New Trends in the Regime of the Seas

A Consideration of the Problems of Conservation and Distribution of Marine Resources (II) *)

Shigeru Oda

Assistant Professor of Law, Tōhoku University (Sendai), Japan
Senior Fellow in Law, 1956–1957, Yale University, U.S.A.

C. Consideration of Conservation of Marine Resources

The freedom of the high seas surely does not mean absence of law on the high seas. It should not be accepted that the doctrine of the freedom of the high seas gives license to unregulated fishing in defiance of the interests of the world community. The International Law Commission provided in its report for the 1953 session that "It is generally recognized that the existing law of the sea provides no adequate protection of marine fauna against extermination" [157]). However, this does not mean that agreement between interested states may not be reached on conservation measures [158]). Conservation measures, taken through agreement, are clearly compatible with the freedom of the high seas and do not deny the interests of any country.

I. Past Conventions for Conservation of Marine Resources

It is beyond the scope of the present study to set out in detail the conventions which have been concluded. We will be concerned only with a

*) Part I see p. 61–102, *supra*.

157) UN. Doc., A/2456, at p. 17.

158) Young aptly stated: "It is believed that the better approach to fishery conservation is to be found in international understandings, tacit or express, and it may be noted that substantial progress in this direction has been made in the international fishery conventions concluded since the war" (Young, Over-Extension of the Continental Shelf, AJIL, vol. 47, 1953, p. 454 f.). According to Herrington: "The development of these new problems does not mean that it is necessary to discard our traditional policies;

bird's eye view of the existing international regulations relating to the high seas fisheries [159]).

It was not until 1937, that the serious problem of depletion, present and potential, of commercially important species of fish in the North Atlantic made itself felt, resulting in an international conference held that year. The International Convention for the Regulation of Meshes of Fishing Nets and the Size Limits of Fish, which was to apply to the entire North Atlantic area was concluded at this conference [160]). The 1937 Convention never became law. The British Government called further international conferences in London in 1943 and 1946 to reconsider this general problem. The United States, participating in these international conferences with observer delegations, suggested, after discussions with the other countries bordering on the Northwest Atlantic, that there were actually two areas in the North Atlantic, readily separable on the basis of the nationals concerned and the stocks of fish and other problems involved. It was proposed that consideration be given to separate treatment for the Northwest and Northeast Atlantic. The agreement of the 1946 Conference incorporated this concept [161]).

An International Convention for the Northwest Atlantic Fisheries was concluded on February 8, 1949 by eleven nations. They were Canada, Denmark, France, Iceland, Italy, Newfoundland, Norway, Portugal, Spain, the United Kingdom and the United States. It was provided that any non-signatory nation could become a party to the Convention. The Convention became law on July 3, 1950, when Canada (including Newfoundland) deposited the fourth instrument of ratification, following ratification by the governments of Iceland, the United Kingdom and the United States [162]). The over-all area subject to regulation under the Convention was divided into

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... To discard and abandon traditional concepts of international law in favour of unilateral action and claims by each nation facing on the international sea would lead only to chaos" (Herrington, U.S. Policy on Fisheries and Territorial Waters, Dep. of State Bull., vol. 26, 1952, p. 1021).

159) On the historical development of international control and regulation of high seas fisheries in the various areas, see Moore's Digest of International Law, vol. 1; Jessup, L'Exploitation des Richesses de la Mer, Recueil des Cours, T. 29 (1929 IV), p. 405–508; Daggett, The Regulation of Maritime Fisheries by Treaty, AJIL, vol. 28 (1934), p. 693–717; Leonard, International Regulation of Fisheries, 1944; Charles Carter and Staff, Treaties Affecting the North-Eastern Fisheries, U.S. Tariff Commission Report, No. 152, 2nd ser., 1944.

160) Hudson, International Legislation, vol. 7, p. 642.

161) See Conservation of Fishery Resources in Northwest Atlantic to be Discussed, Dep. of State Bull., vol. 19 (1948), p. 669.

162) Dep. of State, Treaties and Other International Acts Series, No. 2089 (Pub. 3941); AJIL, vol. 45 (1951), Supp. p. 40.

five sub-areas. These areas covered generally the waters off the western coasts of Greenland, Labrador, Newfoundland, Nova Scotia, and New England. The Convention provided for an International Commission of Northwest Atlantic Fisheries, where all the contracting parties would be represented, and also for separate panels with particular jurisdiction over each sub-area. The panels were to be composed of those contracting parties with particular fishing interests in the sub-areas examined by the respective panels. The primary function of the commission was to collect, collate, and disseminate scientific information on the international fisheries in the convention area. While the commission was to have no direct regulatory powers, any panel might transmit recommendations through the commission to the governments represented on the panel, for appropriate action based upon scientific information, which might be deemed necessary to maintain those stocks of fish which supported international fisheries in the convention area.

The North Pacific Ocean is one of the richest fishing areas in the world. Because of the efforts of Canada and the United States, this region has a long history of measures for the conservation of fish stocks [163]). The first attempt on the part of the United States to protect the fisheries in this area was made on April 11, 1908, when a Convention with Great Britain was signed, which established an International Fisheries Commission [164]). The failure of the United States to adopt the regulation suggested by the commission prevented this Convention from being operative, but it marked the first step in international legislation aimed at conservation and protection of fish in the area. Canada and the United States realized the need for joint conservation and, accordingly, in 1923, they signed the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean Including the Bering Sea [165]). The purpose of the Convention was to lay a basis for future regulation and not to regulate the fisheries until adequate scientific data became available. This Convention was superseded in 1930 by the Halibut Convention. Under this Convention, the nationals, inhabitants and fishing vessels and boats of the two signatories were prohibited during specified seasons from halibut fishing in the high seas off the western coasts of the United States and Canada [166]). Aimed at more effective preservation of halibut

[163]) See Bingham, Report on the International Law of Pacific Coastal Fisheries, 1938; Gregory, North Pacific Fisheries, 1939; Tomasevich, International Agreements on Conservation of Marine Resources, 1943.

[164]) Martens, Nouveau Recueil, 3e Série, Tome 4 (1911), p. 188; AJIL, vol. 2 (1908), Supp. p. 322.

[165]) League of Nations, Treaty Series, vol. 32 (1925), p. 94 (No. 809); AJIL, vol. 19 (1925), Supp. p. 106.

[166]) League of Nations, Treaty Series, vol. 121 (1931–1932), p. 45 (No. 2982); AJIL, vol. 25 (1932), Supp. p. 188.

fisheries, a revision of this Convention of 1930 was signed at Ottawa in 1937 [167]). Successive regulations have since been adopted. Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean and Bering Sea was signed on March 2, 1953 by representatives of the Governments of Canada and the United States [168]).

Another Convention was concluded by the United States and Canada in 1930, for the protection and preservation of the sockeye salmon fisheries in the Fraser River System [169]). The agreement went into effect in 1937 [170]). The Convention delegated to an International Pacific Salmon Fisheries Commission established by the Convention the power to enact regulations. Thus, each contracting party was to be responsible for the enforcement of orders and regulations adopted by the commission. The commission was to make a thorough investigation into the natural history of the Fraser River sockeye salmon, hatchery methods, spawning ground conditions, and other related matters. The commission was also empowered to limit or prohibit the taking of sockeye salmon in the convention waters.

