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Preemption in the Fisheries and the United Nations' Law of the Sea Treaty

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I. Introduction

For centuries the nations of the world have sought to agree on the proper allocation of control over the oceans.[1] In 1973, the Third

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1. The dispute over the proper allocation and control over the oceans goes back to early Greek and Roman times. Greece it appears believed that the ocean was subject to being appropriated by the coastal states, C. PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE 367 (1911). Roman law suggests that the sea is open to all and therefore not subject to appropriation, although some scholars are skeptical of such an interpretation. *See* S.P. SCHOTT, THE CIVIL LAW 243 (1973) and P. POTTER, THE FREEDOM OF THE SEA IN HISTORY, LAW AND POLITICS 27 (1924).

The dispute over the free sea versus domain of the sea concepts erupted when Hugo Grotius in his book, Mare Liberum, presented a carefully thought out and well documented discussion of the freedom of the seas. GROTIUS, MARE LIBERUM (trans. 1916). So great was the impact of this book, that the King of England, James, who desired to appropriate several fisheries, attacked Grotius and his thesis. T.W. FULTON, THE SOVEREIGNTY OF THE SEA 351 (1911).

John Seldon, an English lawyer, responded to Grotius in a book defending appropriation. *See* J. SELDON, OF THE DOMINION, OR, OWNERSHIP OF THE SEA (trans. 1972). This book also became a classic of international law. Such was the effect of these authors, that the actual legal regime of the oceans was unsettled for centuries. Vattel, in his great work, The Law of Nations, suggested a compromise:

> It is manifest that the use of the open sea, which consists in navigation and fishing, is innocent and inexhaustible; that is to say — he who navigates or fishes in the open sea does no injury to anyone, and the sea, in two respects, is sufficient for all mankind. Now, nature does not give to man a right of appropriating to himself things that may be innocently used, and that are inexhaustible, and sufficient for all. For, since these things, while common to all, are sufficient to supply the wants of each, — whoever should, to the exclusion of all other participants, attempt to render himself sole proprietor of them, would unreasonably wrest the bounteous gifts of nature from the parties excluded.

VATTEL, LAW OF NATIONS 125 (trans. 1863). Recognizing that certain commodities were becoming limited due to increasing populations, thus forcing nations to appropriate land to feed their people, Vattel argued that these constraints did not apply to the ocean.

> But this reason [need to appropriate land for food] cannot apply to things [which are in themselves inexhaustible] and consequently, it cannot furnish any just grounds for seizing the exclusive possession of them. If the free and common use of a thing of this nature was prejudicial or dangerous to a nation, the care of their own safety would authorize them to reduce that thing under their own dominion . . . . But this is not the case with the open sea, on which people may sail and fish without the least prejudice to any person whatsoever, and without putting any one in danger. No nation, therefore, has a right to take possession of the open sea, or claim the sole use of it, to the exclusion of other nations.

Id. at 125.

United Nations Conference on the Law of the Sea (UNCLOS) convened in a concerted effort to negotiate a comprehensive treaty regulating the uses of the oceans.[2] This third attempt at adoption of such a document was remarkably successful, resulting in a completed text whose provisions contain more than 300 articles designed to regulate use of the oceans.[3]

During the negotiation of the Law of the Sea Treaty, the United States enacted the Fishery Conservation and Management Act (FCMA).[4] The FCMA was designed to complement the Law of the Sea Treaty's provisions regulating fishing.[5] Congress and Presi-

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The arguments Vattel used, pro and con to support appropriation, became the focal point for countries exposing the appropriation as freedom of the sea theory. His appropriation justification is very similar to the arguments made by countries such as the United States to justify unilateral extension of control over ocean spaces. When President Truman extended United States jurisdiction over the seabed of the continental shelf, his arguments had a familiar ring:

> Whereas the Government of the United States of America, aware of the long range world-wide need for new sources of petroleum and other minerals, holds the view that efforts to discover and make available new supplies of these resources should be encouraged . . . .Whereas recognized jurisdiction over these resources is required in the interest of their conservation and prudent utilization when and as development is undertaken; . . . .NOW THEREFORE I, HARRY S TRUMAN, President of the United States of America, do hereby proclaim the following policy of the United States of America with respect to the natural resources of the subsoil and seabed of the continental shelf. Having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States subject to its jurisdiction and control.

Pres. Res. of Sept. 28, 1945, No. 2667, 59 Stat. 884 (1945).

2. Attempts to negotiate a comprehensive treaty went back to 1958 when the first Law of the Sea Conference took place. The first conference resulted in four conventions codifying parts of the law of the sea. *See* Convention on the High Seas, Sept. 30, 1962, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205, Convention on the Continental Shelf, June 10, 1964, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311, Convention on Fishing and Conservation of the Living Resources of the High Seas, March 20, 1966, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

The Second Conference on the Law of the Sea convened in 1960 but failed to accomplish its primary goal of setting an internationally acceptable maximum width for the territorial sea. The third and presumably last conference convened in 1973 and resulted in an agreement, the official text of which is to be found in a comprehensive U.N. Document A/Conf. 62/122 (Oct. 7, 1982). The text used in the preparation of this article is from 21 International Legal Materials 1261 (1982) [hereinafter cited as UNCLOS Treaty]. Page references are to the I.L.M. text.

3. U.N. Document A/Conf. 62/122 (Oct. 7, 1982). The Treaty is remarkable for its comprehensiveness as well as its length. Almost all ocean space use is regulated with the only major exception being Antarctica.

4. 16 U.S.C. §§ 1801-1882 (1982).

5. 16 U.S.C. § 1881 Effect on Law of the Sea Treaty.

> If the United States ratifies a comprehensive treaty, which includes provisions with respect to fishery conservation and management jurisdiction, resulting from any United Nations Conference on the Law of the Sea, the Secretary, after consultation with the Secretary of State, may promulgate any amendment to the regulations promulgated under this Act if such amendment is necessary and appropriate to conform such regulations to the provisions of such treaty, in anticipation of the date when such treaty shall come into force and effect for, or otherwise be applicable to, the United States.

Id.

dent Ford believed that the passage of the Act was necessary to prevent further overfishing off United States shores pending passage of the UNCLOS Treaty.[6] The FCMA and its provisions anticipate ultimate United States acceptance of the UNCLOS Treaty.[7]

For reasons unassociated with the fisheries issue, President Reagan has refused to permit the United States to sign the Treaty.[8]

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6. STAFF OF SENATE COMM. ON COMMERCE, 94TH CONG., 2D SESS, A LEGISLATIVE HISTORY OF THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, 2, 34-35 (Comm. Print 1976) [hereinafter cited as A LEGISLATIVE HISTORY]. Congress, in the Purpose Section, 16 U.S.C. § 1801(2)(3)(4) (1982) stated that the Act was based upon the following findings:

> (2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.
>
> (3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.
>
> (4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

In his statement made upon signing the FCMA, President Ford stated:

> I am today signing a bill which provides a comprehensive domestic and international program for the conservation and management of our fisheries.
>
> The extension of our jurisdiction to 200 miles will enable us to protect and conserve the valuable fisheries off our coasts. It is indeed unfortunate that the slow pace of the negotiations of the United Nations Law of the Sea Conference has mandated our course of action here today. However, the foreign overfishing off our coasts cannot be allowed to continue without resolution.

