

## Programmed Diplomacy: The Settlement of the North Atlantic Fisheries Question, 1907-12

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## Programmed Diplomacy: The Settlement of the North Atlantic Fisheries Question, 1907-12

When The Hague Tribunal brought down its Award on 7 September 1910, almost all contemporary observers agreed that the age-old controversy had been laid to rest. Only the eulogies differed, varying with the nationality of the authors. Allen B. Aylesworth, Agent for the combined team of Canada, Great Britain and Newfoundland immediately cabled his Prime Minister, Sir Wilfrid Laurier, that they had won all the points of any consequence and that only one small feature of the Award was unsatisfactory. Two days later, the American Agent, Chandler P. Anderson, sent much the same cheerful sort of message to President William Howard Taft: the Americans had gained a substantial victory and only one point at issue, itself of slight importance, had gone against them.<sup>1</sup> The confusion of those early days has been perpetuated. The "truth" of the matter still depends largely upon a man's nationality. Most Canadian historians who have lately glanced at the Award regard it as one which "favoured Canada", "broadly upheld the Canadian case" or "generally upheld the case of Canada and Newfoundland."<sup>2</sup> When American historians scrutinize the Award — and not too many do — they come to very different conclusions. S. F. Bemis, after patriotically approaching the subject, reached a remarkable half-truth: the "award . . . put into effect the provisions of the unratified Bayard-Chamberlain treaty of 1888 for the definition of territorial bays . . ."<sup>3</sup> Julius W. Pratt, following the same nationalist course, concluded that the Tribunal "decided all the principal questions in favor of the United States."<sup>4</sup> Thomas A. Bailey, whose historical understanding was more precise, likened the decision to a "compromise" in which Gloucestermen were protected against unreasonable local regulations while Newfoundlanders were "generally sustained in their claims to local jurisdiction."<sup>5</sup>

- 1 Laurier Papers, vol. 642, Public Archives of Canada [hereafter PAC] and Taft Papers, vol. 339, Manuscript Division, Library of Congress [hereafter MD/LC].
- 2 J. M. S. Careless, *Canada: A Story of Challenge* (2nd. ed., Toronto, 1963), p. 321; E. McInnis, *Canada: A Political and Social History* (Rev. ed., New York, 1960), p. 396; and Robert Craig Brown and Ramsay Cook, *Canada 1896 - 1921: A Nation Transformed* (Toronto, 1974), p. 174.
- 3 *A Diplomatic History of the United States* (Rev. ed., New York, 1942), p. 429. Bemis's history of the fisheries is filled with sound, fury and errors.
- 4 *A History of the United States Foreign Policy* (New York, 1955), p. 458.
- 5 *A Diplomatic History of the American People* (8th ed., New York, 1969), p. 537.

In fact, no historian, whether Canadian or American, has fully understood the nature and meaning of the Award. Despite appearances, it was not a compromise — unless one were unduly to stretch the meaning of that word and simplistically conclude that the British won in principle while the Americans won in practice. The Award was the product of programmed diplomacy by which the British appeared to win many but by no means all the principles contested, while the Americans were assured of the right to practice their fishing liberties. That right, however, rested upon a cryptically written Award, assurances from the arbitrators, and secret diplomacy; and not until 1912, when a second treaty had been struck, was the right confirmed and the decision wrought at The Hague fully implemented.

When the fisheries question rudely emerged from seventeen years of suspension in 1905, the two principal antagonists were the City of Gloucester, Massachusetts and the Colony of Newfoundland. At that time, Gloucester dominated America's interest in the North Atlantic fisheries. Though its population (in 1898) could not have exceeded 26,000, its fishing fleet of more than 350 vessels brought to port a catch worth more than \$2,500,000, nearly 60% of the dollar-value wrested from the ocean by the Commonwealth of Massachusetts and almost all of the State of Maine's.<sup>6</sup> More significantly, in the dangerous deep-sea fisheries conducted in the high Atlantic, Gloucester's dominance was well nigh absolute. Very few schooners from other New England ports visited these waters and as a result Gloucester enjoyed a well protected American monopoly of the sale of salt cod and winter herring. Of the external forces giving shape to Gloucester's fishing economy, none was stronger than the *Modus Vivendi* of 1888. According to its provisions, which had originally been designed as a temporary settlement but had subsequently been transformed into Canadian and Newfoundland statutes, an American master could acquire commercial privileges in, for example, the Bay of Bulls by buying a Newfoundland license. For a slight fee, he could then purchase bait-fish and other supplies as well as hire whatever men were required to work his dories and tend his trawl-lines. Without the *Modus*, the same master would have to fall back upon the Anglo-American Convention of 1818, which had given Americans the "liberty" to fish territorial waters along the Labrador shore, the Magdalen Islands, and the southwestern and western coasts of Newfoundland. Within these defined areas, he could catch his own bait-fish; and, if he wished, he could land and dry his catch on the unoccupied shore-lines of southwestern Newfoundland and Labrador, although this latter "liberty", since Gloucestermen salted their cod, was of no real value. But he

6 See letter from the Assistant Secretary of the Treasury to Chandler P. Anderson, 2 May 1911, Department of State Records, Decimal Files, 1910-29, File No. 711,438, National Archives [hereafter NA]. See also the *Report of the United States Commissioner of Fish and Fisheries for the Fiscal Year Ending June 30, 1900* (Washington, 1901), pp. 345 *et seq.*

was excluded from all other inshore waters, except for humanitarian missions in search of shelter, wood, water or repairs. Given this choice, it was manifestly more sensible for an American to take advantage of the *Modus* rather than to use the Convention. Customarily, therefore, Gloucester's deep-sea fishing schooners left home with navigating crews of six to eight men and sailed directly to the Maritimes or to Newfoundland, where they picked up licenses, bought bait-fish, hired fishing crews, and spent the season working the cod fisheries on the Grand Banks.

In this scheme of things, Newfoundland played a critical role. Canadian ports such as Sydney continued to serve as depots for fishing crews but rarely as sources of bait-fish, and probably not more than one American vessel stopped off at Magdalens for bait in any given year. Occasionally Gloucestermen would slip into the French island-ports of St. Pierre and Miquelon for supplies but never in large numbers. The majority of them secured bait-fish from agents in the outports of southern Newfoundland and bought their winter herring in the Bay of Islands on the colony's west coast. By 1905, Gloucester depended upon both Canada and Newfoundland for fishing crews and general supplies but exclusively upon Newfoundland for bait-fish and winter herring. Of the commercial advantages offered by the *Modus*, none was more highly esteemed by Gloucestermen than the winter herring fishery. From the moment the fish struck into the arms of the bay in October until the ice shielded them in January, fishing vessels from both Gloucester and Lunenburg dropped anchor in the Bay of Islands, not far from today's Corner Brook. Between fifty and seventy American schooners came annually and perhaps as many Canadians, though their numbers frequently ran less than that and many were often chartered by the Americans.<sup>7</sup> They all came as traders, not fishermen; the fishing itself was left to local Newfoundlanders who set out gill-nets and retrieved their catch in small craft. Until cold weather set in, the herring were either salted down or pickled; but once winter had arrived, the much cheaper process of freezing the fish upon scaffolding erected on the shore was employed. Whatever their preparation, these herring were intended largely for human consumption and were sold at a minimum statutory price per barrel.

The Bay of Islands fishery benefited both parties. The Newfoundlanders caught and sold fish more cheaply than their customers could conceivably have done by themselves. If an American master ever considered using gill-nets, he would not only have to bring the gear with him but also an estimated

<sup>7</sup> See various Reports of the Fisheries Protection Service, attached as appendices to Newfoundland, *Journals of the House of Assembly* [hereafter *JHA*].

fifty men to work it.<sup>8</sup> That was obviously impossible, if only for the reason that schooners could not carry more than thirty crewmen. Perhaps the same skipper might defy colonial fishing regulations, bring purse-seining equipment (costing approximately \$2,500), hire the twenty men needed to handle it, and net his own herring. This option was also flawed. Even if Newfoundland's law against purse seines could be shown to be an unreasonable infringement of the "liberty" given Americans by the Convention to fish within the Bay of Islands, that same Convention forbade them from using the shoreline for freezing fish. Under these circumstances, Gloucestermen happily accepted the facts of economic life. In 1904, sixty-seven American schooners (almost entirely from Gloucester) bought 85% of the total catch in the Bay of Islands.<sup>9</sup> The rest was acquired by eleven Canadian vessels and none whatever by any Newfoundlanders. Given the bountiful nature of this enterprise, Canadians and Americans left the fishery in the hands of the residents — and the "locals" thrived.

