Bridging the Gap to International Fisheries Agreement: A Guide for Unilateral Action

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I. INTRODUCTION

This article begins with a basic assumption: That between now and the time of workable international fisheries agreement, at least a few coastal nations[1] will take unilateral action in the seas beyond their presently claimed areas of fishery jurisdiction, ostensibly for the sake of conserving valuable food resources endangered by overfishing (or perhaps in some cases, pollution). Indeed, unilateral fisheries-protective action has of course already been taken by several countries (including the United States),[2]

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1. The word "nation" will be used throughout this article in place of the more traditional word "state."

2. Exclusive Fisheries Zone Act (1966), 16 U.S.C. §§ 1091-94 (1970). For claims of other nations, *see generally* Bureau of Intelligence and Research, U.S. Dep't of State, National Claims to Maritime Jurisdictions (International Boundary Study, Series A, Limits in the Seas No. 36, 1972) [hereinafter cited as National Claims to Maritime Jurisdictions].

and further extensions are presently being contemplated by several nations (including the United States).[3]

If this initial assumption is correct—and I believe it is—it might further be assumed that the predicted extensions of fisheries jurisdiction will have to be counted as additional steps toward a division of the world ocean into "national lakes." Certainly there are many recent extensions of national ocean jurisdictions, unilaterally proclaimed and otherwise, that must be so characterized: the Truman Proclamation (the Great Precedent for the following),[4] the Latin American 200-mile claims,[5] the Convention on the Continental Shelf,[6] extra-territorial exclusive fishing zones,[7]

3. While this article was being written, Iceland announced that it plans to enforce a 50-mile exclusive fishing zone and a 100-mile pollution zone beginning in the fall of 1972. Seattle Times, Dec. 16, 1971, § G, at 8. Many developing nations are making similar proposals. NATIONAL FISHERMAN, Feb. 1972, § A, at 3, 27. Proposals are continually being made in the United States Congress for extension of the United States exclusive fishing zone. For example, in the 92nd Cong., 1st Sess., H.R. 627 was introduced to extend United States fishing jurisdiction to at least 50 miles and H.R. 628 and H.R. 1675 were introduced to extend the fishing zone to 200 miles offshore.

4. Presidential Proclamation No. 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf (1945); 3 C.F.R. § 67 (1943-48 comp.) [hereinafter cited as Truman Proclamation on the Continental Shelf].

5. Argentina claims a 200-mile territorial sea, Decree Law 17,094 (Jan. 4, 1967); Brazil claims a 200-mile territorial sea, Decree 1098 (Mar. 25, 1970); Chile claims a 200 mile territorial sea, Supreme Resolution No. 179 (Apr. 11, 1953); Costa Rica claims a 200-mile fisheries conservation zone, Decree Law No. 739 (Oct. 4, 1949), Decree Law No. 74 (Oct. 4, 1949); Ecuador claims a 200-mile territorial sea, Executive Accord (Nov. 10, 1966), Decree Law 1542 (Nov. 11, 1966); El Salvador claims a 200-mile territorial sea, Constitution Art. 7 (Sept. 14, 1950); Guinea claims a 130-mile territorial sea, Decree No. 224 (June 3, 1964); Nicaragua claims a 200-mile exclusive fishing zone, Executive Decree 1-L (Apr. 5, 1965); Panama claims a territorial sea of 200 miles, Law No. 31 (Feb. 2, 1967); Peru claims exclusive fishing jurisdiction to 200 miles, Executive Decree (Aug. 1, 1947); Uruguay claims a 200-mile territorial sea, Decree (May 12, 1969), Decree (Dec. 13, 1969). National Claims to Maritime Jurisdictions, *supra* note 2; *See generally* Lecuona, *The Equador Fisheries Dispute*, 2 J. MARITIME L. & COMM. 91 (1970); Loring, *The United States—Peruvian Fisheries Dispute*, 23 STAN. L. REV. 391 (1971).

6. United Nations Conference on the Law of the Sea; Convention on the Continental Shelf, Apr. 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (*in force* June 10, 1964) [hereinafter cited as Convention on the Continental Shelf].

7. *See,* for example, the extra-territorial fishing zones claimed by the United States: Exclusive Fishing Zone Act (1966), 16 U.S.C. §§ 1091-94

the Canadian anti-pollution legislation,[8] etc. All purport to be permanent extensions of exclusive national authority, delimited by geographical boundaries, and thus contribute to the creeping disintegration of an important area of the earth's surface that might otherwise, if given time, be set aside as the "common heritage of mankind."[9]

It is therefore unfortunate that the almost inevitable delay in reaching international agreement on matters of substance, coupled with the technology-threat of overfishing, will probably soon compel some nations to extend themselves further into the sea. However, as the following discussion is supposed to demonstrate, unilateral fishery-protection action beyond present limits of jurisdiction need not be characterized as a step toward national lakes or as a precedent for jurisdictional extensions which can be characterized as such.

The proposition advanced in this article is undoubtedly an oversimplification. It could even be unworkable. Yet it is, I think, something that needs to be considered as we approach the scheduled time for the 1973 Conference on the Law of the Sea.[10] The proposition is this:

(1970); the United Kingdom: Fishery Limits Act of 1964, 12 & 13 Eliz. 2, c. 72, at 1181; Australia: Fisheries Act 1967, Commonwealth Acts, No. 116, at 853 (1967). *See generally* National Claims to Maritime Jurisdictions, *supra* note 2.

8. Arctic Waters Pollution Prevention Act, 18-19 Eliz. 2, c. 47 (Can. (1970) [hereinafter cited as Canadian Pollution Prevention Act]. For a good discussion of the Act, *see* Bilder, *The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea,* 69 MICH. L. REV. 1 (1970). *See also* Green, *International Law and Canada's Anti-Pollution Legislation,* 50 ORE. L. REV. 462 (1971).

9. *See* E. Borgese, The Ocean Regime—A Suggested Statute for the Peaceful Uses of the High Seas and the Sea Bed Beyond the Limits of National Jurisdiction (Center for the Study of Democratic Institutions Occasional Paper No. 5, 1968); Nixon, *U.S. Policy for the Seabed,* 62 DEP'T STATE. BULL. 737 (1970).

10. G.A. Res. 2750C (XXV) (1970), 10 INT'L LEGAL MATERIALS 226 (1971). This is a resolution in which the United Nations General Assembly

> *Decides* to convene in 1973, in accordance with the provisions of paragraph 3 below, a conference on the law of the sea which would deal with the establishment of an equitable international regime—including an international machinery—for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal states), the preservation of the marine environment (including inter alia, the prevention of pollution) and scientific research.

See Dole & Stang, *Ocean Politics at the United Nations,* 50 ORE. L. REV. 378

In view of the apparent trend toward overexploitation of certain stocks of the world's commercial fishes, and in light of the proven incapacity of the international community to come to effective agreement on any important topic in anything like a timely fashion, coastal nations ought to be allowed—even, perhaps, encouraged in some instances—to take emergency resource-protective action in the high seas within the following guidelines: (1) The protective action must be a response to a demonstrable conservation crisis. (2) The protective action must be concerned solely with protection of the endangered resource. (3) The protective action must not unreasonably discriminate on the high seas against nationals of other nations. (4) The protective action must carry an automatic termination time. (5) The protective action must be accompanied by a clear call for international agreement.

Readers familiar with international fisheries law will recognize that this proposition borrows from the concepts underlying the second Truman Proclamation[11] and the Convention on Fishing and Conservation of the Living Resources of the High Seas.[12] In fact, the non-success (it cannot quite be called failure) of that convention[13] represents one of the obstacles to the proposal advanced

(1971); Pollack, *Fisheries Considerations of Ocean Space,* 4 NAT. RES. L. 676 (1971).

11. Presidential Proclamation No. 2668, Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas (1945); 3 C.F.R. § 68 (1943-48 comp.) [hereinafter cited as Truman Proclamation on Fisheries]. A companion executive order contemplated the establishment of fishery conservation zones. Executive Order No. 9634 (1945); 3 C.F.R. § 437 (1943-48 comp.)

12. United Nations Conference on the Law of the Sea Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1958, [1966] 17 U.S.T. 138, T.I.A.S. No. 5969; 559 U.N.T.S. 285 (*in force* March 29, 1966) [hereinafter cited as Convention on Fishing and High Seas Conservation].

13. As of January 1, 1971, only 30 nations had ratified the Convention on Fishing. U.S. DEP'T OF STATE, TREATIES IN FORCE 299 (1971). In 1969 the combined catch of these 30 nations made up only 17 percent of the total world catch. And of this 17 percent the five nations which could be considered fishing powers (Denmark, South Africa, Thailand, United Kingdom, and the United States) caught 75 percent. 28 FAO, YEARBOOK OF FISHERY STATISTICS 1969 § A at 4-11 (1970). *See generally* Herrington, *The Future of the Geneva Convention on Fishing and the Conservation of the Living Resources of the Sea,* Proceedings of the Conference of the Second Annual Law of the Sea Institute 62 (1968).

here. But more on that subject will be presented later.[14]

In the meantime, I will try to demonstrate why unilateral fisheries action might soon be deemed a necessity and how a nation taking such action might avoid being characterized as a "national laker."

II. The Crisis-Creator: Overexploitation

It is common opinion among observers of the international fishing scene that "freedom of fishing," as one of the traditional freedoms of the high seas,[15] is no longer a viable principle of sound fisheries management.[16] In terms of the fishing effort and techniques which could have been fielded in Grotius' day, when the principle was supposedly established,[17] it was perhaps reasonably accurate to say that the living resources of the sea were inexaustible and therefore represented "free goods."[18] In fact, such a rationale was apparently found not too difficult to support as late as 1958, when the principle was re-asserted in an attempted codification.[19]

We know better today. Grotius and the Geneva Convention

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14. *See* text accompanying notes 69-72, *infra.*

15. The traditional doctrine is supposedly "codified" in United Nations Conference on the Law of the Sea; Convention on the High Seas, Art. 2 § 2, April 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, (*in force* Sept. 30, 1962) [hereinafter cited as Convention on the High Seas].

