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THE JAPAN-UNITED STATES NEGOTIATIONS CONCERNING KING CRAB FISHERY IN THE EASTERN BERING SEA

Ko Nakamura*

I. Introduction

On May 20, 1964, the President of the United States approved the Bartlett Act (S. 1988, hereinafter called the "Act"), prohibiting fishing by foreign vessels in American territorial waters and certain other areas.

The Act provides that the taking of any continental shelf fishery resource in such areas is, in principle, reserved to nationals and fishing boats of the United States, and that fishing by foreign vessels in such areas is unlawful. The enforcement of the Act poses a question of current interest in the international law of the sea, which has been undergoing major changes since the end of the last war. The Act follows a series of proclamations by the United States and other countries as to sovereign rights to the continental shelf, and reflects the general principles of the Convention on the Continental Shelf adopted at Geneva in 1958, to which the United States is a party. Thus, by the Act, the United States implemented certain parts of the Convention. Japan is not a party to the Convention.

In signing the Act, the President stated that the Act does not establish any new rights to the continental shelf, but that the Act will permit the enforcement of certain existing and possibly future rights. In connection with the enforcement of the Act, the United States Department of State issued the following statement regarding Japan's long-established king crab fishery:

> The position of the Government of Japan is that it is not bound by the Convention on the Continental Shelf, to which Japan is not a party, and that therefore the rights of the Government of Japan will not be affected by the provisions of the Act to fishery resources of the continental shelf. The United States Government has assured the Japanese Government that prior to implementing this legislation . . ., the United States Government will consult with the Japanese Government and that in such consultations full consideration will be given to the view of the Japanese Government and Japan's long established king crab fishery.

Upon the basis of this statement, the Governments of Japan and the United States held a consultation meeting in Washington from October 15 to November 14, 1964, concerning king crab fishery in the Eastern Bering Sea.

At the above meeting the two Governments confirmed the following general

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points. First, the Japanese Government holds the view that the king crab is a high seas fishery resource, and that nationals and vessels of Japan are entitled to continue fishing king crab in the Eastern Bering Sea. The United States Government is of the view that the king crab is a natural resource of the continental shelf, over which the coastal state has exclusive jurisdiction, control and rights of exploitation. Without prejudice to their respective positions, both Governments, having regard to the historical fact that nationals and vessels of Japan have fished king crab in the Eastern Bering Sea for many years, agreed that Japan may continue fishing in and near the waters which have been fished historically by Japan, including those waters to which the king crab stocks historically exploited by Japan migrate. They agreed that, in order to avoid possible overfishing of king crab in the Eastern Bering Sea, the annual commercial catch by Japan in 1965 and 1966 shall not exceed 185,000 cases per year. They agreed to apply certain interim measures to their respective nationals and vessels fishing for king crab in the Eastern Bering Sea. They did not agree as to whether the king crab is a high seas fishery resource or a continental shelf resource, but they nevertheless sought a provisional solution intended to conserve sea resources.

Apart from the evaluation of the above solution from the viewpoint of international law, the regulation of king crab fishery by the Act has posed a question of great importance and interest to the recent development of sedentary or continental shelf fishery.

According to Section 5(a) of the Act, the term "continental shelf fishery resource" includes the living organisms belonging to the sedentary species, that is to say, organisms which, at their harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil of the continental shelf. The continental shelf is defined in Section 5(d) "as the sea-bed and subsoil of submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters, or beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas . . ." .

It is established by many biologists that the continental shelf abounds in plankton and seaweed, that it constitutes a proper habitat for fish, and that it affords optimum conditions for sponge, pearl shell, oyster, coral, crustacea, bottom fish, etc.

II. Theories on Sedentary Fishery

It is appropriate to review how the fishing of those resources which the Act defines as continental shelf fishery resources, have been treated in international

law. In the 18th Century, E. de Vattel wrote on such parts of the sea as may be appropriated:

> The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, etc. Now, in all these respects, its use is not inexhaustible: wherefore, the nation, to whom the coasts belong, may appropriate to themselves, and convert to their own profit, an advantage which nature has so placed within their reach as to enable them conveniently to take possession of it, in the same manner as they possessed themselves of the domination of the land they inhabit. Who can doubt that the pearl fisheries of Bahrein and Ceylon may lawfully become property?

This famous passage of Vattel caused a controversy on sedentary fishery in international law.

