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Japan, The North Atlantic Triangle, and the Pacific Fisheries: A Perspective on the Origins of Modern Ocean Law, 1930-1953

HARRY N. SCHEIBER*

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I. INTRODUCTION

Fishing rights on the high seas, coastal fisheries management, and international ocean law have long been of great significance in the economic and diplomatic relations between Canada, the United States, and Great Britain.¹ Fisheries issues, dating back to the 18th century, have been complex because they have involved swings and vacillations between conflict and cooperation in Anglo-North American relationships. In many respects, it has been a history of persistent economic rivalry, pitting the interests of Canada's Atlantic and Pacific fishing fleets against the interests of fishing operators in the United States and Great Britain, and in more recent times, involving differences stemming from the divergent policy objectives of North American distant-water fishing and coastal fishing industries. Nonetheless, at many junctures in this history there has also been significant identity of national objectives in regard to fisheries, a particularly important example being the concerns of the British Columbia and Washington-Alaska salmon fisheries to fend off foreign competition in offshore waters. Not to be overlooked, too, is the fact that the Canadian-U.S. relationship in the last eighty years has involved an active coordination of both scientific fisheries research and important management efforts in coastal waters.²

1. Acknowledgments: The author is greatly indebted to the officers and staffs of the American, Canadian, New Zealand, Japanese, and Australian national archives and of the Public Records Office (Kew) of the United Kingdom; and to the archivists of the special collections in the Scripps Institution of Oceanography Archives (University of California, San Diego), the Hoover Institution, the Franklin D. Roosevelt Presidential Library, and the University of Washington. He acknowledges with gratitude the counsel and encouragement in the course of this research of his wife Jane L. Scheiber; Professors Akio Watanabae (University of Tokyo, emeritus), David D. Caron (UC Berkeley), William T. Burke (University of Washington), Paul Pickowicz and Robert Edelman (University of California, San Diego), and Elizabeth Eliot-Meisel (Creighton University); and the late Hon. William Herrington and the late Prof. Stefan A. Riesenfeld.

2. Although there is no comprehensive history on the subject in its full context, many of the general themes to which this study relates are given full context in the treatise by DOUGLAS M. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES: A FRAMEWORK FOR POLICY-ORIENTED INQUIRIES* (1965); and in WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND* (1998), the authoritative work on the subject. Articles by Anne L. Hollick that are cited in notes below and Hollick's book, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA*, are invaluable for their analysis of the large context of U.S. oceans policy process and substantive developments, as well as for their analyses of specific issues. *See infra* note 10. Research for the present Article has built on archival sources relating to policy and law, especially from the Canadian and other Commonwealth archives that provide much data beyond what Hollick had obtained from her research in the U.S. DOS records, her principal source for historical analysis.

The following abbreviations are used in the citations in this Article:

CAN: Canadian National Archives

Documents: Department of External Affairs, Government of Canada, *Documents on Canadian External Relations/Documents Relatifs aux Relations Exterieures du Canada*

Ocean fisheries issues invariably implicate questions of international law. In this aspect of the trilateral interrelationship, there is again a mixed record. Historically, the United States, Britain, and Canada have often stood together on basic doctrinal matters of international law. This was true especially insofar as the governments of all three nations were for many decades strong champions of the “three-mile rule” as the limit of offshore jurisdiction for coastal states.³ And yet, in some periods of the modern era, the three countries have pursued conflicting policies, sometimes producing critical tensions in their diplomatic relations, including direct conflicts over maritime boundaries.⁴

In all these respects, the “fisheries dimension” of the trilateral relationship has reflected accurately the larger framework of economic, political, strategic, and ideological relationships that the late J. Bartlet Brebner depicted brilliantly in his famous book on historic dynamics of change in the “North Atlantic Triangle.”⁵ As will be discussed below, the cultural dimension, especially the manifestations of racism directed against people of Japanese origin living on the West Coast of Canada and the

DOS: Department of State

FRUS: Foreign Relations of the United States

NA: United States National Archives

PRO: Public Records Office (UK), Kew

RG :Records Group

SS for EA: Secretary of State for External Affairs (Canada)

UW: University of Washington

3. The phrase “three-mile rule” refers literally to the three-mile distance from shore as the formal boundary of national jurisdiction; in fact, prior to the 1940s, even the maritime nations that most assertively defended that rule—the United States and the United Kingdom—had in various ways deviated from it in limited contexts (for defense of security, for policing against pollution of coastal waters, and for interdiction of smugglers). The phrase is used here with those exceptions taken as granted, and for which see, *inter alia*, the classic work by STEFAN A. RIESENFELD, PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW (Carnegie Endowment for Int’l Peace, Div. of Int’l Law, Monograph Series, No. 5, 1941); and SAYRE A. SWARZTRAUER, THE THREE-MILE LIMIT OF TERRITORIAL SEAS (1972).

4. See, e.g., Anne M. Hollick, *Canadian-American Relations: Law of the Sea*, 28 INT’L ORG., Autumn 1974, at 755; Barbara Johnson, *Canadian Foreign Policy and Fisheries*, in CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 49–99 (Barbara Johnson & Mark W. Zacher, eds., 1977); DOUGLAS M. JOHNSTON, CANADA AND THE NEW INTERNATIONAL LAW OF THE SEA 1–12, 64–75 et passim (1985); HIROSHI KASAHARA & WILLIAM T. BURKE, NORTH PACIFIC FISHERIES MANAGEMENT 1–27 (Res. for the Future, Program of Int’l Studies of Fisheries Arrangements, Paper No. 2, 1973); and see generally DAVID L. VANDERZWAAG, THE FISH FEUD: THE U.S. AND CANADIAN BOUNDARY DISPUTE (1983).

5. JOHN BARTLET BREBNER, NORTH ATLANTIC TRIANGLE: THE INTERPLAY OF CANADA, THE UNITED STATES AND GREAT BRITAIN (1945).

United States, also figured large in the history of fisheries relationships, as the three countries sought to pursue their respective positions and protect their individual interests from the 1930s to the 1950s.⁶

During the last half of the twentieth century, the governments and the fishing industries of the North Atlantic Triangle nations have played major roles in the shaping of formal international ocean law. The existing scholarly literature on this subject provides a rich body of data regarding this record. Most studies focus upon the ocean law reforms that were pursued under the aegis of the United Nations, that is to say, the process of reform since 1951.⁷ The United Nations, prodded among others by the United States and Canada, began the work of developing a new ocean law in the 1950s with a comprehensive study by the International Law Commission of unsettled legal issues in ocean law, followed by conferences in Rome (1955) and Geneva (1958), which resulted in new multilateral agreements on principles to govern the exploitation of living resources of the seas and on other cognate matters of law.⁸ There followed a series of further negotiations in search of agreement on a comprehensive new Law of the Sea. Shifting alliances among states in the global community, the vicissitudes of the Cold War, and the increasing use of new technologies that put unprecedented pressure on ocean resources complicated and prolonged the negotiating process. Finally, the continuing talks culminated in 1982 with the signature of the United Nations Convention on the Law of the Sea (UNCLOS).⁹ This

6. See *infra* note 68.

7. See generally, the essays in two recent volumes: THE LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES (Harry N. Scheiber, ed., 2000) [hereinafter LAW OF THE SEA]; AND ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY (Davor Vidas & Willy Østreng eds., 1999) [hereinafter ORDER FOR THE OCEANS]. On the institutional and political contexts of the U.N. Law of the Sea meetings that produced the 1982 Convention, see generally ROBERT L. FRIEDHEIM, NEGOTIATING THE NEW OCEAN REGIME (1993).

8. The most complete historical overview and analysis is contained in LAWRENCE JUDA, INTERNATIONAL LAW AND OCEAN USE MANAGEMENT: THE EVOLUTION OF OCEAN GOVERNANCE (1996). See also D. J. J. ATTARD, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW 1–13 (1987); and Barbara J. Rosenow, *Comment: North Pacific Fisheries Treaties and International Law of the Sea*, 38 Wash. L. Rev. 223, 234–35 (1963).

9. Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 1833 U.N.T.S. 397, reprinted in 21 I.L.M. 1261. Although the 1982 Convention was comprehensive in the light of existing technology in the late 1970s to 1982, the agreement was unfortunately negotiated just before ocean diplomats and lawyers began to recognize the enormous potential of genetic resources and the related imperatives for sustaining biodiversity at all levels. The “ecosystem” concept was already well known and had been incorporated into the agenda of fisheries scientists and of oceanographers for more than two decades—even finding its way into the guiding principles of agenda-writing for fishery investigations, though not as yet explicitly into the specified missions of fishery management regimes. See Harry N. Scheiber, *The Biodiversity Convention and Access to Marine Genetic Materials in Ocean Law*, in ORDER FOR THE OCEANS, *supra* note 7, at 187–202; and, for the earlier period

convention was an ambitious framework document of extraordinary scope in its subject matter, designed to clarify the boundaries of claims to control in the world oceans and to set down universally applicable principles of law to govern the varied uses of marine space and resources.

It is the object of this study to analyze the “pre-history” of those developments. I seek to establish here the degree to which multilateralism prevailed in the postwar era, or instead was overcome by unilateralist objectives and methods in pursuit of national interests. The empirical basis and special focus in much of my analysis is the discussion of Canada’s role in regard to the diplomacy of the Pacific fisheries and more generally in regard to the process of developing modern ocean law as reflected in Canadian-U.S.-Japanese-British relations.¹⁰ In Section II, the general record of modern change in ocean law is discussed more fully. Against that background, we turn in the ensuing Sections to significant episodes in the ongoing relationships of Canada, the U.K., and the United States in dealing with Japan and its fishing industry—in every case with important implications of the future of ocean law. The first episode in question (discussed in Sections III and IV) is the “Bristol Bay incident” of 1937-38, when Japanese factory ships threatened to “invade” American and Canadian fishing grounds in the Northeast Pacific. The second episode (treated in Section V and VI) came immediately after the end of World War II. It was the result of U.S. and Canadian reaction to the Bristol Bay incident—the American government’s issuance of the Truman Fisheries Proclamation of 1945. This U.S. action proved to be the trigger of a transformation in ocean law that challenged the traditional rules of territorial waters and offshore jurisdiction of coastal states. Of particular interest in this aspect of the history is the

and the introduction of the ecosystem concept into postwar fishery science, revitalizing ideas that had been essential to early studies in fishery biology going back to the turn of the century, see Harry N. Scheiber, *California Marine Research and the Founding of Modern Fisheries Oceanography: CalCOFI's Early Years, 1947-1973*, 31 Cal. Coop. Oceanic Fisheries Investigations [CALCOFI] REPORTS 63-83 (1990). On fisheries oceanography’s scientific and organizational history, see ERIC L. MILLS, *BIOLOGICAL OCEANOGRAPHY: AN EARLY HISTORY, 1870-1960* (1989); and MARGARET DEACON, *SCIENTISTS AND THE SEA, 1650-1900: A STUDY OF MARINE SCIENCE* (1997).

10. The Canadian dimension of law and policy, in the present study, is based largely on archival sources not previously discussed in the literature. Studies of Canadian policy that include consideration of the historical trends of the postwar decade that were advanced or deflected in the later period include FRANK LANGDOM, *THE POLITICS OF CANADIAN-JAPANESE ECONOMIC RELATIONS, 1952-1983* (1983) (esp. Chapter 4); and Johnson, *supra* note 4. The standard work on U.S. policy history is ANNE L. HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* (1981).

character of the war-period planning that led to the Truman Proclamation, producing new stresses in the relationships involving Canada, the United States, and the U.K.—stresses that brought to prominence the key issues that would dominate global debate of ocean law for several decades to follow.

Section VII treats the history of the fisheries and whaling policies of the Occupation authority in postwar Japan, under General Douglas MacArthur, and how those policies intensified tensions among the Allies from 1945 to 1952. These tensions were reflected in bitter divisions of opinion and policy objectives among members of the Far Eastern Council (FEC), an international body sitting in Washington that nominally was responsible for basic Occupation policies. The key issues affecting the future of ocean law, and not only the future of Japan's fishing and whaling industries, again were at the forefront of debate.

Finally, Section VIII offers an interpretation of the debates over principles of ocean law, in counterpoint with a set of other formative influences, that marked the process that led to successful conclusion of the historic 1952 tripartite Canadian-U.S.-Japanese agreement called the International North Pacific Fisheries Convention (INPFC). (The INPFC was initialed after several weeks of talks in Tokyo during November and December 1951, was signed formally by the three powers in 1952, and went into force in 1953). By the terms of this agreement, Ottawa and Washington sought to resolve some of the most intractable, unsettled issues of fishery management and international law that had carried over from the earlier episodes discussed here. From the standpoint of the Japanese government, the agreement not only represented a surrender of the old principle of freedom of the seas, which was of great importance to Japanese fishing interests, but it also represented a new opportunity for Japanese distant water fleets to operate over a wide area of the globe's ocean waters without legal challenge.¹¹ Japan won this opportunity at a time when many within the Commonwealth were hoping to keep Japanese fishing out of the south-western Pacific Ocean area. Indeed, there was a striking asymmetry between what Canada won for itself, through an alliance with Washington in the INPFC, and the way in which the Convention left Australia and other coastal nations exposed to renewed Japanese fishing competition, so that a triumph of Canadian-U.S. diplomacy became a burden for other Allied states to bear.¹²

11. For full documentation of this interpretation of the Convention and its import, see Harry N. Scheiber, *Origins of the Abstention Doctrine in Ocean Law: Japanese-U.S. Relations and the Pacific Fisheries, 1937-1958*, 16 *ECOLOGY L.Q.* 23-99 (1989).

12. See, *inter alia*, the argument and documentation in my recent book: HARRY N. SCHEIBER, *INTER-ALLIED CONFLICTS AND OCEAN LAW, 1945-53: THE OCCUPATION COMMAND'S REVIVAL OF JAPANESE WHALING AND MARINE FISHERIES* (2000). Shigeru Oda,

In each of these episodes, the international policy conflicts at issue carried far beyond the bounds of fisheries policy alone. And in each instance, the vital issues of international oceans law that were implicated actually foreshadowed the major ocean law controversies and trends of the decades that followed. Indeed, the Canadian-U.S.-Japanese fishery relations of the Occupation era established the terms of argument and framework of debate for much of the ocean law reform movement during the 1960s and 1970s. That movement culminated in the signing of the UNCLOS in 1982 and thereafter led to modern-day agreements such as the 1995 Fish Stocks Agreement, which had enormous potential of affecting the rights and obligations of fishing nations whose vessels operate on the high seas.¹³

II. MODERN OCEAN LAW DEVELOPMENT: AN OVERVIEW

With regard to fisheries, the 1982 U.N. Convention was especially important in two respects. First, it validated the movement of “ocean enclosure,” already effectively established by the time the convention was signed, by which coastal states were authorized to extend their jurisdiction over fishing and other activities out to a distance of 200 miles off their shores. This new rule formally supplanted the long-dominant three-mile rule, which had still held sway since the 1940s despite various exceptions, none of the which being even remotely as radical as permitting a distance of 200 miles for purposes of such control.¹⁴ The concept of a 200-mile Exclusive Economic Zone (EEZ) had been championed by its supporters as a way of strengthening environmental protection. If access by

later Senior Judge of the International Court of Justice and for five decades a major figure in jurisprudence of ocean law, published his first major work on these very questions seen from the immediate contemporary perspective and especially from the standpoint of Japanese policy objectives: *See* SHIGERU ODA, *INTERNATIONAL CONTROL OF SEA RESOURCES* (1963); *see also* Shigeru Oda, *Recollections of the 1952 International North Pacific Fisheries Convention*, 6 *SAN DIEGO INT'L L.J.* 11 (2004).

13. Most important among later agreements is the 1995 U.N. Fish Stocks agreement, on which *see* William T. Burke, *Compatibility and Precaution in the 1995 Straddling Stock Agreement*, in *LAW OF THE SEA*, *supra* note 7, at 105–26; and Moritaka Hayashi, *The 1995 UN Fish Stocks Agreement and the Law of the Sea*, in *ORDER FOR THE OCEANS*, *supra* note 7, at 37–53. *See also* GOVERNING HIGH SEAS FISHERIES: THE INTERPLAY OF GLOBAL AND REGIONAL REGIMES (Olav S. Stokke, ed., 2001) (discussing legal and implementation problems in the regional management of high seas species generally).

14. The standard work on ocean law in relation to fisheries management and jurisdiction is BURKE, *supra* note 2; *see also* Ellen Hey, *Reconceptualization of the Issues Involved in International Fisheries Conservation and Management*, in *DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW* 5 (Ellen Hey, ed., 1999).

foreign-flag vessels could be limited or restricted by the coastal states, it was argued, then the chances of an effective conservationist management regime under the coastal state's aegis would be vastly enhanced. The protectionist aspect of ocean enclosure, however, was never absent in the consideration of the various reforms of formal norms and doctrine that were considered in the U.N. debates; the goals of protectionism were an underlying reality. Indeed, it was obvious that the benefits of jurisdiction extended to 200 miles would be of great potential profitability to coastal states. The EEZ would be of crucial importance especially to countries whose economies were highly dependent on fisheries, such as Iceland, and it was favored more generally by Third World coastal countries that were hopeful of developing their own fisheries industries.¹⁵ But among the big winners were powerful industrial nations with large coastal fisheries, most notably Canada and the United States.¹⁶

The second major respect in which the Convention was important for fisheries was its incorporation of the principle that the signatory states would recognize formal obligations as to the sustainability of fishery resources in ocean space under their control and as to the activities of fishing vessels flying their flags.¹⁷ Until late in the 19th century, it had been a widely accepted idea that ocean fishery resources were "inexhaustible." This belief was not altogether absurd, given the fact that before the harnessing of steam to bottom trawlers and other advances in technology, the scale and intensity of most, though not all, marine fishing operations did not pose anything like the threat to resources that the modern fishing fleets and their gear posed in later times.¹⁸ By 1982, however, this notion had been universally laid to rest. Of course, specific fishing industry people continued to insist, almost regardless of evidence to the contrary, that their particular ocean area or the particular fisheries they were operating in certainly were not in danger of depletion. "Exhaustibility" had to be defined in terms of such particulars. It was difficult to prove, just as uncertainty is today (even with modern scientific methods in use), a continuing problem for fisheries management.

15. FRIEDHEIM, *supra* note 7 (analyzing alignments and coalitional behavior at the conferences). See also EDWARD L. MILES, *GLOBAL OCEAN POLITICS: THE DECISION PROCESS AT THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, 1973-1982* (1998).

16. Johnson, *supra* note 4.

17. Jon Van Dyke, *Sharing Ocean Resources—In a Time of Scarcity and Selfishness*, in *LAW OF THE SEA, supra* note 7, at 3; see generally *LAW OF THE SEA, supra* note 7, at 3-36.

18. See generally RIESENFELD, *supra* note 3; DAVID CUSHING, *FISHERIES RESOURCES OF THE SEA AND THEIR MANAGEMENT* (1975); and Lawrence Juda, *Changing Perspectives on the Oceans*, in *BRINGING NEW LAW TO OCEAN WATERS* 17-28 (David D. Caron and Harry N. Scheiber, eds., 2004).

To determine whether a specific fishery stock was being depleted requires scientific investigation, and a sound judgment relies upon the dependability of data (a rare thing indeed in fisheries management) as well as the accurate interpretation of trends and potentialities. Uncertainties have sometimes had tragic consequences. A particularly notorious example was Japan's denial of the endangerment of the pygmy blue whale, assaulting the stocks until they were finally destroyed altogether.¹⁹ Similar examples for pelagic fisheries may be cited. Thus in the 1940s, during the period that we are concerned with here, the California sardine fishery collapsed.²⁰ To cite an example from our own day, Canada, the European fishing powers, and the United States all bear heavy responsibility for giving the historic Northwest Atlantic cod fishery entirely inadequate protection.²¹ In any event, for the purpose of strengthening the conceptual foundations of scientific management and identifying the possibilities for principled legal reform that would embody the idea of voluntary abstention from coastal fishing under specified circumstances, the 1982 Convention brought such issues into a much clearer focus, though not a definitive resolution.²²

As the present study will show, the central issues that would become the focus of the U.N. debates and that presaged key provisions of the 1982 Convention surfaced dramatically during the 1930s-1952 period in relations between Japan and the North Atlantic Triangle nations. Intensive diplomatic efforts looking toward the resolution of these issues were pursued in different arenas of deliberation and action throughout the period in question, as the North Atlantic Triangle governments engaged, both individually and in varying configurations of alliance, in attempts

19. Harry N. Scheiber, *Historical Memory, Cultural Claims, and Environmental Ethics in the Jurisprudence of Whaling Regulation*, 38 OCEAN & COASTAL MGMT. 5-40 (1998); GEORGE L. SMALL, *THE BLUE WHALE* (1977).

20. Scheiber, CALCOFI REPORTS, *supra* note 9; and Arthur F. McEvoy & Harry N. Scheiber, *Scientists, Entrepreneurs, and the Policy Process: A Study of the Post-1945 California Sardine Depletion*, 44 J. OF ECON. HIST. 393-406 (1984).

21. Canadian public policy failed to deal effectively with obvious problems and even exacerbated the crisis, especially after taking full control of its EEZ area. This is emphatically argued and well documented in Lennox O'Reilly Hinds, *Crisis in Canada's Atlantic Sea Fisheries*, 19 MARINE POL'Y 271-83 (1995); see also William E. Schrank, *Extended Fisheries Jurisdiction: Origins of the Current Crisis in Atlantic Canada's Fisheries*, 19 MARINE POL'Y 285-99 (1995).

22. The 1995 Fisheries Stocks Agreement provided highly specific definitions that were without precedent in U.N. Law of the Sea as to "reference points" as levels of stocks availability that required conservationist intervention. See Hayashi, *supra* note 13, at 22, 49-50.

to reform international fisheries management. In a related and derivative enterprise, these governments also worked toward a reform of the fundamental principles of international ocean law.

A parallel theme in this history that is of special interest is the way in which Canadian-U.S.-British relations were affected by the quest for a consensus on how science should be deployed in marine fisheries management. There was a parallel quest for embedding the ideal of sustainability in fishery management—what was known as the concept of Maximum Sustainable Yield (MSY)—in international law, or, failing that, at least embedding it in the prevailing international agreements for multilateral fishery management.²³ The sustainability concept had come into prominence in fisheries science early in the century. The theory was built upon the fisheries investigations of Johan Hjørt of Norway and other pioneering figures in the field working in British and Northern European laboratories.²⁴ At critical junctures, the evolving scientific theories of sustainable management became vital to the reconsideration of inherited doctrines in international law and their revision to accommodate new realities of the ocean fisheries. This was true especially of the way in which the concept called “abstention” was incorporated into the INPFC of 1952, in which Canada and the United States joined with a reluctant Japanese government to place fisheries management in the Northeast Pacific on a new conceptual and legal basis.²⁵

Finally, the history of the period from the 1930s to 1952 involved both academic reconsideration and diplomatic initiatives on the vital issue in international law of “territorial waters,” that is, the issue of offshore limits of coastal states’ sovereignty. This issue would prove to be inseparable from fishery management questions when the U.N. embarked on its Law of the Sea effort in later years and when the interrelatedness

23. Harry N. Scheiber & Christopher J. Carr, *From Extended Jurisdiction to Privatization: International Law, Biology, and Economics in the Marine Fisheries Debates, 1937–1976*, 16 BERKELEY J. INT’L L. 10–54 (1998). The troubled history of MSY as what may be termed the “Holy Grail” of a generation of fishery management scientists is told in Larry A. Nielsen, *The Evolution of Fisheries Management Philosophy*, MARINE FISHERIES REV., Dec. 1976, at 15; and P.A. Larkin, *An Epitaph for the Concept of Maximum Sustained Yield*, 106 TRANSACTIONS AM. FISHERIES SOC’Y 1 (1977).

24. Harry N. Scheiber, *Modern U.S. Pacific Oceanography and the Legacy of British and Northern European Science*, MAN AND THE MARITIME ENVIRONMENT 36–79 (Stephen Fisher ed., 1994); see generally HELEN M. ROZWADOWSKI, THE SEA KNOWS NO BOUNDARIES: A CENTURY OF MARINE SCIENCE UNDER ICES (2002); MILLS, *supra* note 9.

25. See *infra* § VIII. For contemporary expositions on abstention, refer to Richard Van Cleve’s speech during the U.N. Conference on the Law and the Sea, see *The Economic and Scientific Basis of the Principle of Abstention (Preparatory Document No. 3)*, U.N. GAOR, 12th Sess., at 47–63, U.N. Doc. A/CONF. 13/3 (1957); and William C. Herrington, *Problems Affecting North Pacific Fisheries: Tripartite Fisheries Conference at Tokyo, November 4–December 14, 1951*, 26 DEP’T ST. BULL. 340–346 (1952).

of the two was finally expressed in the adoption of the 200-mile EEZ.²⁶ There were profound differences in the underlying economic and political factors that influenced the respective policies of the British, American, and Canadian governments on the territorial-waters question during the period that concerns us here. Moreover, the role of the Japanese government and fishing industry before the war, then during the Occupation era, and finally after the peace treaty went into effect in 1952, proved to be an important catalyst in bringing these questions to the fore in ocean law diplomacy both within the Triangle and in the larger global arena of ocean politics and law reform.²⁷

At issue was whether it was desirable (and, from an environmental standpoint, whether it was truly essential), to reduce the prerogatives that sovereign states had long associated with the concept of “freedom of the seas.” This could be accomplished by enhancing the prerogatives of the coastal states through ocean enclosure, i.e., through extended jurisdiction in what finally took the form of the EEZs, or through international agreements to sustain the fisheries while at the same time maintaining the core validity of the old limitations, especially the three-mile rule. The disputes of such questions were usually advertised as being pursued in the name of protection of the fisheries in order to sustain their productivity for current harvest and profit and for the benefit of future generations.²⁸ Proposals for reform of ocean fisheries law were sometimes candidly advanced, however, not as a noble cause to benefit humankind but rather on the argument that they were needed in order to protect the established domestic commercial fishing interests and communities from the economic threat posed by new foreign competition. I discuss below how all of the major players in the postwar debate over the Pacific fisheries and the future of ocean law were keenly attuned to special fishing interests, even though principled multilateralism and other large strategic factors in their diplomacy sometimes prevailed.

Moreover, the defenders of the old rule of freedom of fishing on the high seas and of the three-mile limit of coastal jurisdiction, in some instances, simply made their arguments on grounds that their own national food requirements and economic interests were adequate justifications

26. FRANCISCO ORREGO VICUÑA, *THE CHANGING INTERNATIONAL LAW OF HIGH SEAS FISHERIES 3 et seq.* (1999).

27. See *infra* §§ VI and VII. Japanese fisheries and whaling in the postwar years are considered in detail in SCHEIBER, *supra* note 12.

28. See generally Juda, *supra* note 18, at 19.

for the continuance of the established legal order. For example, when the United States unilaterally made a dramatic break with established doctrine in 1945 with the issuance of the Truman Fisheries Proclamation, which declared the U.S. intention to create "conservation zones" for fisheries beyond the traditional three-mile offshore boundary of jurisdiction, the State Department's Legal Adviser counseled the Secretary that the new policy was "designed to improve the economic conditions of the United States and its nationals."²⁹ But the official posture of the United States was quite different, of course, justifying the policy to world opinion on grounds of conservationist aims and equitable considerations.³⁰ As I have suggested here already, in all these respects the controversies and confrontations of the 1930-1952 period foreshadowed essential features of the developments that would later result in the transformation of ocean law.

