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COMMENTS

The United States Distant Water Fishing Industry and the United Nations Law of the Sea Conference—A Position Paper

WILLIAM UTZ*

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INTRODUCTION

Any discussion of the United States fishing industry and its relationship to the present United Nations Conference on the Law of the Sea (UNCLOS) must commence with an understanding of the importance of that industry. The U.S. fishing industry is a primary source of food—a real and immediate human need. Despite this important position, there are other issues at UNCLOS which have attracted considerably more attention than fishing. For the United States, the fishing issue is domestically complicated because its fishing industry is complex and multifaceted—composed of segments with divergent positions on the U.S. stance at UNCLOS. On any given issue, conflicting perspectives may develop between the U.S. coastal fishermen and the U.S. distant water fishing fleets.¹ Divergent positions are a natural outgrowth of the differences in type and location of fishing activities.

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1. The coastal water interests would devise a more rigid, exclusive control by the coastal nation; while distant water fishermen would see such U.S. action as precipitating similar action by foreign nations against U.S. flag vessels operating off their coasts. Essentially, the distant water fleets desire minimal fishing fees and the coastal interests favor maximum fishing fees.

Prior to the convening of UNCLOS the U.S. fishing industry was asked by the U.S. government, primarily through the Department of State, to bring together the various interests of U.S. fishermen and develop a comprehensive fisheries negotiating position acceptable to all segments of the industry. Fishermen realized the importance to themselves, to the nation, and to the world of developing a program which would provide order in the utilization of the oceans. With this in mind, representatives of U.S. fishing industry interests formulated a workable solution to the fishing problems. Pursuant to intensive effort on the part of these representatives, a comprehensive program which not only seemed workable but also biologically sound² was reached. The plan was the "species approach" to the living resources of the sea.

THE SPECIES APPROACH

The species approach plan provided that each coastal state develop and manage the individual species of marine life off of its coast. Different standards and criteria for each species were to be established concerning access to the fishery and the actual fishing methods. Standards were to be based on the population and biological limits of a particular species and to be tailored to compensate for differing characteristics of the many diverse species of fish.³

This plan not only offered protection to the near shore fisheries but also the flexibility required for the distant water interests. For example, tuna is a highly migratory species not easily controlled by any one coastal nation. Under the species approach an international commission would be set up to manage such fisheries. On the other hand, shrimp are not highly migratory. Therefore, distant water shrimpers could look, on a case by case basis, to what degree of fish-

2. The plan was based on a biological view of the fishery. The biology of each harvested species was to be considered in determining the required management techniques. The management was not limited by zones of control.

3. Obviously the harvestable stocks of the world have different life cycles. Some species, such as tuna and mackerel, migrate over far reaching stretches of the high seas and coastal waters of the world. Other species are anadromous, spawning in fresh waters and spending most of their lives in the salt water of the oceans. Salmon, which range from the coastal waters to the high seas, exemplify this type of fish. Eels, which spawn at sea and then migrate to fresh water, are, on the other hand, catadromous. Some species are primarily coastal-reproducing, living and dying relatively near shore, *i.e.*, shrimp, menhaden, and flounder. Standards for the management of any particular species must be dependent upon the particular life cycle of that species.

ing would be conducive to any particular shrimp population being considered for harvest. Guidelines for the management of that population would be developed in conjunction with the country off of whose coast the resource exists, that is, the coastal state.

The species approach plan would give the coastal state powers over these species similar to the powers provided in the 200 mile zone by the United States Fishery Conservation and Management Act (FCMA).⁴ However, under a zone type plan, the coastal state would have the initial authority to manage a species only within a certain distance from shore. A management scheme based strictly on a 200 mile zone would provide limited effectiveness in managing far ranging species. This limitation provided the impetus for the industry's species approach proposal. If a species ranged beyond 200 miles, under the species approach, the coastal state would still exercise primary management authority. Of course, there would be some limitations on this authority. Strict guidelines for coastal states would be required to ensure equitable application of management plans. Some resources would require special management vehicles, such as an international commission, or possibly bilateral or multilateral agreements among affected nations.

The species approach was painstakingly developed by the U.S. fishing industry despite the inherent conflicts between coastal and distant-water fisheries. The predominant importance of this compromise was that it developed a management program acceptable to all U.S. fishing interests. Without that compromise the United States position at UNCLOS would have been weakened by divergent interests, and the quibbling which would have accompanied them. Realistically, economics would demand protection of the shrimp, tuna, and salmon segments of the U.S. industry at the expense of the coastal fisheries because those distant water fleets are the largest money producers.⁵ Instead, a united industry offered the species approach in an effort to protect, as much as possible, all segments of the U.S. fishing industry.

4. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (1976) [hereinafter cited as FCMA].

5. The dollar value of the shrimp, tuna, and salmon catch exceeds fifty percent of the total dollar value for the total U.S. catch. See U.S. Department of Commerce, Current Fishery Statistics No. 7200, Fisheries of the United States, 1976 1-10 (Apr. 1977).

Little remains of the species approach plan. The text of the Informal Composite Negotiating Text (ICNT)⁶ which concerns living resources bears little resemblance to the initial plan worked out by the U.S. fishing industry. The approach embodied in the ICNT is the 200 mile Exclusive Economic Zone (EEZ). The species approach was not adopted at UNCLOS.

THE EEZ APPROACH

The present text of the ICNT setting forth the EEZ approach creates various problems for the industry. Areas of particular concern include control over the extended jurisdictional zones, determination and allocation of surplus resources, and dispute settlement. An overall evaluation of the ICNT from the U.S. fishing industry's perspective leads to the conclusion that UNCLOS is doing nothing to benefit the U.S. fishing industry—especially the distant water fishermen.

Control

Unfortunately, the current text sets up the EEZ as a zone scheme with management tied primarily to distance rather than individual species. The control to be exercised by the coastal state in this 200 mile zone has been a point of contention since the beginning of the conference. As early as the Caracas meeting⁷ representatives of various developing countries, especially the Chile, Ecuador, and Peru (CEP) Group, claimed that they intended to exercise sovereign rights within their 200 mile zones. These countries felt no obligation to respect the EEZ guidelines proposed by other nations. Some of the developing countries felt that the guidelines established in the United States domestic plan (FCMA)⁸ were protective of the interests of the developed countries at the expense of the stated goal of the conference—protecting the interests of mankind. These nations argued that the developed countries were not interested in successfully protecting living resources during their development period, when it was to their benefit to take optimum advantage of the resources

6. Informal Composite Negotiating Text, Third United Nations Conference on the Law of the Sea, July 15, 1977, U.N. Doc. A/Conf. 62/WP.10/Part V (1977). [hereinafter cited as ICNT].

7. UNCLOS III began with a short organizational meeting in New York City in December 1973. Substantive work started on June 20, 1974, in Caracas, Venezuela. The Caracas meeting was followed by meetings in Geneva in 1975, in New York in 1976 and 1977, and in Geneva and New York in 1978.

8. FCMA, *supra* note 4, §§ 201, 301.

within their EEZ and to pollute the water and air⁹ without limitations.

Another major problem the fishing industry has in accepting the ICNT concerns coastal management control over the EEZ. With the authority to manage the resources off its coasts, the coastal state necessarily has a responsibility for effective management that cannot be undertaken lightly. Management will be a precise and complicated process imposing foremost a duty to consider the best interests of any particular fishery. The coastal state's fishermen will have first priority access to any fisheries resource. After the optimum yield is determined by the coastal state, that managing state will make any existing surplus available to other nations.¹⁰ This plan presents two major points for dispute: (1) determination of the existence of any surplus, and (2) determination of the allocation.

Surplus Determination

The ICNT provides that "the coastal state shall determine the allowable catch of the living resources in its exclusive economic zone."¹¹ The coastal states are also directed to "promote the objective of optimum utilization of the living resources in the exclusive economic zone."¹² When a coastal state does not have the capacity to harvest the entire allowable catch, as determined by that coastal state, it "shall, through agreements or other arrangement . . . , give other states access to the surplus of the allowable catch."¹³ These provisions are of no significant benefit to the distant water fishing interests since the coastal state determines the allowable catch, its own capacity, and finally, the amount of surplus, if any. Coastal states can be expected to utilize their own scientific data rather than refer to United States or world organizational sources such as the Food and Agriculture Organization of the United Nations (FAO).¹⁴ Challenges

9. This claim is based on the fact that today's developed countries reached their present success by exploiting the resources of the world without conservational and environmental restrictions. These restrictions are now advantageous to the "user" countries and are being urged upon the developing countries. Therefore, the developing countries argue that they are being asked to carry an unfairly heavy load as they strive for development.

10. ICNT, *supra* note 6, art. 62, para. 2.

11. *Id.* art. 61, para. 1.

12. *Id.* art. 62, para. 1.

