THE U.S. FISHERY CONSERVATION AND MANAGEMENT ACT 1976—A PLAN FOR DIPLOMATIC ACTION

By

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THE Fishery Conservation and Management Act of April 13, 1976, which took effect on March 1, 1977, undertook to revise an important aspect of U.S. international relations in a period when the law of the sea was in flux, and a new public order of the oceans was in the making. Although enacted exclusively in response to the urgings of national interests, and as an emergency measure, it demonstrated a feeling and perception of trends and developments in the realisation of the broader needs of the international community at large. In addition, experimenting with a unilateral approach to the process of international law-making, the Act has demonstrated its usefulness, while at the same time drawing a line on its application. Assuredly, there are still important hurdles to take before the Act, as a programme of diplomatic action, is a total success; but even at this moment it seems to have added an important initiative to American activity in the international arena.

The most important provisions of the 1976 Fishery Conservation and Management Act are fairly simple. The Act extended the exclusive authority of the United States in regard to fishery management by 200 miles, calculated from the baseline from which the American territorial sea is measured, in respect of all fish within the zone. It also included, under the protection of the U.S. conservation and management authorities, all anadromous species (salmon) wherever found (even those outside the fishery conservation zone) and applied that protection to them throughout their migratory range, except where this included a conservation and management zone within the territorial waters of another State, provided that the U.S. had recognised the foreign conservation and management zone in question. Finally, the Act also included all continental shelf fishery resources, even those outside the 200-mile limit. It prohibited all foreign fishing of the protected species except in accordance with its provisions. Fishing permits will be issued to domestic and foreign fishermen, following a procedure established by the Act and upon payment of fees.

Until late in the inter-war years, U.S. fishermen had to compete almost exclusively with their geographic neighbours. It was not until 1937 and 1938 that a large number of Japanese fishermen appeared off

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the Canadian and U.S. Pacific coast, harvesting salmon and causing considerable concern over the possible depletion by foreign fishermen of Pacific salmon, which for some time had been an object of domestic conservation policies.[1]

Japanese intrusion into an area which American fishery interests regarded as their own was paralleled after the war by the activities of foreign fishing fleets off the Atlantic coast. A good example of this competition of foreign fishermen with American fishing interests is seen in the New England fishing grounds. Before 1960, the George Bank fishing area was exploited almost exclusively by United States fishermen, with the exception of a few Canadians who represented virtually no competition to Americans. In 1961, Soviet fishing fleets appeared and reported taking 68,000 tons of fish off the George Bank. By 1965, Soviet exploitation had expanded south to Chesapeake Bay and the Soviets' catch reached over one-half million tons, far in excess of the United States catch. By 1970 several other countries had joined in fishing off the U.S. coasts and the foreign take grew to more than one million tons, far in excess of the allowable harvest recommended by the scientific estimates of the available fish stocks. As a result, the U.S. share began to decline. In 1972, American fleets took only about 12 per cent. of the total catch off the Atlantic coast.[2]

The real meaning of these events in terms of the U.S. economy may be seen in the following figures. In the period since 1938, when Japanese fishermen appeared in the Bristol Bay area, world landings of fish have trebled, while U.S. landings rose in aggregate from 4·3 billion pounds in 1938 to 5·3 billion in 1969, at which time demand for fishery products in the United States was rising steadily, but declined again to 4·7 billion pounds in 1973. In fish and fishery products, the 1973 adverse balance of payments amounted to $1·3 billion—an increase of 318 per cent. compared with 1960.[3]

In 1973 the United States fishing industry landed only 4·4 billion pounds taken from U.S. coastal waters.[4] While landings decreased, consumption of fishery products in the United States nearly doubled in the past two decades. This increase in demand, coupled with decreasing American landings led to an increase of imports between 1959 and 1973 from 1·75 billion pounds to 5·5 billion.[5]

The haddock is a particular example of the over-fishing of seas off American coasts. The annual catch of haddock off the George Bank averaged 120 million pounds until Soviet fishing flotillas began operating there and then the catch by New England fishermen fell to 11·7

[1] Allen, the Fisheries Proclamation of 1945 (45 A.J.I.L. 177 (1951)).
[2] Marine Fisheries Act of 1975: Report, H.R. 445, 95th Congress, 1st Sess. 34 (1975).
[3] H.R. Report 445, *supra* n. 2, at 32, 9949.
[4] Department of Transportation Coast Guard, Study of Coast Guard Enforcement of 200-Mile Fishery Zone (May 1976) at III-2-3.
[5] *Ibid.* 31–32.

million pounds. The American consumer continued to buy haddock, which now comes imported and frozen.[6] In New England, cod, hake, pollock, ocean perch, lobster and herring, as well as haddock, have been over-fished to the point of commercial extinction, within only the last 20 years.[7] The yellowtail flounder, which is not the primary commercial fish stock in New England, has been so over-fished that the National Marine Fisheries Service has indicated that the overall catch may have to be reduced by 50 per cent. in some parts of the ocean. Other threatened species in this area include mackerel, flounder, halibut and herring. On the west coast, the Alaskan pollock is gravely over-fished, and foreign fishing of this species is at least 200,000 tons over what it should be. In addition, Pacific halibut, salmon, mackerel and hake have all been taken to the point of near extinction.[8]

