Fishery Conservation and Management Act of 1976: An Accommodation of State, Federal, and International Interests

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Fishery Conservation and Management Act of 1976: An Accommodation of State, Federal, and International Interests

We all know from experience in our ... country's political and private affairs that problems unattended do not go away. ... Indeed, one of the greatest problems ... today is to deal in absolute terms with the distribution of rights in the [world's] coastal waters. In each case, we must now examine the relative interests and find a legal formula which accommodates them. This is not a mere matter of compromise or "splitting the difference," but rather of building a legal structure which is simultaneously responsive to the different needs and interests.*

INTRODUCTION

EFFICIENT REGULATION AND use of the United States coastal waters is the primary objective of the recently enacted Fishery Conservation and Management Act of 1976 (FCMA).¹ The FCMA extends national fishery management jurisdiction outward 200 nautical miles from shore.² For the first time a comprehensive management regime has been established for the fishery resources off the United States coasts. Additionally, the FCMA has played a key role in fostering a new rule of customary international law relating to the unilateral extension of national jurisdiction over coastal waters.³ Notwithstanding

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² The FCMA is a mixture of numerous approaches previously proposed by bills in Congress. For a list of the earlier proposals see Manguson, The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries, 52 WASH. L. REV. 427, 433 (1977).

³ During 1976 eight countries extended their fisheries jurisdiction to 200 nautical miles. Members of the European Economic Community have also decided to operate under a similar extension vis-à-vis nonmember countries. Moreover, Japan, having recently decided to expand its territorial limits to 12 miles, is expected to ex-
the sharp criticism levelled against the FCMA for its potentially destructive effects on the Third Conference on the Law of the Sea (LOS III), it nevertheless represents a feasible and workable solution to the urgent problem of fishery resource protection.

The application and enforcement of the FCMA permeates state, federal, and international fishery regulatory schemes. Conflicts arising between federal and state schemes present problems as fully com-

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complicated as those existing between national and international concepts of ocean management. It was not until the FCMA that the United States began speaking with one voice, attempting to accommodate state coastal interests within the context of national uniformity as well

which gave the Federal Government control over the submerged lands beyond the three-mile marginal belt. 43 U.S.C. § 1331 et seq. (1976). The OCSLA has been read narrowly by some commentators "to involve the federal government in the lucrative practice of leasing offshore oil lands to oil companies for petroleum development." Rathje, Saving Bryon's Sea: Federal and State Regulation of Oil Pollution from Ocean Petroleum Production, 22 HASTINGS L.J. 485, 490-91 (1971).

By far the most extensive entry into the fishery regulation field prior to the FCMA by the federal government was through the Federal Extra-Territorial Waters Act of 1966, commonly known as the 12-Mile Act. 16 U.S.C. § 1091 et seq. (1970) (repealed 1976). The 12-Mile Act was an important step in the unilateral extension of exclusive fisheries regulation to 200 miles under the FCMA.

Until enactment of the FCMA in 1976, the Federal Government did no more than act as a passive partner or custodian of the contiguous zone beyond the state's territorial three-mile limit. This was reflected in the states ability to regulate fisheries beyond their traditional three-mile territorial sea limitation. In Skiriotes, supra, the Supreme Court affirmed the conviction of a fisherman under a Florida state statute for using illegal diving equipment in the taking of sponges from the Gulf of Mexico six miles off the Florida cost. Since the application of the statute involved no question of international law or foreign relations, and the conviction raised questions of domestic rights and duties, namely, the power of the state over its citizens and there was no conflicting federal legislation, the Court reasoned that Florida could regulate the rights of its own citizens beyond its territorial limit. 313 U.S. at 77. State regulatory powers were further expanded in United States v. La., 363 U.S. 1 (1960), wherein the Supreme Court determined that Congress had the power to grant submerged lands beyond the three-mile limit to Texas and Florida "as a domestic matter which did not necessarily affect United States claims regarding the territorial sea for international purposes" because of the "special and limited character" of the jurisdiction to exploit submerged lands. Id. at 31.

Therefore, until a clearly enunciated purpose was established by the federal government a state was able to extend its fishery jurisdiction beyond the territorial limits established by the SLA. Nonetheless, serious theoretical hurdles had to be overcome. See generally Note, Territorial Jurisdiction — Massachusetts Judicial Extention Act—State Legislature Extends Jurisdiction of State Courts to 200 Miles at Sea, 5 VAND. J. TRANSNAT'L L. 490 (1971) [hereinafter cited as Fisheries Jurisdiction].

Prior to the passage of the FCMA, relevant international law, customs and agreements on the subject of fishery regulation were confusing and with few exceptions, were accomplishing very little to help conserve and effectively manage the fishery stocks of the high seas. For a comprehensive look at the state of affairs in international fishery regulations before the FCMA see D. McKERNAN, INTERNATIONAL FISHERY POLICY AND THE UNITED STATES FISHING INDUSTRY (1968). See also Fisheries Jurisdiction, supra note 5, at 324-25.
as providing the appropriate machinery for conforming international agreements to the overall FCMA policies and objectives.\footnote{The two broad purposes of the FCMA are: (1) to extend the fisheries jurisdiction of the United States to the newly created fishery conservation zone which has an outer boundary of 200 nautical miles from shore, and (2) to impose a management structure within the fishery conservation zone which is to be administered by the Regional Fishery Management Councils and the Department of Commerce. FCMA, §§ 101, 302(a), 16 U.S.C. §§ 1811, 1852 (1976).}

The aim of this note is to examine the impact of the FCMA upon these traditional regulatory and conservation efforts with primary emphasis given to fishery jurisdiction in coastal waters off the United States. Analysis of the traditional approach to fishery jurisdiction is considered in the context of a recently decided Supreme Court of Alaska decision, \textit{State v. Bundrant}.\footnote{546 P.2d 530 (Alas. 1976), appeal dismissed sub nom., Uri v. Alas., 97 S.Ct. 40 (1977).} \textit{Bundrant} accurately illustrates the conventional interplay among state, federal, and international interests and the treatment accorded each prior to the enactment of the FCMA. Discussion of pertinent FCMA provisions and their impact upon state and federal management interests follow. Finally, attention is drawn to the FCMA's influence in the area of international fishery affairs, including mandatory revision of certain United States treaty obligations pursuant to the FCMA and the potential tensions which could foreseeably result from such compliance.

Overall, this note demonstrates that the FCMA is a significant step forward in the comprehensive management and conservation of sorely depleted fishery resources in American coastal waters. Further, the management regime under the FCMA provides sufficient flexibility and sensitivity to fulfill individual states' needs while simultaneously preserving the delicate balance between national and international concerns over extraterritorial fishery regulation.

\section{Traditional Approach: \textit{State v. Bundrant}}

On January 19, 1976, the Alaska Supreme Court, in a controversial decision, upheld state emergency fishery regulations declaring certain areas within and beyond Alaska's territorial waters closed to crab fishermen.\footnote{\textit{Id.} The case was denied a rehearing on March 26, 1976, less than one week before the passage of the FCMA. The Alaska Supreme Court reversed and remanded the case to the trial court after rejecting arguments, \textit{inter alia}, based on Congress' dor-} By ruling in favor of the state's interests and thereby allow-
ing extraterritorial fishery jurisdiction, the court rejected countervailing federal and international concerns as presented by the appellees. Consequently, *Bundrant* illustrates the traditional approach to judicial resolution of fishery jurisdiction conflicts among competing interests. A brief account of the background data giving rise to this decision is necessary in order to fully understand its representative value.

In 1973, the Alaska Board of Fish and Game promulgated fishery regulations calling for a maximum quota catch of twenty-three million pounds of crabs "to be harvested in the Alaskan coastal waters." These measures were taken in an effort to avoid eventual depletion of harvestable crabs taken from the Bering Sea and also to preserve the fishery area at state determined sustainable yield levels. This quota was made effective for the entire 1973-74 crabbing season. However, the limitation was reached before the end of the crabbing season whereupon the Bering Sea Shellfish Area (BSSA) was closed until June 15, 1974. Soon after the closing, several crab fishermen brought suit in federal court seeking a preliminary injunction against the enforcement of the Board's quota requirements. A three-judge district court heard the case on April 30, 1974, and by enjoining the State of Alaska from applying the crabbing restrictions granted the relief sought. On June 15, 1974, just two weeks before the opening of the next crabbing season, the Board issued a comprehensive set of emergency regulations which prohibited the taking and the possession of crabs in a closed area. In effect, the Board once again designated fishery areas within and beyond territorial waters as subject to its regulations.

The Alaska Board of Fish and Game (Board) began efforts to regulate crabbing as early as 1969. The areas under regulation were both territorial and extraterritorial fishery zones so designated.

The Board promulgated regulations creating the Bering Sea Shellfish Area (BSSA) which included waters within and without Alaska's territorial limits. The Board also prohibited possession or sale of crab taken "in violation of the rules and regulations promulgated by the Board" when such crabs were taken in waters beyond the state's territorial waters. 546 P.2d at 533.