16. *See* F. Christy & A. Scott, The Commonwealth in Ocean Fisheries 6-7 (1965); FAO, The State of the World's Fisheries 1-5 (World Food Problems No. 7, 1968); J. Crutchfield & A. Zellner, Economic Aspects of the Pacific Halibut Fishery; Goldie, *The Oceans' Resources and International Law—Possible Developments in Regional Fisheries Management,* Colum. J. Transnat'l L. 1, 3-4 (1969). *See also* 1 L. Oppenheim, International Law 593-94 (8th ed., H. Lauterpacht, 1955).

17. H. Grotius, The Freedom of the Seas 22-44 (1916) (translated with a Revision of the Latin text of 1633, by Ralph Van Deman Jagoffin). *See generally* H. Knight, The Law of the Sea 37-61 (1969); Reppy, *The Grotian Doctrine of the Freedom of the Seas Reappraised,* 19 Fordham L. Rev. 243 (1950).

18. The inexhaustibility premise was disputed even in initial responses to Grotius. *See* T. Fulton, The Sovereignty of the Sea 548 (1911):

> Welwood, Selden, and many others, held, in opposition to Grotius and his school, that the fisheries along a coast might be exhausted or injured by promiscuous fishing, and that the inhabitants of the coast had a primary right to the fractus of the adjacent sea, as against the intrusion of foreigners—a principle which lay at the root of the Scottish claims to the reserved waters.

19. Convention on the High Seas, *supra* note 15, Art. 2 § 2. But, in the exercise of freedom of fishing, the nation must take into account the interests of other nations and the interests of conservation of the living resources. II Int'l L. Comm'n, Commentaries on the Draft Articles on the Law of the Sea, U.N. Doc. A/3159, Art. 27 (1956).

framers were wrong not so much in their respective assessments of then-existing fishing capabilities and fish supplies as in their inability to predict the tremendous impact of technology on these matters. Grotius, at least, can be excused.[20]

Today we are confronted with many technology crises which challenge the existing order of our society. The society represented by the community of nations is not immune. New and growing technology in the field of ocean mining accounts for much of the current rethinking about international institutions;[21] ocean weapons technology, known and suspected, adds its share of concern;[22] ocean transportation is being technologically revamped on a large scale and thus presents potential threats to freedom of navigation;[23] technology has opened up the sea to uses unsuspected a short time ago.

New and coming fishing technology now threatens the ancient practice of free ocean fishing. Larger and faster boats, improved fishing gear and fishing techniques, high seas processing, and more fishing nations have made fishing a major international activity.[24] This tremendous increase in fishing effort[25] and fishing ability has made it possible to exploit stocks which a few dec-

20. Excused not only because of his failure to foresee the much later impact of technology, but also because he was probably not really concerned with fishing rights when he drafted *Mare Liberum* (*i.e.*, THE FREEDOM OF THE SEAS, *supra* note 17). *See* Reppy, *supra* note 17, at 263. And not everyone agreed, even in Grotius' time, that the seas were inexhaustible. *See* Knight, *supra* note 17, at 55-73.

21. *See* COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, PANEL REPORT, INDUSTRY AND TECHNOLOGY, H.R. Doc. No. 91-42, Part 2, 91st Cong., 1st Sess. at VI, 161-221 (1969) [hereinafter cited as STRATTON PANEL REPORT 2].

22. *See* E. Brown, Arms Control in Hydrospace: Legal Aspects 1-36 (Woodrow Wilson International Center for Scholars—Ocean Series 301, 1971); Breckner, *Some Dimensions of Defense Interest in the Legal Delimitations of the Continental Shelf,* Proceedings of the Fourth Annual Conference of the Law of the Sea Institute 188 (1970).

23. STRATTON PANEL REPORT 2, *supra* note 21, at VI, 115-21.

24. *See* FAO, FISHERIES IN THE FOOD ECONOMY 41-45 (Freedom from hunger Campaign—Basic Study No. 19, 1968).

25. In 1850, the total world catch of fish and shellfish products was (excluding whales) between 1.5 and 2.0 million metric tons; in 1900, about 4.0 million tons; in 1930, about 10.0 million tons; in 1950, about 20.0 million tons; in 1960, 38.0 million tons; in 1965, 52.4 million tons; and in 1968, 64 million metric tons.
Chapman, *The Theory and Practice of International Fishery Development-Management,* 7 SAN DIEGO L. REV. 408, 414 (1970).

ades ago were not feasible and has resulted in an increasing number of overfished stocks.[26] In the face of rapidly increasing demand for food fish,[27] the classical response to overfishing moving to another stock is no longer as viable as it used to be.[28] The need for sound management has become critical.[29]

New fisheries technology and the prediction of overfishing crises have caused concern on at least two levels: (a) the "objective" level—represented by fisheries scientists, academicians, policy makers, and the like—who are worried about the preservation of important food resources for the hungry of today's and tomorrow's world populations;[30] and (b) the "subjective" level—

26. In 1949 a group of fishery experts believed the only fish stocks in need of serious management to be a few high-priced species like plaice in the North Sea and salmon and halibut in the northeast Pacific. However, in 1968, about half of some 30 stocks believed underfished in 1949 were in need of protection. FAO, THE STATE OF THE WORLD FISHERIES I (World Food Problems No. 7, 1968).

27. It is estimated that by 1985 the world demand for food fish will be 65 to 100 per cent greater that the 1965 catch. This growth will result from a 33 to 50 per cent increase in demand from the developed nations, a 90 to 150 per cent increase from the centrally planned countries (includes mainland China), and a 100 to 160 per cent increase from the developing nations. FAO, FISHERIES IN THE FOOD ECONOMY, *supra* note 24, at 60. *See generally* Holt, *The Food Resources of the Ocean,* 221 SCIENTIFIC AMERICAN, Sept. 1969, at 178.

28. The FAO predicts that by 1990 few substantial stocks capable of being harvested with modern fishing gear will remain unexploited. FAO, FISHERIES IN THE FOOD ECONOMY, *supra* note 24, at 38-39.

29. Further potential danger to the living resources of the sea comes from the threat of pollution. Most pollutants reach the oceans from land-based sources, over which the coastal nation can exercise little control (except, of course, for those sources within its own land boundaries). *See* NATIONAL ACADEMY OF SCIENCES, MARINE ENVIRONMENTAL QUALITY: SUGGESTED RESEARCH PROGRAMS FOR UNDERSTANDING MAN'S EFFECT ON THE OCEANS (1971), where it is suggested that most pollutants (including 95 per cent of the petroleum) reach the oceans through the atmosphere. Coastal nations are now beginning to take unilateral action in the high seas to protect themselves and fisheries from the dangers of oil pollution resulting from accidental spills and intentional discharges. Canada and Norway have taken such action. Canadian Pollution Prevention Act, *supra* note 8; Law No. 6 of Mar. 6, 1970, [1970] Lovtid 335. *See* Swan, *International and National Approaches to Oil Pollution Responsibility: An Emerging Regime for a Global Problem,* 50 ORE. L. REV. 506, 570-72 (1971). Iceland plans to enforce a 100-mile pollution zone beginning in late 1972. NATIONAL FISHERMAN, Feb., 1972, § A at 27.

30. *See generally* F. CHRISTY & A. SCOTT, *supra* note 16; J. CRUTCHFIELD & G. PONTECORVO, THE PACIFIC SALMON FISHERIES—A STUDY IN IRRATIONAL CONSERVATION (1969); COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, REPORT, OUR NATION AND THE SEA, H.R. Doc. No. 91-42, 91st Cong., 1st Sess., 88-94 (1969) [hereinafter cited as STRATTON COMMISSION REPORT]. For a discussion on the STRATTON COMMISSION REPORT'S recommendations regarding fishing, *see* Proceedings of the Fourth Annual Conference of the Law of the Sea Institute 286-359 (1970).

represented mainly by fishermen and their representatives—who foresee real threats to their livelihoods in the depletion of fish stocks upon which they depend.[31] The basic assumption at the start of this article—that unilateral fisheries-protective action on the high seas will be taken soon by some nations—is in turn founded on the assumption that pressures emanating from one or both of these two levels will in fact cause the unilateral fisheries jurisdictional extensions to be undertaken.

Certainly, in view of the seemingly inevitable overfishing crises, it would be a good idea for *somebody* to act for the purpose of conserving important fish resources. But does that somebody have to be single nations acting on their own?

III. The Ultimate Solution: The Desirability of International Agreement

The 70 percent of our planet's surface covered by ocean is the vast stage now set for the drama in which man will perform acts determinative of his essential character as an organized species of intelligent life for generations to come. Perhaps it would be even more appropriate to view this immense area as the field fate has selected for an impending battle whose significance may well eclipse that of the skirmishes fought at Salamis and Waterloo. Whatever the metaphor, important things are about to happen in the ocean. In this decade and much of the next, we of the present generation will be forced to decide whether it is really possible for man in his present condition to administer an incredibly valuable world resource for the shared benefit of all men everywhere. No matter what our decision ultimately will be, men living hundreds of years in the future will be affected by it. It is an awesome responsibility, and there is no way we can avoid it.

Two scenarios represent the opposite ends of a spectrum of scenarios covering the possible results of our decades of decision in the ocean:

(1) In the 1970's and 80's, the nations of the earth continue to

31. *See* Wakefield, *Fishing Interests on the Shelf,* Proceeding of the Third Annual Conference of the Law of the Sea Institute 230 (1969); Wedin, *Impact of Distant Water on Coastal Fisheries,* Proceedings of the Second Annual Conference of the Law of the Sea Institute 14 (1968).

debate and disagree on the structure of a regime for management of the ocean's resources. In the meantime, the coastal nations continue to expand their self-proclaimed authorities farther out to sea, until it finally becomes apparent to the debaters that there is really very little left to argue about. By that time, most of the ocean has been sliced up into segments claimed by the coastal nations. Conflicts between coastal nations over particularily rich areas of ocean develop, harsh words are exchanged, fleets are mobilized, shots are fired, missiles are launched, and the world goes up in flame, proving what many have long suspected: that man is really an unsuccessful species of life.

