Canada's 1994 International Fisheries Actions*

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Introduction

During 1994 Canada aggressively pursued its international fisheries interests on both the east and west coast, arresting foreign vessels, asserting regulatory jurisdiction and adopting confrontational tactics aimed principally at Americans. These acts were part of a new "get tough — take action" posture which emphasized Canada's willingness to deal unilaterally with foreign fishing perceived to be contrary to Canadian interests. Yet Canada has forsaken neither multilateralism nor bilateralism. International arrangements continue to be viewed as necessary to deal with global fisheries problems and the high-profile, aggressive measures were designed to put pressure on negotiators.

Three specific measures were representative of Canada's 1994 fisheries aggressiveness. First — and most far-reaching — was the passage in May of legislation to extend regulatory and enforcement power over vessels from specified countries engaged in "destructive fishing" beyond the 200-nautical mile (nm) zone on the east coast. This act has been viewed as an unilateral extension of Canadian jurisdiction beyond the commonly-acknowledged and internationally-accepted 200-nm limit of coastal state sovereignty over living resources in the water. Second, in June Canada temporarily imposed a transit licence requirement on foreign fishing vessels passing through certain waters along Canada's west coast. This gesture, which was suspended several weeks later, was directed at US salmon vessels using the "inside passage," a series of connecting channels on the landward side of a string of Canadian islands between Alaska and the continental US. The purpose was to demonstrate Canada's frustration with the stalled negotiations on Pacific salmon management. Third, and of lesser importance, was the July arrest of US fishing vessels harvesting scallops beyond Canada's east-coast 200-nm limit.

That Canada adopted a "get tough — take action" approach to international fisheries reflects several factors. First, the collapse of the fish stocks in Canada's east-coast waters demanded action. Second, bilateral negotiations with the US on west-coast salmon, and multilateral negotiations on east-coast fish stocks that straddle the 200-nm limit, were either stalemated or proceeding slowly, creating high levels of frustration within Canada. Third, and most important, a newly-elected federal government brought

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a fresh outlook, a new ministerial team, and a clear desire to be seen to be proactive rather than reactive on international fisheries issues. The latter was particularly true of the Minister of Fisheries and Oceans, whose department has been the most aggressive.

All these aggressive steps were widely hailed by Canadian fishing interests and the general public. Of course, arrests and threats against foreign fishers, particularly Americans, virtually guarantee a good press for the relevant minister. What follows is a brief discussion of the specific measures undertaken by Canada, why they were aggressive, and how they fit into a strategy to influence international negotiations.

The Transit Licence and the 1985 Pacific Salmon Treaty'

Salmon is an anadromous species which begins life in freshwater rivers, migrates to the oceans and returns to spawn in its river of origin. This life cycle poses particular problems for resource management and international relations. On the west coast, salmon originating in Canadian rivers can easily be harvested in American waters and *vice versa.* Bilateral cooperation to prevent over-exploitation is clearly essential. Tied to the obvious requirement for bilateral conservation measures is the accepted international legal principle that the state in which the salmon originates (state of origin) has "primary interest and responsibility."[2] The state-of-origin principle leads nations to bilateral discussions over balancing the harvest of salmon spawned in the other's rivers. The harvesting by fishers in one state of salmon originating in the rivers of another is referred to as "interceptions."

After protracted negotiations that commenced in the early 1970s, Canada and the US agreed to the 1985 Pacific Salmon Treaty, which committed them to prevent overfishing and to attempt to balance the salmon interceptions made by each. For Canada, which felt that US interceptions were far greater than its own, the key concept was "equity," under which "each Party shall conduct its fisheries and its salmon enhancement programs so as to...provide for each Party to receive benefits equivalent to the production of salmon originating in its waters." While the equity concept is simply stated — each country should get the benefit of salmon originating in its rivers — differences in interpretation and quantification undermined any easy application. Still, the treaty created the Pacific Salmon Commission and a process for the development of bilateral management plans. Implementation of "equity" was left for the future, although annual fishery arrangements were to be done "in an equitable manner."[3] The treaty, while on one level a considerable achievement, left the implementation of the issue most important to Canada to one side.

