Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries*

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INTRODUCTION

The center of the Bering Sea is enclosed by the 200-mile exclusive economic zones (EEZ's) of the United States and the Soviet Union, resulting in a configuration known as the donut hole (the donut).[1] Under contemporary international law, the donut is "high seas," an area where any state is free to fish, subject only to limitations established by international law. This Article examines these limitations on fishing in the Bering Sea donut, along with the corresponding opportunities for instituting a management regime in high-seas areas adjacent to EEZ's.

The impetus for fisheries management in ocean regions where high seas border EEZ's, and where there is a direct or even indirect relationship between the fisheries stocks on both sides of the 200-mile limit, stems from a tension between domestic and foreign fishing interests. This tension arises because, under contemporary international law, many coastal nations (probably a substantial majority) believe they have virtually complete discretion to manage fisheries within their EEZ's.[2] To pro-

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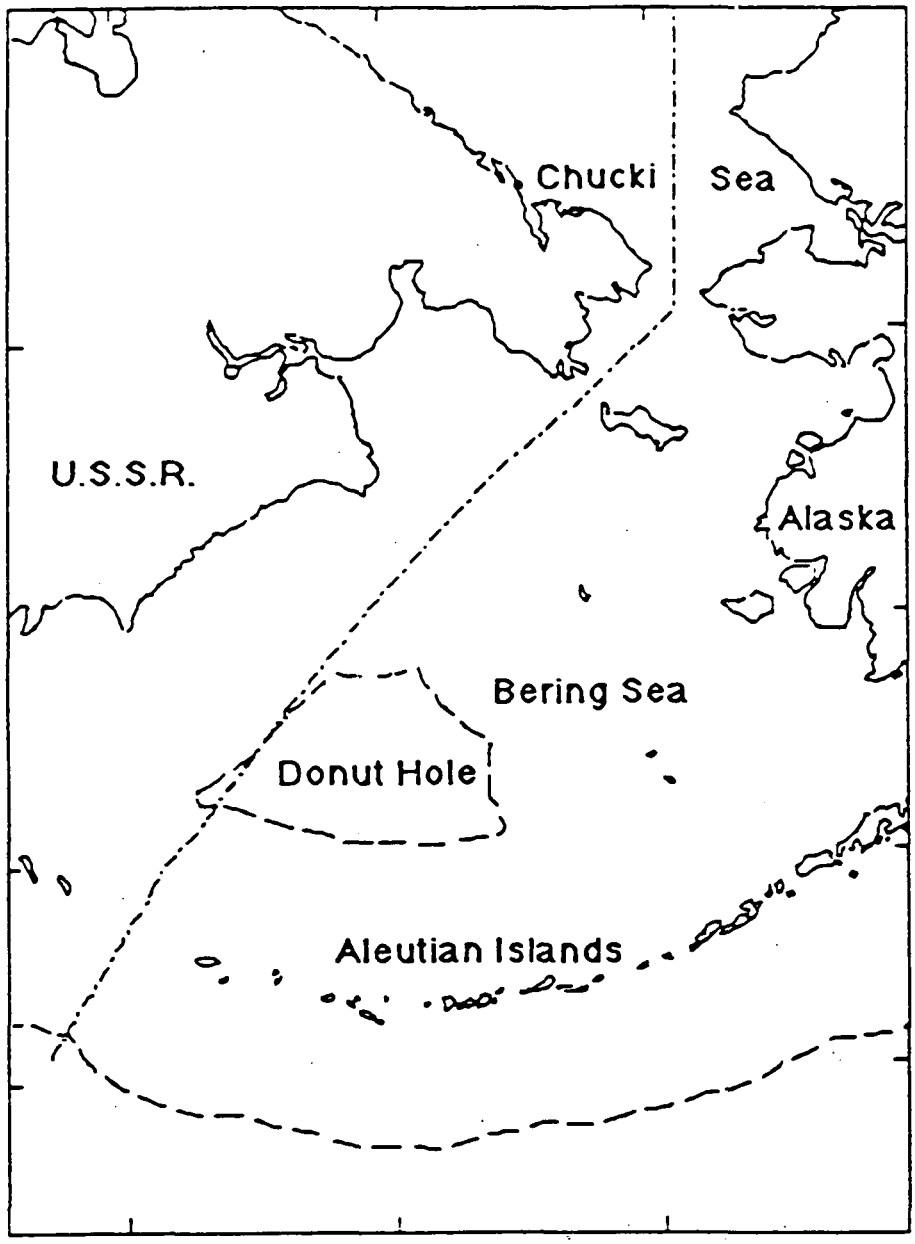
1. For an official depiction of the donut, see BUREAU OF OCEANS & INT'L ENVTL. & SCIENTIFIC AFFAIRS, U.S. DEP'T OF STATE, LIMITS IN THE SEAS, NO. 107, STRAIGHT BASELINES (1987); *see also* E. MILES, J. SHERMAN, D. FLUHARTY, S. GIBBS, S. TANAKA & M. ODA, ATLAS OF MARINE USE IN THE NORTH PACIFIC REGION 6 (1982) [hereinafter ATLAS OF MARINE USE] (national fisheries claims and fisheries convention areas); J. PRESCOTT, THE MARITIME POLITICAL BOUNDARIES OF THE WORLD 251 (1985).

2. Articles 56, 61, and 62 of the 1982 Convention on the Law of the Sea, considered by many to reflect customary international law, grant coastal states sovereign rights for use and management of living resources, including conservation, within a 200 nautical mile Exclusive Economic Zone (EEZ). *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 61, 62, U.N. Doc. A/CONF.62/122, 21 I.L.M. 1261, 1281 [hereinafter 1982 Convention]. Most states believe these rights are extensive and that there are few limits on coastal state authority. The significant choices of the coastal state in management are discretionary and cannot be challenged in a compulsory dispute settlement proceeding that is otherwise applicable. 1982 Convention, *supra*, art. 297(3)(a). *See generally* G. MOORE, COASTAL STATE



The approximate location of the donut.

—·—·— U.S.-Russia Convention line of 1867.
– – – EEZ limits

tect these interests, coastal states frequently wish to maintain stocks above a level producing the theoretical maximum sustainable yield by limiting their own fishing effort and prohibiting (or severely restricting) foreign fishing.[3]

Excluded from EEZ's, foreign fishing interests often concentrate more of their effort on the adjoining high-seas stocks. Where the foreign fleets are harvesting a stock common to both areas (a straddling stock), or one that is linked in some less direct manner (such as by a common food source), the management goals of the coastal and foreign states come into direct conflict. Perhaps the greatest danger inherent in this

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REQUIREMENTS FOR FOREIGN FISHING 6-10 (U.N. Food and Agriculture Organization Legislative Study No. 21, 2d rev. ed. 1985) (brief overview of various coastal states' duty to allow access to surplus catch).

This conception of coastal state authority over EEZ fisheries is not universal. There is a body of opinion that a coastal state is required by international law to give foreign access to an EEZ fishery if the coastal state cannot or will not harvest the biologically safe annual yield. Such an interpretation of customary law would restrict, if not deny, a right to regulate the fishery in order to satisfy the social and economic interests of the coastal state.

3. The coastal states' justification is seen in the following:

> The principle, as it has become established in the draft Law of the Sea, that under certain conditions foreign fishermen should be given access to resources is the result of the interplay of many arguments and considerations, among which biological factors played at most a small part. However, the basic biological argument is apparently straightforward, and is based on a few simple points:
> (a) It will be assumed that there is a maximum sustainable yield (MSY) which can be taken from any stock, and this yield, and the population level which will produce it can with appropriate research be estimated.
> (b) This MSY may be modified by economic considerations, as well as by environmental factors.
> (c) The coastal state shall determine the allowable catch.
> (d) If this TAC [Total Allowable Catch] is greater than the amount the coastal state can catch, the difference is a surplus, which can be allocated to foreign fishermen.
> . . . .
> The most serious difficulty in the simple argument to establish a "surplus" is the implication in the fourth step ((d) above) that if the catch that would be taken by the coastal state, with its existing capacity is (sic) less than the target allowable catch, then the difference—"surplus"—can be taken without affecting the existing coastal state fishery. This is seldom the case. Any fishing by foreign vessels, carried out in addition to fishing on the same stock by the coastal state, will reduce the abundance of the stock. This reduction will tend to reduce the catches by the coastal state, or require it to increase the amount of fishing (and hence costs) if it is to maintain its catch. In either case the benefits to the coastal state from the resources off its coasts will be reduced. The pattern of fishing is therefore on the arguments of the previous paragraphs (sic), sub-optimal, at least to the coastal state. A surplus therefore does not exist.