The eastern Pacific Ocean from the coast of Central America and the State of California is abundant in numerous edible fish. In 1925, the United States concluded a treaty with Mexico in order to "conserve and develop marine life resources in waters off the Pacific coast of California and Lower California, embracing territorial as well as extra-territorial areas" [171]). The commission was to make appropriate studies and recommendations. The Convention was abrogated only one year after it had become operative [172]).

The U.S. proposal for co-operation upon conservation of marine resources in this area was acceptable to Mexico and Costa Rica. A Convention was concluded on January 24, 1949, between Mexico and the United States for the establishment of an International Commission for the Scientific Investigation of Tuna [173]). The commission was not to be directly concerned with

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167) League of Nations, Treaty Series, vol. 181 (1937–1938), p. 209 (No. 4190); AJIL, vol. 32 (1938), Supp. p. 71.

168) See Dep. of State Bull., vol. 28 (1953), p. 441; vol. 29 (1953), p. 273.

169) League of Nations, Treaty Series, vol. 184 (1938), p. 305 (No. 4255); AJIL, vol. 32 (1938), Supp. p. 65.

170) The ratification was delayed because of the objection by the State of Washington. The Governor of the State of Washington maintained that the agreement was not necessary (1) because the sockeye salmon runs were already on the way to rehabilitation as a result of existing regulations in Washington and British Columbia, and (2) because Washington and British Columbia would be able to work out a system of adequate protection. See Tomasevich, *op. cit. supra* note 163, at p. 260.

171) League of Nations, Treaty Series, vol. 48 (1926), p. 443. (No. 1 B). This is a Convention to Prevent Smuggling and for certain Other Objects.

172) See Jessup, *op. cit. supra* note 159, at p. 446.

173) Dep. of State Bull., vol. 20 (1949), p. 174; AJIL, vol. 45 (1951), Supp. p. 51.

conservation measures but was rather to engage in scientific research as a first step towards effective conservation.

A similar Convention for scientific research preliminary to effective conservation measures was concluded in the same year (May 31, 1949) by the United States and Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission [174]). This commission was empowered to undertake scientific investigation of yellowfin and skipjack tuna and of anchovetta and other bait fish in the eastern Pacific Ocean in the fisheries maintained by the nationals of the two countries. Since the fisheries included in this Convention presented problems of interest to a number of countries besides the signatories, the Convention made possible the participation of other governments whose nationals operated in the fisheries involved. It was hoped that these other governments would join the United States and Costa Rica in the cooperative program for maintaining the stock of fish concerned at a level which would permit maximum sustained catches year after year.

The Japanese Government convened a conference in November 1951 at Tokyo with a view towards the conservation of marine resources in the North Pacific Ocean [175]). The history behind the conference is easily understood, if proper account is taken of the diplomatic tension aroused by the appearance of Japanese fishing vessels in the Alaskan waters late in the 1930's and the demand of the fishing industry of the American Pacific coast, which obliged Japan, in accordance with the provision of the Peace Treaty, to enter into negotiation with the Allied Powers for the regulation and conservation of fisheries on the high seas [176]).

In the Annex to the Convention, stocks of fish were specified upon which certain limits were placed. With regard to halibut, herring and salmon, Japan was prevented from fishing in the areas therein specified, while Canada and the United States were to continue to carry out necessary conservation measures. Also, with regard to salmon in specific areas, Canada and Japan agreed to abstain from fishing, while the United States undertook to carry out necessary conservation measures. The Convention provided for the establishment and maintenance of an International North Pacific Fisheries Commission, composed of three national sections. The chief function of the commission was to formulate conservation policies for the contracting parties. It was empowered to carry out annual studies to determine whether the condition of stocks mentioned in the Annex continued to justify fishing prohibitions against certain parties. The commission could decide which

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[174]) Dep. of State Bull., vol. 20 (1949), p. 766.
[175]) See Dep. of State Bull., vol. 26 (1952), p. 340. The text is also available therein.
[176]) See p. 62 *supra* and p. 272 f. *infra*.

species of fish required conservation and this stock might be added to the list in the Annex.

This International Convention for the High Seas Fisheries of the North Pacific Ocean was tentatively signed on December 14, 1951, at Tokyo by the representatives of Canada, Japan and the United States, and formal signing was postponed until May 9, 1952, after the Peace Treaty came into effect. The Convention was brought into force on June 12, 1953 [177]).

It has been previously explained that Japan and the U.S.S.R. signed a Convention of Northwest Pacific Fisheries on May 15, 1956. The fishing of salmon, herring and crab in the northwestern area of the Pacific was thereby controlled with a view towards their conservation. This Convention was brought into effect on December 12, 1956 [178]).

The whale is a species which is most effectively protected from extinction on an international scale [179]). In 1931 the Convention for the Regulation of Whaling was open for signature at Geneva. However it did not become effective until 1935, because of the delay of Great Britain in ratifying it. The Convention, ratified in 1935 by eighteen nations and adhered to by ten non-signatory parties, gave absolute protection to baleens or whalebone whales, which had been nearing extinction, and also inaugurated a method whereby valuable statistics could be gathered which were to be of considerable aid in the formulation of new agreements [180]). That program, however, fell short of achieving its aims for various reasons [180a]).

As a result of the London Conference in 1937, to which interested nations were invited by the British Government, an Agreement for the Regulation of Whaling and a Final Act of the Conference were signed by the delegates [181]). This Agreement contained similar conservatory measures to those

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177) See Dep. of State Bull., vol. 26 (1952), p. 830; *id.* at vol. 30 (1954), p. 165.

178) See p. 82 *supra*.

179) See Raestad, La Chasse à la Baleine en Mer Libre, Revue de Droit International, Année 2 (1928), p. 595–642; Jessup, International Protection of Whales, AJIL, vol. 24 (1930), p. 751 f.; Wolgast, Walfang und Recht, Zeitschrift für Völkerrecht, Bd. 21 (1937), p. 151–172; Zeitschrift für Völkerrecht, Bd. 23 (1939), p. 1–22; Hayden, The International Protection of Wild Life, 1942, especially at p. 137–172.

180) League of Nations, Treaty Series, vol. 155 (1934–1935), p. 349 (No. 3586); Hudson, International Legislation, vol. 5, p. 1081.

180a) Leonard mentioned three reasons: 1. inadequate knowledge of the migrations and life history of whales; 2. the refusal of nations to adopt measures which could curtail the profits of their nationals for any period of time; 3. the failure of Japan to accede to the agreements or co-operate with the programm (Leonard, International Regulation of Fisheries, 1944, p. 104). Also see Leonard, Recent Negotiations toward the International Regulation of Whaling, AJIL, vol. 35 (1941), p. 90–113.

181) League of Nations, Treaty Series, vol. 190 (1938), p. 79 (No. 4466); Hudson, International Legislation, vol. 7, p. 754; AJIL, vol. 34 (1940), Supp. p. 106, 112.

of the previous convention. The outbreak of hostilies in 1939 practically suspended whaling expeditions to the Antarctic.

