



Royal Commission on Renewing and Strengthening Our Place in Canada

Policy Options For the Management and Conservation of Straddling Fisheries Resources

By:
Phillip M. Saunders

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The views expressed herein are solely those of the author and do not necessarily reflect those of the Royal Commission on Renewing and Strengthening Our Place in Canada.

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Introduction

The continuing problem of over-fishing and inadequately regulated fishing for stocks which straddle the outer limits of Canada's 200 nautical mile (M) Exclusive Economic Zone (EEZ) remains a focus of concern for the Government of Newfoundland and Labrador, and for communities and fishing industry representatives. The perception, backed up by the experience of provincial, federal and industry participants at the international level,¹ is that the current management regime under the Northwest Atlantic Fisheries Organization (NAFO) has simply failed to fully address the continued mismanagement of critical stocks, with negative impacts both within and outside the 200 M limit.

There have been varying responses to this perceived problem, the most ambitious of which have called for the extension of some form of Canadian jurisdiction beyond 200 M, whether through declaration of a Canadian EEZ over the area of the continental shelf (including, potentially, the Nose and Tail of the Bank and the Flemish Cap), or some lesser form of jurisdiction such as "custodial management".² Alternatively, it has been suggested that Canada should work within existing international structures, notably NAFO and the United Nations Fishing Agreement (UNFA),³ to improve the effectiveness, and particularly the enforceability, of the management regime outside 200 M. This paper considers the viability and potential impacts of the main policy options available to Canada and Newfoundland and Labrador, and makes recommendations for a future course of action. Prior to any consideration of options for the future, however, it is essential to review the nature of the current management problems, and of the legal structures that underlie those difficulties.

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The Scope and Nature of the Problem

Fish stocks off the East Coast of Canada can be seen as falling within four categories for the purposes of this review:

- Stocks within Canada’s 200 M EEZ, for which Canada exercises full management authority;
- Stocks which are fully outside 200 M and which are either regulated by NAFO, or remain unregulated (except to the extent that they are regulated by flag states);
- Sedentary species (such as Icelandic scallops and snow crab) beyond 200 M but on Canada’s extended continental shelf, which are within Canada’s jurisdiction;⁴
- Stocks which “straddle” the 200 M limit, and which are subject to management measures both by agreement under NAFO, and within the Canadian EEZ.

It is this final category of straddling stocks which is the focus of this paper, although reference will be made where necessary to the management implications of jurisdiction over sedentary species on the extended continental shelf. Table 1 shows the straddling and “discrete” high seas stocks currently subject to NAFO management, and summarizes quotas and other management measures in place in 2002.⁵

Table 1: NAFO Regulated Stocks

Straddling Stocks:	Discrete Stocks:
• 3NO Cod (moratorium since 1995)	• 3M Cod (moratorium since 1999)
• 3LN Redfish (moratorium since 1998)	• 3M Redfish (TAC — 5,000t)
• 3LNO American plaice (moratorium since 1995)	• 3M American Plaice (moratorium since 1996)
• 3LNO Yellowtail (TAC — 13,000t)	• 3M Shrimp (Effort regulation since 1997)
• 3NO Witch (moratorium since 1995)	
• 3NO Capelin (moratorium since 1993)	
• 2+3KLMNO Greenland halibut (TAC — 40,000t — 29,640t Regulatory Area)*	
• 3+4 Squid (TAC — 34,000t)	
• 3L Shrimp (as of 2000) (TAC — 6,000t)	

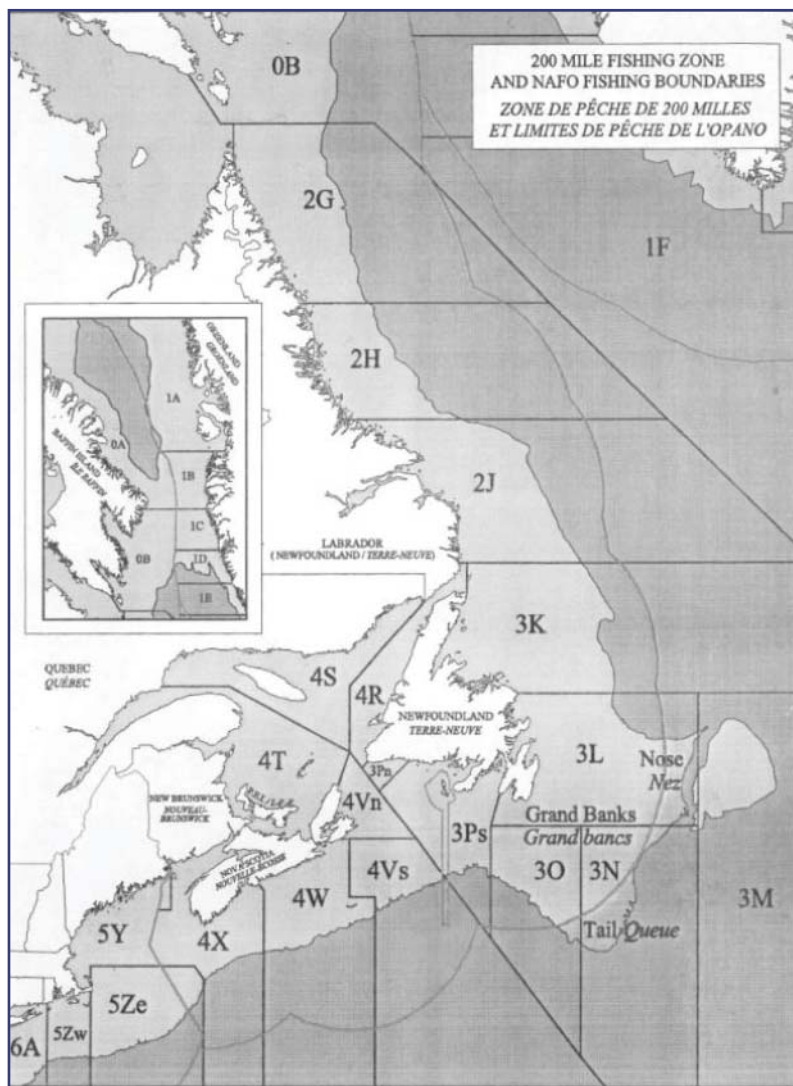
Source: DFO/NAFO, as reproduced in *Standing Committee Report*, at p.20.

* Increased to 44,000t at the NAFO Fisheries Commission Special Meeting in January 2002.

Status and Functions of NAFO

NAFO is an international organization with 17 members, including Canada and the European Union (EU). It was established by treaty (the NAFO Convention) in 1979,⁶ and operates within the NAFO Regulatory Area, as shown in Map 1 below.

Map 1 - NAFO Regulatory Area⁷



NAFO's general objectives are stated in Article II of the Convention:

The Contracting Parties agree to establish and maintain an international organization whose object shall be to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources of the Convention Area.

Through its constituent parts (the General Council, the Scientific Council, the Fisheries Commission and the Secretariat), the organization carries out a number of management functions:

- The conduct of stock assessments based on scientific data, and the establishment of stock-by-stock Total Allowable Catches (TACs);
- The allocation of quotas to the parties to the Convention;
- The prescription of conservation management measures, including, *inter alia*, minimum fish or mesh sizes, bycatch criteria, and species moratoria;
- Under the Joint International Inspection and Surveillance system, conducts surveillance, coordination of inspections, observer and other monitoring programmes and dockside inspections.⁸

The Foreign Fishing Issue

What is often termed the “problem of foreign overfishing” for NAFO-regulated stocks is in fact a shorthand for a range of problems that have, over many years, been identified with the organization and the implementation of its mandate. These might be summarized in general terms as follow:

- The presence of unregulated vessels from non-NAFO states, operating outside any NAFO controls;⁹
- A failure to adhere to the best available scientific advice in the adoption of management measures. This includes, but is not limited to, perceived misuse of NAFO’s objection procedures in the setting of quotas, which allows unilateral disregard of allocations;
- Serious gaps in enforcement, which is based largely on flag state control, with some fishing states being willing to countenance routine violations of agreed management measures (including quotas, species moratoria and gear restrictions, and late or non-submission of reports);
- The growing use of bycatch allowances to mask directed fisheries for prohibited species.¹⁰

The impact of these failings on Canadian stocks and the fishing industry is seen as operating in two main ways. First, the abuse of fishing rights beyond 200 M has the direct impact of denying or limiting fair access to those stocks for Canadian fishers. Second, it is argued that the interrelationship of stocks is such that the failure of management measures outside 200 M has the additional impact of delaying or preventing the recovery of stocks inside 200 M, blunting the effect of stricter management measures taken in the Canadian zone. These impacts may be difficult to quantify, but for the purposes of this review it is accepted that the conclusions of many observers, and of the Standing Committee on Fisheries and Oceans, are correct: a failure to properly and effectively regulate beyond 200 M will inevitably have some negative effect on the Canadian industry inside and outside the EEZ.

It must be remembered as well that the problem of straddling stocks in the Northwest Atlantic is a manifestation of a broader international phenomenon,¹¹ one which is rooted in the current structure of the international Law of the Sea. In order to properly understand the nature of the current problems off the East Coast of Canada, and thus to assess options for future

action on those problems, it is necessary to briefly consider how and why we came to where we are now.

Fisheries Jurisdiction Under the Law of the Sea

Prior to the widespread adoption of extended fisheries zones in the 1960s and 1970s, fishing beyond the narrow belt of the territorial sea was generally considered to be a freedom of the high seas.¹² Canada, consistent with the practice of many states, extended its jurisdiction over fisheries to 200 M in 1977. The nature of coastal state jurisdiction had, however, continued to evolve, both in state practice and in the negotiations at the Third United Nations Conference on the Law of the Sea (UNCLOS III), ultimately coalescing around the broader, multipurpose zone concept of the EEZ, as reflected in the 1982 United Nations Convention on the Law of the Sea (LOS 1982),¹³ and claimed as a jurisdictional zone by Canada in the Ocean Act of 1996.¹⁴

Under the LOS 1982, and under customary international law, coastal states are entitled to claim an EEZ extending to 200 M from the baselines from which the territorial sea is measured. Within this zone, the coastal state has comprehensive jurisdiction over living and non-living resources of the seabed and water column, as expressed in Article 56 (1) (a):

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil...

These rights are accompanied by a number of obligations, including, *inter alia*, the following:¹⁵

- An obligation to exercise coastal state rights with “due regard to the rights and duties of other states” ;
- Obligations to use “proper conservation and management measures” to ensure that living resources in the zone are not “endangered by over-exploitation”;
- With respect to the conservation and management of stocks, an obligation to “cooperate to this end” through international organizations;
- Obligations to promote the objective of optimum utilization of resources and, where the coastal state does not have the capacity to harvest its total allowable catch (TAC), to give other states access to the surplus (subject to management restrictions).

