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INTRODUCTION

The United States, Canada, and Japan signed the International Convention for the High Seas Fisheries of the North Pacific Ocean [hereinafter cited as Tripartite Treaty] on May 9, 1952,[1] 11 days after the effective date of the Japanese Peace Treaty. This fisheries Treaty became effective June 12, 1953. It initiated the "abstention" principle whereby Japan agreed to abstain from fishing stocks of North American spawned salmon when the Commission, created in the treaty, was satisfied that the United States and Canada were taking the "maximum sustainable yield"[2] of those stocks, when it was demonstrated that United States and Canadian fishermen were being regulated by law toward the production of the maximum sustainable yield, and when continuing scientific studies were being carried on to assure such full utilization. In application of this concept the Japanese, in the annex to the treaty, specifically agreed to abstain from fishing for North American spawned salmon east of a line in the Bering Sea located for the most part at longitude 175° W.

The treaty had a mandatory life of 10 years, which elapsed on June 12, 1963, and is now terminable on one year written notice by any of the three parties.[3] Criticism from both sides of the Pacific has brought

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[1] International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952 [1953] 4 U.S.T. 380, T.I.A.S., No. 2786 [hereinafter cited as Tripartite Treaty].

[2] The goal of maximum sustainable yield is also set forth in the preamble of the Tripartite Treaty, where it is said that "it will best serve the common interest of mankind, as well as the interests of the Contracting Parties, to ensure the maximum sustained productivity of the fishery resources of the North Pacific Ocean...." A considerable body of literature has grown up over the past few years debating the issue whether "maximum sustainable yield" or "maximum economic yield" is the more rational goal for high seas fishery management. *See, e.g.*, F. CHRISTY & A. SCOTT, THE COMMON WEALTH OF OCEAN FISHERIES (1965). The relationship between these two concepts is an interesting and important one for the North Pacific salmon fishery as in other high seas fisheries, and is discussed at length in the article in this symposium by Dr. James A. Crutchfield.

[3] Tripartite Treaty, art. XI, para. 2.

about negotiations toward a new agreement. The aspirations of the participants can be simply stated: Japan wants a larger share of the North American spawned salmon, the United States wants the Japanese to have a smaller share,[4] and Canada wants to continue the total exclusion of the Japanese from Canadian spawned salmon.

It might seem curious at first glance that the Japanese have not terminated the Tripartite Treaty under the one-year termination provision. If they did, they would have the legal right to fish anywhere outside the United States 12-mile fisheries zone, and could, of course, take a much larger share of salmon. A number of reasons contribute to their failure to take this action, one of the more important of which is the ever tightening squeeze in which Japan is caught, between the two most powerful nations in the world, the United States and the Soviet Union.[5]

The Russians, like the Americans, objected to the Japanese catch of salmon on the high seas, in their case Soviet-spawned salmon, and in 1956 entered the Northwest Pacific Fisheries Convention with Japan, creating a Fishery Commission with the power to set annual quotas of Soviet-spawned salmon to be taken on the high seas by Japanese fishermen. Over the past few years the Soviets have become increasingly alarmed over the decline of Soviet-spawned salmon stocks; in addition, they seek to increase their own quota vis-à-vis the Japanese under the 1956 convention; they have thus insisted upon a gradual reduction of the Japanese high seas catch. At the same time, the United States continues to press for a larger share of the Bristol Bay salmon runs and

[4] The Japanese catch of North American spawned salmon taken west of the abstention line is considerable, averaging an estimated 30% of the total (Japan-United States) catch from the Bristol Bay run for the 10 years from 1956 to 1965, with respective highs of 59.3% in 1957, 37.4% in 1961 and 24.1% in the spectacular run of 1965. There is little evidence that any of the salmon spawning in British Columbia rivers, or in the rivers of Washington, Oregon, or California are caught by the Japanese because few, if any, of these fish roam beyond the 175° abstention line.

[5] Furthermore, the Japanese are quite aware of the intense feelings generated by the salmon issue among powerful political groups in the United States. Some Japanese believe their country may be better off remaining with the present treaty, under which they are only restricted from certain areas of the high seas, rather than abrogating it and thereby risking the ill feeling that could be expected in this country and the possible damage to other sectors of friendly Japan-United States relations.

It should be remembered that, like Japan's attitude toward the United States, the United States considers Japan's friendship and economic well-being important and valuable assets. In spite of these general feelings of friendliness and good will, however, it would be misleading to leave the impression that fishery negotiations between the two countries are marked by attitudes of softness or indecision. They are not. Those associated with the negotiations describe them as firm, tough, and intelligently handled on both sides.

is attempting to push the abstention line further west in an effort to exclude the Japanese salmon fishermen from an ever larger portion of the North Pacific.

Given this pressure from both sides, the Japanese have very little room to maneuver. Very possibly if they gained some slight advantage over the Americans, the Russians would insist upon a proportionate reduction in the Japanese quota, on the ground that the Japanese were getting their "share" of salmon elsewhere. Thus, if the Japanese were able to push the abstention line (now at longitude 175° W.) five degrees further east, the Soviets might insist upon adding this five-degree area to the "zone" set up under the 1956 convention which now borders on the 175° line, and resist strenuously any increase in the total Japanese quota.

Some observers have suggested the possibility of the Soviets and Americans combining in new treaty negotiations to present a common front against the Japanese concerning the latter's high seas salmon fishery. With this combined power the two countries might put greater pressure on the Japanese. After all, nearly all the salmon caught by the Japanese are spawned in either Soviet or American streams. Several reasons for the lack of such a common approach can be given. Neither the Soviet nor United States governments apparently wishes to push the Japanese that hard. Each has other, nonfishery reasons, both political and economic, for staying on good terms with the Japanese. Also, the United States has hesitated to deal directly with the Soviet Union for fear the Russians will insist on other concessions for their cooperation. Lastly, the Soviet Union is in an ambivalent position with regard to abstention. They vigorously opposed the principle at the 1958 Geneva Conference, yet they certainly would be expected by the United States to support it now in any joint dealings with Japan. But if they did so, they might find that it works more to the benefit of the Japanese than to themselves. The Japanese, after all, have a considerably longer history of salmon fishing along the Siberian coast than do the Russians, and the Japanese might claim that abstention requires the Soviets to stay out of that part of the fishery historically exploited by the Japanese.

The Soviet salmon runs along the Siberian coast are very large, although not quite as large as those along the North American coast. These runs are no doubt one of the reasons why the Russians have never attempted to fish commercially for North American spawned

salmon. If they fished for United States spawned salmon on the high seas, the United States fishermen might reciprocate, with mutually destructive results. Besides, both countries find that they can harvest their salmon most economically close to their respective shores, near the spawning streams. The Russians, like the Americans, do not engage in high seas net fishing for salmon. Their fishing is limited to coastal and territorial waters off the Soviet Union. Only the Japanese fish for salmon with nets on the high seas.

This article will briefly describe the events that followed the signing of the Tripartite Treaty and the recent negotiations attempting to replace or modify that treaty. After describing the current state of negotiations between Japan and the United States, the article will then examine several key isues that form the focal points of the disagreement.[6] Was Japan coerced into signing the Tripartite Treaty in 1952? What is the meaning of the Protocol and the abstention line at longitude 175° W.? What is the standing of the abstention principle in international law? What are the policy arguments for and against abstention, especially in the North Pacific?[7] What will happen if the Tripartite Treaty is abrogated and what then would be the effect of the 1958 Geneva Convention on Fishing? And finally, what effect might Korean entry into the North Pacific fishery have on the relationship of Japan, Canada and the United States?

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[6] It should be noted too that the current controversy with Japan concerns the question of who *catches* the fish, not who processes, markets, or consumes them. Nor is "conservation," *i.e.,* management toward maximum sustainable yield, the main issue in the controversy. Both Japan and the United States agree that "conservation" of the salmon resource is essential in order that the supply of fish not be depleted; this concept is, after all, one of the cornerstones of the Tripartite Treaty. They do not, however, agree on its implementation. Theoretically conservation management could be carried out whether the fish are caught by Japanese or American fishermen. But the situation is more complex than this. First, the goal of maximum sustainable yield, although verbally accepted in the treaty, is not by any means the exclusive and controlling goal of either of the two nations. Furthermore, the question of applying this goal to the several thousand salmon stocks of the North Pacific and Bering Sea is the subject of continuing and heated controversy between the two nations, the Japanese usually arguing that more salmon can properly be caught, and the Americans arguing the opposite. It has been suggested at various times by the Japanese that these problems of implementation might be solved more easily if they were allowed to participate directly in the decision-making process. However, the Americans fear that to do so might (1) somehow allow the Japanese to get a larger share of the salmon, and (2) make the decision-making process too cumbersome to be workable. The United States already has great difficulty in arriving at its own salmon management decisions, given the diversity of views among commercial fishermen, sports fishermen, cannery owners, fishery scientists, and government officials. Bringing in the Japanese, with a wholly different set of values and pressures, might bring the whole process to a standstill.

[7] References made to the "North Pacific" in this article are intended to include the Bering Sea unless otherwise indicated.

I. Recent Negotiations

The Tripartite Treaty requires the Japanese to abstain from fishing for salmon in the Pacific Ocean or Bering Sea east of the meridian at longitude 175° W.[8] In the protocol to the treaty this line is clearly denoted a "provisional" line, "subject to confirmation or readjustment"[9] at a later time, when more facts about the salmon are known. Investigations are to be conducted by the North Pacific Fisheries Commission (created by the treaty) and recommendations for a new line reported to the three governments. The Commission is to determine if, in some areas, salmon originating in Canadian and United States waters intermingle with salmon originating in Asian waters. "If such areas are found the Commission shall conduct suitable studies to determine a line or lines which best divide salmon of Asiatic and salmon of North American origin."[10] The provisional line at longitude 175° W. is not to be changed, however, unless "it can be shown beyond a reasonable doubt that the new line or lines more equitably divide"[11] the salmon than the provisional line.

Recommendation of a new line requires a unanimous Commission decision. In the event of failure to recommend such lines within a reasonable time the matter is to be transferred to a special committee of three scientists from nations other than the contracting nations. A majority of this special committee can recommend a new line and the Commission shall make its own recommendation in accordance therewith.[12]

Shortly after the signing of the Convention, United States fishermen

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[8] This is the correct abstention line for salmon through the North Pacific and north through most of the Bering Sea. However, in the northerly portion of the Bering Sea the line changes somewhat, and is described thus:

> the line starting from Cape Prince of Wales on the west coast of Alaska, running westward to 168°58'59" West Longitude; thence due south to a point 65°15'00" North Latitude; thence along the great circle course which passes through 51° North Latitude and 167° East Longitude, to its intersection with meridian 175° West Longitude; thence south along a provisional line....

Tripartite Treaty, annex, para. 2.

[9] Tripartite Treaty, protocol (emphasis added):

> The Governments of the United States of America, Canada, and Japan agree that the line of meridian 175° West Longitude and the line following the meridian passing through the western extremity of Atka Island, which have been adopted for determining the areas in which the exploitation of salmon is abstained or the conservation measures for salmon continue to be enforced in accordance with the provisions of the Annex to this Convention, *shall be considered as provisional lines* which shall continue in effect *subject to confirmation or readjustment* in accordance with the procedure mentioned below.

[10] Tripartite Treaty, protocol.

[11] *Id.*

[12] *Id.*

began to fear the effect of Japanese fishing for Bristol Bay salmon beyond the 175° line. These fears were expressed at the annual Commission meeting in 1957;[13] in 1958 the United States delegation declared that unless the Japanese were regulated in their high seas catch of Bristol Bay salmon the United States might have to close its own inshore fishery for these stocks.[14] The Japanese disagreed, stressing the need for further "development" and suggesting that the United States was not taking the maximum sustainable yield of these fish. Subsequent meetings brought further disagreements over the Japanese catch beyond the 175° line, and over the meaning of the language of the protocol concerning the location of a new line. To resolve the latter question an Ad Hoc Committee on the Protocol was appointed,[15] but after studying the question the Committee was unable to arrive at an agreement.[16] The Commission thereupon adopted a resolution requesting the three signatory nations to "provide the Commission with an interpretation of the intent of the Protocol as soon as is practicable."[17] To date no interpretation has been agreed upon.

On the other hand, by 1959 it had become apparent that certain herring stocks did not meet the abstention requirements and were removed from the protection of the treaty.[18] In 1962 most of the remainder of the herring stocks, and all the halibut in the "triangle" area between the Pribilof Islands and the Aleutian chain were removed from the protection of the treaty.[19] This latter decision was especially important as a confirmation by the United States of its intent to "live up to" the obligations of the treaty, even though doing so brought severe criticism from within the country. It also demonstrated some of the problems inherent in the abstention procedures within the treaty.

