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Fisheries Management and Development in the EEZ: The North, South, and Southwest Pacific Experience

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I. Introduction

A. *The Prospect of Extended Maritime Jurisdiction from the United States' Perspective*

The establishment of Exclusive Economic Zones (EEZ's) has generated modifications of existing institutional arrangements and creations of new regional bodies to promote international cooperation in the conservation, management, and development of living resources of the sea. The United Nations Convention on the Law of the Sea[1] (the "Convention") has affected fisheries management by authorizing coastal States to extend their sovereign rights over living and non-living resources seaward up to the outer limits of 200-nautical-mile off-shore areas,[2] measured from their coastlines which could be drawn as straight baselines. On a global basis, the areas within the exclusive economic zones of coastal States cover more than one-third of the surface of ocean space. More importantly, 95% of the living resources of the sea under commercial exploitation are present in these areas.[3]

When President Reagan issued a proclamation on March 10, 1983, establishing a 200-nautical-mile Exclusive Economic Zone for the United States, he gave as basis for the unilateral declaration "recognition by international law that in the zone beyond its territory and adjacent to its territorial sea, known as the Exclusive Economic Zone, a coastal State may assert sovereign rights over natural resources and related jurisdiction."[4] The areas contemplated by this Presidential proclamation, which

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1 Dec. 10, 1982, U.N. Doc. A/CONF.62/122 U.N. Sales No. E.83V.5 (1983) [hereinafter U.N. Convention on the Law of the Sea]. The Convention was signed by 119 nations and the Final Act also by 23 other delegations on December 10, 1982. The Convention will enter into force 12 months following the date of deposit of the 60th instrument of ratification or accession.

2 *Id.*, arts. 56(a) & 57. The 200 mile off-shore area includes the territorial sea and the exclusive economic zones.

3 *Report of the ACMRR Working Party on the Scientific Basis for Determining Management Measures* (Hong Kong, Dec. 10-15, 1979), FAO Fisheries Rep. No. 236, at 1.

4 Proclamation No. 5030 (Mar. 10, 1983), *reprinted in* 23 VA. J. INT'L L. 600 (1983). *See also Statement by the President of the United States on the Exclusive Economic Zone of the United States Ocean Policy* (Mar. 10, 1983), *reprinted in* 23 VA. J. INT'L L. 598 (1983) (hereinafter "Reagan Proclamation of Mar. 10, 1983").

established sovereign rights over resources and jurisdiction over activities, encompass some 3.9 billion acres, significantly more than the 2.3 billion land acres of the United States and its territories. The exact size of the EEZ proclaimed by the United States depends on whether certain or all Pacific island territories are included.[5]

Since this historic proclamation, there has been no executive decree to explore this vast expanse of generally unknown aquatic wilderness. With regard to oil and natural gas, for instance, only three percent of the newly acquired acreage has been explored.[6] The purpose of this article is to examine some of the main options open to the United States in the operation of its EEZ's, particularly with regard to the management and development of the living resources of the sea. This article concentrates on the North Pacific area and the South and Southwest Pacific region. It analyzes relevant issues in light of the experience and policy options adopted by the United States and their possible coordination and harmonization, including factors which may have influenced the current trends in the practice of the United States. It is on the basis of governmental practice, especially the treaty practice of the United States, that the present study will be made.

B. *The General Interests and Concerns of the United States and the New Law of the Sea*

The United States Delegation signed the Final Act of the Third Conference on the Law of the Sea along with 141 other nations on December 10, 1982, but refused to sign the Convention itself, principally because of U.S. concerns about deep seabed mining provisions. The United States, independently of treaty obligations, accepted those provisions which are consistent with its own determinable interests and endeavored to establish firm rules of international law, through State practice and usages as evidence of customary rules of international law, binding all nations to those provisions.[7]

Without entering the arena of acrimonious debate as to the wisdom of the oceans policy maintained by the current administration of the United States, it is submitted that, consistent with the long line of U.S. long-term policy supportive of the integrity of international law and universality of international regimes of oceans law, in the long run the Convention of 1982, despite its human fallabilities and imperfections, constitutes the best balance of interests and concerns of all nations: large and small, rich and poor, coastal and land-locked, naturally endowed and geographically disadvantaged. Many respected American jurists believe that the Convention as a whole serves the best interests of

5 "The significance of the E.E.Z. to the future of our country may well be greater than the 1803 Louisiana purchase. . . ." *The Exclusive Economic Zone of the United States: Some Immediate Policy Issues, National Advisory Committe on Oceans and Atmosphere, Special Report to the President and Congress* (1984). *Cf.* Ryan, *The Exclusive Economic Zone*, OCEANUS, Winter 1984-85, at 3. *See* Annex I.

6 *See* Ryan, *supra* note 5, at 3.

7 "Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, committed as such." Vienna Convention on the Law of Treaties, art. 38, U.N. Doc. A/CONF. 39/27 (1969, entered into force Jan. 27, 1980).

mankind and essentially those of the American nation.[8] Without pursuing the ultimate goal of oceans law and policy to its logical conclusions, we may proceed to examine some of the vital interests and concerns of the United States in the Exclusive Economic Zones of both the United States and other coastal and island States in the areas or regions under active consideration, the North Pacific and the South and Southwest Pacific regions.

Regardless of whether or not the United States will sign and ratify or accede to the United Nations Convention on the Law of the Sea 1982, one thing is clear. The United States is basing its proclamation of the EEZ on the provisions of the 1982 Convention, regarding them as generating rules of customary international law. Never for one moment has the United States avowedly forsaken international law as a sound and solid basis for its actions in the field of international relations. Yet, in adopting unilateral measures, such as the Presidential proclamation, which is likely to be implemented by other more detailed administrative regulations, the United States cannot afford to create disharmonies or inconsistencies within its own government instrumentalities or with the customary rules of international law.[9] Each time a State adopts national legislation to give effect to international obligations, there is a risk of inconsistencies and conflicts in the interpretations or applications by States and the government agencies competent in the fields. Therefore, States should exercise maximum caution to minimize, if not altogether to avoid, the risk of conflicts and inconsistencies in national understandings and implementations of treaty provisions.[10] The ensuing study will observe the extent to which unilateral declarations by States, especially the Reagan Proclamation of 1983, conform to, comply with, or derogate from the relevant provisions of the 1982 Convention on the international regime of the Exclusive Economic Zones.

C. *The Particular Interests and Specific Concerns of the United States in Regard to Fisheries Management and Development in the Exclusive Economic Zones*

Contrary to the view advanced by some and conceded by others that the establishment of the EEZ's by the 1982 Convention confers upon coastal States "sovereignty" or "imperium" over all living and non-living resources of the sea present within the confines of the maritime boundaries of coastal States, the new law of the sea merely authorizes coastal States to exercise "sovereign rights for the purpose of exploring and ex-

8 *See, e.g.*, the view of Ambassador Elliot Richardson, formerly Head of the U.S. Delegation to the Third Law of the Sea Conference.

9 The cogent arguments articulated in Belsley, *A Strategy to Avoid Conflicts*, OCEANUS, Winter 1984-85, at 19-22, appear to be convincing.

10 For an overall assessment of the 1982 Convention, *see, e.g.*, the remarks by Tommy T. B. Koh of Singapore, President of the Third U.N. Conference on the Law of the Sea in *A Constitution for the Oceans*, U.N. Sales No. E.83.V.5 at xxxiii-xxxvii (1983), adapted from statements by the President on Dec. 6 and 11, 1982, at the final session of the Conference at Montego Bay.

ploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and its subsoil."[11]

The sovereign rights as specified in the Treaty provisions do not constitute "sovereignty" or "imperium" which would necessarily encompass "ownership" or "dominium," thereby implying automatic vesting of property rights of the coastal States to the living and non-living resources of the sea found within its extended maritime jurisdiction, or EEZ.[12] In point of fact as well as of law, no right of ownership over the living resources of the sea could be said to have been transferred to the coastal State or any agency exercising fishery management authority. Nor do the transboundary species of all sizes and ages recognize the sovereignty or ownership by any coastal State. Neither sovereign rights nor indeed fishery management authority can be identified with "sovereignty" of the coastal State.[13]

Having clearly distinguished "sovereignty" from "sovereign rights," including the power to regulate, control and manage fishery development in the EEZ, it remains to be asserted that the coastal State nevertheless retains the authority exclusively to explore, exploit, conserve and manage the living resources within its zone, free of interference from external powers or non-nationals, except as authorized by the coastal State, and only to the extent and subject to the conditions and limitations contained in the authorization.

The specific regime of EEZ, being the creation of the 1982 Convention, is a product of consensus achieved after a series of protracted negotiations. It contains in itself an integral body of governance or rules governing the rights, duties, obligations, and responsibilities of coastal States and other States in their mutual relations. Such a regime cannot exist without the reciprocal cooperation of all States concerned. It would lead to utter chaos if one State, however powerful and righteous, could claim to exercise the rights and reap the benefits under the EEZ provisions of the Convention, but could refuse to recognize the similar rights and privileges of others under the same Treaty provisions, or could be heard to reject the obligations incumbent upon it under the Convention.[14] Nor could this exceptional or privileged position be attained through the process of self-proclaimed immunity from the international regime wherever and whenever the State is required to fulfill an obligation, while accepting all the benefits and harvesting all the fruits of the

11 *Rights, Jurisdiction, and Duties of the Coastal States in the Exclusive Economic Zone*, U.N. Convention on the Law of the Sea, *supra* note 1, art. 56(1)(a), at 18.

12 For the non-living resources, exploitation is necessary, even before processing could commence. For the living resources of the sea, the species have to be caught before being processed into fishery product, whether fresh, frozen or canned.

13 Transboundary species owe no allegiance to any coastal State. Nor do they recognize any boundary line, either between adjacent States, or between a coastal State and the high seas. Unless and until caught, fish are the living resources of the sea, not of any State or any fisherman in particular.

14 For instance, under article 36(2) of the Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27 (1969, entered into force Jan. 27, 1980), "a state exercising a right [as non-party to a treaty] shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty."

oceans regardless of the rights of others or of its own duties and responsibilities towards other States or mankind in general.[15]

1. The United States as a Coastal State

As a coastal State, the United States' interests in the management and development of fisheries within its EEZ cannot be any different from those of other coastal States. The United States, no less ardently than other coastal States, is striving to promote the objective of optimum utilization of the living resources in the zone.[16] It must determine the allowable catch of the living resources within this zone,[17] as well as its capacity to harvest them.[18] It is the duty of the coastal State, taking into account the best scientific evidence available to it, to ensure through proper conservation and management measures that the maintenance of living resources is not endangered by over-exploitation. As appropriate, the coastal State is under an obligation to cooperate to this end with competent international organizations, whether subregional, regional or global.[19] Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities. The special interests and concerns of the United States as a coastal State may be considered to be best served by the principles incorporated in the provisions of the 1982 Convention in regard to the rights of the coastal State within its own EEZ. This is true whether the power to regulate and manage the living resources is to be viewed as "sovereignty" or merely "sovereign rights." No question of ownership of the living resources or their registration or nationality needs to be examined. It is sufficient that the living resources within the zone are subject to the control, regulation and whatever measures of conservation may be deemed appropriate by the coastal State.

It would appear to be in the best interest of the United States, as a coastal State, to observe the rules of customary international law derived from treaty provisions, as they seem to furnish sufficient latitude and discretion for coastal States to regulate, control, manage, and develop all living resources within the Exclusive Economic Zone. Whatever the United States may choose to adopt by way of legislation or other unilateral measures within the purview of the permissive rules of international law, the United States is obliged to respect the rules of other coastal States to do likewise, or even to do differently within the permissible basic principles authorized by the treaty provisions. A single State cannot

15 Belsky, in *A Strategy to Avoid Conflicts*, OCEANUS, Winter 1984-85, at 22, suggested that "the best method to implement this policy would be national legislation committing us to the settlement procedures detailed in the Law of the Sea Treaty with any nation that agrees to apply those procedures with us."

16 The U.N. Convention on the Law of the Sea, *supra* note 1, art. 62, para. 1, at 21 (Utilization of the Living Resources, objective of optimum utilization).

17 *Id.*, art. 61, para. 1, at 20 (Conservation of the Living Resources, allowable catch).

18 *Id.*, art. 62, para. 2, at 21 (capacity to harvest).

19 *Id.*, art. 61, para. 2, at 20. *See also* paras. 4 & 5.

create rules of customary international law derogatory of the existing practice of other States.

2. The United States as a Fishing Nation

Coastal States have found it necessary to manage and conserve living resources within the 200-mile zone off their shores, motivated, as they were, by self-protection and self-preservation in the face of over-fishing and possible depletion of stocks within the zones close to their shorelines by shifting fleets of other nations.[20] Yet, these same coastal States cannot be totally unaware of the fact that their own nationals also operate fishing fleets, either for commercial exploitation or simply for sport, within off-shore areas of their immediate or distant neighbors. Fishing fleets flying the United States flag, for instance, are engaged actively in distant water fishing, particularly in regard to transboundary and highly migratory species, notably tuna.[21] Thus, the United States, not unlike other distant-water fishing nations, would also like to protect national fleets fishing in distant waters. This protective interest extends beyond the territorial limits and national jurisdiction of the United States. It follows American fishing fleets wherever and whenever they may find themselves on fertile fishing grounds, whether within the United States' own EEZ's or on the high seas where there are undisputed freedoms, including fishing, or indeed well within the EEZ's of other nations.

In this connection, the protective interests of the United States are akin to those of other more active distant-water fishing nations, such as Japan, the Soviet Union and Thailand. The only difference may lie in the attitude of the flag State in extending their protective arms in support of their national fishing industries. Clearly, EEZ's are unilaterally proclaimed. Their respect may well depend on the degree of recognition by other States. It is not unnatural therefore that the United States, like other fishing nations, is prepared to observe the 200-mile fishing zone of other coastal States. Disputes may relate to discrepancies between the delimitation recognized by the United States and the 200-mile zones proclaimed by other coastal States.[22]

Some distant-water fishing nations have been reluctant to declare their 200-mile exclusive fishery or economic zones lest their declaration be inconsistent with the activities of their own fishing fleets within the 200-mile zones of other States. They would rather have the fishing vessels of their nationals operating in distant waters within the 200-mile zone of other far away lands than exclude foreign fishing fleets from their

20 For instance, off the Canadian east coast, the fishing effort doubled between 1960-73, led by the appearance of distant-water fleets from the Soviet Union, Japan and eleven other European countries. B. JOHNSON, CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 56 (1977). *See also* comments and tables in V. KACZYNSKI, DISTANT-WATER FISHERIES AND THE 200-MILE ECONOMIC ZONE 2-9 (1983).