In sum, the LOS 1982 created a structure of rights and responsibilities within the EEZ, based on coastal state sovereign rights, but not sovereignty. The practical effect of this jurisdiction, insofar as it applied to fisheries, was to give full management authority to the coastal state. At the other extreme, fisheries located beyond the limits of national jurisdiction were left largely to the regime of the high seas. Fishing is clearly a high seas freedom, open to all states and subject to flag state jurisdiction. This freedom is, however, subject to a number of quite general duties on the flag state:¹⁶

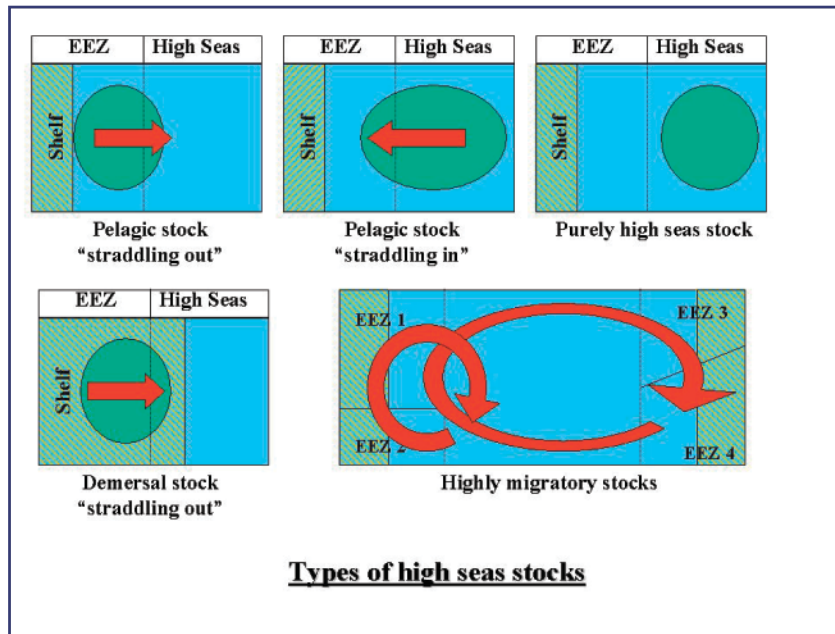
- High seas rights are to be exercised with due regard for the interests of other states in their own exercise of high seas freedoms;
- The right to fish is “subject to” the “rights and duties as well as the interests of coastal states”, as provided for under the *LOS 1982*;
- Flag states have a duty to “take, or co-operate with other states in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas”;
- States are under a duty to co-operate in the conservation and management of high seas living resources, and to “co-operate to establish subregional or regional fisheries organizations to this end”.

Beyond the general high seas duties noted above, the LOS 1982 also addressed instances of intersection between national jurisdiction and high seas freedom, including highly migratory, anadromous and catadromous species.¹⁷ With respect to straddling stocks, the relevant provision is Article 63 (2):

Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal state and the states fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

There are several features of this provision that should be noted. First, the definition of straddling stocks is quite broad, extending as it does to “associated species”, and it would clearly apply to a number of stocks off the East Coast (see below re – relevant NAFO stocks). Figure 1 graphically portrays the various potential types of high seas, highly migratory and straddling stocks.

Figure 1



Source: FAO Fisheries Department¹⁸

Second, it should be noted that it is not certain whether Art. 63(2) has the status of customary international law, reciprocally binding on parties and non-parties (such as Canada) to the LOS 1982. However, given the further developments under the UNFA, and Canada’s status as a party to that agreement, it is assumed for the purposes of this review that Art. 63(2) is an accurate statement of the applicable law.

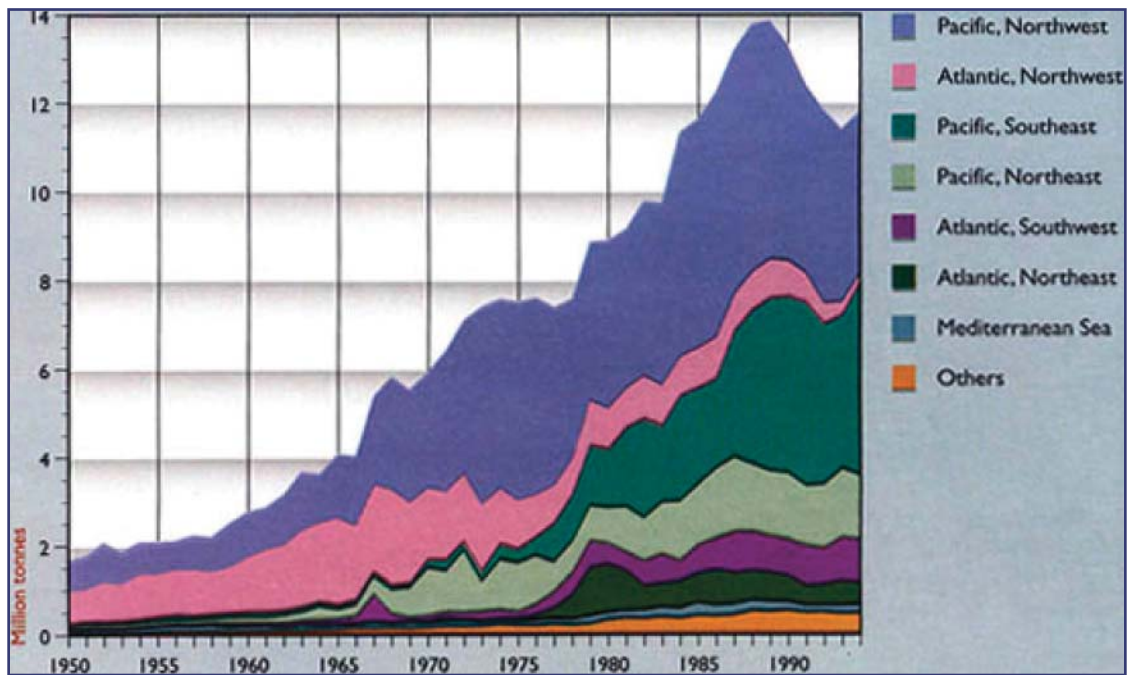
Even if it is accepted that this provision represents customary international law and that numerous Canadian stocks are included in the definition, however, there are far greater difficulties to be found in the practical implementation of the obligations as stated. Numerous observers have pointed to the fact that states must only “seek” to agree upon management measures – there are no time limits for agreement; there is no requirement for resort to regional organizations; and, most significant, there is no explicit enforcement power which would enable a coastal state or regional organization to deal independently with violators.¹⁹ The default position is flag state enforcement against private violators, with normal avenues of negotiation and dispute resolution available to deal with states in breach of these very general duties.

The ambiguity of obligations to “co-operate” and “seek to agree”, coupled with the absence of any authoritative compliance mechanism (whether by coastal state enforcement or multilateral action), left the management of straddling stocks as “the ‘unfinished business’ of UNCLOS III”;²⁰ a case in which there was a failure to “...adequately define an allocation of jurisdictional competence...”²¹

This problem was certainly identified at UNCLOS III, but it was not possible to reach agreement on anything more explicit, or with more enforcement teeth.²² By the early 1990s, the concerns of coastal states about the perceived gap in authority had been confirmed in reality, especially given the fact that Distant Water Fishing Nations (DWFNs) were increasingly being excluded from former areas of high seas now brought within EEZs. Figure 2 shows the clear

trend, repeated across a number of regions, of increased catches from identified straddling stocks in the period from the 1970s to the early 1990s.

Figure 2: Landings From Straddling Stocks By Region



Source: FAO (1996)²³

At the United Nations Conference on Environment and Development (UNCED) in 1992, it was felt that the post-UNCLOS period had resulted in a failure of management efforts respecting valuable straddling stocks, in some cases due to complete lack of cooperation, and in others to the ineffectiveness of cooperation measures, especially on enforcement. The problems with management of straddling stocks were additionally linked to the depletion of fisheries within 200 M, through the undermining of management within EEZs by poorly regulated fishing outside. The perceived difficulties in the implementation of the regime led directly to a number of regional and global initiatives in the 1990s, including the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks²⁴ and the Canadian actions in the so-called “turbot war” in 1994/95.

Canadian Actions Of 1994/1995

The various failings of the NAFO system, as discussed above, came to a head in the Canada-EU dispute of 1994/95. The background to this dispute is well-known, and does not require a detailed recounting here. In the view of Canada, NAFO, for the reasons suggested above, had been ineffective in preventing the mismanagement and depletion of some straddling stocks within the Regulatory Area, with negative effects inside the Canadian Exclusive Fishing Zone (EFZ – under the Oceans Act replaced by the EEZ). The combined effect of these failings and

increasingly strong conservation measures within Canadian waters after 1992 led to a number of actions on the part of the Canadian government.²⁵

In May of 1994 Canada amended the Coastal Fisheries Protection Act to allow enforcement of NAFO regulations against stateless vessels and some flag of convenience vessels registered in non-NAFO states,²⁶ and in March 1995 regulations under this Act were amended to cover Spanish and Portuguese vessels.²⁷ The enforcement action against the Spanish vessel *Estai* followed soon after.²⁸ The immediate dispute was resolved by the conclusion of an agreement between Canada and the EU in April 1995, and the main provisions of that agreement were adopted by NAFO in September 1995.²⁹ In addition to settling the specific quota allocations in dispute, the Canada-EU settlement provided as follows:

- Expansion of inspection capabilities;
- Creation of a class of “major infringements” (such as refusal to cooperate with inspectors and misreporting of catches), which would trigger certain duties related to enforcement;
- Implementation of a 100 per cent on-board observer programme (on a pilot basis);
- Introduction of some satellite tracking coverage;
- Enhanced transparency in flag state enforcement, including improved reporting of numbers and types of violations.

The long-term impact of the steps taken within NAFO is considered below, but to the extent that the resolution of this dispute was regarded as a success for Canada, and thus a possible model for future actions, it is useful to note two general characteristics of the 1994/1995 dispute and the outcomes that resulted from it. First, although Canada’s actions have been portrayed as essentially unilateral, it must be remembered that these steps were also closely tied to the structure of NAFO. The prohibitions in the Coastal Fisheries Protection Act were directly related to prescribed NAFO management measures, giving Canada’s unilateral enforcement action a substantive basis in rules agreed at a multilateral level. As one observer has noted, this clearly added to the legitimacy of the Canadian actions:

It is quite possible that Canada’s unilateral enforcement efforts would not have been successful without the presence of NAFO and without Canadian policymakers’ decision to use this presence to their advantage. Far from being a simple case of brute force, Canada’s was a fairly nuanced foreign policy that was sensitive to the international institutional context. Throughout all levels of Canada’s sanctioning process the existence of NAFO and its various regulations legitimized certain enforcement actions ...In enforcing these multilateral rules, Canada was acting in accordance with international norms - and against a state that was not.³⁰

Second, it should be noted that throughout this dispute Canada pursued its objectives, not just through unilateral action, but by a number of means, at a number of levels and through a number of processes in parallel. During and after the events of 1994/1995, Canada acted unilaterally to assert its jurisdiction (through the rationalization of jurisdictional zones in the Oceans Act). At the same time, Canada operated at the bilateral (Canada-EU) and regional (NAFO) levels to pursue its objectives for improved management of straddling stocks within

its own area of concern. These bilateral and regional measures, in turn, fed into the global initiative for enhancement and revision of the legal regime for straddling stocks, which is addressed below.³¹

The *UNFA*

The *United Nations Fishing Agreement*, which came into force in Dec. 2001, represents the most significant advance on the straddling stocks issue at the global level since the LOS 1982. A detailed review of this Agreement is beyond the scope of this paper, and there are numerous analyses available.³³ The purpose here is to outline the broad scope of the Agreement's provisions, particularly as they relate to the question of options for the future.

