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COMMENT

NORTH PACIFIC FISHERIES TREATIES AND INTERNATIONAL LAW OF THE SEAS

INTRODUCTION

Fisheries¹ problems in the North Pacific are not new. In the past century, disputes between nations have developed over whaling, fur sealing, halibut and salmon fishing. Currently, crises are again in the making concerning the utilization of certain fishery stocks of this area. The purpose of this comment is to provide a framework of international law of the sea concepts within which the current problems can be examined.

Four major fishing powers are vitally interested in the North Pacific fisheries. These countries are the United States, Japan, Canada and the U.S.S.R. In tables compiled by the United Nations Food and Agriculture Organization on the 1960 world catch, the principal fishing countries in the order of their catch were Japan, China (mainland), Peru, the U.S.S.R., the United States, Norway, Spain, and Canada.² Although these tables reflect fishing activities by these nations in all waters, their significance to the North Pacific is readily discernible. These figures do not include whale catches, which, as compiled for 1959/60, show Japan leading, closely followed by Norway. The U.S.S.R. also has large whaling fleets, while the United States and Canada have only a small stake in this fishery.³

This comment will discuss the four major fishing powers mentioned above, and will concentrate upon their impact in the North Pacific

¹ Included within the term "fisheries" are the activities of catching whales and fur seals, two sea mammals of economic import hunted in the North Pacific.

² The catch order is expressed in terms of metric tons. 12 *FAO YEARBOOK OF FISHERY STATISTICS* a-33 (1960). The order given for the 1955-59 average, at a-32, places Japan first, the United States and the U.S.S.R. third and fourth respectively, and Canada seventh. These tables include freshwater and marine catches, and except whales. Excellent summaries of the 1960 fishing season may be found in *PACIFIC FISHERMAN*, International Yearbook Number (January 25, 1961). See especially at 81 for a review of the Japanese fishing year, and at 115 for the same information on the U.S.S.R. Since Mainland China does not have distant-water fishing fleets which penetrate the North Pacific, an examination of her fishing activities is not within the scope of this comment.

³ *Id.* at h-5. To illustrate the respective interests of the four North Pacific fishery nations in whaling, the 1959/60 figures show the following number of whales caught by each to be: Canada, 2; United States, 453; U.S.S.R., 11,436; Japan, 18,854. For the whaling statistics on the 1960/61 season see 12 *INT'L WHALING COMM'N REP.* 4-5 (1961).

area.⁴ The approach chosen has been to delineate the positions of these States regarding pertinent international law of the sea concepts, including the principles of contiguous zones and the continental shelf. The international commissions presently exerting controls in the North Pacific will also be noted. Particular treatment will then be given to Alaska, with specific note of the Bristol Bay area—scene of current conflict between Alaskan salmon interests and the Japanese fishing industry.

FREEDOM OF THE HIGH SEAS AND THE TERRITORIAL SEA

The principle of freedom of the high seas is one of the most generally recognized rules of international law. Perhaps the most famed work advocating this principle is Hugo Grotius' *Mare liberum* (1609), which is said to have "opened the famous literary controversy over the freedom of the seas . . ." ⁵ From this actively debated stage of development in the seventeenth century, the concept has become established as the "cardinal principle of the law of the sea."⁶ In Article 2 of the Convention on the High Seas adopted by the 1958 United Nations Conference on the Law of the Sea the principle is clearly expressed:⁷

⁴ For general background information a recommended book is ALLEN, *NORTH PACIFIC* (1936).

⁵ RIESENFELD, *PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW* 8 (1942). See also Heinzen, *The Three-Mile Limit: Preserving the Freedom of the Seas*, 11 *STAN. L. REV.* 597, 598-612 (1959).

⁶ Sorenson, *Law of the Sea*, *INT'L CONC.* (No. 520) at 212 (1958).

⁷ U.N. Doc. No. A/CONF.13/L.53 (1958). The final act and annexes of the 1958 United Nations Conference on the Law of the Sea are reprinted in 7 *INT'L & COMP. L.Q.*, Special Supplement, *The Law of the Sea* (1958). The texts of the final act and conventions are also available in United Nations Conference on the Law of the Sea, *Official Records*, Vol. II, 132-47 U.N. Doc. No. A/CONF.13/38 (1958). Further references to these conventions will be made by citing the United Nations Document number.

Eighty-six States were represented at the 1958 Law of the Sea Conference which met at Geneva from February 24 to April 27, 1958. A wealth of material was produced by this Conference, not only in the form of records of the proceedings and the final act and annexes, but also in the documentations prepared for the consideration of the Conference participants. The Conference prepared four conventions, adopted a protocol and nine resolutions. Only the conventions will be noted further at this point. These conventions were: (1) Convention on the Territorial Sea and the Contiguous Zone; (2) Convention on the High Seas; (3) Convention on Fishing and Conservation of the Living Resources of the High Seas; and (4) Convention on the Continental Shelf. The rules expressed by these conventions were agreed upon by a two-thirds majority of the States participating, thereby reflecting the prevailing opinion. The conventions were open for signature until October 31, 1958. As of that time the Territorial Seas Convention had been signed by forty-four States, including Canada, the U.S.S.R. and the United States; the High Seas Convention had received forty-nine signatures including the same three nations; the Fishing and Conservation Convention had been signed by thirty-seven States, including Canada and the United States; and the Continental Shelf Convention had forty-six signatures, among them those of Canada, the United States and the U.S.S.R. U.N. Doc. No. ST/LEG/13 (December

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and noncoastal States :

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

The corollary implicit to the concept of freedom of the high seas involves the rights of the coastal State over its marginal waters. These rights are variously expressed in terms of jurisdiction or sovereignty over the marginal or littoral sea, but are more frequently designated by the concept of territorial waters or the territorial sea.⁸ The reasons for the general recognition of this jurisdiction of the coastal State have been summarized as security interests, the furtherance of commercial, fiscal and political interests, and the exclusive enjoyment of sea products within these waters in order to sustain the existence of the coastal population.⁹ It has been asserted that the most important

31, 1958). However, each convention must be ratified by at least twenty-two nations before coming into force. As of February, 1962, the ratification or accession to these conventions stood as follows: Territorial Sea, 15, including the U.S.S.R. and the United States; High Seas, 18, including the same two; Fishing and Conservation, 7, including the United States; and Continental Shelf, 14, including the U.S.S.R. and the United States. U.N. Doc. No. ST/LEG/3, Rev. 1 (February, 1962). Thus at the present time, not one of these conventions is in force as a treaty.

In 1960 the Second United Nations Conference on the Law of the Sea was convened to consider the two specific questions of breadth of the territorial sea and fishery limits, issues unresolved by the 1958 Conference. No agreement was reached on either question. See, Second United Nations Conference on the Law of the Sea, *Official Records*, U.N. Doc. No. A/CONF.19/8 (1960). A synoptical table (U.N. Doc. No. A/CONF.19/4 (1960)) concerning the breadth and juridical status of the territorial sea and adjacent zones, updating that prepared for the 1958 Conference, is annexed to this record, *id.* at 157-63. This table shall hereinafter be cited as Synoptical Table. For further reference to the 1960 Conference, see *infra* note 16.

⁸ This comment does not purport to deal in any detail with the many facets of the concept of territorial waters. Only the broad and general principles will be given. The topic has been extensively written upon and the reader is especially referred to JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* (1927); COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* § 77 *et seq.* (3d ed. 1954); 1 HYDE, *INTERNATIONAL LAW* § 41 *et seq.* (2d ed. 1945); McDougal & Burke, *Crisis in the Law of the Sea: Community Perspectives versus National Egoism*, 67 *YALE L.J.* 539 (1958); Heinzen, *supra* note 5; Sorenson, *supra* note 6.

⁹ COLOMBOS, *id.* § 77.

right the coastal State enjoys within its adjacent waters is the exclusive right to control fisheries.¹⁰

In addition to this comprehensive jurisdiction over its territorial sea, the coastal State exercises its most exclusive competence over waters commonly designated "internal waters," that is, those waters landward of the baseline from which the territorial sea is measured and including ports, harbors and historic bays.¹¹ The rules applicable in these waters are generally accepted and the area itself need not be given further mention here.¹² Beyond the territorial sea is a limited area within which the littoral State claims certain less comprehensive rights; this area is known as the contiguous zone and will be discussed in greater detail under the next subtitle.

