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THE FREEDOM OF THE SEAS AND JAPAN

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Professor of International Law

I. Mare Liberum is recognized by Japan

Japan is a sea-girt, insular country. From olden times, the Japanese people have taken the albuminous substance in their dietary life from maritime resources; to them, fishery has come to play the role of vital industry. The Japanese whose intercourse with foreign countries has been by sea, have shown a special concern over the freedom of navigation and trade. Immediately after Japan was admitted into the Family of Nations, the first thing she did was to declare that she respected the principle of the freedom of the seas. When, that is to say, the Franco-Prussian war broke out in July, 1870, the Japanese Government declaring for neutrality on August 24 of the same year, issued a Neutrality Order, Article 2 of which adopted a three-mile limit as the breadth of the territorial waters, while recognizing the freedom of the high seas. The said Article reads as follows:

"The contending parties are not permitted to engage in hostilities within Japanese harbours or inland waters, or within a distance of three ri (miles) from land at any place; such being the distance to which a cannon-ball can be thrown. Men-of-war or merchant vessels will, however, be allowed free passage as heretofore."

Since then, Japan has striven for the establishment of the three-mile principle in the matter of territorial waters, constantly respecting the freedom of the seas. In the Sino-Japanese war and the Russo-Japanese war, it is an indisputable fact that Japan faithfully observed Maritime International Law. During the Second World War, on December 11, 1943, Foreign Minister Shigemitsu said in his speech over the radio, that the freedom of the seas must be guaranteed.2

On September 28, 1945, that is, soon after the cessation of the Pacific

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2 The Asahi Shimbun, December 12, 1943.
War, Mr. Harry S. Truman, President of the United States of America, issued two proclamations and two accompanying Executive Orders, advocating thereby the doctrine of the Continental Shelf and Fishery Conservation Zone. This attracted wide attention. These two Proclamations by President Truman were of the same date: the one was entitled Proclamation of Policy of the United States with respect to the Natural Resources of the Subsoil and Sea-Bed of the Continental Shelf, and the other had for its title Proclamation of Policy of the United States with respect to Coastal Fisheries in certain areas of the High Seas. These Truman Proclamations have found imitators in many countries, it is regrettable to observe, creating a world-wide trend to extend the territorial waters by unilateral action. This has also given rise to difficult problems which may have serious bearing on the position of Japan as a maritime nation.

Further, when in March, 1954, the United States carried out the experiment of hydrogen bomb at the Bikini Atolls, it so happened that a Japanese fishing boat was showered with radioactive ashes, and that marked contamination was caused of the sea water. Japan is thus confronted with a new phase of the problem of the freedom of the seas.

II. The Syngman Rhee Line

On January 18, 1952, President Syngman Rhee of the Republic of Korea issued a Proclamation which established the so-called Rhee line to take the place of the MacArthur line, the restrictions to which Japanese fishing activity had been subjected during the Occupation. This Rhee Proclamation claims to exercise the Korean sovereignty over the high seas adjacent to the Korean waters, to interdict the operation of Japanese fishing boats within the line, and to exercise the control and jurisdiction over Japanese vessels in the open seas. This Proclamation, it must be said, was ill-advised in the extreme. The text of the Proclamation is as follows:

Presidential Proclamation

"Supported by well-established international precedents and urged by impelling need of safeguarding, once and for all, interests of national welfare and defense, President of the Republic of Korea hereby proclaims:

1. Government of the Republic of Korea holds and exercises national sovereignty over the shelf adjacent to the peninsular and insular coasts of the National Territory, no matter how deep it may be, protecting, preserving and utilizing, therefore, to best advantage of national interests, all national resources, mineral and marine, that exist over said..."
shelf, on it and beneath it, known, or which may be discovered in the future.

2. Government of Republic of Korea holds and exercises national sovereignty over seas adjacent to coasts of the peninsula and islands of national territory, no matter what their depths may be, throughout the extention, as here-below delineated, deemed necessary to reserve, protect, conserve and utilize the resources and natural wealth of all kinds that may be found on, in, or under said seas, placing under government supervision particularly fishing and marine hunting industries in order to prevent this exhaustible type of resources and natural wealth from being exploited to disadvantage of inhabitants of Korea, or decreased or destroyed to detriment of the country.