21 For instance, the landings of tuna by U.S. fishermen in 1986 were 555 million pounds, valued at $217.2 million, an 8% increase over 1985. NATIONAL OCEANIC AND ATMOSPHERIC ADMIN., U.S. DEPT. OF COMMERCE, CURRENT FISHERY STATISTICS No. 8385, FISHERIES OF THE U.S. viii 1986 (1987) [*hereinafter* CURRENT FISHERY STATISTICS No. 8385].

22 *See, e.g.*, the position of the United States government as reflected in Reagan Proclamation of Mar. 10, 1983, *supra* note 4.

own already overfished or depleted 200-mile off-shore zones. It is difficult to have it both ways without being inconsistent or self-contradictory. Thus, a coastal State cannot be heard to claim a 200-mile zone for itself while in the same vein allowing its fishing fleets to fish in the 200-mile zone of its neighbors or of other distant States. Such a claim would not be well received by other countries. Yet, modern States, large or small, would leave no stone unturned in trying to protect their national interests in every possible way.

The United States is no exception. It has considerable experience in experimenting with the art of the possible. Thus, in the Reagan Proclamation declaring the 200-mile EEZ, the United States has disclaimed jurisdiction or sovereign rights over highly migratory species, such as tuna. This United States position would not appear to be inconsistent with its own posture in protecting U.S. fishing fleets harvesting tuna within the 200-mile zone off the coasts of other nations in the South and Southwest Pacific. Thus, the United States, as a country with its own EEZ and as a distant-water fishing nation, appears to be able to claim the best of both worlds. To what extent can such a practice be tolerated by other nations?[23] Conflicts of interests are inevitable. It remains to be seen how such differences could be or might to some extent have been resolved.[24]

II. Delimitation of Regions and Identification of Problem Areas Under Consideration

Having cleared the introductory path, it is now opportune to proceed to narrow down the geographical scope of the present enquiry and focus attention on more definitive problem areas within range of closer examination. For purposes of illustrative comparison, we have selected as geographical regions for our study two roughly defined regional or sub-regional areas, designated as the North Pacific and the South and Southwest Pacific, respectively. The problem areas that call for immediate attention in connection with the regime of fishery conservation and management in the EEZ's of interested States within these two regions may be identified from two different, adjacent, often diametrically opposite standpoints. These are the point of view of coastal States, primarily interested in the optimum utilization of the living resources of the sea within their own 200-mile zones on the one hand, and the perspective of distant-water fishing nations whose traditional fishing grounds are being rescinded. In the North Pacific, the United States may be qualified as predominantly a coastal State, whereas in the South and Southwest Pacific the United States is identifiable as a distant-water fishing nation, whose stand and viewpoints need to be fully taken into consideration. For convenience sake, therefore, the North Pacific may be inspected from

23 The U.S. position dates back to the 1950's, as noted by Healey, *United States Tuna Management Policy*, INT'L L.J. 84-85 (1981). Thus, the Fishery Conservation and Management Act of 1970 does not include, nor extend to, highly migratory species. The Reagan Proclamation merely reaffirmed this position. *See also* Burke, *Highly Migratory Species in the New Law of the Sea*, 14 OCEAN DEV. & INT'L L. 308-09 (1984).

24 *See infra* notes 105-34 and accompanying text, especially in the context of the treaty between the United States and members of the South Pacific Forum of April 2, 1987.

the point of view of a coastal State which clearly reverses its role in regard to the South and Southwest Pacific.

A. *The North Pacific and United States' EEZ's*

The North Pacific is bordered by huge coastal States and includes some of the most vigorous fishing fleets. The richest fishing grounds within the EEZ's of coastal State in the North Pacific region belong to the United States and Canada. On the other hand, the most active fishing nations in the area have traditionally been Japan, the Republic of Korea, and the U.S.S.R. The immediate concern is with the EEZ's of the United States in this region. We will study the practice of the United States as a coastal State in the wake of the new law of the sea. We will examine how effectively a coastal State can take legislative and administrative measures to ensure the optimum utilization of its resources within this newly-acquired maritime zone.

1. Geographical Area

There are at least two separate areas or sub-regions within the geographical scope of this inquiry: i) off the coasts of Alaska in the Arctic Ocean adjacent to the Canadian EEZ (Beaufort Sea) to the east, and opposite the Soviet coast (Chukchi Sea) to the west, and in the North Pacific around the Aleutian Islands, opposite the Soviet coasts bordering the Bering Sea and adjacent to the Canadian Pacific coast to the south and southeast of Alaska; and ii) off the United States west coast, adjacent to the Canadian coast in the northwest and to the Mexican coast in the southwest.

As the Arctic issues present different challenges, it might be appropriate to leave them for future consideration. For present purposes, the study is confined to the U.S. EEZ's in the North Pacific including the Bering Sea, but excluding the zone close to the Beaufort Sea bordered by Canada and the United States and the Chukchi Sea on the Soviet side. The Arctic Ocean is not within the scope of the current inquiry. The problems in that polar region assume an entirely different character.

2. The Problem Areas

The problem areas in the U.S. zone under current consideration concern principally the development, conservation and management of fisheries and stocks within the extended exclusive jurisdiction of the United States or the 200-mile zone off the Alaskan coast and the west coasts of the United States. This investigation covers exploration, data-collecting, stock generating, conservation measures, harvesting, production, processing, and distribution. Interests include allocation of quotas, licensing of foreign fishing vessels, joint ventures in terms of investment of capital and capital goods as well as technology and its transfer. The exploration also includes identification and location of stocks and identification of transboundary species, studies of their habits and movements, recycling and reproduction including hatchery, culture, marine biology including artificial insemination to enhance breeding, and production.

Also examined is the determination of maximum sustainable catch and capacity to harvest as well as allocation of surplus to foreign vessels, joint ventures and eventual exclusion or phasing out of foreign fishing fleets. The economics and politics of fishery development, management and conservation will be examined in the light of the practical experience of the United States.

The problem areas thus outlined are enormous in the EEZ's of the North Pacific region. The problems facing coastal States in the North Pacific are very complex and yet illustrate, and to some extent are typical of, the wide range of challenges to be met by States actively concerned with fisheries development, management and conservation within and without the EEZ's. For one thing, not all coastal States enjoy the same luxury or share of good fortune of opulence and munificence. The United States, Mexico (to the South) and Canada (in between Alaska and the west coast) may be said to fall into this privileged category of State, whose coastal seas abound with multitudes of fishes of almost all valuable species, whether as human food or as industrial products. These are the nations endowed with richness in natural living resources beyond the dreams of avarice.[25]

Between the United States and Canada, as between the United States and Mexico, there are bilateral problems due to geographical proximity and to the existence of transboundary species as well as stocks occurring within the EEZ's of two or more coastal States or both within the zone and in the area beyond and adjacent thereto.[26] Conservation measures appear to be desirable both for the anadromous stocks originating in the river or rivers of one of the coastal States[27] and catadromous species which may spend more time in the waters of one of the adjacent coastal States.[28] These problems could only be resolved with the consultation, concurrence and agreements or arrangements among all the coastal States concerned. Measures unilaterally adopted by one of the interested coastal States without such consultation may only serve to aggravate the matter by reducing the regulating State's stock within the EEZ and encouraging unrestricted harvesting in the zone of its neighboring coastal State. It has not been without trials and tribulations that the United States has been able to resolve some of the major fishery problems with its neighbor to the south (Mexico) and in the middle (Canada) within the North Pacific region.[29]

The second category of coastal States in the North Pacific region is not as fortunate. While the United States EEZ's contain approximately 15 percent of total world catch of seafood, including shellfish, various species that can be harvested in the EEZ's of other coastal States in the

25 *See, e.g.*, table of statistics of the quantities of the species harvested in pounds or tons and their values in dollars for the recent years in CURRENT FISHERY STATISTICS No. 8385, *supra* note 21.

26 *See* U.N. Convention on the Law of the Sea, *supra* note 1, art. 63, at 22. *See also id.* art. 64 (Highly Migratory Species) and art. 65 (Marine Mammals), at 22.

27 *See id.* art. 66, at 22.

28 *See id.* art. 67, at 23.

29 *See, e.g.*, Bower & Hennessey, *U.S. EEZ Relations with Canada and Mexico*, OCEANUS, Winter 1984-85, at 41-43 and Colson, *Transboundary Fishery Stocks in the EEZ*, OCEANUS, Winter 1984-85, at 48-51.

North Pacific region are nowhere comparable to the abundance of the living resources of the sea off the U.S. North Pacific coasts. These other coastal nations are obliged to seek their fishing grounds to feed themselves as well as for processing as export products. They are actively fishing within their zones, making arrangements for mutually tolerable exchanges and adopting agreed conservation measures among themselves, and conducting distant-water fishing in the high seas beyond their EEZ's as well as within the exclusive fishery zones of other coastal States. This category of coastal States includes China, Japan, the Republic of Korea and the U.S.S.R. Each has a national fishing fleet capable of fishing and has established fishing habits within a distance of less than 200 miles from the coastlines of the U.S., Canada and the U.S.S.R. Of course, the United States and Canadian zones are the more plentiful. We will focus on the U.S. zones and the U.S. fishery arrangements with other States from the North Pacific region such as China, Japan, Korea, and the U.S.S.R., as well as from beyond the region, such as Poland. We will see how from 1976 the United States has managed to substitute its own fishing fleets by progressively phasing out virtually all foreign flags from its EEZ's without drastic measures.

B. *The South Pacific Island States' EEZ's and the United States*

The next geographical region under current study is the South and Southwest Pacific. This region covers roughly all the island States in the South and Southwest Pacific ocean, notably members of the Pacific Forum. The full title is the "South Pacific Forum Fisheries Agency" (F.F.A.), a recently formed international organization for the specific purposes of fisheries management and conservation.[30] The problem areas to be examined concern principally the management and conservation measures for highly migratory species, notably tuna, within the region and the attitude and activities of interested States from outside the region, especially the United States.

1. The Pacific Island States

As a regional grouping for present purposes, the members of the F.F.A. appear to occupy a place of prominence in our study of fisheries development, management and conservation undertaken by the region as a whole. A quick glance at the South and Southwest Pacific region shows a fast developing group of newly emerged island nations, which until recently did not enjoy self-governing status.

a. *The F.F.A.: Australia and New Zealand*

The group also includes two relatively older nations, members of the British Commonwealth, otherwise included in the group within the United Nations informally designated as "Western European and others." Australia and New Zealand rank among the "others" within the

30 South Pacific Forum Fisheries Agency Convention of 1979, FAO Fisheries Rep. No. 293, 201-204 (1983); *see also* International Environmental Law—Multilateral Treaties, N. B2UB7/VI/82.

Western European group for practical and election purposes. Members of this group are all developed countries. However, within the F.F.A. Australia and New Zealand have very different roles to play. They constitute active regional members of the F.F.A. with distinct responsibilities, not only as former administering powers for some of the newly independent territories, but also for their own respective welfare and national interests which for reasons of geographic proximity are inherently linked to those of the smaller developing island nations.

b. *The F.F.A.: Developing Island States*

The newly emerged developing island nations constitute a growing group of coastal States in the South and Southwest Pacific. Their livelihood has been made viable by the new law of the sea. The notion of archipelagic waters and the EEZ's give them new sustenance of life, a new lease on a reasonable chance to attain an adequate standard of living expected of every human being under the International Covenant of Economic, Social and Cultural Rights.[31] Their inhabitants traditionally survive on the living resources of the sea and on what little income they can derive from licensing or from fees collected in exchange for fishing rights. These rights are universally recognized as their sovereign rights within their exclusive 200-mile zones. Furthermore, their basic right to survival is a legitimate collective and individual human right. It is also guaranteed by the International Bill of Rights.[32] No one can deny them such basic rights and fundamental freedoms as rights of man and as sovereign rights of any people.

Those Pacific island nations are no richer than the countries often classified as the least developed countries. Nor are they endowed with other living or non-living resources, either inland or offshore. The rising membership of this group, in addition to Australia and New Zealand includes:

Cook Islands	Fiji
Republic of Kiribati	Republic of the Marshall
Federated State of Micronesia Islands	Republic of Palau
	Niue
Papua New Guinea	Solomon Islands
Kingdom of Tonga	Tuvalu
Western Samoa	Republic of Vanuatu

31 International Covenant on Economic Social and Cultural Rights, art. 11, December 16, 1966, entered into force January 3, 1976, G.A. Res. 220 (XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966).

32 The International Bill of Rights includes the following U.N. instruments:
(1) The Universal Declaration of Human Rights, December 10, 1948), G.A. Res. 217 (III 1948);
(2) The International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3, Annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 at 490;
(3) The International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, at 52; and
(4) Optional Protocol to the International Covenant on Civil and Political Rights, December 16, 1966, 999 U.N.T.S. 171, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316, at 59, recognizing the competence of the Human Rights Committee to receive and consider communications from individuals claiming to be victims of human rights violations.

c. *French and American Polynesia*

Another group of island territories lies within or in the vicinity of the Southwest Pacific region, which, for want of a better expression, may be referred to as "non self-governing Polynesian island territories." They include French Polynesia, Tahiti (Papete), New Caledonia (Numea) and the American Polynesian territories such as American Samoa. In addition, the United States extends its metropolitan territory to cover not only the fiftieth State of Hawaii, but also several other Pacific islands, notably, Jarvis Island and American Samoa. Other territories in the Pacific Ocean, such as Baker Islands, Guam, Howland, Johnston Atoll, Northern Mariana Islands, Midway and Wake, lie north of the equator. These American Pacific islands present no problem for our current investigation. French Polynesia, New Caledonia as well as Tahiti, present problems of different strategic interests, not to the native inhabitants as such but more specifically as testing grounds for French nuclear explosion experiments. The United States had earlier made use of Pacific territories for that same purpose[33], as had the British slightly later.[34] But neither the United States nor the United Kingdom has persisted to make use of their Pacific islands for nuclear testing in recent years. Only the French Minister of Foreign Affairs made unilateral Statements, in the wake of international litigation instituted by Australia and New Zealand, in the United Nations General Assembly on September 25, 1974, to the effect that France "has reached a stage in her nuclear technology that makes it possible to continue the program by underground testing."[35] Whereupon the International Court of Justice reached the conclusion that there was no longer any dispute or issue to be decided. The Court decision has proven groundless as France resumed nuclear explosion tests in 1981.[36] As recently as August, 1987, a representative of France openly and unabashedly admitted that France has resumed interests in New Caledonia and Tahiti because of the new law of the sea, recognizing 200-mile zone in which France could exercise certain sovereign rights. As nuclear testing in metropolitan France is precluded by demographic reasons, France has been compelled to resume the conduct of nuclear tests in the Pacific.[37]

33 In 1954, radiation from hydrogen bomb tests conducted by the United States in the area of the Eniweton Atoll in the Strategic Trust Territory administered by the United States caused death and injury to Japanese fishermen. D.J. HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 322 (3d ed. 1983).

