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Approaches to the Resolution of Atlantic and Pacific Ocean Problems

Donald M. McRae*

INTRODUCTION

The discussions in this symposium have reflected that we have moved beyond the "jurisdictional" phase in the law of the sea—the phase when the scope of state jurisdiction was being determined and fundamental principles were being formulated—into a phase of consolidation and management. The basic framework for ocean management that was formulated over the ten to twelve years of the Third United Nations Conference on the Law of the Sea (UNCLOS III)¹ is now being tested, implemented, and elaborated. Such a process of consolidation will continue regardless of the number of ratifications or of the time that it takes for the 1982 Convention on the Law of the Sea (1982 Convention)² to come into force formally. The Exclusive Economic Zone (EEZ) provisions set out in the 1982 Convention reflect the regime generally accepted under customary international law, with or without the formality of ratification.

The advent of the new regime has not been a clear break with the past, however: present problems of ocean management implicate past disputes over jurisdiction. Some of the problems of today are a direct consequence of the unfinished business of UNCLOS III. These are transitional problems that mark the gap between the pre-UNCLOS III period and the future reality of an orderly regime for the management of ocean resources.

This Article will consider some of these transitional problems, drawing on both Atlantic and Pacific examples and approaches. I will focus on problems that have confronted Canada, which is the basis of my own

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1. *Third United Nations Conference on the Law of the Sea*, 1-17 UNCLOS III, U.N. Doc. A/CONF.62 (1975-84).

2. The 1982 Convention was concluded as a result of twelve years of negotiations at UNCLOS III. United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 [hereinafter 1982 Convention].

experience. My discussion will look principally at the management of living resources, largely because Canada has had only limited experience with international problems arising out of the exploitation of nonliving resources. Canada's experience dealing with other states in the field of fisheries management is longstanding, however, and it can provide insights for others into the problems of managing these resources under the new ocean regime.

Canada's perspective on ocean management is somewhat different from the perspective of either Japan or the United States, although there are many common elements. Each state's initial premise is the foundation of the difference. Canada has always perceived itself as a coastal state seeking to protect the resources off its coasts from overexploitation, which most Canadians believe has been caused principally by the activities of foreign vessels. Thus, negotiating with foreign states seeking access to resources in the Canadian 200-mile zone has been an important aspect of ocean management for Canada in the post-UNCLOS III period.

The perspectives of the United States and Japan are somewhat different in their emphasis and focus. Both countries have important interests in securing access to resources in the 200-mile zones of *other* states. This tension between coastal and distant-water fishing interests was a major factor throughout UNCLOS III. Although UNCLOS III went some way towards resolving conflicts between these competing interests, actual reconciliation of these interests remains a key issue in securing a rational international ocean management regime.

My remarks will focus on the need to effect a reconciliation of the interests of coastal states and the other states desiring access to coastal states' waters. I will deal with three types of problems that Canada has had to face in the implementation of a regime to manage the resources of its 200-mile zone on its Atlantic and Pacific coasts: the delimitation of maritime boundaries with neighboring states and the consequent need for the management of resources that lie on both sides of those boundaries; the allocation of resources to foreign states that have traditionally fished in what is now Canada's 200-mile EEZ; and the management of resources that straddle the outer limit of the 200-mile zone and the adjacent high seas. This last issue of transboundary stocks differs from the problem of transboundary stocks with neighboring states because it potentially involves numerous actors.

I

MARITIME BOUNDARIES WITH NEIGHBORS AND TRANSBOUNDARY STOCKS

The problem of boundary-making with neighboring states was one

of the immediate questions facing coastal states as a result of the creation of 200-mile EEZ's. Although boundary-making had begun under the continental shelf regime, the new integrated 200-mile EEZ meant that those seabed boundaries had to be adapted to apply to the water column above the seabed, or that new multipurpose boundaries had to be devised.

There was very little guidance in the law for the delimitation of water column boundaries. In this respect, the *Gulf of Maine Case*³ is a landmark. In their pleadings before the Chamber of the International Court of Justice, Canada and the United States each had to craft a new law for the delimitation of "single maritime boundaries," boundaries that would apply to both the seabed and the water column, and then apply this newly created law to the circumstances of the Gulf of Maine area to produce a result favorable to its own side.

Although the problem facing states that have proclaimed 200-mile zones is often formulated as one of boundary delimitation, in reality what is at stake is the rational management by two states of a resource that is generally not contained by any boundary. This reality was brought to the fore on Canada's Atlantic and Pacific coasts after the extension of fisheries jurisdiction to 200 miles in 1977.⁴

On the Atlantic coast, the two major boundary disputes were between Canada and the United States over the Gulf of Maine area, particularly over the rich fishing ground known as Georges Bank, and between Canada and France over the fishing grounds off Newfoundland and the tiny French territories of St. Pierre and Miquelon, which lie some fifteen miles off the coast of Newfoundland.⁵

There were two boundary disputes with the United States on the Pacific coast: one located off the Strait of Juan de Fuca between the state of Washington and the province of British Columbia, and the other to the north, off Dixon Entrance between British Columbia and the state of Alaska.⁶

As between the United States and Canada, there was some intermingling of the fisheries between the two states, but salmon presented the major fisheries problem. The fishermen of each state were catching salmon bound for the rivers of the other state. This problem of "interception" had been a cause of friction between the fishermen of the two states for many years. The problem could not be solved by drawing a

3. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12).

