when they are on the high seas. Thus, high seas salmon fishing might take an entire run from one river system wiping out that river's salmon.<sup>158</sup> By fishing at the inland stream as the fish return to spawn adequate escapement can be allowed to ensure sufficient spawners to continue that run. High seas salmon fishing is also economically inefficient, taking salmon at an immature stage, approximately 3 pounds, compared to the five and one-half pounds they weigh at the time of their return inland.<sup>159</sup> The nation of origin often has a significant economic investment in the resource. Sizeable expenditures are necessary to keep the water of the streams pure, a requirement for the eggs' survival, and to construct fish ladders and spawning channels to aid the fish around man-made obstacles such as dams.<sup>160</sup>

As logical and desirable as nation of origin regulation of salmon throughout their migratory cycle might be, their migration patterns cover thousands of miles and the practical ability of the United States to prevent overfishing during the extensive high seas migration is almost nonexistent. For example, even with an expanded budget the United States Coast Guard will not be totally effective within 200 miles of the coast because of the large area involved.<sup>161</sup> Here again the validity of the FCMA in international law is questioned. Assuming the concept of a 200-mile fishing zone is accepted as a rule of customary international law, the provision for enforcement of anadromous regulation on the high seas thousands of miles from the United States coast would probably never be accepted by other nations. American proposals at the Law of the Sea Conference for coastal state regulation of anadromous species met with

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157. FCMA § 102(2), 22 U.S.C. § 1812(2) (1976).

158. *Yonkers*, *supra* note 152, at 68.

159. *Id.* at 69.

160. *Id.* at 70.

161. *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation*, *supra* note 125, at 206; 2 *Marine Fish Management* No. 5 at 2 (May 1976). For an estimate of the costs of enforcement see *Hearings Before the Subcomm. on Fisheries and Wildlife Conservation*, *supra* note 125, at 212-32.

considerable disagreement from non-host nations<sup>162</sup> who insisted that since salmon gain 90 percent of their weight on the high seas, the international community should have the right to harvest them.<sup>163</sup>

In actuality it is likely that fishing for anadromous species will continue to be regulated by treaties among interested nations similar to the Convention on the High Seas Fisheries of the North Pacific Ocean Between the United States, Canada, and Japan.<sup>164</sup> In this tripartite agreement Japan and Canada agreed to abstain from salmon fishing in designated high seas areas.<sup>165</sup> While the United States has announced its intent to withdraw from the Convention,<sup>166</sup> similar measures will probably be renegotiated under the aegis of the FCMA. The expanded United States fishing zone may have made the negotiation of such bilateral or multilateral agreements on salmon conservation easier since nations willing to cooperate to preserve anadromous species can be rewarded with greater access to the United States zone for taking other species. In the event a nation still will not cooperate with the United States on anadromous conservation efforts the United States' power and readiness to regulate and protect the species on the high seas might be a sufficiently credible threat to prompt cooperation.

### *Impact on the Coastal Fishing Industry*

The coastal fishing industry was one of the main groups lobbying for an extension of the United States fishing zone and hopes to benefit the most from the new legislation.<sup>167</sup> The coastal fishing industry is generally characterized by old, inefficient vessels and equipment that are expensive to maintain, long hours, low wages, and marginal profitability.<sup>168</sup> Declining profitability has generally been blamed on the increasingly sophisticated foreign fleets operating off the United States coast depleting the fish

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162. See Denmark: Draft Article on Anadromous Species, U.N. Doc. A/Conf. 62/C. 2/L.37 (August 5, 1974); Japan: Draft Article on Anadromous Species, U.N. Doc. A/Conf. 62/C.2/L.46 (Aug. 8, 1974).

163. Official Records of the Third U.N. Conference on the Law of the Sea, Caracas, Session II, Vol II, (June 20-Aug. 29, 1974), Representative of Denmark at 220.

164. 4 U.S.T. 380, T.I.A.S. 2786 (in force June 12, 1953).

165. *Id.* See Annex (1)(c) and (2).

166. The Kansas City Star, Feb. 14, 1977 at 5.

167. *Hearings on S. 1988, supra* note 43, at 112-13; *Hearings on Extending the Jurisdiction of the U.S. Beyond the Present 12-mile Fishery Zone Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 93d Cong., 2d Sess. 36, 42, 66, 123, 129, 188, 245, 270, 475, 513, 516, 529-32, 560-65, 577, 843-88 (1974).

