

# Origins of the Abstention Doctrine in Ocean Law: Japanese-U.S. Relations and the Pacific Fisheries, 1937-1958

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This Article uses a number of standard abbreviations in the notes for archival materials. They are: DOS=Department of State; NA=National Archives (Washington, D.C.); RG=Record Group (National Archives categories); SCAP=Supreme Commander, Allied Powers; SCAP:GHQ=Supreme Commander, Allied Powers, General Headquarters; SCAP:NRS=Supreme Commander, Allied Powers, Natural Resources Section; SCAPIN=SCAP Instructions Bulletin; POLAD=the U.S. Political Advisor in Japan; UW=University of Washington Library (Seattle).

For Japan, [the] high-seas fishery is not to be viewed merely as an enterprise that profits those who are directly or indirectly connected with it. It is an essential, basic industry, without which it would be impossible to solve the national problems of food, population, and economic self-support.<sup>1</sup>

Of course, most of the non-Japanese people in the whole Pacific area would like to drive Japanese fishermen completely off the seas. Very extravagant demands in this respect are being made by other Pacific countries. The problem was one of finding a formula which would preserve the principle of the freedom of the seas and, on the other hand, give reasonable protection to fisheries that were conserved and that needed to be conserved.<sup>2</sup>

#### INTRODUCTION

In 1952, Japan, the United States, and Canada concluded the North Pacific Fisheries Convention, an agreement on research and management of the ocean fisheries that now stands out as one of the truly pivotal events in post-World War II diplomacy and ocean law.<sup>3</sup> This was the first international engagement undertaken independently by Japan beyond the general Peace Treaty of 1952 and related defense understandings; thus it was important because it marked the reentry of Japan as a sovereign power into global diplomacy.<sup>4</sup> The Convention's significance also rests in the fact that, for nearly two decades, it governed the extensive commercial fisheries activities in the North Pacific region—activities that were vitally important to the national economy of Japan and also to the West Coast regional economies of Canada and the United States, including Alaska.<sup>5</sup>

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1. Government of Japan, Memorandum on High-Seas Fishery (Mar. 20, 1950) (File 611.946/3-2350, DOS Records, NA) [hereinafter Memorandum on High-Seas Fishery].

2. Letter from John Foster Dulles to E.L. Bartlett (Mar. 28, 1952) (John Foster Dulles Papers, Princeton University).

3. North Pacific Fisheries Convention, May 9, 1952, United States—Canada—Japan, 4 U.S.T. 380, T.I.A.S. No. 2786 [hereinafter Fisheries Convention] (negotiated in Tokyo, Nov. 4-Dec. 14, 1951; entered into force June 12, 1953). The text of the Convention is also found in JAPAN, MINISTRY OF FOREIGN AFFAIRS, TRIPARTITE FISHERIES CONFERENCE: CANADA—JAPAN—UNITED STATES: NOVEMBER 5-DECEMBER 14, 1951, at 9-17 (1951); it is summarized and reprinted in part in 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 995-1002 (1965). For commentary, see A. KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES 97-100 (1973); Kasahara, *International Arrangements for Fisheries*, in THE LAW OF THE SEA: THE UNITED NATIONS AND OCEAN MANAGEMENT 41 (L. Alexander ed. 1971); Selak, *The Proposed International Convention for the High Seas Fisheries of the North Pacific Ocean*, 46 AM. J. INT'L L. 323 (1951).

4. Prior to the conclusion of the 1952 Convention, during the occupation, when Japan was still under the authority of the SCAP and did not yet exercise sovereign powers, Japan formally adhered to the terms of the international convention on whaling. See S. ODA, INTERNATIONAL CONTROL OF SEA RESOURCES 79 (1963).

5. See Herrington, *Problems Affecting North Pacific Fisheries: Tripartite Fisheries Conference at Tokyo, November 4-December 14, 1951*, 26 DEP'T ST. BULL. 340-46 (1952). See

This Article will reappraise the origins and historical context of the 1952 agreement. The central focus of the analysis here is what was termed the "abstention principle." This phrase referred to the section of the 1952 Convention by which each signatory power agreed to abstain from commercial fishing of those designated fish species that were determined scientifically to have been exploited to the point of maximum sustained yield.<sup>6</sup> The doctrine applied, of course, to all three signatory parties. Its practical significance, however, was quite different: it was a basis for excluding the fishing fleets of Japan from the rich Northeast

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generally *North Pacific Fisheries Symposium*, 43 WASH. L. REV. 1 (1967). For analysis, see especially D. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* 275-80 (1965).

6. A close analysis of abstention is provided in Van Cleve, *The Economic and Scientific Basis of the Principle of Abstention*, 1 U.N. Conference on Law of the Sea, Official Records, Preparatory Documents at 47-63, U.N. Doc. A/CONF.13/3 (1958) [hereinafter U.N. C.L.S.O.R.]; see also E. MILES, S. GIBBS, D. FLUHARTY, C. DAWSON, & D. TEETER, *THE MANAGEMENT OF MARINE REGIONS: THE NORTH PACIFIC* 55-63 (1982) [hereinafter E. MILES, *MANAGEMENT OF MARINE REGIONS*]; Herrington, *U.S. Participation in Conservation of International Fishery Resources*, 3 DEEP-SEA RESEARCH (Supp. entitled PAPERS IN MARINE BIOLOGY AND OCEANOGRAPHY) 398, 402-03 (1955) [hereinafter Herrington, *U.S. Participation*].

In later U.N. Conventions on the Law of the Sea, the phrase "maximum sustainable yield" was generally employed, but the text here uses the alternative "maximum sustained yield," which was the common phrase used in discussions and negotiation of the 1952 Convention. For William C. Herrington's recollection of how Michael Graham, a British fisheries scientist and government adviser on marine policy and law, persuaded the American proponents of abstention to adopt the "maximum sustainable yield" designation, see Herrington, *In the Realm of Diplomacy and Fish: Some Reflections on International Convention on High Seas Fisheries in the North Pacific Ocean and the Law of the Sea Negotiations*, 16 *ECOLOGY L.Q.* 101 (1989) (this issue) [hereinafter Herrington, *Diplomacy and Fish*].

Article IV of the 1952 Convention provides that abstention from fishing a given stock of salmon, herring, or halibut be recommended when the tripartite board of scientists of the Commission (established by the Convention) determines that the stock of fish meets the following conditions (with certain exceptions based on historic fishing presence and activity):

- [(i)] . . . more intensive exploitation of the stock will not provide a substantial increase in yield which can be sustained year after year,
- (ii) The exploitation of the stock is limited or otherwise regulated through legal measures by each Party which is substantially engaged in its exploitation, for the purpose of maintaining or increasing its maximum sustained productivity, such limitations and regulations being in accordance with conservation programs based upon scientific research, and
- (iii) The stock is the subject of extensive scientific study designed to discover whether the stock is being fully utilized and [to discover] the conditions necessary for maintaining its maximum sustained productivity.

Fisheries Convention, *supra* note 3, art. IV.

The Convention also obliges the Tripartite Commission implementing the agreement to investigate, upon request of any signatory power, the need for joint conservation measures relating to other stocks not subject to conservation regimes but fished by two or more of the signatories. This provision was successfully invoked to end abstention for stocks of herring in 1959 and 1961, and for halibut in 1963. R. JACKSON & W. ROYCE, *OCEAN FORUM: AN INTERPRETATIVE HISTORY OF THE INTERNATIONAL NORTH PACIFIC FISHERIES COMMISSION* 106-29 (1986); D. JOHNSTON, *supra* note 5, at 279-80; R. VAN CLEVE & R. JOHNSON, *MANAGEMENT OF THE HIGH SEAS FISHERIES OF THE NORTHEASTERN PACIFIC* 18-19 (2 PUBLICATIONS IN FISHERIES (n.s.) No. 2, 1963).

Pacific fisheries for several profitable commercial species, including salmon.<sup>7</sup>

In a longer historical view, the Convention was significant because soon after its ratification abstention became the conceptual centerpiece of U.S. ocean law policy: American diplomats, joined at critical junctures in United Nations Law of the Sea talks by the Canadians, would seek to elevate abstention to the status of a universally applicable principle in ocean law.<sup>8</sup> As a general principle, derived from the Convention, abstention meant

that, where a stock of fish is being fully utilized by one or more of the contracting parties [in an agreement], and where such parties have enacted and are enforcing fishery conservation regulations and limitations developed through extensive scientific research, other contracting parties not sharing in exploitation of that stock should . . . abstain from participation.<sup>9</sup>

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7. See S. ODA, *supra* note 4, at 122-35. *Contra* Johnson, *The Japan-United States Salmon Conflict*, 43 WASH. L. REV. 1 (1967) (Japan's failure to terminate the Convention after 1963 indicates that the Convention offered Japan advantages it was reluctant to forego and demonstrated the irrelevance of Japan's contention of duress during the negotiation of the Convention).

8. A. HOLLICK, UNITED STATES FOREIGN POLICY AND THE LAW OF THE SEA 100-01 (1981). Wilbert M. Chapman, then director of research for the American Tunaboat Association, and former first-ranking fisheries officer in the U.S. Department of State, summarized the principle as follows:

[The abstention principle] states essentially that if a nation, or nations jointly, bring a fishery to its level on the basis of sound scientific principles and research so as to prevent waste either from overfishing or from underfishing, then other nations who had not been involved in the development of that fishery should voluntarily abstain from entering it.

*To Protect Rights of United States Vessels on High Seas: Hearings Before the House Merchant Marine Comm. on H.R. 9584, A Bill to Protect the Rights of the United States on the High Seas and in Territorial Waters of Foreign Countries*, 83rd Cong., 2nd Sess. 4 (1954).

9. Herrington, *U.S. Participation*, *supra* note 6, at 403. As initially formulated within the State Department in 1955 (when the United States was preparing its response to International Law Commission proposed articles for a convention on living resources of the sea), the abstention principle was described as follows:

[In] situations where the nationals of one or more States have, in cooperation with their governments, established conservation programs designed to make possible the maximum sustainable yield from a living resource of the high seas . . . and the program has been prosecuted to the point where the maximum sustainable yield was already, within reasonable limits, being obtained from the resource, then States not exploiting the resource or which have not within a reasonable period of time exploited such resource, should be required to abstain from operating therein. This proposed rule would take account of the fact that there is a point of productivity with respect to any fishery known as the maximum sustainable yield, and that when one or more States, through their own efforts, forbearance, and self-restraint, have progressed so near to that point with respect to a given fishery that any additional fishing effort would not reasonably be expected to result in a substantial increase in the sustainable yield, then the equities of the situation requires [sic] that States not having participated in the development of the fishery should not be entitled to come in and enjoy the fruits of the labor of others.

Memorandum from William Herrington to R. Yingling, Commentary on the draft International Law Commission articles regarding conservation of the living resources of the sea, International Law Commission, seventh session, May 2-July 8, 1955, at 15 (n.d.) (copy in Wilbert

The Convention, as we can now see from the perspective of a rapidly changing ocean regime in the late 1980's, thereby also became a pivotal event in the global ocean enclosure movement—a turning point in the historic development of ocean law that led to adoption of the extended 200-mile Exclusive Economic Zone (EEZ), which now regulates our fisheries.<sup>10</sup>

The equity of the abstention doctrine was a matter of controversy from the outset; indeed, most Japanese commentators and diplomats consistently denied that it was appropriate to dignify the concept by terming it a “principle.” Professor Yamamoto and others in Japan have maintained that abstention was formulated by American negotiators in 1951 not upon any basis in principle, but only as an elaborate rationalization of a self-interested policy of exclusion.<sup>11</sup> Only because of duress, they contend, did Japan accept exclusion from the Northeast Pacific fisheries, thereby lending some legitimacy to the abstention formula as a putative “principle” of international law. According to this view, the highly disadvantageous terms of the 1952 Convention were part of a quid pro quo exacted from Japan by the United States and Canada in exchange for restoration of Japanese sovereignty through the general Peace Treaty of 1952. Hence, only out of political necessity did Japan consent to abstention—a doctrine that Judge Oda has characterized as “very similar to acquisitive prescription . . . [and] completely contrary to the concept of freedom of the high seas.”<sup>12</sup>

Among the issues to be treated in this Article are the origins of the abstention doctrine, the policy process that led to its endorsement by the United States Government and its incorporation in the 1952 agreement and, finally, its larger historic context in light of Japanese-North American relations concerning the Pacific fisheries.

One purpose of the inquiry is to appraise the claim of “duress” and its implications. This fresh look at the duress issue will be based on archival evidence not previously used by historians or legal scholars. Thus, I shall consider how the doctrine of abstention as it stood in 1952 was one product of a legacy of tension between Japan and the North Ameri-

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Chapman Papers, UW). Compare the language finally adopted for the U.S. Comment, transmitted by a Note Verbale dated 12 March 1956 from the United States Mission to the United Nations, U.N. Doc. A/CN.4/99/Add.1 (1956), reprinted in [1956] 2 Y.B. INT'L L. COMM'N 91, at 93, U.N. Doc. A/CN.4/SER.A/1956/Add. 1.

10. D. JOHNSTON, *supra* note 5, at 289-97.

11. Yamamoto, *The Abstention Principle and its Relation to the Evolving International Law of the Seas*, 43 WASH. L. REV. 45 (1967); see Oda, *Japan and International Conventions Relating to North Pacific Fisheries*, 43 WASH. L. REV. 63 (1967) (contending that the abstention principle had its counterpart in the Soviet-Japanese Treaty, which similarly confined the extent and volume of Japan's fishing in exchange for an empty formalistic concession); see also T. AKAHA, *JAPAN AND THE LAW OF THE SEA* (1985) (overview of Japanese ocean policies).

12. S. ODA, *supra* note 4, at 90; see also JACKSON & ROYCE, *supra* note 6, at 191-92. For another Japanese view on the subject, see *infra* note 261.

can powers that dated from the 1930's. This legacy was in part doctrinal, but in an important measure it was also political; and a powerful line of continuity ran directly from the 1930's to the formulation of the abstention provision in the negotiations that led to the Convention.

Another contention that I shall advance here is that the abstention doctrine was by no means the product of a unanimous or consensual view either in the United States or in Canada. Moreover, contrary to the impression conveyed in the view of abstention advanced by several distinguished Japanese scholars, the principle was not imposed in its most draconian form, in absolute exclusionist terms, to the maximum disadvantage of Japan. Instead, as I shall argue, it was incorporated in the 1952 Convention as a compromise of conflicting views within the highest policymaking councils of the U.S. Government. Other factors that mitigated the potential for coerciveness or duress were the necessity of accommodating the Canadian Government's views (basically sympathetic to Japanese concerns in important respects) and the room, even the outright encouragement, that the U.S. Government gave to Japan with respect to the strength and independence of its negotiating position—albeit always within the parameters dictated by Japan's status as a defeated power following a bitter and bloody war. In many regards, abstention as it appeared in the Convention represented a surrender of long-held objectives by important fisheries interests and allied political elements in the United States. To some degree, the same sort of compromise obtained in Canada.

Almost entirely neglected in the literature on postwar Japan is the history of how the United States, during the seven years of the Occupation, vigorously promoted the rehabilitation of Japan's enormous deep-water fishing fleets—the very ships that the United States and Canada became so vitally concerned to keep out of “their” fisheries in the Northeast Pacific in 1951-52. In fact, as I shall contend, General Douglas MacArthur, as Supreme Commander for the Allied Powers (SCAP), played a critical role in championing Japanese interests in the U.S. policy process. MacArthur's management of the Japanese fishery industry's recovery program, together with his policies regarding the spatial expansion of Japan's high-seas fishing activities from 1945 to 1952, gave his headquarters a unique importance in the developments that finally produced the 1952 agreement and the abstention doctrine. MacArthur's role in this regard has been entirely neglected in previous scholarship on the Occupation and on the 1952 Convention. Indeed, the importance of marine fisheries policy and diplomacy has also been unjustifiably relegated altogether to obscurity in the standard accounts of the period.<sup>13</sup>

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13. For example, J. DOWER, *EMPIRE AND AFTERMATH: YOSHIDA SHIGERU AND THE JAPANESE EXPERIENCE, 1878-1954* (1979), is the standard biography of the Prime Minister and a splendid introduction to and analysis of postwar occupation issues—but one that entirely

Yet it is impossible, I believe, to understand the roles of either the Japanese or the North American powers in the 1952 Convention negotiations unless one takes full account of MacArthur and SCAP policies.<sup>14</sup>

Finally, I will discuss the role of other leading actors in the policy process, both within the top-level U.S. planning and diplomatic circles, and in the larger political arena outside. Attention will be given to the parts played by Japanese Prime Minister Shigeru Yoshida and by John Foster Dulles, special envoy to negotiate the Japanese Peace Treaty, in Pacific fisheries diplomacy during the 1950-53 period. Dulles, no less than the political and Far East specialists with whom Dulles dealt in the State Department, also had to contend with special-interest pressures from the West Coast fishery industries. And attention will also be given to the contributions of the ranking fisheries officers of the State Department during this time, namely Wilbert McLeod Chapman, who served in the post from 1948 to 1951, and his successor William C. Herrington, who also was named as chairman of the U.S. delegation in the Fisheries Convention negotiations. While MacArthur's position was reinforced by an internationalist element in the highest levels of the U.S. Government's foreign policy planning apparatus, as will be shown, the impact of their ardent championship of the Japanese cause ultimately gave way to a compromise engineered by Dulles.

## I

### THE LEGACY OF BRISTOL BAY: A HALF CENTURY OF CONTINUITY

Events of the first hundred days of 1988 in Pacific Rim diplomacy and geopolitics remind us vividly of the historic continuities that have long made fishery issues so prominent in Japan's relations with the North American powers. In the winter months of 1937-38, a fleet of Japanese mother-ship fishing vessels entered Bristol Bay in Alaska and began taking salmon.<sup>15</sup> Until then, Alaskan salmon had been fished exclusively by American vessels, under strict regulation by the federal government. An immediate outcry came from Alaska and Seattle, demanding that the

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neglects fisheries policy and diplomacy. Other accounts of the postwar period that are devoid of serious consideration of the Pacific fisheries (either as to economic recovery policy during the Occupation or as to diplomacy) are: W. BORDEN, *THE PACIFIC ALLIANCE: UNITED STATES FOREIGN ECONOMIC POLICY AND JAPANESE TRADE RECOVERY, 1947-55* (1984); R. PRUESSEN, *JOHN FOSTER DULLES: THE ROAD TO POWER* (1982); the older work, H. FEIS, *CONTEST OVER JAPAN* (1967); and, most recently, M. SCHALLER, *THE AMERICAN OCCUPATION OF JAPAN* (1985).

14. I have provided a brief introduction to these issues in the context of U.S. approaches to ocean science, policy, and diplomacy, in Scheiber, *Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945-70*, 13 *ECOLOGY L.Q.* 381, 430-34 (1986).

15. See Jessup, *The Pacific Coast Fisheries*, 33 *AM. J. INT'L L.* 129, 132-33 (1939).

U.S. Government run the Japanese ships out of "our" waters. The fishing companies sent up airplanes to photograph the fishing—which the Japanese Government claimed was for scientific purposes only—and there were threats that American fishing boats would fire on the Japanese if they did not withdraw.<sup>16</sup> Not only Japanese aggression in China (which was a prominent element, of course, in the immediate political context), but also Japan's continued refusal to enter into international whaling agreements,<sup>17</sup> gave additional force to the outraged reaction of Americans in the Pacific Northwest—and also of Canadian fishing interests in British Columbia. Finally, the United States Government formally demanded withdrawal of the vessels, hinting at sanctions against Japan if agreement was not forthcoming.<sup>18</sup>

In the winter months of 1987-88, precisely half a century later, an unfolding drama in Alaskan waters resonated hauntingly with memories of the earlier confrontation. Again Japanese vessels were accused of fishing by methods that could quickly destroy the stocks of salmon maintained through far-reaching regulatory programs imposed on U.S. vessels. Again there were aerial photographs, demands for sanctions, and public outrage in the context of Japanese whaling expeditions in the Antarctic.<sup>19</sup>

In the episode fifty years ago, in November 1937, the United States issued a stern diplomatic warning to Japan reaffirming American adherence to the three-mile offshore limit of jurisdiction—but making an exception of Alaskan salmon on the equitable grounds that the American industry had maintained the fishery by accepting regulation. The fact

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16. *Id.*

17. *See id.* at 132.

18. H. GREGORY & K. BARNES, *NORTH PACIFIC FISHERIES, WITH SPECIAL REFERENCE TO ALASKA SALMON* 296, 303-07 (1939).

19. *U.S. Denies Japan Plea on Fishing*, N.Y. Times, Apr. 7, 1988, at D1, col. 6; *U.S. Declares Japan in Violation on Whaling and May Curb Trade*, N.Y. Times, Feb. 11, 1988, at A1, col. 2; *Foreign Trawlers Accused of Violating U.S. Zone*, N.Y. Times, Jan. 21, 1988, at A1, col. 5; *see also* Caron, *International Sanctions, Ocean Management, and the Law of the Sea: A Study of Denial of Access to Fisheries*, 16 *ECOLOGY L.Q.* 311 (1989) (this issue).

Two years earlier, in 1985, the Japanese fleet fished salmon on the high seas just beyond the 200-mile exclusive economic zone (EEZ), forecasting a serious confrontation. American fishing interests charged that the Japanese were putting out some 5,000 miles of floating drift nets that caught millions of salmon spawned in U.S. waters. The Wall Street Journal reported: "Pacific Northwest congressmen talk of trade reprisals. An Alaska commercial fishing lobbyist suggests 'all-out [trade] war' with Japan. Secretary of State George Shultz has become personally involved; a State Department insider calls the issue 'volatile' and frets that it will become 'something really big.'" Wall St. J., Dec. 3, 1985, at 33, col. 1. Senators from Alaska and Washington advocated that the United States Government retaliate by cutting Japan's allocations of rights to take bottom fish in the U.S. EEZ. *Id.*

On the continuing problems of Japanese fishing in the "donut" areas of high seas framed by the outer boundaries of the U.S., Soviet, and Japanese EEZ's, see Burke, *Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries*, 16 *ECOLOGY L.Q.* 285 (1989) (this issue).



that salmon, an anadromous species, spawned in Alaska's inland streams was also advanced as a justification in favor of an exception from the three-mile rule.<sup>20</sup>

Japan bent to this pressure, agreeing in a Note issued in March 1938 to withdraw its ships from Bristol Bay.<sup>21</sup> The Japanese formally reserved the right to fish on the high seas beyond three miles of any other nation's coastline; nonetheless, Japan further specified that for an indefinite period it would refrain voluntarily from permitting any salmon fishing by its fleets in the controversial Alaskan waters.<sup>22</sup>

This dramatic incident in 1937-38 bequeathed a manifold legacy to Japanese-North American relations—and, by extension, to the development of modern international ocean law. One dimension of that legacy was political in character. Japan's "invasion" of Bristol Bay waters became an enduring reminder to the fishing interests (not only in Alaska, but also in British Columbia and in Washington, Oregon, and California) that Japan was capable of mobilizing distant-water operations on a large-scale basis, using the most modern and efficient—indeed devastatingly efficient—gear.

No one doubted that the Japanese had the capacity to conduct such expeditions to the Northeast Pacific on a commercially profitable basis.<sup>23</sup> The whole incident was a nightmare specter realized for North American fisheries interests, for they had long been concerned that the salmon industry's harvest regulation regime, the U.S. Government's artificial hatchery investments, and the regional economic structure of the fisheries could be undone virtually overnight—with the salmon stocks becoming severely depleted—by the "destructive method" of mother-ship

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20. Secretary of State C. Hull, Memorandum (Nov. 20, 1937), *reprinted in* 4 FOREIGN REL. U.S. 1951, at 763, 765 (1985) [hereinafter Hull, Memorandum]. "It must be taken as a sound principle of justice that an industry such as [the Alaskan salmon fishery] . . . which has been built up by the nationals of one country cannot in fairness be left to be destroyed by the nationals of other countries." *Id.*

Pacific fishing interests in Canada also took the position that salmon should be viewed as a proprietary resource of their country. Senator Lewis Schwellenbach quoted S. G. Pearson, Commissioner of Fisheries for British Columbia as follows: "The Dominion should decide what rights we have in these fisheries. . . . These are our fish." *Government is Responsible for Protection of Fisheries, Says Senator Schwellenbach*, PAC. FISHERMAN, Apr. 1937, at 38 [hereinafter *Government is Responsible*].

21. The Note is reprinted in *Japanese Government Makes Official Statement on Bristol Bay Salmon Fishing*, PAC. FISHERMAN, Apr. 1938, at 25. The Note declared that the Japanese Government had given its assurances "without prejudice to the question of rights under international law" that it would suspend the three-year salmon fishing survey that it had formerly authorized for Bristol Bay; and that it would "on its own initiative continue to suspend the issuance of such licenses." *Id.*

22. *Id.*

23. See *Japanese Fishing Areas: Pre-War and Post-War*, PAC. FISHERMAN, June 1946, at 33.

operations that Japan had perfected.<sup>24</sup> Hence, the appearance of such a fleet from across the North Pacific was a prospect deeply feared and reviled by North American interests in the years that followed. Typical of the views expressed as to Japanese fishing was the contention of Senator Schwellenbach of Washington, in a speech delivered to the Senate on March 8, 1937, in which he declared that Japan had intercepted salmon in a ruthless manner in the Siberian fisheries of the Northwest Pacific, causing the collapse of the salmon supply that now induced them to seek entry into the Bristol Bay fishery as a substitute source of salmon for their markets. "If the Japanese are able to cork up our Alaskan fisheries [through interception of anadromous stock] as they have the Siberian fisheries," Schwellenbach declared, "the supply will soon be depleted and we will face the same situation as is faced by the shore fisheries on the coast of Kamchatka. Succeeding this, it is understandable that they will proceed south by the coast of British Columbia and the States of Washington, Oregon, and California."<sup>25</sup>

Even before the United States and Canada entered the war, there were attempts in high political circles of each country to legislate or order an extension of offshore jurisdiction beyond the traditional three-mile limits, as a measure designed to keep Japan out of the salmon waters.<sup>26</sup>

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24. Address by Edward Allen, *They Fish to Eat* (June 1949) (Edward Allen Papers, UW) ("Here is Japan, before the war the worst offender in limitless shortsighted exploitation [of ocean fisheries]. . ."); see also Address by Edward Allen, *Bristol Bay Presents Issue between American System of Fishery Conservation and Foreign System of Unrestricted Exploitation*, (1939 speech to the Commonwealth Club of San Francisco) (Edward Allen Papers, UW).

25. 81 CONG. REC. 1959 (1937). Senator Schwellenbach's speech is reprinted in *Government is Responsible*, *supra* note 20, at 38; the original manuscript is available in the Lewis Schwellenbach Papers, Library of Congress.

26. Thus, Alaska's representative, Anthony J. Dimond, called upon Congress to extend jurisdiction over salmon waters beyond the traditional three miles so as to exclude Japan, declaring:

[T]he present urgency of Japan to find employment for her out-of-work [salmon] fishermen and fishing vessels was brought about through her failure to effectively conserve the fisheries provided for her off the coast of Siberia . . . . If this is the proven result of the "conservation" practiced in Japanese fisheries, and which Japan now offers to thrust upon the United States, what have we to look forward to if we allow such practice in our hitherto carefully preserved [Bristol Bay] fishery, which Japan not only threatens but plans to invade as her right, untouchable by law or treaty?

81 CONG. REC. 4865 (1937). Representative Dimond's speech is also quoted in *U.S. Has Authority to Protect Alaska Fisheries*, PAC. FISHERMAN, June 1937, at 28.

