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FISHERIES: CANADA-UNITED STATES RECIPROCAL FISHERIES RELATIONS UNDER THE INTERIM FISHERIES AGREEMENT OF 1978.

On June 2, 1978, Don Jamieson, Secretary of State for External Affairs of Canada, released a statement concerning the difficulties encountered by the Canadian Government with respect to the enforcement of the 1978 Canada-United States Fisheries Agreement on both the Atlantic and Pacific Coasts.¹ This provisional Interim Agreement² was designed to sustain the traditional fishing rights of the two countries until a long-term pact could be worked out. A statement in response released the same day by the Department of State of the United States³ maintained that the effect of the Canadian statement was that Canada no longer recognized provisional enforcement of the 1978 Interim Agreement. The American statement further stipulated that the United States had no choice but to reciprocate with similar repudiation of the Agreement.

Interim fisheries agreements, like the one discussed here, have been a natural outgrowth of the Fishery Conservation and Management Act of 1976, enacted by the United States Congress on April 13, 1976.⁴ This Act sought to constrain the rapid escalation during the late 1950's and early 1960's of large mechanized fishing fleets off the coasts of the United States, specifically those fleets of foreign countries.⁵ As early as

¹ *Canada/USA Fisheries Relations, Statement by the Secretary of State for External Affairs*, Don Jamieson, Press Release, Canadian Embassy, Public Affairs Division, June 2, 1978 [hereinafter cited as *Statement by the Secretary of State for External Affairs*].

² Reciprocal Fisheries Agreement between the Government of the United States of America and the Government of Canada [hereinafter cited as *Reciprocal Fisheries Agreement of 1978*]. While the Agreement was to enter into force on April 11, 1978, it currently is designated an unperfected agreement by the State Department library due to the abrogation herein discussed.

³ *OCEANS: USA/Canada Interim Reciprocal Fisheries Agreement, Department Statement*, 78 DEP'T STATE BULL. 38 (August 1978).

⁴ The Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 104, 90 Stat. 331 (codified at 16 U.S.C. §§ 1801-82 (1976)) [hereinafter cited as *Fishery Conservation and Management Act*]. For a comprehensive treatment of the Act and its effect on pre-existing fishing agreements, see Note, 10 CASE W. RES. J. INTL L. 703, 734-36 (1978).

⁵ The Fishery Conservation and Management Act prohibits foreign fishing within the prescribed fishery zones without authorization through an international bilateral fishery agreement entered into with the United States Secretary of State, Fishery Conservation and Management Act, §§ 201-205, 16 U.S.C. §§ 1821-25 (1976).

1955 there were over eighteen other countries taking a substantial share of the catch from both the Atlantic and Pacific coasts, some fleets coming from such prosperous fishing regions as Norway, Japan and Italy.⁶ The Act also was a response to the comparatively low rate of increase between 1950 and 1969 of the United States share of total world catch of fish products. It was estimated that during those years, while the total world production increased from twenty million metric tons to sixty-three million metric tons, the American share of that catch remained relatively stable at approximately two million metric tons.⁷ Yet, the United States imports of fish products during those same years increased by approximately four times to meet the ever increasing demands for an alternative to rising meat prices.⁸ At the same time, other nations with large and efficient fleets (many subsidized and carrying the most technologically advanced equipment) experienced substantial increases in production and decreases in total imports.⁹ Thus, while the United States catch of fish from its own waters remained stable or declined relative to other countries' catches from these waters, and the demand for fish products in the United States increased in dramatic proportions, foreign efforts and subsequent rewards increased substantially, often resulting in instances of imports by the United States of its own fish products. This situation also resulted in the overfishing of at least ten major American commercial stocks,¹⁰ resulting in serious economic consequences in the American fishing industry.

