FISHERY CONSERVATION: IS THE CATEGORICAL EXCLUSION OF FOREIGN FLEETS THE NEXT STEP?

Pressure is building for what may be the most significant fishery legislation since the enactment of the Fishery Conservation and Management Act of 1976 (FCMA).[1] In the midst of the FCMA's failure to reduce substantially the amount of foreign fishing in the United States' 200-mile fishery conservation zone,[2] legislation was introduced that would require a complete phase-out of foreign fishing.[3] The enactment of such a measure would have substantial implications in international law and would be a unilateral action unique in the history of United States' law of the sea policy.[4]

The sea's fishery resources always have been a vital source of food. The realization that these resources are finite and exploitable beyond the point of self-renewal has come to pass only within the last eighty years.[5] The Truman Proclamations[6] of 1945 recognized the need for a system of conservation and management to prevent the depletion of these fishery resources off the coast of the United States. Lesser-developed countries followed by claiming jurisdiction to 200-mile territorial seas and exclusive economic zones (EEZ)[7] to protect their offshore resources, but the United States re-

1. Pub. L. No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801-1882 (1976)). H.R. 200, 94th Cong., 1st Sess. (1975), passed the House by a vote of 208 to 101 on October 9, 1975, and passed the Senate in lieu of S. 961, 94th Cong., 1st Sess. (1975), on January 28, 1976. The Act went into effect on March 1, 1977.

2. Fishery conservation zone as defined by the Fishery Conservation and Management Act is found in 16 U.S.C. § 1801 (1976):

> There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

3. *See* the latest such proposal of this nature in Title III of House Bill H.R. 7039, 96th Cong., 2d Sess. (1980) [hereinafter cited as House Bill]. *See* Bill in the form that House of Representatives passed in 126 CONG. REC. H9389-94 (daily ed. Sept. 23, 1980) [hereinafter cited as CONG. REC.]; *see also* H.R. REP. NO. 1138, Part 1, 96th Cong., 2d Sess. (1980) [hereinafter cited as House Report]; Wall St. J., Sept. 24, 1980, at 12, col. 1.

4. *See* notes 268-334 *infra*, and accompanying text.

5. D. JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES 3 (1965).

6. *See* notes 51-65 *infra*, and accompanying text.

7. A functional zone in which coastal states claim exclusive rights to exploit all living

frained from such extended claims. The United States eventually became disenchanted with the ineffectiveness of its treaty agreements to regulate foreign fishing off its shores and with the slow pace of United Nations negotiations; its response was one of the most significant unilateral actions in the previous two hundred year history of the law of the sea.[8]

In 1976 the United States Congress enacted the FCMA, claiming jurisdiction to a 200-mile Fisheries Conservation Zone (FCZ). The two main objectives of the Act were to promote the interests of the United States fishing industry[9] and to conserve and manage the fishery resources in United States coastal waters.[10] Both objectives hinged on strictly regulating the amount of foreign fishing within the FCZ.[11] After four years and two amendments to the FCMA,[12] foreign fishing in the FCZ has not been substantially reduced.[13] Foreign fleets are harvesting over sixty-five per cent of the fishery resources within the United States' 200-mile exclusive economic zone while the United States continues to import over one-half of its seafood needs from foreign companies.[14] Major violations of foreign fishing regulations are seriously hampering effective conservation and management measures.[15] Thus, the objectives of the FCMA remain largely unfulfilled.

In response to these unfulfilled expectations, legislation[16] was introduced on April 15, 1980, which, *inter alia*, would establish a

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and non-living resources within a zone having a seaward limit of 200 nautical miles from the baselines used to measure the territorial sea. R. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES 30 (1979).

8. Secretary of Commerce, Juanita M. Kreps, described the new statute as "by far the most significant marine fishery legislation in our history." 1977 DIG. U.S. PRAC. INT'L L. 543.

9. 16 U.S.C. § 1801(b)(3) (1976).

10. *Id.* § 1801(b)(1).

11. *See id.* § 1821.

12. Pub. L. No. 95-354, 1978 Amendment; Pub. L. No. 96-61, 1979 Amendment.

13. *See* notes 200-03 *infra*, and accompanying text.

14. H.R. REP. NO. 445, 94th Cong., 1st Sess. 33 (1975). In 1950 the United States imported only 23.4 per cent of its seafood while in 1974 imports were over 60 per cent. *See also* [1976] U.S. CODE CONG. & AD. NEWS 604, 605.

15. *See* notes 237-45 *infra*, and accompanying text.

16. Known as the American Fisheries Promotion Act, H.R. 7039 (*supra* note 3) was introduced on April 15, 1980, by Mr. Breaux, Mr. Murphy of New York and Mr. Forsythe. The Bill provides for comprehensive research and development regarding United States fisheries, to expand the fishing vessel and fish processing capacity of the United States and establish a program to phase-out foreign fishing vessels from waters under United States fishery management jurisdiction. This Comment focuses on Title III, Amendments to the Fishery Conservation and Management Act of 1976, specifically § 301, Phase-out of Foreign Fishing. *See* House Report, *supra* note 3.

phase-out mechanism for foreign fishing within the United States' FCZ. In May of 1980, hearings were held and an overwhelming majority of the testimony presented was in strong support of the legislation.[17] Subsequently, a modified version of the original Bill passed the United States House of Representatives in September of 1980. The Bill that was finally enacted into law on December, 22, 1980, the American Fisheries Promotion Act, did not incorporate the mandatory phase-out mechanism of the original Bill.[18] But, in view of the serious attention being given to the construction and implementation of a phase-out program and the continuation of the antecedents that prompted the proposal, it is necessary to examine the phase-out concept and its implications in international law. Economic necessity and preservation of United States offshore resources may yet provide the impetus for the enactment of such a measure.

This Comment suggests that the enactment of a mandatory phase-out program categorically excluding foreign nations from the United States' FCZ may be a flagrant violation of international law. The historical background of jurisdictional zone claims is reviewed, showing that the present proposals for phasing-out foreign fishing are not novel. The successful attempt of the first United Nations Conference on the Law of the Sea to partially codify extended fisheries jurisdiction in international law is examined. It is then shown that the failures of the second and third Conferences to draft a treaty acceptable to all nations helped provide the impetus for unilateral action. Following this discussion, the FCMA and the events leading to its enactment are examined to show that the Act's failure to fufill its original objectives has provided the atmosphere for the proposal of a more extreme measure of phasing-out foreign fishing. Finally, this Comment discusses whether there is a need for such a measure in the light of the protective provisions already embodied in the FCMA. Possible violations of both international law, especially treaties, and of emerging international law are also

17. House Report, *supra* note 3, at 14-15.

18. American Fisheries Promotion Act, Pub. L. No. 95-561, § 201, 94 Stat. 3287 (1980) [hereinafter cited as the Promotion Act]. This Act is Title II of the Salmon and Steelhead Conservation and Enhancement Act of 1980, Pub. L. No. 96-561, § 101, 94 Stat. 3275 (1980). This reference to the American Fisheries Promotion Act is only to a single section of the Act, § 230, which amends § 1821(d) of the FCMA. Although the phase-out mechanism was not incorporated into the Promotion Act amendment, political and economic factors will undoubtedly raise again the issue of categorically excluding foreign fleets from the United States FCZ.

examined. Justification for enforcement of such a measure is discussed as well as the likely international response to such an action.

I. HISTORICAL BACKGROUND OF JURISDICTIONAL ZONES

A. Initial Development of Jurisdictional Zones

The principle of the freedom of the high seas[19] is a stable concept that has been recognized in the international law of the sea since the time of Grotius.[20] Since the mid-twentieth century, fundamental changes have occurred, not in the concept of the high sea as *res communis*,[21] but in the degree to which coastal States have

19. This principle has been stated in slightly different terms at different times. Lord Stowell, in the case of *Le Louis* (2 Dods. 210, 243 (1817)) summed up the principle in one sentence: "[A]ll nations have an equal right to the unapportioned parts of the ocean for their navigation . . . ." *Cf.* (Judge Story's opinion in *The Marianan Flora*) (1 Wheaton 1, 43 (1826)): Upon the ocean, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior or exclusive perogative there." C. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 54 (3d rev. ed. 1954).

The International Law Association expressed the principle in Article 13 of the *Laws of Maritime Jurisdiction in the Time of Peace* adopted at its Vienna Conference in 1926, thusly: "no state or group of states may claim any right of sovereignty privilege or perogative over any portion of the high seas or place any obstacle to the full and free use of the seas." 34th Report, at 101 *et seq*.

The modern legal position on the freedom of the high seas was synthesized by the Institute of International Law at its Lausanne Conference in 1927 in a Declaration declaring that: "The principle of the freedom of the sea implies specifically the following consequences: (i) freedom of navigation on the high seas, subject to the exclusive control, in the absence of a convention to the contrary, of the state whose flag is carried by the vessel; (ii) freedom of fisheries on the high seas subject to the same control; (iii) freedom to lay submarine cables on the high seas; (iv) freedom of aerial circulation over the high seas." 33 ANNUAIRE 339 (1927).

The most recent codification of this principle of international law is the Convention on the High Seas, produced at the first United Nations Conference on the Law of the Sea in 1958. It embodies, *inter alia*, the same four basic consequences mentioned in the Declaration by the Institute of International Law in 1927. *See* Article 2, Convention on the High Seas, *done* at Geneva, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (1962). *See also* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 501-603 (1965) for a history of the freedom of the high seas, and J. BRIERLY, THE LAW OF NATIONS 194 (6th ed. 1963).

20. The celebrated Dutch jurist Hugo Grotius is generally regarded as the "Father of International Law." History crowned him with this title due to this treatise, DEJURE BELLI AC PACIS, published in 1625. By the end of the seventeenth century this treatise was generally considered as embodying the rules of international law. *See* VREELAND, HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW (1917); DE PAUW, GROTIUS AND THE LAW OF THE SEA (1965); C. COLOMBOS, *supra* note 19, at 8.

21. *Res communis* (a thing common to all) is the doctrine that the sea is incapable of effective occupation. This is the view supported by Grotius. *See* C. COLOMBOS, *supra* note 19, at 52. *See also* GARCIA-AMADOR, THE EXPLOITATION AND CONSERVATION OF THE RESOURCES OF THE SEA 16-17 (2d ed. 1959). *Cf.* (the property of no one) *res nullins*, signifying that the sea is capable of ownership. C. COLOMBOS, *supra* note 19, at 55.

extended their coastal jurisdiction seaward into areas previously considered to be high sea. The boundary line delimiting jurisdictional zone claims has been moved further and further out to sea and with it the historical freedoms associated with the high seas have been removed further from land areas.[22]

The freedom that has been historically regarded as a fundamental principle of the high seas emerged in its modern form from the famous Grotius-Seldin debate of the seventeenth century.[23] The debate sprang from the conflicting views of the Dutch and English as to a State's right to the use of the ocean for trade with the East Indies. Hugo Grotius, a seventeenth century Dutch jurist, produced the treatise, *Mare Librum*,[24] in defense of the right of the Dutch to the free use of the oceans to participate in this trade. John Seldin responded with *Mare Clausum*,[25] articulating the English position that the seas were capable of appropriation and thus could come under national control. The debate was long and heated, but the Grotian view ultimately prevailed.[26]

By the end of the seventeenth century, claims to vast expanses of ocean no longer had international recognition in law or practice.[27] Jurisdictional claims to ocean space, however, were soon to take a new form — the territorial sea.[28]

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22. *Cf.* (when that extended jurisdiction constitutes a territorial sea) E. JONES, LAW OF THE SEA: OCEANIC RESOURCES 63-64 (1972), for the view that extending the breadth of the territorial sea constitutes a process of encroachment upon the internationally sanctioned doctrine of *res communis* which endangers the future status of the freedom of the seas; W. FRIEDMAN, THE FUTURE OF THE OCEANS 43-44 (1971), for the view that any extension of jurisdiction beyond the three mile territorial sea constitutes an infringement on the freedom of the seas. Friedman states that "[i]n the perspective of the Grotian Doctrine of the fredom of the seas, an extension of territorial waters from the now generally accepted maximum of 12 miles to 200 miles is a disaster, turning us back three and one-half centuries to Seldin's doctrine [*see* notes 23-26 *infra*, and accompanying text] of the closed sea."

23. For an account of this debate *see* G. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS 13-22 (1978); E. JONES, LAW OF THE SEA: OCEANIC RESOURCES 7-13 (1972).

24. MARE LIBRUM was written in 1604 and published in 1609. It forms the twelfth chapter of Grotius' work DE JURE PRAEDAE, which was published only in 1868. C. COLOMBOS, *supra* note 19, at 52. *See* MARE LIBRUM (R. Magoffin trans. 1916).

25. MARE CLAUSUM was an exhaustive reply in two books to Hugo Grotius' MARE LIBRUM. It appeared in 1816 but was not published until 1635. C. COLOMBOS, *supra* note 19, at 53.

26. The debate continued with unabated persistence into the eighteenth and nineteenth centuries. *See* T. FULTON, THE SOVEREIGNTY OF THE SEA 377 (1911).

27. L. HENKIN, INTERNATIONAL LAW 307 (1980).

28. *See* J. BRIERLY, *supra* note 19, at 195. For a definition of territorial waters *see* COLOMBOS, *supra* note 19, at 67. For a complete discussion of the territorial sea *see* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1-417 (1965); Fenn, *Origins of the Theory of Territorial Waters*, 20 AM. J. INT'L L. 465 (1926).

In the early eighteenth century States began exerting jurisdiction over areas of adjacent ocean waters.[29] Bynkershoer, a Dutch jurist, was the first to advance a "cannon shot" rule, a theory that claimed that a State's dominion extended out to sea only so far as its cannons would reach.[30] This theory did not involve a continuous belt of waters, but merely constructed zones or "pockets" of adjacent sea limited to the range and location of the cannons on shore.[31] Some years later the Italian writer Galiani explicitly stated a more practical and definite territorial sea doctrine. Rather than have the neutrality of particular waters depend on the capricious placement of cannons on adjacent shores, Galiani proposed a continuous belt of territorial sea extending from the shores of the littoral State[32] three marine miles out to sea.[33] Galiani's view prevailed, and by the end of the nineteenth century, a three mile wide territorial sea was, with few exceptions, worldwide.[34]

The early part of the twentieth century saw States asserting jurisdiction into territorial seas expanded to six and twelve miles.[35] These practices were generally considered incompatible with accepted rules of international law in the first half of the twentieth century.[36] By 1958, however, only twenty coastal States out of seventy-three were adherents to the three mile rule.[37] The remainder of States claimed ocean areas greater than three miles from their coasts. To date no limit of the breadth of the territorial sea has been agreed upon by a majority of States.[38] But it is now clear that a claim larger than three miles is no longer, *ipso facto*, contrary to

29. *See* E. JONES, *supra* note 23, at 56-60 for an account of the origins and development of the three mile territorial sea.