Following World War II, a conference was held in Washington late in 1946 to consider problems pertaining to the conservation of world whale stocks. Representatives of nineteen countries participated in this conference. The following fourteen countries were represented by plenipotentiary delegates: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, Netherlands, New Zealand, Norway, Peru, USSR, UK and USA. Observer delegations represented the following five countries: Iceland, Ireland, Portugal, Sweden, and the Union of South Africa. Japan, under the occupation of the Allied Powers, was represented by its observer officers.

The Convention for the Regulation of Whaling was signed on December 2, by the above-mentioned fourteen countries and the Union of South Africa [182]). The most remarkable feature of the Convention was the establishment of the International Whaling Commission. The commission, consisting of one member from each contracting government, was to engage in scientific research and collection and analysis of information. The commission could amend from time to time the existing regulations relating to the conservation and utilization of whale resources, as far as necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources.

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Some conventions, as mentioned above, clearly indicate the possibility of conservation measures being taken through bilateral or multilateral agreements between states concerned. There is no indication that those conventions are inadequate to ensure appropriate conservation of marine resources. The report on "Types of Conservation Measures Applicable in a Conservation Programme" drafted by the Rome Conference [183]) reads:

> "(a) Regulation of the amount of fishing to maintain or to increase the average sustainable catch, by
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> (i) directly limiting the amount of the total catch by fixing a maximum annual catch,
>
> (ii) indirectly limiting the amount of the catch by closed seasons and closed areas, or by the limitation of fishing gear and ancillary equipment.
>
> (b) Protection of sizes of fish, the conservation of which will result in a greater average catch or a more desirable quality, by

182) Dep. of State Bull., vol. 15 (1946), p. 1101; Hudson, International Legislation, vol. 9, p. 117; AJIL, vol. 43 (1949), Supp. p. 174.

183) *Supra* note 151 at § 23.

(i) regulation of fishing gear to achieve differential capture of specified sizes,

(ii) prohibition of landing of fish below a specified size, and requiring their return to the sea alive, if technically practicable,

(iii) prohibition of fishing in areas where, or seasons when, small fish predominate.

(c) Regulations designed to assure adequate recruitment:

(i) control of the amount of fishing by any of the means of (a) to ensure adequate spawning stock,

(ii) differential harvesting of different sizes of fish, by any of the means of (b) to lower the fishing rate on immature fish,

(iii) prohibition of fishing in spawning areas or during spawning seasons,

(iv) preservation and improvement of spawning grounds,

(v) differential harvesting of sexes to achieve a desirable *sex ratio* in the population".

Similar measures have been adopted in various past conventions. Some conventions provide only for scientific investigation of marine resources as a step towards effective conservation. On the other hand, one of the most important features in those conventions prescribing direct conservation measures is the provision that no state may punish foreign nationals for offences against the convention. Only the flag nation of a person or fishing vessel committing an offence might try such offence and impose penalties therefore. In this way, no signatory power may take the law into its own hands. The freedom of the high seas has been properly upheld in these conventions. So long as all states concerned are willing to subordinate themselves to measures drafted for the purpose of conservation, there is no derogation from the freedom of the high seas.

II. Conservation Policy of Major Maritime Countries

At the present time some major maritime countries have indicated that they are prepared to enter into negotiations with other interested states for the purpose of conserving marine resources. This is of some importance, since a suspicion, though perhaps groundless, has been growing that some resources in the high seas are about to be exterminated through the overexploitation by some states having huge fishing industries [184]).

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184) Such suspicion has been shown in a great number of unilateral claims to coastal fisheries on the high seas.

1. The U.S. Policy

The history of conservation in both the Pacific and Atlantic Oceans generally indicates the policy of the United States in this respect [185]).

The Truman Proclamation, promulgated just after the cessation of hostilities of World War II, drew world-wide attention. On September 28, 1945, the President of the United States announced that "in view of the pressing need for conservation and protection of fishery resources," the policy of the United States would aim at the establishment of conservation zones in those areas of the high seas contiguous to the coast of the United States wherein fishing activities have been, or, in the future, may be developed and maintained on a substantial scale [186]). The proclamation reads:

> "Where such activities have been or shall hereafter be developed and maintained by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States. Where such activities have been or shall hereafter be legitimately developed and maintained jointly by nationals of the United States and nationals of other States, explicitly bounded conservation zones may be established under agreements between the United States and such other States, and all fishing activities in such zones shall be subject to regulation and control as provided in such agreements".

In the light of certain semi-official statements, the proclamation appeared to activate certain suspicions. The Department of State in its press release of 30 September 1945 stated that "zones will be set up in which the United States may regulate and control all fishing activities" [187]). In the author's opinion this interpretation is not free from doubt. What appears to be an equally doubtful reading of the proclamation is the statement in the annual report of the Secretary of the Interior, that "Presidential proclamation assert ... our jurisdiction over the fishery resources of the high seas contiguous to our land" [188]). Ickes, the then Secretary of the Interior, expressed his view in 1946:

> "This country acquired these resources on September 28th of last year when President Truman ... claimed jurisdiction over the fishery resources of the high seas contiguous to our lands ... It is probable that, as a result of this proclamation, we have ensured for the nation food resources nearly as great as those made possible by the opening of the Middle West to agriculture ... In

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185) See explanation of some past conservation conventions in relation to the Pacific Ocean, *supra* p. 263 f.

186) UN's Laws and Regulations, p. 112. Dep. of State Bull., vol. 13 (1945), p. 486; AJIL, vol. 40 (1946), Supp. p. 46.

187) Dep. of State Bull., vol. 13 (1945), p. 484.

188) Report of the Secretary of the Interior to the President, 1945, p. X.

this way ... we could also protect the great fisheries of our coast, and we need [them]" [189]).

It may well be that the proclamation was actually drafted out of the fear of the United States that Japanese fishing vessels would once again appear in the northeastern Pacific. It may be not too far off the track to gather the real spirit of the proclamation from the statement of Bingham:

"Now that the Japanese and the Germans are out of the arena and the need of better justice in the world is acknowledged as a prime concern of peace seekers, we should expect little opposition abroad to the new policy" [190]).

However, we must note that the proclamation proposed to set out a future policy for the conservation of resources and was not intended to serve *per se* to claim new rights. The statement of Chapman, then Special Assistant to the Under Secretary of State, seems to indicate this intention:

"It should be carefully noted that the proclamation made no mention of extension of sovereignty beyond territorial waters or of exclusion of fishermen of any nationality from any fishery. The purpose of the proclamation was to provide for new means, under law, to protect fishery resources lying in international waters from overexploitation. One nation by itself cannot change international law. A proclamation by the United States does not bind other nations to accept the new principle into the body of international law" [191]).

