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## Legal and Diplomatic Developments in the Northwest Atlantic Fisheries

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Douglas M. Johnston\*

Legal and Diplomatic  
Developments in the  
Northwest Atlantic  
Fisheries

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### I. *The Old Order*

Within the astonishingly brief timespan of five or six years, a fundamental change has been wrought in the international law of fisheries. Even to those only fleetingly familiar with current developments in the law of the sea, it is apparent that the establishment of 200-mile fishing zones in many parts of the world must signify a major legal change in the world of fishing. Indeed many of us have already become sufficiently accustomed to the new order that it may be useful to remind ourselves of the old order which has now yielded place to it.

The classical approach to the international law of the sea was based upon a *laissez faire* principle favouring maximum freedom of movement, which was consonant with the commercial, political, and military interests of the dominant maritime powers. It was also judged to be equitable to the extent it rested upon the kind of equality that is inherent in the principle of reciprocity. In a much more constricted world community of independent nation states — a system characterized by a relatively high degree of cultural and economic homogeneity — reciprocity did not seem to work a particular hardship on any of the effective claimants within the existing political process of international society.

Moreover, the ocean in classical times was perceived in strictly physical terms. One thought of it as a great, two-dimensional surface area, waiting to be traversed. Quite logically, therefore, the purpose of the international law of the sea was chiefly to facilitate passage, to keep navigation almost wholly unencumbered by international legal constraints. This was done by reference to two complementary *spatial* concepts: that of a narrow zone of closed waters (the territorial sea) over which the coastal state was conceded to exercise sovereignty, subject only to the important right of innocent passage; and that of the open ocean areas (the high seas), in which all vessels equally enjoyed freedom from foreign

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authority. To the extent that any thought was given in classical times to the case for regulating the use of marine resources, it was seen only as a question concerning the right of access, not as a question of management. Outside the narrow limits of the territorial sea, the “freedom of fishing” was held to be an important and necessary consequence of the principle of the freedom of the high seas. The right of free and equal access to high seas fisheries was justified on the basis of a pre-scientific, but then entirely reasonable, belief that the fish in the sea were legion: limitless and inexhaustible.<sup>1</sup>

The untruth of this plausible dogma gradually became apparent early in the 20th century; first in the North Sea, where intensive exploitation of traditional stocks and equally intensive scientific investigation produced an awareness that fisheries, though renewable, were a finite and depleteable resource, in practice as well as theory.<sup>2</sup> Beginning in the 1920s, efforts were made to bring the most heavily fished stocks under international protection through bilateral or multilateral arrangements for conservation.<sup>3</sup>

This was the stage that had been reached in the history of ocean fisheries when the first systematic attempt was made to codify the law of the sea at the First United Nations Conference on the Law of the Sea (UNCLOS I), held at Geneva in 1958. In one of four conventions concluded there, the Convention on the High Seas,<sup>4</sup> the classical view was reaffirmed in Article 2, which identified the “freedom of fishing” as one of four enumerated “freedoms” of the high seas. The only constraint imposed by this article is the classical condition that these freedoms “shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas”.

What may be described as the “neo-classical” influence at UNCLOS I is reflected in another of the Geneva conventions, the

1. On the classical assumption of inexhaustibility of stocks, see Douglas M. Johnston, *The International Law of Fisheries* (New Haven: Yale University Press, 1965) at 321-26

2. *Id.* at 358-65

3. The first international attempt to conserve a marine fishery was the Convention for the Preservation of the Halibut Fishery of the North Pacific Ocean, signed by Canada and the United States in 1923. This was also the first Canadian treaty on any subject to be negotiated and signed independently of the Imperial government. *Id.* at 372-84. For a recent appraisal, see B. E. Skud, *Jurisdictional and Administrative Limitations Affecting Management of the Halibut Fishery* (1977), 4 Ocean Development and Int'l. Law 121

4. 450 U.N.T.S. 11

Convention on Fishing and Conservation of the Living Resources of the High Seas.<sup>5</sup> Intended to be an exercise in “progressive development” rather than “codification”,<sup>6</sup> this convention is now often judged to be a cautious, or even conservative, approach to law reform, but at the time it was generally viewed as a rather imaginative advancement of the cause of conservation and management. For the first time, a duty to adopt fishery conservation measures on the high seas, independently of any special treaty obligations, is affirmed;<sup>7</sup> conservation authorities are urged to aim at the objective of “optimum sustainable yield”;<sup>8</sup> an obligation to negotiate co-operative arrangements in designated circumstances is spelled out;<sup>9</sup> criteria are specified to guide the formulation of conservation measures and to help determine disputes to which they might give rise;<sup>10</sup> and, most important of all, the coastal state is declared to have “a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea,”<sup>11</sup> and in certain circumstances is held entitled to adopt unilateral measures of conservation in such an area.<sup>12</sup>

By and large, then, the “Geneva law” was a mixture of classical and neo-classical approaches to the management and conservation of living resources. The more progressive “special interest” and “unilateral measures” provisions provide a hint of the shape of things to come, twenty years later, but within a normative framework that is chiefly designed to persuade or induce neighbouring and co-user states, which have not already done so, to negotiate the establishment of bilateral or regional commissions for the management of most marine fisheries, which remain under the classical regime of the high seas.

Under the actual conditions of the 1950s this moderate approach was neither unreasonable nor irrational. But, rather rapidly, events in the 1960s began to bring the Geneva law into disrepute. First, a dramatic intensification of fishery technology over the following ten

5. 559 U.N.T.S. 286

6. See U.N. Charter, Article 13; and Article 15 of the Statute of the International Law Commission

7. 559 U.N.T.S. 286, Art. 1(2)

8. *Id.*, Art. 2

9. *Id.*, Arts. 4, 5 and 9

10. *Id.*, Arts. 7 and 10

11. *Id.*, Art. 6

12. *Id.*, Art. 7

years increasingly imperilled the prospects of maintaining the productivity of stocks in traditional fishing areas. In the Canadian Atlantic offshore, where the International Commission for the Northwest Atlantic Fisheries (ICNAF) had been supervising international fishing since 1949, it had become evident that even the most advanced research and regulatory techniques would be of no avail in stopping the decline of the stocks, in the absence of a strong, mandatory, management system.<sup>13</sup> In short, the Geneva approach to fishery management was found to be too *inefficient* as a means of ensuring the continued productivity of the stocks.

Second, the Geneva framework provided insufficient safeguards to protect the “special interest” of the coastal state in stocks adjacent to its territorial sea. Once the special, or privileged, nature of the coastal state’s interest was acknowledged, it became increasingly difficult to argue that it applied only to the maintenance of productivity, and not to the economic benefits of the harvest as well. This objection was particularly cogent in areas where the coastal state’s share in the catch was falling in the face of increasing, and relatively unregulated, foreign fishing. The argument for effective safeguards for coastal interests was virtually irresistible when made by a developing coastal state least able to cope with the threat of foreign competition. In this second perspective, then, the Geneva law was also seen to be *inequitable*, above all to those whose “special interest” it was partly, and inadequately, designed to protect.