An essential element of the structure of UNFA is its interrelationship with the LOS 1982. The Agreement is intended to fall within the structure of the LOS Convention, as is emphasized in Article 2, which refers to the objective of the Agreement as ensuring “the long-term conservation and sustainable use of straddling stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.” Article 4 also notes that nothing in the Agreement “shall prejudice the rights, jurisdiction and duties of states under the Convention,” and that it “shall be interpreted and applied in the context of and in a manner consistent with the Convention.” All of this makes it clear that the UNFA is meant to operate within the jurisdictional regime established at UNCLOS III, and to reinforce and define the “duty to cooperate” set out in the LOS 1982.

A central thrust of the substantive provisions of UNFA is to better define the role and purpose of regional fisheries organizations. In brief, where an organization or “arrangement” exists which “has the competence to establish conservation and management measures for a particular straddling stock,” states are to give effect to their duty to cooperate by joining the organization or arrangement, or by applying the management measures it establishes.³⁴ Where such institutions are in place, their members, and those who abide by the rules, should have exclusive access as among UNFA parties.

With respect to the perennial problem of compliance and enforcement with rules established by competent organizations, UNFA offers limited progress. Primary reliance is still placed upon flag state enforcement,³⁵ but some limited provision is made for “international cooperation” in enforcement. Provision is made for member states of regional organizations to board and inspect vessels of states party to the UNFA, and (under exceptional circumstances), to compel the vessel to proceed to port.³⁶ In addition, the Agreement gives a broader authority to port states to take measures, including inspection and prohibition of landings and transshipment, to “promote the effectiveness of subregional, regional and global conservation measures” with respect to vessels which are voluntarily in its “ports or offshore terminals”.³⁷

While direct enforcement against foreign vessels would still be very much the exception under UNFA, leaving doubt as to the effectiveness of its compliance mechanisms, there are more substantial improvements in the provisions for calling states to account for failures to fulfill their obligations under multilateral arrangements. Part VIII of UNFA provides for a system of dispute resolution, with two innovations being particularly significant. First, the compulsory dispute settlement provisions of the LOS 1982 are applied both to the interpretation

and application of UNFA itself, and to disputes between UNFA parties with respect to other agreements relating to straddling stocks to which they are also parties.³⁸ Furthermore, this will be the case whether or not the states involved are parties to LOS 1982.³⁹ Given the lack of any objective dispute settlement system within NAFO, this represents a major advance where both disputing states are parties to UNFA (see below for further discussion).

The second major contribution of UNFA to dispute settlement as applied to straddling stocks relates to the issue of applicable law. Courts or tribunals adjudicating these disputes are to apply the provisions of LOS 1982, UNFA and the “other” agreements (such as NAFO), but are also to use “generally accepted standards for the conservation and management of living resources” and act “with a view to ensuring conservation.”⁴⁰ This broad language sends a strong signal, and opens the possibility of much more creative, litigation-based approaches to the development and application of management principles.

With respect to the issue of management principles, the UNFA does call for enhanced application of such concepts as precaution, sustainability and integration. Furthermore, Article 7 requires that coastal states and fishing states shall ensure the “compatibility” of measures taken inside and outside national jurisdiction, a long-standing issue in NAFO.⁴¹ Article 5 requires that states implement a number of principles “in giving effect to their duty to cooperate”, including adoption of measures to “ensure long-term sustainability” and “promote the objective” of optimum utilization, and application of “the precautionary approach in accordance with article 6”.⁴²

Other Instruments and Programmes

In 1995 FAO adopted the non-binding Code of Conduct for Responsible Fisheries,⁴³ which set out “principles and international standards of behaviour for responsible practices with a view to ensuring the effective conservation, management and development of living aquatic resources.”⁴⁴ The Code has led to the development of a number of International Plans of Action (IPOAs) on specific issue areas, including the voluntary International Plan Of Action To Prevent, Deter And Eliminate Illegal, Unreported And Unregulated (IUU) Fishing⁴⁵. This plan provides a series of objectives and principles to be adhered to in dealing with IUU fishing inside and outside national jurisdiction. Finally, the particular problem of high seas fishing is addressed, again within the framework of the Code of Conduct, in the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas.⁴⁶ This agreement, which becomes binding upon its acceptance by 25 parties,⁴⁷ sets out a number of standards for flag state responsibility for high seas fishing, including requirements for information exchange and international cooperation.

All of these documents, and particularly the Compliance Agreement, represent significant contributions to the global effort to deal with IUU fishing, including that directed at straddling stocks. While they should be carefully considered in the development of Canada’s position in NAFO (given Canada’s support and adherence to them), the more significant legal instruments at the regional level will continue to be the NAFO Convention and the UNFA, both of which are more directed efforts at implementing the same general principles.

The Resurfacing of NAFO Problems

There is a general consensus that in the period following the Canada-EU Agreement and the signing of the UNFA, the situation in NAFO, particularly with respect to enforcement, improved to some degree. However, testimony before the Standing Committee on Fisheries and Oceans in 2002 indicated that there has been a growing tendency towards increased violations (particularly on the bycatch issue), lax enforcement and a renewed use of the objection procedure to avoid management measures (though not by the EU). In general, the Committee found, and it is well-supported by the evidence available, that the gains of the immediate post-1995 period have been reversed to some extent, and that fundamental problems remain in the effectiveness of the NAFO system.

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Objectives

In order to assess the various options for future management of straddling stocks outside the Canadian EEZ, it is essential that we have a clear idea of the intended objective. It is clearly not enough to state that Canada needs, or wants, an enhanced level of legal jurisdiction. Any fisheries management system comprises a number of essential components, including scientific knowledge, management principles and practical measures, monitoring/surveillance and enforcement capability and jurisdictional competence. Jurisdiction is a means – the end must be sound management. Still, while jurisdiction in isolation does not guarantee sound management, there must be some body (whether coastal state or multilateral organization) that has the power to establish and implement management measures. The Standing Committee of Fisheries and Oceans described the ultimate objective as follows:⁴⁸

Clearly, what is required is a comprehensive, conservation-based fisheries management regime outside the 200-mile limit that is as rigorous as that inside the 200-mile limit.

Similar language was used in the 2003 Report of the Newfoundland and Labrador All Party Committee, but with an added emphasis on the need for improved management principles, going beyond traditional stock-based management:⁴⁹

Scientific research and fisheries management must move toward a multi-species approach (i.e. an ecosystem approach) as opposed to the current single species approach.

If these statements are considered in the light of the history of problems with NAFO, and with the general experience with straddling stocks world-wide, it is possible to identify three components for Canadian objectives for improved management of straddling stocks:

- First, the system must be comprehensive, in that compatibility between measures inside and outside must be achieved. Furthermore, it must be able to deal both with NAFO participants and the more general problem of IUU fishing.
- Second, the system must be enforceable, or else it cannot be “rigorous”. In this context enforceability includes ability to prevent and punish violations, but also the ability to ensure that states live up to their responsibilities to deal with their own flag vessels appropriately.
- Third, the system should go beyond ensuring that existing measures are both rigorously and consistently applied, and incorporate the most advanced management principles possible (as reflected in the recommendations of the All Party Committee). In short, the more effective application of ineffective management approaches is unlikely to achieve the desired results.

The following section considers some of the main options for future action which have been suggested, and attempts to assess them within the framework of these criteria. Of the legal options that have been put forward, which offer the most realistic prospect of moving in the directions set out above?

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Options for the Future

Status Quo

The simple continuation of the present situation, into the indefinite future, does not appear to be a serious option at this point. The results obtained under the current system, and the widespread dissatisfaction with it within Canada, are enough to make “business as usual” an unsustainable course, both managerially and politically. This view is reinforced when one considers the growing pressure on high seas stocks at the global level, and the need to react to the new management rights and duties under the UNFA. The legal structure for management of these stocks has been fundamentally altered, in part by the endorsement of new cooperative arrangements, but also by the introduction of new, conservation-based management principles, as discussed above. Standing still, when the international community has clearly moved on, is not a realistic choice.

Extension of Canada’s EEZ

One suggestion that has been put forward is the extension of the Canadian EEZ beyond 200 M, possibly over the entire extent of the Canadian continental shelf. There are a number of difficulties with this proposal that make it a highly unlikely, and possibly counterproductive, course of action.

To begin, an extension of an “EEZ” to areas beyond 200 M carries with it more than fisheries jurisdiction – Canada would be asserting sovereign rights and jurisdictional control over a range of activities and resources unrelated to control of fishing activity. Such a broad assertion of jurisdiction would clearly be seen as unnecessary to the stated objectives set out above. Furthermore, within the fisheries context, an extension to the limits of the continental shelf would encompass high seas fisheries stocks which are not straddling stocks, and for which the legitimacy of Canadian control would be highly suspect. These obvious difficulties could, of course, be addressed by restricting Canada’s action to a more limited unilateral assertion of jurisdiction. Canada could, for example, declare a simple “fishing zone”⁵⁰ beyond 200 M, of a geographic scope sufficient to cover all relevant straddling stocks. Such a declaration could be further limited in its effect to apply only to designated straddling stocks.

Even if we assume, however, that the jurisdictional claim was limited in this way, there would still be serious problems arising from any claim that purported to give Canada full jurisdiction over these stocks – for everything from carrying out the science through to enforcing against violators. In particular, a claim of this type would presumably bring with it the power to assign both the amounts and allocations of catch, and to limit those allocations (except for any identified surplus) to the Canadian industry, as a matter of sovereign entitlement. The benefits of such a move to the Canadian industry and the communities that depend on it need hardly be stated; although not on a scale of the potential resource access gained by the original extension of jurisdiction in 1977, the incremental gain for Canadian (and especially Newfoundland and Labrador) interests would be huge.

Feasibility and Legality

Unfortunately, the realization of these benefits would depend on Canada's ability to carry off such an extension of its jurisdiction, and for a number of reasons this must be regarded as improbable. First, it would be simply unrealistic to expect any significant degree of international support for this new expansion of coastal state jurisdiction. The jurisdictional architecture of the LOS 1982 was the product of long, difficult global negotiations that saw a large-scale compromise between the interests of expansionist coastal states, on the one hand, and maritime (including DWFN) states on the other. The EEZ, limited to 200 M, was a keystone of the structure that made agreement possible; it represented a compromise both on the nature of jurisdiction (being more functionally limited than the quasi-territorial claims of some states), and on the spatial extent (being less extensive than the wider broad-shelf claims).