4. Fishing Zones of Canada (Zones 4 and 5) Order, P.C. 1977-1, Can. Gaz. Part II, Vol. III, No. 1, at 115 (1977).

5. For an early survey of Canada's maritime boundary problems, see Beauchamp, Crommelin & Thompson, *Jurisdictional Problems in Canada's Offshore*, 11 ALTA. L. REV. 431, 438-48 (1973).

6. *Id.* at 443.

boundary—the salmon still would enter the waters of one state en route to the rivers of the other.

The early negotiations between Canada and the United States in 1976 and 1977 envisaged some form of joint management as the solution to the problems on both coasts.⁷ Boundaries were to be drawn, but they would be only a backdrop to a joint management regime. In 1979, Canada and the United States concluded an agreement dealing with the management and exploitation of the fishery resources on the Atlantic coast of Canada—the Agreement on East Coast Fishery Resources.⁸ This agreement was designed primarily to provide for “the co-operative management and sharing of the fisheries resources of Georges Bank.”⁹ As to the Pacific coast, Canada and the United States discussed the possibility of joint access and management, particularly with respect to halibut, but in relation to other groundfish as well.¹⁰ No formal agreement was ever reached, however.

Canada made similar attempts to solve its transboundary problems with France. In 1972, Canadian and French negotiators drew up a *Relevé des conclusions* as a means of resolving the question of the continental shelf boundary around St. Pierre and Miquelon.¹¹ Under this provisional agreement, France was to obtain access to, and some elements of management over, hydrocarbon resources on the Canadian continental shelf beyond the area of continental shelf accorded to St. Pierre and Miquelon. No joint management arrangements were made with respect to fisheries.

Unfortunately, all of these ventures into joint management came to nought. The U.S. Senate did not ratify the 1979 Agreement on East Coast Fishery Resources, making it a dead letter. When the parties were unable to reach any agreement on joint management of halibut or other groundfish on the Pacific Coast, they adopted agreements providing for the eventual exclusion of any access to each other's 200-mile zone.¹² Neither the French nor the Canadian Government adopted the 1972 *Relevé des Conclusions*, and Canada and France have made no joint arrangements with respect to fisheries. With the exception of a salmon interception treaty that was concluded much later,¹³ no joint fisheries

7. *Joint Report by Chief Negotiators on Canada-United States Maritime Boundaries and Related Resource Issues*, reprinted in 2 Memorial Submitted by Canada, Delimitation of the Maritime Boundary in the Gulf of Maine Area, Annex 36 (1982) [hereinafter *Joint Report*].

8. 1 *id.* at Annex 20.

9. Memorial Submitted by Canada, Delimitation of the Maritime Boundary in the Gulf of Maine Area ¶ 260 (1982).

10. *Joint Report*, *supra* note 7.

11. The Court of Arbitration referred to this provisional agreement in the Anglo-French Continental Shelf Case, Decision of June 30, 1977, 18 I.L.M. 397, 444 ¶ 200 (1979).

12. The agreements are summarized in DEP'T ST. BULL., June 1979, at 7.

13. See *infra* text accompanying notes 29-35.

management arrangement between Canada and its neighbors has resulted from the advent of the 200-mile zones of extended fisheries jurisdiction.

Thus, Canada and the United States, two countries that pride themselves on a long history of amicable and cooperative relations, and Canada and France, two countries with historical and cultural ties, have proved unable to cooperate on the joint management of fisheries or on the management of hydrocarbon exploitation in boundary areas. This hardly bodes well for collaborative arrangements for ocean management between other states. Under the circumstances, then, is the drawing of a boundary—the building of a fence—to be the only, or the most common, solution to these problems of ocean resource management? How well will this serve the need for the rational management of ocean resources, an objective clearly in the fore in the 1982 Convention?

I do not think, however, that the experiences on Canada's Atlantic and Pacific coasts is cause for complete pessimism. First, both the Canada-United States and the Canada-France experiences must be placed in their political contexts. Second, the results of the *Gulf of Maine Case* and other maritime delimitations have clarified what can be expected of adjudicated delimitations and highlighted the limitations of adjudication. And third, the Pacific Salmon Treaty, concluded between Canada and the United States in 1985, provides a model for other fisheries management problems.

A. *The Political Context*

Canada's fisheries relations with both the United States and France have their origins in the European discovery of North America. They have involved numerous disputes, arbitrations, and even wars. Although today Canada enjoys excellent relations with both countries, fisheries issues have been a constant irritant.

In the case of the United States, the issues engage not only the two states but also their local and state governments and the fishermen themselves. The Cutler-Cadieux fisheries and boundary negotiations of the late 1970's involved a substantial number of industry advisers on both sides—the United States negotiating team for the Pacific Salmon Treaty had over 100 members.¹⁴ These advisers exercised considerable influence. A comprehensive fisheries agreement for the Pacific coast worked out by Canadian and U.S. negotiators in 1978 apparently was rejected by Canadian industry advisers.¹⁵ The U.S. Senate rejected the 1979 East

14. Yanagida, *The Pacific Salmon Treaty*, 81 AM. J. INT'L L. 577, 585 (1987).

15. *Minutes of Proceedings and Evidence of the Standing Committee on Fisheries and Forestry*, [Canada] House of Commons, 30th Parl., 4th Sess., issue 6 at 5 (1979).