Following the *Brooks* decision, the Board repealed the enjoined regulations and took alternative steps to govern crabbing in the BSSA for the upcoming season. 546 P.2d at 534. A system of designated closures was created by the Board whereby "statistical areas" were delineated. The "statistical areas" consisted of:
The activity giving rise to the Bundrant decision occurred in a closed area defined as "the waters of the Bering Sea and the Chukchi Sea, including all tributary bays except Bechin Bay and Isanotski Strait . . . north of 54° 36' North Latitude. . . ." Prior to July 1, 1974, the date for the opening of the new crabbing season, an organization of Bering Sea crab fishermen promulgated their own rules for the upcoming crabbing season. The reactionist group's rules called for the crabbing season to open on June 26. In response, the Board issued emergency regulations delaying the opening of the season and vested the Board's Commissioner with discretionary powers to open the season when "general order can be restored and the State can be assured that fishing will be conducted in a manner which will not jeopardize the rights of law-abiding fishermen." The fishermen who had been successful earlier in gaining a preliminary injunction enjoining enforcement of the Board's previous regulations petitioned the federal district court for a temporary restraining order against the Board's most recent regulations. The petition was denied and the fishermen remained subject to the emergency regulations. The question presented by that case, as well as by Bundrant, was whether the Board's emergency regulations were applicable to waters beyond Alaska's traditional territorial limits.

A. Factual Setting

The appeal in State v. Bundrant represents the consolidation of three individual cases in which all the appellees were granted lower court dismissals. The State of Alaska's appeal charged the appellees with extraterritorial activities prohibited by the emergency regulations, possession in the state's waters of shellfish taken outside the territorial

(1) a registration area comprised of all waters . . . which are waters subject to the jurisdiction of the state, and

(2) an adjacent seaward biological influence zone, comprised of all waters . . . which are not part of the regulation area. Id.

"Id.

However, even before June 26, 1974, it was demonstrated that a large number of vessels engaged in crabbing in the Bering Sea.

546 P.2d at 534. The Board's Commissioner also issued notice that the season would not open until all illegal crab pots were removed from the area in question.

See note 12 supra.

546 P.2d at 534. The Bundrant opinion offers no citation to the district court's denial of the temporary restraining order and one can only speculate as to the grounds for the dismissal.
The first group of appellees, Uri et al., faced charges of possession of king crab within a closed area between June 30 and July 24, 1974. All of the charged activities took place sixteen to sixty miles off the Alaskan coast. Additionally, all but one of the appellees were residents of states other than Alaska. In the lower court, the Uri defendants moved for a dismissal on a number of grounds, including lack of jurisdiction, the unconstitutional vagueness of the regulations, and an illegal search of their crab pots. The motion was granted by the trial judge. The court adopted the appellees' argument that the emergency regulations had intruded upon and were in conflict with an area of exclusive federal jurisdiction established by the Outer Continental Shelf Lands Act (OCSLA), and therefore were preempted by the Supremacy Clause of the United States Constitution. Implicit in the ruling was the notion that extraterritorial fishery jurisdiction was a matter of federal concern since it pervaded both national and international affairs.

The second case involved in the appeal concerned a single appellee, Bundrant. He was charged with seven counts of possession of migratory shellfish within a closed area in violation of the Board's regulations. Bundrant's activities occurred within the three-mile territorial limit of the State of Alaska during October 1973. Although Bundrant was a legal resident of the State of Washington he nevertheless held commercial fishing licenses in Alaska. A dismissal motion...
was made on behalf of Bundrant claiming that the Board's regulations were invalid due to Alaska's lack of extraterritorial fishery jurisdiction. The motion initially was denied on March 27, 1974, but on September 10, 1974, following the federal district court's ruling in Hjelle v. Brooks, the trial judge reconsidered and granted dismissal of Bundrant's charges. Although the Bundrant opinion fails to detail the reasoning of the trial judge's dismissal motion, it is fair to assume that a majority of the Alaska Supreme Court found that Bundrant as well as Uri et al., had sufficient minimum contacts with the state in order to confer the court with *in personam* jurisdiction.

The third case of the consolidation also involved a single appellee, Kaldestad. He was charged with three counts of prohibited extraterritorial conduct, and one count of possession within the three-mile territorial limit of shellfish taken illegally outside of it. Kaldestad's case was dismissed by the trial court on the grounds that the alleged conduct occurred wholly outside of Alaska's territorial waters.

The state of the law in Alaska prior to Bundrant was that extraterritorial fishery regulation was not permitted, since such regulation was in conflict with federal statutory law and intruded into the field of international affairs which was constitutionally entrusted to the legislative and executive branches of the Federal Government. Moreover, only one defendant was a resident of Alaska which, although not causing the Supreme Court concern, curtailed the trial courts ability to gain jurisdiction over the parties. The Bundrant decision abruptly changed the fishery jurisdiction law in the State of Alaska. The Bundrant court overcame all federal statutory obstacles challenging the Board's extraterritorial fishery regulation authority and found "that the appellees had sufficient contacts with the state so as to make the court's exercise of jurisdiction proper."

Viewed from a different perspective, it can be said that the Bundrant court was effec-

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25 See note 12 supra.
26 546 P.2d at 534.
27 See note 22 supra. Appellee Bundrant presented a much clearer case for minimum contact *in personam* jurisdiction. Bundrant maintained a warehouse for use in processing his catch in Dutch Harbor, Alaska.
28 546 P.2d at 535. The fourth count against Kaldestad was basically the same charge made against Bundrant. The only distinction was that Bundrant's violation fell under the earlier (pre-1974) regulations, while Kaldestad's violation was based on the Board's emergency regulations.
29 Id.
30 See note 22 supra.
tuating the state's desire to preserve economically vital fishery resources through the maintenance of quota limitations and "in some zones, closing completely some of the more hard-pressed areas."31 No matter how the case is viewed it is certain that the Bundrant court faced an unsettling result in any event.

B. Interest Balancing Approach—State Regulation and National Uniformity

The approach taken by the Bundrant court was to stake out a local interest which was sought to be protected, examine the scope of federal powers, if any, over that local interest, and determine whether state authority had been excluded or preempted.32 The overall concern became the basis and extent of the grant of enumerated powers to the Federal Government, and the subsequent exercise of that power, curtailing state authority over the same subject matter.33

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31 The importance of fishing to Alaska's economy was made quite clear by the court:

[F]ishing now constitutes the largest single industry . . . and crabbing is a substantial portion of that activity. Exhaustion of this marine resource would have a devastating impact on employment in this state. . . . Particularly crippled would be those villages along our shores whose sole livelihood comes from the sea. 546 P.2d at 540-41.

32 The recurring theme of a state's interest to regulate a local activity and the limits on state powers that flow from national economic concerns is generally explored in the context of the commerce clause powers of the United States Constitution. However, similar restrictions on state authority may arise in connection with other national powers as well. See Zschernig v. Miller, 389 U.S. 429 (1968) (foreign affairs powers barring application of a state inheritance law.) See generally G. GUNThER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 277-372 (9th ed. 1975).

33 State action may be barred by the federal commerce clause in two types of situations. Where Congress has been silent and taken no action either expressly or impliedly on a given subject matter, the objection to state authority is grounded on the "dormant" commerce clause of art. I, § 8, cl. 3 of the United States Constitution. This unexercised commerce clause power becomes a barrier to state action due to the need for free trade within the national economy.

The second barrier arises when Congress has exercised its commerce clause powers and indicated its policy or position in a given area. In this situation the challenge to state authority rests on valid "supreme" national legislation which compels inconsistent state action to give way. This rationale is grounded not only in the exercise of art. I, § 8, cl. 3 powers alone, but also on the overriding effect of the Supremacy Clause in art. VI of the United States Constitution.

Professor Gunther states that these two barriers to state action oftentimes present themselves in overlapping situations. See G. GUNThER, supra note 32, at 277.
The majority and concurring opinions stated that the Fish and Game Board was not preempted from extraterritorial fishery regulation nor was the subject matter exclusively under federal control. In opposition, the dissent found that control of the sea and its resources was so bound up with international affairs and national defense that Alaska's extraterritorial crabbing regulations and state regulatory authority thereunder was preempted. The confusion surrounding this question is manifested by the fact that practically the same authority is relied upon by both the majority and dissent in reaching opposite conclusions of law.

The nub of the court's division lies in the varied interpretations accorded the Outer Continental Shelf Lands Act (OCSLA) and the Submerged Lands Act (SLA). Applying strict scrutiny to the statutory language of the OCSLA, Mr. Justice Erwin's majority opinion found that living resources were not affected. Mr. Justice Connor's dissent, on the other hand, looked beyond the immediate language of the OCSLA and concluded that the express policy and rationale giving birth to the OCSLA called for state restraint in the exercise of extraterritorial fishery regulation. The operative language of the OCSLA reads:

> It is declared to be the policy of the United States that the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of distribution . . .

This subchapter shall be construed in such a manner that the character as high seas of the waters above the outer Continental Shelf and the right to navigation and fishing shall not be affected.

This language, coupled with the fact that the SLA "vested proprietary title in each state to the lands and resources, including fish, beneath and within the navigable waters of the state" to an outer seaward limit of three miles, caused Justice Erwin to conclude that the OCSLA did not intend to speak to the regulation of organic resources, and therefore such authority remained within the states.

