Fisheries Jurisdiction and the Atlantic Salmon: Fact and Law From A Canadian Point of View

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I. Introduction

Fisheries conservation has become an important if also recent concern of maritime nations with significant economic sectors heavily dependent on ocean harvests. Canada is one of these and the Atlantic salmon is certainly conspicuous among a growing number of endangered fisheries. Grossly depleted salmon runs in the Maritime Provinces once supported a burgeoning estuarial and riparian commercial fishery as well as an immensely profitable tourist industry based on sport fishing. In the past the salmon have suffered from domestic problems, chiefly pollution, for which internal remedies in the form of river clean-ups, pollution abatement and artificial inducements such as fish hatcheries have been forthcoming. However, this article concerns a threat outside the ability of purely domestic policies to control: the exploitation of Canadian salmon stocks beyond their streams of origin by other fishing nations not responsible for the maintenance of the fishery.

The Atlantic salmon fishery occupies a less important economic position for Canada than its much larger Pacific counterpart. The British Columbia fishery has been privileged with the protection of international agreements and comparative freedom from pollution. Nevertheless, long term security for the fishery is lacking. Hence the present study should be of relevance for Canadian salmon fisheries as a whole and not simply its impoverished eastern sector.

II. Background to the Problem: Crisis and Conflict

Salmon are an anadromous species which means simply that they

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spawn in inland waters, usually in the upper reaches of their streams of origin where the newly hatched fingerlings partially mature, and migrate out to sea where they spend most of their adult lives. Salmon return by instinct to the same stream bed where they were born.1 If they cannot do this they will not reproduce. Each salmon run contributes its quota to the preservation of the species and the responsibility for their maintenance as well as the harvesting benefits fall to the state where the runs are located.

In the summer of 1958, United States nuclear submarines conducted submerged polar voyages through the Canadian Arctic.2 Large schools of salmon were detected feeding on the fringes of the pack ice off West Greenland in the Davis Straits. While the seasonal presence of salmon had been noted as early as 1939 their commercial significance was not initially recognized; the first recorded exploitation of this resource did not occur until 1960 when inshore fishermen from Greenland netted approximately 60 metric tons in their first season.3 The inshore fishery rapidly escalated when the potential for the salmon fishery became apparent, reaching a peak of 1539 tons in 1964. This effort was reinforced by an offshore fishery entered into by Denmark in 1965, roughly paralleling inshore yields by the end of the decade. Both inshore and offshore fisheries ranged all along the west coast of Greenland with the major effort being concentrated in a 30 to 40 mile belt of ocean next to the coast.4

The discovery of where the Atlantic salmon concentrated during the ocean-going portion of its life cycle immediately raised the question of the distribution of these fish in terms of their points of origin and the consequences of exploitation on the high seas for traditional fisheries geared to the return of the Atlantic salmon at

4. *Id.* at 373-374; Dr. May cites a peak of 1240 tons for the offshore fishery achieved in 1971. The fishing grounds range from 60 degrees north to 70 degrees north latitude and are exploited seasonally from August to November of each year.
spawning time. Preliminary tagging experiments conducted under the auspices of the International Commission for the Northwest Atlantic Fisheries (ICNAF) revealed that Atlantic salmon found off West Greenland originated from both sides of the Atlantic, but data was insufficient to prove conclusively the proportional content of the schools that were being fished.\(^5\) The need for more comprehensive information and statistics in order to evaluate the impact of the West Greenland salmon fishery was recognized by Canada as well as concerned European members of ICNAF and, in 1965, a Joint Working Party sponsored by ICNAF and the International Council for the Exploration of the Sea (ICES) was established to look further into the situation.\(^6\)

The Greenland fishery as a whole was still an infant in the mid-1960's. And at this point in time, the new competitor appeared to be causing no discernable ill-effects on the Canadian fishery. In fact, the total Canadian catch of salmon on the Atlantic coast did not peak until 1967.\(^7\) However, the commencement of offshore fishing by Denmark in 1965 — augmented by smaller efforts coming from Norway and the Faroes — did become worrisome. Canadian concern grew in direct proportion to the increasing intensity of the Danish fishing effort.\(^8\)

