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POTENTIAL CONFLICTS BETWEEN A FUTURE LAW OF THE SEA TREATY AND THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976

Jon L. Jacobson* and Douglas G. Cameron**

I. INTRODUCTION: THE PROBLEM SUMMARIZED

On March 1, 1977, the United States "200-mile-limit" law—the Fishery Conservation and Management Act of 1976¹—became effective. By this congressional enactment, which was signed into law on April 13, 1976,² the United States unilaterally claims "exclusive management authority" over all fish except highly migratory species³ within a "fishery conservation zone"⁴ having an outer boundary 200

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The article can be viewed as a preliminary assessment of some of the problems associated with potential conflicts between United States fisheries laws and a future Law of the Sea treaty. The article is a project of the Ocean Resources Law Program currently proposed for funding by the Sea Grant Program.

1. Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C.A. §§ 1801-1882 (West Supp. 1977)) [hereinafter cited as FCMA or the Act].

2. See 12 WEEKLY COMP. OF PRES. DOC. 644 (Apr. 13, 1976); OCEAN SCI. NEWS, April 16, 1976, at 2.

3. FCMA § 3(14), 16 U.S.C.A. § 1802(14) (West Supp. 1977). Section 3(14) defines "highly migratory species" as "species of *tuna* which, in the course of their life cycle, spawn and migrate over great distances in waters of the ocean." (emphasis added). In addition, the definition of "fish" specifically excludes "highly migratory species." *Id.* § 3(6), 16 U.S.C.A. § 1802(6). Thus, the United States has specifically declined to assert any authority over tuna even while within the 200-mile zone. This exclusion is further reiterated by *id.* § 103, 16 U.S.C.A. § 1813: "The exclusive fishery management authority of the United States shall not include, nor shall it be construed to extend to, highly migratory species of fish."

4. *Id.* § 101, 16 U.S.C.A. § 1811, provides that:

There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

nautical miles from shore.⁵ In addition, the Act asserts the claim to exclusive fishery management authority over all United States-source anadromous species⁶ (essentially salmon) "throughout the migratory range of each such species beyond the fishery conservation zone," except when found in foreign waters,⁷ and claims exclusive authority over all "Continental Shelf fishery resources" beyond 200 miles.⁸ Vessels of a foreign nation may be allowed to fish in the conservation zone for that part of a fishery's optimum yield⁹ not harvested by United States vessels, but usually only if the foreign nation has entered into a "Governing International Fishery Agreement."¹⁰ The Act also

5. *Id.* Pending agreement on and ratification of a new Law of the Sea (LOS) treaty, the territorial sea baseline remains as defined by the 1958 Convention on the Territorial Sea and Contiguous Zone, *done* April 29, 1958, art. 3, [1964] 15 U.S.T. 1606, 1607, T.I.A.S. No. 5639, 516 U.N.T.S. 205, 208 (entered in force Sep. 10, 1964).

6. "Anadromous species" are defined as "species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters." FCMA § 3(1), 16 U.S.C.A. § 1802(1) (West Supp. 1977).

7. *Id.* § 102, 16 U.S.C.A. § 1812, provides, with respect to anadromous species: The United States shall exercise exclusive fishery management authority, in the manner provided for in this Act, over the following:

...
(2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such sea or zone is recognized by the United States.

8. The term "Continental Shelf fishery resources" is defined by listing known species of colenterata, crustacea, mollusks, and sponges, and providing criteria for future additions to this otherwise exclusive list. *Id.* § 3(4), 16 U.S.C.A. § 1802(4). A limit to the geographical extent of "Continental Shelf fishery resources" is provided by defining "Continental Shelf" as follows:

The term "Continental Shelf" means the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, of the United States, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of such areas.

Id. § 3(3), 16 U.S.C.A. § 1802(3). This definition follows closely the language of the 1958 Convention on the Continental Shelf, *done* April 29, 1958, art. 1, [1964] 15 U.S.T. 471, 473, T.I.A.S. No. 5578, 499 U.N.T.S. 311, 312 (entered in force June 10, 1964). For the definition of Continental Shelf in the Revised Single Negotiating Text of the current United Nations Law of the Sea Conference, see note 24 *infra*.

9. The optimum yield of a fishery is defined in FCMA § 3(18), 16 U.S.C.A. § 1802(18) (West Supp. 1977).

10. Foreign fishing is prohibited within the fishery conservation zone and for anadromous species and Continental Shelf fishery resources beyond the fishery conservation zone, in the absence of an existing agreement or a "Governing International Fishery Agreement" (GIFA), entered into between that foreign nation and the government of the United States. FCMA § 201, 16 U.S.C.A. § 1821 (West Supp. 1977). This section further provides mandatory terms and conditions to be included in each GIFA, limits the total allowable level of foreign fishing to that portion of the optimum

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contains a complex domestic scheme for the management of the fisheries within the claimed jurisdiction.¹¹

Congress has thus apparently resolved a longstanding domestic debate over United States participation in the worldwide trend toward establishment of 200-mile offshore zones for coastal nations.¹² Until recently, the executive branch has resisted a unilateral claim by the United States on the principal ground that high seas fisheries management is an international problem to be resolved by international agreement resulting from negotiations in the Third United Nations Law of the Sea Conference (LOS III).¹³ Congressional impatience with the lack of progress in the LOS III negotiations finally led the executive branch to end its resistance.¹⁴ LOS III has been in session since December 1973, having met five times thus far without reaching agreement on any of the many ocean law items on the agenda.¹⁵ Although some progress has been made in the negotiations concerning fisheries management, other issues—principally regulation of deep-seabed mining—have created serious obstacles to the conclusion of a widely acceptable comprehensive treaty.¹⁶ A “package deal” approach

yield of a fishery which will not be harvested by vessels of the United States, and provides criteria for the allocation of allowable foreign fishing among the foreign nations concerned.

11. *Id.* §§ 301–311, 16 U.S.C.A. §§ 1851–1861.

12. Unilateral fisheries-protection action was first taken by the United States with passage of the Contiguous Fisheries Zone Act, Act of Oct. 14, 1966, Pub. L. No. 89-658, 80 Stat. 908, which extended United States exclusive fisheries authority to 12 miles. Since then, proposals have been continually made in the United States Congress for extension of the United States exclusive fishing zone. Some of the early attempts following passage of the Contiguous Fisheries Zone Act included H.R. 627, 92d Cong., 1st Sess. (1971), which was introduced to extend United States fishing jurisdiction to at least 50 miles, and H.R. 628 and H.R. 1675, both also in the 92d Cong., 1st Sess., which were introduced to extend the fishing zone to 200 miles offshore.

13. *See, e.g., Hearings on H.R. 197 et al. Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess. 48–50 (1975)* (letter of John Norton Moore, Chairman, National Security Council Interagency Task Force on the Law of the Sea, and Deputy Special Representative of the President, for the Law of the Sea Conference).

14. 12 WEEKLY COMP. OF PRES. DOC. 644 (Apr. 13, 1976).

15. The previous five sessions of the Law of the Sea Conference have been held as follows: 1) December 3 to December 21, 1973, in New York City; 2) June 28 to August 29, 1974, in Caracas; 3) March 17 to May 3, 1975, in Geneva; 4) March 15 to May 7, 1976, in New York City; 5) August 2 to September 17, 1976, in New York City. The summary records and documents through the fourth session are collected in Third United Nations Conference on the Law of the Sea (5 vol., 1975–76) [hereinafter cited as Third U.N. Conf.].

16. Miles, *An Interpretation of the Caracas Proceedings*, in LAW OF THE SEA: CARACAS AND BEYOND 39, 56–73 (F. Christy, T. Clingan, J. Gamble, H. Knight, E. Miles eds. 1975) [hereinafter cited as CARACAS AND BEYOND].

has so far precluded agreement on any particular items without agreement on all.¹⁷

Nevertheless, it is conceivable that a treaty containing widely acceptable provisions on fisheries management jurisdiction could, in the near future, emerge from the current LOS Conference. Agreement could be reached in either of essentially two ways: (1) the deep-seabed deadlock could be broken, and comprehensive agreement would follow; or, more likely, (2) the "package deal" approach could be abandoned and certain nearly settled issues, including fisheries management, would be agreed upon in the form of a less than comprehensive treaty or set of treaties.

If proposed international rules on fisheries jurisdiction do indeed emerge from the LOS III negotiations in the near future, it is presently possible to predict accurately what those rules will be. It has, for example, been quite obvious for at least two years that the concept of "exclusive economic zones," granting coastal states exclusive or nearly exclusive jurisdiction over living resources out to 200 miles from shore, will substantially replace the traditional "freedom to fish" rule.¹⁸ This much is clear from the record of LOS III negotiations¹⁹ and is reinforced by the series of national claims to such jurisdiction.²⁰

In addition, the LOS III process has produced what are reputed to be highly negotiated and generally acceptable draft provisions on fisheries management jurisdiction. These are currently contained in the Revised Single Negotiating Text (Revised Text),²¹ which is the prin-

17. See Johnston, *The Options for LOS III: Appraisal and Proposal*, in CARACAS AND BEYOND, *supra* note 17, at 357. In this paper Professor Douglas M. Johnston has proposed a series of more limited treaty objectives—alternatives to the "package deal" concept of a single all-encompassing convention supported by universal (or near-universal) consent—and has evaluated their potential for leading to successful negotiation of a Law of the Sea Treaty. See also P. RAO, *THE PUBLIC ORDER OF OCEAN RESOURCES* 203 (1975).

18. *THE FUTURE OF INTERNATIONAL FISHERIES MANAGEMENT* 42 (H. Knight ed. 1975). See also P. RAO, *supra* note 17, at 201.

19. See Miles, *supra* note 16, at 77–81.

20. As of December 1975, 14 nations claimed authority over fishing matters out to 200 miles. See BUREAU OF INTELLIGENCE & RESEARCH, U.S. DEP'T OF STATE, *LIMITS IN THE SEAS* NO. 36, *NATIONAL CLAIMS TO MARITIME JURISDICTION* (3rd rev. ed. 1975). Since that time the very significant 200-mile assertions by the United States, Mexico, Canada, the Soviet Union, and the European Economic Community have been made.

21. 5 Third U.N. Conf. 125–201, U.N. Docs. A/CONF.62/WP.8/Rev.1 & A/CONF.62/WP.9/Rev.1 (1976). Part II of the Revised Text contains its major provisions concerning fisheries management jurisdiction and subsequent citations are to specific articles of Part II unless otherwise indicated. The LOS III negotiating document preceding the Revised Text was the Informal Single Negotiating Text (Informal Text), 4 Third U.N. Conf. 137–81, U.N. Doc. A/CONF.62/WP.8 (1975).

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cial document around which LOS III negotiations are now proceeding. Part II of the Text not only sets out the basic grant of 200-mile fisheries jurisdiction to coastal states²² but also contains several articles on the content of that jurisdiction.²³ Coastal state rights in living resources of the Continental Shelf are also described.²⁴

It is probably unnecessary to point out that these anticipated fisheries provisions of a potential international treaty are not completely consistent with the provisions of the Fishery Conservation and Management Act (FCMA), even though both adopt the 200-mile zone concept. For example, the Act's anadromous-species claim would not be authorized by the treaty.²⁵ On the other hand, some control over highly migratory species, excluded from the Act, is allowed under the Revised Text.²⁶

The problem that forms the crux of this article is thus presented: If the United States should ratify²⁷ a Law of the Sea treaty containing

22. Article 44(1) describes the rights of each state in an "exclusive economic zone" adjacent to its coastlines as follows:

1. In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has:

(a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the bed and subsoil of the superjacent waters;

(b) Exclusive rights and jurisdiction with regard to the establishment and use of artificial islands, installations and structures;

(c) Exclusive jurisdiction with regard to:

(i) Other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and
(ii) Scientific research;

(d) Jurisdiction with regard to the preservation of the marine environment, including pollution control and abatement;

(e) Other rights and duties provided for in the present Convention.

The breadth of the exclusive economic zone "shall not extend beyond 200 nautical miles from the baseline from which the breadth of the territorial sea is measured." Article 46.

23. *Id.* Articles 44-63.

24. Article 64 defines the Continental Shelf, and coastal state rights over the natural resources of the continental shelf are described in Article 65.

25. See notes 42-51 and accompanying text *infra*.

26. Under the Revised Text, highly migratory species would be among the natural resources in the superjacent waters of the exclusive economic zone over which the coastal state is granted sovereignty. Article 44(1)(a). In addition, however, the coastal state and other states that fish highly migratory species in the region are admonished to cooperate directly or through appropriate international organizations to ensure conservation and optimum utilization both within and beyond the exclusive economic zone. Article 53(1).

