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THE VOLUNTARY ABSTENTION PRINCIPLE AND JAPAN: SOME LEGAL AND POLITICAL IMPLICATIONS

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On September 28, 1945, President Harry Truman issued two separate proclamations regarding the high seas and the continental shelf.[1] Strictly speaking, the Truman Proclamation regarding the high seas asserts unilaterally the national rights of the United States to establish exclusive conservation zones on the high seas "contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale." Although the Truman Proclamation did not extend U.S. national sovereignty over this area, it claimed the right of the United States to establish jurisdiction under which fishing activities of other nations were affected.

C. B. Salak, Jr., pointed out that "jurisdiction and control to be exercised over high seas fisheries under that proclamation is not an extension of sovereignty beyond three miles from shore, but rather a special type of jurisdiction for a limited purpose, a jurisdiction which must be jointly exercised whenever the substantial interests of more than one nation are involved."[2] Just what this "special type of juris-

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1. Regarding the Proclamation and its formulation, Whiteman gives a succinct summarization in 4 Dig. of Int'l L., Pub. No. 7825, at 945-62 (1965) [hereinafter cited as Whiteman]. For its international influences, *see* F. Christy, Jr. and A. Scott, The Common Wealth in Ocean Fisheries 160-67 (1965); D. Johnston, The International Law of Fisheries 233-40 (1965) [hereinafter cited as Johnston]; Selak, *Recent Developments in High Seas Fisheries Jurisdiction Under the Presidential Proclamation of 1945,* 44 Am. J. Int'l L. 670-81 (1950) [hereinafter cited as Selak]. Further, regarding the original considerations of the proclamation *see Proclamations Concerning United States Jurisdiction Over Natural Resources in Coastal Seas and the High Seas,* XIII Dep't State Bull. No. 327, at 484-87 (1945). Also, regarding interpretation of the Proclamation, *see* W. Bishop, Jr., International Law: Cases and Materials 537-43 (1962), and Chapman, *United States Policy on High Seas Fisheries,* XX Dep't State Bull. No. 498, at 67-71, 80 (1949). In his article *High Seas Fisheries and the Law: A Case Study in the North Pacific,* in The Fisheries Problems in Resources Management 120, 125 (J. Crutchfield ed. 1965), R. Johnson stated, "This proclamation, although duly announced, was never effectuated."

2. Selak, *supra* note 1, at 679. I. Brownlie, Principles of Public International Law 230-31 (1966) wrote:

> *Ad hoc,* somewhat anomalous, claims to fishery conservation zones as such on the high seas have been made, notably in a proclamation by the United States President in 1945. Whatever the justification for extended claims to take fish exclusively, unilateral claims to take conservation measures involving abstention by other states have been resisted; in other words, the reference to con-

diction for a limited purpose" is, and what criteria should be employed, and applied to what resources, in order to justify the proclamation of one nation's interests over another's on the high seas, however, remains unanswered.

Further, although the U.S. government "regards it as proper to establish conservation zones . . . where fishing activities have been or shall hereafter be developed and maintained by its nationals alone," what then happens when a newcomer wishes to join in high seas fishery proposing a cooperative joint conservation program?[3] Presumably the underlying theory in the Truman Proclamation follows the logic of the division of the oceans of the world into segments, which would engender the justification of establishing a "special type of jurisdiction for a limited purpose." In other words, the Truman Proclamation, employing the unilateral standards of American conservation philosophy supported by domestic socio-economic and political necessities, attempted to assert the exclusive competence of the United States on the high seas.

More specifically, since no international agreements existed to prevent other nations from entering into Pacific halibut or Alaskan

servation as a reason for unilateral assertion of rights to control fish stocks makes no legal difference.

Clearly treaty arrangements may provide a reasonably stable conservation regime involving also a negotiated distribution of marine resources. The object of a treaty will often be the maintenance of the maximum sustainable yield of the fish stock combined with principles of equal access and equal limitations on fishing. Conservation thus appears in conjunction with allocation of resources. Another relevant factor is a dislike of the principle of 'free competition' by states unable to compete on the same basis and which, as underdeveloped countries, claim a priority of needs. Moreover, commercial fishing by non-regional interests generates regional maritime zones.

3. Johnston, *supra* note 1, at 333:

> The real significance of the declaration lies in the priority it gives to conservation needs, rather than in the degree of authority, modified or unshared, that it claims for the purposes of conservation . . . . Yet it is clear that . . . [until] the need for conservation is accepted by other exploiting states, the national conservation program may be enforced unilaterally against all comers until a joint authority is acceptable. That is, the United States implicitly claims an unshared authority over conservation until the conditions for its modification are met.

Further, he continues:

> [P]ermissive competence claimed in the Proclamation anticipates a scheme of modified conservation authority, shared by all exploiting states, not a scheme of unshared conservation authority vested solely in the United States. *Id.* at 334.