The significance of the EEZ regime has been enhanced in the years since the adoption of the LOS 1982 and its coming into force in 1994. In state practice, the vast majority of states limit their jurisdictional claims to the type and extent set out in the Convention, with claims to the seabed and water column limited to 200 M, and seabed claims extending beyond (as permitted under the formula of Article 76 of the LOS 1982). This practice extends even to non-parties to the LOS 1982, including Canada and (critically) the United States. There is no doubt that a Canadian attempt to extend jurisdiction in this fashion would be regarded as a violation of international law. Moreover, there is at present no evidence of a widespread willingness among states to re-visit the fundamental nature of the jurisdictional allocations set out in the LOS 1982 regime.

The fact that it would be a violation of international law does not necessarily mean that Canada should not consider this option, but this consideration must be realistic. In the absence of widespread international interest in a further evolution of the jurisdictional regime, Canada must expect to take this stand without any broad support, and in the face of significant active opposition from fishing states. Is Canada willing, or able, to enforce its will, contrary to established international law, over the wide area of the NAFO Regulatory Area? How far is it willing to take this assertion of jurisdiction in an eventual confrontation? It should also be noted that an assertion of jurisdiction which failed in the face of determined opposition would potentially leave Canada in a weaker position, eliminating any remaining credibility of the threat to extend jurisdiction, should it be used for leverage in negotiations.

The House of Commons Standing Committee on Fisheries and Oceans considered the question of EEZ extension, and summarized the difficulties as follow: 51

“First, there is no international support for the unilateral extension of EEZs; Second, unilateral extension would be contrary to the international fisheries priorities Canada has pursued since the establishment of modern EEZs;

Third, repudiation of a tenet as fundamental to UNCLOS as the 200-mile EEZ would make it very difficult for Canada to fully partake in the rights, duties and organizations the Convention creates; and,

Finally, unilateral extension of the EEZ would practically guarantee a drawn out and expensive legal challenge against Canada with a significant risk that Canada would lose.”

On this last point, it might more accurately be argued that there would be an extremely high likelihood, not a “risk”, of a Canadian loss should litigation occur. It should also be noted that Canada’s 1994 reservation to the compulsory jurisdiction of the International Court of Justice (ICJ), dealing with certain fisheries issues, was phrased to apply to “conservation and management measures” taken in the NAFO regulatory area:⁵²

...d) disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures.

This limitation on Canada’s accession to the compulsory jurisdiction of the ICJ does not appear to include disputes about the assertion of full Canadian jurisdiction over this geographic area, which is entirely distinct from an application of management measures (as Canada itself argued in 1994/95). Accordingly, to avoid compulsory dispute settlement on such an assertion, Canada would need to further limit its acceptance of the Court’s jurisdiction.

Conclusions

In sum, the extension of a Canadian EEZ or EFZ beyond 200 M would be contrary to international law, extraordinarily difficult to enforce, and preclude the possibility of full Canadian participation in the UNFA (which presupposes acceptance of the LOS 1982 regime, as noted above). Moreover, it would require Canada’s departure from NAFO, leaving little or no multilateral basis for continuing management, should Canada’s extension of jurisdiction ultimately fail. This could place Canada in a worse position with respect to the problem of IUU fishing discussed earlier, in that the removal of NAFO would leave no international management measures in place, as noted by a DFO representative who appeared before the House of Commons Standing Committee:

...[I]t is important to note that in the absence of NAFO, there would, in fact, be no agreed rules on how the fisheries would be conducted within straddling stocks. NAFO provides the forum for trying to cooperate on conservation measures. In its absence, there would effectively be no rules to govern harvesting activities on straddling stocks outside 200 miles.⁵³

Sedentary Species Management

There is one unilateral jurisdictional option, short of EEZ expansion, that should be noted. Canada, consistent with both the LOS 1982 and the 1958 Geneva Convention on the Continental Shelf,⁵⁴ currently exercises jurisdiction over sedentary species throughout its entire continental shelf. These species (defined by regulation in Canada) are those which “at the harvestable stage” are immobile on the seabed, or can move only in constant contact with the bottom.⁵⁵ It could be argued that any taking of such species constitutes an infringement of Canada’s sovereign rights, and that this jurisdiction could be “leveraged” into an ability to

restrict or prohibit any fishing method which results in the exploitation of such species (at least where these species are found).

There is some limited precedent for this approach in activities of the US prior to their extension of fisheries jurisdiction in 1976, when they enforced against vessels on the shelf that had on board certain amounts of prescribed species. However, the US recognized that any use of this power to enforce, for example, where there was a de minimis violation, would be an abuse of rights and beyond the scope of international law.⁵⁶ This is an option that may bear further research, if only to establish the legitimate parameters of sedentary species jurisdiction applied to non-directed fishing that results in sedentary species bycatch, but its usefulness would in any event be limited to those locations and methods that would result in sufficient volume of such bycatch.

Custodial Management

In response to the likely difficulties that would be encountered by an extension of a Canadian EEZ or EFZ beyond 200 M, but in an effort to secure some of the central conservation and management objectives with respect to straddling stocks, it has been suggested that Canada could unilaterally declare a distinct, limited form of jurisdiction known as “custodial management”. This concept has appeared most prominently in the House of Commons Standing Committee on Fisheries and Oceans report of June 2002, where it was argued that Canada could assume responsibility for management of stocks beyond 200 M on the following general terms: 57

Under a custodial management regime, Canada would assume sole responsibility for the management and conservation of the areas of our continental shelf beyond the 200-mile limit: the Nose and Tail of the Grand Banks and the Flemish Cap. However, foreign fishing interests would not be removed; instead, historic allocation and access would be respected.... The essential purpose of custodial management would be to establish a resource management regime that would provide comparable standards of conservation and enforcement for all transboundary stocks, inside and outside the 200-mile limit. In other words, precisely the kind of regime promised by *UNFA* but delivered by Canada rather than *NAFO*.

A similar though less detailed proposal appears in the recent report of the Newfoundland and Labrador All Party Report:⁵⁸

To address the problem of foreign overfishing, Canada must establish a Canadian-based fisheries management regime to protect straddling fish stocks and their ecosystem. This would include Canada placing observers on all vessels, and implementing a custodial management regime for straddling fish stocks on the nose and tail of the Newfoundland Grand Banks.

What Is Custodial Management?

In assessing the merits of a move to custodial management over the continental shelf or parts thereof, an initial difficulty arises from the fact that it is a concept as yet unknown to international law, and is thus lacking any concrete, widely accepted definition. For the purposes of this review, the most detailed attempt at a definition – that of the House of Commons Standing Committee – is used as a starting point. It is assumed, based on that Committee’s report, that the regime would extend only to straddling stocks (although there are references to designation of a geographic area including the Flemish Cap). The essence of the proposal can be found in the powers and functions that Canada would assume in the relevant area: 59

Under such a regime, Canada would conduct the science, set the TACs, and implement and administer a conservation-based management system that would include monitoring and enforcement.

The only major aspect of what would be a full assertion of jurisdiction not found here is the power to exclude other states entirely from the fishery, with preference being given to Canada’s own fishers. Instead, the allocative function would be performed by reference to “historic allocation and access”. Otherwise, Canada would assume much the same power (and responsibility) that it does within its EEZ: the duty to base management on available science (and thus to conduct that science); the ability to set TACs; the power to choose and apply management measures; and the power to monitor and enforce compliance with those measures.

It should be noted at this point that a reliance on “historic” shares would not be sufficient to deal with two problems – new entrants to the fishery and development of new fisheries. In neither case would the simple equity inherent in this proposal offer a solution other than Canada stepping beyond the proposed role to decide such allocations on a unilateral basis. This is, however, a relatively minor and technical issue when considered against the more general problems with the proposal, which are addressed below.

Benefits

In general, if we assume for the moment that such a regime could successfully be implemented, it would provide a framework for the major policy challenges suggested earlier. It would be possible, under the proposed jurisdiction, to devise and implement more appropriate management principles for straddling stocks, taking into account the best available scientific evidence, unmodified by political intervention. Monitoring and enforcement could be carried out in a meaningful manner, at least to the limits of Canadian capabilities (see below). Finally, this form of jurisdiction would not restrict Canada from dealing with the non-member and IUU fishing issues. All of this, however, is predicated on the assumption that Canada could assert this jurisdiction and maintain it against the rest of the world, and it is here that more serious difficulties arise.

Feasibility and Legality

The Standing Committee Report concluded that an assertion of jurisdiction in this form would be treated differently from an expanded EEZ claim, and that it could be successfully maintained. There are, however, a number of reasons to question this conclusion.

First, the legality of such a claim is extremely doubtful, for reasons similar to those raised for the EEZ option. The removal of the “ownership” aspects of the EEZ regime still leave to Canada, as coastal state, a number of powers which are clearly important components of the EEZ legal regime. The ability to choose and implement management measures, and especially the power to enforce those measures against the vessels of other states, are powers which come as part of EEZ jurisdiction. Furthermore, the proposal would place the power of allocation of resources, another important aspect of EEZ jurisdiction, in the hands of Canada, albeit to be based on criteria which would respect “historic” shares.

In sum, the proposal amounts to an “EEZ minus resource ownership”, which does not remove the fact that it would still involve the assertion of significant elements of the rights and responsibilities which comprise an EEZ, but in areas beyond the 200 M limit agreed in the LOS 1982 and confirmed in customary law as the outer extent of this zone. Accordingly, the same questions that arise with respect to an expanded EEZ are relevant here. Is there any reason to believe that there is significant support among other states for such a departure from the current state of international law? If we assume that DWFNs will vigorously oppose this claim, is Canada willing or able to take the enforcement measures necessary to make it stick? There has been no strong evidence offered to date to indicate that either of these questions can be answered in the affirmative.

The Standing Committee Report takes the view that an assertion of custodial management would be no more than a continuation of the activities that were successful in 1994/95, and points to the amendments to the Coastal Fisheries Protection Act as an example:⁶⁰

The Committee sees no fundamental reason custodial management cannot be implemented. By passing Bill C-29 in 1994, Canada has already demonstrated its willingness and ability to enforce conservation measures beyond its 200-mile limit. Amending the *Coastal Fisheries Protection Act* for this purpose would represent a difference only in scope and not in kind to the measures previously implemented under C-29.

This conclusion ignores critical differences between the current situation and that in 1994/95, and is based on a misapprehension of exactly what was done – and what worked – at that time. In 1994/95, Canada was in a position to argue that the jurisdictional gap in the LOS 1982, as discussed earlier, left it with no other effective avenue apart from limited unilateral action to ensure that the conservation and management principles in the Convention were met. That is, the Canadian action was premised on the existence of duties on all states to respect both conservation principles and coastal state interests in straddling stocks, but an absence of agreed multilateral means for enforcing those duties.

