
Centre for International
Governance Innovation

Canada in International Law at 150 and Beyond | Paper No. 7 – February 2018

Canada's Influence on the Law of the Sea

Suzanne Lalonde



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67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

Table of Contents

vi	About the Series
vii	About the International Law Research Program
vii	About the Author
1	Acronyms and Abbreviations
2	Canada's 1970 Arctic Waters Pollution Prevention Act
7	The 1995 Canada-EU Turbot Dispute
14	Conclusion
16	About CIGI
16	À propos du CIGI

About the Series

Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's past, present and future in international law and governance. "Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" is a series of essays, written in the official language chosen by the authors, that provides a critical perspective on Canada's past and present in international law, surveys the challenges that lie before us and offers renewed focus for Canada's pursuit of global justice and the rule of law.

Topics explored in this series include the history and practice of international law (including sources of international law, Indigenous treaties, international treaty diplomacy, subnational treaty making, domestic reception of international law and Parliament's role in international law), as well as Canada's role in international law, governance and innovation in the broad fields of international economic, environmental and intellectual property law. Topics with an economic law focus include international trade, dispute settlement, international taxation and private international law. Environmental law topics include the international climate change regime and international treaties on chemicals and waste, transboundary water governance and the law of the sea. Intellectual property law topics explore the development of international IP protection and the integration of IP law into the body of international trade law. Finally, the series presents Canadian perspectives on developments in international human rights and humanitarian law, including judicial implementation of these obligations, international labour law, business and human rights, international criminal law, war crimes, and international legal issues related to child soldiers. This series allows a reflection on Canada's role in the community of nations and its potential to advance the progressive development of global rule of law.

"Canada in International Law at 150 and Beyond/Canada et droit international : 150 ans d'histoire et perspectives d'avenir" demonstrates the pivotal role that Canada has played in the development of international law and signals the essential contributions it is poised to make in the future. The project leaders are Oonagh Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); Valerie Hughes, CIGI senior fellow, adjunct assistant professor of law at Queen's University and former director at the World Trade Organization; and Mark Jewett, CIGI senior fellow, counsel to the law firm Bennett Jones, and former general counsel and corporate secretary of the Bank of Canada. The series will be published as a book entitled *Reflections on Canada's Past, Present and Future in International Law/Réflexions sur le passé, le présent et l'avenir du Canada en matière de droit international* in spring 2018.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

About the Author

Suzanne Lalonde is a professor of international law and the law of the sea at the University of Montreal Faculty of Law and a research associate with ArcticNet, a network of centres of excellence in Canada. She holds a Ph.D. in public international law from the University of Cambridge, King's College, obtained in 1997 under the supervision of James Crawford. Her publications and research focus on core international legal principles, especially those pertaining to sovereignty and the determination of boundaries on land and at sea, with a particular emphasis on the Arctic. She is the Canadian member of the International Law Association Committee currently investigating state practice in relation to straight baselines, a member of the Canadian Arctic Security Working Group and co-editor of the journal *Ocean Development and International Law*.

Acronyms and Abbreviations

AWPPA	Arctic Waters Pollution Prevention Act
CCS	Convention on the Continental Shelf
CFCLR	Convention on Fishing and Conservation of Living Resources of the High Seas
CHS	Convention on the High Seas
CTS	Convention on the Territorial Sea and the Contiguous Zone
EEZ	exclusive economic zone
EFZ	exclusive fishing zone
ICJ	International Court of Justice
IMO	International Maritime Organization
km ²	square kilometres
LOSC	Convention on the Law of the Sea
NAFO	Northwest Atlantic Fisheries Organization
NAFO Convention	Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries
nm	nautical miles
NRA	NAFO's Regulatory Area
TAC	total allowable catch
UNCHE	United Nations Conference on the Human Environment
UNCLOS	United Nations Conference on the Law of the Sea

In his renowned textbook on international law, Malcolm Shaw explains the stabilizing role law plays in any given society: “In the long march of mankind from the cave to the computer a central role has always been played by the idea of law — the idea that order is necessary and chaos inimical to a just and stable existence. Every society whether it be large or small, powerful or weak, has created for itself a framework of principles within which to develop.... Law consists of a series of rules regulating behaviour, and reflecting, to some extent, the ideas and preoccupations of the society within which it functions. And so it is with what is termed international law.”¹

However, while identifying order and stability as the core tenets of international law, Shaw emphasizes that “to survive, it must be in harmony with the realities of the age.”² He adds, “there is a *continuing tension* between those rules already established and the constantly evolving forces that seek changes within the system. One of the major problems of international law is to determine when and how to incorporate new standards of behaviour and new realities of life into the already existing framework, so that, on the one hand the law remains relevant and on the other, the system itself is not too vigorously disrupted.... There are several instances of how modern developments demand a constant reappraisal of the structure of international law and its rules.”³

Canada, throughout its 150-year history, has adhered to and, at times, has had to vigorously defend the ideal of the rule of law among nations. This vision and commitment were recently emphasized by Canada's Minister of Foreign Affairs Chrystia Freeland in an address to the House of Commons, identifying Canada's foreign policy priorities: “Since before the end of the Second World War, beginning with the international conference at Bretton Woods in 1944, Canada has been deeply engaged in, and greatly enjoyed the benefits of, a global order based on rules.”⁴

1 Malcolm N Shaw, *International Law*, 3rd ed (Cambridge, UK: Cambridge University Press, 1991) at 1.

2 *Ibid.*

3 *Ibid* [emphasis added].

4 Chrystia Freeland, “Address by Minister Freeland on Canada's foreign policy priorities” (6 June 2017), online: Global Affairs Canada <www.canada.ca/en/global-affairs/news/2017/06/address_by_ministerfreelandoncanadasforeignpolicypriorities.html>.

In her remarks, however, she also alluded to a number of key developments and issues that provoked a necessary evolution in the established legal system, declaring that “[i]n each of these evolutions in how we humans organize ourselves, Canadians played pivotal roles.”⁵

Thus, Canada, while being a staunch defender of international law as a guarantor of shared aspirations and values, has not been immune to the tension identified by Shaw. Indeed, Canada has inevitably been confronted with the reality that international law must adapt and respond to fundamental shifts in priorities and the rise of new powerful forces. Yet, as its essential function is to provide order and stability, international law can struggle to adapt quickly to sudden changes. Dennis Livingston refers to international law’s “traditional image as a social process relatively slow to respond to contemporary public issues.”⁶ At certain critical junctures, international law has needed a major event or a resolute sponsor to evolve.

On at least two occasions, Canada has played the role of determined promoter of necessary change in the law of the sea. Stepping outside its usual role of committed proponent of the established international legal order, Canada has chosen to act beyond the strict confines of existing rules to defend environmental values and promote a more effective governance regime.

