

On the Chino-Japanese Fisheries Agreement

A New Principle of the International Regulation of High Seas Fisheries

by Seiji KONDA

日中漁業協定について

公海漁業の国際規制
に関する新原則

今田清二

Introduction

On April 15, 1955, an Agreement with respect to Fisheries in the East China Sea and Yellow Sea was signed between the Chino-Japanese Fisheries Council, on the part of Japan, and the China Fisheries Association, on the part of continental China. One year was the term of validity of this agreement which came into force on June 13, 1955. Prior to its June expiration, a protocol was signed on May 8, 1956, between the above two non-official fisheries organizations of China and Japan, respectively, extending the term of validity for another year, or until June 12, 1957.

According to the preiamble, the purpose of this fisheries agreement is "to promote friendship and cooperation between the fisheries communities of China and Japan, utilizing the fishing grounds of the East China and Yellow Seas reasonably, protecting the fisheries resources, and avoiding disputes among fishing vessels of either party while they are operating."

The agreement is to be applied to the East China Sea and the Yellow Sea, except the belt of waters closed to trawl fisheries set out along the coast of the continent, and the strategic blockade waters west of a straight line drawn off the mouth of the River Yalu to a point off the Shan-tung Promontory, as well as the strategic operation waters south of 29°N., all set up unilaterally by the Chinese government.

The agreement consists of the main text and Annexes No. 1 to No. 4 which form integral parts of the main text. Thereto are attached the letters and memoranda, exchanged between the representative groups of the above fisheries organizations of China and Japan. Above all, Annex No. 1 sets down the allocation of the number of fishing vessels of both parties to the six fishing areas established in the high seas outside the above closed waters to trawl fisheries; and, Annex No. 2 sets down the rules for keeping order of fishing operation, to be observed within the whole areas where the agreement is applied.

It is the point of the Chino-Japanese fisheries agreement to have provided the rules for keeping order of fishing operation; and particularly, the rule of dividing the high seas, allocating the number of fishing vessels according to their nationality. Such an idea of dividing the high seas may obtain growing support among the nationals of under-developed coastal States. The correlation since the War of the principles of the freedom and the division of the high seas is the most serious

problem of fisheries by nationals in the high seas. The author is to analyse the idea of these rules, and, to find the meaning of such rules of international regulation of fisheries in relation to the principle of freedom of the high seas.

An Idea to Divide the East China and Yellow Seas between China and Japan

In the preamble of the Chino-Japanese fisheries agreement, there are proclaimed the fundamental ideas of the above agreement. These are "mutual benefit on equal footing" and "peaceful coexistence." According to the explanation of Mr. Yang, leader of the Chinese group, at the second general meeting (Jan 17, 1955), "the ideas of mutual benefit on equal footing and of peaceful coexistence mean, in short, that both parties are accorded equal opportunity to utilize the marine resources in satisfying the demands of the nationals, and one party can never exclude the other, entirely monopolizing the fishing grounds." He also explained at a sub-committee meeting (Jan 31) that the Japanese idea claiming freedom of fishing in the high seas was not consistent with the idea of mutual benefit on equal footing, because, under such an idea, it was sure that vessels of one party could take position of absolute superiority, and the operation of vessels of the other party would be entirely excluded.

Mr. Yang, leader of the Chinese group, proposed his concrete plans at the fifth general meeting of the negotiations (Feb 23) as follows: "The East China Sea and the Yellow Sea are to be divided into three fishing areas, distributing to China, in principle, the area which is adjacent to China; distributing to Japan, in principle, the area which is adjacent to Japan; and establishing a common fishing area between the above two areas. When Chinese and Japanese fishing vessels engage in the area distributed, in principle, to China, a proper ratio regarding the number of vessels from the respective countries should be provided so that the Chinese fishing vessels will not be excluded and the fishing area will not be monopolized by the Japanese. In the case of Chinese vessels entering into the Japanese fishing area, such area will never be monopolized by them, hence, the Japanese fishing vessels will never be excluded. Nevertheless, we are intending to accept an adequate regulation of ratio regarding the number of vessels of both parties... Japanese desire to have unlimited fishing, taking advantage of the superiority of their fishing vessels, running about as they please in disorder, and without taking into account the interests of the Chinese. This is the cause of all disputes."