However, the question still remains: *whose need* for conservation should be accepted by other exploiting states? The primary intention of the Santiago Declaration by Peru, Ecuador and Chile lies in the priority it gives to conservation needs, which are accepted by these three exploiting nations, rather than a concept of wider territorial waters. They consider the 200-mile maritime zone as a necessary means for ensuring their conservation programs. Should the ends justify the means?

salmon fishing operations right after World War II, the primary purpose of the Truman Proclamation was to prevent future fishing disputes with Japan such as the United States had experienced over Bristol Bay salmon in 1936 and 1937.[4] As a press statement released by the U.S. Government at the time of the delivery of the Truman Proclamation explicitly stated:

> As a result of the establishment of this new policy, the United States will be able to protect effectively, for instance, its most valuable fishery, that for the Alaska salmon.[5]

Certainly, during the occupation of Japan, such a protection of Alaskan salmon from Japanese fishermen was unnecessary, simply because of the strict regulations imposed by the MacArthur Line, which remained in effect until April 25, 1952, three days prior to

4. In 1936 the Japanese Government announced that it would undertake a three-year scientific fisheries research program to study Bristol Bay salmon resources. This announcement raised serious legal and ethical objections among American fishermen. Alaskan fishermen attempted to mobilize public antipathy against Japanese "encroachment" on "their" fishing resources. Concurrent Japanese expansion onto the Chinese mainland further aggravated the Alaskan anti-Japanese climate. The dispute was complicated by the fact that the United States maintained three-mile territorial waters. Thus, Japan legally could fish for salmon or halibut outside Alaskan territorial waters, and the United States did not possess a valid legal basis to demand that Japan desist.

On November 22, 1937, the U.S. Government delivered a statement to the Japanese Government, declaring that the Alaskan salmon belonged exclusively to the United States since the resources had been conserved for many years under strict American regulations. The U.S. Government did not discuss the legal technicalities of its three-mile territorial water, but only emphasized the *equity* of its exclusive claim over the resources. Although the Japanese Government was fully aware of its advantageous legal position in this dispute, due to tense world politics, it accepted the American claim. However, no diplomatic agreement was transacted.

5. *Proclamation Concerning United States Jurisdiction over Natural Resources on Coastal Areas and the High Seas,* XII Dep't State Bull. No. 327, at 484 (1945).

An interesting relationship exists between the Truman Proclamation regarding the high seas, issued on September 28, 1945, and the Statement of United States Policy with Respect to Fishing and Aquatic Industries of Japan [*see Occupation Orders for Japanese Fishing and Aquatic Industries,* XIV Dep't State Bull. No. 348, at 346-47 (1946)] which was sent to the Supreme Commander of the Allied Powers in Japan (SCAP) on November 13, 1945 and used to formulate the "MacArthur Line."

> During the period of occupation, the Supreme Commander should be guided, subject to military considerations, by the following general principles:
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> . . . .
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> *b* The coastal fisheries and fish culture should be utilized as the primary sources for domestic consumption. To the extent that fish culture and coastal fisheries are unable to meet the minimum domestic requirements, deep sea fisheries and other fisheries in waters open to Japanese operation may be utilized where security and political considerations permit. Deep sea fishing in areas near United States territory or near United States island responsibilities should not be authorized. Japanese fishing should not be permitted near areas under Allied jurisdiction without prior permission from the country concerned. These

when the San Francisco Peace Treaty became effective.[6] What is more, the primary intention of the Truman Proclamation was successfully carried into the Tripartite Fisheries Treaty as a concrete legality binding upon Japanese fishing operations in the North Pacific. This was carried out principally through the doctrine of voluntary abstention. Although the United States proposed adoption of the principle of voluntary abstention as a rule of international law at both the Rome and Geneva Conferences on the Law of the Sea,

> prohibitions should continue until international agreements are negotiated permitting Japanese fishing in these areas.
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> . . . .
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> *d* Japanese fishing operations should conform strictly to:
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> . . . .
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> (3) The policies or rules governing specific fisheries announced by the United States, or by other governments in conformity with policies announced by the United States with respect to coastal fisheries. . . .

It is clear that these provisions confirmed the primary intention of the Truman Proclamation, which was "effectuated" in terms of the "MacArthur Line." The U.S. Government attempted to formulate a rationalization to support its particular national interests and their implementation disregarding then-existing international laws or agreements. This action is not a commendable one, because it permits a particular nation first to execute whatever policy it deems necessary and after that to formulate specific legal justification for its policy, instead of consulting international laws or agreements for the limits of implementing such national interests upon another nation.

6. The San Francisco Peace Treaty, signed on September 8, 1951, bears a peculiar relationship to the Tripartite Fisheries Treaty signed on May 9, 1952. According to Article IX of the Peace Treaty, "Japan will enter promptly into negotiation with the Allied powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas." The following chronology illustrates the progression of events:

April 17-18, 1950: The General Conference of the Pacific Northwest Trade Association adopted the resolution "that no peace treaty should be entered into with Japan by either Canada or the United States until and unless definite and binding commitments are made by Japan which will adequately protect the interests of Canada and the United States in their coastal fisheries not only within but beyond territorial waters." Bishop, *Need for a Japanese Fisheries Agreement*, 45 Am. J. Int'l L. 712 (1951).

February 7, 1951: Japanese Prime Minister Yoshida sent a letter to U.S. Ambassador John Foster Dulles stating that Japan would be ready to enter into negotiation with other countries for the conclusion of the equitable fisheries arrangements. Whiteman, *supra* note 1, at 989-90.

July, 1951: "Agreement was finally reached on the proposals [of the Tripartite Fisheries Treaty] . . . , and the Governments of Canada and Japan were asked if they were ready to enter into negotiations for a fisheries treaty on this general basis." Herrington, *Problems Affecting North Pacific Fisheries*, XXVI Dep't State Bull. No. 662, at 340-41 (1952).