## II. *Canadian Maritime Claims and the New Law of the Sea*

Vast extensions of coastal state jurisdiction over fisheries were first claimed in Latin America. As early as the 1950s a number of Latin American states initiated a series of claims for the establishment of zones of sovereignty or exclusive jurisdiction for fishery (and sometimes other) purposes.<sup>14</sup> The present acceptance of 200-mile “economic zones” today owes most of all to these early, and allegedly blatant, “encroachments” upon the freedom of the high seas. But it is important to note that, in the forms presented, these

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13. Johnston, *supra*, note 1 at 365-69. For a more recent appraisal, see Peter Finkle, *The International Commission for the Northwest Atlantic Fisheries: An Experiment in Conservation* (1974), 1 Dalhousie L.J. 526

14. See, for example, K. Hjertonsson, *The New Law of the Sea: Influence of the Latin American States on Recent Developments of the Law of the Sea* (Leyden: Sijthoff, 1973) at 19-79

Latin American claims were not generally regarded as acceptable by the rest of the international community.<sup>15</sup> It is only in the 1960s, after the failure of UNCLOS II, that the mood of the legal community changed significantly. In my view, this change had possibly less to do with the “rightness” of these sweeping claims than with the pragmatic and moderate approach successfully adopted by coastal states in the Northern hemisphere. The importance of their success was enhanced by the fact that it was also in these regions that the resistance to change by distant fishing states was most implacable.

Similarly, it was not so much the belligerent, confrontationist “cod war” strategy of Iceland as the quieter and more sophisticated diplomacy of countries like Canada and Norway that played the largest part in turning the Northern hemisphere around on the critical issues of fisheries jurisdiction. Iceland’s case could be, and by many sympathetic observers was, accepted as *sui generis*, because of the unique dependence of its national economy upon fishery products and the stocks from which they were supplied. Even though it failed to have this case accepted in law at UNCLOS I and II,<sup>16</sup> Iceland was “compensated” in some degree by a relatively permissive public attitude in most countries to its position in the “cod wars” when it embarked upon a series of unilateral claims directed chiefly against the trawler fleets of the United Kingdom, and to a lesser extent the Federal Republic of Germany. Despite its legal failures,<sup>17</sup> Iceland won its political struggle against the U.K., but the final outcome will depend on its diplomatic finesse in dealing with the formidable EEC bureaucracy in Brussels.<sup>18</sup> Because of its unique case in a unique regional situation, it is difficult to claim that the Icelandic experience had a major influence on legal development elsewhere.

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15. *Id.* at 117-75

16. Johnston, *supra*, note 1 at 282-88

17. Iceland’s failures at UNCLOS I and II to acquire unique legal treatment of its “special situation” was followed, several years later, by the refusal of the International Court of Justice to give sympathetic consideration to its legal action against British trawlers. On the circumstances of the Court’s Interim Order of August 17, 1972, *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, [1972] I.C.J. 12, see Richard B. Bilder, *The Anglo-Icelandic Fisheries Dispute*, [1973] Wisc. L. Rev. 37. See also S. R. Katz, *Issues arising in the Icelandic Fisheries Case* (1973), 22 I.C.L.Q. 83

18. See Robert Boardman, “Ocean Politics in Western Europe”, in D. M. Johnston, ed., *Marine Policy and the Coastal Community* (1976), (London: Croom Helm, 1976) at 183; and *Coming up for Oil* (1977), 32 *Int’l J.* 232

In retrospect, it seems more accurate to say that the first critical break-through to the new law of fisheries was the acceptance of the concept of “phasing out” foreign trawler fleets from designated areas adjacent to the territorial sea of a coastal state, in circumstances where the latter could demonstrate an entitlement to an exclusive or privileged share of the catch in such areas.<sup>19</sup> This “pragmatic” approach was regarded as “reasonable”, because it was the stuff of compromise diplomacy and provided a period before withdrawal for the distant fishing state to reinvest its activities elsewhere without serious dislocation in the industry. This is not to say, however, that this approach was entirely “rational”: it made no distinction between area and stock, and could hardly be represented as a major step toward the scientific management of the fishery in question. But the legal importance of the “phasing out” formula cannot be denied, for it reflected the willingness of non-coastal states to go beyond the Geneva law in negotiations and accept a concept of “special interest” that entitled the coastal state to an exclusive or privileged share of the harvest in areas outside narrow limits of the territorial sea.

From this “phasing out” development it could be inferred that it now lay in the interest of the coastal fishing states to establish exclusive fishing zones, unilaterally if necessary, in the hope of having most or all of these designated areas subsequently accepted as areas from which the distant fishing states were under a new or evolving legal obligation to phase out their trawler activity, unless there were very special historical reasons for exemption. This clearly was the inference drawn by the Canadian government when it came to design a new, expansionist strategy for its fisheries in the early 1960s.<sup>20</sup> In 1963 it decided that the protection of increasingly depleted offshore resources necessitated the establishment of a fishing zone without waiting for a global consensus. To this effect

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19. The concept of “phasing out” seems to have first surfaced publicly at UNCLOS II in 1960. See Johnston, *supra*, note 1 at 240-46. After the failure to reach accord there on the question of fishing limits, the phasing out technique quickly became acceptable in bilateral negotiations. *Id.* at 185-87

20. See, generally, L.H.J. Legault, “Maritime Claims”, in R. Macdonald, G. Morris and D. Johnston, eds., *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974) at 377-97. On the policy considerations behind these claims, see Allan Gotlieb and Charles Dalfen, *National Jurisdiction and International Responsibility: New Canadian Approaches to International Law* (1973), 67 A.J.I.L. 229; and the comments of J. Alan Beesley in the *Proceedings of the First Annual Conference of the Canadian Council on International Law* (held in October, 1972), at 92 ff.

in the following year it introduced the *Territorial Sea and Fishing Zones Act*.<sup>21</sup>

This 1964 statute not only made the straight baseline system of delineating the base of the (still three-mile) territorial sea applicable to the Canadian coasts — thereby creating an extended area of exclusive fishing and other rights — but also established a further nine-mile exclusive fishing zone contiguous to the territorial sea. The fishing vessels of the United States, France, Britain, Portugal, Spain, Italy, Norway and Denmark were allowed to continue to fish in this contiguous zone on the east coast, pending the conclusion of negotiations already under way with each of these countries.

It was made clear that France and the U.S., the only two countries having treaty rights to fish in Canadian waters, would be allowed to continue their activities in the areas concerned, subject to agreed arrangements and conservation regulations, but that the traditional fishing practices of the other countries named in the order in council would be subject to phasing-out arrangements.<sup>22</sup>

The propriety of such a zone had, of course, already been supported in principle by a majority of delegations at UNCLOS II in 1960, so that this Canadian legislation in 1964 was not regarded as unduly provocative.