A LEGISLATIVE HISTORY, *supra*, at 34.

7. *Id.*

> The need for a timely and successful Law of the Sea Conference is even more pressing today than ever before. I have directed our negotiators to make every effort, consistent with our basic interests, to conclude the substantive negotiations this year. The bill I sign today is generally consistent with the consensus emerging at the Conference. It is increasingly apparent that a failure to reach substantive agreement this year will move the world community inevitably toward disorder respecting competing use of the oceans. In the absence of a timely treaty, no nation can be assured that its paramount interest in the oceans will be protected.
>
> Some specific aspects of this legislation require comment. I supported this legislation on the condition that the effective date of the legislation would be delayed so that the Law of the Sea Conference could complete its work and to permit sufficient time for a proper transition.
>
> The tasks of continuing our negotiating efforts at the Law of the Sea Conference and at the same time establishing new fishery plans, issuing hundreds of new fishing permits and negotiating specific fishery agreements with foreign governments will require substantial resources in excess of those presently allocated to international fisheries affairs. The Departments of State, Commerce, and Transportation must do their best to implement the act fully. Since available resources are finite, however, it is possible that full implementation may take more time than is provided in the act.

8. The United States' primary objections to the UNCLOS Treaty revolve around the

However, this article will examine the potential serious impact on traditional patterns of fishery management in the United States if the treaty is eventually signed. Preemption, a process by which the federal government takes over fishery management within the coastal states' territorial waters,[9] may be facilitated, and in some cases required, if the Treaty is adopted.[10]

II. Traditional United States Fisheries Management Practices

The original thirteen colonies inherited from England rights to fisheries much as they obtained other more familiar principles of Anglo-Saxon jurisprudence. The United States Supreme Court has consistently recognized a dual state/national dichotomy in fisheries

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Treaty's deep seabed mining provisions. Very simply, the Treaty provides for parallel private and international development of the mineral resources of the deep seabed. Part XI of the Treaty outlines the division of authority between international and private interests. The deep seabed, known as the "Area," is governed by a number of governmental organs. UNCLOS Treaty, *supra* note 2, at arts. 136, 156-70. The Authority is the body which controls the Area. *Id.* at art. 158. All member nations make up the Authority. The Assembly also is made up of all members of the Authority. The Assembly is the general legislative body. *Id.* at arts. 159-160. The Council is made up of 36 members of the Authority and is the executive organ of the Authority. *Id.* at arts. 161-162. The Enterprise runs leasing and mining operations in the Area. *Id.* at art. 170.

The Area is to be leased to private concerns who are required to develop their plots after paying the Enterprise and transferring technology to the Enterprise where appropriate. *Id.* at arts. 170-172 and Annex III.

In outlining his objections to the Treaty, President Reagan identified the following perceived deficiencies:

> These decisions reflect the deep conviction that the United States cannot support a deep seabed mining regime with such major problems. In our view, those problems include:
>
> Provisions that would actually deter future development of deep seabed mineral resources, when such development should serve the interest of all countries.
>
> A decisionmaking process that would not give the United States or others a role that fairly reflects and protects their interests.
>
> Provisions that would allow amendments to enter into force for the United States without its approval. This is clearly incompatible with the United States approach to such treaties.
>
> Stipulations relating to mandatory transfer of private technology and the possibility of national liberation movements sharing in benefits.
>
> The absence of assured access for future qualified deep seabed miners to promote the development of these resources.
>
> We recognize that world demand and markets currently do not justify commercial development of deep seabed mineral resources, and it is not clear when such development will be justified. When such factors become favorable, however, the deep seabed represents a potentially important source of strategic and other minerals. The aim of the United States in this regard has been to establish with other nations an order that would allow exploration and development under reasonable terms and conditions.

Public Papers of the Presidents' of the United States — Ronald Reagan, July 3 to Dec. 31, 1982 Bk. II at 911-912.

9. Territorial waters are those waters over which the coastal state and/or coastal nation exercises sovereign rights. The territorial waters of most coastal states in the United States is 3 nautical miles as measured from the baseline which delineates inland water from territorial waters.

10. 16 U.S.C. § 1856(b) (1982).

management.[11] In *Martin v. Waddell*,[12] the Court was asked to determine title to ownership of 100 acres of submerged lands in Perth Amboy, New Jersey. The dispute arose because the State of New Jersey set aside an area of submerged lands for oyster growing.[13] Merritt Martin had received a lease to the submerged lands in question from the state.[14] The lessee of Waddell brought an action in ejectment, claiming ownership of the tract. He traced title to the original charter granted to the Duke of York by Charles II.[15]

The Supreme Court discussed at length the status of submerged lands in England and the rights of the people to use that land as a common resource.[16] The Court likened the King's authority over submerged lands to that of a trustee.[17] The Court reasoned that this status was transferred to the Duke of York.[18] When the Duke assigned his interests in the lands to a number of proprietors, they too stood as trustees over the submerged lands and fishery resources.[19]

In 1702, the proprietors of the land at issue in the *Martin v. Waddell* case surrendered their interests back to the crown.[20] The Court believed that this reconveyance included the trusteeship over the submerged lands because the surrender documents failed to reserve any rights to the proprietors or their grantees.[21] The impor-

11. The FCMA still recognizes this dual role, but the preemption provision in the Act is a product of the cases and analysis to follow.

12. 41 U.S. (16 Pet.) 367 (1842).

13. *Id.* at 379.

14. *Id.* at 379-80.

15. *Id.* at 407-08.

16. *Id.* at 408-14.

17. *Id.* at 411-12. The Court's opinion is very hard to follow at this juncture. In one breath the Chief Justice reviews English law concerning submerged lands lying under navigable waters and likens the Crown's control to that of a trustee. *Id.* at 411-12. In the next breath he suggests the lengthy history is of little consequence and title must be tried by "different" principles because the American colonies broke away from the Crown. *Id.*

In analyzing the interest received by individuals tracing title to a charter from the Duke, Chief Justice Taney returns again to English common law. *Id.* at 411. Finally Taney settles on the idea that the Duke could not, as a trustee, transfer title. *Id.* at 411-12.

The case is important, too, as an example of the early acceptance by the Court of the Public Trust Theory later fully articulated in Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892).

18. Martin v. Waddell, 41 U.S. at 412 (1842).

19. *Id.* at 415-16.

20. *Id.* at 415.

21. *Id.* at 416. The Court suggested that had the control of the submerged lands been reserved by the proprietors the instruments facilitating the retransfer back to the crown would have specifically included such reservations. *Id.* The Court stated:

> The surrender, according to its evident object and meaning, restored them in the same plight and condition in which they originally came to the Lands of the Duke of York. Whatever he held as a royal or perogative right, was restored, with the political power to which it was incident. And if the great right of dominion and ownership in the rivers, bays, and arms of the sea, and the soils under them, were to have been severed from the sovereignty . . . this important change in this particular territory would have been clearly indicated by appropriate terms.