None of the areas so to be divided by Mr. Yang's proposal is the exclusive property either of China or Japan. A certain number of fishing vessels of one party may engage in fishing within the area distributed to the other party. It may be reasonable to suppose that, under Mr. Yang's proposed idea, the East China and Yellow Seas are to be divided and distributed, not only between China and Japan, but also Korea and other States concerned, and that a certain number of fishing vessels of those States may be entitled to operate within the distributed areas in respective ratios.

Mr. Yang's idea is different from that of President Rhee's of Korea, who, by the proclamation of 1952, excluded Japanese fishing vessels from operating within the limits drawn on the high seas around the Korean peninsula. It is also different from the proclamations of Chile, Equador and Peru, who claim territorial waters of 200 miles from their respective coasts.

Nevertheless, Mr. Yang's idea is inconsistent with the principle of freedom of the high seas, because the proposed division of the high seas means to avoid free competition by allocating the number of fishing vessels according to their nationality. That is why he stated at the seventh general meeting (Feb 28) that "in spite of the great changes which have taken place since the War in the situations of the world and the east, some of the fisheries circle of Japan are still insisting on the so called freedom of fisheries... The present condition of fisheries in the East China and Yellow Seas, where Japan is unilaterally monopolizing the fishing grounds, should by all means be reformed." He also stated at the same meeting that "the monopoly of fishing grounds by the vessels of superior position can not be avoided by means of merely establishing the normal order of fishing operation." This meant that the allocation of fishing vessels according to their nationality was essential to avoid a monopoly of fishing grounds by a country keeping superior fishing fleets. The Chinese group accepted, later, the Japanese proposal to set up six limited fishing areas instead of persisting in their own original proposal to divide over-all the East China and Yellow Seas into three areas. This was certainly because the proposal of the Japanese group included the idea of allocation of fishing vessels. Such idea of allocation of the number of fishing vessels according to their nationality was firmly adhered to, to the end by the Chinese group for the purpose of avoiding the monopoly of the fishing grounds by other nationals as the result of free competition. Thus, it is safe to say that the basic thinking of the Chinese in connection with the Sino-Japanese fisheries agreement is against the freedom of fisheries in the high seas.

The Rules respecting the Six Fishing Areas

The Japanese group, maintaining the principle of freedom of the high seas, had to find some practical compromise measures, irrespective of the question of principle. At the sixth general meeting of the negotiations (Feb 25), Mr. Shichida, leader of the Japanese group, stated that "it is necessary, as a provisional measure, to confer and decide the number of vessels of either country with respect to only small areas, short periods, and principal kinds of fish, in connection with the fishing ground adjacent to the coast of China, especially where and when the fishing vessels of both countries compete seriously in their operation." At the seventh general meeting (Feb 28), the Japanese group made a proposal to set up six limited fishing areas, allocating according to their nationality the number of fishing vessels actually to operate within each of the six fishing areas during certain fixed periods in the respective areas.

Mr. Yang, Chinese leader, announced that the maximum number of fishing vessels should be limited (Sub-committee meeting, Mar 11). He thought that, if the maximum number was limited, disadvantageous result could be avoided even if the vessels concentrated within the limits of certain areas (Do. Mar 12). For this maximum number of fishing vessels, they offered the number they desired for each of the six fishing areas. The number so offered was approved as the maximum number to be allocated within the areas concerned. Only for the area No. 3, the number of vessels suggested by the Japanese group was reduced from 120 to 80, as the result of discussions concerning the protection of the stock of sea bream in the above area. However, this was not a matter to reflect the predominance in the Chinese thinking of preventing a monopoly of the fishing grounds by a country keeping superior fishing fleets.

