UNIVERSITY OF NORTH CAROLINA SEA GRANT PROGRAM

North Carolina Fishery Law:

Its Relationship to International, Federal and Sister State Law

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NORTH CAROLINA FISHERY LAW:

ITS RELATIONSHIP TO INTERNATIONAL,

FEDERAL AND SISTER STATE LAW

by
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FOREWARD

This publication is the sixteenth produced by the Law of the Sea North Carolina Sea Grant research project at the School of Law of the University of North Carolina, and is the sixth in 1975. The author, William P. Andrews, Jr., plans to engage in the practice of law in North Carolina. He has previously authored an article entitled, "Manganese Nodules and International Law", which appeared in Sea Grant publication, UNC-SG-74-02, "Emerging Ocean Oil and Mining Law".

Andrews here brings together the diverse laws which impinge upon fishing operations in the Atlantic Ocean adjacent to coastal North Carolina. The international component of these regulations comes from the provisions of the various Law of the Sea Conventions and Fishing Treaties to which the United States is a party. The national, or federal, segment derives from acts of Congress which are progressively exerting more control over coastal waters and coastal zone areas of the maritime states. The importance of this federal component of control is underscored by the 1975 United States Supreme Court decision in United States v. Maine, reaffirming the rule that the territorial sea belonging to coastal states extends only three miles from the shore line. The third source of law, naturally, is the legislation of North Carolina itself regarding salt water fishing activities, and the regulations issued thereunder. Interacting legal sources at this level also derive from the fishing laws of the adjoining states of Virginia and South Carolina and from legislative efforts to coordinate these state requirements. This complex of law is here lucidly stated, examined and evaluated so that it is readily available for laymen and lawyers alike. The whole area is one of rapid development. Significant legal changes in the near futute must be reasonably anticipated.

Again, thanks are due to Dean Robert G. Byrd of the School of Law of the University of North Carolina, Dr. B. J. Copeland, Director, and Dr. William Rickard, Assistant Director, of the North Carolina Sea Grant Program for their support of this and other Law of the Sea research conducted under the supervision of the undersigned.

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NORTH CAROLINA FISHERY LAW

ITS RELATIONSHIP TO INTERNATIONAL,

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I. INTRODUCTION

The world production of marine fish has increased from fifteen million tons in 1938 to twnety seven million tons in 1958. By 1970 it had doubled again and reached sixty two million tons. "Such a rate of increase exceeds that of any other basic food commodity."[1] The United States is fortunate in being one of the richest nations in the world in this resource. Estimates put the potential annual yield of marine fish off the United States coast at 40.7 billion pounds, which is over eight times the present United States catch.[2] The United States fishing industry, however, is in trouble. For numerous reasons[3], the annual catch of the United States had declined over the past twenty years. This decline, coupled with the increased foreign fishing effort, "manifests the da[illegible] of an inefficient and discordant national fishing effort."[4]

> "The volume of fish harvested off the U. S. coast has increased dramatically in 25 years from a level of about 4.4 billion pounds . . . in 1948 to about 11.1 billion pounds in 1972. Almost all this additional catch has gone to foreign fishermen in their worldwide search for further protein supplies. The growth in U. S. consumption has therefore been supplied by imports. This multiplying fishing pressure and the lack of effective management has resulted in overfishing of several important species."[5]

North Carolina is caught in the middle of the crisis. The State ranks fifth among the southeastern states in overall commercial fishing and third in the nation in blue crab production. One-hundred thirty-one million pounds of seafood were harvested by North Carolina

fishermen in 1973 for a value to the fishermen of about sixteen million dollars.[6]

Under the present system of fisheries management, authority to regulate lies with the states, but often their policies, interests and authorities differ, resulting many times in conflicting and inefficient regulations. As one commentator has said, "it is a fact that fish, in their movements take no heed of artificial lines drawn by man for purposes of jurisdiction over part of the ocean and their resources."[7] Through the use of common sense it seems that we could see the logic of making these "artificial lines" as meaningless as possible with respect to their effect on our fishery resources, so that they may be efficiently monitored and regulated. This can be done through a unified national (preferably international) program.

It is my purpose in this study to deliniate as clearly as possible where these "artificial lines" are presently located, how they got there, and what effect, if any, they have on North Carolina fishing, or North Carolina legislation has on them. The paper will include international, federal and state jurisdictional boundaries and fishery law.

II. JURISDICTIONAL BOUNDARIES

In order to properly study the relationship of federal and sister state fishery law to North Carolina, it is necessary first to review the jurisdictional setting in which these laws operate. Jurisdiction over the oceans has been a problem area among the nations of the world for hundreds of years. It is important therefore to review international

as well as federal law when discussing the jurisdictional boundaries of the fishery laws of a particular state.

A. International Law

> ". . .The delimitation of the sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessarily a unilateral act, because only the coastal state is competent to undertake it, the validity of the delimitation with regard to other states depends upon International law."[8]

All nations presently claim to exercise sovereignty over an ocean area directly adjacent to their coastal territoty. This area, generally known as the "territorial sea"[9], is bounded by the coastland of the state and by the high seas. Distinguished from national or interior waters[10], the territorial sea is an area over which nations can claim certain rights such as the right of innocent passage, but which nonetheless is exclusively in the jurisdictional control of the contiguous state.[11]

1) Historically

Codified laws as early as the Justinian code, promulgated in 529 A.D.[12], lay down rules concerning the legal status of the oceans and the fish found within them It was not until the Middle Ages, however, that littoral states began claiming sovereignty over the waters adjacent to their land territory. Beginning in 1529 Venice demanded fees from all vessels sailing in the Adriatic.[13] This move precipitated what was to become by the seventeenth century the policy of "mare clausum" (closed sea), a policy which was predicated on a nation having enough military might to enforce its claim over an area of the oceans.[14]

By the eighteenth century the world position regarding "mare clausum" had completely changed and there was movement in the direction of freedom of navigation and fishing. This principle of freedom of the seas had been asserted as early as 1587 by the Russian czars.[15] A few years later Elizabeth I of England affirmed the same pinciple in answer to a Spanish protest arising from the expedition of Drake.[16] It was not until 1605, however, that the principle of freedom of the high seas began its ascent into International law, propelled by its most influential advocate.[17] That was the year the brillant Dutch Jurist Hugo Grotius wrote De Iure Praedae[18], a treatise which expounded upon the principle in order to justify the seizure by the Dutch East India Company of a Portuguese galleon.[19] He stated:

> "The sea is included among those things which are not articles of commerce, that is to say, the things that cannot become part of anyone's private domain. Hence it follows - in the opinion of the more erudite authorities, and in the correct and strict sense - that no part of the sea may be regarded as pertaining to the domain of any given nation."[20]

As Grotius understood freedom of the seas, it was total freedom for all, with no buffer zone between the edge of the adjoining land mass and the open seas.[21] As it developed however, a distinction was made between high seas, over which the freedom of the seas concept was enforced, and territorial seas of varying widths which were ocean areas adjacent to land. Through the use of the concept of freedom of the seas, states gradually abandoned their bombastic claims over vast expanses of the oceans in favor of the more modest and realistic concept of territorial seas. The width of these territorial seas was to become the next major issue which needed resolving.[22]

What evolved as the yardstick for measuring territorial seas was the famous cannon-shot rule.[23] This practical rule made its debut for the purpose of establishing an easily recognizable zone that was equally easily protected. It assured the littoral state of jurisdiction over the ocean area most vital to its defense without unduly extending that area[24]; thus the neutrality of the area would theoretically be assured.[25] The rule was by no means a concept of a uniform belt around a state, rather the rule rested on the range of the actual guns located along the coastlines of the sovereign nations.[26] This nonuniformity was one of the main criticisms of the rule. By the late eighteen hundreds this hurdle was overcome and the three mile limit had become the accepted standard for territorial seas.

The Swedes were the first to experiment with the three mile limit in 1758.[27] In 1782 the Italian economist and diplomat Abbe Ferdinando Galiani proposed three miles or one marine league as the "utmost range" of a cannon and therefore a useful measurement for a territorial sea.[28] France has already equated the cannon-shot to three miles and had used the territorial seas argument as a justification for the seizure of British ships as early as 1761. The diplomatic birth of the three mile limit however occurred on November 8, 1793 when Secretary of State Thomas Jefferson responded to a note from French Minister Edmond Charles Genet regarding the outside limit of United States territorial protection:

> "Reserving, however, the ultimate extent of this for future deliberation, the President gives instructions to the officers acting under his authority to consider those heretofore given them as restrained for the present to the distance of one sea league or three geographic miles from the seashores."[30]

Seven months after the Jefferson notes were delivered, the three mile limit, through Congressional enactment, became the law of the land.[31] During the period of the Napoleonic Wars the English and American prize courts translated the cannon-shot rule into the three mile rule.[32]

The commercial and naval power of France, Britain and the United States in the nineteenth century dictated support for the principle of freedom of the high seas and for the adoption of the three mile territorial seas boundary.[33] These rules prevailed virtually unopposed until after World War I. After the war, many independent nations rose out of the conquered Russian, Ottoman, Austro-Hungarian and German empires. Many of these fiercely independent young states wished to assert their non-conformance with the traditional system. Prior to this period the making of international law had been left up to the powerful nations, but a new era of international democracy was in the offing. To illustrate how rapidly this new attitude grew after World War I, at the Hague Codification Conference of 1930[34], Czechoslovakia, a new, non-maritime, landlocked state was given an equal voice in an attempt to codify the international law of the territorial seas. As a result of this new attitude, the Hague Conference opened up the previously well settled issue of the width of the territorial seas.[35]

2) 1950-1970

Slowly for the next twenty years, the three mile limit began losing favor and began being overrun for various purposes.[36] Then, in 1951 the Anglo-Norwegian Fisheries Case was decided by the

International Court of Justice.[37] In that important case the Court upheld a four mile extended Norwegian fishing zone and overruled the internationally recognized three mile limit. With this sanction from an international tribunal, the already weakened three mile limit was dealt its death blow and all types of contiguous zones for all types of purposes began emerging.[38] The exclusive fishing rights of coastal states off their own shores and freedom of fishing on the high seas were still the basic principles on which international fishery law rested, however many states began divorcing the width of their territorial sea from the width of the area in which they claimed exclusive fishing rights.[39]

Until recently the sea area over which coastal states had exclusive jurisdiction for fishing purposes was in most cases co-extensive with the territorial sea.[40] As we have seen, that width was for centuries universally recognized as being three nautical miles. By 1958, however, there was total disagreement. The breadth of the territorial sea was considered that year by the first United Nations Conference on the Law of the Sea, held at Geneva.[41] Although the Conference adopted a Convention on the Territorial Sea and the Contiguous Zone, including rules regarding the base lines from which territorial seas are to be measured[42], the width itself could not be agreed upon. Another Convention adopted by the Conference was High Seas: Fishing; Conservation of the Living Resources.[43] One of the intense controversies which developed in committee regarding that particular Convention was the drive for additional jurisdiction by "coastal states" which agreed that only through extensive grants of jurisdiction could

conservation be assured.[44] They were not successful however, and Article 1 paragraph 1 of the Convention reaffirmed traditional freedom to fish.[45]

A second Geneva conference was held in 1960.[46] There was no agreement at this conference either, although a joint proposal by Canada and the United States which allowed coastal states to claim as territorial sea an area six miles wide and as an exclusive fishing zone an area immediately beyond the territorial sea extending up to twelve miles from the coast, failed to gain the two-thirds majority vote required by only one vote.[47]