Id. at 416.

tance of tracing the ownership of the land lies in the fact that after the American Revolution, the then independent sovereign states acquired the property in trust for their people subject only to the powers relinquished to the federal government when the Constitution was passed[22] and any grants to private land owners.

The Court in *McCready v. Virginia* reiterated the status of the states as owners of the fish and submerged land within their jurisdiction.[23] However, the Court in *McCready* began the process of identifying those rights relinquished to the national government by the States upon entry to the union. The right to regulate navigation was one such power, according to the Court's rationale.[24] In determining whether Virginia could prohibit the citizens of other states from planting oysters on submerged lands within the state, the Court stated:

> The title thus is held subject to navigation, the paramount right, the regulation of which, in respect to foreign and inter-state commerce, has been granted to the United States. There has been, however, no such grant of power over the exclusive control of the States, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation.[25]

This right, according to the Court's analysis, is a property right.[26] Later, in other opinions, the Court changed its interpretation and definition of the interest, but preserved the conclusion that each state retains control over resources within its territorial waters.[27]

Before the Court began distinguishing and limiting the decision in *McCready v. Virginia*,[28] it reaffirmed the states' primary role in

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22. *Id.* at 410.

23. 94 U.S. 391 (1876). The Court stated:

> The principle has long been settled in this court, that each State owns the beds of all tide waters within its jurisdiction, unless they have been granted away. Pollard's Lessee v. Hagan, 3 How. 212; Smith v. Maryland., 18 How. 74; Mumford v. Wardwell, 6 Wall., 436; Weber v. Commissioners, 18 *id.* 66. In like manner, the States own the tide waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty. Martin v. Waddell, 16 Pet. 410.

Id. at 394.

24. *Id.* at 394-95.

25. *Id.*

26. *Id.* at 395. The Court stated:

> Such an appropriation is, in effect, nothing more than a regulation of the use by the People of their common property. The right which the People of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship.

27. *See, e.g.*, Toomer v. Witsell, 334 U.S. 385 (1948).

28. *See, e.g.*, Manchester v. Massachusetts, 139 U.S. 240 (1890).

managing their inland and tide water fisheries.[29] However, in interpreting a Massachusetts statute regulating the taking of menhaden[30] in Buzzard's Bay, the Court reflected:

> If there be a liberty of fishing or swimming in the navigable waters of the United States common to the citizens of the United States, upon which we express no opinion, the statute may well be considered as an impartial and reasonable regulation of this liberty; and the subject is one which a state may well be permitted to regulate within its territory, in the absence of any regulation by the United States.[31]

This seemingly innocuous statement signaled a retreat by the Court from the exclusive control/property concept. In *Toomer v. Witsell*[32] the Court interpreted a South Carolina statute which imposed a license fee on shrimp fishing in the territorial sea off its coast.[33] The statute required a fee 100 times greater for non-resident fishermen than for resident fishermen. In determining the constitutionality of the statute under the privileges and immunities clause of the Constitution,[34] the Court confronted clashing of state and federal constitutional interests regarding the management of a fishery located in state territorial waters and beyond.[35]

The state of South Carolina vigorously argued that an exception to the privilege and immunities clause existed for regulation of fisheries within state jurisdiction.[36] The state argued that animals *ferae naturae* belonged to the state and its people for the benefit of the citizens of the state.[37] The Court, while conceding that some of its

29. *Id.* at 262-63.
30. Menhaden are small school fish which in tonnage account for the majority of the total United States fishing catch. *Douglas v. Seacoast*, 431 U.S. 265, 269 n.3 (1971).
31. *Id.* at 265.
32. Toomer v. Witsell, 334 U.S. 385 (1948).
33. *Id.* at 387-88.
34. U.S. CONST. art. IV, § 2, cl. 1.
35. *Id.* at 393-94.
36. *Id.* at 399.
37. *Id.* The full statement of the state's position as understood by the Court was:

> Appellees strenuously urge that there is such an exception. Their argument runs as follows: Ever since Roman times, animals *ferae naturae*, not having been reduced to individual possession and ownership, have been considered as *res nullius* or part of the "negative community of interests" and hence subject to control by the sovereign or other governmental authority. More recently this thought has been expressed by saying that fish and game are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this "ownership" for the benefit of its citizens. In the case of fish, it has also been considered that each government "owned" both the beds of its lakes, streams, and tidewaters and the waters themselves; hence it must also "own" the fish within those waters. Each government may, the argument continues, regulate the corpus of the trust in the way best suited to the interests of the beneficial owners, its citizens, and may discriminate as it sees fit against persons lacking any beneficial interest. Finally, it is said that this special property interest, which nations and similar governmental bodies have traditionally had, in this country vested in the colonial governments and passed to the individual

opinions, including *McCready v. Virginia*[38] seemed to support the state's position, distinguished the cases.[39]

First, the Court pointed out that in *McCready*, Virginia was regulating oysters, a sessile[40] animal living its entire life in the same place. Shrimp, however, are migratory, often crossing state lines of jurisdiction.[41] Second, the *McCready* case involved a statute affecting fish in inland waters.[42]

The Court then proceeded to announce that the exception in *McCready* was limited to the facts of the case and that the ownership theory therein was inapplicable to the shrimp regulation in question in the *Toomer* case.[43] While conceding that the states had some authority in the marginal sea over both migratory and nonmigratory animals, the Court cautioned the states against treating such animals as property:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a state have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the state exercise that power like its other powers, so as not to discriminate without reason against citizens of other states.[44]

This contraction of state authority was a logical offshoot of the entire dispute between the states and the United States over ownership of submerged lands in the territorial waters and the mineral revenue therefrom.[45]

States.

38. *Id.* at 401.

39. *Id.*

40. *Id.* Sessile is the biological term for being immobile. The term refers to animals such as clams, oysters and scallops.

41. *Id.*

42. *Id.*

43. *Id.* at 401-02.

44. *Id.* at 402.

45. Ann Hollick, in her book, U.S. Foreign Policy and the Law of the Sea, suggests that Secretary of the Interior Harold Ickes lobbied President Roosevelt to push claims of federal ownership over submerged lands offshore in order to ensure that mineral revenues went to the federal government following oil exploration and development. A. HOLLICK, U.S. FOREIGN POILCY AND THE LAW OF THE SEA 36-37 (1981) [hereinafter cited as U.S. FOREIGN POLICY].

Ickes' design won the first round of battles when the Supreme Court in 1947 ruled that the United States had paramount rights to lands underlying the territorial sea of California. United States v. California, 332 U.S. 19 (1947). In 1950 the same decision was made with reference to the waters of Texas and Louisiana. United States v. Louisiana, 339 U.S. 699 (1950).