Canada can no longer point to the jurisdictional vacuum that existed in 1994 as a justification. The conclusion of the UNFA, in which Canada played a leadership role, represents the international community’s explicit attempt to deal with this “unfinished” business from the

LOS 1982. The compromise, to which Canada is a party, further limits the high seas freedom of fishing as it relates to straddling stocks, and deals with the jurisdictional competence issue by assigning a more explicit role to regional fisheries organizations, such as NAFO. It would be difficult for Canada to deny an obligation it assumed in 1995, and there is no doubt that an assertion of custodial management would be outside the structure set out in the UNFA.

The Standing Committee response is that a “comprehensive, conservation-based” management regime is “...what was promised by UNFA but which it has failed to deliver.”⁶¹ It must be remembered, however, that the UNFA was only concluded in 1995, and came into force in December 2001. This is a relatively short period for a major multilateral convention to achieve the requisite numbers of ratifications (by contrast, the LOS 1982 was signed in 1982 and came into force in 1994). Furthermore, the whole structure of the UNFA is based on the management institutions and principles being implemented in various regional organizations, a process which, frustrating though it may be, will take time. For the Standing Committee to conclude in June 2002 that a complex multilateral treaty that had only come into force six months earlier had “failed to deliver” was somewhat premature.

Apart from the changes in the international context referred to above, any lessons drawn from 1994/95 must be rooted in the nature of Canada’s actions at that time. First, as noted earlier, the unilateral Canadian enforcement actions were directly tied to the multilateral management measures of NAFO, giving a higher degree of international legitimacy than might have been expected from a purely unilateral assertion of jurisdiction. The second relevant characteristic of Canadian actions in 1994/95, also noted earlier, was the multiple means by which they were pursued. The response was not a simple assertion of jurisdiction or even limited enforcement power. Rather, Canada relied as well on a combination of other activities, including domestic management and legislative improvements, bilateral and regional diplomacy and global law-making (through UNFA). The unilateral action, which certainly provided focus and a degree of diplomatic leverage, must be seen as part of this broader package of legal and diplomatic efforts.

It is assumed in the Standing Committee Report that assertion of custodial management jurisdiction would be coupled with a withdrawal from NAFO,⁶² and this is certainly a likely requirement, given the extent to which the jurisdictional claim would be contrary to the letter and spirit of the NAFO Convention. Abandonment of NAFO would remove any possibility of linking Canadian enforcement to multilaterally-agreed measures, as was done in 1994/95. Furthermore, rejection of NAFO could lead to important negative consequences that must be placed in balance against the potential benefits discussed above. As was noted above, if NAFO is abandoned, and if the Canadian assertion of jurisdiction cannot be maintained, there is the real possibility of an unregulated “free for all” much worse than the situation under NAFO. Despite its problems, it would be difficult to claim that NAFO has no ameliorative impact on fishing for straddling stocks.

Even if it is assumed that custodial management could be attained, it is likely that the successful transition would take a number of years (assuming opposition by DWFNs, including legal challenges). The damage done in the meantime, in the absence of any effective multilateral management, could be significant. This could eliminate one of the primary perceived advantages of custodial management over other diplomatic avenues, which is the speed with which it could be implemented.

Conclusion

An assertion of custodial management jurisdiction over straddling stocks beyond the Canadian EEZ would, if successful, provide the opportunity to pursue more effective management of those stocks. It would, however, appear to be a violation of customary international law, and of Canada's recently-agreed treaty obligations under the UNFA. Without a significant investment in enforcement, and a willingness to engage in potentially protracted confrontations (legal and otherwise) with other states, this move would face a strong possibility of ultimate failure. Furthermore, there are important risks attendant upon such a step, in that the removal of a multilateral management presence, even for a transitional period, could result in serious impacts from uncontrolled fishing.

The threat or actual assertion of custodial management might have some role as "leverage", as part of a broader package of multilateral efforts to improve management of straddling stocks. However, it would be such a significant step to unilateralism, beyond what was attempted in 1994/95, that its usefulness even in this context is questionable.

Renewal and Adaptation Within NAFO

In 1994/95, as suggested above, Canada achieved some successes by operating at a number of levels - national, bilateral, regional and global. The practical outcomes at the regional level were reflected in improvements to the NAFO regime; improvements which, despite more recent apparent "backsliding", were nonetheless significant. The question which remains is whether further renewal and adaptation of the NAFO system could still be a realistic option for dealing with the continuing problems posed by management of straddling stocks off the East Coast. While the House of Commons Standing Committee was skeptical of the value of further efforts in NAFO, it should be recalled that new legal instruments and avenues for both cooperation and confrontation have emerged since 1995, and any assessment of this option must be made with those developments in mind.

The potential list for action is long, and could begin with "operational" improvements within the existing mandate, focussed on such issues as the inspection regime, blacklisting of offending ships and ensuring that full publicity is given to identified violations.⁶³ More ambitious goals could include a re-negotiation of the NAFO Convention to address issues such as, *inter alia*: enhancement of the opportunities for member-state inspection and enforcement against vessels of other members; changes to the voting system to reflect a "weighting" for degree of interest and involvement in a fishery; strengthening of the role played by scientific advice in contrast to political decisions; elimination or reform of the objection system in management decision-making; and development of a dispute settlement system.⁶⁴

The desired improvements could in some cases be sought through diplomacy in NAFO (perhaps with a more aggressive public component), while the more substantive changes would require amendment of the NAFO Convention. Both of these options present difficulties. Diplomacy in NAFO has achieved gains in the past, but experience would indicate that the most substantial results have been obtained when that diplomacy has been backed up by other action outside the confines of the organization. With respect to formal amendment, it is true

that the NAFO Convention can be amended by a vote of three-quarters of the membership. The problem, of course, is that given the current composition of the membership, favourable amendments are unlikely to achieve the necessary majority.

This does not mean, however, that it is impossible to seek change in NAFO. As noted earlier, the coming into force of UNFA, and its relationship to the LOS 1982, opens new possibilities for Canada to put pressure on recalcitrant members, and to seek constructive interpretations and enforcement of existing NAFO obligations.

Dispute Settlement Under UNFA

As was noted in the earlier discussion of UNFA, the Agreement provides that the compulsory dispute settlement procedures in Part XV of LOS 1982 apply to any dispute as to the “interpretation and application” of UNFA, and to any “dispute between states parties to ...[UNFA] concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks...”.⁶⁵ Part XV of LOS 1982 provides a number of options for dispute settlement, including non-binding conciliation procedures.⁶⁶ If settlement is not achieved through non-binding means, compulsory dispute settlement is available,⁶⁷ under one of a number of fora, including the International Tribunal for the Law of the Sea, other arbitral tribunals or the International Court of Justice⁶⁸ (see Appendix C).

The combined operation of UNFA and Part XV of LOS 1982 offers the possibility of obtaining objective and authoritative determinations respecting the extent to which NAFO members (and other states) are fulfilling their obligations under UNFA and/or the NAFO Convention, something which was clearly lacking in 1994/95. Given the impact of Article 30(5), which allows tribunals to apply the terms of UNFA, the relevant regional agreement and “generally accepted standards for the conservation and management of living marine resources”, it is at least conceivable that the scope of legal debate might be framed more widely, and in a manner more favourable to Canada’s objectives. In this context, it should be recalled that Canada’s position has always been that a large part of the problem with NAFO has been the failure of members to fully implement and comply with their obligations.

Utilization of the dispute settlement procedure may offer the possibility of obtaining orders or other remedies⁶⁹ respecting the failure of NAFO members to, eg., investigate in good faith or to apply agreed management measures, but the importance of these processes is not limited to concrete legal results. As was recognized in 1994/95, and as has been emphasized by the House of Commons Standing Committee, the fight over straddling stocks is one which must engage the domestic populations of those states perceived as the worst offenders, and a concerted campaign of public education is essential to making Canada’s case.⁷⁰ In this context, it would be invaluable to be able to point to objective, independent rulings which confirmed Canada’s position.

There are, of course, obstacles to the pursuit of the dispute settlement option, including the difficulty of proving violations which are often based in inaction rather than action. The most significant problem, however, is the fact that many NAFO members, including the EU, are not yet party to the UNFA and are thus not subject to the compulsory dispute resolution structure which it provides (see Table 2). It has been reported, however, that the EU has “made a

political commitment to ratify” in the near future,⁷¹ and this should be encouraged by all means possible. Bringing the EU within the scope of UNFA will be a significant step forward.

**Table 2 – NAFO Members
and Acceptance of LOS 1982, UNFA**

NAFO Members	LOS 1982	UNFA
Bulgaria	Signed, ratified	--
Canada	Signed – Not party	Signed, ratified
Cuba	Signed, ratified	--
Denmark (Faroe Islands and Greenland)	Signed – Not party	Signed - Not party
Estonia	--	--
European Union	Signed, formal Confirmation	Signed - Not party
France (St. Pierre and Miquelon)	Signed, ratified	--
Iceland	Signed, ratified	Signed, ratified
Japan	Signed, ratified	Signed – Not party
Korea (Republic Of)	Signed, ratified	Signed – Not party
Latvia	--	--
Lithuania	--	--
Norway	Signed, ratified	Signed, ratified
Poland	Signed, ratified	--
Russian Federation	Signed, ratified	Signed, ratified
Ukraine	Signed, ratified	Signed, ratified
USA	--	Signed, ratified

Ratification of LOS 1982

The other major potential gap results from the inapplicability of UNFA dispute settlement procedures to non-parties to UNFA.⁷² The LOS 1982, on the other hand, has a much more extensive list of parties in general (142 as of April 2003⁷³), and in the NAFO membership in particular (see Table 2). This is, however, a list which does not yet include Canada. The question of Canadian ratification is a debate with implications beyond the scope of this study (including Canada’s willingness to be subjected to dispute settlement for potential actions beyond 200 M under the Coastal Fisheries Protection Act), but there are two points of particular relevance to the straddling stocks problem.

First, ratification of LOS 1982 opens the possibility of pursuing non-UNFA states (whether members of NAFO or not) via compulsory dispute settlement, where those states are parties to LOS 1982. It is true that the obligations of states fishing on the high seas, as stated in the Convention, are minimal (as shown above), but they are still obligations which give rise to justiciable issues. Part of Canada’s justification for unilateral action in 1994/95 was grounded in the assertion that certain states were in violation of international law through their tolerance of unrestricted fishing practices on the high seas in the Northwest Atlantic. Availability of

compulsory dispute settlement under the LOS 1982 would make it possible to pursue those contentions in a court or tribunal, something which cannot be done at present.

Second, it is assumed here that Canada will need to obtain significant international support for its demands for a rules-based, conservation-oriented regime in the Northwest Atlantic, and that this support must come from states and from public opinion in DWFNs. It will be essential that Canada demonstrate that its own house is in order, as it has done in recent years with sweeping, and painful, conservation measures within its own EEZ. Against this, Canada's continuing failure to become a party to the single most important international legal instrument of global oceans governance – one which has delivered massive jurisdictional entitlements to Canada – will be difficult to explain.

