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In The Realm of Diplomacy and Fish: Some Reflections on the International Convention on High Seas Fisheries in the North Pacific Ocean and the Law of the Sea Negotiations*

William C. Herrington**

Two of the most contentious and critical problems faced in negotiation and implementation of the 1953 Convention for the High Seas Fisheries of the North Pacific Ocean1 were: (1) the extent to which Japan would participate in the fishery for stocks of salmon and halibut found in the coastal waters of the United States and Canada, which had been restored and maintained through strict limitations on catch and other regulations based on extensive research; and (2) the location of the boundary line for the area in which exploitation of salmon was to be "abstained." These problems were resolved though the so-called "principle of abstention" and the "protocol." They represent such finely drawn compromises that the fishermen of none of the parties really liked them, but neither side quite dared terminate the convention at the end of the minimum ten years or later for fear of getting something worse. Both of these issues promoted greatly expanded research by all three parties on the relevant fish stocks. As stated by Wilbert M. Chapman in a candid report given at the June 1968 Conference of the Law of the Sea Institute in referring to the International Convention for the High Seas Fisheries of the North Pacific Ocean, "[t]he device that made this agreement possible was the so-called 'principle of abstention.' "2 An account of some of the

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* Editor's Note: The Ecology Law Quarterly is honored to publish Mr. Herrington's memoir of his activities in fisheries diplomacy from 1951 to 1958. The memoir was drafted four years ago from contemporary notes and correspondence in his files.

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behind-the-scene activities that do not appear in the official records may be of interest and help in understanding the events that took place.

During 1949-50, as the United States and other allied powers approached negotiations on the peace treaty with Japan, U.S. fishery interests, particularly those on the Pacific Coast, became increasingly concerned about provisions related to Japanese fishing in the Eastern North Pacific. Their concern was somewhat tempered by Prime Minister Shigeru Hujera Yoshida's commitment to permit no fishing in this area until the peace treaty had been negotiated. Concern with fishery problems on the high seas, and general dissatisfaction with the way they had been handled by the Department of State, had led to the appointment in 1948 of Wilbert ("Wib") Chapman as Special Assistant for Fisheries and Wildlife to the Under Secretary of State. I had been in Japan since February 1947 as Chief of the Fisheries and Wildlife Division of Supreme Command Allied Forces (SCAP), and Wib and I soon set up a correspondence through which I learned of the problems he was having in developing a United States position on fisheries that could be cleared with the various government departments involved and with the concerned fishery interests. One of his areas was the Northwest, where the United States and Canada, through pioneering research and management and strict limits on their own fishermen, had made great progress in restoring the halibut stocks and were making progress with the Fraser River salmon. The position of our Northwest fishermen on the subject of Japanese fishing was more or less exemplified by the sentiments of a grizzled fisherman: "Sure I favor the three-mile limit, they stay inside their three miles and we'll stay outside." Wib also had the California tuna fishermen, who operated mostly off foreign coasts, shrimp fishermen of the southern states who operated to some extent off Mexico, and New England fishermen who took a considerable part of their catch off Canada. There also were the people in the State Department—particularly the economists—who held to a policy of free trade and competition, as well as the overall U.S. policy that the terms of the peace treaty should not unduly handicap Japan in her efforts to feed herself and restore a healthy economy.

At the time I returned from Japan in February 1951, Wib had not been able to get a position on fisheries cleared through State—that is, a position at all acceptable to our fishery interests. From my overseas observation of U.S. activities and interests, two developments struck me as important to U.S. fisheries. One was with regard to salmon research and management in Alaska, then under the Fish and Wildlife Service, where research and management were under separate heads who sometimes seemed to have little communication with each other. I felt strongly that research and management should be under one head and one program, as
with the Halibut\textsuperscript{3} and Fraser Salmon Commissions.\textsuperscript{4} I was by no means the first one to have this conviction. The other idea was one I hoped could resolve the problem of a position on fisheries: one acceptable to halibut and salmon people, that would not be opposed by tuna and other fishery interests, that could be cleared by the State Department, and that would stimulate improved research and management of fishery resources. This principle later evolved as the "principle of abstention."

The principle of abstention consisted of the proposition that when a country (or countries in cooperation) had carried on extensive scientific study of a fish stock (or stocks), and on the basis of the scientific findings had so regulated the exploitation of that stock and had so limited their fishing that more extensive fishing would not produce a sustained increase in yield, then other states should waive the right to participate in that fishery. Such a principle would encourage countries to research and manage their fisheries on a scientific basis, and at the same time would not exclude newcomers from unused or underused stocks.