The Prime Minister of British Columbia, T.D. Pattullo, wrote privately to Edward Allen in 1939, arguing that the United States and Canada should "declare this continental shelf to be exclusive fishing waters for [the] United States and Canada." Letter from T.D. Pattullo to Edward Allen (Mar. 30, 1939) (Edward Allen Papers, UW). See also *Congressmen Seek Extension of Fishery Jurisdiction*, PAC. FISHERMAN, Feb. 1939, at 12 ("Our Pacific fishing industry will be in jeopardy until American jurisdiction is established over the fisheries adjacent to the Pacific Coast as a whole. We cannot be satisfied with less."); *Japanese Vessels Appear Again in Bristol Bay*, PAC. FISHERMAN, June 1939, at 28; *Protection of Offshore Fisheries Requires Continued Vigilance*, PAC. FISHERMAN, Dec. 1939, at 14.

Canadian and American hostility toward Japan naturally was intensified vastly by the war.

Another element of the Bristol Bay legacy, also political, was the long-term result of a highly effective campaign waged against the Japanese by the fishery industries' leadership in Seattle and Alaska. They organized an intensely emotional campaign of public pressure and use of influential political figures, successfully mobilizing the West Coast representatives in Congress.<sup>27</sup> Their efforts won President Franklin D. Roosevelt's personal (and sympathetic) attention to the matter, and in the Senate they actually mustered enough votes to pass a bill that would have extended U.S. jurisdictional claims to the salmon grounds out beyond the traditional three-mile limit. Not least important, they gained appointment of a special fisheries officer in the State Department.<sup>28</sup>

The swift and dramatic success of the fishery industry's campaign firmly established in the minds of Washington policy officials how powerful these interests could be. It also signalled how volatile public opinion was in the Pacific Northwest on the matter of protecting traditional deep-water fisheries from Japanese incursions. These lessons would be well remembered when the 1952 Convention was being negotiated.<sup>29</sup>

Moreover, the coalition of fishery interests—boat owners and fishermen, cannery operators, and labor union leadership—that was formed in the "defense" of Bristol Bay in 1937-38 became the nucleus of a powerful new trade organization, the Pacific Fisheries Conference, formed in 1946. In the postwar period this organization, representing all segments of the fishing industry throughout the Pacific Coast area, would exercise considerable influence in the policy processes that shaped U.S. Pacific fisheries diplomacy.<sup>30</sup>

The last element of the Bristol Bay legacy was doctrinal: it consisted of the argument incorporated in the U.S. Government's formal protests to the Japanese Government in the winter of 1937. The argument stated that the United States could legitimately protect a fishery under special circumstances, such as applied in Bristol Bay, and that this was so even if it meant keeping the vessels of other nations from the waters beyond three miles offshore, which were traditionally considered

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27. See Jessup, *supra* note 15; see also *infra* text accompanying notes 123-26.

28. See H. GREGORY & K. BARNES, *supra* note 18, at 286, 295-96; A. HOLLICK, *supra* note 8, at 20-28, 66; Jessup, *supra* note 15. The fisheries officer appointed was Leo Sturgeon.

29. See *infra* text accompanying notes 123-26.

30. The prominent role of the Pacific Fisheries Conference as a pressure group in the politics of the Peace Treaty is recognized in the one study available, which provides an extended analysis of the Peace Treaty issues within the U.S. Government. B. COHEN, *THE POLITICAL PROCESS AND FOREIGN POLICY: THE MAKING OF THE JAPANESE PEACE SETTLEMENT* 253-79 (1953). Cohen's long-standard study, although generally insightful and largely accurate, does not deal at all with numerous central issues and events presented in this Article.

(and long regarded by the United States) as part of the high seas and so open to fishing by vessels of any power.<sup>31</sup>

There is a direct line of continuity from the delivery of the U.S. Note of 1937 to the issuance of the Truman Fisheries Proclamation in September 1945. In this proclamation, immediately following the war, the President declared that when high-seas fisheries had been exploited historically by the United States, and when additional entrants into that fishery might endanger survival of the resource, then the United States reserved the right to declare a "conservation zone" within which all fishing would be "subject to the regulation and control of the United States."<sup>32</sup> Indeed, a press release accompanying the publication of the Proclamation referred specifically to the need for protection of the Alaskan salmon industry.<sup>33</sup>

The Truman Proclamation was stillborn, so far as the making of U.S. policy was concerned. It did inspire claims to jurisdiction beyond three miles by other nations, especially in Latin America during 1945-53, but the United States itself did not follow with creation of any "conserva-

31. Hull, Memorandum, *supra* note 20, at 765, 768. Professor Burke's proposal for unilateral action by a coastal state to manage "straddling" fish stocks beyond the limits of Exclusive Economic Zones is in an intellectual lineage that surely derives from the arguments set forth in the Hull Memorandum. See Burke, *supra* note 19.

32. Proclamation No. 2668, 3 C.F.R. 68 (1943-1948), *reprinted in* 59 Stat. 885 (1945). The Proclamation also authorized designation of offshore "conservation zones" by joint action of the United States and another nation or nations that previously had exploited the fishery.

There was considerable ambiguity in the language of the Proclamation regarding whether the fishing vessels of nations that had not fished previously in the waters designated as "conservation zones" would now be subject (upon entering such zones to fish) to assertions of regulatory authority by the United States, even in areas beyond the three-mile limit. In December 1948 the State Department tempered this potentially volatile provision of the Truman Proclamation in a statement by Wilbert M. Chapman, Special Assistant, Fisheries and Wildlife, to the Under Secretary, pulling back from the implication that the United States intended to depart so radically from accepted principles of international law (the three mile limit). "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." Chapman, *United States Policy on High Seas Fisheries*, 20 DEP'T ST. BULL. 67, 71 (1949); see also Bishop, *International Law Commission Draft Articles on Fisheries*, 50 AM. J. INT'L L. 627 *passim* (1956) (contending that the Truman Proclamation, which Bishop had played a key part in drafting during 1943-45, had been intended to give full recognition to "all states having any real concern in each concrete situation, whether by contiguity or by substantial fishing." *Id.* at 632 (emphasis in original)); Scheiber, *supra* note 14, at 442-43 (discussing Bishop's views on the Truman Proclamation), 457-59 (discussing the Chapman statement).

For the history of the U.S. policy discussions, beginning with the 1937-38 incident in Bristol Bay, which culminated in the issuance of the Truman Proclamation in 1945, see Hollick, *U.S. Oceans Policy: The Truman Proclamations*, 17 VA. J. INT'L L. 23 (1976); Watt, *First Steps in the Enclosure of the Oceans: The Origins of Truman's Proclamation on the Resources of the Continental Shelf, 28 September 1945*, 3 MARINE POL'Y 211 (1979). On the Proclamation in the context of postwar fisheries science and policy, see Scheiber, *supra* note 14, at 407-8, 457-64. Documentation is available in 4 M. WHITEMAN, *supra* note 3, at 942-62.

33. See Allen, *The Fishery Proclamation of 1945*, 45 AM. J. INT'L L. 177, 177-78 (1951). See generally A. HOLLICK, *supra* note 8.

tion zones.”<sup>34</sup> Nonetheless, its apparent renunciation of the three-mile limit as a universally applicable legal principle governing offshore fishing jurisdiction opened the way within the U.S. State Department’s own planning and policy apparatus to consideration of other proposals for policy innovation on the same line—proposals that might further compromise the principle of free access by all nations to the high seas fisheries beyond three miles offshore. In that sense, Truman’s Proclamation laid the foundation for the abstention principle as it found its way into the 1952 Convention.<sup>35</sup>

Finally, the confrontation of 1937-38 in Bristol Bay was of lasting significance because of its dramatic denouement in Japan’s “voluntary” withdrawal, albeit under pressure, from the Alaskan salmon waters. It immediately became a treasured and single-minded objective of the American salmon industry leadership, and also many of the British Columbia fishery interests, to convert Japan’s concession into a permanent formal commitment.<sup>36</sup>

Pearl Harbor and World War II, of course, placed the whole question of Japanese fishing rights in a totally different political framework. Once the United States had entered the war, the Pacific Northwest’s fisheries leadership demanded that permanent exclusion of the Japanese from the major Northeast Pacific fisheries be made an integral part of the surrender or peace treaty terms. The war, in their view, was a marvelous opportunity to end forever the threat posed by Japanese fishing technology and enterprise against the fragile structure of their monopoly on salmon and other species in “their” offshore waters.<sup>37</sup> The situation was

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34. Allen, *supra* note 33, at 177; see M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS* 966-68 (1962); T. WOLFF, *PERUVIAN-UNITED STATES RELATIONS OVER MARITIME FISHING* 5 (Law of the Sea Institute, University of Rhode Island, Occasional Paper No. 4, 1970).

35. See *infra* text accompanying notes 134-45. It should be noted that strict adherence to the three-mile principle had been under attack from some important American scholars in international law, including Stefan Riesenfeld and J.W. Bingham; on this point, see Scheiber, *supra* note 14, at 437-47.

36. See Allen, *Legal Limits of Coastal Fishery Protection*, 21 WASH. L. REV. & ST. B. J. 1, 1-4 (1946) for an aggressive nationalistic interpretation of the Proclamation.

37. Testifying before a congressional committee in 1946, Edward Allen stated that the defeat of Japan provided an opportunity to close the door permanently on Japanese access to Alaskan waters to harvest salmon and other fisheries—even crab, which the Japanese had fished regularly in the Northeast Pacific throughout the prewar decade. *Alaskan Fisheries Part 2: Hearings Before the Special Subcomm. on Alaskan Problems of the Comm. on Merchant Marine and Fisheries*, 79th Cong., 2d Sess. 185, 191 (1946) (testimony of Edward Allen).

In a memorandum prepared after the 1952 Convention was concluded, Edward Allen recalled that “following the war, . . . [the industry] demanded that this country enter into an immediate understanding with the Japanese that they should stay out of American coastal fisheries and we in turn would stay out of the Asiatic coastal fisheries.” Edward Allen, *Memorandum on the North Pacific Fishery Situation* (1952) (enclosed with Letter from Edward Allen to Miller Freeman (Nov. 19, 1954) (Miller Freeman Papers, UW)).

described in 1951 in a revealing letter from the head of the delegation for the United States to the conference on the Fisheries Convention:

The Japanese threat to the Pacific Coast fishing industry, especially . . . in Alaska and the Northwest, has been a bugaboo for more than fifteen years, particularly to the people in the salmon and halibut fisheries. Once the United States became involved in World War II these people looked forward to the end of the war and the Peace Treaty to provide the final solution of the Japanese problem in our waters.<sup>38</sup>

Hence, both in the general peace treaty talks of 1951-52 and in the negotiation of the convention on fisheries in 1951, all parties labored in the long shadow of the prewar Bristol Bay incident. Eventually, the line of historical continuity would extend still further in another legal and political arena—to the law of the sea negotiations of the late 1950's and after, when Canada and the United States championed abstention as a universal principle to govern global relations among the fisheries powers.<sup>39</sup>

## II

### THE OCCUPATION YEARS: MACARTHUR AND THE RECONSTRUCTION OF JAPAN'S FISHERIES

#### A. *The SCAP Fisheries Regime and the Economic Rehabilitation Policy*

Prior to World War II, Japan had been the world's leading marine fisheries nation.<sup>40</sup> Her fishing fleets sought out and exploited deepwater fishery resources with a legendary entrepreneurial drive. In the late 1930's and the early war period, moreover, Japan's fishing companies followed the invading Japanese military forces into the South Pacific and East Asia, just as they had done in an earlier era of Japanese military occupation of Korea.<sup>41</sup> In the 1930's, Japan led all other Pacific Rim nations in the use of trawler, factory-ship, and mother-ship fishing technologies. Taken together with Japanese disregard for systematic management for sustained yield—a concept to which the Western fishing powers paid at least lip service, if sometimes little more—the size, techniques, and enterprising expansionism of Japan's deepwater fleet posed a threat of unprecedented magnitude to the deepwater resources of the Pacific.<sup>42</sup> The portrait of Japan's marine fisheries as predatory and ruthless

38. Memorandum from William Herrington to Under Secretary Webb (Aug. 30, 1951) (File 611.946/8-3051, DOS Records, NA).

39. See *infra* text accompanying notes 260-69.

40. E. ACKERMAN, *JAPAN'S NATURAL RESOURCES* 109 (1953).

41. On the Japanese exploitation of Korean fishing waters, see C. PARK, *EAST ASIA AND THE LAW OF THE SEA* 57-60 (1983). An overview of Japanese post-1945 fishing is provided in SCAP, *JAPANESE NATURAL RESOURCES* 93-126 (1949).

42. The United States and Canada had a strict regulatory regime in place for Pacific halibut fishing. Convention for the Preservation of the Halibut Fisheries of the Northern Pacific Ocean and Bering Sea, May 9, 1930, United States-Canada, 47 Stat. 1872, T.S. 837; Con-

was painted in trade-press articles, in scholarly studies, and in political debates whenever the threat of new Japanese "invasions" of Northeast Pacific waters was contemplated by the fishing industry in British Columbia and the Pacific Coast region of the United States.<sup>43</sup>

During World War II most of the vaunted Japanese deepwater fishing fleet was sunk, captured, or disabled. The vessels that survived the war suffered from shortages of materials and gear, to say nothing of loss of manpower. Moreover, at the outset of the Occupation, General MacArthur, as Supreme Commander of the Allied Powers, ordered all vessels kept in port or within a twelve-mile limit.<sup>44</sup>

Late in November 1945, however, a new era in Japanese fishing history was inaugurated when the SCAP headquarters authorized a limited deepwater fishing zone—known popularly as the SCAP Fishery Zone, or simply the MacArthur Zone—within which Japanese vessels would be permitted to operate.<sup>45</sup> This zone (shown in Figure 1) was in a confined region of the western Pacific, and it had a southern limit considerably

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vention for the Preservation of the Halibut Fisheries of the Northern Pacific Ocean, Mar. 2, 1923, United States-Canada, 43 Stat. 1841, T.S. 701. U.S. regulations (often opposed, of course, by Alaskan fishing interests) also applied in Bristol Bay salmon waters. See generally W. CARROTHERS, *THE BRITISH COLUMBIA FISHERIES* (1941); R. COOLEY, *POLITICS AND CONSERVATION* (1963); A. KOERS, *supra* note 3, at 80-82.

The Fraser River salmon runs were still unregulated in 1939, though a treaty between Canada and the U.S. had been concluded that eventually led to imposition of harvest controls. Convention for the Protection of the Fraser River Sockeye Salmon Fisheries, May 26, 1930, United States-Canada, 50 Stat. 1355, T.S. 918; see D. JOHNSTON, *supra* note 5, at 384-90; A. KOERS, *supra* note 3, at 82-84.

43. See, e.g., Allen, *International Law, War, and Fish*, 18 TUL. L. REV. 118, 119 (1943) (on Japan's "inexcusably destructive" fishing methods); Scheiber, *supra* note 14, at 439-40 (quoting S. RIESENFELD, *PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW 282 passim* (1942), on "piratical" fishing practices); *Japanese Menace Long Seen in Fisheries of the Pacific*, PAC. FISHERMAN, Jan. 1942, at 18-19; see also *supra* note 24. The chief fisheries officer in the Occupation declared in a press conference in 1949 that "prewar Japanese fishing policies and practice [had] caused the people, particularly the fishermen, of other nations to distrust the Japanese fishermen and the Japanese Government as being irresponsible and having no consideration for international agreements or the interests of other countries." William C. Herrington, Fisheries Division, Japanese Fishing Areas: A Press Conference Statement (Feb. 5, 1949) (SCAP Records, RG 331, NA), quoted in COM. FISHERIES REV., May 1949, at 44.

44. W. NEVILLE, *FISHERIES PROGRAMS IN JAPAN, 1945-51*, at 9-10 (SCAP:NRS Report No. 152, 1951). See *infra* note 45 for an annotated chronology of SCAP orders regarding areas authorized for fishing and whaling.

45. *Japanese Fishing under the Occupation*, 1949 NAT. FISHERIES INST. Y.B. 103.

Below are the SCAP orders regarding areas authorized for Japanese fishing from 1945 to 1950. This chronology is compiled from SCAP:NRS Records, RG 331, NA, and includes whaling outside the Antarctic region.

*August 20, 1945* (presented to Japanese delegation at Manila): Required fishing vessels over 100 gross tons to cease movements other than voyages then in progress, pending further instructions.

*September 14, 1945* (FLOTLOSCAP 35): Permission to wooden vessels over 100 gross tons, specifically auxiliary sailing craft, to operate within 12 miles of the Japanese coast for fishing purposes.

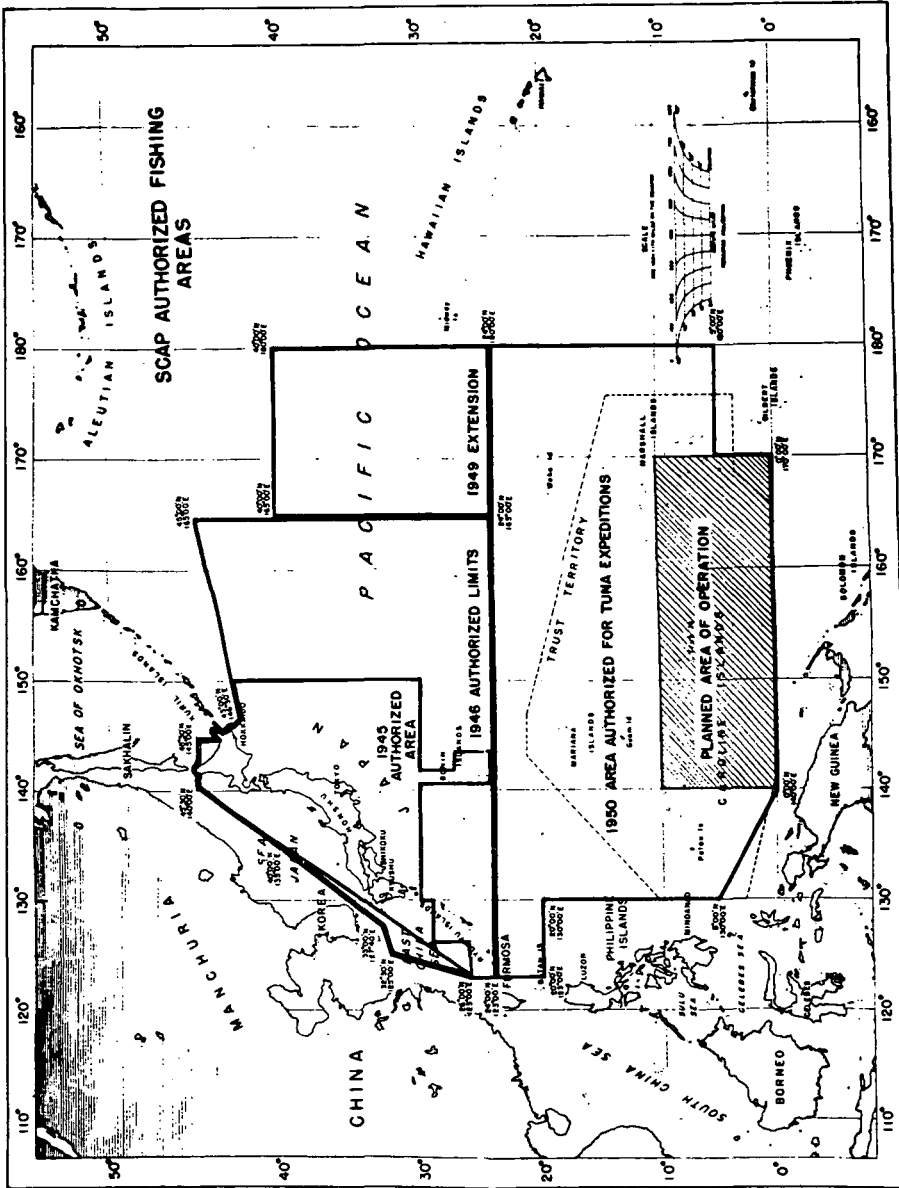


FIGURE 1



north of both the old Mandated Islands fishing area and much of the China Sea, regions in which extensive fishing had been conducted by Japan before the war.<sup>46</sup>

In June 1946, SCAP expanded the zone to more than twice its original area. This represented a significant enlargement, since the new boundaries embraced waters where about 80% of Japanese fishery product, by volume, had been harvested in the prewar years.<sup>47</sup> Japan was still excluded, however, from fishing in two regions that had produced a significant portion of its fish exports in foreign trade prior to the war. One was the salmon region north of Hokkaido, which the Soviet Union now controlled; the other was the former Mandated Islands area of the South Pacific, which had been the source of a rich tuna export produce for Japan.<sup>48</sup> Also excluded, of course, was the entire Northeast Pacific, in-

*September 22, 1945* (FLOTLOSCAP 69): Temporary permission to operate designated whalers, trawlers, bonito ships, and ship carriers in areas to the east of Honshu and Hokkaido and the south and west of Kyushu beyond the twelve-mile limit.

*September 27, 1945* (FLOTLOSCAP 80): Extension of fishing area beyond the twelve-mile limit and establishing boundary lines that comprised the first so-called MacArthur Zone.

*September 27, 1945* (FLOTLOSCAP 95): The Japanese Government notified that it was no longer necessary to submit a separate request for placing any vessel over 100 gross tons into operation. The Government was required to submit to SCAP a list of such vessels as they became involved in fishing activities.

*October 13, 1945* (SCAJAP 42): First modification of the SCAP Zone, extending the southern extremity beyond Kyushu; also 33 vessels in the 100-270 ton range were authorized for fishing operations.

*November 3, 1945* (SCAJAP 587): Adjustment of the line in the region of Hokkaido, including access opened to the Nemuro Strait.

*November 30, 1945* (SCAPIN 371): Japanese whaling operations in the Bonin and Volcano Islands authorized for the period of December 1, 1945 to March 31, 1946.

*March 25, 1946* (SCAPIN 547): Whaling season in Bonin-Volcano area extended to April 20, 1946.

*June 22, 1946* (SCAPIN 1033): Fishing Zone increase to more than twice the size of that previously designated.

*December 23, 1946* (SCAPIN 1033/1): Two minor changes in the Nemuro Peninsula region on Hokkaido to provide more exact determination of the authorized area.

*September 19, 1949* (SCAPIN 2046): Extension eastward toward Midway to permit access to important albacore region.

*May 11, 1950* (SCAPIN 2097): Special area in region of the U.S. Trust Territories authorized only for mothership-type tuna fishing expeditions.

46. *Japanese Fishing under the Occupation*, *supra* note 45, at 19-20. See generally E. ACKERMAN, *JAPAN'S NATURAL RESOURCES AND THEIR RELATION TO JAPAN'S ECONOMIC FUTURE* 109-33, 444-51 (1953).

47. SCAP:NRS, *Mission and Accomplishments of the Occupation in the Natural Resources Field* (Sept. 26, 1949) (SCAP Records, RG 331, NA). Japan's prewar fisheries production was 9.3 billion pounds, of which 7.9 billion pounds "came from the areas now authorized for Japanese fishing." *Id.*

48. See Chapman, *Tuna in the Mandated Islands*, 15 *FAR EASTERN SURVEY* 317, 319 (1946). See generally SCAP:NRS, *REPORT 104: THE JAPANESE TUNA FISHERIES (1948)* (on prewar fishing in the South Pacific); OFFICE OF THE CHIEF OF NAVAL OPERATIONS, U.S. NAVY DEPARTMENT, *CIVIL AFFAIRS GUIDE: THE FISHING INDUSTRY OF THE JAPANESE MANDATED ISLANDS* (1944).

cluding the Bristol Bay salmon waters from which Japan had voluntarily withdrawn in 1938.<sup>49</sup>

Augmenting MacArthur's expansion of the fishing zone in 1946 was a controversial SCAP order authorizing Japan to resume limited whaling in the Antarctic. This was fiercely opposed by the Australian Government and other members of the Far East Commission. This commission nominally was the highest authority in the Occupation, but de facto it had little power because it was paralyzed by the veto power enjoyed by each member. As a result it was ignored with impunity by MacArthur both on the whaling question and on many other issues.<sup>50</sup> Indeed, when the U.S. State Department conveyed to MacArthur's headquarters in Tokyo the objections to his whaling orders, submitted by Great Britain and other nations, SCAP rejected such objections virtually out of hand, declaring: "It appears to us obvious that [they] . . . are largely, if not entirely, based upon selfish economic desires."<sup>51</sup> This remained the SCAP position in ensuing years, as Japan's whaling fleets were outfitted and approved annually by SCAP for whale hunting in Antarctic waters.<sup>52</sup>

MacArthur's purpose in authorizing resumption of Japanese fishing in a wide area of the Pacific was part of a more comprehensive SCAP program for economic rehabilitation. It was a program in which rebuild-

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49. See *supra* note 21 and accompanying text. This was also an area in which some profitable crab fishing had been conducted before 1940 by the Japanese, in this instance without either competition or any diplomatic objections from the U.S. or Canada. See generally SCAP:NRS, REPORT NO. 109: CANNED CRAB INDUSTRY OF JAPAN (1948); SCAP:NRS, REPORT NO. 95: JAPAN: FISHERIES PRODUCTION, 1908-46 (1947) (canned crab exports in the 1930's averaged \$5 million per year, most of the sales being in the United States market).

50. On the Far East Commission, see G. BLAKESLEE, *THE FAR EASTERN COMMISSION, 1945 TO 1952* (U.S. Dep't of State, Far Eastern Series No. 60, 1953). On MacArthur's ignoring the Far East Commission, see R. ROSECRANCE, *AUSTRALIAN DIPLOMACY AND JAPAN, 1945-1951*, at 74-81 (1962).

The British Foreign Office resented the SCAP and U.S. whaling policy not only because the British, backing the Australians on this point, opposed the policy in substance; they also resented deeply the lack of consultation by SCAP and the failure of the State Department to exhibit any signs of respect for the Commonwealth nations' concerns that the Japanese whaling effort be contained. R. BUCKLEY, *OCCUPATION DIPLOMACY: BRITAIN, THE UNITED STATES AND JAPAN, 1945-1952*, at 139-41 (1982). A superb essay by Bradford Perkins treats the larger context of Anglo-American and Commonwealth diplomatic relations in the postwar era. Perkins, *Unequal Partners: The Truman Administration and Great Britain*, in *THE SPECIAL RELATIONSHIP: ANGLO-AMERICAN RELATIONS SINCE 1945*, at 43-64 (1986).

For further analysis of Commonwealth representation on the Far East Commission and relations with MacArthur, see R. BUCKLEY, *supra*, at 71-86; see also D. ACHESON, *PRESENT AT THE CREATION* 428 (1969) (quoting Edwin O. Reischauer on how the Far Eastern Commission, largely ignored by MacArthur, "settled down to a genteel position of pompous futility," while its twin agency, the four-power Allied Council for Japan, went through a phase of "acrimonious argument" and thereafter "lapsed into a moribund state"); C. THORNE, *ALLIES OF A KIND: THE UNITED STATES, BRITAIN AND THE WAR AGAINST JAPAN 659-60* (1978).

51. Cable from George Acheson, Jr. (SCAP:GHQ) to Secretary of State James F. Byrnes (Sept. 14, 1946) (Records Relating to International Whaling Conferences, DOS Records, NA).

