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INTRODUCTION

A State Department official once remarked to me that in a world that frowns upon the use of brute force a young lawyer in the Department can make his or her career by finding a new economic sanction. How is this observation relevant to a symposium on marine resources? Marine resource management requires a complex interdisciplinary effort. Fishery management in particular involves complicated international arrangements whose success rests upon the cooperation of the parties and on the separateness of such arrangements from the turmoils of our world. It is precisely these turmoils, however, that may lead a government to find it desirable to link its cooperation in fisheries to the cooperation of its partners in other areas. Consequently, when partners fail to so cooperate, a piqued state may consider using access to fishing as a lever to coerce or encourage certain acts by its partners.

This Article considers the implications of international sanctions for ocean resource management and the law of the sea through an exami-
nation of one particular sanction, denial of access to fishing. Part I examines the origin and use of the fishing weapon. Part II discusses the legal restraints on denial of access to fishing, and Part III evaluates the potential of this sanction as an instrument of foreign policy. Part IV considers the wisdom of employing this sanction and concludes that despite the potential effectiveness of denying access to fishing, use of the sanction should be avoided because of the implications of its use for the legal regime of the Exclusive Economic Zone.

I

THE ORIGIN AND USE OF THE FISHING WEAPON

A. Origins

The possibility that coastal states might deny access to fisheries arose with the right of those states to control such fisheries. For centuries, a state's right to fisheries encompassed only the fish within a narrow band of the territorial sea. Since the Second World War, however, rights to wider bands of adjacent water have been claimed and ultimately have been recognized.

One clear consequence of the Third United Nations Conference on the Law of the Sea (UNCLOS III)\(^2\) is that much of the oceans and the resources therein was "enclosed" by the coastal states.\(^3\) The 1982 Law of the Sea Convention (1982 Convention)\(^4\) manifests, among other things, an international consensus that greater authority over extended maritime zones is necessary to solve the problems of ocean management. Under the order existing before UNCLOS III and the 1982 Convention, use of the ocean outside of the territorial sea generally had been open to all.\(^5\)

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5. There were a number of exceptions to this free-for-all. Sedentary species, for example, were characterized as a resource of the continental shelf within the jurisdiction of the adjacent coastal state under the Convention on the Continental Shelf, Apr. 29, 1958, art. 2(4),
No state or group of states could reserve use for themselves or interfere with the reasonable activities of other states. The limited enforcement capabilities of this bare-bones legal order could do little either to protect a fishery from overexploitation or to protect the oceans themselves from abusive activities such as the operational discharge of oil from tankers. Importantly, the states at UNCLOS III chose to provide a major part of the needed authority by expanding the maritime zones of coastal states rather than by allocating authority to an international organization with a regional or global membership.

The 1982 Convention increased the maritime authority of coastal states by granting them a 200-mile wide Exclusive Economic Zone (EEZ). Although the EEZ was articulated explicitly for the first time in the 1982 Convention, the legality of such a zone generally had been recognized under customary international law by at least the late 1970's. As of March 1986, it is estimated that 105 coastal states claimed 200-mile maritime zones; fifteen of these were extended territorial seas.


8. See, e.g., R. Smith, supra note 8, at 3. Estimates vary in this regard, however. A different source estimated that as of October 1, 1985, 96 of the 140 independent coastal states had established zones reaching out to 200 miles. G. Moore, Coastal State Requirements for Foreign Fishing 2 (1985).

9. R. Smith, supra note 8, at 3. A territorial sea differs from an EEZ in that a state possesses full sovereignty over the former, but only specified functional jurisdictions over the latter. In essence, an extended territorial sea is the annexation of an area of ocean while an exclusive economic zone is the assertion of limited rights over an ocean area.
sixty-nine were exclusive economic zones, and twenty-one were fishing zones.

The geographic consequence of these 200-mile zones is that 27% of the world’s oceans for certain purposes fall under the authority of coastal states. Moreover, the fisheries of the world are not evenly distributed throughout the oceans, but instead lie primarily within the extended maritime zones claimed by coastal states. Indeed, an estimated 75-80% of present commercial fisheries fall within the 200-mile zones.

Coastal nations thus gained control over access to fishing in their EEZ’s by foreign groups. The creation of an EEZ under the authority of the adjacent coastal state almost automatically poses a threat to foreign groups fishing such waters. The threat of denial of access to fishing, however, results not so much from the creation of the EEZ as it does from the fact that the EEZ is placed under the authority of the coastal state to which it appertains. If EEZ’s had been placed under regional authorities, the process of arriving at a collective denial of fishing rights would be far more complex.


12. R. Smith, supra note 8, at 3.

13. See id.; see also Juda, supra note 11, at 308 (estimating the potential enclosure at almost 40%).


15. “There is a strong component of nationalism in enclosure efforts. . . . [A]n awareness of the harm one state can do to another state and its citizens is an essential component of a worldwide 200 mile zone theory.” Friedheim, supra note 7, at 161-62.


16. The common fisheries policy of the European Economic Communities (EEC) is an example of regional control of foreign access to fishing. The EEC, however, has little surplus catch to allocate, so access has been granted only in a few cases, and the withdrawal of access
Although conservation groups have called on other countries to follow suit, to date only the United States has used denial of access to fishing as a sanction. The United States has denied or threatened to deny access in three instances, the most recent of which spans almost a decade and involves at least seven countries.

1. The 1979 Soviet Invasion of Afghanistan

Following the Soviet invasion of Afghanistan on December 27, 1979, President Carter imposed a partial embargo on grain exports and related feedgrain commodities, and tightened restrictions on the export of certain high technology products and other “strategic” goods. The President also “severely curtailed” the fishing privileges of the Soviet Union in waters subject to U.S. fisheries jurisdiction by reducing the authorized 1980 catch from 435,000 metric tons to just over 75,000 metric tons and then to zero the following year.

This denial of access for fishing was later extended in response to the Soviet Union’s alleged complicity in the 1981 suppression of the independent trade union Solidarity in Poland. It was not until July 25, 1984, that the State Department announced that the ban was lifted and that the Soviet Union would be authorized “to catch 50,000 tons of fish off Alaska and the western coast.”

2. The 1981 Imposition of Martial Law in Poland

President Reagan responded to the Polish Government’s December 1981 crackdown on Solidarity by imposing a variety of sanctions on Poland. Potentially one of the most severe was the suspension of Poland’s fishing activities in U.S. waters. The 230,000 metric tons of fish Poland had caught in U.S. waters in 1981 represented approximately one-third of Poland’s total world catch.

privileges has not been used as a sanction. See R. Churchill, EEC Fisheries Law 176-84 (1987).

17. See, e.g., McCloskey, Whaling for Science?, Whale Center Newsl., Spring 1987, at 4 (“Other conservation-minded countries should enact their own domestic laws that will serve as sanctions.”).


The U.S. restrictions were removed in late 1983, but because no fishing surplus remained unallocated for 1983 the sanction, in effect, was not lifted until January 1984.23

3. **Enforcement of Quotas and Restrictions Established by the International Whaling Commission**

The most prolonged and sophisticated use of the fishing sanction has been in support of the aims of the International Whaling Commission (IWC). In support of IWC goals, the United States has ordered or threatened denial of access to fishing against at least seven countries.

Established in 1946 under the International Convention for the Regulation of Whaling (ICRW),24 the IWC was intended to serve as the primary international mechanism for the conservation of the whale as a fishing stock.25 In time, however, the IWC became the primary mechanism for the protection of the whale as a species.26 This change in institutional mission is most evident in the IWC’s 1982 adoption of a 5-year moratorium on commercial whaling to commence in 1986.27

Whatever its programmatic emphasis, the IWC, like many international organizations, has built-in limitations that hamper its effectiveness.

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27. The moratorium, passed by a 25 to 7 vote with 5 abstentions, provided: 
[C]atch limits for all the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review based upon the best scientific advice, and by 1990, at the latest, the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modifications of this provision and the establishment of other catch limits. See Britain Orders Sanctions Over Poland, N.Y. Times, Feb. 6, 1982, at A3, col. 6.
2 P. BIRNIE, *supra* note 26, at 615 (quoting International Whaling Commission Schedule, ¶ 10(e)). The seven countries voting against the measure were Brazil, Iceland, Japan, Norway,
First, the IWC’s power to “legislate” a moratorium or even quotas is limited, because any member state may opt out of a quota or moratorium simply by objecting to it. Second, even as to states that do not object, the IWC has no authority or means to enforce its quotas.

The United States on its own moved to further the aims of the IWC through two pieces of legislation: the 1971 Pelly Amendment to the Fisherman’s Protective Act of 1967, and the 1979 Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976 (FCMA).

The Pelly Amendment provides that when the Secretary of Commerce determines that the nationals of a foreign country are diminishing the effectiveness of an international fishery conservation program (including the IWC’s program), the Secretary shall certify this fact to the President. The President then has the discretion to ban

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28. ICRW, supra note 24, art. V. The quotas are, effectively, guidelines such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources... shall be based on scientific findings;... and... shall take into consideration the interests of the consumers of whale products and the whaling industry.

29. “[Any] amendment [to the ICRW] shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn.” Id. Contracting states also may withdraw from the organization. Id. art. XI.

30. There are other ways by which the United States promotes the IWC’s goals. For example, the United States prohibits the importation into the United States of whale products. Endangered Species Act, 16 U.S.C. § 1538(a)(1)(A) (1982); Marine Mammal Protection Act of 1972 (MMPA), 16 U.S.C. §§ 1371(a), 1372(c) (1982). Further, in adopting a 200-mile fishing conservation zone in 1976, the United States also extended the coverage of the MMPA. The Act prohibits the importation of whale products and also prohibits the taking of whales by persons or vessels in areas subject to U.S. jurisdiction (with limited exceptions for researchers and aboriginal whalers). Consequently, the United States came to prohibit whaling in its 200-mile zone. See Scarfi, supra note 26, at 614-18; see also Coggins, Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation, 6 ENVTL. L. 1 (1975) (describing the MMPA).


importation of fishing products from the offending country.\textsuperscript{35} The Packwood-Magnuson Amendment provides that when the Secretary of Commerce certifies that a country is diminishing the effectiveness of the work of the IWC, the Secretary of State must reduce that country’s fishing allocation in U.S. waters by at least 50%.\textsuperscript{36}

Although the Pelly Amendment involves the closure of U.S. markets to imports of fish rather than the denial of access to fishing, both it and the Packwood-Magnuson Amendment must be considered together because both were utilized in efforts to enforce the IWC’s whaling quotas and moratorium. The threat and effects of both amendments, as well as the circumstances of their invocation,\textsuperscript{37} are not easily distinguished.\textsuperscript{38}

The United States employed the Packwood-Magnuson Amendment almost immediately after its passage. Threatened certification in 1980 under both the Packwood-Magnuson and Pelly amendments led the Republic of Korea to agree to follow IWC guidelines restricting use of cold (i.e. nonexplosive) harpoons.\textsuperscript{39} The Republic of China, threatened with certification for its failure to observe IWC restrictions in 1980 and 1981, placed a complete bar on whaling.\textsuperscript{40} Most of the use or threatened use of the Packwood-Magnuson Amendment, however, falls into two later periods: use in support of the IWC moratorium on commercial whaling and use in opposing “scientific” whaling.


\textsuperscript{36} 16 U.S.C. § 1821(e)(2).

\textsuperscript{37} For example, a certification under the Packwood-Magnuson Amendment also serves as a certification under the Pelly Amendment. 16 U.S.C. § 1821(e)(2)(A).

