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United States Law and Policy Regarding High Seas Driftnets In the North Pacific Ocean

The U.S. has been concerned about foreign fishing on the high seas of the North Pacific Ocean for several decades. Recently this concern has focused on high seas driftnet fleets. High seas driftnets are an effective but nonselective fishing method. Evidence of the driftnet fleets' incidental catch of North American salmon and steelhead has led U.S. fishermen to seek restrictions on driftnet fleets. Driftnets also kill a large number of marine mammals and sea birds, leading environmentalists to request stricter regulations or a ban on driftnet fishing.

Section I of this memo examines the development of high seas driftnet fishing in the North Pacific. Section II traces the evolution of U.S. policy affecting Japan's high seas salmon driftnet fleets as reflected in the International Convention on High Seas Fisheries of the North Pacific Ocean. Section III explores the impact that domestic U.S. marine resource laws have had on driftnet fishing. Finally, Section IV briefly discusses the Tarawa Declaration and a United Nations Resolution placing a

moratorium on high seas driftnets. The conclusion examines the possible impacts of a high seas driftnet moratorium on U.S. commercial fishing interests.

I. High Seas Driftnet Fisheries in the North Pacific Ocean

Consumer demands for fish and fish products increased dramatically over the last few decades. Prior to World War II, long-range fishing was rather limited by a lack of technology and was generally unnecessary because of an abundance of fish relatively near shore. After the war, improved technology allowed construction of large, efficient, long-range fishing vessels.

As traditional nearshore fish stocks were depleted and more coastal states claimed 200-mile Exclusive Economic Zones (EEZ), these vessels began to search for new fishing grounds and harvest new species of fish. For distant water fishing nations such as Japan, the Republic of Korea, and Taiwan, salmon

stocks in the North Pacific Ocean were an attractive prospect. The Final Environmental Impact Statement and Economic Impact Analysis on the Incidental Take of Dall's Porpoise in the Japanese Salmon Fishery, U.S. Department of Commerce (May 1987), provides a concise summary of the size of the various nations' driftnet fleets, the mesh size and length of their driftnets, and international agreements regulating driftnet fleets on the high seas. Robert Eisenbud's article, *Problems and Prospects for the Pelagic Driftnet*, 12 B.C. Env't'l L. Rev. 473 (1985), is also very helpful in understanding the development of the driftnet problem and possible regulatory solutions to the problem.

A. Development of driftnets as high seas commercial fishing gear

High seas driftnets are an adaptation of traditional gillnets. Gillnets have a long history of use in nearshore waters where nations can effectively regulate their mesh size, length, and fishing seasons and areas. Regulated nearshore gillnets are



an effective commercial fishing method still used extensively in the U.S. EEZ.

The situation changes when large-scale monofilament driftnets up to thirty miles long are used on the high seas beyond the regulatory reach of affected coastal nations. High seas driftnets are a form of gillnet consisting of panels of plastic webbing suspended vertically in the water by floats at the top and weights at the bottom. They are not biodegradable, are virtually invisible to fish and marine mammals, and are practically unbreakable.

High seas driftnets in the North Pacific are designed to catch specific species such as salmon, squid, marlin, or sailfish. There are also driftnets in the South Pacific designed to catch albacore tuna. Still, driftnets have a high non-catch mortality of the targeted species. After being caught in the net and dying, a significant number of fish fall out of the net before or during retrieval. Regarding the Japanese mothership salmon fleet, estimates indicate that one immature salmon dies and drops out of the driftnet for every one that is harvested. For adult salmon, one dies and is lost for every three that are harvested. A conservative estimate places the 1983 non-catch mortality of salmon from the Japanese mothership fleet at three million fish.

In addition, driftnets substantially impact whales, other marine mammals, and seabirds. The Japanese mothership salmon fleet kills up to 5,500 Dall's porpoise and between 250,000 and 750,000 seabirds each year. The mothership salmon fleet only accounts for about 10 percent of the total number of high seas

driftnet vessels fishing in the North Pacific. Limited data on the incidental catch by the squid driftnet fleet indicate that there is an average of one marine mammal death for every 27.3 kilometers of driftnet deployed. While limited observer data from the squid fleets make projections suspect, it seems that driftnets have the potential to seriously affect marine mammal and sea bird populations.

B. Development of high seas driftnet fleets

The Japanese have the only high seas driftnet fleets targeted on salmon. In 1952, Japan's mothership salmon driftnet fleet started fishing in the Bering Sea with three motherships and fifty-seven catcher boats. This type of fishing involves catcher boats harvesting the fish and transferring them daily to the mothership for processing and storage. The fleet peaked at sixteen motherships and 460 catcher boats in 1959. From 1978 until 1988, the fleet had four motherships and 172 catcher boats. In 1988, the mothership fleet was denied a marine mammal permit necessary to fish within the U.S. EEZ.