In 1967 and 1969 the Governor-in-Council issued lists of geographical co-ordinates of points for the establishment of straight baselines on portions of the Atlantic (as well as the Pacific) coast, including areas off Labrador, Newfoundland and Nova Scotia, but not yet the Bay of Fundy or the Gulf of St. Lawrence, whose legal status was still at issue with the United States.<sup>23</sup> These two gaps were, however, filled shortly afterwards with the introduction of the 1970 amendment of the 1964 *Territorial Sea and Fishing Zones Act*,<sup>24</sup> which authorized the drawing of “fisheries closing lines” across bodies of water not enclosed by territorial sea straight baselines under the 1967 and 1969 orders-in-council. These bodies included, therefore, the disputed Bay of Fundy and Gulf of St. Lawrence. In line with growing international practice, the same statutory amendment also extended Canada’s territorial sea from three to 12 miles, which of course had the effect of eliminating the

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21. S.C. 1964-65, c.22

22. Legault, *supra*, note 20 at 383

23. S.O.R./67-543 and S.O.R./69-278

24. S.C. 1969-70, c.68



9-mile contiguous fishing zone created in 1964.

Canada was now moving from a cautiously progressive to an openly radical strategy, but the government felt it would be too bold, and indeed counterproductive, to leave these legal claims exposed to the international process of dispute settlement at a time when the law of the sea was undergoing a historic transformation but adjudicators were still likely to apply the norms of the old order. Unheroically, but perhaps shrewdly,<sup>25</sup> it issued a declaration which attached a new reservation to Canada's acceptance of the compulsory jurisdiction of the International Court of Justice, excluding from it "disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea . . .".<sup>26</sup> The United States objected to the establishment of "fisheries closing lines" in designated waters such as the Bay of Fundy and the Gulf of St. Lawrence.<sup>27</sup> At the same time Canada emphasized that its new "functional" legislation could not be construed as an abandonment of its claims to sovereignty over special bodies of water such as the Gulf of St. Lawrence.<sup>28</sup>

This new legislation had the effect of transcending the bilateral negotiations which had been begun (but not completed) with eight countries as a result of the 1964 statute. These negotiations took on a more exclusionary purpose in 1970 and resulted in a different pattern: one type of phasing-out arrangement was concluded with Norway, Denmark, Portugal, and the U.K. with respect to the Gulf of St. Lawrence and the outer nine miles of the territorial sea off the east coast;<sup>29</sup> different *ad hoc* agreements, each with special provisions of its own, were signed with France, Spain, and the U.S.,<sup>30</sup> and Italy dropped out of negotiations due to its discontinuance of all fishing activities in the region.

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25. The conservative approach of the International Court of Justice toward the interpretation of "preferential fishing rights" in the *Fisheries Jurisdiction Case* of 1973 could be regarded as a vindication of Canada's reluctance to entrust the test of its maritime claims to the judicial process pending the outcome of UNCLOS III.

26. (1970-71), 25 I.C.J. Yearbook 49

27. For U.S. note of protest, see (1971), 9 Can. Y.B. of Int'l Law 287-89

28. Legault, *supra*, note 20 at 385

29. These agreements, the first (with Norway) signed on July 15, 1971, the others on March 27, 1972, were straightforward arrangements for the phasing out of foreign fishing in the designated waters by a given deadline. The agreement with Norway was accompanied by a separate agreement on sealing.

30. Also signed on March 27, 1972, the Canadian-French agreement provided for the termination of fishing activities by metropolitan French trawlers in these same

Meanwhile, as these phasing-out arrangements were being negotiated, Canada and the United States were applying considerable pressure on ICNAF to innovate radically in order to halt the serious decline in stocks. The adoption of mesh regulations, closed seasons, closed areas and other traditional forms of regulation had failed to prevent depletion or facilitate rehabilitation of stocks. Moreover, the use of total quotas, providing for uniform constraints on all, but permitting each to operate as intensively as it wished in free competition for the stocks within these limits, had had disastrous consequences for the less competitive fleets of the two coastal states. Accordingly, in January 1972 the ICNAF convention was amended to permit the employment of *national* quotas for each species within each area of convention waters as a means of attempting fishery management in the region, in the hope that this system would prove to be both more effective and more equitable.<sup>31</sup> The general formula that was accepted as the basis for distribution of national quotas was “40-40-10-10”, whereby the neighbouring coastal state over and above its normal share was entitled to a special ten per cent “preferential” share.<sup>32</sup>

By the time of these fishery management developments in ICNAF Canada had become deeply involved in the UN Seabed Committee, which despite its name had actually become the official

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areas but allowed continued fishing by a limited number of St. Pierre and Miquelon vessels subject to reciprocal treatment for Canadian vessels in the waters off the coast of the French islands. This same agreement also fixed the territorial sea dividing line between Newfoundland and St. Pierre and Miquelon but not the continental shelf boundary south of the French islands.

The Canadian-Spanish agreement took the longest to negotiate, and though similar to those other phasing out agreements contains a number of special provisions. Legault, *supra*, note 20 at 387

Signed on April 24, 1970, before the new legislation had been enacted, the Canadian-U.S. agreement allowed the fishermen of both countries to continue fishing as before up to three-mile limits, on the basis of reciprocity. Recently renewed for another year, this exemption-granting agreement represents the point of departure, as it were, in current discussions between the two governments concerning fishery cooperation under the new 200-mile limits of the U.S. and Canada.

31. Francis T. Christy, Jr., *Northwest Atlantic Fisheries Arrangements: A Test of the Species Approach* (1973), 1 *Ocean Development and Int'l. L.* 65

32. *Id.* at 70. For an accurate prediction that coastal preferential rights would soon be converted into exclusive rights under extended coastal state jurisdiction, see Austen Laing, “The Case for a North Atlantic Preferential Fishing System” in G. Pontecorvo, ed., *Fishery Conflicts in the North Atlantic: Problems of Jurisdiction and Enforcement* (Cambridge: Ballinger Publishing Co., 1974) at 95-104

preparatory exercise designed to culminate in a comprehensive law-making conference: the Third United Nations Conference on the Law of the Sea (UNCLOS III). In the early stages of its involvement in the Seabed Committee discussions, Canada, like the United States, had adopted a "functional" approach to issues of fishery management jurisdiction. This took the form of a proposal for a differentiated, species-by-species approach which envisaged different types of regimes depending on the category into which the species fell and allowed considerable scope for regional regulatory bodies such as ICNAF.<sup>33</sup> By the end of the Seabed Committee deliberations and the beginning of UNCLOS III proper, however, in the spring of 1974, this approach had been modified in favour of a policy of outright support for the semi-sovereign, semi-functional concept of the "economic zone" advanced by a growing number of third world delegations.<sup>34</sup> This new position was influenced chiefly by the complex dynamics of the Conference which virtually forced Canada to close ranks with other delegations whose support was needed on crucial issues. Put simply, Canada could not afford to be behindhand in the economic zone "movement", since it promised not only to secure global legitimation of Canada's fishery enactments but also to obtain significant additional safeguards and benefits in the interest of coastal states such as Canada. Moreover, the third world was almost unanimous in regarding the original, species-by-species approach to fishery management as overly

