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Commentary

on

Rethinking the Principle of Abstention:  
The North Pacific and Beyond

(A paper by Yasuko Tsuru)

In reviewing the evolution of coastal states' efforts to limit distant-water fishing countries within and beyond the areas of coastal state jurisdiction, Professor Tsuru persuasively argues that the principle of abstention, since its initial introduction in 1952 into the lexicon of international legal regime regarding high seas fisheries, has found its way into the contemporary international sea law as seen in 1995 convention on straddling and highly migratory stocks. She does so through an objective legal analysis, without taking the perspective of the Japanese government, which obviously has clearly been the most important target of early efforts to limit high seas fisheries. I would like to take a step back from the legal analysis and consider the subject from a constructivist perspective and comment on Japan's contribution—or lack thereof—to the law of the sea regime as regards high seas fisheries.

The most important question from this perspective is: Why has Japan failed to translate its own experience with its near-shore fisheries into a principle of resource conservation at the international level? There is ample evidence that the Japanese have understood for quite some time—certainly from the early 1970s if not earlier—the need to restrict fishing within their own waters—in both coastal (engan) and offshore (okiai) fisheries. Today Japan has a very elaborate system of resource monitoring, resource conservation and management, and regulatory mechanisms as regards these fisheries. One might expect that Japan would have

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reflected on this experience in articulating and protecting its interests in foreign coastal waters? The record has been quite the contrary. The Japanese have long resisted attempts by other countries to impose restrictions on fishing off their coasts, including on the high seas. If the same resource conservation concerns within Japanese waters had been allowed to inform their policy internationally, that policy would have been a more enlightened and probably more effective policy.

A review of Japan's fishery diplomacy in the postwar era—both in bilateral and multilateral settings—leads me to conclude that the nation's diplomacy in this area has always been driven by domestic economic (fishing) interests and has exposed Japanese diplomats to international criticisms. Japan has rarely been able to influence significantly, much less lead the direction of international regime building in this and other areas of international law and policy. The Japanese approach has often appeared blatantly self-centered and myopic. The Japanese delegation's behavior at the IWC in recent years has further exacerbated the international image of Japan. From an outsider's perspective, Japanese diplomacy has been self-defeating and demonstrates Japan's uncaring attitude toward ocean resource conservation. In contrast, from a Japanese perspective, they are more interested than most other peoples about what the outsiders think of them. How are we to understand these contradictory views on Japanese behavior?

In my opinion, culture is key to understanding the Japanese behavior. In addition to whatever merit there may be to Japan claims about the scientific merit of continued whaling, Japanese culture has an important bearing on the nation's behavior in the IWC.<sup>2</sup> The *sakoku* mentality—the sense that the outside world does not and cannot understand Japan—is important in understanding Japan's behavior.<sup>3</sup> *Sakoku*, the Tokugawa governments' policy of seclusion that lasted well over 200 years until the Meiji Restoration of 1868, has had a lasting impact and its consequences are seen even today. The orchestrated international criticism of Japan (and Norway) has vindicated the long-held belief among many Japanese that the international community cannot and will not understand their unique culture. As a result, the contestation over Japanese whaling in and around the IWC is seen by many Japanese as a clash between their “fish eating culture” and the “meat eating cultures” of the west.<sup>4</sup>

Is this critical view of Japan's international fishery-sea law diplomacy unfairly harsh? To answer this question, one would need to examine international

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<sup>2</sup> See Robert L. Friedheim & Tsuneo Akaha, *Antarctic Resources and International Law: Japan, the United States, and the Future of Antarctica*, 16 *ECOLOGY L. Q.* 119 (1989).

<sup>3</sup> See MAYUMI ITOH, *GLOBALIZATION OF JAPAN* (2002).

<sup>4</sup> Robert L. Friedheim, *Introduction: the IWC as a Contested Regime*, in *TOWARD A SUSTAINABLE WHALING REGIME* 14 (Robert L. Friedheim, ed., 2001).

fishery regimes and identity norms and rules that have a Japanese imprint. What intellectual contributions has Japan made to the principles found in international legal regimes, particularly in multilateral conventions? In some bilateral fishery treaties, one can find Japanese influences, e.g., in the concept of "joint regulation zones" that appears in Japan's bilateral fishery treaties with China and South Korea. These arrangements include efforts to limit access to fishery resources through a variety of restrictions, e.g., fishing periods, the size of gear, the number of fishing boats, and the size of take. They represent a realistic, if not totally satisfactory compromise between Japan and its neighboring countries. Can one find signs of Japanese ideas in multilateral legal regimes regarding high seas fishing?

Beyond the cultural dimension noted above, what other factors have influenced Japan's position on high seas fishing regimes? In particular, what role has the legal community played in domestic debate and in the formulation of Japan's official positions on such contested issues as the abstention principle and other forms of access control on the high seas? What we need are interdisciplinary analyses that into consideration, legal, political, economic, and cultural factors, and both international and domestic processes of debate and rule making.