Because of dam construction, pollution, conflicting river usage and overfishing, the number of salmon spawned in US rivers has declined sharply since the 1970s. Salmon originating in Canadian rivers, on the other hand, have not been affected as dramatically. As US stocks have dwindled, American interceptions of Canadian salmon have increased while Canadian interceptions of US salmon have fallen. The numbers provided by the Pacific Salmon Commission tell the story. From 1985 to 1992, US interceptions rose from six to nine million, while Canadian interceptions decreased from five to 3.5 million. This imbalance has become increasingly intolerable to Canada, particularly since there has been

little sign of restraint in US fishing; indeed, in 1993-1994 there were indications that the US effort to intercept Canadian salmon was intensifying. In bilateral negotiations the US expressed sympathy for Canada's position, but emphasized the need to conserve its own increasingly scarce stocks. Canada felt that the US was stalling and was unwilling to face the fundamental problem of controlling its fishers.

The 1994 negotiations on both equity and specific stock management plans were stalemated by Canadian frustration with an unyielding and unhelpful US negotiating position. Because US fishers operated in American waters beyond the reach of Canadian enforcement, the only leverage Canada had previously employed was to encourage greater Canadian interception of American salmon and to invite Canadian fishers to capture domestic salmon before they reached US waters. In 1994, however, Canada adopted a more aggressive measure to attempt to pressure the US into taking a "reasonable" position. Up to June, US fishing vessels using the "inside passage" were not required to seek permission to do so. When this exemption was removed in June, American salmon vessels from Washington and Oregon heading to and from Alaska were required to purchase and display a licence. The waters in which a transit licence was required are shown in figure 1: the waters between the BC mainland and Vancouver Island, Fitz Hugh Sound, Finlayson Channel, Princes Royal Channel; Principe Channel, Grenville Channel and Laredo Sound. Clearly, Canada selected waterways which were integral components of its land mass and avoided naming Hecate Strait or Queen Charlotte Sound; while Canada has claimed absolute jurisdiction over both on the basis of historic usage, there exists a degree of ambiguity about the international legal status of these waters. However, there is little doubt that in international law the designated waters for which the transit licence was needed have the status of internal waters over which a state has absolute sovereignty and can impose whatever requirements on passage it desires, including banning entry. Hence, as a matter of international law, the transit licence requirement was not an aggressive action.

Regardless of its legality, that the transit licence requirement was perceived to be aggressive is clear from the US reaction. Indignation and condemnation were voiced in the US for several reasons. Any interference with US navigational rights is guaranteed to trigger an adverse reaction. Moreover, the US has long had a policy of diplomatically and physically challenging measures by foreign states that interfere with what the US perceives to be its navigational rights; the Canadian move was viewed in this light.[4] Further, there was the possibility of US retaliation. While it was unlikely that the US would have used its navy to protect its fishing vessels, or otherwise interfered with Canadian vessels in US waters, there has been growing pressure in the US to impose a pollution fee on all vessels using the Juan de Fuca Strait, including Canadian and other vessels bound for Vancouver. Canada would strongly object to such a measure and would rely on the wording of the 1846 Oregon Treaty which provides that the Juan de Fuca Strait is to "remain free and open to both parties." While the legal issues are different, there is a kind of symmetry between the pollution fee and the transit licence requirement.