There are two controversial issues regarding delimitation of the territorial sea; these revolve around the problem of designating the inner and outer boundaries of the area. The importance of such limitations is readily apparent when merely the exclusive right to control fisheries within these waters is recalled. The two-fold problem is: determining the breadth of the territorial sea, and the baseline from which that breadth is to be measured.¹³

At the 1958 Geneva Law of the Sea Conference no agreement could be reached upon the breadth of the territorial sea. Thus Article 1 of the Convention on the Territorial Sea and the Contiguous Zone merely recognizes that: "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its

¹⁰ The rank of importance to be given the exclusive fishery rights within the territorial sea is illustrated by the following statement by McDougal & Burke, *supra* note 8, at 578: "The real impetus behind most of the demands for a broader territorial sea appear to derive from a demand to monopolize the exploitation of fish or to obtain revenue by requiring payment for exploitation by nonnationals. Certainly, this interest is most explicitly stated in the modern demands for extension of the territorial sea, and indeed it overshadows all other particular interests that might be advanced to justify the extension."

Regarding the coastal State's jurisdiction, JESSUP, *op. cit. supra* note 8, says, "The littoral sovereign has over territorial water rights, powers and privileges which are in principle the same as those which he possesses on his land territories. His freedom of action is restrained by the right of innocent passage and the right to seek shelter in distress." COLOMBOS, *id.* § 106, summarizes the rights of the coastal State within its marginal belt as "jurisdiction over foreign ships of war and merchant vessels, police functions, customs and revenue functions, fishery rights and maritime ceremonial."

¹¹ See 1 SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 119 (4th ed. 1960). The problem of delimiting waters in bays is covered more extensively later in this comment. A comprehensive judicial expression defining a bay may be found in *People v. Stralla*, 14 Cal. 2d 617, 96 P.2d 941 (1939).

¹² See H.R. REP. No. 2515, 82d Cong., 2d Sess. (1952) for a report on the investigation and study of the seaward boundaries of the United States.

¹³ These factors are discussed in greater detail in *The Territorial Seas and Fisheries Disputes - I*, 103 SOL. J. 849-50 (1959). *Cf.*, the summarization of prominent methods of fixing seaward boundaries in H.R. REP. No. 2515, *id.* at 15-16.

coast, described as the territorial sea."¹⁴ The failure to arrive at any solution to this controversial question was one of the most serious shortcomings of the 1958 Conference.¹⁵ The Second United Nations Conference on the Law of the Sea met in Geneva from March 17 to April 26, 1960, to consider only the two specific questions of the breadth of the territorial sea and fishery limits.¹⁶ The 1960 Conference ended without having adopted any proposals on either question. Currently, therefore, there is no certainty of an international "rule" as to the extent of the territorial sea, other than that a nation may properly claim at least three miles; claims range from this traditional three-mile or one league limit¹⁷ to zones up to 200 miles.

The 1958 Conference was, however, more successful in adopting general propositions regarding baselines from which to measure the territorial sea.¹⁸ The historically established and generally accepted rule is that the territorial sea shall be measured from the low-water mark following the sinuosities of the coastline. The same rule is applied to islands, unless the island is one of a group forming an archipelago.¹⁹

¹⁴ U.N. Doc. No. A/CONF.13/L.52 (1958).

¹⁵ See Sorenson, *supra* note 6, at 242-52 for a discussion of the deliberations of the 1958 Conference on this issue and the many compromise proposals which were put forth but defeated. A comprehensive table reflecting the positions of the various States on the compromise proposals made at both the 1958 and 1960 Conferences has been compiled by a Japanese scholar; see *infra* note 16. The Synoptical Table, *supra* note 7, of claims to jurisdiction over the territorial sea published with the 1960 Conference materials reveals that while a greater number of the coastal States represented claimed the customary three-mile or one league limit than any other limit, this number was far from commanding a majority position.

¹⁶ See Bowett, *The Second United Nations Conference on the Law of the Sea*, 9 INT'L & COMP. L.Q. 415 (1960) for an excellent report on the proceedings of this Conference. The Final Act of this Conference, U.N. Doc. No. A/CONF.19/L.15 (1960), comprises only two resolutions. See also Oda, *The Extent of the Territorial Sea*, 6 JAPANESE ANNUAL OF INT'L LAW 7 (1962) for an analysis of both Geneva Conferences on the territorial seas issue. The author presents a comprehensive table showing the positions of the States upon the various compromise proposals made at both Conferences.

¹⁷ The mile referred to in this limit is the nautical or marine mile. Thus the three-mile limit equals about three and one-half statute miles. The one-league limit likewise refers to the marine league, equal to three nautical miles. See JESSUP, *op. cit. supra* note 8, at xxxviii.

¹⁸ Articles 3-13 of the Convention on the Territorial Sea and the Contiguous Zone deal with this area. U.N. Doc. No. A/CONF.13/L.52 (1958).

¹⁹ COLOMBOS, *op. cit. supra* note 8, at § 101 says, "The generally recognized rule appears to be that a group of islands forming part of an archipelago should be considered as a unit and the extent of territorial waters measured from the center of the archipelago. In the case of isolated or widely scattered groups of islands, not constituting an archipelago, the better view seems to be that each island will have its own territorial waters, thus excluding a single belt for the whole group. Whether a group of islands forms or not an archipelago is determined by geographical conditions, but it also depends, in some cases, on historical or prescriptive grounds."

Care must be taken to distinguish between coastal and outlying archipelagoes since, although the 1958 Geneva Conference did not specifically agree upon a method of delimiting the territorial waters of archipelagoes, the former may come within the straight baselines rule approved in the Anglo-Norwegian Fisheries Case, *infra*, and

A special problem is presented when the coastline is extremely indented and deeply cut into. In the much written about *Anglo-Norwegian Fisheries Case*,²⁰ the International Court of Justice held that the Norwegian use of straight baselines in delimiting her territorial sea was not contrary to international law.²¹ The 1958 Geneva Conference adopted the rule of this case²² but specifically expressed the limits upon its use in these words:

1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

The final problem to be included here under the issue of determining baselines concerns the special difficulties in delimiting the territorial waters of bays. Writing in 1927, Jessup noted the absence of an international rule to determine whether a bay is to be considered in whole or in part a portion of the territory of the coastal State, but stated that several rules had been advanced for the admeasurement of bays.²³ As there given, these rules are: (1) a strict application of the usual three-mile limit of territorial waters; (2) the theory that all bays should be considered territorial when the mouth of the bay is not more than ten miles in width; and (3) the headlands theory—the general principle of which is to draw a line between headlands of the

adopted by the Conference in the Territorial Seas Convention. A coastal archipelago is a group or fringe of islands lying directly off the mainland. Illustrative are the Norwegian "skjaergaard" and the Alexander Archipelago lying off the southeastern Alaska mainland.

A comprehensive document regarding archipelagoes was prepared for the 1958 Conference: Everson, *Certain Legal Aspects Concerning the Delimitation of the Territorial Waters of Archipelagos*, U.N. Doc. No. A/CONF. 13/18 (1958) [hereinafter cited as Everson]. This document is found in Vol. I, Official Records, of the 1958 Conference, *supra* note 7, at 289. Further references to Everson will include the page number of this volume.

As previously stated, the 1958 Conference made no special reference to archipelagoes in its conventions. The United States practice *re* the Hawaiian Islands, an outlying archipelago, is given by Everson, *id.* at 299. The Philippines position on the special claims of an archipelagic nation is set forth in U.N. Doc. No. A/CONF./4/99 (ILC YEARBOOK, VOL. II, 1956, pp. 69-70). Sorenson, *supra* note 6, at 239-40, comments upon the archipelagic position at the 1958 Conference. Indonesia also exerts claims as an archipelago; see the text of the Indonesian declaration to this effect in Lauterpacht, *The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment*, VI, 7 INT'L & COMP. L. Q. 514, 538 n. 68 (1958).

²⁰ *Fisheries Case*, [1951] I.C.J. Rep. 116.

²¹ An excellent brief summary of this case is given in *The Territorial Seas and Fisheries Disputes—II*, 103 SOL. J. 867 (1959), and by Everson, *supra* note 19, at 295. See also McDougal & Burke, *supra* note 8, at 540 n. 6.

²² U.N. Doc. No. A/CONF.13/52 (1958).

²³ JESSUP, *op. cit. supra* note 8, at 355-82. See also HYDE, *op. cit. supra* note 8, at § 146.

bay, and measure the territorial sea from this line. It must also be added that prescriptive claims may be exerted and upheld over bays of very great size. Jessup stated that the legality of claims to these so-called "historic" bays "is to be measured, not by the size of the area affected, but by the definiteness and duration of the assertion and the acquiescence of foreign powers."²⁴

In 1958, Sorenson recognized as a general rule that a straight baseline may be drawn across the mouth of a bay and the territorial sea measured therefrom, but noted that the maximum length of this line is disputed.²⁵ He also reserved the historic bay from the operation of this general rule. The 1958 Geneva Conference adopted a maximum baseline length of twenty-four miles to enclose waters within bays.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.²⁶

However, since this Article by its terms applies only to bays the coast of which belong to a single State, and further specifies that its provisions do not apply to historic bays, the delimitation of territorial waters in many bays is still open to doubt.²⁷

The foregoing paragraphs contain only a very general outline of the broad principles applicable to territorial waters and the high seas. These comments have been set down only to make more meaningful the following remarks regarding the positions of the four fishing powers of the North Pacific waters.