September 8, 1951: The San Francisco Peace Treaty was signed by Japan, the United States, and 47 other nations.

October 18, 1951: The Japanese Government invited the United States and Canada to Tokyo to convene the Tripartite Fisheries Treaty negotiations.

November 4–December 14, 1951: The negotiations began in Tokyo and the International Convention for the High Seas Fisheries of the North Pacific Ocean was adopted.

April 15, 1952: President Truman ratified the Peace Treaty.

April 25, 1952: The "MacArthur Line" was abolished by a SCAP memorandum.

both times this was rejected.[7] While in the case of the Tripartite Fisheries Treaty, at least, the less-than-traditional principle of voluntary abstention has become part of international agreement, the very traditional doctrine, that of freedom of the high seas, seems to have become more and more impractical with the passage of time.

The original doctrine of freedom of the high seas was formulated and developed by Hugo Grotius,[8] who was attempting to defend

April 28, 1952: The Peace Treaty went into effect.

May 9, 1952: The Fisheries Treaty was signed by all parties in Tokyo.

June 12, 1953: The Fisheries Treaty entered into force. Actual negotiations for the Fisheries Treaty began almost a year ahead of Japanese independence. In order to give the Japanese Government a fair opportunity to negotiate independently with the governments of the United States and Canada, the U.S. occupation forces granted *ad hoc* sovereignty to Japan from November 4 to December 14, 1951. Further, even after the adoption of the Fisheries Treaty on December 14, 1951, the "MacArthur Line" still remained in effect until April 25, 1952. What was the function of Japanese *ad hoc* sovereignty except merely as a display of American "fair" diplomacy? In other words, the Fisheries Treaty was ready for Japan to sign, not to negotiate, right after she was granted normal and permanent independence. Thus, Article IX of the Peace Treaty did not serve its intended function, simply because by the time it became effective no necessity existed for either Japan or the United States to convene and conclude negotiations concerning North Pacific fisheries problems. However, Article IX did serve to impose the necessary legality binding Japan to sign the Fisheries Treaty.

7. *See* Whiteman, *supra* note 1, at 968-77. Japan opposed adoption of the joint proposal of Canada and the United States for these two reasons:

> [F]irst, that "the procedure known as abstention . . . had nothing to do with the conservation measures inasmuch as it lacked scientific basis, thus being contradictory to the articles concerning conservation which had already been adopted in the Committee"; secondly, . . . the proposal on abstention was based on the assumption that any State would not be disposed to spend money for the restoration of productivity of certain stocks of fish unless other States would abstain from fishing them; further it was unreasonable that the State giving protection to a part of certain stocks of fish should claim the monopoloy of those stocks of fish as a whole; and it was not fair that a State responsible for the depletion caused by intensive fishing should ask other States to abstain. *Id.* at 974.

8. *See* Alexandrowicz, *Freitas Versus Grotius,* XXIV Brit. Y.B. Int'l L. 162-82 (1959). He reveals distinct conceptual differences between the two lawyers. Further, for both historical and contemporary evaluations of the concept of "freedom of the seas," Johnston, *supra* note 1, at 303-17, and The Law of Nations 328-30 (H. Briggs ed., 2d ed. 1952) [hereinafter cited as Briggs]. J. Bingham, Report on the International Law of Pacific Coastal Fisheries 23 (1938) advocated that the doctrine of freedom of the seas was "a product of the interplay of national interests." Although I believe the concept of a 3-mile limit of territorial waters is an established and "necessary" international rule, I agree with Bingham's arguments, particularly concerning ambiguities of the application of width of territorial waters and the doctrine of freedom of the seas. However, it seems to me that Bingham did not provide a sufficiently reasonable methodology to establish several concepts he advocated. He strongly emphasized the role of national interests in formulating an international law—with which I agree—but did not indicate there is a limit to which national interests of one nation can play their role in the formulation and implementation of international law. For instance, he stated "[t]o establish this [the exercise of governmental power beyond the 3-mile limit] as law will require only its assertion by a powerful state on behalf of a clearly just claim, and skillful diplomatic support of the assertion." *Id.* at 41. According to this method of establishing an international law by dependence upon power for conflict resolution, legal anarchy is more likely to occur than a settlement.

Dutch national interests in East India and the Indian Ocean against Portugal, which held extensive political, economic and religious interests in that region. While it was through Grotius that this concept came to be developed as an international rule, Grotius' primary intention was to protect one particular national interest from another in a conflict situation. When a conflict of mutually incompatible interests is expressed in a manifest confrontation between nation-states, each nation-state attempts to define the conflict situation subjectively in order to maximize its gains and minimize its losses. Thus, the concept of freedom of the high seas in terms of three-mile-limit territorial waters illustrates an acute manifestation of political conflict manipulated by one nation against another in order to achieve a legal conclusion for the justification of certain unilateral national policies or claims. That is, in a conflict situation over the utilization of specific high seas resources, where appropriate international agreements are absent which would regulate the actions of nation-states interested in such resources, these nation-states would tend to formulate and implement their own legal vindications for the purpose of acquiring and maximizing exclusive utilization of the resources in question. From this perspective, freedom of the high seas is not and cannot be absolutely "free" from claims to common use of the high seas. Because of these conditions, there remains a constant question as to the practicability or applicability of freedom of the high seas to the roles of present day national interests in the field of world politics.