Within the United States, the Gloucestermen had a powerful, intricately inter-related organization to watch over their interests. Statistics *per se* argued against both unity and strength; there were scarcely more than two thousand fishermen in 1910, of whom not more than 15% were American-born and well over 60% from Canada and Newfoundland.<sup>10</sup> Yet theirs was a coherence fashioned by profit-sharing. All the schooners were worked "on shares" and the captains belonged to a tightly-knit, guild-like body called the Master Mariners' Association. On the same street where the Masters had their lodge were located the offices of the Gloucester *Daily Times* and the Gloucester Board of Trade. Membership among all these organizations was closely interwoven. The fifty or sixty merchants who owned the schooners and sold the fish were invariably members of the Board and often "Associates" within the Mariners' fraternity. One of them, William D. Jordan, advertised himself and his company within the Gloucester *Directory* as "Wholesale Salt Fish Dealers"; unadvertised, though revealed in the same *Directory*, were the facts that Jordan was also Collector of Customs and a principal

8 Information regarding projected costs (in men and equipment) was drawn from the following sources: A. B. Alexander of the Fisheries Bureau to the Secretary of State, 1 February 1910; Arthur L. Millett of the Gloucester Board of Trade to the Secretary of State, 31 January 1910; Numerical Files, 1910-29, File No. 17931, NA; and A. P. Gardner to Chandler P. Anderson, 28 June 1906, Chandler P. Anderson Papers, MD/LC.

9 Report of the Fisheries Protection Service for the Year 1905, Newfoundland, *JHA*, 1905.

10 See letter from the Assistant Secretary of the Treasury to Anderson, 2 May 1911, *op. cit.*

officer in the Gloucester National Bank.<sup>11</sup> Behind men like Jordan stood (after 1902) their congressman, A. P. "Gussie" Gardner; behind him stood his father-in-law, United States Senator Henry Cabot Lodge, close friend of President Roosevelt and the strongest member of the Senate Foreign Relations Committee.

All of Gloucester's organizational strength was called into action when Sir Robert Bond's government of Newfoundland announced a bold double-barreled policy for the fisheries in the spring of 1905. Bond introduced into the legislature a Foreign Fishing Vessels Act (FFVA) which sailed through his parliament and was proclaimed on 15 June.<sup>12</sup> It was a retaliatory piece of legislation intended to force the United States into ratifying the reciprocal Hay-Bond Treaty, which Bond had negotiated in 1902 but now lay entombed in the Senate's Foreign Relations Committee. Americans were stripped of all commercial privileges extended by the *Modus*. The law authorized colonial officials to board, search and bring into port any vessel found within territorial waters and suspected of buying bait-fish, engaging local crewmen, purchasing supplies or entering the colony's domain for any purposes other than those allowed under the Convention. The presence aboard such a vessel of bait-fish, Newfoundland servants, and the like would be "prima facie" evidence of their having been illegally acquired. Guilty parties were subject to fines; and their ships, together with stores and rigging, to forfeiture. Although the Act specified that none of its provisions affected any rights granted Americans by the Convention, Bond also enunciated a new interpretation (his own) of that agreement which would have so restricted those rights as to make them inoperable.<sup>13</sup> During the debates in the assembly in the spring of 1905, the premier drew attention to an apparent discrepancy in the wording of the Convention. On the one hand, it authorized Americans to fish in the "Bays, Harbours and Creeks" along certain stretches of Labrador; but, on the other, it stated that they could fish only on the "Coast" of Newfoundland. Such a linguistic difference demonstrated to Bond, despite a broad belief to the contrary which had prevailed for almost ninety years, that Americans could not fish within the territorial waters of his

11 Gloucester *Directory*, 1911, p. 618, Cape Ann Historical Association, Gloucester, Massachusetts. See also directories for the years 1903, 1905 and 1907, as well as various publications by the Master Mariners' Association, *ibid.* Arthur L. Millett, for example, worked for the *Daily Times*, the Gloucester Board of Trade, the Master Mariner's Association (writing for its annual publications), and went to The Hague in 1910 as an "attaché" of the State Department.

12 Newfoundland, *JHA*, 1905, pp. 6-9. See also the Supplement to the *American Journal of International Law*, I (1907), pp. 22-24.

13 Colonial Office to Foreign Office, 1 August 1905, FO 5/2622, Public Record Office [hereafter PRO].

colony — only beyond; and according to Bond's view of such things, three miles beyond the headlands.

The consequences of Bond's policies were soon revealed. Gloucestermen, whose habits had been shaped by seventeen years under the *Modus*, found it difficult to adjust to new conditions. Many were unsure of their rights under the Convention, and amidst their confusion they were confronted by unfriendly Newfoundland authorities who enforced the Convention literally and applied colonial ordinances with rigor. During the season of 1905, at least two American vessels seeking refuge for repairs along the non-treaty coast were harrassed, while eighteen were prosecuted for failing to report to customs.<sup>14</sup> Nonetheless, the withdrawal of commercial privileges proved more annoying than detrimental. Gloucester's "bankers" found it possible to get bait-fish elsewhere, buying it from Canadians on Cape Breton or from the French at St. Pierre (both of whom probably acquired the greater part of their stock from Newfoundland) or by fishing for themselves within the disputed headlands on the southern coast.<sup>15</sup> The Americans grudgingly accepted Newfoundland's aggressive stand on the non-treaty coast, knowing that the colony had a right to abrogate the *Modus* and that they could still carry on their deep-sea fisheries. It was quite a different matter on the West Coast, where the threatened application of local fishing regulations and the implementation of Bond's doctrine could destroy Gloucester's interests in the winter herring fishery.

From the beginning, the "eye" of the diplomatic storm was centered in the Bay of Islands — a fact that was recognized at once by both the United States and Great Britain. Before assuming office in September, 1905, America's incoming Secretary of State, Elihu Root, travelled leisurely along the West Coast, mingling the sport of salmon fishing with the business of getting to understand the commercial fisheries.<sup>16</sup> Before his departure, he took the precaution of ordering a fishery commission vessel, the "Grampus", to visit the area and remain until the season ended. For public knowledge, the "Grampus" was sent to observe "the movements of mackerel" and to conduct other scientific labors.<sup>17</sup> The real reason was to place Professor Alvin B. Alexander, Chief of the Division of Fisheries, in a position to advise Gloucester-

14 U.S. Consul at St. Pierre to State Department, 16 and 20 September 1905, Consular Papers, Records of the State Department, NA.

15 Lodge to Roosevelt, 12 May 1905, contained in H. C. Lodge, ed., *Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge, 1884-1918* (New York, 1925), II, pp. 119-120.

16 Phillip C. Jessup, *Elihu Root* (New York, 1938), II, p. 84. John Hay, Root's predecessor, died on 1 July 1905.

17 Note from the Acting Secretary of State to Sir Mortimer Durand, enclosed in Durand to Lansdowne, 27 July 1905, FO 5/2622, PRO. Durand was the British Ambassador to the United States; the Marquess of Lansdowne was Britain's Foreign Secretary.

termen about their Convention rights and to acquaint the State Department with local developments.

To prevent collisions between Newfoundlanders and Gloucestermen, Britain sent a small warship to the Bay of Islands. Throughout the season, London worried more about what Bond might do than about the Americans. Repeatedly the premier was told that there was "no foundation for [his] view . . . that [the] terms of the Convention of 1818 prohibit United States citizens from fishing in bays, harbours, and creeks between Cape Ray and Rameau Islands and between Cape Ray and Quipon Islands and [that] His Majesty's Government cannot countenance any action based on that view."<sup>18</sup> He was also informed that, in the opinion of Britain's law officers, Americans could fish in these waters while Newfoundland could restrict the fishery according to the FFVA; but it was made very clear that HMG would "strongly deprecate" any attempts to enforce the act. Bond was told not to apprehend any Americans and warned that Britain would not be "responsible for any consequences in the way of retaliation by the United States . . . ."<sup>19</sup>

Nonetheless, beginning with tales that the "S.S. Fionna", a Newfoundland cruiser managed by Joseph O'Reilly of the Fisheries Protection Service, was keeping Americans from fishing and ending with stories about net-cutting by Newfoundlanders, wild rumors from the Bay kept the Colonial Office and the State Department in a dither throughout most of the season. Although none of the reports was true, the first false rumor from the Bay of Islands triggered the diplomatic exchange between Washington and London which led ultimately to arbitration at The Hague. Believing the rumor about the "Fionna", Root immediately protested (19 October 1905) to the British Ambassador and urged Britain to repeal the entire FFVA.<sup>20</sup> After a long delay occasioned by Britain's change of government, Root got an answer from London. It came from the new Foreign Office Secretary, Sir Edward Grey, and was handed to the American Ambassador, Whitelaw Reid, on 2 February 1906.<sup>21</sup> Grey argued that the FFVA was not meant to restrict American fishing rights, nor did it do so. However, all Grey's arguments were shattered when Bond passed a second act in May, 1906.<sup>22</sup> This statute restated the provisions of the old act and added new provisions to plug loopholes which had

18 Colonial Secretary, Sir Alfred Lyttleton, to the Administrator of Newfoundland, 17 August 1905, enclosed in CO to FO, 23 August 1905, FO 5/2622, PRO.

