

NOTES

INTERNATIONAL RAMIFICATIONS OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976

I. INTRODUCTION

On April 13, 1976, President Ford signed the Fishery Conservation and Management Act of 1976 (hereinafter referred to as the Fisheries Act).¹ The Fisheries Act established a 200 mile fishery conservation zone² effective March 1, 1977,³ over which the United States will exercise exclusive fishery management.⁴ This action made the United States the first major power⁵ to declare unilaterally a 200 mile exclusive fisheries zone⁶ (hereinafter referred to as EZ). Although the President⁷ and many experts⁸ expressed grave doubts as to the legality of the EZ under customary international law, the consensus of the Third Law of the Sea Conference as to the necessity for 200 mile exclusive economic zones⁹ and the general acceptance of the inevitability of such zones minimized adverse reaction.¹⁰ Even assuming the United States has not violated currently accepted precepts of international law, other aspects of the unilateral action are as problematic. Among the issues to be faced by the United States in the implemen-

¹ Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified in scattered sections of 1800, 16 U.S.C.A. (Ph. 2, pt. 1, June 1976)) [hereinafter cited as Fisheries Act].

² *Id.* § 1811.

³ *Id.*

⁴ *Id.* § 1812.

⁵ See G. KNIGHT, *THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 697-715 (1975-76)* [hereinafter cited as KNIGHT].

⁶ Canada unilaterally declared a 100 mile Arctic anti-pollution zone in 1970 which met with violent protests from the United States. Henkin, *Arctic Anti-Pollution: Does Canada Make—or Break—International Law?*, 65 AM. J. INT'L L. 131 (1971) [hereinafter cited as Henkin].

⁷ Statement by the President Upon Signing H.R. 200 Into Law, 12 WEEKLY COMP. OF PRES. DOC. 634 (April 13, 1976) [hereinafter cited as Presidential Statement].

⁸ *Two-Hundred-Mile Fishing Zone: Hearing on S. 961 Before the Subcomm. on Oceans and the International Environment of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 159 (1975) (prepared statement of Hon. John Norton Moore) [hereinafter cited as *Fishing Zone Hearing*]; see also Wall St. J., Oct. 23, 1975, at 18, col. 4.

⁹ U.S. DELEGATION, REPORT ON THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 1 (New York, Aug. 2 - Sept. 17, 1976), reprinted in *Status Report on the Law of the Sea Conference before the Subcomm. on Minerals, Materials, and Fuels of the Senate Interior & Insular Affairs Comm.*, 95th Cong., 1st Sess. 1618-37 (June 8, 1976) [hereinafter cited as U.S. DELEGATION REP.].

¹⁰ Japan is the only nation that has formally notified the United States that it will not recognize American jurisdiction in the 200 mile zone. Letter from Kathryn Clark-Bourne, Director of Fisheries Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, to Donna Christie (Nov. 3, 1976).

tation of the Fisheries Act are impediments to prior treaty obligations and Law of the Sea Conference negotiations, stress on relations with the Soviet Union, Japan and Latin America, a rash of other unilaterally declared zones which go beyond the scope of the Fisheries Act, and enforceability.

This Note will attempt to elucidate the international aspects of these issues as they affect the United States and the world community.

II. PRIOR TREATY OBLIGATIONS

The United States is a party to eleven bilateral and six multilateral fishing agreements which give the signatories the juridical right to conduct fishing operations within the areas that will be designated exclusive fisheries management zones.¹¹ The Fisheries Act provides that foreign fishing may be conducted pursuant to these prior agreements.¹² The Act also requires, however, that the Secretary of State promptly renegotiate any treaties that pertain to fishing within the EZ in order to conform the treaty terms to the legislation.¹³ If such treaties are not renegotiated within a reasonable time, the Act asserts that the United States will withdraw from the treaty.¹⁴

The United States takes the position in its internal constitutional law that a subsequently enacted law will be given effect over a prior conflicting treaty.¹⁵ Clearly, however, the enforcement of the Fisheries Act against foreign parties to fishing agreements without renegotiation would be a violation of the treaties and customary international law.¹⁶ Less clear is whether use of such blackmail-type tactics by the United States to induce renegotiations is sanctioned by international law. Arguably, under the doctrine of *pacta sunt servanda*,¹⁷ by enacting legislation inconsistent with prior treaties the United States is acting in bad faith in performance of its treaty obligations¹⁸ even if withdrawal from the treaties is in accordance with the terms of the agreements.¹⁹ If such is the case, the Fisheries Act amounts to a unilateral denunciation of treaties involving fishing within

¹¹ H.R. REP. NO. 542, 94th Cong., 1st Sess. 9 (1975) [hereinafter cited as HOUSE REP.]; see generally Jacobs, *United States Participation in International Fisheries Agreements*, 6 J. MAR. L. & COMM. 471 (1974-75).

¹² Fisheries Act, 16 U.S.C.A. (Ph. 2, pt. 1, June 1976) § 1821(b).

¹³ *Id.* § 1822(b).