As far as the development of an operational definition of "freedom of the high seas" goes, the doctrine has been described as follows:

> [N]o state can exercise authority over any vessels on the high seas except those flying its own flag; in positive form, it means that in time of peace every State and its inhabitants may make use of the high seas for navigation, fishing, the collection of its fauna and flora, the laying of submarine cables, and flying above it.
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> . . . .
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> [V]essels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the high seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.[9]

These statements clearly express the idea of the national legal sovereignty of all nations on the high seas—"the right of one nation

9. Briggs, *supra* note 8, at 329.

to pursue its own policies without asking permission of another."[10] However, it becomes a different question as to whether or not a nation can possess "political sovereignty" on the high seas or, in other words, possess the capability or capacity of exercising such a legal right independently.

Applying this discussion to the specific situation existing between Japan and the United States in 1952, it is clear that Japan possessed the legal right and sovereignty to pursue fishing operations wherever she chose, but did not possess sufficient political strength or sovereignty to exercise independently such legal rights. On the other hand, the United States, being well aware of her own superior position at the time, could exercise her full political sovereignty, which permitted her to disregard Japanese legal sovereignty on the high seas. This peculiar relationship between Japan and the United States at the time is an example of power politics and illustrates the fact that many times political sovereignty becomes superior to legal sovereignty. However, since 1952 the Japanese political and economic situations and her relationship with the United States have been changing significantly in accord with modifications of world politics.

In 1963 the ten-year term of the Tripartite Fisheries Treaty expired and now may be readily terminated upon one year's notice by any of the three nations concerned. Presently Japan is independent enough of the United States that she may openly declare non-acceptance of the rationale that only the nation in whose rivers salmon spawn may possess exclusive rights to that particular fish resource. In other words, Japan is capable of claiming and exercising her legal sovereignty.

As was mentioned in the text of the Tripartite Fisheries Treaty, and as further scientific evidence collected by the North Pacific Fisheries Commission indicates, Asian and American origin salmon intermingle over vast areas of the central North Pacific where Japanese fishermen are permitted to pursue fishing operations. It is impossible for any fishermen to fish for salmon in this particular area without taking a mixed catch.[11] Since neither the American fisher-

10. E. Lefever, Ethics and United States Foreign Policy 5-11 (1957).

11. As to the decision whether 175 degrees west longitude line satisfactorily divided American- and Asian-origin salmon, W. Herrington in his testimony [*Before the Senate Foreign Relations Committee*, 82nd Cong., 2nd Sess. (June 1952)] explained:

> [T]hat compromise on the hundred and seventy-fifth meridian was the result of a long discussion. It resulted from the fact that the scientific evidence to the extent of the stocks of salmon in the Bering Sea, those salmon coming from the coast of North America and those coming from the coast of Asia, the evidence was very limited, and after long discussion, the delegations agreed

men nor the U.S. Government can find an equitable means to resolve this problem, they have decided to push for extension of the "provisional" line ten degrees further westward toward Japan.[12]

In this respect the two most pertinent controversies in regard to the present fishing dispute are, first of all, to determine whether the principle of voluntary abstention is really applicable to an international fishing agreement, and, secondly, to determine whether the provisional line, drawn at 175 degrees west longitude for the division of American and Asian-origin salmon in the North Pacific is really equitable.[13]

First, neither American nor Canadian fishermen have engaged in salmon fishing on the high seas on a large scale. They do not consider

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> upon drawing a provisional line . . . and it provided further in this protocol that one of the first jobs for the new commission would be to make a study of the salmon in the area to find out whether this was the best line for dividing the two stocks, otherwise, some different line should be substituted for it.

In regard to the interpretation of the original function of the "provisional line," there is a definite difference between Japan and the United States. W. M. Terry, Assistant Director for International Affairs, U.S. Dept. of Interior, Fish and Wildlife Service, wrote me (Letter from W. M. Terry to T. Nishi, Dec. 19, 1966) stating in part:

> When it was found that the Japanese were taking substantial quantities of Bristol Bay red salmon, the United States section of the Commission . . . recommended that the provisional line of 175 degrees west longitude be moved further west. The Japanese section did not agree with the United States recommendation and has maintained the position that the Protocol to the Convention should be interpreted to mean that the provisional line was established for the purpose of dividing the area where salmon of Asian and North American origin intermingle. The United States has maintained that the provisional line was established for the purpose of protecting all salmon of North American origin. Since no interpretation of the Protocol has been agreed upon, it has not been possible to move the provisional line farther westward. In some years the Japanese high seas fleets take substantial quantities of Bristol Bay red salmon and, therefore, affect the conservation programs of the United States.

Interestingly, the Protocol in question reads in part:

> If such areas are found the Commission shall conduct suitable studies to determine a line or lines which *best divide* salmon of Asiatic origin and salmon of Canadian and United States or American origin, from which certain Contracting Parties have agreed to abstain . . . (emphasis added).

It seems obvious that since the absolute monopoly of American-origin salmon by the United States has proved a failure, the U.S. Government sees no reason why such legality—according to the present articles of the Tripartite Fisheries Treaty—should be mechanically applied to the resources in question. The U.S. Government believes that it must establish another "new" legality which is best suited to protect its national exclusive interests in regard to the resources. Consequently, the United States formulated and applied authoritative interpretation and justification of legality (legal vindication) to its exclusive claim.