Gulland, *Conditions of Access to Fisheries: Some Resource Considerations*, in REPORT OF THE EXPERT CONSULTATION ON THE CONDITIONS OF ACCESS TO THE FISH RESOURCES OF THE EXCLUSIVE ECONOMIC ZONES 81-82 (U.N. Food and Agriculture Organization Fisheries Rep. No. 293, 1983).

The quoted passage indicates why an EEZ state may be concerned about fishing on adjacent high seas stocks, even where there is a putative surplus. Nevertheless, this Article will argue that the only legitimate regulatory purpose a coastal state may have regarding an adjacent high seas fishery is to conserve common stocks, rather than to allocate a limited resource entirely to itself. However, further evolution of law of straddling stocks seems likely to require recognition of some preference for the coastal stock in allocation of these stocks.

conflict is that coastal states, frustrated by their inability to gain the cooperation of foreign fishing interests in meeting stock-specific management goals, will move to extend their EEZ's beyond the current 200-mile limit.

In the United States, fishing industry interests are urging that drastic action be taken in cooperation with the Soviet Union to eliminate foreign fishing in the Bering Sea donut. On March 21, 1988 the U.S. Senate adopted a nonbinding resolution[4] directed at the then forthcoming meeting of a U.S.-Soviet working group, calling for the two nations to declare a moratorium on fishing in the donut and for measures to be taken against nations that refused to comply. Such an action would be inconsistent with widely accepted norms of international law.

While a unilateral moratorium on fishing in a donut area has no basis in international law, there are two other alternatives for instituting a management regime. This Article considers the alternative approaches of (1) establishing a management regime by international agreement, or (2) using various forms of unilateral action other than a moratorium. These alternatives protect the integrity of coastal states' management programs while relying on accepted principles of international law. Finally, this Article analyzes the U.S. Senate's recent resolutions in light of these alternatives.

I
THE BERING SEA FISHERY

The principal species harvested in the Bering Sea donut is pollack.[5] If other species (including cod and herring) are also caught, they are probably taken primarily as the result of by-catches and not as target species. Japan, Poland, South Korea, and the People's Republic of China are the most active nations fishing in the donut, with Japan taking approximately 60% of the estimated one million metric ton annual catch.[6] Beginning in 1988, these nations were no longer allowed to fish

4. S. Res. 396, 100th Cong., 2d Sess., 134 CONG. REC. S2621 (daily ed. Mar. 21, 1988).

5. For information and maps regarding distribution, life history, percentage catch by area and nation, and harvesting of pollack through 1977, see ATLAS OF MARINE USE, *supra* note 1, at 42. The pollack involved here is *Theragra chalcogramma,* also known as walleye, Alaska, or Pacific pollack. *Id.*

6. Interview with Dr. Donald E. Bevan, Professor Emeritus, College of Ocean and Fishery Sciences, University of Washington, Seattle (Dec. 28, 1987). Dr. Bevan bases this upon Japanese and Polish reports.

Robert C. Francis, Director, Fisheries Research Institute, University of Washington, Seattle, estimates the foreign catch in the Aleutian Basin at one million tons in 1987, "most of that coming from the donut hole." R. Francis, Pollack of the Aleutian Basin 1 (Dec. 1987) (unpublished manuscript); *see also* Summary of Current Knowledge and Working Hypotheses Concerning Pollack in the Bering Sea 1, 8 (1987) (obtained from Richard Marasco, Director, Resource Ecology and Fisheries Management Division, Northwest and Alaska Fisheries Center, National Marine Fisheries Service) [hereinafter Pollack in the Bering Sea].

within the 200-mile U.S. EEZ, except in conjunction with U.S. joint ventures.[7]

The relationship between fisheries, including pollack, in the Bering Sea donut and those in surrounding waters, particularly the waters of the U.S. EEZ, is not well understood.[8] At present, the plan management team in the North Pacific Fishery Management Council (the U.S. entity under the Magnuson Fishery Conservation and Management Act responsible for managing Bering Sea fisheries within the U.S. EEZ) treats catches in the Bering Sea donut as independent of catches in the U.S. EEZ.[9] It is known that pollack in the donut spawn at different times and have a different size and age structure than pollack within the U.S. EEZ.[10] Nonetheless, the stocks are suspected to interact to some degree.[11]

II

THE LEGAL PROBLEM AND ALTERNATIVE SOLUTIONS

This Article accepts that an effective fishery management regime for pollack (and other groundfish) in the Bering Sea donut should be estab-

7. 53 Fed. Reg. 894, 897 (1988) (to be codified at 50 C.F.R. § 675.20, Table 1) specifies that the final Total Allowable Level of Foreign Fishing (TALFF) is zero for all groundfish in the Bering Sea. Some stocks are also unavailable for joint venture fishing, but there is an allocation of 490,838 metric tons for joint venture processing of pollack. *Id.* These measures were adopted pursuant to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1882 (1982). *See also* Department of State, Fishery Conservation Management Measures, 50 C.F.R. § 675.20 (1987).

8. *See* R. Francis, *supra* note 6, at 2. Scientists at the December 1987 meeting of the North Pacific Fishery Management Council reportedly indicated that they are operating on the hypothesis that Bering Sea pollack are of the same stock as those in the U.S. EEZ. *See* Matsen, *Council Retains Cap on Bering Sea Groundfish*, NAT'L FISHERMAN, Feb. 1988, at 2, 3-4. At the same meeting, a National Marine Fisheries Service scientist is reported to have replied "exactly right" when asked if it was fair to say that the relationship between donut fish and EEZ fish was unknown. *Id.* at 4.

9. Bevan interview, *supra* note 6.

10. *Id.; see also* Pollack in the Bering Sea, *supra* note 6, at 1, 3 (comparing pollack on the continental shelf to pollack in deep water).

11. The report by Dr. Francis, *supra* note 6, at 1, states that "[t]he so-called 'donut hole' is only a part of the Aleutian Basin. There is no reason to assume that fish harvested in the donut hole are distinct from those harvested in other parts of the Basin." His brief report does not discuss any implications this assumption might have for management within the U.S. EEZ. Compare the following:

> It is not known if the continued and uncontrolled harvest of pollock in the international zone will have an adverse effect on the pollock stocks in the U.S. FCZ [Fisheries Conservation Zone]. The problem essentially is to determine the relationship of the pollock of the international zone to pollock of other areas—United States FCZ, Soviet FCZ, and the western Pacific. Such knowledge is necessary for the effective management of the pollock resource and the furtherance of our understanding of the Bering Sea ecosystem.

National Marine Fisheries Service, A Study of the Relationship of Bering Sea Pollock Aggregations—Research Proposal 3 (1987). The author further states that, in understanding the complexity of the problem, the hypothesis that the donut fish are an independent stock is the "least plausible." *Id.* at 9.

lished. The first real question is how to achieve this goal given that the rationale for such a regime—the relationship between stocks within EEZ's and stocks in the high seas—is not definitively established.

The United States and the Soviet Union are discussing ways to improve the state of scientific knowledge regarding fisheries in the Bering Sea donut. The two countries are exploring the matter through a special working group, apparently with some urgency, prior to negotiations with Japan and other nations actively fishing in the donut.[12]

Japan is interested in improving the state of knowledge regarding the donut fisheries.[13] Japan raised the subject of the pollack fishery in the context of discussions held by the International North Pacific Fisheries Commission (INPFC) in November, 1987 with the United States and Canada. Japan based its proposal on article 4 of the 1978 INPFC Protocol, which commits the signatories to work toward establishing an international organization to gather information on groundfish in the Bering Sea. Under article 4 of the Protocol, the organization is to have a "broader membership dealing with species of the Convention area [which includes the Bering Sea] other than anadromous species."[14]

Shortly after the November INPFC session, however, in a meeting involving the United States, Canada, the Soviet Union, and the People's Republic of China, Japan appeared to reverse course and opposed a proposed international scientific organization that would coordinate the marine scientific activities of these nations in the North Pacific.[15] Thus,

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12. *See infra* note 16.

13. Japan's interest is reflected in the following statement:

> Due to a rapid reduction of fish allocation by the United States, Japan has directed its attention to the Bering high seas as a fishing ground of bottom fish fishery, and fishing there has been remarkably expanding. It is said that pollack in the Bering high seas consists of several stocks and that their quantity is large, but, at present, our scientific knowledge on bottom fish resources in the waters is limited. Therefore, we think it is important to compile scientific knowledge by improving research studies and to establish at an early stage an international organization with broader membership dealing with non-anadromous species, as provided for in Article 4 of the Convention, and to throw an objective light on the resources by enhancing cooperation with regard to research, analysis and exchange of scientific information and knowledge on non-anadromous species in the North Pacific Ocean.