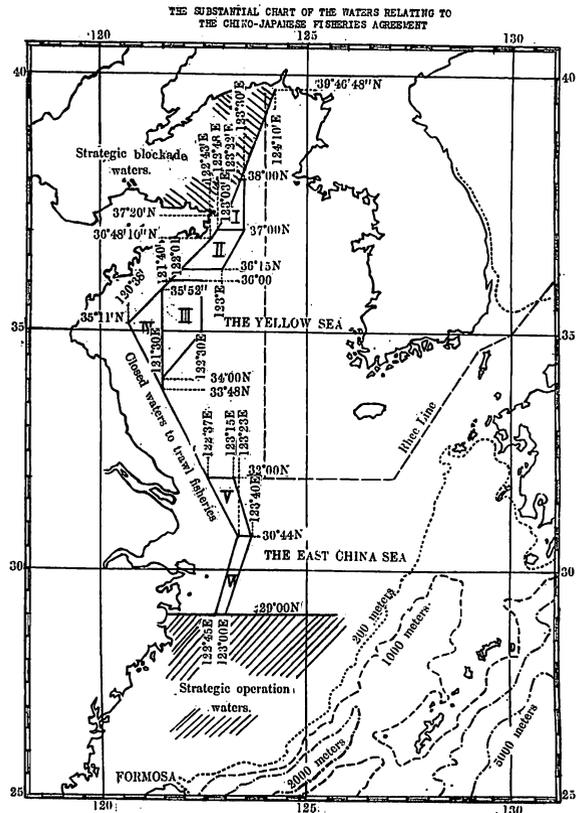
Thus the proposal of setting up the six fishing areas was developed and implemented in Annex No. 1 of the Chino-Japanese fisheries agreement. The names of the six fishing areas, the locations, the periods in which fishing vessels of either country are allocated, and the maximum number of such vessels provided in the above Annex No. 1 are as follows:

Names	Periods	Maximum number of vessels allocated	
		Japanese vessels	Chinese vessels
Fishing area No. I	Mar.1-Apr. 20 Nov.1-Dec. 15	46	112
Do. No. II	Feb.1-Mar. 31 Dec.16-Jan. 15		
Do. No. III	Aug.1-Oct. 31	80	40
Do. No. IV	Apr.1-Oct. 31	50	50
Do. No. V	May.1-Jul. 31 Nov.1-Nov. 30	70	100
Do. No. VI	Mar.1-Apr. 30 Oct.1-Nov. 30		

(Locations are shown in the chart below.)

The allocation of fishing vessels according to their nationality was realized in the Chino-Japanese fisheries agreement only within the limits of the six fishing areas and only during certain periods of time fixed to each of these areas. As the result of such limitation of the extent of waters and the period of time, it may rightly be said that the nature of the allocation of fishing vessels has changed so that such allocation is not a rule inconsistent with the principle of freedom of fisheries in the high seas. It is surely an exception to the principle of freedom of the high seas to allocate fishing vessels according to their nationality. But so far as it is an existing need of the community to recognize an exception to a principle, such an exception can not be inconsistent with the principle. The allocation of fishing

vessels according to their nationality is a special rule for keeping order of fishing operation under, and, not inconsistent with, the principle of freedom of the high seas.



At the end of 1954, when the fisheries circles of China and Japan were going to open negotiations, the number of Japanese fishing vessels seized by continental China since 1950 amounted to 158 vessels carrying 1,909 persons, of which 104 vessels had not yet been returned. It was natural, therefore, that the aspects of avoiding disputes and keeping normal order of fishing operation were emphasized in the agreement. Many rules to keep such order have accordingly been provided in Annex No. 2 of the above agreement. These are the general rules to be observed throughout the waters where the agreement is applied. A few rules among them, for instance, are as follows :

- (1) Not to shoot the net in front of the bow of other vessels towing their nets.
- (2) Not to shoot the net within about 1,000 meters sternward of other vessels towing their nets.
- (3) When two sets of vessels (a set means two vessels which operate a net together) tow their nets running parallel to each other, a distance of more than 300 meters shall be kept between them.
- (4) At the fishing ground where trawlers are concentrated, the same direction in towing nets shall be held by both the Chinese and Japanese trawlers.
- (5) When vessels towing their nets cross directly in front, they shall turn to the right at a distance more than 500 meters from each other.