Coast Fishery Resources Agreement largely because of the dissatisfaction of Massachusetts fishermen with the agreement.¹⁶

Thus, a third party was needed to resolve the boundary dispute in the Gulf of Maine area. Adjudication put to rest the contentious question of jurisdiction that had created a stumbling block to securing an adequate management arrangement, where each side measured its gains and losses on its perception of what the proper extent of its jurisdiction should be. The determination by the Chamber of the International Court of the course of the boundary in the Gulf of Maine area settled the issue that has always lurked beneath any discussion of joint management, opening the possibility for discussions on a new basis. One example of that new basis was that the scallop fishery, which was one of Canada's principal concerns on Georges Bank and had been a contentious issue in the joint management negotiations of 1977-79, was no longer a transboundary fishery and did not have to be brought into any joint management discussions.¹⁷

The past still dominates the present, however: four years after the decision in the *Gulf of Maine Case*, no real negotiations are in progress on joint management of these transboundary stocks. The political fallout from a failed negotiating endeavor, such as the 1979 East Coast Fishery Resources Agreement, makes the resumption of new negotiations difficult.

The Canada-France dispute has a different political context. The question is not simply the delimitation of a boundary with the islands of St. Pierre and Miquelon; it also involves the right of fishing vessels based in France to fish in Canadian waters. Successive negotiations over almost a twenty-five-year period have produced no result. The drawing of a boundary seems to be the only way out of the impasse.¹⁸ The results of any adjudicated boundary will determine the extent of the need for any joint management arrangements.

Of course, political contexts differ. The difficulties that prevented cooperative approaches in the Gulf of Maine area and off St. Pierre and Miquelon may not be the same in other boundary areas. With the possible exception of the Beaufort Sea area,¹⁹ no immediate political or eco-

16. For background on this issue, see D. VANDERZWAAG, *THE FISH FEUD: THE U.S. AND CANADIAN BOUNDARY DISPUTE* (1983).

17. The Canadian scallop fishery in dispute was located principally in an area that was on the Canadian side of the Court-established boundary. Hence, the decision of the tribunal did not create a transboundary stock of scallops. I am indebted to Dr. Gordon Munro, Department of Economics, University of British Columbia, for this information.

18. For a discussion of this issue, see Pharand, *The Cod War Between Canada and France*, 18 *REVUE GÉNÉRALE DE DROIT* 627 (1987); Symmons, *The Canadian 200-Mile Fishery Limit and the Delimitation of Maritime Zones Around St. Pierre and Miquelon*, 12 *OTTAWA L. REV.* 145 (1980).

19. See Legault & McRae, *The Gulf of Maine Case*, 22 *CAN. Y.B. INT'L L.* 267, 271 (1985).

conomic pressures are forcing the resolution of the other unsettled boundaries between Canada and the United States. Perhaps it is not too late in these areas to pursue the option of collaboration rather than of fence-building.

B. *The Impact of the Gulf of Maine Decision*

Both Canada and the United States entered the *Gulf of Maine Case* litigation believing that the location of the fishery resources and their respective exploitation thereof supported the boundary for which each was arguing. Canada felt that the location of the scallop fishery, predominantly exploited by Canadians on the Canadian side of an equidistance line, supported its contention that an equidistance line would produce an equitable result.²⁰ The United States believed that the location of the resources in the Gulf of Maine area supported its proposal for three separate ecological regimes, each with single state management.²¹ According to this view, Georges Bank was on the U.S. side of an appropriate boundary, and both management and exploitation therefore should fall to the United States.²²

The Chamber of the Court disregarded the elaborate arguments and accompanying evidence each party presented in support of its position. In the view of the Chamber, the position of neither party could provide a basis for the drawing of an equitable boundary line. Invoking its mandate to delimit a "single maritime boundary,"²³ the Chamber rejected considerations that were unique to only one aspect of the boundary—such as water column or seabed arguments—and sought a rationale for its decision in an element that was common to both: geography.²⁴ Nongeographical factors played no part in the Court's formal reasoning in support of establishing the boundary; they were relevant only to a post facto determination that the boundary was not "radically inequitable."²⁵ Nongeographical factors could be considered, the Chamber stated, only to the extent that they would result in "catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned."²⁶

A legacy of the *Gulf of Maine Case* is the reduction of the process of

20. *Id.* at 271.

21. *Id.* at 272.

22. For a survey of the written arguments, see McRae, *The Gulf of Maine Case: The Written Proceedings*, 21 CAN. Y.B. INT'L L. 266 (1983). For a comprehensive review of the pleadings and decision, see Schneider, *The Gulf of Maine Case: The Nature of An Equitable Result*, 79 AM. J. INT'L L. 539 (1985).

