

# The 1953 International North Pacific Fisheries Convention: Half-Century Anniversary of a New Departure in Ocean Law<sup>†</sup>

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In June 1953, just 51 years ago, the International North Pacific Fisheries Convention (Convention)—one of the most important fishery treaties in modern history—entered into force. Negotiated in Tokyo during November and December 1951, its signatories were Japan, Canada, and the United States. Under its terms, the tripartite North Pacific Fisheries Commission was established to oversee and evaluate scientific research on the condition of salmon, halibut, and other designated fish stocks in the eastern North Pacific Ocean area. In addition, the Commission was empowered to establish actual allocation levels for the catch in high seas waters.<sup>1</sup>

This treaty was historic in ways that are well worthy of our attention today, as we recall the several dimensions of its context when the three

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1. International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, U.S.-Can.-Japan, 4 U.S.T. 380, 205 U.N.T.S. 80. For historical analysis and accounts of the treaty's operation, see Harry N. Scheiber, *Origins of the Abstention Doctrine in Ocean Law: Japanese-U.S. Relations and the Pacific Fisheries, 1937-1958*, 16 *ECOLOGY L.Q.* 23 (1989); ROY I. JACKSON & WILLIAM F. ROYCE, *OCEAN FORUM: AN INTERPRETIVE HISTORY OF THE INTERNATIONAL NORTH PACIFIC FISHERIES COMMISSION* (1986).

North Pacific nations fashioned its terms.

First, it was noteworthy if for no other reason than it was the first international agreement undertaken by the government of Japan beyond the Peace Treaty and defense pact that ended the postwar occupation (1945-52) and restored Japan to full sovereign status in the global community of nations. The timing accurately reflected the exceptionally important place of ocean fishing in the Japanese economy and in Japan's diplomatic priorities.

A second historic feature of the Convention was that it represented the culmination of the United States government's postwar policy of promoting the rapid and full restoration of Japan's fishing capacity. The Occupation, under General Douglas MacArthur, had given high priority to rebuilding Japan's fishing fleets as a way of stimulating general economic recovery while providing for Japanese nutritional needs. Over the bitter objections of the British Commonwealth, China, and the Philippines, MacArthur's Occupation regime returned Japan to Antarctic whaling and promoted the expansion of distant water fishing, including factory ship expeditions for tuna in the South Pacific. The Occupation also promoted fish exports even when they meant new competition for the American fishing industry, and it built up the trawling fleet to the point where by 1949 it was depleting stocks in waters off the Chinese and Korean coastlines. Hence, the Convention should be seen as the capstone of an established policy. To be sure, as will be explained below, the treaty placed a seaward limit in the Northeast Pacific beyond which Japan was committed to refrain from fishing salmon or halibut under specified conditions, and, in that sense, worked against Japan's desires. But that limit was only one feature of a larger U.S. policy that championed Japanese fishing interests and the expansion of Japan's fishing enterprises in far-flung areas of the globe. Perhaps most important to remember is that this largely benevolent U.S. policy toward Japan was pursued in a way that overrode and ignored the wishes and interests of America's wartime allies.<sup>2</sup>

A third aspect of the Convention that gave it great significance in 1953 was its introduction into ocean law and diplomacy of what was known as the "abstention doctrine" or "abstention rule." This phrase referred to terms of the Convention by which each power agreed to abstain from fishing of those species that were determined scientifically to be under exploitation at or beyond the point of "maximum sustained yield" (MSY). In this respect, the treaty represented a major departure

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2. See, e.g., HARRY N. SCHEIBER, *INTER-ALLIED CONFLICTS AND OCEAN LAW, 1945-53: THE OCCUPATION COMMAND'S REVIVAL OF JAPANESE WHALING AND MARINE FISHERIES* 192-93 (2001).

from the traditional doctrine of freedom of fishing on the high seas, out beyond the limits of offshore national jurisdiction (that is, beyond the boundaries of the coastal States' territorial seas, typically three miles offshore). Abstention was by agreement and hence voluntary, so that technically freedom of the seas as the overriding principle was preserved. Moreover, as became an issue later on, no nations other than the three signatories were in any way legally obliged to abstain from fishing on stocks that the Convention was protecting.

For many Japanese commentators, then and even today, the Convention represented a surrender of the "freedom of the seas" principle, entirely to Japan's disadvantage.<sup>3</sup> These critics believe that in 1951, in the midst of the Occupation, the U.S. Government extracted by duress a promise from Japan's Prime Minister to conclude a fisheries agreement in return for an early peace-treaty settlement.

The U.S. diplomatic archives, however, reveal that the State Department did not force the terms of the treaty upon Japan; to the contrary, the American negotiators were deeply worried that the talks would break down at one point.<sup>5</sup> In addition, the terms of the Convention—typically

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3. The most prominent legal commentator who has advanced this view is Judge Shigeru Oda of the International Court of Justice (retired). *See, e.g.*, ODA, INTERNATIONAL CONTROL OF SEAS RESOURCES 90 (1963) (characterizing the abstention doctrine as "very similar to acquisitive prescription . . . [and] completely contrary to the concept of freedom of the high seas"). A reiteration of this exact view was voiced by one of the Japanese scholars present at the February 2003 Law of the Sea Institute conference, "Multilateralism and International Ocean Resources Law."