The Commission had taken the position that any nation advocating a stock of fish for abstention must, under the treaty, carry the burden of proof that the stock meets the treaty requirements. The United States was thus called upon to prove that the maximum sustainable yield of halibut was being taken from the "triangle" area. It was unable to do so. The problem was not that the Japanese could prove more fish could safely be taken from the area, but rather that the

[13] 1957 INT'L NORTH PACIFIC FISHERIES COMM'N ANN. REP. 8 [hereinafter cited as INPFC ANN. REP.].
[14] 1958 INPFC ANN. REP. 2.
[15] 1956 INPFC ANN. REP. 8.
[16] 1959 INPFC ANN. REP. 4-5.
[17] *Id.*
[18] 1959 INPFC ANN. REP. 9.
[19] 1962 INPFC ANN. REP. 11-13.

United States could not prove otherwise. Failing satisfactory evidence on *either* side of the issue the decision necessarily went against the party carrying the burden of proof. The evidence marshalled by the United States was insufficient for two reasons: relatively little fishing had occurred in the area in previous years, and only minor research had been conducted in the area.[20]

Numerous other developments have also occurred since the treaty was signed in 1953 which suggest the need for review of the treaty structure.[21] Thus in 1963, when the 10-year mandatory life of the treaty came to an end, pressure was initiated in both countries toward renegotiation. Negotiators were appointed and held two meetings in 1963, one in Washington, D.C., in June, and the other in Tokyo in September. A third meeting was held in Ottawa in September, 1964. These meetings have not resulted in any new agreement.[22]

At the June 1963 meeting Mr. Masayoshi Ito, chairman of the Japanese delegation, called for a new North Pacific treaty which would abandon the principle of abstention.[23] Reference was made to the intrusion of the large Soviet fishing fleet into the convention area and

[20] Johnson, *Fishery Developments in the Pacific*, in DEVELOPMENTS IN THE LAW OF THE SEA 1958-1964 at 140-41 (British Institute of International and Comparative Law Spec. Pub. No. 6, 1965).

The first year after the "triangle" was opened the catch increased excessively, resulting in a severe decline in the resource and suggesting that possibly the area should not have been subjected to a greater fishing effort. Total production in the brief 1965 season in which 27 Canadian and United States vessels operated was 553,000 pounds, only 25.8% of the 1964 figure. 1965 INPFC ANN. REP. 9. In recent years the imposition of stringent controls has gradually brought about the rehabilitation of the resource.

[21] Some of the more significant developments which affect the Tripartite Treaty were discussed in a series of articles appearing in a 1962 Japanese fisheries trade journal. The subheadings in these articles indicate the broad range of relevant post-treaty developments:

1. Extension of range of operations of Japanese mothership-type salmon fishery.
2. Development of Japanese mothership-type bottomfish fishery.
3. United States systematized control of Bristol Bay fishery.
4. Development of scientific knowledge on the intermingling of salmon of North American and Asian origin on the high seas.
5. Progressive expansion of Soviet fisheries in the Northern waters.
6. Establishment of closer ties between Japan and the United States after conclusion of the Peace Treaty.
7. Alaskan statehood.
8. Increase of Japanese exports of marine products to the United States.
9. International trend toward regulation of fisheries.
10. Rejection of abstention principle under international law.
11. Effect of Russian-Japanese fisheries treaty.

News Concerning Developments in Japanese Fishing Industry, U.S. Bur. Comm. Fish., Japanese Press Transl., Aug. 8, 1962, at 3-10. (*Minato Shimbun*, July 25-Aug. 3, 1962.)

[22] Taguchi, The Salmon Resources and Salmon Fisheries Around the Pacific Ocean, U.S. Bur. Com. Fish. Transl., 1966, 10-14 (*Taiheiyōsan sake-masu shigen to sono gyōgyō*).

[23] Seattle Times, June 6, 1963, at 1, col. 3.

the need to reform the agreement in order to take account of resulting changes. Mr. Ito also pointed out that the large Japanese bottomfish fleet operating off Alaska could not avoid catching a substantial number of halibut in their nets, which, under the treaty, were required to be thrown back into the sea. In view of the difficulties of sorting out and throwing back the halibut, many of which are necessarily injured in the process, and in view of the disproportionately greater value of the Japanese bottomfish fishery in comparison to the United States halibut fishery, the Japanese urged a change in the treaty to allow them to retain these accidentally caught fish. The Japanese proposed a new draft treaty which, although never made public, was reported in the press as discarding the abstention principle and accounting for the large scale expansion of Soviet fishing fleets in the area.[24]

The United States rejected the Japanese proposals. The Japanese were told that the United States and Canada had both moral and historic rights to salmon spawned in North American streams and to halibut in the Gulf of Alaska.[25] These two countries then proposed that limits be set on Japanese fishing east of the 175° line as to numbers of fish, types of gear and times for fishing. It was noted that the Russians and Japanese, through a joint commission, each year set the number of salmon the Japanese are permitted to take on the high seas.[26] The United States felt it should similarly have a voice in the Japanese high seas catch of North American spawned salmon.

The United States delegation was urged by United States fishing interests to seek additional protection for Bristol Bay red salmon at the second meeting of the negotiators in Tokyo, in September 1963. The industry urged that this country threaten the Japanese with economic sanctions if agreement could not be reached.[27] Senators Magnuson and Bartlett, of Washington and Alaska, demanded that the Japanese abstain from fishing for North American spawned salmon anywhere on the high seas, east or west of the 175° abstention line. The possibility of moving the abstention line further east if the Japanese would agree to abstain completely from fishing for North American spawned salmon was mentioned. These Senators urged continued recognition of the historic rights claim formulated by former Secretary of State Cordell Hull in the late 1930's. It was reported that the American negotiators

[24] Seattle Post-Intelligencer, June 7, 1963, at 41, col. 2.
[25] Seattle Times, June 16, 1963, at 38, col. 3.
[26] Seattle Times, June 16, 1963, at 38, col. 3.
[27] Seattle Times, Sept. 6, 1963, at 18, col. 3.

were surprised at the firmness of the Japanese in demanding abolition of the abstention principle.[28] Such a stand should not have been surprising in view of the vigorous opposition to this principle often expressed in Japan.[29] The Japanese characterized the principle as causing "unfair monopolistic discrimination" and as being "completely unreasonable." Four objections to abstention were raised: (1) the North Pacific Treaty was negotiated while Japan was still under allied military occupation and the Japanese position at the time was so weak they could not adequately protect their own interests; (2) as the most active fishing nation in the world Japan is interested in exploiting all her rights under the basic doctrine of freedom of the seas, a doctrine the United States has strongly advocated in times past; (3) Japan has serious fishing problems with several other nations and by agreeing to the abstention principle she seriously weakens her position with these other nations who would also like to ask the Japanese to abstain from fishing certain other stocks of fish; (4) Japan is perfectly willing and capable of engaging in genuine conservation measures toward developing and maintaining maximum sustainable yield if the abstention principle is dropped.[30]

At the Tokyo session the United States surprised the Japanese by agreeing to drop the abstention principle.[31] Apparently this was an agreement to drop the principle in name only, in effect, still requiring the Japanese to refrain from fishing the same stocks of fish. In return for the change the Americans asked that all parties to the new treaty

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[28] Seattle Times, Sept. 22, 1963, at 34, col. 6.

[29] Reports in Japanese publications indicate strong pressure from some political groups, and from the fishery industry, to abolish the abstention principle, through abrogation of the treaty under the one-year notice provision if necessary. For example, in 1963 the Japanese Socialist Party urged the Japanese Government to "immediately give notice to the United States and Canada of Japan's intention to formally terminate the present treaty" and prepare a new one which would include concepts of equality, reciprocity and freedom of the high seas. California Fish Canners Ass'n, Japanese Press Transl., June 21, 1963, at 1. The Japan Socialist Party again called for abrogation of the treaty in August, 1965; *see* PAC. FISHERMAN, Sept., 1965, at 16. (*Suisan Keizai Shimbun*, June 12, 1963.)

At the Ottawa meeting of the treaty negotiators in 1964 it was reported that the Japanese Government was receiving "strong pressure from industry" not to compromise on the issue of abstention. U.S. Bur. Com. Fish., Japanese Press Transl., Aug. 27, 1964, at 1. (*Suisan Keizai Shimbun*, Aug. 16, 1964.) In October, 1964, Mr. Iwao Fujita, Vice President, Japan Fisheries Society, urged the Japanese fisheries industry to consider whether Japan should abrogate the treaty if negotiations drag on without making any progress. U.S. Bur. Com. Fish., Japanese Press Transl., Oct. 14, 1964, at 2. (*Suisan Keizai Shimbun*, Oct. 7, 1964.) At the same time the fisheries industry argued that it was meaningless to continue the negotiations and urged the government to abrogate the treaty. *Id.*

[30] Seattle Times, Sept. 22, 1963, at 10, col. 1.

[31] Seattle Times, Sept. 25, 1963, at 73, col. 4.

restrict their fishing east of the 175° line to waters and methods used in the previous five years. The effect of this would be to bar Japan from all salmon fishing east of the line and prevent any expansion of Japanese halibut fishing in the same area. It would, of course, also prohibit Canadians and Americans from changing catching methods or exploiting bottomfish which Japan had been taking east of 175°. The apparent intent of these new provisions was to create the aura of bilateral restraint, *i.e.*, restraint in fishing effort both by Japan and the United States, and not merely by the former. These proposals did not meet with Japan's favor. They were characterized by one spokesman as "no more than a euphemism expressed in what appeared to be a compromising semantic."[32] The Japanese claimed that the proposal totally ignored the three basic principles which Japan demanded: freedom of the high seas, equal access to the resources, and joint (tripartite) control measures for the conservation thereof.

The poor Bristol Bay salmon fishing runs in 1962, 1963, and 1964 lent urgency to the negotiations held in September, 1964.[33] However, the positions of the principals remained adamant. The Japanese said the United States appeared to want a monopolistic and exclusive interest in North Pacific salmon fishery. The Americans continued to criticize the Japanese for their high seas salmon fishing on the ground (among others) that immature stocks of Bristol Bay salmon were being taken. Reports of the meeting said the United States was taking a stiffer line regarding halibut due to the disastrous fishing decline that followed the opening of the Bering Sea "triangle" to Japanese fishermen in 1962.[34]

This third round ended in Ottawa without agreement. No date or place was set for the next meeting. The Ottawa meetings were described as "friendly but searching;" however, observers could detect no progress.[35] Shortly after the meeting, the Japanese Agriculture-Forestry Minister, Munenori Akagi, said it was politically difficult for the United States to make any concession during a presidential campaign year. In the United States this was construed by some as suggesting the need for a fourth round of negotiations soon after the elections when United States negotiators would feel free to make some substantial concessions to the Japanese. Some United States sources

[32] *Nihon Keizai Shimbun* (Int'l Weekly ed.), Oct. 15, 1963.
[33] *See* estimates of the high seas catches given in Alaska Dept. of Fish and Game Informational Leaflet No. 82, June 15, 1966.
[34] Seattle Times, Sept. 14, 1964, at 1, col. 3.
[35] Seattle Times, Oct. 1, 1964, at 31, col. 2.

warned of a possible "post election giveway."[36] At the same time agitation mounted in Japan for abrogation of the Tripartite Treaty if negotiations did not produce a new, acceptable agreement.[37] Some voices urged retention of the present treaty on the ground that so long as no new agreement was reached on a new abstention line, the Japanese could legally continue to take large quantities of United States spawned salmon west of that line.[38]

To date no new negotiations have been held, and none are planned. Both sides continue to express their dissatisfaction with the present state of affairs. In the spring of 1965, representatives of the fishing industry from Washington, Oregon, and Alaska met with State Department officials in Washington, D.C., to discuss methods of preventing the possibility of Japanese high seas fishing for Bristol Bay salmon during the summer of 1965. These representatives repeated a request that in the future American negotiators hold out for a new treaty which would move the provisional abstention line ten degrees further west.

To increase the pressure on the Japanese, the United States Senate passed a bill on May 19, 1965, permitting the President to increase import duties on fish products by as much as 50 percent for any country whose practices were "found to be injurious to United States fish conservation programs."[39] Although Japan was not mentioned specifically in the bill, the sponsors made it clear that Japan was the country to be punished.[40] Also during May, the newly formed Congress of American Fishermen threatened a national boycott of Japanese imports effective June 1, 1965, unless the Japanese agreed not to fish for United States spawned salmon, east or west of the abstention line. About the same time, Alaska's Governor Egan proposed a plan whereby a low dam would be built across Bristol Bay which would

[36] Seattle Times, Oct. 6, 1964, at 8, col. 1.

[37] U.S. Bur. Com. Fish., Japanese Press Transl., Oct. 14, 1964, at 2. (*Suisan Keizai Shimbun*, Oct. 7, 1964.)

