

(b) THE PERSISTENT OBJECTOR RULE AND
THE DEVELOPMENT OF CUSTOMARY
INTERNATIONAL LAW*

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Owing to Japan's island status and its substantial reliance on fish products, it has had a major interest in maximizing the freedoms of the seas in order to minimize restrictions on its distant water fisheries and commerce to and from its territory. It has strenuously resisted the movement towards the expansion of coastal State jurisdiction in the oceans. When, in the mid 1960s, Australia, Mexico, New Zealand, the Republic of Korea and the US claimed their 12-mile exclusive fishery zones, Japan made its position clear that the area beyond the 3-mile territorial sea was high seas open to fishing by all nations. It then proceeded with diplomatic efforts to resolve the dispute. While at one point Japan threatened to take New Zealand to the International Court of Justice on the issue, in the end it entered into agreements with each of these countries, which temporarily resolved

⁴⁴ Ibid., separate opinion of Judge Waldock, at pp. 106, 120 (emphasis added). See dissenting opinion of Judge Gros, *ibid.*, at pp. 126, 148-9. See also judgment of 25 July 1974, *ibid.*, at pp. 23-6, 29-31, and joint separate opinion, *ibid.*, at pp. 45, 46.

⁴⁵ Ibid., separate opinion of Judge De Castro at pp. 91-2.

⁴⁶ Ibid., at pp. 32, 34.

⁴⁷ Ibid., at pp. 14, 29.

⁴⁸ Anand, 'A New Legal Order for Fisheries', *Ocean Development and International Law*, 11 (1982), pp. 265, 280.

the dispute.⁴⁹ In all but the agreement with the Republic of Korea pragmatic solutions were reached whereby Japanese fishermen obtained limited access to specified areas for a determinate period of time without a Japanese acknowledgement of the legality of the coastal State's fishery zone. The agreement with the Republic of Korea contained an express mutual recognition of the right of each State to establish a 12-mile fishery zone.⁵⁰ The agreements were intentionally ambiguous on the question of whether international law permitted the coastal State unilaterally to establish a 12-mile exclusive fishery zone. Thus one can interpret the events as demonstrating that Japan had to obtain permission from these coastal States to fish in their fishery zones. Viewed from this perspective, the events implicitly establish the *de facto* effect of these unilateral claims. On the other hand, the record could also be interpreted to establish that Japan's high seas rights in the areas had been vindicated because the coastal States were compelled to permit Japanese fishing in portions of these zones and to obtain the Japanese agreement to relinquish rights to pursue fishing in other parts of these zones.⁵¹ In the end, however, the strong forces favouring the 12-mile fishery zone and then the 200-mile zone overwhelmed the Japanese tenacious efforts to resist these changes. It has accepted the new law of the sea with its 12-mile territorial sea and 200-mile exclusive economic zone.⁵² Its status as a persistent objector was of little value in the face of these changes in international law.

⁴⁹ The 1967 Agreement between the United States of America and Japan concerning Certain Fisheries off the Coast of the United States of America, signed 9 May 1967, *United Nations Treaty Series*, vol. 685, p. 254, reprinted at Oda, *The International Law of the Ocean Development: Basic Documents*, vol. 2 (1975), p. 136; the 1968 Agreement on Fishing by Japanese Vessels in Waters Contiguous to the Mexican Territorial Sea, signed 7 March 1968, entered into force 10 June 1968, *United Nations Treaty Series*, vol. 683, p. 257, reprinted at Oda, *op. cit.*, at p. 152; the 1967 Agreement on Fisheries between Japan and New Zealand, signed 12 July 1967, entered into force 26 July 1968, *United Nations Treaty Series*, vol. 683, p. 45, reprinted at Oda, *op. cit.*, at p. 160; the 1968 Agreement on Fisheries between Australia and Japan, signed 27 November 1968, entered into force 24 August 1969, *United Nations Treaty Series*, vol. 708, p. 201, reprinted at Oda, *op. cit.*, at p. 162; Agreement on Fisheries between Japan and the Republic of Korea, signed 22 June 1965, entered into force 18 December 1965, *United Nations Treaty Series*, vol. 583, p. 51, reprinted at *International Legal Materials*, 4 (1965), p. 1128.

⁵⁰ The diplomatic records of the Japanese efforts on this matter have been collected in Oda and Owada, *The Practice of Japan in International Law 1961-1970* (1982), pp. 149-70. See also Oda, 'International Law of the Resources of the Sea', *Recueil des cours*, 127 (1969-II), pp. 355, 392-6. Even in 1969 Professor Oda seemed to recognize the futility of the Japanese efforts in this regard: *ibid.*

⁵¹ This ambiguity is made clear in the Japanese diplomatic record. See Oda and Owada, *op. cit.* (previous note); and Oda, *loc. cit.* (previous note).