Address by Mr. Kenjiro Nishimura, Chairman of the Japanese National Section of the International North Pacific Fisheries Commission (INPFC) at the opening ceremony of its 34th annual meeting (Nov. 3, 1987).

14. Article 4 provides:

> The Contracting Parties shall work towards the establishment of an international organization with broader membership dealing with species of the Convention area other than anadromous species. Progress towards this end shall be reviewed during the consultations provided for in Article XI. When such an international organization becomes functional, the functions of the Commission under the provisions of Article III, paragraph 1, sub-paragraph (b) shall be terminated and transferred to the new organization.

Protocol Amending the International Convention for the High Seas Fisheries of the North Pacific Ocean, April 25, 1978, United States-Canada-Japan, 30 U.S.T. 1097, 1103, T.I.A.S. No. 9242, at 9.

15. Canada Department of Fisheries and Oceans, Report of the Special Conference on

the mechanism that will be used to document the relationship between fisheries within and outside of EEZ's in the Bering Sea remains uncertain. The only concrete proposal now on the table is for a symposium to review the current state of knowledge regarding Bering Sea fisheries.[16]

Apart from the scientific uncertainty regarding the relationship between fisheries, the most troubling issue arising from unregulated harvesting of straddling stocks on the high seas is (1) whether a solution can be found to the management difficulties within the context of a 200-mile EEZ, or (2) if coastal nations are unable to obtain the cooperation of high-seas fishing states, whether there will be a trend toward extension of the 200-mile zone to include disputed fisheries.[17] As coastal states around the globe continue to take larger proportions of the sustainable catch within their EEZ's and come to displace foreign fishing entirely, pressures will grow both to harvest on the high seas and to subject common stocks to management.

There are two major alternatives to extension of EEZ's: (1) establishing a management regime by international agreement; and (2) unilaterally extending coastal nations' exclusive management authority over straddling stocks. The remainder of this Article discusses the legal issues involved in these two alternatives.

A. Establishing a High-Seas Fishery Management Regime by International Agreement

The principles of customary international law and conventional law are very much the same regarding states' obligation to cooperate with fishery conservation measures for high-seas fisheries.[18] The major provi-

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the Concept of a New Marine Science Organization for the North Pacific Ocean and Bering Sea 2, 4-5 (unpublished report presented in Ottawa, Dec. 8-9, 1987) [hereinafter Report]. It should be noted that only one participant abstained from endorsing the concept of the new organization. *Id.* at 7; *see also infra* notes 30-33 and accompanying text (regarding possible Japanese motives for opposing the organization to coordinate scientific research).

16. In a joint press statement issued April 22, 1988 in Washington D.C., the United States and the Soviet Union announced their agreement to "jointly convene a scientific symposium in the United States in 1988, inviting scientists from all states concerned, to review the status of fishery resources in the Bering Sea, particularly Pollack." This meeting was scheduled to occur in July, 1988 in Sitka, Alaska.

17. On the surface, this seems unlikely, because the 200-mile EEZ has been established as the central concept of the new law of the sea so recently and is now generally accepted as customary international law. *See supra* note 2. However, if the United States and the USSR impose regulations on straddling stocks, and these regulations have no basis in international law, it would be unwise to dismiss the potential for other nations claiming further extensions of EEZ's elsewhere.

18. Provisions of widely accepted international agreements (e.g., the 1982 Convention) prescribe an obligation to the states to cooperate in matters regarding high seas fisheries. *See infra* note 21. Although this practice of cooperation has been well established for many years, it has often failed to produce adequate management regimes.

sion on straddling stocks in the 1982 Convention on the Law of the Sea (1982 Convention) is article 63(2), which provides:

> Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of those stocks in the adjacent area.[19]

The United States has not specifically asserted that article 63 of the 1982 Convention reflects customary law, but it has expressed this view concerning other fisheries provisions of the 1982 Convention.[20] This Article assumes that the United States would take the same position regarding article 63.

In addition to article 63(2), articles 87 and 116-118 of the 1982 Convention also apply, because the Bering Sea donut is an enclave of the high seas.[21] Article 87 is the basic article in the 1982 Convention concerning

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19. 1982 Convention, *supra* note 2, art. 63(2). The scope of the reference to the same stock or stocks of associated species is not entirely clear, but this question is not developed in this discussion because it appears to be a peripheral issue. For discussion of the analogous problem of stocks occurring in two or more EEZ's, see Burke, *The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction,* 63 OR. L. REV. 73, 103-06 (1984).

20. *See* Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction at 17-20, Brownsville-Port Isabel Shrimp Producers Ass'n v. Calio, No. B-85-99 (S.D. Tex., June 19, 1985). The federal court in this case relied on the 1982 Convention as authority for its statements of the international law applicable to fishing in the Mexican EEZ. Brownsville-Port Isabel Shrimp Producers Ass'n v. Calio, No. B-85-99 (S.D. Tex., June 19, 1985).

21. The text of these articles is as follows:

Article 87. Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia,* both for coastal and land-locked States:

. . . .

(e) freedom of fishing, subject to the conditions laid down in section 2;

. . . .

Section 2. Conservation and Management of the Living Resources of the High Seas

Article 116. Right to fish on the high seas

All States have the right for their nationals to engage in fishing on the high seas subject to:

(a) their treaty obligations;

(b) the rights and duties as well as the interests of coastal States provided for, *inter alia,* in article 63, paragraph 2, and articles 64 to 67; and

(c) the provisions of this section.

Article 117. Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas

All States have the duty to take, or to co-operate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources on the high seas.

Article 118. Co-operation of States in the conservation and management of living resources

States shall co-operate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical

freedom of the seas, providing for freedom of fishing subject to articles 116-120.

Under articles 117-118 of the 1982 Convention, fishing states are required to conserve high-seas fisheries exploited by their nationals and to cooperate with other states in such efforts. Thus, even for fishing on the high seas, articles 117-118 confirm that where conservation is necessary for straddling stocks, the fishing state must cooperate with measures adopted by the coastal state if the measures are necessary to conserve their resource.

Clearly, the most effective and least disruptive means for pursuing a management regime is through an explicit agreement on the measures needed, as indicated by the best available scientific evidence. Article 118, in particular, underlines the preference for negotiated agreements both by calling for negotiations regarding conservation measures and by declaring that states "shall, as appropriate, co-operate to establish subregional or regional fisheries organizations to this end."[22] Thus, for straddling stocks, the 1982 Convention directs states to seek agreements establishing conservation measures.[23] While nations may agree on such measures—leaving only the problems of implementation—it is also perfectly plausible that the states may observe the injunction that they "seek to agree" or "enter into negotiations" and yet in good faith fail to reach agreement.

Of the several 1982 Convention articles pertaining to the high seas, only article 116 appears to anticipate the possibility of a good faith deadlock.[24] Articles 117 and 118 contain no provision for this contingency.[25] In this sense they reflect the prevailing approach in fisheries matters prior to the extension of national jurisdiction to 200 miles, that is, that the only way to establish an effective management regime is by international agreement. It was the failure of this approach that led to the new law of the sea and the creation of EEZ's. Article 116 offers an alternative to this old dilemma by permitting coastal states to take unilateral action under certain circumstances beyond their EEZ's.[26]

There is also reason to believe that even if states agreed on a conservation regime, the regime would not be effective in practice. Since enforcement measures are absent from article 116 and the other provisions

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living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, co-operate to establish subregional or regional fisheries organizations to this end.

1982 Convention, *supra* note 2, arts. 87, 116-118.

22. *Id.* art. 118.

23. *Id.* art. 63(2).

24. *Id.* art. 116.

25. *Id.* arts. 117-118.

26. *See infra* text accompanying notes 34-47.

relating to cooperative fisheries management, the best that states may be able to achieve is conservation arrangements based on consensus. Nevertheless, the record of past international fishery agreements does not instill confidence that a consensus-based regime will produce useful conservation measures.