33. This proposal, contained in a working paper tabled by the Canadian delegation to the U.N. Seabed Committee on July 27, 1972, was based on what was seen as a "functional" approach to the management of living resources of the sea. For a summary see (1972), 11 Can. Y.B. Int'l Law 287-88

34. The transition was clearly in evidence by November 30, 1972, when the following statement was made by the Canadian Representative on the First Committee of the U.N. General Assembly:

To put it simply, Mr. Chairman, we consider that the concept of 'economic zone' is the keystone to any overall accommodation on the Law of the Sea. Differences of views may exist concerning the precise nature and extent but there can be no solution which is not based on the 'economic zone' approach . . . . Undoubtedly such an economic zone would have to include jurisdiction over the living resources of the sea, which, if not exclusive, would at least include coastal state preferential rights, plus pollution control jurisdiction and sovereign rights over the resources of the seabed of the economic zone . . . .  
(*Id.* at 286-87)

On the character of the economic zone concept, see D. M. Johnston and E. Gold, *The Economic Zone in the Law of the Sea: Survey Analysis and Appraisal of Current Trends*, Occasional Paper No. 17, Law of the Sea Institute, University of Rhode Island (1973).

complicated, and in any event the overfishing problem in the Northwest Atlantic had become more serious than ever, casting fresh doubt on the effectiveness of ICNAF. Certainly the concept of an exclusive fishing zone out to 200 miles or further was exceedingly popular in the coastal communities of Atlantic Canada, especially in the fishing industry but also with the public at large. In short, the prospect of a 200-mile economic zone proved to be politically irresistible.

At the time of writing, the latest version of the working draft before UNCLOS III is a document entitled the Informal Composite Negotiating Text.<sup>35</sup> Although this draft is non-binding, with controversial passages that may have to be altered and some inconsistencies that need to be removed, it does contain the main features of the new law of the sea as far as most fishery issues are concerned. Within the proposed exclusive economic zone, the coastal state would have *inter alia* “[s]overeign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the bed and subsoil and the superjacent waters . . .”<sup>36</sup> Moreover, the coastal state would be authorized to determine both the allowable catch of the living resources in its zone,<sup>37</sup> and its own capacity to harvest these resources.<sup>38</sup> Where the coastal state does not, by its own admission, have the capacity to harvest the entire allowable catch, as determined by itself, then it would be obligated to give other states access to the “surplus”.<sup>39</sup>

On the face of things, then, under this version of the draft treaty, the coastal state would have virtually an unqualified discretionary authority over rights and conditions of access to the fishery stocks in its zone. Moreover, the conservation constraints suggested in the text are vague and, arguably, contradictory. On the one hand, the coastal state would be required within the zone to promote the objective of “*optimum utilization*” [emphasis added],<sup>40</sup> but without prejudice, on the other hand, to its obligation to take “proper

35. U.N. Doc. A/CONF. 62/WP10 (15 July, 1977). (hereafter referred to as “I.C.N.T.”) This document, prepared by the Secretary-General of the Conference in consultation with the chairmen of the three main committees and the drafting committee, consists of 303 draft articles and seven annexes.

36. *Id.* Draft article 56(1) (a)

37. *Id.* Draft article 61(1)

38. *Id.* Draft article 62(2)

39. *Id.*

40. *Id.* Draft article 62(1)

conservation measures and management measures” to ensure that “the maintenance of the living resources . . . is not endangered by over-exploitation.”<sup>41</sup> Such measures, it is suggested in the same text, should be “designed to maintain or restore populations of harvested species at levels which can produce the *maximum sustainable yield* [emphasis added], as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing countries, and taking into account fishing patterns, the interdependence of stocks and any generally recommended subregional, regional or global minimum standards.”<sup>42</sup>

### III. *The Golden Age of Fishery Diplomacy*

Although still unfinished, Canadian fishery diplomacy of the 1970s (and early 1980s?) is likely to be looked upon as one of the most brilliant periods in Canadian diplomatic history. In many respects it is even more impressive than Canada’s contributions to peacekeeping diplomacy in the 1950s and early 1960s.

As it became increasingly apparent that the economic zone concept had become the dominant motif of UNCLOS III, bilateral fishery diplomacy in the Northwest Atlantic assumed a wholly new purpose for Canada and the United States alike. Each of the major non-coastal fishing states would now have to be persuaded of the inevitability of this new regime of extended maritime jurisdiction by the coastal state, including exclusive jurisdiction over fishery management. Under this regime the managing state would have sole authority to prescribe the total allowable catch for each species within the zone and virtually complete discretion in determining its own harvesting capability. Whatever surplus might exist after allowance for the coastal state would then become available to non-coastal states. Accordingly, it lay in the interest of such states to anticipate the establishment of such a zone in the Northwest Atlantic, to acknowledge the legality of the coastal state’s claim to such a zone, and to negotiate now, before the end of UNCLOS III, for rights of access and a share of the expected surpluses. Once one non-coastal state was induced to enter into such negotiations, its competitors would be likely to follow.

41. *Id.* Draft article 61(2)

42. *Id.* Draft article 61(3). Whether these objectives are mutually irreconcilable seems to depend on the interpretation given to the phrase “*can produce*” — not “*will produce*” — in the last cited provision.

A comparison of the various alternatives showed the Ottawa fishery strategists that Norway would be the ideal partner to initiate this new round of “surplus sharing” agreements. First, Norway was unlikely to resist such an approach because it no longer had a substantial commercial involvement in the Northwest Atlantic fisheries and Canada had none at all in the North Sea — the ideal situation for a reciprocal agreement, where neither party stood to lose much! On the other hand, both had much to gain from such an arrangement, designed as it was to create a bandwagon effect. Norway had much the same kind of interest in reducing foreign fishing in the offshore as Canada had, and this shared interest was directed mostly at the same fishing states of Northern Europe: the Soviet Union, the United Kingdom, the Netherlands, France, Denmark, West Germany, East Germany, and Poland; and, potentially, perhaps also at the even more distant fishing states of Japan, South Korea, and Taiwan. Moreover, after a year or two of careful re-calculation early in the Seabed Committee, Norway had come around to occupy positions on most major issues at UNCLOS III that were nearly identical to Canada’s. If any alliance was made in heaven, it was this one!

