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# The Joint Venture Controversy: A Short-Term Solution for a Long-Term Fisheries Policy

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The Joint Venture Controversy: A Short-Term Solution For  
A Long-Term Fisheries Policy

by

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## I. INTRODUCTION

The enactment of the Fishery Conservation and Management Act of 1976<sup>1</sup> (hereinafter Act or FCMA) provided the United States with the authority to regulate the vast fishery resources that are found within 200 miles of its coast. This so-called "200-mile law", in effect, gave the United States the right to say who may catch the resources, in what areas, and in what quantities. The Act established a Fishery Conservation Zone (FCZ)<sup>2</sup> extending from the seaward boundary of the Territorial Sea to 200 nautical miles from shore within which the U.S. would assume exclusive fishery management authority.<sup>3</sup>

The Act provided a framework for the U.S. fishing industry to rebuild itself and expand through the development of our fisheries resources. The United States made a national commitment to revitalize its commercial fisheries through a system which includes preferential fishing rights for U.S. fishermen and protection from the advanced and efficient fishing fleets of foreign nations. However, even with the benefits of the FCMA the domestic industries soon came to realize that extended jurisdiction did not solve all fishery problems. Competition with foreign fleets for fishery resources still prevailed in some fisheries. Because of inefficient operations, underinvestment in some fisheries and overinvestment in others, and lack of technological equipment, the small and highly fragmented commercial fish industry has failed to respond to the challenge of the system.

The U.S., once a leader among fishing nations, has now fallen to fourth place in landings,<sup>4</sup> which have not increased at the same rate as fish consumption. This reduction in the ability of the industry to compete in the world fishery market in the face of a growing demand for fishery products is evidenced by the relations of imports and domestic landings to total U.S. supply. Imports have represented a steadily higher margin of supplies of edible seafood products. In 1982, imports were 4.7 billion pounds (round-weight), constituting 58.7% of total U.S. supply of edible fishery products.<sup>5</sup> Even though industrial production is constantly being upgraded, and worldwide catches are being landed at an increasing rate, the failure of the industry to keep pace with the new development is an anomaly.<sup>6</sup>

On a national level the picture is a little brighter. The U.S. commercial fishing industry is estimated to contribute \$7.5 billion to the GNP.<sup>7</sup> It accounts for full-time employment of roughly 270,000 with an additional 30,000 during peak seasons. In most regions off the coast of the U.S. there has been sustained growth in the fisheries industry since 1973. The fastest growing fishing region is Alaska, with the South Atlantic not far behind.

Growth rates for all regions are as follows:<sup>8</sup>

<u>Region</u>	<u>% Growth since 1973</u>
New England	31
Mid-Atlantic	-49
Chesapeake region	13
South Atlantic	76
Gulf	49
California	4
Northwest	45
Alaska	93

These growth rates indicate that the FCMA has helped the industry expand, but whether the industry can develop to fully utilize and process all the resources within our waters to the exclusion of all foreign fleets is unpredictable at this point.

The preferential rights given to U.S. fishermen to harvest available resources have led to the elimination of large numbers of the foreign fishing vessels that were overexploiting many fishery stocks. This loss of access to supplies alarmed nations, e.g. Japan and the Soviet Union, which depend on seafood as a major source of protein requirements.<sup>9</sup> Fish also serves as a major export for many countries that fish within the FCZ, such as Japan and Korea.<sup>10</sup> In order to gain an alternative but more definite access to supplies, foreign nations, notably Japan, began investing in various segments of the U.S. industry.<sup>11</sup> In line with the increase in foreign investment, news came out in August 1976 that Bellingham Cold Storage of Seattle, Washington, was entering into a joint business venture with the Soviet Union for the purpose of harvesting and processing fish. The venture triggered immediate speculation in the Pacific Northwest that this form of business arrangement might become an "escape hatch" through which foreign states could sidestep the restrictions on foreign fishing the FCZ.<sup>12</sup> Since that time, the number of joint ventures<sup>13</sup> has increased and so has the controversy regarding these adaptive arrangements. Critics charged that these arrangements were "loopholes" in the FCMA which should be eliminated.<sup>14</sup>

This paper will examine the development of joint ventures under the FCMA, the legislative and regulatory measures designed to control these ventures and the procedures for establishing a joint venture. More recent developments in joint venture policy will be examined, including the controversy over squid joint ventures on the East Coast, to determine what the objectives are and what current policy is regarding joint ventures. The debate between harvesters and processors will be put forth as a way of summarizing the costs and benefits of joint ventures to the industry as a whole. Finally, recommendations on policy will be suggested and

conclusions drawn concerning the future viability of joint ventures in overall fisheries management.

## II. OVERVIEW OF JOINT VENTURE DEVELOPMENT

The clear policy of the U.S. in enacting the FCMA was to develop American fishing capacity to harvest the entire optimum yield and eventually exclude foreign fishermen entirely.<sup>15</sup> Under the FCMA, foreign fishing in the FCZ is prohibited unless it is authorized by an existing fishery treaty or agreement, or by a "governing international fishery agreement" negotiated pursuant to the Act.<sup>16</sup> Each fishing vessel of a nation authorized to fish within the FCZ must have a valid permit and must fish in accordance with the conditions and restrictions of that permit.<sup>17</sup>

The FCMA provided that processing and support vessels are "fishing vessels" for purposes of the Act<sup>18</sup>, and therefore subject to the permitting system applicable to all foreign fishing vessels<sup>19</sup>, and that "fishing" as defined in the Act included any support activities or operations at sea relating to the catching, taking, or harvesting of fish.<sup>20</sup> The FCMA, however, did not deal with the possibility of foreign processing vessels conducting joint operations with U.S. fishermen. "Foreign fishing" is defined as "fishing by a vessel other than a vessel of the United States".<sup>21</sup> A "vessel of the United States" is one that is "registered under the laws of any State [of the United States]" or is "documented under the laws of the United States".<sup>22</sup>

Until recently, the distinction between domestic and foreign fishing enterprises was a relatively uncomplicated issue. In most cases, a commercial entity engaged in fishing was provided the preference or was subject to the restrictions that attached to the flag of its vessels.<sup>23</sup> No inquiry generally was made as to nationality of the vessel's owner or crew. Some ambiguity in the meaning of these two phrases resulted in allowing foreign fishing interests access to fishery resources by owning or operating a U.S. vessel since the definition of a "vessel of the United States" did not absolutely eliminate foreign fishing interests. The issue of foreign ownership in U.S. vessels was a grave concern in House hearings after implementation of the FCMA.<sup>24</sup>

When joint ventures were first proposed tremendous controversy arose concerning these activities and a difficult policy issue emerged.<sup>25</sup> Congressional hearings were immediately held.<sup>26</sup> The purpose of these hearings was to determine whether or not joint ventures raised questions about the enforcement of the 200-mile law and to determine what steps, if any, were

necessary to make certain that the spirit as well as the letter of the law was maintained.<sup>27</sup>

Key questions were whether these arrangements would allow foreign states to harvest fish that were not surplus to U.S. needs as outlined in the FCMA; whether the arrangements would allow foreign states to avoid the fees imposed on foreign fleets to help manage our fisheries<sup>28</sup>; and whether joint ventures would permit foreign states to roam at will throughout the 200-mile zone.<sup>29</sup>

The National Marine Fisheries Service (NMFS) received two applications for foreign processing vessels to receive U.S. harvested fish in 1977. NMFS did not immediately act upon the applications because it felt a need to consider and evaluate alternatives and to develop a policy governing such ventures.<sup>30</sup> The applications were received from two fishing companies who proposed to use foreign processing and transport vessels to purchase, process, and transport fish caught by U.S. fishermen.<sup>31</sup>

The two major proposals concerned the foreign purchase of Gulf of Alaska (GOA) pollock from Alaskan fishermen and Pacific hake from West Coast fishermen. Other operations for Bering Sea herring, Alaska salmon, black cod, and Atlantic squid were being considered by foreign companies in 1977.<sup>32</sup>

The reason behind the formation of joint ventures is obvious. Foreigners looked for sources of supply, and domestic businessmen recognized the inefficiency involved with large-scale onshore processing of pollock.<sup>33</sup> They saw a joint venture operation as a means of recognizing immediate gains from exploitation without delays of the normal investment process. The size of the capital outlay was smaller. The costs of operation were less because of cheaper foreign labor on processing ships and the inefficiency of at-sea processing for pollock.<sup>34</sup> It was a more risk-free alternative to gain expertise in the high volume, low value type of fishing operation which the pollock fishing represented and with which the U.S. had little previous experience.<sup>35</sup> But for NMFS, granting the permits posed special problems. Granting such permits could have: (1) resulted in exceeding the optimum yield (OY) since regulations in place contemplated harvest levels without the product level provided by joint ventures; (2) decreased the catch available to domestic processors; and (3) expanded market opportunities for U.S. fishermen.<sup>36</sup> Because of potential far-reaching effects, the joint venture proposals generated considerable controversy and led to extensive public hearings.

Opponents of joint ventures argued that onshore processors could not compete with foreign processing vessels that were not subject to U.S. wage, safety and health requirements<sup>37</sup>, an

argument still being promoted today. These onshore processors also demanded clarification of FCMA and its allowances, arguing that the FCMA was passed to promote development of the entire fishing industry, not just the fishermen, and that this perceived "loophole"<sup>38</sup> should be effectively closed in order that new onshore processing capacity would not be hindered.<sup>39</sup>

Proponents of joint ventures countered that joint ventures were proposed only for species for which there was little or no U.S. processing capacity, that the joint ventures would not only transfer technology necessary to open up new fisheries for U.S. fishermen by providing an immediate market<sup>40</sup>, but would also help the development of U.S. fisheries for under-utilized species.<sup>41</sup> Some proponents were convinced that joint ventures would actually aid the development of harvesting and processing sectors. It was felt that by giving U.S. fishermen experience in new fisheries and by supplying an adequate supply of under-utilized species to processors once expertise was developed, then new investment and expansion could be justified.<sup>42</sup>

### III. LEGISLATIVE AND REGULATORY RESPONSES

Because of the importance and long-range consequences of granting these permits, an advance "Notice of Proposed Rulemaking" was published in the Federal Register on June 17, 1977, giving notice to hold public hearings on the joint ventures.<sup>43</sup> The Councils were invited to join NMFS in these hearings. On July 13, 1977, NMFS issued proposed rules concerning new procedures to provide for modification of existing foreign fishing permits, if they did not specifically prohibit foreign vessels from purchasing U.S. fish harvested in the FCZ.<sup>44</sup> NMFS held a series of eighteen public field hearings in July and August of 1977 to receive comments generally on "joint fisheries ventures" and more specifically on "selling at sea with respect to under-utilized species under certain conditions."<sup>45</sup> Results of the hearings were considered by the Marine Fisheries Advisory Committee (MAFAC) at a public meeting on October 5, 1977. The MAFAC on October 6, 1977, gave NMFS a series of recommendations on the issue, including a call for case-by-case consideration of joint venture proposals.<sup>46</sup> The Committee recognized that "joint ventures may be a vehicle to be utilized by U.S. harvesters and processors to achieve the objectives of the Act" and that the U.S. trade policy "is relevant to whether joint ventures should be allowed".<sup>47</sup>

The National Oceanic and Atmospheric Administration (NOAA) then issued final regulations "to govern fishing activities of foreign fishing vessels fishing within the U.S. Fishery Conservation Zone (FCZ) during 1978."<sup>48</sup> The new regulations purported to make it clear that foreign fishing vessels providing support for vessels of the U.S. in the form of at-sea processing would have to be authorized by permit.



Following the 1977 public hearings, consideration by MAFAC, and extensive NOAA review of these alternatives, an interim policy statement was proposed and published in the Federal Register to govern consideration of applications for permits by foreign vessels seeking to purchase or receive fish from U.S. vessels in the FCZ.<sup>49</sup> This policy provided that foreign joint ventures applications be approved only when the capability and intent of the U.S. fishing industry to harvest fish exceeded the capability and intent of the U.S. processors to process the fish. NOAA received comments to the proposed policy which questioned the legal authority of NOAA to base a permitting system on purposes other than conservation and management in the Act. The comments also suggested the policy was contrary to the purposes of the FCMA because it inhibited the development of new fisheries for under-utilized species by restricting markets.<sup>50</sup>

Analysis of the comments received, and further review of the legal and policy issues involved, led NOAA to conclude that such a "preference" policy lacked legislative authority because the policy was based on factors not directly related to conservation and management of the resource and requirements of the FCMA.<sup>51</sup>

On April 26, 1978, the Department of Commerce acknowledged the shortcoming of its authority under the FCMA. James Walsh, Deputy Administrator of NOAA, announced "the government will have no choice but to issue long-delayed permits to two foreign factory vessels that want to come within the 200-mile limit and buy U.S. fish from U.S. fishing vessels".<sup>52</sup> Accordingly, on May 12, 1978, NOAA published in the Federal Register a policy statement that permitted receipt of U.S. fish by foreign vessels if the application and activities of the foreign vessels met the conservation and management requirements of the FCMA and other applicable law.<sup>53</sup>

Two civil actions were filed to challenge the new policy announced by NOAA with respect to foreign fish processing vessels in the FCZ. One such case, Tom Lazzio Fish Co. v. Kreps, was filed in the District Court in Washington, D.C. by a variety of West Coast fishing companies<sup>54</sup>, while the other case Pacific Seafood Processors Association v. Kreps, was commenced in the District Court in Seattle by a different group of firms.<sup>55</sup> Both actions challenged the NOAA policy statement under which fish caught by U.S. vessels, but processed by foreign vessels, were treated as part of the U.S. share rather than deducted from the Total Allowable Level of Foreign Fishing (TALFF).<sup>56</sup> The two actions also asserted that the Secretary should provide a preference to U.S. fish processors, and that the policy statement was issued in violation of the Administrative Procedure Act.<sup>57</sup> In June 1978, U.S. Magistrate Weinberg in Seattle denied an application by plaintiffs in the Pacific Seafood Processor's case for a

temporary restraining order enjoining the Secretary from taking action on the foreign vessels permits.<sup>58</sup> These cases were essentially mooted in August 1978 when the Congress passed amendments to the FCMA<sup>59</sup>, which established specific procedures for considering joint venture applications.

