

CANADA-UNITED STATES COOPERATIVE APPROACHES TO SHARED MARINE FISHERY RESOURCES: TERRITORIAL SUBVERSION?[†]

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The concept of territory as an organizing principle of national action and responsibility extends from a nation's territorial lands and waters into adjacent ocean areas, albeit with significant differences. From the perspective of international law, a State has nearly absolute authority respecting all activities, persons, and the environment—land, water, animals, minerals, and air—within its defined land territory.¹ Under this international legal model each State is a separate box on the global map. Even within that box, however, there are caveats on the authority of the State respecting activities, persons, and the environment. For example, such caveats include diplomatic and sovereign immunity, the general principle of good neighborliness, and human rights and other responsibilities established by international law. The box analogy is also inadequate to explain fully the realities of international communications, trade, and cross-boundary resources (for example, rivers, air, and wildlife). However, while in some circles it is popular to talk about the diminishment of State sovereignty and the box metaphor at the international level, at present this is mostly academic or intellectual sophistry. The adventure of coming from Canada to the United States, or

[†] This Essay draws from the author's recent publication, TED L. MCDORMAN, *SALT WATER NEIGHBORS: INTERNATIONAL OCEAN LAW RELATIONS BETWEEN THE UNITED STATES AND CANADA* (2009).

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1. See generally ANTONIO CASSESE, *INTERNATIONAL LAW* 88–90 (2001).

vice-versa—encountering the border, the security, the passport, the flags, and the fierce assertion of nationality—belies any significant appetite for the diminishment of the box approach by either governments or citizenries.

As compared to land territory, national authority over its adjacent ocean space is not as all-inclusive respecting activities, persons, and the environment. National authority over salt water areas is best understood as being functional, with differing balances existing between national authority over ocean resources and ocean activities (including vessel navigation), depending upon proximity to the coast and the nature of the resource and/or the activity.

This Essay will focus on how Canada and the United States have both succeeded and failed in adopting cooperative approaches to managing ocean fishery resources. A critical factor that has influenced these efforts is the introduction of an international legal construct dictating that States have *exclusive* sovereign rights respecting all marine living resources within 200 nautical miles of their shores.² Cooperative approaches to managing transboundary marine living resources between Canada and the United States are necessary for two reasons. First, in the case of marine living resources, the resource pays scant attention to human-constructed national boundaries. Put another way, marine living resources challenge the entire idea of territory and boundaries. Therefore, for proper management of these transboundary resources that benefits both States, cooperation is necessary. Second, unlike respecting land, on salt water, as a result of each State having 200-nautical-mile zones, Canada and the United States have areas where both States claim exclusive national authority. These are areas where there are disputed maritime boundaries, and they exist between Canada and the United States on the Atlantic, Pacific, and Arctic coasts.³ Both for proper resource management purposes and for pragmatic “lets-not-fight” purposes, bilateral cooperation is required.

This Essay argues that the cooperative approach that has developed between Canada and the United States respecting marine living resources is one that simultaneously respects and ignores boundaries and territorial constructs. Part I provides background on the emergence of the modern international law of the sea within which States operate and cooperate. Part II investigates the two notable failures of Canada and the United States to cooperate respecting fisheries matters that have played a large role in shaping today’s more cooperative approach. Part III details

2. United Nations Convention on the Law of the Sea art. 56(1)(a), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention].

3. See MCDORMAN, *supra* note †.

the existing cooperative arrangements on fisheries management in the Gulf of Maine on the Atlantic coast and respecting salmon, halibut, hake/whiting and albacore tuna, as well as the cooperative arrangements on fishing activities in disputed waters and fisheries enforcement on the Pacific Coast.

I. BACKGROUND

The starting point for understanding the reach of national authority in the oceans is the age old legal principle of freedom of the high seas. For the purposes here, there are the two key components of freedom of the high seas. The first is freedom of fishing and the idea that resources of the high seas, which historically meant primarily marine living resources, were open to capture by anyone. The second is freedom of navigation, which is the understanding that vessels on the high seas were subject only to the laws and authority of State where the vessel was registered.⁴ These freedoms attached to an area known as the high seas, defined as that area of the water column outside of national authority. From a twenty-first century perspective, this approach to ocean space as *res communis* resulted in the serious diminishment of fishing and marine mammal stocks—the tragedy of the commons—and minimal regulation of vessel behavior on the high seas.

It was only in the second half of the twentieth century that the dominant characteristics of the international law of the sea—these freedoms of the high seas—were challenged. The challenge came not in undermining the freedom of the high seas *per se*, although this also occurred to a certain extent, but primarily in expanding the ocean area of coastal State authority so as to limit the area that was subject to high seas freedoms. While this was the approach to freedom of fishing and access to ocean minerals, this was not applied to freedom of navigation. Hence, what has emerged is a complex situation in which national authority over offshore resources and navigational freedoms depends upon the particular ocean area in question.

The traditional narrative of the development of the international law of the sea in the twentieth century categorizes and explains the developments in terms of coastal State *versus* maritime State interests. In this narrative, the coastal States are those that seek to assert national authority in adjacent offshore areas and to push back the border beyond which freedom of the high seas exists. The maritime States, in contrast, are

4. ROBIN ROLF CHURCHILL & ALAN VAUGHAN LOWE, *THE LAW OF THE SEA* 203–08 (3d ed. 1999); LAWRENCE JUDA, *INTERNATIONAL LAW AND OCEAN USE MANAGEMENT* 8–48 (1996).

those that seek to constrain the expansion of coastal State authority and to promote the freedoms of the high seas.⁵ In this narrative, Canada, for example, is usually portrayed a coastal State, evidenced by its enactment of a one-hundred-nautical-mile pollution prevention zone for Arctic waters in 1970⁶ (well ahead of its time) and, more recently, by the arrest of a Spanish fishing trawler on the high seas adjacent to its 200-nautical-mile fishing zone in 1995.⁷ The United States, on the other hand, is usually portrayed in this narrative as a maritime State, primarily because of its high regard for and insistence on continuation of freedom of navigation, for example, through international straits.⁸

Professor Oxman, a distinguished law of the sea expert, has suggested a different paradigm categorizing State actions: he describes those States interested in extending national authority into the ocean at the expense of the high seas as “territorialists,” and those that support high seas freedoms—most prominently navigational rights—as “internationalists.”⁹ Professor Oxman’s approach has a nice congruence with the themes of this Symposium and more specifically this panel, which is entitled “Colonizing Natural Resources.” Indeed, what has occurred in the late twentieth century is coastal States’ acquisition of exclusive authority to explore and exploit the natural resources of their offshore environments, whether those resources be marine living resources, such as fish and marine mammals, or mineral resources of the ocean floor, such as hydrocarbons.

5. See JUDA, *supra* note 4, at 213–24 (discussing how the coastal–maritime State divide played out during the Third United Nations Conference on the Law of the Sea (UNCLOS III)).

6. Arctic Waters Pollution Prevention Act art. 3(1), R.S.C. ch. 2 (1970, 1st Supp.). The United States strongly protested the Canadian measure. See Note from the Secretary of State to Embassy of Canada, Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.), 1984 I.C.J. Pleadings 5 (Apr. 14, 1970) [hereinafter Gulf of Maine Case]; Note from the Secretary of State to Embassy of Canada, Gulf of Maine Case, 1984 I.C.J. Pleadings 5 pt. 5 Annex 8 (Apr. 14, 1970) [hereinafter Gulf of Maine Case]; Press Release, U.S. Department of State, Department of State Statement on Government of Canada’s Bills on Limits of the Territorial Sea, Fisheries and Pollution (Apr. 15, 1970), reprinted in 9 I.L.M. 605–606 (1970).