The decade following the second inconclusive Geneva Conference was replete with bilateral and multilateral agreements and unilateral legislative actions which have changed substantially the jurisdictional picture.[48] As regarding fishing rights specifically, by 1972 a majority of coastal states claimed twelve miles as the extent of their exclusive jurisdiction over fisheries.[49] States have either claimed a territorial sea of twelve miles[50] or have established fishing zones beyond the territorial sea which extend to a distance of twelve miles measured from the coast.[51] Claims over wider areas, either as territorial sea or as exclusive fishing zones are no longer uncommon.[52]

The reasons behind these unilateral moves are not difficult to comprehend. Nations are afraid that their fishery resources will be exhausted. Francis Christy, member of the Board of Directors of the law of the Seas Institute, has said:

"The history of free and open access has been very damaging for fisheries. Where there is no security of tenure and no ability to control the amount of capital and labor that is invested, there is no incentive on the part of individual fishermen to restrain their efforts in the interest of future returns. They cannot afford to do so, for anything they leave in the sea for tomorrowwill be taken by others today. Thus, as long as the demand remains and there are no controls on catch or on fishing, the stock willbecome depleted. The number of such casualties is long and increasing."[53]

3) Caracas Conference

As early as 1967, the United Nation's General Assembly began consideration of the "sea-bed" question.[54] Soon, a United Nations Seabed Committee was formed which began laying the groundwork for an international conference on the law of the sea.[55] Resolution 2750 C (XXV) (1970) by which the General Assembly of the U. N. decided in December, 1970 to convene a Third United Nations Conference on the Law of the Sea, specifically included "fishing and conservation of the living resources of the high seas (including the question of the preferential rights of coastal states)" among the issues to be dealt with at the conference.[56]

The Conference, which was held June 20th through August 29th, 1974 in Caracas, Venezuela, had four main goals: First, to put a uniform worldwide limit on how far out at sea a coastal state can claim sovereign authority. Second, to create an intermediate zone where a coastal state retains power to regulate the resources, but where other states have rights to navigate and a limited right of exploitation. Third, to impose international law over the deep sea beyond national jurisdiction, especially for the regulation of mineral resources. And fourth, to establish an international authority for the regulation and control of pollution and the encouragement of scientific research.

With regard to the fishery question, species of marine resources which extend beyond twelve miles from coastal baselines are in waters that under present law should be for the use of all nations. Thus, both national and international arrangements are an important aspect of fishery conservation and management plans. The plans for fishery management presented at the Law of the Sea Conference in Caracas can be divided into five main categories.[57]

The first category, represented by the position taken by the Netherlands, calls for a continuation of the existing framework of International Law in the area of fisheries management.[58] Under this approach countries would continue to rely on international mechanisms for the regulation of fisheries except within their three mile territorial sea or an adjacent contiguous fishery zone (up to twelve miles from coastal baselines). Excepted are also sedentary resources qualifying as Continental Shelf resources under the Convention on the Continental Shelf of 1958. There would be continued requirement of international fishery management organizations and bilateral agreements.

The second approach is the "species approach" advanced by the United States[59], which takes into account "the essential differences and characteristics of individual fishery resources which determine the type of managment systems best suited to them, respectively."[60] This position allows the coastal state to regulate and have preferential rights to all coastal living resources off its coast beyond the territorial seas to the limits of their migratory range. Also, the coastal state in whose fresh or estuarine waters anadromous

species spawn would have authority to regulate and have preferential rights to such resources beyond their territorial sea. Under this system highly migratory oceanic resources such as tuna would be regulated by appropriate international fishery organizations.

In applying regulations, the coastal state or appropriate international organizations would set an allowable catch based on the maximum sustainable yield, taking into account environmental and economic factors. For coastal and anadromous species, the coastal state may reserve for its flag vessels the portion of the allowable annual catch it can harvest. With regard to these species, the coastal state is free to implement unilaterally (subject to the constraint of compliance with the international standards and dispute settlement decisions) management measures such as regulations pertaining to areas, seasons, types of gear, etc. Coastal states would be allowed to charge reasonable fees for the right to harvest their coastal and anadromous fish. Also, they would have a right to board, inspect, and arrest foreign fishing vessels for violation of coastal state regulations.

Disputes arising under this approach would be subject to settlement by a commission of independent experts appointed from states not included in the dispute, whose decisions would be binding.

Very similar to the "species approach" is the third category, the non-exclusive two-hundred mile economic resource zone.[61] Under this plan the coastal state would exercise control over all species of fish within a two-hundred mile area. An alternative

proposal here includes an international management regime for highly migratory stocks. Coastal authority, under this apporach, would be subject to international standards and compulsory dispute settlement procedures to insure observance of the non-exclusive character of the regime.

The fourth category eliminates the application of international standards to coastal state actions regarding management and allocations of fishery resources in the two-hundred mile coastal area.[62] This exclusive two-hundred mile economic resource zone would allow coastal states to exercise complete control over management and allocation of fisheries resources in the zone without international guidelines.[63]

The fifth category is much less comprehensive than the other four, and directs itself only to highly migratory species. Under this approach, there would be an international organization or mechanism which would regulate allowable catches and national allocations of these species such as whales and tuna.[64]

Although the conference met for ten weeks, the only firm decision made was to hold more conferences. In the final plenary session of the Caracas meeting, Hamilton Amerasinghe of Sri Lanca, conference president, stated: "Most of the issues or most of the key issues have been identified and exhaustively discussed. . . The stage of discussion in the form of general statements and set speeches must be recognized as definitely over. The time has come for active serious and earnest negotiation."[65] The

timetable set up for these less general discussions calls for regional and bilateral meetings to work on issues prior to a Geneva session, which began March 17th 1975.

Although the Caracas Conference was not as successful as most felt it would be[66], there were some areas which showed promise. As for the territorial sea, there seems to be an unwritten consensus that it should be twelve miles wide.[67] Another indication of progress is the compromise move by the United States and the Soviet Union to back a proposal that would create a two-hundred mile "economic zone" off the shores of coastal countries.[68]

4) Geneva Conference of 1975

The 1975 Geneva Conference is the third and most crucial session of the Third U. N. Conference on the Law of the Sea. The official positions of the delegates is one of optimism, but when looked at objectively it is very difficult to see any well founded basis for this optimism. It is difficult to see how the deep-seated conflicts of interests between coastal states and landlocked states, advanced states and developing states, maritime states and non-maritime states, states with rich seabed minerals and states without, can be resolved. To complicate matters even worse, the delegations representing each nation are themselves split between oil interests who want freedom to drill and oil transporters who want freedom to navigate, and fishing interests who want coastal waters protected and distant fishing fleets who do not. There is one real incentive to find a workable treaty,

however, and that is the parade of horribles which may come to pass if there is no agreement. Harvard Professor Louis B. Sohn sees nonagreement as leading "to a division of the oceans among a few major powers along the lines of the division of Africa in the 19th Century; and such neocolonialist competition might easily degenerate into a new era of imperialists wars."[69]

Whatever happens in the event that there is no agreement in Geneva, it is certain that there would be an upswing in unilateral action which would seriously complicate any future negotiations. Although neither in 1958 nor in 1960 were nations able to agree on issues such as the breadth of the territorial sea, the extent of fisheries jurisdiction, or the outer limits of the coastal states' exclusive rights over continental shelf resources, let us hope that by 1975 the nations of the world have realized the value of cooperation in order to solve the acute problems existent today with relation to the oceans.[70]

B. National Law

1) Federal Jurisdiction

Traditionally in the United States, the states have had the duty and obligation of regulating fishing in territorial waters.[71] This jurisdictional exercise has been subject to the understanding that the federal Congress can divest the states of this duty wherever it deems it necessary.[72] The federal government has, in the past thirty years, become increasingly active with respect to coastal fisheries. In 1945 the Truman Proclamation extended federal support for "conservation zones in the areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been

or in the future may be developed and maintained on a substantial scale."[73] The Territorial Waters Act of 1964 made it "unlawful for any vessel, except a vessel of the United States . . . to engage in the fisheries within the territorial waters of the United States..."[74] This Act included exceptions for vessels fishing under an international agreement to which the United States is a party and for foreign vessels authorized by the Secretary of the Treasury to engage in fishing of designated species within the territorial waters of the United States.[75]

The most consequential exercise of federal jurisdiction in the area of fisheries has been the Exclusive Fisheries Zone Act of 1966.[76] This act established a fisheries zone contiguous to the territorial sea of the United States where all jurisdiction is federal.[77] In this zone, "the United States will exercise the same exclusive rights in respect to fisheries . . . as it has in its territorial sea, subject to the continuation of tradition fishing by foreign states within this zone as may be recognized by the United States."[78] Although the federal government has not attempted to regulate domestic fishing practices in this nine mile contiguous zone, there is no doubt that it possesses the power and authority to do so.

With regard to the area of the ocean beyond twelve miles from the coastal baselines, there is a strong possibility of federal regulation there as well. As we have already reviewed, international law is almost nonexistent today in the area of ocean jurisdiction and that uncertainty which exists with regard to jurisdiction generally is carried over to the area of fisheries and jurisdiction

over fish. To fill this void, and to protect United States fishing interests, Congress has been seriously considering the possibility of unilateral action through extension of the contiguous fishery zone.[79] During the 1st Session of the 93rd Congreee, Senate Bill 1988[80]passed the Senate but was blocked in the House fisheries subcommittee[81] without a hearing because of the expected progress at the Third United Nations Conference on the Law of the Sea in Caracas.[82] Although nothing was resolved at Caracas[83], the bill is not expected to make any progress in 1975 until after May 10th, when the third session of the Conference on the Law of the Sea being held in Geneva should end. [84] S. 1988 extends on an interim basis the jurisdiction of the United States over certain ocean areas contiguous to its territorial sea out to "one hundred and ninety-seven miles from the nearest point in the inner boundary"[85]. It also extends United States jurisdiction "to its anadromous fish wherever they may range in the oceans" except where they pass through territorial waters or fishery zone of another country."[86] Whether the bill will pass the House or not probably depends in large part on the progress made by the delegations in Geneva.

A major alternative to the two-hundred mile bill is a bill to protect only those species of fish which are endangered by overfishing. This bill is in accordance with Article Six and Article Seven of the Convention on Fishing and Conservation of the Living Resources of the High Seas.[87] Article Six recognizes the special interest a State has in maintaining the living resources of the waters adjacent to its territorial sea.[88] Adoption of unilateral measures of

conservation is allowed by Article Seven provided negotiations with other states have not led to agreement. There are three requirements which must be met for the action to be valid under the Convention, however. First, there must be a need for these measures. Second, the measures adopted must be based on scientific findings. Third, the measures must not discriminate against foreign fishermen.[89] It is this third requirement that had held up the progress of this endangered species bill.