As against the above general rules, the rules provided in Annex No. 1 of the same agreement may be construed to be special rules to keep normal order of fishing operation within the limits of the six fishing areas. In such fishing areas where fishing vessels concentrate during certain periods of time, it may be necessary to limit the maximum number of fishing vessels during such periods, so as to keep the normal order of fishing operation. Under the present existing conditions between China and Japan, such maximum number of fishing vessels may have to be allocated to the respective countries. Mr. Yang and his group may disagree with the above exposition, insisting that Annex No. 1 and No. 2 of the agreement differ from each other in principle, the former being concerned with rules to avoid free competition, while the latter, rules for keeping order of fishing operation under free competition. But as already mentioned, the rules of allocating fishing vessels according to their nationality changed their nature so that such allocation did not contradict the principle of free competition.

It must be a merit of the Chino-Japanese fisheries agreement that such special rules for keeping normal order have been suggested as a measure for avoiding the problems arising from the claims of coastal States to divide the high seas in connection with fisheries. Where and when such allocation of fishing vessels is an existing need, the same special rule of keeping order as provided regarding the East China and Yellow Seas may be applied to any area of the high seas without contradicting the principle of freedom of the high seas.

Question of Existing Needs in the Light of the Results in 1955-56

There is a question with respect to certain provisions of Annex No. 1 of the Chino-Japanese fisheries agreement whether they correspond with the existing need of fisheries. Above all, there is the question whether the periods of time fixed to some of the six fishing areas coincide with such existing need.

The number of Chinese vessels actually engaged in fishing within the limits of each of the six fishing areas by periods during the first year of validity of the above agreement has not been made public. But the number of Japanese fishing vessels which actually operated within some of the six areas in certain periods or certain months was quite small. For instance in the fishing area No. 4, the percentage of the daily maximum number of vessels actually operated was zero in April, under 8% in June, and 12% in May, July and August. This would seem to mean that the fixed periods of the area No. 4, i. e., Apr 1 to Oct 30, is too long as compared with the existing needs of the fisheries. Such period may be shortened, thus enabling the vessels of either country to operate freely in fishing within the above area during a longer term of the year.

Conditions of Operation in Each of the Six Fishing Areas
by Month during the First Year of Validity of
the Fisheries Agreement.

Fishing area	Daily maximum number	June since 13th	Jul	Agu	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun till 12th
No. I	vessels %						14 30.0	18 39.1			14 30.0	24 52.2		
No. II	vessels %							38 63.3	18 30.0	8 13.3	28 46.6			
No. III	vessels %			8 10.0	10 13.0	60 75.0								
No. IV	vessels %	4 8.0	6 12.0	6 12.0	20 40.0	28 56.0						0 0	6 12.0	2 4.0
No. V	vessels %	36 51.0	34 49.0				6 8.6						38 54.3	22 31.4
No. VI	vessels %					20 29.0	26 37.1				42 60.0	32 45.7		

An Aspect of Evolution of the Freedom of the High Seas

The Chino-Japanese fisheries agreement does not provide rules for protecting the inshore fisheries such as are operated by small boats with hook and line or other small gear. It is characteristic of the above agreement to have provided the rules for keeping normal order of fishing operation among trawlers, as well as between trawlers and the vessels engaging in other off-shore fisheries, such as junk fisheries. The limits of fishing area No. 7 were extended, conceding to the demand of the Chinese group to protect the catch of junks operating in numbers within this area.

On the other hand, with respect to the protection of the inshore fisheries from obstruction by trawlers, the Chinese government set up, unilaterally, a belt of waters closed to trawl fisheries along the continental coast. The limits to the coast of the above belt of closed waters extend some forty miles from the coast, for instance, between 35°N and 32°N, and more than twenty miles in the archipelagoes south of 32°N. When the Chino-Japanese fisheries agreement was negotiated, however, the question of the limits of the above closed waters to trawl fisheries was not discussed. It was because of the attitude of the Chinese group that "the closed waters to trawl fisheries was set up by the Government, and is out of the scope of discussion by unofficial groups as our's. It is a domestic affair to set up regulations of conservation, and there is no need to ask the Japanese opinion." (Sub-committee meeting, Feb. 1)

