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SOME LEGAL ASPECTS OF THE ATLANTIC LOBSTER INDUSTRY

by

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Independent Study Under
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FOREWORD

This is the seventeenth publication to come from the Law of the Sea North Carolina Sea Grant research project at the School of Law of the University of North Carolina. It is the seventh produced in 1975. The author, Edward L. Winn, III, conducted this research while a second year law student in the course in International Law.

Winn here examines the relatively sparse legal efforts heretofore made to regulate lobster fishing in northern climes and to adjust the conflicts that have arisen in those areas. This is a regulatory field in which there are many questions and, as yet, few answers. This paper presents the issues, the existing efforts to arrive at legal solutions and considers the possibility of their applicability to the infant, but hopefully expanding, lobster industry in North Carolina. It is a valuable initial contribution in a field of law in which very much yet remains to be done. Jurisdictional problems, state, regional, federal and international are most formidable.

The continued support of Dean Robert G. Byrd of the School of Law of the University of North Carolina, Dr. B. J. Copeland, Director, and Dr. William Rickards, Assistant Director, of the North Carolina Sea Grant Program in furthering the work of this Law of the Sea research program is appreciated.

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To many Americans the mention of lobster evokes visions of a steaming red and delectable animal whose succulent white meat has no equal among the foods of the world. This particular animal is actually one species of many.¹ There are five families of crustaceans commonly called lobsters. The variety generally eaten in the United States is Homarus americanus, whose habitat is the eastern seaboard of North America from Labrador to North Carolina.² The American, or Maine, lobster, so called because for many years Maine fishermen have had the largest catches, is decidedly a delicacy. It is often hard to find anywhere but in North-eastern restaurants, and is always expensive. There has never been an over-abundance of lobster, and the stocks today, like many of the world fishing stocks, are dwindling.³ It is inappropriate to look at the industry in terms of a worldwide food-from-the-sea point of view. Annual catches are minimal when compared to world fish catches.⁴ Nonetheless, lobsters represent a considerable income to a recognizable group of American and Canadian fishermen,⁵ and there is evidence that the world market is increasing.⁶ In view of the problems inherent in a situation of shrinking

¹Encyclopedia Britannica, Macropedia, 288-89 (1974).

²Id. Not to be confused with other edible varieties of lobster, for example, the Norway lobster, the California spiny lobster of the Pacific Coast, the West Indian spiny lobster, or the South African rock lobster. Id. Commercial concentrations of Homarus americanus occur to depths of 700 meters along the edge of the North American continental shelf and slope from Georges Bank, off Massachusetts, southward to the latitude of North Carolina. Cooper and Uzzman, Migrations and Growth of Deep-Sea Lobsters, Homarus Americanus, 171 Science 288, 288-90 (1971).

³There is ample evidence that the average catch has been on the downtrend. For example, Maine catches in 1963 totaled 22.8 million pounds, while in 1965 the total was only 18.9 million pounds. Fewer Lobsters Reach their Destination, Business Week, August 13, 1966, at 32. The decline in the number of lobsters found inshore has been attributed to temperature fluctuations in the Atlantic, influencing the growth and mating habits of the lobster, and pollution. Studies have shown the lobster to be extremely sensitive to water quality. Only a few drops of oil or kerosene in a tank will cause a lobster to stop eating for a week. Keiffer, Where Have All the Lobsters Gone? N.Y. Times, Nov. 18, 1973 (magazine), at 37.

⁴See generally Fisheries, 7 Encyclopedia Britannica, Macropedia, 250-60 (1974). The lobster industry is the nation's 6th most valuable fishery and the Atlantic Coast's most valuable one. Firger, A Lingering Look at the Lobster Culture, 3 Oceans 26 (1974).

⁵In 1971 the 33.3 million pound U.S. landed catch brought fishermen \$35.1 million in sales. This makes lobsters the second most valuable single species (after Gulf shrimp) in the \$643 million fishing industry. Weigle, Prelude Corporation, Harvard Business School publication no. 6-373-052, rev. 7/74, at 18. Canadian figures are roughly equal to U.S. figures, with the U.S. market drawing 80%-90% of their catch. Id.

⁶One report by a U.S. government agency projects that by 1980 demand will increase a minimum of 70% to about 107 million pounds a year. Using projections for population incomes and income elasticizers, the report estimates that the potential demand for lobster far exceeds the current available supply. Prices will continue upward, despite a gradual rise in supplies brought about by the further exploitation of offshore resources and a possible increase from cultured lobsters. Firger, supra note 4, at 27.

supply and growing demand, and in view of recent developments in the industry itself, as well as growing concern over international fishing rights in the Northwest Atlantic, analysis of the legal issues involved becomes important. While generally a part of the larger international dilemma of how best to manage and allocate the fishery resources of the sea, the northern lobster industry presents questions and issues peculiar to itself.

Along the northeast coast of the United States and into the Atlantic provinces of Canada, within the three mile territorial sea limit, lobsters have been fished by traditional means, virtually unchanged for hundreds of years.⁷ Essentially, it involves trapping lobsters in pots which are baited and dropped to the seabed and which are attached by a warp line to a floating buoy identifiable by the lobsterman's colors.⁸ Credit for the lathe pot goes to Frank Verrill of Biddeford Pool, Maine, who developed the trap in the early 1870s.⁹ It has since achieved the sanction of legal status by being incorporated into the Maine statutes.¹⁰ Typically, a full-time lobsterman might own 300-600 traps which he periodically hauls up, checks, rebaits, repairs if necessary, and relowers. He does this from a lobster boat, itself of distinctive design, which is a vessel of about thirty feet.¹¹ In 1971 there were about 8,000 fishermen in the trade using about one million pots.¹² While the number of lobstermen in the inshore waters has remained relatively constant, the one million figure represents an enormous increase in the number of traps, largely due to the advent of the hydraulic pot hauler.¹³ The days of rowing or sailing to the pots are gone, and the new hauler has greatly facilitated the raising of traps, formerly a painstaking and time-consuming process done by hand.¹⁴ But the general tenor of the trade remains

⁷Bell, Technological Externalities and Common Property Resources: An Empirical Study of the U.S. Northern Lobster Industry, 80 J. Political Economy 148, 149 (1972).