NOAA's radical policy reversal apparently was intended to provoke and arouse opponents of joint ventures, and they, in a surprisingly strong organized effort, pushed Congress to respond legislatively. Congress acted immediately to amend the FCMA by providing NOAA with the authority to regulate ventures and by creating a domestic processor preference scheme similar to the priority given to U.S. fishermen in the FCZ.<sup>60</sup>

#### A. Joint Venture Amendments of 1978.

On August 28, 1978, the Joint Venture Amendments of Pub. L. No. 95-354, 92 Stat. 519, were enacted. The law amended certain sections of the FCMA to give processors an advantage similar to the advantages given harvesters with the original FCMA.<sup>61</sup> Protection was extended to shoreside processors by giving them a preferential right to establish what portion of the U.S. catch they would have the capacity to utilize. By the amendments, the FCMA was extended to ensure that all sectors of the industry would have the opportunity to benefit from extended jurisdiction.<sup>62</sup> Furthermore, a more favorable economic atmosphere was created within which domestic processors could compete and expand their utilization of under-utilized resources with assurances that they would have first priority to the U.S. catch.

It is obvious that the fishermen were not well organized at the time these amendments were being considered or they would have fought strongly against this intrusion into their freedom. For these amendments considerably restricted any promotion of new markets strictly for the fishermen's sake by mandating equal promotion for all segments of the industry. In effect, the U.S. fishermen were required to downplay their new initiatives just to give an advantage to shoreside processors.

The amendments created a domestic processor preference scheme by establishing a three-tiered priority system for fishing operations in the FCZ by governing the issuance of permits for foreign processing vessels.<sup>63</sup> First priority was given to the U.S. fishing industry for fish harvested and processed domestically. Second priority was given to operations involving over-the-side sales of domestically harvested fish to foreign processing vessels. The lowest priority was given to foreign fishermen involved in a directed fishery with TALFF allocations.<sup>64</sup>

The effect of the amendment guidelines was that permits for foreign processing vessels could only be issued for that part of the Optimum Yield (OY) which was not utilized by U.S. processors.<sup>65</sup> The Regional Fishery Management Councils were required to include an assessment of the "capacity and extent to which United States processors will process United States harvested fish on an annual basis" in preparing Fishery Management Plans for affected species.<sup>66</sup>

The Merchant Marine and Fisheries Committee found that without appropriate legal authority to regulate these joint ventures between foreign processing vessels and U.S. fishermen, the U.S. processing industry would face an uncertain future and would have to compete for all species within our FCZ with a foreign fleet operating on a significantly different cost basis.<sup>67</sup> One potential outcome of this situation would be significant damage to the domestic processing industry. Congress thought the amendments would bring increased job security to workers in U.S. processing plants by assuring a constant supply of fish.<sup>68</sup> However, a problem remained in that the processor preference would not ensure a lessening of competition from the fish importers that had dominated the U.S. fish market since World War II.<sup>69</sup> Because of the Administration's commitment to free trade policies, there was no provision regarding protection from imports.

One concern that soon arose after enactment of the joint venture amendments was the fear that foreign countries were investing in the U.S. processing industry as another means of circumventing the Act. Congress called on the General Accounting Office to study all aspects of foreign investment in the U.S. fishing industry.<sup>70</sup> GAO's study dealt with the extent and nature of foreign investment and the impact of such investment; whether if the concern among the industry and public officials that U.S. owners and managers were losing control of the industry was valid; and whether the fear that foreign investors were unduly influencing U.S. production, marketing, pricing, and fisheries development, was justified.<sup>71</sup>

GAO identified 61 U.S. seafood processing firms with foreign ownership. The majority of these firms were in Washington, Alaska and Oregon. The rest of the firms were located in six East Coast states. GAO also identified 27 U.S. seafood processing firms located in Washington, Alaska and on the East Coast which had loans from foreign sources. Sixteen of these firms also had foreign ownership.<sup>72</sup> GAO made the conclusion that federal and state government information on the extent of foreign investment in seafood processors was lacking<sup>73</sup> because most of the states covered by GAO's review did not require firms doing business in their states to disclose foreign investment.<sup>74</sup> GAO found no consensus on the effects of foreign investment on seafood processors except that

some industry and public officials believed that foreign investors could manipulate the industry while others believed that foreign investment supplied necessary and beneficial funds to U.S. seafood processors.<sup>75</sup>

While concerns about the negative impact of foreign investment raged on, other problems developed concerning the implementation of the legislation. The joint venture amendments made it clear that it was the intent of Congress to encourage the development of under-utilized fisheries by the entire U.S. fishing industry, both harvesters and processors. All foreign vessels were to have a permit authorizing the receipt of any fish. U.S. fishermen were prohibited from making any transfer without such a permit.<sup>76</sup>

On October 20, 1978, NOAA proposed amendments to 50 C.F.R. 602, "Guidelines for the Development of Fishery Management Plans" to implement the provisions of Pub. L. No. 95-354.<sup>77</sup> At the same time, NOAA published in the Federal Register preliminary determinations of the consistency of existing 1978 "Joint Venture" permits with L. No. 95-354.<sup>78</sup> Comments on the proposed amendments and the preliminary determinations were then reviewed. The information requirements that Regional Councils were to assess as contained in the amended 50 C.F.R. 602.3, included: contracts to purchase fish, the ability and intent of processors to process a particular species, geographical proximity of harvest areas, recent history of processor activity, seasonal schedules, availability of labor force, processing machinery, etc.<sup>79</sup>

In determining capacities and allocations, the Regional Councils determine Domestic Annual Harvesting (DAH) after the OY is fixed. The difference between OY and DAH may be allocated as TALFF to foreign fleets by the Department of State.<sup>80</sup> The Domestic Annual Processing (DAP) must then be determined in order to find if any of the DAH will be available for Joint Venture Processing (JVP).<sup>81</sup> A potential problem arises with respect to redistributions of allocations if the DAP falls below the amount initially declared for a certain fishery. At first glance it seems reallocations would be made in much the same fashion as reallocations of surplus stocks for harvesting purposes. Since the JVP is calculated directly from the DAH, any surplus of stocks remaining from inability of U.S. processors to process would have to be allocated to joint venture processors in order to sustain the DAH and provide a market for U.S. fishermen. The three-tiered priority system of the 1978 amendments would clearly support this inference since joint ventures are given priority over foreign harvesting/processing operations.<sup>82</sup> However, there are no provisions for dealing with this situation in the Act, or in the regulations. Since permits specify the amounts allowed for foreign processing, there needs to be some provision for amending the permits in light of reallocation of the DAP.

There are also no provisions regulating the discretion of the Secretary in making the reallocations - whether reallocations are mandatory or not.

Some processors viewed the possibility of such a reallocation to joint ventures as the final step in undermining the domestic processor priority for under-utilized species<sup>83</sup>. It was also suggested that if reallocations were made to foreign fishermen as part of TALFF, rather than to joint ventures, there would be more incentive for U.S. fishermen to deliver to domestic processors.<sup>84</sup> For reasons stated above, there would be no justification for reallocations to foreign fishermen if any domestic harvesting capacity existed.

In order to give U.S. processors as much protection as necessary, time and area restrictions could be placed on the permits for foreign joint ventures in order to lessen the impact on onshore processors and for conservation or management purposes.<sup>85</sup> Although fostering more protection for U.S. processors, they also could have the possibly inadvertent and detrimental effect of limiting opportunities to U.S. fishermen in developing fisheries for under-utilized species. These restrictions would not encourage U.S. fishermen to enter an under-utilized fishery in the first place in areas where joint ventures were not allowed because of limited market opportunities.<sup>86</sup> The DAH for under-utilized species had previously been fixed by the domestic processing capacity because these processors provided the only available markets, so there was an initial difficulty in determining the effect on DAH.

Proponents of joint ventures tried to promote the idea that the DAH could be calculated by adding the DAP and the potential amount of fish processed by joint ventures because the joint ventures would provide an additional market for domestically harvested fish.<sup>87</sup> But, as the processors countered, this would create an automatic allocation for joint ventures but would not take into account opportunities for growth in processing capacity, or whether the new markets would lure fishermen from other more valuable fisheries. There was also concern as to whether any priority protection was actually given to U.S. processors. The processors were just as extreme in their approach, however: They wanted DAP to be defined as the OY, thereby shutting out any joint venture activity.

On May 1, 1979, the New England Fish Co. (NEFCO) and certain other U.S. fish processors and a fishermen's group filed a civil suit in U.S. District Court in Washington, D.C. challenging NOAA's interpretation and implementation of the joint venture amendments to the FCMA.<sup>88</sup> Plaintiffs alleged, among other things, that the public had not been given an adequate opportunity to comment on certain applications for foreign fishing vessels that would engage in joint ventures;

that NMFS had failed to rely on U.S. processors' statements of intent as determinative of how much fish they would process, and that fish caught by U.S. harvesters and processed by foreign fishing vessels in joint ventures should be counted against the TALFF. The processors argued that determinations of DAH should be based on an independent calculation of processors' capacity, otherwise overestimates of DAH could substantially injure the development of shore-based processors.

The plaintiffs sought to invalidate permits that had been issued to Korean vessels for a joint venture off Alaska and to prevent issuance of similar permits to certain USSR vessels. NOAA's answer to the complaint generally denied that the agency had acted illegally in any way concerning the subject joint venture permits and determinations, and Korea Marine Industries Development Corporation (KMIDC) intervened in the case.<sup>89</sup> On December 1979, a settlement was submitted for court approval. In the proposed settlement agreement filed with the Court, NOAA agreed to clarify procedures that allow the public to comment on foreign joint venture applications before decisions are made on them. NOAA also agreed to make available to the public an explanation of how the agency determines its estimates of DAH, DAP and JVP.<sup>90</sup> Confidential data used to determine the estimates would not be made public. At the same time, NMFS recognized that the amount and type of information necessary to make the required determinations may vary with different fisheries<sup>91</sup> thus leading the way for some discretionary determinations in different fisheries that could not be challenged in Court unless they were considered capricious and arbitrary.<sup>92</sup>

One more problem involved in determining processors' capacity and intent were the prices these processors could offer U.S. fishermen. A difficulty arising in this determination was maintaining the processor priority in underutilized species where there was direct competition from joint ventures. Even if shoreside processors could offer the same prices as the foreign processors, it is likely the U.S. fishermen would choose to deliver to the foreign processors because of savings on delivery time, cost of ice, fuel, and increased fishing time.<sup>93</sup>

The legislative history indicated that U.S. fishermen do not have to fulfill the requirements of U.S. processors; fish may be delivered to processing vessels, and fishermen have the right to refuse to deliver to processors if the fishermen are unsatisfied with the terms offered by the processors.<sup>94</sup> As one commentator wrote:

In other words, for underutilized species, the amendment establishes a processor priority for fishery allocations, but in no way creates the same type of captive market that exists for fully utilized

species, nor does it guarantee that anticipated levels of fish will be delivered to United States processors. When one also considers that most United States fishermen have a certain amount of flexibility and are not restricted to one fishery, merely limiting fishery allocations to joint ventures does not necessarily benefit the onshore processor of underutilized species; fishermen may change to an alternative fishery rather than resort to less economically viable onshore markets. Given these facts, it is difficult to ascertain whether processors of underutilized species have been given any priority at all.<sup>95</sup>

Although price may not be a relevant consideration in determining processors' capacity and intent, it often becomes a determining factor in monitoring the requisite "intent" to process since fishermen are not required to sell the U.S. processors if they do not agree on price terms. In other words, if processors intend to offer prices competitive with joint ventures, then their intent is present and their preferred capacity can be increased. But on the other hand, if their price terms should later fall short of the terms offered by the joint venture operation, this would signal a lessening of intent to process the fish.<sup>96</sup>

Critics of the amendments claim that the standards for determining processor capacity were not properly developed, nor are they being applied properly now. Thus there are gross overestimates of DAP capacity in the FMPs for under-utilized species, such as squid, causing fishermen to be hampered in their ability to expand effort. This area is ripe for litigation and it remains to be seen what will happen as more fishermen become frustrated in their efforts.

Another criticism of the amendments is that they require the Regional Councils and NMFS to predict what processors' capacity will be 15 or 16 months ahead of the fishery. Predictions must be made as to what fishermen will catch and what processors will process. These predictions can end up being very speculative. It is possible that Congress left the language on defining intent and capacity purposely vague so that the Secretary of Commerce could respond on a regional basis to the needs of processors.

#### B. American Fisheries Promotion Act of 1980.

In 1980, Congress passed the American Fisheries Promotion Act (AFPA).<sup>97</sup> As a preliminary matter Congress changed the name of the Act to the Magnuson Fishery Conservation and Management Act (MFCMA) to honor Warren Magnuson, long-time

Senator from Washington and principal architect of the Act.<sup>98</sup> In enacting the AFPA, Congress primarily focused on legislative action that could further stimulate and enhance the development of the U.S. fishing industry. Congress had originally hoped that the active pursuit of the underlying policies of the FCMA - that is, the grant of priority access to U.S. fishermen to fishery resources found off the coasts of the U.S. - would result in the rapid replacement of foreign fishing efforts within the U.S. FCZ by domestic fishermen.<sup>99</sup> According to a House Committee report this hope had not been fully realized, in large part because foreign nations had created tariff and other trade barriers to the importation of U.S. harvested fish.<sup>100</sup> These barriers helped perpetrate the lack of adequate markets for U.S. fish products and acted as an artificial brake upon the development of the U.S. fishing industry.

Specifically, the AFPA amended the criteria upon which the Secretary of Commerce must rely in allocating the TALFF to various countries to take into account whether and to what extent, a nation requesting allocations imposes tariff or non-tariff barriers on the importation of U.S. fish or fishery products, whether the nation is cooperative with the U.S. in advancing new opportunities for fisheries trade; or how the nation contributes or helps foster the growth of a sound and economic U.S. fishing industry.<sup>101</sup> Second, a number of provisions were designed to accelerate the phase-out of foreign fishing in the FCZ and the concurrent development of the U.S. industry in those fisheries. The development of the U.S. industry was to be aided by monies received as a result of increased fees charged to those foreign fishermen who remain in the FCZ.<sup>102</sup>

The AFPA affected joint ventures in a number of ways. First, the AFPA resolved the question of whether the Secretary of Commerce could consider foreign trade barriers in approving joint ventures.<sup>103</sup> This was an important consideration because the trade barrier limitations could severely restrict access to new markets for U.S. processed fish. Secondly, in establishing the level of foreign fishing fees to be assessed, the legislative history indicated that it was not Congress's intent that foreign processing vessels purchasing U.S.-harvested fish at sea be charged at the same rate as foreign fish harvesting vessels, because "foreign processors participating in these joint ventures are benefitting U.S. fishermen, therefore, the foreign processing vessels should not be required to assume the same financial obligations as foreign fishing vessels and foreign processing vessels which are servicing foreign fishing vessels."<sup>104</sup> Thirdly, it was feared that the AFPA phase-out mechanism could have the effect of harming foreign trade relations by stifling joint ventures, plans for investment in processing plants, formation of new markets, and technical assistance. It was felt that phase-out was inconsistent with linking TALFF to gaining foreign market



access.<sup>105</sup> Thus, by discriminating against world markets already developed, the AFPA would be unsuccessful in promoting the U.S. fishing industry. Actually, the opposite has come true: By restricting access of foreign fleets, joint ventures have been encouraged since many countries are dependent on fish supply and they realize that access to supplies through joint ventures is better than no access at all.