Not only has the federal government been involved with fishery boundaries for limiting the encroachment of foreign fishing vessels in areas adjacent to our territorial seas, it has also participated in numerous conventions and bilateral agreements in an attempt to regulate fisheries, on an international level, through the species approach.[90] These agreements transcend artificial boundaries such as the line between the three-mile limit and the nine-mile contiguous fishery zone, and give the federal government, through its treaty power, jurisdiction over the species regulated.[91] The issue of the supremacy of the federal treaty power over the conflicting laws of a state was litigated before the Supreme Court in Missouri v. Holland where the Court upheld the federal position.[92]

2) State Jurisdiction

Judicial decisions have long upheld the rights of states to regulate fisheries within the limits of the territorial waters of the United States. These decisions have been based on reasoning which ranges from the sovereign power of the states rationale[93] to the argument that it is the state's duty to protect

wildlife within its borders as a trustee of its citizens.[94] In 1953, however, Congress passed the Submerged Lands Act[95] and gave coastal states "title to and ownership of the land beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . ."[96] Section 1301(e) defines natural resources as including "oil, gas, and all other minerals, and fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine and plant life . . ." With statutory law now supporting their authority, "there can be no doubt that . . . the federal government and the individual states share concurrent jurisdiction over coastal waters."[97]

Since the passage of the Exclusive Fisheries Zone Act of 1966[98], however, there has been some question as to the extent of the jurisdictional grant. The Act gives states authority "to a line three geographical miles distant from the coastal line of each . . . State and to the boundary line of each such State where in any case such boundary as it existed at the time such state became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles . . ."[99] The "coastline" for purposes of this act has been held by the Supreme Court in United States v. California[100] to be the same as the national "baseline" defined in the Convention on the Territorial Sea and Contiguous Zone.[101] Article 4 of the Convention defines "normal baseline"

as "the low-water line along the coast as marked on large scale charts officially recognized by the coastal state."[102]

States have largely relied on federally drawn maps in order to deliniate their seaward jurisdictional boundary. But, with the new negotiations going on in Geneva, there is a possibility that there will be a new international agreement with respect to boundaries.[103] The United States government has recently amended the original low water boundary line so that it is measured from the low water mark on the mainland as always but it now includes reefs and low tide islands off the coastline.[104] For states like North Carolina whose waters are open year around to all types of fishing this new line is of little consequence. But in South Carolina, where state regulations close certain areas during various parts of the year to specific types of fishing, this extended region of state jurisdiction has had an adverse effect on fishermen who fished in the off-season on the fringe areas of the limits of the coastal state's jurisdiction.[105] Whether this redrawing of the boundary line was done because of the Third United Nations Law of the Sea Conference or not, it is clear that States have little real authority in this area regardless of what their constitutions and legislation say.[106]

The federal government and the courts have been fairly liberal however with regard to State exercises of jurisidction. In Skiriotes v. Florida[107], the Supreme Court affirmed a Florida state statute which regulated the taking of commercial sponges by its citizens through diving equipment restrictions beyond the state's territorial limits. In affirming the conviction the

Court said that even though the offense was beyond Florida's territorial waters, "it would not follow that the State could not prohibit its own citizens from the use of the diver's equipment at that place."[108] The Court relied on the case of The Hamilton[109] which stated that "the mere fact of the parties being outside state territory in a place belonging to no other sovereign could not limit the authority of the state, as accepted by civilized theory." The Skiriotes case went on to say that to the extent that there were no Federal regulations or international agreements which conflicted with the state law, Florida had a legitimate interest in regulating the rights of its own citizens in the ocean area beyond its territorial limits.[110]

With regard to lateral seaward State boundaries, the federal government has generally allowed states to work out their own boundaries.[111] In 1969 North Carolina entered into reciprocal agreements with both South Carolina and Virginia and drew its lateral seaward boundaries.[112] The main purpose of these boundaries is for enforcement of state laws within the three-mile territorial sea.

III. NORTH CAROLINA, SOUTH CAROLINA, AND VIRGINIA FISHERY MANAGEMENT PROGRAMS COMPARED

Laws and regulations pertaining to fisheries vary significantly from state to state. In order to properly evaluate North Carolina's laws in this area, it is necessary also to review the laws of its neighbor states. In this review it will be useful to note the

flexibility of these laws since it is generally agreed that uniformity is desirable[113] and for uniformity to come about there must be change. The main emphasis in this paper is in the cooperative relationship between fishery laws of the three states, therefore, a study of specific legislation such as seasons, tax rates, gear regulations and enforcement provisions is not here included. In order to make this management oriented comparison more meaningful and useful, each state's applicable laws will be divided into four categories[114]: administrative organization, legislative authorization, reciprocal agreements, and limited entry.

A. South Carolina

The agency in charge of coastal fisheries management in South Carolina is the Wildlife and Marine Resources Department. The governing board of this department is the nine member South Carolina Wildlife and Marine Resources Commission.[115] The Division of Marine Resources has jurisidction over all salt-water fish, fishing and fisheries.[116] This Division is authorized to promulgate rules and regulations for the control of fisheries consistent with existing state policies and statutes.[117]

Most of the regulatory authority of the Division is specified by statute,including provisions concerning reasons for and manner of taking oysters, clams, shrimp, prawn, crabs, shad, sturgeon, terrapin, sea turtles, and industrial fish. Statutes also regulate gear, licenses and taxes. Because of its completeness, the system is extremely inflexible except in limited areas where the Division

is given some leeway. There are four sections that allow the Commission to exercise its discretion. S.C. Code §28-781 allows the Commission either to open the oyster and clam season fifteen days early or extend the season fifteen days later when it is in "the best interests of the State." S. C. Code §28-791 empowers the Commission with authority and discretion for leasing the State-owned oyster beds. With respect to shrimp, S. C. Code §28-861.5 allows the Commission (after consultation with the Marine Resources Division) to shorten or extend the shrimp and prawn seasons by not more than thirty days. The Commission is also allowed to open or close any designated area to trawling for shrimp or prawn "if it feels such action should be taken in the best interest of the state". The Commission may also close designated areas for specified periods of time to crab trawling.[118]

The law enforcement unit of the South Carolina Wildlife and Marine Resources Department is the Division of Law Enforcement and Boating.[119]

The following is a summarization of the management system pertaining to fisheries in South Carolina:

1) Administrative Organization

   (a) Management Unit -- Division of Marine Resources, South Carolina Wildlife and Marine Resources Department.

   (b) Enforcement Unit -- Divison of Law Enforcement and Boating, South Carolina Wildlife and Marine Resource Department.

2) Legislative Authorization

(a) General Statutes -- S.C. Code Chapter 7, Title 28 (1973), specifies the jurisdiction of the Division as well as the regulatory, licensing, taxing and leasing provisions.

(b) Department Regulations -- S.C. Code §28-159 provides that the Division possessed jurisdiction over coastal fisheries. Section 28-174 authorizes the Division to adopt and promulgate rules and regulations for the government of the force under its control. The Commission may prescribe and require permits "of all persons actually engaged in the taking of fish . . ." It may also issue special permits for scientific purposes.

3) Reciprocal Agreements

There is presently no authorization in the South Carolina Code for the Deparrment of Wildife and Marine Resources or any of its subdivisions to enter into reciprocal agreements with other states concerning the management of coastal fisheries. It appears that the South Carolina legislature must enact specific reciprocal agreement authority such as the blanket agreement it has with North Carolina.

4) Limited Entry

No specific provisions for limited entry are contained in the South Carolina Code.

B. North Carolina

The organizational unit responsible for management and regulation of marine and estuarine resources in North Carolina is the Department

of Natural and Economic Resources and the Commercial and Sports Fisheries Committee.[120] The Committee is the organizational unit charged with coastal fisheries management-enforcement functions. This Committee is also charged with making "regulations as necessary to implement the work of the Department in carrying out its duties".[121]

Under N.C. Gen. Stat. §113-134.1, "the State of North Carolina shall exercise all . . . jurisdiction, it possesses under the State Constitution, necessary for the maintenance, preservation and protection of all marine fisheries resources from their inland reaches to a line drawn parallel to the entire coastline at a distance of 200 miles or where the water depth reaches 100 fathoms, whichever is greater." With this jurisdictional provision, the State of North Carolina has joined Maine[122] and Massachusetts[123] in unilaterally extending its jurisdiction beyond that recognized by the United States. This has created a conflict as to whether the state statute amounts to an improper interference with the exclusive federal foreign relations power or national security apparatus.[124]

> "The underlying rationale for an exclusive federal power over foreign relations is the perception that adoption of separate foreign policies by the states would be inimical to an effective federal foreign policy (footnote omitted). The necessity of a nation speaking with one voice to other nations in discussions concerning treaty-making and international military commitments is undisputed. But the problem is when does state action on law interfere with this foreign relations power."[125]

The Supreme Court in Clark v. Allen[126] Zschernig v. Miller[127] has set up a standard for ascertaining when state action has interfered. This three pronged test asks: (1) whether there is an

improper purpose of interference with foreign relations; (2) whether a direct impact upon international relations has been shown; (3) whether the state law has a possible adverse effect upon the power of the government to carry out existing foreign policy. If the state legislation fails this test, under the supremacy clause it will die. Thus, the value of N.C. Gen. Stat. §113-134.1 seems limited at best.

The specific authority of the Commercial and Sports Fisheries Committee is granted through N. C. Gen. Stat. S113-182[128], which allows the Committee to operate with extreme flexibility. All matters including seasons, size limits, quantity limits, gear restriction and management procedures are within the discretion of the Committee.[129] Only fees, taxes and a technical provision for leasing oyster and clam bottoms[130] are dealt with statutorily.[131]

A general summary of the management system pertaining to fisheries in North Carolina follows:

1) Administrative Organization

   (a) Management Unit -- North Carolina Department of Natural and Economic Resources, the Commercial and Sports Fisheries Committee.

   (b) Enforcement Unit -- Commercial and Sports Fisheries Committee enforcement division; Commercial and Sports Fisheries Inspectors.

2) Legislative Authorization

   (a) General Statutes -- Chapter 113, Subchapter IV, of the North Carolina General Statutes specifies the jurisdiction, duties and power of the Department and the Committee.

There are also provisions for the licensing and taxing of coastal fisheries.

(b) Departmental Regulation -- N.C. Gen. Stat. §§113-181 and 113-182 give the Commercial and Sports Fisheries Committee authority to promulgate specific regulations for the control of coastal fisheries.[132]

3) Reciprocal Agreements

N.C. Gen. Stat.§113-181(a) provides that:

> "It is the duty of the Department of Natural and Economic Resources to administer and enforce the provisions of this subchapter Chapter 113, Subchapter IV, Conservation of Fisheries Resources pertaining to the conservation of marine and estuarine resources. In execution of this duty, the Department may . . . enter into reciprocal agreements with other jurisdictions with regard to the conservation of marine and estuarine resources."

Under section 113-223, "the Department of Natural and Economic Resources is empowered to make reciprocal agreements with other jurisdictions respecting <u>any</u> of the matters governed in this Subchapter IV."[133] (emphasis added). §112-161 allows the Secretary of Natural and Economic Resources the authority to grant reciprocal agreements with other jurisdictions for licensing purposes "provided that such jurisdictions accord privileges of similar nature or value to holders of North Carolina licenses."[134] These provisions coupled with the authority of the Department over "any and every aspect of cultivating, taking, possessing, transporting, processing, selling, utilizing and disposing of fish taken in coastal fishing waters, whatever the manner or purpose of taking..."[135], allow the State great flexibility with respect to coastal fishery

management functions. As Professor Gary Knight has pointed out in a recent study "these provisions coupled with the State's administrative flexibility provide North Carolina with an effective device for interstate cooperative efforts."[136]

4) Limited Entry

If the North Carolina fisheries management program is truly as flexible as it seems to be then "a basis exists for utilizing limited entry in order to optimize net economic return to a particular segment of the coastal fishing industry."[137] Although the fishery laws and regulations themselves do not specifically address themselves to this question, there are suggestions that seem to cut against the implementation of a limited entry scheme. In the case In Re Certificate of Need for Ashton Park Hospital, Inc.[138], a case dealing with a statute allowing a state agency to deny permits to build hospital facilities under certain conditions, the court said:

> "The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the state in the paramount public interest for reasons of health, safety, morals or public welfare."

