THE FISHERIES POLICY OF JAPAN UNDER THE NEW LAW OF THE SEA

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1. INTRODUCTION

With the coming of the so-called 200-mile age, Japan's fisheries policy has changed greatly. Japan, which once espoused the idea of narrow territorial seas and vast high seas and was opposed to the concept of a 200-mile resource zone or an exclusive economic zone, has gradually accepted the idea and now has its own exclusive zone.

Today, Japanese fishing vessels are being phased out from the 200-mile zones of foreign countries. For example, the *Japan-US Fisheries Agreement*, which provided for conditions of access and operation for Japanese vessels in the 200-mile zone of the US, lost its validity at the end of 1991. Also, the catch quota for Japanese vessels in the Russian 200-mile zone, determined by the Japan-Russian fishery talks, has been decreasing.

Partly because the areas in which Japanese fishing vessels operate are becoming smaller and partly because Japan's 200-mile exclusive economic zone, established in 1996, is the world's seventh-largest, the Japanese Government is now paying greater attention to the preservation and management of living resources within its zone. For example, Japan in 1997 introduced the total allowable catch (TAC) system for its fishing vessels. Under this system Japan decides each year the total allowable quota for each main species.

Moreover, in the field of high seas fisheries, Japanese vessels have been increasingly regulated by international conventions. With the decrease of high seas fish stocks and straddling stocks, and as a result of international pressure on high seas fishing, Japan has changed its fisheries policy to attaching more and more importance to the preservation and management of fisheries resources based on scientific evidence.

This paper will discuss the fisheries policy of Japan under the New Law of the Sea.

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2. THE TERRITORIAL SEA

Through applying the *Law on the Territorial Sea* of 1977, Japan extended its territorial sea from three miles to twelve miles, except in the five international strait areas where the territorial sea remains three miles. The reasons why Japan extended its territorial sea were to keep up with the world-wide trend of enlarging the territorial sea to twelve miles and, more directly, to keep foreign fishing vessels, mostly Russian ships, out of the nearby sea. At the time when Japan enacted the 1977 law, Russian fishing vessels operated in the Pacific Ocean off Hokkaido and Honshu, and southward as far as the Izu Islands, damaging the fishing nets of Japanese fishing vessels and affecting the amounts of fish caught by Japanese vessels.

When Japan ratified the *United Nations Convention on the Law of the Sea* (UNCLOS) in 1996, it revised the Law on the Territorial Sea and the Contiguous Zone to adopt the system of straight base lines and contiguous zone; (through the revision the name of the law was changed into the Law on the Territorial Sea and the Contiguous Zone). Among the merits of adopting straight base lines, as expressed by a Government official in the Diet, was that the areas where fishing by foreigners was banned would become larger and that it would become easier to enforce fishing laws in intricately configured coastal areas.

In 1997, several cases occurred in which South Korean vessels were seized by Japanese patrol boats in Japan's thus enlarged territorial sea. In some of them, Korean fishermen were fined on summary verdicts.

In the Daedong No.909 case, a Korean fishing vessel was seized off Hamada, Shimane Prefecture, at a point beyond twelve miles from the coast but within Japan's new territorial sea. Under the 1965 *Japan-Korea Fisheries Agreement*,¹ which was still in force at the time of the seizure, the flag state had exclusive enforcing jurisdiction beyond twelve miles from the coast. The Hamada Branch of the Matue District Court rendered a decision on 15 August 1997.² It threw out the indictment against the captain of the vessel, saying that under the Japanese constitution the Japan-Korea Fisheries Agreement had priority over Japanese domestic law, that is, the Law on the Territorial Sea and the Contiguous Zone. According to the decision, the point where the Daedong No.909 was seized was beyond the twelve-mile fishing zone as established by the Agreement, and thus at a place where only the flag state had enforcement jurisdiction.

The Matue Branch of Hiroshima High Court, on 11 September 1998, annulled the decision of the Hamada Branch of the Matue District Court and referred the case back to the District Court, saying that the point where the Daedong No.909 was seized had been within the Japanese territorial sea from

¹ Text of the Agreement in SHIGERU ODA (Ed.), *The International Law of the Ocean Development* (1975) at 554.

² Matue District Court, judgment 15 August 1997, Case No.(wa) 35 (1997).

1 January 1997. According to the decision of the Matue Branch, the Law on the Territorial Sea and the Contiguous Zone was enacted in accordance with the United Nations Convention to which Korea was also a party, so that Japanese authorities had jurisdiction of enforcement within the territorial sea as determined by it.³

On further appeal by the defendant the case was dealt with by the Supreme Court. The No.3 Petty Bench of the Supreme Court upheld the decision of the Matue Branch of Hiroshima High Court on 30 November 1999.⁴

In another case in which a Korean fishing vessel was seized by a Japanese patrol boat while the fishing vessel was operating within the newly determined territorial sea off Nagasaki, the Nagasaki District Court sentenced the captain to 30 months in prison, suspended for three years, and fined him 1.5 million yen. The court also sentenced two members of the crew to 18 months in prison, suspended for three years. The court held that in the waters declared Japanese territorial sea under the Law on Territorial Sea and the Contiguous Zone, Japan had enforcement jurisdiction and that the bilateral agreement did not restrict Japan's control over the area.⁵ The Fukuoka High Court on 28 April 1999, and The No.3 Petty Bench of the Supreme Court on 30 November 1999, upheld the decision of the Nagasaki District Court.⁶

3. THE EXCLUSIVE ECONOMIC ZONE

When the problem of the exclusive economic zone was considered at the earlier sessions of the Third United Nations Conference on the Law of the Sea, Japan was not willing to accept the idea of a 200-mile resources zone. The delegate of Japan at the second session of the Conference, which was held in Caracas in 1974 said:

"For Japan, the sea areas beyond the territorial sea should retain basically the character of high seas. It had been argued that the freedom of fishing in the high seas could be abused, but it was surely not appropriate to abolish a freedom because of the risk of abuse.