12. *See* S. Oda, International Control of Sea Resources, 70-71 (1963) [hereinafter cited as Oda].

13. On a more concrete level, the line extends over 600 miles off of Bristol Bay, and 2,000 miles from Seattle.

it necessary insofar as the abstention principle presently applied to Japanese fishermen is maintained. That salmon are anadromous in nature and thus return to breed in rivers within American and Canadian territories where fishermen of these countries can carry out their fishing activities economically, is the major reason high seas fishing has remained relatively unimportant or unexploited.

Although the governments of the United States and Canada exercise conservation regulations on their fishermen, particularly concerning salmon and halibut, for the necessity of maintaining maximum sustainable yields, should both governments be permitted to violate the principle of freedom of the high seas by extending and exercising their criteria for needs over Japanese fishing vessels in order to secure high seas resources for their own exclusive use?

It is well understood that the governments of the United States and Canada have spent great amounts of time, effort and money in maintaining maximum sustainable yields of salmon and halibut. However, does this fact offer a sufficient rationale for the governments of both nations to claim exclusive rights to those high seas resources? Simply because both governments exercise strict domestic conservation regulations, which inevitably engender "sacrifices" on their fishermen, do they then have the right to impose their own domestic conservation regulations on Japanese fishing activities on the high seas? If the governments of the United States and Canada, pursuing their fishing activities to the maximum sustainable yields of high seas resources, are permitted to inflict their domestic conservation policies on Japanese fishermen on the high seas, what is the necessity for Article III of the 1952 Tripartite Fisheries Treaty, which states in part as follows:

> (a) In regard to any stock of fish specified in the Annex, study for the purpose of determination annually whether such stock continues to qualify for abstention under the provisions of Article IV. If the Commission determines that such stock no longer meets the conditions of Article IV, the Commission shall recommend that it be removed from the Annex.

Though in accord with this Article the Commission recommended in 1963 that halibut be removed from the Annex, and though all three nations accepted it, this recommendation was greatly restricted in its application regarding the halibut fishing areas available to Japanese fishermen, besides reducing the annual total catch of halibut for three nations within the so-called "triangular area." This does not mean halibut fishing operations of both Canadian and U.S. fishermen

are restricted only within the triangular area.[14] Since open halibut fishing areas and the maximum amount of catch permitted for Japanese fishermen are so limited, the practical effect of such a recommendation for removing an abstention on halibut in this particular triangular area is trivial from an economic standpoint. That is, the Japanese fishing industry is reluctant to carry out its halibut fishing operations there. In the case of salmon, it is almost certain there will be no recommendation for Japanese participation in the salmon fishery by the Commission, which requires unanimity for implementing its recommendations.

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14. The International North Pacific Fisheries Commission Report states regarding the decision of removing the abstention principle on halibut:

> At the 1962 Annual Meeting of the Commission it was determined that the halibut stock of the eastern Bering Sea no longer met the abstention provisions of the Convention and it was therefore recommended that this stock be removed from the Annex to the Convention [*i.e.*, no longer be subject to abstention by Japanese fishermen]. In order for a stock to be removed from abstention, it is necessary that all three governments approve the Commission's recommendation. In this case, approvals were received by the Commission on the following dates: from Japan on February 26, 1963; from the United States on March 23, 1962; and from Canada on May 8, 1963. Therefore, on May 8, 1963, Japanese fishermen were no longer required to abstain from fishing halibut in the eastern Bering Sea.
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> . . . In the North Pacific Ocean south of the Alaska Peninsula and in the Gulf of Alaska the situation is somewhat different from that in the eastern Bering Sea. In this great area, comprising the principal halibut fishing ground of Canadian and United States fishermen, no change has been recommended insofar as abstention is concerned. That is, Japanese fishermen continue to abstain from fishing halibut in this area. Int'l N. Pac. Fisheries Comm'n Annual Rep. 12 (1963) [hereinafter cited as INPFC].
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> At the 1964 Annual Meeting . . . the Commission again conducted studies to determine whether any stock of halibut remaining in the Annex to the Convention continued to meet the abstention requirement of Article IV. No agreement was reached in the Commission as to whether such stocks continued to qualify for abstention. Therefore, the Commission made no recommendation that any stocks now listed in the Annex no longer met the conditions of Article IV of the Convention. The practical effect of this is that halibut south of the Aleutian Islands and in the Gulf of Alaska continue under abstention from fishing by Japanese fishermen. INPFC Annual Rep. 10 (1964).

According to the Commission's recommendation of 1963, Japan is still permitted to fish for halibut in the "triangular area" (the area bounded by a line connecting Cape Navarin and the northern tip of Cape Sarichef on Unimak Island, the meridian of 170 degrees west longitude and the Aleutian Islands). However, there was a major reduction of the total catch limit for the three signatory nations. The Commission recommended that the catch be reduced to a maximum of 2,900 metric tons (6,393,340 pounds) from the 1963 quota of 5,000 metric tons (11 million pounds) for 1964. Also, a fishing season of only seven days, from April 4 to 11, was recommended. "In the brief 1965 season, 27 Canadian and United States vessels operated in the former quota area. No Japanese vessels participated in the fishery. Total production was 251 metric tons (553,000 pounds) dressed weight." INPFC Annual Rep. 8-13 (1965).