27. Any treaty resulting from the Third Law of the Sea Conference will undoubtedly be deemed a "treaty" within the meaning of article II of the United States Constitution. See U.S. CONST. art. II, § 2, cl. 2. Under that constitutional provision, treaties are required to be ratified by the President upon the advice and consent of the Senate. See notes 208-10 and accompanying text *infra*.

the fisheries management rules now found in the Revised Text, what would be the effect of ratification on conflicting provisions of the FCMA?

In section 401 the Act itself purports to anticipate the possibility of a subsequent United States ratification of an LOS treaty:

If the United States ratifies a *comprehensive* treaty, which includes provisions with respect to fishery conservation and management jurisdiction, resulting from any United Nations Conference on the Law of the Sea, the Secretary [of Commerce], after consultation with the Secretary of State, may promulgate any amendment to the *regulations* promulgated under this Act if such amendment is necessary and appropriate to conform such regulations to the provisions of such treaty, in anticipation of the date when such treaty shall come into force and effect for, or otherwise be applicable to, the United States.²⁸

The emphases added to this quotation illustrate two significant aspects of the anticipatory provision. First, by reference to a "comprehensive" LOS treaty the provision arguably does not anticipate the higher likelihood that fisheries provisions will be contained in a *less* than comprehensive LOS treaty.²⁹ Second, it does not expressly contemplate that the Act itself will be amended to conform to a treaty, only that the "regulations" under the Act may be amended.

The most significant aspect of this provision, however, is that it does not call for the automatic termination of the Act upon the effective date of a subsequent treaty. Early versions of the bill which later became the extended jurisdiction law did include an automatic-termination clause,³⁰ under which the United States would have entered into its LOS treaty obligations with a blank legislative slate. Congress

28. FCMA § 401, 16 U.S.C.A. § 1881 (West Supp. 1977).

29. See notes 16-17 and accompanying text *supra*.

30. S. 961, 94th Cong., 1st Sess. (1975), introduced on March 5 by Senator Warren Magnuson from the State of Washington, contained the following language in § 11(b):

TERMINATION DATE. The provisions of this Act shall expire and cease to be of any legal force and effect on such date as the Law of the Sea Treaty, or other comprehensive treaty with respect to fishery jurisdiction, which the United States has signed or is party to, shall come into force or is provisionally applied.

S. 1988, 93d Cong., 2d Sess. (1973), which was introduced by Senator Magnuson on June 13, 1973, had contained an identical provision in its § 11(b). Other bills introduced into the House simultaneously with H.R. 200, 94th Cong., 1st Sess. (1975), which became the final Act, contained language substantially equivalent to the "cease to be of any legal force and effect" provision of S. 961. See, e.g., H.R. 3412, 94th Cong., 1st Sess. (1975).

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could then have enacted a management law consistent with the treaty, and the necessity for the present discussion might have been obviated. The automatic termination provision was apparently replaced by the present section 401 at approximately the same time it was decided that the bill should include comprehensive provisions detailing the establishment of a complex domestic system for management of the new fisheries jurisdiction.³¹ The Act now provides for eight Regional Fishery Management Councils, composed of federal and state representatives,³² whose main job will be to devise the actual rules of fishing in the areas of extended jurisdiction.³³ The drafters of the Act presumably—and if so, wisely to this extent—felt that the complicated management system created by the Act should not be demolished automatically upon United States agreement to a treaty authorizing extended fisheries jurisdiction. As it now stands, the Act will not terminate, *by its terms*,³⁴ upon the effective date of the treaty for the United States. In fact, it can be argued that the Act's anticipatory clause, especially in light of its legislative history, exhibits a congressional intent that the Act itself, as contrasted with promulgated "regulations," would remain effective and unchanged even after ratification of an LOS treaty.

This argument, however, is not justified. First, Congress can of course amend its own act at any time, whether that act does or does not anticipate future changes.³⁵ Second, it is quite possible that parts

31. The original H.R. 200 contained no comprehensive conservation and management provisions when it was first submitted to committee for hearings along with companion bills on the same subject. See, e.g., *Hearings on H.R. 197 et al. Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 8 (1975). At that time H.R. 200 did include an automatic termination provision. *Id.* at 9. H.R. 3412, one of the companion bills submitted along with H.R. 200, contained both comprehensive domestic fishery conservation and management provisions and a termination clause very similar to the present FCMA § 401, 16 U.S.C.A. § 1881 (West Supp. 1977). *Id.* at 30.

32. The Act establishes eight Regional Fishery Management Councils and designates the state composition and management jurisdiction of each Council. FCMA § 302, 16 U.S.C.A. § 1852 (West Supp. 1977).

33. The Act directs each Council to prepare fishery management plans and enumerates both required and discretionary provisions of the plans. *Id.* §§ 302(h), 303, 16 U.S.C.A. §§ 1852(h), 1853. For an analysis of the implications of the Regional Councils' membership and structure, see Pontecorvo, *Fishery Management and the General Welfare: Implications of the New Structure*, 52 WASH. L. REV. 641 (1977).

34. Ratification of the Law of the Sea treaty by the United States may itself automatically terminate at least part of the Act upon the treaty's effective date. See text accompanying notes 128–205, *infra*.

35. See, e.g., 1A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 22.02 (4th ed. 1972).

of the LOS treaty will, upon its effective date following ratification, automatically supersede parts of the Act under the supremacy clause of the Constitution³⁶ without any action by Congress as a whole and, again, despite any previously expressed wishes of the legislative body. Therefore, any provision in the Act prohibiting or setting guidelines for the Act's own amendment would be a fruitless exercise. On the other hand, it was entirely proper for the drafters of the Act to anticipate and to authorize in advance any new *regulations* that the treaty might require. Congress, however, can be faulted for failing to foresee a non-"comprehensive" LOS treaty containing fishery rules. Nevertheless, in the context, the word "comprehensive" can and should be interpreted to include not only an LOS treaty covering the whole gamut of items on the LOS III agenda³⁷ but any multilateral treaty "resulting from"³⁸ LOS III which contains a broad scheme of rules on fisheries management jurisdiction. Thus, a proper interpretation of the Act's anticipatory provision would allow amendment of regulations promulgated under the Act, should the Act or appropriate parts of it remain in effect, to conform to a subsequent "comprehensive" LOS treaty, whether that treaty deals only with fisheries or with the complete range of ocean law topics.

As the ensuing discussion will show, however, the Act and the predictable treaty cannot be made entirely consistent with one another by the mere amendment of regulations. Changes in the Act itself will be required if the United States is to fulfill its treaty obligations. This article identifies some of the areas of conflict between the Act and the probable LOS treaty in the area of fisheries jurisdiction and management. In addition, the article examines methods by which the United States, if it chooses to become a treaty party, might resolve the conflicts consistent with its obligations under international law.

36. See notes 128-205 and accompanying text *infra*.

37. The Revised Text covers in detail a wide range of marine issues of international concern of which sovereignty over natural resources in the exclusive economic zones of coastal states is only a part. Other issues currently being negotiated include marine scientific research, preservation of the marine environment and protection from pollution, an international regime concerning the deep seabed and ocean floor, the rights of landlocked states, rights of passage through straits used for international navigation and provisions for the settlement of disputes. Altogether there are 25 major agenda items, including over 80 specific subitems. See 2 *NEW DIRECTIONS IN THE LAW OF THE SEA* 745-49 (S. Lay, R. Churchill & M. Nordquist eds. (1973)). For a discussion of the issue of submerged transit through straits, see Burke, *Submerged Passage Through Straits: Interpretations of the Proposed Law of the Sea Treaty Text*, 52 *WASH. L. REV.* 193 (1977).

38. FCMA § 401, 16 U.S.C.A. § 1881 (West Supp. 1977).

II. CONFLICTS BETWEEN THE ACT AND THE PROBABLE LOS TREATY

A. *The United States Obligation Under International Law*

If ratification of the predicted treaty by the United States is assumed, the United States obligation under international law is simply stated: *pacta sunt servanda*.³⁹ That is, the “contract” represented by the treaty must be carried out according to its terms. Although inconsistent provisions of the FCMA may or may not remain in effect as *domestic* law upon the effective date of the treaty following ratification,⁴⁰ the Act could not be legally enforced against nationals of other treaty parties if such enforcement were contrary to the treaty’s provisions. Thus, the treaty will establish jurisdictional boundaries, both as to geography and content, within which the United States as a coastal state may operate but beyond which it may not trespass with respect to other treaty parties.⁴¹

B. *Conflicts Between Treaty and Act*

If the FCMA and a treaty containing the fisheries management parts of the Revised Text were simultaneously in effect for the United States—the treaty defining the extent of the United States international legal rights to fisheries jurisdiction beyond the territorial sea, and the Act asserting exclusive national claims to the same subject matter—the overlapping of the jurisdictional rights granted under the treaty and the claims asserted under the Act would reveal several vari-

39. *Pacta sunt servanda*, the foundation upon which the treaty structure is based, is the principle that states must carry out their treaty obligations. A. McNAIR, *THE LAW OF TREATIES* 493 (1961). See also Vienna Convention on the Law of Treaties, done May 23, 1969, art. 26, U.N. Doc. A/CONF.39/27, reprinted in 63 A.J.I.L. 875, 884 (1969); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 138 (1965).

40. This depends on the self-executing nature of the treaty’s provisions. See notes 128–205 and accompanying text *infra*.

41. If the LOS Treaty is widely ratified, it will arguably also reflect customary international law and thus be an expression of international law binding on nonparties as well. I.C.J. Stat., art. 38(1)(b). See also 1 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* § 3 (Dep’t of State Pub. No. 1506, 1940). The present rash of unilateral claims to 200-mile fishery zones and the responses to these claims will provide strong support for this argument. See note 23 *supra*. See also H. Knight, *The Law of the Sea: Cases, Documents and Readings* 459–62 (1975) (discussion of customary international law and its relation to certain law of the sea issues).

ances of substance. Many represent conflicts that could not be resolved without changes in the Act.

1. *Anadromous species jurisdiction*

The most serious conflict between the potential treaty and the Act concerns jurisdiction over anadromous species or stocks. The Act defines "anadromous species" as "species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters."⁴² The various species of salmon comprise the principal anadromous species.⁴³ As noted above, the FCMA asserts a claim to exclusive management authority over anadromous species throughout their migratory ranges, even beyond the 200-mile zone (except when the fish are in areas of recognized foreign waters).⁴⁴ Geographically, this is a massive claim: Pacific salmon which spawn in United States waters often migrate as far as 1,000 nautical miles from the United States shores, their migratory patterns including huge areas of ocean.⁴⁵ The extra-200-mile anadromous species claim is made in the interest of preventing foreign fishermen—especially Japanese—from engaging in unregulated fishing for American-source salmon on the high seas beyond 200 miles and thereby thwarting the United States management scheme.⁴⁶

42. FCMA § 3(1), 16 U.S.C.A. § 1802(1) (West Supp. 1977).

43. See generally U.S. FISH AND WILDLIFE SERVICE, DEP'T. OF INTERIOR, ANADROMOUS FISH RESOURCES (1970).

44. FCMA § 102(2), 16 U.S.C.A. § 1812(2) (West Supp. 1977), quoted at note 7 *supra*.

45. THE ENCYCLOPEDIA OF MARINE RESOURCES 588-94 (F. Firth ed. 1969). For a map of the distribution and migratory patterns of North Pacific salmon, see J. GULLAND, THE FISH RESOURCES OF THE OCEAN Fig. 2.4 (1971).

46. Japanese fishermen are presently prevented from fishing North American salmon in the Pacific Ocean east of 175° West Longitude. International Convention for the High Seas Fisheries of the North Pacific Ocean (INPFC), done May 9, 1952, Annex, [1953] 4 U.S.T. 380, 391, T.I.A.S. No. 2786, 205 U.N.T.S. 65, 98. Nevertheless, they do catch substantial numbers of American salmon on the high seas even beyond the 175° line. See generally NAT'L MARINE FISHERIES SERVICE, NAT'L OCEANIC AND ATMOSPHERIC ADM'N, U.S. DEP'T OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT/PRELIMINARY FISHERY MANAGEMENT PLAN, HIGH SEAS SALMON FISHERIES OF JAPAN (1977). It has been predicted that a United States 200-mile zone claim would cause Japan to withdraw from or abrogate the INPFC, thus allowing Japanese fishing for American salmon over the whole Pacific beyond the 200-mile zone. See, e.g., *Hearings on H.R. 200 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 514 (1975) (Statement of Robert O. Archer, Vice Pres., Ass'n of Pacific Fisheries). The current United States claim to anadromous species jurisdiction throughout the species' migratory range is the result. It nevertheless appears unlikely that the United States will enforce the claim beyond 200 miles.