34 The U.K. conducted nuclear tests on the high seas near Christmas Island in the Pacific, 1957-58. *Id.* at 321, n.36 (Nuclear Tests in the Pacific).

35 The claim "no longer has any object," and "the court is therefore not called upon to give a decision thereon." 1974 I.C.J. 253, 457.

36 D. J. HARRIS, *supra* note 33, at 323 n.36. In 1981, when underground testing in Africa became difficult, the position shifted and nuclear tests were resumed by France in the Pacific. *See also* the Rainbow Warrior incident, 1985, recounted in D. ROBIE, EYES OF FIRE, THE LAST VOYAGE OF THE RAINBOW WARRIOR (1986).

37 See the deliberation at the 20th Annual Conference of the Law of the Sea Institute, Hawaii, Aug. 4-7, 1986.

d. *Non-regional Powers*

States outside the region under consideration which have displayed keen interests in assuming or resuming activities within the South and Southwest Pacific region consist of a number of former or current colonial powers. The principal interested States, the Soviet Union and the United States, as super-powers, clearly have general as well as security interests above all. There had been a security breach in parts of this region during World War II. Japan, once the belligerent, hostile invader of the Pacific, has changed its war-like posture and emerged as a peaceful trader and demonstrated genuine interest in fishing in South Pacific waters within the 200-mile zones off the island nations. Soviet Union and United States nationals have continued to fish in these zones with or without the authorization of coastal States and often, regardless of regional regulations, pending the conclusion of agreements with these island nations.

Apart from fisheries, France and traditionally also the United Kingdom were original members of the old South Pacific Forum (not to be confused with the F.F.A.), composed of the United States, United Kingdom, France, Australia and New Zealand. This was an organization established in 1948 to promote peace and orderly development within the South Pacific.[38] The major powers were entrusted with responsibilities for administering territories in the region. The problem has been one of safeguarding the primary interest and well-being of the inhabitants of the Pacific territories.

2. The Management and Conservation of Highly Migratory Species in the South Pacific

While there are countless problem areas that may fascinate legal scholars interested in the studies of the South Pacific, attention is focused on one specific problem area, namely, the development, management and conservation of highly migratory species in the South Pacific by the F.F.A.. It will be seen how members of the F.F.A. are coping with the situation and encroachments of their EEZ's which may be compared to the regulatory measures taken by the coastal States such as Canada and, more directly on point, the United States, in the North Pacific. It is interesting to appreciate the gradual evolution of acceptance of norms that are valid and applicable in the South as they have been in the North Pacific.

It will be seen how, in this connection, the United States, as a Christian nation, has demonstrated for the North Pacific region unbounded generosity even towards its rivals, current and former, beyond the call of justice and the dictates of humanity.[39] On the other hand, an opposite attitude appears to have been adopted for the South and Southwest Pa-

38 See the Agreement Establishing the South Pacific Commission, Feb. 6, 1947, T.I.A.S. No. 2317. This was succeeded and superseded by the new South Pacific Forum Fisheries Agency in 1979, FAO Fisheries Rep. No. 293, at 201-204 (1983) composed of purely regional members, including Australia, New Zealand, and the South Pacific island States.

39 *See infra* notes 41-104 and accompanying text.

cific region. It will be seen how slowly justice, humane and humanitarian considerations painfully moved forward and ultimately prevailed, given an appropriate promotion to reactivate the instinct of survival in the face of the hard realities of international life.[40]

III. Fisheries Management and Development in the North Pacific EEZ of the United States

Facing the challenge posed by foreign fishing fleets within the region designated as the North Pacific as defined and delimited in section II.A. above,[41] a closer examination will be made of the problem areas therein identified.[42] It is with generosity, compassion and understanding that the United States has approached the problems and challenges facing this richly endowed coastal nation under the new law of the sea. The stage has been set for the ultimate takeover by the United States of all the living and nonliving resources within its EEZ, assuming rightful control and exercising sovereign rights over a wide variety of stocks of highly precious species within the 200-mile zones of its national maritime jurisdiction. The final takeover is to coincide with the eventual and gradual phasing out of all foreign fishing fleets from the fishing grounds where they have either traditionally or recently been conducting fishery activities, harvesting and developing the valuable species that correspond to the increasing market demands of the time. The market has been cultivated in the United States and further expanded in the Asian Pacific region by the United States with particular insistence on increasing United States shares in the growing Asian and Pacific markets.

During the transitional stage, the United States has skillfully managed to catch a comfortable ride on the rising tide favoring extension of exclusive jurisdiction of the coastal State for the management and conservation of stocks within the marine area up to the distance of 200 miles measured from its coastlines. The best national interests of the United States have been clearly perceived and fully served in the management and conservation of worthy stocks.

A. *Pre-1976 Setting*

The situation prevailing prior to the Magnuson Act of 1976 deserves special mention. In the area under consideration, the North Pacific as a whole constitutes the single most significant fishing region. A glance at recent statistics shows that in 1974, for instance, out of the total world catch of 82.8 million metric tons (mt.), 26.4 mt. (31.9 percent) were caught in the North Pacific, of which 23.7 mt. were harvested in the Northwest Pacific (FAO Area 61).[43] In 1975, just before extensions of national jurisdiction by coastal States in the region, the North Pacific accounted for 27.6% of the total world catch. China and North Korea derived their catches exclusively from this region, South Korea 89.9% and

40 *See infra* notes 105-34 and accompanying text.
41 *See supra* notes 25-40 and accompanying text.
42 *See id.*
43 58 FAO, YEARBOOK OF FISHERY STATISTICS (Catches and Landings), 1984, Table A-1 (1986).

the Soviet Union 33.3%.[44] The United States in that period was harvesting from the area only 12.5% of its total production and for Canada the percentage was also only 13%.[45] In the world of fisheries, these statistics indicate very high stakes for many interested parties.

International control or regulation of fishery in the North Pacific before 1976 was sporadic if not chaotic. It was also extremely complex. Several agreements were operational, mostly bilateral and trilateral, covering a minimal number of stocks. In fact most of the stocks were exploited without regulation.[46] Extension of jurisdiction by coastal States was initially limited to sedentary fishing or continental shelf resources such as Alaskan crab. Apart from the International Whaling Commission, a world-wide body established in the United Kingdom by the 1946 Convention to adopt resource regulations,[47] three multilateral long-term agreements were applicable: the North Pacific Fur Seal Commission (NPFSC), the International North Pacific Fisheries Commission (INPFC) and the Commission for Fisheries Research in the Western Pacific (CFRWP), which had become virtually inactive by 1967.[48] Side by side with the multilateral conventions, there were in addition six long-term bilateral agreements, including the International Pacific Salmon Fisheries Commission (IPSFC) between the U.S. and Canada, and four sets of intergovernmental and non-governmental agreements between Japan and the U.S.S.R., the Republic of Korea (South) and China and the Democratic Peoples' Republic of Korea (North) and China. Finally, there were nine ad hoc short-term bilateral agreements in force in the Northeast Pacific.[49]

The impact of extended jurisdiction has been comprehensive in the region. All stocks are now regulated, most of the ad hoc, short-term arrangements have been replaced, the long-term bilateral and multilateral agreements have been substantially amended to be of continued use, the Japan-U.S.S.R. bilateral arrangement was significantly modified, while Japan-Korea (South), Japan-China, and China-Korea (North) bilateral arrangements have continued to function.

The advent of extended jurisdiction primarily struck Japan like a volcanic eruption, so soon after the oil shock of the Fall of 1973. The Republic of Korea and even Thailand, as distant-water fishing nations, were similarly stultified. The United States took the initiative of unilaterally extending her exclusive jurisdiction over fisheries to 200 miles in 1976, followed closely by Canada in the same year and by the U.S.S.R. in 1977.

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44 *See, e.g.*, E. MILES, ET AL., THE MANAGEMENT OF MARINE REGIONS: THE NORTH PACIFIC Table 1.1 (1982).

45 *Id.*

46 *See, e.g.*, H. Kasahara & W.T. Burke, *North Pacific Fisheries Management, Resources for the Future* (RFF), Programme of International Studies for Fisheries Arrangements 39-50 (Paper 2, Washington, D.C., 1973).

47 Membership of the Commission includes most coastal States of the North Pacific, China, Japan, Korea (Republic of), U.S.A. and U.S.S.R. *See* Carroz, *International Aspect of Fishery Management Under the New Regime of the Oceans*, 21 SAN DIEGO L. REV. 513 (1984).

48 *See, e.g.*, Miles, et al., *An Assessment of Impact of Proposed Changes in the Law of the Sea on Regional Fishery Commission on FAO Technical Assistance Programs in Fisheries and on FAO Committee on Fisheries and Department of Fisheries*, FAO, Doc. COFI:c/4/70 Inf. Feb. 3, 1976.

49 This summary is based on E. MILES, *supra* note 44, at chap. 3.

Reluctantly, Japan and the Democratic People's Republic of Korea (North Korea) responded in kind by likewise extending their jurisdictions in 1977. Neither China nor the Republic of Korea (South Korea) was then prepared to make like declarations, both facing other boundary delimitation problems and territorial conflicts with several adjacent and opposite coastal States.

The continuing expansion of fishing activities provoked defensive relations on the part of coastal States hard pressed by domestic outcry to protect national fishermen and resources from competition of larger and often more sophisticated fishing fleets of the Soviet Union or Japan or even Korea. Domestic pressures heightened beyond constraint. The United States and Canada had to resort to measures of effective control over foreign fishing fleets, providing better conservation and developing national harvesting and processing capabilities. Since the U.S. zones were of considerable significance to Japan and the Republic of Korea, as traditional fishing nations in the areas, both countries faced serious and imminent threats of sudden dislocation of their fisheries.[50] These problems were multiplied and further complicated by the establishment of Soviet zones in the North Pacific.[51] Although the Pacific was not truly a primary Soviet concern, the decision was in fact prompted by developments in other areas, namely, the Atlantic. But once extended, jurisdiction is comprehensive and of general application, resulting in greater dislocation for Japan and total exclusion for South Korean fleets from the Soviet zones. The North Koreans benefited from this competition from their counterparts in the Soviet zone. A series of arrangements and accommodations were concluded after frequent and prolonged negotiations between the fishing and coastal nations concerned.

B. *The Magnuson Act, 1976: a Historic Milestone*

Domestic pressure and ardent desires to preserve and protect vital national interests of the coastal State induced the United States to yield to the irresistible temptation of proclaiming the U.S. Fishery Conservation Zone (FCZ) of 200 miles off U.S. coastlines. The Act, to be known as the Magnuson Fishery Conservation and Management Act of 1976 (Magnuson Act),[52] was passed by Congress, establishing the U.S. Fishery Conservation Zone and extending exclusive management authority of the United States over all stocks, all anadromous species spawning in the fresh and estuarine waters of the United States, and all living resources of the U.S. continental shelf. It is worthy of notice that highly migratory species such as tuna are specifically omitted from inclusion under U.S. management.[53] The Act authorized the U.S. government to negotiate

50 For instance, Japan's yearly catch in the 200-mile zones of U.S.S.R., Canada and the U.S. amounted to 6 mt. The prospect of an abrupt curtailment of 60% of the annual catch required considerable maneuvers and tactics to achieve speedy readjustments within the time constraint.

51 *See, e.g.*, Miles, *The Evolution of Fisheries Policy and Regional Commissions in the North Pacific Under the Impact of Extended Coastal State Jurisdiction*, in ESSAYS IN MEMORY OF JEAN CARROZ 139 (1987).

52 16 U.S.C. §§ 1801-1882 (1982).

53 This distinct omission was to have significant implication in subsequent conflicts with the South Pacific island States discussed in Section IV, *infra* notes 103-34 and accompanying text.

treaties Governing International Fishery Agreements (GIFA) with governments of other countries to award foreign flags access to fishing grounds within the FCZ, or since the Reagan Proclamation of 1983 the U.S. EEZ, under national jurisdiction of the United States. The Magnuson Act came into effect on March 1, 1977. Thus, from February 28, 1977, foreign vessels were prohibited from fishing within the 200 mile FCZ off the United States coasts without prior authorization from the U.S. government.[54]

Indeed, authorization from the competent agency of the United States Government is not likely to be forthcoming in the absence of a GIFA treaty. Only fishing vessels flying the flag of a State with which the United States government has concluded a GIFA treaty would be eligible for an award of such access to the fertile fishing grounds of the U.S. North Pacific (FCZ).[55] The explicit purpose of any such bilateral GIFA Treaty is the optimum utilization of the fishery stocks located within the U.S. FCZ which are of mutual interest to both parties, who are required under the Treaty to ensure the effective utilization and management of the species identified. The United States government determines on a yearly basis the total allowable catch for each specific region, and the allocation to foreign fishing fleets or fishermen for such region on a country-by-country basis.[56] The allocation of catch on a country-by-country basis cannot be determined exclusively on the consideration of past performance or by the criterion of economic needs. After all, considerations of the most favorable character cannot be based on grounds that are totally devoid of sound political foundations. The inclination of the U.S. Government to conclude such a GIFA treaty must initially be guided by political considerations. Actual annual determination of the allocation for each of the GIFA partners must also be grounded on political expediency apart from other substantively valid qualifications.