In 1953, in reaction to these decisions, Congress passed the Submerged Lands Act, 43 U.S.C. §§ 1301-1356 (1982), which re-established state control over those lands. U.S. FOREIGN POLICY, *supra*. The legislation provided the following boundary definition:

> The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the

The Supreme Court continued its redefinition and clarification of the states' power to regulate fishery resources in *Dougals v. Seacoast*,[46] a case interpreting a Virginia statute designed to insure that non-residents not be permitted to catch menhaden in parts of Chesapeake Bay and the state's territorial waters.[47] The state required that only citizens of the United States could get a license and that a corporation seeking such a license must have seventy-five percent of its stock owned by United States citizens.[48] Seacoast Products, Inc., a leading company producing menhaden products, was owned primarily by a British corporation.[49]

In striking down the Virginia statute, the Supreme Court used part of the rationale in *Gibbons v. Ogden* to justify its decision.[50] The Court reasoned that *Gibbons v. Ogden* required federally licensed vessels, such as those owned by Seacoast, to be treated fairly and reasonably by the states.[51] States, the Court reasoned, may impose nondiscriminatory conservation and environmental protection measures on foreign vessels, as they do on their own. In so holding, the Court further relied on its rationale in *Manchester v. Massachusetts*[52] to the effect that the statute passed by Massachusetts was adopted for the preservation of fish and was therefore nondiscriminatory.[53]

A recent decision by the Court has probably put an end to the last vestiges of the state ownership theory in any waters subject to both state and federal control. In *Hughes v. Oklahoma*[54] the state legislature's statute prohibiting the sale (outside the state) of min-

> case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provisions, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

43 U.S.C. § 1312 (1976).

The last sentence permitted Texas and Florida (on her Gulf side) to have 3 marine league territorial seas. This explains the unevenness of the shoreward boundary of the Fishery Conservation Zone. (For more on the FCZ see *infra* note 62 and accompanying text).

46. 431 U.S. 265 (1977).
47. *Id.* at 267-68.
48. *Id.* at 268.
49. *Id.* at 269-70.
50. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
51. Douglas v. Seacoast, 431 U.S. at 275-277.
52. 139 U.S. 159.
53. Douglas v. Seacoast, 431 U.S. at 277-78.
54. 441 U.S. 322 (1977).

nows caught in Oklahoma was struck down as violative of the Commerce Clause. The Court reviewed the history of its interpretation of cases involving the regulation of fish and game resources, reiterating its rejection of the old ownership analysis.[55] Any remaining exception to the rule that states may treat citizens of other states in a discriminatory manner on the basis of an ownership theory was rejected by the Court in *Hughes* in unequivocal language.[56]

These cases leave the states with the authority to manage the fishery resources in their inland and territorial waters but clearly illustrate that these management schemes are subject to paramount national interests.[57] In 1976, the states' interests in managing fishery resources were further defined by the adoption of the Fishery Conservation and Management Act (FCMA).[58]

III. The FCMA: Structure and Purpose

The Fishery Conservation and Management Act was enacted by Congress and signed by President Ford for a variety of reasons. Both foreign and domestic fishing pressure had resulted in overfishing

55. *Id.* at 325-35. In *Hughes* the Court overruled its decision in Geer v. Connecticut, 161 U.S. 519 (1896). *Geer* was a decision which had used an ownership theory to interpret a Connecticut statute which prohibited the transportation of game animals from the state. *Id.* at 521. The Court reviewed international law on the status of *ferae naturae*, coming to a conclusion that the enactment was constitutional. *Id.* at 522-35. It also reviewed its own decisions such as *McCready v. Virginia* with approval. *Id.* at 528. The Court in *Hughes* believed *Geer* and *Hughes* were on all fours. *Hughes*, 441 U.S. at 335.

56. *Hughes*, 441 U.S. at 335-36. The Court stated in putting the fictitious ownership theory to rest:

> We now conclude that challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources, and therefore expressly overrule *Geer*. We thus bring our analytical framework into conformity with practical realities. Overruling *Geer* also eliminates the anomaly, created by the decisions distinguishing Geer, that statutes imposing the most extreme burdens on interstate commerce (essentially total embargoes) were the most immune from challenge. At the same time, the general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership.

57. *Id.* at 337-38. The Court pointed out:

> The State's interest in maintaining the ecological balance in state waters by avoiding the removal of inordinate numbers of minnows may well qualify as a legitimate local purpose. We consider the States' interests in conservation and protection of wild animals as legitimate local purposes similar to the States' interests in protecting the health and safety of their citizens [citations omitted]. But the scope of legitimate state interests in "conservation" is narrower under this analysis than it was under *Geer*. A State may no longer "keep the property, if the sovereign so chooses always within its jurisdiction for every purpose." *Geer v. Connecticut*, 161 U.S. at 530. The fiction of state ownership may no longer be used to force those outside the State to bear the full costs of "conserving" the wild animals within its borders when equally effective nondiscriminatory conservation measures are available.

58. 16 U.S.C. § 1801.

which threatened the depletion of several major fish stocks.[59] Attempts at the regulation of fisheries important to the United States through the use of international agreements met with little success.[60] Negotiations on the Law of the Sea Treaty, designed in part to define and regulate participation of foreign fishing vessels in fisheries off coastal nations' shores, dragged on, offering little immediate help to overfished populations.[61]

To varying degrees, these factors culminated in the adoption of a federal system of management for United States' fisheries. The FCMA regulates fisheries in an area called the Fishery Conservation Zone (FCZ).[62] The Act is designed to promote conservation and

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59. A LEGISLATIVE HISTORY, *supra* note 6, at 433. Senator Pastore stated:

> I am concerned about further delay and I remain skeptical about the effectiveness of international negotiation despite some heralded successes in establishing overall fishing quotas by the International Commission for the Northwest Atlantic Fisheries (ICNAF) recently.
>
> My concerns flow from the general and fundamental lack of success of ICNAF, a vehicle for international negotiation, over the past quarter century. Now ICNAF was established when the Northwest Atlantic — the fishing grounds of New England, the Georgia Bank and the Grand Banks — was still the richest and most prolific fishing grounds in the world.
>
> With ICNAF watching these great fishing grounds, which New Englanders fished for centuries without doing ecological damage, the foreign fleets moved in and decimated the largest stocks of fish in the world.
>
> Not until the very existence of the haddock was immediately threatened did ICNAF take firm action. But damage to the haddock was so great that the member nations of ICNAF were forced to clamp a ban on all directed fishing for haddock.

Id. Senator Hathaway from Maine echoed his colleagues' distress:

> The effects of foreign fishing has been especially acute off the New England coast. In a particularly rich fisheries area — that of Georgia Bank — 88 percent of the total catch was taken by U.S. fishermen as recently as 1960. As of 1972, the figures were turned around and foreign fishing accounted for over 89 percent of the total catch from the Georgia Bank area. In just 12 years the relative catch of U.S. and foreign fisherman was reversed. This statistic reflects untold economic disruption for our individual fishermen and, of course, an increasingly adverse balance of payments for the Nation as increasing market demand for fish products has been met by imports. Testifying before the Small Business Committee last spring at hearings on the "Economic and Loan Problems of the Fisheries Industry," Richard Reed of the Maine Sardine Council surveyed the damage done by foreign fishing to the sardine industry. He said that from 1941 to 1960, the sardine business had an average pack of about 2½ million cases a year. From 1962 to 1975, after foreign fishing started in earnest, the average pack was from 900,000 to 1 million per year. He felt that foreign fishing was resulting in the taking of the larger, strong fish and that a decline in the number of juveniles was taking place.
>
> At these hearings, fisherman after fisherman stressed the need for extension of the fisheries limits as a necessary first step correcting this situation: and significantly, they recognized that extended jurisdiction was not a complete or simple answer to a complex situation, but rather than each of them — and the industry as a whole — would have to cooperate in conservation efforts for the sake of the preservation of the industry itself.