52. See J. TONNESEN & A. JOHNSEN, *THE HISTORY OF MODERN WHALING* 529-32 (1982).

ing of the deepwater fisheries was given the very highest priority. SCAP gave the fishing fleet itself and the boatyards that built its ships priority on petroleum, hemp, lumber, cotton, and other materials used either for construction or for fishing operations.<sup>53</sup> The SCAP Natural Resources Section, which was in charge of fisheries plans and policy implementation, imposed regulations on fishing operations at sea during 1945-48, but only for purposes of maximizing output and effecting savings in uses of fuel and gear. The conservation or management of fishery resources was not a consideration at that time—though in 1949 and after, conservationist objectives would become more prominent in SCAP policy.<sup>54</sup> These policies for all-out support and subsidy of the Japanese reconstruction program for deepwater fishing were a central part of MacArthur's plan to make the nation, at least with regard to food, as self-supporting as possible.<sup>55</sup>

Beginning in late 1948, moreover, the emphasis in larger U.S. policy toward East Asia shifted radically as the Cold War intensified. Known as "reverse course," the new American policy called for the swiftest possible rebuilding of the overall Japanese economic structure, with a concomitant attenuation or even outright reversal of some controversial reform policies—aimed since 1945 at democratization, demilitarization, and dismantling of the *zaibatsu* cartels in industry.<sup>56</sup> The significance of the reverse course has long been recognized in the scholarly literature.<sup>57</sup> The significance, however, of fisheries policy and the fishing fleets in subsequent policy development and, finally, in the diplomacy of the Peace Treaty, has been completely overlooked.

In fact, fisheries policy became a centerpiece of the reverse course strategy. Pressing forward with expansion of Japanese fishing was important—not only to provide for domestic food needs in Japan, as before, but now also to bolster exports. With the Soviet Union maintaining an intransigent attitude toward reentry of Japanese boats into the salmon waters of the Northwest Pacific, naturally both the Japanese industry and SCAP officials began to look eastward once again to the possible reentry of Japan into Alaskan salmon waters. And with the tuna market expanding phenomenally in the United States as the result of a significant change in dietary preferences after World War II, inevitably SCAP and

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53. SCAP:NRS, Mission and Accomplishments of the Occupation in the Natural Resources Field 11-12 (Sept. 26, 1949) (SCAP Records, RG 331, NA).

54. See *infra* text accompanying note 81.

55. W. NEVILLE, *supra* note 44, at 9-14. By 1950, the Japanese Government was imposing new regulations to prevent overfishing of inshore fishery resources and to temper excessive price competition for coastal fish products. *Id.* at 10-12; see also SCAP:NRS, Mission and Accomplishments of the Occupation in the Natural Resources Field 12-13 (Sept. 26, 1949) (SCAP Records, RG 331, NA).

56. See generally W. BORDEN, *supra* note 13; M. SCHALLER, *supra* note 13.

57. See, e.g., J. DOWER, *supra* note 13, at 369-70.

the Japanese industry began to see attractive possibilities in reentry of the Japanese fleet into ocean waters of the former Mandated Islands, now the U.S. Trust Territories, as well.<sup>58</sup> These waters, embracing a vast area of the South Pacific, were rich in the tuna species best suited for the export trade to America.<sup>59</sup>

MacArthur's position on the need for further fisheries expansion proved to be critical in the subsequent negotiations leading to the general Peace Treaty and the 1952 Fisheries Convention. His approach had three central elements. The first looked ahead to a significant export trade in fish, especially tuna, to the United States; and in 1949-50 MacArthur pressed forward unremittingly—to the chagrin of West Coast fishing interests in North America—with a carefully orchestrated campaign preparing for Japanese export to the United States market.<sup>60</sup> Indeed, it is hard to imagine an "export invasion" into a targeted market being engineered with greater determination.

The second element of SCAP policy was an insistence that the Japanese Government and fishing industry accept some new regulations that would foster management and conservationist goals. In the view of William C. Herrington, the chief SCAP fisheries officer, only if Japan conveyed to the world a new image—demonstrating in a visible way a concern for the potential exhaustion of marine fishery resources in trawling waters such as the China Sea—would SCAP be able to justify its generous policies promoting Japanese fishing. As a U.S. fisheries official returning from a visit to Japan in early 1949 reported:

Mr. Herrington has taken the stand that until the Japanese can show themselves to be responsible in world fisheries they should not be allowed to expand [further] into the high seas. At present, the East China Sea trawling grounds are being badly overfished. He wishes to see them establish rational programs of fisheries management research before they

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58. SCAP:NRS, Extension of Authorized Fishing Area to the East and South Pacific (Memorandum for the Chief of Staff, attached to Memorandum of Jan. 9, 1948) (SCAP Records, RG 331, NA). The expansion of the post-1945 U.S. tuna market and its impact are analyzed in Scheiber, *Economic Interdependence and Common Ocean Resources, 1945-75* (Sept. 1988) (paper presented to the Economic History Association, Detroit) (available in author's files).

59. Chapman, *supra* note 48, at 317.

60. MacArthur set the stage for export management when he opened a New York office for Japanese foreign trade in late 1947. *SCAP Opens Foreign Trade Office in New York*, COM. FISHERIES REV., Dec. 1947, at 29. By early 1950 MacArthur also authorized agencies in several foreign commercial centers. Viewed warily by the salmon industry, these agencies, as William Herrington of the SCAP staff explained, were founded "primarily for the purpose of stimulating trade and to increase exports to the United States to help balance Japanese purchases." Memorandum from William Herrington to Edward Allen (Mar. 27, 1950) (Edward Allen Papers, UW).

are allowed to operate elsewhere than within the present authorized area.<sup>61</sup>

Herrington insisted that only by imposing serious and well-enforced restrictions upon its existing deepwater fishing activity could Japan win the support of other nations for expansion of the authorized Pacific fishing zone—let alone gain international support for its more comprehensive ambition to reenter global ocean fishing as an equal of all other nations.<sup>62</sup> Accordingly, the Japanese Government and industry did accept new constraints on fishing gear and volume in the China Sea, adopted some important reforms affecting coastal fisheries, and demonstrated a positive (if grudging) interest in pursuing the substantive and image-building conservationist strategy upon which Herrington was so insistent.<sup>63</sup>

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61. Memorandum from Fred Cleaver to Director O.E. Sette (circa March or April 1949) (Pacific Oceanic Fishery Investigations Files, f.829.1, U.S. Fish and Wildlife Service Records, RG 22, NA). In meetings in 1948 with representatives of the trawling industry (which dominated the China Sea and outer coastal fisheries), Herrington had urged the representatives, as well as prefectural officials, to undertake systematic patrols and adopt management policies that encouraged conservation. Memorandum for the Record by William Herrington, Field Trip to Nagasaki and Shimonoseki to Attend Trawlers' Association Meeting (Final Report) (July 8, 1948) (SCAP Records, RG 331, NA).

62. Herrington believed that without evidence of "sound conservation and good [fishery resources] management policies," it would be impossible for Japan to win sufficient support for expanding the SCAP zone either from Washington or from the other Allies. Memorandum by William Herrington, Fisheries (Jan. 26, 1949) (SCAP:NRS Records, RG 331, NA). Herrington pressed this view on the Japanese industry in an open press conference on June 30, 1949, as well as in private talks. *See, e.g.*, Memorandum for the Record, William Herrington (July 5, 1949) (SCAP Records, RG 331, NA).

In February 1949 Herrington had told a press conference that if Japanese fishermen wished to reenter high-seas fisheries without restrictions, they must persuade the outside world that they "would respect regulations and agreements controlling their operations" and also demonstrate authentic concern to "prevent over-exploitation of aquatic resources and to obtain the maximum sustained yield through adequate research and regulation." *Quoted in id.*

63. *See* W. HERRINGTON, A PROGRAM FOR JAPANESE COASTAL FISHERIES (SCAP:NRS, Preliminary Study No. 48, 1951). Despite Japan's progress toward effective reform, highlighted by the national government's expansion of patrols to enforce the limits of the SCAP zones, an American expert's assessment in 1951 of Japanese coastal fisheries (which included the deepwater trawling fisheries) was severely pessimistic, citing "a chaotic condition featured by too many fishermen, overfishing, contradictory and ambiguous laws and regulations, widespread law evasion, and inadequate law enforcement, accompanied by a general lack of appreciation of the serious nature of the situation." R. CROKER, JAPANESE FISHERIES ADMINISTRATION 13 (SCAP:NRS, Preliminary Study No. 46, 1951).

A "Law for the Prevention of Exhaustion of Marine Resources" was passed by the Japanese Diet on May 1, 1950, vesting authority in the Minister of Agriculture and Forestry to order reduction of the size of fleets in any fishery to prevent depletion of the stock in that fishery. SCAP successfully pressed the Japanese Government to reduce, under the terms of this law, the number of vessels trawling in the East China Sea. William Herrington, Some Outstanding Fishery Developments in Japan during the Twelve Months ending 31 August 1950 (n.d.) (SCAP Records, RG 331, NA); *see* SCAP:NRS, General Plan of Operation for 1950 (n.d.) (SCAP Records, RG 331, NA).

Herrington and others in SCAP's fisheries office maintained close contact with Kotaro Mori and other officials in Japan's fishery agency. Through these contacts, it was made clear

The final element in the SCAP strategy for rebuilding Japan's ocean fishing industry was the most controversial and difficult to accomplish. Its central objectives were precisely the same as those of the Japanese themselves: first, incremental expansion of the authorized SCAP Zone in the short run; and second, in the longer run, recognition of full sovereignty for Japan, together with open and equal access throughout the world for her fishing vessels in all deepwater fishery areas outside the traditional three-mile offshore limits of coastal nations. As will be shown in the pages following, the consequences of MacArthur's decision to pursue this last element of his strategy would bring him into direct, and finally dramatic, conflict with other parts of the U.S. Government policy apparatus and with powerful economic and political interests on the Pacific Coast.

*B. MacArthur, the U.S. Government, and Fisheries Issues: Occupation Policy and Pacific Rim Diplomacy*

MacArthur's determination to champion the expansion of Japan's fishing industry, linked to the long-term objective of restoring the Japanese fleet to fully equal status with that of all other nations, inevitably meant conflict with the Allied nations in the Pacific Rim. Virtually all of them—Korea, China, the Netherlands (as an imperial power), Australia, and the Philippines—not only opposed SCAP's 1946 whaling authorization but also sought to halt any further expansion of the SCAP Zone.<sup>64</sup> Moreover, the Philippine Government actively sought to create a special jurisdictional zone as wide as 200 to 300 miles off its shores, within which Japanese fishing would be banned.<sup>65</sup> Despite such pressures, SCAP held

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to Japan that SCAP was serious in its desire to see closer surveillance of fishing on the high seas waters at margins of the SCAP zones and a reduction in the size of the trawling fleets.

Mr. Takashi Hisamune, who was a ranking official responsible for trawler regulation in the fisheries agency, recalls that Herrington was extremely firm with Japanese officials in pressing for these reforms and for their rigorous implementation. Interview with Takashi Hisamune, in Tokyo (May 1986); *see also* Memorandum from Fred Cleaver to Director O.E. Sette (circa March or April 1949) (Pacific Oceanic Fishery Investigations Files, f.829.1, U.S. Fish and Wildlife Service Records, RG 22, NA).

Orders regarding fishery patrols and inspection, issued by SCAP and directed to the Japanese Government, are summarized in SCAPIN, Memorandum, Japanese Fishery Inspection System (n.d.), accompanying Memorandum from William M. Terry to Chief, Fisheries Division, SCAP:NRS (Mar. 10, 1950) (AG 333) (SCAP Records, RG 331, NA).

64. On the intensive pressures from other Asian powers to limit Japanese fishing, *see, e.g.*, U.S. State Department Comments, *reprinted in* 4 FOREIGN REL. U.S. 1951, at 1070-71 (1977); Letter from Ambassador Cowen to John Foster Dulles (Mar. 15, 1951), *reprinted in* 4 FOREIGN REL. U.S. 1951, at 925, 926-28 (1977); *Aide-Memoire* from the British Embassy to the Dept. of State 6 (part 1) (Mar. 12, 1951), *reprinted in* 4 FOREIGN REL. U.S. 1951, at 909, 914 (1977). *See generally* R. ROSECRANCE, *supra* note 50, at 74-80.

65. Message of March 20, 1948 (document NR W97992) (SCAP Records, RG 331, NA) (summarizing positions of the Philippine Government in Far Eastern Commission discussions, asking SCAP to permit Japanese fishing no closer than 300 nautical miles to Philippine shores); *see* Letter from Dean Rusk to Philip Jessup (July 6, 1950) (File 611.9461/7-650, DOS

firm, rejecting as unreasonable the other Allied nations' demands for additional areal restrictions and resisting their demands for holding the SCAP Zone to its 1946 boundaries.<sup>66</sup>

It became equally important in the era's diplomacy that MacArthur used these varied pressures to contain Japanese fishing as a lever to advance his own views within U.S. Government policy circles. In fact, in 1949 the Interior Department (with responsibility for the Trust Territories fishing waters), the Navy (with its security concerns), and the fisheries desk of the State Department (with close and sympathetic ties to the West Coast fishing industry) all objected to a plan advanced by MacArthur for expansion of the SCAP Zone into the Trust Territories' fisheries. In response, MacArthur declared that to maintain unreasonable or unwarranted restraints on Japan would merely legitimize the self-interested demands of the other Allied powers, perpetuating inequities and shutting off a vital outlet for Japanese enterprise.<sup>67</sup>

Indeed, once MacArthur had determined in 1948 to win approval for his plan to reopen the Trust Territories fisheries to Japan, he was unrelenting in throwing the stated ideals of wartime diplomacy into the faces of Washington policymakers and bureaucrats. He opened his crusade for the southward expansion of the SCAP Zone in early 1948, when the United States was ready to announce the opening of Trust Territories waters to all nations except Japan. The U.S. Government had made "economic stabilization, including . . . maximum production for export" a major objective of Occupation policy in Japan.<sup>68</sup> Also, in early 1948, the U.S. Government's coordinating committee for Far East policy had recommended specifically that "Japanese nationals . . . should eventually be permitted access to all ocean areas" on an equal basis with all others at peace with the United States.<sup>69</sup> The two objectives of economic rehabilitation and equal access, MacArthur declared, were inseparably linked.<sup>70</sup> It was vital that the Japanese fleets be readmitted to the Trust

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Records, NA); see also Letter from John Foster Dulles to E.L. Bartlett (Mar. 28, 1952) (John Foster Dulles Papers, Princeton University).

66. See Diplomatic Section, SCAP, Extension of Japanese Fishing Area (Apr. 30, 1949) (Memo S-322.3) (SCAP Records, RG 331, NA).

67. Cable from General MacArthur to Secretary of the Army Kenneth Royall (Oct. 3, 1948) (SCAP Records, RG 331, NA); see also *infra* text accompanying note 72.

68. Letter from Walter Wilds to U.S. member, Far East Commission (member not named) (Dec. 1948) (File 894.50/12-1048, DOS Records, NA).

69. SCAP, U.S. Policy for Japanese Fishing and Other Aquatic Industries (n.d.) (NRS Records for Jan.-Mar. 1948, SCAP Records, RG 331, NA) (draft report).

70. The official SCAP position on expansion of whaling operations, for example, was set forth in 1946 and subsequently reiterated in the following terms: "General MacArthur had, as a primary consideration, the dangerously critical shortage of protein foods and edible oils in Japan." *Japanese Whaling Industry*, 216 SCAP:NRS WEEKLY SUMMARY 31 (1949). Similarly, SCAP planning documents in 1948-49, preparatory to extending the authorized fishing zone, referred to the basic SCAP objective: "to maximize Japanese fish production to alleviate continued food shortages in Japan" requiring "opening of additional [ocean] areas" to fishing

Territories waters so that they could fish for tuna, a potential source of major export earnings.<sup>71</sup>

Confronted with intransigent opposition to expansion of the SCAP Zone by the Navy, the fisheries desk of the State Department and, to a lesser extent, the Interior Department, MacArthur threw down the gauntlet. In an extraordinary confidential memorandum to the Secretary of the Army, dated October 3, 1948, the General pulled out all the rhetorical stops.<sup>72</sup> Objections to his proposed zone expansion, he declared, were invalid "on the grounds of legality, morality, [and] logic." Opposition such as that expressed by Wilbert M. Chapman, the chief fisheries officer in the State Department—who clearly had in mind the problem of new competition for American fishing fleets—did violence, MacArthur declared, to "domestic political morality" and left the nation "vulnerable to the charge of regulating her adherence to international commitments in accordance with the special interests of private American business groups."<sup>73</sup> The General's memorandum found the objections from Interior and Navy similarly lacking in merit.

Moving to a higher ground, MacArthur reminded his superiors that the United States had made open commitments assuring the world that "all States, great or small, victor or vanquished," would be given "access,

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by Japanese operators. SCAP, Proposed Extension of Authorized Japanese Fishing Area to the East and South Pacific (Document S780/AG 800.217) (SCAP Records, RG 331, NA). The Chief of the Natural Resources Section, SCAP, summarized SCAP policy as being to permit Japanese fishing "in areas accessible to [the] Japanese fishing fleet: a) when the fish supplies of such areas are not being fully utilized by other nations. b) When Japanese fishing operations will not compromise the security of other nations. [and] c) When boat[s], manpower, and materials are adequate for such purposes." Col. H. Schenk, Memorandum for the Chief of Staff, (n.d.) (attached to *id.*).

As reported later in a State Department memorandum on the issue of extending Japan's authorized fishing area, SCAP in 1948 initially stressed the need to attain self-sufficiency in food for Japan as an argument for zone expansion; but by late 1949 the arguments from SCAP headquarters began to stress long-range diplomatic considerations as well. Thus, when MacArthur, in October 1949, sought approval of Japanese fishing expeditions to the Trust Territories waters, he contended that to exclude Japan while other nations were admitted would be to establish a precedent that other Asian nations might follow to exclude Japanese fishing vessels from their own offshore waters. These SCAP positions are summarized in a letter from Dean Rusk to Under Secretary James Webb (Apr. 10, 1950) (File 611.946/4-1050, DOS Records, NA).

71. It was as early as January 1948 that SCAP first raised the issue of extending the fishing zone to embrace the Trust Territories waters. On October 6, 1949, SCAP "urgently requested" approval for such expansion. Letter from Dean Rusk to Under Secretary Webb (Apr. 10, 1950) (File 611.946/4-1050, DOS Records, NA).

72. Cable from General MacArthur to Secretary of the Army Kenneth Royall (Oct. 3, 1948) (SCAP Records, RG 331, NA).

73. *Id.* For a description of Chapman's activities and style while chief fisheries officer (Special Assistant for Fisheries and Wildlife, reporting to the Under Secretary) during 1948-51, see Scheiber, *supra* note 14, at 430-85.



on equal terms, to the trade and to the raw materials of the world.”<sup>74</sup> This language—which was from the Atlantic Charter—was later embodied, MacArthur stated, in the Potsdam Declaration and the basic post-surrender policy of the Allied Far Eastern Commission for Japan.<sup>75</sup> To renounce such principles now for patently self-interested reasons, the General’s memorandum went on, in vintage MacArthur style, would

materially weaken our moral leadership among the nations of the world. Adherence to [those principles] on the other hand would conform to traditional American policy and afford the means of advancing our positive influence in the broad field of international morality. It would re-fortify the faith of the Japanese and all other peoples in the sanctity of an American pledge.<sup>76</sup>

No Washington bureaucrat, let alone any staff officer mindful of MacArthur’s support in Congress, could very readily ignore a communication that spoke in these terms of moral absolutes. And, in fact, from the time of receipt of this memorandum, the Department of the Army came to MacArthur’s side in intragovernmental councils on the proper policy toward Japan’s fisheries expansion.<sup>77</sup> Once he had personalized a cause and cast it in terms of absolute morality, the man sometimes referred to by exasperated policy officials in Washington and Tokyo as “SCAP Augustus” and “the All Highest” could not be expected to back off.<sup>78</sup> Hence, the stage was set for a contest which, even if it proved unequal, still would be both protracted and momentous. It aligned MacArthur with some improbable allies in the State Department, and it pitted them against the American fishing industry and its principal champion in the policymaking bureaucracy, Wilbert M. Chapman.

From his desk as Special Assistant for Fisheries and Wildlife to the Under Secretary, Chapman—who always kept in close touch with the West Coast industry—sought to hold SCAP’s proposed expansion of the fishing zone as a hostage, in effect, for a plan of his own. The price of release, as Chapman sought to work it, would be a treaty arrangement with Japan, either bilateral or trilateral (to include Canada), which would include a provision excluding Japanese fishing vessels from the

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74. Cable from General MacArthur to Secretary of the Army Kenneth Royall (October 3, 1948) (SCAP Records, RG 331, NA) (quoting from the Atlantic Charter, 55 Stat. 1603 (1941)).

75. *Id.*

76. *Id.*

77. MacArthur’s ability to exert pressure was illustrated during October 1948 in his efforts to expand the SCAP fishing zone. See Telegram of William Flory to Wilbert Chapman (Oct. 7, 1948) (File 740.00119/10-748, DOS Records, NA).

78. Letter from Wilbert Chapman to Montgomery Phister (Apr. 15, 1949) (Wilbert Chapman Papers, UW) (“SCAP Augustus”); Letter from William Herrington to Edward Allen (Mar. 27, 1950) (Edward Allen Papers, UW) (“All Highest”). Even Secretary of State Dean Acheson was moved, later, to refer ironically to MacArthur as “the oracle.” D. ACHE-SON, *supra* note 50, at 430.

Bristol Bay salmon area as well as the other important Northeast Pacific fisheries.<sup>79</sup> Among the latter were tuna, herring and, most importantly, halibut—the last being a fishery that for nearly twenty years had been managed jointly by Canada and the United States under a bilateral treaty.<sup>80</sup>

Throughout 1949, therefore, Chapman consistently opposed the SCAP plan. He declared that he would not endorse any initiative such as the one SCAP proposed until the United States had extracted a commitment from Japan to keep its fleets out of the Northeast Pacific fisheries. Chapman therefore drew up a draft treaty embodying what he termed a “mutual denial” or “mutual forbearance” principle. Its essence was that Japan would agree to keep its fishing vessels 150 miles or more from the western coast of the United States and Canada. This would apply for fifteen years, and then could be abrogated by either side. In turn, the two North American powers would deny themselves the privilege of fishing in waters a similar distance offshore from Japan. Moreover, in a truly extraordinary provision, Chapman’s draft would have required Japan to abide by all fishery management agreements made by the United States and Canada concerning the Pacific area, including even the purely domestic management and conservation regulations that were adopted jointly by the state governments on the Pacific coast.<sup>81</sup>

In October 1949, despite their entirely opposed objectives, Chapman and SCAP suddenly agreed to inaugurate informal talks on the fishery issue with the Japanese Government and fishery officials. Chapman hoped that these negotiations would produce agreement on the treaty he wanted. MacArthur, however, lent his support to the opening of talks for a very different reason: he believed that any negotiations would work in favor of gaining U.S. approval of his design for expansion of the SCAP Fishery Zone and his (and the Japanese Government’s) larger objective of full access to all ocean fisheries.<sup>82</sup>

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79. Chapman told fishing industry colleagues on the Pacific Coast that he had determined “to take . . . a last ditch stand” on the reservation of the Trust Territories for American tuna fishermen. Letter from Wilbert Chapman to Edward Allen (Sept. 12, 1948) (Edward Allen Papers, UW).

80. See *supra* note 42. In October, Chapman wrote that he had decided to proceed with the idea of the fisheries agreement with Japan even though it meant acting without the support of the Army or SCAP. Letter from Wilbert Chapman to Montgomery Phister (Oct. 23, 1949) (Wilbert Chapman Papers, UW).

81. Letter from Wilbert Chapman to Montgomery Phister (May 7, 1949) (Wilbert Chapman Papers, UW). At first, Chapman also proposed a similar treaty with the Soviet Union, but he quickly dropped that idea from his agenda, concentrating on the Japanese issues. *Id.*; Letter from Wilbert Chapman to Edward Allen (Nov. 25, 1949) (Edward Allen Papers, UW). Copies of the 1949 draft treaties are available in the Wilbert Chapman Papers, UW.

82. In a sense, MacArthur and Chapman, each acting for his own reasons, bypassed much of the State Department in getting the talks under way. In the following months, career people at the political and economic desks objected to the apparently irregular procedures by which talks were opened with Japan, absent any formal approval or clearance from the Far

Once it had received Chapman's draft treaties, SCAP headquarters issued a Memorandum making MacArthur's position abundantly clear. The concessions proposed by Chapman as to the 150-mile protected areas offshore, SCAP contended, were "only superficially" mutual in nature; in fact, there was no likelihood of American or Canadian expeditions to Japanese coastal waters, so that "Japan apparently is being asked to concede real fishing rights while the United States and Canada would be giving up only theoretical rights."<sup>83</sup> It was obvious, SCAP further declared, that only under extreme duress would Japan accept such a condition. To force Japan's hand in this way "would set a precedent which almost surely would be eagerly grasped by the other members of the Allied powers" that wanted to impose similar jurisdictional obstacles to Japanese fishing in Asian waters.<sup>84</sup>

Having thus sounded the warning of its intentions, SCAP headquarters unilaterally proceeded to inaugurate talks with elements of the Japanese Government.<sup>85</sup> The American negotiators assured the Japanese at the outset that the negotiations were informal and confidential; they urged the Japanese to "express themselves freely and frankly on the subject, since the United States is anxious that an understanding be reached on a basis of mutual agreement."<sup>86</sup> The tone of this approach was entirely consistent with MacArthur's original call for the talks, which had stated: "The objective would be to attempt to have proposals originate from both sides of the Pacific and thus avoid the implication that they represent conditions imposed on the vanquished by the victor."<sup>87</sup>

These direct SCAP approaches to the Japanese effectively cast Chapman aside for a time, keeping him out of the actual negotiating process. Meanwhile, other forces within the State Department gathered behind MacArthur's championship of Japan's claims to full sovereign

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East officers of the Department. Letter from H.W. Moseley to John Allison (Feb. 3, 1950) (File 611.945/2-350, DOS Records, NA).

American diplomats in Tokyo, as well as the two protagonists themselves, recognized from the outset that SCAP and Chapman had sharply divergent motives in opening the talks. Letter from C. K. Huston to John Allison (Feb. 7, 1950) (File 611.946/2-750, DOS Records, NA).

83. Memorandum from General Headquarters, SCAP, to Adj. General, Dept. of the Army (Sept. 15, 1949) (SCAP Records, RG 331, NA).

84. *Id.*

85. Memorandum for the Record (Oct. 27, 1949) (Meeting with Standing Committee for Fisheries of House of Representatives, Japanese Diet) (SCAP Records, RG 331, NA); Note for the Record, (Sept. 12, 1949) (approved Oct. 22, 1949) (AG 1092, SCAP Records, RG 331, NA); Memorandum from General Headquarters, SCAP, to Adj. General, Dep't of the Army (Sept. 15, 1949) (SCAP Records, RG 331, NA). The U.S. Mission in Tokyo and Herrington led the American side in the talks. Letter from C. K. Huston to John Allison (Feb. 7, 1950) (File 611.946/2-750, DOS Records, NA).

