

Ocean Law Memo

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The Law of the Sea Conference's "New" Salmon Provision

When and if the UN Law of the Sea Conference--having convened eight times in nearly five years--succeeds in adopting a new ocean-law treaty, it will almost certainly include the salmon article approved by the conference this year in Geneva. Some U.S. observers consider the new provision to be an improvement over its predecessor. In practical effect, however, the significance of the salmon (or anadromous stocks) article is likely to turn on events occurring outside the LOS Conference. Some background is in order.

Anadromous fish are those remarkable species of aquatic life that are spawned in freshwater streams, migrate to the open ocean to fatten and then return to their home streams to begin the cycle anew. In the case of salmon, the oceanic migratory patterns can cover thousands of miles and take several years to complete. The outermost reach of the long ocean journey has been traced to 1000 miles or more from the coastal entry point for some salmon runs.

For several years, the U.S. argued that international law forbids other nations from fishing salmon on the high seas where the source nation is capable of fully harvesting the yield. Naturally, those countries who have engaged in fishing for salmon on the high seas disputed this so-called "abstention principle." In fact, international law, with its traditional emphasis on freedom of fishing, never clearly recognized the abstention rule advocated by the U.S. and other source

* Officially, the "International Convention for the High Seas Fisheries of the North Pacific Ocean."

nations. The only real evidence of the rule appeared in the International North Pacific Fisheries Convention (INPFC)* between the U.S., Canada, and Japan, which was originally negotiated in 1952. The principal effect of this international agreement was to prohibit Japan from fishing North American-source salmon in the Pacific eastward of 175° West longitude (a North-South line that runs approximately through the middle of the Aleutian Island chain). As it turns out, however, large numbers of Alaska-origin salmon migrate into international waters west of this line, mingle with Asian salmon out of U.S.S.R. streams, and are captured there by Japanese gill nets.

The source-nations have continued in the meantime to urge the abstention doctrine and the abolition of the high seas salmon fishery. These nations, especially the U.S., reason that they have expended large sums in protecting spawning areas and fish runs and thus deserve first crack at the resource, that high seas gill-netting captures or kills the fish before they attain their optimum size and is therefore wasteful, and that indiscriminate fishing on several stocks at once jeopardizes rational management of individual salmon runs. The Japanese fishery nevertheless continued.

Early in the current Law of the Sea Conference it became clear that only nine nations** had any direct concern with salmon, which are thus far limited to the northern hemisphere. By the end of the

** U.S., Canada, Japan, Norway, Denmark, Ireland, Britain, Iceland and U.S.S.R.



second substantive LOS session in 1975, this "Salmon Group" had negotiated a compromise draft treaty provision on salmon. Basically, it would prohibit fishing for salmon beyond the 200-mile economic zone-- with an important exception: any nation that would suffer "economic dislocation" from the prohibition would be allowed to continue fishing in its accustomed modes and places. In other words, while new or expanded high seas salmon fisheries would be disallowed, the Japanese gill net fishery could be retained.

But that article was only a proposed treaty provision contained in the LOS Conference's "negotiating text." It was not, and is not, law.

In 1976, the United States Congress passed the Fisheries Conservation and Management Act of 1976, our by-now familiar "200-mile limit" law. That act, however, did more (and less, in some respects) than establish a 200-mile fisheries zone. It also asserted U.S. control over salmon of U.S. origin throughout their high seas migratory patterns even beyond 200 miles.*

Because of this congressional claim, it became necessary for the U.S., Canada and Japan to re-negotiate the INPFC. This was recently accomplished. The revised agreement is considered quite favorable to the U.S.: The "abstention line" will be basically moved ten degrees westward, across the international dateline, to 175° East. In return for agreeing to allow the abstention area to be increased, Japan will be allowed to fish for salmon in certain areas within the U.S. 200-mile zone, but during seasons when Alaskan salmon are not present there in significant numbers. The new arrangement should substantially reduce the Japanese take of U.S.-source salmon.