The United States implemented a new management scheme through regional councils established under the Magnuson Act. In the region under consideration, the North Pacific Fishery Management Council[57]

54 For the legislative history of the Fisheries Conservation and Management Programs of the United States, *see* Pub. L. No. 99-659, 100 Stat. 3706 (1986); S. REP. No. 67, 99th Cong., 2d Sess. (1986); H.R. REP. Nos. 165, 430, 99th Cong., 2d Sess. (1986).

55 Allocation of the tonnage of harvest for a given species in a given region is based on the nationality of the fishing vessel as forming part of the national fishing fleet of a State with which a bilateral GIFA Treaty is applicable. Section 1821(e) of the Magnuson Act, 1976 entrusts the power to make the allocation to the Secretary of State. 16 U.S.C. § 1982(e) (1982).

56 For instance, for the year 1986, optimum yield (OY) for the Gulf of Alaska was set at 471,651 mt. round weight, domestic annual harvest (DAH) 430,005 mt. and allocation to Japan 15,900 mt. For Eastern Bering Sea and Aleutian Islands: OY 2,003,000 mt., DAH 1,401,012 mt. Allocation to Japan: 458,439 mt., China: 4,963 mt., Poland: 8,043 mt. and Korea (South): 116,169 mt. CURRENT FISHERIES STATISTICS No. 8385, *supra* note 21, at 96. The term "total allowable level of foreign fishing" is defined in § 1821(d) of the Magnuson Act. 16 U.S.C. § 1821(d) (1982).

57 The North Pacific Fishery Management Council is responsible for the supervision of assessment of the optimum yield for the North Pacific Region. This region is defined as extending from about 30 degrees North Latitude to the Northern tip of the Bering Strait. *See* E. MILES, *supra* note 44, at 3-4. Under § 1852 of the Magnuson Act, the North Pacific Council is the seventh of the eight councils. It consists of the states of Alaska, Washington and Oregon with jurisdiction over fisheries in the Arctic Ocean, Bering Sea, and the Pacific Ocean seaward of Alaska. The Council has eleven voting members including seven appointed by the Secretary (five from Alaska and two from Washington). 16 U.S.C. § 1852 (1982).

has discharged its responsibility in supervising the calculation of the optimum yield for each species. From this calculated total optimum yield or allowable catch is subtracted the amount to be harvested by American fishermen. Only the remainder, which must of necessity be diminishing each year, will be considered for allocation to other coastal States with which the United States has concluded a GIFA Treaty. The Department of State has a decisive voice in the allocation of catches to a GIFA signatory, taking into account the conditions of political relations, the satisfactory degree of cooperation in research, as well as past records of fishing pattern.[58] Political tensions, undemocratic manifestations, aggressive designs or offensive postures, disturbing or threatening international peace and order, may result in reduction or forfeiture of such allocation or indeed suspension or non-renewal of treaty rights.[59] The Act has proved to be an effective means of persuasion in a positive way, and is not unlikely to be invoked as an indication of displeasure incurred by the United States through actions or omissions of the foreign governments concerned, unconnected as they may truly be with the conservation and management of the living resources under United States jurisdiction in the North Pacific.[60]

C. *The United States' Fishery Policy and Practical Implementations*

The Magnuson Act was amended in 1980 by the American Fisheries Promotion Act[61] to include a mandatory reduction of foreign fisheries within the United States FCZ. This was to be implemented by gradual phasing out which could eliminate all foreign fishing within United States conservation zones by 1990.[62] In the North Pacific region, the North Pacific Fishery Management Council was determined to achieve final phasing-out of all foreign fishing as soon as possible. Very high priority is accorded to this policy.[63]

The Northeast Pacific witnessed some abatement in the intensity of conflict over issues of conservation of stocks. Coastal States in the North

58 Section 1821(e) clearly confers this power on "[t]he Secretary of State, in cooperation with the Secretary [of Commerce, to] make allocations to foreign nations from the total allowable level of foreign fishing [(TALFF)] which is permitted with respect to each fishery subject to the exclusive fishery management authority of the United States." 16 U.S.C. § 1821(e) (1982).

59 Foreign fishing allocations under the Magnuson Act can be and have been used as rewards and as sanctions or pressures in United States relationships with other countries. The allocation to the Soviet Union was reduced by approximately 17% from the establishment of the FCZ in 1977 until 1979 and by 88% in 1980, when President Carter banned all direct Soviet fishing in FCZ for 1981 in reaction to the Soviet invasion of Afghanistan. The Japanese quotas on the other hand have increased by 17% from 1977 to 1980. *See* Miles, *supra* note 51, at 140-58.

60 Political relations on fishery issues have improved somewhat under the Reagan Administration. The fishing ban was partially lifted in July 1984 by allocation of 110.2 mm. pounds (50,000 mt.) of fish (mostly Alaska pollack) to Soviet fishermen in the Pacific region. The Soviet Union has agreed to provide an equal value of fish and seafood to the U.S. in return. The ban remained for the Atlantic coast. Bilger, *US-Soviet Fishing Agreement: Treaty Authorizing Soviet Fishing in U.S. Waters*, MARINE POLICY, Jan. 1986, at 51-56 (1986).

61 Pub. L. No. 96-561, Title II, 94 Stat. 3287 (1980). *See also* D. VANDERZWAAG, THE FISH FEUD 43 (1983).

62 *See* H.R. Doc. No. 217, 98th Cong., 2d Sess. (1984), and the documents preceding it.

63 *See, e.g.*, Bilger, *supra* note 60, at 51-56. *Compare* D. JOHNSON, CANADA AND THE NEW INTERNATIONAL LAW OF THE SEA (1985), especially pp. 5-9, discussing fishery interests.

Pacific, U.S., Canada, U.S.S.R., Korea, China and Japan appeared to have developed effective control over all foreign fishing within their respective fisheries conservation zones, which subsequently were to be identified as their exclusive economic zones (EEZ's).

The relatively cold and frozen seas of the Gulf of Alaska and the North Pacific knew little of United States fishing activities prior to 1976. The two-pronged policy of "Fish and Chips," initiated in 1980 to promote the U.S. fishing industry and to encourage consumption of seafood in the United States, has given tremendous impetus to American industrial fishery production as well as distribution in the U.S. markets. This fishing industry which was virtually non-existent or negligible in 1976 rose astronomically in value from two million dollars in 1980 to $500 million in 1986 to approximately double that figure in 1987. Thus, within eight to ten years from 1980, the Americanization of the fishing industry is likely to materialize in full.[64]

The take-over with phase-out policy planning has been relatively simple. As most coastal States have accepted like practices, there appears to have been general acquiescence, if not indeed consensus, on the status of 200 miles, at least by 1977. However, conflict seems to have intensified significantly in regard to several multifaceted problem areas to which careful attention may now be devoted.

1. Policy-planning and Decision-making Body

Fishery management plans include the eventual takeover of the FCZ or EEZ by the American fishing fleet and the phase-out of all foreign fishing in the zone. In the meantime, implementation of these plans called for determination of the optimum yield for each fishery, defined as that amount of fish which will yield the "greatest overall benefit to the Nation."[65] The Secretary of Commerce and the Regional Councils are required under the Magnuson Act to conserve stocks and to restore

64 *See, e.g.*, Japanese allocations in the U.S. North Pacific.

TABLE 1 (in metric tons)

Years	Gulf of Alaska	Bering Sea/Aleutian Islands	Total
1977	105,000	1,063,400	1,168,400
1978	101,785	1,129,025	1,230,810
1979	118,002	1,063,585	1,181,587
1980	159,422	1,220,640	1,380,062
1981	217,439	1,181,443	1,398,882
1982	196,753	1,159,715	1,356,468
1983	142,917	1,023,339	1,166,265
1984	131,649	1,022,891	1,154,540
1985	35,668	864,332	900,000
1986	15,900	458,439	474,339

Sources: NATIONAL OCEANIC AND ATMOSPHERIC ADMIN., U.S. DEPT. OF COMMERCE, CURRENT FISHERY STATISTICS No. 8380, FISHERIERS OF THE U.S., 1986, at 98 (1987) [*hereinafter* CURRENT FISHERY STATISTICS No. 8380]; and CURRENT FISHERY STATISTICS No. 8385, *supra* note 21, at 96.

65 16 U.S.C. § 1802(18)(A) (1982).

stocks depleted by foreign fishing.[66] In so doing, they are to assure a continuity of food and recreational benefits, avoid irreversible or long-term adverse effect, and maintain a multiplicity of options for the future. The total allowable level of foreign fishing (TALFF), which is on the decrease, is calculated after deducting the domestic annual harvest (DAH) from the optimum yield (OY). The domestic annual harvest (DAH) does not always reflect the sum-total of domestic annual processing (DAP) and joint venture processing (JVP), although in principle DAP and JVP roughly constitute the DAH.[67]

The allocation of TALFF, on the other hand, is determined by the Secretary of State in cooperation with the Secretary of Commerce.[68] Therefore, there is a settled division of labor or distribution of power among the various branches of the government in matters of policy-planning and decision-making in the implementation of Fishery Management Plans. The most crucial aspect of this planning includes the creation of American fishing fleets and the promotion of the U.S. fishing industry, the "Fish and Chips" policy. The Fishery Management Plans (FMPs) are in turn subject to existing international arrangements, such as with high seas salmon, Pacific halibut, U.S./Canada salmon interceptions, and North Fur seals. Allocations are otherwise in accordance with the series of GIFA treaties.

Inherent in the decision system of the North Pacific Fishery Management Council is a two-tier structure of national and sub-national levels of participants by agencies or instrumentalities of government. At the national level, under supervision of Congress, the participants include the Secretary of Commerce, through the National Marine Fishery Service (NMFS) and the National Oceanic and Atmospheric Administration (NOAA), the Secretary of State (foreign allocation), the Secretary of the Treasury, and the Secretary of Transportation (U.S. Coast Guard for Enforcement of Regulation).[69] The sub-national participants include the North Pacific Fishery Management Council (with its seat in Anchorage, Alaska), the Northwest and Alaska Fisheries Center (with its headquarters in Seattle, Washington), National Marine Fisheries Service (NMFS), Alaska Department of Fish and Game, Alaska Board of Fisheries, Washington Department of Fisheries, and Oregon Department of Fish and Wild Life.

In addition to the national and sub-national official levels of management implementation, there is an interplay of competing, if not conflicting, private sectors, viz., domestic fishermen, domestic processors, domestic fast food chains, foreign fishermen, and foreign processors. The transition is envisaged from foreign to joint ventures and hence to final domestication or Americanization of the fishing industry from research to techniques in harvesting, processing, distribution, and marketing. This may in turn serve to prolong if not perpetuate joint ventures

66 16 U.S.C. § 1801 (1982) (Findings, purposes and policy). *Cf.* Miles, *National and International Premises in Ocean Management, The Use of the North Pacific*, 17 L. SEA INST., 477, 482 (1984).

67 *See* 16 U.S.C. § 1821(d) (1982) (Total Allowable Level of Foreign Fishing (TALFF)).

68 *See id.* § 1821(e) (Allocation of Allowable Level).

69 For a critical opinion of the decision system, see Miles, *supra* note 66, 488-489.

since export trade would seem to presuppose the cooperation of foreign trade partners. It would be difficult to imagine how fish and fish products could be exported from the United States to markets in Japan, South Korea, or other parts of Asia without the cooperation of the governments of the importing States.

The United States is a pluralistic society. The American people are inventive and pragmatic. The complex composition of the different tiers of administration of fishery management is not untypical of a creative body from which may flow great decisions. It has not been simple to achieve harmony and agreed priorities on all questions with differing implications. Other problem areas also provide interesting challenges.

2. Joint Ventures as a Means to Promote Domestic Fishing Industry

In a number of instances, joint ventures involving harvesting as well as processing technologies are included as explicit or implicit conditions for access to the Fishery Conservation Zone (FCZ) in the North Pacific. Transfer of technology is sought to enable U.S. fishermen to learn not only the techniques of trawling but also to acquire the ability to locate the species to be harvested. Joint ventures constitute the most reassuring means to promote the skills of American fishermen in the search for valuable species and in their optimum exploitation. The American fishing industry is further promoted by transfer of processing technology, canning, and preserving in cold storage for distribution. Japanese partners in the joint ventures have sometimes complained that the requirement of joint ventures invariably implies U.S. participation in a relatively easier part of the operation. Japanese partners are to find with precision the location and movements of the schools of fish or bowls of shrimps so as to enable trawling or swooping nets. The catch may be sold over the ship side at higher prices than landing, as the landing charges need not be paid or transport costs defrayed for the purchase of the catch fresh from the sea where they have been spotted.[70]

Joint ventures in harvesting have contributed to the economy of the region, not only in securing additional revenue for State and income for the fishermen, but particularly in opening opportunities for crab vessels which would otherwise have been dormant and unemployed since the collapse of crab fisheries in 1982. The variety of species harvested include sable fish, white fish, pollack, Pacific cod, flounder, Pacific hake, Atka mackerel, rockfish, squid, Pacific whiting, Pacific ocean perch and others.[71]

Joint ventures in processing have equally supported the developing economy of the region by guaranteeing both increased income and steady employment. However, in this connection another internal conflict appears to have arisen between the American off-shore processors who have resorted to Soviet or Japanese factory ships, thus saving time and costs of landing, and the traditional land-based processors who are

70 These shortcuts constitute time-saving devices and cost-cutting procedures for U.S. partners in the joint ventures.

71 *See* CURRENT FISHERY STATISTICS No. 8385, *supra* note 21, at 96, 98-99.

confronted with problems of long-term decline as the result of restructuring of the fishing industry.[72] Government intervention and protection have been constantly sought. Indeed, joint ventures, in their actual operation, have raised considerable controversies, as the catch delivered over-the-side to a foreign factory ship would not be considered as foreign fishing. The United States land-based processors were able to include an amendment to the Magnuson Act in 1978,[73] which in effect disallowed such over-the-side deliveries unless it was established that the United States land-based processors either did not have the capacity or would not utilize such capacity to process the amount and species of fish to be processed at sea. This "Processor Preference Amendment" serves to readjust the ranking of double priorities for allocating the living resources in the U.S. zone. Harvesting and processing by U.S. industry takes top priority. Harvesting by the United States combined with foreign processing receives second priority. Harvesting and processing by foreign industries will be accorded lowest priority.