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The Revised Text, in what is purportedly a highly negotiated compromise between Japan and the salmon-source nations, would grant to source nations only "primary interest in and responsibility for" anadromous stocks originating in their rivers.⁴⁷ In general, fishing for anadromous stocks beyond coastal state economic zones would be prohibited,⁴⁸ and the "State of origin" would establish regulatory measures for its source-stocks.⁴⁹ Each state of origin, however, is admonished to "co-operate in minimizing dislocation in such other States fishing these stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred."⁵⁰ Further, enforcement of the state of origin's anadromous-species regulations beyond the economic zone "shall be by agreement between the State of origin and the other States concerned."⁵¹

Thus, while the Act asserts exclusive United States jurisdiction over American salmon throughout their high seas migrations, the predictable treaty will require some international cooperation in promulgating and enforcing salmon regulations applicable beyond the 200-

47. Article 55(1) states: "States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks."

48. Article 55(3)(a) provides: "Fisheries for anadromous stocks shall be conducted only in the waters landwards of the outer limits of exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin."

49. Article 55(2) provides:

The State of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters landwards of the outer limits of its exclusive economic zone and for fishing provided for in [paragraph 3(b)]. The State of origin may, after consultation with other States fishing these stocks, establish total allowable catches for stocks originating in its rivers.

50. Article 55(3)(b). Currently, substantial numbers of American-source salmon are being taken by Japanese gillnets on the high seas. THE ENCYCLOPEDIA OF MARINE RESOURCES 591-92 (F. Firth ed. 1969). See also P. CHITWOOD, JAPANESE, SOVIET, AND SOUTH KOREAN FISHERIES OFF ALASKA 12-15 (U.S. Fish and Wildlife Serv. circular 310, 1969). See generally NAT'L MARINE FISHERIES SERVICE, NAT'L OCEANIC AND ATMOSPHERIC ADM'N, U.S. DEP'T. OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT/PRELIMINARY FISHERY MANAGEMENT PLAN, HIGH SEAS SALMON FISHERIES OF JAPAN (1977).

51. Article 55(3)(d). Cooperation and agreement concerning anadromous species is further called for among "interested states" by Articles 55(4) and 55(5). Article 55(4) provides: "In cases where anadromous stocks migrate into or through the waters [within] the exclusive economic zone of a State other than the State of origin, such State shall co-operate with the State of origin with regard to the conservation and management of such stocks." Article 55(5) admonishes the state of origin and other states fishing those anadromous stocks to "make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations."

mile economic zone. The Act claims more than the treaty will allow, presenting the first conflict.

2. *Foreign access*

The Act and the Revised Text share the same basic approach to foreign fishing access: Foreign access to living resources of the 200-mile zone is authorized to the extent that the coastal nation does not have the capacity to take the allowable harvest.⁵² There are, however, conflicts in the respective implementations of this basic allocation philosophy.

a. *Extent of the United States obligation*

The Revised Text uses language which, on its surface, appears to mandate the allocation of catch surplus to vessels of foreign nations: "Where the coastal State does not have the capacity to harvest the entire allowable catch, it *shall* . . . give other States access to the surplus of the allowable catch."⁵³ The Act nowhere contains words clearly requiring foreign access. On the contrary, the United States claim is to "*exclusive* management authority."⁵⁴ Moreover, the authority given by Congress to the Secretaries of State and Commerce to arrange for foreign fishing is defined in discretionary language⁵⁵ and is expressed in terms of an exception to the general exclusion of foreign fishing.⁵⁶ Thus, the United States, under the Act's term, is arguably

52. See FCMA § 202(d), 16 U.S.C.A. § 1822(d) (West Supp. 1977).

53. Article 51(2) (emphasis added).

54. FCMA § 102, 16 U.S.C.A. § 1812 (West Supp. 1977) (emphasis added).

55. Section 201(b) of the Act provides, in pertinent part, that "[f]oreign fishing . . . may be conducted pursuant to an international fishery agreement." *Id.* § 201(b), 16 U.S.C.A. § 1821(b) (emphasis added). Similar discretionary language is again used in describing the content of the Governing International Fishery Agreements. *Id.* § 201(c), 16 U.S.C.A. § 1821(c).

56. The Act provides, with regard to foreign fishing in general, that "[a]fter February 28, 1977, *no foreign fishing is authorized* within the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond the fishery conservation zone, *unless* such foreign fishing" is allowed by either an Existing International Fishery Agreement (subsection (b)) or a Governing International Fishery Agreement (subsection (c)), is conducted under a valid section 204 permit, and is not prohibited by subsection (f). *Id.* § 201(a), 16 U.S.C.A. § 1821(a) (emphasis added). Section 201(f) further provides: "Foreign fishing *shall not be authorized* for the fishing vessels of any foreign nation *unless*" certain conditions are met. *Id.* § 201(f), 16 U.S.C.A. § 1821(f) (emphasis added). See text accompanying note 70 *infra*. If Congress had intended to require foreign access to harvest excess resources, the pertinent language would arguably have been that "foreign fishing *is authorized* . . . *if*" certain conditions are met.

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not required to allow foreign access—or, to state the proposition more accurately, the authority claimed on behalf of the United States by the Act apparently includes the authority to exclude foreign fishing altogether.

Yet neither interpretation is by any means certain. The reverse can be argued in the case of either the Revised Text or the Act. The Revised Text, while seemingly stating a duty of the coastal nation to allow foreign access to the surplus, conditions that duty on important determinations that lie within the complete control of the coastal nation. Thus, the coastal nation will determine: The total “allowable catch”;⁵⁷ its own capacity to harvest the allowable catch;⁵⁸ within broad bounds, the “relevant” access factors;⁵⁹ and, again with practically no limitation, the terms and conditions of foreign fishing.⁶⁰ As a practical matter, then, the extent of coastal nation control over foreign access granted in the Revised Text appears to be limitless. Little, if anything, remains of the supposed “duty” to grant foreign fishing access.

On the other hand, it is far from clear that the Act claims authority to exclude foreign fishing entirely. “Exclusive” might refer to the right to manage rather than the power to exclude foreigners. Some “shalls” do appear in the provisions concerning foreign fishing,⁶¹ and, most telling, one of Congress stated purposes in enacting the law is “to permit foreign fishing consistent with the provisions of this Act.”⁶² Furthermore, the Act has reportedly been interpreted by the executive branch as requiring foreign access to the surplus portions of United States fisheries.⁶³

Nevertheless, the Revised Text, in theory at least, would impose on a coastal-nation party an international obligation to allow foreign fishing in its economic zone under the conditions noted, while one interpretation of the FCMA is that foreign access is not mandated. Thus, potential conflict exists between the Act and the LOS treaty in this respect.⁶⁴

57. Article 50(1).

58. Article 51(2).

59. Article 51(3).

60. Article 51(4).

61. See FCMA §§ 201(d)–(e), 16 U.S.C.A. §§ 1821(d)–(e) (West Supp. 1977).

62. *Id.* § 2(c)(4), 16 U.S.C.A. § 1801(c)(4).

63. See OCEAN SCI. NEWS, Dec. 31, 1976, at 1.

64. The Act's legislative history tends to resolve this uncertainty in favor of mandatory foreign access subject to United States preference. Although the legislative

b. *Access factors*

The Revised Text would grant broad discretion to the coastal nation to decide which foreign nations are to be allowed entry to the exclusive economic zone and to determine the resource allocations among the nations granted access.⁶⁵ The coastal nation is "required" to take into account "all relevant factors" in making these decisions.⁶⁶ Some of the factors it *must* consider include, *inter alia*, certain rights of adjoining landlocked nations⁶⁷ and certain developing coastal nations in the same subregion or region.⁶⁸

Although the FCMA is basically consistent with this provision of the Revised Text, nothing in the Act specifically authorizes or directs the Secretaries of State and Commerce to consider the above factors when determining the allocations to foreign fishing nations. The United States has no adjoining landlocked neighbors; yet South Korea, Mexico and other Latin American nations, and perhaps even Taiwan, are arguably "developing" nations of the "subregion or region" and thus entitled to be given special consideration should the Revised Text become part of a treaty ratified by the United States. It might be contended that this potential conflict between the Revised Text and the Act is avoided by the Act's residual direction to the Secretaries to consider "such other matters as [they deem] appropriate,"⁶⁹ but another of the Act's provisions casts some doubt on this contention. Section 201(f) states:

Foreign fishing shall not be authorized for the fishing vessels of any foreign nation unless such nation satisfies the Secretary [of Com-

history contains indications of divided opinion as to whether the Act empowers the United States to exclude foreign fishermen totally, see 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 440-441 (Comm. Print 1976) (remarks of Senators Magnuson and Gravel), the legislative record as a whole is more consistent with the notion that the United States has an obligation to negotiate in good faith for foreign access to surplus fish stocks (at least for traditional foreign fishing nations). See, e.g., *id.* at 679-80, 682, 899.

Senator Magnuson, one of the principal sponsors of the FCMA, has stated in this Symposium that it was not the intent of Congress to exclude foreign fishing, but rather to give preference to American fishermen. See Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 435 (1977).

65. Article 51(3).

66. *Id.*

67. *Id.*; Article 58.

68. Articles 51(3), 59.

69. FCMA § 201(e)(4), 16 U.S.C.A. § 1821 (e)(4) (West Supp. 1977).

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merce] and the Secretary of State that such nation extends substantially the same fishing privileges to fishing vessels of the United States, if any, as the United States extends to foreign fishing vessels.⁷⁰

Thus, while the Revised Text would *direct* discrimination in favor of certain regional developing foreign fishing nations, section 201(f) of the Act specifically would *disallow* such special treatment unless those nations reciprocated with “substantially the same fishing privileges” in favor of fishermen from the United States, a developed nation.⁷¹ The Act, therefore, could prohibit what the treaty will require, thus creating another potential conflict.

3. Enforcement

The Revised Text would grant broad enforcement authority to the coastal nation as to living resources within its exclusive economic zone. The enforcing nation is authorized to “take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations enacted by it in conformity with the present Convention.”⁷² There are, however, three restrictions imposed by the Revised Text upon the otherwise nearly unlimited enforcement rights of the coastal nation: (1) arrested vessels and crews must be released promptly “upon the posting of reasonable bond or other security”;⁷³ (2) in the absence of agreement with the foreign fishing nation, imprisonment is not an allowable penalty for violation of fishing regulations, nor may the coastal nation impose any other form of corporal punishment;⁷⁴ (3) the flag state must be promptly notified of action taken by the coastal nation against foreign vessels.⁷⁵

The Revised Text does not specifically grant the coastal nation unilateral enforcement competence seaward of its exclusive economic zone. Enforcement of regulations applicable to anadromous stocks beyond the zone must be by agreement between the source nation and

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

71. Developing foreign nations could not be accorded more favorable treatment than other nations in regard to the requirement of reciprocity. *Id.*

72. Article 61(1).

73. Article 61(2).

74. Article 61(3).

75. Article 61(4).

other concerned nations.⁷⁶ Curiously, the Revised Text contains no enforcement provision at all concerning Continental Shelf species beyond the exclusive economic zone, even though the Text recognizes the "sovereign rights" of the coastal nation in the "sedentary species" of the shelf⁷⁷ and despite the Text's acknowledgement that these Continental Shelf species can be found outside a 200-mile economic zone boundary.⁷⁸ Arguably, enforcement rights are reasonably implied. Whether the enforcement limitations specifically applicable within the exclusive zone also by implication restrict the coastal nation in the extra-200-mile exercise of its Continental Shelf fisheries is, however, a closer question.

The FCMA would seem to overstep, in certain respects, even the broad grant of authority that would be established by a Revised Text treaty. As already noted,⁷⁹ the Act claims exclusive jurisdiction to regulate fishing for United States-source anadromous species throughout the migratory ranges of those species. The Act also provides that it is unlawful for any person "to violate any provision of this Act or any regulation or permit issued pursuant to this Act;"⁸⁰ or for a foreign vessel to fish for any United States-source anadromous species anywhere without a United States permit.⁸¹ Civil and criminal penalties are established for commission of these acts.⁸² Various arrest, inspection, boarding, and search and seizure rights are also claimed.⁸³ To the extent that these enforcement measures⁸⁴ are taken unilaterally by the United States beyond 200 miles against vessels of a foreign nation that has not by agreement recognized the claimed United States jurisdiction over anadromous species, the enforcement conduct would be unlawful under the prospective LOS treaty.

Another potential conflict concerns the Revised Text's general dis-

76. Article 55(3)(d).

77. Article 65(1), (4). This provision is, of course, a restatement of rights already recognized under international law. See Convention on the Continental Shelf, done April 29, 1958, art. 2(1), (4), [1964] 15 U.S.T. 471, 473, T.I.A.S. No. 5578, 499 U.N.T.S. 311, 312, 314.