Canada’s 1970 Arctic Waters Pollution Prevention Act

For more than half a century, Canada has claimed that all the waters within its Arctic archipelago, including the various routes of the Northwest Passage, are Canadian historic waters over which it exercises sovereign control. In 1958, Canada’s Minister for Northern Affairs Alvin Hamilton declared before the House of Commons, “The area to the north of Canada, including the islands *and the waters between the islands and areas beyond*, are looked upon as our own, and there is no doubt in the minds of this government, nor I think was there in the minds of former governments of Canada, that this is national terrain.”⁷

In September 1969, the SS *Manhattan*, an American ice-strengthened supertanker, successfully completed an easterly crossing of the Northwest Passage and “touched off the first major clash between Canada and the United States over the Arctic waters.”⁸ The voyage, designed to test whether the Northwest Passage could be used to transport Alaskan oil to the Atlantic seaboard, sparked concern over the potential for a disastrous oil spill in the fragile Arctic environment. According to Donald R. Rothwell, this anxiety, combined with the disturbing realization that Canada’s legal position was not sufficiently articulated, “allowed the *Manhattan’s* voyage through these waters to be portrayed as a direct threat to Canadian sovereignty which required an immediate Canadian response.”⁹

Canada’s response to the *Manhattan* crisis included the adoption of the Arctic Waters Pollution Prevention Act¹⁰ (AWPPA). During discussions on the proposed Arctic waters legislation in the House of Commons a month after the *Manhattan’s* controversial transit, Prime Minister Pierre Trudeau, referring to the water, ice and

5 Some of the examples cited by Freeland included the role of the Canadian delegation at the 1944 Bretton Woods conference, which was instrumental in drafting the provisions of the International Monetary Fund and the International Bank for Reconstruction and Development, the role of John Humphrey as principal author of the 1948 *Universal Declaration on Human Rights*, GA Res 217A(III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948), or, more recently, the conclusion of the *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 UNTS 3, 26 ILM 1550 (entered into force 1 January 1989), to phase out chlorofluorocarbons.

6 Dennis Livingston, “Science, Technology and International Law: Present Trends and Future Developments” in Cyril E Black & Richard A Falk, eds, *The Future of the International Legal Order – Volume IV, The Structure of the International Environment* (Princeton, NJ: Princeton University Press, 1972) 68 at 96.

7 *House of Commons Debates*, 23rd Parl, 1st Sess, No 2 (27 November 1957) at 1559 (Hon Alvin Hamilton) [emphasis added].

8 Nicholas C Howson, “Breaking the Ice: The Canadian-American Dispute over the Arctic’s Northwest Passage” (1988) 26 *Colum J Transnat’l L* 337 at 346.

9 Donald R Rothwell, “The Canadian-U.S. Northwest Passage Dispute: A Reassessment” (1993) 26 *Cornell Intl LJ* 331 at 338.

10 *Arctic Waters Pollution Prevention Act*, RSC 1985, c A-12.

land areas of the Canadian Arctic archipelago, declared, “We do not doubt for a moment that the rest of the world would find us at fault, and hold us liable, should we fail to ensure adequate protection of that environment from pollution or artificial deterioration. Canada will not permit this to happen.... It will not permit this to happen either in the name of *freedom of the seas*, or in the interests of economic development.”¹¹

A few years later, Alan Beesley, the legal adviser and director general of the Bureau of Legal and Consular Affairs at the Canadian Department of External Affairs, commented that the AWPPA “manifests in legislative terms Canada’s view of the special status of Arctic waters and ice and the special rights and responsibilities of the Arctic coastal states, with particular respect to the preservation of the Arctic ecology.”¹²

The AWPPA imposes strict safety and environmental requirements on all shipping, initially within 100 nautical miles (nm) and today within 200 nm of Canada’s Arctic coast, including the islands.¹³ As Donald M. McRae and D. J. Goundrey explain, the act adopts a two-pronged strategy for pollution prevention and control¹⁴: “First, the Act establishes a complete ban on the discharge of waste in Arctic waters, although exemptions may be made by Order in Council.... Second, the Act provides for the regulation of the construction, design and operation of vessels in Arctic Waters.... The regulations...stipulate requisite hull strength, power, internal subdivision, and stability standards.”¹⁵ The AWPPA also describes offences punishable under Canadian law and outlines the

powers of the pollution prevention officers charged with the effective enforcement of the act.¹⁶

At the time of its adoption, the AWPPA was denounced by a number of countries, most notably the United States,¹⁷ as contrary to international law, which did not, at that point, recognize coastal-state rights in waters beyond the territorial sea.¹⁸ Indeed, the Canadian government effectively admitted that the AWPPA was unlawful when, shortly before adopting the statute, it entered a reservation to its acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ) that excluded litigation over the matter.¹⁹ In explaining the need for the reservation, on April 8, 1970, Trudeau acknowledged that there was a “very grave risk that the World Court would find itself obliged to find that coastal states cannot take steps to prevent pollution. Such a legalistic decision would set back immeasurably the development of law in this critical area.”²⁰

In 1970, when Canada acted to more effectively protect the unique ecological balance of the

11 Pierre Trudeau, quoted in JA Beesley, “Rights and Responsibilities of Arctic Coastal States: The Canadian View” (1971) 3 J Mar L & Com 1 at 6 [emphasis added].

12 *Ibid* at 5.

13 Initially, the act extended out to 100 nm from Canada’s northern coast. However, as part of the Stephen Harper government’s northern strategy, the spatial scope of the AWPPA and its regulations was extended from 100 nm to 200 nm. Bill C-3, *An Act to amend the Arctic Waters Pollution Prevention Act*, 1st Sess, 40th Parl, 2008, received royal assent on June 11, 2009, and came into force on August 1, 2009. As a result, the spatial extent of the AWPPA now corresponds with the limit of Canada’s exclusive economic zone (EEZ) in the Arctic.

14 Donald M McRae & DJ Goundrey, “Environmental Jurisdiction in Arctic Waters: The Extent of Article 234” (1982) 16 UBC L Rev 197 at 205–06.

15 *Ibid* at 206. The AWPPA has two key regulations: the *Arctic Shipping Pollution Prevention Regulations*, CRC, c 353 and the *Arctic Waters Pollution Prevention Regulations*, CRC, c 354.

16 “A pollution prevention officer may prohibit navigation by any vessel which he believes does not comply with the regulatory requirements or is likely to endanger shipping safety generally.” *Ibid*.

17 The United States responded to the legislation by sending a diplomatic note: US, Press Release No 121, “U.S. Opposes Unilateral Extension by Canada of High Seas Jurisdiction” (15 April 1970), reprinted in (1970) 9 ILM 605. In 1978, a Canadian official acknowledged that a “drawer full of protests” had been received concerning the AWPPA. See House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on External Affairs and National Defence*, 30th Parl, 3rd Sess, No 16 (27 April 1978) at 16 (Erik Wang, Director of Legal Operations, Department of External Affairs), cited in Ted L McDorman, “The New Definition of ‘Canada Lands’ and the Determination of the Outer Limit of the Continental Shelf” (1983) 14 J Mar L & Com 195 at 215, n 64.

18 Coastal rights beyond the territorial sea were recognized, however, as regards the continental shelf.

19 The reservation excluded from the court’s compulsory jurisdiction over Canada any “disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada.” “Canadian Declaration Concerning the Compulsory Jurisdiction of the International Court of Justice” (1970) 9 ILM 598.

20 Quoted in Richard B Bilder, “The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea” (1970) 69 Mich L Rev 1 at 29.

Arctic marine environment,²¹ it had few legal tools at its disposal. Most of the rules regulating the oceans were then codified in the four binding conventions adopted in Geneva in 1958, at the close of the first United Nations Conference on the Law of the Sea (UNCLOS I): the Convention on the Territorial Sea and the Contiguous Zone²² (CTS), the Convention on the High Seas²³ (CHS), the Convention on Fishing and Conservation of Living Resources of the High Seas²⁴ (CFCLR) and the Convention on the Continental Shelf²⁵ (CCS).