The closed waters to trawl fisheries having thus been unilaterally provided by the Chinese government, the Japanese group expressed their attitude regarding the above question in a letter attached to the agreement addressed to the China Fisheries Association as follows: "The Japanese representative group understands that a national legislation of a State can not restrain directly nationals of other States in the high seas, but, paying attention to the purport of the establishment by your Government of the closed waters to trawl fisheries, we promise, spontaneously, to keep the Japanese trawlers out of the above closed waters." The Japanese are of the opinion that a belt of closed waters to trawl fisheries is to be set up, in the nearest possible future, by an agreement between China and Japan along the coast of the continent for the purpose of protecting the small scale inshore fisheries of China.

Originally, the freedom of the high seas might have been construed independent of any restriction. For instance, in 1882, when the International Convention for the Purpose of Regulating the Police of the Fisheries in the North Sea outside the Territorial Waters was under negotiation, the German delegate thought that "restrictive measures should be enforced to prevent the destruction of fry of fish and taking of small fish." But his opinion was denied on the ground that "the question was not ripe for discussion by the Conference which was not concerned with reproduction of fish." (Fulton, *The Sovereignty of the Sea*.)

At the present, however, a number of conventions for the purpose of conservation of fishery resources have been concluded, so that closed waters, closed seasons, maximum amount of catch in a season, and other restrictions are provided regarding the high seas fisheries. The freedom of the sea has evolved from a freedom without restriction to that of carrying duties of protecting resources.

The rules of protecting resources have been first developed in the international community, but the rules of such a category are not the only ones to be put on the freedom of fisheries in the high seas. So far as it is actually needed in the community and so far as applied equally and impartially among States, there is no reason that the rules for keeping normal order of fishing operation will not become a restriction on such freedom of fisheries. The above rules for keeping normal order of high seas fisheries may develop, some times, in order to protect the inshore fisheries from being obstructed by trawl and/or other off-shore fisheries; and, some times, as in the case of the Chino-Japanese fisheries agreement, for the sake of keeping order among trawl and/or other off-shore fisheries.

The Chino-Japanese fisheries agreement is of great theoretical importance, because the rules of the above agreement seem to be the germ of development of a new principle of international regulation of high seas fisheries. The rules of keeping normal order of fishing operation including the allocation of fishing vessels as provided in the Chino-Japanese fisheries agreement may be universally applied, pertaining to any small area in the high seas, where fishing vessels of more than two States concentrate during certain periods of time. Freedom of the high seas is now being evolved so that it carries, not only restrictions for conservation purposes, but also the restrictions for the purpose of keeping normal order of fishing operation in the high seas.

Conclusions

The basic thinking of the Chinese in connection with the Chino-Japanese fisheries agreement is against the freedom of fisheries in the high seas. The Chinese never compromised nor conceded their claim to divide the high seas and to allocate the number of fishing vessels according to their nationality, maintaining it to be the essential rule for avoiding free competition of fisheries which has caused exclusion of Chinese fishing vessels by the Japanese.

However, notwithstanding the above basic thinking of the Chinese, such an allocation of the number of fishing vessels by their nationality as realized in the above agreement is rightly to be construed not to contradict the freedom of fisheries in the high seas. Because of the limitation of the extent of waters, as well as the period of time in which the number of fishing vessels is allocated by nationality, the above allocations have changed its nature from an over-all denial of the principle of freedom of fisheries in the high seas to an exception of such principle. So far as it is an existing need to admit an exception under a principle, such an exception can not be inconsistent with the principle.

In some areas of the high seas other than the East China and Yellow Seas, also, needs may exist for measures of keeping normal order of fishing operation, including an allocation of fishing vessels according to their nationality, within limited extent of waters and limited periods of time. It must be a merit, therefore, of the Chino-Japanese fisheries agreement to have suggested the means of preventing international conflicts arising under the above circumstances, without contradicting the freedom of high seas fisheries, by way of setting up the same rules for keeping normal order of fishing operation, i. e. allocation of the number of fishing vessels according to their nationality.

