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Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks

*Derrick M. Kedziora**

I. INTRODUCTION

In March 1995, Canadian gunboats seized and impounded a Spanish fishing trawler and cut the nets of another Spanish boat for alleged violations of international quotas and regulations governing the fishing of Greenland Halibut in the international waters of the North Atlantic.¹ Spain and the European Union (EU) responded by alleging that the Canadians violated international law and committed an act of piracy by seizing a foreign ship in international waters.² The EU threatened to impose economic sanctions against Canada, and the Spanish government responded by sending its own gunboats into the

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¹ *Fisheries: Canada Slashes Net of Spanish Trawler*, GREENWIRE, Mar. 27, 1995; Colin Nickerson, *Fish Spawning Ill Will at Sea; Dwindling Stocks Are Straining International Relations*, BOSTON GLOBE, Mar. 26, 1995. See also Clyde H. Farnsworth, *When They Talk About Fish, the Mellow Canadians Bellow*, N.Y. TIMES, Mar. 31, 1995, at 11.

The Greenland Halibut is used mainly to manufacture processed fish products. It is largely considered unappetizing in Spain, and almost the entire Spanish catch of Greenland Halibut is exported to Japan. See John Darnton, *Spanish Stirred by 'War' Over a Fish They Don't Eat*, N.Y. TIMES, Apr. 15, 1995 at 3.

² See Juan Antonio Yanez-Barneuvo, *Canada Flouts Sea Law in Fish Dispute*, N.Y. TIMES, Apr. 3, 1995, at A18.

North Atlantic.³ The stage was set for a classic shoot-out on the high seas.

This comment analyzes the Canada-EU dispute in light of current fisheries law as embodied in the 1982 United Nations Convention on the Law of the Sea (UNCLOS III).⁴ More specifically, it examines how the Canada-EU dispute highlights some major deficiencies in the existing system of international fisheries law regulating straddling and highly migratory fish stocks.⁵ In addition, this comment discusses the most recent attempt aimed at reforming international fishery law and preventing future international disputes concerning straddling and migratory fish stocks: the August 1995 United Nations Agreement on Straddling and Highly Migratory Fish Stocks (Fish Stocks Agreement).⁶ This comment argues that, although the Fish Stocks Agreement is an important step in the creation of a solid legal framework to regulate straddling and migratory fish stocks, it contains several ambiguities which may hamper its ability to address current deficiencies in fisheries law which contributed to the 1995 Canada-EU dispute.

Part II of this comment gives a brief history of the development of international fisheries law. Part III analyzes the Canada-EU dispute in light of current international fisheries law and shows how the dispute highlights some of the main deficiencies of UNCLOS III in dealing with straddling and highly migratory fish stocks. Part IV provides a brief overview of the August 1995 United Nations Fish Stocks Agreement. Part V evaluates how the Fish Stocks Agreement addresses some of the main deficiencies in international fisheries law

³ See John Darnton, *Two Feuding Nations With Fish Stories*, N.Y. TIMES, Apr. 2, 1995, at 4; *Spain, Canada Head for New Clashes in Fish War*, AGENCE FRANCE PRESSE, Apr. 15, 1995; Tom Buerkle, *Fishing Pact Ends Dispute Between EU and Canada*, INT'L HERALD TRIB., Apr. 17, 1995.

⁴ See United Nations Convention on the Law of the Sea, with Annexes, Dec. 10, 1982, and the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, with Annexes, *opened for signature* July 28, 1994, art. 55, S. TREATY DOC. No. 103-39 (1994) [hereinafter UNCLOS III].

⁵ Straddling fish stocks are fish stocks which tend to "straddle" jurisdictional lines, and highly migratory fish stocks are fish stocks which tend to move between various jurisdictions. See generally William Emerson, *Hitting the High Seas*, ORGANISATION FOR ECONOMIC CO-OPERATION AND OECD OBSERVER, Aug. 1995, at 33. See also Cyril De Klemm, *Migratory Species in International Law*, 29 NAT. RESOURCES J. 935, 935-37 (1989) (discussing the status of various types of migratory species in international law).

⁶ 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 Stock and Highly Migratory Fish Stock, Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 6th Sess., U.N. Doc. A/CONF 164/37 (1995), 34 I.L.M. 1542 (1995) [hereinafter Fish Stocks Agreement]. The Agreement consists of fifty Articles and several Annexes. *Id.*

which contributed to the 1995 Canada-EU dispute. Finally, Part VI offers some concluding remarks.

II. HISTORICAL BACKGROUND

Between the 17th and the late 19th centuries, two principles came to dominate the customary international law of the sea: the principle of *mare liberum* (open sea) and the principle of the territorial sea.⁷ *Mare liberum*, developed by the Dutch philosopher Hugo de Groot (Grotius) in the early 17th century, was rooted in the idea that the oceans were the common property of all.⁸ Because the oceans were the common property of all humankind, *mare liberum* dictated not only that no one nation or individual could possess private property rights over the oceans, but also that the oceans should be free and accessible to all.⁹ Gradually, *mare liberum* gained acceptance and became one of the dominant principles of the international law of the sea.¹⁰ As part of the doctrine of *mare liberum*, the freedom of fishing on the high seas became an entrenched element of the international law of the sea.¹¹ This meant that no state had a right to prohibit or regulate the fishing activities of foreign vessels on the high seas.¹² Both the principle of freedom of fishing on the high seas and *mare liberum* were premised on the idea that ocean resources and the op-

⁷ See JAMES C.F. WANG, HANDBOOK ON OCEAN POLITICS AND LAW 43-44 (1992).

⁸ JAMES B. MORELL, THE LAW OF THE SEA: AN HISTORICAL ANALYSIS OF THE 1982 TREATY AND ITS REJECTION BY THE UNITED STATES 2 (1992). In 1609, Grotius published a pamphlet entitled *Mare Liberum* which outlined his principle and argued for the freedom of the seas. See generally R. P. ANAND, ORIGIN AND DEVELOPMENT OF THE LAW OF THE SEA 77-89 (1982).

⁹ See MORELL, *supra* note 8, at 2. According to Grotius, "[t]he sea can in no way become the private property of any one, because nature not only allows but enjoins its common use. . . . Nature does not give a right to anybody to appropriate such things as may inoffensively be used by everybody and are inexhaustible, and therefore, sufficient for all." Quoted in *id.*

¹⁰ In the 17th century, *mare liberum* (open sea) gradually prevailed over the rival concept of *mare clausum* (closed sea). *Mare clausum* extended state sovereignty from land to sea and allowed states to claim jurisdiction and control over vast areas of the world's oceans. With the discovery of the Americas in the 15th century, Spain and Portugal became the dominant naval powers and, relying on their naval might and the doctrine of *mare clausum*, proceeded to seize control of vast stretches of the world's oceans in order to better exploit the resources of the New World. In order to break the Spanish and Portuguese monopoly over the oceans, developing naval powers such as the British and the Dutch developed and championed *mare liberum*. With the arrival of the Dutch and British as the new dominant naval powers in the early 17th century, *mare liberum* gradually became the dominant tenet of the law of the sea and remained so for the next 300 years. See WANG, *supra* note 7, at 41-43. See also ANAND, *supra* note 8, at 72-116, 124-35.

¹¹ See Jon L. Jacobson, *Law of the Sea: International Fisheries Law in the Year 2010*, 45 LA. L. REV. 1161, 1170 (1985); ANAND, *supra* note 8, at 151.

¹² See Jacobson, *supra* note 11, at 1170.

portunities to exploit them were inexhaustible.¹³ As long as there was enough for all, there was no reason to limit access to the oceans' bounty.

At the same time, international law recognized the principle of the territorial sea. The principle of the territorial sea allowed a coastal state to claim exclusive possession and control over a *narrow* belt of the sea (usually three to four nautical miles) adjacent to the coastal state's land area.¹⁴ Until the middle of the 20th century, the concept of the territorial sea — that narrow belt of the sea over which coastal states exercised sovereignty — and the principle of freedom of the high seas — that vast area of the oceans beyond national jurisdictions — remained the two cornerstones of the customary international law of the sea.¹⁵

The law of the sea, including international fisheries law, underwent crucial changes in the post-World War II period. While growing world populations increased the demand for ocean resources, new technologies permitted the exploration of the ocean bottom for such resources as gas and oil and allowed long-term fishing on the high seas which made possible the capture of entire stocks of fisheries.¹⁶ Increased demands for the world's sea resources, combined with highly efficient modern fishing methods, led to overfishing and the depletion of the world's fisheries.¹⁷ As a result, the Grotian view that ocean resources were inexhaustible was challenged and superseded by the realization that the oceans' resources were scarce and that conservation measures were necessary to prevent their total depletion.¹⁸ In addition, the development of ocean technologies such as supertankers

¹³ See WANG, *supra* note 7, at 44. This view is also reflected in the arguments used by Grotius in support of *mare liberum*. As Grotius argued, the seas should remain open for everybody because "[n]ature does not give a right to anybody to appropriate such things as may inoffensively be used by everybody and are inexhaustible, and therefore sufficient for all." Quoted in MORELL, *supra* note 8, at 2.

¹⁴ See MORELL, *supra* note 8, at 2. According to Morell, the limited acceptance of *mare clausum* reflected the limited nature of the territorial sea concept. *Id.*

In 1703, another Dutchman, Bynkershoek, fixed the distance of the territorial sea as the distance a cannon shot travels when fired from shore, and by the beginning of the 19th century many states considered the extent of their territorial seas to reach three miles from their respective shores. See ANAND, *supra* note 8, at 138-39.

¹⁵ WANG, *supra* note 7, at 43-44.

¹⁶ *Id.* at 44-45. See also ANAND, *supra* note 8, at 162-63.

¹⁷ According to the Food and Agriculture Organization, in the early 1990s almost 70% of the world's harvested species were depleted, overexploited to the brink of their capacity to reproduce, or just recovering after a period of depletion. See Emerson, *supra* note 5, at 34.