⁶ Other nations fishing the United States coasts at the same time included Poland, Russia, Germany, China, France, Spain, Korea, Mexico, Ireland, Romania and Bulgaria. A typical example of this monumental increase was the Soviet Union fishing enterprise in the New England Fishing Grounds. In the late 1950's, the Georges Bank Fishing Area was used almost exclusively by American fishermen. In 1961, Soviet fishing vessels reported taking 68,000 metric tons of fish (including shell weight) from the Georges Bank Area. By 1965, Soviet exploitation had expanded south to the Chesapeake Bay, with a reported catch of over a half-million metric tons, far in excess of the American catch. By 1970, total foreign fishing catch in this region was well over one million metric tons, with the Soviet take estimated at 75 percent of that total. By 1972 the American share of the total catch in that area had been reduced to 49.1 percent. See H.R. REP. NO. 445, 94th Cong., 2d Sess. 32-43 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 593, 604-10.

⁷ *Id.* at 35, *reprinted in* [1976] U.S. CODE CONG., & AD. NEWS 593, 604-10.

⁸ U.S. DEP'T OF INTERIOR, FISHERY STATISTICS OF THE U.S. (Pub. Nos. 44-57).

⁹ H.R. REP. NO. 445, *supra* note 6, at 37.

¹⁰ *Id.* at 36.

It therefore became apparent that it was in the best interests of the United States to seek a balanced concord that could protect American coastal stocks, distant water fishermen, and the conservation and management of all fishing resources from indiscriminate use by both foreign and national interests. This included as a matter of policy and law the American interests off the coasts of other countries as well. In the words of Rozanne L. Ridgway, Deputy Assistant Secretary for Oceans and Fisheries:

While foreign fishing has always been a part of our life, the arrival on the fishing grounds of modern technology gave a new dimension—a conservation dimension—to the challenge. The need to preserve opportunities for our own fishermen and protect our resources combined to make fisheries and coasts central to the negotiations toward a new law of the sea. The same need led to the enactment of the Fishery Conservation and Management Act These goals were very much on our minds as we embarked upon the international negotiations required by the passage of the [Fishery Conservation and Management] Act.

These negotiations had begun on April 13, 1976, not only with Canada, but also with Poland, the Republic of China, the Soviet Union, Bulgaria and Korea.¹² Title II, § 201(c) of the Act enabled such negotiations to be conducted pursuant to the establishment of international fishery agreements.¹³

The first of these international fishery agreements¹⁴ to be enacted with Canada by virtue of the Fishery Conservation and Management

¹¹ *Department Reviews Developments in International Fisheries Policy, Statement by Rozanne L. Ridgway*, 77 DEPT STATE BULL. 175-76 (Feb. 1977) (made before the Subcommittee on Oceans and International Environment of the Senate Committee on Foreign Relations on Feb. 3, 1977) [hereinafter cited as *Statement by Assistant Secretary Ridgway*].

¹² *Id.*

¹³ Fishery Conservation and Management Act, *supra* note 4, § 201, 16 U.S.C. § 1822 (1976).

¹⁴ Reciprocal Fisheries Agreement between the Government of the United States and the Government of Canada, 28 U.S.T. 5571, T.I.A.S. No. 8648 (1977) [hereinafter cited as Reciprocal Fisheries Agreement, 1977]. A similar treaty was enacted with Canada in 1973, apparently on its own momentum. Agreement on Reciprocal Fishing Privileges in Certain Areas off the Coasts of the United States and Canada, 24 U.S.T. 1729, T.I.A.S. No. 7676 (June 15, 1973) [hereinafter cited as Agreement on Reciprocal Fishing, 1973]. This Treaty was superceded by the 1977 Agreement.