III. THE BRISTOL BAY INCIDENT

When Britain, Canada, and the United States were initially confronted with these issues, the challenge was triggered not by an incident in the familiar North Atlantic fishing grounds but rather by a situation involving Japan's fishing operations in the Pacific coastal waters of North America. This was a portent of future directions in ocean diplomacy. The challenge came in the late 1930s, but it had been presaged by the emergence of Japan in that decade as the world's leading marine fisheries power.³¹ In its pelagic fishing and whaling operations alike, Japan made an unenviable reputation as being not only expansionist, but also ruthless in hunting and harvesting and scornful of scientific management principles except within the limits of its own coastal waters. Virtually no concessions were made by Tokyo or the Japanese fleets to the objectives of sustainability or conservation, and the fishing grounds of several of the colonies of the expanding militarist empire in Asia were stripped of their resources, as exemplified by Japanese fishing methods in Korean offshore waters. References to Japanese fishing operators' "ruthless disregard of

29. Green Hackworth, Conversation between Hackworth and James F. Byrnes, in FOREIGN REL. U.S. [FRUS], 1945, at 2:1521.

30. See HOLLICK, *supra* note 10, at 26-27. Japan was consistently the foremost champion of older free-seas doctrines on this candidly self-interested basis. Even during the Occupation period, the Japanese government assertively couched its policy on international fisheries law in terms linking the principled view of inherited doctrine to the contention that Japan's essential national interest was involved. See *infra* text at notes 233-36, 265. Arguments of Japan on this line expressed years later in the U.N. debates are discussed in Haruihiro Fukui, *How Japan Handled UNCLOS Issues: Does Japan Have an Ocean Policy?*, in ROBERT FRIEDHEIM ET AL., JAPAN AND THE NEW OCEAN REGIME 21, 44-46 (1984).

31. EDWARD A. ACKERMAN, JAPAN'S NATURAL RESOURCES 109 (1953).

conservation”³² abounded in the fisheries trade press outside Japan and are frequently encountered in internal reports and correspondence in governmental archives for the 1930s period.³³ In the salmon waters north of Hokkaido, off Kamchatka Peninsula, Japan had introduced factory ships and initiated an unprecedented level of intensity of fishing—a development that was thought to have severely depleted the salmon stocks of that region, raising fears that Japan might one day similarly “wreck the salmon fishery” in Canadian and American offshore waters.³⁴ “If the Japanese are able to cork up our Alaska fisheries as they have the Siberian fisheries,” Senator Lewis B. Schwollenbach of Washington State said in Congress, “the supply [of salmon] will soon be depleted and we will face the same situation [as] faced by the shore fisheries on the coast of Kamchatka.”³⁵

In addition, there was widespread criticism in Europe and North America during the 1930s directed against the Japanese government and industry for refusal to enter into the whaling conventions of the period that were designed to limit the Antarctic season, establish quotas, and protect endangered species. To be sure, the Antarctic whaling regulatory regime in question was little more than a tight club of established European whaling nations, mainly interested in maintaining a profitable oligopoly. Nonetheless, the whaling conventions represented the only hope for conserving anything of the whale stocks and, in the long run, saving the industry itself.³⁶ Japan also was notorious for the way it pulled out of the 1911 Fur Sealing Agreement, thereby undermining the oldest-standing international agreement of its kind and effectively removing the protection of the fur seal populations in the North Pacific.³⁷

32. Letter from A. W. Neill, M.C., to Hon. Joseph-Enoil Michaud, Minister of Fisheries (June 14, 1937) (on file with Canadian Records Group [RG] 25, f. 7212-19-12).

33. See, e.g., Memorandum from Mr. Flory to Mr. Hilldring (June 4, 1947) (on file with Int'l Resources / Fisheries & Wildlife, DOS Records) (commenting on Japan's prewar fishing record having “accumulated much international ill-will by her ruthless exploitation of high seas fisheries off other-than-Japanese coasts”). See generally HOMER E. GREGORY & KATHLEEN BARNES, NORTH PACIFIC FISHERIES (1939).

34. Confidential letter from Eugene Dooman, U.S. DOS official, Canadian Embassy, Washington, to Ottawa, Ontario, Canada (on file with RG 23, Cypher No. 1189).

35. Lewis B. Schwollenbach, Statement to Congress (Aug. 1937), in “Fishery Raids Alaskan Issue,” VANCOUVER DAILY PROVINCE, Aug. 25, 1937.

36. See generally J. N. Tønneson & A.O. Johnsen, THE HISTORY OF MODERN WHALING (1982).

37. Japan withdrew in 1940 from participation in the 1911 Fur Seal Agreement. This action, together with Japan's refusal to cooperate in whaling regulation, became a prime item in evidence for critics of the Japanese record who saw them as enemies of conservation and rational management. See L. LARRY LEONARD, INTERNATIONAL REGULATION OF FISHERIES

All the foregoing aspects of Japan's fisheries and whaling served as ominous indicators of trouble for the Canadian and U.S. West Coast fisheries. Initially, the focus of concern for the fisheries was the need to protect the rich salmon stocks and the salmon fishing and canning industries of Alaska, British Columbia, and Washington State—one of the world's most valuable fisheries, the largest producer of income from marine fishing for the United States, and a rich source of a major export product for Canada. If Japan's newly expanded fleet of modern, diesel-driven factory vessels should be shifted across the Pacific to the North American salmon waters, an ocean area that until then had been fished only by the Canadian and U.S. fleets (along with some inshore native Indian artisanal fishing), it would mean devastating economic competition. Such a Japanese incursion would also pose a vital threat to the highly fragile regime of hatcheries, subsidies, and regulations that Canada and the United States had long been developing both separately and jointly. For example, an essential element in the Alaska salmon regime was the requirement that only hand or sail power be used in fishing for salmon. Motor power, let alone the use of giant factory ships, was forbidden, an example of imposing an inefficient technology as a way of reducing pressure on the resource, and perhaps of assuring the welfare of smaller-scale individual operators against the possibility of heavily capitalized corporate competitors.³⁸

As seen by fishing leaders in British Columbia, Alaska, and Washington State, once Japanese fleets came into the fishing grounds and intercepted the salmon migrations, the entire coastal fishing industry, the welfare of coastal communities from the Aleutians to Seattle, and ultimately (as they argued), the very survival of the salmon stocks and, perhaps, other commercial fish species would be fatally damaged. Moreover, both industry leaders and some government experts argued that once Japan was permitted to establish a presence in the salmon grounds, it was a virtual certainty that the Japanese fleets would move southward into the halibut fishery area.³⁹ The halibut stocks off the coast of British Columbia

92–93, 98–109 (Johnson Reprint 1971) (1944); and Edward W. Allen, *The North Pacific Fisheries*, 10 PAC. AFFAIRS 136 (1937). See also ALBERT W. KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES: A STUDY OF REGIONAL FISHERIES ORGANIZATIONS (1973) (providing brief histories and full legal citations to the fishery conventions and treaties of the twentieth century).

38. See GREGORY & BARNES, *supra* note 33. Other forms of control that were then or later imposed on the North American salmon fishermen at various times included outlawing or regulation of such gear as seiner nets, fish wheels, traps, weirs, and in recent times, monofilament gill nets. Until 1953, even the use of engine power for salmon fishing in Bristol Bay was prohibited. A concise history of salmon regulation in the Northeast Pacific is provided in James L. McHugh, *Fishery Management*, in 10 LECTURE NOTES ON COASTAL AND ESTUARINE STUDIES 113–124 (Richard T. Barber et al., ed.).

39. Confidential Memorandum No. 371 from the Dept. of Fisheries to External

and the United States were then being managed under an elaborate research program and scientific regime jointly administered under a bilateral commission established by Canada and the United States by treaties in the 1920s and in 1931.⁴⁰ The threat of Japanese factory-ship operations was felt in waters to the south as well, for in mid-1936, Japanese fishing interests sounded out the Canadian government as to what attitude it would take if they were to send a 10,000-ton factory ship to the Pacific Coast. They planned that the ship, with catcher boats, would engage in operations "starting off the coast of Mexico working on tuna and pilchards[,] and gradually working up the coast to British Columbia to process salmon and herring in the autumn season."⁴¹ Unsurprisingly,

Affairs (Nov. 16, 1936) (on file with RG 23, f. 721-19-12).

40. Thus the Canadian Department of Fisheries advised External Affairs that if Japanese fishing were established in Bristol Bay, "it does not seem unlikely . . . that similar fishing and canning operations would be extended in the course of time to the British Columbia coast" and that while the Japanese were known to be interested in taking halibut, still other species would later become the targets of their expanding operations. Dispatch from External Affairs, Canadian Minister, to the United States (Nov. 16, 1936) (on file with RG 23, f. 721-19-13-2) (quoting the Dept. of Fisheries). Other expressions of concern on this line included: Letter from A. L. Hager, President, New England Fish Company, Vancouver, Canada, to Ray Lyman Wilbur (May 28, 1937) (on file as part of the Ray Lyman Wilbur Papers, The Hoover Institution Archives, Stanford University); Letter from A. L. Hager, President, New England Fish Company, Vancouver, Canada, to W. A. Found, Minister of Fisheries (May 3, 1938) (on file with RG 23, f. 721-19-12); "Alien Menace Discussed by Canadian Fishermen," PAC. FISHERMAN, May 1937, p. 22; and "Japanese Activity in North Pacific Fisheries: Surveys are Made Off Alaska and B.C. Coast," THE DAILY NEWS (Prince Rupert, British Columbia, Canada), Dec. 16, 1936.

The "Halibut Commission," as it was popularly known, was formally the International Fisheries Commission established under the Convention for the Preservation of the Halibut Fishery of the Northern Pacific, Including Bering Sea, Oct. 21, 1924, U.S.-Can., 32 L.N.T.S. 93, and later agreements. The Commission was regarded widely as a model of how scientific management could be successfully pursued in a fishery when access could be limited through unilateral action or international agreement and where scientific data on the condition of the stocks was systematically used for setting season limits and other methods of limiting harvests. See F. Hewerd Bell, *Economic Effects of Regulation of the Pacific Halibut Fishery*, in BIOLOGICAL AND ECONOMIC ASPECTS OF FISHERY MANAGEMENT (James Crutchfield ed., 1959); and Edward Allen, "The North Pacific Fisheries," reprinted in the 18 CONG. REC. 7296, 7298, app. (1937). The chief biologist and director of research for the Commission, Prof. William Thompson of UW, once boasted that the Commission's success resulted from the fact that in his research "the laws governing the population of fish were discovered. . ." in a program of studies that led to application of the theory and restoration of the halibut stocks to commercially harvestable levels. Thompson, "The Hand of Industry in Conservation Research," PAC. FISHERMAN, March 1947, p. 24.

41. Letter from G. J. Langley, Charge d'Affaires, Canadian Legation, Tokyo, Japan, to Secretary of State for External Affairs, Canada, [hereinafter SS for EA] (No.

the Canadians, in reply, informed the Japanese that such a venture "would be regarded with the greatest disfavour."⁴²

Meanwhile, Canada and the United States were moving, albeit slowly and uncertainly, toward approval of a bilateral international commission that would conduct scientific studies of the salmon, looking toward active cooperation in conservationist management for the international Fraser River salmon industry.⁴³ Hence Ottawa closely monitored developments in 1936-37 that portended a Japanese move eastward to fish for salmon and also sought full information from Washington of any American diplomatic moves in reaction to that possibility.⁴⁴

The fisheries agency in Tokyo already had authorized experimental fishing operations in Central and South America, with shrimp vessels operating for cod off the Pacific coast of Mexico and trawlers working the waters off the Argentine coast. Other distant-water Japanese expeditions had operated in the coastal areas of Australia.⁴⁵ Japanese distant-water salmon fishing increasingly used large factory ships, and reports of the declining salmon yields in the Northwest Pacific intensified the concern in North America that Japan's fleets might also move eastward in order

249, July 17, 1936) (on file with RG 23, v. 1098, f. 721-19-12-1).

42. *Id.*

43. Extended debates in the United States, both in the U.S. Senate and in the State of Washington, over whether to ratify any of several agreements drafted in the 1920s finally came to a resolution in 1930 with signature of the Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fishery in the Fraser River, May 26, 1930, U.S.-Can., 50 Stat. 1355. Even then, protracted resistance from a faction of Washington State's salmon fishermen delayed entry into force until 1937. For discussion of the politics in Washington State, see *Proceedings of the Special Committee on Sealing and Fisheries in Pacific Waters*, Can. Senate, 17th Parl. 110-11, 124, *et passim* (Ottawa, Ontario, Canada 1934); and Wilbert M. Chapman, *The Theory and Practice of International Fishery Development/Management*, 7 *SAN DIEGO LAW REVIEW* 408-54 (1970). The intra-industry conflicts that made this such a vexed history typified the layers of complexity and tension in fishery relations between Canada and the United States and were at many times corrosive of trust between the fishing communities on the two sides of the border.

44. Letter from William A. Found, Deputy Minister for Fisheries, to Chargé d'Affaires, Canadian Legation, Tokyo, Japan (Oct. 30, 1936) (on file with RG 23, v. 109, f. 7-11-28); Letter from Herbert Marler to SS for EA (Nov. 4, 1936) (on file with RG 23, f. 7-21-19(12)).

45. Letter from Canadian Legation, Tokyo, Japan, to Ottawa, Ontario, Canada (No. 50, Feb. 12, 1937) (on file with RG 23, f.721-19-8). A trawler expedition to Australian waters was in addition to the long-established Japanese pearl-fishing industry on the Australian continental shelf, an activity that Japan sought to revive after World War II over the vigorous opposition of the Australian industry and of the government in Canberra. Letter from Canadian Embassy, Tokyo, Japan, to Under Secretary EA (Oct. 6, 1953) (on file with RG 25, in 32 Ministry of Fisheries Records 2622-40) (discussing Japanese fisheries problem).

For an overview (with maps) of Japanese fishing activities in the context of prewar fisheries expansion and a discussion of Japanese fishing activities on the eve of America's entry into the Pacific war, see Supreme Commander for the Allied Powers [SCAP], *JAPANESE NATURAL RESOURCES: A COMPREHENSIVE SURVEY* (1949).

to find fresh sources of supply. This concern was well based, for Canadian diplomatic reports from Tokyo revealed that the Soviet Union and Japan were re-negotiating the rents paid by the Japanese to operate on-shore stations on Kamchatka Peninsula. If the leasing costs came down, it would place the factory ships at a cost disadvantage, requiring that they seek other fishing grounds in order to be profitable.⁴⁶

No wonder, then, that the West Coast fishing interests had a rising fear of a Japanese "incursion" into "their" Canadian-American salmon waters. Japan had already been successful in establishing a crab fishing industry in the Bering Sea area of the Pacific, although it had done so without substantial controversy because neither Canadian nor U.S. operators were then much involved in fishing for crab.⁴⁷ But salmon and halibut were a very different matter.⁴⁸

46. Letter from Canadian Legation, Tokyo, Japan, to External Affairs (No. 81, March 1, 1937) (on file with RG 23, vol. 1098, f. 721-19-12-2). American diplomatic officials had earlier been of the opinion that whatever the situation in regard to the Soviet-Japanese arrangements for Kamchatka, "large-scale transfer" of Japanese factory ship operations to Alaskan and other North American waters "was not likely to take place for some years." Letter from Herbert Marler to SS for EA, Ottawa, Ontario, Canada (No. 1189, Dec. 29, 1936) (on file with RG 23, f. 721-19-12) (discussing the views of Eugene Dooman).

47. Japanese crab production from Alaskan offshore waters, out to 150 miles, reportedly came to between three and four percent of total Japanese crab harvest from 1932 to 1940, but the Alaska crab were an important export commodity for Japan in that period. Memorandum by E. W. Doherty (May 10, 1950) (on file with the United States National Archives [hereinafter NA], Dept. of State Rec., f. 611.946/5-1050) (discussing the effective area restrictions on Japanese fisheries). There were some very small crab fishery operations conducted out of Washington State and Alaska in the 1930s, and in 1940 and 1941, the U.S. Tariff Commission held hearings to consider a protective tariff in order to protect the tiny American industry from the competition of crab exported from Japan. The American operators claimed that Japanese labor costs were so low that their crab could be sold profitably in the U.S. market at far lower prices than the American crab fishermen could profitably charge. *Statement to U.S. Tariff Commission on the Status of the Dungeness Crab (Cancer Magister) Fishery in the State of Washington*, 76th Cong. (1940) (on file with UW Library, Henry M. Jackson Papers) (statement of J. B. Lincoln, Dept. of Fisheries, State of Wash., to Rep. H. M. Jackson asking for a high tariff or even an embargo). Congressman Jackson, who received considerable pressure from his home constituents on the issue, pressed the Tariff Commission to impose "the highest possible tariff" on imported crab and stated that he "hope[d] that we can prevent the Japanese from selling either their fish or crab meat on the American market." Letter from Rep. H.M. Jackson to C. Koerber, Secretary, United Fishermen's Union of the Pacific (Jan. 28, 1941) (on file with UW Library, Henry M. Jackson Papers).

48. Letter from A. L. Hager to Ray Lyman Wilbur (May 28, 1937) (on file with Hoover Institution Library, Wilbur Papers) (discussing special character of the halibut and salmon fisheries); Memorandum from Herbert Marler, Canadian Legation, Wash., to

Meanwhile, as early as 1931, the State Department had explored with the Japanese government the idea of a bilateral agreement by which Japan, in exchange for some valuable trade concessions, would cease to authorize any salmon fishing by Japanese vessels in the Northeast Pacific. Nothing came of this, however, and for the time the issue rested as a matter of active diplomacy.⁴⁹ Both American and Canadian diplomats were convinced that the chances of easing tensions over potential fisheries expansion by Japan would be better if the United States alone dealt with Tokyo, while Canada remained formally uninvolved. It was feared that any “joint action” or “common front” in diplomatic relations would probably serve only to stiffen the backs of the Japanese.⁵⁰

It was actions by the Japanese, however, that generated heightened tensions. Leaders of Japan’s salmon fishing industry made public statements in 1936 declaring forthrightly their interest in shifting operations to the Northeast Pacific; and predictably these announcements further agitated public opinion in the Canadian and American coastal region. One Japanese trade organization was so bold, or foolish, as to circulate a pamphlet endorsing the idea of salmon expeditions to Alaskan waters in which it declared that Bristol Bay should be regarded, in light of modern maritime innovations, as merely “an extension of the Bay of Tokyo!”⁵¹ The leading English-language newspaper in Japan editorialized that there was every reason to resent the Canadian and American references to Japanese fleets having “invaded” the northeastern Pacific waters—fish were like migratory birds, belonging to no-one until captured, and it was “childish” to base claims to salmon or halibut on notions of proprietorship or special rights.⁵² The president of Japan’s leading fisheries trade association issued a public statement stoutly defending the right, under international law, of Japanese fleets to fish in Bristol Bay waters; but he added a gratuitous explanation of why the reaction in North America

SS for EA, Ottawa, Ontario, Canada (Dispatch No. 1189, Dec. 29, 1936) (on file with RG 23, f. 721-19-12) (addressing crab fishery).

49. Information of this initiative, said to have been undertaken in 1931, is reported in Memorandum from Herbert Marler to SS for EA, *supra* note 48. Dooman told the Canadians that although the State Department had been eager to pursue the scheme for a deal on salmon and tariffs, the U.S. fisheries management experts were not interested and allowed the initiative “to peter out.” By 1936, however, the American fishery agency experts had changed their minds and were “alarmed,” hence revising their views as to the Japanese threat to the salmon industry. *Id.*

50. Memorandum from Herbert Marler to SS for EA, *supra* note 48.

51. *Kaiyo Gyogyo Shinko Kyokai* [The Society of Oceanic Fishing Promotion], CONCERNING FISHING IN EASTERN NORTH PACIFIC 4 (1937). The publication was widely reported and commented upon on the Pacific Coast; see, e.g., the reprinted pamphlet and editorial commentary in PAC. FISHERMAN, May 1937, at 19–22.

52. “Fishing on the High Seas,” JAPAN TIMES, Mar. 25, 1937. See *infra* notes 69–71, for views of the prominent American scientist and director of the Halibut Commission, W.F. Thompson, claiming precisely such proprietary rights.

was so hostile: "White men," he wrote, "jealous of the skill of the Japanese and unable to compete with them, are resentful and seek to bar them" from competition in the Northeast Pacific Ocean fisheries.⁵³

It is hard to imagine how more provocative rhetoric could have been conjured up, whatever the degree of truth in the interpretation of North American responses to Japanese competition being tinged with racism. The widely read American magazine *Reader's Digest* featured a story given the fetching title "Japanese Poaching in Alaska Waters,"⁵⁴ and the fishing industry trade newspapers on the Pacific Coast in both countries expressed outrage at what was seen as the wanton arrogance of the Japanese fishery leaders.⁵⁵ In British Columbia, various fishing and maritime organizations, including the powerful labor unions, immediately demanded that Ottawa take cognizance of the danger and issue a strong response. The Province of British Columbia's provincial legislative assembly passed a resolution in November 1936 sounding the alarm against "the threatened invasion of the fisheries . . . by alien interests operating in waters off the coast" for the purpose of intercepting salmon on the runs to the spawning grounds.⁵⁶ Vigilance was urged, too, by officials in the Canadian Department of Fisheries, who predicted that although Alaska's Bristol Bay salmon area was the immediate stated target of Japanese interests, waters off British Columbia, and ultimately the halibut fishery as well as salmon found in those Canadian waters, would inevitably be the next area of Japanese expansion.⁵⁷

At the same time as the commotion over the Japanese threat was in progress, another wave of worried anticipation and considerable anger swept through British Columbia fishing circles that was typical of the ambiguities and occasional contradictions in Canadian-U.S. fishery relations. The new subject of discussion was a proposed expedition by United States flag factory ships to waters off the Canadian coast to engage in the processing of sardines for fish meal and oil. Known as "floating

53. Kaju Nakamura, *quoted in* JAPAN ADVERTISER, June 29, 1937.

54. READER'S DIGEST, Dec. 1937, at 97-103.

55. See, e.g., the coverage and the editorials in the PAC. FISHERMAN, June 1937, and others throughout 1937 and 1938; and discussion in Homer E. Gregory, *Alaska Salmon in World Politics*, in 7 FAR EASTERN SURVEY, No. 5 47-53 (1938); and in GREGORY & BARNES, *supra* note 33.

56. *Quoted in Report to the Executive Council and Lieutenant-Governor, Committee of Council, Canada* (1936) (on file with RG 25, f. 13699).

57. Letter from C.B. Skelton, on behalf of the SS for EA, to the Canadian Minister to the US (No. 371, Nov. 16, 1936) (on file with RG 23, f. 35760).

reduction plants," these vessels had been the subject of animated criticism from on-shore factory operators and labor unions in California; and their operations had been attacked in a series of court suits that upheld laws enacted by the California legislature which prohibited the landing in its ports of any product of the offshore operations.⁵⁸ The British Columbia on-shore processors were no less opposed to the factory ships than were their counterparts in California, and they were quick to point out to the Canadian government that the American plan to bring reduction ships to offshore waters beyond three miles would serve as a convenient excuse for the Japanese to act in a similar manner in the salmon grounds to the north. The plan to move the American ships coming to their coastal waters, they declared, should thus be opposed by Ottawa "on the grounds that it endangers the welfare of Canadian workers and Canadian plants as well as setting a precedent for other nationalities to invade the fisheries of both Canada and the United States."⁵⁹ George Pearson, British Columbia's Commissioner of Fisheries, demanded that Ottawa make a "strenuous protest in Washington," lest the door be left "wide open" to other foreign distant water fleets.⁶⁰ The need for action was endorsed by the federal fishery department's deputy minister, but he advised that the External Affairs Department seek help on the matter from the State Department, as probably, "in view of the whole situation, . . . the U.S. authorities would not wish to see a precedent of this kind established."⁶¹

As it turned out, the American "menace" proved to be a paper tiger because the expedition project was abandoned, probably for financial reasons. Still, this scare heightened the general alarm in British Columbia about potential factory ship incursions. The episode also indicated the presence of abiding tensions between fishing interests on either side of the border; the Canadian and American operators were in competition with one another, no matter how important their common interests in the

58. On California's policies and the complex legal-economic history of the reduction industry on the Pacific coast, see ARTHUR M. McEVROY, *THE FISHERMAN'S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES, 1850-1980*, at 178-83 (1986).

59. Letter from G. R. Clark, Secretary of the Meal, Oil and Salt Fish Section, Canadian Manufacturers Association, to Hon. Joseph-Enoil Michaud, Minister of Fisheries, Ottawa, Ontario, Canada (May 25, 1937) (on file with RG 23, f.721-19-12). See also "B[ritish] C[olumbia] Files Protest of U.S. 'Invasion,'" *MONTREAL GAZETTE*, May 28, 1937; "B.C. Asks Canada for Help to End U.S. Fish Menace," *VANCOUVER DAILY PROVINCE*, May 27, 1937.

60. Telegram from George Pearson, Commissioner of Fisheries, Ottawa, Ontario, Canada, to Hon. Joseph-Enoil Michaud, Minister of Fisheries, Ottawa, Ontario, Canada (May 27, 1937) (on file with RG 23, f. 721-19-12).

61. Letter from William A. Found to Mr. MacDonald, acting under SS of EA (May 29, 1937) (on file with RG 23, f. 721-19-12).

protection of “their” coastal waters.⁶² The competitive dimension became evident when Canadian legation in Washington approached the State Department on the matter. The American officials responded that whereas salmon and halibut were under conservationist management regimes, the sardine fishery was not; and there was no international convention in effect that warranted intervention by the U.S. government. These views of the U.S. government, “while they may be technically correct,” the legation declared, “seem to give evidence of a rather non-cooperative spirit in this matter.”⁶³

Yet the two nations merged their diplomatic forces swiftly and effectively when a similar threat to introduce factory ships came from a third source, namely, a plan by Norwegian and British investors to send a steam-trawler expedition to the halibut grounds off the British Columbia-Washington State coast.⁶⁴ This plan had the potential for scraping the ocean bottom clean of the halibut stocks that had been rebuilt at the expense of the regulatory regime administered by the joint Canadian-U.S. Halibut Commission.⁶⁵ Both the State Department and

62. In June, the sardine industry’s trade association, The Pacific Fisheries Institute (San Francisco), denied that the reduction ships actually planned to work the waters near British Columbia’s coast; rather, the proposed expedition would be targeting an area more than 100 miles from Vancouver Island. Letter from Louis Hicks to Hon. Joseph-Enoil Michaud, Minister of Fisheries, Ottawa, Ontario, Canada (June 3, 1937) (on file with RG 23, f. 721-19-12).

63. Letter from Herbert Marler to MacDonald (June 14, 1937) (on file with RG 23, F 19711, f. 721-19-12).

64. In addition, there were rumors that German interests were seeking to organize expeditions of factory ships and catcher boats to go to the salmon grounds. Draft of Proposed Telegram from A. L. Hager to Hon. Joseph-Enoil Michaud, Minister of Fisheries, Ottawa, Ontario, Canada (May 21, 1937) (on file with RG 23, f. 721-19-10) (stating that “obviously establishment of floaters (factory ships) beyond territorial waters conducting unrestricted fishing would render futile any conservation efforts by our government”).