Accordingly, this marriage of natural allies was celebrated in December 1975,<sup>43</sup> and by the spring of the following year the Canadian-Norwegian prototype had been followed, with relatively minor variations, in bilateral agreements with four other major

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43. The Norwegian agreement has become the prototype for the others despite the introduction of minor variations. The crucial provision of the Norwegian model is Article II:

1. The Government of Canada undertakes, upon the extension of the area under Canadian fisheries jurisdiction, to permit Norwegian vessels to fish within this area, beyond the present limits of the Canadian territorial sea and fishing zones off the Atlantic coast, for allotments, as appropriate, of parts of total allowable catches surplus to Canadian harvesting capability, in accordance with the provisions of paragraphs 2 and 3 of this Article.
2. In the exercise of its sovereign rights in respect of living resources in the area referred to in paragraph 1, the Government of Canada shall determine annually, subject to adjustment when necessary to meet unforeseen circumstances:
  - (a) the total allowable catch for individual stocks or complexes of stocks, taking into account the interdependence of stocks, internally accepted criteria, and all other relevant factors;
  - (b) the Canadian harvesting capacity in respect of such stocks; and
  - (c) after appropriate consultations, allotments, as appropriate, for Norwegian vessels of parts of surpluses of stocks or complexes of stocks.

fishing states seeking guaranteed access to surplus stocks within 200 miles of the Canadian Atlantic shoreline: Poland, Spain, Portugal, and the Soviet Union. These five countries together accounted for 88% of the catch taken within 200 miles of the Canadian Atlantic coast by foreign fishermen other than those of the United States. Thus, by virtue of five shrewdly selected and successfully conducted series of bilateral negotiations, Canadian officials had secured a buffer against any adverse shocks that might be felt abroad in the wake of further unilateral action in promulgating a 200-mile exclusive fishing zone.

Canada's intention to take such action had been indicated privately, and hinted at publicly, long before the conclusion of these five "surplus sharing" agreements. The art of negotiation in these circumstances required a nice sense of timing and the striking of a delicate balance between firmness and tact. The success of Canadian diplomacy became fully apparent shortly after the conclusion of the Canadian-Soviet agreement and just days before the opening of an important meeting of ICNAF at Montreal. On June 4 the Minister of External Affairs (Mr. Allan J. MacEachen) rose in the House of Commons to make the long-awaited announcement of the government's intention to promulgate a 200-mile fishing zone on January 1, 1977.<sup>44</sup> His contention that the decision had been taken "at about just the right time"<sup>45</sup> seemed to be borne out by subsequent events. Spain and Portugal duly signed the remaining "surplus sharing" agreements without overt displeasure and, contrary to some fearful predictions, the other members of ICNAF received the news with resignation, if not total equanimity. The gamble had paid off.

But even more difficult challenges to Canadian fishery diplomacy had still to be met.

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3. To fish for allotments pursuant to the provisions of paragraphs 1 and 2, Norwegian vessels shall obtain licences from the competent authorities of the Government of Canada. They shall comply with the conservation measures and other terms and conditions established by the Government of Canada and shall be subject to the laws and regulations of Canada in respect of fisheries.

4. The Government of Norway undertakes to cooperate with the Government of Canada, as appropriate in light of the development of fisheries relations between the two countries pursuant to the provisions of this Article, in scientific research for purposes of conservation and management of the living resources of the area under Canadian fisheries jurisdiction off the Atlantic coast.

44. *Halifax Mail-Star*, June 5, 1977, at 21

45. *Id.*

- (a) Within ICNAF it was necessary to produce agreement on the question of its future role, or that of a successor organization, both outside the impending Canadian 200-mile limits and to a lesser degree within these limits.
- (b) To bolster the Canadian position in ICNAF (and enhance the prospect of further unilateral action, if necessary), it was desirable, wherever possible, to secure acceptance in bilateral negotiations of Canada's right to exercise special management authority, and to a privileged share of the catch, in areas beyond the impending 200-mile limits.
- (c) It was essential, sooner or later, to reach an accommodation on boundary and related fishery issues with the United States (in the Gulf of Maine) and France (with respect to the areas surrounding St. Pierre and Miquelon).

Although some progress has been made on all three fronts, these diplomatic exercises are still incomplete at the time of writing and are likely to continue for some time. Accordingly, it is easier to treat these events as unresolved issues.

Before doing so, however, it is important to note the recent emergence of an important, complicating factor: the establishment of the EEC as a major, independent, negotiating force to be contended with in the Northwest Atlantic fisheries. Due to the combined effect of the logic of Community development and the virtuosity of its bureaucracy in Brussels — surely the most competent bureaucracy in the world — the EEC has already produced a considerable impact on fishery and related conference diplomacy at UNCLOS III, over and above that of the member states. Both at UNCLOS III and in regional forums such as ICNAF, the EEC is rapidly moving toward the stage of being accepted as a full participant in its own right, within the treaty-making process.<sup>46</sup> The question of its “role” is important both in legal theory and diplomatic practice, and theorist and practitioner alike will watch its evolution in the years ahead with fascination.

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46. Paul D. Reynolds, *The EEC and the Law of the Sea* (1977), 1 Marine Policy 118. The emergence of the EEC as a separate force in international fishery diplomacy was indicated with special clarity in a Council resolution on “external aspects of the creation of a 200-mile fishing zone”, which came into effect on January 1, 1977, the same day that Canada's zone came into force. This resolution, which was approved by the Council of the EEC by written procedure on November 3, 1976, reads as follows:

With reference to its declaration of 27 July 1976 on the creation of a 200-mile fishing zone in the Community, the Council considers that the present circumstances, and particularly the unilateral steps taken or about to be taken by



#### IV. *The Unresolved Issues*

There are, of course, many unresolved legal issues affecting the Northwest Atlantic that are unrelated, or only distantly related, to fishery questions. Many of these issues can only be resolved at UNCLOS III; or in general customary international law, over a longer period of evolution. For example, what exclusive or special rights, if any, will Canada be conceded to have to the resources of the continental shelf *beyond* 200 mile limits of national jurisdiction?<sup>47</sup> What will be the *precise* legal status of the economic

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certain third countries, warrant immediate action by the Community to protect its legitimate interests in the maritime regions most threatened by the consequences of these steps to extend fishing zones, and that the measures to be adopted to this end should be based on the guidelines which are emerging within the Third United Nations Conference on the Law of the Sea.

It agrees that, as from 1 January 1977, member states shall, by means of concerted action, extend the limits of their fishing zones to 200 miles off their North Sea and North Atlantic coasts, without prejudice to similar action being taken for the other fishing zones within their jurisdiction such as the Mediterranean.

It also agrees that, as from the same date, the exploitation of fishery resources in these zones by fishing vessels of third countries shall be governed by agreements between the Community and the third countries concerned.

It agrees, furthermore, on the need to ensure, by means of any appropriate Community agreements, that Community fishermen obtain fishing rights in the waters of third countries and that the existing rights are retained.