In spite of these difficulties, international agreements have been reached regarding the management of straddling stocks. In 1978 New Zealand concluded separate agreements with Japan and South Korea in which both countries agreed to observe New Zealand's EEZ regulations in the high-seas enclave surrounded by the New Zealand EEZ.[27]

The chances of negotiating a similar agreement between the United States, the Soviet Union, and Japan on pollack fishing in the Bering Sea donut would be materially enhanced if the Japanese were still allowed to fish for pollack in U.S. waters. Only then would the pressure to concentrate fishing efforts on the high seas areas adjoining the EEZ be relieved. The arrangement between Japan and New Zealand probably was possible only because of an agreement allowing Japan to fish within New Zealand's EEZ (subject, of course, to conservation measures). Although the Bering Sea donut involves the EEZ's of two nations (the United States and the Soviet Union), perhaps a similar agreement could be reached if Japan were allowed to retain some fishing access to their EEZ's. Of course, since the United States currently is taking all of the available fish in its own EEZ, this does not seem likely.[28]

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27. Agreement on Fisheries, Sept. 1, 1978, New Zealand-Japan, 1978 Jōyakushū (Japan) No. 837; Agreement on Fisheries, Mar. 16, 1978, New Zealand-South Korea, 1978 N.Z.T.S. No. 4.

28. The need for agreements to deal with straddling stock issues is well-known and widely discussed. *See, e.g.,* Kwiatkowska, *Conservation and Optimum Utilization of Living Resources,* in 1986 PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE (in press); Sullivan, *Special Problems Concerning Fishing,* in UNITED STATES LAW OF THE SEA POLICY: OPTIONS FOR THE FUTURE 249, 255-58 (Oceans Policy Study Ser. No. 6, 1985); Burke, *supra* note 19, at 111-15; V. Kaczynski, Management Problems of Shared Chilean Jack Mackerel Resource: The Coastal State Perspective (May, 1984) (copy available in *Ecology Law Quarterly* files). Nevertheless, only one multilateral body dealing with groundfish stocks exists. The Northwest Atlantic Fisheries Organization (NAFO), with headquarters in Halifax, Nova Scotia, considers conservation measures concerning fisheries adjacent to the 200-mile fishing zone of Canada in the Atlantic. The NAFO Convention area (the Regulatory Area) extends beyond the area of coastal fisheries jurisdiction, and the function of the Fisheries Commission is to secure consistency between measures adopted by coastal states and those adopted for the Regulatory Area. *See* E. MILES, S. GIBBS, D. FLUHARTY, C. SAWSON & D. TEETER, THE MANAGEMENT OF MARINE REGIONS: THE NORTH PACIFIC 409 (1982) [hereinafter MANAGEMENT OF MARINE REGIONS]. Despite NAFO, Canada has had problems with fishery conservation programs concerning stocks that are also fished beyond the limit of Canadian fishery jurisdiction. *See infra* note 33.

The need for international cooperation in other regions is evident. *See* REPORT OF THE AD HOC WORKING GROUP ON FISHERY RESOURCES OF THE PATAGONIAN SHELF 75 (U.N. Food and Agriculture Organization Fisheries Rep. No. 297, 1983) (identifying a probable requirement for future management agreements for straddling stocks and urging the immediate creation of scientific mechanisms to prepare for this development); *see also* REVIEW OF THE

1. Scientific Research as a First Step

The Japanese representative at the 1987 INPFC meeting indicated that the Japanese were interested in investigating pollack stocks in the Bering Sea donut and in creating a broad-based international organization (not limited to INPFC members) to carry out this scientific research, as called for in article 4 of INPFC.[29]

There are several difficulties with this approach. The first is that developing the scientific basis for conservation is only the first step in creating a management regime. While such evidence is a necessary step, and is usefully pursued on the international level, it does not guarantee that the states doing the research will take the next step and commit to the necessary conservation measures.

The Japanese desire to avoid conservation measures, or at least to delay their implementation, may be the underlying reason for the INPFC proposal. Japan may wish to ensure that any fisheries organization for the Bering Sea donut is concerned solely with research, not with management.[30] The suspicion that the Japanese interest in research is motivated by other purposes is reinforced by their opposition to the Pacific International Council for the Exploration of the Sea (PICES, which is the common, unofficial name attached to the proposed entity). PICES duties would include, but not be limited to, promoting scientific cooperation and developing information concerning fisheries as part of a broader, more comprehensive focus on the marine environment in the North Pacific.[31] Japan's opposition to PICES is probably based on a fear that it could develop into a means for managing high seas fisheries in the North Pacific, or accelerate the advent of such management.

The Japanese proposal that INPFC, with its more limited charter, take responsibility for research on pollack may well be designed to forestall or frustrate the creation of PICES. While these conflicting purposes are being worked out, a process that could take a considerable period of time, unabated fishing in the Bering Sea donut may imperil conservation efforts within the U.S. EEZ.

STATE OF WORLD FISHERY RESOURCES (U.N. Food and Agriculture Organization Fisheries Circ. No. 710, Rev. 4, 1985) (calling attention to the considerable increase in the fishing of these stocks and noting that more cooperation is needed regarding research and management policies worldwide).

29. *See supra* notes 13-14 and accompanying text.

30. At the December 1987 meeting to consider a new marine science organization for the North Pacific Ocean and Bering Sea, however, Japan declared: "We encourage establishment of an international organization aimed at investigations and management of fishery resources, e.g. the pollack stocks in the Bering Sea." Report, *supra* note 15, at 5.

31. For a brief discussion of the need for, and early work to secure, such an organization, see MANAGEMENT OF MARINE REGIONS, *supra* note 28, at 419-27.

2. *How Much Research is Enough?*

Whether or not there is a demonstrable relationship between the fisheries of the Bering Sea donut and those of the surrounding EEZ's, the relevant legal principles call for the states concerned to seek international agreement on necessary conservation measures.[32] Nevertheless, the sufficiency of scientific evidence showing the need for particular conservation restrictions inevitably will be controversial. If a coastal state believes that there is a relationship between the stocks, it will advocate conservation measures that are consistent with management goals for the EEZ. Because those measures are unlikely to benefit distant-water fishing states, at least in the short term, fundamental disagreements are bound to occur about the weight of scientific evidence sufficient to justify particular actions.[33]

B. *Unilateral Extension of Management Authority by Coastal States*

The following discussion assumes the failure of good faith efforts to reach agreement on conservation measures. In cases where negotiations fail, it may stem in large part from an indeterminate relationship between high seas and EEZ fisheries. Even so, unilateral action is still possible under article 116 of the 1982 Convention. Article 116 may be interpreted to allow certain forms of unilateral action when coastal and distant-water states are unable to reach agreement on an effective international management regime.[34]

1. *Unilateral Extension of EEZ's*

Unilateral action to protect straddling stocks or related fisheries could take several forms. One alternative is to eliminate donuts altogether by unilateral extension of an EEZ.[35] In the Bering Sea this step

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32. Of course if there is no relationship between high-seas and EEZ stocks, the coastal state may have no interest in participating.

33. Practical strategies force countries not to join in regulating high-seas fishing. Referring to U.S. fishing in the high seas outside the Canadian 200-mile limit in the North Atlantic, the following comments by U.S. Ambassador Edward E. Wolfe, Jr. suggest the problem:

> Total allowable catches and quotas in the NAFO Regulatory Area are established each year by the NAFO Fisheries Commission. While we are not the only nation whose fishermen operate in the NAFO Area outside the framework of the [NAFO] Convention, all such fishing creates an obstacle to the Organization in its efforts to manage these fisheries.
>
> On the other hand, without some assurance of fishing opportunities within the Organization, non-members are somewhat reluctant to join. To deal with this problem, a balance must be struck between the Organization's desire to assure that fishing by non-members does not undermine its conservation objectives and the concern of those outside the Organization that membership will not spell the end of their fishing opportunities.

EAST COAST FISHERIES LAW AND POLICY 168 (J. Bubier & A. Rieser eds. 1987).

34. *See infra* notes 44-45 and accompanying text.

35. The precise configuration and location of the donut in relation to the surrounding EEZ's may be relevant for various alternatives. Virtually all of the current donut is located

might be taken by the United States or the Soviet Union, acting unilaterally or jointly. However, because there is no authority under international law for unilateral extension of an EEZ, such an action is unlikely. Customary international law permits a coastal state to establish an EEZ for no more than 200 miles.[36] No state has tried to expand its EEZ into a high-seas enclave formed by adjacent EEZ's. Given their concern that such a move would establish a precedent for other nations, it is doubtful that either the United States or the Soviet Union will attempt to initiate a practice of eliminating enclaves, including the Bering Sea donut, in this way.[37]

2. *Unilateral Extension of Management Programs*

If a fishery is managed within an EEZ but extends into the high seas (that is, either normally resides across the 200-mile limit or migrates from one side to the other), states might attempt to extend management measures in the EEZ to fishing on the high seas. Whether this were done by the United States, the Soviet Union, or both acting together, distant-water fishing states would have a duty to observe such measures under article 116 of the 1982 Convention.[38]

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east of the 1982 Convention line established by the U.S.-USSR agreement of 1867 ceding Alaska to the United States. *See* sources cited *supra* note 1. The two states agree that this line marks the limit of their respective fishery jurisdictions in areas less than 400 miles apart. J. PRESCOTT, *supra* note 1, at 249; *see also* J. BOYD, 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 557 (1979); Feldman & Colson, *The Maritime Boundaries of the United States*, 75 AM. J. INT'L L. 729, 751-53 (1981). Therefore, additional agreement would be necessary for the fishery management regime of the Soviet Union to extend farther east in the Bering Sea.