The dissent responded by pointing to the rationale of the United States Supreme Court in *United States v. California*, where a dispute

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57 546 P.2d at 537.
centered around the issue of the proprietary exploitation of undersea oil reserves. The Court's opinion was premised on the recognition that where there is a need for unified national authority in an area inextricably intertwined in international affairs, it becomes necessary for the United States to exert its paramount rights and authority. Conceding that the actual holding of the California decision may arguably have been negated by the SLA, Justice Connor maintained that its rationale nevertheless lived on and squarely covered the facts presented in Bundrant.

Appellees' initial argument attempted to demonstrate that fishery regulation beyond traditional territorial waters was subject to exclusive federal domain. The reasoning behind this argument was based on the Federal Government's authority to regulate interstate and foreign commerce as well as manage foreign relations. In response, the majority acknowledged the prohibitory force of the Commerce Clause upon state action, but maintained that the issue at hand was fundamentally resolved by reaching an accommodation of the conflicting state and federal interests at stake. The court fashioned the essential issue as being whether the state interest was outweighed by a national interest of uniformity in the free flow of interstate and foreign commerce. Briefed on the foregoing principles, the court decided that the Commerce Clause did not render the State of Alaska powerless to regulate fisheries in waters beyond the three-mile limit. The court stated that "as to the need for national uniformity of regulation, it would appear doubtful that crabbing in the Bering is of such a nature as to require such uniformity." Thus, the court reached the conclusion that the Board may validly regulate fisheries seaward of the traditional three-mile limit since federal authority over this area was not ex-

38 332 U.S. 19 (1946).
39 546 P.2d at 561-62 (dissenting opinion). In light of the stated purposes and underlying policy of the FCMA Justice Connor may have been correct.
40 U.S. CONST. art. I, § 8, cl. 3.
41 U.S. CONST. art. I, § 8, art. II, art. VI.
42 546 P.2d at 538. Under the "dormant" commerce clause rationale state laws may be invalid even where there is no federal law or statutory policy directly applicable. If the state legislation burdens interstate or foreign commerce it may be found invalid. Whether a state law in fact burdens interstate or foreign commerce is determined by a court's taking evidence and balancing the state's interest against the burden on commerce. Southern Pac. Co. v. Ariz., 325 U.S. 761, 768-69 (1945) (invalidation of state law requiring passenger and freight trains to be a prescribed length.)
43 546 P.2d at 539. Contra, notes 45-46, 82-85 infra and accompanying text.
exclusive. Moreover, the court ruled that the conventional approach of local, non-uniform management of fishery resources was appropriate since the Federal Government abstained from regulating fishing in traditional territorial waters, despite its constitutional power to do so.

In opposition to this position are those critics that view such unilateral regulation over fisheries resources as being inconsistent with and destructive of larger international efforts to deal with all the problems of the seas. The problems of fisheries jurisdiction and the effective conservation of fishing resources, it is contended, cannot be dealt with in a vacuum; these problems are intertwined with problems of the breadth of the territorial sea, external delimitation of the Continental Shelf and the governance of the seabeds and water columns beyond national jurisdiction which are all areas of intense international concern. Even more significant as an argument against state regulation is the contention that real success in the conservation and exploitation of fishing resources everywhere in the world can ultimately be achieved only through international regulation, and that unilateral action is therefore harmful in the long run.

The court's finding that the problem at hand did not demand a uniform solution so as to exclude state action faced still another
theoretical hurdle. It was alleged that the state's exercise of extraterritorial regulatory powers carried with it adverse affects upon interstate and foreign commerce. Since fishery resources move from the waters of one state to another and from national to international waters and the exploitation, distribution, and marketing of such resources ordinarily involve movement among the states, significant adverse affects to neighboring coastal states and foreign fishing fleets would result in restricting catches beyond the three-mile limit. The court's justification for the attendant affects rested on a questionable "residuum of state power theory" which was established by dictum in Southern Pacific Co. v. Arizona. In Southern Pacific, the Court stated that "there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it...." Bolstering its position, the Bundrant majority further found that the

48 325 U.S. 761 (1945).
49 Id. at 767. Littoral states like Alaska unquestionably have a high interest in protecting the quality and quantity of their fishery resources. The weight accorded a state's interest in protecting fishery resources is illustrated by the modern standard for evaluating local health regulations. Unless "the total effect of a law as a safety measure . . . is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it," the statute will be upheld. 325 U.S. at 775-76.

The Court's standard of review, however, is in fact more scrutinizing than this language suggests. Under this standard, two types of legislation, closely analogous to the emergency regulations in the Bundrant decision, have been invalidated as inconsistent with the commerce clause policy of free trade.

In the first type, a state attempted to allocate natural resources to the use of state citizens in preference to citizens of other states. Specifically, the statute required all local demand for natural gas to be met before gas could be exported. The Supreme Court, in reviewing the statute, expressed a deep concern that retaliatory efforts between states might arise with commerce halting at state lines. The Court spoke in terms of a "new power appearing and a new welfare which transcends that of any state" where local regulations may inhibit the free flow of commerce among the states. Pa. v. W. Va., 262 U.S. 553, 599-600 (1923), quoting from West v. Kansas Natural Gas Co., 221 U.S. 229, 255 (1911). The rationale of these cases was recently reaffirmed in Hughes v. Alexander Scrap Corp., 426 U.S. 794 (1976).

A second type of invalidating technique employed by the Supreme Court arises where a state has available a less restrictive alternative than the one chosen. In Dean Milk Co. v. Madison, 340 U.S. 349 (1951), the Court struck down a Wisconsin ordinance regulating milk pasteurization. The Court stated that "even in the exercise of its unquestioned power to protect the health and safety of its people" the state must use whatever reasonable and adequate alternatives are available to achieve its ends. Id. at 354.
Board's regulations would neither discriminate against non-Alaskans nor provoke retaliatory restrictions by Alaska's neighboring states. The court also reached the position that the possible ramifications of the challenged regulations in the field of international commerce appeared extremely speculative. And, moreover, the threat of conflict with existing international agreements or foreign fishing rights was remote. Accordingly, the court concluded that the challenged regulations dealt with a problem local in nature and that the dormant Commerce Clause did not render regulation of fisheries in the Bering Sea within the exclusive domain of the Federal Government.

Applying these two circumstances to the state action condoned in *Bundrant*, it is possible to conclude that the Board's regulations would be found unconstitutional by the Supreme Court. Indeed, Alaska's attempt to prohibit extraterritorial crabbing in the Bering Sea in the name of fishery conservation and management may be a more serious interference with interstate and foreign commerce than is necessary.

The primary concern of Justice Connor's dissenting opinion in *Bundrant* was that extraterritorial fishery regulations were "inextricably entwined with foreign affairs" and thereby within federal regulatory authority. 546 P.2d at 563-64 (dissenting opinion).

Despite the above analysis, it could also be argued that the *Bundrant* court need not balance interests in the context of environmental protection because the interest in the environment is so powerful that it outweighs any conceivable burden on commerce. This argument can be bolstered by the fact that the Supreme Court's overriding concern in the commerce clause cases has been the prevention of state discrimination against nonresidents. See *Soper*, *The Constitutional Framework of Environmental Law*, in *FEDERAL ENVIRONMENTAL LAW* 20, 94 (E. Dolgin & T. Guilbert eds. 1974).

State legislation that applies to residents and nonresidents alike poses a lesser threat to commerce clause policies, and as a result greater weight can be given to interests identified by a state as pressing.

Nevertheless, the Supreme Court has always employed a balancing test where transportation in interstate commerce is involved, as opposed to environmental regulations. At issue in commerce clause cases is whether a particular problem demands a uniform solution, and where Congress has failed to indicate a preference the function falls to the courts. *Southern Pac. Co. v. Ariz.*, 325 U.S. 761 (1945).

The dissenting opinion found this conclusion untenable. Pointing to numerous treaties in which the United States is a signatory and dealing with ownership and regulatory authority over resources of the Continental Shelf and deep seabed, Justice Connor could not conclude that Alaska's actions were "speculative" or "indirect." Additionally, Alaska's extraterritorial regulatory assertion could cause definite embarrassment to the United States international negotiations at the Law of the Sea Conference. *Id.* at 562 (dissenting opinion).

Support for this conclusion was derived from *Alas. v. Arctic Maid*, 366 U.S. 199 (1961). In that decision the Supreme Court upheld the constitutionality of an Alaskan occupation tax on freezer ships stationed beyond territorial seas but receiving catches taken within the three-mile limit. The *Bundrant* court relied on
Before leaving the issue of federal exclusivity, the court addressed appellees' argument based on the submerged land cases. As seen earlier, the Supreme Court in *United States v. California*, held inter alia, that the Federal Government had paramount authority over the seas and submerged lands on both sides of the traditional three-mile territorial limit. However, the submerged land cases have been read by subsequent courts as not establishing the principle that the Federal Government has exclusive authority in these areas, and in the absence of an exercise of the Federal Government's paramount powers over

*Arctic Maid* to show that the regulation was a local activity which the state could properly reach. However, as pointed out in the dissent, the court's reliance on *Arctic Maid* may have been misplaced. The *Arctic Maid* decision can be read as not authorizing Alaska to tax activity outside the three-mile limit. Instead, the opinion expressly stated that if the fish caught "were taken or purchased outside Alaska's territorial waters all of respondent's business... would be beyond Alaska's reach." 366 U.S. at 203. Following a remand to determine this precise question of what quantity of the catch was obtained outside Alaska's territorial waters, the case was settled.