### C. Internal Waters Amendment of 1982.

In 1981, a controversy arose when Bristol Bay Herring Marketing Cooperative, a herring fishermen's association, created a joint venture with the N. Pacific Longline-Gillnet Association, a Japanese enterprise. The venture itself - the Alaskan Herring Corporation - was to be restricted to purchasing herring in Alaskan waters directly from fishermen and unloading the catch into a freezer hold for transport to processing facilities in Japan. However, an Alaskan state regulation required primary processing of fishery resources to take place in Alaska before allowing shipment to a foreign nation. In other words, Alaskan processors had the first right to catches from vessels making landings in the state. The joint venture was in apparent defiance of this Alaskan law. Bristol Bay filed suit in the District Court in Anchorage seeking to enjoin the enforcement of the provision by the Commissioner of the Alaska Department of Fish and Game, Ronald Skoog.<sup>106</sup> After a trial on the merits, a permanent injunction was granted on the basis that the processing requirement constituted an "unlawful burden under the commerce clause of the United States Constitution".<sup>107</sup> After this decision, a general fear spread that U.S. fishermen would seek foreign buyers for other types of seafood. As a result of this decision, states could not prohibit foreign processing vessels from entering their internal waters. A state's internal waters are located inside the baseline used for establishing the three-mile territorial sea.<sup>108</sup>

The court in Bristol Bay noted that the state regulation was essentially a measure of economic protection, held to be an unconstitutional burden on interstate and foreign commerce, and that establishment of such a system favoring domestic processors required action only by the Federal government.<sup>109</sup>

This court action renewed concern as to whether or not existing federal law, specifically the MFCMA, prohibited the operation of foreign processing vessels in the internal waters of any state. Sec. 307(2) (A) of the MFCMA prohibits foreign vessels from engaging in "fishing" within the boundaries of any state.<sup>110</sup> The term "fishing" is defined in the MFCMA to include support activities when conducted "at sea".<sup>111</sup> As the point of confusion, the term "at sea" was formerly interpreted

by NOAA as "encompassing all oceanic waters extending outward from the baseline of the territorial sea".<sup>112</sup> Following this interpretation, "fishing" in state waters, as defined in the MFCMA, would refer only to the territorial sea and not to the internal waters of the state. Neither the act nor its legislative history defines "internal waters".<sup>113</sup> The court in Bristol Bay never addressed this question of whether the federal prohibition of "at sea" processing was applicable. It appeared therefore, that no extant federal law pertained to the regulation of foreign processing vessels within the internal waters of a state.

A subsequent suit was brought by interested Alaskan fish processors seeking injunctive relief.<sup>114</sup> These processors argued that the MFCMA absolutely prohibited foreign processing vessels from operating within a state's waters and that the proposed herring sale was therefore illegal. The District Court denied the request for relief holding that no such private right of action existed under the MFCMA.

U.S. processor interests advised the Secretary of Commerce of their view that foreign harvesting and processing activities in state internal waters was absolutely prohibited by the MFCMA. In this interpretation, "at sea" was meant to apply to those areas not on land. In contrast, U.S. fish harvesters expressed concern that U.S. shore-side processing capacity was often inadequate; that without the processing capacity provided by foreign vessels, their ability to reach their harvesting capacity would be severely restricted.<sup>115</sup>

Since 1980, the problem of unrestricted operation of foreign processing vessels in state internal waters has expanded from Alaska to become a national concern. On the East Coast, a Portuguese company tied a processing vessel up to a dock in Fall River, Mass., and purchased codfish. After it made its purchases, it began processing the fish once it got outside the 3-mile territorial sea on its way back home. This blatant operation enraged local processors, who turned to Congress for the relief they felt they were owed.

Legislation was then introduced by Congressman Donald Young (R-AK) in Congress to fill this gap in the regulation of foreign processing vessels. The draft bill suggested a coastal state would be allowed to offer the federal government a management plan for foreigners within state waters. If the plan were approved, the state would be able to manage its own affairs; otherwise, without a plan, the federal government would have the right to control the operation of foreign vessels in the state's waters. On June 1, 1982, the President signed S.2535 into public law to regulate foreign fish processing vessels operating within state's internal waters.<sup>116</sup> The purpose of the bill was to provide that no foreign fishing vessel could process fish within the internal

waters of a state unless the Governor of that state finds the U.S. fish processors did not have the capacity and intent to process all U.S. harvested fish from the fishery concerned.<sup>117</sup> The bill amended §306 (a) of the MFCMA by extending State fisheries jurisdiction to "(1) any pocket of waters that is adjacent to the State and totally enclosed by lines delineating the territorial sea of the United States..."<sup>118</sup> The bill also adopted the same test for determining whether foreign processing vessels will be allowed to operate in State waters that is used for allowing joint ventures in the FCZ.<sup>119</sup>

The amendment permits a foreign fishing vessel to engage in fish processing in waters of a state if: 1) the foreign nation under which such vessel is flagged is party to a GIFA or treaty, within the meaning of §201(h) of the MFCMA during the time the vessel engages in such fish processing activities; and (2) the owner or operator of the vessel applies to the Governor of the concerned state for, and is granted, permission for the vessel to engage in such processing. The Governor of the state may not grant such permission if he "determines that processors within the State have adequate capacity and will utilize such capacity, to process all of the United States harvested fish from the fishery concerned that are landed in that State."<sup>120</sup> Thus, the purpose of the law is to provide protectionist treatment for the domestic seafood processing industry, while at the same time allowing foreign vessels access to the internal waters of the states when that is necessary to provide U.S. fishermen with enough processing capacity to handle their catches.

The legislative history of the law nevertheless demonstrates a clear intent to maintain parallel, similar preferences for the two sectors of the industry even in internal waters:

With respect to the determination of U.S. processing capacity and intent, it is not our intent that the decision of a Governor be based solely on the price, or other contract provisions, offered by foreign processors, nor that the decision be used to intervene in labor disputes. In our new, U.S. processors need not match or exceed the price, or other contract provisions, being offered by the foreign processors in order to demonstrate their capacity and intent for a certain fishery.<sup>121</sup>

The amendment also makes clear that foreign fishing vessels which have been granted permission to conduct fish processing activities within internal waters of a state are required to comply with all applicable Federal and State laws while operating within the internal waters of that State.<sup>122</sup>

The Department of Commerce opposed the request for a GIFA for foreign processing vessels in state internal waters as

being unduly burdensome, thus restricting the number of nations whose vessels were eligible to engage in joint ventures with U.S. fishermen.<sup>123</sup> Also no provision was made for review of gubernatorial decisions by the Regional Councils and the Department of Commerce to ensure compatibility with the regulatory programs for the FCZ; foreign processing vessels would not have access to state waters outside the baseline; thus, only the fishermen of those states with significant internal waters would benefit from the improved market provided by foreign processors. Also, there was no provision made for the possibility that out-of-state processors would have adequate capacity and would utilize such capacity if foreign processing vessels were not allowed.<sup>124</sup> The Department of Commerce believed the FCZ and all state waters should have similar standards for granting access to foreign processing vessels. The Governor should have the initial decision regarding access to state waters, but that decision should be reviewed by the Secretary of Commerce and Regional Councils to ensure compatibility with regulatory decisions in the FCZ and to ensure that out-of-state U.S. processors are not deprived of their fish supply by decisions made in states nearby.

This amendment offers some loopholes for foreign processors. First, if a Governor of one state approves foreign processing in internal waters, but the Governor of an adjacent state does not, the approval in the first state may cause a shift in U.S. landings to the state in whose waters the foreign processing vessel operates. Thus, foreign processing vessels could "shop around" for the state with easiest access. Secondly, as presently written, the definition of "internal waters of a state" could open a loophole for foreign processing vessels in state waters by permitting processing to occur seaward of the 3-mile territorial sea off Florida (West Coast) Puerto Rico, and Texas, where state boundaries extend seaward of the territorial sea.

#### IV. Establishing a Joint Venture.

Joint venture arrangements are initially negotiated between private business interests receipt of U.S. harvested fish in the FCZ by a foreign processing vessel. These "over-the-side sales" arrangements are contractual in nature, with specific numbers of U.S. vessels delivering fish to a foreign processing vessel for a certain price per pound. The foreign partner determines how much fish it will receive based on available resources. Once the venture is initially negotiated, except for price, the owner or operator of a vessel registered under the flag of a country with a GIFA applies for a foreign fishing permit to receive the fish in the FCZ.<sup>125</sup> NMFS provides application forms to an applicant through a U.S. embassy

or foreign embassy in Washington, D.C. The applicant must answer all questions and then send the application to the Department of State. A copy of the application and a fee of U.S. \$60 covers the costs of processing the permit application and a surcharge for the Fishing Vessel and Gear Damage Fund.

Each application is reviewed by the public, and the appropriate Regional Council, for up to 45 days. NMFS considers comments by the public, the Coast Guard, the Department of State, and Congress, then NMFS decides whether or not to issue the permit. Before the permit is issued, an official representative of the foreign government must accept, on behalf of his government, "conditions and restrictions" attached to the permit.<sup>126</sup> When the conditions and restrictions are accepted, NMFS sends the permit to the Department of State and notifies the vessel's designated agent, who must be located in the U.S. The Department of State then sends the permit to the foreign government.

Permits ordinarily may not be switched to a different vessel unless the original vessel is disabled or decommissioned. A replacement may not be made to adjust to changes in fishing strategy. Also, no permit is required of U.S. vessels for the sale of fish to a foreign buyer. But, the U.S. vessel owner must be sure under present law, that the foreign processing vessel holds a permit to receive fish in the FCZ.

A permit may be revoked for "egregious offenses" if the offenses presented the risk of substantial harm to the affected resources so that the activities should not be permitted to continue. If the violations are found to be willful and intentional, and a hearing has been held to determine whether the vessel was in fact used in the commission of the act, this is an adequate basis for revocation of a permit.<sup>127</sup>

Other restrictions on the venture apply under other laws of the U.S. For example, U.S.-caught fish processed onboard a foreign flag vessel may not be landed in the U.S. unless transshipped to a U.S. vessel for landing.<sup>128</sup> If the fish is landed by a U.S. vessel in the U.S. it is not free of duty unless the foreign flag processing vessel is under the requisite control of an American master or owner.<sup>129</sup> If the U.S.-caught fish are sorted on the foreign processing vessel for landing it in the United States, and all or a fraction of the fish are transferred back to a U.S. vessel the fish are considered products of the American fisheries, for purposes of classification or country or origin.<sup>130</sup>

Examples of a number of joint ventures are included in the Appendix in order to give the reader a short survey of the types of joint ventures that have been proposed.

## V. Changes in Outlook

Joint ventures were seen as interim measures before full utilization of fish in the 200-mile zone by the U.S. fishermen and processors would take place. How quickly the U.S. industry would develop was still debatable. The technology to process under-utilized species and the export markets for processed goods that could compete in a world market supplied by a number of countries were grossly inadequate. The AFPA did not go far enough to encourage development of the fishing industry. A central focus and further stimulation for development were still needed. Joint ventures have provided much of this needed focus and stimulation but the debate still rages as to what place, if any, joint ventures have in the long-range future of fisheries management. They have provided needed opportunities for U.S. fishermen, especially on the West Coast, but processors on the East Coast continue their calls for a complete phase-out of joint ventures immediately. It is clear that a concise policy as to the role of joint ventures would have to be developed.

The number of species exploited through joint ventures has increased from the original proposal for hake and pollock. In 1982, joint ventures were established for Loligo squid, Illex squid, silver hake, red hake, Pacific whiting, Pacific cod, Alaska pollock, yellowfin sole, Atka mackerel, and Atlantic mackerel. The U.S. catch going to foreign processors has increased dramatically in the past few years, as shown in Table 1 below, representing a significant return for those involved. In 1980, the joint venture catch was only 137.7 million pounds valued at \$8.4 million. In 1981, this amount rose to 307.8 million pounds, valued at \$21 million. This represents over a 120% increase in amount of fish and a 150% increase in total value. Then in 1982, the joint venture catch took another gigantic leap up to 561.4 million pounds valued at \$ 36.4 million. 131

TABLE 1

The growth in volume of fish purchased and value to U.S. fishermen of joint ventures since 1980:

<u>Year</u>	<u>Volume</u>	<u>Value</u>
1980	137.7 million lbs.	\$ 8.4 million
1981	307.7 million lbs.	\$21.0 million
1982	561.4 million lbs.	\$36.4 million

Therefore, in just three years the volume of joint venture catch increased over 300% with a value increase of 300%. One

NMFS official stated that the number of joint venture operations was increasing at a rate of 10% in the last few years.<sup>132</sup> Although there is no way to compare increases in volume with increases in effort expended without knowing the number of vessels and crewmen involved in each operation, in elementary terms of characterizing one new operation = one unit of effort output, then volume of fish transferred has increased at a rate of over 300% compared to an increase of only 30% in effort. Even in this very generalized comparison, a 300:30 ratio is a very good return for a new type of industry only five years old. Notwithstanding this somewhat imperfect analysis, in the last three years U.S. fishermen obtained a return of \$65.8 million in sales of under-utilized species for which there might not otherwise have been a market but for the joint ventures. If current economic multipliers are applied to this figure, it can readily be seen that the return to the nation in benefits from these joint ventures is substantial.

This optimistic portrayal of such a new development would portend enthusiastic vigor on the part of the U.S. fishing industry in hopes for revitalization, but the controversies over joint ventures continue. U.S. processors, of course, staunchly oppose the establishment of joint ventures, while many fishermen remain skeptical of any foreign investment at all, still rallying behind the protectionist cry of "Get rid of the foreigners from our waters."