13. *Id.* art. 62, para. 2.

14. Whether based on national pride, embarrassment, or opportunism, nations may reject outside data especially when rejection is in their own self interest.

to a coastal state's determination of these factors will take years; even the determinations are patently absurd. In the interim, U.S. distant water fishermen, if precluded from the fishery, could go into bankruptcy. Article 62(3) of the ICNT is particularly troublesome in granting access to the resources of the EEZ. The coastal state "shall take into account all relevant factors including, *inter alia*, the significance of the living resources of the area to the economy of the coastal state concerned and its other national interests" ¹⁵ "Other national interests" is nothing more than a concession to the politicians. Such wording reflects a belief by some that the fishing issue is too politically strategic to leave to fishermen and economists. ¹⁶ No one in the industry is satisfied with this sort of provision.

Undeniably, fisheries issues have been discussed at UNCLOS, and some consider the pertinent text of the ICNT successful. Indeed, there may be a success in that the Conference reached a tentative agreement. Those directly concerned—the U.S. fishermen—realize, however, that the conference has gained little for them. The United States will have the most scientifically accurate statistics in the world and can be expected to be honest with them. There may be some politics involved in allocating surplus, but actual determination of surplus off the coast of the United States will certainly be sound. This will not be the case for other coastal states with little or no statistical information and no propensity to utilize outside data.

An excellent example of the surplus problem can be illustrated by examining a relatively recent bilateral treaty between the United States and Mexico concerning fishing matters. ¹⁷ Mexico contended in the initial discussions that it was capable of harvesting the entire allowable catch of shrimp off of its coast. The Mexican delegation explained how this Mexican harvest could be accomplished. The U.S. fishing industry noted that Mexico's allegations were an expectation, and not factually related to what really was being harvested by that coastal state. In answer to these doubts, Mexico claimed that approximately one hundred Mexican boats would be added to the fishery the following year. That treaty is now three years old and there has been no increased Mexican effort. This example demonstrates that under this bilateral agreement, or even the present ICNT provisions,

15. ICNT, *supra* note 6, art. 62, para. 3.

16. See note 20 *infra*.

17. Fisheries Agreement, Nov. 24, 1976, United States—Mexico, T.I.A.S. No. 8853.

the U.S. distant water industry is virtually at the mercy of the controlling coastal state.

The United States 200 mile legislation recognizes traditional fishing rights¹⁸ but under the ICNT other coastal states are not bound by this concept.¹⁹ The coastal states may claim that there is no surplus, or, as in the case of Mexico, by professing a future increased effort may otherwise preclude foreign fishing activity in their coastal zones. Under the treaty with Mexico, U.S. fishermen will be excluded from the Mexican shrimp fishery by 1980 despite the surplus of shrimp which scientists from the United States have ample statistics to establish. In fact, at one negotiating session, Mexican scientists agreed with the United States scientists until the head of the Mexican delegation stopped them.²⁰

Surplus Allocation

If a coastal state does determine that there is a surplus of a given resource, the question then becomes who may harvest the surplus. The U.S. distant water industry is, of course, dependent on the traditional right concept. There has been considerable resistance at the conference to any rigid guidelines concerning the allocation and division of such a surplus. Rigid guidelines would take into account such factors as (1) length of time in the fishery, (2) capital expended for the fishery, and (3) other related considerations. Realistically, it may be more politically beneficial for a coastal nation to favor certain newcomers than to allow fishing access to a country that has previously fished in the area. Without rigid guidelines the fishermen that have developed the fishery and fishing equipment over a period of years may suddenly be excluded from a fishery that was once a high seas fishery and upon which the traditional fisherman has staked his life's work. This prospect of exclusion does not place the U.S. distant water fisherman in an enviable position. U.S. fishing interests have been informed by U.S. State Department officials that rigid guidelines concerning priority of access to surplus fishing harvests were not saleable at UNCLOS. This outcome of the allocation issue signifies a loss for the U.S. fishermen at the UNCLOS conference.

18. FCMA, *supra* note 4, § 201(d).

19. The Informal Composite Negotiating Text does not require consideration of traditional fishing other than minimizing economic dislocation. ICNT, *supra* note 2, art. 62, para. 3.

20. Agreement between U.S. scientists and their Mexican counterparts was squelched by the head of the Mexican delegation who stated that the surplus issue was not to be left to scientists and fishermen but to politicians.