19 Lyttleton to Sir William MacGregor, Governor of Newfoundland, 25 October 1905, FO 5/2622, PRO.

20 Enclosed in Durand to Lansdowne, 19 October 1905, FO 5/2623, PRO.

21 Contained in the *Supplement to the American Journal of International Law*, *op. cit.*, pp. 355-64.

22 *Ibid.*, pp. 24-7.



appeared during the season of 1905. In the future, no Newfoundlander could fish in home waters from an American vessel; no resident could leave the island to take employment on an American vessel intending to fish within colonial limits; no Newfoundland fishing gear or supplies could be sold to Americans; and the master of any American or colonial craft conveying residents beyond territorial limits to engage aboard an American ship would be liable to severe penalties. Finally the law stated that American ships exercising Convention rights would be "amenable to all laws of the Colony not inconsistent with such rights under treaty or convention", i.e., laws regarding Sunday fishing, lighthouse dues, and so forth.

With Bond's new legislation in mind, Washington resorted to a cruder style of diplomacy. The President, whose concern over the fisheries was that of his good friend Cabot Lodge, told Whitelaw Reid that the British were now — as they once had in the Alaska boundary question — "drifting where we shall have to send a warship up to Newfoundland to look after our own interests."<sup>23</sup> Naturally Reid conveyed the gist of this warning to the Foreign Office; and a few days later, he followed it up with Root's formal response to Grey's February memorandum, in which the Secretary of State put his case in inflexible terms.<sup>24</sup> Grey got the message. It was now very clear that the opposing positions regarding the fisheries had become so polarized that a quick settlement was impossible. He and his government therefore decided upon a *modus vivendi* for the coming season — breathing space in which to work out a diplomatic solution. On 8 August, the Colonial Office acquainted St. John's with this decision and sought suggestions concerning the nature of the *modus*, inquiring whether Newfoundland would prefer to allow Sunday fishing or the use of purse seines. About a week later, the Foreign Office informed Reid that it would, because of the wide divergence of Anglo-American views, be submitting proposals for a *modus*.

Bond's response was unrealistic.<sup>25</sup> Rather than a *modus*, which would undermine his present policies, he favoured another form of action. In effect, he was willing to let Americans fish without restrictions, provided no Newfoundlanders worked for them. Grey's initial proposal was the exact opposite of Bond's. Britain offered not to enforce the new FFVA and to remove those sections of the old act to which Root objected. In return, it asked the United States to comply with all of Newfoundland's other laws and fishing regulations,

23 Roosevelt to Reid, 27 June 1906, vol. 153, Roosevelt Papers, MD/LC.

24 Root to Reid, 30 June 1906, enclosed in Reid to Sir Edward Grey, 20 July 1906, *Supplement to the American Journal of International Law*, *op. cit.*, pp. 364-373. See also Reid to Roosevelt, 17 July 1906, Reid Papers, vol. 167, MD/LC.

25 MacGregor to Elgin, 22 August and 8 September 1906, Correspondence regarding U.S. Fishing Question, 1905-09, Provincial Archives of Newfoundland.

i.e., pay light dues and so forth. Practically speaking, the agreement would make American fishermen completely dependent upon cooperation with any Newfoundlanders who dared to defy Bond and engage themselves beyond the three-mile limit. Reid's answer came only after the State Department had carefully checked with the power-structure of Gloucester. With one important exception and a few qualifications, the United States accepted Britain's proposal. Though Sunday fishing was renounced, the use of purse seines was insisted upon, for if Newfoundlanders either could not or would not work for Americans there might be no winter herring fishery at all. The Americans would pay lighthouse dues, provided their fishing rights were unobstructed — and enter customs, if that were physically possible. To avoid embarrassing Bond, they also promised to engage Newfoundlanders far enough outside the three-mile limit to remove all reasonable doubts as to the location. The *modus* itself took effect by an exchange of notes on 6 and 8 October 1906 between the Foreign Office and the American Embassy.

In reaching this accord, His Majesty's Government knowingly rode "roughshod" over its senior colony, oblivious to the cries of outrage inevitably to arise in Britain and Canada as well as in St. John's.<sup>26</sup> By fiat, Britain assumed authority over the fisheries. Many reasons suggest themselves to explain this manifestation of raw imperial power. Primary among them was Sir Edward Grey's (and his government's) passionate desire for an Anglo-American "bond of union" on such trans-Atlantic issues as the fisheries.<sup>27</sup> Underlying this sentiment was an unpleasant truth: Britain did not wish to quarrel with the United States over a matter in which its president had shown so strong a personal interest. Significant, too, was the fact that no one in authority, either in the Colonial or the Foreign Office, seemed to sympathize with either Bond or his Newfoundlanders. They disliked and distrusted the premier, regarding him as a "very dangerous man" and his fellow islanders as "deceitful and despicably wicked".<sup>28</sup> Quite obviously, Gloucester exercised a great and continuous influence upon Washington that was unseen in St. John's' relations with London.

With the *modus vivendi* in hand, the diplomats could begin searching for a lasting solution to the fisheries. Both Washington and London initially rejected arbitration and looked for a political formula instead. Britain opti-

26 Minute by F. A. Larcom on CO to FO, 28 September 1906, FO 371/160, PRO.

27 Grey to Durand, 2 January 1905 [1906], Grey Papers, FO 800/80, PRO.

28 Sir M. F. Ommanney, Permanent Under-Secretary of State for the Colonies, to Lord Elgin, 6 June 1906, Elgin Papers, Microfilm No. 2, Queen's University, Kingston; Lansdowne to Durand, 14 November 1905, Durand Papers, Item 14A, University of London. The Earl of Elgin was Colonial Secretary. For another view, see Peter F. Neary and Sidney J. R. Noel, "Newfoundland's Quest for Reciprocity, 1890-1910", in Mason Wade, ed., *Regionalism in the Canadian Community* (Toronto, 1969), *passim*.

mistically pinned its hopes on James Bryce, the new ambassador who came to Washington in March, 1907, to replace Durand. But Bryce soon discovered that Gloucester's interests were kept safe in Root's hands. That city's views, which were continually being sought by the State Department, were clearly expressed.<sup>29</sup> What the fishermen wanted was a return to the good old days in the Bay of Islands and elsewhere and, to regain the past, they were willing to part with any fishing practices to which Newfoundland might object. But never would they pay the price of reciprocity, for the conviction persisted among them that such a policy would ruin their economy. As long as Root was Secretary of State, the Hay-Bond Treaty would never be revived. Moreover, within the Department, the "tendency . . . [was] strongly against" arbitration, believing that there was nothing to arbitrate with Canada and that American rights might be compromised if arbitration were arranged with Newfoundland.<sup>30</sup> All that Root would suggest to Bryce, when they first conversed about slate-cleaning differences in mid-March, 1907, was that Britain and the United States ought to establish a joint commission to frame fishing regulations.<sup>31</sup>

In Canadian-American relations, the fisheries did not possess the controversial qualities evident in Newfoundland-American relations. Yet what seemed at first to be merely another item on the slate-cleaning agenda which Root proposed to Canada in May 1906 quickly grew to vexing proportions, as Newfoundland's quarrel with the United States worsened. When Sir Robert ended the *Modus* of 1888, he drove an increasing number of Americans into Canadian ports for their bait-fish and other supplies and services; and on 24 May 1907, a Gloucester schooner, the "Alert", came to the Magdalens and tried, unlicensed, to fish for bait within inshore waters in a manner and with equipment forbidden by Canadian law.<sup>32</sup> The incident was quickly and amicably resolved but its meaning lingered: Laurier had not wanted to get involved in arbitration, but Canada, regardless of Laurier's personal feelings,

29 A. B. Alexander to the State Department, 26 January and 5 April 1907, Numerical Files, 1906-10, File No. 573, NA.

30 Whitelaw Reid to John R. Carter, First Secretary, United States Embassy, London, 7 January 1907, Reid Papers, vol. 168, MD/LC.

31 James Bryce to Sir Edward Grey, 19 March 1907, FO 371/360, PRO.

32 There is a good deal of material on the "Alert" case in the Numerical Files 1906-10, File No. 573. See also *Papers relating to the Foreign Relations of the United States, 1907* (Washington 1910), pp. 533-7. Of intriguing interest is the fact that the captain of the "Alert", A. D. Malloch, had been engaged in a similar escapade in 1906. At that time, he was master of the "Edna Wallace Hooper" out of Gloucester; and he attempted to build scaffolding on the shores of the Bay of Islands in order to freeze herring. The Government of Newfoundland confiscated (from Malloch) a seine and several dories but A. B. Alexander told him (and others with claims) that their losses would be met. See Numerical Files, 1906-10, File No. 293.

would now be inextricably involved in any future arbitration proceedings. By August, Sir Wilfrid had to tell London that, although the principle of arbitration was still distasteful, he would agree to it.<sup>33</sup> In his opinion, Bond's foolish policies had brought Britain to the point where it was the only solution.

By this time, the United States had reversed its stand and proposed to Great Britain that their differences be arbitrated at The Hague. It was not an easy decision for any of the parties to the controversy to reach. Only after months of strenuous claims and counter-claims were Britain and the United States convinced that their positions were too divergent for diplomacy. Increasingly borne upon Bond was the unpleasant fact that his retaliatory policies had failed and, indeed, now threatened his own political fortunes. At London's Imperial Conference in June 1907, he covertly agreed with the Foreign Office that, if his policies were not productive, he would take his case to The Hague.<sup>34</sup> As soon as he was committed to this course, Canada had no choice but to follow him. A month later, Britain neatly maneuvered the United States into making the first approach to arbitration, thereby sealing Bond's bargain with the home government and assuring Laurier's compliance.