36. State practice establishes that the EEZ is universally considered to be limited to 200 nautical miles. The International Court of Justice has stated: "It is in the Court's view incontestable that . . . the institution of the exclusive economic zone, with its rule on entitlement by reason of distance, is shown by the practice of States to have become a part of customary law . . . ." Case Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 33 (June 3, 1985).

37. One alternative that has attracted some attention is that article 123 of the Convention provides a basis for unilateral action. This article provides that states bordering semi-enclosed seas "should cooperate with each other with regard to their rights and duties under the Convention," and that "they shall endeavour, directly or through an appropriate regional organization: (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea." This alternative is not available because the Convention itself is not in force and there is no comparable customary law. Furthermore, article 123 confers no rights on the bordering states to take any unilateral (including joint) action affecting the area beyond national jurisdiction. Nothing in the quoted language or the rest of the article suggests any competence concerning third states in the semi-enclosed sea, and the concept of coordinating the named actions presupposes competence on the part of other states to take those actions. Article 123 seems to have been drafted to assure that bordering states have no rights in addition to those they already have. One commentator has written that the first sentence makes it clear that "there are not rights or duties specifically created for the States concerned which do not already exist in the various other provisions of the Convention." Kittichaisaree, THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA 173 (1987).

38. *See infra* text accompanying notes 42-44.

Even if the fishery at issue does not extend into the high seas, there may still be a relationship between stocks in the EEZ and those in the donut, such as a common food source.[39] Even where the relationship between stocks is indirect, effective conservation of the fishery in the EEZ may require management of the fishery on the high seas. In these cases coastal states may still rely on article 116 to justify extending management measures.

Any unilateral action could be accompanied by an agreement to submit disputes over management measures to an international body for arbitration or mediation. To remain workable, however, the management regime and its measures should remain in effect while dispute resolution proceedings are pending. Otherwise, conservation objectives are likely to be thwarted by drawn-out challenges.

3. *The Legal Framework for Unilateral Action*

As of 1988, there were no relevant international agreements regulating fisheries in the Bering Sea donut. Nevertheless, any management regime established must be consistent with international law, and an important initial question is whether *any* form of unilateral action meets this criterion.

While the United States is not a signatory to the 1982 Convention,[40] it has taken the position in the context of other fisheries provisions in the Convention that the Convention reflects customary international law.[41] Therefore, the Convention may be understood as applying to fisheries within U.S. jurisdiction and to U.S. activities in other jurisdictions, despite the U.S. decision not to ratify the Convention.

With the 1982 Convention as the measure of customary international law, the basic legal question is whether article 63(2) reflects the only customary authority for a conservation regime imposed by a coastal

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39. The most common indirect relationship is probably that of predator-prey, where stocks taken within the EEZ prey upon the high-seas stock. A reduction in such prey may adversely affect the EEZ stock by reducing its food supply. A less common relationship might be, for example, where the depleted high-seas fishery is prey for a stock that, in turn, is a food source for the target stock in the EEZ.

40. U.N., MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS AT 31 DECEMBER 1987, at 735-36, U.N. Doc. ST/LEG/SER.E/6 (1988) [hereinafter MULTILATERAL TREATIES]. The 1982 Convention does not take effect until 12 months after sixty nations ratify the Convention. *See* 1982 Convention, *supra* note 2, art. 308(1). As of December 1987, only 35 nations had done so. MULTILATERAL TREATIES, *supra,* at 735. The Convention is not expected to take effect soon, because of continuing difficulties over the seabed management regime and the costs of implementing that regime as originally conceived. This is a highly political matter, the outcome and timing of which depend upon many obscure factors and influences. It is conceivable that a sudden spurt of activity might quickly produce the required 60 signatories. While the status of the 1982 Convention does not appear to affect the position of coastal and fishing states in this instance, if it came into force this might add strength to the view that the Convention provisions are customary law.

41. *See supra* note 20 and accompanying text.

state on fisheries that extend into adjoining high seas.[42] The answer to this question depends on one's interpretation of other articles in the Convention, especially articles 56, 87, and 116.

Article 87 provides for freedom of fishing on the high seas, subject to the limitations imposed by articles 116-120 of the Convention.[43] In turn, article 116 qualifies this right by declaring that the right to fish on the high seas is subject to the rights, duties, and interests of coastal states. These interests include not only the straddling stock provision enumerated by article 63(2), but also (by use of the phrase "inter alia") other articles of the Convention, including article 56. Article 56 establishes that coastal states have sovereign rights over the living resources in their EEZ's.[44]

In light of the relationship between these articles, particularly articles 116 and 56, the limitations on high-seas fishing rights may go beyond simply requiring that the distant-water states and coastal state seek agreement on conservation measures (as required by article 63(2)). Merely seeking agreement will not preserve the coastal state's sovereign rights over the living resources in its EEZ if these resources are dependent on what happens in the waters of adjacent high seas.

Reading articles 116 and 56 together, wherever there is a reasonable basis for projecting a relation between EEZ and high-seas resources, there is a basis for unilateral action if negotiations on an international approach fail. Even if the precise relationship between fisheries cannot be documented conclusively, the coastal state should have authority to

42. The United States is a party to the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, but none of the other states fishing in the donut are parties to this agreement. MULTILATERAL TREATIES, *supra* note 40, at 726. Furthermore, this agreement is now considered to be out of date and displaced, in part, by contemporary customary law to the effect that coastal states enjoy sovereign rights over fisheries in the EEZ and have rights over certain other species beyond the EEZ. The 1958 agreement was concluded when exclusive fishing zones (beyond territorial seas) generally were not recognized and coastal states had only limited rights to certain sedentary fisheries in adjacent waters. Neither of these conditions prevails today and, therefore, the 1958 Convention is outmoded in its provision for limited unilateral action adjacent to the territorial sea.

Although general acceptance of the EEZ concept means that achieving management rights beyond the territorial sea is no longer the critical problem for fishery conservation, the basic policy sought by the 1958 Convention is not obsolete. That Convention sought to recognize and make provision in articles 6 and 7 for unilateral action by a coastal state concerning species that were beyond its jurisdiction but considered of special interest to the coastal state by reason of their adjacent location. The most significant element of the 1958 Convention in this regard was the requirement for negotiations with fishing states which, if unsuccessful, could be followed by unilateral application of coastal state measures subject to an international dispute settlement procedure following criteria specified in the Convention. As noted below, *infra* note 54, this approach is similar to one widely supported, but not adopted (perhaps for political reasons mostly unrelated to its merits), by the Third U.N. Conference on the Law of the Sea.

43. *See supra* text accompanying note 21; *see also* 1982 Convention, *supra* note 2, arts. 116-120.

44. 1982 Convention, *supra* note 2, art. 56(1).

extend its management regime to the high seas if it can reasonably project that it will improve conservation of EEZ stocks. To make such a projection, coastal states must have sufficient knowledge to project the effects of regulatory measures. If this cannot be done, or if no relationship can reasonably be determined from the best scientific evidence available, then the coastal state has no authority to take unilateral action.[45]

In sum, the legal argument for unilateral extension of conservation measures is that high-seas fishing rights under customary law, as reflected in the 1982 Convention, are subject to coastal states' rights as provided in articles 56, 87, and 116. Because coastal states' sovereign rights over living resources within their EEZ's may be frustrated or extinguished by unrestrained fishing in the adjacent high seas, high-seas rights must be subordinated to those of the coastal states to the extent a coastal nation finds that conservation measures are necessary.