30. Walker, *Territorial Waters: The Cannon Shot Rule*, 12 BRIT. Y.B. INT'L L. 210 (1945).

31. *Id.* at 212.

32. Littoral means belonging to the shore. Littoral States are coastal States with some part of their border touching the ocean.

33. *See* note 30 *supra*, at 228-29.

34. The notable exceptions were: the Scandanavian countries claiming four miles, Russia claiming three to twelve miles at different times, and Spain and Portugal claiming six miles each. L. HENKIN, *supra* note 27, at 308.

35. At the time of the Hague Conference in 1930 less than one-fifth (8 of 38) of the coastal States claimed territorial waters over the three mile limit. No plenary assertions of jurisdiction beyond three miles by these states apparently were exercised in the first thirty years of the twentieth century. *See* Sorensen, *National Sovereignty Over the Marginal Sea*, 520 INT'L CONC. 242 (1958).

36. Heingen, *The Three Mile Limit: Preserving the Freedom of the Seas*, 11 STAN. L. REV. 639 (1959). *See also* Note, 23 COLUM. L. REV. 472 (1923).

37. 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW, 17; J. BRIERLY, *supra* note 19, at 207.

38. Both the Hague Conference and the 1958 United Nations Conference on the Law of

international law.[39]

The International Law Commission has formulated the proposition that "international law does not permit an extension of the territorial sea beyond twelve miles."[40] A three mile territorial sea may now be considered customary international law, but such a claim to a breadth greater than 12 miles would not be sanctioned by international law.[41] Whether the 12 mile territorial sea is now accepted as customary international law is still a bone of contention. Some authorities claim that a 12 mile territorial sea is international law,[42] and in terms of State's practice, the marked trend in the last twenty years from a three mile breadth to a twelve mile breadth would at least indicate it is developing customary international law.[43] "International legal scholars, however, still differ on the question whether a twelve mile breadth is now sanctioned by customary international law."[44]

Extra-territorial contiguous zones[45] of numerous types[46] have been created to deal with special ocean jurisdiction problems, such as high seas fisheries,[47] that could not adequately fit into the framework of the doctrine of the high seas or the concept of the territorial sea.[48] These ocean zones of limited jurisdiction, contiguous to the territorial sea, are by definition generally regarded as not extending

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the Sea (UNCLOS) at Geneva failed to solve the problem of the breadth of the territorial sea. *See* J. BRIERLY, *supra* note 19, at 202-11.

39. J. BRIERLY, *supra* note 19, at 206-07.

40. This proposition was formulated by the International Law Commission in the immediate aftermath of the 1948 Truman Proclamations (*see* note 51 *infra*) which provided impetus for extended Latin American claims to the exclusive rights to all the resources of the seas over their continental shelf. *See* J. BRIERLY, *supra* note 19, at 207.

41. G. KNIGHT, *supra* note 23, at 7-39.

42. *See* Statement made by the representatiave of Mexico in the Sea-Bed Committee at UNCLOS that "there is a sufficient international consensus of opinion for the twelve mile limit of the territorial sea to be regarded as Customary International Law." U.N. DOC. A/AC. 138/SC. II/SR. 11 (1971).

43. Over three times as many States (60 States) now claim a breadth of 12 miles as their territorial sea than any other claim except for three miles. Since the time of the first United Nations Conference on the Law of the Sea there is a marked trend toward a 12-mile territorial sea claim. G. KNIGHT, *supra* note 23, at 7-39.

44. *Id.* at 12-60.

45. Contiguous Zone is defined as part of the high seas constituting a belt outside the territorial sea over which a state claims limited jurisdiction for the protection of specific national interest. A Fisheries Conservation Zone (FCZ) is one of the most important contiguous zones. G. SCHWARZENBERGER & E. BROWN, A MANUAL OF INTERNATIONAL LAW 553 (6th ed. 1976).

46. *See* G. KNIGHT, *supra* note 23, at 79-124.

47. G. KNIGHT, *supra* note 23, at 4-1.

48. *Id.*

more than twelve miles beyond the territorial sea.[49] The evolution and debate over 3, 6, and 12 mile territorial seas, however, pales in comparison to the 200-mile functional zone concept[50] which emerged in the middle of the twentieth century.

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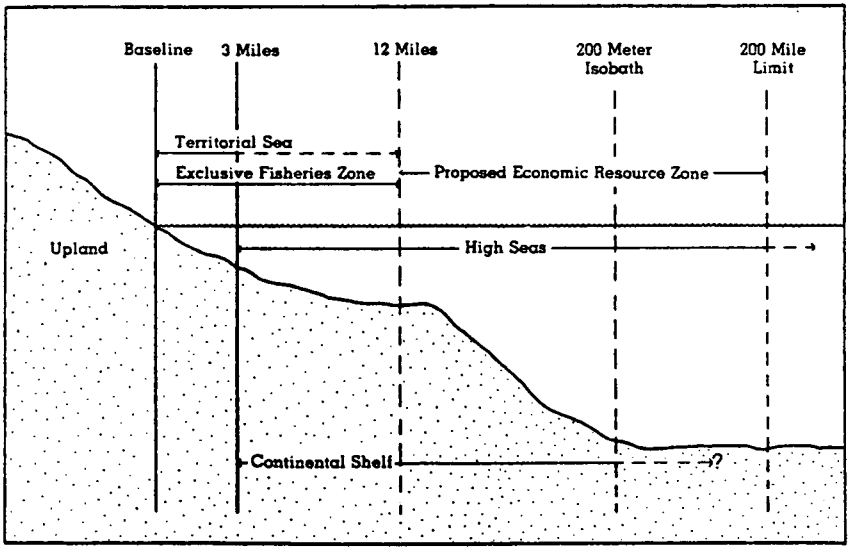
49. Article 24 of the 1958 Convention on the Territorial Sea and Contiguous Zone states that:

> 1. In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to:
> (a) Prevent Infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
> (b) Punish infringement of the above regulations committed within its territory or territorial sea.
> 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.
> 3. Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of the two states is measured.

50. "The purpose of claiming a functional zone, whether it is called 'exclusive economic zone,' 'epicontinental sea,' 'exclusive fishery zone,' 'conservation zone' or 'patrimonial sea' is to exercise concrete functional jurisdiction over the resources of an area adjacent to the territorial sea normally of up to 200 miles from the coast . . . ." A. SZEKELY, LATIN AMERICA AND THE DEVELOPMENT OF THE LAW OF THE SEA 88-93 (1976).

The following illustration provides a simplified overview of basic jurisdictional zones established in ocean space through treaties or by the evolution of customary international law principles.



G. KNIGHT, MANAGING THE SEAS LIVING RESOURCES 20 (1977).

B. The Beginnings of 200-Mile Zones

The Truman Proclamations[51] of 1945 gave birth to the concept of 200-mile zones.[52] The Proclamations ushered in a new era of high seas jurisdiction[53] which would eventually lead to such extreme claims as 200-mile territorial seas.[54]

The two Proclamations were largely a response to advancing technological development[55] allowing for greater and more efficient exploitation of the seas' resources as well as the prospect of overfishing.[56] The value of fish stocks in offshore waters and the second Proclamation, the "Fisheries Proclamation," provided the authority, through a unilateral claim to the regulation and control of a designated conservation zone,[57] by which the United States could enclose that resource under its exclusive control.

The Fisheries Proclamation was misinterpreted, however, by several nations that subsequently made extended unilateral claims to offshore resources.[58] These nations assumed the Proclamation

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51. Two Proclamations were issued on September 28, 1945: (1) Presidential Proclamation No. 2667, often called the "Truman Continental Shelf Proclamation," which stated United States policy regarding the natural resources of the subsoil and sea bed of the continental shelf, and (2) Presidential Proclamation No. 2668 often called the "Truman Fisheries Proclamation," which stated United States policy with respect to coastal fisheries in certain areas of the high seas. Of significance is that this second Proclamation came with corresponding Executive Order No. 9634, providing for the establishment of a fisheries conservation zone. *See* 13 DEP'T STATE BULL. 487 (1945). For an examination of the impact of these Proclamations on subsequent Latin American claims *see generally* A. SZEKELY, *supra* note 50.

52. The first and many subsequent claims to 200-mile zones expressly as well as impliedly relied on the precedent set by the Truman Proclamations. For an examination of the impact of these Proclamations on subsequent Latin American claims *see* A. SZEKELY, *supra* note 50. *See also* Hollick, *The Truman Proclamations*, 17 VIRG. J. INT'L L. 23, 55 (1977) [hereinafter cited as *Truman Proclamations*].

53. Selak, *Recent Developments in High Seas Fisheries Jurisdiction under the Presidential Proclamation of 1945* 44 AM. J. INT'L L. 670 (1950). *See Truman Proclamations, supra* note 52, at 55, stating that the Proclamations set the stage for subsequent claims.

54. Hollick, *The Origins of 200-Mile Zones* 71 AM. J. INT'L L. 494 (1977) [hereinafter cited as *Origins of 200-Mile Zones*]. As of 1978, fourteen States have claimed 200-mile territorial seas. These are: Argentina, Benin, Brazil, Congo, Ecuador, El Salvador, Ghana, Guinea, Liberia, Panama, Peru, Sierra Leone, Somalia and Uruguay. *See also Truman Proclamations*, *supra* note 52, at 55.

55. After World War II the increasing use of the diesel engine at sea, and the introduction of new chilling and freezing techniques, enabled fishing fleets to range over greater distances from home ports. *Truman Proclamations*, *supra* note 52, at 55.

56. *Id.* It is also important to note that a motivating purpose behind the Truman Proclamation was conservation and arose out of the incursion of Japanese fishing fleets into the Alaska Bristol Bay red salmon fishery. H.R. REP. NO. 445, 94th Cong., 1st Sess. 25 (1975).

57. *See* second Truman Proclamation, No. 2668, *reprinted in* 13 DEP'T STATE BULL. 448 (1945).

58. In 1945, Mexico proclaimed jurisdiction over the continental shelf and established a

meant that the United States would accept the extension of their sovereignty over the high seas off their coasts.[59] This idea apparently developed because it was thought that the second Proclamation set up conservation zones in the high seas which were to be administered by the United States.[60] This notion was not the case. The official United States interpretation of the Fisheries Proclamation was that the President "*might* set up zones in the high seas in order to conserve fisheries without regard to the limitations of territorial waters."[61] In fact this action was never taken. The practical consequences of the Fisheries Proclamation was not to change existing international law but to affirm it.[62] Nevertheless, the Truman Proclamations set the stage for all subsequent national 200-mile claims.[63]

C. The First 200-Mile Claims

On June 23, 1947, relying on the Truman Proclamations as precendent,[64] Chile took the lead in extending a unilateral claim to the first 200-mile zone in history.[65] Peru soon followed as did Costa Rica, El Salvador and Honduras. A gold rush fever reaction

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fishery conservation zone. In 1946, Argentina claimed not only the shelf and its resources, but also the superjacent waters, while Panama made a similar claim. The following year, Chile and Peru took steps toward establishing an EEZ by claiming national sovereignty 200 miles seaward for the purposes of preserving and exploiting their "patrimonial" resources. Krueger & Nordquist, *The Evolution of the 200-mile Exclusive Economic Zone: State Practice in the Pacific Basin*, 19 VIRG. J. INT'L L. 321, 326 (1978).

59. This is the opinion of Senator Green, Chairman of the Senate Foreign Relations Committee's Subcommittee. Text of statement *reprinted in* 44 AM. J. INT'L L. 680 (1950).

60. T. WOLFE, PERUVIAN-UNITED STATES RELATIONS OVER MARITIME FISHING: 1945-1969; Occasional Paper No. 4, Law of the Sea Institute, 1-8, 14-16 (1970), *reprinted in* G. KNIGHT, *supra* note 23, at 710.

61. This was the interpretation given by Dr. W.M. Chapman, spokesman for the Department of State. 20 DEP'T STATE BULL. 71 (1949) (emphasis added). *See also* Selak, *Recent Developments in High Seas Fisheries Jurisdiction Under the Presidential Proclamations of 1945*, 44 AM. J. INT'L L. 680 n.49 (1950). Apparently only such an interpretation would be consistent with the position of the United States at that time of "[reserving] the rights and interests of the United States so far as it concerns any effects . . ." of the decree in question (referring to United States non-recognition of the first exclusive 200-mile claims made by Chile in 1947 in reliance on the Truman Proclamations as precedent). Complete text of the note sent by the United States to Chile is *reprinted in* 44 AM. J. INT'L L. 674 (1950).

62. *Id.* The view expressed by W.M. Chapman, spokesman for the Department of State.

63. *Truman Proclamations*, *supra* note 52, at 55.

64. The Truman Proclamations are not only cited as precedent, but also reflected in the text of the Chilean claim. *See Origins of 200-Mile Zones*, *supra* note 54.

65. United Nations Legislative series, Laws and Regulations on the Regime of the High Seas, U.N. Doc. ST/LEG/SER.B/1, at 6 (1951); 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 794-96 (1965).

had begun and the lesser-developed countries, especially in Latin America, became a hotbed for such extended claims. From this movement sprang the second landmark in "200-mile zone" history — the Declaration of Santiago.[66] It was signed by Chile, Peru and Ecuador in 1952[67] and was the first multilateral declaration of a 200-mile zone.[68] It proclaimed that each country possessed "sovereignty and jurisdiction over the area of the sea adjacent to the coast of its own country and extending not less than 200 nautical miles."[69] Its effect was to legitimize and give credibility to one of the newest and most extreme concepts ever advanced in the international law of the sea.[70]

But, the trilateral Declaration of Santiago was insufficient to elevate the 200-mile zone to the status of broadly applicable international law.[71] Although the Declaration evidenced the three signatories' idea of what the law should be, it did not as a treaty evidence customary international law. A prime requirement for the establishment of international law by custom is "evidence of a general practice accepted as law."[72] The lack of State practice and recognition of a 200-mile unilateral claim, as well as the fact that only three lesser-developed countries had declared, by treaty, their position on the law at this time, failed to give the 200-mile zone concept the status of international law. The United Nations Conferences on the Law of the Sea made the first concerted effort to reach agreement on and codify through multilateral conventions the 200-mile zone and other aspects of the international law of the sea.[73]

66. Laws and regulations on the Regime of the Territorial Sea, U.N. Doc. ST/LEG/SER.B/6, at 723 (1956).

67. Agreements between Chile, Ecuador and Peru, signed at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific, Santiago, August 28, 1952, Declaration on the Maritime Zone, U.N. Doc. A/AC. 135/REV. 1, at 11-12 (1968).

68. Lynch, *The Nepal Proposal for a Common Heritage Fund: Panacea or Pipedream?*, 10 CALIF. W. INT'L L.J. 25, 29 (1980).