¹⁴ *Id.*

¹⁵ The view in the United States is that a treaty and a legislative act are placed on the same footing by the Constitution. If a treaty and legislation are completely inconsistent, the most recent in date will control. *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

¹⁶ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 27, U.N.Doc. A/CONF. 39/27 (1971) [hereinafter cited as Vienna Convention].

¹⁷ *Id.* art. 26: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

¹⁸ *Fishing Zone Hearing*, *supra* note 8, at 109-10.

¹⁹ Fisheries Act, 16 U.S.C.A. (Ph. 2, pt. 1, June 1976) § 1822(b).

the area designated EZ. In the Fisheries Jurisdiction Cases,²⁰ the International Court of Justice found that a nation's rights with regard to denunciation of treaties as set forth in the Vienna Convention and in customary international law are surrounded by substantive conditions and limitations.²¹ That is, in a treaty with no provisions for termination there is no true right of unilateral denunciation; however, there are certain internationally recognized circumstances that will justify termination.²² Inherent in the Court's opinion is the requirement that any termination, withdrawal or suspension must be in good faith in order to meet the conditions essential for the assertion of such a right. It would not be unreasonable to assume that this good faith condition might apply to treaties with provisions for termination,²³ in which case the United States would be required to demonstrate a more reasonable justification for invoking a termination provision than the fact that the other party refused to renegotiate a formerly mutually acceptable agreement in order to conform to terms newly imposed by the United States. Despite the argument's feasibility it is unlikely that it would be utilized because nations do not want to develop a principle of international law that would encroach to such an extent on their sovereignty. Even if the principle were developed, it would probably be unenforceable.²⁴

III. LAW OF THE SEA CONFERENCE NEGOTIATIONS

The United Nations is currently conducting a series of Law of the Sea Conferences in an attempt to negotiate a comprehensive international agreement as to the rights and duties of nations. Prior to the enactment of the Fisheries Act the United States supported the concept of international agreement and strongly opposed unilateral action in this area.²⁵ However, increased internal pressures and foreign overfishing mandated the legislation. President Ford said he signed the bill because of three major factors: (1) the slow pace of the Law of the Sea (LOS) Conference

²⁰ United Kingdom v. Iceland, [1972] I.C.J. 3, reprinted in 11 INT'L LEGAL MAT'LS 1069 (1972).

²¹ *Id.*; see also Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 AM. J. INT'L L. 51, 68 (1974).

²² *Id.* at 66; Vienna Convention *supra* note 16, art. 60 (material breach), art. 61 (impossibility of performance), art. 62 (fundamental change of circumstances), art. 63 (severance of relations).

²³ All bilateral fishing agreements of the United States have provisions for termination. See *Fishing Zone Hearing, supra* note 8, at 174.

²⁴ Interview with Dean Rusk, Sibley Professor of International Law, University of Georgia School of Law (Oct. 27, 1976).

²⁵ President's Message to the International Commission for the Northwest Atlantic Fisheries, 11 WEEKLY COMP. OF PRES. DOC. 1065 (Sept. 23, 1975); Address by Secretary of State Henry A. Kissinger Before the American Bar Ass'n, Montreal, Canada (Aug. 11, 1975), reprinted in *Fishing Zone Hearing, supra* note 8, at 296; 73 DEP'T STATE BULL. 623 (Oct. 27, 1975).

negotiations; (2) the fact that the legislation is consistent with United States objectives at the LOS Conference;²⁶ and (3) the effective date of the legislation is delayed until March 1, 1977.²⁷ The Fisheries Act is intended as an interim measure²⁸ and contains provisions for the amendment of the Act in the event the United States ratifies a comprehensive treaty resulting from the United Nations Law of the Sea Conference.²⁹

Because many of the issues faced by the LOS Conference are mutually dependent, passage of the Fisheries Act by the United States may have resulted in the loss of negotiating power on apparently nonrelated issues.³⁰ Of even greater consequence is the possibility that this action may affect the likelihood of any agreement being reached at the LOS Conference.³¹ The 200 mile exclusive economic zone is one principle that has been generally accepted at the LOS Conference and former Secretary of State Kissinger has stated that the Fisheries Act has not impeded the progress of negotiation in that area.³² However, the United States, by its unilateral action, has set a dangerous precedent, enabling other nations to assert similar claims³³ with a resulting "sea-grab" by coastal states.³⁴ When these nations are allowed to assert such unilateral claims successfully, the incentive to reach an international agreement is eliminated.³⁵ The positive aspect of such unilateral action is that many of its original opponents—landlocked and geographically disadvantaged states—have virtually conceded the principle of a 200 mile economic zone, preferring to have the zones established by negotiation rather than appropriation by coastal states.³⁶ Since a Law of the Sea Conference treaty will now be the only sure way of protecting their interests, landlocked and geographically disadvantaged nations will be more inclined to conclude negotiations.

Continued pressures by Congress³⁷ as well as the deadlocked negotiations

²⁶ See *INFORMAL SINGLE NEGOTIATING TEXT*, U.N. Doc. A/CONF. 62/WP.8, pt. I-III (May 7, 1975), reprinted in 14 *INT'L LEGAL MAT'LS* 682 (1945) [hereinafter cited as *NEGOTIATING TEXT*].