(2) On the other extreme, a much more pleasant prospect invites consideration. Suppose that the upcoming Law of the Sea Conference meets with great success—success in the sense that out of it comes the seed from which grows a new world organization devoted to the principle that the ocean's wealth is the common heritage of all mankind. Eventually, under the guiding hand of the new organization, the sea's resources, mineral and living, are developed and harvested and distributed in such a way as to eliminate poverty and hunger from all corners of the earth. The nations, occupying the land, are thus shown the hitherto suspected but undemonstrated advantages of world-wide cooperative effort, old barriers to international cooperation fall, a new world order is established, and wars are forgotten, thus proving what a few have suspected: once shown the way, all men can be brothers.

Obviously, neither of these extremes is likely to happen. What *is* likely to happen will probably look more like the first scenario than the second. But I think most of us would prefer to leave something like the second scenario for future generations to inherit.[32] So what we must do is keep the second goal in mind while rejecting those avenues which might lead toward the first.

This all means, of course, that in dealing with any matter affecting that largely unregulated area of the earth's surface that man now calls "high seas"—certainly in the case of international fisheries—the international community should, as a general rule, reject any further attempt of nations unilaterally to extend their seaward jurisdictions. International agreement of some form (including regional agreement between nations) is the desirable end solution to the problems which engender such moves.

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32. Again, a gross assumption. *Contra,* Eisenbud, *Understanding the International Fisheries Debate,* 4 NAT. RES. L. 19, 38-39 (1971).

International management also has some more immediate, practical advantages. As to most swimming resources of the high seas, lines drawn seaward as extensions of national land boundaries, no matter how far these lines go, tend to result in arbitrary divisions of the geographical area occupied by the resource. Truly effective management will, logically, require unitary control of the whole area of the resource—and, perhaps, the entire area of the ecological unit of which the resource is a part. Furthermore, the great expense of administering, enforcing and scientifically monitoring the progress of a management scheme should be reduced and more easily borne by a single international manager. In sum, fractionalized management would not only be inefficient but would, in the long run, undoubtedly fail.[33] International agreement on management plans is the only real long-term answer.

But we cannot forget two important realities taught to us by recent history: (1) Technology tumbles forward at an incredible pace, feeding on itself and accelerating as it goes. (2) Despite the aids of technology (such as jet planes and communication satellites), workable international agreement on any important topic still takes a long, long time to accomplish. It is doubtful that technology will await the pleasure of the diplomats.

The nations are therefore presently faced with a slightly different fisheries problem: Not what to do *eventually* about management of the sea's living resources, but what to do *now* to bridge the gap between the present and that desirable eventuality, to forestall the effects of overfishing which we are about to inherit from advancing technology.

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33. A similar statement has been made about existing international agreements:

> The coverage of the fishery conventions is inadequate in another crucial way. Taken together, they apply to only a small part of the actual and even smaller part of the potential catch from the world's fisheries. At present, too, no international organization has been explicitly entrusted with the task of taking a world-wide view and making recommendations that will result in the creation of a world-wide system of regional fishery conventions able to anticipate difficulties and to assure the conserving and economically efficient utilization of the living resources of the high seas.

COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, PANEL REPORT, MARINE RESOURCES AND LEGAL-POLITICAL ARRANGEMENTS FOR THEIR DEVELOPMENTS, H.R. Doc. No. 91-42, Part 3, 91st Cong., 1st Sess. at VIII-55 (1969) [hereinafter cited as STRATTON PANEL REPORT 3].

IV. The Immediate Solution: Careful Unilateral Action

The present system for "management" of high seas resources illustrates perfectly the horrible mis-meshing of the two rates of movement represented by technology's rapid pace and the international community's turtle-like response to regulatory needs. It has been known for some years now that the ocean's food resources are not, as originally thought, limitless.[34] It has therefore been quite obvious for some time that these important resources need to be carefully managed.[35] Yet despite this knowledge on the part of individuals and nations, the international community (the present instrument of high seas "management") continues officially to view the sea's resources as "free goods"—free for the taking by anyone who has the desire and the ability to take.[36] The desire continues and the ability increases, the danger of overfishing threatens the food resources, and the international organism remains helplessly stuck in first gear, ponderously trying to move to cut off the threat.

Perhaps it will move in time to save the bulk of the endangered resources. Some will undoubtedly be saved by bilateral and regionally multilateral action, by both existing mechanisms and those to be created.[37] But some will, tragically, not be saved by international action or, perhaps, at all.[38] The creation and operation of the necessary saving mechanisms comes about too slowly.[39]

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34. *See* text accompanying notes 24-28 *supra.*

35. *See* authorities cited in notes 16 & 30 *supra.*

36. *See* Hardin, *The Tragedy of the Commons,* The Environmental Handbook 31 (ed. G. de Bell, 1970), where the writer demonstrates the dangers in a common-property approach to a limited resource.

37. *See* Legislative Reference Service, Treaties and Other International Agreements on Oceanographic Resources, Fisheries, and Wildlife to Which the United States is a Party, 91st Cong., 2nd Sess. (1970). *See also* Lucas, *International Fishery Bodies of the North Atlantic* (Law of the Sea Institute, Occasional Paper No. 5 ,1970); Chapman, *supra* note 25, at 417-52.

38. The greatest failure of all the international fishery bodies has been the International Commission on Whaling. Its basic purpose was not the protection of whale stocks, but rather the protection of the investment nations had in whaling. Quotas, established on almost no scientific information, were much too large and nearly caused the extinction of several species of whale. The Commission has yet to adopt a sensible system for establishing quotas, although they are now low enough that, for the time being, the whale is perhaps out of danger. Chapman, *supra* note 25, at 427-30.

39. Indeed, a few of the organizations have fair successes to their credit. The fact is, however, that the fisheries have been changing faster than the international machinery to deal with them. . . . Nations have given, and continue to give, ludicrously low-level support to the bodies of which they are members, and the bodies themselves do not have the powers they need properly to manage

Unlike the international regulatory mechanisms, the mechanisms of most national governments are of course capable of responding more quickly to crises. And where international mechanisms fail to respond to developments considered by certain nations to be of crisis proportions, is it not likely that at least some of these nations will take what they deem to be appropriate responses unilaterally? Indeed, the unilateral extensions of seaward sovereignty by the Latin American countries can certainly be classified in large degree as reactions to what these nations felt to be a failure of international mechanisms to respond to fisheries crises.[40] Or, to take a more recent analagous example, the Canadian arctic legislation asserting exclusive pollution-control jurisdiction into the high seas must be viewed as a unilateral response to the slow-motion nature of international mechanisms.[41]

> the fisheries and conserve the resources. Add to this the trend to high mobility and range of today's fishing fleets, the problems of species interaction and the growing number of nations at various stages of economic development participating in international fisheries, and the regional bodies are indeed in trouble!

Holt, *supra* note 27, at 191.

This impotence of international fishery bodies has forced many coastal states to take a hard look at unilateral protective action. For example, the Ivory Coast delegation to a preliminary meeting for the Law of the Sea Conference in 1973 remarked that "subjecting fisheries to international organization is the way of ultimate solution, but coastal states cannot wait." NATIONAL FISHERMAN, Feb., 1972, § A, at 3. Hans G. Andersen (Iceland's ambassador to Norway), in announcing his country's proposed extension of its exclusive fishing zone, said, "We cannot wait—we will not wait." Seattle Times, Dec. 16, 1971, § G, at 8.

40. "[I]f regional precedents are any indications, it is perhaps not too surprising that Chile, Peru and Ecuador feel wary about entering into agreements with maritime powers larger than themselves." Lecuona, *supra* note 5, at 104. Also, "Chile's 200 mile territorial sea claim was supported in great part by its desire to avoid the regulations established by the International Commission on Whaling." Chapman, *supra* note 25, at 429.

41. A Canadian defender of his country's anti-pollution legislation recently stated:

> [B]y and large all we have done is to carry out exactly what the world community told us to do, and what the international agreements haven't done. The world community has consistently said, "Governments, get on with it." The international convention hasn't got on with it effectively. We might have loaded the charge of dynamite that makes others begin to get on with the realization, "By god, somebody really means it!"

Green, *Canada's Anti-Pollution Legislation: Oral Proceedings,* 50 ORE. L. REV. 491, 492-93 (1971). *See also* Bilder, *supra* note 8, at 2-3.

The Law of the Sea Conference scheduled for 1973 should probably not be looked to as the place where international solution to the high seas fisheries problem will be finally assembled. The Conference will have a vast array of ocean issues to deal with;[42] and even if it is successful beyond the most optimistic of present expectations in its handling of the fisheries issue, there is not likely to be any effective, working management program for many years to come.[43]

The tragedy of delay in international agreement on high seas fisheries is found in the apparent dilemma it presents to some fishing nations: on the one hand, such a nation can await the ultimate agreement of the international community and thereby possibly watch the substantial deterioration or destruction of important food resources upon which its economy has come to depend and which should be preserved for future generations; or, on the other hand, the nation can attempt a unilateral extension of fisheries jurisdiction (or sovereignty) for the purpose of maintaining the endangered resource and thereby add to the division of the world ocean into national seas (and perhaps breach a treaty obligation as well).[44] In a real crisis a nation that feels the crunch will probably choose the short-term but clearly definable benefits of immediate resource-protective action to the long-term and nebulous benefits of awaiting international agreement. And perhaps such a nation will be right.

Again, my assumption is that unilateral fisheries-protective action *will be* taken before international agreement gets around to meeting the coming fisheries crises. But my main purpose is to suggest that a nation which ultimately feels constrained to act unilaterally need not face the dilemma as presented above. There is, I think, a middle ground which will allow a nation to act to preserve important fisheries, which will not necessarily contribute to a national division of the high seas, and which will encourage international action on fisheries conservation.