N.C. Gen. Stat. §113-131 states that "the marine and estuarine and wildlife resources of the State belong to the people of the State as a whole." (emphasis added). The language in the statute coupled with the reasoning behind the language in the case would seem to indicate that a limited entry program would not be allowed in North Carolina.

C. Virginia

The agency in charge of coastal fisheries management in Virginia is the Marine Resources Commission which consists of the Commissioner of Marine Resources and six additional members appointed by the governor.[139] The jurisdiction of the Commission extends from "the fall of all tidal rivers and streams" to all tidal waters of the Commonwealth, and extends over "all commercial fishing and all marine fish . . . shellfish, and . . . organisms. . ."[140] This Commission is authorized to "make such regulations as it deems necessary to promote the seafood and marine resources of the State. . ."[141] It also has the power to enforce all the fish and shellfish laws to "provide for the development of programs to enhance and improve commercial and sport fisheries in Virginia's tidal waters."[142]

The regulatory authority of the Commission is specified by state including licensing, taxing, season for and manner of taking oysters, clams, scallops, other bivalves and industrial fish. Statutes also regulate gear, health provisions, radio navigation and in a detailed manner, the particular usage of certain waters. Because the statutes are so detailed, the Commission has little leeway with which to operate. To effect change the Commission must report to the General Assembly biennially.

> "The condition of the fish and shellfish industries under the supervision of the Commission shall be discussed, and such legislation as the Commission may think advisable for the betterment, protection and conservation of such industries shall be recommended."[143]

An independent research and service agency, the Virginia Institute of Marine Sciences is provided "to consider means by which fishery resources may be conserved, developed and replenished and to advise the Commission of Fisheries and other agencies and private groups on these matters."[144]

The following is a summarization of the management system pertaining to fisheries in Virginia"

1) Administrative Organization

   (a) Management Unit -- Virginia Marine Resources Commission

   (b) Enforcement Unit -- Virginia Marine Resources Commission - enforcement division

2) Legislative Authorization

   (a) General Statutes -- Virginia Code Title 28.1 entitled, Fish, Oysters, Shellfish and Other Marine Life specifies the jurisdiction of the Commission as well as the regulatory, taxing and leasing provisions.

   (b) Department Regulations -- Va. Code Title 28.1, Chapters 1 and 2 deal with the Marine Resources Commission, the Commissioner, and the proceedings, actions and regulations of the Commission.

3) Reciprocal Agreements -- There is presently no authorization in the Code of Virginia for the Marine Resources Commission or any of its subdivisions to enter into reciprocal agreements with other states concerning the management of coastal fisheries. Guided by Chapter 10 of Title 28.1 which deals with: Compacts and Joint Laws with Other States[145], it appears that the Virginia General Assembly must specifically enact each individual reciprocal agreement. There may

be an exception built into the Code for agreements concerning menhaden. Va. Code §28.1-60 allows for the authorization of licenses to nonresident menhaden fishermen. In a limited way, an interstate agreement might be construed if another state provides for the same types of procedure for Virginia fishermen.

4) Limited Entry

Although there is no specific provision for the limited entry in the Virginia Code, the industrial approach the code takes with regard to the fishery resources of the state would seem to imply that there is a basis for utilizing limited entry in order to optimize the return of a particular segment of the fishing industry. This conclusion is strengthened by the wording of the Virginia Code Section which grants the Commission authority to make regulations and establish licenses. Va. Code §28.1-23 states:

> "The Commission shall have authority to make such regulations as it deems necessary to promote the general welfare of the seafood industry and to conserve and promote the seafood and marine resources of the State."[146]

IV. INTERSTATE COOPERATION IN FISHERIES MANAGEMENT - ISSUES RAISED

A. Why Interstate Fishery Management

"Management is the science of making decisions and, therefore, fishery management is the science of making fishery decisions.[147] These decisions are important because they allow us to harvest an extremely valuable natural resource at an optimum level without harming appreciably the source of supply. However, many of these decisions are not easily made because of the particular complexities and the many variables found in the fishery context. Modern fishery decisions must continually reflect greater environmental uncertainties, more performance complexities, technological changes that in some instances threaten the older ways of life and produce changes in social habits, structures and aspirations. Specifically, there are numerous variables which must be dealt with in forming fisheries management decisions. These include:

> "Poorly developed criteria for national and international temporal and spatial allocation of stocks.
> The open-access problem.
> Many overfished stocks.
> Little understanding of the stocks and recruitment problem.
> Poorly developed theory on multiple species fisheries and the effects of exploitation of one species on the exploitation of others.
> Fleets capable of exerting tremendous amounts of fishing intensity.
> Misallocation of stock complexes in the time stream.
> A need for the fishing community as a whole to participate in rational management and to be held accountable for mismanagement, overfishing, and irrelevant research."[148]

Because of these variables and because many of our management techniques do not consider them, some segments of United States' fishing have not been particularly successful in recent years. In some areas supply has outdistanced demand causing huge losses for the fishing industry, and in other areas dwindling stocks have forced the industry into a retrenchment posture. In North Carolina the resource does not seem to be the problem; it is the cost of catching, processing, storing and marketing it that is pinching the industry. In other states the problems are different.

Fisheries management policies, organization, systems and suport must be modified to allow for more efficient methods of conserving our resource, and to insure fair distribution between the commercial and the sport fisherman. One particular problem which must be addressed is the common property problem of fisheries. This is the problem of unlimited competition for fish which in turn leads to uneven yields and in some cases maximum yields that are too small for profit.

Since the problem is international, for optimum results to be reached, the solution should also be implemented on an international level. But as we have seen through our review of the international fisheries management picture, international machinery moves slowly and many times not very effectively. We no longer have the luxuries of time and an unlimited natural resource supply, and it is incumbent upon us, therefore, to examine the problem and begin implementing, as a nation, a viable, workable solution.

The crux of the problem lies in developing and maintaining the full benefits of our stocks. These stocks, although vast, are not boundless, and with abuse they can become severely depleted. There

are four major reasons why our national fishery stocks have or potentially could become depleted or destroyed. One cause over which we have little or no control is natural mortality. A second is overfishing. This can occur if there is inadequate management control over the resource. A third and more important cause is conflicting jurisdiction, where fisheries stocks travel through waters of several states which are not coordinated in any way and which therefore have varying policies, research regulations and procedures. In this situtation,

> "inadequate conservation through management may arise from lack of the rather extensive biological and economic data needed to regulate fisheries, or from insufficient funds to maintain the necessary scientific and administrative staffs to establish enforce and monitor sound management systems."[149]

The fourth cause for damage to fishery resources is environmental pollution of, and changing uses for, fisheries habitat.

What is needed to correct these problems with our ability to maintain the full benefits of our fishery stocks is a comprehensive national fisheries plan which would call for interstate cooperation, planning and management. To effectuate such a plan, however, there must be a foundation on which to build and at the present time there is none.

B. Interstate Fishery Regulation - Federal or State Control

When establishing a foundation for a program such as an interstate fisheries management plan, a threshold question which must be resolved is where to put the basis of power, and if, under our present legal system, the center of authority chosen is able to promulgate and enforce the program in the collective states.

A strong argument can be made for placing the center of authority in the federal government. By allowing federal regulations to be used in fishery management there would be assurance that all states would cooperate in the program equally and enforcement regulations would be adhered to. States, on the whole, have been ineffective in their fishery management programs, especially with respect to migratory species which touch them only temporarily. State legislatures are often slow and cumbersome in passing needed legislation which too often, when passed, is burdened with the effects of political compromise. Special interest groups are firmly entrenched in some states and are often obstacles for meaningful change that might upset the states quo.

There are, of course, numerous disadvantages to federal control. One major criticism is a lack of ability, on the part of federal beauracracies to adapt and become responsive to local conditions and problems. Another is the possible necessity of forming an entirely new federal office when there exists already a network of state management units that could theoretically get the job done. A third problem with federal management is that, like the states, the past programs of fishery management that have been attempted by the federal government [150] have not extremely successful. There is also fear that a national program that might serve the national interest would not be responsive to localized needs and might not be in the interest of the individual states.

There are valid arguments for both federal and state jurisdiction. The solution might lie with a federal planning and enforcement center whose programs are implemented by the state management units

and which can be modified by the state agencies within certain guidelines; i.e. a federal program with meaningful state input.

To implement a federally based program, however, the federal government must have the power to regulate within the three mile territorial seas. With the passage of the Submerged Lands Act of 1953[151], jurisdiction within the three mile territorial seas was given to the states.[152] This grant of jurisdiction did not leave the states as the only enforcers in the zone, however. Through various legal doctrines there can be traced a basis for federal power in the territorial seas of the United States.

1) The Treaty Power

The treaty power of the federal government is recognized in the U.S. Constitution. U.S. Const. art II, § 2 says "He (the President) shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur . . ." U.S. Const. art I. § 10 provides that "3. No State shall, without the consent of Congress . . . enter into any agreement or compact with another State, or with a foreign power . . ." In United States v. Curtiss-Wright Export Corp.[153],

> "The powers to declare and wage wars, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality. . . As a member of of the family of nations, the right and power of the United States in that field are equal to the right of the other members of the international family. Otherwise, the United States is not completely sovereign."[154]

In Missouri v. Holland[155], the Court specifically addressed the issue of the superiority of a treaty over the general terms of the Tenth Amendment.[156] The Court said, in the context of the Migratory Bird Treaty Act of 1918[157]:

> "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action. . . The subject matter is only transitorily within the State and has no permanent habitat therein. . . We see nothing in the Constitution that compels the government to sit by while a food supply is cut off. . .It is not sufficient to reply upon the States."[158]

This language could be easily analogized to the migratory fish context to give the federal government power to regulate while implementing a treaty.[159]

2) The Commerce Power

Although the Submerged Lands Act conveyed title and ownership of the natural resources to the states, it also included a provision whereby Congress "could assert regulatory powers persuant to the Commerce Clause if it found that the failure of the States to manage the marine fisheries imposed an undue burden upon interstate commerce."[160]

Under the commerce clause Congress does not need the excuse of a treaty in order to exercise its power. Congress can reach activities that "affect" commerce even if the activity is conducted entirely within one state.

It has never been held that migratory fish constitute commerce, but it would be a small step for the courts to take. The Supreme Court has held that ranging cattle constitute commerce even when they are not driven or transported across State boundaries but merely roam across.[161] Thus if ranging cattle, not hampered by

the knowledge that as they graze they cross state lines, are interstate commerce, so too then must be fish migrating through the waters of three or four states.

Although the case for federal regulation of migratory species of fish seems to be easily made[162], there remains for consideration those species which do not migrate across state lines, especially shellfish who have little movement at all in their entire life cycle.

3) The Affectation Doctrine

Still part of the power granted by Congress through the commerce clause of the Constitution, the affectation doctrine allows Congress to regulate intrastate activities if those activities, in the eyes of the courts, have an impact on interstate commerce. In Southern Pacific Co. v. Arizona[163] the Supreme Court said about the affectation doctrine of the commerce clause:

> "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce."[164] (emphasis added)

How "peculiarly local" the concern could be and still be within the reach of Congress was made only too clear by the case of Wickard v. Filburn.[165] In Wickard, a farmer grew more wheat than he was allocated to grow through a federal program instigated during the depression. The farmer did not sell the wheat, he merely kept if for his own comsumption. The wheat never left the farm. The Supreme Court held that

> "even if the appellee's activity be local, and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce."[166] (emphasis added)

The Court found that if other farmers similarly situated had done the same thing they would not have needed to buy wheat for feed and seed and the effect on the economy would be "far from trivial".

