

Fishing beyond the limit: the Canada-European Union Dispute

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Introduction

The arrest of the Spanish trawler *Estai* on the high seas just beyond Canada's exclusive zone in early March focussed the world's attention on how far a coastal state can go to protect fish stocks that inhabit the waters of its exclusive zone and the high seas beyond, and the rights and duties of foreign fishers exploiting the same resource in the high seas area. The specific action was defended by Canada as necessary to protect a straddling stock of Greenland halibut (turbot) from overfishing by the European Union (EU): it was attacked by the European Community (EC) Fisheries Commissioner as "*an act of organised piracy*", while the Spanish government asserted that its fishers have the right to exploit the resources of the high seas, will never give up the right to fish just beyond Canada's limits, and that its vessel was fishing within international norms.¹

In a more general framework, Canada's actions against the Spanish fleet were taken after years of impotent management by the Northwest Atlantic Fisheries Organisation (NAFO) of the high seas components of many straddling stocks and an equally long history of the European Economic Community (EEC)/EU circumventing NAFO's management policies. In this context, the dispute poses the question of whether a coastal state has any right to act to protect a resource base for its fishing communities when the international regional fisheries management organisation with which it is supposed to cooperate under the law of the sea cannot control the action of its members, and consequently cannot fulfil its mandate to manage its section of the straddling stocks.