The United States has been a staunch adherent to the three-mile rule, and has been consistent in this view from her early years as a

²⁴ JESSUP, *id.* at 382.

²⁵ Sorenson, *supra* note 6, at 237-38.

²⁶ Article 7 (4), (5), U.N. Doc. No. A/CONF.13/L.52 (1958).

²⁷ *E.g.*, in 1957 the Soviet Government claimed the closure of Peter the Great Bay as internal waters. (The mouth of this bay extends approximately 115 miles.) This action was repeatedly protested by the United States Government. See 37 DEP'T STATE BULL. 388 (1957) and 38 DEP'T STATE BULL. 461 (1958) for the text of notes delivered to the Soviet Ministry of Foreign Affairs by the United States Embassy at Moscow regarding this action. The Chairman of the United States delegation in a statement at the 1958 Law of the Sea Conference again referred to the United States protest to this Russian claim. See Dean, *The Law of the Sea*, 38 DEP'T STATE BULL. 574, 578 (1958).

nation.²⁸ The oft-quoted phrases of the Supreme Court in *Cumard S.S. Co. v. Mellon*²⁹ bear repeating here: "the territory subject to its [the United States] jurisdiction includes . . . the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coastline outward a marine league or three geographic miles." A strong reassertion of the three-mile limit was made by Arthur H. Dean, Chairman of the United States Delegations to the 1958 and 1960 United Nations Conferences on the Law of the Sea.³⁰ This position is explained by the fact that the United States is a strong maritime nation and naval power in addition to having important high seas, as well as coastal, fisheries. These interests require the fullest freedom of navigation. Moreover, as Dean points out,³¹ although the concept of the State's rights in territorial waters is balanced in part by the doctrine of right of innocent passage for vessels of other nations through these waters, there is no right of innocent passage for aircraft over territorial seas as distinct from the right for vessels. Thus, extensions and claims to wider territorial seas cuts down the freedom of air navigation as well as cutting the zone of naval movement and high seas fisheries activities.

However, in the North Pacific the United States has important coastal fishery interests that are endangered by strict adherence to the rule of a narrow territorial sea.³² This poses the problem of resolving

²⁸ See HYDE, *op. cit. supra* note 8, at § 142 *et seq.*; COLOMBOS, *op. cit. supra* note 8, at § 89. RIESENFELD, *op. cit. supra* note 5, at 251-63 has a concise chapter on the practice of the United States.

²⁹ 262 U.S. 100, 122 (1923).

³⁰ Dean, *supra* note 27, at 579.

³¹ *Ibid.* See also Lauterpacht, *supra* note 19, at 536-37.

³² BINGHAM, REPORT ON THE INTERNATIONAL LAW OF PACIFIC COASTAL FISHERIES, (1938), strongly advocates protection of the coastal fishery interests, particularly the Alaskan salmon fishery. See n. 39, p. 74, where the author strongly criticizes "rigid adherence" to the three-mile doctrine and suggests "pragmatic reasons" for this adherence. The conflicting character of legitimate interests regarding the breadth of the territorial sea is well put in this remark by BAILEY, AUSTRALIA AND THE LAW OF THE SEA 7-8 (1959):

"The concept of the freedom of the seas was, indeed, consonant with the dominant interests of the great maritime powers of the West. But the truth is that the freedom of the seas . . . is consonant with the dominant interest of all States . . . which depend upon access to the coasts, and to the waters adjacent to the coasts, of other countries. . . . Over against this distant-waters interest stands the dominant interest of those States whose nationals are chiefly concerned in the exploitation of the waters along the coastline of their own State. Such an interest may spring from the absence of international or oversea shipping lines (or airlines), from the presence of rich fisheries along their own coastline or the absence of regular dependence on distant-waters fisheries, or from a particular concept of national defence and security. For one or more of these reasons, a coastal State may be more concerned to extend its authority in the waters adjacent to its coast, even to the point of reserving them exclusively for the use and exploitation of its own nationals, reckoning that on balance the sacrifice of access to the waters of other States would cost it less than it would gain in its own

overall policy in the light of this conflict between legitimate interests. Since other methods are available to exert protective jurisdiction over coastal fisheries without requiring an extension of the territorial sea, the conflict is arguably solvable in this manner. These alternative methods will be discussed subsequently.

The three-mile limit is recognized in the Alaskan state commercial fisheries regulations in the following definition:³³

101.20 Waters of Alaska.

For the purposes of the regulations in this part, the term "waters of Alaska" north and west of the International Boundary at Dixon Entrance are defined as including those extending three miles seaward:

- (a) From the coast.
- (b) From lines extending from headland to headland across all bays, inlets, straits, passes, sounds and entrances.
- (c) From an island or group of islands, including the islands of the Alexander archipelago, and the waters between such groups of islands and the mainland.

As a seafaring nation with perhaps the strongest interests in high seas fisheries, Japan vigorously adheres to the three-mile rule. Her history has been consistent in this respect "since her entry into the international community."³⁴ Japan's main area of high seas fisheries is the North Pacific, and her fishing vessels ply the waters off the coasts of Alaska and the U.S.S.R.³⁵

Like the United States and Japan, Canada also supports the three-mile limit. Canada's early years are, of course, identified with the principles asserted by Great Britain, one of the earliest proponents of the fullest freedoms of navigation and the three-mile doctrine.³⁶

waters. . . . But in fact most States will contain interests, and perhaps organized interests, of the most conflicting character."

³³ Alaska Adm. Code, tit. 5, ch. 1, para. 101.20. The regulations in this chapter became effective February 2, 1962.

³⁴ RIESENFELD, *op. cit. supra* note 5, at 247; *cf.* JESSUP, *op. cit. supra* note 8, at 45-46. The Japanese position is well explained in Oda, *Japan and the United Nations Conference on the Law of the Sea*, 3 JAPANESE ANNUAL OF INT'L LAW 65 (1959). See especially the statement of the Japanese delegation to the Conference on the importance of the sea to Japan, at 66-67.

³⁵ For an extensive coverage of the Japanese salmon fishing interests in the North Pacific see MINGHI, *THE CONFLICT OF SALMON FISHING POLICIES IN THE NORTH PACIFIC* (unpublished Master's thesis, University of Washington, Seattle, 1959), especially at 9-31. Japanese fishing activities in the Northwest Pacific are ably discussed in both historical and modern-day settings by Ohira, *Fishery Problems Between Soviet Russia and Japan*, 2 JAPANESE ANNUAL OF INT'L LAW 1 (1958). For further reference see Note, *A Map Analysis of Japan's Fishery Problems*, 3 JAPANESE ANNUAL OF INT'L LAW 103 (1959).

³⁶ See JESSUP, *op. cit. supra* note 8, at 10-18; RIESENFELD, *op. cit. supra* note 5, at 129-71.

Canada's interests in the North Pacific, however, are similar to those of the United States. She is in the position of a coastal State attempting to exert conservation measures and protective jurisdiction over fishery stocks historically utilized by her fishermen, and presently endangered by high seas fishery activities of others. Although the Synoptical Tables compiled in connection with both Geneva Conferences under special limits list a Canadian twelve-mile fishery limit, the law upon which this listing is based does not apply to foreign fishing vessels,³⁷ which fish to within three miles of the shores. The Fisheries Council of Canada is presently urging declaration of a twelve mile fishing limit to protect its coastal sea resources from foreign fishing activity.³⁸

It is interesting to note that when Canada acquired the treaty-making power independent of Great Britain, the first treaty she signed was the Halibut Treaty with the United States, which has been lauded as one of the finest examples of international cooperation to protect a high seas fishery stock.³⁹

The U.S.S.R. claims a twelve-mile territorial sea.⁴⁰ Historically, the Russian position has been inconsistent. Czarist Russia made varying claims over her marginal belt dependent upon the interest in issue,⁴¹ and also denied that international law had any rule limiting the extent of territorial waters.⁴² The Soviet Government has adhered to a twelve-mile limit and is the leader of a strong bloc of States moderny asserting the claim.

