note that two "Third World" and "new" states here openly violate principles to which the Third World, in substantial part, owes its existence.

In the most immediate sense, Moroccan and Mauritanian behavior in the *Western Sahara* case threatens to ignite flammable irredentist situations existing throughout Africa. Political borders on the continent do not correspond to the distribution of tribal, ethnic, and linguistic communities. Virtually every African state has, in the language of the General Assembly and the International Court, "legal ties" of some sort with people and events in neighboring countries. Any doctrine that authorizes the consolidation of inchoate "legal ties" into territorial sovereignty will prove, at the least, mischievous and at the most, calamitous for regional order. The actions in Western Sahara thus violate not only the rights of the inhabitants of the territory, but also the hopes for minimum order for all Africans.

The reluctance of the Organization of African Unity to take a forthright position on the case is understandable, but it is wrong. The perniciousness of this case will go far beyond the sands of the Sahara.

W. MICHAEL REISMAN

FOREIGN POLICY AND FIDELITY TO LAW: THE ANATOMY OF A TREATY VIOLATION

On April 13 President Ford signed a bill unilaterally to extend the fisheries jurisdiction of the United States from the present 12-mile limit to 200 miles onto the high seas (and even thousands of miles at sea with regard to salmon) effective March 1, 1977.[1] Barring a sudden breakthrough in the law of the sea negotiations, as of March 1, 1977 the Coast Guard may begin arresting vessels on the high seas pursuant to this act in violation of the treaty obligations of the United States. This action again exposes the inadequacy of the present foreign policy process for taking an international legal perspective into account.[2] It may also prove the greatest mistake in the history of U.S. oceans policy.

During the past decade fishing pressure on stocks off the U.S. coasts has increased dramatically, largely as a result of an increase in foreign fleets using newer technologies. The result has been that some stocks such as haddock were largely fished out and many others were severely depleted. These problems off our coast mirror a worldwide crisis in fishery management with existing international law not providing jurisdiction coextensive with the range of the stocks. The resulting "common pool problem" actually created a disincentive to conserve similar to early experiences with depletion of oil reserves in the East Texas oil fields. Thus the culprit itself was to a significant extent an outmoded legal structure. The plethora of

[1] *See* the "Statement of the President Upon Signing the 200-Mile Fishing Legislation," April 13, 1976. 12 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 644 (1976), full text in *Contemporary Practice* section, *infra* p. 820.

[2] *See, e.g.*, Moore, *Law and National Security*, 51 FOR. AFF. 408 (1973); Falk, *Law, Lawyers, and the Conduct of American Foreign Relations*, 78 YALE L.J. 919 (1969).

fisheries bilaterals and limited multilaterals that sprang up to plug the disintegration of this legal structure only moderately stemmed the flow.

By the early 1970's these defects in fisheries jurisdiction were well understood. The remedy was to seek a new law of the sea which would recognize fisheries jurisdiction coextensive with the range of the principal types of species. That is, an extension of coastal limits for coastal species (200 miles includes about 95% of coastal species), host state control over anadromous species (such as salmon) throughout their range on the high seas, and a network of regional international agreements for highly migratory species (such as tuna). By the end of the 1975 Geneva session of the Law of the Sea Conference it seemed likely that such a structure would be adopted as part of a comprehensive treaty, though the details of the 200-mile economic zone and provisions for highly migratory species were yet to be agreed.[3]

Prior to the Geneva session of the Conference the Senate had overwhelmingly passed a bill unilaterally to extend U.S. fishing jurisdiction from the present 12-mile fishery contiguous zone to 200 miles. In doing so it was understood by the Senate that it was too late for House action that session.[4] Passage was widely regarded as a signal to Executive branch policymakers that unless something was done quickly to ease the foreign fishing pressure Congress would act.

Executive branch interim fisheries policy had focussed on negotiating yearly bilateral agreements (with the Soviets, Japanese, Koreans, and others) and limited multilateral agreements (within the International Commission for Northwest Atlantic Fisheries, the International North Pacific Fisheries Commission, and other commissions) to alleviate the pressure until a comprehensive law of the sea treaty could be concluded. A separate fisheries office in the Department of State did little else but negotiate these agreements. This policy, though moderately successful, particularly after the serious push developed for passage of the 200-mile bill, was too little and too late. The Office of the Law of the Sea of the Department of State estimated during late 1975 that as a result of recent breakthroughs in fishery agreements only nine stocks out of more than 100 off our coasts were below maximum sustainable yield and continuing to decline as a result of foreign fishing.[5] By then, however, some major commercial stocks such as haddock had a zero quota and the 200-mile bill had a full head of steam.