The striking feature in the process of deterioration of marine life in American fishing grounds is the rapidity of that process. Most of the damage was done in the course of the last decade or so. At the same time, negotiations for a new comprehensive law of the sea treaty, which would prevent over-fishing and establish a world-wide system of conservation and management, is painfully slow and, at the moment when the Congress decided to act in defence of American fishing interests, such an agreement was not even in sight. A report which the Merchant Marine and Fisheries Committee submitted to the House Committee concluded that:

> While gladly conceding that an inevitable goal must be the reform and increased sophistication of international law ... the Committee is resolute in its conviction that the time required to effect needed adjustments in the area of international law is such as to make the conservation of many fish stocks and the welfare of our domestic fishing industry almost moot unless immediate ... action is taken without further delay.[9]

The initiative for the regulation of international fisheries came from the Congress itself. Bill H.R. 200, which was eventually adopted as the 1976 Fishery Conservation and Management Act, was introduced in the House by a group of 25 congressmen. In addition, there were 13 identical and four similar bills introduced by individual members of the House. This legislative venture into the realm of U.S. foreign relations was congressionally conceived, and the set of measures to achieve the purpose of the Act was designed almost exclusively within the legislative branch of the Government.

The proposed legislation was strongly supported by the Eastern seaboard States and equally strongly opposed by California. It was felt that while the proposed Act might effectively protect the interests of the fishing industry in the east and the salmon fishery on the western coast,

[6] H.R. Rep. No. 152, 94th Congress, 1st Sess. at 9949.
[7] H.R. Rep. 445 (note 2) at 9927; S. Doc. No. 189, 94th Cong. 1st Sess. 23074 (1975).
[8] *Ibid.* 36; S. Doc. 189 23074.
[9] *Ibid.* 612.

it might jeopardise the interests of western fishermen, who relied considerably on the fishery resources in foreign waters.

The other complexity which the Congress had to face and resolve, was the resolute opposition of the Executive. During the hearings on the bill the House consulted the departments of Commerce, State, Interior, Justice, Treasury, Defence and Transportation. House requests were referred to the National Security Inter-agency Task Force on the Law of the Sea, which raised important objections to the bill. These may be briefly summarised as follows:

(1) The U.S. was engaged in negotiations in the Law of the Sea Conference, and the passing of the Act would jeopardise the chances of securing a multilateral fishery régime.

(2) Unilateral action was contrary to international law and would recognise similar jurisdictional claims by others, prejudicing distant waters fishing by American fishermen.

(3) Serious foreign policy problems would result if other nations engaged in distant waters fishing refused to recognise American claims to control fisheries off the American coasts.

(4) The Bill was at variance with the U.S. proposals submitted to the Law of the Sea Conference in regard to the two-hundred-mile economic zone necessary to protect the interests of all States and of the international community as a whole, particularly in regard to dispute settlement and the levying of fees to cover the cost of regulating international fisheries.

As the House Report indicates, Congressional policy was directly opposed to the line followed by the Executive:

> As a matter of policy, for the last several years the United States has been adamantly opposed to any extension of fishery jurisdiction beyond 12 miles. In fact the Executive Branch of the Government has generally supported the principle of unlimited freedom of the seas as being in the best interest of the Nation. This is attributable to strong naval interests, the need to import large amounts of energy and raw materials by water, and distant water fishing interests, notably tuna and shrimp.

American foreign policy regarding the protection and regulation of international fisheries was "the so-called ' species ' approach, designed to assert no geographical fisheries jurisdiction."

The Report continued:

> Under this proposal coastal nations would be given regulatory jurisdiction over coastal and anadromous species of fish, together with preferential rights to such fish up to the level of their capacity. The actual limit of coastal jurisdiction over these species would be determined by their location, not by any arbitrary line.[10]

Although born in opposition to the Executive's approach in regards to the protection of American fishing interests, the Act follows the main

[10] U.S. Code Cong. and Admin. News, 94th Cong., 2nd Sess. 1976. Vol. 2, P.L. 94-265. 90 Stat. 331 pp. 595 *et seq.* 16 U.S.C. 1812.

objectives of the foreign policy pursued by the Executive branch of Government. This is due primarily to the fact that the American position in the Law of the Sea Conference had undergone a substantial modification, because of the rapidly changing aspirations of individual States.

While the intention of the United States Government was to establish, jointly with other nations, fishing off the United States under a conservation and management régime, other countries went ahead and unilaterally established exclusive fisheries zones, extending in most cases for 200 miles. By 1974 there were about 40 such zones, thus indicating a definite trend in international approach to the conservation of fisheries programme. This development was not without influence on the United Nations Conference on the Law of the Sea. In effect, the Informal Single Negotiating Text, which reflected a general consensus on many points among the majority of the participants in the Conference, included the provision that coastal States shall control fishery resources in an area extending 200 miles from the coast.[11]

As a result, the United States delegation changed its position regarding conservation.[12] On July 11, 1974, Ambassador Stevenson, the chief American delegate, declared the new line of U.S. policy to be supportive of the idea of the 200-mile economic zone:

> . . . we are prepared to accept, and indeed we would welcome general agreement on a 12-mile outer limit for the territorial sea and a 200-mile outer limit for the economic zone, provided that it is a part of an acceptable comprehensive package, including a satisfactory régime within and beyond the economic zone and provision for unimpeded transit of straits used in international navigation . . . to the extent that the coastal nation does not fully utilise a fishery resource, we contemplate coastal nation's duty to permit foreign fishing under reasonable coastal State regulations. . . .[13]

The change in the U.S. policy line has not removed the opposition to unilateral action in regard to the regulation of international fisheries which the proposed bill was aiming to achieve within the Congress itself. As a result, an interesting debate ensued.