3. Government of Republic of Korea hereby declares and maintains the lines of demarcation, as given below, which shall define and delineate the zone of control and protection of national resources and wealth on, in, or beneath said seas placed under the jurisdiction and control of the Republic of Korea and which shall be liable to modification, in accordance with the circumstances arising from new discoveries, studies, or interests that may come to light in future. The zone to be placed under sovereignty and protection of Republic of Korea shall consist of seas lying between coasts of peninsular and insular territories of Korea and the line of demarcation made from the continuity of the following lines:

A. From highest point of U-AM-RYUNG, KYUNG-HUNG-KUN, Ham-Kyoong-Pukdo to point (42 degrees 15 minutes North—130 degrees 45 minutes East).

B. From point (42 degrees 15 minutes North—130 degrees 45 minutes East) to point (38 degrees 00 minutes North—132 degrees 50 minutes East).

C. From point (38 degrees 00 minutes North—132 degrees 50 minutes East) to point (35 degrees 00 minutes North—130 degrees 00 minutes East).

D. From point (35 degrees 00 minutes North—130 degrees 00 minutes East) to point (34 degrees 40 minutes North—129 degrees 10 minutes East).

E. From point (34 degrees 40 minutes North—129 degrees 10 minutes East) to point (32 degrees 00 minutes North—127 degrees 00 minutes East).

F. From point (32 degrees 00 minutes North—127 degrees 00 minutes East) to point (32 degrees 00 minutes North—124 degrees 00 minutes East).

G. From point (32 degrees 00 minutes North—124 degrees 00 minutes East) to point (39 degrees 45 minutes North—124 degrees 00
minutes East).

"H. From point (39 degrees 45 minutes North—124 degrees 00 minutes East) to western point of MA-AN-DO, SIN-DO-YULDO, YONG-CHUN-KUN, PYUNGAN-PUKDO.

"I. From Western point of MA-AN-DO to point where a straight line drawn North meets with western end of Korean-Manchurian border-line.

"4. This declaration of sovereignty over adjacent seas does not interfere with rights of free navigation on high seas."

The Rhee Proclamation extends the theory of Continental Shelf even to a region of any depth\footnote{Speaking geographically, Continental Shelf is the extension of continent which stretches itself in the ocean. The limit of Continental Shelf is generally recognized to be a depth of 100 fathoms. Article I of the draft articles on the continental shelf, adopted by the International Law Commission, at its 234th meeting, 1953, runs as follows; "As used in these articles, the term 'continental shelf' refers to the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres."} where there may be no continental shelf at all, and attempts to monopolize the high seas to the extent of sixty miles or more from the coastal line. Furthermore, the Proclamation makes a fusion of the two theories of the continental shelf and the fishery conservation zone, and interdicts the operation of Japanese fishing boats within the line. From the standpoint of International Law, the Proclamation, it must be noticed, is utterly an unacceptable doctrine. On January 28, 1952, the Japanese Foreign Office sent a note verbale to the Korean Mission. In it, the Japanese Government stated: "The Japanese Government considers that the contents of the proclamation of the President of the Republic of Korea of January 18, 1952, not only are entirely incompatible with the long internationally established principle of the freedom of the high seas, but also run counter to the basic principle of international cooperation for the development and protection on an equal footing of the marine resources of the high seas. This unilateral proclamation is utterly untenable under any of the accepted ideas of international society, and therefore cannot be acquiesced in by the Japanese Government." In this strong protest, the Japanese Foreign Office made clear its position on the problem.

When, on February 20, 1952, the First Session of the Japanese-Korean Conference was held in Tokyo, no solution of the problem was attained. Although the Second and Third Sessions of the Conference took place, no appreciable progress was seen, and the situation remains the same up to the present.