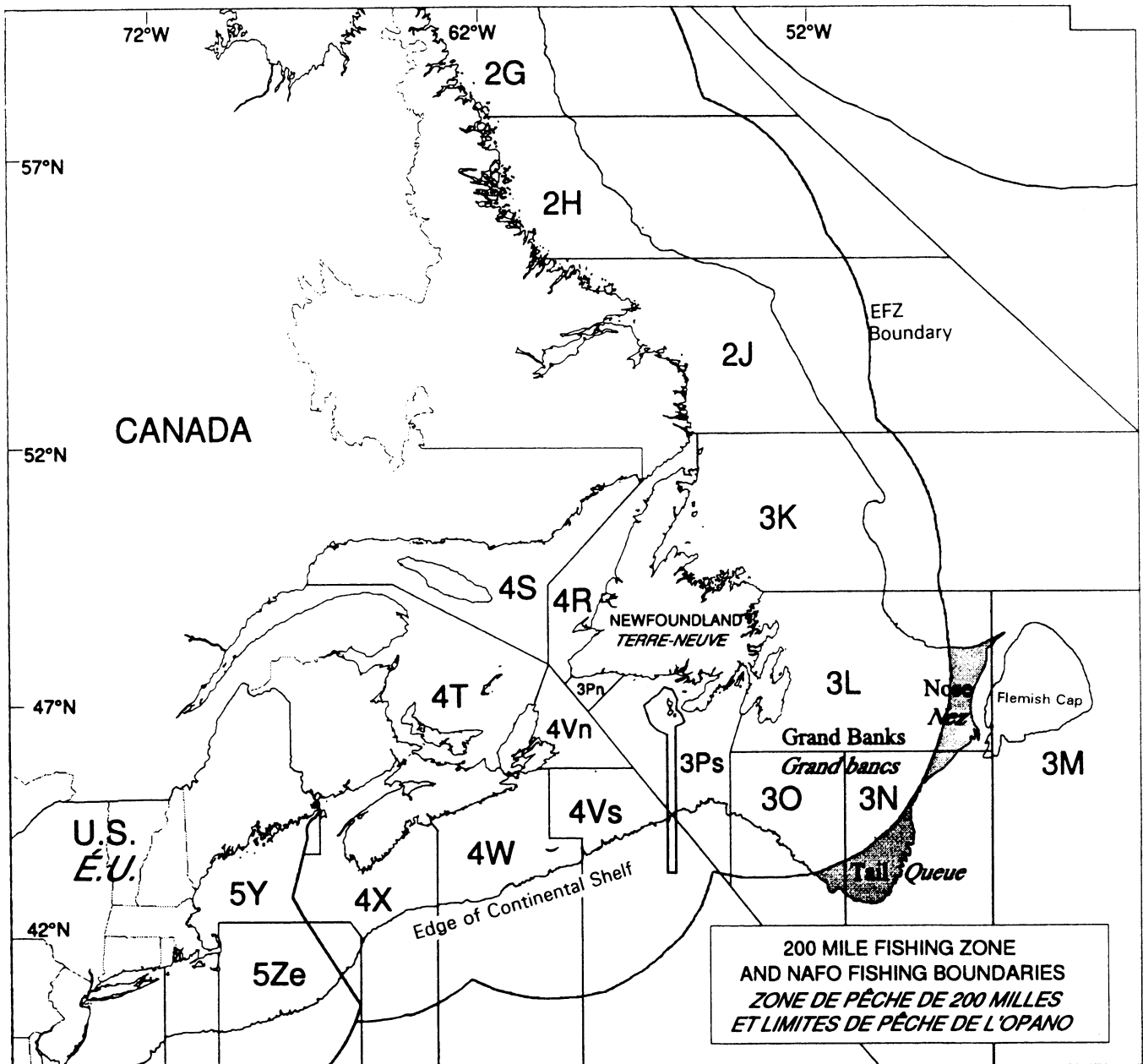
Background

As Figure 1 shows, the Nose and Tail of the Grand Banks form part of an extended continental margin and lie beyond Canada's 200 nm exclusive fishing zone (EFZ). They are home to a number of stocks that also inhabit waters inside

the EFZ. One of these is the turbot but it is important to realise that it has only acquired commercial significance in NAFO waters since 1990 as other straddling stocks in the area have become severely depleted. These other straddling stocks include Northern Cod, southern cod, capelin, and three kinds of flatfish (American plaice, Yellowtail flounder, and witch flounder), all of which were recognised by NAFO's Scientific Council as being seriously depleted in 1993.² Given that "*a number of the groundfish stocks are generally in the worst condition in history*",³ these straddling stocks were protected by NAFO moratoria in 1994: not only were directed fisheries for these species banned, but severe restrictions were placed on other fisheries (e.g., shrimp trawling) in the area that could produce by-catches of heavily depleted species such as cod.

Management of these transboundary stocks has been the shared responsibility of Canada's Department of Fisheries and Oceans (DFO) and NAFO. The latter has the authority to manage fisheries in the Regulatory Area beyond the EFZ. There are at least twenty-eight stocks that straddle the EFZ-high seas boundary, but NAFO has only developed a management strategy for cod, American plaice, Yellowtail flounder, witch flounder, various redfishes, squid, capelin, and turbot. DFO's management of its part of these stocks has not been a success: following its declaration of a 200nm limit in 1977 Canada overexpanded its fishing capacity and its scientists and decision makers became overly optimistic about stock yields and stock biomasses. By the late eighties, DFO was reducing total allowable catches (TACs) on most of these straddling stocks. In mid-1992, the size of the northern cod resource had declined to such an extent that DFO declared a moratorium on commercial cod fishing. A year later the stock was still declining and the moratorium was extended to cod fishing for subsistence purposes. In 1993 DFO also imposed bans on fishing for the three straddling flatfish

Figure 1



Source: Canadian Department of Fisheries and Oceans

stocks (American plaice, Yellowtail flounder, witch flounder) within the EFZ.

From its establishment in 1979, NAFO has been unable to enforce its management policy for straddling stocks on all of its members. This failure results from a constitution that allows a member to opt out of a NAFO management decision, from the organisation's lack of surveillance and enforcement infrastructure, and

an unwillingness on the part of most members to encourage the development of a strong enforcement capability.

Each year NAFO has set TACs and assigned each member a quota for the straddling stocks based on their historic catches. The EEC/EU has frequently disagreed with these. A provision in the NAFO constitution allows any member that does not agree with a decision of NAFO's General

Council to opt out from that management decision and set its own TAC/quota. This procedure raises the effective TAC above NAFO's recommended TAC and thereby contributes to overfishing of the straddling stocks.

The EEC/EU has been the greatest user of the objection procedure.⁴ Its repeated and frequent use by the EEC (and Spain and Portugal before they joined the EEC in 1986) prompted the General Council to call upon members in 1988 not to abuse the objection procedure as it was undermining NAFO's conservation and management strategy. In spite of this resolution, use of the objection procedure by the EEC/EU continued and has contributed significantly to the overfishing of straddling stocks in the high seas areas. Members have also contributed to overfishing these stocks through not abiding by either NAFO's TACs or the TACs set autonomously by the EEC/EU, through not reporting catches, or misreporting catches. By 1991, NAFO's Scientific Council had become convinced that there was so much misreporting and non-reporting of catches by members and non-members that it was impossible to make a proper assessment of the straddling (and other) stocks in the Regulatory Area.