The conflict did not end there. Further controversies arose between U.S. fishermen harvesting the same stock, but serving different markets. Thus, area separation of fleets and mesh size regulations had to be implemented.[74] The possibility of reflagging or transfer of foreign fish-processing vessels to the U.S. flag was indeed attractive to off-shore processors with foreign crews, but caused appropriate alarm to Alaskan land-based processors and organized labor. The loophole in United States law regarding nationality of vessels may have to be maintained in view of the crisis in another area of the world,[75] but for the U.S. fishing industry to grow, the requirement of U.S. crews would afford tolerable compromise.

Joint ventures in the private sector, both for harvesting and processing, have proved successful after weathering seasonal storms to promote the United States fishing industry to replace, if not to supplant, foreign enterprises operating within the U.S. fishery conservation zones. As a problem area, joint ventures will need to grow from harvesting to processing and thence to marketing as an ultimate target, which requires meticulous care and patience in policy planning and implementation. The challenges continue as new conflicts and problems emerge to defy new endeavors and resolute perseverance.

3. Regulation of Fishery Practices

To implement the Magnuson Act, especially the "Fish and Chips" policy since 1980, fishery practices within the United States Fishery Conservation Zone (FCZ) in the North Pacific need to be closely watched.

72 *See, e.g.*, Miles, *supra* note 51, at 146-48.

73 *See, e.g.*, Gordon & Gutting, Jr., *The Coastal Fishing Industry and the EEZ*, OCEANUS, Winter 1984-85, at 36-37.

74 *See* remarks made by Bart Eaton, fisherman and director of Trident Seafoods Corp., at a seminar on U.S./Japan Friendship Society of Seattle and the Institute of Marine Studies, University of Washington. *Cf.* E.L. Miles, *supra*, note 51, at 146 n.9.

75 For instance, the reflagging of Kuwaiti vessels in the Persian Gulf in 1987 and 1988.

They require rational and sound regulation in order to achieve optimum results in every imaginable respect.

Minimum practical measures to regulate fishing by foreign nationals and vessels within the U.S. FCZ comprise the enlisting of cooperation on the part of the foreign governments concerned. Necessary measures must be taken by the participating foreign governments to ensure that their nationals and vessels refrain from harassing, hunting, capturing or killing or attempting to harass, hunt, capture or kill, any marine mammals within the U.S. FCZ except as may be otherwise provided by applicable international agreement respecting marine mammals.[76] They shall also refrain from fishing for living resources over which the United States exercises fishery management authority, except as authorized pursuant to agreement with the United States. Foreign vessels so authorized shall comply with the provisions of the permits issued pursuant to the applicable laws of the United States. In any event, the total allocation assigned to the fishing fleet of a participating government must not be exceeded for any fishery.[77] Application for a permit for each foreign fishing vessel is prepared and processed according to regulations. Payment of reasonable fees for such permits may be required.[78]

Each foreign vessel is required to display the authorizing permit prominently. Designated U.S. observers are permitted on board any such fishing vessel upon request and shall be treated as ship's officers while aboard such vessel. The United States government is entitled to reimbursement for the costs incurred in using observers.[79] Foreign fishing vessels shall "allow and assist the boarding and inspection" of such vessels by any duly authorized enforcement official of the U.S. and shall "cooperate in such enforcement actions."[80] Joint Fisheries Claims Boards have been established to consider claims resulting from damage to fishing vessel, gear or catch caused by fishing vessels of another party.[81]

Jurisdiction in civil and criminal matters is provided by the Magnuson Act and accepted in bilateral agreements concluded with foreign governments. Section 1857 provides that it is unlawful for any person, among other things, to forcibly assault, resist, oppose, impede, intimidate or interfere with any such authorized officer of the United States in the conduct of any search or inspection.[82] In case of enforcement action undertaken by the United States government, the economic loss incurred by the vessel and crew because of the loss of fishing time

76 *See, e.g.*, Article VI of the Agreement between the U.S. and the U.S.S.R. concerning Fisheries off the Coasts of the U.S., Nov. 26, 1976 [*hereinafter* U.S.-U.S.S.R. Agreement of Nov. 26, 1976]; H.R. Doc. No. 217, 98th Cong., 2d Sess. (1984).

77 *See id.*, art. IV.

78 *See id.*, art. V.

79 *See id.*, art. VII(3).

80 *See id.*, art. VIII(1).

81 *See, e.g.*, the U.S.-U.S.S.R. Agreement relating to the Consideration of Claims Resulting from Damage to Fishing Vessels or Gear and Measures to Prevent Fishing Conflicts, signed in Moscow, February 21, 1973 (referred to in U.S.-U.S.S.R. Agreement of Nov. 26, 1976, *supra* note 76, art. VIII(3)).

82 *See* 16 U.S.C. § 1857(1)(E) (1982).

shall be minimized through "prompt release of the vessel and crew upon the posting of reasonable bond or other security."[83] While this provision appears to conform to the language of Article 73 of the U.N. Convention on the Law of the Sea 1982,[84] Article 73 also provides that "penalties for violations of fisheries laws and regulations in the [EEZ] may not include imprisonment . . . or any other form of corporal punishment."[85] Thus, the exercise of enforcement measures pursuant to regulations in force in the EEZ or FCZ, especially in penal sanctions, could run counter to the letter and spirit of the U.N. Convention and customary rules of the Sea.[86] The jurisdiction of the flag State in penal matters appears to have been generally recognized as predominant if not indeed exclusive.[87] This is another problem area where controversies and conflicts could arise between the United States Government and foreign flag State.[88] The solution may be found in observance of general rules of international law or maritime law, rather than insistence on fishery management regulation by the coastal State.[89] A compromise formula may be opportune in the form of a mixed claim commission or joint claim board, established by bilateral agreements.

Another problem area for enforcement of management and conservation regulations lies in the implementation of fact-finding, data-collecting, biostatistical information gathering, and survey or monitoring of stocks and catches in order to determine the optimum yield (allowable catch), the capacity of domestic harvesting, and the level of allocation to foreign harvesting. Boarding and physical inspection of foreign fishing vessels constitute a potential source of tension. It is difficult to verify compliance with the requirements of submission of periodic reports and records of catches for each of the species specified, such as Pacific hake, Pacific Ocean perch, rockfishes, sable fish, Dover sole, flounders, anchovies, herrings and any other species taken in excess of 1,000 mt. It is also difficult to verify compliance with catch data reporting requirements for the Bering Sea and Aleutian Trawl Fishery, covering yellowfin sole, rock sole, arrow-tooth flounder, Greenland turbot, Pacific cod and Walleye pollock, and for Gulf of Alaska Trawl Fisheries. The U.S. Coast Guard is developing plans to place devices on board foreign vessels authorized to fish in United States FCZ to enable enforcement cutters or aircraft to

83 *See* art. IX(2), U.S.-U.S.S.R. Agreement of Nov. 26, 1976, *supra* note 76.

84 *See* art. 73, U.N. Convention on the Law of the Sea, *supra* note 1, at 26.

85 *Id.*

86 *See, e.g., id.*, art. 27 (criminal jurisdiction on board a foreign ship), art. 97 (penal jurisdiction in matters of collision or any other incident of navigation), and art. 73(3)(4), at 9, 33 and 26, respectively.

87 *See, e.g.*, the Geneva Convention on the High Seas, April 29, 1958, art. 11, 450 U.N.T.S. 82.

88 A dispute has arisen respecting a South Korean fishing vessel boarded by a U.S. officer of inspection, who for personal reasons was assaulted by a member of the Korean crew. The arrest and prosecution took place in the U.S. in accordance with U.S. regulation. The Korean government would have preferred to exercise penal jurisdiction through a Korean Court of Law in conformity with maritime law for offenses committed on the high sea on board a Korean vessel. Admittedly, there could be concurrent criminal jurisdiction as the victim of the assault was a U.S. official while in the performance of his functions.

89 General international law of the sea should take precedence over special enforcement measures when there could be concurrence of competing jurisdiction. The flag State is predominant. *See* art. 97(1), UN Convention on the Law of the Sea, *supra* note 1, at 982, and earlier conventions.

identify and ascertain the position of authorized vessels within United States jurisdiction.[90]

4. Greater Access to Foreign Markets for United States Fish Products

To carry out the "Fish and Chips" policy to its logical conclusion, the promotion of United States fishing industry must necessarily include a further final step of securing greater access of U.S. catches and fish products to the markets of the countries whose fishing vessels and nationals continue to receive permits to fish in U.S. FCZ. Trade barriers should continue to be lowered in favor of U.S. based or U.S. processed fish products, through trade liberalization and marketing assistance. There is an inevitable connection between access to FCZ and access to markets, especially in the effort to offset in some measure the trade imbalance with countries like Japan. For several years Japan has continued to maintain a favorable balance of trade vis-a-vis the United States even in regard to mutual trade in fish products, owing to the open structure of U.S. markets. The link between trade and access to the U.S. zone is more pronounced in the U.S.-Japanese relations than in regard to access to the U.S. zone by other foreign fishing vessels. The impact of linkage between access to fishing zones and access to markets has been negligible in countries such as the U.S.S.R., with which joint ventures have had no opportunity to take root. With Japan, the impact is clearly noticeable. Since 1979, Japan has imported more fish products in quantity and value from the United States, and the United States is an important trade partner of Japan in both exports and imports.[91] Once established, this healthy trade practice, based on mutuality of benefits and complementarity of different components in the joint ventures, will grow.

D. *Bilateral Fisheries Relations in the North Pacific*

1. Soviet-United States Fisheries Relationship

Soviet fishing vessels had been harvesting in the off-shore areas close to the U.S. coasts in the North Pacific long before the negotiations on the Third Conference on the Law of the Sea. Since the 1960's, the United States and the Soviet governments have signed bilateral agreements permitting Soviet access to fishing grounds in U.S. waters. During the 1970's, the issue of Soviet fishing fleets in U.S. waters became more noticeable as interests in promoting the U.S. fishing industry began to take shape, culminating in the adoption of the Magnuson Act in 1976. The U.S. "Fish and Chips" policy incorporated in the Amendment of 1980,[92] called for total abolition of foreign fishing within a decade.

In 1977, the U.S.S.R. caught some 844 million pounds live weight of fish in the U.S. FCZ, or approximately 23% of the total foreign alloca-

90 *See* Annexes II and III, U.S.-U.S.S.R. Agreement of November 26, 1976, *supra* note 76, at 11018.

91 *See, e.g.*, Ginsberg & Naska, *Japan's Fisheries*, 193 U.S. EMBASSY CERP REPORT, TOKYO, apps. 8, 9 and 11.

92 Pub. L. No. 96-561, Title II, 94 Stat. 3287 (1980); *see also* D. VANDERZWAAG, *supra* note 61, at 43.

tions. The Soviet allocations have been reduced each year. Table 2[93] shows a comparison of actual catch and allocation by year and by country which indicates substantial reduction of Soviet allocations and catch down to zero level in 1981, during which there was a total ban on direct Soviet fishing as a countermeasure to the Soviet activities in Afghanistan.[94] In 1984, the ban was temporily lifted for the Pacific region. An allocation of approximately 50,000 mt. of fish, mainly Alaskan pollack, was made to Soviet fishermen in the Pacific region. The Soviet-U.S. agreement concerning fisheries off the U.S. coasts was renewed from year to year, the last one expiring on December 31, 1985.[95] The chapter on U.S.-Soviet fishery relations was brought to a close with the total exclusion of Soviet fishing fleets from U.S. FCZ. In a strange way, the agreement may be viewed as the only constructive non-strategic trade relations between the United States and the U.S.S.R. in recent years.

2. Japanese-U.S. Fisheries Relationship

In a way healthier, but not unlike the Soviet-U.S. fisheries relationship, the Japanese-U.S. cooperation in fisheries has succeeded in implementing almost in full the policy objectives set in the Magnuson Act and

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TABLE 2: Catches and Allocations by Comity in the U.S. FCZ 1977-81 (in millions of pounds live weight).

Actual Catches

Country	1977	1978	1979	1980	1981
Total	8,599	5,281	5,408	5,591	5,968
U.S.A.	4,853	1,414	1,771	2,003	2,320
Foreign	3,747	3,867	3,637	3,588	3,648
U.S.S.R.	844	823	628	128	xxxx
Japan	2,487	2,610	2,458	2,602	2,559
Canada	69	91	58	65	66
U.K.	N/A	N/A	N/A	N/A	N/A

Allocation

Country	1977	1978	1979	1980	1981
Total	xxxx	xxxx	xxxx	xxxx	xxxx
U.S.A.	xxxx	xxxx	xxxx	xxxx	xxxx
Foreign	xxxx	xxxx	4,634	4,799	4,638
U.S.S.R.	1,433	1,286	1,191	169	xxxx
Japan	2,649	2,757	2,657	3,095	3,140
Canada	49	xxxx	xxxx	xxxx	xxxx
U.K.	N/A	N/A	N/A	N/A	N/A

Source and Notes: U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1977-83. Numbers are rounded to the nearest million. Total foreign catches include countries not shown separately. Principle species caught by the U.S.S.R. include hake, pollock, whiting and flounder; by Japan include pollock, founder and Pacific cod; by Canada include scallops, Antarctic cod and haddock.

94 During the ban, Soviet fishermen were allowed to purchase U.S. caught fish over-the-side through the joint venture Marine Resources Co. of Seattle, Washington. U.S. fish was processed by Soviet factory ships in mid-ocean. N.Y. Times, Jan. 9, 1981, at D4.