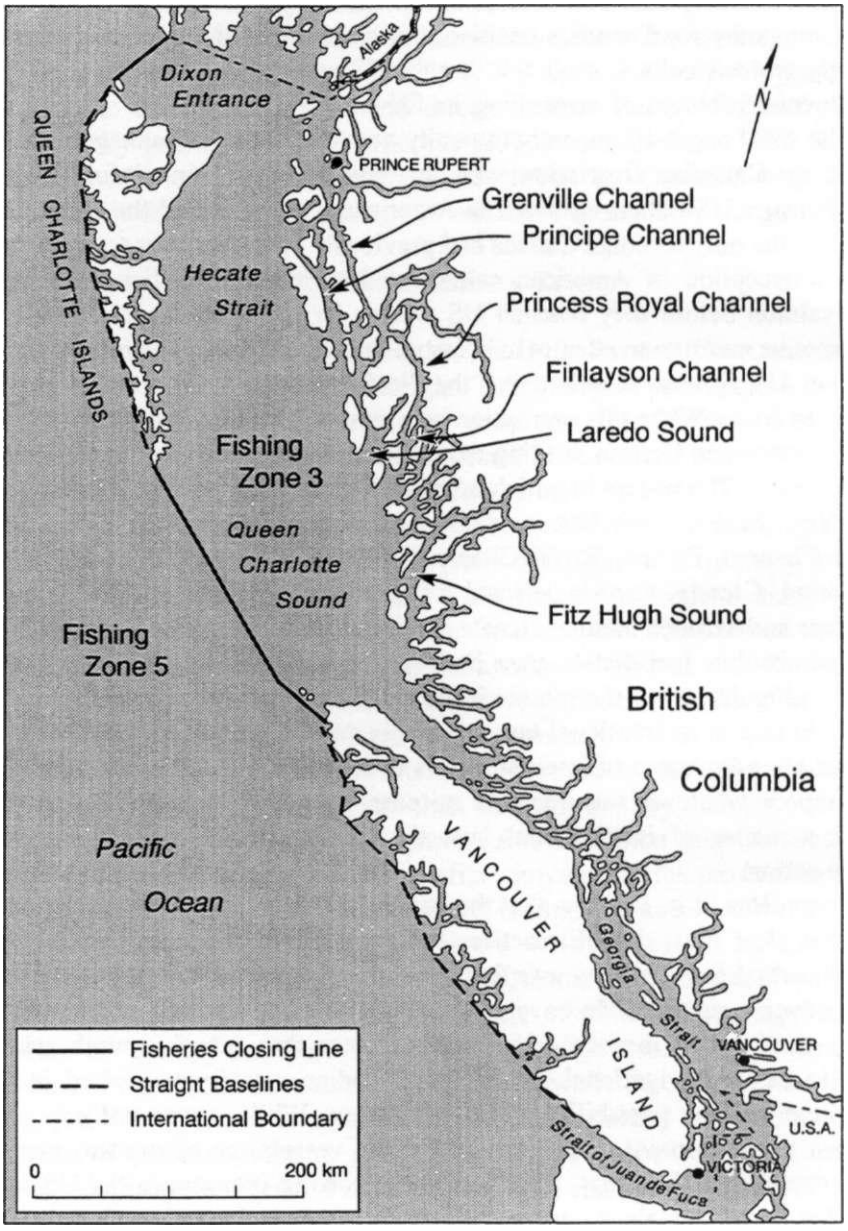

Figure 1: BC waters that require a transit licence.

Source: Courtesy of the author.

Several weeks after the transit licence requirement for US fishing vessels was imposed, it was withdrawn. Its intended effect was to attract attention at the highest levels of the US government and to show that the stalemated negotiations on Pacific salmon were unacceptable to Canada.[5] The licence measure accomplished this goal when Vice President Al Gore interceded to provide assurances that renewed negotiations on Pacific salmon could be fruitful. Reportedly, Gore also assured Canada that the US would reverse the trend of increasing interceptions; regulate its fishery to protect sensitive stocks; and negotiate a new management arrangement spanning more than a single year.[6] Following this intervention, Canada withdrew the transit licence measure.

The limited time span of the transit licence requirement, and its narrow purpose of attracting US attention and showing Canadian resolve, leads to the conclusion that it should improve the climate for renewing and revising the 1985 Pacific Salmon Treaty. Still, thus far negotiations have not been successful. Moreover, the intensity of the American reaction mitigates against its future employment to attain leverage.