On returning to Washington to be debriefed by the State Department and the Pentagon, I met with Chapman and discussed at length the problem of a U.S. position on fisheries. I broached my ideas on "waiver of rights" and related issues. After some consideration he conceded the concept might help resolve our tuna problem and the difficulties in the State Department. He also informed me he had accomplished all he could in the Department and had decided to move on. But first he had to find an acceptable replacement, that is, acceptable to State and industry. He had recommended me to the Under Secretary. Was I interested? I was not interested; I wished to get back into research and management.

I then called on Al Day, Director of the Fish and Wildlife Service, and made my most persuasive argument for combining research and management of the Alaska salmon fisheries. My efforts at persuasion failed, but he offered me the job as chief of the salmon research program. I was not interested in the job under the prevailing policy.

Partly in reaction to the attitude toward management in Fish and Wildlife, and partly owing to further thinking about possibilities in the State Department, I called on Chapman and informed him I was interested. Wib immediately got an appointment with his boss, James Webb, the Under Secretary. We spent half an hour or so discussing with him the functions and responsibilities of the position and I then informed him I was interested. On leaving, I asked when would I know whether I had

\textsuperscript{3} [Ed. note] Convention for the Preservation of the Halibut Fisheries of the Northern Pacific Ocean, Mar. 2, 1923, 32 L.N.T.S. 93.

the job. His reply: "You have it now." Thus was I introduced into the realm of diplomacy and fish.

Plans were developing for a conference in September of 1951 in San Francisco between representatives of the Allied Powers and Japan to negotiate a peace treaty. We still had no position on fisheries acceptable to fisheries interests that could be cleared in State. My most urgent task was to develop such a position. Presently it was decided that the complex fishery issues would not be included in the peace treaty; rather, they would be negotiated separately afterwards. This caused much concern in the fishing industry for it still had no assurance as to what kind of fishery arrangements the U.S. Government would seek. After numerous meetings with my industry advisory committee, with the Canadians, and within State, I was gradually developing a draft that was acceptable (or at least not opposed), except by some interests in State. As the September date approached, the West Coast fishery interests became more and more concerned; plans were being developed to swarm into San Francisco, when the Peace Conference opened, to parade and generally to raise hell.⁵

I finally persuaded the economic section in State to clear the draft. They still didn't like it, but they ran out of negative arguments. I think it was the relationship of the "waive the right" concept to conservation that finally got them. I then took the draft to Ambassador John F. Dulles, who had done a magnificent job in preliminary consultations with governments in preparation for the Peace Conference. After some discussion, he cleared the draft and recommended that I head the U.S. delegation to negotiate a fisheries convention. I was sent to the Peace Conference in San Francisco to assure the fishermen that the State Department had approved the position that had been developed in consultation with and had the approval of their representatives on my industry advisory committee. These representatives had such status in the industry that this assurance calmed the rising seas and quieted the demonstrations.

Tokyo was agreed upon as the location of the fishery negotiations. This venue would give the Japanese delegation ready access to concerned government and industry officials should unforeseen problems develop. The U.S. delegation included representatives of the industry who had been advisors in developing the U.S. position and who had such knowledge of and standing with the industry that I did not consider the overseas location a handicap. The U.S. delegation included Milton James, assistant director of the Fish and Wildlife Service, and one of the few Washington fishery officials at that time held in high regard in Northwest

fishery circles; Richard Croker, Chief of the Bureau of Marine Fisheries, State of California, with a fishery scientist background; Warren Looney, my deputy in the Department of State and a drafting expert; Edward Allen, head of a Seattle law firm closely involved in North East Pacific fisheries and a member of the International Fisheries Commission; Milton Brooding of the California Packing Corporation; Harold Lokken, Manager of the Fishing Vessel Owners Association; and Donald Loker, General Manager of High Seas Tuna Packing Company.

With such a delegation I had unusual latitude regarding modifications in our opening draft proposals as long as they did not affect the U.S. position on the territorial sea or constrain Japanese fishing operations beyond the proposals in our opening draft, and were acceptable to my delegation.