Although it was true that in certain limited cases, freedom of access to fishery resources might have led to over-exploitation and depletion, it was an exaggeration to contend that the danger of depletion of world fishery resources was imminent or omnipresent. The truth of the matter ... was that despite the popular belief to the contrary, the number of stocks that were actually depleted, in the sense that their

³ Hiroshima High Court, judgment 11 September 1998, Case No.(u) 32 (1997).

⁴ Supreme Court, judgment 30 November 1999, Case No.(a) 1137 (1998).

⁵ Nagasaki District Court, judgment 24 June 1998, Case No.(wa) 15 (1998).

⁶ Fukuoka High Court, judgment 28 April 1999, Case No.(u) 221 (1998); Supreme Court, judgment 30 November 1999, Cases Nos.(a) 764 and 855.

productivity had been significantly reduced, was still small. The world catch could thus be increased substantially before the level of full utilization was reached.”⁷

He then emphasized that the new convention should contain a general obligation for all States to adopt conservation measures and should lay down certain basic principles relating to such measures. These should include the need to base decisions on the best scientific evidence available, the requirement of consultation with appropriate international or regional organizations, the principle of non-discrimination among fishermen, and recognition of the special status of the coastal state with regard to conservation. He added:

“If the proposed 200-mile economic zone was adopted, the major fertile fishing grounds of the world come under the exclusive jurisdiction of several coastal states, including some highly developed countries. That fact showed ... that acceptance of the exclusive economic zone as currently conceived would accentuate rather than reduce existing inequities.”⁸

It was in 1976 that the fishery interests in Japan began reconsideration of Japan’s negative attitude.⁹ However, when the Japanese Government decided in that year to extend its territorial sea from three miles to twelve miles, it had no intention of establishing a 200-mile zone. However, actions by the Soviet Union and the United States in that same year caused Japan to change direction. In the course of drafting a territorial sea law, the Soviet Union in February 1976 extended fishery jurisdiction to 200 miles off its coast. Similarly, the United States set up a 200-mile fishery zone through the Magnuson Fishery Conservation and Management Act. Japan then decided to establish a 200-mile fishing zone in order to stand on an equal footing in fishery talks between Japan and the Soviet Union.¹⁰

In conformity with this change of policy, Japan established a 200-mile fishing zone through the *Law on Provisional Measures relating to the Fishing Zone* of 1977. Under the Law, Japan claimed “jurisdiction” over fisheries within the fishing zone,¹¹ unlike other countries that claimed “sovereign rights” or “exclusive jurisdiction” for the purpose of fishery or resource control within their respective 200-mile zones. The Enforcement Order on the Law on Provisional Measures refrained from setting up a fishing zone in the area of the Sea of Japan west of the line 135°E and the East China Sea, a part of the Pacific Ocean adjoined thereto, the Yellow Sea, because the Republic of Korea and China did not have a 200-mile zone. Moreover,

⁷ Third United Nations Conference on the Law of the Sea, Official Records, Vol.2 (1975) 217.

⁸ Ibid.

⁹ MOTOO OGISO, “Japan and the UN Convention on the Law of the Sea”, 25 *Archiv des Völkerrechts* (1987) 73.

¹⁰ CHIYUKI MIZUKAMI, *Nihon to Kaiyoho* [Japan and the Law of the Sea] (1995) 63-69.

¹¹ Art.2

the fishery control within the fishing zone was directed towards Soviet fishing vessels, whereas Korean and Chinese fishing vessels were exempted from the application of the Law although small parts were applicable to them.

Japan ratified the United Nations Convention on the Law of the Sea on 20 June 1996. To implement Part V of the Convention, it enacted the *Law relating to the Exclusive Economic Zone and Continental Shelf*, the *Law on the Exercise of Sovereign Rights concerning Fisheries in the Exclusive Economic Zone*, the *Law relating to the Preservation and Management of Marine Living Resources* and, in addition, amended some of its existing laws.¹²

The *Law relating to the Exclusive Economic Zone and Continental Shelf* established a 200-mile exclusive economic zone. The Law stipulates the establishment of the exclusive economic zone as being a zone in which Japan exercises its sovereign rights and other rights as a coastal State as prescribed in Part V of the UN Law of the Sea Convention. Unlike the case of the fishing zone, the exclusive economic zone was set up around all the coasts of Japan, taking into account Japan's basic stand on Takeshima and the Senkaku Islands. Of course it could be expected that the Republic of Korea and China would react strongly.¹³ In the case of Takeshima, it is agreed by Japan and the Republic of Korea that the territorial problem over the island and the issues of the delimitation of the exclusive zone and fisheries that had accompanied the establishment of the exclusive economic zone should be handled separately.¹⁴