Sadly, there were other approaches which in combination with the fishery negotiations could have dramatically improved protection for coastal fish stocks without violating the legal obligations of the United States or severely impairing overall U.S. oceans interests. Under Article 2 of the

[3] *See* the "Informal Single Negotiating Text," Arts. 50–62, 53 and 54. UN Doc. A/CONF.62/WP.8, 14 ILM 682 (1974). *See also* the "Revised Informal Single Negotiating Text," Arts. 50–52, 53, 54, and 55 UN Doc. A/CONF.62/WP.8/Rev. 1/Part II (May 6, 1976).

[4] This early Senate vote was 68 in favor, 27 opposing, and 5 not voting. *See* 20 CONG. REC. S.21130 (daily ed. Dec. 11, 1974).

[5] *See* the testimony of John Norton Moore in *Hearings on S.961 Before the Senate Comm. on Armed Services*, 93rd Cong., 2d Sess., Nov. 19, 1975.

1958 Geneva Convention on the Continental Shelf[6] the coastal state exercises sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources including living organisms belonging to sedentary species. Many of the most seriously destructive foreign fisheries use bottom tending trawls which harvest large quantities of crab and other sedentary species along with targeted finfish stocks. After officers from the State Department Law of the Sea Office observed piles of crab and other shelf creatures on the decks of Soviet and Japanese vessels during a Coast Guard flight over the Bering Sea, the Office began pushing for regulation of bottom tending trawls when such use would normally result in a catch of sedentary species clearly under U.S. jurisdiction. Because of the heavy dependence on bottom tending trawls, such regulation, if imaginatively pursued, could have led to dramatic side gains in protection of finfish stocks. Though we were successful in getting new regulations approved, they were drastically watered down by an overly cautious bureaucracy and never produced the potential protection.[7] The first opportunity for a creative legal approach to the problem was, if not lost, at least misplaced.

There was yet a second opportunity. Article 7 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas[8] contemplates unilateral coastal state conservation measures for protection of threatened coastal stocks provided certain specified criteria, such as nondiscrimination against foreign fishermen, a prior six-month effort to find a negotiated solution, and submission of disputed actions to impartial arbitration, are met. The United States is party to this Convention, although neither the Soviet Union nor Japan, among other nations fishing off our coast, are parties. Nevertheless, prevailing legal opinion is that the Article 7 right reflects customary international law and that the United States could lawfully apply these measures against nonparties. In addition, exploratory overtures with the Soviets, Japanese, and British indicated a relaxed attitude toward an Article 7 approach as opposed to the 200-mile bill. Building on this provision and the evident need for an alternative to the 200-mile bill, in late 1974 a Working Group of the National Security Council Interagency Task Force on the Law of the Sea prepared a bill based on this "Article 7" approach. Once again the Law of the Sea Office recommended adoption by the Administration of an alternative approach to the 200-mile bill, urging that the fish stocks could be protected faster through such an approach and that without such an approach the 200-mile bill would be highly likely to pass. Unfortunately, this approach was blocked at a high level within the State Department for over a year until it was too late to do any good. Ironically the Article 7 approach was picked up in the Senate by Senators Griffin and Cranston

[6] 15 UST 471, TIAS No. 5578, 499 UNTS 311, 52 AJIL 858 (1958).

[7] These new regulations were explained in a letter of September 5, 1974 from John Norton Moore to the Chairman of the Senate Commerce Committee, Senator Warren G. Magnuson.

[8] 17 UST 138, TIAS No. 5969, 559 UNTS 285, 52 AJIL 851 (1958).

and received 37 votes as an alternative to the 200-mile bill even though the Senators had only a week to sell it with no Administration support![9] To the State Department's credit, shortly before the final Senate action the Department did recommend the Article 7 approach to the President, to be coupled with a veto of the 200-mile bill. This late recommendation was at least reluctantly acquiesced in by the other concerned Departments. On the eve of the vote, however, the President refused to take any action even informally indicating Administration support for the Griffin-Cranston amendment. This inaction ensured passage of the 200-mile bill.