It must also be a merit of the Chino-Japanese fisheries agreement that a step of evolution of freedom of fisheries in the high seas has been forwarded. Freedom of fisheries in the high seas, originally independent of any restriction, has been evolved to carry restrictions of conservation purposes. But the restrictions on freedom of high seas fisheries may not always be of the above category. Allocation of fishing vessels by their nationality and other restrictions for keeping order of fishing operation as provided in the Chino-Japanese fisheries agreement may rightly be said to be a new principle of international regulation of high seas fisheries.

概 要

〔海洋分割の主張〕 日中漁業協定の基本原則は、その前文に宣言されているように「平等互恵」「平和共存」である。中国側の説明によれば「平等互恵、平和共存の原則というのはつまり双方がいつでも海上の資源を利用してその国の人民の需要を満足させることが出来るように平等な機会をもち、片方だけが完全に漁場を独占して相手方を排斥してはならないということとあります。」

中国側はこの原則を実現するため、東海・黄海を全面的に三分割して中国捕魚区、日本捕魚区及び共同捕魚区とし、中国捕魚区で操業する漁船の隻数・噸数を中国と日本とに適当な比率で割当て、また日本捕魚区についても同様の国別割当をすることを提案した。この中国案は、

李承晩宣言または南米諸国の主張などとは趣を異にするけれども、やはり自由競争の原則を否定するもので、公海自由の原則に反する。

中国側はその後、漁船数の国別割当を行う区域及び期間を限定することに譲歩した。然し漁船数の国別割当を行うことそれ自体は、最後までこれを主張して譲らなかつた。中国側の考によれば「自由競争の枠内で行われる操業規律の確立といった方法だけでは、優勢を占める漁船が漁場を独占するのを避けることはできない」換言すれば、漁場の独占を避けるためには自由競争を否定して漁船数の国別割当をしなければならぬ。中国側の根本思想は、公海における漁業自由の否定である。

〔公海自由との関係〕 然し日中漁業協定の規定する漁船数の国別割当は、公海における漁業自由の原則と矛盾するものでない。同協定が漁船数の国別割当を行う区域を六つの漁区のみ限定し、且つその期間をも限定した結果として、その国別割当は公海漁業自由の原則の全面的否定から、同原則の例外に変質した。例外は、原則を行うための現実の必要に基づくものである限り、原則と矛盾する理由はない。

東海・黄海以外の公海にも、限られた区域、限られた期間、漁船数の国別割当を行うことが現実の必要である区域があり得るであろう。日中漁業協定は、そのような事情により国際紛争が生ずる場合、公海自由の原則と矛盾することなく、漁船数の国別割当によりこれを解決することを示唆したのものと見て贅えられるべきである。

その半面、六つの漁区の想定が果して現実の必要と合致しているかどうかを、一層検討しなければならない。協定実施以来一年間の日本側の実績によれば、割当てられた最高隻数に対する実際の一日最高操業隻数の比率すなわち利用率が甚だ低い場合がある。中国側の実績は発表されていないが、或る漁区については定められている期間の一部を解除して日中双方の漁船が自由に出漁するのを認めてよいのではないか。

〔公海自由の進化〕 日中漁業協定は中国政府が一方的に定めた機船底曳網漁業禁止区域を協定水域から除外している。日本側は協定附属の書翰により、右の禁止区域では操業しないことを約束すると共に、国際的な禁止区域の設定は両国政府の協定によらなければならないという見解を表示した。

現在多くの国々は各種の漁業資源を保護するため世界の水域に多くの条約を結んでいる。公海における漁業の自由は、無制限の自由から資源保護の義務を伴う自由に進化した。将来は更に進化して、資源保護以外の目的の制限をもまた伴うに至るであろう。現実の必要に基づくもので且つ平等・無差別に適用される制限である限り、それが公海漁業の自由に加えられない理由はない。漁船数の国別割当、操業秩序の維持など、日中漁業協定が規定している諸制限のルールは、公海漁業の国際規制に関する新原則である。