If a farmer who keeps his own wheat "affects" commerce, then it is plain to see that the fishing industry with its large expenditures on gear, gas, oil, etc. as well as the interstate travel of the final packaged material is "affecting" commerce enough to be regulated by Congress as well.

4) Public Trust Doctrine

With renewed emphasis on clear air and clean water, the public trust doctrine has been making a comeback in recent years as a tool used by states to clean up their air, water, beaches and other natural resources. The theory is founded on the premise that the state holds the natural resources within its boundaries as a trustee for the citizens of the state. The interest of the state has been described as follows:

> "It is not only the right, but the duty of the State to preserve for the benefit of the general public, the fish in its waters from destruction or undue reduction, in numbers, whether caused by improvidence or greed or any interests. As trustee for the people, in the exercise of this right and duty, the state may conserve fish and wildlife by regulating the taking of the same, as long as such action does not violate any organic law of the land. . .a State. . . may control the fish. . . within its borders and may regulate or prohibit such fishing . . . subject however to the absence of conflicting legislation."[167]

If it is found that a state has breeched this "public trust", for whatever reason, then Congress may be able to setp in as a substitute trustee. Foster-Fountain Packing Co. v. Louisiana[168] implies that "if the states have failed in their duty, the Federal government may have the obligation to rectify the disruption to the national interest.[169]

5) Federal Preemption

Assuming that under one of the provisions discussed, the federal government has the power to regulate fisheries within the territorial seas, Congress through enactment of specific legislation may be able to preempt state law. That is, since federal law is the "supreme" law of the land, it would prevail over the state law.

In considering the preemption cases, it is vital to bear in mind an observation in Hart and Wechsler[170]:

> "Federal law is generally interstitial in nature. It rarely occupies a legal field completely . . . Federal legislation, on the whole, has been conceived and drafted on an ad hoc basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total corpus juris of the states in much the way that a state legislature acts against the background of the common law assumed to govern unless changed by legislation."[171]

What do the courts use as a test then for deciding whether the state law has been preeempted? In Rice v. Santa Fe Elevator Corp., [172] Justice Douglas stated:

> "The question in each case is what the purpose of Congress was . . .Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it. . .. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement

> of state laws on the same subject. . .Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . Or the state policy may produce a result inconsistent with the objective of the federal statute."[173]

In Hines v. Davidowitz[174] Justice Black stated that, in considering the validity of state laws in the light of federal laws touching the same subject, the Court "has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconciliability; inconsistency; violation; curtailment; and interference."[175] He went on to say that the only thing these words pointed to was the lack of a "crystal clear distinctly marked formula."[176]

Whether a federal statute dealing with territorial sea fisheries regulation would preempt a particular state law would be, as the previous paragraph points out, a highly unpredictable question. There is language that states, however, that a state regulation would be "suspended only where the repugnance or conflict is so 'direct or positive' that the two acts cannot 'be reconciled' or consistently stand together."[177] (emphasis added)

C. What Can be Done Under the Present Law

Under the present management system North Carolina is in excellent condition with regard to ability to change and implement a comprehensive interstate fisheries management program. With respect to interstate agreements with either South Carolina or Virginia, the present management system seems to be entirely adequate for entering into, adopting and enforcing these agreements. Our neighboring states, however, are not in such a flexible position, and their inability

to move could very well have a chilling effect on North Carolina. If North Carolina, although able herself to enter into reciprocal agreements and compacts, cannot exact such agreements from her neighboring states, then much of the flexibility built into the program goes for nought. It is true that the present program allows for flexibility within the area of state jurisdiction, but as we have seen, the major problems lie with the ability of the states to interact collectively and implement programs that transcend state boundaries.

At the present time the only interstate compact that all three states belong to is the Atlantic States Marine Fisheries Compact[178], which under Article I is designed to:

> "promote the better utilization of the fisheries, marine, shell and anadromous of the Atlantic seabed by the development of a joint program for the promotion and protection of such fisheries, and by the prevention of the physical waste of the fisheries from any cause."

Although the compact is a good beginning, it has not been extremely successful in accomplishing its purpose. One of the main reasons for this lack of success has been the lack of any power to implement a program. Article IX states:

> "Nothing in this compact shall be construed to limit the power of any signatory state or to repeal or prevent the enactment of any legislation on the enforcement of any requirement by any signatory state imposing additional conditions and restrictions to conserve its fisheries."

Without a central authority it will be extremely difficult to get meaningful fishery management program uniformity.

D. The National Fisheries Plan

In August, 1974 the National Marine Fisheries Service made available for review purposes a draft outline for a national fisheries plan.[179] The plan addresses 23 major issues which include: available options for improved organization of fisheries management, methods for developing equitable allocation of fisheries, developing alternative means of funding fisheries management programs, providing means for increasing industry efficiency and cost reduction, and improving economic utilization of fisheries. After identifying the issues the proposal then provides the realistic options available for the solution to each of the 23 problems.

Part two of the draft is devoted to specific fisheries, the present catch, the maximum projected catch under the plan and the costs and benefits for each specific program.

One controversial aspect of the plan is its promotion of the idea of limited entry. Even in North Carolina, where the fisheries management program is deemed to be progressive and modern, the courts do not seem to be inclined in the direction of selective harvesting of marine resources. However, the idea is really not a new one. The same basic idea is implemented in the agricultural field where farmers are given subsidies for not planting certain crops. In the fishery context however there are no incentives for not going out to fish (although certainly that would be one method of implementing a limited entry program); rather, the number of fishermen is reduced either through taxes, high license fees and limitations or quotas. Thus with fewer fishermen, the ones

that do go out will catch economically efficient catches and the nation as a whole theoretically is helped.

The major problem caused by limited entry programs is what to do with those fishermen who are no longer permitted to fish. It may be a powerful tool for fisheries management, but it does not do much for the social structure of the fishing towns up and down our 88,633 miles of national shoreline.

V. CONCLUSION

North Carolina has one of the most comprehensive and adaptable fisheries management programs in the southeast. But due to management inefficiences and the relative rigidity of the Virginia and South Carolina fishery programs this flexibility has not been reflected in needed and meaningful changes. There seems to be little preoccupation with studies and research in areas that concern marine fisheries. North Carolina has begun asking the right questions; it is now time to start looking for some of the answers.

It is the opinion of this writer that a federally managed, national fisheries management program would be beneficial to North Carolina. It would force Virginia and South Carolina to implement meaningful changes in their infrastructure while allowing us to put ours to full use. It would also force the Department of Natural and Economic Resources into action.

FOOTNOTES

[1]Carroz, The Richness of the Sea: Fisheries, in THE FUTURE OF THE LAW OF THE SEA 77, 77-78 (L. Bouchez & L. Kaijen ed. 1973)

[2]U.S. Dep't of Commerce, A Draft Outline for the National Fisheries Plan 5 (1974).

[3]See T. Suher & K. Hennessee, STATE AND FEDERAL JURISDICTIONAL CONFLICTS IN THE REGULATION OF UNITED STATES COASTAL WATERS 1 (Sea Grant Pub. UNC-SG-74-05, 1974); Payne, Fishing Industry Fears Net Loss, The News and Observer (Raleigh), Oct. 6, 1974, S 4 at 1.

[4]Suher & Hennessee supra note 3 at 1.

[5]Supra note 2 at 7.

[6]Payne supra note 3.

[7]Carroz supra note 1 at 84.

[8]Anglo-Norwegian Fisheries Case, I.C.J. Rep. 116 (1951).

[9]Other terms which have been used periodically are "marginal sea", "territorial waters", "the maritime belt" and "Maritime frontier". I. Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 183 (2d ed. 1973).

[10]These consist of internal waters such as lakes and rivers as well as coastal waters which are more enclosed by land such as bays, straits, gulfs and sounds. J. Colombos, THE INTERNATIONAL LAW OF THE SEA 74 (4th ed. 1959).

[11]Philip C. Jessup has said:

> "It will be pointed out that within three miles of the coast, a state may under international law, exercise any jurisdiction and do any act which it may lawfully do upon its own land territory. Exception must be made to this general statement only in favor of the servitude known as the right of innocent passage." P. Jessup, THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION xxxiv (1927).

[12]The Justinian Code declared that the sea and the fish in it were the property of mankind. State jurisdiction ended at the high-water mark of the flood tide. Fenn Justinian and the Freedom of the Seas, 19 Am. J. Int'l. L. 716-727 (1925).

[13]S. Swarztrauber, THE THREE MILE LIMIT OF TERRITORIAL SEAS 11 (1973).

[14]For a more indepth study of the concept of "mare clausum" see Id. at 10-22.

[15]Brownlie supra note 9 at 233.

[16]Id. "However, in instructions to her ambassadors in 1602, while contesting a Danish claim to dominion over the seas between Norway, on the one hand, and Iceland and Greenland, on the other, The Queen recognized the right of 'oversight and jurisdiction'" Id.

[17]Hugo Grotius (1583-1645) was a Dutch jurist, publicist and statesman. He was famous while still an adolescent. King Henry IV of France referred to him as "the miracle of Holland" while he was a member of the staff of the Dutch embassy in France at the age of fifteen. At age sixteen he received the degree of Doctor of Laws from the University of Orleans. Swarztrauber, supra note 13 at 18.

[18]The title translates as: On the Law of Spoils.

[19]H. Grotius, DE IURE PRAEDAE (J. B. Scott ed. 1950). The book was not published until two and a half centuries after it was written (1868), but in 1608 Chapter VII of the manuscript, which dealt with freedom of the seas, was published anonymously under the title Mare Liberum.

[20]Id. at 236. The modern international rule was stated in the Lotus case:

> "Vessels on the high seas are subject to no authority except that of the state whose flag they fly . . .no state may exercise any kind of jurisdiction over foreign vessels upon them." P.C.I.J. (1958) series A/10, p. 25.

[21]He allowed that in the case of a small inlet one could prohibit others from fishing in it or using it, but

> "if the region involved exceeds the limits proper to a small inlet, the said rule will not be applicable, for it might interfere with the common use of that region. Thus it has been assumed that I may prohibit fishing by any other person in front of my dwelling or country-seat, but the assumption lacks any legal basis." Id. at 235.

He does acknowledge that a territory can have dominion over the sea "in so far as those who sail in that part of the sea can be compelled from the shore as if they were on land." See Walker, 22 Brit. Y.B. Int'l L. 210 (1945).

[22]"The territorial sea represents the historic balance between the needs of the coastal State and the international community's rights and interests in the freedom of the high seas." Jessup, The United Nations Conference on the Law of the Sea, 59 Colum. L. Rev. 234, 241 (1959).

[23]For an account of this evolution see Swarztrauber, supra note 13 at Chap. 2.

[24]Colombos, supra note 10 at 79.

[25] "By the laws of nations, the Princes and States noways engaged in the present war ought to preserve the neutrality of their several ports and harbours. To that end care must be taken that no prize should be attacked, seized, or taken within the harbours of Princes and States in amity with the King of Great Britain

or the Spanish Kings, or within shot of their cannon." (emphasis added) Burrel, Reports of Cases determined by the High Court of Admiralty (1758-1774) 355 (R. Marsden ed, 1885) quoted in Jessup & Deak, I NEUTRALITY, IT'S HISTORY, ECONOMICS & LAW 255 (1935).