7. For a colorful recitation of the seizing of the Spanish vessel *Estai* see MICHAEL HARRIS, LAMENT FOR AN OCEAN 1–38 (McClelland & Stewart eds. 1998). More scholarly and insightful discussion is provided by Phillip Saunders, *Jurisdiction and Principle in the Implementation of the Law of the Sea: The Case of Straddling Stocks*, in TRILATERAL PERSPECTIVES ON INTERNATIONAL LEGAL ISSUES: CONFLICT AND COHERENCE 382–93 (Chi Carmody et al. eds., 2003); see also Christopher Joyner, *On the Borderline? Canadian Activism in the Grand Banks*, in GOVERNING HIGH SEAS FISHERIES: THE INTERPLAY OF GLOBAL AND REGIONAL REGIMES 207, 207–33 (Olav Stokke ed., 2001).

8. See generally Elliot Richardson, *Law of the Sea: Navigational and Other Traditional National Security Concerns*, 19 SAN DIEGO L. REV. 553 (1982).

9. Bernard Oxman, *The Territorial Imperative: A Siren Song at Sea*, 100 AM. J. INT’L L. 830, 850 (2006).

There are presently three international legal “regimes” addressing ocean resources. The first is national law and authority that is applicable to marine living resources and hydrocarbon resources in adjacent waters and seafloor. As a matter of international law, each State has exclusive national authority respecting all ocean resources, mineral and living, out to 200 nautical miles.¹⁰ Where there is a legal and physical continental shelf area beyond 200 nautical miles from shore, a coastal State has exclusive jurisdiction over the mineral resources and sedentary species in and on that continental shelf area.¹¹ The second regime is the freedom of the high seas—freedoms of fishing and navigation—that, subject to international treaties, continues to apply in the water column beyond a coastal State’s 200 nautical mile zone.¹² Finally, there is the international regime that applies to the mineral resources of the deep ocean floor. One of the innovative developments respecting global resources came in the 1960s with the concept of the “Common Heritage of Mankind.” Pursuant to the 1982 U.N. Convention on the Law of the Sea (LOS Convention), the minerals of the deep ocean floor—defined as the seafloor beyond national jurisdiction and referred to as the “Area,”¹³—are “vested in mankind as a whole.”¹⁴ Thus, they are not subject to national appropriation or claims¹⁵ and their benefit is to be shared among all States (and most particularly among developing States). The International Seabed Authority (ISA) is to act on behalf of humankind as a whole in the development of the mineral resources of the deep ocean floor.¹⁶

It is worth noting that the idea and acceptance of the seafloor as the Common Heritage of Mankind predates the 200-nautical-mile zone. Now lost in the mists of time, in 1970, the United States proposed a treaty that would have recognized all natural resources of the seabed beyond the 200-meter water depth to be “the common heritage of mankind.”¹⁷ The treaty further proposed the formation of a trusteeship zone encompassing the physical continental shelf area beyond the water depth of 200 meters to the physical outer limit of the continental shelf, with adjacent coastal States acting as trustees for the international

10. LOS Convention, *supra* note 2, art. 56(1)(a).

11. *Id.* arts. 76–77.

12. *Id.* art. 87.

13. *Id.* art. 1(1).

14. *Id.* art. 137(2).

15. *Id.* art. 137(1).

16. *Id.* art. 137(2).

17. Statement from Richard Nixon, President of the United States, Statement on United States Oceans Policy (May 23, 1970), *reprinted in* NEW DIRECTIONS IN THE LAW OF THE SEA 751–52 (S. Houston Lay et al. eds., 1973); *see id.* at 753–68 (providing the U.S. Department of State’s summary of the proposed treaty’s provisions).

community.¹⁸ The United States proposed that the benefits of the resources from this area of the shelf be shared between the international community and the adjacent coastal State. Beyond the outer limit of the physical continental shelf, the United States proposed creation of “international machinery” to authorize and regulate the resources of the deep ocean floor.¹⁹ The United States called for a treaty that “should provide for the collection of substantial mineral royalties to be used for international community purposes, particularly economic assistance to developing countries.”²⁰ All of this was swept away with the adoption of “national” 200-nautical-mile zones that provided for exclusive jurisdiction over marine living resources and mineral resources within these zones. Arguably, the “territorialist” mentality prevailed. It was developing States in Africa, Asia, and Latin America that were the initiators and promoters of the 200-nautical-mile zone idea.²¹ The 200 nautical miles diminished the area that would be subject to the Common Heritage of Humankind. Further shrinking the area of Common Heritage is the legal regime of the continental shelf, which allows a State to exercise exclusive jurisdiction over resources of the shelf extending beyond 200 nautical miles.²² This is far from what the United States proposed in 1970, although at a later stage the United States, Canada, and other States adopted 200-nautical-mile zones²³ and asserted national jurisdiction over shelf areas beyond 200 nautical miles.²⁴

To bring this general discussion back to a “today” issue, a great deal of attention is being given the so-called “scramble” for resources in the central Arctic Ocean. Much of this attention is media hype fueled by ill-

18. *Id.* para. 7.

19. *Id.* para. 8.

20. *Id.* para. 5.

21. CHURCHILL & LOWE, *supra* note 4, at 160.

22. LOS Convention, *supra* note 2, art. 76.

23. Fishery Conservation and Management Act (renamed the Magnuson Fishery Conservation and Management Act), 90 U.S. Stat. 331 (codified at 16 U.S.C. 1801–82 (1977)); Fishing Zones of Canada (Zones 4 and 5) Order, C. Gaz. Part II, Vol. 111, SOR/77-62, Jan. 1, 1977, at 115–20, *replaced by* Fishing Zones of Canada (Zones 4 and 5) Order, C.R.C. (1978), Vol. XVIII, ch. 1548, at 13741–46; Fishing Zones of Canada (Zone 6) Order, C. Gaz. Part II, Vol. 111, SOR/77-173, Feb. 24, 1977, at 652–55, *replaced by* Fishing Zones of Canada (Zone 6) Order, C.R.C. (1978), ch. 1549, at 13747–50 (governing Zones 4 and 5 on the east and west coasts and Zone 6 in the Arctic).

24. Canada asserted jurisdiction over its adjacent continental shelf beyond 200 nautical miles as early as the 1960s. *See* Barry Buzan & Danford Middlemiss, *Canadian Foreign Policy and the Exploitation of the Seabed*, in *CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA* 1, 17–18 (Barbara Johnson & Mark Zacher eds., 1977). By 1974, the United States had joined with “broad margin States” supporting coastal State jurisdiction over the continental shelf beyond 200 nautical miles. *See* ANN HOLLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 259–62 (1981).

informed commentators.²⁵ What is occurring in the central Arctic Ocean is that States such as the Russian Federation, Canada, Denmark (Greenland), and the United States are undertaking, at significant expense, to map and explore the Arctic Ocean seafloor in order to determine (1) how much the seafloor comes within national jurisdiction, based on the complex formula and procedures set out in the LOS Convention and (2) what part of the Arctic Ocean seafloor might be left to the International Seabed Authority.²⁶ For all of the “scramble” and hype, it is clear that Canada, Denmark, and the United States are cooperating at the operational, scientific level to gather and share data.²⁷

Another timely topic concerns marine genetic resources that exist beyond the 200-nautical-mile zones of States. Marine genetic resources of the deep ocean are seen by some as the twenty-first century deep seabed minerals, holding a promise of significant riches.²⁸ There are current international discussions as to whether marine genetic resources of the deep ocean floor are either (1) part of the Common Heritage of Humanity and thus subject to the authority of the ISA; (2) subject to the freedom of fishing and thus available to all States; or (3) in need of a new regime unique to marine genetic resources of the deep ocean floor.²⁹ It is worth noting that unlike mineral or marine living resources, marine genetic resources on their own are without value; it is the chemicals, drugs, or cosmetics, among other things, that may be produced based on

25. See, e.g., *Arctic Battle Heats Up as Denmark Joins the Fray*, THE INDEPENDENT, Aug. 11, 2007.

26. See generally Tavis Potts & Clive Schofield, *Current Legal Developments: The Arctic*, 23 INT'L J. MARINE & COASTAL L. 151, 153–67 (2008); Ted McDorman, *The Legal Framework and Recent Developments Regarding the Continental Shelf Beyond 200 nm in the Arctic Ocean* (unpublished paper presented at “The World Ocean in Globalization: Challenges for Marine Regions” conference held in Oslo, Norway, Aug. 21–23, 2008, on file with author).