Articles 1 and 2 of the CTS confirmed that the sovereignty of a coastal state extended beyond its land territory and its internal waters to a belt of sea adjacent to its coast, described as the territorial sea, including in the air space above it, as well as to its bed and subsoil. While the participating delegations were unable to agree on a precise external limit to the territorial sea, the definition of the contiguous zone in article 24 effectively limited claims to 12 nm. In the exercise of its sovereignty, the coastal state was entitled to devise and impose laws and regulations for the protection of its territorial waters, and article 14 provided that the right of innocent passage could be exercised only so long as it was not prejudicial to the peace, good order and security of the coastal state and, thus, in conformity with such laws and regulations.

The CTS also provided that in a specific zone of the high seas contiguous to the territorial sea, which could not extend beyond 12 nm from the

territorial sea baseline, the coastal state could exercise the control necessary to prevent and punish infringement of four specific categories of regulations, which included “sanitary regulations.”²⁶

However, beyond this narrow band of sovereign waters (territorial sea) and zone of control (contiguous zone) — beyond, therefore, 12 nm — the law of the sea considered the maritime space as high seas, subject to a regime of freedoms. Despite the proximity of those high seas areas to their coastlines, coastal states were not granted any special environmental protection powers for fear of arbitrary infringements on the sacrosanct freedoms of navigation and fishing recognized in article 2 of the CHS. Articles 24 and 25 of the same convention merely imposed upon all states the obligation to draw up regulations to prevent pollution from ships or activities under *their* sovereign control, taking into consideration existing international standards.

While article 6 of the CFCLR, at least, acknowledged that “[a] coastal State has a special interest in the maintenance of the productivity of the living resources in any areas of the high seas adjacent to its territorial sea,”²⁷ the conservation regime laid out in the convention was based on negotiations and consultations between all interested states. Article 1(2) of the convention aptly summarizes the approach under the CFCLR: “All States have a duty to adopt, or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.”²⁸

Julian Roberts summarizes the limited impact of the 1958 Geneva conventions:

The United Nations convened the Geneva Conference on the Law of the Sea in 1958. Little attention was given to the protection of the marine environment at the Conference, and the conventions that the Conference delivered had little to say on the subject.... [W]hile reference was clearly made to the regulation of pollution, the 1958 conventions did not impose duties on States to adhere to that convention or regulate pollution at sea but merely empowered them to do

21 According to Veronica Frank, “it is commonly agreed that the term ‘marine environment’ refers to the ocean space taken as a whole (i.e., the surface of the sea; the water column; the subsoil; the seabed and the atmosphere above them) and everything comprised in that space, both physical and chemical components, including marine life.” Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2007) at 13.

22 *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 15 UST 1606, 516 UNTS 205 (entered into force 10 September 1964) [CTS]. Canada became a signatory to the CTS on April 29, 1958.

23 *Convention on the High Seas*, 29 April 1958, 13 UST 2312, 450 UNTS 11 (entered into force 30 September 1962). Canada became a signatory to the CHS on April 29, 1958.

24 *Convention on Fishing and Conservation of Living Resources of the High Seas*, 29 April 1958, 17 UST 138, 559 UNTS 285 (entered into force 20 March 1966) [CFCLR]. Canada became a signatory to the CFCLR on April 29, 1958.

25 *Convention on the Continental Shelf*, 29 April 1958, 15 UST 471, 499 UNTS 311 (entered into force 30 September 1962) [CCS]. Canada became a signatory to the CCS on April 29, 1958, and a party through its ratification on February 6, 1970 (see the Canadian declaration interpreting article 1 of the convention).

26 CTS, *supra* note 22, art 24.

27 CFCLR, *supra* note 24, art 6.

28 *Ibid*, art 1(2).

so. Article 24 of the 1958 Convention on the High Seas, while requiring States to regulate oil pollution from ships, did not specify the content of those regulations beyond requiring that existing treaty provisions should be taken into account. This left a large measure of discretion available to those individual States.²⁹

Thus, in 1970, the success of environmental measures for the protection of vast sections of the oceans, the high seas, hinged on the political will of flag states and their actual capacity to exercise effective control over ships under their jurisdiction. And even when those two vital elements were present, environmental standards for ocean activities, at that time, were woefully out of step with new realities and emerging concerns.

Howard S. Schiffman characterizes the increasing concern for the status of the marine environment in the latter half of the twentieth century as one of “the most remarkable developments in the field of international law.”³⁰ It might, therefore, be argued that while Canada’s 1970 AWPPA was clearly contrary to the established rules, it contributed to a momentous shift in the law of sea as concern for the health of the world’s oceans gained momentum. Only two years later, the “conceptual cornerstone of modern environmental law”³¹ was laid with the convening of the United Nations Conference on the Human Environment (UNCHE), which had as one of its key priorities the protection of the marine environment. The Stockholm Declaration on the Human Environment,³² adopted by the UNCHE, contained principles that referred to the need to avoid damage to natural ecosystems and pollution of the seas by substances that could endanger human health, harm living resources and interfere with legitimate uses of the sea. As Lynton Keith Caldwell writes, “The Stockholm Conference was a

watershed in international relations. It legitimised environmental policy as a universal concern among nations, and so created a place for environmental issues on many national agendas where they had been previously unrecognised.... The growth of international environmental co-operation during the 1970s and thereafter is an aspect of a larger social transition. It is an expression of a changing view of mankind’s relationship to the earth.”³³

Opposition to Canada’s AWPPA all but disappeared after the adoption in December 1982 of the United Nations Convention on the Law of the Sea³⁴ (LOSC), which includes strong declarations on the protection of the marine environment. Indeed, according to the preamble, the basic objective of the convention is to establish a “[l]egal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.”³⁵

Roberts explains that many of the outcomes of the UNCHE were placed before the UNCLOS III, ensuring “that it would focus on environmental issues and, as a consequence, the LOSC would stand as one of the most important international agreements on the subject of marine environmental protection.”³⁶ Indeed, J. I. Charney argues that the LOSC established the very foundation of the international environmental law of the sea.³⁷

Without analyzing in detail all of the LOSC’s environmental provisions, this discussion must highlight article 56(1)(b)(iii). Within a new maritime zone stretching a maximum of 200 nm from the territorial sea baselines — the EEZ created by part V of the LOSC — coastal states are now afforded jurisdiction with regard to “the protection and

29 Julian Roberts, *Marine Environment Protection and Biodiversity Conservation – The Application and Future Development of the IMO’s Particularly Sensitive Sea Area Concept* (Berlin, Germany: Springer, 2007) at 15–16 [footnotes omitted].

30 Howard S Schiffman, “International Law and the Protection of the Marine Environment” in Aaron Schwabach and Arthur John Cockfield, eds, *International Law and Institutions* (Oxford, UK: Encyclopedia of Life Support Systems Publishers, 2009) at 213.

31 Roberts, *supra* note 29 at 17.

32 *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, UN Doc A/Conf.48/14/Rev 1, 11 ILM 1416. For a comprehensive overview of the outcomes of the conference and a detailed analysis of the declaration, see Louis B Sohn, “The Stockholm Declaration” (1973) 14 *Harvard Intl LJ* 423.

33 Lynton Keith Caldwell, *International Environmental Policy: Emergence and Dimensions* (Durham, NC: Duke University Press, 1990) at 21.

34 Donald M McRae, “The Negotiation of Article 234” in Franklyn Griffiths, ed, *Politics of the Northwest Passage* (Montreal, QC: McGill-Queen’s University Press, 1987) 110. See also Donat Pharand, “The Northwest Passage in International Law” (1979) 17 *Can YB Intl L* 99. *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 UNTS 3, 21 ILM 1261 (entered into force 16 November 1994) [LOSC].

