REGULATION OF INTERNATIONAL JOINT VENTURES IN THE FISHERY CONSERVATION ZONE*

*Donna R. Christie***

I. INTRODUCTION

In 1976, the United States enacted the Fishery Conservation and Management Act (FCMA)[1] which extended exclusive fishery management authority[2] to 200 nautical miles off the nation's coast.[3] The legislation was designed not only to maintain fish stocks and rebuild stocks of overfished species,[4] but also to promote domestic commercial and recreational fishing[5] by establishing a national priority system.[6] The possibility of so-called "joint ventures"[7] in which fish harvested by United States fishermen would be delivered to foreign processing vessels in the fishery conservation zone (FCZ)[8] was perceived as a loophole in the FCMA. Onshore processors demanded that the FCMA be amended to clarify that the fishery conservation zone was established to promote the development of not only the fishermen but the entire fishing industry and to limit joint ventures which hindered the development of new onshore processing capacity.[9] An amendment to the FCMA,[10] hastily passed in the summer of

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** B.S. Chem, University of Georgia (1969); J.D., University of Georgia School of Law (1978); Marine Policy Fellow, Woods Hole Oceanographic Institution (1978-1980).

[1] 16 U.S.C.A. §§ 1801-1882 (1976).

[2] *Id.* § 1812 (1976).

[3] *Id.* § 1811.

[4] *Id.* § 1801(a)(2) and (b)(1).

[5] *Id.* § 1801(b)(3).

[6] *Id.* § 1821(d).

[7] The arrangements between United States fishermen and foreign vessels are not joint ventures in the legal sense of the phrase. If considered as a more general term, the usage is still inaccurate because the term could be used to describe a myriad of international business arrangements. However, since the term has been commonly used for these transactions and the 1978 amendments to the FCMA have even been dubbed the "Joint Venture Amendments," the term will be used in this paper.

[8] 16 U.S.C.A. § 1811 (1976).

[9] *See, e.g., Fishery Conservation and Management Act Oversight: Hearings Before the Senate Committee on Commerce, Science, and Transportation*, 95th Cong. 2d Sess. 62, 88-90 (1978) (statements of Edward Furia and Lee Weddig) [hereinafter cited as *Senate Oversight Hearings*].

[10] Joint Venture Amendment, Pub. L. No. 95-354, 92 Stat. 519 (1978).

1978, created a United States processor preference for American-harvested fish similar to the fishermen's priority in the FCZ; however, the amendment also specifically authorized joint ventures for that part of the domestic harvest which the United States processors have no capacity or intent to process.

This Article will present the background of the joint venture amendment and an analysis of the major problems involved in implementing the legislation. Current joint ventures and their effect on the United States fishing industry will also be discussed.

II. BACKGROUND

Foreign fishing off the coasts of the United States reached a peak in 1971 when foreign fleets harvested record catches.[11] In the following years, foreign catches declined due to the depletion of certain stocks and the imposition of quotas by the International Convention of the Northwest Atlantic Fisheries (ICNAF).[12] ICNAF had no real enforcement mechanism, however, and the United States believed that the organization was an ineffective means of managing already dangerously depleted fish stocks.[13] With the institution of the United States fishery conservation zone, foreign fishermen were limited to only that part of the optimum yield[14] of a fishery that United States fishermen could not harvest.[15] Lower allocations, as well as time, area and gear restrictions, resulted in a 1977 foreign catch in the FCZ of less than half of the 1971 catch.[16] In addition, the clear policy of the United States was to develop the American capacity to harvest the entire optimum yield and eventually to exclude foreign fishermen completely.[17]

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[11] 16 U.S.C.A. § 1824(b)(6)(B)(i) (1976).

[12] *See* Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 445 (1977); Warner, *The Politics of Fish*, THE ATLANTIC, Aug. 1977, at 41; and U.S. DEP'T OF COMMERCE, U.S. OCEAN POLICY IN THE 1970s: STATUS AND ISSUES III-5, Fig. 3-3 (1978) [hereinafter cited as U.S. OCEAN POLICY].

[13] *See* Magnuson, *supra* note 12, at 444-45. *See also* 16 U.S.C.A. § 1801(a)(2)-(4) (1976).

[14] *See* 16 U.S.C.A. § 1802(18) (1976). The optimum yield (OY) of a fishery is the amount of fish that will provide the greatest overall benefit to the nation, based on not only a biological assessment of maximum sustainable yield, but also relevant social, economic and ecological factors.

[15] *Id.* § 1821(d).

[16] *See* U.S. OCEAN POLICY, *supra* note 12, at III-4, Fig. 3-2 and III-5, Fig. 3-3. *See also* 16 U.S.C.A. § 1824(b)(7)(F) (1976).