27. See, e.g., *Canada, U.S. to Team Up On Arctic Seabed Mapping Project*, CBC NEWS, June 30, 2008, www.cbc.ca/technology/story/2008/06/30/cda-mapping.html (last visited June 9, 2009); Press Release, U.S. Department of State, *Two Scientific Cruises—including Joint U.S., Canadian Mission—to Map Arctic Seafloor*, (Aug. 11, 2008).

28. See generally SALVATORE ARICO & CHARLOTTE SALPIN, *BIOPROSPECTING OF GENETIC RESOURCES IN THE DEEP SEABED: SCIENTIFIC, LEGAL AND POLICY ASPECTS* (2005); DAVID KENNETH LEARY, *INTERNATIONAL LAW AND THE GENETIC RESOURCES OF THE DEEP SEA* (2006); Charlotte Salpin & Valentina Germani, *Patenting of Research Results Related to Genetic Resources from Areas Beyond National Jurisdiction: The Crossroads of the Law of the Sea and Intellectual Property Law*, 16 REV. EUR. COMMUNITY & INT'L ENVTL L. 12, 12–23 (2007).

29. See *Report of the Ad Hoc Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction*, U.N. Doc. A/61/65 (Mar. 20, 2006) (prepared by Juan Manuel Gómez & Philip D. Burgess); Letter from Juan Manuel Gómez-Robledo & Robert Hill, Co-chairpersons of the Ad Hoc Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity Beyond Areas of National Jurisdiction, to the President of the General Assembly (May 15, 2008), U.N. Doc. A/63/79 (May 16, 2008).

or from the genetic resources that may have value. This extra step, which involves significant research and scientific engagement, is important and is what makes the marine genetic resources issue particularly complex.

II. FAILED COOPERATION ON FISHING

There are two noted failures of Canada and the United States to achieve cooperation regarding cross-border marine living resources, one on the Atlantic coast in the late 1970s and the other on the west coast in the 1990s regarding Pacific salmon. In the Atlantic case, the two countries were trying to overcome or deny territorial and boundary constructs. On the Pacific coast, the rigorous adherence to territorial/property ideas led to stalemate. In both cases, the cooperation failures hurt the fish stocks in question. On the Atlantic coast the failure to overcome the territorialist's approach was primarily the responsibility of the fishing constituencies and stakeholders involved. On the Pacific coast, the strict adherence to territorialism and property was demanded by the fishing constituencies and stakeholders involved. Both "failures" indicate the authority of territorialism and property in shaping attitudes and inhibiting compromise that departs from a rigid application of territorialism.

A. *The Gulf of Maine in the 1970s*³⁰

While Canada and the United States have a long history of both fisheries cooperation and dispute, both States anticipated that new and different problems would emerge after each State formally delineated their 200-nautical-mile zones in 1977.³¹ Bilateral attention quickly focused on the Gulf of Maine area, and more particularly, the fisheries-rich Georges Bank. The Georges Bank, in the outer Gulf of Maine, was transformed from an area of the high seas open to fishers from Canada, the United States, and many other countries to being under the exclusive authority of either Canada or the United States. In 1977, the United

30. Paragraphs in this section are drawn, with modification, from MCDORMAN, *supra* note †, at 135–39.

31. For further discussion on the Magnuson Fishery Conservation and Management Act, *supra* note 23, and specifically the delineation of the U.S. 200 nautical mile zone adjacent to Canada, see Public Notice 506: Maritime Boundaries Between the United States and Canada, 41 Fed. Reg. 48,619, 48,619–20 (Nov. 4, 1976) [hereinafter *Maritime Boundaries*], reprinted in 15 I.L.M. 1435–36 (1976) *superseded by* Public Notice 2237: Exclusive Economic Zone and Maritime Boundaries; Notice of Limits, 60 Fed. Reg. 43825, 43,825–29 (Aug. 23, 1995). For information on Canada's 200 nautical mile zones, see also Fishing Zones of Canada (Zones 4 and 5) Order, *supra* note 23; Fishing Zones of Canada (Zone 6) Order, *supra* note 23.

States claimed that all of Georges Bank was within its exclusive authority, while Canada claimed sovereignty over the northeastern portion.³²

Special negotiators, appointed in 1977, agreed upon two linked agreements: the first on fisheries³³ and the second to submit the maritime boundary question in the Gulf of Maine to binding international dispute settlement.³⁴ The relevant agreement here, the East Coast Fishery Agreement was a complex deal involving “an elaborate superstructure of entitlements, access areas, joint management authority and dispute settlement procedures.”³⁵ The key feature of the Agreement was that “there was to be reciprocal access in perpetuity to all boundary stocks of interest to fishermen on both sides, regardless of where an agreed maritime boundary might eventually be drawn.”³⁶ Essentially, the eventual maritime boundary was to be largely irrelevant to the cooperative management, including bilateral cross-border access to and sharing of, the fisheries.

The innovative 1978 East Coast Fishery Agreement that sought to reach beyond a territorialism/property approach was rejected by the very people it was designed to assist. A significant portion of the fishing industry in New England was unimpressed with the insurance policy structure of the 1979 Agreement. Opposition in the United States quickly formed and centered on the U.S. Senate, which was constitutionally required to provide its consent in order for the United States to ratify the Agreement.³⁷ There were calls within the U.S. fishing communities for renegotiation. Further, aggressive U.S. fishing efforts were seen by Canada as undermining the Fishery Agreement.³⁸ Ultimately, the fishing communities within the United States preferred the certainty of a maritime boundary that they felt would exclude Canadians from the Georges Bank and were willing to gamble on the result of boundary

32. See Maritime Boundaries, *supra* note 31; Fishing Zones of Canada (Zones 4 and 5) Order, *supra* note 23.

33. Agreement between Canada and the United States on East Coast Fishery Resources, U.S.-Can., Mar. 29, 1979, S. EXEC. DOC. V (1979), *as reprinted in* IX NEW DIRECTIONS IN THE LAW OF THE SEA 178–212 (Myron Nordquist & Kenneth R. Simmonds eds., 1980) [hereinafter Nordquist & Simmonds].

34. Agreement to Submit to Binding Dispute Settlement the Delimitation of the Maritime Boundary in the Gulf of Maine, U.S.-Can., Mar. 29, 1979, S. EXEC. DOC. U (1979), *reprinted in* Nordquist & Simmonds, *supra* note 33, at 167–77.

35. Erik B. Wang, *Canada—United States Fisheries and Maritime Boundary Negotiations: Diplomacy in Deep Water*, 38 BEHIND THE HEADLINES 17 (1981).