23. See *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (Oct. 12).

24. See *id.* ¶¶ 194-95.

25. See *id.* ¶ 237.

26. See *id.*

boundary delimitation by third-party adjudication into three parts: (1) the determination of the relevant coasts and their geographical relationship to each other; (2) the drawing of an equal division of the areas between the coasts by some geographical means; and (3) the adjustment of the boundaries in proportion to the relevant coastal lengths of the two states. This methodology was utilized in the *Gulf of Maine Case* and appears to have been followed with little variation by both the ad hoc tribunal in the *Guinea-Guinea Bissau Case*²⁷ and by the International Court of Justice in the *Malta-Libya Case*.²⁸

The outcome of the *Gulf of Maine Case* and this approach to boundary delimitation by third-party tribunals reinforces what probably has always been obvious—adjudication or other third-party settlement of boundary disputes is not a mechanism for resolving intricate questions of fisheries management. A tribunal can provide only a line, and the line may bear little resemblance to actual fishing practices. If the parties want to resolve a boundary dispute in a way that reflects their need for fisheries allocations and management, they must resolve it themselves. They cannot depend on a tribunal to give priority to their particular fisheries management needs and goals. Massachusetts fishermen gave up guaranteed access to fisheries under the 1979 East Coast agreement, only to find that areas to which they would have had access under that agreement were now excluded to them as a result of the Chamber's delimitation in the *Gulf of Maine Case*.

Thus, while third-party dispute settlement mechanisms can play a useful role in resolving a political deadlock between states over jurisdiction, they cannot be expected to solve the more intricate needs of ocean management in general or of fisheries management in particular. Neighboring states must work out arrangements for fisheries management through bilateral negotiations. In such matters, third parties are appropriate only in conciliatory or mediation roles. The Chamber's rejection in the *Gulf of Maine Case* of the United States's intriguing theory of single state management of separate ecological regimes may have reduced the incentive for states to adopt a "winner take all" approach to international litigation, thereby encouraging increased attempts to seek negotiated solutions.

C. *The Pacific Salmon Treaty: A Model for Fisheries Management*

The Pacific Salmon Treaty,²⁹ which was concluded in 1985, culminated more than fourteen years of negotiations between Canada and the United States on a subject with a century-long history.³⁰ The

27. 25 I.L.M. 252 (1986) (English translation).

28. Concerning the Continental Shelf (Libya v. Malta), 1985 I.C.J. 13 (June 3, 1985).

29. Treaty with Canada Concerning Pacific Salmon, Pub. L. No. 99-5, 99 Stat. 7 (1985).

30. Yanagida, *supra* note 14; Munro & Stokes, *The Canada-United States Pacific Salmon*

Agreement established a binational management regime for the Pacific salmon fishery, a resource that emanates separately from the rivers of each country but intermingles both within the 200-mile zones of the two states and in the high seas.

The Treaty has two critical features. First, it provides for management of the fishery by a joint Canadian-American Pacific Salmon Commission, composed of an equal number of Canadian and American representatives.³¹ The Commission operates various "panels," which seek to avoid overfishing and to promote "optimum production."³² In addition to promoting conservation of the resource through recommendations to the member states, the Commission also allocates jointly exploited stocks and negotiates the terms under which future fishing will take place.

Second, the Treaty establishes the "equity principle," under which each party is to "receive benefits equivalent to the production of salmon originating in its own waters."³³ This principle is rooted in article 66 of the 1982 Convention, which recognizes that the "primary interest in and responsibility for" anadromous species is in the state in whose rivers such species spawn.³⁴

The equity principle is important, although its precise application has yet to be worked out.³⁵ The principle specifically recognizes that equal treatment of the two states in the interception of salmon is essential and, hence, provides a basis for solving the difficulties generated by efforts to enhance salmon productivity. Without the equity principle, enhanced catches resulting from one state's good management of the salmon's river habitat might produce only partial benefits to that state, with windfall benefits going to the neighbor state. The equity principle avoids this result and rewards the state that invests in enhancement of the resource in its rivers.

The Pacific Salmon Treaty obviously has to be understood in light of the specific characteristics of salmon as a species. Nevertheless, the creation of a regime of binational management, the granting of decisionmaking powers to a joint commission, and the formal recognition that the state within whose jurisdiction the resource is managed and controlled should receive the benefit of that resource, together provide important guidelines for other areas of fisheries management.

Treaty 7, paper presented to Workshop on Canadian Oceans Policy, University of British Columbia (Mar. 18-19, 1988).

31. See Treaty with Canada Concerning Pacific Salmon, *supra* note 29, art. II.

32. *Id.* art. III.

33. *Id.*

34. 1982 Convention, *supra* note 2, art. 66.

35. Yanagida, *supra* note 14, at 588-92.

II

FOREIGN STATE "RIGHTS" IN THE EEZ

The precise nature of the rights to be accorded to the coastal state in the 200-mile EEZ was a matter of some contention at UNCLOS III. The claims to 200-mile territorial seas of some of the Latin American states implied more substantial rights than did the purely resource-based jurisdiction advocated by proponents of the economic zone concept. On the other hand, the decision of the International Court of Justice in the *Fisheries Jurisdiction Cases*³⁶ would have given the coastal state only preferential rights, granting explicit recognition to the historic rights of the distant-water fishing state.