⁵² For a recent and comprehensive review of Japan's oceans interests and activities, see Friedheim *et al.*, *Japan and the New Ocean Regime* (1984). While, externally, Japan actively opposed the expansions of coastal State jurisdiction, a study of the internal politics in Japan reveals that there was much conflict: Fukui, 'How Japan Handled UNCLOS Issues: Does Japan Have an Ocean Policy?', *ibid.*, at pp. 21, 36-40, 44-51; Akaha, 'A Cybernetic Analysis of Japan's Fishery Policy Process', *ibid.*, at pp. 173, 198-210. The Japanese change of position in favour of these expansions was critically influenced by its increased international isolation as demonstrated by State practice and the negotiations at the Law of the Sea Conference: Fukui, *loc. cit.* above, at pp. 39 and 47; Yanai and Asomura, 'Japan and the Emerging Order of the Sea—Two Maritime Laws of Japan', *Japanese Annual of International Law*, 21 (1977), pp. 48, 71, 72.

See, generally, Jones, 'Freedom of Fishing in Decline: The Fishery Conservation and Management

Only reluctantly in 1983 did the US accept the view that States could legally claim territorial seas in excess of 3 nautical miles.⁵³ Until that announcement, it was also a persistent objector to territorial sea claims beyond 3 nautical miles. Similarly, it objected to the development of extended resource zones in the water column for many years. In both circumstances, its status as an objector was often met by coastal States' enforcement of their broad claims.⁵⁴ Ultimately, the US was forced to accept the new zones.⁵⁵

Even today, the US continues to maintain that highly migratory species of tuna are exempt from coastal State jurisdiction beyond the territorial sea.⁵⁶ While the international law may not be completely settled, it appears

Act of 1976 and the Implications for Japan', *California Western International Law Journal*, 11 (1981), pp. 52, 91-104; Ouchi, 'A Perspective on Japan's Struggle for Its Traditional Rights in the Oceans', *Ocean Development and International Law*, 5 (1978), p. 107; Ouchi, 'Japanese Perspective on the Law of the Sea', *Proceedings of the American Society of International Law*, 71 (1977), p. 159; Park, 'The Sino-Japanese-Korean Sea Resources Controversy and the Hypothesis of a 200-Mile Economic Zone', *Harvard International Law Journal*, 16 (1975), pp. 27, 35-7; Yanai and Asomura, loc. cit. above. For a review of the effects of the 200-mile zone on Japanese fishing, see Tanaka, 'Japanese Fisheries and Fishery Resources in the Northwest Pacific', *Ocean Development and International Law*, 6 (1979), p. 163.

⁵³ This acceptance came in the Statement of the President on the Exclusive Economic Zone of 10 March 1983, which accompanied the Exclusive Economic Zone Proclamation of the same date (Proclamation No. 5030, *Federal Register*, 48 (1983), No. 50, at p. 10605). In the statement the President said:

'Today I am announcing three decisions to promote and protect the oceans interests of the United States in a manner consistent with those fair and balanced results in the Convention (on the Law of the Sea) and international law.

'First, the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans—such as navigation and overflight. In this respect, the United States will recognize the rights of other states in the waters off their coasts, as reflected in the Convention, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.'

('United States Oceans Policy', Statement by the President, 10 March 1983, *Weekly Compilation of Presidential Documents*, vol. 19, no. 10, p. 383 (14 March 1983))

⁵⁴ Some indication of the magnitude of the conflict can be obtained by a review of the expenses incurred by the US to reimburse fishermen for their losses and fines resulting from exercises of coastal State jurisdiction that the US maintains is illegal. In fiscal year 1981 the US paid \$3,600,000 in accordance with the Fishermen's Protective Act, 68 Stat. 883, 22 USC section 1971 f., on claims under the programme to protect ships from foreign seizure: *Catalogue of Federal Domestic Assistance*, 1982, pp. 495-6. Payment in fiscal year 1981 out of the Fishermen's Guarantee Fund, section 7 of the Fishery Conservation and Management Act (FCMA), 16 USC sections 1812-13, was \$1,777,000: *ibid.*, at p. 111. Payment out of the Fishermen's Guarantee Fund in fiscal year 1982 was \$2,314,800: *Update to Catalogue of Federal Domestic Assistance*, 1983, p. E-24. Payment in the same year for the protection of ships from foreign seizure was \$1,600,000: *ibid.*, at p. E-82. Payment under the Fishermen's Guarantee Fund for fiscal year 1983 was \$1,516,799: *Catalogue of Federal Domestic Assistance*, 1984, p. 111. Payment for the protection of ships from foreign seizure under the FCMA in fiscal year 1983 amounted to \$17,000: *ibid.*, at pp. 515-16.

⁵⁵ See above, n. 53.

⁵⁶ In the President's Statement which accompanied his Exclusive Economic Zone Proclamation (loc. cit. above, n. 53), he said: 'My proclamation does not change existing United States policies concerning the continental shelf, marine mammals, and fisheries, including highly migratory species of tuna which are not subject to United States jurisdiction. The United States will continue efforts to achieve international agreements for the effective management of these species': Statement, loc. cit. above (n. 53). This position is codified in legislation: FCMA, loc. cit. above (n. 54).

THE PERSISTENT OBJECTOR RULE

that the claims of many interested coastal States and the text of the Law of the Sea Convention would support the view that such species of fish are within the coastal States' jurisdiction in the exclusive economic zone.⁵⁷ Despite the fact that the US would have a persistent objector status, it has been subjected to serious enforcement actions by coastal States.⁵⁸ Those coastal States appear to be unwilling to treat the US as exempt from the new rule.