95 *See* Governing International Fishery Agreement between the United States and the Soviet Union, Message from the President of the United States, (transmitting notification of the proposed extension of the governing international fishery agreement between the United States and the Soviet Union until December 31, 1985, pursuant to Pub. L. No. 94-265, § 203(a)), H. R. Doc. 217, 98th Cong., 2d Sess. (1984).

the "Fish and Chips" policy outlined in the 1980 amendment. Every inch of the way is characterized by extreme care on both sides coupled with understanding and sympathetic, if not generous, considerations displayed by the United States government. As has been apparent from Tables 1 and 2,[96] Japanese quotas were maintained over several years even with increases in 1980 and 1981 due to the absence of allocation to the Soviet fishermen following the Soviet intervention in Afghanistan. Subsequent allocations were shared by other meriting foreign partners in fishery relations such as South Korea and China. As shown in Table 3,[97] even Poland is a beneficiary of United States allocation for waters off Washington, Oregon, and California, as well as the Eastern Bering Sea and Aleutian Islands as late as 1986. The Japanese quotas were kept intact for several years between 1977 and 1984. It was not until 1985 and 1986 that allocations for Japan were drastically reduced from the average of 1.2 mts. (1977-1984) to 0.806 mt. in 1985 and 0.457 mt. in 1986. There was a reduction of one third in 1985 and nearly one half in 1986.[98] The downward trend is likely to continue with a steady decrease of 40% which may be sustained in the foreseeable future.[99]

In 1976, total Japanese catch was 9.6 mt., of which 5.5 mt. were within Japan's 200-mile zone. 4.7 mt. were within 200-mile zones of other coastal States. Of the Japanese foreign catch, 1.4 mt. were from the U.S. zone, 1.4 mt. from the Soviet zone, 0.6 mt. from China and Korea 200-mile zones and 0.3 mt. in the high seas. Thus, 40% of the Japanese catch in 1975 was from U.S. and Soviet 200-mile zones. But Japan was better able to replace the lost fishing grounds resulting from the extended maritime jurisdiction by other coastal States by increasing the catch and exploiting new species such as sardines within her own coastal waters. With patience in negotiation for continuing U.S. and Soviet allocations and optimum utilization of fisheries and fish culture, Japan has been able to maintain and even increase the volume and value of her commercial catch world wide throughout the critical period of impact of extended jurisdiction by coastal States, notably the U.S., Canada and U.S.S.R.[100] As shown in Table 4,[101] Japan remained at the top of the list of commercial catches of selected countries even after 1975, followed closely by the U.S.S.R. and trailed in the distance by the U.S.A.

96 *See* TABLE 1, *supra* note 64, and TABLE 2, *supra* note 93.

97 TABLE 3: Foreign Fishing Allocations — by Country and Region for 1986 (in metric tons)

	Washington, Oregon California, Alaska	Gulf of Bering Sea	Eastern Alaska	Total
Japan	0	15,900	458,439	474,339
China	0	0	4,963	4,963
Poland	70,000	0	8,043	78,043
South Korea	0	0	116,169	116,169

Source: CURRENT FISHING STATISTICS No. 8385, *supra* note 21 at 96.

98 *See* TABLE 1, *supra* note 64.

99 There is no indication of upward trend.

100 *See, e.g.*, Statement by a Japanese participant at the 21st Annual Conference of the Law of the Sea Institute (Aug. 4-7, 1987).

In the ten years since the United States extended its jurisdiction over fisheries, it has been observed that foreign fishing in the U.S. FCZ had declined by 67%.[102] With the greater share of fish caught in the U.S. zone being taken by American fishermen and harvesters, competition among domestic interests has grown. Every advantage counts, and if that advantage is affected by foreign fishermen or processors, controversy over foreign fishing flares up again. As far as Japan is concerned, it is a different story altogether. It is one of survival with flying colors but with patience and bitter experience, especially in the context of the U.S. FCZ and the Soviet EEZ. With the U.S.S.R., Japan has to trade her access to the Soviet zone with Soviet access to the Japanese zone on an equal or equivalent footing. Table 5 indicates total catch and allocation for Japan in the Soviet zone and for the U.S.S.R. in the Japanese zone in 1975-

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TABLE 4: Commercial Catch of Selected Countries 1970-1980 (in billions of pounds live weight)

Country	1970	1972	1973	1974	1975
Total	153.4	144.6	145.7	155.4	154.1
Japan	20.5	22.5	23.7	23.8	23.2
U.S.S.R.	26.0	17.1	19.0	20.4	21.9
U.S.A.	6.1	5.8	5.9	6.1	6.0
Canada	3.1	2.6	2.6	2.3	2.3
U.K.	2.4	2.4	2.5	1.2	1.1

Country	1976	1977	1978	1979	1980
Total	164.1	159.0	155.5	157.1	159.2
Japan	23.5	23.7	22.5	21.9	23.3
U.S.S.R.	22.3	20.6	19.7	20.1	20.8
U.S.A.	7.0	6.8	7.5	7.7	8.0
Canada	2.5	2.8	3.0	3.1	2.9
U.K.	1.1	2.2	1.2	1.9	0.9

Source: U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 1977-1983

102 *See, e.g.*, Remarks by Ambassador Edward Wolfe, Jr., Center for Oceans Law and Policy, University of Virginia, Charlottesville, VA. (Oct. 25, 1986).

1986.[103] This bears testimony to the efforts of both parties to maintain a healthy balance.

The only clear-cut winner since the extensions of coastal State jurisdiction in the North Pacific in 1977 is undoubtedly the U.S.A.. The Soviet Union cannot be said to be a loser, as her Northwest Pacific catch has increased by 25 to 28 percent since 1976. This region has been the most significant region for United States domestic catch with room to maneuver in terms of allocations based on joint ventures and greater access to markets in Japan and other Asian countries. Canadian interests in the Pacific are relatively small. While the major losers are Japan, South Korea[104] and Thailand, Japan has recovered her loss through increased production from her off-shore fishery as well as from the production of hatchery reared chum salmon, which appear to represent a shift in relation to the declining salmon catch by Japanese high seas fleets. The United States government sees some advantage in continuing allocations for Japanese fishermen in return for continuing joint ventures and widening built-in access to Japanese markets. Thus, complete phase-out

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TABLE 5: Total Catch and Allocation for Japan in the Soviet Zone and for the U.S.S.R. in the Japanese Zone 1975-86 (in metric tons)

Year	Japanese catch/allocation in Japanese zone	Soviet catch/allocation in Soviet zone
1975	914,000	300-400,000
1976	N/A	365,000
1977	700,800	458,850
1978	750,000	650,000
1979	750,000	650,000
1980	750,000	650,000
1981	750,000	650,000
1982	750,000	650,000
1983	N/A	N/A
1984	700,000	640,000
1985	600,000	600,000

Sources and Notes: The figures for 1975 show the reported and estimated catches for the areas later covered by extended jurisdiction. Figures for 1975-78, E. MILES, *supra* note 44, at 188-189, Tables 6.8, 6.9, 6.12, 6.13; Figures for 1979-83, U.S. DEPT. OF COMMERCE, NORA/NMFS, Foreign Fishery Information Release No. 83-2, Jan. 25, 1983; for 1984, FFI Release No. 85-5, March 21, 1985; and for 1985, FFI Release No. 86-0, March 8, 1986.

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TABLE 6. South Korean Allocation 1977-1986 (in metric tons)

Year	Gulf of Alaska	Eastern Bering Sea	Total Alaska
1977	38,100	43,090	81,190
1978	43,698	69,755	113,453
1979	43,051	106,974	150,025
1980	52,105	190,340	242,445
1981	88,387	180,149	268,536
1982	96,031	210,969	307,000
1983	59,518	265,172	324,690
1984	65,597	264,160	329,757
1985	10,347	239,872	250,219
1986	0	116,169	116,169

Sources: CURRENT FISHERY STATISTICS No. 8380 *supra*. note 64, at 98, and CURRENT FISHERY STATISTICS No. 8385, *supra* note 21, at 96.

of foreign fishing under the "Fish and Chips" policy will best be delayed at least in the few years ahead.

IV. Cooperation Between the United States and Island Nations in the South-West Pacific

To shift the scene from the North to the South or Southwest Pacific is to transform the position of the United States from the perspective of a coastal State, entitled to extend maritime jurisdiction to cover fishery conservation and management in the 200-mile zone, to that of a distant-water fishing nation, whose interest is to maintain the capacity and ability to fish freely in the high seas and as liberally as possible in the waters of other coastal States. In the North Pacific region, which is the most significant region of the fishery world, the United States has emerged as the uncontested winner, the unchallenged champion with increasing wins and accruing interests. It remains to be seen how in the converse situation, the United States in the Southwest Pacific region could ultimately emerge also as salvor of its own national interests as well as reliable friend, good neighbor and active partner of the South Pacific Island States in progress and mutual cooperation.

That every nation, large or small, every coastal State, rich or poor, has the duty to cooperate with one another,[105] no one denies. Yet when it comes to actual implementation of this lofty principle, both within and beyond the EEZ's, a State may be overly influenced by its own immediate self-interests, at the expense of its more consistent long-term interest in the peace, progress and stability of the entire region. Clearly, the United States is a superpower particularly vis-a-vis the sixteen member nations of the Pacific Forum. The United States could impose its views in this region, but such an autocratic attitude would be unbecoming of a great nation such as the U.S.A.. Differences and conflicts of views or interests should be resolved with give and take, such that all parties benefit from a negotiated solution to the conflicting interests. The lessons of history have taught us the futility of a dictated solution whereby one State imposes its will as the rule of law or even international law.

The maximum interests that any State could claim for itself in every possible situation have been claimed by the United States. For the North Pacific region, as coastal State, the United States has won a clear victory and is hailed as a generous victorious power, without making the other States shameful losers without honor and dignity. The United States had chosen to extend its jurisdiction in the North Pacific in 1976 by the adoption of the Magnuson Act. Having done so, it had rightly accepted similar claims of extension by other coastal States in the same region, including Canada, the U.S.S.R. and Japan. Having set this pattern, the United States cannot be heard to propound a different principle for a different region of the Pacific ocean. In this regard, the United States has been consistent in exempting "migratory species" from the exercise of U.S. fishery management and conservation authority.

105 *See* in particular U.N. Convention of the Law of the Sea, *supra* note 1, art. 64, at 22 (Highly migratory species).

A. *The Controversial Issue of Sovereignty*

The point at issue has been presented, rightly or wrongly, as the controversy regarding sovereignty or lack thereof over the migratory species which have found their way into the EEZ's or the 200-mile limits of a coastal State. It has been suggested that, quite consistently with the Magnuson Act establishing the Fishery Conservation Zone (FCZ) of 200-miles measured from U.S. coastlines, the United States has not claimed sovereignty or any title over highly migratory species, notably tuna, which roam about in the U.S. 200-mile zone. By the same token, it has been argued that no other coastal State can adopt any view different from that adopted by the United States with regard to sovereignty over highly migratory species within their EEZ's. It follows that the fishing vessels of any foreign States, not excluding the United States, could fish for highly migratory species within the 200-mile EEZ of any given coastal State. By not claiming or by disclaiming U.S. sovereignty over highly migratory species within the U.S. EEZ, it is not inconsistent for the U.S. government to oppose the claim of sovereignty made by other nations over highly migratory species within their respective EEZ.

But is sovereignty really at issue in this connection? Highly migratory species do not recognize the sovereignty of any nation whose EEZ they happen to pass through, nor indeed do they feel that any allegiance is owed on their part for any pleasure of passage through a national EEZ. Is that not equally true of any other species that happen to transgress maritime boundaries? Halibut or salmon swimming across the EEZ of one coastal State to another neither change their allegiance nor ownership. Nor can any change in status be attributable to them for leaving or entering the high seas to and from the EEZ of any coastal State.[106] There is an apparent mistaken identity as to the legal point at issue.

If the new law of the sea permits the exercise of regulatory control over living and non-living resources within the 200-mile EEZ of a coastal State, it is open to each coastal State to exercise or not to exercise any control in any way it deems appropriate. If the United States government did not choose to regulate the highly migratory species within her EEZ, it is entitled so to refrain from any regulation. Does this mean, however, that every other coastal State, regardless of her interests, must be bound to follow the example, view, leadership or whatever path is taken by the U.S.A.? Clearly it is lawful for the U.S. government to claim sovereignty or to denounce sovereign rights over migratory species within its own EEZ. But this does not authorize the U.S. government to oppose a different position, adopted by other coastal States, that is within the permissible limits of the new ocean law.

Indeed, Article 64 of the 1982 Convention requires the coastal State and other State (U.S. not excluded) whose nationals fish in the region for highly migratory species to "cooperate directly or through appropriate international organizations with a view to ensuring conservation and pro-

106 *See, e.g.*, Tsamenyi, *The South Pacific States, the U.S.A. and Sovereignty over Highly Migratory Species*, MARINE POLICY, Jan. 1986, at 29.

moting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone."[107]

The question at issue therefore is not whether the coastal State has sovereignty over highly migratory species within its EEZ. The question at hand is whether the U.S. fishermen could penetrate the EEZ of another coastal State and with impunity proceed to harvest living resources in that zone in violation and utter disregard of the regulations adopted by that coastal State. The issue to be resolved is whether the United States government should observe the fishery conservation and management regimes set up by other coastal States for fishing within their respective EEZs, these regimes operating within the permissible limits of the new ocean law.

B. *The South Pacific Forum Fisheries Agency (F.F.A.)*

Article 64 of the 1982 Convention on the Law of the Sea envisages the establishment of international organizations in every region to promote cooperation among the coastal State and other State whose nationals harvest highly migratory species in the region. In 1976 at the Seventh South Pacific Forum Meeting, the island State of South and Southwest Pacific decided to set up the South Pacific Forum Fisheries Agency (F.F.A.) to foster regional cooperation in this connection, to conserve marine resources, and to undertake joint actions in matters of surveillance and policy.[108] The convention establishing the agency was concluded in July, 1979 at the Eighth South Pacific Forum Meeting in Suva, Fiji. Australia and New Zealand contribute two-thirds of the F.F.A.'s budget; the remaining one-third is shared equally among the other South Pacific island member nations.[109]

The agency is governed by the Forum Fisheries Committee which functions to promote intra-regional coordination and cooperation, the harmonization of fisheries management policies, relations with distant-water fishing countries, such as the U.S., U.S.S.R., Japan, Korea and Thailand, surveillance and enforcement, onshore fish processing and marketing, and mutual access to the 200-mile zones of other parties.[110]

Geographically, the EEZ of the F.F.A. covers an enormous expanse of ocean space, with the necessary financial burden of managing the resources in these zones of extended jurisdiction. Practically all South Pacific States have adopted 200-mile exclusive fisheries zones, if not the EEZ. Thus, more than six million square nautical miles of the tropical Pacific Ocean fall directly under the national and collective jurisdiction of members of the F.F.A. The sea-land ratio for the members of the F.F.A.