There is also a Japanese land-based driftnet fleet of 250 vessels which fishes the high seas but delivers their catch to ports. Each salmon driftnet vessel sets a net nine miles long each night for a total of approximately 3,429 miles of net being fished each night of the season.

In 1978, Japan initiated a high seas squid driftnet fleet which had grown to 463 vessels by 1988. These vessels deploy twenty-mile-long driftnets. Another Japanese driftnet fleet of roughly 400 vessels uses large

mesh driftnets in the North and South Pacific to harvest marlin and other large pelagic species.

Taiwan and the Republic of Korea also developed high seas driftnet fleets at a rate that far outpaced the arrangements necessary to effectively regulate them. The Taiwanese high seas squid driftnet fleet contained 87 vessels in 1987 and increased to 163 squid and some tuna driftnet vessels in 1988. Taiwanese squid vessels utilize driftnets from 7.1 to 9.5 nautical miles long, while tuna vessels utilize driftnets from 14 to 19 miles long. The Taiwanese also have a high seas driftnet fleet targeted on sailfish and marlin. Details on the number of vessels engaged in that fishery are not available. The Republic of Korea's high seas squid driftnet fleet had 147 vessels in 1988. These vessels each set a seventeen-mile-long driftnet each night.

C. The "ghost net" problem

The exact number of vessels engaged in high seas driftnet fishing and the length of their nets are unclear. However, it is estimated that at least 20,500 miles of driftnets were set nightly during the 1983 and 1984 fishing seasons. For the salmon driftnet fishery, it is estimated that 0.06 percent of the driftnet is lost each time the net is set. This may appear to be insignificant but when extrapolated out to cover the total length of driftnets set in the North Pacific, at least twelve miles of net are lost each night. Thus 639 miles of driftnet may be left to ghost fish in the North Pacific each year. In addition, U.S. personnel have documented instances of vessels abandoning entire driftnets when caught fishing illegally in restricted waters.

Whether lost or intentionally discarded, these driftnets continue to ghost fish the North Pacific. Ninety-nine dead seabirds and over 200 dead salmon were found in a portion of an abandoned salmon driftnet. Further, an estimated 50,000 northern fur seals from Alaska's Pribilof Islands die annually from entanglement in lost or abandoned nets, including driftnets and other plastic debris. Death by entanglement is the principal suspected cause of the continued decline of the northern fur seal population. Unless this decline is reversed, the population will be reduced by half within the next decade.

Lost and abandoned synthetic fishing nets are an international problem. Nevertheless, the international community has been slow in enacting regulations to address the problem. In 1987, however, the U.S. Senate ratified Annex V to the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships. Marine Plastic Pollution Research and Control Act of 1987, 33 U.S.C.A. § 1901 note §§ 2101-2108 (1989), Pub. L. No. 100-220 Title II, 101 Stat. 1460-1464 (1987). Annex V specifically deals with abandoned driftnets by prohibiting the intentional disposal of synthetic fishing nets at sea. A detailed discussion of the ghost net problem and prospects for regulation of lost or abandoned fishing nets is found in Comment, *The Ghosts of Fishing Nets Past: A Proposal For Regulating Derelict Synthetic Fishing Nets*, 63 Wash. L. Rev. 677 (1988).

II. Trilateral Regulation of Japan's High Seas Salmon Driftnet Fleets Under the International Convention for the High

Seas Fisheries of the North Pacific Ocean

The possibility of Japanese driftnet vessels fishing for salmon of North American origin in the North Pacific exacerbated relations between the U.S. and Japan prior to World War II. After the war, in 1953, the U.S., Canada, and Japan entered into the International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 4 U.S.T. 380, T.I.A.S. No. 2786 [hereinafter North Pacific Convention]. This Convention implemented the abstention principle advocated by the U.S. To understand the North Pacific Convention's regulatory scheme, it is necessary to examine the U.S. policy towards anadromous fish as advanced in the abstention principle. The North Pacific Convention provides a framework to regulate Japan's salmon driftnet fleets both within the U.S. EEZ and on the high seas of the North Pacific. Sathre's article, *Salmon Interception on the High Seas: A Continuing Controversy Between the United States and Japan*, 16 *Env't'l L.* 731 (1986), provides a detailed discussion of the evolution of the North Pacific Convention's salmon management provisions.