\textsuperscript{38} Before passage of the Packwood-Magnuson Amendment in 1979, the United States threatened sanctions under the Pelly Amendment alone in a number of instances. On November 12, 1974, the Secretary of Commerce certified the USSR and Japan under the Pelly Amendment because both had objected to and exceeded the 1973-74 minke whale quota. After negotiations including discussion of Pelly Amendment sanctions, both countries agreed to abide by the 1974-75 quotas. See Not Saving the Whales: President Ford Refuses to Ban Fish Imports from Nations Which Have Violated International Whaling Quotas, 5 Envtl. L. Rep. (Envtl. L. Inst.) 10,044-47 (1975). Similarly, on December 14, 1978, the Secretary of Commerce certified Chile, South Korea, and Peru for exceeding IWC quotas. As a consequence, all three nonmember countries joined the IWC by the next annual meeting. Finally, the threatened certification of Spain in 1979 led that country to observe a fin whale quota to which it had objected. Preparations for the 34th International Whaling Commission Meeting: Hearings Before the Subcomm. on Human Rights and International Organizations of House Comm. on Foreign Affairs, 97th Cong., 2d Sess. 11 (1982) [hereinafter Whaling Report].


\textsuperscript{40} Whaling Report, supra note 38, at 11.
a. Use in Support of the Moratorium on Commercial Whaling

In 1982 the IWC adopted a five-year moratorium on commercial whaling, to commence in 1986. Of the seven states that voted against the moratorium, Japan, Norway, Peru, and the Soviet Union exempted themselves from its application by objecting to the decision in accordance with the ICRW. With the threat of the Pelly and Packwood-Magnuson Amendments in the background, the United States began to press almost immediately for withdrawal of these objections. Peru withdrew its objection not long after.41 The negotiations were more prolonged with the remaining three.

1. Norway

In 1986, after four years of negotiations urging Norway to observe the moratorium, U.S. Commerce Secretary Baldridge certified Norway for its continued catches of minke whales.42 The President shortly thereafter reported to Congress on actions the United States would take given the certification of Norway.43 In particular, because Norway's response was to announce that it would cease commercial whaling in 1987, the United States agreed not to impose sanctions at that time.44

2. The USSR

In 1985, amidst U.S. efforts to have the Soviet Union withdraw its objection to the IWC moratorium, the Soviets exceeded an IWC quota on minke whales.45 Although the Soviet Union also had objected to the minke whale quota, the Secretary of Commerce provided the President a certification under the Packwood-Magnuson Amendment on April 1, 1985. The Soviet allocation of fish in U.S. waters was halved immediately.46 As a result of the certification, the Soviets' 1985 catch was re-

44. See id. It appears that the sanction barring imports of Norwegian fish products was of more concern to Norway. See text accompanying infra note 164.
45. U.S. Vows to Cut Soviet Fish Catch, San Francisco Chron., Apr. 4, 1985, at 8, col. 1. The U.S. estimated that the IWC quota for the Soviet Union would have been 1,941 whales had it not objected. The Soviet catch was estimated at 2,403 minke whales. Id. (estimate attributed to Monitor, a conservation group).
46. President's Message to Congress, Whaling Activities of the U.S.S.R., 21 WEEKLY COMP. PRES. DOC. 728 (May 31, 1985). The President declined to embargo fish products from the Soviet Union on the grounds that such an action (1) would have a negligible impact because the Soviets could market the fish elsewhere; and (2) might interfere with U.S.-USSR
duced by approximately 18,000 metric tons, valued at about $9 million. In 1986, their permitted catch in U.S. waters was reduced to zero.

The Soviet Union, like Japan and Norway, continued commercial whaling during 1986, the first year of the moratorium, taking approximately 2,700 whales. The USSR, however, announced in the spring of 1987 that it would not conduct commercial whaling operations during the 1987-88 season and has not whaled since then.

3. Japan

Japan consistently has opposed the IWC's restriction of commercial whaling. It voted against and subsequently exempted itself from both the zero quota placed on the taking of sperm whales in 1981 and the 1982 moratorium on commercial whaling. To encourage Japan to withdraw its objection to the moratorium, but without invoking the Packwood-Magnuson amendment, the U.S. Government reduced Japan's 1983 allocation of fish in U.S. waters by 9%, representing approximately 102,000 metric tons. Japan's whaling policy did not change, however.

As a balm accompanying passage of the moratorium, the IWC granted Japan special sperm whale quotas for the 1982-83 and 1983-84 joint venture companies that involved U.S. nationals. Id. ("An embargo imposed in 1985 could cost the United States 90,000 metric tons of expected joint-venture catch and over $12 million."); MARINE MAMMAL COMMISSION, ANNUAL REPORT OF THE MARINE MAMMAL COMMISSION, CALENDAR YEAR 1985, at 36 (1986) [hereinafter 1985 MARINE MAMMAL COMMISSION].


48. Keller, Soviet Says It Is Giving Up Commercial Whaling, N.Y. Times, May 24, 1987, at 1, col. 3 ("The only fish taken from American waters by the Soviet Union are caught by American trawlers ... under joint venture agreements signed nearly a decade ago.").

49. Japan's Commissioner Quits Whaling Group Over a Vote, supra note 42 ("Japan took 2,769 and the Soviet Union is believed to have taken a similar number.").

50. Id; Keller, supra note 48; see also Reilly, Japan's Needless Whaling, N.Y. Times, Sept. 3, 1987, at 19, col. 2. The USSR indicated as early as July 1985 that it intended to cease whaling. See 1985 MARINE MAMMAL COMMISSION, supra note 46, at 33.


52. Japan was the only nation voting against the zero quota on sperm whaling (25 in favor, 1 opposed, 3 abstaining). REVIEW OF THE 33d INTERNATIONAL WHALING COMMISSION MEETING: HEARING BEFORE THE SUBCOMM. ON HUMAN RIGHTS AND INTERNATIONAL ORGANIZATIONS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 97th Cong., 1st Sess. 11-12 (1981).

53. See supra note 27.

seasons, but later denied Japan a special quota for the 1984-85 season. Because Japan had objected to the original 1981 zero quota, however, it was not bound under the ICRW to stop taking sperm whales. Subsequently, although Japan did not have a special quota for the 1984-85 season, it was observed taking sperm whales in late 1984. Unlike the tough U.S. reaction that would follow the Soviets' taking of minke whales in excess of an IWC quota, the Commerce Secretary did not certify and the President did not sanction Japan under either the Pelly or Packwood-Magnuson amendments. Because of complex trade and defense issues between Japan and the United States, the President preferred to continue negotiations.

Two actions converged in late 1984 as a consequence of the Commerce Secretary's decision not to certify Japan. First, a collection of U.S. environmental groups brought suit on November 8, 1984, to compel the Secretary of Commerce to certify Japan under the two amendments. They argued that the Secretary was directed by the statutes to provide certification whenever the actions of a foreign nation "diminished the effectiveness" of the IWC's program. Second, the United States and Japan, partly in anticipation of the lawsuit, agreed on November 15, 1984, that the Secretary of Commerce would not certify Japan in return for (1) Japan's withdrawal of its objections to the IWC sperm whale quota and the moratorium; (2) Japan's stopping of commercial whaling by the start of 1988; and (3) Japan's promise to take fewer than 1,200 sperm whales and a mutually acceptable number of minke and Bryde whales before 1988. Consequently, during 1986, the first year of the

57. See infra notes 159-60 and accompanying text.
60. However, Japan caused some confusion by advancing a different interpretation of the executive agreement shortly after its conclusion. Japan's stated view was that they agreed only to withdraw their objection to the IWC sperm whale quota and to limit sperm whaling to 400 per year for 1984 and 1985. Chira, Japan Denies Pact to End All Whaling, N.Y. Times, Nov. 15, 1984, at 3, col. 4 (Tatsuo Saito, then deputy director of Japan's Fishery Agency, reportedly said that "[t]here was agreement only on sperm whaling"). U.S. officials suggested, however, that Saito's statement might reflect political posturing in view of the political sensitivity of the Japanese to the whaling issue. U.S. Sticks to its Version, N.Y. Times, Nov. 15, 1984, at 3, col. 4.

As to the negotiations, see Shabecoff, Sanctions Sought Against Japanese Whalers, N.Y. Times, Nov. 3, 1984, at 5, col. 2. Japan notified the U.S. on December 11, 1984, that it had withdrawn its objection to the sperm whale quota. By an exchange of letters on April 5, 1985, Japan agreed to withdraw its objection to the moratorium once an unappealable judgment was
moratorium, Japan was able to take 2,769 whales without sanction from the United States.61

The lawsuit proceeded notwithstanding this executive agreement. On March 15, 1985, the U.S. District Court for the District of Columbia held for the plaintiff environmental groups and ordered the Secretary of Commerce to certify Japan.62 On August 6, 1985, the U.S. Court of Appeals affirmed the District Court's ruling.63 In May 1986, the U.S. Supreme Court reversed by a vote of five to four.64 Justice White, writing for the majority, concluded:

[T]he Secretary's decision to secure the certainty of Japan's future compliance with the IWC's program through the 1984 executive agreement, rather than rely on the possibility that certification and imposition of economic sanctions would produce the same or better result, is a reasonable construction of the Pelly and Packwood Amendments.65

Given the language of the Packwood-Magnuson amendment to the contrary, and the intent of Congress in enacting the legislation, the decision reflects how large the stakes were in this whaling and fishing dispute. It illustrates the lengths to which the Supreme Court will go to avoid Congressional tying of Executive hands in foreign affairs, particularly when the situation is too delicate to foreclose avenues of negotiation.66

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61. Japan's Commissioner Quits Whaling Group Over a Vote, supra note 42 ("[The IWC] says the figures are based on information from member nations.").


65. Japan Whaling Ass'n, 106 S. Ct. at 2872.

66. See Gibson, Narrow Grounds for a Complex Decision: The Supreme Court's Review of an Agency's Statutory Construction in Japan Whaling Association v. American Cetacean Society, 14 ECOLOGY L.Q. 485, 516 (1987) (the decision should not be viewed as an extension of the deference afforded an agency's construction of the statute, but rather "as one influenced by the
In March of 1987, true to the letter of the agreement, Japan announced the end of its commercial whaling.67

b. Use of Sanctions to Oppose “Scientific” Whaling

Just as it appeared that the moratorium on commercial whaling would take hold, first Iceland and then Japan announced whaling programs for scientific purposes. The notion of whaling for scientific rather than commercial purposes follows from two characteristics of the IWC regime. First, the moratorium adopted in 1982 applies only to commercial whaling. Second, article VIII of the ICRW allows states to issue special permits to its citizens to take whales for scientific research, subject to prior review by the IWC and its Scientific Committee.68

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68. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operations of this Convention. ICRW, supra note 24, art. VIII(1), reprinted in 2 P. BIRNIE, supra note 26, at 692.
land and Japan test the international community’s attitude toward scientific whaling, a number of other nations have indicated they also may adopt such programs.69

1. Iceland

In 1985, Iceland submitted a scientific research program to the IWC for the 1986 to 1989 seasons in which it would authorize the taking each year of eighty fin whales, forty sei whales, and eighty minke whales.70 Unable to reach agreement on the proposal, the IWC established a special working group to address the question and called upon member states to avoid research activities that assume the characteristics of commercial whaling.71 In 1986, the first year of the moratorium on commercial whaling, Iceland initiated the practice of scientific whaling and took 117 sei and fin whales.72 Yet, it reportedly also intended to export the whale meat to Japan.73 In 1987, to avoid certification by the United States, Iceland agreed to lower its proposed catch of whales from 120 to 100.74 At the same time, the United States promised to work with Iceland to seek changes in the IWC. On January 23, 1988, however, Halldor Asgrimsson, Iceland’s Fisheries Minister, joined Japan in taking a more aggressive stance toward the IWC. Calling for more action on changes in the IWC, Iceland announced it would proceed with a four-year program of hunting up to 120 whales per year and threatened to leave the IWC if the organization objected.75