78. See, e.g., Articles 64, 70.

79. See notes 6 & 44-46 and accompanying text *supra*.

80. FCMA § 307(1)(A), 16 U.S.C.A. § 1857(1)(A) (West Supp. 1977).

81. *Id.* § 307(2)(B), 16 U.S.C.A. § 1857(2)(B).

82. *Id.* §§ 308-310, 16 U.S.C.A. §§ 1858-1860.

83. *Id.* § 311, 16 U.S.C.A. § 1861.

84. For an excellent analysis and discussion of enforcement under the FCMA, see Fidell, *Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot*, 52 WASH. L. REV. 513 (1977).

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allowance of imprisonment as a form of punishment for violating the coastal nation's "fisheries regulations" within the exclusive economic zone.⁸⁵ For certain offenses under the Act, imprisonment is a permissible penalty.⁸⁶ These offenses include fishing by a foreign vessel without the required United States permit,⁸⁷ certainly a violation of a "fisheries regulation." Other offenses under the Act—such as forcible resistance to inspection, resistance of arrest, and obstructing another's arrest⁸⁸—might be characterized as violations of criminal enforcement laws rather than fisheries regulations. If so, the treaty's imprisonment disallowance will not conflict with the Act's allowance of imprisonment as a permissible penalty for these offenses. Nevertheless, it is possible to argue that "fisheries regulations," as the term is used in the Revised Text, refers to the complete scheme of jurisdictional authority over fisheries, including enforcement laws, granted by the exclusive economic zone provisions to the coastal state. The latter interpretation would be consistent with the Text's unqualified requirement that arrested vessels and crews be released on posting of security. It is also consistent with a desire undoubtedly felt by some nations to prevent imprisonment of their own nationals, under any circumstances, in certain other nations with different philosophies of crime and punishment. The Revised Text does recognize the validity of agreements by

85. Article 61(3).

86. FCMA § 309(b), 16 U.S.C.A. § 1859(b) (West Supp. 1977), provides for imprisonment for not more than six months, or a fine of not more than \$50,000, or both, for the commission of any acts prohibited by FCMA § 307(1)(D), (E), (F), or (H), 16 U.S.C.A. § 1857(1)(D), (E), (F), or (H) (West Supp. 1977). Acts prohibited by those subsections include refusing to permit an authorized officer to board a fishing vessel for search or inspection, forcibly assaulting or interfering with that officer in the conduct of the search or inspection, resisting lawful arrest, and interfering with, delaying, or preventing the arrest of another person knowing that such person has committed a FCMA § 307, 16 U.S.C.A. § 1857 (West Supp. 1977), violation. An additional penalty of imprisonment for not more than ten years, or a fine of not more than \$100,000, or both, is provided if the above offenses are committed using a dangerous weapon or in such manner as to cause bodily injury to the officer or put the officer in imminent fear of bodily injury. Offenses described in § 307(2), 16 U.S.C.A. § 1857(2) (West Supp. 1977), are punishable by imprisonment for not more than one year, or a fine of not more than \$100,000, or both. That section prohibits fishing by any foreign vessel, and the owner or operator of any foreign vessel, within the boundaries of any State, or, "within the fishery conservation zone, or for any anadromous species or Continental Shelf fishery resources beyond such zone, unless such fishing is authorized by, and conducted in accordance with, a valid and applicable permit issued pursuant to [section 204(b)-(c) of the Act]."

87. *Id.* §§ 307(2), 309(a)(2), 309(b), 16 U.S.C.A. §§ 1857(2), 1859(a)(2), 1859(b) (West Supp. 1977).

88. *See id.* §§ 307(1), 309(b), 16 U.S.C.A. §§ 1857(1), 1859(b).

foreign nations to waive the anti-imprisonment rule,⁸⁹ so United States permits might be conditioned on recognition of the applicability of the Act's penalty provisions by the foreign flag nations.⁹⁰ This would not, of course, resolve the clear conflict between the Revised Text and the Act's allowance of imprisonment for foreign fishing *without* a permit or in the absence of a Governing International Fishery Agreement.

It is also uncertain whether the Act would comply with a treaty mandate that arrested vessels and crews "be promptly released upon the posting of reasonable bond or other security."⁹¹ With respect to arrested vessels or property, the Act empowers and requires the United States officer serving "any process in rem" to "stay the execution of such process" upon receipt of a satisfactory bond or other security.⁹² Thus the Act, by its own terms, would seem to *require* that arrested or seized vessels and other property be released upon posting of security in some cases—that is, those involving service of "process in rem." Moreover, the federal district courts, which are assigned exclusive jurisdiction under the Act,⁹³ are authorized to "take such other actions as are in the interest of justice."⁹⁴ Under this provision of the Act, the federal courts would arguably be *allowed*, at least, to release vessels (and perhaps crews) on receipt of security. Compliance with the prospective treaty would, therefore, not be prohibited by the Act's terms. Application of Federal Admiralty Rule E⁹⁵ provides additional

89. Article 61(3).

90. Some of the Governing International Fisheries Agreements may in fact include a disallowance of imprisonment as a permissible form of punishment, or a United States promise to recommend no imprisonment, for foreign violations. With respect to certain foreign fishing nations, an anti-imprisonment GIFA provision may be of benefit to United States distant-water fishermen by way of reciprocity. The domestic validity of such a GIFA provision, however, is at least questionable even if Congress, in the exercise of its broad GIFA oversight powers, allows it to stand. *See* note 104 *infra*.

91. Article 61(2).

92. FCMA § 310(d)(1), 16 U.S.C.A. § 1860(d)(1) (West Supp. 1977). The Act authorizes federal officers to seize any fishing vessel suspected of violating the Act, "with or without a warrant or other process." *Id.* § 311(b), 16 U.S.C.A. § 1861(b). Questions concerning the fourth amendment guarantee against unreasonable searches and seizures that this provision raises, at least with respect to American fishermen, are beyond the scope of this article. *See* Fidell, *supra* note 84, at 560.

93. FCMA § 311(d), 16 U.S.C.A. § 1861(d) (West Supp. 1977).

94. *Id.* § 311(d)(4), 16 U.S.C.A. § 1861(d)(4).

95. FED. R. CIV. P. E(5)(b) provides:

The owner of any vessel may file a general bond or stipulation, with sufficient surety, to be approved by the court, conditioned to answer the judgment of such court in all or any actions that may be brought thereafter in such court in which the vessel is attached or arrested. Thereupon the execution of all such process against such vessel shall be stayed so long as the amount secured by such bond

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authorization for release of vessels upon posting of security where the Act does not so provide. Thus, the Act, when read together with Rule E, may be consistent with the Revised Text release requirement as to vessels.

The more likely conflict relates to the release of “crews” required by the Text.⁹⁶ The Act provides for punishment by fines or imprisonment of “any person”⁹⁷ guilty of certain offenses under the Act and of “the owner or operator” of any foreign vessel violating the Act’s permit requirement.⁹⁸ The Act itself does not refer to the possibility of release of arrested crew members—presumably including the vessel captain—on the posting of bond. However, the Federal Rules of Criminal Procedure, where not inconsistent with the Act, are undoubtedly applicable to fisheries enforcement matters brought before the courts. Rule 46 requires release on bail of any person accused of a crime,⁹⁹ and this rule applies to accused aliens as well as United States citizens.¹⁰⁰ However, Rule 46 is clearly designed also to ensure ap-

or stipulation is at least double the aggregate amount claimed by plaintiffs in all actions begun and pending in which such vessel has been attached or arrested. Judgments and remedies may be had on such bond or stipulation as if a special bond or stipulation had been filed in each of such actions. The district court may make necessary orders to carry this rule into effect, particularly as to the giving of proper notice of any action against or attachment of a vessel for which a general bond has been filed. Such bond or stipulation shall be indorsed by the clerk with a minute of the actions wherein process is so stayed. Further security may be required by the court at any time.

If a special bond or stipulation is given in a particular case, the liability on the general bond or stipulation shall cease as to that case.

96. Article 61(2).

97. FCMA § 307(1), 16 U.S.C.A. § 1857(1) (West Supp. 1977). The Act defines “person” broadly to include “any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.” *Id.* § 3(19), 16 U.S.C.A. § 1802(19).

98. *Id.* § 307(2), 16 U.S.C.A. § 1857(2). See Fidell, *supra* note 84, at Part III–B.

99. FED. R. CRIM. P. 46.

100. It has been held that aliens in the United States are entitled to the protection of its Constitution and laws with respect to their rights of person and property and that they are entitled to this protection under certain circumstances, in both civil and criminal proceedings against them. *Fong Yue Ting v. United States*, 149 U.S. 698, 724 (1893); *United States v. O’Rourke*, 213 F.2d 759, 763 (8th Cir. 1954). Furthermore, distinctions between aliens and citizens are considered inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired. *Graham v. Richardson*, 403 U.S. 365 (1971). In *Heikkinen v. United States*, 208 F.2d 738 (7th Cir. 1953), the issue for decision was whether the trial court required excessive bail of a resident alien defendant who had not been brought to trial on an information charging him with wilfully failing to depart from the United States within six months from the date of an order of deportation. The court noted that the alien defendant had “an absolute right to be admitted to bail, based,

pearance of the accused for trial and possible imprisonment; the court is admonished to set the amount of bail and conditions of release on this basis.¹⁰¹ On the other hand, the Revised Text, which contemplates fines but not imprisonment of convicted crew members,¹⁰² probably means that crews shall be "promptly released" to return to fishing or to their foreign homes. Conditions of release on bail imposed by a United States federal court—conditions designed to keep the accused within the jurisdiction—would therefore not likely be consistent with the prospective treaty.

At least some governing international fishing agreements (GIFA's) negotiated thus far with foreign fishing nations, however, include provisions, in language similar to the Revised Text release requirement, for prompt release of vessels and their crews on the posting of "reasonable bond or other security" to allow the vessels to resume fishing.¹⁰³ These GIFA's, then, are consistent with the Revised Text; but,

as to the amount fixed, on the standards prescribed by [statute] for the purpose of securing his presence for trial." *Id.* at 740 (citation omitted).

101. It is provided in FED. R. CRIM. P. 46 that "[e]ligibility for release prior to trial shall be in accordance with 18 U.S.C. § 3145, § 3148, or § 3149." 18 U.S.C. § 3146(a) (1970) provides:

Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

- (1) place the person in the custody of a designated person or organization agreeing to supervise him;
- (2) place restrictions on the travel, association, or place of abode of the person during the period of release;
- (3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;
- (4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or
- (5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

See also 8B MOORE'S FEDERAL PRACTICE ¶ 46.05 (2d ed. 1976).

102. Article 61(3).

103. See, e.g., Agreement Concerning Fisheries off the Coasts of the United States, August 2, 1976, United States-Poland, reprinted in H.R. Doc. No. 94-613, 94th Cong., 2d Sess. 5 (1976). Article X(2) of that agreement provides: "In cases of arrest of a Polish fishing vessel, the economic loss encountered by the vessel and crew

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as just indicated, they may also promise more than the terms of the Act, read together with federal procedural rules, would require.¹⁰⁴

The Revised Text's remaining restriction on basically unbounded coastal nation enforcement rights—prompt notification to the flag nation¹⁰⁵—is not required by the Act; but neither is it prohibited. No *necessary* conflict results.

4. *Other inconsistencies between the Act and the Revised Text*

a. *Delimitation of zone boundaries*

Some inconsistencies of lesser importance, or less certain to present actual conflicts, can also be noted. One of these possible conflicts concerns the guidelines by which the boundaries of the United States fishery conservation zone are to be established with respect to neighboring countries.¹⁰⁶ The Act provides:

The Secretary of State, in cooperation with the Secretary [of Commerce], may initiate and conduct negotiations with any adjacent or opposite foreign nation to establish the boundaries of the fishery conservation zone of the United States in relation to any such nation.¹⁰⁷

The Act thus simply authorizes the executive branch to negotiate boundaries without delineating any guidelines for drawing the boundary lines or establishing any methods for settling a negotiations impasse.

By contrast, the Revised Text, while also directing delimitation of the exclusive economic zone boundaries by agreement, requires that

because of lost fishing time shall be minimized through prompt release of the vessel and crew upon the posting of reasonable bond or other security." *Id.* at 9.