The heart of the U.S. position (and the Canadian) was the concept expressed by the waiver provision of our opening draft (which evolved into the principle of abstention). I considered it to be a measure that would encourage countries to manage their fisheries on the basis of sound research, with the objective of maximum sustained yield. In general, fishermen (and often their countries) find it difficult to adopt and implement programs of research and management involving expensive research and strict limitations on catch to bring a stock of fish to and maintain it at the level providing the maximum sustained yield. This is so particularly when maintaining the stock at that level serves to attract unlimited numbers of fishermen from previously nonparticipating countries to participate in the already fully utilized yield. Experience in the North Sea and elsewhere had demonstrated the difficulty in applying effective scientific management in open-ended multilateral fisheries. The Halibut and Frazer Salmon situations were exceptional. They were two-party agreements, and the parties were not overtly threatened by new entrants until shortly before the War. They had also had some inspired leadership from individuals involved with fishery science and with the fishing industry.

In addition to encouraging effective fishery management, the principle of abstention would serve to keep the Japanese out of our halibut and salmon fisheries and such other stocks as we could demonstrate reasonably satisfied the requirements of scientific research and management to secure the maximum sustained yield and were fished to the extent that increased fishing would not increase the sustainable yield. Furthermore, it would not exclude our fishermen from the fisheries for tuna that they had developed on the high seas off the coasts of some South and Central American countries. To those of us dedicated to improved fishery man-

agement, the stimulus to research and management was not the least im-
portant of the abstention principle's attributes.

Japan clearly desired a convention under which she could fish the
salmon, halibut, and other stocks along the North American coast on the
same basis as the United States and Canada, and which would set no
adverse precedents in her dealings with other countries off whose shores
she fished. Any limitations on fishing such stocks, whether fully
researched, managed, and utilized or not, would have to be based on
specific arrangements negotiated from time to time and would depend on
the various pressures then existing. The Japanese proposal implied that
the fishermen of any and all countries would be entitled to enter the hal-
ibut and salmon fisheries, as well as any of the others. Japan's coastal fish
stocks were managed by a system of fishing rights and associations. They
were intensively fished to the extent that there appeared little likelihood
that foreign fishermen would or could invade these fisheries. Conse-
quently, her overriding concern was to keep the sea open to her fishing
operations everywhere outside the territorial sea.

With these diverse objectives, negotiations proceeded slowly, with
many proposals and drafting changes which the United States and Can-
da had to accept without breaching our basic requirements, namely, protection of the salmon and halibut fisheries on the basis of
scientific management and full use.

After a month or more of negotiating, we finally mastered our
problems and had a draft agreement completed with only a few drafting
details to be completed. Most of the U.S. (including all of the industry
members) and Canadian delegations had departed. Warren Looney, my
drafting expert, Stewart Bates, and Dr. John Hart of Canada remained.

When our (presumably) final session opened, Mr. Iwao Fujita, chief
negotiator for the Japanese Delegation, proposed that we agree on a line
to define the boundary of treaty waters outside of which the Japanese
could fish without stimulating charges of treaty violation. We considered
the Japanese proposal of an agreed-upon abstention line desirable be-
cause it should help prevent later charges and counter-charges. At that
time neither the United States nor Canada had definitive information re-
garding the offshore migration of salmon. U.S. and Canadian fishing was
carried on inshore, mostly near the mouths of rivers where the salmon
were pretty well sorted out as to their spawning rivers. Exploratory off-
shore fishing by U.S. scientists had been discouraged for fear it would
stimulate the development of offshore commercial fishing, despite my
urging that such a study be undertaken. (Such exploratory fishing was
considered undesirable because it would result in immature fish being
taken and would make managing of spawning escapement for individual
rivers and tributaries much more difficult.) Extensive intermingling with
Asiatic salmon was not suspected. During the early days of the occupa-
tion of Japan, the SCAP Fishery Division had sponsored preparation of reports based on available Japanese records describing all of Japan's major fisheries. No record had been found, written or oral, of Japanese fishing in the Northeastern Bering Sea or in the Eastern Pacific south of the Aleutians.

The U.S. delegation considered the 180 degree meridian to be most appropriate and was astounded when Fujita proposed 165 degrees West. In the course of the debate that ensued, Fujita refused to budge from the line he had proposed. It became clear that the Japanese had convincing information that there were a hell of a lot of salmon in that area and, from the presumptive knowledge in our possession, they had to be mostly of North American origin. In the course of the debate that ensued, Fujita refused to budge from the line he had proposed. It became clear that the Japanese had convincing information that there were a hell of a lot of salmon in that area and, from the presumptive knowledge in our possession, they had to be mostly of North American origin.7 We struggled over this issue well into the night, and on adjourning Fujita remarked he would rather continue under the present restraints on Japanese fishing than make any concessions on moving the line westward.