Canada's Fisheries Regulations Beyond 200 Nautical Miles

At the earliest negotiations on renewing the Law of the Sea in the 1970s, Canada sought acceptance of a species-by-species approach to fisheries management that would permit the relevant coastal state to manage adjacent stocks irrespective of artificial boundaries. Canada argued that this type of supervision would ensure effective and efficient protection of the living resources off its coast. What was accepted, however, was the national fishing zone of 200 nm. While this zone captured most of the fishing resources off Canada's east coast, a significant component remained outside. Species divided by the 200-nm limit are referred to as "straddling stocks." Those beyond Canadian jurisdiction either were to be regulated by the Northwest Atlantic Fisheries Organization (NAFO), which establishes quotas and other regulations for its members, or were left unregulated as freedom-of-the-high-seas fishing, if harvesters were from non-NAFO nations.

The Canadian government has long been under pressure from domestic interests to take action against both NAFO and non-NAFO fishers allegedly engaged in destructive harvesting in the waters adjacent to Canada's east-coast 200-nm zone. The usual demand was that Canada should extend its regulatory regime to cover the living resources located in the waters above the tail and nose of the Grand Banks. Canada's sense of urgency over foreign fishing off the east coast, always high, became acute in the late 1980s and early 1990s as quota cuts and harvesting moratoriums were imposed in Canadian waters. While the precise relationship between the exhausted stocks within Canada's 200-nm zone and the activity of non-Canadians outside remains to be determined, the accepted dogma has been that the foreigners must share the blame and that something must be done. Canada, together with several other countries, successfully induced the 1992 UN Conference on Environment and Development (UNCED) to recommend that the General Assembly convene an international conference on the problem.

The UN Conference on Straddling and Highly Migratory Fish Stocks, which commenced in 1993, is trying to find consensus on straddling-stock and high-seas fishing issues within the jurisdictional framework established by the 1982 UN Convention on the Law of the Sea. What this means is that the 200-nm limit on coastal state fisheries jurisdiction is going to remain inviolable and that fisheries activities beyond it will continue to be subject primarily to *international* control. Indeed, divergent views have been expressed at the conference over the desirable degree of international regulation beyond the 200-nm limit. The gulf has been so wide at times that many are pessimistic about the possibility of successful negotiations. Canada, which has vigorously participated in the conference, along with many other like-minded states, favours detailed and effective international controls over high-seas fishing and a great degree of coastal state involvement in the establishment and enforcement of international rules on straddling stocks. Countries with significant interests in high-seas fishing, such as certain members of the European Union (EU), have taken the view that direct coastal state involvement must be circumscribed and that, while high-seas fisheries should be regulated, the basic principle of fishing freedom on the high seas should not be unduly weakened.

The final treaty can be expected to contain the following five features, although the details are still being discussed.[7] First, regulatory and enforcement measures relating to straddling stocks will, where possible, be within the purview of existing, or newly-established, international fisheries organizations such as NAFO. The mandates of these bodies will be enhanced to ensure acceptance and implementation of sustainable management principles. Second, non-members of relevant international fisheries organizations are to respect their regulations when harvesting in an area managed by any body. The general thrust will be to discourage, if not to prohibit, non-members of an international fisheries organization from fishing in waters under an organization's mandate. Third, high-seas fishing states are to adopt laws effectively to regulate and control the activities of its fishers engaged in straddling-stock harvesting. Such laws are to be "compatible" with measures applied by the adjacent coastal state to its share of the straddling stocks within its 200-nm zone. Fourth, high-seas fishing states are to ensure appropriate enforcement of the relevant regulations applicable to its vessels. Thus, flag-state enforcement on the high seas rather than coastal state enforcement remains the primary principle, although the negotiating text indicates that in limited situations flag-state enforcement *may* be usurped by others. Fifth, efficient international dispute settlement must exist to ensure compliance with any treaty.

Despite the continuing work of the UN Conference on Straddling Stocks, in May 1994 Canada responded to increasing evidence of fishing by unregulated non-NAFO vessels in adjacent waters by enacting legislation applying NAFO regulations, particularly the various harvesting moratoriums, to non-NAFO fishers. Canadian Fisheries Minister Brian Tobin stated that the new law was *not* designed to extend Canada's 200-nm fishing jurisdiction and that Canada remained committed to developing international rules to deal with overfishing beyond 200 nm.[8] The minister justified the new law on the grounds that urgent action was necessary to prevent destruction of endangered species.