The purpose of the *Law on the Exercise of Sovereign Rights concerning Fisheries in the Exclusive Economic Zone* is to provide necessary measures for the exercise of sovereign rights over fisheries in the exclusive economic zone.¹⁵ This includes measures to preserve and manage marine living resources appropriately by properly implementing the provisions of the UN Law of the Sea Convention. The Law repealed the 1977 *Law on Provisional Measures* and replaced it with another that contained changes in several respects. One of the more important changes was the deletion of the exception of highly migratory species from the requirement of permission for foreigners to catch these species. Japan now claims, as do other countries, including

¹² MORITAKA HAYASHI, "Japan, New Law of the Sea Legislation", 12 *The International Journal of Marine and Coastal Law* (1997) 570-580. For the text of the Law on the Exclusive Zone and the Continental Shelf, see (United Nations) *Law of the Sea Bulletin* No.35 (1997) 94.

¹³ TOSHIHISA TAKATA, "The conclusion by Japan of the United Nations Convention on the Law of the Sea (UNCLOS) and the adjustment of maritime legal regime", 39 *JAIL* (1996) 137.

¹⁴ *Ibid* at 140. See also *The Daily Yomiuri* of 22 February 1996; *Nihonkeizai Shimbun* of 8 August 1996.

¹⁵ Art.1.

the United States, jurisdiction over highly migratory species within its 200-mile zone.¹⁶

Under the above Law foreigners shall not engage in fishing or catching, nor in taking marine animals and plants within the exclusive economic zone (with the exception of the area referred to in the subparagraphs of Article 4) without permission from the Minister of Agriculture, Forestry and Fisheries, except if, *inter alia*, the catching and taking concerned is of an insignificant nature.¹⁷ The Minister shall not grant such permission unless he is confident (a) that the fishing or catching and the taking of marine animals and plants as meant by the application will be conducted properly in accordance with the applicable international agreements or other arrangements, (b) that such activities will not exceed the limits of the catch as laid down by the ordinance of the Minister of Agriculture, Forestry and Fisheries Ordinance for the purpose and (c) that such activities will be in accordance with any other criteria prescribed by Cabinet Order.¹⁸¹⁹ The purpose of the *Law relating to the Preservation and Management of Marine Living Resources* is (a) to preserve and manage marine living resources in the exclusive economic zone through a program of preservation and management of the said resources, (b) to take measures to control the allowable catch, along with the measures taken under the *Fisheries Law* and the *Fisheries Resources Conservation Law* and (c) to ensure, at the same time, a proper implementation of the UN Law of the Sea Convention. The ultimate goal of the Law is to help develop the fishing industry and stabilize the supply of marine products.²⁰

In Japan, fishery management had been conducted under the Fisheries Law and its regulations through the Minister of Agriculture, Forestry and Fisheries and by prefectural governors controlling the size of fishing vessels, fishing areas, fishing periods of the year, etc. However, these measures have proved to be “not only ineffective but consequently invite over-fishing because many boats tried to outdo each other in their horse-power abilities to beat

¹⁶ In the United States, effective 1 January 1992, an amendment to the Magnuson Fishery Conservation and Management Act includes highly migratory species within US jurisdiction. WILLIAM T. BURKE, *The New International Law of Fisheries, UNCLOS 1982 and Beyond* (1994) at 238.

¹⁷ Art.5.

¹⁸ Art.6 para.1.

¹⁹ The decisions on the limits of the catch are to be made in accordance with prescriptions under Cabinet Order, based on (1) fishery resources trends as supported by scientific evidence; (2) the actual situation with respect to fishing by Japanese fishermen within the fishing zone, and (3) overall consideration of factors such as the actual situation with respect to fishing by foreigners within the fishing zone and the situation with respect to Japanese fisheries in the waters adjacent to a foreign country (Art.6 para.2). Decisions on the limits of catch in respect of the marine living resources referred to in Art.2 para.3 of the *Law relating to the Preservation and Management of Marine Living Resources* are to be based on the total allowable catch as determined under Art.2 para.2 of the Law, in addition to the conditions mentioned above (Art.6 para.3).

²⁰ Art.1.

out their rivals.”²¹ The UN Law of the Sea Convention obliges the coastal state to ensure, through proper conservation and management measures, that the maintenance of living resources in the exclusive economic zone is not endangered by over-exploitation.²² It also obliges the coastal state to determine the allowable catch of living resources in its exclusive economic zone, to promote the objective of optimal utilization of living resources, to determine its capacity to harvest the living resources of the exclusive economic zone, and to give other states access to the surplus of the allowable catch.²³ When Japan became a party to the UN Law of the Sea Convention, it reconsidered its policy on the preservation and management of marine living resources. This involved consideration of the recent situation of fisheries in the sea off Japan, stock levels, and the fact that many of the Western countries, particularly Canada and the United States, had adopted the Total Allowable Catch system (TAC), although each country’s concrete measures of TAC system vary.