[38] U.S. Bur. Com. Fish., *supra* note 29.

[39] S. 1734, 89th Cong., 1st Sess. (1965).

[40] S. REP. No. 194, 89th Cong., 1st Sess. 4-7 (1965):

> The law for many years has prohibited American fishermen from engaging in high seas salmon net fishing. It has been clearly established by scientific evidence that high seas salmon fishing with nets is detrimental to the conservation of the resources and is shockingly wasteful. Despite this clear evidence, the Japanese high seas fishery has within the past several years engaged in the taking of salmon of American origin on the high seas with nets.
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> The wastefulness of high seas salmon fishing was emphasized by several witnesses... [Dr. William F. Royce, Governor William A. Egan; Congressman Lloyd Meeds, Washington State.].

Those opposed to the bill (S. 1734) included the Japan Fisheries Association and the American Seafood Distributors Association.

stop the migration of these salmon to the sea if the Japanese persisted in their high seas salmon fishery. (This is reminiscent of the 1961 effort by Alaska, on the basis of historic rights, to declare Bristol Bay, inside the 170 mile line drawn from Cape Newenham to Cape Menshikof, internal waters; this effort was thwarted by Secretary of State Rusk's declaration on behalf of the United States denying any historic claim to these waters.)[41] Although the Egan plan was considered biologically absurd by the United States scientists, it nonetheless served to exemplify the angry mood of the Alaskans concerning the Japanese high seas salmon fishery.

Japan answered these charges in late May 1965, arguing that its fishermen planned to fish only west of longitude 175° W. in accordance with their legal right under the Tripartite Treaty; that the 175° line was established as a compromise line because the areas and rates of mixing of North American and Asian salmon were not known; and that Japan had never absolutely agreed not to catch salmon of North American origin but only to refrain from taking them east of the 175° line so long as the United States met the conditions set out in article III(1)(a) of the Tripartite Treaty.[42]

The threatened action by United States fishing interests did not bear much visible fruit. The Senate Bill permitting the President to increase import duties on Japanese (or other nation's) products when that nation refuses to act in accordance with United States fish conservation laws failed to pass in the House. The attempted boycott of the Congress of American Fishermen received little support from the public and apparently had little impact on Japanese trade with the United States. Whether these threats had any substantial impact on Japanese policy is a matter of conjecture. In any event, during the summer of 1965 eleven Japanese motherships and 369 catcher vessels fished for salmon on the high seas west of longitude 175° W. and took

[41] This claim arose when Alaska attempted to impose a fish processors tax on the *Arctic Maid*, a vessel licensed in the State of Washington and operating more than three miles offshore but with small catcher vessels operating within three miles. Alaska attempted to impose its tax on the *Arctic Maid* on the ground that Bristol Bay was legally internal waters because of long established historic claims by the United States and Alaska. While an appeal was pending in the case before the state supreme court the United States filed an amicus curiae brief, in which it referred to a letter written by Secretary of State Dean Rusk to the United States Attorney-General setting out the official United States position on territorial sea claims on Bristol Bay. The Secretary denied any historic rights claim to the bay, then said the United States only claimed that area allowed under article 7 of the Territorial Sea Convention of 1958 providing for a maximum closing line of 24 miles in bays. *See* Rosenow, *North Pacific Fisheries Treaties and International Law of the Seas*, 38 WASH. L. REV. 223 (1963); Johnson, *supra* note 20.

[42] Portland Oregonian, May 27, 1965, at 33, col. 1.

an estimated 6,168,000 Bristol Bay red salmon, 24.1 percent of the total estimated catch of 33,236,000.[43]

In the United States public criticism of Japanese high seas salmon fishing dropped very rapidly as the 1965 season progressed, when it became apparent that a record run was in the making. Whether or not the accusations that the Japanese fishermen were in the long run depleting the Bristol Bay stocks were true, such criticism seemed untimely in the face of the largest run in history.[44]

The heated accusations of 1965 were not repeated in 1966, or at least they appeared in much subdued form, both sides apparently becoming resigned to a continuation of the status quo.

II. Was Japan Coerced into Signing the Tripartite Treaty in 1952?

Over the past few years some Japanese have complained that their country was coerced into accepting the terms of the Tripartite Treaty. They charge that the negotiations for the treaty occurred during November and December 1951, while Japan was still occupied, before the ratification of the Peace Treaty by the United States on April 15, 1952, and before the effective date of the Peace Treaty on April 28, 1952.[45]

The charge of duress has not generally been recognized in international law as grounds for vitiating a treaty.[46] Although writers have criticized this rule[47] it has not been changed. However, whether or not a treaty is legally binding, the "lasting effect of any . . . treaty will depend far more on its intrinsic fairness as viewed in later years, and on the subsequent course of international politics, than upon its legally binding character."[48] It is therefore important to examine carefully the charge of "duress" made by Japan. In this context it should be remembered that the mandatory life of the Tripartite Treaty was 10 years. Since 1963 Japan has been in a position to "legally" terminate

[43] Informational Leaflet No. 82, *supra* note 33.

[44] *Id.*

[45] *See, e.g.,* Taguchi, *supra* note 22, at 1; T. Matsushita, The Japan-United States-Canada Fishery Treaty 15 (U.S. Bur. of Comm. Fish. Transl. Ser. No. 20, July 25, 1958); U.S. Bur. of Comm. Fish. Japanese Press Transl. Aug. 8, 1962; (*Minato Shimbun* July 25-Aug. 3, 1962); Address by Edward W. Allen, Northwest Pacific Regional Conference on Int'l Law, Univ. of British Columbia, April 6, 1963; Seattle Times, Sept. 22, 1963, at 10, col. 1.

[46] *See* 5 G. Hackworth, International Law 158 (1943); W. Bishop, International Law, Cases and Materials 95-96 (1953).

[47] J. Brierly, Law of Nations 230-31 (4th ed. 1949); 1 L. Oppenheim, International Law § 499 (7th ed. 1948).

[48] W. Bishop, *supra* note 46.

the treaty, on any grounds whatsoever (or without any grounds), merely by serving one year notice. This tends to reduce the importance of the duress argument, although the Japanese point out that the posture of the two countries in the present stalemate is a product of the pattern set in 1952 and that one of the important reasons why the Japanese are so unhappy with the treaty is their belief that they were over-borne at that time.

The question of duress can only be considered in the context of the total relationship of the two countries during the period in question. The Second World War had ended just 6 years earlier. Japan was still occupied, although that occupation was now coming to an end. The times were uncertain for Japan, the future holding both promise and hazard for a new and unstable economy. The Japanese people were grateful to the United States for the humane manner in which this country treated Japan after the war, and for the food, industrial equipment, building supplies and other economic aid. Because of their defeat and the circumstances attending that event, the Japanese people had become rather disillusioned with their prewar and wartime militarist regime, had lost much of their national self-confidence, and had tended to turn away from nationalism, militarism and aggression toward internationalism, pacifism, and law and order.[49]

The more immediate background for the negotiations on the Tripartite Fisheries Treaty was the impending ratification of the Japanese Treaty by the United States. This treaty meant a great deal to the Japanese in terms of sovereignty, independence, and termination of the occupation. The chronology of events surrounding the Peace Treaty and the Tripartite Fisheries Treaty deserves careful notice:[50]

> September 8, 1951: Peace Treaty signed by Japan, United States and forty-six other nations. (Japan-United States defense treaty signed at same time.)
>
> October 26, 1951: Peace Treaty ratified by Japanese Diet.
>
> November 4-December 14, 1951: Negotiations for Tripartite Fisheries Treaty.
>
> March 20, 1952: United States Senate advises ratification of Peace Treaty.
>
> April 15, 1952: President Truman ratifies Peace Treaty.
>
> April 28, 1952: Peace Treaty becomes effective. (Japan-United States defense treaty effective same date.)
>
> May 9, 1952: Tripartite Treaty signed by all parties in Tokyo.

[49] E. REISCHAUER, JAPAN-PAST AND PRESENT 202-05, 250-58 (2nd ed. 1964); E. REISCHAUER, THE UNITED STATES AND JAPAN 205, 222, 296 (3d ed. 1965).

[50] Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 2490, T.I.A.S. No. 2490,

July 30, 1952: President Truman ratifies Tripartite Treaty.
June 9, 1953: Japan ratifies Tripartite Treaty.
June 12, 1953: Tripartite Treaty enters into force.

Thus while the Tripartite Treaty was being negotiated, the United States Senate was considering the approval of the Peace Treaty. Because of the vital importance of the Peace Treaty to Japan, and because of the Japanese fear of antagonizing the Senate into either refusing to approve, or delaying approval of this important document, some Japanese claim Japan was unfairly constrained in their bargaining on the fisheries treaty. They also point out that the pattern of events preceding the fishery treaty negotiations gave Japan reason to fear for her bargaining power on the fisheries issue. One of these events was the exchange of letters between Prime Minister Yoshida and Secretary of State Dulles in February, 1951. To understand the significance of this exchange it is necessary to comment on certain preliminary matters.

Immediately following the war the United States became concerned that Japanese fishermen might suddenly acquire an interest in Bering Sea and North Pacific salmon and send a fishing fleet out to participate in those fisheries. To prevent that possibility the Supreme Commander, Allied Powers issued a directive, on June 22, 1946, establishing the "McArthur Line" beyond which Japanese fishermen were prohibited from fishing. This line enclosed the area immediately around the Japanese islands and that portion of the high seas lying due east of these islands for about 1500 to 2000 miles.[51] It did not include the Bering Sea, or any part of the Pacific in which North American spawned salmon can be found. This line remained in effect until April 12, 1952.[52] Prior to its repeal the United States again became concerned that between the time of repeal and the effective date of the Tripartite Fisheries Treaty on June 12, 1953, the Japanese might attempt to send a salmon fleet into the Bering Sea or North Pacific; thus the Yoshida-Dulles exchange of letters occurred.[53] The Japanese government promised to prohibit fishing activities in those areas where international or domestic conservation regimes were in existence, and where Japanese nationals or Japanese vessels had not been engaged in fishing in 1940.

136 U.N.T.S. No. 1832, at 49. Tripartite Treaty, *supra* note 1 (205 U.N.T.S. No. 2770, at 65).

[51] *See* map, Appendix.

[52] Taguchi, *supra* note 22, at 7.

[53] *Id.*

Some Japanese have since argued that the chain of events preceding the negotiation of the Tripartite Treaty placed the Japanese in an awkward position. The Japanese were aware of the widespread distrust in the United States of their fishery ambitions. They were concerned that this distrust would heighten, and that unless Japan cooperated in the fish treaty negotiations they might be further restrained from participating in the high seas fishery.[54]

Apparently some thought had been given to the inclusion of the fisheries agreement as part of the overall Peace Treaty,[55] but this was rejected and the Peace Treaty only provided generally that Japan would shortly engage in a fisheries treaty for the North Pacific and would recognize the need for conservation measures for the stocks of fish found there.[56]

In view of these events, the questionable sovereign equality of Japan at the time of the fishery negotiations assumes some importance. The status of Japan in this respect was apparently considered doubtful enough to be the subject of a "Memorandum" from the Supreme Allied Command to the Japanese Government,[57] dated November 5, 1951 (the opening date of the fishery negotiations) wherein the Supreme Command purported to affirm the sovereign status of Japan for the purpose of negotiations, saying:[58]

> In order that there may be no misunderstanding with reference to the status of the Government of Japan for the purpose of the negotiations . . . it is hereby confirmed that the Japanese delegation will negotiate and conclude the said International Convention on the basis that the Government of Japan possesses ad hoc sovereign equality with the governments of Canada and the United States.

It would seem that rather than prove the fact of Japan's "sovereign equality" at the time, this document tends to prove that such status was at least in doubt; otherwise, why would such a document be necessary![59] Furthermore, the document only purports to confirm

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[54] U.S. Bur. of Comm. Fish., *supra* note 45, at 2.

[55] T. MATSUSHITA, *supra* note 45, at 4.

[56] Treaty of Peace with Japan, art. 9, Sept. 8, 1951, 3 U.S.T. 2490, T.I.A.S. 2490, 136 U.N.T.S. No. 1832, at 45:

> Japan will enter promptly into negotiations with the Allied Powers so desiring for the conclusion of bilateral and multilateral agreements providing for the regulation or limitation of fishing and the conservation and development of fisheries on the high seas.

[57] JAPAN MINISTRY OF FOREIGN AFFAIRS, TRIPARTITE FISHERIES CONFERENCE 149 (1951). [Hereinafter cited as TRIPARTITE CONF. PROC.]

[58] *Id.*

Japanese sovereignty for this one, "ad hoc," purpose whereas experience in international relations suggests that a nation's strength in negotiating any particular treaty results from its ability to "trade-off" something desired by the other participant in a quite different, and unrelated area. The possibility of such a trade-off would seem less likely where a nation is sovereign for one purpose only.