¹⁸ WANG, *supra* note 7, at 44.

gave rise to concerns for environmental safety in case of oil spills.¹⁹ All of these developments required a re-evaluation of the old principles of the law of the sea and the creation of new legal regimes to deal with emerging political, economic, and environmental problems.²⁰

After World War II, the primary feature in the development of fisheries law has been the extension of national jurisdiction into what had been considered the high seas — areas beyond national jurisdiction which were previously free and accessible to all.²¹ Coastal nations favored an extension of their jurisdictions into the high seas in order to gain control of valuable fishing and mineral resources.²² In addition, the development of modern and sophisticated distant-water fishing fleets — fishing vessels capable of fishing on the high seas for extended periods of time — by nations such as Japan, the former Soviet Union, and the United States stimulated the movement for the extension of national sovereignty into the high seas.²³ Faced with growing scarcity of fishery resources, local fishermen and their governments resented both the presence of these distant-water fleets in “their” seas and the taking of “their” fish.²⁴ However, under the traditional principle of the freedom of fishing on the high seas, the coastal states could not generally regulate these foreign distant-water fleets because they would fish outside the coastal states’ limited territorial seas.²⁵

¹⁹ *Id.* at 44-45.

²⁰ The emergence of this new international law of the sea in the post-World War II period was heavily influenced by newly independent Asian and African states. With the collapse of colonialism after World War II, newly independent African and Asian states for the first time began to play an important role in the formulation of international law of the sea through concerted action in such international bodies as the United Nations. *See ANAND, supra*, note 8, at 161-62. *See also* M. Johanne Picard, *International Law of Fisheries and Small Developing States: A Call for the Recognition of Regional Hegemony*, 31 *TEX. INT’L L.J.* 318, 320-22 (1996) (outlining the role played by newly independent states in the formulation of international law of the sea after World War II).

²¹ This does not mean that states did not try to extend their jurisdictions into the high seas before World War II. In fact, several states unilaterally declared extensions of their territorial seas beyond the traditionally accepted three mile limit well before World War II. *See generally* ANAND, *supra* note 8, at 140 (pointing out that disagreement over the scope of the territorial sea continued into the twentieth century “with countries adopting various limits as suited their interests or whims”). However, it was only after World War II that extension of state sovereignty into the high seas became a prominent feature of international fisheries law. *See generally* Jacobson, *supra* note 11, at 1170-73.

²² *See, e.g.*, M. DAHMANI, *THE FISHERIES REGIME OF THE EXCLUSIVE ECONOMIC ZONE* 14-15 (1987) (stressing the desire of developing coastal states to get control of vital economic resources through the EEZ concept).

²³ *See* Jacobson, *supra* note 11, at 1171.

²⁴ *Id.*

²⁵ *Id.*

Gradually, during the 1960s and 1970s various coastal states claimed extended jurisdictions of up to 200 miles.²⁶ The scope of these claims varied substantially. Some states claimed extensions of their territorial seas of up to 200 miles. Others claimed the creation of various 200 mile zones aimed at controlling only particular fishery resources.²⁷ Moreover, initially, the United States and the Soviet Union opposed any extension of state jurisdiction into the high seas.²⁸ Both superpowers possessed large navies, and both feared that the creation of these zones would interfere with the traditional high sea freedoms of navigation and overflight.²⁹ As a result, the superpowers sought to control this movement through the development of comprehensive agreements which would guarantee those traditional freedoms.³⁰ Nevertheless, the movement toward the extension of state power onto the high seas was inescapable. According to Professor Jacobson: "The best parts of the ocean were being progressively gobbled up by national jurisdiction. The planet's great international commons was in danger of division into national lakes."³¹

A watershed event occurred in 1976 when the United States declared its own 200 mile zone of jurisdiction.³² Once the United States, the greatest maritime power, adopted its own 200 mile zone, the concept of the zone became widely accepted and utilized throughout the international community. In fact, the endorsement of the 200

²⁶ *Id.* at 1171-74. As early as 1952, Chile, Peru, and Ecuador adopted the Santiago Declaration which asserted their moral and legal right to claim a 200 mile zone of maritime jurisdiction for the purposes of protecting and regulating the use of natural resources within those areas. *Id.* at 1171-72. See generally ROSS D. ECKERT, *THE ENCLOSURE OF OCEAN RESOURCES* 128-29 (1979) (discussing early attempts at extending national jurisdiction into the high seas).

²⁷ In the 1960s and 1970s, a large number of states extended the size of their territorial seas up to 12 miles. Moreover, a great variety of claims extending between 12 and 200 miles and encompassing various types of jurisdictions proliferated at this time. See Jacobson, *supra* note 11, at 1174.

²⁸ Countries possessing deep-sea fishing fleets also opposed the creation of these 200 mile zones. However, almost all states have coasts while relatively few states have long-range fishing fleets. Consequently, the vast majority of coastal states had an interest in extending their jurisdictions into the high seas in order gain control of valuable resources and had no interest in preserving the traditional freedom to fish on the high seas which worked solely for the benefit of the few states which possessed distant-water fishing fleets. *Id.* at 1175.

²⁹ See ANN L. HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 174-75 (1981).

³⁰ *Id.*

³¹ Jacobson, *supra* note 11, at 1174.

³² See Proclamation No. 5030, 3 C.F.R. 22 (1985 Comp.). See generally Fisheries Conservation and Management Act of 1976, 16 U.S.C.A. §§ 1801-1802 (West 1985 & Supp. 1996). Although the United States favored a comprehensive world-wide agreement which would regulate the establishment of these 200 mile zones, Congress and the executive branch eventually gave in to pressure from the domestic fishing industry and declared the creation of a 200 mile zone by the United States. See Jacobson, *supra* note 11, at 1176-77.

mile exclusive economic zone in the 1982 United Nations Convention on the Law of the Sea (UNCLOS III) was largely a recognition of an already existing customary principle of the international law of the sea.³³

UNCLOS III is generally regarded as a codification of the basic principles of both fisheries law and the law of the sea.³⁴ Under UNCLOS III, a coastal state may create a 200 mile EEZ in which it has "sovereign" rights to exploit, explore, manage, and conserve both living and non-living resources.³⁵ As part of the coastal state's "sovereign" rights, UNCLOS III allows the coastal state to enforce its laws and regulations on foreign ships within its EEZ.³⁶

³³ See Jacobson, *supra* note 11, at 1177-78 (arguing that it was a "foregone conclusion" that UNCLOS III would endorse the principle of a 200 mile exclusive economic zone).

The United States finally ratified UNCLOS III on October 7, 1994. See MORELL, supra note 8, at 96-148 (discussing reasons for U.S. delay in ratifying UNCLOS III).

³⁴ See R.R. CHURCHILL AND A.V. LOWE, *THE LAW OF THE SEA* 18-19 (1988) (arguing that although there is no single text codifying all of the law of the sea, United Nations Conventions on the Law of the Sea provide the basic framework); Suzanne Iudicello and Margaret Lytle, *Marine Biodiversity and International Law: Instruments and Institutions That Can Be Used To Conserve Marine Biological Diversity Internationally*, 8 TUL. ENVTL. L. J. 123, 128 (1994) (arguing that many experts believe that UNCLOS III functions as a codification of the law of the sea); Julie R. Mack, Comment, *International Fisheries Management: How the U.N. Conference on Straddling and Highly Migratory Fish Stocks Changes the Law of Fishing on the High Seas*, 26 CAL. W. INT'L L. J. 313, 317 (1994) (arguing that UNCLOS III codified customary international law).

UNCLOS III is the third attempt the by United Nations Conference on the Law of the Sea to adopt a convention regulating the law of the sea. See generally ROBERT L. FRIEDHEIM, *NEGOTIATING THE NEW OCEAN REGIME* 27-40 (1993) (offering a "short history" of UNCLOS III). The First United Nations Conference on the Law of the Sea (UNCLOS I) was held in 1958 and succeeded in adopting four conventions: the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources of the High Seas. See CHURCHILL AND LOWE, *supra* at 13. The Second United Nations Conference on the Law of the Sea (UNCLOS II) was held in 1960 but failed to adopt any proposals regarding the extent of the territorial sea or the scope of fisheries jurisdiction. See ANAND, *supra* note 8, at 189 (outlining reasons for the failure of UNCLOS II to adopt any proposals on the extent of the territorial sea or the scope of fisheries jurisdiction).

³⁵ UNCLOS III, *supra* note 4, art. 56, at 115-16. Article 56 of UNCLOS III states in part: "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 sea-bed and of the sea-bed 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." *Id.*

Article 57 of UNCLOS III establishes the extent of the EEZ: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.* at 116.

³⁶ *Id.* art. 73, at 124. Article 73 allows the coastal state to "take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention." *Id.*

UNCLOS III also contains certain basic guidelines outlining how states are expected to manage their respective EEZs.³⁷ For example, under Article 61, the state “shall” ensure that the living resources within its EEZ are not overfished or overexploited.³⁸ Apart from these general provisions, however, UNCLOS III gives each state a great deal of discretion over how it chooses to manage and exploit the fishery resources of its own EEZ. Moreover, given that 90% of all fishery resources are found within 200 miles of the world’s coasts,³⁹ the EEZ concept essentially allows coastal states to manage and exploit the vast majority of the world’s oceanic fishery resources.

In sum, modern fisheries law as embodied in UNCLOS III constitutes a profound departure from the traditional principle of freedom of fishing on the high seas. By recognizing the EEZ concept, modern fisheries law has extended coastal state jurisdiction to the vast majority of the world’s fishery resources and to almost 40% of the world’s oceans.⁴⁰ Although the freedom of fishing still exists on the high seas,⁴¹ the development and proliferation of EEZs has greatly limited the size of the high seas and has also defined the high seas as some of the least biologically productive parts of the Earth’s oceans.⁴²

³⁷ See *id.* arts. 60-75, at 117-25. For example, under Article 62 of UNCLOS III, “the coastal State shall promote the objective of maximum utilization of the living resources in the exclusive zone without prejudice to Article 61.” *Id.* at 118. This means that a coastal state shall determine the maximum allowable catch (the maximum amount of fish that can be safely caught without overexploiting or depleting the resource) within its own EEZ. Moreover, if the coastal state does not have the capacity to harvest the entire maximum allowable catch, it shall allow foreign vessels, pursuant to regulations and quotas established by the coastal state, access to the surplus of the allowable catch. *Id.* art. 62, at 118-19. See generally BARBARA KWIATKOWSKA, *THE 200 MILE EXCLUSIVE ECONOMIC ZONE IN THE NEW LAW OF THE SEA* 46-52 (1989) (discussing the rights and duties of states under Articles 61 and 62 of UNCLOS III).