It is obvious that the availability and quality of scientific evidence supporting the need for conservation will be a critical element. Under the 1982 Convention, the need for conservation measures must be shown by the best available scientific evidence.[46] What if available scientific evidence is not adequate to document with certainty a relationship between the stocks, but there are strong grounds for believing that such a relationship exists and that the currently intense fishing in the donut will affect the EEZ in the imminent future? Does this scenario also justify unilateral measures by coastal states? Although a lack of certainty dilutes the basis for unilateral action, where the evidence consists of substantial and uncontradicted (even if inconclusive) scientific evidence, the action maintains credibility. The coastal state's position will be strengthened and justified further if that state is actively participating in researching the relationship of the stocks.[47]

4. *Legislative History of the 1982 Convention*

There were attempts during the Third United Nations Conference on the Law of the Sea (UNCLOS III), in 1982, to amend article 63(2) to give explicit authority to coastal states to extend their conservation measures to the adjacent high seas. Despite proponents' claims of wide support, none of these efforts succeeded. From the records of the Conference, one may surmise that the basic reason for the amendment's failure was the opposition of the Soviet Union and Japan, along with the peculiar requirements of approving such a massive agreement.

Unfortunately, the failure of UNCLOS III to approve the amendment to article 63(2) is a major obstacle to the legal argument for unilat-

45. *Id.* art. 61(2).
46. *Id.*
47. *See supra* notes 29-33 and accompanying text.

eral extension of management measures to adjacent high seas. It is clear that the representatives at the Conference recognized that existing language on straddling stocks was inadequate. UNCLOS III records include proposals and interventions by Argentina and Canada, both independently and in conjunction with a dozen other nations, calling attention to the straddling stock problem in terms reflecting an interpretation of article 63(2) that coastal states have no management authority beyond 200 miles, even over straddling stocks.[48] The Conference records also make it appear that there was broad, but unrealized, agreement to allow coastal states to extend management measures to the adjacent high seas.[49]

The original Argentine proposal, made in 1980,[50] called for the distant-water fishing states and the coastal states to seek agreement on conservation measures for high-seas fisheries, but provided for application of coastal state measures in the event the nations failed to agree. However, this was to be accomplished not by direct unilateral action, but by indirect means. In the event negotiations failed, the Argentineans proposed that the matter be referred to a dispute settlement tribunal under article 286.[51] That tribunal would be authorized to determine what conservation measures to apply, but only insofar as the measures were compatible with regulations applied to the same stocks by the coastal state in its EEZ. Pending determinations on provisional or definitive measures, distant-water fishing nations would follow whatever rules the coastal state already applied within its EEZ.

This proposal was replaced later in 1980 by one supported by fifteen nations,[52] and in 1982 by one supported by eight nations.[53] The 1980 proposal suggested that a dispute settlement tribunal would determine what conservation measures should be taken, taking into account both the coastal state's management practices for the stocks in its EEZ and the interests of other states fishing these stocks outside the EEZ. The 1982 proposal, the last position advocated before the end of the UNCLOS III

48. U.N. Doc. A/CONF.62/WS/4 (1980), *reprinted in* 13 UNCLOS(III)OR at 103, 105, U.N. Sales No. E.81.V.5; U.N. Doc. A/CONF.62/WS/14 (1980), *reprinted in* 14 UNCLOS(III) at 154, U.N. Sales No. E.82.V.2.

49. This is based upon the discussions during the last days of the conference in the 159th to 166th meetings, held March 30 through April 1, 1982, to consider amendments to the draft Convention. U.N. Doc. A/CONF.62/L.114 (1982), *reprinted in* 16 UNCLOS(III)OR (159th-166th plen. mtgs.) at 16-85, U.N. Sales No. E.84.V.2.

50. *See* 5 R. PLATZODER, THIRD UNITED NATIONS LAW OF THE SEA CONFERENCE: DOCUMENTS 59 (1984).

51. *Id.*

52. *Id.* at 60.

53. U.N. Doc. A/CONF.62/L.114 (1982), *reprinted in* 16 UNCLOS(III)OR (159th-166th plen. mtgs.) at 224, U.N. Sales No. E.84.V.2.

deliberations, would have given a tribunal the authority to decide whether and how to incorporate coastal state measures, while mandating consideration of fishing state interests.[54]

There was some opposition to the proposed amendments.[55] Near the very end of UNCLOS III, the proposals on article 63(2) were among the few that were still being pressed—an effort that finally gave way to the overwhelming pressure to avoid voting on particular amendments out of fear that such a path would have led to the collapse of the entire agreement.[56]

The failure of UNCLOS III to amend article 63(2), coupled with the position of some states that the authority to regulate straddling stocks under the 1982 Convention is at best uncertain, remains a possible obstacle to unilateral extension of management measures. Nevertheless, based on the legal arguments made above,[57] if negotiations for an agreement pursuant to article 63(2) fail, articles 116 and 56 still provide authority for coastal states to restrict high-seas fishing where they can show the relationship between the stocks inside and outside the EEZ and that conservation measures on the high seas are necessary for conservation of the fishery within the EEZ.

5. *The Current Political Context for Unilateral Action*

Some coastal states may welcome suitably restricted action to control fishing in adjacent high seas. Argentina, Canada, and Chile may stand to lose the most from unregulated harvesting of straddling stocks and, therefore, may be receptive to a unilateral move by the United

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54. The proposal to amend article 63(2), the Convention provision on straddling stocks, read as follows:

> Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall, by mutual agreement, either directly or through appropriate subregional or regional organizations, adopt such measures as may be necessary for the conservation of these stocks in the adjacent area. In the event that agreement on such measures is not reached within a reasonable period, and proceedings are instituted before the appropriate tribunal pursuant to article 286, that tribunal shall determine the measures to be applied in the adjacent area for the conservation of these stocks. If definitive measures cannot be determined within a reasonable period, the tribunal, upon request of any of the interested States, shall determine provisional measures for that same area. In establishing definitive or provisional measures, the tribunal shall take into account those measures applied to the same stocks by the coastal State within its exclusive economic zone and the interests of other States fishing these stocks.

Id. Though widely supported, the proposal was not adopted by the Third U.N. Conference on the Law of the Sea. *See* U.N. Doc. A/CONF.62/SR.168-176 (1982), *reprinted in* 16 UNCLOS(III)OR (168th-176th plen. mtgs.) at 87-134, U.N. Sales No. E.84.V.2.

55. U.N. Doc. A/CONF.62/SR.168-176 (1982), *reprinted in* 16 UNCLOS(III)OR (168th-176th plen. mtgs.) at 90-125, U.N. Sales No. E.84.V.2.

56. *See id., reprinted in* 16 UNCLOS(III)OR, at 132 (176th plen. mtg.).

57. *See supra* text accompanying notes 35-45.

States in the Bering Sea donut.[58] Action by the United States might encourage these nations to act similarly.

It is also obvious, however, that because Japan and the Soviet Union (the major opponents of amendments to article 63(2) in UNCLOS III) are continuing to exploit straddling stocks around the globe, they can be expected to oppose unilateral measures. Whether the Soviets would oppose all such actions is unknown, but given their extensive distant-water fishery interests, they can be expected to join Japan in opposing these measures.

In assessing international perspectives on this problem, it should also be recalled that Canada's efforts to strengthen article 63(2) during UNCLOS III were accompanied by statements that no one was proposing to extend coastal state fishery authority beyond 200 miles.[59] This position, however, did not reflect the actual content of some proposals dealing with straddling stocks.

6. *The Lack of Enforcement Authority*

In addition to the obstacles presented by both the legislative history of the 1982 Convention and the conflicting political interests, one further obstacle to any unilateral regulation of adjacent high-seas fisheries must be noted: There is no basis in any source of law that would permit unilateral enforcement of exclusively prescribed management measures beyond an EEZ. If such measures were adopted by the United States, the only permissible means of enforcing them would be by virtue of agreement with the fishing states harvesting straddling stocks.

This assessment of enforcement authority is based on article 66 of the 1982 Convention, which authorizes coastal states to regulate beyond 200 miles for the coastal state's salmon fishery, but expressly requires the agreement of high-seas fishing states to any enforcement provisions.[60] Since high-seas fishing for salmon, an anadromous species, requires the advance agreement of the state where the fish spawn, it is likely that coastal states will extract the fishing nation's consent to enforcement as a condition of their approval of salmon fishing on the high seas. In light of the limited enforcement authority granted for salmon regulations, it seems unlikely that other provisions of the 1982 Convention would be interpreted to provide any broader unilateral authority.

7. *Some Concluding Thoughts on Unilateral Measures*

The proponents of unilateral regulation of adjacent high-seas fisher-

58. *See supra* note 28.

59. U.N. Doc. A/CONF.62/SR.168-176 (1982), *reprinted in* 16 UNCLOS(III)OR (172d plen. mtg.) at 115, U.N. Sales No. E.84.V.2.