The "submerged land cases" are confusing and complex. They most accurately represent that overlapping area of the doctrines of federal exclusivity and preemption as pointed out by Professor Gunther. See note 33 supra. Many of the cases in this area are subject to varied interpretations and constructions. For a good analysis of the "submerged land cases" see Breeden, *Federalism and the Development of the Outer Continental Shelf Mineral Resources*, 28 STAN. L. REV. 1107 (1976).

332 U.S. 19 (1947). In this case, it was held that the Federal Government and not the State of California owned the three-mile marginal belt off its coastline, and that incidental to the Federal Government's ownership was dominion over the natural resources found in the submerged lands. The Court commented that federal control of the three-mile belt was essential to national security, foreign affairs and international commerce. *Id.* at 35.

As to the seas beyond the three-mile limit, *United States v. La.*, 339 U.S. 699 (1950), declared that the rights of the Federal Government were paramount to asserted claims by the individual states. This decision involved a complaint by the United States that it had exclusive ownership and rights in the submerged lands in an area extending from the low water mark on the Louisiana coastline to a point extending 27 miles into the Gulf of Mexico. The Federal Government sought to enjoin Louisiana from executing leases to persons and corporations for the purpose of oil drilling as well as extraction of other mineral resources from the seabeds. Additionally, the United States sought an accounting from Louisiana for rents and other financial benefits received therefrom. The Court upheld the claim and rendered the requested relief. The *California* decision was cited as precedent controlling the case. The Court reasoned that since the *California* decision established the principle that the Federal Government had ownership and control of the three-mile belt, it was to be presumed that any area beyond this point would also be owned by the Federal Government. 339 U.S. at 705.

332 U.S. at 35.
fishery areas, states enjoy some regulatory authority. Thus, the question of whether the Federal Government has in fact exercised those paramount powers, thereby preempting state authority to regulate fisheries, became the court's next consideration.

The doctrine of federal preemption presented the justices of the Bundrant court their greatest cause for concern. Federal legislation that cuts across domestic and international fronts bars inconsistent state regulation. Oftentimes, the difficulty faced in the preemption area is determining to what extent Congress has entered into a field, and if such entry has sufficiently covered the subject matter so as to render ineffectual state authority over the same subject.

In response to the Court's declaration in California that the seabed within the three-mile territorial limit was owned by the Federal Government, Congress passed the Submerged Lands Act (SLA) of 1953. This legislation granted to the states ownership of the seabed and its resources seaward to a three-mile limit. However, the SLA can be said to be consistent with the California decision to the extent that the Federal Government's paramount powers still remain intact.

56 546 P.2d at 544. For example, in Tex. v. Witsell, 334 U.S. 385 (1948), the Supreme Court ruled that state regulation within territorial waters in the absence of conflicting federal legislation was valid so long as the means were constitutionally permissible. So too, in Skiriotes v. Fla. 313 U.S. 69 (1941), the Court made clear that a state may regulate activities of its own citizens even beyond territorial waters when the state has a legitimate interest in the fishery and there is no conflicting federal law.

57 Federal preemption of state authority may take on numerous forms. Clearly, Congress may pass a law or ratify a treaty pursuant to an enumerated constitutional power which expressly displaces state law through the supremacy clause. It is also possible for a court to conclude that the power alleged to exist by the state is impliedly within a federal scheme of fishery regulation. Moreover, federal preemption is a preferred ground of invalidation because a court is not declaring state law incompatible with the constitution, but rather only labelling it inconsistent with congressional policy on the same subject matter. As a result, the power of the state to regulate has not been destroyed but only denied in a particular instance. See G. Gunther, supra note 32, at 357-60.

58 43 U.S.C. § 1301 et seq. (1976): See note 5 supra. Many legal scholars, including the majority in Bundrant, hold that the SLA implicitly overruled the holding in California. However, the SLA did not affect rights beyond the three-mile limit. Therefore, it is plausible to argue that the rationale of the California and Louisiana decisions is still valid as applied to areas seaward of the territorial marginal belt.

59 It has been argued that the the SLA implicitly placed a limit on states territorial water rights to the three-mile limit off their respective coastlines and further, the SLA made no provision for the extension of state boundaries beyond this point. See 6 Val. U.L. Rev. 170, 178 (1972).
over this area for purposes of navigation, commerce, national defense and international affairs.\(^6^0\)

Shortly after the enactment of the SLA, Congress passed the OCSLA\(^6^1\) to deal with the submerged lands lying beyond the three-mile limit. The OCSLA specifically vested the Federal Government with control over the submerged lands lying beyond the three-mile limit.\(^6^2\) The jurisdiction asserted by the OCSLA was later confirmed by the Geneva Convention on the Continental Shelf,\(^6^3\) which recognized coastal nations' sovereignty over the seabed of the Continental Shelf in 1958.

As a result of the OCSLA and the 1958 Geneva Convention, the Continental Shelf lands off American waters became the territory of the United States.\(^6^4\) Thus, the enormous tracts of submerged lands beyond state territorial properties were consequently within national

\(^{60}\) The SLA specifically states that:
[T]he United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to but shall not be deemed to include proprietary rights of ownership, or the rights of . . . leasing, use, and development of the lands and natural resources . . . vested in and assigned to the respective states. . . . 43 U.S.C. § 1314(a) (1976).


\(^{62}\) The OCSLA broadly states that:
It is declared to be the policy of the United States that the subsoil and seabed of the Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition. . . . Id. § 1331(a).

The term "outer Continental Shelf" was defined as all submerged lands under American jurisdiction which lie seaward of the areas granted to the states under the SLA. Id.

Although this language may be broad in nature, the majority in Bundrant interpreted the OCSLA as expressing Congress' desire to involve the Federal Government in the practice of offshore oil leasing arrangements with major oil companies and thereby not dealing with the regulation of living ocean resources. 546 P.2d at 543. See also Rathje, Saving Byron's Sea: Federal and State Regulation of Oil Pollution from Ocean Petroleum Production, 22 Hastings L.J. 485 (1971).


\(^{64}\) Although the international law of the sea is currently undergoing reappraisal in light of technological changes, environmental problems and newly developed uses for the seas, the United States has unilaterally affected the extent of federal offshore lands and has directly affected the division of federal and state jurisdiction over offshore lands as a result of the FCMA.
jurisdiction and owned outright by the Federal Government. Accordingly, the Bundrant appellees' argued that the logic underlying the OCSLA and relevant Supreme Court decisions applied with equal force to use of the surface and waters for fishing purposes as to the use of seabed and subsoil for mineral extraction; in both instances, extraterritorial regulation by the State of Alaska would conflict with federal laws and policies, and would therefore be preempted through the Supremacy Clause. The majority's rejection of this position was grounded on the express language of the OCSLS. Preempted was state regulation of the "seabed and subsoil" while permissible state regulation of water-borne ocean resources was not specifically addressed by

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65 See United States v. Me., 420 U.S. 515 (1975). In Maine, several Atlantic coast states claimed sovereignty rights over the subsoil and seabed to the outer edge of the Continental Shelf. Except for Florida and New York, all of the defendant states contended that they each had title to the areas by virtue of succeeding to the title formerly held by England before the adoption of the United States Constitution. Id. at 518-19. The Court rejected these claims and affirmed a special master's findings that the California and Louisiana decisions were controlling and that as a matter of "purely legal principle . . . the Constitution . . . allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defense," and that "it necessarily follows that, as a matter of constitutional law, that . . . the federal government has paramount rights in the marginal sea." Id. at 552.

Moreover, Congress explicitly forbade state regulatory jurisdiction over the federal outer Continental Shelf properties by providing in the OCSLA that federal laws would apply "as if the outer Continental Shelf were an area of exclusive federal jurisdiction located within a state." 43 U.S.C. § 1333(a) (1976). Relying on this and similar language from the OCSLA, Mr. Justice Connor's dissent in Bundrant articulated the position that the Federal Government should be vested with authority and control over outer Continental Shelf areas and not the individual states. Justice Connor pointed to floor debates during the consideration of the OCSLA and cited remarks made by Senator Cordon, the floor manager of the OCSLA:

[T]he area is one in which national problems intermingle. The outer Continental Shelf is not and never has been within the boundary of any State or Territory, and it is, therefore, uniquely an area of exclusive Federal jurisdiction and control. . . . [T]o give the states a sort of extraterritorial jurisdiction over it is unnecessary and undesirable. Particularly in view of the intermingling of national and international rights in the area, it is important that the Federal Government, which has the responsibility for handling foreign relations, have the exclusive control of lawmaking and law enforcement there.

