method of compensation is not a compromise in the principles of international law; on the other hand, nationalization should never be permitted or recognized if the compensation provided for is so inadequate as to constitute merely a disguise for the spoliation of foreign-owned property.

ARTHUR K. KUHN

THE NEED FOR A JAPANESE FISHERIES AGREEMENT

The near approach of peace with Japan necessitates careful consideration and prompt action with respect to Pacific Ocean fisheries relations.[1] The peace treaty with Japan provides in Article 9:

> 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.[2]

[1] Many groups, particularly on the Pacific coast, urge that action should be taken at once, or should have been taken already. For example, the General Conference of the Pacific Northwest Trade Association adopted April 17–18, 1950, a resolution "that no peace treaty should be entered into with Japan by either Canada or the United States until and unless definite and binding commitments are made by Japan which will adequately protect the interests of Canada and the United States in their coastal fisheries not only within but beyond terriorial waters." The Pacific Fisheries Conference resolved on Nov. 29, 1950, "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." See also Report of the Committee on Fisheries and Territorial Waters, 1950 Proceedings of the Section of International and Comparative Law, American Bar Association, p. 37; E. W. Allen, "International Aspects of Fishery Conservation," Pacific Northwest Industry, June, 1950, p. 160.

[2] Department of State Bulletin, Vol. 25, No. 635 (Aug. 27, 1951), p. 350. In his address, "Essentials of a Peace with Japan," on March 31, 1951, at Whittier College (Department of State Publication 4171, p. 8), Ambassador J. F. Dulles pointed out that attempting to cover the problems of Japanese participation in high seas fisheries in the peace treaty itself, rather than in separate agreements between Japan and the country or countries concerned in each fishery, "would almost surely postpone indefinitely both the conclusion of peace and the obtaining of the results which are desired." He added, "There is, I believe, a considerable possibility of agreement between the United States and Japanese fishing interests. . . . No quick results can by won by attempting to make the peace treaty into a universal convention on high-seas fishing. . . . The Japanese now see the importance of avoiding practices which in the past brought Japan much ill will, and, if we can hold to our tentative timetable, there can,I believe, be an early and equitable settlement of this thorny problem."

On the other hand, at the recent San Francisco Conference the Indonesian and Netherlands representatives expressed the view that the treaty should have established greater safeguards against Japanese fishing in high seas areas off Indonesia and Dutch New Guinea. The New York Times, Sept. 7, 1951, p. 7, col. 5; *ibid.*, Sept. 8, 1951, p. 4, col. 3 and p. 5, col. 7.

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Previously, in a note of February 7, 1951, to Ambassador Dulles, Prime Minister Yoshida of Japan had stated:

> . . . We are aware of the fact that certain countries have adopted international agreements and voluntary self-denying ordinances to prevent the exhaustion of high seas fisheries which are readily accessible to fishermen of their own country, and that if these conserved fisheries were to be subjected to uncontrolled fishing from other countries, the result would be international friction and the exhaustion of the fisheries themselves.
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> Accordingly, the Japanese Government will, as soon as practicable after the restoration to it of full sovereignty, be prepared to enter into negotiations with other countries with a view to establishing equitable arrangements for the development and conservation of fisheries which are accessible to the nationals of Japan and such other countries.
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> 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.[3]

The present need is for speedy and effective implementation of these provisions along lines which will promote both the conservation and prudent utilization of the fisheries resources of the Pacific and the maintenance of friendly relations between Japan and her former enemies. All must be aware of the extent to which fisheries problems complicated these relations in the years prior to Pearl Harbor. Not only did Japan terminate (in 1941) the Treaty of 1911 with the United States, Great Britain, and Russia for the Protection of Fur Seals,[4] and refuse to take part in any of the world-wide agreements for the regulation of whaling,[5] but bitter controversies

[3] Department of State Bulletin, Vol. 24, No. 608 (Feb. 26, 1951), p. 351.