A. Rationale for the U.S. policy regarding salmon stocks of U.S. origin

The U.S. is both a principal nation of origin and salmon fishing nation. As a nation of origin, the U.S. has asserted exclusive or, at a minimum, preferential rights to its anadromous fisheries. These rights are based on equity and economic rationality. Salmon are harvested with greatest economic efficiency when they assemble in schools at the mouths of rivers before spawning.

Salmon are in peak condition and weight at this time.

Effective salmon management requires coastal nation fishing regulations to ensure that a sufficient number of salmon from specific stocks are allowed to spawn. Correspondingly, nations of origin have the primary responsibility for protection and enhancement of both salmon stocks and spawning streams. Nations of origin are financially responsible for habitat improvement and hatcheries to support and complement native salmon stocks. Finally, nations of origin must choose whether to utilize a river for salmon rearing or for other, frequently incompatible, uses--such as hydroelectric power, irrigation, flood control, and navigation. Thus, "[i]n view of both costs incurred and the benefits forgone, the [nation] of origin may also advance the argument of equity in claiming exclusive rights to anadromous fish spawned in its rivers." Copes, *The Law of the Sea and Management of Anadromous Fish Stocks*, 4 *Ocean Dev. & Int'l Law* 233, at 244 (1977). However, the effectiveness of such unilateral claims is limited without international recognition and compliance.

B. Implementation of the abstention principle in the 1953 Convention

The U.S. first asserted a form of the abstention principle in response to a Japanese high seas crab fishery initiated in 1930 in the Bering Sea. This fishery sparked an outcry from the commercial fishing industry in the Pacific Northwest. The controversy subsided during World War II as Japanese fishing vessels returned to their home waters.

Nevertheless, on September 28, 1945, President Truman responded to the possibility of a resumption of Japanese high seas salmon fishing by issuing a presidential proclamation, "Policy of the United States With Respect to Coastal Fisheries in Certain Areas of the High Seas." The proclamation enunciated the U.S. policy of asserting control over fisheries it developed or maintained and of establishing, through treaties and other international agreements, conservation zones in parts of the high seas contiguous to the U.S. in which fishing would be subject to U.S. regulation.

Japanese acquiescence to the abstention principle for salmon was expedited when the U.S. took an active role in directing Japan's fishery policies at the end of World War II. While the Far Eastern Commission's (FEC) Subcommittee on Fishing was intended to have a major role in Japan's fishing policy, the Supreme Commander of the Allies in the Pacific's Headquarters usually acted unilaterally and according to his own best judgment in determining that policy. In that light, the FEC accepted a U.S. proposal, which was included in Article 9 of the Peace Treaty, that Japanese fishing not be permitted within 50 miles of land and should conform to "provisions of . . . international agreements relating to conservation of fisheries; [and] [r]ecognized conservation practices, including abstinence from pelagic sealing or interference with conservation measures instituted by littoral states." U.S.-Japan Peace Treaty, Sept. 8, 1951, 3 U.S.T. 3169, 3177, T.I.A.S. No. 2490, 136 U.N.T.S. 45.

Japan met this obligation by entering into negotiations with the U.S. and Canada toward a North Pacific Fisheries Convention. Negotiations culminated in all parties ratifying the International Convention for the High Seas Fisheries of the North Pacific Ocean by 1953. The North Pacific Convention's purposes are to promote and coordinate scientific studies pertaining to fishery resources of the North Pacific and "ensure the maximum sustained productivity of the fisheries of the fishery resources of the North Pacific Ocean."

The North Pacific Convention incorporated the abstention principle of fishery management to satisfy U.S. policy objectives. Under this principle, implied by the Truman Proclamation, "a nation ought to abstain from newly entering a fishery if the stock of fish concerned is already fished and is regulated and conserved by another nation or nations." This approach resulted in an "abstention line" being established at 175 degrees west longitude. Japan agreed to abstain from fishing for salmon east of this line. Thus, the North Pacific Convention allowed the Japanese high seas fleets to renew their operations in certain areas of the North Pacific.

The North Pacific Convention created the International North Pacific Fisheries Commission to conduct and coordinate scientific studies into the life histories and migratory ranges of Pacific salmon. The Commission's subsequent research indicated that North American and Asian salmon stocks intermingled with U.S.-origin salmon migrating west and Asian salmon stocks migrating east of the abstention line. The Commission's research, therefore, found that the absten-

tion line at 175 degrees west longitude was ineffective in regulating the harvest of salmon.

C. *Rejection of the abstention principle and the Convention's 1978 Protocol*

Controversies soon arose about the location of the line. Canada, the U.S., and Japan were unable to agree to a new line. Further, the U.S. was having difficulty in finding international support for voluntary abstention as a basis for international fisheries policy. Although the abstention principle was rejected as a basis for fisheries policy at the 1958 Geneva Conference on the Law of the Sea, the North Pacific Convention's parties adhered to it until 1978.