²⁷ The President insisted upon the delayed date of enforcement in anticipation of a comprehensive Law of the Sea Conference agreement which would render unilateral action unnecessary. See note 7 *supra*.

²⁸ *Fishing Zone Hearing*, *supra* note 8, at 73, 161.

²⁹ 16 U.S.C.A. (Ph. 2, pt. 1, June 1976) § 1881.

³⁰ *HOUSE REP.*, *supra* note 11, at 6.

³¹ *Id.*

³² 75 *DEP'T STATE BULL.* 395, 402 (Sept. 27, 1976).

³³ *Id.* at 401.

³⁴ *THE ECONOMIST*, Sept. 18, 1976, at 15.

³⁵ *HOUSE REP.*, *supra* note 11, at 6.

³⁶ *THE ECONOMIST*, *supra* note 34.

³⁷ The U.S. Congress is currently considering unilateral action concerning seabed mining. For a recent version of the proposed legislation, see *Hearings on Deep Seabed Hard Minerals Act before the Subcomm. on Oceanography of the House Comm. on Merchant Marine & Fisheries*, 94th Cong., 2d Sess. 357-64 (1974).

at the fifth session of the Third LOS Conference³⁸ have led the United States to threaten unilateral action in regard to seabed mining.³⁹ The Fisheries Act may lend credence to these threats and thus stimulate negotiations in order to forestall another "sea-grab." However, there is a great difference in the fundamental nature of asserting a fisheries claim to a generally agreed upon contiguous zone and asserting unilateral claims to the high seas. The fact that the United States has asserted a unilateral fisheries claim without undue reaction does not mean the international community will tolerate a claim to the high seas or even bargain to keep the United States from asserting such a claim.

Clearly the Fisheries Act has affected both the Law of the Sea Conference negotiations and the position of the United States, but uncertainty remains as to whether the United States will be able to utilize these changes advantageously in further negotiations.

IV. FOREIGN RELATIONS

The Fisheries Act will obviously cause tension between the United States and Japan and Russia, the major fishing nations which have traditionally utilized the area which will be designated as the EZ. A second major problem will relate to whether the United States will reciprocally recognize the 200 mile zones of certain Latin American nations or will continue to protect the vital interests of the American tuna fishing industry by nonrecognition of the zone and retention of the Fisherman's Protective Act.⁴⁰

A. Japan

Japan has the most extensive and far-ranging fishing industry in the world⁴¹ and will be the nation most affected by the imposition of the 200 mile fishing zone either by the United States or the world community.⁴² Approximately 40 percent of Japan's total marine fisheries catch is from the Northern Pacific Ocean, half of which is caught within the projected United States fisheries zone.⁴³ The Japanese fishing industry is therefore justifiably dismayed with American plans, for example, to set a quota on the Japanese pollock catch at 60 percent of present levels.⁴⁴

³⁸ The Third Law of the Sea (LOS) Conference is deadlocked mainly over issues of seabed mining. U.S. DELEGATION REP., *supra* note 9.

³⁹ 75 DEP'T STATE BULL. 363, 370-71 (Sept. 20, 1976).

⁴⁰ 22 U.S.C. §§ 1971-79 (Supp. V, 1975).

⁴¹ Wells, *Japan and the United Nations Conference on the Law of the Sea*, 2 OCEAN DEV. & INT'L L.J. 65, 67 (1974) [hereinafter cited as Wells].

⁴² *Id.* at 65.

⁴³ Japan Fisheries Ass'n, *What's 200 Miles Between Friends?*, L.A. Times, Aug. 6, 1976, § 3, at 15, col. 5 (advertisement) [hereinafter cited as Jap. Fish Ass'n Ad.].

⁴⁴ FAR EAST ECON. REV., Oct. 15, 1976, at 67.

Japanese and American negotiators met in Washington in August 1976, but the two countries remained deadlocked over the 200 mile zone. Japan maintains that the Fisheries Act is not consistent with international law,⁴⁵ does not sufficiently recognize or protect traditional Japanese fishing rights,⁴⁶ and is unworkable and unenforceable as to anadromous species.⁴⁷ The Japanese also point out that the continuation of Japanese traditional fishing would not harm the United States fishing industry because most of Japan's catch is pollock.⁴⁸ Although not utilized in America, pollock is used in Japan to make a fish sausage that the Japanese Fisheries Agency claims supplies 10 percent of the nation's supply of animal protein.⁴⁹ On this basis, the Japanese have charged the United States with deprivation of a valuable food resource in a manner totally unrelated to conservation or management of fisheries merely to protect the United States fishing industry. Although the fish sausage has historically been a Japanese staple for over 1,500 years, the sausage has only been made of pollock since 1960 when other fish in the Yellow Sea dwindled because of Japanese overfishing.⁵⁰ It is obviously a legitimate concern of the United States to prevent similar overfishing and resulting ecological imbalance in the North Pacific.

