

Wet War—North Pacific*

EDWARD F. OLIVER**

I. UNITED STATES CONTIGUOUS FISHERY ZONE

A. *Basis for Establishment*

An unpublicized American offensive in a "wet war" at sea is now gathering momentum as Coast Guard cutters and aircraft patrol the North Pacific in search of foreign fishing vessels operating in violation of treaty or federal statute. The offensive was triggered in April 1966 when a foreign fishing fleet of over 500 Russian and Japanese vessels systemically swept the waters of the Gulf of Alaska and the Pacific Coast.¹ Often in sight of the Oregon and Washington coasts, the threat to depletion of salmon, hake, and other fish stocks was apparent.²

* For the status of the Wet War—South Pacific, see Note, *Seizures of United States Fishing Vessels—The Status of the Wet War*, 6 SAN DIEGO L. REV. 428 (1969).

** B.S. California Maritime Academy, J.D. George Washington University (June 1971); Capt. United States Coast Guard; Chief, Merchant Vessel Personnel Division, U.S.C.G. Headquarters.

The opinions expressed herein are strictly those of the author and do not necessarily represent the views of the Commandant, U.S.C.G., or the Department of Transportation.

1. San Pedro, Calif., *News Pilot*, Apr. 11, 1966 at 1; Astoria, Oregon, *Daily Astorian*, Apr. 11, 1966 at 1; *PACIFIC FISHERMAN*, May, 1966 at 7.

2. The Soviets stated that they intended to net 220 million pounds of hake by the end of 1966. The Bureau of Commercial Fisheries estimated that the area could surrender only 200 million pounds per year. *PACIFIC FISHERMAN*, Sept., 1966 at 19.

The fears of the Northwest fishing interests were supported by a finding that an estimated 81 percent of the total United States fishery catch is taken within 12 miles of the shores of the United States.³ From 1959 to 1963, the average fishery catch in the United States was four and one-half billion pounds. 68 percent of the total was taken within 3 miles of our shores. 13 percent was taken within 9 miles contiguous to that 3 miles, and the remaining 19 percent was taken beyond 12 miles from United States shores.⁴

The comparative development of the Russian and American Pacific Ocean perch and hake catches is dramatic: In 1965 the American catch of perch was 25 million pounds, nearly 10 times that of the Russians; one year later the Russian catch had doubled that of the U.S. In 1965 the American catch of hake was three million pounds and the Russians had not entered the field; one year later the Russian catch was 20 times higher than the American catch, although the American catch had quadrupled.⁵

In October 1966 Congress responded to the aroused Northwest fishing industry by enacting Public Law 89-658 which declared a 9-mile fishery zone contiguous to the territorial sea and stretching uniformly along the United States coastline.⁶ In customary international law "contiguous zone" refers to a belt of sea of a certain limited breadth located beyond the territorial sea and adjacent to its outer boundary. Within this zone the coastal state may exercise limited jurisdiction for special purposes.⁷

Prior to proclaiming the 9-mile contiguous Zone Congress had attempted to protect United States fishing interests in 1964 by enacting Public Law 88-308.⁸ The 1964 Act made it unlawful for any foreign vessel to engage in fishing within United States territorial waters. A maximum fine of \$10,000 or imprisonment for not more than one year, or both, was provided for persons violating provisions of the Act. Also, it authorized the seizure and forfeiture of any vessel and its catch found in violation.

Until 1964 federal law did not expressly prohibit foreign vessels from fishing within United State territorial waters.⁹ There was no

3. H.R. REP. No. 2086, 89th Cong., 2d Sess. 3 (1966).

4. *Id.* at 4.

5. Johnson, *Foreign Fishing Activities in the North Pacific Coast and Bering Sea*, 11, table 3. Paper presented before the Pacific Marine Fisheries Commission, Seattle, Wash., Nov. 17, 1966.

6. 80 Stat. 908, 16 U.S.C. § 1091 (Supp. V, 1966).

7. M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 575 (1962).

8. 78 Stat. 194, 16 U.S.C. §§ 1081-85 (1964).

9. Act of Sept. 2, 1950, ch. 842, 64 Stat. 577.

provision for seizure or forfeiture of vessel and cargo, nor any penalty against the master. Whenever a foreign vessel did not have a valid reason for being in United States territorial waters, the only recourse was for the Coast Guard to order the vessel to leave and escort her to the high seas. Obviously, the limited scope of the law failed to serve as a deterrent and enabled foreign vessels to fill their vessels with United States fishery resources.¹⁰

B. Evolution of Regime of Contiguous Fishery Zones

The enactment of the 1966 Bill firmly established a regime of contiguous fishery zones in international law of the sea which had been slowly developing. The evolution was dramatically aided by the Presidential Proclamation in 1945,¹¹ known as the "Fisheries Proclamation," in which President Truman asserted the right of the United States "to establish conservation zones in those areas of the high seas contiguous to the coasts of the U. S. wherein fishing activities have been or in the future may be developed and maintained on a substantial scale."