86. Letter from C. K. Huston to John Allison (Feb. 7, 1950) (File 611.946/2-750, DOS Records, NA).

87. SCAP Statement (Oct. 24, 1949), *quoted in* Letter from Wilbert Chapman to Lieut. Col. E. W. Hendrick (Nov. 8, 1949) (File 611.946/8-1050, DOS Records, NA).

privileges and "equal access" to ocean resources, both in the Trust Territories' waters and elsewhere on the high seas. MacArthur's allies were the Far East experts and the political and economic officers within the State Department; they mounted an increasingly intransigent opposition to Chapman's ideas, supporting MacArthur on virtually all counts. The principals in this bloc of policy officers were associated closely with New Deal liberal views of international cooperation, and their determination to oppose Chapman's nationalist approach was reinforced in 1949-51 by Cold War developments and the outbreak of the Korean War.<sup>88</sup> These people were indeed an improbable set of bedfellows for MacArthur, for they were largely detested by many of the General's most ardent admirers in the domestic political arena—those who tended to be critical of New Deal liberalism and abhorred the internationalist and altruistic bent of policy evident in the State Department. However that may be, the specialists and career officers who emerged on MacArthur's side in Foggy Bottom uniformly denounced Chapman's effort to exclude Japan from the Northeast Pacific in much the same terms as MacArthur had done. Chapman's treaties, they said, represented a policy that would undermine all international respect for American motives in seeking cooperation in trade and international finance through proposed new structures such as the General Agreement on Tariffs and Trade (GATT).<sup>89</sup>

A deadlock resulted within the Department of State in early 1950, with Chapman and the internationalists of the International Trade Policy desk determinedly opposed to one another. "My position is simply this," wrote Chapman in April:

The [Japanese] will not be permitted back into our coastal fisheries. . . .

The economists' position is just as simple: The [Japanese] have every right to come into these fisheries and should be helped to do so so they

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88. This account of the factions in the State Department is based upon the Wilbert Chapman correspondence with Montgomery Phister, 1949-51 (Wilbert Chapman Papers, UW) and on State Department archival records. See, in particular, Wilbert Chapman's summary of the record, in Letter from Wilbert Chapman to Under Secretary of State Webb (Apr. 5, 1950) (File 611.946/4-2450, DOS Records, NA).

89. The General Agreement on Tariffs and Trade (GATT) and the International Trade Organization were being organized at this time. See Scheiber, *supra* note 14, at 455. Chapman's internationalist protagonists in the State Department founded their objections to his proposals for keeping Japan out of the Bristol Bay fisheries on the grounds that they were incompatible with the purposes of GATT. See, e.g., Memorandum from Winthrop Brown, International Trade Policy Office, Department of State, to Wilbert Chapman, Proposed Fisheries Discussions (Mar. 6, 1950) (Edward Allen Papers, UW). This was in addition to the more general objection that "the [proposed] conventions tend to erect formidable barriers to the accessibility of natural resources . . . [and] would appear to run contrary to the objectives of our foreign economic policy." Letter from Edwin Martin to Wilbert Chapman (Aug. 3, 1949) (Wilbert Chapman Papers, UW).

would sooner get off the [American] taxpayer's back. There is no compromise apparent between these positions.<sup>90</sup>

The deadlock persisted, and as the months went by there seemed to be no movement toward resolution of the dilemma.<sup>91</sup>

### III

#### NEW FACTORS IN THE POLICY PROCESS DURING 1950

A convergence of significant new factors began to influence the policy process in 1950. First, the triumph of Communist forces in China in 1949 and then the Korean War led the U.S. Government to authorize accelerated expansion of the Japanese economy. This policy move was part of a larger U.S. diplomatic plan, embraced somewhat warily by American military leaders, to effect a peace treaty with Japan that together with a defense agreement would tie Japan into the perimeter alliance that was forming against what was seen as a monolithic Sino-Soviet power bloc in Asia.<sup>92</sup> The new urgency associated with Japanese economic reconstruction gave MacArthur the opening he needed to act entirely on his own authority in September 1949 to expand the SCAP Fishery Zone to embrace an area of important albacore tuna fisheries. This was followed in May 1950 by SCAP's authorization of a further expansion of the Zone, opening the entire Trust Territories ocean region to large-scale mother-ship expeditions by the Japanese tuna fleet.<sup>93</sup> This expansion meant that the hostage effectively held by Chapman was sud-

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90. Letter from Wilbert Chapman to Montgomery Phister (Apr. 16, 1950) (Wilbert Chapman Papers, UW).

91. *Id.*; Letter from Wilbert Chapman to William Herrington (Apr. 11, 1950) (Wilbert Chapman Papers, UW).

92. See D. ACHESON, *supra* note 50, at 429-30 (on the relationship of the security pacts to the peace treaty negotiating strategy); see also H. Bix, *Japan: The Roots of Militarism*, in REMAKING ASIA: ESSAYS ON THE AMERICAN USES OF POWER 322 (1974) (contending that reverse course policy decisions worked toward "nurturing Japan as the military workshop of non-Communist Asia").

Japanese responses to American initiatives for the proposed defense agreement, prepared alongside the general peace treaty in 1950-52, are the subject of an unpublished paper by Professor Akio Watanabe, generously loaned to the author. A. Watanabe, *The Japanese Peace Settlement: The Japanese Perspective* (June 1985) (paper presented to the Joint Annual Meeting of the American Historical Association, Pacific Coast Branch, and the Society for Historians of American Foreign Relations, Stanford University) (copy available in author's files).

93. SCAPIN 1097, Memorandum for Japanese Government: Mothership-Type Tuna Fishing Operations (May 11, 1950) (AG 800.217, SCAP Records, RG 331, NA). For the limits of the extended area, see Figure 1; for an annotated listing of SCAPIN Orders regarding Japanese fishing areas, see *supra* note 45. The U.S. Government gave MacArthur permission to extend the zone upon determining that the Japanese Government had met several conditions, including imposition of effective conservation measures for fishing in the East China Sea, and upon demonstrating that its high-sea patrol system was effective in enforcing these measures. MacArthur made an immediate finding that these conditions (which were never made public) had been fulfilled, and then issued his expansion authorization order. Letter from Wilbert Chapman to Montgomery Phister (May 31, 1950) (Wilbert Chapman Papers, UW).

denly lost; he would need another way of trumping MacArthur in the struggle for the larger prize, the Northeast Pacific salmon grounds.<sup>94</sup>

Second, the Canadian Government, consulted throughout the year by the State Department, began to exercise a moderating influence. In March 1950, Canada responded to Chapman's basic approach—a fifteen-year treaty that would keep the Japanese fleet 150 miles off the North American coast—with a warning that the Australians and other Allied powers in Asia might seize upon the precedent to deny equality of treatment to Japanese fishing fleets on that side of the Pacific.<sup>95</sup> Admitting readily that their own West Coast fishing industry wanted precisely what Chapman proposed, the Canadian negotiators declared that the proposals appeared blatantly “aimed more at protection against competition than at conservation”; they were a betrayal of the internationalist and the multilateralist approaches to which they and the United States had been dedicated on international economic issues generally. Not least important, they feared that Chapman's approach would create trouble for Canada within the Commonwealth, extracting for Canada a type of concession from Japan that neither Australia nor New Zealand had been promised in any way.<sup>96</sup>

Expressing views already championed by General MacArthur and by the State Department's internationalist element, the Canadians also adverted to the importance of honoring the Potsdam Declaration, which “provided for free Japanese access to raw materials”; they were worried that the Chapman approach would “infringe on Japanese rights on the high seas.”<sup>97</sup> In short, the consultations with Canada threw a damper on

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94. Chapman protested that he had not cleared, nor even been consulted on, the decision authorizing southward extension of the fishing zone. Memorandum from Wilbert Chapman to Dean Rusk (June 27, 1950) (DOS Records, NA).

95. Memorandum of Conversation between Mr. Collings of the Canadian Embassy and U. Alexis Johnson of the Northeast Asia desk, U.S. Department of State, Japanese Fishery Treaty (Mar. 23, 1950) (File 611.946/3-2450, DOS Records, NA). The Canadian Government's concern to guard against precedents that might work contrary to the Japanese interest in restoration of full sovereignty and equal treatment in world commerce was symptomatic of Canada's larger role in the Pacific diplomacy of that era. Thus, Canada—resisting opposition from the United Kingdom and other Commonwealth nations to its policy in this regard—joined as the principal partner of the United States in championing Japan's quest for admission to full membership in GATT. F. LANGDON, *THE POLITICS OF CANADIAN-JAPANESE ECONOMIC RELATIONS, 1952-83*, at 19-25 (1983).

96. Memorandum of telephone conversation between Richard W. Byrd (Embassy of Canada) and Southworth (British North American desk, U.S. Department of State) (Apr. 19, 1950) (File 611.946/3-2450, DOS Records, NA); see also F. LANGDON, *supra* note 95, at 53-71 (on the politics of the fisheries question and the pressures from British Columbia fisheries interests on the Canadian Government paralleling pressures from Alaska and Washington on the U.S. Government during the post-war period and until ratification of the 1952 Convention).

97. Memorandum of telephone conversation between Richard W. Byrd and Southworth, *supra* note 96.

Chapman's progress and seemed to threaten his entire campaign for a tough exclusionist approach.

Third, in early 1950 the Japanese themselves became active participants in the discussion of their future on the high seas. The SCAP initiative to open talks with the Japanese Government headed by Premier Yoshida Shigeru led to the formulation of an official Japanese position in early 1950.<sup>98</sup> Finally, on March 20, 1950, the Ministry of Foreign Affairs presented to SCAP a Memorandum on High-Seas Fishery, setting forth the Japanese Government's formal bargaining position.<sup>99</sup>

The Memorandum opened with a statement of how uniquely important high-seas fishing was to the nation's domestic food supply, employment, and national income. The Japanese proposed the following as "general principles" on which agreements with the United States and Canada might be concluded: (1) Japan accepted a tripartite approach to a fisheries agreement; (2) with regard to coastal fisheries, Japan was ready to seek with the United States "a formula satisfactory to both sides" that would not set any precedents prejudicial to Japanese fishing interests in other areas of the world; (3) Japan would agree to continue its "voluntary suspension of [salmon] fishing in Bristol Bay," in accord with the terms of its March 1938 note;<sup>100</sup> (4) Japan wished full access to fishery land stations in the former Mandated Islands and other former possessions; (5) Japan sought U.S. support for its accession to the International Whaling Convention and proposed to join into other international agreements for halibut and tuna research and regulation;<sup>101</sup> and finally, (6) Japan proposed that the agreement would run for five years, after which time any of the contracting parties might terminate it.

The critical components of the Japanese Memorandum concerned the duration of the agreement—only five years, instead of fifteen; the commitment, but only a temporary one, to refrain from reentry into the Bristol Bay salmon grounds; and a multipronged effort to establish the principle of full sovereignty for Japan, by dint of admitting her to other international agreements (on whaling, tuna, and halibut), along with the possibility of inviting the Japanese fleets into fishing grounds of the Eastern Pacific region through those very agreements. The language of the

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98. The talks were held on January 27 and March 13, 1950 between the Japanese Foreign Ministry and the leadership of SCAP's diplomatic and natural resources sections. Chapman was excluded, though perhaps he was not without influence as a result of his close, albeit informal, communication with Herrington, then chief of fisheries in SCAP headquarters. The Japanese position was presented in the Memorandum on High-Seas Fishery, *supra* note 1.

99. *Id.*

100. See *supra* text accompanying note 21.

101. *E.g.*, Inter-American Tropical Tuna Convention, May 31, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044, 80 U.N.T.S. 3. On the tuna pact and a related convention with Mexico, Convention for the Establishment of an International Commission for the Economic Investigation of Tuna, Jan. 25, 1949, United States-Mexico, 1 U.S.T. 513, T.I.A.S. No. 2094, see A. KOERS, *supra* note 3, at 95-97; Scheiber, *supra* note 14, at 464-69.

Memorandum spoke boldly of the basic Japanese position—surely more boldly than conceivably could have been expected had the support of SCAP and the new policy of courting Japan for the anti-Communist alliance not been effective at the time:

For Japan, high-seas fishery is not to be viewed merely as an enterprise that profits those who are directly or indirectly connected with it. It is an essential basic industry, without which it would be impossible to solve the national problems of food, population and economic self-support. . . .

The Japanese Government *hopes and expects* that once the peace treaty is concluded, Japan will not be subjected to any special restrictions on high-seas fishery, such as are not ordinarily applicable to sovereign states. Indeed, it is hoped that the current restrictions imposed upon Japanese high-seas fishery will be removed as early as possible even prior to the conclusion of peace.<sup>102</sup>

It was manifest by this time that if SCAP and the U.S. Government were dancing an elaborate minuet with the Japanese Government—which, under Yoshida, operated entirely under the tutelage and authority of MacArthur—the music was increasingly that of the Cold War, containment policy, and the Korean War. Yoshida and his ministers had begun to trade very adroitly upon American concern for Japan's support in the long run, both in East Asian and global political confrontations. Also, Japanese Cabinet leaders clearly were so forthright in asserting the prerogatives of full sovereignty as an ocean power because they were receiving signals from SCAP headquarters that this comported with MacArthur's own design and was in the main acceptable to Washington.<sup>103</sup> There is also an oral tradition, at least in Japanese fisheries circles, claiming that in a truly extraordinary moment at about this time, Emperor Hirohito appealed personally to General MacArthur to recognize the vital importance of the fisheries to the nation—and to resist the kind of harsh exclusionist policy that Chapman was pressing against them.<sup>104</sup>

Herrington reported from Tokyo in private correspondence that the March Memorandum was an accurate expression of the Japanese Government's views: "We could have got them to go even further, but I did not think this to be desirable. It would not represent their real position, and there is no point in trying to kid ourselves or the people in the

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102. Memorandum on High-Seas Fishery, *supra* note 1 (emphasis added). Some of this language was incorporated in a later Japanese policy document. See Appendix II.

103. In correspondence with Herrington of the SCAP fisheries office, for example, Chapman declared that "it seems to be the case" that "we have to discuss these [fisheries treaty] matters with Japan as an equally sovereign power." Letter from Wilbert Chapman to William Herrington (Dec. 5, 1949) (Wilbert Chapman Papers, UW); see also *infra* text accompanying notes 105 and 117.

104. In various interviews with leaders of Japan's fisheries industry, and in a discussion of this research with a specialist on the fishery policies of Japan, all held during 1986, the author was told of the Emperor's rumored intervention, but no written documentation of this alleged intervention appears to exist.



States."<sup>105</sup> Perhaps especially encouraged by the acknowledgement in the Memorandum that Japanese fleets had engaged in some "selfish, predatory or short-sighted fishing methods,"<sup>106</sup> Herrington assessed the document as one that offered "a reasonable basis for further discussions."<sup>107</sup>

Fourth, there was a change evident by mid-1950 in Chapman's own perception of the priorities that ought to govern the definition of U.S. interests. Previously he had been wholly determined to make the exclusion of Japan from the Northeast Pacific the sine qua non of the postwar settlement. Gradually he came to realize that the Korean conflict, and the emerging priority in the Truman Administration to win Japan's alignment with the United States in the Cold War, would overrule virtually all other policy objectives.<sup>108</sup> By 1949 "Japan's bargaining power became sufficiently great," Chapman would later remark, "that our opportunity for using duress became severely limited. With the outbreak of the Korean war this quite vanished so far as fishery matters are concerned."<sup>109</sup>

Apart from these reasons for softening his views on Japan's access to Pacific fishing waters, Chapman also underwent something of a conversion as to the basic premises of U.S. fisheries policy in its comprehensive global dimensions. It was becoming clear to him in early 1950 that any precedent in policy or international law that might be established by the prospective agreement with Japan had to be measured against the rising importance of American distant-water tuna fishing in Latin America. In that region, the American tuna fleet needed the U.S. Government to demonstrate strict adherence to the three-mile principle; it was confronting claims to extended jurisdiction by several of the major coastal nations there, leading to costly licensing and other exactions, with the longer term prospect of regulation or exclusion from coastal tuna waters.<sup>110</sup> And finally, there were brazen seizures of American tuna clipper by several countries that claimed extended jurisdiction beyond three miles.<sup>111</sup>

Chapman thus admitted candidly to advisers in the industry that if forced to make the choice, he would have to place the sanctity of the three-mile principle above the need of the Northwest's salmon industry

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105. Letter from William Herrington to Edward Allen (Mar. 27, 1950) (Edward Allen Papers, UW).

106. Memorandum on High-Seas Fishery, *supra* note 1.

107. Letter from William Herrington to Edward Allen (Mar. 27, 1950) (Edward Allen Papers, UW).

108. Letter from Wilbert Chapman to Montgomery Phister (May 9, 1951) (Wilbert Chapman Papers, UW).

109. Letter from Wilbert Chapman to Montgomery Phister (Mar. 5, 1951) (Wilbert Chapman Papers, UW).

110. See A. HOLLICK, *supra* note 8, at 84-85.

111. See generally T. WOLFF, *supra* note 34, at 8-16.

to exclude the Japanese.<sup>112</sup> "I have changed the major base of my strategy," Chapman revealed in a letter to a California tuna-packing executive in May 1950, shortly after Japan's Memorandum had entered the stream of documents in the policy process. "If it [came] to a showdown," he wrote, he would "back away" from a confrontation over terms of the Japanese treaty "and save my showdown for the territorial waters fight" that was vital to the tuna fleet.<sup>113</sup>

By no means did Chapman abandon the concept of a Japanese treaty that would give the American salmon interests what they wanted. But he now began to stress the voluntaristic aspect of the agreement—the "mutual forbearance" idea, embodying a notion of abstention that was purely a matter of pragmatic agreement between the signatory powers and not in any way stating a legal principle. Herein lay an historical irony—for in later years, in the United Nations Law of the Sea talks, the United States would seek above all to elevate abstention to the level of principle.<sup>114</sup> In 1950, Chapman also increasingly stressed the conservationist objective expressed in his treaty proposals—even though Canadian diplomatic officials, SCAP, and his supporters in his own Department all had stated explicitly, at one time or another, that conservation was merely a smokescreen for self-interested exclusion in what Dean Rusk feared would be "an unequal treaty imposed upon Japan under duress."<sup>115</sup> Nonetheless, Chapman seemed to hope that if any general principle applicable to international law was to be found in such an agreement, it would be inextricably tied in with scientific investiga-

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112. Letter from Wilbert Chapman to William Arnold (Jan. 3, 1949) (Wilbert Chapman Papers, UW). Chapman wrote that he was working to obtain a fisheries convention regarding tuna with Central American nations; to draft a multilateral pact for the Northwest Atlantic Ocean fisheries; and to draft an agreement for Alaskan salmon that would permit exercise of principles styled on the Truman Fisheries Proclamation (that is, extension of American claims beyond the three-mile limit). Letter from Wilbert Chapman to Montgomery Phister (May 7, 1949) (Wilbert Chapman Papers, UW). Meanwhile Chapman was also proceeding with the idea of a convention based on mutual forbearance, and by May 1950 he was placing a different emphasis on the three-mile issue. Indeed, even by March 1950 Chapman was advocating the mutual forbearance concept in discussions in the State Department as a means of dealing with the salmon fisheries. Chapman's argument included the proposition that the Truman Proclamation was now inappropriate since its principles would serve the Latin American states so well against American tuna interests. Memorandum from Wilbert Chapman to Winthrop Brown, Proposed Fisheries Discussions with the Japanese (Mar. 8, 1950) (Edward Allen Papers, UW).

113. Letter from Wilbert Chapman to Montgomery Phister (May 5, 1950) (Wilbert Chapman Papers, UW).

114. See *supra* text accompanying note 39; *infra* notes 260-69 and accompanying text.

115. Letter from Dean Rusk to Philip Jessup (July 6, 1950) (File 611.946/7-650, DOS Records, NA).

tions and the determination by advanced methods in ocean science of depletion threats to fishery stocks.<sup>116</sup>

Chapman set forth his dilemma in a letter penned in October 1950:

My whole scheme back here has been premised on the negotiation of a successful treaty to keep the [Japanese] out of the salmon area. I have slugged at everyone to get the three mile doctrine back on its feet. But I know that the minute [Japan] got back to fishing salmon, that doctrine would have its feet knocked out from under it. I can see no umbrella which has any remote chance of being sold back here under which tuna and salmon can both be sheltered except a strong three mile doctrine plus a treaty with the [Japanese] to keep them out of the salmon area.<sup>117</sup>

Fifth, there was a shift in Japanese-American commercial and economic relations. This change consisted of a new flow into the American market in 1949-50 of both packed and raw or semiprocessed tuna exports from Japan—a development given impetus by SCAP's authorization of new mother-ship tuna expeditions to the Trust Territories' waters.<sup>118</sup> The reappearance of Japanese tuna as a threat both to American tuna packing companies and to the heavily capitalized U.S. tuna fleet of Southern California added a new political dimension to the Japanese-U.S.-Canadian diplomatic drama.<sup>119</sup> At a minimum, it introduced the

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116. This was evident, for example, in Chapman's office memorandum to John Foster Dulles (Jan. 5, 1951) and accompanying documents (File 611.946/11-1050, DOS Records, NA).

Chapman played a central role in promoting the development of the New Oceanography, which in the late 1940's laid the groundwork for a new ecosystemic approach to ocean ecology and marine biology, with vital implications for the scientific foundations of fishery management programs. See generally Scheiber, *supra* note 14, at 394-427.

117. Letter from Wilbert Chapman to Montgomery Phister (Oct. 30, 1950) (Wilbert Chapman Papers, UW).

118. Imports as a percentage of total U.S. combined landings and imports of fresh and frozen tuna shifted radically upward during 1948-51:

Year	Percentage Imported
1946	1.9
1947	3.4
1948	2.8
1949	6.2
1950	14.2
1951	26.7

*Tuna Imports, 1951: Hearing on H.R. 5429 Before a Subcomm. of the Comm. on Ways and Means, 82nd Cong., 1st Sess. 16 (1951).* The value of American imports of fresh and frozen tuna from Japan was zero in 1947; then rose in 1948 to \$536,000 (which comprised less than one-third of the total value of imports from all sources); then in 1950 to \$4 million (comprising more than half the value of imports from all sources). *Id.* at 17.

119. For the larger context of interrelated political, economic and strategic considerations, see Scheiber, *U.S. Pacific Fishery Studies, 1945 to 1970: Oceanography, Geopolitics, and Marine Fisheries Expansion*, 22 DEUTSCHES HYDROGRAPH. ZEITSCHRIFT (in press 1989) (Proceedings of the IVth International Congress on the History of Oceanography, Hamburg, 1987).

Chapman wrote in May 1950: "SCAP is concentrating on canning tuna for the U.S. market for U.S. dollars. The mothership expeditions he [MacArthur] has authorized to the Trust Territories should just about double the pack, to a million cases." Letter from Wilbert

issue of possible tariff or quota limitations upon these Japanese exports, a policy option that gained increasing support in Congress and that greatly worried the State Department's internationalists as the Japanese peace treaty discussions loomed ahead.<sup>120</sup>

Sixth and finally, among the new factors that came into play during 1950 was the Truman Administration's decision in the last months of the year to press forward decisively with the negotiation of a general peace treaty.<sup>121</sup> This brought into the center of the picture John Foster Dulles, who was assigned by Truman in September to be the special negotiator with Japan.<sup>122</sup> News of Dulles's appointment led the West Coast fisheries interests to mount a full-scale campaign of pressure on the State Department, demanding that an agreement excluding Japan from the salmon grounds be included as part of any treaty. Their position was advanced by scores of elected officials, by the Pacific Fisheries Conference, and by private interests.<sup>123</sup> The essence of their demand was set forth by Senator William Knowland of California in November 1950: A "simple provision," such as Chapman had proposed, for mutual forbearance from fishing by Japan 150 miles from the North American coastline, and a similar commitment by Canada and the United States respecting Japanese waters, was, Knowland declared, "an essential element in any sound treaty of peace with Japan."<sup>124</sup>

Such pressures from the West Coast were particularly ominous from Dulles's standpoint, if for no other reason than that they signalled a possibly serious problem for a peace treaty that had to be ratified by the Senate. Naturally, neither the Pacific Coast fishery leadership nor Chapman at his State Department desk missed any opportunity to underline the reality of that threat.<sup>125</sup> Under pressure from Senator Knowland, Dulles declared in mid-December that, while he regarded it as doubtful

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Chapman to Montgomery Phister (May 31, 1950) (Wilbert Chapman Papers, UW); see also Chapman, *The Tuna Import Situation*, PAC. FISHERMAN, Oct. 1951, at 27-30.

120. See Montgomery, *Tuna Cannery Advocate Balanced Tariff*, PAC. FISHERMAN, Feb. 1952, at 25; *Double-Barrelled Drive Aims at Equalized Tariffs on Tuna*, PAC. FISHERMAN, Jan. 1952, at 25; *Equalized Tuna Tariffs: Objectives of Industry Campaign*, PAC. FISHERMAN, Jan. 1952, at 13-14; see also Scheiber, *supra* note 14, at 506-10.

121. See B. COHEN, *supra* note 30, at 13.

122. *Id.*; see J. ALLISON, *AMBASSADOR FROM THE PRAIRIE 150-51* (1973) (stating the seven principles in Dulles's earliest diplomatic objectives regarding Japan, which included concluding an agreement on high-seas fisheries).

123. See B. COHEN, *supra* note 30, at 261-65. Evidence of the campaign is also prominent in State Department files of the period. See, e.g., Office Memorandum from U. Alexis Johnson to Francis Fisher (Jan. 8, 1951) (611.946/1-851, DOS Records, NA).

124. Letter from Senator Knowland to Assistant Secretary of State Jack McFall (Nov. 7, 1950) (611.946/11-750, DOS Records, NA).

125. Thus, Chapman urged the U.S. diplomats associated with SCAP to recognize the potential political consequences in the Northwest if the Peace Treaty failed to deal with fisheries questions to their satisfaction. He stated that in addition to political pressure from state officials, a strong bloc of about twenty Senators and fifty Representatives could be counted upon to protect Northwest fishing interests in Congress. Letter from Wilbert Chapman to the

that fisheries issues would be discussed in any early treaty negotiations, if he went to Japan for talks he would first "try to talk to Chapman."<sup>126</sup>

In early discussions of the March 1950 Japanese Memorandum on High-Sea Fishery,<sup>127</sup> Chapman had warned negotiators that any policy must be acceptable to the West Coast fisheries interests: "If this group is not satisfied fully then we do not have any basis for a fishery policy."<sup>128</sup> When, in the last weeks of 1950, the U.S. Government became committed to an early general peace settlement with Japan, the prospect of trouble from the West Coast bloc in the Senate became a matter of increasing worry in the State Department's inner councils. It therefore came as no surprise that Dulles should have begun to regard "an acceptable solution of the fishery issue as a form of insurance to protect an otherwise satisfactory peace treaty."<sup>129</sup>

#### IV

#### THE DULLES-YOSHIDA LETTERS, FEBRUARY 1951

Chapman's skills as a tough bureaucratic entrepreneur and tactician served him well once Dulles was appointed and the treaty negotiations with Japan began in earnest. Encouraged by Senator Knowland and West Coast fisheries executives to pursue a more aggressive course, Chapman circulated throughout the State Department a memorandum protesting the lack of a decision on the question of whether Japan should be "deter[re]d" from fishing in the Northeast Pacific.<sup>130</sup> As Chapman had doubtless intended, this memo precipitated Dulles's direct intervention, and a few days later Dulles summoned Chapman to his office for a private conference. The conference took place shortly after January 1, 1951, and it was to be a crucial turning point in the planning for a peace treaty. It also decisively set in motion the events leading directly to the 1952 Fisheries Convention and, in particular, to the adoption of the abstention formula.<sup>131</sup>

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Acting U.S. Political Advisor for Japan (June 7, 1950) (File 611.946/6-750, DOS Records, NA).

126. Letter from John Foster Dulles to Senator Knowland (Dec. 15, 1950) (replying to letter from Knowland to Dulles (Dec. 15, 1950)) (both letters available in Dulles Peace Treaty Files, DOS Records, NA). A few days later, Dulles informed the Senator that he was "making arrangements to have a talk with Dr. Chapman on this [fisheries policy] matter." Letter from John Foster Dulles to Senator Knowland (Dec. 20, 1950) (Dulles Peace Treaty Files, DOS Records, NA).