In addition to members not fishing within the limits set by NAFO, illegal fishing has been occurring on the Nose and Tail by vessels registered in non-member states. Surveillance by Canada and the EEC has revealed that most of these vessels are re-flagged Spanish and Portuguese boats owned and crewed by Spanish and Portuguese, and landing their catches in the EEC.⁵ In short, re-flagging of vessels allowed Spain and Portugal a second way to circumvent the NAFO management regime and contributed to a further overfishing of the part of the straddling stocks located in the Regulated Area. NAFO's efforts to eliminate this illegal fishing in the 1990s was only partly successful by early 1994 when NAFO placed moratoria on all the commercial straddling stocks on the Nose and Tail.

Canada's Coastal Fisheries Protection Act

Canada's actions against the *Estai* were taken under its Coastal Fisheries Protection Act. Under a set of amendments passed in May 1994, Canada assumed the power to arrest foreign fishing

vessels exploiting straddling stocks found on the Nose and Tail. The amended Act was seen as urgent but 'temporary' action, in response to the threat posed by illegal fishing to a major renewable world food resource already heavily depleted and "*threatened by extinction*".

Although overfishing of these straddling stocks has given rise to much pressure in Canada for an extension of its jurisdiction over these areas,⁶ Canada's initiative under the amended Coastal Fisheries Protection Act proclaimed a very limited set of powers compared with those exercised by a coastal state over its exclusive zone. Under amendments to this Act, it assumed the power to arrest and fine certain fishing vessels exploiting designated straddling fish stocks in a manner contrary to the conservation and management measures approved by NAFO.

Hence, Canada continued to recognise the jurisdiction of NAFO as the legal manager of the resources beyond its 200 mile limit but, given that certain vessels were fishing contrary to the NAFO management regime and that NAFO was unable to deal with this situation in a way that could save one of the world's largest fish resources, Canada assumed the responsibility to enforce NAFO's management decisions on the fishing vessels exploiting the straddling stocks shared by Canada and the international community. The 'illegal' fishers that Canada assumed the power to arrest and fine were of two kinds: those not belonging to members of NAFO; those belonging to members but which did not comply with the policy approved by NAFO's General Council.

The powers of the Act were specifically limited in both area and types of fish stock: the powers assumed under the Act applied only to the Nose and Tail and only to straddling stocks. These aspects of the Act can only be changed by the federal Parliament. However, the regulations under the Act can be changed by Governor in Council. These regulations are used to define the classes of vessel designated as illegal, the specific straddling fish stocks that the Act will be used to protect, the length of time the Act will apply in any given situation, and the prescribed NAFO conservation and management measures that are not to be contravened (e.g., minimum fish sizes, minimum mesh sizes).

Implementation of the Act

The Act has been used in 1994 and 1995 to address the two types of 'illegal' fishing mentioned earlier. In the spring of 1994, when the cod and flounder resources of the Nose and Tail had been placed under moratoria, a top NAFO priority was to eliminate illegal fishing by vessels from non-member countries and by stateless vessels. NAFO's General Council had made repeated requests to non-member countries to respect NAFO's management regime and withdraw their vessels from its Regulatory Area.

By early 1994 some (e.g., the Republic of Korea, the United States, Venezuela, Morocco, and Vanuatu) had complied with these requests but six others (Belize, Panama, Honduras, Sierra Leone, Cayman Islands, and St. Vincent and the Grenadines) who played host to the re-flagged vessels from Spain and Portugal, did not. Moreover, some vessels that had been de-registered by non-NAFO countries proceeded to fish on the Nose and Tail without flying any flag.

Faced with this situation and NAFO's inability to deal with the issue, Canada acted to enforce NAFO-approved measures. It arrested the *Kristina Logos*, a Portuguese-owned and crewed trawler registered in Panama (and also still carrying a Canadian registration) for fishing on straddling stocks just beyond the Canadian limits. Following this arrest and passage of the new legislation, the problem of non-member fishing on the Nose and Tail disappeared during 1994.