The United States also had given great impetus to the concept that exclusive or superior claims to the fish resources in coastal waters could be validly made in areas beyond the territorial sea plus a 6-mile fishing zone at the 1958 Geneva Conference on the Law of the Sea. This proposal failed acceptance, however, in 1958 and again at the 1960 Geneva Conference.¹²

Historically, one of the principles of law of the sea is that all nations have an equal right to fish on the high seas and superior rights in the resources are obtainable only on the basis of capture. The 1958 United Nations Conference on the Law of the High Seas specifically enumerated freedom of fishing as one of the freedoms of the high seas. At the same time the international community gave recognition to a high seas zones contiguous to the territorial sea, in which the coastal state was granted special authority for specific

10. H.R. REP. No. 91-1430, 91st Cong., 2d Sess. 3 (1970) (Report on "A Bill to Strengthen the Penalties for Illegal Fishing in the Territorial Waters and the Contiguous Zone of the United States . . .").

11. Presidential Proclamation No. 2668, "Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas," 10 Fed. Reg. 12304, 3 C.F.R. 1943-1948 comp. at 68 (1945).

12. M. McDUGAL & W. BURKE, *supra* note 7, at 547.

purposes which, however, did not include the exploitation or conservation of fishery resources.¹³

Perhaps the most significant turning point in customary international law occurred in 1964 when Great Britain passed legislation to create a fishing zone extending 9 miles beyond her territorial waters. This was followed in March 1964 by the European Fishing Conference in which 16 European nations participated and where a 12-mile exclusive fishing zone was recognized.¹⁴

There was also ample precedent in United States history for the unilateral establishment of a contiguous zone for a special purpose. In the infancy of the United States, for example, statutes were enacted giving the United States the competence to exercise customs control within four sea leagues (12 marine miles) from the shore.¹⁵

Federal court decisions through the years have upheld the right of the Government to regulate the use of contiguous zones in the enforcement of the National Prohibition Act¹⁶ and the Anti-Smuggling Act.¹⁷ When the United States Coast Guard seized the British vessel *GRACE & RUBY* for carrying contraband in violation of the National Prohibition Act, the vessel was more than 3 miles but less than 12-miles from shore. The court held that the seizure was lawful and ordered the vessel forfeited.¹⁸

When the Coast Guard seized the *MAZEL TOV*, also a British rum runner, the United States Supreme Court held that the United States had the power to make the seizure, but by treaty the United States had imposed upon itself a 12-mile limitation within which United States authority could be imposed. Therefore, since the seizure was made outside of the 12-mile limit, a libel for the forfeiture of the ship should have been dismissed.¹⁹

As a result of the *MAZEL TOV* decision, the United States broadened its jurisdiction by enacting the Anti-Smuggling Act which permits the President to set special customs-enforcement zones "in proximity to such vessel or vessels that such unlawful introduction

13. Convention on the High Seas, Apr. 29, 1958 [1962] art. 2, 13 U.S.T. 2312, T.I.A.S. No. 5200; Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958 [1964] art. 24, 15 U.S.T. 1606, T.I.A.S. No. 5639.

14. Fisheries Convention Final Draft, *Reprinted* 58 AM. J. INT'L L. 1068 (1964).

15. An Act to Regulate the Collection of Duties on Imports and Tonnage, ch. 22 § 25, 1 Stat. 627 (1799). See W.E. MASTERSON, JURISDICTION IN MARGINAL SEAS 181-92 (1929), for a summary of this early legislation.

16. ch. 85, 41 Stat. 305 (1919).

17. 19 U.S.C. § 1701 *et seq* (1964).

18. 285 F. 475 (D. Mass. 1922).

19. *Cook v. United States*, 288 U.S. 102 (1933).

or removal of merchandise or persons may be carried on by or to or from such vessel or vessels." This special zone is not permanent, as is the case with the 12-mile customs zone which is permanently in effect along the entire United States coast, and "shall not include any waters more than fifty nautical miles outwards from the outer limit of customs waters."²⁰

II. NORTH PACIFIC FISHERIES TREATIES

The law of the sea has shown that the regulations of fishery zones by the coastal state, either unilaterally or by treaty, is a part of national development. The 1966 proclamation of a contiguous zone to conserve fishery resources in United States coastal water had been preceded by three decades of international negotiation to conserve traditional United States fishery catches, that is, salmon, halibut, perch, and hake in North Pacific high seas areas.