There are three types of fishery management under the TAC system. One is the system of Individual Transferable Quotas (ITQs) in which quotas, a form of property right, are set for fisheries or EEZs and individual quotas (IQs) are allocated to vessels or groups of vessels within TACs. This system was first introduced in New Zealand and has since been adopted in various ways by fisheries in Australia, South Africa, Holland, Canada, and the United States.²⁴ The second is the so-called IQ system in which individual quotas are not transferable. Norway and several EU countries have adopted this system in some of their fisheries.²⁵ The third is the so-called “olympic” system in which, without allocating catch quotas, fishing vessels stop operating when the total allowable catch for the species is reached. The United States, Sweden and Argentina have adopted this system in some of their fisheries. Japan has also adopted this system.

Japan introduced the TAC system in the above *Law on the Preservation and Management of Marine Living Resources* (the so-called TAC Law), in addition to the traditional system. According to the TAC Law, the Minister of Agriculture, Forestry and Fisheries shall establish a basic program for the preservation and management of marine living resources in the area under Japanese jurisdiction. The program shall contain, *inter alia*, a basic policy concerning preservation and management of marine living resources, a deter-

²¹ *Asahi Evening News* of 3 March 1996.

²² Art.61 para.2.

²³ Art.61 para1, Art.62 paras 1 and 2.

²⁴ G.R.MORGAN, “Optimal fisheries quota allocation under a Transferable Quota (TQ) management system”, 19 *Marine Policy* (1995) 379-390; COLIN HUNT, “Management of the South Pacific Tuna Fishery”, 21 *Marine Policy* (1997) 167-170.

²⁵ RAGNAR ARNASON, “Ocean Fisheries Management: Recent International Developments”, 17 *Marine Policy* (1993) 339.

mination of the stock situation of each designated marine living resource, and the total allowable catch of each designated marine resource.²⁶

As for designated resources, this was to be understood as those about which enough scientific data and knowledge are available and meet the following criteria: (a) species which are caught and consumed in large quantities and are important for people's livelihood and the fishing industry, (b) species in need of preservation and management measures such as urgent establishment of TAC due to the bad situation of the resources, and (c) species for which foreign vessels undertake activities in the waters near Japan.

Under Japan's TAC system, the Minister or the Prefectural Governor may publicize the catches made if they consider that these are drawing near the total catches according to their management authority, and give advice or guidance to fishermen to prevent them from surpassing the total allowable catch. They may also order to halt operations or take other measures when they consider that the catches made have surpassed, or are likely to surpass, the total allowable catch.²⁷ The Fisheries Agency on 2 October 1966 decided on the following allowable catch for 1997 for six species, as follows:

Pacific saury	300,000 tons	
Alaska pollack	267,000 tons	
Yellowfin horse mackerel	370,000 tons	
Spotlined sardine	720,000 tons	
Snow club	4,815 tons	
Chub mackerel and spotted mackerel	630,000 tons	(later changed to 700,000 tons)

The Fisheries Agency decided in October 1997 to add Pacific flying squid as a designated resource to which the TAC system was to apply. This addition became possible as a result of the developments in the ways of detecting the volume of the population of Pacific flying squid.²⁸ The final annual allowable catch for 1998 for seven species were as follows:

Pacific saury	300,000 tons
Alaska pollack	311,000 tons
Yellowfin horse mackerel	430,000 tons
Spotlined sardine	520,000 tons
Snow club	4,945 tons
Chub mackerel and spotted mackerel	700,000 tons
Pacific flying squid	450,000 tons

²⁶ Art.3.

²⁷ Arts. 8-10.

²⁸ Norintoikeikyokai, *Gyogyohakusyo* [White Paper on Fisheries] 1997 (1998) 115.

In May 1996 Japan began negotiations with the Republic of Korea on new fishery relations under the UN Law of the Sea Convention. On 23 January 1998, Japan decided to give notice to Korea of its decision to terminate the 1965 Japanese-Korean *Fisheries Agreement* in order to protect Japanese fishermen from the operations of Korean vessels off the Japanese territorial sea. Under the 1965 Agreement, the operation of Korean vessels off the Japanese territorial sea was regulated by the Korean authorities. After tough negotiations, the two countries concluded on 28 November 1998 a Fisheries Agreement that replaced the 1965 Agreement. It came into force on 22 January 1999 and applies to the exclusive economic zones of the Parties.

Under the agreement, each Party decides every year on the catch quotas and other conditions of fishing operations in its exclusive economic zone for fishing vessels of the other Party, taking account of the conditions of the marine living resources in the zone. Accordingly permissions are issued to the vessels.

The agreement establishes a Provisional Zone around Takeshima, the title to which is being claimed by both Parties. A similar Provisional Zone was established in the East China Sea off the Korean Cheju Island. In these Provisional Zones the flag state has jurisdiction to prescribe and enforce fishing regulations.

The agreement set up a Joint Fishery Committee whose functions are to take into consideration and advise the parties on fishing operations in the exclusive economic zone of each party, the maintenance of order of fishing operations, the cooperation between the two countries in the field of fisheries, the preservation and management of living resources in the provisional zones, etc.

