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THE LEGAL STATUS OF HIGHLY MIGRATORY SPECIES, 1970-2000: A CASE STUDY OF DEBATE AND INNOVATION IN INTERNATIONAL FISHERIES LAW

by

Christopher James Carr

B.A. (University of California, Berkeley) 1990
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Abstract

THE LEGAL STATUS OF HIGHLY MIGRATORY SPECIES, 1970-2000:
A CASE STUDY OF DEBATE AND INNOVATION IN INTERNATIONAL FISHERIES LAW

by

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Doctor of Philosophy in Jurisprudence and Social Policy

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Disputes over tuna have highlighted international fisheries affairs since World War II. The underlying legal and policy question has been whether tuna should be subject to exclusive coastal state jurisdiction, or, instead, subject to multilaterally agreed measures that apply throughout their migratory range. The "juridical position" of the United States on this question—in both domestic law and international practice—has played a major role in this history. Until 1990, the United States maintained, consistent with the interests of the U.S. distant water tuna industry and traditional "freedom of the seas" principles, that tuna should not be subject to exclusive coastal state jurisdiction. To this day, the United States has insisted that tuna fishing be subject to measures prescribed by international and regional organizations that are applied consistently to the species throughout its range, both within and beyond exclusive economic zones. The U.S. juridical position was reflected in disputes between the United States and Latin American countries over tuna fishing in the 1950s and 1960s, the failure of the Third United Nations Conference on the Law of the Sea (1970 to 1982) to definitively resolve tuna issues, and controversies over tuna fishing, most notably in the Western and Central

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Pacific Ocean, in the 1970s and 1980s. In 1990, the United States finally reversed position and accepted exclusive coastal state jurisdiction over tuna. Then, the 1995 U.N. Fish Stocks Agreement went beyond the duty to "cooperate" of coastal and fishing states declared in the Law of the Sea Convention, to prescribe that tuna conservation and management measures for exclusive economic zones and adjacent high seas areas be compatible and consistent. In 2000, these principles were implemented in the creation of a multilateral organization for tuna conservation and management in the Western and Central Pacific Ocean. Because of the critical role that the United States, and its juridical position, played in these developments, this study analyzes the key episodes in U.S. foreign relations and domestic lawmaking with respect to tuna fisheries.

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INTRODUCTION

Tuna, more than most ocean fishes, have captured the imagination of man for millennia. Homer makes note of them in The Odyssey. Fishers have long marveled at their migrations, which Aristotle described nearly 2,500 years ago in his History of Animals. Resonating this amazement with the peripatetic nature of tuna, more recently, it has been asked of them: "Who would claim the rain cloud?"[1]

The question nicely captures the awesome physical qualities of this best known and most commercially important of those fish known as "highly migratory species" in the international law of fisheries.[2] It is also suggestive of the central question underlying the controversies over tuna in international fisheries law and diplomacy over the second half of the 20th century—whether tuna can appropriately be subjected to exclusive coastal state jurisdiction, or, instead, can only be effectively conserved and managed by international or regional organizations prescribing measures that apply throughout their migratory range. The United States has been at the center of these controversies, as the most powerful and influential nation with a significant fleet fishing for tuna in the waters off other countries. It developed a "juridical position" in answer to this question that has guided U.S. fisheries law and diplomacy.

For most of the post-World War II period, the U.S. "juridical position" held that tuna could not be subjected to the exclusive jurisdiction of any state and could only be

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[1] Statement of Captain John Burich in "Fisheries Jurisdiction: Hearings on Extending the Jurisdiction of the United States Beyond the Present Twelve-Mile Fishery Zone Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Com. on Merchant Marine and Fisheries," (94th Cong. 1st Sess.) (1975) at 588.

[2] Annex I to the United Nations Convention on the Law of the Sea is a list of "highly migratory species" that includes billfish and sharks, in addition to a number of tuna species.

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effectively conserved and managed by application of multilaterally agreed measures throughout their range. These two aspects of the juridical position were long considered an identity. In 1990, the United States abandoned the first aspect of its juridical position, accepting, and asserting for itself, exclusive coastal state jurisdiction over tuna. However, the second aspect of the juridical position—that tuna should be managed throughout their range based on measures prescribed by international and regional organizations—has remained an important element of U.S. fisheries diplomacy. It is because of the critical role that the United States, and its juridical position, played and continue to play in the evolution and development of international law and diplomacy with respect to tuna fisheries that it is important to reconstruct in detail and to understand the actions of the United States in this area.

The U.S. juridical position on tuna also expressed, and for many years would be buttressed by, the U.S. commitment to "freedom of the seas." This doctrine, born of the maritime commercial rivalries of the 17th century, was famously espoused by Grotius in his "Mare Liberum."[3] The U.S. commitment to "freedom of the seas" was expressed in several facets of U.S. ocean policy, including aggressive insistence that states could not extend their territorial (and fisheries) jurisdiction beyond the traditional three-mile territorial sea.[4] The "freedom of fishing" this insistence implied favored nations, like the United States, whose vessels fished off foreign shores, and stood in opposition to coastal

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[3] Ann L. Hollick, U.S. Foreign Policy and the Law of the Sea (1981) at 5.

[4] See Harry N. Scheiber, "Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945-70," 13 Ecology Law Quarterly 381, 517 (1986).

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state efforts to extend their fisheries jurisdiction beyond three miles from shore.[5]

Claims to ownership of, or some degree of control or jurisdiction over, tuna emerged as a major problem in international fisheries law and diplomacy in the first decade after World War II. In that decade, differences and controversies between "coastal nations," interested in asserting ownership or jurisdiction over coastal fishery resources, and "distant water fishing nations," interested in maintaining and gaining access to the fishery resources off the coasts of other countries, grew increasingly more pronounced. Although the United States was (and continues to be) a country with both "coastal" and "distant water" interests, disputes between the United States and its tuna fleet, and, first, the coastal states of Latin America and, much later, the small island countries of the South Pacific, off whose shores the U.S. fleet fished, would play a major part in the evolution and development of international fisheries law—and especially extended coastal state jurisdiction.

It is not a little ironic that the process of claim and counterclaim driving this evolution and development was initiated by the Truman Proclamations of 1945.[6] The Truman Proclamation on fisheries declared the intention of the United States to establish "conservation zones" for the conservation and management of fishery resources in the high seas beyond three miles. The companion Truman Proclamation on the continental shelf declared U.S. ownership of continental shelf seabed resources. Both inspired, and were cited as precedent for, a flurry of claims to extended national jurisdiction by Latin

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[5] For an overview of the evolution of extended national jurisdiction see William T. Burke, The New International Law of Fisheries (1994) at 1-25.

[6] See Harry N. Scheiber and Chris Carr, "Constitutionalism and the Territorial Sea: An Historical Study," 2 Territorial Sea Journal 67, 69-73 (1992); Ann L. Hollick, U.S. Foreign Policy and the Law of the Sea (1981) at 18-61.

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American countries that some backed up by seizing foreign fishing vessels, including U.S. tuna and shrimp vessels.[7] In the early 1950s, Chile, Ecuador, and Peru, the "CEP" countries, would emerge as the leading southern hemisphere "coastal" states, a role they continue to play in international fisheries law and diplomacy.[8] The United States responded, in part, by enacting the Fishermen's Protective Act of 1954, which required the U.S. government to pay fines levied against U.S. vessels seized for fishing beyond the three-mile territorial sea and negotiate for their release.[9] To further counter these claims to extended jurisdiction, and to avert the use of the Organization of American States as a forum to consolidate and promote them, the United States successfully elevated the issue of extended fisheries jurisdiction to the United Nations, leading to codification efforts by the International Law Commission, a 1955 U.N. technical conference in Rome, and, the first and second law of the sea conferences in 1958 and 1960, respectively.[10]

The First United Nations Conference on the Law of the Sea, convened in 1958, found the issues of the breadth of the territorial sea and fisheries jurisdiction inseparable and unsolvable.[11] The rival interests of "coastal" states and "distant water fishing" states resulted in numerous proposals, but little resolution. Instead, participants in the 1958 conference could only reach agreement, embodied in the Convention on the Territorial Sea and Contiguous Zone, on a territorial sea of up to 12 miles and a 12 mile contiguous

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[7] Hollick at 67-85.

[8] Hollick at 85-91.

[9] Hollick at 87-88; Scheiber (1986) at 510-16.

[10] Wilbert McLeod Chapman, "The United States Fish Industry and the 1958 and 1960 United Nations Conferences on the Law of the Sea," Law of the Sea Institute Proceedings (1968) 35; Hollick at 88-95.

[11] Hollick at 135-150; Chapman at 48-55.

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zone adjacent to it within which the coastal state could exercise certain functions (excluding fisheries jurisdiction).[12] Difficulty in satisfying these competing interests was also reflected in the complex fisheries provisions—articles "carefully balanced between coastal and distant-water fishing interests"—that eventually became the Convention on Fishing and Conservation of the Living Resources of the High Seas.[13]

The Second United Nations Conference on the Law of the Sea was convened in 1960 for the express purpose of seeking to attain resolution on the breadth of the territorial sea and the contiguous fishing zone, an area adjacent to the territorial sea within which the coastal state would exercise jurisdiction over fisheries.[14] It was at this conference that the famous joint proposal of the United States and Canada for a six mile territorial sea and an adjacent six mile contiguous fishing zone—the "six plus six" proposal—was made and narrowly rejected by only one abstention.[15] This occurred despite the earlier agreement by the United States and Canada to an amendment to the proposal that would have recognized coastal state claims of preferential fishing rights in the high seas adjacent to the contiguous fishing zone itself.[16] Because the U.S. Navy had only reluctantly agreed to accept a six mile territorial sea, and U.S. tuna interests were adamantly opposed to any recognition of coastal state preferential rights, the failure of the

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[12] Hollick at 144.

[13] Hollick at 150. On the 1958 Conference generally see Arthur H. Dean, "The Geneva Conference on the Law of the Sea: What was Accomplished," 52 American Journal of International Law (1958) 607-628.

[14] Hollick at 155; Chapman at 55.

[15] Hollick at 156-68; Chapman at 55.

[16] Id.

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U.S.-Canadian proposal was welcomed by them.[17] The shared interest of the U.S. Navy and the U.S. tuna industry in keeping claims to extended jurisdiction, whether territorial, fisheries or other, in check would pervade U.S. fisheries law and diplomacy for the following 30 years.

This study begins its detailed consideration of the evolution and development of international law and diplomacy concerning tuna fisheries with the failure of the Second U.N. Conference on the Law of the Sea. The years between 1960 and the beginning of preparations for a third law of the sea conference at the end of the decade, though widely termed an ocean policy "interregnum,"[18] witnessed extended fisheries jurisdiction generally, and its impact on tuna fishing particularly, persist as a source of controversy in both U.S. domestic policy and international fisheries law and diplomacy. During this period, the United States itself increasingly took the "coastal" state view on extended fisheries jurisdiction as its own coastal fisheries came under mounting foreign fishing pressure and its domestic fisheries production plateaued or declined.[19] Reflecting this increasingly "coastal" orientation, Congress, in 1964, passed legislation to reserve for American vessels exclusive fishing rights within the three-mile territorial sea.[20] Two years later, over the opposition of the U.S. tuna and shrimp industries, Congress passed a law extending exclusive U.S. fisheries jurisdiction to 12 miles.[21] During the same period,

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[17] Id. On the 1960 Conference generally see Arthur H. Dean, "The Second Geneva Conference on the Law of the Sea: The Fight for Freedom of the Seas," 54 American Journal of International Law (1960) 751-789.

[18] Hollick at 160-195.

[19] Chapman at 56-57.

[20] Scheiber and Carr at 74.

[21] Scheiber and Carr at 75-76.

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the U.S. tuna industry sought and obtained from Congress additional legislative protection against vessel seizures by Latin American countries.[22]

The divergent interests of coastal states and distant water fishing nations with respect to extended jurisdiction were comprehensively addressed by the Third United Nations Conference on the Law of the Sea, which spanned nearly 12 years, meeting from 1970 to 1982.[23] The resulting Law of the Sea Convention resolved, for the most part, the issue of the quality and extent of coastal state ownership or jurisdiction over the vast majority of commercially valuable fishery resources by establishing coastal state sovereign rights over them within a 200-mile exclusive economic zone. However, it provided less definitive resolution with respect to straddling fish stocks and highly migratory species.[24] Countries were not able to develop an agreed formulation to reconcile the interests of coastal and fishing states concerning tuna. Instead, Article 64 of the Convention effectively deferred the question for further elaboration by international and regional organizations. The United States played a central role in the deliberations of the conference concerning fisheries, and bears a major share of responsibility for the indeterminate approach reflected by Article 64.

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[22] Hollick at 162-164.

[23] For an analysis of the history of the negotiation of fishing issues at the Conference see Robert L. Friedheim, 22 Ocean Devel. & Int'l Law 209 (1991). On the negotiating history and politics of the Conference generally, see Robert L. Friedheim, Negotiating the New Ocean Regime (1993) and Edward L. Miles, Global Ocean Politics: The Decision-Process at the Third United Nations Conference on the Law of the Sea (1998).

[24] As noted in footnote 2, supra, "highly migratory species" are listed in Annex 1 to the Law of the Sea Convention. Straddling fish stocks are defined by Article 63 of the Law of the Sea Convention as those stocks (1) occurring within the exclusive economic zones of two or more coastal states or (2) occurring both within the exclusive economic zone and in an area beyond and adjacent to it. The paradigm case is a species that "straddles" the line separating an exclusive economic zone from an adjacent area of high seas.

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At the same time that the fisheries articles of the Convention were winning consensus, the United States extended its fisheries jurisdiction to 200 miles for most species by enacting the Fishery Conservation and Management Act of 1976. However, tuna were specifically exempted from this claim of jurisdiction, and the law contained various provisions refusing to recognize and seeking to discourage claims to exclusive jurisdiction over tuna by other countries. This codification of the U.S. "juridical position"—that exclusive coastal state jurisdiction over highly migratory species is not appropriate and that international cooperation in the management of highly migratory species within 200-mile zones (and not only on the high seas) is required—would underpin, indeed, direct, the actions of the United States in fisheries diplomacy for the next decade and a half.[25]

After 1976, the United States would continue to play a central role in the evolution and development of international fisheries law and diplomacy with respect to tuna. The U.S. juridical position had a tremendous impact on the evolution and development of mechanisms for tuna management involving both coastal states and distant water fishing nations. In one sense, the U.S. juridical position arrested the development and implementation of such mechanisms. Although the United States, in 1987, concluded an agreement with the Pacific Island Countries that provided for access by U.S. tuna vessels to their exclusive economic zones, the agreement did not establish a multilateral conservation and management organization for tuna. The small island

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[25] The Fishery Conservation and Management Act contained provisions declaring that the United States did not recognize claims to exclusive jurisdiction over tuna and directing the Secretary of State to negotiate, instead, multilateral agreements for their conservation and management. Consistent with longstanding executive branch practice to defend Presidential prerogatives in the area of foreign affairs, President Ford issued a statement upon signing the law objecting to this congressional direction.

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nations of the South Pacific refused to consider the creation of a multilateral management regime for tuna in the region so long as the United States refused to recognize the exclusive jurisdiction or sovereign rights of coastal states over tuna within their exclusive economic zones.

In 1990, the United States abandoned this aspect of its juridical position by enacting the "tuna inclusion" amendments to the Fishery Conservation and Management Act. This dramatic departure from previous policy reflected several simultaneous developments from the mid to late-1980s. First, the legendary political power of the U.S. tuna industry waned. Second, most of the U.S. tuna fleet relocated from the Eastern Tropical Pacific Ocean to the South Pacific, where it had the benefit of an access agreement concluded in 1987 between the United States and the Pacific Island Countries. Third, most of the regional fishery management councils established by the Fishery Conservation and Management Act agitated for a role in managing tuna in the U.S. exclusive economic zone, something that the Act had denied them by disclaiming any intent to assert U.S. jurisdiction over tuna and declaring it U.S. policy to object to and refuse to recognize the claims of other countries to enjoy exclusive jurisdiction over tuna when in their exclusive economic zones.

Following enactment of the tuna inclusion amendments, development of multilateral mechanisms for managing tuna generally, and particularly for the South Pacific, has occurred. The U.S. has continued to insist on the second aspect of the juridical position—that tuna can only properly be managed through international cooperation that leads to the application of consistent measures for their conservation and management both within and beyond exclusive economic zones. This insistence has

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helped insure the elaboration of an international "framework agreement" specifying principles for developing regional tuna conservation and management regimes and the conclusion of a convention to establish such a regional organization in the South Pacific. Both of these agreements—the 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, and the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean—reflect the imperative that highly migratory species be managed throughout their range.

The following table sets forth in summary form the major events in the evolution of tuna law and policy reviewed above.

MAJOR EVENTS IN TUNA LAW AND POLICY: 1945-2000	
DATE	**DESCRIPTION**
1945	Truman Proclamations issued
1946 to early 1950s	Latin American states make claims to extended jurisdiction and seize U.S. vessels
Early to mid 1950s	International Law Commission codification efforts undertaken
1954	Fishermen's Protective Act enacted
1955	U.N. Rome technical conference held
1958	First United Nations Conference on the Law of the Sea convened
1960	Second United Nations Conference on the Law of the Sea convened
1964	U.S. law claiming exclusive fishing rights for U.S. vessels within territorial sea enacted
1966	U.S. law extending U.S. fisheries jurisdiction to 12 miles enacted
Mid to late 1960s	U.S. laws providing further protections against vessel seizures enacted
1970	Third United Nations Conference on the Law of the Sea convened
1975	Consensus reached at Law of the Sea Conference on 200-mile zone
1976	Fishery Conservation and Management Act enacted

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MAJOR EVENTS IN TUNA LAW AND POLICY: 1945-2000	
DATE	**DESCRIPTION**
Late 1970s to mid 1980s	Pacific Island Countries establish organization to regulate access to tuna
1982	Third United Nations Conference on Law of the Sea ends
1987	United States and Pacific Island Countries conclude access agreement for U.S. tuna vessels
1990	Tuna inclusion amendments to Fishery Conservation and Management Act enacted
1995	United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks concluded
2000	Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean concluded

The critical role of the United States in the evolution and development of international fisheries law and diplomacy with respect to tuna commends its detailed study. In addition, the complications presented by U.S. policies and actions also call for understanding the reasons for them, both principled and political, both international and domestic. Hence, this study examines the domestic political actors and interest groups at the center of debates about extended fisheries jurisdiction in the United States. In particular, the roles of the U.S. distant water fishing industry—shrimp fishermen but much more importantly tuna interests—and U.S. coastal fishermen are therefore traced in detail. Although fisheries policy in general, and extended jurisdiction in particular, were not (and to this day are not) partisan political issues, they have strongly implicated institutional politics and prerogatives between the executive branch and Congress, especially as the issues have involved concerns beyond "the water's edge." The constellation of interest group pressures and institutional politics surrounding the extended jurisdiction issue as it impacted tuna, in particular, nicely reveals the insights of

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public choice theory in showing how a "concentrated minority"—the U.S. tuna industry—preserved its interest in freedom of fishing against a rising tide of claims to extended jurisdiction made not only by other countries but also by the United States itself.[26] Until the 1960s, when the United States started to take action to protect and advance its own "coastal" fisheries interests,[27] the interests of the U.S. tuna industry were by-and-large consistently aligned with the positions advocated by the United States in international fisheries law and diplomacy. The focused, intense interest of the U.S. tuna industry in preserving, as much as possible, freedom of access to tuna fisheries enabled that industry to secure from Congress a sanction for and mandate to defend the U.S. juridical position even for many years after the United States had extended its own fisheries jurisdiction to 200 miles.

The domestic and international law and policy processes examined in this study also nicely demonstrate the operation of a "two-level game" in the international diplomacy surrounding extended fisheries jurisdiction generally, and tuna issues particularly.[28] This is particularly evident in the relationship between the Congress and U.S. negotiators with respect to the Third Law of the Sea Conference. U.S. negotiators criticized Congressional consideration of 200-mile legislation on the ground that such

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[26] The term "concentrated minority" derives from Mancur Olson's theory of collective action. Mancur Olson The Logic of Collective Action: Public Goods and the Theory of Groups (1965). On law and public choice generally see Daniel A. Farber and Phillip P. Frickey, Law and Public Choice: A Critical Introduction (1991).

[27] While, as noted earlier, the Truman Proclamations precipitated a variety of claims to extended fisheries jurisdiction by other countries, the United States did not itself "implement" the Truman Proclamation on fisheries and establish conservation zones.

[28] On two-level games generally see Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," International Organization 42 (Summer 1988) 427-60; Peter B. Evans, Harold K. Jacobson, and Robert D. Putnam, eds., Double-Edged Diplomacy: International Bargaining and Domestic Politics (1993).

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action constrained or forced their hands at the Law of the Sea Conference. At the same time, leading members of Congress publicly stated their belief that that institution's consideration of extended fisheries jurisdiction legislation while the executive branch was engaged in negotiations at the Third U.N. Law of the Sea Conference had an important influence on the development of fisheries articles at the Conference.

This study contributes to analysis of some major issues in the field of international fisheries law and in the literature examining the U.S. policymaking process, both foreign and domestic, especially as it regards the oceans. While there are several recent books that comprehensively treat international fisheries law,[29] there is no monographic study of the evolution of the international law of fisheries governing highly migratory species.[30] At the same time, because of the significant influence of U.S. policy and actions on the evolution of the international law governing highly migratory species, this study considers the key episodes in U.S. foreign relations and lawmaking with respect to highly migratory species, and the processes from which those policies and laws emerged.[31]

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[29] See, e.g., Burke (1994) and Francisco Orrego Vicuña, The Changing International Law of High Seas Fisheries (1999).

[30] This study attempts to provide that account. A synopsis "legislative history" of Article 64 of the Law of the Sea Convention (the article governing highly migratory species) has been provided by Satya N. Nandan and Shabtai Rosenne in United Nations Convention on the Law of the Sea in 1982: A Commentary, Vol. II (1993) at 648-658. Burke (1994) also has a chapter on highly migratory species at 199-254 that discusses Article 64, though not its development, in some detail.

[31] A similar study of the U.S. policy process and fisheries law and diplomacy has been carried out by Harry Scheiber for the Pacific fisheries for the period 1945 to 1970. See Harry N. Scheiber, "Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945-70," 13 Ecology Law Quarterly 381 (1986). For a more general study of the U.S. ocean policy process see Edward Wenk, Jr., The Politics of the Oceans (1972).

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This study relies heavily upon the author's research in the papers of the major U.S. political actors and agencies involved in those law and policymaking processes. The account of U.S. actions at the Third Law of the Sea Conference, and the consideration, passage and enactment of 200-mile legislation, rely heavily upon original archival research in the Ford and Carter presidential papers, and the papers of some Members of Congress who were active and influential on the issues as well as other congressional materials. Consideration of the development of Article 64 at the Third U.N. Law of the Sea Conference has been greatly informed by the vast secondary literature concerning the Conference, as well as materials the parties submitted and negotiated on. Discussion of later major policy episodes—from efforts to address tuna issues in the South Pacific to the 1990 amendment including tuna under U.S. jurisdiction to negotiation of the U.N. Fish Stocks Agreement and a multilateral conservation and management agreement for the Western and Central Pacific Ocean—draw upon original archival research in the papers of the Western Pacific Regional Fishery Management Council, as well as secondary literature.

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The evolution in the law of highly migratory species from 1970 to 2000, and the role of the United States in that process, is canvassed over seven chapters. Chapter 1 sets the stage by explaining U.S. oceans policy with respect to extended fisheries jurisdiction as of the late 1960s, and providing a snapshot of the U.S. fishing industry at that time. Particular attention is given to the U.S. distant water fishery interests and especially the tuna industry, as it was the key non-governmental actor in the formulation and trajectory of U.S. policy with respect to highly migratory species—and in particular, tuna—both domestically and internationally.

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Chapter 2 considers changes in U.S. fisheries policy, and especially that with respect to highly migratory species, at the Third U.N. Conference on the Law of the Sea, from 1971 to 1974. The change in U.S. policy from a "species" or "species-by-species" approach to fisheries jurisdiction, according to which coastal state jurisdiction would vary in extent by species—coastal, anadromous, or highly migratory—to the U.S. acceptance of a 200-mile zone concept while continuing to insist on special treatment for highly migratory and anadromous species is traced. In addition, the influence of Congress's consideration of legislation to extend U.S. fisheries jurisdiction to 200 miles on this change in U.S. policy and on the Law of the Sea negotiations more generally is also discussed.

Chapter 3 considers events leading up to the crucial Geneva session of the Law of the Sea negotiations, held in spring 1975. The content of what was to become Article 64 of the Law of the Sea Convention—the highly migratory species article—was essentially determined at that session, and the negotiations resulting in that article are covered in some detail. Many of the viewpoints and concepts put forward in the negotiation of that article would find expression in future efforts to implement and elaborate the requirements of Article 64, including the U.N. Fish Stocks Conference and the Multilateral High Level Conference concerning tuna conservation and management in the Western and Central Pacific Ocean.

Chapter 4 presents a focused account of the struggle in the United States over passage and enactment of the Fishery Conservation and Management Act of 1976, which asserted exclusive U.S. jurisdiction over fisheries (except for tuna) to a distance of 200 miles. That history reveals a major struggle between congressional leadership in favor of

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U.S. unilateral action to extend fisheries jurisdiction and Executive Branch departments and agencies, led by the Department of State, almost uniformly opposed to such action on the ground that it would negatively impact U.S. negotiating efforts at the Law of the Sea Conference. The development of the provisions of the legislation designed to address the concerns of U.S. distant water interests, and especially the U.S. distant water tuna industry, is set forth in detail. These provisions would provide the legislative backbone for the U.S. juridical position that tuna could not properly be subjected to exclusive coastal state jurisdiction and had to be managed throughout its range for the next decade and a half.

Chapter 5 considers developments in the international law governing tuna in the South Pacific from the late 1970s to the late 1980s. This region became the focal point for disputes involving coastal state claims of exclusive jurisdiction over tuna within 200-mile zones and the U.S. refusal to recognize such claims, as the U.S. distant water fleet shifted operations from waters off the Pacific coast of Latin America to the Western and Central Pacific Ocean during that time period. The conflicting interpretations of Article 64 and its requirements held by the United States and the Pacific Island Countries, in an apparent paradox, simultaneously forestalled and inspired efforts to further elaborate the requirements of Article 64.

Chapter 6 canvasses the development of the 1990 amendment to the Fishery Conservation and Management Act by which the United States reversed its longstanding juridical position and subjected tuna to its exclusive management jurisdiction. The chapter explains how changes in the political economy of the U.S. tuna industry and the juridical position's frustration of the ambitions of the fishery management councils

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established by the Fishery Conservation and Management Act conspired to generate momentum for tuna inclusion. Special attention is given to the role of the Western Pacific Regional Fishery Management Council in the development and consideration of the tuna inclusion amendment. The tuna inclusion amendment, signaling the demise of the U.S. juridical position (more precisely, that aspect denying exclusive coastal state jurisdiction within the exclusive economic zone), set the stage for further implementation and elaboration of Article 64's requirements.

Chapter 7 considers this further implementation and elaboration. The negotiation of the 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks ("U.N. Fish Stocks Agreement") involved just this. The U.N. Fish Stocks Agreement's specifications with respect to the conservation and management of highly migratory species are considered in some detail and reveal the continuing vitality and influence of that aspect of the U.S. juridical position stressing the need for coordinated management of highly migratory species throughout their range, within and beyond exclusive economic zones. The specifications of the U.N. Fish Stocks Agreement, in turn, were reflected and implemented in the development of a tuna convention for the Western and Central Pacific Ocean by the Pacific Island Countries and fishing nations. This effort, too, reflects the continuing vitality of that aspect of the U.S. juridical position stressing the need for coordinated management of highly migratory species throughout their range.

This study concludes that although there is now worldwide agreement that tuna are appropriately subjected to coastal state jurisdiction within exclusive economic zones, whether the framework and regional agreements designed to effect multilateral

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management of tuna for conservation throughout their range will succeed remains to be seen. Uncertainty on this score is partly a product of the continued insistence by a few distant water fishing nations on a robust "freedom of fishing" principle, especially as it pertains to the high seas beyond exclusive economic zones. More importantly, and in major part, this uncertainty results from continuing controversy over the extent to which coastal state regulation of tuna will be consistent with, and established by, the measures adopted by international and regional organizations for those species. For although ambiguities left unresolved by the Law of the Sea Convention's treatment of tuna in Article 64 have been substantially narrowed, there remains considerable uncertainty over the competence of coastal states and international and regional organizations, respectively, to regulate tuna both within and beyond exclusive economic zones.

The longstanding "juridical position" of the United States regarding highly migratory species, in both of its aspects—that exclusive coastal state jurisdiction over highly migratory species is not appropriate and that international cooperation in the management of highly migratory species within 200-mile zones (and not only on the high seas) is required—has significantly contributed to the evolution of the international law of highly migratory species. While that aspect of the U.S. juridical position denying coastal state jurisdiction over tuna within the exclusive economic zone fell by the wayside in 1990 with the tuna inclusion amendment to the Fishery Conservation and Management Act, the corollary aspect of the U.S. juridical position that conservation and management of tuna should be consistent throughout their range retains vitality and informs ongoing tuna conservation and management efforts by regional organizations.

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These efforts will determine whether the now universally acknowledged coastal state jurisdiction over tuna within 200-mile zones is truly "exclusive."

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CHAPTER 1: THE EVOLUTION OF U.S. POLICY ON EXTENDED FISHERIES JURISDICTION IN THE BUILDUP TO UNCLOS III AND THE U.S. DISTANT WATER TUNA INDUSTRY

I. U.S. POLICY 1960-1967: SEEKING TO MAINTAIN THE STATUS QUO IN THE LAW OF THE SEA

The failure of the American-Canadian six-plus-six proposal—a six-mile territorial sea plus a six-mile fisheries zone beyond it—at the second Geneva Conference was met with relief by U.S. distant water fishing interests.[1] The proposal also would have accorded coastal states preferential fishing rights in areas of the high seas adjacent to the contiguous fisheries zone.[2] For the next 30 years, U.S. distant water fishing interests, and particularly U.S. tuna fishermen and their allied processors and workers, would oppose extended fisheries jurisdiction and the related concept of coastal state preferential rights.

From 1960 to 1967, the U.S. government consistently resisted entreaties by Canada, Great Britain, and other countries to convene a multilateral conference for the purpose of achieving an agreement embodying the failed six-plus-six proposal.[3] The United States preferred the status quo, fearing that an effort to reach a multilateral agreement on the limits of the territorial sea and contiguous fisheries zone would reveal scant support for the narrow three-mile territorial sea that had long been the linchpin of U.S. oceans diplomacy, and possibly galvanize those states supporting a territorial sea of

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[1] See Hollick at 157-158.

[2] The provision for preferential rights of coastal states resulted from an amendment of Brazil, Cuba, and Uruguay. See Hollick at 157-158.

[3] See "United States Policy Regarding The Oceans And The Law Of The Sea, 1960-1967," Research Project No. 1031-B, Historical Studies Division, Historical Office, Bureau of Public Affairs, Department of State (June 1974) at 2-22 (hereinafter "DOS 1974 Study").

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12 miles or greater.[4] However, this strategy proved unsuccessful, as claims to extended jurisdiction, both territorial and fisheries, continued unabated through the mid-1960s.[5] Indeed, the United States itself extended its fisheries jurisdiction to 12 miles (while retaining a three-mile territorial sea) with enactment of the Twelve Mile Act in 1966.[6]

The extension of U.S. fisheries jurisdiction to twelve miles was a response to demands of coastal fishermen who were alarmed by growing Russian and European fisheries off North American coasts.[7] The Executive Branch of the U.S. government did not oppose the extension of fisheries jurisdiction to twelve miles. In its view, the extension was acceptable because it did not alter the three-mile territorial sea and would actually serve to confirm the twelve-mile fishery zone as the norm in international practice.[8] The principal opposition to the extension came from U.S. distant water tuna and shrimp fishermen. They were concerned lest the United States take any action which Latin American states could point to in legitimation of their claims to extended jurisdiction, and in support of their efforts to exclude, or impose access restrictions upon,

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[4] See DOS 1974 Study at 22.

[5] See DOS 1974 Study at 45-77.

[6] See P.L. 89-658, 80 Stat. 908; see also Hollick at 162. Two years earlier, the United States, in anticipation of the coming into force of the Geneva Convention on the Continental Shelf, enacted the Bartlett Act, also called the Fishing Act of 1964, which prohibited foreign vessels from fishing in the U.S. territorial sea and from taking living resources of the Continental Shelf. See P.L. 88-308, 78 Stat. 194; see also Hollick at 167-168; see also Harry N. Scheiber and Chris Carr, "Constitutionalism and the Territorial Sea: An Historical Study," 2 Territorial Sea Journal 67 (1992) [hereinafter Scheiber and Carr (1992)].

[7] See Hollick at 162; see also Scheiber and Carr (1992) at 74.

[8] See Scheiber and Carr (1992) at 75 and sources cited therein.

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U.S. vessels that had traditionally fished off their coasts.[9] Nonetheless, while taking a strong stand against the extension of fisheries jurisdiction to twelve miles, the American Tunaboat Association, which represented the U.S. distant water tuna fleet, acknowledged that its opposition was based on principle, as most tuna fisheries occurred well beyond the twelve-mile limit of any other nation.[10]

Throughout the 1960s, the interests of U.S. coastal and distant water fishermen increasingly diverged. At the same time coastal fishermen sought protection from growing foreign pressure on U.S. coastal fisheries, distant water fishermen opposed any action by the United States that could be used by the Latin American states to legitimate their claims to extended jurisdiction and vessel seizures based on those claims.[11] To aid them in their struggle to maintain access to fishing grounds off Latin America, the U.S. distant water interests secured legislation, including amendments to the Fishermen's Protective Act and the Pelly Amendment of 1968.[12] These laws insured U.S. vessels against seizures and aimed to deter them. More generally they served to maintain U.S. opposition to other nations' claims of extended jurisdiction.[13]

II. THE MOVEMENT FOR A THIRD LAW OF THE SEA CONFERENCE AND THE U.S. POLICY STATEMENT

By 1967, following the proliferation of claims to extended jurisdiction, a consensus had developed within the U.S. government "that the absence of a new

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[9] See Scheiber and Carr (1992) at 76 and sources cited therein; for data on vessel seizures by Latin American states during the 1960s see Hollick at 162-163.

[10] See Scheiber and Carr (1992) at 76 and sources cited therein.

[11] See Hollick at 176-178.

[12] See Hollick at 163-164.

[13] See Hollick at 178.

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agreement did not preserve the status quo but only engendered greater chaos."[14] In that year, the U.S. and Soviet governments reached an informal understanding on the need for a new Law of the Sea Convention, with the United States advocating generous treatment of coastal fishing interests as necessary to secure a territorial sea of no more than twelve miles and freedom of transit passage through straits. This "package" approach—and the trade-offs inherent in it—reflected not only the influence of U.S. coastal fishing interests,[15] but more importantly in terms of its impact on U.S. policy, the influence of the Department of Defense, led by the Navy, which was increasingly concerned with halting "creeping jurisdiction" that could result in limitations on freedom of navigation for U.S. military vessels.[16]

In 1967 the United Nations General Assembly ("UNGA") established the Seabed Committee as the first step toward convening a third Law of the Sea Conference.[17] However, it would be another three years before the U.S. government would issue a policy statement on the objectives of a Law of the Sea Conference, submit draft articles to the Seabed Committee, and call for the United Nations General Assembly to convene the conference to address all of the Law of the Sea issues, including seabed, navigational freedom, and fisheries issues, among others, in one forum.[18]

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[14] See DOS 1974 Study at 77.

[15] See Hollick at 174-175.

[16] See Hollick at 183-190.

[17] See Hollick at 201; for a detailed account of the activities of the Seabed Committee see Shigeru Oda, The Law of the Sea in Our Time-II: The United Nations Seabed Committee, 1968-1973 (1977).

[18] See Hollick at 233-237.

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In February 1970, the United States issued a policy statement consistent with the understanding on a "package" approach it had reached with the Soviet Union in 1967. The 1970 policy statement announced that the United States would accept a twelve-mile territorial sea (withdrawing its long-held commitment to the three-mile territorial sea) if provision were made for unrestricted freedom of passage through and over international straits.[19] Preferential fishing rights for coastal states beyond the territorial sea were included as a part of this "package" to garner support from coastal nations.[20]

In August 1970, the United States submitted draft working papers to the Seabed Committee, embodying the "package" approach reflected in its policy statement.[21] The U.S. submission led the UNGA to vote in December 1970 to convene a third Law of the Sea Conference for 1973. At the same time, the UNGA expanded the membership of the Seabed Committee and directed it to hold preparatory conferences in 1971 and 1972.[22]

The U.S. domestic fishing industry had not participated in formulating the 1970 U.S. policy.[23] Predictably, U.S. distant water fishermen reacted negatively to the

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[19] See Hollick at 235.

[20] See Hollick at 235. The United States had similarly provided for such preferential rights in accepting an amendment according preferential rights to coastal states when trying to generate support for the six-plus-six proposal at the 1960 Conference. See Hollick at 157-158. The 1970 policy statement's provision for coastal state preferential state fishing rights avoided the concept of a fishing zone, at the insistence of the Department of Defense, which was concerned with "creeping jurisdiction." See Hollick at 236.

[21] See Hollick at 220-221, 232-233.

[22] See Hollick at 234, 237-238; see also Myron H. Nordquist and Choon-ho Park, eds., Reports of the United States Delegation for a Third United Nations Conference on the Law of the Sea (1983) at 31.

[23] See Hollick at 237.

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preferential rights aspect of the U.S. proposal to the Seabed Committee.[24] U.S. coastal fishermen, on the other hand, favoring an extension of coastal state fisheries jurisdiction, supported such preferential rights for the coastal state.[25]

III. THE POLITICAL ECONOMY OF EXTENDED JURISDICTION: A SNAPSHOT OF THE U.S. FISHING INDUSTRY

In developing a fisheries position for the Law of the Sea negotiations, U.S. policymakers would face the challenge of addressing the conflicting—indeed, diametrically opposite—positions of the distant water and coastal segments of the U.S. fishing industry on extended fisheries jurisdiction. These seemingly irreconcilable positions would also be pressed before Congress in its consideration of legislation to extend U.S. fisheries jurisdiction. Because of the rival demands placed on the U.S. government by the distant water and coastal fishing interests, some background on the claimants is in order.

In 1973, nearly 77 percent of the volume and 62 percent of the value of fish and shellfish caught by U.S. vessels came from within 12 miles of the U.S. coast.[26] Another 12 percent of the volume and 21 percent of the value of the U.S. catch came from waters

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[24] See Hollick at 267-268. Japan and Russia, at the time the number two and number three fishing nations in the world, respectively, also disagreed with the preferential rights component of the U.S. "package" approach. See Hollick at 236.

[25] See Hollick at 267-268. Upset by their exclusion from the process that led to the 1970 U.S. policy statement, the domestic fishing industry sought Congressional intervention in support of an increased role for the industry in the policy process. See Hollick at 241, 266-268. The requested support resulted in the inclusion of two industry seats, one for coastal and one for distant water interests, on the Advisory Group on Law of the Sea formed in 1972. See Hollick at 268. For a description of the fragmentation within the U.S. domestic fishing industry see Hollick at 267.

[26] See Interim Fisheries Zone Extension and Management Act of 1973 – Part 3: Hearings Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce, 93rd Cong., 2d Sess. (1974) [hereinafter "1974 Senate Commerce Hearings"] at 984-985 (Department of Commerce, NOAA, response to questions).

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from 12 to 200 miles off the U.S. coast.[27] Only 12 percent of the volume and 17 percent of the value of the U.S. catch came from beyond 200 miles of the U.S. coast, including waters off foreign shores.[28]

Given the volume and value of the U.S. catch taken within 200 miles of shore, it is not surprising that the coastal fishing interests of the United States functioned as a monolith in supporting extended fisheries jurisdiction, and that those interests received the support of a broad range of politicians. More surprising, and more interesting, is that the opponents of extended jurisdiction—consisting principally of the distant water interests who fished off foreign shores—were able to exert considerable influence on the trajectory of U.S. fisheries diplomacy at the Law of the Sea Conference and on the shaping of the 200-mile legislation enacted by the United States in the Fishery Conservation and Management Act of 1976 ("FCMA").

The tuna industry—tuna fishermen (including boat owners) and allied processors and workers—comprised the most vocal and influential component of the distant water segment of the U.S. fishing industry. Gulf State shrimp and snapper-grouper fishermen, concerned about the effects of extended jurisdiction on their fisheries off Mexico and Latin America, filled out the distant water segment of the industry. These distant water interests would play an important role in the development of the U.S. fisheries position at the Law of the Sea negotiations and in shaping the 200-mile legislation ultimately enacted in the FCMA.[29]

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[27] See id.

[28] See id.

[29] The U.S. salmon industry also formed a distinct segment of the U.S. fishing industry. As U.S. distant water tuna fishermen would for tuna, U.S. salmon fishermen would push U.S. negotiators to press for a special regime for anadromous stocks in the

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While U.S. distant water interests—and especially the tuna industry—would have a major influence on U.S. fisheries policy, as reflected both in the U.S. fisheries position at the Law of the Sea negotiations and in the consideration of 200-mile legislation, U.S. recreational or sportfishermen would play no role in the development of U.S. policy at the Law of the Sea negotiations. Although supportive of 200-mile legislation, sportfishing interests would play a very limited role in shaping it generally, but an important role in how the law would treat highly migratory species. Some 20 years later, after developing into a powerful and well-organized interest group in its own right, sportfishermen would play a crucial role in the passage and enactment of the tuna inclusion amendments to the FCMA of 1990, which fundamentally altered U.S. tuna policy.

Because of its central role in the development and evolution of U.S. policy concerning extended fisheries jurisdiction, the distant water segment of the U.S. industry as of the early 1970s is described in greater detail below.

IV. THE U.S. DISTANT WATER INTERESTS IN FOCUS

The distant water segment of the U.S. fishing industry was actually comprised of the fishermen and allied industries of three different fisheries. Far and away the most important of these, in terms of its influence on U.S. policy at the Law of the Sea

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Law of the Sea negotiations. See William T. Burke, The New International Law of Fisheries: UNCLOS 1982 and Beyond (1994) at 162-165. And like the distant water interests, certain elements within the U.S. salmon industry would oppose 200-mile legislation. However, unlike U.S. distant water interests, those in the salmon industry who opposed 200-mile legislation did not fear its passage would lead to their exclusion from traditional fishing grounds, but rather that a unilateral assertion of such extended jurisdiction would prompt the Japanese to abrogate the International North Pacific Fisheries Convention, and begin setting on salmon of U.S. origin east of the "abstention" line established by that treaty.

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negotiations and on 200-mile legislation, was the distant water tuna industry, consisting of boatowners and fishermen, and the processors and workers which depended on their catch. Gulf State shrimp fishermen also exerted considerable influence in the formulation of U.S. Law of the Sea policy and extended jurisdiction legislation. Much lesser influence in these policy processes was exerted by the Gulf State snapper-grouper fishermen.

A. THE DISTANT WATER TUNA INDUSTRY

During the 1950s and 1960s, the Southern California tuna fleet established itself as an economic and political force to be reckoned with, both domestically and internationally. This fleet led the "purse seine revolution in tuna fishing,"[30] so that by the early 1970s, the U.S. distant water tuna fleet was the most modern and efficient of any in the world.[31] As of 1974, purse seiners comprised two-thirds of the U.S. tuna fleet fishing the Eastern Tropical Pacific Ocean and nearly 95 percent of the fleet's carrying capacity.[32] The distant water boat owners and fishermen had developed a reputation, and self image, as risk-taking entrepreneurs often likened to buffalo hunters on the seas.[33]

Perhaps not a little ironically, this entrepreneurial industry, throughout the 1950s and 1960s, aggressively sought the support of the federal government in its efforts to secure and preserve access to tuna resources and to obtain tariff protection from tuna

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[30] See Richard L. McNeely, "Purse Seine Revolution in Tuna Fishing," Pacific Fisherman, June 1961, at 27-58.

[31] See F. David Froman, "The 200-Mile Exclusive Economic Zone: Death Kneel for the American Tuna Industry," 13 San Diego Law Review 707 (1976) [hereinafter Froman (1976)].

[32] See Froman (1976) 716 and n. 35.

[33] See generally Michael K. Orbach, Hunters, Seamen, and Entrepreneurs: The Tuna Seinermen of San Diego (1977).

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imports.[34] The industry was partially successful in these efforts. In 1954, it won enactment of the Fishermen's Protective Act ("FPA"), which obligated the U.S. government to reimburse fines paid by U.S. vessels seized under another state's claim of jurisdiction beyond the three mile territorial sea and to negotiate for the vessel's release.[35] The FPA was passed over the strenuous opposition of the State Department, which believed it would encourage confrontations between U.S. tuna vessels and Latin American states.[36] In 1968 the industry secured amendments to the FPA that strengthened the protection it provided to U.S. tuna fishermen. One amendment broadened the FPA to require the U.S. government to reimburse not only fines but also all the costs incurred by the owner of a seized vessel.[37] Another amendment, which came to be known as the "Pelly Amendment," prohibited U.S. defense assistance to any country that seized or fined a U.S. vessel for fishing beyond 12 miles from its coast.[38] The industry's efforts to secure tariff protection were not similarly successful, as they conflicted with the free trade regime advocated by the United States in the decades after World War II.[39]

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[34] See Harry N. Scheiber, "Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945-70," 13 Ecology Law Quarterly 381, 500-516 (1986) ["Scheiber (1986)"].