⁸The traps are wooden, about 3 feet long, made of spruce slats or bars over oak frames. The design has remained unchanged for over 100 years. One end of the trap is left open and rigged with a funnel-shaped net, allowing the lobster to climb in but not out. The buoy designs are normally registered with the state. Acheson, Territories of the Lobsterman, 81 Natural History 61, 63 (1972).

⁹Myers, The Law of the Lobster, 4 The New England Galaxy 13, 15 (1963).

¹⁰Me. Rev. Stat. Ann. tit. 12, § 4453 (1974). The law was passed in 1961 to prevent scuba divers from catching lobsters. H. HENRY, MAINE LAW AFFECTING MARINE RESOURCES 717 (1970).

¹¹Acheson, supra note 8, at 62.

¹²Weigle, supra note 5, at 19.

¹³Acheson, supra note 8, at 65.

¹⁴Id. at 64.

unchanged. It is a fiercely independent group of fishermen, aware of a proud heritage, and slow to acknowledge new developments in the area or to seek radical solutions to their mounting problems.

Within the three mile limit, governed by state law,¹⁵ the industry is one of the most intensely regulated of all fisheries.¹⁶ The regulations were developed in an effort to preserve the lobster industry and perhaps to preserve the lobstermen themselves in the process. Many of the laws have been criticized as counter-productive of the presumed conservation intent, for example the Maine statute limiting the maximum size which can be caught and kept.¹⁷ Generally, however, the laws seem a valid attempt to reserve access to lobstermen located in the vicinity of specific grounds and to prevent the use of more efficient means of capture.¹⁸ This seems a valid goal, especially in view of the fact that already ninety percent of the available inshore lobster supply is caught annually.¹⁹

The most far-reaching development in the Northwest Atlantic lobster industry has been the discovery and exploitation of the offshore catch. This new source of lobsters was known to exist in the early 1800s,²⁰ but there is some controversy as to who first realized the potential and began to exploit it.²¹ Real development of the offshore industry began in the

¹⁵Historically, the regulation of fisheries has been deemed a power of the states within their territorial waters. See e.g., *McCready v. Va.*, 94 U.S. 391 (1876); *Manchester v. Mass.*, 139 U.S. 240 (1891). This power is subject to the U.S. treaty-making power in the federal government. *Mo. v. Holland*, 252 U.S. 416 (1920); U.S. Const. art. 2, § 2. The Submerged Land Act, 43 U.S.C. 1301-1315 gives to the states ownership of land beneath navigable waters within the boundaries of the respective states and the natural resources within such land and waters. Natural resources include lobsters. Henry, *supra* note 10, at 648. See also the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, 516 U.N.T.S. 205, art. 1, § 1. If fishing is carried out in the maritime internal, or the territorial, waters of a state, regulation can be undertaken by that state alone, since the sovereignty of a coastal state extends to these waters.

¹⁶See e.g., *Mass. Gen. Laws Ann.* ch. 130, §§ 37-56; *Me. Rev. Stat. Ann.* tit. 12, §§ 4404-66 (1964).

¹⁷*Me. Rev. Stat. Ann.* tit. 12, §§ 4451 (1964).

¹⁸Mackenzie, *Problems of the Fisheries in the Atlantic Provinces*, LOS Workshop, Canadian-U.S. Maritime Problems at 79 (1971).

¹⁹Myers, *supra* note 9, at 19.

²⁰Letter from J. Uzzman to the editor, 242 *Harpers's Magazine* 18 (1971).

²¹Some claim that the Russians discovered the offshore lobsters at far greater depths than anyone thought. Fischer, *The Easy Chair* column, 241 *Harper's Magazine* 26 (1970). But this idea is generally discounted. See Uzzman's letter, *supra* note 20. It seems that the U.S. industry began in the early 1900s when lobsters were caught by beam or otter trawls which had been recently introduced into America; but these were only incidental catches for the groundfish industries which were utilizing the new nets. Firger, *supra* note 4, at 14.

late 1950s.²² Essentially, the offshore fishermen either trawl or use traps on long lines. Since these lobsters are found outside the three mile territorial sea, and therefore are beyond state jurisdiction, there are no restrictions regarding the manner of fishing. Trawling has certain decided attractions: no competition from Maine and Canada where it is illegal to land the catch;²³ less manpower needed; and an offshore trawler is far more expensive than an inshore boat, and takes a crew of several men.²⁴ But almost as soon as the industry began, there were problems of overcrowding, loss of fixed gear when the nets were dragged across offshore potting lines, and most importantly, injuries to the lobsters which cause a fifty to seventy percent loss of catch.²⁵ As a result, refinements in the trap method of lobstering on a much larger scale than allowed inshore is becoming the rule. Results have shown significant increases in the lobster catches.²⁶ Of some note is the fact that the offshore fishery apparently extends further south than the inshore one,²⁷ although as yet, relatively little is actually known about the character or the extent of the offshore lobster fishery.²⁸

Initially, the exploitation of the offshore catch caused considerable concern among the inshore fishermen. They feared that the offshore stock was the parent stock for the inshore fishery.²⁹ They also foresaw the deepwater trawling methods as killing a lot of lobsters which might otherwise produce catches inshore.³⁰ Evidence now indicates that the deep-sea lobsters constitute a distinct population and that the development of the fishery has not been detrimental to the inshore catch.³¹ There was also, no doubt, jealousy at the large offshore catches compared to the modest and shrinking inshore catches. A natural fear was that the new source would

²²Weigle, supra note 5, at 19.