Japan's fishing industry is struggling to maintain its existence⁵¹ and Japan is standing firm both in negotiations with the United States and at the Law of the Sea Conference. The probability of Japan receiving special concessions or considerations in either of these negotiations is extremely limited.

The Single Negotiating Text of the LOS Conference makes several provisions on behalf of geographically disadvantaged nations;⁵² however, Japan will not qualify as a geographically disadvantaged state under any of the currently proposed criteria.⁵³ There is thus little likelihood of Japan's fishing industry receiving relief through a treaty resulting from the LOS Conference.

⁴⁵ *Id.*

⁴⁶ Wells, *supra* note 41, at 82-83.

⁴⁷ FAR EAST ECON. REV., *supra* note 44. 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." Fisheries Act, 16 U.S.C.A. (Ph. 2, pt. 1, June 1976) § 1802(1).

⁴⁸ FAR EAST ECON. REV., *supra* note 44.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ The Japanese fishing industry has experienced a series of crises in the last two years including stricter controls on whaling, the quadrupling of the price of fuel oil, recession, increasingly high wages, greater competition from the Taiwanese and South Korean fishing fleets, and now the imposition of 200 mile zone. *Id.*

⁵² NEGOTIATING TEXT, *supra* note 26, at pt. II, arts. 45(2), 57, 59.

⁵³ For a discussion of proposed criteria for designation of geographically disadvantaged states and those states which would qualify under each, see Alexander & Hodgson, *The Role of the Geographically Disadvantaged States in the Law of the Sea*, 13 SAN DIEGO L.R. 558 (1975-76).

In negotiations with the United States, Japan will receive relatively high allocations based on the extent of its traditional fishing,⁵⁴ but the currently proposed quotas are not satisfactory to the Japanese Fisheries Agency.⁵⁵ Japan's negotiating power is limited by the fact that there is no reciprocal United States fishing off Japan.⁵⁶ The Japanese have resorted to appeals to reason and sense of fairness of the United States, as well as warnings that the matter will become a "major cause of discord" between the two nations and could lead to a "substantial deterioration in good will."⁵⁷ Japan's foreign investments are among its strongest negotiating tools,⁵⁸ as Japanese investment in American business and industry is extensive.⁵⁹ The United States is extremely sensitive to the dangers of sharply curtailed investments and the loss of a major foreign employer,⁶⁰ but the Fisheries Act makes no allowances for exemptions or executive agreements inconsistent with the terms of the legislation.⁶¹

B. Soviet Union

The Soviet Union also has a major interest in the American fisheries zone in the North Atlantic and Pacific Oceans. The Soviet Embassy notified the State Department that the Soviet Union held "a negative view" of the United States action.⁶² Although the Tass report was under a heading of "Unlawful Action,"⁶³ the embassy filed no formal protest.⁶⁴ The main concern of the Soviets was that the unilaterally declared zone would hinder the efforts of the Law of the Sea Conference.⁶⁵

The Soviet Union supports a 200 mile economic zone but is also concerned about its extensive distant water fishing fleet.⁶⁶ The Soviets, therefore, support the idea that fishermen from other countries should be al-

⁵⁴ Fisheries Act, 16 U.S.C.A. (Ph. 2, pt. 1, June 1976) § 1821(e)(1).

⁵⁵ THE ECONOMIST, *supra* note 34.

⁵⁶ Fishing Zone Hearings, *supra* note 8, at 76-77.

⁵⁷ Jap. Fish Ass'n Ad., *supra* note 43, at col. 7-8.

⁵⁸ Wells, *supra* note 41, at 86.

⁵⁹ Japan has a 20 percent interest in Alaska's fishery investment. THE ECONOMIST, Feb. 7, 1976, at 38.

⁶⁰ Rather than curtail investments, the Japanese might be encouraged to make a greater investment in the United States fishing industry in order to take advantage of the exclusive United States EZ. Japanese fishermen had earlier used similar tactics (fishing aboard foreign vessels) to circumvent an agreement between the United States, Canada, and Japan concerning North Pacific Ocean salmon fishing. Complaints by the United States and Canada led to strict restraints on Japanese salmon fishing abroad vessels registered in other countries. MAR. FISH. REV., Jan. 1976, at 37.

⁶¹ 16 U.S.C.A. (Ph. 2, pt. 1, June 1976) § 1821(b).

⁶² Pravda, May 6, 1976, at 4, col. 8.

⁶³ *Id.*

⁶⁴ N.Y. Times, May 6, 1976, at 13, col. 1.

⁶⁵ Pravda, *supra* note 62.

⁶⁶ MAR. FISH. REV., June 1976, at 26.

lowed to fish for species not fully utilized by a country in its economic zone.⁶⁷ This view is one of national priorities, not a program of conservation and management. In general, however, the United States and the Soviet Union are aligned as to the 200 mile fisheries zone and other Law of the Sea issues. They present a common front against the People's Republic of China, which is currently demanding a 200 mile territorial sea with the consequent closing of international straits to both ships and overflight.⁶⁸

The Soviet Union has agreed to discuss the transition to a 200 mile United States fisheries zone.⁶⁹ Because the Soviets accept the principle of the 200 mile zone and have already agreed by treaty to recognize a unilaterally declared Canadian zone,⁷⁰ the United States is in a superior bargaining position vis-à-vis the Soviet Union in the matter of coastal fisheries.⁷¹ Little difficulty is anticipated in reaching an agreement.