The suggested solution is temporary, resource-related, nondiscriminatory unilateral action in response to a real conservation crisis.

V. The Form of Unilateral Action

If one accepts the premise that there are greater values to be served by eventual international or supranational management

42. *See* note 10, *supra,* for discussion.
43. *See* National Fisherman, Feb., 1972, § A, 3, 27.
44. *See* text accompanying notes 73-89, *infra.*

of ocean resources than by continued non-management ("freedom of the seas") or fractionalized national management, then there have been several things wrong with the recent national resource-protective moves into the open seas. At least the following objections appear:

(1) The claimed extensions are often delimited by geographic lines not reasonably related to the area occupied by the resource to be protected. This is especially true in the case of fisheries-protective action. The extensions therefore appear to be boundary-related rather than resource-related.

(2) The claims are often capable of being characterized as "over-kill" measures—that is, extensions of sovereignty or national jurisdiction encompassing more claimed authority than required for protection of the resource.

(3) The claims have often been accompanied by stated—and, sometimes, enforced—management policies that grossly discriminate in favor of the claimant nations.

(4) The claimed extensions have *all* been presented as permanent.

The sum total of these factors, if the claims are given credence, means that *nations*—and not just soon-to-be-discarded bits of national authority—are expanding and the high seas are shrinking. This is, as already suggested, a trend toward potentially monumental dangers.

The problem resolves itself, then, to one which can be stated simply: Can a nation unilaterally act in the high seas to protect fisheries resources which it "subjectively" would like to preserve for its own benefit, or which it "objectively" would like to see preserved for future generations, without contributing to the trend toward a division of the world ocean into national territories? I think the answer is "maybe." Such unilateral action, must, however, convincingly appear to be a voluntary undertaking of the task of managing a high seas resource substantially for the benefit of the world community (though it might have as a partial purpose the safeguarding of the actor's own share of that resource) pending permanent international agreement.

Unilateral fisheries-protective action might have a chance if it is carefully planned and executed according to the following guidelines.

A. The protective action must be a response to a demonstrable conservation crisis.

This, like the following factors, is essentially a requirement of a showing of "good faith." To have a chance of indicating to the world community its ultimate desire for international management, a nation claiming unilateral fisheries authority in the high seas must be convincing in its posture as a protector or custodian of an international resource. Any claim clearly based on a selfish grab for an added portion of ocean space is bound to be viewed as a bad faith, uncooperative move prompted solely by the "subjective" appetite for a greater share of fish resources; more importantly, it is likely to be met with opposition from some rather strong sources.[45] Even a claim patently based upon a demonstrated conservation crisis will probably find some opposition, but the demonstrable-crisis requirement would seem to be a crucial premise for any unilateral fisheries-protective extension if such an extension is to have any possibility of success in terms of the final goal of international management.

The problem lies of course in demonstrating to the international community that a conservation crisis does in fact exist. Much depends on the definition to be given to the word "crisis." Is its meaning restricted to its "objective" sense, so that the only relevant inquiry is whether there is an imminent threat to the world-community interest in conserving the fishery? This is probably too much to expect; in view of the recent tendency of many fishing nations to recognize the principle of coastal-nation preference in respect to adjacent fisheries,[46] a nation claiming management jurisdiction over nearby high seas fisheries ought to be able to concede that a special "subjective" interest in the immediate

45. It has become increasingly difficult for one nation to move unilaterally effectively in excluding, or hampering, the operations of fishermen of other nations in the high seas simply to gain preferential advantage in that fishery for its own nationals. Such actions tend to provide the offending nation with a bad international public image, which is not beneficial diplomatically in these times. Chapman, *supra* note 25, at 408. *See also* S. ODA, INTERNATIONAL CONTROL OF SEA RESOURCES 21-35 (1962).

46. *See* Convention on Fishing and High Seas Conservation, *supra* note 12, at Art. 6; STRATTON COMMISSION REPORT, *supra* note 30, at 110; Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries Submitted by the United States, U.N. Doc. A/AC. 138/SC. II/L. 4 (1971) (submitted to the U.N. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, July 30, 1971) [hereinafter cited as U.S. Draft Articles on the Territorial Sea and Fishing]. *See also* Schaefer, *Some Recent Developments Concerning Fishing and the Conservation of the Living Resources of the High Seas*, 7 SAN DIEGO L. REV. 371, 398-405 (1970).

regulation of the endangered resource colors its determination of a "crisis" without destroying the credibility of its "international protector" claim or risking fatal opposition to its unilateral extension—so long as it is also convincing in its showing that there is at least some not-too-long-term threat to the international interest. That is, a coastal nation which can demonstrate that its economy is in serious trouble because of overfishing of an adjacent fishery upon which it has come to depend might get away with a claim of "crisis" even though there is no immediate threat of extinction of the particular species or any other imminent danger to the international community's short-term interest in conserving the fishery. However, there should also be a showing that the continuance of the present regulation (or non-regulation, as the case may be) will, in the near future, lead at least to a very serious reduction of the fishery's physical yield.[47]

A similar crisis determination is a prerequisite for the more limited allowance of unilateral conservation management found in the Convention on Fishing and Conservation of the Living Resources of the High Seas:

> 2. The measures which the coastal state adopts under the previous paragraph [authorizing "unilateral measures of conservation" after six months of unsuccessful attempts at international agreement] shall be valid as to other states only if the following requirements are fulfilled:
>
> (a) That there is a need for urgent application of conservation measures in the light of existing knowledge of the fishery;
>
> (b) That the measures adopted are based on appropriate scientific findings. . . .[48]

The requirement that the showing of a conservation crisis be based on scientific findings is one not often easy to meet.[49] But it would seem necessary that the claimant nation base its claim

47. Since it is highly unlikely that a stock of fish could be exploited to extinction (except for slowly reproducing stocks of mammals like whales—*see* note 38 *supra*), it is important that criteria for defining depletion be established. For the difficulties in defining depletion, *see* F. CHRISTY & A. SCOTT, *supra* note 16, at 80-86.

48. Convention on Fishing and High Seas Conservation, *supra* note 12, Art. 7, § 2 (a & b).

49. *See* M. MCDOUGAL & W. BURKE, PUBLIC ORDER OF THE OCEANS 994-95 (1962); *see also* Jackson, *Some Observations on the Future Growth of World Fisheries and the Nature of the Conservation Problems*, Proceedings of the Second Annual Conference on the Law of the Sea Institute 2 (1969).

that the fishery's yield is rapidly dwindling on *some* kind of reliable evidence. It might be questioned whether evidence that the coastal nation's total landings have decreased is either "appropriate" or "scientific." Yet this is likely to be the sort of evidence that is most available to many nations and provides a primary reason for contemplating unilateral action. Evidence of a decline in the coastal nation's yield should not, however, standing alone, be sufficient for showing of a "crisis."

B. The protective action must be concerned solely with protection of the endangered resource.

As noted already, some recent unilateral extensions of national jurisdiction tend to be more territory or sovereignty oriented than resource oriented. Either the extension is delineated by strict geographic boundaries or the proclaimed authority embraces more than is required to meet the coastal nation's immediate concern, or both. The claimant nation thus gives the impression (sometimes accurate) that it is primarily concerned with expanding its own existence. A nation concerned with the conservation of a high seas resource would probably increase the acceptability of a unilateral extension of authority to meet that concern if it limits the extended jurisdictional control specifically to the resource to be protected. Geographically, the new jurisdiction should cover the area or areas inhabited by the fish resource, wherever that may be, and no others;[50] similarly, the claimed authority should not be substantively broader than required for the protection of the resource.

For example, if the fish resource to be protected is an anadromous species spawned in the coastal nation and the threat is overfishing, the unilaterally extended authority can and should geographically follow (but be limited to) the entire migratory pattern of the fish; and it should not attempt to affect any high seas activities unrelated to fishing the species. If the threat is high seas pollution, then the asserted control should be directed only to pollution prevention.

Again, the purpose of these resource-relationship limitations on unilateral action is to enhance the credibility of the claimant's position.[51]

50. But where the resource is part of a highly integrated ecological unit, effective regulation of the endangered resource requires regulation of the whole unit. *See* F. CHRISTY & A. SCOTT, *supra* note 30, at 78-80.

51. Several resource-oriented multilateral agreements are currently in effect. International Convention for the Conservation of Atlantic Tunas,

C. The protective action must not unreasonably discriminate on the high seas against nationals of other nations.

Like a unilateral claim not demonstrably in response to a conservation crisis, a claim that appears to be a grab for *exclusive* access to a high seas fishery will probably not be acceptable to, or acquiesced in by a substantial number of the rest of the nations. The management policy and procedures of the new "resource custodian" should not be designed to assign a substantially greater share of the resource to the custodian.

On the other hand, a unilateral claim to some sort of preference for the claimant nation may not be viewed unfavorably. Coastal-nation preference is, as already noted, apparently becoming more widely accepted as a general principle of high-seas fisheries management.[52] Therefore, to an extent, the coastal-nation claimant just might receive an understanding response even if its unilateral management regulations tend to favor its own coastal fishermen—but only to an extent. The line between a possibly acceptable claim to a moderate preference and an unacceptable selfish grab is still indistinct; a claimant nation would be well advised to err on the side of the smaller preference.