The Canada-EU fishing dispute

At the beginning of 1995, the remaining threat to NAFO conservation and management measures for straddling stocks on the Nose and Tail and to the recuperation of these straddling stocks was non-compliance with the General Council decisions by NAFO members. With directed fisheries for capelin, cod, and the three flatfish fisheries banned and with severe limitations placed on the shrimp and redfish fisheries in order to protect against by-catches of protected groundfish species, no fishing vessels should have been exploiting the straddling groundfish stocks on the Nose and Tail with the exception of the turbot fishery based in deeper waters at the edge of these areas.

The centre of gravity of this straddling stock fishery until 1990 was inside Canada's EFZ. With the assistance of EC funding, the Spanish fishing industry had developed a turbot fishery on the edge of the Nose from 1990. Their fishery expanded rapidly to an average annual catch of 50,000 tonnes between 1992 and 1994. At the same time the Canadian turbot catch declined. Canada contended that the two developments were connected and asked for NAFO management of the stock, which was initiated in late 1994. The Scientific Council had already issued a warning about the turbot stocks in June 1994: "*The offshore effort levels on all subareas are in excess of what the Greenland halibut stocks can sustain*". It recommended a 1995 TAC of 27,000 tonnes (a reduction of more than 50% from the average catch between 1992-1994), which was approved by NAFO. The EU had argued for a higher TAC.

In January 1995, the turbot TAC was allocated to NAFO members, with Canada receiving 75% of the allocation based on its proportion of the catch between the late 1980s and 1984, its special interest in the stock as the coastal state, and the stock's apparent movement in recent years from being located primarily within the EFZ to being found more in the areas fished by the EU fleets. Although it had wanted 75% of the TAC using 1992-1994 catch levels as the relevant point of reference for allocations, the EU quota was set by NAFO at 3,400 tonnes for 1995 and the EU once again invoked the objection clause to set its own unilateral quota of 18,000 tonnes, which was essentially assigned to Spain and Portugal. With a NAFO TAC of 27,000 tonnes (including a 3,400 tonnes allocation to the EU), the EU's action increased the amount that could be caught by another 14,600 tonnes. In other words, the effective TAC resulting from the EU action would be 41,600 tonnes, more than 50% above the Scientific Council's recommended level.

The same use of the objection procedure that had been condemned by NAFO's General Council in 1988 and by another General Council resolution in 1989 as undermining the organisation's stock management measures and which had had a major impact on the decimation of straddling stocks such as northern cod, southern cod, American plaice, Yellowtail flounder, and witch flounder was now being used on the recently developed high seas fishery for turbot. Observing this and

the dangers to yet another straddling stock essential to the economic foundation of Canada's coastal fishery, Canada monitored the Spanish and Portuguese fleets engaged in the turbot fishery on the Nose and Tail and estimated that by the beginning of March 1995 they had caught the legal quota for the EU, according to NAFO's decision of late January.

Once again it decided to fill NAFO's enforcement void by adjusting the regulations under its Coastal Fisheries Protection Act. Spanish and Portuguese registered vessels fishing for Greenland halibut on the Nose and Tail between March 3 and December 31 were now included under the Regulations. Soon after these adjustments were approved, the *Estai* was arrested.

Canada and the Law of the Sea

Fishing for turbot beyond NAFO's approved quota can certainly be termed 'illegal', given that NAFO is the internationally recognised and properly constituted legal body managing the high seas resources of the Northwest Atlantic. However, Article XII of NAFO's constitution allows a member to object to any NAFO decision and, thereby, opt out of a particular management decision. In essence, this allows any country or associated group of countries to appear to be cooperating in the management of the high seas resources by being a member of NAFO while actually using the objection clause to inflict serious depletion on those resources.

Under the circumstances, it has to be asked whether any coastal state could treat cooperative management with an international management organisation seriously when that organisation's TACs and other management measures related to straddling stocks can be undermined as a result of illegal fishing by members using an objection clause as well as by fishing fleets that are not part of the organisation.

This is particularly relevant if reference is made to the Law of the Sea Convention which finally came into effect in November 1994. Its treatment of the management of these straddling stocks is both short and superficial, a problem that the Liberal Government in Ottawa had promised to address when elected in November 1993. In Article 63 (2), the Convention states that:

"where the same stock of 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 organisations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area."