Act was signed in 1977 and established that both governments have extended their exclusive fishery jurisdiction to 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.¹⁵ Also established was the importance of the two countries' previous relationship under the Reciprocal Agreement of 1973 and the Fishery Conservation and Management Act of 1976. Article I states that these waters will be identical to those zones described in a similar 1973 treaty,¹⁶ and that catch levels will be construed to refer to quantities during the entire calendar year 1977.¹⁷ Articles II and III refer to the provisional agreement of both countries to allowing fishing in those exclusive areas of the other country, with the exceptions of any species of lobster, clam, crab or herring on the Atlantic coast, and any species of clam, scallop, crab or herring on the Pacific coast. Catches of rockfish and black cod are allocated differentially to each country with regard to the Pacific Marine Fisheries Commission Groundfish Statistical Areas in article IV. Article V prohibits salmon fishing by nationals and vessels of either country in the zone of the other, except by trolling within a three to twelve nautical mile range west of a line joining Bonilla Point and Tatoosh Island south to latitude 48 degrees 00.3 minutes North, longitude 124 degrees 43.3 minutes West, and north to latitude 29.7 minutes North, longitude 125 degrees 00.7 minutes West, and otherwise within 12 nautical miles off the coast.¹⁸ This provision also allows each country to limit such salmon fishing in their respective zones to specified open times periods in order that conservation of the species might be maintained.¹⁹ Article VI continues to recognize the importance of the salmon fishing industry by offering bilateral consultation with regard to chinook and chum salmon in the Washington State and British Columbia Statistical Areas. This article also carefully designates that each country shall respect the prohibited fishing days for salmon (those determined in accordance with article V) according

¹⁵ Reciprocal Fishery Agreement, 1977, note 14 *supra*. This jurisdiction had previously been limited to only twelve miles for the entire length of the coastal jurisdiction. Agreement on Reciprocal Fishing, 1973, note 14 *supra*.

¹⁶ Agreement on Reciprocal Fishing, 1973, note 14 *supra*.

¹⁷ U.S. DEP'T OF INTERIOR, FISHERY STATISTICS OF THE U.S. (1977).

¹⁸ This is located roughly off the Strait of Juan de Fuca, between Vancouver Island and Washington state.

¹⁹ The United States later chose from April 15 to June 14 as the specific time periods due to the dense schools of spawning salmon traveling in the area during those times.

to the needs and conservation interests of the other country.²⁰ Article VII states that each country shall continue tuna fishing as previously agreed upon and expand the scientific basis for international cooperation in the conservation of that species. The remaining articles specify the means by which the agreements are to be enforced, most importantly, by the recognition of the domestic law of the jurisdiction in which the fishery lies.

The Interim Agreement of 1978²¹ was basically a continuation of the 1977 Agreement, which expired on December 31, 1977. There were, however, two important areas in which the 1978 Agreement differed from the Agreement of 1977,²² and it was these areas that became the subject of Mr. Jamieson's statement of June 2, 1978. These modifications, concerning salmon fishing and consultation committees, were seen as necessary especially by the United States since both Canada and the United States were seriously considering extending their respective fishery jurisdictions, and the Fishery Conservation and Management Act had put the United States in the lead in the global move toward coastal-state jurisdiction over fisheries. The tactical advantages of both the Act and the modifications were clear to the United States, as stated by Assistant Secretary Ridgway in her speech before the Senate Subcommittee:

Our act is the first of its kind, including as it does not only the simple extension of jurisdiction but new machinery for the exercise of that jurisdiction. We are being closely watched by other nations as they also move toward extended jurisdiction. . . . If these problems [are difficulties between the United States and Canada over the 1977 agreement], rather than challenges to the integrity of the Act, some solutions [are] . . . to shorten the period of congressional oversight . . . [and] allow payments [for fishery privileges] to take place after the issuance of the permits and the initiation of the fishery on March 1, [1977].²³

The first of these important modifications established two joint consultative committees, one each for the Atlantic and Pacific coasts.

²⁰ There was no language regarding how such needs were to be determined by either country. As will be seen later, this resulted in the major area of controversy between the United States and Canada.

²¹ Reciprocal Fisheries Agreement of 1978, note 2 *supra*.