³⁷ Synoptical Table, *supra* note 7, at 158. This Canadian statute is printed in U.N. Doc. No. ST/LEG/Ser.B/8 (1959) at 22. This twelve mile distance does not have any application to Canadian fishing vessels operating on the Pacific Coast.

³⁸ Seattle Times, Jan. 28, 1963, p. 10.

³⁹ This first treaty was the Convention With Great Britain for the Preservation of the Halibut Fishery of the Northern Pacific Ocean, March 2, 1923, 43 Stats. 1841, T.S. No. 2900. The most recent revision of this treaty is the Convention With Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, March 2, 1953, 5 U.S.T. & O.I.A. 5, T.I.A.S. No. 2900. The first halibut treaty and its importance to Canada was commented upon by Hon. James Sinclair in an address entitled *Canada and the Abstention Principle* given at a 1959 conference on fisheries management held at the University of Washington. A summary of these proceedings was published by the University under the title *BIOLOGICAL AND ECONOMIC ASPECTS OF FISHERIES MANAGEMENT (1959)* [hereinafter cited as *FISHERIES MANAGEMENT CONFERENCE*]. See pp. 118-19 of this publication for Sinclair's remarks upon this subject.

⁴⁰ Synoptical Table, *supra* note 7, at 162. A concise statement of the Soviet position is given in U.S. NAVAL WAR COLLEGE, *INTERNATIONAL LAW SITUATION AND DOCUMENTS—1956*, Vol. 51, at pp. 492-95. This publication will be referred to as War College Publication.

⁴¹ See JESSUP, *op. cit. supra* note 8, at 26-31; COLOMBOS, *op. cit. supra* note 8, at § 91; RIESENFELD, *op. cit. supra* note 5, at 194-203; Heinzen, *supra* note 5, at 632-36.

⁴² JESSUP, *id* at 29-30.

CONTROLS BEYOND THE TERRITORIAL SEA

It is generally agreed that the coastal State may exercise certain controls in waters beyond the territorial sea. These recognized controls include customs, fiscal, immigration and sanitary regulations, and have in general practice been limited to an area of twelve miles from the baseline for the measurement of the territorial sea.⁴³ This area is designated the contiguous zone; its practical purpose is summarized in this statement:⁴⁴

The real function of the contiguous zone concept has been to serve as a safety valve from the rigidities of the territorial sea, permitting the satisfaction of particular demands through exercise of limited authority which does not endanger the whole gamut of community interests.

Another example of control beyond the territorial seas is the claim asserted by many coastal States to the continental shelf.⁴⁵ This right as generally recognized acknowledges the coastal State's exclusive right to exploit the resources of the sea-bed and subsoil,⁴⁶ but does not change the status of the superjacent waters or airspace. The first claim to the continental shelf was made by the United States in 1945;⁴⁷

⁴³ Article 24(1), (2) of the Convention on the Territorial Sea and the Contiguous Zone, U.N. Doc. No. A/CONF.13/L.52 (1958), expresses the controls generally recognized in the contiguous zone:

"1. In a zone of the high seas contiguous to its territorial sea, the coastal State may exercise the control necessary to:

(a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;

(b) Punish infringement of the above regulations committed within the territory or territorial sea.

2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured."

The Synoptical Table, *supra* note 7, reveals that the claims of the four North Pacific fishing nations with respect to special limits are: (1) Canada: customs, 12 miles; criminal jurisdiction, 3 miles; civil jurisdiction, 3 miles; fishing, 12 miles; (2) Japan: neutrality, 3 miles; (3) U.S.S.R.: no limits for special purposes claimed, but breadth of territorial sea claimed is 12 miles; (4) United States: customs, 12 miles; sanitary regulation, 3 miles.

⁴⁴ McDougal & Burke, *supra* note 8, at 581.

⁴⁵ See the text of the Convention on the Continental Shelf, U.N. Doc. No. A/CONF.13/L.35 (1958). Article 1 states in part, "For the purpose of these articles, the term 'continental shelf' is used as referring (a) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent water admits of the exploitation of the natural resources of the said areas; (b) to the sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands." This Article provides for the rights of the coastal State as "rights for the purpose of exploring and exploiting its natural resources."

⁴⁶ Article 2(4) of this Convention, *ibid.*, defines natural resources to include "living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the seabed or the subsoil."

⁴⁷ Presidential Proclamation No. 2667, 59 Stat. 884 (1945). Sorenson, *supra* note 6, at 226 notes that there was a 1942 agreement between the United Kingdom and Venezuela dividing their rights to the submarine areas of the Gulf of Paria.

declarations by others have rapidly followed, so that by 1960 some thirty-two such claims existed.⁴⁸

The 1958 Geneva Conference did not include fishery regulations within its statement on the contiguous zone. This exclusion was apparently based on the idea that freedom of fishing is an essential element of the broader rule of freedom of the high seas. However, even before the 1958 Conference it was widely recognized that the coastal States have a special interest with regard to fisheries in the high seas off her coastline.⁴⁹ This interest has generally been expressed in terms of conservation of fishery stocks. By Presidential Proclamation in 1945, the United States announced a policy of establishing zones for fishery conservation in areas of the high seas contiguous to the coastline.⁵⁰ This policy, however, has not been effectuated.

The question of special limits for fishery purposes was sharply dis-

⁴⁸ Synoptical Table, *supra* note 7. Sorenson, *ibid.*, explains that these claims had been made by "some twenty states, and the United Kingdom with respect to a dozen dependent territories." Although the majority of the claims have expressly limited themselves to the sea-bed and subsoil, others asserted sovereignty over superjacent waters. Of the four North Pacific nations only the United States has claimed the continental shelf.

⁴⁹ See the text of the Convention on Fishing and Conservation of the Living Resources of the High Seas, U.N. Doc. No. A/CONF.13/L.54 (1958), where Article 6(1) reads, "A coastal State has a special interest in the maintenance of the productivity of the living resources in any of the high seas adjacent to its territorial sea." The operation and significance of this convention is explained by Sorenson, *supra* note 6, at 211-25, and Bishop, *The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas*, 62 COLUM. L. REV. 1206 (1962).

⁵⁰ Presidential Proclamation No. 2668, 59 Stat. 885 (1945). The pertinent portion of this proclamation is as follows:

"In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States; and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements. The right of any State to establish conservation zones off its shores in accordance with the above principles is conceded, provided that corresponding recognition is given to any fishing interests of nationals of the United States which may exist in such areas. The character as high seas of the areas in which such conservation zones are established and the right to their free and unimpeded navigation are in no way thus affected."

Ten years later a succinct statement of the problem of conserving fisheries resources while maintaining the freedom of the seas was given in 32 DEPT STATE BULL. 696 (1955), and the United States position is delineated at 697 as a firm conviction that the solution to the problem lay in "negotiating agreements having as their objective the management of the exploitation of the fisheries resources in such a way as to maintain their maximum productivity for the beneficial use of all the interested parties."

puted at both Law of the Sea Conferences and no satisfactory conclusion to the problem was adopted. Proposals to allow a contiguous fishing zone extending to twelve miles without a general increase in the breadth of the territorial sea were advanced in various forms by the Canadian and United States delegations, but fell short of adoption.⁵¹ Presently, no general rule regarding this problem can be stated.

Regulation and conservation of high seas fisheries can be achieved by treaty. The United States is party to several successful endeavors in this direction, but, like all treaties, they bind only the signatory nations, and their effectiveness with respect to certain high seas fishery stocks is therefore of limited value. At least six international agreements currently in effect are worthy of mention with regard to the North Pacific fisheries. These are: (1) Interim Convention on Conservation of North Pacific Fur Seals,⁵² between Canada, Japan, the U.S.S.R., and the United States; (2) International Whaling Convention and Schedule of Whaling Regulations,⁵³ to which currently seventeen nations are parties, including Canada, Japan, the U.S.S.R., and

⁵¹ See notes 15 and 16, *supra*, for reference to the compromise proposals. For the text of proposals made at the Second Law of the Sea Conference by the United States see U.N. Doc. No. A/CONF.19/C.1/L.3 (1960); by Canada, U.N. Doc. No. A/CONF.19/C.1/L.4 (1960); by the two jointly, U.N. Doc. No. A/CONF.19/C.1/...10 (1960) and U.N. Doc. No. A/CONF.19/L.11 (1960). An example of the text of one of these compromise proposals is this one introduced by Canada at the 1958 Conference, U.N. Doc. No. A/CONF.13/C.1/L.77/Rev. 3 (1958):

"1. A State is entitled to fix the breadth of its territorial sea up to a limit of six nautical miles measured from the baseline which may be applicable in conformity with articles 4 and 5.