35 LOSC, *supra* note 34, Preamble.

36 Roberts, *supra* note 29 at 20. The UNCLOS III lasted from 1973 to the adoption of the LOSC in December 1982.

37 JI Charney, “The marine environment and the 1982 United Nations Conference on the Law of the Sea” (1994) 28 *Intl Lawyer* 884.

preservation of the marine environment.”³⁸ In addition, articles 216 and 220 confer important enforcement powers upon coastal states for violations of pollution standards and rules by vessels navigating in their EEZs. More generally, part XII of the convention establishes an overall framework of governing principles and general obligations for the protection and governance of the world’s oceans. Indeed, the LOSC is the first general international treaty to impose, through article 192, a general and unqualified obligation on states “to protect and preserve the marine environment.”³⁹ In addition, as emphasized by Roberts, the LOSC alters the “balance of power between flag States and coastal States, with respect to the rights of the latter to regulate shipping for the purposes of protecting their coastal waters and the resources therein.”⁴⁰

However, perhaps the clearest vindication of Canada’s vision and its AWPPA is article 234 of the LOSC, often referred to as the “Arctic exception” or the “Canadian clause.” According to this lone article in section 8 of part XII:

Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.⁴¹

As McRae comments, “In the space of six years, Canada went from the assertion of a claim to jurisdiction in domestic legislation that was protested by other states, and whose

international validity was sufficiently in doubt for Canada to withdraw its acceptance of the jurisdiction of the ICJ, to international recognition of the acceptability of that legislation.”⁴²

In addition to this formal international recognition of Canada’s right to adopt and enforce the AWPPA, the Canadian rules themselves eventually came to exert considerable influence and are today considered a model for marine pollution legislation.⁴³ Franklyn Griffiths reported in 2009 that the AWPPA regulations were normalized when the member societies of the International Association of Classification Societies completed their ratification of a new set of uniform requirements in 2008 for polar ship construction, equipment, operations and environmental protection: “Canadian regulations for ship safety and pollution prevention in ice-covered waters that we regard as internal to Canada have become pretty well synonymous with the ‘generally accepted regulations, procedures and practices’ governing the duties of ships.”⁴⁴ In addition, many of the AWPPA’s provisions have been integrated into the International Maritime Organization’s (IMO’s) International Code for Ships Operating in Polar Waters (Polar Code), which entered into force on January 1, 2017.⁴⁵

38 LOSC, *supra* note 34, art 56(1)(b)(iii).

39 *Ibid*, art 192. As Roberts, *supra* note 29 at 21, n 44, comments, “Numerous authors have written on the subject of the LOSC and its provisions relating to environmental protection.”

40 Roberts, *supra* note 29 at 22.

41 LOSC, *supra* note 34, art 234.

42 McRae refers to a span of “six years,” as the broad outline of article 234 had been established by the 1976 spring session of UNCLOS III. McRae, *supra* note 34.

43 See the report funded by the Fridtjof Nansen Institute and WWF Norway and drafted by Øystein Jensen: Øystein Jensen, “The IMO Guidelines for Ships Operating in Arctic Ice-covered Waters” (Lysaker, Norway: Fridtjof Nansen Institute, 2007), online: <www.fni.no/doc&pdf/FNI-R0207.pdf>.

44 Franklyn Griffiths, “Canadian Arctic Sovereignty: Time to Take Yes for an Answer on the Northwest Passage” in Frances Abele et al, eds, *Northern Exposure: Peoples, Powers and Prospects for Canada’s North* (Montreal, QC: McGill-Queen’s University Press, 2009) 19.

45 Acknowledging that polar waters impose additional demands on ships, their systems and operations, members of the IMO negotiated and developed the Polar Code to supplement existing IMO instruments (principally, the 1974 *International Convention for the Safety of Life at Sea*, 1 November 1974, 32 UST 47, 1184 UNTS 278 [entered into force 25 May 1980], the 1973/78 *International Convention for the Prevention of Pollution from Ships*, 2 November 1973, 12 ILM 1319, TIAS No 10,561, 34 UST 3407, 1340 UNTS 184 [entered into force 2 October 1983], and its 1978 protocol, *Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships*, 17 February 1978, 1340 UNTS 61, 17 ILM 546 [entered into force 2 October 1983]) in order to increase the safety of ships’ operations and mitigate the impact on people and the environment in the remote, vulnerable and potentially harsh polar waters. See *International Code for Ships Operating in Polar Waters (Polar Code)*, IMO, MEPC 68/21/Add.1 [entered into force 1 January 2017] at Preamble, online: <www.imo.org/en/MediaCentre/HotTopics/polar/Documents/POLAR%20CODE%20TEXT%20AS%20ADOPTED.pdf>.

The 1995 Canada-EU Turbot Dispute

The second example of Canada's influence on the development of the law of the sea is more controversial than the adoption of the AWPPA in 1970. For while the AWPPA undoubtedly served Canada's national interests and stretched the boundaries of what constituted, at the time, lawful conduct by a coastal state, the legislation and its detailed regulations were aimed at *all* ships navigating in Canadian Arctic waters, both domestic and foreign. Furthermore, the intent was not to deny or infringe established rights of navigation, but, rather, to ensure that navigation activities were conducted safely and responsibly.

Canadian measures and actions in the mid-1990s in respect of fishing activities by EU-flagged vessels do not appear quite as even handed. They have, in fact, been harshly criticized by some commentators in light of Canada's own disastrous mismanagement of its Atlantic fisheries. Indeed, as George A. Rose and Sherrylynn Rowe explain, "the great 'northern' Atlantic cod...stock complex off Newfoundland and Labrador...once among the largest cod stocks in the world, is often held up as *the* icon for decline and mismanagement."⁴⁶ Those stocks once supported several million tons of fish but, after heavy unsustainable fishing in the 1960s and then again in the 1980s, the stock eventually collapsed to 1 percent of its previous level, and in 1992, the Canadian federal government was obliged to impose a moratorium.⁴⁷

The crux of the fisheries dispute that arose between Canada and the European Union a few years later is expertly summarized in the opening sentence of Michael Sean Sullivan's 1997 article: "In March 1995, Canadian fisheries authorities boarded and arrested the Spanish fishing vessel, *Estai*, outside the Canadian 200-mile zone on the Grand Banks, an event that served to focus world attention on a dispute that had its origin in the failure of the 1982 United Nations Convention on the Law of the Sea to implement an effective conservation and

management regime for fish stocks on the high seas, particularly with respect to fish stocks that straddle coastal states' exclusive economic zones."⁴⁸

It is generally accepted that even before the end of the third UNCLOS and the adoption of the LOSC in December 1982, the concept of the EEZ had already become part of customary international law as a result of its swift and widespread acceptance by a significant number of states.⁴⁹ Indeed, by 1977, most of the coastal states of the Northwest Atlantic, as in other areas of the world, had established either a 200-nm EEZ or an exclusive fishing zone (EFZ). In a bid to establish a more systematic and effective approach to the management of its valuable fisheries, Canada had, in 1970, created a series of EFZs, including off its Atlantic coast, which were eventually replaced by the Canadian 200-nm EEZ, effective January 1, 1977.

Within the new 200-nm EEZ, coastal states were not only afforded jurisdiction for the protection of the marine environment, as discussed above, but they were also granted sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living. Beyond the 200-nm EEZ, on the high seas, all states continued to enjoy the right for their nationals to engage in fishing activities. Fish stocks that straddled the two zones (that extended across the two zones or were situated in both zones) thus presented a significant challenge, namely that of reconciling the rights of nations to fish on the high seas with the rights of coastal states to manage fishery resources within their EEZs.