Supporters of the Bill relied on the fact that there is a community of some 40 nations which have taken a unilateral step and established an economic zone or exclusive fishing rights zone extending far beyond the 12-mile limit permitted by the 1958 Convention on the Territorial Sea and the Contiguous Zone.[14] Comfort was taken in the fact that the Single Negotiating Text proposed the establishment of the 200-mile economic zone.[15]

In the brief submitted by the Department of Justice, it was argued

[11] United Nations Third Conference on the Law of the Sea, Informal Single Negotiating Text, *International Legal Materials*, 682 (1975), §§ 45–46.
[12] See, H.R. 445 *supra* n. 2, at 599.
[13] *Ibid.*
[14] Representative Leggett, 121 Cong. Rec. H 9916 (1975).
[15] 122 Cong. Rec. H 121 (1976).

in favour of unilateral extension that State practice does not conform to the existence of the maximum breadth for exclusive fishery zones; that most States have not protested against broad claims made by other States to fishery zones; that the Single Negotiating Text worked out at the Third Law of the Sea Conference was evidence of the developing norms of international law, and that proposals at the Third Law of the Sea Conference relating to the 200-mile economic zone stressed coastal " sovereign rights." It was argued that precedents exist in American practice of unilateral action, particularly in the area of fisheries utilising the Truman declaration, and the 1966 unilateral U.S. extension of the fisheries jurisdiction to 12 miles.[16]

Opponents of the Bill responded that international custom did not authorise a unilateral extension of fisheries. Claims of other States to broad areas of fishery jurisdiction had met with protests, including those of the United States. Finally, proposals emanating from the Law of the Sea Conference were not international law—certainly not before they are adopted.[17] Regarding the Truman Proclamation, it was argued that its force was limited to areas where only Americans fished, and applied only to them. Any conservation regulation for foreign nations had to be negotiated. The 1966 extension of fisheries to 12 miles was authorised by the 1958 Convention on the Territorial Sea and Contiguous Zone.[18]

Opposition came also from the ranks of American professors of international law. In their opinion, customary international law did not support a unilateral extension of fishery jurisdiction to 200 miles.[19]

There was some discussion in the Senate of the import for the proposed legislation of the judgment of the International Court of Justice in the *Icelandic Fisheries* case. The opponents of the bill quoted the language of the opinion of the International Court indicating that Iceland's extension of control over the fishing grounds to the extent of 50 miles off its coast, was incompatible with the rights of others to fish in those waters:

> A coastal State entitled to preferential rights is not free, unilaterally and according to its own uncontrolled discretion, to determine the extent of those rights. The characterisation of the coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States—particularly of a State which, like the Applicant [Great Britain] has for many years been engaged in fishing in waters in question—such fishing activity being important to the economy of the country concerned. The coastal State has to take into account and pay regard to the position of such other States, particularly when they have established an economic dependence on the same fishing grounds.[20]

[16] 122 Cong. Rec. H 9930 (1975).
[17] 122 Cong. Rec. H 9916 (1975).
[18] 122 Cong. Rec. H 262 (1976).
[19] 121 Cong. Rec. H 9916 (1975), 122, 262 (1976).
[20] Fisheries Jurisdiction Case (*United Kingdom and Northern Ireland* v. *Iceland* (1974) I.C.J.Rep. 27–28).

The question considered in Congressional argument was whether the holding of the *Icelandic Fisheries* case could be limited to the situation in which another country with an " established economic dependence on the same fishing grounds " was involved. In the case itself, the Court focused on the fact that Great Britain had been fishing in Icelandic waters for centuries. The proponents of the Bill limited the relevance of the case to situations in which a fishing country had " historic rights," which none of the countries affected by the 1976 Act—U.S.S.R., Japan and Poland—could establish.[21]

The last major point of controversy in Congress was over the validity of the 1976 Act in the light of existing international agreements. Section 201 of the Act allows foreign fishing pursuant to an international fishery agreement, if such agreement is in effect at the date of enactment of the Act or has not expired, been renegotiated or otherwise ceased to be in effect with respect to the United States.

The proponents of the bill argued that current fishery agreements were still in force, due to the provisions of section 201. The opponents of the bill charged that it contravened the 1958 Geneva Convention on the High Seas and the Convention on the Territorial Sea and the Contiguous Zone. This is true specifically with regard to Article 2 of the Convention on the High Seas, which expressly guarantees freedom of fishing. This argument was countered by the argument that the underlying premise of Article 2 of the Convention is that fishery resources are inexhaustible. While this may have been true in 1958, it is not true today, when depletion of the fishery resources by modern fishing methods is a fact. Secondly, it was contended that the Geneva Conference of 1958 reached no agreement on fisheries preservation and jurisdiction, and that these questions were left open to be resolved by the Third Conference.[22] Thirdly, it was argued that the 1976 Act was constitutionally in order, since according to the doctrine of *Whitney* v. *Robertson*, an act of Congress supercedes an earlier treaty.[23]

Another argument of the opponents of the Bill was that, according to Article 24 (2) of the Convention on the Territorial Sea and the Contiguous Zone, both zones were limited to 12 miles and that no jurisdiction of any nature could be exerted beyond that point. Again the answer was that this Convention had nothing to do with fisheries control.[24]

Viewing the general trend in the changing world arena, particularly in regard to the Law of the Sea, Congress adhered to a certain set of theories which justified a unilateral approach to management and conservation policies as having a legitimate place in the system of

[21] 121 Cong. Rec. H 9923.
[22] 121 Cong. Rec. H 9930 (1975).
[23] 121 Cong. Rec. S 2307 (1975).
[24] *Ibid.*

international law. In essence it resulted in determining the function of the unilateral action taken by the coastal State, and its relationship to international agreements dealing with fishing rights of other nations.