Conclusions

The discussion here is not intended to suggest that the availability of compulsory dispute settlement will be a cure-all for the ills of NAFO. It does, however, raise the possibility of adding to the diplomatic tools available to achieve the main objective considered in this section, which is the renewal and improvement of the NAFO system. Hard negotiations in NAFO and other forms of pressure (such as ship blacklisting, port closures and public education efforts) would all need to be part of the mix in any effort to reform the current system. Compulsory dispute settlement, however, provides a new and valuable avenue which should be explored, one which can be integrated with other actions as part of a coordinated effort to seek meaningful change in NAFO.

Conclusions and Recommendations

The problem of overfishing and poorly regulated fishing for straddling stocks outside Canada's 200 M limit is not amenable to any one "quick fix". As is argued above, Canada has been most successful in bringing about productive changes in NAFO when it has pursued a combination of actions at different levels – national, regional and global - but with a continued recognition of the need for multilateral management. It is the conclusion of this study that recent proposals for the unilateral assertion of "custodial management" jurisdiction beyond 200 M, while they may promise a quick and straightforward solution to these difficulties, are unlikely to deliver that result.

The assertion of this form of jurisdiction would be widely regarded as a violation of international law, including treaty obligations voluntarily assumed by Canada under the UNFA. As such, it is highly likely to attract significant resistance, and insufficient support, from the international community. When this prospect is considered together with the fact that Canada would need to abandon NAFO to pursue this course, it becomes clear that a declaration of custodial management is not a "risk free" option. A failure to enforce and maintain custodial management in the face of resistance from other states would result in a complete lack of regulation over the relevant stocks, perhaps for a significant period of time. It is the conclusion of this report that the likelihood of successfully maintaining such a claim is very low, which means that very serious risks would be incurred in exchange for a very low probability of a successful outcome.

There is another consideration which should be kept in mind as well. The effort that would be expended in declaring and defending this highly problematic claim would divert attention and resources from less dramatic but more productive long-term actions, and would be likely to reduce international support Canada might otherwise attract.

In the end, the most realistic conclusion is that for the foreseeable future the management and conservation of fish stocks beyond 200 M will require the presence of NAFO or something like it, and the most productive course of action is to enhance the management capabilities of the organization that is already in place. This is not to suggest that this is an easy task, nor that it will be without further frustrations, but it does recognize the reality of the situation. It is certainly possible for Canada to act more forcefully within the current NAFO system, and particularly to take full advantage of those options for dispute settlement that become available under UNFA and, assuming ratification, under the LOS 1982. Consistent with the multi-faceted approach taken in 1994/95, these options should be pursued in tandem with other diplomatic and public education initiatives to maximize the pressure on fishing states to accept the overall objective stated by the House of Commons Standing Committee (and by the Newfoundland and Labrador All-Party Committee), a "comprehensive, conservation-based fisheries management regime outside the 200-mile limit that is as rigorous as that inside the 200-mile limit."

Endnotes

- ¹ See evidence recounted in: House of Commons Standing Committee on Fisheries and Oceans, *Foreign Overfishing: Its Impacts and Solutions – Conservation on the Nose and Tail of the Grand Banks and the Flemish Cap*, (House of Commons, June 2002; hereinafter *Standing Committee Report*) at: <http://www.parl.gc.ca/InfoComDoc/37/1/FOPO/Studies/Reports/FOPORP10-e.htm> (accessed March 30, 2003), pp. 9-10. (Note – the on-line version of the report is not paginated. All page references are to the sequential pages, beginning with the first page of the Introduction, as presented on the website version of the Report). See also the Committee’s reiteration of its position, and its dissatisfaction with the Government response, in its more recent report, *Custodial Management Outside Canada’s 200 Mile Limit* (House of Commons, March 2003) at: <http://www.parl.gc.ca/InfoComDoc/37/2/FOPO/Studies/Reports/foporp02-e.htm> (accessed April 15, 2003).
- ² *Standing Committee Report, ibid*, p.17. See also: Newfoundland and Labrador All Party Committee on the 2J3KL and 3Pn4Rs Cod Fisheries, *Stability, Sustainability and Prosperity: Charting a Future for Northern and Gulf Cod Stocks* (St. John’s, March 2003, hereinafter *All-Party Report*), p. 6.
- ³ *Agreement For The Implementation Of The Provisions Of The United Nations Convention On The Law Of The Sea Of 10 December 1982 Relating To The Conservation And Management Of Straddling Fish Stocks and Highly Migratory Fish Stocks*, A/CONF.164/37, September 8, 1995; adopted August 4, 1995; in force Dec. 11, 2001.
- ⁴ The issue of sedentary stock jurisdiction is addressed further below, but it should be noted that Canada claims a continental shelf outside 200 M: *Oceans Act*, S.C. 1996, c. 31 (hereinafter *Oceans Act*), s. 17. Although the outer limits of this jurisdiction have not been delineated, it is clear that it extends to the areas of interest for straddling stocks.
- ⁵ There are other stocks, not listed here, that remain unregulated in that no quotas or other measures have been established.
- ⁶ *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, done at Ottawa, October 24, 1978, Canada Treaty Series 1979 No. 11 (hereinafter *NAFO Convention*). This Convention replaced the earlier *International Convention on Northwest Atlantic Fisheries* (ICNAF), following Canada’s extension of fisheries jurisdiction to 200 M.
- ⁷ Source: NAFO, <http://www.nafo.ca/>
- ⁸ See summary at *Standing Committee Report*, p. 7.
- ⁹ The issue of fishing beyond 200 M extends beyond perceived abuses of the NAFO system to include illegal, unreported and unregulated fishing (IUU fishing) in general, which would encompass non-parties to NAFO. This problem, as reflected both inside and outside national jurisdiction, has been the subject of extensive work by the FAO, and is discussed briefly below.
- ¹⁰ For an early review of these problems as they emerged in the NAFO context, see R. Applebaum, “The Straddling Stocks Problem: The Northwest Atlantic Situation, International Law and Options for Coastal State Action”, in A. Soons, ed., *Implementation of the Law of the Sea Convention Through International Institutions* (Honolulu: Law of the Sea Institute and University of Hawaii, 1990), pp. 282-317. See also *Standing Committee Report*, pp. 7, 11.

- ¹¹ For discussions of the global scope of this problem by the 1990s, see, *eg.*: E. Miles & W. Burke, “Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks”, 20 *Ocean Development and International Law* 343 (1989); E. Meltzer, “Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries”, 25 *Ocean Development and International Law* 255 (1994); W. Burke, “Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries”, 16 *Ecology Law Quarterly* 285 (1989). For a discussion of the direct relationship between the exclusion of Distant Water Fishing Nations (DWFNs) from 200 M zones and the growth of the straddling stocks problem, see F.M.A. Pfirter, “Straddling Stocks and Highly Migratory Stocks in Latin American Practice and Legislation: New Perspectives in Light of Current International Negotiations”, 26 *Ocean Development and International Law* 127 (1995), pp. 133-134.
- ¹² With the exception of sedentary species on the continental shelf, as discussed below.
- ¹³ UN Doc. A/Conf.62/122, Dec. 6, 1982; in force Nov. 16, 1994; reprinted at (1982) 21 *I.L.M.* 1261 (Hereinafter *LOS 1982* or the Convention), Part V. See Appendix A for various provisions of relevance to the EEZ and high seas regimes.
- ¹⁴ *Oceans Act*, ss.13-15.
- ¹⁵ *LOS 1982*, Articles. 56, 61, 62.
- ¹⁶ See *LOS 1982*, Articles 87, 116, 117,118,119.
- ¹⁷ See *LOS 1982*, Articles 64, 66, 67.
- ¹⁸ Figure reproduced in UN Atlas of the Oceans: www.oceansatlas.com/world_fisheries_and_aquaculture/html/issues/govern/xboundmng/default.htm, (accessed March 30. 2003).
- ¹⁹ For reviews of these shortcomings, see Miles and Burke, *supra* note 11, and Meltzer, *supra* note 11.
- ²⁰ B. Kwiatowska, “The High Seas Fisheries Regime: At A Point of No Return?”, 8 *International Journal of Marine and Coastal Law* (1993), p. 327; as cited in A. Thompson, “Canadian Foreign Policy and Straddling Stocks: Sustainability in an Interdependent World”, 28 *Policy Studies Journal* (Summer)2000, note 3.
- ²¹ Miles and Burke, *supra* note 11, p. 356.
- ²² See Burke, *supra* note 11, pp. 300-302. Thompson, *supra* note 20, at note 3, refers to the efforts of some coastal states, including Canada, to include provision for a tribunal to address management disputes over these stocks, but it did not garner support and was withdrawn.
- ²³ R. Grainger and S. Garcia, *Chronicles of Marine Fishery Landings (1950-1994): Trend Analysis and Fisheries Potential*, FAO Fisheries Technical Paper 359 (1996), section 2.5: www.fao.org/DOCREP/003/W3244E/w3244e00.htm#Contents (accessed March 30, 2003).
- ²⁴ The Conference was established pursuant to a resolution of the General Assembly: G.A. Res. 47/192, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/192 (Dec. 22 1992). The Resolution followed on from a 1992 recommendation at UNCED (see *Agenda 21: Programme of Action for Sustainable Development*, UN Doc A/CONF.151/26/Rev.1 (1992), at Chapter 17, para. 17.49).

- ²⁵ A fuller review of the actions taken in 1994/95 is found at P. Saunders, “And Now That The War Is Over: Looking Back At The Canada-European Union Fisheries Confrontation Of 1995”, (1996) 31 *Canadian Law Newsletter* 15, pp. 18-25, from which portions of this section have been condensed.
- ²⁶ *Coastal Fisheries Protection Act*, R.S.C. c. C-33 (1985) as amended by S.C. c. 14 (1994). The specific application was done by regulation, through the *Coastal Fisheries Protection Regulations*, C.R.C., c. 413, as amended by S.O.R./94-362, Canada Gazette, Part II, vol. 128, No. 12 at 2222 (May 25, 1994).
- ²⁷ SOR/95-136, Canada Gazette Part II, Vol. 129, No. 6 at 650 (March 3, 1995). Application to Spain and Portugal was repealed by SOR/95-222, Canada Gazette Part II, Vol. 129, No. 10, at 1445 (May 1, 1995), after the negotiation of a settlement.
- ²⁸ The particular action against *Estai* resulted in Spain bringing a case against Canada in the International Court of Justice. Canada, however, asserted its reservation to the jurisdiction of the Court (May 10, 1994) for disputes concerning “conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area...”: <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicdeclarations.htm#cana> (accessed March 30, 2003). The Court applied the reservation and found that it had no jurisdiction to adjudicate the dispute: *Fisheries Jurisdiction Case (Spain v. Canada)*, ICJ [1998], General List no. 96: <http://www.icj-cij.org/icjwww/idocket/iec/iecframe.htm> (accessed March 30, 2003).
- ²⁹ Canada - European Community: Agreed Minute On The Conservation And Management Of Fish Stocks, done at Brussels April 20, 1995, reprinted at (1995) 34 I.L.M. 1260 (1995). By a decision of the NAFO Annual Meeting, the terms became effective against other NAFO Parties on January 1, 1996: DFO Press Release NR-HQ-95-108E, Sept. 15, 1995.
- ³⁰ Thompson, *supra* note 20, p. 14.
- ³¹ P. Saunders, “Jurisdiction and Principle in the Law of the Sea”, in C. Carmody *et al*, eds, *Trilateral Perspectives on International Legal Issues: Conflict and Coherence* (Baltimore: American Society of International Law, 2003), p. 398.
- ³² Portions of this review of *UNFA* are drawn from a fuller version found in *ibid*, pp. 393- 397.
- ³³ See, *eg.*: D.A. Balton, “Strengthening The Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks” 27 *Ocean Development and International Law* 125 (1996); L. Juda, “The 1995 United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: A Critique” 28 *Ocean Development and International Law* 147 (1997); T. McDorman, “The Dispute Settlement Regime of the Straddling and Highly Migratory Fish Stocks Convention”, 35 *Canadian Yearbook of International Law* 57-79 (1997). For selected provisions from the Agreement, see Appendix B.
- ³⁴ *UNFA*, Art. 8(3). Given the requirement to join or comply with management measures of these organizations, membership must be made possible for new entrants. States with a “real interest” in a relevant fishery “may become members of such organization or participants in such arrangement” [Art. 8(3)]. Where none exists, coastal states and DWFNs “shall cooperate to establish such an organization or enter into other appropriate arrangements: [Art 8(5)].