2. Japan

In April of 1987, barely a month after ending its commercial whaling, Japan announced its intention to take 825 minke whales and fifty sperm whales for “scientific purposes” each year for the next ten years.76 In the view of environmentalists, this action would allow Japan to sidestep the U.S.-Japan executive agreement under the pretext of scientific

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69. During the first year of the moratorium, South Korea took approximately 70 whales on this basis. See Japan’s Commissioner Quits Whaling Group Over a Vote, supra note 42.
70. 1985 MARINE MAMMAL COMMISSION, supra note 46, at 35.
71. Id. at 34.
73. Id. (“So far, the United States and Germany have successfully blocked this scheme.”).
75. Id.
76. Reilly, supra note 50. Reilly, new EPA Administrator and former President of the World Wildlife Fund and the Conservation Foundation, states in this editorial that in April 1987 “Tokyo announced it would provide $2.3 million to subsidize the killing of 825 minke whales and 50 sperm whales.” Id.
Although environmentalists expressed surprise at this development, Japan had indicated as early as 1985 that it might conduct such research. See Japan Agrees to End Whaling, N.Y. Times, Apr. 6, 1985, at 1, col. 2. Moreover, it is important to remember that Japan used the “scientific” argument in the late 1930’s with regard to the Alaskan Salmon fishery. See Jessup, The Pacific Coast Fisheries, 33 AM. J. INT’L L. 129, 132-33 (1939).


The action sought relief from judgment because “fraud . . . misrepresentation, or other misconduct of an adverse party” had occurred (citing FED. R. Civ. P. 60(b)). See Pettinato, Conservationists Back in Court to Stop Japanese Whaling, WHALE CENTER NEWS, Fall/Winter 1987, at 1.


Id. A U.S. official did speculate, however, that some allocations might be available later in 1988. Id.

Japan and Iceland Will Hunt Whales, supra note 74.
the United States places sanctions against Japan, we are ready to accept such sanctions." \(^{85}\) Commerce Secretary Verity certified Japan to the President on February 11 after the first whale was taken, \(^{86}\) and a little over one month later the President banned fishing by Japan in U.S. waters. \(^{87}\)

In June 1988, at its annual meeting, the IWC reaffirmed its opposition to the scientific whaling undertaken by Japan and Iceland. \(^{88}\) Japan nonetheless took 273 minke whales during the 1988 season. \(^{89}\)

II

THE LEGALITY OF DENYING ACCESS TO FISHING

The economic sanction has emerged as a key device for a significant number of states, either individually or collectively, to enforce international norms. Although foreign policy advisors will need to assess carefully the potential effectiveness of any sanction, consideration of its legality under international law is equally important to decisionmaking in this area. International law in large part is a system created by states and, as such, it manifests policies that states believe to be in their long term interests. \(^{90}\) Although in some instances economic coercion is prohibited, \(^{91}\) a significant number of states continue to assert the right under international law to impose economic sanctions in response to an internationally wrongful act. \(^{92}\) The growing instrumental importance of sanctions stems from the fact that the right to use armed force in response to internationally wrongful acts has become progressively more limited in this century. Ultimately, the right to impose sanctions in turn may be

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85. Id.
91. E.g., Charter of the Organization of American States, art. 16, Apr. 30, 1948, 2 U.S.T. 2394, 2420, T.I.A.S. No. 2361, reprinted in C. FENWICK, *The Organization of American States* 551 (1963) ("No state may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another state and obtain from it advantages of any kind.").
replaced by an effective system for peaceful resolution of disputes. 93 For
the present, however, economic sanctions remain an important part of
international public order.

In addition to manifesting the desire of states to employ economic
sanctions to enforce norms, international law also incorporates the ex-
pectation of states that such measures will not endanger minimum public
order by escalating hostilities. Thus, an economic sanction is a lawful
reprisal or, as more recently termed, a lawful countermeasure, if: (1) the
sanctioning state was injured by the target state's alleged breach of inter-
national law; (2) the sanctioning state has satisfied its duty to seek a
peaceful settlement of the dispute; and (3) the impact of the sanction on
the target state is proportional to the injury suffered by the sanctioning
state. 94

These prerequisites to a legal sanction only apply, however, under
two circumstances. First, the resource or activity to be denied must be
recognized by the international community to be subject to the authority
of the sanctioning state. If the sanctioning state does not possess interna-
tionally recognized authority over that which is to be denied by the sanc-
tion, then the sanctioning state does not have the right to impose the
sanction at all and the possibility of limitations a fortiori is not reached.
Normally, the presence or absence of authority is quite clear. For exam-
ple, in sanctioning the Soviet Union for its invasion of Afghanistan, the
United States clearly possessed the authority to block, for example, fur-
ther United States grain sales to the Soviet Union. It is equally clear that
the United States would not have had the authority to block further Ca-
nadian sales to the Soviets. But a state's right to act in regard to the
resource or activity underlying a sanction is not always so clear. When
the United States attempted to sanction the USSR by blocking U.S.
assistance in the construction of a gas pipeline from Western Europe to
the Soviet Union, a number of Western European countries disputed the

93. Indeed, this transition can be said to have been accomplished in several areas of inter-
Rep. 2729, 2739 (in response to French restriction of mutton imports, Court held that
although special measures were necessary, a decision to adopt them could no longer be made
unilaterally because they had to be adopted within the Community system). But although the
submission of a dispute to a tribunal with the effective power to settle the dispute may preclude
the imposition of countermeasures, a treaty requirement that the parties negotiate all disputes
does not necessarily bar such countermeasures. See, e.g., Case Concerning the Air Service
Agreement of 27 March 1946 (U.S. v. France), 54 I.L.R. 304, 340 (Arb. Tribunal est. by
Compromise of 11 July 1978) (duty to negotiate did not preclude order prohibiting certain
flights from operating in United States where order given to expedite recourse to arbitration).

94. See generally O. Elagab, The Legality of Non-Forcible Counter-Measures
in International Law (1988); E. Zoller, Peacetime Unilateral Remedies: An
Analysis of Countermeasures (1984); Malanczuk, Countermeasures and Self-Defence as
Circumstances Precluding Wrongfulness in the International Law Commission’s Draft Articles
on State Responsibility, in United Nations Codification of State Responsibility 197
authority of the United States to order Western European corporations controlled by U.S. nationals not to assist in the construction.\textsuperscript{95} Similarly, the precise extent of the coastal state's authority over the living resources in a functional jurisdictional zone such as the EEZ should not be assumed lightly.

The second circumstance that must be present for limitations on sanctions to apply is that the target state have an international right to that which the sanction denies. If the target state does not have a right to that which is denied, the sanction, although perhaps unfriendly, does not present a question under international law and the limitations described above need not be examined. As will be seen, the rights acquired by foreign states to access to fisheries subject to U.S. jurisdiction are quite limited.

A. The Extent of the Authority of Coastal States Over Fisheries in Their EEZ's

In arguing for passage of the Packwood-Magnuson Amendment, Senator Packwood stated that the amendment would compel states "to choose between that privilege [of whaling contrary to IWC quotas] and the privilege of fishing in our 200-mile zone."\textsuperscript{96} This snappy declaration manifests the widely held belief that the excess fish within the EEZ are ours. Access to fish in our 200-mile zone is a "privilege"—ours to grant or deny. Although this view is generally accepted by states vis-à-vis others using their waters, it is not always received as enthusiastically by those same states. For example, the same Congress that speaks of fishing in our waters as a privilege provided in the U.S. Fishery and Conservation and Management Act that it is the sense of the Congress that the U.S. shall not recognize foreign claims to extended fishery jurisdictions if such nations impose "on fishing vessels of the United States any conditions or restrictions which are unrelated to fishery conservation and management."\textsuperscript{97} Given the unique nature of the EEZ in international law, it is important to understand why the "privilege" view, at least technically, is correct.

The international regime of the EEZ is not fully settled: the 1982 Law of the Sea Convention is not yet in force,\textsuperscript{98} and although many unilateral claims to an EEZ expressly refer to the 1982 Convention, other

\textsuperscript{96} 125 Cong. Rec. 21,742, 21,743 (1979).
\textsuperscript{97} 16 U.S.C. § 1822(e) (1982). But see United States v. Shelhammer, 681 F. Supp. 819, 820 (S.D. Fla. 1988) ("The court finds that the . . . language in section 1822(e) is precatory and is solely intended to advise the various branches. . . .").
\textsuperscript{98} See supra note 4.
claims do not.\textsuperscript{99} However, given that the 1982 Convention is the most authoritative statement of the regime at present, the Convention is the proper point of departure.

The 1982 Law of the Sea Convention provides that the EEZ "is an area . . . subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal state and the rights and freedoms of other states are governed by the relevant provisions of this Convention."\textsuperscript{100} The area is sui generis in that its \textit{residual} nature imparts a presumption of authority neither to the coastal state nor to users of the high seas. Rather,

\begin{quote}
\begin{itemize}
\item In cases where this Convention does not attribute rights or jurisdiction to the coastal state or to other states within the exclusive economic zone,
\item the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.\textsuperscript{101}
\end{itemize}
\end{quote}

Therefore, the question is precisely what rights in the living resources of the EEZ are and are not attributed to the coastal state by the 1982 Convention.

In the area of fisheries, the Convention clearly attributes a great many rights to the coastal state. It provides that the coastal state has "sovereign rights for the purpose of . . . exploiting, conserving and managing" the resources, living and nonliving, of the EEZ.\textsuperscript{102} The Convention also provides, however, that the coastal state shall "promote" optimum utilization of the living resources.\textsuperscript{103} If the allowable catch is greater than the estimated domestic catch, then the coastal state "shall . . . give other states access to the surplus" in accordance with domestic law and regulations.\textsuperscript{104} Although the Convention speaks in terms of granting rather than denying access, the authority of the coastal state to

\textsuperscript{99} Indeed, whether the 1982 Convention reflects customary international law in this regard is debatable. States that have established an EEZ often do not expressly recognize any right of foreign fishing fleets to harvest the surplus. For an excellent survey of state practice in this regard, see G. Moore, supra note 9. "Few cases, quite understandably, acknowledge any obligation of the coastal state to give foreign vessels access to the surplus of its fishery resources." \textit{Id.} at 7 (footnote omitted); see also M. Dahmani, \textsc{The Fisheries Regime of the Exclusive Economic Zone} 75 (1987); Moore, \textit{National Legislation for the Management of Fisheries Under Extended Coastal State Jurisdiction}, 11 J. Mar. L. \& Comm. 153 (1980); Wolfrum, \textit{The Emerging Customary Law of Marine Zones: State Practice and the Convention on the Law of the Sea}, 18 Neth. Y.B. Int'l L. 121, 135 (1987). Of course, the failure of domestic legislation to recognize the duty to grant access does not necessarily indicate that the state does not believe such an international duty exists; nor could municipal legislation negate an international obligation.

\textsuperscript{100} 1982 Convention, supra note 4, art. 55.

\textsuperscript{101} \textit{Id.} art. 59.

\textsuperscript{102} \textit{Id.} art. 56.

\textsuperscript{103} \textit{Id.} art. 62.