[26]See Walker, 22 Brit. Y.B. Int'l L. 210-31 (1945). Another rule that emerged as a means of defining the limits of the Territorial Seas was the line of sight doctrine. This doctrine envisioned a continuous belt equidistant from shore which was for the purpose of providing security around the littoral state. It was a protective zone rather than one developed for neutrality purposes. It could not automatically be enforced as the cannon-shot rule could.

[27]Swartztrauber, supra note 13 at 52.

[28]Id. at 55.

[29]Id. at 54.

[30]H.R. Ex. Doc. No. 324, 42nd Congr., 2nd Sess. 553-554 (1872).

[31]Colombos, supra note 10 at 83.

[32]See e.g. Twee Gebroeders, 3 c. Robinson 162 (1800); The Anna, 5 C. Robinson 373 (1805); The Brig Ann 1 Gallison, 62 (1812). See also S. Swarztrauber, supra note 13 at 60-61.

[33]I do not mean to imply that these international law maxims were unanimously upheld, since states including France, Germany and Russia claimed zones for particular purposes beyond three miles. See Brownlie supra note 9 at 193.

[34]The Hague Codification Conference held at the Hague in 1930 was an effort of the League of Nations. It did not result in the adoption of a Convention on the Territorial Sea, however there was a majority opinion in favor of the coastal States exercising sovereignty over the territorial sea. See League of Nations Doc. C. 351 (b)

M.145(b). 1930 V#, p. 212.

[35]"Several eminent jurists doubted whether the three mile limit had been unequivocably settled." Id.

[36]In 1927, Canada, to counteract the effects of trawling in the waters on its Atlantic coast, adopted regulations prohibiting trawling within its territorial waters and limiting it in all waters within a twelve mile radius of the shoreline. In 1934, Ecuador regulated fishing in an area up to fifteen miles from its shoreline. Once the United States joined the nations issuing unilateral proclamations in 1945 with the Truman Proclamation, which allowed the establishment of "conservation zones in those areas of the high seas contiguous to the coast of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale ", the trend became irreversible. See United Nations Legislative Series, Laws and Regulations on the High Seas ST/LEG/SER.B/1 57, 68, 112.

[37]I.C.J. Rep. 116 (1951).

[38]The Court's holding in the Anglo-Norwegian Fisheries case was extremely narrow and precise. See Id. at 134, 135 and 144. However, the tests used by the Court were not adhered to by the nations claiming contiguous zones, so the issue now becomes whether or not international law is to be consulted at all in the matter. Brownlie, supra note 9 at 195.

[39]See Cuban Official Gazette of 25 February 1954; Venezuelan Official Gazette of 17 August 1956 and the Indian "Proclamation Regarding Fishing in Adjacent Seas (1957).

[40]The distinction between the rights of a state in territorial waters and the rights of a state to exploit any accessible resources of the seabed adjacent to its coast, whether within or without territorial waters has been recognized in international law for centuries. E.G.:

> "By the Sea Fisheries Act of 1868 power was taken to issue an Order in Council enabling the Irish Commissioners to regulate the dredging for oysters on any oyster beds within a distance of twenty miles seaward from a straight line between Lambay Island and Carnsore Point. Some of these banks were between ten and twenty miles beyond the three mile limit . . .
> . . .
> The Bay of Tunis has . . . claimed the exclusive right to the sponges on a bank outside the three-mile limit off the coast of Tunis by the continuous and unquestionable fructus of these banks. . . Similarly, Mexico is said to have legislated for regulating pearl fisheries off the Mexican coast though outside the three-mile limit." Hurst, Whose is the Bed of the Sea? 1923-24 Brit. Y.B. Int'l L. 34 at 40,41 as quoted in the Testimony of Philip C. Jessup in United States v. Maine, No. 35, Original decided March 17, 1975, pp. 82-83.

However,

> "Pearl fisheries stand on a different footing to the ordinary kind of fishing in the waters of the sea, because the banks where the pearl oysters lie must be treated as part of the bed of the sea . . . Where the oyster beds are situated under the high seas the claim to sovereignty and control is limited in extent to the area of the banks, and does not affect the rights of navigation or of ordinary fishing in the waters over the banks." Parliamentary Debates, H.C., 5th Ser., vol. 164, cols. 1261-1262, in Hackworth, II Digest of International Law, 679 (1941).

[41]The Official Records of the United Nations Conference on the Law of the Sea comprise seven volumes:

Volume I - Preparatory Documents

Volume II - Plenary Meetings

Volume III - 1st Committee (Territorial Seas and Contiguous Zone)

Volume IV - 2nd Committee (High Seas: General Regime)

Volume V - 3rd Committee (High Seas: Fishing, Conservation of Living Resources)

Volume VI - 4th Committee (Continental Shelf)

Volume VII - 5th Committee (Question of Free Access to the Sea of Land-locked Countries)

[42]15 U.S.T. 1606 (1964). The matter of "straight baselines" had been in a state of great confusion following the Anglo-Norwegian Fisheries case. Supra note 23. This convention helped to clarify the international law in the sea.

[43]13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82. Also A/CONF.13/L. 21, annex.

> "Prior to the Law of the Sea Conference in 1958 there was very little that one could conclude with respect to accepted rights and duties bearing on conservation of fish . . . The Geneva Fisheries Convention was the first to develop an international code respecting fisheries. . .However, the convention cannot be considered to represent international law. . ." Herrington, The Convention on Fisheries and Conservation of Living Resources: Accomplishments of the 1958 Geneva Conference, in THE LAW OF THE SEA 26, 34 (L. Alexander ed. 1967).

[44]For a discussion of the background of the 1958 Geneva Convention and particularly the activities of the fishing and conservation of living resources committee see Id. at 35.

[45]13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82.

[46]Second United Nations Conference on the Law of the Sea, Official Records A/CONF.19/8 (1960).

[47]Doc. A/CONF.19/c.1/L/10 (1960)

[48]See Appendix A for some of the agreements to which the United States is a party.

[49]FAO, Fisheries Circular No. 127, Limits and Status of the Territorial Sea, Exclusive Fishing Zones, Fishery Conservation Zones and the Continental Shelf, 1971.

[50]The most recent data available on fishing limits of the world was compiled by the United Nations in 1971 when the world's family of nations stood at 126. Of those, 54 have a territorial sea which is 12 miles wide, and all but three of those have fishing limits equal to the width of their territorial sea. World Fishing, May 1974, at 44-45. Haiti extended her territorial sea from 6 to 12 miles in 1972, thus continuing the trend toward 12 mile territorial seas.

[51]Twenty seven countries of the world, including the United States, have fishing jurisdiction out to 12 miles from the coastline boundary which is beyond their territorial sea jurisdiction. Id.

[52]As of 1971, 20 out of 126 nations claimed either as territorial seas or as a contiguous fishing zone an area beyond 12 miles measured from the coast line. The widest claim of territorial sovereignty is that of the Philippines which uses archipelago concept baselines and has a territorial sea that varies from 0 to 300 miles wide. Id.

[53]Remarks at a symposium in Washington, D.C., Feb. 19, 1971.

[54]See Knight, The Draft United Nations Convention on the International Seabed Area: Background, Description and Some Preliminary Thoughts, 8 San Diego L. Rev. 459 (1971).

[55]United Nation Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, established by U.N. General Assembly Resolution 2467 (XXIII) (1968).

[56]The conference was to address, inter alia, matters relating to territorial seas, the contiguous zone, the continental shelf, the seabed, scientific research, artificial islands, economic zones, marine ecology, the high seas, etc. See U.N.G.A. res. 2749 (XXV), Dec. 17, 1970; U.N.G.A. Res. 2750 (XXV), Dec. 17, 1970.

[57]These categories are more extensively discussed in NOAA Environmental Impact Statement on Law of the Sea Alternatives (Fishery Resources) GLOBAL FISHERIES SYSTEMS AND THEIR RESOURCE MANAGEMENT IMPLICATIONS 79-102 Draft April 1, 1974.

[58]Countries with heavy investments in distant water fishing such as Japan (see Proposals for a Regime of Fisheries on the High Seas, U.N. Doc. A/AC.138/SC.II/L.12 (1972)) and the Soviet Union (see Draft Articles on Fishing, U.N. Doc. A/AC.138/SC.II/L.6 (1972)) have aligned themselves in this category.

[59]See Draft Articles on the Breadth of the Territorial Sea, Straights and Fisheries Submitted by the United States, U.N. Doc. A/AC.138/SC.II/L.4 (1971); United States Revised Draft Fisheries Article, U.N. Doc. A/AC.138/SC.II/L.9 (1972).

[60]Statement by the Honorable Howard W. Pollock, United States Representative in Sub-Committee II, of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor, Press Release USUN - 31 (73), April 3, 1973.

[61]The key difference between this alternative and the species approach is the precise deliniation of the geographic area in which the coastal States can exercise authority.

[62]Some countries include waters above the continental shelf, others use depth as aline of demarcation, but most simply use 200 miles.

[63]For example of groups three and four, see e.g. Argentina: Draft Articles, U.N. Doc. A/AC.138/SC.II/L.37 (16 July 1973); Working Paper Submitted by the Delegations of Australia and Norway Containing Certain Basic Principles of an Economic Zone and on Delimitation, U.N. Doc. A/AC.138/SC.III/L.36 (16 July 1973).

[64]For a summary of the early views expressed to the Sea-Bed Committee, see FAO, Docs. COFI/71/9(b), Sup. 2 and COFI/72/7/Sup.1 (1971).

[65]The Wall Street Journal, Aug. 30, 1974.

[66]A secret Senate Commerce Committee memo charged that the Caracas meeting was a failure. "Nations felt no desire to negotiate (and) the Caracas session failed to make as much progress as had been hoped for." Anderson, Debate on 200 Mile Fishing Limit, The News and Observor (Raleigh), October 7, 1974.

[67]J. Stevenson & B. Oxman, The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session, 69 Am. J. Int'l L. 13-14 (1975).

[68]See generally A. Aguilar, The Patrimonial Sea or Economic Zone Concept, 11 San Diego L. Rev. 579 (1974). For a more comprehensive coverage of the 1974 Caracas Conference see J. Stevenson & B. Oxman supra note 66; Dept. of State Pub. 8781, Int. Org. & Conf. Series 115, Results of Caracas Session of the Third U.N. Law of the Sea Conference (1974).

[69]The Wall Street Journal, June 18, 1974, at 1 col. 6.

[70]For a report on the U.S. position at Geneva see Dept. of State Pub. 8764, INT. ORG. & CONF. Series 113, U.N. Law of the Sea Conference 1975 (1975).

[71]This power is allowed under the Commerce Clause of the U.S. Constitution, U.S. Const. art. I, § 8. See Corsa v. Tawes, 149 F. Supp. 771 (D. Md. 1957), aff'd., 355 U.S. 37 (1957); Browning, Some Aspects of State and Federal Jurisdiction in the Marine Environment, 3 THE LAW OF THE SEA 89, 141 (L. Alexander ed. 1969).

[72]Toomar v. Witsell, 334 U.S. 385 (1948); Cerritos Gun Club v. Hall, 96 F.2d 620 (9th Cir. 1938); Brown v. Anderson, 202 F.Supp. 96 (D. Alaska 1962).

[73]Presidential Proclamation No. 2668, Sept. 28, 1945; Coastal Fisheries in Certain Areas of the High Seas, 10 Fed. Reg. 12304 (1945); 59 Stat. 885.

[74]16 U.S.C. §§ 1081-1086 (1974).