107 *See, e.g*, Reagan Proclamation of March 10, 1983, *supra* note 4; Healey, *supra* note 23, at 84-85.

108 The current members of the South Pacific Forum are Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Solomon Islands, Kingdom of Tonga, Tavalu, Vanatu, and Western Samoa (Sixteen in all).

109 *See, e.g.*, A. Lawrent, Institution for Political Cooperation in the South Pacific: The South Pacific Forum, 1971-1979, at 144 (unpublished M.A. thesis, University of Papua, New Guinea, 1980).

110 *See* art. 5, South Pacific Forum Fisheries Agency Convention, 1979, FAO Fisheries Rep. No. 293, 201-294 (1983), *supra* note 30; van Dyke & Heftel, *Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency*, 3 U. HAW. L. REV. 6 (1981).

is several thousands to one.[111] To implement the optimum utilization of the newly acquired EEZ resources, the zones have to be protected against unauthorized foreign fishing. Policing such a large area is expensive. Furthermore, the need for regional cooperation is dictated by the highly migratory nature of the stocks. The species need to be adequately managed to avoid over-exploitation. This regional organization is indeed in conformity with the recommendation inherent in Article 64 of the 1982 Law of the Sea Convention.

C. *Cooperation from Distant-Waters Fishing Nations*

The Pacific island States appear ever ready and willing to accept the cooperation of out-of-region States, including distant-water fishing nations, whose national economies have been largely strengthened by the extended maritime jurisdiction. The land area of the Pacific Island region (excluding Papua New Guinea) is 87,801 square kilometers. As seen in Table 7,[112] total EEZ marine areas of 27,449,000 square kilometers have been attached to these island States. Without the EEZ, these

111 *See* sketch map in Annex 2, *infra*.

112 The 22 countries and territories shown in Table 7 have a combined land area of approximately 550,000 square kilometers of which one country, Papua New Guinea, accounts for 84% (462,243 km2). The 200 nautical mile EEZ and Fishery Zones declared under the U.N. Convention on the Law of the Sea have effectively extended their marine resource jurisdiction to a total area greater than 30 million km2.

TABLE 7: Pacific Island Countries and Territories

Country/Territory	Land Area (km2)	Status of 200 Mile Zone Declared	Year	1980 EEZ Area (1000 km2)
American Samoa	197	Economic	1977	390
Cook Islands	240	Economic	1977	1,830
Federated States of Micronesia	701	Fishing	1979	2,987
Fiji	18,272	Economic	1981	1,290
French Polynesia	3,265	Economic	1978	5,030
Guam	541	Economic	1977	218
Kiribati	690	Economic	1983	3,550
Marshall Islands	181	Fishing	1979	2,131
Nauru	21	Fishing	1978	320
New Caledonia	19,103	Economic	1978	1,740
Niue	259	Economic	1978	390
Northern Mariana Is.		Fishing/Economic	1978/1983	1,823
Palau	496	Fishing	1979	629
Papua New Guinea	462,243	Fishing/Economic	1978	3,120
Pitcairn Island	100	Fishing	1980	800
Solomon Islands	27,556	Fishing/Economic	1978	1,340
Tokelau	10	Economic	1977	290
Tonga	699	Economic	—	700
Tuvalu	26	Economic	1984	900
Vanuatu	11,880	Economic	1978	680
Wallis & Funtuna	225	Economic	1978	300
Western Samoa	2,935	—	1977	120
Pacific Islands region	550,044			30,569
Pacific Islands region (excluding Papua New Guinea)	87,801			27,449

island nations are not viable economically. Their livelihoods depend on income from the resources within the 200-mile zone, and their ability individually as well as collectively to prevent intrusion and unauthorized exploitation by out-of-region distant-water fishing nations.

This Southwest Pacific region is among the world's richest fishing grounds for tuna. In 1984, for instance, an estimated 650,000 mt. of tuna of all species were harvested, which accounted for one quarter of the total world production. In 1985, the total world skip-jack tuna catch was about 700,000 mt, of which well over 400,000 mt. were harvested by distant-water fishing nations. This catch is considered small compared to the region's sustainable yield of skip-jack tuna. In Fiji, for instance, the processing plant at Levuka has the capacity to process more than double the 4,000 to 6,000 mt. of annual catch from Fiji-based fishing operations. Fiji's EEZ could easily sustain an annual tuna harvest of 30,000 mt. There are thus immense opportunities and scope for expansion of commercial exploitation of tuna resources in the region without the danger of depletion. Ninety percent of the tuna catch in the region is currently being taken by distant-water fishing nations from outside the region. The remaining 10% is being harvested by locally based fishing fleets. Only 3% of the catch is being processed within the region, with 97% being processed elsewhere.

In 1984, 598,720 mt. of tuna, out of the 650,000 mt. total catch, were taken by distant-water tuna fleets licensed to operate within the region. The foreign catch was estimated at $662.7 million as against the access fees of $15 million a year, or less than 3% of the market value. A collective approach by the F.F.A. is yielding more fruitful results.

In the South Pacific, F.F.A. countries are prepared to cooperate with every friendly distant-water fishing nation, be it Japan, Thailand, the U.S.S.R. or the U.S.

1. Japan's Access and Cooperation

Japan has been the first country to establish sound cooperation with the F.F.A. nations. The access fee paid by Japan to Pacific Island countries averages about 4 percent of the commercial value of the catches. In addition, Japan provides direct assistance in the forum of technical cooperation and financial grants under her fisheries cooperation program with Pacific Island countries, which for the period 1981-1985 accounted for more than $10 million in annual contributions.

2. ASEAN Overture

The F.F.A. nations have recently turned to members of the Association of South East Asia Nations (ASEAN), comprising Thailand, Malaysia, Singapore, Indonesia, the Phillippines, and Brunei Darusalem, as their good neighbors to the northwest for cooperation. The F.F.A. has turned especially to Thailand as a distant-water fishing nation, for access and joint ventures in tuna processing within the region. Cooperation has been sought from outside the region by the Pacific Island nations for support in the form of commercial investment in the development of na-

tional and regional capability in fishing, transhipment and processing, market access, training and research, and conservation and management of the region's tuna resources.

3. Soviet Reactions

To this overture, the U.S.S.R. reacted favorably by concluding a fishery treaty with Kiribati after the Jeannette Diana incident in 1984.[113] The Solomon Islands announced in 1984 that she would welcome Soviet participation in tuna harvesting in her EEZ, subject to her regulatory controls and payment of access fees.[114] The U.S.S.R. may be said to have overpaid the access fees for tuna fishing in the South Pacific; however, the Soviet fishery policy is not purely one of survival but also of economic recovery. Tuna could provide a new source of hard currencies earning for the U.S.S.R. by opening new markets in Asian ports, such as Singapore. It is clear that the Soviet interests in the commercial exploitation of tuna are justifiable. This does not preclude other political and strategic interests which could well be served by establishing a toehold in strategic South Pacific island States, where peace and serenity have thus far been undisturbed (except by occasional nuclear explosion tests conducted by an out-of-region power to serve its own ambitions, to the utter amazement of the region if not the entire world).

D. *United States Affirmative Response*

The initial response by the United States government to collective enforcement actions by the F.F.A. was disappointing, if not indeed appalling. It is useful to examine the material facts and events leading to the adoption of stern counter-measures by the United States government facing lawful collective enforcement sanctions by the South Pacific Island States escalating a second tuna war that should never been waged between "civilized nations."

Past record shows that only about 1% of the total tuna catch by American fishing fleets has come from the U.S. EEZ.[115] It is not likely that foreign fishing fleets could have fished for highly migratory species within the U.S. FCZ in spite of the disclaimer of United States sovereignty or jurisdiction over tuna in the area. If for no other reason, it would not have had been economically viable for other States to have done so. This paucity of prospective catch explains more eloquently than words the reasoning behind the United States' voluntary waiver of sovereignty over tuna within the U.S. EEZ. By adopting this stance within her own FCZ, the United States was able to project the appearance of consistency in her claim that U.S. fishing fleets should enjoy open access to large tuna stocks elsewhere around the globe, including those

113 For the Jeannette Diana, see Niugini Nius, Sep. 8, 1984, at 1, and see Jun. 8, 1985, at 10 for the Kiribati Treaty.

114 The licensing fee is valued at $300,000 per boat as compared to $50,000 per vessel under the U.S. Treaty. The tuna is valued at $800 per metric ton live weight. The Soviet payments have been criticized as commercially unrealistic. News Release, Ministry of Foreign Affairs, Honaira, Solomon Islands (August 22, 1984).

115 Healey, *supra* note 23, at 87.

occurring within the EEZ of other coastal States, Southeast and Southwest Pacific alike.

The United States has sought to enforce her position in regard to highly migratory species in foreign waters through two important legislation: The Fishermen's Protective Act of 1954[116] and the Magnuson Fishery Conservation and Management Act of 1976 (Magnuson Act).[117] The Fishermen's Protective Act provided for compensation by U.S. tuna fishermen whose vessels have been seized for illegally fishing in the fisheries zones in foreign countries. This amount is reimbursable by the U.S. Secretary of State by deduction from the foreign assistance granted to that country.[118] This legislation was in response to earlier seizures of U.S. tuna fishing vessels by Southeast Pacific countries, such as Chile, Ecuador, and Peru during the first U.S. tuna war following the historic Santiago Declaration of 200-mile zone of "mar patrimonial."[119] The Magnuson Act provides that a foreign fishery conservation zone shall not be recognized by the United States if such zone fails to accept that highly migratory species are to be managed by an applicable international fishery agreement.[120] The Act also authorizes the United States government to impose an embargo on importation of fisheries products from any country that seizes a U.S. fishing vessel harvesting tuna without a license. Upon receipt of certification by the Secretary of State to that effect, the Secretary of Treasury is empowered to take appropriate action to prohibit importation of all fish and fish products, such as highly migratory species, from the fishery involved, or indeed any other fishery deemed appropriate.[121] The embargo is virtually automatic.

The net results of these two Acts in practice encouraged U.S. fishermen to violate fisheries regulations of foreign sovereign nations. These actions might not otherwise have been totally unwarrantable originally in the fifties and the sixties, when the practice of States on the limits of exclusive fishery conservation zones was still unsettled, and while U.S. tuna vessels would be compelled to pay for very costly foreign licenses and to adhere to whatever arbitrary or discriminatory regulations were imposed by the coastal State.[122] Such a protective counter-measure might have been viewed with some sympathy, having regard to the lack of consistency in the law and the weakness of enforcement capabilities of Latin American States to protect their own fishing interests within the 200-mile zone, at a time when the territorial sea was conceived to be no

116 Pub. L. No. 90-482, 82 Stat. 729 (1968), especially § 2(a).

117 Pub. L. No. 94-265, Title II, 16 U.S.C. §§ 1801-1882 (1982).

118 *See, e.g.*, Meron, *The Fishermen's Protective Act: A Case Study in Contemporary Legal Strategy of the United States*, 69 AM. J. INT'L L., 290 (1975).

119 Chile and Peru in 1947, El Salvador in 1950, Honduras in 1951 and Ecuador in 1966. *See* Carroz, *Les problemes de la pêche dans la convention sur le droit de la mer et la pratique des Etats*, LE NOUVEAU DROIT INTERNATIONAL, édition Pedone, 178-229, Annexes at 221-229 (1983).

120 Pub. L. No. 94-265, Title II, § 202(e)(2), 90 Stat. 339 (1976).

121 *Id.* § 205, 16 U.S.C. § 1822 (1982).

122 *See, e.g.*, Statement by Theodore Kronmiller, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs to Congressional Committee on Commerce, Science and Transporation, on consideration of an amendment to the Magnuson Act 1976, which would have extended the application of the Act also to highly migratory species, December 8, 1981 (unpublished); Burke, *supra* note 23, at 308-09.

more than three to twelve miles. In this day and age, however, with practically all coastal States having adopted 200-mile exclusive fishery conservation zones or EEZ's, countermeasures in the form of embargoes against the island nations in the South Pacific that are exercising their legitimate sovereign rights and are so heavily dependent on their fishing industries are an inappropriate response.

The growing tension between the United States and the Pacific Island Forum States culminated in the sanctions and counter sanctions following the arrest of the *Danica*, an American purse seiner, by Papua New Guinea fisheries officials in February 1982 for fishing in her EEZ without a license.[123] Embargo was imposed as a retaliatory measure and the *Danica* was released for a fee of 200,000 kina.[124] An interim agreement was concluded allowing access to the American Tunaboat Association under more favorable conditions than the Japanese purse seiners.

A second dispute concerned the *Jeannette Diana*, arrested by Solomon Islands on June 24, 1984 on the charge of illegal fishing in her EEZ.[125] The captain and owner of the fishing vessel were found guilty by the High Court of Solomon Islands and fined 72,000 Solomon Islands dollars. Harsh counter-measures were exchanged between the United States and Solomon Islands. U.S. embargo was lifted seven months later in April, 1985[126] following an agreement between the two governments. The Solomon Islands agreed to return the *Jeannette Diana* to its owner for a fee of 770,000 Solomon Island dollars.[127]

This intolerable state of affairs could not be allowed to continue much further. An attempt had to be made to salvage the untenable situation. The initiative to conclude a fisheries treaty with the South Pacific island States began as early as 1982, following the *Danica* incident. The United States objective would be to conclude a regional treaty after the model of regional cooperation in the management of migratory species with Nauru.[128] U.S. Congressman McCloskey struck the right chord as he proposed to demonstrate the willingness of the United States to cooperate fairly and justly in the conservation and management of international fisheries and stocks to encourage reasonable use of such resources by U.S. fishermen as well as providing assistance to developing island nations in fisheries conservation, management, harvesting, processing,

123 This was in contravention of § 12 of the Papua New Guinea Fisheries Act, penalties for which entail a fine not exceeding 1,000 kina, or imprisonment for a term not exceeding six months, or both, on summary conviction, and more on indictment. *Cf.* Tsamenyi, *supra* note 106, at 37.