At the eighteenth annual meeting of ICNAF convened at London in June of 1968, Canada proposed that all fishing for salmon beyond national fishery zones be prohibited in the Convention area governed by the Commission.\(^9\) The following year at Warsaw the

\(^5\) ICNAF, 14 Annual Proceedings 1963-1964 at 31(1964); the report cited 26 recaptures: Maine (USA) 1; New Brunswick and Newfoundland 10; England 8; Scotland 5; Sweden 2. However the report concluded only "that salmon from both sides of the Atlantic move to West Greenland on feeding migrations where they occur along the coast in inshore as well as in offshore waters."


\(^7\) See Appendix I, Table I

\(^8\) Dr. Parrish has divided the West Greenland salmon fishery spanning the period 1900 to 1971 into three phases: "the Period of rapid growth of the set gill-net fishery in the years 1960 to 1964 when the catches increased from 60 to 1,500 metric tons; the period 1965 to 1968 when total catches fluctuated without any significant trend about a mean of around 1,200 metric tons; the period 1969 to 1971 of substantially higher catches, in excess of 2,000 metric tons, following the major growth of the drift-net fishery." Supra, note 6 at 385

ICES/ICNAF Joint Working Party on Atlantic salmon reported that while data was still insufficient to "estimate accurately" the distribution of losses to home fisheries occasioned by the West Greenland fishery, "the largest proportion of total losses have continued to be experienced by the fisheries for salmon in Canada and the United Kingdom." The Commission in plenary session took further note of the Canadian submission at the previous meeting in London and it was agreed that "the Commission recommend to the Contracting Governments that the fishing for salmon in the waters outside national fishery limits should be prohibited in the Convention Area." However, since the Commission's recommendations had no binding effect the resolution furnished no real protection to the Canadian fishery.

By 1969 the Canadian Atlantic coast salmon fishery was definitely in trouble. The overall catch had dropped almost two million pounds (fresh weight) since 1967. To be sure, the decline could not be attributed solely to the West Greenland fishery; many of Canada's eastern salmon rivers were suffering the cumulative effects of pollution and poor management. Nevertheless, just as these problems were being addressed the spectre of exploitation on the high seas threatened to render all efforts at recovery superfluous. The 1970 report of the Fisheries Research Board biological station at St. Andrews, New Brunswick furnished additional evidence substantiating this dismal forecast:

Atlantic salmon commercial catches in 1970 for the Gulf of St. Lawrence coast of mainland Canada (Cape Gaspe to northern tip of Cape Breton) were the lowest recorded in 100 years. This continues a decreasing trend started about 1965, from 1.4 million lb. to a low of 0.7 million lb. in 1970. It contrasts with an upward trend of much larger landings in the Davis Strait-West Greenland area, which impinged on the same year classes (3.4 million lb. in 1964 and 4.7 million lb. in 1969). This distant-water fishery in 1970 gives early promise of approximating the 1969 landings; if an inverse relation with the Gulf of St. Lawrence fishery exists, the latter is unlikely to increase greatly in 1971.

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11. The fifteen member nations constituting ICNAF are: Canada, Denmark, France, Iceland, Italy, Japan, Norway, Poland, Portugal, Romania, Soviet Union, Spain, United Kingdom, United States, West Germany.
12. Supra, note 10 at 28.
13. See Appendix I, Table I
Such statistical correlations clearly indicated the policy Canada was required to pursue: the banning of fishing for salmon on the high seas.

By 1970 the work of the ICES/ICNAF Joint Working Party had progressed to the point where the effects of the West Greenland fishery on salmon catches in home waters and the conservation of Atlantic salmon stocks as a whole could be better understood. The results of tagging salmon in home waters and getting returns from the West Greenland fishery indicated that Canadian and British rivers furnished the bulk of salmon stocks being exploited there. Parasite studies of random samples further suggested that a majority of the salmon were of North American origin. Later studies evidenced that a catch in the West Greenland fishery of 2000 metric tons would result in a total loss to all home waters fisheries of between 500 and 1900 metric tons.