168. H.R. REP. NO. 445, 94th Cong., 1st Sess. 30 (1975).

stock. From 1952-60 the American catch from waters off New England averaged 700 million pounds or 99 percent of the total catch from the area.<sup>169</sup> By 1969 the Soviet fishing fleets were taking over 800 million pounds or 50 percent of the total catch from those waters.<sup>170</sup> At the same time the American catch fell to 25 percent of the area's harvest.<sup>171</sup> The figures off the Northwest coast and Alaska show similar large scale foreign efforts. The National Marine Fisheries Service has initially concentrated on developing preliminary management plans implementing limited access to the United States' zone for foreign fishermen,<sup>172</sup> but regulation of these massive fishing fleets will probably not have an immediate effect on the American coastal fishing industry since depleted fish stock will need time to recover. While regulations on the entry of foreign fishermen may improve the profitability of the coastal industry, in the long run the regional councils will probably adopt a limited entry system for domestic fishermen<sup>173</sup> to further improve conservation efforts and enable the United States' industry to operate as efficiently and as profitably as their foreign counterparts.

#### *Impact on the Gulf Coast Fishing Industry*

The 200-mile fishing bill has had a much more immediate impact on the Gulf Coast shrimpers whose shrimp catch off the Mexican coast amounted to 25 million dollars last year.<sup>174</sup> Following the United States' lead, Mexico extended its fishery jurisdiction to 200 miles, and in order to regulate the fishermen in each other's zone, Mexico and the United States negotiated a bilateral agreement. For American shrimpers the agreement set catch limits at 6 million pounds for 1977, down 4 million pounds from 1976, reduced the number of American boats to 318 in 1977 with following years cuts to 225 vessels, 127, and 95, and established a license fee of

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169. *Hearings on S. 380, S. 1988, and S. 2388, supra* note 41, at 863-98.

170. *Id.* at 81.

171. *Id.*

172. 2 *Marine Fish Management* No. 7 at 3 (July 1976). The National Marine Fisheries Service has undertaken this effort in case: (1) of a signed and approved GIFA, (2) of applications from foreign nations for permits and (3) no fish management plan is prepared by the council on March 1, 1977. It is not the intent of the agency to limit the options of the regional councils by making these preliminary plans.

173. For a discussion of the methods and legal problems of a limited entry system see, H. Knight & J. Lambert, *Legal Aspects of Limited Entry for Commercial Marine Fisheries* (Oct. 15, 1975).

174. Associated Press Release, *Austin American Statesman*, Aug. 10, 1976.

\$2006 per boat.<sup>175</sup> By 1980 American fishing within 200 miles of the Mexican coast will be phased out entirely.<sup>176</sup>

The president of a Texas shrimpers' association is certain a more advantageous agreement could have been obtained if the United States had threatened a tariff or embargo on imported shrimp if Mexico would not agree to more favorable access conditions.<sup>177</sup> However, State Department and National Marine Fisheries Service officials contend the United States obtained a more favorable agreement than was once anticipated.<sup>178</sup> According to the Executive Director of the Texas Shrimpers Association, the shrimping industry will not be hurt by the agreement as much as had been predicted.<sup>179</sup> Federal sources agree; they estimate that only a few hundred of the more than 8000 United States shrimp boats in the Gulf depend heavily on Mexican waters for their catch.<sup>180</sup> Federal statistics further show that of the 208 million pounds of shrimp caught in the Gulf last year not more than 10 million pounds were caught within 200 miles of Mexico.<sup>181</sup> Even though these federal figures have been challenged, Gulf shrimpers have probably been hurt much more by the rising fuel and labor costs that were already pricing American fishermen out of competition with foreign fishermen.<sup>182</sup>

The economic and conservation problems that lead to the enactment of the FCMA have not resulted solely from foreign fishing activities, but stem from the very nature of the fisheries as a common property resource. For years the United States has lacked a jurisdictional or statutory basis from which to develop and enforce a unified fishery management plan. By treating fishery resources within 200 miles as private rather than common property, the FCMA should be able to provide the authority for the sound management of one of our most valuable resources—the fisheries.

*Sarah Weckel Hays*

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175. 2 *Marine Fish Management* No. 8 at 8 (Aug. 1976).

176. Associated Press Release, *Houston Chronicle*, Sept. 21, 1976.

177. *Id.*

178. 2 *Marine Fish Management* No. 8 at 8 (Aug. 1976).

179. Associated Press Release, *Brazosport Facts*, Aug. 11, 1976.

180. N.Y. Times, Sept. 7, 1976 at 20.

181. *Id.*

182. *Id.*