69. U.N. Doc. ST/LEG/SER.B/6, at 723-24 (1957).

70. Lynch, *supra* note 68, at 29.

71. Article 38(1)(c) of the Statute of the International Court of Justice lists as a source of international law "the general principles of law recognized by civilized nations." 59 Stat. 1055, T.S. 993, 3 Bevans 1179; *signed* at San Francisco on June 26, 1945; *entered into force* on October 24, 1945 [hereinafter cited as Statute of the I.C.J.]. All members of the United Nations are *ipso facto* parties to the Statute (*see* Charter of the United Nations, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, art. 93). Liechtenstein, San Marino and Switzerland also are parties.

72. *Id.* art. 38(1)(b).

73. *See* Dean, *The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas*, 54 AM. J. INT'L L. 751, 769 (1960).

D. United Nations Conferences on the Law of the Sea

The United Nations Conferences on the Law of the Sea (UNCLOS)[74] reflect an attempt to establish some international uniformity and agreement among nations in the area of the law of the sea.[75] Rapid change in ocean politics, use and technology have injected into the Conferences the realization that customary international law is inadequate to deal with these problems.[76] Thus, UNCLOS has set itself to the task of writing a global charter based on the theme, "the common heritage of mankind."[77] Due to the multifarious interests of the member nations,[78] however, agreement on anything but broad generalities has remained elusive.[79]

At the time of the convening of the first United Nations Conference on the Law of the Sea (UNCLOS I) in 1958,[80] only a half-dozen States[81] had asserted some form of 200-mile claim. Though the breadth of any exclusive fishery zone was a major issue, 200-mile zones, *per se*, were not a major focus of discussion, since there was little support for such claims.[82] It would remain for UNCLOS III and its global educational effects to help the 200-mile Exclusive Economic Zone gain acceptance in international practice.[83]

The importance of UNCLOS I lies in the four Conventions

74. The first UNCLOS met in Geneva from February 24 to April 28, 1958. The second UNCLOS met in Geneva from March 17 to April 27, 1960. The third UNCLOS convened in 1974 and is still in session.

75. For example, at UNCLOS I, the four Conventions; at UNCLOS III, the Negotiating Text. This attempt is also reflected in John Norton Moores' statement at UNCLOS III that "the Conference is writing a global charter for an area of approximately three-quarters of the surface of the earth." *See* Proceedings LOS Institute, Ninth Annual Conference, January 6-9, 1957; CHRISTY, LAW OF THE SEA: CARACAS AND BEYOND 4-5 (1975).

76. *Id.* at 5. The fact is, however, that because of the failure by member nations to agree on any proposals of international significance, the UNCLOS continue to lag behind customary international law.

77. *Id.* at 5, 26.

78. *Id.* at 19. In 1970 the United Nations General Assembly adopted the "Declaration of Principles," stating that the seabed beyond the limits of national jurisdiction, together with its resources is the "common heritage of mankind." Declaration of Principles, G.A. RES. 2749, 25 U.N. GAOR, (Supp. No. 28) 24, U.N. Doc. A/8028 (1970). *See also* Ambassador Pardo's "Common Heritage" speech to the United Nations General Assembly, U.N. Doc. A/6695 (1967); U.N. Doc. A/C.1/p.v, at 1515-16 (1967).

79. Some broad areas of general consensus, however, were outlined in a commentary on the Ninth Conference of UNCLOS III by John N. Moore. *Id.* at 14-15.

80. UNCLOS I met for its first session in Geneva on February 27, 1958. These include Chile, Ecuador, Peru, Costa Rica, El Salvador, Honduras and Panama.

81. These include Chile, Ecuador, Peru, Costa Rica, El Salvador, Honduras and Panama.

82. D. BOWETT, THE LAW OF THE SEA 5-12 (1967); Gutteridge, *Beyond the 3-Mile Limit: Recent Developments Affecting the Law of the Sea*, 14 VIRG. J. INT'L L. 195, 198 (1973).

83. Krueger & Nordquist, *supra* note 58, at 329.

adopted by the Conference — the Convention on the Territorial Sea and Contiguous Zone,[84] the Convention on the High Seas,[85] the Convention on Fishing and Conservation of the Living Resources of the High Seas[86] and the Convention on the Continental Shelf.[87] The first two Conventions — on the territorial seas and the high seas — were largely codifications of existing customary international law.[88] The latter two Conventions — on fishing and the continental shelf — explored new area.[89] The Conventions laid an important foundation for latter developments in the 200-mile zone beyond the territorial sea. By piecing together certain provisions of the Conventions, the beginnings of a general fishery zone beyond the territorial sea emerge.

From Article 24 of the Convention on the Territorial Sea and Contiguous Zone[90] comes a codified explication of the contiguous zone. This Article allows the coastal State to exercise the control necessary to prevent infringements of its customs, fiscal, immigration or sanitary regulations in a twelve mile zone contiguous to its territorial sea.[91] The Convention does not, however, expressly provide for any control over fishery resources in this contiguous zone. The Convention on Fishing and Conservation of the Living Resources of the High Seas[92] fills this gap, to an extent, by recognizing a coastal State's "special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea."[93] The Convention also provides for the unilateral adoption of "measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas

84. *Done* at Geneva, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (1964) [hereinafter cited as the Territorial Seas Convention].

85. *Done* at Geneva, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (1962) [hereinafter cited as the High Seas Convention].

86. *Done* at Geneva, April 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5669, 559 U.N.T.S. 82 (1966) [hereinafter cited as the Fishing Convention].

87. *Done* at Geneva, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (1964) [hereinafter cited as the Continental Shelf Convention].

88. Gutteridge, *supra* note 82, at 196. For example, the Convention on the High Seas is a codification of the views of Grotius. *See* notes 24-25 *supra*, and accompanying text. The Convention on the Territorial Seas, though setting no breadth, was a codification of the customary international law of the territorial waters. *See* notes 39-44 *supra*, and accompanying text.

89. *Id.* at 196.

90. *See* Territorial Seas Convention, *supra* note 84, art. 24.

91. *Id.*

92. *See* Fishing Convention, *supra* note 86.

93. *Id.* art. 6.

adjacent to its territorial sea. . . ."[94] It should be noted, however, that this Convention was not designed to give *exclusive* fishing rights to the coastal State, for any conservation measures were to be applied without discrimination and with the aim of securing the "optimum sustainable yield"[95] so as to secure a "maximum supply of food and other marine products."[96]

Perhaps more important to later developments of extended jurisdictional zones was the recognition in the Convention on the Continental Shelf[97] that "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."[98] Though this Convention left the extent of such jurisdiction uncertain and did not, by definition, deal with the fishery resources in the marine layer,[99] its importance is that it recognized, as did the Convention on the Territorial Sea and Contiguous Zone,[100] two extensions of national jurisdiction beyond the territorial sea.[101]

Out of all three of the Conferences on the Law of the Sea, the four Conventions produced at UNCLOS I are, to date, the only codified principles of international law accepted by a significant number of States[102] regarding jurisdictional zones beyond the territorial sea.[103] Thus, taken as a whole, these Conventions come as close as anything yet formulated to a codification of international law regarding extended fisheries jurisdiction.[104]

For all its successful and far reaching codification of much of

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94. *Id.* art. 7.

95. *Id.* art. 2. For a discussion of the concept of optimum yield *see* text accompanying notes 258-64 *infra*.

96. *Id.*

97. *See* Continental Shelf Convention, *supra* note 87.

98. *Id.* The Continental Shelf is referred to as "[t]he seabed and subsoil of the submarine area adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas." *Id.* art. 1. *See also* Gutteridge, *supra* note 82, at 197.

99. Continental Shelf Convention, *supra* note 87, art. 1.

100. *Id.*

101. Gutteridge, *supra* note 82, at 197.

102. Over forty-five States are parties to these Treaty Conventions including all the major powers such as the United States, the Soviet Union, the United Kingdom, Canada and Japan.

103. The Draft Convention on the Law of the Sea (informal text), the latest UNCLOS negotiating text has yet to be adopted by any country. U.N. Doc. A/CONF.62/WP.10/Rev. 3/Add. 1 (1980). *See also* G. KNIGHT, CONSEQUENCES OF NON-AGREEMENT AT THE THIRD U.N. LAW OF THE SEA CONFERENCE (1976).

104. D. BOWETT, *supra* note 82, at 11.

the law of the sea,[105] UNCLOS I left unresolved the two crucial issues of the breadth of the territorial sea and the breadth of exclusive fishery zones.[106] This failure made a second Conference on the Law of the Sea (UNCLOS II) in 1960 necessary, for the incompleteness of the 1958 codification was obvious.[107] The two questions remained unsettled, however, for UNCLOS II also failed to produce an agreed solution to these problems.[108]

The significance of UNCLOS II, in regard to extended fishery jurisdiction, was the occurrence of the first notable proposal[109] for an exclusive contiguous fishery zone subject to a ten-year phasing-out period.[110] The United States and Canada, backed by the Western Powers, jointly sponsored a proposal[111] for a six-mile territorial sea and a six-mile contiguous fishery zone extending six miles beyond. Existing fishing rights within this exclusive 12-mile contiguous zone were to be preserved for a limited period of ten years.[112] "This was felt to be the minimum period in which the long range fishing States could either seek for alternative fishing grounds on the high seas or, if this was not possible, make the necessary economic adjustments so as to cushion the effects of the stoppage of large sections of their fishing industry."[113] This so-called "six-plus-six" formula[114] failed by one vote to achieve the two-thirds majority necessary for adoption.[115] This formula is the closest any proposal for an exclusive fishery zone has come to codification in international law.[116]

After the failure of UNCLOS II, countries[117] began negotiating agreements reflecting the influence of the six-plus-six formula

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105. *Id.* at 5.

106. *Id. See also* Jessup, *The Law of the Sea Around Us*, 55 AM. J. INT'L L. 104 (1961); Jessup, *The U.N. Conferences on the Law of the Sea*, 59 COLUM. L. REV. 234 (1959).

107. D. BOWETT, *supra* note 82, at 5.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 11.

112. *Id.*

113. *Id.*

114. The six-plus-six formula was a proposal whereby there would be an inner zone of six miles of territorial waters and an outer zone of a further six miles in which more-or-less exclusive fishery rights would be conferred on the coastal State. BOWETT, *supra* note 82, at 11.

115. A two-thirds vote is required. The proposal received 54 yeas, 24 nays, with 5 abstentions. D. BOWETT, *supra* note 82, at 11.

116. Comment, *Fisheries Jurisdiction Beyond the Territorial Sea — with Special Reference to the Policy of the United States*, 44 WASH. L. REV. 307 (1968).

117. United Kingdom, Norway and Iceland. D. BOWETT, *supra* note 82, at 14.

(in regard to fisheries) and in particular the notion that historic rights should not exist in perpetuity, but should be phased-out gradually.[118] The most notable agreement, the European Fisheries Convention,[119] was produced at the European Fisheries Conference of 1964.[120] Fourteen countries[121] agreed to a six-plus-six formula with phase-out provisions. A notable departure, however, from the Geneva proposal was the phase-out of historic fishing rights in relation to the inner six miles and not the outer six miles of the 12-mile zone.[122] In the outer six these rights were considered permanent, thus upholding traditional fishing rights. Nevertheless, the phasing-out of fishing rights in exclusive fishery zones, though at this time concerned only with a 12-mile continguous zone, was being discussed and formulated as early as 1960.

Not until UNCLOS III did 200-mile exclusive economic zones begin to receive serious attention from the United Nations and gain acceptance in international practice.[123] Recognition in a multilateral treaty of an exclusive economic zone may eventually emerge from UNCLOS III.[124] At present, however, negotiations are moving at a less than expedient pace. This combined with the failure among member States to reach any significant agreement has provided an impetus for the United States to take unilateral steps to protect its interests in the oceans. The FCMA of 1976 was such a step.

II. THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976

A. Events Preceding the Adoption of the Act

As early as the seventeenth century, the "exclusive right of the inhabitants of a country to the fisheries along their coasts"[125] was

118. *Id.* at 14.

119. *Reprinted in* 3 INT'L LEGAL MATS. 469 (1964).

120. The European Fisheries Convention met from December 1963 to March 1964 and was attended by sixteen States. D. BOWETT, *supra* note 82, at 15.

121. Austria, Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Itialy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, the United Kingdom and Northern Ireland.

122. D. BOWETT, *supra* note 82, at 17.

123. *See generally* CHRISTY, CLINGAN, GAMBLE, LAW OF THE SEA: CARACAS AND BEYOND (1975).

124. *See id.* at 8.

125. William Wellwood (1578-1622) writing in 1613. *See* C. COLOMBOS, *supra* note 19, at 110. It is noteworthy that this statement refers to the territorial waters only.

recognized as a principle of international law.[126] The United States codified this principle with the enactment of the Coasting and Fishing Act in 1793.[127]

The Act was implemented mainly for the purpose of licensing foreign flag vessels involved in the coasting trade or fisheries and only indirectly prohibited foreign fishing within the territorial waters of the United States.[128] For the next 150 years the United States did little to impose restraints on foreign fishing in any waters off its coasts. Even the Truman Proclamations, though having great precedent setting effect in the international sphere,[129] did little to formulate concrete sanctioned law to prohibit foreign fishing within United States waters.

The Bartlett Act[130] of 1964 was the first comprehensive program, including sanctions,[131] which prohibited foreign fishing in the coastal waters of the United States. The Act was in fact the domestic implementation by the United States of Article 2 of the Convention on the Continental Shelf produced at Geneva in 1958.[132] The Act prohibited foreign fishing within three nautical miles of the coast of the United States and the taking of continental shelf resources.[133] The Exclusive Fisheries Zone Act[134] of 1966 amended the Bartlett Act by increasing the sanctions and establishing a fisheries zone, nine nautical miles contiguous to the territorial

126. It was recognized that within territorial waters, a State could enact regulations reserving to its nationals the right of fishing. *See* C. COLOMBOS, *supra* note 19, at 110.

127. The Act was also known as the Nicholson Act. 46 U.S.C. § 251(c) (1970) corresponds to the Coasting and Fishing Act of 1973, § 1, 1 Stat. 305. *Cf.* (limited to Alaska) Alien Fishing Act, 34 Stat. 263 (1906).

128. *See* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 936-37 (1965). Also note that the lack of any sanctions in this statute generally prevented any federal prosecution for violations.

129. *Origins of 200-Mile Zones, supra* note 54, and accompanying text.

130. 16 U.S.C. §§ 1081-1085 (1976). Signed into law by President Johnson on May 20, 1964. *See also* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 936-38 (1965). Note that this Act was repealed as of March 1, 1977, by § 402(b) of the FCMA. *See* note 1 *supra*. The FCMA incorporates the essential provisions of the Bartlett Act for the United States' 200-mile exclusive fishery zone. G. KNIGHT, THE LAW OF THE SEA: CASES, DOCUMENTS AND READINGS 701(a) (1980).

131. Any person found to be in violation of this law could be fined $10,000 or imprisoned for not more than one year and forfeit their vessel and its catch. *See* 16 U.S.C. § 1082 (1976).