A similar viewpoint was taken by other officials. Selek, then former legal assistant in the State Department emphasized in 1950 that the Truman Proclamation would not have the effect of extending sovereignty [192]). Herrington, Special Assistant for Fisheries and Wildlife to the Under Secretary of State, said in 1952:

"The policy of the United States is to work toward the stabilization of international law in this field in a manner which will further the interests of the United States and the world community through maintenance of freedom of the seas, giving due consideration to the need for encouraging and safeguarding programs designed to maintain maximum productivity of the world's resources" [193]).

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189) Ickes, Underwater Wealth, Collier's, 23 February 1946, at p. 20, 46, 48.

190) Bingham, The Continental Shelf and the Marginal Belt, AJIL, vol. 40 (1946), p. 173, 177.

191) Chapman, United States Policy on High Seas Fisheries, Dep. of State Bull., vol. 20 (1949), p. 67, 71.

192) Selak, Recent Developments in High Seas Fisheries Jurisdiction under the Presidential Proclamation of 1945, AJIL, vol. 44 (1950), p. 670, 679.

193) Herrington, U.S. Policy on Fisheries and Territorial Waters, Dep. of State Bull., vol. 26 (1952), p. 1021, 1023.

Herrington's Office prepared an article in 1955 for the Department of State as follows:

> "The United States Government is convinced, on the basis both of law and of practical experience, that the most satisfactory avenue for the solution of growing conflicts of interest over fishery resources lies in the development of conservation agreements among interested states" [194]).

Phleger, Legal Adviser of the Department of State, endorsed the U.S. Policy relating to the high seas fisheries in his speech delivered on May 13, 1955 before the American Branch of the International Law Association, as follows:

> "This proclamation has been misunderstood by some as implying a claim to exclusive fishing rights for United States nationals in the waters off its coasts. The proclamation asserts no such claim, and such is not the position of the United States ... The sole purpose of the proclamation was to make possible by appropriate legal means the prevention of the depopulation and destruction of international fishing grounds" [195]).

If the Truman Proclamation is interpreted in this way, the document neither establishes nor implies any new concept. The proclamation was issued with a view towards co-operative measures for conservation of the fishery resources. The practice the United States has taken with regard to her fishing shows that she has always been ready to enter into negotiations with other coastal states on desirable measures to be taken for conservation of the resources in the high seas.

Despite repeated assurance given by competent officials of the United States, the Truman Proclamation has been widely interpreted as modifying the established doctrine of the sea [196]). Several coastal states have invoked the proclamation as a precedent for their unilateral claims to extend jurisdiction over the fisheries on the high seas [197]).

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194) U.S. Position on Conservation of Fisheries Resources, Dep. of State Bull., vol. 32 (1955), p. 696, 698.

195) Phleger, Some Recent Developments Affecting the Regime of the High Seas, Dep. of State Bull., vol. 32 (1955), p. 934, 936.

196) Scelle is of the view that the United States should be responsible for this misinterpretation: « la notion de P. C. [plateau continental] ne revêt l'allure d'une prétention juridique exclusive qu'avec la proclamation du Président des États-Unis du 28 septembre 1945. Le gouvernement américain endossait à ce jour, peut-être à son insu, une responsabilité certaine en adoptant une attitude d'apprenti sorcier ... Manifestement, le gouvernement de Washington s'efforce de réduire au minimum l'atteinte portée au Droit en vigueur: il protestera plus tard contre l'extension incroyable donnée par ses voisins d'Amérique à sa conception originaire ... Malheureusement, quand l'exemple vient de haut et qu'il réveille des appétits séculaires, il est fatalement suivi » (Scelle, Plateau Continental et Droit International, Revue Générale de Droit International Public, Année 59 (1955), p. 5, 7 f.).

197) See p. 67 f. *supra;* note 69 *supra.*

According to Aramburú

„by a unilateral act the United States has proclaimed that it has rights over ocean spaces beyond the traditional distance of three-miles ... thereby the United States is abandoning the three-miles rule which it has defended until recently" [198]).

This view, supported by some Latin American scholars, also seems to be taken by Baxter, who is of the opinion that any conservation zone established in accordance with the Truman Proclamation is, by implication, an expression of a right to exclude new-comers [199]).

2. Obligation Imposed upon Japan

Japan has attained notoriety as a depredator in exploiting high sea resources, because of her entrance into the Alaskan waters late in the 1930's [200]). Although the controversy which ensued between the United States and Japan temporarily subsided as a result of the suspension of fishing on the part of Japan, it remained in abeyance during the war. The U.S. fishing industry had hoped, since the latter stages of the war, that certain limitations on Japanese fishing would be inserted in the Peace Treaty. Various measures were proposed, such as restricting Japanese fishing operations to the seas west of the International Date Line or to waters more than 150 miles from the coast line of the United States [201]). Several countries demanded the assurance that the Japanese fishing industry would not threaten their own fisheries interests [202]).

198) Aramburú, Character and Scope of the Right Declared and Practised over the Continental Sea and Shelf, AJIL, vol. 47 (1953), p. 120.

199) Baxter, *op. cit. supra* note 140, at p. 121.

200) See note 4 *supra.*

201) See Herrington, Problems Affecting North Pacific Fisheries, Dep. of State Bull., vol. 26 (1952), p. 340 f. The General Conference of the Pacific Northwest Trade Association adopted a resolution on April 17–18, 1950 that no peace treaty should be entered into with Japan by either Canada or the United States until and unless definite and binding commitments were made by Japan which would adequately protect the interests of Canada and the United States in their waters. The Pacific Fisheries Conference resolved on November 29, 1950, that in the Peace Treaty with Japan, or in a separate treaty to be concluded prior to or at the same time, suitable provisions should be made which would ensure that Japanese fishermen would stay out of the fisheries of the Northwest Pacific Ocean which had been developed and husbanded by the United States and the other countries of North America. See Bishop, Need for a Japanese Fisheries Agreement, AJIL, vol. 45 (1951), p. 712.

202) The Fisheries Council of Canada demanded of the Government that the peace treaty would be drafted so as to ban Japanese fishermen from Canadian fishing areas (N. Y. Times, April 10, 1951, p. 8, col. 5). The Korean Government asked that some measures be taken to ensure that the Korean waters would not be violated by Japanese fishermen (N. Y. Times, July 18, 1951, p. 4, col. 2). The Indonesian delegations to the Peace Conference demanded some further assurance in addition to provisions of the peace treaty with respect to her fishing (N. Y. Times, September 1, 1951, p. 3, col. 1).

During the occupation period, high sea fishing by the Japanese fishermen was restricted to an area within the so-called MacArthur line [203]). This line was drawn in September 1945, and extended in November 1945, June 1946 and September 1949. The area was further extended in May 1950 for tuna fishing only. The MacArthur line restrictions were finally abolished by a SCAP Memorandum to the Japanese Government on April 25, 1952, three days before the Peace Treaty came into effect.