104. Congress gave itself a broad veto power over all GIFA's. FCMA § 203, 16 U.S.C.A. § 1823 (West Supp. 1977). If any provision of an approved GIFA conflicts with the terms of the Act, the effect of affirmative congressional approval of the inconsistent GIFA provision is uncertain. Does the GIFA, which would not be a "treaty" entitled to statutory status under the Constitution's supremacy clause, *see* notes 128–205 and accompanying text *infra*, rise to the level of a statute because of congressional approval? If so, it would be an amendment of the Act. Or, perhaps, the GIFA could be viewed as an executive agreement authorized by an act of Congress and therefore supersede the conflicting terms of the Act (at least to the extent that the Act itself would permit the deviations). *See* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 143 (1965).

105. Article 61(4).

106. *See* Fidell, *supra* note 84, at 531.

107. FCMA § 202(d), 16 U.S.C.A. § 1822(d) (West Supp. 1977).

the agreement be "in accordance with equitable principles, employing, where appropriate, the median or equidistant line, and taking account of all the relevant circumstances."¹⁰⁸ The draft treaty would further require the negotiating nations to resort to dispute settlement procedures if no agreement can be reached within a reasonable time.¹⁰⁹ Moreover, "[p]ending agreement or settlement, the States concerned shall make provisional arrangements"¹¹⁰

The treaty, therefore, will presumably include these mandatory, though in some respects vague, instructions for determining boundaries by agreement—restrictions which the Act does not impose. Arguably, however, the Act does not *prohibit* adherence by United States negotiators to the treaty guidelines, and thus the Secretaries could conduct negotiations in accordance with the treaty rules without violating the terms of the Act.

b. The FCMA's "non-recognition" provision

The Act states that "[i]t is the sense of Congress"¹¹¹ that the United States will not recognize any foreign nation's claim to a fishery conservation zone, or similar zone, if that nation:

(1) fails to consider and take into account traditional fishing activity of fishing vessels of the United States;

(2) fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements, whether or not such nation is a party to any such agreement; or

(3) imposes on fishing vessels of the United States any conditions or restrictions which are unrelated to fishery conservation and management.¹¹²

108. Article 62(1). "Median line" is defined as "the line every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured." Article 62(4).

109. Article 62(2). Procedures for the settlement of international disputes concerning law of the sea issues were also a subject of negotiation and the pertinent articles are located in Part IV of the Revised Text.

110. Article 62(3). Compare the Informal Text, *supra* note 21, which stated in its Part II. Article 61(3): "Pending agreement, no State is entitled to extend its exclusive economic zone beyond the median line or the equidistance line."

111. Although "sense of Congress" resolutions have little, if any, binding effect on the Executive's conduct of foreign affairs, they can be tremendously influential. As Professor Henkin has stated, "Presidents cannot lightly disregard them." L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 86 (1972).

112. FCMA § 202(e), 16 U.S.C.A. § 1822(e) (West Supp. 1977).

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The first two of these three conditions for foreign-zone recognition were apparently designed principally to allow the United States to continue to protest the applicability of foreign 200-mile claims to United States distant-water tuna fishermen—tuna being the principal “highly migratory species.”¹¹³ As previously noted,¹¹⁴ the Act does not claim exclusive management authority over highly migratory species. The purpose of the third condition is, presumably, to discourage United States recognition of geographically extensive foreign claims of authority to interfere with fishing vessels engaged solely in navigation within the foreign zones.

The first two conditions of the FCMA’s “non-recognition” provisions are alluded to in the Revised Text. Under Article 51 the coastal state, in granting economic zone fishing access to other nations (which it is not required to do in all circumstances¹¹⁵), must take into account, *inter alia*, “the need to minimize economic dislocation in States whose nationals have habitually fished in the zone.”¹¹⁶ Unlike the Act, the

113. United States tuna fishermen, primarily from California, have traditionally fished the migrating tuna off the west coast of South America, often fishing well within the claimed 200-mile zones of the nations along that coast. See OUR CHANGING FISHERIES 222–24 (S. Shapiro ed. 1971); T. Wolff, Peruvian-United States Relations Over Maritime Fishing: 1945–1969 (Law of the Sea Inst. Univ. of R.I., Occasional Paper No. 4, 1970). The Act has been drafted, for the most part, in such a way as to be consistent with the claims that the United States would like to make on behalf of its tuna fishermen fishing off foreign shores. FCMA § 201(e), 16 U.S.C.A. § 1821(e) (West Supp. 1977), lists among the criteria for allocating among nations the allowable level of foreign fishing within the U.S. 200-mile zone “whether, and to what extent, the fishing vessels of such nations have *traditionally engaged* in fishing in such fishery.” (emphasis added.) In addition, the Act makes no exclusive claim to U.S. jurisdiction over tuna found within the 200-mile zone. See *id.* § 103, 16 U.S.C.A. § 1813.

114. See note 3 and accompanying text *supra*.

115. Article 51(2) sets out the circumstances under which the coastal nation is required to grant foreign access:

The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch.

Paragraph 4 (Article 51(4)) provides a non-exclusive list of conservation measures and conditions the coastal state is allowed to include in its regulations concerning access by other states to its exclusive economic zone. Those listed relate to, for example, licensing of vessels and the payment of fees; determining the size, age, and number of those species allowed to be caught; regulating the gear, the number and type of fishing vessels, and the seasons and areas of allowable fishing; requiring statistical and scientific data to be kept; and the placing of observers or trainees aboard such vessels by the coastal state.

116. Article 51(3).

Revised Text does not except authority over highly migratory species from the general grant to the coastal state of "sovereign rights" for the purpose of managing fishery resources in its exclusive economic zone.¹¹⁷ A subsequent provision, however, does seem to require the coastal nation in setting management rules to cooperate "directly or through appropriate international organizations," with those nations who fish the highly migratory species.¹¹⁸ Whether an LOS treaty with these provisions would be consistent with the first two conditions set out in the Act's "non-recognition" provision is subject to argument. The better argument appears to be that a zone established by a foreign nation under the treaty would meet these two conditions and therefore that no conflict would result. The foreign treaty zone would "consider and take into account" traditional foreign fishing activity by other nations to the extent that economic dislocation would result from termination of the activity in the zone; it also would seem to recognize the need for international management of highly migratory species. On the other hand it could be contended that since "sovereign rights" over highly migratory species would not be excepted from the coastal nation's treaty zone, management of those species could be carried out in the zone unilaterally by the coastal nation pending international settlement. Under these circumstances, the treaty zone nation would fail "to recognize and accept" that highly migratory species are to be managed *only* internationally. Yet if the United States is presumed to be a party to the treaty, it would be required by the treaty to recognize the foreign zone, whatever the proper interpretation of the highly migratory species authority, and the result of such recognition would be an Act/treaty conflict, *if* the "sense of Congress" is given effect.

The Act's third condition to recognition of a claim to extended jurisdiction—concerning restrictions on fishing vessels not related to fishery management—also presents an arguable conflict. The Revised Text includes in the coastal state's economic zone authority "[j]urisdiction with regard to the preservation of the marine environment, including pollution control and abatement."¹¹⁹ Standing alone, this language would seemingly allow a coastal nation to regulate or restrict vessel traffic, including fishing vessels, within its economic

117. Article 44(1)(a), *quoted at note 22 supra*.

118. Article 53(1). *See also note 3 supra*.

119. Article 44(1)(d), *quoted at note 25 supra*.

zone and outside its territorial sea if the regulations or restrictions are reasonably related to pollution control. This provision should, however, be read together with Part III of the Revised Text, which specifically addresses protection and preservation of the marine environment. If this Part is also included in the future LOS treaty in its present form, the authority of a coastal nation to restrict economic-zone vessel traffic for pollution-control purposes would be limited.¹²⁰ Nevertheless, a degree of residual jurisdiction would exist, and fishing vessels could be affected. To the extent that the United States will be required by the future LOS treaty to recognize this jurisdiction, the Act's "non-recognition" provision is arguably not consistent with the treaty.

The possible conflicts suggested between the Act and the prospective LOS treaty are only the most obvious ones that appear from an overlay of the language of one upon that of the other. Additional conflicts might result from inconsistencies in later interpretations of wordings that presently appear to present no conflict. For example, the conservation goal of the Act¹²¹ apparently matches in substance the stated conservation goal of the Revised Text,¹²² even though the goal is expressed in different terms in each. Subsequent interpretations could well lead to conflicts that consistency of language would tend to avoid. This is especially possible with respect to the conservation goal statements, which are each couched in language recently subjected to heavy criticism.¹²³

The basic point to be noted, however, is this: the Act and the Revised Text, though generally similar, are inconsistent in several respects. In a few cases, the Act would seem to mandate the conflict,¹²⁴ while in others the Act allows but does not ensure United States com-

120. See Part III, Article 21(5).

121. The conservation goals of the Act are established by the definitions of "conservation and management" and "optimum," FCMA §§ 3(2), 3(18), 16 U.S.C.A. §§ 1802(2), 1802(18) (West Supp. 1977), and the national standards, *id.* § 301, 16 U.S.C.A. § 1851. For a critical analysis of the Act's management objectives, see Christy, *The Fishery Conservation and Management Act of 1976: Management Objectives and the Distribution of Benefits and Costs*, 52 WASH. L. REV. 657 (1977).

122. See Article 50.

123. See, e.g., J. GULLAND, *THE MANAGEMENT OF MARINE FISHERIES* 108 (1974) (deficiencies of "maximum sustainable yield" concept); Holt, *Objectives in Conserving the Living Resources of the Sea*, in EXCERPTS FROM CRITICAL ENVIRONMENTAL ISSUES ON THE LAW OF THE SEA 43 (R. Stein ed. 1975).

124. This is particularly true with respect to anadromous species jurisdiction, see notes 42-51 and accompanying text *supra*, and allowable enforcement measures within and beyond the zone, see notes 72-105 and accompanying text *supra*.

pliance with the prospective treaty.¹²⁵ At least with respect to the former cases, the United States will be required by the LOS treaty to reconcile the conflicts. In the latter instances, the United States should ensure compliance with the treaty obligations and should also prevent subsequent noncompliance which might arise from inconsistencies in expression.

III. RESOLVING CONFLICTS BETWEEN THE ACT AND THE TREATY

Conflicts between legislation and a subsequent treaty ratified by the United States will not be presumed by the courts; rather, consistency is the presumption.¹²⁶ Where conflicts do exist, the inconsistencies must be resolved in favor of the treaty obligations. The Constitution's supremacy clause, which by judicial construction equates treaties with congressional legislation as the "law of the land,"¹²⁷ automatically resolves conflicts in favor of the later treaty to the extent that the treaty is "self-executing." As will be demonstrated, however, it is no easy task to determine whether or to what degree any treaty is self-executing.

A. *Resolving Conflicts in Favor of "Self-Executing" Treaty Provisions—the Foster Doctrine*

The general rule equating acts of Congress and treaties ratified by the President upon the advice and consent of the Senate¹²⁸ stems from

125. This is particularly true with respect to the delimitation of zone boundaries. *see* notes 107–110 and accompanying text *supra*, and foreign access to living resources of the 200-mile zone, *see* notes 65–77 and accompanying text *supra*.

126. *See Moser v. United States*, 341 U.S. 41, 45 (1951); *United States v. Lee Yen Tai*, 185 U.S. 213, 222 (1902); 2 C. HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1464–65 (2d rev. ed. 1945); Evans, *Self-Executing Treaties in the United States of America*, 30 BRIT. Y.B. INT'L L. 178, 184 (1953).

127. U.S. CONST. art. VI, cl. 2 provides:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

128. The power to ratify treaties on behalf of the United States is granted by the Constitution to the President, "by and with the advice and consent of the Senate. . . . provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

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article VI, clause 2 of the Constitution.¹²⁹ The leading case for the proposition that congressional acts and treaties are of equal rank is the early Supreme Court decision in *Foster v. Neilson*.¹³⁰ In that case, Chief Justice Marshall also formulated the important qualification that non-self-executing treaties cannot operate as domestic law under this rule until executed by the “political department”:

[A treaty is] to be regarded in Courts of justice as equivalent to an act of the legislature, *whenever it operates of itself*, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.¹³¹

The *Foster* principle is now a well-established domestic doctrine.¹³²

A logical extension of the act/treaty equivalence is that the later in time controls any inconsistencies between them, and this corollary has been upheld in the courts.¹³³ A partial answer to questions concerning resolution of the potential conflicts between the FCMA and the prospective LOS treaty could be: the treaty, being later in time, controls to the extent that the appropriate treaty provision is self-executing. It therefore becomes important to inquire whether the prospective LOS treaty will be considered self-executing in whole or at least in the areas of inconsistency. To the extent that it remains merely unfulfilled promises—a nonperformed contract, in Marshall’s terms—the conflicts can be resolved only by legislation amending the Act.

