# 8. International Law

**A case in which it was held that Japanese fishing regulations are applicable to fishing operations conducted in the vicinity of the Northern Territories by Japanese nationals under the pretense of a Japanese-Soviet joint venture.**

Judgment by the Criminal Division of the Kushiro District Court on February 15, 1991. Case No. 278 (*wa*) of 1991. A case concerning a violation of the Hokkaido Ocean Fishery Regulations. 772 *Hanrei Taimuzu* 227; 1383 *Hanrei Jihō* 173.

[Reference: Hokkaido Ocean Fishing Regulations (prior to amendment by the 1991 Hokkaido Fishery Regulations no. 13) Articles 5 subpara. 15, 55(1) subpara. 1, and 57.]

*[Facts]*

Defendant X is the president of A Corp., a company engaged in fishing and seafood processing and sales. In June, 1989 A Corp. established a Japanese-Soviet joint venture under the laws of the former Soviet Union with a Soviet public corporation. In October and November of 1989, the captain and crew of C, a fishing vessel chartered by A Corp. from another company, engaged in crab harvesting in the vicinity of Shikotan Island (one of the islands of the so-called Northern Territories) and harvested crab without permission from the governor of Hokkaido. Defendant X was accused of violating the Hokkaido Ocean Fishery Regulations.

Defendant X made the following assertions. The fishing operations conducted were performed by B Corp., a Soviet legal entity, under a contract between A Corp. and B Corp., based on a permit granted by the Soviet Fisheries Agency (issued October 1989), and were not the operations of A Corp. Under the legal system of Japan, the Hokkaido Ocean Fishery Regulations do not apply to B Corp., a Soviet legal entity, so there can be no question of the captain and crew of the vessel C violating those regulations, and therefore, defendant X is not guilty.

*[Dicision]*

The defendant is found guilty and sentenced to five months imprisonment. This sentence is postponed three years from the date of the decision of the court.

*[Opinions of the Court]*

The fishing operations conducted in this case were based on a contract concluded in October 1989 between A Corp. and B Corp., and a permit granted by the Soviet Fisheries Agency in the same month to B Corp. for fishing vessel C, and can be recognized as actions conducted by X and the captain of vessel C.

The fishing permit held by B Corp. was issued by the Soviet Fisheries Agency, and permitted "the harvesting, processing, and transport of crab and shrimp" by the fishing vessel C. Also, under the contract between A Corp. and B Corp., A Corp. agreed to dispatch a vessel to the operations area (the Soviet exclusive economic zone) for "processing, transport and harvesting," and is under the obligation to employ two Soviet specialists on the vessel. B Corp. was under an obligation to dispatch a sufficient number of harvesting vessels to the operations area. In light of these permit and contract, "the fishing vessel C should be considered to be a vessel for harvesting, processing, and transport dispatched by A Corp."

Two Soviet specialists were employed on vessel C, but in fact it was the captain who gave the orders on the ship. If the defense argument that there is a charter agreement between A Corp. and B Corp. is accepted, several unnatural and contradictory points arise, so it is appropriate to conclude that a charter agreement for A Corp. to provide a vessel and crew had not actually been formed.

Under the contract between A Corp. and B Corp. the fishing activities in question conducted by the captain and crew of vessel C were actually conducted by A Corp. and should be considered to be the activities of A Corp.

In accordance with these facts the fishing activities in question were conducted by A Corp., a Japanese legal entity, and since the activities fall within the scope of application of the Hokkaido Ocean

Fishery Regulations Article 5 prohibiting unlicensed fishing, the argument of the defense can not be accepted.

***[Comment]***

The point of contention in this case is whether the Hokkaido Ocean Fishery Regulations apply to the fishing operations in question, conducted in waters in the vicinity of the Northern Territories. Concerning the application of these regulations, there is first the question of whether application is under the territorial principle or only under the personality principle, and second, whether they were conducted by A Corp., a Japanese legal entity, or by B Corp., a Soviet legal entity. These questions will be examined below.