[35] See Act of August 27, 1954, Ch. 1018, 68 Stat. 833.

[36] See Scheiber (1986) at 512.

[37] P.L. 90-482, 82 Stat. 729.

[38] Section 3, P.L. 90-629, 82 Stat. 1320. These amendments and the enactment of other laws to benefit the U.S. tuna industry in the late 1960s and early 1970s are discussed in Hollick at 163-164 and notes 23-26.

[39] See Scheiber (1986) at 506-510.

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1. Economic Importance

The U.S. tuna fleet had numerous backward and forward economic linkages that magnified its economic importance. The most significant linkage was that between the U.S. fleet and the processing segment of the U.S. tuna industry, consisting of canneries and their workers. "Through the mid-1970s the harvesting and processing segments of the U.S. tuna industry were well integrated. Corporate entities in each segment of the industry were linked together through financial obligations, equity-sharing and long-term supply contracts and U.S. tuna vessels had a secure market for their catches. Foreign-caught tuna was more expensive than domestic-caught tuna and was imported primarily to offset domestic supply shortages."[40] This meant that through the mid-1970s, the tuna fleet and processors stood shoulder-to-shoulder on issues that were perceived to impact the access of the U.S. fleet to tuna stocks.

The processors themselves had additional economic linkages, purchasing goods and services from other U.S. industries. The U.S. tuna fleet itself also relied on ship building and repair services, import services and other goods and services. These linkages generated "indirect and induced economic impacts that ripple[d] throughout the economy," having a substantial multiplier effect.[41]

An industry study estimated the economic impact of the tuna fleet (or harvesting segment) itself in 1973 to be over a billion dollars.[42] The study further found that in

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[40] See Dennis M. King and Harry A. Bateman, "The Economic Impact of Recent Changes in the U.S. Tuna Industry," (1985) at 7.

[41] See King (1985) at 24-25.

[42] See Gordon C. Broadhead and Charles J. Peckham, "The Potential Economic Impact of a 200-Mile Fishery Zone on the United States Fisheries for Tuna, Shrimp and Salmon," (June 1974) at 3 [hereinafter "Living Marine Resources Study"], reprinted in Fisheries Jurisdiction: Hearings Before the Subcomm. on Fisheries and Wildlife

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1973 the tuna fleet provided direct employment to approximately 6800 people with a payroll of approximately $65 million, and that shore support for the fleet (including shipyard employees and their subcontractors) provided approximately 5000 jobs with a payroll of approximately $48 million.[43]

The processing segment of the industry packed $714 million (at processor level) of canned tuna in 1973.[44] Using an economic multiplier of 3.4,[45] the processing segment generated approximately $2.4 billion in economic activity in 1973. The processing plants employed approximately 16,000 people in administrative and factory tasks during 1973, with a total payroll of more than $90 million.[46]

2. Southern California Concentration

The U.S. distant water tuna fleet was based in San Diego. In 1972, 90 percent of the fleet's vessels called the city their homeport.[47] A much smaller number of vessels homeported in San Pedro.[48]

Conservation and Environment of the House Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess. (1975) [hereinafter "1975 House MM&F Committee Hearings"] at 483; see also Froman (1976) at 730-731. The economic multiplier of five used in the Living Marine Resources Study does not appear to significantly overestimate the multiplier effect from the harvesting segment of the U.S. tuna industry. The 1982 California Inter-Industry Fisheries (CIF) model (see Rand Technical Report P-T-31) had a multiplier of approximately 3.7 for the harvesting segment of the U.S. tuna industry. See King (1985) at 28-29.

[43] See Living Marine Resources Study at 3.

[44] See Living Marine Resources Study at 3.

[45] See King (1985) at 28-29.

[46] See Living Marine Resources Study at 3.

[47] See Froman (1976) at 708 n. 5.

[48] See Froman (1976) at 724-725; see also Scheiber (1986) at 519 n. 464.

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Three large concerns dominated tuna processing operations in the United States in the early 1970s: Star Kist, a subsidiary of H.J. Heinz Company; Van Camp, a subsidiary of Ralston Purina Company; and Bumblebee, a subsidiary of Castle & Cooke.[49] These, and several smaller companies, had tuna processing facilities in San Diego and San Pedro, California; Ponce and Mayaguez, Puerto Rico; American Samoa; Honolulu, Hawaii; Astoria, Oregon; and Cambridge, Maryland.[50] In the early 1970s, while the U.S. fleet landed up to a third of its tuna catch in Puerto Rican ports for processing,[51] most of the catch was landed in San Pedro; a lesser percentage of the U.S. catch was also processed in San Diego.[52] The American Samoa canneries received most of their tuna from Korean and Taiwanese longline vessels fishing the South Pacific.[53]

3. Trade Organizations and Unions

The Southern California tuna fleet vessel owners were represented by the American Tunaboat Association (ATA). The organization, which had been in existence since 1923, had established a well-deserved reputation as a formidable lobbying group

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[49] See Robert T.B. Iversen, "U.S. Tuna Processors," in David J. Doulman ed., The Development of the Tuna Industry in the Pacific Islands Region; an Analysis of Options (1987) at 271-273; see also Alessandro Bonanno and Douglas Constance, Caught in the Net: The Global Tuna Industry, Environmentalism, and the State (1996) at 153-56.

[50] See Living Marine Resources Study at 3; see also Thomas Wolff, In Pursuit of Tuna: The Expansion of a Fishing Industry and Its International Ramifications – The End of an Era (1980) at 11.

[51] See Froman (1976) at 733. Orbach explains that the transit time from fishing grounds in the Eastern Tropical Pacific, through the Panama Canal, to Puerto Rico was approximately the same as that to California. Moreover, according to Orbach, "[i]t is cheaper to unload and process the tuna in Puerto Rico and ship it by sea back to the mainland United States than it is to unload and process in Southern California and ship by rail." Orbach (1977) at 22.

[52] See Froman (1976) at 732; see also Orbach (1977) at 22.

[53] See Living Marine Resources Study at 3-4.

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and, at the federal level, could rely upon California's senators and Southern California House members for support of the distant water tuna industry.[54] U.S. tuna processors were represented by the Tuna Research Foundation, a trade association dating back to 1913.[55] The workers in the canneries were represented by the United Cannery and Industry Workers of the Pacific and the International Longshoremen Workers Union.[56] Together, these industry and labor organizations formed an effective coalition in support of ensuring the continued access of U.S. tuna vessels to their traditional tuna grounds off foreign shores.[57]

4. Dependency on Distant Waters

As of the early 1970s, the U.S. distant water fleet focused the overwhelming majority of its fishing effort in the Eastern Tropical Pacific; a much smaller percentage of the U.S. fleet's catch came from the Southeast Atlantic. However, evidencing the dependency of the U.S. fleet on continued access to coastal waters, approximately 80 percent of the fleet's Eastern Tropical Pacific catch and nearly 100 percent of its Atlantic catch came from within 200 miles of the coasts of Latin America and Africa, respectively.[58] In 1974, 150 purse seiners, fishing the Eastern Tropical Pacific and, to a

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[54] See Scheiber (1986) at 503; see also Bobbie B. Smetherman and Robert N. Smetherman, Territorial Seas and Inter-American Relations; with Case Studies of the Peruvian and U.S. Fishing Industries (1974) at 98-108; 1974 Senate Commerce Committee Hearings at 477 (statement of August Felando).

[55] See 1975 House MM&F Committee Hearings at 481 (statement of Charles R. Carry, Executive Director, Tuna Research Foundation); see also Wolff (1980) at 16.

[56] See Froman (1976) at 725 n. 70; see also Wolff (1980) at 16.

[57] As will be discussed later, these interests occasionally differed on intra-industry issues, such as tuna prices, wages, tariffs and responses to the Marine Mammal Protection Act of 1972.

[58] See Froman (1976) at 716-717.

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much lesser extent, the Atlantic, accounted for approximately 75 percent of the U.S. tuna catch.[59] A significantly smaller number of bait boats (using pole and line fishing methods) and an even smaller number of trolling vessels, both types of vessels with carrying capacities dwarfed by that of the seiners, also fished the Eastern Tropical Pacific.[60]

Virtually all components of the U.S. tuna industry were overwhelmingly dependent on tuna caught within 200 miles of the coasts of other nations; they did not rely on tuna caught within 200 miles of the coasts of the United States. Only west coast albacore trollers depended in any degree on tuna catches within U.S. coastal waters.[61] The catch of these vessels was insignificant in comparison to the rest of the tuna industry.[62] Given their fishing activities and interests, the albacore fishermen were not a part of the U.S. distant water tuna industry.

B. GULF STATE SHRIMP FISHERMEN

By the early 1970s, the shrimp fishery had become the most valuable fishery in the United States, measured by the value of sales.[63] Production from the Gulf of Mexico

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[59] See Bonanno and Constance (1996) at 121.

[60] See Froman (1976) at 716 and n. 35.

[61] See 1974 Commerce Committee Hearings at 639-640 (statement of Harold E. Speer, Western Fishboat Owners Association), 640-644 (A.W. Munro, Western Fishboat Owners Association); 1975 MM&F Committee Hearing (statement of Charles R. Carry, Executive Director, Tuna Research Foundation) at 491; see also King (1985) at 12 and n. 9. In supporting 200-mile legislation, the albacore trollers were not concerned about directed foreign fishing of albacore within 200 miles of the U.S. coast, but rather feared foreign pressure on other stocks would displace U.S. fishermen fishing for coastal stocks and force them to target albacore. See 1974 Commerce Committee Hearings at 641.

[62] See Living Marine Resources Study at 3.

[63] See Philip M. Roedel, "Shrimp '73: A Billion Dollar Business," Marine Fisheries Review, Vol. 35 (1973) at 1-2.

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accounted for over 60 percent of the volume and 80 percent of the value of U.S. shrimp landings annually.[64] The Gulf State shrimping industry of the early 1970s could roughly be divided into three components: distant water shrimpers, who fished off the Atlantic coast of Latin America and in the Gulf of Mexico; coastal shrimpers, who fished off the Gulf coast of the United States; and "bay" or "pine tree" fishermen, so-called because they never fished out of sight of land.[65]

In the early 1970s, Gulf State distant water shrimpers fished international waters off the coasts of Mexico, British Honduras (now Belize), and the northeastern countries of South America, including Guyana, Suriname, French Guiana, and Brazil.[66] While based largely in Florida and Texas, these distant water vessels also home ported in Alabama and Louisiana.[67] The distant water fleet was the best-equipped component of the shrimp industry, with highly efficient, state-of-the-art boats, and normally harvested a volume of shrimp equivalent to more than 25 percent of the annual shrimp catch by the U.S. "coastal" and "bay" shrimp fishermen in the Gulf of Mexico.[68]

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[64] See Gulf South Research Institute, The Fisheries Industry in the Gulf Region (1976), prepared for Gulf States Marine Fisheries Commission (hereinafter "Gulf Region Fisheries Report") at 65.

[65] See 1975 House MM&F Committee Hearings at 473 (1975) (statement of William N. Utz, Executive Director, American Shrimp Boat Association and National Shrimp Congress); see also Gulf Region Fisheries Report at 61-63.

[66] See Gulf Region Fisheries Report at 6. For the status of domestic shrimp industries in these and other countries of the Caribbean and Latin America at the time see George B. Gross, "Shrimp Industry of Central America, Caribbean Sea, and Northern South America," Marine Fisheries Review, Vol. 35 (1973) at 36-55.

[67] See Gulf Region Fisheries Report at 61.

[68] See 1975 House MM&F Committee Hearings at 473 (1975) (statement of William N. Utz, Executive Director, American Shrimp Boat Association and National Shrimp Congress); see also Gulf Region Fisheries Report at 61-63.

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In the Gulf, U.S. vessels had fished for shrimp off Mexico, primarily in international waters, since 1945. Mexico began to participate in the shrimp fishery off its Gulf coast in the late 1940s. Cuba entered the fishery in 1968.[69] Between 1957 and the early 1970s, the U.S. catch off Mexico decreased while the Mexican catch increased, as Mexico developed its domestic fishery.[70] Nonetheless, as of the early 1970s, the fishery remained an important part of the U.S. effort in the Gulf of Mexico, with 630 to 860 U.S. vessels fishing for shrimp off Mexico each year between 1962 and 1972.[71] As a result, in the early 1970s, 10 percent of the shrimp harvested by U.S. vessels in the Gulf of Mexico still came from waters off Mexico.[72]

During this time, some 99 percent of the U.S. shrimp catch from waters off Mexico was landed in Florida and Texas. Between the two states, Texas was the more dependent on shrimp production from those waters. While 11 percent of Florida's shrimp landings and revenues came from the waters off Mexico, 17 percent of Texas' shrimp landings and 19 percent of its revenues did.[73] Moreover, on average, more than 550 Texas-based vessels fished off Mexico each year, while only 85 from Florida did.[74] At the same time, almost two-thirds of the shrimp taken by U.S. vessels from waters off the

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[69] See Donald M. Allen, et al., "The Present Status of U.S. Fisheries off Mexico (Gulf of Mexico and Caribbean Sea)," (1976) at 1.

[70] See Allen, et al. (1976) at 4-9.

[71] See Allen, et al. (1976) at 13.

[72] See Wade L. Griffin and Bruce R. Beattie, "Mexico's 200-Mile Offshore Fishing Zone: Its Economic Impact on the U.S. Gulf of Mexico Shrimp Fishery," TAMU-SG-77-210 (1977) at 4.

[73] See Griffin and Beattie (1977) at 12.

[74] See Griffin and Beattie (1977) at 18.

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Mexican coast were caught south of Texas in the Western Gulf of Mexico.[75] Most of the catch brought to Texas from these waters was landed in the ports of Brownsville and Port Isabel, located just across the Rio Grande River from Mexico. Vessels operating out of these ports landed 42 percent of all their shrimp catch from waters off Mexico, making them highly dependent on continued access to those waters.[76]

The regional focus and importance of the shrimp industry would be reflected in the positions taken by members of Congress from Texas and other Gulf States in the consideration of 200-mile legislation.

C. GULF STATE SNAPPER-GROUPER FISHERMEN

In the Gulf of Mexico and the Caribbean Sea, U.S. vessels had fished for snapper and grouper off the Mexican coast since 1890.[77] As in the case of the shrimp fishery off Mexico, the snapper-grouper fishery was also prosecuted by Cuban and Mexican vessels. While the U.S. catch from the fishery declined between 1964 and 1972, Mexican landings of snapper and grouper increased dramatically, from slightly more than 20 million pounds in 1964 to nearly 39 million pounds in 1972.[78] Much of this production was exported from Mexico to the United States.[79] The Cuban share of the fishery remained constant at between 10,000 and 11,000 pounds from 1964 to 1972.[80]

By the early 1970s, the U.S. fishery for snapper and grouper off the coast of Mexico had been in decline for nearly a decade. The number of U.S. vessels participating

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[75] See Griffin and Beattie (1977) at 4.

[76] See Griffin and Beattie (1977) at 12.

[77] See Gulf Region Fisheries Report at 32, 73.

[78] See Allen, et al. (1976) at 24, 28.

[79] See Allen, et al. (1976) at 28.

[80] See Allen, et al. (1976) at 24, 28.

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in the fishery fell from between 100 and 150 vessels in 1964 to between 30 and 35 vessels in 1971.[81] In 1972, U.S. vessels landed 1.4 million pounds from the fishery worth about $650,000, down from the more than 8.1 million pounds valued at nearly $2.6 million landed in 1964.[82] Forty percent of this catch was landed in Florida, where Panama City provided a primary base for the fleet. Another 27 percent was landed in Alabama, where Mobile served as a primary homeport. Twenty-two percent of the catch was landed in Texas, where Port Isabel served as a base of operations. Slightly more than 11 percent was landed in Mississippi, where Pascagoula was a center of the industry.[83]

Although the snapper-grouper fishery was declining in economic importance, its Gulf State base would also be reflected in the positions taken by members of Congress from Texas and other Gulf States in the consideration of 200-mile legislation.

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[81] See Allen, et al. (1976) at 25.

[82] See Allen, et al. (1976) at 24.

[83] See Allen, et al. (1976) at 25.

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CHAPTER 2: U.S. FISHERIES POLICY AT UNCLOS III: 1971-1974

I. U.S. FISHERIES POLICY AT UNCLOS 1971-73: THE SPECIES APPROACH

Following announcement of the U.S. policy statement in 1970, the U.S. fishing industry would begin to exert influence on the development of U.S. Law of the Sea policy, such that its views would be reflected in subsequent U.S. proposals at the Law of the Sea Conference.[1] In the summer of 1971, the National Federation of Fishermen ("NFF"), meeting in San Francisco, adopted as its position the "species approach" to fisheries jurisdiction. Under the "species approach," ownership of, or management authority over, fish would differ by species.[2] The United States would advocate a variant of the "species approach" for the next several years at the Law of the Sea negotiations.

In recognition of the differing interests of U.S. coastal and distant water fishermen, the United States submitted in 1971 a proposal to the Seabed Committee on the territorial sea, straits, and fisheries,[3] that set forth the "species approach" to fisheries jurisdiction.[4] Under the U.S. proposal, coastal states would enjoy preferential rights, beyond an exclusive fishing zone of up to 12 miles, to coastal and anadromous stocks to

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[1] See Hollick at 268. The role of the industry in the U.S. Law of the Sea policy process was institutionalized when the State Department's Advisory Group on Law of the Sea was formed in 1972, and the industry, with Congressional support, secured two seats on the U.S. delegation to the Law of the Sea negotiations for members of the Advisory Group's fisheries subcommittee. See id.

[2] See Interim Fisheries Zone Extension and Management Act of 1973-Part 3: Hearings Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce, 93rd Cong., 2d Sess (1974) at 617-19, 627 (statement of Dennis Grotting, Fishermen's Marketing Association) [hereinafter "1974 Commerce Committee Hearings"].

[3] See A/AC.138/SC.II/L.4., reproduced in SBC Report 1971, at 241.

[4] See Hollick at 268.

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be allocated based on the fishing capacity of the coastal state.[5] Highly migratory species, on the other hand, would not be subject to preferential rights and would "be regulated pursuant to agreement or consultation among the states concerned with the conservation and harvesting of the stock."[6] The U.S. proposal as a whole (and not only with respect to highly migratory species) "envisioned a strong role for international and regional organizations in the regulation of high seas resources and sought thereby to counter pressure for unilateral extension of coastal state control over offshore resources."[7]

At the same time the U.S. government was fine-tuning its Law of the Sea proposals in response to the concerns of U.S. distant water fishermen, it was compelled to address a flurry of vessel seizures by Ecuador that seemed to confirm those very concerns. In 1971, Ecuador made 51 seizures of U.S. tuna vessels and extracted a total of $2.4 million in fines and license fees. The application of Pelly Amendment sanctions and the elevation of the dispute to the Organization of American States did not resolve the issue. Because no agreement could be reached with Chile, Ecuador and Peru, concerning U.S. fishing off the Pacific coast of Latin America, in 1972 Congress extended to July 1977, the insurance program established under section 7 of the Fishermen's Protective Act (which was due to expire in February 1973).[8]

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[5] See Hollick at 268. The U.S. proposal differed from the "species approach" formulated by the NFF, as the latter called for ownership of, and not merely "preferential rights" over, coastal and anadromous stocks. See 1974 Commerce Committee Hearings at 617-19, 627 (statement of Dennis Grotting, Fishermen's Marketing Association).

[6] A/AC.138/SC.II/L.4, Article III, ¶ 3, § A, reproduced in SBC Report 1971, at 241, 243; Satya N. Nandan and Shabtai Rosenne, United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. II (1993) at 650; see also Hollick at 268.

[7] Hollick at 269.

[8] See Hollick at 270; see also Historical and Statutory Notes for 22 U.S.C. § 1977.

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Diplomacy to protect the interests of the U.S. distant-water shrimp fleet—the other significant component of the U.S. distant-water industry—was more successful. The U.S. government negotiated an agreement with Brazil so that U.S. shrimp fishermen could continue fishing off the shores of that nation. The Brazil Shrimp Fishing Agreement, concluded in 1972, allowed both the United States and Brazil to continue to maintain their juridical claims.[9]

In 1972, the U.S. government fundamentally altered its approach at the Law of the Sea discussions. As the upshot of a study prompted by difficulties in U.S./Latin American fisheries relations, the U.S. government decided to separate fisheries from territorial sea and straits issues.[10] At the August 1972 meeting of the Seabed Committee, the United States submitted revised draft fisheries articles which retained the species approach, but granted yet more robust preferential rights to coastal states than had the 1971 draft articles.[11] To counterbalance these more robust coastal state preferential rights, the U.S. revised draft articles contained a full utilization principle.[12] With respect to highly migratory species particularly, the U.S. draft articles continued to require states

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[9] See Hollick at 270.

[10] See Hollick at 269.

[11] See Hollick at 270.

[12] See A/AC.138/SC.II/L.9, § V, reproduced in SBC Report 1972, at 175, 177 (U.S.A.); see also John R. Stevenson and Bernard H. Oxman, "The Preparations for the Law of the Sea Conference," The American Journal of International Law, Vol. 68 (1974) 1, 21-22 (discussing full utilization principle as presented in various draft fisheries articles). While the United States would emphasize the need to meet the world's protein requirements in advocating the full utilization principle (see Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 47), it served to qualify, albeit weakly, coastal state preferential rights and, thereby, supported the interests of U.S. distant water shrimp and snapper-grouper fishermen in continued access to fisheries off the coasts of other nations.

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to either cooperate with international organizations or form direct agreements for the regulation of those species.[13]

Several other delegations submitted documents noting the special management problems presented by highly migratory species or calling for their international management.[14] Among these was Japan. Its fisheries proposal differed in important ways from that of the United States. The Japanese proposal called for international or regional management of anadromous species, instead of according the state-of-origin ownership or jurisdiction over salmon. Moreover, it was less generous than the U.S. proposal in its recognition of the preferential rights of coastal states over coastal stocks.[15]

At the 1973 meetings of the Seabed Committee, the United States reiterated its support for the species approach, coupled with the full utilization principle.[16] It submitted a working paper on special considerations regarding the management of anadromous and highly migratory species that called for international or regional management of the latter.[17] Indeed, most fisheries proposals made at the 1973 session

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[13] See Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 650; Stevenson and Oxman (1974) at 21; see also A/AC.138/SC.II/L.9, § III, reproduced in SBC Report 1972, at 175, 176 (U.S.A.).

[14] See Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 650-651; see also Stevenson and Oxman (1974) at 21.

[15] See Tsuneu Akaha, Japan in Global Ocean Politics (1985) at 71-74. Japan's position on anadromous species reflected Japan's significant North Pacific salmon fisheries. See id. at 72. Its position on coastal state preferential rights reflected Japan's orientation as a distant water fishing nation. "The Japanese articles restrict[ed] the preference to a 'major portion' of the stock and contain[ed] special limitations on the preferential rights of developed coastal states." Stevenson and Oxman (1974) at 22; see also Akaha (1985) at 73.

[16] See Hollick at 270; see also Nordquist and Park (1983) at 46.

[17] See A/AC.138/SCII/L.20, Part II, reproduced in III SBC Report 1973, at 11, 15. Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 651; see also Stevenson and Oxman (1974) at 14 n. 45.

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advocated international regulation of highly migratory species.[18] On the other hand, a proposal by Canada and several other "coastal" states called for coastal state regulation of highly migratory species within an exclusive economic zone and regulation by some authority designated for that purpose beyond that zone.[19]

II. U.S. TWO HUNDRED MILE LEGISLATION AND U.S. FISHERIES POLICY AT UNCLOS: 1974

Beginning in 1974, the approach of the United States to fisheries issues at the Law of the Sea Conference would be profoundly influenced by Congress' consideration of legislation to establish a 200-mile zone for the United States.

Although the executive branch of the U.S. government and U.S. distant water interests vigorously opposed 200-mile legislation, and it would not be enacted by the 94th Congress, congressional pressure, in part, led the United States to abandon a strict "species approach" and agree to the concept of an exclusive economic zone at the Law of the Sea negotiations in the summer of 1974. At the same time, negotiations on fisheries provisions would reveal the seemingly irreconcilable views held by "coastal" states and

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[18] See Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 651 and n. 6.

[19] See Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 651; see also Stevenson and Oxman (1974) at 20; A/AC.138/SC.II/L.38, Article 10, reproduced in SBC Report 1973, at 82, 84 (Canada, India, Kenya, Madagascar, Senegal and Sri Lanka). For a detailed discussion of the role of Canada in leading the "coastal-states group" at UNCLOS III and promoting robust fishery management authority for coastal states see Barbara Johnson, "Canadian Foreign Policy and Fisheries" in Barbara Johnson and Mark W. Zacher eds., Canadian Foreign Policy and the Law of the Sea (1977) at 52-99. In the meetings of the Seabed Committee, Canada had advanced its own version of the "species approach" which, according to one senior Canadian official, differed from the U.S. approach in that it "grants a clear-cut management authority to the coastal states where [the U.S. approach] emphasizes the role of international commissions." Id. 73-76 and n.45. Canada's proposal to the Seabed Committee in the summer of 1973 maintained something of the species approach but very clearly recognized coastal state control over tuna within an exclusive economic zone. See id. at 77.

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"fishing" states on how regulations for fishing for highly migratory species within exclusive economic zones were to be established.

Numerous bills to extend U.S. fisheries jurisdiction to various distances, using various formulas, had been introduced in the early 1970s.[20] However, none of these extended jurisdiction bills had been seriously considered by Congress. This would change with the introduction of a bill to extend U.S. fisheries jurisdiction to 200-miles by Washington Senator Warren Magnuson in the summer of 1973.[21]

A. THE OPPOSITION TO 200-MILE LEGISLATION

Upon assuming office in Fall 1973, the new U.S. Secretary of State, Henry Kissinger, was informed by Donald McKernan, the State Department's top fisheries official, that the domestic movement for 200-mile legislation "ha[d] acquired an increased potency." According to McKernan, this had occurred after Magnuson, the powerful Chairman of the Senate Commerce Committee, introduced a bill to extend U.S. fisheries jurisdiction in the summer of 1973.[22] McKernan warned Kissinger that if a 200-mile bill was passed, "the continued existence of the United States tuna and shrimp

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[20] See, e.g., 119 Cong. Rec. 16722 (1973) (statement of Sen. Gravel) (introducing S. 380 to extend U.S. fisheries jurisdiction to the edge of the continental shelf); 119 Cong. Rec. 17511 (1973) (statement of Rep. Wyman) (introducing H.R. 8320 to extend U.S. fisheries jurisdiction to 200-miles or a depth of 200 meters, whichever is further).

[21] See 119 Cong. Rec. 19407 (1973) (statement of Sen. Magnuson) (introducing S. 1988, the "Interim Fisheries Zone Extension and Management Act of 1973").

[22] Memo from McKernan to Pickering re "Preparations for Secretary-Designate Kissinger," Sept. 5, 1973 at 5, in McKernan Papers, Box 42, General Correspondence November 30, 1947-November 27, 1973. During his six terms in the Senate (1944-80), Magnuson exerted a greater influence over the evolution and development of U.S. ocean policy, and fisheries policy in particular, than any other member of Congress. There is no critical scholarly biography of Magnuson or study of his role in U.S. ocean and fisheries policy. The recent biography of Magnuson by Shelby Scates, Warren G. Magnuson and the Shaping of Twentieth-Century America (1997) contains a very brief treatment of Magnuson's advocacy of 200-mile legislation. See id. at 262-63.

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operations would become marginal," and "Japan, [the] Soviet Union and perhaps other major maritime states would probably decide to withdraw from [the] Law of the Sea deliberations."[23]

Magnuson and most other supporters of 200-mile legislation did not deny that a unilateral extension of fisheries jurisdiction by the United States could negatively impact U.S. distant water tuna and shrimp interests. Rather, they emphasized that the United States delegation to the Law of the Sea Conference was endeavoring to negotiate provisions that would offer some protection to those interests, and that 200-mile legislation, especially with respect to tuna, tracked the approach of the U.S. negotiators. They were, on the whole, unsympathetic to the State Department's concerns about the potential impact of a 200-mile bill on the Law of the Sea negotiations, which they viewed as ill-founded. Moreover, they believed that the State Department had historically ranked "fisheries [as] low man on the priority totem pole—something to trade away or something to leave alone so the countries with strong fishing interests will not be unduly offended."[24] In their view, 200-mile legislation would take unregulated foreign access to

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[23] Memo from McKernan to Pickering re "Preparations for Secretary-Designated Kissinger," Sept. 5, 1973 at 5, in McKernan Papers, Box 42, General Correspondence November 30, 1947-November 27, 1973.

[24] Remarks of Senator Warren Magnuson before the Fish Industry Leadership Conference, Seattle, Washington, Dec. 15, 1973, attached to memo from Charles Carry to August Felando and John Royal, Jan. 21, 1974, in McKernan Papers, Box 42, General Correspondence November 30, 1947-November 27, 1973. Magnuson had entertained such doubts about the commitment of the State Department to protecting U.S. coastal fishing interests for years. For example, in 1966, in response to Soviet trawlers fishing off the coast of Washington, Magnuson demanded action. In June 1966, White House aide Joseph Califano informed President Johnson that Magnuson felt "[t]he State Department isn't moving fast enough—he wants your personal attention." Califano told the President that he would "call [Secretary of State] Rusk and ask that he contact the Soviet embassy and Sen. Magnuson." Memo from Joseph Califano to Pres. Johnson,

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U.S. fisheries beyond 12 miles from the coast "off the table" at the Law of the Sea negotiations.

1. State Department Arguments

In early 1974 the State Department formally conveyed the opposition of the Executive Branch to Magnuson's 200-mile bill. The reasons for such opposition would be reiterated on numerous occasions by the State Department over the following two years as Congress would consider, and eventually legislate, a 200-mile exclusive fishery zone for the United States by passing the Fishery Conservation and Management Act in 1976. These arguments would also be enlisted by U.S. distant water interests and congressional opponents of 200-mile legislation.

The State Department made four main arguments against 200-mile legislation. First, unilateral action by the United States would undermine U.S. efforts at the Law of the Sea Conference generally, and, particularly, U.S. efforts to establish a satisfactory fisheries regime.[25] Second, the recognized problems of coastal fisheries could be addressed by provisional application of the fisheries regime agreed to by the Law of the Sea Conference, and were already being addressed by State Department efforts to strengthen existing bilateral and multilateral agreements.[26] Third, a unilateral extension

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June 2, 1966, quoted in Scates (1997) at 262 and n. 15 (sourced in "Magnuson file, LBJ Library").

[25] See Moore to Magnuson, Jan. 18, 1974, at 2, attached to Wright to Magnuson, Jan. 18, 1974, in Magnuson Papers (Walsh subgroup), Box 1, Floor Book-Folder 4. According to the State Department, U.S. coastal fishing interests were already assured a Law of the Sea treaty would protect their interests because there was already broad agreement among the parties to the negotiations on the necessity of greater coastal state control over coastal fisheries. See id. at 5-6.

[26] See Moore to Magnuson, Jan. 18, 1974, at 2-3, attached to Wright to Magnuson, Jan. 18, 1974, in Magnuson Papers (Walsh subgroup), Box 1, Floor Book-Folder 4.

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of jurisdiction would run counter to international law which, in the view of the United States, limited claims of fisheries jurisdiction to 12 miles, and would prompt claims to extended jurisdiction by other countries.[27] Fourth, the U.S. tuna and shrimp industries would be prejudiced and the coverage of the Fishermen's Protective Act would be compromised because waters beyond 12 miles to a distance of 200-miles would no longer be considered part of the "high seas," so that U.S. tuna and other distant-water fishing vessels, if seized for fishing in such waters, would no longer enjoy the Act's protections.[28]

2. Distant Water Arguments

Field hearings on 200-mile legislation conducted throughout the winter and spring of 1974 highlighted the deep division between U.S. distant water and coastal fishermen over 200-mile legislation.[29] Representatives of the tuna and shrimp industries, and, to a lesser extent, some participants in the Pacific northwest salmon industry, testified in opposition to the legislation. The tuna and shrimp industries were concerned about the impact of U.S. action on their access to fisheries off the coasts of other countries. The opposition of some in the Pacific northwest salmon industry was not similarly predicated upon concern about denial of access to fisheries, but rather upon concern that unilateral action extending U.S. fisheries jurisdiction to 200-miles would prompt the Japanese to

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[27] See Moore to Magnuson, Jan. 18, 1974, at 3-4, attached to Wright to Magnuson, Jan. 18, 1974, in Magnuson Papers (Walsh subgroup), Box 1, Floor Book-Folder 4.

[28] See Moore to Magnuson, Jan. 18, 1974, at 4, attached to Wright to Magnuson, Jan. 18, 1974, in Magnuson Papers (Walsh subgroup), Box 1, Floor Book-Folder 4.

[29] See Interim Fisheries Zone Extension and Management Act of 1973-Parts 1 to 3: Hearings Before the Subcomm. on Oceans and Atmosphere of the Senate Comm. on Commerce, 93rd Cong., 2d Sess. (1974) [hereinafter "1974 Commerce Committee Hearings"].

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abrogate the North Pacific Fisheries Convention and begin setting on salmon on the high seas east of the abstention line specified by that treaty.[30]

According to the tuna industry and its supporters in Congress, passage of 200-mile legislation "would have the effect of pulling the rug right out from under th[e] entire industry in the fight that it's made to preserve the sanctity of the international 12-mile limit."[31] Echoing a number of the objections to 200-mile legislation made by the State Department, tuna industry spokesmen charged that unilateral action by the U.S. would destroy existing international organizations for tuna conservation and management (the Inter-American Tropical Tuna Commission ("IATTC") and the International Commission for the Conservation of Atlantic Tunas ("ICCAT")), have a negative impact on the U.S. fisheries position at the Law of the Sea negotiations, prompt unilateral extensions of jurisdiction by other countries leading to more seizures of U.S. fishing vessels, and render the Fishermen's Protective Act ineffective to protect U.S. vessels from seizures for fishing within 200-miles of foreign shores.[32] Tuna industry representatives further charged that the switch to a zonal approach, embodied in Magnuson's 200-mile

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[30] See, e.g., 1974 Commerce Committee Hearings at 680-88 (testimony of Walter V. Yonker, Executive Vice President, Association of Pacific Fisheries) and 692-93 (testimony of William G. Saletic, Executive Manager, Seiners Association). On the origins of the abstention doctrine and its codification in the North Pacific Fisheries Convention see Harry N. Scheiber, "Origins of the Abstention Doctrine in Ocean Law: Japanese – U.S. Relations and the Pacific Fisheries, 1937-1958," 16 Ecology Law Quarterly 23 (1989).

[31] 1974 Commerce Committee Hearings at 464 (statement of Rep. Van Deerlin of California).

[32] See 1974 Commerce Committee Hearings at 477-494 (statement of August Felando, General Manager, American Tunaboat Association).

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legislation,[33] represented a break from the species approach agreed upon by the U.S. fishing industry and reflected in the U.S. fisheries proposals at the Law of the Sea negotiations.[34]

Most components of the U.S. shrimp industry also opposed 200-mile legislation. One representative of that industry testified that passage of 200-mile legislation would "be the most damaging blow the U.S. Senate could render the U.S. shrimp industry."[35] The shrimp industry was concerned that passage of 200-mile legislation would undermine the Brazil Shrimp Fishing Agreement (by which American shrimp vessels enjoyed access to waters over which Brazil claimed jurisdiction). It also feared such action by the United States would prompt Mexico to declare a 200-mile zone, thereby resulting in increased competition among U.S. shrimp fishermen as distant-water shrimp vessels, excluded from their traditional fishing grounds, would be confined to fishing in that portion of the Gulf of Mexico over which Mexico did not claim jurisdiction.[36]

3. The Article 7 Approach

U.S. distant water fishermen opposed any legislation to extend U.S. fisheries jurisdiction while the Law of the Sea negotiations were ongoing. But, as a fall-back

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[33] See 1974 Commerce Committee Hearings at 237-38 (testimony of Harold E. Lokken, Manager, Fishing Vessel Owners Association re zonal approach versus species approach).

[34] See 1974 Commerce Committee Hearings at 524 (testimony of Charles R. Carry, Executive Director, American Tuna Research Foundation, Inc.). For further discussion of industry agreement on the species approach see 1974 Commerce Committee Hearings at 617-19, 627 (testimony of Dennis Grotting, Fishermen's Marketing Association).

[35] 1974 Commerce Committee Hearings at 655 (testimony of William N. Utz, Executive Director, National Shrimp Congress).

[36] See 1974 Commerce Committee Hearings at 654-65 (testimony of William N. Utz, Executive Director, National Shrimp Congress), 666-72 (testimony of Robert G. Mauermann, Executive Director, Texas Shrimp Association), 672-79 (testimony of C.W. Sahlman, on behalf of the American Shrimpboat Association, et al.).

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position, they argued that if Congress felt compelled to act to protect U.S. coastal fisheries, it should base legislation on Article 7 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas.[37] Article 7 of the Geneva Convention authorized a coastal state to unilaterally adopt conservation measures for stocks in the high seas adjacent to its territorial sea if it did not reach agreement with other states upon such measures after six months of negotiations. Proponents of the Article 7 approach argued that because such unilateral action was authorized by the Geneva Convention, it would not, in contrast to 200-mile legislation, violate international law and adversely impact U.S. efforts to achieve a fair and effective fisheries regime at the Law of the Sea negotiations. According to supporters of the Article 7 approach, while the State Department publicly opposed legislation based on Article 7 because it was opposed to any unilateral action, the Department had privately stated that the Article 7 approach would have less impact than 200-mile legislation on the Law of the Sea negotiations.[38]

In opposing the Article 7 approach, supporters of 200-mile legislation cited the State Department's lack of enthusiasm for it. They pointed out that, as all recognized, action pursuant to Article 7 could not be used to exclude foreign fishing vessels to reserve fisheries for the exclusive use of U.S. fishermen because Article 7 provided only

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[37] See 1974 Commerce Committee Hearings at 523 (testimony of Charles Carry, Executive Director, American Tuna Research Foundations, Inc.), 697-99 (testimony of Ross Clouston, President, National Fisheries Institute), 725-26 (testimony of August Felando), 766-85 (testimony of Samuel R. Levering, U.S. Committee for the Oceans).

[38] See 1974 Commerce Committee Hearings at 767-69 (testimony of Samuel R. Levering); see also memo comparing 200-mile legislation and Article 7 legislation, prepared by Samuel R. Levering, Sept. 26, 1974, in McCloskey Papers, Box H259, file 200-mile 1974 and 1975 House MM&F and memo "How to Save Our Coastal and Anadromous Fish" prepared by Samuel R. Levering, Sept. 1974, in same McCloskey Papers.

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for nondiscriminatory conservation measures. Furthermore, they emphasized that Japan and Russia, among other major fishing nations, were not parties to the 1958 Convention.[39] Moreover, they noted, as the State Department acknowledged, that Article 7 had never been used by any nation as a basis for imposing fishery conservation measures on foreign vessels fishing beyond its territorial sea.[40]

Opponents of the Article 7 approach were also concerned that it required a negotiation period of at lest six months before measures could be unilaterally adopted, and questioned whether such measures could be effectively enforced in any event.[41] Senator Stevens, for one, charged that the tuna industry endorsed the Article 7 approach because it was "a mechanism for delay."[42] While Article 7 legislation was introduced in both the Senate and the House, it failed to secure the backing of the Executive Branch and was not seriously considered in the 93rd Congress.

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[39] See 1974 Commerce Committee Hearings at 827 (Department of State response to questions of the Committee concerning 200-mile legislation); see also 1974 Commerce Committee Hearings at 768-778 (statement of Senator Stevens).

[40] See 1974 Commerce Committee Hearings at 775 (statement of Senator Stevens) and 827 (Department of State response to questions of the Committee concerning 200-mile legislation).

[41] See 1974 Commerce Committee Hearings at 775-78 (statement of Senator Stevens).

[42] See 1974 Commerce Committee Hearings at 778 (statement of Senator Stevens). One House staff analysis of Article 7 legislation termed it "an artfully concocted sham." According to this analysis, "the tuna, distant-water shrimp and canning industries recognize this [Article 7 legislation] for what it is, and that is why they are supporting it. It gives the appearance but not the substance of protection to our coastal fishermen from further depredation of our fishery resources by the foreign fleets." Memo from Dick Sharood to Congressman James R. Grover, et al. re "Proposed 'Fisheries Conservation Act of 1974' to be introduced by Congressman Dingell," June 21, 1974, in McCloskey Papers, Box H199, file H.R. 15039-amend the Fishermen's Protective Act. The Chairperson of the House Merchant Marine and Fisheries Committee, Leonore Sullivan of Missouri (home to the headquarters of Ralston-Purina, the parent company of Chicken of the Sea), introduced legislation based on Article 7 in June 1974. See 120 Cong. Rec. 24643 (June 25, 1974).

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B. ACCEPTANCE OF THE 200-MILE ZONE CONCEPT AT CARACAS AND MODIFICATION OF THE U.S. FISHERIES POSITION

In the months preceding the second session of the Law of the Sea Conference, to be held in Caracas in summer 1974, an international consensus for a 200-mile economic zone developed. Acceding to this reality, on the eve of the Caracas meeting, the United States signaled that it would accept a 200-mile economic zone, but would still insist upon "an exception for salmon beyond it and for tuna within it."[43] Accordingly, at the start of the Caracas session, the new U.S. fisheries policy for the Law of the Sea negotiations combined the species and zonal approaches: coastal species would be subject to the zonal approach; highly migratory and anadromous species would be subject to the species approach.[44] In early July 1974, the United States formally announced to the Law of the Sea Conference its willingness to accept a 12 mile territorial sea and a 200-mile economic zone as "part of an acceptable comprehensive package, including a satisfactory regime within and beyond the economic zone and provision for unimpeded transit of straits used for international navigation."[45]

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[43] See transcript of a press conference by Ambassador John R. Stevenson, United States Representative to the United Nations Law of the Sea Conference, at United Nations Headquarters, June 12, 1974, press release, press released dated June 14, 1974, United States Mission to the United Nations at 6, copy in author's files.

[44] See Hollick at 270-271.

[45] Address by Ambassador John R. Stevenson, Special Representative of the President, U.S. Representative to the Law of the Sea Conference before the Plenary Session of the Law of the Sea Conference, Caracas, Venezuela, July 11, 1974, Department of State press release at 2, in Ford Papers, White House Central Files, Box 9, FO 3-1 Int'l Waterways (General).

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One month later, the United States submitted draft articles on a 200-mile economic zone.[46] The jurisdictional section of the U.S. article on highly migratory species provided:

> Fishing for highly migratory species . . . within the economic zone shall be regulated by the coastal state, and beyond the economic zone by the state of nationality of the vessel, in accordance with regulations established by appropriate international or regional fishing organizations pursuant to this article.[47]

In the view of the U.S. delegation, the highly migratory species article "represent[ed] a large conceptual and substantive shift in the hope of finding reasonable accommodation."[48] Most significantly from a doctrinal standpoint, under the article "a coastal State would have the right to regulate highly migratory species within its economic zone."[49] However, while recognizing the power of the coastal state to regulate highly migratory species in its economic zone, the U.S. article specified that the content of the regulation would be provided by international or regional fishing organizations.[50]

In this respect, the article carried forward from prior U.S. proposals an emphasis on the role of international and regional fishing organizations in managing highly migratory species. Consistent with this emphasis, the article called for coastal and

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[46] See Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 71; John R. Stevenson and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1974 Caracas Session," The American Journal of International Law, Vol. 69 (1975) 1, 16-17; Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 651-653.

[47] A/CONF.62/C.2/L.47 (hereinafter "L.47"), Art. 19(A), reproduced in III Off. Rec. 222 (U.S.A.); also reproduced in Renate Platzöder ed., Third United Nations Conference on the Law of the Sea: Documents (1984), Vol. V, at 166-67.

[48] Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 71; see also Stevenson and Oxman (1975) at 17.

[49] Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 652.

[50] See Stevenson and Oxman (1975) at 17.

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fishing states to participate in such organizations, or to establish them, where they did not exist.[51] The U.S. proposal also addressed "fees, special allocations, enforcement rights, and other protections for the coastal state."[52] The U.S. delegation reported that "[a] large number of developing-country delegates . . . commented favorably on the U.S. move."[53] According to the head of the U.S. delegation, the U.S. highly migratory species article reflected the fact that:

> An effort had been made to take into account scientific evidence that made it critical to agree on international arrangements for the conservation and management of such species, while recognizing the clear interest of coastal States in whose economic zone such fish were caught in an equitable share of the benefits.[54]

At the close of the Caracas session, it appeared a fait accompli that highly migratory species would be subject to coastal state regulation in the economic zone. Each of the several alternative provisions concerning highly migratory species included in the "Main Trends Working Paper" prepared by Committee Two[55] recognized coastal state jurisdiction over highly migratory species in the economic zone,[56] with the

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[51] See L.47, Art. 19(A).

[52] Stevenson and Oxman (1975) at 17; see also L.47, Art. 19(C)-(E).

[53] Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 71.

[54] Second Committee, 41st meeting (1974), para. 19, II Off. Rec. 291, quoted in Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 652.

[55] The Law of the Sea Conference established three main committees to deal with substantive issues. Committee II was responsible "for issues pertaining to national jurisdiction such as the economic or resource zone, the continental shelf, fishing, the territorial sea, and straits." Hollick at 284-85. Outside of the committees, numerous formal and informal negotiating groups played an important role in the development of substantive positions. See id. at 285-86.