Despite a general agreement to arbitrate, not until late January, 1909, were all parties able to concur upon procedure and practice. For this gradual march of events, there were two fundamental causes. The British side was long unable to fashion common terms of reference; and once they had done so in the spring of 1908, it still remained for the diplomats to reconcile the American and the British terms.

Britain's pace was a consequence of her decision to leave matters in colonial hands. There would be no more riding roughshod over Newfoundland. Arbitration would be a colonial enterprise and, if Newfoundland held back or faltered, Whitehall counted on Canada to pick up the cadence. What seemed like a sensible imperial policy became an ordeal for the Colonial Office. For months, Bond annoyed everyone by insisting he would "paddle his own canoe unassisted by Canada", while revealing none of his own plans (if he had any) and scorning all offers of help.<sup>35</sup> So long as Bond remained aloof, Sir Wilfrid Laurier did little to disturb him. From first to last, Laurier resolutely refused to say or do anything that would "give offense to" the Newfoundlander, graciously offering aid but always leaving him the initiative.<sup>36</sup> Bond was not being coquettish or uncooperative. Association with Canada would greatly strengthen his position at The Hague, shoring up his

33 Lord Grey to Lord Elgin, 13 August 1907, vol. 754, Laurier Papers, PAC. Cf. Grey to Bryce, vol. 7, Grey of Howick Papers, PAC.

34 Sir Edward Grey to James Bryce, 14 May 1907, Grey Papers, FO 800/80, PRO.

35 Elgin to Sir Edward Grey, 21 November 1907, *ibid.*

36 Lord Grey to Bryce, 22 November 1907, vol. 7, Grey of Howick Papers, PAC.

little corps of lawyers with expertise and experience; and if he did not accept Canada's aid, he would have to turn to London. Yet, at the same time, co-operation with Canada would expose him to attacks from numerous independent-minded countrymen in the House of Assembly. Inevitably they would identify cooperation with confederation — and no suspected confederationist could expect to survive in Newfoundland politics.

Bond made his break in January, 1908, announcing in the Throne Speech on the 9th that, at the Imperial Conference, he had "suggested that all questions arising under the . . . Treaty [of 1818] be referred to the Hague for arbitrament, and the three other Governments interested in the question . . . have concurred . . ."<sup>37</sup> Just before that splendid revelation, he cabled Laurier an outline of the roughest sort of draft terms of reference and asked what questions Ottawa would be submitting. To this overture, Sir Wilfrid replied that he only wished "to assist you and to join with you in the case which you intend to propose."<sup>38</sup> Although Bond's questions seemed acceptable, he would resist commenting upon them until he and his legal advisors had received the full text from St. John's. With the reception of that document in late January, cooperation began. Throughout four months of extended correspondence — there were no conferences despite Ottawa's urgings — Laurier's government stuck to its policy of non-interference but still managed to obtain extraordinary results. Allen B. Aylesworth, Laurier's Minister of Justice, imparted to Bond's question a greater clarity and effectiveness. He got the Newfoundlander to admit that Britain had never exercised an unmeasured control over the fisheries, only the authority to legislate "reasonable provisions for the regulation of fishing operations."<sup>39</sup> Out of friendship, he embraced Bond's dubious interpretation about the Convention and inserted the Magdalen Islands within it. Most significantly of all, Aylesworth pointed out to Bond that, according to The Hague Convention under which arbitration would proceed, the judges would be drawn from the Permanent Court, a body in which neither Newfoundland nor Canada had a member while the United States and Britain had four each. He asked whether the composition of an arbitral tribunal might be more important than the questions submitted to it. The upshot was Britain's selection of Canada's Chief Justice, Sir Charles Fitzpatrick, to fill a chance British vacancy on the court.

For some reason, Aylesworth never disclosed to Newfoundland his fears that the American questions might be so structured as to authorize the arbi-

37 Newfoundland, *JHA*, 1908, pp. 3-4.

38 Laurier to Bond, 17 January 1908, vol. 500, Laurier Papers, PAC.

39 Memorandum of Suggested Questions, enclosed in Aylesworth to the Attorney General of Newfoundland, 29 February 1908, Governor-General's Numbered Files, File No. 192F, vol. 1(b), PAC.

trators, "should they decide the question of right against the United States, to prescribe regulations to which Canadians were to conform in exercising their rights."<sup>40</sup> What he had in mind was the Bering Sea Tribunal of 1893, where Canada's rights to pelagic sealing had been upheld, only to be severely restricted by regulations laid down later by the same court. His suspicions were well founded; the mystery is why he never acted upon them. Despite his own forewarnings, he failed to comprehend the programmed diplomacy that was taking place; and not till the final award did he try to wriggle out of the results. One wonders whether his deafness, which came suddenly upon him in the summer of 1907, was symptomatic of a generally deteriorating state of health.

The United States began composing its questions early in January, 1909. The man responsible for the drafting was Chandler P. Anderson, a clever Wall Street lawyer and special agent for the State Department in Canadian-American affairs. He wrote draft after draft, submitting them all to Secretary of State Elihu Root, and most of them to the other lawyers who would be arguing the American case. Throughout Anderson's labors, Root's directions were clear and unmistakable: put the questions in such a form that the arbitrators have to answer them in America's favor.<sup>41</sup>

On 8 May 1908, Root presented the British Ambassador, James Bryce, with a draft of the "Special Agreement for the submission of questions relating to the Northeastern Fisheries under the General Treaty of Arbitration concluded between the United States and Great Britain on the 4th day of April."<sup>42</sup> Although a simple diplomatic instrument could have served, there were good reasons for selecting this particular one. Bryce had always been a fervent believer in the arbitral process. When Root suggested to him in January that a General Arbitration Treaty, once approved by the American Senate, would not only guarantee that the fisheries would be referred to The Hague but that other controversies could also be arbitrated, the ambassador agreed at once and quickly secured the acceptance of the treaty by his home government. Root's proposal dealt with procedural matters; his draft of questions followed within a fortnight, when both sides exchanged proposed terms of reference. The American set was markedly different from the straight-forward British set.<sup>43</sup> The Americans began with questions about

40 Aylesworth to Laurier, 15 April 1908, vol. 514, Laurier Papers, PAC.

41 Root to Anderson, 29 April 1908, Chandler P. Anderson Papers, MD/LC.

42 Enclosed in Bryce to Lord Grey, 12 May 1908, vol. 756, pp. 216177-82, Laurier Papers, PAC.

43 The Canadian/Newfoundland set was enclosed in Aylesworth to the Governor-General in Council, 18 April 1908, Governor-General's Numbered Files, File No. 192F, vol. 1(b), PAC; the American set was enclosed in Bryce to Sir Edward Grey, 22 May 1908, GR 7, G 6, vol. 64 (2), PAC — with the copy sent to Lord Grey.

principles, asking whether fishing regulations could be imposed unless they were necessary to protect the fisheries, uniformly applied and inherently reasonable. Moreover, they questioned whether regulations could exist without common agreement upon their appropriateness and unless the United States shared in their enforcement. Then came a series of specific questions touching all the bones of contention. Following this was an artfully constructed question inquiring whether existing colonial acts contravened or impaired America's liberties. If so, and if an answer required further examination, the tribunal was to refer the acts to a special committee of experts who were to visit and study the fisheries and whose decision was to become part of the final award. Finally, a follow-up question was inserted: "The Tribunal shall in such case [*per supra*] also prescribe rules and a method or procedure under which all similar questions with respect to the appropriateness, necessity, reasonableness and fairness hereafter proposed to the fisheries may be similarly determined."

Although Aylesworth's prophecy seemed about to come true, very little was done to prevent it. Unsympathetic to Newfoundland and always ready to assert the imperial will whenever Bond delayed diplomacy, the British Ambassador took a very light view of the American questions. It did not matter to him how they were stated; the issues would be correctly decided if the arbitrators were "worth their salt."<sup>44</sup> He also believed that some way had to be found for settling future differences about regulations. "Of course," he wrote the Colonial Secretary, "Canada & Newfoundland will kick at the notion . . . but something of the sort is needed."<sup>45</sup> Officials in Britain were also willing to let both sets of questions go before the Tribunal; and in Ottawa, no one seemed concerned about the nature of Root's questions. Laurier merely objected to the existence of two sets, unpersuaded by Governor-General Grey's arguments that their differences were "trifling."<sup>46</sup> Once again, however, Sir Wilfrid was willing to defer to Bond's "better judgement."<sup>47</sup> When the latter opted for a single set, Bryce manfully tried to combine impossible elements. Throughout November and December, drafts shuttled back and forth between his embassy and the State Department with the constant complaint being voiced at either end that one party was trying to eliminate the other's questions. At last, Bryce arranged a provisional agreement which fused all questions except for the one about fishing regulations; and to Lord

44 Bryce to Lord Grey, 24 May 1908, vol. 8, Grey of Howick Papers, PAC.

45 Bryce to Lord Crewe, 25 May 1908, Crewe Papers, C3, Cambridge University Library. The Marquess of Crewe succeeded Elgin as Colonial Secretary in 1908.