The Federal government has held off making policy judgments about the long-term plans or assessments of joint ventures. The National Advisory Committee on Oceans and Atmosphere (NACOA) has advocated a "wait-and-see" attitude, preferring to defer to the exigencies of experience.<sup>133</sup> And NMFS, the agency most responsible for developing fishery management policy has just recently developed a scheme to follow in approving joint ventures.<sup>134</sup> Though rumors have abounded in the past year that TALFF allocations are now only going to those nations which agree to enter into joint ventures that benefit the U.S. industry, thus making commitment to enter a joint venture the major criteria in determining foreign fishing rights, NMFS had not developed any kind of monitoring system to govern the joint venture contractual arrangements themselves, leaving this to the private parties in each venture. All applications for joint ventures have been approved when DAH exceeds DAP, subject to previously discussed restrictions, and NMFS has not engaged in any long-term planning or investigation of joint venture benefits to the U.S. industry. The lack of monitoring led to the rise of abuses. A U.S./Korean venture off the West Coast was one such example, where the Koreans were not paying the fishermen for their deliveries, and they were dramatically underreporting the amount of catch delivered to Korean processing vessels. The Japanese abused the system also. While promising the Federal government an intent to enter into more joint ventures in

return for an increased allocation, negotiations to set up ventures never took place in certain instances, and the Japanese notoriously, perhaps flagrantly, violated the provisions and regulations of the MFCMA.

#### A. Developments On The East Coast

Joint ventures have operated primarily on the West Coast, but in recent years have begun operating on the East Coast, focusing on the squid fishery. As the potential for joint venture activity developed on the East Coast, it became more apparent that the statutory and regulatory language of the MFCMA, as well as NMFS' governing policies, addressed joint ventures strictly from West Coast perspectives. Thus, the New England and the Mid-Atlantic Councils embarked upon an effort to establish a policy guiding joint venture applications from the perspective of East Coast fisheries.

The fishing industry on the East Coast is completely different from the West Coast. These East Coast fisheries are characterized by a high degree of fragmentation and small firms. Fishing effort is way over-capitalized. There is little vertical integration in this industry. Also, the processing industry has had a much longer history on the East Coast, handling a broader range of products, and is more capable of delivering fish for export than processors on the West Coast. Thus the debate between harvesters and processors over joint ventures is more pronounced and politicized on the East Coast.

The squid industry has been the focus of growing controversy in recent years, especially with this year's allocation of unprecedented quantities of Loligo for joint ventures.<sup>135</sup> U.S. landings of squid have increased tremendously, mainly as a result of the joint venture activity and the concurrent interest of shoreside processors in exploiting the large Western European squid market. U.S. landings of squid on the East Coast for 1982 are summarized below:<sup>136</sup>

Mid-Atlantic	7.9 million lbs.	-up 259% from 1981
New England	6.0 million lbs.	-up 58% from 1981
Chesapeake region	3.3 million lbs.	-up 747% from 1981

This controversy has finally led NMFS to initiate the formulation of a definitive policy concerning joint ventures. However, the effort to develop criteria for governing joint ventures has stemmed from the work of the New England Fisheries Management Council (NEFMC) and the Mid-Atlantic Fisheries Management Council (MAFMC).



Under the MFCMA, the Regional Councils make recommendations to the Secretary of Commerce on policy concerning implementation of fishery management plans. Since the Regional Councils develop the specifications and assessments for MSY, OY, DAH, DAP, and thus, amounts available for JVP, they began developing policy guidelines for approval of joint venture applications. NEFMC and MAFMC worked closely together to develop joint policy guidelines since the squid fishery extends throughout the Northwest Atlantic.

Joint Guidelines were published in February of 1983.<sup>137</sup> The two Councils recognized that joint ventures offer a wide range of benefits, but at the same time carry some potential costs. They realized that both harvesters' and processors' interests had to be weighed in formulating the guidelines, but their ultimate concern was to end foreign harvesting in the FCZ. With these factors in mind the Councils decided that joint ventures would be allowed in fisheries where there is a TALFF, and also in fisheries where domestic harvesting capability and intent exceeds domestic processing capability and intent. Also, the Councils agreed that joint ventures should be authorized for specific amounts of fish since they felt a guaranteed quantity would make a joint venture more attractive. The Councils felt that joint ventures without specified amounts would attract new, specialized vessels into the fisheries, rather than provide an alternative to existing vessels. The Councils wanted to guard against the creation of a separate "joint venture industry." It was also felt that allocating specific amounts of fish would give NMFS greater ability to monitor an individual venture's operations to make sure it was in conformance with its permit.

Critics of these recommendations claimed specific allocations were disastrous because the allocations precluded someone else from getting the fish who may have been a more efficient operator. They claimed this practice resulted in the ownership of fish amounts - an anti-competitive practice indeed. However, these recommendations were carried through by NMFS.

If there were more joint venture applications for a particular species than there were fish available, the applications would be categorized and ranked according to which ones provided the greatest involvement by the U.S. industry in the entire process of utilizing the fish, i.e. harvesting, processing and marketing. The categories were as follows:

Category A: The U.S. partner is the main participant in all phases of the operation: harvesting, processing and marketing.

Category B: The U.S. partner is the main participant in the harvesting and marketing of the product, with the foreign partner the main participant in the processing.

Category C: The U.S. partner is the main participant in the harvesting and processing of the product, with the foreign partner the main participant in the marketing.

Category D: The U.S. partner harvests and sells over the side, while the foreign partner is the main participant in the processing and marketing.

Within each category the preferred joint ventures were those that involved technical or scientific assistance to the U.S. or purchases of additional under-utilized species products from U.S. processors. Those that involved requests for additional TALFF allocations or exemption from foreign fishing regulations were considered less favorable. The idea was to help build up the fisheries infrastructure, and the joint ventures which would help accomplish this purpose were highly recommended. An extensive amount of information on each joint venture, including 1) information on the fishery; 2) information of the foreign partner; 3) information on the U.S. partner; and 4) information on the joint venture itself, was required before an application would be evaluated. These informational requirements are listed in the Appendix.

Because requests for joint venture allocations in the Illex squid fishery exceeded amounts available for JVP, NMFS had to devise a means of ranking the applications it received.<sup>138</sup> Applications were received by the Secretary of State from seven foreign parties to receive U.S. harvested Illex for the 1983-84 fishing year. The total amount requested was 42,200 metric tons, however, only 22,100 metric tons were available.<sup>139</sup> While NOAA considered issuing all the permits and letting competitive market factors govern the resource, NOAA Assistant Administrator for Fisheries, William Gordon, decided to devise criteria to rank the applications. Most applicants had stated that a threshold quantity was required before capital, time and effort would be committed to begin the venture. Therefore NMFS developed a ranking system relying on the recommendations of NEFMC/MAFMC in their joint guidelines.<sup>140</sup> The ranking system, published as a "Notice of Intent to Approve Joint Ventures", amended 50 C.F.R. § 611 governing foreign fishing by establishing 23 objective criteria used in evaluating the applications. These criteria are listed in the Appendix.

The criteria covered three broad categories: (A) Compliance with Regulations/Business Agreements; (B) Trade

Barriers and Market Development; and (C) U.S. Benefits and Technology Transfer. Category A concerns past violations, if any, of both the foreign and the U.S. partner in previous joint ventures, as well as the total number of violations by the foreign country's fleet. Category B follows the basic criteria imposed by the AFPA for allocating TALFF to foreign nations based on intent to lower trade barriers and increase U.S. imports. Category C contains more comprehensive criteria directed at the individual joint venture arrangements. These criteria include: technology transfer provisions, training, commitment to joint ventures, commitment of capital investment, participation in U.S. fishery development, and the distribution of harvesting/processing/marketing responsibilities between the U.S. and the foreign party.

After a review of all the applications for Illex, they were ranked according to the criteria. Five applications scored high (joint ventures with Italy, Portugal, and Japan) and were approved for specified amounts<sup>141</sup>; three applications (joint ventures with Spain and the USSR) scored much lower and were denied any allocations. Permits were granted for 45 days following the issue date and subject to reauthorization based on performance of the permit holder during the 45-day period.

The Notice of Intent specified the procedures for applying for Loligo joint ventures and stated that if Loligo requests exceeded amounts available for JVP, the same 23 criteria would be employed to rank the applications.<sup>142</sup> Presumably this scheme of ranking will apply to other fisheries as the need arises.

A few criticisms of the criteria can be discerned. While admittedly "objective," the criteria are arguably subjective in many instances. For example, if the U.S. partner or the foreign partner are new to joint ventures, there is no "past performance" to judge. Also, the "willingness to transfer technology" and the "long-term commitment to joint ventures" are subjective determinations. There is no definition of the standards used to define "past performance". There is no way of knowing the relative priorities of the criteria on the ranking actually employed as a guideline for future experience. This failure to define the standards and priorities more clearly leads one to the conclusion that NMFS will still exercise a great deal of discretion in approving joint venture applications.<sup>143</sup>

The development of specific criteria and guidelines upon which applications would be evaluated did not lessen the heated debate between harvesters and processors over the role of joint ventures. This has been the biggest year for squid joint ventures off the East Coast. An unusually large spring run produced unprecedented shoreside landings. Processors

originally told fisherman that they would handle all the squid the boats could bring in. But with the glut of squid in May and June, many boats were put on quotas and the price plummeted. Prices started out at \$ .38/lb. for unboxed squid, but by the end of May had dropped to under \$ .20/lb.<sup>144</sup> Yet several major New England processors still claim that the prospect of joint ventures hampered their ability to compete on the Western European squid market, resulting in a huge buildup of inventory which they could not sell.<sup>145</sup>

The fishermen, meanwhile, say that joint ventures have created a new and necessary outlet for their squid catches, sparing them from the uncertainties and fluctuations of the marketplace. The fishermen received "guaranteed" prices of \$ .30-.40/lb. for squid sold at sea to foreign processors. One fisherman suggested that domestic processors "got stuck" with a large inventory of squid, after processing all they could handle, because the quality of the squid they had produced could not compare with the product that was sorted, packed and frozen at sea.<sup>146</sup> One buyer and exporter in a joint venture contended that there is at best a limited market for the U.S. shoreside-processed product solely because of the quality.<sup>147</sup> He says that foreign buyers opt for the best quality product; that quality is the bottom line. The opposing processors believe that the argument about quality is "overstated." They say that many buyers, particularly the Spanish, were reluctant to buy from shoreside processors until they saw how their Loligo joint ventures were going.<sup>148</sup>

The fishermen have also argued that the U.S. processors are not geared up to process or market the squid. They fear that if foreign processing ships are turned away, squid prices will plummet to the low levels of \$ .15/lb seen before joint ventures arose. They suggested that the competitive prices shoreside processors are forced to pay for squid because of the the joint ventures are the real issue, not competition in the world marketplace.<sup>149</sup>

The processors counter that prices will remain high because they have developed new markets and increased demand for squid - both domestically and through export. However, they say they cannot invest in new processing facilities until the government sets a course to curb foreign competition in U.S. waters - an argument the processors have been making since before the preference amendment in 1978.

## B. Recent Developments

Because of strong opposition by U.S. processors to joint ventures and their requests that joint ventures be radically curtailed or stopped altogether next year, NMFS conducted six

meetings in the Northeast to generate industry input in the matter. After hearing arguments from fishermen, dock owners and processors affected by the joint venture squid fishery, it appeared NMFS was ready to recommend a phasing out of both the joint venture program and directed foreign fishing for squid in U.S. waters. William Gordon remarked that his goal is to take processing and exporting of U.S.-caught squid out of the hands of foreigners, and that he wants the joint venture program entirely phased out in the next two years.<sup>150</sup> While this action may appease the shoreside processors, it would certainly hurt the harvesters just when they are finally starting to get ahead. Without the needed processing capability, as yet undemonstrated by shoreside processors, the fishermen would lose the valuable market that the joint ventures provide.

In a recent interview, Allen Peterson, former NMFS Regional Director, suggests that eliminating foreigners from our FCZ may not be realistic. "I don't believe we're in a position to totally utilize the squid resources today without the help of foreign interests." He views foreign fishing in the FCZ as a necessary tool: "Directed fishing for some of our resources may be the necessary incentive or provide the economic viability for certain kinds of joint ventures to take place."<sup>151</sup> He added that directed fishing is also needed as leverage to open additional foreign markets under the U.S. fish-and-chips policy. His arguments are persuasive, for any abrupt action in eliminating joint ventures could spark retaliatory trade bans on U.S. squid in the offended nations, particularly Spain. Spain was glutted with an oversupply of squid this year from many different countries, not just the U.S. For this reason it is important to remember that foreign partners willing to engage in joint ventures still need some kind of incentive to participate, without which they could turn to other sources of supply.

In March of this year a bill was introduced by Senator Ted Stevens (R-AK) to close the 200-mile FCZ to all foreign fishing by 1988.<sup>152</sup> The bill was part of legislation to implement the Exclusive Economic Zone (EEZ) proclaimed by President Reagan on March 10, 1983.<sup>153</sup> While many believe the phase out called for in the bill would help the U.S. industry, others are less sure. Joint venture fishermen have shown particular concern about the possibility that the bill could kill their operations. A Stevens aide, when asked about this possibility, stated that the hope is the loss of direct access to fish will force foreign fleets to increase their reliance on joint ventures.<sup>154</sup> Whether this would happen is debatable. But the prospect of the bill being passed has already had a major impact, in particularly trade negotiations with the Japanese.

Since the first joint ventures began to get underway in 1977, Japan has consistently lagged behind other nations in its willingness to offer markets to the N. Pacific trawl fleet,

either through direct purchases or through participation in joint ventures. The Japanese were cautious about participating in joint ventures because of the effect on their own fishing industries. In 1982 the Japanese finally agreed to participate in joint ventures after heavy pressure from Congress and the White House and after the withholding of 10% of their TALFF in waters of Alaska for the second half of the year. They eventually purchased around 68,000 metric tons of Alaskan groundfish from U.S. harvesters. In 1983, they increased their purchases to 208,000 metric tons after the pressure from Congress and the White House continued.

In November 1983, when trade negotiations resumed for the 1984 fishing year, the U.S. delegation came armed with the Stevens bill. Faced with the prospects of this phase-out, the Japanese reluctantly agreed to buy more than 360,000 metric tons of pollock from U.S. fishermen by the end of 1984 and argued in principle of make direct purchases from U.S. processors of up to 50,000 metric tons of combined species.<sup>155</sup> These purchases could be worth \$44 million to the U.S. industry next year. The Japanese have finally realized that the size of their directed fishery will be directly linked to their joint venture operations, a result that fisheries promoters believed the AFPA could originally bring about.