To this end, irrespective of the common action to be taken in the appropriate international bodies, it instructs the Commission to start negotiations forthwith with the third countries concerned in accordance with the Council's directives. These negotiations will be conducted with a view to concluding, in an initial phase, outline agreements regarding the general conditions to be applied in future for access to resources, both those situated in the fishing zones of these third countries and those in the fishing zones of the member states of the Community.

(1976), 15 Int'l Legal Materials 1425

The EEC has taken the position that, without a special clause enabling it to become a party to the UNCLOS III convention, neither the Community *nor its member states* could become bound by it. It is to be noted, however, that no clause to this effect has appeared so far in any version of the proposed draft articles.

47. The latest text at UNCLOS III suggests that the regime of the continental shelf should, wherever geography or geology permits, extend beyond 200-mile limits "throughout the natural prolongation of its land territory to the outer edge of the continental margin". I.C.N.T., *supra*, note 35 article 76. But draft article 82, on the other hand, suggests that the coastal state in these circumstances should be required to make payments from the revenues obtained from these shelf areas through the proposed International Seabed Authority, which would otherwise have authority over the seabed beyond limits of national jurisdiction. These proceeds would be redistributed by the Authority "on the basis of equitable sharing criteria,

zone: a special subset of the regime of the high seas, a virtual extension of the territorial sea for designated purposes, or a *sui generis* intermediate regime?<sup>48</sup> How much, if any, of the old “Geneva law” will be deemed to have “survived” intact in the event of a successful conclusion to UNCLOS III?<sup>49</sup> To what extent will these and other basic questions in the new law of the sea depend, in turn, on the answers to difficult technical questions about an UNCLOS III convention arising in the law of treaties?<sup>50</sup> In this essay, however, speculation must be confined to the chief issues directly related to the fisheries of the Northwest Atlantic.

The establishment of the *principle* of a 200-mile economic zone at UNCLOS III both transcends some old fishery issues and creates some new ones. For example, it seems likely, on the one hand, to reduce the importance of the question of the legal status of the Bay of Fundy and the Gulf of St. Lawrence as exclusive fishing zones;<sup>51</sup> but it creates new problems, on the other hand, concerning boundary delimitation in the Gulf of Maine and jurisdiction over the “tail” of the Grand Banks, which lies beyond the 200-mile limits of Canada’s newly established fishing zone.<sup>52</sup> Let us look at the unresolved issues as problems of diplomacy in the order outlined above.

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taking into account the interests and needs of developing countries, particularly the least developed and the land-locked amongst them”.

48. It seems likely that the zone will be treated as *sui generis*, falling outside the regimes of the high seas and the territorial sea. See I.C.N.T., draft article 55. But this issue is still highly controversial.

49. Evidently most of all four Geneva conventions would be superseded by an UNCLOS III convention, but it seems likely that some holes will remain in the new text and in an effort to fill these holes it is possible that a tribunal might feel free to use the relevant provisions of the old texts for this purpose, to the extent they are not inconsistent with the new convention.

50. See, for example, Douglas M. Johnston, “Some Treaty Law Aspects of a Future International Fishing Convention”, in H. Gary Knight, ed., *The Future of International Fisheries Management* (St. Paul: West Publishing Co., 1975), at 103-58

51. The question is not entirely irrelevant, since under the new law of the sea parts of these bodies of water might either belong to the regime of *internal waters*, as Canada claims, or to the new regime of the economic zone, as would be argued by states that might contest Canada’s right to draw baselines across the openings to these areas. The difference might be important, for example, if a foreign state were contesting Canada’s right to take certain kinds of shipping control measures for environmental purposes. More specifically, there is the question whether foreign states, independently of a special agreement, have a legal right to harvest “surplus stocks” (of no commercial interest to Canada) in these waters.

52. About one-quarter of the Grand Banks lies beyond 200-mile limits.

The question of ICNAF's future is still open, but the present series of meetings and proposals seems likely to result in a radical overhaul of the existing organization, and possibly in the establishment of a successor body (the "Northwest Atlantic Fisheries Cooperation Organization" or "NAFCO") which could be in force by 1979. The prospects of such a development will be clarified at an important diplomatic conference to be held in Ottawa in October 1977. Further in the future, it is conceivable that the North European members of "NAFCO", the "son of ICNAF", might suggest a marriage with the "daughter of NEAFC" (the North-East Atlantic Fisheries Commission), which has similar jurisdiction over the eastern half of the North Atlantic.<sup>53</sup> Meanwhile, proposals are being considered for the revision of the NEAFC convention and the reorganization of its scientific arm, ICES (International Council for the Exploration of the Sea).<sup>54</sup>

The chief purpose of Canada's diplomacy within ICNAF would seem to be to retain the valuable services performed by the organization, such as statistical information and analysis, and other benefits of membership, such as exchanges of scientific data, without accepting the need for a mechanism which could obstruct the coastal state's management of the 200-mile zone. In pursuing this objective Canada has been able to be much more flexible than the United States, the neighbouring coastal state in the Northwest Atlantic region. On March 1, 1977, the U.S. brought into force its own 200-mile fishing zone legislation, two months after the Canadian counterpart came into effect. Unlike the Canadian enactment, a simple order-in-council which merely moves the existing fisheries closing lines much further out to sea,<sup>55</sup> the U.S. legislation took the form of a major new statute, the Fishery Conservation and Management Act of 1976.<sup>56</sup>

Already generally conceded to be the most important fishery legislation ever enacted in the United States, this statute not only

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53. Albert W. Koers, *International Regulation of Marine Fisheries: A Study of Regional Fisheries Organizations* (London: Fishing News (Books) Ltd., 1973), at 90-92

54. *Id.* at 77-79

55. See *Fishing Zones of Canada (Zones 4 and 5) Order*, SOR/77-62, January 1, 1977; and *Foreign Vessel Fishing Regulations*, SOR/77-50, December 29, 1976. The official statement to the House of Commons regarding the new zones was made by the Secretary of State for External Affairs (Mr. Don Jamieson) on November 19, 1976.

56. Publ. L. 94-265, 16 U.S.C. 1801 *et seq.*

extends the national fishery limits 200 miles out, but also provides an elaborate set of mechanisms and guidelines for the management of marine fisheries. It covers all fish within 200 mile limits, and also all anadromous and sedentary species beyond the conservation zone.<sup>57</sup> U.S. coastal areas are divided into eight regions, and the fisheries of each region are brought under the control of a regional council composed of federal and state officials as well as knowledgeable members of the public.<sup>58</sup> In the context of ICNAF issues, the most important feature of this statute is its provision for negotiation of new fishery agreements with foreign countries operating within 200 miles of the U.S. shore. In accordance with this legislation, the United States has now given notice of its withdrawal from the International North Pacific Fisheries Commission and the International Pacific Halibut Commission, and actually withdrawn from ICNAF.