46 Lord Grey to Crewe, 11 September 1908, vol. 15, Grey of Howick Papers, PAC.

47 Laurier to Bond, 11 September 1908, vol. 533, Laurier Papers, PAC.

Grey, he sighed that it represented the "Maximum . . . we can get in the way of an agreed set of questions."<sup>48</sup>

The Special Agreement was provisionally signed in Washington on 27 January 1909. Qualification was necessary because Bond's man lacked full powers and both Newfoundland and the American Senate would have to approve the agreement before it could come into effect. After several days of indecision, Sir Robert accepted on 3 February. The Senate followed suit on the 18th, though appending an explanatory note stating that the agreement excluded the Gut of Canso and the Bay of Fundy. When the long struggle was over, both Bryce and Aylesworth expressed their jubilation. In a private letter to London, the ambassador suggested that, if Britain ever awarded decorations to Americans, as the French had given the Grand Cross of Legion to John Hay, Root should be a candidate — "for his services to the cause of arbitration."<sup>49</sup> Aylesworth would have preferred that the honors be tendered to Bryce, whom he extolled as Canada's "spokesman and champion."<sup>50</sup>

If Aylesworth had carefully read and comprehended the Special Agreement,<sup>51</sup> he probably would have branded Root as a scoundrel and Bryce as a dupe. Article I contained all questions, the first and most critical of which had two versions. The British contended that the American liberty to fish was "subject, without the consent of the United States, to reasonable regulations by Great Britain, Canada, or Newfoundland . . . ." However, such regulations had to be "appropriate and necessary" to protect the fishery, the right of British subjects, and the liberties of Americans; "desirable on grounds of public order and morals;" and "equitable and fair as between" local fishermen and visiting Americans. On the other hand, the Americans contended that their liberty was "not subject to limitations or restraint", unless the regulations were appropriate, necessary, reasonable and fair, and unless the appropriateness, etc., should be "determined . . . by common accord and the United States concurs in their enforcement." All the other questions, numbered two through seven, then followed, and since the succeeding articles of the Special Agreement, II through IV, virtually assured the Americans of a directed verdict in their favour, it is essential that they be understood. Article II stated that either party could call the attention of the Tribunal to any acts "claimed to be inconsistent . . . with the Treaty of

48 Bryce to Lord Grey, 30 December 1908, vol. 8, Grey of Howick Papers, PAC.

49 Bryce to Sir Charles Hardinge (Permanent Under-Secretary of State for the Foreign Office), 8 February 1909, Grey Papers, FO 800/80, PRO.

50 Aylesworth to Governor-General Grey, 8 February 1909, Governor-General's Numbered Files, File No. 192F, vol. 2(a), PAC.

51 For a copy of the agreement, see *Foreign Relations, 1909* (Washington, 1914), pp. 275-83.



1818.” (This would be done by Anderson in June 1909, and again on 13 August 1910, the day after the trial.) Either party could ask the Tribunal “to express in its Award its opinion” about such acts, illustrating (if need be) how they contravened the principles of the Award; and “each Party agrees to conform to such opinion.” Article III stated that, if any question arose about present regulations which required expert examination and information, the Tribunal could appoint a three-man committee of experts and instruct them to inquire into designated regulations. Their report, if accepted by the Tribunal, would become part of the Award. Article IV directed the Tribunal to recommend rules and procedures for any future controversies. If the parties did not accept these recommendations and if future differences developed, they had to return to The Hague for judgement. The remaining articles of the agreement dealt largely with details of the arbitral process.

Invitations were dispatched to the chosen judges of the Permanent Court on 5 March 1909, the day after the agreement’s proclamation. In structure and in composition, the Hague Tribunal of 1910 was strikingly different from the Alaska Boundary Tribunal of 1903. From the outset, all parties had agreed that the court should consist of an uneven number of men, all drawn from the Permanent Court. Newfoundland originally wanted three judges. Each party would select one, the two name a third, and none of them would be a national. But Britain found a potential flaw in this formula. With the French Shore still rankling Frenchmen, Newfoundland would not want anyone from that country; and if British, American and French judges were excluded, there might not be enough English-speaking jurists left. London suggested instead that an Austrian, Heinrich Lammasch, be picked by both parties as presiding officer and that Britain appoint Canada’s Chief Justice, hoping by example to induce the United States to do the same. Root, on the other hand, wanted a five-man court so that the majority could be non-national and the award carry maximum weight.<sup>52</sup> Though he had no objections to Sir Charles Fitzpatrick, he believed the American Chief Justice was too old to be considered. Bryce also favored the larger court, especially since Root felt so strongly on the subject; and the home government concurred, easily convincing Newfoundland and Canada of the wisdom of that decision.<sup>53</sup>

The resulting court was a felicitous combination of national and non-national members. Although both sides doubtless scanned the whole list of judges, screening out non-nationals whose views might be prejudiced, the three ultimately chosen were men with worldwide reputations in the field of

52 Bryce to Sir Edward Grey, 25 May 1908, Crewe Papers, C3, Cambridge University Library.

53 Laurier did not care much either way, whether a three-man or a five-man court, and was willing — as always — to go along with Newfoundland. See Lord Grey to Bryce, 16 May 1908, vol. 8, Grey of Howick Papers, PAC.

international law. As president, both parties agreed upon Lammasch, who was a member of Austro-Hungary's upper chamber and Professor of International Law at the University of Vienna. Britain nominated a Hollander, A. F. de Savornin Lohman, his country's Minister of State and a renowned lawyer. In turn, the United States selected an Argentinian, Luis M. Drago, former Minister of Foreign Affairs. The choice of national members was equally appropos. The United States appointed George Gray, ex-Senator from Delaware and present Judge of the Circuit Court of Appeals, Third District. Gray was picked though it was well known that, as a senator, he had defended the ill-fated Chamberlain-Bayard Treaty and had expressed the strongest sort of sentiment for Canada's claims to exclusive rights over her large bays.<sup>54</sup> Gray was pro-Canadian in other ways, too, belonging to that little colony of American jurists and businessmen who summered at Murray Bay, Quebec. Also a summer resident and the close friend of several American judges, including Gray, was Sir Charles Fitzpatrick, Britain's choice as its national member. "Fitz" had been appointed on 27 May 1908 to fill a vacancy on the Permanent Court "with a view to his serving on the Court to which it is proposed that the Atlantic Fisheries be referred."<sup>55</sup>

Fitzpatrick's selection was an imperial concession. So was the appointment of Aylesworth as British Agent, for it was the private wish of the home government "to give the Dominion and Colony the onus of preparing, settling, and presenting the prime substance of the case."<sup>56</sup> As Agent, Aylesworth theoretically assumed this supervisory burden as well as the responsibilities of general trustee for Canada's and Newfoundland's sovereignty. And in the eyes of his compatriots he apparently succeeded, being knighted for these and other efforts. Despite that honor, Aylesworth was not an effective Agent. His deafness obviously precluded normal intercourse; but this disability *per se* could not have accounted for the fact that he frequently seemed uncomprehending of the written as well as the spoken word and too often just did not know what was going on. Furthermore, he disliked Fitzpatrick and, during the trial, collaboration between them was difficult if not impossible. He prided himself as "being almost if not quite as violent a jingo as" Sam Hughes;<sup>57</sup> and the British, recognizing the force of Aylesworth's imperialism,

54 Anderson to Root, 12 March 1908, Anderson Papers, MD/LC.

55 W. Langley of the FO to the Under-Secretary of the CO, 13 June 1908, Fitzpatrick Papers, vol. 13, PAC.

56 Minute by Francis J. S. Hopwood of the CO upon a telegram from Governor MacGregor of Newfoundland to the CO, all enclosed in Crewe to Prime Minister Asquith, 20 April 1909, Crewe Papers, C40, Cambridge University Library.