Another development is the small but growing trend in Alaska to attack the groundfish resources with catcher/processors, either new boats or converted old vessels. These new catcher/processors, known as "pocket processors," could provide a further stimulus to the U.S. industry and lead the way to full utilization of the groundfish resources, albeit many years away.<sup>156</sup> On the East Coast, Lund's Fisheries in Cape May, N.J., is finalizing plans to build a freezer/trawler that should become the first totally American-built processing ship operating on the East Coast.<sup>157</sup> Lund's has been involved in joint ventures since 1980 and has been putting their experience to work in the design of this vessel. Because the joint venture produces one thing that the U.S. shoreside processors have not produced - a quality product - the development of these catcher/processors will provide the means for the U.S. processors to compete openly with the foreigners.<sup>158</sup>

The Mid-Atlantic Council has recently revised its policy guidelines for joint ventures and these revisions are expected to be passed by the New England Council very soon. MAFMC eliminated the four categories it previously used to rank the joint venture applications, establishing instead criteria based on benefits to be gained as a whole to the U.S. fishing industry.<sup>159</sup> In their consideration of the relative merits of joint venture applications, the Council stated it will pay particular attention to the following criteria:

1. the amount of projected increase in U.S. involvement in all phases of harvesting, processing, and marketing due to the joint venture;
2. past performance and compliance with past joint venture commitments and permit conditions;
3. the benefits that the foreign nation offers the U.S. fishing industry (includes extent to which the flag nation of the foreign partner: purchases U.S. processed products, competes with the U.S. fishing industry in the world market, presents trade barriers to U.S. processed fish products, and provides overall assistance, including technology transfer to the U.S. fishing industry);
4. long-term fishery commitments;
5. compliance with the MFCMA; and
6. the extent to which the participants are identified and committed to the joint venture.

The Council also changed some of the informational requirements for evaluation of applications, placing more emphasis on the history of the foreign flag itself, rather than just the history of the foreign joint venture partner. These revised requirements are also included in the Appendix.

At the same time MAFMC adopted specific criteria applicable entirely to the Illex, Loligo and mackerel joint venture applications. These criteria are as follows:

1. To receive a favorable recommendation from the Council, Loligo joint ventures should contain the provision that they will provide an increased US domestic market for US processed Loligo or purchase domestic processed Loligo. In setting priorities between Loligo joint ventures, the joint venture with the largest percentage of domestic processed Loligo will receive the highest priority. Joint ventures that purchase domestic processed Illex or mackerel in addition to the higher amount of Loligo will receive additional preference.
2. To the extent it is necessary to set priorities for Illex or mackerel joint ventures, the following priorities will be used:
  - a. the highest priority will be given to joint ventures that provide an increased US domestic market for US processed Loligo, Illex, or mackerel or purchase domestic processed Loligo, Illex, or

mackerel;

- b. joint ventures involving a directed foreign fishery will have the lowest priority unless they have a greater share of the tonnage purchased from US processors than joint ventures that do not involve a directed foreign fishery; and
- c. in all cases, the greater the value of US processed product purchase, the higher the priority ranking.

It is clear from these newly developed criteria that the Council, instead of merely trying to solve short-term problems, is starting to work toward the long-term goal of promoting full utilization of resources by all segments of the industry.

One last development to occur that potentially could affect joint ventures is the proposal for a Fisheries Development Corporation coming out of the House Merchant Marine and Fisheries Committee.<sup>160</sup> Though the bill has gone back to the drawing board,<sup>161</sup> the bill raises speculations about the ability of the Corporation to address policy concerns that are stymied at NMFS, such as the role of foreign fishing in future fisheries management. The ability to make long-range decisions and plans that are needed in the industry might be effected more easily by a quasi-governmental unit such as this Corporation. Also, the Corporation, presumably removed from political pressures, might be better equipped to address the debate between the harvesters and the processors to the satisfaction of both. At this point in time, though, these advantages are purely speculative.

## VI. OVERVIEW OF COSTS AND BENEFITS OF JOINT VENTURES

In considering the previous discussion presented in this paper, a review of the costs and benefits (real or perceived) of joint ventures is necessary before any recommendations can be made regarding the sufficiency of existing policy on joint ventures. NACOA has listed many benefits and costs in its 1982 Report on Fisheries which provides a general overview for this purpose:

### BENEFITS

- 1) Joint ventures have stimulated increased catches of under-utilized species by domestic vessels;
- 2) catches by foreign vessels are being correspondingly reduced;



- 3) fishing opportunities have been provided for American boat owners whose vessels would have otherwise been idled most of the year and who would have suffered severe financial loss;
- 4) new markets for U.S.-caught fish have been created, which, for the first time, are providing U.S. fishermen with opportunities to make foreign sales comparable to those enjoyed by U.S. processors;
- 5) some species new to foreign markets have been introduced into those markets. To the extent these gain acceptance, opportunities for the sale of the under-utilized fishery products by both U.S. processors and fishermen will be enhanced;
- 6) deliveries are made at sea where processing can take place soon after capture thereby improving quality, and saving on time, fuel and ice;
- 7) costs are reduced because the system has eliminated the need for long vessel runs to deliver catches to shoreside processors;
- 8) American fishermen have gained improved fishing and hauling techniques from experienced foreign fishermen which will benefit the U.S. industry in long-term development;
- 9) joint ventures have facilitated acquisition of better trawling gear by established fishermen, resulting in new trawl vessel construction, and expanded business opportunities for support facilities such as yards, gear and net supplies.<sup>162</sup>

Other benefits include:

- 10) increased data is collected on location of stocks;
- 11) advanced fleet management techniques are learned;
- 12) an alternative is provided for the high costs of installing refrigeration equipment;
- 13) coordination among historically fragmented vessel operators is enhanced;
- 14) needed investment funds are provided to all segments of the industry;
- 15) economic analyses are incorporated in the MFCMA framework.

COSTS:

- 1) U.S. processors have been precluded from the opportunity to process and sell the U.S. caught fish;
- 2) expansion of U.S. processing facilities has been held back in areas where joint ventures are operating;
- 3) U.S. shore labor loses job opportunities to foreign ship labor where joint ventures are operating;
- 4) foreign at-sea processing could be terminated suddenly by foreign processors, and this could leave domestic vessels without markets;
- 5) joint ventures have tended to polarize and divide fishing and processing segments of the industry;
- 6) only a relative small number of fishermen are able to take advantage of joint ventures;
- 7) U.S. processors are at a competitive disadvantage with foreign processors because of many domestic shore side constraints not in effect on foreign vessels.<sup>163</sup>

Many of these costs and benefits seem anomalous; in effect, a chicken and egg debate can be discerned: First of all, domestic and/or export markets must be available for the processed fish and processors require steady and sufficient supplies to operate efficiently; secondly, U.S. fishermen will supply the fish for a decent price to garner some profits and make endeavors worthwhile, but there will not be any markets developed unless the fish are supplied in the first place. The fishermen will not supply the fish unless the processors will buy the fish for a decent price, and the processor's will not buy the fish, or be able to offer competitive prices unless there are adequate markets in which to offer the processed product. Then add to this circular argument the fact that investment is needed to develop the markets, but lending institutions will not provide investment funds unless there are established markets. At the same time much of the industry remains fearful of accepting foreign investment.

Even with available export markets, the U.S. processors will have to be competitive in these world markets, or buyers will look to alternative sources of supply. The joint ventures must be competitive in the international marketplace as well. If all joint ventures were eliminated today, the U.S. processors would still not be competitive in a global sense for high volume/low value species.

The long-term viability of the whole fishing industry must be enhanced. Chuck Bundrant, president of Trident Seafoods Corporation in Seattle, Washington, characterized joint ventures as a "band-aid solution" to industry's problems. He also said the "overabundance of joint ventures has created a fleet of fish sharecroppers with no long-term profitability scheme and no development of infrastructure other than the fishing vessels themselves.<sup>164</sup> However, Robert Swanson, Vice President of Horizon Fish Company (another processor) characterized joint ventures as essential "stepping stones" to full domestic utilization of the vast resources. And that the industry needs joint ventures, not only for the economic viability of large U.S. stern-tractors, but also so that industry can learn firsthand of the sizes, behavior, and concentrations of under-utilized species and the processing, care, handling and marketing of the resultant product.<sup>165</sup> Though joint ventures provide a short-term adaptation to development of underutilized fisheries, full domestic utilization will not only require viable on-shore processors, but also offshore processors as well. American fishermen may not have to automatically adopt the technology of foreign processing vessels, but they will have to devise ways of overcoming the problems these vessels were designed to meet, e.g. immediate processing to prevent spoilage and decomposition.

The current push for changing U.S. shipping laws in order to allow foreign-built, U.S.- owned processing vessels to land fish in U.S. ports is a plausible alternative to joint ventures if full domestic utilization is economically warranted. Indeed, the great surplus of idle processing vessels on the market today at rock-bottom or scrap prices indicates that utilizing these vessels would be an economic solution in a comparative cost sense, rather than building domestic vessels at three, four, or maybe ten times the cost of a used vessel. Of course, this solution would not be in the best interests of the U.S. shipbuilding industry, but promoting one industry at the expense of another is a judgmental balance that any government must undertake. In terms of allocative efficiency, the industry with the greatest economic efficiency should be supported, but in a political sense, this is rarely the case. Cost/benefit analytical conclusions will rarely stifle protectionist cries of politically popular constituents.

## VII. RECOMMENDATIONS

Recommendations for improving the regulation of joint ventures are listed below under five qualitative categories: (1) economic; (2) political; (3) administrative; (4) legislative; and (5) social. Some of the recommendations made

are general, some are very specific, both necessarily so. Some of these suggestions are mutually exclusive, i.e. the commitment to phase-out all foreign fishing and processing entirely precludes encouragement of tying fishing rights to joint venture commitments. Also, the commitment to economic efficiency precludes most political considerations, and vice versa. However, all the recommendations given constitute factors and considerations that must be taken into account in determining an overall management system. The recommendations are as follows:

(1) ECONOMIC

- a. More long-range planning for the U.S. fishing industry should be conducted by NMFS.
- b. Economic and allocative efficiency should be incorporated into management decisions.
- c. Incentives for foreign involvement in joint ventures should be instituted by maintaining foreign fishing rights.<sup>166</sup>
- d. Flexibility should be maintained in joint venture arrangements so that the business interests can readily adapt to changing market conditions.
- e. Foreign investment in U.S. fishing industry should be encouraged.
- f. Economic impediments to development should be minimized.
- g. Increases in per capita consumption of seafood should be promoted.
- h. Industry representatives should be sent to our major overseas markets to collect more information on the quality of product desired by consumers in these markets.
- i. Quality control programs should be more fully developed by all shoreside processors.

(2) POLITICAL

- a. Priorities should be determined regarding promotion between different industries, and different segments of an industry; i.e., fishing industry v. ship building industry; harvesters v. on-shore processors.

- b. The degree of protection given to the U.S. fishing industry in trade matters should be more clearly defined.
- c. A commitment to export market expansion should be maintained to increase the industry's competitiveness in world trade matters.
- d. Incentives for domestic investment in the U.S. fishing industry should be provided.
- e. The real goals regarding phase-out of foreign fishing should be determined<sup>167</sup>, and assurance mechanisms instituted to see that these goals are carried out.
- f. Political disruptions in fisheries activities should be minimized.<sup>168</sup>
- g. The goals in extracting benefits from foreign partners in joint fishery ventures should be determined.

(3) ADMINISTRATIVE

- a. A monitoring system for evaluating the performance of joint ventures on a periodical basis should be instituted by NMFS or the Regional Councils and the results of the investigations published.
- b. The criteria used in evaluating joint venture performances should be clarified and published.
- c. The consistency of joint venture arrangement decisions with other oceanic and coastal programs, e.g., coastal zone management, offshore pollution control, and oil and gas leasing, should be determined on a continuing basis.
- d. The priority given to each of the criteria used in ranking joint venture applications should be clarified; i.e., the relative importance of post performance in joint ventures and commitment to lower trade barriers.
- e. Procedures for amending permits to reflect increased allocations of joint venture processing should be established and published.
- f. Procedures for redistribution of joint venture processing itself should be established and published.

- g. Some system of technology-sharing among U.S. operators should be established so the whole industry may take advantage of gains made in joint ventures.
- h. A more comprehensive framework for national fisheries management by NMFS should be established.
- i. A quality inspection program should be instituted by the FDA similar to agricultural, dairy and meat inspection systems.

#### (4) LEGISLATIVE

- a. Shipping and landing laws should be amended and Pub. L. No. 96-61 repealed, so as to allow the purchase of foreign-built, but U.S. - flag, processing vessels for use in coastal fisheries.
- b. Customs laws for defining export sales should be amended so as to characterize over-the-side sales of fish by U.S. fishermen to foreign processing vessels in joint ventures as exports for balance of trade purposes and statistical analysis.<sup>169</sup>
- c. The internal water processing amendment should be modified to incorporate consistency of State Governor-determined processor capacity with Regional Council/NMFS-determined state capacity by requiring Regional Council and/or NMFS review of governors' determinations.<sup>170</sup>
- d. Flexible provisions in domestic loans to fishermen or processors should be mandated through a government-guarantee program.

#### (5) SOCIAL

- a. Diversification of industry sectors should be encouraged to take advantage of seasonal variations in fisheries.
- b. The goal of training U.S. labor through joint ventures by the foreign partner should be elevated to a higher stature.
- c. Worker retraining programs should be established in the event the U.S. fishing industry continues to erode.

## VIII. CONCLUSION

The U.S. has witnessed the rise of joint ventures in recent years as an innovative method of garnering some of the economic returns from our tremendous fishery resources. These joint ventures potentially offer a wide range of benefits to the entire fishing industry in the regions where they operate, but there are also potential costs involved.

Both the foreign and domestic partners have benefitted by these arrangements: the foreigners in maintaining access to supplies, and U.S. fishermen in harvesting underutilized species, developing new markets and new technology. And the federal government has benefitted by extracting concessions from the foreign partner as a condition of permit approval, including lowered trade barriers, technology transfer, training opportunities, and compliance with regulations, thereby accomplishing a variety of policy objectives.

