Ocean Law Memo

PREPARED BY THE OCEAN RESOURCES LAW PROGRAM, UNIVERSITY OF OREGON LAW SCHOOL, EUGENE, OREGON 97403, AS AN ADVISORY SERVICE OF THE SEA GRANT COLLEGE PROGRAM.

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THE GENEVA LOS SESSION AND FISHERIES MANAGEMENT

The Geneva session of the current U.N. Law of the Sea Conference is now history, and the question remains: Did anything significant happen? The same question was often asked following last summer's Caracas session, and again, as then, the answer depends on your definition of "significant." Again the negotiating machinery was in great motion--whirring, clicking and clanking--but was there any movement forward?

This time, though there is still no ocean-law treaty, I believe the answer to these questions should be a qualified "yes." A significant step toward an eventual treaty can be found in the last-minute introduction of a lengthy document called an "informal single negotiating text."

THE "SINGLE NEGOTIATING TEXT"

Throughout both the Caracas and the Geneva sessions, negotiations generally focused on flurries of draft proposals on various topics submitted from all directions by individual nations, blocs of nations, working groups, interest groups, and so forth. It was enough to make any diplomat cross-eyed, and the whole process was highly confused and confusing.

Then, at the end of the fifth week of the eight-week Geneva session, the Conference President called an important plenary meeting. There he chastised the delegates for the lack of progress; he then announced that he had directed the chairmen of the three Main Committees to draw together the proposals in their own areas and submit, before the end of the Geneva meeting, a single text of treaty provisions to be used as the basis for negotiations at the next session.

The "single negotiating text"--in three parts, one from each chairman--was distributed three weeks later, just as the gavel ended the Geneva meeting. Some observers now feel that any eventual treaty on the law of the sea will look very much like the single negotiating text. If so, the text is an important step and deserves examination and analysis.

For ocean users in the Pacific Northwest, the single text's provisions on fisheries management are the most significant, and they will be the main subject of this Ocean Law Memo.

THE FISHERIES PROPOSALS

The conference agenda items on fisheries problems were assigned to the Second Committee, and it is consequently in Part II of the single text that the fisheries-management articles are found. These articles have special meaning above and beyond most of the rest of the single text provisions because they are in principle more reflective of a negotiated position that nearly all nations appear ready to adopt. They resemble very closely, in fact, the fisheries-management scheme negotiated by the "Evensen Group," a group of eminent international lawyers chaired by the highly respected Norwegian jurist, Jens Evensen.

The single text's fisheries articles are found within the description of the "Exclusive Economic Zone" (EEZ). In more general parlance, the EEZ is known as the "200-mile zone." The EEZ is--or would be, once a part of a treaty--an ocean zone extending up to 200 nautical miles from shore, where the adjacent coastal nation would exercise a high degree of control, especially over both mineral and living natural resources. In the technical language of the document, the coastal nation is to be granted "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the bed and subsoil and the superjacent waters . . . ."

So each coastal nation is to be given the primary right to conserve and manage fisheries in its 200-mile ocean belt. However, this right also carries certain responsibilities. These include the duties to ensure that the living resources found within the zone are not endangered by over-exploitation and to attempt to maintain or restore populations of harvested species to the level of "maximum sustainable yield, as qualified by relevant environmental and economic factors . . . ."

The single text's most important limitation on the coastal nation's right to regulate fisheries in its EEZ is the obligation to promote the "optimum utilization" of the zone's fisheries. Translated, this principle means that the managing coastal nation must generally allow foreign fishermen to take the fish that the coastal nation cannot itself harvest, up to the maximum sustainable yield limit. The single text, in other words, adopts in theory the "preferential zone" concept for fisheries management, seemingly granting to the coastal nation manager only preferential rights to its EEZ fish, not exclusive rights. Nevertheless, this "mere preference" fades nearly into exclusivity: the coastal state will have sole authority to determine its own capacity to harvest and wide discretion to say which other countries can be allowed to fish the excess. In exercising this discretion, the coastal nation is allowed (the

document sets it in the form of a requirement!) to take into account all relevant factors, including its own economy "and its other national interests . . . ." The interests of nearby developing countries and landlocked countries are to be given weight for this purpose, as are, finally, the interests of those countries whose fishermen have "habitually" fished in the zone or who have assisted research efforts there.

