Washington Law Review

Volume 14 | Number 2

4-1-1939

Control of Fisheries Beyond Three Miles

Edward W. Allen

WASHINGTON LAW REVIEW
and
STATE BAR JOURNAL

VOLUME XIV. APRIL, 1939 NUMBER 2

CONTROL OF FISHERIES BEYOND THREE MILES

EDWARD W. ALLEN*

Our Pacific Northwest has attained worldwide recognition from the fact that here a successful system was initiated by two independent nations for the conservation of a deep sea fishery. Now it appears probable that the threatened disruption of this system may in turn give birth to new conceptions of international law.

Strictly legal phases of this situation are so interwoven with the economic and the diplomatic that a factual as well as a legal background is essential to their complete appreciation.

In the 17th century the English and Dutch engaged in a series of wars largely due to contentions over their respective rights in the North Sea. There was also verbal warfare led by such men as Hugo Grotius and John Selden. At that time the English advocated *mare clausum* and the Dutch *mare liberum.* Out of these controversies gradually evolved the theory that each maritime nation was entitled to a strip of water along its shores (sometimes referred to as marginal, sometimes as territorial waters) as wide as it could defend from the shore, which in the case of England and some other countries became arbitrarily fixed as three miles. Fishing rivalry had been directly or indirectly involved in these English-Dutch wars. However, deep sea fisheries were believed to be inexhaustible, so that in the evolution of the rule as to territorial waters there was no serious thought of its effect upon the permanency or destruction of such fisheries.

There has never been a universal recognition of a fixed width for territorial waters, nor has there been any general understanding that a nation has no special rights beyond the limit of its territorial waters. However, the great naval nations during the 19th century, and extending into the 20th, conceived it to be to their advantage to hold down the width of territorial waters as narrowly as possible. These nations, therefore, have not only advocated that the limit of such waters is three miles, but have on

*Of the Seattle Bar; chairman of the International Fisheries Commission; United States member of the International Pacific Salmon Fisheries Commission; author: *North Pacific* (1936).

occasion taken drastic steps to impose this limit upon non-conforming nations. They have never been completely successful. On the contrary, it is probable that at least half of the nations do not approve such a limitation. Nevertheless, text writers of the great naval nations treat this rule as if it were universally recognized and absolutely immutable. In the application of this principle such text writers have indicated that a nation has no right whatever to regulate any fishery (except as to its own people and vessels) beyond the limits of its territorial waters regardless of the effect that unregulated fishing may have upon the fishery within the territorial limits.

Different fisheries have had greatly variant international backgrounds. Many nations, some bordering, some nearby, have engaged in the North Sea fisheries from the beginning of their commercial development. Other important North Atlantic fisheries were developed upon an international scale prior to the settlement of the adjacent shore as in the case of banks off Newfoundland, or where the shore population was sparse and incapable of successfully defending the banks against outsiders, as in the case of Iceland. On our North Pacific Coast, on the other hand, the commercial fisheries followed instead of preceded settlement. They originated with the two nations which owned the entire shore line. They have been wholly developed, over-fished, conserved and restored out to the edge of the continental shelf by these nations and them alone, and have been exclusively engaged in by the people and vessels of these two nations without interference until the recent Japanese invasion. As to Bristol Bay in particular the enjoyment by the United States has been so long and exclusive as well to entitle this country to assert title to the bay as an historic bay.

The problem is one of vital importance to the people of Canada and the United States. The fishing industry exceeds in importance all other industries of Alaska combined, and is one of the major industries of British Columbia and the three Pacific Coast states. More than 75,000 men are directly employed, probably as many again indirectly in shipyards, can-making plants and other allied industries. The annual value of the industry's products approximates $100,000,000. But of even greater importance is the question of whether by rational conservation methods an enormous food resource shall be, as it can be, utilized in perpetuity, or whether it shall be destroyed for the very brief and temporary benefit of certain marine exploiters.

Having this background in mind, let us turn to the North Pacific halibut fishery. This fishery is pursued from Northern California to Bering Sea, both in the inside salt water channels and out as

far as the edge of the continental shelf which in different parts of the coast varies from a few miles to as much as one hundred miles. In other words, this fishery exists both inside and outside of the recognized territorial waters of both Canada and the United States.