[56] See A/CONF.62/C.2/WP.1, provision 112, formula A (based on U.S. proposal); provision 112, formula B (based on proposal of Australia and New Zealand); provision 157, formula A (based on proposal of Canada et al.), reproduced in Renate Platzöder ed.,

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exception of one based on a proposal by Japan.[57] However, the provisions of the "Main Trends" document recognizing coastal state jurisdiction over highly migratory species in the economic zone differed on whether the regulations implemented by the coastal state in its economic zone would be developed by international or regional organizations, or unilaterally by the coastal state. Those formulations based on the U.S. proposal and that of Australia and New Zealand would have required coastal state regulation of highly migratory species to be consistent with or give effect to the regulations of international or regional fishing organizations.[58] The provision based on the proposal of Canada and several other "coastal" states did not impose any such requirements on the implementation of regulations for highly migratory species by the coastal state, but, to the contrary, specified development of such regulations by international or regional organizations only in respect of fishing "outside the limits of the exclusive fishing zone."[59] These differing positions concerning, if not the prescriptive jurisdiction of, then the influence of, international and regional organizations over regulation of fishing for

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Third United Nations Conference on the Law of the Sea Documents, Vol. IV, at 3, 59-62, 80-81. See also, Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 653-54.

[57] See A/CONF.62/C.2/WP.1, provision 128, formula A, reproduced in Platzöder ed., UNCLOS Documents, Vol. IV at 3, 67-68. Japan also alone actively spoke out against the economic zone concept at Caracas. For discussion of Japan's position on the economic zone and fisheries at Caracas see Akaha (1985) at 89-93.

[58] The Australia/New Zealand proposal was arguably more "coastal" than that of the United States because it provided for an international or regional organization to be established only upon the rendering of an affirmative opinion by the Director-General of FAO "as to whether proper management of [highly migratory] species requires the setting up of" such an organization. A/CONF.62/C.2/WP.1, provision 112, formula B, reproduced in Renate Platzöder ed., Third United Nations Conference on the Law of the Sea Documents, Vol. IV, at 60. The FAO Director-General would undertake to render an opinion on that question upon the request of either a coastal state or a fishing state. See id.

[59] A/CONF.62/C.2/WP.1, provision 157, formula A, reproduced in Renate Platzöder ed., Third United Nations Conference on the Law of the Sea Documents, Vol. IV, at 80.

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highly migratory species within exclusive economic zones, would pervade tuna law and diplomacy for the next quarter century.[60]

C. CONGRESS' CLAIM TO INFLUENCE THE LAW OF THE SEA NEGOTIATIONS

Members of Congress felt that their consideration of 200-mile legislation had played a major role in the change of position by the United States on the acceptability of a 200-mile economic zone at the Law of the Sea negotiations.[61] Tuna industry representatives agreed with the assessment that Congress bore a major share of the responsibility for the U.S. change of position announced at Caracas. In their view, statements made by Members of Congress in support of 200-mile legislation while the Caracas session was ongoing were "a stab in the back" of the tuna industry.[62] The U.S. delegation at Caracas, one tuna industry representative in attendance reported, had been "obsessed . . . with the possibility of 200-mile legislation coming about as a result of

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[60] These differences reflect the "inside-outside" problem that, as explained below, would not be resolved by the Law of the Sea Convention and would ultimately be further addressed as to regulation of both straddling stocks and highly migratory species in the 1994 U.N. Fish Stocks Convention. As the final chapter of this study details, the relative prescriptive competencies of coastal states, on the one hand, and international and regional organizations, on the other hand, over regulation of tuna fishing both within and beyond EEZs is still being worked out through implementation of the U.N. Fish Stocks Convention.

[61] See, e.g., 120 Cong. Rec. 22936 (1974) (statement of Sen. Magnuson) ("I am glad that, instead of taking exception to what we have been doing, they have finally come to understand that this apparently is how the Members of Congress feel about it and that, therefore, they should do their best, as representatives of the United States, to work this matter out.").

[62] Fishery Jurisdiction: Hearings on Extending the Jurisdiction of the United States Beyond the Present 12-Mile Fishery Zone Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 93rd Cong. 2d Sess. (1974) (hereinafter "1974 House Hearings") at 779 (statement of August Felando).

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Congress."[63] Another tuna industry representative colorfully described the effect of congressional consideration of 200-mile legislation on the negotiating posture of the U.S. delegation as follows:

> In effect, it literally pulled their negotiating strength and ability, gut wise, right out through their backbone. [In Caracas,] nation after nation shot down the U.S. species approach and resolution, pointing out repeatedly that Congress, contrary to what Ambassador John R. Stevenson was recommending, was moving in the direction of extended jurisdiction unilaterally.[64]

The executive branch feared that the effect of Congress' mere consideration of 200-mile legislation appeared to have had on the Law of the Sea negotiations would be magnified by the passage of such legislation, if even by only one house of Congress. In an effort to prevent what it feared would be an even greater impact on the U.S. negotiating position, the Ford Administration worked to prevent 200-mile legislation from coming to a vote in both the House and the Senate in the fall of 1974. The effort was only partly successful. While 200-mile legislation was not reported out of committee in the House, the Senate, in the closing days of the 93rd Congress, passed Magnuson's 200-mile bill.

In the House, the Merchant Marine and Fisheries Committee held hearings on 200-mile legislation throughout the fall,[65] but the Administration persuaded the

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[63] See 1974 House Hearings at 786 (statement of August Felando). Such "obsession" seems understandable in light of the political pressure exerted by Congress on the U.S. delegation, as evidenced by the announcement by Senators Stevens and Muskie at a press conference in Caracas, where they were attending the negotiations as observers, that the United States might move unilaterally to establish a 200-mile zone. See Jon Jacobson, "International Fisheries Law Debated in Caracas," Ocean Law Memo, Aug. 23, 1974 at 2.

[64] See 1974 House Hearings at 720 (statement of John J. Royal, Executive Secretary-Treasurer of the Fisherman & Allied Workers' Union, ILWU).

[65] See 1974 House Hearings.

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Committee Chairperson not to report a 200-mile,[66] thereby averting a vote on 200-mile legislation by the full House in the 93rd Congress.

In the Senate, Magnuson's Commerce Committee favorably reported S. 1988 in September 1974, after Magnuson, at the Administration's request, held off reporting the bill until the Caracas session of the Law of the Sea negotiations had ended.[67] After holding a hearing, the Foreign Relations Committee issued a negative report on S. 1988 by a vote of 9 to 8. As a measure of the momentum behind the legislation in the Senate, Kissinger informed President Ford that "[d]espite the negative Foreign Relations Committee report on the bill . . . a difficult floor fight in the Senate" was still expected.[68] In order to forestall, if not prevent, consideration of Magnuson's 200-mile bill by the full Senate, the Administration requested referral of the bill to the Armed Services Committee for hearings on its defense implications.[69] Magnuson agreed to the Armed Services Committee referral, but with the understanding that, regardless of that Committee's

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[66] See Janka to Friedersdorf, c. Sept. 1974, Loen and Leppert Files, Box 10, Fisheries Leg.-200 Mile Limit (2), Ford Papers; see also Recommended Telephone Call, c. Sept. 1974, WHCF, Box 65, PR 7-2 9/10/74-10/6/74. The Committee Chairperson, Leonore Sullivan, was known to be sympathetic to the concerns of the tuna industry. Chicken of the Sea was a subsidiary of Ralston-Purina, which was headquartered in Sullivan's state of Missouri.

[67] See 120 Cong. Rec. 39055 (1974) (statement of Sen. Magnuson).

[68] Memorandum for the President from Henry A. Kissinger re opposition to the 200-mile fisheries bills, S. 1988 and H.R. 8655, Sept. 23, 1974, Ford Papers.

[69] See Recommended Phone Call to Magnuson, Oct. 4, 1974, WHCF, Box 65, PR 7-2 9/10/74-10/6/74, Ford Papers; Memo, meeting with Senator Warren G. Magnuson, Oct. 10, 1974, WHCF, Box 52, PR 7-1 10/9/74-10/10/74; Memorandum for President's meeting with Congressmen Clausen, Grover, Henderson, Forsythe, Studds and Young, Oct. 11, 1974, WHCF, Box 9, FO 3-1/Fisheries 8/9/74-11/31/74, Ford Papers.

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determination, S. 1988 would still go to the floor of the Senate for a vote.[70] As a result, the Administration, which believed passage of 200-mile legislation by the Senate alone would harm U.S. interests at the Law of the Sea negotiations,[71] focused its efforts on defeating the bill on the Senate floor. In late November 1974, the Armed Services Committee favorably reported S. 1988 by a vote of 8 to 6. On December 11, 1974, the Senate debated and passed S. 1988 by a vote of 68 to 27.[72] Supporters of the legislation rejected the arguments of the State and Defense Departments, and expressly declared their desire to influence the Law of the Sea negotiations by passing 200-mile legislation.[73]

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[70] Memorandum for General Scowcroft from Clift re Proposed Call to Senator Stennis on 200-Mile Fisheries Bill, Nov. 19, 1974, WHCF, Box 65, PR 7-2 11/15/74-12/5/74, Ford Papers.

[71] See Memorandum from Kissinger to President Ford re Call to Senator Stennis on the 200-Mile Fisheries Bill, Nov. 15, 1974, WHCF, Box 65, PR 7-2 11/15/74-12/5/74, Ford Papers.

[72] 120 Cong. Rec. 39105 (1974).

[73] See, e.g., 120 Cong. Rec. 39062 (1974) (statement of Sen. Stevens) (passage of S. 1988 would send a "strong warning and message to the Law of the Sea negotiators" that would infuse the negotiations with immediate sense of urgency); 120 Cong. Rec. 39057 (1974) (statement of Sen. Pastore) (passage of S. 1988 intended to give the negotiators "a nudge" at the Geneva session.).

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CHAPTER 3: ARTICLE 64 DETERMINED

In the first half of 1975, the Law of the Sea negotiations resulted in the production of a draft convention referred to as the "Informal Single Negotiating Text," which contained provisions for highly migratory species that would become, without substantive change, Article 64 of the Law of the Sea Convention. The Geneva session was preceded by the introduction of 200-mile legislation in the new Congress and renewed seizures of U.S. tuna vessels. At the same time, U.S. diplomats pledged to seek to protect the interests of the U.S. distant water tuna and shrimp fisherman at Geneva by advocating a regional approach to tuna conservation and management, and a requirement that states allow foreign vessels access to fish stocks they did not themselves fully utilize.

I. THE RUN-UP TO GENEVA

A. 200-MILE LEGISLATION IN THE NEW CONGRESS

On January 14, 1975, the first day of the 94th Congress, Democratic Congressman Gerry Studds of Massachusetts introduced the bill that would become the Fishery Conservation and Management Act of 1976 and extend U.S. fisheries jurisdiction to 200-miles, giving it the bill number H.R. 200.[1] On the eve of the Geneva Session of the Law of the Sea negotiations, scheduled to commence in mid-March 1975, the House Merchant Marine and Fisheries Committee began hearings on H.R. 200 and other bills to extend U.S. fisheries jurisdiction beyond 12 miles.[2] The testimony of the executive branch in opposition to extended jurisdiction legislation reiterated earlier arguments that

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[1] See 121 Cong. Rec. 186, 189 (submitted Jan. 14, 1975) (Jan. 15, 1975).

[2] See Fisheries Jurisdiction: Hearings on Extending the Jurisdiction of the United States Beyond the Present Twelve-Mile Fishery Zone Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 94th Cong. 1st Sess. (1975) (hereinafter "1975 House MM&F Committee Hearings").

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such action was unnecessary and would be detrimental to U.S. ocean interests. The problems of U.S. coastal fisheries could be addressed, the State Department maintained, by provisional application of the fisheries articles of a Law of the Sea Agreement, and were already being addressed through a "positive program" of efforts to strengthen conservation measures under existing bilateral and multilateral agreements, as well as through enforcement of regulations restricting foreign fishing of Continental Shelf fishery resources.[3] The State Department asserted that unilateral action would harm U.S. ocean interests generally by "lead[ing] to a crazy quilt of uncontrolled national claims," and harm the interests of distant water tuna and shrimp fishermen particularly.[4]

As they had in the previous Congress, opponents of 200-mile legislation outside the government—the tuna and shrimp industries, certain segments of the Pacific Northwest salmon industry, and internationalists—also advanced these arguments.[5] They also touted, with renewed vigor, legislation based on Article 7 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas as a viable, legal alternative to a 200-mile bill. Leonor Sullivan of Missouri, Chair of the House Merchant Marine and Fisheries Committee, again introduced Article 7 legislation in the 94th Congress.[6] It was blessed by international law scholars and Law of the Sea

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[3] See 1975 House MM&F Committee Hearings at 88 (testimony of John Norton Moore); see id. at 154-59 (enforcement regulations).

[4] 1975 House MM&F Committee Hearings at 90 (testimony of John Norton Moore).

[5] See 1975 House MM&F Committee Hearings at 349-77 (statement of Samuel R. Levering, Secretary, United States Committee for the Oceans), 440-69 (statement of August Felando), 469-81 (statement of William M. Utz), 481-99 (statement of Charles R. Carry, Executive Director, Tuna Research Foundation), 514-31 (statement of Robert O. Archer, Vice President, Association of Pacific Fisheries).

[6] H.R. 1070 is reprinted in the 1975 House MM&F Committee Hearings at 10-17.

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luminaries as consistent with international law.[7] While the Ford Administration continued to oppose any extended jurisdiction legislation, the State Department allowed that legislation based on Article 7 would not be contrary to international law.[8]

Supporters of a 200-mile bill once again opposed Article 7 legislation on multiple grounds. They argued that because the 1958 Geneva Convention did not codify customary international law, and Japan and the Soviet Union were not parties to the Convention, the fishing vessels of those major fishing states could not be subjected to conservation measures promulgated pursuant to Article 7. They further pointed out that because Article 7 required nondiscrimination against foreign fishermen, it precluded the United States from discriminating in favor of American fishermen. Finally, they claimed that the Article 7 procedures for unilaterally adopting conservation measures were too time consuming and cumbersome to effectively address the plight of U.S. coastal fisheries.[9] Supporters of H.R. 1070, on the other hand, claimed diplomatic soundings indicated that Japan and the Soviet Union would be agreeable to U.S. regulations based on Article 7[10] and proposed steps to address concerns about the timeframes for adopting such regulations.[11]

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[7] See, e.g., letter of Louis Henkin to Leggett, Mar. 5, 1975, in 1975 House MM&F Committee Hearings at 173-175; 1975 House MM&F Committee Hearings at 546-65 (statement of Donald McKernan).

[8] See 1975 House MM&F Committee Hearings at 154 (statement of John Norton Moore).

[9] See 1975 House MM&F Committee Hearings at 236-37 (statement of William G. Mustard, Executive Director, National Federation of Fishermen).

[10] See 1975 House MM&F Committee Hearings at 351 (statement of Samuel Levering).

[11] In particular, Representative Paul Rogers of Florida proposed an amendment to H.R. 1070 that would require the promulgation of regulations for depleted or threatened species within 60 days after enactment of the legislation. See 1975 House MM&F

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Despite holding hearings on the eve of the Geneva session of the Law of the Sea Conference, the House Merchant Marine and Fisheries Committee promised to delay further action on 200-mile legislation until the session concluded, after which time it would determine what progress had been made at the Conference and what further action to take.[12]

B. THE "TUNA WAR" FLARES UP

A flare up in the long-running "tuna war" between Ecuador and the United States in late-January 1975 provided opponents of 200-mile legislation ammunition in their campaign against it.[13] Ecuador's seizure of seven U.S. tuna boats resulted in fines of $1.5 million and the loss of another $1.5 million in confiscated catches. In order to provide compensation for these losses under the Fishermen's Protective Act, the Departments of State and Commerce had to request supplemental appropriations from Congress.[14] Both State Department officials and tuna industry representatives pointed to the seizures as evidence of what would befall U.S. distant water fishermen with greater frequency if the United States enacted 200-mile legislation.[15] Indeed, an Administration

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Committee Hearings at 494 (statement of Charles R. Carry), 634-35 (statement of Ned Everett, Subcommittee Counsel), 664-666 (statement of Rep. Rogers).

[12] See 1975 House MM&F Committee Hearings at 667 (statement of Rep. Leggett).

[13] See Douglas Watson, "'Tuna War' Escalates in Ecuador," Washington Post, March 10, 1975, reprinted in 1975 House MM&F Committee Hearings at 2-4; see also Fish and Wildlife Briefings: Hearings on State Department Briefing Before the Subcom. on Fisheries and Wildlife Conservation and the Environment of the House Com. on Merchant Marine and Fisheries, 94th Cong. 1st Sess. (1975) (hereinafter "1975 House MM&F State Department Briefing") (statement of Thomas A. Clingan, Jr., Deputy Assistant Secretary of State for Oceans and Fisheries) at 159-162.

[14] See 1975 House MM&F State Department Briefing (statement of Thomas A. Clingan, Jr., Deputy Assistant Secretary of State for Oceans and Fisheries) at 159-160.

[15] See 1975 House MM&F Committee Hearings at 90-95 (statement of John Norton Moore); 104, 106 (statement of Thomas A. Clingan, Jr., Deputy Secretary of State for

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official asserted that it was "quite possible that the Senate's" passage of S. 1988 in December 1974 had "reinforced [Ecuador's] strongly held views" on the 200-mile issue just before the vessel seizures were carried out.[16]

The vessel seizures led to calls from tuna fishermen and politicians for U.S. destroyers to escort tuna boats off the coast of Ecuador.[17] In his newspaper column, then-Republican presidential aspirant Ronald Reagan declared that if Congress did not pass a 200-mile bill, "and the 12-mile limit continues to be the international standard, the U.S. government next winter should send along a destroyer with the tuna boats to cruise, say, 13 miles off the shore of Ecuador in an updated version of Teddy Roosevelt's dictum to 'talk softly, but carry a big stick.'"[18] The domestic political implications of 200-mile legislation would later figure prominently in the Ford Administration's approach to it.

Oceans and Fisheries); id. at 440-69 (statement of August J. Felando, General Manager, American Tuna Boat Association); id. at 607-615 (detailed statement submitted by Felando on "Seizure of American Tuna Vessels"); id. at 601-607 (statement of John King, Ecuadorian Desk, Statement Department and correspondence regarding U.S. government's response to seizures).

[16] Loen to Sullivan, Mar. 20, 1975, reprinted in 1975 House MM&F Committee Hearings at 602-603. This belief, along with prior experience, led the Administration to believe that application of Pelly amendment sanctions would not be likely "to sway the Government of Ecuador" to alter its practice of seizing U.S. vessels for fishing within 200 miles of its coast. Id.

[17] See, e.g., 1975 House MM&F Committee Hearings at 597 (testimony of John Royal); The Ronald Reagan column, Mar. 7, 1975, attached to Mar. 5, 1975 memo to the President, Presidential handwriting file, Box 23, Foreign Affairs-Fisheries, FO 3-1/Fisheries, Ford Papers.

[18] The Ronald Reagan column, Mar. 7, 1975, attached to Mar. 5, 1975 memo to the President, Presidential handwriting file, Box 23, Foreign Affairs-Fisheries, FO 3-1/Fisheries, Ford Papers. Interestingly, while Reagan did not at this time take a position on the 200-mile bill as such, he opined that if Congress passed one, it "should, for the sake of consistency, rescind the Fishermen's Protective Act and let the tuna fishermen solve their own problem off the shores of South America." Id.

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C. THE PUSH FOR A REGIONAL APPROACH TO TUNA CONSERVATION AND MANAGEMENT

Ironically, until the January 1975 incidents, vessel seizures by Ecuador and the marshal rhetoric they generated had been averted since the Law of the Sea Conference had convened, not because of diplomacy, but rather because, in the words of the head of the U.S. delegation to the Law of the Sea Conference, "the tuna were very helpful because they stayed away [from the waters off Ecuador] for about two years."[19] In his view, "this had permitted continuing discussions with the various tuna countries" about a regime to conserve and manage tuna, which, reflecting a tenet of the U.S. juridical position, he asserted, "no single coastal state can really effectively manage because they don't stay in any one economic zone for that long a time."[20]

The regional approach to tuna management had been reflected in the draft article on highly migratory species the United States had submitted at Caracas. State Department officials explained that the U.S. position on management of tuna and other

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[19] Backgrounder by John Stevenson, Chairman of the U.S. delegation to the Law of the Sea Conference, Mar. 11, 1975, at 17, copy in author's file.

[20] Id. Whether the biological justification for special management provisions for tuna was in fact legitimate—i.e. whether the tuna were, in fact, highly migratory—has been subject to debate. The biological question has been colored by the jurisdictional implications of the answer to it. The dispute over the highly migratory nature of tuna associated with efforts to repeal the FCMA's tuna exclusion position is illustrative. See Chapter 6, infra. Regardless, the biological justification was elegantly expressed by the captain of the *Neptune*, one of the tuna boats seized by Ecuador in early 1975. Captain John Burich, in testimony before Congress, explained:

> The very reason I went into Ecuador right at the beginning of the year there was because there was a big run of fish then and there.
>
> Within a week or 1-1/2 weeks after we were seized, that fish was gone. God knows where the fish is now, it might be up in Mexico. It is like a rain cloud coming down across the United States passing into Mexico.
>
> Incidentally, who would claim the rain cloud?

1975 House MM&F Committee Hearings at 588 (statement of John Burich).

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highly migratory species at the Law of the Sea negotiations called for "an international or regional organization which would establish regulations, quotas, and reasonable fees for the catching of fish, and those regulations would be enforced within the 200-mile economic zone by the Coastal State concerned and outside the 200-mile zone by the flag State."[21] Under such a regime, individual coastal states would not assess license fees, but rather the regional organization would assess fees which would be distributed to the coastal state in whose zone fish were caught.[22] This regional approach was also favored by representatives of the tuna industry, who likened the need for it to the need for federal regulation of interstate commerce:

> If, for instance, let us take the tuna that migrate off the 13 countries, were subjected to diverse control by each of the coastal States, we would have the same problem as if you attempted to establish a railroad from California, let us say from San Diego, to New Bedford, Massachusetts, and attempted and allowed each of the several States to regulate that railroad in any way they deemed fit. You would have a pretty lousy railroad. In effect, Mr. Chairman, you would frustrate interstate commerce and, in effect, we think the same thing would happen with respect to tuna.[23]

According to the State Department, there was considerable support at the Law of the Sea negotiations for the regional approach to highly migratory species being advocated by the United States.[24] Moreover, the United States had "bargaining leverage left" in its discussions with other countries over arrangements for highly migratory

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[21] 1975 State Department Briefing Hearing at 168 (statement of Thomas A. Clingan, Jr., Deputy Assistant Secretary of State for Oceans and Fisheries Affairs); see also 1975 House MM&F Committee Hearing at 107 (statement of Thomas A. Clingan, Jr., Deputy Assistant Secretary of State for Oceans and Fisheries Affairs).

[22] See id.

[23] 1975 House MM&F Committee Hearings at 443 (testimony of August Felando); see also id. at 452 (testimony of August Felando).

[24] See 1975 House MM&F Committee Hearings at 111 (responses to questions posed to Mr. Moore by Mrs. Sullivan).

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species, John Norton Moore asserted, because it had "not recognized their jurisdiction over [such] stocks."[25] The fact that H.R. 200 differentiated between highly migratory and other species, according to Moore, would not prevent its passage from reinforcing coastal state claims to control highly migratory species and, thereby, undercut the U.S. efforts to secure a regional approach for tuna.[26] Moore predicted, with undue optimism, as it would turn out, that there was "a good chance of getting provisions on [a regional approach to] tuna conservation agreed within Committee II at the committee level . . . in Geneva."[27]

D. THE PUSH FOR A FULL UTILIZATION PRINCIPLE

In addition to seeking a special regime for highly migratory species, the U.S. delegation to the Law of the Sea negotiations also advocated the "full utilization" principle, requiring states to allow foreign vessels to fish for surplus stocks the coastal state could not itself harvest. U.S. advocacy of the full utilization principle was animated both by a commitment to the proposition that resources should not be wasted and a desire to provide some support for U.S. distant water shrimp and snapper-grouper fishermen who, unlike the tuna fishermen, prosecuted fisheries for which special regimes, based on the species approach, were not being pursued at the Law of the Sea negotiations.[28] While

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[25] 1975 House MM&F Committee Hearings at 121 (statement of John Norton Moore).

[26] See 1975 House MM&F Committee Hearings at 93 (statement of John Norton Moore, Chairman, National Security Council Interagency Task Force on the Law of the Sea and Deputy Special Representative of the President and U.S. representative to the Law of the Sea Conference).

[27] 1975 House MM&F Committee Hearings at 120 (statement of John Norton Moore).

[28] U.S. fishermen who fished off Mexico's coast in the Gulf and on the Pacific Coast for snapper and grouper stood to benefit if coastal states were under an obligation to

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the full utilization principle would theoretically be of assistance to all U.S. distant water fishing interests,[29] it was viewed within the U.S. government as of greatest importance to the distant water shrimp fishermen, who depended on access to waters within 200 miles of the coasts of Mexico and Latin America.[30]

In the early 1970s, the United States took steps to secure access for distant water shrimpers to fishing grounds off Brazil, resulting, in 1972, in the Brazil Shrimp Fishing Agreement. The Agreement, according to a State Department official, "enabled the United States to walk around the Brazilian claim to a 200-mile territorial sea that ha[d] been in effect since 1970."[31] Under the Agreement, neither country recognized the other's juridical position, and the United States licensed up to 325 U.S. vessels to fish

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allow access to surplus stocks. See 1975 House MM&F Committee Hearings at 93 (statement of John Norton Moore).

[29] The article on highly migratory species submitted by the United States at Caracas itself called for allocation decisions to ensure full utilization. See L.47, Art. 19(C).

[30] See 1975 House MM&F Committee Hearings at 177 (statement of Howard W. Pollock, Deputy Administrator, NOAA); 1975 House MM&F Committee Hearings at 551 (statement of Donald McKernan, former Special Assistant to the Secretary of State for Fish and Wildlife). As described in Chapter 1, above, the U.S. shrimp industry consisted of three segments, only one of which was "distant water." The distant water shrimpers opposed U.S. unilateral action because they feared it would result in their exclusion from their traditional fishing grounds within 200-miles of Brazil and other Latin American countries, and off Mexico in the Gulf of Mexico. See 1975 House MM&F Committee Hearings at 479 (statement of William N. Utz, Executive Director, American Shrimp Boat Association, National Shrimp Conference). Coastal shrimp fishermen opposed the legislation out of a concern that displaced distant water shrimpers would have no choice but to redirect their fishing effort to coastal areas off the United States, particularly in the Gulf of Mexico, and, thereby, increase competition for the resource. See id. at 473 (statement of William T. Utz).

[31] 1975 State Department Briefing Hearing at 157 (statement of Thomas A. Clingan, Jr., Deputy Assistant Secretary of State for Oceans and Fisheries Affairs).

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under its own regulations in return for paying Brazil, in lieu of a license fee, an annual fee to enforce those regulations against U.S. vessels.[32]

As would be the case many years later when the United States negotiated access for U.S. tuna vessels to the 200-mile zones of the Pacific Island Countries, the efforts of the State Department to secure access for distant water shrimpers to their traditional fishing grounds prompted charges from advocates of extending fisheries jurisdiction that the U.S. actions effectively recognized coastal state jurisdiction over fisheries within 200 miles of the coast. Congressional supporters of 200-mile legislation argued that the Brazil Shrimp Fishing Agreement amounted to de facto recognition of Brazil's claims to extended fisheries jurisdiction.[33] State Department officials disagreed, explaining that the area covered by the Agreement did not coincide with a 200-mile limit, but rather with the 30-fathom curve.[34] Anticipating the very argument U.S. distant water tuna fishermen would make, more than a decade later, in explaining why the agreement of the United

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[32] See 1975 State Department Briefing Hearing at 157 (statement of Thomas A. Clingan, Jr., Deputy Assistant Secretary of State for Oceans and Fisheries Affairs). In 1974, supporters of 200-mile legislation opposed implementing legislation for the Brazil Shrimp Fishing Agreement to protest what they perceived as the State Department's failure to address the needs of other segments of the U.S. fishing industry. See 1975 House MM&F Committee Hearings at 479 (statement of Rep. Studds). On January 2, 1974, the requisite implementing legislation (P.L. 93-242) was passed because, in the Senate, it was coupled with legislation declaring the American lobster, tanner crab, king crab, and 22 other species of crustacea, mollusks, and sponges as creatures of the Continental Shelf pursuant to the 1958 Geneva Convention on the Continental Shelf. See 1975 House MM&F Committee Hearings at 130 (statement of John Norton Moore) and 479 (statement of Rep. Studds). The State Department had opposed this "Lobster Legislation" on the ground that it would inhibit negotiations at the Law of the Sea Conference. See id. at 130. See also id. 151 (statement of Rep. Studds) (explaining machinations re shrimp agreement implementing legislation and lobster bill).

[33] See 1975 House MM&F Committee Hearings at 151-53 (statement of Rep. Studds).

[34] See 1975 House MM&F Committee Hearings at 106 (statement of Thomas A. Clingan, Jr.).

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States with the Pacific Island Countries for access to their 200-mile zones for U.S. vessels was not a de facto recognition of coastal state jurisdiction over tuna, a shrimp industry representative retorted that the United States had succeeded in negotiating the Brazil Shrimp Fishing Agreement only because it "had a stone wall behind [it], and that stone wall was the policy of failing to recognize any extension of jurisdiction beyond 12 miles."[35]

Notwithstanding the jurisdictional niceties of the Brazil Shrimp Fishing Agreement, State Department officials recognized that the "delicate" modus vivendi[36] it achieved was only an interim, pragmatic arrangement that would be superseded by the fisheries articles under negotiation at the Law of the Sea Conference.[37] In light of that reality, State Department officials looked to the full utilization principle to offer some hope to America's distant water shrimpers. As with provisions for highly migratory species, State Department officials testified that including a full utilization requirement in 200-mile legislation would not prevent the unilateral extension of jurisdiction effected by such legislation from harming efforts to negotiate a full utilization requirement at the Law of the Sea Conference.[38] According to John Norton Moore, in the absence of an agreed upon international legal obligation to fully utilize fishery resources, "if we can

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[35] 1975 House MM&F Committee Hearings at 478 (statement of William N. Utz).

[36] See 1975 House MM&F Committee Hearings at 106 (statement of John Norton Moore) and 115 (statement of Thomas A. Clingan, Jr.).

[37] See 1975 House MM&F Committee Hearings at 108 (statement of Thomas A. Clingan, Jr.); see also 1975 House MM&F Committee Hearings at 177-78 (statement of Howard W. Pollock, Deputy Administrator, NOAA).

[38] See 1975 House MM&F Committee Hearings at 90, 94-95 (statement of John Norton Moore).

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take unilateral action with a full utilization principle out to 200-miles, there is nothing to prevent other countries from doing it without a full utilization principle."[39]

Nonetheless, even advocates of the full utilization principle recognized that its inclusion in the Law of the Sea Convention would have a limited long-term impact in keeping fishing grounds open to U.S. distant water shrimpers because the countries off whose coasts they fished would eventually develop their own capacity to fully utilize the resource.[40] It was also recognized that, even in the short-term, the full utilization principle might not prove very effective because, as it was being as formulated at the Law of the Sea negotiations, the coastal state would decide whether a particular stock was being fully utilized.[41] For these reasons, one fisheries official candidly conceded, when questioned by Gulf state Congressmen, that the future of the U.S. distant water shrimp industry appeared "dismal."[42]

Recognizing that the full utilization principle would not be its salvation, representatives of the shrimp industry, while opposing 200-mile legislation, urged that if it were passed it include a trade sanction or embargo provision that would prohibit all

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[39] 1975 House MM&F Committee Hearings at 95 (statement of John Norton Moore).

[40] See 1975 House MM&F Committee Hearings at 199 (statement of Howard W. Pollock, Deputy Administrator, NOAA).

[41] See 1975 House MM&F Committee Hearings at 360 (statement of Rep. Pritchard). The provision of the Law of the Sea Convention ultimately agreed upon proved even weaker in protecting access to surplus stocks than the full utilization principle advocated by the United States would have. Article 62 requires states to "promote the objective of optimum utilization" of EEZ fishery resources. UNCLOS Art. 62(1). Article 62 authorizes the coastal state to determine, in its sole discretion, both the allowable catch in its EEZ and its own harvesting capacity. See UNCLOS Art. 62(2); see also Burke (1994) at 62-65 (discussing treatment of harvesting capacity and surplus determination by Article 62); R.R. Churchill and A.V. Lowe, The Law of the Sea (1988) at 233-34, 338.

[42] 1975 House MM&F Committee Hearings at 191, 199 (statement of Howard W. Pollock, Deputy Administrator, NOAA).

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seafood products from entering the United States from any nation that denied U.S. vessels access to their traditional fishing grounds pending agreement on such access.[43] Such a provision was ultimately included in the FCMA as enacted in 1976. While neither the embargo provision nor diplomacy would be able to preserve access for U.S. distant water shrimp fishermen to their traditional grounds off Mexico and Latin America, the embargo provision would serve as an important instrument of U.S. tuna policy for many years.

II. THE GENEVA SESSION: ARTICLE 64 DETERMINED

The Geneva session of the Law of the Sea Conference, held from March 17 to May 9, 1975, produced an Informal Single Negotiating Text ("INST") containing provisions for highly migratory species that would, without substantive change, become Article 64 of the Law of the Sea Convention. During the first half of the session, Committee II completed a second reading of the "Main Trends Working Paper" compiled at Caracas, in an effort to reduce the number of alternative formulations of each article.[44] At the mid-point of the session, this process was abruptly superceded by a different procedure designed to yield a unified negotiating text.[45] Under this procedure, each of the three committee chairmen was given the responsibility for assembling a draft text.[46]

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[43] See 1975 House MM&F Committee Hearings at 473, 476, 481 (statement of William M. Utz, Executive Director, American Shrimp Boat Association and National Shrimp Conference).

[44] See Hollick at 303; see also John R. Stevenson and Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The 1975 Geneva Session," 69 American Journal of International Law 763, 770 (1975).

[45] See Hollick at 300.

[46] See Hollick at 300.

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At the Geneva session, Committee II, which had responsibility for developing economic zone and fisheries articles, was chaired by Reynaldo Galindo Pohl of El Salvador.[47]

A. THE EVENSEN GROUP HIGHLY MIGRATORY SPECIES ARTICLE

Provisions for highly migratory species were the subject of much controversy during the Geneva session.[48] While several negotiating groups produced texts on the economic zone in Geneva,[49] the Evensen Group or "Juridical Experts"[50] was the most important in terms of its influence on the formulation of provisions on the economic zone and, therefore, fisheries. Although the Evensen Group's final text did not contain an article on highly migratory species because agreement upon one could not be reached within the Group, such an article from an earlier Evensen Group draft was closely followed by Galindo Pohl,[51] in developing fisheries articles for the ISNT.[52]

On April 16, 1975, the Evensen Group produced a draft text on the economic zone, including fisheries, which was circulated to all delegations.[53] Because the Evensen Group draft article on highly migratory species was so closely followed by Galindo Pohl

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[47] See Hollick at 285. Satya Nandan of Fiji, who would in later years assume a leading role in the development of the Law of the Sea generally, and in the elaboration and implementation of Article 64 particularly, was one of two rapporteurs for Committee II. Nandan's key role in these later developments is discussed in Chapter 7, infra.

[48] See Stevenson and Oxman (1975) at 780.

[49] See Hollick at 306; see also Stevenson and Oxman (1975) at 770.

[50] So named after its chairman, Jens Evensen of Norway, this group of some 40 delegation heads had a predominantly coastal state orientation. See Hollick at 304.

[51] See Hollick at 285, 308.

[52] See Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 103-104; see also Stevenson and Oxman (1975) at 779 and n. 32.

[53] See Group of Juridical Experts, The Economic Zone, 16 April 1975, reproduced in Platzöder ed., UNCLOS Documents, Vol. XI, at 481-489; see also Stevenson and Oxman (1975) at 770; Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 654.

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in formulating the highly migratory species article for the ISNT, its most pertinent paragraphs are reproduced here. The Evensen Group draft article provided:

> 1. In the exercise of its sovereign rights over the living resources in the economic zone, the coastal State shall regulate fishing for highly migratory species listed in Annex A, in accordance with this and other relevant articles of this chapter.
>
> 2. The coastal State shall co-operate directly and through appropriate international organizations, with other States whose nationals fish highly migratory species in the region, with a view to ensuring conservation and optimum utilization of such species. In regions where no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region, shall establish such organization and shall participate in its work.
>
> 3. On the basis of best scientific evidence available and other relevant information, the organization shall formulate standards with respect to highly migratory species that will ensure, throughout the region, both within in and beyond the economic zone, conservation and optimum utilization. To this end the organizations concerned shall formulate standards or recommendations with regard to, inter alia, allowable catch, equitable allocation, issuance of permits, a uniform system of fees and penalties.[54]

This article represented one of several attempts made in the Evensen Group, "[b]ased on a U.S. initiative, . . . to negotiate an article on highly migratory species."[55] In mandating

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[54] Group of Juridical Experts, The Economic Zone, 16 April 1975, Art. 12, reproduced in Platzöder ed., UNCLOS Documents, Vol. XI, at 487.

[55] Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 104.

The rest of the article provided:

> 4. In formulating such standards or recommendations the organization shall take into account all relevant circumstances including, inter alia, the effects on related or dependent species, the requirements of coastal States' vessels which fish only within their respective zones, the harvesting capacity of coastal States of the region, the need to minimize economic dislocation and other relevant management and conservation criteria contained in articles 5 and 6.
>
> 5. The adoption of standards and recommendations by the organization shall require, in the absence of agreement, a two-thirds majority, including the votes of all coastal States of the region present and voting.

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the creation of regional organizations, requiring coastal states to "cooperate" in highly migratory species conservation and management by working through them, and giving regional organizations authority to prescribe conservation standards that coastal states had to act "in conformity with" in their EEZs, the Evensen Group draft article emphasized a regional approach to highly migratory species management of the sort advocated by the United States and favored by its distant water tuna industry.

The Evensen Group draft article recognized coastal state jurisdiction to regulate fishing for highly migratory species within the exclusive economic zone, but required coastal and fishing states to cooperate both directly and through regional organizations to insure the conservation and optimum utilization of such species.[56] Where such regional organizations did not already exist, coastal and fishing states were required to create them.[57] The draft article attempted to finesse the issue of whether the coastal state or a

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> 6. To achieve uniformity and effective conservation throughout the region, the States concerned shall ensure that their laws and regulations are in conformity with the standards formulated by the organization, and take into account its recommendations with regard to allocation, permits, fees and penalties.
>
> 7. Within the economic zone, the coastal State shall adopt effective measures to ensure compliance by all vessels with the applicable standards and regulations, in accordance with article 15.
>
> 8. Nothing in this Convention shall restrict the right of a coastal State or international organization, as appropriate, to prohibit, regulate and limit the exploitation of marine mammals. States shall co-operate either directly or through appropriate international organizations with a view to the protection and management of marine mammals.

Group of Juridical Experts, The Economic Zone, 16 April 1975, reproduced in Platzöder ed., UNCLOS Documents, Vol. XI, at 487.

[56] See Group of Juridical Experts, The Economic Zone, 16 April 1975, Art. 12(1), (2), reproduced in Platzöder, ed., UNCLOS Documents, Vol. XI, at 487.

[57] See Group of Juridical Experts, The Economic Zone, 16 April 1975, Art. 12(2), reproduced in Platzöder, ed., UNCLOS Documents, Vol. XI, at 487.

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regional organization would develop the content of the regulations which the coastal state would implement in its economic zone. It did this by differentiating between "standards" and "recommendations" developed by the organization. Regulation by the coastal state had to be "in conformity with" the "standards," but the coastal state only had to "take into account" the "recommendations."[58] The organization had to establish standards to insure conservation and optimum utilization of highly migratory species both within and beyond the economic zone, but the organization could decide for itself whether to formulate binding standards or non-binding recommendations with regard to, among other things, allowable catch, equitable allocation, issuance of permits, fees and penalties.[59] Coastal states would enjoy special voting protection because the adoption of standards and recommendations by the organization would be contingent on the affirmative vote of "all coastal States of the region present and voting."[60] The draft article failed to specify whether the coastal state or regional organization would develop the precise content of the regulations which the coastal state would implement in its economic zone. This failure to so specify meant that such authority resided with the coastal state, subject only to the requirement that such regulations be "in conformity with" standards and "take into account" recommendations formulated by the international organization.

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[58] See Group of Juridical Experts, The Economic Zone, 16 April 1975, Art. 12(6), reproduced in Platzöder, ed., UNCLOS Documents, Vol. XI, at 487.

[59] See Group of Juridical Experts, The Economic Zone, 16 April 1975, Art. 12(3), reproduced in Platzöder, ed., UNCLOS Documents, Vol. XI, at 487.

[60] See Group of Juridical Experts, The Economic Zone, 16 April 1975, Art. 12(3), (5), reproduced in Platzöder, ed., UNCLOS Documents, Vol. XI, at 487.

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Ultimately, neither this nor any other highly migratory species article could be agreed upon by the Evensen Group.[61] As a result, the final text the Evensen Group submitted to Galindo Pohl in April 1975, for his consideration in preparing a unified negotiating text, did not contain an article on highly migratory species but rather indicated that such an article was "still under discussion."[62]

B. THE ISNT HIGHLY MIGRATORY SPECIES ARTICLE

Although the Evensen Group could not reach agreement on a highly migratory species article, Galindo Pohl closely followed paragraphs 1 and 2 of the Evensen Group draft article in formulating Article 53 of the ISNT. Article 53 of the ISNT provided:

> 1. The provisions of paragraph 2 shall apply, in addition to the other provisions of this part, to the regulation by the coastal State in its exclusive economic zone of fishing for the highly migratory species listed in the annex.[63]
>
> 2. The coastal State and other States whose nationals fish highly migratory species in the region shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions where no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.[64]

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[61] See Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 103-104; see also Stevenson and Oxman (1975) at 779 and n.32.

[62] Group of Juridical Experts, The Economic Zone, 24 April 1975, reproduced in Platzöder ed., UNCLOS Documents, Vol. IV, at 209, 216; see also Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 104; Stevenson and Oxman (1975) at 779.

[63] Annex I of the Convention lists seventeen types of highly migratory species.

[64] A/CONF.62/WP.8/Part II, Art. 53, reproduced in Platzöder ed., UNCLOS Documents, Vol. I, at 20, 29. The third and last paragraph of Article 53 concerned marine mammals.

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Paragraph 2 of Article 53 adopted almost verbatim paragraph 2 of the Evensen Group's text, and incorporated from paragraph 3 of that text the injunction that conservation and optimum utilization of highly migratory species be achieved "both within and beyond" the exclusive economic zone.[65] Article 53 very conspicuously declined to address explicitly whether the coastal state or the international organization was responsible for developing the content of the regulations the coastal state would implement within its EEZ to achieve conservation and optimum utilization of highly migratory species. Unlike the Evensen Group draft article, Galindo Pohl's highly migratory species article also did not address development of "standards" and "recommendations" by international organizations or specify the duties of coastal states with respect to their implementation.[66] As a result, how coastal states and fishing states were to "cooperate" through regional organizations, as the ISNT article directed, "with a view to insuring conservation and providing the objective of optimum utilization of [highly migratory] species throughout the region, both within and beyond the exclusive economic zone," was left unresolved.[67] Even though the ISNT had declined to address, let alone specify,

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[65] See Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 655.

[66] See A/Conf. 62/WP.A/Part II, Art. 53, reproduced in Platzöder, ed., UNCLOS Documents, Vol. I, at 20, 29; see also Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 655.

[67] See A/Conf. 62/WP.A/Part II, Art. 53(2), reproduced in Platzöder, ed., UNCLOS Documents, Vol. I, at 20, 29. Also left unresolved was whether coastal states were required to "cooperate" in establishing regional organizations and "cooperate" by working through them. Galindo Pohl arguably introduced ambiguity on this score by making the duty to cooperate disjunctive, so that the duty could be discharged by coastal and fishing states through either direct cooperation or cooperation in a regional organization. The Evensen Group draft article appears to have mandated both types of cooperation. This ambiguity in the scope of the duty to cooperate would give rise to disputes in later years over the Pacific Island Countries' refusal to pursue the creation of a regional fisheries organization including both themselves and distant water fishing

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the prescriptive authority of regional organizations, the U.S. delegation reported after the close of the Geneva Session, too sanguinely as it would turn out, that "an organization which would establish mandatory conservation measures would be broadly acceptable, but there is still disagreement as to whether other measures adopted by an organization including allocation would be mandatory."[68]

Galindo Pohl's formulation of a highly migratory species article was consistent with his approach to developing the ISNT. Where he "was able to choose from" among multiple "drafts on the economic zone, he unerringly chose the most coastal formulations."[69] "Although the [ISNT] was clearly not a negotiated or a compromised formulation, it served as the basis for future negotiations" and "in essence determined the outlines of the Law of the Sea text."[70]

In the two 1976 sessions of the Law of the Sea Conference, discussions about the highly migratory species article took place but no substantive changes were made to specify the relative responsibilities of coastal states and international organizations for

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nations. See Chapters 5 and 8 for further discussion of the development of fisheries organizations for the Western and Central Pacific.

[68] See Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 88.