[4] 37 Stat. 1542; this JOURNAL, Supp., Vol. 5 (1911), p. 267. See Hackworth's Digest of International Law, Vol. 1, pp. 792–798; S. S. Hayden, International Protection of Wild Life (1942), pp. 114–136; L. Leonard, International Regulation of Fisheries (1944), pp. 55–95. On the Japanese termination, see Department of State Bulletin, Vol. 5 (1941), p. 336. The United States and Canada continued protection of fur seals under a provisional agreement of Dec. 8 and 19, 1942, 58 Stat. 1379, Ex. Agr. Ser. 415, which was modified Dec. 26, 1947, Treaties and Other International Acts Series, No. 1686. Pending such time as a new treaty may be worked out between the United States, Canada, Japan, and the Soviet Union, it would appear to be desirable for the United States and Canada to obtain from Japan an acceptance of the principles of the provisional agreement, at least to the extent that pelagic sealing would be forbidden to Japanese nationals and vessels. Such an agreement should not be too difficult to negotiate.

[5] *Cf.* L. Leonard, *op. cit.*, pp. 98–109; *idem*, "Recent Negotiations toward the International Regulation of Whaling," this JOURNAL, Vol. 35 (1941), p. 90.

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arose in 1936–38 over what was looked upon as a "Japanese invasion" of the salmon fisheries off Alaska, centering in the Bristol Bay area.[6] Up and down the Pacific coast of North America there were fear and suspicion of what Japanese fishing vessels might do to destroy the carefully protected fisheries in high seas areas adjacent to the coast and to wipe out the flourishing fishing industry dependent on these resources. During the Allied occupation Japanese high seas fishing activities have been regulated in such fashion that these difficulties have not recurred.[7] With the relaxation of such controls and the termination of the occupation, however, it becomes necessary for the United States and Japan (and likewise for Canada and Japan, and perhaps other fishing nations on the west coast of the Americas) to work out arrangements for the future. There is no need here to spell out the past experiences which make it clear that there will once again be a real danger of friction and ill will unless action is taken.

As a barest minimum, it would seem that Japan should and would be willing to enter into treaties with the United States and other west coast American countries under which Japanese nationals and vessels would be required to conform to the conservation regimes laid down by the nations whose vessels have been engaged in these fisheries. For example, Japanese vessels and nationals should be required to conform to the international whaling agreements (it is understood that Japan is about to become a party to the 1946 Whaling Convention [8]), and to refrain from pelagic sealing upon herds which migrate to Bering Sea. If Japan should under any circumstances be permitted to participate in fisheries off the west coast of America which have been subject to conservation by American nations, then it should be expected to obey the strict rules which the United States and Canada have so successfully applied in their efforts to conserve and rebuild the stock of Pacific halibut and sockeye salmon.[9] Likewise, if permitted to

[6] This controversy is reviewed briefly in L. Leonard, International Regulation of Fisheries (1944), pp. 121–136; see further sources cited there. P. C. Jessup, "The Pacific Coast Fisheries," this JOURNAL, Vol. 33 (1939), p. 129, discusses the problem and the bills introduced in Congress to extend control over adjacent high seas far enough to cope with it. The White House Press Release accompanying the Truman Coastal Fisheries Proclamation of September 28, 1945, suggests the connection of that Proclamation with the desire to prevent a repetition of such trouble as that with Japan over Alaskan salmon. Department of State Bulletin, Vol. 13 (1945), p. 484.

[7] *Cf.* Department of State Bulletin, Vol. 14 (1946), p. 346.

[8] Treaties and Other International Acts Series, No. 1849; this JOURNAL, Supp., Vol. 43 (1949), p. 174. The Norwegian comment on the treaty at the San Francisco Conference urged that the Japanese whaling fleet should not be expanded, lest the Whaling Convention prove inadequate with greater pressure upon the depleted world stock of whales. The New York Times, Sept. 7, 1951, p. 6, col. 1.