The Magnuson Fishery Conservation and Management Act (MFCMA), 16 U.S.C. §§ 1801 *et seq.*, declared a U.S. Fishery Conservation Zone (now known as the Exclusive Economic Zone or EEZ) extending 200 miles from the territorial sea's baseline and asserted exclusive fishery management authority over U.S.-origin salmon on the high seas, thereby rendering the North Pacific Convention obsolete. The MFCMA also required the secretaries of State and Commerce to renegotiate any treaty related to fishing within the U.S. EEZ and to anadromous species of U.S. origin beyond the U.S. EEZ. On February 10, 1977, the U.S. gave its notice of intent to terminate the North Pacific Convention unless it was renegotiated. Consequently, the North Pacific Convention was amended by Japan, Canada, and the U.S. ratifying a protocol in 1978. Protocol Amending the International Convention for the High Seas Fisheries of the North Pacific Ocean, April 25, 1978, 30

U.S.T. 1095, T.I.A.S. No. 9242 [hereinafter Protocol].

The major provisions of the Protocol shifted the abstention line from 175 degrees west longitude to 175 degrees east longitude (except for an area in the North Bering Sea beyond the U.S. EEZ) and granted Japan's mothership salmon driftnet fleet permission to fish in the U.S. EEZ. Additionally, the Protocol expanded high seas enforcement provisions for parties to the North Pacific Convention. In conjunction with the right to fish within the U.S. EEZ, Japan and the U.S. signed a Memorandum of Understanding enumerating elements of a joint research effort relating to the driftnets' incidental take of marine mammals, specifically Dall's porpoise. The research program would address methods to reduce or eliminate the incidental take of Dall's porpoise in the Japanese mothership gillnet salmon fishery.

1. The Marine Mammal Protection Act's impact on the North Pacific Convention's 1978 Protocol

The adverse impact of driftnets on marine mammals within the U.S. EEZ brought the mothership driftnet fleet into conflict with the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361 *et. seq.* The MMPA prohibits commercial fishing within the U.S. EEZ which results in the incidental "take" of marine mammals without a permit from the Secretary of Commerce. In *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 783 (1989), in reviewing the issuance of a permit to the motherships, the Court of Appeals stated that "the MMPA provides a scheme

to determine the *number* and *kind* of marine mammals which can be taken incidental to commercial fishing operations. Under this scheme, the Secretary is obligated to determine that the permit applicant has carried its burden of proving that the taking sought does not disadvantage the species involved and is consistent with the policies and purposes of the Act." *Id.* at 800 (emphasis in original).

Cognizant of possible conflict, Congress reconciled the North Pacific Convention's 1978 Protocol with the MMPA's permit requirements by amending the Protocol's implementing legislation to essentially exempt the mothership fleet from the MMPA until June 9, 1981. North Pacific Fisheries Act, 16 U.S.C. §§ 1021-1035, at § 1034(b). In 1981, the National Oceanic and Atmospheric Administration (NOAA) issued the mothership fleet an MMPA permit allowing an annual "take" of 5,500 Dall's porpoise, 450 northern fur seals, and 25 northern sea lions incidental to their driftnet salmon fishing. Congress amended the North Pacific Fisheries Act again in 1982 to extend the mothership fleet's permit until June 9, 1987.

The extension was conditioned on continued research to determine the effect of Japan's salmon driftnet fishery on marine mammal populations and reduce or eliminate its incidental take of Dall's porpoise and other marine mammals. Further, the Secretary was authorized to place U.S. observers on Japanese driftnet and research vessels operating within the U.S. EEZ and to make scientific observations and studies on the biology of the Dall's porpoise and the incidental take of marine mammals, seabirds, and salmon of U.S.

origin. Finally, Congress mandated the implementation of new fishing gear and techniques or both in the mothership driftnet fishery to reduce or eliminate the incidental take of marine mammals, with 100 percent coverage of the fleet required by June 9, 1987.

The 1978 Protocol effectively reduced the Japanese mothership fleet's catch of mature Bristol Bay sockeye salmon by ninety-four percent from the 1956-1977 levels. Chum salmon interceptions were also significantly reduced. In sum, the Protocol successfully maintained protection of U.S.-origin coho and pink salmon stocks while establishing greater protection for sockeye and chum salmon stocks. Still, far ranging chinook salmon of U.S. origin were not adequately protected.