[69] Hollick at 308. In addition to strengthening coastal state jurisdiction over highly migratory species in the EEZ, the ISNT limited the efficacy of the full utilization principle in ensuring distant water fishermen access to underutilized resources in the EEZ. According to one observer, "[t]he role of international fisheries organizations in setting guidelines for conservation and rational utilization disappeared in the Galindo Pohl draft. Instead the coastal state was unequivocally given the right to determine the allowable catch of fisheries in its economic zone." Hollick at 307; see also A/CONF.62/WP.8/Part II, Arts. 50-51, reproduced in Platzöder ed., UNCLOS Documents, Vol. I, at 28.

[70] Hollick at 308, 379.

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the development of regulations to be implemented in the economic zone, as major disagreement on that issue persisted.[71]

C. ARTICLE 64

At the 1977 session of the Law of the Sea Conference, also convened in New York, the United States proposed to revise the highly migratory species article to accord regional organizations more explicit authority. The article proposed by the United States expressly recognized that coastal state consent was required for adoption of measures applicable to the EEZ and assigned to regional organizations the authority to determine a total allowable catch or quota for highly migratory species in the area it covered.[72] While the U.S. proposal provided that member states of an organization would have to agree on "necessary means" to insure the catch did not exceed the overall quota, it did not address the allocation of the quota or other management issues, such as permits, fees, or

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[71] See Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 125-128, 151-152; see also Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 656. ISNT Article 53 was revised to reverse the orders of paragraphs 1 and 2, so that the paragraph requiring coastal states and fishing states to cooperate is first. In addition, specific reference to highly migratory species in the paragraph stating that the other EEZ fisheries articles also apply to highly migratory species was deleted, so that it read: "The provisions of paragraph 1 apply in addition to the other provisions of this Chapter." A/CONF.62/WP.8/Rev. 1/Part II, Art. 53, reproduced in Platzöder, ed., UNCLOS Documents, Vol. I, at 183, 212. Burke terms this reformulation a "substantive" change "to give coastal states a general regulatory power within the EEZ" and make it "clear that the article dealing with sovereign rights in the EEZ applies to HMS as do the more specific provisions concerning coastal state rights over living resources." Burke (1994) at 212-213. Other commentators treat this change as technical and non-substantive. See Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 656. The change did not generate much controversy or commentary, and it is difficult to see how it effected a substantive change. Moreover, there is no evidence that either coastal or fishing states cited the change in subsequent years to support their respective positions regarding the extent of coastal state authority over highly migratory species in the EEZ.

[72] See United States, Exclusive Economic Zone (Art. 53 RSNT II), reproduced in Platzöder, ed., UNCLOS Documents, Vol. IV, at 439; see also Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 656.

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penalties.[73] By recognizing the need for coastal state consent for the adoption of any measures applicable to its EEZ, the U.S. proposal was more "coastal" than the Evensen Group draft article had been, but less "coastal" than the ISNT, which did not address the prescriptive authority of regional organizations at all. Following informal consultations, the U.S. proposal was not agreed to,[74] and the highly migratory species article was assigned the number it bears today, Article 64.[75]

In the next few years, only minor technical and drafting changes were made to Article 64; no substantive changes were made.[76] Article 64 failed to resolve a number of key issues surrounding the conservation and management of highly migratory species. While a fair reading of Article 64 had to conclude that it recognized coastal state jurisdiction over highly migratory species in the exclusive economic zone, serious disagreement remained over how the "cooperation" it mandated between coastal and fishing states was to be operationalized.

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[73] See United States, Exclusive Economic Zone (Art. 53 RSNT II), reproduced in Platzöder, ed., UNCLOS Documents, Vol. IV, at 439; see also Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 656.

[74] See Nordquist and Park, U.S. UNCLOS Delegation Reports (1983) at 175; see also Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 656.

[75] See Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 656. At the Geneva session of the Law of the Sea Conference in 1978, the U.S. proposal resurfaced in a draft article submitted by Ecuador that was identical in substance to the U.S. proposal and little different in form. See Ecuador, Exclusive Economic Zone (Article 64 ISNT), C.2/Informal Meeting/25, 1 May 1978 and Corr. 1, reproduced in Platzöder, ed., UNCLOS Documents, Vol. V, at 35-36. The proposal was not accepted. See Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 656.

[76] See Nandan and Rosenne, UNCLOS Commentary, Vol. II, at 657.

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CHAPTER 4: THE POST-GENEVA BATTLE OVER 200-MILE LEGISLATION AND ENACTMENT OF THE FCMA

After the Geneva session, Congress resumed consideration of 200-mile legislation and momentum for its passage quickly grew. At the same time, the Ford Administration decided to take a measured approach in opposing 200-mile legislation that did not rule out possible future support for it. By not foreclosing this possibility, the Administration sought to enhance U.S. negotiating leverage on fisheries issues at the Law of the Sea negotiations and in multilateral and bilateral discussions to improve conservation measures and reduce foreign fishing off U.S. shores. Although continuing to oppose 200-mile legislation, the distant water tuna and shrimp industries, and their supporters in Congress, successfully pressed for the legislation to include provisions intended to provide those industries some protection. These included the tuna exclusion provision (excluding tuna from the claim of the United States to exercise exclusive jurisdiction over fish stocks to 200 miles), the non-recognition provision (committing the United States to refuse to recognize claims of fisheries jurisdiction not also made by the United States), and the embargo provision (mandating the embargo of fish products from nations which refused to allow the continuation of U.S. distant water fishing or seized U.S. vessels based on a claim of jurisdiction not recognized by the United States). Despite these and other provisions intended to lessen the impact of 200-mile legislation on them, U.S. distant water interests continued to lobby the Ford Administration to veto it. In a remarkable instance of polarized internal division over major legislation, the executive branch departments gave conflicting recommendations to President Ford, with the Departments of State, Justice and Defense, among others, advocating a veto, and only the Departments of Commerce and Transportation recommending that the President sign the

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legislation. Nonetheless, acceding to the imperatives of election year politics, President Ford signed the 200-mile legislation into law in April 1976.

I. CONGRESSIONAL CONSIDERATION OF 200-MILE LEGISLATION RESUMES

In late May and early June, 1975, following the conclusion of the Geneva Session, the State Department appeared before the Congressional committees considering Law of the Sea matters to report on the progress made at the Conference.[1] John Norton Moore conceded that his earlier predictions of a speedy conclusion to the Law of the Sea negotiations had been "wrong" and "overly optimistic," but reported that the ISNT was a significant accomplishment that would speed agreement on a convention.[2] Moore further reported that the economic zone and fisheries provisions of the ISNT reflected areas of broad support and would likely be components of any resulting treaty.[3] The ISNT's provisions for coastal state jurisdiction over coastal species and state-of-origin jurisdiction over salmon throughout their range, according to Moore, protected the interests of U.S. coastal and salmon fishermen "fairly well."[4] Distant water shrimp

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[1] See Fish and Wildlife Miscellaneous-Part 1: Law of the Sea Conference Briefing before the Subcomm. on Fisheries and Wildlife Conservation and Environment the House Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess. 133-54 (1975) ("1975 LOS Briefing") (testimony of John Norton Moore); Law of the Sea: Achievements of the Geneva Session of the Third United Nations Law of the Sea Conference: Hearing before the Subcomm. on Oceans and International Environment of the Senate Comm. on Foreign Relations, 94th Cong., 1st Sess. (1975); Geneva Session of the Third United Nations Law of the Sea Conference: Hearings before the National Ocean Policy Study of the Senate Comm. on Commerce, 94th Cong., 1st Sess. (1975); Status Report on the United Nations Law of the Sea Conference, Part 3: Hearing before the Subcomm. on Minerals, Materials, and Fuels of the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess. (1975).

[2] See 1975 LOS Briefing at 135-136 (statement of John Norton Moore).

[3] See 1975 LOS Briefing at 135-136 (statement of John Norton Moore).

[4] See 1975 LOS Briefing at 143 (statement of John Norton Moore).

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fishermen, according to Moore, received some protection by virtue of the ISNT's provisions regarding full utilization and minimization of dislocation of traditional distant water fisheries.[5] However, the ISNT's provisions on highly migratory species, according to Moore, would not adequately protect U.S. distant water tuna interests.[6]

At the same time, Congress quickly resumed its consideration of 200-mile legislation. Magnuson opened his Committee's hearing on the 200-mile bill by declaring: "Now that another session of the Law of the Sea Conference has ended without resolving the fishery conservation question, we here in Congress must do the job."[7] Magnuson's exasperation with the perceived lack of progress at the Law of the Sea negotiations was typical of coastal state senators supporting 200-mile legislation.[8] New support for action on 200-mile legislation came from within the fishing industry. The National Fisheries Institute ("NFI"), which represented the processing and marketing segment of the industry, came out in favor of action on 200-mile legislation following the conclusion of the Geneva Session, reversing its earlier position in favor of waiting for the Law of the Sea negotiations to produce an agreement.[9] While supporting 200-mile legislation, the NFI at the same time demanded protection for America's distant water fishermen through continuation of the FPA, and inclusion of a full utilization principle

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[5] See 1975 LOS Briefing at 143 (statement of John Norton Moore).

[6] See 1975 LOS Briefing at 143 (statement of John Norton Moore).

[7] Emergency Marine Fisheries Protection Act of 1975-Part 1: Hearing before the Comm. on Commerce on S. 961, 94th Cong., 1st Sess. (1975) (hereinafter "1975 Commerce Comm. Hearing on S. 961 Part 1") at 1 (statement of Sen. Magnuson).

[8] See 1975 Commerce Comm. Hearing on S. 961 Part 1 at 29-31 (statement of Sen. Packwood); 1975 Commerce Comm. Hearing on S. 961 Part 1 at 53-57 (statement of Sen. Muskie).

[9] See 1975 Commerce Comm. Hearings on S. 961 Part 1 at 57-64 (statement of Murry Berger, President, National Fisheries Institute).

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and special provisions for highly migratory species in a Law of the Sea convention.[10] In addition, the NFI supported the use of license fees for foreign fishing in the U.S. 200-mile zone to pay for licenses that other nations would require U.S. distant water vessels to purchase for fishing in their 200-mile zones.[11]

The Congressional juggernaut for 200-mile legislation picked up speed during the summer of 1975. On July 31, 1975, the House Merchant Marine and Fisheries Committee voted overwhelmingly, 36 to 3 to 1, to favorably report H.R. 200, as amended.[12] In the Senate, Magnuson had clearly signaled his Committee's intention to act favorably on a 200-mile bill. This forced the Ford Administration to decide what position it would take on 200-mile legislation.

II. THE ADMINISTRATION'S DECISION TO OPPOSE 200-MILE LEGISLATION

On August 6, 1975, President Ford decided the approach his Administration would take to the growing momentum for 200-mile legislation.[13] On Secretary of State Henry Kissinger's recommendation, the President adopted a two-pronged approach. First, the Administration would continue its strong opposition to unilateral legislation, while indicating willingness to consider support for such legislation in the future if bilateral and multilateral negotiations to improve conservation measures and reduce

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[10] See 1975 Commerce Comm. Hearings on S. 961 Part 1 at 59, 64 (statement of Murry Berger, President, National Fisheries Institute).

[11] See id.

[12] See Memorandum for the President from Henry A. Kissinger re 200-Mile Interim Fisheries Legislation at 1, Aug. 5, 1975, Charles Leppert Files, Box 10, Fisheries (2), Ford Papers.

[13] See Memorandum for the President from Henry A. Kissinger re 200-Mile Interim Fisheries Legislation, Aug. 6, 1975, Charles Leppert Files, Box 10, Fisheries (2), Ford Papers.

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overfishing did not show progress. Second, the Administration would continue multilateral and bilateral initiatives to reduce the catch levels of foreign vessels fishing off U.S. coasts.[14] The President's decision represented a middle ground between, on the one hand, the positions of the State and Defense Departments, which called for a public announcement of a threat to veto any 200-mile legislation, and, on the other hand, the Departments of Treasury and Commerce, which wanted the Administration to commit to support 200-mile legislation if bilateral and multilateral negotiations did not bear fruit within a year.[15] Ford's decision was intended to maintain leverage on fisheries issues at the Law of the Sea negotiations and in multilateral and bilateral discussions to improve conservation measures and reduce foreign fishing off U.S. shores.

The decision memorandum for the President outlined the reasons the Administration had opposed 200-mile legislation in the past: it would violate international law; it would lead to confrontations with the Soviet Union, Japan, and other fishing nations; it would trigger unilateral claims by other countries; and it would undermine the U.S. position at the Law of the Sea negotiations.[16] The memorandum

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[14] See Memorandum for the President from Henry A. Kissinger re 200-Mile Interim Fisheries Legislation at 8-9 and attachment, Aug. 6, 1975, Charles Leppert Files, Box 10, Fisheries (2), Ford Papers. Over the preceding year, the Administration had achieved some reduction in catch levels by Japan and the Soviet Union off U.S. coasts. See id. at 5-6.

[15] See Memorandum for the President from Henry A. Kissinger re 200-Mile Interim Fisheries Legislation at 2-3, 7-8 and attachment, Aug. 6, 1975, Charles Leppert Files, Box 10, Fisheries (2), Ford Papers. Legislation based on Article 7 of the 1958 Geneva Convention was not presented to the President as an option for lack of "agency or congressional support . . . since enforcement would be difficult and neither the Soviets nor the Japanese [we]re parties to [it]." Id. at 7.

[16] See Memorandum for the President from Henry A. Kissinger re 200-Mile Interim Fisheries Legislation at 3-4 and attachment, Aug. 6, 1975, Charles Leppert Files, Box 10, Fisheries (2), Ford Papers.

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informed the President that the ISNT negotiated at Geneva was "unsatisfactory in the area of highly migratory species (tuna and high seas shrimp), leaving the coastal state with wide discretionary control over the species in its zone," and noted that although it was "widely recognized that U.S. distant water fisheries will be badly hurt by unilateral action, the Congress in general believes this cost is justified by the need to gain control over the fisheries within 200-miles of the U.S. coast."[17] Further complicating matters, from the perspective of the State Department, the memo related, "[t]he tuna and shrimp representatives are trying to obtain mandatory sanctions such as tariff restrictions, embargoes and other protective devices for seizures we would still consider illegal."[18]

Over the next four months, Administration officials would undertake to implement the President's decision. The laboring oar in these efforts was taken by the State Department, working in conjunction with the Department of Defense and the National Security Council.[19] The State Department's Office of Law of the Sea

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[17] See Memorandum for the President from Henry A. Kissinger re 200-Mile Interim Fisheries Legislation at 5-6 and attachment, Aug. 6, 1975, Charles Leppert Files, Box 10, Fisheries (2), Ford Papers.

[18] See Memorandum for the President from Henry A. Kissinger re 200-Mile Interim Fisheries Legislation at 6 and attachment, Aug. 6, 1975, Charles Leppert Files, Box 10, Fisheries (2), Ford Papers.

[19] See "Detailed Domestic Plan of Action to Oppose the 200-Mile Bill" in 200-Mile Fishing Legislation Opposition Plan Book, Kendall Files, Box 5, Two Hundred Mile Fisheries Legislation, File 2, Ford Papers. In the 1960s, the most influential department within the executive branch concerning Law of the Sea matters had been the Defense Department, led by the Navy. See Hollick at 183. During that period, State Department involvement in ocean matters gradually increased. See Hollick at 192. In early 1970, the National Security Council Interagency Task Force on the Law of the Sea was established, and charged with coordinating the government's position on Law of the Sea issues. See Hollick at 217. While the State Department's Office of the Legal Advisor had chaired the Interagency Task Force since its creation, the State Department's "control over the decision-making process" was consolidated in 1973 with the establishment of a new Office of Law of the Sea Negotiations (D/LOS), which "further institutionalized the interagency process." Hollick at 257-258. For a detailed discussion of the organizational

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Negotiations (D/LOS) was tasked with, among its many other responsibilities in implementing the President's decision, coordination with the ocean user groups and internationalist organizations that opposed 200-mile legislation.[20] Distant water tuna and shrimp fishermen figured prominently among the former, while the United Nations Association, Save Our Seas and the World Federalists were among the latter.[21]

III. PASSAGE AND ENACTMENT OF 200-MILE LEGISLATION

The Ford Administration recognized that House and Senate passage of 200-mile legislation was likely, regardless of its efforts. While it would nonetheless seek to have 200-mile legislation referred to the International Relations Committee in the House and the Foreign Relations and Armed Services Committees in the Senate, in the hope they would issue negative reports on the legislation, officials believed such reports would not prevent its passage in both houses of Congress. Because passage in both the House and Senate seemed certain, the Administration's strategy aimed to "create a veto sustaining position" by implementing a "positive Administration program" of "interim measures to protect American fisheries until the LOS negotiations [we]re completed."[22]

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and management arrangements established within the Department of State to deal with the Law of the Sea negotiations between 1971 and 1976, including D/LOS, the NSC Interagency Task Force, and the Advisory Committee on the Law of the Sea, see Otho E. Eskin, "Law of the Sea and Management of Multilateral Diplomacy," Oceans Policy Study 1:5 (Center for Oceans Law and Policy, May 1978).

[20] See "Detailed Domestic Plan Of Action To Oppose 200-Mile Bill" at 2, in 200-Mile Fishing Legislation Plan Book, Kendall Files, Box 5, Two Hundred Mile Fisheries Legislation, File 2.

[21] See "Detailed Domestic Plan Of Action To Oppose 200-Mile Bill" at 2, in 200-Mile Fishing Legislation Plan Book, Kendall Files, Box 5, Two Hundred Mile Fisheries Legislation, File 2.

[22] Memorandum for the Record re LIG Meeting—Friday, Sept. 12, Sept. 15, 1975, John O. Marsh Files, Box 17, Fish. Jur. 200 General 6/75-4/76(1), Ford Papers, at 2.

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The Administration presented its "fisheries initiative" in hearings before the Senate Commerce Committee on September 19[23] and the House International Relations Committee on September 24.[24] Its fisheries initiative, according to the Administration, would "accomplish through phased negotiations," both in existing fisheries commissions such as ICNAF, as well as in bilateral negotiations with, among other countries, Japan and the Soviet Union, "the functional objective of a 200-mile fishery zone."[25] These efforts would be rejected by Congress as too little too late to justify further deferring passage of 200-mile legislation.

A. HOUSE CONSIDERATION AND PASSAGE OF H.R. 200

In the House, the Merchant Marine and Fisheries Committee had favorably reported H.R. 200 on August 20 by an overwhelming margin.[26] The great majority of

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[23] See 1975 Commerce Comm. Hearings on S. 961 Part 2 at 91 (statement of Carlyle E. Maw, Undersecretary for Security Affairs, Department of State).

[24] See Potential Impact of the Proposed 200-Mile Fishing Zone on U.S. Foreign Relations: Special Oversight Hearing on H.R. 200 Before House Comm. on International Relations, 94th Cong., 1st Sess. (1975).

[25] 1975 Commerce Comm. Hearings on S. 961 Part 2 at 97 (statement of Carlyle E. Maw, Undersecretary for Security Affairs, Department of State).

[26] See House Comm. on Merchant Marine and Fisheries, Marine Fisheries Conservation Act of 1975, H.R. Rep. No. 445, 94th Cong., 1st Sess. (1975) (hereinafter "House MM&F Committee Report"), reprinted in A Legislative History of the Fishery Conservation and Management Act of 1976, at 1051 (1976) (hereinafter "FCMA Legislative History"). The Committee vote was 36 for, 3 against, and one present. See id. at 1074. The three negative votes were cast by Representatives Anderson and McCloskey of California, and Representative Treen of Louisiana. The vote to abstain was cast by Representative de La Garza of Texas. Anderson, whose district included San Pedro, counted distant water tuna fishermen among his constituents. McCloskey opposed unilateral action on internationalist grounds. Treen explained that his opposition to the measure was based on its extension of federal jurisdiction to fisheries in the territorial sea that had traditionally been managed by the states. See "Dissenting Views on H.R. 200" in MM&F Committee Report, reprinted in FCMA Legislative History at 1156. De La Garza's Texas district included coastal areas home to shrimpers who fished off the Mexican coast.

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Committee members concluded that after "several years of painstaking fact-finding and deliberation" unilateral action could no longer be deferred because "the time required to effect needed adjustments in the arena of international law are such as to make the conservation of many fish stocks and the welfare of our domestic fishing industry almost moot unless immediate, or at least short-term, action is taken without further delay."[27]

After holding an oversight hearing on 200-mile legislation, the House International Relations Committee, on October 7, voted, by a significant margin, to issue a negative report on H.R. 200.[28] The Committee majority was persuaded by the Administration's arguments that the overall ocean interests of the United States could best be protected by a Law of the Sea agreement and that passage of H.R. 200 would harm those interests by: damaging U.S. objectives at the Law of the Sea Conference, including efforts to obtain special regimes for distant water fisheries; prompting claims of extended jurisdiction more excessive than that made by the United States; provoking claims by other countries, such as Mexico, that were only waiting to see if the U.S. took unilateral action; contravening longstanding U.S. policy; and violating U.S. treaty obligations.[29]

Despite the negative report of the International Relations Committee, the momentum for passage of 200-mile legislation was not slowed. On October 9, 1975, the

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[27] House MM&F Committee Report, reprinted in FCMA Legislative History at 1094-1095.

[28] See House Comm. on International Relations, Special Oversight Report on H.R. 200, the Marine Fisheries Conservation Act of 1975, H.R. Rep. No. 542, 94th Cong., 1st Sess. (1975) (hereinafter "House International Relations Committee Report"), reprinted in FCMA Legislative History at 1025. The vote was 15 ayes, 5 nays, and one voting present. See id. at 1035.

[29] See House International Relations Committee Report, reprinted in FCMA Legislative History at 1035-1041.

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House debated and passed H.R. 200[30] by a vote of 208 to 101.[31] In the debate, H.R. 200 was opposed most vigorously by those members who counted among their constituents distant water tuna fishermen (and the canneries they supplied)[32] and distant water shrimp fishermen.[33] They were joined by members opposed to unilateral action on internationalist grounds, as well as members concerned with the foreign policy and defense implications of the legislation.[34] As passed by the House, H.R. 200 contained a number of provisions designed to address the concerns of U.S. distant water fishermen that would eventually be enacted in the FCMA, including the tuna exclusion, non-recognition, and embargo provisions.

B. SENATE CONSIDERATION AND PASSAGE OF S. 961

1. Momentum Builds in the Senate

A like momentum for passage of 200-mile legislation existed in the Senate and was growing. In September, the Commerce Committee voted overwhelmingly to

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[30] See FCMA Legislative History at 823-1014.

[31] See FCMA Legislative History at 1011-1013.

[32] See FCMA Legislative History at 863-866 (statement of Rep. Anderson of California), 877-878 (statement of Rep. van Deerlin of California), 878-879 (statement of Rep. Wilson of California), 882-884 (statement of Rep. Burgener of California), 915-917 (statement of Rep. Mink of Hawaii), 921-922 (statement of Rep. Hannaford of California) 997-999 (statement of Rep. van Deerlin of California), 1008-1009 (statement of Rep. Wilson of California), 1017-1021 (statement of Rep. van Deerlin of California).

[33] See FCMA Legislative History at 952-954 (statement of Rep. Bennett of Florida), 974-975 (statement of Rep. Pepper of Florida), 1019-1020 (statement of Rep. Bennett of Florida).

[34] See FCMA Legislative History at 835-836 (statement of Rep. McCloskey), 868-872 (statement of Rep. Gude), 876-877 (statement of Rep. Gilman), 884-889 (statement of Rep. McCloskey), 886 (statement of Rep. Eckhardt), 887-889 (statement of Rep. Biester), 909 (statement of Rep. Eckhardt), 910-911 (statement of Rep. McCloskey), 912-914 (statement of Rep. Zablocki), 943-945 (statement of Rep. Eckhardt), 955-956 (statement of Rep. Eckhardt), 963 (statement of Rep. Fascell, 1005-1007 (statement of Rep. McCloskey), 1018-1019 (statement of Rep. Eckhardt).

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favorably report S. 961, Magnuson's 200-mile legislation, finding, as had the House Merchant Marine and Fisheries Committee, that the conservation crisis in U.S. coastal fisheries was too great to permit further delay by the United States in exercising fisheries jurisdiction when international agreement on a Law of the Sea treaty still appeared a number of years away.[35]

On October 7, two days before the House vote on H.R. 200, the President and certain cabinet members discussed 200-mile legislation at a meeting with Republican Congressional leaders.[36] Secretary of State Henry Kissinger explained the Administration's desire to have Congress defer passage of 200-mile legislation so that the United States could "use [its] leverage . . . on the fisheries issue to achieve other items such as transit of straits and archipelagos, marine pollution, etc., which [the Administration] consider[ed] absolutely essential to [the U.S.] oceans policy position" at the Law of the Sea negotiations.[37] President Ford and Kissinger also raised the Administration's concern that unilateral action would prompt unilateral declarations of excessive jurisdictional claims by other countries.[38] Kissinger asserted that the U.S. Law of the Sea negotiators firmly believed that an agreement, including a 200-mile zone,

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[35] See Senate Comm. on Commerce, Magnuson Fisheries Conservation and Management Act, S. Rep. No. 416, 94th Cong., 1st Sess. (1975) (hereinafter "Senate Commerce Committee Report"), reprinted in FCMA Legislative History at 653, 672.

[36] See Memorandum of conversation prepared by Leslie A. Janka, Oct. 7, 1975, White House Central Files, FG 31-1 10/1/75-11/4/75 (Executive), Ford Papers ("NSC Memo of Meeting with Republican Congressional Leaders"); Memorandum of GOP Leadership Meeting, Oct. 7, 1975, John O. Marsh Files, Box 9, Congressional Leadership Meetings with President 10/7/75, Ford Papers ("GOP Leadership Meeting Minutes").

[37] See NSC Memo of Meeting with Republican Congressional Leaders at 2; GOP Leadership Meeting Minutes at 5.

[38] See NSC Memo of Meeting with Republican Congressional Leaders at 2; GOP Leadership Meeting Minutes at 5.

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could be reached by the end of 1976, and promised that the State Department would withdraw its opposition to 200-mile legislation if the Law of the Sea negotiations did not.[39]

These arguments did not persuade Republican Congressional leaders, who overwhelmingly expressed their support for passage of 200-mile legislation without further delay. Some stated that while they had supported delay before, they were now convinced that legislative action was needed.[40] Others expressed lack of confidence that the Law of the Sea negotiations would reach an agreement in 1976.[41] Members also candidly pointed to the domestic political implications of 200-mile legislation, emphasizing its endorsement by other presidential candidates.[42] Senator Stevens told the President: "A veto of this legislation will be political suicide."[43] When President Ford asked about the concerns of distant-water tuna fishermen, Representative Forsythe responded: "It is true that the tuna fishermen are concerned about this bill, which in effect does what the Peruvians and the Ecuadorians are doing to them. We are doing our darnedest to accommodate their interests in this bill."[44]

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[39] See NSC Memo of Meeting with Republican Congressional Leaders at 2, 4; GOP Leadership Meeting Minutes at 5, 6.

[40] See NSC Memo of Meeting with Republican Congressional Leaders at 4 (statement of Sen. Case); GOP Leadership Meeting Minutes at 7 (statement of Sen. Case).

[41] See NSC Memo of Meeting with Republican Congressional Leaders at 3-4; GOP Leadership Meeting Minutes at 6-7.

[42] See NSC Memo of Meeting with Republican Congressional Leaders at 3-5; GOP Leadership Meeting Minutes at 6-7.

[43] See NSC Memo of Meeting with Republican Congressional Leaders at 4; see also GOP Leadership Meeting Minutes at 7.

[44] See NSC Memo of Meeting with Republican Congressional Leaders at 4; GOP Leadership Meeting Minutes at 7.

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Throughout the fall of 1975, the State Department pushed the White House to take a high profile in its opposition to 200-mile legislation and to be prepared to veto it.[45] The State Department honed the Administration opposition to focus on those arguments which it found most effective: (1) under bilateral and multilateral agreements already in force, any "emergency" in coastal fish stocks was under control; (2) 200-mile legislation violated U.S. treaty obligations; (3) 200-mile legislation could seriously harm U.S. defense interests; and (4) 200-mile legislation would undermine the LOS negotiations.[46]

The State Department made these arguments in testimony before the Senate Foreign Relations Committee[47] and in individual meetings with Committee Members and their staffs following the hearing.[48] These efforts paid off when, on November 13, 1975,

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[45] See Memorandum from Kissinger to Ford, Oct. 31, 1975, re "Next Steps Concerning the Bills Unilaterally to Extend United States Fisheries Jurisdiction from 12 to 200-miles," at 10-11, Ford Papers; Memorandum from John Norton Moore to John Marsh and Max Friedersdorf, Nov. 12, 1975, 1-3, John O. Marsh Files, Box 17, Fish. Jur. 200 of ML Briefing Book 11/75 (1), Ford Papers; Memorandum from Moore to the Deputy Secretary and the Under Secretary for Security Assistance, Nov. 12, 1975, 3, John O. Marsh Files, Box 17, Fish. Jur. 200 ML Briefing Book 11/75 (1), Ford Papers.

[46] See Memorandum from John Norton Moore to the Deputy Secretary and the Under Secretary for Security Assistance, Nov. 12, 1975, at 3, John O. Marsh Files, Box 17, Fish. Jur. 200 ML Briefing Book 11/75, Ford Papers.

[47] See Two-Hundred Mile Fishing Zone: Hearing on S. 961 Before the Subcomm. on Oceans and International Relations of the Senate Comm. on Foreign Relations, 94th Cong., 1st Sess. 150-168 (1975) (statements of Carlyle E. Maw, Under Secretary of State for Security Assistance, and John Norton Moore).

[48] See Status Report on Contacts with Senate Foreign Relations Committee, Attachment to Memorandum from John Norton Moore to the Deputy Secretary and the Under Secretary for Security Assistance, Nov. 12, 1975, John O. Marsh Files, Box 17, Fish. Jur. 200 ML Briefing Book 11/75, Ford Papers. The State Department was assisted in this effort by Alaska Senator Mike Gravel, and Samuel Levering of the U.S. Committee for the Oceans. Gravel, an original sponsor of S. 961, became the most vocal Senate opponent of 200-mile legislation after attending the Geneva session of the Law of the Sea negotiations in spring 1975. It appears that internationalist convictions accounted for Gravel's change of position. He testified against S. 961 before the Senate Foreign Relations Committee (see Two-Hundred Mile-Fishing Zone: Hearings on S. 961 Before

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the Foreign Relations Committee voted 7 to 6 to issue a negative report on S. 961.[49] The Committee majority reported that unilateral action would be inconsistent with existing U.S. international legal obligations and would undermine U.S. efforts at the Law of the Sea negotiations. If the Conference failed, the majority explained, there would be "more than enough time to take unilateral action to protect our coastal resources."[50] Some members noted that Article 7 of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas provided "a legal alternative" to S. 961.[51] Article 7 legislation, co-sponsored by California Senator Alan Cranston, would later pose the most serious challenge to 200-mile legislation in the Senate floor debate over S. 961.

On November 19, 1975, the Armed Services Committee held hearings on S. 961.[52] The Chief of Naval Operations, speaking for the Joint Chiefs of Staff, testified against 200-mile legislation on the ground that it could lead other nations to claim extended territorial seas that would restrict freedoms of navigation and overflight.[53] John Norton Moore offered testimony on both the foreign policy implications of unilateral

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the Subcomm. on Oceans and International Relations of the Senate Comm. on Foreign Relations, 94th Cong., 1st Sess. 104 (1975) (statement of Sen. Gravel)) and would lead the opposition to it in the Senate floor debate.

[49] See Senate Comm. on Foreign Relations, Fisheries Management and Conservation Act, S. Rep. No. 459, 94th Cong., 1st Sess. (1975) (hereinafter "Senate Foreign Relations Committee Report"), reprinted in FCMA Legislative History at 583, 587.

[50] Senate Foreign Relations Committee Report, reprinted in FCMA Legislative History at 587.

[51] Senate Foreign Relations Committee Report, reprinted in FCMA Legislative History at 595.

[52] See Emergency Marine Fisheries Protection Act of 1975: Hearings on S. 961 before the Senate Comm. on Armed Services, 94th Cong., 1st Sess. (1975).

[53] See 1975 Senate Armed Services Committee Hearing at 1-7 (statement of Adm. James L. Holloway III, Chief of Naval Operations).

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action and the improving status of U.S. fisheries in light of the Administration's fisheries initiative.[54] On December 3, 1975, the Committee voted 9 to 7 to favorably report S. 961 with an amendment to delay the effective date of the legislation until January 1, 1977.[55] The Committee majority explained that it believed S. 961 was needed to protect U.S. fisheries interests and would not adversely impact national defense and security interests because an extension of fisheries jurisdiction was "clearly distinguishable from jurisdictional extensions which would infringe upon vital military ocean rights."[56] In so doing, the Committee majority rejected the theory of "creeping jurisdiction" that had been the centerpiece of executive branch opposition to congressional efforts to extend fisheries jurisdiction for nearly two decades.

2. The State Department Struggles to Hold the Course

While the State Department was battling 200-mile legislation in the Senate, it was simultaneously struggling within the executive branch to maintain the President's opposition to the legislation. The State Department had to contend with the White House Congressional Relations Office, which was institutionally predisposed to move the legislative process forward and please its interlocutors in Congress. This led the National Security Council, in the fall of 1975, to screen proposed meetings of members of Congress with the President concerning 200-mile legislation to ensure he did not receive

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[54] See 1975 Senate Armed Services Committee Hearing at 8-12 (statement of John Norton Moore).

[55] See Senate Comm. on Armed Services, Fisheries Management and Conservation Act, S. Rep. No. 515, 94th Cong., 1st Sess. (1975) (hereinafter "Senate Armed Services Committee Report"), reprinted in FCMA Legislative History at 569, 572.

[56] Senate Armed Services Committee Report, reprinted in FCMA Legislative History at 574.

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an "unbalanced picture."[57] The lack of a unified executive branch position was also of concern to Senate opponents of 200-mile legislation. For instance, Senator John Stennis of Mississippi, the Chairman of the Armed Services Committee, expressed uncertainty as to what the White House position actually was, and encouraged the Administration to have a united, strong position by the time his Committee held hearings on S. 961.[58]

After being reported out of the Armed Services Committee, S. 961 went to the full Senate, which took up debate on S. 961 on December 19, 1975.[59] Because the Senate recessed soon thereafter, the debate did not begin in earnest until Congress reconvened in January 1976. In the meantime, the State Department and National Security Council redoubled their efforts to maintain the President's opposition to 200-mile legislation and to persuade him to more forcefully oppose it.

The State Department again encouraged the President to signal that he would veto 200-mile legislation, informing him that Senate leaders opposed to S. 961, such as Senators Stennis, Thurmond, and Humphrey, had indicated "that a veto signal . . . would

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[57] Memorandum from Clift to Scowcroft re Senator Ted Stevens' Proposal for Meeting with President on 200-Mile Interim Fisheries Legislation, Nov. 17, 1975, FO3-1 Fisheries Box 10, FO3-1 Fisheries 12/1/74-3/18/75, Ford Papers; see also Agenda of Meeting with House Republican Proponents of the 200-Mile Limit Bill, Oct. 6, 1975, FO3-1 Fisheries Box 10, FO3-1 Fisheries 12/1/74-3/18/75, Ford Papers; Agenda for Meeting with Congressional Opponents of 200-Mile Interim Fisheries Legislation, c. Nov. 1975, FO3-1 Fisheries Box 10, FO3-1 Fisheries 12/1/74-3/18/75, Ford Papers; Memorandum from Clift to Scowcroft regarding Senator Ted Stevens' Proposal for Meeting with President on 200-Mile Interim Fisheries Legislation, Nov. 17, 1975, FO3-1 Fisheries Box 10, FO3-1 Fisheries 12/1/74-3/18/75, Ford Papers.

[58] See Memorandum from Wolthuis to Marsh, Nov. 11, 1975, WHCF, Box 9, FO3-1 Int'l Waterways (Exec.) (2), Ford Papers.

[59] See FCMA Legislative History at 521-568.

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attract additional support against the bill."[60] The State Department also explained that a veto signal alone might not enable the Administration to defeat S. 961, but that the prospects for doing so would be increased if the Administration took unilateral domestic action to address fisheries conservation in conjunction with a veto threat.[61] The NSC Interagency Task Force prepared draft legislation based on Article 7 of the 1958 Geneva Convention to provide such unilateral action. The State Department told the President that although Japan and the Soviet Union were not parties to the 1958 Geneva Convention, there was nonetheless "a reasonable legal basis for enforcement of an Article 7 approach against non-parties," and that the Japanese and Soviets would be amenable to the Article 7 approach because they understood the domestic pressures the Administration was facing on the 200-mile bill.[62] Even though the State Department believed legislation based on Article 7 "would be substantially less damaging to our overall ocean interests than 200-mile fisheries legislation," it did not urge this intermediate course, but recommended that the President continue to oppose any legislation to extend U.S. fisheries jurisdiction and signal that he would veto a 200-mile bill.[63] As it would happen, the crucible of election year politics, the President would

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[60] Memorandum for the President from Robert S. Ingersoll, Acting Secretary of State, re 200-Mile Fisheries Legislation, c. Dec. 19, 1975 at 1-2, John O. Marsh Files, Box 17, Fish Jur. General 6/75-4/76 (2), Ford Papers.

[61] See Memorandum for the President from Robert S. Ingersoll, Acting Secretary of State, re 200-Mile Fisheries Legislation, c. Dec. 19, 1975 at 2, John O. Marsh Files, Box 17, Fish Jur. General 6/75-4/76 (2), Ford Papers.

[62] See Memorandum for the President from Robert S. Ingersoll, Acting Secretary of State, re 200-Mile Fisheries Legislation, c. Dec. 19, 1975 at 3, John O. Marsh Files, Box 17, Fish Jur. General 6/75-4/76 (2), Ford Papers.

[63] See Memorandum for the President from Robert S. Ingersoll, Acting Secretary of State, re 200-Mile Fisheries Legislation, c. Dec. 19, 1975 at 2, 5, John O. Marsh Files, Box 17, Fish Jur. General 6/75-4/76 (2), Ford Papers.

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reject the State Department's recommendation and refuse to signal a veto, either alone or in conjunction with Article 7 legislation.

The National Security Council also went on the offensive during the Congressional recess by urging the President to ask the Senate leadership to recommit S. 961 to the Commerce Committee to allow the March session of the Law of the Sea negotiations to take place, and to provide the Administration an opportunity to report on the achievements of its fisheries initiative and present updated data on the status of U.S. coastal fisheries stocks.[64] Again reflecting the imperatives of election year politics, the Administration took a calibrated approach to requesting recommittal. The Administration sent letters seeking recommittal of S. 961 to the Senate leadership and the Chairmen of the jurisdictional committees signed by the Secretaries of Commerce, State, and Defense,[65] after the White House Counsel's Office recommended that Ford not sign them "in order to isolate the President from any adverse political consequences which may result and to preserve alternative presidential options for the future."[66] The effort to recommit failed.

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[64] See Memorandum from Janka and Clift to Scowcroft re 200-Mile Fisheries Legislation, Jan. 9, 1976, at 1-2, FO3-1 Fisheries Box 11, FO3-1 Fisheries 1/1/76-3/10/76, Ford Papers; Memorandum from Scowcroft to the President re 200-Mile Fisheries Bill, Jan. 17, 1976, FO3-1 Fisheries Box 11, FO3-1 Fisheries 1/1/76-3/10/76, Ford Papers.

[65] See Letter to Senator Mansfield, Jan. 21, 1976, FO3-1 Fisheries Box 11, FO3-1 Fisheries 1/1/76-3/10/76, Ford Papers.

[66] See Memorandum from Connor to the President re Brent Scowcroft's Memorandum of January 17, 1976, regarding 200-Mile Fisheries Bill, Jan. 19, 1976, Pres. Handwriting File, Box 23, Foreign Affairs-Fisheries, Ford Papers.

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At the same time, Senator Ted Stevens of Alaska had informed the White House Congressional Relations Office that he would offer an amendment that would delay enforcement of the legislation until January 1, 1977.[67]

On January 22, 1976, in an interview with newspaper editors from New Hampshire, traditionally the home of the first presidential primary, the President stated he would not veto the 200-mile bill.[68] Ford explained that he "strongly believe[d] in the concept of 200-mile fishing limit," but hoped that the Congress "would give [the Administration] at least until the end of [1976] to make a major effort in the Law of the Sea conference."[69] When pressed if his statement should be interpreted as a veto threat, the President responded that if the amendment to be offered by Senator Stevens were accepted, and "all the other provisions are satisfactory, [he] would probably not veto it, but . . . would hope, in the meantime, [to] get a Law of the Sea conference agreement."[70]

3. Senate Debate, Defeat of the Article 7 Amendment, and Passage of S. 961

Senate debate on S. 961 began in earnest on January 19, 1976.[71] On January 28, 1976, following a week of debate and adoption of several significant amendments, the Senate passed S. 961 by a vote of 77 to 19.[72] As had occurred in the House, supporters

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[67] See Memorandum from Friedersdorf to the President re 200-Mile Limit Bill, Jan. 21, 1976, Pres. Handwriting File, Box 23, Foreign Affairs-Fisheries, Ford Papers.

[68] See Interview of the President by New Hampshire newspaper editors, Jan. 22, 1976, at 17, Ron Nessen Papers, Box 52, Jan. 22, 1976, NHEds., Ford Papers.

[69] See Interview of the President by New Hampshire newspaper editors, Jan. 22, 1976, at 17, Ron Nessen Papers, Box 52, Jan. 22, 1976, NHEds., Ford Papers.

[70] See Interview of the President by New Hampshire newspaper editors, Jan. 22, 1976, at 17, Ron Nessen Papers, Box 52, Jan. 22, 1976, NHEds., Ford Papers.

[71] See FCMA Legislative History at 453 ff.

[72] See FCMA Legislative History at 270.

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of 200-mile legislation in the Senate rejected the achievements of the Administration's fisheries initiative as insufficient to delay extending U.S. fisheries jurisdiction any longer because they believed bilateral and multilateral agreements had proven ineffective at conserving U.S. coastal fishery resources.[73] Senate supporters also rejected the State Department's argument that a Law of the Sea agreement was in sight.[74] Magnuson and other supporters of 200-mile legislation also rejected the Defense Department's arguments from national security as unfounded.[75] Finally, Magnuson rejected the argument that the Administration's fisheries initiative had arrested what he viewed as the "emergency" in U.S. coastal fisheries.[76]

As had been the case in the House, 200-mile legislation was opposed in the Senate by a bipartisan collection of members devoted to international law and institutions, members concerned about the foreign policy and defense implications of the legislation, and members who represented substantial distant-water interests—in this case, California Senators Alan Cranston and John Tunney.[77]

Although Alaska Senator Mike Gravel acted as the floor manager for those opposed to S. 961, the most serious challenge to its passage was mounted by California

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[73] See, e.g., FCMA Legislative History at 518 (statement of Sen. Magnuson), 356-361 (statement of Sen. Stevens), 352-353 (statement of Sen. Jackson), 264 (statement of Sen. Hollings).

[74] See FCMA Legislative History at 449 (statement of Sen. Packwood), 240 (statement of Sen. Packwood), 267 (statement of Sen. Hollings), 377 (statement of Sen. Magnuson).

[75] See FCMA Legislative History at 486, 376-377 (statement of Sen. Magnuson).

[76] See FCMA Legislative History at 454, 540-545 (statement of Sen. Magnuson).

[77] California's fishermen were, in fact, divided on 200-mile legislation. While the Southern California tuna industry opposed it, most fishermen in California strongly supported it.

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Senator Alan Cranston. Cranston, a long-time internationalist, proposed an amendment based on Article 7 of the 1958 Geneva Convention that would have had the effect of gutting the 200-mile legislation.[78] Cranston had earlier supported the Article 7 approach in opposing 200-mile legislation in 1974.[79] The Article 7 amendment he co-sponsored with Republican Senator Robert Griffin of Michigan had been developed primarily by Senator Gravel in collaboration with the State Department.[80] Because Cranston had a prominent role in the Senate as Majority Whip and enjoyed the respect of his colleagues, he served as principal sponsor of and spokesman for the Article 7 amendment for "strategic reasons."[81]

According to Cranston, the Article 7 approach would be consistent with international law and not disrupt the Law of the Sea negotiations.[82] Numerous international law scholars concurred in this position.[83] The Article 7 approach was also

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[78] Cranston had served as one of the early presidents of United World Federalists and was active in efforts and organizations to achieve world law throughout his career. See generally Eleanor Fowle, Cranston: The Senator from California (1984). The Fowle book, while informative, is not a critical biography. The author was Cranston's sister.

[79] See "Cranston Asks Action to Save Sea Resources," Valley News & Green Sheet, July 4, 1974, at 8, Cranston Papers, Carton 462, Environment 1976; Memorandum regarding S. 1988, 200-Mile Limit Bill, Sept. 18, 1974, Cranston Papers, Carton 94, Cranston-Griffin Amend.

[80] See Memorandum of Bill Hoffman to File, Oct. 2, 1980, Gravel Papers, Box 962, Law of the Sea Conference (1).

[81] See Memorandum of Bill Hoffman to File, Oct. 2, 1980, Gravel Papers, Box 962, Law of the Sea Conference (1).

[82] See FCMA Legislative History at 292-297 (statement of Sen. Cranston).

[83] See FCMA Legislative History at 322-327 (statement of Sen. Griffin).

