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MARITIME RESOURCE CONFLICTS— PERSPECTIVES FOR RESOLUTION

T. PAUL MESSICK, JR.

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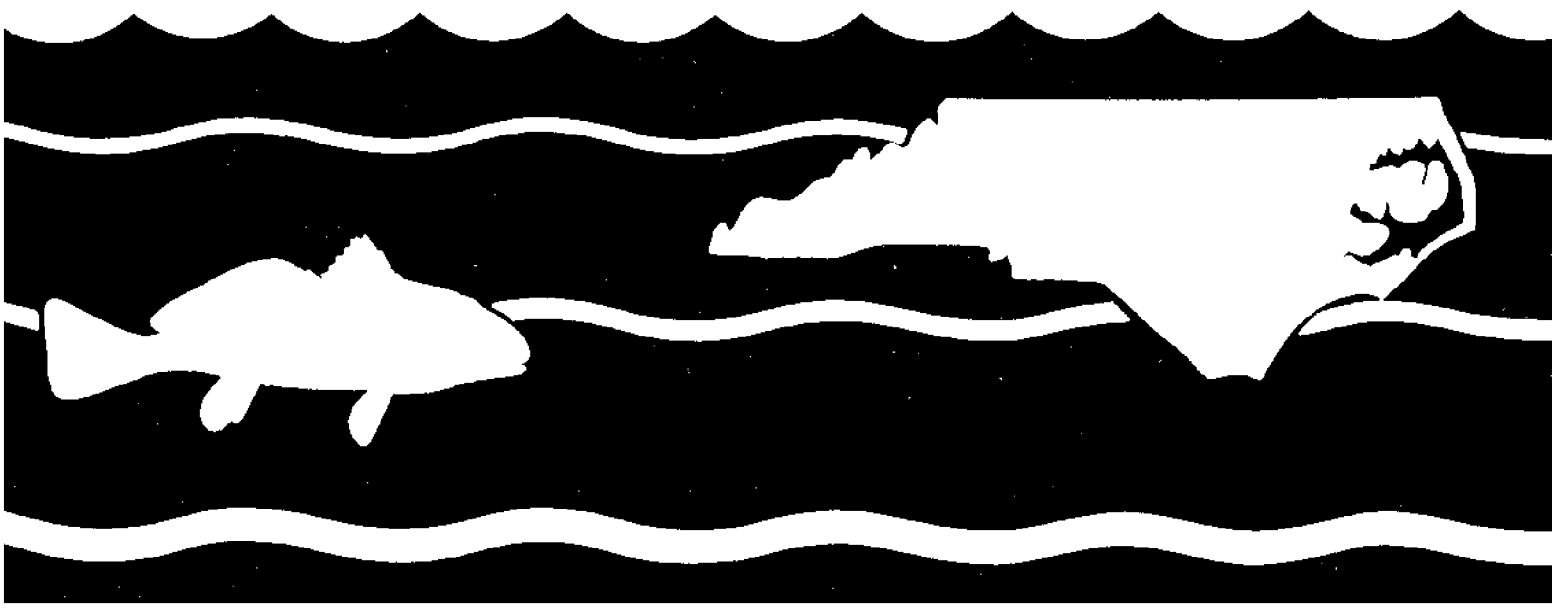

MARITIME RESOURCE CONFLICTS--

PERSPECTIVES FOR RESOLUTION

by

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INTRODUCTION

It has been an easy task to edit this excellent manuscript and is a real pleasure to present it as the eighth University of North Carolina Sea Grant Publication produced by the Law of the Sea research project at the School of Law. The author, Paul Messick, who receives his J.D. degree in May 1974, has previously contributed a significant Sea Grant article entitled, "United States Participation in the Treaty Regulation of Fishery Conservation" to the 1974 Sea Grant publication, UNC-SG-74-01 , "Some Aspects of International Fishery Law."

His present research monograph is both an imaginative and realistic presentation of the possible means of solving international fishing conflicts short of the, as yet highly elusive, conclusion of a comprehensive and nearly universally accepted law of the sea convention. Messick here deals lucidly with the only partially successful efforts to resolve by a show of force the Franco-Brazilian "Lobster War"; to determine by resort to the International Court of Justice the United Kingdom-Icelandic "Cod War"; to decide international fishing rights by domestic judicial decisions of coastal states; to compose "high seas" catch conflicts by bilateral treaties and continued diplomatic negotiations, particularly in the North Pacific

and North Atlantic; and finally the "boot strap" method of vastly extending exclusive or preferred coastal state fishing jurisdiction by the fiat of unilateral national legislative assertions. There is astute wisdom in his conclusion that "A spirit of cooperation and compromise, plus a reciprocal willingness in certain instances to give up concepts of national jurisdiction for the international good, would go further toward resolving the conflicts than new legal principles."

Appreciation is due to Drs. B. J. Copeland, Director, and William Rickards, Assistant Director, of the North Carolina Sea Grant Program, for their continuing interest in seeking legal answers to aid in solution of the monumental ocean resources conservation problems with which they grapple as marine biologists.

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FOREWORD

The world's oceans have long been one of mankind's most important resources, providing man throughout his history with a valuable source of food and economic wealth. Never before, however, have these marine resources assumed such a position of primary importance as they have today. The problems of world hunger and poverty become more prevalent and pressing when it is realized that the population of underdeveloped nations comprise two thirds of the world's total population and doubles every 18-27 years.[1] In an effort to feed the growing world population, nations have more and more turned to the sea to provide the necessary foodstuffs. However, the competition of different nations for the same fishery resources carries with it the inherent possibility of conflict. As one author has noted,

> . . . fishing is one of the few activities of man in which different states are in direct confrontation with each other over the same resources. It is a confrontation that is increasing rapidly in extent and severity and it is becoming a major source of conflict in and of itself.[2]

The competition for marine resources, however, is more complex than just a simple question of economics. As

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[1]Eisenbud, Understanding the International Fisheries Debate, 4 Nat. Res. Law. 19 (1971). [Hereinafter cited as Eisenbud.]

[2]Christy, Fisheries and the New Conventions on the Law of the Sea, 7 San Diego L. Rev. 455, 456 (1970).

one author has stated, citing the director of the Bureau of Commercial Fisheries' Exploratory-Fishing and Gear-Research Base, "The nation which can provide meat and animal protein to the hungry may have the trump card in the battle for minds of the world's people," and thus "fisheries resource allocation raises claims of political import as well as of economic significance."[3] In an attempt to pre-empt the competition of other nations, a large number of countries have sought to preserve certain fishery resources for themselves by extending their national jurisdiction in offshore waters, and thus correspondingly reducing the extent of sea areas pertaining to the classification of high seas, which are subject to the freedom of fishing by all nations. This reduction in areas formerly considered high seas and increase in delineation of areas of national jurisdiction has further exacerbated the fisheries conflict and

> . . . is a subject of heated controversy complicated by the fact that the distinction between national and international fisheries becomes less meaningful with each passing day. Modern processing and distribution techniques link major producing nations and consuming markets throughout the world and fish stocks which freely roam across artificial boundary lines drawn by man are pursued by long range fishing vessels.[4]

The question of jurisdiction is really the central crux of the fisheries conflict. With jurisdiction comes the power to exclude, and thus the crucial questions are raised: who

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[3]Shenker, Foreign Fishing in Pacific Northwest Coastal Waters, 46 Ore. L. Rev. 422, 427 (1966-67). [Hereinafter cited as Shenker.]

[4]Eisenbud, supra note 1, at 21-22.

has the right to catch the fish when and where; what are the consequences, both long and short-range, of unregulated catches; who is affected; and finally, who (what nation, body, organization or agency) has the right or power to answer the first question posed, i.e., who has the right to fish?

Certainly, as the conduct of fishing operations becomes more technologically advanced, the incidence of international fisheries disputes will increase. The need to resolve these disputes, however, is immediate. As Dr. Arvid Pardo, former U.N. ambassador from Malta, recently noted, it has been estimated that if present commercial fishing fleets were used totally they could harvest twice over all known commercially exploitable stocks of fish.[5] The need, therefore, to immediately resolve the conflicts and arrive at an equitable method for conserving and allocating marine resources is obvious. In Dr. Pardo's terms, we "must move from fish hunting to fish farming."[6] The fact that the apparent capability exists to significantly exhaust the living resources of the sea demonstrates the seriousness and possible implications of fisheries conflicts if not resolved in an acceptable manner. This urgent need for resolution has not been lost upon the nations of the world, yet the voluminous outpouring of writing in recent years on such

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[5]Address by Dr. Arvid Pardo, Law of the Sea--Implications for Coastal States, Houston, Texas, February 1, 1974.

[6]Id.

subjects as the "Lobster War," "Cod War," "Tuna War" and "Wet War" demonstrates that resolution of the conflicts has been a far more difficult objective to accomplish. The purpose of this paper, therefore, is to explore the different methods of fisheries resource conflict resolution that have been employed, their effectiveness, advantages, disadvantages, and the perspectives for the peaceful resolution and regulation of existing and future marine resource conflicts.

I. THE FRANCO-BRAZILIAN "LOBSTER WAR"

The 1963 French-Brazilian conflict over lobster fishing provides an interesting study of a number of methods of conflict resolution. Like many other resource disputes, the "lobster war" contained strong overtones of economic self-interest backed by arguments ostensibly drawn from the current international law of the sea. However, the initial reactions of the parties were far from "legal," as both the French and Brazilians sought to enforce their respective claims by a show of military force. Perhaps the most interesting aspect of the Franco-Brazilian lobster conflict is that, unlike other resource conflicts, the approach to resolution in the "lobster war" was reversed, as negotiations and diplomatic attempts at settlement followed rather than preceded the resort to force.

Finding that the yield of lobster off the African coast was decreasing, Breton lobster fishermen sailed further west and began fishing for lobster off the northern coast of Brazil. Because of their experience and more modern equipment, the Breton fishermen caused considerable apprehension among their Brazilian counterparts, resulting in a number of incidents between the two countries in 1962.[7] The dispute,

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[7] Azzam, The Dispute Between France and Brazil Over Lobster Fishing in the Atlantic, 13 Int'l. & Comp. L.Q. 1453 (1964). [Hereinafter cited as Azzam.]

however, did not acquire the aura of a serious international conflict and confrontation between the parties until January 30, 1963, when Brazilian authorities seized three French fishing vessels.[8] As reported in the French press, the three boats were fishing on the "high seas" when they were arrested by Brazilian warships and conducted to the port of Natal where they were shortly released after intervention by the French authorities.[9] This incident had been foreshadowed the preceding September when two other French ships had been told to leave the fishing zone under threat of seizure.[10]

On February 12, 1963, the Brazilian Government issued orders prohibiting French lobster fishing, ". . . but French diplomatic representations resulted in the Brazilian President's issuing an 'Exceptional Authorisation' to allow the resumption of fishing activities."[11] The "Authorization" extended to the six-ship French lobster flotilla then in the disputed waters and was to be valid only for the length of time necessary for those six ships to complete their season, it being understood that this authorization was only a temporary "modus vivendi," which would be replaced by bilateral negotiation.[12] This exceptional authorization was short-

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[8] Id., at 1453.

[9] Le Monde, March 2, 1963.

[10] Id.

[11] Azzam, supra note 7, at 1453.

[12] Le Monde, March 2, 1963.

lived, however, as it was "rescinded a few days later, and the French ships were issued a forty-eight hour ultimatum to withdraw from an area extending one hundred kilometers from Brazilian shores."[13] At this juncture the issue was squarely joined, and before either side engaged in diplomacy or bilateral negotiations of any sort, the first response was to alleviate the problem and enforce one's rights through a show of military force. Upon learning that the Breton lobstermen had been ordered from the area, the French Government dispatched the destroyer Tartu to the area in order to "protect French nationals and ensure freedom of the seas."[14] This first move of a military nature was followed by a corresponding move on the part of the Brazilian government. Two Brazilian Corvettes were ordered to patrol the disputed area and Brazilian Admiral Arnoldo Toscano announced that he had received orders to arrest any French lobster boats that started to fish again.[15] In response to what must have appeared as a dangerous escalation of the military situation, Le Monde reported on February 28, one week after the Tartu was ordered to the area, that the small cruiser Paul-Goffeny would replace the Tartu in its protective mission.[16] As was pointedly noted in the French press, "Le Paul-Goffeny

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[13] Azzam, supra note 7, at 1453-1454.

[14] Id., at 1454.

[15] Le Monde, February 28, 1963.

[16] Id.

est beaucoup plus petit que le Tartu (17 hommes et 6 officiers au lieu de 328 hommes et 19 officiers). Le gouvernement français veut ainsi manifester sa bonne volonté."[17] However, both sides remained firm in their positions, if not somewhat distrustful of the intentions of the other. The Admiral of the Brazilian Navy announced he had received information that the French aircraft carrier Clemenceau and the cruiser de Grasse had been ordered to prepare to sail from Dakar to Brazil. The French excitedly denied this report and noted that the movement of these ships of the French Mediterranean Fleet had been announced almost a month previous.[18] The Brazilian radio announced that several more Brazilian warships were expected at Recife where there were already three destroyers.[19] At the same time the various naval maneuverings were taking place, a spokesman for the Brazilian Ministry of Foreign Affairs announced that the presence of a French warship off its shores, even if stationed outside the Brazilian territorial waters, rendered impossible the pursuit of negotiations.[20] At this point it became clear that any attempt to resolve the question of fishing rights in the disputed area by military

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[17] Id. [Author's translation: "The Paul-Goffeny is much smaller than the Tartu (17 men and 6 officers in place of 328 men and 19 officers). The French Government thus wishes to show its good intentions."]

[18] Le Monde, March 1, 1963.

[19] Id.

[20] Id.

means could well lead to disastrous or undesirable consequences. Subsequently,

> On March 8 the French Government announced that the Breton boats had been ordered to proceed to their home ports and that the French sloop which had replaced the destroyer Tartu had been recalled. Meanwhile, the French Ambassador in Rio de Janeiro was recalled to Paris "for consultations" and did not return to his post in Brazil.[21]

Attempts to settle the dispute then moved from the military to the diplomatic sphere, but this shift in resolution tools had little immediate effect on the tensions and depth of feeling evidenced by the two parties. Attempts to intimidate or persuade by show of force, to dictate the "rightness" of a position by military means, were simply transferred to the negotiation stage where both France and Brazil continued to maneuver for recognition of their respective claims.

The most immediate question that presents itself is to determine the reason for such a dispute. Are lobster really so important that a dispute over the right to harvest them can precipitate the mobilization and deployment of two navies? There are several factors that figure in the dispute, principal among them being a rather complex intermingling of legal and economic considerations. At the bottom of the Franco-Brazilian conflict is the ongoing legal argument over the extent and nature of jurisdictional rights a nation may claim and exercise with respect to the waters

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[21] M. Whiteman, 7 Digest of International Law 89 (1970). [Hereinafter cited as Whiteman.]

and continental shelf adjacent to its coasts. It is important to note, however, that one's legal position on the jurisdictional issue is often dictated by economic considerations and in fact the international legal and economic aspects of a marine resource conflict may become inseparable.