The basic idea in the Congressional understanding of the international law agreements is that owing to the absence of central authority, international law relies, to a large degree, on the principle of reasonableness as applied to claims of members of the international community. In the Senate, the author of a treatise on the Law of the Sea was cited in support of this proposition:

> The law of nations, which is neither enacted nor interpreted by any visible authority universally recognised, professes to be the application of reason to international conduct. From this follows that any claim which is admittedly reasonable may fairly be presumed to be in accordance with law and the burden of proving that it is contrary to law should be on the State which opposes the claim.[25]

In the House, the justification for a new approach was founded on the conviction that new fishing technology required a total re-appraisal of international rules dealing with the fishing rights of individual members of the international community.

> For well over 300 years, one of the most basic principles of the freedom of the seas has been the freedom of fishing. That is, States have generally claimed, and been accorded, relatively narrow limits of jurisdiction, and fishermen have had free and open access to all stocks on the high seas (outside the territorial waters of coastal nations). In these international waters, no single State or group of States has had a right to exclude others from freely exploiting these common property resources.[26]

This approach worked well until modern technology created a real danger of over-fishing the oceans. In particular, this affected more desirable species of fish. Recent experience of the United States had forced the Congress to take action to protect the interests of American fishermen and the effectiveness of conservation efforts of the American Government in co-operation with other governments.

In order to achieve these objectives, the purpose of U.S. Government action had to be differently defined, and the concept of international law, and the role of individual States in relation to each in connection with national and international conservation efforts, had to be redefined. In effect, Congress adopted the idea that nations which have undertaken action in order to conserve the existing stock of fish should be able to control certain sea areas and to enjoy priority in exploiting available resources.[27]

The central point of the Act is legislative determination of the roles played by unilateral action compared with the function of international agreements in developing international law. The Act recognised the supremacy of international agreements over an act of a national

[25] Smith, *The Law and Custom of the Sea* (1959), at 29. Cong. Rec. S 23079 (1975).
[26] H.R. 445 (note 2) 596. [27] *Ibid.* at 617.

legislature. In consequence, the 1976 Fishery Conservation and Management Act is destined eventually to be replaced by international agreement, when it is achieved and has entered into force.[28] At the same time, Congress acknowledged the futility of earlier efforts to establish a working conservation and equitable management régime by means of international agreements. Unilateral American action, however, is legitimate only when it is expressive of the already existing trends in the development of international law. In support of this policy, the House Report cites the report of the National Advisory Committee on Oceans and Atmosphere:

> The major new challenge is fisheries management. Instead of the living resources of the sea belonging to no one, a world consensus is developing which would place the exclusive jurisdiction of most fisheries and other living resources with the coastal nation. For the United States, with one of the longest coastlines of any nation and some of the richest fishing areas of the world ocean, this virtual ownership of vast fisheries resources . . . presents a new opportunity for our people and new responsibility for our government.[29]

Traditionally, American government refrained from regulating fishing in the seas under American jurisdiction. Prior to recent times, the only prohibition against foreign fishing was contained in the Nicholson Act of 1793, limiting fishing within the three-mile territorial sea to United States vessels enrolled for the fisheries.[30] In the mid-1960s the Bartlett Act was adopted,[31] followed by the Exclusive Fisheries Zone Act.[32] These two Acts extended the exclusive fisheries jurisdiction of the United States from 3 to 12 miles, and prohibited foreign fishing for crawling marine life on the continental shelf of the United States. In 1970, Congress again took action to strengthen the penalty provisions of the Bartlett Act.[33] On this occasion the report to the House stated:

> These two Acts initiated the intense Congressional effort to convince the Department of State and successive administrations that vital national resources, our fisheries and our fishing industry, are in grave danger. Each of these many steps has been resisted, and whenever possible frustrated.

The only thing that has been achieved by the administration was the conclusion of a number of bilateral fisheries agreements, predominantly with nations which historically never fished in American waters. The pattern of these agreements was to induce these nations to refrain from fishing in designated waters beyond the exclusive fisheries of the United States (12-mile zone) during particular seasons which are of the greatest importance to American fishermen. In exchange, the U.S. Government grants work privileges and a variety of other concessions. However,

[28] *Ibid.* at 612.
[29] *Ibid.* at 612.
[30] 40 U.S.C. § 251 (a) (1970) (corresponding to Coasting and Fishing Act of 1793, § 1, 1 Stat. 305).
[31] Act of May 20, 1964, Pub. Law 89-308, Stat. 194 16 U.S.C. 1981 *et seq.* (1970).
[32] Act of Oct. 1966, P.L. 89-658 § 3, 80 Stat. 980 16 U.S.C. 1091-94 (1970).
[33] Act of Oct. 27, 1970, P.L. 94-265, 384 Stat. 1297, L6 U.S.C. 1081 *et seq.* (1970).

these newly-fishing nations have never agreed to desist from fishing in American coastal waters, nor do they allow American inspectors on board their vessels to monitor their activities regularly, without advance notice. Foreign partners to such agreements have also refused to recognise the reality of the fact that fishery resources are exhaustible, except in return for concessions from the United States which would make foreign fishing even more successful, such as the right to re-supply in American ports rather than at home, thus avoiding long trips to and from the fishing grounds.