At the present, Soviet fishing activities in the North Pacific, for example, are not subject to the abstention principle. The Soviet Union fishes extensively for nearly every kind of bottom fish except halibut. Such Soviet activities have caused very serious concern not only among American fishermen and fisheries industries but also among the other signatories of the Tripartite Fisheries Treaty—Japan and Canada—simply because such extensive fishing activities by a non-signatory nation eventually are certain to nullify the function of the treaty.[15] However, there presently exists an agreement between the governments of the United States and the Soviet Union that the latter shall not pursue its fishing activities within the 12-mile exclusive fishing zone measured from the coast of the United States.[16]

Why should the abstention principle apply only to Japanese fishing operations, while other nations, such as the Soviet Union and South Korea, which are highly efficient and competent in their operations, are totally free from such a limitation and may fish for salmon or halibut anywhere outside the U.S. 12-mile limit if they wish to. This further questions the validity of applying the abstention principle to international fishing and conservation regulations. It will be interesting to note how the governments of the United States and Canada, in the near future, approach the Soviet Union—one of the nations chiefly opposing the abstention principle[17]—to persuade

15. One of the primary purposes of this fisheries treaty at the time of its formulation was the establishment of buttresses against Communist "encroachment" in the Far East, *i.e.*, the containment of Communist expansion. At the same time, Soviet Russia was scarcely involved in high seas fisheries in the North Pacific fishing area now in question. Thus, the United States and Canada did not feel an immediate need to protect their salmon or halibut from Soviet Russia. As a consequence, Soviet Russia was disregarded as a possible signatory to the treaty. In this respect, Japan was the primary party from whom the United States was seeking to protect these high seas resources.

16. A few violations by Russian fishermen have occurred since the agreements on February 14, 1967. On March 2, 1967, the first Russian trawler was captured by the U.S. Coast Guard and fined $5,000; the second Russian trawler was seized by the U.S. Coast Guard on March 22, 1967, and fined $10,000. N.Y. Times, Mar. 7, 1967, at 82, col. 7; *id.* Mar. 26, 1967, at 15, col. 2. The U.S.'s third case against a Russian trawler captured on August 3, 1967, for alleged illegal fishing ended with the U.S. dismissing criminal charges and Russia agreeing to an out-of-court settlement of a civil suit. The Soviet government agreed to pay $20,000 if the U.S. government dropped its admiralty suit against the gear of the Russian trawler in question. Seattle Post-Intelligencer, Aug. 8, 1967, at 13, col. 1; N.Y. Times, Aug. 15, 1967, at 29, col. 5. The Washington State Patrol flies weekly missions off the Washington coast to investigate Russian fishing operations, in addition to twice-a-week patrols by a Coast Guard surveillance mission. *See* Seattle Times Aug. 4, 1967, at 1, col. 4.

It should be remembered that the Soviet Union is one of the oldest nations that has claimed the 12-mile-limit for territorial waters.

17. The Soviet delegate at the Geneva Conference (1958) stated:

> There were no real grounds for holding utilization principally responsible for the reduction in size of the stocks of the species in question. . . . The need for a limitation of yield, amounting in certain instances to complete temporary prohibition of fishing, arose in very rare cases only—*e.g.*, with regard to easily

her that salmon and halibut of American origin belong to the United States and Canada, no matter how far they swim from the North American continent.

Secondly, since salmon of both American and Asian origin intermingle in that area of the North Pacific between 160 degrees west longitude and 170 degrees east longitude, Soviet fishermen can pursue their fishing activities without violating any international laws or agreements. Presently no definite scientific data exist regarding the number of salmon intermingling in the area. Thus, it is impossible to equitably divide them, even if such a division really posed a solution to the problem. Further, if the United States claims the exclusive right to fish for particular high seas resources, such exclusivity may engender Soviet counter claims of exclusivity to other high seas resources, such as the Asian-origin salmon.

What is more, why should the abstention principle be applied only to certain fish? The answer to this question lies in both the historic and contemporary social and economic needs of the United States, and in the time, effort and money spent by the U.S. Government in maintaining maximum sustainable yields of specific fish such as salmon and halibut. If this is so, why must only U.S. needs be favored, and the United States allowed to pursue the maximum sustainable yields, while the needs of Japan are not fully considered? Who decides who has the right to fish for what? Who imposes whose conservation regulations on whom?[18] W. W. Bishop, Jr., ardent advocate of the abstention principle, emphasizes that:

> Under these peculiar circumstances—in which a program of intensive research and conservation is already under way and regulations effectively enforced, in which productivity of the resource is being maintained at the maximum sustainable level and is dependent upon the program of regulation and control, and in which the introduction of additional fishing vessels would cut down, rather than increase, the overall benefits from the fishery—it seems reasonable to

fished stocks such as plaice, turbot, salmon, etc., in certain limited areas. The principle of abstention meant abstention from overfishing in cases where overfishing could be objectively proved. It was difficult to understand why that principle should apply only to newcomers or to those who were not fishing the stock regularly. Johnston, *supra* note 1, at 296.