57 Canada, House of Commons, *Debates*, 11th Parliament, 1st Session, 18 May 1909, pp. 7057-62.

reckoned he would “knock under to any pressure from above . . . .”<sup>58</sup> More importantly, Aylesworth was delinquent where he should have been active. He kept aloof from the detailed preparation of the case, neither consulting with his workers nor reading their work until it was in print.<sup>59</sup>

The great bulk of the work done in preparing the British case was accomplished by the author of the *Kingdom of Canada Papers*, John S. Ewart, a highly qualified Ottawa lawyer. After exhausting Canadian repositories, he moved to London, where he was joined by other men in whose selection Aylesworth played the vital role; but it was Ewart who first picked up the threads of research in the fall of 1908, who kept at it until the trial began in May 1910, and who then served as one of the advocates. For these Herculean labors, Ewart paid the price, being driven almost to the edge of a nervous breakdown. At The Hague, he lived alone, some distance from his colleagues, and would rarely collaborate with them. For all that, Ewart’s input was immeasurable. “None of us who took part in the case,” a grateful British senior counsel wrote afterwards, “will ever forget or minimize how much we owe to your efforts in the supply of material on which we worked.”<sup>60</sup>

Newfoundland’s contribution to the British case was negligible. In considering the research done, Aylesworth complained that he had not had “one single atom of help from Newfoundland — not one atom.”<sup>61</sup> Having created the fisheries problem in the first place, the island colony did little or nothing to resolve it. While St. John’s drifted, Ottawa conned the ship, engaging the counsel and solicitors and putting up all the money, for which Newfoundland had not paid a penny of its half-share by the spring of 1911. At the trial itself, Sir James Winter, the colony’s chief representative, cut a sorry figure. In retrospect, it would appear that all Newfoundland did of enduring significance in the fisheries arbitration was to leave matters in the hands of others — and to agree, with Canada’s concurrence, that a seventy-year old Scot, Sir Robert B. Finlay, be retained as their leading counsel.

The imperial influence was subtly but strongly exerted. When Finlay was chosen, he brought his “devil” into the picture, Sir H. Erle Richards, who soon assumed the general direction of research that should normally have been Aylesworth’s responsibility.<sup>62</sup> When Finlay, former Attorney General

58 George Young to Bryce, 28 July [1910], Bryce Papers, USA No. 32, Bodleian Library, Oxford University [hereafter BL].

59 Such was the public charge made by John S. Ewart and never refuted. See his letter to the *Montreal Gazette* quoted verbatim in Canada, House of Commons, *Debates*, 11th Parliament, 3rd Session, 3 March 1911, pp. 4639-41.

60 Lord Robson to Ewart, 20 January 1911, Ewart Papers, vol. 1, Provincial Archives of Manitoba. Robson was elevated to the peerage for his work at The Hague.

61 Aylesworth to Laurier, 23 September 1909, vol. 589, Laurier Papers, PAC.

62 Young to Bryce, 2 July 1909, USA No. 29, Bryce Papers, BL.

of Britain's old Tory government was engaged, the incumbent Liberal government appointed its own Attorney General, Sir William S. Robson. As the British Prime Minister confidentially explained to the Colonial Secretary: Finlay would be briefed by the colonies; Robson by HMG.<sup>63</sup> And finally there was the ubiquitous George Young, First Secretary in Bryce's embassy and as clever and designing a man who ever worked the backstages of diplomacy. Young was attached to the British contingent to The Hague as a "secretary." Though Aylesworth thought he had asked for Young, that the Foreign Office prevailed upon the Colonial Office to secure the latter's services confirms the suggestion that Agent Aylesworth could be knocked under whenever Britain started the "screw turning."<sup>64</sup>

The preparation and management of the American case lay in the very capable hands of Chandler P. Anderson. Anderson was a real agent; his was the guiding hand in preparing the case, assigning tasks to counsel, getting data from specialists, pulling everything together. Under his general direction, the American participants became a well-drilled team. All the lawyers were engaged in the research and writing and everyone took part in the final oral arguments. In addition to three junior men, there was as many senior counsel: George Turner, an aggressive Spokane lawyer and former member of the Alaska Boundary Tribunal; Samuel J. Elder, one of Boston's best trial lawyers, picked for his sympathy towards Gloucester as well as his legal talents; and Elihu Root, another Alaska veteran, now Senator from New York and sometime lawyer from the City, with the reputation of being one of its finest and most generously rewarded attorneys. Root had been drafted by President Taft in the fall of 1909 when the American group had grown concerned about the number and quality of their British opposition. Throughout the preparations, the "Gloucester committee" was regularly consulted; and when the Americans sailed off to The Hague, accompanying them as an "attaché" was Arthur L. Millett of the Gloucester Board of Trade and the Gloucester *Daily Times*. Of any undercover, pre-arbitral consultation between Anderson's group and Judge Gray, there remains no evidence; but it seems likely that the same sort of informal intimacy existed between them which later characterized Fitzpatrick's relations with George Young.

After the Cases, Countercases and Written Arguments had been drawn up, distributed and presumably read, a distinguished assembly of jurists, scholars, diplomats and lawyers gathered at The Hague in May, 1910. Their work would take all summer. Arguments by counsel inched their way through ten long weeks, with morning and afternoon sessions four days a week. The pleading was followed by almost a month of deliberation (and secret diplo-

63 Asquith to Crewe, 22 April 1909, Crewe Papers, C40, Cambridge University Library.

64 Young to Bryce, 28 July [1910], USA No. 32, Bryce Papers, BL.

macy) before the Tribunal announced its award on 7 September. Despite the fact that history was being made at The Hague, newspaper coverage of the proceedings was very light and the suspicion easily comes to mind that reporters were either uncomprehending or bored into silence. The *Toronto Globe* had virtually nothing to offer its readers. Back home in Canada, Laurier complained to Aylesworth about getting "very scanty news"; all he knew was that the speeches seemed interminable.<sup>65</sup> (He said nothing about the fact that Aylesworth wrote him only twice between May and September.) In fact, the arguments were long, complex and very dull. One observer estimated that approximately two and a half million words were spoken and over eleven hundred exhibits presented.<sup>66</sup> About the eighth week, a British lawyer inadvertently referred to the Convention as the "treaty of 1918." Just at that time, a rare moment of silence coincided; and a second Briton whispered in an audible voice: "Good Lord! Have we been here that long?"<sup>67</sup>

Many participants at The Hague reacted strongly to the pressures placed upon them by their work and the environment. Social relations between the Americans and the Newfoundlanders and Canadians, never too cordial, grew progressively colder as the proceedings lengthened. But among themselves, the Americans remained singularly unified. Anderson's leadership was always evident, never challenged. While some members of his team occasionally worried about the results, he was never in doubt, positive that everything had been so well programmed that "the ultimate outcome, whatever the decision . . . , will be entirely satisfactory to the [American] fishermen and to the Government."<sup>68</sup> In sharp contrast, the British group never achieved a strong sense of unity. Unlike the Americans, they were composed of sub-groups, each working for its own ends. They lacked common goals, and quarrelling quickly appeared, particularly among the Canadians. Aylesworth and Fitzpatrick were soon at odds. So intense was the Agent's hostility that he tried to deprive the Chief Justice of the rich fees ultimately given the arbitrators.<sup>69</sup> Fitzpatrick had words with a Toronto lawyer whom Aylesworth had hired; and Ewart, as we have already noted, rarely spoke to anyone.

What the British group needed was leadership, a role which Aylesworth simply could not fill. Doubtless his deafness was again a factor, but one

65 Laurier to Aylesworth, 7 July 1910, Laurier Papers, PAC.

66 P. T. McGrath, "The Hague Award," *University Magazine*, IX (December, 1910), pp. 542-9.

67 Speech by S. J. Elder entitled "The Panama Tolls" and delivered before the Canadian Club of Ottawa, 10 January 1914, *Addresses Delivered before the Canadian Club of Ottawa, 1913-1914* (Ottawa, 1914).

68 Anderson to Henry M. Hoyt (Counsellor of the State Department), 3 July 1910, Anderson Papers, MD/LC.

69 Anderson to Root, October 1910, *ibid.*

wonders whether character and intelligence were not more at fault. It was impossible for a impassioned imperialist like him to lead lawyers like Finlay and Robson, Attorneys General of the realm for whom he felt such awe. And, as Young so perceptively put it, "Canadians in London seem smaller than at Ottawa."<sup>70</sup> At The Hague, Aylesworth was a small man who reportedly "did not even attend the daily conference at the close of each day's session when the happenings of the day were discussed and the plan for the next day arranged."<sup>71</sup> Furthermore, he had not mastered the subject; judging by his actions and his utterances, he never understood that the Special Agreement had been designed to attain certain results. He was confused about central issues and the people who argued them. He would later give exclusive credit to Finlay and Robson for winning the case; he always believed that Question V (regarding the definition of the bays) was of primary importance.

The question was really of minimal importance. The only bay that mattered to the Americans was Fundy, which had been excluded from arbitration; they had not used the others for years. The primary question was the initial one concerning fishery regulations and upon this the Americans concentrated their efforts. Two principal arguments were constructed and the responsibility for their presentation given to Turner and Root. The first argument sought to apply the arcane doctrine of international servitudes to the fisheries, i.e., when the Convention of 1818 established a common fishery, *ipso facto*, Britain lost its sovereign right of regulation. The second contended that the Convention had imposed upon Britain "a contractual obligation limiting the exercise of British sovereignty in treaty waters, to the extent that the prerequisite of reasonableness must be determined before regulations could be enforced against American fishermen, and that neither Great Britain nor her colonies could be the sole judge of the question of reasonableness."<sup>72</sup> Both were contrived arguments, especially servitudes. Turner assumed the burden of this argument and led off for his side. It proved to be a theory more attractive to scholars than to jurists. "Servitudes" was effectively countered by British counsel and strongly contested by the judges, including both Gray and Fitzpatrick. In Young's opinion, when Turner closed, he left the Americans "weaker than when he joined them."<sup>73</sup>

When Root took the floor in the closing days of the trial, he presented the "contractual obligation," summed up his country's case and pitched into Newfoundland's fishing regulations. At first, Young thought him very ineffective,

70 Young to Bryce, 28 July [1910], USA No. 32, Bryce Papers, BL.

71 Letter from Ewart to the Montreal *Gazette*, *op. cit.*

72 Anderson, "The Final Outcome of the Fisheries Question," *American Journal of International Law*, 7 (January, 1913), p. 9.