The restriction of the Japanese fishing on the high seas was one of the main subjects to be considered in the drafting of the peace treaty. On November 24, 1950, the U.S. Department of State disclosed the Seven Principles to be observed in the Japanese Peace Treaty, the fifth of which reads that "Japan would agree to adhere to multilateral treaties dealing with ... fishing" [204]). In light of the importance of the fisheries, an exchange of letters took place between Premier Yoshida and Foster Dulles, then American Ambassador [205]). Yoshida's letter of February 7, 1951, reads as follows:

> "the Japanese Government will, as soon as practicable after the restoration to it of full sovereignty, be prepared to enter into negotiations with other countries with a view to establishing equitable arrangements for the development and conservation of fisheries which are accessible to the nationals of Japan and such other countries. In the meantime, the Japanese Government will, as a voluntary act, implying no waiver of their international rights, prohibit their resident nationals and vessels from carrying on fishing operations in presently conserved fisheries in all waters where arrangements have already been made, either by international or domestic act, to protect the fisheries from over-harvesting, and in which fisheries Japanese nationals or vessels were not in the year 1940 conducting operations".

Dulles replied:

> "It is a good omen for the future that the Japanese Government should already now indicate its willingness voluntarily to take measures for the protection of conserved fisheries".

In his address delivered on March 31, 1951 at Whittier College in California, Dulles spoke of the possibilitiy of agreements between Japan and other states:

> "When I was in Japan, the Prime Minister advised me that the Japanese Government stood ready to negotiate fisheries agreements as soon as peace restores

203) Ministry of Foreign Affairs (Japan), Collection of Directives concerning the so-called "MacArthur Line".

204) U.S. Memorandum to Governments on the Far Eastern Commission, Dep. of State Bull., vol. 23 (1950), p. 881.

205) Dep. of State Bull., vol. 24 (1951), p. 351.

to Japan the possibility of independent sovereign action ... The Japanese now see the importance of avoiding practices which in the past brought Japan much ill will, and, if we can hold to our tentative timetable, there can, I believe, be an early and equitable settlement of this thorny problem" [206]).

A draft peace treaty with Japan was prepared by the Governments of the United States and the United Kingdom and was released to the press on July 12, 1951 [207]). Article 9, adopted without modification at the San Francisco Conference, 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".

On July 13 the Japanese Government issued a statement on high seas fisheries, in which it assured that Japan's voluntary declaration contained in the Premier's letter of February 7, 1951 was intended to embrace fishery conservation arrangements in all parts of the world. It reaffirmed that the Government of Japan was prepared, as soon as practicable after restoration to it of full sovereignty, to enter into negotiations with other countries with a view to establishing equitable arrangements for the development and conservation of fisheries [208]).

The Peace Treaty was ratified on September 8, 1951 in San Francisco by as many as 49 nations [209]) and brought into effect on April 28, 1952 [210]).

In its domestic policy the Japanese Government had previously demonstrated its attitude towards the control and regulation of fishing carried on under the Japanese flag on the high seas. Under the Fisheries Act of 1949 [211]) and the Act for Conservation of Marine Resources of 1951 amending the Act for Prevention of the Marine Resources from Extermination of 1950 [212]), all pelagic fishing was to be carried on under licence issued by the Administration.

Thus it had become clear by 1951 that Japan would never claim unregulated fishing on the high seas. Furthermore, she was eager to enter into negotiations with interested states.

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206) Dulles, Essentials of a Peace with Japan, Dep. of State Bull., vol. 24 (1951), p. 576, 579.

207) Dep. of State Bull., vol. 25 (1951), p. 132.

208) See Fisheries Board (Japan). Collection of International Fisheries Convention, p. 283.

209) Dep. of State Bull., vol. 25 (1951), p. 447. Although not being a signatory nation, Korea is entitled to the benefit of Article 9 of this treaty in accordance with Article 21.

210) Dep. of State Bull., vol. 26 (1952), p. 687.

211) Law, No. 267 of 1949.

212) Law, No. 313 of 1951.

3. The United Kingdom's View

The U.K. Government, while denying approval of the extension of jurisdiction claimed by some Latin American countries, made it clear in her notes to Chile, Peru, Costa Rica, El Salvador and Honduras that she was prepared to enter into negotiations with any governments to reach agreement on necessary measures in the common interest for the protection and conservation of the resources in the sea [213]).

* * *

As we have seen, agreements among the states concerned can effectively protect natural resources of the sea from being exhausted by excessive fishing. Although the unilateral claims were adopted with the purpose of excluding or regulating fishing by big maritime nations, there is no indication that these maritime nations deny the usefulness of agreement for the purpose of conserving and preserving marine resources.

III. Compulsory Conservation Measures Proposed by the International Law Commission

Some maritime countries have shown that they are prepared to enter into negotiation with other states for that purpose. However, there is certainly no positive assurance that agreement can be reached. In this respect, a proposal drafted by the International Law Commission is remarkable in that states are obliged, under certain circumstances, to adopt joint conservation measures.

The International Law Commission of the United Nations, which has endeavoured to codify and develop international law of the sea [214]), reaffirmed, in its 1956 Articles concerning the law of the seas, the principle of the freedom to fish on the high seas. "All States have the right for their nationals

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213) See notes 33 to 37 *supra.*

214) The International Law Commission, at its first session (1949), drew up a provisional list of topics, the codification of which it considered both necessary and feasible. Among the *items* in this list were the regime of the high seas and the regime of the territorial seas. The Commission included the regime of the high seas among the topics to be given priority. At its third session (1951) the Commission decided to initiate work on the regime of the territorial sea. The following draft articles were published concerning the regime of the seas: Draft Articles on the Continental Shelf and Related Subjects (1951, A/1858); Draft Articles on the Continental Shelf and Related Subjects (1953, A/2456); Provisional Articles concerning the Regime of the Territorial Sea (1954, A/2693); Provisional Articles concerning the Regime of the High Seas; Draft Articles on the Regime of the Territorial Sea (1955, A/2934); Articles concerning the Law of the Sea (1956, A/3159).

to engage in fishing on the high seas" [215]). The Commission of course was not unconcerned with the conservation of resources.

> "A State whose nationals are engaged in fishing in any area of the high seas where the nationals of other States are not thus engaged, shall adopt measures for regulating and controlling fishing activities in that area when necessary for the purpose of the conservation of the living resources of the high seas" [216]).
>
> "If the nationals of two or more States are engaged in fishing the same stock or stocks of fish or other marine resources in any area of the high seas, these States shall, at the request of any of them, enter into negotiations with a view to prescribing by agreement the necessary measures for the conservation of such resources" [217]).

While the Commission recognized the duty of interested states to enter into negotiations for the adoption of conservation measures, compulsory arbitration was provided for in detail in the Articles. In the event of disagreement, it was of course possible to place the dispute before the Hague Court or before ordinary arbitration, but it was also provided that, at the request of any party the matter should be submitted to the arbitral commission.

If the states concerned, whose nationals engaged in fishing in the same area, did not reach agreement within a reasonable period, any of the parties might initiate the arbitral procedure [218]). Where, subsequent to an agreement, nationals of other states engaged in fishing in the same area, the measures adopted were to be applicable to them; if the newcomer's states did not accept these measures, and no agreement could be reached within a reasonable period of time, any of the parties might resort to the same procedure [219]).