The essential difficulty here is, of course, allocation of the unilaterally managed fishery's benefits between the custodian and the various other nations having some sort of fishing experience in the fishery. This allocation-of-benefits problem has been at the heart of the international fisheries hassle and has been responsible in large part for the failure of the world's nations to agree successfully on management schemes for many high seas fisheries.[53] At least the difficulty of obtaining agreement on a

(*opened for signature* May 14, 1966), [1968] 20 U.S.T. 2887, T.I.A.S. No. 6767 (*in force* March 21, 1966); Convention for the Establishment of an Inter-American Tropical Tuna Commission, (*opened for signature* May 31, 1949), [1950] 1 U.S.T. 230, T.I.A.S. No. 2044, 80 U.N.T.S. 3 (*in force* March 3, 1950). For a proposed world tuna Convention, *see* Kask, *Tuna—A World Resource* App. I (Law of the Sea Institute, Occasional Paper No. 2, 1969). *See also* Convention for the Regulation of Whaling, (*opened for signature* Sept. 24, 1931), [1935] 49 Stat. 3079, T.S. 880, 3 Bevans 26, 155 L.N.T.S. 349 (*in force* Jan. 16, 1935); Interim Convention on Conservation of North Pacific Fur Seals, (*opened for signature* Feb. 9, 1957), [1957] 8 U.S.T. 2283, T.I.A.S. No. 3948, 314 U.N.T.S. 105 (*in force* Oct. 14, 1957).

52. *See* text accompanying note 46 *supra.*

53. "The roadblock to conservation normally is reduced to a question of

particular system of apportionment could be solved—or, rather, obviated—by unilateral management. However, the custodian-nation would, it seems, have to be careful not to grossly discriminate against foreign fishermen in order to maintain a convincing "protective" posture.

D. *The protective action must carry an automatic termination time.*

Of the five proposed guidelines for unilateral action, the proposals that the action be self-terminating and be accompanied by a call for international agreements are the guidelines especially tailored to unilateral action and therefore have not been discussed in the literature devoted to general questions of fishery management. The termination provision might work something like this: the legislation or proclamation (or whatever means the nation uses to assert its management responsibility) should include an express clause stating that the newly claimed authority will terminate on a certain date in the future or on the effective date of any acceptable international management agreement, whichever date is earlier. The termination date might be many years in the future; the important thing is that there be a termination clause so that the unilateral action can be classifiable as a stop-gap measure pending international agreement.

Of course, it is possible that the termination date will arrive without the conclusion of acceptable international agreement, and there would be nothing to prevent the custodian-nation from further extending the time of its unilateral management. But such a prolongation (if it, too, carries a new termination date) would not destroy the proclaimed temporary nature of the unilateral action: it would still be self-terminating by design and thus incapable of being categorized as a permanent national boundary extension.

E. *The protective action must be accompanied by a clear call for international agreement.*

That the unilateral extension of management authority be accompanied by a call for international management is an obvious credibility requirement. If the claimant nation is truly interested in an eventual international solution it should say so and, beyond

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division of the wealth created by . . . conservation efforts." Chapman, *supra* note 25, at 444. For a proposed allocation system, *see* U.S. Draft Articles on the Territorial Sea and Fishing, *supra* note 46, at Art. III, § 2.

the mere statement, might take some steps to get the international machinery rolling in higher gear. For example, a draft treaty or convention might be submitted to an appropriate international body or gathering.[54] At a minimum the claimant nation should, in an appropriate forum, call upon the world community to start or hasten its deliberations on fisheries conservation and regulation.

And, of course, subsequent cooperation by the custodian nation in the international deliberation process would be essential to the maintenance of credibility.

VI. MAJOR OBSTACLES AND DIFFICULTIES

There are, of course, many obstacles to and difficulties with implementing unilateral fisheries-protective action, even assuming that following the suggested guidelines gives credence to the claimant nation's asserted "custodian" status. At a minimum, there are the following major problems: (1) "legal" obstacles under international law; (2) formulation of management methods; (3) enforcement problems; and (4) risk of over-response by other nations.

A. *"Legal" obstacles under international law.*

Unilateral fishery-protective action is bound to run up against fairly formidable legal obstacles; or, more accurately perhaps, the claimant nation will have to be prepared to meet some opposition arguments having sound bases in the set of norms we have come to call international law. Certainly freedom of fishing, as one of the fundamental, customarily recognized freedoms of the high seas, will have to be reckoned with. In addition, the claimant nation may be a party to one or more treaties that expressly or implicitly prohibit unilateral management of the high seas fishery.

Although freedom of fishing has long guaranteed community-resource status to fish located on the high seas—thus prohibiting any single nation from restricting the fishing activities of any

54. *E.g.*, the 1973 Law of the Sea Conference, *see* note 10, *supra*; subsequent international conferences; or presently constituted world oganizations like FAO.

other nation beyond the territorial sea[55]—the principle has recently come under attack, both by the actions of individual nations and in the writings of some international-law commentators.[56]

As already noted in another context,[57] several nations have in recent years asserted unilateral jurisdiction over fishing grounds which had prior to the unilateral assertions been universally recognized as part of the high seas and thus subject to the freedom-of-fishing principle. There is more than a suggestion that this spate of unilateral expansion found its initial impetus in the 1945 Truman Proclamations.[58] In the first proclamation, the United States President asserted his country's exclusive right to control the exploitation of all resources, living and mineral, of the U.S. Continental shelf beyond the three-mile territorial sea. The second proclamation claimed the right of the United States to establish and regulate high seas conservation zones for fisheries. The response to these two proclamations by other nations was somewhat surprising: instead of rejection—imitation. In machine-gun succession, compared to the usual pace of international-law developments, individuals in the world community extended their jurisdictional boundaries farther out to sea. In what still seems to some a grotesque exaggeration of the Truman precedent, several Latin American countries claimed various sorts of sovereignty over huge areas of high seas.[59] Other nations followed suit. The 1958 Geneva Conventions on the Law of the Sea, while reasserting freedom of fishing, excepted "sedentary species" on the continental shelf from the doctrine's application.[60] The even more recent practice by narrow-territorial sea nations of claiming exclusive fishing zones out to 12 miles from shore (exemplified by

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55. *See* text accompanying notes 15-19, *supra.*

56. [T]here is much more doubt that the oceans or their fisheries are inexhaustible. While it may be impossible to destroy some species of fish by today's fishing methods, it is possible to deplete a species; and it is certainly possible to raise the productivity of the seas by means analogous to those which have justified private property in land. Consequently, it is not surprising that to many people the freedom of the seas, no longer based on unassailable assumptions, is something less than an article of faith.

F. CHRISTY & A. SCOTT, *supra* note 16, at 179. *See also* Christy, *Marine Resources and the Freedom of the Seas,* 8 NAT. RES. J. 424, 425-428 (1968).

57. *See* text accompanying notes 4-9, *supra.*

58. *See* notes 4 and 11, *supra.*

59. *See* note 5, *supra.*

60. Convention on the High Seas, *supra* note 15; Convention on the Continental Shelf, *supra* note 6. *See* S. ODA, *supra* note 45, at 181-95; Goldie, *Sedentary Fisheries and Article 2 (4) of the Convention on the Continental Shelf—A Plan for a Separate Regime,* 63 AM. J. INT'L L. 86 (1969).

the U.S. zone[61]) has been followed by many nations.[62] The expansionist trend continues to the present, with Canada and Iceland being the most prominent current examples.[63]

This pattern of erosion of the freedom-to-fish concept is of course extremely significant in the international society, where norms of acceptable conduct are not legislated but are established by the practice of nations.[64] The only safe conclusion that can be drawn from the continuing practice of nations with respect to high seas fisheries is that freedom of fishing is not what it used to be. Whether it will disappear entirely or only become a limited concept is not clear at this point; but it is trending away from the almost universally accepted doctrine of the past.

This means, of course, that a nation asserting unilateral fisheries jurisdiction can respond with some force to the argument that it is "breaking" the "law" prohibiting restrictions on freedom of fishing: it can answer that it is only a part of the trend away from strict application of the freedom-to-fish principle and that in the international community this is the traditionally accepted way of establishing new norms of conduct.[65] This is of course a

61. Exclusive Fishing Zone Act (1966), 16 U.S.C. §§ 1091-94 (1970).

62. *See* note 7 *supra.*

63. Canadian Pollution Prevention Act; Seattle Times, Dec. 16, 1971, § G, at 8.

64. *See* J. BRIERLY, THE LAW OF NATIONS 59-62 (6th ed., 1963); Kunz, *Nature of Customary International Law,* 47 AM. J. INT'L L. 662 (1953); Wright, *Custom as a Basis for International Law in the Post-War World,* 2 TEXAS INT'L L. FORUM 147 (1966).

65. From the perspective of realistic description, the international law of the sea is not a mere static body of rules but is rather a whole decision making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world's seas, and in which other decision-makers, external to the demanding state and including both national and international officials, weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living, growing law, grounded in the practices and sanctioning expectations of nationstate officials, and changing as their demands and expectations are changed by the exigencies of new interests and technology and by other continually evolving conditions in the world arena.

McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea,* 49 AM. J. INT'L L. 356, 356-57 (1955).

technical response that unfortunately relies upon questionably appropriate past acts as precedents. But it is, nevertheless, a fairly strong response to the argument based on the freedom-of-fishing doctrine.

A more comfortable response to that argument lies in documenting the *reasons* why freedom of fishing is no longer considered by many to be a valid principle of fisheries management. Essentially those reasons can of course be attributed to the increased demand (due to population growth) and vastly increased ability to harvest (due to technological development) in the face of relatively constant supply of food fishes.[66] In fact, because we are dealing with "living goods" in a wild (unregulated) state, the greatly expanded fishing capability and effort has adversely affected the supply of several important species.[67] Therefore, a fundamental premise upon which freedom to fish was originally constructed—that the supply is inexhaustible[68]—has, in recent times, collapsed. And—to put it metaphorically and rhetorically—if the cornerstone crumbles, should not the house soon follow?

So while a self-proclaimed custodian might be accused of breaking new legal ground in assuming temporary custodian status, it would arguably not be guilty of breaking the old freedom-to-fish "law."

Nevertheless, the failure of the Convention on Fishing and High Seas Conservation[69] to become widely adopted provides some basis for the assertion that freedom of fishing is still immune to unilateral conservation management. From the fact that only five major fishing nations have so far become parties to the convention,[70] it can be reasoned that those who are most concerned about conservation of high seas fishes are not prepared to endorse unilateral conservation regulation as a solution to the problem; and therefore that the community of nations, however it defines the trend away from tradition freedom of fishing, does not yet include unilateral conservation management within the new exceptions to the doctrine.