The coastal nation is, then, to be given a considerable amount of control over the exploitation of fish stocks inhabiting its EEZ. Even where it decides to allow foreign fishing, it is allowed to regulate this fishing in the traditional methods and enforce its regulations, and to license and charge fees.

This would be the end of the management scheme if fishery resources were, like minerals, locked in place, or if fish minded imaginary lines in the sea. The fact is, of course, many of the ocean's living resources roam throughout large migratory patterns, no matter how hard we humans think our sea boundaries into place. The 200-mile limit is largely a political concept, not particularly well suited to the management of a fluid biological resource. Therefore, there must be some exceptions to the strict boundary approach, and the single text document provides a few.

First, the text requires the coastal nation to seek agreement on the regulation of fish stocks that also occur within the EEZ of another coastal nation.

Second, highly migratory species, essentially tuna, would have to be managed through cooperation by the coastal nation and other nations who fish them, and in conjunction with appropriate international organizations. (The article on highly migratory species is very general. The subject is apparently quite controversial, and the Evensen Group found it necessary at the last minute to withdraw its suggested provision; there was no consensus within the Group.)

Third, the text contains an article on anadromous fish, such as salmon. Anadromous fish spawn in inland streams, then move to the open sea, often migrating far beyond 200 miles from shore. Salmon are highly prized by the fishermen of the countries where the spawning occurs and by fishermen from other nations who have traditionally caught the fish on the high seas. These two types of nations--host country and traditional fishing country--make up only seven of the nearly 150 nations in the Law of the Sea Conference. The single text's article on anadromous fish is the result of a negotiated compromise among these seven nations. It can therefore be viewed as a solid prediction of the eventual rule.

In general, the anadromous-species provision gives the host country "primary interest in and responsibility for" those species, and prohibits fishing for anadromous species beyond the host nation's EEZ. An exception for extra-zone fishing would exist in favor of foreign nations who would experience "economic dislocation" if their high seas fishing for anadromous fishes were to be discontinued. There is, moreover, no provision for phasing out this sort of foreign fishing; in effect, implementation of the andromous-species provision would "freeze" the situation as it now stands, preventing only fishing beyond 200 miles by nations newly entering the fishery.

Enforcement of fishing regulations, from initial vessel-boarding through judicial proceedings, would be conducted by the coastal nation in its EEZ. Neither imprisonment nor any other form of corporal punishment is allowed; the principal sanctions would, then, be fines and seizure of cargo and vessel. Enforcement of anadromous-species regulations in areas beyond the host nation's EEZ would be only by agreement between the host nation and the other nations allowed to fish there.

In the case of certain species, the coastal nation's regulatory rights could, by other provisions of the single text, extend occasionally beyond 200 miles. The text allows a coastal nation to exercise "sovereign rights" over the natural resources of its "continental shelf"--including within the definition of that term the whole continental margin down to the abyssal plain of the deep seabed. In many places, the continental shelf, so defined, protrudes farther seaward than 200 miles. "Natural resources" includes, as it did in the 1958 Continental Shelf Convention, "sedentary species" of living organisms. Inexcusably, the definition of sedentary species is no more specific than the 1958 Convention's: "organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or subsoil." Does this definition encompass only kelp and a few species of worms and clams, or does it also (as claimed by the U.S.) cover such important shellfish as lobster and crab? The answer has not been clear since 1958 and apparently will continue to be clouded for some time.

1976 NEW YORK SESSION

Whether the fisheries provisions of the single negotiating text will ever become part of a real treaty is subject to some doubt. Despite the progress represented by the emergence of the Geneva text, the Third Law of the Sea Conference still hangs in the balance. The next session will be held at the U.N. headquarters in New York for eight weeks, beginning March 29, 1976. That meeting will undoubtedly see proposals of amendments and alternatives to the single text's provisions. All of these proposals will be debated, some voted on, and the complex process of international negotiation and agreement will grind on.

In the meantime, though, the United States Congress is likely to establish unilaterally a 200-mile fishing zone for the U.S., and other countries are likely to do the same prior to the New York meeting. If so, the urgency--indeed, the necessity--for a Law of the Sea treaty on fisheries management may well disappear.

Jon L. Jacobson June 20, 1975

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For further information on subjects covered in the Ocean Law Memo, contact Professor Jon Jacobson, Ocean Resources Law Program, University of Oregon Law School, Eugene, OR 97403. Tel. (503) 686-3845.

Sea Grant College Program
Oregon State University
Corvallis, Oregon 97331