[17] *Id.* at III-32. It has been visualized that once American fishermen are relieved of foreign competition in the FCZ, the opportunity for larger catches and the incentive for new investment will lead to the development of a United States fishing fleet capable of utilizing the entire OY.

Fish products provide a major portion of the nations' protein and serve as a major export for many of the countries that fish within the FCZ.[18] Countries such as Japan, Korea, Poland and the U.S.S.R. have relied upon extensive, technologically-advanced, distant water fishing fleets, but the advent of virtually world-wide 200-mile fishery or economic zones has limited the production and economic feasibility of many of these fleets. Understandably, these countries have attempted to find new means of guaranteeing an adequate supply of fishery products while at the same time protecting the enormous investment in their distant water fleets.[19] International joint ventures involving United States fishermen and foreign processing vessels seemed to provide one possible means of alleviating the problem.

Although international joint ventures are common vehicles for fisheries operations in other parts of the world,[20] this type of joint venture had never been proposed for United States fishermen prior to the enactment of the FCMA. Opponents take the position that the joint ventures are merely a means of circumventing the FCMA and perpetuating foreign domination of certain United States fisheries. More importantly, the opponents argue, onshore processors cannot compete with foreign processing vessels that are not subject to United States wage, safety and health requirements.[21] New investment necessary for development of processing capacity for underutilized species could suffer because of the competition.

Advocates of the arrangements point out that joint ventures have been proposed only for species for which there is little or no United States processing capacity.[22] The joint ventures would not only transfer the technology necessary to open up new fisheries for United States fishermen, but also provide an immediate market.[23] Proponents also argue that the creation of joint ventures would encourage the development of United States fisheries for underutilized species. United States fishermen have tradi-

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[18] Japanese, for example, derive more than 50 percent of their protein from fish products, *id.* at III-18. Japan and Korea are also major exporters of fisheries products, U.S. DEP'T OF COMMERCE, FISHERIES OF THE UNITED STATES, 1978, Current Fisheries Statistics No. 7800, at 32 (1979).

[19] *See* Kaczynski, *Joint Ventures in Fisheries between Distant-water and Developed Coastal Nations: An Economic View*, 5 OCEAN MANAGEMENT 39, at 41, 45 (1979).

[20] *Id.*

[21] *See* H.R. REP. No. 95-1334, 95th Cong., 2d Sess. 6 (1978) [hereinafter cited as H. REP.].

[22] *See Senate Oversight Hearings*, *supra* note 9, at 233 (statement of Dr. Walter Pereyra).

[23] *Id.*

tionally shunned species such as hake and pollock because of the low value and the lack of processors or markets; processors, on the other hand, have never been convinced that United States fishermen possessed the experience or technology to catch economically significant amounts of underutilized species. Joint ventures, it has been hypothesized, would actually aid the development of both sectors by giving fishermen experience in new fisheries and by creating confidence in the processors that an adequate supply of underutilized species will be available to justify new investment and expansion.[24]

Although the FCMA of 1976 provided that processing and support ships are "fishing vessels" for purposes of the Act[25] and, therefore, subject to the permitting system applicable to all foreign fishing vessels,[26] the FCMA did not deal with the possibility of foreign processing ships conducting fishing operations with United States fishermen. When two applications for foreign processing ships to receive United States harvested fish were received in 1977, the applications were not acted upon because of the need to consider and evaluate alternatives and to develop a policy governing such ventures.[27]

After extensive public hearings in the summer of 1977,[28] the Department of Commerce through the National Oceanic and Atmospheric Administration (NOAA) issued a proposed interim policy statement on February 8, 1978, which provided for approval of foreign vessel permits to purchase or receive United States harvested fish in the FCZ. Permits were to be granted only if the optimum yield of the concerned fishery would not be exceeded, the harvesting capacity of United States fishermen would exceed domestic goals and capability to process such fish, and the foreign vessel had the capability and intent to process the fish.[29] Comments to the proposed policy questioned the legal authority of NOAA to base a permitting system on a United States processor preference and suggested the policy was contrary to the purposes of the FCMA because it inhibited the development of new

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[24] Public Hearings on Joint Venture Regulations, Mar. 13, 1979 (statement of Dr. Walter Pereyra). *See* 44 Fed. Reg. 7708 (1979).

[25] 16 U.S.C.A. § 1802(11) (1976).

[26] *Id.* § 1821(a)(3).

[27] *See* H. REP., *supra* note 21, at 4.

[28] U.S. DEP'T OF COMMERCE, 1977 ANNUAL REPORT ON THE FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976, *reprinted in Senate Oversight Hearings, supra* note 9, at 34-35.