The re-negotiated INPFC will have an important effect on the significance of the "economic dislocation" standard in the LOS draft treaty article. The nature and extent of Japanese high seas salmon fishing at the LOS treaty's effective date will clearly be the measure of the "economic dislocation" that a salmon fishing prohibition beyond 200 miles would cause. In other words, the extent of the continued allowance of high seas salmon fishing outside 200 miles will be limited to no more than the extent of that fishing which exists when the treaty becomes law. Thus, any reduction in the areas, seasons

* In the U.S.-Japan "Governing International Fishery Agreement" (GIFA), by which the U.S. allows Japan to continue fishing off U.S. coasts for surplus stocks, Japan purports to recognize the U.S. salmon claim. However, one GIFA provision appears to embody, to some degree, the "economic dislocation" language of the LOS text.

and catches of the Japanese fleet prior to the treaty's existence will reduce the amount of fishing the U.S. will be required by the treaty to allow beyond 200 miles.

As already noted, however, the Japanese fleet also captures U.S.S.R.-source salmon in the North Pacific. The Soviets, therefore, have been equally concerned about Japanese high seas gill-netting of "their" salmon. This concern led the Soviets to propose in Geneva that the 1975 draft LOS provisions on salmon be revised. This re-opening of an LOS issue, previously considered "closed," caused considerable consternation, especially to the Japanese delegation. For one thing, the amended article submitted by the Russians would have reduced the obligation of source nations (e.g., the Soviet Union) to consult with other nations (e.g., Japan) in limiting the total catches of salmon. More importantly, the proposed revision would have removed the definite suggestion in the article that Japan has the international-law right to continue fishing beyond the source nation's exclusive economic zone without regard for the conservation needs of the source nation. As might have been expected, the Soviet proposal was rejected by the Japanese delegation.

Difficult negotiations--principally between Japan and the U.S.S.R., with the U.S. acting as mediator--followed the Soviet proposal. These talks eventually resulted in a revised draft article on salmon, and the nine members of the Salmon Group unanimously approved the new provision. Any forthcoming comprehensive LOS treaty will almost certainly include the new article.

The revised provision, currently numbered Article 66 in the Conference's working document, still retains the "economic dislocation" clause, originally designed to allow Japan and other non-source nations to maintain established extra-EEZ fisheries. That clause, however is now modified by a sentence requiring all the "concerned" nations to "maintain consultations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and needs of the State [i.e., nation] of origin . . ."

The full significance of the added words is far from clear (and the negotiators undoubtedly intended to leave the meaning somewhat fuzzy). Nevertheless, a good argument for the following interpretations, based on new Article 66 and certain other draft Articles, can be made:

(1) Extra-EEZ salmon fishing by non-source nations, such as Japan, will not be permitted unless and until the "concerned" nations agree on the terms and conditions of the fishing. Certainly this will be the practical effect of the amendment.

(2) The "concerned" nations will have no obligation to agree on the "terms and conditions." The new wording requires only that consultations be maintained in good faith.

(3) If there is no agreement--or pending agreement--the source nation will be permitted to make its own unilateral conservation regulations controlling both EEZ and extra-EEZ salmon fishing.

(4) The existence or extent of any "economic dislocation" suffered by the general prohibition of salmon fishing beyond the EEZ will still be measured at the time the LOS treaty goes into effect.

Because of this last interpretation the "economic dislocation" language, which was carried forward into the new Article 66, continues to pose a decreasingly significant threat to Alaskan salmon.

Much more important is the primary prohibition on fishing anadromous stocks beyond the EEZ. With this restriction as part of a future LOS treaty, the significant threat that other nations will develop new high seas salmon fisheries can be avoided. Then, with wise management of salmon fishing within our own 200-mile EEZ (and cooperation with Canada --another story), the important anadromous resources can be effectively conserved.

Jon L. Jacobson
November 13, 1978

EDITOR'S NOTE: With this issue of the OCEAN LAW MEMO we have adopted a new format and numbering system. The volume designation has been dropped and issues will be numbered consecutively. This MEMO is No. 11, reflecting the ten MEMOS previously published.



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