[75]Id. at § 1081. The enforcement of the regulations set out by the Act is left up to the Secretary of Commerce, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating. Id. at § 1083.

[76]16 U.S.C. 1091-1094 (1974).

[77]16 U.S.C. § 1094 states that:

> Nothing in this chapter shall be construed as extending the jurisdiction of the States to the natural resources beneath and in waters within the fisheries zone established by this chapter or as diminishing their jurisdiction to such resources beneath and in the waters of the territorial seas of the United States. (emphasis added)

[78]16 U.S.C. § 1091.

[79]Numerous bills have been floating around both houses of Congress for the past two or three years. For the most recent ones see e.g., H.R. 3294, 93rd Cong., 1st Sess (1973); H.R. 3362, 93rd Cong., 1st Sess. (1973); H.R. 8320, 93rd Cong., 1st Sess. (1973); H.R. 8665, 93d Cong., 1st Sess. (1973); H.R. 9137, 93d Cong., 1st Sess. (1973); H.R. 9944, 93d Cong., 1st Sess (1973); S. 1988, 93d Cong., 1st Sess. (1973); S. 2338 93d Cong., 1st Sess. (1973). See T. Messick, Maritime Resource Conflicts - Perspectives for Resolution Chap. VI (Sea Grant Pub. UNC-SG-74-06, 1974).

[80]S. 1988, 93d Cong., 1st Sess. (1973). In the House of Representatives it is H.R. 9137, 93d Cong., 1st Sess. (1973).

[81]The Committee on Merchant Marine and Fisheries.

[82]See supra pg. 8.

[83]See supra pg. 12.

[84]Id.

[85]Supra note 80 at § 3.

[86]Supra note 80 at § 4.

[87]U.S.T. 138, .T.I.A.S. 5969, 559 U.N.T.S. 285.

[88]Id. at Art. 6.

[89]Id. at Art. 7.

[90]For some examples of conventions and bilateral agreements, see Appendix A.

[91]See pg. 32 infra.

[92]Id.

[93]U.S. Const. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[94]LaCoste V. Department of Conservation, 263 U.S. 545 (1924).

[95]43 U.S.C. 1301-1343 (1964).

[96]Id. at § 1311 (a) (1).

[97]Cowan, Era of Militant Fishing Jurisdiction - A Study of the Florida Territorial Waters Act of 1963, 23 U. Miami L. Rev. 160, 174 (1968).

[98]See supra pg. 14.

[99]Supra note 95 at S 1301 (2).

[100]381 U.S. 139 (1965).

[101]15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205.

[102]This is in line with the North Carolina baseline which is defined in N.C. Gen. Stat. § 141-6 (1974) as being measured from "the extreme low-water mark."

[103]There are many ways of delimiting baselines and boundaries. See Colombos, supra note 10 at 98 through 113.

[104]See e.g. National Oceanic and Atmospheric Administration, National Ocean Survey, Nautical charts numbered 1227, 1229, 1231, 1232, 1233, 1234, 1235, 1236, 1237, 1238, 1239, amd 1240. Under the new chart numbering system these would be charts 12207, 12204, 11548, 11555, 11544, 11543, 11546 11546, 11535, 11531, 11521, 11513.

[105]Interview with Raymond J. Rhodes of the South Carolina Marine Resources Center, Charleston, S.C. (Dec. 1974).

[106]The Supreme Court recently decided United States v. Maine, 43 Law Week 4359 (1975) a case in which the States bordering on the Atlantic were attempting to extend their sovereignty over the seabed and subsoil. The Court upheld the cases of U.S. v. California 332 U.S. 19 (1947), U.S. v. Louisiana 339 U.S. 699 (1950) and U.S. v. Texas 399 U.S. 707 (1950) and held that "paramount rights in the marginal sea and seabed were incidents of national sovereignty." 43 Law Week at 4361. The seaward boundaries of Atlantic coastal states were limited to three miles.

[107]313 U.S. 69, reh. den. 313 U.S. 509 (1941).

[108]Id. at 76.

[109]207 U.S. 398 (1907).

[110]313 U.S. at 77. Even after the passage of the Exclusive Fisheries Zone Act, coastal states may still regulate the fishing activities of their citizens beyond their territorial jurisdiction. G. Knight & V. Jackson, Legal Impediments to the Use of Interstate Agreements in Coordinated Fisheries Management Programs: States in the N.M.F.S. Southeast Region 45 (1973).

[111]If for some reason the States cannot agree, they have a direct appeal of their case to the Supreme Court. Congress may, if it so desires, ratify these boundaries.

[112]N.C. Gen. Stat. §§ 141-7 (1974):

> The lateral seaward boundary between North Carolina and South Carolina eastward from the low-water mark of the Atlantic Ocean shall be and is hereby designated as a line beginning at the intersection of the low water mark of the Atlantic Ocean and the existing North Carolina-South Carolina boundary line; thence by a straight line projection of the present North Carolina-South Carolina boundary line to the point where the said line intersects

> $33^{o}27'00"$ N; thence due east on a true 90 degree bearing along 33 27' 00" N latitude to the seaward jurisdictional limit of North Carolina; such boundary line to be extended on the true 90 degree bearing along 33^{o} 27' 00" N latitude as far as need for further delineation may arise.

N.C. Gen Stat. § 141-8 (1974):

> The lateral seaward boundary between North Carolina and Virginia eastward from the low water mark of the Atlantic Ocean shall be and is hereby designated as a line beginning at the intersection of the low water mark of the Atlantic Ocean and the existing North Carolina-Virginia boundary line; thence due east on a true 90 degree bearing to the seaward jurisdictional limit of North Carolina; such boundary line to be extended on the true 90 degree bearing as far as need for further delineation may arise.

[113] See part I of this paper.

[114] These four categories are some of the ones used by Charles M. Bearden in section 7 of The Shrimp Fishery of the Southeastern United States: A Management Planning Profile. South Carolina Marine Resources Center Technical Report Number 5 (D. Calder et al. ed. 1974).

[115] S.C. Code § 28-93 (1973).

[116] Id. §§ 28-159. The jurisdiction includes: "All shellfish, crustaceans, diamond back terrapin, sea turtles, porpoises, shad, sturgeon, herring and all other migratory fish except rock fish (striped bass)". Id.

[117] Id. §§ 28-174.

[118] Id. §§ 28-874.

[119] Bearden supra note 114 at 177.

[120] N.C. Gen. Stat. §§ 113-8 (Cum. Suppl. 1974) - The Department of Natural and Economic Resources "shall have the duty of enforcing all laws relating to the conservation of marine and estuarine resources." Id. § 113-151. The Marine Fisheries Commission is authorized to "make reasonable rules and regulations." See also §§ 113-134.

[121]N.C. Gen. Stat. §§ 113-181 (Cum. Supp. 1974).

[122]Maine Gen. Stat., Tit.1, §§ 2-A, amending § 2. H.P. 904-L.O. 1192 (June 19, 1973). "The State of Maine declares that it owns and shall control the harvesting of the living resources of the seas adjoining the coastline from a distance of 200 miles. . . Conrol over the harvesting of these living resources shall be by licenses or permits issued by the Department of Sea and Shore Fisheries."

[123]Mass. Gen. Stat. § 17(10). The Director of Marine Fisheries is vested with all powers to adopt rules and regulations "necessary for the maintenance, preservation and protection of all Marine Fisheries Resources" to a distance of 200 miles or where the water depth reaches 100 fathoms, whichever is greater.

[124]Note, Territorial Jurisdiction - Massachusetts Judicial Extension Act - State Legislature Extends Jurisdiction of State Courts to 200 miles at Sea, 5 Vand. J. Trans. L. 490 (1971).

[125]T. Suher & K. Hennessee supra note 3 at 11.

[126]331 U.S. 504, 516-17 (1949).

[127]389 U.S. 441 (1968).

[128]N.C. Gen. Stat. §§ 113-182 (Cum. Supp. 1974):

> (a)The Marine Fisheries Commission is authorized to authorize, license, regulate, prohibit, prescribe, or restrict all forms of marine and estuarine resources in coastal fishing waters with respect to:
>
> (1)Time, place, character or dimensions of any methods or equipment that may be employed in taking fish;
>
> (2)Seasons for taking fish;
>
> (3)Size limits on and maximum quantities of fish that may be taken, possessed, bailed to another, transported, bought, sold, or given away.
>
> (b)The Marine Fisheries Commission is authorized to authorize, regulate, prohibit, prescribe, or restrict and the Department is authorized to license:
>
> (1)The openings and closing of coastal fishing waters, except as to inland game fish, whether entirely or not as to the taking of particular classes of fish,

use of particular equipment, or as to other activities within the jurisdiction of the Department; and

(2) The possession, cultivation, transportation, importation, exportation, sale, purchase, acquisition, and disposition of all marine and estuarine resources and all related equipment, implements, vessels, and conveyances as necessary to implement the work of the Department in carrying out its duties.

[129] Id.

[130] Article 16 of the Statute deals with oysters and clams generally. Specifically, see N.C. Gen. Stat. § 113-202 (Cum.Supp. 1974).

[131] Although the North Carolina Department of Natural and Economic Resources and the Marine Fisheries Division thereof have been granted liberal parameters in which to operate, they have failed to make the meaningful changes that are needed in order to balance the state's available resources with its needs.

[132] N.C. Gen. Stat. § 113-188 (Cum. Supp. 1974) affirmatively states that even the specific requirements set out in the statute book are not to be construed as limitations on the authority of the Marine Fisheries Commission to make similar provisions not in conflict with the Article.

[133] N.C. Gen. Stat. § 113-223 (Cum. Supp. 1974). The power is subject to SS 113-153 and 113-161 relating to reciprocal provisions as to landing and selling catch and as to licenses. Under this section, the Department has authority to modify provisions of Subchapter IV "in order to effectuate the purposes of such agreements, in the overall best interests of the conservation of marine and estuarine resources."

[134] N.C. Gen. Stat. § 113-161 (Cum. Supp. 1974).

[135] N.C. Gen. Stat. § 113-129(2) (Cum. Supp. 1974) Definitions relating to resources - Coastal Fisheries.

[136]Knight & Jackson supra note 110 at 68.

[137]Id. at 73.

[138]282 N.C. 542, 193 S.E.2d 729 (1973).

[139]Va. Code § 28.1-4 (1973).

[140]Va. Code § 28.1-3 (1973).

[141]Va. Code § 28.1-23 (1973).

[142]Va. Code § 28.1-9 (Supp. 1974). What authority the Commission does have in the realm of making regulations is limited by a detailed chapter (chapter 2) which spells out the process and includes an appeal process which goes all the way to the Virginia Supreme Court of Appeals.

[143]Va. Code § 28.1-17 (1973).

[144]Va. Code § 28.1-195 (b) (1973).

[145]VA. Code §§ 28.1-202; -203; -203.1 (1973).

[146]Va. Code § 28.1-23 (1973).

[147]GLOBAL FISHERIES SYSTEMS supra note 57 at 46.

[148]Id. at 50 quoting Rothschild (1972).

[149]U.S. Dept. of Commerce, A Draft Outline for the National Fisheries Plan 17 (1974).

[150]e.g. The Alaskan salmon fishery program which has been under federal management for years.

[151]See supra note 95 and accompanying text.

[152]Id.

[153]299 U.S. 304 (1936).

[154]Id.

[155]252 U.S. 416 (1920).

[156]U.S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[157]July 3, 1918, c. 128, 40 Stat. 755.

[158]252 U.S. 416 (1920).

[159]See supra note 92 and accompanying text.