During the congressional battle on the 200-mile bill the Law of the Sea Office systematically pointed out to all Senators and Congressmen that the 200-mile bill would violate the treaty obligations of the United States and would be seriously harmful to overall national oceans interests.[10] Specifically, it was pointed out that absent new fishery agreements in place before March 1, 1977 (which at this writing in July, 1976 we do not have):

—the bill would violate Articles 1, 7, and 9–12 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas;

—under prevailing international law as recognized by the United States the bill would violate Articles 2, 6, and 22 of the 1958 Geneva Convention on the High Seas;

—the bill would violate a number of fishery bilateral and limited multilateral agreements though most of these are relatively short-term;

—the bill would undercut the cardinal tenet of United States oceans policy: no illegal unilateral oceans claims. As the largest user of the world's oceans the United States has the most to lose by a pattern of unrestrained national extensions. If we can make such claims over others' oceans interests others can make their own claims over ours. This is not merely an imaginary horrible. In only three months following passage of the 200-mile bill, Canada, France, Guatemala, Japan, Spain, India, Sri Lanka, Mexico, Senegal, and other nations have announced or have begun planning new unilateral oceans claims. The claim by Senegal to a 150-mile territorial sea, among other claims, has been specifically justified by reference to the United States action;

—the bill would undermine the law of the sea negotiations in a variety of subtle ways (including giving away a major bargaining lever), even though its endorsement of the popular 200-mile limit is unlikely to and has not resulted in collapse of the negotiations;

[9] *See* the floor debate on the Cranston-Griffin Article 7 amendment to S.961. 122 CONG. REC. S.701-10 (daily ed. Jan. 28, 1976).

[10] This was done through personal letters and memoranda to all Senators and Congressmen, systematic coverage of staff, and individual appointments with each Senator who would grant an appointment (over half the Senate) and many Congressmen, a high level phone campaign by the executive branch where it was felt to be useful as well as, of course, the usual executive branch-congressional relations efforts.

—the bill would undermine the important effort to obtain agreement on a regional international arrangement for the conservation and management of tuna. Following passage of the bill these negotiations with our Latin American neighbors, which had been the most promising in the over 20-year history of the tuna dispute, collapsed;

—the bill could lead to a risky confrontation with the Soviet Union, Japan, or other nations fishing off our coasts when we begin arresting their vessels on the high seas. The Soviet Union and Japan have protested the action even though they are prepared to accept a 200-mile economic zone as part of a comprehensive law of the sea treaty. Recently, they also held joint talks in Moscow on "common fishery problems";

—even short of a confrontation, in view of the heavy dependence of the Japanese on fish stocks as a source of protein, the bill could significantly harm United States–Japanese relations. Again, this has proven not to be merely an imaginary horrible. In Japan the bill has been referred to as a "stab in the back" by the United States. Prime Minister Miki recently protested passage of the bill directly to President Ford; and

—the bill would undermine U.S. efforts to obtain binding international conservation standards and other reasonable restraints on coastal nations in the exercise of expanded jurisdiction within the 200-mile economic zone.

With some exceptions, notably the vigorous and enlightened opposition of Senators Griffin (Michigan) and Gravel (Alaska) and Congressmen McCloskey (California) and Fraser (Minnesota), there was little congressional interest in whether the bill violated international law. Indeed there was little interest in any of the points in opposition. Though many felt otherwise, my assessment was that the legal argument coupled with arguments as to present protection of stocks through recent breakthroughs in fisheries agreements probably had been the most effective in opposition.[11] Nevertheless, the treaty violation was received with a large yawn.

Unfortunately, violation of our treaty obligations had equally little impact on the Secretary of State or the President. Though Secretary Kissinger signed a few letters to congressional leaders early in the battle, he resisted all efforts to weigh in hard, most seriously in refusing to testify before the Senate Foreign Relations Committee in opposition despite repeated entreaties from the Law of the Sea Office that his testimony could be decisive.[12] Similarly, despite an earlier decision to oppose, President Ford

[11] One counterargument heard in the House debate as to the illegality of the bill was that it did not violate the 1958 Geneva Convention on Fishing and Conservation since the Soviets and Japanese were not parties to that Convention! No one pointed out in rebuttal that the United States *was* a party and would be likely to be arresting signatories that were fishing off the U.S. coast.

[12] At one point the Law of the Sea Office succeeded in writing a paragraph in opposition to the 200-mile bill into Secretary Kissinger's testimony on another subject before the Senate Foreign Relations Committee. This arrangement was worked out

signed the bill even against the advice of the State and Justice representatives that it would put the United States in violation of international law! A presidential veto, at least if coupled with an Article 7 approach, could have been sustained, as is evidenced by the over 100 votes in the House in opposition (with no effective White House opposition) and the 37 votes in the Senate for an Article 7 approach (with no Administration support). The President, however, had made statements during election year political appearances in New England strongly suggesting that he would sign the 200-mile bill if passed by the Congress.[18]