2. A State has a fishing zone contiguous to its territorial sea extending to a limit twelve nautical miles from the baseline from which the breadth of its territorial sea is measured in which it has the same rights in respect of fishing and the exploitation of the living resources of the sea as it has in its territorial sea."

⁵² Feb. 9, 1957, 8 U.S.T. & O.I.A. 2283, T.I.A.S. No. 3948. The historic predecessor of this current agreement was the treaty between the United States, Great Britain, Japan, and Russia, July 7, 1911, 37 Stat. 1542, T.S. No. 564, which was entered into at a time when the fur seal herds of the North Pacific were in danger of extermination from over-hunting. The fur seal controversies are extensively discussed in LEONARD, INTERNATIONAL REGULATION OF FISHERIES 55-95 (1944); the agreements are noted in WAR COLLEGE PUBLICATION, *op. cit. supra* note 40, at 345.

⁵³ Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849. The amendments to the schedule are cited in TREATIES IN FORCE 282 (1961). See Note, *A Map Analysis of Japan's Fishery Problems*, *supra* note 35, at 108 which sets out the text of the notification of Japan's withdrawal from this agreement, to be effective June 30, 1959. However, this notice was rescinded and Japan continues to adhere to the convention. 11 INT'L WHALING COMM'N REP. 6 (1960). Norway rejoined the convention effective as of September 23, 1960, after a period of withdrawal. 12 INT'L WHALING COMM'N REP. 3 (1961). The Netherlands, an original member nation, has withdrawn and not rejoined.

The text of this convention may be found in WAR COLLEGE PUBLICATION, *id.* at 300-15. This treaty establishes the International Whaling Commission which is given extensive regulatory powers over the conservation and utilization of whale resources. However, the success of this Commission has not been highly remarked; *e.g.*, comments by Sinclair, *supra* note 39, at 120.

the United States; (3) Treaty between Japan and the Union of Soviet Socialist Republics concerning Fisheries on the High Seas in the North Pacific Ocean;⁵⁴ (4) International Convention for the High Seas Fisheries of the North Pacific Ocean,⁵⁵ a tripartite treaty between Japan, Canada, and the United States; (5) Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fishery of the Fraser River System,⁵⁶ and, Protocol Amending the Convention of May 26, 1930 for the Protection, Preservation, and Extension of the Sockeye Salmon Fisheries to Include Pink Salmon in the Fraser River System,⁵⁷ to which agreements the United States and Canada are parties; and (6) Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea,⁵⁸ another bilateral treaty between the United States and Canada. Of particular interest to the United States coastal fishery industry in the Northeastern Pacific are the latter three agreements, and only these will be commented upon further.

The principle of conservation of high seas fishery stocks through

⁵⁴ May 15, 1956; the text and annex to this treaty can be found in WAR COLLEGE PUBLICATION, *supra* note 40, at 361-68. This treaty sets up a Japanese-Soviet fisheries commission, with certain regulatory powers over the catch, area, season, and gear to be used in salmon, herring, and crab fisheries in specified Northwestern Pacific areas. For further information on Soviet-Japanese fishery problems see Ohira, *supra* note 35. For an indication of the jockeying between these nations to reach agreement under this treaty see 57 PACIFIC FISHERMAN, No. 3, at 11 (1959); *id.*, No. 5, at 31.

⁵⁵ May 9, 1952, 4 U.S.T. & O.I.A. 380, T.I.A.S. No. 2786. The text of this treaty is reprinted in WAR COLLEGE PUBLICATION, *supra* note 40, at 347-56. This treaty creates the International North Pacific Fisheries Commission; its functions are set out in Article III. The stocks of fish controlled by this agreement are salmon, halibut, and herring. Article XI provides that the convention shall enter into force on the date of the exchange of ratifications (which was June 12, 1953), and that it shall continue in force for ten years and thereafter until one year from the day on which notice of termination is given by one party whereupon it shall terminate as to all parties.

⁵⁶ May 26, 1930, 50 Stat. 1355, T.S. No. 918.

⁵⁷ Dec. 28, 1956, 8 U.S.T. & O.I.A. 1057, T.I.A.S. No. 3867. See the note on these agreements in WAR COLLEGE PUBLICATION, *supra* note 40, at 345-46. The Commission operating under these agreements is the International Pacific Salmon Commission. Its work has been very successful in regulating these salmon runs of the Fraser. Bulletins and reports of the Commission are available in the Fisheries Library of the University of Washington.

⁵⁸ March 2, 1953, 5 U.S.T. & O.I.A. 5, T.I.A.S. No. 2900. The text of this agreement is reprinted in WAR COLLEGE PUBLICATION, *supra* note 40, at 357-60, and the background of the agreement is given at 356-57. This convention continues what is recognized as one of the most successful international commissions to conserve a high seas fishery stock. This commission is the International Pacific Halibut Commission. Through careful management and consistent conservation efforts by the Governments and fishermen of the United States and Canada, the badly depleted halibut stocks of three decades ago have been developed to the point of the maximum sustained yield and the halibut industry is an economic boon to both nations. This comment does not purport to set forth any scientific data on the subject; for a general background see FISHERIES MANAGEMENT CONFERENCE, *supra* note 39, at 39-86. The reports, bulletins, record of proceedings and statistical yearbook of the Halibut Commission are available in the Fisheries Library of the University of Washington.

international cooperation has been successfully demonstrated in the operations of the International Pacific Halibut Commission and the International Pacific Salmon Commission. These Commissions exercise regulatory powers respectively over the halibut and sockeye and pink salmon of the Fraser River System. Through extensive conservation programs and adherence to regulatory schemes, these fishery stocks have been built up and maintained at optimum sustained yield levels. This yield could be seriously affected by the addition of a non-regulated fishery fleet which could harvest the product of expensive conservation efforts of others. Since treaties have no effect upon the conduct of non-signatory nations, the principle of freedom of the seas arguably would allow such fishery activities. This danger to the halibut and salmon conservation programs of Canada and the United States is very real in view of the well-equipped and successful distant-water fishing fleets of both Japan and the Soviet Union. Japan's participation in these fisheries has been regulated by the North Pacific Fisheries Convention. However, there is nothing to stop the Soviets from fishing in these international waters, and Soviet vessels are in fact being observed in the Gulf of Alaska and other areas off the Alaskan coastline,⁵⁹ although available evidence indicates that these vessels are not engaged in salmon or halibut fishing.

The North Pacific Fisheries Convention between Canada, Japan, and the United States has been effective in the post-war years to keep the large Japanese distant-water fleets of factory and freezer ships from invasion of the halibut, salmon and herring stocks in large areas of the Northeastern Pacific.

The concept of abstention was introduced into international fisheries agreements in this treaty. A comprehensive explanation of this principle was prepared for the 1958 Geneva Conference by Richard Van Cleve, director of the University of Washington School of Fisheries:⁶⁰ The concept is well defined in this quotation from Edward W. Allen:⁶¹

The essence of the proposed treaty is that where one or more nations have engaged in the intensive scientific research of a specific coastal

⁵⁹ *E.g.*, see the report on observations made of Soviet trawlers in the Gulf of Alaska in 24 COMMERCIAL FISHERIES REVIEW, No. 9, at 11-12 (1962). The taking of large catches of ocean perch was noted. For further reports on the activities of Soviet fleets see Seattle Times, Nov. 15, 1962, p. 13. Both the Soviets and Japanese maintain large king crab fleets in the Bering Sea; 58 PACIFIC FISHERMAN, No. 6, at 8 (1960).

⁶⁰ Van Cleve, *The Economic and Scientific Basis of the Principle of Abstention*, U.N. Doc. No. A/CONF.13/3 (1958).

⁶¹ Allen, *A New Concept for Fishery Treaties*, 46 AM. J. INT'L L. 319, 321 (1952). For further reference see the previously noted speech by Sinclair, *supra* note 39, at 116-25.

fishery, have subjected it to conservation regulation, and are making approximately maximum use of it upon a sustained-yield basis, then, in the interests of maximum world food production and in light of equitable and peaceful international relationships, other nations which have not participated in such research, regulation or previous exploitation should recognize these conditions and agree to restrain their nations from participating in such fishery.

Although the United States and Canada urged inclusion of this principle in the Convention on Fishing and Conservation of the Living Resources of the High Seas, the measure failed to be adopted.⁶² Japan has been critical of the abstention principle,⁶³ although in recent meetings of the International North Pacific Fisheries Commission, the Japanese, through this principle, gained the important concession to fish halibut in portions of the Eastern Bering Sea which had heretofore been closed to them.⁶⁴ The reason for this opening of important grounds to the Japanese was the lack of a sufficient showing that stocks were being fully utilized, one of the necessary elements under the abstention concept. The Commission's action has been sharply criticized by American fisheries interests.⁶⁵ This criticism may be a preview of the controversy between the American and Japanese fishing industries which could develop if Japan exercises her termination rights under the treaty.⁶⁶ The treaty allows notice of termination to be given for the first time June 12, 1963, which would become effective one year later. What action the Japanese will choose to take is of course

⁶² See the account given by Bishop, *supra* note 49, at 1225-28.