The research of the Joint Working Party pointed to the possibility that by some quirk of nature in the distribution of Atlantic salmon in their feeding groups off West Greenland, certain salmon runs of Canadian origin were particularly vulnerable to high seas exploitation. The precipitous decline of the New Brunswick salmon fishery in recent years, while factors such as pollution and river bed obstructions have also played a role, would appear to reinforce this hypothesis. If such a phenomenon is indeed the case with respect to certain sectors of the Canadian Atlantic salmon fishery, it can only strengthen the original Canadian position advocating a ban on high seas exploitation of this species.

Canadian efforts to counter the rapidly worsening situation for Maritime salmon stocks had been initially channeled through ICNAF since the West Greenland fishery fell squarely within the convention area. However, things were moving far too slowly for those Canadians who suffered directly as a result of fewer salmon coming back to their streams of origin, the fishermen themselves. Early in 1970 Lloyd Crouse, the Opposition critic for fisheries urged upon Jack Davis, Minister of Fisheries and Forestry, that

18. Studies have indicated that the salmon stocks of the Miramichi River in New Brunswick are very sensitive to high seas exploitation “thereby indicating a lower total catch from that group of salmon in the presence of the West Greenland fishery than in its absence.” Parrish, supra, note 6 at 393; see also A. W. May, supra, note 3 at 381
19. See Appendix I, Table II
some international agreement be reached placing a reasonable quota on the taking of salmon off Greenland. Mr. Davis replied that the question had indeed been taken up at the international level "and all but two countries have agreed on abstention . . . ."20 Unfortunately, few concessions were forthcoming from the countries that really mattered. The chief beneficiary of the Greenland fishery remained intransigent in exercising its high seas freedoms.21

Discussions before the Standing Committee on Fisheries and Forestry pointed to the frustration experienced by Canadians in removing domestic threats to the salmon only to have them scooped up before they can return home. Mr. Crouse observed with accuracy the potential futility of the whole exercise: "Why would you recommend we spend $250 million, for example, in re-establishing runs, while at the same time we obviously have not control of the offshore fishing which takes this resource." Homer Stevens, President of the United Fishermen and Allied Workers Union and witness before the Committee, admitted the conflict cited by Crouse but emphasized that, to preserve the fishery at all, such expenditures were required to build up the depleted runs and that these efforts should be based on the assumption that an international solution could be found.22 Mr. Stevens perceived correctly that "the extension of exclusive fishing zones and so on will not solve the problem . . . ."23

In a later session of the same Standing Committee, Mr. Crouse pinpointed the crux of the Canadian position. He borrowed a metaphor from a similarly aggrieved British member of Parliament: "Denmark is milking a cow which she neither owns nor feeds."24 Having decided that the "cow" should continue to be nourished at Canadian expense the assumption was clear that propietal rights should devolve from such a substantial investment. The Minister of Fisheries noted that the West Greenland salmon fishery took place

21. Denmark, supported by West Germany, had blocked the Canadian proposal banning the exploitation of salmon on the high seas. See ICNAF, 18 Annual Proceedings, supra, note 9. The West Greenland fishery falls within Subarea 1 covered by the convention.
22. Canada, House of Commons Standing Committee on Fisheries and Forestry, Proceedings, No. 12, (March 19, 1970) at 44 (hereinafter cited as Standing Committee on Fisheries)
23. Id. at 49
not only on the high seas but within their exclusive fishing zones as well. "So, we are in effect, saying if we wish to protect our salmon fisheries, do not catch salmon not only on the high seas, but also our salmon which happen to swim within your fisheries waters . . . ." Canada required a vested legal right to preferential control and exploitation of her salmon stocks no matter where the fish happened to go; the problem was one of establishing jurisdiction over the fish themselves, not simply a geographically delimited zone in which the fish might be found at a particular time.