Nonetheless the Japanese did not, at the time, complain of any lack of freedom on their part to refuse to enter the treaty if they wanted to, or to press hard for terms of their choosing. In fact at the closing of the negotiating conference the Japanese delegation said they were[60]

> exceedingly happy that the delegations of the United States, Canada, and Japan, through sincere discussions which extended over a month, have arrived at a unanimous agreement on the draft international convention .... It is the firm conviction of the Japanese delegation that ... the Conference has been brought to a fruitful conclusion through understanding and respect of each other's position. We particularly appreciate the considerations given by the United States delegation in understanding the position of Japan ....

Again, at the opening organizational meeting of the Commission created by the treaty, the Minister Plenipotentiary of Japan remarked how "extremely happy" Japan was with the Treaty, and he expressed confidence that the principles set forth in it would be a "guiding spirit" for the conduct of fisheries in other areas of the high seas.[61] Even as late as 1963 the late, respected Mr. Koichiro Kobayashi, then Presi-

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[59] It should be remembered that the authority which SCAP held was extremely extensive and absolute, as illustrated by part of the text of the message transmitted September 6, 1945, through the Joint Chiefs of Staff to General McArthur, approved by President Truman:

> The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied Powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.... You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

U.S. DEPT. OF STATE, THE AXIS IN DEFEAT: A COLLECTION OF DOCUMENTS ON AMERICAN POLICY TOWARD GERMANY AND JAPAN at 114. The question of the effectiveness of this Memorandum to give Japan equal sovereign status is commented upon in T. MATSUSHITA, *supra* note 45, at 15.

[60] *See* TRIPARTITE CONF. PROC. at 189. The Japanese delegation to the Fisheries Conference also said, some 5½ months prior to the effective date of the peace treaty, that the fisheries "Treaty to be concluded on this occasion is the first to be negotiated and entered into by Japan on the basis of sovereign equality since the war." TRIPARTITE CONF. PROC. at 173.

[61] Remarks as quoted in an Address by Edward W. Allen, Northwest Pacific Regional Conference on International Law, at the Univ. of British Columbia, April 6, 1963. *See generally* INPFC, PROCEEDINGS OF ORGANIZATIONAL MEETING (1954).

dent of Nichiro Fisheries Company, one of Japan's largest fishing companies, said in Vancouver, B.C. that "we voluntarily and willingly joined these treaties, and the purpose of all is conservation of the [fish] stocks."[62]

Two principal reasons can be cited for the view that Japan was not overreached in 1953. First, Japan had not participated in any significant degree in the high seas salmon fishery for North American spawned salmon prior to the Second World War; thus, in signing the Tripartite Treaty Japan was not giving up anything it already had, but was only foregoing a possible expectancy. Second, the treaty was written with a mandatory life of only 10 years, after which Japan could legally abrogate it for any reason upon one year's notice. If the United States had such enormous power, and purported to use it at the bargaining table to overwhelm a weakened Japan, it seems anomalous that all it would demand was a 10 year agreement. Moreover, after only 5 years under that agreement the United States became charged with the burden of proving each year that each stock of fish recommended for abstention continued to meet all the abstention requirements. That this was no mere formality was demonstrated by the failure of the United States to prove that the herring and certain halibut stocks required abstention; these were removed from abstention within this second 5-year period. More significantly, Japan, four years after the end of the mandatory life of the treaty, has not seen fit to bring about its termination, indicating that it still contains more advantages than disadvantages for the Japanese.

III. DISAGREEMENT OVER THE MEANING OF THE PROTOCOL AND THE ABSTENTION LINE AT LONGITUDE 175° W.

The protocol[63] to the Tripartite Treaty (which is also part of the treaty) contains language that has been the subject of extensive argument between Japan and the United States. To understand this dispute it is necessary to recall that in 1953, when the treaty went into effect, it was thought that few North American spawned salmon wandered west of the abstention line located, for the most part,[64] at longitude 175° W. Subsequently scientists have discovered that large numbers of these salmon can be found as far west as longitude 170° E.,

[62] Seattle Times, Nov. 26, 1963, at 41, col. 5.
[63] The protocol became part of the treaty by agreement of the three nations. *See* TRIPARTITE CONF. PROC. at 103, 109.
[64] *See* Tripartite Treaty, *supra* note 8.

some 15 degrees further west than the abstention line.[65] The United States maintains that the meaning and "spirit" of the treaty dictates that the Japanese abstain from fishing for North American spawned salmon, wherever they might be found; that the purpose of drawing the provisional line was simply to assist in administering the treaty until further investigations could occur; and that those investigations conclusively prove that United States spawned salmon[66] roam west of

[65] The following estimates* of catches of maturing Bristol Bay sockeye salmon by the Japanese west of long. 175° W. were supplied the author by private communication from R. A. Fredin, Bureau of Commercial Fisheries, in May, 1967.

Year	*Longitudinal Interval*	*Catch*
1956	170E - 175E	1,458,000
	175E - 180E	798,000
	180W - 175W	496,000
1957	Same	2,855,000
		2,189,000
		2,616,000
1958	Same	997,000
		17,000
		000,000
1959	Same	777,000
		293,000
		000,000
1960	Same	559,000
		863,000
		2,585,000
1961	Same	1,321,000
		749,000
		4,350,000
1962	Same	708,000
		401,000
		205,000
1963	Same	423,000
		556,000
		37,000
1964	Same	420,000
		103,000
		93,000
1965	Same	660,000
		1,586,000
		3,919,000
10-year average, 1956-1965	Same	1,018,000
		756,000
		1,431,000

* Estimates are based on assumption that all sockeye salmon caught by the high seas salmon fishery in the indicated longitudinal intervals during certain times of the fishing season are maturing Bristol Bay fish. Although available scientific evidence supports the assumption for years of large runs of Bristol Bay sockeye, it remains to be demonstrated that the assumption is valid for other years, particularly with respect to the high seas catches between long. 170° and 175° E.

Catch statistics for 1956-1960 are from INPFC Bull. 15; Catch statistics for 1961-1965 are from INPFC statistical yearbooks; Catch statistics for 1966 are preliminary. Final figures will be given in the 1966 INPFC statistical yearbook.

[66] *Id.*

this line, (and that an average of some 30 percent of the total Bristol Bay catch is caught there by the Japanese); therefore the line should be moved further west. The Japanese contend, to the contrary, that the literal language of the treaty is controlling and that this language only requires them to abstain from fishing for North American spawned salmon east of the provisional line. Further they contend that the line should not be moved further west because this would place a disproportionate number of Asian spawned salmon east of the line, and that they have not agreed, and did not intend to agree, to abstain from fishing for Asian spawned salmon.

The protocol expressly recognized that the line at longitude 175° W. was "provisional" and subject to relocation at some future time. The argument is over the criteria that are to be applied in relocating the line. Certain ambiguities in the protocol make the question difficult to resolve.[67]

The protocol provides that the Commission shall, as expeditiously as possible, investigate the waters of the convention area[68]

> to determine if there are areas in which salmon originating in the rivers of Canada and the United States . . . intermingle with salmon originating in the rivers of Asia. If such areas are found the Commission shall conduct suitable studies to determine a line or lines which best divide salmon of Asiatic origin, and salmon of Canadian and United States . . . origin, from which . . . [the Japanese] . . . have agreed to abstain . . . and whether it can be shown beyond a reasonable doubt that this line or lines more equitably divide such salmon than the provisional lines . . . . In accordance with these determinations the Commission shall recommend that such provisional lines be confirmed or that it be changed . . . giving due consideration to adjustments required to simplify administration.

[67] An interesting difference exists in the way the business communities of these two countries tend to look at contracts. One Japan-United States comparative law expert has said:

> Japanese businessmen, unlike Americans, do not habitually use formal detailed contracts drafted with a view to enforcement by litigation in their domestic business relations; they traditionally have preferred flexibility in their hierarchical relations to meet problems as they unfold and preferred social power and conciliation to resolve disputes.

Henderson, *Contract Problems in U.S.-Japanese Joint Ventures*, 39 WASH. L. REV. 479, 510 (1964). The Japanese rely relatively little on litigation in domestic business affairs regarding contracts, "depending more on traditional organizational patterns, social hierarchy, and authority, which always have been the dominant features of perhaps the world's most *socially* (not legally) organized society." *Id.* at 481. The Tripartite Treaty is not, of course, controlled by Japanese law or custom, but rather by the rules of international law. These rules tend to treat treaties legalistically; that is, as creating specific, enforceable rights and obligations between the parties that, so far as possible, remain the same through time. The rules of international law suggest an approach to the Tripartite Treaty more in accord with American legal tradition than with Japanese law and custom.

[68] Tripartite Treaty, protocol.

Then comes an arbitration clause, providing that in the event the Commission cannot agree upon a new line, the matter will be referred to a "special committee" of scientists from neutral countries to make recommendations. When this special committee has made its determination, the Commission "shall make" its own recommendations to the states involved "in accordance therewith."

One of the key questions during the negotiations for the treaty was whether Japanese fishermen would abstain from fishing only in certain areas or only for certain stocks of fish. The final treaty incorporated both ideas. Although the United States favored abstention applied solely to stocks of fish,[69] the problems in administering such an arrangement seemed to dictate the drawing of a geographic line. The Japanese also initially wanted the abstention principle stated only in terms of stocks of fish.[70]

Apparently the Japanese argued for stock abstention, instead of area abstention, on the assumption they would then be excluded from a smaller portion of the Bering Sea. This view rested upon the premise, later proven false, that North American spawned salmon did not roam as far west as longitude 175° W[71] and did not mix with Asian spawned salmon, which were not protected by the treaty and which the Japanese wanted to continue catching. It is interesting, in this regard, that the Japanese explicitly retained the right to catch Asian spawned salmon east of longitude 175° W. in those areas where *only* salmon of Asian origin can be found. At no place in the Proceedings do the Japanese agree to abstain from fishing for salmon of North American origin that roam west of the 175° line, although the United States contends this was the underlying intent of the treaty.[72] It was assumed at the time that few of these fish ever went beyond this line.[73]

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[69] *See* TRIPARTITE CONF. PROC. 49, 102.

[70] The Japanese delegation to the third meeting of the Committee on Biology and Conservation on December 1, 1951, inquired whether "it was necessary to draw a demarcation line in the Bering Sea, and added they would be in favor of using the words 'the seaward limits of the area in which Pacific salmon of North American origin might be found' to designate this area." *See* TRIPARTITE CONF. PROC. 127. The same attitude is evidenced at the 15th meeting of the Committee on Principles and Drafting, December 13, 1951, where it was discussed whether the Japanese were to abstain from fishing for the salmon originating in the Western Aleutian islands which lay beyond long. 175° W. The Japanese argued, and the United States reluctantly agreed, that this stock of fish was not being taken by United States fishermen to the maximum sustainable yield and thus should not be protected by the abstention principle. *See* TRIPARTITE CONF. PROC. 104-105, 131, 134.

[71] *See* TRIPARTITE CONF. PROC. 183; INPFC REPORT OF U.S. SEC. MEETING 6, 19 (U.S., Bur. of Comm. Fish. Circ. No. 85, March, 1960); *see generally* S. ODA, INTERNATIONAL CONTROL OF U.S. SEC. MEETING, *supra* note 71, at 9.

[72] INPFC, REPORT OF U.S. SEC. MEETING, *supra* note 71, at 9.

[73] *Id.*

Because of the uncertainty of scientific knowledge, the protocol provided for investigations by the Commission to determine if and where the salmon originating from the two continents mixed, and, if found to mix, what new line would "best divide" or "more equitably divide," Asian salmon from North American salmon—from which the Japanese "have agreed to abstain." Much disagreement has occurred over the meaning of this language. The Japanese contend that the line should divide the salmon originating from the two continents in such a way that the number of North American salmon found west of the line is approximately equal to the number of Asian salmon found east of the line. This would permit the Japanese to catch large numbers of Bristol Bay red salmon which cross the line; it would not seriously interfere with their ability to catch salmon of Asian origin which move east of the line, because these salmon eventually return west of the line on their way to Asian streams to spawn. The United States objects to this interpretation because American fishermen are prohibited by their own conservation laws from fishing on the high seas anywhere near the 175° line and thus have no opportunity to take Asian salmon that roam east of that line. The United States contends that the primary objective of the treaty was to apply the principle of abstention to the entire stock of salmon originating in North America and therefore the line should be so located that the Japanese will abstain from catching any American spawned salmon. At the same time the United States realizes that the abstention principle should not be interpreted so rigidly that Japan will be prevented from continuing her historical fishery for Asian salmon.[74]

Further ambiguity results from the phrase in the protocol stating that the new line shall be located where it can be shown "beyond a reasonable doubt"[75] that it would more equitably divide such salmon than the provisional lines. It is curious that the phrase "beyond a reasonable doubt" should be used, because in American jurisprudence it is generally used to describe that exceptionally high degree of proof

[74] *See, e.g.*, INPFC, REPORT OF U.S. SEC. MEETING, *supra* note 71, at 9.