⁶³ *E.g.*, see accounts given in 24 COMMERCIAL FISHERIES REVIEW, No. 9, at 91-92 (1962), which report the opposition of the Japanese salmon industry and the Japanese Socialist Party to the abstention principle.

⁶⁴ See the report given in Seattle Times, Nov. 18, 1962, pp. 1, 10. This source also notes that herring fisheries off the coast of British Columbia in one area had been removed from the abstention list, but adds that the Japanese were not expected to fish this area.

⁶⁵ See Seattle Times, Nov. 19, 1962, p. 2; *id.* at Nov. 20, 1962, p. 8; *id.* at Dec. 8, 1962, pp. 1, 10. See also an editorial in the Seattle Post-Intelligencer, Nov. 26, 1962, p. 12.

⁶⁶ It has been suggested that American officials have a retaliatory weapon in the form of action against Japanese imports. "*The new Trade Expansion Act gives the President authority to take steps toward restrictions in the American market for foreign exports of fish caught under conditions which violate conservation practices.*" (All italicized in original.) Editorial, Seattle Times, Nov. 13, 1962, p. 8. The Alaska Fishermen's Union has suggested two solutions to force the Japanese to comply with good conservation principles. These are: (1) federal legislation to prohibit the sale of Japanese canned salmon on American markets; (2) education of the American housewife to the merits of buying American canned salmon. 57 PACIFIC FISHERMAN, No. 5, at 8 (1959). For an example of a bill directed at prohibition of the import of fish that had been taken by methods violative of our conservation regulations, see S. 2707, 87th Cong., 2d Sess. (1962). This proposal, introduced by Senator Warren G. Magnuson of Washington, was not enacted into law.

unknown, but that tension over fishing "rights" in the North Pacific will increase during the coming months is a certainty.

ALASKA: FISHERIES JURISDICTION

Prior to statehood, the two agencies responsible for the management of the fishery resources of the Territory of Alaska were the Department of the Interior and its predecessor in function, the Department of Commerce.⁶⁷ The Fish and Wildlife Service and the Bureau of Commercial Fisheries were the agents of the Department of Interior in carrying out this function. The Territorial Government of Alaska included the Alaska Fish and Game Department and the Fisheries Experimental Commission.⁶⁸ With the advent of statehood, the jurisdiction of fishery resources within state waters passed to the newly created State of Alaska. The Department of Fish and Game and the Board of Fish and Game⁶⁹ are the state agencies charged with the responsibility of management of fishery resources.

The major fishery in Alaska is salmon; fishery activities for this resource are generally centered in the Southeastern, Central and Northwestern waters. Economic and biological aspects present a picture of extreme complexity with regard to this resource. Much has been written on this subject,⁷⁰ and no attempt to explore it is made in this comment. Suffice it to say that the salmon industry was an essential element of revenue in the territorial structure; presently tax revenue from this source to the State of Alaska comprises less than seven percent of the gross tax revenue of the state.⁷¹ However, the industry still plays an important part in the economy of the state because of the employment it provides for a substantial number of inhabitants.⁷² The industry is likewise of importance to the Puget Sound region for a

⁶⁷ This background information was supplied upon request from the United States Department of the Interior.

⁶⁸ See ALASKA LEGISLATIVE COUNCIL, HANDBOOK ON ALASKA TERRITORIAL GOVERNMENT 35-36 (rev. ed. 1957) for a statement of the basic organization, duties and functions of these two agencies.

⁶⁹ See ALASKA LEGISLATIVE COUNCIL, LEGISLATIVE HANDBOOK ON ALASKA STATE GOVERNMENT 33-36 (1960) for a summary of the organizations and functions of these bodies.

⁷⁰ Extremely valuable for its extensive bibliography as well as its content is MINGHI, THE CONFLICT OF SALMON FISHING POLICIES IN THE NORTH PACIFIC (unpublished Master's thesis, University of Washington, Seattle, 1959). A good discussion will also be found in FISHERIES MANAGEMENT CONFERENCE, *supra* note 39, at 90-114.

⁷¹ See ALASKA LEGISLATIVE COUNCIL, REVENUE AND TAXATION IN ALASKA, PT. I, A HANDBOOK 50-60 (1962).

⁷² See ALASKA LEGISLATIVE COUNCIL, REVENUE AND TAXATION IN ALASKA, PT. II, EVALUATION AND RECOMMENDATIONS 58 (1962).

similar reason since the greatest percentage of migratory workers who go north during the salmon season are from this area.

It is generally agreed among fishery experts and economists that the Alaskan salmon industry is in a very precarious condition.⁷³ The unhealthiness of the industry can be attributed to many factors, such as over-entry into the fishery, conservation regulations which foster inefficiency of operation, and in some instances, diminishment of returning runs. However, another factor which will be given further consideration here is the competition of foreign fishery activities, specifically that of the Japanese.

Intrusion of the Japanese into the Alaskan salmon areas is not a new problem. Prior to World War II the threat of wholesale Japanese "invasion" into this fishery in the Bristol Bay region caused immediate and sharp repercussions. The problem at that time was solved through diplomatic channels.⁷⁴ The major portion of the salmon resources supporting the Alaskan fishery has been protected since 1952 by the operation of the North Pacific Fisheries Treaty. Under the terms of this international agreement the Japanese fishing effort for this resource has been confined to areas west of the 175 degree West Longitude line. At the commencement of the treaty period, scientific evidence indicated that the utilization of this line to demark the limit of the abstention zone would provide complete protection for the American-spawned salmon. However, evidence currently available indicates that there is an area of inter-mingling of Asian-spawned and American-spawned salmon of the Bristol Bay area in waters west of the abstention zone. Japanese fishery activities in this area have therefore, without any violation of the international agreement, been instrumental in diminishing the runs of salmon returning to the Bristol Bay area.⁷⁵

If the Japanese do not choose to continue to operate under the terms of the treaty, the large distant-water fleets of that nation could fish

⁷³ See FISHERIES MANAGEMENT CONFERENCE, *supra* notes 39, 70.

⁷⁴ After an exchange of notes the Japanese government withdrew its fishery vessels from the area. The incidents aroused high feelings; an excellent summary and background information can be found in LEONARD, *supra* note 52, at 121-36. See also Allen, *Bristol Bay Presents Issue Between American System of Fishery Conservation and Foreign System of Unrestricted Exploitation*, Address given before Commonwealth Club of California, San Francisco, March 3, 1939, and broadcast over NBC Pacific Coast radio network.

⁷⁵ MCDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS* 953-55 (1962). Of particular concern were the low 1958 Bristol Bay salmon runs. See 57 *PACIFIC FISHERMAN*, No. 1, at 6 (1959). For a report on the large Bristol Bay run of 1960 see 58 *PACIFIC FISHERMAN*, No. 9, at 7 (1960); speculation on how heavily the Japanese had fished this run is advanced, *id.* at 12.

directly off the Alaskan coast in international waters. It is therefore pertinent to determine the delimitation of territorial waters off the Alaskan coastline, for under the rules of international law previously discussed, it is agreed that the coastal State has the right to exclusive fisheries in the marginal belt which comprises her territorial sea.⁷⁶

The three-mile limit which the United States has traditionally recognized is of course the base point from which to launch any discussion *re* delimiting the marginal belt off the Alaskan coastland. The Alaskan coastline measures 26,000 miles and presents extreme variations in geographic configurations. The coastline variations selected for additional comment are located in two of the major salmon fishery areas, the Southeast and Northwest. These variations are respectively: (1) the Alexander Archipelago and (2) Bristol Bay.

(1) The southeastern region of Alaska is commonly referred to as the Alaskan "panhandle." It comprises a narrow strip of mainland and an adjacent chain of islands connected by intricate waterways. The rugged mainland is sharply cut into by arms of water. The area is dotted with hundreds of islands, the group being designated the Alexander Archipelago. These waterways comprise the main mode of transportation between the land areas, whereon are situated the major salmon canning and lumber and pulp industries.⁷⁷ This area is the second most populated region of Alaska, but its population basis comprises over 98% civilians, leading the civilian-military ratio of the other two regions.⁷⁸ The waters of this area support a vital portion of the Alaskan fisheries industry. For this reason as well as the peculiar geographic problems it poses, delimitation of these waters will be considered.