Numerous bilateral and multilateral agreements have been entered into by the four major fishing nations bordering the North Pacific. The major international conservation effort with respect to salmon was signed by the United States and Canada in 1930.²¹ Other conventions include the Pacific Halibut Conventions of 1930 and 1953 between the United States and Canada,²² and the North Pacific Fisheries Convention of 1952²³ signed by the United States and Japan.

These three conventions provide for the policing and enforcement of the Treaty provisions on each nation's vessels by the other signatory nation. In the case of violation of the North Pacific Fisheries and Halibut Conventions any signatory nation may seize the other's vessels for violation but the vessel must then be turned over to an official of the flag nation for prosecution. In the case of the Sockeye Salmon Convention²⁴ violators can be seized and prosecuted

20. 19 U.S.C. § 1701 (1964).

21. Convention for Protection, Preservation and Extension of the Sockeye Salmon Fisheries of the Fraser River System, signed 1930, effective 1937, 184 L.N.T.S. 306 (1938).

22. Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, 121 L.N.T.S. 46 (1931-32), replaced, 222 U.N.T.S. 78 (1955).

23. International Convention for the High Seas Fisheries of the North Pacific Ocean, 205 U.N.T.S. 80 (1955).

24. Sockeye Salmon Convention, *supra* note 21.

by the nation making the arrest.

The Coast Guard as part of its regular law enforcement mission, primarily the Alaska Patrol, enforces these conservation conventions and makes seizures when violators are detected.

In order to encourage international cooperation and compliance with treaty areas and exclusive fishing rights in contiguous areas, provisions have been included in some instances to provide for seizure and/or fines. The dramatic expansion of foreign fishing fleets operating close to United States shores has resulted in fishing interests through their Congressional representatives to demand strict enforcement of statutes and treaties. The United States Coast Guard, the major seagoing law enforcement agency, has been charged with the duty. Limited funds, however, has restricted the degree of surveillance. Four cutters and a similar number of aircraft are now operating out of Alaskan ports engaged in the North Pacific patrol. It is expected that an increase in congressional appropriations will soon allow for an expansion of the patrol.

III. RECORD OF VESSELS SEIZED AND DISPOSITION

A. *Violation of Contiguous Fishery Zone*

The first seizure in the United States offensive against foreign fishing in United States waters was on September 16, 1966, when the Canadian trawler *MISTY MOON* was seized within the 3-mile territorial sea off Chuginadak Islands in the Aleutians. The master was fined \$5,000 and the catch was forfeited under the provisions of 46 U.S.C. 1082. On March 2, 1967 the 178-foot Russian trawler *SRTM-8413* was seized within territorial waters off the Aleutians. The master was detained, but the vessel was not forfeited. Two weeks later the Russian Embassy paid a fine of \$5,000 for the master.

The first application of the 1966 Act which established the 9-mile contiguous zone was on March 22, 1967, when the Russian trawler *SRTM-8457* was seized 5.5 miles off the Aleutians. The vessel ignored the command to stop, hauled in its gear and headed for the open sea, but the vessel was overtaken by a Coast Guard cutter and seized. The master was fined \$10,000. On July 16, 1967, the Japanese *TENYO MARU* was seized in territorial waters off the Aleutians. The master was fined \$5,000. On August 3, 1967 the Russian trawler *SRTM-8457* was again seized for violation of the U. S. contiguous fishing zone. This time the master pleaded *nolo contendere* and was fined \$20,000. On June 7, 1968 the Korean trawler *SAMSU* was seized within the contiguous zone off Akutan in the Aleutians. The master was fined \$10,000.

On June 7, 1969 the cutter *STORIS* seized two Japanese gill net fishing vessels, *KOAI MARU* and *ZENPO MARU*, in Norton Sound within the contiguous zone. A Fish and Wildlife Service aircraft had a fleet of Japanese vessels consisting of two mother ships and 31 gill netters under covert surveillance for three days. The *STORIS* was diverted to Norton Sound to apprehend the violators and found the two vessels 6 miles inside the 12-mile zone. It was necessary for the cutter to fire shots across the bows of the two vessels before they would heave to. Boarding parties were put aboard the vessels and they were escorted to Nome. The masters pleaded *nolo contendere* and were fined \$3,500 and \$5,000 respectively.