²² *OCEANS: U.S./Canada Interim Fisheries Agreement, Statement by Ambassador Cutler*, 78 DEP'T STATE BULL. 38 (August 1978) [hereinafter cited as *Statement by the United States Ambassador to Canada*].

²³ *Statement by Assistant Secretary Ridgway*, note 11 *supra*.

The second area which differed from the 1977 Agreement, and the area which is now most disputed, was in the provision relating to salmon trolling in the American zone off Washington State by Canadian vessels. Under the revised terms included in the 1978 Agreement, Canadian vessels were allowed to have on board only those salmon which measured twenty-six inches or more in length, to insure against the taking of undersized fish and thus threatening future salmon catches in American waters. In return, Canadian vessels were allowed to troll for salmon in the three-to-twelve mile range off the Pacific coast considerably further south than was allowed in the past.²⁴ However, the extended fishing allowance was conditional upon the Canadian Government's actions to close the Swiftsure Bank area off British Columbia (Statistical Area 21) from April 15 to June 14, provided the need to do so was verified by environmental studies indicating dangerously high capture rates of immature and spawning salmon.²⁵ This area was of concern to the United States due to the heavy spawning schools that travel it on their way to the Puget Sound-Columbia River area during those specified times. The United States wishes to protect the future of the species in these spawning schools as ratified by the efforts of the Fishery Conservation and Management Act of 1976.²⁶

However, while Canada enjoyed the extended salmon trolling privileges granted in the new agreement, they did not close the specified conservation areas off the Swiftsure Bank to their own fishermen, after continued notices by the United States requesting them to do so.²⁷ The United States then retaliated by notifying Canadian officials, the National Marine Fisheries Service and the Coast Guard that all Canadian salmon trolling in the United States waters would be reduced to the more restricted terms of the 1977 Interim Fisheries Agreement,²⁸ thus abating a major portion of Canada's anticipated catches, and resulting in one of the provocations of Mr. Jamieson's statement and subsequent actions on the part of Canada.

²⁴ This extension amounted to approximately 54 miles further south. *Statement by the United States Ambassador to Canada*, note 22 *supra*.

²⁵ Again, no specific language regarding how such needs were to be determined by either country was included. This resulted in the major area of controversy between the United States and Canada.

²⁶ Fishery Conservation and Management Act, *supra* note 4, § 2, 16 U.S.C. § 1801 (1976).

²⁷ These notices were dated April 14 and 15, 1978. *Statement by the United States Ambassador to Canada*, note 22 *supra*.

²⁸ *Id.*

The statement by Mr. Jamieson of June 2, 1978, revealed further problems encountered by Canada regarding the Interim Agreement that may have prompted Canada's contumacy of the salmon trolling restrictions on the West coast. The Canadian Government viewed the unrestricted fishing for scallop, pollock, haddock, and cod by the United States off the Gulf of Maine and the Georges Bank area as excessive and unnecessary by the terms of the 1977 Agreement.²⁹ On June 8, 1978, the Canadian Consulate released a background text explaining more fully its reasons for the partial suspension of the agreement and the activity in the Swiftsure Bank area.³⁰ However, only scant mention was made of the problems encountered on the Atlantic coast. The background text explained that the Canadian Government was prepared to close the specified fishery off the Swiftsure Bank as agreed, but only if a conservation problem became apparent due to the high incidence of spawning or immature salmon in the required survey catches. While both countries had conducted separate statistical surveys, it was never determined in the Interim Agreement whose survey data would be used, or whose interpretation of a conservation problem would be respected. As was stated in the background text:

To reflect these differing views, the agreement provides . . . "If the U.S. concludes that there is a conservation need to close the fishery . . . but if Canada does not [so conclude], the U.S. shall have no obligation to permit salmon fishing in its Pacific coast waters . . . [as provided in] the terms of the 1977 Reciprocal Fisheries Agreement." While the final conclusion is left to the U.S. on this matter, it was our [Canadian] position at the time of the agreement . . . that the U.S. would not make its determination unilaterally and arbitrarily but on a sound technological appraisal as to whether a conservation need justifies the closure of the [Swiftsure Bank] fishery.³¹