Canada entertained high hopes for a favourable settlement of their salmon claim going into the 1970 ICNAF conference held at St. John's, Newfoundland. However, the opposition remained steadfast. Between 1968 and 1969 the West Greenland fishery had increased its catch by almost ninety per cent due to a doubling of the number of drift-net vessels in the fishery and the use of highly efficient monofilament nylon nets. While Canada's proposal for banning the fishery altogether was still blocked by Denmark, the latter offered to limit its fishing effort to the 1969 level in terms of equipment used and agreed to the prohibition of monofilament nylon nets except those purchased before 1 July 1970. There was another provision whereby those nations not participating in the fishery would agree not to take salmon beyond their national fishing zones. The agreement was to last for one year. Canada voted against the resolution in disgust. The Danish compromise was no concession at all since the West Greenland fishery had peaked in 1969 and the Danish and Greenland fleets were fully equipped with the more effective nets prior to the prohibition coming into force.

The Opposition critics in Ottawa had earlier advocated economic sanctions against Denmark, a suggestion to which Fisheries Minister Davis gave no decisive response. Despite the Government's failure to bring Denmark around, however, its position exhibited remarkable consistency. The Opposition queried whether it was fair to restrict Canadian salmon fishermen as to where they could take fish if the salmon were to be lost to Denmark in any case. Davis replied unequivocally: "our policy is no fishing

25. Id. at 10
27. Id. at 20, 39; the resolution passed by 10 votes to 4 (one member abstaining); salmon catches had doubled to 2,180 metric tons in 1969.
28. B. B. Parrish, supra, note 6 at 386
for salmon on the high seas. I do not think it would be appropriate for us to relax our regulations with respect to Canadian fishermen on the high seas.'"  

When ICNAF convened again at Halifax in 1971 a Canadian chaired the meeting. Dr. Needler stated forcefully that 'we shall continue to press for a ban on the fishing for Atlantic salmon on the high seas.' He emphasized that a reasonable return from the fishery was an essential incentive to its preservation. The ICES/ICNAF Joint Working Party reported that the West Greenland Fishery yielded a catch substantially equal to the record take of 1969. A Canadian proposal to limit the West Greenland fishery to eighty per cent of its 1969 catch and vessel tonnage was defeated while the Danish proposal to renew the 1970 agreement effective until 1973 was accepted. Back in Ottawa the Opposition critics were quick to emphasize that the absence of a catch limitation in favour of a ceiling on the number of vessels to be employed made such an agreement of negligible value. And just prior to the Halifax gathering one Opposition member had questioned the utility of continuing fruitless negotiations in such a forum. Mr. McGrath commented: "We have been notably unsuccessful in our efforts to prevail upon the Danes to substantially reduce their catch with a view to avoiding total extinction of the species . . . . I think therefore, we must, as a consequence of our failure to obtain meaningful agreement with the Danes, look at our position within ICNAF . . . ."  

Canada's growing disenchantment with ICNAF was apparent when events were taken to hand from an unexpected quarter. The United States Congress, largely in response to a power lobby of New England sportsmen and anglers who sought to preserve the

32. Id. at 25
33. Id. at 30-31; the Canadian recommendation failed 3 votes for, to 5 votes against with 7 abstentions.
34. 2 Int'l Canada at 154 (1971); Commons Debates, Vol. VI, at 6414, June 7, 1971
35. "We must be a joke in the international forum," Mr. McGrath continued, "especially in ICNAF, because I submit there is not one member of . . . ICNAF who has a greater stake in the North Atlantic fisheries than does this country. Yet this country has gone in with half-hearted efforts . . . ." He urged a "talk tough" policy and possible economic sanctions. "That is the only kind of language the Danes will understand, and in my view that is the only way in which we can protect this important resource from virtual extinction." Commons Debates Vol. V, at 5004-5, April 7, 1971
vestiges of their own virtually extinct salmon runs, had placed a boycott on all Danish fish products coming into the United States. Denmark gave in to American pressure and the result was a joint proposal from the two countries presented to ICNAF for the phasing out of the Danish high seas salmon fishery, excluding the Greenland inshore fishery. Why had Denmark acquiesced so easily after giving nothing to Canada for so long? The reason was quite simple and correctly stated by Minister Davis before the Standing Committee on Fisheries.\textsuperscript{36} Denmark, along with other Scandinavian countries as well as the United Kingdom, was about to enter the European Economic Community (EEC). Greenland, while \textit{de facto} Danish territory, enjoyed associate status with the mother country and would not be included in the membership of the Community. One of the terms of Community membership was reciprocal access to zones of national fisheries jurisdiction. As a result, Denmark, having a common fishing zone with other EEC members would be excluded from fishing within the territorial sea around Greenland. Giving up the salmon fishery in the narrow zone beyond that area\textsuperscript{37} was not worth fussing over, or antagonizing a country like the United States. In any case the same benefits could accrue indirectly through the Greenland fishery.