1. Scope of Application of Fishing Regulations

The Hokkaido Ocean Fishery Regulations were issued, under the authority of the Fisheries Act (Article 65(1)) and the Marine Resources Conservation Act (Article 4(1)), to allow the Hokkaido Governor to establish a fishries regime for the preservation, cultivation, and maintenance of marine resources and otherwise restrict and regulate fisheries activities (preamble of the Regulations). Article 36 of the Regulations stipulates the geographic scope of application, which prohibits certain fisheries activities. The regulations apply to activities within "areas of the ocean as is necessary for the coordination of fisheries activities", as do the Fisheries Act and the Marine Resources Act, and therefore, the scope of application of the Regulations is dependent upon interpretation of these two Acts.

The Fisheries Act and the Marine Resources Act apply to "waters which are subject to public use" and "waters which, although not subject to public use, constitute a whole with adjoining waters subject to public use" (Articles 3 and 4 of the Fisheries Act; Articles 2 and 3 of the Marine Resources Act). These "waters" of course include the internal waters and territorial sea of Japan, and the Acts are interpreted to apply to the high seas under the personality principle of jurisdiction (decision by the Great Court of Judicature on December 2, 1937 and the decision by the Second Petty Bench of the Supreme Court, on December 16, 1960). The question then is if the

territorial sea of a foreign country is included in these "waters."

The question of whether or not Japan's Fisheries Act or any other legislation can apply to the territorial sea of a foreign state has been much debated in cases involving unlicensed fishing in the waters in the vicinity of the Northern Territories. Opinion is divided in lower courts. Cases which determined that Japanese legislation does not apply in the territorial sea of a foreign state include the Kushiro District Court Decision on March 29, 1968 (Kitajima-maru Case, trial of first instance; 14 Japanese Annual of International Low (J.A.I.L.) 112 (1970)), the Kushiro District Court Decision on April 21, 1969 (Sanko-maru Case, trial of first instance; 15 J.A.I.L. 158 (1971)) and the Sapporo High Court decision on November 6, 1969 (Sanko-maru Case, *koso* appeal; 15 J.A.I.L. 152 (1971)). Among cases which decided that Japanese legislation does apply include the Sapporo High Court Decision on December 19, 1968 (Kitajima-maru Case, *koso* appeal; 14 J.A.I.L. 89 (1970)). The Supreme Court determined that such legislation does apply in the territorial waters of a foreign state by way of application of Japan's personal jurisdiction in the decision on September 30, 1970, (the Supreme Court, Second Petty Bench; Kitajima-maru Case, *jokoku* appeal; 17 J.A.I.L. 178 (1973)), and the decision on April 22, 1971 (the Supreme Court, First Chamber; Sanko-maru Case, *jokoku* appeal; 17 J.A.I.L. 179 (1973)). The reasons given why laws and regulations concerning fisheries can not apply in the territorial waters of a foreign state are as follows. Fisheries-related laws and regulations prohibit certain fisheries activities, but in certain circumstances some of these activities can be permitted by prefectural governors. The scope of application of such permission, however, is limited to the bounds of Japan's territorial jurisdiction. In other words, Japanese law can not be applied to permit fishing activities in the territorial waters of a foreign state where Japan does not have jurisdiction. To the extent that there is no specific legislative provision stipulating otherwise, the scope of permission and the scope of prohibitions are, in principle, identical, and therefore, the prohibition of certain fisheries activities is limited to within Japan's jurisdiction. Fisheries-related legislation also includes penal provisions, and under the principle of *nullum crimen*, as far as the scope

of application of these penal provisions is not expressly stipulated, even if interpreted according to purpose, it is not possible to interpret such laws and regulations as applicable in the territorial sea of a foreign state. In contrast to this position are the decisions which permit application of Japanese legislation in such cases, which give the following reasons. Certainly, within fisheries-related laws and regulations, there are administrative functions which should be limited to the scope of Japan's jurisdiction because of their nature. However, the question of whether certain authority applied to nationals in a foreign country varies depending upon the specific nature of each authority, and therefore, it can not be said that all such authority is limited to the scope of Japan's jurisdiction. In consideration of the purpose of the legislation involved, there is no reason why the scope of application of the prohibitions of the said legislation must be limited to the scope of Japan's jurisdiction.

There are differences of opinion among legal scholors on this point, but it can be said that the application of Japanese fisheries legislation in the territorial seas of foreign states as an application of Japan's personal jurisdiction is today established by judicial decisions (Naoya Okuwaki, *Jurisuto* No. 1002, 252 (1992)).