546 P.2d at 559-60, citing from 99 CONG. REC. 6963 (1953) (remarks of Sen. Corden).

66 Alternatively, such regulation by the State of Alaska would conflict with federal activities in areas of national defense, foreign affairs, and international commerce. See note 64 supra.
the OCSLA. Also rejected was appellees' contention that since the SLA refers to and provides a definition of "natural resources" which explicitly includes crabs, that definition should be viewed as evidence of Congressional intent to include crabs within the terms of the later enacted OCSLA. The court, however, refused to accept the wholesale adoption of the statutory construction principle of pari materia which suggests that a statute which was considered at approximately the same time and which dealt with the same general question but passed subsequent to another can be interpreted in light of the earlier enacted measure. Instead, the majority construed the OCSLA as providing that no state shall have jurisdiction over the seabed and subsoil of the outer Continental Shelf, and the natural resources thereof. "Thereof" was read as modifying the OCSLA's scope to the natural resources which are part and parcel of the outer Continental Shelf. In the end, the court was faced with a new issue—whether crabs are a resource of the seabed and subsoil or a resource of the superadjacent waters.

Appellees' new line of attack emphasized the fact that federal legislation and international agreements subsequent to the passage of the OCSLA evidenced congressional intent to include sedentary species of marine life, i.e., crabs, among the resources of the seabed and subsoil thereby vesting the Federal Government with preemptive authority. It was further shown that the 1958 Geneva Convention established sedentary species as resources of the Continental Shelf thereby granting coastal nations sovereign rights of exploitation over these species. Crabs were specifically intended to be included within the category of

67 Although the Maine decision specifically related to claims to the subsoil and seabed, the Court reinterpreted California as establishing "that in our constitutional system paramount rights over the ocean waters and their seabed were vested in the Federal Government." 420 U.S. 515, 520 (1975) (emphasis added).

Nevertheless, Justice Erwin of the majority in Bundrant opined that this language may be taken as an indication that the Court did not consciously draw a distinction between seabed and seawaters, but rather applied its rationale to only the former. 546 P.2d at 543.

66 546 P.2d at 545.


70 546 P.2d at 545.

71 Art. 2.4 of the Convention provides that the natural resources appertaining to nations shall include "living organisms belonging to sedentary species . . . organisms which, at the harvestable stage, either are immobile or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." Convention on the Continental Shelf, April 29, 1958, 25 U.S.T. 471 (pt. 1), T.I.A.S. No. 5578, 499 U.N.T.S. 311.
sedentary species by a 1973 Agreement between the United States and the Soviet Union. The Agreement listed king and tanner crabs as natural resources of the Continental Shelf and under the control of the respective signatories. Nevertheless, the majority in Bundrant found these documents unimpressive. The court stated that since the 1958 Geneva Convention was drafted by parties other than Congress and failed to effectively resolve the domestic jurisdictional question as between the United States and the individual states that it was not controlling.

The Bartlett Act which was passed eleven years after the OCSLA and provided the means by which the United States was able to enforce against foreign nationals the rights obtained pursuant to the 1958 Geneva Convention was next cited to the court. The argument made was that since the Bartlett Act applied to the policing of sedentary species, including crabs, pursuant to the Geneva Convention or other international agreements where the United States was a party, that the Federal Government was the only proper authority to regulate the area beyond the three-mile limit. The Bundrant court found this enforcement legislation irrelevant to the immediate issue presented in the case. The contention that Congress had intended to realign domestic jurisdiction through the Bartlett Act so as to preempt further state regulation of sedentary Shelf marine life was too tenuous in the eyes of the majority. Therefore, it was concluded that the OCSLA was not

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73 546 P.2d at 546. Furthermore, since the Board's regulations were not to be enforced against foreign nationals, the court felt that the King and Tanner crab agreements with the Soviet Union were not relevant to the decision. Id. at 542.
75 As of March 1, 1977, the Bartlett Act was repealed by the FCMA. The FCMA provides its own mechanism for renegotiating governing international fishery agreements. For a comparison of the enforcement efforts under the Bartlett Act and those contemplated for the FCMA see Fidell, Enforcement of the Fishery Conservation and Management Act of 1976: The Policeman's Lot, 52 WASH. L. REV. 513 (1977).
76 546 P.2d at 546. On the other hand, Justice Connor, in his dissenting opinion deemed interpretation of the OCSLA in the context of international law to be highly relevant, if not conclusive, to the preemptive effect of federal authority on state action beyond the three-mile marginal sea. Judge Connor accused the majority of inconsistently construing the OCSLA. "It does not seem likely that the same language, indeed the same sections, could have a different meaning in international law from its meaning for preemptive purposes." Id. at 560 (dissenting opinion).
intended to be an exercise of federal preemption over both seabed mineral resources and sedentary species of the Continental Shelf. The distinction drawn by the OCSLA was between the inorganic resources of the seabed and subsoil, which were to be within the exclusive domain of the Federal Government and organic marine life resources, which were not affected by the OCSLA.77

Next, the majority pointed to the then-pending congressional proposals authorizing federal agencies to regulate activities of American citizens in ocean fisheries. In the view of the majority, such proposals suggested that the OCSLA never had the preemptive effect which was ascribed to it by the appellees. Further, the proposals lacked a clear intention of federal exclusivity or preemption.78 The court did, nevertheless, note that its decision raised issues with merit on both sides and expressed a hope that final resolution of the general question as to what extent a state may regulate fisheries beyond territorial waters receive “prompt and definitive” attention by the Congress or the Supreme Court.79

Thus, after finding that the federal doctrines of exclusivity and preemption were not applicable and that therefore the Board’s promulgations were not invalidated under the Supremacy Clause, the court had little trouble justifying Alaska’s interest for extraterritorially applying its laws and police powers. The majority concluded that Alaska could reasonably extend its jurisdiction to control fish and game resources outside the limited area of the state’s territorial...
sovereignty so long as the exercise was based on conservation principles and not on artificial boundaries or political pressures. On the basis of this reasoning, the court held that the difference in citizen status between each appellee did not affect its judicial power to confer in personam jurisdiction. Consequently, jurisdiction was asserted over each appellee regardless of state citizenship and without concern over whether their activities took place within the three-mile limit or beyond.

C. FCMA Provisions: Function and Impact

The practical effects of the Bundrant decision are that crabbers who wish to fish off the Alaska coast will be subjected to preordained quotas established by the State Fish and Game Board, and in some instances fishery areas will be closed completely to crabbing. Theoretically, the case illustrates the overall inconsistency that existed prior to the passage of the FCMA in the area of extraterritorial fishery jurisdiction between the Federal Government and the individual states. So long as

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80 Id. The issue of the state’s fishery jurisdiction was whether the regulations bore a reasonable relationship to the purpose sought to be achieved. On the basis of Skiriotes v. Fla., 313 U.S. 69 (1941), the Bundrant majority concluded that the State of Alaska could regulate the activities of the defendants even though such activity was beyond territorial borders since legitimate state interests were affected and the claim of state authority did not infringe the rights of other governments nor was it in conflict with congressional legislation.

In Skiriotes, a Florida statute prohibited the use of diving apparatus in the taking of commercial sponges. The defendant, a Florida citizen, was convicted under this statute, and contended that because his activities occurred outside Florida’s territorial waters Florida could not constitutionally regulate those activities. Even though the Supreme court did assess Florida’s undersea rights, it nevertheless held that Florida could constitutionally apply its law to the defendant’s activities. The Court stated that “the question is solely between appellant and his own state. . . . [W]e see no reason why the State of Florida may not . . . govern the conduct of its citizens upon the high seas with respect to matters in which the state has a legitimate interest and where there is no conflict with acts of Congress.” Id. at 76-77.

Thus, three conditions were necessary before a state court could enforce extraterritorial regulations against a named defendant—that the defendant be a citizen of the state enforcing the regulations, that the alleged activities affect legitimate state interests and that the rights of other governments not be infringed upon. It may be argued however, that two of these conditions—that the defendant(s) be a citizen of the regulating state and that the rights of other (foreign) governments not be infringed upon—are lacking in the Bundrant decision.

81 See note 80 supra. The dissent did not address the question of state jurisdiction since Justice Connor found federal preemption of the state’s extraterritorial regulatory authority. 546 P.2d at 564 (dissenting opinion).
a court could identify a compelling state interest which was sought to be protected there was ample room within the federal statutory law and case decisions to avoid federal exclusion and preemption. On the whole, resolutions to conflicts in fishery matters were varied in scope, exceedingly technical and ultimately political in nature. Moreover, individual states were able to intrude into areas previously thought to be beyond their territorial reach. The movement into zones of foreign commerce and international affairs was done under the guise of state conservation and management objectives. As a result, state fishery regions have become greater in breadth, more commonplace among American coastal states, and breeders of theoretical confusion and dissent between state and federal fishery authorities.

With the passage of the FCMA, Congress affirmatively entered into the field of extraterritorial fishery jurisdiction and assembled statutory machinery working to preserve the Federal Government's paramount rights to navigation, commerce, defense, and foreign affairs, while at the same time providing for a national regulatory authority aimed at accommodating state, federal, and international interests. Also under the regime of the management authority of the FCMA, fishermen governed by the ultimate regulations have a voice in their drafting which was entirely absent from the *Bundrant* case.