[9] For the Pacific Halibut Treaty of 1937, revising the earlier conventions, see 50 Stat. 1351; U. S. Treaty Series, No. 917; this JOURNAL, Supp., Vol. 32 (1938), p. 71. For the Sockeye Salmon Treaty of 1930, see 50 Stat. 1355; U. S. Treaty Series, No. 918; this JOURNAL, Supp., Vol. 32 (1938), p. 65. On these treaties and the regime under

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enter the fishery, Japan should be expected to conform to the regulations regarding tuna which may eventually be laid down by the United States, Mexico, Costa Rica and other countries to the south under the recently concluded treaties,[10] which now provide for co-operative investigations and which are expected to be followed by such regulations as may be necessary. If Japanese nationals and vessels, or those of any other state, were to enter these preserved fisheries, and to take immature or undersized fish or use prohibited equipment or fish during closed seasons, the conservation efforts would come to naught and the American and Canadian fishermen who have borne the brunt of the restrictions would rise up in righteous indignation. These are fisheries which would not exist at their present level of abundance if it were not for the close supervision of fishing operations in the area. Equity and justice require that such natural resources which have been built up by systematic conservation and self-denying restricted utilization, together with the industries based upon them, be protected from destructive exploitation by interests which have not contributed to their growth and development.

It thus appears obvious that any Japanese fishing activities in these areas of the high seas close to the American Continent should conform to present and future conservation regulations; this is the very least which should be expected. But this, alone, is not enough. In view of the past record and the probability of the repetition of trouble if Japanese fishermen carry on their activities in these conserved fisheries close to American shores (or if American fishermen should cross the Pacific and begin to fish in waters near Japan), it is important that steps be taken now to prevent the occurrence of such events which can only bring about a deterioration of the good relations between the American countries and Japan which accompany the return of peace. Whether or not there may be any legal right under international law for the United States, Canada, *et al.* to exclude Japanese fishing activities from these areas of the high seas contiguous to our Continent in which our people have fished on a substantial scale,[11] the people of our Pacific coast who are most closely affected feel that there is or should be such a right. As the United States asserted on November 22, 1937, in the Bristol Bay controversy with Japan over the attempt of Japanese fishermen to catch salmon on the high seas off Alaska:

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them, see J. Tomasevich, International Agreements on Conservation of Marine Resources, (1943), pp. 125–265; statement by W. M. Chapman of the Department of State, Hearings before a Subcommittee of the Senate Committee on Foreign Relations on the Fisheries Conventions, July 14, 1949, pp. 52–56.

[10] The Convention with Mexico, signed Jan. 25, 1949, is published in T.I.A.S. 2094; this JOURNAL, Supp., Vol. 45 (1951), p. 51. That with Costa Rica, signed May 31, 1949, is in T.I.A.S. 2044. On both, see also the Hearings cited in note 9 *supra*.

[11] *Cf.* J. W. Bingham, Report on the International Law of Pacific Coastal Fisheries (1938). See also E. W. Allen, "The Fishery Proclamation of 1945," this JOURNAL, Vol. 45 (1951), p. 177.

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> These resources have been developed and preserved primarily by steps taken by the American Government in cooperation with private interests to promote propagation and permanency of supply. But for these efforts, carried out over a period of years, and but for consistent adherence to a policy of conservation, the Alaska salmon fisheries unquestionably would not have reached anything like their present state of development.
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> The cost of the extensive efforts made by the Government to regulate salmon fishing and to perpetuate the supply of salmon has been borne by the American people, and not infrequently American fishermen have suffered loss of employment and income as a result of the various restrictions imposed. Because of such sacrifices, and the part that American citizens have played in bearing the cost of conserving and perpetuating the salmon resources, it is the strong conviction and thus far unchallenged view on the part of millions of American citizens on the Pacific Coast interested in the salmon industry and on the part of the American public generally that there has been established a superior interest and claim in the salmon resources of Alaska.[12]

In that controversy the Japanese Government agreed that Japanese vessels should not enter the Alaskan salmon fisheries in question, although they were outside Alaskan territorial waters.