\textsuperscript{104} \textit{Id.} Under the Convention, a state may be denied access for failure to follow such law and regulations. Lewis Alexander adds that a coastal state "can also make political use of the
deny access as a sanction can be approached by reference to its duty to grant access.

There are subtle differences in scholarly opinion regarding the duty to grant access. These differences become more pronounced when one is examining the right to deny access. Professor Lowe recently argued that the EEZ regime can be viewed as an order that sometimes places the coastal state in the role more of a steward than of a proprietor.\(^\text{105}\) The coastal state possesses the sovereign rights to exploit, conserve, and manage the fish within its EEZ, and in this regard its role is one akin to a proprietor.\(^\text{106}\) It also is under the duty, however, to utilize optimally the resource and as a consequence give access, if necessary, to any surplus. For Lowe, therefore, the issue is whether the coastal state that is making access decisions possesses the discretion of a proprietor or the trust of a steward. Under his stewardship view, access to surplus fish would not belong to the coastal state to grant or deny arbitrarily.\(^\text{107}\)

For Professor Burke the terms of any trust are set forth in the 1982 Convention, and in his view “giving access is not a meaningful obligation on the part of the coastal state.”\(^\text{108}\) Professor Burke’s analysis emphasizes in part the nonreviewable discretion the coastal state possesses right of access,” and he refers to the U.S. actions in response to the Soviet invasion of Afghanistan as an example. Alexander, \textit{supra note} 3, at 581 n.105.

105. \textit{Lowe, Reflections on the Waters—Changing Conceptions of Property Rights in the Law of the Sea}, 1 \textit{INT’L J. ESTUARINE \& COASTAL L.} 1, 1-2 (1986) (the law of the sea uses “an approach to the use of marine resources based more upon notions akin to stewardship than upon the untrammelled proprietorship which has, broadly speaking, characterized the previous legal order.”).

106. If the difference between a proprietor with contractual duties and a steward is the possession of residual rights in the \textit{res}, then it appears the coastal state is more akin to the proprietor. The qualification of “sovereign” rights in article 56 suggests that the coastal state receives all rights in the living resources. Professor Brown agrees that the ordinary meaning of sovereign rights “implies that, in case of doubt, there will be a presumption in favor of the plenary powers and jurisdiction of the coastal state.” Brown, \textit{The Exclusive Economic Zone: Criteria and Machinery for the Resolution of International Conflicts Between Different Users of the EEZ}, 4 \textit{MARINE POL’Y MGMT.} 325, 334 (1977).

A recent decision of the U.S. Court of International Trade, however, was careful to point out that sovereign rights in the EEZ “are not the equivalent of ‘sovereignty.’” Koru North America v. United States, 701 F. Supp. 229, 232 (Ct. Int’l Trade 1988). In this action contesting U.S. Custom Service exclusion of fish allegedly improperly marked as to country of origin, the court held that “the state retains control of the fishing resources only for the purpose of optimum utilization” and that it consequently “would be improper to characterize fish caught within a country’s EEZ [by a foreign vessel] as originating from that country.” \textit{Id.} at 233.

107. If the coastal state is a steward in any meaningful sense, the coastal state should not have the right to deny access as a sanction. Only if the rationale underlying the legality of sanctions equates the interests of the international community in the fisheries with that of the coastal state in its foreign affairs is such action justified. See text accompanying notes 116-17.

108. Burke, \textit{The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction}, 63 \textit{OREGON L. REV.} 73, 90 (1984). Note that highly migratory fisheries (such as tuna) are governed by special regimes, 1982 Convention, \textit{supra note} 4, art. 64, as are anadromous fisheries (salmon). \textit{Id.} art. 66.
under the Convention to find there simply is no surplus at a variety of points in the fishery management process.109 For Burke the coastal state's discretion in setting the amount of surplus flows from its power to determine both its harvesting capacity110 and the total allowable catch.111 This characterization is confirmed by the Convention's placement of these determinations within the "discretionary powers" of the coastal state that are not subject to the mandatory dispute settlement provisions of the Convention.112

Although Lowe agrees with Burke that the coastal state enjoys a wide range of discretion, he argues that "the practical failure of the EEZ 'access' regime would not eradicate the significant advance . . . of the legal duty to allow access . . . as an essential part of the concept of coastal rights over those fisheries."113 The weakness of the EEZ access regime, however, is more than a practical one brought about by nonreviewable discretion. Indeed, although discretion might obscure choices regarding the granting of access, it does not similarly obscure the choice to deny access as a sanction. A meaningful denial of access suggests that a surplus exists. Indeed, a meaningful denial of access suggests that if not for the sanctioned conduct, access would have been granted to that particular state.

But even if one puts aside the discretionary considerations that could result in a coastal state's finding that no surplus exists, Burke emphasizes that the Convention requires only that the coastal state's granting of access to the surplus be consistent with the Convention's provision for optimal use of the resource.114 For Burke, it does not require the coastal state to allocate the surplus to any particular state. In other words, the coastal state also has discretion as to whom it allocates any surplus.115 Indeed, the fine print of the Convention ultimately recognizes the right of the coastal state to make access decisions in accordance with its interests rather than with those of the international community. Article 62(3) provides that in giving access to other states the coastal state may take into account "its other national interests."116 For Burke, this

110. Id. at 89-90.
111. Id. at 79-81.
112. Id. at 90 (citing art. 297(3) of the 1982 Convention).
113. Lowe, supra note 105, at 10.
115. As Professor Oxman has noted: "The duty to ensure optimum utilization should not be confused with the exclusive power of the coastal state over allocation. As long as the coastal state ensures optimum utilization, it has a right . . . to 'marry the bride with the largest dowry.'" Oxman, An Analysis of the Exclusive Economic Zone as Formulated in the Informal Composite Negotiating Text, in LAW OF THE SEA: STATE PRACTICE IN ZONES OF SPECIAL JURISDICTION 57, 72-73 (T. Clingan ed. 1982) (Proceedings of the 13th Annual Conference of the Law of the Sea Inst.) (quoting Jorge Castañeda).
provision "could embrace all conceivable interests that might bear on fisheries, including political, military . . . or ideological interests. Any doubt that fisheries significantly relate to such a diversity of interests can be dispelled by proving that states already employ their controls over fisheries to secure such diverse objectives."117

The Convention thus provides that a coastal state possesses the international authority to deny any given state access to fisheries in its EEZ on the basis of that coastal state’s national interests so long as optimum utilization is ensured. This provision is striking because it gives a very narrow effect to the community’s interests in the fisheries of any coastal state’s EEZ. The community arguably has a number of interests other than optimum utilization in the access regime. The Convention, for example, provides that the coastal state in making allocations shall give particular regard to landlocked118 and geographically disadvantaged119 states, especially those that are less developed.120 The community also has an interest in avoiding the disruption of numerous fishery management efforts because of one coastal state’s denial of access as a sanction. Despite the presence of such community interests, perhaps it should not be surprising that article 62(3) was included in the Convention. It is important to remember that the Convention was drafted carefully by states that likely sought to preserve freedom of action for themselves, even in remote contingencies. In this sense, the authority to deny access as a sanction should not necessarily be taken as an indication that it is advisable to do so.

B. The International Right of Foreign States to Access

The international limitations on countermeasures apply only when such measures deny an international right of the target state. As discussed above, although the 1982 Convention places a general duty on the coastal state to utilize the resource optimally, it does not grant any particular state a right of access. Therefore, a right of access, if one exists, must be found elsewhere.

It appears that no right of a foreign state is breached if the United States denies access to its fisheries. Foreign fishermen have little, if any, right to fish in waters subject to U.S. jurisdiction either under U.S. law or by treaty. For foreign fishermen to gain access to U.S. waters, U.S. law requires the conclusion of a governing international fishing agreement (GIFA) between the United States and the foreign state.121 In essence,

117. Burke, supra note 108, at 103 (referring to the U.S. denial of access to the Soviet Union following its invasion of Afghanistan).
118. 1982 Convention, supra note 4, arts. 62(2), 69.
119. Id. art. 70.
120. Id. arts. 62(2), 69(4).
the agreement is both an acknowledgement by the foreign state of the exclusive fishing management authority of the United States and a binding commitment to comply with a number of terms and conditions. 122

Pursuant to a GIFA, a catch is allocated to the foreign state on an annual basis after the United States has determined the surplus catch available for that year. The foreign state obtains permits for its nationals based on the allocation received. The United States does not commit itself, however, to make any allocation in any given year.

The Fishery Conservation and Management Act lists a number of factors to be considered in making allocations to foreign states. 123 Importantly, the last of these is "such other matters as the Secretary of State, in cooperation with the Secretary [of Commerce] deems appropriate." 124 The provision of FCMA immediately following this list of factors is that inserted by the Packwood-Magnuson Amendment. Consequently, a foreign state signing a GIFA not only has little assurance year to year as to the quota it will receive, but that state implicitly also recognizes that any allocation is subject to revocation under the Packwood-Magnuson Amendment. 125

Consequently, U.S. denial of access to fisheries involves actions essentially within its domestic jurisdiction not limited by international law.


124. Id. § 1821(e)(1)(E)(viii). Note that this can also come into play during the mid-year adjustment of the allocation. Id. § 1821(e)(1)(D). Ambassador Edward S. Wolfe, Deputy Assistant Secretary of State for Oceans and Fisheries Affairs, recently testified that this clause "is a very, very, very controversial provision outside of the government." Oversight of the U.S. and U.S.S.R. Fisheries Agreement: Hearing before the Subcomms. on Human Rights and International Organization and on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 100th Cong., 2d Sess. 15 (1988).

125. The clarity of U.S. municipal law, however, is not always repeated in international undertakings. For example, the GIFA between the U.S. and Soviet Union states that the purpose of the Agreement is "to establish a common understanding of the principles and procedures under which fishing may be conducted." Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Concerning Fisheries off the Coasts of the United States, Nov. 26, 1976, United States-USSR, art. 1, 28 U.S.T. 1848, 1849, T.I.A.S. No. 8528. The factors enumerated in this GIFA do not permit the U.S. to consider political concerns in making its allocation to the Soviet Union. In particular,

[in] determining the portion of the surplus that may be made available to vessels of the Soviet Union, the Government of the United States of America will promote the objective of optimum utilization, taking into account, inter alia, traditional fishing of the Soviet Union, contributions by the Soviet Union to fishery research and the identification of stocks, previous cooperation by the Soviet Union in enforcement with respect to conservation and management of fishery resources of mutual concern, and the need to minimize economic dislocation in cases where vessels of the Soviet Union have habitually fished for living resources over which the United States now exercises fishery management authority.
If, however, the United States or another state in the future granted an international right of access, then international law would place limits on the denial of that access as a sanction. 126

III

THE EFFECTIVENESS OF DENYING ACCESS TO FISHING

In assessing the effectiveness of sanctions, it is important to recognize that the general perception of the effectiveness of sanctions, as well as the methodology used to make such an assessment, have changed greatly throughout this century and in the last decade. 127

Collective economic sanction, in the first part of this century, was a pillar that many thought would support the League of Nations. 128 The perceived failure of sanctions in that forum and in the United Nations led many during the second part of this century to reject the efficacy, if not the feasibility, of multilateral sanctions. 129 In the past decade, however, economic sanc-

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126. Such international limits can be explored through examination of the United States' employment of this sanction. In particular, would the U.S. actions have satisfied the requirement that sanctions be imposed only in response to a wrongful act by the target state?

127. See M. DAOUDI & M. DAJANI, supra note 1, at 18-55.

128. See id. at 18-28.

129. See id. at 43-50.
tions, particularly unilateral ones, have received greater favor both in practice and in academia. The rehabilitation of sanctions, however, must be approached with care. Scholars at the forefront of this effort attack the dogma that sanctions are never successful. They by no means argue, however, that sanctions always work.