36. *Id.*

37. See *id.* at 30–33, 41–44; L.S. PARSONS, MANAGEMENT OF MARINE FISHERIES IN CANADA 327–28 (1993).

38. *Id.* at 31–33.

adjudication.³⁹ As a result, the United States did not ratify the 1979 East Coast Fishery Agreement.

An important factor that played a role in this saga was the novelty in the 1970s of the 200-nautical-mile national fishing zone respecting waters that had previously been shared with foreign fishers. The “territorial exclusivity” of the 200-nautical-mile zone held an allure for those directly involved and essentially undermined any desire to compromise.

B. *Pacific Salmon in the 1990s*⁴⁰

Pacific salmon begin life in fresh water rivers or lakes, then migrate to the ocean where they feed and mature, and finally return to their fresh water places of origin. As a result, some salmon originating from Canadian rivers pass through Alaskan 200-nautical-mile waters on their homeward journeys and thus may be caught or “intercepted” by fishers in Alaskan waters. Likewise, some salmon from rivers in Washington and Oregon enter into Canadian 200-nautical-mile waters and thus similarly may be caught or “intercepted” by fishers in Canadian waters. Enhancing the concern about interceptions was that both Canada and the United States endorsed that idea that for Pacific salmon where the salmon originated, the so-called “State-of-origin,” had a special relationship, akin to but not quite a property right, with salmon beyond the national waters of the State-of-origin. Canada and the United States were successful in having the State-of-origin principle included in the 1982 LOS Convention.⁴¹

After a long period of negotiations starting in the 1970s,⁴² both States entered into the 1985 Pacific Salmon Treaty.⁴³ Central to the Treaty was the understanding that U.S. interceptions of Fraser River sockeye and salmon from other Canadian rivers, mostly by Alaskans, would be matched by Canadian interceptions of coho and chinook originating from U.S. rivers in Washington and Oregon.⁴⁴ In 1985, Canada

39. See Maritime Boundary Settlement with Canada, U.S.-Can., Mar. 29, 1979, S. EXEC. REP. NO. 97-5, at 1-2 (1981); PARSONS, *supra* note 37, at 328; see also DAVID L. VANDERZWAAG, *THE FISH FEUD: THE U.S. AND CANADIAN BOUNDARY DISPUTE* 89-94 (1983).

40. Paragraphs in this section are drawn, with modification, from MCDORMAN, *supra* note †, at 296, 298, 301-02.

41. LOS Convention, *supra* note 2, art. 66.

42. See MICHAEL PERRY SHEPARD & W. ARGUE, *THE 1985 PACIFIC SALMON TREATY: SHARING CONSERVATION BURDENS AND BENEFITS* 67-74 (2005) (discussing these negotiations and the rejection of an earlier treaty by U.S. fishing interests).

43. Treaty Between the Government of Canada and the Government of the United States of America Concerning Pacific Salmon, U.S.-Can., Jan. 28, 1985, T.I.A.S. 11091 [hereinafter *Pacific Salmon Treaty*].

44. Gordon R. Munro & Robert L. Stokes, *The Canada-United States Pacific Salmon Treaty*, in *CANADIAN OCEANS POLICY: NATIONAL STRATEGIES AND THE NEW LAW OF THE SEA* 17, 30 (Donald McRae & Gordon R. Munro eds., 1989).

was of the view that there existed “a rough, albeit imperfect, balance” of interceptions.⁴⁵ Also central to the Treaty was the acceptance of a special status for the “State-of-origin” that suggested, where interceptions were unbalanced, that the State-of-origin in deficit was entitled to “benefits equivalent” to its salmon intercepted by the other State.⁴⁶ The Salmon Treaty was based on territorial principles and did not resolve the relationship between “State-of-origin” and the exclusivity a coastal State has respecting salmon and other fishery resources within its 200-nautical-mile zone. Canada promoted the “State-of-origin” concept and the balance of interceptions, or if that could not be attained, then “benefits equivalent.” The United States, or at least Alaska, asserted that the rights of the coastal State over all fisheries resources within its 200-nautical-mile zone trumped the State-of-origin concept and that there was a lack of certainty respecting the meaning and calculation of “benefits equivalent.” Finally, the Treaty created the Pacific Salmon Commission (PSC) as the mechanism for cooperation.⁴⁷ The PSC, composed of a U.S. and a Canadian section, was to adopt by consensus quotas and other limitations for the salmon stocks covered by the Treaty.

When the various Annex IV management and harvesting arrangements were about to expire and renegotiation was necessary in the early 1990s, Canada voiced serious concerns with the Pacific Salmon Treaty. Canada believed that U.S. interceptions of Canadian salmon had increased dramatically during the late 1980s, while Canadian interception of U.S. salmon had significantly declined due to weak salmon runs in the United States.⁴⁸ Throughout the 1990s, Canada and the United States remained deadlocked in their negotiations, rendering the PSC essentially dysfunctional. The deadlock focused on the following: (1) the extent of limitations, if any, that were necessary on Alaskan fishers; (2) whether and how interception balance (however it was defined) was to be re-established; (3) and how to implement in a practical manner the “benefits equivalent” wording from the 1985 Treaty that was tied to the State-of-origin concept.

45. Gordon Munro et al., *Transboundary Fishery Resources and the Canada-United States Pacific Salmon Treaty* (Canadian-American Pub. Pol’y Occasional Papers Series No. 33, 1998).

46. See WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES* 183 (1994); MICHAEL PERRY SHEPARD & A.W. ARGUE, DEP’T OF FISHERIES & OCEANS, CANADIAN INDUSTRY REPORT OF FISHERIES AND AQUATIC SCIENCES No. 242, *OCEAN PASTURAGE IN THE PACIFIC SALMON TREATY: FACT OR FICTION?* 8–11, 33–37 (1998); Thomas. C. Jensen, *The United States-Canada Pacific Salmon Interception Treaty: A Historical and Legal Overview*, 16 ENVTL. L. 363, 400 (1986).

47. Pacific Salmon Treaty, *supra* note 43, art. II.

48. *Statement of Canada, Dec. 3, 1992, in 1992/1993 PACIFIC SALMON COMM’N EIGHTH ANN. REP.* 8–9 (1993).

Two special efforts to overcome the Pacific salmon impasse are noteworthy. First, in 1995, the two sides agreed on a mediator, New Zealander Christopher Beebe, to assist regarding the “benefits equivalent” dispute.⁴⁹ The mediator eventually withdrew without attaining success. U.S. negotiator James Pipkin indicated that the mediator withdrew because “the two countries were simply too far apart.”⁵⁰ Second, in 1997, a stakeholder process was attempted and two special envoys, one from each country, were appointed to investigate means to resolve the Pacific salmon controversy.⁵¹ However, in early 1998 the envoys reported that the stakeholder process was at a dead-end and that it was up to the two governments to resolve the dispute.⁵²

Like on the Atlantic coast a decade earlier, the fishing constituencies and stakeholders, in this case in both States, pressed their own interests and were unwilling to approach a compromise position. In Canada, the State-of-origin quasi-property right in salmon ruled, whereas in the United States (and particularly Alaska), the territorialist approach of the salmon being present in Alaskan waters ruled. Notably, the 1985 Pacific Salmon Treaty contained wording that supported both positions.⁵³

III. COOPERATIVE SUCCESSES

Not surprisingly, the fisheries cooperation failures generated a lot of public and political attention. Less attention is paid to both the coopera-

49. Agreement Between the Government of the United States of America and the Government of Canada on the Establishment of a Mediation Procedure Regarding the Pacific Salmon Treaty, U.S.-Can., Sept. 11, 1995, T.I.A.S. 12689, 2029 U.N.T.S. 307.

