

Recollections of the 1952 International North Pacific Fisheries Convention: The Decline of the “Principle of Abstention”

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Having recently completed twenty-seven years on the bench of the International Court of Justice in The Hague, I have just returned to Sendai, Japan, my home town. Please permit me therefore to offer some personal recollections of the time fifty years ago when, as a graduate law student from occupied Japan traveling on a passport issued by General MacArthur, Supreme Commander of the Allied Powers in Japan, I began preparation of my doctoral dissertation at Yale Law School.

My professor at Yale, the late Myres S. McDougal, suggested that, as a candidate for the J.S.D. degree in 1953, I could choose to study either air and outer space law or the law of the sea. There was growing interest in outer space at that time, just after an article entitled “Who Owns the Moon?” had appeared in the *Saturday Evening Post*, then one of America’s leading weeklies. I felt, however, that the atmosphere and outer space were still somewhat out of mankind’s reach, while the sea lay all around us. I therefore began by reading all the available legal literature in English, French, and German on the sea, starting with the classic works of Fulton, Gidel, and Higgins-Colombos¹ and including

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1. See generally THOMAS W. FULTON, *THE SOVEREIGNTY OF THE SEA: AN*

works concentrating specifically on the territorial waters, such as those of Meyer and Jessup²—all published before the war.

In the late 1930s, on the eve of the Second World War, the United States learned that a Japanese fleet had been sent to the Eastern Bering Sea for scientific investigation of salmon stocks. In response to this discovery, the United States fishing industry successfully lobbied for the passage by Congress of bills extending the territorial waters with a view chiefly to securing a monopoly on fishing sites.

Edward W. Allen, a Seattle lawyer who was later appointed to the Commission set up under the 1952 Convention, was a leading advocate of protection for the Pacific coast fishing industry.³ Allen was joined in this crusade by Professor Bingham of Stanford University and Professor Riesenfeld of the University of California at Berkeley, the author of *Protection of Coastal Fisheries under International Law*.⁴ Professor Jessup of Columbia University stood in firm opposition to these scholars' unilateral claims, adhering rather to the orthodox doctrine of international law.⁵

In the course of one of the many days spent in the Yale Law School Library, I discovered with great interest a passage in the proceedings of the 1940 Annual Meeting of the American Society of International Law containing an exchange of views between Professors Jessup and Bingham. Jessup, who had been criticized for being doctrinaire by Bingham in his speech on "Changing Concepts of International Law: Maritime Jurisdiction in Time of Peace," replied as follows:

I agree that international law must be dynamic if it is to endure, but there is a distinction which I think Professor Bingham sometimes leaves out of sight, and that is the distinction between dynamism and dynamite. . . . It (the concept of dynamism as applied to international affairs) tends to merge with the notion that because a state's interests require something, the law must be so interpreted as to permit the state to obtain it.⁶

HISTORICAL ACCOUNT OF THE CLAIMS OF ENGLAND TO THE DOMINION OF THE BRITISH SEAS, AND OF THE EVOLUTION OF THE TERRITORIAL WATERS, WITH SPECIAL REFERENCE TO THE RIGHTS OF FISHING AND THE NAVAL SALUTE (1911); GILBERT GIDEL, *LE DROIT INTERNATIONAL PUBLIC DE LA MER* (1932-1934); A. PIERCE HIGGINS & JOHN C. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* (1943).

2. See generally CHRISTOPHER B.V. MEYER, *THE EXTENT OF JURISDICTION IN COASTAL WATERS* (1937); PHILIP C. JESSUP, *LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* (1927).

3. Edward W. Allen, *Control of Fisheries beyond Three Miles*, 14 WASH. L. REV. 91 (1939).

4. JOSEPH W. BINGHAM, *REPORT ON THE INTERNATIONAL LAW OF PACIFIC COASTAL FISHERIES* v-vi (1938); STEFAN A. RIESENFELD, *PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW* (1942).

5. Philip C. Jessup, *The Pacific Coast Fisheries*, 33 AM. J. INT'L L. 129, 131 (1939).

6. *Changing Concepts of International Law*, 34 AM. SOC'Y INT'L L. PROC. 63, 65 (1940) (quoting discussion led by Philip C. Jessup).

Professor Norman J. Padelford of the Fletcher School of Law and Diplomacy supported Jessup's view and said Bingham's "[d]ynamism will mean anarchy."⁷

I felt that the future of the ocean would focus not on conservation of fish—a scientific principle not open to challenge—but on issues of social and national policy, such as determining how States could share limited fish resources, which were subject to ever-increasing demand.

International scholars are in agreement that the interests of the fishing industry in the United States Pacific Northwest led President Truman to issue his famous Proclamation on the protection of fishery resources on September 28, 1945 (only some weeks after Japan's surrender).⁸ One of the real, but undisclosed, purposes of the Truman Proclamation was to exclude Japanese fishing fleets from the northeast Pacific Ocean, although this was camouflaged by the beautiful-sounding slogan of "conservation" of fish resources through international co-operation.