In the case of the "lobster war," the French and Brazilians differ fundamentally over their interpretation of the legal status of the lobster. Both ostensibly based their diametrically opposed interpretations upon the same legal foundation, the 1958 Geneva Convention on the Continental Shelf.[22] This convention purports to define the rights of the coastal state with respect to the continental shelf and its resources adjacent to the land mass of the coastal state. For the purposes of the lobster war, the pertinent language of this Convention is found in Article 2 (4), which states:

> The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.[23]

The Brazilian argument supporting their position maintains that the lobster falls within the definition of "sedentary species" contained in Article 2 (4) and thus is subject to

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[22]Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

[23]Id., Art. 2, par. 4.

the provisions of Article 2 (2) of the Continental Shelf Convention which provides that the rights provided by this convention are ". . . exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State."[24] France, on the other hand, contends that as lobster are capable of swimming they are not a "sedentary species" within the meaning of Article 2 (4) but rather appertain to the high seas fisheries, and therefore Brazil may not interfere with French lobstermen or any others beyond her territorial waters.[25] The legal arguments, however, are really but a manifestation of other factors, prominent among which are the issues of national pride and economics. One commentator has noted that;

> In the Franco-Brazilian lobster dispute, a note of acuity is added by the social, demographic and economic problems in the Northeastern Province of Brazil, and to a lesser extent in Brittany, whose fishermen must man the seas to capture resources which their own waters no longer afford.[26]

The high degree of interest and economic importance attached to the lobster is best illustrated perhaps by the serious

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[24] Id., Art. 2, par. 2.

[25] Azzam, supra note 7, at 1455. For discussion of the Convention's ambiguities as to "sedentary species" and disagreement as to what qualifies thereunder, see Goldie, 8 Colum. J. Transnat'l. L. 1 (1969) and Young, 55 AJIL 359 (1961).

[26] Id., at 1459.

and often vitriolic reaction to the "lobster war" displayed in the respective national presses contemporaneous with the unfolding of the conflict. The Brazilians view the French lobster fishing on their continental shelf as a simple question of plunder. This attitude was noted in Le Monde which quoted from an editorial in the Sao-Paulo Ultima Hora where the editorialist expressed the Brazilian view that, "Nous sommes tout disposés à contribuer, avec nos crustacés comme matière première, à l'incomparable cuisine française, mais sur la base d'un commerce raisonable et non sur celle de la rapine pure et simple."[27] The Le Monde article further reported that the newspapers in Recife assured their readers that, "la France envoyait des navires de guerre pour protéger des pirates."[28] As for the French, an article in the March 2 edition of Le Monde set forth a number of reasons why the conflict erupted. Admitting that there was no definitive international text defining fishing rights on the continental shelf, the French suggested a proper resolution of the respective rights of the parties might be had by submitting the dispute to arbitration in accordance with the provisions of an agreement between the two countries concluded in 1909.[29]

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[27] Le Monde, February 25, 1962. [Author's translation: "We are completely disposed to contribute, with our crustaceans as raw material, to the incomparable French cuisine, but upon the basis of reasonable commerce and not that of pure and simple plunder."]

[28] Id. [Author's translation: ". . . France was sending warships to protect pirates."]

[29] Le Monde, March 2, 1963.

The article further suggests that Brazil would not agree to arbitration as the result would probably be unfavorable to her interests.[30] Although not clearly defined, the article also indicated that the United States had a role in the conflict as it was conducting a lucrative business of buying Brazilian lobster at low prices and did not wish to see a third party (i.e. France) interjected into a profitable relationship.[31] Finally, the article suggests that the Brazilian reaction to the situation was dictated in part by the economic and political problems peculiar to the impoverished Northeastern province of Brazil, where the local fishermen were afraid that the more modern and efficient French lobster boats would totally deplete the lobster beds.[32]

But, behind the French legal justification of their rights to take lobster from this area, there are also strong economic reasons for the French reaction in the "lobster war." The February 28, 1963 edition of Le Monde recounts that four large French lobster boats returning from a 4-5 month season off the coasts of Mauritania, the traditional fishing grounds for the Breton lobster fleet, yielded less than 20 tons of lobster per boat; a catch clearly insufficient to financially and profitably support a modern lobster boat.[33] This fact, coupled with the continuing depopulation of the Mauritanian lobster beds explains the intense interest

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[30] Id. [31] Id. [32] Id.

[33] Le Monde, February 28, 1963.

of the Breton fishermen in the lobster war, as their livelihood may depend upon its outcome. In fact, after the recall of the Paul-Goffeny and the six lobster boats, the Breton fishermen were quite angry. The President of the Chamber of Commerce of Brest, in an interview with the Director of Fisheries M. Rouget, communicated the discontent of the Breton fishermen, who, upon the sending of the Tartu into the disputed waters, had thought that "la France était décidée à appuyer la pêche, au besoin par la force."[34] Deceived as they felt they were by the actions of their government, and idled for almost two months during the period from the first incidents in the conflict to the recall of the French fleet, the angry Breton fishermen charged that, "Il avait été plus honnête de nous dire toute de suite qu'ils comptaient nous laisser tomber...."[35]

While it is doubtful that the Breton lobstermen would have really wanted a war over the lobsters, a statement such as the above is indicative of the importance attached to the lobster and of the extreme gravity of the conflict. The prospect of two of the world's largest countries going to war over the right to catch lobster is therefore not a mere

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[34] Le Monde, March 12, 1963. [Author's translation: "... France was decided to support fishing, by force if necessary."]

[35] Le Monde, March 11, 1963. [Author's translation: "It would have been more honest to tell us immediately that they intended to abandon us...."] The French Finance Minister subsequently approved payment of 120,000 francs to the crews unable to fish on the Brazilian continental shelf following the dispute.

laughing matter. However, the chronology of the Franco-Brazilian dispute does demonstrate the inadequacy and undesirability of effecting a resolution by military means. Upon the realization of this fact, the parties resorted to the more traditional approach of diplomacy and bi-lateral negotiations. Initially this approach proved no more fruitful than did the military approach, as both parties remained firm in their positions. The visceral public reaction in the press to the various naval moves and countermoves continued but the object of its attention was transferred to the diplomatic sphere where the two sides traded snubs and acted in a manner that could hardly be called diplomatic, as repercussions from the "lobster war" spilled over into other relationships between the two countries. The French press reported that at a meeting of European ambassadors called during the crisis by the Brazilian Minister of Foreign Affairs, Mr. Dantas, to explain pending plans to refinance Brazilian debts to American creditors, the ambassadors were asked to transmit this information to their governments and for the European governments to give their aid and sympathy to Brazil. During this meeting the French Ambassador M. Baeyens "est resté de glace," and agreed to transmit the demand to his government but "il a été froid, sec et bref."[36] As further evidence of its irritation over the lobster affair, the same article noted that to receive

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[36]Le Monde, March 12, 1963. [Author's translation: "M. Baeyens remained icy"; "he was cold, dry, and brief."]

help in its financial readjustments, Brazil would have to show considerable good faith in the lobster affair, as;

> Aujourd'hui la France est politiquement et militairement dans l'Europe du Marché Commun le pays le plus fort et le plus influent. Si la France s'oppose à ses projets ou prend seulement une attitude réticente, M. Santhiago Dantas éprouvera donc de sérieuses difficultés.[37]

Thus, with the French national pride apparently piqued by the lobster war, and in need of soothing, the Brazilians made several conciliatory diplomatic gestures. They chose not to treat the recall of the French Ambassador on March 9, 1963, as a break in Franco-Brazilian diplomatic relations. "The French Embassy at Rio de Janeiro was placed in the hands of a Chargé d'Affaires ad interim and the Ambassador's name was included in the Brazilian Lista Diplomatica as absent."[38] Hoping to further repair the ruptured and almost non-existent dialogue between the two countries, the Brazilian Government nominated one of its most respected diplomats, M. Vasco Leitao Da Cunha, who was at the moment on assignment in Moscow, to become the new ambassador to Paris.[39] The Brazilians, as is customary, deposited with the French a "démande d'agrément" inviting the French to accept Mr. Da Cunha to fill the previously vacant

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[37] Id. [Author's translation: "Today France is politically and militarily the strongest and most influential country in Common Market Europe. If France opposes his projects or merely takes a reticent attitude, Mr. Santhiago Dantas will find himself with serious difficulties."]

[38] Whiteman, supra note 21, at 89.

[39] Le Monde, November 15, 1963.

ambassadorship. However, after three months of silence on the part of the French Government, the Brazilian Parliament and newspapers demanded that the "démande" be withdrawn to end the diplomatic humiliation of M. Da Cunha, a request with which the Brazilian Government quickly complied.[40]

With the passage of time, tensions gradually lessened and the diplomatic impasse that had resulted from the fishery conflict was resolved in July 1964 when full diplomatic relations between France and Brazil were resumed at the ambassadorial level.[41] As for the dispute over the lobster, the conflict was resolved shortly after resumption of diplomatic relations in a most unusual fashion. Calling it an "ad hoc" solution, one author reported that,

> On December 10, 1964, an amicable settlement was reached between the conflicting interests of both countries--the Breton lobstermen on the one hand and the Brazilian group which sought its government's intervention in the first place on the other. By this accord, twenty-six French vessels were permitted to fish for five years in the prohibited zones; but they were obliged to give tribute in lobsters and fish to the private Brazilian group for the privilege.[42]

The settlement of the dispute, and the manner by which it was resolved, is both unique and incredible. In short, it is a situation in which the navies of two countries became involved in supporting their respective contentions,

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[40] Id.

[41] Whiteman, supra note 21, at 89.

[42] Goldie, The Oceans Resources and International Law--Possible Developments in Regional Fisheries Management, 8 Colum. J. Transnat'l. L. 1, 13 (1969). [Hereinafter cited as Goldie.]

diplomatic relations were ruptured over a conflict replete with questions of international law, and the governments then allowed the controversy to be settled by an accord between two industries of their respective private sectors. The consequences of such a form of conflict resolution are almost unimaginable and could certainly be quite disadvantageous for France. As Professor Goldie further observed,

> May not the Breton lobstermen, by undertaking to deliver a percentage of their catch off the Brazilian continental shelf, have placed themselves in an unfavorable position, namely one analogous to contractual licensees in the common law? And may not France, by not intervening to prevent this resolution of the immediate problem be viewed as having tacitly acquiesced in the Brazilian claim?[43]

The desirability and possible effectiveness of the application of this method of resource conflict resolution to future disputes is at best questionable. A better means of resolution is most certainly that of having direct governmental participation in, agreement on, or objection to any form of settlement, the ultimate effect of which could be to influence or even establish international law between the countries involved.

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[43] Id., at 13-14.

II. THE UNITED KINGDOM - ICELAND FISHERIES CONFLICT

Probably one of the best known of fishery disputes is the "Cod War" between Iceland and the United Kingdom. Unquestionably the general awareness of this conflict has been produced by media and press coverage of the often spectacular nature of the dispute in which both sides have been quick to resort to naval power to assert and protect their respective rights in the disputed area. The Iceland-Great Britain cod war is important for other reasons as well, however, as the yet unresolved conflict between the two countries has run the gamut of possible means of resolution all without a large amount of ultimate success. Even more importantly, however, the conflict has now been referred to the International Court of Justice for judicial settlement. It is this aspect of the conflict, perhaps, more than any other, that makes a study of the Iceland-Great Britain dispute so important. The reason is that this is the first actual fisheries jurisdiction dispute taken by the ICJ,[44] and a decision on the merits in this case could have a potentially far-reaching impact on the whole question of fishing and fishery rights.

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[44]The ICJ rendered a decision in the Anglo-Norwegian fisheries dispute, but the question there dealt with was the validity of the method of drawing straight baselines for measuring territorial seas rather than the validity of unilateral extensions and coastal state fisheries jurisdiction.

To fully assess the current dispute and the various attempts at resolution, it is necessary to know something of the history of the dispute as well as understand its causes and exactly what is at stake in the conflict over fishery rights off the Icelandic coast. The dispute between these two countries is a longstanding one. The course of its history has been one of recurring periods of intense disagreement followed by periods of relative tranquillity. In fact, a chronological analysis of the dispute reveals that the periods of intensity have exactly coincided with Icelandic attempts to resolve her fishery problems by unilateral extension of her fisheries jurisdiction, all of which have been vigorously challenged by the United Kingdom. The dispute had its early genesis in 1952 when Iceland extended its fisheries to 4 miles.[45] This extension was promptly protested by the United Kingdom and the ensuing dispute lasted almost four years, including such retaliatory actions by the opposing sides as a British boycott "pursuant to which landings in British harbors of fish caught by Icelandic vessels were largely suspended. . . ."[46] During this period Iceland was instrumental in obtaining United Nations approval of a resolution requesting the International Law Commission to study and report on the

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[45] Bilder, The Anglo-Icelandic Fisheries Dispute, 1973 Wisc. L. Rev. 37, 50 (1973). [Hereinafter cited as Bilder.]

[46] Id., at 50.

development and codification of the international law of the sea, a direct outgrowth of which was the 1958 Geneva Law of the Sea Conference.[47] Pursuant to negotiations between the parties, Great Britain and Iceland temporarily agreed that the boycott of Icelandic fish would be ended and that there would be no further extension of jurisdictional claims pending the outcome of the International Law Commission discussions and the Law of the Sea Conference.[48]

As is now well known, the resulting Law of the Sea Conference was unable to reach any agreement on the permissible width of the territorial sea or maximum fisheries jurisdiction limitations. However, one of the more popular proposals at the 1958 Conference had been one advocating a three-mile territorial sea with an adjacent nine-mile exclusive fisheries zone, and in line with this proposal "the Icelandic Government, shortly after the Conference ended issued Regulations extending their own zone of exclusive fisheries from four to twelve miles."[49] The British Government again protested the extension but negotiations failed to produce an agreement and at the beginning of September 1958 when the Icelandic 12-mile claim became effective, the British "stationed warships off Iceland to prevent the arrest of British vessels by the Icelanders in the four-to-

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[47] Id., at 50-51.

[48] Id., at 50-51.

[49] Alexander, Offshore Claims and Fisheries in Northwest Europe, 1960 Y. B. World Affairs 236, 243 (1960). [Hereinafter cited as Alexander.]

twelve mile zone."[50] Commenting contemporaneously on the Icelandic extension, the British Under-Secretary of State for Foreign Affairs set forth the British view of the problem that,

> Her Majesty's Government find it difficult to believe that the Icelandic Government would use force against British fishing vessels to secure compliance with a unilateral decree which the parties of the Government Coalition propose to issue without regard for International law.[51]

Asserting that Britain would "prevent any unlawful attempt to interfere with British fishing vessels on the high seas," the Under-Secretary proceeded to point out that a more acceptable manner of resolving the dispute was available, as;

> While one nation or a number of nations cannot by themselves alter international law, it is of course open to nations to enter into bilateral or multilateral agreements waiving or restricting in specified areas some or all of the rights which they now enjoy under the law of the sea. Her Majesty's Government and a number of other friendly Governments have done their utmost to persuade the Icelandic Government to abstain from unilateral action and to enter into discussions with a view to the negotiation of an appropriate fisheries agreement.[52]

Still trying to avoid a confrontation between the two navies, the British offered as early as 1958 to place the legal aspects of the dispute before the International Court of Justice, but this offer was declined by Iceland.[53]

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[50] Id., at 244.