- ³⁵ Flag state enforcement is required under Art. 19(1), and is also reflected in the general duties set out in Part V.
- ³⁶ Boarding and inspection require prior notice and compliance with certain rules and procedures [Arts 21(1),(2),(4); 24]. Most important, where violations are detected, the flag state is notified and may enforce itself or authorize the inspecting state to investigate [Art 21(5),(6)]. In the case of “serious violations” (defined in Art. 21(11) to include, eg., fishing without licence, fishing in closed areas or seasons or for stocks under moratorium, and tampering with evidence), if the flag state has not acted, the inspecting state may order the vessel to port to complete the investigation. However, the flag state can still re-assert its rights by acting to enforce itself [Arts. 21(8),(12)].
- ³⁷ *UNFA*, Art. 23 (1), (2).
- ³⁸ Under *UNFA* Art. 29, there is also the possibility of establishing *ad hoc* expert panels to consult with parties in a non-binding process, on disputes relating to matters of a “technical” nature.
- ³⁹ *UNFA*, Art. 30(1),(2).
- ⁴⁰ *UNFA*, Art. 30(4). See McDorman, *supra* note 33, p. 22.
- ⁴¹ *UNFA*, Art. 7(2). The requirement for adoption of compatible measures is subject to an extensive list of considerations, including the following: measures previously applied by coastal and fishing states, or by regional organizations; respective dependence on the stocks; the impact on living marine resources; biological unity of stocks and interrelated stocks. There is no apparent priority established among these quite varied “considerations”: L. Juda, *supra* note 33 , pp. 154-155.
- ⁴² See Saunders, *supra* note 31, pp. 396-397, for a discussion of the various qualifications and limitations which may tend to weaken the innovative impact of *UNFA* insofar as the introduction of new management approaches is concerned.
- ⁴³ Available at: <http://www.fao.org/fi/agreem/codecond/ficonde.asp> (accessed April 15, 2003).
- ⁴⁴ FAO, September 2002: <http://www.fao.org/fi/agreem/codecond/codecon.asp> (accessed April 15, 2003).
- ⁴⁵ FAO, 2001: <http://www.fao.org/DOCREP/003/y1224e/y1224e00.HTM> (accessed April 15, 2003).
- ⁴⁶ Adopted by the 27th FAO Conference, Nov. 1993. Text at: <http://www.fao.org/legal/treaties/012T-e.htm> (accessed April 17, 2003). Hereinafter *Compliance Agreement*.
- ⁴⁷ *Compliance Agreement*, Art. XI(1). There have been 24 acceptances deposited, including Canada, the EU, Norway and the United States. <http://www.fao.org/legal/treaties/012s-e.htm> (accessed April 17, 2003).
- ⁴⁸ *Standing Committee Report*, p. 15.
- ⁴⁹ *All-Party Report*, p. 6.

- ⁵⁰ The *Oceans Act*, s. 16, makes it possible to prescribe “fishing zones” by regulation. Although this was probably intended more for *internal* management zones, the wording of the section does not explicitly restrict its use outside 200 M. However, the reference in the section to areas “adjacent to the coast of Canada” could be taken to be distinct from areas “adjacent to the EEZ”. In any event, a fishing zone of this type could still be legislated, if not prescribed under regulation.
- ⁵¹ *Standing Committee Report*, p. 16.
- ⁵² Canadian Declaration of May 10, 1994, *supra* note 28.
- ⁵³ Testimony of Patrick Chamut, Assistant Deputy Minister, Fisheries Management, to House of Commons Standing Committee, Feb. 28, 2002. <http://www.parl.gc.ca/InfoComDoc/37/1/FOPO/Meetings/Evidence/fopoev41-e.htm> (accessed March 30, 2003).
- ⁵⁴ Article 2(4): The natural resources ...[of the shelf] consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species...”.
- ⁵⁵ The relevant provision in the *LOS 1982* is Article 77(4), which provides as follows:
- The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.
- ⁵⁶ See the discussion of this issue at E. R. Fidell, “Ten Years Under the Bartlett Act: A Status Report on the Prohibition of Foreign Fishing”, 54 *Boston Univ. Law Review* 705 (1974), pp. 725-729.
- ⁵⁷ *Standing Committee Report*, p. 17.
- ⁵⁸ *All Party Report*, p.6.
- ⁵⁹ *Standing Committee Report*, p. 17.
- ⁶⁰ *Standing Committee Report*, pp 17-18.
- ⁶¹ *Standing Committee Report*, p. 15.
- ⁶² *Standing Committee Report*, p. 18.
- ⁶³ For a full discussion of these and other potential actions within the current structure, see A. Chircop, D.M. Johnston and H. Williamson, *Straddling Stocks In The Northwest Atlantic: Conservation Concerns and Options – A Report to the Fisheries Council of Canada* (Halifax: April 2003), pp. 48-51.
- ⁶⁴ *Ibid*, pp. 51-58 The issue of an internal dispute settlement system for NAFO has been the subject of negotiation through the NAFO Working Group on Dispute Settlement Procedures, but no agreement has been reached. For a discussion of the Consolidated Text which has been the subject of discussion, see *ibid*, at pp. 57-58.

⁶⁵ *UNFA*, Art. 31(1),(2).

⁶⁶ *LOS 1982*, Art. 284.

⁶⁷ *LOS 1982*, Art 286. There are a number of restrictions on the availability of compulsory dispute settlement in *LOS 1982* which apply here as well, the most important of which is the exclusion of disputes related to a coastal state's exercise of its powers to manage fisheries within the EEZ: *LOS 1982*, Art. 297(3)(a). There is no restriction which would preclude compulsory dispute settlement for the issues likely to arise with respect to straddling stocks.

⁶⁸ *LOS 1982* allow for parties to agree on other dispute settlement procedures, including binding procedures established within regional organizations, which would be given priority over the choices within Part XV: *LOS 1982*, Arts. 280, 282. These provisions would apply under *UNFA* as well by operation of Art. 30.

⁶⁹ Decisions are final and binding, and must be complied with by parties: *LOS 1982*, Art. 296. Provisional measures are available under *LOS 1982*, Art. 290, and *UNFA*, Art. 31. The *UNFA* provision contemplates provisional measures to "preserve the respective rights of the parties to the dispute or to prevent damage to the stock in question" (With respect to states which are not party to *LOS 1982*, *UNFA*, Art. 31(3), limits the powers of the International Tribunal for the Law of the Sea to prescribe provisional measures in cases where an arbitral tribunal has not yet been constituted.)

⁷⁰ This point was clearly recognized in Recommendation 4 of the *Standing Committee Report*, p.18:

"That the Government of Canada conduct a targeted public information campaign to increase awareness of violations of NAFO conservation measures by vessels under the flag of member states and to canvass for public support to end the abusive exploitation of the fisheries resources of the Northwest Atlantic."

⁷¹ Testimony of Mr. Patrick Chamut, *supra* note 53.

⁷² *UNFA*, Art. 33, makes the following provisions with respect to non-parties, but it does not, and could not, subject non-parties to the dispute settlement scheme:

1. States parties shall encourage non-parties to this Agreement to become parties thereto and to adopt laws and regulations consistent with its provisions.

2. States parties shall take measures consistent with this Agreement and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this Agreement.

⁷³ UN Division of Ocean Affairs and Law of the Sea, List of Ratifications and Accessions: http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The United Nations Convention on the Law of the Sea (accessed April 12, 2003).

Appendix A
Selected Provisions –
1982 United Nations Convention on the Law of the Sea

EXCLUSIVE ECONOMIC ZONE

Article 55

Specific legal regime of the exclusive economic zone

The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention.

Article 56

Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
 - (i) the establishment and use of artificial islands, installations and structures;
 - (ii) marine scientific research;
 - (iii) the protection and preservation of the marine environment;
 - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

Article 57

Breadth of the exclusive economic zone

The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 61
Conservation of the living resources

1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.
2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.
3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.
4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.
5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.

Article 62
Utilization of the living resources

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.
2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.
3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made

substantial efforts in research and identification of stocks.

4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to the following:

(a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;

(b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;

(c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;

(d) fixing the age and size of fish and other species that may be caught;

(e) specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;

(f) requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;

(g) the placing of observers or trainees on board such vessels by the coastal State;

(h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;

(i) terms and conditions relating to joint ventures or other cooperative arrangements;

(j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;

(k) enforcement procedures.

5. Coastal States shall give due notice of conservation and management laws and regulations.

Article 63

Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

CONTINENTAL SHELF

Article 76
Definition of the continental shelf

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

...

Article 77
Rights of the coastal State over the continental shelf

1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
4. The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.

HIGH SEAS

Article 87 Freedom of the high seas

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- (a) freedom of navigation;
- (b) freedom of overflight;
- (c) freedom to lay submarine cables and pipelines, subject to Part VI;
- (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- (e) freedom of fishing, subject to the conditions laid down in section 2;
- (f) freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Article 116 Right to fish on the high seas

All States have the right for their nationals to engage in fishing on the high seas subject to:

- (a) their treaty obligations;
- (b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67; and
- (c) the provisions of this section.

Article 117 Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas

All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

Article 118 Cooperation of States in the conservation and management of living resources

States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

Article 119
Conservation of the living resources of the high seas

1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall:
 - (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;
 - (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.
2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.
3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

Appendix B
Selected Provisions –
1995 United Nations Fish Stocks Agreement (UNFA)

Article 2
Objective

The objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.

Article 3
Application

1. Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention.
2. In the exercise of its sovereign rights for the purpose of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction, the coastal State shall apply *mutatis mutandis* the general principles enumerated in article 5.
3. States shall give due consideration to the respective capacities of developing States to apply articles 5, 6 and 7 within areas under national jurisdiction and their need for assistance as provided for in this Agreement. To this end, Part VII applies *mutatis mutandis* in respect of areas under national jurisdiction.