In November 1997 Japan and the People's Republic of China also signed a *Fisheries Agreement*. However, as of the time of this writing, it has not yet come into effect. The agreement would apply to the exclusive economic zones of the Parties. Each Party would decide on the species, the quotas and other conditions for fishing operations in the exclusive economic zone of either Party for nationals of the other Party. The agreement would establish a Provisional Measures Zone (Joint Management Zone) in the area between 30°40'N and 27°N and beyond 52 miles from the coast of each Party. In the zone, joint management measures taken by the Parties would apply. In the area south of 27°N, in which the Senkaku Islands are located, the flag state principle would apply. Both Japan and China, and also Taiwan, claim territorial rights to the islands.²⁹

²⁹ For comment on the Agreement, see MASAYOSHI MIYOSHI, "New Japan-China Agreement; an evaluation from the point of view of dispute settlement", 41 *JAIL* (1998) 30-43.

4. THE CONTINENTAL SHELF

Japan was not a party to the 1958 Convention on the Continental Shelf. It refrained from participation because the Convention included sedentary species in the continental shelf resources, whereas Japan had argued that some crabs such as king crabs are not continental shelf resources but high seas resources. Even when Japan established the 200-mile fishing zone in 1977, a government official stated as the government's view in the Diet that under the Law on Provisional Measures crustaceans at the seabed or subsoil of the 200-mile zone are not continental shelf resources, but marine living resources.³⁰

On the other hand, with the development of the continental shelf regime in international law, Japan has been engaged in the exploration and exploitation of mineral resources of the continental shelf such as oil or natural gas, on the understanding that under customary international law the coastal state has exclusive rights to explore and exploit these resources.

The Law on the Exclusive Economic Zone and the Continental Shelf of 1996 provides that Japan exercises sovereign and other rights as a coastal State in accordance with the UN Law of the Sea Convention.³¹ So, Japan in fact adhered to Part VI of the Convention that contains a provision concerning sedentary species, although in practice it does not make any difference within the 200-mile zone whether marine living resources are exclusive economic zone resources or continental shelf resources.

The Law on the Exercise of the Sovereign Rights concerning Fisheries in the Exclusive Zone provides that its Articles 3-14 which deal with fishing by foreigners in the exclusive economic zone, apply *mutatis mutandis* to fishing of *sedentary species* (within the meaning of the UN Law of the Sea Convention) and to the taking and exploitation of marine living resources on the continental shelf *beyond* the outer limits of the exclusive economic zone.³² On the other hand, the TAC Law applies to *marine living resources* of the exclusive economic zone and the continental shelf.³³

Under the laws mentioned above, read together, fish and other marine living resources on the continental shelf beyond the outer limits of the exclusive economic zone would be subject to the TAC system. Under the UN Law of the Sea Convention, sedentary species of the continental shelf are not subject to the provisions of Part V on the preservation and management of living resources, including the determination by the coastal state of allowable catch.³⁴ Nevertheless, some countries, including the United States, apply

³⁰ Minutes of the Joint Committee of the Committee for Agriculture, Forestry and Fisheries, the Committee for the Cabinet, and the Committee for Foreign Affairs No. 1 (1977) at 1-2.

³¹ Art.2.

³² Art.14.

³³ Art.2.

³⁴ Art.77.

the preservation and management system under their national law to the sedentary species of the continental shelf.³⁵

6. INTERNATIONAL CONTROL OF HIGH SEA FISHERIES

Japan is one of the countries which has made the most of freedom of fishing on the high seas. But that does not necessarily mean that Japan has paid little attention to preservation and management of marine living resources. For example, the delegate of Japan at the Sea-Bed Committee of the United Nations in 1972 said:

“Developments of modern techniques have increased man’s capabilities to fish so much that, if unregulated, over-fishing is now not only possible, but a reality in some cases. Thus, the necessity for regulating fishing activities, whenever there is a danger of over-exploitation, has now come to be widely recognized by the international community, and indeed international cooperation for the purpose of conservation – both bilateral and multilateral – has been developed in response to such circumstances.

Accordingly, it would seem reasonable to say that the freedom to fish has already been modified to the extent that there is now [an] obligation imposed on States to take an cooperate [sic] in the adoption of necessary conservation measures whenever it is necessary to do so.”³⁶

It is significant to note the contrast to Japan’s earlier policy of freedom of access. Japan is now a party to the *Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea*, the *Convention for the Conservation of Anadromous Stocks in the North Pacific Ocean*, the *Agreement for the Establishment of the Indian Tuna Commission*, the *Convention on Conservation of Antarctic Marine Living Resources*, the *Convention between the United States of America and the Republic of Costa Rica for the Establishment of an Inter-American Tropical Tuna Commission*, the *Convention for the Conservation of Atlantic Tuna*, the *Convention on Future Multilateral Cooperation in the North Atlantic Fisheries*, and several more.

5.1 Ban on salmon fishing in the high seas

In regard to anadromous stocks, the UN Law of the Sea Convention provides that fishing such stocks shall be conducted only in waters landward of the outer limits of exclusive economic zones, except in cases where this

³⁵ USC 1802, 1812.