132. *See* Continental Shelf Convention, *supra* note 87, and accompanying text.

133. *See* 16 U.S.C. § 1801-1885 (1976).

134. *Id.* § 1091-1094 (1976). Note that this Act was repealed as of March 1, 1977, by § 402(a) of the FCMA. The Act reads in part: "There is established a fisheries zone contiguous to the territorial sea of the United States [extending 9 nautical miles out to sea from the territorial sea]. The United states will exercise the same exclusive rights in respect to fisheries in the zone as it has in its territorial sea . . . ." *Id.* § 1091.

sea of the United States, in which the United States "exercises the same exclusive rights in respect to fisheries . . . as it has in its territorial sea."[135]

Eventually even this 12-mile contiguous zone[136] became ineffective to conserve and manage United States' fish stock[137] and protect the United States' fishing industry from competition with foreign fishermen.[138] Overfishing in distant waters by foreign fishermen also depleted valuable fishery resources adjacent to the shores of the United States.[139] The relevant statistics are revealing. In comparison to the total annual world landings of fish, which have tripled from 1938, from approximately 50 billion pounds to over 150 billion pounds, the United States landings increased only slightly, from 4.3 to 4.7 billion pounds from 1938 to 1973.[140] United States' consumption had increased only slightly less dramatically than the total annual world catch.[141] The result was that the difference between United States' catch and consumption represented imported fish, much of which was taken from waters adjacent to the United States.[142] Thus, though the volume of fish caught off the coast of the United States increased, the increase was mainly attributable to foreign fishing efforts.[143]

The efficiency and mobility of foreign fishing fleets, combined with their introduction of processing vessels at sea, have led to severe overfishing off the shores of the United States.[144] Overexploitation of fishery resources is no longer a theoretical possibility but an actual occurrence.[145] In an effort to find solutions to the problem, fishery management scientists and biologists began examining the high seas fishery as a classic common property resource.

This examination led to the conclusion that a common prop-

135. 16 U.S.C. §§ 1091-1094 (1976).

136. *See* note 134 *supra*.

137. Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 431 (1977).

138. *Id.* Magnuson reported in his article that foreign vessels take nearly 70 per cent of the commercial catch of the United States coastal fisheries.

139. *See generally id.*

140. *Id.* at 431.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 432. At the time of the Congressional debate on the FCMA, sixteen species of fish were judged by United States scientists to be overfished off the shores of the United States.

145. *See* G. KNIGHT, MANAGING THE SEAS LIVING RESOURCES 1 (1977) [hereinafter cited as MANAGING THE SEAS RESOURCES].

erty resource left unregulated becomes subject to the "tragedy of the commons."[146] The thesis of the tragedy of the commons is that freely exploitable resources common to all will eventually be run down to the point of destruction.[147] The logic of this theory is ideally illustrated with the high seas fishery — a paradigm of a common property resource.[148]

Solutions to the tragedy of the commons immediately spring to mind. One solution might be to create private ownership rights in the high seas fisheries. Thus, when the carrying capacity of a fishery is reached, the negative impact or burden on the fishery will exceed the benefit of increased catch and one will have the incentive not to overfish.[149] The most feasible solution, however, is: restriction of entry into the fishery.[150]

Imposing a regime of restrictions on a resource that has been historically regarded as public property requires some governmental entity endowed with jurisdiction over the particular area of the ocean and fishery resource concerned.[151] So far, legal and political developments have not led to the creation of an entity that would effectively control and manage fish stocks. Another approach to the fishery conservation and management problem has been treaties.

Treaties, in which nations agree among themselves to restrict

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146. In a now classic article entitled *The Tragedy of the Commons*, Garret Hardin was one of the first to propose a theory for the breakdown of a common property resource, which he termed the "tragedy of the commons." *See* SCIENCE, Dec. 13, 1968, at 1243.

147. *Id.* at 1244-45.

148. The concept of the freedom of the high seas and the now outmoded belief that the resources of the oceans are inexhaustible has led to the characterization of the high seas fishery as a common property resource. *See* MANAGING THE SEAS RESOURCES, *supra* note 145, at 4.

Before the twentieth century, neither the science nor the technology was available to allow any significant depletion of the fishery resources of the oceans. Fisherman could take as many fish as they were capable of without destroying the commons. Thus, it was to the benefit of each fisherman to maximize his catch. This was the logic of the commons.

By the twentieth century, science and technology had made it possible to overfish or exceed the carrying capacity of a fishery. At this point the inherent logic of the commons degenerates. Tragedy is the result. In the short run, it is to the advantage of each fisherman to maximize his catch, regardless of the affect it will have on the common fishery, since he will experience a full unit of benefit but only a fraction of the burden imposed on the commons by such action. Consequently, "[E]ach man is locked into a system that compells him to increase his [catch] without limit — in a world that is limited." *Id.* at 1244. In such a situation, the carrying capacity of the fishery is soon exceeded and the inevitable result is the destruction of the commons. Thus, "freedom in a commons brings ruin to all." *Id.*

149. MANAGING THE SEAS RESOURCES, *supra* note 145, at 4.

150. D. JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES 50-60 (1965).

151. MANAGING THE SEAS RESOURCES, *supra* note 145, at 4.

their fishing in certain fisheries for the common good, have provided only a partial solution to the fishery management problem.[152] The major defect of a system of conservation and management by treaty is that nations not choosing to be a party to the treaty have no responsibility, under the customary international law principle of the freedom of the sea, to restrict themselves voluntarily from overfishing. Since an effective system of conservation and management depends on the group participation of all nations utilizing the fisheries, the treaty system immediately breaks down.[153]

The United Nations Conferences have tried to conciliate the varying interests of nations and achieve a draft treaty to which all or most nations would agree. So far this attempt has failed. The ineffectiveness of these different solutions to terminate or prevent overfishing and the slow pace of United Nations negotiations have created the atmosphere for unilateral action. To conserve and manage its fishery resources, the United States took such an action, with the adoption of the Fishery Conservation and Management Act of 1976.

B. The Fishery Conservation and Management Act as Enacted

On April 13, 1976, President Ford signed into law the Fishery Conservation and Management Act (FCMA).[154] The effect of the Act was to extend national fishery management jurisdiction to 200 nautical miles over all fish except highly migratory species.[155] The premises for adopting the FCMA were two: (1) to conserve and be able to manage better fishery resources in United States coastal waters and prevent overfishing;[156] and, (2) to aid the development of the United States fishing industry.[157]

The FCMA is organized in four titles. Title I[158] states the authority of the United States for fishery management. It establishes a zone contiguous to the territorial sea of the United States, extending 200 miles seaward from its coast, known as the Fishery Conservation Zone (FCZ).[159] Title I also exempts all highly migra-

152. *Id.*
153. *Id.*
154. *See* note 1 *supra*.
155. Magnuson, *supra* note 137, at 427. The term "highly migratory species" means species of tuna which, in the course of their life cycle, spawn and migrate over great distances in waters of the ocean. 16 U.S.C. § 1802(14) (1976).
156. 16 U.S.C. § 1801(b)(1) (1976).
157. *Id.* § 1801(b)(6).
158. *Id.* §§ 1811-1813.
159. *Id.* § 1811.

tory species of tuna from the fishery management authority of the United States.[160]

Title II of the Act authorizes foreign fishing within the FCZ if there was an existing international fishery agreement at the time the Act was signed into law or if the country desiring to fish within the FCZ enters into a Governing International Fishery Agreement (GIFA) with the United States.[161] Under either case, the requirement of securing a permit from the Secretary of State to fish within the FCZ must be met.[162] The Secretary is authorized to charge reasonable fees for these permits.[163]

Title III establishes regional fishery management councils[164] and national standards for fishery conservation and management.[165] This Title also sets forth a framework for implementation of the fishery management plans[166] and sanctions[167] for violations.

Title IV of the Act provides authority to amend the regulations to conform to any treaty the United States might ratify as a result of the third United Nations Law of the Sea Conference.[168] This title gives the Act the character of an interim measure until an acceptable comprehensive international agreement is reached.[169]

Whether the United States has internationally-sanctioned authority to exercise jurisdiction over a 200-mile zone depends on whether such claims are accepted as international law. In the absence of conventional regulations, such as international conventions (treaties),[170] the most important source of international law is custom.[171] International legal custom is defined by consistent and uniform usage which States are obliged to follow because of a general feeling that a sanction will be imposed upon them if they do not.[172] "Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of

160. *Id.* §§ 1813 & 1802(14).
161. *Id.* § 1821(b) & (c).
162. *Id.* § 1824.
163. *Id.* § 1824(10).
164. *Id.* § 1852.
165. *Id.* § 1851.
166. *Id.* §§ 1821-1857.
167. *Id.* §§ 1858-1860.
168. *Id.* § 1881.
169. Magnuson, *supra* note 137, at 438.
170. *See* Statute of the I.C.J., *supra* note 71, art. 38(1)(a).
171. Fleischer, *The Right to a 200-Mile Exclusive Economic Zone or a Special Fishery Zone*, 14 SAN DIEGO L. REV. 548, 570 (1977).
172. Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 393 (1950).

states"[173] to see whether the alleged custom shows "a general practice accepted as law."[174] Thus, a State making a claim that an international law exists must show that the alleged rule of international law "is in accordance with a constant and uniform usage practiced by the States in question."[175]

When the United States claimed jurisdiction to a 200-mile FCZ, twenty-five countries had already made some sort of 200-mile claim — generally as an EEZ or as a territorial sea.[176] It is clear that in the creation of customary international law "what matters is not so much the number of states participating in its creation and the length of period within that change takes place, as the relative importance, in any particular sphere, of states inaugurating that change . . . ."[177]

Prior to the United States' 200-mile claim in 1976 only lesser-developed countries, economically and politically weak, had made such claims. In 1976, developed countries joined the 200-mile group. Included in this assemblage were Canada, the United States, the United Kingdom, France, the Soviet Union, Norway, Mexico and the European Economic Community, followed soon after by Japan. Considering the economic and political prominence of the developed countries that have asserted some form of 200-mile claim, the evidence may now exist for at least giving 200-mile claims the status of developing customary international[178] law if not developed customary international law.[179] Senator Magnuson, principal draftsmen of the FCMA, has stated that the United States' 200-mile claim "played a key role in establishing [the 200-mile claim as] a customary rule of international law in a relatively short period of time."[180]

The criticism that can be levied against construing 200-mile claims as customary international law today is minor in comparison to the strong evidence supporting such a claim. One such criticism would be that the wide variance of rights claimed within the zones prevents any real uniformity — a necessary element for customary international law. Another criticism is the sharp protests that en-

173. *Id.*
174. Statute of the I.C.J., *supra* note 71, art. 38(1)(b).
175. Asylum Case (Colombia v. Peru) [1956] I.C.J. 266; J. BRIERLY, *supra* note 19, at 276.
176. Lynch, *supra* note 68, at 33.
177. Lauterpacht, *supra* note 172, at 394.
178. Fleischer, *supra* note 171.
179. Magnuson, *supra* note 137.
180. *Id.* at 427.

sued from the United States' 200-mile claim, especially from Japan and the Soviet Union.[181] Vehement protests usually indicate that the protesting State does not accept as law, or as being in conformity with existing law, the practice of another State.[182] With these protesting States' subsequent adoptions of 200-mile zones, however, the effect was to nullify the protests and implicitly ratify the United States' action.

Initially, the FCMA accomplished its major goals.[183] The number of fishing vessels within the FCZ was reduced by one-half.[184] The United States' fleet expanded its catch of popular species and its fish catch grew. For example, the United States' cod catch increased by 50 per cent, and the haddock catch increased by 100 per cent.[185] Development in other areas of the United States fishing industry occurred in response to the fishermen's new found wealth.[186] Foreign fishing interests, however, soon found their way around the FCMA.

C. Disappointments in the Aftermath of the FCMA

1. *The United States Fishing Industry*. The overall performance of the fishing industry since the enactment of the FCMA has been discouraging.[187] The United States fishermen have not seen the preferential access[188] guaranteed to them by the FCMA produce any substantial economic growth or net increase in harvest over the foreign fisherman.[189] The reduction in foreign fishing since the enactment of the FCMA has not been substantially re-

181. Japan declared its "regrets . . . over the recent enactment of the FCMA of 1976 . . ." and declared the Act could not be "deemed valid under international law." Note from the Embassy of Japan to the United States Department of State (April 15, 1976) *reprinted in* G. KNIGHT, *supra* note 130, at 741(n).

182. Lauterpacht, *supra* note 172, at 395.

183. *See* notes 156-57 *supra*, and accompanying text.

184. Wash. Post, Aug. 21, 1977, § A, at 1, col. 4.

185. *Id.*

186. For example, boat builders and fish processors expanded their operations. *Id.*

187. House Report, *supra* note 3, at 17.

188. 16 U.S.C. § 1821(d) (1976).

189. Table I shows the volume and value of harvests by United States and foreign fishemen in the FCZ in the years, 1976-1979. Clearly the growth of the harvest has been quite slow. House Report, *supra* note 3, at 17.

duced.[190] More than three years after the enactment of the FCMA, United States fishing fleets were harvesting only 33 per cent by volume, and 66 per cent by value, of the total catch in the FCZ.[191] By 1979, foreign fishing in the United States' FCZ had been displaced by only one per cent per year.[192] That one per cent by volume translates to less than three per cent by value. Thus, while the *volume* of the foreign catch has decreased slightly, the *value* of the foreign catch has actually increased by thirty-seven million dollars since 1976.[193]

a. Fish Processing. The fish processing segment of the United States fishing industry initially fared no better after the enactment of the FCMA. Foreign nations soon resorted to more indirect techniques to gain access to United States resources. One of the more profitable methods of circumventing the FCMA was through the "joint venture."[194]

The joint venture arrangement involves a United States fisherman selling his catch to foreign processing ships operating within the FCZ.[195] The foreign vessels process the fish, take it abroad, and

	Volume in thousands of metric tons and percent of total		
	U.S. Landings	Foreign catch	Total
1976	720 (23%)	2,368 (77%)	3,088
1977	689 (29%)	1,899 (71%)	2,338
1978	841 (27%)	1,754 (73%)	2,395
1979	803 (33%)	1,641 (67%)	2,444
	Value (estimate) in millions of dollars and percent of total		
	U.S. Landings	Foreign catch	Total
1976	561 (56%)	433 (44%)	994
1977	689 (80%)	445 (40%)	1,134
1978	641 (58%)	460 (42%)	1,101
1979	945 (66%)	470 (34%)	1,415

TABLE I

190. CONG. REC., *supra* note 3, at H9395.

191. *See* note 189 *supra*.

192. House Report, *supra* note 3, at 17.

193. *Id.*

194. *See generally* Christie, *Regulation of International Joint Ventures in the Fishery Conservation Zone*, 10 GA. J. INT'L & COMP. L. 85 (1980); Comment, *Amendments to the Fishery Conservation and Management Act of 1976: The Path to Expanded Protection for American Fish Processors*, 10 LAW & POL. INT'L BUS. 1325 (1978).