[29] *See National Marine Fisheries Service Proposed Interim Policy*, 43 Fed. Reg. 5398 (1978).

fisheries for underutilized species by restricting markets.[30] After considering the comments on the proposed policy and reassessment, however, NOAA determined that the FCMA did not give it a "clear legislative direction" to adopt a policy or permit approval system based upon factors not directly related to conservation and management.[31]

This radical reversal of policy opened the way for approval of pending joint venture applications and enlarged the apparent loophole in the law to the point that all processors, not just new processors of underutilized species, could find themselves in direct competition with foreign processing vessels in the FCZ. The policy reversal stimulated just the swift legislative response that the announcement apparently was intended to invoke. Congress acted immediately to provide NOAA with the authority to regulate ventures and created a domestic processor preference similar to the priority given to United States fishermen in the FCZ.[32]

III. PROVISIONS OF THE 1978 AMENDMENTS TO THE FCMA

The most basic provision of the 1978 amendments to the FCMA is the clarification of Congressional intent that all segments of the United States fishing industry, including processors, benefit from the establishment of the fishery conservation zone.[33] In order to achieve this goal, the amendments in effect create a three tiered priority system for FCZ fishery resources which will govern the issuance of permits for foreign processing vessels.[34] First priority is given to the United States fishing industry for fish harvested and processed domestically. Second priority is given to joint ventures in which United States harvested fish is delivered to foreign processing vessels. Foreign fishermen are given the lowest priority.[35] Following these guidelines, permits for foreign processing vessels can be issued only for that part of the optimum yield of a fishery which will not be utilized by United States processors.[36]

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[30] 43 Fed. Reg. 20532 (1978).

[31] *Id. See also Senate Oversight Hearings, supra* note 9, at 16-17 (statement of James P. Walsh, Deputy Administrator, NOAA).

[32] Pub. L. No. 95-354, 92 Stat. 519 (1978).

[33] *See* 16 U.S.C.A. §§ 1801(b)(6), 1824(b)(6)(B)(ii) (1976). In addition to establishing a processor preference, the amendments also provide that the entire fishing industry should be encouraged to develop fisheries in underutilized species.

[34] H. REP., *supra* note 21, at 6; S. REP. NO. 95-935, 95th Cong., 2d Sess. 5 (1978) [hereinafter cited as S. REP.].

[35] H. REP., *supra* note 21, at 6.

[36] *Id. See also* 16 U.S.C.A. § 1824(b)(6)(B)(ii) (1976).

The amendments also require that certain information concerning the fish processing industry to be included in fishery management plans which are prepared by the Regional Fishery Management Councils.[37] In addition to determinations of optimum yield, domestic harvesting capacity and the allowable level of foreign fishing, fishery management plans must now include an assessment of the "capacity and extent to which United States fish processors will process United States harvested fish."[38]

Original versions of the amendments provided that a foreign country's tariff and nontariff barriers to the importation of fish products be considered as a factor in the allocation of fish among nations and the issuance of permits to foreign fishing vessels, including processing vessels which participate in joint ventures.[39] The administration objected to the provisions on the basis that they conflicted with United States policy to reduce barriers to international trade.[40] Although the provisions were deleted from the final version of the bill, the amendments nevertheless require that the Secretaries of the Treasury, Commerce and State Departments submit an annual report to the President and Congress on the allocations of fish to foreign countries and the tariff and nontariff barriers imposed on the importation of such fish from the United States.[41]

IV. PROBLEMS IN IMPLEMENTATION OF THE AMENDMENTS

A. *The Processor Priority*

Perhaps the only provision of the Joint Venture Amendments which is unambiguous in application is the restriction which prohibits foreign processing vessels from receiving those fish species which are fully utilized by American processors.[42] Among the species which are clearly not within the scope of joint ventures are salmon, king crab, halibut, surf clams, menhaden, lobster and shrimp.[43] These species are fully utilized by United States pro-

[37] 16 U.S.C.A. §§ 1853(a)(4)(c)-(a)(5) (1976). The FCMA established eight Regional Fishery Management Councils composed of State officials, members of the public with knowledge of or experience in commercial or recreational fishing and the regional director of the National Marine Fisheries Service. The major function of the Councils is the preparation of management plans for fisheries in their geographic areas. 16 U.S.C.A. §§ 1852(a)-(b)-(h) (1976).

[38] 16 U.S.C.A. §§ 1853(a)(4)(c)-(a)(5) (1976).

[39] *See* H. REP., *supra* note 21, at 2-3.

[40] Statement of the President on Signing H.R. 10732 into Law, 14 WEEKLY COMP. OF PRES. DOC. 1479 (Aug. 29, 1978).

[41] 16 U.S.C.A. § 1821(f) (1976).

[42] *Id.* § 1824(b)(6)(B)(i)-(ii).