124 In 1986, one Kina (Papua New Guinea) was worth $0.97.

125 *See* Solomon Islands Fisheries Act, containing provisions similar to those of Papua New Guinea. *Cf.* Tsamenyi, *supra* note 106, at 37-38.

126 In 1986, one Solomon Islands dollar was worth $0.70.

127 *See* Niugini Nius, Sep. 8, 1984, at 1; News Release, Ministry of Foreign Affairs, Honaira, Solomon Islands, Aug. 27, 1984.

128 *See* McCloskey, Statement on the floor of the U.S. House of Representatives 4-5, (Mar. 11, 1982), (unpublished) *noted in* Tsamenyi, *supra* note 106, at 40.

and marketing.[129] This could serve in time to avert further Soviet intrusion into an area hitherto near and dear to the United States.[130]

The Treaty of Fisheries between the Governments of Certain Pacific Island States (16) and the Government of the United States of America, with annexes and Agreed Statement was signed on April 2, 1987.[131] The package carries the license fees of $1,750,000 representing 35 licenses of $50,000 each and $250,000 technical assistance, totalling $2 million a year payable by the U.S. Tuna Fishery Association. Additionally the United States government agreed to provide an annual assistance of $10 million for the next five years.[132] In total, this package would represent about 9% of the $131.8 million estimated commercial value of the United States tuna catch of 208,000 mt. in the Pacific Islands region in 1984. The actual license fees of $1,750,000 amount to less than 3% of the total catch value, compared to the average of 4% paid by Japanese fishermen on top of the assistance furnished by the Japanese government averaging over $10 million per year during 1981-85.[133]

This treaty has served to avert what has threatened to be an ugly tuna war between the United States and a group of micro-polynesian island nations, whose desire for a peaceful world is beyond suspicion. The treaty is not an end in itself, but merely serves as a positive first step. The F.F.A. States are traditional friends and allies of the United States. They pose no threat to anyone and under no circumstances should they be treated as enemy or competitor. They have the right to survive and should be encouraged to defend themselves singly as well as collectively. Their union has proved to be strong enough to be noticeable. Had they shown less strength, they might have perished. It calls for Statemanship to recognize and appreciate the value of friendship and relations of cooperation, based on give-and-take, and the submergence of short-term ad-

129 *Id.* at 1. *See also* the confidential document prepared by the State Department, South Pacific/Solomon Islands: Multilateral Fisheries Negotiations (unpublished), (March 5, 1985), still adhering to the original U.S. position. There is no change in U.S. policy. The lifting of the embargo in the *Jeannette Diana* case was "a reinterpretation of administrative practice."

130 McCloskey, *supra* note 128 at 4-5 ("There is a far greater danger, however, vis-a-vis our continuing efforts to deny expansion of Soviet influence in the Pacific Basin. . . . Following the Soviet invasion of Afghanistan, Soviet efforts to count support among these nations were effectively blocked.")

131 S. TREATY DOC. No. 5, 100th Cong., 1st Sess. 91-118 (1987).

132 The preambles of the Treaty read:

> "The Governments of the Pacific Island States party to this Treaty and the Government of the United States of America:
>
> Acknowledging that in accordance with international law, coastal states have sovereign rights for the purposes of exploring and exploiting, conserving and managing the fisheries resources of their exclusive economic zones or fisheries zones;
>
> Recognizing the strong dependence of the Pacific Island parties on fisheries resources and the importance of continued abundance of those resources;
>
> Bearing in mind that some species of fish are found within and beyond the jurisdiction of any of the parties and range throughout a broad region;
>
> Desiring to maximize benefits flowing from the development of the fisheries resources within the exclusive economic zones or fisheries zones of the Pacific Island Party
>
> Have agreed as follows.

133 *See* Jioji Kotablavu, Extended Maritime Jurisdiction in the Pacific Maximizing Benefits from Marine Resources, (paper presented at Law of the Sea Institute, 21st Annual Conference, Honolulu, Aug. 1987).

vantages for the big and the strong to the detriment of the smaller and weaker nations.

What is needed is an ability to see beyond the obvious confrontation between the two opposing views of sovereignty over highly migratory species within the EEZ. Whatever the view which will ultimately prevail, it is not worth alienating the valuable friendship of our neighbors. Congressman McCloskey has put the matter aptly thus:

> These South Pacific Nations have, until now, been among our closest friends and have supported us on many international issues of great importance. Even now, Fijian troops are maintaining the peace in troubled Middle East. A continuance of strong arm tactics against a small country such as Papua New Guinea may endanger long standing friendships far more valuable to us than a slight increase in tuna costs through acceptance of licensing fees by our tuna industry.[134].

V. Conclusion

The conclusions to be drawn from the foregoing presentation appear irresistible. Peace is global and indivisible. Peace without law is untenable. Lawless peace is inconceivable. International Ocean Law is derived from the practice of States. We no longer live in an age when the big and powerful can dictate for the rest of the world a code of conduct which they themselves neither can nor care to observe. The days are long gone when it is considered a privilege for the strong to take what was not given from the battered weak. Cooperation should supplant confrontation as the order of the day.

The chance is practically nil if we do not proceed from the basic proposition that States are under an obligation to cooperate with one another. Nor can we today afford to deny or ridicule the collective efforts of peace-loving nations, however poor and meager might be their resources, economic power, or military might.

Fisheries conservation and management provide clear examples of possible fruitful international cooperation. The possibilities are there to confront, conciliate, or avoid altogether the competing and conflicting interests of coastal and other States. The alternatives and options are open. It is for us to decide.

In this particular connection, Japan offers a most interesting instance for in-depth study. The new ocean law of extended maritime jurisdiction has presented a most profound shock to countries like Japan, Korea, and Thailand, countries whose traditional distant-water fishing grounds have suddenly shrunk beyond recognition and comprehension. Each nation has had to fend for herself to find new grounds and alternatives for survival. Japan has emerged still strong in spite of the multifarious difficulties that stand in the way to survival. It has had to resort to scientific research and to find alternative solutions through negotiations, joint ventures, and an arduous process of give-and-take.

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134 McCloskey, *supra* note 128, at 1 ("It is time to abandon our convention that we can control fishing in our own 200-mile zone while still claiming the right to fish tuna within other nations' 200-mile zones."). *Cf.* Tsamenyi, *supra* note 106, at 37 n.41.

In the North Pacific, the United States stands out as the grand champion, winning the admiration and gratitude of other strong and powerful nations, acting on the principle of the new ocean law, permitting the extension of the 200-mile exclusive economic zone and its exploitation to the fullest optimum limits. The phasing out of foreign fishing, including the Soviet, the Japanese, the Korean, the Polish and the Chinese, has been orderly, well-planned and executed without major disruptions. In the meantime, the U.S. fishing industry in all its splendor, researching, harvesting, processing and marketing, is thus enabled to grow from strength to strength. Other less fortunate coastal States like Japan, Korea and Thailand have not fared so well. They have had to look to other alternative solutions with varying degrees of success to date. Their U.S. partners and Soviet counterparts are enjoying a relatively comfortable respite in the commercial exploitation of their fisheries.

For the North Pacific region, the ocean law has been kindly and permissive, allowing coastal States to regulate fisheries within their exclusive economic zones. The United States has proved to be a principal if not unique beneficiary of progressive development of the law. When the same legal developments were about to occur in the South Pacific region, however, the United States showed hesitancy in acknowledging the legitimate rights and aspirations of the Pacific Island nations. The reappearance of the Japanese and the emergence of the Soviet in the Southwest Pacific have been a blessing in disguise, an eye-opener in a way for those whose vision has been temporarily beclouded by short-term advantages.

Indeed, the same rule of international ocean law is applicable to all nations alike. None can be heard to be the overload law-giver, as the process of international law-making has been taken from the monopoly of the European and Western Powers into the rightful hands of all nations, large and small, rich and poor, regardless of their economic or political structures. The Pacific Island States have joined the community of nations, accepting customary rules of the law of the sea as they exist, and have since taken active part in the process of their modification and progressive development to respond more effectively to the exigencies of the new international economic order, under which international relations are conducted on the basis of equal sovereignty and dignity. Gone are the days when colonialists clung to the maxim "pacta sunt servanda" as a sacred formula for perpetuating their colonial gains. Unequal treaties are today void ab initio without consequence. Peremptory norms of international law have swept away unfounded claims of illicit promises that offend the conscience of mankind. The law is in every nation's hand and not, as it were, in the hands of the mighty and powerful nations of the West.

A practice which may have been expedient at one time for a particular location, such as the Fishermen Protective Act, to protect United States fishermen in the East Pacific region has no application to another region which is differently composed, especially at a time when the emerging legal developments have recognized the legitimate rights of

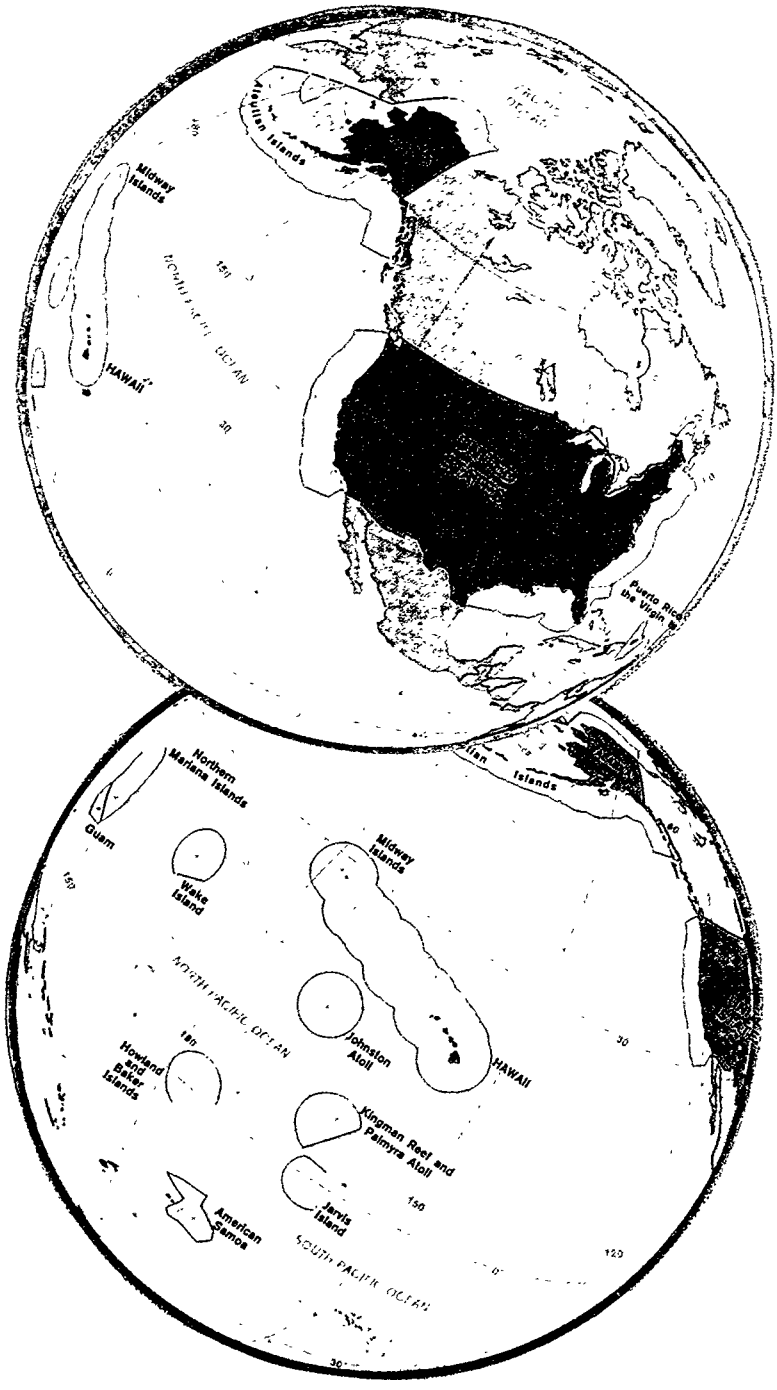
the Pacific Island States. Law is intertemporal. Its untimely application is out of place apart from being out of time.

Reason must ultimately prevail whatever duration of time it may take to persuade those who have been spoiled by the outdated rules of international customs permitting subjugation of the weak and the conquered by the mighty and the ruthless. Reason is stronger than armed forces. Material gains are no match for friendship and the love of peace.

The greatness of man, or State, is not measured by his capacity to induce mass destruction, nor indeed by his constructive or productive potentials, but rather by his ability to endure the hardships and sufferings that mankind is called upon to face. The magnanimity of man lies in his endurance, tolerance, and sacrifices, so that others too may live in peace, progress, and prosperity.

The time has come for the United States to take her rightful place as a leader of the free nations of the world in the codification and the progressive development of the law of the sea. United States interests in the ocean realm would best be served by her re-entry into the mainstream of international legal developments. The community of nations needs the participation of the United States in its collective endeavors and cooperative efforts. The international community urgently needs a dedicated and responsible leader like the United States, a major maritime-oriented nation, who is able, willing, and ever ready to undertake and implement obligations in the maintenance of international peace and security. The United States is second to none in her contributions to the scientific progress and economic developments for the well-being and betterment of mankind. The active role of the United States in the conclusion of the Fisheries Treaty with the South Pacific State in April 1987 marks a significant step in the right direction. The treaty in its resounding preamble acknowledges the sovereign rights of every State to regulate fisheries in its own exclusive economic zones. This is indeed an opportune signal to herald a new era of active meaningful cooperation and good neighborliness among nations, and indeed a welcome return to international law and order. The greatest attribute of the United States is reflected in her flexible attitude and her ability to alter her policy course to respond more effectively to the pressing needs of the contemporary world. The balance thus struck may be happily maintained for the common good of all for years to come.

Annex I: The United States' Exclusive Economic Zone



Annex II: The South Pacific, Possible Exclusive Economic Zones