Statement on S. 1988

by

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My name is Jon Jacobson. I am an Associate Professor of Law at the University of Oregon Law School. I also direct the Ocean Resources Law Program at the Law School. The ORLP is a part of the Sea Grant College Program in Oregon. The views I express here today are my own and are not necessarily those of the Sea Grant College Program in Oregon or of the National Sea Grant Program. Neither are they necessarily representative of any other group or organization. My opinions are, I hope, the result of a reasoned, objective study of the present problem of high seas fisheries management.

If I have any bias that I can consciously recognize, it is in favor of ultimately international management of high seas fisheries and not the irrational patchwork management which threatens to materialize from the current trends of national practice and international negotiations.

The question before this Committee today, though, is not directed at the ultimate nature of high seas fisheries management--the regime that will result from the Third Law of the Sea Conference, if it is successful in this respect--but instead asks what, if anything, the United States can and should do in the time span between now and that eventual international solution.

It is instructive to emphasize and separate the words "can" and "should" in the question just posed. An irony familiar to every lawyer is that the wise approach to a problem is not always the legal approach, and the converse is just as true. In the present context, it may well be that what the United States should do to meet the interim fisheries management problems is not something the U.S. can do under

current rules of international law.

The remainder of my statement will address these two questions: (1) What is the preferred interim approach by the United States to high seas fisheries management? (2) Would this preferred approach be consistent with principles of international laws?

The Preferred Approach.

I believe that all fishing nations would benefit greatly from a cooperative system of international management, established by international agreement and with management responsibility resting in a single global agency or a few broad-regional agencies. While this will obviously be extremely difficult to achieve, the alternatives--no management at all or fractionalized management by coastal nations--are worse and will ultimately fail.

I am the first to recognize that the expression of a hope for cooperative international management is surrounded by an air of unreality. The trends of national practice and Law of the Sea negotiations indicate strongly that any eventual LOS treaty will recognize extended national jurisdiction in the ocean for purposes of living-resources management. Nevertheless, there will undoubtedly be an overlay, in greater or lesser degree, of internationally agreed rules for coastal nations to follow in carrying out their management responsibilities. In my opinion, the greater the degree of international cooperation and coordination of management efforts, the better for all fishermen.

This digression away from the immediate question--interim fisheries management--to the nature of the ultimate management framework is, I believe, necessary because it realtes directly to the nature of the

preferred form of interim management. If there is any basic point to this part of my statement, it is this: the "preferred" interim approach is one that interferes as little as possible with the hope for eventual international management.

In light of this basic principle, I believe a nation comtemplating unilateral management of high seas fisheries must cast itself in the role as a custodian of an international resource, temporarily stepping into the high seas management vacuum pending the international community's solution. Such a nation must, I think, be prepared to follow six guidelines in devising its management approach:

First, the unilateral management must be a response to a demonstrable conservation crisis. In other words, the action must be necessary, and the nation asserting management jurisdiction must be able to demonstrate clearly that there is an immediate need for regulation pending international agreement. Further, this need must be expressed in terms of the fishery resource itself; that is, that the resource is being overfished because of unregulated competition. Demonstration of an economic crisis in the nation's own fishing industry should not be sufficient without an additional identification of an international conservation crisis.

Second, there must be some clearly recognizable connection between the managed resource and the nation asserting management jurisdiction. This is a guideline not likely to be violated. A showing that the regulated resource (a) either spawns within the nation's boundaries or occupies an ocean area adjacent to those boundaries and (b) is heavily fished by vessels of the nation should be sufficient.

Third, the unilateral management claim must be concerned solely

with protection of the endangered fishery resource. This guideline is designed to prohibit the presently popular, but ultimately dangerous, trend of national claims to geographically delineated pieces of ocean space for management purposes. A boundary claim (for example, a 200-mile zone) is not only irrational from a management viewpoint but also gives the impression that the claimant nation is primarily concerned with expanding its own national existence. A nation truly concerned with management of an endangered resource should assert jurisdiction over the resource and not over a piece of international ocean space. Moreover, the activities which the coastal nation seeks to regulate should be only those related to fishing the protected species; it should not be guilty of "over-kill" extensions of sovereignty or national jurisdiction encompassing more claimed authority than that required for protection of the resource.