50. *Hearing on the U.S.-Canada Pacific Salmon Treaty*, 105th Cong. 57 (1997) (statement of James Pipkin, U.S. Pacific Salmon Negotiator) as cited in DENNIS BROWN, SALMON WARS: THE BATTLE FOR THE WEST COAST FISHERY 218 (2005).

51. *See id.*, at 159–63, 217–19; EUGENE BUCK, CONG. RESEARCH SERV., ORDER CODE RL30324, THE PACIFIC SALMON TREATY: THE 1999 AGREEMENT AND RENEGOTIATION OF ANNEX IV 9–10 (2007).

52. DAVID W. STRANGWAY & WILLIAM D. RUCKELSHAUS, PACIFIC SALMON: REPORT TO THE PRIME MINISTER OF CANADA AND THE PRESIDENT OF THE UNITED STATES, FISHERIES AND OCEANS CANADA 4 (1998). For the recommendations of the Strangway-Ruckelshaus Report; *see* 1997/1998 PACIFIC SALMON COMM’N THIRTEENTH ANN. REP. 91–92 (1998).

53. Pacific Salmon Treaty, *supra* note 43, art. III(3) (“In fulfilling their obligations pursuant to paragraph (1), the parties shall take into account: (a) the desirability in most cases of reducing interceptions; (b) the desirability in most cases of avoiding undue disruption of existing fisheries; and (c) annual variations in abundances of the stocks.”); *see also* Marlyn Twitchell, *Implementing the U.S.-Canada Pacific Salmon Treaty: The Struggle to Move from “Fish Wars” to Cooperative Fishery Management*, 20 OCEAN DEV. & INT’L L. 409, 419 (1989) (explaining how both sides could find support in the treaty text because “[f]ishers who feel they aren’t getting enough fish and want to increase their allocation . . . invoke ‘equity’ as a debating point. Intercepting fishers counter that the treaty also prohibits ‘undue disruption’ of existing fisheries, and therefore their allocation should not be altered.”).

tive arrangements that eventually emerged from the failures in the Gulf of Maine (respecting Pacific salmon) and the other cooperative endeavors regarding halibut, hake/whiting, albacore tuna and enforcement. It is these cooperative successes outlined below that define the Canada–U.S. fisheries relationship.

A. Fisheries Management Arrangements

1. The Gulf of Maine⁵⁴

From Canada's perspective, the loss of the East Coast Fishery Agreement was disheartening. Nevertheless, when the United States proposed that the two States should go ahead and have a five-person panel of the International Court of Justice determine the location of the maritime boundary, Canada accepted that establishing the maritime boundary was necessary for peace on the water. The two sides agreed that the boundary would apply to both the water column and the seafloor and would essentially be a property divider for the purposes of national ocean activities, but differed on where the line should fall. In its 1984 decision, the Court rejected both the Canadian and the U.S. proposed outcomes and arguments and decided on a line that appears to split the difference between the competing claims.⁵⁵ The maritime boundary provides to Canada a share of the fisheries-rich Georges Bank, but not as much as Canada had claimed. The line artificially divides management responsibility for many fish stocks in the Gulf of Maine region between Canada and the United States. The Court noted the long "tradition of friendly and fruitful co-operation in maritime matters" enjoyed by Canada and the United States, stated that this cooperation "now becomes all the more necessary . . . in the field of fisheries," and challenged the two States to join once more in such a common endeavor.⁵⁶ However, this cross-border fisheries cooperation was slow to materialize.

In the aftershock of the boundary case, bilateral "coordination of fisheries management strategies was virtually non-existent" with respect to transboundary fish stocks.⁵⁷ Neither side seemed interested in a repeating the East Coast Fishery Agreement experience.

54. Paragraphs in this section are drawn, with modification, from MCDORMAN, *supra* note †, at 153–55.

55. See Gulf of Maine Case, *supra* note 6; *cf. id.* at 285, 289, 346 (showing the maps of the claims and the result).

56. *Id.* at 343–44.

57. Transboundary Mgmt. Guidance Comm., Maritime Region, Dep't of Fisheries & Oceans, *Development of a Sharing Allocation Proposal for Transboundary Resources of Cod, Haddock and Yellowtail Flounder on Georges Bank*, FISHERIES MGMT REG'L REP., Jan. 2002, at 3 [hereinafter *Development of a Sharing Allocation Proposal*], available at <http://>

In the 1990s, however, informal bilateral science and management contacts led to the creation of the Transboundary Resource Assessment Committee, which was designed to coordinate and cooperate on stock evaluations and ensure that the scientific advice used in management decisions by both States was “based on the best available combined information.”⁵⁸ In 2000, the Transboundary Management Guidance Committee (TMGC) was established, composed of six members—two from government and four from industry—from each State “to provide non-binding guidance” respecting harvest levels and national catch allocations for cod, haddock, and yellowtail flounder in the Gulf of Maine boundary area.⁵⁹ Since 2003, the TMGC has annually recommended the total allowable catch (TAC) and the sharing allocations between Canada and the United States, for the fisheries located within that part of Georges Bank through which the maritime boundary passes.⁶⁰ The work of the TMGC is not based on a bilateral treaty and hence can be described as legally informal; nevertheless, the result is cross-border collaboration of fishing effort that has been a long time in coming.

2. Pacific Salmon⁶¹

In June 1999, Canada and the United States reached an agreement that provided a multi-year resolution of the Pacific salmon dispute.⁶² The 1999 Agreement did not supersede or replace the 1985 Pacific Salmon Treaty but rather contained new management arrangements that replaced the expired arrangements in the 1985 Treaty. Critical to reaching the 1999 Agreement was the fact that Canada and the United States both accepted the importance of conservation and sustainability of the Pacific salmon resources.⁶³ In Canada’s case, adopting conservation as its primary negotiating objective replaced its long-standing goal of attaining an

www.mar.dfo-mpo.gc.ca/science/tmgc/background/FMR_2002_01.pdf (last visited June 2, 2009).

58. Development of a Sharing Allocation Proposal, *supra* note 57, at 4. See generally Emily Pudden & David VanderZwaag, *Canada—USA Bilateral Fisheries Management in the Gulf of Maine: Under the Radar Screen*, 16 REV. EUR. COMMUNITY & INT’L ENVTL L. 36, 37 (2007).

59. Development of a Sharing Allocation Proposal, *supra* note 56, at 5–6; Pudden & VanderZwaag, *supra* note 58, at 37.

60. Pudden & VanderZwaag, *supra* note 58, at 38–40.

61. Paragraphs in this section are drawn, with modification, from MCDORMAN, *supra* note †, at 303–04.

62. *Exchange of Diplomatic Notes Regarding Comprehensive Agreement Between the Parties Related to the Pacific Salmon Treaty*, in 1997/1998 PACIFIC SALMON COMM’N, FIFTEENTH ANN. REP. 114, 120–69 (1998).