A few days later the *STORIS* received a message from the *BANSHU MARU* which still has the Coast Guard wondering about the Oriental mind: "Dear Sir Captain. Thanks for your kindness. We left Norton Sound for Japan this afternoon. We hope generous disposal for our two boats."

On June 7, 1970 the Japanese *AKEBONO MARU* was seized 9.3 miles off Yakobi Island, near Chichagof Island. The master was fined \$10,000 plus settlement for \$20,000 in lieu of civil suit against vessel, total \$30,000.

One of the largest vessels seized was later released without fine when it was discovered the vessel's charts were in error. On July 16, 1970 the Coast Guard cutter *COMANCHE* sighted the Soviet factory stern trawler *KATANGLI* fishing off the Klamath River off the coast of Northern California within the 12-mile contiguous zone. A Coast Guard officer boarded the vessel and informed the master that he was violating a United States fishing zone. Through an interpreter the two men discussed the vessel's position. From land the *KATANGLI* was actually outside the 12-mile limit. United States territory, however includes small islands or rocks and the 12-mile limit is measured from the outermost land to the west.

The Soviet charts showed that Redding Rock, from which the 12-mile zone is measured, was marked on the chart as a wreck. After marking the Soviet navigation charts to show the correct limits of the United States fishery zone, the Coast Guard officer departed the vessel and it was allowed to depart the area.

The Coast Guard cutter *STORIS* while on fisheries patrol in the

Gulf of Alaska on August 18, 1970 observed and identified the Japanese longline fishing vessel *KAKI MARU* within the United States contiguous zone off Middleton Island. The vessel was at position 59-18.5N, 146-05W. This position was obtained by the operations officer on the *STORIS* with the aid of the LORAN and radar. With the use of international signal flags, the Japanese longliner was told the vessel would be boarded.

Upon boarding the Coast Guard officer requested that the ship's papers and logs be turned over to him. The boarding officer then photographed the incriminating entries in the ship's log and returned them to the Captain. The master told the boarding officer that he thought he was fishing outside the contiguous zone but that his LORAN and radar were both inoperative. The boarding officer checked the electronic sets aboard the Japanese vessel and found them both in excellent operating condition.

The *KAKI MARU* was escorted into Seward where gear, cargo, and vessel were appraised for forfeiture value. Upon arrival inspection of the ship's log showed that it had been altered after the initial boarding. When shown the photographs of the log depicting the entries at the time of boarding and asked to explain the discrepancy, the master declined an explanation. He indicated that he was willing to accept the position obtained by the Coast Guard as the position where the vessel was fishing. A fine totaling \$35,000 was subsequently imposed for the violation.

On August 21, 1970, a foreign fishing vessel subsequently identified as the Japanese *KIYO MARU* was observed by Coast Guard aircraft in the United States contiguous zone off Alaska. The vessel ignored a message block that was dropped by the aircraft in a low pass and headed for the high seas. The aircraft maintained hot pursuit throughout the night and notified Coast Guard cutters on patrol of the attempt to escape. During the night the cutter *CLOVER* made positive radar contact and overhauled the vessel at daylight. Because of the Japanese master's attempt to escape seizure, the cutter's commanding officer was instructed to arrest and remove him from his vessel if he remained uncooperative.²⁵ The Japanese vessel

25. See Radio Message from District Commander, 17th Coast Guard District, Juneau, Alaska, to Commandant, Coast Guard:

21163Z AUG 70 X HOT PURSUIT MAINTAINED THROUGHOUT NIGHT BY COGARD ACFT FROM ANNETTE AND KODIAK. X 210955Z CLOVER RELIEVED HOT PURSUIT WITH POSITIVE RADAR CONTACT POSIT 56-28N 138-48W X 211145Z SUBJ VESSEL HOVE TO, CLOVER ASTERN VESSEL 1200 YDS AWAITING DAYLIGHT X ATTEMPTS TO SIGNAL WITH LT, VOICE, AND FLAGS TO PROCEED SIKTA NEG RESULTS. X CLOVER DIRECTED TO BOARD WHEN POSSIBLE SEIZE VESSEL AND

was eventually taken into Sitka where a fine of \$45,000 was levied against the vessel and master. In addition, the master was given a one-year suspended sentence.

On August 22, 1969, the Japanese *MATSUI MARU* was seized 9.6 miles off Herbert Graves Island. The master was fined \$10,000. On September 7, 1970, the Canadian trawler *CLIPPER II* was seized 1.3 miles off Cape Muson by the cutter *CONFIDENCE*. The captain pleaded guilty to four criminal counts in the state court and was fined \$3,000.00. A federal settlement of \$2,000.00 was made out of court.