I returned to my hotel faced with failure in the negotiations after all the work invested in developing the U.S. and Canadian positions. The impact on our fisheries and on U.S.-Japanese relations could be great. I was sure from Fujita's reactions that the proposed line so near the Alaskan coast would give the Japanese access to large numbers of North American salmon, and that a convention with this line would not be accepted by U.S. industry or cleared by the Senate. A solution had to be found. I finally worked out three possible compromises, one of which was to establish the line at 175 degrees West, and to carry out research from which it could be determined whether another line would more equally divide salmon of North American origin from those of Asiatic origin. The next day, I consulted with Stewart Bates and John Hart regarding these possible compromises, and asked whether the proposed determination of the degree of intermixture of the North American and Asiatic stocks was, as I believed, within the reach of contemporary fishery science. Hart, after some study, agreed that it was.

Having long acquaintance with Fujita and his negotiating style, I knew that if I submitted the proposed compromise to him we would get no direct concession in return; we would then be debating between 175 degrees and his original proposal. I called upon Ambassador Sebold, who represented the U.S. Government in Japan. I reported the deadlocked state of the negotiations, and gave him my judgment that we could not get the U.S. fishing industry and the U.S. Senate to accept a treaty with the abstention line, as proposed by Fujita, so near the Alaskan coast. It would be difficult to get acceptance of my 175 degrees pro-

posal, but I considered it possible. I then laid out my three possible compromises. After some discussion of the situation he called on Prime Minister Yoshida. Ambassador Sebold later informed me that Mr. Yoshida had approved the compromise establishing a 175 degrees West line, including the provisions for research and adjustment.

We returned to the negotiating table and spent a couple of days working out detailed wording during which time Fujita pressed to tighten the requirements for adjusting the line. We finally had an approved draft ready to sign. As we were about to sign, the electric power went off; we signed by candlelight. Warren Looney, a student of diplomatic matters, assured me in pleasurable excitement that this was the first time in many decades that such a document had been signed by candlelight.

At last we had a convention involving the three countries then involved in the fisheries of the Northeast Pacific. Some of the terms of the convention were not what the several members would have preferred, but they were such as could be secured and as their constituents could live with. All of the industry members of our delegation were involved in or associated with the work of the Halibut, Fraser Salmon, and Tropical Tuna Commissions and had seen the benefits of scientific fishery management. They were an exceptional group with widely differing interests who were thrown closely together in work and recreation for over a month.

IMPLEMENTING THE CONVENTION

When the Convention came into effect in 1953, its provisions calling for scientific evidence stimulated a massive increase in the research programs of all three parties: on the part of the United States and Canada to demonstrate that the requirements for abstention were being satisfied and that the abstention line should be moved westward, and on the part of the Japanese to prove that none of the stocks qualified and that the line should be moved eastward or at least remain in place. The contentions that arose came mainly from among the Commissioners; the scientists were pressed to produce good science. Unlike the Halibut, Fraser Salmon, and Inter-American Tropical Tuna Commissions, which had single international research staffs concerned only with factfinding and management measures, the North Pacific Commission depended mainly on three national staffs. Each of the three concentrated primarily on its indigenous interests, a characteristic of international fishery commissions with national rather than international research staffs.

8. [Ed. note] See D. JOHNSTON, supra note 4, at 372-76.
In the course of the meetings of the Commission and its committees, data and conclusions of differing degrees of reliability were presented, oftentimes labeled as facts. At times, to press his point, a young scientist would stress that his were "true facts," and on one occasion a young enthusiast, in his efforts to convince, claimed that his were "real true facts." (I stress that these were young scientists, for any senior scientist would know better than to qualify his "facts.") Subsequently, in the banter within the U.S. section, the facts we listened to became classed in three general categories: "Facts," "True Facts," and "Real True Facts." "Facts" were general information based on something less than sound scientific evidence. "True Facts" were "facts" based on sound scientific evidence. "Real True Facts" were "true facts" that supported one's position.

Deliberations of the Commission on problems of common interest and objectives generally proceeded amicably. But on the two main subjects—qualification for abstention and position of the abstention line—differences were substantial and debate was sometimes animated. Results of the scientific work increasingly demonstrated extensive intermingling of North American and Asiatic salmon both east and west of the abstention line. The Protocol called for the Commission as expeditiously as practicable to determine "a line or lines which best divide Asiatic salmon and salmon of Canadian and U.S. origin" and to determine whether this line or lines would "more equitably divide such salmon than the provisional lines specified." The Commission could not reach agreement on interpretation of these provisions and finally the question was referred to the respective governments to resolve. No action was taken by the governments, and the Commission did not press for an answer. It appeared that all parties preferred not to press the issue. If a decision were reached that the phrase "more equally divide such salmon" meant that if the numbers of Asiatic salmon east of the line should be equal to the number of North American salmon west of the line, then the United States could compensate for any Japanese catch of North American salmon west of the line by taking an equal number of Asiatic salmon east of the line. This result would breach the general U.S. policy against high seas salmon fishing, however, because it would take many immature salmon and make control of runs to individual areas or rivers more difficult, if not impossible. Furthermore, and probably of more importance, such fishing would involve catching salmon spawned in rivers of the Soviet Union and inevitably bring that country into the picture as a party in the management program, and as a participant in the fishery. It is likely