127. See *supra* text accompanying notes 99-102.

128. Letter from Wilbert Chapman to William Herrington (Apr. 11, 1950) (Wilbert Chapman Papers, UW).

129. B. COHEN, *supra* note 30, at 265; see also *infra* text accompanying note 148.

130. Quoted in Letter from Wilbert Chapman to Montgomery Phister (Jan. 6, 1951) (Wilbert Chapman Papers, UW).

131. Wilbert Chapman's detailed recapitulation of the events leading to his meeting with Dulles, and also of what transpired at the meeting itself, is in his January 6, 1951 and March 5, 1951, letters to Montgomery Phister (both letters are available in Wilbert Chapman Papers,

Dulles's paramount objective, he made clear to Chapman, was to align Japan against the Soviet Union; hence he was concerned "that his quick negotiation of a short general Treaty of Peace would not get so bogged down in fisheries squabbles that it would drag out the settlement."<sup>132</sup> Avowing impatience with the altruistic view of the State Department's "internationalist" element, Dulles dismissed as "nonsense" their view that Japan should not be asked to accept limitations on its access to ocean resources. "If a country wanted to voluntarily refrain from exercising rights in order to prevent friction, it could quite properly do so," Dulles declared.<sup>133</sup>

Dulles then mused on how fisheries issues might successfully be separated from the main peace negotiations—how, in other words, the fisheries questions might be formally distinguished and dealt with separately, or else deferred. Then he suggested a course of action that was lifted wholesale from an earlier era of American history, indeed from a time at the height of the nation's imperialist era: "He brought up the subject of the Gentlemen's Agreement on Immigration," as Chapman recalled, and dwelt on it at some length. I told him I was well acquainted with it and told him about the same type of agreement made on salmon in Bristol Bay in 1938, which he had not heard of.<sup>[134]</sup> What if the Japanese Government sent us a letter [Dulles asked,] stating that, while they would not prejudice any rights, in order to prevent friction they were going to restrict their fishermen from coming into our fisheries. In return we could send them a letter of similar intent.<sup>135</sup>

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UW). DOS archival evidence also supports the following account. For an overview of the events of early 1951, flawed by a lack of attention either to Chapman's role or to the complexities of the many intradepartmental differences on key policy issues, see B. COHEN, *supra* note 30, at 264-66.

132. Letter from Wilbert Chapman to Montgomery Phister (Jan. 6, 1951) (Wilbert Chapman Papers, UW). In a confidential briefing to a Council on Foreign Relations group in October 1950, Dulles stated that the primary objectives of the United States in the negotiations were to keep Japan out of the Soviet orbit, to foster economic recovery, and to get the Allied powers to agree to a settlement which, "aside from territorial clauses" concerning the Mandated Islands, would "restore to Japan complete and untrammelled sovereignty," with no economic restrictions or limitations on its economic activities. Council on Foreign Relations, Study Group Reports, Japanese Peace Treaty Problems 4 (digest of discussions, Oct. 23, 1950) (John Foster Dulles Papers, Princeton University).

133. *Reported in* Letter from Wilbert Chapman to Montgomery Phister (Jan. 6, 1951) (Wilbert Chapman Papers, UW).

134. *See supra* text accompanying notes 15-20.

135. Letter from Wilbert Chapman to Montgomery Phister (Jan. 6, 1951) (Wilbert Chapman Papers, UW). The letter also refers to the 1907 Gentlemen's Agreement between the United States and Japan. As Raymond Esthus points out, the Agreement is contained in Telegram from Ambassador Luke Wright to Secretary of State Elihu Root (Feb. 24, 1907) and Telegram from Ambassador Thomas O'Brien to Secretary of State Elihu Root (Jan. 1, 1908). R. ESTHUS, *THEODORE ROOSEVELT AND JAPAN* 163-64 nn. 67-68 (1966). *See generally* T. BAILEY, *THEODORE ROOSEVELT AND THE JAPANESE-AMERICAN CRISES 150-67* (1934). The Agreement stemmed from the Japanese Government's outrage at American treatment (especially in California) of Japanese immigrants. As a result of this treatment Japan was unwilling

Chapman replied that his preference was for a formal treaty, as soon as possible, providing for "mutual denial"—each signatory to keep its fishing vessels out of waters within 150 miles of the other's coastline.<sup>136</sup> The conference ended with Dulles stating that he and Chapman "were by and large in substantial agreement." He thus asked Chapman to work on a letter that Dulles might tender to the Yoshida government with a request that Japan adopt it as its own, then to transmit it officially to the United States—that is, a letter which would be the basis for a gentlemen's agreement on fishing.<sup>137</sup>

Chapman quickly moved to seize the moment. Taking language from the 1938 Japanese note, in which Japan had agreed to keep its vessels out of Bristol Bay waters,<sup>138</sup> he provided Dulles with a draft letter for the Japanese Government in which it would agree to a similar policy for the future with regard to salmon, tuna, herring, and halibut.<sup>139</sup> Dulles then asked Chapman to clarify the language. The revision was completed within a few hours, and Dulles's staff then referred the document to the Northeast Asia desk, headed by U. Alexis Johnson, for approval.<sup>140</sup>

The essence of Chapman's draft letter consisted of two elements. The first was a formal assurance to the United States that Japan "looks with favor upon the early negotiation" of formal treaties to restrict entry by either nation's vessels into the "developed and preserved fisheries" that were under conservation regimes of the other nation.<sup>141</sup> The letter's

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to enter into a formal treaty accepting a bar on further emigration to the United States, taking the position that this would dignify the idea of inequality of their people with the Americans. Instead, the Japanese exchanged notes with the Theodore Roosevelt administration, with both nations agreeing to a "voluntary" halt in this unwanted movement of emigrants. See G. MOWRY, *THE ERA OF THEODORE ROOSEVELT AND THE BIRTH OF MODERN AMERICA* 187-90 (1958).

136. This was in accord with the provisions of Chapman's earlier draft treaty. See *supra* text accompanying note 81.

137. Memorandum from Robert Fearey to John Allison (Jan. 10, 1951) (Dulles Peace Treaty Files, DOS Records, NA).

138. See *supra* note 21.

139. In internal correspondence, State Department officials noted that a key portion of Chapman's proposed letter, referring to the "comity of the nations concerned" and also "the right or obligation of the United States Government to protect its developed fisheries" was taken "almost verbatim" from the U.S. Note that prompted withdrawal by the Japanese from Bristol Bay in 1938. Memorandum from Robert Fearey to John Allison (Jan. 10, 1951) (Dulles Peace Treaty Files, DOS Records, NA); see also *infra* note 145.

140. Letter from Wilbert Chapman to Montgomery Phister (Jan. 18, 1951) (Wilbert Chapman Papers, UW).

141. The relevant passage reads as follows:

The Japanese Government believes the difficulties consequent upon the exercise of full legal rights under international law in such developed fisheries by newcomers from other nations can be resolved through international agreements with advantage of all nations concerned. It desires, therefore, to assure the United States Government that it looks with favor upon the early negotiation of such agreements between Japan and the United States.

second key element was an interim commitment by Japan to prohibit fishing by its vessels or its nationals in the "developed fisheries" of the Bering Sea and the Eastern Pacific—including salmon, halibut, herring, sardine, and tuna—insofar as these fisheries were under active conservation programs imposed by the United States.<sup>142</sup>

It is noteworthy that Chapman's draft letter shifted the technique of exclusion away from the earlier strategy of demarcating an area free from Japanese fishing within 150 miles of the North American coast, which had been the approach taken in the Chapman draft treaty presented to the Japanese Government in 1950. Now, the focus of the proposed Japanese exclusion was instead upon specific fisheries and species—"such fisheries as are already mature and are maintained at present levels of harvest only through vigorous self-denying conservation ordinances"—without regard to distance from the coast or geographic boundaries on the high seas.<sup>143</sup> Chapman probably was emboldened to attempt this expansion of Japan's commitment by the fact that an official Japanese delegation visiting Washington, D.C. and the Pacific Coast in November 1950 openly endorsed the idea of voluntarily keeping their vessels out of specified North American coastal fisheries "regardless of the distance seaward to which they were extended, if such agreement were reciprocal."<sup>144</sup> Effectively, by this new formula, Chapman also was proposing a comprehensive commitment by the Japanese that went far beyond what Japan had itself proposed in its March 1950 Memorandum.<sup>145</sup>

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Draft statement, attached to Memorandum from Wilbert Chapman to John Foster Dulles (Jan. 10, 1951) (Dulles Peace Treaty Files, DOS Records, NA).

142. Letter from Wilbert Chapman to John Foster Dulles (Jan. 10, 1951) (Dulles Peace Treaty Files, DOS Records, NA); Memorandum from Robert Fearey to John Allison (Jan. 10, 1951) (Dulles Peace Treaty Files, DOS Records, NA); *see also* Attachment to Memorandum (no author, entitled "Dr. Chapman's Proposal") (Jan. 17, 1951) (Wilbert Chapman Papers, UW).

143. Attachment to Memorandum from Robert Fearey to John Allison (Jan. 10, 1951) (Dulles Peace Treaty Files, DOS Records, NA).

144. A report of talks between Pacific Fisheries Conference leadership and the Japanese delegation is found in Open Letter from Miller Freeman, Chairman, Pacific Fisheries Conference, to Dean G. Acheson, Secretary of State (Nov. 9, 1951) (File 946/11-950, DOS Records, NA), *published in* PAC. FISHERMAN, Jan. 1951, at 19-20. In the Miller Freeman Papers, there is a memorandum on this Japanese delegation, stating that their mission to the United States might well be to study "American sentiment concerning a fisheries treaty." Memorandum from Miller Freeman to Dean Acheson (Nov. 1950) (Miller Freeman Papers, UW). Freeman also reported that at a Seattle meeting with Pacific Fisheries Conference leaders the Japanese asserted that they did not want "immediate" access to Bristol Bay or other established fisheries off the North American coast. Open Letter from Miller Freeman, *supra*, *published in* PAC. FISHERMAN, Jan. 1951, at 19-20.

Richard Croker, a California fisheries official temporarily serving in MacArthur's Tokyo headquarters, regarded it as salutary that this Japanese delegation should have been exposed first hand to "what the West Coast thinks of Japanese fisheries." Letter from Richard Croker to Wilbert Chapman (Nov. 24, 1950) (Wilbert Chapman Papers, UW).

145. Chapman wrote of this change: "Essentially what was done was to expand the policy of 1937 Bristol Bay salmon to all the important fisheries from salmon south to tuna by way of



Prior to this time, the Northeast Asia desk had steadfastly opposed Chapman, aligning itself on the fisheries question with MacArthur, with the State Department's economic and trade officers, and with the Japanese Government. With Dulles now pushing the gentlemen's agreement tactic, however, a startling reversal occurred. U. Alexis Johnson phoned Chapman within a few hours to say that the draft letter for Japan seemed to him "letter perfect and . . . a splendid way out of this fisheries mess."<sup>146</sup> And so, with stunning suddenness, Chapman's approach to Japan was on the agenda for an immediate official decision.

A meeting was called for January 17, at which the State Department's regional Far East experts, economic officers, and political planners would decide whether to clear Chapman's draft letter for presentation to the Yoshida government. The old divisions surfaced immediately, with the economic officers opposing Chapman's draft as "inconsistent with major U.S. economic policies" and virtually coercive of the Japanese. They also complained that it would remove all incentive for future negotiations because the West Coast industry would have already achieved their goal—that of exclusion.<sup>147</sup>

Working in Chapman's favor, however, were the political forces that had been systematically mounted from the West Coast in the past months, converging with the urgency of Dulles's overarching goal of a general treaty. Johnson saved Chapman the need of reiterating the arguments that had been voiced in Chapman's memoranda for more than two years. The new approach being proposed, Johnson asserted, would assure that the general peace treaty—with the thorny issue of fishery rights separated from it—"would meet with minimum opposition in the Senate." Dulles, declared Johnson, "had to be governed not by the justice of the fish case, but by its possible effect in dividing Congressional support on the Peace Treaty, support which could not tolerate many defections and be successful."<sup>148</sup> Again, the department officials could not break out of their stalemate, and so the meeting ended inconclusively. But Dulles quickly reviewed the arguments on each side, and—as probably was by then predictable, absent a decided consensus in the State Depart-

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[the] 'developed' device." Letter from Wilbert Chapman to Montgomery Phister (Jan. 11, 1951) (Wilbert Chapman Papers, UW); see *infra* text accompanying notes 202-04.

146. U. Alexis Johnson's statement is reported in a letter from Wilbert Chapman to Montgomery Phister (Jan. 18, 1951) (Wilbert Chapman Papers, UW).

147. *Id.*

148. Memorandum, "Fishery Relationship between Japan and U.S." (Jan. 17, 1951) (constituting minutes of the January 17 meeting) (Wilbert Chapman Papers, UW); see Letter from Wilbert Chapman to Montgomery Phister (Jan. 18, 1951) (Wilbert Chapman Papers, UW) (reporting U. Alexis Johnson's reaction).

ment meeting against the gentlemen's agreement idea—he decided in favor of Chapman's draft letter.<sup>149</sup>

The way was thus opened for Dulles to begin face-to-face talks with Japanese officials on the main treaty. On January 19—less than two weeks after his private talk with Chapman—he boarded a plane for Japan with Chapman's draft letter in his briefcase. During the flight to Tokyo, Dulles revised the draft letter slightly to state that Japan was ready to negotiate on fisheries questions with all countries, not only with the United States and Canada.<sup>150</sup> Otherwise, he left the document as Chapman had written it.

As the formal talks were about to commence in Tokyo, Yoshida presented Dulles with a proposed agenda that included the following three-part item on fisheries:

1. Freedom of fishing on the high sea [sic] being a recognized principle of international law, we expect that Japan will not be subjected to special restrictions such as are not imposed upon sovereign states.
2. Japan will scrupulously observe all international law, international agreements and usages; she will cooperate wholeheartedly in all international undertakings and programs for the conservation and investigation of fishery resources.
3. Accordingly Japan will cooperate in the execution of the existing international agreements on the protection and investigation of the fishery resources including whales, seals, halibut, salmon and tuna. With respect to United States conserved fisheries, we are prepared to reach a concrete understanding.<sup>151</sup>

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149. In talks with members of Congress before departing for Tokyo, Dulles denied that fisheries issues were on his agenda for the Tokyo mission. "This [was] interesting," Chapman commented at the time,

because Dulles has consulted [Senator] Knowland about a position which might be used in talking with the Japanese. It may be that Mr. Dulles is beginning to get jammed up a little on fish. I fancy he is going to get jammed up some little bit more before he gets through, because a number of other countries are going to be giving him trouble.

Letter from Wilbert Chapman to Montgomery Phister, *supra* note 148. Dulles's proposed agenda for the Tokyo talks (apparently prepared en route to Tokyo, and then given to Prime Minister Yoshida on January 26 by Political Advisor Sebald and John Allison) included this item: "Fisheries: possible voluntary prohibition of Japanese use of United States conserved fisheries." *Undated Agenda Handed the Prime Minister of Japan*, 6 FOREIGN REL. U.S. 1951, at 816 (1977).

At a meeting on January 30, 1951, British diplomatic officers were informed that the United States envisioned a treaty that would "obligate Japan to negotiate fishing agreements to limit poaching and intelligence activities of Japanese fishermen." Minutes, Jan. 30, 1951, Dulles Mission Staff Meeting, *reprinted in Memorandum by Mr. Robert A. Fearey of the Office of Northeast Asian Affairs*, 6 FOREIGN REL. U.S. 1951, at 830, 831 (1977).

150. *Undated Agenda Handed the Prime Minister of Japan*, *supra* note 149.

151. Yoshida Shigeru, Suggested Agenda (n.d., marked by hand "Feb. 1, 1951") (File 320.1, Tokyo Post Files, NA). The proposed agenda was entirely consistent with the position established in the March 1950 Memorandum on High-Seas Fisheries, *supra* note 1. At the head of this document, however, Yoshida entered the following disclaimer: "Note: I am setting forth below my private views, on which the cabinet is yet to be consulted. They do not,

Dulles in turn apparently presented Yoshida, for his consideration, the draft letter he had carried from Washington. Given Japan's willingness, a matter of record since March 1950, to adopt some form of voluntary abstention—and given Yoshida's primary concern, no less urgent than Dulles's own, to clear away all obstacles to the main peace treaty—it is easily understandable that he should have quickly accepted the gentlemen's agreement approach on Dulles's terms.<sup>152</sup> Yoshida did, however, slightly change the language proposed in the Chapman draft to reiterate Japan's special need for fishery products. On his own initiative, moreover, Yoshida specified that he would set up a commission to monitor the regulations imposed upon Japanese fishing operations in the Pacific, with the United States and other "interested foreign governments" to be invited to sit in as observers.<sup>153</sup> Otherwise, Yoshida accepted the key provisions of the Chapman draft, together with much of its language. To give himself time to gain formal approval of his Cabinet, and possibly to mend some political fences with the Japanese fishing industry, Yoshida asked Dulles for additional time before publication of the agreement in the form of an exchange of letters. Hence, it was not until February 13, 1951, after Dulles had returned to Washington, that the text of the Dulles-Yoshida Letters was made public.<sup>154</sup>

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therefore, represent necessarily the official and final opinion of the government. —S.Y." *Id.* at 6-7.

152. See J. DOWER, *supra* note 13, *passim*, for the ways in which Yoshida's diplomacy combined a rising assertiveness in pursuit of Japan's aims (always placing restoration of sovereignty as the highest priority) with acquiescence to Dulles on essential points. Dower's study does not, however, give any attention to the fisheries issues of the day.

The official record of the Dulles-Yoshida talks did not reveal that Dulles had taken the initiative in presenting Yoshida with a draft letter. Rather, it reads as follows for the session of February 5, 1951:

Ambassador Dulles raised the question of Japanese fishing, saying that there would be considerable criticism if he returned without some understanding on this question. He referred to the proposal submitted by the Japanese, which seemed quite satisfactory, and suggested that it would be desirable to have the Japanese send him a signed letter embodying agreed views on this problem before his departure.

Minutes, Dulles Mission Staff Meeting, Feb. 5, 1951, reprinted in 6 FOREIGN REL. U.S. 1951, at 859, 859 n.8 (1977) (emphasis added).

153. Minutes, Dulles Mission Staff Meeting, *supra* note 152, at 859 n.8; Letter from Wilbert Chapman to Montgomery Phister (Mar. 5, 1951) (Wilbert Chapman Papers, UW).

154. The text of the letters is reprinted in 24 DEP'T ST. BULL. 351 (1951). Dulles's reply to Yoshida's letter consisted of three brief paragraphs, affirming the willingness of the United States (and of other allied nations) to negotiate fishery issues with Japan after restoration of her sovereignty "with a view to establishing equitable arrangements for the development and conservation of fisheries." *Id.* For a history of the diplomacy of the period (lacking discussion, however, of the fisheries issues) see Curtis, *The Dulles-Yoshida Negotiations on the San Francisco Peace Treaty*, in 2 COLUMBIA ESSAYS IN INTERNATIONAL AFFAIRS: THE DEAN'S PAPERS, 1966, at 37 (1967).

Statements in the text regarding the political situation and Yoshida's handling of the fisheries interests are based upon the author's interviews with William Herrington, Staffordville, Connecticut, June 1988; with Mr. Takashi Hisamune, *supra* note 63; and with Mr. N. Okamoto, a journalist and publisher active in the postwar years, in Tokyo (May 1986).

Informing MacArthur of the exchange with Yoshida, Dulles stated:

The commitments made by Yoshida were: (1) to negotiate fisheries issues with other countries, as soon as sovereignty was returned to Japan, "with a view to establishing equitable arrangements for the development and conservation of fisheries" accessible to Japan and other nations; and (2) to impose an abstention policy on Japanese vessels in the interim period. The language of this second commitment was as follows:

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 overharvesting, and in which fisheries Japanese nationals or vessels were not in the year 1940 conducting operations. Among such fisheries would be the salmon, halibut, herring, sardine and tuna fisheries in the waters of the eastern Pacific Ocean and Bering Sea.<sup>155</sup>

Thus, as Chapman wrote in response to the news from Tokyo, Yoshida had "bought the whole works"—abstention from not only all Eastern Pacific fisheries under international regulation, but also those under domestic regulation, thereby temporarily keeping Japanese vessels out of virtually all fisheries of commercial significance to the United States in the Eastern Pacific.<sup>156</sup>

Yoshida doubtless blunted the criticisms of his policy, which came in very predictable ways from the Japanese fishing interests dismayed by the price they were being made to pay, by claiming that it was an indispensable concession required to push the peace talks along toward a larger goal—the restoration of sovereignty. Also, the Yoshida letter had explicitly reserved Japan's "international rights." Yoshida's position, widely accepted in Japanese political circles, was essentially that it was a matter of duress. The Government had done its best, first, by inserting the saving clause reserving Japan's sovereign rights in the future; and,

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It is expected that this exchange of letters may be made public after Prime Minister Yoshida has cleared the matter with his Cabinet. I think this prospective action, which is purely voluntary, will greatly allay the apprehension which exists along the West Coast of the United States and Canada as well as elsewhere.

Letter from John Foster Dulles to General MacArthur (Feb. 10, 1951) (Dulles Peace Treaty Files, DOS Records, NA).

155. 24 DEP'T ST. BULL. 351 (1951). Yoshida's language adopted a vital portion of the language of Chapman's draft document. The latter included the following final statement: "The Japanese Government undertakes these voluntary commitments without prejudice to the question of rights under international law." Draft Statement Attached to Letter from Wilbert Chapman to John Foster Dulles (Jan. 10, 1951) (Dulles Peace Treaty Files, DOS Records, NA). Chapman's phraseology, in turn, closely tracked the language in the Japanese diplomatic Note, published in 1938, announcing indefinite suspension of permission to Japanese vessels to conduct salmon fishing in the Bering Sea. See *supra* note 21 and accompanying text.

156. Letter from Wilbert Chapman to Montgomery Phister (Feb. 10, 1951) (Wilbert Chapman Papers, UW). Chapman received word of the Dulles-Yoshida Letters while he was in Latin America, where he had gone to deal with conflicts over claims of extended jurisdiction. *Id.*

second, by avoiding any permanent concessions—though clearly it had made a commitment to negotiations that would, in all likelihood, result in some form of restriction or exclusion of Japan in the Eastern Pacific fisheries.<sup>157</sup>

On the more positive side, nothing in the Dulles-Yoshida Letters proscribed Japan—once its sovereignty was restored—from pursuing its rights to open fishing, without restrictions, in the western region of the Pacific. It was, after all, in these Asian waters that Japan's most vital interests lay, at least in the foreseeable future.<sup>158</sup> Moreover, nothing in the Letters restricted Japan in any way vis-a-vis fishing for crab in the Bering Sea and other North Pacific waters. In fact, crab operations in

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157. Hisamune interview, *supra* note 63; Okamoto interview, *supra* note 154. Two months after the exchange of letters the United States delivered a Note asking the Japanese Government to interpret the February 7 Yoshida Letter as extending to pelagic fur sealing as well as to fishing for tuna, herring, sardine, salmon, and halibut in the Eastern Pacific Ocean and Bering Sea. Memorandum, U.S. Government to Prime Minister Yoshida (Apr. 3, 1951), published in *Japan Agrees to Temporarily Prohibit Pelagic Fur Sealing*, COM. FISHERIES REV., July 1951, at 42-43. On April 7, 1951, the Japanese Government agreed to this interpretation, reiterating, however, the formulistic caveat that this understanding was to be effective only until conclusion of a new fisheries convention and implied "no waiver of [Japan's] international rights." See Japanese Note entitled U.S. Memorandum of April 3, 1951 Concerning Pelagic Fur Sealing (Apr. 7, 1951), published in *Japan Agrees to Temporarily Prohibit Pelagic Fur Sealing*, *supra*, at 43.

In July 1951, Japan undertook an extension, covering ocean fisheries worldwide, of the formula it had accepted that February vis-a-vis the specified North American fisheries treated in the Dulles-Yoshida Letters. The Japanese policy declared that Japan's voluntary declaration in respect of fishing conservation in the February 7 letter to Dulles "was intended to embrace fishery conservation arrangements in all parts of the world." Statement of the Japanese Government on High Seas Fisheries (July 13, 1951). Japan's commitment was to prohibit its nationals and vessels "from carrying on fishing operation [sic] in presently conserved fisheries in all waters, where arrangements have already been made either by International or Domestic Act, to protect the fisheries from overharvesting and in which fisheries Japanese Nationals or Japanese registered vessels were not in the year 1940 conducting operations." See Appendix II for the full text.

The author has in progress a study, based upon materials in Allied diplomatic archives, of the pressures that induced the Japanese to issue this broad statement in July 1951.

The Japanese declaration on fur sealing policy was released to the public on June 12, 1951. *Japan Agrees to Temporarily Prohibit Pelagic Fur Sealing*, *supra*, at 43. The author has found only one passing mention of the July statement regarding the extension of the voluntary prohibition to worldwide fishing waters in secondary sources. Matsushita, *The Japan-United States-Canada Fishery Treaty*, 6 SUIKAN KAGAKU (Fisheries Science), Dec. 1957, at 20-24, 44 reprinted in U.S. Fish and Wildlife Service, Bureau of Commercial Fisheries, Pacific Salmon Investigations, Translation Series No. 20 (July 25, 1958) (available at Scripps Institution of Oceanography, La Jolla, California). A search of the published diplomatic documents and of English-language newspapers in Japan, the U.S., and Australia for mid-1951 did not produce any evidence that the Note was published at that time.

158. The Japanese delegation to the Tripartite Fisheries Conference in 1951 singled out the matter of Asian waters as an issue of particular importance to Japan: "We . . . have a specially strong interest in the future of our high seas fisheries in these [Asian and South Seas] areas and naturally must consider realistically the eventuality of concluding fisheries treaties with these interested countries." Statement of Views of Japanese Delegate (Nov. 15, 1951), reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 171, 173; see also *infra* text accompanying notes 232-33.

the Alaskan ocean region, which before the war had been a profitable element of Japanese distant-water fishing, would be resumed by Japan only a year after the Peace Treaty was concluded.<sup>159</sup> Finally, it was distinctly to Japan's advantage, as a defeated power, to have the United States treating fishery issues—even salmon in Bristol Bay—as negotiable, rather than disposing of them in a unilateral mode as the American salmon industry wanted, and indeed as the 1945 Truman Proclamation seemingly had threatened to do.<sup>160</sup>

All the foregoing arguments have direct bearing on the issue of “duress” in regard to Japan's fishery rights. In retrospect, one can say confidently that it was to Japan's significant advantage in 1951 to align itself with the United States—as was done by the Dulles-Yoshida Letters—to set aside fishery questions until the general peace treaty had been concluded. Had the United States not cooperated to establish a joint interest in post-treaty fishery negotiations and agreements, there seems little doubt that the other Allied powers—most notably Australia and the Philippines—would have pressed hard to have the main treaty include harsh provisions restricting Japan's fishing rights in Asian and South Pacific ocean waters.<sup>161</sup> Moreover, Japan's accommodation of American

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159. Chapman defended his March 1951 draft revisions as being liberal towards Japan, in part because his proposals did not affect Bering Sea king crab fishing by Japan. Memorandum from John Leddy to Wilbert Chapman (Apr. 12, 1951) (Dulles Peace Treaty Files, DOS Records, NA); Wilbert Chapman, Draft Convention 8 (circulated Mar. 28, 1951) (Dulles Peace Treaty Files, DOS Records, NA). The Japanese did, in fact, resume crab fishing after the Treaty went into effect, but they held back until after ratification in 1953 in order to avoid any political backlash in the Pacific Northwest and British Columbia. As reported at the time, the Japanese Cabinet officer in charge of fisheries admitted that “fishing for crabs in the Bering Sea before the fisheries treaty was ratified was detrimental to Japanese interests and would antagonize American fisheries interests.” *Japan*, COM. FISHERIES REV., Mar. 1952, at 43.