Yann-Huei Song explains⁵⁰ that it was the extension of the jurisdiction of the coastal states over living resources up to the limits of the new 200-nm zone that led to the adoption of the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries⁵¹ (NAFO Convention) on October

46 George A Rose & Sherrylynn Rowe, "Northern Cod Comeback" (2015) 72:12 Can J Fisheries & Aquatic Sciences 1789 [emphasis in original].

47 *Ibid.* See also IFL Science, "Cod Stocks Off Canada's Eastern Coast Making A Comeback", online: <www.iflscience.com/plants-and-animals/cod-stocks-canadas-eastern-coast-making-come-back/>.

48 Michael Sean Sullivan, "The Case in International Law for Canada's Extension of Fisheries Jurisdiction Beyond 200 Miles" (1997) 28 Ocean Dev & Intl L 203.

49 See e.g. Gemma Andreone, "The Exclusive Economic Zone" in Donald Rothwell et al, eds, *The Oxford Handbook of the Law of the Sea* (Oxford, UK: Oxford University Press, 2015).

50 Yann-Huei Song, "The Canada-European Union Turbot Dispute in the Northwest Atlantic: An Application of the Incident Approach" (1997) 28 Ocean Dev & Intl L 269 at 274.

51 *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, 24 October 1978, 1135 UNTS 369, 34 ILM 1452, CTS 1979/11 [entered into force 1 January 1979] [NAFO Convention].

24, 1978, and the creation of the Northwest Atlantic Fisheries Organization (NAFO). According to article II of the NAFO Convention, the primary objective of the convention is “to ensure the long term conservation and sustainable use of the fisheries resources in the Convention Area and, in so doing, to safeguard the marine ecosystems in which these resources are found.”⁵² To reach this objective, the contracting parties agreed, individually or collectively, to “promote the optimum utilization and long-term sustainability of fishery resources” and to “adopt measures based on the best scientific advice available to ensure that fishery resources are maintained at or restored to levels capable of producing maximum sustainable yield.”⁵³

The NAFO Convention area encompasses a large portion of the Atlantic Ocean and includes the EEZs of the United States, Canada, St. Pierre et Miquelon and Greenland. The total area subject to the NAFO Convention is 6,551,289 square kilometres (km²).⁵⁴ However, in recognition of the coastal states’ jurisdiction up to 200 nm, management by NAFO is restricted to the areas straddling and outside the EEZs. This is known as NAFO’s Regulatory Area (NRA) and is 2,707,895 km². Song reports that approximately 10 percent of the Grand Banks (known as the “nose” and “tail” of the banks) lie beyond Canada’s 200-mile EEZ and are included in the NRA. There are presently 12 contracting parties to the NAFO Convention: Canada, Cuba, Denmark (in respect of the Faroe Islands and Greenland), the European Union, France (in respect of St. Pierre et Miquelon), Iceland, Japan, Norway, the Republic of Korea, the Russian Federation, Ukraine and the United States.

In January 1982, the Canadian federal government set up a task force to identify problems in its rapidly expanding Atlantic fishing industry and to create a plan to manage it. While the task force, in its final report, made a number of strong recommendations to overcome existing impediments to effective management and conservation, the new strategy and strengthened political commitment were unable to prevent the drastic decline in Canada’s Atlantic fisheries.⁵⁵

⁵² *Ibid*, art II.

⁵³ See *ibid*, art III, “General Principles”.

⁵⁴ NAFO, “About Us”, online: <www.nafo.int/About-us>.

⁵⁵ Michael J.L. Kirby, *Navigating Troubled Waters: A New Policy for the Atlantic Fisheries, Report of the Task Force on Atlantic Fisheries* (Ottawa, ON: Minister of Supply and Services Canada, 1983).

In early 1992, Canada cut the annual northern cod quota within its EEZ from a mid-1980s level of 265,000 tons to 120,000 tons in an attempt to save dwindling stocks.⁵⁶ However, shortly thereafter, the Canadian Department of Fisheries and Oceans was obliged to impose a two-year moratorium on northern cod fishing. Canada also urged NAFO to ban northern cod fishing for 1994 in the NRA.⁵⁷ In a further attempt to improve conservation, Canada amended its Coastal Fisheries Protection Act,⁵⁸ enabling Canada to inspect and seize vessels fishing within the NRA.⁵⁹ Section 5.1 of the amended act provided as follows:

Parliament, recognizing

- a) that straddling stocks on the Grand Banks of Newfoundland are a major renewable world food source having provided a livelihood for centuries to fishers,
- b) that those stocks are threatened with extinction,
- c) that there is an urgent need for all fishing vessels to comply in *both* Canadian fisheries waters and the NAFO Regulatory Area with sound conservation and management measures for those stocks, notably those measures that are taken under the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries...and
- d) that some foreign fishing vessels continue to fish for those stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of sound management measures.⁶⁰

Relying on Canada’s special interests as a coastal state, the 1994 amendment subjected the nose and

⁵⁶ Julian Beltrame, “Polite, Diplomatic Meeting Brings No Resolution to Cod Fishing”, *Montreal Gazette* (24 April 1992) B1.

⁵⁷ (1994) 1 *Northwest Atlantic Fisheries Organization News* 3. NAFO had previously adopted similar fishing bans in parts of the convention area for American plaice, yellowtail flounder, witch flounder and capelin.

⁵⁸ *Coastal Fisheries Protection Act*, RSC 1985, c C-33.

⁵⁹ Bill C-29, *An Act to Amend the Coastal Fisheries Protection Act*, 1st Sess, 35th Parl (as passed by the House of Commons 11 May 1994), SC 1994, c 14, 33 ILM 1382 (1994).

⁶⁰ *Coastal Fisheries Protection Act*, *supra* note 58, s 5.1 [emphasis added].

tail of the Grand Banks to Canada's jurisdiction and banned certain nations, commonly referred to as flags of convenience, from fishing in the Canadian areas of the NRA (Belize, Cayman Islands, Honduras, Panama, Saint-Vincent and the Grenadines and Sierra Leone). Finally, on May 10, 1994, Canada once again amended its declaration recognizing the compulsory jurisdiction of the ICJ to add a new reservation and exclude from the court's jurisdiction "(d) disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures."⁶¹

In February 1994, Canadian researchers had confirmed a two-thirds decline in Greenland halibut (turbot) biomass since 1992, prompting Canada to impose a drastic reduction in allowable catches by mid-year (25,000 tons down, from a historic high of 100,000 in 1986–1989).⁶² As Canada intensified conservation measures within its own EEZ, it also pressed for more effective management efforts within the NRA, that is to say, in those areas beyond Canadian control and thus managed by the NAFO. W. T. Abel writes that, at Canada's urging, the NAFO Scientific Council agreed to set a total allowable catch (TAC) for 1995 for Greenland halibut of 27,000 tons down from 60,000.⁶³ According to Abel, "Because NAFO considers both a member's historical dependence on fishing the NRA and its most recent quota level in setting a quota allocation, the European Union expected to obtain a substantial percentage of NAFO's Greenland halibut allocation. Previously, the EU had received seventy-five percent of NAFO's Greenland halibut quota. The Fisheries Commission, however, awarded the EU only about twelve percent or 3,400 tons of the

total allowable catch, while providing Canada with nearly sixty percent, or 16,300 tons."⁶⁴