Academic analysis of the "success" of economic sanctions has considered primarily whether the sanctions achieved the political objectives that inspired their use. In part it is the change in the scope and method of such analysis that accounts for the change in scholarly opinion toward the efficacy of economic sanctions. In particular, success is no longer measured simply by the ability to coerce a desired course of conduct; it is measured as well by the effectiveness of communicating to multiple audiences the extent of the sanctioning state's concern over the objectionable conduct.

The more concrete task of evaluating success in terms of coercion is not easy. First, the stated or assumed objective of the sanctions may be false or incorrect. For example, although a popular impression is that the U.S. sanctions imposed in response to the Afghanistan invasion were intended to persuade the Soviet Union to withdraw its troops, it seems doubtful that this interpretation accurately reflects President Carter's main objective. Rather, he imposed sanctions because he felt that forcing Moscow to pay some price for its intervention might deter it from future acts of aggression. Second, the effect of a sanction on altering policy is difficult to discern. For example, did the U.S. sanctions imposed against the USSR for its invasion of Afghanistan dissuade the Soviet Union from intervening militarily in Poland during the ascendency of Solidarity, as some speculate?  

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133. G. HUFBAUER & J. SCHOTT, supra note 19, at 665 ("It is unknown what effect, if any, economic sanctions had on Soviet calculations with respect to adventures in other parts of [the] world"); Nincic & Wallensteen, supra note 132, at 7 ("[T]he memory of the sanctions that attended the invasion of Afghanistan might help explain why Poland was spared the fate that befell Czechoslovakia in 1968.").
The success of sanctions as a device to communicate the state's concern is even more difficult to assess. It is arguable, for example, that the Executive's almost symbolic denial to Japan of access to fishing in 1988 was an effort to demonstrate concern not to the Japanese, but rather to U.S. environmentalists. Indeed, the Executive's delay of this sanction from 1986 to 1988, despite strong domestic lobbying, sent a strong message to Japan that the U.S. Government for whatever reasons was reluctant to impose sanctions against Japan over whaling. Moreover, communication analysis may not be particularly significant for this particular type of sanction, because the potential communication value of denying access to fishing at least in one sense is low. Sanctions communicate the extent of a state's concern because they evince a willingness to bear suffering by that state in a way that a diplomatic protest does not. But as will be seen, denial of access to fishing places few costs and thus little suffering on the sanctioning state. Suffering may not be a prerequisite to the communication of serious concern, however, if the target state is sensitive even to symbolic statements. In this sense, the actions needed by the United States to communicate serious concern to Japan are likely far less grave than those necessary for the Soviet Union.

Evaluation of the coercive effect of the fishing weapon in the instances described in Part I reveals some clear failures and, perhaps, a few successes. At a minimum, it appears that the threat of withdrawing fishing rights, or their actual denial, can achieve limited foreign policy objectives. Evaluating the effectiveness of the past uses of this sanction requires analysis of the factors that influence its potential success. This Part explores the factors a policymaker should consider in evaluating the effectiveness of this sanction in a given situation, briefly discusses the effectiveness of the past use of this sanction, and considers the sanction's future.

A. Evaluating the Potential Success of Denial of Access to Fishing as a Sanction

Ascertaining the viability of any potential sanction is a lengthy and complex strategic task. Often the politically charged contexts in which such decisions must be made provide neither the time nor the climate necessary for such analysis. Assuming, however, that a decisionmaker does have the time and dispassionate climate necessary to consider carefully whether denial of access to fishing would be an effective sanction, what factors should be examined? In general, the sanctioning state must consider (1) the importance it places on the objective of the sanction, (2) the costs to the sanctioning state of imposing the sanction, and (3) the likelihood that the sanction will achieve its objective fully or in part. The last consideration is particularly complex, involving both economic and political calculations of the value the target country would place both on
the sanction and the conduct to be sanctioned. Estimating whether even a limited objective can be achieved requires in-depth knowledge not only of the general economic relations between the countries but also of the political and economic strength of the foreign fishing industry within the target state.

1. **What are the economic values the target country places on the sanction and the sanctioned conduct?**

   A logical first step in evaluating the potential effectiveness of a sanction is to calculate both the economic cost of the sanction and the economic benefit of the sanctioned conduct to the target country.\(^{134}\)

   The calculation of the direct cost to the target country of denied access should be relatively straightforward, because ordinarily the sanctioning state knows the size and type of the target country's catch. The difficulty is in calculating how successful the target state will be in reducing this potential loss. For example, if other states are willing to provide access to the same kind of fishery that the sanctioner is denying, the loss can be reduced.\(^{135}\) Moreover, a distant-water fleet abruptly denied access to the EEZ of a particular state may be willing to pay higher license fees to another state to keep the fleet employed. In that case, it is possible that a number of states would authorize an overutilization of their own fisheries for the few years that the sanction is in place. In addition, the target state may choose to exploit less plentiful high seas fisheries, supplemented by occasional unauthorized forays into various exclusive fishing zones.\(^{136}\)

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\(^{134}\) Curiously, studies of the Afghanistan sanctions do not include an entry for the loss of fishing rights among the economic costs of the sanctions to the USSR. See, e.g., G. Hufbauer & J. Schott, *supra* note 19, at 662-63 (listing only impacts of bans on grain and high technology exports). Likewise, there are no calculations of the cost to Poland of the fishing sanctions imposed against it. See, e.g., id. at 692 (listing only impacts from trade reduction and suspension of credit). Marantz merely states that the Polish fleet likely had “to fish elsewhere in less abundant waters.” Marantz, *Economic Sanctions in the Polish Crisis*, in THE UTILITY OF ECONOMIC SANCTIONS, *supra* note 95, at 138.

In contrast, more precise economic calculations were made in the case of countries continuing to take whales. The difference may simply reflect the fact that there was time in the case of whaling to make such calculations and an incentive to calculate the costs to make the U.S. threat of certification more powerful.

\(^{135}\) Considering the extent to which EEZ's have enclosed many fisheries, one might think that the demand for access to fisheries by foreign fleets far exceeds supply. Although this is true for several valuable fisheries, a number of fisheries that are not commonly marketed remain underutilized.

   The level of production has still a long way to go before it reaches the theoretical limit. With improved management . . . presently exploited species could yield 110 [rather than 73 million metric tons] annually. If the so-called unconventional species . . . were to be brought into full-scale production, the harvest would be considerably higher . . . .


overfish its own waters to put off the cost of the sanction for the present.\textsuperscript{137}

Similarly, the potential cost can be reduced if there are other types of fisheries available that could substitute for the one being denied. Much of the Soviet Union’s grain loss from the U.S. grain embargo over Afghanistan was made up by purchases from Argentina.\textsuperscript{138} But in the case of fisheries, a right to fish for salmon off the coast of British Columbia, for example, may not simply be replaced by a comparable catch of squid off the coasts of Africa. The state’s fishing boats may not have the proper gear. The factory ships may not be able to process the different catch. The new catch may require new buyers or be of less value.

Yet, although difficult, transfer is not impossible. When sanctions were imposed against Poland, for example, many of the vessels barred from the United States were deployed in high seas fisheries off Argentina, Chile, and Peru. By transferring their fleet to different fisheries, the Poles, who in losing their U.S. allocation lost one-third of their total catch, suffered only an 8% decline in their total catch in 1982 (a reduction from 630,000 to 582,000 metric tons).\textsuperscript{139} Poland claimed to have developed new high seas fishing methods for squid, and indeed their catch of squid off Argentina in 1982 exceeded 100,000 metric tons.\textsuperscript{140}

To the degree that the target state cannot find replacements for the lost fisheries, the sanction also will have dislocation effects within the broader fishing industry and the communities related to that industry.\textsuperscript{141}


\textsuperscript{138} See M. Daoudi \& M. Dajani, \textit{supra} note 1, at 143-44; Falkenheim, \textit{supra} note 132, at 113.

\textsuperscript{139} Poland Transfers Fishing Efforts to South America, \textit{Marine Fisheries Rev.}, Mar. 1984, at 94.

\textsuperscript{140} \textit{Id.} “[T]he Poles also benefited from the British 150-mile Exclusion Zone around the Falkland Islands which had prevented the Argentines from fully enforcing their 200-mile zone.” \textit{Id.} at 95. Distant-water fleets anxious to gain access to valuable fisheries such as squid were quick to take advantage of the British 150-mile protection zone, which pushed back Argentina’s claimed 200-mile territorial sea and left fishing in such waters wide open. Such fishing was not without danger. See Nien-Tsu Alfred Hu, \textit{The Sino-Argentine “Squid War” of 1986}, 11 \textit{Marine Pol’y} 133 (1987). Nor is it as profitable as it was initially; the U.K. began to require licenses for such fishing in 1987. See Churchill, \textit{The Falklands Fishing Zone: Legal Aspects}, 12 \textit{Marine Pol’y} 343, 346-47 (1988); Hodgson, \textit{The Falkland Islands: Life After the War}, 173 \textit{Nat’l Geographic} 390, 396 (1988). As to the U.K. establishment of the fishery zone, see 57 Brit. Y.B. Int’l L. 588 (1986); Churchill, \textit{supra}; Kohen, \textit{La Declaración británica de una zona de pesca alrededor de Malvinas}, 39 \textit{Rev. Española de Derecho Int’l} 487 (1987); Symmons, \textit{The Maritime Zones Around the Falkland Islands}, 37 Int’l & Comp. L.Q. 283 (1988).

\textsuperscript{141} The disagreement has adversely affected the 40 percent of Spain’s fishermen who normally fish Moroccan waters, and the effect has radiated out to Spain’s entire fish-
In this sense, the sanctioning state must also consider the financial relationship of the target state to its distant-water fishing fleet. For example, will the state support the idle fleet and prevent its dismantlement? The economics of distant-water fleets from countries such as Poland and the Soviet Union may be further complicated by the need of those countries to acquire hard currencies.

Finally, the total economic cost of a sanction will turn on how long it remains in force. Thus, the target country’s perceptions of the sanctioning country can influence the effectiveness of sanctions. Marantz writes, for example, that the Soviets can withstand sanctions because they believe “the capitalist world has limited staying power.” As discussed below, this perception may be quite inaccurate in the case of fisheries because the denial of access may cost the sanctioning state little.

2. What are the political values the target country places on the sanction and the sanctioned conduct?

Often the target country’s reaction to the sanction (at least for the short term) will have more to do with political than economic calculations. In mid-1985, for example, the estimated value of Japan’s entire catch in U.S. waters was approximately $500 million, reportedly fifteen times greater than the value Japan derived from whaling. Whaling in Japan is a small industry directly employing less than 1,000 workers, and the vessels employed are aging. But, while the economics of Japan’s choice were clear, economics alone were not determinative of Japan’s whaling policy. The added factor was politics.