Although Marshall’s original distinction between self-executing and non-self-executing treaties has been applied and commented on throughout the course of American judicial history,¹³⁴ there is still no

129. See note 127 *supra*.

130. 27 U.S. (2 Pet.) 253 (1829).

131. *Id.* at 314 (emphasis added).

132. See *Bacardi Corp. v. Domenech*, 311 U.S. 150 (1940); *Cook v. United States*, 288 U.S. 102 (1933); *Asakura v. City of Seattle*, 265 U.S. 332 (1924); *People of Saipan ex rel. Guerrero v. United States Dep’t of Interior*, 502 F.2d 90 (9th Cir. 1974); *Ortman v. Stanray Corp.*, 371 F.2d 154 (7th Cir. 1967).

133. See, e.g., *Cook v. United States*, 288 U.S. 102, 118 (1933); *Chae Chan Ping v. United States*, 130 U.S. 581, 600 (1889). See also L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 163 (1972).

134. See cases cited note 132 *supra*.

workable test for making the determination with any certainty.¹³⁵ Some general guidelines, however, have been stated by various authorities and are discussed below.

1. *Intent test*

The basic inquiry appears to be one of intent: Did the treaty parties understand that the treaty would be immediately effective, or did they intend that the treaty obligations would be implemented only by domestic legislation?¹³⁶ As is true for other intent tests, this one does not often allow for easy answers. The guidelines for determining intent are also familiar: (1) Express terms in the treaty itself stating whether the agreement is self-executing are controlling.¹³⁷ (2) In the absence of express terms, the intent of the parties may be determined from the language of the treaty document.¹³⁸ Are the obligations broadly phrased in "hortatory" or policy language, or is the wording clear and definite, mandatory, resembling statutory language?¹³⁹ (3) The history

135. See 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 304-05 (1970), where the author quotes from a 1948 memorandum prepared for the State Department Legal Adviser: "An examination of adjudicated cases and of some treatises and of some of the law reviews has failed to disclose a clear definition of the term 'Self-Executing Treaty.'"

136. See, e.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141 (1965) (emphasis added):

(1) A treaty made on behalf of the United States . . . that manifests an intention that it shall become effective as domestic law of the United States at the time it becomes binding on the United States

(a) is self-executing in that it is effective as domestic law of the United States, and

(b) supersedes inconsistent provisions of earlier acts of Congress or of the law of the several states of the United States.

(2) A treaty made on behalf of the United States . . . that does not manifest the intention referred to in Subsection (1)

(a) is not self-executing and does not have the effect stated in Subsection

(1)

For commentary in accord on the intention test, see L. HENKIN, *supra* note 111, at 158; McLaughlin, *The Scope of the Treaty Power in the United States*, 42 MINN. L. REV. 709, 748-50 (1958); Comment, *Criteria for Self-Executing Treaties*, 1968 U. ILL. L. FORUM 238; Note, *Self-Executing Treaties*, 10 TEX. INT'L L.J. 138 (1975).

137. See L. HENKIN, *supra* note 111, at 158-59; Comment, *supra* note 136, at 241-42.

138. See authorities cited note 136 *supra*.

139. See Note, *supra* note 136, at 142. An illustration of the potentially crucial importance of treaty language can be found in *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833). In that case the very same treaty between Spain and the United States held to be non-self-executing in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), was ruled self-executing by the Marshall court when it was acknowledged that the Spanish verb "*quedarán*" ("shall remain") had been erroneously translated in the treaty's English version as "shall be." Similarly, such phrases as "shall promote"

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of the treaty, the circumstances surrounding its negotiation and execution, its type and subject matter, and other matters broadly classified as “surrounding circumstances” can also be relevant to the intent issue.¹⁴⁰ (4) Determinations or statements of the executive branch concerning the nature of the treaty as immediate or prospective domestic law are given “great weight” by the courts,¹⁴¹ even though only the United States Supreme Court can make a final determination.¹⁴² (5) The effect given the same treaty by other nation-parties in their own domestic legal systems can also be indicative of the parties’ intent.¹⁴³ (6) When all else fails, it is convenient to have a presumption one way or the other. On this point there is apparently some disagreement. It has been said that the courts are cautious in holding treaties to be self-executing,¹⁴⁴ seemingly raising a presumption that treaties are generally not self-executing. On the other hand, courts are said to “avoid construing an international agreement in such a way that it becomes a ‘mere unfulfilled national promise,’ ”¹⁴⁵ suggesting a presumption favoring self-execution. The latter approach is supported by the basic notion that treaties and statutes are constitutionally of equal status,¹⁴⁶ arguably leading to the conclusion that treaties are to be given the same effect as statutes unless there is some good reason to do otherwise. One “good reason” would be the clear intent of the treaty parties; but absent sufficient evidence of intent, the constitutional grant of equality should control.

or “shall undertake” may qualify the obligation as a prospective one, indicating an intent that implementation is needed, while “does hereby” may evidence the opposite intent. See, e.g., *Fujii v. California*, 38 Cal. 2d 718, 242 P.2d 617 (1952); H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* 584 (1976) [hereinafter cited as STEINER & VAGTS].

140. See *Cook v. United States*, 288 U.S. 102, 112 (1933); Comment, *supra* note 136, at 242–43; Note, *supra* note 136, at 141–42.

141. See *Aerovias Interamericanas de Panama, S.A. v. Board of County Comm’rs*, 197 F. Supp. 230, 245–48 (S.D. Fla. 1961), *rev’d on other grounds sub nom. Board of County Comm’rs v. Aerolineas Peruanasa, S.A.*, 307 F.2d 802 (5th Cir. 1962), *cert denied*, 371 U.S. 961 (1963). See also Comment, *supra* note 136, at 243; Note, *supra* note 136, at 141–42.

142. See 14 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 312 (1970); Reiff, *The Enforcement of Multipartite Administrative Treaties in the United States*, 34 AM. J. INT’L L. 661, 669–71 (1940).

143. See Comment, *supra* note 136, at 244.

144. McLaughlin, *supra* note 136, at 748–49.

145. Note, *supra* note 136, at 147.

146. See notes 128–132 and accompanying text *supra*.

2. *Other factors*

The courts have seemed to recognize other "good reasons," however, why a treaty should not be given effect without implementing legislation. These reasons can be attributed to considerations of policy and practicability, although they are sometimes expressed in terms of the intent test. For instance, the classic example of a non-self-executing treaty is one that calls for appropriation of funds for its implementation.¹⁴⁷ Only the Congress as a whole can appropriate money,¹⁴⁸ and therefore, the treaty *cannot* be self-executing—presumably even if it is intended by the parties to be self-executing.

Perhaps a broader statement of the test for self-execution is whether it is possible for a court to enforce the treaty absent its implementation.¹⁴⁹ Thus, for example, a treaty that might otherwise have required implementation has been deemed self-executing because of the preexistence of domestic procedures and institutions appropriate for direct implementation.¹⁵⁰ Also within this rule are probably the holdings that a treaty cannot create domestic criminal laws,¹⁵¹ even though "treaties taking away the criminal jurisdiction of American courts over foreign seamen are always regarded as self-operative."¹⁵² On the other hand there are certain additional types of treaties that have generally been held self-executing. This category includes those that confer rights upon individuals, especially aliens, and those settling boundary disputes.¹⁵³

A question of some importance in the present discussion is whether certain parts of the potential LOS treaty might be self-executing while others would require implementation for domestic effect. Curiously,

147. See, e.g., W. FRIEDMANN, O. LISSITZYN & R. PUGH, *CASES AND MATERIALS ON INTERNATIONAL LAW* 361 (1969); HYDE, *supra* note 126, at 1455-56; STEINER & VAGTS, *supra* note 139, at 584; Evans, *supra* note 126, at 185.

148. See, e.g., L. HENKIN, *supra* note 111, at 159; C. HYDE, *supra* note 126, at 1455-56.

149. See, L. HENKIN, *supra* note 111, at 159; C. HYDE, *supra* note 126, at 1462; Note, *supra* note 136, at 141.

150. *People of Saipan ex rel. Guerrero v. United States Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974); Evans, *supra* note 126, at 186, 193.

151. See, e.g., *The Over the Top*, 5 F.2d 838 (D. Conn. 1925); STEINER & VAGTS, *supra* note 139, at 584. This position, however, has been attributed to historical inertia. 5 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 177-78 (Dep't of State Pub. No. 1927, 1943); Comment, *supra* note 136, at 243 n.42.

152. Henry, *When Is A Treaty Self-Executing*, 27 MICH. L. REV. 776, 782 (1929).

153. See Evans, *supra* note 126, at 186; STEINER & VAGTS, *supra* note 139, at 585. For a comprehensive listing of other treaties held self-executing, see Evans, *supra* note 126, at 186.

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the rules on self-execution are nearly always stated with reference to “the treaty,” not its often separable provisions, as if automatic operation of any treaty clause depends on a determination that the whole is self-operative.¹⁵⁴ Yet it is quite clear that the courts apply the rules to individual clauses of treaties, at least tacitly assuming that parts may be individually operative automatically without the necessity of a ruling on the treaty as a whole.¹⁵⁵ In fact, one of the most cited cases on self-execution¹⁵⁶ can stand for the proposition that certain articles of the United Nations Charter, a treaty in the United States, are self-executing while others are not. The definite impression left from an examination of the authorities is that the self-execution rules allow individual parts of a treaty to operate automatically. Certainly the general intent test would not exclude this approach, and it will be the view adopted in the present discussion.

All of these rules, guidelines, and examples, although helpful, still leave the basic problem: It is not generally possible to determine with certainty whether any treaty ratified by the United States is or is not automatically operative, prior to a court decision on the issue. Unfortunately, the new Law of the Sea treaty, if adopted, will probably not be one of the exceptional, “easy” cases.

It is important to remember that the specific question addressed here is whether the LOS treaty will automatically supersede conflicting provisions of the FCMA upon ratification. Some precedent does exist concerning an earlier Law of the Sea treaty. In *United States v. Ray*¹⁵⁷ the Court of Appeals for the Fifth Circuit stated: “To the extent that any of the terms of the [Outer Continental Shelf Lands Act¹⁵⁸] are inconsistent with the later adopted Geneva Convention on the Continental Shelf, they should be considered superseded.”¹⁵⁹ Self-execution was apparently assumed. The court went on to rule, how-

154. See, e.g., RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141 (1965).

155. See, e.g., *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 738 (1943) (Ship-owners’ Liability Convention) (concurring opinion of Stone, C.J.); *Indemnity Ins. Co. of North America v. Pan American Airways*, 58 F. Supp. 338, 340 (S.D.N.Y. 1944) (Warsaw Convention); *Fujii v. California*, 38 Cal. 2d 718, 242 P.2d 617 (1952) (United Nations Charter).

156. *Fujii v. California*, 38 Cal. 2d 718, 242 P.2d 617 (1952).

157. 423 F.2d 16 (5th Cir. 1970).

158. 43 U.S.C. §§ 1331–1343 (1970).

159. 423 F.2d at 21.

ever, that there was "nothing in the pertinent language" of the convention that was inconsistent with the federal statute.¹⁶⁰

Nearly the same issue, involving the same treaty, subsequently came somewhat more squarely before the federal district court for the Southern District of Florida. In *Treasure Salvors, Inc. v. Abandoned Sailing Vessel*,¹⁶¹ the United States asserted title to a sunken 17th-century Spanish vessel discovered by the plaintiff on the Continental Shelf but outside the United States territorial sea. The government argued, *inter alia*, that the Outer Continental Shelf Lands Act (OCSLA)¹⁶² placed the vessel within United States "jurisdiction," thus giving title to the United States under the terms of the Antiquities Act¹⁶³ and the Abandoned Property Act.¹⁶⁴ The district court held that the OCSLA asserts federal jurisdiction only over mineral resources and therefore that the government's argument failed.¹⁶⁵ The court nevertheless examined the language and drafting history of the Continental Shelf Convention. It noted that the rights to Continental Shelf resources granted to coastal states were limited to "natural" resources.¹⁶⁶ Especially telling was the International Law Commission's (ILC) report on the proposed treaty, in which the ILC expressly stated the understanding that the rights described in the treaty did not cover "wrecked ships and their cargoes (including bullion)."¹⁶⁷ The court was thus able to support its holding that the law of salvage, and not the federal acts or the treaty, determined the plaintiff's rights in the sunken vessel. The district court then made the comment especially relevant to the present inquiry:

If, for purposes of argument, the Court accepted the government's position that [OCSLA] brings the abandoned property within the jurisdiction of the United States, then the inconsistent language of the Convention On The Continental Shelf nullifies the jurisdictional effect of [the OCSLA], at least in the context of the facts of this case. The

160. *Id.*

161. 408 F. Supp. 907 (S.D. Fla. 1976).