[75] This is the phrase that appears in the English "official version" of the treaty. In Anglo-American jurisprudence this phrase is a "term of art" and has a very special and widely known meaning. The Japanese "official version" appears to be a literal translation of the English version, and is not a "term of art" with any special meaning in Japanese law, according to Professor Dan F. Henderson (Director of the Law of Asian Countries Program at the University of Washington School of Law). This suggests that the phrase probably appeared first in an English draft, and then was simply (and literally) translated into Japanese. It would also suggest that one of the most important sources of meaning for the term would be American law.

required for conviction in criminal cases.[76] Such a burden would seem to be almost impossible to carry in the North Pacific salmon fisheries issue. Not only are the commissioners confronted with the ambiguity of the phrase "more equitably divide," but they must face a profusion of scientific unknowns about the nature and habits of the salmon and the impact on various stocks of different fishing techniques and intensities. These unknowns are amply illustrated in the reports of the tripartite Commission itself, as well as elsewhere.[77] It is not surprising that the Commission has been unable to determine a new line or lines to replace the existing provisional line.

True, if the Commission fails to agree upon a new line within a reasonable time, the matter is to be referred to a special committee of scientists from neutral countries. However, this special committee of scientists must also labor under the protocol's ambiguous language.

United States sources have also objected to Japan's high seas fishing effort beyond longitude 175° W. on grounds relating to wastefulness of the resource. Their arguments are threefold: (1) that the high seas fishery takes immature salmon; (2) that the high seas fishery makes biological control more difficult; and (3) that excessive numbers of salmon are injured and drop out of the nets during high seas gill-netting.[78]

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[76] In general, three different degrees of proof are used in American jurisprudence: (1) for ordinary civil litigation (proof by a preponderance of the evidence); (2) for civil litigation in which fraud is alleged (clear, cogent and convincing proof); and (3) criminal cases (proof beyond a reasonable doubt). Although much debate exists about the exact nature and definition of these three degrees of proof, there is agreement that the burden of proof in criminal cases (beyond a reasonable doubt) is more difficult to carry than the other two. *See* J. WIGMORE, EVIDENCE § 2497 (1940); *cf.*, B. JONES, EVIDENCE § 227 (1958). One writer has compared them as (a) probably is true, (b) what highly probably is true, or (c) what almost certainly is true. McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242 (1944). Applying this language to the issue of locating a new line to replace the present "provisional" line, the test might look like this:

> A reasonable doubt exists where after a comparison and consideration of all the evidence the minds of the commissioners are not convinced that it is almost certain that the new line will "more equitably divide" the salmon than the existing provisional line.

[77] *See, e.g.*, INPFC, REPORT OF U.S. SEC. MEETING, *supra* note 71; S. ODA, *supra* note 71.

[78] These arguments were recently presented in PAC. FISHERMAN, Dec. 1965, at 9, by Clarence Pautzke, Chairman of the American Section of the Tripartite Fisheries Commission. He said:

> The Japanese high seas fishery is causing great difficulty to the conservation program of the U.S. Furthermore, the high seas fishery in 8 of the past 10 years has had a severely adverse economic effect upon the inshore fishery on Bristol Bay.
>
> The high seas fishery of Japan seeks Sockeye in the corridor between 175 degrees west longitude and 170 degrees east longitude when they have largely separated from Asian salmon. A high seas fishery is unselective on salmon...

Studies by United States and Canadian scientists demonstrate that the taking of immature fish is wasteful because it does not allow these fish to continue growing until they return to territorial waters where they would gain substantially in weight and thus increase the total yield of salmon available to man.[79] An estimated 20.8 percent are immatures at the time they are caught,[80] *i.e.*, they would not return to their spawning streams until one year later. When these fish are caught on the high seas they have no opportunity to gain their full weight and it is lost. This argument is rejected by some Japanese who suggest that most of the salmon caught by their high seas fishery would, in any event, probably return to United States territorial waters within a few weeks and that the loss through natural mortality may be greater than the size-of-fish loss during this period.[81] In any event they argue that scientific evidence is lacking to decide the argument either way.[82] One Japanese author goes so far as to suggest that

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and thus may overfish weak races, the bulk of which should be reserved for spawning. On the other hand, strong races, with a large catchable surplus might be under-harvested by a high seas fishery. Conservation of the resource depends upon fishing these races selectively, according to their strength, as is done in the inshore fishery.

A high seas fishery is destructive and wasteful. As much as 30% of the fish caught in ocean gillnets drop out of the net before it is retrieved, and do not survive.... The high seas fishery catches the salmon while they are still feeding and growing rapidly, before full growth is attained. In contrast, the inshore fishery harvest the fish when they are mature and segregated into component runs.

But see French, *Dropout Rate for High Seas Gillnets Studied by U.S. Fisheries Biologists,* PAC. FISHERMAN, March 1965, at 10, where the most recent investigations on the dropout rate proved inconclusive.

[79] *See* 1965 INPFC, ANN. REP. 99:

For Sockeye, chum, and pink salmon of commercial size, an accumulating body of evidence now indicates that increases in stock weight from growth of individuals continue to exceed the losses in stock weight from natural mortality until mature fish reach both the North American and Asian coasts....The general conclusion is that pelagic fishing reduces potential yields.

See also Ricker, *Comparison of Ocean Growth and Mortality of Sockeye Salmon During Their Last Two Years,* 19 J. FISHERIES RESEARCH BD. CAN. 531-60 (1961).

[80] This figure of 20.8 is the estimate of Mr. R. A. Fredin, Bureau of Commercial Fisheries, and is the estimated average for the period 1956-1965. His figures were based on the assumption that all Bristol Bay sockeye caught in the following areas and time periods were immature:

170°E-175°W July 1 thru end of season
175°E-180°W June 21-30.

Admittedly the degree of accuracy of this assumption has not been fully tested. This data supplied the author by private communication from R. A. Fredin, May, 1967. They may also be found in Alaska Dep't of Fish and Game Information Leaflet No. 82, Table No. 3, June 15, 1966.

[81] *See* U.S. Bur. of Comm. Fish., Japan's Northern Water Resources Research Council's Comments on Van Cleve & Johnson's *Management of High Seas Fisheries of the Northern Pacific,* Oct. 1964, at 6, 7, 10, 11.

[82] T. MATSUSHITA, *supra* note 45, at 17; U.S. Bur. of Comm. Fish., Japanese Press Transl. [*Nippon Suisan Shimbun,* Feb. 11, 1957]—summary of remarks by Dr. Moiseev (Russia) and Dr. Fujinaga (Japan). United States sources admit that "definitive

"from the standpoint of effective utilization of resources, it is desirable to conduct" both offshore and coastal fisheries, because the total tonnage of fish caught year after year might be higher by such a combination.[83]

To the argument that the high seas fishery makes biological control more difficult, the Japanese answer that in the "coastal fisheries of the United States and Canada, it is very common . . . to utilize mixed stocks of fish and to capture fish in waters far distant from their spawning grounds,"[84] and that therefore the United States has little cause to criticize the Japanese high seas fishery on these grounds. It would seem too obvious for argument that control of escapement can best be accomplished at or very near the mouth of the spawning streams. Only at this point can one be sure that the fish that are caught, or permitted to escape, are of a single stock, headed for a particular river. Nonetheless the Japanese claim they are "substantially" selective in their high seas catch, and that is all that is required.[85] That the United States fishermen sometimes catch salmon far from their spawning streams also cannot be denied. Yet there is obvious validity to the argument that as between the two fisheries, *i.e.*, the United States coastal fishery or the Japanese high seas fishery,

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research techniques are not yet available" for handling certain problems, but argue that "direct proof is seldom if ever available to support the assumptions required in estimating natural mortality." They also criticized certain Japanese experiments which tended to prove that which was obviously untrue, *i.e.*, that the Pacific salmon had no natural mortality at all. *See* 1966 INPFC ANN. REP. (Investigations by the United States, U.S. Bur. Com. Fish. draft submitted for future publication).

[83] T. MATSUSHITA, *supra* note 45, at 19.

[84] *See* U.S. Bur. of Comm. Fish., *supra* note 81, at 8:

> The United States scientists, for example, point out with respect to the migration of salmon to the Alaska Peninsula, Southeastern Alaska, Prince William Sound, and Puget Sound waters that "the salmon from individual river systems are complexly intermingled in the fishery and so it is impossible to separate them according to specific systems." (INPFC Bulletin No. 10, 1962, pp. 83, 85, 86, 88, etc.) Furthermore, the number of concerned river systems in those areas are innumerable. Again, to quote that report "The Prince William Sound pink salmon fishery harvests mixed runs to about 200 streams (ibid., p. 82) the Southeastern Alaska pink salmon fishery mixed runs to several hundred systems (ibid., p. 86) the Kodiak Island pink salmon fishery the mixed runs to numerous systems (ibid., p. 85) and the pink salmon fishery, extending from Puget Sound to British Columbia, also harvests runs to many different systems'." In this manner, the pink salmon fisheries of the United States and Canada are catching mixed stocks of fish originating from many different systems—that is, apart from the discussion that a migratory group of fish to one system consists of several stocks, such as the upstream-spawning stock and the intertidal-zone spawning stock—and the actual situation is far different from the claims made . . . that the coastal fisheries are separately harvesting individual stocks of fish at the river mouths or in nearby waters.

[85] T. MATSUSHITA, *supra* note 45, at 16. The Japanese high seas salmon fishery is controlled by the Japan Fisheries Agency which regulates the number of licenses quantities of fish taken each year, and permissible areas of fishing.

the former, being closer to the mouths of the spawning streams, has a better chance of accurately sorting out and regulating different stocks. To be sure, it is a question of degree, and the United States approach could undoubtedly be improved upon, so far as biological control is concerned, by requiring all fishing to be carried out at or very near the mouths of spawning streams, although this might impose other costs on the fishing industry (travel time, etc.) that would make such a procedure undesirable.

The United States also argues that more salmon are injured and drop out of the Japanese gillnets on the high seas than in the United States coastal gillnet fishery. The reason for the difference is alleged to be the amount of time the gillnets are left in the water before they are picked up. In the coastal fishery United States fishermen usually leave their nets in the water no more than 2 or 3 hours. In the Japanese high seas gillnet fishery, the logistics involved in handling and positioning catcher boats, and the larger nets apparently require the nets to be left in place for longer periods of 6 to 10 hours. A recent study by United States scientists tends to prove that the dropout rate is about 4 percent when the nets are in the water from ½ to 1 hour, 21 percent after 2½ hours, and 30 to 35 percent over a period of 6½ to 11½ hours.[86] These are significant differences which would tend to suggest a more frequent tending of the nets, whether on the high seas or in coastal waters. Also there is some evidence that mature fish caught in estuaries withstand injury better than either immature fish or mature fish caught on the high seas.

The United States also claims that excessive Japanese fishing is depleting the stocks of Bering Sea salmon. The Japanese answer that the United States has not yet demonstrated that more intensive exploitation of the salmon stocks would not result in an increased sustainable yield. This argument is based on their hypothesis that the long-term average yield from a salmon stock is primarily controlled by natural factors, and that fishing plays a relatively minor role.[87] Furthermore, the Japanese argue that if the United States wants to assure a certain escapement, "all" it needs to do is curtail its own fishermen more. Thus if the proper escapement for a particular stock is 30 percent, and the Japanese take 30 percent, the inshore United States fishery could properly take up to 40 percent. The more the

[86] 1966 INPFC ANN. REP. (Investigations by the United States, Bur. Com. Fish.; draft submitted for future publication).
[87] INPFC, REPORT OF U.S. SEC. MEETING, *supra* note 71, at 16.

Japanese take, the less are available to United States fishermen, assuming the escapement percentage remains the same.[88] Of course one logical (and absurd) result from this argument might be that the United States would end up with nothing but the management of the resource, taking no fish whatsoever, leaving the total harvest to the Japanese.

IV. The Abstention Principle and International Law

Detailed studies of the principle of abstention have been made elsewhere.[89] I shall trace its history only briefly here.

The United States view is that abstention should apply to "situations where states have, through the expenditure of time, effort and money on research and management, and through restraints on their fishermen, increased and maintained the productivity of stocks of fish, which without such action would not exist or would exist at far below their most productive level." Under these conditions, "when the stocks are being fully utilized, that is, under such exploitation that an increase in the amount of fishing would not be expected to result in any substantial increase in the sustainable yield, then states not participating, or which have not in recent years participated in exploitation of such stocks of fish, excepting the coastal state adjacent to the waters in which the stocks occur, should be required to abstain from participation."[90]

As the originator and the chief proponent of the abstention principle, it is understandable that the United States would recommend its adoption at the 1955 Rome Conference and at the 1958 and 1960 Geneva Conferences. The Rome Conference declined to indorse the principle, merely describing it as an "existing procedure" which attempted to deal with the problem of new entrants into a fishery where the maximum sustainable yield was already being taken. The conference observed that under conditions where the maximum yield was being taken, and where research and regulation were designed to develop and maintain the fishery, then the "participation of additional states in the exploitation of the resources will yield no increase in

[88] T. Matsushita, *supra* note 45, at 19.