The oceans in the vicinity of the Northern Territories are currently under the *de facto* control of the Republic of Russia (see the Joint Japanese-Soviet Declaration of 1956, paragraph 9). The application of fisheries legislation will of course differ depending on whether the territorial rights to the Northern Territories are attributable to Russia (that is, the waters in question are the territorial sea and exclusive economic zone of a foreign state) or to Japan. In both the Kitajima-maru Case and the Sanko-maru Case the courts did not touch upon this question, but, with the presumption that since the waters in question are not under the control of Japan they should be treated as the waters of a foreign state, examined only the question of whether application of Japanese fisheries legislation in such waters is possible as an extension of Japan's personal jurisdiction. The Supreme Court determined, also in accordance with this presumption, that since application of Japan's fisheries legislation in the territorial sea of a foreign state is possible, application of such legislation

in the waters in the vicinity of the Northern Territories, which is equivalent to the waters of a foreign state, is also possible (decision on April 22, 1971; Sanko-maru Case, *jokoku* appeal; 17 J.A.I.L. 181 (1973)). In the present case the Kushiro District Court spent so much time considering whether the entity conducting the activities in question was the Japanese legal person A Corp. or the Soviet legal person B Corp. because it too considered the waters in the vicinity of the Northern Territories to be equivalent to the waters of a foreign state, and thus with the assumption that Japanese fisheries legislation could be applied as an extension of Japan's personal jurisdiction. Approached from another angle, it can be said that the above Supreme Court opinion is supported by the recent Kushiro District Court decision.

2. Concerning the Determination of the Entity Conducting the Activities in Question and Application of Japan's Fisheries Legislation

The Kushiro District Court determined that the entity conducting the activities in question was not B Corp., a Soviet legal entity, but was A Corp., a Japanese legal entity. The basis of this determination was, with the presumption that the fishing operations were conducted by the vessel C, that this fishing vessel was not chartered by B Corp. and under the control of B Corp., but was dispatched so that A Corp. could conduct operations under the contract between A Corp. and B Corp. In other words, although the activities in question appear to be the activities of B Corp., this is merely a pretense, and in fact the activities were conducted by A Corp. Therefore, based on this determination and on the presumption that Japan's fisheries laws and regulations (including the Hokkaido Ocean Fishery Regulations) are applicable in the territorial sea of a foreign state as an extension of Japan's personal jurisdiction, the Court found defendant X to be guilty. If the Court's determination of the acting party and the Supreme Court's precedent concerning the application of Japanese legislation are assumed to be correct, then the current decision of the Kushiro District Court is proper.

However, previous cases involved unlicensed fishing, of which

it can be said there is a need to restrict and punish. But since there is no specific provision of domestic law for the restriction and punishment of unlicensed fishing in the vicinity of the Northern Territories, the problem of whether this type of restriction and punishment is possible under current law is a question of interpretation for the courts. However, in cases such as the current one, the question of whether the application of law is possible or not needs to be followed with a determination of whether such restriction and punishment is necessary or not in the case of activities conducted by joint ventures.

3. Activities in Japanese-Soviet Joint Ventures and Japanese Fisheries Policy

In recent years the use of the high seas, which has traditionally been free, has been increasingly coming under restriction under international law. What has exerted a particularly large influence is the regime of the exclusive economic zone. This regime, which is provided for in the 1982 United Nations Convention on the Law of the Sea (LOS Convention), has been adopted by many countries and may be said to have achieved the status of customary law. The regime recognizes the sovereign rights of the coastal state in the zone (LOS Convention Art. 56(1)(a)). Although there is some dispute concerning the legal nature of the exclusive economic zone and the sovereign rights of the coastal state, at a minimum, fishing activites by third states, which were previously recognized as free, have been severely restricted. As a result, there is a trend for fisheries corporations of countries with advanced fisheries technology to establish local corporations and joint ventures in countries with plentiful marine resources in an effort to secure the necessary harvests.