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supported by a majority of the State Department's Law of the Sea Advisory Committee as an acceptable alternative to 200-mile legislation.[84]

Supporters of S. 961 derided the Cranston-Griffin amendment as "the State Department compromise."[85] They made two primary arguments against it. First, they objected that Article 7 did not permit the United States to discriminate against foreign fishermen to favor American fishermen.[86] Second, they pointed out that none of the major distant water fishing nations were signatory to the 1958 Geneva Convention.[87] Opponents of the amendment also maintained, correctly, that notwithstanding the informal support of the Departments of State and Defense,[88] the President did not support the amendment.[89]

Despite the absence of White House backing, the Cranston-Griffin amendment garnered sufficient support to prompt Senators Magnuson and Stevens to ask individual senators to oppose the amendment and call upon Senator Edmund Muskie of Maine, a respected Democratic Party leader, to offer the rebuttal to Cranston.[90] Responding to Cranston's plea for multilateralism, Muskie likened 200-mile legislation to arms control diplomacy, saying its purpose was "to assert our unilateral interests [and] to prod an

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[84] See Letter from Advisory Committee members to President Ford, Jan. 23, 1976, WHCF, Box 10, F03-1 Fisheries 1/1/76-3/10/76 (exec.), Ford Papers.

[85] See FCMA Legislative History at 347 (statement of Sen. Magnuson).

[86] See, e.g., FCMA Legislative History at 301 (statement of Sen. Stevens).

[87] See, e.g., FCMA Legislative History at 303 (statement of Sen. Stevens).

[88] See FCMA Legislative History at 251, 297, 300 (statement of Sen. Cranston). See also Memo from Sanders to Kranowitz (OMB) re 200-Mile Fisheries Bill, Jan. 27, 1976, Max Friedersdorf Files, Box 16, 200-mile Offshore Limit, Ford Papers.

[89] See FCMA Legislative History at 300, 313 (statement of Sen. Stevens).

[90] See Betty Mills, "Both Sides Used Strategic Moves," Anchorage Times, Jan. 29, 1976, at 1, Gravel Papers, Box 795, 1976: March Notebook.

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international forum into recognition of those interests."[91] The Senate rejected the Cranston-Griffin amendment by a vote of 58 to 37,[92] after which Cranston admitted to "having suffered through my worst vote count in my time in the Senate."[93]

After the Cranston-Griffin amendment was defeated, one final amendment was made to S. 961 to secure the President's support for it. The enforcement date for the law had already been pushed back to January 1, 1977, by agreement to an amendment offered by Senator Stevens.[94] Senator Thurmond offered an amendment to push the date back further, to July 1, 1977, and claimed to have the President's pledge to sign a bill with that date.[95] The amendment was agreed to.[96] Later that day, on January 28, 1976, the Senate passed S. 961 by a vote of 77 to 19.[97] Like H.R. 200 as passed by the House, S. 961 as passed by the Senate contained several provisions designed to address the concerns of U.S. distant-water fishermen. These are discussed in detail in section IV, below.

C. THE LEGISLATIVE ENDGAME: CONFERENCE RECONCILIATION, VETO RECOMMENDATIONS, SIGNATURE

Following Senate passage of S. 961, congressional opponents of 200-mile legislation and several executive departments continued their efforts to persuade the President to veto it. At the same time, the Administration sought changes to those provisions of the legislation it viewed as most objectionable in negotiations with the

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[91] See FCMA Legislative History at 250 (statement of Sen. Muskie).

[92] See FCMA Legislative History at 251-253.

[93] See FCMA Legislative History at 253 (statement of Sen. Cranston).

[94] See FCMA Legislative History at 391.

[95] See FCMA Legislative History at 254 (statement of Sen. Thurmond).

[96] See FCMA Legislative History at 255 (statement of Sen. Thurmond).

[97] See FCMA Legislative History at 270.

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conference committee charged with reconciling the House and Senate bills. The Administration's efforts to shape the legislation met with some success, and President Ford signed the 200-mile bill into law on April 13, 1976. Upon signing the FCMA, Ford issued a statement setting forth the Administration's concerns about the legislation and signaling its desire that enactment of the legislation not disrupt the Law of the Sea negotiations.

In the month after Senate passage of 200-mile legislation, three House members representing the distant-water tuna fleet—Lionel van Deerlin and Bob Wilson of San Diego, and Glenn Anderson of San Pedro—urged the President to veto the legislation. Van Deerlin and Anderson, both Democrats, emphasized the negative impact of the legislation on tuna fishermen and argued that a veto could be sustained.[98] Wilson, the ranking Republican on the House Armed Services Committee, emphasized the anticipated negative impacts of enactment of 200-mile legislation on the Law of the Sea negotiations and the objections of the Department of Defense to it.[99]

In discussions with the conference committee, the Administration's "prime objective [was] to delay the effective date of the legislation so that [there would be] time to complete two more sessions of the Law of the Sea Conference."[100] Although most of the major provisions the Administration had found objectionable were modified to some

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[98] See van Deerlin to Marsh, Jan. 28, 1976, John O. Marsh Files, Box 107, van Deerlin, Lionel, Ford Papers; Anderson to the President, Feb. 11, 1976, White House Central Files, Box 9, FO3-1 Int'l Waterways (Exec.) (2), Ford Papers.

[99] See Wilson to the President, Feb. 3, 1976, FO3-1 Fisheries, Box 11, FO3-1 Fisheries 1/1/76-3/10/76, Ford Papers.

[100] Memorandum from James T. Lynn to the President re 200-Mile Fisheries Legislation, Mar. 2, 1976, Pres. Handwriting File, Box 23, Foreign Affairs-Fisheries, Ford Papers.

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extent by the conference committee, a number of other significant provisions (such as the embargo provision) were not changed.[101] Moreover, although the President had asked the conference committee to accept the July 1, 1977 effective date included in the Senate bill, the conferees responded that they could accept an effective date no later than March 1, 1977, and only then if the President promised to sign the legislation.[102] On March 2, 1976, having decided to sign the legislation, the President agreed to the March 1, 1977 effective date.[103] On March 29 and 30, 1976, the Senate and House, respectively, adopted the Conference Report on H.R. 200.[104]

Despite the fact that the White House had gone on record several times that the President would sign 200-mile legislation that contained an acceptable delayed effective date,[105] the Departments of State, Justice, and Defense, along with the National Security Council, the Office of the Special Representative for Trade Negotiations, the Environmental Protection Agency, and the National Science Foundation weighed in

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[101] See Memorandum from James T. Lynn to the President re 200-Mile Fisheries Legislation, Mar. 2, 1976, at 2, Pres. Handwriting File, Box 23, Foreign Affairs-Fisheries, Ford Papers.

[102] See Memorandum from James T. Lynn to the President re 200-Mile Fisheries Legislation, Mar. 2, 1976, Pres. Handwriting File, Box 23, Foreign Affairs-Fisheries, Ford Papers.

[103] See Memorandum from James T. Lynn to the President re 200-Mile Fisheries Legislation, Mar. 2, 1976, at 2, Pres. Handwriting File, Box 23, Foreign Affairs-Fisheries, Ford Papers; Memorandum from Connor to the President, Mar. 3, 1976, Pres. Handwriting File, Box 23, Foreign Affairs-Fisheries, Ford Papers.

[104] See 122 Cong. Rec. 8387, 8558 (1976).

[105] See interview of the President by New Hampshire newspaper editors, Jan. 22, 1976, Ron Nessen Papers, Box 52, Jan. 22, 1976 NH Eds., Ford Papers; Transcript of January 29, 1976 White House News Conference with Ron Nessen, George Humphreys Files, Box 1, Law of the Sea Conf., Ford Papers; "Ford to Accept 200-Mile Bill," Baltimore Sun, Mar. 3, 1976, Box H259, File 200-Mile (2) 1976 MM&F, McCloskey Papers.

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strongly against 200-mile legislation and recommended that the President veto it.[106] With only the Office of Management and Budget, the Departments of Commence and Transportation, the Council on International Economic Policy, and the Council on Environmental Quality recommending approval of the legislation, President Ford was confronted with a dramatic split in his Administration over the appropriate response to passage of 200-mile legislation.[107] Nonetheless, with the "political realities seem[ing] obvious," as one White House aide put it, Ford signed the legislation into law on April 13, 1976.[108]

While opponents of 200-mile legislation in both the executive branch and Congress were not ultimately successful in stopping its enactment, they persuaded the President to take steps to minimize the feared negative impacts of the new law on the Law of the Sea negotiations and U.S. distant water fishermen. First, they persuaded the President to issue a statement upon signing H.R. 200 registering his concerns about the legislation and expressing the Administration's "commitment to protect the freedom of navigation and the welfare of our distant water fisheries."[109] The decision to issue a signing statement, like the decision to sign 200-mile legislation itself, was the subject of differing recommendations within the executive branch. Within the Administration, the

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[106] The Department of the Interior deferred to the State Department.

[107] See Memorandum from Cannon to the President, re H.R. 200-Fishery Conservation and Management Act of 1976, c. Apr. 13, 1976, at 3, FO3-1 Legislation Case Files, Box 42, H.R. 200 (1), Ford Papers.

[108] Action Memorandum re H.R. 200-Fishery Conservation and Management Act of 1976, notation by Robert Hartmann, Apr. 8, 1976, White House Records Office, Legislative Case Files, Box 42, 4/13/76, H.R. 200 (2), Ford Papers.

[109] Statement by the President upon signing H.R. 200 into law, 12 Weekly Comp. Pres. Doc. 644 (Apr. 13, 1976); see also id. reprinted in FCMA Legislative History at 34-35.

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State Department and the National Security Council recommended the President issue a signing statement.[110] Such a statement was also sought by Representative Bob Wilson of San Diego, who specifically requested that it reiterate the commitment of the United States to freedom of navigation and its distant water fishermen.[111] A signing statement was opposed by the Office of Management and Budget and several of the President's closest domestic policy and political advisors.[112]

Second, those within the Administration concerned about the potential negative impacts of the legislation on U.S. distant water fishing interests and the Law of the Sea negotiations prevailed in their desire that a signing ceremony not be held. After the National Security Council strongly objected to the recommendation of the Congressional Relations Office for a signing ceremony, the proposal was rejected.[113]

Both the signing statement and the decision not to hold a public signing ceremony were intended to minimize the negative impacts of the U.S. unilateral action.[114] But, in

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[110] See Memorandum from Cannon to the President re H.R. 200-Fishery Conservation and Management Act of 1976, c. Apr. 13, 1976, at 3, FO3-1 Legislation Case Files, Box 42, H.R. 200 (1), Ford Papers.

[111] See Wilson to Marsh, Apr. 5, 1976, Judith R. Hope Files, Box 28, Two Hundred Mile Limit, Ford Papers.

[112] See Memorandum from Cannon to the President re H.R. 200-Fishery Conservation and Management Act of 1976, c. Apr. 13, 1976, at 3, FO3-1 Legislation Case Files, Box 42, H.R. 200 (1), Ford Papers.

[113] See Friedersdorf to Nicholson re Bill Signing Ceremonies, Apr. 1, 1976, White House Central Files, Box 11, FO3-1 Fisheries 3/11/76-4/8/76 (Exec.); Davis to Nicholson re Bill Signing Ceremony for H.R. 200, Apr. 5, 1976, White House Central Files, Box 11, FO3-1 Fisheries 3/11/76-4/8/76 (Exec.).

[114] The State Department explained that "the President's statement is a reflection of his concern that implementation of the law be done in such a manner as to avoid conflict, and insofar as such statements are customarily addressed to both domestic and international audiences can be taken as an assurance to affected nations that we will work with them to implement this new regime." Questions and Answers on Implementing P.L.

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truth, these steps could not avert the difficulties in bilateral relations surrounding the issue of access for U.S. distant water fishermen to waters within 200-miles of other nations. In recommending that the President veto H.R. 200, the State Department predicted that the provisions of the FCMA designed to protect the interests of U.S. distant water fishermen, including the tuna exclusion and trade embargo provisions, as well as amendments the law made to the FPA, would strain relations with those nations off whose coasts U.S. distant water vessels principally fished.[115] The State Department predicted, quite accurately it would turn out, that "the exclusion of tuna from our jurisdiction and our probable refusal to recognize [other countries'] jurisdiction over tuna within 200-miles will be offensive. It will also be patently hypocritical, since we have nearly no tuna resources in our zone."[116] Over the next 15 years, fishery relations between the United States and the countries of Latin America and the Western and Central Pacific would be characterized by the latter's taking offense at what they viewed as the hypocrisy of the United States in denying their claims to jurisdiction over tuna within their 200-mile zones.

IV. PROVISIONS OF THE 200-MILE LEGISLATION TO ADDRESS U.S. DISTANT-WATER INTERESTS

As noted earlier, the FCMA contained several provisions intended to address the concerns of distant-water tuna and shrimp fishermen. While versions of some or all of these provisions had appeared in different 200-mile bills over the preceding several years,

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94-265 at 2, attached to Memorandum for Scowcroft, Apr. 20, 1976, FO3-1 Fisheries, Box 11, FO3-1 4/9/76.

[115] See McCloskey to Lynn, c. early April 1976, at 5, White House Records Office, Legislative Case Files, Box 42, 4/13/76, H.R. 200 (2), Ford Papers.

[116] See McCloskey to Lynn, c. early April 1976, at 5, White House Records Office, Legislative Case Files, Box 42, 4/13/76, H.R. 200 (2), Ford Papers.

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they were crystallized in the legislation developed and reported by the House Merchant Marine and Fisheries Committee in August 1975 and by the Senate Commerce Committee in September 1975. These Committees had primary jurisdiction over fisheries issues in their respective houses. In favorably reporting H.R. 200, the House Merchant Marine and Fisheries Committee declared that it had "made every effort to see that all segments of the U.S. fishing industry were protected, including those fishermen who fish off the coasts of other nations."[117] In reporting S. 961, the Senate Commerce Committee similarly claimed to have crafted the legislation to "deal[ ] with the tuna situation" and to address the concerns of distant water shrimp fishermen.[118] The bills reported by those Committees contained several provisions designed to address the concerns of the U.S. distant water tuna and shrimp interests which would, with greater and lesser changes, be enacted in the FCMA. These provisions, the most important of which excluded tuna from U.S. management jurisdiction, required the imposition of embargoes on fish products from countries that seized U.S. distant water vessels, and expanded the losses reimbursable under the Fishermen's Protective Act of 1954, would form the legislative backbone for the tuna policy and diplomacy of the United States until the FCMA was amended in 1990 to bring tuna under U.S. management authority. Accordingly, their development is reviewed below.

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[117] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1051, 1074.

[118] See Senate Comm. on Commerce, Magnuson Fisheries Conservation and Management Act, S. Rep. No. 416, 94th Cong., 1st Sess. (1975) (hereinafter "Senate Commerce Committee Report"), reprinted in FCMA Legislative History at 653, 671-672.

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A. THE TUNA EXCLUSION AND NONRECOGNITION PROVISIONS

As enacted, the FCMA expressly disclaimed U.S. jurisdiction over tuna. It provided: "The exclusive fishing management authority of the United States shall not include, nor shall it be construed to extend to, highly migratory species of fish."[119] As discussed in greater detail below, the Act defined "highly migratory species" to include only tuna, and not also other species thought to range over great expanses of ocean.[120] In tandem with this "tuna exclusion" provision, the FCMA declared that the United States would not recognize the fishery conservation zones of any country which did not itself "recognize and accept that highly migratory species are to be managed by applicable international fishery agreements, whether or not such nation is a party to any such agreement."[121] The "tuna exclusion" and "nonrecognition" provisions would dictate U.S. policy with respect to tuna, until the 1990 "tuna inclusion" amendments to the FCMA. This policy was implemented by the National Marine Fisheries Service in domestic fisheries management, and by the Department of State in international relations.

Similarly worded tuna exclusion and nonrecognition provisions were included in the bill reported by the House Merchant Marine and Fisheries Committee.[122] The text of the Committee bill remained unchanged in H.R. 200 as passed by the House.[123] In the Senate, the tuna exclusion and nonrecognition provisions included in the bill reported by

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[119] FCMA § 103 [1976].

[120] See FCMA § 3(15) [1976].

[121] See FCMA § 202(e)(2) [1976].

[122] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1060.

[123] See FCMA Legislative History at 782-783.

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the Senate Commerce Committee[124] were included verbatim in S. 961 as passed by the Senate.[125] With only minor changes, the provisions of the Senate Bill were included in the conference committee report.[126]

In sum, the tuna exclusion and nonrecognition provisions included in the bills reported by the House Merchant Marine and Fisheries Committee and the Senate Commerce Committee were not significantly changed or seriously debated.

B. THE HMS TREATY NEGOTIATION PROVISION

As enacted, the FCMA directed the State Department, upon the request of the Secretary of Commerce, to initiate and conduct negotiations to establish international agreements for the conservation and management of tuna.[127] Congress had in mind efforts to negotiate treaties that would establish multilateral conservation and management organizations for tuna in addition to IATTC and ICCAT.[128] A similar provision in the bill reported by the House Merchant Marine and Fisheries Committee[129] was included unchanged in H.R. 200 as passed by the House.[130] The bill reported by the

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[124] See FCMA Legislative History at 679, 683, 705, 707.

[125] See FCMA Legislative History at 151, 160.

[126] See Conference Report on the Fishery Conservation and Management Act of 1976, H. Conf. Rep. No. 94-711, 94th Cong., 2d Sess., reprinted in FCMA Legislative History at 44, 48, 79, 82.

[127] See FCMA § 202(a)(4)(B) [1976].

[128] See, e.g., House MM&F Committee Report, reprinted in FCMA Legislative History at 1109-1110.

[129] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1058.

[130] See FCMA Legislative History at 777.

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Senate Commerce Committee contained a similar provision,[131] and was included in S. 961 as passed by the Senate.[132]

While there was little dispute in Congress over the desirability and appropriateness of directing the Secretary of State to undertake negotiations to establish international agreements for the conservation and management of tuna, the executive branch registered its objection to such direction on the ground that it encroached upon the Executive's constitutional prerogatives in the area of foreign affairs. Indeed, this was one of the four specific "problem areas" noted by the President in his signing statement.[133] The State Department amplified on the basis for the objection, explaining: "As a legal matter, . . . the decision to negotiate at all, with whom to negotiate, and on what subjects to negotiate, is within the exclusive province of the President to conduct the foreign affairs of the United States."[134]

In subsequent years, the State Department would undertake negotiations to establish or re-negotiate agreements for tuna conservation and management in the Eastern Tropical Pacific and the Western and Central Pacific. In the Eastern Tropical Pacific, negotiations with Latin American states would founder not so much because of the U.S. juridical position on tuna—which the countries could finesse—but rather because the Latin American countries insisted upon allocations and privileges for their own

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[131] See Senate Commerce Committee Report, reprinted in FCMA Legislative History at 682, 707.

[132] See comparative print on H.R. 200, reprinted in FCMA Legislative History at 151.

[133] See statement by the President upon signing H.R. 200 into law, 12 Weekly Comp. Pres. Doc. 644 (Apr. 13, 1976); see also id. reprinted in FCMA Legislative History at 34-35.

[134] Questions and Answers on Implementing P.L. 94-265 at 4, attached to Memorandum for Scowcroft, Apr. 20, 1976, FO3-1 Fisheries, Box 11, FO3-1 4/9/76.

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developing fishing fleets which necessarily reduced the quantity of fish available to U.S. distant water fishermen.[135] In the Western and Central Pacific, most of the Pacific Island Countries with rich tuna resources in their expansive EEZs would not develop their own tuna fleets. But negotiations to establish a multilateral conservation and management organization would be complicated tremendously by the U.S. juridical position on tuna and the Pacific Island Countries' interpretation of Article 64 of the Law of the Sea Convention as not mandating the creation of regional organizations, including both fishing and coastal states, where they did not already exist. As a result, while the United States concluded an agreement with the 16 Pacific Island Countries in 1987, securing access to their EEZs for U.S. tuna vessels, it would not be until 2000, ten years after the formal demise of the U.S. juridical position was effected by the tuna inclusion amendments to the FCMA of 1990, that an Article 64 body, consisting of both the Pacific Island Countries and distant water fishing nations, would be established for the Western and Central Pacific. These developments in the Western and Central Pacific are discussed in detail in Chapters 5 and 7.

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[135] See Bonnano and Constance (1996) at 131-34. The lengthy and involved history of U.S. fishery relations in the Eastern Tropical Pacific, and particularly with Latin American countries and the IATTC, is not considered in this study for several reasons. First, that history has already been canvassed in detail in other studies. See, e.g., Smetherman and Smetherman (1974); Wolff (1980). Second, as the U.S. distant water tuna fleet began to look to the tuna grounds of the Western and Central Pacific in the early 1980s, the Eastern Tropical Pacific faded in importance as a region for further development and elaboration of approaches to tuna fisheries issues addressing the concerns and interests of coastal states and fishing nations. In other words, the "action," both in terms of tuna fishing and legal developments, was increasingly to be found in the Western and Central Pacific.

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C. THE HMS DEFINITION PROVISION

As noted above, the FCMA excluded "highly migratory species" from its assertion of U.S. fisheries jurisdiction.[136] The Act limited the exclusion to tuna by defining "highly migratory species" to mean only tuna.[137] The highly migratory nature of tuna was proffered as the scientific justification for excluding them from U.S. management jurisdiction and declaring them only properly subject to international management. In the years following enactment of the FCMA, this "scientific" justification would be regularly invoked by U.S. tuna interests and the Department of State in their dealings with foreign countries concerning access to tuna within their EEZs. The validity of this justification would be assailed not only by those countries asserting jurisdiction over tuna within their EEZs—and especially those countries dealing with the U.S. tuna industry—but also by some of the fishery management councils established by the FCMA, leading, eventually, to the 1990 tuna inclusion amendment to the Act. The controversy surrounding the definition of "highly migratory species" in the FCMA foreshadowed these developments.

The bill reported by the House Merchant Marine and Fisheries Committee defined "highly migratory species" to mean "any species of fish which spawn and migrate during their life cycle in waters of the high seas, in and outside the fishery zone, including, but not limited to, tuna; but excluding halibut, sable fish, and herring."[138] The Committee explained that highly migratory species included not only tunas, but also, among other

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[136] See FCMA § 103 [1976].

[137] See FCMA § 3(15) [1976], reprinted in FCMA Legislative History at 6.

[138] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1053.

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fish, marlin, sailfishes, swordfish, dolphinfish, and oceanic sharks.[139] It had specifically excluded halibut, sable fish, and herring from the definition of highly migratory species, the Committee reported, because these were "migratory—as distinguished from highly migratory," and the Committee wanted to make it clear that those species would be subject the fishery management jurisdiction of the United States.[140] This broad definition of "highly migratory species" was, of course, internally consistent in reflecting the purported biological basis for the exclusion of such species from the assertion of extended fisheries jurisdiction (indeed, this broad definition generally followed that which was being developed at the Law of the Sea Conference and is contained in Annex I to the Convention). Nonetheless, it would be the subject of further dispute because sportfishing interests wanted the U.S. to extend fisheries jurisdiction over billfish and other gamefish.[141] As a result of pressure from sportfishing interests, the definition of highly migratory species enacted in the FCMA included only tuna.[142]

In July 1975, the Senate Commerce Committee distributed to state government and fishing industry representatives a "staff working paper" intended to serve as a draft

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[139] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1099. [140] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1100.

[141] For instance, Representative Bo Ginn of Georgia, while voting to favorably report H.R. 200 out of the Merchant Marine and Fisheries Committee, submitted a statement setting forth his view that billfish should not be excluded from U.S. fishery management jurisdiction. See "Supplementary Views on H.R. 200" in House MM&F Committee Report, reprinted in FCMA Legislative History at 1155. According to Ginn, billfish were "important both in terms of their economic value and their special value to sport fishing." Id.

[142] See FCMA § 3(14) [1976].

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200-mile bill.[143] The working paper was prepared by the Committee staff following a June "Fishery Management Workshop" convened to discuss and develop provisions for domestic management to be included a 200-mile bill.[144] The working paper defined "highly migratory species" to mean "those species of fish which spawn and migrate during their lifecycle in waters of the open ocean, including but not limited to, tuna."[145] A number of comments on the working paper addressed issues of particular concern to U.S. distant water interests, including the "highly migratory species" definition. In written comments and in testimony before the Commerce Committee, representatives of recreational fishermen recommended that the definition be limited to include only tuna, so that billfish would be subject to exclusive U.S. management jurisdiction.[146] Some state fishery management agencies also criticized the definition as overly broad.[147]

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[143] See 1975 Commerce Comm. Hearings on S. 961 Part 2 at 199-234.

[144] See 1975 Commerce Comm. Hearings Part 2 at 199.

[145] See 1975 Commerce Comm. Hearings Part 2 at 206.

[146] See 1975 Commerce Comm. Hearings Part 2 at 165-166 (testimony of Peter Kyros, National Coalition for Marine Conservation), 246-248 (collecting correspondence), 254-256 (letter from Sport Fishing Institute).

[147] See 1975 Commerce Comm. Hearings Part 2 at 145-146 (testimony of E.J. Huizer, Deputy Commissioner, Alaska Department of Fish and Game) (recommending more precise HMS definition, recommending Secretary of Commerce be given authority to list highly migratory species by regulation, and recommending consideration of lists of highly migratory species contained in the Annex to Part II of the ISNT) and 296-297 (letter from Texas Parks and Wildlife Department) (criticizing definition of highly migratory species as "too inclusive because it would eliminate many of the very species which most need management," and recommending limiting definition to include tuna). In early September 1975, the Marine Fisheries Advisory Committee to NOAA (MAFAC) conducted a workshop to discuss issues relating to fisheries management under extended jurisdiction. The MAFAC took the position that highly migratory species should not be excluded from U.S. fisheries management jurisdiction. See 1975 Commerce Comm. Hearings Part 2 at 260, 275 (letters from John P. Harville, Executive Director, Pacific Marine Fisheries Commission).

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Academic fishery scientists and policy experts, on the other hand, advocated expressly including billfish and some sharks in the definition of highly migratory species.[148] Ironically, Donald Bevan, who had been among those making this recommendation, later changed his position on the grounds that exclusion of tuna and other highly migratory fishes from U.S. management jurisdiction was "simply not acceptable to the recreational fishery interests."[149]

In reporting an amended 200-mile bill, the Commerce Committee itself also responded to the concerns of recreational fishermen, defining "highly migratory species" to mean "species of the tuna which, in the course of their lifecycle, spawn and migrate in waters of the ocean."[150] The Committee explained the exclusion of tuna from coastal

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[148] See 1975 Commerce Comm. Hearings Part 2 at 172 (statement of Dr. Edward F. Miles, Chairman, Ocean Policy Committee, National Research Council) and 267 (letter from Donald E. Bevan, Assistant Vice President for Research, Professor of Fisheries and Marine Studies, University of Washington).

[149] See 1975 Commerce Comm. Hearings Part 2 at 269 (letter from Donald E. Bevan, Assistant Vice President for Research, Professor of Fisheries and Marine Studies, University of Washington). Bevan's change of position occurred after he chaired the MAFAC workshop. Bevan explained: "While I philosophically agree with the view that tuna and highly migratory fishes should be under international regulation, I believe the 200-mile extension bill should provide for their management until such time as international management is in effect. To delete them from the Bill as was done in the House version is simply not acceptable to the recreational fishery interests." Id.

[150] See Senate Comm. on Commerce, Magnuson Fisheries Management and Conservation Act, S. Rep. No. 416, 94th Cong., 1st Sess. (1975) (hereinafter "Senate Commerce Committee Report") reprinted in FCMA legislative history at 653, 703. The principal Commerce Committee staff person handling 200-mile legislation, James P. "Bud" Walsh, explained that the limitation of the definition of highly migratory species to include only tuna was simply a matter of horse trading. In testifying before Congress in 1989 in opposition to amending the FCMA to subject tuna to U.S. management jurisdiction, Walsh explained:

> [O]n the point about billfish, in fact the anomaly, the inconsistency, was the fact that we exempted billfish. That was a strict political deal. At the time, the United States' position was that all [highly migratory species]

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state fisheries jurisdiction was necessitated by "the extensive migration of tunas and the mobility of sophisticated tuna fleets."[151] Moreover, the Committee explained, "unlike anadromous and coastal species, tuna have no special nexus to any coastal nation which gives rise to a claim of exclusive ownership."[152]

When the House debated and passed H.R. 200 on October 9, 1975, it amended the definition of highly migratory species so as to limit it to only tuna, thereby subjecting billfish to U.S. fisheries management jurisdiction.[153] Representative Conte of Massachusetts offered the amendment, which defined highly migratory species to mean "those species of tuna which spawn and migrate during their lifecycles in waters of the high seas, in and outside the fishery zone."[154] He explained the amendment was needed because no international agreement existed or was contemplated to conserve and manage billfish and other game fish, and catch rates of game fish off the Atlantic Coast had

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> had to be managed internationally. That is reflected in The Law of the Sea Treaty. The treaty says so, and lists all species of fish.
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> . . . What we did, very simply is we made a political deal in 1976, in order not to have confrontations over the highly-migratory issue, as we put together a piece of legislation that reflected the interests of all of our fishing industry. It was not on the basis that tuna was the anomaly. It was on the basis that billfish was the anomaly, and I am sure the record will bear me out on that.

Conservation and Management of Highly Migratory Species: Hearing before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 101st Cong., 1st Sess. (1989) at 21 (statement of James Walsh).

[151] Commerce Committee Report, reprinted in FCMA Legislative History at 676.

[152] Commerce Committee Report, reprinted in FCMA Legislative History at 676.

[153] See FCMA Legislative History at 930, 945-949.

[154] FCMA Legislative History at 945 (statement of Rep. Conte).

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declined precipitously in the preceding decade.[155] He further explained that the Senate Commerce Committee "recognized the need to include game fish in this bill and changed the language in the full Committee markup to include game fish."[156]

The definition of highly migratory species reported by the Commerce Committee was not changed in the Senate's debate and passage of S. 961.[157] The Conference Report combined the House and Senate definitions: "'Highly migratory species' means species of tuna which, in the course of their lifecycle, spawn and migrate over great distances in waters of the ocean."[158] This definition of highly migratory species was enacted in the FCMA.[159]

D. THE EMBARGO PROVISION

As enacted, the FCMA included a provision mandating the imposition of prohibitions on the importation of fish products from countries which refused to allow the continuation of U.S. distant water fishing or seized U.S. vessels in their 200-mile zones based on a claim of jurisdiction not recognized by the United States.[160] The mandatory nature of the embargo provision was disputed in the Congress, and the executive branch strongly objected to a trade sanctions provision of any sort. In the years following enactment of the FCMA, the embargo provision would provide one of the more

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[155] See FCMA Legislative History at 946-947 (statement of Rep. Conte).

[156] FCMA Legislative History at 947 (statement of Rep. Conte).

[157] See comparative print on H.R. 200 Marine Fisheries Conservation Act of 1975 as passed by the House of Representatives and by the Senate at 14, reprinted in FCMA Legislative History at 131.

[158] Conference Report on Fishery Conservation and Management Act of 1976, S. Rep. No. 711, 94th Cong., 2d Sess. (hereinafter "Conference Report"), reprinted in FCMA Legislative History at 42.

[159] See FCMA § 3(15) [1976], reprinted in FCMA Legislative History at 6.

[160] See FCMA § 205 [1976], reprinted in FCMA Legislative History at 16-17.

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controversial tools in the effort to preserve and secure access to distant water grounds for the U.S. tuna fleet.

The bill reported by the house Merchant Marine and Fisheries Committee required the mandatory imposition of trade sanctions prohibiting importation of seafood products from foreign countries in two circumstances. The first involved efforts by the United States to negotiate continued access for U.S. vessels to fisheries they had historically prosecuted within other countries' 200-mile zones. The bill directed the State Department to commence such negotiations.[161] If another country refused to negotiate such an agreement in good faith or violated an existing agreement under which U.S. vessels enjoyed such access, the Secretary of State was required to certify this determination to the Secretary of the Treasury who would then be required to place an embargo on all seafood products from that country.[162] The second circumstance requiring imposition of trade sanctions involved seizure of U.S. fishing vessels. The embargo provision would be triggered by a foreign country's seizure of a U.S. vessel in violation of the Fishermen's Protective Act ("FPA").[163]

While there was no serious dispute in the House over whether authorizing the imposition of trade sanctions as a tool to secure continued access for America's distant water fishermen was desirable and appropriate, there was serious disagreement over whether the imposition of such sanctions should be mandatory or discretionary. The tuna

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[161] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1057, 1108. The Committee explained that, as an example, this provision would apply to U.S. vessels that fished for shrimp off the coasts of Brazil and Mexico. See id.

[162] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1058, 1109.

[163] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1058, 1109.

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industry and its representatives felt that the executive branch in the past had inappropriately exercised its discretion by not imposing sanctions authorized by the FPA and the Pelly Amendment for the seizure of U.S. tuna vessels.[164] For this reason, the House Merchant Marine and Fisheries Committee had decided to make the import prohibitions of the FCMA mandatory.[165]

In issuing its negative oversight report on the bill, the House Committee on International Relations objected to the embargo provision as "contrary to our longstanding policy against automatic embargoes" and expressed concern that it could lead to trade wars as well as "affect other U.S. interests which may be current at the time with the country concerned."[166] These concerns were reiterated in the House debate over H.R. 200.[167] According to one member who otherwise supported H.R. 200, because of the mandatory nature of the embargo provision: "International confrontations and executive decisions are at the mercy of a shrimp or tuna boat captain."[168] He proposed an amendment to make the imposition of trade sanctions discretionary with the Secretary of State and to eliminate trade sanctions as a response to seizures of U.S. vessels.[169] The floor manager for H.R. 200 did not oppose the amendment, observing that "[u]ndoubtedly the diplomatic thing to do is to make it discretionary."[170] Accordingly,

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[164] See, e.g., FCMA Legislative History at 1020 (statement of Rep. van Deerlin).

[165] See FCMA Legislative History at 974, 1021 (statement of Rep. Leggett).

[166] Potential Impact of the Proposed 200-Mile Fishing Zone on U.S. Foreign Relations, Special Oversight Report of the Comm. on International Relations, H. Rep. No. 94-542, reprinted in FCMA Legislative History at 1041.

[167] See, e.g., FCMA Legislative History at 913 (statement of Rep. Zablocki).

[168] FCMA Legislative History at 973 (statement of Rep. Waggonner).

[169] See FCMA Legislative History at 971-974 (statement of Rep. Waggonner).

[170] FCMA Legislative History at 974 (statement of Rep. Leggett).

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H.R. 200 as passed by the House provided the Secretary of State with the discretion to trigger import prohibitions against all the seafood products of a country if he determined it was not negotiating in good faith, or failing to comply with, an agreement with the United States providing access to U.S. vessels.[171] It also did not authorize the imposition of trade sanctions as a response to the seizure of U.S. distant water fishing vessels.

The bill reported out by the Senate Commerce Committee did not contain an embargo provision of any sort. Early in the Senate debate on S. 961, Senator Lloyd Bentsen of Texas, who counted distant water shrimp fishermen among his constituents,[172] offered as an amendment an embargo provision based on that reported out by the House Merchant Marine and Fisheries Committee, making trade sanctions mandatory and triggering their imposition not only by a country's failure to negotiate in good faith, or comply with, an agreement providing access to U.S. vessels, but also by foreign seizure of U.S. fishing vessels.[173] But, unlike the bill reported by the Merchant Marine and Fisheries Committee, the Bentsen amendment embargoed only those products from the fishery involved, and not all of a country's seafood exports.[174] Senator Bentsen responded to the criticism that the measure was heavy handed by observing that trade sanctions for failure to negotiate in good faith were only triggered if the State Department made that requisite determination, and that "anyone who knows anything about the State Department's history of negotiating can see that this mandate to the

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[171] See FCMA Legislative History at 775-777.

[172] As already noted in Chapter 1, Texas shrimpers were significantly more dependent on Mexican waters than were shrimpers from the other four Gulf States.

[173] See FCMA Legislative History at 415-421 (statement of Sen. Stevens); see also id. at 356 (statement of Sen. Stevens) (setting forth full text of amendment).

[174] See FCMA Legislative History at 341 (statement of Sen. Stevens).

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Secretary of State will be given the most liberal interpretation possible."[175] After a debate in which the amendment was opposed by opponents of 200-mile legislation concerned about its international and foreign policy impacts,[176] the amendment was agreed to by a vote of 71 to 16.[177]

Following passage of S. 961, the Conference Committee had to reconcile the rival embargo provisions of the Senate and House bills. The Senate version required mandatory trade sanctions for failure to negotiate in good faith, or comply with, agreements pertaining to access for U.S. distant water fishermen, as well as for seizures of U.S. fishing vessels. The House version made trade sanctions discretionary for failure to negotiate in good faith, or comply with, access agreements for U.S. distant water fishermen, but did not authorize or require trade sanctions in response to seizures of U.S. fishing vessels. The scope of the sanctions provided for by the House bill was broader, embracing all the seafood products of a country, while the Senate bill would have only banned products from the particular fishery that was the subject of dispute.[178]

The executive branch was strongly opposed to the embargo provision in any form.[179] Indeed, the White House identified the embargo provision as one of the "major

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[175] See FCMA Legislative History at 337 (statement of Sen. Bentsen).

[176] See FCMA Legislative History at 336-344 (statements of Sen. Gravel and Griffin).

[177] See FCMA Legislative History at 344.

[178] See Conference Policy Issues Summary H.R. 200 (S. 961), reprinted in FCMA Legislative History at 101.

[179] See Memorandum from Janka to Friedersdorf re Amendments to 200-mile Fisheries Bill, Jan. 23, 1976, at 1, Max Friedersdorf files, Box 16, 200-mile Offshore Limit, Ford Papers; Memorandum from Sanders to Kranowitz re 200-mile Fisheries Bill, Jan. 27, 1976, at 2, Max Friedersdorf files, Box 16, 200-mile Offshore Limit, Ford Papers; Memorandum from Walsh to Senate Conferees on H.R. 200 re February 24 meeting of House and Senate Conferees, Feb. 24, 1976, at 2-3, Magnuson Papers.

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objectionable provisions" of the legislation, but was ultimately unsuccessful in eliminating or modifying the provision in its negotiations with the Conference Committee.[180] The bill reported by the Conference Committee contained an embargo provision that largely followed the structure and scope of the Senate bill, but which adopted the discretionary approach of the House bill.[181] Moreover, the Conference Committee limited the scope of the embargo provision to include only tuna.[182]

The embargo provision was strongly criticized in recommendations on the FCMA made by agencies and departments to the President. The Office of the Special Representative for Trade Negotiations, in recommending the President veto H.R. 200, objected that the embargo provision would violate U.S. obligations under the General Agreement on Tariffs and Trade (GATT) and perhaps prompt retaliatory trade measures.[183] The Trade Office also objected that the embargo provision was inconsistent with the Administration's longstanding opposition to "tying the extension of continuation of trade benefits to non-trade related conditions."[184] The State Department also objected to the embargo provision in its veto recommendation. According to the State Department, the provision would put it "under great pressure to impose embargoes"

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[180] Memorandum from Lynn to the President re 200-mile Fisheries Legislation, Mar. 2, 1976, George Humphreys files, Box 2, 200-mile Limit Fishing Boundaries (2), Ford Papers.

[181] See FCMA Legislative History at 53-54, 85-86.

[182] See FCMA Legislative History at 54 (§ 205(d)(1) [defining the term "'fish,'" "as used in this section," to include "any highly migratory species"]).

[183] See Memorandum from Wolff to Frey re Enrolled Bill H.R. 200, Apr. 2, 1976, Legislation Case Files, Box 42, H.R. 200 (2), Ford Papers.

[184] See Memorandum from Wolff to Frey re Enrolled Bill H.R. 200, Apr. 2, 1976, at 2, Legislation Case Files, Box 42, H.R. 200 (2), Ford Papers.

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which "would violate GATT and invite retaliation in the trade area, even while [they] would damage the objective of inducing good faith negotiations."[185]

In the statement he issued upon signing the FCMA, President Ford indirectly identified the embargo provision as one of the "four specific problem areas" raised by the legislation. The signing statement explained, "the enforcement provisions of H.R. 200 dealing with the seizure of unauthorized fishing vessels, lack adequate assurances of reciprocity in keeping with tenets of international law."[186] The State Department later explained its concern that import prohibitions would be triggered by actions the United States itself would undertake in its own 200-mile zone pursuant to the FCMA.[187]

Despite the State Department's objection to the embargo provision, it would be invoked numerous times in the following years on behalf of the U.S. distant water tuna fleet.

E. THE RECIPROCITY PROVISION

As enacted, the FCMA conditioned foreign fishing in the U.S. 200-mile zone on a nation's granting reciprocal privileges to U.S. vessels to fish within its 200-mile zone. The Act provided: "Foreign fishing shall not be authorized for the fishing vessels of any foreign nation unless such nation satisfies the Secretary and the Secretary of State that such nation extends substantially the same fishing privileges to fishing vessels of the

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[185] McCloskey to Lynn, c. early April 1976, at 5, White House Records Office, Legislative Case Files, Box 42, 4/13/76, H.R. 200 (2), Ford Papers.

[186] See statement by the President upon signing H.R. 200 into law, 12 Weekly Comp. Pres. Doc. 644 (Apr. 13, 1976); see also id. reprinted in FCMA Legislative History at 34-35.

[187] See Questions and Answers on Implementing P.L. 94-265 at 3, attached to Memorandum for Scowcroft, Apr. 20, 1976, FO3-1 Fisheries, Box 11, FO3-1 4/9/76.

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United States, if any, as the United States extends to foreign fishing vessels."[188] While not expressly excluding tuna, this reciprocity provision necessarily did not apply to such species because, as described above, they were excluded from the Act's assertion of U.S. fisheries management authority. In other words, under the Act, neither the U.S., nor any other country, could purport to authorize or prohibit fishing for tuna beyond its territorial sea. As a practical matter, then, distant water shrimp fishermen along with U.S. fishermen who fished for lobster in the Caribbean and Red Snapper off the coast of Mexico, stood to be the principal beneficiaries of the reciprocity provision.

While the bill passed by the House did not contain an express reciprocity provision, the House Merchant Marine and Fisheries Committee explained that U.S. distant water fishermen would stand to benefit from the expected reciprocity of other countries whose vessels were permitted by the United States to prosecute under-exploited fisheries in the U.S. 200-mile zone.[189] The bill reported by the Senate Commerce Committee contained a reciprocity provision, conditioning authorization of foreign fishing within the U.S. fishery conservation zone, or for anadromous species of U.S. origin or U.S. Continental Shelf fishery resources, on a nation's extending similar privileges to U.S. vessels.[190] The 200-mile bill passed by the Senate contained the same provision.[191] The Conference Committee accepted the reciprocity provision of the

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[188] FCMA § 201(f) [1976].

[189] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1094.

[190] See Senate Commerce Committee Report, reprinted in FCMA Legislative History at 680, 705.

[191] See FCMA Legislative History at 138.

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Senate bill, making technical changes to it to eliminate the redundancy created by the specification of anadromous and Continental Shelf fishery resources.[192]

F. THE FPA AMENDMENTS

Since its enactment in 1954, the FPA had served to encourage U.S. distant water fishing vessels to continue fishing off the coasts of Latin America despite seizures by foreign governments and, thereby, maintain the position of the United States in refusing to recognize the claims of such countries to extended territorial and fisheries jurisdiction.[193] The 1976 amendments to the FPA, enacted in the FCMA, extended the scope of both its seizure and reimbursement provisions.[194]

Prior to 1976, the FPA's seizure provision only applied to seizures based on claims of extended jurisdiction not recognized by the United States. The 1976 amendments extended the Act's coverage to seizures based on conditions and restrictions made by a foreign nation pursuant to a jurisdictional claim recognized by the United States but that were unrelated to fishery conservation and management, failed to consider or take into account historic fishing by U.S. vessels, went beyond the conditions and restrictions the United States applied to foreign fishing vessels in its fishery conservation zone, or failed to grant U.S. vessels equitable access to fish.[195] The amendments to the

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[192] See Conference Committee Report, reprinted in FCMA Legislative History at 46, 81.

[193] See Harry N. Scheiber, "Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945-70," 13 Ecology Law Quarterly 383, at 510-13 (1986); see also Theodore Meron, "The Fishermen's Protective Act: A Case Study and Contemporary Legal Strategy of the United States," 69 American Journal of International Law 290, 299 (1975).

[194] See FCMA § 403 [1976], reprinted in FCMA Legislative History at 32-33.

[195] See FCMA § 403(a) [1976], reprinted in FCMA Legislative History at 32-33; 22 U.S.C. § 1972(2) [2001].

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Act's seizure provision were designed to assist U.S. distant water fishermen other than tuna fishermen, as the latter were already protected by that part of the FPA's seizure provision addressing seizures based on jurisdictional claims not recognized by the United States.

The 1976 amendment to the FPA's reimbursement provision was intended to benefit all distant-water fishermen. It expanded the category of charges levied by foreign nations following seizure of a U.S. vessel to include charges based on the value of fish onboard a vessel.[196]

While the 1976 amendments to the FPA's seizure provisions would never play a significant role in U.S. fisheries diplomacy, as U.S. distant water shrimp fisheries were rapidly phased out, the FPA would continue to be an important instrument of U.S. tuna policy.[197]

The bill reported by the House Merchant Marine and Fisheries Committee would have amended the FPA to protect historic U.S. distant water fishing generally.[198] The Committee explained that the amendment was "intended to extend the protection of the [Act] to situations where United States' vessels are seized for engaging in fishing within 200-miles of the shores of a nation for a specific stock of fish in areas where such vessels

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[196] See FCMA § 403(a) [1976], reprinted in FCMA Legislative History at 32-33; 22 U.S.C. § 1973(a) (2001).