Dismayed by the quota allocation, the European Union invoked article XII (the objection procedure) of the NAFO Convention and unilaterally set its own quota for Greenland halibut, while maintaining the ceiling of 27,000 tons (it claimed 69 percent of the TAC, or 18,630 tons, for 1995). This marked a return to a strategy frequently relied upon by the European Union in the second half of the 1980s. Indeed, J. Alan Beesley and M. Rowe have established that, between 1986 and 1989, the European Union relied on the objection mechanism 36 times, including against all eight NAFO groundfish quota decisions and the NAFO Division 3L cod moratorium outside Canada's 200-mile EEZ.⁶⁵ The authors also show that in 1990, the European Union objected to eight NAFO decisions, while eight decisions in 1991 and three in 1992 were targeted by similar objections. Many of those objections then led to the setting of unilateral EU quotas. Song highlights a 1986 example in which NAFO had set the EU quota for cod in NAFO Division 3NO (off the coast of Newfoundland) at 14,750 tons, but the European Union objected and established a unilateral quota of 26,400 tons, and its catch was eventually estimated at 30,470 tons.⁶⁶

In response to the European Union's objection and unilateral action in regard to the 1995 TAC, Canada declared a 60-day moratorium on Greenland halibut for EU vessels in the NRA. When EU-flagged vessels disobeyed the moratorium, on March 3, 1995, Canada added Spain and Portugal to the list of nations it had banned from fishing on the high seas Grand Banks. As Abel explains, Canada viewed Spain and Portugal "as major offenders of international fishing agreements."⁶⁷

61 Canada, "Declarations recognizing the jurisdiction of the Court as compulsory" (10 May 1994), online: ICJ <www.icj-cij.org/en/declarations/ca>.

62 Jesper Bøge, ed, *Greenland Halibut Biology and Population Dynamics* (Copenhagen, Denmark: Nordic Council of Ministers, 2002) at 16.

63 (1995) 2 *Northwest Atlantic Fisheries Organization News* 2. WT Abel, "Fishing for an International Norm to Govern Straddling Stocks: The Canada-Spain Dispute of 1995" (1996) 27 *U Miami Inter-Am L Rev* 553 at 566.

64 *Ibid* [footnotes omitted]. The share-out was decided by six votes to five, with two abstentions. The six NAFO members that voted for the allocation were Canada, Cuba, Iceland, Japan, Norway and Russia. Donald Barry, "The Canada-European Union Turbot War" (1998) 53:2 *Intl J* 253 at 262.

65 J Alan Beesley & M Rowe, "Canada and Spain: A Conservation Dispute" (Honolulu, HI: Law of the Sea Institute, 1995) 1 at 2.

66 Song, *supra* note 50 at 277, n 67, citing David VanderZwaag, "The Management of Straddling Stocks: Stilling the Troubled Waters of the Grand Banks" in David VanderZwaag, ed, *Canadian Ocean Law and Policy* (Toronto, ON: Butterworths, 1992) 115 at 137, figure 6.1 ("EC Quotas vs. Catches").

67 Abel, *supra* note 63 at 567, n 91.

He cites arguments by Bob Applebaum,⁶⁸ who points out that while Spain had traditionally fished the Northwest Atlantic, it did not join the NAFO upon its formation: “Instead, Spain heavily fished the area outside the NAFO conservation framework, targeting cod, and fishing at a level higher than that set aside for Spain by NAFO.” Furthermore, once Spain joined NAFO, it began to fish stocks above levels set by NAFO. According to Applebaum, “When Spain and Portugal joined the European Community, the European Commission adopted a noticeably more conservative position at NAFO meetings, which Canada blamed on Spain and Portugal’s membership.”⁶⁹

Song describes how tensions quickly escalated in the days following the extended Canadian ban: “On March 5, 1995, Canada issued a radio message, warning that EU vessels had fished enough and could be seized by Canadian authorities. On March 7, Canada’s Minister of Fisheries and Oceans Brian Tobin warned the EU fishing vessels to withdraw from the ‘nose’ and ‘tail’ of the Grand Banks by March 8 or risk having their vessels seized.”⁷⁰ On March 9, 1995, after warning shots were fired, and acting under the Coastal Fisheries Protection Act, Canadian officials boarded and seized the Spanish fishing trawler, *Estai*, eventually towing it back to the port of St. John’s in Newfoundland.⁷¹ Ted L. McDorman reports that “the arrest and confrontational approach [were] extremely popular in Canada” and that “[t]he righteousness of Canada’s action was enhanced when it was asserted and theatrically demonstrated that the *Estai* had used undersized nets, had a false hold, had systematically misrepresented

its harvesting activity and that the turbot on board were immature and of small size.”⁷²

Canada’s actions prompted retaliatory measures by Spain and the European Union, including the dispatch of Spanish naval patrol vessels to the waters off the coast of Newfoundland to ensure the safety of Spanish fishing vessels and to deter further Canadian interference. On March 28, 1995, the Spanish government also filed proceedings against Canada before the ICJ. However, despite significant tensions, both internationally and domestically, and what Song describes as “some diplomatic posturing and manoeuvring,”⁷³ Canada and the European Union were able to resolve their dispute on April 16, 1995. Abel notes,

While the agreement does not address Canada’s extension of its coastal state jurisdiction into the Grand Banks high seas, it reaffirms the parties’ “commitment to enhanced co-operation in the conservation and rational management of fish stocks” and requires Canada to repeal its March 3, 1995 act prohibiting Spain and Portugal from fishing the Grand Banks. The agreement upholds the 27,000 ton Greenland halibut allocation and ensures a ratio of ten to three in favour of the EU and Canada for future Greenland halibut quotas. It also focuses primarily upon improved control and enforcement of NAFO fisheries through inspections, elaborating major infringements and vessel observers for the NRA. At NAFO’s annual meeting in September 1995, members adopted the Canada and EU Agreement as a NAFO regulation, effective January 1, 1996.⁷⁴

As noted above, in the discussion of Canada’s 1970s AWPPA, the decision to specifically exclude from the ICJ’s jurisdiction any disputes stemming from the Coastal Fisheries Protection Act one day before the amendments were adopted seems to confirm that the Canadian government was acutely

68 Bob Applebaum, “Straddling Stocks – International Law and the Northwest Atlantic Problem” in L Scott Parsons & W Henry Lear, eds, *Perspectives on Canadian Marine Fisheries Management: Canadian Bulletin of Fisheries and Aquatic Sciences* (Ottawa, ON: NRC Research Press, 1993) 193 at 194, 196.

69 *Ibid.*

70 Song, *supra* note 50 at 278 n 88, citing “Brussels Rebuts Fishing Accusation: Canada’s Claim Over Seized Trawler ‘Without Foundation’ says Commission”, *Financial Times* (28 March 1995); and *ibid* at 278 n 89, citing “Fisheries: EU and Canada on the Brink of a Fish War”, *European Reporter* (7 March 1995). See also Donald Barry, Bob Applebaum & Earl Wiseman, *Fishing for a Solution: Canada’s Fisheries Relations with the European Union 1977–2013* (Calgary, AB: University of Calgary Press, 2014) at 60.

71 See *ibid*, c 3 for a detailed account of the seizure of the *Estai*.

72 Ted L McDorman, “Canada’s aggressive fisheries actions: Will they improve the climate for international agreements?” (1994) 2:3 *Can Foreign Pol’y* 5 at 26. McDorman writes that “[t]hese Canadian charges were vigorously rebutted by the European Union following its own investigation of the trawler *Estai*.” “EU Official Rebuts Canadian Charges”, *The Globe and Mail* (1 April 1995) at A1.