[89] G. Amador, The Exploitation and Conservation of the Resources 69 (1959); D. Johnston, The International Law of Fisheries 275-97 (1965); R. Van Cleve & R. Johnson, Management of the High Seas Fisheries of the Northeastern Pacific 1 (Univ. of Wash. Pub. in Fisheries New Series, Vol. II, No. 2, 1963); Van Cleve, The Economic and Scientific Basis of the Principle of Abstention, 1 U.N. Conf. on Law of the Sea at 47, U.N. Doc. A/Conf.13/3 (1958).

[90] G. Amador, *supra* note 89.

food to mankind, but will threaten the success of the conservation program." In its "general conclusions" the conference suggested that where additional entrants into the fishery posed serious problems, the states involved should agree to submit the question to "suitably qualified and impartial experts chosen for the special case by the parties concerned . . . ."[91]

The United States subsequently recommended the abstention principle to the International Law Commission [hereinafter cited as ILC] which was assigned the task of preparing draft conventions on the law of the sea for consideration by the 1958 and 1960 Geneva Conferences. The United States argued that abstention was somewhat analogous to the "unjust enrichment" principle in United States municipal (internal) law which dictates that a party through whose efforts and money an industry or a property has been developed, should not be deprived of that industry or property by someone who has made no contribution to the development.[92]

During the discussions of the drafts of the ILC it was observed that other special situations might exist which would tend to support the granting of exclusive rights of exploitation, *e.g.*, where an important economic activity within a state was clearly dependent upon a certain species inhabiting the neighboring waters, as in the Peru-Chile situation involving the biological cycle "anchovy-guano-fertilizer-agricultural produce."[93]

The International Law Commission declined to recommend the adoption of the abstention principle, but did describe it in the commentary to the final draft convention on the law of the sea, noting that:[94]

> both this proposal, the purpose of which was to encourage the building up or restoration of the productivity of resources, and the proposals of some other governments, based on the concept of vital economic necessity, reflect problems and interests which deserve recognition in international law. However, lacking the necessary competence in the scientific and economic domains to study these exceptional situations adequately, the Commission, while drawing attention to the problem, refrained from making concrete proposals.

At the 1958 Geneva Conference the abstention principle was dis-

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[91] *See generally* D. JOHNSTON, *supra* note 89.
[92] *Id.* at 292.
[93] *Id.*
[94] *Id.* at 293.

cussed at length, but was ultimately opposed by the Soviet Union, Japan, France, Britain, and many others. Their arguments were in summary, that: it was a distribution scheme rather than a conservation measure; it discriminated in favor of the developed nations, and against the developing nations; it conflicted with the principle of freedom of the seas; if applied generally it would be subject to much abuse by nations claiming incorrectly that certain fisheries had been developed to a certain level of yield by their sole efforts; its general application was unrealistic because of the lack of adequate study of biological, technological and political elements involved in its application.[95]

The "Third Committee" of the Geneva Conference, to which the abstention principle was assigned for consideration, approved a resolution which would "commend the abstention procedure to States for utilization where appropriate as an incentive to the development and restoration of the productivity of living resources of the sea;"[96] however, this resolution failed by a small margin to attract sufficient support to be adopted in plenary session.[97]

To date the Tripartite Treaty is the only fishery treaty in which this principle has been adopted. Whether it will become a more widely accepted principle in international law, or remain uniquely a product of the North Pacific, remains to be seen.

The abstention principle is, after all, merely a special case of historic rights,[98] and historic rights have not served as the basis for any widespread rule of exclusivity in international law. At the Geneva Conference this principle was recognized as a proper basis of *temporary* exclusivity, on a phasing out basis, *i.e.*, the nation claiming historic rights in certain circumstances, would have an exclusive right to a given fishery only for a temporary phasing out period, at the end of which all exclusive rights would terminate.[99] It was not accepted as a basis for a permanent right of exclusivity.

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[95] *Id.* at 293-94.

[96] M. McDOUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS 959-60 (1962).

[97] *Id.*

[98] *See* Allen, *supra* note 45. Mr. Edward W. Allen, former chairman of the INPFC, says that during the formative period of the Tripartite Treaty the United States talked about the historic rights concept in order to protect her fisheries from high seas exploitation by the Japanese. The Japanese objected to this language, thus the word "abstain" was used in the treaty to describe the Japanese restraint in certain historic areas. The concept was a "split-off" from "historic rights." *See also* discussion of historic rights and abstention in the Seattle Post-Intelligencer, Aug. 30, 1963, at 10, col. 1.

[99] This rule was nearly adopted at the 1960 Conference where Canada and the

V. ABSTENTION IN THE NORTH PACIFIC

Although the abstention principle was not officially endorsed at Rome or Geneva a substantial minority of the delegates approved the principle for consideration under "special circumstances." To find those special circumstances each situation must be examined on its own facts, and this means a study in depth of relevant biological, economic, social and political factors. Such a study is beyond the scope of this paper; however I shall attempt briefly here to review some of the features of the North Pacific and Bering Sea salmon fishery that have been at the center of the abstention debates between Japan and the United States.

One of these special features is the spawning habits of salmon. Salmon spawn in fresh water rivers and streams, often hundreds or even thousands of miles from the sea. After birth they often travel several weeks to reach the ocean; then after spending between 1 and 5 years on the high seas they return to their original spawning streams to propagate and die. Spokesmen for the United States have argued that this peculiar characteristic of the salmon tends to make this fishery appropriate for abstention. They argue that without the use of United States rivers and streams these stocks of fish could not exist. (The Japanese have only minor runs of salmon that spawn in their home islands, and thus primarily take Soviet spawned or United States spawned salmon on the high seas.) Some of the more ardent proponents of abstention from the United States have tended to express their arguments in terms of legal ownership, *i.e.*, that the United States has a "vested property right" in the salmon that spawn in our rivers "the same as the merchant ships that ply the high seas," and, it has been argued, that for a nonowner to harvest these fish is as much an

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United States proposed an exclusive 6-mile fishery zone with a further 6-mile zone of special fishery rights, subject to a right to phase out fishermen from other nations who had exploited the outer 6-mile zone for 10 years or more (later amended to 5 years). This Canada-United States proposal received 45 votes for, 33 against, and 7 abstentions, enough for a strong showing of support, but not for adoption. Mr. Gardia Amador, the widely respected Cuban delegate, suggested that the state claiming historic rights should have preferential status over all other nonfishing nations except the coastal state which was said to have a "special interest" in the fishery. Thus, if it were necessary to impose conservtaion restrictions for the area, the nationals of the coastal state and the state possessing historic rights should both be accorded the same preferential treatment over foreign fishermen during the interim, phaseout period. Subsequently, several nations have taken unilateral action (Canada) or have engaged in treaties (Great Britain, Iceland, Japan, South Korea) reflecting principles similar to those proposed in the Canada-United States proposal. The basis of the phasing out operation was to allow the noncoastal state time to relocate its fishermen and vessels. *See generally,* D. JOHNSTON, *supra* note 89, at 282-88, 301.

act of piracy as an interference with shipping on the high seas.[100] Although such claims have little standing in international law[101] they do indicate the strength of feeling attached to the issue by some of the abstention proponents.

Another difficulty with the spawning stream-ownership concept is the alleged inconsistent position of the United States vis-à-vis Canada. Under the 1937 Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fisheries in the Fraser River System, the United States became entitled to harvest some 50 percent of the Fraser River salmon runs.[102] As the Fraser is a Canadian river it could be argued that these fish belonged to the Canadians and that United States participation in the fishery is inconsistent with that ownership.[103] Also, the recent disagreement between Canada and the United States in the Noyes Island area is relevant. Noyes Island is part of Alaska. Both Canada and the United States claim "historic rights" to the runs of salmon that pass near this island on their way to spawn in distant Canadian rivers. The Canadians have argued that the United States is inconsistent in claiming a right to fish for Canadian spawned salmon

[100] *See* Address by Lloyd A. Royal, Director of the International Pacific Salmon Fishery Commission, *Salmon Are Property as Much As Ships,* in PAC. FISHERMAN, Feb. 1965, at 11.

Other claims of legal ownership have been made in the past. In 1938 a Senate bill (S. 2679, 75th Cong., 3d Sess. (1938)) was introduced declaring: "2. The salmon which are spawned and hatched in the waters of Alaska are hereby declared to be the property of the United States...." 83 CONG. REC. 2622 (1938).

[101] For the most part, spokesmen for the United States have declined to make such claims, realizing that they have little support in international law. When claims of ownership have been made they have often been criticized for doing a disservice to this country's basic position. *See* PAC. FISHERMAN, Feb. 1966, at 1, criticizing a TIME magazine editorial (Jan. 28, 1966) which spoke in terms of property rights in salmon. Mr. Edward W. Allen former Chairman of the INPFC has also criticized such claims of ownership.

A similar claim of ownership was raised by the United States in the fur seal arbitration of 1893 where this country sought to exclude British Columbian vessels from high seas fur sealing. These seals return each year to the place of their birth on the Pribilof Islands to bear their young. Between these visits they, like the salmon, roam vast distances across the open seas. The arbitral tribunal held that the United States has no property or ownership rights in the fur seals outside the three mile territorial sea. *See* D. JOHNSTON, *supra* note 89, at 206-07.

The Geneva Conferences of 1958 and 1960 declined to recognize any claims to ownership to high seas fishery resources; on the contrary these conferences affirmed the freedom of high seas fishing concept in the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, U.N. Doc. A/CONF.13/L.54.

[102] Convention for Protection, Preservation and Extension of the Sockeye Salmon Fisheries in the Fraser River System, May 26, 1930, 184 L.N.T.S., at 305.

[103] A counter argument is, of course, possible. It can be argued that the Canadians "own" the salmon and that for reasons of their own they have agreed to share their salmon with United States fishermen. Similarly it could be argued that the Russians "own" the salmon that spawn in Soviet streams, but for other reasons have agreed to share these fish with the Japanese, under the 1956 Japan-U.S.S.R. International Convention for the High Seas Fisheries of the Northwest Pacific Ocean, Oct. 19, 1956, 263 U.N.T.S. No. 3768, at 99. However, if these treaties were based on a con-

while at the same time objecting to Japanese high seas fishing for United States spawned salmon.[104] There are a number of distinctions, however. The United States has for years harvested these fish which pass through its 3-mile territorial waters, and did so before the Canadians considered them "Canadian" fish. Certainly none of the North American spawned salmon ever pass anywhere near the territorial waters of Japan. Moreover, in the Noyes Island fishery, tagging results indicate that the Canadians take a comparable amount of Alaska spawned fish.

Some Japanese argue that the abstention principle is contrary to the concept of freedom of the high seas, and is similar to the widely rejected notion of "acquisitive prescription." Although the Japanese recognize the need for regulation toward conservation,[105] they believe the freedom of high seas fishing argument supports their "equal treatment" position, *i.e.*, that they should be entitled to share equally with the United States in the salmon resources of the high seas. Also, while admitting that salmon spawn in United States rivers, they point out that some 95 percent of the weight of these fish is put on while they are beyond United States territorial waters.

Spokesmen for the United States have seldom argued that abstention is based on the concept of historic fishing rights,[106] probably because the current practice of nations suggests this only justifies exclusive rights for a limited time and not permanently.[107] As noted previously

cept of sharing an "owned" resource one would expect to find a declaration of ownership, and a recitation of the purpose of sharing this "owned" resource somewhere in these treaties. Such declarations are not to be found, nor do the reports on the negotiations of the treaties indicate that the parties believed they were dealing with an owned resource. At least there is no evidence of an understanding between the parties that the fish were owned by the nation on whose territory the spawning stream is found. There are, of course, occasional unilateral statements by one individual or another that the salmon are owned. Such declarations do not, however, constitute international law.

[104] *See* Seattle Times, May 3, 1966, at 1, col. 305; *id.*, at 38, col. 1-2; Seattle Times, May 20, 1966, at 1, col. 3-6; *id.* April 22, 1966, at 48, col. 1; Seattle Post-Intelligencer May 26, 1966, at 39, col. 4-5.

[105] *See* S. ODA, INTERNATIONAL CONTROL OF SEA RESOURCES 90 (1962); *see also* H. AIKAWA, FISHERY BIOLOGY AND INTERNATIONAL REGULATION OF FISHERIES 6, 8, 18 (U.S. Bur. Com. Fish. Transl. Ser. No. 19, July 24, 1958).