Koreans' attitudes shown on this matter are quite unyielding, as may be illustrated by the number of Japanese fishing boats captured on a charge of violating the Rhee line. As of October, 1953, the number of captured
Japanese fishing boats and fishermen stands at 142 and 1,788, respectively. Especially in this connection, it is to be recalled that off the shore of the Quelpart Island a crew member of the No. 1 Daihō Maru, Japanese fishing boat, was shot to death on February 4, 1953, and that the attitude which the Korean Government revealed in defending the Rhee line by sheer force evoked adverse comments both at home and abroad.

The Japanese Government showed its willingness to accept any offer for a conference between both nations, for conservation of marine resources and appropriate readjustment of fishery interests of two countries, and also to ensure control over fishing activities on the high seas under an international agreement on the basis of justice and equality, whereas the Korean Government still unilaterally adheres to the Rhee line and does not cease to exercise sovereignty of Korea over the high seas circumjacent to its coasts. This must be said to be an aggressive attempt inadmissible under the existing rule of international law.

III. Pearl in Arafura Sea Area

On September 10, 1953, the Australian House of Representatives passed the Pearl Fisheries Bill (No. 2), 1953, which authorizes the extension of control of the Australian Government over the seas adjacent to New Guinea. By virtue of this law, Marshal Slim, Governor-General of Australia, declared, on September 11, the sovereignty of Australia over the continental shelves contiguous to the coasts of the mainland of Australia and its territory. The Proclamation runs as follows:

_Proclamation_

"WHEREAS International Law recognizes that there appertain to a coastal state or territory sovereign rights over the sea-bed and subsoil of the continental shelf contiguous to its coasts for the purpose of exploring and exploiting the natural resources of that sea-bed and subsoil:

"And whereas it is desirable to declare that those sovereign rights exist in respect of the Territory of New Guinea:

"And whereas the territory of New Guinea is administered by the Government of Australia under the Trusteeship system of the United Nations:

"Now therefore I, Sir William Joseph Slim, the Governor-General aforesaid, acting with the advice of the Federal Executive Council, hereby declare that sovereign rights exist over the sea-bed and subsoil of the continental shelf contiguous to any part of the coasts of the Territory of New Guinea for the purpose of exploring and exploiting the natural resources of that sea-bed and subsoil:

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6 These figures are quoted from the Rhee Line Mondai to Nihon-no-Tachiba (the Rhee Line Problem and Japan's Position), edited by the Nikkan Gyogyō Taisaku Honbu, November 20, 1953.
"And I further declare that those rights are exercisable by the Government of Australia as the Administering Authority of the Territory of New Guinea:

"And I also declare that nothing in this Proclamation affects—

(a) the character as high seas of waters outside the limits of territorial waters; or

(b) the status of the sea-bed and the subsoil that lie beneath territorial waters."

This proclamation of Governor-General Slim insists on the exclusive monopoly of the sea-bed and the produce therefrom, on the basis of the theory of Continental Shelf. The continental shelf of the Arafura Sea is very large, covering an area of 277,000 square miles. After all, the proclamation demands the monopolistic control over the fishery of pearl oysters in the whole area of the Arafura Sea. The Australian authorities are of the opinion that sedentary fishery, which consists in gathering the sedentary produce on the sea-bed, should require an integral part of the sea-bed itself and that pearl oysters are part of the sea-bed. On the basis of this opinion the Australian Parliament indicated the limit of the Australian waters and deliberated on the draft act to amend the Pearl Fishing Act 1952, under which those seeking to engage in pearl fisheries within that limit should receive the permission of the Australian Government. Eventually on September 17, the draft act passed the Upper House and came into force.

The above-mentioned legislative measures were taken after the Japan-Australian conversations which had been held at Canberra to negotiate on the subject of pearl fishery were broken off. The reality of this rupture was that while the Japanese side assumed an attitude disfavouring the restrictions on fishing banks imposed unilaterally by the Australian side, the Australians became displeased with the reaction of Japan and responded with a unilateral proclamation on the continental shelf.