Id. at 450.

60. *See* Maine v. Kreps, 563 F.2d 1043, 1045-56 (1st Cir. 1977); A LEGISLATIVE HISTORY, *supra* note 6, at 433-50.

61. A LEGISLATIVE HISTORY, *supra* note 6, at 433-50.

62. 16 U.S.C. § 1811 (1982). The section reads:

management through fishery management plans (FMPs) consistent with national standards enumerated therein.[63]

FMPs are created by regional fishery management councils consisting of representatives from state fishery management agencies, representatives of the National Marine Fisheries Service (NMFS), and a number of individuals nominated by the governor of coastal states to represent industry, recreational fishermen and the public.[64] Each FMP adopted by the regional council determines the maximum sustainable yield (MSY) and the optimum sustainable yield (OY) for the fishery.[65] The plan must identify that part of the OY which on an annual basis will not be harvested by domestic fishermen.[66] The amount not harvested is to be allocated to participating

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> There is established a zone contiguous to the territorial sea of the United States to be known as the fishery conservation zone. The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal States, and the outer boundary of such zone is a line drawn in such a manner that each point is 200 nautical miles from the baseline from which the territorial sea is measured.

63. 16 U.S.C. § 1851 (1982).

> (a) In general. Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title [16 USCS §§ 1851 et seq.] shall be consistent with the following national standards for fishery conservation and management.
>
> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.
>
> (2) Conservation and management measures shall be based upon the best scientific information available.
>
> (3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.
>
> (4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be
>
> (A) fair and equitable to all such fishermen;
>
> (B) reasonably calculated to promote conservation; and
>
> (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

Id.

64. 16 U.S.C. § 1852.

65. 16 U.S.C. § 1802(18). The term "optimum," with respect to the yield from a fishery, means the amount of fish

> (A) which will provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and
>
> (B) which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social or ecological factor.

Id.

Maximum sustainable yield (MSY) is not defined in the FCMA, but has been judicially interpreted to mean the following:

> . . . a scientific appraisal of the safe upper limit of harvest which can be taken consistently year after year without diminishing the stock so that the stock is truly inexhaustible and perpetually renewable.

Maine v. Kreps, 563 F.2d at 1047 n.4, *citing* H.R. Rep. No. 445, 94th Cong., 1st Sess. 48 (1975).

66. 16 U.S.C. § 1853(a)(4).

foreign fishing interests.[67]

Each FMP is reviewed by the United States Secretary of Commerce to ensure compliance with national standards.[68] In this review, the Secretary consults with the Secretary of State on the plan's provisions regulating foreign fishing.[69] In limited circumstances, the Secretary of Commerce, in conjunction with the Secretary of State, is required to prepare an FMP.[70]

As noted above, the regulation of foreign fishing on traditionally domestic fishing grounds was one of the motivations behind the passage of the FCMA. Briefly, foreign fishing is permitted in the FCZ when, under a treaty or other agreement, the foreign nation and its nationals agree to follow the FCMA and its regulations.[71] The foreign nation and its nationals are prohibited by the Act from exceeding their allocation of the total allowable level of foreign fishing.[72]

Through the use of FMPs, state, national, and foreign fishing interests are taken into account. The Act, of course, presupposes that state management of fishing resources which migrate from state to state and from state to waters in the FCZ will not seriously disrupt an FMP scheme. Many species, such as shrimp, spend part of their lives in state inland and territorial waters as well as in the FCZ.[73] The Regional Management Council prepares a plan to manage

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67. 16 U.S.C. § 1821(d).

68. 16 U.S.C. § 1854(a)(1)(A). *See also supra* note 63.

69. 16 U.S.C. § 1854(a)(2)(C).

70. 16 U.S.C. § 1854(c). This section addresses inaction or refusal to act by a Council after the Secretary of Commerce has asked for a plan to be revised or if no plan has been prepared within a reasonable time.

71. 16 U.S.C. § 1821.

72. *Id. See also supra* note 67 and accompanying text.

73. J. CLARK, COASTAL ECOSYSTEMS 26-27 (1983) [hereinafter cited as COASTAL ECOSYSTEMS]. Clark describes the movement of shrimp thusly:

> Shrimps are found along all U.S. coasts. Many are commercially useful and all are essential to the food web. The peneid shrimps of the South Atlantic and Gulf Coasts (the brown, pink and white) are the most valuable commercially. The diet of various species appears to consist of plant detritus and small crustaceans, worms, and various larvae. Although most species are oceanic residents as adults, the estuary fulfills two primary functions for certain life stages of these shrimps: (1) provision of adequate nourishment during a period of rapid physical growth and (2) protection from predators.
>
> The pink shrimp, abundant in the Gulf of Mexico, spawns offshore in water 100 to 150 feet deep. The larvae move and drift with currents toward the mainland for three to five weeks while passing through a series of developmental stages and growing to a size of about ½ inch. They enter the inlets and within the estuary they grow rapidly, reaching commercial size in two to four months before returning to the sea to complete their life cycle. The closely related brown shrimp spawns offshore in depth of 150 to 230 feet. The young move inshore to remain for several weeks in the estuary. The other important Gulf of Mexico species, the white shrimp, inhabits water less than 100 feet deep and has a life cycle similar to the brown shrimp although it resembles the pink shrimp in having a greater affinity for fresh water.

Id.

shrimp in the FCZ.[74] If the Council's strategy differs dramatically from that of the states in the Council, the FMP's success can be destroyed.[75]

To prevent this type of clash, the FCMA contains a provision which preempts state management under certain circumstances.[76] The preemption provision can be triggered only when a fishery is located predominantly in the FCZ and outside the FCZ a state has taken or failed to take any action which will substantially and adversely affect the success of the FMP.[77]

Although it has not yet been used or challenged, the preemption provision is clearly constitutional and is a logical further inroad on the fishery management authority of the states.[78] On balance, the

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74. 16 U.S.C. § 1852(h).
75. 16 U.S.C. § 1854(b).
76. 16 U.S.C. § 1856(b).
77. *Id.* This section reads:

(b) Exception.

(1) If the Secretary finds, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code [5 USCS § 554], that —

(A) the fishing in a fishery, which is covered by a fishery management plan implemented under this Act, is engaged in predominately within the fishery conservation zone and beyond such zone; and

(B) any State has taken any action, or omitted to take any action, the results of which will substantially and adversely affect the carrying out of such fishery management plan;

the Secretary shall promptly notify the State and the appropriate Council of such finding and of his intention to regulate the applicable fishery within the boundaries of such State (other than its internal waters), pursuant to such fishery management plan and the regulations promulgated to implement such plan.