²⁹ The net effect of this unrestricted fishing was a decline in the Canadian stocks and adverse effects for Canadian fishermen. In June 1978, Canada expanded claims to maritime jurisdiction in the Gulf of Maine beyond the area claimed as of November 1976, evidently to compensate for this loss. The United States indicated that this claim was without merit and informed Canada of its formal rejection of the claim. Both Canada and the United States denied each other access to these fishing grounds in June 1978. These activities were conducted outside the scope of the interim agreements due to the mutual abrogations. Canada/USA Fishery Relations, Press Release, United States Embassy, Sept. 22, 1978 (copy on file at the offices of the *Case Western Reserve Journal of International Law*).

³⁰ Canada/USA Fisheries Relations, Press Release, Canadian Embassy, Public Affairs Division, June 8, 1978 [hereinafter cited as Press Release, Canadian Embassy].

³¹ *Id.* While referring to the 1978 Interim Fishery Agreement, the background

The background text states further that a preseason test fishery was conducted by Canada to determine the incidence of immature and spawning salmon caught in the fishery, and that on the basis of the data collected, Canada acted to prevent the opening of the inshore one-quarter of the Bank to protect the conservation efforts of the United States. It was in this area only that the test revealed a high incidence of immature salmon. "[T]he preseason test fishery showed the incidence of immature salmon to be significantly higher [there] than in offshore waters. We allowed the remaining area of Swiftsure Bank to open as usual on April 15."³² Canadian officials continued to monitor the fishery on the offshore part of the Bank, and inform the United States of the results.

The background text further stated that when the United States was questioned by Canada regarding reasons for the otherwise abrupt abrogation of Canada's fishing rights off the Swiftsure Bank, no reply was offered.³³ At that time Canada offered to close the balance of the Swiftsure Bank area on April 28, to provide time for the negotiations needed to determine the mutual conservation efforts and needs of both countries.³⁴ However, the United States indicated that a definite conservation problem existed as shown by their own tests, and that since the Bank was not closed on April 15, the favorable terms of the 1978 Agreement would be denied.³⁵ Meanwhile, the Swiftsure Bank area was completely closed to fishing by the Canadian government, evidently as a goodwill gesture.³⁶ Both the background text and Mr. Jamieson's statement concluded with an invitation to continue negotiations with regard to this and other Interim Agreement difficulties.³⁷

text was attempting to delineate differences arising between the United States and Canada regarding the determination of conservation needs and goals. Presumably, this was the first interpretation, albeit unilateral, of the requirements for conservation needs and interests specified in article VI of the 1977 Agreement. *See also* notes 20 and 25 *supra*.

³² *Id.*

³³ Press Release, Canadian Embassy, note 30 *supra*. Evidently, the notices of April 14 and 15 were ineffective in informing Canada of these reasons. *See* note 27 *supra*.

³⁴ These negotiations began on April 12, 1978, and continued on May 11-12, and again on May 26, apparently with no successful resolution. *See also* note 37 *infra*.

³⁵ *Statement by the United States Ambassador to Canada*, note 22 *supra*.

³⁶ Press Release, Canadian Embassy, note 30 *supra*.