The EEZ management plan is certain to have a profound secondary impact on the U.S. fishing industry as a whole. Likely effects on the shrimp industry are illustrative. A 200 mile EEZ off Brazil and Mexico will probably exclude U.S. fishermen from those areas and thereby eliminate a healthy portion of the shrimp production of the United States. The displaced U.S. fishing boats will be forced back into the U.S. portion of the Gulf of Mexico, creating an overabundance of boats in an economic, although not necessarily in a biological, sense.²¹

U.S. shrimp boats which regularly shrimp in the Gulf of Mexico have always operated in the U.S. Gulf except during "slow" periods. During these periods U.S. shrimpers generally migrate to the Mexican Gulf and shrimp fifteen to thirty miles off shore. Although the catch in the Mexican waters comprises a relatively small proportion of the total U.S. shrimp catch, this Mexican fishery is important to the U.S. industry because it makes up a substantial part of the total shrimp catch during the slow periods. This catch keeps the processing plants fully operational and the shrimp boats running during the slack time. A 200 mile EEZ coupled with the expected exclusion of U.S. shrimpers from the fisheries off areas of South America and Mexico will force these distant water and Gulf shrimpers back into the U.S. Gulf year around. This may have disastrous effects for processing plants during slack periods. Since the distant water shrimpers traditionally have large, modern, and efficient boats, the real losers under the EEZ approach will be the smaller and less efficient producers—the "Ma and Pa" operators. Given the limited fishing area in the U.S. portion of the Gulf, the small operator will not only be at a disadvantage in head to head competition with incoming distant water boats, but if he has a breakdown or delay in operations, the small producer will not only lose what he would have caught during the delay, but he may also face a fished out resource on his return. As a result of the EEZ approach, the U.S. shrimping industry may be forced into a graduated scale of success for its participants. The most productive fleets which formerly fished off foreign coasts will catch shrimp; the next plateau of shrimpers will catch fewer shrimp; the next lower group, much fewer; and the lowest level, the least productive, will likely go out of business.

21. Shrimp cannot be overfished, in the normal sense of the term, because of the shrimp life cycle. If the shrimp are harvested off of the coast after the eggs are laid, the young will be safe in the estuarine areas. Even if all of the adults are taken, the young will mature and continue the cycle the next year. The really limiting factors on the shrimp population are the pollution and weather in the estuary.

The potentiality of business failure illuminates another problem confronting the U.S. fishing industry—the need for stability. In order to recommend the industry to investors the financial community, which unfortunately considers the fishing industry from the same perspective as it would a land based industry, requires assurance as to the stability of the U.S. fishing industry. The assurance might be forthcoming were order established under an UNCLOS treaty, but uncertainties built into the fishing articles of the ICNT provide little reason for confidence. The impending exclusion of U.S. distant water fishermen from their traditional fishing areas does not create an atmosphere of stability for the industry.

Despite the prospects of the EEZ scheme, there may still be cause for measured optimism. Joint venture operations provide one possible opportunity for the fishing industry. Even Brazil, which claims a 200 mile territorial sea, has proposed a joint venture scheme. The plan is rather restrictive and non-Brazilian participation is limited to forty-nine percent of the voting stockholders.²² Additionally, the Fishermen's Protective Act²³ offers remedial assistance but is a stop-gap measure which may have limited applicability after an UNCLOS treaty.²⁴ Other means of stabilizing the prospects of the U.S. distant water industry are needed. An UNCLOS treaty with rigid guidelines could have enhanced the future of U.S. distant water fishing interests.

Dispute Settlement

International political machinations have so permeated the UNCLOS that the fishing industry has become a thorn under the saddle of this elite political interest troop. The loose provisions of the ICNT are sufficient evidence of the high politicization of the negotiat-

22. The proposed Brazilian plan also limits majority control to natural-born Brazilian citizens. The vessels used in the fishery would be required to fly the Brazilian flag. This would preclude the use of vessels of U.S. ownership and registry. Generally, the proposal is that the entire operation be Brazilian.

23. Basically this Act provides for reimbursement to U.S. fishermen for charges paid to foreign governments for the release of the fishermen's seized fishing vessels. Fishermen's Protective Act of 1967, 22 U.S.C. § 1972 (Supp. V 1975).