(2) If the Secretary, pursuant to this subsection, assumes responsibility for the regulation of any fishery, the State involved may at any time thereafter apply to the Secretary for reinstatement of its authority over such fishery. If the Secretary finds that the reasons for which he assumed such regulation no longer prevail, he shall promptly terminate such regulation.

78. The thesis of this paper is that Section 1856(b) gives the Secretary authority to preempt pursuant to the Act's provisions. It is arguable that in light of the case law discussed above and the Submerged Lands Act, 43 U.S.C. § 1301-56, that the United States could successfully challenge management policies without using the FCMA. It is clear that the United States retained rights in the area of the states' territorial seas. United States v. California, 332 U.S. 19 (1946). This case precipitated the passage of the Submerged Lands Act. In its opinion, the Court addressed the United States' power in the territorial sea area:

What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations [citations omitted]. The very oil about which the state and nation here contend might well become the subject of international dispute and settlement.

The ocean, even its three mile belt, is thus of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world; it also becomes of crucial importance should it ever again become impossible to preserve that peace.

Id. at 35. The Court found the United States had paramount rights in the area. *Id.* at 35-36. The Submerged Lands Act recognized these paramount rights even as it conveyed to the states control over the resources of the territorial seas. Section 6(a) of that Act states:

The United States retains all its navigational servitude and rights in and

FCMA, standing alone, gives the states a valuable voice in foreign fishery policy and in other states' management schemes.[79] The value of the Act to the states may be severely threatened, however, by the UNCLOS Treaty's provisions on fisheries.

IV. UNCLOS and Fisheries

The UNCLOS Treaty recognizes the importance of wise fishery management to the coastal nation and the international community. The Treaty's codification of a zone beyond the territorial sea within which a coastal state exercises paramount sovereign rights over living and nonliving resources to a large extent resulted because of increasing international fishing pressure on historic coastal state fisheries.[80] This zone is termed by the Treaty to be the "Exclusive Economic Zone" (EEZ).[81]

The EEZ is defined as an area beyond and adjacent to the territorial sea. The zone's breadth is to be no greater than 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.[82] The Treaty gives a coastal nation sovereign rights in the EEZ for the purpose of exploring, exploiting and managing the living and nonliving resources of the area.[83] The Treaty also makes

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powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 3 of this Act.

79. *See* MacRae, *The Fishery Conservation and Management Act: The States' Role in Domestic and International Fishery Management*, 88 DICK. L. REV. 306 (1982) [hereinafter cited as MacRae].

80. *See* A LEGISLATIVE HISTORY, *supra* note 6, at 34-35.

81. UNCLOS Treaty, *supra* note 2, at Pt. V arts. 55-75, pp. 1279-1284.

82. *Id.* at art. 57, p. 1280.

83. *Id.* at art. 56, p. 1280 which states:

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights

the coastal state primarily responsible for the conservation of the living resources in the zone.[84]

In carrying out its conservation function, the coastal nation is obilgated to prevent overexploitation.[85] In accomplishing its function, the coastal state is charged with designing a management scheme based on a MSY model as qualified by relevant economic and environmental factors.[86] In addition, the coastal nation's management scheme is required to take special steps to recognize developing nations' needs in the fisheries.

The coastal nation has an affirmative duty to promote optimum utilization of the living resources while maintaining the concept of a socially modified MSY. The nation is required to allocate portions of the allowable catch to other nations when the coastal nation's harvesting capacity is not large enough to bring in the entire MSY.[87]

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and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI.

84. *Id.* at art. 61, p. 1281. Article 61 states:

Article 61

Conservation of the living resources

1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.

2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measure that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall co-operate to this end.

3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.

4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.

5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

85. *Id.* at art. 61(2).

86. *Id.*

87. *Id.* at art. 62(2). This provisions states:

The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 or 70, especially

Two coastal nations that have the same stock or stocks of associated species within the EEZ of both nations have the duty to coordinate their conservation efforts.[88] Other provisions of the Treaty outline the duties of coastal nations over catadromous[89] and anadramous[90] species.[91]

The Treaty requires that coastal nations allow land-locked nations access to the surplus allowable catch equal to the access of other coastal nations.[92] Similar provisions permit geographically disadvantaged[93] states to have equal access as well.[94] The Treaty is designed to alleviate the ineffectiveness of prior international fishery management schemes by granting primary authority to the nation having the greatest self-interest.

V. The UNCLOS Fishery Provisions and the States

It is evident that the UNCLOS Treaty's fishing provisions envision an international solution to fishing disputes.[95] For nations which

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in relation to the developing States mentioned therein.

88. *Id.* at art. 63.

89. Catadramous fish — A fish which goes back to salt water to spawn after having lived most of its life in fresh water.

90. Anadramous fish — A fish which goes back to fresh water to spawn after living the majority of its life in salt water.

91. UNCLOS Treaty, *supra* note 2, at Pt. V, arts. 66-67.

92. *Id.* at art. 69.

93. *Id.* at art. 70. A geographically disadvantaged country is defined as:

> . . . coastal States, including States bordering enclosed or semi-enclosed seas, whose geographical situation makes them dependent upon the exploitation of the living resources of the exclusive economic zone of other States in the subregion or region for adequate supplies of fish for the nutritional purposes of their population or parts thereof and coastal States which can claim no exclusive economic zone of their own.

94. *Id.*

95. Part XV of the Convention is devoted to Settlement of Disputes arising from interpretations and applications of provisions of the UNCLOS Treaty. Specifically, Article 297(3) applies to the resolution of disputes involving fisheries in the EEZ. The subsection reads:

> 3(a) Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with Section 2, except that the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.
>
> (b) Where no settlement has been reached by recourse to section 1 of this Part, a dispute shall be submitted to conciliation under Annex V, section 2, at the request of any party to the dispute, when it is alleged that:
>
> (i) a coastal State has manifestly failed to comply with its obligations to ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not seriously endangered;
>
> (ii) a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing; or
>
> (iii) a coastal State has arbitrarily refused to allocate to any State, under

manage the fishing resources using a national instead of a federal system of management, the effects of the Treaty's substantive as well as enforcement provisions are clear. The United States, however, operates under a federal system of management. What has not been explored adequately is the potential effects, if any, on state management authority and on state influence on federally managed international fishery policies of the nation in the event the United States ratifies the Treaty.