Although the United States Coastal Fisheries Proclamation of September 28, 1945,[13] does not specifically refer to a right to exclude nationals of other states from fishing in areas covered by it, we should remember that it proceeds on the theory that (a) proximity to the coastal state, and (b) development and maintenance of fishing activities on a substantial scale by the coastal state and any other states, afford a proper and sufficient basis for the establishment by the coastal state (and any other states whose nationals have developed and maintained fishing activities in the area) of limited conservation zones in which all fishing activities shall be subject to regulation and control by the state or states establishing such zones. In many quarters there is a belief that the regulation and control, justified on the basis of such proximity and substantial fishing activities, should be sufficient to cover the exclusion of all newcomers from engaging in the fisheries of the conservation zone, if there are obviously not enough fish for everybody to catch as much as they want (*e.g.*, the Pacific halibut fishery covered by the treaty between the United States and Canada, under which

[12] Department of State Press Releases, Vol. 18 (1938), p. 413.

[13] 10 Fed. Reg. 12304; this JOURNAL, Supp., Vol. 40 (1946), p. 46. Regarding this proclamation, see E. M. Borchard, "Resources of the Continental Shelf," this JOURNAL, Vol. 40 (1946), p. 53; J. W. Bingham, "The Continental Shelf and the Marginal Belt," *ibid.*, p. 173; E. W. Allen, "Legal Limits of Coastal Fishery Protection," Washington Law Review, Vol. 21 (1946), p. 1; W. M. Chapman, "United States Policy on High Seas Fisheries," Department of State Bulletin, Vol. 20, No. 498 (Jan. 16, 1949), p. 67; C. B. Selak, "Recent Developments in High Seas Fisheries Jurisdiction under the Presidential Proclamation of 1945," this JOURNAL, Vol. 44 (1950), p. 670.

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a maximum total catch is set for each season and all fishing for the season ends when that total is reached). The Yoshida note quoted accepts such a position as a temporary measure pending the conclusion of new treaties; it does not say that the Japanese Government will require its nationals and vessels to comply with conservation regulations in these high seas areas near other states' shores, but that Japan will prohibit them from carrying on fishing operations in such waters if Japanese nationals or vessels were not conducting operations there in 1940.

Whether or not as a matter of international law or morality Japanese vessels and fishermen could be excluded *unilaterally* from fishing in these established and regulated high seas fisheries, it is for the best interests of all concerned that the United States and Japan should speedily enter into agreements which will keep Japanese fishing activities out of these relatively small areas off the American Continent and keep American fishing activities away from Japanese waters. We all want to see international co-operation between the two countries. Such co-operation is not promoted by the fishermen of either country fishing close to the other or in proximity to the fishermen of the other country. American fishermen and large groups of our general population, particularly on the Pacific coast, are likely to feel that any Japanese fishing activities in our established fisheries close to American shores would be a constant threat to their economic security. Rightly or wrongly, this vocal and influential group of Americans would be likely once again to suspect such Japanese fishing vessels operating close to our shores of all sorts of political and military espionage and sabotage; wholly unfounded as one may hope and expect such suspicions to be, their prevalence and spread will in fact greatly impair the maintenance of friendly relations with Japan. Similarly, one may suppose that many Japanese would look askance at what they would regard as encroachments upon a vital source of Japanese food supply, if American fishing vessels were to begin fishing in waters close to Japan. Popular reactions are highly important to good international relations, and commercial fishermen are not famous for their tolerance or willingness "to turn the other cheek"!

Thus with a view primarily to avoiding causes for potential friction, it would appear desirable for the United States and Japan to enter into a mutual agreement under which the fishing vessels of each country would be required to refrain from carrying on fishing activities in areas close to the other country. This might take the form of an undertaking that fishermen of each country should not fish within a specified distance (such as 100 or 150 miles) of the shores of the other, or, as suggested by the language of the Yoshida note, it might be in the form of an agreement that they should keep out of conserved areas established unilaterally or by treaty in which such fishermen had not been engaging in operations at a specified date.

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Such an arrangement would do no violence to the economic needs of either country; each has fishing grounds nearer home so that there is no real need for its fishing vessels to cross the wide Pacific to seek fish. Such an arrangement for the purposes of avoiding international irritations and conflicts, and of preventing the breakdown of conservation regimes on either side of the Pacific, would not appear to be in conflict with any overall economic policy of the United States in favor of equal opportunity of access to raw materials. If, however, anyone should look upon such an international agreement as not wholly consistent with any of our international economic policies, then the purposes of the agreement should suffice to warant an exception to, or apparent departure from, the economic policy in question.