Political calculations are always difficult. An important consideration is the political strength of the foreign distant-water fleet in its own country. Fishermen, like farmers, often represent a potent domestic political force. Distant-water fishing tends to be more corporate and
concentrated than are the diffuse small businesses of coastal fishing, and often it holds as much or more power than coastal fishing. This is true in part because often the coastal and distant-water fishing industries involve and economically benefit people from the same communities. The distant-water fishermen also can be more politically influential because their centralized structure is conducive to such activity.\textsuperscript{148}

The reaction of the population as a whole also can be an important factor in setting the political value of a response to sanctions. The act of sanctioning evokes a moral message that the sanctioned country is doing something wrong. Assuming that a people are aware of the sanction and that they have some voice in political determinations, then the country’s internal politics actually may strengthen the sanction if the population also believes the sanctioned conduct is wrong. As is often the case, however, a people may feel unjustly accused, and the political demand for continuing the targeted conduct may outweigh economic arguments that the conduct should be abandoned.\textsuperscript{149}

The Japanese Government has been masterful at massaging the public view of what the IWC, environmentalists, and the United States call Japan’s moral wrongs. For example, Japan no longer confronts world opinion by authorizing the taking of sperm whales, a species that is probably endangered. The international message to Japan in that case would be that taking sperm whales is morally wrong because it is irresponsible to hunt a species to extinction. The Japanese people likely would agree with this judgment. Instead, Japan proposed to take only 300 minke whales, a species that has an estimated population of 300,000 and is not endangered.\textsuperscript{150} In doing so, Japan altered the moral question from whether it is wrong to hunt a species of whale to extinction to whether it is wrong to kill even a single whale, regardless of whether its species is endangered.\textsuperscript{151}

\textsuperscript{148} See, e.g., T.\textsuperscript{\textregistered} AKAHA, supra note 147, at 22 (“Although the Japan Fisheries Association presumably represents the interests of the fishery industry as a whole, it is often strongly influenced by the distant-water fishery interests and the major fishing companies.”).

\textsuperscript{149} Nincic & Wallensteen, supra note 132, at 8.

\textsuperscript{150} See Shabecoff, supra note 86; see also Kendall, Nielsen & Keckes, supra note 126, at 477-80 (not listing the minke whale as “endangered,” “vulnerable,” or “rare”).

\textsuperscript{151} See supra note 126. Similarly, a fisheries official recently wrote concerning U.S. policy:

\begin{quote}
Virtually all countries in the world oppose the harvesting of animals if such harvesting threatens the survival of the species involved. If a harvesting regime threatens a species . . . with extinction, the current world ethic demands that such activities cease. The problem comes, however, when populations are sufficiently abundant to permit their harvest . . . . If the issue is simply restoration, we must recognize that protection has worked. . . . If the marine mammal issue is one of moral ethics, we must be prepared to admit this and critically examine how our policies impact our international relationships.
\end{quote}
This shift is particularly significant because it reflects Japan’s primary criticism that the moratorium was not based on a rational resource management decision to restore stocks, but rather was a political attempt by a politicized organization to end whaling entirely.

Consequently, the Japanese view the anti-whaling crusade as lacking scientific basis and its crusaders as hypocrites. As to the lack of scientific basis, the Japanese Commissioner to the IWC, Tatsuo Saito, stated as the IWC closed the “scientific” whaling loophole in June 1987: “There is a constant vote against Japan, even including members who have never attended the commission’s scientific committee. All Japanese will be infuriated by it.” It is the condemnation of killing even a single whale that makes the Japanese view anti-whaling crusaders as hypocrites. Voicing this view, Etsuji Hirano, a Japanese writer, reportedly stated: “We are called barbaric for eating whales, but Americans and Europeans who kill sheep, cattle, pigs and other mammals for food have no room to condemn us for barbarism.”

When the whaling is coastal and closer to a subsistence than a commercial activity, political considerations again can overwhelm economic analysis. In Norway, for example, some limited coastal whaling of minke whales was sought by Norway to maintain the economic base of its outlying districts. Norway, like Japan, does not believe its coastal stock of minke whales is endangered, and the 1,000 jobs involved in the industry is politically quite significant to a region with a population totalling less than 500,000.

Political considerations may be greatest when the state itself, as distinct from the people or a portion of the industrial sector, places a high value on continuing the sanctioned conduct. The great importance the Soviet Government attached to reestablishing a political order allied to the Soviet Union in Afghanistan, for example, must have overwhelmed any concern for the economic costs of the resulting sanctions.


153. Japan’s Commissioner Quits Whaling Group Over a Vote, supra note 42. Indeed, the objectors to the moratorium originally argued that the ICRW required that schedule amendments have a scientific basis and pointed to the finding of the IWC’s Scientific Committee and a U.N. Food and Agriculture Organization observer that available data did not support the call for a ban. See P. BIRNIE, supra note 26, at 615-17.

154. Yates, supra note 67. This view has also been fueled by the U.S. call for both an end to commercial whaling by Japan and a bowhead whale quota for Alaskan aborigines.


156. Id.
3. What are the economic and political costs of the sanction to the sanctioning country?

The fisheries weapon is politically attractive for the sanctioning state because there is little, if any, domestic dislocation. There may be some loss of revenues from fishing licenses, but it is the foreign rather than domestic industry that must absorb the costs of adapting to the change. Indeed, the domestic fishing industry might desire such a sanction inasmuch as an excluded fleet will not be able to exceed their allocation illegally, and the increase in stocks will increase domestic catch per unit effort. In contrast, President Carter's domestic advisers thought that a grain embargo against the Soviet Union would hurt his reelection chances with U.S. farmers. Such internal repercussions greatly diminish the likelihood that other nations, concerned for their own internal economies, will join in a collective sanction.

The sanctioning state also must weigh carefully the costs of possible counter sanctions. Certainly the maze of economic and political linkages and array of points of tension between the United States and Japan complicated considerably the decision to deny Japan access to U.S. fishing waters. Amidst loud calls to engage Japan on issues of trade and defense, the Executive proceeded as diplomatically as possible on the subject of whaling. As mentioned earlier, the Supreme Court's decision in Japan Whaling Association can be explained in large part by its recognition of these difficulties.

There can be complicated linkages even within the area of fisheries itself. For example, while U.S. legislation threatened to deny a substantial portion of Japan's catch in the U.S. EEZ because of objections to Japan's whaling activity, Japan threatened to close its domestic markets

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158. President Carter had great difficulty persuading Canada, Australia, and the EEC to join the grain embargo. See Falkenheim, supra note 132, at 112-14.

159. See, e.g., Packard, The Coming U.S.-Japan Crisis, 66 Foreign Aff. 348 (1987/88) ("For many American leaders, Japan was already guilty of running up a huge trade surplus through questionable tactics while keeping its own market largely closed to American products.").

160. See, e.g., id. at 355 ("Thus, it seems clear that American advocates of faster Japanese rearmament will be disappointed for some years to come.").

161. See supra notes 62-66 and accompanying text.
FISHERY SANCTIONS

1989] 343

to U.S. fishermen because of concerns over its continued right to harvest North American-spawned salmon.\(^{162}\)

B. The "Success" of the Fishing Weapon Thus Far

Bearing in mind the difficulties of measuring "success", has the fishing weapon been an effective coercive instrument thus far?

**TABLE 1**

<table>
<thead>
<tr>
<th>Year</th>
<th>USSR Catch (1,000 mt)</th>
<th>U.S. Allocation (1,000 mt)</th>
<th>U.S. Jt. Vent. (1,000 mt)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>9,226.2(^{1})</td>
<td>650.0(^{2})</td>
<td>--</td>
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<tr>
<td>1978</td>
<td>9,046.7(^{1})</td>
<td>583.5(^{2})</td>
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<tr>
<td>1979</td>
<td>9,049.7(^{1})</td>
<td>540.1(^{2})</td>
<td>0(^{5})</td>
</tr>
<tr>
<td>1980</td>
<td>9,515.6(^{1})</td>
<td>76.5(^{2,7})</td>
<td>24.9(^{3})</td>
</tr>
<tr>
<td>1981</td>
<td>9,566.3(^{1})</td>
<td>0(^{7})</td>
<td>48.0(^{3})</td>
</tr>
<tr>
<td>1982</td>
<td>9,990.6(^{1})</td>
<td>0(^{2})</td>
<td>53.2(^{5})</td>
</tr>
<tr>
<td>1983</td>
<td>9,816.7(^{1})</td>
<td>0(^{2})</td>
<td>71.8(^{5})</td>
</tr>
<tr>
<td>1984</td>
<td>10,592.9(^{1})</td>
<td>35.0(^{2,8})</td>
<td>92.3(^{5})</td>
</tr>
<tr>
<td>1985</td>
<td>10,522.8(^{1})</td>
<td>10.8(^{2,9})</td>
<td>186.7(^{5})</td>
</tr>
<tr>
<td>1986</td>
<td>11,260.0(^{1})</td>
<td>0(^{3})</td>
<td>200.6(^{5})</td>
</tr>
<tr>
<td>1987</td>
<td>--</td>
<td>0(^{4})</td>
<td>158.7(^{5})</td>
</tr>
<tr>
<td>1988</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
</tbody>
</table>


\(^{3}\) NOAA FISHERIES STATISTICS, 1986, at 96.

\(^{4}\) NOAA FISHERIES STATISTICS, 1987, at 92.

\(^{5}\) National Marine Fisheries Service, Joint Venture Requests and Harvests in the EEZ Off Alaska, 1978-1987. 1987 data covers only Jan. 1 through Nov. 7. Joint venture catch figures are difficult to estimate because they are confidential and only partially available. The above figures represent the joint venture catch off Alaska, by far the dominant joint venture fishery. The figures were supplied to the author by Stephen P. Freese, Office of the National Marine Fisheries Service, Washington, D.C.


\(^{7}\) See text, note 19.

\(^{8}\) See text, note 20.

\(^{9}\) See text, note 46.

\(^{10}\) See text, note 180.

\(^{11}\) See text, note 183.

162. See Wells, Accord is Reached on Japan's Catches of U.S. Salmon, Wall St. J., Mar. 11, 1986, at A36, col. 4 ("Japan ... had threatened to close its markets to U.S. fishermen: Alaska fishermen sell about 70% of their annual $250 million sockeye salmon harvest to Japan."); see also Rosati, Enforcement Questions of the International Whaling Commission: Are the Exclusive Economic Zones the Solution?, 14 CAL. W. INT'L L.J. 114, 140 (1984). But see Reilly, *supra* note 50, at A27, col. 2 ("Japan's exports of fish products to America, valued at $565 million in 1986, are also vulnerable to sanctions.").
In two incidents, the Soviet invasion of Afghanistan and the Polish suppression of Solidarity, denial of access to fishing was just one part of a broad package of economic sanctions. Generally, it is believed these sanctions were not effective. The likelihood that these sanctions would fail (at least in regard to the most apparent goals) was quite high, given that the target states themselves placed very high political values on the sanctioned conduct. But even so, the fishing aspect of these sanctions specifically does not appear to have had much effect. In fact, the Soviet Union's total worldwide catch increased during the sanction period (see Table 1), and the Polish total worldwide catch dropped by only 8% for the first year of the sanction and increased by 21% during the second year (see Table 2).