The more limited view of coastal state rights presented in the *Fisheries* case was not endorsed at UNCLOS III. Article 56 of the 1982 Convention defines the concept of the EEZ in terms of "sovereign rights."³⁷ These words imply absolute authority, similar to that provided for in the case of the continental shelf in the 1958 Continental Shelf Convention.³⁸ "Sovereign rights" under the Continental Shelf Convention excluded the possibility of rights over the resource residing in any state other than the coastal state, unless the coastal state directly granted them.³⁹

Provisions of articles 61 and 62, however, complicate the question of the nature of the coastal state's rights over the living resources in its 200-mile zone. Articles 61 and 62 contemplate the determination of a total allowable catch and the allocation of any surplus to other states.⁴⁰ Article 56(2) requires that coastal states exercising their rights in their EEZ's give "due regard to the rights and duties of other states."⁴¹ Article 311 preserves pre-existing agreements between coastal and noncoastal states over entry rights, so long as those agreements are compatible with the convention.⁴² The past attitude of the United States in denying the coastal state authority over highly migratory species within its EEZ has added further confusion to the issue.⁴³ Accordingly, the precise nature of coastal state rights has yet to be fully determined.

36. *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3 (July 25, 1974).

37. 1982 Convention, *supra* note 2, art. 56.

38. *Convention on the Continental Shelf*, Apr. 29, 1958, art. 2, 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311, 312.

39. *Id.* art. 2 ¶ 2.

40. Such decisions are not, however, reviewable in third party proceedings in the absence of coastal state agreement. 1982 Convention, *supra* note 2, art. 297, ¶ 3(a). For a different view, that the coastal state is a "custodian" rather than a "proprietor," see Lowe, *Reflection on the Waters: Changing Conceptions of Property Rights in the Law of the Sea*, 1 INT'L. J. ESTUARINE & COASTAL L. 1, 1-14 (1986).

41. 1982 Convention, *supra* note 2, art. 56(2).

42. *Id.* art. 311.

43. On this issue, see Burke, *U.S. Fishery Management and the New Law of the Sea*, 76 AM. J. INT'L L. 24, 41-45 (1982). The United States' conclusion of the Treaty on Fisheries Between the Governments of Certain Pacific Island States and the Government of the United

One major problem is determining the extent of the coastal state's authority over foreign vessels within its 200-mile zone. This problem has two main aspects. The first concerns the treatment of states that had prior treaty rights to fish in what has now become the 200-mile economic or fisheries zone of the coastal state. The second concerns the limitations that can be imposed by a coastal state on foreign state vessels that have been granted the right to fish within its 200-mile zone.

How one approaches these questions depends in part upon one's view of the nature of the 200-mile EEZ. Does the EEZ constitute a conceptual break with the past, such that old rights must be interpreted in the light of the new regime? Or must the new regime be interpreted in the light of, and ipso facto be limited by, the past? The 1982 Convention itself does not explicitly answer this question, although it acknowledges the past obliquely in articles 56(2) and 311.⁴⁴

In the absence of explicit treatment of this question in the 1982 Convention, one is forced back to general principles of international law. One principle is that a new treaty cannot abrogate old treaty rights unless it does so clearly and with the agreement of the parties to the treaty being abrogated.⁴⁵ Rights under the old treaty, however, must be interpreted in light of any new regime.⁴⁶ In other words, prior treaty rights must be preserved, but they should be applied in a way that is consistent with the new legal regime. Thus, where a fishing treaty entered into by two states is silent on a matter, one would look to the regime under the 1982 Convention to ascertain the rights of the parties. Where no prior treaty exists at all, the coastal state's rights would always be sovereign as provided in the 1982 Convention. Under this analysis, a coastal state should be able to impose restrictions on foreign vessels granted a right to fish within its 200-mile EEZ, provided that such restrictions are not incompatible with the terms of an existing treaty with the state affected or with the new regime embodied in the 1982 Convention.

These principles were in issue in 1986 before an arbitral tribunal in a case between Canada and France—the *La Bretagne Case*.⁴⁷ The case has not received much attention, which is unfortunate because it could have

States of America, 26 I.L.M. 1053 (1987), however, appears to constitute a change of position by the United States on this issue.

44. See *supra* text accompanying notes 41-42.

45. See generally SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 183-85 (2d ed. 1984).

46. For a discussion of this issue of intertemporal law, see *id.* at 138-40.

47. Dispute Concerning Filleting Within the Gulf of St. Lawrence (Can. v. Fr.) (Award of July 17, 1986) (arbitral tribunal established by agreement) (available from the Department of External Affairs, Government of Canada). The tribunal was composed of Professor Paul de Visscher (Chairman) (Belgium), Professor Donat Pharand (Canada), and Professor Jean-Pierre Quenedec (France). The arbitral tribunal was established by agreement on October 23, 1985, pursuant to article 10 of the 1972 Canada-France Agreement on their Mutual Fishing Relations. Memorial Submitted by Canada, *supra* note 9, at vii.

far-reaching implications for coastal states' rights over their economic zones.⁴⁸

The case arose out of a relatively mundane matter—the claim by France to allow fishermen operating vessels registered in St. Pierre and Miquelon, those tiny French islands off the coast of Newfoundland, to fillet their catch on board while fishing in the Gulf of St. Lawrence. Fishing vessels with such a capacity are known as “factory trawlers.” The right of French vessels to fish in the Gulf of St. Lawrence—waters claimed by Canada as internal, but for the purposes of the arbitration treated as an area of Canada’s 200-mile EEZ—is granted by a 1972 Canada-France fishing agreement (1972 Fishery Agreement).⁴⁹ That agreement, which replaced earlier colonial treaties and practices, allowed for the continuation of French fishing in Canadian waters, even after the extension of any Canadian 200-mile zone.⁵⁰ It provided expressly for vessels registered in St. Pierre and Miquelon to continue to fish in the Gulf.⁵¹

Canada’s objection to filleting done on these vessels was based largely on a desire to control French fishing capacity. The 1972 Fishery Agreement provided that up to ten St. Pierre and Miquelon registered vessels up to 50 meters in length could continue to fish in the Gulf of St. Lawrence.⁵² Canada felt that ten factory trawlers would place far greater pressure on stocks than would ten wet-fish trawlers. Hence, Canada sought to exercise its right as a coastal state to impose a condition of no filleting upon these French vessels while fishing in the Gulf of St. Lawrence.