160. On the Truman Proclamation, see *supra* note 32. On the logic of arguments against the “duress” view, see Johnson, *supra* note 7, at 13-18.

161. For evidence of the rising pressure from the Allied powers in Asia to restrict Japan's fishing through the Peace Treaty or otherwise, see generally C. PARK, *supra* note 41, at 60-61 (on Korea); Oda, *supra* note 11, at 67-70 (referring to Soviet relations with Japan); Tanaka, *Japanese Fisheries and Fishery Resources in the Northwest Pacific*, 6 OCEAN DEV. & INT'L L. J. 163, 176-85 (1979) (discussing Japanese relations with the Soviet Union, the Republic of Korea, and China); *Memorandum of Conversation by the 3rd Secretary of the Mission in Japan (Finn)*, 6 FOREIGN REL. U.S. 1951, at 1143-46 (1977) (discussing the concerns of the Philippines); *Memorandum of Conversation by the Officer in Charge of Korean Affairs in the Office of Northeast Asian Affairs (Emmons)*, *id.* at 1182-94, 1202-06 (referring to Korea's concerns regarding Japanese fishing). In July 1950 Dean Rusk (an officer of the Far East desk of the State Department) cited the pressures from China, the Philippines, and Australia to obtain new restrictions on Japanese fishing. Memorandum from Dean Rusk to Philip Jessup (July 6, 1950) (File 611.946/7-650, DOS Records, NA). In fact, Australia issued a proclamation on September 25, 1953, a year following the signature of the general Peace Treaty, asserting the power to regulate its pearl fisheries in the waters over its continental shelf beyond three miles; and the Australian Government specifically applied the regulations to foreign nationals, leading to a formal protest by Japan and an agreement to submit the issue to the International Court of Justice. The issue was finally settled by the parties. On this episode, see Oda, *Japan and the International Fisheries*, 4 JAPANESE ANN. INT'L L. 50, 56-57 (1960).

policy aims with respect to the Northeast Pacific fisheries served to advance another paramount economic and diplomatic interest of Japan: the acceptance of Japan as an equal trading partner in international commerce. At the very time the fisheries issue was being pursued through the Dulles diplomatic initiative of 1951, it should be remembered, the United States was also pressing the other Allied powers to extend most-favored-nation trading status to Japan, and to extend to the Japanese the full privileges of partnership in GATT.<sup>162</sup> There can be no doubt of the enormous benefits Japan stood to gain from this American policy, which the State Department was vigorously championing in the face of reluctance and often bitter resentment on the part of other Allied Governments.<sup>163</sup>

In the view of some observers and participants, including Chapman himself, the Dulles-Yoshida Letters represented a realistic tradeoff for the Japanese.<sup>164</sup> Japan's trump card was that its commitment to fishery negotiations was only a general one. Once Japan had reacquired full sovereignty, the range of her options would be significantly enlarged, even if tempered by considerations of *realpolitik*. Also, although he was delighted at the concessions Yoshida had made in such broad terms, Chapman cautioned that realism must inform the American appraisal of Japan's commitments. For, in his view,

Japan [would] stay out of these fisheries just so long as they need our good will and friendship more than they need our fish, and when this

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162. See W. BORDEN, *supra* note 13, at 191-97; W. BROWN, JR., THE UNITED STATES AND THE RESTORATION OF WORLD TRADE 332-33 (1950); Scheiber, *supra* note 14, at 456-7.

163. Thus, when the United States-Japanese Treaty of Friendship, Commerce, and Navigation, April 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863, was signed in April 1953 (embodying the internationalist principles that the State Department had long been pursuing vis-a-vis Japan), a leading Japanese journal editorialized that the treaty was "non-nationalistic, open door, and liberal in concept." *Quoted in* Foreign Service Dispatch 210, Economic News from the Yokohama Consular District (Apr. 6, 1953) (Edward Allen Papers, UW). Although the United States had not yet achieved its aim of gaining admission of Japan to GATT as a full partner, the editorial continued, what Japan gained in the Treaty regarding U.S. tariffs was "practically as good as if Japan had been admitted into GATT." *Quoted in id.*

As early as spring 1950, the U.S. Government (over the objections of the United Kingdom and lacking the approval of 13 of the 59 U.N. member governments) was sponsoring the cause of full membership for Japan in the United Nations Educational, Scientific, and Cultural Organization; the United States also sought acceptance of Japanese overseas trade agencies by the United Kingdom and other Allied nations, was sponsoring World Health Organization membership for Japan, and—over protests by New Zealand, the United Kingdom, Australia, and other governments—had approved SCAP's continued authorization of Japanese whaling expeditions. U.S. Department of State, A Japan Political Summary for April-May 1950 (File 794.00/6-1350, DOS Records, NA).

164. Chapman had long considered it politically impossible for Japan to fish in Bristol Bay or other Northeast Pacific waters simply because a "storm of reaction from Alaska and the West Coast States" would result, so that the U.S. Government would have to "take whatever action might be necessary to force Japanese vessels from such areas." Wilbert Chapman, Justification for Japanese Fishery Discussions (Feb. 27, 1950) (File 611.946/6-2150, DOS Records, NA).

balance changes they will come after the fish whether there is a Gentlemen's Agreement, an iron clad treaty, or absolutely no commitment at all.<sup>165</sup>

V

THE NORTH PACIFIC FISHERIES CONVENTION OF 1952

The American fishery interests on the West Coast wanted firmer assurances about future Japanese exclusion than were offered by the Dulles-Yoshida Letters. Their position had been set out earlier, just before Dulles had gone to Tokyo for his talks with Yoshida:

that in the treaty of peace with Japan, or in a separate treaty to be concluded prior to or at the same time, suitable treaty provisions be made which will ensure that Japanese fishermen will stay out of the fisheries of the Northeast Pacific Ocean which have been developed and husbanded by the United States and the other countries of North America.<sup>166</sup>

The exchange of letters with Yoshida did not promise in unqualified terms that the West Coast demands would be met. Hence, in early 1951 some of the salmon industry's leadership opened a sustained campaign for immediate negotiation of a formal long-term fisheries agreement. Drafting such an agreement, they contended, should not wait for signature of the general peace treaty, let alone for its ratification.<sup>167</sup> In response, however, Chapman counseled restraint. He warned the fisheries leaders that Dulles had engineered the interim agreement with Yoshida despite the sustained opposition of the State Department's internal hierarchy—the people who, even more than Japan, had been what Chapman called “the enemy of us fishery folks.”<sup>168</sup> Dulles's willingness to eschew a doctrinaire course adhering to freedom of the seas and the three-mile doctrine, Chapman declared, was good reason for such folks to withhold criticism: “I will not,” he pledged, “be a party to further disturbance of the situation we have.”<sup>169</sup>

165. Letter from Wilbert Chapman to Montgomery Phister (Mar. 5, 1951) (Wilbert Chapman Papers, UW).

166. Pacific Fisheries Conference resolution of Nov. 29, 1950, *quoted in* Bishop, *The Need for a Japanese Fisheries Agreement*, 45 AM. J. INT'L L. 712, 712 n.1 (1952).

167. B. COHEN, *supra* note 30, at 253-77, treats the industry role in some detail. *See also* Herrington, *Diplomacy and Fish*, *supra* note 6.

168. Letter from Wilbert Chapman to Montgomery Phister (Mar. 5, 1951) (Wilbert Chapman Papers, UW). Even in the face of the Dulles-Yoshida agreement, Edward Allen and others on the West Coast (especially the salmon interests) pushed hard to have fishery issues settled by the main peace treaty. Senator Ellsworth of Oregon raised the question why the main treaty could not incorporate a permanent fisheries settlement. Letter from Senator Harris Ellsworth to Assistant Secretary of State Jack McFall (Feb. 24, 1951) (File 611.946, DOS Records, NA).

169. Letter from Wilbert Chapman to Montgomery Phister (Mar. 5, 1951) (Wilbert Chapman Papers, UW).



Within departmental circles, however, Chapman played the role of advocate rather than conciliator. He insisted that the Dulles-Yoshida agreement be viewed as only the first step toward earliest possible negotiation of a more durable treaty understanding. After his meetings with leaders of the West Coast fisheries in March, for example, Chapman reported to Dulles that the industry believed that outstanding "fishery differences" with Japan could be settled "at this time without much trouble."<sup>170</sup> The West Coast leaders, Chapman declared,

[know] that the only thing blocking this agreement is a difference of opinion in the U.S. Department of State. This, then, is a strictly domestic fight which has no possibility of embarrassing you in your general [peace treaty] negotiations, and it will be continued after a brief resting spell with more concentrated vigor than has been shown heretofore.<sup>171</sup>

Chapman pressed on Dulles his view that "responsible fishery opinion in both Japan and North America would have bought . . . a deal last year, will buy it now, and will buy it next year," on the basis of agreed zones on each side of the Pacific from which specific parties would be excluded, with some "flexible mechanism—probably a joint Commission—to make adjustments in this arrangement to accommodate the dynamic situations" that would arise from continued expansion of fishery effort on both sides of the ocean.<sup>172</sup>

As reported by one of the Northeast Asia desk officers of the Department in May 1951, following a discussion with representatives of the Canadian Government:

Dr. Chapman indicated that he had every intention to press forward immediately with the formulation of a Departmental position on the question of a fishery treaty with Japan. He indicated that it was his understanding and also that of the west coast fishery industry (though it is not mine) that the Dulles-Yoshida exchange of letters was only expected to hold off the west coast fishing industry until after the negotia-

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170. Letter from Wilbert Chapman to John Foster Dulles (Mar. 15, 1951) (Dulles Peace Treaty Files, DOS Records, NA).

171. *Id.* Meanwhile the leaders of the West Coast fisheries industry also pressed their view that the Dulles-Yoshida Letters should be seen "as only a first step" on the State Department. They demanded that Secretary of State Acheson set the earliest possible date for concluding a formal fisheries treaty. Open Letter from Miller Freeman, Chairman, Pacific Fisheries Conference, to Dean G. Acheson, Secretary of State (Nov. 9, 1951) (File 946/11-950, DOS Records, NA), published in PAC. FISHERMAN, Jan. 1951, at 17. They made clear, in effect, that delaying a fisheries treaty until after the general Peace Treaty was signed (when Japan would be free to repudiate the Yoshida commitment) was unacceptable. This prospect was treated rather as a likelihood by the more militant fisheries leadership, especially Allen, who was reported by Chapman as being convinced that the Japanese were engaged in treachery. Allen, he wrote, believed that Yoshida had outmaneuvered Dulles and set the stage for the Japanese fleets "[to] set off for Bristol Bay to fish sockeye [salmon]" the day after the general Peace Treaty was signed. Letter from Wilbert Chapman to Montgomery Phister (Mar. 5, 1951) (Wilbert Chapman Papers, UW); see also *infra* note 176.

172. Letter from Wilbert Chapman to John Foster Dulles (Mar. 6, 1951) (Dulles Peace Treaty Files, DOS Records, NA).

tion and signing of the peace treaty with Japan and not until after its ratification. He pointed out that we could expect the west coast Senators to take every step to delay the ratification of the peace treaty until after they were satisfied that their interest would be protected, i.e., until steps had been taken to exclude the Japanese from the west coast fisheries.<sup>173</sup>

Chapman's strategy of pressing for an early decision, some of his colleagues believed, was an effort to "steam roller" the Department<sup>174</sup>—to force them to bring the Japanese fishing issue to a resolution prior to the end of Chapman's tenure in June, when he would leave the Government to become research director of the American Tunaboat Association.<sup>175</sup> In any event, prior to his leaving office, Chapman successfully persuaded the Department of State to appoint a fisheries industry advisory committee on the Japanese fishing rights issue, thus institutionalizing the industry's role in the policy planning process—and also, as events proved, giving the industry a key role in the negotiations with Canada and Japan that would follow.<sup>176</sup>

With the threat of West Coast defections on the vote to ratify any peace treaty always in the background, it became crucial for Dulles to achieve a formula for holding onto his political support on the West Coast without permitting the Pacific fisheries to become the victim of a diplomatic feeding frenzy at the general peace conference that was being scheduled for later in 1951. Thus, the State Department produced a compromise in the form of article 9 of the Treaty, which provided: "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."<sup>177</sup>

So matters stood when Chapman left the Department of State in June of 1951.<sup>178</sup> He was succeeded as the Under Secretary's Special As-

173. Office Memorandum from Alice Dunning to U. Alexis Johnson, Discussion with Canadians Regarding Japanese Fishery Treaty (May 3, 1951) (File 611.946/5-351, DOS Records, NA).

174. *Id.*

175. On Chapman's resignation and his activities in his new post with the American Tunaboat Association, see Scheiber, *supra* note 14, at 485-533.

176. B. COHEN, *supra* note 30, at 253-77; Scheiber, *supra* note 14, at 479. Allen, then counsel to the salmon processing industry's major trade association and chairman of the International Pacific Salmon Commission (U.S.-Canadian), was one of those appointed to the advisory committee. *Id.* at 443. This gave an important role in the planning process to one of the most prominent spokesmen for containment of Japanese fishing activities and exclusion of Japan from Pacific waters. For a discussion of Allen's career and writings, see generally *id.*

177. Treaty of Peace with Japan, Sept. 8, 1951, art. 9, 3 U.S.T. 3169, T.I.A.S. No. 2490, 136 U.N.T.S. 45, *quoted in* Dulles, *The San Francisco Conference on Proposed Japanese Peace Treaty*, 25 DEP'T ST. BULL. 346, 350 (1951); *see also* C. PARK, *supra* note 41, at 61.

178. Despite Dulles's having moved matters to the point where there was an agreement to negotiate, from the standpoint of Chapman's successor there remained the key dilemma that the United States Government "still had no position on fisheries acceptable to [West Coast]

sistant for Fisheries and Wildlife by William C. Herrington, a figure very familiar to the Japanese from his service throughout most of the Occupation period as SCAP's chief fisheries officer.<sup>179</sup> Herrington was respected in Tokyo as a man whose firmness was matched by the strength of his credentials in fisheries science and by his reputation for personal integrity. Herrington was well known in Japanese Government circles for his willingness to chastise their fishing industry, in public forums, for failures in the realm of fisheries conservation and management; but he had also been long associated with General MacArthur's highly benevolent policy for encouragement of Japanese high-seas fishing expansion. Throughout his service in Japan, Herrington had maintained contacts with both the fisheries agency officials and the industry leadership in the United States.<sup>180</sup> Thus, his appointment brought to the center stage of Pacific fisheries diplomacy a figure who commanded respect and trust on all sides.

From June to December of 1951, Herrington painstakingly prepared the way for the formal tripartite fishery talks with Canada and Japan. He was the officer in the U.S. Government chiefly responsible for preparing the American draft convention. This proved to be not only a challenge to Herrington's diplomatic skills, but also a complex assignment that required him to perform a political balancing act, so that from the outset, following Chapman's example, he consulted closely at every step with the West Coast fishing industry leadership to develop the American position on Japan's future rights in Pacific waters.<sup>181</sup>

As had been true since the outset of General MacArthur's campaign for expansion of Japanese deepwater fishing in 1948, the State Department's leading political and economic officers stood foursquare for the open seas principle, advocating free access for Japan to all waters beyond three miles of coastal boundaries. At a minimum, they hoped to cut back the length of time any fishery treaty might be invoked to limit Japanese fishing in Bristol Bay or other ocean waters, arguing against Chapman's

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fisheries interests that could be cleared in State [Department councils]." Herrington, *Diplomacy and Fish*, *supra* note 6, at 104.

179. The Japanese view of Herrington is based upon interviews in Japan with former fisheries officials; with Mr. Takashi Hisamune, *supra* note 63; with Mr. N. Okamoto, *supra* note 154, and with Mr. Frederick Bundy, in Manchester, Massachusetts (July 1987). Mr. Bundy was a member of a visiting experts' mission to Japan in 1949 on fisheries management and policy; the mission was organized by, and reported to, Herrington.

180. See generally Correspondence with William Herrington, 1949-51, *passim* (Wilbert Chapman and Edward Allen Papers, UW). In 1948-49, Herrington also had coordinated a series of special assignments to Tokyo of leading U.S. fishery management experts and scientists. Herrington interview, *supra* note 154.

181. Herrington has written some remarkably full and candid analyses of his own work. See Letter from William Herrington to Ann L. Hollick (Feb. 5, 1977), quoted in A. HOLLICK, *supra* note 8, at 426-27, nn. 169, 173-74, 176. See generally Herrington, *supra* note 5; Herrington, *Diplomacy and Fish*, *supra* note 6.

concept of a fifteen-year treaty.<sup>182</sup> Even this was a retreat for the internationalist faction in the department, which earlier had pushed for a five-year limit on any agreement, and at one time had even insisted that the fisheries treaty—whatever its duration—should be subject to one-year notice of abrogation by any of the signatory parties, including Japan.<sup>183</sup> Herrington, however, continued to work with drafts calling for a fifteen-year agreement aimed primarily at committing Japan to a “waiver” of fishing rights in Bristol Bay.<sup>184</sup>

#### A. *From Mutual Forbearance to Abstention*

Herrington’s signal personal achievement in shaping the proposed convention was his use of the concept of maximum sustained yield as the purpose of (and justification for) abstention—or, as Herrington himself initially termed it, the “waiver of rights.”<sup>185</sup> Prior discussions, during the period of Chapman’s service in the State Department, had centered on the mutual forbearance idea, proposing restriction of Japanese fishing within a specified distance—Chapman had wanted 150 miles—from the North American coast, rather than restrictions applied to specific species.<sup>186</sup> It had been “found . . . impossible to fit such proposals into our over-all international policies,” Herrington later wrote in an official account of the treaty talks; and, besides, he went on, “[s]ome felt . . . that the [Chapman] proposals went beyond what was required to meet the conditions necessary for encouraging the continued conservation of our fully utilized and conserved fisheries and would provide a dangerous precedent for fencing off areas of the high seas.”<sup>187</sup>

In October 1951, amidst development of the American position, Herrington recalled another dimension of the situation, one that bears on the question of alleged “duress” with respect to Japan. There was “no possibility,” he averred,

that Japan, as a sovereign nation, would accept such terms [as Chapman’s] in a fishery agreement, unless absolutely forced to by the United States Government as a condition of the Peace Treaty. Under the poli-

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182. Office Memorandum from Joseph Zurhellen to U. Alexis Johnson, Fisheries Convention Committee Meeting (July 17, 1951) (File 6711.946/7-1751, DOS Records, NA).

183. See, e.g., Memorandum from Edwin Martin to Wilbert Chapman, Proposed Fisheries Conventions (Aug. 3, 1949) (Wilbert Chapman Papers, UW).

184. See, e.g., Memorandum from William Herrington to Montgomery Phister (July 25, 1951) (Wilbert Chapman Papers, UW) (drafts of the proposed Convention attached).

185. Herrington’s initial use of “voluntary waiver of rights,” rather than the phrase ultimately adopted, “abstention,” was confirmed in the author’s interview with him. Herrington interview, *supra* note 154.

186. Although the Yoshida Letter, following the language of the draft letter Dulles had brought with him, had referred to developed fisheries and specific species, the Convention draft circulating in the State Department three months later still provided for the 150-mile restricted area. See *supra* text accompanying notes 79-81; see also Herrington, *supra* note 5, at 341.

187. Herrington, *supra* note 5, at 341.

cies developed and insisted upon by the United States Government in the negotiation [by Dulles] of the Peace Treaty with Japan this was not possible.<sup>188</sup>

The strength of this calculation was reinforced, as the deliberations on the proposed agreement proceeded in mid-1951, by a warning from the U.S. Mission in Tokyo to the effect that "we will be dealing with a sovereign government when the convention is finally negotiated," so that "we must . . . be prepared for modifications in the course of the actual negotiations."<sup>189</sup>

Confronted with these realities, Herrington strove to produce an acceptable alternative formula. It was at this juncture that the core principle of the U.S. Government's approach shifted profoundly. In place of the old "forbearance" idea that applied to a specified ocean area, Herrington suggested that any waiver of fishing rights be applied to specified fishery stocks that scientific investigation determined were in danger of overharvesting.<sup>190</sup> As Chapman later described the shift in focus in the May 18 and succeeding drafts: "the concept of the Dulles-Yoshida letters, the mutual forbearance from certain fisheries for the purpose of preserving friendly relations between the fishing countries of the North Pacific . . . disappeared."<sup>191</sup> By early July, the State Department officials charged with developing the agreement's terms had indeed formally renounced the idea of seeking "complete exclusion from the eastern Pacific waters" of the Japanese fleets.<sup>192</sup> "In its stead [there emerged] the concept of exclusion from only fully mature, regulated fisheries."<sup>193</sup>

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188. Letter from William Herrington to Miller Freeman (Oct. 3, 1951) (Wilbert Chapman Papers, UW).

189. Telegram from U.S. Department of State Mission in Tokyo (July 6, 1951), *quoted in* Memorandum from U. Alexis Johnson to Dean Rusk, Fisheries Convention with Japan (July 10, 1951) (File 611.946/7-1051, DOS Records, NA).

190. Letter from William Herrington to Miller Freeman (Oct. 3, 1951) (Wilbert Chapman Papers, UW); *see also* Letter from William Herrington to Ann L. Hollick (Feb. 5, 1977), *quoted in* A. HOLLICK, *supra* note 8, at 426-27, nn.169, 173-74, 176.

191. Letter from Wilbert Chapman to Miller Freeman (Sept. 17, 1951) (Wilbert Chapman Papers, UW).

192. Memorandum from U. Alexis Johnson to Dean Rusk, Fisheries Convention with Japan (July 10, 1951) (File 611.946/7-1051, DOS Records, NA) (reporting decisions of an intradepartmental committee chaired by Russell B. Adams (representing the Secretary), William Herrington, and three others charged with "producing a draft agreement on an urgent basis").

193. Letter from William Herrington to Miller Freeman (Sept. 17, 1951) (Wilbert Chapman Papers, UW).

The State Department committee responsible for developing the agreement formally adopted the new approach in July 1951, stating that it was "premised upon the sound and defensible basis of the need to develop adequate conservation measures for fishery resources whose productivity would otherwise decline under conditions of unlimited exploitation." The "practical effect" of the new approach would be exclusion of the Japanese from five specified fisheries (salmon, tuna, sardine, herring, halibut), but the convention would also recognize "that a nation should not be expected to waive its rights in any fishery in waters contiguous to its own territorial waters, or in any fishery in which it has in the past maintained substantial

In a series of meetings with the fishery industry advisory committee, in internal discussions within the State Department, and in negotiations with other departments of the U.S. Government and with Canada, Herrington succeeded in producing a draft text in September—and eventually a signed Convention—that brought the abstention idea into operation in international fisheries management and treaty law. The essence of his view was reflected in the role that the draft text proposed to assign to an international tripartite commission which, after considering scientific evidence, would advise the signatory nations on which fish stocks qualified for abstention.<sup>194</sup>

In two other important respects, Herrington's efforts were geared to obtaining political and diplomatic compromises. First was his negotiation of terms with Canada, whose government was concerned in general to avoid the appearance of joining in a harsh and unfair treaty that gave it special advantages not enjoyed by other Commonwealth nations.<sup>195</sup> The Canadians were also determined, however, to obtain a firm declaration by the United States—one that would be embedded in the Convention itself—that the abstention doctrine would not be invoked so as to disrupt existing bilateral (Canadian-American) arrangements for salmon and halibut management.<sup>196</sup> Above all, Canada sought to avoid any application of abstention that would permit the United States to deny Canadian fishing vessels free access to the fisheries off the coast of the United States. After talks with Canadian officials in August, Herrington reported to the State Department that they wanted a specific guarantee against invocation of the abstention doctrine against the Canadian fleet. Otherwise, the Canadians feared, they "would be 'frozen in' to their past areas of fishing."<sup>197</sup> The government fisheries officials sent by Ottawa to negotiate for Canada, Stewart Bates and Samuel Ozere, apparently arrived with instructions that they could not accept anything less than the assurance that under this treaty Canadian vessels could never be asked to stay out of any fishery, including the Bering Sea salmon fisheries. In these discussions, Bates drew on many arguments, including one that the Canadians considered the United States fishermen to pose a much greater

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operations." Memorandum from U. Alexis Johnson to Dean Rusk (July 10, 1951) (File 611.946/7-1051, DOS Records, NA).

194. This was reflected in the terms of the Convention providing for annual assessments of the condition of stocks for each species covered in the Convention. Fisheries Convention, *supra* note 3, art. III, reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 11.

195. See *supra* text accompanying notes 95-96.

196. See Herrington, *supra* note 5, at 342.

197. Memorandum for the Files, U.S.-Canadian-Japanese Fishing Treaty (Sept. 4, 1951) (File 611.426/9-451, DOS Records, NA); see also Johnson, *Canadian Foreign Policy and Fisheries*, in CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 52, 60 (1977) (on continuing Canadian concern in the 1950's to protect interests of the coastal fisheries from any American as well as any Japanese fleets that would be adverse to the Canadian interests).

threat, as competitors in the Pacific coastal waters, than did the fishermen of Japan.<sup>198</sup>

Once the impasse had become evident, Herrington obtained firm assurances from the Pacific Coast industry advisory committee that they "had no intention or desire to use the terms of the treaty with respect to Canada."<sup>199</sup> Thus, Herrington gained a free hand in his further talks with the Canadians. On October 12, 1951 he reached a compromise agreement with them on the following draft language:<sup>200</sup>

The Contracting Parties [Japan, the U.S., and Canada] agree that because of the historic intermingling of fishing operations of the United States and Canada in the Northeast Pacific and because of the long-established joint conservation and regulation programs of the United States and Canada, [n]o waiver of exploitation rights by the United States or Canada shall be recommended under the provisions of this Convention with reference to the stocks of fish located in the waters off the Pacific Coa[s]ts of the United States and Canada from and including the waters of the Gulf of Alaska southward.<sup>201</sup>

The other political compromise critical to acceptance of the abstention idea also involved the West Coast fishing interests. It entailed a serious obstacle that arose suddenly in September 1951 from a truly unexpected quarter. It was a moment fraught with irony, for it was Chapman—now serving on the industry advisory group as the American tuna fleet's representative—who raised the issue. Chapman, of course, had

198. Letter from William Herrington to Milton Brooding (Oct. 1, 1951) (Edward Allen Papers, UW).

199. Letter from William Herrington to Miller Freeman (Oct. 3, 1951) (Wilbert Chapman Papers, UW).

200. Letter from William Herrington to Miller Freeman (Oct. 16, 1951) (Wilbert Chapman Papers, UW).

In fact, Herrington was unsuccessful in gaining Canadian support through his discussions with Ottawa in August of 1951. He reported that on August 31 the Canadians explicitly rejected the draft convention, and at that juncture he advised that the U.S. ought to proceed to negotiate with Japan, without Canada. Memorandum for the Files, U.S.-Canadian-Japanese Fisheries Treaty (Sept. 4, 1951) (File 611.426/9-451, DOS Records, NA). Herrington's advice was rejected by the State Department, and so, at a meeting on September 4, 1951, he proposed inserting the following language in the draft:

It is agreed that because of the historic intermingling of fishing operations of the United States of America and Canada in the Eastern Pacific Ocean, and the intermingling of stocks of fish exploited by those operations, no action will be requested under the provisions of this Convention which would result in a waiver of the exercise of fishing rights by the U.S. or Canada in this area.

*Id.* This became the U.S. bargaining position towards Canada, and served as the basis for the language eventually adopted in the Convention.