Apart from this, there is a brief reference under Article 61 in which the coastal state is charged with the responsibility of ensuring that the exclusive economic zones' fish resources are not endangered by over-exploitation and *"As appropriate, the coastal State and competent international organisations, whether subregional, regional or global, shall co-operate to this end."*

In terms of both the scientific work and decisions by fishery managers regarding the conservation of straddling stocks, Canada's DFO and NAFO have sought, often quite successfully, to agree on the measures needed. Unfortunately, in many years agreement between DFO and NAFO has been accompanied by EEC/EU objections and pursuit of a unilateral course of action. UNCLOS Article 63(2) is conditioned by permissiveness: as long as states seek to agree on the conservation and management of straddling stocks, they fulfil the obligations of this Article, but they are under no obligation to agree. However, the EEC/EU actions are not so easily justified under Article 61. NAFO is required to cooperate with Canada to ensure that its coastal resources are not endangered. Being a member of NAFO, the EU assumes the same obligation. It can, therefore, be argued that if this cooperation is not forthcoming on behalf of the NAFO or any of its members and the coastal state's resources are being endangered, then a contravention of Article 61 is occurring.

Whilst Spanish claims to unrestricted fishing on the high seas may apply to non-straddling stocks, Article 61 imposes an obligation approved by the United Nations and ratified by the international community that they must cooperate with Canada to ensure that fishing does not endanger the straddling stocks. If their fishing does endanger the part of the straddling stock resource in coastal waters (and any overfishing on the high seas part of a straddling stock must eventually affect the

resource in the exclusive zone), this contravenes Article 61. The question then arises, if 'illegal' fishing of turbot is occurring in contravention of both an international fisheries organisation management regime and UNCLOS Article 61, what action can the coastal state take?

Many coastal states have been faced with similar problems regarding overexploitation of straddling stocks. In 1992 they steered UNCED to call for a UN conference on this and the management of highly migratory fish stocks. Chapter 17, Programme Area C of Agenda 21 noted the inadequacy of high seas fisheries management and over-utilisation of fish resources, including problems of unregulated fishing, vessel reflagging in order to circumvent management controls, insufficiently selective gear, and lack of sufficient cooperation between coastal and high seas fishing States.

In response, the United Nations has convened a conference on Straddling and Highly Migratory Fish Stocks to identify, assess, and find solutions to the conservation and management problems regarding these resources. By the end of its 56th meeting on 26 August 1994, the Conference had developed a Draft Agreement⁷ which amplifies considerably the UNCLOS provisions regarding the conservation and management of straddling stocks and, if approved and properly implemented, should provide a framework more conducive to meeting the Canadian government's demands in the Northwest Atlantic.

As a broad framework, the Draft Agreement urges compatible conservation and management to ensure that measures taken with respect to the management of high seas stocks do not undermine the effectiveness of those established for the same stocks in areas under the coastal state's jurisdiction. The draft agreement proposes a regional dispute settlement mechanism whereby, if there is a dispute over the management of straddling stocks which has not been resolved by the parties concerned, any party may take the dispute to arbitration by the President of International Tribunal for the Law of the Sea and that decision is final and not subject to appeal unless agreed to by the parties involved. This proposal may, for example, provide a mechanism by which NAFO or its individual members could control the use of its objection clause.

The Draft Agreement deals at length with the issues of non-member fishing of straddling stocks, the duties of flag states and the use of enforcement powers by coastal states. States that are not members of a regional fisheries management organisation such as NAFO are obliged to cooperate with such organisations in the conservation and management of straddling stocks and are told not to authorise their fishing vessels to fish in regions under the management of a regional organisation of which they are not a member. Members of the organisation are given the right and duty to take appropriate action to stop such non-member fishing. Furthermore, the Draft Agreement does not allow re-flagging at sea, a flag state is instructed not to authorise its vessels to fish in the management area of a regional organisation unless it has the capability to monitor, surveil, and enforce its regulations to ensure that vessels comply with the regional organisation's management measures. The Draft Agreement also indicates that flag states will cooperate with coastal states directly through a regional organisation to develop agreed procedures for control of their vessels and urges States to agree on procedures for the arrest of one state's vessel by another state where violations are occurring. In such cases, it would authorise a coastal state to continue with boarding until the flag state is able to take control of its vessel.