Canada’s reasoning⁵³ was that in the absence of any treaty with France, Canada undoubtedly would have had the right as a coastal state to impose such a condition on any French vessels permitted to fish within its 200-mile zone. Although article 62(4) of the 1982 Convention, which sets out the terms and conditions that a coastal state may impose on foreign vessels, does not mention filleting, it recognizes that the coastal state might impose conditions even more restrictive in nature, such as

48. See Arbour, *L’Affaire du Chalutier-usine “La Bretagne” ou les Droits de l’Etat côtier dans sa zone Economique Exclusive*, 24 CAN. Y.B. INT’L L. 61-89 (1986); Burke, *Coastal State Fishery Regulation Under International Law: A Comment on the La Bretagne Award of July 17, 1986 (The Arbitration between Canada and France)*, 25 SAN DIEGO L. REV. 495 (1988).

49. Agreement between Canada and France on their Mutual Fishing Relations, 862 U.N.T.S. 209 (1972).

50. *Id.* art. 2.

51. *Id.* art. 4.

52. *Id.* art. 4 ¶ (b).

53. Only part of Canada’s argument is dealt with here. The 1972 Fishery Agreement also provided that St. Pierre and Miquelon vessels in the Gulf fish on an “equal footing” with Canadian vessels. *Id.* Because Canadians were prohibited from operating factory trawlers in the Gulf, Canada also sought to sustain its action on the “equal footing” ground.

requiring that the catch be landed for processing in the coastal state.⁵⁴ In any event, the list in article 62(4) states that it is intended to be indicative, not exclusive.⁵⁵

Canada argued that the 1972 Fishery Agreement did not limit Canada's authority to impose such a condition on French vessels. Limitations on Canada's authority as a coastal state had to be found expressly in the 1972 Fishery Agreement, it argued, and powers that accrued to Canada as a coastal state by virtue of developments in the law of the sea could only be ousted if the 1972 Fishery Agreement so provided. In Canada's view, the 1972 Fishery Agreement preserved certain rights for France, but it did not by implication freeze Canada's rights as a coastal state.⁵⁶

Canada's position was consistent with what were described earlier as "general principles." The development of the EEZ concept did not abrogate France's rights under the 1972 Fishery Agreement, but those rights could only be exercised in light of Canada's sovereign rights as a coastal state under the new regime. Canada would have been deprived of the benefit of the incidents of the new EEZ only if the 1972 Fishery Agreement had clearly ousted the development of the new regime vis-a-vis France.

By a majority of two to one, the tribunal found against Canada.⁵⁷ The decision was based primarily on an interpretation of the 1972 Fishery Agreement, but it also contained general comments on the nature of the coastal state's rights within the 200-mile zone.

The tribunal concluded that the 1972 Fishery Agreement permitted French vessels to continue to fish in the waters of the Gulf of St. Lawrence, notwithstanding Canada's exclusive or sovereign rights with respect to those waters,⁵⁸ a position that is quite defensible. The tribunal, however, went on to decide that the 1972 Fishery Agreement, in effect, sheltered France from all of the incidents of the new EEZ regime, a position that is completely indefensible.⁵⁹

According to the tribunal, Canada's rights vis-à-vis France in these waters were derived solely from the 1972 Fishery Agreement. Since the 1972 Fishery Agreement contained no provision permitting Canada to

54. 1982 Convention, *supra* note 2, art. 62(4).

55. *Id.*

56. The Canadian pleadings in which these arguments were developed have been made public. Copies are available from the Department of External Affairs, Government of Canada. France has not chosen to make its pleadings public as of this date.

57. The majority was composed of Professors de Visscher and Quenedec. Professor Pharand dissented. See *Dispute Concerning Filleting Within the Gulf of St. Lawrence (Can. v. Fr.)* (Award of July 17, 1986) (arbitral tribunal established by agreement) (available from the Department of External Affairs, Government of Canada).

58. *Id.*

59. *Id.* ¶¶ 49-58.

restrict filleting on board St. Pierre and Miquelon vessels fishing in the Gulf of St. Lawrence, Canada was prohibited from placing such a restriction on these vessels. The 1972 Fishery Agreement was, therefore, a most powerful instrument: instead of being the source of rights Canada granted to France, it had become the source of Canada's rights as a coastal state.

Thus, with regard to the first aspect of coastal state authority—the effect of the new EEZ regime on preexisting treaty rights—the tribunal suggested that a state possessing such fishing rights by treaty in the 200-mile zone of another state is not subject to *any* of the incidents of the 200-mile zone regime—a truly remarkable conclusion.