[160]Report of the Commission on Marine Science, Engineering and Resource, Marine Resources and Legal-Political Arrangements for Their Development, Pt. VII at 75 (1969). 43 U.S.C. S 1314 (1964) provides that:

> "The United States retains all its navigational servitudes and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purpose of commerce . . .which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights to management, administration, leasing, use and development of the lands and natural resources which are specifically. . . assigned to the respective states. . . ."

[161]Thornton v. United States, 271 U.S. 414 (1926). The court said:

> "It is argued. . . that when the cattle only range across the line between states and are not transported or driven, their passage is not interstate commerce. We do not think that such passage by ranging can be differentiated from interstate commerce."

[162]Even if certain migratory species were to move from the coastal state directly out to sea and back without crossing the jurisdiction of another state, the federal government would probably have jurisdiction either under the Exclusive Fisheries Zone Act, supra note 76, or under the "foreign commerce" clause of the Constitution.

[163]325 U.S. 761 (1945).

[164]Id.

[165]317 U.S. 111 (1942).

[166] Id.

[167] LeClair v. Swift 76 F. Supp. 729, 733 (E.D. Wisc. 1948).

[168] 278 U.S. 1 (1928).

[169] Knight & Jackson supra note 110 at 34.

[170] Hart and Wechsler, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953).

[171] Id. at 435.

[172] 331 U.S. 218 (1947).

[173] Id. at 229-230.

[174] 312 U.S. 52 (1941).

[175] Id. at 67.

[176] Id.

[177] Florida Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

[178] See N.C. Gen. Stat. §§ 113-252.

[179] Much of the material and text of this section of the paper has been taken from U.S. Dep't of Commerce, A Draft Outline For the National Fisheries Plan. (1974).

APPENDIX A

List of Convention and Bilateral Agreements

1. International Convention for the Regulation of Whaling, December 2, 1946, 62 Stat. 1716, TIAS 1849 (effective November 10, 1948). Termination - Indefinite. Member countries are: Argentina, Australia, Canada, Denmark, France, Iceland, Japan, Mexico, Norway, Panama, South Africa, U. S. S. R., U. K., United States. Areas of geographical interest - Worldwide. Species concerned: only whale resources.

2. Convention for the Establishment of an Inter-American Tropical Tuna Commission, May 31, 1949, 1 UST 230, TIAS 2044 (effective March 3, 1950). Termination - Indefinite. Member countries are: Costa Rica, United States, Mexico, Panama, Canada, Japan and France. Areas of geographical interest - Eastern Tropical Pacific. Species concerned: yellowfin, skipjack tuna and tuna bait fishes.

3. Convention on Conservation of North Pacific Fur Seals, February 9, 1957 8 UST 2283, TIAS 2948 (effective October 14, 1957). Termination - Review in 1975. Member countries are: Canada, Japan, United States, U. S. S. R. Areas of geographical interest-North Pacific. Species concerned: fur seals.

4. Convention with Canada for the Preservation of the Halibut Fishery of the North Pacific Ocean and the Bering Sea, March 2, 1953, 5 UST, TIAS 2900 (effective October 28, 1953). Termination - Indefinite. Member countries are: Canada and United States. Areas of geographical interest - East Bering Sea and Northeast Pacific. Species concerned: Halibut.

5. International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 4 UST 380, TIAS 2796 (effective June 12, 1953). Termination - Indefinite. Member countries are: Canada, Japan, United States. Areas of geographical interest - North Pacific. Species concerned: Fish and shellfish resources, particular emphasis is on salmon, halibut and herring.

6. Convention with Canada on the Sockeye Salmon Fisheries, May 26, 1930, 50 Stat. 1355 (effective July 26, 1937). Termination - Indefinite. Member countries are: Canada and United States. Areas of geographical interest - Fraser River, Puget Sound, Strait of Juan de Fuca. Species concerned: Sockeye salmon (includes pink salmon as a result of a 1956 Protocol to the Convention).

7. International Convention for the Northwest Atlantic Fisheries, February 8, 1949, 1 UST 477, TIAS 2089 (effective July 3, 1950). Termination - Indefinite. Member countries are: Bulgaria, Canada, Denmark, Federal Republic of Germany, France, Iceland, Italy, Japan, Norway, Poland, Portugal, Romania, U. S. S. R., Spain, U. K., United States. Areas of geographical interest - Western Atlantic from Rhode Island east and north to Davis Strait.

Species concerned: special emphasis has been put on haddock, yellowtail flounder and herring. Other regulated species include red and silver hake, mackerel, pollock, cod, redfish and harp and hood seals.

8. International Convention for the Conservation of Atlantic Tunas, May 14, 1966, TIAS 6767 (effective March 21, 1969). Termination - Indefinite. Member countries are: Japan, Canada, United States, Brazil, France, Portugal, Spain, Morocco, Ghana, Republic of South Africa, Korea, Senegal, and the Ivory Coast. Areas of geographical interest - All waters of the Atlantic Ocean. Species concerned: Tuna and tuna-like species.

9. Agreement with the U.S.S.R. on the Middle Atlantic Fishery, December 13, 1968, 19 UST 7661, TIAS 6603 (effective March 21, 1969), (2 years). Termination - December 1974. Member countries are: U.S.S.R. and United States. Areas of geographical interest - Middle Atlantic area and waters of the 50 to 100 fathoms zone from Rhode Island to Virginia and a small area within the U.S. contiguous zone off New Jersey and Long Island. Species concerned: Scup, flounder and other groundfish, river herring, red hake, silver hake, black sea bass, bluefish, menhaden and lobster. A new agreement was reached February 1975.

10. Agreement with Brazil on the Conservation of Shrimp, May 9, 1972 24 UST 923 TIAS 7603 (effective February 14, 1973). Termination - June, 1974. Member countries are: United States and Brazil. Area of geographical interest - Large triangular area off northeast coast of Brazil. Species concerned: Shrimp. An agreement modifying and extending the original agreement was entered into January, 1975.

11. Agreement with South Korea Concerning Cooperation in Fisheries, November 24, 1972, TIAS 7517 (effective December 12, 1972) (5-year agreement). Termination - December 1977. Member countries are: United States and South Korea. Area of geographical interest - North Pacific and Bering Sea east of 175°W, longitude. Species concerned: salmon and halibut.

12. Agreement with Japan on the King and Tanner Fisheries of the Eastern Bering Sea, November 25, 1964, 15 UST 2076, TIAS 7527 (effective November 25, 1964), modified and extended December 1972 (2 years). Termination - December, 1974. Member countries are: Japan and United States. Areas of geographical interest - Western continental shelf of the United States. Species concerned: King and Tanner crabs. A new agreement is in force as of January, 1975 23 UST 3775, TIAS 7527.

13. Agreement with Japan on the Contiguous Fishery Zone, May 9, 1967, 18 UST 1309, TIAS 7528, modified and extended, December 1972 (2 years). Termination - December 1974. Member countries are: Japan and United States. Areas of geographical interest - Northeast Pacific, Eastern Bering Sea, Gulf of Alaska and the U. S. contiguous zone off Alaska and the State of Washington. Species concerned: species of mutual concern with emphasis on halibut, Pacific Ocean perch and blackcod. A new agreement is in force as of January 1975 23 UST 3781, TIAS 7528.

14. Agreement with U. S. S. R. on Fisheries Operations in the Northeastern Pacific (Gear Conflict), December 14, 1964, 15 UST 2179 TIAS, 5703 (effective December 14, 1964), renegotiated February 1973 (2 years) Termination - February 1975. Member countries are: U. S. S. R. and United States. Area of geographical interest - Gulf of Alaska beyond the 12 mile fishery zone. Species concerned: King crab (Soviets agreed not to fish around Kodiak Islands for specified periods when U. S. king crab fishermen fish extensively with fixed crab gear). A new agreement with modifications was reached February 1975. See 24 UST 669, TIAS 7575.

15. Agreement with the U. S. S. R. on the King and Tanner Crab Fisheries of the Eastern Bering Sea, February 5, 1965, 16 UST 24, TIAS 5752 (effective February 5, 1965), renegotiated and extended February 1973 (2 years). Termination - February 1975. Member countries are: U. S. S. R. and United States. Areas of geographical interest - U. S. continental shelf in the eastern Bering Sea. Species concerned: King and Tanner crabs. Extended to July 1975. See 24 UST 603, TIAS 7571.

16. Agreement with the U. S. S . R. on the Contiguous Fishery Zone, February 13, 1967, 18 UST 190, TIAS 6218, renegotiated and extended February 1973 (2 years). Termination - February 1975. Member countries are: U. S. S. R. and United States. Areas of geographical interest - Northeast Pacific including the U. S. contiguous zone. Species concerned: Species of mutual concern particularly interest on halibut, king crab, salmon and rockfish. Extended to July 1975. See 24 UST 1603, TIAS 7664.

17. Agreement with U. S. S. R. Concerning Claims Resulting from Damage to Fishing Vessels or Gear and Measures to Prevent Fishing Conflicts, February 21, 1973 (effective February 21, 1973). Termination - Indefinite. Review in February 1975. Member countries are: U. S. S. R. and United States. Area of geographical interest - Northeastern Pacific, Bering Sea and Western areas of the Atlantic. Species concerned: primarily gear conflicts associated with crab and halibut fisheries of the Northeastern Pacific and between lobster and mobile gear fisheries in the Western Atlantic. A new agreement was reached February 1975.

18. Agreement with Poland Regarding Fisheries in the Western Region of the Middle Atlantic Ocean, June 13, 1969, 20 UST 884, TIAS 7659, modified and extended June 1973 (1 year). Termination - June 1975. Member countries are: Poland and United States. Areas of geographical interest - Western region of the Middle Atlantic Ocean and 3 areas within the U. S. and contiguous zone off Long Island, New Jersey and Virginia. Species concerned: Scup, flounders and other groundfish, red hake, silver hake, menhaden, river herring and black sea bass, bluefish and lobster. The agreement also establishes a U. S. - Polish Fisheries Conciliation Board - to assist in the expeditious settlement of damage claims involving conflicts between fixed and mobile gear fisheries.

19. Agreement with Canada Concerning Reciprocal Fisheries Privileges, April 24, 1970, 21 UST 1283, TIAS 6879. (2 years) extended in April 1972 (1 year) and June 1973. Termination - April 1974. Member countries are: Canada and United States. Areas of geographical interest - the fishery contiguous zone extending along east and west coast of both nations, south of 63°N. Species concerned - Species of mutual concern with emphasis on Pacific salmon, and the transfer of herring on the east coast of the United States and Canada (fishing for any species of clams, lobsters, scallops and shrimp in the reciprocal fishing area of either country is excluded). No information on treaty renewal, but is still in force. Dept. of State, Treaties in Force (Jan. 1975).

20. Agreement with Romania on Fisheries in the Western Region of the Middle Atlantic Ocean, December 4, 1973 (effective December 4, 1973). Termination - December 1975. Member countries are: Romania and the United States. Areas of geographical interest - Western region of the Middle Atlantic Ocean. Species concerned: Scup, flounders and other groundfish, red hake, silver hake, menhaden, river herring black sea bass, bluefish and lobster. In Force, but no TIAS No. Dept. of State, Treaties in Force (Jan. 1975).

21. Agreement with Denmark concerning Ocean Fishery of the Atlantic Salmon, March, 1972, 23 UST 1279, TIAS 7402. Member countries: Denmark and United States. Fishing will be curtailed in gradual steps until a total phaseout in 1976. Species concerned: Atlantic salmon.