[106] Mr. Takeshi Yasukawa, speaking for Japan at the 12th North Pacific Fisheries Commission meeting in Seattle, Nov. 12, 1965 said:

> The principle of freedom of high seas fishery does not justify unrestricted exploitation of marine resources. Rather it means that these resources—a common property of mankind—are open for utilization to all nations and all peoples, and that no country is entitled to fence-off any of such resources, denying other countries an opportunity for their utilization.
>
> It is admitted that one who makes use of such resources is in duty bound to exercise resource conservation. The importance of conservation of resources cannot be over-emphasized.

[107] *See* D. JOHNSTON, *supra* note 89, at 300-01, 446-47.

the historic fishing rights concept received some support at the 1958 Geneva Conference, but only on a phasing out basis.[108]

On the other hand, the United States has argued that it has regulated and restrained its own fishermen for more than 50 years for the purpose of maintaining and in some cases rebuilding the salmon runs, and that this regulation and restraint should entitle it to a certain exclusivity with regard to salmon.[109] The Japanese counter by saying that this restraint would, again, entitle the United States to exclusive rights only for a temporary period, not permanently. Further, they argue that if restraint is the criteria then the "Japanese fishermen, who have totally abstained from salmon fishing east of 175° west longitude for over ten years ought now be granted the right to share proportionately in the harvest since they have substantially contributed to the conservation of those resources." (Japan, by practicing abstention, has lost the profits she would have otherwise gained, and in this sense has borne conservation expenses.)[110]

The United States also claims exclusive rights to the salmon resource because of the hundreds of millions of dollars that have been spent for pollution control, fish ladders, and other efforts to protect the salmon resource, because of the extensive investment in fish hatcheries and artificial propagation that has been made by this country,[111] and because of the comprehensive salmon research program carried on in this country. The Japanese counter that United States efforts at pollution control, fish ladders, and artificial propagation should, indeed, give the United States certain special rights, but only commensurate with their investment, and only with regard to those stocks of fish

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[108] *Id.* at 282-88.

[109] The United States argument is, of course, based on the fact that the United States had a capacity to catch more fish during this period, but voluntarily restrained itself from doing so in order to conserve the salmon for future use, and toward a maximum sustainable yield. Thus it would not be possible to argue, under this approach, that the French, or Swiss, also would be entitled to share in the resource because they too "restrained" themselves from fishing for salmon. There is no evidence that they had an active capacity to take them, thus no "restraint" occurred.

[110] *See* U.S. Bur. Com. Fish., Japan's Northern Water Resources Research Council's Comments on Van Cleve & Johnson's *Management of the High Seas Fisheries of the Northeastern Pacific*, Oct. 1964, at 5.

[111] A reported $225 million has been spent for conservation of Columbia River salmon. About $2 million per year is spent for hatcheries. PAC. FISHERMAN, Feb. 1965, at 11. In addition, the United States has spent over $18 million for management and research on Alaska salmon. Van Cleve, *The Economic and Scientific Basis of the Principle of Abstention*, 1 U.N. Conf. on Law of Sea 47, 59, para. 84, U.N. Doc. A/CONF.13/3 (1958). The capital construction cost of each fish passage facility ranges from $6 million to $36 million. *See* Marts, *Evaluation of the Fishing Industry and Fish-Preservation Facilities: The Columbia River Case*, *in* THE FISHERIES: PROBLEMS OF RESOURCE MANAGEMENT (J. Crutchfield ed. 1965).

affected by those measures.[112] Virtually none of these activities has been necessary for Alaskan rivers and streams and thus this argument has little weight there. (The evidence available indicates that the Japanese catch only Alaska spawned salmon on the high seas.) One exception is the research expenditure; these have been substantially aimed at the Alaskan salmon stocks. Presumably the Japanese would concede these should give the United States "some" special equity in the Alaskan runs.

Lastly the Japanese argue that the United States has failed to meet the abstention conditions in that it has failed to prove that "more intensive exploitation of the stock will not provide a substantial increase in yield which can be sustained year after year."[113] The Japanese apparently base their scientific arguments "on the hypothesis that the long term average yield from a salmon stock is primarily controlled by natural factors, and that fishing plays a relatively minor role."[114]

VI. SIGNIFICANCE OF THE 1958 GENEVA CONVENTION ON FISHING

If the Tripartite Treaty is abrogated what would be the effect of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the Sea?

So long as the Tripartite Treaty remains in effect, the Geneva Convention on Fishing and Conservation of the Living Resources of the Sea[115] will have no application to the salmon conflict in the North Pacific and Bering Sea. However, given the intensity of feeling on both sides of the Pacific it is possible that one of the parties to the Tripartite Treaty will terminate it under the one year termination clause. In such an event it would be useful to know what legal regime would probably prevail, and what effect the Geneva Fishing Convention might have on the relationship of Japan and the United States.

The Geneva Convention went into effect on March 20, 1966[116] and

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[112] *See* U.S. Bur. Com. Fish., note 110 *supra*.

[113] Tripartite Treaty, art. IV, para. 1(b)(i).

[114] INPFC, REPORT OF U.S. SEC. MEETING, March 1960, 16 (U.S. Bur. Comm. Fish. Cir. No. 85, May 1960).

[115] Convention on Fishing and Conservation of the Living Resources of the High Seas, April 28, 1958, adopted by United Nations Conference of the Law of the Sea, U.N. Doc. A/CONF. 13/L.54. [hereinafter cited as 1958 Geneva Convention on Living Resources of the High Seas].

[116] The Convention became effective 30 days after the 22d ratification. The 22 ratifying nations include: United States, Australia, Columbia, Dominican Republic, Finland, Haiti, Netherlands, Portugal, United Kingdom, Venezuela, Yugoslavia, South Africa, Cambodia, Malaysia, Senegal, Malagasy Republic, Uganda, Malawi, Upper Volta, Nigeria, Sierra Leone, and Jamaica.

has been ratified by the United States, although not by Japan. Without Japanese ratification Japanese fishermen could legally fish for salmon anywhere outside the United States 12-mile exclusive fishery zone, and could take as many salmon as they deemed appropriate. On the other hand if Japan ratifies the convention, or otherwise accepts its terms, then she would have to negotiate with the United States and Canada toward the establishment of an overall quota of salmon to be harvested each year. The convention would not, however, provide any criteria for deciding which fishermen caught the fish. Thus the fishermen of each nation would simply catch as many fish as possible up to the overall quota. Needless to say, the United States fishermen would almost certainly take a share of salmon smaller than at present.[117]

Article IV of the Convention on Fishing provides that when the nationals of two nations are both engaged in fishing the same stock of fish on the high seas either may require the other to engage in negotiations with a view to prescribing the necessary conservation measures for the resource affected.[118] This article also provides that if the states do not reach agreement within 12 months either may initiate proceedings for arbitration[119] by a 5-member "special commission" under article IX.[120] Also, if the United States is deemed a coastal state with

[117] The suggestion has been made privately in American quarters that if the Japanese continue to insist upon taking a larger share of the salmon, the Americans should deliberately overfish the stocks until they are reduced to a size that would put the Japanese out of business. After foreign fishermen were out of operation, the Americans might reach some agreement with them to reserve the fishery exclusively for United States citizens. Needless to say, such a course of action poses serious economic risks to the United States fishing industry and is not likely to be taken.

[118] 1958 Geneva Convention on Living Resources of the High Seas, art. 4, § 1:

> If the nationals of two or more States are engaged in fishing in the same stock or stocks of fish or other living marine resources in any area or areas of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement for their nationals the necessary measures for the conservation of the living resources affected.

[119] *Id.* § 2:

> If the States concerned do not reach agreement within twelve months, any of the parties may initiate the procedure contemplated by article 9.

[120] *Id.* art. 9:

> 1. Any dispute which may arise between States under articles 4, 5, 6, 7, and 8 shall, at the request of any of the parties, be submitted for settlement to a special commission of five members, unless the parties agree to seek a solution by another method of peaceful settlement, as provided for in Article 33 of the Charter of the United Nations.
>
> 2. The members of the commission, one of whom shall be designated as chairman, shall be named by agreement between the States in dispute within three months of the request for settlement in accordance with the provisions of this article. Failing agreement they shall, upon the request of any State party, be named by the Secretary-General of the United Nations, within a further three-month period, in consultation with the States in dispute and with the President of the International Court of Justice and the Director-General of the Food and Agri-

regard to the high seas salmon fishery, under article VII,[121] then it can insist that Japan engage in negotiations, and if these negotiations do not produce agreement within 6 months the United States "may ... adopt unilateral measures of conservation appropriate ... [to the salmon in the] ... area of the high seas adjacent to its territorial sea." This approach raises the question whether the salmon in the mid-Bering Sea and mid-Pacific are in the "high seas adjacent to [the United States] territorial sea." The convention can only provide a temporary answer, until a voluntary agreement is reached, or until settlement by arbitration could be arrived at under article IX. Furthermore, these unilateral conservation measures cannot "discriminate ... against foreign fishermen"; that is, foreign fishermen must be permitted to fish on equal terms with the fishermen from the coastal state.

Thus the critical question—who is to catch the salmon—would not be resolved by the Geneva Convention, although conceivably it might control the overall fishing effort toward conservation and management of the resource.

VII. SOUTH KOREA AND THE SALMON FISHERY

One of the striking new developments in high seas salmon fishing is the potential entry of South Korea into the fishery. This may have substantial impact on Japanese-United States fishery relations. During

culture Organization of the United Nations, from amongst well-qualified persons being nationals of States not involved in the dispute and specializing in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled. Any vacancy arising after the original appointment shall be filled in the same manner as provided for in the initial selection.

3. Any State party to proceedings under these articles shall have the right to name one of its nationals to the special commission, with the right to participate fully in the proceedings on the same footing as a member of the commission, but without the right to vote or to take part in the writing of the commission's decision.

4. The Commission shall determine its own procedure, assuring each party to the proceedings a full opportunity to be heard and to present its case. It shall also determine how the costs and expenses shall be divided between the parties to the dispute, failing agreement by the parties on this matter.

5. The special commission shall render its decision within a period of five months from the time it is appointed unless it decides, in case of necessity, to extend the time limit for a period not exceeding three months.

6. The special commission shall, in reaching its decisions, adhere to these articles and to any special agreements between the disputing parties regarding settlement of the dispute.

7. Decisions of the commission shall be by majority vote.

[121] *Id.* art. 7, § 1:

Having regard to the provisions of paragraph 1 of article 6, any coastal State may, with a view to the maintenance of the productivity of the living resources

1966, six South Korean vessels fished experimentally for salmon near Hokkaido.[122] To date none are reported to have taken any North American spawned salmon either in the North Pacific or Bering Sea; however this possibility exists and is causing considerable concern in the United States.

South Korea is planning a major expansion of its fishing industry within the next few years. One report indicates a planned construction of 572 fishing vessels under the current three year plan; 259 of these would be built in Japan. Financing for this construction was planned to total about $190 million—$100 million from the total $300 million in reparations owed South Korea by Japan, plus $90 million from the fisheries assistance fund which Japan agreed to provide to South Korea under the normalization agreement recently concluded between both countries.[123] More recent reports indicate that the $90 million from the Japanese assistance fund has been made unavailable because of the Japanese Government's decision not to approve loans for construction of vessels which might be used in the high seas salmon fishery. Some of this money was to have been used for an 8000 ton mothership from Japan and some 35 catcher vessels.[124]

The Japanese Government has also taken other actions to discourage South Korean entry into the high seas salmon fishery; for example, it is reported to have denied passports to some 21 Japanese fishermen who were under contract with a South Korean firm to act as technicians[125] and for a time it was considering the denial of port calls by Korean fishing boats.[126] There has also been agitation in Japan for abandonment of its traditional three-mile territorial sea in favor of a wider territorial sea, or a wider exclusive fishery zone in order to exclude the Koreans from the area immediately around Japan.[127]

These actions appear somewhat anomalous in view of the long stand-

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of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with other States concerned have not led to an agreement within six months.

[122] THE ORIENTAL ECONOMIST, Nov. 1966, at 660.

[123] *See* U.S. Bur. Com. Fish., Foreign Fishery Information Release No. 65-21, Sept. 10, 1965, at 3 (*Suisanchō Nippō*, Sept. 3, 1965). For a comprehensive analysis of this treaty and its effect on Japanese-Republic of Korea relations see Oda, *The Normalization of Relations Between Japan and the Republic of Korea*, 61 A.J.I.L. 35-36 (1967); *see generally* G. WEISSBERG, RECENT DEVELOPMENTS IN THE LAW OF THE SEA AND THE JAPANESE-KOREAN FISHERY DISPUTE (1966).