195. *Id.* at 1329.

then export it to the United States.[196] The United States, consequently, imports fish caught in its waters for a higher price than if the whole operation had been done domestically.[197] The joint venture was soon perceived as a major loophole in the FCMA.[198] United States fish processors demanded an amendment to the FCMA that would put their interests on parity with the interests of the United States fisherman[199] protected by the FCMA.[200] Congress' response was the Joint Venture Amendment[201] to the FCMA.

The Amendment "created United States processor preference for American harvested fish similar to fisherman's priority in the FCZ."[202] It clearly prohibited foreign processing vessels from receiving those fish species which were being fully utilized by United States processors.[203] The Amendment was ambiguous, however, concerning United States processor preference regarding underutilized species. Ironically, this was the segment of the processing industry the FCMA specifically singled out in its purposes to encourage.[204] It still remains questionable whether the amendment has given any priority to the United States onshore processor of underutilized species.[205]

The Amendment also fails to provide sufficiently clear guidelines for implementation of the processor preference given by the FCMA.[206] Thus, in spite of the Amendment, United States processed fish products have increased only slightly over 11 per cent per year since the enactment of the FCMA.[207] It has been suggested that further guidance from Congress may be necessary before final

196. *Id. But see* Pereyra, *Some Preliminary Results of a U.S.-Soviet Joint Fishing Venture*, 10 J. CONTEMP. BUS. 7, 10 (1981). In the joint venture described therein the participating United States company markets the finished product in the international market. Less than one percent of the fish are imported by the United States.

197. *Id.*

198. Christie, *supra* note 194, at 85.

199. *Id.* at 85-86.

200. *See generally* FCMA 16 U.S.C. § 1801 (1976). Before the Joint Venture Amendment the language in the FCMA was specifically oriented toward the United States fisherman.

201. Joint Venture Amendment, Pub. L. No. 95-354, 92 Stat. 519 (1978). The Act amended various sections of the original FCMA.

202. Christie, *supra* note 194, at 86.

203. Among the species which are clearly *not* within the scope of the joint ventures are salmon, king crab, halibut, surf clams, menhaden, lobster and shrimp. Christie, *supra* note 194, at 90.

204. *Id.* at 91.

205. *Id.*

206. *Id.*

207. House Report, *supra* note 3, at 17. Table II shows the increase in value by dollars of United States processed fish products from 1976-1979.

implementation of the Joint Venture Amendment can be realized.[208]

b. Fish Imports and Exports. The United States import-export picture is also bleak.[209] With approximately 20 per cent of the world's fishery resources located off its shores, the United States remains a net importer of seafood.[210] Improved access for United States fish products to foreign markets is crucial to the development of the United States fishing industry.[211] Yet United States exports are being closed out of many markets because of severe trade barriers.[212] Japan, for example, though harvesting far more fish from the United States' FCZ than any other foreign nation,[213] continues to impose some of the most restrictive quotas and oppressive import tariffs on United States exports of any country.[214] Japan also

[In billions of dollars]

1976	3.2
1977	3.9
1978	4.6
1979	4.7

TABLE II

208. Christie, *supra* note 194, at 100.

209. House Report, *supra* note 3, at 17; CONG. REC., *supra* note 3, at H9395. Table III compares the dollar amounts of United States fish imports and exports. Note that while the growth in exports has been substantial the increase in imports has been greater.

[In millions of dollars]

	Imports	Exports	Net
1976	2,277	382.0	−1,895.0
1977	2,621	520.5	−1,900.5
1978	3,099	905.5	−2,193.5
1979	3,811	1,082.4	−2,728.6

TABLE III

210. *Id.* at 17-18.

211. CONG. REC., *supra* note 3, at H9398.

212. House Report, *supra* note 3, at 30.

213. In 1979, Japan took 72 per cent by value and 68 per cent by volume, of all of the fish harvested in the United States' FCZ. Japan's harvest was 1, 184,420.3 metric tons valued at $297 million. According to the NMFS, this is an increase for Japan of $87 million over the value of its 1976 catch in the same area. House Report, *supra* note 3, at 30-31.

214. Japan maintains a system of import quotas, exclusive or restrictive import licenses and oppressive import tariffs that substantially impede imports of United States fish products. A recent GAO Report to the Committee entitled, "Developing Markets for Fish Not Traditionally Harvested by the United States: The Problems and the Federal Role," states, "Despite marketing opportunities in Japan, tariff and non-tariff trade barriers hamper United States marketing efforts there. Japan maintains a tariff of between five and fifteen percent on most imported fresh and frozen fish, including pollock. Non-tariff restrictions, such as import quotas, present an even more important barrier to United States imports to Japan. . . ." House Report, *supra* note 3, at 31.

happens to be one of the markets the United States is most heavily dependent upon for its export trade.[215] The result is that the United States trade deficit continues to grow.[216] As long as foreign nations are permitted to continue a high level of fishing in the FCZ and at the same time deny their markets to United States fish exporters by imposing restrictive quotas and oppressive import tariffs, the United States will be unable to achieve full development of its fishery resources.[217] Furthermore, the evidence shows that significant problems also are being encountered in the fulfillment of the conservation and management objective of the FCMA.

2. *The Conservation and Management of Fishery Resources.* The fishery conservation and management objective of the FCMA recognized the need for a regulatory device to prevent the destruction of United States fisheries by overfishing.[218] It was recognized that the sea's living resources were not inexhaustible[219] and that common pool resources, such as high seas fisheries, left unregulated would eventually be destroyed.[220] A major portion of the FCMA is devoted to setting out a scheme of regulations to prevent the ruin of United States fisheries.

The FCMA sets out specific fishery conservation and management guidelines regulating the total allowable level of foreign fishing (TALFF)[221] in the United States' FCZ. In each fishery there is to be determined a TALFF based on "that portion of the optimum yield of such fishery which will not be harvested by vessels of the United States. . . ."[222] The TALFF is then allocated among foreign nations by the Secretary of State,[223] who takes into account such factors as the traditional fishing rights of the foreign nations[224] and whether they have cooperated with the United States in respect to its conservation and management guidelines and enforcement measures.[225] The continued threat to fish species off the coast of the

215. *Id.* at 30.
216. *Id.* at 17.
217. CONG. REC., *supra* note 3, at H9395.
218. 16 U.S.C. § 1801(a) (1976).
219. *Id.* § 1801(a)(5).
220. *See* notes 148-58 *supra*, and accompanying text.
221. *See* 16 U.S.C. § 1821 (1976).
222. *Id.* § 1821(d) as originally enacted. This section of the FCMA is now amended by the Promotion Act, *supra* note 18, § 230.
223. *Id.* § 1821(e)(1).
224. *Id.* § 1821(e)(1)(A) as originally enacted. This same criterion is incorporated in the FCMA as amended by the Promotion Act, *supra* note 18, § 231.
225. *Id.* § 1821(e)(1)(C) as originally enacted. This factor is also included in the

United States appears to be the result, not so much of the inadequacies of the mechanics of the FCMA's conservation measures, but of the difficulty in enforcing them.[226]

Since the enactment of the FCMA, it has become clear that poor enforcement of its guidelines can lead to overfishing of a magnitude sufficient to undermine conservation and management measures.[227] Unfortunately, the level of enforcement necessary to achieve the effective conservation and management of fish stocks has fallen far short of what is required.[228] Currently, the resources of the two bodies responsibile for enforcing the FCMA — the National Marine and Fisheries Service (NMFS) and the Coast Guard — are stretched very thin.[229] Overall observer coverage, wherein a United States observer is placed on board the foreign vessel to monitor the catch, is the surest and most effective means of enforcement. Yet the overall observer coverage is only 17.1 per cent off Alaska, 22.1 per cent in the South Atlantic and 23.2 per cent in the

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amended version. As a result of the American Fisheries Promotion Act amendment to § 1821(e)(1) of the FCMA, the factors now used in determining allocation of the TALFF are:

> (A) whether, and to what extent, such nations impose tariff barriers or nontariff barriers on the importation, or otherwise restrict the market access, of United States fish or fishery products;
>
> (B) whether, and to what extent, such nations are cooperating with the United States in the advancement of existing and new opportunities for fisheries trade, particulary through the purchase of fish or fishery products from United States processors or from United States fishermen;
>
> (C) whether, and to what extent, such nations and the fishing fleets of such nations have cooperated with the United States in the enforcement of United States fishing regulations;
>
> (D) whether, and to what extent, such nations require the fish harvested from the fishery conservation zone for their domestic consumption;
>
> (E) whether, and to what extent, such nations otherwise contribute to, or foster the growth of, a sound and economic United States fishing industry, including minimizing gear conflicts with fishing operations of United States fishermen, and transferring harvesting or processing technology which will benefit the United States fishing industry;
>
> (F) whether, and to what extent, the fishing vessels of such nations have traditionally engaged in fishing in such fishery;
>
> (G) whether, and to what extent, such nations are cooperating with the United States in, and making substantial contributions to fishery research and the identification of fishery resources; and
>
> (H) such other matters as the Secretary of State, in cooperation with the Secretary, deems appropriate.

These criteria that the State Department must now use when it considers how to allocate the TALFF have been termed the United States' "fish and chips" policy. Essentially, these criteria put foreign nations on notice that the United States wants something in return for its allocation of fish to foreign nations in the FCZ. *See* Sloan, *The Fishing Industry and the Future: Confronted with Limitless Opportunities*, 10 J. CONTEMP. BUS. 45, 46 (1981).

226. *See generally* CONG. REC, *supra* note 3; House Report, *supra* note 3, at 33.

227. House Report, *supra* note 3, at 33.

228. CONG. REC., *supra* note 3, at H9394.

229. *Id.* at 33-34.

Mid-Atlantic and New England areas.[230] At the same time, reports from the NMFS indicate there may "be a formidable and possibly pre-planned effort at non-compliance with the FCMA regulations. . ." by foreign fishing fleets.[231]

There was a total of 382 violations of the FCMA in 1979 by foreign fishermen.[232] Most of these violations involve "the attempted concealment of total catches by erroneous entries into ships' logs."[233] When combined, the violations constitute the retention and concealment of several thousand metric tons of fish.[234] In the view of the NMFS, these violations seriously frustrate their efforts to conserve effectively and manage United States' fish resources.[235]

After four years and a cost of over $105 million for enforcement of the FCMA in 1979 alone, conservation and management of the fishery resources in the FCZ are not at the level that was hoped for when the FCMA was enacted. The current dissatisfaction with the *status quo* of the fishing industry and the difficulty and cost of enforcing the fishery conservation and management measures are

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230. *Id.*
231. *Id.*
232. Table IV shows the countries violating the FCMA and the number of incidents:

Violators in 1979 were the following:

	Incidents
Japan	147
Italy	87
Spain	50
U.S.S.R.	48
Mexico	35
Poland	10
Korea	4
Canada	1
Total	382

As of mid-May 1980, NMFS reported 5 serious underloggings in percentages ranging from 17 to 35. There were 17 major violations in 1979 and 1980, a major increase over 1977 and 1978. Those violators were as follows:

	Incidents
Japan	9
Korea	3
Taiwan	3
U.S.S.R.	1
Poland	1
Total	17

TABLE IV

House Report, *supra* note 3, at 34.
233. *Id.* at 33-34.
234. *Id.*
235. *Id.*

providing the atmosphere for extreme solutions. Pressure is building for a complete phase-out of foreign fishing.[236]

III. THE PROSPECT OF PHASING-OUT FOREIGN FISHING

The primary objective of the FCMA is the conservation and management of United States fishery resources.[237] The FCMA recognized that although these resources are subject to total depletion and irreversible damage if overfished, they are renewable.[238] The Act outlines a program of national conservation and management to replenish overfished stocks and maintain them at a level sufficient to provide optimum yields on a continuing basis.[239] United States fishing fleets were to have preferential access to the fisheries while foreign fleets were to be allowed access only if a portion of the optimum yield was not harvested by United States' fleets.[240] It was projected that this preferential access would promote the sagging United States fishing industry.[241] As discussed, neither of these goals has been fully realized by the FCMA.[242] Many perceive the problem to be the continued fishing in the United States' FCZ by foreign fishermen.[243] A proposed solution therefore is to eliminate completely the foreign fleets from the FCZ by phasing-out their fishing activities. Such a measure must be evaluated in the light of the FCMA's own phase-out mechanism and existing and projected international law.

A. The Need for a Phase-Out

One of the earliest concepts to emerge from fisheries management science was maximum sustainable yield (MSY).[244] The theory of MSY is that for each stock of fish there exists a level of fishing at which the maximum tonnage of fish can be taken year after year without depleting the stock.[245] If the maximum sustainable yield of a fishery is exceeded, the stock will be depleted and it will eventually become economically infeasible for the fishery to

236. *See* Jones, *Freedom of Fishing in Decline: The Fishery Conservation and Management Act of 1976 and the Implications for Japan*, 11 CALIF. W. INT'L L.J. 52 (1981).
237. 16 U.S.C. §§ 1801(b) & 1851(a)(2) (1976).
238. *Id.* § 1801(a)(5).
239. *Id.* §§ 1801(a)(5) & 1801(a)(6).
240. *Id.* § 1821(a) & (d).
241. *See* House Report, *supra* note 3. *See also id.* § 1801(b)(3).
242. *See* notes 187-235 *supra*, and accompanying text.
243. *See generally* House Report, *supra* note 3.
244. MANAGING THE SEAS RESOURCES, *supra* note 145, at 3-6.
245. *Id.*

continue.[246] The shortcomings of MSY are that it relies solely on biological criteria and fails to take into account the social, political and economic factors also associated with fishery management.[247]

In the middle 1950's, a new theory suggested that the only realistic objective of a conservation program was to achieve in each fishery "a state of optimum fishing"[248] based on a combination of economic, biologic and social factors. Only if all these criteria were taken into equal consideration could an optimum sustainable yield in a fishery be achieved. The undercurrent of this theory is that there is a point below the MSY at which it is no longer economically profitable to increase the catch.[249] This point is the optimum yield (OY) of a fishery and in practice will always be less than the maximum sustainable yield of a stock.[250]

The FCMA recognizes that optimum yield is a major goal of fishery management[251] and makes the attainment of an OY in each fishery its primary objective.[252] Optimum yield, as used in the FCMA, is defined[253] in terms of what provides "the greatest overall benefit to the nation"[254] coupled with a prescribed level of fishing based on a modification of the maximum sustainable yield by "relevant economic, social or ecological factor[s]."[255] From a determination of the optimum yield of the fishery and the United States catch, the level of foreign fishing in the FCZ is set.