On September 27, 1970, the Japanese *KYOYO MARU* was seized by the Coast Guard cutter *BALSAM* while fishing 10.5 miles off Atka Island in the Aleutians. A total fine of \$50,000 was levied against the vessel and master. The master was also given a one-year suspended sentence. During the pursuit it was thought that gunfire across the bow would be necessary, but the vessel finally hove to.²⁶

B. Violations of High Seas Treaty Areas

Seizures of Japanese or Canadian vessels fishing in treaty areas is provided by the North Pacific Fisheries treaty.²⁷ Vessels seized must be turned over to an official of the flag government for prosecution. The Japanese salmon fleet consists of approximately 380 vessels and four patrol vessels. The treaty provides that the vessels will not fish East of 175 West longitude. This line was drawn as a conservation measure to reduce the taking of Bristol Bay red or sockeye salmon which spawn in Alaskan waters.

PROCEED IN COMPANY TO SITKA X IF MASTER UNCOOPERATIVE CLOVER DIRECTED TO ARREST MASTER AND REMOVE FROM VSL.

26. See Radio Message from District Commander, 17th Coast Guard District, Juneau, Alaska to USCG Cutter *BALSAM*:

280445Z SEPT 1970 X SHOULD SUBJ VSL FAIL TO HEED YOUR SIGNAL TO STOP, ATTEMPT TO TAKE STATION ON VSL BOW. USE VERY SIGNALS ACROSS BOW OR CLEARLY VISIBLE TO SUBJ. SHOULD VERY SIGNAL FAIL, WITH DUE REGARD SAFETY YOUR VESSEL AND SAFE TARGET ANGLE YOU ARE AUTH TO EMPLOY MACHINE GUN FIRE WELL FORWARD OF SUBJ BOW WITH FALL OF SHOT CLEARLY VISIBLE TO SUBJ VSL X IF ALL ABOVE FAIL, ADVISE AND MAINTAIN PURSUIT X.

27. Art. X of the Convention Authorizes seizure of violators and delivery to authorized officials of his own nation for appropriate action.

The first seizure was made in 1965. On June, 19 vessels were observed by aerial surveillance in violation. On June 5, the cutter *WAUCHUSETT* boarded the *WAKASHIO MARU* and commenced towing it to Adak. These two vessels were later joined by the Japanese patrol vessel *TOKO MARU*. In Adak the hold was sealed and the vessel turned over to the Japanese patrol vessel.

A seizure of a Japanese vessel, *DAIEI MARU*, while alongside a dock in Juneau was made on February 4, 1969. The vessel had put into port for provisions and fuel. When searched by Customs Officers, she was found to have a catch of illegal halibut aboard taken in violation of the High Seas Fisheries Convention. The holds of the vessel were sealed. When the *DAIEI MARU* sailed, she carried a complete set of documents to be delivered to the Japanese Fishery Agency in Toyko for use in prosecution. Another set containing the physical evidence was sent through diplomatic channels to the Japanese Government.

The Japanese *FUKUYOSHI MARU* was seized alongside the dock in Kodiak on February 10, 1969. The vessel had two tons of halibut in her hold caught in violation of the High Seas Fisheries Convention. The vessel was released to a Japanese official after her holds were sealed and copies made of the ship's log for use as evidence in Japan. On May 27, 1970 the Japanese *KOFUKU MARU* was observed fishing 78 miles inside the treaty area and was seized. The vessel was subsequently turned over to a Japanese patrol on the high seas. On June 2, 1970, the Japanese *DAI-ICHI MARU* was seized 4.5 miles east of 175 degrees west longitude and turned over to a Japanese patrol vessel on the high seas.

IV. LEGAL ASPECTS INVOLVED WITH SEIZURE OF FOREIGN VESSELS

In complying with the Congressional mandate to prevent foreign vessels from fishing in United States territorial waters, the United States contiguous fishery zone, and high seas treaty areas, the Coast Guard has found its actions delimited by ancient law of the sea doctrines.

A. *Innocent Passage*

The primary doctrine to be observed is that of "innocent passage," the right of a foreign vessel to traverse the territorial sea between points on the high seas, enroute from the high seas to internal waters in accordance with the laws and customs of the littoral state, or from internal waters following lawful clearance to the high seas. It may include stopping or anchoring when this is incident to normal navigation (as when awaiting a favorable tide to traverse a

particular narrows) or when *force majeure* or distress is encountered. It does not include hovering, stopping, or anchoring for other reasons, and it does not include fishing. A foreign fishing vessel in innocent passage through the United States territorial seas must comply with all applicable United States laws and regulations.²⁸

Inasmuch as the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone contains a comprehensive codification of the concept of "innocent passage" and expressly sets forth the conduct of fishing vessels, Coast Guard enforcement officers have no difficulty in applying this doctrine.