There is no question that joint ventures have stimulated development in the industry. Without joint ventures, the huge groundfish stocks off Alaska would remain as a directed foreign fishery for we would not have the capacity to harvest or process the stocks. New overseas markets have been developed, such as for squid. And U.S. participants in joint ventures have acquired the technology and experience to establish their own catcher/processor vessels thereby moving one more step toward full utilization of fishery resources by the U.S. industry.

The debate between harvesters and processors is certain to continue until all foreign fishing is completely phased out, including joint ventures. The National Fisheries Institute has called joint ventures and other direct sales by U.S. fishermen to foreigners as short-sighted and detrimental to the growth of the industry. But it seems joint ventures have provided the only real growth to take place in the last few years. The fishermen have progressed further than the processors in developing their potential, and this has led to much of the political arguments that have arisen. Patriotic cries of the processors are heard, demanding that fishermen curb their joint venture activities so that the processing industry may catch up in development. In effect, the processors say the fisherman should accept lower prices as a subsidy to processors, thereby benefiting the industry as a whole.

However, fishermen's efforts should not be stymied when the processors have not demonstrated that the investment and capital necessary to build up capacity will be committed. Granted, some uncertainty over policy and the considerable costs involved have contributed to discouraging the risk capital necessary to get processors on their way, but

investments will increase as economic viability during the joint venture years is proven. Also, by perpetuating foreign involvement in the fisheries, the joint ventures may also continue dependence on foreign companies and allow foreign fishermen to exploit markets which might otherwise turn toward the U.S.

Joint ventures will eventually be phased out as the investments increase, but in the meantime, foreign factory ships should be allowed to continue buying and processing fish and squid until the processors show they can handle all the U.S. fishermen can catch - and at a fair price. For the fishing vessels must keep working; without a continuous supply of fish from the harvesters, the processors will surely be the losers in the longrun.

The threshold problem that processors must face right now is quality. They must set high standards for their products and institute improved handling procedures. Al Guimond, President of Stonington Seafoods - a participant in joint ventures - requires the fishermen fishing for him to box the squid they catch in specific ways on board the vessel before bringing it in. The squid's shape is properly maintained and consequently, Guimond has no problem selling his product in the overseas markets.<sup>171</sup> Quality may well be the bottom line in expanding overseas markets, and this expansion is the determinative factor in any formula to promote the fishing industry.

The future of joint ventures is now in the hands of the federal government, i.e. NMFS. Although NMFS has indicated a willingness to phase-out joint ventures in the next two years, this could prove disastrous to the fishermen who have staked their livelihood on the species exploited through joint venture arrangements. The joint ventures have proved to be economically viable; the fishermen are satisfied; and markets have been created. NMFS must undertake more long-term planning in order to determine what is best in the long run. Management decisions made now could have long-range effects; therefore, goals and priorities must be further established to govern these decisions - such as whether NMFS will continue to allow joint ventures or not. Right now NMFS is not really settling any problems - it is just trying to keep everyone happy.

The problem clearly remains that we do not know what is best in the long run, and this inability hampers our decision-making power. But the decision must be made as to the place of joint ventures in the long-range future of fisheries development. Some have predicted that the move to a truly domestic industry will be more evolutionary than revolutionary - perhaps covering a decade or more - and that joint ventures are simply one step in this evolutionary process. Whatever the case, until the fishing industry is able to fully develop and



compete in the world markets, joint ventures will provide the means whereby at least a small share of the overseas market is earned.

## APPENDIX I. Examples of Proposed Joint Ventures

- (1) A joint venture was formed in 1976 between Bellingham Cold Storage of Seattle, Wash., and Sovrybflot, the Soviet fisheries ministry, resulting in a new company - Marine Resources Co. (MRC). U.S. vessels fish for Pacific cod, herring, and pollock off the coasts of Washington, Oregon and Alaska. Vessel contracts are with MRC itself and not with the Russians directly. The fish delivered to the Soviet foreign processing vessel are processed onboard, transferred back to the Soviet Union and sold on the export market or exchanged for higher-valued species which are then returned to the U.S. for sale at the highest price available. All profits go to the MRC and are then divided - 50/50 between Bellingham Cold Storage and the Soviets. This joint venture has been extremely successful and has been the role model for other joint venture proposals.<sup>172</sup>

A lot of flexibility was lost after the Soviet invasion of Afghanistan since the Soviets could no longer engage in a directed fishery and in joint venture processing. Nonetheless the venture is still profitable for the U.S. interests. It is the only venture where the U.S. partner actually owns the product and markets it, then splits the profits with the Soviets.

- (2) MRC applied for a permit for a US/USSR operation off the Southern California coast with San Pedro fishermen catching and processing anchovies, mackerel, and squid. The Regional Council initially recommended approval of the permit, but the permit was denied by NMFS. No clear reason for denial was communicated, but the permit application was filed shortly after the Soviet invasion of Afghanistan in December 1979, and after President Carter announced all direct fishery allocations to the Soviet Union were cut-off.<sup>173</sup>
- (3) Pan Alaska Fisheries entered an agreement with Taiyo Fishery Co. of Japan for 7000 metric tons of unspecified bottom fish to turn into paste in the Gulf of Alaska and Bering Sea areas.
- (4) Universal Seafoods of Washington and Nippon Suisan Kaisha, Ltd. of Japan entered an arrangement for 700 metric tons of pollock in order to get insight into the Japanese surimi market.
- (5) A US/USSR joint venture for shortbelly rockfish, scheduled to begin in April 1981 was panned by the Pacific Fishery Management Council. PFMC was under

intense pressure from salmon trollers and other smallboat fishermen who feared the venture would cause a great by-catch of Pacific salmon. MRC had plans to have the shortbellies minced, frozen, and then sold on the international market, reportedly in Africa.

- (6) The Taiwanese got a directed fishery for pollock by donating \$250,000 for the purchase of a vessel by Pribilof natives or for training aboard processing vessels.
- (7) AMFISH, Ltd., a partnership between the Fisheries Development Corporation of New York and a domestic subsidiary of an Italian fishing firm, Amuroso, sought revision of shipping laws to allow squid caught by the Italian processing vessel to be landed in U.S. ports. FDC and Amoruso planned to use the Italian vessel only until such time as a U.S. processing vessel could be built in the U.S., after which the new U.S. vessel would take over operations of the Italian vessel. The needed legislation was never passed and the joint venture was cancelled.<sup>174</sup>
- (8) A joint venture between Korea Marine Industry Development Corporation (KMIDC) and R.A. Davenny Associates of Alaska was entered into for processing approximately 40,000 metric tons of Alaska pollock. Although this operation had a few problems at the start, such as underreporting of delivery amounts by the Koreans, and delayed payments to U.S. fishermen, this venture has succeeded very well and continues each year.
- (9) East Germany was permitted to harvest 5000 metric tons of Atlantic mackerel and may purchase an additional 5000 metric tons through a joint venture with Joint Trawlers Ltd. (Gloucester, MA). Under the agreement, approved by NOAA, the fish are taken from the U.S. FCZ between Maine and North Carolina. None of the fish harvested will be sold in the U.S. or Canada. East Germany also has applied for an additional joint venture from 1 April 1983 to 31 March 1984 in the same fishery.

II. New England/Mid-Atlantic Council Joint Policy Guidelines-  
February 1983

I. Information on the Fishery

1. Area of usual domestic harvest; area JV is proposed for.\*
2. Amount of export and import of species, and destinations and origins of each.\*
3. Time JV is proposed for.\*
4. Amount applied for; minimum amount necessary to engage in JV.\*
5. Usual bycatch (type and percent); planned method of disposition.\*
6. MSY, OY, DAH, DAP, TALFF, JVP, Reserve-Fishing year, dates.
7. Time of usual domestic harvest.
8. Other JV's for same species.
9. Allocations from TALFF to country applying for JV.

II. Information on the Foreign Partner

1. Vessels to be involved and violation record of those vessels. Specify name, company or owner, length, hold capacity in tons, processing capacity, type of gear and other equipment.\*
2. Whether participating vessel will also be involved in a directed fishery under an allocation from TALFF.\*
3. Prior participation in joint ventures by the foreign company of its vessels.\*
4. Method of processing and final destination of product.\*
5. Is the foreign partner willing to extend the venture if it is successful?\*
6. Nation - violation record by all vessels of the nation.
7. Prior participation in joint ventures by the foreign nation.

III. Information on the US Partner

1. Name and description of the firm\*
2. Record of any previous joint ventures.\*
3. Number, type and size of US vessels participating.\*
4. Method of harvesting.\*

#### IV. Information on the joint venture

1. Will there be any purchase of US processed product? Specify amount and form.\*
2. Will there be any transfer of technology to the US partner or US harvesters? Give details.\*
3. Is there any scientific cooperation or experimentation involved? Give details.\*
4. How will the catch be transferred to the foreign processing vessel?\*
5. How will incidental catch be minimized and how will it be handled?\*

\*Information must be supplied by applicant.

### III. JOINT VENTURE EVALUATION CRITERIA - APRIL 1983

#### A. Compliance with Regulations/Business Agreements:

1. Total violations by country's fleet (Northwestern Atlantic).
2. Violations by vessels identified in joint ventures.
3. Settlement record.
4. U.S. partner's past performance.
5. Past performance and U.S. partner's satisfaction.

#### B. Trade Barriers and Market Development:

6. Existing tariff and/or non-tariff barriers.
7. Indication of change, i.e. lowering of tariffs.
8. Import quotas, history and trend.
9. Purchase of U.S. processed product (amount, form).
10. Knowledge of final destination of product.

#### C. Technology Transfer and U.S. Benefits:

11. Willingness to transfer technology.
12. Description of technology to be transferred.
13. Need for technology transfer.
14. Training opportunities.
15. Long-term commitment to joint ventures.
16. Commitment of capital investment to U.S. partner by foreign partner (to the extent known).
17. U.S. partner main participant in harvesting, processing, marketing.
18. U.S. partner main participant in harvesting/marketing; foreign partner main participant in processing.
19. U.S. partner main participant in harvesting/processing; foreign partner main participant in marketing.
20. U.S. partner harvests and sells over the side; foreign partner main participant in processing/marketing.
21. Compatible with U.S. management strategy.
22. Direct participation in U.S. fishery development.
23. Amount of increased U.S. landings.

Source: 48 Fed. Reg. 18864, Notice of intent to approve joint venture applications, April 26, 1983.

IV. Mid-Atlantic Council Revised Policy Guidelines - November 1983

Information Needed to Evaluate JV Applications

1. Information on the Foreign Partner

- a. Vessels to be involved, including name, company or owner, length, hold capacity in tons, processing capacity, type of gear and other equipment, and violation record of those vessels.
- b. Whether participating vessel will also be involved in a directed fishery for the species involved in the JV.
- c. Is the foreign partner willing to extend the JV if it is successful (how long and under what conditions)?
- d. Documentation of request to NMFS for observer coverage.

2. Information on the US Partner

- a. Name and description of the firm; including harvesting, processing, and freezing capacity, and whether the facilities are owned or leased.
- b. Name and historical business background, including previous fishery experience, of the principal officers of the firm.
- c. Number, type, size, and NMFS permit number of US vessels participating and type and extent of commitment to JV.
- d. Method of harvesting.

3. Information on the JV

- a. Area JV is proposed for, specified by NMFS Statistical Areas.
- b. Time (beginning and ending months and years) JV is proposed for.
- c. Amount applied for, by species.
- d. Allocation and catch of any previous JVs.
- e. Planned disposition of bycatch, measures to minimize and handle bycatch.
- f. If there is to be any purchase of US processed products specify: amount, form, species, processor(s) involved, and timetable.
- g. If there is to be any technology transfer to the US partner or US harvesters, specify schedule and type transfer (gear, quality improvement, facility development, or processing).
- h. If there is to be any scientific cooperation or experimentation involved, specify schedule and type of cooperation or experimentation.

- i. How will the catch be transferred to the foreign processing vessel?
  - j. Method of processing and final destination of product.
  - k. The amount of and schedule for projected increase in US involvement in all phases of harvesting, processing, and marketing due to the JV.
4. Information on the Flag Nation of the Foreign Partner
- a. Purchases (imports) of US processed fishery products by species for the two most recent calendar years.
  - b. Import tariff rates for US fishery products.
  - c. Import quotas or other trade barriers relating to the species involved in the JV.
  - d. Quantity of the species involved in the JV that the nation harvested, imported, and exported for each of the two most recent calendar years.
  - e. Nations to which the flag nation sold the species involved in the JV and the quantities sold by nation for each of the two most recent calendar years.

The Council expects JV applicants to appear before the Council as requested to explain responses to the above items and possibly to answer additional questions.



## FOOTNOTES

1. The Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, 90 Stat. 331 (codified in scattered sections of 16 U.S.C.) (FCMA). For a variety of articles dealing with various aspects of this statute, see Symposium on the Fishery Conservation and Management Act of 1976, 52 Wash. L. Rev. 427 (1977).

2. 16 U.S.C. §1811 (1976).

3. U.S.C. §§ 1811-1812 (1976). The territorial sea extends seaward three nautical miles from the shore for all but two states. The seaward boundaries of Texas, the Gulf Coast of Florida, and Puerto Rico are three marine leagues (9 nautical miles).

4. Nat'l Marine Fisheries Service, Fisheries of the United States 1982 (1983).

5. Id.

6. See Robinson, Ocean Fisheries: National Instrument for International Stability in 61 Role of International Law and an Evolving Ocean Law 425-48 (B. Lillich & J.N. Moore eds. 1980).

7. NOAA Draft, Summary of Major Trends Affecting U.S. Marine Fisheries, July 21, 1983; 24 pp.

8. Id.

9. See generally U.S. Dep't of Commerce, U.S. Ocean Policy in the 1970s: Status and Issues III-18 (1978).

10. Id.

11. See Kaczynski, Joint Ventures in Fisheries Between Distant-Water and Developed Coastal Nations: An Economic View, 5 Ocean Management 39, 41, 45 (1979).

12. See Joint Ventures: Hearings on Foreign Investments and Joint Ventures in the U.S. Fishing Industry Before the Subcommittee on Fisheries and Wildlife Conservation of the House Merchant and Fisheries Comm., 94th Cong., 1st Sess. 138-39 (1976) (hereinafter cited as 1976 Joint Venture Hearings).