The joint proposal was in effect a bilateral agreement between the two countries soon to become a treaty.\textsuperscript{38} The agreement prescribed a gradual phasing out of the Danish component of the West Greenland fishery “in the calendar years of 1972, 1973, 1974 and 1975 to an approximate level of 800, 600, 550 and 500 tons respectively.” The annual catch by local Greenland fishermen was to be the average of the catches spanning 1964 through 1971, approximately 1100 metric tons. The Danish component was to cease fishing altogether by 1976.\textsuperscript{39} The proposal received approval at the 1972 gathering of ICNAF at Washington by a comfortable majority.\textsuperscript{40} Canada’s one attempt to amend the proposal so as to have the Danish component of the fishery closed down by 1973 and the Greenland catch inside the three mile limit maintained at or

\textsuperscript{36} Standing Committee on Fisheries, No. 1 (March 13, 1972) at 24
\textsuperscript{37} It will be recalled, supra, note 4 that the salmon concentrate off West Greenland no more than thirty to forty miles from the coast.
\textsuperscript{38} 23 U.S.T., 1278 (1972)
\textsuperscript{39} Id.
\textsuperscript{40} ICNAF, 22 Annual Proceedings 1971-1972 at 3031; 12 votes to 1 (Canada) with 2 abstentions
below previous catches was defeated.\textsuperscript{41} In contrast, a House of Commons resolution on Atlantic salmon\textsuperscript{42} submitted by the Canadian delegation to the Washington meeting barely received lip service in light of the \textit{fait-accompli} of the prevailing accord.

In Parliament, the Opposition displayed increasing dissatisfaction over the Government's inability to come to terms with Denmark.\textsuperscript{43} With respect to the Danish-American agreement the reaction of Mr. McGrath (Fisheries critic, St. John's East) typified Maritime political sentiments: “They are laughing at us now.”

The \textit{Globe and Mail} today carries a story from the Danish Embassy . . . and Mr. Abrahamsen, who is one of the officials in the Danish Embassy, indicated that the 800 tons of canned salmon they catch in 4 months every year is of “negligible significance to the national economy. That is why” — and the paper is quoting him — “we gave in to the U.S. pressure.” Surely that to me is a terrible slap in the face of Canada.\textsuperscript{44}

He went on to cite the American boycott and the failure of the Canadian Government to be similarly tough-minded. Dr. Needler, an expert witness before the Committee, had to admit that the agreement still allowed for the taking of enough salmon to severely jeopardize the recovery of the fishery.\textsuperscript{45} The sad irony about the whole affair was that in order to satisfy their own conservationist sentiments, the Americans in effect traded away the welfare of a fishery that did not even belong to them.

This agreement became a particularly sore point for Canada in view of the Canadian Government's decision to close down the almost exhausted salmon runs on the St. John, Mirimachi and