Contrary to the ancient belief that all deep sea fisheries were inexhaustible, it has been demonstrated that over-fishing can deplete halibut banks commercially, and that such banks are of limited extent and number. The fishermen of this Northwest coast engaged in over-fishing so aggressively that they began finding their efforts unprofitable. They appealed for help to their respective governments which in 1924 responded by creating the International Fisheries Commission consisting of two commissioners from each country. This body was directed to investigate the situation. An investigation was conducted upon strictly scientific and factual lines as a result of which recommendations were made for the joint regulation of the fishery. By a new treaty of 1930 the same Commission was granted the power of regulation. This grant was unique in international history in that it extended to the regulation of the fishermen and vessels of both countries both within and without their territorial waters. The Commission annually adopts regulations which, when approved by the President of the United States and the Governor General of Canada, have the binding effect of law on the citizens and vessels of both countries in their respective inside waters and without limit at sea. It is the first instance of any independent nations setting up a joint tribunal for the conservation of a deep sea fishery and granting it such powers.

Such remarkable success has characterized the Commission's conservation program that the quantity of fish upon these North Pacific banks has practically doubled and they now afford the finest halibut fishing anywhere in the world. This in turn has aroused the avarice of fishing interests of other countries, which interests have threatened to send their own halibut vessels to the Northwest coast, there to operate more than three miles off-shore in defiance of the regulations of the Commission, destroy the results of the Commission's conservation policy, and deplete these banks to their former unprofitable condition.

An analogous situation occurs with reference to salmon of the North Pacific Coast. These fish spawn in streams and lakes, go to sea, and return to the streams or lakes of their birth in from two to five years, there to spawn and die. The salmon canning industry in Canada and the United States is normally conducted from shore plants, and the fishing is generally done within the three mile limit. In both countries over-fishing has threatened to bring about com-

mercial depletion, but in each country rigid governmental restrictions have been imposed, and the fishery as a whole has been saved. It has been demonstrated, however, that in the Bristol Bay region of Alaska, a region famous for its high quality red salmon, these fish can be successfully caught ten, fifteen, and twenty-five miles from shore. Floating canneries from Japan have actually invaded the region. If they can operate successfully in Bristol Bay, there is no reason to believe that they cannot do so in other places down the coast, including the entrance to the Strait of Juan de Fuca. Here they would come into direct conflict with the conservation efforts of a commission established by the United States and Canada in 1937 (the International Pacific Salmon Fisheries Commission) for the express purpose of restoring the once valuable sockeye salmon industry of Puget Sound and the Gulf of Georgia.

Members of both of these international commissions, the national departments dealing with fisheries of Canada and the United States, and the fishing interests involved, including not only the operators but the various fishermen's and cannery workers' unions, have all become greatly exercised over these threats. The State Departments of the United States and Canada have been responsive, but find themselves faced with the contention that their governments are so irretrievably bound to the three mile doctrine that they are helpless to ward off these foreign threats.

In this situation, some of those interested had the temerity to question whether these two great nations were as impotent as had been suggested. Research disclosed that there was probably a great misconception of the origin, recognition, application, and inflexibility of the three mile doctrine. With this in mind, one national organization was induced to make an appropriation for a thorough briefing of the international law applicable to this situation, and to engage Dr. Joseph Walter Bingham of the Law School of Stanford University, for that purpose. Dr. Bingham in turn engaged the assistance of Dr. Stefan Riesenfeld. Their report is being submitted in two parts. One part—understood to be an uncolored summary of the technical disclosures of the research by Dr. Riesenfeld—remains to be published. The other part—Dr. Bingham's commentary in the nature of a brief founded on the research—was produced by the Stanford University Press and has arrested the attention of those interested in the field of international law.

Dr. Bingham points out that international law is in a constant state of flux, and that, generally speaking, modern international law of the sea has been the result of British diplomatic and juristic ingenuity, backed by British power and prestige, and has changed from time to time in accord with British self-interest. It was not

until the early part of the last century that England completely reversed its previous position, and in response to commercial, naval, and fishery interests developed the present doctrine confining foreign territorial jurisdiction over marginal seas to narrowest width.

The United States, guided largely by similar interests in this country, and particularly the New Englanders' desires to fish off the great banks to the north, readily followed England's lead. British diplomacy, however, has never hesitated to back away from the universal application of the doctrine whenever it was considered politic to do so, whereas in this country there has been a tendency, particularly by text writers, to be dogmatic in asserting the doctrine regardless of our own interests or its rationale. Among the nations at large there has been no uniformity in the matter.

The Bering Sea Arbitration is frequently pointed to as if it were a conclusive determination of the universal application of the three mile rule, but Dr. Bingham points out that it has no such significance, that the two contending parties both apparently favored the British doctrine and that there were other features influencing the decision such as the fact that Congress had declined to assert extended jurisdiction.

In fact:

> "To an unprejudiced student of history and of present world affairs, it is abundantly apparent (a) that there never has been and is not today any general agreement on the extent of territorial waters, (b) that no state ever has applied consistently a uniform limit for all purposes to the zone of its coastal sea jurisdiction, (c) that it always has been the opinion of realistic experts that if definite limits are set to marginal sea jurisdiction those limits should be different for different purposes, and (d) that there is no common or nearly common agreement on the matter of legality of control over coastal fisheries beyond a three mile zone of marginal sea or other conceded territorial area."