In those circumstances direct intervention into the agreement-making process became necessary. It was inevitable that Congress should determine the goals and purposes of diplomatic action by the Executive and State Department in particular.

At the same time the 1976 Act is founded upon the conviction that a unilateral approach is not in conflict with the international law in force. It is, indeed, sanctioned by international law:

> International lawyers view the law of the oceans as a process "of continuous interaction; of continuous demand and response," a developing system whereby unilateral claims are put forward, the world community weighs the claims and then such claims are either accepted or rejected.[34]

The usual process is to negotiate bilateral or general international agreements. However, unilateral action may initiate a trend of change. An example of such an action, directly connected with the Congressional initiative leading to the enactment of the 1976 Fishery Act was the Truman declaration of September 28, 1945,[35] concerning Coastal Fisheries in Certain Areas of the High Seas. This launched the idea that the United States claims the right to regulate and control fishing activities in the high seas contiguous to its coast in order to establish conservation zones in the areas where substantial fishing activities have developed or may develop.[36]

In practical terms, the Act provided also for the pattern of re-negotiation of international agreements, which in the past determined U.S. relations with nations fishing off the U.S. coasts. The general directive regarding the aims of future international fishery agreements is that their purpose is to give effect to the substantive provisions of the Act. This was not always possible in the past, as the State Department and its negotiators, in demanding concessions from fishing nations, found themselves at a disadvantage compared with those who could rely on the freedom of the oceans. In these negotiations, neither the Congress, nor the American fisherman had a role to play.[37]

The main reason for the shortcomings of the hitherto-followed

[34] H.R. 445, *supra*, n. 2, at 597.
[35] Presidential Proclamation No. 2668, 59 Stat. 885 (1945).
[36] H.R. 445, *supra*, n. 2, 597–598.
[37] *Ibid.* at 627.

routines, which frustrated the policies pursued by the Congress, was that, in the context of international agreements, oversight procedures were completely inadequate. While some of the fishery agreements followed procedures established by Article II of the Constitution (ratification with the advice and consent of the Senate) most of the fishery agreements were concluded without the previous consent of Congress:

> The role of Congress has been limited, by reason of the decision not to submit such agreements to the ratification process . . . oversight is after the fact and in a climate which is not conducive to meaningful probate of what should have been accomplished in the negotiations versus what was actually agreed to, in order to insure that the utterly bankrupt negotiating procedures of the past decade are not repeated after the enactment of this Act. . . .[38]

The 1976 Act not only sets up the policy, but prescribes a new negotiating process in which supervision of the negotiated agreements is assured, in spite of the fact that fishery agreements made pursuant to the Act are still executive agreements.

Under Section 202 of the Act, no fishery agreement may be made after May 31, 1976, or renewed after June 1, 1976, unless it conforms strictly to the protective provisions of section 201 of the Act.

Compliance with the fishery agreements concluded under the régime of the Act is assured by the Congressional oversight procedures, which follow practices already established in the Trade Act of 1974 and the Foreign Assistance Act of 1974.[39]

According to the scheme established in the 1976 Act, no fisheries agreement shall become effective before the close of 60 calendar days of continuous session of Congress after the submission by the President of the text of the agreement, both to the House and Senate—provided that neither House shall adopt a resolution of disapproval.

This applies to the bilateral fishery agreements, such as those made with Japan, Russia and Poland, as they relate to fishing for certain species of fish in the 12-mile exclusive fishery zone. In other words, the purpose of the negotiation or renewal would be to extend the provisions of these bilateral agreements to the 200-mile zone, and at the same time to provide for enforcement of the provisions of the Act in regard to the allocation of quotas, issue of permits, control of compliance and civil and penal sanctions.

In addition, in order to bring agreements into line with the Act, the Act requires the Secretary of State, in consultation with the Secretary of Commerce, immediately after the coming into force of the Fishery Conservation and Management Act, to renegotiate all treaties concluded in the manner prescribed by Article II, section 2 of the Constitution, which pertain to fishing within the fisheries zone or to species,

[38] *Ibid.*

[39] *Ibid.* at 628.

stocks of fish or fisheries with respect to which the United States may exercise management and conservation authority under the Act.

In this last class of treaties, three groups of fishery agreements must be distinguished.

The first are those dealing with fish or fisheries which, according to the Fishery and Management Act, were placed under United States jurisdiction. This included three groups of fish: fish, stocks of which were to be found within the 200-mile zone; continental shelf fish; and anadromous fish, including those found during their migration cycle outside the 200-mile zone. Two such agreements are those specifically aimed at the International Convention for Northwest Atlantic Fisheries,[40] and the International Convention for the High Sea Fisheries of the North Pacific Ocean.[41]

The second group of agreements which must be negotiated with foreign countries are those protecting the rights of American fishermen to specific stocks of fish within the 200-mile zones of the coasts of foreign nations. Typically, the Report quotes the shrimp fishery off the coast of Brazil.[42] To strengthen the hand of the Secretary of State in inducing foreign governments either to negotiate or to respect their obligations, the Act provides that, in the case of refusal or non-compliance, the Secretary of State shall certify the fact and notify the Secretary of the Treasury who will subsequently prohibit the importation of any seafood product from such a country into the territory of the United States. However, this procedure excludes seafood products and fish harvested by United States vessels.[43]