C. *Latin America*

The adoption by the United States of a 200 mile fisheries zone will not mean automatic recognition of similar zones extended unilaterally by other states⁷² and in particular will not recognize the restrictive zones promulgated by Latin American countries.⁷³ The United States will not recognize any zone that fails to take into account traditional United States fishing⁷⁴ or that purports to manage highly migratory species such as tuna.⁷⁵ Perhaps the best indications of whether the Latin American countries will agree to these reciprocal terms are illustrated by the recent Mexican closing of the Gulf of California to foreign fishing⁷⁶ and the passage of a Costa Rican law which would regulate tuna fishing within 200 miles of the Costa Rican coast.⁷⁷

The Fishermen's Protective Act⁷⁸ will not be effectively repealed by the

⁶⁷ *Id.*

⁶⁸ See S. Pavlov, *Detente and the World's Oceans*, Pravda, Feb. 12, 1976, at 4, col. 7; see also Pravda, May 8, 1976, at 5, col. 3.

⁶⁹ 74 DEP'T STATE BULL. 498 (Apr. 12, 1976).

⁷⁰ N.Y. Times, May 20, 1976, at 24, col. 6.

⁷¹ For a discussion of the effect of United States policies on relations with the Soviet Union, see Knight, *International Fisheries Management Without Global Agreement: United States Policies and their Impact on the Soviet Union*, 6 GA. J. INT'L & COMP. L. 119 (1976).

⁷² Fisheries Act, 16 U.S.C.A. (Ph. 2, pt. 1, June 1976) § 1821(f).

⁷³ KNIGHT, *supra* note 5, at 705-15.

⁷⁴ Fisheries Act, 16 U.S.C.A. (Ph. 2, pt. 1, June 1976) § 1822(e)(1).

⁷⁵ *Id.* § 1822(e)(2).

⁷⁶ N.Y. Times, June 7, 1976, at 8, col. 4; MAR. FISH. REV., Jan. 1976, at 36. The major United States fishing operation in the Gulf of California is for tuna.

⁷⁷ MAR. FISH. REV., Jan. 1976, at 36. This law has only been passed in first debate.

⁷⁸ 22 U.S.C. §§ 1971-79 (Supp. V, 1975). The Fishermen's Protective Act was passed in 1954 to encourage fishing in areas considered high seas by the United States but regarded as territorial waters or fishery zones by certain Latin American nations. The Act contained provisions for compensation of owners of American vessels for losses due to seizure, penalties and confiscation by coastal states asserting "illegal" claims.

Fisheries Act.⁷⁹ American fishermen will continue to be reimbursed for seizure by Latin American countries on the basis of claims in territorial seas or high seas not recognized by the United States.⁸⁰ In addition, an amendment to the Fisherman's Protective Act will provide reimbursement to fishermen:

[I]f any general claim of any foreign country to exclusive fishery management authority is recognized by the United States, and any vessel of the United States is seized by such foreign country on the basis of conditions and restrictions under such claim, if such conditions and restrictions-

- (A) are unrelated to fishery conservation and management,
- (B) fail to consider and take into account traditional fishing practices of vessels of the United States,
- (C) are greater or more onerous than the conditions and restrictions which the United States applies to foreign fishing vessels subject to the exclusive fishery management authority of the United States (as established in Title I of the Fishery Conservation and Management Act of 1976), or
- (D) fail to allow fishing vessels of the United States equitable access to fish subject to such country's exclusive fishery management authority.⁸¹

This provision puts the United States in the interesting position of having the option to recognize general fisheries claims of Latin American countries and at the same time encourage the continued violation of those claims by United States vessels. Such a position is difficult to reconcile either by the legislative history of the Fisherman's Protective Act⁸² or by any precept of customary international law. It can only be explained as a concession to the distant water fishing industry and is sure to cause further contention in United States-Latin American negotiations.

V. RASH OF UNILATERAL ACTIONS

Although several countries had unilaterally declared fisheries zones prior to the United States action, these countries had neither the power nor the influence to establish the principle of the extended economic zone as a clearly acceptable concept in international law. The affirmation of this principle by the United States not only aided in the acceptance of economic zones as consistent with customary international law, but has also

⁷⁹ See generally Meron, *The Fishermen's Protective Act: A Case Study in Contemporary Legal Strategy of the United States*, 69 AM. J. INT'L L. 290 (1975) [hereinafter cited as Meron].

⁸⁰ Fisherman's Protective Act of 1967, 22 U.S.C. § 1973 (Supp. 1975 & Ph. 2, pt. 1, June 1976).

⁸¹ *Id.* § 1972.

⁸² The legislative history indicates that this Act was based on the illegality of Latin American claims. Meron, *supra* note 79, at 305.

afforded many countries the opportunity to extend zones unilaterally without fear of adverse reaction from the United States. Other nations have since taken action to protect their interests and improve their negotiating positions.