²³Id.

²⁴Id.

²⁵Id.

²⁶In 1970 1.5 million pounds were caught offshore. In 1971 the figure rose to 2.3 million pounds. Id. at 19-20. During its first year of operation the Canadian offshore lobster fleet of 6 boats caught about 1 million pounds of lobster mainly along the continental slope. Fisheries Research Board of Canada, Annual Report, 1971, at 10.

²⁷Edwards, Prizes Wrested from the "Virginia Sea," The Washington Post, Nov. 3, 1974, at 1, 14. There is presently at least one study under way by the Virginia Institute of Marine Science (VIMS), Gloucester Pt., Va., financed by a \$41,000 grant from the U.S. National Marine Fisheries Service. Id. at 14.

²⁸Id.

²⁹Firger, supra note 4, at 27. This may be attributable to the fact that the offshore catches averaged larger lobsters than the inshore catch by a ratio of 4 pounds to 1 1/4 pounds. Weigle, supra note 5, at 18.

³⁰Firger, supra note 4, at 27.

³¹Henry, supra note 10, at 719; Firger, supra note 4, at 27.

depress the market and lower prices. In view of the incredible demand, this has simply not proved the case, nor is this likely.

As already noted, the inshore industry is heavily regulated by state law. Generally, these laws restrict the time and methods of lobstering as well as the size and type of lobsters which can be caught.³² Lobster fishermen must be licensed by the state, and where the industry is an important one, there may be stringent residency requirements.³³ While the laws were carefully considered by legislators, often reflecting the views of a strong lobby, and are generally recognized as valid conservation measures in that the fishermen obey them,³⁴ there are invariably problems, given the impossibility of effective enforcement and economic straits in which many lobstermen find themselves due to the dwindling inshore stocks.³⁵ It is beyond the scope of this paper to compare and contrast various states' laws governing the lobster industry; there are minor variations, for example, governing the minimum size for a landable lobster.³⁶ Generally, however, the scope and intent of the statutes appear to be the same, at least in the states where the industry is most important, i.e., Maine, Massachusetts, New Hampshire, New York. If other states have fewer restrictions, it is because there are fewer lobsters, fewer lobstermen, and therefore arguably less need.³⁷

An important element of the law regulating the inshore industry is the unwritten local legal system which informally allocates fishing areas.

³²See statutes at note 16, *supra*.

³³*Me. Rev. Stat. Ann.* tit. 12, § 4404; *N.H. Rev. Stat. Ann.* § 211:23 (1972). *Me. Rev. Stat. Ann.* tit. 12, § 4404-9 (Supp. 1974) put a freeze on the issuance of licenses to the effect that

On and after May 15, 1974, lobster and crab fishing licenses shall be issued only to license holders of record with the Department of Marine Resources, which were issued for the calendar year ending Dec. 31, 1973 and which were issued in 1974 prior to May 15, 1974.

This act is to remain in effect through 1975, evidencing the official recognition of the plight of overfishing in the inshore industry.

³⁴Acheson, *supra* note 8, at 61.

³⁵For example, one of the most frequently violated laws is that against keeping berried females, i.e., ones carrying eggs. If a lobsterman were to haul pots and find 5 lobsters, each weighing 2 pounds and 3 of the 5 were egg-bearers, the law requires throwing 6 pounds of lobster back into the sea. However, if the lobsterman removes the eggs--"brushes" the lobster--a practice difficult to detect in normal buying and selling, he could sell them for about \$2 a pound and save \$12. If caught, fines would range to \$100 for each "brushed" lobster, Firger, *supra* note 4, at 26.

³⁶Maine and Massachusetts set the minimum at 3 3/16 inches carapace measurement. New Hampshire sets the limit at 3 1/8 inches.

³⁷It will be interesting to see if southern states like Virginia and North Carolina, as they become increasingly better able to exploit the offshore lobster fisheries, adopt restrictive measures to control the landings of lobsters as have Maine and Canada. With the three mile limit in effect, obviously they will not be able to control the fishery itself since it is not within territorial waters.

There is no legal basis for the system, though some lobstermen consider it a conveyable, inheritable right.³⁸ The restrictions amount to territoriality among lobstermen,³⁹ and undoubtedly arose as lobstermen found fertile areas in which to drop their pots and staked out "claims" accordingly. The traditional lobstering territories were no more than one hundred square miles and were usually located by reference to minor coastal features--a cove, a reef, a buoy, etc.⁴⁰ Violations of the territoriality are met with quick reprisals. For a first offense there will be a warning by way of a knotted line. If the offending traps are not moved they will be cut loose. For repeated intrusions, there may be gun shot volleys, or even physical violence erupting into local lobster "wars."⁴¹ While these local unwritten laws are clearly in violation of states' statutes and actions taken under their guise are often criminal, there seems little that local officials can do, and the strength of the tradition plus the practical nature of the restrictions have made them firmly a part of the trade.⁴²