The question of "innocent passage" does not arise in connection with navigation of vessels in the contiguous zone. This zone is part of the high seas and the United States has made no claim that would be contrary to the customary international law. Following the 1945 Presidential Proclamation concerning the continental shelf and contiguous waters, the State Department explained to Congress that the proclamation did not extend United States sovereignty or affect the nature of the high seas above the shelf and that it confirmed to all nations the right to free and unimpeded navigation.²⁹

B. Hot Pursuit

The interesting doctrine of "hot pursuit" which gained the Coast Guard both publicity and notoriety during the rumrunning days is particularly applicable in present day enforcement of laws and treaties pertaining to fishing. This doctrine establishes a right under international law for a coastal state to pursue and arrest a foreign vessel on the high seas when there is reason to believe that the vessel has violated laws of the coastal state while in the territorial waters or in the contiguous zone.³⁰ This doctrine was first propounded in 1826 by Justice Story in the *Marianna Flora*.³¹

Although there have been no decisions concerning the applicability of this doctrine in the case of a vessel violating a treaty area on the high seas, in the leading American case on hot pursuit, *Giliam v. United States*, decided in 1928, the declaration of the court

28. Convention on the Territorial Sea, *supra* note 13, at art. 14.

29. 28 DEP'T STATE BULL. 718 (1953).

30. Convention on the High Seas, *supra* note 13, at art. 23.

31. 24 U.S. (11 Wheat.) 1 (1826).

has been construed to mean, and vigorously criticized,³² that where a right of seizure is conferred by treaty to operate in a particular maritime zone, the right of hot pursuit is also to be honored when begun from the same zone.³³

Thus far in the wet war, the Coast Guard has had to use "hot pursuit" in two seizures involving Japanese vessels fishing in contiguous waters. There has been no "hot pursuit" after vessels in violation of treaty areas.

C. *Force Majeure*

The doctrine of *force majeure* is the humanitarian doctrine in international law which provides that a vessel of any nation can seek any safe haven or a port of refuge when an overwhelming force, such as fire, disablement, storm, or mutiny, puts the vessel in grave danger of loss.³⁴

This doctrine was most recently used in May 1966 when the Russian factory ship *CHERNJAKHOVSK* requested permission to put into San Francisco Bay to make emergency repairs. After a Coast Guard boarding party ascertained that engine repairs were necessary, authorization was granted for the vessel to put into Drakes Bay, 37 miles north of San Francisco. During the period the vessel was within territorial waters it was kept under surveillance by a Coast Guard cutter.

D. *Constructive Presence*

An obscure doctrine of the sea, "constructive presence," has become a consideration with the advent of the modern self-sustained foreign fishing fleets. This is the doctrine whereby a foreign vessel on the high seas may be arrested and held responsible for a violation of United States laws committed in United States territorial waters by one of its boats or a boat from ashore acting in concert. Thus there is a possibility that a mother ship on the high seas that permits her catcher boats to fish in United States territorial waters or in the contiguous fishery zone could be held equally guilty of illegal fishing.³⁵

32. Fitzmaurice, *Some Results of the Geneva Conference on the Law of the Sea*, 8 INT'L COMP. L.Q. 96, 97 (1959).

33. M. McDUGAL & W. BURKE, *supra* note 7, at 900.

34. P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 195 (1927).

35. M. McDUGAL & W. BURKE, *supra* note 7, at 909.

V. PROOF AND PROSECUTION

A. *Disposition of Vessel*

The Coast Guard air and sea patrol of the North Pacific acts as an arm of the United States Attorney in collection of evidence for the prosecution of violations of federal laws. With respect to high seas treaty area violations, the Coast Guard acts for the Department of State in gathering evidence to serve as a basis for diplomatic protests.

The Coast Guard has statutory authority to stop, search, and seize foreign vessels on the high seas for violation of United States laws and to use all necessary force to compel compliance.³⁶

If a vessel is seized for a fishing violation on the territorial sea or in the contiguous fishery zone, it is escorted or towed to the nearest United States port. The master is then taken before a United States District Judge or a United States Commissioner for arraignment and the setting of bond. The vessel's gear, cargo, and hull is appraised at the same time for forfeiture valuation.

Japanese vessels seized for treaty area violations are usually turned over to the Japanese patrol vessels which accompany the giant Japanese fishing fleet. Since the fishing treaties between the United States and Russia do not provide for seizure there have been no incidents of violation of treaty area. To date two Russian trawlers have been seized, one of them twice, for violation of the contiguous fishery zone. These vessels were released after the fines were paid.