On November 22, 1937, the United States Department of State sent a note to Japan which Dr. Bingham summarizes:

> "The salmon are spawned in Alaskan streams and at maturity return to the streams of their nativity to spawn and die. They are caught on the way back to these streams. American fishermen have monopolized these fisheries (as to salmon) for over half a century. When there arose a danger of exhaustion of the supply through over-fishing, conservation measures were applied and they still are being applied under government supervision. These salmon fisheries are of very great economic value to the United States. To the well-being of Alaska they are essential. Foreign competitive fishing would soon destroy the fisheries."

This North Pacific situation involves doctrines of prior occupation, of prescription, and of usage, as foundations of right, all of which are common both to common law and civil law systems. They correspond to very elementary motives and concepts of justice in social life, and have been applied in international law.

Much stress is laid upon the desirability of securing the concurrence of England in any sound policy for the conservation of deep sea fisheries. Improved fishery technique and equipment have increased the range of fishing fleets until they can now rove the world. In the past England has been the greatest beneficiary of this development, but as with still increasing efficiency the fleets of other nations as well as her own become more destructive in their complete disregard of conservation principles England will be one of the chief sufferers. (It should be noted that the British are keenly aware of this situation and have been the leaders in recent movements for conservation in the North Atlantic.) England should be as much interested in the promotion of sound fishery practices in the Pacific as in the Atlantic. Should the practice of unlimited exploitation prevail throughout this largest of oceans, Japan, with its cheap labor and aggressive methods, will profit largely at the expense of important parts of the British Empire.

Moreover, recognition of particular instances in which a nation's fishery interests extend beyond the three mile limit does not necessarily involve the abandonment of fishery rights of non-adjacent nations in off-shore fisheries in which they have actually been substantially engaged. And there may be situations where the preservation of a fishery can only be worked out by all the nations involved.

International law always has been a product of the interplay of national interests and will continue to be subject to change. It is therefore dangerous to acquire the "comfortable conviction that a system of law has reached maturity in familiar and incontestable formulas of practice and should be frozen by codification against disturbing corruptions and dissipations."

Finally Dr. Bingham concludes that the United States should review the situation and make such adjustment of its position as will best meet the practical demands of our people.

> "There is no difficulty about this. No violation of international law or ethics would be involved in the direct and frank abandonment by our government of the rigid application of the three mile rule to coastal fishery problems. The primary question is: What do American interests demand? Our North Atlantic fishery interests in waters off British Colonial coasts can be protected sufficiently by arguments drawn from the historical facts of

> use of those fisheries for two hundred years past and by our treaty rights. Such claims on other foreign coasts as deserve official support can be given it on the peculiar facts of the case, and American claims which are no better than the claims of foreign invaders of the salmon fisheries of Bristol Bay do not deserve insistent assertion against opposition of the coastal state."

Dr. Bingham's treatise has been thus extensively reviewed, not because it necessarily furnishes the solution of the North Pacific fishery problem, but because it does clear the way for a consideration of that problem on its merits by shattering the concept that the three mile rule is sacrosanct. There is no reason to believe this particular doctrine to be more sacred than any other. It is inconsistent with its own origin, often inequitable in its application, far from being universally recognized, and among its own advocates there is no unanimity as to its scope.

Nevertheless in the practical solution of the specific situation which now confronts Canada and the United States, it is unnecessary and unwise that they should make their cause dependent upon the universal abrogation of the three mile rule. It is sufficient that the doctrine be held within rational bounds and that the bogie of its immutability be permitted no longer to frighten these countries from making an appraisal of their mutual interests, determining how those interests may best be protected, and then agreeing upon such course as the facts require.

The writer submits the following summary and procedure:

1. Canada and the United States have already dealt with two fishery problems of the region in an advanced, unique, cooperative, and effective manner.

2. They should survey the whole North Pacific fishery situation as a joint problem which by reason of its different historical and factual background is entitled to different treatment from that of the Atlantic.

3. As between themselves they could agree that the *status quo* should be definitely continued as to the rights and privileges of their respective fishermen and fishery vessels unless and until changed by specific subsequent agreement.

4. An accord might be worked out as to the nature and extent of extended jurisdiction necessary for the conservation of all the fishery resources of the continental shelf in complete disregard of the question of the proper width of strictly territorial waters, treating the fishery situation of this coast in its proper light of being wholly distinctive.

5. These two peacefully inclined but powerful American nations

should then let the world know that their special interest in these fisheries entitles them to assert and to maintain the conservation practices and control upon which they agree and that they intend to do so.