[51] M. Whiteman, 4 Digest of International Law 1159 (1965).

[52] Id., at 1159.

[53] Bilder, supra note 45, at 53.

The British fleet thereupon continued to fish within the new 12-mile limit under protection of the British Royal Navy, resulting in a number of incidents in which "British trawlers resisted arrest by Icelandic Coast Guard vessels and British naval vessels intercepted Icelandic vessels seeking to halt and arrest the trawlers. Because of these confrontations this period of strained Anglo-Icelandic relations became known as 'the Cod War'."[54]

The incidents continued and in 1960 the Geneva Conference failed again to reach agreement on the maximum breadth of territorial seas and fishery zones.[55] The conferences did serve however to demonstrate a broad international support for a 12-mile fisheries limit, which culminated in a resumption of negotiations between the parties and a diplomatic Exchange of Notes on March 11, 1961, wherein the British stated that they would no longer object to a twelve mile fishery zone around Iceland.[56] In return, the Icelandic Government agreed in the appropriate language of the Notes that:

> The Icelandic Government will continue to work for the implementation of the Althing [Icelandic Parliament] Resolution of May 5, 1959, regarding the extension of fisheries jurisdiction around Iceland, but shall give to the United Kingdom Government six months notice of such extension and, in case of a dispute in relation to such extension, the matter

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[54] Id., at 53.

[55] Id., at 54.

[56] Id., at 54.

shall, at the request of either party, be referred to the International Court of Justice.[57]

Following the Exchange of Notes, the conflict appeared to have been resolved and both parties settled into a period of relative cooperation in which the terms of the Exchange were apparently adhered to by both Iceland and U.K. fishermen.

The present flare-up and renewal of the conflict ensued from Iceland's notification of Great Britain in an Aide-Memoire of August 31, 1971, that it (the Icelandic Government) "now finds it essential to extend further the zone of exclusive fisheries jurisdiction around its coasts to include the areas of sea covering the continental shelf. . . ."[58] In February 1972 Iceland formally denounced its 1961 agreement with Great Britain[59] and on September 1, 1972, the regulations establishing the new 50-mile fisheries zone went into effect.[60] With this third extension of its

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[57]Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), Order of 17 Aug. 1972, [1972] I.C.J. 16. [Hereinafter cited as Order of 17 Aug. 1972.] The Althing Resolution stated inter alia ". . . that it considers that Iceland has an indisputable right to fishery limits of 12 miles, that recognition should be obtained of Iceland's right to the entire continental shelf area in conformity with the policy adopted by the Law of 1948, concerning the Scientific Conservation of the Continental Shelf Fisheries and that fishery limits of less than 12 miles from base-lines around the country are out of the question." Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1973] I.C.J. 9.

[58]Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1973] I.C.J. 9. [Hereinafter cited as Fisheries Jurisdiction Case.]

[59]Bilder, supra note 45, at 39.

[60]Id., at 62.

fisheries jurisdiction in two decades, the issue was squarely joined between the parties to the conflict, and the search for a means of resolution was begun again.

Before discussing the various means of conflict resolution employed in the Anglo-Icelandic dispute, it is necessary to understand the underlying causes of the conflict and what each nation perceives as its "stake" in any ultimate settlement of the problem. Only when these factors are considered is it possible to fully comprehend the fervor with which each side seeks to preserve its "right" to engage in the disputed fisheries. Like most marine resource conflicts, the "Cod War" is fundamentally a question of economics. But, more than profits, it is also a question of the economic survival of the nations themselves, as the economies of both Iceland and Great Britain to a lesser extent, are dependent upon the revenues generated by the fisheries. Iceland has a relatively large continental shelf, which extends some 50-70 miles from her shores.[61] The waters above the shelf are nutrient rich thus making these waters an exceptionally good ground for fish breeding and as a consequence the Icelandic economy has traditionally depended heavily upon these coastal fisheries.[62] However, it is not merely a question of fishing constituting a large segment of the economy; fishing is in effect the economy.

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[61] Bilder, supra note 45, at 42.

[62] Id., at 42.

As one commentator has noted:

> Indeed Iceland is more dependent on fishing than any other independent nation in the world. Fishing and fish products are Iceland's principal industry, employing over one-third of its labor force (over 30,000 persons) and directly generating about one fifth of its gross national product. Moreover, in view of Iceland's limited resources, it is heavily dependent upon imports, with foreign trade constituting close to 50 percent of its gross national product. Iceland's fishing industry, which accounts for about 80 percent of its exports is by far Iceland's most important source of foreign exchange to pay for these imports.[63]

It is not difficult, therefore, to imagine her consternation when she sees her rich and vital coastal waters invaded by an ever-increasing number of foreign fishermen, all competing for what is now generally recognized as an exhaustible natural resource. In recent years the Icelandic proportion of the catch from these waters has been about 50% of the total annual catch, with the British the next largest competitor in the area taking about 25% of the total catch.[64] While the impact on the British economy of that percentage of fishing attributable to the Icelandic coastal waters is not as great as that of Iceland, it is nevertheless an important factor in the British economy. A recent British White Paper on fishing noted that the waters in the Iceland area "are by far the most important of UK distant water grounds and one of the longest established."[65] In fact,

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[63] Id., at 43.

[64] Id., at 43-44.

[65] Why Britain Fights Iceland's Claim to a 50-Mile Limit, Fishing News International, Aug. 12, 1973, at 50. [Hereinafter cited as Fishing News.]

British fishermen have fished in the disputed waters "for at least several centuries"[66] a fact which forms the basis for the major British contention in the conflict; that is, in her view it "is the right of the British trawler fleet to continue to fish in its 'traditional' fishing grounds off of Iceland."[67] The economic value of the British landings from fish from Icelandic waters can best be illustrated by the following figures; during the past 50 years the British catch from the disputed waters "has averaged about 170,000 metric tons a year and in the past ten years this has been worth about £13 million a year, about half the value of all UK landings from distant waters"[68]--a figure which represents about one fifth of the total annual catch of the British fishing fleet.[69] Consequently, the British view as unacceptable any measures tending to ultimately exclude British fishing fleets from these waters. The same British White Paper pointed out that "a phase-out period suggested at one stage by Iceland would, by excluding British vessels from these waters, 'have virtually destroyed the life of three British fishing ports'."[70] In effect, the enforcement of a 50 mile fishery zone around Iceland would

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[66] Bilder, supra note 45, at 44.

[67] Id., at 68.

[68] Fishing News, supra note 65, at 50.

[69] Bilder, supra note 45, at 44.

[70] Fishing News, supra note 65, at 50-51.

have a widespread "ripple" effect on the whole British economic structure. One author has stated that such an action would result in immediate and irreparable injury to British fishing, related industries, and to the British public.[71] The British trawlers have high fixed costs and their owners cannot easily withstand even short term losses, and it is doubtful that trawlers displaced from their

> . . . traditional Icelandic fishing grounds could find profitable alternative employment in other fishing grounds. Consequently, Iceland's enforcement of its regulations could have the effect of quickly forcing many of these trawlers out of business. This in turn could mean the loss of a substantial quantity of fish to British consumers, the scrapping of British fishing vessels, and unemployment for British fishermen and other workers, with widespread economic and financial consequences.[72]

However, the British are apparently willing to recognize some validity to the Icelandic demands as the White Paper states that Britain will concede certain priority to the coastal state for conservation management and catch preferences, but is not willing to let Iceland's priority extend to taking all the fish to the exclusion of the British.[73] As proof of her willingness to allow Iceland a catch preference to the fish, the White Paper notes that in the five years 1967-1971 Iceland only once had less than 1/2 of the demersal fish caught in the region and in 1969 and 1970 her

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[71] Bilder, supra note 45, at 69.

[72] Id., at 69.

[73] Fishing News, supra note 65, at 51.

share was just under 60%.[74] Thus it can be seen that the generating factor in the conflict is a question of competing economic interests in which both countries feel to a greater or lesser extent that their continued economic survival depends upon the continued right to fish the species in the case of the British, and the right to exclude other fishing interests on the part of Iceland. With economic viability being the issue at stake, it is obviously in the best interests of both nations to resolve the conflict as soon as possible in a satisfactory manner. However, achieving a settlement has not been easy as a number of means of resolution have been used with varying degrees of success.

Of course the obvious approach to settling their difference would be through direct negotiations, and this method of resolution has been resorted to by the parties. This means of resolution has apparently proved unsatisfactory, possibly because of the intransigence of the parties. Perhaps one of the real difficulties in the negotiation route lies in the fact that any negotiation must take place in the face of the now "effective" Icelandic 50 mile jurisdictional limits. If the Icelandic position is that negotiation must begin with the validity of this law and work toward some form of licensing or concession to British fishermen then it is not difficult to understand why the bilateral negotiations have so far been unsuccessful. It

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[74] Id., at 51.

should be noted that unilateral action in the form of extension of fishery jurisdiction has been Iceland's first response to a conflict or impending "fishing" crisis on each of the three occasions of the renewal of the "Cod War"; in 1952, 1958 and again in 1972. It is perhaps a fitting commentary on the effectiveness of unilateral extension as a means of conflict resolution that the "Cod War," after a period approaching a quarter of a century, continues unabated. In 1952 negotiations resulted in the conflict entering a dormant stage while the parties agreed to await results of the International Law Commission studies and the Law of the Sea Conferences. Negotiations did not result in any direct and conclusive regulation of rights and priorities. With the 1958 unilateral extension, resulting negotiations were somewhat more fruitful, the parties basically agreeing that Britain would recognize the new 12-mile limit if she were allowed to continue fishing within the new zone.

Unlike a number of marine resource conflicts which seem to excite little world attention and are usually relegated to low priority status among newsworthy items, the Anglo-Icelandic fishing conflict has been glamorized in the world press because of the often spectacular incidents involving naval vessels of the two countries. The Cod War is a classic illustration of an attempt to resolve a dispute through the use of military force and intimidation. The precedent for the incidents of the latest renewal of the conflict was set during the 1958 dispute when a certain

amount of force was used by naval vessels of both sides. It has been reported that,

> Icelandic gunboats made more than 70 unsuccessful attempts to arrest British trawlers fishing in the disputed zone. A reporter from The Sunday Times has descriptively written that "[b]lank shots and some live rounds were fired across bows, British trawlermen threatened to defend themselves with filleting knives, fire axes and boiling water, and men were struck viciously across the face with wet cod." British fishery protection vessels, sent to assist the British trawlers, cordoned off areas within which the British vessels could fish unmolested. Whenever Icelandic seamen managed to board a British vessel, they were forceably removed and sent ashore on a Royal Navy frigate.[75]

With the breakdown in bilateral negotiations following the current 50 mile extension of Icelandic fisheries jurisdiction, the parties have again resorted to military force. Since the September 1, 1972, effective date of the new Icelandic regulations, "while Iceland has reportedly not sought to arrest or impose penalties on British trawlers fishing within its new limits, a number of incidents have occurred involving Icelandic Coastal Patrol vessels harassing British trawlers and cutting their trawl lines. The British Government has responded by protests and by stationing several Royal Navy frigates just outside the disputed waters."[76] The current war between the two countries seems, however, to be as much psychological as it is physical. Threats have been made of attempts to board violating

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[75] Katz, Issues Arising in the Icelandic Fisheries Case, 22 Int'l. & Comp. L. Q. 83, 85 (1973). [Hereinafter cited as Katz.]

[76] Bilder, supra note 45, at 62.

British trawlers and "Icelandic Ministers have publicly threatened physical seizure of British vessels"[77] in addition to denying the British vessels access to Icelandic port facilities.[78] It is by far, however, the physical aspects of the conflict that have attracted the most attention. The British White Paper on fishing notes that Icelandic coast guard vessels;

> have ordered British trawlers to cease fishing within the area and when they did not comply have used cutting gear to sever the warps holding the nets. This operation has involved maneuvering in dangerous proximity to fishing vessels, wholly contrary to normal navigational rules, and has resulted in several collisions. There have been some 50 warping incidents up to May 1973. Gear to an estimated value of £48,300 has been lost and normal fishing operations disrupted.[79]

The White Paper further notes that in the course of harassment of British vessels the Icelandic coast guard has used both blank and live ammunition, at times firing dangerously close to British vessels.[80] The British, on the other hand, have seemed somewhat reluctant to engage in the same tactics and have kept their warships in the general area but outside the disputed zone. Following a rather serious shooting incident in May of 1973, however, the British ships were ordered inside the zone to protect the English fishermen.[81] The British Government has also taken other

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[77] Fishing News, supra note 65, at 51.

[78] Bilder, supra note 45, at 40.

[79] Fishing News, supra note 65, at 51.

[80] Id., at 51.

[81] Id., at 51.

"physical" measures designed to protect her interests. While reluctant to make any use of her warships other than to be nearby in case help was needed, she has provided a means to minimize harassment by the Icelandic patrol vessels.

> When the Icelandic government ignored all protests and indicated publicly that it intended to continue harassment, the British government--earlier this year [1973]--chartered the ocean-going tugs Statesman, Englishman, Irishman and Lloydsman, whose task was to shield trawlers from interference. These ships are not armed and operate purely defensively. Their captains are instructed to comply with normal navigational rules.[82]

It would appear readily apparent that the use of military-naval force is a very ineffective way to resolve a dispute. If anything, as shown by the Anglo-Icelandic dispute, such an attempted means of resolution is often counterproductive and serves only to further aggravate the existing differences. In the present dispute, it should be noted that the two sides have resorted to their navies for somewhat different reasons. The use of the Icelandic Coast Patrol is actually the second step in a two-tiered approach to her fisheries problem, in the sense that it was not used initially to solve the problem itself but rather to serve as an enforcement mechanism for Iceland's underlying approach to the dispute, that being her unilateral extension of fisheries jurisdiction. The British, on the other hand, seem to have utilized the Royal Navy not so much to resolve the conflict over fishery rights, but as a means of safeguarding

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[82] Id., at 51.

or preserving its rights pending a resolution of the conflict by other means. Given this slightly different motivation of the respective parties, emphasis should still be placed on the fact that resort to military means to either dictate or intimidate another party into a settlement will seldom be effective nor will it create an atmosphere conducive to later more appropriate attempts at resolution.

Arriving thus at a sort of stalemate, Iceland and Great Britain diverged upon two different courses in their attempts to reach an agreement, both of which involved to a certain extent the resolution of the conflict by third parties. While the United Kingdom renewed its longstanding attempts to get a judicial resolution of the dispute, Iceland embarked upon a course seemingly designed to bolster her position through recognition of the validity of her claims in diplomatic and world opinion forums. In seeking to win support for her position, Iceland has been actively participating in and pressing her views upon the United Nations Seabed Committee "which has been entrusted with the preparatory work for the forthcoming UN Law of the Sea Conference."[83] In her quest to influence the outcome of the conflict, Iceland recently achieved a rather spectacular diplomatic success in negotiating an Exchange of Notes with

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[83]Bilder, supra note 45, at 64.