B. *Geographical Position*

The geographical position of the vessel is the essential element in establishing a violation of treaty or statute. Detailed instructions have been disseminated to Coast Guard vessels to assist them in compiling the necessary evidence to prove a violation.³⁷ The longitude and latitude of the positions of the foreign vessel when first observed in violation, when ordered to heave to, and when finally stopped and boarded, are to be fixed by precise navigational meth-

36. 14 U.S.C. § 89 (1950).

37. See U.S. Coast Guard *Commandant Instruction* 5921.1b, July 21, 1966, containing operational instructions.

ods. LORAN, TACAN, radar and fathometer are normally used. The instruments used must then be checked for accuracy. The calculations used to establish positions or to determine instrument error must be recorded and preserved. Photographs are taken of pertinent ship's log entries and of fixes on navigational charts.

In the event the case comes to trial, the Coast Guard boarding officer must be prepared to testify to the location of the vessel seized and how the position was determined. Heretofore, in every case except one, the master of the seized vessel has through his attorney pleaded *nolo contendere* and a fine has been levied. The amount of fines has progressively increased until the most recent fine of \$50,000 and one year's suspended sentence which was levied against the *KYOYO MARU*.

C. Treaty Violations

In the case of high seas treaty area violators, the practice is to gather all documentary evidence necessary to support the charge and form the basis for a diplomatic protest. In addition, the holds of the vessel are sealed so that the illegal catch can be used as evidence of violation. In most cases, the seized vessel, together with the documentary evidence, is turned over to enforcement patrol vessels which accompany the fishing fleet. A duplicate package of the documentary evidence is furnished the Department of State for forwarding through diplomatic channels to the Japanese government.

In October 1970 the United States requested that information on disposition of the cases of high seas treaty violations where the vessel and evidence was turned over to Japan for prosecution be furnished the United States State Department. The Japanese representative declined and pointed out that the treaty imposes no obligation to give such information.³⁸ Consideration is now being given to amending the agreement between the United States, Canada, and Japan so as to provide that such information be made available to the signatory nations.

VI. CONCLUSIONS

The United States offensive in the North Pacific "wet war" has been underway for 5 years. The success of the venture is debatable. It is estimated that only 5 percent of foreign vessels violating

38. See report of Annual Conference of Signatories to the International North Pacific Fisheries Convention in Tokyo, October 1970.

the contiguous zone are apprehended.³⁹ This estimate is not unreasonable considering that the Alaska coastline is longer than the combined total of the Pacific, Gulf, and Atlantic coasts; and, there are only four aircraft and an average of three cutters for the Alaska patrol.⁴⁰

There are indications that the Northwest fishing interests are not satisfied with the effort to curtail the depletion of United States fishery stocks. At the urging of this group, two Bills were introduced at the 91st Session of Congress, one to increase the sanctions for violation of the contiguous zone and the other to extend the contiguous zone farther out into the high seas. The first Bill, which would increase the maximum penalty for illegal fishing from \$10,000 to \$100,000, authorize more cutters and aircraft for patrol purposes, and authorize the payment of \$5,000 to informers was passed on October 27, 1970 as Public Law 91-514.⁴¹

The second Bill would extend the limits of the contiguous zone out to 20 miles.⁴² Aside from the almost insurmountable task of patrolling an area this large, which would require a peacetime armada, such a proposal is in direct opposition to the long held United States policy of refusing to recognize the 200-mile exclusive fishery zones claimed by El Salvador, Panama, Uruguay, Ecuador, Peru, and Argentina.⁴³

Assuming that with an increase in the number of cutters, seizures would accelerate, the question still remains: "Is protection of a contiguous fishery zone the solution to depletion of fishery resources?" A corollary question might be: "Is the United States attempting to conserve a resource or preserve an industry?" Al-

39. *Hearings on H.R. 14678, H.R. 14824 Before the Subcomm. on Fisheries and Wildlife Conservation of the Comm. on Merchant Marine and Fisheries*, 91st Cong. 1st & 2d Sess. at 165 (1969-1970).

40. *Id.* at 31.

41. H.R. 14678, 91st Cong., 2d Sess. (1970) ("Bill to Strengthen the Penalties for Illegal Fishing in the Territorial Waters and the Contiguous Fishery Zone of the United States").

42. H.R. 18345, 91st Cong., 2d Sess. (1970) ("Bill to Amend the Act entitled 'An Act to establish a Contiguous Fishery Zone Beyond the Territorial Sea of the United States', approved October 14, 1966, to Extend the Seaward Boundary of the Contiguous Fishery Zone to Two Hundred Nautical Miles").