65. Philip Jessup, *The Pacific Coast Fisheries*, 33 AM. J. INT’L L. 29, 33 (1939); Letter from Canadian Legation, Washington, to SS for EA (Feb. 12, 1937) (on file with RG 23, f. 72 19). In an address to the Commonwealth Club in 1939, Edward Allen spoke at length of the Norwegian-British plans for sending trawlers to the Pacific Coast. Edward W. Allen, *Bristol Bay Presents Issue between American System of Fishery Conservation and Foreign System of Unrestricted Exploitation*, (1939) (unpublished manuscript, University of Washington) (on file with UW Library, Edward W. Allen Papers). There was a later dispute, well aired among scientists, as to whether the claim of the Halibut Commission to have been responsible for restoring halibut stock levels was a valid one (some biologists arguing that natural causes had produced both the decline of the 1916-20s period and the revival in the 1930s). Martin Burkenroad, *Some Principles of Marine Fishery Biology*, 2 U. TEX. MARINE SCI. PUB. 177 (1951). For an economist’s critique of the regulatory regime, see James Crutchfield, *Regulation of the*

the Canadian government dispatched strenuous protests to the U.K. Foreign Office, which agreed to use its influence in the matter. Subsequently, the British government successfully squelched the plan.

In the 1937 fishing season, the Japanese threat became palpable and immediate as a fleet of three large factory vessels, flying the Flag of the Rising Sun, appeared in Bristol Bay salmon waters together with 18 catcher boats. Japan was in fact now there—in the heart of the North American salmon grounds. On both sides of the Canadian-American border, salmon fishermen and canning industry leaders, together with their political and business allies, immediately raised an alarm. The economic rivalries and border disputes, such as regarding the Hecate Straits area boundary, that had troubled relations were put aside in the common cause. A few of the industry spokesmen called for an immediate suspension of the regulations of gear and vessel power that made the American salmon fishing such a puny operation in comparison with the giant steel ships that had “invaded” (as the favorite phrase went) the traditional U.S. fishing grounds. This demand for suspension of the fishing rules inspired the U.S. federal fisheries commissioner to publish his opinion that “the large fishing interests of this country have been very anxious to throw a scare into the Bureau of Fisheries as to the Japanese depleting the Bristol Bay run. No doubt this was a scheme to frighten the Bureau into relaxing the fishing regulations. . . . I am getting so used to these bugaboos that I refuse to get excited until credible information is received.”⁶⁶

Miller Freeman, a long-time Japanophobe and influential editor of the Seattle-based publication *Pacific Fisherman*, demanded that the United States declare all of the Alaskan salmon waters a “strategic military area” and thereby close the area to all foreign vessels.⁶⁷ Freeman addressed

Pacific Coast Halibut Fishery, in U.N. FOOD & AGRIC. ORG., ECONOMIC EFFECTS OF FISHERY REGULATION at 354–59 (Fisheries Reports, No. 5, 1962). Cf. WILLIAM A. CARROTHERS, *THE BRITISH COLUMBIA FISHERIES* (1941); and F. Heward Bell, *Management of the Pacific Halibut, in A CENTURY OF FISHERIES IN NORTH AMERICA 209–12* (Norman G. Benson ed., Special Pub. No. 7, 1970).

66. Letter from Frank T. Bell to Sen. Homer T. Bone (June 18, 1937), reprinted in PAC. FISHERMAN, July 1937, at 25. The fishermen’s union immediately responded by denouncing the charge as entirely unfounded. Marine E. Olsen, Agent for the Alaska Fishermen’s Union, Portland, Oregon, to Miller Freeman (June 28, 1937), reprinted in *id.* at 26.

67. “Fishing Ban Urged in U.S.,” VANCOUVER DAILY PROVINCE, Sept. 21, 1936. Freeman’s animus against the residents and citizens of Japanese descent in the American Pacific Northwest and in British Columbia was manifest in various demands that he made for investigation of alleged spying, sabotage of the economy, and the like in wartime correspondence with the U.S. government. See generally Letters from Miller Freeman (1942–44) (on file with UW, Miller Freeman Papers, Special Collections). Senator Warren Magnuson of Washington described Miller as a leader in advocating economic development for the U.S. Pacific Northwest region and Alaska “as a buffer

mainly an American audience, but he was supported by many fishing industry spokesmen and politicians in British Columbia. Indeed, these Canadians struck a sensitive and all-too-familiar note when denouncing Japanese competition and the Bristol Bay "invasion." Suspicion of Japan as a security threat and racism directed at their own fellow-residents of Japanese ancestry (many of them North American-born citizens) were deeply rooted.⁶⁸ The immediate response to the Bristol Bay situation was a stream of demands from the West Coast calling upon the Canadian and U.S. governments to use diplomatic muscle to force the Japanese fleet to withdraw and to obtain from Tokyo an agreement that the government would license no further expeditions to the Northeast Pacific.

The previous year, Dr. William F. Thompson, research director of the Halibut Commission and the leading fisheries management scientist in the North American Pacific Ocean fisheries, had endorsed a study of possibilities for joint or unilateral action to bar foreign fishing of salmon or halibut. What ought to be considered, Thompson had declared, was "a Monroe Doctrine for our fisheries."⁶⁹ For the United States and Canada to resist foreign incursions into protected fisheries such as the salmon grounds would be "no greater a violation of 'international law,'" he insisted, "than is the prevention of their seizure of American territory in helpless minor American (i.e., Latin American) nations. The whole legalistic argument over the 'three mile limit' might be swept out of consideration."⁷⁰ Alternatively, Thompson suggested, the coastal fisheries might be protected by simply extending the territorial waters jurisdiction "to a greater distance offshore, as Norway has attempted."⁷¹

and a mailed fist in the face of Japan." CONG. REC., (July 1, 1943) (on file with RG 23, f. 721-19-13).

68. Indeed, as one contemporary commentator observed, "the use of the term 'Japanese' to describe Canadians of Japanese race" in the British Columbia fisheries trade press articles in 1937-38 on the Bristol Bay situation "made it appear as if an invasion of territorial waters had actually taken place." CAN. FISHERMAN, No. 12, 1939, at 27, *quoted in* HENRY F. ANGUS, CANADA AND THE FAR EAST 74 (1953). On attitudes toward the Japanese, *see generally* KEN ADACHI, THE ENEMY THAT NEVER WAS: A HISTORY OF THE JAPANESE CANADIANS (1976); and W. PETER WARD, WHITE CANADA FOREVER: POPULAR ATTITUDES AND PUBLIC POLICY TOWARD ORIENTALS IN BRITISH COLUMBIA (1978). It should be recalled that not until after World War II was the voting franchise extended by British Columbia to Japanese-Canadians.

69. Memorandum by William F. Thompson to Miller Freeman (June 26, 1936) (on file with RG 23, f. 721-19-12).

70. *Id.*

71. *Id.* Thompson was consistent in his views as time went on, and after the war he urged that the United States and Canada declare full control over access to the salmon

Thompson's view of these matters may appear at first blush to have been a fishery scientist's shoot-from-the-hip approach and a cavalier rejection of the entire "freedom of the seas" tradition in international law, but in fact, Thompson was saying nothing very different from what some highly prominent international lawyers had already advocated. Most notable among the nationalistic lawyers was Edward W. Allen, the salmon industry counsel and prominent Seattle lawyer, well known as a Pacific affairs expert. Allen sounded the message that it was time to consider that anadromous fish such as the North American salmon, regulated under a conservationist management regime, ought to be "[made] immune from the assaults of all despoilers,"⁷² and that "if international law, as conceived on the Atlantic, is ineffective for the purpose, it may be desirable for the Pacific . . . to evolve some new rules of international law relating to fisheries based upon ethics and principle, not upon compromise and blind precedent."⁷³

By 1938, Allen's views had been endorsed by some highly respected "legal realists" in the academic world; they included the young German-American scholar Stefan Riesenfeld of Boalt Hall at the University of California at Berkeley and Riesenfeld's mentor at Stanford Law School, Walter Bingham. Riesenfeld and Bingham denounced the formalistic philosophy that made the three-mile rule holy writ, and they called for a thoroughgoing reform of international law to meet the new realities of distant-water fishing technology.⁷⁴

No one in the salmon industry from 1936-38 regarded the Japanese government's claim that the fleets were merely engaging in feasibility studies and scientific analysis of the salmon stocks as plausible. However, leading diplomatic officials in both the North American capitals were initially inclined to accept Tokyo's reassurances and hoped to avoid a confrontation. But before long, many of the diplomatic bureaucrats had begun to acknowledge that a massive Japanese incursion into the salmon

and halibut of the Northeast Pacific. "These . . . resources belong to and [are] cared for by the American and Canadian people," he wrote. "They belong to them in the same sense as do earth and water yielding wheat and corn. . . . [O]ur rights in our fishery resources must be protected against foreign encroachments, however far this protection must be extended to sea." William F. Thompson, "The Hand of Industry in Conservation Research," PAC. FISHERMAN, March 1947, at 23, 24.

72. Quoted in CONG. REC., Appendix, 7295-96 (June 10, 1937) (statement of Allen Feb. 1937).

73. *Id.*

74. Riesenfeld and Bingham both presented their exclusionist views (in favor of extended jurisdiction) in a panel on the issues at the American Society for International Law meetings in 1940. AM. SOC'Y INT'L L. PROC. 54-63, 69-71 (1940). See also JOSEPH W. BINGHAM, REPORT ON THE INTERNATIONAL LAW OF PACIFIC COASTAL FISHERIES (1938). On Riesenfeld's role in challenging received doctrine, see Scheiber & Carr, *supra* note 23, at 10-14.

fishing grounds was a serious possibility.⁷⁵ An investigation on the scene at sea by Leo Sturgeon (a special State Department agent then on special assignment to deal with international fisheries questions) in September 1937 confirmed that the Japanese vessels were catching salmon at “commercial levels” and said it was only diplomatic camouflage to characterize the expedition as “scientific.”⁷⁶ He advised that “new ground in the field of international economic relations would have to be broken,” arguing that there was a growing need for reconsideration of the traditional three-mile limit.⁷⁷

Sturgeon’s position was echoed in advice tendered to President Roosevelt a few weeks later by the State Department’s legal counselor, Walton Moore. If the problem of defending imperiled offshore fisheries were to be solved, in light of what he termed “poaching” by other countries, Moore asserted the American position on legal doctrine must become more realistic. It would be necessary to reject the stultifying premise of those who still held to “the idea that that government can be conducted on the strict basis of precedent.”⁷⁸ This boldness of view on matters of law was entirely congenial to FDR. Indeed, less than a week before, the President had asserted that some kind of extension of U.S. jurisdiction beyond three miles was “indispensable” in order to safeguard the Bristol Bay salmon fisheries and, at least potentially, other American fisheries.⁷⁹

IV. THE U.S. DIPLOMATIC RESPONSE AND THE CANADIAN ROLE: RECONSIDERING A BASIC TENET OF TERRITORIAL WATERS LAW

The White House had already become directly involved; and when President Roosevelt intervened in the policy discussions, he did so on the premise that: “Every nation has a right to protect its own food supply

75. Letter from Canadian Legation, Washington, to SS for EA (Message No. 1311, Dec. 2, 1937) (on file with RG 23, f. 721-19-12).

76. Leo Sturgeon, “Report and Recommendations dealing with the Threat of Japanese Salmon Fishing in Bristol Bay” (Sept. 28, 1937) (on file with NA, DOS Rec., North Pac. Files).

77. *Id.*

78. Confidential letter from R. Walton Moore, Counselor of the DOS, to Franklin D. Roosevelt, President of the U.S. (Nov. 26, 1937) (on file with Franklin D. Roosevelt Presidential Library, FDR Papers, Box 42, “Japan” file).

79. Letter from Franklin D. Roosevelt, President of the U.S., to R. Walton Moore, Counselor of the Dept. of State (Nov. 21, 1937), in MARJORIE M. WHITEMAN, DIG. INT’L L. 768-69 (1963).

in waters adjacent to its coast.” He asked Secretary of State Cordell Hull to comment on the idea of protecting the U.S. fishery by declaring the waters off the coast of Alaska “a kind of marine refuge.”⁸⁰ Hull quickly initiated talks between the American Ambassador in Tokyo and the Japanese government, seeking agreement by Japan to halt the licensing of further expeditions.⁸¹ West Coast congressional members meanwhile introduced measures to extend American jurisdiction out beyond the traditional three-mile limit and to declare the salmon to be the “property” of the United States, with ownership rights of control over its protection throughout the area of its migrations at sea.⁸² Even though Secretary Hull was taking a strong line in dealing with the Japanese, there were reportedly many diplomatic planners in the State Department who were worried by these congressional initiatives. “They are afraid,” the Canadian mission in Washington informed the Department of External Affairs, that “extravagant claims for United States proprietary rights in deep sea fishery resources” that were being voiced in the Senate might not only make trouble with the Japanese but “might also alarm the U.K. and Canada by advancing a doctrine of international law on the matter of the three-mile limit to which neither of these two latter countries could adhere.”⁸³

The Japanese foreign ministry was worried about such provocations of American public opinion at a time when its nation’s military adventures in Asia were already inviting counter-moves by Washington.⁸⁴ Therefore, after a second effort at fishing for salmon in Bristol Bay in 1938, the Japanese government—despite the continuing demands from their salmon industry and the government’s own fisheries officials for further expeditions—pledged to halt licensing of such operations for an indefinite period. At the same time, Japan formally reserved its right to change policy in the future under terms of the “freedom of the seas” concept in

80. Memorandum from Franklin D. Roosevelt, President of the U.S., to R. Walton Moore, Counselor of the Dept. of State (Nov. 21, 1937), in *FRUS*, 1937, at 4:768–69; see also *WHITEMAN*, *supra* note 79, 945.

81. *HOLLICK*, *supra* note 10, at 19–28.

82. *Id.* at 29. *Jessup*, *supra* note 65.

83. Letter from Walter A. Riddell, on behalf of Minister, Canadian Legation, Washington, to SS for EA (April 6, 1936) (on file with RG 23, f. 721-19-12).

84. Letter from Canadian Legation, Tokyo, Japan, to SS for EA (No. 81, March 1, 1937) (on file with RG 23, f. 721-19-12). In Hull’s 1937 note to Japan, moreover, he emphasized that a threatened boycott of Japanese ships and goods by the West Coast maritime industry unions, and the general mood of anger and unrest in the coastal region, meant that Japan should be aware that possibly serious incidents could occur if the Japanese fleets continued fishing Bristol Bay waters. *Reported in* Letter from Canadian Legation, Washington, to SS for EA (No. 1311, Dec. 2, 1937) (on file with RG 23, f. 721-19-12 (32)).

international law.⁸⁵ This reservation of course warranted fishing anywhere on the high seas that lay outside the three-mile or other territorial water limits of the coastal nations, using any kind of vessel or gear, for any species of fish, and without limit on quantity.⁸⁶ Nonetheless, the Japanese pledge did defuse the immediate crisis. The incident had not been without danger for Pacific relations, for as the American Ambassador in Tokyo, Joseph Grew, commented: with the U.S. and Japanese governments both “faced with . . . powerful pressures from the fisheries interests at home,” the issues had been “full of dynamite.”⁸⁷

The U.S. government’s position, as articulated in its notes to Japan and instructions to the American Embassy in Tokyo during the negotiations that led to withdrawal of the Japanese fleets, left no doubt that the Roosevelt administration was entirely receptive to the idea of making some fundamental changes to the traditional three-mile doctrine. Thus Secretary Hull, in his note to Japan, referred to considerations of equity and justice in recent statements by American fishery leaders and legal scholars who wanted Japan to withdraw from Bristol Bay. These considerations required protection, it was contended, for fisheries that had been built up by the efforts and expenditure of a coastal state. Japan’s critics argued the American fishing industry had accepted self-denying measures in a regulatory regime so that the resource itself could be preserved. According to the official U.S. position, such a situation ought to vest historic rights in the coastal state’s claims. It was also made clear that U.S. recognition of freedom of the seas would not be interpreted in an absolute way that would invite destructive new foreign competition in its coastal fisheries.⁸⁸

The Canadian government did not participate directly in the diplomatic correspondence with Japan during this crisis, but Ottawa was hardly

85. See LEONARD, *supra* note 37, at 133, on the Japanese note.

86. On this classic concept and the actual deviations from it, historically, because of the special claims to jurisdiction beyond three miles advanced by many nations for purposes of defense, anti-smuggling, sanitary measures, and even fisheries and other resources protection, see RIESENFELD, *supra* note 3. Additional commentary by a leading scholar who served in the State Department as a key figure in development of the Truman Fisheries Proclamation is in a 1949 address: William W. Bishop, Jr., *The Exercise of Jurisdiction for Special Purposes in High Seas Areas beyond the Outer Limit of Territorial Waters*, in INTER-AM. BAR ASS’N PROC. (1952).

87. Diary of Joseph Grew, United States Ambassador, Tokyo, Japan, 3717–18 (March 1938) (on file at Stanford University, Stanley Hornbeck Papers, Hoover Institution).

88. FRUS, 1945, at 4:768. See also Anne L. Hollick, *U.S. Oceans Policy: The Truman Proclamations*, 17 VIR. J. INT’L L. 23 (1976).

disinterested nor an entirely passive bystander in the drama. The State Department kept Canadian officials fully apprised of the progress of the exchanges with the Japanese; and the two North American governments even discussed in explicit terms the possibility of cooperation in hammering out a comprehensive treaty with Japan that would be designed to protect the salmon and halibut fisheries. Such a treaty might also include the Soviet Union, according to archival documents, so that it might thus provide a solid framework for the protection being sought.⁸⁹ In the war crisis, though, other issues of diplomacy became far more pressing; and with the Japanese disposed to back off, the project apparently was placed on the back burner.

But even so, the doctrinal and diplomatic issue had been joined, except that there now was a stalemate on the matter of extended jurisdiction. Although the crisis had eased in that sense, neither in British Columbia nor in Alaska and Washington State did industry leaders or politicians lose sight of their objective to assure against any future threat of foreign incursions. There was continuing discussion of Canadian-U.S. cooperation to deal with such threats, and in late 1937, preliminary consideration was given to negotiating a comprehensive fisheries treaty to be signed by the two nations, covering Atlantic, Pacific, and Great Lakes fisheries issues. Such a treaty would settle all outstanding questions between them, U.S. planners suggested, and it would thus strengthen the hand of the North American powers by presenting a "united front" in dealing with Japan and other countries that might want to send distant-water fleets to North American waters for large-scale commercial fishing.⁹⁰ Leo Sturgeon, then on special assignment in the State Department to deal with international fisheries questions, urged Ottawa that the moment was propitious; because of the Bristol Bay situation, he asserted, fisheries questions had been "brought to the forefront" and, with the Secretary of State and other governmental officers now "thoroughly aware" of fisheries issues and their importance, "advantage should be taken of the impetus thus given to interest in these problems. . . ."⁹¹ Similarly, the State Department had shown the Canadian ambassador a tentative draft for a four-party agreement

89. Letter from Herbert Marler, Canadian Legation, Washington, to SS for EA (No. 1311, Dec. 2, 1937) (on file with RG 23).

90. Walter A. Riddell, on behalf of the Minister, Canadian Legation, Washington, to SS for EA (No. 468, April 6, 1938) (on file with RG 23, f. 721-1912).

91. Sturgeon cited William F. Thompson's opinion that such a general treaty would be a useful way of addressing the varied problems of fisheries management on the two coasts and the Great Lakes. Hoping for a "united front," in light of heightened interest in the Bristol Bay issues in Ottawa as well as Washington, Sturgeon indicated that coordination of scientific information and expertise would be needed before a bilateral treaty could be drafted, and he asked whether Canada had undertaken any relevant research in connection with such an idea. *Id.* On Thompson, see also *supra* notes 69-71.

(with Canada, Japan, and the Soviet Union) that would address the problem of fishery conflicts over salmon in the North Pacific; but this too was laid aside, as the Americans decided instead to approach Japan directly to achieve a suspension of Japanese licensing of further Bristol Bay expeditions.⁹²

The ambitious idea of achieving a united front between Ottawa and Washington did not receive further attention once the European conflict broke out in 1939. In fact, it would not be until a decade later, in 1949, that the idea would be broached afresh in a bilateral conference in Ottawa on an initiative by Wilbert M. Chapman, then the State Department's chief fisheries officer. At that meeting, Chapman raised the question of how the two countries might cooperate to keep Japanese fishing vessels out of North American waters, and he presented the Canadians with a treaty draft that became the first step toward the negotiation of the 1952 International North Pacific Fisheries Convention.⁹³

As of 1938 and well into the war years, it remained an unanswered question whether there might be set in motion some basic revisions of U.S. and Canadian policies on fishing and territorial waters—or even a more sweeping effort to reform the basic tenets of accepted international ocean law for offshore fisheries. The Canadian legation in Washington had alerted Ottawa as early as December 1936 that some officials in the State Department were inclined to favor a stiffening of the American position. These officials were “clearly anxious to avoid at this juncture . . . any novel unilateral interpretation of International Law,” he wrote, hence the United States was not prepared as yet to renounce outright the three-mile doctrine. “If on the other hand,” his report continued, “the Japanese persist in maintaining their right to fish in these waters as and when they please, it is likely that the U.S. authorities will be obliged to advance a legal doctrine in defence [sic] of the fisheries and to take whatever action may be necessary to enforce it.”⁹⁴

92. Marler, *supra* note 89.

93. See *infra* text at notes 203–4, for a discussion of this meeting. Chapman was the first State Department officer since Sturgeon's departure during the late war period to have a special competence in fishing and fisheries. On the circumstances of his appointment, upon the creation of the new position he held as Special Assistant for Fisheries and Wildlife, reporting to the Under Secretary, see Harry N. Scheiber, *Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945–70*, 13 *ECOLOGY L.Q.* 383, 427–30 (1986).

94. Letter from Canadian Legation, Washington, to SS for EA (No. 1189, Dec. 29, 1936) (on file with RG 23, f. 721-19-12); Marler, *supra* note 89; Letter from Herbert Marler Canadian Legation, Washington, to SS for EA (No. 276, March 3, 1938), *id.* (on file with RG 23).

The war situation cast in an entirely different light the degree to which Japan's sensibilities should be taken into account, and it gave a new context to the longer-run question of what should be done about the protection of the salmon fisheries of North America. The spokesmen for the North American fisheries industries described the attack on Pearl Harbor and the Pacific war as a vindication of their views of Japan as a menace to the "civilized" world, and throughout the war they kept up a drumfire of demands for keeping Japan out of "their" waters as one of the objectives of an Allied victory. No longer could conservative jurists or timid diplomats dismiss the proponents of strong action to protect the fisheries as "just a bunch of calamity howlers," a salmon industry lobbyist wrote in 1942, because they had proven "right all the way in warning against [Japan]"⁹⁵ and condemning the Japanese government as "ruthless" in its disregard of equitable principles and rule of law.⁹⁶ In the U.S. Congress, too, the concerns of prosecuting total war did not mean any loss of interest in protecting fisheries on the part of senators and representatives from the Pacific Northwest. Thus, well-publicized committee hearings were held in Congress in 1944 that gave spokesmen from Alaska and Washington State such as Edward Allen the opportunity to argue for an immediate extension of American jurisdiction out to sea beyond three miles. It should be done jointly with the Canadian government, he contended, being "an opportunity for Canada and the

95. Letter from Ernest Clark to Miller Freeman (April 30, 1942) (on file with UW Library, Miller Freeman Papers). It should be noted that a year before the United States entered the war, the salmon interests in Washington State and Alaska mounted a determined campaign to obtain an increase in the tariff on imported salmon, warning that the domestic industry would be "driven from the market by Japanese, Korean, and Russian products produced by cheap Oriental labor. . . ." Letter from Senator Schuyler O. Bland to Rep. Henry M. Jackson (Jan. 16, 1941) (on file with UW Library, Jackson Papers); see also "Low Cost Aids Sales; Tariff May be Boosted," SEATTLE TIMES, Jan. 25, 1941 (reporting an economic analysis by Prof. Homer Gregory warning that even an increase of the salmon tariff to the maximum allowable level, under existing law, of 37-1/2 percent *ad valorem*, would likely not stem the flow of imports from Japan). A Japanese fisheries delegation in December 1940 proposed in Seattle that if American wholesalers cooperated with them, they would regulate the flow of their export salmon in such a way as to protect the market price (which of course would have been illegal under American antitrust law); the Seattle-based fishing trade group immediately protested and called for measures to exclude Japanese salmon. Letter from the Jt. Cmte. for the Protection of Pac. Coast Fisheries to Cordell Hull, Secretary of the State Dept. (Dec. 26, 1940) (on file with UW Library, Jackson Papers) (recounting Japanese delegation's views).

96. Edward Allen, in his writings and speeches of the period, had regularly characterized Japanese fishing strategies as "piracy" and as being "ruthless" in disregard of principles of equity. Edward W. Allen, Bristol Bay Presents Issue between American System of Fishery Conservation and Foreign System of Unrestricted Exploitation (March 3, 1939) (on file with UW Library, Edward W. Allen Papers); and Edward W. Allen, *International Law, War, and Fish*, 18 TUL. L. REV. 118-29 (1943). Professor Stefan Riesenfeld, in his academic treatise, similarly referred to "piratical techniques [used] by distant nations" on coastal nations' offshore fishing grounds. RIESENFELD, *supra* note 3, at 282.

U.S. [to work] together as they are doing in such close friendship . . . while we are at war with Japan, rather than wait until the war is over when it may be far more difficult to settle a problem of this character."⁹⁷ At the same hearings, American union leaders called for extended jurisdiction to protect fisheries fifty to sixty miles offshore, and other political and industry leaders joined in the demand for a permanent solution to the problem of potentially destructive competition for the industry in the salmon grounds.⁹⁸ The British Columbia interests also remained active in keeping the issue alive in Ottawa during this period.⁹⁹

Throughout the war period, State Department policy planners continued to consider measures that might give the salmon region permanent protection against foreign threats such as the Japanese fleets had posed. Out of these deliberations, which involved intensive consultation with the Canadian government during 1944-45, came the famous Truman Fisheries Proclamation of September 1945.¹⁰⁰

The Fisheries Proclamation stated that the United States was prepared to declare "conservation zones" on the high seas, contiguous to its coastal areas (out to sea to indeterminate distances), and that in these zones, either unilateral U.S. control or joint control with other nations, by agreement, would be exercised over fishing activity. Whether the U.S. Government under President Truman truly contemplated unilateral U.S. action against a new entrant, such as Japan, or instead merely was setting the stage for cooperative agreements in case a new entrant came in, was a vital question ambiguous at the time and remains a matter of speculation

97. Edward W. Allen, Remarks regarding S. 930, Alaskan Fisheries Bill, *quoted in* Memorandum by U.S. State Dept. (March 8, 1944) (on file with NA, Dept. of State Rec., f. 811.0145/8-1944).