12. [Ed. note] Id. at 98.
that similar considerations related to potential Soviet involvement prompted Japan as well not to press for further clarification.

The Commission’s other major charge was to study the stocks named in the Annex to the Convention (the stocks from which Japan had agreed to abstain as long as they met the specified qualifications), and to study other stocks in the convention area to determine whether they qualified.\footnote{13} However, no recommendation for removal or addition could be made until after the fifth year of the Convention. To either remove or add a stock to the abstention list required the agreement of all three sections of the commission.

The scientific requirements in the convention stimulated an impressive expansion in the research programs of all three parties, and extensive data were accumulated bearing on the questions confronting the Commission. As the five-year base period drew to a close, debate warmed on the question of certain stocks fulfilling the qualifications for abstention.\footnote{14} The Japanese interpreted the requirements for abstention so rigorously that in their view no stock could qualify. The U.S. and Canadian Commissioners’ interpretation was somewhat more liberal and practical. They found that the salmon stocks and the halibut stocks fished by U.S. and Canadian fishermen, and managed by the Halibut Commission, continued to qualify. No substantial fishery had developed north of the Aleutians, but it was known that young halibut from this area migrated south and contributed to the stocks fished along the Alaskan coast. Expanded research had shown that some of the other stocks originally covered in the convention no longer met the requirement of full utilization; in spite of some opposition, the U.S. and Canadian Commissioners agreed to their removal from abstention.

The case of Bering Sea halibut was particularly stressful. U.S. halibut fishermen had made a few trips to this area but had not found sufficient halibut to establish a substantial fishery. (The Halibut Commission had data indicating that juvenile halibut from this area migrated to the south and contributed to the stocks to the south). However, they did not have a scientific measure of the size of the population and the extent to which it was being utilized. General information indicated that the stock was small and was being utilized through migration of the young to the south, where they joined the stocks harvested by the fishery in that area. In spite of great pressure, the U.S. Commissioners observed the technical terms of the convention and concurred in the decision that halibut in this area be removed from abstention. The Commission then established a

\footnote{13}{Id. at 84.}
quota for the area. The Japanese then insisted on a catch quota much larger than U.S. estimates of stock size would justify, but in order to get agreement on any limitation the United States accepted the Japanese figure. Subsequently, the excessive quota resulted in drastic overfishing of the stock and the quota was reduced.

As the Commission worked its way through these problems and controversies, the greatly expanded research program constantly developed more extensive and reliable information. There was much criticism, meanwhile, from Japanese fishermen about the restrictions imposed by the Convention. This was matched by as much (or more) criticism from North American fishermen, particularly those from the United States, who were more exposed to the impact of Japanese fishing than were the Canadians. Many Japanese and North American fishing interests demanded that the Convention be terminated at the end of the mandated ten years. However, as the time approached when such notice could be filed, the growing realization that they might get an even less favorable arrangement led to calmer thinking. No notice of termination was filed at the end of the ten years or later.

Thus, this Tripartite Convention and the Commission it engendered served to maintain reasonably amicable fishing relations among the three Parties during a tumultuous thirty-year period when the ocean regime shifted from one of freedom of all to fish anywhere outside the territorial sea to one of coastal-state jurisdiction over the living resources within 200 miles of its coasts. The Convention also produced a mass of outstanding fishery management data, and did a relatively good job of maintaining the stocks of fish under its jurisdiction. Some of the key factors which made this possible were the abstention concept, the Protocol compromise, the ability of its commissioners, industry advisors, and research staffs, and the general good will that prevailed.

Wib Chapman summed it up in the paper he presented to the 1968 Conference of the Law of the Sea Institute: “Bill Herrington had solved his Northwest problem for the time being by negotiating in 1953 the ‘International Convention for the North Pacific Fisheries among Japan, United States and Canada.’ The device that made this possible was the so-called ‘principle of abstention.’”