63. Donald McRae, *The Negotiation of the 1999 Pacific Salmon Agreement* 27 CAN.-U.S. L.J. 267, 270–71 (2001).

equitable balance of interceptions.⁶⁴ Essentially, the two countries accepted that an agreement placing some constraints on salmon fishing activity, irrespective of achieving a balance of interceptions, was better for the salmon stocks than no agreement at all. The Canadian negotiator of the 1999 Agreement has noted that the Agreement “is technically complex,” and is “a functional arrangement” that “often . . . was drafted by scientists” and, therefore, is “written for the people who have to administer it.”⁶⁵

Two key elements can be noted. First, the centerpiece of the new arrangements is abundance-based management, described by the negotiators of the 1999 Agreement as a “new conservation-based approach.”⁶⁶ The idea was that harvest rates for the various salmon stocks would be set based on the stock’s actual abundance rather than on pre-determined “ceilings,” as had been applied by the 1985 Treaty.⁶⁷ The national shares of the harvest would be determined as a percentage of or in relation to the actual abundance of a specific stock. It was hoped that abundance-based management would create sufficient incentive for both States to conserve and enhance stocks, in order to increase future yields. Second, in the 1999 Agreement the United States committed \$140 million for two trust funds, with the interest to be used to restore habitats, improve scientific information, and enhance wild stock production.⁶⁸ While unstated in the 1999 Agreement, it was understood that the U.S. financial commitment was related to redressing the imbalance in salmon interceptions that had existed in the 1990s.⁶⁹

On the central issue of the balance of salmon interceptions, one commentator writing in 2007 surmised that: “Both parties appear comfortable with the equity achieved under harvest regimes of the 1999 Agreement, and no particular concerns related to overharvesting have arisen.”⁷⁰

64. BUCK, *supra* note 51, at 14 (“At the heart of the new accord was agreement between the parties to focus on conservation and habitat protection, rather than division of shared salmon stocks.”). See generally Ted McDorman, *A Canadian View of the 1999 Canada-U.S. Pacific Salmon Agreement: A Positive Turning Point?*, 6 WILLAMETTE J. INT’L. L. & DISP. RESOL. 99, 101–02 (1998).

65. McRae, *supra* note 63, at 273.

66. Letter from Donald McRae, Chief Negotiator for Canada, and James Pipkin, Chief Negotiator for the United States, to the Governments of Canada and the United States, (June 23, 1999), in 1999/2000 PACIFIC SALMON COMM’N FIFTEENTH ANN. REP. 109, 109–10 para. 7 (2001).

67. See McRae, *supra* note 63, at 273–74; see also BUCK, *supra* note 51, at 13.

68. McRae, *supra* note 63, paras. 3, 6, attachment C (“Northern Boundary and Trans-boundary Rivers Restoration and Enhancement Fund and Southern Boundary Restoration and Enhancement Fund”).

69. See Buck, *supra* note 51, at 19; McRae, *supra* note 63, at 275.

70. Buck, *supra* note 51, at 22.

Subsequent to the 1999 Agreement, the PSC has worked well with the Canadian and U.S. sections, reaching agreement on a number of matters, including a Southern Coho Management Plan in 2002.⁷¹ More importantly, in May 2008, the Commission announced that it had reached accord on new management arrangements to replace the expiring 1999 Agreement.⁷² Interestingly, the proposed 2008 arrangements include that the United States is to provide to Canada \$30 million dollars to be used “for a fishery mitigation program designed . . . to reduce effort in [Canada’s] commercial salmon troll fishery,”⁷³ located off the west coast of Vancouver Island. One representative of the trollers association has complained that the \$30 million dollars is a “buyout” and has raised issues of “sovereignty,” stating that “you don’t sell your natural resources.”⁷⁴

3. Pacific Halibut⁷⁵

Canada-U.S. agreements regarding Pacific halibut date back to 1923,⁷⁶ with the most recent complete text being the 1979 Protocol to the 1953 Halibut Convention.⁷⁷ Until 1979, the halibut management approach involved having closed fishing seasons, by-catch regulation, and controls on the numbers of vessels that Canada and the United States could authorize to engage in the fishery. With the adoption of the 200-nautical-mile zones, the 1979 Protocol phased out reciprocal fishing along the coasts of each State, which resulted in the territorialist ap-

71. Pacific Salmon Comm’n, *Southern Coho Management Plan*, in 2001/2002 PACIFIC SALMON COMM’N, SEVENTEENTH ANN. REP. 143, 149–53 (2003); *Pacific Salmon Commission Annual Meeting*, in 2001/2002 PACIFIC SALMON COMM’N, SEVENTEENTH ANN. REP. 8, 10 (noting the adoption of the Southern Coho Management Plan) (2003).

72. Press Release, Pacific Salmon Comm’n, *New Bilateral Agreement* (May 22, 2008), available at <http://www.psc.org/pubs/AnnexIV/AnnexIVPressRelease22May08.pdf> (last visited June 9, 2009).

73. Letter from David Balton, Deputy Head of Mission of Canada, to Condoleeza Rice, U.S. Secretary of State (Dec. 23, 2008), available at http://www.treaty-accord.gc.ca/ViewTreaty.asp?Treaty_ID=105133&bPrint=True&Language=0 (last visited June 9, 2009).

74. Mark Hume, *U.S. Salmon Payment “A Buyout,”* GLOBE & MAIL, May 23, 2008, at A1, A6 (quoting Kathy Scarfo, head of the West Coast Trollers Association); see also Justine Hunter, *Salmon Deal Dells Out Fishermen, Angry B.C. Trollers Say*, GLOBE & MAIL, May 24, 2008, at A14.

75. Paragraphs in this section are drawn, with modification, from MCDORMAN, *supra* note †, at 312–14.

76. See Convention Between Canada and the United States for the Preservation of Halibut Fisheries of the Northern Pacific Ocean, U.S.-Can., Mar. 2, 1923, T.I.A.S. 2900, 32 L.N.T.S. 93.

77. See Convention for the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, Mar. 2, 1953, 5 U.S.T. 5, as amended by Preservation of Halibut Fishery Protocol, Mar. 29, 1979, 32 U.S.T. 2483 [hereinafter Halibut Fishery Protocol].

proach—fishers from each State could harvest halibut only in their national waters.

The International Pacific Halibut Commission (IPHC), composed of three members appointed by each country, has broad authority to study and manage the Pacific halibut fishery and to regulate all halibut found in the Pacific waters of the United States and Canada.⁷⁸ The IPHC is empowered to do the following: establish open and closed seasons in each area; limit the size of the fish and the quantity of the catch to be taken from each area; regulate incidental catch; establish the size and character of halibut fishing appliances to be used in any area; and make regulations to aid data collection.⁷⁹ The IPHC is responsible for establishing the TAC for the Canada-U.S. commercial halibut fisheries and for agreeing on and recommending to the two States their allocation of the TAC.

The Halibut Convention has had considerable success in protecting the species. The IPHC reported in 2006 that the “halibut stock is healthy in the central and southern portion of the range,”⁸⁰ which covers the waters adjacent to British Columbia and the Pacific coast of the United States. However, in 2008 the IPHC noted that the halibut stock had reached a low point in its natural population cycle.⁸¹

4. Hake/Whiting⁸²

Canadian and U.S. scientists, fisheries managers and fishers have been cooperating since the 1970s in establishing a TAC for Pacific hake/whiting.⁸³ A formal joint scientific assessment process was established in 1997.⁸⁴ Despite these collaborative efforts, the two countries were unable to agree on how to divide the TAC between them, with the United States generally claiming 80% of the TAC and Canada claiming 30%.⁸⁵

78. Halibut Fishery Protocol, *supra* note 77, art. I(3).

79. *Id.* art. III(3).

80. Press Release, Int’l Pacific Halibut Comm’n, Halibut Commission Completes 2006 Annual Meeting (Jan. 23, 2006), *available at* www.iphc.washington.edu/halcom/newsrel/2006/nr20060120.htm (last visited June 9, 2009).

81. Press Release, Int’l Pacific Halibut Comm’n, Halibut Commission Completes 2008 Annual Meeting (Jan. 22, 2008), *available at* <http://www.iphc.washington.edu/halcom/newsrel/2008/nr20080122.htm> (last visited June 9, 2009).

82. Hake, the Canadian term, and whiting, the U.S. term, refer to the same species of fish. Paragraphs in this section are drawn, with modification, from MCDORMAN, *supra* note †, at 316–17.