³⁸ UNCLOS III art. 61(2), *supra* note 4, at 118. In addition, under Article 61, coastal states must design measures “to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yields.” *Id.* art. 61(3).

³⁹ Ferdinand J. Gallo III, *The Future of Fishery Management and Its Impact on the Seafood Industry: A Comparison of United States and Canadian Fishery Management Policies After UNCLOS III*, 13 Nw. J. INT’L L. & BUS. 177, 178 (1992).

⁴⁰ See Jacobson, *supra* note 11, at 1179; Mack, *supra* note 34, at 317.

⁴¹ See UNCLOS III art. 87, *supra* note 4, at 128-29. Article 87 enumerates the various freedoms of the high seas. *Id.* Among others, all states have the freedoms of navigation, overflight and fishing. *Id.* However, the freedom to fish on the high seas must be exercised with respect for the rights of others. According to Article 87(2), the freedom of fishing “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.” *Id.* at 129.

⁴² For an explanation of why most of the world’s fishery resources are found within a couple hundred miles from land, see OUR CHANGING FISHERIES 25-29 (Sidney Shapiro ed., 1971).

III. THE CANADA-EU DISPUTE AND THE CURRENT LAW OF THE SEA REGARDING STRADDLING AND MIGRATORY FISH STOCKS

A. Straddling and Migratory Fish Stocks Under UNCLOS III

The nature of migratory or straddling fish stocks raises special jurisdictional problems regarding which state is entitled to regulate the stocks' use, to partake of the stocks' bounty, and to ensure the stocks' preservation and optimal use. Because straddling fish stocks "straddle" the lines between the high seas and the coastal states' EEZs and because highly migratory stocks tend to move between various jurisdictional areas and the high seas, any conservation efforts undertaken by a coastal state within its own EEZ can be undermined by indiscriminate fishing in areas beyond the coastal state's jurisdiction.⁴³ Consequently, special rules are needed to promote the peaceful, economical, and ecologically sound harvesting of these ocean resources.

UNCLOS III contains two articles dealing specifically with highly migratory and straddling fish stocks.⁴⁴ Under UNCLOS III, coastal states and other states fishing for migratory or straddling fishing stocks must seek to agree, either directly or through regional fisheries organizations, upon the measures necessary to ensure conservation and to promote the optimum utilization of these fishery stocks.⁴⁵ Although UNCLOS III sets out certain general goals concerning

⁴³ See Donald M. McRae, *State Practice in Relation to Fisheries* 84 AM. SOC'Y INT'L L. PROC. 283, 286 (1990) (arguing that the "benefits of effective management on the one side of a boundary may be negated by the actions of the state on the other side"). See generally Mark Christopherson, Note, *Toward a Rational Harvest: The United Nations Agreement on Fish Stocks and Highly Migratory Species*, 5 MINN. J. GLOBAL TRADE 357, 364-66 (1996) (explaining that the nature of straddling and migratory fish stocks has made them particularly susceptible to overfishing); Donald M. Grzybowski et al., *A Historical Perspective Leading Up to and Including The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, 13 PACE ENVTL. L. REV. 49, 50 (1995) (arguing that "[b]ecause fish do not observe international oceanic boundaries during migrations, a problem arises as to who owns the fish").

⁴⁴ UNCLOS III, *supra* note 4, arts. 63-64, at 119-20.

⁴⁵ UNCLOS III Article 63(2) states: "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." *Id.* at 119.

Article 64(1), pertaining to highly migratory species, contains similar language: "The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective or optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose

straddling and migratory fish stocks, it fails to provide any specific directives detailing how states are to achieve these goals.⁴⁶ In addition, although UNCLOS III contains provisions calling for binding dispute settlement procedures which may apply to conflicts over straddling or migratory fish stocks,⁴⁷ the duty to “seek . . . to agree upon measures necessary for the conservation” of straddling and migratory fish stocks enshrined in UNCLOS III is probably too vague or too political in nature for resolution through these judicial settlement mechanisms.⁴⁸ In effect, UNCLOS III leaves straddling and migratory fishing stocks largely unregulated in the hope that interested parties will devise their own regulatory schemes in conformance with the goals set out in UNCLOS III.

B. The Northwest Atlantic Fisheries Organization

Both Canada and the European Community are members of the Northwest Atlantic Fisheries Organization (NAFO).⁴⁹ The Northwest

nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.” *Id.* at 120.

UNCLOS III also contains provisions requiring states, based on the “best scientific evidence,” to take steps to protect and restore high seas fish stocks at levels that will produce “maximum sustainable yield[s].” *See id.* art. 119(1), at 136.

⁴⁶ Christopherson, *supra* note 43, at 367 (pointing out that UNCLOS III does not provide any substantive rights in disputes between coastal states and nations fishing for endangered or vulnerable high seas fish stocks); Grzybowski, *supra* note 43, at 55 (asserting that UNCLOS III fails to provide guidelines for cooperation and fails to indicate what happens if cooperation fails); Mack, *supra* note 34, at 321-22 (arguing that UNCLOS III fails to provide a mechanism allowing members of regional organizations to enforce regulations). *See generally* Emerson, *supra* note 5, at 33 (arguing that UNCLOS III fails to spell out the means necessary to achieve its goal of protecting high sea fishery resources from abuse); Shigeru Oda, *Fisheries Under the United Nations Convention on the Law of the Sea*, 77 AM. J. INT’L L. 739, 754 (1983) (arguing that by merely suggesting cooperation among nations regarding the conservation of high sea resources UNCLOS III has overlooked the basic problem of the allocation of these fishery resources among states).

⁴⁷ *See* UNCLOS III, *supra* note 4, arts. 286-87, at 197-98. Under Article 286, any signatory party may request that a dispute regarding the interpretation or application of any provision of UNCLOS III be submitted to a court or tribunal for settlement. *Id.* at 197.

When signing or ratifying UNCLOS III, parties have the option to chose among several dispute resolution mechanisms including the International Tribunal for the Law of the Sea and the International Court of Justice. *Id.* art. 287, at 197. *See also id.* arts. 297-99, at 200-03 (outlining various limitations and exceptions to the dispute resolutions mechanisms).

⁴⁸ *See id.* art. 63(2), at 119; Christopherson, *supra* note 43, at 367 (stating that general requirements to cooperate under UNCLOS III are “arguably unenforceably vague”); Oda, *supra* note 46, at 753-54 (arguing that disputes between states concerning the allocation of fishery stocks on the high seas are political in nature and not suitable for resolution by judicial bodies).

⁴⁹ The 1978 Northwest Atlantic Fisheries Convention established the Northwest Atlantic Fisheries Organization (NAFO) which came into existence in 1979. Since 1986, the European Community has represented Spain in NAFO proceedings. As of October 1995, there were fifteen contracting parties to the Northwest Atlantic Fisheries Convention: Bulgaria, Canada,

Atlantic Fisheries Convention of 1978 established NAFO as a regional fisheries organization whose object is to "contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources of the Convention Area."⁵⁰ Although the Northwest Atlantic Fisheries Convention applies to all the waters of the Northwest Atlantic, NAFO's regulatory powers extend only to the Regulatory Area — that area of the Northwest Atlantic over which coastal states have no jurisdiction.⁵¹

NAFO has its own secretariat and consists of three principal organs: the General Council, the Scientific Council, and the Fisheries Commission.⁵² The main functions of the General Council are to coordinate and supervise the organizational, financial, and administrative functions of NAFO.⁵³ The Scientific Council provides a forum for consultation and cooperation among member states regarding issues of scientific research in the Northwest Atlantic. More specifically, the Scientific Council appraises, compiles, and exchanges information relating to the fisheries of the Northwest Atlantic and provides advice about management and conservation issues to the Fisheries Commission and to individual member states.⁵⁴

Cuba, Denmark, Estonia, European Economic Community, Iceland, Japan, Republic of Korea, Latvia, Lithuania, Norway, Poland, Romania, and the Russian Federation. See Notice of Other Documents, 34 I.L.M. 1452 (1995).

⁵⁰ Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, *opened for signature* Oct. 24, 1978, art. II(1), Canada Treaty Series No. 11, 3-4 (1979) [hereinafter Convention]. Article I outlines NAFO's regulatory area, and the fishery resources covered both by NAFO and by the Convention. See *id.* art. I, at 3.

⁵¹ *Id.* art. I. Article I(1) defines the Convention Area as "the waters of the Northwest Atlantic Ocean north of 35°00' north latitude and west of a line extending due north from 35°00' north latitude and 42°00' west longitude to 59°00' north latitude, thence due west to 44°00' west longitude, and thence due north to the coast of Greenland, and the waters of the Gulf of St. Lawrence, Davis Strait and Baffin Bay south of 78°00' north latitude." *Id.* Article I(2) defines the Regulatory Area as "that part of the Convention Area which lies beyond the areas in which coastal States exercise fisheries jurisdiction." *Id.* at 3.

⁵² *Id.* art. II(2), at 4. For a concise discussion of the organization and functions of NAFO's various organs, see ELLEN HEY, *THE REGIME FOR THE EXPLOITATION OF TRANSBOUNDARY MARINE FISHERIES RESOURCES* 188-91 (1989).

⁵³ See Convention, *supra* note 50, art. III, at 4. The General Council coordinates both the internal relations and the external functions of NAFO. Within the General Council each member state has one vote, and decisions are taken by majority vote of all members present as long as there is a quorum of two-thirds of all the members. See *id.* art. V, at 6.

⁵⁴ *Id.* arts. VI(a)-(d), VII, VIII, at 5-6. The Scientific Council is to provide scientific advice to the Fisheries Commission either upon the request of the Fisheries Commission or upon its own initiative. *Id.* art. VI, at 5. All the contracting parties are members of the Scientific Council. *Id.* art. IX, at 6. Moreover, the scientific advice provided by the Scientific Council is to be determined by consensus. Where consensus cannot be achieved, the Scientific Council must include in its report all the opinions expressed on the matter under consideration. See *id.* art. X(1), at 7.