With these measures in place, amendment and implementation of Canada's Coastal Fisheries Protection Act in 1994 may not have been necessary. Alternatively, its actions would have been more easily justified under international law. It is also conceivable that overfishing may have been reduced or avoided on the high seas part of the straddling stocks of the Grand Banks. However, although an important advance on the existing UNCLOS, nonetheless the draft agreement only provides a framework for the management of these stocks. It would be necessary for detailed negotiations at a regional level in, for example, a NAFO context. This, together with the negotiation, ratification, and implementation of a final agreement will take time.

In 1994 and again in 1995 Canada decided, with justification from NAFO scientists and from the evidence of its surveillance and monitoring efforts on the Nose and Tail, that time was something that the state of straddling stocks in the Northwest

Atlantic did not have available. In short, the outcome of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks may, when ratified, help prevent the depletion of straddling stocks on the scale of the Northwest Atlantic from recurring elsewhere but it will not be a significant factor in arresting overfishing of straddling stocks beyond the limit of Canada's EFZ.

Conclusions

The arrest of the *Estai* and Canada's threatened actions against other Spanish and Portuguese trawlers fishing the turbot resources in waters beyond Canada's EFZ has highlighted weaknesses in NAFO's management of straddling stocks that have been evident since it was established. Current EU-Canada negotiations indicate that a new internationally agreed system of enforcement in the Northwest Atlantic may emerge from the dispute. If an agreement between the major coastal state of the Northwest Atlantic region and the major distant water fishing member produces this, the EU will be less able to fish beyond the limits of NAFO's conservation and management regime than at any time in the past. This, in turn, may restore Canada's faith in NAFO's ability to enforce its conservation and management measures and can only be of benefit in replenishing and maintaining the straddling stocks in Canada's exclusive zone and the high seas beyond. In producing a more effective regional organisation with jurisdiction over the high seas part of the straddling stocks, the recent conflict will hopefully move Canada and the EU closer to real cooperation within NAFO and lead to a peaceful management of straddling stocks in the region that will allow the recuperation and maintenance of a major renewable world food resource.

the General Council and Fisheries Commission for 1993. Dartmouth, Canada, 1994, 88-95 and 106-107.

- ³ Hayashi, M. (1995) 'The Role of the United Nations in Managing the World Fisheries', in G. H. Blake, W. J. Hildesley, M. A. Pratt, R. J. Ridley, C.H. Schofield (eds.), *The Peaceful Management of Transboundary Resources*. London: Graham and Trotman: 375.
- ⁴ See (i) Oceans Institute of Canada (1990) *Managing Fishery Resources Beyond 200 miles: Canada's Options to protect Northwest Atlantic Straddling Stocks*, Prepared for the Fisheries Council of Canada. Ottawa, January, 87 pp. and (ii) NAFO (1993) *Meetings and Decisions, 1979-1992*, Dartmouth, Canada: 376 pp.
- ⁵ (i) Annex 4: Non-Contracting Parties Fishing Activity in the NAFO Regulatory Area by the Canadian Delegation and (ii) Annex 5: Non-Contracting Parties Fishing Activity in the NAFO Regulatory Area by the EEC Delegation in Report of the First Meeting of the Standing Committee on Fishing Activities of Non-Contracting Parties in the Regulatory Area (STACFAC), January 1991. In NAFO (1992) *Meeting Proceedings of the General Council and the Fisheries Commission for 1991*. Dartmouth, Canada: 43-58.
- ⁶ See, for example, (i) Oceans Institute of Canada, *op. cit.* and (ii) Government of Newfoundland and Labrador (n.d.) *Why Canada must act to protect the Grand Banks*, St. John's, Newfoundland.
- ⁷ "Draft Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks". A further round of Conference meetings began on March 27 during the Canada-EU dispute and an intended final round is scheduled for July 24 to August 4, 1995 during which it is hoped to produce a final text which would then have to be ratified by 40 countries before it comes into force.

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Notes

- ¹ The Spanish Government reiterated this determination on 4 April 1994, when it refused to agree to an EU-Canada draft agreement under which Canada would be given rights to fish for turbot in a special reserve on the Nose beyond its 200 mile limit.
- ² Report of the Meeting of the Fisheries Commission, September 1993 in NAFO *Meeting Proceedings of*