Belgium dated September 7, 1972.[84] This diplomatic fait accompli takes on added significance when it is understood that Belgium occupies a similar position vis-à-vis the disputed fisheries to that of the U.K. In short,

> The agreement establishes a 'practical arrangement,' effective until June 1, 1974, under which Belgium agrees to Iceland's licensing of specific Belgian fishing vessels to fish in specific areas within its new limits, and to the right of the Icelandic Coastal Patrol to examine the fishing gear of the licensed Belgian vessels and request any information concerning the fisheries which it deems necessary.[85]

Although the agreement does expressly provide that "nothing in this arrangement shall be deemed to affect the claims or views of either Contracting Party concerning the general right of a coastal state to determine the extent of its fisheries jurisdiction,"[86] and therefore cannot be construed as a tacit acquiescence by Belgium to the validity of the 50-mile claim, it certainly adds weight to the position that coastal states such as Iceland have preferential rights in the regulation and conservation of fish in adjacent waters.

Aside from the interesting and well-publicized naval incidents between the parties, the attempt to get a judicial resolution is by far the most unique feature of the Anglo-Icelandic fisheries conflict. This approach is important

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[84]Agreement on Fishing Within Fifty Mile Limit Off Iceland, September 7, 1972, 11 I.L.M. 941 (1972). [Hereinafter cited as Agreement on Fishing.]

[85]Bilder, supra note 45, at 65.

[86]Agreement on Fishing, supra note 84, at 941.

not only because of its novelty but also because judicial decision is a potential conflict resolution mechanism that, if effectively and impartially employed to resolve this dispute, could serve as a guide for settling countless future conflicts.

As early as 1958 Great Britain had tried to get Iceland to agree to submit their continuing dispute to the International Court of Justice for resolution. Iceland refused at that time and she is still refusing to agree to have the Court hear the case. The essential difference in the earlier attempts to bring the conflict before the Court and the present attempts is that there is now at least an arguable basis upon which the Court can found jurisdiction over the dispute, whereas in 1958 no such basis of jurisdiction existed absent voluntary conferral of jurisdiction upon the Court by mutual agreement of the parties to the dispute or prior acceptance by both parties of compulsory jurisdiction.[87] On April 14, 1972, the United Kingdom of Great Britain and Northern Ireland filed an Application in the Registry of the Court instituting proceedings against the Republic of Iceland in which the Government of the United Kingdom asked the Court to declare "that Iceland's claim to extend its exclusive fisheries jurisdiction to a zone of 50 nautical miles around Iceland is without foundation in

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[87] I.C.J. Stat., art. 36, para. 1 and 2.

international law."[88] Alleging that the I.C.J. possessed jurisdiction based on the Exchange of Notes of March 11, 1961[89] between the two countries, Great Britain requested that the Court indicate, pending the final decision in the case, the following interim measures of protection:

(a) That Iceland should not threaten to interfere with vessels registered in the United Kingdom fishing outside the 12-mile limit as agreed upon by the parties in the Exchange of Notes of 11 March 1961,

(b) That the Government of Iceland should not take or threaten to take in their territory (including their ports, territorial sea or 12-mile fishing zone) measures of any kind against any vessels registered in the UK, or any persons connected with such vessels, being measures intended to impair freedom of fishing outside the 12-mile limit,

(c) That in conformity with (a) the UK vessels are free to fish outside the 12-mile limit but the Government of Great Britain will ensure that such vessels do not take more than 185,000 metric tons of fish in any one year from the sea area of Iceland (as defined by the International Council for the Exploration of the Sea),

(d) That each Government should seek to avoid circumstances arising which are inconsistent with the foregoing

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[88] Order of 17 Aug. 1972, supra note 57, at 13.

[89] See supra at note 57.

measures and which are capable of aggravating or extending the dispute submitted to the Court, and

(e) That in conformity with the foregoing measures each Government should ensure that no action is taken which might prejudice the rights of the other in respect of the carrying out of whatever decision on the merits the Court may subsequently render.[90]

Thus, the United Kingdom based its right to bring the fisheries dispute before the International Court solely upon the crucial language contained in the last sentence of the Icelandic Note in the March 11, 1961, Exchange of Notes: ". . . in case of a dispute in relation to such extension, the matter shall, at the request of either party, be referred to the International Court of Justice."[91] Great Britain, however, not only sought a decision on the dispute itself, but, pending such decision, wanted the Court to immediately issue interim orders as well, a request somewhat analogous to a preliminary injunction and requested apparently for the purpose of maintaining the positions of the two parties as of the status quo prior to the most recent Icelandic jurisdictional extension. Iceland vigorously protested the interjection of the I.C.J. into the dispute and objected to both the Court's jurisdiction and its competence to render interim orders, arguing that:

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[90]Order of 17 Aug. 1972, supra note 57, at 13-14.

[91]Fisheries Jurisdiction Case, supra note 58, at 8.

(1) the compromissory clause in the 1961 Exchange of Notes was no longer in effect so there was no jurisdiction, not even for the issuance of an interim order,

(2) as the Court's jurisdiction in the dispute is questionable at best, this question should be decided before any interim order is issued,

(3) the British request fails to meet the requirements for the issuance of such an order as it is directed at preserving the economic interests of British nationals rather than the legal position of the United Kingdom itself,

(4) the Court lacks the necessary facts and technical competence to issue such an order, and

(5) the British request should have been denied in any case as it is an unwise interference in the dispute and tends to hamper further negotiations between the parties.[92]

In further pressing her arguments, Iceland, in a letter to the Registry of the Court, "asserted that the agreement constituted by the Exchange of Notes of 11 March 1961 was not of a permanent nature, that its object and purpose had been fully achieved, and that it was no longer applicable and had terminated,"[93] and therefore there was no valid basis upon which the Court might exercise jurisdiction; that since the vital interests of the Icelandic people were

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[92]Bilder, supra note 45, at 69-70.

[93]Order of 17 Aug. 1972, supra note 57, at 6.

involved Iceland would not confer jurisdiction on the Court, and would not appoint an Agent.[94]

In its consideration of the request for interim orders, the Court noted Iceland's lack of representation, but further stated that, according to the jurisprudence of both the I.C.J. and its predecessor the P.C.I.J., ". . . the nonappearance of one of the parties cannot by itself constitute an obstacle to the indication of provisional measures, provided the parties have been given an opportunity of presenting their observations on the subject."[95] The Court then proceeded to determine the applicability of Article 41[96] of the Statute of the Court, concerning provisional measures, noting that Article 41 could be applied before the Court had fully satisfied itself of its jurisdiction on the merits of the case but ought not to apply Article 41 "if the absence of jurisdiction on the merits is manifest."[97] The Court found that the previously stated language in the Exchange of Notes appeared "to afford a possible basis on which the jurisdiction of the Court might

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[94] Id., at 6.

[95] Id., at 7.

[96] Article 41 of the Statute of the Court provides:
(1) The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
(2) Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.

[97] Order of 17 Aug. 1972, supra note 57, at 7.

be founded."[98] Therefore, following the command of Article 41, the Court found that Iceland's 50-mile fishery limitation anticipated the Court's ruling and would serve to prejudice the rights of the United Kingdom in the event of a judgment in its favor, and announced interim measures by a vote of 14 to 1 intended to "preserve the respective rights of the Parties pending the decision of the Court."[99] The Court essentially adopted the five measures suggested in the British request for the order, with the exception that the Court reduced the suggested annual catch limitation to be imposed on British fishermen operating in the disputed area from 185,000 to 170,000 metric tons. To these measures the Court also added two others: that the United Kingdom Government should furnish the Icelandic Government and the Registry of the Court "with all relevant information, orders issued and arrangements made concerning the control and regulation of fish catches in the area,"[100] and that unless the Court had meanwhile rendered a final decision in the case, the Court would at an appropriate time before August 15, 1973, "review the matter at the request of either Party in order to decide whether the foregoing measures shall continue or need to be modified or revoked."[101]

In the opinion of the dissenting judge Padilla Nervo, the Court should not have indicated the interim measures

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[98] Id., at 8.

[99] Id., at 8.

[100] Id., at 10.

[101] Id., at 10.

of protection as the "special features of the case do not justify such measures against a State which denies the jurisdiction of the Court, which is not a party to these proceedings and whose rights as a sovereign State are thereby interfered with."[102] Arguing further, the dissenting judge noted that a 50 mile zone for fisheries jurisdiction had not been proved to be contrary to international law and that the Court had failed to thoroughly explore the jurisdictional question,[103] Judge Nervo feeling that there existed serious enough doubts as to the existence of jurisdiction that the request for interim measures should have been denied.[104] Crucial to the dissent's argument of lack of jurisdiction under the Exchange of Notes was that the Note expressly referred to continued implementation of the Althing Resolution of May 5, 1959 wherein the Icelandic Government was urged to seek a recognition of rights to Icelandic fisheries limits "extending to the whole continental shelf."

Undoubtedly the indication of interim measures was intended to reduce the number of incidents occurring between ships of the two nations in the disputed zone. It was certainly meant to ease the tensions and temporarily freeze the "conflict" into the pre-1972 position wherein the waters outside the then 12-mile Icelandic fishery limits would still partake of the quality of "high seas" open to the free fishing of all. Despite the orders and their good intentions,

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[102] Id., at 12. [103] Id., at 12. [104] Id., at 14.

however, Iceland has made it clear that "it intends to maintain its new 50-mile fisheries limits and to enforce them against any foreign fishermen attempting to fish within the waters covered."[105] As there was no basis for jurisdiction on the part of the ICJ, and as there is still no consent on Iceland's part to the submission of the dispute to the Court, Iceland has stated "that it will not consider the Court's interim orders as in any way binding."[106] Unfortunately because of this attitude, the interim orders, in spite of their good intentions, have been relatively unsuccessful. The British and the Germans for their part have been adhering to the catch limitations imposed upon them by the interim orders.[107] The Icelandic Government, however, has continued to harass foreign fishermen operating within the new 50-mile zone and a number of other incidents have occurred such as the collision of opposing vessels, the firing of shells by Icelandic coastguard vessels, and the continued presence of warships in the area.[108]

Early in 1973, the International Court heard and decided the jurisdictional issue in the conflict. Once again, Iceland was conspicuously absent from this stage of the judicial resolution process, submitting no memorial and

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[105] Bilder, supra note 45, at 39.

[106] Id., at 40.

[107] Fishing News, supra note 65, at 53.

[108] Fisheries Jurisdiction Case (United Kingdom v. Iceland), Order of 12 July 1973, [1973] I.C.J. 305 (Ignacio-Pinto, J., dissenting). [Hereinafter cited as Order of 12 July, 1973.]

refusing to appoint or send an agent for the argument of the jurisdictional issue. The Court regretted Iceland's failure to appear, but noted that the Court, "in accordance with its Statute and its settled jurisprudence, must examine proprio motu the question of its own jurisdiction to consider the Application of the United Kingdom."[109] The Court further stated that in the present case the Court's duty to make the jurisdictional examination on its own initiative was reinforced by the terms of Article 53 of the Court's Statute, and that Iceland's failure to appear at the jurisdictional hearing constituted a violation of her duties under Article 62, paragraph 2, of the Rules of Court.[110] Article 62 requires a State objecting to the Court's exercise of jurisdiction to set out the facts and law upon which the objection is based as well as any other submissions and evidence.[111] Despite Iceland's failure to participate in the case, the Court nevertheless noted that, pursuant to Article 53, "in examining its own jurisdiction, will consider those objections which might, in its view, be raised against its

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[109] Fisheries Jurisdiction Case, supra note 58, at 8.

[110] Fisheries Jurisdiction Case, supra note 58, at 8. (Article 53 of the Statute of the Court reads as follows:
1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim.
2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.)

[111] Id., at 8.

jurisdiction."[112]

At the close of the oral proceedings the United Kingdom submitted the following contentions:

(a) that the Exchange of Notes of March 11, 1961, was and now remains a valid agreement,

(b) that, for the purposes of Article 36 (1) of the Statute of the Court, the Exchange of Notes constitutes a treaty or convention in force and consequently a submission by both parties to the jurisdiction of the Court in case of a dispute concerning Iceland's extension of fisheries jurisdiction beyond that agreed upon in the Exchange of Notes,

(c) that, given United Kingdom refusal to accept the validity of unilateral extension of Iceland's fisheries limits, a dispute exists between the two countries which is within the terms of the compromissory clause of the Exchange of Notes,

(d) that Iceland's purported termination of the Exchange of Notes is without legal effect, and

(e) that by virtue of the Application Instituting Proceedings the Court is now possessed of jurisdiction over the dispute.[113]

After referring to the diplomatic and legislative history leading up to the Exchange of Notes, the Court concluded that the intention of the Parties was

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[112] Id., at 8. [113] Id., at 7.

> to give the United Kingdom Government an effective assurance which constituted a sine qua non and not merely a severable condition of the whole agreement: namely, the right to challenge before the Court the validity of any further extension of Icelandic fisheries jurisdiction in the waters above its continental shelf beyond the 12-mile limit.[114]

The Court thus found that it was possessed of jurisdiction, but before acting upon this decision the Court had to consider other contentions raised that the Agreement was either void initially or had since ceased to operate. A May 29, 1972, letter from the Icelandic Minister of Foreign Affairs addressed to the Registrar of the Court stated that "[t]he 1961 Exchange of Notes took place under extremely difficult circumstances, when the British Royal Navy had been using force to oppose the 12-mile fishery limit established by the Icelandic Government in 1958."[115] The Court construed this letter as a "veiled charge of duress" which might have rendered the Exchange of Notes void ab initio, but dismissed this contention as the allegations of duress were too vague and the history of the negotiations which culminated in the 1961 Exchange showed that the agreement was freely negotiated and voluntarily entered into by parties on an equal basis.[116] Iceland made a further argument against the Court's jurisdiction on the grounds that the Exchange appeared to grant a permanent right to judicial settlement, which would have made the Agreement either void in international law or subject to the right of unilateral

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[114] Id., at 14. [115] Id., at 15. [116] Id., at 15.

termination.[117] The Court, however, disposed of this argument also, finding that as there was no time limit placed upon when Iceland might seek to implement the Althing Resolution there could be no time limit placed upon the right to seek judicial settlement of an ensuing dispute, and thus the agreement was not of an indefinite period but rather "[t]he right to invoke the Court's jurisdiction was thus deferred until the occurrence of well-defined future events and was therefore subject to a suspensive condition."[118] In responding to a final Icelandic argument that the Exchange of Notes was no longer valid because of changed circumstances, the Court conceded that some aspects of the dispute had changed, but not with respect to the operation of the compromissory clause, and in any event the changed circumstances argument would have relevancy for the decision on the merits rather than the jurisdictional question.[119]

Since finding that it possessed jurisdiction over the dispute, the Court has issued two other orders prefatory to rendering a decision on the merits. In the first of these orders, the Court fixed August 1, 1973, as the date for the filing of the memorial of the United Kingdom and January 15, 1974, for the filing of the countermemorial of the Government of Iceland.[120] In response to the United Kingdom's

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[117] Id., at 16. [118] Id., at 16. [119] Id., at 17-23.