The Fisheries Commission — probably NAFO's most important organ — is responsible "for the management and conservation of the fishery resources of the Regulatory Area."⁵⁵ Membership in the Fisheries Commission is determined by the General Council and consists of contracting parties which participate in the fisheries of the Regulatory Area and any contracting parties which have provided satisfactory evidence that they expect to participate in the fisheries of the Regulatory Area during the year of that annual meeting or during the following calendar year.⁵⁶ Each Commission member has one vote, and as long as there is a quorum of two-thirds of all Commission members, the Fisheries Commission adopts proposals by majority vote of all members present and voting.⁵⁷

The Fisheries Commission may adopt proposals for joint actions by the contracting parties in order to fulfill NAFO's mandate to manage and conserve the fishery resources of the international waters of the Northwest Atlantic.⁵⁸ The Northwest Atlantic Fisheries Convention does not enumerate the type of proposals the Commission may adopt, and the Commission has no special powers to deal with straddling or highly migratory stocks. However, in adopting proposals relating to straddling or transboundary stocks, the Northwest Atlantic Fisheries Convention stipulates that the Fisheries Commission must try to achieve consistency and coordination between the Commission's own measures and the management and conservation measures adopted by various coastal states within their own EEZs.⁵⁹

The Fisheries Commission carries out at least two important functions. First, Article XI of the Northwest Atlantic Fisheries Convention allows the Fisheries Commission, as part of its management duties, to adopt proposals for the allocation of catches among the various member states within the NAFO Regulatory Area.⁶⁰ In other words, the Fisheries Commission, based on the advice of the Scientific Council,⁶¹ has the power to establish and allocate fishing quotas to various NAFO members for assorted fishing stocks found in the inter-

⁵⁵ *Id.* art. XI(2), at 7; *id.* art. I(2), at 3.

⁵⁶ *Id.* art. XIII(1)(a)-(b), at 9. A contracting party is any state or entity which has signed the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries.

⁵⁷ *Id.* art. V(1)-(2), at 5.

⁵⁸ *Id.* art. XI(2), at 7.

⁵⁹ *Id.* art. XI(3), at 7.

⁶⁰ *Id.* art. XI(4), at 7-8.

⁶¹ The Fisheries Commission may refer to the Scientific Council any questions regarding the conservation and management of stock within the regulatory areas. *See id.* art. XI(8), at 8.

national waters of the Northwest Atlantic.⁶² Second, Article XI also allows the Fisheries Commission to “adopt proposals for international measures of control and enforcement within the Regulatory Area” in order to enforce various NAFO rules and regulations.⁶³ Combined, these two provisions give the Fisheries Commission broad powers to formulate and enforce rules for the management and exploitation of Northwest Atlantic fisheries.

Despite the apparent wide-ranging power of the Fisheries Commission to draft proposals, NAFO has several important weaknesses which can render NAFO’s conservation and management measures largely ineffective. NAFO’s primary weakness is its inability to force member states to abide by the rules and regulations established by the Fisheries Commission. Article XII of the Northwest Atlantic Fisheries Convention allows any member of the Fisheries Commission to be exempted from any new proposal made by the Fisheries Commission by simply voicing an “objection” to that proposal to the Executive Secretary within a specified time period.⁶⁴ If a member objects to the Commission’s proposal, that member is not bound by the proposal, and the proposal binds only those member states that did not voice objections.⁶⁵ If a majority of members voices objections to the Fisheries Commission’s proposal, the proposal does not become binding on any of the Commission’s members unless they agree among themselves to be bound by the proposal on a later date.⁶⁶

Article XII of the Northwest Atlantic Fisheries Convention also allows a member of the Fisheries Commission to choose not to be bound by Commission rules and regulations already in force. A Commission member must simply file a notice of intent not to be bound by a particular measure at any time after one year from the date on which the measure became effective and must give notice to the Executive Secretary of its intention not to be bound.⁶⁷ If that notice is not withdrawn, the measure ceases to be binding on that member one

⁶² *Id.* art. XI(4), at 7-8. In deciding on the quotas allotted to the various members, the Fisheries Commission must take into account the interests of Commission members whose vessels have traditionally fished in that area and the interests of parties whose various coastal communities are primarily dependent on fishing for the regulated stock. In setting quotas for a particular regulated stock, the Fisheries Commission must give special consideration to parties which have taken measures to conserve that particular stock. *Id.*

⁶³ *Id.* art. XI(5), at 7-8.

⁶⁴ *Id.* art. XII(1), at 8. Article XII also spells out a time-line for the making of proper objections. *See id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* art. XII(3), at 9.

year after the date of the receipt by the Executive Secretary of the notice not to be bound. Once a single member has opted out of a particular Fisheries Commission managerial or conservatory measure in this manner, any other Commission member may cease to be bound by that measure upon the date that the Executive Secretary receives notice of the member's intention not to be bound.⁶⁸

In sum, NAFO's structure allows a member state to exempt itself from any regulatory measure or fishing quota established by the Fisheries Commission. More importantly, NAFO's voluntary compliance system allows a member to comply with only those rules and regulations that promote that member's own individual interests. Thus, the degree to which NAFO is able to achieve compliance with its conservation and regulatory measures will likely depend to a large extent on how appealing those measures are to *all* of NAFO's members.

The combination of NAFO's voluntary compliance system with the traditional freedom of fishing on the high seas as embodied in UNCLOS III can have a significant and potentially devastating impact on straddling and migratory fish stocks. Under this regime, any conservation and management goals for straddling or highly migratory stocks implemented either by a coastal state within its own EEZ or by member states complying with NAFO regulations can be seriously undermined by unregulated fishing on the high seas or in areas adjacent to the coastal state's EEZ. Allowing each state to disregard NAFO regulations and set its own fishing quotas creates a powerful disincentive on the part of the coastal states and other NAFO members to attempt to conserve and properly manage dwindling straddling and migratory fishery resources. If each NAFO member state is free to disregard the Fisheries Commission's quotas, a NAFO member state that complies with the Commission's quotas will be at an economic disadvantage because its access to scarce and valuable fishery resources will be limited while its fellow member states will be free to plunder the fishery resources of the Northwest Atlantic largely without regulations. In addition, the possibility that unregulated fishing might totally deplete a particular fishery resource provides an additional disincentive for states to follow NAFO quotas. If unregulated fishing can totally deplete a fishery resource and if there is no way to enforce NAFO regulations, member states will have little reason to follow NAFO quotas designed to conserve and manage that resource. In fact, under these circumstances, a NAFO member state would have

⁶⁸ *Id.* In other words, other members who decide to opt out will not have to wait one year before they are no longer bound by the regulations of the Commission.

an incentive to disregard NAFO quotas in order to capture as much of the fishery resource as possible before that resource became totally depleted.

NAFO's second major weakness lies in its toothless enforcement mechanisms.⁶⁹ Article XVIII of the Northwest Atlantic Fisheries Convention states that the parties to the Convention agree to implement "a scheme of joint international enforcement."⁷⁰ This scheme "include[s] provision[s] for reciprocal rights of boarding and inspection by the Contracting Parties and for flag State prosecution and sanctions on the basis of evidence resulting from such boarding and inspections."⁷¹ In other words, although all member states have the right to board and inspect the vessels of other member states within the NAFO Regulatory Area, only the flag state (the state under whose jurisdiction the vessel operates) can prosecute and sanction these vessels for violations of NAFO rules.

Although mutual inspection of vessels in the NAFO Regulatory Area is frequent,⁷² many flag states appear very reluctant to prosecute and sanction their own fishing vessels for violating NAFO rules. For instance, NAFO records indicate that although 49 European vessels were charged in 1993 with offenses such as misreporting catches or the use of illegal nets, only six of those charges resulted in prosecutions by the flag state.⁷³ In short, relying on each state to prosecute its own vessels does not appear to be a very effective way to enforce NAFO rules. Thus, even if all NAFO members agree to abide by a particular set of NAFO rules or quotas, NAFO's weak enforcement mechanisms may allow member states to break those rules with impunity.

C. 1995 Canada-EU Dispute

The March 1995 Canada-EU dispute can be traced to an earlier attempt by the Canadian government to bypass altogether NAFO's weak compliance and enforcement mechanisms by enforcing NAFO regulations on its own. In 1994, Canada amended one of its own laws

⁶⁹ For a discussion of NAFO's enforcement mechanism, see WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES* 335-36 (1994).

⁷⁰ Convention, *supra* note 50, art. XVIII, at 11.

⁷¹ *Id.*

⁷² For example, in 1994, excluding any additional surveillance conducted from the air, EU vessels were boarded and inspected 430 times within the NAFO regulatory area. For many EU vessels, this equaled almost an average of one inspection every two weeks. See *Background Note On EU-Canada Fisheries Relations*, REUTER EUR. COMMUNITY REP., Mar. 10, 1995.

⁷³ *Fisheries II: Canada Asks to Postpone NAFO Meeting*, GREENWIRE, Mar. 20, 1995; see also Mack, *supra* note 34, at 322-23 (tracing NAFO's failure to an unwillingness of flag states to prosecute and sanction their own vessels).

to give Canadian authorities the right to unilaterally enforce NAFO regulations in the NAFO Regulatory Area — the international waters of the Northwest Atlantic.⁷⁴ The statute's avowed purpose was "to enable Canada to take urgent action necessary to prevent further destruction of [straddling and migratory fish] stocks and to permit their rebuilding" within the NAFO Regulatory Area.⁷⁵ The act allowed Canada to define which stocks are "straddling" and to take various measures to protect them. For instance, the act allowed Canadian authorities to board and search, without a warrant if necessary, any vessel present in NAFO waters for any violations of NAFO regulations;⁷⁶ to arrest any person for violating NAFO regulation and to seize any fishing vessel and its cargo for similar violations.⁷⁷ The act also authorized Canadian officials to use force in order to disable and board a foreign fishing vessel,⁷⁸ and it gave Canada the power to prosecute and punish violators of NAFO rules in Canadian courts.⁷⁹

The March 1995 Canada-EU dispute can be largely attributed to a failure of interested parties to agree within the framework of a regional fisheries organization. The "fish war" between Canada and the EU began in February 1995 when NAFO reduced the total allowable catch of Greenland halibut (also known as turbot) in international waters just outside Canada's EEZ. Concerned that overfishing just outside Canada's 200 mile zone endangered the survival of the turbot fishery, the Fisheries Commission reduced the total catch from 60,000 tons to 27,000 tons annually and allotted 60% of the total annual catch to Canada and 13% to the EU.⁸⁰ The EU, relying on the "objection" provision of Article XII of the Northwest Atlantic Fisheries Convention, decided to exempt itself from the new quotas. Subsequently, the EU unilaterally established its own quotas at about 70% (18,000 tons)

⁷⁴ Coastal Fisheries Protection Act as Amended in 1994, 33 I.L.M. 1383 (1994). See generally Clyde H. Farnsworth, *Canada Acts to Cut Fishing by Foreigners*, N.Y. TIMES, May 22, 1994, at 9.