A few years later, the Treaty of Peace with Japan (drafted mainly by the United States) included an article (Article 9), which reads:

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.⁹

Late in 1951, a few months before the Treaty of Peace came into force, the United States, notwithstanding the continuing occupation, dealt with Japan as an equal in the North Pacific fisheries negotiations in Tokyo. It seems to me highly symbolic that the first international treaty Japan concluded after the war was this fisheries treaty.

The treaty was promoted as an idealistic arrangement to enhance international co-operation in considering ocean fishery resources, but the only information available to me—from the press (in particular, *The New York Times*)—left me skeptical. The United States was to be left free to maximize its own benefits, limited only by the Maximum Sustainable Yield (MSY) determined by conservation requirements, while Japan was to contribute to the conservation of fishing resources by *not* engaging in fishing at all.

7. *Id.* at 98 (quoting discussion led by Norman J. Padelford).

8. Harry S. Truman, *Proclamation by the President with Respect to the Coastal Fisheries in Certain Areas of the High Seas*, 40 AM. J. INT'L L., SUPPL. 46 (1945).

9. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 46.

One day in April 1952, while in Washington, D.C., to attend the Annual Meeting of the American Society of International Law, I paid an unannounced visit to Mr. Herrington of the State Department. He had been fisheries attaché at the Allied Powers Headquarters in Tokyo when the occupation of Japan began in 1945 and later headed the American delegation at the Japan-U.S. negotiations on the Convention.

Mr. Herrington was extremely gracious to this young student from occupied Japan, and I enjoyed a very friendly, three-hour-long discussion with him at his office in the State Department. I could not share his view that the Convention would be the most idealistic agreement for future conservation of ocean fish resources, and I put to him various questions which had long interested me relating to the ban on foreign fishing in the vast oceans. Mr. Herrington, of course, was not convinced, but he understood my position.

One month after my visit to Mr. Herrington and only ten days after the Treaty of Peace with Japan came into force, the Convention was formally signed on May 9, 1952.

The discussion with Mr. Herrington became the springboard for the studies that formed the basis of my J.S.D. dissertation in 1953, as well as for my article, entitled "New Trends in the Régime of the Seas—A Consideration of the Problems of Conservation and Distribution of Marine Resources,"¹⁰ and my first book, *International Control of Sea Resources*.¹¹ I can say with some certainty that the article, prepared during my second stay at Yale, introduced the concept of sharing or distribution of fish resources. At that time, Professor William T. Burke was also at Yale, preparing a book with Professor McDougal.¹² As I recall, although Professor McDougal did not entirely agree with my ideas, he fully understood the position I advocated.

The United States succeeded in turning Japan's abstention from fishing into a more general principle of international law, which was incorporated into the 1952 Convention. The important thing to me, however, was the U.S. effort to give general scope to a formula which would lead to the exclusion of foreign fishing from widely broadened coastal waters, whether justified on grounds of respect for past customary fishing activities or of the supremacy of the coastal State's interest.

10. 18 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [Heidelberg Journal] 261 (1957).

11. SHIGERU ODA, *INTERNATIONAL CONTROL OF SEA RESOURCES* (1963).

12. MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962).

At the 1955 Rome Conference,¹³ Mr. Herrington (again head of the United States delegation) openly suggested that the abstention formula should be generalized as a legal principle. This effort failed. In the mid-1950s, when the United Nations International Law Commission was engaged in formulating draft articles on high seas fisheries,¹⁴ Mr. Edmonds, a member from the United States, made a similar attempt at the Commission. Sir Gerald Fitzmaurice of the United Kingdom, however, objected rather vigorously. The 1956 draft articles on the law of the sea—the final text of the International Law Commission to be put on the agenda of the First United Nations Conference on the Law of the Sea (UNCLOS I)—did not include the principle of abstention.

UNCLOS I was convened in the spring of 1958 in Geneva for an 11-week period. Having just returned to Japan from my stay at Yale and holding a position as Professor of International Law in Sendai, I was called upon to assist the Foreign Office in formulating Japan's position regarding the law of the sea. I was part of the Japanese delegation to this Geneva Conference, serving as legal counsel in charge of its third and fourth committees dealing with the questions of high seas fisheries and of the continental shelf.

I was pleased to see that the American delegation included Mr. Herrington, once again, as well as Mr. Wilbert Chapman. Thanks to my friendship with Mr. Herrington, I became the contact point with the American delegation as far as the matters of fisheries and of the continental shelf were concerned. The "honeymoon" between the American and Japanese delegations started at the beginning of this First Law of the Sea Conference in Geneva. Our relationship, however, cooled somewhat in the middle of the Conference when it became apparent that the United States was keen on including the principle of abstention in the Convention on Fishing and Conservation of Living Resources of the High Seas.

The Latin American States and the developed nations then started to campaign for the supremacy of interest of the coastal State, to be supported by the concept of abstention. The United States faced a paradox: economic interests in the coastal Pacific Northwest were still

13. *Report of the International Technical Conference on the Conservation of the Living Resources of the Sea*, Int'l L. Comm'n, 7th Sess., UN Doc. A/CONF.10/6, revised by U.N. Doc. A/CONF.10/6/Corr. 1 (1955).