\textsuperscript{41} 4 votes for (Canada, France, Iceland and the Soviet Union) with 4 votes against (Denmark, Germany, Italy and Norway) and 7 abstentions
\textsuperscript{42} Whereas the Atlantic salmon is the most threatened fish in the North Atlantic, and whereas only by a concerted international effort can an agreement be reached to protect salmon from being overfished, and whereas it is the position of the government of Canada that Canada has the exclusive right to harvest salmon that spawn in Canadian rivers, This Canadian House of Commons calls on all nations participating in the International Commission for Northwest Atlantic Fisheries Meeting in Washington, D.C. in May, 1972 to agree that the survival of the Atlantic salmon as a species is of paramount concern and to take whatever steps are necessary to ensure such survival. \textit{Commons Debates}, Vol. II, at 1603, April 25, 1972
\textsuperscript{43} Mr. Heath Macquarrie: “Are we recalling our ambassador from Copenhagen for consultation? In short, when are we ending our mealy-mouthed diplomacy on this matter?” \textit{Commons Debates} Vol. II, at 1864, May 3, 1972
\textsuperscript{44} \textit{Standing Committee on Fisheries}, No. 7, (May 4, 1972), at 17
\textsuperscript{45} \textit{Id.} at 18
Restigouche rivers in New Brunswick and in the Port Aux Basques area of Newfoundland. It was estimated that a full cycle of six years would be required to elapse before commercial operations could resume. The volume of the mainland take of salmon had dropped almost eighty per cent since 1967 and no alternative remained to preserve what was left of the runs. The Minister subsequently spoke to salmon fishermen at a meeting in Chatham, New Brunswick to explain the reasons for taking away their livelihood. He emphasized the problem posed by the distant water fishing of salmon, and he cited a $30 million campaign to improve and restore the salmon rivers and a continuing budget starting with $2 million to compensate and diversify the activities of the fishermen affected while the salmon recovered.

From the fishermen's point of view, the situation was far from satisfactory. In theory the federal government's system of compensation payments was very generous allowing the fishermen to choose the best three consecutive year catches on which to base the level of payment. However the administration of the programme was allegedly mishandled since some bureaucrats felt the formula was too generous and used arbitrary figures especially where a fisherman's records were incomplete. Moreover, there was no appeal procedure although on further prodding the Minister of Fisheries agreed to an investigation of grievances which helped to clear the air. But as one Member of Parliament perceptively observed: "even full compensation in terms of dollars cannot recompense these people for the loss of a way of life." In this respect, the loss of the salmon may entail a far greater loss - social, cultural as well as economic - in terms of the dependencies at stake.

III. The Position Delineated: Factual Persuasiveness

Canada does not want Denmark, or any country for that matter,
fishing for her salmon on the high seas. More precisely, the Canadian claim goes to the prohibition of any exploitation of anadromous species beyond the control of the state of origin of the given species. To be sure the Canadian position is one of self-interest; but the presence of self-interest cannot be said to be determinative of the presence or absence of fairness and reasonableness.

In the spring of 1970 the Department of External Affairs issued the following statement:

In our view, high seas fishing for salmon, by its very nature, does not discriminate as to the river of origin of the fish, and increasing high seas fishing will make salmon management impossible. . . . Salmon are a species separate from the general high seas fishery and no other fishery is so dependent upon the positive efforts of particular states in their home rivers to assure its continuance. We pointed out that the maintenance and growth of Canadian salmon runs depend on research and development and also abstaining from using the rivers for other purposes which, taken together, are costly to Canada's economy. Canada has consistently opposed high seas fishing for salmon and has ensured that its own fishing fleets in the Pacific Ocean adhere to strict regulations by fishing within national fishery limits in order to carry out good conservation methods. The Canadian Government therefore expressed the hope that the Danish Government would reconsider their position.52

Is the Canadian request so extraordinary or inequitable? To answer this question one must consider the assumptions and criteria framing the claim to preferential rights and the basis for applying a principle of abstention.

The Canadian approach to the management of salmon is essentially an articulation of the "functional approach" which has characterized the Canadian style of international negotiations: designing a specific solution based upon the nature and circumstances of a given problem. Problems of conservation and management of marine resources are particularly amenable to this mode of solution. It has been recognized by one learned observer that "there is no line that can be drawn on the ocean that separates living marine resources into convenient spatial categories, either as

52. 1 Int'l Canada 124, 125 (1970); statement issued in conjunction with an aide-memorie submitted to Denmark calling for a total ban of salmon fishing on the high seas, May 13, 1970
to species or as to groups of species." Fish are governed by their nature and instinct; carefully delineated juridical categories such as the high seas, territorial sea and fishing zones, while convenient for men, are held in utter contempt by marine populations to which they may apply. Handling fisheries problems by species rather than by ecological or geographical units concedes this fact. Nature sets the rules; solutions which ignore these rules are doomed to failure.