The FCMA provides United States fishing fleets with preferential access to harvest the optimum yield from each fishery.[256] In

246. *Id.*

247. *Id.*

248. As early as the 1900's empirical evidence was available which showed that overfishing was the prime cause of the depletion of oceanic fisheries. In the 1930's F.S. Russel introduced a theory which linked stock abundance to additions via growth and recruitment and to losses via natural and fishing mortality. Combining this empirical and theoretical reasoning led to the generalization that for a given stock of fish there exists an MSY and an associated level of fishing which will achieve that yield. MSY became a principal goal of fisheries management following the turn of the century. MANAGING THE SEAS RESOURCES, *supra* note 145, at 8; G. KNIGHT, *supra* note 130, at 662(a)-662(h).

249. *Id.*

250. This generalization concerns total catch which is a biological phenomenon related to stock rather than catch. G. KNIGHT, *supra* note 130, at 552(h).

251. 16 U.S.C. § 1801(b)(4) (1976).

252. *Id.*

253. *Id.* § 1802(18).

254. *Id.* § 1802(18)(A).

255. *Id.* § 1802(18)(B).

256. It is important to note that a glaring deficiency of this definition is the lack of criteria for establishing what constitutes "the greatest overall benefit to the Nation." *See* Alverson, *The Role of Conservation and Fishery Science Under the Fishery Cons. & Management Act of 1976*, 52 WASH. L. REV. 723, 727-29 (1977). *See also* Christy, *The Fishery Conservation*

any given season, the foreign fisherman is allowed to take only that portion of the optimum yield the United States' fleets do not harvest.[257] This amount is the total allowable level of foreign fishing (TALFF) allowed by the FCMA.[258] If, in any given year, the United States fisherman has the capacity to harvest the full optimum yield, then the foreign fisherman will be completely excluded from that fishery for that year. Thus, a mechanism for the phase-out of foreign fishing is in fact built into the FCMA by giving absolute preference in all fisheries to the United States fisherman and allowing the foreign fisherman to harvest only that portion of the optimum yield the United States fisherman does not.[259] The advantage of this formula is that, in the event the United States fisherman does not take the optimum yield from a fishery, the surplus will not be left unused.[260] The Secretary of State is authorized to allocate this surplus — the TALFF — among foreign nations wishing access to fisheries under the exclusive management authority of the United States.[261]

In contrast, the legislative proposal[262] for a mandatory phase-out is intended automatically to phase-out foreign fishing in the

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and Management Act of 1976: Management Objectives and the Distribution of Benefits and Costs, 52 WASH. L. REV. 657, 658 (1977).

257. It should be noted that an implied requirement of this section is that any deviation from the MSY for economic, social or biological reasons within any management plan must be substantiated by use of the best scientific information available. 16 U.S.C. § 1801(a)(3) & § 1851(a)(2) (1976); Alverson, *The Role of Conservation and Fishery Science Under the Fishery Conservation and Management Act of 1976*, 52 WASH. L. REV. 723 (1977). *See also* Comment, 52 WASH. L. REV. 599 (1977). This definition also suffers from a major weakness since the only real clue to a scientific objective for optimum yield is the stipulation in Subchapter III of the FCMA that conservation and management measures shall, "where practicable, promote efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose." 16 U.S.C. § 1851(a)(5) (1976).

258. For example, if the optimum yield of a fishery is determined to be 100,000 tons and the United States capacity is 60,000 tons then the foreign fisherman would be allowed to take 40,000 tons from that fishery.

259. 16 U.S.C. § 1821(d) (1976) and Promotion Act, *supra* note 18, § 230. This statement is the net result of 16 U.S.C. § 1821(d) both before and after the American Fisheries Promotion Act amendment. The Promotion Act does little more than complicate the original provision of the FCMA which it amends. The key provision in the amended version of § 1821(d) which essentially leads to the same net result as the original provision, is the carry-over provision of § 1821(d)(4).

260. *See* House Report, *supra* note 3, for dissenting views. In Title III of the House Report, McClosky states that it would be a waste of valuable protein to leave these stocks unused.

261. 16 U.S.C. § 1821(e)(1). *See* note 225 *supra*.

262. *See* House Report, *supra* note 3, at 8. This was the House passed version of a proposed amendment to the FCMA before the enactment of the American Fisheries Promotion Act. Henceforth, the Bill will be referred to as the "legislative proposal."

FCZ regardless of what portion of the optimum yield the United States' fleets harvest in any given year. It will automatically reduce the allowable foreign catch by a certain specified percentage each year until no foreign fishing would be allowed in the FCZ. The mechanism specifically proposed in Title III of the legislative proposal[263] would establish a "phase-out reduction factor amount"[264] that would, in the first year of implementation, reduce "the aggregate harvest by all foreign nations in that fishery . . ."[265] (the base harvest) by 15 per cent. Each consecutive year the base harvest amount would be reduced by an amount equal to 10 to 15 per cent, provided the United States' fleets could harvest 50 to 75 per cent of the amount denied foreign fleets in the previous year.[266] This process would continue until no foreign fishing would be allowed.[267] Best estimates predict that such a program, if begun in 1981, for example, would eliminate foreign fishing in the FCZ by 1990.[268]

Since the FCMA contains its own phase-out mechanism conditioned on the United States fish catch in any given year, a need for a categorical exclusion of foreign fishing fleets appears to be lessened. Of more importance, however, are the possible violations of international law a phase-out program might cause if enacted.

B. Possible Violations of International Law by Excluding Foreign Fishing

Compared to the absence of regulations before 1976 on foreign fishing fleets outside United States' territorial waters, the FCMA placed strict limitations on foreign fishing within 200 miles of the United States' territorial sea.[269] When the FCMA was enacted, it not only lacked support in international law,[270] but also violated

263. *Id.*

264. *Id.* at 8, § 301(1)(C).

265. *Id.*

266. *Id.* For example, assuming that the TALFF in 1981 was 40,000 tons, an automatic 15 per cent reduction (6,000 tons) would allow the foreign fleets to harvest only 34,000 tons in the first year, even if the United States fleets did not harvest that 6,000 tons. In each subsequent year another 10 to 15 per cent reduction in the 1981 TALFF amount of 40,000 tons would be denied the foreign fleets if the United States fleets harvested 50 to 75 per cent of the 40,000 ton amount denied.

267. *Id.* at 8, § 301(4).

268. This was the prediction of fishery management authorities if implemented. *Id.* For the mechanism now used in determining the TALFF, *see* Promotion Act, *supra* note 18, § 230, which amends § 1821(d) of the FCMA.

269. *See generally* the FCMA, 16 U.S.C. §§ 1801-1882 (1976). This was the result of the Fishery Management regulations.

270. *See generally* Moore, *Foreign Policy and Fidelity to Law*, 70 AM. J. INT'L L. 802 (1976).

United States' treaty obligations and contradicted United States ocean policy.[271] Using the proposed legislation[272] as a paradigm, a phase-out of foreign fishing would come about by amendment to Title II of the FCMA.[273] Thus, the violations of international law, by enacting a program to exclude foreign fishing fleets from United States' waters, would in many ways parallel the FCMA's earlier treaty violations.[274]

1. *Possible Treaty Violations*. The two major treaties still in force involving high seas fishing rights are the 1958 Geneva Convention on the High Seas[275] and the Convention on Fishing and Conservation of the Living Resources of the High Seas.[276] By categorically excluding foreign fishing within 200 miles of the United States' territorial sea, the United States would be in violation of Articles 2, 6, and 22 of the High Seas Convention and Articles 1, 7, and 9 through 12 of the Fishing Convention.

a. The Geneva Convention on the High Seas. Article 2[277] of the High Seas Convention grants to all nations, *inter alia*, the "freedom of fishing"[278] and further provides that "no state may validly purport to subject any part . . . [of the high seas] . . . to its sovereignty."[279] By closing off a 200-mile fishery zone and excluding foreign fishing, the traditional freedom of fishing guaranteed by Article 2 is violated and the high sea is thereby subjected to national sovereignty.[280] Article 6 of the High Seas Convention would also be breached since it provides that a ship "shall be subject to the exclusive jurisdiction on the high seas"[281] of the nation under whose flag it sails. Under a phase-out program, a foreign fishing vessel upon entering the United States' 200-mile FCZ would, for purposes of fishing, be under the jurisdiction of United States'

271. *Id.*

272. *See* notes 16-17 & 261-67 *supra*.

273. *See* House Report, *supra* note 3; *see also* Promotion Act, *supra* note 18, as an example of how the FCMA might be amended.

274. But note, as discussed *infra*, at note 328, and accompanying text, it also would go beyond the FCMA because it was not conditional.

275. *See* note 85 *supra*, and accompanying text.

276. *See* note 86 *supra*.

277. *See* High Seas Convention, *supra* note 85, art. 2.

278. *Id.* art. 2, para. 1.

279. *Id.*

280. *See* note 362 *infra*.

281. High Seas Convention, *supra* note 85, art. 2.

laws.[282] The vessel would be required to limit its catch to a specified per cent[283] and eventually to refrain from fishing.[284] The only exception allowed by Article 6 to this "exclusive jurisdiction of one state" requirement is an exception which is "expressly provided for in international treaties. . . ."[285] The phase-out program would clearly not qualify for this exception since it would be a unilateral action, not a treaty.

Under Article 22[286] of the High Seas Convention, a warship may not board another ship on the high seas unless there is reasonable ground for suspecting the ship is engaged in piracy, slave trade, or is of the same nationality as the warship. Under a phase-out program enacted pursuant to the FCMA,[287] the Coast Guard would be authorized to board and if necessary to seize any vessel which it had cause to believe was in violation of the Act.[288] Boarding and seizing a vessel for fishing violations clearly does not fall within Article 22 and would be in violation of that provision.[289]

b. The Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas. The enactment of a phase-out program would also violate Articles 1, 7, and 9 through 12 of the Fishing Convention.[290] Article 1, paragraph 1 of the Convention enumerates the right of different nationals "to engage in fishing on the high seas;"[291] paragraph 2 provides that all countries are duty-bound "to adopt or to cooperate with other states in adopting such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."[292] Thus, by the terms of this treaty, the United States cannot restrict fishing by other countries, absent bilateral or multilateral agreements, without cooperating with those countries.[293] Similarly, being a unilateral measure, a phase-out program would seem to be in conflict with the basic premise of the Fishing Convention that "the problems in-

282. *See* House Bill, *supra* note 3.
283. *Id.*
284. *Id.*
285. High Seas Convention, *supra* note 85, art. 6.
286. *Id.* art. 22.
287. *See* note 1 *supra*.
288. 16 U.S.C. 1861(b) (1976).
289. *See* High Seas Convention, *supra* note 85, art. 22.
290. *See* note 284 *supra*, and accompanying text.
291. *Id.*
292. *Id.*
293. Kindt, *Special Claims Impacting Upon Marine Pollution Issues at the Third U.N. Conference on the Law of the Sea*, 10 CALIF. W. INT'L L.J. 397, 418 (1980).

volved in the conservation of the living resources of the high seas is such that there is a clear necessity that they be solved, whenever possible, on the basis of international co-operation through the concerted action of all the states concerned."[294]

Article 7 of the Fishing Convention contemplates "unilateral measures of conservation appropriate to any stock of fish. . ."[295] provided certain specified criteria are met. These measures include nondiscrimination against foreign fishermen, a prior six-month effort to find a negotiated solution, and submission of disputed actions to impartial arbitration." Since the prevailing legal opinion is that Article 7 reflects customary international law,[296] a blanket exclusion of foreign fishing within the United States' 200-mile FCZ would not only be a violation of this fishing treaty, but contrary to customary international law as well.

c. Other Treaties. Other limited multilateral and bilateral fishing agreements, though most are of a relatively short duration,[297] would also be violated by a phase-out measure. Since access to the FCZ by foreign fleets would automatically be terminated at the conclusion of a phase-out program,[298] any treaty granting fishing rights to foreign nationals in the FCZ would be in jeopardy. As discussed,[299] the phase-out measure would be by amendment to the FCMA and therefore the Act's unamended provisions would still govern.[300] Title II of the FCMA requires the Secretary of State to renegotiate promptly "any treaty which pertains to fishing within the fishery conservation zone . . . which is in any manner inconsistent with the purposes, policy, or provisions of this [Act] . . ."[301] Such treaties must be renegotiated in a reasonable time or, by terms of the Act, the United States must withdraw from the treaty.[302] As discussed, exclusion of foreign vessels from the FCZ would be inconsistent with existing fishing treaties.

The United States Constitution places a treaty and a legislative

294. Fishing Convention, *supra* note 86, Preamble.

295. *Id.* art. 7.

296. *See* Moore, *supra* note 270, at 804.

297. *Id.* at 805.

298. *See* House Bill, *supra* note 3, Title III, § 301(d)(4).

299. *See* text accompanying note 281 *supra*.

300. Using House Bill, *supra* note 3, as a paradigm, the other provisions of the FCMA are still kept in force.

301. 16 U.S.C. § 1822(b) (1976).

302. *Id.*

act on equal footing.[303] When legislation is in conflict with a treaty, the most recent in date will control.[304] Thus, subsequent legislation enacting a phase-out program would be given effect over a prior conflicting treaty such as the Fishery Convention. Relying on this constitutional basis as justification for enforcing a phase-out measure against foreign parties would, however, be a violation of customary international law. The applicable rule, as codified in Article 27 of the Vienna Convention on the Law of Treaties,[305] provides that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[306] Thus, by refusing to perform according to the terms of the treaty, the United States would be the party in default.

2. *Pacta Sunt Servanda*. The international legal rule of *pacta sunt servanda*[307] may also be jeopardized by enacting legislation to phase-out foreign fishing. Article 26 of the Vienna Convention, in regard to this fundamental rule of customary international law,[308] states that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[309] The essence of *pacta sunt servanda* is that treaties create binding law between signatories and must be observed. "The rule also connotes that a party must abstain from acts calculated to defeat the objects and purposes of the treaty."[310] That is, parties are duty bound to act in good faith. Arguably, under the doctrine of *pacta sunt servanda*, by enacting legislation inconsistent with prior treaties, the United States is acting in bad faith in the performance of its treaty obligations and thus is in violation of the doctrine. If this were the case,

303. The United States Supreme Court has "repeatedly taken the position that an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." Reid v. Covert, 354 U.S. 1, 18 (1957).

304. *Id.*

305. Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969. U.N. DOC. A/CONF. 39/27 (1969), art. 27, *entered into force* on Jan. 27, 1980, *reprinted in* 63 AM. J. INT'L L. 875 (1969) [hereinafter cited as Vienna Convention]. This Convention is codified international law and has been cited as authority for customary law in court decisions and state practice. *See* Barcelona Traction Case, [1970] I.C.J. 3, 303, 305; Nambia Case, [1971] I.C.J. 16, 47; Fisheries Jurisdiction Case, [1973] I.C.J. 3, 14, 18, 21, 43, 47; Nuclear Tests Case, [1974] I.C.J. 253, 334-38, 349, 357, 418.

306. *Id.* art. 27.

307. The rule *pacta sunt servanda* literally translated means "contracts (treaties) are to be kept." G. SCHWARTZENBERGER & E. BROWN, *supra* note 45, at 564.