In practice, these waters are commonly understood to be inland waters of the state of Alaska. Their geographic configuration is such that to delimit the waters of territorial seas three miles from each island would result in a system of overlapping lines, or in narrow uneven strips of high seas. This configuration is designated a coastal archipelago. The Alaska commercial fisheries regulations define the term "waters of Alaska" in this area as "those extending three miles

⁷⁶ In addition, the legitimacy of the interest of the coastal State with regard to conservation of fishery stocks in areas contiguous to its coastline, discussed previously, should be recalled at this point. It must be noted, however, that there is far from a universally accepted principle in this area and the concept is in the flux of development.

⁷⁷ ALASKA LEGISLATIVE COUNCIL, *op. cit. supra* note 72, at 60.

⁷⁸ *Id.*, at 54. The three generally used regional divisions are Southeast Alaska, Central and Interior Alaska, and North and West Alaska; *id.* at 37.

seaward . . . from an island or group of islands, including the islands of the Alexander Archipelago, and the waters between such groups of islands and the mainland."⁷⁹ These are the exact words which appeared in the Department of Interior regulations in effect just prior to statehood.⁸⁰

Applying the methods for delimiting territorial seas adopted by the 1958 Geneva Conference to this area, it appears that the straight baselines method approved by the International Court of Justice in the *Anglo-Norwegian Fisheries Case* and adopted by the Conference in Article 4 (1) of the Convention on the Territorial Sea and Contiguous Zone would be applicable.⁸¹ The mainland is cut into by deep fiords and hundreds of islands fringe the coast. Under this method, the islands would be treated as a unit. This result would be achieved by drawing a series of straight lines connecting points on the islands and delimiting the territorial sea three miles beyond this baseline. In the *Fisheries Case*, the use of baselines which extended over forty miles in the longest instances was approved by the court. No landed areas in the coastal islands off southeastern Alaska are thus divided. Although the fringe of islands off the Norwegian coastline is of a more intricate nature than that of the Alexander Archipelago,⁸² it seems that the similarities of the two are more numerous than the differences. Moreover, the geographic realities of these islands, in that their locale dictates usage primarily or exclusively by the coastal State itself, would lend support to a usage and prescriptive claim. In addition, the ratification by the United States of the Territorial Sea Convention which has adopted the straight baseline method of the *Fisheries Case* can be urged to advocate adherence to this view in applicable geographic configurations. This argument has particular cogency in view of a recent statement by Secretary of State Dean Rusk in regard to this convention:

Although the Convention is not yet in force according to its terms because the twenty-two States have not yet ratified or acceded to it, nevertheless, it must be regarded in view of its adoption by a large majority of the States of the world as the best evidence of international law on the subject at the present time. . . . Furthermore, in view of

⁷⁹ These regulations are cited *supra*, note 33.

⁸⁰ U.S. Dep't Interior Reg., 21 Fed. Reg. 5446 (1956).

⁸¹ U.N. Doc. No. A/CONF.13/L.52 (1958).

⁸² "The special features of the Norwegian coastline are—aside from its profusion of fjords and bays—the Norwegian coastal archipelago called the 'Skjaergaard'. It consists of some 120,000 islands, islets and rocks, and extends along most of the coast." This description is taken from Everson, *supra* note 19, at 295.

the ratification of the Convention by the President with the advice and consent of the Senate, it must be regarded as having the approval of this Government and as expressive of its present policy.⁸³

This convention needs only four more ratifications to come into force, and at that time it will become binding upon signatory nations. Of interest to note here, however, is the statement of United States practice in reference to coastal archipelagoes presented in one of the preparatory documents compiled prior to the 1958 Conference:

This country has been one of the staunchest advocates of the view that archipelagos, including coastal archipelagos, cannot be treated in any different way from isolated islands where the delimitation of territorial waters is concerned. Thus, according to information received, *the practice of the United States in delimiting, for example, the waters of the archipelagos situated outside the coasts of Alaska is that each island of such archipelagos has its own marginal sea of three nautical miles.* Where islands are six miles or less apart the marginal seas of such islands will intersect. But not even in this case are straight base-lines applied for such delimitation.

That the Florida Keys have been considered a unit is actually no exception to this practice. The several islands of the Keys are situated so close together and the waters so shallow that they must naturally be considered as a continuous whole. (Emphasis added.)⁸⁴

In view of United States ratification of the Territorial Seas Convention, as explained above, the currency of this statement of practice to the Alexander Archipelago is doubtful.

(2) Bristol Bay is located in the area of Alaska classified as the North and West region.⁸⁵ This region is the least developed of the three major divisions of the state, and it boasts the highest percentage of native population.⁸⁶ Bristol Bay plays an important part in the economy of this region since its fishery resources support the major employment industry, the salmon canneries.⁸⁷ The waters of the Bay are comparatively shallow and in this area is one of the richest salmon-

⁸³ This statement is taken from a letter written by Secretary of State Dean Rusk to Attorney General Robert F. Kennedy, January 15, 1963, directed to the subject of the Department of State position regarding the extent of territorial waters in Bristol Bay. Although this statement was directed specifically at approval of Article 7, dealing with bays, it has general significance also. This letter is attached as an Appendix to the Brief for the United States as *Amicus Curiae*, filed in the Supreme Court of Alaska in connection with the case *State of Alaska v. Arctic Maid*, now on appeal in that court. This case is covered more extensively under the discussion of Bristol Bay.

⁸⁴ Everson, *supra* note 19, at 297.

⁸⁵ ALASKA LEGISLATIVE COUNCIL, *op. cit. supra* note 72, at 37.

⁸⁶ *Id.*, at 51, 69. The 1960 census figures show the native population in this region to be 11.13 per cent of the total population.

⁸⁷ *Id.*, at 60, 61, 69.

grounds in the world. The northern headland of the Bay is Cape Newenham, but there does not appear to be a sharply defined southern promontory.

Though several suggestions have been made concerning the extent of Bristol Bay, there is no generally accepted boundary. Neither has the Bay been considered as "territorial" or within the exclusive jurisdiction of the United States.⁸⁸

A recent Supreme Court case, *State of Alaska v. Arctic Maid*,⁸⁹ considered the constitutionality of Alaska's fish processors tax as applied to Washington-based vessels operating in the Bristol Bay area. Most of the time these ships were anchored in waters beyond the three-mile limit as measured from the low water mark along the coastline, but employed catcher boats within that limit. The Territory [subsequently the State] of Alaska maintained throughout that Alaskan jurisdiction extended much farther than three miles from the coastline. The measurement advanced to delimit Alaskan jurisdiction was a line drawn from Cape Newenham to a point three statute miles south of Cape Menshikof.⁹⁰ This distance is approximately 170 statute miles. In its brief submitted to the circuit court, the Territory urged that the international situation was pertinent to upholding this claim.⁹¹

Finally, in view of the tense international situation, it cannot be too strongly stressed that if appellants' argument is accepted and this Court rules that all of Bristol and Kvichak Bays, save waters in the marginal belt three miles from the shorelines thereof, are not United States waters and hence open to foreign entrance and fishing, far-reaching adverse effects on our relations with foreign nations who are interested in the Alaska fisheries would occur.

The reply brief submitted by the freezer ship operators chided this attempt "to influence the determination of the taxing authority of Alaska by considerations of foreign relations and national defense."⁹²

When the case reached the Supreme Court, the constitutionality of

⁸⁸ LEONARD, *supra* note 52, at 121; in his footnote, Leonard cites two suggested boundaries which have been advanced. The earlier of these suggestions was made in 1901 and would have drawn a line from Port Moller to Cape Newenham, approximately 180 statute miles. In 1938 a line drawn from the Northwest tip of Unimak Island to Nuniwak Island, approximately 350 statute miles, was suggested.

⁸⁹ 366 U.S. 199 (1961).

⁹⁰ This line was taken from the then effective Department of Interior regulations definition of the Bristol Bay area. See Brief for Appellee, pp. 18-19, *Arctic Maid v. Territory of Alaska*, 277 F.2d 120 (9th Cir. 1960).

⁹¹ *Id.*, at 25.