5. In September 1951 Wilbert Chapman, former ranking fisheries officer in the State Department, told the industry leaders that the State Department and other government officials were standing firm to assure that negotiations with Japan would not be pursued in an atmosphere of "duress." *See* Memorandum from Wilbert M. Chapman, State Department, to Miller Freeman (Sept. 17, 1951) (on file with University of Washington, Wilbert M. Chapman Papers). Meanwhile, William Sebald, the political adviser to the Occupation headquarters in Japan and ranking U.S. diplomatic officer in Tokyo, informed the Japanese Government directly that it should be understood it was negotiating on the basis of "ad hoc sovereign equality with the Governments of Canada and the United States." *See* Memorandum from William Sebald to Japanese government (Nov. 5, 1951) in JAPANESE MINISTRY OF FOREIGN AFFAIRS TRIPARTITE FISHERIES CONFERENCE: CANADA-JAPAN-UNITED STATES: NOVEMBER 5-DECEMBER 14, 1951, at 149 (1951) (recording the official proceedings of the negotiations). The near-breakdown of the conference is recalled by the U.S. head of delegation, William C. Herrington, in his article cited *infra*, note 7.

denounced by Japanese legal and political commentators as harmful to Japanese fishing interests—in fact were highly advantageous to Japan in ways that the Japanese fishing industry and government officials fully understood in 1951–53, as evidenced in recently opened archival records in Tokyo.<sup>6</sup> It appears that the Japanese realized that “abstention,” as defined in the Convention, would apply only to fish stocks that were already under a scientific management regime with conservationist purposes and where proof was forthcoming that the fish were being exploited at MSY. There was no other such regime in effect anywhere in the Pacific Rim or Indian Ocean at the time, and so the Japanese negotiators were victorious in establishing the precedent on terms that placed them in a position to resist efforts by other governments (such as Australia’s, which wanted to exclude Japan’s fleets from waters in the entire Southern Hemisphere) to use the Convention as a model for exclusionist policies.<sup>7</sup>

Indeed, insofar as the Convention provided a model in international fisheries diplomacy and management structure, it also advanced the concept of the international commission. In that respect, it built upon an ongoing aspect of U.S. policy, already expressed in American support for the International Whaling Commission and the initiative of the U.S. Government in creating commissions for the tropical tuna in the Eastern Pacific and the ocean stocks in the Northwest Atlantic.<sup>8</sup>

Although the sustainability concept was central to the U.S.-Canadian strategy in the negotiations and an essential element in the Convention, it must be noted that the MSY concept, as understood fifty years ago, has become the subject of heavy criticism and has been largely supplanted by other concepts in management theory since that time. While the MSY standard served well in its day in obtaining consent for conservationist

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6. See discussion, based on files of the Japanese Ministry of Foreign Affairs and the Ministry of Fisheries and Agriculture, in the Japanese National Archives, Tokyo, in SCHEIBER, *supra* note 2, at 179–82. See also Harry N. Scheiber, *Japan, the North Atlantic Triangle, and the Pacific Fisheries, 1930–1953: A Perspective on the Origins of Modern Ocean Law*, 6 SAN DIEGO INT’L L.J. 27 (2004).

7. The head of the American delegation and principal author of the abstention doctrine, William C. Herrington, provides a valuable autobiographical account of the Convention’s negotiation. See William C. Herrington, *In the Realm of Diplomacy and Fish: Some Reflections on the International Convention on High Seas Fisheries in the North Pacific Ocean and the Law of the Sea Negotiations*, 16 ECOLOGY L.Q. 101 (1989). For an account of conflicting Allied and U.S. positions vis-à-vis Japan’s long-run interests in the diplomatic context, based on evidence from the United States, Canadian, Australian, United Kingdom, and New Zealand archives, see SCHEIBER, *supra* note 2, at 175–96.

8. See, e.g., ALBERT W. KOERS, *INTERNATIONAL REGULATION OF MARINE FISHERIES: A STUDY OF REGIONAL FISHERIES ORGANIZATIONS* (1973); Harry N. Scheiber, *Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945–1970*, 13 ECOLOGY L.Q. 381 (1986).

ideas in management, it is now remembered as the precursor of more protective concepts such as the precautionary principle and the conservation of marine ecosystems as central features of modern high seas fishery management.

Despite continuing tensions regarding the abstention doctrine and also the specific allocation policies pursued over the years under its terms, the Convention remained in effect for two decades—serving as the mechanism for maintaining the uneasy but steady balance of fishing powers in the Northeast Pacific Ocean area and as the protector of stocks in the crucially important salmon fishery. In that respect, it bridged the period from the immediate postwar settlement to the advent of the extended 200-mile exclusive zones that rendered necessary a newly designed regime both in the Northeast Pacific and in other ocean fishing areas of the globe.<sup>9</sup> Even today, it casts a long shadow, as the implementation of the United Nations Straddling Stocks Convention will (if successful) revivify and apply the abstention doctrine in a new context, while adapting in this new arena of high-seas fisheries management the international commission model.

In the broadest historical perspective, the Convention laid the groundwork for the modern-day norm of multi-lateralist style and structure for sustainable management of ocean resources. It is fitting, then, that a conference bringing together experts on ocean law and policy from many countries would have gathered in 2003 at the University of California, Berkeley to consider the current-day initiatives in multilateralism and, at the same time, to recall their origins and precursors starting with the International North Pacific Fisheries Convention.

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9. *See generally*, MANAGEMENT OF WORLD FISHERIES: IMPLICATIONS OF EXTENDED COASTAL STATE JURISDICTION (Edward L. Miles ed., 1989); and retrospective and prospective essays in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY (Davor Vidas & Willy Østreg ed., 1998); LAW OF THE SEA: THE COMMON HERITAGE AND EMERGING CHALLENGES (Harry N. Scheiber ed., 2000); and BRINGING NEW LAW TO OCEAN WATERS (David D. Caron and Harry N. Scheiber, eds., 2004).