[43] *See* H. REP., *supra* note 21, at 6; *see also* S. REP., *supra* note 34, at 5-6.

cessors and the amendments give the processors an absolute monopoly on such species regardless of price.[44]

In the case of species for which the United States' processing capacity is relatively low, such as hake, pollock, and squid,[45] the nature of the processor preference is less clear. Although United States processors technically are given a priority for all the fish that they have the capacity and intent to process, a problem arises over how to maintain that priority in areas where there is direct competition from joint ventures. Studies have shown that even when a joint venture and onshore processors pay the same price per pound of fish, fishermen can make a greater profit by delivering to the joint venture because of a more favorable ratio of fishing time to delivery time, more efficient delivery techniques and savings on fuel and ice.[46] The legislative history indicates that it is not necessary for fishermen to fulfill the requirements of United States processors before fish may be delivered to processing vessels, and that fishermen have the right to refuse to deliver to processors if the fishermen are unsatisfied with the terms offered by the processors.[47] In other words, for underutilized species, the amendment establishes a processor priority for fishery allocations but in no way creates the same type of captive market that exists for fully utilized species, nor does it guarantee that anticipated levels of fish will be delivered to United States processors. When one also considers that most United States fishermen have a certain amount of flexibility and are not restricted to one fishery, merely limiting fishery allocations to joint ventures does not necessarily benefit the onshore processor of underutilized species; fishermen may change to an alternate fishery rather than resort to less economically viable onshore markets. Given these facts, it is difficult to ascertain whether processors of underutilized species have been given any priority at all.[48]

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[44] 16 U.S.C.A. § 1824(b)(6)(B)(i) (1976). *See also* H. REP., *supra* note 21, at 10. "With respect to the determination of U.S. processing capacity and intent, the committee does not intend that U.S. processors demonstrate an ability to outbid the price or other contract provisions offered by foreign processors in order to establish capacity and intent."

[45] H. REP., *supra* note 21, at 6.

[46] *See, e.g.*, Presentation to the North Pacific Fisheries Management Council on the Subject of Joint Ventures by Sig Jaeger, Mgr., North Pacific Fishing Vessel Owners Association, at 5-9 (Aug. 5-6, 1977).

[47] *See* H. REP., *supra* note 21, at 9-10.

[48] It seems anomalous that the amendments would provide the least protection to the segment of the processing industry that the FCMA singled out in its purposes to encourage, *see* 16 U.S.C.A. § 1801(b)(6) (1976). It must be noted, however, that although dependent upon each other, fishermen and processors are generally in contentious positions. The

B. Determinations of Capacities and Allocations

In order to determine if allocations will be available for joint ventures, several closely interrelated determinations of capacity must be made by the Fishery Management Councils. After the optimum yield (OY) for a fishery is fixed, domestic harvesting capacity (DHC) is the first determination that must be made. The difference between the OY and DHC may be allocated to foreign fleets by the Department of State.[49] The domestic processing capacity must then be ascertained in order to determine whether any of the DHC will be available for joint ventures.[50]

In fisheries for underutilized species, however, the determinations have not always followed this logical progression. The limiting factor in harvesting underutilized species has generally not been insufficiency of stocks or lack of skill in the fisheries (*i.e.*, how many fish could be caught), but simply an absence of markets and correspondingly low prices. The DHC for underutilized species, therefore, has been fixed by the domestic processing capacity.[51] When joint ventures provide additional markets, there is an initial difficulty in determining the effect on the DHC. If the availability of markets is the major limiting factor, joint venture advocates contend that the DHC can be calculated by merely adding the domestic processing capacity and the amount of fish that can be processed by joint ventures.[52] Processors, however, disagree with this method because it automatically creates allocations for joint ventures but does not take into account whether the availability of new markets will lure fishermen from fisheries for more valuable species or provide any priority or protection for United States processors.[53] The processors argue that determina-

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captive United States market that exists for fully utilized species is nevertheless a fair one for fishermen in most cases because of internal competition. This argument would not apply to the same extent for underutilized species because without external competition from joint ventures fishermen would be subject to terms and conditions unilaterally established by the relatively few processors of underutilized species. The amendments were clearly not intended to put fishermen at that kind of disadvantage in the market.

[49] 16 U.S.C. § 1853(a)(4)(B) (1976).

[50] *Id.* § 1824(b)(6)(B)(ii) and § 1853(a)(4)(C).

[51] *See* NATIONAL MARINE FISHERIES SERVICE, BACKGROUND PAPER—PUBLIC HEARING ON INTERIM PART 602 REGULATIONS, at 4 (Mar. 13, 1979, Washington, D.C.) [hereinafter cited as NMFS BACKGROUND PAPER].