Another legal aspect of the inshore industry is the question of boundaries between states and between the United States and Canada. It seems that neither the state line between Maine and New Hampshire nor the international border between the United States and Canada as they extend into the territorial sea has been satisfactorily delineated. This dispute on two fronts is known locally as the Great Maine Lobster War.⁴³ The dispute arose on the northern front in 1970 when a Canadian Fisheries boat informed a U.S. lobsterman that he and his traps were trespassing in Canadian waters around Machias Seal Island. The next day, the lobsterman returned with a U.S. Coast Guard cutter and a helicopter, while the Canadian vessel was accompanied by a Royal Canadian Air Force plane. The U.S. Department of State declared the island to be a part of the United States by the authority of the Treaty of Paris, despite the fact that Canada had maintained a lighthouse on the island since 1832 and a Canadian Wildlife Service sanctuary for several years.⁴⁴ One reason for the dispute is that the area around the island is prime lobstering ground, and the differences between Canadian and U.S. lobster laws make each group of fishermen feel that the other is getting an unfair advantage.⁴⁵ The State Department is more concerned with the bigger question of offshore oil and deepwater ports in the area and seems unwilling to exert much pressure on behalf of the U.S. lobstermen.⁴⁶ The director of legal

³⁸Henry, supra note 10, at 716-17.

³⁹Acheson, supra note 8, at 61.

⁴⁰Id. at 65.

⁴¹Henry, supra note 10, at 716-17; Acheson, supra note 8, at 65-67.

⁴²It must be noted, however, that mechanization in the industry has increased the scope of a single lobsterman's fishing ability, and has thereby reduced the importance of the local territories somewhat.

⁴³Soucie, The Great Maine Lobster War, 3 Oceans 66 (1974).

⁴⁴Id. at 40.

⁴⁵For example, Canada has a closed season for lobstering from June 25 through Nov. 14 each year, while the Maine season is open all year. On the other hand, Maine permits only three traps per warp line and buoy; Canada has no such limit. See generally, Can. Rev. Stats., Fisheries Act, c. 14; Me. Rev. Stats. Ann. tit. 12 §§ 4401-66 (1964).

⁴⁶Soucie, supra note 43, at 40.

operations for the Canadian Department of External Affairs offers articles 10(2) and 12 of the 1958 Geneva Convention of the Territorial Sea and Contiguous Zone as justification for the Canadian position (even though Canada is not a signatory).⁴⁷ Clearly some agreement needs to be reached to keep the fishermen from fighting among themselves. Yet neither country seems in a hurry to act. The United States has argued for a quick settlement of the dispute but done nothing; Canada has said that it is willing to discuss any aspect of the controversy except its sovereignty over the island. Ultimately, negotiators will have to hammer out concessions and define the boundary line out into the territorial sea, but since three of the four U.S.-Canada marine boundaries are presently in dispute,⁴⁸ it is not unlikely that the Maine line will ultimately be part of a larger settlement.

The Maine-New Hampshire dispute presents equally sticky legal issues by virtue of the fact that in 1740 when the King of England divided the two colonies, he did so vaguely at the shoreline and the result on maps has been a curved line bowed to the southwest.⁴⁹ New Hampshire fishermen complain that it is difficult to determine positions relying on a curved line. Maine and New Hampshire met to discuss mutual problems of fishery laws enforcement near the boundary in 1970, with New Hampshire taking the position favoring a straightening of the line. In 1971 both state legislatures established interstate boundary commissions to work together to study the problem. New Hampshire sued for a preliminary injunction in the U.S. Supreme Court to prevent Maine from enforcing her laws in the disputed area between the curved line and the proposed straight line, but the Court refused to hear the case.⁵⁰ The issue came to a head when a New Hampshire lobsterman was arrested by Maine officials in the disputed area for violations of the Maine lobster laws.⁵¹ Mr. Heaphy lost his case in the Maine courts and was fined fifty dollars, but not before appealing to his own governor who protested to Maine.⁵² This same bold lobsterman was arrested again in May, 1973, and when Maine tried to confiscate the boat and traps, Governor Thomas of New Hampshire exclaimed, "Maine has apparently declared war on us."⁵³ After the arrests, New Hampshire repealed the statute establishing the interstate boundary commission,⁵⁴ and went ahead with its own new boundary legislation, adopting a straight line measure,⁵⁵ though altering it slightly to avoid confiscating certain of Maine's island territory.⁵⁶ The joint commission was certainly a reasonable response to the situation, and doubtlessly some type of mutually agreeable arrangement will eventually be negotiated. In

⁴⁷Id.

⁴⁸Id. at 67.

⁴⁹Id. at 66.

⁵⁰New Hampshire v. Maine, 413 U.S. 918 (1973).

⁵¹He was arrested for lobstering without a license and for violating the conservation laws by having 10 traps per line, allowed by N.H. law, but Maine allows only 3. The lobsters kept probably also violated Maine law, since the N.H. landable minimum is smaller than the Maine minimum. See N.H. Rev. Stat. Ann. § 211:18-45 (1972).

⁵²Soucie, supra note 43, at 66.

⁵³Id.

⁵⁴N.H. Rev. Stat. Ann. § 1:8-a (1973 Supp.).

⁵⁵N.H. Rev. Stat. Ann. § 1:15 (1973 Supp.).

⁵⁶Soucie, supra note 43, at 66.

the meantime, however, it appears as if headstrong lobstermen continue to try the states' patiences and the strength of their lobbies may influence how far either state will go in attempting unilateral solutions. For the moment there appears to be a thin sliver of territorial sea which is allegedly under the jurisdiction of two states.