A. *Canada*

In 1970 Canada enacted statutes establishing a 100 mile antipollution zone⁸³ and authorizing the extension of exclusive fishing zones beyond twelve miles.⁸⁴ Partially due to American negative reaction to the antipollution zone⁸⁵ the Canadian government made no attempt to impose an extended fisheries zone. As late as August 1975, Prime Minister Pierre Trudeau stated that the Canadians would be foolish to jeopardize the Law of the Sea Conference negotiations for the "purely temporary, paper success" of a unilaterally declared economic zone.⁸⁶ However, when United States action became imminent, Canada began to make preparations for the extension of a 200 mile fisheries zone. Through bilateral negotiations Canada has been assured of the recognition of its 200 mile fisheries zone by Norway,⁸⁷ the Soviet Union,⁸⁸ Poland,⁸⁹ Portugal,⁹⁰ and possibly Spain.⁹¹ On June 4, 1976, the Canadian Foreign Secretary announced that Canada will unilaterally extend its fishery jurisdiction to 200 miles effective January 1, 1977.⁹²

The United States and Canada are currently negotiating two instruments in preparation for the extensions of jurisdiction: a new Pacific Salmon Treaty and a comprehensive bilateral fisheries treaty.⁹³ The objective of the Salmon Treaty is limitation of the interception by either country of salmon originating in the other's rivers.⁹⁴ Through a comprehensive agreement Canada hopes to continue reciprocal fishing privileges, regulate fish stocks in boundary regions and establish a bilateral fisheries commission.⁹⁵ As an interim measure the United States and Canada have extended

⁸³ Henkin, *supra* note 6, at 131.

⁸⁴ *Id.* An Act to amend the Territorial Sea and Fishing Zone Act, CAN. REV. STAT. c. 68 (1969-70), reprinted in 9 INT'L LEGAL MAT'LS 543 (1970).

⁸⁵ Henkin, *supra* note 6, at 131-32. See also U.S. Dep't of State Press Release No. 121 (April 15, 1970), reprinted in 9 INT'L LEGAL MAT'LS 605 (1970).

⁸⁶ *Canadian Officials Reject Unilateral Extension of 200 Mile Economic Zone*, MAR. FISH. REV., Dec. 1975, at 37.

⁸⁷ *Current Legal Developments: Law of the Sea*, 25 INT'L & COMP. L.Q. 685, 686 (1976) [hereinafter cited as *Current Legal Developments*].

⁸⁸ N.Y. Times, May 20, 1976, at 24, col. 6.

⁸⁹ MAR. FISH. REV., March 1976, at 31.

⁹⁰ Wall St. J., June 7, 1976, at 12, col. 3.

⁹¹ MAR. FISH. REV., June 1976, at 27.

⁹² N.Y. Times, June 5, 1976, at 5, col. 5.

⁹³ Address by J.H. Warren, Canadian Ambassador to the United States, to the Rotary Club of Boston (Sept. 15, 1976).

⁹⁴ *Id.*

their Agreement on Reciprocal Fishing Privileges⁹⁶ until April 24, 1977.⁹⁷

B. Mexico

Mexico claimed a 200 mile exclusive economic zone by decree of January 22, 1976, amending article 27 of its Constitution.⁹⁸ Mexico claimed sovereign rights for the purposes of exploration, exploitation, conservation, and management of all natural resources within the zone including marine life and minerals.⁹⁹ It recognized that other states retain freedom of navigation, overflight, and laying of submarine cables and pipelines.¹⁰⁰

Foreign vessels will be required to purchase permits "for each trip" and will be allowed to fish for stocks that exceed the capacity of the Mexican fishing industry.¹⁰¹ Permits will not be granted, however, for certain species which have been restricted by law for exclusive exploitation by the Mexican fishing industry.¹⁰² Foreign fishing rights will be gradually reduced with a long range goal of total exclusion.¹⁰³ The Gulf of California has been declared "interior waters" and closed to foreign fishing.¹⁰⁴ These restrictions will have an immediate detrimental effect on United States tuna fishing interests in the Gulf of California and its shrimp fishing industry in the Gulf of Mexico.¹⁰⁵

The Mexican legislation includes additional provisions that will aid in the development of its fishing industry. Foreign fishing companies are

⁹⁵ *Id.*

⁹⁶ April 24, 1970, United States-Canada, 21 U.S.T. 1283, T.I.A.S. No. 6879.

⁹⁷ 74 DEP'T STATE BULL. 731 (June 7, 1976).

⁹⁸ D.O. (Mex.), Feb. 13, 1976, reprinted in 15 INT'L LEGAL MAT'LS 382 (1976).

⁹⁹ *Id.* at 383. Article 4:

Within the exclusive economic zone, the Nation has:

- I. Sovereign rights of exploration and exploitation, conservation and management of natural resources, both renewable and nonrenewable of the seabed, including the subsoil, and the superjacent waters;
- II. Exclusive rights and jurisdiction with regard to the establishment and use of artificial islands, installations, and structures;
- III. Exclusive jurisdiction with regard to other activities relating to the exploration and economic exploitation of the zone;
- IV. Jurisdiction over:
 - (a) Preservation of the marine environment, including pollution control and abatement;
 - (b) Scientific research.