D. The Convention's 1986 Amended Annex and subsequent developments affecting Japan's salmon driftnet fleets

The mothership fleet had an incidental catch of 380,000 U.S.-origin chinook salmon in 1980. This was five times the 1979 level and twelve times the 1978 harvest. Recent continent-of-origin studies estimated that, together, Japan's mothership and shore-based driftnet fleets intercepted about thirty percent of the total western and central Alaskan chinook harvest. Despite this evidence of the adverse impacts of its driftnet fleets, Japan resisted U.S. efforts under the Convention to limit or eliminate those fleets.

Nonetheless, in 1986, all the North Pacific Convention's signatories agreed to an Amended Annex. Regarding the mothership fleet, the 1986 Amended Annex

allowed for continued operations within the U.S. EEZ but called for a phase-out of the fleet from the Bering Sea north of 56 degrees latitude and outside the U.S. EEZ by 1994. For the shore-based fleet, the Amended Annex moved the abstention line one degree west to 174 degrees East longitude. Additionally, there were provisions for an increase in continent-of-origin studies on anadromous stocks.

Notwithstanding the Amended Annex, the mothership fleet operating within the U.S. EEZ remained subject to provisions of the MMPA. With the mothership fleet's congressional permit scheduled to expire on June 9, 1987, the fleet's representatives applied for a five-year MMPA permit on July 21, 1986. After completing a rule-making procedure, the Secretary of Commerce issued the mothership fleet an MMPA permit for three years. On June 15, 1987, a domestic fishing organization and an environmental group were able to obtain a preliminary injunction against issuance of the permit in federal district court, which was upheld on appeal. *Kokechik Fishermen's Ass'n*, 839 F.2d 795 (D.C. Cir. 1988). Congress gave its blessing to the injunction during reauthorization of the MMPA in 1988. Thus the mothership fleet is currently prohibited from fishing in the U.S. EEZ.

It was feared that the injunction against the permit would cause Japan to give notice of its intent to withdraw from the North Pacific Convention and effectively end multilateral salmon management in the North Pacific. However, Japan had not given notice of an intent to withdraw as of the North Pacific Convention's November 1988

meeting. So the North Pacific Convention remains an effective, though often frustrating, mechanism for the U.S. to promote its interests in anadromous fish of U.S. origin beyond its EEZ *vis-a-vis* Japan's salmon driftnet fleets.

Japan has driftnet fleets operating in the North Pacific that are not targeted on salmon. Also, the Convention's provisions do not apply to Taiwan or the Republic of Korea and their driftnet fleets operating in the North Pacific. This memo will now examine other means available to the U.S. to protect anadromous stocks of U.S. origin from interception by these non-salmon driftnet fleets.

III. Regulation of Non-Salmon Driftnet Fleets in the North Pacific Ocean

Before turning to unilateral efforts by the U.S., it is helpful to examine the relevant provisions of the 1982 United Nations Convention on the Law of the Sea (LOS) as customary international law available to protect U.S. interests in anadromous stocks of U.S. origin. Although the LOS has not entered into force, it is possible to view certain of its provisions as a codification of existing international law. LOS Article 66(3)(a) states the rights and responsibilities of nations of origin of anadromous species. They have "the *primary interest* in and responsibility for such stocks," and "may, *after consultation with other states . . . fishing these stocks* establish total allowable catches for stocks originating in its rivers" (emphasis added). In addition, Article 66 would prohibit fishing

on the high seas for anadromous stocks unless the prohibition "would result in economic dislocation for a State other than the State of origin." Thus the LOS seems to be reasonably in accord with prior international arrangements regarding U.S. and Japanese interests in salmon.

A. *The Magnuson Fishery Conservation and Management Act*

One of the MFCMA's purposes was "to take immediate action to conserve and manage the . . . anadromous species . . . of the United States by exercising . . . exclusive fishery management authority beyond the EEZ over such anadromous species. . . ." MFCMA at § 2(b)(1). Thus the U.S. unilaterally claimed exclusive management authority over

[a]ll anadromous species throughout the migratory range of each such species beyond the exclusive economic zone; except that that management authority does not extend to any such species during the time they are found within any foreign nation's territorial sea (or the equivalent), to the extent that that sea or zone is recognized by the United States. MFCMA at § 101(b)(1).

By claiming exclusive management authority over anadromous species the U.S. appears to be exceeding the "primary interest" in such stocks allowed by LOS Article 66. The U.S. continues to assert this exclusive jurisdictional claim, but it has never been enforced beyond the EEZ.