There are legal problems of an entirely different nature in the offshore industry which exists far outside the various states' jurisdictions. While the U.S. contiguous zone and accompanying federal laws effectively prevent foreign vessels from fishing within a twelve mile limit of U.S. shores,⁵⁷ the offshore lobster fishery is found largely on the continental shelf and slope much further out--up to over one hundred miles offshore. Lobstering here is on the high seas and ruled by international law.⁵⁸ As will be seen, there is little recognized law in the area, and the result, at least temporarily, has been a noteworthy lack of restrictions for the offshore industry.⁵⁹ Nonetheless, there are certain advantages accruing to the U.S. offshore fishermen. The lobster market is largely American, which has inflated the market here more than elsewhere. As world recognition grows, however, the demand is certain to keep pace. In addition, Maine and Massachusetts have statutes which prevent foreign vessels from unloading lobsters in their ports. Added to that is the fact that the value of lobsters is their live weight. Canned or frozen lobster simply does not demand the price of live lobster selling in the U.S. Finally, many contend that Maine lobsters do not "travel well," i.e., they lose their delicate flavor if shipped long distances or are kept out of native water for very long. Given these factors, it is not surprising that most of the complaints are not that foreign fishermen are depleting the offshore stocks,⁶⁰ but rather that they are getting in the way of U.S. offshore lobstermen and destroying much valuable lobstering equipment in the process.

⁵⁷16 U.S.C.A. 1081-85 (1964); 33 U.S.C.A. 855 (1966).

⁵⁸Interestingly, Maine and Massachusetts have both recently extended their respective state jurisdictions over living resources of the sea out to 200 miles, or the outer edge of the continental slope, whichever is greater. In addition to the constitutional question of whether the states have the power to so extend their jurisdiction, there is the question of the effect of these laws on the high seas. Given the fact that these laws do not represent a state's unilateral extension of jurisdiction into the high seas in any international sense, one is presented with a legal anomaly. The issue becomes more complex considering the U.S. position of restricting territorial seas at the various LOS conferences. While enforcement against foreign vessels would be difficult if not impossible for the states as well as politically dangerous, one can only hope for some international settlement of territorial sea boundaries before these laws are put to the test. See also, N.C. Gen. Stat. § 113-134.1 (1974) for equivalent legislation over marine resources out to 200 miles.

⁵⁹One writer reports that a high State Department official indicated that most nations fishing off the east coast of the U.S. would respect requests not to fish for lobster. Keiffer, supra note 3, at 37.

⁶⁰There are those who claim that foreign fishermen are making off with large amounts of offshore lobster--from 16 to 22 million pounds. U.S. lobstermen also are claiming that undersized and egg-bearing Maine lobsters are turning up in foreign ports, but these reports, at present, are impossible to substantiate. Id. at 38.

The conflict is essentially one over fishing techniques. While the offshore lobstermen use fixed gear--long strings of pots which require only periodic checking--most fishermen of traditional stocks use the trawl method--dragging weighted nets through the sea behind or beside the vessel. Both of these means are efficient for exploiting the different fisheries. Both are unalterably in conflict. The heavy nets destroy the traps and lines and vice versa.

The 1967 London Convention of Conduct of Fishing Operations in the North Atlantic attempts to establish a code of conduct for vessels in the area, and one clause gives the right of way to "fixed" fishing gear, like lobster pots.⁶¹ This is not yet technically the law, and in any case is likely to be ignored by fishermen in hot pursuit of free-swimming schools of fish. One such incident could easily destroy gear which cost \$7000.⁶²

The most famous such incident involved the Russian fishing fleet and the Prelude Corporation, a leader and a giant in the field of offshore lobstering.⁶³ The initial U.S. policy had been to establish restricted areas solely for lobster fishing,⁶⁴ and to have the Coast Guard maintain order by persuading the lobstermen to keep traps only in the predetermined areas and to publish and disseminate the locations of these areas to all trawler fishermen in the vicinity.⁶⁵ These measures had been decried by the offshore lobstermen who claim them to be inadequate.⁶⁶

In May, 1971, there was arranged an informal meeting aboard the Soviet vessel, Robert Eykhe, outside the twelve mile limit between Soviet and American fishermen and U.S. officials. An understanding was reached that the Soviets would not fish in the areas designated as lobster grounds by the U.S. Coast Guard.⁶⁷ Prelude Corporation, however, had already suffered extensive damage to its operations, and was unable to get satisfaction through diplomatic channels. Accordingly, in June, 1971, Prelude brought suit in U.S. District Court for the Northern District of California against the U.S.S.R. charging that vessels of the defendant "with either malicious contempt or reckless disregard of the rights of American fishermen fishing in the area," drug their nets through the area, destroying much of plaintiff's fishing gear. Since the defendant was not within the jurisdiction, Prelude sought attachment of the Suleyman Stalskiy,⁶⁸ a 530-foot U.S.S.R. freighter docked in San Francisco.⁶⁹

⁶¹Convention of Conduct of Fishing Operations in the North Atlantic, 6 Int'l Legal Materials 760 (1967).

⁶²Weigle, supra note 5, at 20.

⁶³Id. at 1-15.

⁶⁴N.Y. Times, Aug. 18, 1969, at 37.

⁶⁵Windley and Blondin, Issues Raised by the Attachment of the Suleyman Stalskiy: Sovereign Immunity of Socialist Fishing Vessels and Liability for Damage to Fixed Fishing Gear by Vessels Mobile Gear, 4 J. Maritime Law 141, 142 (1972).