83. David Balton, Deputy Assistant Sec’y, Div. of Oceans and Fisheries, U.S. Dep’t of State, Comments to the Senate Committee on Foreign Relations (Sept. 29, 2005), *available at* <http://2001-2009.state.gov/oes/rls/rm/54128.htm> (last visited June 9, 2009).

84. Press Release, Fisheries and Oceans Canada, Canada and the United States Sign Treaty to Improve Stewardship of Pacific Hake (Nov. 21, 2003), *available at* <http://www.dfo-mpo.gc.ca/media/npress-communique/2003/pr66-eng.htm> (last visited June 9, 2009).

85. Balton, *supra* note 83.

In November 2003, Canada and the United States finalized the Hake/Whiting Agreement, which came into force in 2008.⁸⁶ The Agreement applies to all hake/whiting located in U.S. and Canadian Pacific coast waters, except for the stock found in Puget Sound and the Strait of Georgia. On the sharing of the TAC, the Agreement establishes that the U.S. allocation is to be 73.88% and the Canadian allocation 26.12%.⁸⁷

While the Hake/Whiting Agreement sets out the allocation shares, the TAC will still need to be determined annually. This will be undertaken through a complex process involving four distinct but interactive bodies⁸⁸ designed to ensure that the input and advice from scientists, fishers, and other interested parties is taken into consideration.

5. Albacore Tuna⁸⁹

The 1981 Canada-U.S. Albacore Tuna Treaty⁹⁰ is different than the above fishery agreements and arrangements. The 1981 Agreement principally established reciprocal fishing rights that placed no restrictions on the number of vessels from either State that could operate in the waters of the other State and similarly no restrictions on the total amount of albacore tuna that could be taken by these vessels. Visiting vessels were required, however, to meet registration and reporting requirements.⁹¹ The principal reason for this difference from the other agreements is that in 1981, when the Albacore Tuna Agreement was completed, the United States was of the view that tuna, a highly migratory species, was not subject to the jurisdiction of a coastal State within its 200-nautical-mile fishing zone.⁹² Thus, the 1981 Agreement was negotiated with the goal of respecting Canada's view that tuna was subject to Canadian 200-nautical-mile jurisdiction, whereas the U.S. view was that tuna was not subject to such jurisdiction. In 1991, the United States joined the rest of the world in accepting that all marine living resources within 200-nautical-mile zones, including tuna, were subject to the exclusive authority of the adjacent coastal State.⁹³

86. See Agreement on Pacific Hake/Whiting, U.S.-Can., Nov. 21, 2003, S. TREATY Doc. No. 108-24 (2004).

87. *Id.* art. III(2).

88. *Id.* art. II.

89. Paragraphs in this section are drawn, with modification, from MCDORMAN, *supra* note †, at 314–16.

90. Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges, U.S.-Can., May 26, 1981, 33 U.S.T. 615, 1274 U.N.T.S. 247.

91. *Id.* Annex A ¶¶ 1, 4.

92. See William Burke, *Highly Migratory Species in the New Law of the Sea*, 14 OCEAN DEV. & INT'L L. 273, 303–10 (1984).

93. Environment and Other Transnational Scientific Issues: Protection of the Marine Environment and Marine Conservation: Environment: Marine Wildlife: Highly Migratory

Complaints by U.S. fishers that Canadian vessels were “overcrowding” the U.S. fishing grounds and that albacore tuna stock migration had resulted in Canadians receiving “disproportionate benefits” under the 1981 Treaty led the United States to initiate negotiations to amend the Treaty.⁹⁴ The 2002 Amendment to the 1981 Treaty⁹⁵ resulted in fishing vessels from each State now only being allowed into the other State’s waters for a limited amount of time per year, although there remains no restriction on harvest levels. The Albacore Tuna Treaty, however, is presently the only Canada-U.S. fisheries agreement that creates reciprocal fishing rights for the vessels of each State in the waters of the other.

B. *Transboundary Fisheries Enforcement*⁹⁶

In the years immediately following the *Gulf of Maine Case*,⁹⁷ there were a significant number of U.S. fishing vessels allegedly crossing the boundary line into Canadian waters to fish illegally, and, when chased, avoiding arrest by crossing back into U.S. waters.⁹⁸ Similarly, on the Pacific coast, there were a number of Canadian fishers in the Juan de Fuca Strait area darting into U.S. waters and then using Canadian waters as a haven from U.S. prosecution.⁹⁹ The issue came to a head in the Gulf of Maine in 1989 when Canadian and U.S. vessels collided and a cannon shot was fired across the bow of a fleeing U.S. fishing vessel.¹⁰⁰

The 1989 incident and the general problem of illegal cross-boundary fishing activity led to the 1990 Canada-United States Fisheries Enforcement Agreement.¹⁰¹ Pursuant to the Agreement, the two States made it an offense under their national laws to fish in the waters of the other State

Fish: U.S. Inclusion of Highly Migratory Tuna Under U.S. EEZ Jurisdiction, 1991–1999 DIGEST § 13(A)(4)(a)(4)(i), at 1707–08.

94. Letter of Submittal from Colin Powell, Sec’y of State, to George Bush, President of the United States (Oct. 9, 2002) in S. TREATY DOC. NO. 108-1, at V–VI (2003).

95. Exchange of Notes Constituting an Agreement Amending the Treaty on Pacific Coast Albacore Tuna Vessels and Port Privileges, U.S.–Can., Aug. 21, 2002, Sept. 10, 2002, S. TREATY DOC. NO. 108-1 (2003).

96. Paragraphs in this section are drawn, with modification, from MCDORMAN, *supra* note †, at 150–51.

97. See *supra* text accompanying notes 55–56.

98. Parsons, *supra* note 37, at 334; Glen J. Herbert, *Fisheries Relations in the Gulf of Maine: Implications of an Arbitrated Maritime Boundary*, 19 MARINE POL’Y 301, 311–13 (1995); Allen L. Springer, *Do Good Fences Make Good Neighbours? The Gulf of Maine Revisited*, 6 INT’L ENVTL AFF. 223, 229 (1994).

99. Springer, *supra* note 98, at 229.

100. See *Georges Bank Spawns Anger*, CALGARY HERALD, Dec. 13, 1989, at A15; Deborah Jones, *Deal Signed to End U.S.-Canada Fisheries War*, GLOBE & MAIL, Sept. 27, 1990, at B4. See generally John Lavers & Ian Stewart, *Fisheries Surveillance and Enforcement*, in CANADIAN OCEAN LAW AND POLICY 173, 182–83 (David VanderZwaag ed., 1992).

101. Agreement on Fisheries Enforcement, U.S.–Can., Sept. 26, 1990, T.I.A.S. No. 11753, 1852 U.N.T.S. 73.

without authorization.¹⁰² This obligation simultaneously respects territorialism (a State can only directly enforce within its territory) and undermines territorialism (by ensuring that a fisher of one State will be prosecuted and punished for illegal activity in the other State). Another part of the 1990 Agreement obliges the two States to consult concerning the Agreement's implementation, including as regards "standard fisheries law enforcement practices in the vicinity of maritime boundaries."¹⁰³ This has resulted in yearly meetings of Canadian and U.S. officials and has enhanced enforcement cooperation. It is worth noting that Article V of the 1990 Agreement specifically reaffirms the commitment of both States "to ensure full respect for the maritime boundaries between them delimited by mutual agreement or third-party dispute settlement, including by the International Court of Justice."¹⁰⁴ This clause was clearly aimed at U.S. east coast fishing constituencies and stakeholders who remained unhappy with their lost gamble on the Gulf of Maine boundary.