73 Song, *supra* note 50 at 279.

74 Abel, *supra* note 63 at 570–71.

aware that the proposed amendments were likely contrary to the existing legal framework. Yet Canada was determined to act to remedy what it perceived as a dangerous gap in the legal rules governing the sound management of fish stocks straddling coastal states' EEZs and the high seas.

Canada asserted that, as a coastal state, it possessed a special interest in preserving fish stocks straddling its EEZ. Certainly, no one could doubt that the quantity of fish taken on the nose and tail of the Grand Banks affected the quantity of fish within Canada's EEZ. It can be argued that this special interest and vulnerability with respect to stocks located both within its EEZ and in the high seas areas adjacent to it is in fact acknowledged by the 1982 LOSC. Article 63(2) provides as follows: "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."⁷⁵

However, article 63 seeks to establish a balance between the sovereign rights conferred upon coastal states by article 56(1)(a) to explore, exploit, conserve and manage the living resources within their EEZs and the freedom of fishing on the high seas, proclaimed under article 87 of the convention. This attempt to reconcile the competing interests of coastal states and distant fishing nations is also present in the high seas provisions that flesh out the "freedom of fishing." Article 116, which proclaims that "[a]ll States have the right for their nationals to engage in fishing on the high seas,"⁷⁶ subjects this freedom to an obligation to respect existing treaty obligations, "the rights and duties as well as the interests of coastal States,"⁷⁷ provided in articles 63(2) and 64 to 67, as well as the other provisions in section II of part VII (High Seas) of the convention. Article 118, for example, provides that states "shall" cooperate with each other in the conservation and management of living resources in the areas of the high seas. They "shall,

⁷⁵ LOSC, *supra* note 34, art 63(2).

⁷⁶ *Ibid*, art 116.

⁷⁷ *Ibid*.

as appropriate, co-operate to establish subregional or regional fisheries organizations to this end."⁷⁸

Both articles 63(2) and 118 specifically direct that regional organizations govern straddling stock issues. Abel comments that, "[b]y appointing regional organizations to manage ocean resources, UNCLOS III shifts authority away from coastal states to a more neutral policy maker. As members of the regional organizations, coastal states and distant water nations can work together in conserving the resources utilized by each."⁷⁹ Abel concludes his 1996 article by arguing that while under the LOSC, coastal states may lose their "preferential rights," the "strengthening of regional organizations will provide for the conservation and management of straddling stocks in the most equitable manner, thus preserving the sea's resources for future generations."⁸⁰

Sullivan is also of the opinion that the 1982 convention was clearly intended to bring to a halt "the pattern of unilateral extensions of jurisdiction and sovereignty into the seas that had preceded it."⁸¹ Sullivan notes, "while the 1982 Convention sanctioned the expansion of coastal state jurisdiction to 200 miles, the treaty was also an expression of international desire to furnish a 'comprehensive framework with respect to uses of the oceans.... After decades of dispute and negotiation, the Convention reflects consensus on the extent of jurisdiction that States may exercise off their coasts and allocates rights and duties among States."⁸²

While the analysis of the various arguments justifying or condemning Canada's unilateral assertion of jurisdiction beyond its EEZ in respect of straddling fish stocks is a fascinating exercise for any student of international law, the focus of this enquiry is on the impact Canadian actions had on the subsequent development of the law of the sea.

One important consequence of Canada's resolve to tackle what it considered to be irresponsible fishing practices in the Northwest Atlantic was to significantly strengthen NAFO.

⁷⁸ *Ibid*, art 118.

⁷⁹ Abel, *supra* note 63 at 560-61.

⁸⁰ *Ibid* at 582 [emphasis added].

⁸¹ Sullivan, *supra* note 48 at 230.

⁸² *Ibid* [footnote omitted].

For while Abel argues that *strong and effective* regional fisheries organizations are the best arbiters of competing interests, Song opines that the 1995 Canada-EU dispute revealed “the failure of international and regional fisheries organizations in conserving fisheries resources and managing fisheries activities.”⁸³

As noted above, the April 1995 Canada-EU agreement that diffused the turbot crisis was eventually adopted as a NAFO regulation and became effective on January 1, 1996. The agreement targeted standard inspection procedures and increased the presence of inspectors in a bid to improve compliance with NAFO regulations.⁸⁴ Under the agreement/NAFO regulation, when inspectors suspect illegal activity, they must not unduly hinder fishing vessels, but should instead swiftly contact the flag state and NAFO’s executive secretary. In addition, under NAFO regulations, the fishing stocks of members’ vessels must undergo dockside inspection at each port of call, and the vessels must report catches of Greenland halibut to NAFO within 48 hours.⁸⁵

Michael Keiver summarizes other important developments: “The Agreement included new measures to ensure compliance with NAFO measures: such as observers required aboard *all* fishing vessels (100 percent coverage), a satellite tracking system (35 percent coverage), dockside inspections of all vessels at each port of call, special powers to order a vessel to port for inspection, and authority to seal fish holds in order to preserve evidence.”⁸⁶

Canada’s forceful assertion of its special interest in protecting the Greenland halibut resulted in an agreement that significantly enhanced NAFO’s enforcement capability and thus the overall effectiveness of the organization “to ensure the long term conservation and sustainable use of the fisheries resources in the Convention Area.”⁸⁷

However, Canada’s actions resonated well beyond the confines of the Northwest Atlantic. The Canada-EU turbot dispute occurred in the midst of the development of a generally accepted legal regime to regulate high seas fishing and, according to Sullivan, precipitated the conclusion of the 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks.⁸⁸ In many ways, comments Sullivan, the “1995 Agreement is perceived as the final chapter in the dispute between Canada and the EU, successfully addressing at the international level the problems of managing and conserving straddling fish stocks and highly migratory species.”⁸⁹

The regime for high seas fisheries, in particular for straddling fish stocks and highly migratory fish stocks, was one of two issues recognized by the 1992 United Nations Conference on Environment and Development to be in urgent need of further elaboration and development.⁹⁰ Fisheries experts from around the world had long shared this assessment. Edward L. Miles and William T. Burke had warned in 1988 that “[f]rom a perspective of a growing number of important coastal states, the 1982 Convention on the Law of the Sea does not adequately settle the issue of straddling stocks.”⁹¹ According to the two experts, although articles 63 and 116 address the issue of fishing for straddling stocks beyond the EEZ, “the precise distribution of competences to make these [Articles 63 and 116] effective is not prescribed in the treaty... The failure to specify consequences for failure to agree on conservation measures for high seas fishing, the uncertain extent of the coastal State’s superior right, and the absence of express enforcement measures beyond the EEZ — all these contribute to a situation of high uncertainty and growing dissatisfaction.”⁹² David VanderZwaag

⁸³ Song, *supra* note 50.

⁸⁴ *Canada–European Community: Agreed Minute on the Conservation and Management of Fish Stocks*, 20 April 1995, 34 ILM 1262, A(1). See *ibid*, Annex I, §II(1)-(4) for standards of inspection procedure and Annex 1, §II(3) detailing the method outlined for increased inspection presence.

⁸⁵ See *ibid*, Annex I, §II(7), (8).

⁸⁶ Michael Keiver, “The Turbot War: Gunboat Diplomacy or Refinement of the Law of the Sea?” (1996) 37:2 C de D 543 at 562–63.

⁸⁷ NAFO Convention, *supra* note 51 at 10.