Coastal states have not always had a vehicle such as the FCMA to influence foreign fishery policy. Domestic fishing interests take precedence over decisions pertaining to the international fishery decisions of the State Department.[96] Through state participation in the preparation of an FMP, the states can now directly influence the level of foreign fishing through the calculation of the surplus of fish available following domestic allocation.[97] Should the Secretary of Commerce fail to adopt the FMP or alter the Regional Management Council's decision, member states have a legally protected right to challenge that decision in court.[98]

Two cases involving different aspects of the FMP process provide examples of how normal operation of the Act works. Both serve as illustrations of how foreign fishery interests could affect the Act's effectiveness. *Louisiana v. Baldridge*[99] involved a challenge by the State of Louisiana to an FMP for shrimp adopted by the Gulf of Mexico Regional Fishery Management Council. Shrimp represent the most valuable domestic fishery, having made up an average of twenty-three percent of the value of all fish landed in the United States from 1964 through 1977.[100] The Gulf of Mexico accounted

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> articles 62, 69 and 70 and under the terms and conditions established by the coastal State consistent with this Convention, the whole or part of the surplus it has declared to exist.
>
> (c) In no case shall the conciliation commission substitute its discretion for that of the coastal State.
>
> (d) The report of the conciliation commission shall be communicated to the appropriate international organizations.
>
> (e) In negotiating agreements pursuant to article 69 and 70, States Parties, unless they otherwise agree, shall include a clause on measures which they shall take in order to minimize the possibility of a disagreement concerning the interpretation or application of the agreement, and on how they should proceed if a disagreement nevertheless arises.

Id. at art. 297(3). Section 2 of Part XV is a compulsory dispute resolution mechanism. Section 1 is a more general statement of objectives but includes conciliation (Art. 284) as an alternative means of resolution for fishery disputes when one of the nations has refused to submit to the binding decision process.

96. See U.S. FOREIGN POLICY, *supra* note 45, at 62-65. The author there identifies the various competing fishery interests in the United States. *See also* MacRae, *supra* note 79.

97. 16 U.S.C. § 1853(a)(4).

98. 16 U.S.C. § 1855(d).

99. 538 F. Supp. 625 (E.D. La. 1982).

100. *Id.* at 627.

for eighty percent of the dockside value of these landings.[101] The Shrimp FMP challenged by Louisiana contained a measure which closed the FCZ adjacent to the Texas territorial seas to all but Texas shrimpers in conjunction with the state's own closure of the territorial waters under its exclusive control.[102]

The purpose of the closure was to maximize the tonnage of shrimp caught.[103] This measure was thought to be required because the shrimpers in Texas and Louisiana have distinctly different fishing strategies. Louisiana shrimpers in general support, and are a product of, the Louisiana shrimp canner industry.[104] Canners use small and medium sized shrimp.[105] Texas processors, and consequently Texas shrimpers, seek medium and large shrimp.[106] Allowing Texas boats to harvest shrimp before the shrimp have fully matured results in large fishing mortality resulting from discarded small shrimp. Louisiana objected to the closure provisions because its canners needed a year round supply of small shrimp.[107]

The district court, speaking through Judge Robert F. Collins, upheld the FMP.[108] The specifics of the opinion are less important for an understanding of the Act's contribution to state management than the result of the opinion. For one of the first times, one state's management scheme was accepted by the federal management authority for the FCZ over another state's. The FCMA's promise of giving coastal states a say in national and other state's management programs was fulfilled.

On the other hand, even with the FCMA in effect, the states have been subject to the old deference to foreign fishing interests because of State Department influence. In *Maine v. Kreps*,[109] the State of Maine complained about the adoption by the Secretary of Commerce of a Preliminary Fishery Management Plan for herring in the Georges Banks fishing grounds.[110] In the PFMP, the Secretary set the OY for herring at 33,000 m.t. with the United States' share being 12,000 m.t.[111] The United States' share was a 6,000 m.t. reduction from the original plan — a reduction made in return for economic concessions from the Federal Republic of Germany[112] and an acceptance by all members of the International Commission for

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 631.
109. 563 F.2d 1043 (1st Cir. 1977).
110. *Id.* at 1045.
111. *Id.* at 1046.
112. *Id.*

the Northwest Atlantic Fisheries (ICNAF) for a limited season for foreign fishermen.[113]

Maine challenged the allocation of 12,000 m.t. as being too low.[114] The State argued that the domestic fleet's hold capacity and renewed interest in the fishery should be used in determining the domestic allocation.[115] In rejecting the State's claims, the Court discussed the FCMA's relationship to foreign policy considerations and the then prospective UNCLOS Treaty:

> While the Act, in its preamble makes clear that it was enacted in reaction to the ineffectiveness of international agreements to prevent overfishing, § 1801(a), it speaks to encourage such international agreements in the future, and to encourage continued active United States efforts to obtain an internationally acceptable treaty at the upcoming Third United States Conference on the Law of the Sea.[116]

In another appeal to the Court of Appeals in the same case, an affidavit of the federal government stated explicitly that foreign affairs played a role in the final determination of both OY and the allocation. The affidavit concluded:

> It is my opinion that any abrupt termination of foreign fishing, given this historical background, could have significant adverse impacts on our international fisheries relations.[117]

While the Act thus has fulfilled its promises in relation to providing a more effective mechanism for states to influence both foreign and domestic fishing policies, *Maine v. Kreps* should present a red flag.

It has long been recognized that treaties, when properly ratified, become part of the law of the land.[118] The fishery provisions of the UNCLOS Treaty are arguably self-executing, even though the FCMA directs the Secretary to pass regulations to ensure that regulations promulgated under the FCMA are in compliance with the Treaty.[119]

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113. *Id.*
114. *Id.* at 1048.
115. *Id.*
116. *Id.* at 1049.
117. State of Maine v. Kreps, 563 F.2d 1052, 1055 (1st Cir. 1977).
118. Missouri v. Holland, 252 U.S. 416 (1920).
119. If it is found that the provisions are not self-executing, at least one well respected scholar would find little substantive conflict between the UNCLOS Treaty (draft) and the FCMA. Burke, *U.S. Fishery Management and the New Law of the Sea Treaty* 76 AM. J. INT'L L. 24 (1982). Burke concludes: "That the draft LOS Treaty and the FCMA are, with few exceptions, in fundamental accord is not surprising. Both reflect a strong effort to protect coastal interests." *Id.* at 52. Burke does, however, suggest that coastal nations really have little need to fear any loss of fishery management authority as a result of the Treaty. *Id.*at 53.

His conclusion on its face is true as far as the nations are concerned. From the states' perspective, however, the new element of foreign involvement should be of greater concern than it is to the federal Departments of State and Commerce. Burke's treatment of the alloca-

A hypothetical example of how the Treaty could affect a coastal state's fishery management authority will illustrate the potentially negative effect of the Treaty on state management and control as it currently exists under the FMCA:[120] An FMP for shrimp determines that domestic harvesting capacity will leave no surplus available to foreign fishing interests in the area controlled by the Gulf Regional Fisheries Management Council. Mexican shrimpers, through Mexico, complain of the action, citing an improper calculation and a failure to manage properly. The United States would then have the option of refusing to submit the dispute to binding decision.[121] The dispute would then go to conciliation.[122] If, however, the case was submitted under binding decision-making, the FMP would be subject to scrutiny in a forum in which the coastal state would not have an independent voice. One of the greatest values to the coastal states under the FCMA is that its provisions ensure state input into foreign fishery policy.[123] The United States, presumably through the State Department, would represent all national interests, including the interests of the individual states, in the event of a Treaty dispute.