98. *Id.*

99. *See, e.g.*, Memorandum by Stewart Bates, Deputy Minister of Fisheries, Under Secretary of State for External Affairs (Nov. 12, 1947) (on file with RG 23, f. 721-21-4(2)).

100. Proclamation No. 2668, 3 C.F.R. § 68 (1943-48). During the same period, and in tandem with the planning for the Fisheries Proclamation, the State Department and Interior Department worked on what became the Proclamation on the Continental Shelf, issued on the same day in September 1945 and declaring U.S. ownership of the seabed resources of the Shelf. This was the basis for U.S. control and the federal government's proprietorship claim for the offshore oil resources. For full discussion, *see* ERNEST R. BARTLEY, *THE TIDELANDS OIL CONTROVERSY: A LEGAL AND HISTORICAL ANALYSIS* (1953); *see also* Hollick, *supra* note 88; and Donald C. Watt, *First Steps in the Enclosure of the Oceans: The Origins of Truman's Proclamation on the Resources of the Continental Shelf, 28 September 1945*, 3 *MARINE POL'Y* 211 (1979).

and debate among scholars today.¹⁰¹ What was unquestioned then and now, however, was the fact that the Proclamation's language represented a distinct departure from the long-standing U.S. policy, long associated principally with the United Kingdom as the world's leading maritime power, which had held the three-mile limit of offshore sovereignty to be a fixed principle.¹⁰²

Thus, Pandora's box was opened. The Latin American nations leapt on the Proclamation's appearance as an invitation to declare extended offshore jurisdiction themselves, not only over fisheries, but in some instances on a wholesale basis going so far as to claim full sovereignty over the extension to 200 miles.¹⁰³ "The race was on," as Professor Friedheim writes, "not to match the United States, but to surpass it in unilateral claims."¹⁰⁴ And thus, famously, was set in motion the movement for "ocean enclosure," which would culminate thirty-five years later in validation of the EEZ concept in the U.N. Convention.

V. TOWARD NEW PRINCIPLES OF LAW: THE 1945 TRUMAN PROCLAMATION AND THE NORTH ATLANTIC TRIANGLE

A. Scientific Research, Diplomacy, and the Marine Fisheries

The Pacific salmon and halibut fisheries that came under the Japanese threat in 1937-38 were under regular scientific study and had long been managed for purposes of sustainability under regulatory regimes of Canada and the United States—jointly managed, in the case of the halibut.¹⁰⁵ These two were not, however, the only fisheries in the global oceans picture that were seemingly endangered in the 1930s. Excessive

101. The present author has in progress a full study reexamining the policy process that led to the Truman Fisheries Proclamation.

102. Of course there had been exceptions to the three-mile rule even for the nations, such as the U.K., that adhered most strictly to it in their diplomatic stance. Control of smuggling, regulation for sanitary purposes (against pollution), and military security considerations were among the factors that justified extension of jurisdiction for special purposes beyond three miles. For a full analysis, see generally RIESENFELD, *supra* note 3.

103. José A. de Yturriaga, THE INTERNATIONAL REGIME OF FISHERIES: FROM UNCLOS 1982 TO THE PRESENTIAL SEA 3-9 (1997); HOLLICK, *supra* note 10, at 67-95.

104. FRIEDHEIM, *supra* note 7, at 21.

105. This is not to say that the American or Canadian studies of salmon were adequate to the full needs of a regulatory regime since the investigations were almost exclusively concentrated on the near-coastal areas and inland streams. The Japanese, by contrast, had aggressively pursued scientific work on the migrations out at sea. Letter from A. J. Whitmore, Chief Supervisor of Fisheries, Vancouver, British Columbia, Canada, to Deputy Minister, Dept. of Fisheries (Oct. 31, 1947) (on file with RG 23, f. 721-21-4); and Letter from Neal M. Carter to A. J. Whitmore, Chief Supervisor of Fisheries, Vancouver, British Columbia, Canada (Oct. 18, 1947) (on file with RG 23, f. 721-21-4).

intensity of fishing effort, the result of continuing technological innovation in methods and in ship design, was a problem that had been the cause of concern for scientists and most governments in Europe at least since the turn of the century. World War I had given the fish stocks in the Northeast Atlantic, the North Sea, and the Baltic a respite, so that when fishing operations resumed after the Armistice, yields were high. Within only a few years, however, rising tonnage of the fleets, the introduction of heavy trawling and other gear, and modernization of vessels (ever larger and faster) meant excessive pressure once again on many of the target species.¹⁰⁶

Fishery scientists, mobilizing their expertise and data not only in national biological stations but also in the well-organized investigations conducted by International Council for the Exploration of the Seas (ICES), warned of impending disaster if conservationist-minded measures were not imposed. Led by Norway, which extended its claims to offshore jurisdiction well out beyond three miles, and by Denmark, some of the coastal states sought to protect their fisheries by creating larger offshore zones in which they would either regulate or altogether exclude the trawlers and other distant-water vessels that came to their waters. As the leading nation in trawling fisheries, the United Kingdom energetically led resistance to such measures, and British diplomacy adhered unflinchingly to defense of the three-mile principle. In addition, however, the United Kingdom sought to develop cooperative international alternatives to the movement for unilaterally created offshore zones, most notably by crafting international conventions for the limitation of net-mesh size so that juvenile fish would be protected from the depredations of the era's intensive fishing. Agreements were concluded in 1937 and 1938 and though they never went into effect formally, most fishing nations in Europe enforced their terms in the operations of their own flag vessels.¹⁰⁷

For the British, agreements to place limits on gear or seasons, based on the data from impartial investigations of ICES and national science establishments, was the instrument of choice for achieving fishery sustainability. Such agreements would effectively work to leave untouched the three-mile doctrine—a doctrine that was vital to assuring unhindered

106. EDWARD S. RUSSELL, *THE OVERFISHING PROBLEM* (1942), is the classic contemporary work on these developments.

107. Anne L. Hollick, *The Roots of U.S. Fisheries Policy*, 5 OCEAN DEV. & INT'L L. 61-64 (1978).

passage of the Royal Navy's combat vessels around the world, as well as to maintaining maximum freedom in distant waters for the British trawler fleets and to the merchant marine. As a great naval and merchant-shipping power itself, the United States had long seconded Great Britain in the diplomacy for protection of the three-mile rule.¹⁰⁸ Hence the departure from the American position, seemingly signaled by the Hull note to Japan in 1937, was a strikingly new factor in the international situation.

World War II brought heavy fishing activity in the North Atlantic to a virtual halt. This was perceived by the British Foreign Office as an opportunity to advance the project of a long-term solution to the fishery problem through an international agreement that would pose no threat to the three-mile doctrine. Both the diplomatic planners and the fisheries experts in the British government were hopeful that the trawler industry and the Lords of the Admiralty might be willing to show enough flexibility that some concessions could be made to foreign coastal nations—enough to gain the main purpose, protection of the three-mile principle, while also advancing fisheries conservation.¹⁰⁹ International meetings were held in London in 1943 and 1944, and a draft convention that would cover the Northeast Atlantic region was circulated in 1944.¹¹⁰ The draft featured provisions for gear regulation, but the British meanwhile contemplated opening talks after the war to negotiate on the offshore claims of Norway, the Soviet Union, and other nations that did not adhere to the three-mile rule. The Scottish Trawlers' Federation announced its unyielding opposition to any commitments for such negotiation on offshore limits, rejecting any compromise on freedom of the seas for

108. Again, however, with significant exceptions for special jurisdictional purposes such as defense against smuggling, especially in the 1920s period, when the United States had a national liquor prohibition in effect. See, *inter alia*, RIESENFELD, *supra* note 3.

109. This is based upon my study of Admiralty and Ministry of Fisheries and Agriculture minutes and related correspondence for the period, archived in the files of those ministries in the PRO, Kew, UK. A related major issue for the Admiralty was the recommendation of a special blue ribbon scientific commission that in 1944 advocated reduction in the size of the trawler fleet under a proposed agreement in which all the major fishing nations would undertake to limit the intensity of fishing by cuts in their fleet tonnage. The Admiralty opposed this proposal unalterably, concerned that it would undermine the traditional reliance of the Royal Navy on large civilian vessels and their crews for combat and logistic operations at sea in wartime. This was quite apart from the Royal Navy's insistence on the need for narrow territorial seas in order to give maximum room for their operations at sea. *Id.* (containing correspondence).

110. FINAL ACT OF THE INTERNATIONAL FISHERIES CONFERENCE (London, Oct. 22, 1943), Cmd. 6496 (1943). The Canadian view of the proposed convention was that it should cover much of the Northwest Atlantic as well, to give the Canadian fleets some leverage over their U.S. competitors in the Grand Banks and other areas. But the British, supported by the United States, which was only an observer at the talks, believed it was too inefficient to go beyond areas of the size that the convention covered. These diplomatic movements are discussed in Hollick, *supra* note 107.

fishing. In the teeth of this opposition, the Ministry of Agriculture and Fisheries forthrightly responded, declaring:

It is regarded as essential to put an end to uncertainties and disputes as to the precise extent of the exclusive fishery limits of countries whose vessels operate in the same waters as our own. While it is intended to obtain as wide a recognition as possible of the principle of the three-mile limit, it is quite obvious that some provision must be made for meeting any exceptional cases where a country seeks to establish a valid claim on historical or other grounds to something more than the three-mile exclusive fishery limits in any particular area [of the sea].¹¹¹

More specifically, the Ministry warned the trawlers' organization that talks with Norway over its claims to an exclusive fishing zone beyond three miles might well prove absolutely necessary as a way of bringing Norway into agreement on the comprehensive conservationist measures for limiting gear that was a major objective of current British planning for the postwar era.¹¹² A broader view of postwar relations among the Allied nations was also at stake: "The kind of international order which is likely to emerge" from the war, the Ministry declared, would feature multilateralism and international cooperation and would be hostile to any kind of overbearing insistence by Whitehall on having the British view prevail against all competing claims. "In the view of the services which these nations have rendered during the great world war," the UK could not possibly justify seeking to enforce its will in ocean fishery matters on the Allied countries, "which would certainly never voluntarily accept [the three-mile] principle."¹¹³ Commenting on the controversy, one British policy planner supported the view that "any effort to bludgeon the Norwegians would certainly produce deplorable results," while another Foreign Office planning staff member scornfully observed in a memorandum that "the Trawling Interests are playing their traditional role of obstructing any attempt to regulate fishing on rational lines."¹¹⁴

111. Letter from A.T.A. Dobson, Ministry of Agriculture and Fisheries, United Kingdom, to the Secretary, British Trawlers' Federation, Ltd. (June 13, 1944) (on file with the Public Records Office [hereinafter PRO], Kew, England, FO 371/4058, f. 1405-20).

112. *Id.*

113. *Id.*

114. Memorandum regarding Treaty Formalities: Final Act of International Fisheries Conference: Protest by British Trawler's Federation Ltd. (on file with PRO, N. Dept. & Reconstruction Dept., FO 311/4058, f. 1405-20) (including an individual officer's comments and minutes inscribed on the document).

Given the direction of British objectives, the Foreign Office viewed with great apprehension the emerging alignment of the United States and Canada that was indicated by the news of bilateral fisheries talks in Ottawa in 1944, for it was obvious they were coordinating efforts to shape a new policy. Most troubling of all to the British, the North American powers were working to shape a new legal principle that would protect their Pacific coast salmon fisheries. The British understandably feared that such an initiative by Canada and the United States would encourage Norway and other European coastal nations that sought to abandon the three-mile rule in favor of an exclusionist doctrine for offshore waters. Whitehall thus deplored the prospect of any formal move by Britain's allies in North America to bar offshore waters to the distant-water fleets of Japan or other countries. At a minimum, Foreign Office planners believed such moves would give further impetus to Norway's efforts to expand its claims to extended offshore jurisdiction; and in the worst case, the result might be a complete collapse of the three-mile rule internationally, regardless of the minor compromises that the United Kingdom was prepared to make in postwar negotiations.¹¹⁵

Both then and for many years afterward, the lodestone of British policy remained the principle that "all nations have the right of free access to fisheries on the high seas outside territorial waters"¹¹⁶ But how could the Foreign Office hold the line on the key matter of the maximum distance from shore at which the outer boundary of "territorial waters" might legitimately be claimed? This question remained unresolved in relations with Norway, among other nations, after the war, and it was a question that would later go before the International Court of Justice in the famous 1951 *Anglo-Norwegian Fisheries Case* that challenged the very foundations of the three-mile rule.¹¹⁷

115. Memoranda of various Foreign Office planning staff (on file with PRO, f. 1415-20, FO 371/4058).

116. Memorandum regarding Points to be Put Forward by the British Delegation, Northwest Atlantic Fisheries Conference, Appendix (1949) (on file with PRO, Ministry of Agriculture and Fisheries Records, f. 594, MAF 4/1320). This was precisely the view, of course, that the United States government itself had long maintained and that internationalists in the American scholarly community (for example, Philip Jessup) believed the United States should continue to hold. It was precisely the view of ocean law that the Japanese, too, had staunchly reiterated in their responses to U.S. and Canadian pressures against their fishing incursions in the Bering Sea in 1937-38. "The high seas are the common property of the peoples of the world and not to be confined to private ownership," a Japanese industry group declared in 1937, arguing that "[e]verybody has a right to use of the high seas or of utilizing their natural resources." Society of Oceanic Fishing Promotion, *quoted in Charge of 'Invasion' in Fisheries Denied*, JAPAN ADVERTISER, March 21, 1937 (on file with RG 23, f. 721-19-12-13).

117. *Fisheries Case* (United Kingdom v. Norway), 1951 I.C.J. 116. In this case, the ICJ addressed in the context of maritime boundary-drawing the legitimacy of historic claims, the special needs of coastal states highly dependent on their

B. Canadian-U.S. Planning and the Truman Proclamation

Already preoccupied with the continuing uncertainties concerning the issues presented by Norway and other states for the British fisheries in the North Sea, the Foreign Office soon had solid reasons to despair of the trend of policy on the other side of the Atlantic. The planning and consultative process that would result in the Truman Fisheries Proclamation was already well advanced by late 1943. The State Department was engaged at that time in intensive work on a text that could serve either as the basis for an exchange of notes with Canada or (as actually would be done in the end) as the basis for a unilateral proclamation by the United States Government, proclaiming the creation of "conservation zones" out beyond the three-mile line. It was unambiguous from the start that the object was to protect Bristol Bay and the other salmon and halibut waters that had been at issue in the 1937-38 exchange with Japan.¹¹⁸ (Thus Sturgeon was on record, in the early talks in Ottawa, as referring to the objective he had in view of "the exclusive right of fisheries which Canada and the United States are trying to establish on the West Coast."¹¹⁹) Indeed, when the Truman Fisheries Proclamation was finally issued in Washington in September 1945, an accompanying formal statement was published concerning implementation that referred specifically to fish stocks in Bristol Bay and surrounding waters of the Northeast Pacific.¹²⁰

Despite the fact that the British expected an unfavorable result from the developing initiative in Washington, when the early drafts of the Truman Proclamation were finally shown to the Foreign Office planners they were taken aback by the undisguised unilateralism expressed in the draft version. The British also were dismayed by the degree to which the Canadians apparently were buying into the strong exclusionist position

fisheries, and the technical, but crucial, issue of baselines for demarcating maritime boundaries.

118. This was evident in the first full-scale discussion with Canadian officials of a draft text, in a meeting held in Ottawa in January 1944. *Memorandum of a Meeting on the North-western Atlantic Fisheries Problems, East Block*, CAN. DEPT. EXTERNAL AFF., DOCUMENTS CAN. EXTERNAL RELATIONS [hereinafter DOCUMENTS], No. 1062, Jan. 27, 1944, at 1724.

119. *Id.* at 1727.

120. The course of negotiations is traced in Hollick, *supra* note 107. As noted previously, the present author has in progress a book-length study that seeks to revise the prevailing interpretation of the Truman Fisheries Proclamation and to cast new light on why it was so ambiguous with respect to the power to bar unilaterally new entrants from the proposed conservation zones.

favored by Washington. That there was a new balance of power emerging in the North Atlantic Triangle was already painfully evident to the British government.¹²¹ Now it seemed evident that Canada and the United States were poised to challenge the traditional precepts of ocean law and, in particular, to abandon the inherited three-mile rule for offshore jurisdiction. From the standpoint of a worried British Foreign Office, the three-mile doctrine appeared to be "a failing asset."¹²²

Whitehall sought to make the best of the situation by containing the damage. Their best hope, the British decided, was to seek to have the proposed new doctrine confined by the North American powers to their offshore fisheries area on the Pacific Coast. Thus, though admitting that it was absurd to contemplate "one rule of International Law for Europe and another for America," British officials urged the U.S. Government to make an explicit statement that its new doctrine of conservation zones beyond three miles would be applied only to the specific fisheries (*viz.* salmon and halibut) that were under well-established conservationist regimes of research and/or management.¹²³ The British had no doubt that if Washington issued the proclamation in the form they had seen, Canada would follow suit. "It looks as if the U.S.-Canadian tail were beginning to wag the dog," one British planning officer wrote in May 1944, "but we can't do anything about it except to see whether the American proposals can be turned to our advantage."¹²⁴

In fact, the Canadian government's support for the U.S. initiative was not entirely unqualified, for the Department of External Affairs had been rather uneasy from the start with the unilateralist tone of the declaration. Mindful of the need to advance conservationist aims in their Atlantic fisheries as well as on the Pacific Coast, Canadian officials were on the whole favorable to the British multilateral approach in the Atlantic fishing waters. And so Canada feared that a general statement of principle on international law, such as the State Department was proposing in early 1944, would be interpreted by London and other European fishing powers as a first step toward the North American states' making similar claims on the Atlantic coast. The Canadians did not plan application of the extended-jurisdiction doctrine off their Atlantic coast, at least not at that time; External Affairs officers believed that any such move would

121. For analysis of changing Canadian foreign policy and the relationship to Great Britain in this period, see generally JOHN W. HOLMES, *2 THE SHAPING OF THE PEACE: CANADA AND THE SEARCH FOR WORLD ORDER, 1943-1957* (1982).

122. Draft Brief for the Foreign Office Representative (Oct. 12, 1944) (on file with PRO, T 18458, FO 371/4058).

123. R. Dunbar to A.T.A. Dobson, Ministry of Agriculture and Fisheries, United Kingdom (June 20, 1944) (on file with PRO, T 18458, FO 371/4058).

124. Memorandum by R. Carr (May 18, 1944) (on file with PRO, Foreign Office Rec., T 6179/92/381).

be an unfair violation of long-established fishing rights, in any event also complicating Canadian diplomatic relations with the European powers.¹²⁵

A meeting of U.S. and Canadian officials from the diplomatic offices and the fisheries agencies of both countries was held in Washington in February 1944. In the face of the Canadians' reservations, described above, the American delegation pushed hard for immediate action on the kind of general statement justifying extended jurisdiction on the "conservation zones" basis that would be expressed in the Truman Proclamation. Changing realities in fishing technology and the prospects of fleet expansion after the war "made necessary certain advances in international law," the U.S. officials insisted. Recognizing that they might encounter "difficulty in obtaining universal acceptance of the necessary changes," the Americans believed "we should be prepared to use *whatever forces were necessary* [sic] to put them in effect."¹²⁶ The Canadians responded that Atlantic problems ought to be dealt with on their merits before issuing a general proclamation that would undermine the United Kingdom's initiatives for conservationist measures in the Atlantic. In the American delegation's view, however, the West Coast fisheries problem should receive first priority because

the United States could not agree to European states participating in the regulation of fishery off the Atlantic coast [under the London Agreement's terms] without reassuring the people of the western states that trans-Pacific states would not have the right to participate in fisheries off the Pacific coast, and that therefore a general statement of principle was desirable before attempting to regulate the Atlantic Fisheries.¹²⁷

The Canadian delegation further challenged the unilateralist thrust of American intentions with an additional argument that would be voiced often in later years—in opposition to the exclusionist objectives of the State Department's extended-jurisdiction advocates. This was the argument that the Atlantic Charter had committed the Allies to freedom of access to resources for all nations after the war, so that any exclusionist coastal fisheries policy would violate a solemn wartime commitment. Consistent with that commitment, the Canadian diplomats contended, an international consensus should be sought on such a momentous change in international law as abandonment of the three-mile rule would entail. The American

125. Report: Meeting on Fisheries Problems Held in Washington, D.C., DOCUMENTS, No. 1731, Feb. 19, 1944, at 1733–34.

126. *Id.* at 1731 (emphasis added).

127. Memorandum by Eugene Doorman, Dept. of State, *reported in id.* at 1732.

delegation, in a rather serendipitous reading of the Charter, declined to accept this view, on grounds that "it was understood [sic] that the Atlantic Charter assured access to natural resources *by trade* rather than rights of exploitation."¹²⁸

With significant divergences of opinion thus having surfaced at this Washington meeting, the State Department planners lost their enthusiasm for the idea of an exchange of notes with Canada as the best way of announcing the new principles they had in mind. Instead, the State Department developed the draft statement internally as a proposed unilateral U.S. proclamation. Canada and Newfoundland were kept well informed, indeed much more thoroughly than any other Allied capital except London, and they were among the governments to which the next draft was circulated for comment.¹²⁹ But when the United States issued the Truman Fisheries Proclamation in September 1945, it was done without clearing the final draft language with the Canadians—a distinct departure from the pattern of close consultation that had marked the origins of the new policy earlier in the process.

The British government meanwhile tried to head off the worst potential consequences of U.S. action. In commenting on the last draft of the fisheries proclamation, sent to them in July, they appealed to the State Department to make clear "that the principles enunciated are only intended to apply to fisheries off the North American Continent" and also to delete any reference to possible unilateral action by the United States that would exclude foreign vessels from offshore waters in the proposed "conservation zones."¹³⁰ The State Department rejected the latter appeal, responding that "it would be wholly unrealistic if this Government, in seeking to establish new principles for the conservation of our fishery resources, were to give foreigners the impression that it would not assert preemptive control over such fisheries."¹³¹ As to the limiting application of the new doctrine to North American coastal fisheries, the State Department did agree to draft a press release to be issued along with the proclamation indicating that protection of the Pacific salmon fishery was

128. *Id.* at 1732–33 (emphasis added). Hollick's articles provide further analysis of Canadian-U.S. differences on the matter of the London Conference and the draft agreement on Atlantic fisheries regulation. Hollick, *supra* note 88; Hollick, *supra* note 107. (None of this is to say that the fisheries experts in the Canadian government shared the reservations of the External Affairs diplomats; in fact, they were much more sympathetic to the U.S. position than the diplomatic officers.)

129. Newfoundland was then governed independently of Canada, and it did not accept provincial status as part of Canada until later.

130. Letter from Wright, Counselor of the British Embassy, to Eugene Dooman, Asst. Secy. of State (July 4, 1945) in FRUS, 1945, at 2:1517.

131. Letter from Eugene Dooman, Asst. Secy. of State, to Wright, Counselor of the British Embassy (July 6, 1945), in FRUS, 1945, at 2:1522–23.

the immediate intention.¹³²

Once the Proclamation was issued, the diplomatic community expected Canada to follow quickly with its own parallel declaration. Surprisingly, however, the Canadians instead decided to hold back and wait to see how the United States would actually implement the conservation-zone concept. When no moves toward implementation came from Washington, the Canadian government informed the U.S. government in November that a continuing review of the proclamation was going forward in Ottawa, but added that this “does not indicate that the proposals . . . are regarded with any disfavour by the Canadian Government.”¹³³

In the immediate aftermath of the war, Prime Minister Mackenzie King's government was pursuing its newly formulated “functionalist” policy, by which Canadian diplomacy sought to encourage a multilateral approach to international policy issues on a problem-by-problem basis.¹³⁴ Linked with functionalism was Canada's quest, at that time, to carve out for itself a creative “middle power” role. This effort at providing a basic autonomous orientation for Canadian policy had the effect of distancing Ottawa somewhat from Washington, even as the sweeping influence of the *Pax Americana* was reaching its height.¹³⁵ To be sure, the Canadian government, both under Mackenzie King and his postwar successor, Louis St. Laurent, never doubted the necessity of the closest possible cooperation with the Americans. They engaged in this special diplomatic relationship without abandoning, however, two other basic principles of Canadian foreign policy. The first was the maintenance of Canada's

132. *Id.* at 2: 1522. In fact such a press release was issued, *reprinted in id.* at 1528, but it did not offset the impression abroad that the Proclamation set forth a principle of more general application; and the Latin American nations quickly followed with extended jurisdiction claims of their own, citing the general language of the Proclamation as precedent and taking no official note of the press release as representing a substantive qualification or limitation of the new doctrine. Harry N. Scheiber, *U.S. Policy, the Pacific Tuna Economy, and Ocean Law Innovation: The Post-World War II Era, 1945-1970*, in BRINGING NEW LAW TO OCEAN WATERS, *supra* note 18, at 33-37.

133. *Quoted in Memorandum by Legal Division: Coastal Waters*, DOCUMENTS, No. 1731, DEA/12015-40, March 27, 1946, at 1529, 1530.

134. Postwar internationalism, as the Canadian government developed its basic posture on international affairs, involved “a belief in cooperative endeavours through international institutions to preserve the peace . . . and in ‘functionalism,’ a concept which was based on the belief that representation in those institutions should be directly linked to members' contributions to their work.” Margaret Doxey, *Canada and the Evolution of the Modern Commonwealth*, 40 BEHIND THE HEADLINES 1, 3-4 (1982). For acerbic and incisive commentary on the tension between the pragmatics of functionalism, utopianism, and collective-security imperatives, see HOLMES, *supra* note 121, at 4-5, 40-56, 37-75.

135. HOLMES, *supra* note 121, at 37-75.

own national unity, and the other was cooperating with Great Britain and other Commonwealth states in a regular course of “abundant and intimate consultation . . . , [but] without commitments and on the basis of national autonomy.”¹³⁶

It was not surprising, then, that some political leaders and governments questioned the wisdom of Canada’s wholesale acceptance of the American example in regard to a unilateral mode of announcing a new policy on international ocean law as expressed in the Truman Fisheries Proclamation. To many experts in the Canadian government, there seemed a better way to introduce a new position on so momentous an issue—a different way that would be better for Canada’s own interest and, at the same time, better for the cause of comity in the world community. Thus, the Legal Division of the External Affairs Department advised the department in March 1946 that even if the United States actually moved to implement the Proclamation by declaring “conservation zones” beyond the three-mile line, “any such extension [by Canada] should be accomplished by agreement rather than by unilateral declaration.” The Legal Division further suggested that, although Canada actually favored the substantive modification of international law embodied in the proclamation, it might be best to bring the matter before the newly approved United Nations Organization, “where the formulation of a suitable multilateral convention could be considered by its Legal Committee.”¹³⁷ Similarly, a leading Canadian fisheries scientist, Dr. R. S. Foerster, was writing privately to a colleague in California who was then campaigning for an aggressive implementation of the Truman Proclamation: “If the United States is going to be the leader and major influence for peaceful accord in the Pacific, should she not endeavour to stimulate international co-operation . . . rather than at least [be] giving the impression that a wild rush is being made to grasp the whole area and its resources for American use?”¹³⁸

136. Brady, “Canada and the Commonwealth,” 203, *quoted in* ROBERT A. SPENCER, *CANADA IN WORLD AFFAIRS, FROM UN TO NATO 1946–1949* 366 (1959). The Secretary for External Affairs in the St. Laurent government, Lester B. Pearson, described the partnership with the United States as one that made the central principle of Canadian diplomacy to make “‘restrained, responsible, and constructive’ expressions of Canada’s views” in the capitals of the great powers, “above all, in Washington.” Lester B. Pearson, *The Development of Canadian Foreign Policy*, 30 *FOREIGN AFFAIRS* No. 1, at 26 (1951), *quoted in* SPENCER, *id.* at 290. *See also* FREDERICK H. SOWARD, *CANADA IN WORLD AFFAIRS: FROM NORMANDY TO PARIS 1944–46* at 338ff (1950).