Finally, the Secretary is required to renegotiate international conventions concerning highly migratory species. Specifically, this means the Convention for the Establishment of an Inter-American Tropical Tuna Commission (IATTC)[44] and the International Convention on the Conservation of Atlantic Tunas (ICCAT).[45]

The main problem with these three groups of conventions is the enforcement of conservation measures aimed at assuring the optimum sustainable yield (OSY) of the stock of fish obtainable in controlled areas. Congress developed the concept of the OSY, as opposed to the concept of the maximum sustainable yield (MSY). In order to define what is meant by the term OSY, the Report gives the example of haddock:

> An example of such a situation has occurred in the Northwest Pacific where mindless overfishing for haddock has virtually wiped out the species. A zero quota for haddock will not permit that species to restore itself since other

[40] *Ibid.* at 624. 1 U.S.T. 477, T.I.A.S. 2089, 157 U.N.T.S. 157 (1949).
[41] 4 U.S.T. 380, T.I.A.S. 2786, 205 U.N.T.S. 65 (1952).
[42] H.R. 445, *supra*, n. 2, 628.
[43] *Ibid.* at 624–625.
[44] 1 U.S.T. 230, T.I.A.S. 2044, 80 U.N.T.S. 3 (1949).
[45] 20 U.S.T. 320, T.I.A.S. 6767, 673 U.N.T.S. 63 (1969).

> fisheries in the North-west Atlantic cannot be conducted without taking haddock. Accordingly, the harvest of these other species must be reduced below their MSY to reduce the incidental catch of haddock.[46]

In this respect the management activities of the International Commission established by the International Convention for the Northwest Atlantic (ICNAF) came under sharp criticism in Congressional hearings.[47]

Another example of the failure of international management of fishery resources arises in the case of herring. According to the testimony of Dr. Anthony Vaughn, the Deputy Chief of the Northeast Fisheries Center of the National Marine Fisheries Service, and a member of the herring working group of ICNAF, catches of herring in excess of quota for 1972 and 1973 were caused by the INCAF's inability to control the fishing of the German Democratic Republic, not then a member of ICNAF.[48]

The reason for the failure of international fishery conservation schemes is the fact that enforcement of conservation measures, particularly regarding undersized and protected fish, is left to each signatory nation as regards to its own citizens:

> For example, the Congressional Report states, if a Soviet fleet is operating off U.S. shores pursuant to an international agreement, it is the duty of Soviet officials to enforce that agreement on their citizens. It is easy to see, however, why a nation, which on the one hand has directed its fishing fleet to return a high quota of fish may not be as diligent as is necessary to enforce full compliance with international agreements.[49]

A somewhat different problem requires renegotiation of the provisions of the tripartite (U.S., Canada and Japan) High Sea Fisheries of the North Pacific Convention, concluded in 1952 to protect salmon fisheries. It introduced the doctrine of abstention:

> The essence of the ... treaty is that where one or more nations have engaged in the intensive research of a specific coastal fishery, have subjected it to conservation regulation and are making approximately maximum use of it upon a sustained yield basis, then, in the interests of maximum world food production and in light of equitable and peaceful international relationships, other nations which have not participated in such research, regulation or previous exploitation should recognise these conditions and agree to restrain their nation from participating in such fishery.[50]

Under that doctrine, Japan agreed to abstain from fishing for salmon east of the 175th west meridian. At that time, it was thought that this would provide adequate protection for salmon stock spawning in American and Canadian rivers. However, it has been shown that salmon range far beyond this boundary line, and Japanese fishermen, owing to their advanced fishing technology, are able to catch large numbers of

[46] H.R. 445, *supra*, n. 2, 615.
[47] *Ibid.*
[48] *State of Maine et al.* v. *Juanita Kreps et al.*, 563 F. 1043 (1977), n. 2.
[49] H.R. 445, *supra*, n. 2, 610.
[50] Allen, "A New Concept for Fishery Treaties" (1952) 45 A.J.I.L. 319, 321.

salmon after they reach the abstention line. Thus it became necessary to provide for the protection of salmon beyond the 175th west meridian.

The question was whether the 1976 Act was a proper answer to this problem. The move to establish the 200-mile conservation and management zone raised fears in the salmon industry that this would prompt the Japanese to denounce the treaty and to fish for salmon up to the limits of the zone, thus adding pressure on the salmon stock, which until now was harvested by American salmon fishing boats. The counter-argument was that other fish, rather than salmon, available within the zone were more important to the Japanese diet and fisheries industry, and that therefore the U.S. had a negotiating leverage with which to protect high sea salmon in return for fishing privileges in the zone for other species.[51]

A little more than a year has passed since the 1976 Fisheries Conservation and Management Act came into effect (March 1, 1977). The period between the enactment and the coming into force was used by the Administration to bring about compliance by the partners of the U.S. with the Act's provisions.

The initial step was to establish limits and boundaries of the Fisheries Conservation Zone, and here co-operation with other States was essential.