In his article entitled "Whose is the Bed of the Sea?" Sir Cecil Hurst, understanding that Vattel meant that "the exclusive right to the pearls to be obtained from the banks flowed from the ownership of the bed of the sea where the banks were situated," remarked that ". . . particular oyster beds, pearl banks, chank fisheries, sponge fisheries or whatever may be the particular form of sedentary fishery in question outside the three-mile limit have always been kept in occupation by the Sovereign of the adjacent land. . . ." While it contributed a great deal to the present-day theory on the continental shelf, Sir Cecil's article did not correctly interpret the question of sedentary fishery in the light of the theories of the sea prevailing in the days of Vattel.

In contrast to Sir Cecil's view, Gidel stated:

> Cette citation, constamment répétée, ne jette pas la moindre lumière sur la difficulté que pose le cas de pêcheries sédentaires; . . . parce que la phrase figure dans des développements visiblement consacrés à la mer territoriale. Or Vattel ne fixe aucune distance pour ces parties de "la mer près des côtes" que "peuvent être soumises à la propriété". Il envisage donc les pêcheries sédentaires comme faisant partie de la mer territoriale; leur existence est pour lui une des raisons qui justifient la mer territoriale et qui en déterminent les limites. . . . Le droit exclusif de pêche dans la mer proche des côtes se fonde au profit de l'Etat riverain par l'occupation: et ce aussi bien lorsqu'il s'agit de pêcheries de poisson que lorsqu'il s'agit de pêcheries sédentaires, car à aucun de ces divers points de vue l'usage de la mer près des côtes n'est inépuisable. Ainsi pour Vattel le cas des pêcheries sédentaires n'est pas juridiquement différent du cas de la pêche du poisson; le problème des pêcheries sédentaires hors de la limite de la mer territoriale . . . était donc complètement étranger à Vattel . . . .

Thus, Gidel remarked that the question of sedentary fishery outside the territorial waters of the coastal states was not covered by Vattel's theories on the law of the sea.

Today, however, the problem does not concern the correctness of either interpretation of the noted passage of Vattel. Today most international lawyers,

in discussing the jurisdiction of a coastal state over sedentary fishery in the high seas either in relation to the occupation of the sea-bed or as high seas fishery, rely either on the theoretical position of Sir Cecil Hurst or Gidel. Such positions have developed into the two current theories on sedentary fishery: One including it in the entire regime of the continental shelf; and the other comprehending it as part of general high seas fishery.

III. Continental Shelf Legislation as to Sedentary Fishery

In 1945, the President of the United States issued two proclamations to attain the protection and conservation of marine resources adjacent to the coast of the United States. One was the so-called Proclamation on the Continental Shelf, the other the so-called Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas. The Proclamation on the Continental Shelf aimed at exclusive exploration and exploitation of the mineral resources buried under the continental shelf, and recognized jurisdiction over petroleum and other minerals underlying many parts of the continental shelf off the coast of the United States in so far as their utilization is practicable with modern technological progress, for the purpose of conservation and utilization thereof. The express wording of the Proclamation on the Continental Shelf and the fact that a separate proclamation was issued for the conservation and protection of marine resources, indicate that former was intended to apply only to continental shelf mineral resources. However, it was followed by similar proclamations and legislation by other nations, including Australia, applying to both mineral resources and certain kinds of marine resources.

The Australian legislation aimed at the exclusive exploitation of sedentary fishery resources, and directly affected pearl fishery by Japanese boats in the Arafura Sea. The ensuing pearl fishery dispute between Japan and Australia can be called a struggle between the enforcement of the Australian law on the continental shelf, on the one hand, and the protection of the existing Japanese interests, on the other hand.

In order to protect and regulate pearl shells, beche-de-mer and green snail in 1953, Australia enacted another law reserving for Australian nationals the exploration and exploitation of all natural resources in the sea-bed and subsoil of contiguous submarine areas of not more than 100 fathoms in depth. This was an attempt to enunciate Australian sovereign rights to the natural resources on the sea-bed and subsoil of the continental shelf, to control through municipal law the exploration of sedentary fishery in the waters over the continental shelf, and to prohibit sedentary fishing by foreign vessels. Such legislation (although there is some difference as to the species of fish) is analogous to the Bartlett

Act of the United States, which provides for the regulation of king crab fishery.

The Japanese Government protested the Australian policy for these reasons: That fishery resources in the high seas are a common property to be open for exploration and exploitation by nationals of any country, and that any regulations to maintain the optimum sustainable yield of products of the resources should be applied equally to all persons engaging in the exploration and exploitation thereof. The question as to whether sedentary fishery resources are classified as continental shelf or high seas fishery resources was discussed exhaustively, but the two countries never agreed on the question. The Japanese-Australian pearl fishing dispute was almost submitted to the International Court of Justice, but since the two countries did not reach a special agreement on such submission, they chose instead to seek an interim settlement. In the settlement both countries agreed that Japanese vessels are authorized under the license of the Australian Government to conduct fishing operations in certain areas of the seas adjacent to the coasts of Australia. Consequently, the fundamental problems of the dispute have not been finally resolved.