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66. *See* notes 24-28, *supra,* and accompanying text.
67. *See* Holt, *supra* note 27, at 190, 192; F. CHRISTY & A. SCOTT, *supra* note 16, at 102-03.
68. *See* Eisenbud, *supra* note 32, at 37-38. *See also* discussion *supra* note 27.
69. *See* Bishop, *The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas,* 62 COLUM. L. REV. 1206, 1220-21 (1962).
70. *See* note 13, *supra.*

This reasoning is probably not sound. First of all, there is every indication that the relative unpopularity of the Convention is due not so much (if at all) to its allowance of unilateral conservation management as it is to such other provisions as compulsory arbitration.[71] Moreover, the force of the reasoning is substantially mitigated by the fact that the Convention even exists: it was approved in a very political international conference by a vote of 45 in favor, only one against, and with eighteen abstentions.[72] Finally, if the world community is not too bothered by the recent inclination of some coastal nations to carve permanent *exclusive* fishing zones out of the high seas, it cannot really be believed that a temporary custodianship zone will be intolerable.

Therefore, freedom of fishing as a "legal" obstacle is, because of its currently uncertain status, not overly difficult to answer. A somewhat more troublesome argument is found in the charge—capable of being levied against at least some of the nations expected to take unilateral action—that single-nation control of high seas fisheries is a breach of the actor nation's treaty obligations. Treaty obligations, unlike customary norms of conduct, are after all written down in black and white and solemnly entered into by the parties. They would seem less easy to discard or ignore than an obligation founded on the shifting tides of customary practice.[73]

The treaty most widely applicable to unilateral extensions of fishery jurisdiction is of course the 1958 Convention on the High Seas. In what has been termed a "codification" of the customary doctrine,[74] the High Seas Convention specifically provides that

71. Jessup, *The United Nations Conference on the Law of the Sea*, 59 COLUM. L. REV. 234, 263 (1959); Sörensen, Law of the Sea 224-25 (International Conciliation Pamphlet No. 520, 1958); 5 U.N. Conference on the Law of the Sea, Official Records 74-78 (A/Conf. 13/38) (1958).

72. *See* Bishop, *supra* note 69, at 1220.

73. *See* L. OPPENHEIM, INTERNATIONAL LAW (7th ed., H. Lauterpacht ed. 1948); J. BRIERLY, *supra* note 64, at 317-345. But, "treaties are legally binding because there exists a customary rule of International Law that treaties are binding." L. OPPENHEIM, *supra* at 794.

74. Article 13 of the Charter of the United Nations places on the General Assembly the obligation to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification." The General Assembly set up the International Law Commission (ILC) to carry out these tasks. Despite the recent lack of United States Government interest and leadership in the ILC, the Commission, with Professor Francois of the Netherlands as Rapporteur,

freedom of the high seas (that is, all waters beyond the outer limits of territorial seas[75]) includes freedom to fish.[76] Forty-six nations have signed and ratified this convention,[77] thereby binding themselves by contract to recognize the right of all nations to unrestricted fishing of the high seas. Can a nation that has so bound itself restrict fishing on the high seas, even as a temporary custodian, without breaching this "contract"?

Individual nations have also entered into bilateral or multilateral treaties with other countries which define the parties' high seas fishing rights with respect to one another.[78] Presumably such a nation would, by declaring the exclusive right to regulate fishing in the areas covered by these treaties, breach its treaty-recognitions of these rights. It is highly possible that it is these same treaty parties—that is, those fishing in the area to be managed—which the claimant nation wants to restrict or regulate.

A general response by the claimant nation might be to assert the application of the doctrine of *rebus sic stantibus*. This doctrine arguably states that a treaty terminates with the appearance of new and unforeseen circumstances attacking its very foundation.[79] (It is thus very much like the Anglo-American contracts doctrine of frustration of purpose.[80]) This is, however, apparently a controversial principle, not well defined in international law.[81] Fur-

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did an admirable piece of work on the law of the sea. *See* Jessup, *supra* note 71, at 235-36.

75. *See* United Nations Conference on the Law of the Sea; Convention on the Territorial Sea and Contiguous Zone (*opened for signature* Apr. 29, 1958). [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (*in force* Sept. 10, 1964) (hereinafter cited as Convention on the Territorial Sea).

76. Convention on the High Seas, *supra* note 15, at art. 2 (2).

77. U.S. Dep't of State, TREATIES IN FORCE 324 (1971).

78. *See, e.g.*, Interim Convention on Conservation of North Pacific Fur Seals (*opened for signature* Feb. 9, 1957), 1957 8 U.S.T. 2283, T.I.A.S. No. 3948, 314 U.N.T.S. 105 (*in force* Oct. 14, 1957) [hereinafter cited as Fur Seal Convention]; International Convention for the Northwest Atlantic Fisheries Feb. 8, 1949, [1950] 1 U.S.T., T.I.A.S. No. 2089, 157 U.N.T.S., 157 (*in force* July 3, 1950) [hereinafter cited as ICNAF Convention]; International Convention for the High Seas Fisheries of the North Pacific Ocean May 9, 1952, [1953] 4 U.S.T. 380, T.I.A.S. No. 2044, 80 U.N.T.S. 3 (*in force* June 12, 1953) [hereinafter cited as North Pacific Fishing Convention].

79. *See* J. BRIERLY, *supra* note 64, at 335-39; L. OPPENHEIM, *supra* note 73, at 843-50.

80. *See generally* A. CORBIN, CONTRACTS 1128-41 (one volume edition, 1952).

81. We may well hold that the obligation of a treaty comes to an end if an event happens which the parties intended, or which we are justified in presuming they have intended, should put an end to it; the more difficult problem concerns an obligation which the parties did *not* intend to be ended, but which it would be oppressive to enforce, and which will probably in fact be violated, in the events which have happened. It is because so many writers have

thermore, it is doubtful that it is applicable so as to excise a *part* of a treaty that has allegedly become obsolete; and it therefore might not be usable by a claimant nation that wants simply to avoid certain provisions of a treaty.[82] For example, the claimant nation may want to continue to adhere generally to freedom of the high seas, as expressed in the High Seas Convention, and redefine only freedom of fishing. It may want to take a similar attitude toward its bilateral and multilateral fishing treaties. On the other hand, *rebus sic stantibus* comes close to expressing doctrinally the rationale of the claimant nation: a crisis exists because of new circumstances, and a reasonable departure from the obligations assumed under previous circumstances ought to be allowed.

Unfortunately for potential claimant nations that are parties to bilateral or multilateral fishing treaties, the recent so-called Treaty on Treaties[83] takes a rather narrow view of the *rebus sic stantibus* principle. The pertinent part of Article 62 ("fundamental change of circumstances") states that:

> A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
> (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.[84]

Is an overfishing-caused conservation crisis a "fundamental change of circumstances"? Perhaps not; indeed, the fishing treaty may have been motivated by a conservation crisis.[85] Was such a crisis, even if a "fundamental change," "not foreseen by the parties"? Unless the treaty is very old, it is unlikely that a crisis, even if recent, was entirely unforeseen. Was "essential basis of the con-

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sought to find in *rebus sic stantibus* a solution for this latter problem that the doctrine has become one of the most controversial in international law.

J. BRIERLY, *supra* note 64, at 338-39.

82. *Id.* at 339.

83. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 [hereinafter cited as Treaty on Treaties]. *Note* that on Nov. 22, 1971, President Nixon sought advice and consent of the Senate to ratify the Treaty or Treaties. 11 INT'L LEGAL MAT. 234 (1972).

84. Treaty on Treaties, *supra* note 83 at art. 62 § 1.

85. *See* treaties listed in note 78 *supra*.

sent of the parties" the existence of the same level of fishery yield as existed at the time the treaty was concluded? In some cases, it might be justifiably so argued. Is the effect of the conservation crisis "radically to transform the extent of obligations still to be performed under the treaty"? This would probably be difficult to argue in most cases.

Therefore, if the potential claimant nation is a party to the Treaty on Treaties, or if the Treaty on Treaties is acceptable as a "codification" (or at least good evidence) of international law,[86] the claimant nation will have trouble arguing *rebus sic stantibus* in support of modifying or withdrawing from its fishing treaties. It had better be prepared to look for help in its treaty's provisions on termination and withdrawal and also to open negotiations for treaty modification.[87]

The High Seas Convention, which purports to express the customary understanding on freedom to fish,[88] can be handled slightly more easily. A convention designed to "codify" existing but fluctuating principles should not be so interpreted as to freeze those principles at any particular point in time unless this is the clear intent of the parties. In general, and over the relatively long run, the norm-system we call the international law of the sea is a responsive, dynamic system well attuned to the desires of those it regulates. In some respects it is more responsive to change than the agreement process (though this probably says more in criticism of the agreement machinery than in praise of the customary-change mechanism). Certainly the practice of nations indicates that the freedom-to-fish principle is changing in its customary form, and the High Seas Convention is arguably being interpreted by this practice.[89]

Despite these foreseeable difficulties with the "legal" obstacles to unilateral fishery-protective action, the claimant nation is not likely to be too worried about them—*unless* it agrees to take the legality issue to the International Court or to arbitration. There is probably enough in the arguments suggested above (and perhaps other arguments) to lend a color of legality to the action as

86. *See Report of the Commission to the General Assembly*, 61 AM. J. INT'L L. 253, 262 (1967), U.N. Doc. A/6309/Rev. I; Rosenne, *The Temporal Application of the Vienna Convention on the Law of Treaties*, 4 CORNELL INT'L L.J. 1 (1970).

87. *See, e.g.*, Fur Seal Convention, art. 12; ICNAF Convention, Art. 16; North Pacific Fishing Convention, Art. II § 2.

88. The Preamble to the High Seas Convention, *supra* note 15, states the parties' desire to "codify" customary high seas law.