13. Joint Ventures are not true joint ventures in ordinary international business transactions. See Hariri, Fisheries Joint Ventures and the Developing Countries, 6 Marine Aff. J. 100, 103; see generally S. Gorove, Legal Aspects of International Investment (1977); R. Mason, H. Miller, R. Robert & R. Dale, The Economics of International Business (1975); The

Multinational Joint Venture: Planning and Negotiating (1981); and J. Tomlinson, *The Joint Venture Process in International Business: India and Pakistan* (1970). For purposes of this paper, a joint venture represents an operation whereby U.S. fishermen harvest fish in the FCZ and then sell the fish to foreign processing vessels located in the FCZ, under various contractual arrangements.

14. See 1976 Joint Venture Hearings, supra note 12.

15. U.S. Dep't of Commerce, supra note 9, at III-32.

16. 16 U.S.C. § 1821(c) (1976).

17. 16 U.S.C. § 1824 (1976).

18. 16 U.S.C. § 1082 (11) (1976).

19. 16 U.S.C. § 1821 (a) (3) (1976).

20. 16 U.S.C. § 1802 (10) (D) (1976).

21. 16 U.S.C. § 1802 (12) (1976).

22. 16 U.S.C. § 1802 (25) (1976).

23. See generally Maddy, Acquisition and Ownership of Vessels, 47 Tul. L. Rev. 489 (1973)

24. See generally 1976 Joint Venture Hearings, supra note 10; Yarema, 18 Va. J. Int'l L. 513 (1978). See also Douglas v. Seacoast Products, 431 U.S. 265 (1977).

25. See Gillette, Korean Venture "Derails" U.S. Processor, Anchorage Times, Mar. 27, 1977 at 19, col. 1; Landaver, Foreigners Push to Arrange Large Stakes in American Fisheries to Protect Supplies, Wall St. J., Apr. 20, 1977 at 4, col. 1; Morehouse, Foreign Fisheries "End-Run" 200-Mile Limit, Christian Sci. Monitor, June 3, 1977 at 3; Davenny Firm Plans to Market Fish to Koreans, Anchorage Times, May 19, 1977 at 1; Fishery Council Nixes Korean Plan Permits, Anchorage Daily News, Apr. 29, 1977 at 2, col. 1; Fishing to Get Around the 200-Mile Limit, May 9, 1977 at 20; NEFCO Joins Coalition, Kodiak Daily Mirror, Apr. 22, 1977 at 1, col. 3; No to NOAA, Anchorage Daily News, June 24, 1977 at 6, col. 1; Pollock Politics Sink Proposal, Kodiak Daily Mirror, Apr. 29, 1977 at 1, col. 1; The War over Alaska's Fisheries, Bus. Week, June 6, 1977 at 76G.

26. See 1976 Joint Venture Hearings, supra note 12 at 139.

27. Id. supra note 12.

28. For a comprehensive discussion of foreign fees, see MacKenzie, The Evolution of United States Policy on Foreign Fishing Fees, 2(6) Oceans Policy Study (1982).

29. 1976 Joint Venture Hearings, supra note 12 at 139.

30. See H.R. Rep. No. 95-1334, 95th Cong., 2d Sess. 4 (1978) (hereinafter cited as 1978 House Report).

31. Nat'l Marine Fisheries Service, U.S. Dep't of Com., 1977 Annual Report: Fishery Conservation and Management Act of 1976 (1978).

32. Id.

33. See Wally Pareya Speaks Out on Bottom Fishing, The Alaska Fisherman's J. (Dec. 1979).

34. See generally Gorham, Joint Venture Policy and the Future of Alaska's Groundfishery in Alaska Fisheries: 200 years and 200 Miles of Change (B. Melteff ed. 1979).

35. Id.

36. R. Hildreth & R. Johnson, Ocean and Coastal Law 215 (1983)

37. 1978 House Report, supra note 30, at 6.

38. Id.

39. Hearings on Fishery Conservation and Management Act Oversight before the Comm. on Commerce, Science and Transportation, 95th Cong., 2d Sess. 88-90 (1978) (Statements of Edward Duria and Lee Weddig) (hereinafter cited as Senate Oversight Hearings).

40. Id. at 233.

41. Christie, Regulation of International Joint Ventures in the Fishery Conservation Zone, 10 Ga. J. Int'l & Comp. L. 85, 87 (1980).

42. Public Hearings on Joint Venture Regulations (Mar. 13, 1979) (statement of Walter Pereya); see also 44 Fed. Reg. 7708 (1979).

43. Nat'l Marine Fisheries Service, U.S. Dep't of Com., 1977 Annual Report, supra note 31.

44. Id.

45. 42 Fed. Reg. 30875 (1977): Marine Fish Management, June 1977 at 1.

46. Nat'l Marine Fisheries Service, U.S. Dept. of Com., Report on the MAFAC Subcommittee on "Joint Ventures" (1977).

47. Marine Fish Management, Oct. 1977 at 6.

48. 42 Fed. Reg. 60682 (1977); cf. 50 C.F.R. § 611.50 (1983) (current regulations similar to 1977 proposed rules).

49. See National Marine Fisheries Service Proposed Interim Policy. 43 Fed. Reg. 5398 (1978). See also Joint Ventures: Hearings on H.R. 2564, H.R. 4165, H.R. 4166 Before the Subcom. on Merchant Marine and Fisheries, 95th Cong., 1st Sess. (1977) (hereinafter cited as 1977 Joint Venture Hearings).

50. 43 Fed. Reg. 20532 (1978).

51. Off. Gen'l Counsel, U.S. Dep't of Com., Formal Legal Opinion No. 61 (Apr. 1978).

52. See Lardner, Fishing Policy Tack Makes Waves on Hill, Wash. Post, Apr. 28, 1978 at A3, col. 1.

53. 43 Fed. Reg. 20532 (1978). In abandoning its proposed regulations, NOAA also agreed with those who argued that the proposed policy clashed with the administration's foreign trade policy of non-interference in the exportation of food products and that foreign nations would probably retaliate by adopting protectionist policies of their own in other areas. Id. After NOAA abandoned its Interim Policy and its proposed rule making, two complaints were filed against NOAA regarding the validity of its position. See notes 54-55 infra.

54. Tom Lazzio Fish Company v. Kreps, No. 78-\_\_\_ (D. D.C. filed May 23, 1978).

55. Pac. Seafood Processors Assoc. v. Kreps, No. C78-3135 (W.D. Wash. filed May 23, 1978).

56. 16 U.S.C. § 1821 (d) (1976). TALFF is the portion of the OY of a fishery that will not be harvested by U.S. vessels. Allocation of TALFF, as originally formulated, is made by the Sec'y of State, in cooperation with the Sec'y of Comm., taking into account 1) traditional fishing activities; 2) cooperation with the U.S. in fishery research and in enforcement, conservation, and management of fishery resources; and 3) such other matters as the Sec'y of State deems appropriate.

57. 5 U.S.C. § 551 et seq.

58. See generally Fidell, Developments in the Law: The Fishery Conservation and Management Act of 1976 in Oceans 78, the Ocean Challenge: Proceedings of the Fourth Annual MTS Conference (1978). The main themes in the various lawsuits were: 1) has the Administrative Procedure Act been complied with regarding rule making; 2) to what extent does that law apply to particular agency actions under the FCMA; and 3) have the proper factors established in the FCMA for management decisions been taken into account and the analysis spread upon the record. Id.

According to a ruling by the Dep't of State Office of Fisheries Affairs, fish taken by a U.S. flag vessel and transferred to a foreign flag processing vessel will be counted as part of the U.S. harvest. Letter from Albert L. Zucca, Director, Office of Fisheries Affairs, U.S. Dep't of State to Charles L. Meachom, Director, Internat'l Fisheries and External Affairs, Office of the Governor of Alaska (Mar. 2, 1977).

59. Fishery Conservation and Management Act Amendments of 1978, Pub. L. No. 95-354, 92 Stat. 519 (codified in various sections of 16 U.S.C.).

60. FCMA Amendments, Pub. L. No. 95-354, 92 Stat. 519 (1978) reprinted in (1978) U.S. Code Cong. & Ad. News 1350.

61. 16 U.S.C. § 1852 (h) (5) (1976 & Supp. 1978). This provision relates to assessments and specifications made pursuant to the requirements for contents of fishery management plans (FMP's). In other words, as part of every FMP, the Councils must assess and specify the capacity and extent to which U.S. fish processors, on an annual basis, will process that portion of optimum yield that will be harvested by fishing vessels of the U.S. Id.

62. 16 U.S.C. § 1801 (b) (6). The 1978 Amendments substituted "the United States fishing industry" for "United States fishermen" in § 2 (b) (6) and in § 2 (a) (7), thus indicating a desire, or presenting a mandate to stimulate development of the whole U.S. fishing industry, not just the harvesting sector.

63. 1978 House Report, supra note 30, at 6; see also S. Rep. No. 95-935, 95th Cong., 2d Sess. 5 (1978) (hereinafter cited as 1978 Senate Report).

64. Id.

65. 16 U.S.C. § 1853 (a) (3) (1976 & Supp. 1978).

66. 16 U.S.C. § 1853 (a) (4) (c) - (a) (5) (1976 & Supp. 1978).

The amendments also provide a restriction which prohibits a foreign processing vessel from receiving those fish species

which are fully utilized by American processors, such as salmon, king crab, halibut, surf clams, menhaden, lobster and shrimp. The amendments thus give U.S. processors an absolute monopoly on such species regardless of price. 16 U.S.C. §1824 (b) (6) (i) (1976 & Supp. 1978).

"With respect to the determination of U.S. processing capacity and intent, the committee does not intend that U.S. processors demonstrate an ability to outbid the price on other contract provisions offered by foreign processors in order to establish capacity and intent".

1978 House Report, supra note 30, at 10.

67. Id.

68. Senate Oversight Hearings, supra note 39, at 60.

69. Id.

70. Letter from Rep. Les AuCoin to Gen'l Accounting Off., (Oct. 3, 1979) reprinted in Gen'l Accounting Off., CED 81-65, Foreign Investment in U.S. Seafood Processing Industry Difficult to Assess (1981) (hereinafter cited as GAO Report).

71. Id.

72. Id. at 4-13.

73. Id. at 14.

74. Id. at 17-18.

75. Id. at 20-31.

76. 16 U.S.C. §1857 (3) (1976 & Supp. 1978).

77. 43 Fed. Reg. 49023 (1978) (proposed amendments to regulations).

78. 43 Fed. Reg. 49032 (1978) (solicitation of public comments).

79. A case later filed dealt with the extent of the information required by the Regional Councils in developing FMPs. See Wash. Trollers Assoc. v. Kreps, 645 F. 2d 684 (9th Cir. 1981). The summary of information utilized in FMP specifications must provide information sufficient to enable an interested or affected party to comment intelligently on those specifications, and though the "summary" that the plan is required to include may incorporate by reference documents containing the necessary information, those documents must be reasonably available to the interested party. 645 F.2d. 684.

80. 16 U.S.C. §1853 (a) (4) (B).

81. 16 U.S.C. § 1824 (b) (6) (B) (ii); 16 U.S.C. § 1853 (a) (4) (c).

82. 16 U.S.C. § 1824 (b) (6) (B) (i).

83. See 44 Fed. Reg. 7708 (1979) (Comments of Furia on Guidelines for Development of Fishery Management Plans).

84. Id.

85. 16 U.S.C. § 1824 (b) (7) (F); see also 1978 Senate Report, supra note 63, at 4. The Senate Report states that "as long as the interests of U.S. harvesters are not significantly affected, the Secretary may consider imposing geographical restrictions on the areas in which foreign processing vessels may operate in order to foster the development of temporarily vulnerable or developing onshore processing facilities." Id. at 4.

86. See Christie supra note 41, at 97.

87. W. Pereya, Comments by Marine Resources Co. of Seattle on Interim Guidelines for Developing Fishery Management Plans 8 (Mar. 10, 1979).

88. New England Fish Co. v. Kreps, No. 79-1196 (D.D.C. filed May 1, 1979).

89. Nat'l Marine Fisheries Service, U.S. Dep't of Commerce, Calendar Year 1979: Report on the Implementation of the Fishery Conservation and Management Act of 1976 (1980).

90. Id.

91. See 44 Fed. Reg. 7708, 7708 (1979).

92. See Maine v. Kreps, 563 F. 2d 1043 (1st Cir. 1972); Administrative Survey, 10 L. & Pol. Int'l Bus. 1 (1978).

93. See, e.g. Presentation to the North Pac. Regional Fisheries Council on the Subject of Joint Ventures by Sid Jaeger, Manager, North Pac. Vessel Owners Assoc. 5-9 (Aug. 5-6, 1977).

94. 1978 House Report, supra note 30, at 9-10.

95. See Christie, supra note 41, at 91.

96. Interview with Alfred Bilik, Fees, Permits and Regulations Division, Nat'l Marine Fisheries Service, in Washington, D.C. (Apr. 20, 1983).

97. American Fisheries Promotion Act of 1980, Pub. L. No. 96-561, 94 Stat. 3296.

98. Id.

99. See Legis. Hist. of the American Fisheries Promotion Act, reprinted in [1980] U.S. Code & Cong. Ad. News 6903.

100. See generally H.R. Rep. No. 96-1138 pt. 1, 96th Cong., 2d. Sess. (1980) (hereinafter cited as 1980 House Report).

101. 16 U.S.C. § 1821 (e) (1) (E) (i)-(viii) (1980).

102. 16 U.S.C. § 1821 (d) (1980). In discussing the phase-out of foreign fishing, § 201 (d), as amended by §301 of the bill, specifically uses the term "fish harvesting" in order to preclude the possibility that § 201 (d) will be used to phase out foreign processing within the FCZ when that processing is being used to assist the U.S. fishing fleet. Under these so-called joint ventures, foreign processing vessels purchase fish harvested by U.S. vessels, and it is not intended that these joint ventures be phased out under section 301. 1980 House Report, supra note 100, at 47.

103. The 1978 Amendments also would have granted the Sec'y of Com. discretion to deny permits to processors from countries that impose tariff barriers on the importation of fish or fish products. But at the insistence of the Administration, the tariff barrier clause was not enacted into law because retaliation by other countries was feared. See 1978 House Report, supra note 30, at 7-8, 10; 1978 Senate Report, supra note 63, at 3.