The Commission, besides recognizing the right of those states whose nationals have been or are engaged in fishing, also recognized the rights of coastal states [220]) and of those states having special interests in the conservation of resources, even though their nationals did not engage in fishing [221]), to participate in conservation measures. Furthermore, under extremely exceptional circumstances, a coastal state was authorized to adopt unilateral measures of conservation in any area of the high seas adjacent to its territorial seas [222]). Any disagreement arising between states in relation to these

215) Art. 49 of the 1956 Articles, UN. Doc., A/3159, p. 9, 31.
216) Art. 51, *id.* at p. 9, 34.
217) Art. 52, *ibid.*
218) *Ibid.*
219) Art. 53, *id.* at p. 9, 35.
220) Art. 54, *ibid.* See note 149 *supra.*
221) Art. 56, *id.* at p. 10, 36. See note 150 *supra.*
222) Art. 56, *id.* at p. 29, 106. See p. 98 *supra.*

conservation measures was also to be submitted to the arbitral commission.

The arbitral commission was to consist of seven members composed as follows: each of the opposing sides could nominate two members, one of whom could be a national of the nominating state. The three remaining members were to be chosen by agreement between the parties. Failing agreement and upon the request of either party these three members were to be nominated by the Secretary-General of the United Nations after consultation with the President of the International Court of Justice and the Director-General of the FAO. The arbitral commission was to be constituted, in all cases, within three months from the date of the original request and to render its decision within a further period of five months unless it decided, in case of necessity, to extend that time limit [223]). The decision of the arbitral commission was to be binding on the states concerned. If the decision was accompanied by any recommendations, they were to receive the greatest possible consideration [224]).

By these means the International Law Commission proposed an effective and commendable method for achieving the conservation of resources [224a]).

D. Another Movement towards the Dividing-Up of the Seas

Agreement between states is the most commendable and practical way to achieve conservation of marine resources, and it has been indicated that proper conservation can be maintained without changing the regime of the seas.

It is also important to note that, in the conventions discussed, conservation measures were imposed equally upon all signatory powers and that the concept of 'equal access to fisheries' was strictly maintained. Each signatory nation freely competed in fishing within the limitation equally imposed for the purpose of conserving and developing resources, and no state was given any special consideration with regard to its claim to resources. It was the factual difference of fishing technology or economic power of each nation and not any legal institution, which brought about varying catches to each nation. Free competition in exploitation was not denied within the limitations prescribed by scientific consideration for the purpose of conservation

223) Art. 57, *id.* at p. 10, 36.

224) Art. 59, *id.* at p. 10, 37.

224a) Some countries, such as Bulgaria, Byelorussian SSR, opposed to the idea of compulsory arbitration, because this idea ran counter to the principle of state sovereignty. See UN. Doc., A/C. 6/SR. 490, at p. 11; SR. 495, at p. 5 (Both provisional).

of resources. 'Equal access to fisheries and equal limitation on fishing' has been a kernel of the conservation program.

This principle, concerning itself solely with conservation, but not with distribution of resources, does not always ensure satisfaction to all states, if their aim is to maximize their own share. In this respect, the following statement expressed in 1956 by Phister is pertinent:

> "once a decision has been made that controls upon fishing must be established, each nation whose nationals have participated in the fishery want the controls to be established in such a manner that they will best serve the interests of its nationals. Each state would, of course, be most satisfied with a control which would permit its fishermen to fish with little or no restriction and which would exclude all other fishermen. The scientists and politicians of every fishing nation have been busily engaged in endeavouring to find some logical basis by which their fishermen may be permitted to exclusively exploit fisheries in which they have been participating and which are important to them" [225]).

The North Pacific High Seas Fisheries Convention of 1952 [226]) and the Northwest Pacific Fisheries Convention of 1956 [227]) deserve re-examination in this light.

One of the most important features of the North Pacific High Seas Fisheries Convention concluded between Canada, Japan and the United States lies in the fact that Japan (and sometimes Canada) is obliged to abstain from fishing, while others are entitled to maximum utilization of resources in the convention areas. At the conference, it was a matter of great concern whether one or two countries participating in the Convention could for any reason have prerogatives in high sea fishing. The U.S. delegates proposed that the exercise of the right under international law of any contracting party to exploit a high sea fishing should be waived with respect to certain resources, which had been so fully utilized in the past that future intensive fishing would be unwise. According to the American view, however, waiver of the right to fish is exempted, when the exploitation of any fishery resources has been recently or is currently being developed and maintained on a substantial scale by any party, or such fishery resources are located in areas of the high seas contiguous to its territorial waters, or fishing in the area is engaged in for the greater part by a country or countries not party to this Convention [228]). This principle was laid down in the draft convention prepared by the U.S. delegates [229]), but was not acceptable to Japan.

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225) Phister, Regime of the High Seas, Proceedings of the American Society of International Law, 1956, p. 136, 143.

226) See p. 266 *supra*.

227) See p. 82 *supra*.

228) Ministry of Foreign Affairs (Japan), Tripartite Fisheries Conference: Canada-Japan-United States, p. 43.

229) *Id.* at p. 165.

The Japanese delegates emphasized equality of high seas fishing and submitted a draft convention, which provided that

> "The Contracting Party mutually affirms that in the application of this Convention no country concerned under this Convention is to be subject to discriminatory exclusion from the exploitation of any high seas fishery resources, or to any discriminatory restrictions or rules with respect thereto" [230]).

The controversy between the American delegates and the Japanese delegates was clearly summarized by the Canadian delegates as follows:

> "The United States suggests that we must refrain from fishing under certain conditions with some important exceptions to that principle. The Japanese uses the principle of 'free access and free competition on the high seas', then for conservation purposes admits the need for measures comparable to the whaling convention" [231]).

The significance of the American draft should not be overlooked, not because it proposed that all signatory states abstain from fishing for the purpose of conserving resources, but because it advised that, in certain circumstances, some states were to be exempt from this waiver of the right to fish. In fact, the principle proposed by the American delegation and inserted in the draft convention prepared by it was dropped from the final draft of the Convention, after it had met strong objection from the Japanese delegation. However, without referring to the general principle, the United States succeeded in keeping Japanese fishing vessels out of some specified fisheries and in maintaining the sustainable productivity of the resources. It was understood that this inequality stemmed not from the fact that the resources were found off the coast of the United States, but solely from the fact that the fisheries had long been maintained by American fishermen.

It is important to note that the Convention provided that Japanese and/or Canadian nationals were not to be subject to U.S. jurisdiction. If any Japanese or Canadian nationals, being engaged in fishing halibut, herring or salmon contrary to the provisions of the Convention, were found in any designated areas, they were to be sent back to their respective flag nations for trial and punishment. In other words, some signatory powers were obliged by the Convention to be responsible to another party or parties for prohibiting their nationals from fishing for certain specified stocks [232]).

This agreement could effectively protect marine resources from depletion, and it is certainly true that it did not admit the extension of jurisdiction by specific states over the high seas fisheries. This Convention is merely an

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[230]) *Id.* at p. 176.
[231]) *Id.* at p. 82.
[232]) This is a fundamental feature of conservation conventions. See p. 267 f. *supra.*

agreement for the conservation of resources and *prima facie* quite compatible with the freedom of the high seas in that the coastal state is not empowered to exercise jurisdiction over foreign nationals. It should be noted, however, that this agreement is revolutionary in the sense that a state which pursuant to the agreement abstains from fishing, receives nothing in return, while others are exempt from the obligation of abstention, for whatever reasons may be considered justifiable.