What of the second aspect—what limitations can be imposed by the coastal state on foreign vessels fishing within its 200-mile EEZ? Although the tribunal based its decision on the 1972 Fishery Agreement, the tribunal also considered whether there was a general right for coastal states to prohibit filleting on board foreign vessels that have been granted the right to fish within their 200-mile zones. The tribunal felt that coastal states were not so entitled. Indeed, the tribunal took the view that the list of matters in article 62(4) generally could not be extended—“[a]lthough the list is not exhaustive, it does not appear that the regulatory authority of the coastal state normally includes the authority to regulate subjects of a different nature than those described”⁶⁰—despite the express wording of article 62(4) that coastal state regulations “may relate *inter alia* to the following [list].”⁶¹

The decision in *La Bretagne* is wrong, although I appreciate that the opinion of the counsel who argued the case unsuccessfully may not be entitled to great weight. While the direct impact of the decision on Canada was not substantial, as the tribunal emphasized that Canada could use its rights as the coastal state in setting quotas for French vessels directly and control catches in that way,⁶² nevertheless, in my view the decision has harmful implications.

The decision is inconsistent with the rational development of the 200-mile EEZ and with existing state practices within that zone. Coastal states do reserve to themselves the right to regulate and prohibit filleting on board foreign vessels,⁶³ and prior treaties are not regarded as preventing completely the development of the EEZ regime for coastal states that are parties to them. In fact, the practice has been to abrogate such trea-

60. *Id.* ¶ 52.

61. 1982 Convention, *supra* note 2, art. 62(4).

62. Dispute Concerning Filleting Within the Gulf of St. Lawrence (Can. v. Fr.) (Award of July 17, 1986), ¶ 63.

63. The practice is collected in the Canadian Counter-Memorial, Annexes 21, 24.

ties and to replace them with new agreements expressly acknowledging that they are subject to the new regime.⁶⁴

The provisions of the 1982 Convention relating to the EEZ reflect a careful balance between the claims of coastal states and the claims of foreign states seeking access to their waters. The grant of access to surplus stocks protected the interests of the latter. The compromises gave the coastal state sovereign rights over the living resources of the EEZ. These sovereign rights were intended to govern all aspects of the exploration, exploitation, conservation, and management of the resource, not simply rights of conservation.

The *La Bretagne* tribunal ignored this careful balance and moved in the opposite direction. Its decision would reverse the development of coastal state rights within the EEZ regime. The coastal states need to become fully aware of the *La Bretagne* decision and to make clear that they do not accept its approach or its implications for the management of the 200-mile EEZ.⁶⁵

III

THE PROBLEM OF TRANSBOUNDARY STOCKS

The drafters of the 1982 Convention no doubt thought that a 200-mile EEZ would satisfy any serious claim to extended fisheries jurisdiction. This was probably a very reasonable assumption. Yet, fishermen on the Atlantic coast of Canada would like the Canadian Government to extend Canada's 200-mile fishing zone out to 250 miles. So far, the Canadian Government does not appear to be taking their request seriously.

These claims for a further extension of fisheries jurisdiction reflect a problem inherent in the 1982 Convention. This is the problem of transboundary or straddling stocks—stocks overlapping the outer limit of the 200-mile zone and the high seas.

The problem on Canada's Atlantic coast involves two portions of the Grand Banks of Newfoundland that extend beyond 200 miles. These are known respectively as the "nose" and the "tail" of the Bank. The stocks found on the "nose" and the "tail" are part of the stocks that inhabit the Canadian 200-mile zone. While in that zone, the stocks are managed by Canada. The quantity of fish taken from the "nose" and the "tail" outside the Canadian zone, however, has a negative effect on the quantity available for capture inside the Canadian zone.⁶⁶

64. See, e.g., Magnuson Fishery Conservation and Management Act, 16 U.S.C.A. §§ 1801-1882 (1988). The place of this legislation in the developing international law of the sea is discussed in Burke, *supra* note 43.

65. The approach of the majority is rejected in a strong dissenting opinion by Professor Pharand. See *Dispute Concerning Filletting Within the Gulf of St. Lawrence (Can. v. Fr.)* (Award of July 17, 1986).

66. The problem is similar to that which has developed in the "donut hole" in the Bering

The 1982 Convention recognized this problem but failed to deal with it effectively. Article 63(2) requires only that the coastal state and other states fishing the stocks in question "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."⁶⁷

Article 63(2) offers a helpful suggestion but not a solution to the problem. The "regional" organization established for the Northwest Atlantic area—the North Atlantic Fisheries Organization (NAFO)⁶⁸—has been unable to resolve the problem of the "nose" and the "tail" of the Bank. This is in part because not all the states engaged in the fishery are members of NAFO. Moreover, NAFO itself only has the authority to act upon the agreement of its members, and of course its members are divided on the issue.

The underlying difficulty is that there is little or no incentive for the distant-water fishing states to agree on limiting catches. On the one hand, there is the "free rider" problem—other distant-water states who do not agree to go along with a scheme of self-limitation and therefore get the benefits of enhanced stocks. On the other hand, the coastal state can allocate gains from stock enhancement, resulting from abstention by distant-water fishing states beyond its 200-mile EEZ, in a way that those who have voluntarily limited catches cannot control.