104. [1980] U.S. Code Cong. & Ad. News 6904

105. Note, Mare Clausum: The American Fisheries Promotion Act of 1980, 9 Syr. J. Int'l L. & Comm. 403, 423-426 (1982).

106. Bristol Bay Herring Marketing Cooperative v. Skoog, No. A81-043 slip op. (D. Alaska, March 27, 1981).

107. No. A81-043 slip op. at 13.

108. Submerged Lands Act § 1312, 43 U.S.C. §§ 1301-15 (1953).

109. No. A81-043 slip op. at 13. See also Foster Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (Louisiana law requiring primary process of shrimp in-state before shipment out-of-state); Hicklin v. Orbec, 437 U.S. 518 (1978) (striking down "Alaska Hire" statute as violation of both the commerce clause and privileges and immunities clause); E. Belmont, Foreign Processing Vessels in Internal Waters: No Regulation by



the State (Dec. 1981) (unpublished Marine Law Institute Research Paper).

110. 16 U.S.C. § 1857 (2) (A) (Supp. 1982).

111. 16 U.S.C. § 1802 (10) (D) (1976).

112. H.R. Rep. No. 97-549 (1982) (hereinafter cited as 1982 House Report).

113. See United States v. Alaska, 422 U.S. 184 (1975) (defined Cook Inlet as internal waters).

114. Kodiak King Crab, Inc. v. Bristol Bay Herring Marketing Coop, NO. A81-259 civil (D. Alaska, July 14, 1981).

115. See generally 1982 House Report, supra note 112.

116. Marine Fish Management, July 1982 at 3. See also Pub. L. No. 97-191.

117. See 128 Cong. Rec. S6468-69 (daily ed. May 17, 1982) (remarks of Sen. Stevens).

118. See H. Conf. Rep. No. 97-982 at 21 (1982) reprinted in [1983] U.S. Code Cong. & Ad. News 4320.

119. 128 Cong. Rec. H.2730-31 (daily ed. May 25, 1982) (remarks of Rep. Forsythe & Rep. Breaux).

120. See Pub. L. No. 97-191, 1.

121. 128 Cong. Rec. S.5368 (daily ed. May 17, 1982) (remarks of Sen. Stevens for himself, and Senators Packwood, Gorton, Murkowski and Jackson).

122. Id.

123. Letter from Irving P. Margulies, NOAA Gen'l Counsel, to Walter B. Jones, Chairman, House Merchant Marine and Fisheries Comm. (May 11, 1982).

124. See 1982 House Report, supra note 112.

125. See Nat'l Marine Fisheries Service, U.S. Dep't of Commerce, Basic Information on Over-the-Side Joint Ventures: the Transfer of U.S.-Caught Fish to Foreign Flag Processing Vessels (Feb. 1982) (available from NMFS).

126. See notes 86-90 supra and accompanying text.

127. See United States v. Kaiyo Maru No. 53, 503 F. Supp. 1075 (D.C. Alaska 1980).

128. See 46 U.S.C. § 11, § 251 (a), § 252; 19 U.S.C. § 81 (c); [1950] U.S. Code Cong. & Ad. News 3539. See also AMFISH: Hearings on H.R. 4360 to Promote the Development of an American Fishing Industry in Certain Underutilized Species Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Merchant Marine and Fisheries Comm., 96th Cong., 1st Sess. (1979) (amendments to Shipping Acts to allow use of foreign-built processing vessels in domestic fisheries). But See Act of Aug. 15, 1979, Pub. L. No. 96-61, (amending 46 U.S.C. § 251 (a) (prohibiting foreign-built fishing vessels flying the U.S. flag from fishing within the FCZ--so-called "Loophole Amendment").

129. Id.

130. See Schedule 1, Part 15, Subpart A, Tariff Schedule of the United States (definition of products of an American fishery).

131. Fisheries of the United States, 1980, 1981, 1982.

132. Bilik interview, supra note 96.

133. NACOA, Fisheries for the Future: Restructuring the Government-Industry Partnership (1982).

134. 48 Fed. Reg. 18864 (April 26, 1983) Notice of Intent to approve joint venture applications (amending 50 C.F.R. § 611).

135. "Some Processors leery of joint ventures," Nat'l Fisherman, Oct. 83 at 10.

136. NOAA, Draft, Summary of Major Trends Affecting U.S. Marine Fisheries, July 21, 1983.

137. New England and Mid-Atlantic Fishery Management Councils, Guidelines for Council Consideration of Joint Venture Applications, Feb. 7, 1983.

138. The initial annual specifications for Illex and Loligo are as follows:

Species	OY	DAH	DAP	JVP	Reserve	TALFF
Illex	30,000	27,100	5,000	22,100	1,450	1,450
Loligo	44,000	22,000	10,300	11,700	11,000	11,000

See 48 Fed. Reg. 18818 (1983); 48 Fed. Reg. 33002 (1983).

In 1982 U.S. fishermen landed 3432 mt of Illex squid for shoreside processing (a six-fold increase over 1981 landings) and 3770 mt of Loligo squid for shoreside processing (a 30% increase from 1981). Although the Mid-Atlantic Council

recommended an increase in DAP for Illex to 10,000 mt, NMFS determined that this increase was based on unsubstantiated reports of domestic landings. Therefore, NMFS selected 5,000 mt, the same as in the last three years. Shoreside processors of Loligo estimated they could utilize up to 22,000 mt in 1983, mostly in export. However, the growth in the export market is dependent upon 2 factors:

1. A reduced offshore foreign catch of Loligo, and
2. The amount of Loligo allowed for joint ventures.

To create a balance between joint ventures and concerns of the shoreside processors, the Secretary specified an increased DAP of 10,300 mt and a JVP of 11,700 mt. This increase would allow for a three-fold growth for shoreside processors. Id.

139. See 48 Fed. Reg. 18818 (April 26, 1983) (Atlantic Mackerel, Squid and Butterfish Fisheries; Preliminary initial specifications).

140. See 48 Fed. Reg. 18864 (April 26, 1983) (Notice of intent to approve joint venture applications).

141. The amounts approved by NMFS for Illex joint ventures were as follows:

International Seafood Trading Corp./Italy	5950 mt
Lunds Fisheries, Inc./Portugal	8500 mt
Scan Ocean/Portugal	4250 mt
Joint Trawlers, Ltd./Portugal	2550 mt
Lunds Fisheries, Inc./Japan	850 mt
Sea Harvest, Inc./Spain (2 applications)	NONE
Scan Ocean/USSR	NONE

48 Fed. Reg. 18864 (1983). It is clear that under the new criteria politics will continue to play a role in deciding whose application will be approved. For instance, the Scan Ocean/USSR proposal was ranked third overall by the New England Council, but the Mid-Atlantic Council recommended against an allocation because this Council felt political problems between the two countries would prevent the venture from ever coming off. Obviously, MAFMC had some indication from NMFS and DOS that the venture would not be approved, and ultimately, it was not approved. See "Squid, Politics, Joint Ventures," Commercial Fisheries News, May 1983 at 1.

142. The OY, DAP and JVP for Loligo were specified as 44,000 mt, 10,300 mt and 11,700 mt, respectively, supra note 138. And NOAA learned that during the April 1-June 10, 1983 Loligo run, 6500 mt were landed by domestic vessels for shoreside processing. This amount exceeded the entire annual Loligo landings of 3770 mt for 1982, demonstrating that joint ventures have not significantly affected shoreside processors.

ventures have not significantly affected shoreside processors. See 48 Fed. Reg. 33001 (July 20, 1983).

143. Off. of Tech. Assessment, U.S. Cong., Establishing a 200-Mile Fisheries Zone (1977). Discretionary power is not limited to NMFS. In an August press release, MAFMC announced guidelines for changing the OY of squid, mackerel, and butterfish in order to allow for adjustments due to seasonal availability of squid, changes in fishing patterns or practices of U.S. fishermen fishing for more economically valuable species of fish; increases in TALFF to reward foreign nations providing markets for U.S. exporters, joint venture operations and changes to approved joint ventures, and for "other benefits." Presumably this ability to adjust the OYs will endow the councils and NMFS with more "flexibility" in responding to unforeseen circumstances in management of these fisheries. But by taking away the certainty in specifications, the changes render business planning very difficult for longer-term arrangements.

The amendment grants the Regional Director of NMFS, in consultation with the Council, the authority to adjust squid OYs based upon certain biological and economical factors. The economic factors to be applied are as follows:

1. total world export potential by squid-producing countries;
2. total world import demand by squid-consuming nations;
3. U.S. export potential based on expected U.S. harvests, expected U.S. consumption, relative prices, exchange rates, and foreign trade barriers;
4. increased/decreased revenues to the U.S. from foreign fees;
5. increased/decreased revenues to U.S. harvesters (with/without joint ventures);
6. increased/decreased revenues to U.S. processors and exporters;
7. increases/decreases in U.S. harvesting productivity due to decreases/increases in foreign harvests;
8. increases/decreases in U.S. processing productivity; and
9. potential impact of increased/decreased TALFF on foreign purchases of U.S. products and services and U.S.-caught fish, changes in trade barriers, technology transfer, and other considerations.

See Mid-Atlantic Fishery Management Council, Press Release 25 August 1983.

144. "Tempers short, lots at stake in Loligo squid glut," Commercial Fisheries News, July 1983 at 28.

145. "East Coast Squid Fishery Goes International," Nat'l Fisherman, Oct. 1983 at 8-9.

146. "Fishermen on Long Island tell U.S. processors to toe the line," Nat'l Fisherman, Dec. 1983 at 2.

147. "Some processors leery of joint ventures," Nat'l Fisherman, Oct. 1983 at 10.

148. "NMFS gets an earful at hearings on squid ventures," Nat'l Fisherman, Dec. 1983 at 2.

149. Nat'l Fisherman, supra note 146.

150. Nat'l Fisherman, supra note 148.

151. "Alan [sic] Peterson sees major hurdles for industry," Nat'l Fisherman, Sept. 1983 at 18-19.

152. S.750, 98th Cong., 1st Sess. March 10, (1983); A bill to implement an exclusive economic zone adjacent to the territorial sea of the United States, and for other purposes. See "Proposed legislation calls for foreign phase-out," Nat'l Fisherman June 1983 at 18.

153. See United States: Proclamation on an Exclusive Economic Zone reprinted in 22 I.L.M. 461 (1983).

154. See Nat'l Fisherman, supra note 152.

155. "U.S. Industry comes out a winner in talks with Japan," Nat'l Fisherman, Jan. 1984 at 2.

156. See "Small processor will join Alaska bottomfish fleet," Nat'l Fisherman, Sept. 1983 at 55; see also Truver & Little, U.S. - Flag Fish Processing Plantships for the Alaskan Groundfish Fishery, 13 Ocean Dev. & Int'l L. 87 (1983).

157. "Lunds to build first East Coast processor," Nat'l Fisherman, Dec. 1983 at 55.

158. See Koch, Regulation of Vessels in the United States Fishing Industry: Its Effect on Utilization of the Nation's Fisheries Potential, 14 J. Mar. L. & Com. 347 (1983).

159. Mid-Atlantic Fishery Management Council, Guidelines for Mid-Atlantic Council Consideration of Joint Venture Applications, 16 November 1983.

160. H.R. 3806, 98th Cong., 1st Sess. (Aug. 4, 1983). A Bill to establish a fisheries corporation to stimulate the full development of all sectors of the United States fishing industry, and for other purposes.

161. "Fisheries Corp. bill goes back to the drawing board," Nat'l Fisherman, Jan. 1984 at 4.

162. See NACOA, supra, note 133.

163. Id.

164. See Senate Oversight Hearings, supra, note 39, at 76.

165. Id. at 63.

166. Walter Pereya has advocated establishing a reserve of 20% of the TALFF for foreign processors to harvest when involved in joint ventures as a way of maintaining incentives, since many commitments to joint ventures are made in the hope of getting increased allocations. If the carrot is taken away, joint ventures will not survive for the foreigners will go where supplies are more accessible. Pereya, infra note 172, at 106.

167. The rallying cry of "Get rid of the foreigners!" is politically popular, but often without recognizing the importance of foreign fishing to development of the U.S. industry by providing needed capital, increased opportunities, and technology. Total phase-out of foreign fishing may actually occur at the expense of our own operators.

168. There may be some validity to the claim that the curtailment of Soviet fishing rights hurt us more than it hurt the Soviets and accomplished nothing politically. An analogous situation was the embargo on wheat sales to the Soviets for the Soviets got their needed grain from other sources more than happy to obtain the increased trade, while our wheat farmers suffered from lost sales.

169. There are inherent income tax problems with this suggestion, if profits from sales return to the U.S. company before they are distributed to the foreigners.

170. The mere requirement of a GIFA as a precondition to receiving processing rights in State internal waters will not ensure any consistency with Regional Councils' determinations of processing capacity in the area. Contra, 128 Cong. Rec. S5368 (daily ed. May 17, 1982) (remarks of Sen. Stevens).

171. Nat'l Fisherman, supra note 148.

172. See Pereya, Some Preliminary Results of a U.S.-Soviet Joint Fishing Venture, 10 J. Contem. Bus. (1981). One primary reason for the success of this venture is the vast resources of under-utilized species that were available for the taking. U.S. fishermen had all but ignored the hake fishery because hake contains an enzyme which causes it to deteriorate within a few hours after it is caught, meaning it must be processed almost immediately. Americans lacked both factory ships to process the fish at sea and marketing networks to sell

ships to process the fish at sea and marketing networks to sell it in large quantities. Also the fish had been considered unsellable to beef-eating Americans who still only consume an average of 12-13 pounds of fish a year, a fraction of the average world consumption.

173. In § 204 of the FCMA there is a so-called "basket provision" that allows the Secretary of Commerce, in deciding whether to approve a joint venture application, to "take into account, with respect to the foreign nation concerned, such other matters as the Secretary deems appropriate." 16 U.S.C. § 1824 (b) (6) (B) (iii) (1978) (emphasis added). A similar provision in the TALFF allocation provisions allows the Secretary the same degree of discretion. Although never formally announced, MRC suspected that the disapproval of the permit was strictly in retaliation for the Soviet aggression in Afghanistan. It seems clear that this was the main reason involved. And although no NMFS official would discuss this "national security" subterfuge, no one denied the rumors either.

174. See AMFISH: Hearings on H.R. 4360 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries, 96th Cong., 1st Sess. (1979); Michele Amoruso E. Figli v. Fisheries Development Corp., 499 F. Supp. 1074 (1980). Amoruso had agreed to provide a certain percentage of the operating expenses for AMFISH, Ltd. Amoruso subsequently fell behind in payments, and when it was clear the needed legislation would not be enacted, Amoruso refused to forward any back-owed funds. FDC brought a breach of contract claim against Amoruso, who in turn brought the present action to have the original contract declared void and illegal. This suit was dismissed, however, for it was raised under the FCMA which does not provide a remedy for private contractual disputes in fisheries matters.