162. 43 U.S.C. §§ 1331-1343 (1970).

163. 16 U.S.C. §§ 432-433 (1970) ("lands owned or controlled by the Government of the United States").

164. 40 U.S.C. § 310 (1970) ("within the jurisdiction of the United States").

165. 408 F. Supp. at 910.

166. *Id.*

167. *Id.*

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Geneva Convention On The Continental Shelf supersedes any incompatible terminology of the Outer Continental Shelf Lands Act.¹⁶⁸

Again, the necessary implication is that the court assumed the self-executing effect of the 1958 Convention.

It is possible to draw a rather narrow, and unfortunately not very authoritative, conclusion from the *Ray* and the *Treasure Salvors* cases: United States treaties which delimit extra-territorial jurisdiction in the seas are, to that extent, self-executing and supersede prior inconsistent statutes. The guidelines for determining self-executing treaties would necessarily except those treaties in which the parties intend otherwise, as evidenced by the various indicia of intent set forth above.¹⁶⁹

In light of the general rules and the more specific suggested interpretation of the *Ray* and *Treasure Salvors* cases, it is possible to draw some tentative conclusions on whether the probable Law of the Sea treaty will be self-executing as to those areas of potential conflict with the FCMA. To the extent that the treaty is self-executing, unqualified

168. *Id.*, citing *United States v. Ray*, 423 F.2d 16 (5th Cir. 1970). In a list of questions propounded by the Senate Foreign Relations Committee during its consideration of the 1958 Law of the Sea Conventions (including the Continental Shelf Convention) for purposes of approval and consent, the State Department was asked to "point out and explain any article of these conventions which has the effect of superseding domestic legislation." The response was:

It does not appear that any of the convention provisions conflict with existing legislation. It does appear, however, that some supplementary and new implementing legislation may be necessary or desirable. (A detailed answer on this aspect will be furnished shortly.) [A representative of the legal adviser's office of the Department of State informed the committee on March 30, 1960, that in their opinion no implementing legislation would be necessary, but that the matter was still under advisement.]

Hearing Before the Senate Comm. on Foreign Relations on the Law of the Sea Conventions, 86th Cong., 2d Sess. 92 (1960) (parentheses and brackets in original).

169. See notes 136-146 and accompanying text *supra*. Additional support for the proposition stated in the text might be found in the Supreme Court's treatment of one of the so-called "Liquor Treaties." An issue in *Cook v. United States*, 288 U.S. 102 (1933), was whether a treaty between the United States and Great Britain, which authorized the Coast Guard to stop and board suspected British vessels within an hour's sailing distance from the United States shores, was self-executing and therefore superseded, to the extent applicable, a prior federal statute setting a uniform four-league limit. The Court held the treaty self-executing. Justice Brandeis stated for the Court: "The purpose of the provisions for seizure in [the statute], and their practical operation, as an aid in the enforcement of the laws prohibiting alcoholic liquors, leave no doubt that the territorial limitations there established were modified by the Treaty." *Id.* at 119. See also Dickinson, *Are the Liquor Treaties Self-Executing?*, 20 AM. J. INT'L L. 444 (1926). Professor Henkin points out, however, that *Cook* is the only case "in which the Supreme Court held that a treaty provision repealed an earlier statute, and that was a 'liquor prohibition' statute which had notoriously low estate, was widely disregarded and was about to be repealed." L. HENKIN, *supra* note 111, at 164.

ratification by the United States will automatically resolve the conflicts in favor of the treaty upon its effective date; otherwise, implementation will be needed to fulfill the United States obligations imposed by the treaty. It should be remembered that the Act and the Revised Text are basically consistent; therefore, the preavailability of the Act's provisions, the regulations, and the international-agreement scheme should allow self-execution of many treaty provisions.¹⁷⁰

B. *Resolving Specific Conflicts Between the Act and the LOS Treaty*

1. *Jurisdiction over anadromous species*

The Act's assertion of *exclusive* management authority over United States-source anadromous species throughout their entire migratory patterns presents the clearest conflict with the probable treaty.¹⁷¹ A superficial reading of Article 55 of the Revised Text—the anadromous species provision—would indicate an intent that the treaty will not be effective until later implementation by source-state regulations and international consultations and agreements, for the reason that much of the wording is prospective in nature.¹⁷² Yet a necessary implication of Article 55 is that source-state *exclusive* jurisdiction over (as contrasted with “primary interest in and responsibility for”¹⁷³) anadromous stocks is restricted to the source state's exclusive economic zone and is apparently limited even within the zone.¹⁷⁴ The *Ray-Treasure Salvors* “doctrine,” as discussed above, arguably would deem the treaty self-executing and the preexisting FCMA superseded to this extent. The Revised Text's anadromous species article is also analogous to those self-executing treaties that settle boundary disputes. Thus any post-treaty unilateral attempt by the United States to

170. See *People of Saipan ex rel. Guerrero v. United States Dep't of Interior*, 502 F.2d 90 (9th Cir. 1974).

171. See notes 42–51 and accompanying text *supra*.

172. For example, Article 55 states, in pertinent part:

2. The State of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures

3. . . . (d) Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.

173. Article 55(1).

174. See, e.g., Article 55(2), (3), and (5) (state of origin has duty to cooperate in minimizing “economic dislocation” in other nations fishing the source-state's anadromous stocks).

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assert management regulations over extra-200-mile salmon fishing activities by foreign nationals should be ruled invalid.

2. *Foreign access*

The possibility that the Act's potentially *exclusive* claim to 200-mile fishery resources might run afoul of the LOS treaty's *preferential* jurisdiction allowance was noted earlier.¹⁷⁵ The pertinent Revised Text language is:

Where the coastal State does not have the capacity to harvest the entire allowable catch, *it shall, through agreements or other arrangements and pursuant to the terms, conditions and regulations referred to in paragraph 4 [i.e., allowable management rules], give other States access to the surplus of the allowable catch.*¹⁷⁶

The language is definitely prospective in that it clearly looks forward to implementation by the coastal state. If there were no preexisting United States 200-mile zone law at the time of ratification of a treaty using these words, then implementation by legislation, international agreement, and regulation would be necessary for the treaty to have domestic effect. Yet that will not be the situation. At the future time of ratification, the Act will have provided legislation which, by interpretation and action in the executive branch—that is, the allowance of foreign fishing under the GIFA system and existing-agreement renegotiation—will probably meet the implementation requirement.¹⁷⁷ Nevertheless, the Act arguably does not require the continuance of this system; foreign access is not explicitly mandated. A case can therefore be made that further “implementation” is necessary to insure consistency with the treaty obligation by making the access requirement explicit. Still, to the extent of the basic foreign-access requirement, the pertinent treaty language should perhaps be viewed as self-executing. It is a limit on coastal-state management authority and therefore within the suggested *Ray-Treasure Salvors* rule. Any post-treaty administrative termination of foreign access to excess fishery

175. See notes 53–64 and accompanying text *supra*.

176. Article 51(2) (emphasis added).

177. Cf. *People of Saipan ex rel. Guerrero v. United States Dep't of Interior*, 502 F.2d 90, 96–100 (9th Cir. 1974) (discussion of implementation requirement).

stocks, without authorization by the treaty's rules, might therefore be deemed invalid in any United States court test.¹⁷⁸

The Revised Text rules, should they become treaty law, will also require the United States, as a developed nation, to grant special access consideration to developing coastal nations in the same "subregion or region."¹⁷⁹ The Act, however, requires "substantial" reciprocity in access allowances.¹⁸⁰ It is almost impossible to determine with anything approaching exactness which countries, if any, will be entitled to the "right" referred to in the Revised Text or what that "right" is. Nevertheless, it does appear quite clear that the "terms and conditions" of those nations' participation are intended to be ultimately determined by future agreements among the concerned countries.¹⁸¹ Until those agreements are concluded, the treaty's rule of privileged access for regional developing nations should be viewed as non-executed.

3. *Enforcement*

As noted, among the most serious potential conflicts between the Act and the prospective LOS treaty are those concerning enforcement of the United States management jurisdiction. The three principal conflict points are (1) extra-200-mile enforcement of anadromous-species regulations; (2) the imprisonment penalty; and (3) the conditions of release of arrested vessels and crews.¹⁸²

The Revised Text states: "Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned."¹⁸³ The principal issue here is whether this provision is self-executing. The operative verb, "shall be," is the same verb that was

178. It would not be accurate, though, to characterize the potential treaty's foreign access provision as falling within the supposed general rule that treaties conferring rights upon aliens within United States territory are self-executing. See authorities cited note 153 and accompanying text *supra*. Even if the 200-mile zone can be termed United States "territory," the foreign access provision confers the access right on "other States," not individual aliens. Article 51(2) (emphasis added).

179. Article 59; see notes 68-71 and accompanying text *supra*.

180. FCMA § 201(f), 16 U.S.C.A. § 1821(f) (West Supp. 1977).

181. Article 59(2) provides: "The terms and conditions of such participation shall be determined by the States concerned through bilateral, subregional or regional agreements"

182. See Part II-B-3 *supra*.

183. Article 55(3)(d).

construed by the Supreme Court in *Foster v. Neilson*¹⁸⁴ to indicate non-self-executing intent. Certainly no court will be able to recognize enforcement procedures under the quoted Revised Text article prior to their implementation by international agreement, and in this sense the article cannot be self-executing because a future act is required. Yet a court can, immediately upon the treaty's effective date, itself impose the negative implication of the article: that unilateral United States enforcement is not valid. In this sense, the article should probably be viewed as self-executing, either under the *Ray-Treasure Salvors* doctrine¹⁸⁵ or the boundary settlement rule.¹⁸⁶ The Act's enforcement provisions, insofar as they relate to anadromous species beyond 200 miles, should be deemed superseded by the treaty.

The prospective treaty's disallowance of imprisonment as a penalty for violations of fishing zone regulations¹⁸⁷ should also be considered self-executing. Though the Revised Text provision is classifiable as a domestic criminal law, supposedly not self-executing,¹⁸⁸ it is also one that, partially at least, takes away criminal jurisdiction over "foreign seamen,"¹⁸⁹ making it arguably self-executing. These two seemingly conflicting principles can be reconciled by interpreting the first to mean that treaties cannot automatically *confer* criminal jurisdiction on United States courts. This suggestion would then recognize the self-executing nature of automatic treaty-imposed limits on criminal jurisdiction, at least over aliens.¹⁹⁰ Absent agreement to the contrary, the treaty should be deemed self-executing as to the imprisonment disallowance, thus automatically removing imprisonment as a possible punishment for foreign violators of the Act's regulatory scheme.

The requirement that vessels and crews "shall be promptly released upon the posting of reasonable bond or other security,"¹⁹¹ allowing them to resume fishing or return home,¹⁹² should similarly be deemed self-executing. The same reasons noted with respect to the anti-imprisonment rule apply here also. It can be observed that the verb

184. 27 U.S. (2 Pet.) 253, 313–15 (1829) (treaty provision that land grants "shall be ratified and confirmed" required congressional action to be effective).

185. See notes 157–69 and accompanying text *supra*.

186. See authorities cited note 153 and accompanying text *supra*.

187. Article 61(3).

188. See authorities cited note 151 *supra*.

189. See authorities cited note 152 *supra*.

190. See authorities cited note 153 *supra*.

191. Article 61(2).

192. See text accompanying notes 97–103 *supra*.

“shall be” is used here in a context different from that of either the *Foster* treaty¹⁹³ or the Revised Text’s anadromous species enforcement provision.¹⁹⁴ The language here appears to be a direction to the court itself, in statutory-type language, neither contemplating nor requiring the middle step of implementing legislation.

4. *Zone boundaries*

The LOS treaty will probably impose certain guidelines and restrictions upon the negotiation of economic zone boundaries between opposite and adjacent countries.¹⁹⁵ If, by the treaty’s effective application, there remain boundary problems still unsettled by agreement between the United States and its neighbors,¹⁹⁶ these treaty instructions will control the negotiations. Such provisions are not expressly mirrored in the Act, though neither are they expressly prohibited.

The language of the treaty concerning zone boundaries is, of course, prospective in the sense that it looks to future agreements. But there should be no reason to characterize the obligation to follow in good faith the treaty’s guidelines and restrictions as non-self-executing. No contrary intent is evidenced, and implementation by congressional legislation would seem to add nothing to the domestic enforceability of the treaty provision.¹⁹⁷

5. “Non-Recognition”

Because the Act’s “non-recognition” provision is stated only in terms of the “sense of Congress,”¹⁹⁸ it does not present a true conflict

193. See note 184 *supra*.

194. See text accompanying notes 47–51 *supra*.

195. See notes 108–110 and accompanying text *supra*.

196. Such agreements will be given effect. Article 62(5). The “neighbors” of the United States, for economic zone boundary purposes, include not only Canada and Mexico, but also the Soviet Union, Cuba, the Dominican Republic, the Bahamas and others.