⁷⁵ See Coastal Fisheries Protection Act, *supra* note 74, art. 5.1(D), at 1358.

⁷⁶ *Id.* art. 7(1)-(2), at 1386.

⁷⁷ *Id.* arts. 8-9, at 1386.

⁷⁸ *Id.* art. 8(1), at 1386.

⁷⁹ *Id.* arts. 17-19, at 1387-88.

⁸⁰ See *Turbot War Takes Diplomatic Turn*, FIN. POST, Mar. 17, 1995. In previous years, NAFO had awarded the EU about 75% of the total allowable catch of Greenland Halibut while Canada received about 12%. See William T. Abel, *Fishing for an International Norm to Govern Straddling Stocks: The Canada-Spain Dispute of 1995*, 27 U. MIAMI INTER-AM. L. REV. 553, 566 (1996). See generally *Canada Presses for Grand Banks Cod Ban*, FIN. POST, Feb. 15, 1994.

of the total allowable annual catch of 27,000 tons as determined by the Fisheries Commission.⁸¹

Under the current international fishery regime embodied in UNCLOS III and regional fisheries organizations such as NAFO, the EU's actions were permissible. Because the EU legally opted out of the new NAFO quotas and because EU ships were fishing in international waters, the EU technically had the right to establish its own quotas under the traditional principles of freedom of fishing on the high seas.⁸² Although the EU's actions might have had potentially serious consequences for the preservation of the Greenland Halibut, they probably did not constitute any violations of international fishery law under UNCLOS III.⁸³

In response to the EU's "objection," the Canadian government imposed a unilateral moratorium forbidding EU vessels from fishing for Greenland halibut in the international waters of the Northwest Atlantic adjacent to Canada's EEZ.⁸⁴ When Spanish ships violated this moratorium, Canadian authorities boarded, seized, and impounded a Spanish trawler, the *Estai*, and cut the nets of another Spanish ship under the authority of the amended Coastal Fisheries Protection Act for alleged violations of NAFO quotas and fishing regulations.⁸⁵ When the vessel was towed into a Canadian port, further investigation revealed that the vessel had violated several NAFO regulations including using nets with holes smaller than allowed by NAFO regulations and fishing for immature Greenland halibut.⁸⁶ The vessel also contained a secret storage room containing 25 tons of American plaice, a fish which is under a NAFO moratorium, and the

⁸¹ See *EU Charges Canada with Turbot War Escalation*, FIN. POST, Mar. 4, 1995; Peter Morton, *Canada Vows Action On Spanish Fishing 'Pirates'*, FIN. POST, Mar. 7, 1995; Jessica Matthews, *On the High Seas: The Law of the Jungle*, WASH. POST, Apr. 9, 1995.

⁸² See UNCLOS III, *supra* note 4, art. 87(1), at 128-29.

⁸³ See *Background Note On EU-Canada Fisheries Relations*, *supra* note 72 (arguing that once the EU validly invoked NAFO's objection provision, its vessels were no longer legally bound by the NAFO quota). Under UNCLOS III, states have the obligation to attempt to cooperate to preserve and manage straddling and migratory fish stocks. Although the issue has not been resolved, it seems unlikely that the EU violated its duty to cooperate under UNCLOS III by legally exempting itself from NAFO quotas. See generally Jon K. Goltz, Comment, *The Sea of Okhotsk Peanut Hole: How the United Nations Draft Agreement on Straddling Stocks Might Preserve the Pollack Fishery*, 4 PAC. RIM. L. & POL'Y J. 443, 458 (1995) (arguing that nations may fail to reach an agreement without violating their duty under UNCLOS III to seek to agree). In any case, the general duty to cooperate under UNCLOS III is probably too vague to be functionally enforceable. See *supra* notes 47-48 and accompanying text.

⁸⁴ Robert Kozak, *Canada Seizes Fishing Ships on High Sea*, REUTERS, Mar. 10, 1995.

⁸⁵ *Id.* See also *Fisheries: Canada Slashes Net of Spanish Trawler*, *supra* note 1.

⁸⁶ *Fisheries: EU/Canada Fish War Highlights Conservation Issues*, EUR. ENV'T, Mar. 20, 1995; Jill Vardy, *EU Freezes Relations With Canada Over Fish Row*, FIN. POST, Mar. 14, 1995.

captain of the vessel had apparently kept two separate log books: one containing figures meant for inspection by NAFO authorities and the other for the Captain's personal use.⁸⁷

The actions taken by Canadian authorities against the Spanish vessels arguably constituted numerous violations of the customary law of the sea. For instance, the Canadian authorities theoretically violated the traditional freedom of fishing on the high seas by imposing a fishing ban on a foreign vessel outside of Canada's 200 mile EEZ. In addition, by forcefully boarding, searching, and seizing a foreign ship, the Canadian authorities violated the customary exclusive legal right of the flag state to exercise legislative and enforcement jurisdiction over its vessels on the high seas.⁸⁸ However, Canadian authorities argued that given the feebleness of NAFO's enforcement and compliance mechanisms, only unilateral Canadian enforcement of NAFO regulations could ensure the conservation and proper management of the straddling fish stock.⁸⁹ As Brian Tobin, Canada's fisheries minister, said regarding the amended Coastal Fisheries Protection Act:

There is currently nothing in the books allowing us to extend our authority beyond 200 miles, and this legislation will do just that. Some people will think it runs against international law, but others will think otherwise, and we cannot afford to wait for years while this is debated because by that time the fishery will be purely an academic thing.⁹⁰

⁸⁷ See *EU/Canada Fish War Highlights Conservation Issues*, *supra* note 86; *Canadian Authorities Released the Spanish Trawler at the Centre of its Fishing Dispute with the European Union*, EUR. ENV'T, Mar. 8, 1995.

⁸⁸ For a complete list of alleged violations see *Commission Calls on Canada to Negotiate in Good Faith*, RAPID PRESS RELEASE, Mar. 29, 1995 (accusing Canada of mismanaging its own fisheries and violating international law through its actions against the *Estai*).

⁸⁹ See generally *Environment: Latest Canada-Spain Fish Row Highlights U.N. Meet*, INTER PRESS RELEASE, Mar. 27, 1995 (quoting Brian Tobin); *Spain, Canada Head for New Clashes in Fish War*, AGENCE FRANCE PRESSE, Apr. 15, 1995; Edward Tang, *Whose Fish Is It, Anyway?*, STRAITS TIMES, Mar. 26, 1995.

⁹⁰ Quoted in Gavin Hill, *Ottawa May be Adrift with New High-Seas Fishing Law*, FIN. TIMES, Apr. 6, 1994. See generally Abel, *supra* note 80, at 568 (outlining Canada's legal and practical justifications for its actions in the Northwest Atlantic).

Canadian fishery authorities may have been motivated by more than perceived EU violations of NAFO rules in pursuing their unprecedented actions. Prior to the 1995 Canada-EU dispute, Canadian fishery authorities were forced to take drastic actions to attempt to preserve dwindling fishery stocks. Largely because of Canadian mismanagement, in 1992 the Canadian government was forced to impose a moratorium on all cod fishing off the coast of Newfoundland. This moratorium caused the most massive layoff in Canada's history. See Susan Pollack, *The Last Fish: Closing of Newfoundland Fishing Grounds*, SIERRA, July 1995, at 48. See also William McCloskey, *Fencing the World's Oceans*, BALTIMORE SUN, Apr. 28, 1995. With thousands of Canadian fishermen out of work, the Canadian government arguably had some good domestic political reasons to attempt to prevent unregulated fishing by foreigners in international waters. See generally *Commission Calls on Canada to Negotiate in Good Faith*, *supra* note 88 (accusing Canada of attempting to hide the "shortcomings of its own fish conservation

After some diplomatic maneuvering and a good deal of fiery political rhetoric,⁹¹ Canada and the EU resolved their dispute peacefully.⁹² Canada agreed to repeal portions of the Coastal Fisheries Protection Act prohibiting Spanish and Portuguese vessels from fishing in the NAFO Regulatory Area and allowing Canadian authorities to seize vessels fishing in international waters.⁹³ The agreement also revised NAFO quotas and awarded both Canada and the EU about 41% of NAFO's total allowable catch of Greenland Halibut for the remainder of 1995.⁹⁴ Canada and the EU also agreed to implement a new system of monitoring requiring each contracting party to place independent observers on all vessels fishing within the Regulatory Area and to implement a system of satellite tracking on at least 35% of the ships fishing within the Regulatory Area.⁹⁵

Although a wide acceptance of the tougher inspection and monitoring provisions enshrined in the Canada-EU agreement may potentially increase compliance with NAFO regulations,⁹⁶ the bilateral

regime by blaming the EU"); John DeMont, *Tobin's War: Canada's Fiery Fisheries Minister Wins New Allies in his Battle With Foreign Fleets*, MACLEAN'S, Apr. 10, 1995, at 14 (arguing that "at a minimum, the great turbot war had taken the spotlight off [Canada's own] role in mismanaging the Atlantic fishery").

⁹¹ Shortly after the Canadian capture of *the Estai*, Spain sent its own ships into the North-west Atlantic, and tensions were high right up to the signing of the Canada-EC agreement which resolved the dispute. See Buerkle, *supra* note 3; Nickerson, *supra* note 1; Spain, *Canada Head for New Clashes in Fish War*, *supra* note 3; Clyde H. Farnsworth, *North Atlantic Fishing Pact Could Become World Model*, N.Y. TIMES, Apr. 17, 1995.

In response to Canada's actions, protesters in Madrid, led by members of fishermen's families, pounded the Canadian embassy with hundreds of eggs and dead fish. In addition, the Spanish government took revenge upon Canadian tourists for the actions of their government by requiring them to obtain visas in order to vacation in Spain. See Darnton, *supra* note 1. As the rhetoric escalated, the EU's Fisheries Commissioner accused Canada of turning the high seas into the "wild west" by playing the role of "self appointed lawmaker, sheriff and judge." See *Environment: Latest Canada-Spain Fish Row Highlights U.N. Meet*, INTER PRESS SERVICE, Mar. 27, 1995.