The MFCMA offers another rationale for an enforceable U.S. claim over its anadromous stocks. Foreign fishing within the U.S. EEZ, or beyond, for anadromous stocks of U.S. origin was generally prohibited after February 28, 1977. Such fishing is allowed, however, if the government whose vessels wish to fish in or beyond the U.S. EEZ for U.S.-origin anadromous fish enters into a bilateral Governing International Fishery Agreement (GIFA) with the U.S. Each GIFA acknowledges the exclusive fishery management of the U.S. as set forth in the MFCMA. MFCMA at § 201(c). Thus, foreign nations entering into a GIFA with the U.S. must acknowledge the U.S. assertion of exclusive management authority of anadromous stocks of U.S.-origin. The MFCMA therefore has two interrelated but distinct bases for exclusive management authority of U.S.-origin anadromous fish: a straightforward assertion of the authority, reinforced by GIFAs recognizing the claim.

The 101st Congress is reauthorizing the MFCMA. The House Merchant Marine and Fisheries Committee has reported an MFCMA reauthorization bill which directly addresses driftnet fishing. The bill calls upon the Secretary of State to seek an international ban on "large-scale driftnet fishing" on the high seas. H.R. Rep. No. 393, 101st Cong., 1st Sess. at 2-3, 23, (1989). This attempt to ban a fishing method on the high seas is a substantial departure from asserting high seas management jurisdiction over U.S.-origin anadromous stocks. Still, the proposed amendments are an extension of Congress's response to driftnets announced in the 1987 Driftnet Impact Monitoring, Assessment,

and Control Act. 16 U.S.C.A. § 1822, note §§ 4001-4009 (1989), Pub. L. No. 100-220 Title IV, 101 Stat. 1458, 1477-1480 (1987) [hereinafter Driftnet Act].

B. *The Driftnet Impact Monitoring, Assessment, and Control Act*

The Driftnet Act was passed in response to congressional findings that driftnets are "a fishing technique that may result in the entanglement and death of enormous numbers of target and non-target marine resources in the waters of the North Pacific Ocean. . . ." *Id.* at § 4002(1). The Driftnet Act was intended to increase efforts "to monitor, assess, and reduce the adverse impacts of driftnets." *Id.* at § 4002(3).

1. *The Driftnet Act's regulatory framework*

The Driftnet Act either rejects or overlooks the possibility of expanding the North Pacific Convention to include nations with non-salmon driftnet fleets. Instead, it mandates the Secretary of Commerce through the Secretary of State to

immediately initiate[] negotiations with each foreign government that conducts, or authorizes its nationals to conduct, driftnet fishing that results in the taking of marine resources of the United States in the waters of the North Pacific Ocean outside of the [EEZ] and territorial sea of any nation, for the purpose of entering into agreements for statistically reliable cooperative monitoring and assessments of the

numbers of marine resources of the United States killed and retrieved, discarded, or lost by the foreign government's driftnet fishing vessels. *Id.* at § 4004(a).

The agreements must provide for "effective enforcement of laws, regulations, and agreements applicable to the location, season, and other aspects of the operations of the foreign government's driftnet fishing vessels." *Id.* at § 4406(a). The Driftnet Act also provides that if the Secretary of Commerce

determines that a foreign government has failed within 18 months after the date of the enactment of this Act, to enter into and implement an agreement . . . that is adequate, the Secretary shall certify such fact to the President, which certification shall be deemed to be a certification for purposes of . . . the Fishermen's Protective Act. . . . *Id.* at § 4006(b).

The Fishermen's Protective Act gives the President authority to ban the importation of fish products from nations violating fishery management programs. This act is discussed further below.

Finally, the Driftnet Act requires the Secretary of Commerce to provide Congress with a report, including information provided by the driftnet nations, on the impact of driftnet fishing in the North Pacific. *Id.* at § 4005. The Secretary is required to report to Congress on his evaluations and recommendations

regarding (a) a marking, registry, and identification system to determine the vessel of origin of lost or abandoned driftnets or driftnet fragments, (b) the use of alternate material in driftnet construction to increase the rate of decomposition of lost or abandoned driftnets, (c) a bounty system for recovery of lost or abandoned driftnets, and (d) an effective driftnet fishing vessel tracking system. *Id.* at § 4007.

2. The Driftnet Act's implementation

In negotiating these agreements the secretaries of State and Commerce are in the difficult position of balancing U.S. claims to its anadromous stocks against other nations' sovereignty over their fishing vessels and their freedom to fish the high seas. The House of Representatives' report on the Driftnet Act states that, "[w]hile respecting foreign sovereignty, the Secretary shall not take action to diminish the sovereign rights of the United States to conserve and manage stocks of anadromous fishes of U.S. origin on the high seas." H.R. Rep. No. 4899, 100th Cong., 1st Sess. at 24 (1987). Initially, the Secretary was unable to overcome the foreign nations' sovereignty concerns to Congress's satisfaction.