Fourth, the management regulations must not unreasonably discriminate on the high seas against foreign fishermen. One of the most dangerous trends in international law today is the tendency of coastal nations to claim extensive zones in the ocean in which the authority to exclude non-nationals is claimed. Such a claim adds to the impression (sometimes accurate) that the claimant nation is more concerned with national expansion seaward than in filling a resource-management vacuum. Selfish grabs for substantially increased shares of the sea's living resources should be neither tolerated by the international community nor committed by coastal nations. Some sort of allocation preference for the coastal nation might not be viewed unfavorably, since coastal nation preference is apparently becoming more widely accepted as a principle of high seas fisheries

management. Still, the preferred role of the coastal nation is that of a custodian for the world fishing community and discrimination against non-nationals, especially in an interim period, should be avoided.

Fifth, the assertion of management jurisdiction must carry an automatic termination date. This suggested requirement is yet another designed to ensure that the coastal nation emphasizes, in the strongest terms possible, that the management-jurisdiction claim is not an extension of permanent national boundaries. While the non-permanent nature of the management scheme can be indicated by the inclusion of descriptions of the scheme as "interim" or "pending international agreement," it can be proved by inclusion of a definite termination date. For example, the legislation might provide that the newly claimed authority will cease on January 1, 1985, or on the effective date of an acceptable international management agreement, whichever date is sooner. It is no response to this proposal to say that the date can easily be extended by subsequent legislation; the point is that a self-terminating jurisdiction is not easily capable of being categorized as a permanent boundary extension. Instead, it preserves as much as possible the custodial posture of the claimant.

Sixth, the management claim must be accompanied by a clear call for international agreement. This requirement almost goes without saying, but it should be viewed as absolutely necessary. And the claimant nation's subsequent conduct should also underscore its declared intent to seek an international solution to the management problem.

In summary the suggested "preferred" approach to interim management is temporary, resource-related, non-discriminatory

unilateral action in response to a real conservation crisis.

Is It "Legal"?

Whether the preferred approach just outlined--my response to the "should" question--would be in accord with international law if implemented by the U.S.--the "can" question--is difficult to answer in the current confused state of the law. I would say that it would probably not be legal. I am sure the Committee is by now aware of the principles of international law that lead to this conclusion. Basically, the obstacle is the "freedom to fish" principle applicable to the high seas. "Freedom to fish" has centuries of inertia as customary international doctrine and has been embodied in the 1958 Geneva Convention on the High Seas, to which, as you know, the United States is a party. The principle, if it is still applicable today, means that no nation can on its own place restrictions on the high seas fishing activities of nationals or vessels of other nations. Any unilateral attempt to exclude, or enforce regulations against, foreign fishermen in an ocean area beyond twelve miles from shore would arguably run afoul of the freedom-to-fish rule. In addition, the U.S. is a party to several international fishing agreements with foreign fishing nations that could be violated by a blanket application of unilateral fishing regulations in high seas areas.

There is nevertheless, in my opinion, a counter argument to the claimed international illegality of unilaterally extended high seas fishing jurisdiction--at least insofar as the main obstacle, the freedom-to-fish principle, is concerned. The argument must cope with the freedom-of-fishing doctrine on two levels: (a) that it is a customary rule of international law; and (b) that the United States

is bound to recognize it under the 1958 High Seas Convention.

(a) In response to the doctrine on the customary level, the counter argument must first examine the nature of customary international law and, especially, the law of the sea. For this, I borrow a well-known passage from an article by an eminent international-law scholar:

> 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 interest 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).)