As mentioned previously, Congress has declared that its purpose under the FCMA is to create "a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish except highly migratory species." This "fishery conservation zone" is to have an outer boundary 200 miles from shore. In addition, the FCMA asserts the claim to exclusive fishery management authority over all United States anadromous species having their source within the United States and "throughout the migratory range of each such species beyond the fishery conservation zone," except when harvested in foreign waters. Continental Shelf fishery resources are claimed under the exclusive authority beyond 200 miles.

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83 See note 91 infra. This applies essentially to salmon. Anadromous species are defined as "species of fish which spawn in fresh or estuarine waters of the United States and which migrate to ocean waters." FCMA, § 3(1), 16 U.S.C. § 1802 (1976).

84 *Id.* § 102, 16 U.S.C. § 1812.

85 Upon signing the FCMA into law, President Ford expressed deep concern as to whether the United States could properly control fishery resources outside the fishery
Although the express purposes of the FCMA constitute a wide-ranging extension of territorial water jurisdiction to a point 200 nautical miles from the American shoreline, there are recognizable limits. There is a disclaimer of any jurisdictional expansion not expressly provided for in the FCMA. Thus, it is important to keep in mind that the asserted rights and powers under the FCMA deal only with living resources and not with offshore mineral exploitation. Moreover, a limit to the geographical extent of Continental Shelf fishery resources is provided by defining the term Continental Shelf closely analogous to the language of the 1958 Geneva Convention on the Continental Shelf. As such, the FCMA may be categorized as a separate unit of the economic zone concept since it applies only to enumerated fishery resources within the contiguous fishing zone. Within this statutory framework the legislative objective was to establish a national fishery management program which is to be implemented primarily through eight Regional Fishery Management Councils.

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conservation zone under accepted principles of international law. 12 PRES. DOC. 664 (1976), reprinted in 15 INT'L LEGAL MATERIALS 634 (1976).

86 FCMA, § 2(c), 16 U.S.C. § 1801 (1976) states:

It is further declared to be the policy of the Congress in this chapter to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this chapter.

87 The term “Continental Shelf fishery resources” is defined by listing known species of colenterata, crustacea, mollusks and sponges, and providing criteria for future additions to this otherwise exclusive list. Id. § 3(4), 16 U.S.C. § 1802. A limit to the geographical extent of “Continental Shelf fishery resources” is provided by defining “Continental Shelf” as follows:

The term “Continental Shelf” means the seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, of the United States, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of such areas.

Id. § 3(3), 16 U.S.C. § 1802.

88 Subchapter-I of the FCMA which sets forth the scope of the fishery management authority of the United States defines the contiguous fishing zone as follows:

[A] zone contiguous to the territorial sea . . . The inner boundary of the fishery conservation zone is a line coterminous with the seaward boundary of each of the coastal states, and the outer boundary of such zone is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured.

Id. § 101, 16 U.S.C. § 1811.

89 Id. § 302(a), 16 U.S.C. § 1852. The regional council in which Alaska is a
Each council is responsible for deriving the fishery policy and objectives for a particular region. Just as with the traditional approach to coastal fishery jurisdiction, the FCMA requires the regional councils to balance local interests against the national standards necessary to satisfy the needs of the economy (domestic and international) before developing a regional fishery plan. The discussion now focuses upon the specific guidelines envisioned for the conservation and management regime under the FCMA and the accommodations made available for the interests and needs of the individual states.90

The FCMA makes it very clear that the United States will exercise exclusive management authority within the contiguous fishery zone and subject anadromous and Continental Shelf species to such authority as well.91 Among the defined Continental Shelf fishery resources are sedentary species which accounted for the class of crabs subject to regulation in Bundrant.92 Accordingly, under the FCMA these resources are within the jurisdiction of and subject to the control of the national fishery management authority.93 Under the national fishery management authority there are created smaller, local-interest-oriented regional councils. Each council reflects in its membership the interests of the constituent states. The primary function of the regional councils is to prepare, monitor and revise fishery management plans for delineated fishery areas.94 The councils comment on applications for foreign fishing rights within the contiguous fishery zone of the United States. They also critique management plans and amendments prepared by the Secretary of Commerce pursuant to a provision authorizing discretionary powers when a council's actions fail to satisfy

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90 For an analysis of the FCMA's constitutionality based upon Congress' power to control foreign commerce or its foreign affairs power in matters of international concern see Note, 52 WASH. L. REV. 495 (1977).

91 See note 88 supra. The only exception to this control is when the anadromous species are found within any recognized nation's territorial sea or fishery conservation zone. For a brief discussion of the doubtful validity of such control over anadromous species seaward of the contiguous fishing zone see Comment, 12 TEX. INT'L L.J. 331, 351 (1977).

92 546 P.2d at 545-46.

93 For purposes of the FCMA, sedentary species include coral, crab, lobster, clams, abalone and sponges found on the Continental Shelf beyond the 200 mile fishery conservation zone. FCMA, §§ 3(4), 102(3), 16 U.S.C. §§ 1802, 1812 (1976).

the FCMA's requirements or the Secretary's recommendations. The FCMA's requirements or the Secretary's recommendations. Fishery management plans are required to contain a complete description of the fishery to be regulated, detailing, inter alia, the fishing effort, the projected expenditures for the management, expected revenues from the fishery and the recreational and Indian treaty interests currently involved. The FCMA specifically directs each council to continually review and revise their assessments on the basis of two overall objectives: optimum yield and total allowable level of foreign fishing. As a function of reaching the optimum yield projection, councils must estimate and specify the present and future conditions of the fishery, the capacity and extent to which American vessels will harvest the optimum yield, and the portion of the optimum yield that will not be harvested and thus, can be made available for foreign fishing. If there is a portion of the optimum yield that can be allotted to foreign fishing then management plans are required to outline measures determined to be necessary and appropriate for application of the plan to foreign nations. In arriving at management determinations, councils must conduct public hearings, make reports to

95 Id. § 303(c), 16 U.S.C. § 1854. See id. § 204(b)(4)(5), 16 U.S.C. § 1824, for a council's enumerated duties concerning application for foreign fishing privileges.
97 Id. § 303(a)(3), 16 U.S.C. § 1853. The FCMA defines the optimum yield from a fishery as:

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

99 Id. § 303(a)(4)(B), 16 U.S.C. § 1853. The Secretary of State, in conjunction with the Secretary of Commerce, will determine the allocation among foreign nations of that portion of the total allowable catch which cannot be harvested by United States fishermen.
100 Id. § 303(a)(1)(A), 16 U.S.C. § 1853. This provision may also apply to domestic fishing as well.
101 Regional public hearings are to be conducted "so as to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans and with respect to the administration and implementation of the provisions of this chapter." Id. § 302(h)(3), 16 U.S.C. § 1852.
the Secretary of Commerce, and perform any other activities that are required, authorized or appropriate.

Although the FCMA imposes numerous requirements upon the regional councils and their development of fishery management plans, it also provides for certain discretionary measures to be vested with the councils. Included in this category is authority to impose permit and fee requirements, to establish catch quotas, and to limit entry in designated zones on the basis of types of fishery vessels or types and quantities of fishing gear. Incorporation of relevant fishery conservation and management measures of nearby states is also allowable. Councils are also at liberty to establish a system for limiting access to a particular fishery area so as to achieve optimum yield forecasts. However, in order for the prohibition to be effective, the council and Secretary need to take into account present and historical dependence on the resource area, the economics of the fishery, the capability of vessels therein to engage themselves elsewhere, the cultural and social framework relating to the fishery and any other relevant consideration. Thus, it might be said that through a framework characterized by mandatory requirements and discretionary abilities of the councils, the FCMA achieves a management authority with a statutory sensitivity toward accommodating regional (local), national and foreign interests.

After a fishery management plan is prepared by a regional council, it is submitted to the Secretary of Commerce, who initially reviews the plan and notifies the respective council of his decision to approve, disapprove or partially modify the submitted plan. Once a plan has been approved or prepared (partially or totally) by the Secretary, he must publish the plan and any accompanying amendments or regulations in the Federal Register. Normally, plans, amendments and regulations will not be implemented for at least forty-five days after

102 Id. § 302(h)(4), 16 U.S.C. § 1852.
103 Id. § 302(b)(6), 16 U.S.C. § 1852.
104 Id. § 303(b), 16 U.S.C. § 1853.
105 Id. § 303(b)(5), 16 U.S.C. § 1853.
106 Id. § 303(b)(6), 16 U.S.C. § 1853.
107 This statutory sensitivity is at its height where the conditions of optimum yield and allowable foreign quotas are met.
110 Id. § 305(a), 16 U.S.C. § 1855. Note that § 304(c)(3) requires that the plan/system first be approved by a majority of the voting members of each council.
being approved or prepared by the Secretary. In the meantime, interested parties are entitled and encouraged to submit written comments on the plan,\footnote{Id.} with the Secretary reserving the right to schedule a hearing.\footnote{Id. § 305(b), 16 U.S.C. § 1855.} If such a hearing is convened, the Secretary has discretionary powers to delay the effective date of the proposed plan or regulations or to take such other actions as he deems appropriate to maintain the rights of any person.\footnote{Id. § 305(e), 16 U.S.C. § 1855.} The Secretary is, nevertheless, accorded emergency powers to promulgate regulations or amendments to regulations without regard to procedures operative in normal situations.\footnote{Id. § 305(e), 16 U.S.C. § 1855.} Emergency regulations may not remain in effect for longer than forty-five days unless the Secretary exercises the right to extend for an additional forty-five day period.\footnote{Id. § 311, 16 U.S.C. § 1861.}