197. It is difficult to conceive of a domestic enforceability dispute over the boundary negotiation rules reaching United States courts. Nevertheless, the self-execution rules are said to apply also to enforcement by the executive branch. Evans, *supra* note 126, at 190–93.

198. FCMA § 202(e), 16 U.S.C.A. § 1822(e) (West Supp. 1977). For a discussion of “sense of Congress,” see Note, *Congressional Authorization and Oversight of International Fishery Agreements Under the Fishery Conservation and Management Act of 1976*, 52 WASH. L. REV. 495, 496 & n. 9 (1977).

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with the prospective LOS treaty. “Sense” will remain, for whatever legal effect it may have, until it is repealed by later statutory amendment, or unless it is automatically superseded by the LOS treaty. Thus, the treaty, which might require recognition of foreign zones for which recognition would not meet the “sense of Congress,”¹⁹⁹ presents several issues. The first question is whether the treaty grant of coastal state economic zone authority over highly migratory species supersedes the Act’s “sense” rule that the United States refuse to recognize foreign zones which claim such authority.²⁰⁰ The second “non-recognition” issue is whether the treaty’s grant to the coastal state of jurisdiction to preserve the marine environment within its exclusive economic zone supersedes the Act’s “sense” rule disallowing recognition of foreign-zone claims of non-fishing-related restrictions on fishing vessels.²⁰¹ Both treaty provisions are affected by other articles,²⁰² but both arguably conflict with the “sense of Congress” to the extent of the residual jurisdiction they grant to coastal states.²⁰³ The treaty grant of authority in each instance is contained in Article 44 of the Revised Text, one of the provisions containing clear self-executing language: “the coastal State *has* [the listed rights and jurisdictions].”²⁰⁴ Therefore, it should follow that United States ratification of an LOS treaty containing this article will automatically supersede any contrary congressional law, especially a “sense of Congress” rule. Thus United States recognition of treaty-sanctioned foreign zones would be unhampered by any legislative “disfavor.”

6. *Other conflicts*

Other possible conflicts, similar to those just discussed, will have to be considered on a case-by-case basis, in the absence of congressional implementation of the assumed LOS treaty. Unfortunately, there is no reliable “rule of thumb” on the question of self-execution, and there is no federal agency or office, short of the Supreme Court, capable of ultimately determining the issue in context.²⁰⁵ Although arguments

199. See notes 112–20 and accompanying text *supra*.

200. See notes 115–18 and accompanying text *supra*.

201. See notes 119–20 and accompanying text *supra*.

202. Article 53(2); Part III, Article 21(5).

203. See notes 115–20 and accompanying text *supra*.

204. Article 44 (emphasis added).

205. See Reiff, *supra* note 142, at 669–71.

such as those set forth above can be made, they do not dispose of the questions.

There is one relatively sure method of settling potential conflicts between congressional legislation and a subsequent treaty: the legislation can be amended, in accordance with the treaty's language, to bring domestic law in line with international obligations under the treaty.

IV. AMENDING THE ACT: THE POLITICAL APPROACH

The FCMA is a unilateral claim to broad extraterritorial jurisdiction in the ocean. In most respects it is probably a valid claim under an emerging norm of customary international law,²⁰⁶ but in certain other respects it may well be invalid.²⁰⁷ The Third Law of the Sea Conference is attempting, in part, to settle doubts and controversies surrounding such claims by devising a treaty that will establish widely acceptable rules and limitations for the exercise of extraterritorial jurisdiction by coastal nations. If and when that treaty becomes a reality and binds the United States, the extent of the United States claim will be defined and circumscribed as to other treaty parties, not by congressional interpretation of an emerging norm of customary international law, but by that treaty. The United States will then be obliged to trim the edges of its preexisting claim wherever it extends beyond the delimitations of the treaty. Because of the vagaries of the self-execution rule, the constitutional statute/treaty equivalence provides at best a haphazard method of resolution, the success of which can be definitely determined only retroactively as controversies arise. In the

206. Regarding the development of an analogous customary international law concept, the Continental Shelf doctrine, Lauterpacht has written:

Unilateral declarations by traditionally law-abiding states, within a province which is particularly their own, when partaking of a pronounced degree of uniformity and frequency and when not followed by protests of other states, may properly be regarded as providing such proof of conformity with law as is both creative of custom and constituting evidence of it.

Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 395 (1950). The recent history of the 200-mile concept would seem to meet Lauterpacht's test for the creation of a customary international norm. See note 20 *supra*. On customary rules of international law, see also I.C.J. Stat., art. 38(1)(b); W. BISHOP, INTERNATIONAL LAW: CASES AND MATERIALS 25-33 (3d ed. 1971); J. BRIERLY, THE LAW OF NATIONS 59-62 (6th ed. 1963); A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

207. For example, the Act's extra-200-mile claim to anadromous species undoubtedly has insufficient basis in state practice to be valid as an exercise of a customary international right.

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situation under discussion—a treaty inconsistent with a previously enacted statute—prospective resolution by amendment of the prior legislation should be the preferred method, even where there is only some doubt as to the consistency of the two laws or as to the treaty's self-executing effect.

There is, of course, no way that Congress can be compelled to amend prior inconsistent laws. That body must make its own decision, in a political context, regarding the implementation of treaties. Yet the treaty-ratification process in this country does provide opportunities for urging and assisting Congress to resolve potential inconsistencies between treaties and existing statutes.

Basically, ratification of a multilateral treaty takes place in the following manner:²⁰⁸ (1) The treaty, adopted by an international conference, and perhaps signed by a United States representative, is submitted to the State Department. (2) The Secretary of State submits the treaty, together with his recommendations and any comments, to the President. (3) The President, if he wishes, transmits the treaty to the Senate with a view to receiving the advice and consent of the Senate to ratification; the President at this point may incorporate any recommendations and commentary of the State Department or, presumably, his own. (4) The Senate considers the treaty in committee and in floor debate before taking the vote on advice and consent. (5) Upon affirmative vote by two-thirds of the Senators present,²⁰⁹ the treaty is sent back to the President for his ratification. (6) The President ratifies according to the treaty's terms with any appropriate or required conditions, reservations, or understandings.²¹⁰ (7) When the treaty be-

208. See, e.g., STAFF OF SENATE COMM. ON COMMERCE, 91ST CONG., 2D SESS., TREATIES AND OTHER INTERNATIONAL AGREEMENTS ON OCEANOGRAPHIC RESOURCES, FISHERIES, AND WILDLIFE TO WHICH THE UNITED STATES IS A PARTY 268-90 (Comm. Print 1970) (United States procedure for ratification of the four 1958 Geneva Law of the Sea Conventions) [hereinafter cited as SENATE COMMERCE COMMITTEE]. See also M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 54-55 (1970).

209. U.S. CONST. art. II, § 2, cl. 2.

210. For example, President Eisenhower's message to the Senate seeking its advice and consent to ratification of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas requested that the Senate resolution of advice and consent include an understanding "that such ratification shall not be construed to impair the applicability of the principle of 'abstention' [regarding source-state rights in anadromous species]." SENATE COMMERCE COMMITTEE, *supra* note 208, at 269. The Senate's advice and consent to the Convention's ratification was subject to this "understanding," which had been requested by the President. *Id.* at 260, 268-71. For further discussion of the Senate conditions or "reservations" to its advice and consent, see L. HENKIN, *supra* note 111, at 132-36.

comes effective for the United States, it is proclaimed by the President as law.

With this procedure in mind and in reference to ratification of the possible future Law of the Sea treaty, the following steps toward resolution of the conflicts between that treaty and the FCMA are here recommended: (1) Prior to the treaty's submission by the State Department to the President for his transmittal to the Senate, the Departments of State and Commerce and the Attorney General should carefully examine the provisions of the treaty and the Act for potential conflicts. Certain conflicts are likely to exist; others might well develop because of variances in language that can be subject to inconsistent interpretations.²¹¹ (2) In submitting the treaty to the President, the State Department should recommend amendments to the Act, both to resolve the apparent conflicts and to make language discrepancies consistent. This recommendation is advisable *regardless of whether parts of the treaty might be self-executing in the opinion of the Government experts*; although the opinions of the executive branch in this regard are given "great weight," they are not determinative.²¹² Amendments to the Act would be recommended not necessarily because implementation of the treaty is required but because of self-execution uncertainties. In addition, the State Department should urge the administration to draft a bill with appropriate amendments for submission to Congress should the treaty be ratified. (3) The President should then incorporate the State Department recommendations in his message accompanying transmittal of the treaty to the Senate for its advice and consent. (4) Upon the Senate's advice and consent, and its approval of the recommendations of the executive branch, appropriate amendments to the Act should be drafted by the administration, possibly including any Senate suggestions, and submitted to both houses of Congress. With this impetus, Congress could anticipate the effective date of the LOS treaty by matching United States legislation to the treaty requirements before it becomes law.

Other approaches to resolving conflicts between the Act and the treaty are possible but are not here recommended. One approach would have the United States, at the instigation of the Senate, the

211. See Part II *supra*.

212. See L. HENKIN, *supra* note 111, at 243; Comment, *supra* note 136, at 243; Note, *supra* note 136, at 141-42.

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President, or both, enter reservations to the application of the treaty to the United States in the areas of conflict. This procedure will be especially appealing with respect to the Act's anadromous-species claim. On the other hand, the treaty is not likely to provide for such a reservation in the areas of conflict discussed above; in such a case any such reservation would have uncertain and unsatisfactory effects—it may or may not effectively prevent application of the reserved part of the treaty to the United States.²¹³ Moreover, a widely accepted LOS treaty might be viewed as a “codification” of the customary law of the sea, thus possibly nullifying the reservation as to those treaty parties who have not accepted it.²¹⁴ Certainty in the laws of ocean use is a desirable goal and reservations should therefore not be encouraged, at least not for the principal purpose of resolving conflicts with existing legislation of any one treaty party.

Another device not recommended here which would tend to resolve conflicts between the Act and the treaty is conditional ratification. The President could presumably refuse to ratify unless and until amendatory legislation is passed by Congress. The Senate might likewise condition its approving advice and consent on amendment of the Act.²¹⁵ The effect, however, of such a gambit in obtaining the desired legislation from Congress is doubtful at best. Only in the case of firm conviction that the treaty should not bind the United States absent the amendatory legislation would it be advisable to employ this device.

An approach similar to that suggested in this article was adopted during the United States ratification process for the International Coffee Agreement. The executive branch and the Senate agreed that this multilateral treaty required domestic implementation, and draft

213. On the complex topic of treaty reservations, see Vienna Convention on the Law of Treaties, *done* May 23, 1969, arts. 19–23, U.N. Doc. A/CONF.39/27, *reprinted* in 63 A.J.I.L. 875, 881–83 (1969); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 124–129 (1965); 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 132–93 (1970). For a discussion of reservations with reference to LOS III, see H. Knight, *The Potential Use of Reservations to International Agreements Produced by the Third United Nations Conference on the Law of the Sea*, in POLICY ISSUES IN OCEAN LAW 1 (Am. Soc’y of Int’l Law, Studies in Transnat’l Legal Policy No. 8, 1975).

214. See, e.g., North Sea Continental Shelf Cases, [1969] I.C.J. 3.

215. See L. HENKIN, *supra* note 111, at 132–36; 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 138 (1970).

legislation was introduced.²¹⁶ It is suggested here, however, that a determination of the necessity of implementation should not be a prerequisite to an executive or Senate suggestion of implementation; doubts as to self-execution should be sufficient. Unfortunately, the Coffee Agreement example also indicates that the suggested approach does not assure success. Implementing legislation was not enacted until nearly two years after final United States ratification.²¹⁷

The hard fact is that our constitutional system does not provide a certain method for prospectively determining whether or to what extent a treaty will supersede, and thus resolve, conflicts between its terms and those of existing legislation. Too often the international political decision to become bound to international obligations must be followed by a domestic political decision on whether to honor those obligations. When and if the United States ratifies a new Law of the Sea treaty, it is hoped that any actual and potential inconsistencies with the Fishery Conservation and Management Act will be resolved by Congress prior to the treaty's effective date.

216. See Bilder, *The International Coffee Agreement: A Case History in Negotiation*, 28 LAW & CONTEMP. PROB. 328, 373 (1963). The President's deposit of an "intent to ratify" (provided for in the treaty) also conditioned the treaty's binding effect for the United States on subsequent congressional implementation. *Id.* n. 61.

217. See STEINER & VAGTS, *supra* note 139, at 587.