14. *Summary Records of the 356th Meeting*, [1956] 1 Y.B. Int'l L. Comm'n 123, U.N. Doc. A/CN.4/SER.A/1956.

keen to exclude Japanese fishing vessels from the North Pacific, but the United States desired to prevent exclusion of its own fishing fleets from waters off the west coast of Latin America in the South Pacific.

The concept of a 200-mile fishing zone emerged rapidly at the Second United Nations Conference on the Law of the Sea in 1960. The supremacy of interest of the coastal State was no longer ignored. The 1952 Fisheries Convention was rapidly losing its significance, long before formal enactment of the 200-mile fishery zone or the 200-mile exclusive economic zone (EEZ) by Japan in 1977 and the United States in 1983.

The principle of abstention, though, was still discussed in 1966 at the first session of the Rhode Island Law of the Sea Institute.¹⁵ Messrs. Herrington and Chapman never stopped campaigning for this alleged "principle," which I firmly opposed.

In the year that followed, I had an opportunity to work with Professor Burke on the question of high seas fisheries at the *Washington Law Review* symposium.¹⁶ Later, in 1968, opportunities arose at the Institute of Peace and Conflict in Stockholm to work with Professor Burke and Mr. Chapman; in 1969, another opportunity arose at the Inter-Governmental Oceanographic Commission of UNESCO to work with Professors Burke and Wooster,¹⁷ and with them again in 1975 at the Miami Session of the Law of the Sea Institute.¹⁸ Though our discussions no longer touched on either the principle of abstention or the 1952 International North Pacific Fisheries Convention, I continued to have fond memories of the Convention for its great significance in the history of the law of fisheries.

I pursued my interest in the law of fisheries and was appointed by the United Nations in 1967 to the newly established United Nations Group of Experts on Marine Science and Technology.¹⁹ The group consisted of several ocean specialists in various areas, and I was to represent the law. Professor Wooster was similarly appointed to represent marine physics and Mr. Chapman, who joined the second session in 1968, to represent fisheries science. This was really a prelude to the United Nations Committee on the Peaceful Uses of the Seabed beyond National Jurisdiction, set up by the United Nations General Assembly in 1967, which after six years of activity became the Third United Nations Conference on the Law of the Sea.

15. 1 LAW OF THE SEA INST. PROC. (1966).

16. Shigeru Oda, *Japan and International Conventions Relating to North Pacific Fisheries*, 43 WASH. L. REV. 63 (1967).

17. UNESCO, 82nd Sess., UNESCO Doc. 82 EX/10 (1969).

18. *Law of the Sea: Caracas and Beyond*, 9 LAW OF THE SEA INST., PROC. (1975).

19. See ECOSOC Res. 1112 (XL), U.N. ECOSOC, 40th Sess., Suppl. 1, p.3.

The American Bar Association organized a symposium in June 1967 in Long Beach, California.²⁰ Professor Burke discussed seabed mineral resources; and I discussed the outer limit of the continental shelf, arguing that the exploitability test for the continental shelf outer limit suggested in the 1958 Geneva Convention on the Continental Shelf would, at least theoretically, lead to the apportionment of the whole ocean floor among the coastal States. In his historic statement to the United Nations General Assembly on November 1, 1967, Ambassador Pardo was strongly critical of that possible outcome and proposed the new concept of the “common heritage of mankind” for the ocean floor worldwide.²¹ The United Nations Seabed Committee thus came into being in 1968. As the Japanese delegate to this Committee, I enjoyed a close working relationship and friendship with Pardo until the early 1970s when he left the United Nations and his country, Malta, to join academia in California as a professor.

In 1981, upon receiving an honorary doctorate from New York Law School, I predicted that the concept of the “common heritage of mankind”—which, as Pardo advocated, should apply to the mineral resources of the ocean floor—would eventually rise upwards to encompass the ocean waters themselves and would, in turn, apply to the fisheries of the vast oceans.²² It was my great pleasure to have made this presentation before Professor McDougal, at that time a professor at New York Law School, who had guided me into specializing on the law of the sea exactly thirty years before at Yale.

I have perhaps stated too much about my personal voyage into the fascinating realm of the law of the sea. All of the above anecdotes must now seem like stories from the distant past. Twenty-eight years ago, in 1976, I assumed my duties as a Judge on the International Court of Justice and discontinued my academic pursuits in the law of the sea, but I still keenly recollect the 1952 North Pacific Fisheries Convention, a milestone in the development of the law of the sea.

20. Shigeru Oda, *The Geneva Conventions on the Law of the Sea: Some Suggestions for their Revision*, 1 NAT. RESOURCES LAW. 103 (1968).

21. *Declaration and Treaty Concerning the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, Underlying the Seas Beyond the Limits of Present National Jurisdiction, And the Use of Their Resources in the Interests of Mankind*, UN GAOR, 22nd Sess., 1st Comm., 1515th and 1516th mtg., U.N. Doc. A/6695 (1967).

22. Shigeru Oda, *Sharing Ocean Resources—Unresolved Issues in the Law of the Sea*, 3 N.Y.L. SCH. J. INT'L & COMP. L. 1, 12–13 (1981).