The fishery of pearl oysters in Arafura Sea area may be admitted to be a sedentary fishing operated on the continental shelf, but it lacks requirements which enable Australia to acquire the exclusive right to control. Pearl oysters in the area are not so celebrated in history as those of Ceylon or Bahrein. Nor have they ever been gathered exclusively by Australian. Originally, Australians were not skilled fishermen. For instance, marine resources off the coast of Thursday Island have been explored by Japanese divers working away from home, and it cannot be denied that Japanese fishers have rendered distinguished services for the development of fisheries in Australia. Since the arrival in Australia of Mr. Kojirō Nonami in 1874, a great deal of Japanese divers have come over to this sea area. At one time the Japanese fishers in Australia numbered more than 1500. Thus pearl fishery had thrived until the promulgation of the Immigration Restriction
Law. Not a few of these emigrant fishermen signed a charter with Australian ship-owners and operated their business on an independent basis. In this connection, it is worth special mention that after the pelagic pearl fishery with Palao, South Seas Islands, as base of operation, was undertaken in 1931 by Mr. Fukutarō Tange, the pearl fishery became gradually prosperous. For a 10-year period from that time to 1941, Japanese fishers were busy sailing out fishing, with the catch amounting, on an annual average, to 2,500 tons. In 1938, for instance, the number of fishing boats came up to 165 and the catch 3,459 tons. These fishing records may afford a most efficient key to the determination of pearling rights in the Arafura Sea area. Under these circumstances, both countries have come to a pre-arrangement to appeal to the International Court of Justice at the Hague, on the issue of the pearling fishery in the Arafura. The theory of Continental Shelf, even if it comes to be admitted in positive international law, should properly be limited in its application to underground mineral resources of the sub-soil, and should not be extended to the control over marine resources of the seabed. The sedentary fishery also is a type of fisheries which cannot be operated without sea water. Nor is it possible to recognize in international law the right of a peculiar type of fishery epitheted sedentary. Should this particular type of fishing be admitted, it may be presumed, the practice carried on by one country alone for a long period must be accomplished, by historical records, as a prescriptive right. It is expected, therefore, to be unlikely that the Judges of the International Court of Justice at the Hague, ignoring the well-established principle of the freedom of the seas, may acknowledge the exclusive control and jurisdiction of Australia over all pearling boats in the Arafura Sea area.

IV. Experiments with Hydrogen bomb at Bikini Atoll

On March 1, 1954, in the Bikini Atolls, Marshall Islands, an experiment was conducted with a hydrogen bomb, with the result that the No. 5 Fukuryū Maru, a Japanese fishing vessel, was showered with radioactive ashes; its crew members, totalling 23, contracted an atomic disease; tunas captured aboard the boat as well were found contaminated with radioactivity,

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1 These figures are quoted from the 1940 nen no Gyogyōjisseki (Fishing results of 1940), edited by the Nihon Kaiyō Gyogyō Kyōgikai, July, 1951.

Doctor Hiroaki Aikawa, Professor of the Kyūshū University, wrote as follows: “In 1938, the number of Japanese pearling boats came up to 170, the fishermen 2300, and the catch 4,300 tons, in price ¥ 45 millions.” in the Daiiūkai no kaiyō to Seibutsu oyobi Gyogyō, in the Taiheiyō no Kaiyō to Rikusui, published in December, 1943.

7 The Japanese Government offered a proposal for a Compromise to submit the case to the Hague Court, on February 19, 1954. But Australian Authorities have not yet responded to us with their counter-proposal.

8 Mr. Aikichi Kuboyama, one of crew members of the above-mentioned Fukuryū Maru, died of atomic disease, on September 23, 1954, at the First National Tokyo Hospital.
and all of them were abandoned.

Subsequently, America made several consecutive experiments with hydrogen bombs in the said atoll. Our investigation-boat, the Shunkoku Maru, reports that the adjacent sea area has conspicuously been polluted with strong radioactivity.

Experiments with atomic and hydrogen bombs by the United States of America were conducted with Eniwetok Atoll and Bikini Atoll as bases. First, it should be noted that each area belongs to the U.S.—U.N. Trusteeship Agreement Area and that the United States, as a trustee, is authorized to use its trust territory and its territorial waters for its testing grounds for military purposes.