137. *Memorandum by Legal Division: Coastal Waters*, DOCUMENTS, DEA/12015–40, March 27, 1946, at 1529–30.

138. Letter from R.S. Foerster to Wilbert M. Chapman, July 29, 1946 (on file with UW Library, Chapman Papers) (criticizing his friends in American fisheries management and science when they invoked the Truman Proclamation as an instrument for the exploitation of vast fishery resources of the high seas exclusively by the U.S. industry).

The months went by, and the U.S. government continued to be hesitant about undertaking implementation as factions within the State Department were divided as to the wisdom of unilateral action and as to the merits of the Proclamation's terms.¹³⁹ In this situation, the Prime Minister informed the Canadian Parliament that his government's position on the Proclamation was still being studied and that no policy announcement from Ottawa should be expected until further notice. Prime Minister St. Laurent told the House during questions on July 4, 1947, that his government had expected earlier "to introduce a resolution to assert a policy that would in fact be in accord with that announced by the President of the United States . . . to make sure that there would be a uniform policy for the western hemisphere."¹⁴⁰ St. Laurent continued:

The terms of the resolution were discussed with our United States friends. So far it has not appeared that we had reached the point where we were both agreed as to the best form of language to be used. . . . I should like to give honorable members the assurance that as far as the government is concerned, the general policy is in accord with [the Truman Proclamation]. . . . There has not yet been full agreement as to what is the best way of laying the foundation for an effort to get international agreement to the implementation of proper conservation methods for offshore fisheries.¹⁴¹

Asked whether there had been consultation with other governments, or whether instead St. Laurent had talked only with Washington on this issue, the Prime Minister replied evasively, saying: "The answer would depend upon the meaning one gives to the word 'consultation.'" The issue had been "brought to the knowledge of others," he stated, but the real question for him was how to advance the Truman Proclamation's substance in a mode that would achieve not only immediate objectives, but also general reform of international law. "The objective we are pursuing," he declared, "is to try to get a policy which will ultimately become world wide [sic] and which can be implemented to the benefit of the whole of humanity."¹⁴²

This overarching objective of achieving a basic change in law through a process that would evoke consent by the community of nations remained a hopeful objective of Canadian policy. Fostering the multilateralist approach

139. See Scheiber, *supra* note 93, at 453–54.

140. Quoted in Memorandum regarding Japanese Peace Settlement: Canadian Interest in Regulation of Japanese Fishing (October 1947) (on file with RG, vol. 3, f. 50051–40).

141. *Id.*

142. *Id.*

was a goal of Canadian policy not only in 1947 but throughout the ensuing period until the signing of the tripartite convention with Japan in 1952. This was a very difficult objective to attain and was indeed doomed to failure given the transparently self-interested motive of the proclamation and its most ardent adherents in the United States and Canada. The proclamation embodied, moreover, a manifest abandonment of that core principle of international law—the three-mile rule—which was then under attack by the Latin American states and in Norwegian and other North European waters. In response to this attack, paradoxically, the United States, along with the British government, was at the same period in the forefront of resistance to other countries' declarations of extended offshore jurisdiction and abandonment of the three-mile rule.¹⁴³

Throughout 1946 and into early 1947, departments of the Canadian government continued to analyze the Proclamation and to prepare Canada's response. The underlying premise of discussion was that at the end of the day, Canada must go along with Washington and espouse the document's principles, something the fishing interests and politicians of British Columbia were insistently demanding. The obvious dilemma for the legal officers and diplomats remained, however, that it was "not clear" (as an External Affairs Department memorandum put it) "that these principles are recognized by customary international law."¹⁴⁴ Except for the Department of Fisheries, all the Cabinet departments that were consulted agreed that the unilateral procedure that had been followed by the United States was undesirable. "Broad acceptance" in the community of nations, the legal officers declared, was clearly "preferable to unilateral action."¹⁴⁵

The reluctance in Ottawa to endorse the unilateral style of the Truman Proclamation might have made for severe tensions with Washington, had the U.S. Government actually moved to implement the document's terms. But the danger of such tension arising was removed by the fact that neither then nor later would the United States make such a move. When the Department of External Affairs first presented to the Cabinet its comprehensive position on the issues in March 1946, it recalled that when consulted by Washington in 1944, the Canadian government had

143. Scheiber, *supra* note 132; HOLLICK, *supra* note 10, *passim*.

144. *Letter from Under-Secretary of State for EA to Deputy Minister of Transport*, DOCUMENTS, No. 900, June 24, 1946, at 1533. The language quoted in the text pertained to the Continental Shelf proclamation, but in the same memorandum and others exchanged in interdepartmental discussions at this time it was clear that observations as to both procedure and appropriateness of substance were meant to apply to both proclamations. See, e.g., *id.* at 1534; *Memorandum from the Legal Division*, DOCUMENTS, No. 901, Sept. 13, 1946, at 1535.

145. *Memorandum from Legal Division regarding U.S. Presidential Proclamation on the Continental Shelf and on Coastal Fisheries*, DOCUMENTS, No. 901, Sept. 13, 1946, at 1535.

decided to withhold responding until the Cabinet departments had been consulted. "It was felt that acceptance of the principle of fisheries conservation zones in the High Seas would mark a new development in international law," but it was also recognized that policies adopted under the new principle might well prove to be "discriminatory or exclusive."¹⁴⁶ The Department of External Affairs recommended "conditional agreement with United States policy" as expressed in the Proclamation, as doubtless "the long-term interests of Canadian fishermen would be best served by the adoption of a policy of conservation." The condition that the Department recommended, however, was that "no State or states establishing a conservation zone in the High Seas should have the right to exclude or otherwise discriminate against the nationals of foreign states who are prepared to abide by the regulations."¹⁴⁷ (This, it should be noted, was a non-trivial "condition" of acceptance, one arguably at odds fundamentally with the precise terms of the Proclamation, depending on how one reads what its language implied about possible exclusion of new entrants.¹⁴⁸) Both "the interests of Canada" and, explicitly, "the general interest," External Affairs argued, would best be advanced by an orderly process "to support the development of international law by agreement between States rather than by unilateral declaration on the part of any one State."¹⁴⁹

In December 1946, some fifteen months after the Truman Proclamation had been issued, the conversation among the Cabinet departments in Ottawa still had not reached a conclusion. A policy meeting involving External Affairs and Department of Fisheries officers was called specifically to make recommendations to the Cabinet on whether Canada should finally take action on the conservation-zone question. Despite the previous reaffirmations from many sides in favor of a multilateral approach, the consensus that came out of the meeting was in favor of strong action through a unilateral declaration. The U.S. example and the actions of the Latin American states in extending their offshore jurisdictions by proclamation were cited in support of that view. There was no effort to obscure the degree to which a policy reversal for Canada was being

146. Revised Draft Memorandum for the Dept. of EA to Cabinet regarding Conservation of Fisheries in the High Seas, DOCUMENTS, No. 1064, March 14, 1946, at 1805.

147. *Id.* at 1806.

148. On the issue of new entrants and potential exclusivity, see MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 966-67, 1103-04 (1962).

149. Revised Draft Memorandum, *supra* note 146.

advocated—the report of the meeting admitted that its recommendation for a unilateral move involved “discrimination and exclusion,” a policy “inconsistent with the broad principles” to which the Canadian government had previously been committed.¹⁵⁰ A candid admission followed, indicating that both the avoidance of an embarrassment, on the one hand, and the attractiveness of a self-interested policy, on the other, were at stake:

It would not look particularly impressive if we were to say publicly that it had taken a year and a half to discover a principle in the Presidential Proclamation [viz. its unilateralism] to which we objected. Moreover, it might be found preferable to support the present and future interests of the Canadian fishing industry rather than the more shadowy concept of the development of international law.¹⁵¹

Nonetheless, when Prime Minister St. Laurent presented the issue to Parliament in July 1947, he would eschew unilateralism and stay his hand, asserting only that no final determination had as yet been made as how his government would act on the issue.¹⁵²

For the British government, meanwhile, there must have been considerable puzzlement as to what direction American policy actually would take. Whitehall’s officials long had been irritated by the spectacle of His Majesty’s dog being wagged by the “Canadian-American tail!”¹⁵³ As the months went on, however, with no American implementation of the conservation zone policy forthcoming, it seemed, on the one hand, that the effort at full cooperation between Canada and the United States had broken down on the three-mile issues and that the Truman Proclamation might be a bold statement with no real clout, despite the mischief it had caused in prompting other coastal states to make extended claims of exclusive offshore jurisdiction. On the other hand, the United States was demonstrating a remarkable readiness to throw its weight around in largely pushing aside the other Allied governments in determining policies for the governance of occupied Japan. The emerging intention of the Truman Administration and of General Douglas MacArthur as the Supreme Commander of Allied Powers (SCAP) in Japan to oversee Japanese economic recovery on whatever basis the United States deemed proper extended—ominously for the Allies, as events would prove—to establishing policy for the revival of Japanese Antarctic whaling and the restoration of Japanese distant-water fishing capacity.¹⁵⁴

The arena of Anglo-Canadian-American fishery relations broadened immediately after the war to include the Far Eastern Council (FEC), a

150. *Id.* at 1812.

151. *Id.*

152. *See supra* notes 140–42.

153. Carr Memorandum, *supra* note 124.

154. For analysis of this episode, *see* following section of this article.

multilateral Allied agency that was established to set policy for the Occupation. General MacArthur generally ignored or undermined FEC directives so far as his fisheries and whaling policies were concerned. This scornful posture became a source of bitter frustration to the United Kingdom, Australia, and New Zealand, whose FEC representatives led a strong but entirely unsuccessful effort to block and reverse MacArthur's efforts to quickly rebuild Japan's whaling and fishing industries.¹⁵⁵ This element of the history has received full attention in earlier scholarship.¹⁵⁶ What needs to be noted for our purposes here, however, is that these bitter confrontations in the FEC created a dilemma for Canadian diplomats and fisheries experts. For Canada, the protection of its Pacific salmon industry from renewed Japanese competition continued to be a major policy goal; the political pressure from the West Coast members of Parliament and from the fishing industry left little choice. This objective aligned Canada with New Zealand and Australia, but only to a degree, because Ottawa's protectionist concerns on the fisheries issue were tempered by the more general commitment of the Canadian government to the "functional" approach in its diplomacy, both globally and as to Japan.¹⁵⁷

Hence Canada walked a thin line in its oceans diplomacy. To achieve protection for its salmon industry, Ottawa had to work closely with the

155. At first, the U.S. government used the technique of issuing "interim directives" to MacArthur in support of his policies when those policies contravened the positions approved by the FEC; but by August 1948, the U.S. government's support of MacArthur's authority, in the face of FEC opposition on various issues, became explicit: "The decisions of the Far Eastern Commission do not have the force and effect of law," the Legal Adviser of the State Department ruled, stating that FEC decisions were "simply formulations [of policy] which have still to be cast in the form of directives by the U.S. Government." Memorandum by Legal Adviser's Office to Division of Occupied Areas, Economic Affairs (Aug. 13, 1948) (on file with NA, Dept. of State Rec., International Resources/Fisheries and Wildlife files). Even as early as October 1947, the United States had informed the Allied nations represented on the FEC that it could not support any resolutions in the Council that would serve to compromise "the Supreme Commander's freedom of action," in this instance with respect to the policy on whaling. Aide mémoire of Oct. 8, 1947, in 6 FRUS, 1974, at 303; *reaff'd in* Aide mémoire from U.S. to Australia (June 12, 1948), quoted in Ambassador W. H. Wrong to SS for EA (June 26, 1948) (on file with RG 43, f. 722-21-4) (commenting that MacArthur "[must] have broad discretionary powers with regard to problems arising in Japan").

156. See GEORGE H. BLAKESLEE, *THE FAR EASTERN COMMISSION: A STUDY OF INTERNATIONAL COOPERATION, 1945 TO 1952 passim* (DEPT. OF STATE, 60 FAR EASTERN SERIES, 1953); and SCHEIBER, *supra* note 12, at 141-74.

157. Memorandum to Staff regarding Japanese Peace Settlement: Canadian Interest in Regulation of Japanese Fishing 12-13 (Oct. 1947) (on file with RG 23), vol. 3, f. 50051-40). On the functional or functionalist approach, see *supra* notes 133-34.

United States and follow the American lead in regard to Japan. The Canadians attempted to do so, however, without poisoning relations with Great Britain on this issue, mindful that the British were still entirely committed to preserving the three-mile rule on offshore limits. As postwar inter-Allied diplomacy progressed, the possibility opened up for Canada of achieving its fishery-protection objectives either through the general peace treaty or else through a special agreement with Japan. These alternatives might take the Canadian government off the hook, so far as its own reservations about unilateral announcement of extended jurisdiction and its sensitivities to the British position on the three-mile rule were concerned—an advantage not overlooked in Ottawa. The attractiveness of the alternative courses was thus reflected in a Department of External Affairs staff memorandum in 1947, declaring: “[C]onsideration must be given to whether the Japanese Peace Treaty can be used to eliminate or curtail Japanese competition with Canadian Pacific fishing interests. . . .”¹⁵⁸

As for the United States, the question of Japan’s future role in the North Pacific would increasingly be pursued by American diplomacy, not through the FEC. Indeed, diplomatic talks concerning a proposed tripartite Canadian-U.S.-Japanese fisheries agreement resulted in the 1952 North Pacific International Fisheries Convention.¹⁵⁹ The terms of the 1952 Convention would resolve for some fifteen years central questions that had been on the agenda of Canadian-U.S. fisheries diplomacy in 1946. As will be shown in the following pages, the way that the convention addressed those issues was influenced by the experience in the FEC. Looking back on the contemporary context of that agreement, moreover, it is clear that the 1952 Convention was destined to have a major impact on the future direction of the ocean law reform movement and the United Nations debates from the mid-1950s to 1982.

VI. OUTSTANDING ISSUES, 1946

The unresolved issues of ocean law in 1946 included the question of what types of measures might be taken to protect coastal fisheries (and what innovations in international law might be required), given the terms of the Truman Proclamation and the confusion that its non-implementation had created.

First, could the three-mile rule be salvaged, as the British hoped, either with or without some compromises as to the law on offshore limits to accommodate nations such as Norway (and, of course, Japan), whose

158. *Id.* (“It is suggested that Canada and the US should consult together prior to the Japanese Peace Conference regarding objectives to be pursued in dealing with the future of the Japanese fishing industry. . . .”)

159. On the Convention, *see supra* notes 11–12 and *infra* note 264.

national economies were highly dependent on the fisheries? Approaches to an accommodation could be worked out either through international agreements, such as the halibut and salmon treaties between Canada and the United States, or through a broader multilateralist approach, such as what the British were promoting for the North Atlantic.

Second, would the United States, presumably with Canadian support in the end, instead assert unilateral authority aggressively through an implementation of its Truman Fisheries Proclamation? As noted earlier, the terms of the Proclamation called for creation of "conservation zones" to protect specific fishery stocks that were already under exploitation, especially when the coastal state had expended great effort to support sustainability. As the Canadians had pointed out in the 1944 bilateral talks, however, key questions remained unanswered: Would the proposed zones be administered under a principle that admitted new entrants but required them to obey conservationist regulations imposed by the coastal state? Or did the Proclamation set the stage for an "exclusionist" option, barring new entrants altogether? The Proclamation's text as issued contained ambiguous language on this crucial point.¹⁶⁰ Whether or not exclusionist implications were to be controlling, the Proclamation did inject into the emerging debate the basic concept that an existing regulatory regime informed by scientific research should legitimate exceptions to the traditional rules of territorial waters and offshore fishery jurisdiction.

During 1945-47, Latin American states were proclaiming extended jurisdiction for their offshore waters. None of their proclamations restricted their new claims to conserved fisheries under scientific management or to fisheries endangered by possible depletion; indeed, some of the Latin American states were moving toward assertion of extraordinary claims of full territorial sovereignty (not just control of fisheries) over offshore waters as far as 200 miles from their coastlines. The meaning of "territorial seas" was thus changing rapidly in the real world of ocean affairs, although the legitimacy of extended claims under international law remained a contested matter. Lack of decisiveness on the part of the United States government was contributing in a uniquely important way to perpetuating confusion on this crucial issue.¹⁶¹

Third, several alternative approaches to the drawing of geographic boundaries at sea for jurisdictional and/or functional purposes were

160. See JOHNSTON, *supra* note 2; BURKE, *supra* note 2, at 6-8.

161. Scheiber, *supra* note 93, at 457-64; see also ATTARD, *supra* note 8.

being advocated. One approach was to simply identify an area of the high seas, as the London Conference agreements did in regard to net mesh sizes, as the space in which an international agreement on regulation would be applied. Another was a species-oriented approach, implicit in the rationale, if not the specific language, of the Truman Proclamation. In this approach, the area in which specifically named species were found was the area in which an international agreement would apply. The Latin American states were pursuing yet another approach, which was simply to extend their claims out beyond three miles to arbitrarily designated distances. In later years, this approach would be known as “creeping jurisdiction,” part of a larger process of “ocean enclosure” by which many coastal nations adopted six-mile or twelve-mile extended fishing zones, declared control of waters over the continental shelf, or moved to the 200-mile zone that eventually would be adopted in the 1982 UNCLOS.¹⁶²

The consideration of these various alternatives was not something entirely new in international affairs. Well before 1946, precedents and models for each of the variations for protection of coastal fisheries had been discussed or, in specific areas, actually put into effect; and of course, the three-mile doctrine had never been universally accepted.¹⁶³ For example, in the 1930s, Secretary Hull suggested to Japan an agreement on offshore zones in which Japan, Canada, the Soviet Union, and the United States would mutually agree to abstain from fishing. This “defined zone” concept, however, was abandoned in favor of the 1938 Japanese commitment to suspend fishing in Bristol Bay waters.¹⁶⁴ An earlier variant of species-based regulation by agreement was the 1911 Sealing Convention, which had provided for sharing of the harvest among the signatory nations.¹⁶⁵ Meanwhile, by the 1940s, the famous Halibut Commission regulatory regime under joint Canadian and American authority had become widely recognized as an exemplary program for the scientifically determined, species-based, and process-oriented approach; the two countries were moving toward implementation

162. BURKE, *supra* note 2, at 14–24, 320–21.

163. See *supra* note 4. In the Bering Sea Seal arbitration, The United States itself had sought to claim jurisdiction well beyond three miles. See D.P. O’CONNELL, 1 *THE INT’L LAW OF THE SEA* 522-23 (1982).

164. Letter from Cordell Hull to Joseph Grew, Ambassador to Japan (June 5, 1937), in 4 *FRUS*, 1937, at 740–48.

Also in the 1930s, the British Foreign Office (as noted earlier, *supra* text at notes 110–11) had been leading vigorously to fashion international agreements on mesh-size limitations in order to promote conservation-minded methods in the North Atlantic Ocean region.

165. LEONARD, *supra* note 37, at 55–95.

of a similar regime for Fraser River salmon.¹⁶⁶ For fisheries scientists who were striving during the immediate postwar years to advance the cause of fisheries research as an integral part of national and international fishery management, it was crucial to establish the MSY of regulated species as the central concept by which conservationist management could obtain legitimacy and political support. For these scientists and many agency managers, the Halibut Commission record was the gold standard.¹⁶⁷

The dual objectives of advancing multilateral agreements in a species approach to management, on the one hand, and invocation of scientific research on sustainability, on the other, were advanced in 1946 when the International Whaling Convention was adopted by the principal states (except Japan) engaged in Antarctic whaling. The debates in the 1946 Washington meeting that negotiated this agreement involved the whole range of complex legal, scientific, and political issues that typically came into play when an international agreement on ocean fisheries was attempted. The result in this instance was a compromise under which a process of scientific advising was provided for, but without complete surrender of each signatory nation's sovereign authority either to accept or to "opt out" of the agreed regulations.¹⁶⁸ Moreover, the Washington talks were marked by a classic clash between the industrial interests, concerned to protect the profitability of their operations, and the champions of a conservationist ethic, whose objective was the protection of endangered whale species for the sake of future generations.¹⁶⁹

166. ROY I. JACKSON & WILLIAM F. ROYCE, OCEAN FORUM: AN INTERPRETIVE HISTORY OF THE INTERNATIONAL NORTH PACIFIC FISHERIES COMMISSION 42–44, 45, 48 ("The conservation success of the Halibut Commission . . . undoubtedly led to more rapid acceptance of other conservation conventions based on fishery science. Its achievements and its credibility led the United States and Canada to attach great importance to its principles. . ."). See also *supra* note 41.

167. Scheiber & Carr, *supra* note 23, at 22 and accompanying notes; Scheiber, *supra* note 132, at 42–44 (discussing how, in 1949, the U.S. State Department invoked the Halibut Commission model in proposing an international tuna commission for the Eastern Tropical Pacific).

168. TØNNESON & JOHNSEN, *supra* note 36.

169. Prof. Kurk Dorsey of the University of New Hampshire has forthcoming a study of the Washington conference on whaling, showing that the United States was the principal source of concerns expressing a conservationist ethic. Prof. Dorsey's research shows that the American position prevailed over a tendency, even in the British government, to give a large measure of freedom to their industrial interests in setting whaling policy for the international regime. I have offered some analysis of the International Whaling Commission and its original objectives, in light of present-day controversy over the IWC's 1986 moratorium, in Scheiber, *supra* note 19, at 4, 8–11, 13

What role Japan would be permitted to play in the global fisheries and whaling economy was the most prominent controversial issue in oceans diplomacy that remained entirely unresolved at the end of World War II. The vessels of the vaunted Japanese distant-water fleets, including all the factory ships, had been largely destroyed during the war, and Japan's domestic economy was devastated; there was considerable human suffering, despite the firm commitment of the Occupation authority to restore food supply and public health.¹⁷⁰ If, as became evident in 1946, the American-dominated Occupation command, under General MacArthur as SCAP, would seek the speedy reconstruction of Japan's fishing sector, then would such a policy also place new limitations on Japan's distant-water operation? Or would Japan be permitted to regain the position it had held in the 1930s as the leading marine fishing power, posing a competitive threat to other fishing nations throughout the Pacific Basin, including North America?

VII. OCCUPATION-ERA CONTROVERSIES¹⁷¹

When the occupation of Japan began in 1945, MacArthur's headquarters made reconstruction of the coastal and marine fisheries one of its highest priorities as a way of providing the Japanese population with protein requirements at a time of global crisis in food supply. Even when that crisis was met in early 1947, SCAP did not cease to press forward in a policy designed to restore Japan's fisheries and allied fisheries industries to their prewar levels and beyond. In addition to supplying the home market, the fisheries and whaling activities were a welcome source of export earnings that would boost overall living levels and relieve the American taxpayers of occupation costs.¹⁷² The fishing revival offered the additional advantage, from General MacArthur's standpoint, of justifying his decision to rehabilitate the country's shipyards, head off their dismantling as war reparations, and revive the shipbuilding industry as an engine of growth for the Japanese economy more generally.¹⁷³

(quoting Acting Secretary of State Dean Acheson on how the whaling nations had a responsibility for treating the stocks as a "trust for mankind").

170. SCAP, *supra* note 45.

171. Full detail of events and documentation of the Occupation-era fishery policies and diplomatic conflicts that are discussed in brief compass in this Section may be found in SCHEIBER, *supra* note 12. What follows here has a focus on Canadian policy and the North Atlantic Triangle relationships during the Occupation period, an essential part of the background of Canadian-U.S.-Commonwealth relations in the negotiations that led to the International North Pacific Fisheries Convention of 1952.

172. Both these objectives were given a leading place in American strategic policy, especially after the collapse of the Nationalist government and victory of the Communist regime in China in 1949. SCHEIBER, *supra* note 12, at 90-92, 163.

173. Harry N. Scheiber & Akio Watanabe, *Occupation Policy and Economic Planning*

The other Allied governments were deeply concerned from the outset about the implications of the SCAP policies for the restoration of Japanese fishing operations. Especially worrisome to the Asian-Pacific countries (Australia, New Zealand, China, Indonesia, and the Philippines) was the prospect that SCAP's zealous expansionist design for Japan's fishing industries would mean that Japanese vessels would soon again be operating close to their coastlines. In light of how such operations had been used for military intelligence by Japan in the 1930s, the Asia-Pacific Allies believed that a revival of Japan's fishing capacity posed a serious security threat.¹⁷⁴

Within the Commonwealth bloc, there were some decisive differences on the security issue, exemplified by a New Zealand policy paper written for a Commonwealth conference on peace treaty planning. "New Zealand's primary interest in the Japanese Peace Settlement is security," it stated.¹⁷⁵ Yet the authors were fully aware that their security concern was closer to the objectives of China, the Philippines, and even to those of the Soviet Union on this point than to other Commonwealth nations. "Only Australia is likely to join us in insisting that security must be the overriding consideration," the New Zealand paper conceded. "Canada and the United Kingdom do not feel the menacing nearness of Japan as we do."¹⁷⁶

in Postwar Japan, in ECONOMIC PLANNING IN THE POST-1945 PERIOD 102–106 (Eric Aerts & Alan S. Milward eds., 1990). The Australians in particular were concerned that the SCAP policies on shipyard reconstruction and other economic rebuilding could harm the chances of ultimately supporting reparations to the Allies, especially themselves, and sought in vain to speed up the reparations negotiations. For example, they sent out instructions to press for early allocation of reparations. Dispatch from the Dept. of External Affairs, Canberra, Australia, to the Australian Mission, Tokyo, Japan, and Australian Embassy, Washington, D.C. (May 7, 1947) (on file with Australian National Archives, M8605/1, f. M15/4/7).

174. Security considerations were foremost in the analyses evident in, for example, Dispatch from Australian Head of Mission, Tokyo, Japan, to Prime Minister's Department, Canberra, Australia (Nov. 11, 1947) (on file with New Zealand National Archives, EA 2 f. 02/9/33); Dispatch from Australian Embassy, Washington, D.C., to Canberra, Australia (Sept. 26, 1947) (on file with Australian National Archives, A-1068, f. ER 47/31/2); and a series of notes from Australia to the United States government, with the Americans replying that SCAP was taking adequate measures to assure Allied nations' security (*see e.g.*, Letter from U.S. to Australian Embassy (July 9, 1947), *in* 6 FRUS, 1947, at 252–53).

175. Memorandum regarding Japanese Peace Settlement, Part I: General Attitude to Japanese Peace Settlement (May 12, 1947) (on file with New Zealand National Archives, f. EA I 102/9/38).