[52] W. Pereyra, Comments by Marine Resources Company of Seattle, Washington, on Interim Guidelines for Development of Fishery Management Plans at 8 (Mar. 10, 1979) [hereinafter cited as Marine Resources Comments].

[53] Letter from Edward W. Furia to Terry L. Leitzell at 5-7 (June 4, 1979) (comments on Guidelines for Development of Fishery Management Plans, 44 Fed. Reg. 7708 (1979)) [hereinafter cited as Furia Comments].

tions of DHC must be based on an independent assessment of empirical data because overestimates of DHC will substantially injure the development of shore-based processors.[54]

Another factor limiting foreign activity in the FCZ is the amount of fish which will be utilized by the United States processing industry. This determination is not a simple measurement of the potential physical productivity of processors, but an assessment of the processors' actual intent to utilize a species.[55] Consideration must be given to such factors as historical production, geographical area,[56] the effect of seasonal fisheries or processing schedules, evidence of expansion of facilities to accommodate underutilized species and contracts with fishermen for the purchase of particular species.[57]

The initial problem involved in this type of assessment is the financial and administrative burden of compiling and evaluating the enormous amounts of information required.[58] Although every fishery management plan must include a determination of the "capacity and extent" to which United States processors will utilize the species,[59] NMFS has recognized that the amount and type of information necessary to make such a determination varies with the fishery.[60] Many processors also have suggested that the procedure would be considerably expedited if NMFS declared certain species to be "totally utilized by United States

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[54] *See* New England Fish Co. v. Kreps, No. 79-1196 (D.D.C., filed May 1, 1979).

[55] *See* S. REP., *supra* note 34, at 5.

[56] The species involved in underutilized fisheries deteriorate rapidly and require almost immediate processing to maintain quality. Geographical factors, therefore, become very important in determining processing capacity for these fisheries.

[57] *See* S. REP., *supra* note 34, at 5; H. REP., *supra* note 21, at 9-10.

[58] In addition to the reporting requirements and the apparent burden of proof placed on processors, the assessments required by the amendments will add to the already cumbersome duties of the Regional Fishery Management Councils. For example, the eight Regional Councils are responsible for developing approximately 70 fishery management plans (FMP's) and, as of June 1979, 14 of the plans had been implemented, DEP'T OF COMMERCE, COUNCIL MEMORANDUM, at 8-11 (June 1979). Assessments of processor capacity and intent to utilize a species must not only be included in new FMP's, but must be amended to plans already in place and reassessed at least once each year.

[59] 16 U.S.C.A. § 1853(a)(4)(C) (1976).

[60] In early proposed regulations to implement the Joint Venture Amendments, NOAA specified that FMP's must require certain information from processors including price, markets, amount of fish purchased or processed and seasonal, quantity or quality limitations, 43 Fed. Reg. 49023, 49024 (1978). Interim regulations which followed left reporting requirements to the discretion of the Councils, 44 Fed. Reg. 7708, 7709 (1979). Obviously much more information is required in fisheries where the possibility of joint ventures exists. However, since these fisheries are relatively few, it would be extremely inefficient to require the same reporting requirements of all processors.

processors" and eliminated any processor reporting requirements for such species.[61]

A second problem with such an assessment involves the kind of information that processors will be required to report. Processors question the relevance of some of the disclosed information to determinations of processing capacity and are dissatisfied with present methods for preserving the confidentiality of reported information.[62] The most contentious items in the reporting requirements are the price paid for fish and market information.[63] The processors point out that their priority exists regardless of price[64] and, therefore, price is not a relevant consideration in determining processors' capacity and intent. As discussed above, however, fishermen are not required to sell to United States processors if they cannot agree upon terms.[65] Thus, price may be a significant indicator of whether processors have the requisite "intent" to process, *i.e.*, whether processors intend to offer prices competitive with joint ventures and more traditional fisheries.

Processors raise similar arguments concerning the relevance of market information. Obviously processors will not buy fish they cannot sell, and there are few markets for underutilized species in the United States.[66] Furthermore, export markets have been limited by tariff and nontariff barriers and by the relatively poor quality of the American product.[67] Evidence of actual markets, then, would clearly help establish a processor's intent to utilize a certain species with limited marketability.

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[61] *See, e.g.*, Testimony of William W. Solomon, National Food Processors Association, on Interim Final Regulations Implementing the Domestic Processor Preference under Pub. L. No. 95-354, at 3-4 (Mar. 13, 1979) [hereinafter cited as Solomon Testimony]; Testimony of Robert F. Morgan, Pacific Seafood Processors Association, at 2-5 (May 7, 1979) [hereinafter cited as Morgan Testimony].

[62] *See* 44 Fed. Reg. 7708, 7709 (1979).

[63] *Id.*

[64] *See id.*; H. REP., *supra* note 21, at 10.