In its review of the foreign fishing component of an FMP, the decision-makers[124] can consider allegations that the coastal nation against which the complaint is lodged has manifestly failed to conserve and manage its fishery resources.[125] Logically, foreign relations take center stage in an international setting,[126] and as noted above, international relations often take precedence over domestic state policies. If the United States were to accept binding arbitration and if the international body decides that an FMP either fails to manage or conserve resources properly, the United States would then be presented with a binding[127] determination necessitating a plan alteration. Because most countries do not have a federal system of fishery management, nations which are found to have failed in their obligations need only change national policies. In the United States, however, because management of fishing resources is a multi-jurisdic-

tion of authority between the states and the federal government overlooks this concern. *Id.* at 49-51.

120. Any number of examples could be used. All that is necessary for the potential conflict to exist is an interest in the fishery by both foreign and domestic fisherman and a range for the stock across the boundary of the EEZ and the state's territorial waters.

121. UNCLOS Treaty, *supra* note 2, at arts. 297(1)(c) and 3.

122. *Id.* at art. 297(3). Conciliation is governed by the rules set out in Annex 5. *See also supra* note 95.

123. 16 U.S.C. 1853(a)(4).

124. UNCLOS Treaty, *supra* note 2, at art. 295(3)(b)(1).

125. *Id.*

126. It is understandable that the State Department would have its own agenda. What is feared is the possibility that their concerns would predominate any solution.

127. Again as noted, the nation is not required to submit to binding decision making. UNCLOS Treaty, *supra* note 2, at art. 297. However, there are mandatory submission requirements in Annex V, Section 2 for fishery disputes. *See supra* note 95.

tional endeavor, such a decision would necessitate a change in national *and* state fishery policies.

Applying these fact to the Mexican example, the Mexican government might complain that a harvesting strategy, such as the one Louisiana uses inside her territorial waters, results in a failure to ensure proper maintenance of the living resources in the EEZ. To comply with the Treaty, the United States, if found to have failed to protect those resources, would be faced with a choice between exerting pressure on Louisiana or preempting Louisiana's right to manage its fisheries.

The Secretary of State, who is often at odds with domestic fishing interests, would have a much greater justification for putting pressure on the Secretary of Commerce to use the preemption authority. Domestic state interests could easily be sacrificed to international gain. The decision by the international tribunal and the interest of the Secretary of State thus may require a coastal state to alter one or more of its management decisions. Failure to do so may result in preemption under the FCMA.[128]

In order to preempt a state management scheme, the Secretary of Commerce must find that the fishery to be preempted is covered by an FMP and is engaged in managing fisheries predominantly within the FCZ or beyond.[129] Further, the Secretary must find that the management practice substantively and adversely affects the carrying out of the FMP.[130]

Shrimp spawn in the territorial waters of the states. Juveniles migrate shoreward and grow in the internal waters of the various states.[131] Following the hatch, the juvenile shrimp leave the nursery areas and continue moving offshore.[132] In the Mexican example set out above, the coastal state may be allowing the harvesting of juvenile shrimp to be used as canners.[133] Coupled with natural mortality, the loss of the more mature and larger adults attributed to this type of fishing might create a significant reduction in the number of animals available to the offshore fishermen who seek the medium to large-size shrimp.

Obviously, the FMP for shrimp would have to take this factor into account. As a result, MSY and possibly OY for the fishery would be reduced. Dependent on the domestic vessel capacity to har-

128. 16 U.S.C. § 1856(b).

129. *Id.* This phraseology is awkward. It is submitted that it means that the majority of fishing pressure is applied on the stock outside of the territorial waters of the state.

130. *Id.*

131. Internal waters are the waters landward of the line from which the breadth of the territorial sea is measured.

132. COASTAL ECOSYSTEMS, *supra* note 73, at 26-27.

133. Louisiana v. Baldridge, 538 F. Supp. 625 (1982).

vest OY, foreign allocations would clearly be seriously affected by the type of state strategy adopted. Using only domestic criteria, such a result is perfectly acceptable. However, a country such as Mexico could also legitimately feel that the United States had failed to ensure that the resources in the FCZ were being adequately protected.

Other examples of possible preemption problems include any migrating fishes which spend time in estuaries and migrate outside beyond the state's territorial waters. In addition to the shrimp, croaker, winter flounder and striped bass also migrate into the FCZ from internal and territorial waters.[134] Other fish which may be subject to the scenario outlined above might include certain weakfish, redfish, and black drum.[135]

While the UNCLOS Treaty is directed at management and conservation in the FCZ, it is hard to assume that a coastal nation which has been found to have violated its responsibilities can effectively correct the deficiency only in the FCZ. Fish do not read maps; they must be managed as a unit inshore and offshore. Preemption, failing persuasion, is the only tool available to the Secretary of Commerce to disrupt coastal state practices in instances where coastal state policies result in an adverse decision under the UNCLOS Treaty.

VI. Conclusion

The FCMA was adopted to insure that decisions relating to management of the fisheries located in the FCZ be a joint federal and state undertaking. Foreign fishing interests have been required to submit to the resulting federal-state management decisions since

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134. COASTAL ECOSYSTEMS, *supra* note 73, at 26.

135. *Id.* Although the UNCLOS Treaty, Article 77 defines lobsters as sendentary and thus outside of the controls discussed above, the population pattern and reproductive cycle is an excellent model. See L. STUBBS, THE AMERICAN LOBSTER — HOMARUS AMERICANUS (1979); J. KROWSE, HISTORICAL REVIEW OF LOBSTER TAGGING STUDIES IN AMERICAN WATERS (1898-1980) (June 1980); LOBSTER INFORMATION Leaflet No. 7. *See* COOPER & UZMAN, MIGRATION AND GROWTH OF DEEP SEA LOBSTER HOMARUS AMERICANUS, 171 Science 288 (1971). An historic fishery has developed in Maine's inshore area. Several years ago, a fairly substantial lobster fishery also developed offshore, out to about the 200 mile limit. Present thought is that the lobsters making up the two fisheries are unrelated. However, based on a number of studies, there is a developing body of evidence that suggests that the two populations are related through onshore-offshore migration.

Fishing pressure in the inshore fishery is immense. If in fact the populations are related, common sense dictates a severe reduction in OY as well as in possible foreign fishing allocation. Clearly an argument could be made by a foreign fishing country that management measures to ensure the conservation of the species would require reduction in the fishing pressure from the inshore fishery. In fact, should the populations truly be related, inshore strategies might be detrimental. Hypothetically, if, as suspected, there is a migration of young from the inshore area to the offshore area for spawning, the inshore strategy may be taking the spawners that supply both fisheries. Because it takes seven or more years for a lobster to reach sexual maturity, a combination of natural and fishing mortality may combine to effectuate a dramatic crash in the offshore fishery. Foreign interests could legitimately complain of United States fishery strategy in the FCZ.

1976. The UNCLOS Treaty may change this emphasis by giving foreign interests a say in United States fishery policies. The result would be a further erosion of state control over fisheries. This impact should be carefully examined before the United States ratifies the UNCLOS Treaty.