201. Letter from William Herrington to Miller Freeman (Oct. 16, 1951) (Wilbert Chapman Papers, UW) (with attachments). The language of the provision is also in Fisheries Convention, *supra* note 3, art. IV, reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 165 (spelling errors corrected). The final draft of the Convention did provide for Canada's abstaining from the Bristol Bay salmon fishery, which had traditionally been a fishery unilaterally and exclusively regulated by the United States. *Id.* Annex 2, reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 17.

suggested to Dulles the idea of Yoshida's pledge to keep the Japanese fishing fleets out of the salmon, halibut, herring, sardine, and tuna waters of the Eastern Pacific.<sup>202</sup> Once Herrington had begun to frame specific language that required the regular scientific assessment of the Pacific tuna stocks by the tripartite fisheries commission, however, Chapman and his constituency became alarmed; and in September they demanded that tuna be deleted from the terms of the Convention draft.<sup>203</sup>

Recent scientific investigations, Chapman explained, were producing evidence of abundant tuna supplies in the Eastern Pacific off the coasts of Central and South America. Indeed, these stocks represented a far greater supply than would permit tuna to qualify for abstention under the draft Convention's terms; for the draft made only those fisheries that were "fully utilized" and under scientific study and conservation (or management) regimes subject to abstention.<sup>204</sup> Moreover, the United States had recently concluded the Inter-American Tropical Tuna Convention, and it was instituting a research effort with multilateral regulatory potential.<sup>205</sup> If tuna were to be made subject to abstention in the agreement with Japan—and hence subject to evaluation by the tripartite commission—it would give Japan a foot in the door, Chapman feared, in demanding a share in management and exploitation of the rich, expanding Eastern Pacific tuna fishery.<sup>206</sup> Also, if the United States, in an effort to gain abstention from tuna fishing by Japan, were to insist that the tuna resources were being "fully utilized," such a stipulation would give the Latin American states good reason to curtail American fishing in their offshore waters at a time when several of these states already were claiming jurisdiction far beyond the three-mile limit.<sup>207</sup> In response to the tuna industry's pressure, Herrington deleted the objectionable refer-

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202. See *supra* notes 137-39 and accompanying text.

203. Letter from Wilbert Chapman to Miller Freeman (Sept. 17, 1951) (Wilbert Chapman Papers, UW).

204. See Letter from William Herrington to Miller Freeman (Oct. 3, 1951) (Wilbert Chapman Papers, UW).

205. See Scheiber, *supra* note 14, at 464-65.

206. Letter from Wilbert Chapman to William Herrington (Oct. 12, 1951) (Wilbert Chapman Papers, UW).

207. *Id.* A short time later, Chapman also asked that sardine be removed from the list of fishery stocks subject to abstention. Here again, the fishery was under a regulatory regime developed by American interests. Though the stock was in severe crisis, threatened with depletion, Chapman clearly wanted to keep the Japanese from getting a foot in the door via the abstention concept. Letter from Wilbert Chapman to William Herrington (Oct. 19, 1951) (Wilbert Chapman Papers, UW). On the sardine industry and its problems, see generally McEvoy & Scheiber, *Scientists, Entrepreneurs, and the Policy Process: A Study of the Post-1945 California Sardine Depletion*, 44 J. ECON. HIST. 393 (1984); Scheiber, *supra* note 14, at 417-27. On the diplomatic issues surrounding Latin American nations' jurisdictional claims beyond the three-mile limit and the American tuna fleet, see A. HOLLICK, *supra* note 8, at 68-80; Scheiber, *supra* note 14, at 460, 463-64.



ences to tuna and also to sardine from the American draft text.<sup>208</sup> The way thus was cleared to present the abstention idea in the impending negotiations with Japan.<sup>209</sup>

### B. *The Draft Convention*

As finally accepted by the American fisheries industry and the State Department, and as approved for purposes of further negotiation by the Canadian Government, the U.S. draft included the following key elements:

First, there was a brief preamble that emphasized the conservationist purpose of the agreement, referring to the desire of the parties, "in the interest of world food supplies, that maximum productivity of the fishery resources of the high seas be maintained." The preamble used the word "waive" (rather than "abstain," the word that would be adopted in its place during the subsequent negotiations with Japan) in stating that the signatories realized that "attainment of effective conservation may in some instances depend upon agreement by some nations to waive the exercise of their rights to exploit particular high seas fishery resources."<sup>210</sup>

An earlier version of the preamble circulated to the West Coast industry advisory committee had stated that all parties reaffirmed their "equal rights to exploit the fishery resources of the high seas."<sup>211</sup> In the form finally adopted, the language eliminated the reference to equality; instead, it merely reaffirmed the parties' "rights under international law to exploit the fishery resources of the high seas."<sup>212</sup>

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208. Letter from William Herrington to Miller Freeman (Oct. 16, 1951) (Wilbert Chapman Papers, UW); see also *infra* note 209; *infra* text accompanying note 259.

209. Letter from William Herrington to Miller Freeman (Oct. 16, 1951) (Wilbert Chapman Papers, UW). Ironically, earlier in the formulation of the draft, Herrington himself had raised questions about whether tuna would qualify for abstention under the proposed terms of the Convention, i.e., whether the tuna fishery's productivity would decline if additional entrants were admitted to it. Herrington, still very much a fisheries scientist as well as a diplomat, had studied the data on tuna stocks in August 1951 and concluded that yellow-fin tuna might qualify for abstention but the skipjack tuna probably would not. Herrington's views on this subject are reported in Office Memorandum from B. Norwood to Carl Corse (Aug. 15, 1951) (File 611.426/8-155, DOS Records, NA). Early on, the Japanese also expressed doubt that the scientific evidence warranted classifying Pacific tuna as a fishery that was being maximally exploited. Memorandum from U. Alexis Johnson to Dean Rusk (July 10, 1951) (File 611.946/7-1051, DOS Records, NA).

210. U.S. Draft Convention on North Pacific Fisheries (Sept. 3, 1951) (Wilbert Chapman Papers, UW). The language of the final U.S. draft convention [hereinafter U.S. Draft Convention], the preamble of which is identical to Herrington's draft, is reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 164.

211. Quoted in Memorandum from William Herrington to Milton Brooding (Oct. 2, 1951) (Wilbert Chapman Papers, UW).

212. JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 164. The manuscript draft included a notation that the preamble had been modified "by Legal Advisor's Office [in the Department of State] without any change in meaning." U.S. Draft Convention on North Pa-

Second, the substantive sections of the Convention draft included an expression of agreement to

the principle that the exercise of the right under international law of any Contracting Party to exploit a high seas fishery resource should be waived with respect to any such resource

(a) which scientific evidence indicates will not under more intensive exploitation provide a substantial increase in yield which may be sustained year after year; and

(b) which is under extensive study designed to discover the conditions necessary for maintaining its maximum productivity; and

(c) the exploitation of which is limited or otherwise regulated for the purpose of maintaining or increasing its productivity.<sup>213</sup>

Third, the draft limited the operation of the "waiver" to fisheries specified in the Convention's Annex (which would name salmon, herring, and halibut), and it provided that none of the parties would be expected to waive their fishing rights with respect to three categories of fishery stocks:

[a] any fishery resource the exploitation of which has recently been or is currently being developed and maintained on a substantial scale by that Party, or

[b] which is located in areas of the high seas contiguous to its territorial waters, or

[c] which is harvested in greater part by a country or countries not party to this Convention.<sup>214</sup>

In addition to these exceptions—whose vague phrasing would become a matter of close scrutiny by the Japanese and consequently was tightened in the later negotiations—the final U.S. draft document incorporated the language wanted by Canada guaranteeing that its fishing fleets would not be subject to restrictions in any fisheries in U.S. waters off the Pacific coast from the Gulf of Alaska southward.<sup>215</sup>

Fourth, the draft specified the structure of the administrative and investigatory mechanisms, providing for a commission with equal representation of all three contracting parties that would oversee scientific in-

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cific Fisheries (Sept. 1, 1951) (Wilbert Chapman Papers, UW). In his communications with Milton Brooding, the chairman of the Pacific Fisheries Conference, Herrington offered a somewhat different explanation of the change. It had been made, he stated, "because of the strong feeling with regard to the phrase 'equal rights' expressed by our Advisory Committee and was accepted by some units within the Department [of State] with considerable reluctance." Letter from William Herrington to Milton Brooding (Oct. 2, 1951) (Wilbert Chapman Papers, UW).

213. JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 164-65. These provisions would become, in substantially the same language, the operative provisions of article IV of the Convention in its final form.

214. U.S. Draft Convention, *supra* note 210, reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 165.

215. See *supra* text accompanying note 201.

vestigations and enforcement of the agreement's terms.<sup>216</sup> The Commission would also be responsible—but only after the Convention had been in effect for five years—for determining annually whether the fisheries specified in the Annex (salmon, halibut, and herring) still “qualif[ied] for waiver . . . or whether wider access under effective conservation arrangements applicable to the nationals and vessels of the Contracting Parties can be developed.”<sup>217</sup> Upon request of any party to the agreement, the Commission would also be responsible for investigation of any additional fisheries resources being harvested by one or more of the parties, “for purposes of determining whether such resource qualifies for waiver”—provided, however, that again this would be done only after five years had elapsed following ratification of the agreement.<sup>218</sup>

Fifth, there was a provision concerning the applicability of the general “waiver” (i.e., abstention) principle in regard to any future agreements made by the signatory parties with other nations. Late in the planning process, in the draft dated September 3, 1951, Herrington proposed language that would have pledged all parties to “apply the principles” of waiver as stated in the draft Convention document. In the last days before negotiations with Japan began, however, this language was softened, providing only that each government would “give full consideration to the possible application of the principles” of waiver as stated in the Convention.<sup>219</sup> Even then, it was not to be in any negotiations with other governments, as Herrington's September 3 draft had required, but only in negotiations “in respect to problems involving the question of waiver of the exercise of the right of exploitation.”<sup>220</sup>

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216. U.S. Draft Convention, *supra* note 210, reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 166-68. Some of the enforcement provisions, especially relating to the reporting of fishing harvest data to the Commission, were controversial in both the Convention's planning and later in its negotiations, but the details of these controversies lie outside the purview of this Article.

217. *Id.*, reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 167-68.

218. *Id.*, reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 168.

219. *Id.*, reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 164.

220. *Id.*, reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 170. This proposed article was heatedly opposed by the U.S. tuna industry. Chapman, representing the tuna fleet, declared that the tuna interests probably were not alone in their alarm at an approach that would constrain future diplomatic arrangements—especially in regions such as Latin America and the Gulf of Mexico, where American fishing interests wanted a long-term hegemony and opposed any sharing of power to manage the resource except on terms they would formulate. He wrote:

Since we do not believe that the concepts of this proposed treaty are adequate to take care of the international fishery problems of this nation, I could not bind myself, because of present expediency, to considering only that type of treaty in the future. Certainly, opposition to such a clause could be expected from the Gulf shrimp people at the time of ratification of the treaty. So far as I can see the Gulf shrimp problem [involving conflict with Mexico and claims to jurisdiction in Gulf waters] can be taken care of eventually only by the type of fishery treaty which we [Chapman and his staff, in the State Department] originally considered in the Pacific.

One final question of importance related to where the negotiations with Japan would be conducted. The State Department's official explanation for selecting Tokyo, rather than holding the talks at a place in Canada or the United States, turned on the fact that the first negotiating draft would be presented by the United States. The Tokyo site was preferable to allow the Japanese Government to expedite its internal discussions of how to respond to the U.S. draft, and to foster consultation with Japan's commercial fishing interests—so as to involve them actively in the decisionmaking process and, thereby, “to promote acceptance of the final results of the Conference.”<sup>221</sup>

The decision to schedule the talks in Tokyo probably also reflected the prevailing attitude toward the proposed Convention in the Department of State, especially the view that Japan should be treated with benign concern for its economic interests and the basic U.S. commitment to economic internationalism. Thus, in an earlier phase of the discussions, when General MacArthur suggested that a Japanese delegation be sent to Washington to open a formal exchange of views on the fisheries issue, Secretary of State Dean Acheson replied that the Tokyo location was preferred. If required to witness at first hand what difficult times the Japanese people were facing, Acheson indicated, the American delegation (and in particular, no doubt, any American fishing industry representatives in that delegation) would be likely to appreciate better Japan's situation.<sup>222</sup> Here again, one may argue, is evidence that powerful forces in the highest circles of the U.S. Government were mobilized against any tendencies toward negotiation with Japan in an atmosphere of “duress.”<sup>223</sup>

Meanwhile, the State Department moved to constitute the official U.S. delegation in a way that would give highly visible representation to the fishery industries. Herrington saw to it that Edward Allen was appointed as an advisory member of the delegation—an important move because Allen, a distinguished international lawyer and long a member of the Canadian-American bilateral halibut and salmon commissions, was the acknowledged chief spokesman for the U.S. salmon interests in na-

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Letter from Wilbert Chapman to William Herrington (Oct. 12, 1951) (Wilbert Chapman Papers, UW).

The provision in question later was removed from the Convention, as revised in Tokyo, and rendered in generalized form as Resolution III of the Conference. The latter called upon each party, in negotiations with other governments “in respect to problems similar to those covered by the Convention . . . [to] give full consideration to the spirit and intent of this Convention.” JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 7.

221. Herrington, *supra* note 5, at 341; Herrington interview, *supra* note 154.

222. Letter from Dean Acheson to SCAP (May 11, 1951) (File 911.946/4-2651, DOS Records, NA). The letter states that a Tokyo site would give members of the delegation “a wider view of Japanese problems and positions.” *Id.*

223. Memorandum from Wilbert Chapman to Miller Freeman (Sept. 17, 1951) (Wilbert Chapman Papers, UW).

tional policy councils.<sup>224</sup> Also appointed as official advisers were: Milton Brooding, head of the Pacific Fisheries Conference; Richard S. Croker, Chief of the Bureau of Marine Fisheries, State of California (and the leading figure among the scientists administering the state fishery management agencies on the Pacific Coast); Donald P. Loker, a leading Southern California tuna company's general manager; and Harold Loken, manager of the halibut fishing boat owners' association. Herrington was head of the delegation.<sup>225</sup>

### C. *The Tripartite Conference in Tokyo*

The American and Canadian delegations arrived in Japan in early November 1951, in response to a formal invitation from the Japanese Government. And so commenced the historic, and still controversial, meetings that led to adoption of the North Pacific agreement with its much-debated abstention provisions.

From the standpoint of hard-liners on the American side, the negotiations were opened on an inauspicious note. Thus Allen, counsel to the Seattle-Alaskan salmon industry trade association, and long a proponent of excluding Japanese vessels from Bristol Bay, would later complain that immediately on the conference's opening, William J. Sebald, who as U.S. Political Advisor to SCAP was the ranking U.S. diplomat in Japan, openly reassured the Japanese as to their freedom of action.<sup>226</sup> The general peace treaty had been signed earlier in the year, in San Francisco, but it had not yet been ratified; hence, to that degree, Japan's sovereignty was still a somewhat problematical issue. In a memorandum made part of the Conference record, Sebald informed the Japanese Government that it should be understood that Japan was negotiating on the basis of "ad hoc sovereign equality with the Governments of Canada and the United States."<sup>227</sup>

Looking back a few years later on the conference's result, Allen stated: "That was a nice startoff. Under the circumstances . . . we got

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224. See generally R. JACKSON & W. ROYCE, *supra* note 6, at 223-24; Scheiber, *supra* note 14, at 443-47 (discussing Allen's career).

225. The other official members were Milton James, Assistant Director of the U.S. Fish and Wildlife Service, Department of the Interior, and Warren Looney, who had long served as the number two person in the Fisheries and Wildlife Office under Chapman and then Herrington. See JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 2; see also R. JACKSON & W. ROYCE, *supra* note 6, at 29-30.

226. Letter from Edward Allen to Walter Shiel (Aug. 25, 1955) (Edward Allen Papers, UW).

227. Memorandum from Political Advisor Sebald to Japanese Government, Negotiation of International Convention for the Fisheries of the North Pacific Ocean (Tokyo, Nov. 5, 1951), reprinted in JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 149.

everything it was possible to get and more than it looked as if we had any prospect of getting. . . . I don't know who won the war."<sup>228</sup>

To Japan's diplomats at the conference, however, it must have seemed evident enough who had won the war. For above all, the negotiations in Tokyo involved their compliance in a major revision of the three-mile principle. They came to accept, in the end, the formal exclusion of their fishing fleets from a very substantial segment of the rich fishery resources in the Northeast Pacific. From the Japanese vantage point, whatever the reasons that may have justified giving the North American powers the advantage, it was an agreement that gave one side "a maximum share . . . while giving nothing in return to others."<sup>229</sup> Indeed, even one of the U.S. diplomats closest to the scene admitted that "little in the form of tangible benefits" was won by Japan from the Convention negotiations; the Convention was valuable to Japan mainly as "a contribution to harmonious relations with the United States and Canada."<sup>230</sup> But from the pragmatic vantage point—one that surely Yoshida steadfastly represented—the paramount goal had to be restoration of *de jure* sovereignty in the community of nations, something that would be advanced by signing a fisheries treaty as expeditiously as possible.<sup>231</sup>

Moreover, by accepting a major breach in the three-mile principle and therefore compromising her freedom of access to ocean resources on the high seas, Japan risked that "the convention . . . would establish a possible pattern for other fisheries treaties" that it needed to conclude with Asian nations in regard to fishing rights in the Western Pacific.<sup>232</sup> Indeed, in their basic statement of position to the Conference, on November 15, 1951, the Japanese delegates referred specifically to the "complex" historic relationships regarding fisheries between Japan and the countries of Asia and the South Pacific. In light of these relationships, they declared, it was essential to Japan that the Convention be "reasonable, fair and equal in its provisions so as to serve as a good precedent for

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228. Letter from Edward Allen to Walter Shiel (Aug. 25, 1955) (Edward Allen Papers, UW).

229. S. ODA, *supra* note 4, at 70.

230. N. Bond, Counselor of Mission, USPOLAD, Tokyo, Report to Department of State, Tripartite Fisheries Conference (Jan. 4, 1952) (File 611.006 NP/1-452, DOS Records, NA).

231. This view of Yoshida's position, which accords with the portrayal in Professor Dower's authoritative biography, J. DOWER, *supra* note 13, at 312, is also supported by the fascinating revelation in Herrington's memoir, *Diplomacy and Fish*, *supra* note 6, at 107-08, that Yoshida intervened, at Political Advisor Sebald's behest, at a critical juncture to prevent the Convention talks from breaking down.

232. Herrington, *supra* note 5, at 342. Article 9 of the Peace Treaty required Japan to negotiate fisheries issues promptly with Allied powers desiring such talks. See *supra* text accompanying note 177.

the subsequent treaties that Japan will be concluding with other countries."<sup>233</sup>

The actual negotiations turned on several key points requiring agreement on rhetoric, substantive detail, or both. First was the matter of the preamble. In place of the American draft text's language, the Japanese wanted an expression of principle that "exploitation of the fishery resources of the high seas is open to all nations on an equal footing under both the principles of international law and international customs."<sup>234</sup> The Japanese also proposed an affirmation in general terms that the Convention would not embody "discriminatory exclusion" of any party from exploitation of ocean fisheries, or "any discriminatory restrictions or rules with respect thereto."<sup>235</sup>

The Japanese proposed text moved from this basis in principle to the substance of what the U.S. draft termed "waiver" and what eventually became known as abstention. The references to equality of access and nondiscrimination were embodied in a key phrase that qualified the waiver idea. When it was "clearly established by scientific evidence internationally acknowledged" that a specific stock of fish was at its point of "maximum fishing," and the purpose of sustained productivity would be served, the signatory parties would "*voluntarily and on an equal footing* refrain from fishing activities."<sup>236</sup> As the Canadian delegate Stewart Bates aptly summarized the difference, the United States draft text began on the premise that conservation and rational management should be regarded as basic to the international legal regime for marine fisheries, whereas the Japanese draft began with "free access and free competition on the high seas," only then admitting the need for some exceptions (on the model of the international whaling convention) to the free and open order.<sup>237</sup>

Compromise was reached on the preamble's language, so that the document would read that the three powers were:

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233. JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 173. The USPOLAD report filed after the negotiations were over underlined this concern. It stated:

Throughout the Conference it was obvious that the major concern of the Japanese Delegation was to avoid any commitments which might be used by Asiatic nations as precedents for the limitation or curtailment of Japanese fishing. . . . Accordingly, every point discussed . . . was carefully examined by the Japanese to see what its effect might be on future negotiations and future fishing relations.

N. Bond, Counselor of Mission, USPOLAD, Tokyo, Report to Department of State, Tripartite Fisheries Conference (Jan. 4, 1952) (File 611.006 NP/1-452, DOS Records, NA).

234. International Convention for the Conservation and Development of the High Seas Fisheries of the North Pacific Ocean (Japanese Proposed Treaty Text), Nov. 15, 1951, *reprinted in* JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3 at 175.

235. *Id.*, *reprinted in* JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 176.

236. *Id.* (emphasis added); see S. ODA, *supra* note 4, at 68.

237. JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 82.

Acting as sovereign nations in the light of their rights under the principles of international law and custom to exploit the fishery resources of the high seas, and

Believing that it will serve the common interest of mankind, as well as the interests of the Contracting Parties, to ensure the maximum sustained productivity of the fishery resources of the North Pacific Ocean, and that each of the Parties should assume an obligation, on a free and equal footing, to encourage the conservation of such resources.<sup>238</sup>

As to the major substantive provisions of the Convention, room was left for the eventual reentry of Japan's fishing fleets into the waters of the Northeast Pacific, although they accepted temporary exclusion through the abstention formula. Reentry was no trivial or merely theoretical matter, for after the five-year waiting period the tripartite scientific board that was created by the Convention in fact did engage in ambitious new studies of the stocks that originally were designated for abstention. As a result of these studies and their recommendations, virtually all North American herring stocks would be removed from abstention during 1960-61.<sup>239</sup> Of enormous moment, too, was the subsequent removal from the abstention list of halibut in 1965—a fishery that had been under joint management and regulation by Canada and the United States (and under exploitation by their vessels exclusively) for nearly thirty-five years.<sup>240</sup>

Even at the outset of the Convention's operation, before systematic reconsideration of individual stocks would begin, the Japanese fishing fleets had the advantage of a key decision by the scientific advisory body at Tokyo to give North American salmon protection under abstention only in the waters east of the 175th meridian, West longitude.<sup>241</sup> This group of scientists, representing the three signatories, had been assigned the task of defining (in the Annex of the Convention) the specific stocks of fish that were then being exploited at maximum sustained yield, and hence subject to abstention if also under conservation regimes. Agreement was reached fairly readily on halibut and herring stocks, but the terms for abstention regarding Northeast Pacific salmon became highly controversial.<sup>242</sup>

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238. Fisheries Convention, *supra* note 3, at 9; *see also* Herrington, *supra* note 5, at 343-46.

239. R. JACKSON & W. ROYCE, *supra* note 6, at 114-15; *see* R. VAN CLEVE & R. JOHNSON, *supra* note 6, at 1-2.

240. R. JACKSON & W. ROYCE, *supra* note 6, at 115-19; *see also* D. JOHNSTON, *supra* note 5, at 279-80; E. MILES, MANAGEMENT OF MARINE REGIONS, *supra* note 6, at 97-98; R. VAN CLEVE & R. JOHNSON, *supra* note 6, at 12-15.

241. Protocol to the Proposed International Convention for the High Seas Fisheries of the North Pacific Ocean, *reprinted in* Herrington, *supra* note 5, at 346, *and in* JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 18 [hereinafter Protocol to the North Pacific Fisheries Convention].

242. JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 181-83; Herrington, *Diplomacy and Fish*, *supra* note 6.



Of course, the Japanese during their 1937-38 expeditions to Alaskan waters had collected data on North American salmon migrations and their availability in the Bering Sea and mid-North Pacific regions; but the records of their findings had been either lost or hidden, or else were simply overlooked when American occupation forces in 1946-48 systematically collected for translation and study various Japanese scientific files relating to Pacific fisheries.<sup>243</sup> The U.S. Government, by contrast, had never conducted extensive investigations of salmon beyond the near-coastal regions of Alaska, and the Canadians were no better informed. Therefore, Herrington and his scientific advisers had no reliable information on which to base an estimate of where to draw the line demarcating the westward limit of the abstention area for the Northeast Pacific salmon stocks; that is to say, they had no good basis on which to say how far the salmon of Alaskan and other North American streams migrated out into the deep waters of the Pacific.<sup>244</sup> The best guess, Herrington believed, would be the 180th meridian.<sup>245</sup> Hence, the U.S. delegation was "astounded," as Herrington later recalled, when Fujita, the chief Japanese negotiator, proposed the 165th meridian West—far closer to the North American shore than the American diplomats had expected Japan to demand.<sup>246</sup>

"In the course of the debate that ensued," Herrington has written,

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243. Herrington interview, *supra* note 154 (June 1988) (regarding the American negotiating team's lack of data). On the 1937-38 Bristol Bay expeditions, see *supra* text accompanying notes 15-18. The U.S. Occupation forces' survey (apparently supervised by U.S. Fish and Wildlife Service personnel) and translation of Japanese texts on Pacific fisheries, is mentioned frequently in the reports of the Pacific Ocean Fishery Investigations (POFI) scientific staff.

The American effort at collecting and translating fisheries research materials focused mainly upon Japanese tuna fishing technology and science. The work was undertaken by staff members of POFI, a federal project based in Hawaii, in cooperation with SCAP. Milner Schaefer, Presentation to Industry Representatives: Program of the [POFI] Sections of Biology and Oceanography 6-8 (Oct. 7, 1949) (POFI Files, U.S. Fish and Wildlife Service Records, RG 22, NA). Schaefer, head of biological research for POFI, declared that the Japanese materials proved to be "of great value both for planning our biological research and as a guide to fishing operations." *Id.* at 8.

244. Herrington, *Diplomacy and Fish*, *supra* note 6, at 107. In 1957 Allen provided an interesting commentary on American and Japanese scientific intelligence both at the time of the 1951 negotiations and six years later. Reporting on recent meetings of the North Pacific Fisheries Commission (the agency established to implement the 1952 Convention), Allen wrote that only in recent months had American fishery officials and scientists become aware of data showing that Asian and Alaskan stocks of salmon intermingled in the North Pacific as far west as 165 degrees East (20 degrees beyond the line established for abstention in the 1951 talks). Japanese fishing vessels had thus unwittingly been permitted under the Treaty to fish salmon from American spawning grounds in a vast area of the central North Pacific. "You see," wrote Allen in private correspondence, "as the Japanese now admit that they knew when negotiating the treaty, but we did not (in fact our scientists thought otherwise), salmon from both sides [of the North Pacific] are found all over the North Pacific north of about 48 degrees N., and [the] Bering Sea." Letter from Edward Allen to William Bishop, Jr. (Nov. 10, 1957) (William Bishop, Jr., Papers, Bentley Library, University of Michigan).