¹⁰⁰ *Id.* Article 5 states: "Within the exclusive economic zone foreign States shall enjoy freedom of navigation and overflight, the right to lay underwater cables and pipelines, and the right to other internationally lawful uses related to navigation and communications."

¹⁰¹ Decree Amending Law on Fisheries Development, D.O. (Mex.), Feb. 13, 1976, reprinted in 15 INT'L LEGAL MAT'LS 385 (1976) [hereinafter cited as Mexican Decree].

¹⁰² *Id.* at 386.

¹⁰³ N.Y. Times, June 7, 1976, at 8, col. 4.

¹⁰⁴ *Id.*

¹⁰⁵ Fishing companies averaged \$15 million a year on shrimp caught within Mexico's exclusive economic zone. *J. of Com. and Commercial*, March 3, 1976, at 1, col. 4.

required to share their technology and industrial processing methods with Mexico gratuitously.¹⁰⁶ In addition, 50 percent of all crews of foreign vessels must be Mexican citizens receiving pay and benefits identical to those of foreign crewmen.¹⁰⁷ This zone was effective on June 6, 1976.¹⁰⁸

C. Iceland

On October 15, 1975, Iceland extended its fisheries zone from 50 to 200 miles¹⁰⁹ and instigated a third "Cod War" with Great Britain.¹¹⁰ Because cod represents 40 percent of the country's total exports, Iceland considered the extension of the fisheries zone a matter of economic survival.¹¹¹ The zone may indeed protect endangered Icelandic fishing stocks; however, retaliatory trade tariffs imposed by the European Common Market, a growing trade deficit and negative net foreign exchange reserves may also be directly related to the extension of the 200 mile zone.¹¹²

Great Britain's codfishing industry in Icelandic waters amounted to \$69 million a year.¹¹³ Unwilling to concede this substantial portion of its fishing industry to such Icelandic action, Great Britain ordered Royal Navy ships to accompany British trawlers and protect them from Icelandic gunboats.¹¹⁴ A series of incidents ensued, climaxed by Icelandic severance of relations with Britain in February 1976.¹¹⁵

Pressure from NATO allies who feared loss of the key NATO base at Keflavik, the expense of navy-protected fishing and the inevitable worldwide recognition of 200 mile economic zones¹¹⁶ caused tacit recognition by Britain of the Icelandic zone through a six month agreement that limited the numbers of British trawlers entering the zone.¹¹⁷ The agreement also arranged negotiations for a long-term reciprocal fishing agreement between Iceland and the European Economic Community (EEC).¹¹⁸

Iceland had concluded earlier agreements with Belgium, the Federal Republic of Germany, and Norway¹¹⁹ to limit the fishing of these countries

¹⁰⁶ Mexican Decree, *supra* note 101, at 386.

¹⁰⁷ *Id.*

¹⁰⁸ *Current Legal Developments*, *supra* note 87, at 685.

¹⁰⁹ *Id.* at 687.

¹¹⁰ See generally Bilder, *The Anglo-Icelandic Fisheries Dispute*, 1973 Wisc. L.R. 37; Churchill, *The Fisheries Jurisdiction Cases: The Contribution of the International Court of Justice* 40, 24 INT'L & COMP. L.Q. 82 (1975).

¹¹¹ TIME, June 14, 1976, at 37.

¹¹² COM. TODAY, Nov. 10, 1975, at 30.

¹¹³ TIME, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ THE ECONOMIST, Feb. 21, 1976, at 13.

¹¹⁶ THE ECONOMIST, May 29, 1976, at 51.

¹¹⁷ Agreement Concerning British Fishing in Icelandic Waters, June 1, 1976, *reprinted in* 15 INT'L LEGAL MAT'LS 878 (1976).

¹¹⁸ *Id.* at 888-89.

¹¹⁹ *Current Legal Developments*, *supra* note 87, at 687.

within the zone. By reaching an accord with Britain, Iceland has clearly established its sovereignty in the zone and will enjoy a distinct advantage over Great Britain in subsequent EEC-Icelandic negotiation.