89. *See* McDougal, *supra* note 65.

it is discussed and debated in diplomatic correspondence, enough to avoid the label of "wanton lawbreaker" or other similar labels. It is unlikely that the claimant nation will choose to go to the Court or to arbitration, since the odds, I would guess, would not favor a determination of legality. So far, at least, nations making extravagant or different types of unilateral claims of high seas authority have apparently been advised to refuse to submit to a formal test of legality.[90] It is one of the many anomalies of the international law system (though it is not unique in this respect) that a series of seemingly "illegal" actions can eventually add up to a general legality. Perhaps fortunately, coastal-nation control of adjacent high seas fisheries is not yet a general legality.

B. *Formulation of management methods.*

Management problems, discussed briefly in this section and the next one, are the practical difficulties that should cause a nation with any real sense to forget entirely about taking unilateral fishery-protective action in the high seas. Under even a large and rich nation's custodianship, an extensive high seas fishery is likely to be managed poorly at best; and, when poor management is added to the multi-layered objections to unilateral action in general, it should be recognized that very few fishery "crises" deserve that kind of trouble. Nevertheless, according to my initial prediction, unilateral action will be taken soon, and the management problems might as well be faced.

The basic problem is, of course, how to cut down the fishing "take" and so to allow the fishery's physical yield to build back up.[91] (Economic yield might be a better focus, but a practically impossible one for a unilaterally managed international fishery.[92]) There are several methods for regulating the yield of a fishery, once the authority to regulate exists or is recognized. Some are unsuited to unilateral management, and others just might have a chance. First, the unsuitable ones:

(1) *Quotas.* Perhaps the best potential device for regulating

90. *See, e.g.*, Bilder, *supra* note 8, at 12; Wolff, *Peruvian-United States Relations over Fishing: 1945-1969*, 14 (Law of the Sea Institute Occasional Paper No. 4, 1970).
91. *See* discussion note 16 *supra.*
92. *See* Chapman, *supra* note 25, at 454; note 16 *supra.*

international fisheries is a system of national quotas.[93] While a self-proclaimed custodian might set and publicize national quotas for the nations active in the fishery, it will not be able to enforce the quotas without constant boarding and inspecting of foreign vessels, or very unlikely cooperation from all the nations where landings are made. There are indications that quotas might work under a scheme set up by agreement between the fishing nations[94]—landings could then be monitored at home ports—but *unilateral* quota management is bound to fail.

(2) *Gear restriction.* A method of fishery conservation now widely employed is gear restriction.[95] Essentially the purpose of restricting the types and amount of fishing equipment and gear is to make the fisherman inefficient: make him fish with hooks instead of nets; where he is allowed to fish with nets, regulate the size of the mesh so a lot of fish will escape, and so on.[96] With such obstacles, the fisherman simply does not have enough time to overfish. Aside from the rather obvious economic objections to gear restriction (as well as its general silliness),[97] as an international management method it must be classified with the quota system: unless there is a great deal of cooperation among the fishing nations, the surveillance required by the custodian nation will be too expensive and risky.[98] Regular vessel-boarding and inspection of gear would probably be a necessity.

(3) *Limiting entry.* The problem with limiting the number of vessels in the fishery, and thereby reducing the catch, is perhaps more political than practical.[99] It might be barely feasible, for

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93. STRATTON COMMISSION REPORT 105-09; Crutchfield, *National Quotas for the North Atlantic Fisheries: An Exercise in Second Best,* Proceedings of the Third Annual Conference of the Law of the Sea Institute 263 (1969).

94. *See, e.g.,* Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fishery of the Fraser River System May 26, 1930, 50 Stat. 1355, T.S. 918, 184 L.N.T.S. 305 [1937]; Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea Mar. 2, 1953, 5 U.S.T. 5, T.I.A.S. No. 2900, 22 U.N.T.S. 77 (*in force* July 13, 1950).

95. *See, e.g.,* 4 ORE. REV. STAT. §§ 509.360-509.385 (1971); 75 REV. CODE WASH. 12.040-12.080 (1968); ICNAF Convention Art. VIII(1)(d).

96. Bevan, *Methods of Fishery Regulation,* THE FISHERIES: PROBLEMS IN RESOURCE MANAGEMENT 37-39 (J. Crutchfield ed., 1965); J. CRUTCHFIELD & G. PONTECORVO, *supra* note 30, at 40-47; J. CRUTCHFIELD & A. ZELLNER, *supra* note 15, at 29-37; STRATTON PANEL REPORT 3, *supra* note 33, at VIII 48-50.

97. Bevan, *supra* note 96, at 38-39; F. CHRISTY & A. SCOTT, *supra* note 16, at 6-16; J. Crutchfield & G. Pontecorvo, *supra* note 30, at 40-47.

98. Arglen, *Problems of Enforcement of Fisheries Regulations,* Proceedings of the Second Annual Conference of the Law of the Sea Institute 19, 22 (1968); Carroz & Roche, *The International Policing of High Seas Fisheries,* 6 CAN. Y.B. INT'L 61, 86-87 (1968).

99. There is no question but what there is validity to the conten-

a powerful custodian nation anyway, to license only a certain number of well-marked vessels of the various fishing nations and then patrol the fishery to exclude unlicensed boats. Limiting entry, however, means telling people (and, assuming an extreme overfishing crisis, a *lot* of people) to do something else for a living—or at least to fish someplace else. A custodian nation might be able to set up some sort of program to induce or require its own fishermen to accept limited entry, but foreign fishing nations—who will not readily accept *any* kind of restriction—will probably rebel, to the extent that enforcement will again be impossible. And the mechanics of *fairly* limiting entry (a slow phase-out, vessel and gear-reimbursement program, for example)[100] are undoubtedly too complex and expensive for a temporary unilateral management.

There are, on the other hand, some methods of fish conservation that would be less difficult for a single-nation custodian to operate:

(4) *Season restrictions.* Along with gear restriction, season restrictions, (prohibiting fishing during certain times of the year) are currently in wide use as a conservation mechanism.[101] And, like gear restrictions, season restrictions (where their purpose is simply cutting down the harvest of a fishery) supposedly work because they promote inefficiency: if the fishermen are catching too many fish, let them fish less often. It is probably the easiest of the traditional conservation methods to enforce in that it is relatively simple to determine whether a violation is occurring. No

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> tion that the wastage of fishing effort used beyond the point of maximum net economic yield should be avoided. It appears to me, however, that this is a second order problem that is so difficult to solve from the political and diplomatic standpoint that it should not be tackled seriously until the conservation, that is maximizing the physical yield, problem is a little better in hand.

Chapman, *supra* note 25, at 451.

100. *See, e.g.*, Christy, *The Distribution of the Sea's Wealth in Fisheries*, THE LAW OF THE SEA: OFFSHORE BOUNDARIES AND ZONES 106, 116-120 (L. Alexander ed., 1967); J. CRUTCHFIELD & G. PONTECORVO, *supra* note 30, at 177-79; Mead, *Discussion—Symposium on the Appropriate Role of Limitation of Entry as a Method of Managing Marine Fisheries*, Proceedings of the Fifth Meeting of the Governor's Advisory Commission on Ocean Resources (California) 114 (1966).

101. *See* Bevan, *supra* note 96, at 34-35; J. CRUTCHFIELD & G. PONTECORVO, *supra* note 30, at 42-44; J. CRUTCHFIELD & A. ZELLNER, supra note 15, at 35-37, 118-121 (STRATTON PANEL REPORT 3, *supra* note 33, at VIII-49.

boarding of vessels is generally required. The custodian nation's patrol officers need to know, of course, how to determine whether a fishing vessel is fishing for the controlled species (not always easy), but this determination should not usually require boarding.[102] Otherwise, the patrol officers only have to know what time of year it is.

(5) *Area restrictions.* The device of closing off areas, rather than seasons, from fishing is something within the experience of most fishing nations.[103] After all, an exclusive fishing zone or territorial sea is nothing more or less than an area closure. The method is slightly more difficult to enforce—again in the violation-determination sense—than season restrictions because of the problem of drawing geographical lines at sea.[104] On the other hand, it has the advantage of limiting the total surveillance area.

Two more attributes of both season and area restrictions can be noted: (a) the two methods can be combined, and (b) either or both can be readily manipulated to allow a measure of coastal-nation preference; the custodian can allow its own vessels longer seasons, or wider areas, or both.

A major problem with any conservation method is the requirement that the manager know a great deal about the regulated fish before it can intelligently set restrictions. This means knowledge on size, yield, migration patterns, feeding habits, growth rates, ecological interdependencies, etc.[105] Without such scientific knowledge, regulation tends to be haphazard at best. And, because the knowledge is scarce and expensive to obtain by investigation and monitoring, even current management policies, both domestic and international, are seldom based on adequate scientific knowledge.[106] It is probably too much to expect more from a single-nation custodian. It is no doubt unrealistic to expect even as much, since accurate control of harvesting requires monitoring of catches and landings, impossible to carry out without active cooperation of the fishery participants.

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102. *See* Aglen, *supra* note 98, at 21.

103. For a description of area closures and how they operate, *see* Bevan, *supra* note 96, at 34; STRATTON PANEL REPORT 3, *supra* note 33, at VIII-49.

104. Aglen, *supra* note 98, at 21; Carroz & Roche, *supra* note 98, at 85-87. *See* Orlin, *Positioning on the Continental Shelf*, Proceedings of the Third Annual Conference of the Law of the Sea Institute 156 (1969).

105. *See* COMMISSION ON MARINE SCIENCE, ENGINEERING, AND RESOURCES, PANEL REPORT, SCIENCE AND ENVIRONMENT, H.R. Doc. No. 91-42, Part I, 91st Cong., 1st Sess. at I-30 (1969).

106. *See generally* STRATTON PANEL REPORT 3, *supra* note 33, at VIII 51-54; Chapman, *supra* note 25, at 442-44.