The possibility of certification under the Fishermen's Protective Act played a significant role in obtaining the necessary agreements. Both the Republic of Korea and Taiwan were certified. Taiwan's stated goal in ratifying the agreement was to avoid the imposition of fishery import sanctions. Japan stated that if certified, it would cancel any tentatively agreed-to measures, but Japan was not certified. Information on Driftnet Agree-

ments, Presented at the Western Legislative Conference meeting (Nov. 1989); *see* Oversight of Marine Fisheries Management: Hearings Before the National Ocean Policy Study of the Senate Comm. on Commerce, 101st Cong., 1st Sess. (May 17, 1989) (testimony of Richard Smith, Principal Deputy Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, State Department).

Despite difficult negotiations, the U.S. reached acceptable bilateral driftnet agreements with Japan, Taiwan, and the Republic of Korea in the summer of 1989. None of the agreements is binding past the 1990 driftnet fishing season, but assurances of good faith negotiations for future agreements were exchanged.

The U.S. and Japan reached a driftnet agreement on June 23, 1989. The agreement allows fourteen North American and thirty-two Japanese scientific observers to be deployed on thirty-two Japanese squid driftnet vessels for the 1989 season. The observers are to collect data on the numbers of target and non-target species, including anadromous species, marine mammals, and seabirds harvested. In addition, Japan is to supply timely data regarding "(1) cumulative number of standardized tans [lengths of net], (2) number of vessels fishing, and (3) vessel days of operations." Japan will deploy two driftnet research vessels with North American scientists on board. Finally, Japan will double its at-sea enforcement patrols. Japan will consider automatic satellite tracking devices on its squid driftnet vessels for the 1990 season.

The driftnet agreement with Taiwan is more comprehensive. Taiwan will have automatic satellite tracking devices on all its squid driftnet vessels for the 1990 season. Taiwan will also introduce legislation to restrict its driftnet vessels from carrying both large and small mesh driftnets, require driftnet vessels to mark their driftnets for identification, initiate high seas enforcement patrols, allow the U.S. Coast Guard to board and inspect all driftnet vessels detected outside approved fishing areas, and take steps to limit the size of its driftnet fleet. Finally, a scientific observer program will be expanded to obtain statistically reliable data for the 1990 season.

The U.S.-Republic of Korea driftnet agreement is very similar to the agreement with Taiwan. However, this agreement contains an additional provision requiring time and area restrictions for the Korean squid driftnet fleet. It appears that prior to this agreement, Korea had not regulated its squid driftnet fleet's fishing grounds or seasons.

Despite these agreements and the initiation of measures to regulate squid driftnet fleets, Congress was frustrated by the difficulties with the negotiations and the limited duration of the agreements. This was at least partially responsible for the proposed MFCMA amendment calling for an international ban on driftnet fishing.

C. U.S. enforcement mechanisms for fishery laws

Primarily, the U.S. has two methods for enforcing fishery management laws. The Fishermen's Protective Act is utilized against foreign nations that frustrate certain international

conservation agreements the U.S. has entered into. The Lacy Act is used to bring civil or criminal penalties against individuals who deal in fishery products in interstate or foreign commerce in violation of either U.S. or their own nation's laws.

1. The Fishermen's Protective Act

The Pelly amendment to the Fishermen's Protective Act, 16 U.S.C. § 1978, requires the Secretary of Commerce to certify to the President any nation whose citizens conduct fishing operations in a manner which diminishes the effectiveness of an international fishery conservation program. After receiving the certification, the President may direct the Secretary of the Treasury to prohibit the importation into the U.S. of fish products from that nation for as long as the President deems appropriate and to the extent allowed by the General Agreement on Tariffs and Trade. Finally, within sixty days of receiving a certification, the President is required to notify Congress of any action he has taken regarding the certification or the reasons he has not taken any action.

The possibility of certification and trade sanctions on imports of fishery products has had a significant influence on negotiations between the U.S. and nations exporting fish products to the U.S. The North Pacific Convention, discussed above, seems to qualify as an international fishery conservation program. Thus, nations could face certification if they conduct fishing operations which diminish the effectiveness of its salmon conservation programs.

There is increasing evidence that Taiwan's squid driftnet fleet is adversely affecting the North Pacific Convention's salmon conservation programs. In 1986, responding to pressure from the U.S. State Department, Taiwan adopted domestic regulations to control its squid fleet and eliminate salmon interceptions. Additionally, Taiwan prohibits the exportation of salmon by its fishing industry without a permit. Still, there is evidence that some Taiwanese squid driftnet vessels are conducting directed high seas salmon fishing in violation of Taiwanese law.