Marshall Islands are designated as strategic area, and their use for military purpose is officially approved, with the creation of 'closed area' system.

The closed area lying each in Eniwetok and Bikini Atolls was created with respect to both atolls and their territorial waters under Article 13 of the Trusteeship Agreement for the former Japanese Mandated Islands (approved on April 2, 1947 at Security Council, United Nations and came into force on July 18, 1947). And the United States communicated the matter to the Security Council, concerning

(1) Eniwetok Atoll on December 2, 1947 and
(2) Bikini Atoll on April 3, 1953, respectively.

These communications expressly state the holding of military experiments and, in relation to the United Nations, it may be said, the freedom of experimenting with atomic bombs is recognized on legal grounds within the trust territory.

Even in cases where America's experiments with atomic bombs are conducted within the trust territory, if they have a disastrous effect not merely on the territory and territorial waters of the United States, but further on the high seas, it will infringe on the freedom of the seas, a basic principle of international law. Thus, the question is whether the system of danger zone created unilaterally by America on the high sea, as the international public domain, may be legally justified.

As to the danger zone in each atoll, the following legal relation has been established:

(1) With respect to Eniwetok Atoll, the United States Government notified through its Hydrographic Office on July 1, that it get up, together with the above-mentioned closed area in the atoll, the following danger zone circumjacent thereto.

10—15 N 12—45 N.
160—35 E 163—55 E.

In the said notification it is stated:

"All possible precaution will be taken to insure against the incidence of injuries to human life or to property within the danger area. If necessary,
warnings of any hazards outside the designated danger area will be given in the event that such dangers are created by activities conducted within the danger area."

(2) With respect to Bikini Atoll, it was notified on May 27, 1953, that, together with the closed area, the following danger zone was set up circumjacent thereto: In this case, an extension of some 140 nautical miles to the east was made as compared with the foregoing one:

10°-15° N  12°-45° N.

160°-35° E  166°-16° E.

The above-mentioned notification of the United States Government was communicated to the hydrographical department, Maritime Safety Board, of the Japanese Government, in accordance with the resolution reached at the International Hydrographic Conference. Further the United States Government called the attention of the Japanese Government through the Japanese Embassy at Washington, by its note verbale of September 18, 1952, to the fact that there were some Japanese fishing boats which entered the said danger zone and that the fishing boats were not aware of the existence of the danger zone in question.

Considering these facts, the Maritime Safety Board took steps to make it widely known that "navigation of vessels is interdicted" by its route notifications issued on three occasions, i.e. February 10, 1951, November 1, 1952, and October 10, 1953 (covering further Bikini Atoll). Our route notification is a notification issued by the director-general of the Maritime Safety Board by virtue of the authority with which the chief of administrative organ is vested under Article 14 of the National Government Organization Law. The notification goes as far as to state that "navigation is interdicted" but this may be construed to mean not that entry of vessels is actually interdicted, but that the danger zone is delimited by way of precaution.

In other words, the so-called danger zone created on the high seas is intended not to interdict entrance thereinto of foreign vessels, but to give general precaution against danger resulting from atomic tests. It is, of course, not acknowledged in international law that the United States of America may control the high seas by unilateral action and interdict the navigation of foreign vessels in the sea area under the said zone, exercising jurisdiction over the vessels. Therefore, this 'danger' has a character of general precaution taken against danger which may arise from atomic experiments and accordingly can imply nothing further. Therefore, the creation of danger zone as such is, from the standpoint of jurisprudence, only the serving of warning as to the possible extent of danger. As precedents pertaining to the establishment of a danger zone, may be mentioned that of Japan's defence sea area at the time of the Russo-Japanese War, those of America's defence zone in the First World War and of Britain's danger zone, Japan's declaration of interception of navigation during the Sino-
Japanese Incident, and the British-German war area at the Second World War; and as instances, in normal times, target practice with load shells and fleet exercises. However, it should be taken notice of that there have never been in existence in ordinary times a danger zone on such a large scale.

