

US and Japan, along with other fishing states became members of the 1st treaty. This shows state practice and legal obligation of multiple states to protect this specific environment. So the custom of access to the water for fishing, gave way to protection of environment. In the 4 yrs since the 2nd treaty, more act have taken place to back or support the treaty (ex: licenses)

Custom does not need a specific or long period of time. As long as it is continuous and uniform w/ the given area and states feel a legal obligation it becomes custom.

The US cannot be the "persistent objector" for long. When the majority of states concerned are participating, one state cannot hold out. US stated they won't be a member and their actions of fishing w/o license show no sense of legal obligation. But the US was a member of LOS and 1st treaty indicating some ~~type~~ recognition of law of sea and rights of states w/ certain territories, especially regarding the Pacific Salmon.

Another issue is the fact that both parties to this dispute agreed to submit disputes to the International Court of Justice. The ICJ obtained its power from the UN Charter giving ICJ the judicial powers of UN. Decisions by the ICJ are binding only upon the two parties involved. There is no stare decisis in international law. Both parties have to agree to submit to ICJ.

Equity is another issue. This was not a case of "this is mine and you can't have it - get off my property". Here several fishing states got together and tried to work out a solution to a natural resource problem that will eventually (if all fish become extinct) affect all parties. Distinction is a serious problem for multiple reasons.

Equity is based on principles of fairness and reasonableness. It is a form of soft law as opposed to custom or treaties. Here the US is not being fair or reasonable. They won't work with the other states, the Liberty blatantly violated rules regarding fishing in that area. It's not fair that one state can play by their own rules while others are constrained - especially regarding a matter of common good.

Possible Solutions

One solution is that the US wins because they are not bound by the 2nd Treaty b/c they are not members, the denial of the license was wrongful b/c they are still members of the LOS, and that there was custom going back 45 yrs giving US Liberty the right to fish in those waters.

The other solution is that Japan wins. The act took place in waters under the jurisdiction of Japan b/c between islands of Japan and w/c 200 mile zone supporting authority. Japan had authority to declare environmental protection zone due to connectivity w/ its territory, economic effects, possible repatriations of hungry nationals (poor starving children w/ no sushi to eat). The treaty is trying to address a natural resource problem. Other fishing states are members. It affects a local/regional area. In the common good it should be uniformly followed. Protection of the fish in that area has become custom - custom of a multilateral.

treaty which then binds non-signatories.

I think the dispute should be resolved in Japan's favor (for many of the reasons stated previously). The Liberty could have complained to the appropriate channels (US government, Japanese government, UN security council), prior to violating the license requirement. While Japan wrongfully denied the license - (if US was LOS member), if they have the authority to make the rules, they must be given the power to enforce the rules. (means to an end). Because the extinction problem, the amount of fishing needed to be regulated. The licenses were an appropriate means to regulate the fishing. The treaty was signed for the common good even if it specifically affected Japan more than other states.

As US Liberty did not or through appropriate

channels to resolve the issue, Japan had no time to argue their case to an international tribunal (security council). Japan had to act immediately when they came upon the Liberty - therefore ship was impounded and Captain imprisoned.

I don't agree that a US captain should be criminally charged w/ the violation when it was a matter of the state holding out from the treaty. It seems that rather than penalizing individual national who is acting according to beliefs of the state, that maybe sanctions directed at the state are more reasonable. However, Japan can argue territorial jurisdiction over another states national for acts which have negative consequences w/i Japan.

It was not the 45 yr custom that was significant. It was the custom of protecting environmental interests which affect many states. As mentioned previously, US did show legal obligation to fishing in this area for salmon.

While Jus cogens is aimed at larger issues like genocide, there is a need for states to work

together for common good in the interests of
world resources/environment.

Simply for equity purposes, US actions seem
wrong.

Japan was not faultless, but they were
acting for a certain purpose - and probably
trying to force US into joining treaty by
stopping the fishing license