18. In regard to this question, S. Riesenfeld, Protection of Coastal Fisheries Under International Law 2 (1942) described as follows:

> Any such study of international law is faced at the threshold with a difficult methodological problem . . . , namely: how can one find out what the law is? Who are the authorities to be consulted and what is their evidential value? . . . It will suffice to say that the three great sources from which one can ascertain the status of international law pertaining to a specific issue are *a)* text writer, *b)* state practice and *c)* international adjudications. The authority of these sources probably increases in the order named.

> follow the North Pacific Treaty and to require that states which have not engaged in fishing in that particular fishery abstain from doing so.[19]

However, it must be pointed out that although both the American and Canadian governments have exercised intensive research and conservation and strict regulations on their own fishermen in order to maintain the maximum sustainable yields of specific fisheries resources, and although "the introduction of additional vessels could cut down . . . the overall benefits from the fishery" on the part of American and Canadian fishermen, these are, after all, simply domestic conservation regulations the U.S. and Canada use in order to achieve their own domestic needs and interests. If such domestic needs and interests of particular nations which by their very nature are ambiguous, constitute a sufficient and reasonable rationale for excluding other nations from joining fishing activities for high seas resources, it appears almost impossible to define what is or is not a "sufficient" and "reasonable" rationale for the application of the abstention principle. Again, this raises the question of who decides whose rationale is superior.

A case in point which illustrates the above discussion in terms of salient national needs and interests is whether or not any difference exists between the abstention principle as defined in the Tripartite Treaty and as defined in the Santiago Declaration of 1952. This is not an argument in terms of national sovereignty; the Santiago Declaration imposes national sovereignty of its signatories, Chile, Ecuador, and Peru, over any other nation within a 200-mile "marine zone," while the abstention principle as defined in the Tripartite Treaty is not concerned with the national sovereignty of any nation.

The most pertinent aspect of this discussion is the fact that both the abstention principle and the Santiago Declaration stem solely from national interests and needs for certain high seas resources and

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19. Bishop, *The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas*, 62 Colum. L. Rev. 1206, 1226 (1962).

Oda, *supra* note 12, at 89-90. emphasiaed his opposition as follows:

> The fact that "the expenditure of time, effort, and money on research and management" was for the purpose of keeping resources at the maximum yield of sustainable productivity, is not negligible. But, should we accept that all other states are to abstain from fishing in an area where the resources are being utilized by specific states? Is it reasonable to deprive other states of potential interests in fishing only because they have not engaged in fishing in an area previously? It is submitted that if we accept this principle, we are introducing a doctrine very similar to acquisitive prescription into the law of the sea. This is completely contrary to the concept of freedom of the high seas.

their acquisition. Therefore, if one nation utilizes its own domestic needs and interests in justifying exclusive claims to a certain high seas resource, such justification engenders the possibility of justification of another nation's claim to exclusive use of specific high seas resources, depending upon its own domestic needs and interests for the present and future exploitation of those high seas resources. This trend eventually leads to legal anarchy regarding the status of high seas resources.

Even if Japan, which has contributed nothing to the conservation of American-origin salmon and halibut stocks in the past, wishes to join and contribute in the future development of these high seas resources, Canada and the United States maintain a strong antipathy toward accepting such a proposal. Undoubtedly, Japan shall never have the opportunity to join and contribute to these high seas resources. This fact is used by the United States and Canada to enforce the abstention principle and further to refuse Japanese proposals for a joint international conservation program.

As to the much-emphasized point that Asian- and American-origin salmon are anadromous, if such a biological fact is taken as sufficient reason for any state to impose its exclusive right to fish for any stock which returns to breed within that nation's territory, what happens when some nation, within whose territorial waters such a stock (*e.g.*, tuna, mackerel) migrates or remains for a limited or unlimited length of time, claims the stock in question as belonging exclusively to that nation? By this rationale, Pacific tuna eventually would become the exclusive possession of certain Latin-American nations.

Although there is a definite geographical delineation to be made between land and ocean, as far as a particular nation's sovereignty and its exercise is concerned there exists no gap between the land and the territorial waters. Thus the fact that salmon return to spawn in rivers within U.S. territory does not seem to offer sufficient basis for the claim of exclusivity by the United States. This is a question of which nation's scientific biological criteria for exclusive claim to a certain fish stock should be favored. Since on the level of international law no definite biological standard or criterion exists for determining exclusivity of claims, this becomes a circular argument manipulating one side of the coin against the other, resulting in a net impasse.

Despite three major conferences since 1963 held in Washington D.C., Tokyo, and Ottawa, respectively, concerning the revision of the Tripartite Fisheries Treaty, neither Japan, the United States nor Canada has changed its basic standpoint, particularly on salmon and

halibut protocols and no compromising settlement whatever has been reached.[20]

Although the United States is dissatisfied with the present fisheries treaty which has failed to protect every American-origin salmon migrating beyond the "provisional line" on the North Pacific, she remains in a position far superior to Japan concerning these high seas resources. In such a position, the United States probably would prefer to maintain the status quo of the present treaty by not convening negotiation of revision, especially if it turns out to be the case that she perceives no hope of resolving the question of mutually incompatible interests in the use of high seas resources, or if she feels any danger of a threat that Japan might abrogate the entire provisions of this treaty as a reaction against excessive pressure of U.S. demands upon Japan. On the other hand, Japan, if possible, desires to abolish the principle of voluntary abstention, or at least to maintain the status quo of the present treaty, instead of permitting the United States to push for the extension of the "provisional line" ten degrees further west toward Japan, as she presently has been proposing. Thus, if each nation, seeing no possibility of any better resolution of the present dispute, desires to preserve the status quo of the present treaty, there arises no necessity for either having future negotiations with the other.