IV. Draft Rules of the International Law Commission of the United Nations

As Australia and other countries thus proclaimed their exclusive right to explore and exploit the natural resources off their coasts, the international law of the sea was led to consolidate regulations in accordance with such trends. And to accomplish this, the United Nations International Law Commission undertook to draft new rules.

Prior to its 3rd Session in 1951, the Commission had treated the continental shelf and the sedentary fishery problems as separate régimes. At its 5th Session in 1953, Special Rapporteur M. J. P. A. François submitted his 4th Report in which, understanding that the Commission had not intended the term "continental shelf resources" to include fish living in the sea (even species living on the bottom for a certain length of time), he suggested the replacement of such phrase by the phrase "mineral resources." His proposal was not accepted by the Commission, which voted in a diagonally opposite direction to its position at the previous Session. The Commission voted to include sedentary species in the natural resources of the continental shelf. Thus, the opinion to interpret natural resources as mineral resources became a minority opinion, and the final Report of the United Nations International Law Commission (see article 68) treats sedentary fishery in the framework of the régime of the continental shelf. In order words, the coastal state exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources, including mineral and fishery resources. In the Commentary of its Report, the Interna-

tional Law Commission explains the reason why it chose the term "natural resources":

> The Commission came to the conclusion that the products of sedentary fisheries, in particular to the extent that they were natural resources permanently attached to the bed of the sea, should not be outside the scope of the régime adopted and that this aim could be achieved by using the term "natural resources."

It is clearly understood that the rights in question do not cover so-called bottom fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there. It would be sufficient to understand "permanent attachment" as meaning that the marine fauna and flora in question should live in constant physical and biological relationship with the sea-bed and the continental shelf. Subject to respect for acquired rights of aliens, sovereign rights of a coastal state over its continental shelf also cover sedentary fisheries. The International Law Commission thus adopted a draft article in which sedentary fishery is understood within the framework of the continental shelf.

The 4th Committee of the International Conference on the Law of the Sea held in Geneva in 1958, put on the agenda the draft article on the continental shelf prepared by the International Law Commission. The discussion on the scope of the continental shelf resources has the most important significance to our current interests.

V. International Conference on the Law of the Sea

At the Geneva Conference, 1958, the Delegation of Japan expressed regret that draft article 68 and the International Law Commission's Commentary employed the wording "natural resources," thus including living organisms. The Delegation contended that the creatures living at the bottom of the sea on the continental shelf were clearly not an integral part of the sea-bed and that such creatures, belonging either to sedentary fisheries or to groups of bottom fish, had been governed for centuries by traditional rules of international law of the sea. In this respect, Japan stressed her position that the regulation of sedentary fishery and bottom fish should be framed on the basis of those rules of international law which exclusively govern sea fishing.

The United States delegation maintained that while natural resource included mineral resources, living resources, on the other hand, were essentially products of the waters and might well be regarded as appertaining to the high seas; and that the most satisfactory criterion for defining those marine organisms which might, on the basis of long established custom and usage, be recognized as natural resources of the continental shelf appeared to be that of attachment to

the sea-bed during the harvestable stages of life.

The Australian delegation entirely supported the International Law Commission draft articles on the definition of natural resources, arguing that it was impossible for practical purposes to distinguish between the mineral resources of the continental shelf and the sedentary living organisms referred to by the Commission; that there was no more reason to make those organisms available for exploitation by all states than there was to apply such a principle to mineral resources; and that in the case of submerged land, things affixed to it or growing in it should be attributed to the owner of the soil. Australia's understanding was that the living organisms of the sedentary species should be considered as belonging to the continental shelf, whereas bottom fish or demersal species should not.

The Delegation of Mexico contended that a definition of the living resources of the continental shelf restricted to those adhering to the sea-bed was too narrow, and that the definition should include the whole group of mineral and vegetable organisms in direct and necessary dependence on the sea-bed, their legal status being determined by the degree of that dependence. The Delegation proposed, pursuant to the criterion of the conjunction of organisms depending on the sea bottom which was proposed at the Ciudad Trujillo Conference, that natural resources should include all living species that could be said to belong to the sea bottom, at least at the time when fishing was carried on.