Thus, some Taiwanese vessels are directly diminishing the North Pacific Convention's effectiveness. It is conceivable that the possibility of certification would encourage stricter Taiwanese enforcement of its squid driftnet regulations. Despite the current public outcry against illegal salmon interceptions, there is no direct evidence of any other nations' driftnet vessels undermining the North Pacific Convention's salmon conservation programs.

2. The Lacy Act

Still, the U.S. is not dependent on Taiwan to enforce its regulations against exporting salmon without a permit. Under the Lacy Act, 16 U.S.C. §§ 3371-3378, it is "unlawful for any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any fish . . . taken, possessed, transported, or sold in violation of . . . any foreign law." *Id.* § 3372(a)(2)(A). Violations of the Act are punishable by civil and criminal penalties.

In 1987 and 1988, information came to light about large-

scale attempts by certain Taiwanese squid driftnet fishermen to market salmon harvested on the high seas in direct violation of applicable Taiwanese fishery laws. Domestic fishermen and processors felt that Japanese and Taiwanese laws regarding the salmon trade were not effective in curtailing the illegal salmon trade. However, Taiwanese driftnet fishermen who chose to violate Taiwanese salmon regulations by trading in salmon without the requisite permit were prosecuted for violating the Lacy Act. *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824 (9th Cir. 1989).

In response to growing concerns about complicated laundering and relabeling schemes involving illegally harvested salmon taken by Taiwanese "squid" driftnet vessels on the high seas, the National Marine Fisheries Service began a covert investigation into this activity in June of 1988. On January 29, 1989, these investigations culminated in the arrest, under the Lacy Act, of two individuals for contracting to provide twenty-four million pounds of Taiwanese high seas harvested salmon over a two-year period. So it appears that the Lacy Act can play an integral role in enforcing other nations' salmon regulations, regardless of those nations' domestic enforcement.

IV. Prospects for high seas driftnet fishing

This memo is mainly concerned with driftnet fleets operating in the North Pacific, but there is also a serious problem with tuna driftnet fleets in the South Pacific Ocean. Nations of the South Pacific Forum responded to the environmental impacts of tuna driftnet

fleets by issuing the Tarawa Declaration on July 11, 1989. The Declaration commends the Republic of Korea for discontinuing driftnet fishing in the region and calls upon Japan and Taiwan to halt their driftnet fishing there. Many of the South Pacific Forum nations joined the U.S. in introducing a United Nations Resolution addressing the driftnet problem.

In December 1989, the United Nations General Assembly passed a Resolution in which all nations agreed to halt large-scale high seas driftnet fishing by June 30, 1992. The Resolution is a compromise in that it freezes driftnet fishing at its current level and provides for an international review of scientific data on the impact of driftnets by June 30, 1991. A moratorium on driftnet fishing goes into effect on June 30, 1992.

The United Nations Resolution attempts to resolve the driftnet problem by phasing out driftnet fishing until accurate data about the fishery are obtained and reviewed. But banning a specific commercial fishing technique without adequate scientific documentation of its adverse affects creates a precedent which could impact U.S. commercial fishing interests. The driftnet problem is exacerbated by limited data on the incidental catch of marine mammals and non-target fish species, the lack of any comprehensive regulatory framework, and, until recently, limited enforcement of existing regulations. These problems led to a moratorium by the United Nations until these problems are rectified.

In contrast to driftnet vessels, U.S. commercial fishing vessels

are subject to a comprehensive regulatory scheme. These regulations are enforced by both state and federal agencies. Any concerns about the incidental catch of marine mammals and non-target fish species by U.S. commercial fishing vessels can and should be addressed by modifying the regulations and strengthening enforcement efforts, not by banning a commercial fishing technique.

The implications of the United Nations Resolution are most obvious regarding the U.S. distant water tuna purse seine fleet and coastal gillnetters. Tuna purse seine vessels use large nets on the high seas and have a known incidental catch of porpoise. These vessels, however, are subject to strict regulations which minimize their incidental catch of porpoise, have government observers on board, and are not allowed to fish after a congressionally determined quota of porpoise is taken. Thus, the purse seine fleet is easily distinguished from high seas driftnet fleets.

Similarly, since driftnets are large-scale gillnets, coastal gillnetters also have some incidental harvest of non-target fish species and occasionally impact marine mammals. State governments effectively regulate coastal gillnets as to length, fishing seasons, and areas. Still, attempts to legislatively ban coastal gillnets are fairly common. The differences between driftnet and gillnet fishing should not be overlooked when considering regulatory changes necessary to rectify any problems with the gillnet fishery.

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