On March 1, 1977, the State Department sent to the Federal Register the geographic co-ordinates of the fishery conservation zone around the U.S. and its territories and possessions. The establishment of the fishery conservation zone created maritime boundaries with Canada, Mexico, the Soviet Union, the Bahamas, Cuba, The Dominican Republic, the Netherland Antilles, Venezuela, the British Virgin Islands, Tonga, Western Samoa, the Trust Territory of the Pacific Islands, and various islands in the Pacific Ocean which are under the jurisdiction of the United Kingdom or New Zealand. Their determination was particularly urgent in the case of Canada and Cuba, and was achieved in a comparatively short period of time.[52]

With Cuba, a *modus vivendi* was reached on April 27, 1977. Cuba accepted the provisional delimitation as proposed by the American side.[53]

As regards U.S.-Canadian relations concerning fisheries, the reciprocal fishing agreement in certain areas of the United States and Canadian coasts, signed in Ottawa on June 15, 1973,[54] was extended in April 1976 [55] and provided a temporary basis for the relations between two neighbours whose co-operation, in regard to the protection of fishery resources, was of long standing. Negotiations between the two

[51] H.R. 445, *supra*, n. 2, 607, 611. See also H.R. 152, 94th Cong., 1st Sess. at 9943, (1975).
[52] *Dept. of State Bulletin*, Vol. 76, 273–274.
[53] *Ibid.* 504, Vol. 78, 62.
[54] T.I.A.S. 7676.
[55] T.I.A.S. 8251.

countries had a more ambitious goal than those with other countries seeking fishing privileges off the coast of the United States. On February 24, 1977, the two countries signed a new Reciprocal Fisheries Agreement to permit the continuation of fishing by the fishermen of both countries off their coasts. This agreement took into account the fact that both partners extended their fishery jurisdiction over the 200-mile zone.[56] This was only an interim arrangement. A far broader agreement is in the process of negotiation, including a scheme of co-operation between the U.S. and Canada in the programme of conservation. It is planned that negotiations will create a joint fisheries commission with separate panels for the Atlantic and Pacific coasts, composed of members appointed by the respective governments. Fish stock would be divided into three categories: stock that is to be managed jointly, stocks managed jointly following the proposals submitted by the country with a primary interest, and independent management of stocks subject only to consultation.[57]

U.S.-Canadian boundary negotiations also regulate the access to oil and gas resources in the boundary areas. Negotiators have proposed to establish share-access zones, with each country sharing equally in the available oil and gas reserves.[58]

On fishing rights in the U.S. Fishery Conservation and Management Zone of other countries, bilateral agreements have played the main role.

At the present time, the U.S. has concluded bilateral agreements permitting access to fisheries off American coasts with the following countries: Spain,[59] Poland,[60] Korea,[61] East Germany,[62] Soviet Union,[63] Republic of China (Taiwan),[64] Bulgaria,[65] Mexico,[66] Cuba,[67] and finally the European Economic Community.[68]

In this series of bilateral agreements, that with EEC presents certain special problems. Not all the EEC members have traditionally fished off U.S. coasts. Only France, Italy and West Germany have visited American fishing grounds in the past. Since, however, the Community has adopted a common fishery policy and at the same time has established its 200-mile Conservation and Management Zone, an agreement with the EEC as such was unavoidable.

While the Agreement theoretically applies to all members of the EEC, fishing rights are granted in the first place to those of its members who have fished in American waters in the past.

> Throughout the negotiations with the Community, the United States made it clear that it understood that the Community now has a common fisheries policy

[56] *Dept. of State Bulletin*, Vol. 76, 274.
[57] *Ibid.* 856.
[58] *Ibid.*
[59] T.I.A.S. 8523.
[60] T.I.A.S. 8528.
[61] T.I.A.S. 8526.
[62] T.I.A.S. 8527.
[63] T.I.A.S. 8528.
[64] T.I.A.S. 8529.
[65] *Dept. of State Bulletin*, Vol. 76, 327.
[66] *Ibid.* 352.
[67] *Ibid.* 578.
[68] T.I.A.S. 5838.

> and that the objective of the negotiations was to accommodate the interests of the three member States which traditionally have fished off our coasts. The United States retains the right through the domestic process of approving applications and issuing permits, to determine who shall fish off our coasts. Until such time as the fish stocks . . . rebuild, and even then only when they are in excess to the harvesting capacity of the U.S. fleet, we do not expect to allocate, or to approve application for, any country that has no record of traditional fishery. For this year, clearly, permits will be available only to France, Italy and the Federal German Republic . . .".[69]

The importance of the agreement to the United States was in the fact that ". . . approximately 100 U.S. shrimp trawlers fish in waters off French Guiana which lie in the EEC Zone." [70] In addition to gaining recognition of the U.S. Fishery Zone, the EEC agreement also fulfilled the purposes of the other Act defining a foreign policy objective, *i.e.* the protection of the interests of the American distant waters fishing fleet.

In the same category is the agreement on American shrimp fishing with Brazil of March 14, 1975, which took effect on March 1, 1977.[71]

Another major negotiating objective set up by the 1976 Fishery Act was the fishery agreement with Japan, on which the future of the salmon fishery depended. Basic in this connection was the Tripartite (U.S., Canada and Japan) International Convention for the High Seas Fisheries of the North Pacific Ocean of May 9, 1952, which set up a conservation régime for salmon with the participation of the three powers involved.