⁹² *Canada Fish War Over After Five Weeks of High Seas Drama*, DUETSCHKE PRESSE-AGENTUR, Apr. 16, 1995; Anne Swardson, *Canada, EU Reach Agreement Aimed at Ending Fishing War*, WASH. POST, Apr. 16, 1995.

⁹³ See Canada-European Community: Agreed Minutes On The Conservation and Management of Fish Stocks, 34 I.L.M. 1260, 1263 (1995). See also Buerkle, *supra* note 91.

⁹⁴ See Buerkle, *supra* note 3. In other words, the agreement awards the EU with 5,013 more tons of turbot for the remainder of 1995 than it was previously entitled to under the NAFO quota. *Id.*

⁹⁵ See *id.*; Farnsworth, *supra* note 91. See generally *EU/Canada: EU Signs Easter Deal on Fishing Rights*, AGRI SERVICE INT'L, May 5, 1995; Abel, *supra* note 80, at 570-71.

⁹⁶ Beginning in January 1996, the monitoring and enforcement provisions enshrined in the agreement which ended the Canada-EU dispute were applied to all NAFO members. Moreover, requiring contracting parties to provide independent observers on every ship within the Regulatory Area has proven effective in ensuring compliance with NAFO rules. See *Enforcement Measures to Apply to all NAFO Countries*, ECO-LOG WK., Sept. 22, 1995.

agreement itself fails to address problems surrounding NAFO's voluntary compliance structure as well as weaknesses in NAFO's prosecution and sanctioning mechanisms. Because of its failure to address these deeper structural weaknesses, the Canada-EU agreement is unlikely to provide a model for a lasting and meaningful solution to NAFO's deep-seeded problems.

IV. UNITED NATIONS AGREEMENT RELATING TO THE CONSERVATION AND MANAGEMENT OF STRADDLING AND HIGHLY MIGRATORY FISH STOCKS

On August 4, 1995, the United Nations Conference on Straddling Fish Stock and Highly Migratory Fish Stock adopted an Agreement Relating to the Conservation and Management of Straddling and Highly Migratory Fish Stocks (Fish Stocks Agreement).⁹⁷ The stated purpose of the Fish Stocks 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 UNCLOS III.⁹⁸ The Fish Stocks Agreement is also intended to prevent international conflicts over fishing rights on the high seas like the 1995 Canada-EU dispute.⁹⁹

The Fish Stocks Agreement contains several important and innovative provisions.¹⁰⁰ The Fish Stocks Agreement calls for the application of the precautionary approach to the conservation, management, and exploitation of straddling and highly migratory fish stocks.¹⁰¹ The precautionary approach requires states which agree to be bound by the agreement to obtain and share the best scientific information available and to take into account any uncertainties relating to the

⁹⁷ See Fish Stocks Agreement, *supra* note 6, at 1542.

⁹⁸ *Id.* art. 2, at 1548.

⁹⁹ See *UN Conference on High Seas Fishing Adopts Legal Agreement*, Press Release on Adoption of Agreement, Nov. 9, 1995.

¹⁰⁰ The Fish Stocks Agreement's general provisions give a good indication of the full range of issues the agreement purports to cover. For example, some of the general provisions require states to: (1) adopt measures to ensure the long-term sustainability of straddling and migratory fish stocks; (2) ensure that these measures are based on the best scientific evidence available; (3) adopt measures to protect, where necessary, species belonging to the same ecosystem or dependent on or associated with the straddling or migratory stock in question; (4) minimize pollution, waste, and discard catch by lost or abandoned gear, and catch of non-target species; (5) protect biodiversity in marine environment; and (6) promote and conduct scientific research and develop technologies in support of fishery conservation. See Fish Stocks Agreement, *supra* note 6, art. 5, at 1550. See generally Goltz, *supra* note 83, at 463-71 (outlining contours of the Fish Stocks Agreement in its draft form); Mack, *supra* note 34, at 326-31 (describing contours of the Fish Stocks Agreement).

¹⁰¹ See Fish Stocks Agreement, *supra* note 6, art. 6(1), at 1550.

size, productivity, and condition of straddling and migratory fishing stock in order to improve decision-making regarding the conservation and exploitation of these and related fishing resources.¹⁰² The precautionary approach requires states to err on the side of conservation in setting fishing quotas and implementing conservation policies when scientific information is uncertain, unreliable, or incomplete.¹⁰³ Thus, parties bound by this agreement will no longer be able to use the lack of adequate scientific information to justify their failure to adopt proper conservation measures.

The Fish Stocks Agreement also contains groundbreaking provisions regulating international cooperation concerning straddling and migratory fish stocks. The Fish Stocks Agreement requires coastal states with jurisdiction over straddling or migratory fish stocks and other states whose nationals fish for such stocks in the adjacent high seas to seek directly or through appropriate regional fisheries organizations to cooperate in the adoption and implementation of measures necessary to conserve these stocks in the adjacent high seas.¹⁰⁴ As part of their duty to cooperate, the Fish Stocks Agreement requires coastal states and high-sea fishing states (*i.e.*, states fishing for the straddling or migratory stocks on the high seas) to become members of regional fisheries organizations or to participate in such arrangements by agreeing to apply the conservation and management measures established by such organizations or arrangements.¹⁰⁵ Furthermore, under the Fish Stocks Agreement, only those states which are members of such organizations or which agree to abide by the conservation and management measures of such organizations or arrangements shall have access to the fishery resources managed and

¹⁰² *Id.* art. 6(3)(a)-(d). The precautionary approach is apparently intended to apply not only to straddling and migratory fishing stock, but also to non-target and associated or dependent species and their environments. *See id.* art. 6(5).

¹⁰³ *Id.* art. 6(2). According to Article 6(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." *Id.*

¹⁰⁴ *Id.* art. 7(1)(a), at 1551. According to the Fish Stocks Agreement, conservation and management measures established for the high seas and those adopted for areas under national jurisdiction must be compatible. Article 7(2) states: "In determining compatible conservation and management measures, States shall: (a) take into account the conservation and management measures adopted and applied in accordance with article 61 of the [UNCLOS III] in respect of the same stocks by coastal States within areas under national jurisdiction and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures." *Id.*

¹⁰⁵ *Id.* art. 8(3), at 1553. Where there are no regional or subregional fisheries organization, the Fish Stocks Agreement requires the relevant coastal states and high-sea fishing states to form such organizations or arrangements in order to ensure adequate conservation and management of fisheries resources. *See id.* art. 8(5).

protected by those organizations or arrangements.¹⁰⁶ By limiting access to high seas fisheries to states that agree to abide by conservation and management measures established by fishery organizations or arrangements, the Fish Stocks Agreement constitutes a significant departure from the unrestricted freedom of fishing on the high seas embodied in traditional principles of fisheries law.¹⁰⁷

Other innovative provisions of the Fish Stocks Agreement deal with compliance and enforcement of the various conservation and management measures established by regional fisheries organizations and arrangements. The Fish Stocks Agreement places the initial burden of enforcement on the flag state — the state under whose flag a particular fishing vessel is operating.¹⁰⁸ In fact, the Fish Stocks Agreement prohibits a flag state from authorizing a vessel to operate under its flag unless that state is capable of effectively managing and controlling that vessel.¹⁰⁹ Under the Fish Stocks Agreement, the flag state is responsible for ensuring that its vessels do not violate regional conservation and management measures through mechanisms such as the issuance of licenses, permits, and other regulations established by regional fisheries organizations.¹¹⁰ In addition, the flag state is required to monitor and control its fishing vessels through both national observer programs and inspection schemes as well as regional and sub-regional observer schemes including satellite transmitter tracking of

¹⁰⁶ *Id.* art. 8(4). Article 17 of the Fish Stocks Agreement allows states that are members of regional fisheries organizations or that agree to abide by the rules of such organizations to “take measures consistent with this Agreement and international law to deter activities of such vessels which undermine the effectiveness of subregional or regional conservation and management measures.” *See id.* art. 17(4), at 1559.

¹⁰⁷ As Ambassador Satya N. Nandan of Fiji, Chairman of the United Nations Conference on Straddling Fish Stock and Highly Migratory Fish Stock, summed up: “It’s no longer a free-for-all situation. The freedom to fish on the high seas no longer exists as it did under the Law of the Sea Convention.” *Quoted in* William Branigin, *World’s Fishing Nations Net Pact to End Conflicts*, INT’L HERLD TRIB., Aug. 5, 1995; Alan Toulon, *Fishing For New Rules: Canada Hopes to Negotiate Fish Stocks’ Protection Rules at UN*, FIN. POST, Mar. 18, 1995.

¹⁰⁸ Fish Stocks Agreement, *supra* note 6, art. 18(1)-(2), at 1553. Article 18(1) states: “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.” *Id.*

¹⁰⁹ *Id.* art. 18(2). Article 18(2) states: “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.” *Id.*

¹¹⁰ *Id.* art. 18(3). Article 18(3) requires the flag state to establish a national record of fishing vessels authorized to fish on the high seas and to provide this information to other interested states. In addition, the flag state is required to establish rules for the marking of fishing vessels and fishing gear for identification in accordance with a uniform international vessel and gear marking system. *Id.*

fishing vessels.¹¹¹ Furthermore, the flag state has the primary responsibility for the prosecution and sanctioning of any violations committed by vessels operating under its flag.¹¹²

In contrast, the Fish Stocks Agreement does not rely solely on the actions of the flag state to enforce regional conservation and management measures. In a significant departure from the traditional principle that only the flag state has sovereignty over its vessels, the Fish Stocks Agreement allows states which are members of regional fisheries organizations to board and inspect fishing vessels flying the flag of another state which is a party to the Fish Stocks Agreement but which is not necessarily a member of that particular fisheries organization in order to check for violations of conservation and management measures.¹¹³ If after an inspection there are reasonable grounds for believing that a fishing vessel is violating regional conservation and management measures, the state inspecting the vessel must secure evidence of these alleged violations and notify the state under whose flag the ship is registered.¹¹⁴ The flag state could then either proceed with its own investigation and enforcement actions or could authorize the inspecting state to conduct the appropriate investigation and to take appropriate enforcement actions.¹¹⁵ If the flag state does not respond within three working days to the allegations made by the inspecting state, and if the alleged violations are classified as "serious," the inspectors may remain on board to secure evidence and may detain the vessel in port for "further investigation."¹¹⁶

¹¹¹ *Id.* art. 18(3)(a)-(h). For example, Article 18(3)(g) requires the flag state to allow authorized inspectors from other states to board and inspect the vessels in accordance with the rules and regulations outlined by the various regional fisheries organizations. *Id.*

¹¹² *Id.* art. 19(1)(b), at 1560. Article 19(1)(b) requires the flag state to investigate fully and completely any alleged violations of fishing regulations by a vessel flying its flag. In addition, according to Article 19(1)(d): "If [a flag state is] satisfied that sufficient evidence is available in respect of an alleged violation, [the flag state shall] 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." *Id.* at 1561.