60. *See* 1982 Convention, *supra* note 2, art. 66.

ies argue that if there is no relief under article 63(2)'s command to seek international agreement, articles 116 and 56 provide a basis for unilateral solutions in their directive that high-seas fishing rights are to be enjoyed "subject to" coastal state sovereign rights over living resources. The opponents argue that regardless of article 56, the purpose of article 63(2) is to require international agreement before conservation measures can be prescribed for the high seas, even where the fishing involves a stock common to both areas. In this view, the cross reference to article 63 contained in article 116's declaration of the right of free access to high-seas fisheries is a reaffirmation that any conservation measures must be imposed by mutual agreement.

There is no clear answer to this dilemma. Article 116 was lifted almost verbatim from the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.[61] While there was little textual change in the wording of the article, its context certainly changed. Under article 56, coastal states now have sovereign rights that may constrain free access to high-seas fisheries, whereas the 1958 Convention dealt primarily with high-seas *rights*.

Because neither the terms of the 1982 Convention nor its legislative history provide any specific guidance for interpreting article 116, not an unusual occurrence, it is appropriate to examine the article in the context of the 1982 Convention's overall purposes and policies for fisheries management. This approach supports an interpretation of articles 116 and 56 as giving coastal states a right to prescribe conservation measures when international agreement cannot be obtained by good faith negotiations under article 63, and imposing a duty on fishing states to abide by these measures. The basic policy of the 1982 Convention is that effective conservation and management of coastal species require recognition of a single management unit[62] and that coastal states, as single management

61. Article 1 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas provides as follows:

> All States have the right for their nationals to engage in fishing on the high seas subject (a) to their treaty obligations, (b) to the interests and rights of coastal States as provided for in this Convention, and (c) to the provisions contained in the following articles concerning conservation of the living resources of the high seas.

Convention on Fishing and Conservation of the Living Resources of the High Seas, April 29, 1958, 17 U.S.T. 138, 139, T.I.A.S. No. 5969, at 1, 559 U.N.T.S. 285, 286. The changes made in the 1982 Convention were to add "duties" in paragraph (b) and to state "provided for, inter alia, in article 63, paragraph 2, and articles 64 to 67." Paragraph (c) now refers to "the provisions of this section".

62. This is the major assumption underlying the notion of an extended zone of national jurisdiction for fisheries. If the entire stock as a unit of management does not fall within a single jurisdiction, the holder of that jurisdiction cannot accomplish management objectives, unless the requisite measures are extended to the stock as a whole. It is commonly estimated that 95% of the current marine catch occurs within 200 miles, and in that sense a 200-mile EEZ can be effective, discounting lateral movement into other zones. Given the existing territorial organization of political authority, therefore, the EEZ satisfies this basic policy need.

units, should be employed whenever feasible.[63] Thus, in construing article 116's reference to straddling stocks, it is appropriate (in the absence of any plain meaning from its terms) to recognize a priority for coastal states' rights, duties, and interests in conservation. An interpretation refusing such recognition is tantamount to a denial of those rights and interests, would deprive articles 116 and 56 of significant content, and would defeat any efforts for conservation in the area concerned.

C. *Policy Implications for the United States*

Although the legal argument for extension of coastal state authority does not appear to depart from customary international law, and avoids any claim to an extended EEZ, whether it would be agreeable to U.S. officials is questionable. The argument may be unacceptable because of the fear that even well justified and carefully crafted extensions of specifically limited national resource authority by the United States will be used by other nations as a legal basis for more expansive claims to jurisdiction.

It should be emphasized, however, that the United States has not been reluctant to extend its exclusive jurisdiction for resource purposes.[64] Since fisheries are a resource, this might make the argument for unilateral extension of regulatory controls more palatable. Furthermore, the suggestion is not that the EEZ limit be extended, but only that limited controls be established for specific activities that are reasonably believed to have direct impacts on U.S. interests within the EEZ. Requiring a good faith effort to reach agreement on conservation as a precondition for unilateral measures, and giving the coastal nation the burden of establishing that prudent management calls for conservation measures, further strengthens the case for such a course of action.

One other element that bears on the domestic acceptability of unilateral action is including a method for dispute settlement. Under the 1982 Convention, a dispute in a situation such as this is subject to compulsory binding dispute settlement procedures, at least insofar as the high-seas

63. The only exceptions cited in the 1982 Convention to outright coastal state control of marine fisheries concern straddling stocks (article 63), anadromous stocks (article 66), catadromous stocks (fish that return to spawn in the sea) (article 67), and highly migratory species (including marine mammals) (article 64), to the extent these species move beyond the EEZ. *See* 1982 Convention, *supra* note 2, arts. 63-67. In the case of anadromous stocks, the authority of the state of origin extends to the high seas beyond the EEZ. *See id.* art. 66.

64. This discussion would not be complete without recalling the 1945 Truman Proclamation on the continental shelf, which is commonly regarded as the main precursor to the trend toward extension of jurisdiction beyond national territory. *See* Exec. Order No. 9633, 3 C.F.R. 437 (1943-1948 Compilation). The United States also adopted the Fishery Conservation and Management Act of 1976, establishing a 200-mile exclusive fishery zone. Magnuson Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, tit. IV, § 406, 90 Stat. 361 (codified as amended at 16 U.S.C.A. §§ 1801-1882 (1988)). This was done while the Third U.N. Conference on the Law of the Sea was underway and the very same issue was being negotiated.

states do not wish to comply with conservation measures. Only if resources are wholly within an EEZ can the dispute settlement provisions be avoided.[65] Adding a dispute resolution system to a unilateral conservation regime could minimize any serious opposition from those concerned about creeping jurisdiction.

Are there alternatives to international agreement or unilateral extension of conservation measures? One possibility is that, instead of relying on interpretations of generally accepted treaty provisions, a coastal state might claim authority over straddling stocks themselves as an acknowledged further development of international law. This would involve an attempt to create a new customary law of the sea to deal with what is widely conceded to be a grievous gap in the 1982 Convention.[66]

For many of the same reasons, asserting jurisdiction over the resource itself in this fashion might not be popular with policymakers in the United States. There is, in all probability, a continuing sensitivity in the Executive Branch of the United States (particularly within the Department of Defense) to further "creep" in national jurisdiction around the globe. This is particularly so because the United States rejected the 1982 Convention, while still attempting to take advantage of most of its provisions. Although a further modest, and carefully circumscribed, extension of resource jurisdiction would not necessarily threaten military or naval interests, it might be perceived that way in Washington. Perhaps the best way to avoid that perception is through an international, third-party procedure for reviewing conservation measures to ensure that they are limited to resource concerns.

No matter what form a conservation regime for straddling stocks takes, the measures adopted must be supported by scientific evidence reasonably showing that there is a relationship between fishing on the high seas and fishing in the EEZ. If the current state of knowledge does not permit credible assertions of such a relationship, no unilateral measures should even be pursued. Nevertheless, it appears that the scientific evidence to show such a relation between pollack in the U.S. EEZ and the Bering Sea donut does not exist at the present time. Until this situation changes there will be no legal basis for unilateral extension of conservation measures.

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65. Article 297 of the 1982 Convention excepts from compulsory dispute settlement "any dispute relating to [a state's] sovereign rights with respect to the living resources in the exclusive economic zone or their exercise." 1982 Convention, *supra* note 2, art. 297(3)(a). While this provision arguably includes disputes about coastal state authority over stocks common to the high seas and to the EEZ, the rest of this sentence refers to coastal state "discretionary powers," which exist only for resources within the EEZ. *Id.*

66. *See supra* notes 48-49 and accompanying text.

III
PROPOSALS TO BAN FISHING IN THE BERING SEA

While the data supporting an extension of conservation measures into the Bering Sea are inadequate, the U.S. Senate has nevertheless taken a proactive approach to the concerns of the domestic fishing industry, which perceives a real threat to its interests. After a hearing on March 16, 1988, before the Senate Commerce Committee, three resolutions concerning the Bering Sea fisheries were proposed, one was adopted and two were referred to committees.[67]

Senate Resolution 396, recommending a unilateral moratorium on fishing in the Bering Sea donut, was introduced on March 18, 1988, and passed three days later after limited debate and with no amendments permitted.[68] This procedure bypassed the Senate Foreign Affairs Committee and short-circuited any possibility for normal deliberation.