In 1987 the Soviet Joint Venture Law was enacted and Japanese-Soviet joint ventures were established one after another for the purpose of conducting fishing operations in waters withn 200 miles of the Soviet coast. There are currently more than 10 such joint ventures, of which B Corp., the corporation of the current case, is one. In Japan's current fisheries legislation, there is no provision concerning such joint ventures. Therefore, even if through the activities of such joint ventures, the purposes of Japan's fisheries legislation (fish-

eries adjustment and preservation, maintenance of the fisheries order and stability of the lives of persons engaged in fisheries activities, etc.) can not be achieved, the activities of such foreign legal entities can not be regulated under current Japanese law. Thus the only means to achieve the purposes of the fisheries legislation mentioned above is through a strengthening of domestic restriction of capital transaction, greater control of seafood imports, or through a coordination of efforts with the foreign country concerned (Okuwaki, p. 253).

In the present case the court found the defendant guilty for the reason that it is only a pretense that the activities in question were performed by the Soviet joint venture, but if the activities had been conducted by the joint venture, then there could be no application the fisheries legislation under Japan's personal jurisdiction and the defendant would have been held to be not guilty. But in either case, it is true that the activities in question were conducted with a license from the Soviet government and were limited to activities and regions specified by the Soviet government and were limited to activities and regions specified by the Soviet government (this is not to say, of course, that a license from the Soviet government is identical to a license from the Japanese government). Thus, the only difference that arises in these two cases is whether the activities were conducted under the direction of A Corp. or B Corp. That is, the influence upon Japan's fisheries system is no different in either case. The basis of the culpability for finding the defendant guilty was only that the activities in question were not considered to have been conducted under the direction of B Corp. Thus, from the court's point of view, if certain activities have some effect on fisheries in Japan, even if the activities are conducted by a joint venture with foreign nationality, those activities should be made subject to restriction by Japanese law through some means. However, as mentioned previously, under current law, there is no legislative measure for regulating the activities of joint ventures which involve Japanese capital. In this respect, this decision can be said to imply the insufficiency of Japanese legislation.

However, the problem of whether the fisheries legislation should

be enforced or not becomes a problem. It would then be necessary to examine precisely whether the activities of such foreign corporations have an effect on fisheries activities in Japan, and if there is an effect on fisheries activities in Japan, and if there is an effect, to what extent is the effect under varying conditions must also be examined, and then the legal system would have to be modified in accordance with this. Furthermore, the legal standing of the activities of such joint ventures must also be made clear. In other words, the form that the legal system should take will differ depending on whether the establishment of a joint venture is considered merely as a capital transaction with a foreign country, and if the activities of joint ventures are considered to be Japanese trade activities, and also, whether the activities of such joint ventures are considered to be having a direct influence on Japanese fisheries order.

In any case, the changes to the international status of fisheries brought about by implementation of the regime of the exclusive economic zone impose a need on Japan to re-evaluate its domestic legal order, and to rethink the very purposes of its fisheries legislation.

In April of 1991 the Japanese government decided to change its policy concerning international fisheries in accordance with the heightening need for global environmental preservation, including preservation of marine living resources. The policy was changed from "freedom of use of the high seas" to "fisheries oriented for proper resources management in accordance with scientific surveys of marine resources." Specifically, Japan accepted a ban of salmon and trout fishing in the North Pacific (a four state conference for a treaty concerning North Pacific salmon and trout resources was held in June with Japan, the U.S., Canada and the Soviet Union participating; a Treaty was signed in February 1992), accepted restrictions on fishing in the Bering Sea (a conference was held in June with Japan, the U.S., the Soviet Union, Korea, Poland and China participating), and decided in November to prohibit drift net fishing on the high seas (see the United Nations Resolution of December of the same year). To deal with the international environment as it concerns Japanese fisheries, the government is strengthening its policy of promoting and supporting joint ventures with Japanese capital par-

ticipation. In consideration of these conditions it is necessary to clarify the status of the activities of joint venture in the fisheries legal order.

Appendix

On April 16, 1992 a decision was handed down by the Sapporo High Court in a *koso* appeal of this case. Although this decision also supported the original decision, this decision considered that the waters in the vicinity of the Northern territories as the territorial waters of Japan and that the Hokkaido Ocean Fishery Regulations could be applied under Japan's territorial jurisdiction. Until now Japanese courts have avoided making a determination of the legal status of the Northern Territories, and as the decision of this case was much more encompassing than other cases it attracted a great deal of attention.

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