⁸⁸ *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 4 December 1995, 34 ILM 1542 (entered into force 11 December 2001) [Fish Stocks Agreement].

⁸⁹ Sullivan, *supra* note 48 at 241–42.

⁹⁰ The other issue was the regulation of land-based sources of marine pollution. See David Freestone, “The Effective Conservation and Management of High Seas Living Resources: Towards A New Regime?” (1995) 5 *Canterbury L Rev* 341.

⁹¹ Edward L. Miles & William T. Burke, “Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks” (1989) 20 *Ocean Dev & Intl L* 343 at 343–44.

⁹² *Ibid*.

has commented that “[i]t is like reading a chapter with the last page missing — that is the initial feeling one may experience when reading the 1982 Convention’s provisions on fisheries management over stocks that move between a state’s exclusive economic zone and the high seas.”⁹³

For Lawrence Juda, the 1995 Fish Stocks Agreement represents a significant effort to close a gap left by the 1982 LOSC and “provides further evidence of the international community’s movement toward a more systematic, holistic, longer-term, and ecosystem-based perspective on the management of the living resources of the sea.”⁹⁴ From the Canadian perspective, it certainly helped achieve one of Canada’s most important fisheries policy goals: the establishment of effective international rules and mechanisms to deal with the straddling stocks problem.⁹⁵

Sullivan provides a succinct and highly useful summary of the most critical provisions of the 1995 Fish Stocks Agreement and comments that the provisions of article 21 have been singled out as the most radical and controversial extensions of international law comprised in the agreement:

- vii. the provision for any state party which is a member of such organizations or arrangements [subregional and regional fisheries management organizations and arrangements] to board and inspect any vessel flying the flag of another state party, irrespective of whether such state party is a member of that organization or arrangement (Article 21.1);
- viii. the provision, in default of appropriate response by a flag state in exercising its obligations under Article 21, for the state party’s inspectors to remain on board the vessel, secure evidence, and direct the vessel to the nearest appropriate port where they

have clear grounds for believing that the vessel has committed a serious violation (Article 21.8);

- ix. the establishment of default boarding and inspection procedures (Article 22) in the absence of agreement, including the ability to use force where the safety of inspectors arises or the inspectors are obstructed in the execution of their duties (Article 22.1(f)).⁹⁶

While Abel stresses that, on the subject of coastal states’ preferential rights versus distant water nations’ ability to fish adjacent seas, the 1995 Fish Stocks Agreement “wisely grants regional organizations the authority to regulate straddling stocks,”⁹⁷ Tobin rejoiced, declaring that the 1995 agreement “gives Canada the means to end foreign over-fishing permanently.”⁹⁸ He also emphasized that the agreement authorized Canada to take action outside of its 200-mile EEZ where a flag state fails to control its fishing vessels — arguably the very situation that led to the controversial seizure of the *Estai* in March 1995.⁹⁹ This interpretation of a coastal state’s right of action certainly seems consonant with article 21(8) of the 1995 Fish Stocks Agreement, which states, “Where, following boarding and inspection, there are clear grounds for believing that a vessel has committed a serious violation, and the flag State has either failed to respond or failed to take action as required under paragraphs 6 or 7, the inspectors may remain on board and secure evidence and may require the master to assist in further investigation including, where appropriate, by bringing the vessel without delay to the nearest appropriate port.”¹⁰⁰

93 VanderZwaag, *supra* note 66 at 124.

94 Lawrence Juda, *International Law and Ocean Use Management: The Evolution of Ocean Governance* (London, UK: Routledge, 1996) at 284.

95 McDorman writes that “Canada has struggled unceasingly through NAFO and elsewhere since the mid-1970s to ensure effective management of the fishing stocks which straddle Canada’s 200-n. East Coast mile zone.” McDorman, *supra* note 72 at 20.

96 Sullivan, *supra* note 48 at 243–44.

97 Abel, *supra* note 63 at 580.

98 “Fisheries: Bonino Welcomes UN Consensus on Conservation”, *European Reporter* (2 September 1995), quoted in Song, *supra* note 50 at 297.

99 *Ibid.*

100 *Fish Stocks Agreement*, *supra* note 88, art 21(8).

Conclusion

Motivated by concerns over the potential pollution of its fragile Arctic waters and the depletion of vulnerable living resources off its Atlantic coast, Canada twice made the calculated decision to step outside the confines of the then-existing legal framework and to take concrete action in defence of those vital priorities. This brief analysis of the adoption of the Canadian AWPPA in 1970 and Canada's seizure of the Spanish fishing trawler in March 1995 should not, however, be misinterpreted as advocating unilateral action in the name of selfish national interests.

In both cases, it might be argued that Canadian actions merely anticipated developments in the law that were already being discussed in international fora and were gaining momentum. Such a modest assessment of Canada's role in the development of the law of the sea in regards to pollution control and fisheries management would certainly be a much more comfortable proposition for an international legal scholar. For as Shaw emphasizes, order is necessary for a just and stable existence, and international legal norms and rules provide that stabilizing framework.

And yet, as noted at the very beginning of this study, for the international legal order to remain relevant and effective, its structure and standards must at times be challenged and reappraised. Especially in the context of the 1970 AWPPA, it can be argued that Canada acted as a necessary agent of much-needed change, as a promoter of new, emerging priorities and values. In the 1990s, Canada's determination not only to participate in, but also to enforce vital conservation strategies for declining fish stocks, while undoubtedly risky, politically costly, controversial and very likely illegal, did force the issue out of sterile meeting rooms and onto the front pages of newspapers around the world, provoking discussion, debate and, ultimately, compromise.

As Foreign Affairs Minister Freeland emphasized in her June House of Commons address,¹⁰¹ throughout its history, Canada has been a faithful and enthusiastic participant in the creation of a global order based on rules. However, at certain key moments and with respect to emerging global priorities, Canada has shown resolve and provided leadership in promoting new standards of behaviour to better serve the international community's interests in healthy and productive seas.

¹⁰¹ Freeland, *supra* note 4.


ON CANADA'S PAST, PRESENT AND FUTURE
IN INTERNATIONAL LAW

REFLECTIONS

RÉFLEXIONS

SUR LE PASSÉ, LE PRÉSENT ET L'AVENIR DU CANADA
EN MATIÈRE DE DROIT INTERNATIONAL

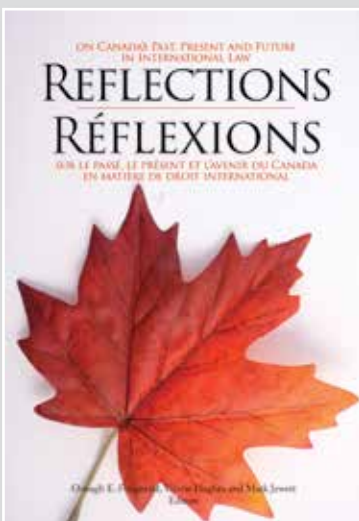
Oonagh E. Fitzgerald, Valerie Hughes and Mark Jewett,
Editors



Marking 150 years since Confederation provides an opportunity for Canadian international law practitioners and scholars to reflect on Canada's rich history in international law and governance, where we find ourselves today in the community of nations, and how we might help shape a future in which Canada's rules-based and progressive approach to international law gains ascendancy. These essays, each written in the official language chosen by the authors, provide a critical perspective on Canada's past and present in international law, survey the challenges that lie before us and offer renewed focus for Canada's pursuit of global justice and the rule of law.

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67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