The cursory discussion of S.R. 396 on the Senate floor prior to its adoption indicates that there was very limited information about the fisheries problem in the Bering Sea. Senator Stevens presented the Resolution in a statement that reflects (1) lack of knowledge of the size of the area involved, identifying it as 4,500 square miles when it is actually about 55,000;[69] (2) a gross exaggeration of the catch in the combined Bering Sea EEZ's of the United States and the Soviet Union (200 million tons—well over double the largest worldwide catch ever recorded);[70] and (3) erroneous claims that previous high-seas moratoria were accepted even in the absence of evidence that the fishery involved required such action.[71]

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67. The three resolutions were: S. Res. 396, 100th Cong., 2d Sess., 134 CONG. REC. S2621 (daily ed. Mar. 21, 1988); S. Res. 397, 100th Cong., 2d Sess., *id.* at S2619; S.J. Res. 277, 100th Cong., 2d Sess., *id.* at S2691. Senate Resolution 396, which passed, was co-sponsored by Senators Stevens, Hollings, Dole, Breaux, and Evans. *Id.* at S2618, S2621.

Senate Resolution 397, which did not pass, was introduced by Senator Murkowski of Alaska and sent to the Senate Foreign Relations Committee after its introduction on March 21, 1988. *Id.* at S2619, S2692. In essence, S.R. 397 recommended that the United States and the Soviet Union unilaterally take control of the fisheries in the donut areas of the Bering Sea. Senate Resolution 397 is inconsistent with international law for many of the same reasons identified in the discussion of Senate Resolution 396 below. *See infra* text accompanying notes 74-83.

The other resolution that did not pass, S.J. Res. 277, introduced by Senator Brock Adams, does not call for extended comment. It is the only one of the three resolutions crafted with respect for international law. It called for continued bilateral negotiations with the Soviet Union and the initiation of negotiations with other nations to establish an international management regime.

68. 134 CONG. REC. S2588, S2621 (daily ed. Mar. 21, 1988).

69. *Id.* at S2618; *see* ATLAS OF MARINE USE, *supra* note 1 (regarding the geographic extent of the donut).

70. 134 CONG. REC. S2618 (daily ed. Mar. 21, 1988).

71. *Id.* at S2588.

Even in the brief time that was allowed for comment on Senate Resolution 396, serious reservations were expressed about both its unilateral nature and its inconsistency with international law.[72] Perhaps some of the flaws in the Resolution stem from the preoccupation of its authors with the highly publicized issue of illegal fishing in the U.S. EEZ.[73] The greater political concern with illegal fishing may have obscured consideration of the legal aspects of straddling stocks. In any event, the haste displayed in adopting a highly questionable resolution suggests that it was intended more as a symbolic gesture rather than a serious recommendation. Certainly it has little claim to serious consideration for compliance with international law and even less for implementation by the Executive Branch.

Senate Resolution 396 requests the Secretary of State to conclude a bilateral agreement with the Soviet Union that would declare a moratorium on fishing within the donut area of the Bering Sea and set forth enforcement measures against states that do not comply with the moratorium. Only after the moratorium is established is the Secretary directed to begin negotiations for an international fisheries management agreement.

Senate Resolution 396 would create several major problems if implemented. The proposed unilateral decision by the United States and the Soviet Union that fishing in the high seas portion of the Bering Sea must cease until such time as they agree on an international management regime "with a majority of interested nations"[74] is inconsistent with international law[75] and would weaken the United States' credibility in future law of the sea negotiations.

Second, and of more immediate significance, a unilaterally declared moratorium could create serious conflicts around the globe. The potential precedent of these actions unaccompanied by scientific evidence of the need for conservation could lead to reciprocal actions by other nations concerning various marine issues of interest to them. Any ensuing

72. *Id.* at S2621 (statements of Sens. Adams and Mitchell); *id.* at S2617 (statement of Sen. Pell).

73. At the hearing on Fishery Management and Enforcement in the Bering Sea, held on March 16, 1988, five days before the consideration of the resolutions on the Senate floor, the Senate Commerce Committee was shown films made by representatives of the Alaska Factory Trawlers Association who had flown over the central Bering Sea, south of the donut and recorded illegal fishing by several Japanese vessels and others of undetermined nationality. The circumstances and details of this activity are set out in the hearing transcript. *Fishery Management and Enforcement in the Bering Sea: Hearing Before the National Ocean Policy Study of the Senate Comm. on Commerce, Science, and Transportation,* 100th Cong., 2d Sess. 48-49 (1988) [hereinafter *Fishery Management and Enforcement Hearing*] (presentations of Edward D. Evans, Executive Director, Alaska Factory Trawler Association, and Sam Hjelle, Glacier Fish Co.); *see also id.* at 2, 59 (statements of Sen. Adams).

74. S. Res. 396, 100th Cong., 2d Sess., 134 CONG. REC. S2621 (daily ed. Mar. 21, 1988).

75. *See supra* notes 35-57 and accompanying text.

threat of interference with the interests of the major maritime states could create serious confrontations. The spread of unilateral claims would seriously disrupt the stable expectations that are a major objective of nations in adhering to the 1982 Convention.

While contemporary principles of international law justify some unilateral action,[76] such an action would have to be preceded by international negotiations seeking agreement on conservation measures for the stocks in the donut area. In addition, any unilateral measures would have to depend upon a showing by the coastal state, based on the best scientific evidence available, that there are common stocks in the donut and the EEZ—evidence that American scientists do not have.

Another major problem with Senate Resolution 396 is that it would allocate the fisheries resource to domestic harvest and not necessarily conserve them. This would occur because the moratorium would remain in effect until comprehensive agreement is reached on a new management regime. Given the number of nations involved (at least seven),[77] and that two of these nations (the United States and the Soviet Union, as the coastal States) would benefit directly from a stalemate, the outcome is not difficult to predict.

A moratorium would benefit fishing interests in the coastal state in two ways: first, by eliminating its competitors' supply and, second, by lowering its harvesting costs to the extent that the EEZ fishery is bolstered by the reduction of fishing pressure in adjacent waters. Testimony before the Senate Commerce Committee by U.S. fishing industry representatives made it abundantly clear that one of their major concerns with the Bering Sea fishery was that the increased supply substantially reduced prices for Alaska pollack.[78] Because U.S. vessels, gear, and equipment in the Bering Sea ground fishery represent a substantial investment, both the catch per unit effort and the income from the total catch are of intense concern.[79]

Another failing of Senate Resolution 396 is that it advises a complete cessation of high-seas fishing in the absence of any information that this is necessary. One of the co-sponsors, Senator Evans, acknowledged the need for better information about the status of stocks, the actual impact of fishing in the donut area on EEZ stocks, and the origin of donut stocks.[80] Despite admitting a need for answers to such important questions, he still concluded, without reference to the potentially massive eco-

76. *See supra* notes 35-46 and accompanying text.

77. The major fishing nations in the Bering Sea are Canada, Japan, North Korea, the People's Republic of China, South Korea, the Soviet Union, and the United States. *See* ATLAS OF MARINE USE, *supra* note 1, at 7.

78. *Fishery Management and Enforcement Hearing, supra* note 73, at 50 (statement of Edward D. Evans, Executive Director, Alaska Factory Trawler Association).

79. *Id.*

80. *Id.* at 9 (statement of Sen. Evans).

nomic dislocation that would be felt by legitimate foreign fishing operations, that a "balanced approach" would include a moratorium as a "short-term answer" because it would "protect" the resource.[81] While prudence might suggest a temporary limit on any increase in the level of fishing in the donut,[82] there is no basis for a complete cessation of fishing.

A final observation is that Senate Resolution 396 does not indicate how the proposed moratorium would be enforced, requiring only that measures taken against noncomplying nations be negotiated with the Soviet Union. In the absence of an agreement with the fishing states, there is no basis in current international law for taking enforcement actions against high-seas fishing.[83] That the Resolution does not anticipate such an agreement only reinforces the view that its only purpose is to play to domestic audiences.

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81. 134 CONG. REC. S2619 (daily ed. Mar. 21, 1988) (statement of Sen. Evans).

82. The Japanese may already be willing to abide by a restriction on further increases in the Bering Sea catch, even without new negotiations on the donut fishery. In its statement at the Senate Commerce Committee hearing on March 16, 1988, the Fisheries Agency of Japan argued that there was no emergency involving the Bering Sea pollack resource, that the Japanese fishing effort was subject to Japanese domestic regulation, and "[a]ccordingly, we do not expect the harvests of Japanese vessels to increase significantly in this area above the catch level reached in 1986 [700,000 m.t.]." *Fishery Management and Enforcement Hearing, supra* note 73, at 96-97 (prepared statement of the Fisheries Agency of Japan).

83. *See supra* note 60 and accompanying text.