73 Young to Bryce, 1 July 1910, USA No. 30, Bryce Papers, BL.

but both Anderson and Elder were thrilled by his performance. Listening so intently he could not take notes, the Boston lawyer later remarked that "It seemed like getting out of an open boat in mid-ocean and being assured of getting to port."<sup>74</sup> The American Agent thought Root's arguments were brilliant and wrote Washington that even the British counsel "were lost in admiration of . . . [Root's] ability and admit it freely."<sup>75</sup> When Root graphically illustrated the injustices of Newfoundland's regulations, he made a powerful impression upon all the judges. Even Fitzpatrick had to agree that some of Root's propositions "seemed reasonable."<sup>76</sup> When Aylesworth grasped the full weight of Root's final plea, he was pleased that it had been reserved until the final moments of the trial. Otherwise, as he told Laurier, it would have been "very damaging." "As it was I dont [*sic*] believe it influenced *any* body."<sup>77</sup> Aylesworth was so very wrong. To Fitzpatrick's dismay, he soon discovered that "when the arbitrators were considering their award . . . the neutrals having given us the main objects of right were going heavily against us as to this legislation." The only way he could see to avoid disaster was "to get the matter away from the Tribunal and [he] asked . . . [Young] to find a way."<sup>78</sup>

In addition to the force of Root's words, there were, of course, other strong reasons inclining the Tribunal towards the logic of the American argument. It must be recalled that the terms of the Special Agreement predetermined many of the results. That these terms were fully understood by counsel on both sides was brought out during the trial. Finlay had admitted, without objection from the Americans, that "The Award . . . will be a very worthy one for it will not only solve the differences which have already occurred, but will provide the principles and a method of procedure for disposing of any question which may arise in the future with regard to the application of those principles to any particular enactment."<sup>79</sup> Also in open court and in response to a direct question from the bench, Root had stated that "all he wants is a suspensory veto — which of course [Young sagely commented] he already has under Art. IV."<sup>80</sup>

74 Margaret Munro Elder, *The Life of Samuel J. Elder* (New Haven, 1925), p. 302.

75 Anderson to Hoyt, 8 August 1910, Anderson Papers, MD/LC. For Root's extended and forceful arguments, see "North Atlantic Coast Fisheries Arbitration," *Senate Document No. 870*, 61st Cong., 3rd Ses. (Washington, 1912-13), XI, pp. 1927-2299.

76 Aylesworth to Laurier, 31 August 1910, vol. 641, Laurier Papers, PAC.

77 *Ibid.*

78 Young to Bryce, 30 November 1910, USA No. 30, Bryce Papers, BL.

79 Lammasch to Anderson, 20 August 1910, Anderson Papers, MD/LC.

80 Young to Bryce, undated but probably 9 August 1910, USA No. 30, Bryce Papers, BL.

Thus the Award makes sense. In its judgement, the Tribunal was guided by the terms of the Special Agreement as well as by the pleas of counsel, agreeing with British legal arguments but accepting the American statement of grievances. To avert a hostile opinion regarding regulations, Fitzpatrick persuaded Young secretly to fashion an award that would satisfy both parties, giving the British all they were entitled to receive on legal grounds and employing recommendations to soften the blow for the Americans and also to prevent future friction. Fitzpatrick had always thought in terms of compromise and advised Young of his wishes at an early date. On his part, Young had always toyed with potential diplomatic forms in which to convey the inevitable compromises. The two men complemented each other perfectly; they were innate and talented schemers. Young got his chance when Fitzpatrick asked him to play a major, though clandestine, role in the drafting of the Award. According to Young — and there is no reason to doubt him — he drafted the critical decision for Question I; and, as he later remarked to Bryce, there was “little trouble” getting it accepted, “as the Americans were resigned to conceding the point of right if our proposals for a modus as to its exercise were fair.”<sup>81</sup> Question II, though drawn by Lohman (the Hollander), was also drafted in its final form by Young. Gray did III and IV; Lohman, VI. Young was wholly responsible for V and VII.

The Award itself was published on 7 September.<sup>82</sup> It was a massive document, difficult to understand; and one doubts whether many newspaper editors read or comprehended it. Every question was cited, every argument examined and answered, and the decisions rendered *seriatim*.

The Tribunal accepted none of the arguments advanced by the United States to prove its case for Question I, casting them all aside before giving this verdict:

The right of Great Britain to make regulations without the consent of the United States as to the exercise of the liberty to take fish . . . is inherent to the sovereignty of Great Britain.

The exercise of that right . . . is, however, limited by the said treaty [of 1818] in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be bona fide and must not be in violation of said treaty.

The Tribune then defined “reasonableness”:

Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on

81 *Ibid.*, 2 September [1910] and 30 November 1910.

82 *Treaties and Agreements affecting Canada in Force between His Majesty and the United States of America . . . 1814-1925* (Ottawa, 1927), pp. 325-48.



grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the treaty in good faith, and are therefore reasonable and not in violation of the treaty.

So much for principles, what about practice? The Tribunal had this to say:

.... By reason . . . of the form in which Question I is put, and by further reason of the admission of Great Britain by her counsel before this Tribunal that it is not now for either of the Parties to the treaty [ of 1818] to determine the reasonableness of any regulations made by Great Britain, Canada or Newfoundland, the reasonableness of any such regulation, if contested, must be decided not by either of the Parties, but by an impartial authority in accordance with the principles hereinabove laid down, and in the manner proposed in the recommendations made by the Tribunal in virtue of Article IV of the agreement.

The Tribunal further decided that Article IV of the agreement is, as stated by counsel of the respective parties at the argument, permanent in its effect . . . .

The Tribunal then went on to make specific pronouncements about Articles II, III and IV of the Special Agreement. Article II dealt with existing regulations; and since the judges were convinced by counsel that a decision on the reasonableness of existing regulations "requires expert information . . . as contemplated by Article III," no further action needed to be taken. In accordance with Article III, the Tribunal called "upon the Parties to designate within one month their national Commissioner for the expert examination of the questions submitted." (The Tribunal then named its commissioner.) If, at the request of either party, President Lammasch reconvened the Tribunal, it was to consider the expert committee's report. If that report were unanimous, it would become part of the Award. If not, the Tribunal would itself rule over the disputed regulations; but the Tribunal recommended that the parties accept either a unanimous report or the opinion of the non-national member. As for Article IV, the Tribunal "recommended" that all future fishing regulations be published in appropriate *Gazettes* two months before their operation; that the United States give notice of any objection; that any regulation designated as objectionable was not to go into effect until the "Permanent Mixed Fishery Commissions for Canada and Newfoundland" decided upon its reasonableness; that the PMFCs be established according to prescribed form; that if the national members of the PMFCs could not agree, the non-nationals should decide; and that, in all cases, a unanimous or a majority decision of the PMFCs would be "final and binding."

Moving to the other six questions brought before it, the Tribunal made the following judgements: II. American inhabitants could employ non-inhabitants, but any non-inhabitants employed as part of any fishing crew "derived no benefit or immunity from the treaty." III. American ships "should" report to customs, "if proper conveniences and an opportunity for doing so are provided." (This could be done by telegraph.) IV. American ships entering the "non-Treaty" coast for the four specified purposes and remaining over forty-eight hours "should" report to customs either in person or by telegraph, "if reasonably convenient opportunity therefore is afforded." V. Regarding the definition of bays, the three-marine-mile was to be measured from a straight line across the bay "where it ceases to have the configuration and characteristics of a bay." To make that decision "more practicable," the Tribunal recommended that, in every bay unprovided for, the line should be drawn across the bay at the first point where the bay did not exceed ten miles in width; and that in particular bays (and they were named), the lines should be drawn as the Tribunal specified. VI. American inhabitants could fish in the bays, creeks and harbors of the treaty coasts of Newfoundland and the Magdalen Islands. ("Sic transit gloria Bondi.") VII. American ships seeking to exercise treaty rights could also claim commercial privileges, but they could not "at the same time and during the same voyage exercise their treaty rights and enjoy their commercial privileges . . . ."