³⁷ At the time this writing went to press it was reported that the United States and Canada had reached a partial settlement over the difficulties experienced on the East Coast, especially those on the Georges Bank. The United States and Canadian Governments indicated they will refer their border claims to third-party arbitration, specifically the International Court of Justice. A spokesman said that reciprocal fishing

The difficulties resulting from Mr. Jamieson's renouncement of the 1978 Interim Fisheries Agreement were further compounded by the closing of the disputed areas off Maine and the Georges Bank to all American fishermen.³⁸ A press release by Mr. Jamieson on June 3, 1978, stated that while the Interim Agreement was designed to expedite matters until long-term pacts could be worked out, abrogation of the Agreement was necessary due to the unusual circumstances.³⁹ The release indicated that while no confrontation was expected over the closure of the disputed Atlantic and Pacific coast fisheries, patrol boats of the Canadian Coast Guard would be sent to those areas to maintain the effects of the closure. The situation worsened throughout the early part of June 1978, as the United States also prohibited Canadian fishermen from the Great Lakes areas that had previously had no such restrictions imposed.⁴⁰ Warnings were sent from the Coast Guards of both countries, and the possibility of heavy fines and confiscations of boat and catch were imposed on potential Canadian offenders. Although very little commercial fishing was conducted by Canada in the Great Lakes, Canada had no choice in the matter but to ban American fishermen from Canadian Great Lakes waters. These bans worked effectively for both sides, although there was a dispute over whether sport fishermen were likewise banned from the Great Lakes.⁴¹ Canada, in order to maintain their excellent sport fishing business from the United States, denied that sport fishing was restricted in any of the disputed areas.⁴² Talks concerning all aspects of the dispute were to resume on June 19, 1978, but no significant progress was

can resume on the Atlantic coast as soon as the accord is ratified by the United States Congress. The Atlantic coast accord establishes a management regime for all 28 fish stocks of mutual interest to the fisherman of both countries. Shares for all 28 fish stocks have been established, subject to review every ten years. Canadian External Affairs Minister, Don Jamieson, indicated that he anticipated the same resolution for the difficulties on the Pacific coast, but informed sources predict that reciprocal fishing for halibut and cod will be phased out by 1980, with the same result following for salmon fishing. Wall St. J., Feb. 15, 1979, at 6, col. 3.

³⁸ *Statement by the Secretary of State for External Affairs*, note 1 *supra*.

³⁹ Cleveland Plain Dealer, June 3, 1978, at 4, col. 2. See note 29 *supra*.

⁴⁰ Cleveland Plain Dealer, June 4, 1978, at 3, col. 1.

⁴¹ Cleveland Plain Dealer, June 5, 1978, at 3, col. 1; *id.*, June 6, 1978, at 10, col. 1; Cleveland Press, June 6, 1978, at 1, col. 1.

⁴² *USA Sports Fishermen Welcome to Canada*, Statement by the Honourable Jack H. Horner, Ministry of Industry, Trade and Commerce, Press Release, Canadian Embassy, Public Affairs Division, June 7, 1978.

reported. However, in a statement by Ambassador Cutler of Canada regarding the progress of the negotiations for the 1979 Interim Agreement, it seemed that Canada expected substantial progress to occur in the remaining months of 1978. Ambassador Cutler also urged that prompt and favorable consideration be given by the Senate Committee on Commerce, Science and Transportation to conclude the 1979 Agreement in full effect.⁴³

The major issue that will confront the United States and Canada in the formation of the interim agreements and play an important role in determining the status of any long-term pact is that of commercial species management and conservation. The need for such an effort is obvious to both countries. Yet for equally obvious reasons both countries are reluctant to forfeit their market for the sake of conservation when the need for fish products has met a strong resurgence in an economy of otherwise fluctuating food demands and inflation-ridden prices. However, these problems must be overcome to avert total extinction of valuable commercial species, and they must be overcome soon. It remains to be seen whether the United States and Canada will adhere to their new bilateral declarations, or what effects those agreements will have on the progress toward a long-term agreement on reciprocal fisheries, or how extensive a role such interim agreements may assume in future pacts, and how closely each country will adhere to the provisions of the Fishery Conservation and Management Act. It does seem clear, however, that both countries are deeply concerned with the situation and the difficulties inherent in reaching a long-term agreement. Substantial progress can only be made by open-ended and realistic negotiations.

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⁴³ *Statement by the United States Ambassador to Canada*, note 22 *supra*.

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