The 1990 Agreement is seen as a success, based on the few instances of fishers of one State being arrested by the other in or near the Canada-U.S. maritime boundaries.¹⁰⁵

C. Fishing Activities in Disputed Waters

There are overlapping 200-nautical-mile maritime claims between Canada and the United States, including waters: in the Beaufort Sea (Arctic Ocean); seaward of the Strait of Juan de Fuca and adjacent to the state of Washington and province of British Columbia; in the Dixon Entrance (separating the Queen Charlotte Islands of British Columbia and the Alexander Archipelago of Alaska), and seaward of Dixon Entrance out to 200 nautical miles; seaward of the maritime boundary within the Gulf of Maine; and adjacent to Machias Seal Island and North Rock located near the Maine and New Brunswick border in the inner Gulf of Maine.

Only in two of the disputed areas have fisheries figured prominently: the Dixon Entrance and around Macias Seal Island. Of the remaining areas, the areas in dispute seaward of the Juan de Fuca Strait and seaward of Dixon Entrance are not large; there is no significant fishing activity in the Beaufort Sea at present; and though the disputed area seaward of the maritime boundary in the Gulf of Maine is a combination of

102. *Id.* art. I.

103. *Id.* art. II(c).

104. *Id.* art. V.

105. Dawn Russell et al, *Fisheries and Shellfish Sanitation*, in DEP'T OF FISHERIES AND OCEANS, OVERVIEW OF CURRENT GOVERNANCE IN THE BAY OF FUNDY/GULF OF MAINE: TRANSBOUNDARY COLLABORATIVE ARRANGEMENTS AND INITIATIVES 55, 68-69 (2006).

fishing zone and extended continental shelf, the issue has not raised much public controversy.

As regards fishing activity in the disputed zones, Canada and the United States operate based on an understanding that each State will enforce its fisheries laws against its own vessels and not against the vessels of the other State, an agreement commonly referred to as flag State enforcement.

Specifically regarding the disputed waters in the Dixon Entrance, where the Canada-U.S. boundary dispute dates back to the 1903 *Alaska Boundary Arbitration*,¹⁰⁶ the two States exchanged notes in August 1980 reaffirming that each side would observe flag State enforcement respecting fisheries.¹⁰⁷

Machias Seal Island and North Rock are the only non-submerged lands over which there is a sovereignty dispute between Canada and the United States.¹⁰⁸ Because of the disputed sovereignty over the islets, there is an area of overlapping maritime claims adjacent to the islands of approximately 210 square nautical miles.¹⁰⁹ Canada and the United States agreed to exclude the question of the sovereignty over and the sea area adjacent to Machias Seal Island and North Rock from the *Gulf of Maine Case*, so this issue remains unsettled.¹¹⁰

Since the early 1970s, Canada and the United States have informally agreed upon a policy of flag State enforcement regarding fishing activity within the disputed waters adjacent to Machias Seal Island and North Rock.¹¹¹ This has generally operated to avoid significant bilateral fisheries problems. However, in 2002, Canadian concerns about decreasing lobster catches and alleged increases in U.S. fishing effort in the disputed area put lobster fishing on the bilateral agenda.¹¹² However, increased availability of lobster and adjusted harvesting activities has resulted in a degree of calm settling on the Canada-U.S. lobster fishery adjacent to Machias Seal Island in recent years.

106. See *Decision of the Alaska Boundary Tribunal Under the Treaty of 24 January 1903 Between the United States and Great Britain*, Oct. 20, 1903; *Proceedings of the Alaska Boundary Tribunal*, S. DOC. NO. 162/1 (1903); see also MCDORMAN, *supra* note †, at 163–68.

107. See U.S. Department of State, 1981–1988 CUMULATIVE DIGEST, at 1930.

108. MCDORMAN, *supra* note †, at 191–92.

109. David H. Gray, *Canada's Unresolved Maritime Boundaries*, 48 *GEOMATICA* 131, 140 (1994).

110. See *Gulf of Maine Case*, *supra* note 6, paras. 20, 211.

111. See *Judicial Settlement: The International Court of Justice*, 1973 *DIGEST* §3, at 466.

112. See Beverly Cook, *Lobster Boat Diplomacy: The Canada—US Grey Zone*, 29 *MAR. POL'Y* 385–90 (2005); Joan Marshall, *Defining Maritime Boundaries: "The Murky Hand of History's Oversight" in the Gulf of Maine*, 48 *CANADIAN GEOGRAPHER* 266, 277–78 (2004); Dept. of Fisheries & Oceans Canada, *The Machias Seal Island Lobster Fishery (LFA 38b)*, BACKGROUND, June 30, 2004, [http://www.mar.dfo-mpo.gc.ca/communications/maritimes/back03e/B-MAR-03-\(4E\).html](http://www.mar.dfo-mpo.gc.ca/communications/maritimes/back03e/B-MAR-03-(4E).html) (last visited June 6, 2009).

CONCLUSION

Fortunately, Canada and the United States have had more successes than failures respecting transboundary fishery resource cooperation. How beneficial this cooperation has been for the resources in question is debatable, but it has resulted in fisheries matters not being high on the bilateral Canada-U.S. political agenda.

The fundamental construct of Canada-U.S. fisheries cooperation respects the territorialist paradigm and the international legal reality that within a State's 200-nautical-mile zone, that State has exclusive authority as regards marine living resources. Thus, the fishers of each State can operate only in national waters and direct at-sea enforcement can take place only in national waters. The exception to this is the Albacore Tuna Treaty, where there is reciprocal access of fishers into the waters of each State.

Nevertheless, territorial subversion does occur, in that the cooperative arrangements for transboundary fisheries in the Gulf of Maine and for salmon, halibut, and hake/whiting in the Pacific Ocean all involve mechanisms that require bodies composed of both Canadian and U.S. members jointly to establish TACs and/or catch limits and other management measures (for example gear restrictions) for the species across the boundary area. Thus, to a degree, the science and management activities transcend territorialism. Depending on the underlying agreement, these joint bodies recommend to the two States the share of the TAC that each State should receive and the management measures each should adopt. The formal adoption by the States of the recommendations and the activities of fishing and enforcement remain strictly based on territorialism. The 1990 Fisheries Enforcement Agreement, however, does a good job of "subverting" territorialism by having each State accept in its national law that it is an offense to fish illegally in the other State's waters.

The failed 1979 East Coast Fishery Agreement, an innovative attempt to disregard national boundaries both for the purposes of management but also as regards fishing activities, was vetoed by the affected U.S. fishing constituencies and stakeholders who preferred the certainty of a territorialist approach—i.e., a maritime boundary. The failure to achieve bilateral cooperation on Pacific salmon in the 1990s was primarily driven by fishing constituencies and stakeholders pressing conflicting property and territorialist views.

More optimistically, subsequent decades in Canada-U.S. fishery relations has seen a change in rhetoric and expectations away from national sovereignty. The acquisitive aspects of the 200-nautical-mile zone and, in the case of Pacific salmon, the State-of-origin concept, have given way to a cooperative ethic on cross-boundary fisheries matters in-

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creasingly motivated by the assessment by governing managers and the fishing industries in both countries that without bilateral cooperation there will be a further decline of cross-boundary stocks.

Nevertheless, despite the fact that the resources in question, fish, significantly challenge the territorialist paradigm, Canada and the United States, driven and supported by the fishing constituencies and stakeholders most effected, have embraced territorialism in bilateral cooperation. The degree of subversion that exists is important but ultimately, from a legal perspective, not that significant. Hence, Canada-United States Cooperative Approaches to Shared Marine Fishery Resources: Territorial Subversion? Not really.