308. T. ELIAS, THE MODERN LAW OF TREATIES 40 (1974).

309. Vienna Convention, *supra* note 305, art. 26.

310. T. ELIAS, *supra* note 308, at 42.

the enactment of a measure to phase-out foreign fishing would amount to a unilateral termination of all treaties involving foreign fishing in the FCZ.

Unilateral termination is a decision to terminate an agreement which has become objectionable to one party.[311] In the absence of protest by the other party, the conflict may be regarded as settled.[312] Even in the face of protests, however, the customary international law rule of *rebus sic stantibus*[313] may be invoked.

3. *Rebus Sic Stantibus: The Fisheries Jurisdiction Case*. Article 62 of the Vienna Convention on the Law of Treaties, in regard to the rule of *rebus sic stantibus*, states that "[a] fundamental change in circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty . . . may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and, (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty." The essence of *rebus sic stantibus* is that when fundamental changes occur in the circumstances which formed the basis of a treaty, a party may, in certain cases, be permitted to withdraw or terminate the treaty on that ground. The justification for the application of this doctrine in the modern law of treaties is to encourage States to seek legal solutions to their treaty problems. Such a solution is deemed more feasible than the use of self-help when the State wishing to terminate its treaty obligations is confronted with a recalcitrant party not willing to recognize the difficulty of continued performance due to changed circumstances.[314]

In the *Fisheries Jurisdiction Case* of 1974, between the United Kingdom and Iceland and the Federal Republic of Germany and Iceland,[315] the International Court of Justice (I.C.J.) explicitly rec-

311. A. DAVID, THE STRATEGY OF TREATY TERMINATION 60 (1975).

312. *Id.* at 61.

313. *Rebus sic stantibus* is the doctrine that a treaty is intended by the parties to be binding only as long as there is no vital change in the circumstances which, at the time of the conclusion of the treaty, all the parties had assumed. G. SCHWARZENBERGER & E. BROWN, *supra* note 45, at 551.

314. T. ELIAS, *supra* note 308, at 121.

315. Fisheries Jurisdiction Case (United Kingdom v. Iceland) Jurisdiction of the Court, Judgment of February 2, 1973, ICJ Reports, 1973, at 3. The comparable Judgment of Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Judgment of February 2, 1973, ICJ Reports, 1973, at 49, is in many, but not all, respects identically worded. For the purposes of this study reference is made only to the United Kingdom case.

ognized the principle laid down in Article 62 of the Vienna Convention on the Law of Treaties.[316] The *Fisheries Jurisdiction Case* concerned a dispute between the Government of the United Kingdom and the Government of Iceland.[317] The dispute arose out of a unilateral claim by Iceland to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around its shore and to phase-out the historic fishing rights of foreign nations within that zone.[318] The facts and resolution of this case by the I.C.J. may have value for projecting the international consequences of a United States phase-out program.

Following the failure of the 1958 Geneva Conference, Iceland undertook to extend its exclusive fishing zone to twelve miles. The United Kingdom, in an Exchange of Notes,[319] reluctantly recognized Iceland's 12-mile exclusive fishing zone in exchange for a three year phasing-out period within that zone and a compromissory clause in the agreement that would, at the request of either party, refer a dispute to the I.C.J.[320] Ten years after this Exchange of Notes, in the face of over exploitation of its fish stocks and the need to increase its catch, Iceland extended its exclusive fishing zone to 50 miles.[321] The United Kingdom objected and, after several months of fruitless negotiations, the dispute was brought before the I.C.J. Though Iceland contended the Court had no jurisdiction and never appeared before it, the I.C.J., noting its obligations and authority to establish its own jurisdiction,[322] proceeded to give its judgment on the merits.

The two fundamental issues presented to the Court of interest

316. The Court, did not, however, employ the term *rebus sic stantibus*, which had also been abandoned by the International Law Commission so as to avoid its doctrinal implications. *Cf.* 2 Y.B. INT. L. COMM. 258 (1966). (Report of the International Law Commission, 18th Sess., Commentary (par. 7) on art. 59); 61 AM. J. INT'L L. 432 (1967). *See also* Briggs, 68 AM. J. INT'L L. 51, 61 (1974).

317. *See* note 315 *supra*; reference will be made to only one case in text since both are similar.

318. T. ELIAS, *supra* note 308, at 123. *See also* Bowett, Note, 33 CAMBRIDGE L.J. 179; Fleischer, *supra* note 171, at 576.

319. Iceland-Federal Republic of Germany. Exchange of Notes constituting an Agreement concerning the Fishery Zone around Iceland, Reykjavik, July 19, 1961, 409 U.N.T.S. 47. Iceland-United Kingdom. Exchange of Notes constituting an Agreement settling the Fisheries Dispute, Reykjavik, March 11, 1961, 397 U.N.T.S. 275.

320. T. ELIAS, *supra* note 308, at 123.

321. Iceland implemented this action by the Resolution of the Althing of February 15, 1972 and Regulations of July 14, 1972. Text of Notes *reprinted in* I LAY, CHURCHILL AND NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA 89.

322. *See* Statute of the I.C.J., *supra* note 71, art. 36 & 37.

here[323] were: (1) Iceland's right to terminate unilaterally a treaty under the *rebus sic stantibus* principle as embodied in Article 62 of the Vienna Convention on the Law of Treaties; and, (2) the possible obligation on the part of Iceland to allow other States to fish in its exclusive fishery zone. Iceland relied on Article 62 of the Vienna Convention, maintaining that *rebus sic stantibus* was sufficient justification for terminating its treaty with the United Kingdom,[324] in which the two parties had agreed to a twelve mile limit.

The Court found that a nation's right with regard to denunciation of treaties, as set forth in the Vienna Convention and in customary international law, is surrounded by substantive conditions and limitations. The Court emphasized that for a change of circumstances to give rise to grounds for invoking the termination of a treaty, the circumstances must have "resulted in a radical transformation of the extent of the obligations still to be performed."[325] The Court also limited the scope of *rebus sic stantibus* by stressing, as dicta, "that the doctrine never operates so as to extinguish a treaty automatically or to allow an unchangeable denunciation by one party; it only operates to confer a right to call for termination and, if that call is disputed, to submit the dispute to some organ or body with power to determine whether the conditions for the operation of the doctrine are present."[326]

Iceland's major contention was that there had been fundamental changes in fishing techniques leading to depletion of its offshore resources. Iceland primarily contended that there had been fundamental changes in legal opinion on fisheries jurisdiction in the ten year interim since the Iceland-United Kingdom treaty. Iceland reasoned that since 12-mile fishing zones had become generally accepted, the previously bargained for treaty, allowing Iceland a 12-mile zone, now failed for lack of consideration. Thus, Iceland was relieved of its commitments because of the changed legal circum-

323. Other issues presented to the Court were whether the I.C.J. had jurisdiction over the case because Iceland refused to appear; and whether a claim to an exclusive fishing zone of 50 miles was contrary to international law (the 12-mile limit being the broadest at this time).

324. Iceland did not recognize the Court's jurisdiction and refused to submit oral or written pleadings. They did, however, effectively communicate with the I.C.J. as Judge Sir Gerald Fitzmaurice observed in his separate opinion:

> Iceland has sent to the Court a series of letters and telegrams on the subject, often containing material going far beyond the question of competence and entering deeply into the merits, and has lost no opportunity of doing the same thing through statements made or circulated in the United Nations, and by other means, all of which have of course been brought to the attention of the Court in one way or another as, doubtless, they were intended to be.

325. Fisheries Jurisdiction Case, *supra* note 315, at 21, para. 43.

326. *Reprinted in* T. ELIAS, *supra* note 308, at 122-23.

stances.[327]

The Court, in applying the provisions of Article 62 to Iceland's contentions, recognized that "changes in the law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of a treaty." The Court failed, however, to decide the issue on these grounds. It held the changed circumstances irrelevant and overshadowed by Iceland's failure to comply with the compromissory clause in the treaty which conferred jurisdiction on the I.C.J. to decide disputes, such as this one, between the parties. On Iceland's claim of a fundamental change in fishing techniques, the Court recognized the "exceptional dependence of Iceland on its fisheries for its subsistence and economic development," but nevertheless found no fundamental change of circumstances which radically increased the burden of obligations still to be performed by Iceland. Thus, the only I.C.J. view to be abstracted from this case, regarding an Article 62 claim to terminate unilaterally a fishing treaty because of changed circumstances, appears to be that over-exploitation of a fishery and economic hardship are not sufficient to constitute a fundamental change of circumstances.

Applying the rule of this case to a United States claim to unilateral termination on the basis of Article 62's fundamental change of circumstances may not appear to produce very positive results. The claims of economic hardship and overexploitation of fishery resources are precisely what prompted consideration by the United States of a phase-out program. Thus, a claimed unilateral right of termination on these bases might not receive a favorable response.

The case was essentially decided on the second issue, of foreign fishing rights in a state's fishery zone, and therefore has special relevance to the enactment of a United States phase-out program. Such a measure would be a categorical rather than a conditional exclusion of foreign fishing (as the FCMA is now). The crucial international legal question that would have to be answered in such a case of complete categorical exclusion, and one explicitly addressed in the *Fisheries Jurisdiction Case*, is whether the coastal State has an obligation to allow other States to fish in its extended exclusive fishery zone. The majority of the Court was clear in stating that "the concept of preferential rights of fishing in adjacent waters in favor of the coastal State"[328] had crystallized as custom-

327. *Id.* at 124.

328. Fisheries Jurisdiction Case, *supra* note 315, at 23.

ary international law.[329] The Court held that Iceland was entitled to "preferential rights" in the area between 12 and 50 nautical miles *but* it was further concluded that "the concept of preferential right is *not* compatible with the exclusion of *all* fishing activities of other states."[330] Furthermore, the Court held that a phase-out of the United Kingdom's historic fishing rights in a 50-mile zone was not a significant recognition of its rights.[331] "The coastal State has to take into account and pay regard to the position of such other States, particularly when they have established an economic dependence on the same fishing grounds."[332] Hence, the I.C.J. opinion is, unequivocally, that a phase-out of foreign fishing in the high seas or any zone endowed with high seas freedoms is contrary to international law.

The relevance of the I.C.J. judgments today, however, has been called into question. First, Iceland never appeared before the Court and consequently, the judgment was delivered by default in accordance with Article 53 of the Statute of the I.C.J.[333] At least one writer holds the opinion that "the legal reasoning of the judgments cannot claim to have exactly the same status as if the judgments had been rendered on the basis of adversary proceedings."[334] Perhaps more important is the fairly rapid evolution of State practice and international law which has occurred since the I.C.J. judgments. Since then the United States, Canada, Mexico and Japan have declared 200-mile EEZ's. These claims would no doubt provide a wholly new atmosphere for the situation and of course the Court would be free to deviate completely from its *Fisheries Jurisdiction* judgment since it is not bound by *stare decisis* as are United States courts.[335] Since we are at a stage of fairly rapid evolution in international law, it is necessary to examine the impact of a mandatory phase-out program on developing international law.

4. *Possible Violations of Developing Customary International*

329. *Id.*

330. Fisheries Jurisdiction Case, *supra* note 315, at 27-28 (emphasis added).

331. The I.C.J. found *inter alia*:

> [t]hat the principle of reasonable regard for the interests of other states enshrined in Article 2 of the Geneva Convention on the High Seas of 1958 require Iceland and the United Kingdom to have due regard to each other's interests, and to the interests of other states, in those resources.

Id. at 29.

332. *See* note 330 *supra*.

333. *See* note 322 *supra*.

334. Fleischer, *supra* note 171, at 573.

335. L. HENKIN, *supra* note 27, at 87-88 (1980).

Law: Conflicts with the Law of the Sea Treaty. The Draft Convention on the Law of the Sea (Informal Text)[336] is the principal document around which the current Law of the Sea (LOS) negotiations are proceeding. Although the provisions of the Draft Convention do not have the status of international law, they do reflect widely accepted State practice and may be said to represent emerging or developing customary international law.[337] If international rules on fisheries jurisdiction do emerge from the LOS Conference negotiations in the near future, it is thus possible, on the basis of the Draft Convention, to predict accurately what those rules will be.[338] It is therefore important to note the ways in which a United States' phase-out program, if enacted, would be inconsistent with the text of the Draft Convention.

The United States enactment of a program to phase-out foreign fishing would be violative of Articles 62 and 69 of the Exclusive Economic Zone section of the Draft Convention on the Law of the Sea. Article 62, paragraph 2, on Utilization of the Living Resources, provides that "[w]here the coastal State does not have the capacity to harvest the entire allowable catch, it shall, . . . give other States access to the surplus."[339] A clue as to which States are the ones to have access is given in paragraph 3 of Article 62, which mentions "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone."[340] As mentioned,[341] the phase-out program, once concluded, would not give access to any State whether the United States harvests the allowable catch or not. Article 69, which addresses the rights of landlocked States,[342] provides, in paragraph 3, that even when a coastal State is able to harvest the entire allowable catch of fish in its FCZ, "the coastal State and other States concerned shall cooperate in the establishment of equitable arrangments on a bilateral, subregional or regional basis." The proposed phase-out program would be a unilateral action with the FCMA[343] and would doubtfully, by its very nature, make any arrangements on a bilateral, subregional or

336. Draft Convention on the Law of the Sea (Informal Text) A/CONF.62/WP.10/Rev.3/Add.1, (1980) [hereinafter cited as Draft Convention].

337. Jacobson & Cameron, *Potential Conflicts between a Future Law of the Sea Treaty and the Fishery Conservation and Management Act*, 52 WASH. L. REV. 427, 451-55 (1977).

338. *Id.*

339. *See* Draft Convention, *supra* note 336, art. 62.

340. *Id.*

341. *See* text accompanying notes 261 & 262 *supra*.

342. *See* Draft Convention, *supra* note 336, art. 9.

343. *See* House Bill and House Report, *supra* note 3.

regional basis. The provisions of the phase-out proposal are, on their face, contradictory to these Articles of the LOS Draft Convention. Furthermore, a phase-out would be in violation of Articles 87, 92 and 110 of the High Seas section of the Draft Convention. These Articles are identical to Articles 2, 6 and 22, respectively, of the High Seas Convention which, as discussed previously, are inconsistent with the enactment of a phase-out program.[344]

The possible violations of treaties, customary international law and developing customary international law may not be sufficient to deter the enactment of a mandatory phase-out program if the United States deems it necessary to protect its interests in the sea. When economic necessity and the need to employ stricter measures for preserving United States' fishery resources reach the point where it is deemed necessary to enact a mandatory phase-out program, the United States will undoubtedly set forth a justification for enforcement of the action.