[120] Fisheries Jurisdiction Case (United Kingdom v. Iceland), [1973] I.C.J. 93.

June 22, 1973, request for renewal of the interim measures, Iceland protested such a renewal, indicating that "highly mobile fishing fleets should not be allowed to inflict a constant threat of deterioration of the fishstocks and endanger the viability of a one-source economy, and concluding that to freeze the present dangerous situation might cause irreparable harm to the interests of the Icelandic nation."[121] Noting that apparently negotiations were taking place between the parties, and that the indication of interim measures did not exclude the possibility of an interim arrangement between the parties upon terms differing from those applied by the Court, the ICJ by a vote of 11 to 3 reconfirmed the interim measures of protection until the Court has given final judgment in the case.[122] The three dissenters felt renewal of the interim orders without a re-examination of the situation, which might justify certain modifications or additions to the original order, would be inappropriate. Judge Ignacio-Pinto felt that the numerous incidents which had occurred during the time period since the imposition of the original measures constituted so many "flagrant violations" that a modification of the original order was necessary because, "If other much graver incidents were to occur before final judgment was given, the Court would be open to criticism for failure to exercise vigilance."[123] Dissenting Judge Gros would have requested

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[121] Order of 12 July 1973, supra note 108, at 303.

[122] Id., at 303-304.

[123] Id., at 305.

a hearing with the Applicant before granting a continuation of the interim measures,[124] and Judge Petren also would have re-examined the interim measures before reimposing them.[125]

Thus having surmounted the various jurisdictional problems, the "Cod War" now awaits a decision of the Court on the merits of the dispute. When forthcoming, it will be the first judicial resolution of a fisheries conflict rendered by an international tribunal. However, even a decision by the International Court of Justice will not necessarily guarantee an end to the conflict, as even a resolution mechanism such as this is subject to certain limitations. It is entirely possible that the decisions of the Court could go entirely unheeded by the "losing" party. This may be particularly true with respect to the Icelandic position. They have refused to participate in the preceding phases of the judicial resolution process and have also refused to acknowledge the validity of any of the Court's prior rulings. There is no guarantee they will not assume the same posture with respect to the decision on the merits. Such a stance is understandable when one remembers the tremendously vital interests each party, particularly Iceland, feels it has at stake in the right to fish in the disputed zone. One commentator has speculated that, if she participates, Iceland may seek to justify the extension of her

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[124] Id., at 307.

[125] Id., at 311.

fisheries jurisdiction to 50 miles on the grounds of the doctrines in international law of "necessity" and "self-defense."[126] Noting that, "The essential preconditions for invoking the doctrine are that the State's very existence is endangered, and that it has exhausted every other conceivable means of protecting itself,"[127] the author thinks it doubtful that Iceland can use the concept to justify her extension as the effect of overfishing on her economy will probably not be so disastrous as to endanger her national existence.[128] In addition, there remain other avenues open to Iceland by which she can protect her vital interest, such as bi-lateral negotiations, development of existing and new industries not related to fishing, and resort to existing multi-lateral machinery. The author admits, however, that use of these mechanisms will not allow Iceland to retain her present favorable economic status, but the "necessity" doctrine may be invoked "not to maintain an advantageous status quo, but only to preserve the very existence of a State."[129]

When compared with the statistics on the percentage of Iceland's economy dependent upon fishing or fishing related activity, it is not too terribly difficult to imagine that Iceland just may feel her very existence to be endangered. Thus, a decision by the ICJ against the

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[126] Katz, supra note 75, at 97.

[127] Id., at 97. [128] Id., at 97. [129] Id., at 98.

validity of the 50-mile zone might well be ignored by Iceland, and the present conflict would quite probably remain unresolved. The potential refusal of a party to honor a decision by the International Court of Justice is further complicated by the fact that sanctions for such non-compliance are almost non-existent and at best of only a marginal effectiveness as against a determined resistor. It can be seen therefore that, while a potentially effective tool of conflict resolution, the success of international judicial decision will ultimately depend upon the willingness of the parties to submit the dispute to the ICJ and abide by its decision. In this respect, judicial decision may not differ substantially from any other means of resolution as they all require a spirit of cooperation, compromise and good faith on the part of the parties involved.

III. JUDICIAL RESOLUTION BY NATIONAL COURTS

Contrasted with the possibility of conflict resolution by an international judicial settlement of the dispute, there also exists the alternative of seeking a resolution by decision from a municipal (or national as opposed to international) tribunal. While the situation would seem to be rare in which the decision of a national court purporting to settle a fisheries dispute between two countries would actually be "effective," there have been a few infrequent instances of just such an occurrence. Of course, while such a decision may more than likely have the effect of settling only a particular incident in the larger scope of a conflict, it is nevertheless a potential means of solution.

One of the earliest municipal judicial decisions came as a result of a serious incident which occurred in November 1954 in which Peruvian war vessels and aircraft captured a whaling fleet flying the Panamanian flag and owned by Aristotle Onassis.[130] When first sighted by units of the Peruvian Navy, the fleet was operating some 110 miles from the Peruvian coast and consisted of 11 vessels and a factory ship.[131] On November 15 and 16, warships and aircraft of

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[130] S. Oda, International Control of Sea Resources 22 (1963). [Hereinafter cited as Oda.]

[131] M. Whiteman, 4 Digest of International Law 1062 (1965). [Hereinafter cited as Whiteman.]

the Peruvian armed forces forced the factory ship and four others of the fleet to enter the Peruvian port of Paita where they were held under arrest for three weeks.[132] According to a Panamanian account of the incident, "two of the vessels were captured approximately 160 miles off the Peruvian coast; two others were attacked with bombs and machine gun fire by Peruvian naval and air units while 300 miles off the coast; and later the factory vessel was attacked by a Peruvian plane 364 miles offshore."[133] In a decision of November 26, 1954, the Peruvian Port Authority found that two of the whalers had been captured at a distance of 126 miles from shore and that as to those captured outside Peru's 200 mile fisheries limit the doctrine of hot pursuit applied.[134] Citing violations of various municipal licensing and revenue statutes as well as a violation of the Santiago Declaration,[135] the Court ordered the masters and owners of the five vessels to pay "'jointly and severally' a fine of $3 million, or its equivalent in the national currency, within a period of 5 days of the date of notification of the judgment, the vessels to remain impounded as security for the payment of the fine until payment in full."[136] By far, one of the most interesting aspects of

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[132] Id., at 1062.

[133] Id., at 1066-67.

[134] Oda, supra note 130, at 23.

[135] Lay, Churchill, Nordquist, 1 New Directions in the Law of the Sea 231-232 (1973).

[136] Whiteman, supra note 131, at 1062.

this case was the manner in which the Port Authority used the Santiago Declaration as a basis for the judgment. Amounting to no more than a declaration of principle that the States of Chile, Ecuador and Peru each possess "sole sovereignty and jurisdiction over the area of sea adjacent to the coast of its own country and extending not less than 200 nautical miles from the said coast,"[137] this decision has the effect of giving the Declaration the force of law as against those countries violating its principles. While this municipal court decision certainly did not establish the validity in international law of the Lain American claim to a 200 mile jurisdictional zone, it will quite probably have a deterrant effect upon unlicensed foreign fishermen competing for marine resources within the self-proclaimed zone.

Another instance of national judicial decision occurred under equally interesting circumstances. In 1963 the State of Florida enacted the Florida Territorial Waters Act, the purpose of which was "to deny . . . to nationals of alien, neutral and hostile powers the right to draw upon the resources of waters long considered by the immemorial usages of all civilized peoples a part of our State and Nation. . . ."[138] In short, the Act makes it illegal for any unlicensed alien to take any natural resource from

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[137] Id., at 1090.

[138] Preamble, Florida Territorial Waters Act, Florida Session Laws ch. 63-202 (1963).

Florida's territorial waters, which are defined in Article I of Constitution of Florida as being 9 miles in width.[139] The new law was used for the first time in February of 1964 by federal authorities who arrested a group of Cuban fishermen fishing in Florida territorial waters off the Dry Tortugas.[140] As the federal law at the time would not support prosecution, the Cubans were turned over to the state authorities for prosecution.[141] Despite an impressive list of defenses, including conflict of the Act with federal law, denial of due process and equal protection, and violation of permissible breadth of territorial waters under international law, the court denied the motion to quash and found the masters of the four vessels guilty of violating the Act, fined them $500 apiece, sentenced them to a six-month suspended jail term, and confiscated the approximately 5000 pounds of fish found on board.[142] The charges against the crew members were dropped and the vessels were released.[143] Prosecution under a state statute such as that of Florida's, however, is of a limited effect, and the future of similar such judicial resolution is questionable in view of the

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[139] Browning, Inter-American Fisheries Resources--A Need for Cooperation, 2 Texas Int'l. L. Forum 1, 32 (1966). [Hereinafter cited as Browning.]

[140] Cowan, Era of Militant Fishing Jurisdiction--A Study of the Florida Territorial Waters Act of 1973, 23 U. Miami L. R. 160, 170 (1968-69).

[141] Id., at 170.

[142] Browning, supra note 139, at 32-33.

[143] Id., at 33.

conflict between the Federal Government and the individual states over who has jurisdiction over the coastal waters.

A more recent case, however, indicates that judicial decisions of domestic courts may have quite a large potential as means of conflict resolution when the suit is brought in an admiralty or tort posture rather than as a prosecution under somewhat questionable self-help legislation. Lobster fishing along the eastern and northeastern Atlantic coast of the United States is an old and profitable fishing business and in 1962-63, with the advent of large-scale pot fishing, the lobster fishermen were enabled to extend their fishing areas as far as 100 miles from shore.[144] The fishing areas in 1971 alone increased from 500 square miles in May to over 1600 square miles in late October and by the summer of 1972 the lobster fishing was being conducted as far south as Cape Hatteras.[145] The lobster pots, however, have suffered great damage from foreign trawlers fishing in the same areas, with U.S. lobster fishermen reporting 903 pots lost during the period January-May 1972 alone.[146] One lobster fishing company, the Prelude Corporation of Westport Point, Massachusetts, lost a large number of pots beginning in late 1968, due to Soviet trawl fishing activities, and

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[144] Blondin & Windley, 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 Fishing Mobile Gear, 4 J. Mar. L. & Commerce 141 (1972-73).

[145] Id., at 142.

[146] Id., at 143.

after failing to obtain relief through diplomatic channels,

> . . . brought suit against the Soviet Union on June 10, 1971, in the U.S. District Court for the Northern District of California in San Francisco. The complaint, filed in admiralty, cited as defendant the "owners of the F/V Atlantik" and 22 other named trawlers, "and other fishing vessels operating in the same fleet or fleets, known as U.S.S.R." The complaint also stated that the defendant was not to be found within the jurisdiction of the court, and sought attachment of the Soviet freighter Suleyman Stalskiy, then at dock in San Francisco. A writ of attachment was issued June 9 and the vessel was attached by a U.S. Marshall.[147]

Prelude, asserting that there had been a reckless disregard of the rights of U.S. fishermen and destruction of much fishing gear and lobsters, asked for damages under three counts: (1) lost or damaged gear of an estimated value of $39,290.34, (2) lost profits in the amount of $126,947.00, and (3) exemplary damages of $200,000.00, for a total of $377,055.15 with interests and costs.[148] The ship's agents moved for immediate vacation of the writ, contending it was improper because: the named defendant was in the district (the Soviet Union maintained a liner service out of San Francisco and solicited freight there), the Suleyman was owned by the Far Eastern Steamship Company (FESCO), a separate entity under Soviet law not responsible for acts of other judicial entities operating fishing fleets in the Atlantic, and sovereign immunity.[149] After consideration of the motion and a communication from the U.S. State

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[147] Id., at 143.

[148] Id., at 143-144.

[149] Id., at 144.

Department, the court dissolved the writ and allowed personal service on a FESCO agent, but Prelude appealed and threatened to attach Soviet ships of the same "judicial entity" as those named in the complaint wherever they could be found, which would have included numerous ports in New England, Canada and St. Pierre-Miguelon.[150] Apparently concerned about the $2000-$3000 per day a vessel like the Suleyman costs when tied up in port, plus the possibility that Atlantic coast judges might be more sympathetic to U.S. lobstermen than those in San Francisco, the Soviets,

> . . . dispatched a representative of "Sovrybflot," the entity of the Soviet Government responsible for servicing the Soviet high seas fishing fleet, to negotiate a settlement. Discussions were held in Westport, Mass., during November 9-12, 1971, with the President of Prelude, and agreement was reached on $89,000.00, or half the amount Prelude was suing for, less exemplary damages. In return, Prelude agreed to drop the suit, including the claim for $200,000.[151]

Thus, while the Court never actually rendered a decision in the case, the "threat" of judicial resolution was effective in bringing about a negotiation and settlement of the differences between the parties. While on its face conflict resolution by judicial decision of a national court or tribunal would seem to be a less desirable alternative to decision by the ICJ, in part because of the involuntary manner in which one of the parties may be brought to suit, it may be a more practical and effective method of getting results. Concrete results may be more readily expected from

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[150] Id., at 144.

[151] Id., at 144-145.

this type of approach because the jurisdiction of the court will often be founded, as in the Suleyman case, upon an in rem or quasi-in rem theory. Thus, while the element of impartiality that attaches to an ICJ decision may be lacking in such a case, the possession of the violating party's vessels, catch or crew, can be a persuasive leverage tool for forcing compliance with the Court's order, a means of enforcement altogether lacking in the case of the International Court of Justice.

IV. U.S.-LATIN AMERICAN CONFLICT

The continuing dispute between the United States and certain Latin American countries, principally Chile, Ecuador and Peru, over fishing rights off the coasts of these latter nations is one by now quite familiar to most Americans. This conflict is essentially the result of the Latin American reaction to the Truman Proclamation of 1945,[152] wherein President Truman declared that United States jurisdiction extended to coastal fisheries in certain areas of the high seas for the purpose of conserving and controlling the development of the natural resources in these areas. In response to the Proclamation, Chile, Ecuador and Peru (the CEP nations) sent delegates to a conference held in Santiago, Chile in August 1952 which promulgated the Santiago Declaration proclaiming "sovereignty and jurisdiction by these three nations over the sea adjacent to their respective coasts, up to a minimum distance of 200 miles, with the single concession that innocent passage would not be restricted."[153] The proclamation of the 200 mile zone was promptly protested by a number of nations, including the U.S., but the CEP nations have remained firm in their commitment to and enforcement of the 200 mile jurisdictional

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[152] 10 Federal Register 12304 (1945).

[153] ODA, supra note 130, at 21-22.

zone. The United States, for its part, has refused to recognize the validity of such a zone, insisting that a zone of such breadth is contrary to international law and violates the doctrine of the freedom of the seas.