57. In addition to the category of all fish within the 200-mile zone, the statute extends national management authority to the two other categories:

(2) All anadromous species throughout the migratory range of each such species beyond the fishery conservation zone; except that such management authority shall not extend to such species during the time they are found within any foreign nation's territorial sea or fishery conservation zone (or the equivalent), to the extent that such area or zone is recognized by the United States.

(3) All Continental Shelf fishery resources [which are designated elsewhere in the statute] beyond the fishery conservation zone.

(16 U.S.C. s. 1812(2))

The right of foreign fishing for any of these three categories is recognized *only* if all three of the following conditions are satisfied:

(1) such fishing is authorized under "existing international fishery agreements" or under "governing international fishery agreements" which become effective after application of the statute and "acknowledge the exclusive fishery management authority of the United States, as set forth in this Act".

(2) the foreign nation satisfies the condition of reciprocity (*i.e.* "extends substantially the same fishing privileges to fishing vessels of the United States, if any, as the United States extends to foreign fishing vessels"); and

(3) the foreign fishing is "conducted under and in accordance with a valid and applicable permit issued pursuant to section 204".

58. The Regional Fishery Management Councils are authorized, under section 2(b)(5), to:

prepare, monitor and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which will take into account the social and economic needs of the States. (Pub. L. 94-265, s. (2) (b)(5))

Technically, it is questionable whether the Act does legally require the U.S. government to withdraw from these regional fishery commissions. In the provision in section 202 (b) entitled "Treaty Renegotiations", it is provided that:

The Secretary of State, in co-operation with the Secretary [of Commerce or his designee], shall initiate, promptly after the date of enactment of this Act, the renegotiation of any treaty which pertains to fishing within the fishery conservation zone . . . or for anadromous species or Continental Shelf fishery resources beyond such zone . . . , *and which is in any manner inconsistent with the purposes, policy or provisions of this Act*, in order to conform such treaty to such purposes, policy and provisions. It is the sense of Congress that the United States shall withdraw from any such treaty, in accordance with its provisions, *if such treaty is not so renegotiated within a reasonable period of time after such date of enactment.* [emphasis added].

It is not clear in what sense these three international agreements (those constituting INPFC, IPHC, and ICNAF) are "inconsistent with the purposes, policy or provisions" of the U.S. legislation,<sup>59</sup> except that all international commissions by their nature are bound to be inconsistent with any new system of national management covering the same waters. Moreover, it is impossible to show that the withdrawal notices were delayed until such "reasonable period" had expired. One senses that the withdrawals are occasioned by considerations of national policy rather than by a legal requirement under the new legislation. In truth, it seems that the diplomatic inflexibility of the United States toward ICNAF can be traced directly to political pressure by the New England fishing industry on the U.S. federal government.

The most difficult legal issue facing ICNAF is what kind of special rights and responsibilities the coastal state should be conceded to have with respect to fishery stocks in areas adjacent to its 200-mile fishery conservation zone. In the Northwest Atlantic few fishing states are prepared to deny outright the validity of a claim to such a zone as Canada's, though some are still reluctant to accept it as a legitimate precursor to the emerging concept of an economic zone, as defined in various drafts at UNCLOS III.<sup>60</sup> But

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59. Pub. L. 94-265, s. 2(c) (4)

60. Even the latest text is simply "work in progress" and has absolutely no legally binding effect on the delegations at UNCLOS III. Moreover, it is still difficult to show that the 200-mile economic zone, as such, has become established in *customary* international law. A general state practice is not yet reflected in an

as soon as one accepts the legitimacy of exclusive coastal state jurisdiction over all fishery conservation and management within 200 mile limits, it becomes difficult to reject out of hand the functional logic of a claim to some kind of special coastal authority over stocks immediately beyond these arbitrary limits. The coastal state's argument can be reinforced by reference to the old Geneva principle of the coastal state "special-interest" in the maintenance of the productivity of the living resources in high seas areas adjacent to the territorial sea, extended now to areas adjacent to the economic zone or a 200 mile fishery conservation zone.<sup>61</sup> Presumably, however, the force of the argument depends chiefly upon (a) the location of the stocks and (b) the category to which the species belongs.

As to location, it should be noted that in the ICNAF convention waters beyond Canada's new 200 mile limits there are eight different stocks of major commercial importance: five of these "straddle" the 200 mile line, and the remaining three are totally "discrete" outside. In the case of the "straddlers" it seems obvious that conservation rights and responsibilities outside should be consistent with those inside. In the case of "discrete" stocks wholly on the outside it might be suggested, on the other hand, that management authority should remain vested in the regional commission, subject to continuing obligation to consult with the management authorities of the coastal state. In this situation it is difficult to envisage an effective and harmonious relationship between the management authorities on both sides of the line without a mutually accepted arrangement for joint enforcement.

The question of how to share authority depends also on the *type* of species in question. As we have seen, the Fishery Conservation and Management Act purports to extend U.S national management authority *outside* 200 mile limits both to anadromous species and continental shelf resources, as defined in the statute. The latter claim is essentially a re-assertion of rights already exercised under the 1958 Convention on the Continental Shelf,<sup>62</sup> a part of the old "Geneva law" that may not be superseded by the provisions of the

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established pattern of national legislation. Many of the recent national statutes establish fishery conservation zones, not multi-purpose economic zones in the fashion of UNCLOS III. Significantly, the U.S. Fishery Conservation and Management Act of 1976 nowhere refers to "economic zones".

61. See page 39, *supra*

62. 499 U.N.T.S. 311

new law emerging at UNCLOS III. But the exercise of exclusive national jurisdiction over anadromous species migrating outside the prospective 200 mile economic zone is likely to be met with protest if it would “result in economic dislocation for a state other than the state of origin”,<sup>63</sup> and it is hoped that parties to a dispute of this kind would observe the conditions suggested in the latest UNCLOS III text.<sup>64</sup> Care has been taken, of course, to define salmon and other anadromous (and catadromous) species *out* of the category of “highly migratory species” referred to in that text.<sup>65</sup>

For Canada, the issue of its authority over stocks outside 200 mile limits goes also to the acquisitive question whether it should be recognized as entitled to a special or privileged share of the catch from such stocks. To deny such a claim in the case of “straddler stocks”, while conceding it on the Canadian side of the line, would lead to rather anomalous results. In the case of wholly discrete stocks of non-sedentary, non-anadromous species, on the other hand, it is more difficult to see why the principle of coastal preference should apply, except in the situation where the coastal state can show that it shoulders a disproportionate share of the burden for managing such stocks and deserves a commensurately disproportionate share of the catch to be taken from the stocks.

It is precisely these issues relating to areas outside 200 mile limits that Canada has now injected into the latest round of bilateral negotiations. On May 12, 1977, Canada concluded with Cuba the first bilateral agreement dealing with these issues as well as with the sharing of surpluses.<sup>66</sup> In this case, the treaty partner is as shrewdly

63. Informal Composite Negotiating Text, *supra*, note 35, draft article 66(3) (a)

64. The Text suggests further:

(b) The State of origin shall cooperate in minimizing economic dislocation in such other States fishing these stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing occurred.