[197] For criticism of the 1976 amendments to the FPA by the FCMA see Comment, "The 1976 Amendments to the Fishermen's Protective Act," 71 American Journal of International Law 740 (1977).

[198] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1070-1071, 1129-1131.

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have previously fished for such stocks."[199] The Committee's report cited the potential seizure of U.S. vessels fishing within 200-miles of Ecuador or Peru as encompassed by the amended FPA, but did not limit its coverage to U.S. distant water tuna vessels.[200]

In addition, the Merchant Marine and Fisheries Committee bill would have expanded the categories of charges imposed on U.S. fishermen that would be reimbursable under Section 3 of the FPA.[201] This amendment was prompted by what transpired following the seizure of U.S. tuna vessels by Ecuador in a flare up of the "Tuna War" in early 1975. Three such vessels had been required to pay the monetary value of their tuna catches in lieu of confiscation of those catches. Had the fish actually been confiscated, the vessel owners would have been entitled to reimbursement for the value of such fish under the voluntary insurance program provided by section 7 of the FPA,[202] which the Department of Commerce administered. But, because the fish were not actually confiscated, the Commerce Department determined that reimbursement could not be paid under section 7. At the same time, the vessel owners were denied reimbursement under section 3 of the FPA by the Department of State, which determined that section 3 did not encompass monies paid for the monetary value of fish. The Committee explained that the amendment was designed to make these, and any future similar claims, reimbursable under section 3 of the FPA. The Committee stated its intent that the FPA "should be interpreted in such a way as to make the vessel owners whole.

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[199] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1130.

[200] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1071, 1130.

[201] See House MM&F Committee Report, reprinted in FCMA Legislative History at 1071, 1130-31.

[202] See 22 U.S.C. § 1977 (2001).

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. . . The only exception to full reimbursement would be that loss relating to loss of fishing time," for which vessel owners and crew would be reimbursed at fifty percent of the loss of fishing while a vessel was detained.[203]

No amendments to the FPA were contained in the bill reported by the Senate Commerce Committee or S. 961 as passed by the Senate.[204] The Conference Committee substituted more narrow language for that of the House bill to amend the FPA's seizure provision by authorizing reimbursement "only if the conditions and restrictions applied to U.S. vessels are more stringent than the conditions and restrictions applied to foreign fishing vessels by the United States."[205] The Conference Committee was concerned that the more broadly worded amendment based on historic fishing in the House bill "might actually encourage seizures of American fishing vessels and that it would endorse fishing by American vessels in a foreign nation's waters under circumstances which would not be allowed with respect to fishing subject to the exclusive fishery management authority of the United States."[206]

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[203] House MM&F Committee Report, reprinted in FCMA Legislative History at 1130-31.

[204] See Comparative Print at 66-67, reprinted in FCMA Legislative History at 216-217.

[205] Conference Report, reprinted in FCMA Legislative History at 95.

[206] Conference Report, reprinted in FCMA Legislative History at 95.

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CHAPTER 5: THE SHIFT IN FOCUS TO THE SOUTH PACIFIC: THE FORUM FISHERIES AGENCY, THE MEANING OF ARTICLE 64 AND THE TUNA TREATY

In the ten years following enactment of the FCMA, the focus of U.S. tuna policy would shift from Latin America and the Eastern Tropical Pacific Ocean to the South Pacific as U.S. tuna vessels would seek more favorable fishing conditions. Two factors drove the U.S. tuna fleet from the Eastern Tropical Pacific. First, U.S. quotas assigned by the IATTC, steadily shrunk as Latin American countries sought to increase their domestic tuna production. Second, increasingly stringent requirements for dolphin protection mandated by the Marine Mammal Protection Act made the Eastern Tropical Pacific inhospitable fishing grounds for U.S. vessels. As an alternative source of supply, vessels of the U.S. fleet, in increasing numbers, would look to the tuna-rich waters of the Western and Central Pacific where there was as yet no regional organization for the conservation and management of tuna and, for reasons unknown, the tuna did not swim in association with dolphins.

The island nations of the Western and Central Pacific have played a leading role in the development of international law regarding tuna over the last quarter of the 20th century. Much of this came about as a result of their interactions with the United States and, particularly, their resistance to the U.S. juridical position on tuna. In 1979, they established the Forum Fisheries Agency ("FFA"). The FFA was premised on the assertion of exclusive coastal state jurisdiction over tuna in the exclusive economic zone and excluded fishing states from membership in it. The U.S. juridical position on tuna had influenced the establishment of the FFA, and would continue to play a critical role in not only U.S. fisheries policy for the South Pacific, but in the overall U.S. foreign policy for the South Pacific, for more than a decade to come.

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The conclusion of the Tuna Treaty between the Pacific Island Countries and the United States in 1987, ensuring access to the Pacific Island Countries' EEZs for U.S. vessels in return for a fee, resolved or at least salved the tensions in relations generated by disputes over tuna. The Tuna Treaty would play a role in the subsequent demise of the U.S. juridical position with the passage and enactment of amendments to the FCMA to bring tuna under U.S. management authority in 1990.

I. THE ESTABLISHMENT OF THE FORUM FISHERIES AGENCY AND THE MEANING OF ARTICLE 64

As a first step in addressing tuna issues on a regional basis, the Pacific Island Countries initiated discussions in 1976 that would eventually lead to the creation of the South Pacific Forum Fisheries Agency ("FFA"). The circumstances of the creation of the FFA were strongly influenced by the U.S. juridical position on tuna. They also reflected the different interpretations of the requirements of Article 64 held by a number of South Pacific Island Countries and distant water fishing nations, especially the United States, as well as the aspirations of the Pacific Island Countries to gain control over valuable fishery resources and further mark their independence from the metropolitan powers. From the time a regional fisheries organization for the South Pacific was first proposed in 1976, it took three years for a convention establishing the FFA to be concluded, principally because of disagreement over whether a South Pacific regional fisheries organization should include only the countries of the region, or also, more broadly, metropolitan powers with island dependencies and distant water fishing nations.[1]

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[1] The account of the establishment of the FFA which follows draws upon the work of a number of authors who have chronicled the events, including: George Kent, The Politics of Pacific Island Fisheries (1980) at 166-172; John Van Dyke and Susan Heftel, "Tuna Management in the Pacific: An Analysis of the South Pacific Forum Fisheries Agency," 3 University of Hawaii Law Review 1, 13-19 (1981); Florian Gubon, "History

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Consideration of establishing a regional fisheries organization was first prompted by a position paper on "The Law of the Sea" presented by Fiji to the 1976 meeting of the South Pacific Forum ("SPF"). In response to Fiji's initiative, the 1976 SPF meeting directed the convening of a meeting to consider the issue and related fisheries matters. At that meeting, which took place in Fiji in October 1976, the Pacific Island governments agreed in principle to create a regional fisheries organization for the South Pacific.

The U.S. juridical position cast a shadow over these efforts and relations between the United States and the peoples of the region more generally. For example, after visiting what was at the time the U.S. Trust Territory of the Pacific Islands (now the Federated States of Micronesia and the Marshall Islands), one U.S. official reported:

> I note with deep concern a deteriorating attitude toward the United States, caused principally, in my view, by our divergent positions concerning the management of tuna fisheries in the context of the Law of the Sea. . . . There is no international regional tuna organization in the Central Pacific, and they feel it necessary to create a 200-mile fisheries zone to include the management and conservation of the tuna species. The Micronesians are of the opinion that the United States has effectively abandoned its tuna position, and yet opposes their own declaration of a 200-mile zone which includes the protection of the tuna resources in their waters.[2]

At its 1977 meeting, the SPF endorsed the creation of a regional organization in the "Port Moresby Declaration," wherein the member countries declared their intention

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and Role of the Forum Fisheries Agency," in David J. Doulman, ed., Tuna Issues and Perspectives in the Pacific Islands Region (1987) 245-256; Neroni Slade, "Forum Fisheries Agency and Next Decade: The Legal Aspects," in Richard Herr, ed., The Forum Fisheries Agency: Achievements, Challenges and Prospects (1990) at 296-299.

[2] Memorandum for Ambassador Elliot L. Richardson, Special Representative of the President for Law of the Sea, from Howard W. Pollock, NOAA Deputy Administrator, re Political Situation in the Trust Territory of the Pacific Islands, and the Law of the Sea Implications, Apr. 12, 1977, Carter Papers, WHCF-Int'l Organizations, IT-9, IT 86-3, 1/20/77-1/20/81. The official further reported that Micronesians felt "it was an intolerable situation for the United States to wish to represent the Marshalls and other areas of Micronesia internationally in fisheries matters, when their views and those of the United States concerning tuna were diametrically opposed." Id. at 4.

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> To establish a South Pacific Regional Fisheries Agency open to all Forum countries and all countries in the South Pacific with coastal state interests in the region who support the sovereign rights of the coastal state to conserve and manage living resources, including highly migratory species, in its 200 mile zone.[3]

At the Port Moresby meeting, U.S. tuna policy colored discussion of the proposed organization's mandate and membership. SPF member countries saw the U.S. juridical position, so recently reiterated and reinforced in the FCMA, as "directly opposed to [the policy] of the countries of the region and to the interests of the Pacific in particular."[4] At a November 1977 follow-up meeting in Fiji to implement the Port Moresby Declaration, negotiations to establish the new organization foundered on the related issues of mandate and membership. According to one observer, "as the meeting progressed," the United States, which, along with Chile, France, and the United Kingdom, participated as voting members in representing their island dependencies in the region, "spoke in support of its own interests as a DWFN and a major industrial fish-processing and fish-marketing nation rather than as a representative of the nonsovereign territories it administered."[5]

A further meeting in June 1978 resulted in agreement on a draft South Pacific Regional Fisheries Organization Convention ("Draft Convention"). The Draft Convention provided for a broad-based organization with membership open to SPF members, metropolitan powers with territories in the region, and DWFNs whose applications garnered the support of two-thirds of the Convention's parties. The

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[3] 8th South Pacific Forum, Declaration on the Law of the Sea and a Regional Fisheries Agency art. 7 (Port Moresby, Papua New Guinea, Aug. 19-22, 1977), quoted in Kent (1980) at 167; see also Van Dyke and Heftel (1981) at 13; Slade (1990) at 297.

[4] Report of the Eighth Meeting of the South Pacific Forum (Port Moresby, Papua New Guinea, 1977) at 31, quoted in Gubon (1987) at 247.

[5] Gubon (1987) at 247.

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document attempted to finesse the disagreement between the United States and the Pacific Island Countries on the juridical status of tuna by merely providing that those countries claiming highly migratory species within their 200-mile zones notify the director of the organization of their claim. The Draft Convention also attempted to finesse the membership issue by providing for the organization to reach decisions by consensus without taking a formal vote. The organization would have functioned as a weak regional coordinating body with only advisory powers, and no powers of enforcement, surveillance, or regulation.

At the 1978 SPF meeting in Niue, the political decision-makers of the Pacific Island Countries rejected the Draft Convention. At that meeting, U.S. representatives advocated an Article 64 type organization, and expressed the willingness of the United States to recognize jurisdiction over tuna when exercised by such a regional organization. Consistent with the U.S. juridical position, the U.S. representatives refused to recognize coastal state jurisdiction over tuna, and insisted that a regional organization could not derive authority over tuna from delegations of power by coastal states because individual states could not properly claim such jurisdiction to begin with. The U.S. position generated considerable acrimony at the Niue meeting, prompting Sir Peter Kenilorea, Prime Minister of the Solomon Islands, to famously remark:

> We do not interfere in the coal mines of America—why should America be able to interfere in the fisheries of the independent Pacific Forum countries? . . . We will not sign that convention until and unless there is a provision to safeguard the immediate concerns of the South Pacific nations. We should have the complete say over our fisheries . . . .[6]

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[6] New Pacific Magazine (March/April 1979) at 9, quoted in Van Dyke and Heftel (1981) at 15; see also Kent (1980) at 169. Other regional leaders pointed to the apparent inconsistency of the United States in defining highly migratory species in the FCMA to include only tuna. For example, the Foreign Minister of Papua New Guinea expressed

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According to one commentator, "[t]he core disagreement at Niue was over whether there should be an Article 64 type organization, as proposed in the [Draft Convention], which would include the United States and other outside fishing nations in the organization, or whether there should be a more limited organization based on establishing a common front by the Forum nations."[7] With the Pacific Island Country leaders unable to agree on this question,[8] they rejected the Draft Convention and directed officials to redraft the convention it to be consistent with the Port Moresby Declaration of 1977 by restricting membership in the organization to Forum nations.

At the 1979 meeting of the SPF in Honiara, Solomon Islands, Forum leaders adopted a convention establishing the FFA as a non-Article 64 body.[9] The Convention limited membership in the FFA to Forum members and "other states or territories in the region" if approved by the SPF.[10] The Convention declared:

> The Parties to this Convention recognize that the coastal state has sovereign rights, for the purpose of exploring and exploiting, conserving and managing the living marine resources, including highly migratory species, within its exclusive economic zone or fishing zone which may

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puzzlement at the U.S. argument that tuna could not be managed effectively by individual countries because of their highly migratory nature, "particularly when the United States claims management rights over marlin, and other highly migratory species, in order to safeguard the interests of its sports fishermen." Pacific Islands Monthly, July 1979, at 83, quoted in Van Dyke and Heftel (1981) at 16.

[7] Kent (1980) at 169.

[8] The smaller island nations of Western Samoa, Niue, and the Cook Islands wanted to admit DWFNs into the organization because they desired to license out their rights to the resources, while Fiji, Papua New Guinea, and the Solomon Islands were joined by Nauru, Tonga, and Kiribati in seeking to exclude metropolitan countries and DWFNs from the organization in order to prevent them from dominating it and compromising the island countries' control over their newly acquired marine resources. See Kent at 169-170.

[9] South Pacific Forum Fisheries Agency Convention (Honiara, Solomon Islands, 1979).

[10] SPFFA Convention Art. II.

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> extend 200 miles from the baseline from which the breadth of its territorial sea is measured.[11]

That the Convention did not intend to establish an Article 64 body was only reinforced by the accompanying provision, which declared:

> Without prejudice to [the sovereign rights of coastal states over tuna within their EEZs], the Parties recognize that effective co-operation for the conservation and optimum utilization of the highly migratory species of the region will require the establishment of additional international machinery to provide for co-operation between all coastal states in the region and all states involved in the harvesting of such resources.[12]

Whether sporadic efforts of the Pacific Island Countries over the next decade and a half to establish an Article 64 body satisfied Article 64's requirement for cooperation between and among coastal states and fishing states would be the subject of much debate.[13]

The Convention established a Forum Fisheries Committee, composed of representatives from all the Forum member countries, and a Secretariat, to do the work of the FFA.[14] In specifying the functions of the FFA, the Convention established "a rather weak service agency rather than . . . anything approaching a management agency,"[15] authorizing the FFA to do little more than act as an information clearing house, provide technical advice to states party, and promote regional coordination and cooperation in fisheries.[16] While the U.S. juridical position served as a focal point for discussions

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[11] SPFFA Convention Art. III(1).

[12] SPFFA Convention Art. III(2).

[13] Compare Gubon (1987) at 252-253 and Slade (1990) at 298-299 (arguing FFA and efforts to cooperate to establish an Article 64 body comply with UNCLOS Article 64 requirements) with Van Dyke and Heftel (1981) at 48-54 (arguing FFA does not meet Article 64 requirements).

[14] See SPFFA Convention Arts. IV-VII.

[15] Kent (1980) at 170.

[16] See SPFFA Convention Arts. V, VII.

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leading to the establishment of the FFA, the weak mandate of the agency reflected very serious differences among the Pacific Island Countries themselves, and particularly as between the more and less highly developed of those countries.[17] Divisions and competing interests among the Pacific Island Countries would continue to play a role in the tuna law and politics of the region for years to come.

II. THE TUNA TREATY

In 1985, the United States and the Pacific Island Countries participating in the FFA embarked on negotiations that would ultimately lead to the conclusion in 1987 of a treaty providing for access for U.S. purse seine vessels to the EEZs of the island nations to fish for tuna.[18] The negotiation of the Tuna Treaty became a focus of high-level U.S. foreign policymakers when one of the Pacific Island Countries reached an agreement with the U.S.S.R. to provide access to its EEZ for Soviet fishing vessels in return for a fee.[19] Relations between the United States and the Pacific Island Countries had long been friendly, as the United States enjoyed a reservoir of goodwill based on its role in liberating many of the islands in World War II, but had suffered throughout the early

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[17] See Kent (1980) at 170-171.

[18] See Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United States of America (done 2 April 1987; entered into force 15 June 1988), TIAS 11100 [hereinafter "Tuna Treaty"]. For an extended discussion of the tuna treaty and the emergence of a regional ocean regime in the South Pacific see Biliana Cicin-Sain and Robert W. Knecht, "The Emergence of a Regional Ocean Regime in the South Pacific," 16 Ecology Law Quarterly 171 (1987). For a survey of the main issues in the negotiations and their resolution see John M. Van Dyke and Carolyn Nichol, "U.S. Tuna Policy: A Reluctant Acceptance of the International Norm," in David J. Doulman, ed., Tuna Issues and Perspectives of the Pacific Islands Region (1987) 105, 117-122.

[19] See Van Dyke and Nichol (1987) at 117-118.

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1980s as a result of U.S. embargoes imposed in response to seizures of U.S. tuna vessels for fishing within Pacific Island Country EEZs without first securing permission.[20]

The resulting Tuna Treaty did not even gesture toward the establishment of an Article 64 type body. Rather, it formalized a modus vivendi for the U.S. purse seine fleet and the island nations. While the Tuna Treaty explicitly denied recognition of Pacific Island state sovereignty over tuna in the EEZ,[21] de facto recognition of such jurisdiction would prove difficult to deny. The Treaty provided for approximately $60 million in payments and financial aid over five years, with about $2 million to be paid annually for license fees and $10 million to be paid annually in direct U.S. foreign aid.[22] Although the Department of State would insist in the future that the Tuna Treaty did not contradict the long-standing U.S. juridical position, its de facto recognition of coastal state sovereignty over tuna would prove to be a rallying point for those who supported repealing the tuna exclusion provisions of the FCMA and bringing tuna under U.S. management authority.

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[20] See id. at 112-115.

[21] See Tuna Treaty, Annex 7, ¶ 3, ("Nothing in this Annex and its Schedules, nor activities taking place thereunder, shall constitute recognition of the claims or the positions of any of the parties concerning the legal status and extent of waters and zones claimed by any party.").

[22] See Van Dyke and Nichol (1987) at 121.

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CHAPTER 6: THE FCMA TUNA INCLUSION AMENDMENT

Efforts to subject tuna fishing within the U.S. EEZ to regulation had begun almost as soon as the FCMA was enacted. Some of these involved attempts by regional fishery management councils to regulate foreign fishing for tuna through fishery management plans for billfish on the grounds that tuna fishing resulted in catches of billfish. However, throughout the 1980s, fishery management plans for billfish were regularly rejected by the Department of Commerce as inconsistent with the Magnuson Act's tuna exclusion provisions and the U.S. juridical position. Other efforts took the form of attempts to repeal the Act's tuna exclusion provisions on the ground that, among others, they prevented the councils from managing billfish effectively.

Additional impetus was provided to calls for repeal of the tuna exclusion provisions by conclusion of the Tuna Treaty in 1987, which many argued effected de facto recognition of coastal state authority to regulate access to and fishing of tuna within EEZs. Moreover, with the growth of domestic tuna longline fisheries off the Atlantic and Gulf coasts, and in the Hawaiian Islands, recreational fishermen and the fishery management councils stressed the need for regulation to address both user conflicts and conservation. At the same time, by the mid-1980s, the political influence of the distant water tuna industry in the United States had begun to wane, as American-based processing operations relocated to low-wage countries. This confluence of events and circumstances enabled the Atlantic and Gulf fishery management councils and the Hawaii-based Western Pacific Regional Fishery Management Council, in league with sport fishermen and conservation organizations, to secure passage of amendments to the FCMA in 1990 that subjected tuna to U.S. management jurisdiction within the EEZ and had the effect of eliminating the juridical position from U.S. fisheries diplomacy.

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I. EARLY TUNA INCLUSION LEGISLATION

In 1981, the Senate considered legislation to amend the FCMA to include tuna under U.S. jurisdiction. The "American Tuna Protection Act" was cosponsored by a number of eastern seaboard senators and supported by commercial and sports fishermen on the Atlantic coast and the Gulf of Mexico.[1] Proponents felt tuna inclusion was a necessary predicate for: (1) regulating the incidental catch of billfish by Japanese longline vessels fishing for tuna in the U.S. 200-mile zone;[2] (2) minimizing gear conflicts between U.S. fishermen and Japanese longline vessels;[3] (3) reserving bluefin tuna in the U.S. 200-mile zone for American fishermen;[4] and (4) enhancing tuna longlining opportunities for U.S. vessels in the southeast and Gulf of Mexico.[5]

The State Department, the Japan Fisheries Association, and representatives of U.S. distant water tuna fishermen testified in opposition to the legislation.

The State Department argued that assertion of U.S. jurisdiction over tuna was unnecessary because it had taken, and would continue to take, many steps "to try to

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[1] See 127 Cong. Rec. 19176 (July 31, 1981) (statement of Sen. Weicker introducing S. 1564, the "American Tuna Protection Act").

[2] See, e.g., "Atlantic Bluefin Tuna Stocks" hearing before the National Ocean Policy Study of the Sen. Comm. on Commerce, Science and Transportation on S. 1564, the American Tuna Act, 97th Cong., 1st Sess. (Dec. 8, 1981) [hereinafter "1981 Tuna Inclusion Hearing"] at 13 (statement of Christopher Weld, Secretary and Executive Director, National Coalition for Marine Conservation).

[3] See id.

[4] See id. at 14-15; see also id. at 4-5 (statement of William G. Gordon, Assistant Administrator for Fisheries, NMFS, NOAA), 19-21 (statement of Myron Nordquist on behalf of Lund's fisheries) and 28-30 (statement of Roger Anderson, Executive Director, Gulf & South Atlantic Fisheries Development Foundation).

[5] See id. at 29, 42. Many of those vessels were converted shrimp vessels that had been displaced (excluded) from their traditional fishing grounds off the Atlantic coast of Latin America and in the Gulf of Mexico as a result of extended coastal state jurisdiction. See id.

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accommodate the coastal interests of the United States with respect to tuna and billfish."[6] According to the Department, these included advocating a coastal state preference for ICCAT's bluefin tuna allocation[7] and negotiating voluntary measures with the Japanese fleet to reduce their billfish and bluefin tuna catches, as well as to minimize gear conflicts with U.S. fishermen.[8] The Department further explained that it had assumed "an increased flexibility" with respect to reviewing billfish management plans developed by regional fishery management councils for consistency with the juridical position.[9] The State Department also reiterated its longstanding opposition to tuna inclusion on the grounds that it would destroy the U.S. juridical position, to the detriment of the U.S. negotiating position in the Eastern Tropical Pacific and elsewhere, as well as undercut the Fishermen's Protective Act and the embargo provisions of the FCMA.[10] Moreover, the Department argued, the juridical position was dictated by the biology of highly migratory species, which showed that the only effective way to conserve and manage them was through international agreements, not exclusive coastal state jurisdiction.[11]

In testifying against the tuna inclusion amendments, the Japan Fisheries Association asserted that Japanese tuna fishermen on the Atlantic and Gulf Coasts were being unfairly targeted. According to the Association, the catch levels of the Japanese directed tuna fishery and its incidental swordfish bycatch in the American 200-mile zone

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[6] Id. at 5 (statement of Theodore G. Kronmiller, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs).

[7] See id. at 5, 76.

[8] Id. at 6, 7.

[9] Id. at 6, 8.

[10] See id. at 6-8, 76-77.

[11] See id. at 9, 76.

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had been greatly exaggerated and was, in fact, dwarfed by the U.S. catch of those species.[12] The Japanese fishing interests were quite strident in expressing their opposition to tuna inclusion:

> The virulent campaign to place tuna under United States authority in the 200-mile Fishery Conservation Zone seeks to subvert scientific principles to xenophobia and greed. Scientists around the world repeatedly have stated in no uncertain terms that no highly migratory fish—including tunas and billfish—can possibly be conserved by a single coastal nation acting alone. Only the high-powered lobbying of wealthy and influential sports fishermen succeeded in placing billfish under U.S. management authority through a last-minute amendment to the FCMA. This action, incidentally, was so contrary to scientific knowledge, that both the Caribbean and Pacific Fishery Management Councils have refused to develop fishery management plans for billfish.[13]

Representatives of two different organizations representing the West Coast tuna industry, the U.S. Tuna Foundation ("USTF") and the American Tunaboat Association ("ATA"), testified in opposition to the legislation on behalf of U.S. distant-water tuna interests. The USTF representative emphasized that the great majority of U.S. tuna production came from the Pacific Ocean (not the Atlantic), predicted that extension of U.S. jurisdiction to tuna would exacerbate difficulties with Mexico over tuna fishing in the Eastern Tropical Pacific, cited recently agreed ICCAT measures as evidence that international management of tuna was effective, and argued that the juridical position was needed to preserve U.S. negotiating leverage to conserve tuna and insure access to it for U.S. vessels.[14]

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[12] See id. at 33 (statement of Allan Macnow, Tele-Press Associates, Inc., Public Relations Counsel to the Japan Fisheries Association).

[13] Id. at 33.

[14] See id. at 37-40 (statement of David G. Burney, Counsel, U.S. Tuna Foundation).

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The ATA representative echoed the statements of the State Department and the USTF, stressing particularly the ongoing difficulties with Mexico regarding the Eastern Tropical Pacific and IATTC. Consistent with its traditionally hard-line approach, the ATA called for the United States to go beyond the embargoes of tuna products from Costa Rica and Mexico imposed in 1979 and 1980, respectively, under the FCMA, and to increase "pressure on the Government of Mexico . . . to bring about discussions for a regional licensing agreement providing fair access for U.S. tunaboat owners to tuna fishing areas."[15]

While the tuna inclusion legislation did not advance, momentum for tuna inclusion would grow throughout the 1980s. Conservation and sportfishing interests would become increasingly assertive in advocating tuna inclusion. While a burgeoning domestic tuna fishing industry would come to oppose tuna inclusion after Japanese fishing in the U.S. EEZ significantly declined, and for fear that recreational interests would dominate them through the fishery management councils, the councils themselves would spearhead the efforts for tuna inclusion. At the same time, the juridical position would be undermined by international developments, and the influence of the U.S. distant water tuna industry would wane and its ability to defend the juridical position would diminish.

II. COUNCIL EFFORTS TO MANAGE BILLFISH AND THE FCMA'S TUNA EXCLUSION PROVISIONS

Throughout the 1980s, the efforts of the Atlantic coast fishery management councils and Gulf Council, on the one hand, and the Western Pacific Fishery

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[15] Id. at 63 (statement of James P. Walsh, representing the American Tunaboat Association).

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Management Council, on the other hand, to develop fishery management plans for billfish were constrained by the tuna exclusion provisions of the FCMA and the U.S. juridical position on tuna, as interpreted and applied by the Commerce and State Departments. This stemmed from a 1979 NOAA General Counsel legal opinion on billfish management under the FCMA that set forth a stringent test that all fishery management measures relating to billfish, and incidentally impacting tuna fishing, had to satisfy.[16] The NOAA legal opinion ruled that "management measures which affect foreign longline fishing for tuna in the FCZ [Fishery Conservation Zone]" would be permissible only if they "(1) provide a reasonable opportunity for foreign longline vessels to fish for tuna in the FCZ and (2) impose the least burden on such vessels that will achieve conservation and management of the billfish covered by the plan."[17] Through implementation of this test, according to the legal opinion, "regulation of the foreign longline take of billfish [could] be carried out so that it does not constitute the exercise of exclusive jurisdiction over tuna fishing," as proscribed by the FCMA.[18]

From 1980 to 1986 the Atlantic coast fishery management councils and the Gulf Council worked to develop a fishery management plan for Atlantic billfish. During that time, several versions of the plan were disapproved by NOAA because they were found to not provide Japanese vessels the requisite "reasonable opportunity" to fish for tuna in

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[16] See GC/NOAA Legal Opinion No. 82 ("Billfish Management Under the Fishery Conservation and Management Act") (Oct. 3, 1979).

[17] Id. at 1.

[18] Id. at 3.

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the U.S. FCZ.[19] An Atlantic billfish plan finally passed muster with NOAA in 1986, but before receiving final approval, it was challenged in court by the Federation of Japan Tuna Fisheries on the ground that it violated the Magnuson Act's tuna exclusion provisions, and NOAA reversed course, disapproving the plan.[20]

The efforts of the Western Pacific Regional Fishery Management Council to develop a fishery management plan for billfish were similarly drawn out and frustrated by concerns about the consistency of the plan with the tuna exclusion provisions of the FCMA and the U.S. juridical position on tuna. The Council first submitted a draft fishery management plan for billfish to NOAA for review in 1981.[21] The central feature of the draft FMP was a management measure closing approximately 30 percent of the FCZ to longline fishing for tuna.[22]

After reviewing the draft FMP, the National Marine Fisheries Service ("NMFS") rejected it. In its view, the FMP, while ostensibly "designed to achieve a transfer of billfish catches from foreign tuna fishermen using longline gear to domestic fishermen," did not promote conservation, promised too speculative economic and social benefits, and was unnecessary because U.S. fishermen in the region were already taking billfish.[23]

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[19] See NOAA Fishery Management Study (June 30, 1986) at 19; see also Draft Inter-Council Congressional Position Paper re Proposed Amendments to Section 102 of the MFCMA (Dec. 19, 1988 Draft) at 7 (copy in author's files).

[20] See Draft Inter-Council Congressional Position Paper at 8.

[21] See Smith to Yee, July 28, 1981, at 1, in Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (July 1986) ("Final Pelagics FMP") at 13-3 (copy in author's files).

[22] See Final Pelagics FMP at 13-9.

[23] See Final Pelagics FMP at 13-5 to 13-9.

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In addition, NMFS found, the FMP would violate the "balancing test" of the NOAA legal opinion, and would negatively impact U.S. tuna policy.[24]

NMFS summed up its concerns about the impacts of the Western Pacific Council's proposed billfish FMP on U.S. tuna policy in writing:

> We fully appreciate the difficulties of designing a management regime for billfish vis-à-vis our national policy on highly migratory species. Officials at NMFS, the Department of State and other Federal agencies have enunciated this policy many times, formally and informally, while the plan was in preparation. Our views at this time remain essentially unchanged. In short, we cannot endorse sweeping closures of the U.S. fishery conservation zone (FCZ) to foreign longline fishing for tuna without more substantial benefits to the conservation and management of billfish than are identified in the plan.[25]

Over the next several years, the Western Pacific Council resubmitted its draft FMP to NMFS for review and approval more than once. Each time, NMFS rejected it. The "single most significant legal issue in the FMP," according to NMFS, was "the justification for the size of the closed areas in view of the balancing test."[26] Finally, in 1987, NMFS approved an FMP that did not create closed areas, but rather established a mechanism by which they could be later implemented.[27] Therefore, while the Western Pacific Council's billfish FMP was finally approved, after more than half a decade of wrangling between the Council and the federal government over the application and implications of the FCMA's tuna exclusion provisions for U.S. management of other highly migratory species, the plan that was ultimately approved fell short of the Council's aspirations for tuna management.

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[24] Final Pelagics FMP at 13-9.

[25] See Final Pelagics FMP at 13-3.

[26] Hochman to Western Pacific Regional Fishery Management Council (c. Summer 1985) in Final Pelagics FMP at 13-101.

[27] See 52 Fed. Reg. 5983 (Feb. 27, 1987).

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III. CHANGES IN THE POLITICAL ECONOMY OF THE U.S. TUNA INDUSTRY

Several important changes in the U.S. tuna industry during the 1980s played a part in the policy process leading to the decision to include tuna under the FCMA. The economic importance and political clout of the U.S. distant water tuna industry declined because of the relocation of canneries from the mainland United States. The U.S. distant water fleet itself underwent a number of changes, including changes in its size, employment practices and ownership, that also weakened the tuna industry's ability to protect its interests. Moreover, at the same time, commercial tuna fishing within the U.S. EEZ was growing, creating user and gear conflicts, if not conservation concerns, that recreational fishermen and the fishery management councils wanted to address. This confluence of circumstances set the stage for enactment of amendments to the FCMA in 1990 subjecting tuna to U.S. management jurisdiction. These changes in the industry are described below.

A. RELOCATION OF CANNERIES

Between 1982 and 1985, U.S. tuna canneries relocated from the U.S. mainland to overseas sites.[28] As of 1982, twelve canneries were operating on the U.S. mainland; by the end of 1985, only one small cannery was left operating on the mainland United States, while U.S. canneries in Puerto Rico and American Samoa were increasing production.[29] Perhaps the most prominent closures were those by Star Kist of its

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[28] See Dennis M. King and Harry A. Bateman, "The Economic Impact of Recent Changes in the U.S. Tuna Industry" (1985); see also Alessandro Bonanno and Douglas Constance, Caught In The Net: The Global Tuna Industry, Environmentalism, and the State (1996) at 149-55; Jesse M. Floyd, "The Tuna Industry in American Samoa: Industry Developments, Current Operations, Future Prospects," (Sept. 1985) at 3-12.

[29] Bonanno and Constance (1996) at 152-55.

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Terminal Island plant and Van Camp of its ultra-modern San Diego plant in 1984, resulting in the loss of some 2,400 processing jobs.[30] Cannery-based jobs and incomes declined by close to 95% during 1980-1985.[31] Moreover, the negative economic impacts of the restructuring were not limited to canneries and their employees. As one commentator put it, "When an industry that produces $1.5 billion in food products moves out of the U.S. and attracts support industries to offshore sites, the indirect and induced economic losses spread to many sectors of the U.S. economy.[32]

B. CHANGES IN THE U.S. DISTANT WATER FLEET

Throughout the 1980s, the size of the U.S. distant water fleet (purse seine vessels) steadily declined. In 1980 there were 117 vessels in the fleet; in 1985 there were 90 vessels in the fleet; and by 1990 the number of vessels in the fleet had fallen to 65.[33] The total capacity of the distant water fleet also declined from approximately 107,000 tons in 1980 to 71,000 tons in 1989.[34] These changes at least partly reflected modernization to remain competitive. While the overall capacity of the fleet declined during the decade, the average vessel capacity increased significantly.[35] However, because of productivity

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[30] See King (1985) at 23, 27 n. 23; Bonanno and Constance (1996) at 152; Floyd (1986) at 9-10.

[31] See King (1985) at 27 n. 23.

[32] King (1985) at 6.

[33] See Bonanno and Constance (1996) at 156; see also David Burney, U.S. Tuna Foundation, to Senator Daniel K. Inouye, Feb. 22, 1990, at 3.

[34] See Bonanno and Constance (1996) at 156; see also David Burney, U.S. Tuna Foundation, to Senator Daniel K. Inouye, Feb. 22, 1990, at 3.

[35] See David Burney, U.S. Tuna Foundation, to Senator Daniel K. Inouye, Feb. 22, 1990, at 3.

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gains, crew sizes did not increase apace with the increases in vessel capacity.[36] Moreover, while prior to 1981 most U.S. vessels had entirely U.S. crews, cost cutting efforts in the increasingly competitive environment of the 1980s led to the hiring of fewer Americans as crewmen.[37]

Until the 1980s, the U.S. tuna industry had substantial vertical integration, with most of the vessels in the fleet owned in whole or in part by processors; those that were not had long-term contracts to supply tuna to the U.S. canneries.[38] However, during the 1980s, U.S. canneries sold their interests in tuna vessels and shifted from long-term to short-term contracts with U.S. vessels.[39] The disintegration of the U.S. tuna industry led to dissension between the industry's processing and harvesting sectors that culminated in an antitrust suit brought by vessel owners against the three largest canneries—Star Kist, Bumblebee, and Van Camp.[40] In July 1985, less than six months after the antitrust suit was filed, some 60 vessels from the U.S. fleet agreed to stop making deliveries to U.S. processors until they agreed to raise the ex-vessel prices they paid for tuna. The strike did not last long and was rendered ineffective by the ready availability to the canneries of substitute supplies.[41]

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[36] See David Burney, U.S. Tuna Foundation, to Senator Daniel K. Inouye, Feb. 22, 1990, at 6.

[37] See David Burney, U.S. Tuna Foundation, to Senator Daniel K. Inouye, Feb. 22, 1990, at 6.

[38] See Bonanno and Constance (1996) at 151, 157-59; King (1985) at 7; Floyd (1985) at 4-5.

[39] See Bonanno and Constance (1996) at 151, 157-59; King (1985) at 7; Floyd (1985) at 4-5.

[40] See Bonanno and Constance (1996) at 159; Floyd (1985) at 7.

[41] See Floyd (1985) at 7-8.

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Although the antitrust suit was settled in 1986, both it and the strike signaled an increasingly weakened and divided tuna industry.[42] The disintegration of the U.S. tuna industry, and controversy over prices, reflect the fact that the positions of the major U.S. tuna companies were often dictated by the interests of the multinational corporations which they were subsidiaries of, rather than more narrow U.S. tuna industry concerns. As a consequence, according to one commentator, "organized labor and local or regional government organizations," rather than tuna processors, were "frequently the most active in protecting the interests of domestic tuna operations."[43] However, with the decline in mainland jobs in Southern California due to the relocation of the canneries, and the loss of jobs to foreign crew on American vessels, organized labor and politicians were themselves no longer as motivated or effective in protecting the industry's interests. The final step in the breakdown of the historic alliance between the distant water tuna fishermen and the processors appears to have occurred in April 1990, when the three largest U.S. canneries agreed to a boycott of tuna caught in association with dolphins in the Eastern Tropical Pacific.

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[42] This is not to say that there had never before been intra-industry divisions. Differences between U.S. canneries and the distant water fleet had long existed over efforts by the fleet to secure protective import duties on foreign caught tuna. See Mark Schoell, "The Marine Mammal Protection Act and its Role in the Decline of San Diego's Tuna Fishing Industry," The Journal of San Diego History, Vol. 45 (winter 1999), available at http://www.sandiegohistory.org/journal/99/winter/tuna.htm. Two of the major canneries opposed a petition for import relief to the U.S. International Trade Commission (USITC) regarding canned tuna filed in 1984. Jesse N. Floyd, "U.S. Tuna Import Regulations," in David J. Doulman, ed. The Development of the Tuna Industry in the Pacific Islands Region: An Analysis of Options (1987); Bonanno and Constance (1996) at 150. In addition, the canneries, as well fishermen's unions, opposed the reflagging of U.S. vessels to avoid the strictures of the Marine Mammal Protection Act. See Schoell (1999).

[43] Dennis M. King, "The U.S. Tuna Market: A Pacific Island's Perspective," in David J. Doulman, ed., The Development of the Tuna Industry of the Pacific Islands Region: An Analysis of Options (1987) at 77.

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C. GROWTH IN U.S. COASTAL TUNA FISHERIES

Beginning in the late 1970s, fishing for tuna within the U.S. EEZ by U.S. fishermen began to increase dramatically. Several factors contributed to this rapid expansion of the U.S. domestic fishery for tuna. First, a market for fresh tuna began to emerge in the U.S., as did a market for fresh tuna exports to Japan. Second, longline fisheries in the Gulf of Mexico and on the Atlantic Coast expanded dramatically as shrimp and snapper-grouper fishermen, displaced from their traditional fisheries off the coasts of Mexico and Latin America, took up longlining. Third, Japanese tuna longline fishing in the U.S. EEZ decreased as the Japanese sought to avoid fishery management council regulation of their incidental catch of billfish and, more generally, conflict with U.S. commercial and recreational fishermen.[44] During the same time period, U.S. recreational fishing for tuna also grew rapidly.[45]

Supporters of tuna inclusion would put forward economic data showing the significant economic value of tuna caught inside the U.S. EEZ.[46] Tuna inclusion opponents would, equally correctly, put forward the fact that the tonnage of tuna caught by the distant water fleet dwarfed that caught by U.S. vessels within the U.S. EEZ.[47]

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[44] See Michael K. Orbach and John R. Mailolo, "United States Tuna Policy: A Critical Assessment" (Dec. 1988) at 7. Linda Hudgins, "Structural Change in the Case for Inclusion of Tuna under the Magnuson Act: Prosperity and Value in U.S. Coastal Tuna Fisheries," (June 1988) at 10-16, 24-40; Draft Inter-Council Congressional Position Paper: Proposed Amendment to Section 102 of the MFCMA (Dec. 8, 1988) at 10.

[45] See Orbach and Mailolo (1988) at 8; Hudgins (1988) at 26.

[46] See, e.g., Inter-Council Congressional Position Paper (Dec. 8, 1988) at 10.

[47] See, e.g., David Burney, U.S. Tuna Foundation, to Senator Daniel K. Inouye, Feb. 22, 1990 at 5 and Exh. 1 thereto. In the ten years spanning 1979 to in 1988, 94 percent of all tuna landed by U.S. vessels in U.S. ports came from outside the U.S. EEZ. See id. at Exh. 1. For skipjack and yellowfin tuna, which together comprised more than 94 percent of all U.S. tuna landings, 98 percent and 97 percent of the fish landed, respectively, were

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Although the percentage of tuna caught by U.S. vessels inside the U.S. EEZ increased slightly relative to the percentage of tuna caught by U.S. vessels outside the EEZ during the period 1979 to 1988, the increase was statistically insignificant in light of the fact that the quantity of tuna caught by the U.S. distant water fleet was so much greater than that caught by U.S. vessels within the U.S. EEZ.[48] Most of the overall growth in the U.S. fishery for tuna in the U.S. EEZ was attributable to a substantial increase in yellowfin tuna landings. In 1979, 1,287 tons of yellowfin were caught by U.S. vessels in the U.S. EEZ; by 1988, this figure had increased to 13,081 tons, representing a better than ten fold increase in yellowfin landings by U.S. vessels from the U.S. EEZ over the ten year

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caught outside the U.S. EEZ. See id. Lesser percentages of bigeye and bluefin tuna were caught by U.S. fishermen beyond the U.S. EEZ. See id. While only 31 percent of albacore were caught beyond the U.S. EEZ (see id.), albacore fishermen were not a part of the U.S. distant water fleet, and had supported including tuna under the Magnuson Act when it was first adopted.

[48] See Exhibit 1 to letter from Burney to Inouye, Feb. 22, 1990. More significant was the fact that the quantity of tuna caught by U.S. vessels in the U.S. EEZ increased significantly between 1979 and 1988. See Exh. 2 to letter of Burney to Inouye, Feb. 22, 1990. This datum is, of course, reflected in the slight decline in the percentage of tuna landed by U.S. vessels caught outside the U.S. EEZ over the period. See Exh. 1 to letter from Burney to Inouye, Feb. 22, 1990. For the five year period 1979 to 1983, 97.6 percent of skipjack tuna caught by U.S. vessels was caught outside the U.S. EEZ; for the five year period 1984 to 1988, this percentage increased to 98.5 percent. For the five year period, 1984 to 1988, 98.8 percent of yellowfin tuna caught by U.S. vessels was caught outside the U.S. EEZ; for the five year 1984 to 1988, this percentage fell to 95.5 percent. For the five year period 1979 to 1983, 95.1 percent of bigeye tuna caught by U.S. vessels was caught outside the U.S. EEZ; for the five year period 1984 to 1988, this percentage was 39.8 percent. For the same two periods, the percentage of bluefin caught by U.S. vessels outside the U.S. EEZ fell from 59.2 to 17.1 percent. Other types of tuna caught by U.S. vessels also declined over the two periods, from 33.5 percent to 13.4 percent. Apart from the slight increase in the percentage of skipjack caught by U.S. vessels outside the U.S. EEZ, only the percentage of albacore caught outside the U.S. EEZ increased for the two periods, from 25.7 percent for the five years from 1979 to 1983, to 37.1 percent for the five years from 1984 to 1988. See Exh. 1 to letter from Burney to Inouye, Feb. 22, 1990. The increase in the percentage of albacore caught outside the U.S. EEZ reflects the development of a new albacore fishery in the South Pacific by U.S. fishermen. See letter from Burney to Inouye, Feb. 22, 1990, at 5.

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period.[49] The great majority of that increase occurred from 1985 to 1988.[50] The amount of bigeye, bluefin and other tunas (not including skipjack and albacore) also increased over the ten year period from 1979 to 1988.[51] The amount of skipjack caught in the U.S. EEZ decreased, as did the quantity of albacore caught in the U.S. EEZ.[52] The total volume of tuna caught in the U.S. EEZ increased over the period from 14,220 tons in 1979, to 22,095 tons in 1988, an increase of more than 50%.[53]

While the U.S. commercial fishery for tuna within the U.S. EEZ experienced considerable growth over the decade 1979 to 1988, and yellowfin catches expanded even more rapidly beginning in 1985, it appears that neither conservation concerns nor the economic value of this growing domestic fishery was the predominant impetus behind the movement to extend the fishery management authority of the regional councils to include tuna. Rather, gear conflicts and allocation disputes between commercial and recreational fishermen drove the movement. Many commercial tuna fishermen feared that, because they were not traditionally represented on the fishery management councils due to the fact that the councils could not manage tuna, recreational fishing representatives on the

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[49] See Exh. 2 to letter from Burney to Inouye, Feb. 22, 1990.