This concept, sometimes called the 'principle of abstention' has been strongly supported by some U.S. scholars and officials. Herrington, an official of the Department of State and one of the principal members of the delegation to the tripartite conference in 1951 at Tokyo, repeatedly supported this idea [233]). In his paper submitted to the Rome Conference in 1955, Herrington explained [234]):

> "The abstention principle appears to be a useful concept which encourages countries to make the investment in talent, time, money and self-denial necessary to derive best use from the present and potential resources of the sea ... It would seem that the world has nothing to lose and much to gain by developing the abstention concept, or some more effective variation, to help meet the real and practical conservation problems with which it will increasingly be confronted".

The Rome Conference approved in its report:

> "Where opportunities exist for a country or countries to develop or restore the productivity of resources, and where such developments or restoration by the harvesting State or States is necessary to maintain the productivity of resources, conditions should be made favourable for such action" [235]).

The proposal, designated the 'principle of abstention' by certain governments for inclusion in the Commission's fishery articles, provided:

> "a) When States have created, built up, or restored productive resources through the expenditure of time, effort and money on research and management, and through restraints on their own fishermen, and
>
> b) The continuing and increasing productivity of these resources is the result of and dependent on such action by the participating States, and
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> c) Where the resources are being so fully utilized that an increase in the amount of fishing would not result in any substantial increase in the sustainable yield, then;

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233) See note 228 *supra, passim.* Also see Herrington, U.S. Policy on Fisheries and Territorial Waters, Dep. of State Bull., vol. 26 (1952), p. 1021 f.; Herrington, Problems Affecting North Pacific Fisheries, Dep. of State Bull., vol. 26 (1952), p. 340 f.

234) Herrington, Comments on the Principle of Abstention. Papers Presented at the International Technical Conference on the Conservation of the Living Resources of the Sea; UN. Doc., A/CONF. 10/7, at p. 344, 349.

235) UN. Doc., A/CONF/10/6, at § 62.

d) States not fishing the resources in recent years, except for the coastal State, should be required to abstain from fishing these stocks as long as these conditions are fulfilled" [236]).

The 1956 session of the International Law Commission recognized that the proposals made by the Rome Conference and certain governments might reflect problems and interests which deserved recognition in international law. However, the Commission, lacking the necessary competence in the scientific and economic domains to study these exceptional situations adequately, refrained from making any concrete proposal [237]).

Some scholars have sought to justify this principle of abstention. However, the present writer has serious doubts about it. It may be true, as suggested by Bishop, that

"This is not to suggest monopoly either as a general rule, or just because a particular state or states were the first to fish there, or are the ones nearest to the fishery" [238]).

Bishop and Phister are in agreement that

"equity and justice require that the natural resources which have been built up by systematic conservation and self-denying restrictive utilization be protected from destructive exploitation by interests which have not contributed to their growth and developments" [239]).

However, it appears to the author that it is not appropriate to define conservation measures only as 'self-denying, restrictive utilization'. It is submitted that the words 'self-denying' do not ring true. In effect it is only the state which prescribes abstention for others that stands to gain. Furthermore, no state has ever claimed 'destructive exploitation'. Again it should be explained that the principle of abstention does not stop at the point of protecting resources from destructive exploitation but goes further and results in exclusion of other nations.

It is admitted that some resources artificially cultivated by investment of labor and money should be reserved to those who have so invested in the resources. However, regular fishing does not belong in this category. The fact that 'the expenditure of time, effort, and money on research and management' was for the purpose of keeping resources at the maximum yield of sustainable productivity, is not negligible. But, should we accept that all other states are to abstain from fishing in an area where the resources are being utilized by specific states? Is it reasonable to deprive other states of

236) See UN. Doc., A/3159, p. 35.

237) *Ibid.*

238) Bishop, International Law Commission Draft Articles on Fisheries, AJIL, vol. 50 (1956), p. 627, 635.

239) Bishop, *op. cit. supra;* Phister, *op. cit. supra* note 225, at p. 145.

potential interests in fishing only because they have not engaged in fishing in an area previously? It is submitted that if we accept this principle, we are introducing a doctrine very similar to acquisitive prescription into the law of the sea. This is completely contrary to the concept of freedom of the high seas.

The significance of the 1956 Convention between Japan and the U.S.S.R. should not be overlooked. The original plan proposed by the Soviet delegation for the calculation of the catch of salmon allowable to the Japanese was withdrawn in the course of the conference, after it had met strong objection from the Japanese group. It is important to note, however, that the U.S.S.R. had not engaged in salmon fishing on the seas on a large scale, and she did not deem it necessary to do so even in the future. The main reason for this was that the great bulk of the stock of salmon in this area bred in rivers within Russian territory and most Russian fishing was carried on in those rivers. Consequently, the provisions of the Convention were inapplicable to Russian fishing, while, on the other hand, the Japanese fished within the area subject to control by the commission established pursuant to the Convention. The domestic policy of the U.S.S.R. regarding conservation within her territorial rivers was of vital importance in the drawing up of conservation measures in the high seas. In fact, the latter was completely dependent on the former.

It is relevant at this juncture to call attention to the Fur-Seal Convention concluded in 1911 between Great Britain, Japan, Russia and the United States [240]).

The United States, to which Russia ceded Alaska in 1867, took possession of the best breeding sites for fur-seals. On the other hand, Great Britain (Canada) without any breeding place, started to catch fur-seals on the high seas. A controversy developed between the United States and Great Britain as to whether the Bering Sea was *mare clausum,* and France, Great Britain, Germany, Japan, Russia and Sweden-Norway were invited by the United States to cooperate in the protection of fur-seal fisheries in the Bering Sea. The effort was in vain. The United States maintained that the Bering Sea was not included historically in the Pacific Ocean. It declared that, where by the act and industry of man wild animals are made to return to a particular place to such an extent that the possessor of the place can deal with them as if they were domestic animals, his property in them continues, no matter how far they go, so long as they have the intention of returning. Great

240) See Tomasevich, *op. cit. supra* note 163, at p. 65–124; Hayden, *op. cit. supra* note 179, at p. 114–136; Leonard, *op. cit. supra* note 159, at p. 55–94; Ireland, The North Pacific Fisheries, AJIL. vol. 36 (1942), p. 400.

Britain pointed out that the Bering Sea was not *mare clausum* but rather open sea in which all nations of the world had the right to navigate and fish.

The award of the Arbitration in 1893 was in favour of Great Britain and held that the United States had no right of protection or property in the fur-seals when they were found outside the ordinary three-mile limit [241]).