**THE LAW OF THE SEA**

The decade following the negotiation of the “International Convention for the High Seas Fisheries of the North Pacific Ocean” (Tripartite Fisheries Convention) witnessed an outbreak of international meetings and conferences, at first dealing primarily with fish and later expanding...
into other aspects of the law of the sea.\textsuperscript{16}

In the early 1950's the International Law Commission (ILC) had been working on codification of the law of the sea, and, in accordance with past practice, in 1953 circulated its fisheries draft to member governments for comment. The ILC was basing its draft on legal documents and references that did not take cognizance of the new developments in fishery science and management that stemmed to large extent from work in the United States and Canada. It was the practice of the United States, and other nations involved in high seas fishing, to return the ILC draft with a few less-than-encouraging remarks. Among the fishery officials at home and abroad with whom I discussed the matter, the general desire seemed to be to keep the ILC lawyers out of the fish business. In the course of our considering a non-encouraging reply, a young State Department lawyer challenged me: if you don't like what those chaps are doing, why don't you guys go in and promote the kind of law you need? The suggestion provided food for thought, particularly as I had been pondering the dilemma we would face if we came to the end of the ten-year minimum period for the Tripartite Convention and it was the only document in which the "principle of abstention" had been mentioned. If left at that, it would be considered merely a gimmick to achieve Japanese exclusion from certain U.S. and Canadian fisheries. I considered abstention a sound concept that encouraged better research, management, and use of the sea's living resources. If we staged a campaign to modernize international law on fisheries we could include "abstention" in our proposals. Ideally we might succeed in achieving its adoption, and in any event we would have the opportunity to generate substantial understanding of its relation to conservation and maximum sustainable yield. Furthermore, it was becoming more and more evident that unless something was done to update global international law on fisheries, we soon would have regional international law that could seriously affect our tuna and shrimp fisheries.

I broached the subject with my industry advisory committee. There was considerable skepticism at first, particularly from tuna land, but the growing threat of the Latin Americans proclaiming a 200-mile regime for South America brought acquiescence from this quarter. By then, despite the Legal Advisor's office being somewhat sensitive to these fish people getting so involved in international law, I had achieved such status in the State Department from finding a solution to our North Pacific fishery problem with Japan that I was given a relatively free hand.

Before launching the proposed campaign internationally, I needed

to have an evaluation of Canada's attitude and that of our European friends who were much involved in fishing and in fishery research and regulation. I first visited Canada and discussed with Stewart Bates and his advisors the proposition and some of the rules we might seek to codify, including the abstention principle. After lengthy consideration of the pros and cons, Bates agreed that Canada would join up. The Canadians became enthusiastic partners in the ensuing campaign.

Next I visited London to sound out the United Kingdom. I met with Sir Gerald Fitzmaurice of the Foreign Office and laid out my ideas on the kind of international law we needed to control overfishing and to encourage conservation. He saw some merit in the proposal and convened a meeting with his senior fishery people, including Michael Graham, with whom I had had many discussions on fishery research and management philosophy while I was working on New England haddock and he was carrying on a special study to evaluate the probable effect on herring and other species of the proposed Passamaquoddy Dam project. He was greatly concerned about overfishing in the North Sea and had for years been striving, without great success, to secure cooperation among the countries involved to reduce fishing intensity. Our "abstention" concept would not solve his North Sea problem, because almost every country within range already was involved. Otherwise he approved our projected goals for management with one modification: he proposed changing "sustained yield" to "sustainable yield." With this modification we had the definition of the goal of fishery management that has become widely used since—with the sometime modification of "optimum" for "maximum." (I don't care too much for "optimum" as an international goal. What is "optimum" to one country may be quite different from what is optimum to another; in effect you have no agreed-upon objective).

The group thought that the Europeans generally would cooperate in achieving the objectives I had outlined, though with some reservations on "abstention."

The United States next introduced the subject of updated international rules on fishery management at the 1954 U.N. meeting where it was shifted from the Committee on Economics, where I had proposed it be handled, to the Committee on International Law. (The lawyers were not going to trust this issue to scientists and fish managers.) There I first met Ambassador Francisco Garcia-Amador of Cuba, Chairman of the U.N. International Law Committee. At that time, Cuban and U.S. interests in high seas fishing were similar. In the process of working with him

17. Sir Gerald was a member of the International Law Commission that had prepared the draft on fisheries law that I had discouraged, also of the U.N. International Law Committee.
18. The Tripartite Convention used "maximum sustained productivity."
at this and later conferences I came to respect and admire greatly his ability as an international lawyer, and his sense of timing and maneuver. From him I acquired much of my limited knowledge of international law and how it is officially formulated. He was also an apt scholar of the problems of fishery conservation and management. He and Sir Gerald Fitzmaurice are the two experts I respect most in the field of international law.