In using the high seas, a state should not be allowed to interfere with any other country which also uses the high seas, but should live strictly up to the two conditions: *equality* and *temporariness*. *Sic utere tuo ut alienum non laedas.* Its use is intended for the virtual control over the vast sea surface and thereby hampers the use of the sea area by other countries, its use of the sea area will become an *abuse of a right*, and ultimately consitute a violation of international law, thus giving rise to the responsibility of damages done to other nations.

The last test in a hydrogen bomb resulted in the destructive power more than 600 times as strong as that of an atomic bomb and thus actually caused damage even to the Fukuryū Maru, which was then without the danger zone. Therefore, it may be concluded that the U. S. Government should meet necessarily, under international law, the obligation of paying resulting damages. There is not a fact that America had ever actually warned the Fukuryū Maru on the spot. Indeed, it is indisputable that the American authorities were not free from any defect in taking precautionary measures. Therefore, it cannot be denied that a legal responsibility for international delinquency is found on the part of the U. S. Government. Furthermore, it is established that the Fukuryū Maru had been, at the time in question, outside the danger zone notified. In these circumstances, we should be allowed to request America to assume its proper responsibility of meeting all damages incurred.10

On March 19, America notified us of an expansion of the existing danger zone and designated the scope six times as large as the former one, thus, limiting in no small measure our fishing right in the scope of activity on the high seas.

Furthermore, now that it has been ascertained that even the sea water outside the danger zone has been seriously poisoned and the planktons and fishes have been affected by radioactivity, we must admit that the freedom of fishery in the Pacific has become subjected to serious restrictions. We desire, on our part, that experiments in atomic and hydrogen bombs which may have perilous effects be discontinued, if possible, for the time being, with a view to maintaining the peace and safety of the ocean. We further aspire to the earliest possible attainment of international control

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11 The United States Government is said to have accepted to pay the direct damages incurred of the No. 5 Fukuryū Maru, on the ground of international courtesy. But reported sum of compensation totalling some $800,000 is considered insufficient by most of Japanese people.
over atomic energy. In this sense, we ardently hope that the United Nations will immediately take appropriate measures in order to ensure the prevention of casualties resulting from A-bomb experiments, in response to the resolution of our House of Representatives of April 1, 1954. And we expect that, pending the adoption by the United Nations of such measures, adequate precautionary action will be taken through negotiations between Japan and America, against any disaster which may arise from atomic experiments, in accordance with the purport of the United States' notification concerning the creation of danger zone and also that full compensation will be made for the loss caused by such experiments.

V. Conclusion

The main course which international law should follow is to minimize the scope of what has so far been regarded as domestic matters by organizing the society of nations, and instead to expand that of international matters. Recently, however, in opposition to the freedom of the seas, there is a tendency, which is becoming pronounced, toward expansion of the limit of territorial waters by unilateral action; besides, there is a case in which a country interferes in another's use of the open ocean by hazardous employment of atomic bombs. Apparently these cannot be said, by any means, favorable phenomena. While it is desired, with respect to the use of atomic power, that the regime of effective international control will be established, it is hoped for, with respect to the conservation of fishery resources, that an appropriate regulation will be provided for by the conclusion of a multilateral treaty. Since the conservation and development of marine resources is a problem of world-wide significance, it should not be left entirely to the unilateral action of the coastal countries, and consequently it should not be settled by having recourse to the extension of territorial waters of the coastal countries. Now that the International Whaling Convention (1946) was concluded and universal controls by international agencies are steadily being put into practice, United Nations organizations should render their utmost efforts to establishing the method of conservation of marine resources. And we must emphasize the point that the principle of distribution of marine resources should conform to the traditional rules of the seas and be dealt with by all means through an international channel.

Moreover, we earnestly hope that, in the establishment of control of pelagic fishery on an international scale, Japan, as one of the largest fishing nations in the world, will be permitted to participate, and that her expression of views based on experience will not be underrated.

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