The distant-water state also has an incentive to use its fishing outside the 200-mile EEZ as a bargaining chip to get an increase in its allocation inside the 200-mile zone. In fact, increased fishing on the "nose" and the "tail" of the Grand Banks may have been a result of the dissatisfaction of some European states with the allocation received from Canada within the Canadian 200-mile zone. United States vessels may have turned to the "nose" and "tail" of the Bank in reaction to their exclusion from fishing grounds on Georges Bank as a result of the decision in the *Gulf of Maine Case*. This problem has resulted in a continuing series of minor fishing wars, which are a constant irritant to Canada's relations with other countries and have the potential to erupt into a major confrontation.

How should we deal with this issue? The exhortation to cooperation in the 1982 Convention has not brought results, and the present situation cannot continue. Experience shows that unrestrained fishing ultimately

Sea, discussed by Professor Burke in Burke, *Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries*, 16 *ECOLOGY L.Q.* 285 (1989) (this issue).

67. 1982 Convention, *supra* note 2, art. 63(2).

68. The North Atlantic Fisheries Organization, a successor to the International Commission for the Northwest Atlantic Fisheries (ICNAF), was created by agreement. Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Oct. 24, 1978, 1979 Can. T.S. No. 11. Not all ICNAF members became members of the new body, however, and the United States still remains outside.

leads to a decline in stocks and reduced catches for all.⁶⁹ There is at least a long term community interest in solving the problem, but what is the correct regulatory model? Is the appropriate analogy the treatment of highly migratory species? If so, transboundary stocks should be subject to the jurisdiction of the coastal state only while they are present within the 200-mile EEZ. Or is the better analogy the treatment of anadromous species, over which the coastal state retains some rights even after the species leaves the 200-mile zone and ventures into the high seas beyond?

In my view, the anadromous species approach is the better one for reasons of both principle and practicality. One of the grounds for recognition of the special right of the coastal state in anadromous stocks is that although the coastal state is in the best position to conserve and manage the stock, it will have no incentive to do so if enhancement would only benefit other states that fish the stock on the high seas without restriction. The same consideration applies here. The coastal state is in the best position to manage and conserve transboundary stocks, but there is little incentive to do so if the benefits simply go to other states that can fish unrestrictedly beyond the 200-mile zone. Moreover, the lack of management authority over the stock once it leaves the 200-mile zone makes management within the zone impossible. Conservation measures and catch quotas become meaningless where the stock can be depleted by fishing beyond the 200-mile limit.

The granting of primary management authority with respect to transboundary stocks to the coastal state is the only practical way of coming to terms with the problem.⁷⁰ Any such solution, however, must ensure that decisions of the coastal state as to conservation or allocation are made on the basis of objective scientific evidence and that states traditionally fishing the stocks outside the 200-mile zone are guaranteed equitable, proportional allocations. The legitimate interests of both sides must be respected. The right to fish stocks that are found on the high seas should not be subjected to the complete discretion of the coastal state, even though those stocks may emanate from its EEZ. Multilateral action is needed before unilateral action becomes an attractive alternative.⁷¹

Multilateral cooperation with respect to these transboundary stocks, however, has been singularly unsuccessful where no special rights in the coastal state are recognized. A fresh approach is needed. Perhaps it is

69. See, e.g., M. KIRBY, NAVIGATING TROUBLED WATERS: A NEW POLICY FOR THE ATLANTIC FISHERIES, REPORT OF THE TASK FORCE ON ATLANTIC FISHERIES 16-17 (1982).

70. The suggestion of Professor Burke that article 116(b) provides an existing legal basis for recognizing such a right in the coastal state is an important starting point. Burke, *supra* note 66.

71. Professor Burke's Article sets out some of the proposed multilateral, bilateral, and unilateral approaches for dealing with the transboundary stock problem in the Bering Sea. See *id.*

time for the states concerned to sit down at a new conference to work out an arrangement that will recognize the special interests and obligations of the coastal state in transboundary stocks and at the same time recognize the right of other states to share in the resource.

IV CONCLUSION

What might one learn from Canada's experience on both the Atlantic and Pacific coasts for future problems of the management of ocean resources? First, as I noted at the outset, we are going through a phase of consolidation and implementation of the regime that was worked out at UNCLOS III. States are now attempting to work out, at the bilateral and regional levels, some of the issues that engaged them multilaterally for a long time in UNCLOS III. The 1982 Convention provided only guideposts; the full implications of its provisions will only emerge in practice.

Second, I think a variety of techniques and mechanisms exist in this implementation process that can assist in the formulation and development of a workable regime. Resort to third-party adjudication is one that Canada has experienced. Such a mechanism has its place, but probably only as a last resort. Third-party adjudication is not a flexible instrument. A tribunal deciding objectively on the basis of international law may ignore the important political, economic, and social context that surrounds an issue. Perhaps attention should be directed at other types of third-party processes, such as conciliation and mediation. But in the end, it will always be difficult to improve on a regime concluded as a result of serious good faith negotiations.

Third, notwithstanding the need to elaborate the economic zone regime, care must be taken not to put it in danger. The 1982 Convention created a careful balance in the EEZ provisions between economic utilization, conservation, and equity. The compromises and arrangements of the future must preserve that balance.

Finally, it is imperative that states address the problem of stocks straddling the outer limit of the 200-mile zone and the high seas. The EEZ regime was meant to provide a framework for the rational management of resources; it was not intended just to push management problems further out to sea.