With behind-the-scenes help from these two, and some forbearance from Ambassador Hans Anderson of Iceland, we managed to stall a vote on the continental shelf proposed by the United States but opposed by Anderson because it adversely affected Iceland's position in her dispute with the United Kingdom, and which Anderson had the votes to beat. We managed to avoid a negative vote and shifted the issue to our proposal to convene a U.N. Conference on the Living Resources of the High Seas. This was approved. We programmed it for Rome in the spring of 1955 to forestall other developments designed to promote regional international law.

From there on we worked like Trojans to prepare for the Conference. A committee of leading figures in the developing science of fishery research and management was assembled to prepare an agenda that led from the subject of sound scientific research to the need for international machinery to provide for the control of fishing effort when needed, and for freedom of fishing on the high seas when conservation regulations were not needed. We also arranged for a number of background papers by leading scientists engaged in the expanding frontiers of modern fishery research and management.

I was preaching conservation, maximum sustainable yield, and the principle of abstention to my contacts at the U.N. and among the fishery scientific and management people and international lawyers with whom I had contact. In this I had certain advantages. I knew more about fish than the international lawyers, and more about the U.N. and international maneuver than most of the fishery people. As to the nature and impact of these activities, let me quote from the 1968 paper by Wilbert Chapman, an informed and competent participant and observer in all these and later activities.

Herrington's logic was based totally on the principle of creating an international mechanism which would make possible the management of any fishery or any living resource so that the maximum sustainable yield could be obtained from it in perpetuity. This came down to the simple word conservation, which even the most unsophisticated delegate thought he understood and was in favor of, and which the most sophisticated fishery-educated delegate also thought he understood and certainly would not oppose. Opposing conservation was, and is, the same as opposing motherhood and being in favor of sin. The analogy is quite appro-
ABSTENTION DOCTRINE

appropriate. Very few fishermen think the rules applying to overfishing and sinning should be applied to his case, but the public position of each must favor conservation and motherhood to be respectable to society.

The principle of "abstention" in Herrington's credo was simply a logical extension of conservation. When a fishery on a particular stock had reached the level of effort corresponding to the maximum sustainable yield, the nations whose fishermen were involved had determined these facts scientifically and were limiting the effort of their fishermen to that level by enforced regulations, then new entrants should not be permitted into that fishery. Nations not engaged in that fishery should "abstain" from entering it. Thus conservation would be achieved in perpetuity.19

The Rome Conference, in the course of more than a month's debate and drafting, had prepared a report including most of the procedures and conclusions we were promoting—with the exception of "abstention." The United States and Canada had made a careful canvass of the anticipated vote on this issue, found that we would lose by a narrow margin, and withdrew the proposal to avoid defeat. We planned to reinject it at the coming meeting of the International Law Commission. In the game we were involved in, one clear-cut negative vote meant we were finished. It was an application of the old jingle, "he who fights and runs away will live to fight another day."

Garcia-Amador, Vice Chairman of the Rome Conference, also was a member of the ILC, which was to meet in Geneva about two weeks after termination of the Rome Conference. Several of the participants in the Rome Conference went on to Geneva to observe the results and to be available for technical consultations if needed. It transpired that they needed considerable help, for the ILC had no knowledgeable advisors on the practical problems of fishing operations and management. Garcia-Amador arrived with a draft he had prepared on the basis of the results from the Rome Conference and presented it with the inference that unless it was substituted for the draft upon which they had been engaged they would be wasting their time. This draft was backed by some of the ILC members who had worked with me at the U.N. in setting up the Rome Conference and on the advice they received from their unofficial consultants (us) who represented governments and had been involved at Rome.

After extensive debate, Garcia-Amador was given the responsibility for drafting the ILC report. He produced an excellent draft very much in line with the conclusions of the Rome Conference, including an article covering the "principle of abstention."

The ILC draft then was circulated among governments for com-

19. These extracts are from the paper he presented at the Third Annual Conference of the Law of the Sea Institute, June 1968. His audience included a number of U.S. and foreign experts who had participated in the activities he described.
ment. Through this procedure we were able to secure some minor modifications which further improved the draft in line with modern concepts of fishery conservation.