The demarcation between national territory and the high seas can be a hindrance to the proper conservation of resources in that those resources which breed within the territory of specific states and spend their lives on the high seas may be cut off at the source. This fact was taken into consideration at the Fur-Seal Convention of 1911. This agreement was concluded as a result of compromise between the United States and Russia, both possessing breeding sites, on the one hand, and Great Britain and Japan, who had no appreciable breeding sites and desired to participate in fur-sealing on the high seas, on the other [242]). The agreement prohibited the citizens and subjects of each party and their vessels from engaging in pelagic sealing in the North Pacific Ocean north of 30° N. and including the Bering, Kamchatka, Okhotsk and Japan Seas. The term 'pelagic sealing' was defined to mean the killing, capturing or pursuing in any manner whatsoever of fur-seals at sea. This meant that only the countries that had territorial jurisdiction over main rockeries were entitled to kill or capture fur-seals. To compensate for the abstention of those countries having no territorial rockeries, each of the countries having such rockeries was obliged to relinquish some fixed amount of skin or value, which it obtained by land sealing within its territorial jurisdiction.

It is beyond the scope of this paper to re-examine the standard by which the catch was distributed, and also the latent interests of the states not parties to the Convention. Although this Convention introduced the concept of abstention perhaps for the first time in the history of conservation, the interests claimed by the states concerned were well compensated by compromised distribution of catches. Furthermore the Convention successfully dealt with the question of conservation of the stock of fur-seals as a whole, no matter whether they were found within or without national territories.

On October 23, 1940 Japan notified the United States, Great Britain and the U.S.S.R. that she was abrogating, effective one year thereafter, the 1911 Convention [243]). The reason advanced by Japan was that the fur-seals in the North Pacific had multiplied to such an extent that Japanese fishing in-

241) See Moore, International Arbitrations, vol. 1, p. 935.

242) Martens, Nouveau Recueil, 3e Série, Tome 5 (1912), p. 720; AJIL, vol. 5 (1911), Supp. p. 267.

243) Dep. of State Bull., vol. 3 (1940), p. 412.

dustries had thereby been damaged. As a result of the War, Japan lost her only fur-seal rockery close to Sakhalin Islands. Even without being obliged by any Convention, Japan abstained from fur-seal hunting on the high seas after the War [244]). On November 28, 1955 negotiations were entered into by delegations of the four countries, which had been parties to the 1911 Convention. On February 9, 1957 the Interim Convention for the Conservation of North Pacific Fur-Seals Herds was signed in Washington [245]). The Convention provided, among other things, for the prohibition of hunting on the high seas. In return, a provision was made for Japan and Canada to receive every year from the U.S.A. and U.S.S.R. fifteen per cent of each of these country's total land kill.

Thus, the 1911 and 1957 Conventions for fur-seals are distinctive in two ways. Firstly, they placed the resources migrating between the high seas and the territory of specific states under international control, and secondly, the abstention from exploitation of the resources on the high seas was compensated by artificial distribution of land kill. By way of contrast, the 1956 Convention between Japan and the U.S.S.R. subordinated high seas fishing of salmon, which are migrating fish, to conservation measures to be unilaterally taken by Soviet Russia within her own territory. The 1952 Convention between Canada, Japan and the U.S.A. did not ensure any benefit to a state which abstained from high sea fishing.

The recent trend indicated by the Conventions of 1952 and 1956 should not be overlooked. Unlike previous conventions for conservation of marine resources, the principle of 'equal access and equal limitation' is no longer assured in these two Conventions. There is no doubt that while these Conventions may serve the purpose of conserving resources, an artificial sharing of such resources, favouring some contracting parties at the expense of others, is thereby secured. It appears that through this device some states may achieve virtual monopoly, and this may lead to a dividing-up of the seas.

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244) In its Memorandum to the Japanese Government, the U.S. Government stated on April 3, 1951 that "the United States Government is desirous of knowing whether it is the view of the Japanese Government that Prime Minister Yoshida's letter of February 7 to Ambassador Dulles may be regarded as extending to pelagic fur sealing". In its reply on April 7, 1951, the Japanese Government indicated: "The Japanese Government has no objection to the interpretation of Prime Minister Yoshida's letter of February 7, 1951 as extending to pelagic fur sealing. That is to say, pending the conclusion of a new convention on the subject after the coming into force of a peace treaty, the Japanese Government will, implying no waiver of their international rights, voluntarily prohibit her nationals and vessels from carrying on pelagic fur sealing in the waters in question, and is moreover prepared to enter into negotiations toward the conclusion of a new convention" (See note 208 *supra*, at p. 275).

245) Dep. of State Bull., vol. 36 (1957), p. 376.

Conclusion

Nobody denies the need for conserving the living resources of the sea. It has been illustrated how in the past various states, through agreement, have undertaken adequate conservation programs. Furthermore, at the present time, several major maritime nations have indicated that they are ready to enter into negotiations for similar future measures. In this respect, the aim of the International Law Commission to provide compulsory conservation measures is undoubtedly commendable.

While it has often been asserted that claims by coastal states to extend jurisdiction over high seas fisheries are made with a view to conservation of resources, it is submitted that such is not the case. Such claims to extension of jurisdiction, no matter whether excluding foreign nationals or not, are a device to increase the interests of the claiming state at the expense of the legitimate interests of other states. While on the one hand we have the claims by coastal states to extend jurisdiction over high seas fisheries, on the other, a trend has become noticeable in agreements on conservation measures that certain parties are in favour of securing a constant, preferably large, share of the resources for themselves.

The most important question to be solved at present is not concerned with the desirability or possibility of conservation measures, but rather with the distribution of resources among nation-states. In other words, we are confronted with the questions: how can marine resources, the exploitation of which must be limited with a view to conservation, be shared among states which naturally want to maximize their own portion? Should any state be entitled to violate the principle of the freedom of the high seas by extending jurisdiction over high seas fisheries in order to control marine resources for itself? Should any state, through the exertion of pressure at the negotiation stage of a conservation convention, secure to itself in the resulting agreement a more favourable share in the distribution of resources?

It is, of course, most desirable to distribute resources among peoples in accordance with their demand and necessity. In a municipal society, fair distribution of resources is secured to some extent by social legislation. In the world community, on the other hand, the last square inch of land has been exhausted through the efforts of colonialism and imperialism. There is no indication that the notion of fair distribution will ever bring about a redistribution of land resources. Furthermore, even as to sea resources, their distribution in terms of the whole interest of the world community has never been considered. Under these circumstances, in the author's view, there is no justification for a distribution of sea resources favourable to certain states at the expense of others.

It is not the intention of the author to maintain that there is no need for the regulation and control of the high seas fisheries. The most effective conservation measures should be taken in terms of agreements with a view to serving the human need of the whole world community. The author can find no reason why the freedom of the high seas, which prohibits all states from exercising jurisdiction on the high seas, as well as the principles of 'equal access and equal limitation' in conventions for conservation, can not serve the general interests of the world. So far as peoples of the world are not given any assurance of fairly distributed resources, we should not be in a hurry to change the regime of the seas so as to please certain states while sacrificing the interests of others. In the words of Grotius: "If a man were to enjoin other people from fishing, he would not escape the reproach of monstrous greed" [246]).

[246]) Grotius, The Freedom of the Seas, 1608, translated by Magoffin, 1916, p. 38.