The wording of the legislation leaves Canada with an extremely wide discretion regarding the measures to be applied and enforced against foreign fishing vessels on the high seas. The limitations on Canadian intent and action are found in the regulatory detail. The new law permits the application of Canadian regulations, which according to the regulatory detail are to be NAFO measures, to fishing activities by foreign vessels, which according to the regulatory detail are only non-NAFO vessels, on the high seas adjacent to Canadian east-coast waters.

The Canadian law is *not* consistent with current international law and practice respecting fishing on the high seas. International law does not permit one country to enforce the regulations of an international fisheries organization against a foreign vessel from a country not a member of that group. Nor does it permit a state to enforce its own laws against foreign fishers on the high seas. For foreign fishing activity on the high seas, the principle is freedom from direct interference by other states. Moreover, the broad wording of the statutory changes, which give Canada the legislative capacity to interfere almost at will with high-seas fishing by foreign vessels, is clearly problematic. Canada recognized the weakness of its legal position when it declared that it would not allow the International Court of Justice to hear any legal challenge to its new law.[9]

The Canadian law is unquestionably an aggressive measure as it challenges the international legal and political orthodoxy of 200 nm as the limit on coastal state fisheries regulation and enforcement. Not surprisingly, therefore, the Canadian law has generated negative reaction abroad. The EU, for example, has reacted strongly, arguing that it is an unacceptable violation of the international law of the sea. The official reaction of the US, while kept private, is negative. In an effort to deflect such criticism, Canada has argued that the measure is limited only to non-NAFO vessels, is temporary and is a response to an urgent environmental disaster. The May 1994 enactment will have a direct influence on negotiations at the UN Conference. The principle that non-NAFO members cannot disregard NAFO regulations is a key part of what is expected to emerge as the *future* international law and practice respecting straddling stocks. Therefore, the detailed application of the Canadian measures may eventually prove to be consistent with the final text agreed at the UN Conference. The October 1994 Chair's Draft Agreement, however, does *not* contain a provision which explicitly supports Canada's enactment. It is worth noting that the Canadian measure had the desired operational effect, as non-NAFO vessels ceased harvesting straddling stocks in the waters adjacent to Canada.[10]

Canada has long preached that the straddling-stock problem has to be resolved, that unilateral action was an option, and that domestic pressures were forcing its hand. Canada's aggressive law indicated the depth of its commitment to altering the *status quo*. The measure can therefore be seen as providing Canada with important negotiating leverage to obtain the desired results at the UN Conference. The law also conveys to the UN Conference the threat that without an acceptable international agreement Canada is willing to act unilaterally. Other countries, such as Peru, Chile, New Zealand, Argentina, Iceland and Norway, have also threatened to take aggressive actions respecting foreign fishing adjacent to their 200-nm zones. This international support confers significant

credibility to Canada. The specifics of the Canadian measure, particularly given its limited scope and its congruence in dealing with non-members of international fisheries organizations, may lead negotiators to adopt wording in a final treaty that supports what Canada has implemented. Regardless, Canada has gambled that a well-timed and limited aggressive action can spur the UN Conference to complete a treaty that meets its interests.

The Arrest of the US Scallop Vessels

In late July 1994, Canada arrested two American trawlers engaged in harvesting scallops from the seabed adjacent to Canada's 200-nm zone. Although Canada and the US constantly arrest vessels for allegedly fishing in each other's waters, the scallop vessel arrests do not fit this routine pattern.

While Canada has long exercised jurisdiction over the non-living resources of the continental shelf beyond 200 nm, only in the early 1990s did it alter its fisheries law to extend jurisdiction over the sedentary species — those that are immobile on the seabed — which are on the continental shelf beyond 200 nm. Both the 1982 Law of the Sea Convention and the 1958 Geneva Convention on the Continental Shelf recognize the right of a state to enact and enforce laws dealing with the harvesting of sedentary species on the continental shelf beyond the 200-nm limit. While the legality of Canada's law is therefore unquestioned, there is uncertainty over whether the specific species (Icelandic scallops) allegedly being harvested by the arrested US vessels were indeed sedentary. Canada took the view that Icelandic scallops are a sedentary species while the US disagreed.