⁶⁶With the enforcement procedures in effect, there were an estimated 903 pots lost from January through May of that year. Id. at 143.

⁶⁷Id.

⁶⁸Id. at 144.

⁶⁹Firger, supra note 4, at 26.

Prelude sought damages of \$377,055, of which \$200,000 were punitive.⁷⁰ A motion to vacate the attachment was granted, but the Soviets fearing threatened future attachments, settled with Prelude for \$89,000 and an agreement to drop the suit.⁷¹ This was clearly a makeshift resolution of the problem, but may well portend future conduct by American lobstermen until a more workable solution is found.⁷²

While the lobstermen prevailed in this instance, the United States law seems against them.

For purposes of ascertaining liability for damage to fixed fishing gear by a vessel fishing mobile gear of whatever type (trawl nets, longline, troll gear, etc.), such a vessel is considered a vessel in navigation and is bound only to the same extent as any other vessel in navigation in the ordinary meaning of the term.⁷³

There are no federal laws governing the area, and injured fishermen must prove tortious conduct, if they can.⁷⁴ There is the Convention on Conduct of Fishing Operations in the North Atlantic,⁷⁵ which has been signed by the United States, but not yet ratified, and is not yet in force. Once in force, however, it would seem to cover this area. Annex V, Rule 2 gives set fishing gear priority over vessels arriving in an area. Rule 6 requires fishing vessels engaged in trawling to "take all practical steps to avoid nets and lines or other gear which is not being towed."⁷⁶ This is a mere application of the principle, first in time, first in right. However, it will do little to help lobstermen unless they are indeed first within a given area. There are also problems with the Convention as to what constitutes an area of fishing operations.⁷⁷ Nonetheless, once in effect, the Convention could do much to alleviate the current offshore lobstermen's problems. The Convention will also establish a review board for claims of damage to fishing gear while not prejudicing anyone's rights to normal legal process.⁷⁸ There is not any question but that this Convention will have widespread beneficial effects on the

⁷⁰Windley and Blondin, supra note 65, at 143.

⁷¹A vessel tied up in port might cost as much as \$2000-\$3000 per day. There was also the possibility that judges on the Atlantic Coast might be more sympathetic to the lobster industry pleas than the California judges. Id. at 144-45.

⁷²For the details of the incident itself, see Recent Developments in the Law of the Sea III: A Synopsis, 9 San Diego L. Rev. 608, 656-58 (1972).

⁷³Windley and Blondin, supra note 65, at 145. See also, 7 A.L. R. 667: 35 Am. Jur. 2d § 25; 36A C.J.S. § 20.

⁷⁴State courts can hear the controversy if both parties are found within the state. But an action against a foreign vessel would require a maritime attachment, and suit would have to be filed in federal court in admiralty. Windley and Blondin, supra note 65, at 147.

⁷⁵6 Int'l Legal Materials 760 (1967).

⁷⁶Id. at 773.

⁷⁷Windley and Blondin, supra note 65, at 148-49.

⁷⁸Id. at 148.

development and growth of the offshore industry.⁷⁹

None of the Geneva Conventions of 1958 cover the area of fishing priorities,⁸⁰ nor does the United States recognize the high seas as being open to claims by fixed gear.⁸¹ Nor do any foreign countries accept any general principle of law to this effect.⁸² There is also at least the possibility that in attempting to establish any first in time, first in right concept for their traps, lobstermen might find that the trawling fishery is older than the offshore lobster industry.⁸³ In any event, the problem persists as incidents continue to arise.

In May 1973 there was an incident of Japanese vessels actually fishing for lobster off the Northeast coast of the United States. The Japanese government ordered the boats to sell the traps in Canada and to desist from fishing for lobsters in the area. One problem is that lobstering is not a licensed activity in Japan, and therefore, no legal action could be taken against the vessels for refusing. The Japanese government, however, assured the United States that it would shortly introduce internal controls to prevent Japanese nationals from lobstering in the Atlantic.⁸⁴ Nonetheless, the Japanese position was that the detention of Japanese vessels by the United States Coast Guard presented grave difficulties for the Japanese government, since presumably, they were on the high seas. The United States maintained that the lack of any punitive action, while understood by the State Department, was "disappointing to those interested in the protection of lobsters."⁸⁵

In an effort to alleviate friction in the Northwest Atlantic, both Russia and Poland have agreed not to fish for lobster in deference to United States requests.⁸⁶ This was attributable more to economic and political interests than to any feeling of goodwill. The haddock, cod and flounder stocks of the Northwest Atlantic are the major fisheries in terms of pounds landed. Competition is fierce for the dwindling stocks of these fishes, and while the International Convention for the Northwest Atlantic Fisheries and subsequent

⁷⁹Windley, International Practice Regarding Traditional Fishing Privileges of Foreign Fishermen in Zones of Extended Maritime Jurisdiction, 63 Am. J. Int'l L. 490 (1969).

⁸⁰Windley and Blondin, supra note 65, at 151.

⁸¹Id. at 150.

⁸²See note 61 supra.

⁸³See Windley and Blondin, supra note 65, at 151.

⁸⁴See Memorandum of Conversation between Minister Yukata Mormuro, Japanese Embassy, and Mr. Stuart Blow, S/FW-LOA (June, 1973).

⁸⁵Id.