[50] See Exh. 2 to letter from Burney to Inouye, Feb. 22, 1990. In the six years from 1979 to 1984, yellowfin landings by U.S. vessels from the U.S. EEZ averaged 1,447 tons per year. See id. In the three years from 1985 to 1987, that figure jumped from 3,034 tons to 5,823 tons to 8,687 tons, before reaching 13,081 tons in 1988. See id.

[51] See Exh. 2 to letter from Burney to Inouye, Feb. 22, 1990.

[52] See Exh. 2 to letter from Burney to Inouye, Feb. 22, 1990.

[53] See Exh. 2 to letter from Burney to Inouye, Feb. 22, 1990.

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councils would encourage councils to impose severe restrictions and management measures on commercial tuna fishing in the U.S. EEZ.[54]

IV. THE FISHERY MANAGEMENT COUNCIL'S INITIATIVE FOR TUNA INCLUSION

In May 1987, the chairmen of the regional fishery management councils, held a meeting to discuss amendments to the MFCMA. Out of this meeting emerged the councils' initiative for the inclusion of tuna under the MFCMA. The South Atlantic Council was tasked with developing the policy rationale for subjecting tuna to U.S. management authority, while the Western Pacific Council was tasked with collecting data to support an economic argument for tuna inclusion based on the value of tuna fishing by U.S. vessels within the U.S. EEZ.[55] In addition to these efforts, the Chairman of the Mid-Atlantic Council, James McHugh, assumed responsibility for development of an

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[54] See, e.g., letter to the Editor from Sean Martin re: "Who's Managing Tuna?" Honolulu Advertiser Aug. 10, 1989, and letter to the Editor from Edwin A. Ebisui, Jr. and Frank P. Farm, Jr. re: "Tuna Fishery Planning" Honolulu Advertiser Aug. 21, 1989; Statement of Jim Cook to PBDC Meeting of Sept. 18, 1989, as reported in Memorandum from Kitty Simonds to Bill Paty re: Felando, et al. Testimony at PBDC Meeting Sept. 18, 1989, Sept. 19, 1989, at 2 (describing Cook as having stated that "[o]f major concern was the lack of commercial interest representation on the Western Pacific Regional Fishery Management Council" and "that he thought that the tuna issue leads to polarization of recreational and commercial interests to the detriment of all."). Rick Gaffney, "Conservation Line: Tuna Management," Hawaii Fishing News (Oct. 1989) at 13.

[55] See Memorandum from Kitty Simonds to Paul Gates re: Regional Council Chairmen's Document for Congress on Why Tuna Should be Included in the MFCMA; Western Pacific Council's task-provide the economic argument, Mar. 15, 1988. To develop the policy rationale, the South Atlantic Council hired Professor Michael Orbach, Professor in the Department of Sociology and Anthropology at East Carolina University. See id. To collect the data and develop the economic argument, the Western Pacific Council hired Professor Linda Hudgins, a Professor of Economics at the University of Notre Dame, who had recently participated in a two year project at the East-West Center in Honolulu studying multinational corporations and the Pacific tuna industry. See id.

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"Inter-Council Congressional Position Paper: Proposed Amendments to Section 102 of the MFCMA," which was intended as an advocacy piece for congressional staff.[56]

Not all of the fishery management councils favored tuna inclusion. As of October 1988, the three Atlantic Coast Councils, the Gulf Council and the Western Pacific Council favored inclusion; the Pacific Council and Caribbean Councils opposed tuna inclusion; and the North Pacific Council was neutral on the issue.[57] The Atlantic Coast and Gulf Councils favored tuna inclusion because of the difficulties tuna exclusion had caused in the management of billfish and swordfish. The Western Pacific Council's primary concern was to exercise management over the burgeoning tuna longline fishery in its region.[58] The North Pacific Council's neutrality was based on the absence of pelagic fisheries in its region. The Pacific Council's opposition to tuna inclusion was ostensibly based on concern that southern California vessels, wholly separate from the distant water tuna fleet, which had traditionally fished for tuna and other pelagics principally off the coast of Mexico would be excluded from those waters if tuna were included under the MFCMA.[59] The Caribbean Council's opposition was based on concerns about the impact of tuna inclusion on Puerto Rico's canneries.[60]

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[56] See Draft Inter-Council Congressional Position Paper: Proposed Amendments to Section 102 of the MFCMA (Dec. 8, 1988 draft); Summary Minutes of Council Chairmen's meeting, Jan. 27-28, 1989 at 3 (statement of Mr. McHugh); Summary Minutes of Joint Fishery Management Council meeting, Oct. 7-8, 1988 at 4-5.

[57] See Summary Minutes of Joint Fishery Management Council meeting, Oct. 7-8, 1988 at 5.

[58] See Summary Minutes of Joint Fishery Management Council meeting, Oct. 7-8, 1988 at 5.

[59] See Michael K. Orbach and John R. Mailolo, "United States Tuna Policy: A Critical Assessment," Dec. 1988, Report to the South Atlantic Fishery Management Council at 9; Summary Minutes of Council Chairmen's Meeting, Jan. 27-28, 1989, at 5 (statement of Mr. Fletcher). The extent to which, if at all, the Pacific Council's position

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At the Council Chairmen's meeting in January 1989, the Councils reaffirmed their respective positions on tuna inclusion, with the majority of the Council Chairmen voting to support amending the MFCMA to include tuna.[61] At that meeting, the staff of the House and Senate subcommittees that had jurisdiction over fisheries issues made it clear that the "burden of proof," so to speak, would be on the proponents of tuna inclusion to make the case for why it was necessary.[62] According to one of the committee staff, members of Congress would need to be convinced why they should subject themselves to "the inevitable bloodbath that would result if they start looking at changing the U.S. juridical position."[63] The security that the juridical position enjoyed from Congress's institutional inertia would manifest itself over the next several years as the councils, recreational fishermen, and others pushed for tuna inclusion.

V. DEVELOPMENT AND CONSIDERATION OF TUNA INCLUSION AMENDMENTS

A. THE WPRFMC ROLE

From among the many fishery management councils advocating tuna inclusion, the Western Pacific Regional Fishery Management Council ("WPRFMC") assumed the lead role in mounting the assault on the FCMA's tuna exclusion provisions and in

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was motivated by concern over the impact of tuna inclusion on the distant water tuna industry is not clear.

[60] See Draft Summary Minutes of Caribbean Fishery Management Council Meeting Oct. 4-5, 1988 at 11-12, attached as Annex 18 to Draft Inter-Council Congressional Position Paper.

[61] See Summary Minutes of Council Chairmen's Meeting, Jan. 27-28, 1989, at 2-7.

[62] See Summary Minutes of Council Chairmen's Meeting, Jan. 27-28, 1989, at 4-7 (statements of Ms. Dalton, Mr. Pike and Mr. Moore).

[63] See Summary Minutes of Council Chairmen's Meeting, Jan. 27-28, 1989, at 5 (statement of Mr. Moore).

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battling the American distant water tuna industry's resistance to tuna inclusion. The Council proved indispensable to the eventual passage and enactment of the tuna inclusion amendments to the FCMA. The Council and its executive director, Kitty Simonds, would organize the support of the governor of Hawaii and the governors of the U.S. flag Pacific islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands, for tuna inclusion; produce counter-arguments to the claims of the U.S. tuna industry opposing tuna inclusion; and coordinate with Hawaii's congressional delegation in developing tuna inclusion legislation and in staging hearings on tuna inclusion.

The Western Pacific Council had advocated tuna inclusion since its creation in 1977. However, in the mid-1980s, criticism of its fisheries management and questioning of its necessity gave the Council reason to advocate tuna inclusion with increased urgency.

In 1985, a draft report of the Office of the Inspector General of the Department of Commerce recommended elimination of the Western Pacific Council, and the transfer of its responsibilities to the Pacific Council, on the ground that there were not meaningful fishery resources to be managed in the Western Pacific region.[64] The Western Pacific Council responded that most of the catch from fisheries in the region occurred in federal waters, regulated by the Council, and that substantial tuna fishing within the fishery conservation zones of the U.S. Flag Pacific islands had to be taken into account.[65] Shortly thereafter, in 1986, a blue ribbon study of fishery management commissioned by

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[64] See NOAA Letter from Yee to Breaux, Feb. 28, 1985 (citing "Opportunities for Cost Reductions and Operational Efficiencies in Management Fishery Resources").

[65] See Yee to Breaux, Feb. 28, 1985 at 2.

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NOAA recommended tuna inclusion.[66] However, the same study recommended elimination of the Western Pacific and Caribbean fishery management councils on the ground that most fisheries within their regions were conducted within state, commonwealth and territorial boundaries, rendering those councils unnecessary.[67]

To say that the Inspector General's report and NOAA-commissioned study galvanized the Western Pacific Council to press harder for tuna inclusion is an understatement. In response to the NOAA Study, the Western Pacific Council argued that its recommendation to subject tuna to U.S. fishery management jurisdiction necessitated the existence of the Council to carry out such management.[68] The Council's response resulted in the publication of an Addendum to the study which receded from the earlier recommendation to eliminate the Western Pacific and Caribbean councils.[69] With tuna management identified, if not as its raison d'etre, then as one of its essential functions, the Western Pacific Council would orchestrate the campaign of the fishery management councils for tuna inclusion.

Further impetus would be given to the Western Pacific Council's efforts in the late 1980s by the tremendous growth in the Hawaii-based longline fishery. This commercial fishery for tuna and swordfish gave rise to serious conflicts with recreational fishermen, who pushed the Western Pacific Council to exclude the commercial fishermen

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[66] See NOAA Fishery Management Study (June 30, 1986) at 19.

[67] See NOAA Fishery Management Study (June 30, 1986) at 13.

[68] See Yee to Calio, Sept. 5, 1986 at 18.

[69] See Tuna Management: Hearing Before the National Ocean Policy Study of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 1st Sess. (1989) [hereinafter "1989 Senate Tuna Inclusion Hearing"] at 43 (Addendum to the NOAA Fishery Management Study, Sept. 18, 1986).

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from certain fishing grounds. Even later, established commercial longline fishermen would advocate that the Council limit new entrants to the fishery.

1. The Pacific Island Governors

In early 1989, the WPRFMC persuaded the Pacific Basin Development Council ("PBDC"), consisting of the governors of Hawaii, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands, to support tuna inclusion.[70] The support of the island governors and the PBDC gave tuna inclusion a "self-determination" cachet that would be usefully set against the "colonialist" and "imperialist" ambitions of the U.S. distant water tuna fleet. More significantly, the support of American Samoa's governor for tuna inclusion would serve to counter the opposition of the distant water fleet, and the two processors with canneries in American Samoa, on the ground that tuna inclusion threatened the economic viability of the canneries.[71]

Throughout 1989 and 1990, the Council rebuffed numerous efforts of the distant water tuna fleet and the canneries in American Samoa to persuade the PBDC, and the governor of American Samoa in particular, to reverse the positions they had taken in favor of tuna inclusion.[72] The Council also worked to maintain the commitment of the island governors to tuna inclusion in response to the entreaties of American Samoa's non-

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[70] See Outline of Presentation by William Paty, Chairman, Western Pacific Regional Fishery Management Council, to the Pacific Basin Development Council, Mar. 1, 1989; "4 Pacific Island Governors Challenge U.S. Tuna Policy," The Honolulu Advertiser, Apr. 15, 1989, at D2.

[71] See Tuna Management: Hearing Before the National Ocean Policy Study of the Senate Comm. on Commerce, Science, and Transportation, 100 1st Cong., 1st Sess. (1989) [hereinafter "1989 Senate Tuna Inclusion Hearing"] at 7-11 (statement of Hon. Peter Tali Coleman, Governor of American Samoa).

[72] See Memorandum from Kitty Simonds to Bill Paty re: Felando, et al. Testimony at PBDC Meeting, Sept. 19, 1989.

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voting delegate to Congress that tuna inclusion would harm American Samoa's canneries.[73] In addition, the Council orchestrated a letter writing campaign from the PBDC governors to members of Congress reaffirming their commitments to tuna inclusion and opposition to any legislation that fell short of tuna inclusion and management of tuna in the Western Pacific region by the WPRFMC.[74]

2. The Role Of The Hawaiian Congressional Delegation

In the U.S. Congress, the WPRFMC enjoyed a powerful political patron in Senator Inouye of Hawaii. A Democrat first elected to the Senate in 1963, Inouye was the ranking majority member of the Senate Commerce Committee, the Senate committee with primary jurisdiction over fisheries issues. He also sat on the Committee's National Ocean Policy Study ("NOPS"), a subcommittee that dealt specifically with fisheries and oceans issues. Inouye's support of the Council was long-standing, and members of the Council, its staff, and other advocates of tuna inclusion from Hawaii were personally acquainted with him.

On the House side, Republican Congresswoman Pat Saiki, one of two members of the House representing Hawaii, would act as the leading advocate for tuna inclusion. Saiki sat on the House Merchant Marine and Fisheries Committee, the House committee with primary jurisdiction over fisheries issues, as well as the Committee's Subcommittee on Fisheries and Wildlife Conservation and the Environment ("House Fisheries

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[73] See Memorandum from Jerry B. Norris to Governor Waihee re: Requested Comments on Congressman Hunkin/Saiki Tuna Inclusion Issue, Nov. 28, 1989; Memorandum from Kitty Simonds to Bill Paty, re: Mishmash—Waihee's Response to Eni, Senator Inouye and Tuna, and the January Hearings, Dec. 15, 1989; Memorandum from Kitty Simonds to Sen. Inouye staffer Maile Luuwai, Dec. 18, 1989.

[74] See Kitty Simonds to Bryson, Mahood, Rolon, Marshall, Swingle, re: Highly Migratory Council, Dec. 19, 1989; Memorandum from Kitty Simonds to Maile Luuwai re: Huge Favor, Mar. 27, 1990.

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Subcommittee"). Although a relatively junior member of Congress, having been first elected to the House in 1986, Saiki proved to be a persistent and surprisingly successful advocate for tuna inclusion.

In their respective houses, Inouye and Saiki would act as the torchbearers for tuna inclusion. Their staffs collaborated closely with the WPRFMC and relied heavily upon it in developing arguments and materials to support tuna inclusion and in moving tuna inclusion amendments through Congress.

B. TUNA INCLUSION HEARINGS

Although Congress held hearings on FCMA reauthorization in the summer of 1989, it also held separate hearings devoted solely to the tuna inclusion issue in both houses.[75]

The House Fisheries Subcommittee hearing overwhelmingly featured opponents of tuna inclusion, reflecting the sentiments of senior Subcommittee members and Subcommittee staff against tuna inclusion, and reinforcing institutional biases against overturning the longstanding juridical position that would have to be overcome if tuna inclusion amendments were to advance.[76] The Subcommittee declined to invite

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[75] See Conservation and Management of Migratory Fish Species: Hearing before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 101st Cong., 1st Sess. (1989) [hereinafter "1989 House Tuna Inclusion Hearing"]; Tuna Management: Hearing Before the National Ocean Policy Study of the Senate Comm. on Commerce, Science, and Transportation, 101st Cong., 1st Sess. (1989) [hereinafter "1989 Senate Tuna Inclusion Hearing"].

[76] See, e.g., 1989 House Tuna Inclusion Hearing at 3 (statement of Rep. Young, ranking Subcommittee member). See also Summary Minutes of Council Chairmen's Meeting (Jan. 27-28, 1999) at 5 (Members of Congress would ask "why they should be putting themselves through the inevitable blood bath that would result if they start looking at changing the U.S. juridical position.") (statement of Mr. Moore).

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representatives of any councils or governors to testify.[77] Of the seven witnesses that testified before the Subcommittee, only one, the representative of a recreational fishing conservation organization, testified in favor of tuna inclusion.[78] Testimony against tuna inclusion was presented by the Departments of State and Commerce, the USTF, the ATA, the East Coast Tuna Association, and a representative of Atlantic Coast swordfishermen.[79]

In the Senate, in contrast, the proponents of tuna inclusion enjoyed a far more receptive hearing before the Commerce Committee's National Ocean Policy Study. Indeed, as the witness list for the House hearing had been loaded against tuna inclusion, the witness list for the Senate hearing was loaded in favor of tuna inclusion. William

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[77] See Memorandum from Kitty Simonds to Bill Paty, re: Senate Tuna Hearings-July 20, 1989-2 PM, June 30, 1989.

[78] See 1989 House Tuna Inclusion Hearing at 22-25, 82-108 (statement of Ken Hinman, Executive Director, National Coalition for Marine Conservation). Prepared statements were submitted by representatives of another recreational fishing organization and a conservation organization supporting tuna inclusion. See id. at 60-64 (statement of C.M. "Rip" Cunningham, Founding Director, United Sport Fishermen) and id. at 138-46 (statement of Steven N. Meyer, Legislative Representative, National Wildlife Federation). A prepared statement of the Governor of American Samoa supporting tuna inclusion, which the Governor would later use to testify before the Senate Tuna Inclusion Hearing, was also included in the printed hearing. See id. at 147-152 (statement of Hon. Peter Tali Coleman, Governor of American Samoa).

[79] See 1989 House Tuna Inclusion Hearing at 4-19, 42-59 (statements of Edward E. Wolfe, Jr., Deputy Assistant Secretary for Ocean and Fisheries Affairs, Department of State, and Carmen Blondin, Deputy Assistant Secretary of Commerce for International Interests, NOAA), 20-22, 25-34, 65-81, 109-120, 129-135 (statements of James Walsh and David G. Burney, U.S. Tuna Foundation, August Felando, President, American Tunaboat Association, Steve Morton, President, East Coast Tuna Association, Rebecca L. Phillips, South Atlantic Fishery Management Swordfish Advisory Committee). Labor union representatives opposed to tuna inclusion submitted a prepared statement and a letter. See 1989 House Tuna Inclusion Hearing at 121-124 (prepared statement of Michael Sacco, President, Seafarers International Union of North America, AFL-CIO) and 136 (letter from John J. Royal, Executive Secretary-Treasurer, Fishermen and Allied Workers' Union Local 33, I.L.W.U. to the Honorable Jerry E. Studds, July 6, 1989).

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Paty, Chairman of the WPRFMC, testified on behalf of the five regional fishery management councils that, at the time, favored tuna inclusion.[80] In addition to Paty, the governor of American Samoa, the Western Pacific Council vice chair and representatives of Hawaiian commercial and recreational fishermen, among others, testified in favor of tuna inclusion.[81] Testimony against tuna inclusion was presented by the Departments of State and Commerce, the USTF, the ATA, representatives of Atlantic Coast swordfishermen, and California Senator Pete Wilson.[82]

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[80] See 1989 Senate Tuna Inclusion Hearing at 69-79 (statement of William Paty, Chairman, Western Pacific Regional Fishery Management Council). In October 1989, the Caribbean Fishery Management Council voted to reverse its opposition to tuna inclusion and instead endorsed it. See Steven A. Monsanto, Chairman, Caribbean Fishery Management Council, to James E. Douglas, Jr., Acting Assistant Administrator for Fisheries, NMFS, Nov. 1, 1989. The Caribbean Council's earlier decision to oppose tuna inclusion, taken in October 1988, had been based on concerns that tuna inclusion might negatively impact the canneries in Puerto Rico. See Draft Summary Minutes of 64th Council Meeting of the Caribbean Fishery Management Council at 11-2 attached as Annex 18 to Draft Inter-Council Congressional Position Paper: Proposed Amendments to Section 102 of the MFCMA, Dec. 19, 1988. The Caribbean Council explained that its change of position was "in response to the new development of longliner activities in the Caribbean and the Atlantic Ocean, and Council concern about the consequences of this type of fishery on swordfish and billfish stocks." Steven A. Monsanto, Chairman, Caribbean Fishery Management Council, to James E. Douglas, Jr., Acting Assistant Administrator for Fisheries, NMFS, Nov. 1, 1989.

[81] See 1989 Senate Tuna Inclusion Hearing at 7-12 (statement of Hon. Peter Tali Coleman, Governor of American Samoa), 100-113 (statement of Fritz Antsberg, commercial fisherman from Honolulu), 116-131 (statement of Trudy I. Nishihara, Hawaiian Fishing Coalition and WPRFMC Vice Chairperson), 131-135 (statement of Peter S. Fithian, Chairman, Hawaiian International Billfish Association).

[82] See 1989 Senate Tuna Inclusion Hearing at 5 (statement of Sen. Pete Wilson, California), 16-44 (statements of Edward E. Wolfe, Jr., Deputy Assistant Secretary for Ocean and Fisheries Affairs, Department of State, and Carmen Blondin, Deputy Assistant Secretary of Commerce for International Interests, NOAA), 79-100 (statements of James Walsh, U.S. Tuna Foundation and August Felando, President, American Tunaboat Association) 113-118 (statements of Michael Franks, President, Coastal Seafood Processors and Becky Phillips, South Atlantic Fishery Management Swordfish Advisory Committee). Senator Pete Wilson of California, who was clearly responding to the concerns of the ATA, testified "I have a great concern for an endangered species, those

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One of the main arguments of tuna inclusion supporters was that studies showed that tuna, and particularly commercially important skipjack and yellowfin species, were not, in fact, highly migratory so as to require international management for their effective regulation.[83] Supporters of tuna inclusion also asserted that the 1987 Tuna Treaty effected de facto recognition of coastal state jurisdiction over tuna and that elimination of the FCMA's tuna exclusion provisions and the U.S. juridical position would improve U.S. foreign relations in the Pacific.[84] Finally, supporters of tuna inclusion emphasized difficulties in billfish management posed by the FCMA's tuna exclusion provisions.[85]

According to the opponents of tuna inclusion, the negotiating "leverage" afforded by the U.S. juridical position had made conclusion of the 1987 Tuna Treaty possible.[86] Opponents of tuna inclusion also challenged the claim that tuna are not really highly

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who fish for and can tuna, particularly in the environs I represent." 1989 Senate Tuna Inclusion Hearing at 5 (statement of Sen. Pete Wilson, California).

[83] See id. at 44-47 (statement of Richard Shomura, Researcher, Hawaii Institute of Geophysics, School of Ocean and Earth Sciences and Technology, University of Hawaii); see also Ray Hilborn and John Sibert, "Is International Management of Tuna Necessary?" Marine Policy (Jan. 1989) 31.

[84] See Senate Tuna Inclusion Hearing at 2 (statement of Sen. Inouye), 7-10 (statement of The Hon. Peter Tali Coleman, Governor of American Samoa), 13 (statement of Adm. Ronald J. Hays, President, Pacific International Center for High Technology Research), 70 and 75-76 (statement of William Paty, Chairman, Western Pacific Regional Fishery Management Council).

[85] See id. at 69 and 73 (statement of William Paty, Chairman, Western Pacific Regional Fishery Management Council), 142-143 (statement of National Coalition for Marine Conservation).

[86] See id. at 16-17 (statement of Edward E. Wolfe, Jr., Deputy Assistant Secretary for Oceans and Fisheries Affairs, Department of State), 81, 88 (statement of James Walsh, U.S. Tuna Foundation), 85 (statement of David G. Burney, U.S. Tuna Foundation). They maintained that, in any event, the Tuna Treaty did not recognize coastal state jurisdiction over tuna. See id.

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migratory species, meriting international management.[87] They further argued that there was no significant foreign fishing for tuna in the U.S. EEZ and so no need to regulate or exclude such vessels.[88] They also rejected the argument that the FCMA's tuna exclusion provisions had negatively impacted billfish management in the U.S. EEZ.[89] Finally, a number of tuna inclusion opponents characterized the push for it as an effort by recreational fishermen to restrict commercial fishing in the U.S. EEZ for tuna.[90]

C. THE HOUSE TUNA INCLUSION AMENDMENT

In early August 1989, Senator William Roth of Delaware, noting the support of five regional fishery management councils and numerous sportfishing and conservation associations, introduced legislation to repeal the tuna exclusion provision of the FCMA.[91] In response to Representative Saiki's request for specific language to accomplish tuna inclusion, the chairman of the Hawaii International Billfish Association proposed the straightforward language of the Roth bill terminating the MFCMA's tuna exclusion

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[87] See id. at 18, 25-26 (statement of Edward E. Wolfe, Jr., Deputy Assistant Secretary for Oceans and Fisheries Affairs, Department of State), 52 (statement of Dr. James Joseph, Director, Interim American Tropical Tuna Commission), 80 (statement of James Walsh, U.S. Tuna Foundation), 83 (statement of David G. Burney, U.S. Tuna Foundation).

[88] See id. at 18, 27 (statement of Edward E. Wolfe, Jr., Deputy Assistant Secretary for Oceans and Fisheries Affairs, Department of State), 80 (statement of James Walsh, U.S. Tuna Foundation), 83 (statement of David G. Burney, U.S. Tuna Foundation).

[89] See id. at 27 (statement of Edward E. Wolfe, Jr., Deputy Assistant Secretary for Oceans and Fisheries Affairs, Department of State), 80 (statement of James Walsh, U.S. Tuna Foundation), 96 (statement of August Felando, President, American Tunaboat Association).

[90] See id. at 84 (statement of David G. Burney, U.S. Tuna Foundation), 95 (statement of August Felando, President, American Tunaboat Association).

[91] See 135 Cong. Rec. S10273 (1989) (statement of Sen. Roth introducing S. 1531, the "Tuna Management Act of 1989").

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provisions.[92] This would become known as the "Saiki amendment." While its language was simple, securing House passage of a tuna inclusion amendment would prove complex.

In the early fall of 1989, the staff of the House Fisheries Subcommittee developed legislation designed to maintain the tuna exclusion and preserve the juridical position, but at the same time authorize the councils to collect data from tuna fishermen.[93] In the Subcommittee markup on September 19, 1989, the staff proposal, offered by the Subcommittee chairman Gerry Studds of Massachusetts and ranking member Don Young of Alaska, was adopted.[94] Representative Saiki offered her amendment to repeal the tuna exclusion from the MFCMA, but it was defeated by a voice vote.[95]

Undeterred by the defeat of her amendment in the Subcommittee markup, Saiki made plans to again introduce her amendment at the full Committee markup scheduled for October 5, 1989. In support of this effort, she solicited individual letters from the

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[92] See Peter S. Fithian, Chairman, Hawaii International Billfish Association, to Rep. Patricia Saiki, Sept. 13, 1989.

[93] See Memorandum from Kitty Simonds to Marina Chang (Pat Saiki) re: Studds/Young Legislation, Sept. 18, 1989; Memorandum from Kitty Simonds to Gerald Sumida re: Congressmen Studds/Young Amendment to H.R. 2061 (the authorization of MFCMA), Sept. 22, 1989.

[94] See House Comm. on Merchant Marine and Fisheries, Magnuson Fishery Conservation and Management Act Authorizations, H.R. Rep. No. 393, 100 1st Cong., 1st Sess. (1989) [hereinafter "House Tuna Inclusion Report"] at 19.

[95] Memorandum from Kitty Simonds to Councilmembers re: MFCMA Reauthorization, Sept. 22, 1989; House Tuna Inclusion Report at 19.

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PBDC governors tailored to each governor's area.[96] Saiki's tuna inclusion amendment was adopted during the full Committee markup, by voice vote.[97]

The full Committee's approval of tuna inclusion came as a shock to the distant water tuna industry and its supporters in the House. Representative Don Young criticized the Committee's action as having "ignored a carefully constructed compromise by the Subcommittee to respond to conservation problems with swordfish and billfish."[98] In his view, ending tuna exclusion would "spell disaster for our distant water tuna fleet."[99] Moreover, he believed that the amendment "certainly cannot be represented as the intent of the Committee" because it was "adopted by voice vote at a time when many of the Committee members were not present at the mark-up."[100] Nonetheless, Representative Young did not feel Saiki's tuna inclusion amendment justified voting against the Committee's bill, which contained numerous other amendments to the MFCMA.[101]

In response to the Committee's adoption of the tuna inclusion amendment, the tuna industry drafted a letter that members of the California congressional delegation sent to the Chairman of the Committee to express their objection to it.[102] In addition, the

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[96] See Kitty Simonds to Dr. Dick Kosaki, Special Assistant to the Governor, re: Reauthorization of the MFCMA: Governors' Tuna Inclusion Resolution-April 1989, Oct. 3, 1989.

[97] See Press Release from United States Congresswoman Pat Saiki, "Saiki Amendment on Tuna Accepted: Including Tuna and Magnuson Act Passes Full Committee!" Oct. 5, 1989; House Tuna Inclusion Report at 21.

[98] House Tuna Inclusion Report (additional view of Mr. Young) at 72.

[99] House Tuna Inclusion Report (additional view of Mr. Young) at 72.

[100] House Tuna Inclusion Report (additional view of Mr. Young) at 72.

[101] 136 Cong. Rec. H. 236 (daily ed. Feb. 6, 1990) (statement of Rep. Young).

[102] Letter from members of the California congressional delegation to Chairman Walter Jones, Oct. 25, 1989, reprinted in 136 Cong. Rec. H. 236 (daily ed. Feb. 6, 1990) (statement of Rep. Anderson).

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industry lobbied House members to reject the tuna inclusion amendment reported by the Committee,[103] and, working thorough American Samoa's non-voting delegate to Congress, Eni Faleomavaega, tried to persuade the PBDC governors to withdraw their support for tuna inclusion and instead support "compromise" legislation being developed by Senate staff that did not repeal the MFCMA's tuna exclusion provision.[104]

In early January 1990, during the Congressional recess, the full Committee held a hearing on various ocean issues, including fisheries, in Honolulu, Hawaii.[105] Although the Committee had already reported FCMA amendments, including Representative Saiki's tuna inclusion amendment, tuna inclusion supporters from the region used the hearing as an opportunity to reiterate their commitment to it.[106]

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[103] See USTF to Rep. Saiki, Oct. 17, 1989; ATA, "The Tuna Repeal Briefing Paper Amendment to H.R. 2061" (c. Oct. 1989).

[104] See Kitty Simonds to Maile Luuwai, Dec. 18, 1989, attacking draft letter from Gov. John Waihee to Rep. Faleomavaega (undated); Memorandum from Kitty Simonds to Bryson, Mahood, Rolon, Marshall, Swingle, re: Highly Migratory Council, Dec. 19, 1989.

[105] See The Authorization of the Coastal Zone Management Act, Hard Mineral Resources in the Exclusive Economic Zone, Fisheries Issue, An Extension of the Territorial Sea: Hearings before the House Comm. on Merchant Marine and Fisheries, 101st Cong., 2d Sess. (1990) [hereinafter "1990 House MM&F Committee Hearing"). The Committee held a hearing in Hawaii at the urging of Representative Saiki. See Kitty Simonds to Jim McHugh re: Fisheries Subcommittee Hearing, Apr. 19, 1989; see also 1990 House MM&F Committee Hearing at 3 (statement of Rep. Jones).

[106] See 1990 House MM&F Committee Hearing at 5-14 (statement of John D. Waihee, III, Governor of Hawaii), 14-19 (statement of William W. Paty, Jr., Chairman, Western Pacific Regional Fishery Management Council), 19-22 (statement of Peter Fithian, Chairman, Hawaiian International Billfish Association), 22-26 (statement of Peter T. Wilson, President, Global Ocean Consultants, Inc.), 48-56 (statement of Hon. Peter Tali Coleman, Governor, Territory of American Samoa), 65-68 (statement of Don Woodworth on behalf of the Commonwealth of the Northern Mariana Islands), 72-77 (statement of Peter Leon Guerrero, Director, Bureau of Planning, representing the Honorable Joseph Ada, Governor of Guam), 77-81 (statement of Richard Shomura, Researcher, Institute of Geophysics, University of Hawaii), and 83-85 (statement of Paul P. (Skip) Spaulding, III, Sierra Club Legal Defense Fund). The Committee held the

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On February 6, 1990, the House approved the FCMA reauthorization amendments, which included the Saiki tuna inclusion amendment, by an overwhelming vote of 396 to 21 (with 14 abstentions). Representative Glenn Anderson of San Pedro, California, insisted on a recorded, rather than a voice, vote, saying: "When the domestic tuna industry, a $26 billion industry, collapses at the weight of this provision, I can say I had no part in it."[107]

D. THE SENATE TUNA INCLUSION AMENDMENT

As they had in the House, the tuna inclusion forces would also have to overcome in the Senate advocacy by committee staff of "compromise" legislation supported by the U.S. tuna industry that would have maintained the MFCMA's tuna exclusion and preserved the juridical position. In fall 1989, the U.S. distant water tuna industry successfully lobbied the NOPS staff to develop and support such "compromise" legislation. Under the "compromise" legislation, the regional councils would have been divested of the authority they already had to manage highly migratory species (viz., billfish) and such management authority would have been given to a "Highly Migratory Council" consisting of one representative from each of the regional fishery management councils. This Highly Migratory Council would not have the authority to manage tuna, but would have acted as an advisory body to the U.S. delegations to international organizations such as the IATTC and ICATT.[108]

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hearing in Hawaii at the urging of Representative Saiki. See Kitty Simonds to Jim McHugh re: Fisheries Subcommittee Hearings, Apr. 19, 1989; see also 1990 House MM&F Committee Hearing at 3 (statement of Committee Chairman Walter B. Jones, North Carolina) and 3-5 (statement of Representative Saiki, Hawaii).

[107] Pacific Fishing (May 1990) at 42.

[108] Memorandum from Kitty Simonds to Maile Luuwai re: Reauthorization of the Magnuson Fishery Conservation and Management Act, Repeal Section 102, Tuna

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The distant water tuna industry was not the only segment of the U.S. fishing industry opposed to tuna inclusion. Commercial swordfishermen on the East Coast had avoided regulation by the fishery management councils because billfish management plans had regularly been rejected by NMFS, pursuant to the 1979 NOAA legal opinion, for failing to allow a reasonable opportunity to fish for tuna.[109] These swordfishermen feared that tuna inclusion would remove this impediment to billfish management and that, if they were subject to fishery management council measures, "the recreational fishermen w[ould] regulate them out of business."[110] The concerns of commercial swordfishermen led Massachusetts Senator John Kerry, a member of the Commerce Committee and the Vice Chairman of the National Ocean Policy Study, to oppose tuna inclusion.[111]

Exclusion, Etc., Oct. 24, 1989; Memorandum from Kitty Simonds to Council Members, re: Senate National Ocean Policy Committee Staff Proposal for a Highly Migratory Species Council, Nov. 29, 1989; Memorandum from James F. McHugh to Jack Ellis, re: Section 102 of MFCMA, Dec. 11, 1989. A single highly migratory species council had been suggested as a possible alternative for U.S. involvement in tuna management in the paper prepared by Professor Michael Orbach for the Councils' tuna inclusion initiative. See Michael K. Orbach and John R. Mailolo, "United States Tuna Policy: A Critical Assessment," Dec. 1988, Report to the South Atlantic Fishery Management Council at 24. Unlike the NOPS compromise proposal, Orbach's highly migratory species council would have had management responsibility for tuna. See id.

[109] See Memorandum from Kitty Simonds to Maile Luuwai, re: "Tuna In," Nov. 8, 1989 at 1-2.

[110] Memorandum from Kitty Simonds to Maile Luuwai, re: "Tuna In," Nov. 8, 1989 at 2.

[111] See Memorandum from Kitty Simonds to Jim Dittmar, Nov. 7, 1989; see also Memorandum from Kitty Simonds to Maile Luuwai, "Tuna In," Nov. 8, 1989; Margaret L. Cummisky to Jerry Norris, May 16, 1990, at 2.

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In response to the staff "compromise" legislation, the Western Pacific Council met and rejected the proposal for a highly migratory council.[112] The Western Pacific Council communicated its objection to the idea to Senator Inouye, and the Council's Executive Director, after collaborating with the Senator's fisheries staffer, informed the executive directors of the other regional councils supporting tuna inclusion that the Senator wanted them to send letters opposing the proposal, if they in fact did.[113] In addition, the Western Pacific Council worked closely with the Pacific Island governors and the PBDC to maintain their continued support for tuna inclusion, and to ensure that such support was communicated to Senator Inouye.[114] In a further effort to bolster the

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[112] See Memorandum from Kitty Simonds to Bryson, Mahood, Rolon, Marshall, Swingle, re: Highly Migratory Council, Dec. 19, 1989.

[113] See Memorandum from Kitty Simonds to Bryson, Mahood, Rolon, Marshall, Swingle, re: Highly Migratory Council, Dec. 19, 1989.

[114] See The PBDC governors opposed the NOPS staff "compromise." See Memorandum from Jerry B. Norris to Governor Waihee re: Requested Comments on Congressman Hunkin/Saiki Tuna Inclusion Issue, Nov. 28, 1989; Memorandum from Kitty Simonds to Bill Paty, re: Mishmash—Waihee's Response to Eni, Senator Inouye and Tuna, and the January Hearings, Dec. 15, 1989; Memorandum from Kitty Simonds to Sen. Inouye staffer Maile Luuwai, Dec. 18, 1989. Interestingly, the executive director of the PBDC informed Hawaii Governor Waihee of his belief that politics had clouded the judgment of the congressman from American Samoa on the tuna inclusion issue: "[O]ne should realize that there are heavy politics between the Governor and Congressman from American Samoa and it is appearing in every facet of their relationship—both public and private. Given Governor Coleman's experience and his understanding of the canned tuna industry, I would side with his position that this issue, from a conservation stand-point balances the concerns of the tuna canneries moving out or a major reduction in employment—a position taken by Congressman Faleomavaega that I think he has blown out of proportion." Memorandum from Jerry B. Norris to Governor Waihee re: Requested Comments on Congressman Hunkin/ Saiki Tuna Inclusion Issue, Nov. 28, 1989, at 2. Internal Samoan politics would continue to be a factor in the debate over tuna inclusion. In early 1990, the Fono, the American Samoan legislature, would pass a resolution opposing tuna inclusion. See letter from Governor Coleman to Speaker of the House of Representatives, Legislature of American Samoa, re: HCR No. 87, Mar. 27, 1990; see also "Governor Coleman Explains His Support for Saiki Amendment," Samoa Daily News, Mar. 30, 1990, at 1. At the same time, Congressman Faleomavaega engaged in a very public dispute in the press over what he felt was the mischaracterization of his

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movement for tuna inclusion, and rebuff the NOPS staff "compromise," the Western Pacific Council's Executive Director coordinated with Senator Inouye's fisheries staffer in developing questions to be directed to the U.S. distant water tuna industry about the economic changes that had occurred within it since passage of the FCMA in 1976.[115] In addition to making the economic case, the Western Pacific Council undertook to highlight the uniqueness of the U.S. juridical position among major distant water fishing nations by soliciting the U.S. embassy in Japan to inquire of the government of Japan whether Americans could fish for tuna within the Japanese EEZ.[116]

In spring 1990, the NOPS staff "compromise" legislation was further refined in an attempt to provide more U.S. management authority over tuna, while at the same time preserving the putative benefits of the juridical position for the U.S. distant water tuna industry. In particular, the revised legislation would have given a "Work Group" management authority over U.S. vessels fishing for highly migratory species (including tuna) within the U.S. EEZ, and over foreign fishing for highly migratory species (except for tuna) in the U.S. EEZ. In addition, the "Work Group" would have been able to provide advice to the IATTC and ICATT through its participation on the U.S. delegation to them. Moreover, because the "Work Group" would have consisted of only the

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position and actions with respect to tuna inclusion by publications with connections to the governor. See, e.g., "Faleomavaega Looking Forward to Race," Samoa News, Mar. 19, 1990, at 4; "'Hogwash,' says Fofoga o Samoa," Samoa News, Mar. 23, 1990, at 4.

[115] See Memorandum from Kitty Simonds to Maile Luuwai, re: Letter to Tuna Industry, Jan. 16, 1990.

[116] See Kitty Simonds to James Salisbury, Fisheries Attaché, U.S. Department of State, Jan. 19, 1990; Kitty Simonds to Jim Salisbury, Fisheries Attaché, U.S. Embassy Tokyo, Feb. 9, 1990; James W. Salisbury, Regional Fisheries Attaché, to Kitty Simonds, Feb. 14, 1990; James W. Salisbury, Regional Fisheries Attaché, to Kitty Simonds, Feb. 15, 1990.

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Atlantic, Gulf and Caribbean Councils, it was unclear about the authority of the Western Pacific Council, the Pacific Council and the Northern Pacific Council to manage fishing for tuna within the U.S. EEZ by U.S. vessels.[117]

In April 1990, tuna inclusion received a boost when the three largest U.S. canneries—Star Kist, Bumble Bee and Van Camp—announced they would no longer purchase or market tuna caught by purse seine vessels that encircled dolphins.[118] Because encircling dolphins swimming above tuna was the predominant method of fishing by the U.S. purse seine fleet fishing in the Eastern Tropical Pacific ocean, the processors' moratorium had the effect of mooting the issue of negotiating satisfactory access for such vessels to the EEZs of Latin American countries.[119] The need for leverage for such negotiations had long been one of the primary arguments of the U.S. distant water tuna industry and the State Department against tuna inclusion.

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[117] See Memorandum Kitty Simonds to Maile Luuwai, re: NOPS Draft-Second Review, Mar. 28, 1990; William W. Paty, Chairman, Western Pacific Regional Fishery Management Council, to Senator Daniel K. Inouye, Mar. 28, 1990; Peter S. Fithian, Chairman, Hawaiian International Billfish Association, to Senator Daniel K. Inouye, Mar. 27, 1990.

[118] See Michael Parrish, "At Star Kist, Film Turn Tide for Dolphins," The Honolulu Advertiser, Apr. 16, 1990, at D2; "Tuna & Dolphins: It Took Consumer Pressure," The Honolulu Advertiser, Apr. 16, 1990, at A8.

[119] See Memorandum from Kitty Simonds to Fred Zeder, re: Tuna, the Magnuson Act, Representative Saiki and Senator Inouye, Apr. 18, 1990. One analysis of the impact of the Marine Mammal Protection Act on the decline of the Southern California tuna industry concludes that the decision of the canneries to join the "dolphin-safe" boycott was "[t]he killing blow to San Diego's tuna industry." Mark Schoell, "The Marine Mammal Protection Act and its Role in the Decline of San Diego's Tuna Fishing Industry," The Journal of San Diego History, Vol. 45 (winter 1999), available at http://www.sandiegohistory.org/journal/99winter/tuna.htm. Relying on IATTC data, Schoell reports that "[i]n the two years that followed the [canneries'] agreement, the number of boats in San Diego's tuna fleet dropped from thirty to eight." Id.

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Before the full Commerce Committee mark-up of the MFCMA amendments, the Western Pacific Council sought to fortify Senator Inouye's commitment to tuna inclusion. Already in March, 1990, Inouye had written the Committee's Chairman to make clear his intention to introduce a tuna inclusion amendment.[120] Inouye provided several reasons for tuna inclusion, including the need for more effective tuna management than was being provided under the auspices of ICATT, and the need for the Western Pacific Council to be empowered to effectively manage the rapidly growing longline fleet in its region.[121] In an effort to galvanize Inouye for the Committee mark-up, the Western Pacific Council's Executive Director wrote Inouye's fisheries staffer that the mark-up presented the "last shot at tuna inclusion."[122] "If we don't have tuna inclusion," Simonds wrote, "we cannot control foreign fishing for tuna."[123] She also insisted that management of tuna by the Secretary of Commerce, rather than the regional councils, "would again take away from the U.S. EEZ in the Pacific management of its only renewable resource."[124] And Simonds made it clear that the councils needed to

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[120] See Daniel K. Inouye to Ernest F. Hollings, Chairman, Committee on Commerce, Science and Transportation, Mar. 21, 1990.

[121] See Daniel K. Inouye to Ernest F. Hollings, Chairman, Committee on Commerce, Science and Transportation, Mar. 21, 1990, at 1-2.

[122] Memorandum from Kitty Simonds to Maile Luuwai, re: "Last Shot at Tuna Inclusion-Pacific," May 20, 1990.

[123] Memorandum from Kitty Simonds to Maile Luuwai, re: "Last Shot at Tuna Inclusion-Pacific," May 20, 1990.

[124] Memorandum from Kitty Simonds to Maile Luuwai, re: "Last Shot at Tuna Inclusion-Pacific," May 20, 1990.

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have the authority to "restrict the number of boats in the fishery" because the Western Pacific Council wanted to limit the influx of longliners into its region.[125]

Going into the mark-up, the likelihood of success of Inouye's tuna inclusion amendment was uncertain.[126] When the full Committee met on May 22, 1990, it accepted Inouye's tuna inclusion amendment by a vote of 11 to 8.[127] As an indication of the controversy surrounding the issue and the significance attached to it, the roll call vote taken by the Committee on the tuna inclusion amendment was the only such vote taken on several amendments and on the bill as amended itself; all other votes were by voice vote.[128]

The bill reported out of the Commerce Committee redefined "highly migratory species" to include tuna, and gave the Secretary of Commerce management authority over highly migratory species on the Atlantic and Gulf Coasts and in the Caribbean, but assigned such management authority to the fishery management councils in the Pacific.[129] In addition, the bill's highly migratory species provisions prohibited

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[125] Memorandum from Kitty Simonds to Maile Luuwai, re: Critique of East Coast Tuna Association Proposed Senate MFCMA Language, May 14, 1990. Simonds stated that "this is what we plan to do in our Hawaii Longline Fishery because we know that 15 East Coast longliners plan to home port in Hawaii soon to fish for swordfish." Id.

[126] See Margaret L. Cummisky to Jerry Norris, PBDC, at 2-3, May 16, 1990.

[127] Sen. Comm. on Commerce, Science, and Transportation, S. 1025, Sen. Rep. No. 414, 101st Cong., 2d Sess. 28 (1990) [hereinafter "Senate Tuna Inclusion Report"] at 10, 27-28. Press Release from Senator Daniel K. Inouye, "Inouye-Akaka Tuna Amendment Approved," May 22, 1990; Memo from Ken Hinman to Chris Weld, Jim McHugh, Jack Ellis, Harry Upton, Bob Hayes re: Senate Passage of MFCMA Amendments 5/22/90, May 29, 1990.