The aggressiveness of the Canadian action is in the willingness to act even in the face of significant legal and biological uncertainty. Moreover, confronting reasonably-held (if conflicting) American opinion must be viewed as aggressive. Certainly the Canadian action was a display of bravado. While it had no ulterior motive respecting international negotiations, the arrests were an important part of the new image being fostered by Canada of being willing to take action against foreign fishers outside the 200-nm limit. Canada can assert that its aggressive scallop-vessel arrests were successful since it was reported in November that the US formally recognized Canada's claim to exercise jurisdiction over Icelandic scallops located beyond the 200-nm limit."

Conclusion

Canada's 1994 aggressive international fisheries actions were grounded in impatience with international diplomacy and stemmed from the government's desire to be seen to be taking action. Both grow from the recent change of government, with new ministers keen to implement electoral promises and wary of traditional advice emphasizing consensual diplomacy. Ultimately, however, diplomacy is Canada's most effective way to protect and obtain its international objectives. The 1994 measures have put increased pressure on

diplomacy to justify the Canadian actions. The success of the aggressive actions can only be judged by their impact on the climate for international fisheries regime-building.

Regarding Pacific salmon, Canada's aggressive transit licence requirement was a limited measure with a circumscribed purpose. Despite the international legal right to regulate US vessels using the "inside passage," the Canadian action was loudly denounced by the US. The cacophony of condemnation made Canada's action more risky than the more legally-questionable east-coast measures. Canada limited the application of the transit measure by quickly withdrawing it once it attracted official US attention. Canada's calculated aggression must be judged as successful in improving the climate for a bilateral salmon agreement. Yet this stance may be less productive if US negotiators use it to justify continued intransigence.

The effect of Canada's aggressive east-coast legislation on the UN Conference on Straddling and Highly Migratory Stocks remains unclear. Canada's intent may or may not have the desired effect upon the negotiations. The features seen thus far in the conference documents favour a view that Canada's action has improved the climate for reaching an acceptable multilateral treaty. But the bluntly negative response of the EU and the presumed negative response by the US are troubling. The October 1994 Draft Agreement does not contain a provision explicitly supporting Canada's action. Eventually, Canada's Fisheries Minister may find himself in the unenviable position of having to backtrack on his aggressive action and repeal the popular legislation.

NOTES

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1. A detailed account of the legal aspects of recent events regarding the 1985 Pacific Salmon Treaty can be found in T.L. McDorman, "The West Coast Salmon Dispute: A Canadian View of the Breakdown of the 1985 Treaty and the Transit Licence Measure" *Loyola of Los Angeles International and Comparative Law Journal,* XVII (1995), forthcoming.

2. Article 66(1) ofthe 1982 United Nations Law of the Sea Convention. For a detailed discussion of the interpretation of this provision, see William T. Burke, "Anadromous Species and the New International Law of the Sea," *Ocean Development and International Law Journal,* XXII (1991), 102.

3. "Memorandum of Understanding," attached to the 1985 Pacific Salmon Treaty, section A — Implementation of Article HI, paragraph 1(b), second paragraph.

4. On the US policy of asserting navigational rights in the face of conflicting claims, see United States, Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, "Limits In The Seas" (No. 112), *United States Responses to Excessive National Maritime Claims* (Washington, 1992), 85.

5. *Victoria Times-Colonist,* 29 July 1994.

6. *Vancouver Sun,* 4 July 1994.

7. The following assessment is based upon the "Draft Agreement for the Implementation of the Provision of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks," prepared by the Chairman of the Conference, UN Doc. A/Conf. 164/22, 22 October 1994.

8. Canada, Parliament, House of Commons, *Debates,* 11 May 1994.

9. Canada, Department of Foreign Affairs and International Trade, press release, 10 May 1994.

10. Canada, Department of Fisheries and Oceans, press release, 31 May 1994.

11. *Victoria Times-Colonist,* 25 November 1994.