D. *European Economic Community*

On September 23, 1976, the EEC Commission called for the imposition of a joint 200 mile economic zone for the nine community countries.¹²⁰ The zone will apply to fishing rights only¹²¹ and each state will maintain its own claims as to seabed oil and minerals on the basis of the Geneva Convention on the Continental Shelf.¹²² The restriction of the joint zone to fishing rights alone was a major concession to Britain and Ireland,¹²³ but these countries did not receive the special 50 mile exclusive fishing zone that they demanded within the joint EZ. All member nations will have exclusive rights only within the twelve mile territorial sea.¹²⁴

Although Britain has violently opposed the establishment of worldwide 200 mile economic zones as "flagrantly inequitable," she has recently decided that the imposition of such zones is inevitable and that her best course, therefore, is not to resist but to attempt to improve her position.¹²⁵ Britain hopes to accomplish this as to fishing and seabed oil by the annexation of Rockall, an islet 250 miles west of Scotland.¹²⁶ This is the only direction in which Great Britain can extend a full 200 mile boundary. If Rockall can generate an economic zone, Britain will control an additional 125,000 square mile area.¹²⁷ However, it is unlikely that any LOS Conference agreement will allow an uninhabitable rock to create such an extensive zone.¹²⁸

The French cabinet has acted independently of the EEC in regard to its territories. On June 16, 1976, France adopted a draft bill claiming exclusive exploration and exploitation rights on and under the seabed and in all waters up to 200 miles from any territory administered by France.¹²⁹ If islands are allowed to generate 200 mile zones, this action will greatly increase the areas under French control.

E. *Other Unilateral Actions*

Prior to January 1, 1974, eleven nations, predominantly Latin American,

¹²⁰ THE ECONOMIST, Oct. 2, 1976, at 14.

¹²¹ THE ECONOMIST, Sept. 18, 1976, at 16.

¹²² April 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (effective for United States June 10, 1964).

¹²³ THE ECONOMIST, *supra* note 121.

¹²⁴ THE ECONOMIST, *supra* note 120.

¹²⁵ THE ECONOMIST, Mar. 13, 1976, at 13.

¹²⁶ THE ECONOMIST, *supra* note 121.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ N.Y. Times, June 17, 1976, at 18, col. 8.

had claimed 200 mile economic zones or their equivalent.¹³⁰ In the following months at least nineteen other States, either in anticipation of or as a direct result of United States enactment of the Fisheries Act, have announced the unilateral extension of 200 mile economic zones or their equivalent.¹³⁰ In addition to those already mentioned, Colombia,¹³¹ Senegal,¹³² Somalia,¹³³ Norway,¹³⁴ India,¹³⁵ and Sri Lanka¹³⁶ have recently declared 200 mile zones. Korea has also announced its intention to extend a 200 mile fishing zone¹³⁷ and Greenland has proposed a 100 mile zone.¹³⁸ Action by other coastal nations is likely to follow.

VI. CONCLUSION

The most important consequence of the passage of the Fisheries Act lies in the legitimization of the unilateral establishment of 200 mile economic zones. Although the concept of the economic zone had been generally accepted by the LOS Conference, few nations had been willing to unilaterally extend such zones in the face of strong opposition from both the United States and the Soviet Union. The adoption of a 200 mile EZ by the United States made unilateral extension an acceptable concept. The result, however, has been a virtual "sea-grab" by coastal nations either because they no longer feared denunciation by the United States or anticipated loss of prestige or bargaining power by awaiting resolution of the issue by the Law of the Sea Conference.

Even though the successful unilateral extension of these zones may lessen the incentive of coastal nations to reach agreement at the LOS Conference, it is the geographically disadvantaged and developing states that are actually causing the deadlock in major areas of the Conference. The United States will be in a better bargaining position vis-à-vis these states concerning seabed mining and other issues as it becomes apparent that most nations are willing to act unilaterally. The power of the geographically disadvantaged and developing states in the LOS Conference is derived from the fact that they control a majority vote in the United Nations General Assembly, but this control is no defense to unilateral action. The only method by which these nations will be able to protect their interests is by compromising their demands in the LOS Conference.

The United States hoped to control the nature and extent of unilaterally

¹³⁰ KNIGHT, *supra* note 5, at 702.

¹³¹ *Current Legal Developments*, *supra* note 87, at 688.

¹³² WORLD NEWS DIGEST, Aug. 14, 1976, at 591.

¹³³ 22 KEESING'S CONTEMPORARY ARCHIVES 27514 (Jan. 9, 1976).

¹³⁴ THE ECONOMIST, *supra* note 120.

¹³⁵ FAR EAST. ECON. REV., *supra* note 44 .

¹³⁶ *Id.*

¹³⁷ MAR. FISH. REV., June 1976, at 38.

¹³⁸ MAR. FISH. REV., April 1976, at 33.

imposed zones by other nations through provisions in the Fisheries Act requiring reciprocity as a requirement for United States recognition of a zone,¹³⁹ and by giving the Secretary of State the right to prohibit importation of fish products¹⁴⁰ from nations that refuse United States vessels equitable access to their zones or which impose more restrictive terms than those established in the Fisheries Act.¹⁴¹ It is unrealistic to believe that such unilaterally imposed limitations can be workable or enforceable. These provisions of the Fisheries Act seem to have had little or no effect on zones declared to this point. These types of problems can only be resolved through bilateral negotiations. The United States appears to have established new customary international law as to the right of a nation to declare unilaterally a 200 mile economic zone—but the United States has not been successful in attempts to unilaterally manipulate that right.

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¹³⁹ Fisheries Act, 16 U.S.C.A. (Ph. 2, pt. 1, June 1976) § 1822(e).

¹⁴⁰ *Id.* § 1825(b).

¹⁴¹ *Id.* § 1825(a).