The United States Coast Guard is given enforcement powers to police any licensing arrangements, to enforce catch limits and gear restrictions and to apprehend any violators, whether domestic or foreign.\footnote{Id. § 305(e), 16 U.S.C. § 1855.}

At the outset, it would appear that a regional council might be able to effectively develop a self-serving fishery plan since its range of discretionary powers appears virtually limitless.\footnote{Id. § 305(e), 16 U.S.C. § 1855.} However, congressional framers placed a gloss on the discretionary powers of councils by subjecting these powers to conformity with national standards. The standard of review under the FCMA is based upon whether a particular plan is consistent with national standards, the other provisions of the FCMA and "any other applicable law."\footnote{FCMA, § 303(a)(1)(C), 16 U.S.C. § 1853 (1976).} Although the extension of the conformity requirement to "any other applicable law" may fuel future litigation,\footnote{Id. § 311, 16 U.S.C. § 1861.} the congressional intent is clear that regional powers should not be allowed to frustrate the overall framework of § 304, providing for special actions taken by the Secretary after receipt of a fishery plan.\footnote{Id. § 311, 16 U.S.C. § 1861.}

Under a council's discretionary powers to set catch quotas and effectively close areas, it would appear that the same result could easily be reached as that in Bundrant. See text and accompanying notes 103-06 supra.\footnote{Id. § 303(a)(1)(C), 16 U.S.C. § 1853 (1976).} Such a clause may lead one right back to the Bundrant type of analysis since states are apt to be favorable toward extending their fisheries jurisdiction while the Secretary will have a host of federal statutes to rely upon to indicate paramount interest vested within the Federal Government.
councils will be expected to weigh national interests heavily before arriving at an acceptable fishery plan. The statutory effect of this conformity requirement is to curtail the overall ability of incorporating discretionary state management measures on the part of a council or the Secretary.\(^{120}\)

In the last analysis, the primary purpose of the national fishery management program is to establish national standards by which regional councils can prevent overfishing and achieve optimum yields on a continuing basis. Furthermore, recognition of local fishery needs and interests is manifested by the regional based councils. Through this framework the FCMA attempts to strike on equitable balance between state, national, and international fishery needs.

While it is entirely possible that the result which was reached in Bundrant might well have been accomplished under the FCMA,\(^{121}\) it is more important to recognize the effect that the FCMA will have on a coastal state's ability in the future to unilaterally legislate in the area of fishery resources. Clearly, the doctrines of federal exclusivity and preemption will play a much more prominent role in a court's determination of whether the Federal Government has entered the field of extraterritorial fishery regulation. Moreover, international relations have been brought to the forefront as a result of the FCMA's application to foreign fishing agreements and this coupled with the revived LOS III negotiations may foreclose future state intrusion into the area.\(^{122}\) Thus, state authority to regulate extraterritorial fishery areas

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120 Section 303(b)(5) repeats parenthetically the federal consistency requirement, thus crippling the overall breadth of the discretionary incorporation powers. This question of state fishery regulation within and without its borders is addressed in \(\S\) 306(a). Moreover, the federal jurisdictional exception of \(\S\) 306(b) which would permit federal authority to be directly asserted over state waters further compounds \(\S\) 303(b)(5)'s discretionary powers.

121 Subject to the general consistency requirement of \(\S\) 303(a)(1)(C) as well as the federal jurisdictional exception of \(\S\) 306(b), the Board regulations might well have been enforceable under the FCMA machinery. The FCMA provides that "nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries." FCMA, \(\S\) 306(a), 16 U.S.C. \(\S\) 1856 (1976). Furthermore, subject to FCMA's qualifications, a state may directly or indirectly regulate fishing outside its boundaries when the fishing vessel is registered under the laws of the regulating state. Id.

The Bundrant record states that only the F.V. Billikin, owned and operated by Bundrant, was registered in Alaska along with its gear. There is no mention of registered vessels owned or operated by the other appellees. 546 P.2d at 534-35.

122 Law of the Sea Conference III has been in session since December 1973, having met five times without reaching agreement. Although some progress has been
independent of the FCMA has been seriously eroded in favor of national conservation and management objectives.

Although the objectives of the FCMA may be national in scope and ultimately guided by federal policy considerations, the FCMA nevertheless ensures that fishery regulatory decisions will also reflect the interests at stake in each region designated. Fishery plans will evolve by reason of negotiation and compromise among member states of each regional council. Consequently, it would be profitable at this point to look into the makeup of a regional council since in essence this is the heart of the FCMA's operative machinery. For purposes of this inquiry, Alaska's membership in the North Pacific Council will serve as an interesting example.

Even though Alaska's population is smaller in comparison to other coastal states, it nevertheless is regarded as primarily a producer of fish and accordingly has the largest council representation of any other member state. Of the sixty-eight council representatives, Alaska has five, or 7.1% of the total. In terms of representation within the North Pacific Council, Alaska's position is even more dominant, controlling 71% of the seven appointed representatives. Therefore, for all practical purposes, Alaska is the dominant force in the North Pacific Council. At first blush, this control may seem unreasonable, but when one considers that about forty percent of the total weight of fish caught off United States shores in 1973 came from the waters off Alaska, its percentage of representation becomes more apparent.

made in negotiations concerning fisheries management, other issues, principally regulation of deep-seabed mining, have created obstacles to the conclusion of a widely acceptable treaty.

It is interesting to note that the council structure excludes most non-coastal states from the fishery management decision-making process. There are 25 states and four political subdivisions of the United States which are represented in the councils. FCMA, § 302(a), 16 U.S.C. § 1852 (1976). As a result 25 states do not participate in fisheries management planning. Those states not included could be adversely affected by regional management decisions which may prompt increased prices through reduced catch quotas and limiting supplies.

Id. § 302(a)(7), 16 U.S.C. § 1852.

Id. The North Pacific Regional Council is comprised of 11 voting members. Alaska has six, five appointed by the Secretary of Commerce and one by the governor. Washington has three, two appointed by the Secretary and one by the governor. Oregon has none appointed by the Secretary and one by the governor. The eleventh member is the National Marine Fisheries Service Regional Director.

The total catch off the United States in 1973 was 11.8 billion pounds. Approximately 4.5 billion pounds of that amount came from Alaskan waters. ALASKA COM-
Council representation is generally awarded according to a state's fishery dependence. Examination of representation on a council-by-council basis suggests that within certain regions coalitions between states with the largest percentage of representation may emerge. To a certain extent, a portion of this discrepancy in the level of representation among some states will be negated by fishery officers appointed by the Secretary of Commerce. These representatives will most probably be concerned with satisfying the national standards of the FCMA in drawing up fishery plans and will effectively diminish a state's ability to monopolize the preliminary negotiations.

In further analyzing the structure and function of the fishery management councils, it is logical to assume that the fishery representative appointed by the Governor will be chiefly sympathetic toward state problems. All states will have a similar set of immediate concerns and will act to protect their legitimate interests accordingly. The set of local problems typical among Councils includes the condition of the fishery resource, and the welfare of the fishermen and economic vitality of the industry within each state. Political issues such as the level of unemployment and generation of income within a fishery will find themselves recurring throughout the councils as well.

The regulations promulgated in *Bundrant* by the Fish and Game Board came about as a result of overfishing, depletion of the resource and the need to conserve and maintain crabbing as an important part of the fishing industry within Alaska. Even though the motivating factors behind *Bundrant* closely parallel those which exist under the regional council structure, it is important to recognize that in *Bundrant* the affirmed state action unilaterally regulated extraterritorial fishery areas without being concerned to any great degree with the effects of such regulatory action on neighboring states. Similar action

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127 This presupposes that those members appointed by state governors would side with their state in coalition efforts. All decisions by a council are by majority vote of the voting members present and voting. A quorum on a council consists of a majority of the voting members. FCMA, § 302(e)(1), 16 U.S.C. § 1852 (1976).

128 546 P.2d at 533, 540-41.

129 *Id.* at 540. The court cited language from Southern Pacific Co. v. Ariz., 325 U.S. 761, 767 (1945), indicating that a state had reserved powers to make laws governing matters of local concern even though there may be some effects upon interstate commerce. *But cf.* H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1949), where Mr. Justice Jackson articulated the distinction between the power of a state to shelter its
through the regional council framework will come about only through a state's manipulation of the voting members and except for the North Pacific Regional Council this appears highly unlikely. Moreover, the additional barrier of conformity to national standards may also serve as a prohibiting force on any one individual state's exertion of unilateral power.

Nonetheless, to the extent that state and personal interests of the federal appointees coincide, they may create, particularly in the North Pacific Council, an Alaskan rather than a regional bias. On balance, however, the Regional Fishery Management Councils represent a new approach to the future management and conservation of fishery resources. They possess qualities of both state and federal regulatory authorities working toward an acceptable accommodation of interests. Enforcement and administration of fishery plans and regulations will be carried out by the respective federal agencies, yet local needs and concerns shape day-to-day decision-making. An overall reconciliation of local and national interests has been attempted and it can be anticipated that the FCMA will aid in the development of a meaningful and functional law of the sea for the immediate future.