[124] U.S. Bur. Com. Fish., Foreign Fishery Information Release No. 66-30, Dec. 2, 1966, at 3 (*Suisan Keizai Shimbun*, Nov. 30, 1966).

[125] *Id.*, No. 67-5, Feb. 16, 1967, at 3 (*Minato Shimbun*, Feb. 10, 1967).

[126] THE ORIENTAL ECONOMIST, Nov. 1966, at 660.

[127] *Id.*

ing position of Japan in favor of freedom of the seas. Japan has long objected to United States restraints upon Japanese fishermen on the high seas, claiming that because of lower pay scales and more efficient operations Japanese fishermen can catch salmon cheaper than the Americans, and that under a free enterprise system (which the United States purports to espouse) the Japanese should be permitted to do so. Thus if the United States fishermen cannot compete in such things as efficiency and prices, they should turn their energies to some other activity.[128] Now Japan finds itself in the embarrassing position of having to reverse itself. As stated by one source, "Now, by the irony of fate, Japan is forced to completely reverse the course and take the position formerly taken by . . . [the United States, Canada, and the Soviet Union] . . . and fight against 'intrusions' of South Korean fishing boats."[129] Needless to say, the new Japanese position poses some hazards. It has been suggested that[130]

> Japan is now in an extremely awkward position. If it demands for the right to freely fish in northern waters, it has naturally to give the same right to South Korea. If it tries to curb the advance of South Korea, it will run the risk of being completely shut out of the northern waters by the United States, Canada and the Soviet Union.
>
> To make the matter worse, the fishing grounds in which South Korean fishing boats are most active are those formerly dominated by Japan and not by other countries. This tactic is just what Japan followed some time ago vis-à-vis with other advanced fishing nations of the world.

South Korea is not bound by the abstention principle from fishing for North American spawned salmon, although that country's close relationship with, and economic dependence upon, the United States suggest that it would give serious weight to United States objections to its intervention in the North Pacific and Bering Sea salmon fishery. Nonetheless such a possibility exists and cannot be discounted. Such action might upset the precariously balanced relations of Japan, Canada and the United States with regard to this fishery. Japan is already aware that the Soviet Union will likely insist on reducing her salmon catch quota by the amount of South Korea's catch within the Soviet-

[128] This view was expressed by Tomoyoshi Kamenaga, Japan Fisheries Agency Production Division Chief, and Isamu Hoshimura, Nihon Suisan Director. Mr. Kamenaga said: "I think everyone in the industry feels that the Japanese can catch fish more efficiently." Mr. Yoshimura then added: "It would be wonderful if division of labor in this world progresses to the point where, say, Japan catches the fish and the other parties process them into final products." U.S. Bur. Com. Fish., Japanese Press Transl. Aug. 27, 1964, at 3 (*Suisan Kaizai Shimbun*, Aug. 20, 1964).

[129] THE ORIENTAL ECONOMIST, Nov. 1966, at 660.

[130] *Id.*

Japanese Convention waters,[131] and a stance along similar lines by the United States would not seem unlikely.

VIII. Conclusion

What lessons for the future might be gleaned from the Japanese-United States experience arising out of the negotiations for and operations of the Tripartite Treaty over the past 14 years; what improvements might be incorporated into a new treaty regime? Without presuming to design such a new treaty—which must necessarily be a product of the total bargaining relationship of the three countries—I would like to discuss some of the benefits to both sides, especially concerning the management of the resource, that might occur from the writing of a new agreement.

First, the issue of duress should be put to rest. Some Japanese spokesmen continue to raise this issue, and it undoubtedly colors Japanese attitudes toward the Tripartite Treaty and toward the United States in current discussions. As explained above, whether Japan was overreached during the 1952 negotiations is not at all clear. It should be noted, however, that since June 10, 1963, Japan has had the legal power to abrogate the treaty on one year's notice, and has voluntarily chosen not to do so. If the treaty was in fact unfair, it would seem the Japanese would, by now, have exercised their legal right of termination. Their failure to do so indicates that the treaty has advantages for them which they prefer not to give up, and further tends to demonstrate the irrelevance, except for historical purposes, of the duress issue in the context of the current debate.

That the Tripartite Treaty was negotiated on the basis of incomplete scientific information is now obvious. The negotiators were, of course, aware to a degree of their lack of knowledge, and thus somewhat arbitrarily drew a line down the middle of the Bering Sea which they assumed probably lay west of the area in which North American spawned salmon could be found. Realizing the incompleteness of their information, they attempted in the protocol to provide a method of altering the treaty if and when better information became available. This attempt failed because of failure to identify clearly the criteria controlling such a change. If the criteria had been adequately identified then the Commission, which was charged with the initial treaty modification responsibility, might have been able to change the agree-

[131] U.S. Bur. Com. Fish., Foreign Fishery Information Release No. 67-5, Feb. 16, 1967, at 2-3 (*Suisan Tsūshin*, Jan. 13, 1967).

ment as required. Even the difficulties posed by the ambiguities in the protocol might have been surmounted if the treaty had provided for an effective arbitration procedure, but it did not do so, with the result that an awkard stalemate was created and has persisted for the past several years, encouraging spokesmen for both Japan and the United States to level angry charges of overreaching, misinterpretation and misconstruction, and violation of the spirit if not the letter of the treaty.

By now it should be clear that the debate over the true meaning of the Tripartite Treaty is so clouded that little can be gained from continuing the search for this will-o-the-wisp. The question to be confronted is not "What was intended in 1953," but "What is the proper salmon fishery regime that should be created *now?*" Looked at in this light the arguments over the disadvantages and inefficiencies of the Japanese high seas salmon fishery become less important. The more important question is whether the Japanese should continue to catch North American spawned salmon at all, and, if that question is answered in the affirmative, when and where would be the most appropriate time and place for them to do so.

Whether the United States can induce the Japanese to leave the North Pacific salmon fishery entirely is a question that cannot be decided in this article, or anywhere other than at the bargaining table. Such a possibility is at least doubtful, however, in view of the strongly held views of the Japanese as to why they should be entitled to continue such participation.[132] What can be usefully done in this writing is a brief analysis of some of the benefits that might be derived by the United States and Japan from a new agreement.

Two major benefits worthy of special consideration are: (1) the establishment of a comprehensive management program which would control Japanese as well as United States salmon fishing; and (2) the opportunity through such a management program to build the Alaska salmon stocks to a higher level, thus increasing total harvest and providing more salmon for all participants.

[132] Summarized, the Japanese arguments for continued participation are: (1) the Japanese can legally continue their high seas salmon fishery under the literal wording of the Tripartite Treaty; (2) they have the legal power to abrogate the treaty on one year's notice and expand this fishing even more; (3) the Tripartite Treaty was essentially written by the United States to protect its own interests and was, to some extent, pushed on a weak Japan in 1952-53, thus why should the United States object now to its terms; (4) Japan is much stronger and independent now and has a vocal public (and socialist party) demanding a larger share of this high seas fishery; (5) a significant segment of the Japanese fishing industry is now dependent upon the high seas salmon fishery for its livelihood and it would be unfair to this industry to stop it; (6) the abstention principle was rejected at Geneva and has not been adopted in other treaties throughout the world as anticipated in 1953.

Needless to say, if a new treaty is negotiated a greater effort should be made to identify goals clearly and completely. If, for example, the new agreement were to allow the Japanese to share a certain percentage of specified North American salmon stocks, then this share, and its determination under varying conditions, should be carefully defined and explicitly stated. Also, it should provide for an effective method of arbitration in the event of later disagreements over treaty interpretation. Some use might be made of the dispute settlement principle expressed in article IX of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the Sea.[133] Careful thought should also be given to a method for infusing new scientific data into the treaty regime so that the problems raised by the ambiguities in the protocol can be avoided. Certainly "proof beyond a reasonable doubt" should not be used as a criterion for measuring the probative effect of new data.

One of the more obvious benefits to be sought in a new treaty would be the inclusion of *all* fishermen under the management umbrella. At present the Japanese high seas salmon fishery is not integrated into the salmon management program and tends to be disruptive of that program as carried out by the United States. One of the principal criticisms of the Japanese high seas fishery is that, because of high seas mixing of various stocks, the Japanese sometimes take too many fish from one stock, thus cutting into desirable escapement, or cutting unfairly into the potential catch by United States fishermen. A logical, albeit politically unpalatable solution to this problem would be to arrive at an estimate of the number of North American salmon the Japanese are going to take in their high seas fishery and then arrange for them to take these fish nearer to United States shores, closer to the mouths of spawning streams, in areas and at times determined most suitable under a comprehensive management regime. The charge of salmon wastage from gillnet dropouts and predator losses resulting from the Japanese practice of leaving gillnets in the water too long—from 6 to 10 hours—and the charge of wastage through the taking of immature salmon, might be met by bringing the Japanese under a tighter management program and requiring appropriate changes in fishing operations. Other illustrations of improvement in resource management resulting from bringing the Japanese into such a program could be suggested.

[133] *See* 1958 Geneva Convention on Living Resources of the High Seas, art. 9.

Regardless of who *catches* the fish, the United States would seem to be the logical choice for the lion's share of the management responsibility: as between Japan and the United States the latter has had vastly more experience in salmon management; all the spawning streams where the counting, collecting, hatching, and water quality control must occur are inside the borders of the United States, not in Japan; and the United States has in the past invested enormous sums in salmon research and continues to do so, whereas the Japanese research investment, both past and present, is on a much smaller scale.

It may be an understatement to suggest that a number of problems can be anticipated from consideration of the suggestions mentioned above, not the least of which would be the peaceful management of two historically hostile groups of fishermen operating in the same waters. Too much proximity could breed open hostility. It has been suggested that the recent Japanese investment and participation in the Alaskan fish canning business may encourage closer cooperation between Alaskans and Japanese, but there seems to be little evidence of any such attitude changes at present.

One other benefit that might be derived from a new treaty would be the more effective exclusion, or at least discouragement, of South Korea and other current non-participating nations from the salmon fishery. It seems likely that if Japan, Canada, and the United States were to settle their differences and agree on a comprehensive management program, the existence of such a program would tend to discourage newcomers. Conversely, it will be difficult to persuade newcomers that high seas salmon fishing is detrimental to the efficient management of the resource so long as Japan is actively engaged in such a fishery under a valid and existing treaty.

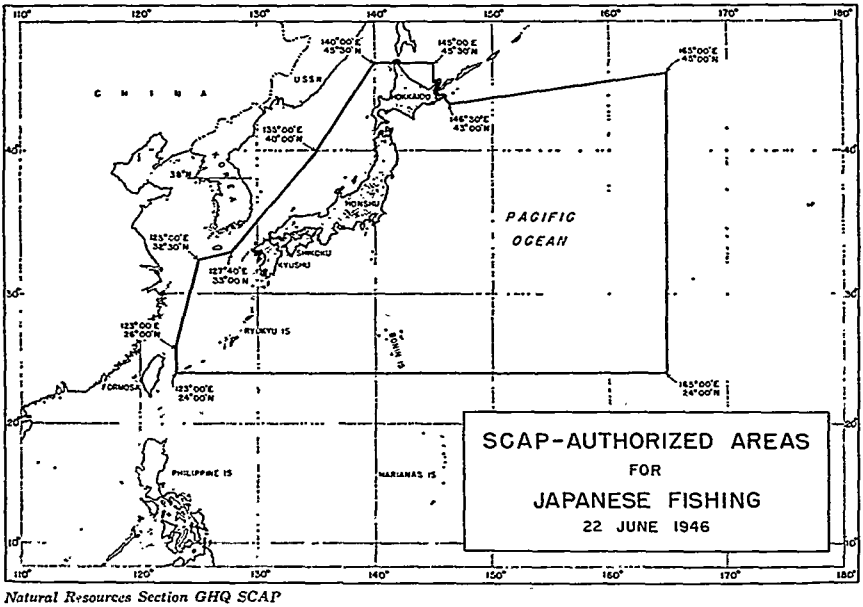
There seems to be little reason to include the Soviet Union in any new salmon treaty regime. The present tacit understanding between the United States and the U.S.S.R. that each should stay out of the other's salmon fishery works well enough and should be continued if at all possible. Bringing the U.S.S.R. into the management program offers few discernible benefits and would only complicate an already difficult decision-making process.[134]

Lastly, good salmon management requires long-range planning with

[134] On the other hand, it has been suggested that if the U.S.S.R. and the United States were to agree formally to stay out of each other's salmon fishery, they might at the same time use such an agreement to put greater pressure on the Japanese, South Koreans, and other foreign fishermen to stay out of these two fisheries.

the expectation that carefully laid plans and experiments will be carried out. The one-year termination provision in the Tripartite Treaty jeopardizes this expectation. Thus one goal to be sought in a new treaty regime would be the commitment of all participating nations to an extended period of unified management.

APPENDIX



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