¹¹³ *Id.* art. 21(1), at 1562. According to Article 21(1): "In any high seas area covered by a subregional or regional fisheries management organization or arrangement, a State Party which is a member of or a participant in such organization or arrangement may, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such State Party is also a member of or a participant in the organization or arrangement, for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement." *Id.*

¹¹⁴ *Id.* art. 21(5).

¹¹⁵ *Id.* art. 21(6)-(7).

¹¹⁶ *Id.* art. 21(8)-(11), at 1563-64. Article 21(11) spells out a list of "serious" violations. Some of these include: (a) fishing without a valid license; (b) failing to maintain accurate records of

The Fish Stocks Agreement contains several provisions intended to provide safeguards against potential abuses of the right to board and inspect vessels under foreign jurisdiction. Article 22 of the Fish Stocks Agreement lists certain basic guidelines for the boarding and inspection of vessels which are intended to curb the unnecessary use of force and to prevent undue interference with legitimate fishing operations.¹¹⁷ Article 21(16) of the Fish Stocks Agreement requires that actions taken against foreign vessels "be proportionate to the seriousness of the violation."¹¹⁸ Furthermore, the Fish Stocks Agreement offers an additional significant safeguard against potential abuse by opening the inspecting state to liability for damage or loss stemming from illegal, abusive, or unreasonable actions taken during the boarding and inspection of fishing vessels.¹¹⁹

Finally, the Fish Stocks Agreement contains provisions dealing with states which are not parties to the Fish Stocks Agreement. According to Article 33, party states shall not only encourage non-parties to become parties to the Agreement, but also "shall take measures consistent with this Agreement and international law to deter the activities of vessels flying the flag of nonparties which undermine the effective implementation of this Agreement."¹²⁰ In other words, the

catch and catch-related data; (c) fishing in closed areas or during closed season; (d) fishing after attainment of quota established by the relevant regional organizations; (e) using prohibited fishing gear; or (f) multiple violations which would together constitute a serious disregard of conservation and management measures. *Id.* at 1564.

¹¹⁷ *Id.* art. 22, at 1565. Article 22 spells out some of the basic provisions for the boarding and inspection of fishing vessels by states which are parties to the Draft Agreement. For instance, according to Article 22(f), the inspectors are to "avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances." *Id.* In addition, Article 21(2) allows regional and subregional fisheries organizations to establish their own procedures for the boarding and inspection of vessels as long as those procedures are consistent with the procedures spelled out in Article 22 of the Draft Agreement. *Id.* at 1565-1566.

¹¹⁸ *Id.* art. 21(16), at 1565. Article 21(16) states: "Action taken by States other than the flag State in respect of vessels having engaged in activities contrary to subregional or regional conservation and management measures shall be proportional to the seriousness of the violation." *Id.*

¹¹⁹ *Id.* art. 21(18). Article 21(18) states: "States shall be liable for damage or loss attributable to them arising from actions taken pursuant to this article when such action is unlawful or exceeds that reasonably required in the light of available information to implement the provisions of this article." *Id.* In addition, under Article 21(12) the flag state retains the right to (at any time) take actions to fulfill its obligations to investigate, prosecute, and punish the offending vessel. *Id.* at 1564.

¹²⁰ *Id.* art. 33, at 1570. Article 20(7) contains similar language: "State 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 his purpose, to deter vessels which have engaged in activities which undermine the effective-

Fish Stocks Agreement empowers regional fisheries organizations (through their members) to take whatever enforcement actions are deemed necessary, within international law, against non-parties to achieve the goals of the Fish Stocks Agreement.

VI. EVALUATION OF THE FISH STOCKS AGREEMENT IN LIGHT OF
THE 1995 CANADA-EU DISPUTE

As the 1995 Canada-EU dispute demonstrates, fisheries law dealing with straddling and migratory fish stock is a potentially volatile area of the law in need of serious reform. The Fish Stocks Agreement is a laudable attempt to create an international regime for the conservation and management of straddling and highly migratory fish stocks. However, while the Fish Stocks Agreement contains several innovative provisions, it also contains crucial ambiguities which could seriously hamper its ability to address some of the main problems which contributed to the 1995 Canada-EU dispute.

In a major step towards the creation of a workable international regime for the management and conservation of straddling and highly migratory fish stocks, the Fish Stocks Agreement simultaneously strengthens the power of regional fishery organizations and substantially limits the traditional freedom of fishing on the high seas by requiring all states wishing to fish for straddling or migratory species on the high seas to join regional fishery organizations or comply with the measures established by such fishery organizations.¹²¹ Parties that refuse to join or comply with regulations and quotas established by regional fishery organizations are denied access to the fishery resources managed by those organizations.¹²² Moreover, by giving individual members of regional fishery organizations the power to enforce regional conservation measures and to exclude non-complying non-members from fishing for the regulated fish stock, the Fish Stocks Agreement gives states with a strong interest in preserving various straddling or migratory stocks (*i.e.*, Canada) the authority to do so.¹²³

ness 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." *Id.* at 1562.

¹²¹ See *id.* art. 8(3)-(5). See also *supra* notes 105-106 and accompanying text.

¹²² *Id.* art 8(4), at 1553.

¹²³ Individual states that are members of regional fishery organizations and that have straddling or migratory resources partially present within their own EEZs (*i.e.*, Canada) will have a strong incentive to preserve and properly manage these resources in order to preserve them for future unrestricted use within their own EEZs. The Fish Stocks Agreement creates a potentially powerful enforcement mechanism by giving member states with these strong incentives to pre-

In sum, it appears that under the Fish Stocks Agreement non-member states will no longer be allowed to flaunt regional fishery regulations simply by fishing in international waters.

At the same time, the Fish Stocks Agreement, by prohibiting non-complying non-members from fishing for the regulated stocks in international waters, provides a very powerful incentive for non-members to join regional fishery organizations. For instance, shortly after the introduction of the Fish Stocks Agreement, the United States joined NAFO.¹²⁴ Although the United States took part in negotiations surrounding NAFO's creation, it did not formally join NAFO largely because of pressure from American fishermen, who, as long as the United States was not a NAFO member, could fish in NAFO's Regulatory Area with immunity from NAFO rules and quotas.¹²⁵ With the introduction of the Fish Stocks Agreement, the United States had a strong interest in joining NAFO not only to maintain its access to the high sea fisheries controlled by NAFO, but also to participate in NAFO's rulemaking and quota-setting functions.¹²⁶ Thus, the Fish Stocks Agreement strengthens regional fishery organizations not only by providing members with the authority to enforce regional rules against non-complying non-members, but also by providing a powerful incentive for non-members to join these organizations.

While the Fish Stocks Agreement strengthens regional fishery organizations in important and substantial ways, the primary weakness of the Fish Stocks Agreement may be its failure to adequately address the consensual nature of organizations like NAFO.¹²⁷ The Fish Stocks

serve straddling and migratory fish stocks the authority to enforce regional fishery rules against non-complying non-members.

¹²⁴ See *Tobin Welcomes U.S. Entry Into NAFO*, CANADA NEWSWIRE, Nov. 30, 1995. See also McCloskey, *supra* note 90.

¹²⁵ See McCloskey, *supra* note 90. See also Mack, *supra* note 34, at 322 (discussing the failure of the United States to join NAFO prior to the Fish Stocks Agreement).

¹²⁶ To gain access to a regulated straddling or migratory fish stock under the Fish Stocks Agreement, a non-member must either join a regional fishery organization or comply with the rules and regulations established by such an organization. See *infra* note 105 and accompanying text. Although parties who decide not to join a regional fishery organization and chose instead to comply with the rules established by that regional fishery organization will gain access to the regulated fish stocks, they will have no voice in the actual formulation of regulations which will govern their fishing activities. Consequently, most parties will want to join a regional fishery organization not only to get access to the regulated fish stock, but also to play a role in the rulemaking functions of those regional organizations.

¹²⁷ The drafters of the Fish Stocks Agreement apparently foresaw the need to strengthen the structures of regional fishery organizations. Article 13 of the Fish Stocks Agreement states: "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 migra-

Agreement relies heavily on the ability of various members of regional fishery organizations to reach agreements on common measures, quotas, and procedures.¹²⁸ However, NAFO structures do not require all of its member states to agree on such vital issues as the proper allotment of fishing quotas.¹²⁹ In other words, although the Fish Stocks Agreement requires members of regional fishery organizations to agree on numerous issues, it fails to address the possibility that the structures of regional fishery organizations may not require their members to agree.¹³⁰

tory fish stocks." See Fish Stocks Agreement, *supra* note 6, at 1556. It seems unlikely, however, that such a vague provision will work to improve the effectiveness of regional organizations such as NAFO.

¹²⁸ According to Article 10: "In fulfilling their obligation to cooperate through subregional or regional fisheries management organizations or arrangements, States *shall*: (a) *agree* on and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stock and highly migratory fish stock; (b) *agree*, as appropriate, on participatory rights such as allocations of allowable catch or levels of fishing effort; (c) *adopt and apply* any generally recommend international minimum standards for the responsible conduct of fishing operations; . . . (e) *agree* on standards for collection, reporting, verification and exchange of data on fisheries for the stocks. . . ." (emphasis added) See *id.* at 1554-55.