<table>
<thead>
<tr>
<th>Year</th>
<th>World Catch (1,000 mt)</th>
<th>U.S. Allocation (1,000 mt)</th>
<th>U.S. Jt. Vent. (1,000 mt)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
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<td>0&lt;sup&gt;3&lt;/sup&gt;</td>
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<tr>
<td>1979</td>
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<tr>
<td>1981</td>
<td>630.1&lt;sup&gt;1&lt;/sup&gt;</td>
<td>230.3&lt;sup&gt;2,6&lt;/sup&gt;</td>
<td>2.2&lt;sup&gt;5&lt;/sup&gt;</td>
</tr>
<tr>
<td>1982</td>
<td>608.1&lt;sup&gt;1&lt;/sup&gt;</td>
<td>0&lt;sup&gt;2,6&lt;/sup&gt;</td>
<td>7.0&lt;sup&gt;5&lt;/sup&gt;</td>
</tr>
<tr>
<td>1983</td>
<td>735.1&lt;sup&gt;1&lt;/sup&gt;</td>
<td>0&lt;sup&gt;2&lt;/sup&gt;</td>
<td>0&lt;sup&gt;3&lt;/sup&gt;</td>
</tr>
<tr>
<td>1984</td>
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<td>79.1&lt;sup&gt;2&lt;/sup&gt;</td>
<td>19.7&lt;sup&gt;3&lt;/sup&gt;</td>
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<tr>
<td>1985</td>
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<tr>
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<td>78.0&lt;sup&gt;3&lt;/sup&gt;</td>
<td>9.3&lt;sup&gt;3&lt;/sup&gt;</td>
</tr>
<tr>
<td>1987</td>
<td>--</td>
<td>53.8&lt;sup&gt;4&lt;/sup&gt;</td>
<td>0&lt;sup&gt;5&lt;/sup&gt;</td>
</tr>
<tr>
<td>1988</td>
<td>--</td>
<td>--</td>
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</tr>
</tbody>
</table>

1 1986 FAO FISHERY STATISTICS 100.
2 NOAA FISHERIES STATISTICS, 1985, at 97-98.
3 NOAA FISHERIES STATISTICS, 1986, at 96.
5 See Table 1, note 5.
6 See text notes 21-22.

In the case of whaling, the threat of denial of access to fishing does appear to have led some countries to alter their policies. It must be emphasized, however, that in some cases the conduct was altered not because of the threat of a loss of fishery allocations, but rather because of the possible embargo on import of fishery products under the Pelly Amendment. For example, although advocates and commentators have cited Norway's agreement to cease whaling as evidence of the strength of the Packwood-Magnuson Amendment, it was not the possible denial of fishing rights that prompted Norway's change in policy. The greater eco-

163. But see supra notes 132-33 and accompanying text.
nomic threat was posed by the Pelly Amendment's bar to Norway's $143 million annual export to the U.S. of salmon, shrimp, sardine, and other seafood.\[164\] Similarly, Iceland agreed to cease scientific whaling in 1986 because the U.S. purchase of 30% of Iceland's fishery exports provided leverage to the threat of importation bans.\[165\] Indeed, U.S. statistics indicate that Iceland, Norway, and Peru have not fished in U.S. waters for at least the past decade.\[166\]

### Table 3

<table>
<thead>
<tr>
<th></th>
<th>World Catch (1,000 mt)</th>
<th>U.S. Allocation (1,000 mt)</th>
<th>U.S. Jt. Vent. (1,000 mt)</th>
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</thead>
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<td>922.52[1]</td>
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<td>1987</td>
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<td>0[4]</td>
<td>0[5]</td>
</tr>
<tr>
<td>1988</td>
<td>--</td>
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<td>--</td>
</tr>
</tbody>
</table>

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\[1\] *TAIWAN Statistical Data Book* (1986).


\[5\] See Table 1, note 5.

Denial of access to fishing could have been used as a sanction against only Japan, the Republic of Korea, Poland, Taiwan, and the USSR. Taiwan's catch from U.S. waters was quite small, however, and thus denial of access did not pose a significant threat (see Table 3). As

\[164\] The total export to the United States represented "15 percent of Norwegian ocean products exports." *Reagan is Told of Norwegian Whaling Infractions*, supra note 42, at col. 1-2; see also Lucas & Loftas, supra note 14, at 43 table 2 (listing Norway as the world's third leading exporter for fishery commodities in 1978). Compare Plutte, supra note 155, at 26 ("In recent years, the entire [Norwegian whaling] industry has generated about five million dollars annually, an insignificant sum compared with the $500 million Norwegian fisheries earn as a whole.").


for Korea, its catch in U.S. waters was only slightly more than Poland's and, thus, perhaps as replaceable elsewhere in the world. Moreover, Korea's world catch was at least three times greater than Poland's and proportionately less dependent on fisheries subject to U.S. jurisdiction (see Table 4). Consequently, as a practical matter, Japan was the primary

<table>
<thead>
<tr>
<th>Year</th>
<th>World Catch (1,000 mt)</th>
<th>U.S. Allocation (1,000 mt)</th>
<th>U.S. Jt. Vent. (1,000 mt)</th>
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</thead>
<tbody>
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<td>113.5(^2)</td>
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<td>1979</td>
<td>2,163.0(^1)</td>
<td>150.0(^2)</td>
<td>1.4(^5)</td>
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<tr>
<td>1980</td>
<td>2,091.1(^1)</td>
<td>242.4(^2)</td>
<td>8.6(^5)</td>
</tr>
<tr>
<td>1981</td>
<td>2,366.0(^1)</td>
<td>268.5(^2)</td>
<td>30.0(^5)</td>
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<td>1982</td>
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<td>1983</td>
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<td>324.7(^2)</td>
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<td>329.8(^2)</td>
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<td>1985</td>
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<td>1986</td>
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<td>399.7(^5)</td>
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<td>1987</td>
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<td>32.4(^4)</td>
<td>452.0(^5)</td>
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<tr>
<td>1988</td>
<td>--</td>
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</tbody>
</table>

\(^1\) 1986 FAO FISHERY STATISTICS 100.  
\(^2\) NOAA FISHERIES STATISTICS, 1985, at 98.  
\(^3\) NOAA FISHERIES STATISTICS, 1986, at 96.  
\(^4\) NOAA FISHERIES STATISTICS, 1987, at 92.  
\(^5\) See Table 1, note 5.

state threatened by the sanction (see Table 5). The threat of denying Japan access to fishing was not particularly effective, however, both because Japan placed a high political value on the continuation of its whaling and because a maze of linked issues discouraged the United States from following through on its threat. The strength of a sanction against Japan has diminished even further as U.S. fisheries have been allocated more and more to a growing domestic fleet.

C. The Future Effectiveness of the Fisheries Weapon

The future use of denial of access to fisheries as a sanction does not lie with the United States. To deny access a state must have a surplus. U.S. policy, however, is aimed at developing a domestic fishing industry that will utilize fully the living resources of its EEZ.\(^{167}\) Prior to 1982, foreign fishing fleets took over 65% of the fish harvested in U.S. waters.\(^{168}\) In 1988, there were virtually no foreign allocations in U.S. fisher-

\(^{168}\) Id. at 155.
In essence, the United States gave legitimacy to a sanction that it no longer can use but rather that it can expect only to be imposed against it.

Denial of access to fisheries will become an option primarily for those states that possess in their EEZ’s a significant fishery but not a comparably significant domestic fishing industry. This group will likely, although not exclusively, include a large number of developing states. For such states, the revenues from licenses for foreign fishing vessels likely will be important and thus the availability of the weapon will turn upon the number of other states demanding access to the zone. An

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171 For example, the Tuna Treaty was negotiated against the backdrop of one-year agreements negotiated by the USSR first with Kiribati and then Vanuatu (both among the island states party to the Treaty). Teiwaki, Access Agreements in the South Pacific: Kiribati and the Distant Water Fishing Nations 1979-1986, 11 Marine Pol'y 273 (1987) (discussing interest in
additional factor tempering denial of access by such countries is a tendency to insulate commercial relationships from foreign affairs concerns. Nonetheless, one possible scenario that remains is the collective denial of access to a single state by several developing states over an issue about which those states care deeply. The shared desire of South Pacific states for a nuclear-free zone, for example, could combine with their control over fishing in a vast area of ocean to yield the decision to deny access to a nuclear power such as the United States.172

Yet even those countries may not have a fishing sanction for very long. The domestic fishing capacity of a number of developing countries is increasing quickly.173 To the degree that the catch is used locally, costly processing facilities will not be as necessary and consequently will not limit the growth of domestic industry. To the degree that the catch is exported, joint ventures involving domestic fishing vessels and foreign factory ships may be attractive and, as in the United States, undercut the potential of using the sanction. If the experience of the United States repeats itself, states in time will lose their fishing weapon as they develop their own domestic industry or participate in joint ventures that create a domestic interest in not denying access. On the other hand, this tendency may be undercut in the future as the value of fish as a resource rises and the loss of even a small allocation becomes a significant sanction.

The potential for further use of this sanction, although limited, suggests that likely target states should seek strategies to limit the threat. The right of a coastal state to deny access to fishing may be limited by both international and municipal law. These limits can be both procedural and substantive and can involve manipulation of both the economic and political costs to the sanctioning state.

Internationally, the most straightforward means to dampen the sanctioning power of the coastal state is to make it pay the costs of the sanction through an enforceable treaty.174 The recently concluded

access expressed by Japan, South Korea, the USSR and the United States); see also Doulman, Licensing Distant-Water Tuna Fleets in Papua New Guinea, 11 Marine Pol’y 16 (1987) (discussing revenue raised from distant-water fishing licenses).


174. See generally Van Houtte, Treaty Protection Against Economic Sanctions, 18 Rev. Belge de Droit Int’l 34 (1984-85). “Treaties are frequently invoked against sanctions. They often have prevented states from imposing sanctions. . . . In 1955, the Soviet Union . . . paid $90 million to Yugoslavia because its boycott had violated treaty commitments toward Yugoslavia.” Id. at 53. Although treaty rights whose enforcement is not dependent on the good faith of the other state party certainly are the most desirable, states have shown a willingness to fulfill guarantees set forth in a treaty even though they might not be enforceable in this sense. See, e.g., supra note 157 (the United States imposed only a partial grain embargo against the Soviet Union in order to fulfill guaranteed shipments).
FISHERY SANCTIONS

Treaty on Fisheries Between the Governments of Certain Pacific Island states and the Government of the United States of America (Tuna Treaty)\textsuperscript{175} embodies this approach. The Tuna Treaty provides that a certain number of fishing licenses will be issued each year, carefully detailing the grounds upon which a license can be denied. The Treaty provides that any dispute relating to or arising out of the Treaty is subject to arbitration under the UNCITRAL Rules of Arbitral Procedure.\textsuperscript{176} Given that the UNCITRAL Rules assume that a national legal system governs the arbitral process,\textsuperscript{177} the arbitral awards rendered, depending upon the place of arbitration, may be enforceable in the national courts of many states under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\textsuperscript{178} In a dispute concerning the access of U.S. license holders, therefore, the participating islands could be held liable at least for the cost of the sanctions to the U.S. nationals involved.

The international (and domestic) political costs to a sanctioning state can be increased by involving nationals or government agencies of other states (or of the sanctioning state itself) in the action. For example, during the “ban” on Soviet fishing, Soviet processing ships continued to purchase catches made by the U.S. fishermen under joint venture agreements, buying 9,192 metric tons of fish in 1979.\textsuperscript{179} In 1980, the first year of President Carter’s sanctions over Afghanistan, the joint venture catch rose to 51,815 tons. In 1981 and 1982, the catches were 81,953 and 108,039 tons respectively.\textsuperscript{180} In 1984 the Soviets purchased roughly 160,000 tons of fish during the U.S. “ban” of fishing in its waters.\textsuperscript{181} Similarly, in the area of foreign investment it has become a well known strategy to involve many countries in a project—a contractor from one country, a designer from another, and a bank from yet a third. Interference with such a project displeases three countries rather than just one. Consequently, if Japan fished in our waters via a joint venture with an-

\begin{thebibliography}{9}
\bibitem{176} Tuna Treaty, \textit{supra} note 170, art. 6.2.
\bibitem{180} Id.
\bibitem{181} Oberdorfer & Pincus, \textit{supra} note 20, at A24, col. 5; see also Foreign Fishing Off West Coast Declines, \textit{Marine Fisheries Rev.}, Nov. 1980, at 33 (“Consistent with President Carter’s policy to deny the Soviet Union fishing privileges in U.S. waters, the [five] Soviet [joint-venture processing] vessels are not allowed to fish as they did last season, but may only receive the catches delivered to them by the U.S. vessels under the agreement.”).