⁸⁶Revised Agreement Between the Government of the United States of America and the Government of Soviet Socialist Republics on Certain Fishery Problems on the High Seas in the Western Areas of the Middle Atlantic Ocean, 1970, T.I.A.S. 7009, original agreement, T.I.A.S. 7040, 1970 protocol. Agreement Between the Government of the United States of America and the Government of Polish Peoples' Republic Re: Fisheries in the Western Region of the Middle Atlantic Ocean. Signed 2 June, 1973. Both countries agree not to fish for lobster and to minimize incidental catches of lobster, and to return to the sea live lobsters caught incidentally.

three protocols⁸⁷ regulate the fisheries by species, regulation is at best inadequate as the competing countries rapidly exploit these catches far in excess of replenishment levels. The most recent amendment to the Convention which provides for the use of national quotas might provide for relief to the over-exploited stocks, but Homarus americanus is not among the fourteen species covered.⁸⁸ Looking at the preamble to the Convention, there is a good cause to include lobsters under Convention controls, since they fall within the designed purpose of the Convention:

for the investigation, protection, and conservation of the fisheries of the North-West Atlantic Ocean, in order to make possible the maintenance of a maximum sustained catch from those fisheries.⁸⁹

In view of the issues involved, what can be done to utilize best the industry both inshore and offshore? Clearly, nothing can be done to offset the increasing demand. Nonetheless, effective conservation measures could easily increase or at least stabilize the supply. There is far too little known at present about the offshore fishery, which is likely the largest. Before specific actions are adopted, the fishery needs to be carefully researched biologically to assure maximum efficiency in whatever means of conservation are adopted.

There is pressure in the United States to follow the lead of South American countries and extend the United States territorial jurisdiction to 200 miles, at least over fishery resources. If this were done, it would effectively eliminate the international character of the problems, since no foreign countries have established a custom of fishing lobsters off United States shores, and the 200 mile extension would incorporate all known lobster stocks. Maine and Massachusetts have already unilaterally extended the state jurisdiction to 200 miles.⁹⁰ While the constitutional validity for such claims of jurisdiction by the states may be questioned, these laws show the intense desire of those people dependent thereon, for protection of their fishing rights from foreign intrusion and exploitation. Even though the official United States position has been to limit territorial sea extensions, pressures from the fishing industry lobbies are growing. It remains to be seen whether unilateral extension of the United States territorial sea limits will be forthcoming. Extension of the exclusive economic zone claims of the United States to 200 miles is a current possibility, if not a probability.

⁸⁷8 Feb. 1949, T.I.A.S. No. 2089, 1 U.S.T. 477, 157 U.N.T.S. 157. The convention divides the Northwest Atlantic into 5 sub-areas and provides for an international commission (ICNAF) to regulate fishing within these areas.

⁸⁸See Christy, Northwest Atlantic Fisheries Arrangements: A Test of the Species Approach, 1 Ocean Devel. and Int'l L. J. 65 (1973).

⁸⁹6 Int'l Legal Materials 760 (1967), preamble to the Convention on Conduct of Fishing Operations in the North Atlantic.

⁹⁰Mass. Ann. Stats. Rev., ch. 130 § 17(10) (Supp. 9, 1972), amending ch. 130, § 17 (1965), as amended (Supp. 1971); Me. Rev. Stats. Ann., ch. 525, R.S., T.1, § 2, sub-§ 2-A (June, 1973).

The 1958 Geneva Convention of the Continental Shelf, while giving the shelf-state jurisdiction over the resources of the shelf, excluded lobsters and the like because they can swim, albeit in a limited sense. One effort to control the lobster industry and exclude foreign competition on the part of the federal government has been to amend the enabling legislation for the Geneva Convention to include lobsters. This was done as a part of the Offshore Fisheries Act of 1973,⁹¹ legislation designed essentially to implement a fishing treaty between the United States and Brazil to control shrimp fishing. The extension in the Act of the definition of "Continental Shelf fishery resource" to include lobsters and other shell fish resulted apparently from fishing groups' pressure which had caused several bills to be introduced in Congress in an effort to protect lobster fishermen and others.⁹² It remains to be seen the effect of this federal legislation on foreign vessels fishing lobsters off United States shores. It is unlikely to have any effect on the damage done to the offshore fishery by foreign vessels dragging heavy nets over lobster beds in pursuit of other species.

Given the importance of the industry to the United States, it is not unlikely that bilateral arrangements can be worked out with countries fishing in the area to leave the lobsters alone. Evidence of this can be seen in the present Russian, Japanese, and Polish agreements.

Even with the foreign fishermen excluded, or at least not actively fishing lobsters, there would be conflicts between the trawl fishermen and the lobster pot fishermen. Careful enforcement of rules already in effect, or soon to be, would seem the only logical solution to this problem. The present makeshift arrangement of setting off areas for lobster fishing would be workable, if enforced. As it is, lobstermen claim that since the restricted areas are not openly fished, it is profitable for vessels to sneak in and tap the area in violation of the restrictions. The use of radar allows them to avoid infrequent patrol boats.⁹³

Inshore, the day of the hearty, independent lobsterman appears to be waning. The profit margin is simply too small; the competition for dwindling stocks too great. It is likely that the larger offshore fishing corporations, once firmly established offshore will move inshore to capture that source also. Clearly there needs to be more standardization in the lobstering laws covering the area. The patchwork which now exists among the different states and the federal government merely adds to the fisherman's problems, without adequately protecting lobster fisheries. John Hughes, Director of the Massachusetts State Lobster Hatchery and Research Station, recommends increasing the minimum legal size to 3 1/2 inches and supplanting various state laws with federal regulation.⁹⁴

⁹¹Act of December 14, 1973, Pub. L. No. 93-242, 87 Stat. 1061, amending 16 U.S.C. 1085(a) (1970).