As a consequence of this difference of views, the conflict has resulted in a number of spectacular seizures of United States fishing vessels found within the 200 mile zone. The first seizures occurred in 1952 when "six tuna boats owned by United States nationals were captured by Ecuadorian patrol vessels off the coast of Ecuador."[154] Since that time there has been a proliferation of fishing boat seizures by the CEP nations. During the period from 1952 to 1969 more than 140 U.S. tuna boats were seized, primarily by Ecuador and Peru, and numerous others harassed.[155] In addition to Peru and Ecuador, eight other Latin nations including Chile, Mexico, Honduras, Panama, Colombia, Argentina, Nicaragua and El Salvador have seized U.S. and other foreign vessels fishing within their jurisdiction.[156] Furthermore, the incidence of seizures appears to be increasing. From 1961 to 1971 Chile, Ecuador and Peru alone have seized and fined 145 U.S. fishing vessels (53 in 1971

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[154] Id., at 22.

[155] Note, Seizures of United States Fishing Vessels--The Status of the Wet War, 6 San Diego L. R. 428, 429 (1969). [Hereinafter cited as Note, Seizures of U.S. Fishing Vessels.]

[156] Samet and Fuerst, The Latin American Approach to the Law of the Sea 76 [UNC-SG-73-08] (1973). [Hereinafter cited as Samet and Fuerst.]

alone), resulting in the loss of over 438 fishing days to the tuna fleet and payment of fines in the amount of $3,543,194.12.[157]

> Typically, the tuna boats have been seized by patrol craft of the coastal nation, forced to proceed to port, charged with violating license and registration regulations, and forced to pay fines before being released. In some instances the vessels' fishing gear and catch have been confiscated as well. There have been strafings and shootings in which American tuna fishermen have been injured.[158]

In a rather ironic note, the United States has been indirectly responsible for helping the CEP nations make these seizures. Quite frequently, the naval vessels used to make the seizures have been supplied to the Latin nations by the U.S. under its military assistance program, and the jet aircraft used to locate the tuna boats have often been furnished the coastal states by the U.S. Government.[159] An even more flagrant example occurred in two other seizures, those of the Ronnie S. and the Determined, where the Ecuadorian crews of the ships making the seizures had just returned from a six month training tour in the United States.[160] Yet, throughout this period of seizures and payment of fines, the U.S. has given Peru and Ecuador over $457,009,000.00 in foreign assistance.[161]

The conflict is obviously, therefore, one involving substantial sums of money and a great deal of inconvenience

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[157] Id., at 76-77.

[158] Note, Seizures of U.S. Fishing Vessels, supra note 155, at 429.

[159] Id., at 429. [160] Id., at 430. [161] Id., at 430.

to American fishermen. It also manifests every sign of worsening, with statistics showing an increase in the number of seizures and amount of fines paid. In commenting on the present situation, one author has noted that, "During the past few years expressions of conflicting policy have continued to occur and the dispute has evolved into a series of political actions and reactions, along with an avoidance of the legal issues involved."[162] This, however, is not entirely true, as the United States in a note of 13 May 1955 proposed that the dispute over the CEP 200 mile claims be submitted to the International Court of Justice for resolution.[163] Responding to this note, the three South American countries, on June 3, 1955, replied that, ". . . they were not prepared at that time to consider whether or not the legal controversy should be submitted to the Hague Court. . . ."[164] Given the prevailing international climate, the relative newness of such an extensive jurisdictional claim coupled with the widely publicized incidents of vessels being seized, it would probably not be too presumptious to assume that the CEP nations refused such a U.S. proposal because of a rather substantial fear that the ICJ would rule against the validity of their new jurisdictional limits.

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[162] Comment, The Tuna Boat Dispute and the International Law of Fisheries, 6 Calif. W. L. Rev. 114, 121 (1969-70). [Hereinafter cited as Comment, Tuna Boat Dispute.]

[163] ODA, supra note 130, at 23.

[164] Id., at 23.

With the passage of time, however, a small but growing number of other nations have accepted the 200 mile concept with the result that there may now be no overriding international norm with respect to the permissible breadth of territorial seas and jurisdictional zones of other natures. As a further consequence of this present state of indecision in international law, both parties to the dispute have resorted to a variety of other methods in seeking a resolution of the conflict.

The first and most obvious attempt to seek a resolution of the conflict was through the process of diplomatic negotiation. Initially, since the principal parties to the dispute were all members of the Organization of American States (OAS), a settlement was sought to be achieved through this organ. Following a 1956 meeting in Caracas of the Tenth Inter-American Conference, it was resolved that the OAS would convene a special conference March 16, 1956 at Ciudad Trujillo to study the continental shelf, ocean, and marine resources, and the Inter-American Council of Jurists was asked to make a preparatory legal study.[165] In early 1956 the Council of Jurists meeting in Mexico City adopted a resolution setting forth the "Principles of Mexico," providing inter alia that three miles was insufficient as a limit of territorial waters and affirmed the competence of each State to set its own territorial waters within

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[165]Browning, supra note 139, at 18.

reasonable limits, taking into consideration the geographical, geological and biological factors as well as the economic needs of its population.[166] The Principles were adopted by a 15 to 1 vote, the U.S. casting the dissenting vote, and it was widely feared that a repetition of the Principles of Mexico at the Ciudad Trujillo conference might "place the unity of the Americas at stake" and produce a "United States-Latin American juridical schism with serious political and practical implications."[167] Therefore at Ciudad Trujillo, because of "considerable behind-the-scenes negotiations and persuasion," the Conference avoided a serious open conflict by expressly providing that ". . . there was no agreement regarding the juridical status of waters superjacent to the submarine areas, nor was there agreement concerning the width of territorial seas."[168] This initial attempt, therefore, actually resulted in the use of diplomatic negotiations to forestall the conflict or at least forestall the further deterioration of relations between the parties. Subsequent negotiations between the concerned parties have likewise failed to achieve any significant success in resolving the controversy. One author has even suggested that diplomatic negotiation may continue to be a fruitless and inappropriate vehicle for resolving these disputes as long as the conflict is perceived as an economic

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[166] Id., at 18-19.

[167] Id., at 19-20.

[168] Id., at 20.

and political struggle between developed and developing nations.[169]

Another possibility for effecting an end to the fisheries conflicts in this area is through the use of military force. The CEP nations have certainly utilized their naval and air forces for just such a purpose, to in effect achieve a de facto recognition of their extended jurisdictional zone and the right to regulate fishing in this area by the forceful seizure of all unauthorized and unlicensed fishing vessels found within the 200 mile zone. Unlike the French-Brazilian and Anglo-Icelandic conflicts, however, the use of naval force in the U.S.-CEP dispute has been largely limited to the Latin Americans, there having been as of yet no direct confrontations of the two navies. But, while naval force has not yet been resorted to in an attempt to force a retreat from the 200 mile concept or to protect American fishermen, its use remains a distinct possibility. Indicative of sentiment in favor of the use of military force, one author reported that:

> In 1969, Senator Jacob Javits, a northern liberal without any particular obligations to the tuna industry stated: "And isn't there a world of difference between the expropriation of the property of IPC in Peru, involving the choice of locating in Peru, and piracy on the high seas by seizing tuna boats 200 miles out or whatever the Government of Peru might decide? . . . Would you see any reason why the United States could not send a destroyer or two or three down with 20 or 30 tuna boats within a hundred miles of the Peru coast, and

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[169] Comment, Tuna Boat Dispute, supra note 162, at 126.

> let us make it crystal clear to the military dictator in Lima that peas are very different from bananas."[170]

Military action against the Latin nations themselves, or against their military forces is probably not a valid means of resolution no matter how serious the nature of the dispute. The concept of a military escort for American fishing boats is one, however, that has received more consideration and some practical application. Apparently the escort concept was recently used quite efficaciously to halt seizure of U.S. boats by Mexico, as one commentator has reported that,

> . . . a Coast Guard patrol was used to protect United States shrimp boats operating in the Gulf of Mexico. This was an effective deterrent to seizures by Mexico, as well as an inducement to negotiate. The "Shrimp Patrol" was terminated in January 1969 upon agreement by Mexico and the United States concerning fishing rights in that area.[171]

However successful the use of the navy might have been in effecting a settlement with Mexico, it is a means of resolution that should rarely, if ever, be considered. It is quite possible that the U.S. with its military might could well enforce by military means a territorial sea of any width and fishing rights of any description off the western coast of South America, but the short term benefits

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[170] Loring, The United States-Peruvian Fisheries Dispute, 23 Stan. L. Rev. 391, 393 n. 4 (1970-71). [Hereinafter cited as Loring.]

[171] Note, Seizure of U.S. Fishing Vessels, supra note 155, at 439.

of such a settlement would surely be outweighed by the possibly long term disadvantages and certain disfavor in the forum of world opinion. While no more than speculation, it is quite probable that the U.S. has refrained, and will refrain in the future, from employing her armed forces to effect a solution in the 200 mile dispute because to do so would have serious detrimental effects upon U.S. foreign policy and political objectives in these areas.

The parties have also tried, or been accused of trying, a number of other methods in attempting to get a favorable resolution of the dispute. Some of these methods have been unusual, others illegal, and a few have achieved brief success, but none have proved themselves flexible enough to provide a permanent solution to the dispute.

One of the most interesting attempts to avoid a confrontation followed the 1952 Santiago Declaration, when representatives of the American Tuna Boat Association (ATA) met privately with Peruvian officials and worked out mutually acceptable fishing regulations.[172] Private arrangements between a government and private industry have been almost non-existent as a means of avoiding conflicts and regulating relations, but as one author noted, "This agreement--allegedly based on the fact that the tuna clippers of the 1950's had to enter the three-mile limit for bait--was the most skillful way around the legal problem yet

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[172]Loring, supra note 170, at 405.

found. It proved that private negotiations can be more effective in some cases than formal diplomatic efforts."[173] The reason that agreement was reached so quickly and with such apparent ease between these two parties is that the ATA, unlike the United States Government, is interested only in preserving its right to fish and is not concerned with international law as such or what "legal" implications might arise from such an arrangement. When Chile first began seizing U.S. tuna boats in late 1957 the ATA was again successful in reaching a similar understanding with the Chilean Government.[174] These agreements kept peace until the 1960's, when technological innovations made it unnecessary for the tuna boats to enter the more shallow waters of the three-mile limit in order to procure their bait as bait fishing was abandoned for the more efficient "purse seine" net fishing method.[175] The fishermen therefore felt they no longer needed to acquire licenses, and with this change in attitude, "the apparent respect for Peruvian law ended, and seizures began again."[176]

A means of ending the 200 mile zone produced conflict that partakes of cloak and dagger tactics, and if not exactly legal at least exciting, are the Peruvian charges against the United States of political subversion. These charges stem from the fact that the Peruvians and many

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[173] Id., at 406.

[174] Id., at 406.

[175] Id., at 407.

[176] Id., at 407.

other Latin Americans believe that the coup d'état which took place in Ecuador on July 11, 1963, was CIA-organized.[177] As proof of U.S. involvement in the coup, the Peruvians note that, "Immediately following the coup, Ecuador's new military junta entered a secret agreement with the United States that, in effect, exempted the United States from Ecuador's 200-mile limit."[178] This modus vivendi following the coup provided that the U.S. would respect the Ecuadorian 12-mile limit for taxation and licensing purposes, and Ecuador agreed to restrain from seizures beyond the 12-mile zone, which was in effect a "de facto renunciation of the 200-mile limit."[179] The validity of the CIA-organization charge is questionable, the existence of the secret agreement is not. But even if true, political subversion and governmental overthrow can hardly be an acceptable means of resolution. In this particular instance, the ensuing agreement was of a short-lived nature. The subsequent history of this agreement is not available to this author, but it has certainly ceased to operate in view of the large number of American fishing boats seized by Ecuador alone in 1971.[180]

Barring some dramatic reconciliation or compromise at the U.N.'s forthcoming Law of the Sea Conference to be held in Caracas this summer, a resort to retortionary

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[177] Id., at 392. [178] Id., at 392. [179] Id., at 408.

[180] Samet and Fuerst, supra note 156, at 77.

tactics such as an economic boycott, or an all-out military effort, multilateral and bilateral treaties between the concerned parties would seem to offer the best approach to minimizing the conflict. It is probable that the core of the problem, the question of the legal validity of the 200 mile zone, could not be resolved by treaty, but it might be possible to reach agreements on conservation of fish stocks and fishing privileges. In the area of treaties, the U.S. and the Latin nations have been only slightly more successful than with their other attempts to reach agreement over the conflict, but there are a few hopeful signs.

The major convention in force between the U.S. and the South American countries is the Inter-American Tropical Tuna Commission (IATTC),[181] created by treaty in 1949 between the United States and Costa Rica. The basic purpose of the Commission is "to investigate the effect of the fishery on the tuna and bait stocks of common concern in the eastern tropical and sub-tropical Pacific, and to make regulatory recommendations to the governments based on its findings."[182] Article V paragraph 3 of the Convention allows other governments whose nationals participate in the regulated fisheries to adhere to the Convention upon

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[181] Inter-American Tropical Tuna Commission, May 31, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044, 80 U.N.T.S. 3. [Hereinafter cited as Tropical Tuna Commission.]

[182] Chapman, The Theory and Practice of International Fishery Development--Management, 7 San Diego L. Rev. 408, 426 (1970). [Hereinafter cited as Chapman.]

unanimous consent of the Contracting Parties, and following this procedure Panama, Ecuador, Mexico, Canada and Japan have become members,[183] but Ecuador withdrew in 1968.[184] It should be noted that the Commission established by the convention has no enforcement power of its own, but rather is responsible only for collecting and analyzing data from participating nations and then making quota recommendations to those fishing in the waters. One of the shortcomings of the Convention is that, when quota regulations become necessary, there has not been worked out a system satisfactory to the member nations for distributing the catch among themselves.[185] Another obvious shortcoming of the Convention is that its conservation impact upon the sub-tropical Pacific tuna is lessened because of the absence from its membership ranks of three of the most important nations engaging in the fishery, Chile, Ecuador and Peru. As the CEP nations are not members, their participation in the tuna fishery is obviously not subject to the Commission's quota recommendations. However, several of these non-member nations and their scientific institutions have cooperated with the Commission's research activities into the tuna species.[186] This is at least an optimistic side of the

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[183] Id., at 426.

[184] Comment, Tuna Boat Dispute, supra note 162, at 118.

[185] Chapman, supra note 182, at 427.

[186] Id., at 426.

U.S.-Latin American fisheries dispute, as one commentator has noted that the fact that "an organization such as the IATTC provides a forum for fishery cooperation and participation, even among non-member nations, enhances the possibilities for reconciliation and resolution of conflicting viewpoints."[187]

The IATTC is at present the only multilateral treaty in force to which the United States and members of the Latin American nations are parties. There have, however, been a few bilateral treaties concluded between the U.S. and a South American country. On October 27, 1967, the U.S. and Mexico concluded an agreement by Exchange of Notes.[188] The Agreement provided essentially for reciprocal fishing by the nationals of each country in the exclusive fishing zones off the coasts of each other for a five year period beginning January 1, 1968,[189] and that the two governments will cooperate in a program of scientific research and conservation of the "stocks of shrimp and fish of common concern off the coast of Mexico."[190] The Agreement was of a limited scope, however, as both parties had extended

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[187]Messick, United States Participation in the Treaty Regulation of Fishery Conservation, International Fishery Law ___, [UNC-SG-74-03] (1974).