[65] *See* text at note 47 *supra*.

[66] The major market in the United States for underutilized species such as hake and pollock is in the form of frozen blocks for making fish sticks and similar products. The United States imports almost all the frozen blocks used. FISHERIES OF THE UNITED STATES, 1978, *supra* note 18, at xii, 43.

[67] Although many countries presently fish in the FCZ for species that are underutilized by the United States, few of these countries represent viable markets for exportation of those species from the United States. Because many of the species are highly perishable or change characteristics if not promptly processed, meeting quality standards is an initial hurdle, but tariff and nontariff barriers, such as quotas and licenses, often create the greatest restrictions on exportation to many countries. *See* U.S. DEP'T OF TREASURY, REPORT FOR 1978 ON FISHERY ALLOCATIONS, PERMITS, AND FOREIGN IMPORT BARRIERS (July 1, 1979).

Perhaps more telling than the relevancy objection is the one concerning confidentiality. Because data concerning markets and other sensitive information is proprietary in nature and may cause economic damage if revealed prematurely, processing firms may be justified in questioning the confidentiality of data submitted to NMFS for capacity determinations. The Fishery Management Councils, which must evaluate the information in order to assess processors' capacity and intent, are themselves composed of competitive processors and other members of the fishing industry that might benefit from the information. Although data is submitted to the Councils for NMFS only in aggregated form,[68] the fact that few firms are expanding into new fisheries in a given area would tend to reveal the source of the information. Because of this probable breach of confidentiality and the ensuing conflict of interest problems created within the Councils, processors insist that such proprietary information should not be included in reporting requirements.[69]

A final problem which arises is how to redistribute allocations if processors clearly will not reach projected assessments of capacity. When United States fishermen have not been able to catch their projected capacity or use reserves set aside to absorb anticipated growth in a fishery, surplus stocks have been reallocated to foreign fishermen.[70] If processors cannot reach projected levels, there are two alternatives for reallocation—joint ventures and foreign fishermen. The three tiered system established by the Joint Venture Amendments clearly gives priority to joint ventures if domestic harvesting capacity exists.[71] Some processors view the possibility of such a reallocation to joint ventures as the final step in undermining the domestic processor priority for underutilized species.[72] It has been suggested that if such reallocations are made to foreign fishermen rather than joint ventures, there would be more incentive for United States fishermen to deliver to domestic processors.[73] No legislative authority exists, however, to justify the reallocation of fish to foreigners if domestic harvesting capacity exists.

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[68] *See* 16 U.S.C.A. § 1853(d) (1976).

[69] *See* 44 Fed. Reg. 7708, 7709 (1979); Solomon Testimony, *supra* note 61, at 7-8; Morgan Testimony, *supra* note 61, at 11-12; NMFS BACKGROUND PAPER, *supra* note 51, at 3.

[70] *See, e.g.*, 44 Fed. Reg. 18028 (1979).

[71] *See* text at note 34 *supra*.

[72] *See, e.g.*, Furia Comments, *supra* note 53, at 14.

[73] *Id.*

C. Restrictions and Conditions

In addition to establishing quota limitations on foreign fishing consistent with fishery management plans, the Secretary of Commerce may impose on foreign fishermen "any other condition or restriction related to fishery conservation and management which . . . [is] necessary and appropriate."[74] These additional conditions are generally time, geographic area and gear restrictions to reduce bycatch.

The Joint Ventures Amendments did not change the language of the FCMA which relates conditions and restrictions on foreign fishing to conservation and management of the resource.[75] This is the same kind of language that NOAA interpreted not to allow a foreign permit approval system based upon a domestic processor preference.[76] The legislative history of the Joint Venture Amendments, however, indicates that restrictions should also be imposed to ensure compliance with the objectives of the amendments.[77] The Senate Report, for example, states that "as long as the interests of the U.S. harvesters are not significantly affected, the Secretary may consider imposing geographical restrictions on the areas in which foreign processing vessels may operate in order to foster the development of temporarily vulnerable or developing onshore processing facilities."[78] One must assume, therefore, that the term "fishery management" must be applied broadly within the context of the amended purposes of the FCMA "to encourage the development of fisheries which are currently underutilized or not utilized by the United States fishing industry . . . ."[79]

Time and area limitations of foreign processing vessels seem to be an obvious means of protecting the processor priority in a given area. Such restrictions in reality must be viewed as limitations on United States fishermen in addition to foreign processors

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[74] 16 U.S.C.A. § 1824(b)(7)(F) (1976).

[75] *Id.*

[76] *See* 43 Fed. Reg. 20532 (1978).

[77] S. REP., *supra* note 43, at 4.