³⁶ The Law of the Sea Office, the Ministry of Foreign Affairs, Third United Nations Conference on the Law of the Sea, Statements Delivered by the Delegation of Japan (n.d.) 133-134.

rule would result in economic dislocation for a state other than the state of origin.³⁷

In the Northern Pacific area, the following actions by the Soviet Union and Japan in relation to this subject are significant. First, in 1976, the Soviet Union established a 200-mile zone. Next, on 29 April 1978, the *Japan-USSR High Seas Fisheries Treaty*, which had governed the fishing of salmon, herring and clubs since 1952, became ineffective. In the same year salmon fishing by Japanese fishing vessels came under the regime of the 1978 *Japan-USSR Agreement concerning Cooperation in the Field of Fisheries* and the *Protocol on the Procedures and Conditions for Japanese Salmon Fisheries*. Since 1985, salmon fishing is regulated by the *Japan-USSR Agreement concerning Cooperation in the Field of Fisheries*. Under the agreements of 1978 and 1985, a Japan-USSR Commission every year sets the quota each year of salmon for Japanese fishing vessels in the sea outside the 200-mile zone of the Soviet Union. However, in the latter half of the 1980s there was a movement to ban salmon fishing in the area beyond the 200-mile limit of the coastal state. For instance, in the 1986 talks between Japan and the Soviet Union under the 1985 Agreement the Soviet delegation made a statement according to which the Soviet Union might ban fishing for salmon of Soviet origin in the area beyond the 200-mile limit. Japan requested withdrawal of the statement on the ground that according to the established rule the annual catch quota was to be decided by agreement between the two countries. Nevertheless, the Soviet Union persisted in its position that it is up to the Soviet Union to evaluate the population of salmon of Soviet origin and to decide the catch quota for Japanese fishing vessels. In the 1988 talks, in line with its position, the Soviet Union announced a ban on fishing for salmon of Soviet origin in the area beyond the 200-mile limit by 1992.

At the US-Soviet Summit on 31 May 1988 the two states signed a comprehensive fisheries agreement. In February 1989, at the first meeting of the US-Soviet Intergovernmental Consultative Committee on Fisheries, which was set up under the agreement, a provisional accord was reached on the banning of salmon fishing in the North Pacific high seas. The two governments then started to draft a new convention on the conservation and management of anadromous stocks in the Pacific aimed at (a) ending high seas salmon fishing (that is, banning any high seas taking except as specifically agreed by the signatories) and (b) providing for broader multilateral cooperation than was provided for under the regime in effect at that time, including the (tripartite) *North Pacific Fisheries Convention*. The draft was then sent to Japan and Canada for consideration.³⁸

Japan decided to accept a proposed four-party convention. This decision was facilitated by two factors: (1) At the Soviet-Japanese Ministerial Meeting

³⁷ Art.66 para.3.

³⁸ MORITAKA HAYASHI, "Fisheries in the North Pacific: Japan at a 'turning point'", 22 *Ocean Development and International Law* (1991) 351.

between Japan and the Soviet Union held in Moscow in June 1991, the Soviet Union agreed to allow Japanese fishing vessels to fish for salmon within the Soviet 200 mile zone and (2) high seas fishing had done great damage to salmon stocks. In 1992, Japan announced that it would henceforth refrain from salmon fishing in the high seas.

Japan, the Russian Federation, the United States, and Canada finally signed the *Convention for the Conservation of Anadromous Stock in the North Pacific Ocean* on 11 February 1992, thus terminating the North Pacific Fisheries Convention. The new Convention prohibits fishing of anadromous stocks in the North Pacific Ocean and its adjacent sea north of 33°N beyond 200 miles from the baselines, while incidental taking shall be minimized to the largest possible extent. Thus, Japan accepted the idea of “no salmon fishing” in the high seas.

5.2 Control of fisheries on the high seas area of the Bering Sea

With the strengthening of control within the 200-mile zones by the United States, the Soviet Union, and other countries, fishing vessels of Japan, the Republic of Korea, China and Poland rushed into the high seas area of the Bering Sea (the Donut Hole).³⁹ In 1980, Japanese and Korean vessels caught approximately 15,000 tons of pollack in the Donut Hole. In 1985 Chinese and Polish vessels, followed in 1986 by Russian vessels, joined operations in the area. These vessels engaged in operations on a large scale. As a consequence, catches in the Donut Hole decreased from the peak of more than 1.4 million tons in 1989 to approximately 290,000 tons in 1991. In response, delegations of China, Japan, the Republic of Korea, Poland, the Soviet Union, and the United States met in February, 1991 in Washington D.C. to discuss the establishment of an international conservation regime for pollack resources of the area. The meeting, which was the First Conference on the Conservation and Management of the Living Marine Resources of the Central Bering Sea, laid the foundation for talks by concluding, by consensus, that pollack stocks were fully utilized and by affirming the need to take urgent conservation measures for the marine living resources of the area.⁴⁰

At first, Japan took the position of giving priority to the maintenance of freedom of fishing on the high seas. However, even before the second

³⁹ Arts.1 and 3. For an account of this Convention, see YVONNE L.DE REYNIER, “Evolving principles of international fisheries law and the North Pacific Anadromous Fish Commission”, 29 *Ocean Development and International Law* (1998) 147-178.