At its 1956 meeting the ILC considered their 1955 draft in light of comments from governments, including the rationale advanced by the United States and Canada in support of the “principle of abstention.” We were doing quite well on this issue and appeared to have the required votes in support. Then Luis Padilla-Nervo, the member from Mexico, spoke eloquently in support of “abstention” with one minor modification: he proposed changing the phrasing to “principle of exclusion of third parties.” This alarmed our European friends and our narrow margin of support evaporated. Again to avoid defeat and oblivion for “abstention,” I passed the word to the U.S. member to withdraw the proposal in favor of citation of abstention as a procedure to be considered in certain situations. This ILC report went to the 1957 U.N. General Assembly.

The 1957 U.N. General Assembly engaged in a general debate on law of the sea issues and concluded by approving the ILC recommendation to convene a Conference of Plenipotentiaries to be held in Geneva in the spring of 1958.

At this 1958 conference, which covered all aspects of law of the sea, I represented the United States on the Third Committee, which dealt with fish, and on the Fourth, the continental shelf committee, when it dealt with living resources on the continental shelf. In the shelf committee we were interested in getting a formula which would include king crab as a resource of the shelf, but not shrimp, and there was much maneuvering among delegates before a formula was approved. A proposal to include bottom fish, shrimp, and organisms of that nature lost by a tie vote. The committee finally approved a formula which limited shelf resources to those permanently imbedded in or attached to the bottom or in constant physical contact during their harvestable stage.20

The Third (fishery) Committee, after extensive debate and maneuvering, approved a set of fishery articles much as they had been drafted by the ILC. Again Canada and the United States campaigned and lobbied for the principle of abstention. The USSR and its satellites opposed it. The principle would not exclude Japan from high seas fishing for salmon spawned in Siberian rivers, for Japan had pioneered these fisher-

20. Later, at meetings of the Tripartite Commission, we spent many interesting moments debating with the Japanese whether king crab satisfied this formula. Did a jump off the bottom disqualify and did the king crab ever jump? At one meeting of the Tripartite commission an informal report came to our section that some diver had seen a king crab jump. I don’t recall that the report ever was confirmed or whether it ever was decided whether a jump disqualified. In any event the question lost importance when the United States established jurisdiction over resources within the 200-mile zone.
ABSTENTION DOCTRINE

ies. Furthermore, at that time the USSR was much more interested in expanding its fisheries off the coasts of other countries than in new procedures for discouraging newcomers off its own coasts. Most of the European fishery experts with whom I discussed the abstention concept considered the philosophy behind the concept sound. But it would not exclude countries already fishing off European coasts, practically everyone within reach was already there, and it might hinder their fishermen's expansion to the coasts of other countries. After adjournment of one session where I had expounded the virtues of abstention, the USSR fishery advisor came over and expressed his liking for the concept. But, when I inquired whether his delegation would support it, he smiled and shook his head.

As the discussions in Third Committee ground toward a close, the United States and Canada concluded that we did not have the needed votes for abstention as an article of international law. Consequently, we withdrew it and substituted a resolution that "abstention was a good procedure and should be considered by nations for handling problems such as described." This resolution passed in committee and then went to plenary session, where it did not get the required two-thirds vote. We had thought we had the necessary votes until a group of Arab states altered their position and voted against it. They had been supporting the U.S. maritime position on most issues until they discovered that the three-mile territorial sea (espoused by the United States) would not block off Israel through the Gulf of Aquaba to the Red Sea whereas the twelve-mile territorial sea espoused by the USSR would.

Following the 1958 Plenary Conference the family of nations continued to seek agreement on the law of the sea through further negotiations, signatures, and ratifications. The fishery articles—crafted by the ILC and the U.N. in 1955 and 1956 with input from a few fishery scientists concerned with improved management of the sea's living resources—were little changed but became less important when most coastal states extended their jurisdiction over sea resources out to 200 miles from their coasts. One might ponder the question: what would be the present situation if more of the major fishing states had supported the thesis that increased coastal state jurisdiction over the living resources of the sea must be earned through appropriate scientific research and management, rather than obtained through expropriation?

The move to 200 miles has moved the world one step toward the solution of the old dilemma—the "tragedy of the commons"—that ensues from the situation where that which belongs to everybody is husbanded by nobody. The 200-mile move has helped resolve this problem among nations, but it has not helped within nations. Some of our philosophers, activists, and enlightened managers are experimenting with this within-country problem through limited entry and other ownership or
semi-ownership concepts. The private ownership concept did succeed in converting our public lands in the west into productive farms. The marine problem is much more complex and difficult, but some form of individual or group ownership or interest is needed to provide an incentive for the fisherman to support measures required for long-range management and improvement in yields: the old concept of maximum sustainable yield.