[78] *Id.*

[79] 16 U.S.C.A. § 1801(b)(6) (1976), *as amended by* Act of 1978, Pub. L. No. 95-354, § 2(b) (as amended). The dismissal of a recent case involving joint venture permits and allocations, *see* note 54 *supra*, was based on a stipulation of settlement the FCMA will not be construed to deny the Secretary of Commerce the discretionary authority to impose conditions and restrictions on joint venture permits if "necessary and appropriate, and relate to fishery conservation and management (which includes, . . . , the development by the United States fishing industry [of underutilized or unutilized fisheries])." New England Fish Co. v. Kreps, No. 79-1196 (D.D.C., Stipulation of Settlement and Dismissal, Jan. 3, 1980).

and as such may be detrimental to the development of fisheries for underutilized species. If, for example, joint ventures in Alaska are limited to the Bering Sea in order to foster growth of the onshore processing industry around the Gulf of Alaska, United States fishermen may indeed be discouraged from participating in joint ventures because of the distance and other related problems. Such restrictions have no reciprocal benefit, however, because they provide no positive encouragement for fishermen to enter an underutilized fishery in the Gulf of Alaska.

The experience of Marine Resources Company,[80] a joint venture off the coast of Washington, suggests that joint ventures may, in fact, have a positive effect on the development of onshore processing. Fishermen who have participated in the Marine Resources joint venture have been able to develop a profitable fishery for Pacific hake and are now capable of providing a steady supply of hake to both the joint venture and a new onshore processor.[81] Since it appears that onshore processors can take advantage of joint ventures' experiments in new fisheries without risking any initial investment[82] it would be a mistake to relegate joint ventures, especially during a period of development, to remote areas where United States processing capacity is unlikely to develop.

D. International Trade Barriers

Although the final version of the Joint Venture Amendments deleted provisions which would require the Secretary of Commerce to consider tariff and other artificial trade restrictions in approving applications for joint ventures,[83] the amendments did provide that in making such decisions, "the Secretary may take into account, with respect to the foreign nation concerned, such other matters as the Secretary deems appropriate."[84] The question of whether the Secretary should consider foreign trade barriers in approving joint ventures, therefore, remains an open question.

Congress and most factions of the fishing industry believe it is inconsistent to allocate surplus fish to countries which have

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[80] Marine Resources Company is a joint venture of Sovrybflot, an agency of the Soviet Ministry of Fisheries, and Bellingham Cold Storage of Washington.

[81] *Public Hearings on Joint Venture Regulations*, Mar. 13, 1979, Washington, D.C. (statement of Walter Pereyra, Marine Resources Company, Barry Fisher, fisherman, and Daniel Golden, Pacific Hake Fisheries, Inc., onshore processor) [hereinafter cited as Pereyra-Fisher-Golden Statement].

[82] *See* U.S. OCEAN POLICY, *supra* note 12, at III-33.

[83] *See* note 40 *supra*.

[84] 16 U.S.C.A. § 1824(b)(6)(B)(iii) (1976).

established artificial trade barriers[85] to restrict or prohibit importation from the United States of the same species of fish.[86] Such trade barriers are perceived as major obstacles to development of fisheries and processing capacity for underutilized species in the United States, because the trade limitations severely restrict access to new markets for United States processed fish.[87]

Because of continued pressure from Congress to tie foreign fishing allocations to market concessions and to forestall the possibility of Congress enacting specific legislation to that effect, the Commerce Department has apparently conceded that access to foreign markets at least should be one consideration in foreign fishing allocations.[88] However, it is unlikely that the Secretary of Commerce will base approval of permits or distribution of allocations to joint ventures on such criteria. As an alternative, the Department of Commerce and other federal agencies are examining potential foreign markets for underutilized species,[89] researching marketing techniques for the creation of new domestic markets[90] and actively negotiating to reduce or eliminate foreign trade barriers to the importation of underutilized species.[91]

V. CURRENT JOINT VENTURES

Although rumors of joint ventures abound, only two joint ventures are currently operating. Both are located on the Pacific coast of the United States.[92] Marine Resources Company is an

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[85] *See* U.S. DEP'T OF TREASURY, REPORT FOR 1978 ON FISHERY ALLOCATIONS, PERMITS, AND FOREIGN IMPORT BARRIERS (July 1, 1979). Artificial trade barriers include excessive tariffs, quota restrictions, import licensing, consular fees, custom surtaxes, inspection fees and health certificates.

[86] *See* H. REP., *supra* note 21, at 7-8, 10; S. REP., *supra* note 34, at 3.

[87] *Id.*

[88] MARINE FISH MANAGEMENT, Dec. 1979, at 6. For example, the Commerce Department has recommended that the State Department withhold 50,000 tons of Japan's 750,000 ton pollock allocation pending discussions with Japan concerning alleviation of trade barriers.