D. International Considerations

Although the majority in Bundrant effectively evaded the question of whether the Board's regulations conflicted with international agreements or foreign rights, finding instead that such considerations were speculative and remote, it is clear from a reading of the FCMA that international relations are to be accorded primary importance. Title II of the FCMA requires that any nation wishing to fish within the 200 mile fisheries zone of the United States must sign a Governing International Fishery Agreement (GIFA). In addition, the FCMA

people from health and safety menaces, even where such dangers arise from interstate commerce, and a state's lack of power to "retard, burden or constrict the flow of such commerce for . . . economic advantage." Id. at 533.

Moreover, the Bundrant court found that the exercise of this jurisdiction in a patently neutral fashion would not provoke retaliatory efforts by Alaska's neighboring states. 546 P.2d at 540 (emphasis added).

546 P.2d at 540. At this point, the dissent stated that the whole area of regulation of ocean resources was immersed in the international law field and accordingly should not be regulated by individual states. Id. at 563-64. (dissenting opinion).

FCMA, §§ 201-05, 16 U.S.C. §§ 1821-25 (1976). After February 28, 1977, the FCMA prohibits foreign fishing within the fishery conservation zone or foreign fishing for anadromous species or Continental Shelf fishery resources beyond the zone unless such foreign fishing is authorized by an international bilateral fishery agreement with the United States Secretary of State. Id. § 201(a), 16 U.S.C. § 1821.
dictates that existing fishing agreements be phased out if they pertain to stocks subject to United States authority and are "in any manner inconsistent with the purposes, policy or provisions of the Act."\footnote{Id. § 202(b), 16 U.S.C. § 1822. Section 202(b) provides that "it is the sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, if such treaty is not so renegotiated within a reasonable period of time after April 13, 1976."} Any currently existing governing fishery agreements which are renegotiated must adhere to prescribed terms and conditions under the FCMA. The foreign nation and its vessels must officially recognize the exclusive fishery management authority of the United States and abide by all the regulations promulgated by the Secretary of State.\footnote{Id. § 201(c), (c)(1), 16 U.S.C. § 1821.} Furthermore, foreign nations must cooperate with certain enforcement and regulation activities.\footnote{Id. § 201(c)(2)(A)-(D), 16 U.S.C. § 1821.} Applicable fees established by the FCMA must be pre-paid,\footnote{Id. § 201(c)(2)(E), 16 U.S.C. § 1821.} and risk of loss for any damage to American vessels, fishing gear or catch must be assumed as well.\footnote{Id. § 201(c)(2)(G), 16 U.S.C. § 1821.} Once a foreign nation meets these specifications, it is eligible to apply for permits licensing its fishing vessels to enter designated fisheries where surpluses have been determined to exist. Thus, whatever rationale was available in the past for avoiding consideration of international agreements upon state fishery regulations must now be considered unpersuasive in light of the FCMA.

The first GIFA to be negotiated was between the United States and Poland on August 2, 1976.\footnote{E. McDowell, 1976 Digest of United States Practice in International Law 356.} In accordance with the requirements of the FCMA, the United States-Polish bilateral GIFA was submitted by the President to Congress. Once submitted to Congress, the agreement becomes subject to debate, revision, or suspension for a period of sixty days.\footnote{FCMA, § 203, 16 U.S.C. § 1823 (1976).} It was later recommended by President Ford that the Congress consider passage of a joint resolution bringing the agreement into force since sixty days of continuous session as required by the FCMA was not available before March 1, 1977.\footnote{E. McDowell, supra note 138, at 356.} Congress did pass enabling legisla-
tion allowing the agreement to come into force prior to the expiration of the minimum statutory period. Besides the United States-Poland GIFA, five additional GIFAs were brought into force on February 21, 1977, through the Fishery Conservation Zone Transition Act.\(^4\)

Despite these treaty successes, not all foreign countries were as willing to renegotiate traditional fishing rights in United States waters pursuant to the provisions of the FCMA. Japanese Foreign Minister, Shinichiro Asao, for example, publicly stated that Japan refused to recognize the United States 200 mile fishery conservation zone.\(^4\) Moreover, there are increasing fears that retaliatory measures initiated by non-complying foreign governments against United States fishermen will seriously cripple certain fishing industries. Tuna fishermen argue that other nations, adopting the lead of the United States, will enact fishery measures creating exclusive zones but will fail to exempt the highly migratory species from their jurisdiction, thereby depriving tuna fishermen of valuable fishery grounds and seriously jeopardizing the growth of the industry.\(^4\)

Domestically, the threat of exclusion from traditional fishing grounds has taken on a different setting. In June 1977, the International Whaling Commission banned all bowhead whale hunting for 1978.\(^4\) Alaskan Eskimos won a lower court order in October 1977, which instructed the State Department to file an official objection exempting the Eskimos from the ban.\(^4\) On appeal, the United States Court of Appeals in Washington, D.C. reversed the ruling, stating that the lower court’s ruling would upset United States efforts to establish and administer effective international machinery for the protection of marine

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\(^4\) N.Y. Times, Nov. 14, 1976, § 1, at 14, col. 1 (city ed.). Japan opposes the assertion of a unilateral fishing zone until it is sanctioned by international law. Furthermore, a proposal submitted by Japan where it was to continue its traditional fishing activities off America waters was rejected by the United States. Id.

\(^4\) Shrimp and salmon fishermen are equally concerned over the possibility of Mexico denying the gulf shrimp industry a major portion of its resources. See Comment, 13 SAN DIEGO L. REV. 707 (1976).


mammals. Alternative solutions are being sought by the National Marine Fisheries Service in order to placate the irate bowhead hunters, but for the moment they appear to be the victims of the same type of FCMA policies which threaten the fishing of foreign nations in American waters.

Some foreign countries have also sought to circumvent the effects of the FCMA by establishing business contacts in the continental United States in order to secure the harvesting of traditional catch quotas. The Soviet Union, for example, has completed an arrangement whereby it is an equal partner in a joint venture with an American processing concern through which certain restrictions otherwise applicable have been evaded. This new enterprise, US—USSR Marine Resources, Inc., was formed in July 1976 between Bellingham Cold Storage, a Washington State fish processor, and Sovrybflot, a Soviet government agency. The enterprise affords the Soviets access to American fish stocks through the use of American fishermen in the harvesting of hake, a fish now exploited primarily by foreign fishing fleets. Processing of the catch will take place at Bellingham Cold Storage. After processing, the fish will then be exported to the Soviet Union on a continuous basis.

Although there are a number of friction areas developing as a result of the FCMA's international influence, the long run effects of the legislative measure should prove fruitful for the creation of a lasting agreement on the use of ocean resources of the world. So long as fishery depletion and overfishing continue to plague coastal nations, compromising positions will have to emerge among conflicting interests. In all instances it must be kept in mind that the FCMA attempts to satisfy foreign fishing interests through a statutory scheme calling for policies of full utilization, conservation, and efficient allocation of limited marine resources. In so doing, the FCMA may offer the most realistic approach toward building a world consensus on future regulation of living resources of the sea.

146 Id. at 955-56.
147 Such arrangements bear out the economic truth of the FCMA to foreign fishing fleets—that traditional access to American fishery stocks could be reduced in order to better accommodate domestic interests.
148 San Diego Union, Aug. 6, 1976, § A, at 12, col. 3.
149 Id.
150 Similar agreements are anticipated with the Japanese in their harvesting of pollack and cod of American waters.
CASE W. RES. J. INT'L L. Vol. 10:703

II. CONCLUDING OBSERVATIONS

The passage of the FCMA may be regarded as a first step in a major transition from an era of unlimited free fishing to a period of controlled fishing pursuant to national jurisdictional mandates. In this context, one should not view the FCMA as a panacea, but rather as a forerunner to dramatic new opportunities in the area of fishery management. The FCMA positions the United States as the leader in the movement toward coastal state jurisdiction over marine resources. Provision is made not only for the extension of jurisdiction but also for the creation of effective machinery for the management over that jurisdiction.

The FCMA allows states within the United States to assert substantially the same interests in offshore marine resources as was possible prior to the enactment of the FCMA. The change that takes place is in the degree of control that the Federal Government now employs in the establishment of national uniformity and consistency among regional fishery plans. In view of the proliferation of economic and fishery zones around the world, the national interest is served by allowing the United States to speak with one voice encouraging the movement toward a global agreement concerning ocean resources.

From an international perspective, the FCMA seeks to take account of traditional fishing interests by foreigners off American coasts provided that such nations reach agreement with the United States pursuant to the FCMA. Although reasonable fears are present, their importance may be reduced somewhat as progress is made under the present conservation and management schemes. Moreover, it is very possible that the same problems faced now would have occurred under the slower, more ineffective, multilateral approach to fisheries questions of the past. Furthermore, negotiating the integration of various exclusive zone areas may prove a more fruitful alternative than contending with all the problems that arise in unruly multilateral conferences. Thus, the machinery has been set in motion and it remains for international negotiators to effectively coordinate the plethora of existing fishery regimes such as the one established by the United States.

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