At the Conference on the Law of the Sea, standpoints of the participating states, and particularly those as to the scope of the resources to be included in the régime of the continental shelf, were varied. As such division of views appeared in the course of the meetings. various proposals were submitted to the 4th Committee. The proposals of Sweden, Greece and Germany (C.4/L.9; L.39; L.43) restricting natural resources to mineral resources were either withdrawn or rejected. Another proposal of Burma (C.4/L.3) to the effect that natural resources include so-called bottom fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there, was also rejected.

Between such extremities was a joint proposal (C.4/L.36) prepared by six nations, i.e., Australia, Ceylon, India, Malaya, Norway and the United Kingdom. It defines natural resources as follows:

> The natural resources consist of mineral and other non-living resources of the sea-bed and the subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil; but crustacea and swimming species are not included.

The Russian, Mexican and some other delegations suggested the elimination of the phrase "crustacea and" from the six-nation joint proposal but such suggestion was rejected by the 4th Committee. When the six-nation joint proposal was sent to the plenary meeting for another vote, it was decided to delete the phrase in question by a vote of 42 to 22 with 6 abstentions. The United Kingdom and Japan voted for the preservation of the phrase, while Australia, Mexico and the Soviet Union voted against, the United States abstaining. The rest of the proviso was also deleted.

Consequently, the Convention on the Continental Shelf, article 2, paragraph 4 reads:

> The natural resources referred to in these articles consist of the mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil.

VI. Treatment of Crustacea and Swimming Species

Thus, the provision of Commentary (3) of the International Law Commission draft article 68 and the six-nation proposal submitted to the 4th Committee, that crustacea and swimming species are not included in the natural resources of the continental shelf, has been discarded. It is not possible, however, to judge from the results of the voting on article 2, paragraph 4 whether crustacea is or is not included. Whichever way the voting may be interpreted, whether or not crustacea is included in continental shelf resources should be decided on the criterion that it belongs to sedentary species, that is to say, living resources which, at the havestable stage, either are immobile on or under the sea-bed or are unable to move except in constant physical contact with the sea-bed or the subsoil. Japan does not interpret crustacea to be included in the continental shelf resources. In voting, the United States abstained, reserving its position on the inclusion of crustacea, while the Soviet Union agreed to its inclusion in the continental shelf resources. It can be said at this stage of development of the question that crustacea, at least traditionally, has not been included in sedentary fishing species. Irrespective of the theoretical relevance of the understanding that sedentary species are included in the continental shelf resources, crustacea has not been considered as belonging to those species having constant physical contact with the sea-bed.

VII. Treatment of King Crab

Nor has king crab, which belongs to the family of crustacea, been

considered as appertaining to sedentary species. Japan and the United States have co-operated for the conservation of king crab in observance of the International Convention for the High Seas Fisheries of the North Pacific Ocean, 1952. Japan and the Soviet Union have also co-operated in the form of the Treaty between Japan and the Union of Soviet Socialist Republics concerning Fisheries on the High Seas in the North Pacific Ocean, 1956.

The Act has made it clear that the United States position now treats king crab as being included in the continental shelf resources. It is suggested, however, that from a biological and legal point of view the United States considered crustacea to which king crab belong as high seas fishery resources, then reserved its position in the voting at Geneva, and now deals with them as appertaining to the continental shelf resources. No scientific evidence warrants that Japanese fishing activities in the Eastern Bering Sea have ever made king crab more sedentary than before on the sea-bed in this part of the Pacific Ocean.

VIII. Conclusion

For many years crustacea has been vaguely recognized as a resource in need of conservation. This may imply that there has been a continued necessity to achieve international co-operation for the conservation of king crab. Consequently, the special circumstances under which catches are most canned for international trade have logically much importance in the conservatory co-operation. But the demand for its conservation and protection ought to have been treated by recourse to the international law of fisheries within the framework of a plan to conserve high seas fishery resources. The United States proclamation to interpret the king crab in the Eastern Bering Sea as belonging to the resources of the continental shelf of the United States would now make it impossible, it may be feared, to open the way leading to an expanded interpretation of continental resources as including not only crustacea but even bottom fish or other fish. Clearly, it is to the advantage of the coastal state, from the point of view of exclusive exploration and exploitation, to consider fishery resources as appertaining to the continental shelf rather than high seas resources requiring conservation. But high seas fishery, if conducted over the continental shelf, can be maintained and grow normally depending on the balance of interests of fishing nations, in accordance with their fishing efforts on the one hand and with their conservation efforts on the other. In this sense, it should not be overlooked that the United States has assured Japan of a certain quantity of catches in the agreement between the two countries, taking into account the past fishing operations

of Japan. This is an instance of respect for acquired interests of aliens for which the Convention on the Continental Shelf does not expressly provide the obligation of respect.