Interestingly, Poland, at least in the Alaskan fishery area, did not increase its joint venture catch during the sanction period. See Table 2.

\end{thebibliography}
other country, the U.S. would face greater political costs in denying access to fishing.

Another approach to limiting use of the sanction would be for the target state to lobby quietly for changes in the municipal law of the potential sanctioning state which would prohibit or at least limit the ability of the government to order such a sanction. For example, after the U.S. grain embargo of the Soviet Union, the United States, at its own initiative, passed legislation that required it to honor export commitments accepted before an embargo if delivery is set within 270 days after the embargo.182

A more radical strategy would be to encourage efforts that remove coastal state discretion entirely. For example, promoting the regional management of fisheries stocks shared by several states might have the incidental effect of making unilateral decisions about foreign access more difficult. This is not to say that the regional council could not withhold access from a certain country, but rather that the country desiring the sanction most would have to persuade others of the wisdom of the action.

IV

THE WISDOM OF DENYING ACCESS TO FISHERIES

I have argued that a state potentially is entitled to deny access to fishing and that, as an instrument of foreign policy, denial of access can lead to policy changes in areas not central to the interests of the target state. Denial of access to fishing, of course, may disrupt well-orchestrated ocean management efforts. The EEZ is a multi-use area that requires complex management efforts.183 Displaced distant-water fleets will raise the demand for access elsewhere. This, in turn, may lead to overutilization, illegal harvests, and political friction. But direct and incidental market disruption is what sanctions are all about. Market disruption is not, however, the only threat posed by ocean-related sanctions such as denial of access to fishing. There is a more fundamental structural implication: such sanctions undermine the underlying concept of the EEZ.

The EEZ addresses a tension between open seas and coastal state authority that has existed for at least four centuries. The 1600's wit-

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183. Many of these complex problems of management are exacerbated by national control. Indeed, the last steps of rational management mentioned by Juda are to “[i]dentify those problems and/or opportunities which cannot be resolved or taken advantage of because of the limitations inherent to the situation of the national EEZ [and d]evelop strategies to overcome such shortcomings.” Juda, supra note 11, at 313.
nessed what has been called the "battle of the books". Hugo Grotius's call for open oceans in *Mare Librum* was opposed by John Selden's assertion of coastal state rights in *Mare Clausum*. The idea of the EEZ has been hailed as our resolution of this intractable conflict. The EEZ, however, does not so much resolve the ancient battle as sidestep it. It accomplishes this maneuver by a technique often used in resolving problems today—it makes the legal order more complex. Neither Grotius nor Selden is preferred. In theory, the EEZ satisfies both. The EEZ is Grotian in that the international community retains the right to navigate in the zone. The EEZ is Seldenian in that the coastal state is accorded very extensive rights in the living resources of the EEZ. The "catch" to the solution is that complex legal orders are more demanding. The complexity is fragile, and the order requires more care. It is appropriate to ask whether a multi-use zone such as the EEZ is capable of being managed. For example, even with its extensive array of technology and a wide-ranging Coast Guard, the United States has had difficulty policing foreign fishing of its waters.

The complexities of the EEZ presuppose a certain degree of cooperation and friendly relations that sanctions threaten to dispel. Sanctions such as denial of access are inherently Seldenian; they imply a possessory view of the resource. The sanctions are legal in that the EEZ established by the 1982 Convention and, in particular, article 62(3) is strongly Seldenian. The danger, however, is that to allow the Seldenian aspects of the EEZ to become even more Seldenian risks a psychology where the coastal state views itself more and more as a proprietor of the EEZ generally. With such a coastal state psychology, will Grotius or Selden edge the other out of this functional sui generis zone? The answer in any particular confrontation likely will be greatly influenced by the power of the

185. Written in 1604, published 1609.
186. This two-volume reply to Grotius first appeared in 1616 and was published in 1635; *see also* W. Welwood, *An Abridgment of All Sea Lanes* (1613).
187. *See, e.g.*, Egan, *Japanese, Reacting to Allegations of Illegal Fishing, Plan New Rules*, N.Y. Times, Feb. 5, 1988, at 10, col. 5 (nat'l ed.); Egan, *Foreign Trawlers Accused of Violating U.S. Zone*, N.Y. Times, Jan. 21, 1988, at 1, col. 4 (nat'l ed.) (calling a recent incident "the most extensive illegal intrusion into America fishing grounds in the Pacific since the 200-mile limit was put into effect 10 years ago," and stating, "American fishermen have argued that illegal fishing by foreign vessels costs them up to $650 million each year"); *see also* Child, *Enforcement of 200 Mile Exclusive Economic Zone Claims Over Living Marine Resources in Southeast Asia*, in *Law of the Sea*, supra note 115, at 438, 439 ("Southeast Asian nations appear to have met these [enforcement] responsibilities with little skill, achieving little and generating considerable costs."). The difficulties posed by enforcement can alter the doctrine. *See generally* Burke, *Exclusive Fisheries Zones and Freedom of Navigation*, 20 *San Diego L. Rev.* 595 (1983). The coastal state authority to regulate navigation in the EEZ should be limited "to instances of very large resource zones outside developing states with a special dependence on fisheries for economic development but without enforcement capability." *Id.* at 623.
parties involved, but I would say that coastal states have the edge.\textsuperscript{188} Will the next sanction be denial of the right to lay a submarine cable across the continental shelf? It is a very long leap from excluding vessels from fishing as an economic sanction to excluding other types of vessels (for example, vessels with hazardous cargoes or employing nuclear propulsion systems), but is such a leap so inconceivable?\textsuperscript{189} Indeed, Professors Cicin-Sain's and Knecht's study of the South Pacific in this symposium suggests that such a possessory psychology is emerging in that region.\textsuperscript{190} A central objective of U.S. policy since World War II has been to foreclose such leaps. The United States worked diligently during UNCLOS III to prevent coastal states from asserting such authority.\textsuperscript{191} The EEZ was acceptable to many maritime states in large part because the powers of the coastal state over this zone were to be constrained carefully by the language of the 1982 Convention. But the United States did not sign the 1982 Convention, and the Convention has not yet entered into force.\textsuperscript{192}

Make no mistake: I conclude that international law as articulated in the 1982 Convention does not prohibit states from denying access to fisheries in the EEZ as a sanction. But it should not be surprising that states,

\begin{footnotesize}
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\item \textsuperscript{188} Indeed some argue that coastal states already tend toward such control. See Juda, \emph{supra} note 15, at 44; see also \emph{Law of the Sea}, \emph{supra} note 115, at 137 (remarks of Professor Boczek) ("So there might be concern that [the Convention's treatment of the EEZ] is a sort of invitation to further extension of sovereignty, a kind of totalization of sovereignty in the further development of the practice, or at least it kind of creates . . . a presumption in favor of this coastal state.").
\item \textsuperscript{189} See, e.g., Whitaker, \emph{Outside the Mainstream}, \emph{Atlantic}, Oct. 1982, at 18, 24-25. For an early articulation of this concern, see Warbrick, \emph{The Regulation of Navigation}, in \emph{3 New Directions in the Law of the Sea} 137, 146 (1973).
\item \textsuperscript{190} Cicin-Sain & Knecht, \emph{supra} note 172.
\item \textsuperscript{191} See, e.g., Oxman, \emph{The Regime of Warships Under the United Nations Convention on the Law of the Sea}, 24 \emph{Va. J. Int'l L.} 809, 862 (1984) ("It will come as no surprise to anyone that the United States was not the only, but certainly the most active, delegation in promoting this result. The irony is that a U.S Administration . . . declined to accept the Convention . . . .")
\item \textsuperscript{192} See \emph{supra} note 4.
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with their nationalistic tendencies and their desire to keep options open, allowed for such action in the Convention. What I suggest is that this authorization did not belong in the Convention; that to push at the limits of that authority will lead to the weakening of an aspect of the law of the sea. In this sense, both Professors Burke and Lowe are correct. The 1982 Convention does not prohibit denial of access to fishing as a sanction, but the notions underlying the EEZ suggest that coastal states should not use the EEZ in this manner. For a maritime power such as the United States, the strategic risk posed by ocean use sanctions to the concept of the EEZ is very high. For a country such as the United States, the situation thus can be viewed as an agonizing choice between using access to fisheries as a sanction to enforce international norms and the likelihood that use of the sanction will undermine an international regime desired by the U.S. Denial of access to fishing as a sanction is only a hairline crack in the sui generis nature of the EEZ, but its widening poses a very real threat.

CONCLUSION

The image that emerges for me from the papers that make up this symposium is that the Pacific is of such immense strategic and economic value to the countries surrounding it that it is rather naive to think a stable legal order can be laid over such a desired area. Instead, we can see a series of attempts in this century to stabilize expectations regarding the ocean resources of the Pacific. The latest attempt rests upon the idea of the Exclusive Economic Zone. This is a complex zone with shared functional jurisdictional authorities. The EEZ represents an effort to satisfy the interests of coastal states, maritime states, and the international community. But although the literature often gives the idea that the EEZ is here to stay, the history of this century suggests that it too may pass.193

It is against this backdrop that I have considered the international sanction of a state denying access to fishing in its EEZ and the implications of this sanction for ocean management and the law of the sea. As a legal matter, the 1982 Convention recognizes the authority of coastal states to deny access to fishing for purely political reasons. As a practical matter, denial of access could be quite effective because few costs are placed upon the sanctioning state while the target state may suffer substantial dislocations if the loss of fishing is sufficiently large.

In fact, only the United States has used this sanction thus far. The value of its use against the Soviet Union over that country’s invasion of Afghanistan was undercut by the United States allowing over-the-side

purchases by the Soviet Union to replace a large part of their direct catch. In the cases of the U.S. sanctions against the Soviet Union and Poland, it was found that fishing losses of approximately 540,000 metric tons and 230,000 metric tons, respectively, could be made up for rather quickly elsewhere in the world. The threat of the United States denying access to fishing was greatest for Japan, which for at least a decade caught approximately 1,200,000 metric tons in waters subject to U.S. fisheries jurisdiction. The possibility of retaliatory sanctions by Japan, however, particularly a Japanese ban on imports of U.S. fishery products, nullified this threat.

I argue that despite the potential legality and effectiveness of denying access to fishing as a sanction, states should avoid imposing such ocean use sanctions because they may undermine the legal regime of the EEZ. I therefore find it ironic that the United States is the only state thus far to use this sanction. First, the United States as a major maritime power has a substantial interest in supporting the legal regime of the EEZ. Second, the sanction, particularly in the cases of Poland's suppression of Solidarity and the Soviet invasion of Afghanistan, was only a minor part of a package of sanctions that in both cases did not add any substantial additional costs. Third, the U.S. practice in essence has legitimized a sanction that was available to the United States for at most a decade because of the U.S. goal of full domestic utilization of U.S. fisheries.

Unfortunately, the recommendation that states not employ this sanction is not enough because it rests upon my earlier assumption that the decisionmaker operates within a context that provides time and a dispassionate climate in which such a recommendation can be considered. The removal of the assumption is troubling because it is uncertain whether in the politically charged atmosphere surrounding sanction decisions officials will appreciate that a complex area like the EEZ is not entirely within their authority. I find this possibility in turn troubling because it challenges the viability of the attempt to address complex international problems by increasing the complexity of the legal order, in particular by the creation of multi-jurisdictional areas such as the EEZ.