[128] Senate Tuna Inclusion Report at 27-28.

[129] See Senate Tuna Inclusion Report at 3-5, 15, 17; see also Memorandum by Margaret Frailey Hayes, Assistant General Counsel for Fisheries (NOAA), re: Comparison of Selected Issues in the House and Senate Bills Amending the Magnuson Fishery Conservation and Management Act, May 22, 1990.

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secretarial management plans for highly migratory species from establishing domestic quotas different from the allocations or quotas established for U.S. fishermen by international organizations.[130] As a practical matter, both secretarial management and the restriction on setting quotas benefited the U.S. commercial tuna and swordfishermen in the Atlantic who wanted neither to be subjected to council management nor to be subjected to stricter management than the vessels of other nations that participated in ICATT. In addition, the bill authorized the Secretary of Commerce to impose a temporary moratorium on new entrants to prevent overfishing.[131] The bill's provisions for secretarial management of highly migratory species on the East Coast, tying domestic effort limitations to quotas established for U.S. vessels by international organizations, and authorizing the Secretary to establish a moratorium on new entrants to a fishery, would prove to be controversial and, to varying degrees, would threaten the ultimate passage of tuna inclusion legislation.

If tuna was going to be managed by the United States, and billfish, including swordfish, was for the first time going to be effectively managed by the United States, the East Coast commercial tuna and swordfishermen preferred for that management to be conducted by the Department of Commerce, and not the regional councils, which they believed were dominated by recreational fishermen. Sportfishing and conservation organizations, on the other hand, were opposed to Secretarial management of highly

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[130] See Senate Tuna Inclusion Report at 21; see also Memorandum by Margaret Frailey Hayes, Assistant General Counsel for Fisheries (NOAA), re: Comparison of Selected Issues in the House and Senate Bills Amending the Magnuson Fishery Conservation and Management Act, May 22, 1990.

[131] See Senate Tuna Inclusion Report at 7,l 21-22. See Summary of S. 1025 prepared by Jack Dunigan, NOA/MFS, May 23, 1990, attached to Memorandum from Bob Iversen to Kitty Simonds, May 23, 1990.

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migratory species because, they believed, the Commerce Department was "vulnerable to Washington power politics" in a way that the councils were not.[132] By transferring management responsibility for highly migratory species from the councils to the Commerce Department, the recreational interests believed, "[p]ublic and State fishery agency input will be diminished while special interest lobbying groups will have greater power by dealing directly with the Commerce Department and/or U.S. representatives on International Fishery Commissions."[133]

The provision of the Senate bill tying any quotas for highly migratory species established by a secretarial management plan to quotas established by international organizations was also opposed by sportfishing and conservation organizations. According to one critic of the limitation, prohibiting the United States from proposing stricter management measures than those established by international organizations "would have the dual effect of tying the hands of U.S. managers and discouraging international cooperation."[134] Sportfishing and conservation organizations believed that, if domestic quotas could not be set lower than those established by international organizations, then the mere existence of an international quota would remove the incentive for development of a domestic management plan and, by the same token,

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[132] See Memorandum from Ken Hinman to Those Interested in Management of Highly Migratory Species under the Magnuson Act, re: Update and Comments on Senate/House Bills to Reauthorize the Magnuson Fishery Conservation and Management Act, June 26, 1990.

[133] Synopsis of Magnuson Act Highly Migratory Species Management Issues, attached to Memorandum from Ken Hinman to Those Interested in Management of Highly Migratory Species under the Magnuson Act, re: Update and Comments on Senate/House Bills to Reauthorize the Magnuson Fishery Conservation and Management Act, June 26, 1990.

[134] Memorandum from Ken Hinman, Executive Director, National Coalition for Marine Conservation, to Maile Luuwai, re: Magnuson Act, June 22, 1990, at 2.

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implementation of a domestic quota would diminish the incentive for reaching agreement within the international organization.[135] Recreational and conservation groups charged, correctly, that East Coast commercial tuna and swordfish fishermen wanted quotas established by domestic management to be tied to ICATT because they believed they had more influence with the U.S. delegation to that organization than with either the Atlantic Coast Councils or the fisheries officials in the Department of Commerce.[136]

The Western Pacific Council also expressed concern about the possible implications of the limitation on domestic quotas for its management authority over highly migratory species. At the time, the provision tying domestic quotas to international quotas only had practical effect on management of fisheries in the Atlantic and the Gulf, because of ICATT's activities. Nonetheless, it appears the Western Pacific Council and supporters of tuna inclusion in the region feared that the U.S. distant water tuna industry might be inspired to urge the Department of State to advocate tuna management by the IATTC in the hopes of restricting tuna management by the Western Pacific Council and the U.S. flag Pacific Islands through IATTC quotas.[137] From a distance it seems farfetched that the U.S. tuna industry would be able to use the IATTC in that way, because the organization did not include Hawaii and the U.S. flag Pacific

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[135] See Memo from Kin Hinman to Chris Weld, Jim McHugh, Jack Ellis, Harry Upton, Bob Hayes, re: Senate Passage of MFCMA Amendment 5/22/90, May 29, 1990, at 1.

[136] See Synopsis of Magnuson Act Highly Migratory Species Management Issues at 2, attached to Memorandum from Ken Hinman to Those Interested in Management of Highly Migratory Species Under the Management, re: Update and Comments on Senate/House Bills to Reauthorize the Magnuson Fishery Conservation and Management Act, June 26, 1990.

[137] See Jack Ellis to Robert Hayes, re: S. 1025, Sept. 20, 1990; James F. McHugh to Jack Ellis, re: Magnuson, Oct. 2, 1990; Peter S. Fithian to Daniel K. Inouye, Oct. 2, 1990, attached to Jack Ellis to Kitty Simonds, re: S. 1025, Oct. 4, 1990.

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Islands within its jurisdiction and for many years had not been establishing quotas but only conducting data collection.[138] Moreover, although the U.S. flag Pacific Islands hoped significant tuna fisheries would be developed in their waters, the U.S. distant water industry had not shown a real interest in fishing those waters. Nonetheless, the Western Pacific Council was reticent to underestimate the determination of the U.S. distant water tuna industry and perceived the limitation of the bill tying domestic to international quotas as a potential impediment to its aspirations for tuna management.[139] How much of the Western Pacific Council objection to tying domestic to international quotas was real, or feigned to put pressure on the Senate to address the East Coast recreational and conservation interests' concerns in order to move the Senate bill forward, is open to question. Because of those interests' dissatisfaction with secretarial management of Atlantic and Gulf Coast highly migratory species, and the tying of that management to ICATT quotas, Senator Bentsen of Texas, a member of the National Ocean Policy Study, had placed a hold on the Senate bill.[140]

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[138] From 1966 to 1979, the IATTC set an annual catch quota for yellowfin in the Commission Yellowfin Regulatory Area ("CYRA"), but abandoned this function in 1980 after Ecuador, Mexico and Costa Rica withdrew from the organization. See Bonanno and Constance (1996) at 131-34.

[139] See Memorandum from Kitty Simonds to Jennifer Goto and Maile Luuwai, re: Magnuson Act Reauthorization, Oct. 4, 1990. In a cautionary memo to Inouye's staff, the Western Pacific Council Executive Director wrote that she "wouldn't put it past Felando, Weddig, etc. to push the State Department toward this end as soon as the legislation is approved by the Congress." Id. A Hawaii-based recreational supporter of tuna inclusion expressed the concern that while ICATT did not operate in the Pacific, he could hear the U.S. distant water tuna industry "reving up their IATTC." Peter S. Fithian to Bob Hayes, Oct. 4, 1990. See also Peter S. Fithian to Daniel K. Inouye, Oct. 2, 1990.

[140] See Memorandum from Kitty Simonds to Jennifer Goto, re: "Tuna In," Sept. 18, 1990; Jack Ellis to Robert Hayes, re: S. 1025, Sept. 20, 1990. The Western Pacific Council Executive Director wrote Inouye's staff that while she was aware of the reason for the hold on the bill, the Council "would prefer the legislation to go to the floor as is

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On October 11, 1990, the Senate debated and passed MFCMA reauthorization legislation asserting U.S. jurisdiction over tuna within the EEZ. While the proponents of tuna inclusion prevailed on this most important issue, some of them were not completely happy with the bill passed by the Senate. In particular, the Senate bill retained the provision requiring secretarial management of highly migratory species on the Atlantic and Gulf Coasts.[141] It also included provisions crafted by the National Ocean Policy Study staff[142] that appeared to temper, but not altogether eliminate, the requirement that secretarial plans for highly migratory species could not establish different quotas than those established for U.S. vessels by ICATT.[143] The bill passed by the Senate also added a provision to delay the effective date of the tuna inclusion amendments until January 1,

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ASAP and let the irritating provisions be ironed out in conference." Memorandum from Kitty Simonds to Jennifer Goto, re: "Tuna In," Sept. 18, 1990.

[141] See 136 Cong. Rec. S14961 (Oct. 11, 1990) (statement of Sen. Hollings).

[142] See Robert G. Hayes to USF Group, Oct. 9, 1990 (attaching staff proposed language for S. 1025).

[143] See 136 Cong. Rec. S14962 (Oct. 11, 1990) (statement of Sen. Hollings). The bill reported by the Commerce Committee provided that such fishery management plans could "not have the effect of increasing or decreasing any allocation or quota of fish provided to the United States under [any international] treaty or agreement." See 136 Cong. Rec. S14957 (Oct. 11, 1990) (sec. 110(b)(3)(D)(ii)); see also Senate Tuna Inclusion Report at 21. The bill passed by the Senate provided that management measures developed by the Secretary for highly migratory species had to "be fair and equitable and in allocating fishing privileges among U.S. fishermen and not have economic allocation as the sole purpose." 136 Cong. Rec. S14962 (Oct. 11, 1990) (statement of Sen. Hollings) (sec. 110(b)(3)(D)(ii)). In addition the bill passed by the Senate had an additional provision designed to provide comfort to East Coast commercial tuna and swordfish fishermen that specified: "With respect to a highly migratory species for which the United States is authorized to harvest an allocation or quota under a relevant international fishery agreement, the Secretary shall provide fishing vessels of the United Stated with a reasonable opportunity to harvest such allocation or quota." 136 Cong. Rec. S14962 (Oct. 11, 1990) (statement of Sen. Hollings) (sec. 110(a)(3)(E)). The ambiguous language of the Senate bill necessitated an extensive colloquy among Senators Kerry, Bentsen, Hollings and Roth to clarify its meaning. 136 Cong. Rec. S14971-14972 (Oct. 11, 1990).

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1992, offered by Senator Inouye as a "compromise,"[144] that had not been included in the bill reported by the Commerce Committee.[145] While not limited to highly migratory species, the bill passed by the Senate also, as had the bill reported by the Commerce Committee, provided for the Secretary of Commerce to impose moratoria on new entrants to fisheries in order to prevent overfishing.[146]

E. RECONCILIATION OF THE HOUSE AND SENATE BILLS

The legislation next returned to the House for its consideration of the Senate amendments. While the House bill had provided for tuna inclusion, it did not contain the controversial provisions for secretarial management of highly migratory species on the Atlantic and Gulf Coasts, restrictions on such management authority tying domestic quotas to quotas established by international organizations, a delayed effective date for tuna inclusion, or authorization of temporary moratoria on new entrants to fisheries to prevent overfishing. When it took up the Senate bill on October 23, 1990, the House concurred with the Senate's amendments, except the provision authorizing the Secretary to impose temporary moratoria on new entrants to fisheries.[147]

The House's deletion of the temporary moratorium provision appears to have been spearheaded by Representative Young of Alaska, who described the provision as

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[144] See 136 Cong. Rec. S14971 (Oct. 11, 1990) (Statement of Sen. Inouye).

[145] See 136 Cong. Rec. S14961 (Oct. 11, 1990) (statement of Sen. Hollings).

[146] See 136 Cong. Rec. S14962 (Oct. 11, 1990) (statement of Sen. Hollings) (sec. 110(e)(1)).

[147] See 136 Cong. Rec. H11878-11893 (Oct. 23, 1990). As had occurred in the Senate, House members concerned to protect the interests of East Coast commercial tuna and swordfish fishermen put forth their understandings of the meaning and impact of the provisions of the legislation restricting the authority of the Secretary of Commerce in setting catch quotas for U.S. vessels that differed from those established by international organizations. See 136 Cong. Rec. H118880-H11889 (statement of Rep. Studds of Massachusetts) and H11890 (statement of Rep. Saxton of New Jersey).

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one "which would have allowed the Secretary of Commerce to determine who could fish and who could not fish in our Nation's waters."[148] Young stated that the provision "is contrary to every action taken by this House in the past 14 years that the Magnuson Act has been in effect and therefore has been removed from the bill."[149] Disagreement between the House and Senate over the temporary moratorium provision threatened passage of the legislation and its presentment to the President. The Senate bill's language authorizing the Secretary to impose such a moratorium in any fishery throughout the nation masked a regional dispute over access to the Bering Sea fisheries by Washington and Alaska vessels.[150]

Concern that the Senate would not accept the House amendment, but rather would reinsert the temporary moratorium provision in the House bill and send it back to the House, alarmed supporters of tuna inclusion in Hawaii. Although they themselves wanted a moratorium placed on new entrants to the Hawaii-based longline fishery,[151] they told Senator Inouye's staff that tuna inclusion should not be sacrificed over the moratorium issue.[152] Senator Inouye communicated the same desire to his Commerce Committee colleagues.[153] When the Chairman of the House Merchant Marine and

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[148] See 136 Cong. Rec. H11892 (Oct. 23, 1990) (statement of Rep. Young of Alaska).

[149] See 136 Cong. Rec. H11892 (Oct. 23, 1990) (statement of Rep. Young of Alaska).

[150] See 136 Cong. Rec. S14970 (Oct. 11, 1990) (statement of Sen. Adams of Washington).

[151] See Memorandum from Kitty Simonds to Jennifer Goto, re: House Merchant Marine/Senate Commerce/Staff Meeting Today Regarding Senate Passed MFCMA Reauthorization, Oct. 21, 1990.

[152] See Memorandum from Kitty Simonds to Jennifer Goto, re: MFCMA Reauthorization, Oct. 25, 1990.

[153] See Memorandum from Kitty Simonds to Jennifer Goto, re: MFCMA Reauthorization, Oct. 25, 1990.

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Fisheries Committee then called the chief Senate proponent of the temporary moratorium provision, Washington Senator Brock Adams, Adams agreed to end his insistence on its inclusion in the MFCMA reauthorization bill.[154] The Senate thereafter acceded to the House amendments.

On November 28, 1990, President George Bush signed the "Fishery Conservation Amendments of 1990" into law.[155] In a signing statement, the President, although acknowledging that the legislation delayed elimination of tuna exclusion until January 1, 1992, declared that "[a]s a matter of international law, effective immediately the United States will recognize similar assertions by coastal nations regarding their exclusive economic zones."[156] This announced the demise of the juridical position in international diplomacy, to the extent it denied coastal state jurisdiction over tuna in the EEZ, and removed a long-standing irritant in U.S. foreign relations with many nations.[157] That aspect of the U.S. juridical position emphasizing the need for coastal and fishing states to cooperate in the conservation and management of tuna throughout their range, as mandated by Article 64 of the Law of the Sea Convention, would live on as an important element of U.S. fisheries diplomacy.

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[154] See Kitty Simonds to Jennifer Goto, re: MFCMA Reauthorization, Oct. 25, 1990.

[155] See P.L. 101-627; Statement by the President upon signing P.L. 101-627 of November 28, 1990; 26 Weekly Compilation of Presidential Documents 1932 (Dec. 3, 1990).

[156] See Statement by the President upon signing P.L. 101-617 into law on November 28, 1990, at 1.

[157] It is worth recalling that in recommending a veto of the FCMA in 1976, the State Department had predicted that its tuna exclusion provisions would cause difficulties in U.S. fisheries relations. See Ch. 4, text accompanying n. 116. The signing statement's declaration also vitiated any impact the delayed effective date of tuna inclusion might have had in smoothing the U.S. distant water tuna industry's transition to a post-tuna exclusion world.

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CHAPTER 7: ELABORATING AND IMPLEMENTING ARTICLE 64: THE U.N. FISH STOCKS AGREEMENT AND THE DEVELOPMENT OF A TUNA CONVENTION FOR THE WESTERN AND CENTRAL PACIFIC OCEAN

While tuna inclusion and the demise of the U.S. refusal to recognize coastal state jurisdiction over tuna may fairly be characterized as a watershed event, not only in U.S. fisheries policy, but in the international law of fisheries, it did not signal an end to disputes over coastal state regulation of fishing for highly migratory species in EEZs. The jurisdictional conflicts inherent in highly migratory species management were highlighted yet again in the negotiation of the U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks that took place in New York between 1993 and 1995.[1]

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[1] The commentary on the Conference and the treaty it produced is extensive. See, e.g., Moritaka Hayashi, "United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: An Analysis of the 1993 Sessions," 11 Ocean Yearbook (1994) 20-45; David A. Balton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks," 27 Ocean Development & International Law (1996) 125-152; Andre Tahindro, "Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," 28 Ocean Development & International Law (1997) 1-58; Moritaka Hayashi, "The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention," 29 Ocean & Coastal Management (1995) 51-69; Peter Örebech, K. Sigurjonsson, and T. McDorman, "The 1995 United Nations Straddling and Highly Migratory Fish Stocks Agreement: Management, Enforcement and Dispute Settlement," 13 Journal of Marine and Coastal Law (1998) 119-41; Lisa Speer and S. Chasis, "The Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: An NGO Perspective," 29 Ocean & Coastal Management (1995) 71-77; Patrick E. Moran, "Recent Developments and Announcements: High Seas Fisheries Management Agreement Adopted by U.N. Conference: The Final Session of the United Nations Conference on Straddling and Highly Migratory Fish Stocks, New York, 24 July-4 August 1995," 27 Ocean & Coastal Management (1995) 217-25; Jon M. Van Dyke, "Modifying the 1982 Law of the Sea Convention: New Initiatives on Governance of High Seas Fisheries Resources: The Straddling Stocks Negotiations," 10 Journal of Marine and Coastal Law (1995) 219-227; Ronald Barston, "United Nations Conference on Straddling and Highly Migratory Fish Stocks," 19 Marine Policy (1995) 159-66; Alex G. Oude Elferink, "The Impact of Article 7(2) of the Fish Stocks Agreement on the Formulation of Conservation & Management Measures for Straddling & Highly

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The Conference resulted in an agreement that elaborated the requirements of Article 64 for the conservation and management of highly migratory species. These more specific requirements guided development of an Article 64 body for the conservation and management of tuna in the Western and Central Pacific Ocean that was agreed upon in 2002, after more than half a decade of negotiations.

I. THE U.N. FISH STOCKS AGREEMENT

The Conference was principally animated by the desires of certain coastal states, most notably Canada and several Latin American countries, to exercise jurisdiction over foreign fishing in high seas areas adjacent to their EEZs to address what they believed were irresponsible fishing practices.[2] The positions of Canada and like-minded coastal states, on the one hand, and distant water fishing nations, on the other hand, with respect to the relative authorities of coastal and fishing states over management of fish stocks both within and beyond EEZs had been largely unchanged for nearly 20 years, since agreement had been reached on the basic fisheries provisions of the Law of the Sea Convention in the mid-1970s. Indeed, the most significant change in the position of any state on the subject had been the decision of the United States in 1990 to amend the

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Migratory Fish Stocks," FAO Legal Papers on Line #4 (Aug. 1999); Lawrence Juda, "The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique," 28 Ocean Development & International Law (1997) 147-166.

Although extensive commentary is available, there is no official record of Conference negotiations. The negotiations were usefully chronicled in the Earth Negotiations Bulletin ("ENB") prepared by the International Institute for Sustainable Development, collected and available at http://www.iisd.ca/linkages/fish.html (last accessed July 9, 2002). In addition, documents issued at the Conference are available, and many of them have been collected, in Jean-Pierre Lévy and Gunnar G. Schran, eds., United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks: Selected Documents (1996).

[2] On the background of, and events leading up to, the Conference see Hayashi (1994) at 26-30; Balton (1996) at 130-33.

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FCMA to subject tuna to U.S. management authority and recognize coastal state claims of jurisdiction over tuna within EEZs. This change of position enabled the United States, as a country with both coastal and distant water interests, to play a self-described "brokering" role at the U.N. Fish Stocks Conference.[3]

As concern and controversy rose in the late 1980s and early 1990s about the impacts of high seas fisheries, countries were in agreement that effective conservation of fish stocks required compatibility and consistency between conservation and management measures applicable to EEZ and adjacent high seas areas. However, various meetings in the early 1990s that considered the problems of high seas fisheries for straddling stocks and highly migratory species had revealed the continuing lack of agreement between coastal and fishing states on the means to insure such compatibility and consistency.[4] So it was not surprising that the Conference struggled mightily to reach agreement on such mechanisms.[5] Indeed, as discussed in detail in Chapter 3, the Third Law of the Sea Conference had left this issue unresolved with respect to highly migratory species in Article 64. It also left ambiguity with respect to straddling stocks in Article 63. The Chair of the Fish Stocks Conference, Satya Nandan, adumbrated the

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[3] Information Memorandum from David A. Colson to Mr. Wirth, U.N. Fisheries Conference, May 6, 1994 at 2, copy in authors' file; see also Balton (1996) at 133-34.

[4] Hayashi (1994) at 26-30.

[5] See Hayashi (1994) at 41-42; see also Balton (1996) at 132. Possible precedent for ensuring compatibility was provided by the agreements establishing the Northwest Atlantic Fisheries Organization ("NAFO") and the North East Atlantic Fisheries Commission ("NEAFC"). See Hayashi (1995) at n. 22; see also Tahindro (1997) at 16. These regional fishery organizations are both required to seek to ensure compatibility of measures they prescribe for high seas areas with measures adopted by coastal states in adjacent EEZs. See Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, (done 24 October 1978; entered into force 1 January 1979), Art. XI; Convention on Future Multilateral in North-East Atlantic Fisheries, (done 8 November 1980; entered into force 17 March 1982), 1285 UNTS 130, Art. 8.

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difficulties posed by this issue when he observed in a background paper prepared for the Conference that while Articles 63 and 64 require coastal and fishing states to cooperate and collaborate in the conservation and management of straddling stocks and highly migratory species, they "do not resolve the underlying conflict of rights that is at the heart of the problem."[6]

The first substantive session of the Conference, held in July 1993, mostly served to provide an opportunity for coastal states and distant water fishing nations to stake out their positions and highlight areas of disagreement. The "Canadian Core Group" consisting of Canada, and the other traditionally "coastal" states of Argentina, Chile, Iceland and New Zealand, submitted, at the close of the session, a draft Convention whose area of application would have been limited to fish stocks on the high seas only.[7] In addition, consistent with the Canadian Core Group's "coastal" orientation, the draft Convention would have required conservation and management measures for fish stocks on the high seas to, inter alia, "recognize and give effect to the special interest of coastal states" in such stocks.[8] However, despite the reassertion of decades' old coastal and fishing state positions, "[t]here was no disagreement on the need to achieve consistency and compatibility between the conservation and management measures adopted within

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[6] Background paper, A/CONF. 164/INF/5 (8 July 1993) at ¶ 58. Nandan, who had served as rapporteur for the Committee that drafted the fishery articles of UNCLOS at the Third Law of the Sea Conference, would play a dominant role in the efforts of the Fish Stocks Conference to fill in the lacunae left by Articles 63 and 64.

[7] See Draft Convention on the Conservation and Management of Straddling Fish Stocks in the High Seas and Highly Migratory Fish Stocks in the High Seas, A/CONF. 164/L. 11/Rev. No. 1, 28 July 1993 (Art. 2.).

[8] See id. at Art. 4(a)(iii)-(v).

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and outside the EEZ. The issue was how to attain that goal in a mutually satisfactory manner."[9]

Going into the second substantive session of the Conference, held in March 1994, the United States made known its view that the provisions of the Chairman's Negotiating Text bearing on compatibility "need[ed] more balance" because "the text collectively grant[ed] Coastal States excessive authority over fishing for [straddling stocks and highly migratory species] on the high seas."[10] Indeed, at this stage of the Conference, it had yet to become clear that the agreement being negotiated would address straddling stocks and highly migratory species throughout their range, and not only on the high seas, as advocated by coastal states and the Canadian Core Group in particular. This prompted the United States to declare that, at least with respect to highly migratory species, it would "oppose any approach which suggests an arrangement for the high seas only."[11] The United States identified the principal point of difficulty regarding compatibility, and proposed addressing it, as follows:

> While all countries may recognize the need for compatibility and consistency between conservation and management measures within EEZs and on the high seas, the real issue centers on mechanisms to achieve, and where necessary, to impose such compatibility and consistency. Some States believe that the success of the Conference ultimately turns on its

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[9] Hayashi (1994) at 43.

[10] "U.S. Objectives for Conference Sessions in 1994," prepared by Office of Marine Conservation, Bureau for Oceans and International Environmental and Scientific Affairs, U.S. Department of State, Feb. 1994, at 10, copy in author's files.

[11] See id. at 11 (copy in author's files). "[T]he United States insisted on maintaining a fundamental distinction between [straddling stocks and highly migratory species], as is reflected in articles 63(2) and 64 of the Convention. For straddling stocks, . . . article 63(2) required coastal states and fishing states to cooperate in the development of conservation measures applicable only on the high seas. For highly migratory species, by contrast, article 64 calls for cooperation in the development of such measures to apply both within and beyond the EEZ." Balton (1996) at 134.

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> ability to resolve this debate through specific, legally-binding rules. While we remain open to this possibility, we believe, given the diversity of resource and user needs represented by the delegations, the Conference would be better served by agreement on a set of parameters within which the debate can be resolved on regional bases.[12]

At the close of the Second Session, the Chair issued a Revised Negotiating Text the compatibility provisions of which remained weighted in favor of coastal states—an orientation such states argued was ordained by UNCLOS. Just how much it was weighted toward coastal states was, of course, subject to disagreement. According to one commentator, the Revised Negotiating Text still gave a "slight jurisdictional tilt" to coastal states.[13]

The Revised Negotiating Text required fishing states to "respect" measures adopted by coastal states for EEZs, by, inter alia, "ensur[ing] that the measures established [for the same stocks in] the high seas are no less stringent."[14] In addition, the Revised Negotiating Text required disagreements concerning compatible and coordinated conservation and management measures to be resolved through dispute settlement, but specified that until such disagreements were resolved fishing states had to "observe

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[12] "U.S. Objectives for Conference Sessions in 1994," prepared by Office of Marine Conservation, Bureau for Oceans and International Environmental and Scientific Affairs, U.S. Department of State, Feb. 1994, at 11-12 (copy in author's files).

[13] William T. Burke, "State Practice, New Ocean Uses and Ocean Governance under UNCLOS" at 9 (paper presented to the 28th Annual Conference of the Law of the Sea Institute, 11-14 July, 1994, Honolulu, Hawaii), quoted in Van Dyke (1995) at 220-21.

[14] Revised Negotiating Text, A/CONF. 164/13/Rev. No. 1 (30 March 1994), ¶¶ 7, 7(d).

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conservation and management measures equivalent in effect" to those applicable in the adjacent EEZ.[15]

At the next session of the Conference, held in August 1994, the compatibility provisions of the Fish Stocks Convention would largely be determined. The groundwork for agreement on the compatibility provisions had been laid at an intersessional meeting held in June in Buenos Aires, attended by the Chairman and 14 key coastal states, fishing states, and the United States.[16] At that meeting, fishing states voiced concerns that the compatibility provisions of the Revised Negotiating Text were "too strongly weighted toward recognition and application of coastal state measures in international waters."[17] To address this perceived imbalance, the meeting developed "compromise wording" on compatibility, which also, in the estimation of the U.S. delegation, appeared to be a factor in the agreement of some fishing states to work toward a binding instrument.[18]

The "compromise wording" eliminated the directive that fishing states "respect" measures adopted by coastal states for areas under national jurisdiction,[19] and tempered the requirement that measures established for the high seas be no less stringent than those for areas under national jurisdiction in respect of the same stocks.[20] In addition, while the parties at Buenos Aires agreed to retain the requirement that states resolve their

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[15] Id. as ¶ 8. Where no coastal state measures existed, but a regional organization had established such measures for a high seas area, the coastal state was to "observe measures equivalent in effect to those agreed in respect of the same stock(s) in the high seas." Id.

[16] See Report of U.N. Intersessional Meeting, Buenos Aires, June 14-17, 1994, prepared by Office of Marine Conservation, Bureau for Oceans and International and Scientific Affairs, U.S. Department of State, undated (copy in author's files).

[17] Id. at 2.

[18] Id.

[19] Id.

[20] Id.

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disagreements about compatibility by dispute settlement, their compromise wording eliminated the mandate for observance of provisional measures.[21] The United States believed that these changes would "accomplish several key objectives," including to "establish the distinction between straddling fish stocks and HMS [and] make clear that international HMS regimes should apply throughout the region, both within and beyond EEZs, while SS regimes should apply to the area adjacent to the EEZs."[22]

At the third session of the Conference, held in August 1994, significant further progress was made in resolving how compatibility of conservation and management measures in EEZs and high seas areas could be achieved while still respecting the jurisdictional competency of coastal states within EEZs. The "Draft Agreement" prepared by the Chairman[23] incorporated some, but not all, of the "compromise wording" developed at the Buenos Aires intersessional meeting.

First, the Draft Agreement eliminated the language requiring fishing states to "respect" measures adopted by coastal states in developing compatible conservation and management measures for the same stocks in high seas areas.[24] Second, it tempered the requirement that high seas measures be compatible with those for the same stocks in EEZs by imposing on states the duty to insure that such high seas measures "do not undermine" the effectiveness of measures established in respect of the same stocks in EEZs.[25] Furthermore, the Draft Agreement, while it did not, as would have the text

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[21] Id.

[22] Id.

[23] See Draft Agreement, A/CONF. 164/22 (23 Aug. 1994).

[24] See id.

[25] Id. at ¶ 7.2(a).

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developed at the intersessional meeting, altogether eliminate reference to provisional measures pending resolution of disputes, softened the obligation of parties to apply such measures.[26]

These changes unquestionably altered the balance that had been struck by the compatibility provisions of the Revised Negotiating Text, as acknowledged by coastal and fishing states alike.[27] It is probably accurate to say that the balance struck by the Draft Agreement still tilted slightly in favor of coastal states, though the extent to which it did so is subject to dispute.[28] The compatibility provisions of the final agreement would not differ significantly from those contained in the Draft Agreement produced by the Chairman at the end of the third session of the Conference.

Despite the efforts of coastal and fishing states to further alter the "balance" of Article 7,[29] only very minor changes were made to the Draft Agreement at the fourth

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[26] Id. at ¶¶ 4-7.

[27] See ENB, Volume 7, "Reactions to the Draft Agreement" section (e.g., statements of South Pacific Forum Fisheries Agency and Japan), available at http://www.iisd.ca/linkages/vol07/0739021e.html (last accessed July 9, 2002).

[28] For example, one commentator observed: "Although the Draft Agreement drops the ability for the coastal state to require observance of its regulations in the area beyond the 200-nautical mile EEZ pending agreement, it achieves more or less the same result by substituting rigid requirements for binding dispute resolution designed to promote early agreement on terms that are 'compatible' with the coastal states' regulation of its own citizens in its own zone." Van Dyke (1995) at 223. Based on this, and other provisions of the Draft Agreement, this commentator concluded that "[t]he current language in the Draft Agreement gives the coastal states the upper hand in initiating management regulations that apply beyond the 200-mile zones." Id. at 224.

[29] See ENB, Volume 7, "Part II-Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks" section (proposal of Iceland), available at http://www.iisd.ca/linkages/vol07/0743015e.html (last accessed July 9, 2002); ENB, "Part III-Mechanisms for International Cooperation Concerning Straddling Fish Stocks and Highly Migratory Fish Stocks" section (proposal of Peru and statement of Japan), available at http://www.iisd.ca/linkages/vol07/0743016e.html (last accessed July 9, 2002).

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session of the Conference. At the end of the session, the Draft Agreement as revised was presented as the Chair's Revised Text.[30] Further proposals by coastal and fishing states to alter the "balance" struck by Article 7 were rebuffed at the fifth and final session of the Conference, held in July and August 1995.[31]

While it is perhaps too sanguine to claim, as has one commentator, that "Article 7 of the agreement solves the compatibility problem,"[32] the provisions of Article 7 do, as another commentator has asserted, "represent clearly significant steps forward from the LOS Convention, which . . . contains no reference to the concept of compatibility, nor any guidance as to the relationship between the conservation and management measures adopted for the [high seas and EEZs]."[33] At the same time, "the Agreement had to be formulated at a sufficient level of abstraction to be equally applicable to all regional situations."[34] This was done so that the Agreement would, as Chairman of the Conference described it, "provide[ ] for a globally agreed framework for regional cooperation in the field of fisheries conservation and management consistent with the

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[30] See Chair's Revised Text (or "Revised Draft Agreement"), A/CONF. 164/22/Rev. 1 (11 Apr. 1995).

[31] See ENB, Volume 7, "Part II-Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks: Article 7-Compatibility of Conservation and Management Measures" section, available at http://www.iisd.ca/linkages/vol07/0754012e.html (last accessed July 9, 2002); ENB, Volume 7, "Informal Plenary: Part III-Mechanisms for International Cooperation Concerning Straddling Fish Stocks and Highly Migratory Fish Stocks" section (proposal of EEU, Japan, Poland and Korea), available at http://www.iisd.ca/linkages/vol07/0748002e.html (last accessed July 9, 2002).

[32] Balton (1996) at 137.

[33] Hayashi (1995) at 57-58.

[34] Elferink (1999) at 3.

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situation prevailing in each region as is envisaged in the 1982 U.N. Convention on the Law of the Sea."[35]

Although commentators differ over the precise meaning and application of the Agreement's compatibility provisions, most all agree with Burke's conclusion that, at the very least, "Article 7 provides a slight but noticeable tilt in favor of the substantive regulations prescribed by coastal states. . . ."[36] No commentator appears to view the Agreement's compatibility provisions as commending precedence for measures established by regional fisheries organizations over those established by coastal states for their EEZs. Some stake out a middle ground, noting that the Agreement contains language supportive of the competence of both coastal states and regional organizations, and concluding that in leaving it to such organizations to resolve for themselves the compatibility conundrum, the Agreement thereby ordains "a legal regime of atomized legal decisions at the [regional organization] level."[37]

The first attempt to implement the compatibility requirements of the Fish Stocks Agreement would, as it happened, take place in the negotiation of an Article 64 body for conservation and management of tuna stocks in the Western and Central Pacific Ocean.

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[35] Statement made by the Chairman of the Conference at the closing of the fourth session, held on 26 August 1994, A/CONF. 164/24 (8 Sept. 1994) ¶ 5(d).

[36] William T. Burke, "Compatibility and Precaution in the 1995 Straddling Stock Agreement" in Harry N. Scheiber ed., Law of the Sea: The Common Heritage and Emerging Challenges (2000) 115; see also Tahindro (1997) at 18 (Under the compatibility provisions of the Agreement "the coastal states' interests might take priority over those of high seas fishing states in circumstances where they would be unable to agree on compatible measures necessary for the conservation and management of straddling fish stocks and highly migratory fish stocks.").

[37] Örebech et al (1998) at 128.

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II. THE DEVELOPMENT OF A TUNA CONVENTION FOR THE WESTERN AND CENTRAL PACIFIC OCEAN

All of the developments canvassed above—from the recognition of coastal state jurisdiction over tuna in UNCLOS, to the enactment of the FCMA and its tuna exclusion provisions, to the creation of the FFA, to the negotiation of the Tuna Treaty between the United States and the Pacific Island Countries, to the rejection by the United States of its juridical position on tuna in the 1990 amendments to the FCMA, to the elaboration of principles and mechanisms for conservation and management of highly migratory species in the U.N. Fish Stocks Agreement—culminated in the conclusion in September 2000 of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (hereinafter "Western Pacific Tuna Convention" or "Convention").[38] The Western Pacific Tuna Convention resulted from negotiations between the Pacific Island Countries and fishing nations in the Multilateral High-Level Conference ("MHLC") process begun in December 1994.[39] It "represents the final chapter in the relations between" the Pacific Island Countries and distant water fishing nations.[40]

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[38] See Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, opened for signature Sept. 4, 2000 (visited Feb. 18, 2002) http://www.spc.org.nc/coastfish/Asides/Conventions.

[39] Final Act of the Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, 7th Sess., Aug. 30-Sept. 5, 2000, Annex 10 (visited on Feb. 18, 2002) http://www.spc.org.nc/coastfish/Asides/Conventions (hereinafter MHLC Report).

[40] Transform Aqorau, "Tuna Fisheries Management in the Western and Central Pacific Ocean: A Critical Analysis of the Convention for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean and Its Implications for the Pacific Island Nations," 16 The International Journal of Marine and Coastal Law 379, 397 (2001) [hereinafter "Aqorau (2001)"].

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The U.S. juridical position on tuna had long stymied efforts to develop an Article 64 type body for the tuna fisheries of the Western and Central Pacific. The chairman of the MHLC, Satya Nandan of Fiji,[41] underscored this by observing in his closing remarks that when the FFA was established in the late 1970s "it was not opportune to negotiate" an Article 64 type body "mainly because some distant water fishing nations did not recognize the jurisdiction of coastal states over highly migratory species in their exclusive economic zones."[42] Soon after the 1990 tuna inclusion amendments by the United States had removed this impediment to such negotiations, the MHLC process began and it is not surprising that there was not much "direct discussion of the jurisdictional dispute over tuna" in it.[43]

However, the Convention itself definitively resolves neither the longstanding differences in view as to the meaning and requirements of Article 64, nor how the compatibility requirement of Article 7 of the U.N. Fish Stocks Agreement is to be implemented. Throughout the negotiations the Pacific Island Countries and fishing nations were "keenly aware that they had differing views of Article 64's duty to cooperate and the compatibility requirement of Article 7 of the U.N. Fish Stocks

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[41] In addition to having chaired the negotiations for the U.N. Fish Stocks Agreement, Nandan had served as rapporteur for Committee II at the 1975 Geneva Session of the Law of the Sea Conference, which produced the text for what was to become Article 64.

[42] Closing remarks by the chairman, Ambassador Satya N. Nandan to the Seventh Session of the Multilateral High-Level Conference, Multilateral High-Level Conference on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific, 7th Sess., Aug. 30-Sept. 5, 2000, Annex 8 (visited on Feb. 18, 2002) http://www.spc.org.nc/coastfish/Asides/Conventions (hereinafter MHLC Report).

[43] Violanda Botet, "Filling in One of the Last Pieces of the Ocean: Regulating Tuna in the Western and Central Pacific Ocean," 41 Va. J. Int'l L. at 800 n. 61 (2001) [hereinafter "Botet (2001)"].

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Agreement," and "did not try to directly persuade each other of their views."[44] Instead, the parties agreed upon a formulation, consisting of several articles, "that in important ways reconciles their differing interests."[45]

The most important of these articles concerns application of regulatory measures developed by the Commission to areas of national jurisdiction. As had been the case in the negotiations concerning the highly migratory species article at UNCLOS, the parties to the MHLC could not reach agreement on whether coastal states would be required to apply regulations developed by regional organizations in their EEZs. The Convention assigns the Commission the responsibility and authority to develop conservation and management measures for both high seas and areas of national jurisdiction.[46] Although the text of the Convention leaves it to the Commission to decide how a particular measure is to be implemented, according to a U.S. negotiator, "[a] major assumption in the Convention is that coastal states will be willing to vote on a case-by-case basis (but not as a general requirement built into a treaty) to apply Commission measures within waters under their national jurisdiction."[47] At the same time, in light of the Convention's failure to specify that certain measures developed by the Commission must be applied in EEZs, one Pacific Island Country commentator has observed that "it is not clear what role the Commission will play in regulating EEZ areas."[48] Foreshadowing an area of likely controversy in the future, this same commentator believes "the Convention is not

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[44] Id. at 800.

[45] Id. at 801.

[46] See Western Pacific Tuna Convention at Art. 3(3).

[47] Botet (2001) at 801.

[48] Aqorau (2001) at 394.

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so clear as to whether the powers of the Commission also include adoption of measures for areas under national jurisdiction."[49]

By leaving it to the Commission to decide what measures, if any, to apply in areas of national jurisdiction, the MHLC parties took an approach similar to that spelled out in the Evensen Group draft article on highly migratory species developed at the 1975 Geneva Session of the Law of the Sea Conference. That draft article assigned to the regional organization the responsibility and authority to develop conservation and management measures, and to decide which of those measures would be "standards" that coastal states were obliged to implement in their exclusive economic zones.[50] Of course, these provisions of the draft article were not incorporated in Article 64, which also left unresolved the related issue of the compatibility of measures for the high seas and zones of national jurisdiction.

The Convention mandates the Commission to adopt a variety of conservation and management measures,[51] and requires coastal states to apply in areas under their national jurisdiction those measures determined applicable to such areas by the Commission.[52]

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[49] Id.

[50] See Group of Juridical Experts, The Economic Zone, 16 Apr. 1975, Art. 12, reproduced in Platzöder, ed., UNCLOS Documents, Vol. XI, at 487. See discussion of this draft article and its fate in section I.B., above.

[51] See Western Pacific Tuna Convention at Arts. 5, 10.

[52] See id. at Art. 7(1). Interestingly, the Convention, in obligating coastal states to apply conservation and management measures in areas of national jurisdiction, specifies that coastal states do so "in the exercise of their sovereign rights for the purpose of exploring and exploiting, conserving and managing highly migratory fish stocks." Western Pacific Tuna Convention at Art. 7(1). This theory of regulatory authority was advocated by the Pacific Island Countries, and opposed by the United States, in the discussions that led to the establishment of the FFA in the late 1970s.

As Kent (1980) at 168 described the disagreement:

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The Convention further seeks to insure compatibility of measures in high seas and areas of national jurisdiction by requiring measures adopted by the Commission to be compatible with coastal state measures, and enjoining coastal states to insure that measures they adopt and apply in areas under their jurisdiction do not undermine the effectiveness of measures adopted by the Commission.[53]

The decision-making procedures established by the Convention, like those specified in the Evensen Group draft article, afford coastal states significant protections. The Evensen Group draft article provided for the organization to adopt binding "standards" and non-binding "recommendations" by consensus or, in its absence, "a two-thirds majority, including the votes of all coastal States of the region present and voting."[54] This effectively gave each coastal state in the organization a veto.

If a regional organization were to be established on the basis of national rights in the 200 mile zones (whether for highly migratory species or for fisheries generally), the mandate for the organization would derive from powers delegated to the separate nations. The organization would act as agent for the member nations by their consent. And it would be the delegation of national rights which would provide the basis for national participation in the decision-making of the organization. By this approach, national jurisdiction would be a prerequisite for management through a regional organization. However, according to the United States' position, the separate nations would not be the source of those powers at the regional level, so far as highly migratory species were concerned, since they would not have those powers at the national level. Their standing would remain uncertain.

By the FCMA tuna inclusion amendments the United States had, of course, repudiated this earlier position.

[53] See Western Pacific Tuna Convention at Art. 8(1), (3). One Pacific Island Country commentator has argued that "Article 8(3) departs significantly from the U.N. Fish Stocks Agreement" by so enjoining coastal states in that the latter "clearly gives preference to coastal state measures." Aqorau (2001) at 387-88.

[54] Group of Juridical Experts, The Economic Zone, 16 Apr. 1975, reproduced in Platzöder, ed., UNCLOS Documents, Vol. XI, at 487, Art. 5.

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The Convention specifies that only decisions of the Commission concerning the allocation of the total allowable catch or the total level of fishing effort, including decisions related to the exclusion of vessel types, must be taken by consensus.[55] All other decisions regarding conservation and management measures may be decided by a three-fourths majority, if consensus cannot be reached.[56] However, the three-fourths majority vote must be supported by the votes of three-fourths of each of two "chambers," composed of FFA member countries and non-FFA member countries, respectively.[57] The Convention also specifies that "in no circumstances shall a proposal be defeated by two or fewer votes in either chamber."[58] "This key proviso," according to one commentator, "prevents a very small minority within one chamber from vetoing proposed measures."[59] In this respect, the Convention, as a formal matter, provides less protection to coastal states than the Evensen text would have. However, as a practical matter, the Commission will be unable to impose measures in areas of national jurisdiction unless the great majority of the Pacific Island Countries agree to such measures. At the same time, the two-chamber voting system provides protection to the fishing nations which the Evensen text would not have.[60]

While the Western Pacific Tuna Convention may indeed be the "final chapter" in the relations between the Pacific Island Countries and distant water fishing nations, it is a

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[55] See Western Pacific Tuna Convention at Art. 10(4).

[56] See id. at Art. 20(2).

[57] See id.

[58] See id.

[59] See Botet (2001) at 803.

[60] See id. for discussion of further aspects of the decision-making process established by the Convention.

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chapter that remains to be completed. The Convention does not itself definitively resolve the "inside-outside" problem with respect to management of highly migratory species. But the Convention specifies principles and procedures according to which states party, through the Commission it establishes, are to implement Article 64's duty to cooperate and related injunction to ensure the conservation of highly migratory species both within and beyond exclusive economic zones. Whether the Commission will serve as a laboratory for further elaboration of Article 64's requirements remains to be seen.

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