[188]Agreement between the United States of America and the United Mexican States on Traditional Fishing in the Exclusive Fishery Zones Contiguous to the Territorial Seas of Both Countries, October 27, 1967, T.I.A.S. No. 6359, 7 I.L.M. 312. [Hereinafter cited as U.S.-Mexican Treaty.]

[189]Id., Art. II. [190]Id., Art 14.

their exclusive fishing zones to 12 miles but due to a difference in the widths of the territorial sea claimed by the two countries (Mexico claiming 9 miles, the U.S. claiming 3 miles) "the agreement thus applied only to fishing in the waters between 9 and 12 miles off each other's coast."[191]

A further bilateral treaty, concerning shrimp also, was entered into by the United States and Brazil on May 9, 1972.[192] The Agreement established a shrimp conservation and regulation zone in which the U.S. is to license up to 325 fishing vessels per year in Brazilian waters (of which no more than 160 will be allowed to fish in the area at the same time),[193] the two governments will exchange information regarding the depletion of the shrimp so that proper conservation measures may be effected,[194] and the U.S. is to pay Brazil $200,000 per year for her share of the expenses in enforcing the Agreement.[195] The treaty does not solve the underlying dispute concerning the validity of Brazil's 200 mile territorial sea, and the Preamble to the Agreement specifically provides that each party reserves its position

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[191]Windley, International Practice Regarding Traditional Fishing Privileges of Foreign Fishermen in Zones of Extended Maritime Jurisdiction, 63 Am. J. Int'l. L. 490, 496 (1969). [Hereinafter cited as Windley.]

[192]Agreement Between the Government of the Federative Republic of Brazil and the Government of the United States of America Concerning Shrimp, May 9, 1972, 11 I.L.M. 453 (1972).

[193]Id., Annex II.

[194]Id., Art. III.

[195]Samet and Fuerst, supra note 156., at 89.

on the permissible width of the territorial sea and that the present Agreement is entered into as an interim solution for the conduct of the shrimp fisheries "without prejudice to either Party's juridical position concerning the extent of territorial seas or fisheries jurisdiction under international law."[196]

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[196] U.S.-Brazilian Shrimp Agreement, supra note 192 Preamble.

V. FOREIGN FISHING INVASION--CRISIS ON THE PACIFIC AND ATLANTIC COASTS

Aside from the longstanding dispute with the CEP nations concerning tuna fishing in the South Pacific, the United States has since the late 1950's been involved in a very serious fisheries conflict much closer to home. In fact, the U.S. is fighting a two front war to both conserve her traditional fisheries from disastrous depletion and to preserve for her fishermen a preferential position in these fisheries in the face of a massive influx, almost an invasion, of foreign fishing fleets into areas stretching along almost the entire Pacific and Atlantic coasts. These foreign fishermen have moved into fishing grounds, developed by American fishermen and long thought to be a private American domain, in such great number and in many instances utilizing such vastly superior equipment and techniques, that a fierce conflict has arisen in which many believe the future of the American fishing industry to be at stake.

The Soviet fishing fleet arrived in the Bering Sea in 1959 and began extensive bottom fishing operations.[197] From the Bering Sea their spread southward along the Pacific coast was almost inevitable. Russian research vessels arrived off the Gulf of Alaska in the early 1960's, survey

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[197] Shenker, Foreign Fishing in Pacific Northwest Coastal Waters, 46 Ore. L. Rev. 422, 425 (1966-67). [Hereinafter cited as Shenker.]

vessels appeared off the coasts of Oregon and Washington in 1964, and in early 1966 the Russian fishing fleet arrived in the Northwest Pacific.[198] Along with the Russians came the Japanese. The most alarming aspect of their appearance, however, was that they arrived not in small groups, but rather en masse. As one writer has reported, in April of 1966, a fishing fleet of more than 500 Russian and Japanese vessels swept the waters of the Gulf of Alaska and the Pacific Coast.[199] Not only was the number of foreign vessels astonishing, but they were large and extremely efficient. It was reported that they could stay at sea for months, had cruising ranges up to 17,000 miles, and were designed with safety regulations even more rigid than those imposed by western builders.[200]

The impact of such a tremendous number of foreign ships on the traditionally American fisheries was immediate and just short of catastrophic. A comparison of Russian and American development of the Pacific Ocean perch and hake fisheries is characteristic of the impact of foreign fishing.

> In 1965 the American fisheries catch of Pacific perch was nearly ten times that of the Russians, the American catch approximating 25 million pounds. By 1966, the Russian catch was doubling that of the United States, although the United States catch had increased by five million pounds. . . .[201]

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[198] Id., at 425.

[199] Oliver, Wet War--North Pacific, 8 San Diego L. Rev. 621 (1971). [Hereinafter cited as Oliver.]

[200] Shenker, supra note 197, at 425.

[201] Id., at 433.

The situation in the hake fishery was even more critical. "In May of 1966, the Russians first were observed moving into the hake fishery off the mouth of the Columbia River. The fleet systematically swept the Columbia River flats on several occasions, eventually building up to 108 vessels in the area."[202] The threat of depletion was readily apparent, as the Soviets stated they intended to net 220 million pounds of hake by the end of 1966, and the Bureau of Commercial Fisheries estimated that the area could only surrender 200 million pounds per year.[203] A statistical comparison of the Russian impact on the hake fishery is as dramatic as with the perch. In 1965 the American catch was three million pounds and the Russians had not yet entered the fishery.[204] "In 1966, however, although the American catch had quadrupled (including Puget Sound), the Russian catch was twenty times higher than the American."[205]

The Japanese, engaged primarily in the salmon, crab and herring fisheries, were also causing a great deal of consternation among Pacific fishermen. In 1965 the Regional Supervisor of the Alaska Department of Fish and Game estimated that some "228 Japanese and 650 Soviet vessels took approximately 2 billion pounds of fish from Alaskan waters,

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[202] Id., at 433.

[203] Oliver, supra note 199, at 621 n. 2.

[204] Shenker, supra note 197, at 433.

[205] Id., at 433.

which if true would far exceed the U.S. catch, which between 1959 and 1963 averaged less than 1 billion pounds off the Pacific Coast states."[206] The essence of the conflict between the United States and Japan, however, centers upon the Japanese taking of American spawned salmon. On May 9, 1952, the U.S., Canada and Japan signed the International Convention for the High Seas Fisheries of the North Pacific Ocean.[207] The most notable feature of this Convention was its introduction of the "abstention" principle, whereby Japan agreed not to fish for American spawned salmon east of a line in the Bering Sea located roughly at longitude 175° W as long as U.S. and Canadian fishermen were taking the "maximum sustainable yield" from those stocks. The problem arose when it was found that the salmon migrate beyond the 175° line and are thus still susceptible to being taken by the Japanese fishermen. There have been a number of excited responses to this new discovery, among them a proposal by the fishing industry to move the abstention line 10° further west,[208] a threatened national boycott by the Congress of American Fishermen of Japanese imports unless the Japanese agreed not to fish for U.S. salmon east or west

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[206]Nomura, Fisheries Jurisdiction Beyond the Territorial Sea--With Special Reference to the Policy of the United States, 44 Wash. L. Rev. 307, 314 (1968-69). [Hereinafter cited as Nomura.]

[207]T.I.A.S. No. 2786, 205 U.N.T.S. 80.

[208]Johnson, The Japan-United States Salmon Conflict, 43 Wash. L. Rev. 1, 11 (1967-68).

of the abstention line,[209] and a proposal by Alaska's Governor Egan to build a low dam across Bristol Bay to stop migration of these salmon to the sea if the Japanese persisted in their high seas salmon fishery.[210] Shortly after this it was reported that the American protests were heard less frequently and in a more subdued form as both sides apparently became resigned to a continuation of the status quo.[211]

The Atlantic coast has likewise been the subject of an intense foreign fishing effort. In 1960, the New England fishing fleet landed 93% of the total amount of fish caught on the New England continental shelf, whereas in 1965 the same fleet landed only 35% of the total fish caught while the Soviet Union landed more fish than all of the other nations fishing in that area combined.[212] The incidence of foreign fishing off U.S. coasts shows no inclination to slow down, as it was reported that in March 1973 the Soviet Union was deploying fishing vessels along the Atlantic coast with more than twice the capacity of those deployed in March 1972.[213] Because of this tremendous rate of growth of foreign fishing, the U.S. percentage of the catch from New

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[209] Id., at 11. [210] Id., at 12. [211] Id., at 13.

[212] Note, International Fisheries Regulation, 3 Ga. J. Int'l. & Comp. L. 387, 387-388 ns. 9-12 (1973). [Hereinafter cited as Int'l. Fisheries Regulation.]

[213] Remarks of Hon. Robert O. Tiernan, H.R. Cong. Rec. E4725, 93d Cong., 1st Session, July 12, 1973. [Hereinafter cited as Tiernan.]

England waters declined even further, and in 1969 the U.S. catch fell to just 25% of the area's harvest.[214] In fact, the problem of foreign fishing in this area is so acute that one Congressman was prompted to note that unless the U.S.,

> . . . takes positive action, the foreign boats fishing off the Northwest Atlantic coast will suck up every fish swimming there and then proceed to harvest the barnacles off the bottoms of our own fishing boats.[215]

The overall effect of foreign fishing in both Atlantic and Pacific waters on the U.S. fishing industry has been devastating. Since 1950, world fish production has multiplied from 20 million metric tons to about 63 million metric tons in 1969, during which time the U.S. share of the catch has remained at a relatively static 2-2.5 million tons. The result has been that the U.S., where before was second only to Japan in size of catch, now ranks sixth among fishing nations behind Peru, Japan, the U.S.S.R., Communist China, and Norway.[216] The economic effect of this drop in position has been that, with an increased American demand for fishing products, the U.S. in 1972 imported 66% of its fishing products for a balance of payment deficit in fishing products of one billion dollars.[217] From the mere statistics alone, it is apparent the American fishing industry is involved in a serious crisis and conflict with foreign

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[214] Cong. Rec. 10562 (daily ed. Dec. 4, 1973).

[215] Id., at 10562. [216] Id., at 10564.

[217] Tiernan, supra note 213, at E4725.

fishermen, which if not soon resolved, could herald the total demise of the U.S. fishing industry.

The U.S. has been far more successful in regulating its fishery differences in the waters off its own shores than it has with respect to the sub-tropical Pacific conflicts with the Latin Americans. The most effective resolution tool, and indeed almost the exclusive approach, has been the use of bilateral treaties. It is possible that treaties have been more successful in this area than with the Latin Americans because there is a "political" element lacking in the negotiations. This is so because both the United States and the countries it has successfully negotiated with, principally Japan and the Soviet Union, are "developed" nations and the parties have been able to negotiate from equal bargaining positions as they all possess relatively equal technological capabilities. Thus one element of suspicion and conflict, that of the "developing v. developed" interests that is present in U.S.-Latin negotiations, is eliminated. Whatever the reason for such success, there have been such a large number of agreements concluded in this area (the N.W. Pacific and Atlantic) that only a few of the more interesting and important treaties will be discussed.

In January of 1965 representatives of the Soviet Union and the United States met in Washington to discuss the continuation of the Soviet fishery for King Crab in the

eastern Bering Sea. Unlike the situation in the Franco-Brazilian lobster conflict, the parties were both able to agree that the crabs were qualified as a continental shelf resource. The United States disagreed that the Soviet king crab fishery qualified as a traditional fishery, but recognized that, "(1) an abrupt cessation of the Soviet king crab fishery would work an economic hardship upon the U.S.S.R., and (2) the king crabs were not being fully utilized by the U.S. fishermen."[218] In an agreement signed February 5, 1965,[219] the U.S. permitted the Soviets to continue their crab fishery for two more years, subject to,

> (1) a reduced catch, (2) reciporcal rights of boarding king crab fishing vessels, to observe enforcement of the agreement, (3) exchange of scientific data on the exploited stocks, (4) delimitation of an area where king crab could be fished by crab pots only (a gear used only by U.S. fishermen), and (5) no Soviet king crab fishing south of the Aleutian Islands.[220]

In 1967 this treaty was renegotiated with the principal difference being that the Soviet Union agreed to a reduction in its catch from "118,600 cases of 48 half-pound cans each" to 100,000 cases.[221] The agreement was again renegotiated

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[218]Windley, supra note 191, at 492.

[219]Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Relating to Fishing for King Crab, Feb. 5, 1965, T.I.A.S. No. 5752, 4 ILM 359 (1965).

[220]Windley, supra note 191, at 493.

[221]Agreement for Extending the Validity of the Agreement of February 5, 1965 Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Relating to Fishing for King Crab, Feb. 13, 1967, T.I.A.S. No. 6217.

in 1969,[222] with the U.S.S.R. accepting a further reduction in catch and agreeing to increase the area where only crab pots could be used.[223]

The U.S. and Japan met in 1964 with reference to the same king crab fishery, but Japan, because she was not a signatory to the Geneva Continental Shelf Convention, maintained that the king crab was a high seas fishery resource and thus not subject to the U.S. continental shelf jurisdiction.[224] The parties reserved their legal positions but did enter into an agreement with a series of subsequent amendments that were identical in terms to those entered into between the U.S. and Russia, differing only in the catch allotments to the parties.[225]

Following passage of the bill extending the U.S. exclusive fishing zone from 3 to 12 miles, Soviet and U.S. representatives again met to discuss Soviet fishing within the new area. The result was an agreement signed February 13, 1967[226] in which the parties agreed that, inter alia,

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[222]Agreement Amending and Extending the Agreement of February 5, 1965, As Amended and Extended, January 31, 1969, T.I.A.S. No. 6635.

[223]Windley, supra note 191, at 493.

[224]Id., at 493.

[225]See 4 I.L.M. 157, T.I.A.S. No 6155, T.I.A.S. No. 6601.

[226]Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Certain Fishery Problems in the Northeastern Part of the Pacific Ocean Off the Coast of the United States of America, February 13, 1967, T.I.A.S. No. 6359.

Russia could fish within the 12 mile zone for one year in certain designated areas, the U.S. would allow Soviet vessels to anchor and transfer catch within certain areas, the Soviet Union would reduce its catch in certain areas outside the 12-mile zone, and the parties would intensify research into exploited species.[227] A 1967 agreement[228] provides, inter alia, for a January 1 to April 1 moratorium on fishing of certain species, limitation to 1967 catch levels for certain species, prohibition on conduct of specialized fisheries for still other fish stocks, and permission for the U.S.S.R. to fish within the 9 mile contiguous fisheries zone during certain periods, all in the Atlantic Ocean. The Japanese likewise agreed to curtail certain of their fishing activities both within and outside the new contiguous fisheries zone.[229]

A large number of these treaties have been expanded, renewed, renegotiated, and many other entirely new ones concluded. In addition, treaties have been concluded with a number of other countries besides the Soviet Union and Japan. This brief treaty survey does serve to demonstrate,

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[227] Windley, supra note 191, at 494.