43. See 22 U.S.C. §§ 1971-76 (1964) (Protection of Vessels on the High Seas and in Territorial Waters of Foreign Countries).

though both functions can be categorized as conservation, a contiguous fishery zone and strict enforcement does questionable service to conservation policies. The main accomplishment is the reservation of exclusive competence to the coastal state to embark upon conservation measures or to ignore conservation measures.

The Department of Interior advised Congress that the extension of the fisheries jurisdiction of the United States would have little long-term value in solving conservation problems. The reason for that view was that a significant portion of the fish stocks now supporting United States coastal fisheries freely move from coastal waters to the high seas.⁴⁴

It would appear that rather than unilaterally extending fishery jurisdiction beyond 12 miles, it would be preferable for the United States to seek another international conference and obtain general concurrence and agreement from the international community.

Two principles that could be advanced to provide a foundation for international agreement are:⁴⁵

1. Greater acceptance by all nations that ocean fishery resources should be harvested with due regard for the maintenance of the yield of the resource.
2. Recognition and acceptance of the special interest of the coastal state in resources lying off its coast.

It is suggested that the problem of the Russian and Japanese depletion of fish on the ocean floor might have been handled more satisfactorily by agreement than by unilateral action. The United States could have invited Russia, Japan, and Canada to a conference to consider joint measures of investigation and control. The possibility of cooperation on conservation measures between these countries is evidenced by the successful management of the fur seal herds of the North Pacific since 1911.⁴⁶

The Russians have evidenced some readiness for international conservation and are members with the United States in such agreements as the International Whaling Commission, the International Commission for the Northwest Atlantic Fisheries, and the King-Crab Treaty.⁴⁷ Although Russia is not a party to the Con-

44. H.R. REP. No. 2086, 89th Cong., 2d Sess. 12 (1966).

45. Address by Donald McKernan, Special Assistant to the Secretary of State for Fisheries and Wildlife, before the National Cannery Association, January, 1968.

46. J. Tomasevich, *International Agreements on Conservation of Marine Resources*, at 77, 78 (1943).

47. Hearings Before the Subcomm. on Merchant Marine and Fisheries of the Senate Comm. on Commerce, 89th Cong., 2d Sess., 83 (1966).

vention on Fishing and Conservation of the Living Resources of the High Seas, this refusal is not on conservation grounds but is based on refusal to accept the convention's compulsory arbitration clauses.⁴⁸

Efforts toward establishing a North Pacific Fishing Authority might be worth pursuing at this time. All four of the chief user states of the North Pacific fishery resources border the North Pacific region. All four have contributed to international arrangements affecting the exploitation of the resources of the North Pacific.⁴⁹

There are some immediate advantages in continuing the present system of short-term bilateral agreements on the allocation of resources, such as the King Crab Treaty and the conservation of sockeye salmon, both for the United States and the non-coastal states. However, a large-scale regional scheme of authority covering the North Pacific which would seek to establish a balance between the special interest of the coastal state and the general interest of non-coastal regional and extraregional users of the region's resources might provide greater and longer lasting advantages.

There appears to be an immediate need to establish such a North Pacific authority. Already a South Korean fishing fleet, with no treaty responsibilities, is harvesting the North Pacific resources. It is only a matter of time before the expanding fleets of Taiwan and Communist China extend their operations to the rich fishing grounds in the Western North Pacific. Perhaps if the four user states were to make the benefits of cooperation with the regional scheme attractive and known to the international community, participation would be sought by the newcomers.

It is hoped that the United States will not be caught up in the frenzy of protectiveness that has compelled some states to make exaggerated unilateral claims; its countervailing interest in the freedom of the seas will likely prevent such a development.⁵⁰ But the issue of the division of fishery resources will not disappear. The unabating quest for food will ultimately lead the nations of the

48. *Id.* at 89.

49. D. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* 264-82, 370-96 (1965).

50. 22 U.S.C. §§ 1971-76, *supra* note 43.

world to the ocean's bounty and unless means are devised by which the harvest will be allocated to all, it will unavoidably go only "to the most ruthless and the most powerful."⁵¹

Perhaps the next decade will see Coast Guard cutters deployed more profitably as a vanguard of an United Nations seagoing enforcement agency sailing the Seven Seas to ensure that vessels of member nations are fishing in compliance with treaty restrictions. In this way, conservation of the world fishing resources could be truly conserved for the benefit of mankind.

51. M. McDUGAL & W. BURKE, *supra* note 7, at 562.