24. Presumably, after order to the oceans is finally recognized, all jurisdictional claims will be standardized and there will be very few seizures based on the jurisdictional claims of a foreign country which are not officially recognized by the U.S. Government.

ing process.²⁵ The loose wording of parts of the fishery-related provisions of the ICNT leads to yet another problem—dispute settlement. For example, concerning the conservation of living resources: “Such measures shall also be designed to maintain or restore population of harvested species at levels which can produce the maximum sustainable yields, as qualified by relevant environmental and economic factors . . .”;²⁶ or concerning the above mentioned utilization article “the coastal state shall take into account . . . its other national interests. . . .”²⁷ Litigation, arbitration, or conciliation over the meaning of these articles could be extremely lengthy, assuming even the existence of a judicial body with proper jurisdiction. Whether such a court exists is a vital issue because dispute settlement for fishing questions is not yet clearly settled in the ICNT.²⁸

CONCLUSION

From the point of view of the U.S. distant water fishing industry, there are several problems in the general approach taken by the UNCLOS. First, there were too many issues on the negotiating table. Second, the issues were not systematically considered, not merely because of the great number of issues but because many unnecessary or inappropriate issues detracted from the consideration of the important ones. From the commencement of preliminary discussion and throughout the conferences, the straits issue occupied an inordinate amount of negotiating time,²⁹ not only for the United States but for

25. Many of the phrases used in the ICNT are in reality political loopholes. The “other national interests” phrase of article 62 is an example. The term is ambiguous. Often a lack of specificity in the text leaves much room for creative interpretations. The absence of guidelines for surplus determination and allocation in articles 61 and 62 is an example of this and shows the politicization of the conference.

26. ICNT, *supra* note 4, art. 61, para. 3.

27. *Id.* art. 62, para. 3.

28. There has been divergence of opinion as to the applicability of the dispute settlement provisions of the ICNT (article 296) to fishing disputes. Negotiating Group 5 met after the 1978 Geneva UNCLOS to work on this question. The resultant proposal would require conciliation in cases of inadequate conservation and management measures and also in cases of a coastal state’s refusal to determine or allocate a surplus. A final agreement on dispute settlement in the area of fishing questions has yet to be reached. Even accepting the proposal, many questions concerning disputes still remain. See Chairman’s Suggestion for a Compromise Formula U.N. Doc. 5/16 (1978), reprinted in Results of the Work of the Negotiating Group on Item (5) of Document A/Conf. 62/62 in Reports Document 100-06 GE 78-85880 (19 May 1978).

29. Fishing interests have always felt that the Conference was an improper forum for discussion of the straits question because (1) straits have always been traditional

all of the major maritime states. The straits issue, in particular, should not have been brought into the bargaining process, since discussion of the issue greatly detracted from the resolution of questions more properly before the conference. The straits issue became so important in the minds of the United States delegation that all else seemed subject to sacrifice.

Because of the undue emphasis on this issue the fishing industry was consistently requested to retreat from its already compromised position. On one occasion the industry was asked to develop a compromise position to entice certain countries to the table. The industry representatives literally worked all night to prepare a position paper, which required tough compromises from the industry. Even before the relevant nations responded to this initiative, a softer position was requested by the U.S. delegation leaders. Typically, the United States was too quick to compromise the interests of the U.S. fishing industry.³⁰ Consequently the fishing interests of the United States appear to be valued only as a bargaining chip at UNCLOS. The compendium of politically imperative issues which fill the ICNT submerges such essential questions as fishing rights.

While UNCLOS has been a wonderful forum for meeting people and exchanging views, an overall analysis reveals minimum benefit to the United States. The Conference to date has been preoccupied with myriad issues—providing a field day for international procrastinators and legal sleight of hand artists. This is tremendously frustrating to those who came to the conference with hopes of solving problems and establishing an order to the oceans. UNCLOS is, indeed, an opportunity that should not be wasted. To this point, however, the results of the conference are less than satisfactory, especially in the eyes of the U.S. distant water fishermen.

international waterways, (2) no country is in a position to unilaterally change this tradition and attempt to prohibit straits transit by the major powers, and (3) the straits are not "resources" in the spirit of UNCLOS. Also, the U.S. fisherman, being rather straightforward in their basic approach to the Conference, would invariably point out conflicts and inconsistencies in the U.S. position on straits.

30. Another example of the U.S. delegation's use of the U.S. fishing interests as a pawn at UNCLOS concerned the U.S. domestic 200 mile legislation. At one point the industry was asked to exert maximum lobbying efforts to hold up the 200 mile legislation because the U.S. delegation felt it was detrimental to negotiations at the Conference. Industry representatives went to great lengths to stall that legislation. Inexplicably on that same day the U.S. delegation accepted the 200 mile EEZ.