245. Herrington, *Diplomacy and Fish*, *supra* note 6, at 107.

246. *Id.*

Fujita refused to budge from the line he had proposed. It became clear that the Japanese had convincing information that there were a hell of a lot of salmon in that area and, from the presumptive knowledge in our possession, they had to be mostly of North American origin. We struggled over this issue well into the night, and on adjourning Fujita remarked he would rather continue under the present restraints on Japanese fishing than make any concessions on moving the line westward [beyond 165 degrees].<sup>247</sup>

Persuaded that the negotiations were about to collapse on this key point, Herrington then used outside leverage for the first and only time during the meetings.<sup>248</sup> After consultation with the Canadian delegation leaders, he worked out a proposed compromise formula, which provided that the line should be drawn at 175 degrees West, but with a commitment to conduct further research to determine so far as possible the exact location and degree of intermixture between Asian and American salmon stocks. Then Herrington went to Political Advisor Sebald to report on the deadlock. Sebald pulled the levers of highest level diplomacy, calling upon Yoshida and persuading him to intervene personally.<sup>249</sup> On Yoshida's instructions, Fujita accepted the 175th meridian line, together with the commitment to conduct research on the migration fields and boundaries.<sup>250</sup> This was consistent, of course, with Yoshida's posture on the fisheries issue since early 1951: that signature of the general peace treaty and the attainment of full sovereignty had to be given highest pri-

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247. *Id.*

248. *Id.* at 107-08.

249. *Id.* Corroborating Herrington's revelation that Yoshida personally decided that the Japanese should accept the compromise 175 degree West dividing line is a summary report on the Tokyo negotiations prepared by POLAD. N. Bond, Counselor of Mission POLAD, Report to Department of State, Subject: Tripartite Fisheries Conference (Jan. 4, 1952) (File 611.006 NP/1-452, DOS Records, NA). In an acerbic commentary on the differences of scientific opinion that were aired, the report stated: "[a]lthough the evidence submitted by biologists was exiguous to say the least, abundance of discussion and firmness of position more than compensated for this defect." *Id.*

Herrington's recollection on this point is further substantiated by a confidential dispatch from the United States Mission in Tokyo stating: "By decision of Prime Minister Yoshida, the Japanese Delegation agreed to abstain from salmon fishing for salmon east of 175 degrees, west longitude." POLAD, Tokyo, Mission Despatch No. 898, Weekly Political Notes from Japan (Dec. 13, 1951) (File 794.00/12-1351, DOS Records, NA) (emphasis added).

250. Herrington, *Diplomacy and Fish*, *supra* note 6, at 108. The language incorporated into the Protocol to the Convention was that the Commission to be established "shall, as expeditiously as practicable, investigate" the issue of intermingling and migration, with the 175th meridian and its extension through the western extremity of Atka Island to be "considered as provisional lines which shall continue in effect subject to confirmation or readjustment in accordance with the procedure" that was specified for investigations by the commission. Protocol to the North Pacific Fisheries Convention, *supra* note 241, *reprinted in* JAPAN, MINISTRY OF FOREIGN AFFAIRS, *supra* note 3, at 18-19.

ority, with Japan compromising its claims to fishing rights when necessary.<sup>251</sup>

As would later prove to be the case, the 175th meridian dividing line, demarcating the area within which the American salmon industry in Alaska would be protected from Japanese fishing competition, proved to be far too close to the North American coast to protect the Alaskan salmon runs from very substantial Japanese interception.<sup>252</sup>

The Japanese also won an important concession in the agreement to establish ten years as the duration of the Convention in force, after which time it might be unilaterally abrogated by any signatory party.<sup>253</sup> Also of significance was a series of painstaking clarifications of language and substantive provisions concerning the stocks and types of fisheries that would not be subject to abstention. Under these provisions, first, no party would be required to abstain from fishing any stocks that had been

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251. On the Yoshida-Dulles exchange, see *supra* text accompanying notes 130-65. Meanwhile, apparently in January 1952, Yoshida asked that the SCAP Zone be enlarged immediately to permit fishing by Japanese vessels in most of the waters of the Trust Territories, in the ocean region centering on Hawaii, and also in waters of the East China Sea. The State Department concurred with SCAP in rejecting the request, finding that such an expansion of the Zone would be undesirable since it might "cause serious deterioration of Japan's relations with other interested governments in the Far East." U.S. Department of State, Monthly Political Summary, Jan.-Feb. 1952 (n.d.) (File 794.00/3-752, DOS Records, NA).

Earlier, the State Department raised the issue with Herrington as to whether a specific line at 175 degrees or anywhere else was desirable. Apparently there was a concern about a "MacArthur line" psychology" that would be evoked by a line comparable to the fishing zone lines that MacArthur had promulgated as Supreme Commander during the Occupation. Cable No. 6884 from William Herrington to Secretary of State Acheson (Dec. 15, 1951) (File 611.006 NP/12-1551, DOS Records, NA). Herrington gave assurances that the line—which was provisional and open to reconsideration—was necessary for conservation purposes and was acceptable to the Japanese delegation (which "desired clear differentiation"); in addition, he warned, the American industry advisors would approve the convention only if such a line of demarcation were specified. *Id.* Apparently Herrington's firm statement set the issue to rest, as no further correspondence on the matter was found in the archival records.

252. See Letter from Edward Allen to William Bishop, Jr. (Nov. 10, 1957) (William Bishop, Jr. Papers, Bentley Library, University of Michigan) (on the parties' understandings of the extent of the salmon runs); see also E. MILES, *THE MANAGEMENT OF MARINE REGIONS*, *supra* note 6, at 61; R. VAN CLEVE & R. JOHNSON, *supra* note 6, at 18-19; Memo, *The International North Pacific Fisheries Commission: A Thirty-Year Effort to Manage High Seas Salmon and Some Suggestions for the Future*, 29 ANADROMOUS FISH L. MEMO 1, 3-4 (1985).

When American scientists, long after the Japanese had known it, finally became aware that salmon spawned in American water intermingled with Asian salmon far out in the Pacific, west of 175 degrees West longitude, they also became aware through tagging and other experimental research that different populations of salmon followed varied migratory patterns at sea. This made all the more difficult the question of where a line ought more properly to be drawn. Letter from Edward Allen to William Bishop, Jr. (Nov. 10, 1957) (William Bishop, Jr., Papers, Bentley Library, University of Michigan).

253. Fisheries Convention, *supra* note 3, art. XI, § 2. In August 1951 the West Coast fishery advisory committee asked Herrington to seek a fifteen-year term for the Convention, but stated that it "would be agreeable to settling for ten if necessary." Memorandum from B. Norwood to Carl Corse (Aug. 15, 1951) (File 611.426/8-155, DOS Records, NA). Thus, the ten-year term agreed to at Tokyo was within the range acceptable to the Department of State and the American fishing industry.

“under substantial exploitation by that Party” for at least twenty-five years preceding the Convention<sup>254</sup>—a concept that would work distinctly to Japan’s advantage if applied in its negotiations with Asian and South Pacific nations. Second, no fishery would be made subject to abstention if harvested mainly by a nation other than one of the signatories.<sup>255</sup> And finally, abstention would not be demanded of any party in “waters in which there is historic intermingling of fishing operations of the Parties concerned, intermingling of the stocks of fish exploited by these operations, and a long-established history of joint conservation and regulation among the Parties concerned.”<sup>256</sup>

Formal ratification of the Convention awaited the conclusion of the ratifying process for the general peace treaty, which occurred in 1952. Then the three signatory governments set their respective constitutional mechanisms for ratification in motion, and the Convention went into force in 1953.<sup>257</sup>

## VI

### CONCLUSION: THE ABSTENTION CONCEPT AND LAW OF THE SEA

In its own day, the Tripartite Convention served the purposes of advancing the general peace treaty negotiations and of restoring Japan to full sovereign status among nations. The same forces within the U.S. Government that had supported General MacArthur’s policies favoring rapid reconstruction of Japan’s fishing fleet and expansion of its fishing activities—the elements in U.S. policy councils that had staunchly resisted pressures from other Allied powers to confine Japanese fishing operations on the high seas—had also opposed the imposition of harsh exclusionist terms wanted by the West Coast fishing industry and elements of Canada’s fisheries. During the planning for the 1952 Convention, these forces consistently resisted the unilateralist style of exclusion that had been presaged by the Truman Fisheries Proclamation of 1945

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254. Fisheries Convention, *supra* note 3, art. IV, § 1(b). Section 2 of the same article qualified the 25-year rule (i.e., that abstention does not apply to any stocks harvested during the 25 years preceding the Convention), as follows: “In any decision or recommendation [by the Commission] allowances shall be made for the effect of strikes, wars, or exceptional economic or biological conditions which may have introduced temporary declines in or suspension of productivity, exploitation, or management of the stock of fish concerned.” *Id.* art. IV, § 2.

255. *Id.* art. IV, § 1.

256. *Id.* In order to cover all contingencies, and to meet the terms of the prior agreement with Canada on language, *see supra* text accompanying note 201, the Convention explicitly recognized that this proviso would apply to Canada and the U.S. “in the waters off the Pacific Coasts of the United States of America and Canada from and including the waters of the Gulf of Alaska southward.” Fisheries Convention, *supra* note 3, art. IV, § 1(b)(iii)(3).

257. *Id.* art. XI. See Appendix I for a chronology of the negotiation and ratification of the Convention.

and then taken up by Chapman in State Department deliberations on fisheries policy.<sup>258</sup>

The last-minute withdrawal of tuna from the list of species that American policy planners had sought to include in the terms of the Convention expressed another important reality that framed the negotiations in Tokyo: the U.S. Government's need to balance the interests of a swiftly growing distant-water tuna fleet—a fleet whose economic welfare and prospects for continued expansion depended heavily upon the three-mile jurisdictional rule and its enforcement—against the demands of the salmon and halibut industries for significant abridgement of the traditional U.S. commitment to the three-mile rule in Alaskan and other Northeast Pacific waters.<sup>259</sup>

What was not sufficiently appreciated by U.S. diplomats at the time of the negotiations, though it would become a prominent theme in later scholarly and diplomatic debates on abstention, was the potential of the abstention doctrine as a juridical foundation for exclusionist ocean policies—and, eventually, its potential as both rationale and instrument for the movement toward global ocean enclosure. The point was not lost, however, on Japan's negotiators, political and industrial leaders, or scholarly commentators.<sup>260</sup> From the moment that Herrington and the American delegation presented the U.S. draft text in Tokyo, the Japanese realized that the writing was on the wall; they did their best to trim and minimize their losses, seeking to phrase the Convention's language and shape the procedures it prescribed in ways that would downplay the abstention principle's exclusionist potential.

There was no denying, however, that the abstention principle, as embodied in the Convention, was a compromise of strongly conflicting interests and theoretical positions. No matter how much the American delegation sought to stress the doctrine's basis in conservationist objectives attained through rational management, still ineluctably embedded in the abstention concept was the idea that firstcomers had a special claim to fishery resources that were being harvested at the level of maximum sustainable yield. In addition, abstention was dualistic in its very essence; its applicability hinged on acceptance by participating nations of the basic principle of conservationist management of ocean fisheries, but equally at its core was the exclusion of fishing nations from ocean waters considered under prevailing international law to be freely accessible to all.<sup>261</sup>

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258. See *supra* text accompanying note 81.

259. See Scheiber, *supra* note 14, at 433-34, 442.

260. See S. ODA, *supra* note 4, at 87-90.

261. In one of the standard treatises on ocean law, abstention is categorized very realistically (along with outright extension of the territorial claims beyond three miles such as Iceland initiated in the 1950's and the Latin American nations initiated even earlier) as one of two

The dualism of abstention was unmasked in ensuing years when the United States sought in U.N. law of the sea discussions, beginning in 1955, to obtain the support of the world community for elevating abstention to the status of general law.<sup>262</sup> Nations seeking to extend their jurisdiction or territorial claims to ocean waters beyond three miles successfully urged that the premises of abstention could readily justify their own more comprehensive unilateralist claims.<sup>263</sup> Moreover, as one of the principal American representatives in the law of the sea talks of the late 1950's and early 1960's has indicated, the United States negotiators were "parochial" in their failure to appreciate fully the negative impact that abstention agreements might easily have upon less-developed coastal nations.<sup>264</sup> Part of this parochialism was the American diplomats' failure to anticipate how well the less-developed nations would mobilize to defeat abstention and throw their weight on the side of Iceland and the Latin American states that were pushing for the extension of jurisdictional rights of coastal states beyond three miles to six, twelve, or even 200 miles offshore.<sup>265</sup>

One positive achievement associated with this effort was that the U.S. Government, though it failed utterly to gain adoption of the abstention principle as an accepted doctrine, succeeded in placing at the center of the law of the sea discussions the concept of international agreements for allocation of fisheries based on the maximum sustainable yield principle and, more generally, the notion of rational management and conservation.<sup>266</sup> This was especially significant because of the stunningly rapid transformation that had occurred in oceanographic research methods during the decade previous to the convening of the first U.N. technical conferences in 1955. A revolution in oceanographic techniques had taken place, with profound effects on the methods for determining the

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major categories of efforts in postwar international relations to achieve "allocation of exclusive use to particular states." M. MCDUGAL & W. BURKE, *supra* note 34, at 957.

Judge (then Professor) Oda provided the most thorough and searching contemporary analysis of the abstention doctrine's theoretical ambivalence. See S. ODA, *supra* note 4, at 87-90.

In another Japanese commentary on abstention, the 1953 Convention, and Japanese-U.S. fishery relationships, Tomonari Matsushita contends that abstention was fundamentally exclusionist and only peripherally and secondarily conservationist. Matsushita, *supra* note 157, at 10, 13. Matsushita contends that because the 1953 Convention permitted the United States effectively to regulate fishing by other nations beyond the three-mile limit off its shores, the Treaty "may be called a concretization of the 'Truman Proclamation.'" *Id.* at 3. On the Truman Fisheries Proclamation, see *supra* note 30.

262. These efforts may be traced through documents reprinted in 4 M. WHITEMAN, *supra* note 3, at 968-77; and through analytic accounts in A. HOLLICK, *supra* note 8, at 100-01, 149-50; and M. MCDUGAL & W. BURKE, *supra* note 34, at 956-64.

263. See 4 M. WHITEMAN, *supra* note 3, at 972-74; see also M. MCDUGAL & W. BURKE, *supra* note 34, at 956-64.

264. Interview with Mr. Burdick Brittin, in Falls Church, Virginia (June 1988).

265. *Id.*

266. This view is stressed by Herrington, *Diplomacy and Fish*, *supra* note 6.

condition of ocean fisheries stocks—as an ambitious ecosystemic approach displaced older, more simplistic concepts of measurement and assessment. Hence, the American initiatives for abstention in the U.N. also served to place at the very center of the emerging international ocean law debate the New Oceanography and its implications for management through legal regimes.<sup>267</sup>

The defeat of the U.S. position on abstention was signalled dramatically during debates on the 1958 U.N. Conference's Convention on Fishing and Conservation of the Living Resources of the High Seas, when the Mexican delegate Luis Padilla-Nervo spoke to the issue of the doctrine's ambivalence. Indicating how, at worst, abstention might be nothing more than a cynical facade for the appropriation of what ought to be common resources accessible to all nations, Padilla-Nervo contended that it could also be seen in a favorable light—but not as the United States had portrayed it, to be applied only when resources were already under intensive exploitation by nations with conservationist management regimes in place. Abstention was in effect exclusionist, he insisted, but it could be characterized as a principle of "justified exclusion of third parties."<sup>268</sup> Justification could be derived, he explained, from a large number of situations and needs, not only from the sort promoted by the Canadian and American fisheries industry in the 1952 Tripartite Convention. As his prime example, Padilla-Nervo cited the matter of nations whose economies or coastal communities were critically dependent upon an offshore fishery resource; such nations, he argued, should have a justified claim to exclusion of others. He listed other bases for justifiable exclusion, using arguments that would become commonplace in ensuing U.N. debates—as the major distant-water fishing nations (particularly Japan) eager to avoid exclusionist claims, and the nations (such as Iceland and Peru) that were seeking wider territorial seas or fisheries jurisdiction beyond three miles, joined forces to make it impossible to sell abstention as a new principle of law.<sup>269</sup>

In sum, it had become politically impossible to transform a principle originally formulated to deal with a specific situation—the demands of the halibut and salmon fishing industries of the Pacific Northwest and Canada, in a context of dealing with Japan as a defeated power, but with

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267. On the New Oceanography, see Scheiber, *supra* note 14, at 383-87; for a good general discussion, see OCEAN SCIENCES (E. Long ed. 1964). On the introduction of management issues into U.N. discussions (with reference to the new scientific methods and basic ecosystemic approaches), see Van Cleve, *supra* note 6, at 47-63.

268. *Summary Records of the Eighth Session*, [1956] 1 Y.B. INT'L L. COMM'N 123, U.N. Doc. A/CN.4/SR.357, ¶¶ 43-49. For a more general discussion of the debates, see M. MCDOUGAL & W. BURKE, *supra* note 34, at 959-64.

269. *Summary Records of the Eighth Session*, *supra* note 268, ¶¶ 43-49; see also A. HOLLICK, *supra* note 8, at 100.

the necessity for compromise on both sides for larger political reasons—into a principle of universal applicability.

The irony of the effort to achieve this transformation was underlined in 1958 by the role of Chapman. Having played so large a part in preparing the way for the diplomacy of 1951 and the formulation of the North Pacific agreement, Chapman was by the late 1950's the chief strategist and public spokesman for the American tuna fishing industry. In this new role, he had come to regard the Japanese distant-water tuna fleet as the American tuna fleet's most important natural ally in the fight to maintain the sanctity of the three-mile rule against exclusionist doctrines.<sup>270</sup> In response to the stalemate signalled by Padilla-Nervo's attack on the pretenses of the American rationale for abstention, Chapman announced to the State Department in 1958 that the tuna fleet interests would no longer support even nominally the championing of abstention.<sup>271</sup> Its critics, most notably Padilla-Nervo, had exposed the doctrine's essential dualism; and abstention had to be written off for what it was, Chapman declared—a doctrinal open door for unprincipled exclusion of marine fishing fleets by all coastal powers that saw fit to invoke special circumstances as a rationale. Hence, he counseled that abstention be abandoned as quixotic and ill-advised.<sup>272</sup>

In a broad historical view, abstention proved enduringly important, both because it established an interim international fishing regime for the Northeast Pacific and because it served as a catalyst in the development of ocean law. But it was not, as Herrington and its other principal authors had intended in the 1950's, a catalyst that would make the scientists' evaluation of ocean resources the dominant factor in international agreements and principles concerning fisheries. Instead, it proved to be a catalyst in the political process that led to ocean enclosure, culminating in the exclusive economic zone concept that has been adopted both in the U.N. Law of the Sea and in the unilateral ocean policies of the United States.<sup>273</sup>

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270. See Scheiber, *supra* note 14, at 504-06.

271. Letter from Wilbert Chapman to William Herrington (Dec. 9, 1958) (Wilbert Chapman Papers, UW).

272. "We have all come to the end of the line," Chapman declared, "with respect to abstention, and . . . we [are] require[d] to sit down and carefully examine alternative methods of procedure which would be less damaging to United States interest[s] and more likely of successful issue." *Id.*

273. See D. JOHNSTON, *supra* note 5, at xxv-lxxx (rev. ed. 1987); see also D. ATTARD, *THE EXCLUSIVE ECONOMIC ZONE AND INTERNATIONAL LAW* 146-72 (1987).



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#### ACKNOWLEDGMENTS

Research for this project was supported in part by grants of combined federal and state funds from the California Sea Grant College Program, under Sea Grant award R/MA28, to the Center for the Study of Law and Society at the University of California, Berkeley. This work is sponsored in part by NOAA, National Sea Grant College Program, Department of Commerce, under grant number NA85AA-D-SG140, project number R/MA28, through the California Sea Grant College Program, and in part by the California State Resources Agency. The U.S. Government is authorized to reproduce and distribute this work for governmental purposes. Additional financial support was given by the Sho Sato Fund for Japanese-U.S. Legal Research, School of Law (Boalt Hall), University of California, Berkeley; and by a fund for legal history at Boalt Hall contributed by Harold Boucher, Esq.

Indispensable contributions were made, in the course of research and editing, by three California Sea Grant trainees: Barbara Liebhardt, Victoria Saker, and Kate Hartley. Thanks are also owed for scholarly advice given by Professors Stefan Riesenfeld and David Caron at Berkeley; Akio Watanabe, University of Tokyo; William T. Burke, University of Washington; and Robert Friedheim, University of Southern California. Professors Shigeru Kozai of Kyoto University and Sadao Asada of Doshisha University in Kyoto both extended important help that expedited the author's research in Japan. The Hon. William Herrington, U.S. State Department (ret.), provided extensive time for interviews, as did Messrs. Takashi Hisamune and N. Okamoto of Tokyo, and the Hon. Burdick H. Brittin of Virginia.

The author is also grateful for the unfailingly generous help of numerous librarians and archivists and to their institutions for providing access, including: Janet Ness, University of Washington Library; Sally Marks, Renee Jaussaud, and Kathy Nicastro of the National Archives, Washington, D.C.; and Mr. Aoki of the Ocean Association of Japan, Tokyo. Translations of some key documents, secondary sources, and interview notes were provided by two advanced graduate students: Messrs. Yasuhide Yamanuchi of the University of Tokyo and Yoshinobu Kitamura of the University of California at Berkeley.

APPENDIX I  
CHRONOLOGY OF U.S. POLICY DISCUSSIONS AND DIPLOMACY  
RESPECTING JAPANESE FISHING RIGHTS IN THE  
NORTH PACIFIC, 1951

*February 7:* Publication of the Dulles-Yoshida Letters.

*March 15:* Tripartite Convention draft prepared by Wilbert Chapman, providing for mutual forbearance by the U.S. and Japan within 150 miles of either coast. Eastern Pacific halibut, salmon, herring, sardine, and tuna are to be covered.

*May 3, 7:* Formal meetings with representatives of the Canadian Government.

*May 18:* New draft Convention prepared by the State Department incorporating the principle of the "waiver" of fishing rights for mature fisheries.

*May-July:* Modifications of the draft in consultation with the U.S. Fish & Wildlife Service, industry representatives, the Pacific Coast state authorities, the State Department Treaty Division, and a special committee appointed within the State Department to establish the basic U.S. position.

*June 8-20:* Meeting on the West Coast between William Herrington and the industry Advisory Committee on Japanese Fishery Affairs to discuss the modified draft.

*July 20:* Circulation of the revised draft Convention.

*July 29-August 3, August 24-27, and September 4-8:* Discussions on the West Coast between Herrington and the industry Pacific Coast Advisory Committee.

*September 1:* Conclusion of additionally revised draft Convention, circulated to the Advisory Committee on October 1.

*September 17:* Tuna industry (per Chapman) withdraws support for the naming of tuna as one of the fisheries to be included in the Convention terms.

*September-October:* Further negotiations with Canada regarding the Canadian request that the U.S. should stipulate it would not invoke the abstention concept to exclude Canada's fishing vessels from any U.S. waters.

*September-October:* Tuna industry mounts a campaign to obtain tariff protection against imports of tuna, especially Japanese tuna.

*October 12:* Conference with Canadian officials reaches agreement on a new article I, paragraph 3, regarding protection of the Canadian fishing industry against the invocation of abstention in fisheries contiguous to the United States' coastal waters.

*October 16:* State Department approves the appointment of Richard Croker (representing the West Coast state governments), and Edward Allen, Donald Loker, and Milton Brooding (representing the industry) as advisory members of the delegation being formed for negotiation of the Convention in Tokyo.

*November 4:* U.S. and Canadian delegates arrive in Tokyo.

*November 5:* First plenary session of Conference.

*November 5-December 13:* Sessions of the Committee on Principles and Drafting (consisting of the main delegations) on basic terms and language of the Convention.

*November 13, 22, 26:* Informal meetings of technical experts of the United States, Canada, and Japan to consider terms of the Annex and Protocol.

*November 30-December 13:* Meetings of the Committee on Biology and Conservation regarding terms of the Annex and Protocol.

*December 14:* Second formal plenary session and conclusion of the Conference, including signatures.

[The Convention was signed at Tokyo on May 9, 1952; ratified by the United States July 30, 1952, by Canada May 15, 1953, and by Japan June 9, 1953; entered into force June 12, 1953.]

APPENDIX II  
STATEMENT OF THE JAPANESE GOVERNMENT ON HIGH  
SEAS FISHERIES, JULY 13, 1951

In order that there shall be no misunderstanding the Japanese Government confirms that Japan's voluntary declaration in respect of fishing conservation contained in the Prime Minister's letter of the 7th February 1951 to Mr. John Foster Dulles, the special representative of the President of the United States, was intended to embrace fishery conservation arrangements in all parts of the world. The Government of Japan will in accordance with the above mentioned letter be 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 which are accessible to the nationals of Japan and such other countries. The Government of Japan reaffirms that in the meantime it will, as a voluntary act, implying no waiver of its International Rights, prohibit Japanese Nationals and Japanese registered vessels from carrying on fishing operation in presently conserved fisheries in all waters, where arrangements have already been made either by International or Domestic Act, to protect the fisheries from overharvesting and in which fisheries Japanese Nationals or Japanese registered vessels were not in the year 1940 conducting operations.

I. *Japan's Position vis-a-vis High-Seas Fishery*

*The position of Japan relative to fishery is governed by the following factors*

- a. *The Japanese eat a vast quantity of fish, incomparably more than any other people. They rely on fish as their major source of animal proteins.*
- b. *Fishery not only supplements the shortage of agricultural food supply of Japan, but also is capable of contributing substantially to the country's economic self-support through the export of its surplus products.*
- c. *Fishery provides a great number of Japanese with a living. Fishery earnings constitute a large proportion of the Japanese national income.*

*For Japan, high-seas fishery is not to be viewed merely as an enterprise that profits those who are directly or indirectly connected with it. It is an essential basic industry, without which it would be impossible to solve the national problems of food, population and economic self-support—namely, as industry in which the interests of all Japanese are involved.*

II. *The General Policy of the Japanese Government relating to High-Seas Fishery*

- (1) *The Japanese Government hopes and expects that once a peace treaty is concluded, Japan will not be subjected to any special restrictions on high-seas fishery, such as are not ordinarily applicable to sovereign states. Indeed, it is hoped that the current restrictions imposed upon Japanese high-seas fishery will be removed as early as possible even prior to the conclusion of peace.*

*While expressing this hope, the Japanese Government is not unmindful of the need of correcting the malpractices of some Japanese fishery operators, which had been the target of censure by other countries of the world in the prewar days. Nor does the government forget its own responsibility in that respect. Regardless of how vitally important is fishery to Japan, that fact does not justify the resort by Japanese operators to selfish, predatory or short-sighted fishing methods. The Japanese Government is determined that the postwar rehabilitation of Japan's fishery industry shall begin by first making Japanese operators conform strictly to international law and conventions, and international usages, and also by seeing to it that they cooperate honestly in all international measures for the protection and investigation of fishery resources.*

*(2) The general views, which underlie the high-seas fishery policy of the Japanese Government, are as follows:*

*i. The Japanese Government is in full agreement with the major points in the statement of Dr. W. [M.] Chapman of the U.S. State Department before the California State Chamber of Commerce on December 2, 1948. That is to say:*

*a) Japan will not support a policy which seeks to establish sovereign ownership of the seas by any nation—itsself included.*

*b) Japan maintains that high-seas fisheries must be operated on the basis of "free enterprise and free competition, based upon fair methods of cooperation."*

*ii. The Japanese Government believes that the problems of high-seas fishery are purely economic or biological, and that the adjustment and furtherance of the interests of nations can best be effected by international means, scientific and non-political. And in the quest for such international means Japan as a world's major fishery nation is aware of her obligation to do her proper share.*

*iii. The Japanese Government attaches special importance to the protection and scientific investigations of fishery resources, which will redound to the benefits of not only of Japan but also of all countries concerned. Japan is prepared to cooperate positively in all such international plans and programs, which are related to her own fishery industry.*

*iv. It is the opinion of the Japanese Government that any question concerning high-seas fishery should be solved by a multilateral, or bilateral agreement between the countries involved.*

[Source: K. KAWAKAME, INTERNATIONAL CONVENTIONS IN POST WAR JAPAN ch. 1, § 2 (1972)]