Unfortunately, the present fishing controversy between Japan and the United States contains a built-in mechanism for intensifying the conflict. The U.S. Government takes a hostile and inflexible attitude toward Japanese fishing activities and claims. This U.S. action receives strong support from its own citizens—particularly from the West Coast fishermen, who have taken such action as attempting to mobilize a boycott of Japanese merchandise.[21] The Japanese Government, supported by its own citizens, responds with similarly hostile and rigid moves toward U.S. government actions. This gives added impetus for the United States to take a more inflexible stand toward

20. *See* Johnston, *supra* note 1, at 280-82. The question of necessity of convening further negotiation for the revision of the treaty for both Japan and the United States must be taken into account. If there are to be no negotiations for further revision, and none of the three signatories gives a year's notice of abrogation of the treaty, the treaty will remain as effective as before. In such a case, Japan must observe the present principle of abstention by receiving no reciprocal gains or benefits from it, while the United States and Canada, exercising "necessary" conservation regulations, continue to fish for the high seas resources in question to their maximum sustainable yields.

21. A case in point: On May 26, 1965, delegates to the biennial convention of the Seafarers International Union of North America urged the Union to boycott Japanese products if Japanese fleets continued to intercept Bristol Bay salmon runs. *See* N.Y. Times, May 27, 1965, at 73, col. 8. West Coast fishermen frequently declared boycotts of Japanese merchandise.

the fishing dispute. At the same time, the same process goes on within Japan. Thus, there exists positive reinforcement for both governments in terms of the justification of their own positions. This vicious circle of interaction between Japan and the United States makes it increasingly difficult to reverse the self-perpetuating attitudes and perceptions of inflexibility on both sides in terms of exclusive national claims to, and "necessary conservation" of, the resources in question.[22] The fishing dispute possesses not only such complications as the mutual distrust and threats by each disputant toward the fishing activities of the other and exclusive and inflexible national claims to particular fishing resources, but also the ambiguity of interpretation and application of the concept of freedom of the high seas.

Further, deep mutual misperceptions of the situation add to the threat perceived by both nations of liquidation of strong political, economic and social alliances, which further promote the vicious circle of events.[23] Insofar as these negative variables persist, any

22. R. Cooley, Politics and Conservation: The Decline of Alaska Salmon 189-92 (1963), described this vicious circle as follows:

> As the Japanese catch increased and the Alaska catch continued its downward trend, the American interests began to see a grim relationship between the two phenomena even though there was no scientific basis upon which to substantiate this circumstantial evidence. . . . The clamor increased and in a short time Japan had become the primary scapegoat for nearly all the ills besetting the Alaska salmon fishery. . . . However, the downward trend in salmon harvests began almost two decades before the Japanese started fishing on the high seas. Scientific research by the American section indicates that the Japanese high-seas salmon fishery has had little adverse impact on American catches except with respect to the important red salmon runs into Bristol Bay, and even here the relationship is not fully known. It is not only a distortion of the facts to blame the Japanese for the present widespread depleted condition of the Alaska salmon runs, but the existence of this convenient scapegoat has tended to distract from conservation issues on the domestic level. Even if equitable means are found to prevent the Japanese from catching American-spawned salmon on the high seas, the danger of complete destruction of the resource still exists.

American fishermen did not perceive or want to perceive anything else but that Japanese "overfishing" was the main cause of the decline of the Alaskan salmon fishery. For instance, in 1965, a big salmon run hit Bristol Bay and Alaska's Governor William A. Egan linked this big salmon run to absence of Japanese fleets that had moved west of the "provisional line" after the U.S. Coast Guard had seized a Japanese fishing vessel early in June. *See* N.Y. Times, July 3, 1965, at 11, col. 1.

23. In addition, possible liquidation of heavy purchase of Japanese canned or frozen marine products, such as tuna, king crab, even salmon, is frequently considered as constituting a major retaliation by the United States if Japan proclaims the abolition of the abstention principle. [The United States purchased 34%, 31%, 29%, and 27%, in 1962, 1963, 1964, and 1965, respectively, out of the total amount of Japanese marine products exported. *See* Suisan Nenkan 110-11 (1967).] With this in mind, the Japanese Government feels it cannot risk such a serious blow to the Japanese economy.

Washington Representative Thomas M. Pelly introduced the bill, both in 1958 and 1959,

resolution of the present fishing conflict is hardly expected in the near future.

Lastly, it should be remembered that the inherent ambiguity of international law and its lack of centralized enforcement of authority provide a nation-state with a wide flexibility whereby it may first execute unilaterally whatever policy it deems necessary, and after that formulate specific legal justification for its policy. In other words, the most difficult question of who decides what is legally justifiable for whom, under what conditions and how, is an urgent matter to be resolved regarding this international conflict.

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which essentially urged the prohibition of "the importation into the United States of salmon in any form taken by nationals of any country which permits fishing for salmon by nets on the high seas of the North Pacific Ocean at times and places where large quantities of immature salmon of North American origin or intermingled North American salmon runs occur. Under the circumstances existing, it would have applied only to importations from Japan." *See* Whiteman, *supra* note 1, at 1192-93.