Thus the differences between the cables sent home by the two Agents are explicable. When Aylesworth exultantly informed Laurier of the British victory, he was referring to the fact that most of the American arguments seemed to have been defeated. When Anderson cabled home, he had in mind the recommendations as well as the principles of the Award; and in this assumption, history has proved him right. Yet, given the backstage diplomacy underlying the Award, he wisely got confirmation as to its meaning. From Fitzpatrick, he obtained assurances that "he did not anticipate any difficulty in securing . . . [the adoption] of the recommendations by Great Britain."<sup>83</sup> "Fitz" also claimed that Aylesworth was "favorably disposed" and that Robson "had promised to support . . . [the recommendations]." Moreover, the Canadian jurist also recalled that "all the legislation specifically objected to by you [Anderson] is referred to the Expert Commission for their opinion"; and of this view, Lammasch, Gray and Lohman wrote Anderson of their concurrence.<sup>84</sup> It is, therefore, understandable that Anderson should conclude that American fishermen would "no longer be a prey to the prejudice and hostility

83 Anderson to Root, 10 September 1910, Anderson Papers, MD/LC.

84 Fitzpatrick to Anderson, 9 September 1910, *ibid.* See also Lammasch, Grey and Lohman to Anderson, all dated 8 September 1910, *ibid.*

of the local authorities . . . .”<sup>85</sup> Or, as Robson confided to Elder: “We have saved our sovereignty but we can’t exercise it.”<sup>86</sup>

All that remained to be done was to wrap up the recommendations in a suitable treaty. It was a final touch that took almost two years to complete, requiring Aylesworth’s retirement from politics, Laurier’s defeat in the election of 1911 and the coming to power of Robert Borden. The chief trouble was Aylesworth himself. His misinterpretation of the Award led to confusion in Ottawa and the resultant complication of Canadian-American diplomacy. When news of The Hague’s decision reached Canada, the press proclaimed it as a triumph: Aylesworth was a conquering hero largely responsible for upholding Canadian sovereignty and defeating the preposterous American claims.<sup>87</sup> It was an unmerited honor which the minister helped perpetuate. In the House of Commons, he informed fellow Canadians that they now had “the sole right to legislate with regard to . . . [the fisheries] exactly and in the same extent as we have to legislate to the people and the . . . city of Ottawa.”<sup>88</sup> Fishing regulations need only be reasonable and bona fide. Unhappily, however, he did have to admit that any existing regulations to which the United States objected might have to be referred to the Tribunal’s committee of experts, but he hoped diplomacy could reach a settlement short-circuiting that arrangement. As for the Tribunal’s creation of Permanent Mixed Fisheries Commissions to secure future disputes, he scorned the whole process as “but a recommendation.” Evidently he and Fitzpatrick had not discussed at The Hague the critical association between the Award

85 Anderson’s draft Report on Arbitration and its Results, undated but written in the fall of 1910, Anderson Papers, MD/LC.

86 Elder, *Life*, pp. 305 and 306. Contemporary British and American authorities, men with a personal knowledge of events, agreed with Robson: Edwin M. Borchardt, “The North Atlantic Fisheries Arbitration,” *Columbia Law Review*, XI (January, 1911), pp. 1-23; Samuel J. Elder, “The Fisheries Arbitration at The Hague,” *New England Magazine*, XLIII (November-December, 1910), pp. 265-76; an unsigned editorial written by George Young, “The North Atlantic Fisheries Arbitration,” *The Economist*, 10 September 1910; Robert Lansing, “The North Atlantic Fisheries Arbitration,” *American Journal of International Law*, V, pp. 1-31; and H. Erle Richards, “The North Atlantic Coast Fisheries Arbitration,” *Journal of the Society of Comparative Legislation*, XXIII (November, 1910), pp. 18-27. Borchardt was an American expert on international law from the Library of Congress who accompanied the American delegation to The Hague. Lansing was a junior counsel attached to the American group. Richards, of course, was Finlay’s “devil.”

87 See, for example, *Halifax Herald and Morning Chronicle*, 8 September 1910; *Saint John Globe and Standard*, 8 September 1910; *Toronto Mail and Empire*, 9 September 1910; *London Free Press*, 8 September 1910; *Toronto Globe*, 8 September 1910; and *Toronto News*, 7 and 8 September 1910.

88 Canada, House of Commons, *Debates*, 11th Parliament, 3rd Session, 2 December 1910, pp. 664-94.

and the recommendations; or, if they had, Aylesworth had forgotten or failed to understand.

Sir Wilfrid stood behind his Agent rather than his Arbitrator. When Bryce informed him that Fitzpatrick's assurances at The Hague had bound Canada to the recommendations as part of the Award, the Prime Minister countered by saying he had never heard of any such deal and that, even if it had occurred, it was not binding. Fitzpatrick had no authority to act for Canada; only Aylesworth, as Agent, had that power. Furthermore, claimed Laurier, "Fitz" had never said anything to him about assurances<sup>89</sup> — and the Chief Justice never would. Though reconfirming the fact to a worried Chandler P. Anderson,<sup>90</sup> Fitzpatrick ended up by denying everything in Canada. He went to the Governor-General and unabashedly stated that he never "went beyond his duties as one of the Arbitrators, or . . . gave any assurance to the United States Representatives that the recommendations would be accepted."<sup>91</sup>

With or without Fitzpatrick's assurances, it seems doubtful that Laurier would have approved Anderson's efforts to implement the recommendations. While amenable to an agreement which shelved the committee of experts and worked out a compromise on the current Canadian regulations particularly vexatious to Americans, Sir Wilfrid rejected out of hand a draft treaty designed to convert the PMFCs into truly permanent form. Even if Laurier could have carried Aylesworth with him, he dared not confront his opposition in the House with a plan too easily misconstrued as an abridgement of Canadian sovereignty. Fighting already for his political life over the issue of Reciprocity, Laurier would have been foolish to accept the draft; and neither Bryce nor London could change his mind. Not even the threat of the United States to withhold its signature from a new General Arbitration Treaty had any effect upon him. The most Laurier would concede was a vague promise to the Governor-General that, after the forthcoming general election, he would visit Washington and discuss the matter with President Taft.<sup>92</sup> Of course, that was one promise Laurier did not have to keep.

Ironically, Borden's new government, which was helped into power with a good deal of anti-American campaigning, easily came to terms with the United States. Borden had the good sense to mend fences quickly; and, unlike Aylesworth, he understood that the Special Agreement of 1909 had empowered the Hague Tribunal to recommend rules and procedure for

89 Laurier to Lord Grey, 8 August 1911, enclosed in Grey to Bryce, 10 August, USA No. 32, Bryce Papers, BL.

90 Fitzpatrick to Anderson, 30 May 1911, Anderson Papers, MD/LC.

91 Lord Grey to Harcourt, 28 August 1911, vol. 17, Grey of Howick Papers, PAC.

92 Memorandum (dated 26 July 1911) of conversation between Lord Grey and Laurier held on the night of the 25th, vol. 5., *ibid.*

settling future differences.<sup>93</sup> Furthermore, Aylesworth, that unbending and uncomprehending foe of recommendations, no longer sat in the House of Commons. Although he had left a time-bomb behind in his office — a memorandum attacking the envisaged procedure of the PMFCs — it was readily disarmed by diplomacy. A compromise version of Anderson's draft treaty was worked out which satisfied almost everyone in Ottawa, including Laurier.<sup>94</sup> According to its terms, at the end of each fishing season, Canada would give advance notice to the United States of any new regulations proposed for the following season. If the United States had any objections, it had to specify them within forty-five days, and the PMFC would then decide whether the regulation(s) was (were) reasonable and/or applicable to American fishermen; if the United States took no action, new regulations were presumed to be reasonable. By this simple device was it possible for Canada to preserve her sovereignty while permitting the United States to question reasonableness of regulations.

On 12 July 1912, the final treaty was signed — and that was that: the ultimate resolution of the fisheries question.<sup>95</sup> Though cheers might have been expected, neither headlines nor editorials greeted the event in Halifax newspapers. Chandler P. Anderson celebrated the occasion by writing his old comrade, George Turner: "I am sure you'll agree with me that it secures a very substantial advantage for the U.S."<sup>96</sup> What Aylesworth thought, no one knows. More to the point was the balanced judgement rendered by President Taft in his Annual Message on 3 December 1912:

In the negotiations . . . between the two Governments, undertaken for the purpose of giving practical effect to . . . rules and methods . . . [recommended at The Hague] it was found that certain modifications therein were desirable from the point of view of both Governments, and these negotiations have finally resulted in the agreement . . . by which the award recommendations as modified by the mutual consent of the two Governments are finally adopted and made effective, thus bringing the century-old controversy to a final conclusion, which is equally beneficial and satisfactory to both Governments.<sup>97</sup>

It was a sensible statement and, not surprisingly, written for the President by Chandler P. Anderson. From start to finish, the settlement of the fisheries was programmed diplomacy.

93 See Borden to Alfred Mitchell Innes (Councillor at the British Embassy), 10 February 1912, Borden Papers, OC 138, PAC. Mitchell Innes had advised Borden (without Bryce's knowledge?) that The Hague had exceeded its powers when it recommended rules and methods for determining future differences regarding the fisheries. Borden flatly disagreed with him.

94 Bryce to Sir Edward Grey, 15 December 1911, Grey Papers, FO 800/83, PRO.

95 *Treaties and Agreements affecting Canada*, pp. 456-9.

96 3 August 1912, Anderson Papers, MD/LC.

97 *Foreign Relations, 1912* (Washington, 1919), 1912, xviii.