Fidelity to law in foreign policy must not remain the frail reed which this sad example illustrates. There is little reason to believe that fidelity to law has fared much better on a variety of other politicized issues, for example the Byrd Amendment with respect to the Rhodesian chrome controversy. There is no sure cure other than a fundamental change in attitude. But there are steps which, I believe, can modestly alleviate the problem. These are:

First, we should add an international legal specialist to the White House staff and give him access to the President. Surely in a structure which has a Special Assistant to the President for Consumer Affairs there is room for an international legal adviser! This could be accomplished by adding to the White House staff a Special Assistant to the President for International Legal Affairs or another Deputy Assistant to the President for National Security Affairs who would be understood to be an international legal specialist. Though both the Office of Legal Counsel of the Department of Justice and the Legal Adviser's Office of the Department of State

with the pre-agreement of the staff of the Senate Foreign Relations Committee. An hour before the testimony was to be delivered Kissinger personally removed the paragraph. In fact, I had started for the Hill and received a radio message from the Secretary that the paragraph had been taken out and I need not be present for his testimony.

Both Acting Secretary of State Kenneth Rush and Secretary Kissinger are on record as to the illegality of the 200-mile fishing bill. Even President Ford in his signing statement of April 13, 1976 admitted that "absent affirmative action, the subject bill could raise serious impediments for the United States in meeting its obligations under existing treaty and agreement obligations." He went on to say "the bill contemplates unilateral enforcement of a prohibition on foreign fishing for native anadromous species, such as salmon, seaward of the 200-mile zone. Enforcement of such a provision, absent bilateral or multilateral agreement, would be contrary to the sound precepts of international jurisprudence," and "the enforcement provisions of H.R.200 dealing with the seizure of unauthorized fishing vessels, lack adequate assurance of reciprocity in keeping with the tenets of international law." Statement of the President, note 1 *supra*.

[18] *See, e.g.*, the transcript of the January 22, 1976 interview with President Ford by newsmen in New Hampshire. Reports of White House capitulation on the 200-mile bill circulated widely as early as the fall of 1975. On October 31, 1975 the *San Diego Union* reported that "the Ford Administration has agreed to support extension of the US fishing zone to 200 miles from its present 12-mile limit, Representative Robert Leggett said here yesterday." More specifically the *Union* quoted Representative Leggett, who chaired the House Subcommittee pushing the 200-mile bill, as saying "I got a committment from the White House that if some of their terms can be satisfied there will be no veto." *See* the San Diego Union, Oct. 31, 1975.

seek to reflect international legal concerns, and often do so effectively, a White House base with access to the President is essential.[14] This may be the single most important institutional change necessary to promote greater fidelity to law in foreign policy.

Second, international legal considerations must receive greater attention in Congress. In a body of 535 chiefs this is difficult to structure. Possibilities worth a try, however, include adding international legal specialists to the staffs of both the Senate and House foreign relations committees and charging them with promoting fidelity to law, and amending the Senate and House rules to permit any ten Senators or Congressmen to require preparation of an "International Legal Impact Statement" before a Senate or House vote would be permitted on a suspect bill. The Congressional Research Service or perhaps the new staff international legal experts could oversee preparation of these impact statements.

Third, international lawyers and bar associations must more effectively police adherence to law. For example, perhaps the American Bar Association Section of International Law or the American Branch of the International Law Association should establish special subcommittees for the purpose of promoting fidelity to law. Such committees might regularly request meetings with the Secretary of State concerning current problems of adherence to law in foreign policy.

Fidelity to law in foreign policy is as important as fidelity to law at home. Our nation must adhere to its treaty obligations and lead the world toward cooperative solutions to global problems. International lawyers have long recognized these truths. The time has come to join hands to bring about the needed institutional changes that can at least begin the process of policing adherence to law.

JOHN MORTON MOORE *

THE FRANCIS DEÁK PRIZE

Each year, the Board of Editors of the *American Journal of International Law* awards a prize in memory of the late Francis Deák for an especially meritorious article appearing in the *Journal.* The Prize for 1976 has been conferred on Mr. Günther Handl for his article "Territorial Sovereignty and the Problem of Transnational Pollution," appearing in the January 1975 issue at page 50.

The Board of Editors extends its congratulations to Mr. Handl and expresses its appreciation to Mr. Philip Cohen, the President of Oceana Publications, Inc., through whose generosity an award is made to the recipient of the Prize.

A.P.S.

[14] The Legal Adviser, Monroe Leigh, and the Assistant Attorney General for the Office of Legal Counsel, Antonin Scalia, were vigorous in seeking White House recognition of the importance of adherence to international law.

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