⁴⁰ WILLIAM T.BURKE, “Fishing in the Bering Sea Donut: straddling stocks and the new international law of fisheries”, 16 *Ecology Law Quarterly* (1989) 285-289; LOURENE MIOVSKI, “Solutions in the Convention on the Law of the Sea to the problem of overfishing in the central Bering Sea: analysis of the Convention, highlighting the provisions concerning fisheries and enclosed and semi-enclosed areas”, 26 *San Diego Law Review* (1989) 525-531.

meeting, which was held in Tokyo from 31 July to 2 August 1991, Japan proposed voluntary fishery controls, thus changing its high seas fisheries policy from one of priority for freedom of fishing to one of priority for preservation and management of high seas fishery resources based on scientific research.

Japan played an important role in the drafting of the *Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea*, which was adopted at the tenth conference held in Washington, D.C. in February 1994. The signatories were China, Japan, South Korea, Poland, the Russian Federation and the United States. The objectives of the Convention are: the establishment of an international regime for conservation, the management and optimum utilization of pollack resources in the Central Bering Sea and the restoration and maintenance of pollack resources in the Bering Sea at levels which will permit maximum yield.

5.3 Large-scale driftnet fishing problems

It is said that the origin of the contemporary driftnet issue dates from 1979 when the fishing fleets of Japan, Korea and Taiwan developed driftnet fisheries targeting neon flying squid in the North Pacific region.⁴¹ In 1987 Canada and the United States exerted pressure on the three countries to control these activities. Canada banned the use of large-scale driftnets within its waters. The United States enacted the 1987 Driftnet Impact Monitoring, Assessment, and Control Act, which directed the Departments of Commerce and State to negotiate with countries using driftnets in areas where U.S. marine resources were affected. Japan, Taiwan and Korea entered into agreements on the matter with the United States in 1989.⁴²

On the other hand, driftnet fishing by Japanese and Taiwanese fishing vessels in the South Pacific region targeting albacore had raised the concern of South Pacific Forum member countries since late 1988. In July 1989, at the meeting of the Forum at Tarawa, Kiribati, the member states adopted a declaration calling on Japan and Taiwan to end driftnet fishing. In response to the Tarawa Declaration, Japan decided in September 1989 to reduce the

⁴¹ WILLIAM T. BURKE, MARK FREEBERG, EDWARD L. MILES, "United Nations resolutions on driftnet fishing: an unsustainable precedent for high seas and coastal fisheries management", 25 *Ocean Development and International Law* (1994) 133. According to JOHNSTON, emerging in 1979, neon squid or flying squid fishery was originally confined to Japanese vessels on the high seas area of the North Pacific designated by the INPFC. DOUGLAS M. JOHNSTON, "The driftnetting problem in the Pacific Ocean: legal considerations and diplomatic opinions", 21 *Ocean Development and International Law* (1990) 12.

⁴² TED L. MCDORMAN, "Canada and the North Pacific Ocean: recent issues", 22 *Ocean Development and International Law* (1991) 371-372; VIRGINIA M. WALSH, "Eliminating driftnets from the North Pacific Ocean: U.S.-Japanese cooperation in the International North Pacific Fisheries Commission, 1953-1993", 29 *Ocean Development and International Law* (1998) 315.

number of vessels engaging in driftnet fishing in the region. The South Pacific Commission (SPC) at its meeting at Guam in October 1989 also adopted a resolution calling for an immediate ban on driftnet net fishing in the South Pacific while pointing out its adverse effects on fishing in the SPC region. In November 1989, member states of the Forum Fisheries Agency adopted the *Convention for the Prohibition of Fishing with Long Drift Nets in the South Pacific* (Wellington Convention) and protocols related to it.⁴³

In December 1989 the General Assembly of the United Nations, upon the proposal of the United States, New Zealand and some other countries, adopted resolution 44/225 entitled “*Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world’s ocean and the sea.*” The operative paragraphs of the resolution included the following:

- (a) Moratoria on large-scale pelagic driftnet fishing on the high seas by 30 June 1992, with the understanding that such a measure will not be imposed in a region or, if implemented, can be lifted, should effective conservation and management measures be taken based upon statistically sound analysis to be jointly made by concerned parties of the international community with an interest in the fishery resources of the region, to prevent the unacceptable impact of such fishing practices on that region and to ensure the conservation of the living marine resources of that region;
- (b) Immediate action to reduce progressively large-scale pelagic driftnet fishing activities in the South Pacific region leading to the cessation of such activities by July 1991, as an interim measure, until appropriate conservation and management arrangements for South Pacific albacore tuna resources are entered into by the parties concerned.

The Japanese government thereupon decided on 17 July 1990 to suspend driftnet fishing in the South Pacific region for the 1990-1991 season, beginning in November. The suspension was to continue until regulatory measures for driftnet fishing referred to in the UN resolution would be established. The Japanese decision was made with due account taken of the fact that the economies of the South Pacific island countries rely on fisheries resources, that these countries wish to develop their economies based on albacore fishing, and that, therefore, their grave concern about driftnet fishing in the region was justified.⁴⁴

In December 1990, resolution 44/225 was re-affirmed by General Assembly resolution 45/197. The following year the General Assembly in its resolution 46/215 of December 1991 called, *inter alia*, for a complete end of driftnet fishing on the world oceans and seas by 31 December 1992. Japan thereupon submitted a plan to the UN Secretariat detailing its intended phase-out and

⁴³ CHIYUKI MIZUKAMI, “Fisheries problem in the South Pacific region”, 15 *Marine Policy* (1991) 118-120.