¹²⁹ NAFO's structure allows any member of its Fisheries Commission to be exempted from any new proposals simply by voicing an "objection" to that proposal within a specified time period. NAFO's rules also allow any member to chose not to be bound by any of NAFO's rules and regulations already in force. For a more detailed explanation of NAFO's structures and procedures see *supra* notes 64-67 and accompanying text.

¹³⁰ For example, Article 30 of the Fish Stock Agreement requires compulsory and binding arbitration of various disputes arising under the Fish Stock Agreement. Under Article 30, states would choose from the options for dispute resolution established under UNCLOS III which include the International Tribunal on the Law of the Sea, the International Court of Justice, or an ad hoc tribunal. See Fish Stocks Agreement, *supra* note 6, art. 30, at 1569. Although the mandatory binding arbitration provisions of Article 30 apply to disputes between members of regional fishery organizations, neither Article 30 nor the entire Fish Stocks Agreement contains a provision addressing the possibility that regional fishery organizations may not require all of their members to agree on common rules, policies, or quotas.

Moreover, NAFO is not the only regional fisheries organization whose consensual nature allows its members to opt out of various regulatory provisions and recommendations. For instance, members of the International Baltic Sea Fishery Commission (IBSFC), a regional fisheries organization regulating the living resources of the Baltic Sea and Belts, have the option of "opting" out of recommendations proposed by the IBSFC. See Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and Belts, 12 I.L.M. 1291, 1294-95, art. XI(2), (4) (1973) (Gdansk Convention) (spelling out procedures for opting-out of the 1973 Gdansk Convention); Protocol Amending Convention on Fishing and Conservation of Living Resources in the Baltic Sea and the Belts to Provide for EEC Membership, 22 I.L.M. 704 art. XI(4)(a)-(b) (clarifying opt out provisions of the 1973 Gdansk Convention). See also Hey, *supra* note 52, at 176 (outlining IBSFC's opt out procedure).

Similarly, members of the North-East Atlantic Fisheries Commission (NEAFC), a regional fisheries organization charged with the preservation and management of the living resources of the North-East Atlantic, can opt out of NEAFC recommendations. See Hey *supra* note 52, at 181-185 (outlining NEAFC's structure, functions, and opting out-out procedure); Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries, 1981 WL 154036 (Intl. Envtl.

Under the Fish Stocks Agreement, the primary responsibility of a state desiring to fish in an area governed by a regional fishery organization is to join or to conform with the regulations established by that regional fishery organization.¹³¹ Once a state joins such an organization, that state is merely obliged to seek "to agree upon the measures necessary for the conservation" of the relevant straddling or migratory fish stocks.¹³² When a regional fishery organization like NAFO does not require all of its members to actually agree on any particular measure or quota and allows members to exempt themselves from any measure or quota, there is a lack of a pragmatic and efficient mechanism to enforce the Fish Stocks Agreement's general duty to pursue cooperation within the framework of a regional fisheries organization. Although other member states are free to litigate the issue of whether or not a particular member has lived up to its duty to seek cooperation,¹³³ the vagueness of this duty is unlikely to make it enforceable.¹³⁴ Thus, it appears that the consensual nature of organizations like NAFO can undermine the effectiveness of the Fish Stocks Agreement in achieving cooperation in the context of a regional fishery organization.

In addition, although the Fish Stocks Agreement contains important provisions dealing with the detection and monitoring of potential violations of regional fishery regulations,¹³⁵ it places the main burden of enforcement of these regulations on the flag state.¹³⁶ By entrusting the flag state with the primary responsibility of prosecuting and sanctioning various violations of regional fishery rules, the Fish Stocks Agreement fails to address a fundamental weakness in NAFO's prose-

L.), art. 12(2)(b) (1981) (outlining NEAFC's opting-out provisions). See generally Hey, *supra* note 50, at 225-30 (outlining the structure, organization and opting-out procedures of the International Commission for the Conservation of Atlantic Tunas (ICCAT)); *id.* at 209-16 (outlining the structure, organization and opting-out procedures of the Permanent South Pacific Commission (PSPC)).

¹³¹ See Fish Stocks Agreement, *supra* note 6, art. 8(3), at 1553. Only states who join such fishery organizations will have access to the fishery resources regulated by those organizations. See *id.* art. 8(4).

¹³² *Id.* art. 7(1)(a), at 1551.

¹³³ *Id.* art. 30, at 1569 (outlining procedures for the settlement of disputes).

¹³⁴ In this respect, the Fish Stocks Agreement's duty to cooperate may be just as unenforceable as the duty to cooperate regarding straddling and migratory fish stocks enshrined in UNCLOS III. See Christopherson, *supra* note 43, at 374 (arguing that the duty to cooperate under the Fish Stocks Agreement is as "unenforcably vague" as the duty to cooperate under UNCLOS III). See also *supra* note 48 and accompanying text.

¹³⁵ For a discussion of those provisions see notes 113-16 and accompanying text. For instance, satellite monitoring of fishing vessels in international waters has proven an effective, but expensive, method of regulations. See Christopherson, *supra* note 43, at 377.

¹³⁶ See *supra* notes 108-12 and accompanying text.

cution and sanctioning mechanism which contributed to the 1995 Canada-EU dispute. Although under the Northwest Atlantic Fisheries Convention each NAFO member has reciprocal rights of boarding and inspection,¹³⁷ only flag states have the right to prosecute and sanction their own vessels for violations of NAFO regulations.¹³⁸ Some NAFO flag states, however, have proven unable or unwilling to prosecute and sanction their own vessels.¹³⁹ Although the Fish Stocks Agreement allows other NAFO members to take some limited actions if the flag state is unable or unwilling to act,¹⁴⁰ the primary duty to prosecute and sanction violators still lies with the flag state.¹⁴¹ Consequently, it appears that even under the Fish Stocks Agreement, the effectiveness of NAFO's enforcement procedures will largely depend on the willingness of the flag states to prosecute and sanction violations of NAFO rules.¹⁴²

NAFO's voluntary compliance regime can compound problems of enforcement. For instance, a NAFO member that disagrees with a quota or regulation established by NAFO's Fishery Commission and that opts out of that quota or regulation is explicitly allowing vessels flying its flag to violate those NAFO guidelines. Under the Fish Stocks Agreement, each NAFO member has the primary duty to enforce regional rules and regulations and to prosecute and sanction any violators operating under that member's jurisdiction. However, a NAFO member that opts out of a NAFO regulation will be very unlikely to fulfill its enforcement mandate under the Fish Stocks Agreement by prosecuting and sanctioning its own vessels for violating NAFO rules which, under valid NAFO procedures, no longer apply to it. Thus, in certain situations, the Fish Stocks Agreement's prosecution and sanctioning provisions can be incompatible with NAFO's consensual nature. This incompatibility can create a good deal of ambiguity as to the responsibilities of NAFO members under the Fish

¹³⁷ In this way, NAFO's monitoring and detection procedures do not differ substantially from the mutual inspection procedures embodied in the Fish Stocks Agreement. *See generally supra* note 113 and accompanying text.

¹³⁸ *See supra* note 71 and accompanying text.

¹³⁹ *See supra* notes 72-73 and accompanying text.

¹⁴⁰ *See generally* Goltz, *supra* note 83, at 471-72 (describing the Fish Stocks Agreement's enforcement procedures).

¹⁴¹ *See supra* note 112 and accompanying text. *See also* Goltz, *supra* note 83, at 472 (concluding that the Fish Stocks Agreement rests ultimate prosecutorial and sanctioning authority in the flag state); Mack, *supra* note 34, at 331 (arguing that the Fish Stocks Agreement still leaves the flag state with the primary responsibility over investigation and sanctioning).

¹⁴² It is arguable, however, that the threat of continued satellite monitoring, boarding and in-port inspection might pressure the flag state into taking actions to prevent *continuing* violations. *See* Goltz, *supra* note 83, at 472.

Stocks Agreement and can potentially severely weaken the effectiveness of the Fish Stock Agreement's enforcement measures.

VI. CONCLUSION

The March 1995 Canada-EU fishing dispute can be largely attributed to deficiencies in existing fisheries law dealing with straddling and migratory fish stocks embodied in UNCLOS III and NAFO. UNCLOS III contains broad and probably unenforceable mandates regarding straddling and migratory fish stocks and leaves their management to regional fishery organizations such as NAFO. NAFO lacks the authority to impose quotas and regulations upon its members, and even if all NAFO's members agree on a common set of policies, NAFO's structure may make the enforcement of these policies and the prosecution of violators very difficult.

The Fish Stocks Agreement is a laudable attempt at reforming current fishery law dealing with straddling and migratory fish stocks, and it contains some groundbreaking provisions. At the same time, the Fish Stocks Agreement fails to adequately address at least two serious structural problems which contributed to the 1995 Canada-EU dispute. First, although the Fish Stocks Agreement relies heavily on regional fishery organizations to formulate and enforce various rules and regulations, it inadequately addresses the voluntary compliance structures of organizations like NAFO. This failure gives rise to serious ambiguities which may impede the Fish Stocks Agreement's ability to address some of the main deficiencies in both UNCLOS III and NAFO which contributed to the 1995 Canada-EU dispute. Second, by entrusting the flag state with the primary responsibility of prosecuting and sanctioning violations of regional fishery rules, the Fish Stocks Agreement may fail to adequately address problems of underenforcement which have plagued NAFO in the past. Thus, it appears that the Fish Stock Agreement's success in regulating and preserving straddling and migratory fish stocks will depend to a large extent on the willingness of states fishing for a particular straddling or migratory resource to agree on common measures and quotas and to enforce those measures and quotas against their own vessels.

As the 1995 Canada-EU fishing dispute demonstrates, states have not always been willing to agree on common conservation measures, and they have not always been willing to prosecute and sanction their own vessels for violating regional rules. To the extent that the Fish Stocks Agreement relies on the willingness of states to agree on common measures and to enforce regional rules on their own, it fails to

adequately address two of the main deficiencies in the existing system of international fishery law which contributed to the 1995 Canada-EU dispute. Thus, it appears that unless regional fisheries organizations like NAFO have the authority to force their members to reach binding and enforceable agreements and unless enforcement and sanctioning authority is placed in some independent tribunal or party, it is unlikely that the Fish Stocks Agreement will fully achieve its goals of promoting the rational and peaceful harvesting of the oceans' straddling and migratory fish stocks.