Obtaining knowledge is not the only expensive component of a management program. Administration and enforcement are expensive activities.[107] License fees and fines for violations are likely to be major sources of income for the program's expenses, and it is probably safe to say that, for most countries, the success of the conservation management will turn upon the ability of the custodian to collect its fees and fines.

C. *Enforcement problems.*

The difficulties of policing a unilaterally proclaimed high seas fishery zone are immense. The problems are essentially related to the necessity to patrol a potentially vast area of open, hostile sea. Hostile is the word for the physical environment as well as the attitudes of the distant-water foreign fishermen likely to be encountered. It will of course be impossible to employ a saturation method of enforcement—one that will discover and punish every violation. The United States says it now has trouble finding the resources to effectively police its twelve-mile fisheries zone.[108] It is not likely that a nation with fewer resources will be able to do a better job in a more extensive management area. Even if saturation or near-saturation policing were possible, the cost would almost certainly outweigh the conservation benefits.

Still, some kind of enforcement will be necessary if a management program is to have a chance of success. Although the extent of enforcement required might be mitigated by the custodian nation's demonstration of good faith and the "good sense" of its management program for the benefit of all, voluntary cooperation in *any* unilateral program—no matter how much sense it makes—should not be anticipated.

So considering that really effective enforcement is probably impossible, what are the options open to the custodian-manager? Enforcement problems can be divided into two kinds: (1) violation determination, and (2) sanctions. The custodian's enforcement options must deal with each.

As indicated in the preceding section, discovery or determination of violations can be aided considerably by the choice of conserva-

107. *See* note 106 *supra.*
108. STRATTON PANEL REPORT 3, *supra* note 33, at VIII 55.

tion methods. Season and area restrictions are probably the most feasible methods for unilateral management (other than outright exclusion of foreign fishermen, a method obviously not recommended here). But even the relatively simple discovery of fishing at the wrong place or the wrong time requires surveillance effort. The offender must be spotted and, moreover, must be seen to be fishing for the controlled fish. Few countries have a fleet of surface vessels sufficient for surveillance of an extensive area of high seas.[109] Where the area to be policed is broad, aircraft can be of great value, although surface craft will still be necessary for apprehension.[110] It is, as noted, not realistic to expect to discover and apprehend every violation. But it would seem that the risk of apprehension would have to be relatively great if violators are to be deterred. Perhaps an occasional "surprise" saturation effort would be sufficient. Alternatively, continuous patrolling with a limited fleet in a haphazard area-pattern is a possibility. Application of the area-restriction conservation method would of course assist the surveillance fleet by cutting down the total area to be patrollled.[111] Nevertheless, violation-determination is, for nearly all (if not all) countries, a very substantial stumbling block in the way of effective conservation management.

But assume a sufficient percentage of violators can be discovered. What are the realistic options for sanctions to be imposed on foreign fishermen or nations? The following alternatives, alone or in conjunction with each other, might be considered:

(1) *License revocation or suspension.* If the offense is committed by a vessel licensed by the custodian, its license might be revoked or suspended. There are at least a couple of things wrong with this sanction: (a) it does not help meet the primary enforcement problem of fishing by unlicensed boats; and (b) the revocation or suspension itself must be enforced.

(2) *Fines.* Imposition of fines, supported by vessel seizures and cargo confiscation, is of course a method now employed by unilateral managers, with uncertain measures of success.[112] Much would seem to depend on the ability of the custodian's policing force to spot, apprehend and force the offender to port where the penalty can be assessed.[113]

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109. *See* NATIONAL FISHERMEN, Feb., 1972, § A, at 3, 27.
110. Aglen, *supra* note 98, at 22.
111. *Id.*, Carroz & Roche, *supra* note 96, at 85.
112. Lecouna, *supra* note 5, at 110.
113. Carroz & Roche, *supra* note 98, at 79-80.

(3) *Imprisonment.* Vessel captains and crews could be imprisoned for violating the custodian's regulations, but this would be risky in that it would be likely to lead to reprisals or at least to heightened resistance by the world community as a whole to the custodian's proclaimed authority.

(4) *Economic sanctions.* Depending upon its economic and trade relationships with the nation of the offending fisherman and on the extent to which his violation reflects an attitude or policy of his country, the custodian might impose economic sanctions against the fishermen's nation. These might range from minor trade reductions and increased tariffs, through boycotts and embargoes.[114] Economic sanctions cannot be undertaken lightly, however, since they tend to affect adversely the economic position of the sanction-imposer also.[115]

(5) *Diplomatic sanctions.* Again depending upon the circumstances surrounding the relationships of the two nations, diplomatic sanctions could, in a serious case, be imposed against the offending nation. Such sanctions might include a spectrum of restrictions on the openness of relations between the two countries—travel restrictions, cultural-exchange restrictions, and so on —and range up to withdrawal of diplomatic recognition.[116] But matters would have to be pretty grim to warrant the last.

(6) *Occupation of territory and war.* Fortunately, disputes over the right to fishery resources are not yet likely to lead to

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114. *See* Loring, *supra* note 5, at 440-41, 448-49; Note, 6 SAN DIEGO L. REV. 443 (1969). The United States has taken recent action toward protecting its conservation programs for Atlantic salmon of North American origin by imposing economic sanctions on any country whose nationals endanger those programs. Act of Dec. 23, 1971, PUB. L. No. 92-219.

115. This would certainly be true for the United States. For example:

> New retaliation against Peru, particularily if the United States should close its markets to Peruvian fish and fish products, will almost certainly bring Peruvian retaliation against United States fishing investment's in Peru . . . . United States-controlled companies produce roughly one-fourth of Peru's fishmeal; the annual value of their product on is about $70 million—nearly the total value of all United States tuna landings. These companies . . . have no interest in tuna, but would like to keep foreigners away from the anchovy fishery, which extends beyond 12 miles, and would like to maintain good relations with the Peruvian government.

Loring, *supra* note 5, at 427-28.

116. *See* VON GLAHN, LAW AMONG NATIONS, Chapter 24 (2d ed. 1970).

the use of force to occupy land territory or go to war.[117] We should hope they never will be.

All in all, enforcement problems probably stand as the largest of the large obstacles in the way of successful unilateral fisheries management on the high seas. The fishery crisis should be quite severe to warrant the expenditure of effort and risk necessary for adequate policing.

D. *Risk of over-response by other nations.*

It has already been pointed out above[118] that the 1945 Truman Proclamation undoubtedly formed the initial precedent (or "excuse") for the subsequent unilateral jurisdictional extensions into the high seas. As a precedent, the Proclamations were not carefully followed. The Proclamation on the Continental Shelf was specifically limited to jurisdiction over the resources of the seabed and did not purport to alter the status of the water above the shelf.[119] The Second Proclamation provided only for future fishery conservation zones and anticipated international agreement.[120] The claims that have supposedly followed the lead of the Truman Proclamations have often gone far beyond these limitations.[121] The Latin American 200-mile claims to some sort of sovereignty are the grossest examples.

The point is this: although the custodian's purpose in following the guidelines set out above would be to preserve a resource for ultimate international management, its unilateral declaration might well undermine the chances for international agreement by triggering other unilateral claims not limited by the suggested guidelines. Permanent extensions of varying aspects of jurisdictional authority or sovereignty might occur, and thus the unfortunate effect of the custodian's action would be to accelerate the national-lake trend rather than to forestall it.

E. *Other problems.*

The list of obstacles and difficulties just summarized is obviously not exhaustive; it is thought to represent the major problems to be faced by any nation that attempts to declare a temporary custodianship of a high seas fishery. Particular nations will have

117. Chapman, *supra* note 25, at 454.
118. *See* text accompanying note 4, *supra.*
119. Truman Proclamation on the Continental Shelf, *supra* note 4.
120. Truman Proclamation on Fisheries, *supra* note 11.
121. *See* Wolff, *supra* note 90, at 7. *See also* note 5, *supra.*

special problems or especially severe versions of the problems already suggested. For example, a nation with a relatively narrow coastline can expect to have greater difficulty establishing authority over a fishery stock whose "adjacency" is shared by neighboring nations. Or, an economically developing nation will undoubtedly experience more trouble than a richer nation in effectively policing a broad-ranging species and in scientifically monitoring the physical yield for conservation purposes. Much will also depend on the nature of the regulated species: a relatively localized fishery, for instance, should be easier to manage than a highly migratory oceanic species.

And the administrative problems—the heavy burden of the everyday management responsibility for an internationally shared resource—should, even if international cooperation were assumed, be enough to give the strongest-willed nation great pause before undertaking the task.

VII. CONCLUSION

It is time for me to admit recognition of the possibility that few (maybe none) of the nations now contemplating extensions of unilateral fisheries jurisdiction really care to become custodians for the international community. It is more likely, despite some assertions to the contrary, that each of these nations simply wants to preserve for itself a greater share of a dwindling resource. The simplest, most direct method for doing this is to join the legitimizing trend of carving out a greater portion of adjacent ocean space for an *exclusive* fishing zone.

Still, it must at some point be seen that a march of individual permanent jurisdictions toward a common center can only postpone the time when the real problems, then to be confronted in full-blown maturity, must be faced. And by then it may be too late for truly effective solutions.

International agreement on detailed management schemes that fairly apportion the benefits and provide for adequate enforcement and scientific monitoring is the only true solution for endangered high seas fisheries. Given time, the world fishing community will certainly have to acknowledge this. It is not impossible that some of the nations now and to be engaged in the march of unilateral claims already recognized the superior virtue

in international management, but that they feel compelled to act now. Who can really blame them? The immediately foreseeable future, despite the promise of the 1973 Law of the Sea Conference, does not seem to hold an effective response to the felt threat of overfishing.

For those nations that feel an irresistible urge to meet the frustration by grabbing while the grabbing's good, I have suggested an alternative to the annexation of new wet territory. It is not an earth-shaking proposition. It simply asks that nations unilaterally act only in response to true over-fishing crises, and only to becoming temporary, relatively non-discriminating custodians of the endangered resources, while we all await the coming of the International Solution.

It might not work. But it should be better than participating in the carving up of an old friend.