⁴⁴ *Asahi Evening News* of 18 July 1990.

stopped all large-scale driftnet fishing on the high seas by the end of December 1992.

5.4 Conservation and management of tuna

Japan took part in the tripartite (Japan, Australia, New Zealand) meetings for the preservation and management of southern bluefin tuna, which started in 1982. In 1993, the three countries adopted the *Convention for the Conservation of Southern Bluefin Tuna*.⁴⁵ The objective of the Convention is to ensure, through appropriate management, the conservation and optimum utilization of southern bluefin tuna. Under the Convention a Commission for the Conservation of Southern Bluefin Tuna decides on the total allowable catch and its allocation among the parties, unless the Commission prefers other appropriate measures on the basis of the report and recommendations of a Scientific Committee.⁴⁶ The Convention reflects a recent positive change in Japan's approach to coastal state jurisdiction over highly migratory species and the regulation of high seas fisheries.⁴⁷ Accordingly Japan enacted the *Law on the Special Measures concerning the Preservation and Management of Tuna Resources* in June 1996.

In October 1996 the Minister of Agriculture, Forestry and Fisheries published a basic policy aimed at strengthening the preservation and management of tuna resources. The policy purported to ensure the strengthening of conservation and management of tuna resources and their optimum utilization through the appropriate international organizations and, where no such organization exists, the cooperation among states concerned to establish a new international organization for that purpose. The Fisheries Agency decided, that same month, to begin consultation with the states concerned on the establishment of an organization to preserve and manage tuna resources in the Pacific Ocean. It was said that the United States, Canada, the Republic of Korea, and Indonesia agreed to establish such an organization.⁴⁸

In further developments, Japan conducted an experimental fishing program in 1998-1999 after it failed to persuade Australia and New Zealand in the Commission for the Conservation of Southern Bluefin Tuna, established by the 1993 Convention, to increase the catch quotas of southern bluefin tuna. This gave rise to a dispute between Australia and New Zealand on the one hand and Japan on the other hand. In Japan's view, experimental fishing can be carried out within the framework of the 1993 Convention and in light of

⁴⁵ For the background and an account of this Convention, see ANTHONY BERGIN and MARCUS HAWARD, "Southern bluefin tuna fishery, recent developments in international management", 18 *Marine Policy* (1994) 263-273.

⁴⁶ Preamble, Arts.3 and 8.

⁴⁷ BERGIN and HAWARD, loc.cit.n.45 at 271.

⁴⁸ *Cyugoku Shimbun* of 29 October 1996.

scientific evidence, without endangering tuna stocks. Australia and New Zealand referred the case to arbitration under Annex VII of the UN Convention on the Law of the Sea, and in July 1999 requested the International Tribunal for the Law of the Sea (ITLOS) to prescribe provisional measures ordering Japan to discontinue its experimental fishing pending the setting up of the arbitral tribunal. Japan contested the existence of jurisdiction of an arbitral tribunal set up under Annex VII of the UN Law of the Sea Convention and argued that the International Law of the Sea Tribunal lacks jurisdiction to order the provisional measures asked for. Japan also contended that the dispute arose from the 1993 Convention and, accordingly, should be settled by reference to the procedure provided for in that Convention. Japan also argued that even if the International Law of the Sea Tribunal has jurisdiction over the request, the prescription of provisional measures would be inappropriate because of the absence of risk of irreparable damage to the southern bluefin tuna stock.

On 27 August 1999, the Tribunal prescribed provisional measures nonetheless, ordering the parties, *inter alia*, to ensure, unless they agree otherwise, that their annual catches do not exceed the annual national allocation at the levels last agreed by the parties and that, in calculating the annual catches for 1999 and 2000, account shall be taken of the catch in 1999 as part of an experimental program. The Tribunal also ordered to refrain from conducting experimental fishing programs, except with the agreement of the other parties or unless the experimental catch is counted against the annual national allocation concerned. It also decided that the parties should resume negotiations without delay with a view to reaching agreement on measures for the conservation and management of southern bluefin tuna.⁴⁹

Following the ruling of the Tribunal, the Fishery Agency of Japan decided to deduct the catch made under the experimental fishing program (2,000 tons) from its commercial fishing quota, partly from that for 1999 but mostly from that for the year 2000.⁵⁰

6. CONCLUSION

As mentioned earlier, Japanese fisheries policy has changed greatly since the latter half of the 1970s with regard to fisheries both within and beyond the 200-mile zone. It evolved from a policy strongly supporting freedom of the high seas to one of acceptance of numerous regulatory regimes. In order to be effective, it is necessary that fisheries policies for the preservation and management of fish stocks be coordinated. Fisheries policies must also be based on the best scientific data and knowledge available. Fishery organiza-

⁴⁹ Order on the Requests for provisional measures in the Southern Bluefin Tuna cases, 27 August 1999.

⁵⁰ Nihonkeizai Shimbun of 30 August 1999.

tions, both worldwide and regional, have significant roles to play in this important endeavour.