Article 4
Relationship between this Agreement and the Convention

Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.

PART II
CONSERVATION AND MANAGEMENT OF STRADDLING
FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS

Article 5
General principles

In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention:

(a) adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization;

(b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;

(c) apply the precautionary approach in accordance with article 6;

(d) assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks;

(e) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened;

(f) minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species, (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques;

(g) protect biodiversity in the marine environment;

(h) take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;

(i) take into account the interests of artisanal and subsistence fishers;

(j) collect and share, in a timely manner, complete and accurate data concerning fishing activities on, inter alia, vessel position, catch of target and non-target species and fishing effort, as set out in Annex I, as well as information from national and international research programmes;

(k) promote and conduct scientific research and develop appropriate technologies in support of fishery conservation and management; and

(l) implement and enforce conservation and management measures through effective monitoring, control and surveillance.

Article 6
Application of the precautionary approach

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.
2. States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.
3. In implementing the precautionary approach, States shall:
 - (a) improve decision-making for fishery resource conservation and management by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty;
 - (b) apply the guidelines set out in Annex II and determine, on the basis of the best scientific information available, stock-specific reference points and the action to be taken if they are exceeded;
 - (c) take into account, inter alia, uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distribution of fishing mortality and the impact of fishing activities on non-target and associated or dependent species, as well as existing and predicted oceanic, environmental and socio-economic conditions; and
 - (d) develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment, and adopt plans which are necessary to ensure the conservation of such species and to protect habitats of special concern.
4. States shall take measures to ensure that, when reference points are approached, they will not be exceeded. In the event that they are exceeded, States shall, without delay, take the action determined under paragraph 3 (b) to restore the stocks.
5. Where the status of target stocks or non-target or associated or dependent species is of concern, States shall subject such stocks and species to enhanced monitoring in order to review their status and the efficacy of conservation and management measures. They shall revise those measures regularly in the light of new information.
6. For new or exploratory fisheries, States shall adopt as soon as possible cautious conservation and management measures, including, inter alia, catch limits and effort limits. Such measures shall remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment shall be implemented. The latter measures shall, if appropriate, allow for the gradual development of the fisheries.
7. If a natural phenomenon has a significant adverse impact on the status of straddling fish stocks or highly migratory fish stocks, States shall adopt conservation and management measures on an emergency basis to ensure that fishing activity does not exacerbate such adverse impact. States shall also adopt such measures on an emergency basis where fishing activity presents a serious threat to the sustainability of such stocks. Measures taken on an emergency basis shall be temporary and shall be based on the best scientific evidence available.

Article 7
Compatibility of conservation and management measures

1. Without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in the Convention, and the right of all States for their nationals to engage in fishing on the high seas in accordance with the Convention:

(a) with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks in the adjacent high seas area shall seek, either directly or through the appropriate mechanisms for cooperation provided for in Part III, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area;

...

PART III
MECHANISMS FOR INTERNATIONAL COOPERATION CONCERNING
STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS

Article 8
Cooperation for conservation and management

1. Coastal States and States fishing on the high seas shall, in accordance with the Convention, pursue cooperation in relation to straddling fish stocks and highly migratory fish stocks either directly or through appropriate subregional or regional fisheries management organizations or arrangements, taking into account the specific characteristics of the subregion or region, to ensure effective conservation and management of such stocks.

2. States shall enter into consultations in good faith and without delay, particularly where there is evidence that the straddling fish stocks and highly migratory fish stocks concerned may be under threat of over-exploitation or where a new fishery is being developed for such stocks. To this end, consultations may be initiated at the request of any interested State with a view to establishing appropriate arrangements to ensure conservation and management of the stocks. Pending agreement on such arrangements, States shall observe the provisions of this Agreement and shall act in good faith and with due regard to the rights, interests and duties of other States.

3. Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement. States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner

which discriminates against any State or group of States having a real interest in the fisheries concerned.

4. Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.

...

Article 12

Transparency in activities of subregional and regional fisheries management organizations and arrangements

1. States shall provide for transparency in the decision-making process and other activities of subregional and regional fisheries management organizations and arrangements.

...

Article 13

Strengthening of existing organizations and arrangements

States shall cooperate to strengthen existing subregional and regional fisheries management organizations and arrangements in order to improve their effectiveness in establishing and implementing conservation and management measures for straddling fish stocks and highly migratory fish stocks.

PART V
DUTIES OF THE FLAG STATE

Article 18
Duties of the flag State

1. A State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures.
2. A State shall authorize the use of vessels flying its flag for fishing on the high seas only where it is able to exercise effectively its responsibilities in respect of such vessels under the Convention and this Agreement.

...

PART VI
COMPLIANCE AND ENFORCEMENT

Article 19
Compliance and enforcement by the flag State

1. A State shall ensure compliance by vessels flying its flag with subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks. To this end, that State shall:
 - (a) enforce such measures irrespective of where violations occur;
 - (b) investigate immediately and fully any alleged violation of subregional or regional conservation and management measures, which may include the physical inspection of the vessels concerned, and report promptly to the State alleging the violation and the relevant subregional or regional organization or arrangement on the progress and outcome of the investigation;
 - (c) require any vessel flying its flag to give information to the investigating authority regarding vessel position, catches, fishing gear, fishing operations and related activities in the area of an alleged violation;
 - (d) if satisfied that sufficient evidence is available in respect of an alleged violation, refer the case to its authorities with a view to instituting proceedings without delay in accordance with its laws and, where appropriate, detain the vessel concerned; and
 - (e) ensure that, where it has been established, in accordance with its laws, a vessel has been involved in the commission of a serious violation of such measures, the vessel does not engage in fishing operations on the high seas until such time as all outstanding sanctions imposed by the flag State in respect of the violation have been complied with.

2. All investigations and judicial proceedings shall be carried out expeditiously. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities. Measures applicable in respect of masters and other officers of fishing vessels shall include provisions which may permit, inter alia, refusal, withdrawal or suspension of authorizations to serve as masters or officers on such vessels.

Article 20

International cooperation in enforcement

1. States shall cooperate, either directly or through subregional or regional fisheries management organizations or arrangements, to ensure compliance with and enforcement of subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks.

2. A flag State conducting an investigation of an alleged violation of conservation and management measures for straddling fish stocks or highly migratory fish stocks may request the assistance of any other State whose cooperation may be useful in the conduct of that investigation. All States shall endeavour to meet reasonable requests made by a flag State in connection with such investigations.

3. A flag State may undertake such investigations directly, in cooperation with other interested States or through the relevant subregional or regional fisheries management organization or arrangement. Information on the progress and outcome of the investigations shall be provided to all States having an interest in, or affected by, the alleged violation.

4. States shall assist each other in identifying vessels reported to have engaged in activities undermining the effectiveness of subregional, regional or global conservation and management measures.

5. States shall, to the extent permitted by national laws and regulations, establish arrangements for making available to prosecuting authorities in other States evidence relating to alleged violations of such measures.

6. Where there are reasonable grounds for believing that a vessel on the high seas has been engaged in unauthorized fishing within an area under the jurisdiction of a coastal State, the flag State of that vessel, at the request of the coastal State concerned, shall immediately and fully investigate the matter. The flag State shall cooperate with the coastal State in taking appropriate enforcement action in such cases and may authorize the relevant authorities of the coastal State to board and inspect the vessel on the high seas. This paragraph is without prejudice to article 111 of the Convention.

7. States Parties which are members of a subregional or regional fisheries management organization or participants in a subregional or regional fisheries management arrangement may take action in accordance with international law, including through recourse to subregional or regional procedures established for this purpose, to deter vessels which have engaged in activities which undermine the effectiveness of or otherwise violate the conservation and management measures established by that organization or arrangement from fishing on the high seas in the subregion or region until such time as appropriate action is taken by the flag State.

Article 23
Measures taken by a port State

1. A port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.
2. A port State may, inter alia, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.
3. States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.
4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

PART VIII
PEACEFUL SETTLEMENT OF DISPUTES

Article 27
Obligation to settle disputes by peaceful means

States have the obligation to settle their disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Article 30
Procedures for the settlement of disputes

1. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.
2. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, whether or not they are also Parties to the Convention.

...

5. Any court or tribunal to which a dispute has been submitted under this Part shall apply the relevant provisions of the Convention, of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention, with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned.

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Appendix C

Compulsory Dispute Settlement: UNFA and LOS 1982

As is noted in the body of the report, the *UNFA* applies the compulsory dispute settlement procedures found in Part XV of *LOS 1982* to disputes respecting the interpretation and application of *UNFA*, and to the interpretation and application of any relevant regional fisheries management agreement (such as the NAFO Convention). This Appendix is intended to briefly summarize the procedural options available under Part XV.

With the exceptions referred to in the body of the report, disputes which cannot be settled by non-binding means such as negotiation or conciliation under the Convention (Art. 284), or which the parties have not agreed to settle by other binding means, are subject to compulsory dispute settlement under the Convention (*LOS 1982* Art. 286; *UNFA* Art. 30).

By Article 287, *LOS 1982* (and Art. 30(3),(4) of *UNFA*), parties elect one or more of the available *fora* under the Convention (and may choose different ones for different purposes). The options are the following (as well as any other agreed by the parties, as noted in the body of the report). Where a party has not made an election, or where the parties to a dispute have elected different options, the default procedure is the Article VII Arbitral:¹

- a. **The International Tribunal for the Law of the Sea (ITLOS)** – A more formal, judicial body with 21 members (though cases may be heard by smaller Chambers). ITLOS is established by Annex VI of the Convention. For details on its operation and jurisdiction, see the summary prepared by the Division for Ocean Affairs and Law of the Sea at the UN: http://www.un.org/Depts/los/settlement_of_disputes/settlement_of_disputes.htm (accessed April 20, 2003).
- b. **Arbitral Tribunals – Annex VII** - Created under Annex VII of the Convention, these tribunals include five members chosen by the parties (one each and three jointly), drawn from a list nominated by States Parties (with the President of ITLOS choosing where agreement is not possible). The expertise can be of a broader “maritime” type, and tribunals can determine their own procedure.
- c. **Special Arbitral Tribunals – Annex VIII** - Drawn from a list of experts in a number of fields, established by various UN organizations, special arbitral tribunals under Annex VIII of the Convention can only deal with disputes related to 1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping” (Annex VIII – Art. 1). In addition to issuing decisions, these tribunals can, on agreement of the parties, fulfill a purely “fact finding” role, which could prove extremely useful in facilitating subsequent agreement by negotiation.
- d. **The International Court of Justice (ICJ)** – This Court is, of course, extremely formal, entirely legal in its orientation and comes with its own procedural rules and practices.

¹ Canada, in ratifying the *UNFA*, elected for the Article VII Arbitral Tribunals. It also declared its reservation with respect to disputes relating to boundaries, historic title, military activities and disputes being dealt with by the Security Council under the Charter of the UN. This reservation is explicitly provided for in Art. 298 of the *LOS 1982*.

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