[89] *See* U.S. OCEAN POLICY, *supra* note 12, at III-34.

[90] *Id.*

[91] The multilateral trade negotiations, for example, have produced significant tariff reductions and quota concessions from Japan. Other countries that have reduced fisheries tariffs are Canada, the EEC countries, Finland and Sweden. Saft, *Multilateral Trade Negotiations May Bring Down Barriers to Overseas Trade*, NAT'L FISHERMAN, July 1979, at 20-21.

[92] On the East coast, a proposed joint venture for squid involving Fass Brothers, a mid-Atlantic fishing company, and an Italian fishing firm has not materialized. Amfish, a partnership between the Fisheries Development Corporation of New York and a domestic subsidiary of an Italian fishing firm; Amoruso, has sought revision of shipping laws to allow squid caught by Italian fishing-processing vessels to be landed in U.S. ports. A joint venture between Japanese processing vessels and U.S. fishermen for the harvest of squid has been proposed for the New England area.

American corporation formed by Bellingham Cold Storage of Washington and Sovrybflot, a special agency of the Soviet Ministry of Fisheries.[93] The second joint venture is between the Korean Marine Industry Development Corporation (KMIDC) and R.A. Davenny and Associates of Alaska.[94]

The Marine Resources operation involves primarily Pacific hake which is purchased from United States fishermen and processed aboard leased Soviet processing vessels in the FCZ off the coast of Washington and Alaska. All of the processed products are exported.[95] In spite of initial adverse reaction, this joint venture has been successful in terms of developing a viable fishery for Pacific hake, demonstrating that United States fishermen can fish profitably for a low value underutilized species and cooperating with the development of onshore processors.[96] Marine Resources has gained the approval of the Pacific Fisheries Management Council and the support of major fishermen's groups, which originally opposed joint ventures on the ground that the short term economic benefits to fishermen would be outweighed by the disincentive to development of onshore industry and the uncertainties created by the dependence on foreign processing vessels.[97] The success in the fishery and the nurturing of good relations tend to ensure the continued development of Marine Resources.

The KMIDC-Davenny joint venture for pollock in the Gulf of Alaska encountered early problems with bad weather conditions and poor performance of catcher boats.[98] Although proponents of the joint venture are optimistic, it is impossible to ascertain whether the venture will attain the same success as Marine Resources.

VI. CONCLUSION

Since its enactment in 1976, the FCMA has proved to contain numerous loopholes. NOAA's decision that the agency lacked

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[93] Gorham, *An Investigation of Joint U.S./Foreign Ventures in the Developing Commercial Fishery in Alaska*, UNIV. OF ALASKA SEA GRANT REPORT 78-7 (1978), at 17-19; Heggelund, *U.S.-Foreign Joint Ventures in the Northeast Pacific*, ALASKA SEAS AND COASTS, Feb. 1978, at 10-12 [hereinafter cited as Heggelund].

[94] *See* note 93 *supra*.

[95] Marine Resources Comments, *supra* note 52, at 1-2.

[96] Pereyra-Fisher-Golden Statement, *supra* note 81.

[97] *See* Marine Resources Comments, *supra* note 52, at 2; *cf.* Heggelund, *supra* note 93, at 12 and DEP'T OF COMMERCE, *Summary of Joint Venture Hearings* (Northwest Region) July 1977, at 8, 12.

[98] Letter from Robert C. Ely, counsel to KMIDC-Davenny joint venture, to Terry Leitzell, NOAA Asst. Administrator for Fisheries (Nov. 14, 1978), at 3, 5.

authority to regulate joint ventures spurred Congress to act on that particular loophole. In the wake of the fishing industry's typically strong reaction to any type of foreign involvement in United States fisheries, Congress acted expeditiously, but perhaps not as effectively as intended. The intent of Congress to create a United States processor priority for fish in the FCZ is clear, but Congress failed to provide sufficiently clear guidelines for implementation of the preference. Congress' attempt to establish a processor preference, while at the same time maintaining a fair market for United States fishermen which would attain optimum utilization of the resource, has resulted in confusing and ambiguous signals to NOAA, the agency responsible for implementation of the amendments. NOAA's delay in developing final regulations[99] clearly is not an example of federal inefficiency but rather a conscientious effort to resolve the ambiguities of the statute and its legislative history by using an interim policy and encouraging public participation. It is possible that the problems which exist cannot be resolved through legislation. Further guidance from Congress may be necessary before final implementation of the Joint Venture Amendments can be realized.

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[99] NOAA issued Proposed Guidelines on October 20, 1978, 43 Fed. Reg. 49023 (1978). Interim Regulations were published February 7, 1979, 44 Fed. Reg. 7708 (1979). A public hearing was held March 13, 1979. Proposed final regulations have not yet been issued.