176. *Id.* Also, New Zealand was uncomfortable with, though it finally did support, Australia's unsuccessful demands in 1946 that it, not SCAP, have control of the Japan-based whaling expeditions. That Canada would decline to support Australia on this issue became evident early in the FEC controversy over whaling policy. Memoranda from

Once the Korean War broke out in 1950, U.S. policy toward Japan, in a shift popularly termed “reverse course,” was directed at the restoration of Japanese sovereignty, the swift conclusion of a peace treaty on non-punitive terms, and, of course, at the formal alignment of Japan with the Allies in the anti-Soviet camp through a security treaty to be signed immediately after general peace terms were settled.¹⁷⁷ As events proved, the New Zealand planners were right in their expectations, as both the United Kingdom and Canada aligned themselves with the Americans in giving these objectives priority over any concern with restrictions on Japan’s expansion of its fishing and whaling fleets in the western Pacific.¹⁷⁸

The Allied countries also feared in 1946 that SCAP-led restoration of Japan’s fisheries capacity would mean either direct competition with their own fishing fleets or, at a minimum, a Japanese preemption of fishing opportunities in areas where the Allied fishing industries were contemplating expansion once the necessary capital and ships became available.¹⁷⁹ Just as the Canadians and Americans had argued in 1937-38 that a depletion of stocks would occur in Bristol Bay under pressure of unrestrained Japanese fishing techniques, these Asian-Pacific countries predicted disaster for their fishing resources if Japan were given complete freedom of the seas such as they had enjoyed in the prewar era. Similar opposition to SCAP policy emerged in a heated Allied campaign to obtain reversal of MacArthur’s decision to permit a revival of Japanese factory-ship whaling operations in the Antarctic in 1946.¹⁸⁰

Also motivating the Allied governments in their concern regarding MacArthur’s policies for fisheries and general economic recovery was the enduring memory of Japan’s atrocities against civilians in Asia during the period of militarist-imperialist expansion and the Second World War. Indeed, at least until late 1949, most of the Allied nations advocated an

New Zealand Legation, Washington, D.C., to External Affairs, Wellington, Australia (Aug. 29, 1946) (on file with New Zealand National Archives, EA 1, pt. 1, f. 268/5/15).

177. On “reverse course,” see GEORGE C. ALLEN, *JAPAN’S ECONOMIC EXPANSION* 32, 251 (1965); WILLIAM S. BORDEN, *THE PACIFIC ALLIANCE* 63-88 (1984); and essays in *DEMOCRATIZING JAPAN: THE ALLIED OCCUPATION* 206 (Robert E. Ward & Sakamoto Yoshikazu eds., 1987).

178. See, *inter alia*, ROGER BUCKLEY, *OCCUPATION DIPLOMACY: BRITAIN, THE UNITED STATES AND JAPAN, 1945-1952* (1982); RICHARD N. ROSECRANCE, *AUSTRALIAN DIPLOMACY AND JAPAN 1945-1951* (1962); SCHEIBER, *supra* note 12; and MICHAEL SCHALLER, *THE AMERICAN OCCUPATION OF JAPAN: THE ORIGINS OF THE COLD WAR IN ASIA* (1985).

179. Thus, New Zealand and Australia opposed resumption of Japanese whaling, authorized by SCAP, not only because of its immediate importance to the Antarctic whaling industry (in which neither of them participated), but also because private investors in both countries were contemplating entry into the industry at a later time. See ROSECRANCE, *supra* note 178.

180. SCHEIBER, *supra* note 12, at 109-41.

array of severely punitive occupation measures, including trials and purges for war criminals, large reparations payments to the Allied government and to individuals who had suffered at the hands of Japan, the permanent dismantling of Japan's capacity for producing heavy military goods, and limits on Japan's economy and trade more generally.¹⁸¹ Not least important, some of the Allies were hopeful of writing into the Peace Treaty, when it was negotiated, clearly defined geographical or other limitations on Japanese operations in marine fisheries and whaling.¹⁸²

The conflict between SCAP and the Allies concerning Japan's fisheries revival became a source of bitter antagonism between the United States and the other Allies. In particular, the other Allies were entirely united against the SCAP policy of permitting Japan to send whaling factory-ship expeditions to the Antarctic. Moreover, they were united not only on the substance of SCAP policy but also on the procedure that SCAP had followed to re-authorize whaling. Australia, New Zealand, China, and the Philippines led the attack on SCAP policies, as the fisheries and whaling policies were debated almost continuously in the FEC throughout the 1946-50 period.¹⁸³ The U.S. government, although it was divided in its internal councils on fishery questions, in every instance gave SCAP policies its full support against repeated Allied demands that the Occupation constrain Japan's fisheries activities more rigidly.¹⁸⁴

In 1946, when General MacArthur authorized an expanded marine fishing zone, extending into the north-central Pacific, the Allied nations (led by Australia) denounced the action both because they had not been

181. BORDEN, *supra* note 177, at 81-82; cf. BUCKLEY, *supra* note 178, at 126-27 (discussing that initially the United States contemplated reparations so large that the British Government believed it to be too harsh a plan, though later the Foreign Office complained that a ten percent share of reparations for the U.K. was too small! In any event, the U.S. policy went through several phases, and at least momentarily in 1945 seemed to be strongly for a punitive settlement, then changed direction moderately, then after 1948 moved radically toward a non-vindictive treaty.) President Truman's approval of NSC 13/3 in May 1949 (stating that SCAP should halt any reparations shipments or plans) definitively decided the issue. BORDEN, *supra* note 177, at 82.

182. Thus, in 1946, the Australian policy paper for basic peace treaty planning included a proposed treaty provision for Japan to be excluded permanently from whaling in the Antarctic, to be excluded from Australian pearl-bed waters (which reached out to the limit of the continental shelf, some 150-200 miles beyond the three-mile limit), and to be required to adhere to the terms of the 1911 Convention for the Protection of Fur Seals (which Japan had renounced in 1940) and the 1946 international whaling agreement. Draft Australian Policy Paper (Sept. 9, 1946) (on file with New Zealand National Archives, f. EA 1 102/9/40).

183. SCHEIBER, *supra* note 12, at 42-47, 54-58, 101 ff.

184. *Id.* at 109-74.

consulted and because they believed the SCAP policies were far too generous. Meanwhile, MacArthur also authorized annual Antarctic whaling expeditions for Japanese factory ships, even though Japan was not a signatory of the 1946 whaling convention and even though the Allies (especially Britain and Norway, the leading whaling nations) were ardently opposed. In this respect, too, the American resistance to any meaningful consultation was a source of deep resentment and often angry exchanges in the FEC meetings.¹⁸⁵ In addition to re-authorizing the Antarctic whaling expeditions each year, MacArthur also acted unilaterally with respect to defining the geographical limits of Japanese fishing in Pacific waters. At first very restrictive, beginning in 1946 the authorized fishing area for Japan, known popularly as the “MacArthur Zone,” was progressively enlarged, soon reaching close to China’s coastal boundaries on the west and extending from there well into the Western Pacific. The expanded zone embraced the waters from which Japan had taken more than eighty percent of its marine fishery harvest in the pre-war years.¹⁸⁶

Canada and the other Commonwealth nations on the FEC joined at first with the Soviet Union and all the other members except the United States in criticism of the SCAP policies, and, perhaps equally important, in objecting heatedly both to MacArthur’s failing to consult them and to the consistent defense by the U.S. government of the SCAP moves. In defending SCAP policies, the Americans often resorted to a cynical extension of assurances to the Allies that future decisions would involve prior consultation, only to have SCAP act unilaterally again and again. The result was a rising sense of betrayal and an atmosphere of profound mistrust of the United States in the ongoing debate in the FEC.¹⁸⁷

For the Canadian government, the intense Allied criticism of American policy posed a difficult choice. Ottawa sought to give support to Australia and New Zealand, hoping to maintain strong relations with its sister Commonwealth members. Canada was reluctant, also, to part with the British on major issues unless the reasons were compelling.¹⁸⁸ London made it easier for the Canadians when, as the Cold War (and then the Korean War crisis) developed and intensified, the influence of the Anglo-American “special relationship” began to be felt in fishery policy. Hence the British Foreign Office assumed in 1950 a position of reluctant

185. *Id.*; BLAKESLEE, *supra* note 156, *passim* (discussing fisheries and whaling).

186. For a map showing the successive Zone expansions, see SCHEIBER, *supra* note 12, at 59.

187. *Id.* at 42–47, 54–58, 101–74.

188. Letter from Canadian Embassy, Washington, D.C., to SS for EA (June 9, 1950) (on file with RG 23, Cypher, WA 1296, 721–21–4(8)). An example of how reasons could be compelling in this way was, obviously, the issues involved in the terms of the Truman Proclamation and more generally in the quest for affording protection to Canada’s Pacific salmon fisheries, as discussed in Section III of this Article.

acceptance of SCAP policy. On that basis, the U.K. decided against embarrassment of the United States, vis-à-vis the Soviet Union, that would result from a forcing of votes in the FEC on the whaling and fishery expansion questions, and so the Australian government, by then lacking full support even from New Zealand, its staunchest ally, agreed to follow suit.¹⁸⁹

Throughout all these FEC debates of SCAP policies, Canadian fishery and diplomatic officials alike were unhappy with the prospect of breaking openly with the United States. Clearly the postwar fate of Japanese ambitions to fish for salmon on the North American coast was not far from the forefront of consideration. Ottawa thus decided that its best strategy was to try to work through bilateral contacts with Washington to assure their West Coast fisheries of protection against any renewed threat of Japanese "invasion" such as had occurred in 1937-38. Consequently the Canadians sought assurances from the State Department that the United States Government instruct MacArthur not to permit the eastward boundary of the SCAP zone for Japanese fishing to come anywhere near North American coastal waters.¹⁹⁰

Meanwhile, the divisions among the Allies on Japanese fishing and whaling, together with the nature of the demands being put forward by Australia with regard to long-term or permanent limitations on Japanese fishing in the peace settlement, led the Canadian government to engage in some fresh thinking about the need to establish a sound scientific basis for any claims that Canada might want to put on the table when the treaty negotiations went into high gear. External Affairs planners thus sought advice on this issue from the government's fishery experts. Scientists in the Department of Fisheries seized the opportunity to call

189. Secret memorandum from U.K. Foreign Office to Embassy in Washington, D.C. (No. 6325, June 25, 1947) (on file with PRO, MAF 41/1337); and Memorandum from London Embassy to Sec'y of State (A 1084, August 15, 1947) (on file with RG 43, Rec. Relating to Int'l Whaling Conf.). Australian readiness to force a vote in the FEC had been cabled to London two weeks earlier. External Affairs, Canberra, Australia, to Secretary of State, Commonwealth Relations, London, England, and to Prime Minister, New Zealand (July 30, 1947) (on file with Australian National Archives, A 1068, ER 47/31/22).

190. Letter from Stewart Bates to Under-Secretary for EA (Nov. 12, 1947) (on file with RG, f. FEC-231/7). In early 1948, the Canadian representative on the Far Eastern Commission reported to Ottawa that U.K. had instructed its representative to seek assurances that Japanese fishing fleets would be kept 100 to 150 miles from the coast of any British possession. Letter from Canadian Ambassador to the U.S. to SS for EA (Feb. 7, 1948) (on file with RG 23, Cypher WA 519, f. 721-21-4).

for more funding that would underwrite an intensive program of oceanographic fisheries research in Pacific waters.¹⁹¹ Declaring that even the rich salmon fisheries had not received sufficient research attention beyond coastal waters, A. J. Whitmore, the chief Canadian government fisheries management officer, recommended that Japanese vessels should be confined to the area west of the International Date Line on the assumption that this was the approximate dividing line between Asian and North American salmon migrations. Lamenting “a great void in the fisheries knowledge of this vast area” in which the salmon traveled, Whitmore reminded the diplomatic officers of what was at stake: “The record of aggression by the Japanese in fisheries,” he wrote, “is well known” so that “as little opportunity as possible should be left to the Japanese fishing industry to endanger or jeopardize fisheries such as the salmon. . . .”¹⁹² Nor did Whitmore think that new research efforts should be confined to obtaining better data on the population dynamics and condition of the salmon stocks. There were other potential opportunities for Canadian fishing operators that ought to be kept in mind:

The Japanese before the war had secured fishing and oceanographical knowledge sufficient to enable them to wrest food fishes from the deep Pacific Ocean waters. Examples (exclusive of whales) are Bonita, tuna, mackerel, yellowtail, sea bream, and to some extent herring. These potential Pacific deep-water fisheries have hardly been touched by Canada.

To sum up, Canada has not exerted itself to the same extent as Japan and Russia. . . .to ascertain the potentialities of its off-shore fisheries. This criticism also applies to the Canadian Arctic waters. It is perhaps too late for Canada to secure the necessary data before international decisions have to be made, but Canada should be prepared to forward reasonable claims with a sincere intention of backing these up with deep-sea oceanographical and fishery investigations as soon as possible.¹⁹³

Stewart Bates, the Deputy Minister for Fisheries, not only endorsed Whitmore’s strong views on the need to keep Japanese vessels west of the International Date Line pending the conclusion of a peace settlement,

191. Letter from A. J. Whitmore, Chief Supervisor of Fisheries, Vancouver, British Columbia, Canada, to Deputy Minister, Dept of Fisheries (Oct 31, 1947) (on file with RG 23, f. 721-21-4(2)).

192. *Id.*

193. *Id.* Other leading fishery scientists in the Canadian bureaucracy had been thinking along the same lines. Thus Dr. R. E. Foerster, then Director of the Pacific Biological Station at Nanaimo, British Columbia, wrote to Wilbert Chapman (who was then campaigning for American tuna research projects in the Central Pacific) that the coastal fisheries should not be ignored. “It is high time,” Foerster wrote, “that some concerted programme of oceanography and biological research was started for the west coast of North America, for conditions off the three-mile limit are liable soon to become intolerable and may require many years’ close restriction and careful husbandry. . . . We should not neglect our coastal fishery resources and let them go to ruin. . . .” Letter from R. E. Foerster to Wilbert Chapman (July 29, 1946) (on file with UW Library, Wilbert McLeod Chapman Papers).

but he also argued for a peace treaty provision that would permanently oblige Japan to keep its factory-ship fleets fifty miles or more from the shores of any territory under Allied control. There is no doubt that Bates had the British Columbia salmon and halibut fisheries in mind when he advanced this idea.¹⁹⁴

The diplomatic planners in the Department of External Affairs had little sympathy for the assertive position advocated by Whitemore and Bates. The dominant view in External Affairs was, instead, to be wary of “precedents which may be established in discussions of the Far Eastern Commission, if friendly countries are to claim vast ocean areas as being of special interest to themselves.”¹⁹⁵ Hence, in late 1947, Canada refrained from giving direct support to the Australian demands in FEC debates that Japanese fishing in the Pacific be restricted by SCAP entirely to the area north of the Equator.¹⁹⁶ Similarly, Canada’s voice was conspicuously muted in the FEC on the issue of Japanese whaling revival, despite concern that MacArthur’s flouting of the Allies on the whaling question threatened to destabilize the newly established International Whaling Commission’s regulatory regime.¹⁹⁷ Canadian officials were irritated by the way MacArthur was ignoring the FEC majority views in framing SCAP policy on Japan’s fisheries expansion; and at one juncture Canada’s representative on the FEC urged External Affairs to take a stronger position on the issue.¹⁹⁸ But Ottawa immediately replied by instructing him to lie low and let Australia take the lead in raising any objections against SCAP actions. He was also instructed to base his diplomatic efforts on the core premise that “Canadian and United States

194. Letter from Stewart Bates, Deputy Minister of Fisheries, to Under-Secretary for EA (Nov. 12, 1947) (on file with RG 23, f. 721-21-4(2)).

195. Letter from SS for EA to Canadian Ambassador, Washington, D.C. (Nov. 7, 1947) (on file with RG 23, f. 721-21-4(2)).

196. *Id.* See also Letter from Canadian Ambassador, Washington, D.C., to SS for EA (June 29, 1950) (on file with RG 23, Cypher WA 1355, f. 721-21-4(8)).

197. Letter from Stewart Bates, Deputy Minister of Fisheries, to Lester B. Pearson, Under-Secretary of External Affairs (May 12, 1948) (on file with RG 23, f. 721-21-4 (3)); Letter from G.R. Clark to Stewart Bates, Deputy Minister of Fisheries (May 12, 1948) (on file with RG 23, f. 721-21-4 (3)) (pointing out to Bates that the United States was eager to see the 1946 IWC gain ratification by other states, so that there might be a bargaining point in regard to reining in SCAP on control of the Japanese whaling expeditions). Concern for the vitality of the IWC regime reflected also, I think, Canada’s commitment to maximizing the influence of multilateral and international organizations in the postwar world.

198. Letter from Canadian Ambassador, Washington, D.C., to SS for EA (Nov. 9, 1950) (on file with RG 23, f. 271-21-4(9)).

interests are so closely allied on fishery matters that it is unlikely the United States would permit any extension of Japanese fishing areas which would be of great concern to the Canadian fishing industry.”¹⁹⁹

Canada’s position on fishery-related issues was equivocal, however, even on the central issue of whether or not SCAP was obliged to consult with, let alone be instructed by, the FEC. Thus in 1949, amidst a controversy in which SCAP (strongly opposed by Australia and other Pacific allies) was preparing to expand the Japanese fishing area southward for tuna expeditions to the Trust Territory waters, Canada straddled the issue. On the one hand, the Canadians formally rejected the American’s insistent view that SCAP had final discretion on Occupation policy, under authority approved by Washington, and that consultation was not a mandatory requirement. On the other hand, Canada’s diplomats were unable to come up with a formula by which the interested Allied nations in the Asia-Pacific region might be given a degree of protection for their security and their coastal fishing interests.²⁰⁰

Withal, ambiguity and indecisiveness, verging into a pattern of continuous wobbling, thus seemed to be the fate of the Canadians as they struggled to balance Commonwealth concerns, their own national interests, their commitment to a principled view of international law, and their desire to avoid damaging tensions with the United States. The concern about a re-entry of Japan’s fishing fleets into offshore North American waters was always a major factor in planning discussions. By mid-1949, the delicate balance had tipped; and the bilateral relationship with the United States prevailed. From that time forward, *treating directly with the United States in bilateral talks became the dominant mode in the Canadian government’s pursuit of oceans and fishery diplomacy*. The bilateral mode was a continuation, in essence, of the close relationship of Canada and the United States in the response to Japan’s Bristol Bay “incursions”

199. Letter from Dept. of EA to Canadian Ambassador to the U.S. (No. EX 233, Ref. WA 2895, Nov. 16, 1950) (on file with RG 23, f. 271-21-4(9)). On the sensitive reparations issue as well, the Canadian government tried to exercise a moderating influence against some of Australia’s ardently pursued demands. JOHN W. HOLMES, *THE SHAPING OF THE PEACE: CANADA AND THE SEARCH FOR WORLD ORDER, 1943-1957* 1291 (1982).

200. SS for EA, Ottawa, Ontario, Canada, to Ambassador to the U.S. (Jan. 26, 1949) (on file with RG 23, Cypher No. 197, f. 721-21-4(4)). A few months later, External Affairs informed its representative in the FEC that it was at a loss as to what position to take on all this and suggested that, “as a way out” of the bind, each interested nation might declare in advance its areas of special interest for fishing. In that way, at least ex post facto claims could be avoided if SCAP did order additional expansions. (SS for EA, Ottawa, Ontario, Canada, to Ambassador to the U.S. (May 12, 1949) (on file with f. 721-21-4(4)). In other words, Ottawa was still trying to bolster the authority of the FEC, in the multilateralist and functionalist mode to which it sought to give priority, but to figure out how, exactly, Canada could structure the process effectively remained elusive for them.

of 1937-38 and in the formulation of the Truman Proclamation.²⁰¹ Now, in 1949, the bilateral mode took on new importance as the two nations confronted the question of Japan's future as a global fishing power, with vitally important principles of ocean law central to the debate.

Ottawa and Washington thus initiated a series of bilateral talks regarding a possible tripartite fisheries treaty with Japan,²⁰² talks that would culminate in November and December 1951 with the negotiation and signature in Tokyo of the International North Pacific Fisheries Convention.

VIII. NEGOTIATING THE "ABSTENTION" PRINCIPLE: OCEAN LAW, FISHERIES SCIENCE, AND DIPLOMATIC COMPROMISE

Bilateral Canadian-U.S. talks commenced in July 1949 and went forward entirely outside the ambits of either the FEC or the consultative processes of the British Commonwealth. Progress of the talks was watched closely—and with some apprehensiveness—by the other Allies, and especially by the other members of the Commonwealth; but still, there is no evidence in the archives of any direct consultation with the British Foreign Office or other embassies until late in the progress of the discussions.²⁰³ To be sure, the Canadian government's representatives in

201. See *supra* § IV. This is not to say that the relations between the two nations' West Coast fishery industries had been uniformly harmonious. On the contrary, there had always been potential for serious conflict between their competing halibut and salmon fleets operating in overlapping offshore waters; jealousies and occasional flare-ups were hardly unknown. See *supra* notes 59–61, on Canadian concern over "reduction" plans by an American company for offshore British Columbia waters. Such issues continued to surface periodically, and continue to our own day in flare-ups involving Canadian and U.S. salmon fleet interests.

202. The July talks are reported in B. M. Meagher, Memorandum, "Canada-U.S. Fisheries Discussions in Ottawa, July 7-8" [1949], July 13, 1949, in *Documents*, 15 (1949): 1620–23. The State Department reported to the Occupation command on the Ottawa discussions, indicating that "Canadian officials [had] expressed agreement in principle" to the draft treaty approach, which was designed to restrict the Japanese fleets from fishing freely in the Bering Sea and other waters off the Canadian and U.S. western coasts. Dispatch No. 213 to Acting U.S. Political Adviser for Japan, Sept. 1, 1949, f. 711.948/9-1649, DOS Records, NA.

203. I use the term "Allies" here to refer to the Allied nations outside the Soviet bloc. The Soviet Union was adamantly opposed to the U.S. initiative to press for a non-punitive Japanese Peace Treaty—and in fact the Soviet delegates walked out of the international meeting for signature of the Treaty in San Francisco in 1951, occurring in the midst of the Korean War. The Soviets were left out entirely of the separate negotiations that resulted in the Japanese-US-Canadian convention, and it was a subject of debate whether Communist influence, at the direction of Moscow, was responsible for some of the intense opposition to the fisheries treaty in 1951–52.

The earliest date of documents that I have located in the archival sources relating to

these talks did express worry that Australia might be alienated by the results; they also expressed a concern that any fisheries treaty with Japan should be based on principles “adapted to inclusion in treaties with any other interested countries,”²⁰⁴ rather than being purely *ad hoc*. At the end of the day, however, Ottawa would subordinate this expressed concern to other objectives; advancing general principles of law gave way to the imperatives of national self-interest. As will be shown in the pages that follow, this happened in large part because the Canadian government yielded to the thrust of U.S. policy—a policy which was consistent with the position of the British Columbia and U.S. West Coast fishing industries and, indeed, was also consistent with the views of the Department of Fisheries scientists and bureaucrats in the Canadian government itself.

Beginning in 1950, the bilateral talks were expanded to include regular consultation with SCAP headquarters officials and leaders of the Japanese government. The inclusion of Japan as a party to the discussion meant that the countries whose interests were directly at stake would deal with the issue of Japan’s future role in the northeastern Pacific’s fisheries. Including all parties directly involved was consistent with the theory of “functionalism” that Canada, under the governments led by Mackenzie King and St. Laurent, sought to advance in global international relations.²⁰⁵ The functionalist approach—which called for taking each issue on its own merits and involving the directly interested parties in its solution—could be in sharp conflict, however, with the pursuit of universal principles of international law that were associated with true multilateralism. That the inconsistency could be troublesome for fisheries diplomacy and law would become evident at every turn in the history of these Canadian-American talks on the Japanese fisheries issues.

There was a larger, more embracing issue at stake: The Canadian and the U.S. governments had a strong common interest in bringing the talks to a successful conclusion because this would advance the cause of the general peace settlement with Japan. Getting the fishery issues out of the Japan Peace Treaty (JPT) negotiations and into the separate channel provided by these bilateral talks—expanded to include Japanese

Commonwealth relations on the issue is some correspondence in November 1951 between Ottawa and the Australian government, when Canberra first saw a draft of the proposed fisheries treaty and became worried that Australian interests would be insufficiently protected by the “abstention principle” if Japanese fleets were to claim the right to commence fishing in waters close off the Australian coast. The British Foreign Office soon joined in that conversation. See A. B. Jamieson, “For Mr. McIntyre” (internal memorandum), Nov. 1951, Australian National Archives, Canberra.

204. Canadian view as reported in “Attitude of Canadian Government toward Proposed Japanese Fishing Treaties, April 19, 1950: memorandum of conversation (telephone),” f. 611.964/4-1950, DOS Records, NA.

205. See text *supra*, at notes 134–35.

officials—would help to avoid a head-on clash over the fisheries question that could involve Australia, China, and other Pacific area nations in a coalition that by demanding strict limits of future Japanese fishing expansion could force a stalemate in inter-Allied negotiation of the general peace treaty.²⁰⁶ Indeed, John Foster Dulles, the special ambassador appointed to negotiate the JPT for the United States, was reported as saying in the midst of the talks with Canada that he was determined “that his quick negotiation of a short general Treaty of Peace would not get bogged down in *fisheries squabbles* that would drag out the settlement.”²⁰⁷

The influence of domestic politics in both Canada and the United States was no less a potential source of such “fisheries squabbles” than were foreign-policy differences among the Allies. This political factor was manifest at every turn, and pressures from domestic economic interests were never lost from sight. Hence, during the diplomatic talks there were ongoing dialogues in both Canada and the United States involving industry leaders on the Pacific Coast, diplomatic planners, government fisheries experts, and legislators.²⁰⁸ The decision to deal separately with the Japanese fisheries question eventually served effectively to blunt the force of the domestic opposition to the peace treaty that came in each country from the Pacific Coast fisheries interests—opposition that was strong enough on the U.S. side that it

206. There had already been dramatic clashes on this question in deliberations of the FEC, so that there was a realistic possibility that the issue of Japan's future as a fisheries power could indeed easily create an impasse in the peace treaty talks. SCAP officials had long been motivated to classify documents relating to their own policies regulating Japan's fishing operations by concern that these regulations under the Occupation authority would, if publicized, “undoubtedly be seized upon as a precedent by other members countries of the Far East[ern] Commission who have . . . endeavored to surround Japanese high seas fishing activities with prohibitions and restrictions which would either deny them access to suitable areas or preclude economical operations.” Natural Resources Section to Diplomatic Section, Commentary on Aug. 4, 1950 Memorandum [on fisheries regulation], Aug. 18, 1950, Natural Resources Section files, SCAP Records, NA.

207. Dulles' view, as reported in letter from Wilbert Chapman to Montgomery Phister, Jan. 6, 1951 (on file with UW, Chapman Papers) (emphasis added). For Chapman's role more generally in the early months of the bilateral negotiations, see Scheiber, *supra* note 93, at 60–74.