In other words, the customary law of the sea is created by the attitudes of the world community as evidenced by the practices and expectations of national decision makers. When current practices and expectations are examined, it can be seen that the freedom-to-fish principle has considerably eroded in recent years. Unilateral claims to extended high seas fisheries jurisdiction have been, and will no doubt continue to be, familiar occurrences. Perhaps more importantly, in the United Nations arena provided by the Law of the Sea negotiations, support for extended national resource zones has grown markedly since the negotiations began in 1967. It is a trend not necessarily to be

approved but one that certainly indicates freedom of fishing, as an international norm, is not what it used to be. It can be argued that the practice and expectations that evidence this erosion indicate approval even of exclusive, boundary-delimited national zones up to 200 miles wide.

Here, then, we see the other side of the "should"/"can" irony: the arguable legality of an unwise practice. If, however, a 200-mile exclusive zone today has the color of legality, it should follow that the custodial approach previously outlined would be generally acceptable to the international community.

Therefore, according to this phase of the argument, the customary freedom-to-fish doctrine has eroded sufficiently to tolerate temporary unilateral custodial fisheries management in the high seas.

(b) But this does not completely answer the freedom-to-fish argument, because the United States is a party to the High Seas Convention which expressly "codifies" the principle. In response to this phase of the argument, I borrow a not-so-well-known passage from an article by a somewhat less eminent international law scholar (in this case, myself):

> 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. (Jacobson, Bridging the Gap to International Fisheries Agreement: A Guide for Unilateral Action, 9 San Diego L. Rev. 454, 480 (1972).)

It can further be argued--but, I think, with less force--that the international-law doctrine of changed circumstances (rebus sic stantibus) excuses today strict compliance with a rule embodied in a sixteen-year-old treaty.

A legal argument that tends to meet both the customary and conventional levels of the freedom-to-fish doctrine rests on one of the other four current 1958 Law of the Sea treaties, the Convention on Fishing and Conservation of the Living Resources of the High Seas. This treaty by its terms allows a coastal nation to set conservation regulations, under carefully limited conditions, in adjacent areas of the high seas. An assertion of the custodial management jurisdiction previously described would seem to meet the treaty's conditions. The problem with the application of the Fishing Convention is that the nations whose fishermen the United States would most like to control in the adjacent high seas are not parties to the convention and are therefore not bound by its terms. On the other hand, it can be asserted that the Fishing Convention is nevertheless strong evidence of customary principles of international law. It was, after all, approved by a representative international conference by a wide margin--there was only one vote against it--and there are good indications that many nations refused to ratify it because of such provisions as the requirement of compulsory dispute settlement rather than the allowance of unilateral fisheries conservation management. It is, at least, certainly significant that the same Law of the Sea Conference which purportedly codified the freedom-to-fish principle in one convention recognized in another convention the right of a coastal nation to unilaterally manage adjacent high seas fisheries pending

international agreement.

For all these reasons, the freedom-to-fish principle is not the major international law obstacle to United States' extension of fisheries jurisdiction.

The main stumbling blocks are the series of international fishing agreements between the U.S. and the nations whose fishermen the U.S. would attempt to regulate under an extended fisheries jurisdiction. If the legislation creating the management authority requires the U.S. to ignore its international agreements, it might be ordering a breach of international obligations. There are two possibly legal approaches to this problem: (a) The clearly better approach is to abide by each agreement's terms respecting termination and withdrawal from the agreement, if no favorable re-negotiation is feasible (though the Constitutional ability of Congress to require the Executive to carry out the withdrawal procedures is probably limited). (b) The far more questionable approach is to claim automatic termination of the agreements by reason of the changed circumstances doctrine.

In summary and in conclusion, it is my opinion that the United States should claim extensive high seas fisheries management authority only if it is in response to demonstrable over-fishing crises, and then only by becoming a temporary, non-discriminatory custodian of the endangered resources pending the international solution. The custodian role would be arguably legal if made subject to the terms of international fishing agreements between the United States and the foreign fishing nations.