C. Justification for Enforcement

1. *The Draft Convention on the Law of the Sea*. The arguments for justifying the implementation of a phase-out program may be rather tenuous in comparison to the blatant violations of international law which the legislation might cause if enacted. A possible argument to support the adoption of a phase-out measure is that, based on Articles 61 and 62 of the Draft Convention on the Law of the Sea, a mandatory phase-out program would be consistent with developing customary international law.[345]

Articles 61 and 62 of the Draft Convention deal specifically with conservation and utilization of the living resources within the EEZ[346] and are the initial obstacle to compliance with the Exclusive Economic Zone section of the Draft Convention.[347] By highlighting the coastal States' right to determine the allowable catch in its EEZ[348] and its responsibility for maintenance of the fish stocks, as *qualified* by environmental and economic factors,[349] it could be maintained that the foreign State's right of access to the United

344. *See* text accompanying notes 276-88 *supra*.

345. *See* House Report, *supra* note 3, at 23-30.

346. For purposes of fisheries, the 200-mile exclusive economic zone (EEZ) is the functional equivalent of the 200-mile United States fishery conservation zone (FCZ) as established by the FCMA. *Id.* at 24.

347. *See* Draft Convention, *supra* note 336, pt. v.

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

349. *Id.* para. 2 & 3.

States' FCZ is only a conditional privilege.[350]

The text of Article 61 allows the coastal State to maintain fish stocks at a MSY capacity[351] as *qualified* by relevant environmental and economic factors.[352] If there is a surplus of fish in a given year, Article 62, paragraph 2, provides that the coastal State must negotiate agreements or other arrangements with foreign nations to allow them access to the EEZ to harvest that surplus. These agreements, however, may also be *qualified* by a number of factors enumerated in Article 62, paragraph 4, such as licensing, observer programs and setting of quotas.[353] Article 62, paragraph 3, allows the coastal State to take into account "the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests" in determining the allowable foreign catch and giving access to other States to its EEZ. The language of the Articles have a somewhat discretionary tone, allowing the coastal State to place many qualifications on the foreign nations fishing activities in the coastal State's EEZ. It has been argued that there is no absolute right of foreign States to the surplus of fish in the 200-mile zones.[354] Such an alleged right is in fact a conditional privilege.[355] Thus, a phase-out program which sets a phase-out rate based on a percentage of the previous year's domestic catch,[356] as the proposed phase-out legislation does, would be consistent with the rights of the coastal State to have complete discretion in determining the allowable level of foreign catch.

2. *Governing International Fishing Agreements*. The United States also enjoys a certain amount of flexibility with the Governing International Fishery Agreements (GIFA)[357] provided for by the FCMA. Title II of the FCMA requires that all foreign fishing in the United States' FCZ be conducted pursuant to a GIFA. At present, all agreements between foreign nations and the United States granting Reciprocal Fishing Rights are pursuant to

350. House Report, *supra* note 3, at 26.

351. *See* notes 244-47 *supra*, and accompanying text.

352. Draft Convention, *supra* note 336, art. 62, para. 1.

353. *Id. See* para. 4(a)-(k).

354. House Report, *supra* note 3, at 26.

355. *Id.*

356. *See* text accompanying notes 264-65 *supra*.

357. 16 U.S.C. § 1821(c) (1976). A GIFA is a Congressional-Executive agreement in which Congress authorizes the Executive to enter into an international agreement on a subject which falls within Congress' constitutional authority. *See* Note, *Congressional Authorization and Oversight of International Fishery Agreements Under the Fishery Conservation and Management Act of 1976*, 52 WASH. L. REV. 495 (1977).

GIFA's.[358] The prerequisite for the creation of a GIFA is that the foreign nation acknowledge the exclusive fishery management authority of the United States. The recognition of this authority entails a binding commitment on the part of the foreign nation to abide by all regulations the United States deems necessary for the implementation of any fishery management plan.[359] Of paramount importance is that a GIFA requires that any foreign nation a party to the agreement is "not to harvest an amount of fish which exceeds such nation's allocation of the total allowable level of foreign fishing"[360] and this total allowable catch shall be determined each year, by the United States Government.[361] Thus, in any given season, the United States has complete discretion to set the level of foreign fishing at zero, thereby completely excluding foreign fishing fleets, while still being in complete compliance with the GIFA. By its terms, the renunciation, practically speaking, of a GIFA, needs no other legal basis for justification.

3. *Rebus Sic Stantibus*. Other broader bases of international law also may be considered as possible justification for enforcing a phase-out program when such a measure is enacted. Perhaps conditions will have so changed by that time, that the Vienna Convention Article 62 principle of *rebus sic stantibus* could be used to withdraw from any existing fishing treaties to which the United States may be a party. Then a claim of absolute jurisdiction over a 200-mile zone of fisheries could be justified by the fundamental international law principles of sovereignty[362] and independence.[363] Even a sovereign, however, is bound by the rules of international

358. The only reciprocal fishing rights agreement of recent time that was not a GIFA was the United States-Mexico Fisheries Agreement, which entered into force on November 24, 1976. The Agreement was to terminate on December 29, 1981. Mexico abrogated the treaty on December 29, 1980. L.A. Times, Dec. 31, 1981, at 4, col. 1; San Diego Tribune, Dec. 30, 1980; *see also* L.A. Times, Feb. 11, 1981, § 3, at 4, col. 1.

359. 16 U.S.C. § 1821(c)(1) (1976).

360. *Id.* § 1821(c)(3). *See* notes 221-25 *supra*, and accompanying text.

361. *See, e.g.*, the provision printed in Article VI, § 1 of the United States-Japan GIFA.

362. Sovereignty is defined as legal independence. In the context of theology and the constitutional theory of the unitary State, sovereignty means omnipotence. G. SCHWARZENBERGER & E. BROWN, *supra* note 45, at 51, 567.

363. Independence was recognized by the P.C.I.J. as a fundamental principle of International Law in the *Eastern Carelia* case. P.C.I.J. Ser. B, No. 5, at 27 (1923). D. O'Connell states that "independence as a legal term signifies only that a fully sovereign state enjoys as much freedom of legal action internally and externally as the *law allows* . . ." (emphasis added). He further states that "it is obviously antagonistic to the conception of international law that a state in the name of independence can claim absolute jurisdiction even in its own territory." D. O'CONNELL, INTERNATIONAL LAW 319-21 (1965).

law.[364] Furthermore, the right of absolute fisheries jurisdiction, to the extent of closing off that resource to other nations, has not yet been realized. Even in the event a phase-out measure should find justification in international law, it would not likely prevent retaliation by foreign nations dismayed at their exclusion from important fishing grounds.

When the FCMA was enacted in 1976, the immediate response of foreign nations fishing extensively within 200 miles of the United States' coast was to protest this extension of fishery jurisdiction.[365] These protests were soon followed by a large number of countries enacting their own 200-mile fishery zones.[366] There seems to be no question that the response to a mandatory phase-out of foreign fishing in the United States' 200-mile FCZ would be similar to that of the FCMA.[367] If a large number of nations were to enact programs resulting in the eventual exclusion of foreign fishing in their 200-mile zones, the results could be disasterous. If 200-mile claims were asserted world-wide, thirty-six per cent of the earth's oceans and ninety per cent of the world's fisheries would be reduced to the exclusive jurisdiction of coastal States.[368] The exclusion of foreign fishing fleets from these zones, through the enactment of a phase-out program, by all coastal States would result in a closing of ninety per cent of the world's fisheries to all but the coastal States' fleets, resulting in severe hardship to the United States' fishing industry as well as those of other nations. In the light of the many consequences of a unilateral action to phase-out mandatorily foreign fishing, it may be wise for the United States to examine alternatives before enacting such a measure.

D. Alternatives to a Mandatory Phase-Out

As discussed, the FCMA contains its own phase-out mechanism that would effectively exclude foreign fishing fleets from United States waters in the event the United States fishing industry is able to harvest the full optimum yield of a given fish stock. It

364. *Id.*

365. *See* MANAGING THE SEAS RESOURCES, *supra* note 145, at 88. *See also* Comment, 37 LA. L. REV. 852, 865 (1977).

366. Within two years after the passage of the FCMA, 86 other countries followed suit and asserted claims to the living resources off their coasts. Many of these were developed countries. Canada, Mexico, Norway, the European Economic Community and the Soviet Union all enacted their own 200-mile fishing zones in 1976, less than a year after the United States claimed exclusive jurisdiction over a 200-mile fishing zone on January 28, 1976.

367. House Report, *supra* note 3, at 71. *See* Wall St. J., Sept. 24, 1980, at 12, col. 1.

368. Krueger & Nordquist, *supra* note 58, at 322.

appears that the disappointments in the development of the United States fishing industry and conservation of fish stocks are due not so much to the failure of the conceptual workings of the FCMA but rather to the lack of effective implementation and enforcement of its provisions. As Senator Magnuson, principle draftsman of the FCMA stated: "[T]he tools for truly effective management are there."[369] Therefore, before such drastic measures as a categorical phase-out of foreign fishing are taken, various ways to strengthen the FCMA should be explored.

In order to function more effectively the FCMA must be rigorously enforced. Such enforcement not only demands more funding to increase the manpower now available for enforcement but also using that manpower in more effective enforcement programs. More of the cost of enforcing the FCMA can be shifted to foreign fishermen by imposing increased fees on them. Such fees can be imposed in an equitable manner allowing different fees in different fisheries according to which fisheries can best bear the cost.[370] A program of full observer coverage[371] could be instituted, supported by the revenue from the increased fees. The observers could be stationed on ships in those fisheries where the greatest problems of overfishing occur.[372]

More funds and energy could also be devoted to fishery management science and research and development. It may be necessary to determine what the social, political and economic factors are that go into formulating the optimum yield standard.[373] At present, the criteria for judging the optimum yield as defined by the FCMA are vague.[374] The heart of the FCMA's fishery management philosophy is optimum yield and it must be clearly defined and set in order to accomplish the objectives of the Act.

Finally, efforts should continue to be made for international cooperation and improved access for United States fish products to

369. Magnuson, *supra* note 137, at 427.

370. House Report, *supra* note 3, at 36. Note that the Promotion Act, *supra* note 18, § 232, amends the permit fee provisions of the FCMA. The amendment provides that "[t]he fees imposed . . . shall be at least in an amount sufficient to return to the United States an amount which bears to the total cost of carrying out the provisions of this Act . . . ." 16 U.S.C. § 1824(b)(10).

371. *See* note 230 *supra*. Note that the Promotion Act, *id.* § 236, adds provisions for a full observer coverage program to § 1821 of the FCMA.

372. House Report, *supra* note 3, at 54.

373. *See* notes 248-54 *supra*.

374. Anderson & Wilson, *Economic Dimensions of Fees and Access Control Under the Fishery Conservation and Management Act of 1976*, 52 WASH. L. REV. 701, 728 (1977).

foreign markets through the elimination of trade barriers. Such market access is crucial to the development of the United States fishing industry.[375] Through such bodies as the United Nations, the United States must also seek to develop a comprehensive Law of the Sea treaty with clearly defined fishery provisions regulating foreign access.[376]

IV. CONCLUSION

The FCMA was enacted in 1976 in response to the increasing over-exploitation of fishery resources off the coast of the United States.[377] It established a comprehensive plan for the conservation and management of fisheries to prevent overfishing and protect the interests of the United States fishing industry.[378] More than four years after its enactment, the FCMA has failed to regulate sufficiently the amount of foreign fishing off the shores of the United States. A complete mandatory phase-out of foreign fishing has been proposed as a solution to the problem.

Legislation was introduced on April 15, 1980, in which a mandatory phase-out program would be put into effect that would eventually reduce the level of foreign fishing in United States waters to zero.[379] The Bill received much positive response, passing the United States House of Representatives in September of 1980.[380] The Bill that was finally enacted into law, however, did not contain the mandatory phase-out provision. Nonetheless, it is likely that the continuation of events leading up to the Bill proposing a mandatory phase-out, economic necessity and the prevailing disenchantment with the *status quo* of the fishing industry under the FCMA will again lead to the introduction of a similar bill.

It is questionable whether there is a need for a complete mandatory phase-out of foreign fishing since the FCMA already contains its own phase-out provision conditioned on the United States' catch.[381] When this fact is combined with the possible viola-

375. House Report, *supra* note 3, at 30.

376. At this time the Law of the Sea negotiations are at an impasse since the Reagan Administration has decided to forestall the conclusion of an acceptable Law of the Sea treaty. *See* L.A. Times, Ap. 15, 1981, § 1, at 2, col. 1; L.A. Times, Aug. 7, 1981, § 1, at 2, col. 2; N.Y. Times, Mar. 4, 1981, at 1, col. 5. For a statement of some of the Reagan Administration's objections to the LOS treaty *see* 81 DEP'T STATE BULL. 48 (1981).

377. *See* notes 139-46 *supra*, and accompanying text.

378. *See* notes 166-79 *supra*, and accompanying text.

379. *See* notes 16-17 & 261-67 *supra*, and accompanying text.

380. *See* note 18 *supra*, and accompanying text.

381. *See* note 258 *supra*, and accompanying text.

tions of international law, a mandatory phase-out looks even more unattractive. Two major treaties — the High Seas Convention and the Fishing Convention — produced at UNCLOS I would be breached if the United States were to enact such a measure.[382] A consequence of such breach would be a violation of the international legal rule of *pacta sunt servanda*.[383] Since under the provisions of a phase-out measure the terms of these treaties could no longer be honored, the effect would be a unilateral termination by the United States.[384] Unilateral termination may be justified, if there has been a fundamental change of circumstances, under the legal rule of *rebus sic stantibus*, as embodied in Article 62 of the Vienna Convention on the Law of Treaties.[385] In the light of the *Fisheries Jurisdiction Case*, economic necessity and depletion of United States' fishery resources may be insufficient to constitute the necessary fundamental change in circumstances needed to justify unilateral termination legally under Article 62 of the Vienna Convention.[386]

Developing customary international law may also be violated by a mandatory phase-out measure.[387] Evidence of such law is found in the Draft Convention of UNCLOS III. The United States would be in violation of Articles 61, 62, 87, 92 and 110 of that Convention.[388] The United States' bilateral reciprocal fishing agreements, known as GIFAs may, by their provisions, be terminated if the United States so desires. Thus, no other legal justification is necessary.[389] Another major drawback of a unilateral action to phase-out foreign fishing is adverse foreign reaction. Foreign nations may enact their own phase-out programs in retaliation, adversely affecting the United States' fishing industry by closing off important fishing grounds. Finally, considering the consequences of such unilateral action, it may be in the best interests of the United States to provide increased enforcement for and refinement of the FCMA in order to achieve more fully their desired objectives, rather than to exclude categorically foreign fishing fleets.

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382. *See* note 274 *supra*, and accompanying text.
383. *See* notes 306-10 *supra*, and accompanying text.
384. *See* notes 313-14 *supra*, and accompanying text.
385. *Id.*
386. *See* notes 326-28 *supra*, and accompanying text.
387. *See* notes 336-44 *supra*, and accompanying text.
388. *See* note 344 *supra*, and accompanying text.
389. *See* notes 357-61 *supra*, and accompanying text.