208. BERNARD COHEN, *THE POLITICAL PROCESS AND FOREIGN POLICY: THE MAKING OF THE JAPANESE PEACE SETTLEMENT* 9–27, 253–79 (1953); William C. Herrington, *In the Realm of Diplomacy and Fish: Some Reflections on the International Convention on High Seas Fisheries in the North Pacific Ocean and Law of the Sea Negotiations*, 16 *ECOLOGY L. QUAR.* 101, 104 (1989).

posed a real threat that it might block ratification of the general peace settlement by the U.S. Senate. Thus, the State Department's chief fisheries officer, Wilbert M. Chapman, warned in 1951 that the Truman Administration "could expect the west coast Senators to take every step to delay the ratification of the peace treaty until after they were satisfied that their interest would be protected, i.e., until steps had been taken to exclude the Japanese from the west coast fisheries."²⁰⁹

Events proved Chapman's warning to be well merited. Indeed, as the time drew near for formal negotiation of the trilateral agreement in Tokyo in mid-1951, Chapman's successor in the State Department had to make an intensive effort (with Secretary of State Dulles's blessing) to assure the West Coast fishing leaders that the proposed fisheries treaty would adequately protect their salmon and halibut industries. Those assurances were reinforced by explicit backing from Dulles and a promise to appoint some leaders of the West Coast industry as members of the U.S. delegation sent to Tokyo for the final negotiations.²¹⁰ Also in the background, as an essential element in the policy debate's larger context, was continuing pressure from MacArthur's headquarters in Tokyo against any moves that would harm the pace of rebuilding and expansion of Japan's fisheries.²¹¹

Another important contextual factor, as the talks progressed, was the British government's steadfast devotion to protecting the principle of the three-mile limit. At the very time that Ottawa and Washington were busily working out a way to exclude the Japanese from their offshore fishing grounds in the Northeast Pacific, the United Kingdom was in the International Court of Justice challenging—on an argument based on the three-mile rule—Norway's efforts to exclude British fishing vessels from operating in ocean waters beyond the traditional limited territorial waters.²¹²

What follows in this Section is a brief analysis of how all of the key doctrinal ocean law issues in international contention during the post-World War II years were raised and, at least for the parties to the INPF

209. Reported in Office Memorandum from Alice Dunning to U.A. Johnson, "Discussion with Canadians Regarding Japanese Fishery Treaty (May 3, 1951)," f. 611.946/5-351, DOS Records, NA.

210. Memorandum from William C. Herrington to Mr. Webb (Under Secretary of State), Subj: Pacific Coast fishing industry and the proposed fisheries treaty, Aug. 30, 1951, f. 6711.946/8-3051, DOS Records, NA. See also, *inter alia*, COHEN, *supra* note 208; and Scheiber, *supra* note 11, at 70–72. Herrington, who had been the chief fisheries administrator for MacArthur's SCAP command, succeeded Chapman in the State Department in 1950. See Amy L. Toro, *Transformation in Fisheries Management: A Study of William C. Herrington*, in OCEANOGRAPHIC HISTORY: THE PACIFIC AND BEYOND 453 (Keith Benson & Philip Rehbock, eds., 2002).

211. Scheiber, *supra* note 11, at 48–49.

212. *Fisheries Case*, *supra* note 117.

Convention, were resolved as the result of the Canadian-U.S. talks and the final negotiations with Japan in November and December of 1951. A major concern in this analysis will be to identify the lines of historic continuity and discontinuity that came down from the diplomacy of the Bristol Bay crisis of 1937-38, from the Truman Proclamation and from the inter-Allied controversies of the Occupation period. This was a legacy of doctrine and international geopolitics that lent a profound significance, in the history of modern ocean law, to the "abstention doctrine" compromise that was fashioned in the tripartite agreement.

A. Parallel Tensions: Political Planners vs. Fishery Experts

Once Canadian-U.S. diplomacy came to a focus upon Japan's future as a marine fishing power, evidence of severe internal tensions quickly surfaced within the policy officialdoms of both Ottawa and Washington. There was a keen awareness among all who were involved in the talks that this would be a treaty that almost certainly the Japanese government must accept. Hence the specific doctrines to be incorporated into this agreement would necessarily have sweeping implications for the ongoing global debates on the limits of territorial waters, on the law of coastal fisheries, and on the role of scientific research in the shaping of oceans law.

This awareness intensified well-established differences of viewpoint on key policy objectives that had become evident in the internal councils of the Canadian and U.S. governments as early as 1937-38 and had pervaded the Canadian-U.S. talks on the Truman Fisheries Proclamation. The cleavages cut across national lines during the policy processes of the two countries, pitting political and area specialists against the fisheries experts and bureaucrats. The multilateralists (or "internationalists," as they were more commonly known) in the diplomatic ranks of both governments shared a commitment to altruistic global cooperation.²¹³ By contrast, the fisheries specialists had an equally strong commitment to exclusionist and protectionist policies that reflected the demands of the Canadian and U.S. Pacific coast fishing industries for a treaty that would exclude Japanese vessels from fishing for salmon or other species in "their" offshore waters.²¹⁴ Finally, the Japanese government and fisheries interests were equally concerned about longer-term implications of

213. See, e.g., text at notes 217, 241-43 *infra*.

214. See, e.g., text at note 219 *infra*.

any agreement for the traditional principle of “freedom of the seas” in international law—quite apart from their worry that a fisheries agreement with Canada and the United States would stymie their ambition to re-enter the Northeast Pacific to fish for salmon, herring, crab, and other species.²¹⁵

A basic source of tension was the fact that scientifically based fishery management objectives were not always easily distinguished from naked self-interest. This conundrum was illustrated well by a policy paper circulated in the Canadian Department of External Affairs in 1947 that discussed the desirability of keeping the distinction in the forefront of policy planning. The conservation zones contemplated in the Truman Fisheries Proclamation, the 1947 External Affairs paper asserted, “are supposed to be for strictly scientific purposes and are supposed to have nothing to do with eliminating undesirable competition.”²¹⁶ The External Affairs political experts were committed to Canada’s established basic policy, as they represented it, which was to advance the cause of multilateralism and international cooperation. They sought to attain this general policy goal by work both through the agencies of the United Nations and through multilateral agreements; and so, specifically as to fisheries, they declared Canada’s objective should be “to negotiate agreements that would embody “wise . . . measures for the conservation of the fish resources . . . [of] the high seas.”²¹⁷ If Canada itself or other states “endeavoured to use conservation as a cloak for the protection of their fishing industries against legitimate foreign competition,” they asserted, it would diminish the chances of success in pursuit of this objective and, in the long run, would be against the Canadian national interest.²¹⁸

The commitment to multilateralism clearly was not shared, however, by the Canadian government’s own Department of Fisheries. For that department’s scientists and bureaucrats, the primary objective in the coming negotiations with Japan remained (as it had been for Whitmore

215. See, e.g., text at note 256 *infra*.

216. 1947 Memorandum, *supra* note 157.

217. *Id.*

218. *Id.* Interestingly, the External Affairs document also recommended that the Canadian government should join with the United States to get the Japanese government (presumably as an integral part of any fisheries treaty) “to introduce domestic legislation requiring Japanese nationals to abide by all the conservation regulations in force in the various fisheries zones [that might in future be] . . . established by multilateral agreement, bilateral agreement, or domestic legislation of the littoral state.” *Id.* This idea actually was incorporated by Mr. Chapman into one of the drafts of the tripartite treaty, but the notion of requiring Japan to adhere to the existing and future regulatory laws of other nations was unable to gain any support in SCAP headquarters and soon was shot down in the State Department by Chapman’s critics in the multilateralist. Scheiber, *supra* note 11.

and Bates in 1947) the guaranteed exclusion of Japanese fishing vessels from the salmon and halibut waters—whether by enforcing a specified zonal boundary line at a specified distance from the coast or by some other formula.²¹⁹ Both the Department of Fisheries and the leaders of the British Columbia fishing industry kept up the pressure on Ottawa, never permitting the government's continuing policy discussions to neglect the objective of protecting the coastal fisheries from what was termed bluntly in parliamentary debate “encroachment by Japanese fishermen.”²²⁰

Tensions on identical lines were evident within the State Department. On the one side was Chapman, the Department's Chief Fisheries Officer and author of the first draft of the tripartite convention that was presented to the Canadian government in Ottawa in July 1949. Chapman was unstinting in his devotion to advancing American fishing industry interests—but at the same time, he sought to pursue that goal through initiation of new multilateral agreements that would provide for cooperative research and international management based on the unique needs of management for each fishery stock or species involved.²²¹ Thus, the tripartite fisheries convention project for Japan was consistent with Chapman's broad strategy in this regard.

Chapman acted on the premise that the diversity of the American fishing interests—with the coastal fishing industry, especially salmon and halibut, having concerns distinctly opposed to those of the distant-water Pacific tuna fleet or many of the New England fishermen who operated in waters close to Canada—required abandoning the radical unilateralist implications of the Truman Proclamation.²²² He aimed

219. See *infra*, notes 191–94 (views of Whitemore and Bates in 1947).

220. Dominion of Canada, 21st Parliament, 4th Session, HOUSE OF COMMONS, DEBATES, 347, 422 (1951). An interesting further aspect of the talks, on this question of exclusion of Japan, was the concern on both the Canadian and U.S. sides that Soviet intransigence with regard to the general peace treaty and Moscow's persistent refusal to accommodate restoration of Japanese fishing and shore operations on the peninsula area north of Hokkaido would require Japan to employ its fishing labor and vessels more heavily on operations in the Northeast Pacific—and thus make it all the more urgent that exclusion of Japan from the North American salmon and halibut waters be worked out. “Canadian-U.S. Fisheries Discussions, Ottawa, July 7-8, 1949: Memorandum for the File, July 12, 1949” (on file with RG 25, f. 12386-8-40).

221. See Scheiber, *supra* note 93, *op. cit.*, 457–69.

222. The New England and Pacific tuna fleets were alarmed, of course, by any move toward U.S. abandonment of the three-mile rule, since it would encourage moves by other coastal states (e.g., Canada, affecting the New England fishermen; and the Latin American states, who already were announcing—and in many cases enforcing—offshore jurisdictional claims as far out as 200 miles). As “distant-water” fleets, therefore, they

instead to fashion policy for each specific fishery “independently, one at a time,” and to pursue each policy through international agreements.²²³ His role in tirelessly promoting within the State Department what would become the tripartite agreement was entirely consistent with this “species approach.”²²⁴ Chapman also championed the concept of “maximum sustainable yield” (MSY) as a matter to be determined for each species by cooperative scientific research and then used as the basis of regulatory and conservationist decision-making by experts in international management regimes. Indeed, getting the MSY concept into international fishery agreements was an integral part of Chapman’s larger strategy.²²⁵

Nonetheless, with regard to Japan in particular, Chapman was quite prepared to fall back on the idea of a tripartite agreement by which Japan would simply waive its rights under international law to fish within a specific distance—in the first draft if the treaty, it was 150 miles—of the U.S. and Canadian coastlines.²²⁶ The draft’s preamble stated the broad objective of protecting coastal fisheries and included the following specific reference to the MSY concept:

The Governments of Canada, Japan, and the United States of America, sharing a concern for the perpetuation of the coastal fisheries of the North Pacific Ocean and adjacent seas; recognizing the possible destructive effect upon coastal fisheries of new long-range fishing methods and facilities; and desiring to provide for the conservation of those fisheries to the end that each may continue to yield the maximum sustained catch year after year; have agreed to the following. . . .²²⁷

were fully as devoted to the three-mile rule as the salmon and halibut industries of the U.S. and British Columbia were devoted to overturning it and establishing extended jurisdiction—or, as the tripartite treaty with Japan promised, at least a multilateral agreement that would keep Japanese vessels out.

223. Letter from Chapman to Montgomery Phister, Nov. 24, 1947 (on file with UW, Chapman Papers). The same ideas were expressed by him somewhat differently in Chapman to William Arnold, Jan. 3, 1949. *Id.* The term “species approach” was later given to Chapman’s conception of “species-by-species” agreements; and it later became the standard nomenclature for the U.S. position in U.N. Law of the Sea talks in the 1970s to describe the U.S. commitment to differentiation in law of highly migratory species on the high seas (which the United States sought to exempt from national control within the EEZs) and other species that it regarded as properly subject to coastal-state regulation within the EEZs. See Scheiber, *supra* note 132, ch. 3. The controversy over the American position championing the “species approach” and its abandonment, finally, by the U.S. government in the 1990s are the subject of a comprehensive study by Christopher J. Carr. *Id.* at ch. 4.

224. Chapman’s presented this view in a detailed policy memorandum of Feb. 27, 1950, “Justification for Japanese Fishery Discussions,” f. 611.00 NP/2-2850, Office of Northeast Asia Affairs, Records Relating to Foreign Policy Decisions, 1950, DOS Records, NA.

225. See Scheiber, *supra* note 93, *op. cit.*, 457–69.

226. Memorandum of Conversation between Mr. Collings of the Canadian Embassy and U. Alexis Johnson of the Northeast Asia desk, U.S. DOS, Japanese Fishery Treaty (Mar. 23, 1950), f. 611.946/3, DOS Records, NA.

227. *Id.* (Draft), Preamble.

The mechanism for achieving these high aims, in the Chapman draft, came down to drawing lines across ocean areas—that is, a “zonal” approach, not requiring any scientific determination of species status as to MSY levels or anything else. In the zonal approach, Japan would simply waive its rights to fish within 150 nautical miles of the U.S. and Canadian western coasts, while Canada and the United States would similarly keep their vessels and fishermen from operating within 150 natural miles of Japan’s Pacific coast.²²⁸

The Canadian government’s External Affairs Department was unhappy with the 150-mile limit idea, both because it appeared to be “aimed more at protection against competition than at conservation.”²²⁹ Also worrisome to External Affairs was that both Australia and New Zealand hoped to get Japan to accept such zones of offshore protection for themselves against Japanese fishing—but these two Commonwealth member states were in no position to obtain that objective, thus potentially a source of embarrassment to Canada within Commonwealth councils.²³⁰ Still, while remaining wary of offending their Commonwealth friends in the Asia-Pacific region, the Canadian diplomatic hierarchs had to attempt to “‘educate’ the Australians on the subject of giving equality of treatment to the Japanese.”²³¹

It fell to the Japanese government, in any event, to shift the focus back to a species approach for management—an approach that would require significant input from scientific research conducted through an international agency. When Chapman’s initial proposal was first shown to the Japanese (who of course remained under the benign guidance of SCAP headquarters in such matters), their immediate response to the 150-mile zone idea was entirely negative. Their response was no doubt encouraged by SCAP’s top fisheries officer, William C. Herrington, who had recommended in

228. *Id.* (Draft), Articles I-III. The waiver would also apply to territories of both the United States and Japan north of the Equator.

229. Memorandum of telephone conversation between Richard W. Byrd (Embassy of Canada) and Southworth (British North American desk, U.S. Dept. of State), April 19, 1950, *quoted in* Scheiber, *supra* note 11, at 52. The question of Canadian-Australian relations was particularly sensitive, since Canberra had been pressing for inclusion of a peace treaty provision that would strictly limit Japanese fishing in the Pacific. Indeed, the Australians’ policy at the time was to obtain a provision in the peace treaty that would forbid Japan’s fleets from fishing in the area south of the Equator for a long period of years.

230. *Id.*

231. Memorandum of conversation, Subj: Japanese Fishery Treaty, between Mr. Collins of Canadian Embassy and Mr. Johnson of Northeast Asian Office, March 23, 1950, dated March 24, 1950, f. 611.946/3-2450, DOS Records, NA.

confidence to Chapman that he drop the 150-mile idea, terming it “an arbitrary determination” that would be indefensible as a general principle of oceans law. Instead, Herrington advocated that the proposed treaty provide for “mutual agreement to avoid intervention in fully matured fisheries that are already under heavy conservation restrictions”—the very concept later adopted as the “abstention principle.”²³²

The Japanese government countered Chapman’s 150-mile zonal concept with an alternative formula, specifically declaring that Japan was willing to continue the “voluntary suspension of [salmon] fishing in Bristol Bay,” consistent with terms of its March 1938 note to the United States. The Japanese proposed that meanwhile they would be committed to seek “a formula satisfactory to both sides” for sustaining conserved fisheries in the Pacific, so long as it did not establish any precedents prejudicial to Japanese ambitions for expansion of fishery activities in its diplomatic relations with other nations. The Japanese proposal was for an agreement that would run for only five years (in contrast to Chapman’s draft, which contemplated a fifteen year period of waiver of rights); and it also declared forthrightly that “the Japanese Government hopes and expects that once the peace treaty is concluded, Japan will not be subjected to any special restrictions on high-seas fishery, such as are not ordinarily applicable to sovereign states.”²³³

Although Japan’s official statement of position did not explicitly refer to MSY or a species approach, further moves from the Japanese government did serve to introduce those questions into the discussion. First, the Japanese Diet’s upper house proposed in May 1950 a draft agreement that would create by tripartite treaty an International Pacific Fisheries Committee that would conduct scientific research on the condition of fishery stocks in the Pacific north of thirty degrees south latitude. The commission would recommend such restrictions on number of boats, type of gear, closed areas, and catch quantities as its research indicated was necessary to conserve the stocks under study.²³⁴ This proposal did not call for Japan to abstain or waive rights except on the same basis as any other nations involved in a fishery. Its thrust was that if restrictions were to be imposed, they should fall on a non-discriminatory basis on

232. William C. Herrington to Chapman, April 26, 1950 (on file with UW, Chapman Papers) (further stating: “That formula can be defended on the basis of logic, good use of resources, and the general conception of ‘reduced to possession’). Herrington later succeeded Chapman in the State Department and became the author, on exactly this basis, of the abstention concept that eventually was incorporated into the International North Pacific Fisheries Convention, on which see *infra*, text at notes 240, 250.

233. Memorandum on High-Seas Fishery (March 20, 1950), f. 611.946/3-2350, DOS Records. See also Scheiber, *supra* note 11, at 24, 46, 52–54.

234. House of Councillors, The Pacific Fishery Agreement (tentative plan), May 11, 1950, reproduced in SCHEIBER, *supra* note 12, at 216–20.

all the nations engaged in the fishery.²³⁵ This theme—that whatever formula was eventually adopted if a tripartite treaty were to be accepted by Japan must be non-discriminatory—would be voiced strenuously by the Japanese negotiators when the treaty language was finally hammered out the following year in the final Tokyo talks.²³⁶

A definitive turn came when Secretary of State Dulles met with Premier Shigeru Yoshida in February and March 1951 to establish the basic groundwork for the general peace treaty, with restoration of Japanese sovereignty. Fisheries were discussed at the outset of the talks. From this meeting came a public commitment by Yoshida that Japan would refrain from allowing its fishing vessels to operate in “presently conserved fisheries” that were under active management.²³⁷ A few months later, Yoshida issued a public statement on fisheries in which he committed Japan to enter into negotiations with other countries “with a view to establishing equitable arrangements for the development and conservation of fisheries,” asserting the “special importance [of] . . . the protection and scientific investigations of fishery resources.”²³⁸ In all the Japanese policy documents of this period on the subject of fisheries, however, the Yoshida government and the Diet leaders insisted that Japan wished to reserve all its rights under the principle of freedom of fishing on the high seas; indeed Yoshida specifically reiterated that “once a peace treaty is concluded, Japan [should] not be subjected to any special restrictions on high-seas fishery. . . .”²³⁹

235. *Id.*

236. In those talks in November 1951, the opening Japanese position, stated in a proposed text, asserted: “[I]n the application of this Convention, no country concerned under this Convention is to be subject to discriminatory exclusion from the exploitation of any high seas fishery resource, or to any discriminatory restrictions or rules with respect thereto.” Japanese Proposed Treaty Text, Nov. 15, 1951, in *MINISTRY OF FOREIGN AFFAIRS, JAPAN, TRIPARTITE FISHERIES CONFERENCE: CANADA-JAPAN-UNITED STATES, NOVEMBER 5-DECEMBER 14, 1951*, at 175 (1951).

237. 24 DEP’T OF STATE BULL. 351 (1951). Yoshida specified that such fisheries included salmon, halibut, herring, sardine, and tuna in the eastern Pacific and the Bering Sea. He also restricted his commitment to those fisheries in which Japanese fishing vessels had been actively engaged in 1940. *Id.* For a full discussion of the Dulles-Yoshida talks and the Japanese commitment—which was a nearly verbatim version of a draft that Chapman himself wrote for the occasion, with Dulles approving its text and passing it on to Yoshida in Tokyo prior to the formal publication of the letter, see Scheiber, *supra* note 11, at 63–68.

238. Statement of the Japanese Government on High Seas Fisheries, July 13, 1951, *reprinted* in Scheiber, *supra* note 11, at 98–99, and also in K. KAWAKAME, *INTERNATIONAL CONVENTIONS IN POST WAR JAPAN* ch. 1, Sec. 2 (1972).

239. Statement of the Japanese Government, *supra* note 238. This language was

Within a short time, both Chapman and his successor as chief fisheries officer in the State Department, Herrington, had abandoned the specific-distance zonal approach that had proven unacceptable both to Canada and Japan. They concentrated instead on a formula (one that was finally incorporated in the agreement) that would involve MSY findings by a scientific commission, to be determined by an international commission and its scientists and to be used as the trigger for “abstention” by Japan from fishing the stocks in question.²⁴⁰

The Japanese position on non-discrimination was echoed by the U.S. officials who staffed the economics, trade, and Northeast Asia desks at the State Department. Leading the opposition to any treaty that would exclude Japanese fishing from offshore waters beyond three miles was Willard Thorp, the chief economics and trade officer. This was no surprise, for Thorp similarly had been an unyielding critic of the Fisheries Proclamation project during the policy process of 1944-45. Like the Japanese government officials, Thorp and his allies in the Department’s Northeast Asia bureau believed that the proposed agreement advanced a blatantly protectionist policy, favoring North American salmon interests. As such, they argued, the agreement would set a precedent that other nations might invoke to restrict access by Japan (or indeed any other nation) to fishery resources in *their* respective coastal waters beyond three miles.²⁴¹ Chapman charged that Thorp seemed intent on building up the economies of other countries “regardless of what it does to ours,”²⁴² and he continued to press for the tripartite fisheries agreement on lines that would satisfy the salmon and halibut fishing industry. “My position,” Chapman told industry leaders, “is simply this: . . . [The Japanese] will not be let back into our coastal fisheries,” whereas Thorp and his allies in the State Department and at SCAP believed that the Japanese “[had] every right to come into those fisheries and should be helped to do so.”²⁴³ Ironically, it was not until June 1950, almost a year after Chapman initiated the talks, that the Canadian government was

taken directly from the earlier paper from the House of Councillors, Pacific Fisheries Agreement, *supra* note 234.

240. See text at note 249 *infra*.

241. Letter of Wilbert M. Chapman to Miller Freeman, n.d. but October 1948 (reporting Thorp’s views and the debate in the DOS) (on file with UW, Chapman Papers).

242. *Id.*

243. Letter from Chapman to Montgomery Phister, April 16, 1950, (on file with UW, Chapman Papers); see also Scheiber, *supra* note 11, at 62–63. One of the international trade desk officers wrote of Chapman’s draft agreement: “The sharp [150-mile] demarcation lines in the [draft] conventions, with complete exclusion from certain areas, would appear to be in the direction of intensifying isolationism and may provide new sources of friction” as well as appearing to be contrary to the basic U.S. policy of maintaining rights of access to natural resources. Mr. Martin (ITP) to Chapman, Aug. 3, 1949, f. 611.946/8-1050, DOS Records, NA.

finally made fully aware of the degree to which Chapman's views were being seriously challenged within the State Department.²⁴⁴

Chapman left the State Department in June 1951 to pursue a career in the private fisheries sector. Herrington, his successor, had just returned from more than three years service in Tokyo as chief of the fisheries branch of General MacArthur's occupation bureaucracy. In that capacity, Herrington, a respected scientist and able administrator, had won the confidence of the Japanese fisheries industry and government leaders. Inheriting responsibility for the tripartite fisheries treaty project, Herrington cast about for a way of revising the treaty in a way so as to avoid the potential for harmful legal precedent that could restrict Japanese fishing interests globally that Chapman's 150-mile zonal concept represented.²⁴⁵

An intradepartmental coordinating committee was appointed in the State Department to hammer out the issues, and by early July, this group had reached consensus that the idea of seeking "complete exclusion from the eastern Pacific waters" of the Japanese fleets had to be abandoned.²⁴⁶ The way out of the resultant impasse, as Herrington conceived it, was the principle of "abstention." Seizing upon the opening given to him by the Japanese diplomatic statements (by Yoshida and the Diet committee, quoted earlier), with their emphasis on conservation goals,²⁴⁷ Herrington now proposed that the tripartite agreement should rest on a formula that would involve Japan voluntarily "abstaining" from the fishing of specified

244. Memorandum of Conversation, Subject: Japanese Fishery Treaty, March 23, 1950, March 24, 1950 (reporting conversation between Canadian Embassy and U. Alexis Johnson of Northeast Asian Office, Dept. of State), f. 611.946/3-2450, DOS Records, NA (stating that the Canadian representative, when informed the State Department had not yet taken a final position on the proposed 150-mile zone concept for the treaty with Japan, "expressed some surprise, stating that it was his understanding that the agreements had already been drafted and approved by the Department and had been sent to Tokyo for preliminary discussions").

245. Scheiber, *supra* note 11, at 73-77.

246. *Id.* at 75 (quoting Memorandum from U. Alexis Johnson to Dean Rusk, July 10, 1951). See also Herrington, *Problems Affecting North Pacific Fisheries: Tripartite Fisheries Conference at Tokyo, November 4-December 14, 1951*, 26 DEP'T OF STATE BULL. 340 at 341 (1952) (stating that the Chapman proposals, in the view of many American officials, "went beyond what was required to meet the conditions necessary for encouraging the continued conservation of our fully utilized and conserved fisheries and would provide a dangerous precedent for fencing off areas of the high seas").

247. It seems a fair inference, and an irony of the process, that Herrington had had a great deal of influence in the formulation of the Japanese government's position, since he was the virtual czar of Japan's fisheries industry during the Occupation and had been a strong proponent of Japanese fisheries and whaling expansion in the face of opposition from the Pacific Allies. See generally SCHEIBER, *supra* note 12, at 51-99.

stocks that were under management and were found by scientific study to be at the MSY level of exploitation. This was precisely what Herrington had proposed from his Tokyo post to Chapman and the State Department a year earlier.²⁴⁸ A memorandum that he penned in April 1951 set forth this view in detail, expounding on the MSY concept as well as the principles of international law that were at stake. The memorandum was of great importance as a turning-point in the State Department's policy process and indeed in the subsequent history of Law of the Sea debates, as it set out in fully developed form what became known as the abstention principle in later global oceans diplomacy.²⁴⁹

The concept of abstention, as Herrington proposed it in his April memorandum, was cast in language that would later be substantially incorporated into the INPFC. His proposed formula for protection of conserved fisheries, encouragement of new investments in scientific management, and multilateral cooperation provided that all parties to the agreement would recognize traditional freedom of high seas fishing,

except for fisheries which fulfill *all* of the following conditions: (1) Fisheries which are full approaching [sic] exploitation: scientific evidence indicates that more intensive exploitation will not produce a substantially sustained increase in yield. (2) Fisheries under extensive scientific study: concerned countries have been and are expending substantial sums of money and effort to discover the conditions necessary for maintaining the maximum productivity of the resource. (3) Fisheries under scientific management: management measures are in effect which limit and/or control the activities of the fishermen of the concerned countries for the purpose of maintaining and increasing the productivity of the resource. (4) Fisheries in which its nationals have no current or recent substantial interest: the citizens of the concerned country have not participated in the fishery on a substantial scale for the past ten (?) years." (5) Fisheries non-contiguous with territorial waters: the territorial waters of the concerned country are not contiguous with the immediate waters in which the fishery is being prosecuted.²⁵⁰

The last (fifth) condition was specifically aimed at the U.S.-Canadian relationship, to make clear that where salmon, halibut, and conceivably other species declared eligible for triggering abstention were concerned, the fact that they were in contiguous territorial waters of Canada and the United States meant that neither of the two nations could be asked to keep its nationals out of that fishery. In this respect, Herrington anticipated a demand by the Canadian government a few months later for a provision such as this that would prevent the Canadian fishing fleet from

248. See text *supra* at note 232.

249. W. C. Herrington, Some Tentative Ideas for U.S. High Seas Fishery Policy (proposed for purposes of discussion), [April 1951], manuscript copy (on file with UW, Chapman Papers).