There is no possible doubt that under international law, as well as under the law of the United States, such a treaty could be validly entered into by the United States and Japan. Such a treaty would in no way impair the legal rights of any third nation to fish wherever, and in whatever manner, it now has a right to fish. During the past century numerous nations have concluded bilateral and multilateral treaties and agreements under which they have restricted their own fishermen and vessels from fishing on the high seas in particular places or in a particular manner. The almost unlimited control which international law permits each nation to exercise over its own nationals and its own vessels on the high seas is far more than enough to warrant the conclusion that two or more nations may validly enter into such an agreement regulating the conduct on the high seas of their own vessels and their own nationals.[14]

Nor should the immediate conclusion of such a treaty between Japan and the United States (and doubtless also between Japan and Canada [15]) await the time when it may become feasible to deal with the long-range fisheries problems between Japan and the Soviet Union, or between the United

[14] Apparently the only serious attempt to deny the validity of a treaty limiting the activities of nationals and vessels of the contracting parties on the high seas was one of the American arguments in the North Atlantic Coast Fisheries Arbitration of 1909–1910 with Great Britain, in which it was contended that the American renunciation of the "liberty heretofore enjoyed or claimed . . . to take . . . fish on, or within three marine miles of any of the . . . bays" of British North American possessions, could not be interpreted to apply to those broader bays which were not part of British territorial waters. In its award the tribunal specifically denied this American contention, saying: "The United States contend: 1st. That while a State may renounce the treaty right to fish in foreign territorial waters, it can not renounce the natural right to fish on the high seas. But the tribunal is unable to agree with this contention. Because though a State can not grant rights on the high seas it certainly can abandon the exercise of its right to fish on the high seas within certain definite limits." (Scott, Hague Court Reports (1916), p. 141, at p. 182.)

[15] See statement by Canadian Delegate L. B. Pearson at San Francisco Conference. The New York Times, Sept. 8, 1951, p. 4, col. 1.

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States and the Soviet Union. Eventually such arrangements with the U.S. S. R. would seem desirable, but in the present state of international affairs they may be long postponed. Fortunately such delays in doing all that might be desired with the problems of North Pacific fisheries do not seriously impede the making of satisfactory arrangements with Japan at the present time when relations are cordial and conditions ripe for taking care of these matters before controversies again arise. It is understood that there is slight connection in fact between the fishing areas and fishing industries which concern Japan and the U. S. S. R., and those for which it is urged that agreement be reached now between the United States and Japan (and Canada and Japan). It appears that in recent years there has been almost no fishing by Soviet vessels near Alaska or by American vessels off Siberia. The international controversies in this field which have actually arisen in the pre-war years, and which may be expected in the immediate future unless steps are now taken to prevent them, are those between the United States and Japan, not between the United States and the Soviet Union. Therefore it is urged that there should be no delay by the United States and Japan in entering into an agreement along the general lines suggested, which will do so much to bring about an era of real peace and good will in the Pacific.

WM. W. BISHOP, JR.

INTERNATIONAL LAW OR NATIONAL INTEREST

Two recent books illustrate current trends of thought as to the conduct of nations within the community of nations. They do not present new attitudes; they represent the long struggle between advancing law and the maintenance of the interest of individual units of society.

Professor Hans Morgenthau writes *In Defense of the National Interest* and regards the interest of the nation as superior to anything else. He appears to regard the pursuit of accepted moral principles as in itself immoral: "a foreign policy guided by moral abstractions, without consideration of the national interest, is bound to fail"; "the appeal to moral principles in the international sphere has no concrete universal meaning" (pp. 33–35). To law and the United Nations he devotes about three pages, under the heading of "legalism"; this approach he speaks of as an "erroneous tendency" of the American people. The United Nations might possibly contribute in the field of procedure, by development of new techniques of diplomacy (pp. 101–104). It is "an iron law of international politics, that legal obligation must yield to the national interest" (p. 144); and the only alternative roads to peace are war or negotiation. There is no place whatever for law or morality in Professor Morgenthau's system; it is "realism" stated in most extreme form.

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