(c) States referred to in subparagraph (b), participating by agreement with the State of origin in measures to renew anadromous stocks, particularly by expenditures for that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.

(d) Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.

65. *Id.* Annex I

66. 11 Canadian News Facts 1760. In return for recognizing Canadian management rights beyond 200/mile limits, Cuba is granted access to the zone for the purpose of harvesting designated “surplus” stocks. In 1977 Cuba is authorized

chosen as Norway, the first to conclude the early round of "surplus sharing" agreements. Cuba, a relative newcomer to the Northwest Atlantic, is interested only in modest fishery expansion in the region and in return for access to "surplus" stocks has little, if anything, to lose by accepting special Canadian rights outside the 200-mile limits.

It remains to be seen how many others will follow the Cuban example. It depends primarily on how each non-coastal state calculates its overall commercial interests in the region, its needs for guaranteed access to specific stocks, for participation in joint ventures with the coastal state, and so on. On the Canadian side, it depends on the configuration of Canada's new marketing needs and capabilities and the importance of long-term guarantees of access to new export markets. At present, the United States is by far the largest market for the export of Canadian fishery products, but the most promising opportunity for market development is likely to be the EEC.<sup>67</sup>

On the face of things, it lies in Canada's commercial interest, therefore, to negotiate directly on fishery questions with the EEC, outside as well as inside ICNAF. Bilateral negotiations with Brussels might even in some ways strengthen Canada's diplomatic position, to the extent they save Ottawa from having to deal separately with the member states. The fact that Brussels has to "represent" the interests of non-members as well as members of ICNAF, of non-fishing as well as fishing states, may complicate its diplomatic task and give an advantage to a more single-minded delegation on the other side of the table.

But facing the EEC brings a new set of legal and diplomatic headaches to Canada. The most difficult of these issues is what kind of authority, if any, the Community should be conceded to have over the marine resources and environment of the areas around the French territory of St. Pierre and Miquelon.<sup>68</sup> Almost as complicated are questions concerning the enforcement and other managerial roles that the Community, as distinct from its member states, can and should be expected to play within NAFCO, the new system of fishery management anticipated for the Northwest

to take 60,000 metric tons, and 15 vessels (including six support ships) are licensed. Similar agreements have been signed with Bulgaria, Rumania and West Germany.

67. See comments at the 1977 Dalhousie Conference on "The Future of the Offshore: Legal Developments and Canadian Business" (in press).

68. See *supra*, note 46



Atlantic.<sup>69</sup> If the EEC, as such, acquires a distinct "legal presence" throughout the Northwest Atlantic fisheries, how many other member states, in addition to Denmark, might claim the right to take "Canadian" salmon off the west coast of Greenland?<sup>70</sup> It is difficult problems such as these that threaten to tarnish the gold of Canada's current fishery diplomacy.

Finally, of course, there are delicate and highly contentious fishery issues between Canada and the United States, especially those related to the disputed areas in the Gulf of Maine. Most publicity has been given to the boundary issue in these waters (as well as in the Juan de Fuca Straits, the Dixon Entrance and the Beaufort Sea): whether to apply the traditional median line principle,<sup>71</sup> or to apply geomorphical criteria such as "the natural prolongation of the landmass"<sup>72</sup>, or to seek a compromise under a more complex formula. Chiefly at stake are two separate and unrelated issues: division of the continental shelf (and possible petroleum deposits under the seabed) and division of the surface waters and the water column for fishery, pollution control and other purposes. In these matters the latest UNCLOS III text raises more questions than it resolves,<sup>73</sup> and it remains to be seen whether the Canadian-U.S. marine boundary disputes can be settled through further negotiations or must be referred to third party adjudication.

In negotiations and in arbitration, if not in litigation, it is

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69. For example, would sanctions be imposed on the EEC for a violation by a vessel belonging to one of the EEC member states? Would a Community position on a NAFCO issue, arrived at within the EEC, overrule that of the EEC member states which are also members of NAFCO? Arising from legal questions such as these are equally interesting political questions: for example, if the EEC members of NAFCO decide to vote as a bloc within NAFCO, or are induced to do so, will this create a tendency for the East European members of NAFCO to do likewise?

70. For more general questions concerning the Community's increasing involvement in external relations, see Charles Pentland, *Linkage Politics: Canada's Contract and the Development of the European Community's External Relations* (1977), 32 Int'l. J. 207

71. A. L. Shalowitz, *1 Shore and Sea Boundaries* (Washington: U.S. Government Printing Office, 1962), at 203-78

72. This language is derived from the decisions of the International court of Justice in the *North Sea Continental Shelf Cases* (1968), I.C.J. Pleadings, Vols. 1 and 2. For an application to the Gulf of Maine, see the forthcoming article by Professor William Barnes in the *Maine Law Review*.

73. The Informal Composite Negotiating Text, *supra*, note 35, has three draft articles dealing with questions of boundary delimitation between adjacent and opposite states: 15 (territorial sea), 74 (economic zone) and 83 (continental shelf). There is, however, no similar provision for unifunctional zones such as the current U.S. and Canadian 200-mile fishing zones.

possible, though not easy, to consider a fisheries dividing line separately from these other issues,<sup>74</sup> but it may be questioned whether a line is really what is needed. The question of fishing rights in the disputed fishing grounds of Georges Bank is a question of access to particular stocks, and as such should perhaps be regarded as one of many issues of fishery management in *neighbouring* waters which can be treated effectively only within some kind of joint U.S.-Canadian scheme of management. This would be a fairly complicated scheme to put together.<sup>75</sup> At present it seems that there is more resistance to the idea on the American side,<sup>76</sup> and it may be that more time is needed for the United States to put its new house of national fishery management into order before it can address itself to new forms of international co-operation. The danger is that by then it may be too late. Meanwhile, the Canadian fishing industry, with a mixture of optimism and anxiety,<sup>77</sup> engages in some soul-searching — with fingers crossed.

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74. In the U.S. fishery legislation enacted in 1976, *supra*, note 56, it is provided in Pub. L. 94-265, Section 202 (e) that a foreign fishery conservation zone is not to be recognized by the United States, if

- (1) it fails to consider and take into account traditional fishing activity of fishing vessels of the United States;
- (2) it fails to recognize and accept that highly migratory species are to be managed by applicable international fishery agreements, whether or not such nation is a party, to any such agreement; or
- (3) it imposes on fishing vessels of the United States any conditions or restrictions are unrelated to fishery conservation and management.

75. G. Pontecorvo, D.M., Johnston and M., Wilkinson, "Institutional Jurisdiction", in Lee Anderson, ed., *Economic Consequences of Extended Fisheries Jurisdiction* (1976)

76. Arguably, American nationalism is even stronger now than the more highly publicized Canadian nationalism.

77. See *The Future of the Offshore*, *supra*, note 67