250. *Id.* The question mark in parentheses is in the original. (Emphasis added.) See discussion of the final treaty draft of the United States in Scheiber, *supra* note 11, at 79-81.

being “‘frozen in’ to their past areas of fishing.”²⁵¹ This demand was satisfied with a provision of the treaty on intermingling of stocks in contiguous waters that specified that “no recommendation shall be made for abstention by either the United States of America or Canada in such waters.”²⁵² When British Columbia fishing leaders later questioned whether that provision, in the version finally written into the INFPC, was disadvantageous to them, the Fisheries Minister could respond persuasively that in that respect the INFPC “is not an agreement with the United States at all. It has not changed our relationship with the United States and we enjoy all the rights and privileges that we have ever had with that country.”²⁵³

B. Adoption of the Abstention Concept

Herrington’s most important task, if the abstention concept were to prevail, was to win Mr. Dulles’s support for it. Herrington was convinced, first, that there was no chance Japan would willingly accept any other basis for exclusion of their fishing fleets from North American waters.²⁵⁴

251. Memorandum for the Files, U.S.-Canadian-Japanese Fishing Treaty, Sept 4, 1951, f. 611.426/9-451, DOS Records, NA.

252. Canada also agreed at the November-December 1951 Tokyo conference to a provision agreeing they would abstain from Bering Sea salmon fishing.

253. Dominion of Canada, 1 HOUSE OF COMMONS DEBATES: OFFICIAL REPORT, Sixth Session, 21st Parliament (1 Eliz. II, 1952) 512–13 (Fisheries Minister R. W. Mayhew). The minister did acknowledge that Canada had agreed to stipulate that Bristol Bay salmon did not intermingle with salmon from Canadian streams, but he pointed out to his critics that under terms of the convention, if scientific studies proved they did intermingle, the Canadian fleet would thereby gain access to the Bristol Bay salmon fishery. *Id.* at 314.

254. Forcing Japan to accept a more arbitrary basis for limiting its fishing was a possibility, of course, given that nation’s status as a defeated and occupied power; but all of American diplomacy after 1950 was geared to achieving the quickest possible general peace treaty on non-punitive grounds. Herrington told the West Coast fishing leadership in October 1951 that so long as Dulles was steering the diplomatic course, there was no chance of imposing more stringent restrictions on Japan’s fishing activity. Letter from Herrington to Miller, Freeman, Oct. 3, 1951 (on file with UW, Chapman Papers) (also cited in Scheiber, *supra* note 11, at 75). As early as December 1949, Chapman complained that with the day for a general peace treaty still obviously quite distant, “it seems to be the case” that he would be required “to discuss these [fishery agreement] matters with Japan as an equally sovereign power.” Letter from Chapman to Herrington, Dec. 5, 1949, (on file with UW, Chapman Papers). (N.B. Herrington was then in SCAP headquarters and overseeing Japanese fishery and whaling policies—and was personally involved in the meetings with Japanese government officials called to discuss the early drafts of the proposed tripartite agreement).

Second, he believed that because the requirements set out to trigger abstention were fully met by the salmon and halibut research and conservationist-management regimes on the West Coast, the abstention idea was a crucial lever for winning support of the fishing leaders there, despite the pervasiveness of racist animosity toward the Japanese that reinforced the economic reasons for trying to keep Japanese competition out of their waters. Finally, Herrington was convinced that if the tripartite agreement required systematic MSY analysis, to be conducted by an international scientific advisory body, it would serve to advance the crucial U.S. policy objective of encouraging scientific management for sustainability of marine fisheries not only in North American waters, but throughout the world.²⁵⁵

Determined to avoid having the fisheries question involved in the general peace treaty settlement, Dulles fended off West Coast industry pressures. Thus, he responded with a strong rebuttal to the industry's call for writing a provision into the general treaty that would categorically keep Japan out of U.S. offshore waters. Dulles declared: "If we write that kind of a peace treaty, every one of the other forty-seven countries at war with Japan will want to write in provisions dealing with their special problems, and the result will be a confusion and long delay which is incompatible with the necessity of moving forward as rapidly as possible to quick peace with Japan. I think, however, there is more than one way to skin a cat, and I hope we can find one of the others."²⁵⁶ Once Herrington could report to him that the West Coast industry was mollified and would refrain from opposing ratification of the INFPC if it conformed to the American draft's key concepts, Dulles found his alternative: to incorporate into the general treaty a special provision in which Japan committed itself to negotiation of fishery issues in the interest of advancing conservationist management.²⁵⁷ It was a vague and open-ended commitment, but it was finally reluctantly supported by Australia and the other Allies who were unhappy with what they regarded as an unleashing of Japan to expand fishing throughout the western and southern Pacific—which, as events proved, was exactly what occurred, since Japan insisted that it would place limits on its fishing industry's expansion only with respect to "conserved" fisheries already under full scientific management regimes. There were no such regimes in place in the entire Pacific rim in 1951, except for the halibut and salmon regimes that gained unique protection by dint of the abstention doctrine in the INPFC.

255. Herrington, *supra* note 249; Herrington, *supra* note 208.

256. John Foster Dulles to Edward Allen, Jan. 19, 1951, marked personal and confidential, in Dulles "Fish" file, Japan Peace Treaty records, DOS Records, NA.

257. This paragraph is based upon documentation provided in SCHEIBER, *supra* note 12, ch. 4 at 175–96.

In 1951, however, the central U.S. policy objective of achieving swift conclusion of a non-punitive general peace treaty (seen as critical in order to align Japan with the United States and against the Soviet Union) drove all other decisions in the State Department relating to Japan. Thus a veteran American diplomatic officer concerned with fisheries, Warren Looney, urged in September 1951 that “promptness is essential, both on domestic and international grounds,” in moving toward formal negotiation of the fisheries agreement.²⁵⁸ With the West Coast industry finally in line, he continued, the international dimension had become foremost:

Indonesia and Korea are pressing, and other far Eastern States will press, for immediate bilateral fisheries agreements with Japan in accordance with Article 9 of the Peace Treaty. The general tendency of these States is to seek a flat prohibition of the Japanese from certain areas of the high seas, . . . [and thus] establish precedents harmful to the concept of the free seas. . . . It is imperative, therefore, that the proposed US-Canadian-Japanese convention, with its temperate treatment of Japan, be first negotiated in order to set a pattern for these other conventions.²⁵⁹

It remained to bring the Far Eastern and economics desks into agreement that the fisheries negotiations should be given the go-ahead, and once Dulles had heard the conflicting viewpoints and made his decision, these segments of the State Department’s bureaucracy capitulated. It was not on “the justice of the case” that they finally agreed to accept the fisheries agreement, the top Far Eastern experts explained. Rather, they did so on the exclusively pragmatic grounds that without it there would be endless turmoil in moving forward with the general peace treaty—due to be considered for final signature in San Francisco in October 1951.²⁶⁰

Thorp felt the heat, too, as Dulles and Herrington pushed the fisheries agreement planning at an urgent pace. At a July 27, 1951, meeting with Herrington, Thorp “expatiated on the theme that a more multilateral type arrangement envisaging true international controls” would be far preferable to what Herrington was proposing for the tripartite scientific commission under terms of his concept for the fisheries treaty.²⁶¹ It was reported that

258. Mr. Looney to IC, Office memorandum, Tripartite Negotiations in Tokyo for North Pacific Fisheries Convention (Sept. 24, 1951), Records of the Bureau of Far East Affairs, DOS records, NA.

259. *Id.*

260. Memorandum “Fishery Relationship between Japan and U.S.” Jan. 17, 1951 (report of meeting submitted by U. Alexis Johnson of the Far East desk) (on file with UW, Chapman Papers).

261. Office Memorandum Mr. Gay to Rusk, Merchant, and Johnson, July 27, 1951, f. 611.946/7-2751, DOS Records, NA.

although Thorp “continues to feel that a[n] exclusion is too clearly the central objective of the present proposal,” he was in nearly full retreat: “He did not want . . . at this late date to interfere with the present plans of action, but hoped that the fullest consideration would be given to means of bringing the treaty closer to his conception of desirable international procedure on the problem.”²⁶²

One can presume, moreover, that because the results of two years of continuous negotiating with the Canadians were also at stake, this would have been an additional factor impelling Dulles to push the policy process in the direction he and Herrington wanted. Meanwhile, the third partner in the traditional North Atlantic Triangle, the United Kingdom, had been pushed entirely to the sidelines. The British government was still trying to defend the three-mile rule and freedom of the seas, but insofar as it was given a voice on the key fisheries issues that worried Dulles, it was only with regard to Article 9 of the general peace treaty; Whitehall was given no voice in the development of the tripartite convention drafts. The British did give reluctant support to Article 9, hoping that under its terms Australia, New Zealand, and other nations and colonies in the Pacific area would be able to bring Japan to the negotiating table once the general treaty had gone into effect.²⁶³

Once the opposition to Herrington had been quelled in the State Department, with Canadian support for the agreement now firmly assured, the United States government moved quickly to inaugurate the formal negotiations with Japan.²⁶⁴ The general peace treaty was signed in San Francisco in September 1951. Secretary of State Dean Acheson decided that the fisheries agreement conference should be formally called by Japan and convened soon as possible in Tokyo. The conference opened in November 1951, and within a short time the final agreement was hammered out. The Japanese delegation sought initially to press for the “non-discrimination” idea, offering to accept conservationist measures but only so long as they were permitted to fish under whatever restrictions the other two powers had accepted for their own fleets. By contrast, the United States and Canadian position—which of course prevailed—was for entire exclusion of the Japanese from fishing for stocks on a specific list of species (salmon and halibut being the most important) that were found by a tripartite commission to be at MSY

262. *Id.*

263. Letter from British Embassy to Mr. Fearey, no date, attached to memorandum from Fearey to Allison, May 11, 1951, Records of the Bureau of Far East Affairs, DOS Records, NA.

264. For a detailed account of the instructions given Herrington, the course of the negotiations in Tokyo, and the INPF Convention’s terms, see Scheiber, *supra* note 11, at 83–94; and Herrington, *supra* note 208, at 104–11.

levels. It was not smooth going for the U.S. and Canadian diplomats, since the Japanese delegation took a hard line at first on “non-discrimination,” finally yielding; and then, near the conclusion of the talks, it required a dramatic personal intervention by Premier Yoshida to bring the Japanese to agree on the specific distance from the North American coast that would demarcate the waters governed by the treaty. The final agreement was initialed in Tokyo in December and went into force after ratification in 1953. The State Department’s basic goal of keeping fisheries disputes out of the inter-Allied preparations for a general peace treaty had been achieved; and the West Coast fishing interests, though distressed that the agreement did not give them air-tight protection from Japanese competition in the salmon and other offshore fisheries, won their main objective of exclusion, at least for a number of years.²⁶⁵ For the Japanese, the agreement was a hard blow in that it was the first major step in international ocean law diplomacy to establish legitimacy of the principle that “freedom of the seas” for fishing was subject to some qualification and abridgment in order to provide for conservation of the stocks. As a U.S. official would later contend, invoking precisely the argument that Herrington had deployed in his confrontation with critics in the State Department, that the agreement

resolutely accepts the thesis that competition in the harvesting of a resource, the economic limits of which are finite, can result in the impairment of the resource to the point where effort and yield lose their normal relationship. The treaty, with complete reliance upon scientific evidence, seeks to provide a systematic, orderly and fair system for the sharing of responsibility in the husbandry of renewable, manageable marine resources.²⁶⁶

265. On the U.S. side of the border, the industry and labor leadership were more readily reconciled to the need for some compromise than were their British Columbia counterparts, especially so with respect to the British Columbia fishermen’s unions. William Herrington reported to the State Department that Ottawa had informed him that “some of this opposition may be basically sincere, but the Canadians report that most of it stems from communist-line organizations which seek any pretext for stirring up opposition to the United States and to the Peace Treaty. [Ed note: The Soviet Union opposed the Japan Peace Treaty, which like the fishery agreement was then awaiting ratification.] An attempt is being made by them to make the case that this treaty is directed by the United States against Canadian interests.” The opposition in British Columbia was strong enough that Canada asked that the initiative for final ratification be taken by Japan and that the United States not appear to be putting the Canadian government under any pressure to speed ratification. Herrington, “Confidential Security Information: Memorandum for the Files, Subj: North Pacific Fisheries Convention,” March 5, 1952 (on file with UW, Chapman Papers).

266. Milton C. James (then chair of the international commission acting under the

Nonetheless, because no other coastal nation in the entire Pacific Rim area could claim to have a scientific management regime in place, Japan was left free to operate without significant limitations in nearly all other areas of the global oceans; and indeed Japanese fishing expanded rapidly in its geographic reach and phenomenally in the volume of its high-seas catch during the decade that followed. The agreement gained Japan a great deal more than it could possibly have hoped for, had Australia, China, Indonesia, and the Philippines had their way in their campaign to restrict Japanese freedom to fish by inclusion of a harsh provision for that purpose in the general peace treaty.²⁶⁷

For the British government, the agreement was a double blow. Not only did it depart from the three-mile principle at the very time the United Kingdom was fighting Norway over offshore fishing rights, but it also indicated the geopolitical reality that Canada was moving ever more closely to the United States in foreign policy coordination generally and in the realm of fisheries diplomacy in particular.

The Canadians had waffled and been nearly paralyzed at many key junctures in this history—during the Truman Proclamation discussions, in the Occupation period, and at certain points in the development of the INPFC agreement—finding it difficult to part with the British and, even more, difficult to reconcile the protectionist goals of emerging bilateral policy with the persistent ideal of multilateralism and “functionalism” that Canada’s leaders were articulating. Dedicated to advancing general principles of law, rather than only short-term objectives in fisheries diplomacy, the Canadian government portrayed the agreement in the ratification debates as having been a success for Canada. With abstention based on scientific study and the MSY idea, Fisheries Minister Mayhew told the House of Commons,

[the INPFC] established a principle that can easily be applied to a fourth, fifth or any other number of nations that want to accept it. . . . All three countries are firmly convinced that the conservation of the fisheries on the high seas is a necessity, and that more and more the nations of the world will come to depend on the sea for more of their food. This agreement will allow the maximum of exploitation and at the same time a sustained yield of fish.²⁶⁸

At the same time, Mayhew insisted, “Canada has received the maximum protection without injuring the welfare of any other country, . . . and has obtained something that we did not have before, security for the

INPC), “Draft of a Paper for Presentation at International Technical Conference on the Conservation of the Living Resources of the Sea (for review by National Sections)” (undated, but 1955) (on file with RG 25 f. 84/85/150, vol. 173, f. 10,600).

267. Scheiber, *supra* note 11, at 84–85.

268. Dominion of Canada, 1 HOUSE OF COMMONS DEBATES, 6th Session, 21st Parliament (1952), at 314 (speech of Mr. Mayhew).

principal fisheries of British Columbia.”²⁶⁹

The Japanese certainly did not share Mayhew’s point of view. Yoshida drew heated criticism from the opposition party, from the industry, and from many of his own party’s Diet members, who disdained the fisheries agreement as the product of simple naked duress.²⁷⁰

For the United States, the INPFC agreement’s incorporation of the MSY principle as part of the abstention process was not the end of the ocean-law reform effort, but rather only the first step in an ongoing diplomatic campaign. Thus, in 1955, Herrington led an American delegation to the first U.N. preparatory talks on the Law of the Sea. There they sought to win international support to place the abstention principle at the core of legal reform for ocean resources. Their effort failed in the face of opposition from a coalition of other nations.²⁷¹ A significant victory was won, however, when in the negotiations for the 1958 U.N. Convention on Fishing and Conservation of the Living Resources of the High Seas,²⁷² the first of a series of U.N. ocean law treaties, introduced

269. *Id.* at 315. The Yoshida government’s acceptance of new limitations on freedom of fishing on the high seas was accepted in Japan only reluctantly as being a tactically necessary surrender of rights in a situation of duress. Author’s interviews with fisheries officials and trade newspaper editors in Japan confirmed that this was the case; on duress, see, e.g., the harsh comments on the treaty’s terms in Oda, *supra* note 12, at 68–72, 87–90; Shigeru Oda, *Japan and International Conventions Relating to North Pacific Fisheries*, 43 WASH. L. REV. 67 (1967); and Soji Yamamoto, *The Abstention Principle and Its Relation to the Evolving Law of the Sea*, 43 WASH. L. REV. 45 (1967).

270. The Yoshida government explicitly justified its acceptance of new limitations on freedom of fishing on the high seas as being a tactically necessary surrender of rights in a situation of duress. (Author’s interviews with fisheries officials and trade newspaper editors in Japan.) On duress, see generally, the harsh comments on the treaty’s terms in Oda, *supra* note 12, at 68–72, 87–90; Oda, *supra* note 269; and Yamamoto, *supra* note 269. Ironically, the U.S. State Department was deeply concerned that even before ratification of the general peace treaty, the Japanese government and its fisheries diplomats should be treated as though they were representing a sovereign power—and it insisted that U.S. negotiators of the tripartite agreement in Tokyo, November–December 1951, conduct themselves in accord with that view of Japan’s status. Scheiber, *supra* note 11, at 83–84.

271. HOLLICK, *supra* note 10. The U.S. diplomats believed that if they could obtain agreement on the abstention concept (or, as they termed it, “abstention principle”), then the divergent interests of the U.S. fisheries, distant-water on the one hand and coastal on the other, could be served equally well. *Id.* Scheiber, *supra* note 93. See also Yasuko Tsuru, *Rethinking the Principle of Abstention: The North Pacific and Beyond*, 28 MARINE POLICY 541, 544–46 (2004) (on the Japanese position on abstention and post-1952 developments).

272. Done in Geneva, 29 April 1958, in force 20 March 1966, 559 U.N.T.S. 285. This convention was mainly of symbolic and precedential importance; it did

into general international law the notion of the positive duty of states to cooperate in achieving “the conservation of the living resources of the high seas”—with conservation being specifically defined as “the aggregate of measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products.”²⁷³

Carried forward from the trilateral context of the INPFC, the sustainability ideal thus was now placed front and center in the ongoing debate on ocean law. The sustainability idea served in the years immediately following as the counterweight against the movement, led by the Latin American countries, for coastal states’ unilateral claims of extended offshore control—that is to say, it served as a counterweight against the rising (and ultimately triumphant) movement for “ocean enclosure” which would reduce by an enormous percentage the area legally designated as the high seas. The winners in this contest were those who successfully created the ocean regime we have today, in which the power of decision whether to pursue conservationist sustainability goals realistically is within the exclusive discretion of the coastal states. And because the vast bulk of biomass of commercially exploitable global marine fish stocks lie within 200 miles of the coasts globally, the new regime would come to represent a full-scale transformation of traditional ocean law as known prior to World War II.²⁷⁴

IX. CONCLUSION

Lying ahead, in the course of ocean law development after the 1958 Convention was signed, were two decades of profound change in the order of the oceans. Although the sustainability idea was not lost from the core of ocean law doctrine, and although it would re-emerge in robust form in the 1990s,²⁷⁵ the reality meanwhile was that ocean enclosure was

not gain ratification from a sufficient number of nations to be effectively enforced.

273. High Seas Fisheries Convention, Articles 1 & 2. One commentator has pointed out that by explicating that maximum supply of food and other marine products is the objective, in fact the reference to “optimum” yield is misleading; and that “since the greatest volume of return is by necessity the maximum sustainable yield, this measure (MSY) is clearly what is the objective of management.” STUART M. KAYE, INTERNATIONAL FISHERIES MANAGEMENT 69 (2001).

274. See generally VICUÑA, *supra* note 26; BURKE, *op. cit. supra* note 2; Harry Scheiber, *Ocean Governance and the Marine Fisheries Crisis: Two Decades of Innovation—and Frustration*, 20 VA. ENVTL. L.J. 119 (2001).

275. Especially in the Rio Convention, the Convention on Biodiversity, and the 1995 Fish Stocks Agreement. See, *inter alia*, Christopher J. Carr and Harry N. Scheiber, *Dealing with a Resource Crisis: Globalization and the Management of the Marine Fisheries*, 21 STAN. ENVTL. L.J. 45 (2002); Van Dyke, *supra* note 17.

ineluctably on the ascendant. By the late 1970s, the 200-mile exclusive zone had been claimed by so many coastal nations that its legitimization in the U.N. Law of the Sea Convention in 1982 had become a foregone conclusion. Indeed, by then the U.S. Government, under terms of the famous “Magnuson Act”,²⁷⁶ had itself definitively discarded both the three-mile rule and the abstention idea, declaring unilaterally an Exclusive Economic Zone of 200 miles.²⁷⁷

The global debates of ocean law from 1952 to 1982, and in some respects to the present day, were marked by the tension between advocacy of legal rules that would favor distant-water fishing interests such as the U.S. tuna fleet, the British trawling interests, and the Japanese tuna and salmon industries, posed against the coastal states’ interest in excluding foreign-flag fishing from fishing grounds well off their coasts. The debates were complicated by the fact that in some countries, including Canada and the United States, their fishing industries included both distant-water and coastal fishing interests of great economic significance and with great political clout. The twists and turns of diplomacy that sought to advance these competing interests have been the subject of many studies, and so that fascinating story in the history of ocean law need not be revisited here. What has not been sufficiently noticed in the standard literature is the extent to which the destabilization of ocean law—a development usually analyzed with attention almost exclusively to the ICJ decision in the fisheries case of 1951 and its convergence with the reports of the International Law Commission soon afterward, introducing the volatile question of how baselines should be drawn to define offshore territorial waters—was significantly affected by the way in which the major fishing powers, as described in this Article, were addressing the question of Japan’s future as a fishing power. The relations of the North Atlantic Triangle nations

276. See Harry N. Scheiber and Christopher J. Carr, *Constitutionalism and the Territorial Sea: An Historical Study*, 22 TERRITORIAL SEA J. 67–90 (1992).

277. Even earlier, the United States Congress had enacted legislation extending fisheries zones out to six miles (78 Stat. 194–196 [1964] and then to twelve miles (80 Stat. 908 [1966]). In the U.N. Law of the Sea debates of the 1970s, U.S. diplomats sought to head off the 200-mile movement with proposals first for a six plus six zone (six miles of territorial waters and six additional for fisheries control) and then for a twelve mile exclusive zone. Finally the U.S. delegation settled on the “species approach” for the U.N. Law of the Sea, arguing for a separate regime for highly migratory species (principally tuna) on the high seas, with coastal state jurisdiction only within the 200 mile zone for species not specifically designated “highly migratory.” See generally Carr, ch. 4, in BRINGING NEW LAW, *supra* note 18.

in this development vividly illustrate the clash of principles and policies that complicated the contemporary response to Japanese fishing ambitions—and that presaged the conflicts of interest and legal innovations that lay ahead.

The deputy minister of fisheries for Canada, Stewart Bates, provided in 1953 a remarkable summary view of where things then stood in ocean law, just as the INFPC was in its initial stage of implementation. Shrewdly pointing out the emergent dilemma for both Canada and the United States of reconciling the competing interests of distant-water and coastal fisheries, Bates suggested that Canada would probably take a place eventually alongside Iceland, Australia, and Norway in a coalition championing extended coastal jurisdiction so as to further exclude foreign vessels from Canada's offshore waters.²⁷⁸ With the situation as to baselines and other questions in international ocean law now "highly fluid," Bates wrote, the Canadians should be careful not to commit too quickly to a fixed position on grounds that Canada had "possible long-run (not necessarily immediate) interests in declaring new territorial areas for Canada and perhaps in redrawing base lines for territorial water purposes."²⁷⁹ The tripartite agreement had successfully achieved the "stand-off" of Japan's fishing fleet from Canadian and U.S. shores without involving the perplexing issue of how to define maritime territorial boundaries, he wrote, because the agreement had instead introduced "*new principles of conservation and exclusion*"—which is to say, the abstention doctrine.²⁸⁰ Nonetheless, the agreement should be seen, Bates argued, as having driven "a deep wedge into the unrestricted fishing concept." The Canadians had taken "two opposite positions simultaneously," he continued,

subscribing to the exclusion principle for all foreign nations but insisting that we retain the right of unrestricted fishing both in Alaska and off the United States proper—a position that caused much embarrassment to the United States and almost disrupted negotiations both before and during the official

278. Stewart Bates to Under Secretary EA, Nov. 4, 1953; re Dispatch 1003 from Tokyo Embassy, f. 2622-40 (on file with RG 25). All the following quotations in this paragraph in the text are from this document. *Id.* Bates's observations proved prescient. By the 1980s, a leading commentator remarked: "Canada's fishing interests are those of a 'coastal state' par excellence." Parzival Copes, *Canadian Fisheries Management Policy: International Dimensions*, CANADIAN OCEANS POLICY: NATIONAL STRATEGIES AND THE NEW LAW OF THE SEA (Donald McRae and Gordon Munro, eds, 1989). See also Wendell Sanford, "The Sea Where International Law is Made," Law of the Sea Institute Occasional Paper, 2003, available at www.law.berkeley.edu/cenpro/earlwarren/losipublications/sanfordtalk.pdf.

279. The possibility of vastly expanding the offshore claims of Canada if straight baselines were to be adopted was opened up to the Canadian Government when Newfoundland joined the Confederation in 1949.

280. See *supra* note 278 (emphasis added).

conference. We achieved the two opposing principles much as the oyster changes its sex—by a special biological formula!²⁸¹

As events proved, even the “special biological formula” that had come out of the Canadian-U.S.-Japanese deliberations—while the British were pushed aside, shattering the Atlantic orientation of the North Atlantic Triangle and fracturing the unity of earlier days over the three-mile rule—could not serve to resolve the complex conflicts that remained outstanding in postwar ocean law. In a sense, the key terms of the 1982 Convention on the Law of the Sea exemplified and perpetuated the ambivalent contribution of the INPFC to ocean law, with what Mayhew had termed its “two opposing principles.” The exclusionary aspect of the tripartite agreement was reflected in the successful movement for the 200-mile EEZ by which the coastal states realized their exclusionist objective—without the need for any special “biological formula” or magical changing of sex. But the conservationist-management aspect of the INPFC was also reflected in the several provisions of the 1982 Convention and other ocean law instruments adopted since then, accepting and elaborating significantly the MSY concept and its more embracing scientific descendent, the ecosystem principle—today so dominant a consideration in the law of living resources of the sea.

281. *Supra* note 278.