[228] Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on Certain Fishery Problems on the High Seas in the Western Areas of the Middle Atlantic Ocean, November 25, 1967, T.I.A.S. No. 6377.

[229] Agreement Between the United States of America and Japan Amending and Extending the Agreement of May 9, 1967, Concerning Fisheries Off the United States, December 23, 1968, T.I.A.S. No. 6600.

however, that the U.S. has established a much more effective and profitable dialogue with the countries whose fishermen compete with those of the U.S. in the Atlantic and Pacific coastal waters of the U.S. However, the simple fact remains that the massive and ever-increasing number of foreign fishermen outside the 12-mile U.S. contiguous fishery zone greatly endanger the continued productivity of many traditional American fishing grounds. As there presently exists no international regulatory and conservation body with power to effect proper management and conservation of these fisheries, the alarmed American fisherman and his congressman have begun a campaign to save the fish from total depletion in the only manner that now appears to be available, another extension of exclusive fisheries jurisdiction.

VI. DOMESTIC LEGISLATION--UNILATERAL EXTENSION OF FISHERIES JURISDICTION AS A MEANS OF CONFLICT RESOLUTION

One of the means of conflict resolution most frequently resorted to has been domestic legislation in one form or another, most frequently as a unilateral extension of territorial waters or exclusive fisheries zones, designed to protect the local fishing industry from foreign competition. Speaking specifically with reference to unilateral extension, the emphasis should quite properly be placed upon the word "unilateral," as this method necessarily implies a one-sided attempt to end the conflict. Of course, the efficacy of domestic legislation and unilateral extension in ending a dispute depend upon a nation's willingness to enforce the legislation and the willingness of other countries to acquiesce to the rights asserted by the unilateral extension. If enforced, these measures can be extremely effective in bringing about a de facto solution to the problem, as one way to end a dispute over rights to fish in a certain area is to exclude the competing parties from the disputed fishing grounds. A large number of nations have resorted to this means of resolution, but for the purposes of this paper the focus will be upon the United States, which has long sought to restrict jurisdictional zones in the sea to narrow limits. Now, beset by increasing

numbers of foreign fishermen operating in waters once considered as belonging to America and a growing vocal unrest among its fishing industry, the U.S. finds itself under mounting pressure to extend its jurisdiction in offshore waters to 200 miles.

Briefly, the United States Congress has passed or has considered passing a number of bills of an economic nature intended to alleviate some of the aspect of the fishing conflicts in which it is involved. Perhaps the most important of these, from the viewpoint of the American fisherman, is the Fisherman's Protective Act of 1954.[230] This Act was one of the first responses of the United States to the seizure of U.S. tuna boats by the CEP nations within their proclaimed 200 mile territorial sea. The Act provides for action by the U.S. Secretary of State,

> In any case where--
> (a) a vessel of the United States is seized by a foreign country on the basis of rights or claims in territorial waters or the high seas which are not recognized by the United States; and
> (b) there is no dispute of material facts with respect to the location or activity of such vessel at the time of such seizure,
> the Secretary of State shall as soon as practicable take such action as he deems appropriate to attend to the welfare of such vessel and its crew while it is held by such country and to secure the release of such vessel and crew.[231]

In addition, the act provides that the owner of the vessel will be reimbursed for any fine, license fee, registration

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[230] 22 U.S.C. §§1971-76 (1954).

[231] Id., at §1972.

fee, or direct charge paid in order to secure the release of the vessel and its crew.[232] Furthermore, a 1968 Amendment to this Act attaches a sanction to the Secretary of State's authority to collect on claims against a foreign country for amounts expended by the U.S. under this Chapter. If the claim filed with the seizing country is not paid within 120 days, the State Department is authorized to consider deducting the amount of fines and damages from funds programmed for that country under the United States Foreign Assistance Act.[233] The latest amendment to the Act contains an even stronger form of economic pressure to resolve the conflict. Section 1978 provides that when the Secretary of Commerce determines that "nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program," and so notifies the President, the President in turn may direct the Secretary of the Treasury to prohibit the importation of fish products from the offending country for as long as he determines appropriate.[234]

The United States has already extended its fisheries jurisdiction once, establishing a 9 mile exclusive fishing zone in 1966 contiguous to the three mile territorial

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[232] Id., at §1973.

[233] Comment, Tuna Boat Dispute, supra note 162, at 121.

[234] 22 U.S.C. §1978 (1968).

sea.[235] This piece of federal legislation was a direct response to the sudden and massive appearance of the Russian fishing fleet off the Pacific coast, an event that evoked intense emotion and a strong lobby in favor of the enactment of such a bill. Commenting on the events surrounding the bill's passage, one author noted that,

> The major buildup of the Russian fleet off the Pacific states took place in April of an election year, 1966. In several states candidates made the Russian presence a campaign issue. As often happens during the heat of a campaign, the candidates contributed as much to the excitement of passions as to the enlightenment of the mind. Rules of international law were often misunderstood or distorted. Statistics on the size of the Russian fleet, the amounts and species of fish being taken, the violation of territorial waters, and the depletion of fish stocks ranged from vague to ridiculous. On the other hand, the volume of research undertaken by some members of Congressional fisheries committees was substantial.[236]

The bill thus passed provided in principal that,

> There is established a fisheries zone contiguous to the territorial sea of the United States. The United States will exercise the same exclusive rights in respect to fisheries in the zone as it has in its territorial sea, subject to the continuation of traditional fishing by foreign states within this zone as may be recognized by the United States.[237]

The bill further provided that the inner limit of this new zone was to be comprised of the outer limit of the three-mile territorial sea and that the outer boundary would be a

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[235] 16 U.S.C. §§1091-94 (1966).

[236] Swygard, Politics of the North Pacific Fisheries --With Special Reference to the Twelve-Mile Bill, 43 Wash. L. Rev. 269, 278 (1967-68).

[237] 16 U.S.C. §1091 (1966).

uniform line nine nautical miles from the nearest point of the inner boundary.[238] Passage of the contiguous fisheries zone bill was not without opposition, however, as the U.S. distant water fishing industry (principally shrimp and tuna fishermen) protested the extension primarily because of the fear that it would inspire reciprocal and retaliatory measures by other coastal nations.[239]

It has been reported that the twelve-mile bill has so far been beneficial for American fisheries, particularly those in the Pacific Northwest and Alaska.[240] Apparently the law has been quite effectively used as a leverage tool in bargaining and has thus resulted in the negotiation of a number of bilateral accords with other countries, particularly Russia and Japan. One writer has noted that

> By granting a few concessions to the Japanese and Russians in the nine-mile zone, allowing their fishermen to catch species of fish not fully utilized by United States fishermen, the United States has gained many important concessions from these nations on the high seas.[241]

The U.S. has also been quick to enforce the provisions of the law and to levy fines on all those caught violating the 12-mile zone. In the five year period ending on January 31, 1972, the U.S. seized approximately 30 foreign fishing vessels, 21 of which were violating the contiguous fishing zone and 9 of which were found within the three-mile

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[238] Id., §1092.

[239] Nomura, supra note 206, at 317 n. 49.

[240] Id., at 324.

[241] Id., at 324.

territorial sea, and levied monetary penalties in a total amount in excess of $783,500.[242] Nationalities of the vessels seized included Russian, Japanese, Canadian, West German and Cuban, the majority of the vessels being seized in Alaskan waters.[243] The bill, however, does not solve the real problem of effecting fishery conservation and preventing depletion of the stocks, as it has no regulatory control over the hundreds of foreign fishermen that systematically sweep the oceans just beyond the twelve-mile limit. Because the fish can be so easily exploited outside the zone where there is presently no real conservation effort, the U.S. is under growing pressure to extend the exclusive fisheries zone to 200 miles to protect and preserve valuable fish stocks from indiscriminate and unregulated foreign fishing.

On July 12, 1973, Representative Tiernan rose to report that "Foreign ships are depleting traditional American fishing grounds off our coasts, and if this competition remains unchecked, the American fishing industry is doomed."[244] Against a background of similar warnings, the U.S. Congress has been transformed by a fury of legislative agitation aimed at protecting American fishermen from foreign competition as well as the more altruistic motives of

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[242] Information supplied by the U.S. Coast Guard, October, 1973.

[243] Id.

[244] Tiernan, supra note 213, at 4725.

saving certain species from total destruction. The numerous bills now pending before the Houses of Congress range from mere expressions of support of the U.S. fishing industry to the extension of U.S. exclusive fishery jurisdiction to 200 miles or further.

Two identical measures, one in the Senate and one in the House of Representatives, note the plight of the American fisherman and affirm a Congressional intent to aid the industry. Reciting inter alia the U.S. fall in position to seventh place among major fishing nations, the obsolescence and inefficiency of much of the domestic fishing fleet, the intensive foreign fishing along U.S. coasts, the failure of international negotiations and the decimation of certain coastal fish stocks, the Resolutions call for establishment of a Congressional policy to afford the fishing industry,

> . . . all support necessary to have it strengthened, and all steps be taken to provide adequate protection for our coastal fisheries against excessive foreign fishing, and further that Congress is fully prepared to act immediately to provide interim measures to conserve overfished stocks and to protect our domestic fishing industry.[245]

House Resolution number 11809,[246] if passed, would provide relief of a more concrete nature to the American fishermen. This bill calls for the adoption of a straight baseline method for purposes of delineating boundaries of territorial seas and fishing zones. If the straight base-

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[245] H.R. Con. Res. 251, S. Con. Res. 11, 93d Cong., 1st Sess. (1973).

[246] H.R. Res. 11809, 93d Cong., 1st Sess. (1973). This proposed legislation was still pending as of April 18, 1974.

line method were adopted the result would be to "extend our fisheries zone overall anywhere from 2 to 10 percent."[247] In an accompanying report to the bill, it was noted that,

> The effect would be greatest in areas where there are deep indentations which are not considered by the United States under its current interpretation as bays. For example, Cook Inlet and several of the large basins on the Alaskan west coast could be inclosed by straight baselines, but are not now deemed to be bays. Also, by connecting a series of islands off the coast of Massachusetts by use of the method of straight baselines, areas considered as beyond the fishing zone as now constituted (using the low-waterline baseline method) would become part of such zone.[248]

The likely effect of the bill would also be to help those fishermen in areas the hardest hit by increased foreign fishing by providing the greatest increase in zone size--off the coasts of the Northwest and Mid-Atlantic States and Alaska.[249] Passage of the Bill does face certain problems, however, as because of its overtones of international law questions the State Department is apparently opposed to the bill. In responding to an assertion of State Department opposition, one of the bill's proponents, Mr. Dingell of Michigan, replied that, "The State Department, as the gentleman will recall, seems to spend a great deal of time representing other governments and very little time representing our own people."[250] Whether the foregoing measure

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[247] Cong. Rec. 104 (daily ed. Jan. 22, 1974).

[248] H.R. Rep. No. 93-755, 93d Cong., 2d Sess. 6 (1974).

[249] Cong. Rec. 106 (daily ed. Jan. 22, 1974).

[250] Id., at 105.

receives legislative approval or not will depend in large part upon how serious the State Department's objections appear to be as opposed to how strongly sentiment favors protection of the American fisherman. It is certain, however, that any bill proposing a more substantial extension of fishery jurisdiction would meet with more strenuous State Department objections.

In addition to the foregoing resolutions, there are a number of other fishery related measures pending Congressional action. One such bill is aimed at including the American lobster in the classification of sedentary species subject to the United States continental shelf fisheries resource jurisdiction.[251] The bill is intended to avoid the argument over whether the lobster does or does not use its "swimming appendages" to actually swim by classifying the lobster as sedentary by legislative fiat, and thus hopefully alleviating the dangerous plight of the North American lobster. In recent years, the lobster has been placed in serious jeopardy of decimation by the large number of foreign fishermen who have taken up to 16 to 22 million pounds of lobster per year in "incidental" catches, when the total fishery is believed capable of supporting only a maximum sustainable yield of 25 million pounds per year.[252] The most interesting bills introduced into

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[251] H.R. Res. No. 6074, 93d Cong., 1st Sess. (1973).

[252] Cong. Rec. 10562 (daily ed. Dec. 4, 1973).

Congress concern the extension of U.S. jurisdiction to 200 miles in one form or the other. In fact, the 93rd Congress has been deluged with such bills. At present, the House of Representatives has before it at least eight almost identical bills which call for an extension of the U.S. contiguous fisheries zone from 9 to 197 miles, making a two hundred mile jurisdictional zone when the territorial sea is added.[253] Each of these bills calls for an outright extension to two hundred miles, as opposed to House of Representatives Resolution 11032 which calls for the same extension but calls it an "interim basis" extension until "general agreement is reached in international negotiations on law of the sea with respect to the size of such zones and authority over such fish, and until an effective international regulatory regime comes into full force and effect."[254] Yet another bill calls for an extension of the contiguous zone out to 200 miles or the outer limit of the continental shelf, whichever is greater.[255] At the time of this writing, there had been no action taken upon any of these bills and they had all been referred to the Committee on Merchant Marine and Fisheries.

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[253] H.R. Res. No. 722, 3968, 4247, 4643, 4815, 5527, 7789, 9705, 93d Cong., 1st Sess. (1973).

[254] H.R. Res. No. 11032, 93d Cong., 1st Sess. (1973).

[255] H.R. Res. No. 10898, 93d Cong., 1st Sess. (1973).

CONCLUSION

Because of the complex number of factors and competing interests involved in fishery resource conflicts, there is probably no single form of resolution that can satisfactorily accommodate the variety of concerned interests. Unlike many other international disputes, in the area of sea law there are now relatively few settled legal principles which can be applied to the problems. With the perception of the oceans by the nations of the world as a valuable source of nutrition for their burgeoning populations, with the realization through more advanced and precise scientific knowledge of the fisheries that these living resources are not, as had been previously believed, inexhaustible, with the growing questions as to ownership and other proprietary rights in the sea, the centuries old law of the sea has become inadequate to answer the questions and regulate the disputes. As one author has stated,

> It must be remembered that the problem presented by the regulation of international fisheries is not one which will be resolved solely by the application of legal principles. . . . On the international level, however, there must exist a responsibility to work toward the establishment of new systems of regulation and conservation which are efficient, equitable and acceptable to other nations involved.[256]

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[256] Int'l. Fisheries Regulation, supra note 212, at 392.

While it is certainly hoped that the forthcoming Caracas Law of the Sea Conference will be able to agree upon a new set of legal standards, what is more imperative is that the fishing nations begin to realize that there is more involved in the international fisheries than profit. A spirit of cooperation and compromise, plus a reciprocal willingness in certain instances to give up concepts of national jurisdiction for the international good, would go further towards resolving the conflicts than new legal principles. In one sense, the world's future may depend upon a speedy rejection of competition and an adoption of Dr. Pardo's fish "farming" standards.

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