⁹²See, e.g., H.R. 6931, 93rd Cong., 1st Sess. (1973), The Lobster Conservation and Control Act of 1973. The purpose of the proposed legislation was "to provide an effective control of lobster fisheries on the continental shelf of the U.S. until such time as the U.S. can enter into an appropriate treaty or treaties providing for such control."

⁹³N.Y. Times, Aug. 18, 1969, at 37.

⁹⁴Keiffer, supra note 3, at 121.

For the moment, there are mostly problems and few solutions. The mechanisms for effective regulation and exploitation of the industry, both inshore and offshore, now exist. It is a question of implementing these mechanisms for the benefit of both lobsters and lobstermen.

Off the coast of North Carolina, there is no inshore lobster fishery because the water is too warm and the sandy coastline unsuited to lobster life. Reports have varied greatly as to the potential of an offshore lobster fishery for North Carolina. Presently, catches offshore are minimal, contributing very little to the total commercial fishery of the state.⁹⁵ There are proponents for the development of an offshore fishery for North Carolina who argue that lobsters, even so far south, are a valuable and relatively underutilized marine resource. The American lobster is a part of the National Marine Fisheries Service's Joint Master Plan for fisheries, which includes increasing the total offshore lobster yield from the current level of 6 million pounds annually to twenty million pounds. Some see the North Carolina fishery as contributing significantly to this increase.⁹⁶

The North Carolina lobster industry may have begun in the 1930s with an otter-trawl fishery, but there remain no records of those early catches to show the extent of the fishery. The United States Bureau of Commercial Fisheries first recorded commercial catches of lobsters in North Carolina in 1967 when the yield was 4,000 pounds worth \$2,600.

Studies were undertaken in 1968 and again in 1972 in an effort to assess the economic feasibility of a major North Carolina lobster industry. On the basis of exploratory fishing and tagging operations in the 1968 study, estimates were that the offshore lobster industry in North Carolina could approach one million dollars annually.⁹⁷ Interestingly, however, when similar operations were carried out in 1972, there were no samplings taken that reached commercial quantities.

Several of the various explanations offered to explain the dramatic decrease in the North Carolina offshore lobster population pose the same legal problems faced by the northern lobster states. During the years between the two studies, MATCO, a Virginia-based corporation, began potting operations off the Virginia and North Carolina coasts. No figures are available as to the extent of their operation or the yield; however, in 1973, MATCO officially declared bankruptcy.⁹⁸ Researchers noted that aside from the catches from the offshore pots, the very existence of the pots in the water severely limited sampling techniques and probably was a factor in

⁹⁵Holland, Yelverton, and McCoy, Lobster Offshore North Carolina and Evaluation of Lobster Handling Methods 1 (Div. of Commercial and Sports Fisheries, N.C. Dept. of Natural and Economic Resources, 1972).

⁹⁶Id. at 2.

⁹⁷Holland and Powell, Interim Final Report--Lobster Project 1 (Div. of Commercial and Sports Fisheries, N.C. Dept. of Natural and Economic Resources, 1974).

⁹⁸There is no firm evidence that the bankruptcy was caused directly by a failure of the lobstering venture, although that is a supposition. In any case, another Virginia firm, Clearview Fisheries, Inc., bought up MATCO's lobster boats and resumed potting operations during the summer of 1973.

the decline.⁹⁹

In addition, there were numerous sightings of foreign vessels, primarily Spanish fishermen trawling for squid and Japanese fishermen using long lines for all types of fish, off the coast of North Carolina. It seems certain that they were taking in lobsters incidental to their other catches.

Presently, there is considerable doubt as to the economic feasibility of an extensive offshore lobster fishery for North Carolina. Large-scale operations will have to await future research. In the meantime, it seems certain that Virginia lobstermen and foreign fishing vessels will continue to fish waters off the North Carolina coast and catch lobsters. It is not unlikely that North Carolina fishermen will soon enter the field to some degree with no state regulation.

A potential legal problem exists in drawing the state line between North Carolina and Virginia seaward, although this problem will be minimal to the lobster industry since there is no inshore fishery. It could, however, prove particularly troublesome farther out to sea, especially if the Virginia firms establish themselves in North Carolina waters and are allowed to fish there uncontested for very long. North Carolina's recent effort to extend the seaward jurisdiction of the state¹⁰⁰ appears to be negated by the Supreme Court decision in United States v. Maine, et al.,¹⁰¹ which held the seaward boundary of Atlantic coast states to be limited to three miles of the seabed from the shoreline.

Of course, should the offshore industry ultimately prove to be of major importance, then all of the present problems which plague Maine and the other lobstering states will confront North Carolina.¹⁰² Hopefully, by then, these northern states will have arrived at workable solutions from which North Carolina may benefit.

⁹⁹Besides the pots marked with lines which had to be avoided, lost or "ghost" pots were also in plentiful evidence. The National Marine Fisheries Service estimated that the pot losses of a similar operation in the New England-mid Atlantic area amounted to 120% per year. The implication of this finding is that already there are hundreds, perhaps thousands, of ghost pots off the coast of North Carolina catching lobsters, with no means of retrieval.

¹⁰⁰North Carolina followed the lead of Maine and Massachusetts in this regard. See supra, note 58.

¹⁰¹95 S. Ct. 1155 (1975).

¹⁰²Additional, non-legal problems of a practical nature also exist for the North Carolina lobster industry which are beyond the scope of this study. For example, new shipping methods will have to be developed to keep large numbers of lobsters alive from the cold waters of the Continental Shelf to the relatively warm North Carolina coastal climate. See generally, Holland, Yelverton, and McCoy, supra note 94.