In course of time, as the American fishery jurisdiction was expanded from three to 12 miles, the North Pacific Convention was supplemented by additional agreements with Japan, including the Agreement of December 24, 1974,[72] and the Agreement of the same date relating to salmon fisheries.[73] These two agreements were replaced by an Agreement of February 10, 1977, which concerned fisheries off the coasts of the United States, and covered the period of transition, until an effective régime of conservation and management of fishery resources was established. Submitting this agreement to Congress for oversight procedures, the Executive Branch simultaneously submitted for information an initial draft of a long-term agreement covering the 1978–82 period.[74]

To assure international acceptance of the 1976 Fishery Conservation and Management Act by the nations fishing off the American coasts, U.S. diplomacy had relied until now exclusively on the instrument of bilateral agreements. Fishery agreements with interested parties have effectively replaced the International Convention for the Northwest Atlantic, and indeed the U.S. Government withdrew from that

[69] *Dept. of State Bulletin*, Vol. 76, 177.
[70] Statement by Deputy Assistant Secretary for Oceans and Fishery Affairs, February 22, 1977; *ibid.* 273.
[71] T.I.A.S. 8253.
[72] T.I.A.S. 7586.
[73] T.I.A.S. 7787.
[74] *Dept. of State Bulletin*, Vol. 76, 178–179, 273, 427.

Convention, restricting its interest in regard to fishing in the area outside the 200-mile zone.[75]

The Tripartite Convention of 1952 (Japan, Canada and the U.S.) has remained in force, although again the bilateral approach (Salmon Fishery Agreement with Japan) may prove to be an adequate substitute for the multilateral approach. The question remains whether adequate protection of salmon from over-fishing in the high seas outside the 200-mile zone off the Pacific coast may be assured by means of a bilateral understanding between the U.S. and Japan. Certainly, a multilateral régime with the participation of the most important fishing nations would seem to represent a more effective method. This again stresses the interim character of the measures enacted by the U.S. Congress.

The Department of State representative, reporting on February 3, 1977, to the Sub-committee on Oceans and International Environment of the Senate Committee on Foreign Relations, confirmed that this was indeed the understanding of the State Department in regard to the intent of Congress as expressed in the Act:

> ... in passing the Act, Congress made clear its intention that the United States should continue to pursue its interests in the law of the sea negotiations, including the fisheries interests. We ... have sought a balanced régime which would give us the desired control over our coastal stocks, protect the interests of our distant-water fishermen, and provide for national conservation and management of all fisheries resources.
>
> While most of the attention given to the Act has been in the area of our coastal interests, the Act also makes clear that the United States as a matter of policy and law, intends to protect its interests off the coasts of other countries.[76]

Bilateral negotiations seem to have succeeded in assuring access to shrimp fisheries off the coasts of other countries. Protection of other American interests (tuna fishing, and sport fishing for other highly migratory fish) by means of bilateral agreements seems less certain. Multilateral approaches, whether leading to the revision of existing conventions, or the working out of a universal scheme, seem to be more promising.

The Act of 1976 stabilised Congressional oversight procedures in regard to the international agreement-making power of the Presidency, inasmuch as it is not subject to the requirements of Article II, section 2 of the Constitution. This aspect of the Congressional initiative and its further sophistication continues the practice established by the Case Act, adopted in 1972, which instructed the Secretary of State to—

> ... transmit to the Congress the text of any international Agreement, other than a treaty, to which the United States is a party as soon as practicable after such agreement has entered into force with respect to the United States but in no event later than thirty days. ...[77]

[75] *Ibid.* 80.
[76] *Ibid.* 176.
[77] P.L. 92–403 U.S.C. See 112b 86 Stet. 619.

The 1974 Trade Act carried Congressional oversight a step further. Section 121 (c) of that Act provided that, whenever the implementation of a trade agreement entered into pursuant to that section (trade liberalisation) would effect a change in any provision of federal law or administrative procedure, the agreement must be submitted to Congress so that it may pass implementing legislation, unless Congress explicitly delegates such implementing authority.[78] Obviously, in the case of non-compliance with section 121 (c), the agreement has no effect, until Congress takes steps and passes the required legislation.

The 1976 Act goes even further. It requires all agreements made pursuant of the foreign policy goals to be submitted to Congress before coming into effect.

The Act continues the trend towards expanding Congressional control over foreign policy, in two directions. In the first place, Congress as such claimed successfully the prerogative to make foreign policy, to determine its goals and prescribe a *modus operandi* in their realisation. In the second place, it also retained the right to supervise and check whether international agreements made under Congressional statutory authorisation are in compliance with its terms. As a result, it checked the growing tendency to expand the Executive prerogative in the area of foreign policy.

It is true that Congressional venture into the area of foreign policy-making, as exemplified in the Trade Act and Fishery Act, concerns commerce with foreign nations (Article 1, Section 8 (3) of the U.S. Constitution), but at the same time it represents a trend away from the doctrine of executive agreements formulated in a number of U.S. Supreme Court decisions, of which *Belmont* [79] and *Pink* [80] are perhaps most significant. The two Acts raise up in a new form, though in a restricted sense, the ideas of the Bricker amendments, proposed by the Senator of Ohio to place limits on international agreements and their legal effect on domestic matters.[81]

[78] P.L. 93-618, 89 Stet. 1378 (1975).
[79] *U.S.* v. *Belmont*, 301 U.S. 329, 570, 80; *U.S.* v. *Pink*, 391 U.S. 203.
[80] *U.S.* v. *Pink*, 391 U.S. 203.
[81] See Sutherland, "The Bricker Amendment, Executive Agreements and Imported Potatoes," 67 Harv.L.Rev. 281 (1953).