⁹² Reply Brief of Appellants, p. 9, *Arctic Maid v. Territory of Alaska*, 277 F.2d 120 (9th Cir. 1960).

the tax was upheld and the case was remanded for further proceedings, but the Court made no decision regarding the extent of territorial waters within the Bay. An express statement⁹³ was made that the Alaskan contention was "a claim on the merits of which we express no opinion."⁹³ However, the remand put this question of delimiting territorial waters directly in issue.⁹⁴

In the course of appeal, the courts below had handled this claim to extensive jurisdiction over Bristol Bay in varying manner. The district court judge cited and recognized the three-mile rule but found it did not apply in this case since the taking of the fish was within Territorial limits.⁹⁵ In an unpublished opinion by a division of the Ninth Circuit Court, Egegik, Kvichak and Nushagak Bays, all arms and tributaries of Bristol Bay, were said to be within Alaskan jurisdiction by virtue of their locations and history. However, as to the entire Bay, it was stated: "Bristol Bay is so large and so ill defined by geographical features that it is better described as a corner of the Bering Sea than as a separate body of water."⁹⁶ A rehearing was granted and the case was argued before the Ninth Circuit Court en banc. The opinion given on rehearing was substituted for the previous division opinion, and in this later decision the court did not find it necessary to make a specific determination of the issue.⁹⁷

When the case was remanded by the United States Supreme Court, the Ninth Circuit in turn remanded to the Supreme Court of the State

⁹³ 366 U.S. 199, 205 n. 5 (1961).

⁹⁴ The Court states, in pertinent part, 366 U.S. at 203, "If the fish were taken or purchased outside Alaska's territorial waters, all of respondents' business in the Bristol Bay area would be beyond Alaska's reach. But since some of the fish in all of the cases before us were taken in Alaska's waters or otherwise acquired there, respondents are engaged in business in Alaska when they operate their 'freezer ships.'" And at 205 the Court concludes, "Since we do not know how many fish, if any, were obtained outside Alaska's territorial waters, we remand the cause to the Court of Appeals for proceedings in conformity with this opinion."

⁹⁵ *Territory of Alaska v. Arctic Maid*, 140 F. Supp. 190, 195 (1956). The court says, "...the prosecution of the line of business of the defendants taxed is not the freezing, the major portion of which is done outside the three-mile limit, but the taking of the fish, all of which is done within the Territorial limits. The rule of *Cunard Steamship Co. v. Mellon*...limiting the jurisdiction of the Territory over Territorial waters within the three-mile zone, does not apply in this case."

⁹⁶ This unpublished division opinion may be found in Brief for Petitioner, Appendix A, *State of Alaska v. Arctic Maid*, 366 U.S. 199 (1961). The discussion regarding Bristol Bay territorial waters is at 10a-15a, and the quotation given above is at 12a.

⁹⁷ 277 F.2d 120, 125 (9th Cir. 1960). The court held that the freezer ships' activities while lying at anchor within territorial waters was an inseparable part of interstate commerce, and the Territory's tax was forbidden by the commerce clause. Thus no decision regarding the extent of Alaska's jurisdiction in Bristol Bay was necessary. At 125 the court states, "A serious question is raised on this appeal as to whether the freezer ships while at anchor beyond the three-mile limit in Bristol Bay were in territorial waters. For the purpose of considering the commerce clause question we will assume that they were."

of Alaska.⁹⁸ This latter court remanded the case to a state superior court. The decision given by the trial judge in that case upheld the Alaskan jurisdictional claim.⁹⁹ Pertinent parts of this decision state:

What, then, does constitute the "territorial waters" of the State of Alaska in Bristol Bay? To answer this question the extent of United States proprietary claims over the waters of Bristol Bay must be determined, as such claims are established either by specific exposition or general policy of the Government of the United States. . . .

It is clear that the area of Bristol Bay waters which may be claimed as Alaskan waters has been adequately defined. The Government of the United States has asserted a claim to all Bristol Bay waters landward of a line drawn between Cape Newenham and Cape Menshikof as inland waters through interrelated administrative and legislative action.

This case is now on appeal in the Supreme Court of Alaska. The United States Government has filed an *amicus curiae* brief in this appeal and of import is a letter written by Secretary of State Dean Rusk which is attached as an appendix to this brief.¹⁰⁰ This letter sets out the Department of State's position on the extent of territorial waters in Bristol Bay. Rusk notes United States approval of the Territorial Seas Convention adopted at the 1958 Law of the Sea Conference, and asserts that Article 7, which provides for a maximum base line length of twenty-four miles to enclose waters in bays, must be regarded as expressive of present United States policy. He then continues:

Since the line drawn from Cape Newenham to Cape Menshikof is some 162 miles long, it will be apparent at once that the waters landward of that line cannot be regarded as internal waters of the United States under the law as set forth in Article 7 of the Convention. Consequently, the Department considers that there is no basis in international law as presently understood and approved by the United States for Alaska's claim to the waters in question as within its domain unless these waters can be considered an "historic bay."

An extensive search of the records of the Department and of the historical records of the Government at the National Archives has revealed no evidence that the United States has claimed the waters of Bristol Bay within the line referred to as internal waters of the United States. . . .

⁹⁸ 297 F.2d 28 (9th Cir. 1961).

⁹⁹ This superior court opinion is unpublished. However, a copy of the opinion is available for reference at the University of Washington Law Library.

¹⁰⁰ See note 83, *supra*. A copy of this brief is available for reference at the University of Washington Law Library.

From the foregoing, it is evident that the Department is not aware of any basis in international law or on historic grounds for now considering all of the waters of Bristol Bay in question as internal waters of the United States. . . .

It is believed that future difficulties in our relations with other countries may be avoided if the Supreme Court of Alaska is advised of the position of the Government on the matters referred to.

These statements by Rusk are fully consistent with United States practice. Although the United States has generally recognized the historic bay exception to the usual rules for delimiting territorial waters in bays,¹⁰¹ its vigorous protest to the Soviet claim on historic grounds to enclose Peter the Great Bay as internal waters is indicative of the United States position *re* claims to extremely wide-mouthed bays.¹⁰² Referring to this Soviet claim Dean stated, "So far as I am informed no other country in the world asserts exclusive right to a so-called bay with a mouth of this size."¹⁰³ Peter the Great is approximately 115 miles as enclosed, whereas the Alaskan claim in Bristol Bay would establish a 170 mile headland-to-headland distance.

In view of these United States policy pronouncements, the probability is slight that Alaska's extensive claim over Bristol Bay will be sustained.

CONCLUSION

It may be submitted as a conclusion that the general principles of the law of the sea set out in this comment illustrate the need for international cooperation to protect the valuable fishery stocks of the North Pacific.

It would be unrealistic to assert the probability of an extension of territorial waters by the United States for the benefit of the Alaskan coastal fishing interests. The United States has consistently claimed the three-mile limit and there is little reason to expect any change, particularly in light of the legitimate interests which weigh on the

¹⁰¹ "In connection with the principles applicable to bays and straits, it should be noted that they have no application with respect to the waters of bays, straits, or sounds, when a state can prove by historical usage that such waters have been traditionally subjected to its exclusive authority." This quotation is taken from a letter dated November 13, 1951, from James E. Webb, Under Secretary of State, to J. Howard McGrath, Attorney General, in reply to the Attorney General's request for a statement from the Department of State in regard to the United States position as to criteria which govern delimitation of United States territorial waters. This letter is reprinted in *Hearings before the House Committee on Merchant Marine and Fisheries on H.R. 9584*, 83d Cong., 2d Sess. at 38 (1954).

¹⁰² See note 27, *supra*. This protest was based on both geographic and historic grounds.

¹⁰³ Dean, *supra*, note 27.

other side of the balance between wide versus narrow territorial seas. However, other avenues are open to protect coastal fishing interests. The United States position regarding the validity of conservation efforts is well illustrated by the Presidential Proclamation of 1945,¹⁰⁴ and by its continued participation in collective action with other nations to effect treaties protecting fishery stocks. This attitude of international cooperation is reflected in the following statement: "There is not, in the view of the United States, any fundamental and legitimate interest of coastal states . . . which cannot be satisfactorily reconciled through a procedure of international agreement based upon a negotiation among states enjoying equal sovereignty and equal rights."¹⁰⁵ The solution to North Pacific fishery conflicts will undoubtedly lie along this avenue. That these four nations have been able successfully to utilize this approach with regard to conservation of one fishery resource is amply illustrated by the convention for the protection of fur seals.

The potential ineffectiveness of any agreement reached without the cooperation of all four of the North Pacific fishing powers is apparent. The fruit of the conservation and abstention efforts of the signatory nations could be harvested without restraint by non-member nations. The alternative approach of free exploitation by all carries the equally obvious hazard of probable future extinction of certain ocean stocks, thereby injuring all. In this reality lies the real hope of international cooperation to protect the North Pacific fisheries.

BEVERLY J. ROSENOW

¹⁰⁴ The main portion of the text of this proclamation is cited *supra*, note 50.

¹⁰⁵ 32 DEP'T STATE BULL. 696, at 697 (1955).