Canada outlined this functional approach in the submission of its delegation to Sub-Committee II of the Seabed Committee preparing for the Third United Nations Conference on the Law of the Sea. The working paper stressed that species had to be differentiated as between sedentary, coastal, anadromous and wide-ranging types in order to be managed properly. With respect to anadromous species, the Delegation pointed out that, "the state of origin has virtually sole responsibility for the continued existence of the stocks and must make major expenditures to assure continuation of the runs."

These heavy and unique responsibilities and the high cost of exercising them ... can be justified only if management authority is vested in the state of origin and if that state, in principle has the sole right to harvest the anadromous species bred in its own rivers. As a step in this direction the Canadian authorities have proposed that fisheries for these species should not be conducted on the high seas.

The Delegation emphasized that, in general, the responsibility and attendant costs of fisheries management must be balanced by a management authority adequate to the task and a preferential right to utilization subject to internationally agreed principles.

The principle requiring recognition is that of abstention. The practical arguments in favour of it are extensive. The direct costs of maintaining the salmon runs are themselves oppressive, but the

56. Id. at 156
57. Id. at 167
opportunity costs involved in terms of alternative uses are even greater. It is also true that the high seas fishing of salmon is economically inefficient. It has been shown that, on average, Atlantic salmon increase their weight by approximately fifty per cent on their homeward journey to spawn, far outstripping natural mortality during the same period. Furthermore, the fishing for salmon away from their streams of origin makes it impossible to manage individual runs since they all come together in the open sea. Thus, there is no way of assuring that enough fish get back to rejuvenate each run. The Miramichi River in New Brunswick provides the classic example of a random victim of the high seas fishery.

The common sense of the Canadian position, however, would make little difference to Denmark and Greenland since the alternative to economic inefficiency, for them, is no salmon at all. Denmark has argued repeatedly that the state of origin is not entitled to exclusive exploitation and management of anadromous species. During migration the salmon spends much of its life on the high seas and off the coasts of other countries, "depending fully on the sea resources of those areas" and competing for those resources with local fishermen. These arguments have been countered convinc-

58. Haig-Brown, supra, note 14 at 20, and, supra, notes 52, 47 and 46; also see the statement of Mr. Legault (Canada) before the Second Committee on the Economic Zone, 31st mtg., 9 August, 1974, Third United Nations Conference on the Law of the Sea O.R. Vol. II, at 231 (1974). Mr. Legault emphasized both the direct and opportunity costs involved and that "Therefore provisions should be made to take into account the special interests of states of origin, like Canada, in the total management of anadromous species . . . ."

59. A contemporary study of the Pacific salmon fishery provides a convenient basis for comparison. Crutchfield and Pontecorvo, consider harvesting of Pacific salmon on the high seas "woefully inefficient" on three grounds: "First, there is obviously a waste of capital and labor involved in the high-seas operation itself, since it cannot be as efficient as a fishery harvesting the fish as they approach the spawning streams near operating bases and in concentrated groups. Secondly, all Pacific salmon grow rapidly during the last week before the spawning runs begin; a high-seas fishery sacrifices a considerable amount of weight for relatively little offset in the way of reduced natural mortality. Finally, it makes it impossible to manage individual runs." The Pacific Salmon Fisheries: A Study in Irrational Conservation (Baltimore: Johns-Hopkins Press, 1969) at 192


61. Supra, note 18

ingly by the Fisheries Council of Canada before the Standing Committee on External Affairs and National Defence. In answer to the one argument, it was stated "the nations of the world do not contribute to the existence of salmon or of their high seas habitat. The salmon are merely grazing on the open range of the ocean and in a very real sense have been 'put to sea' for this purpose by the country by origin." Similarly, the fact that salmon may occupy the territorial sea or fishing zone of another state does not alter the basis for the Canadian claim:

... here again, such countries are not contributing to the existence of those salmon. The salmon are merely taking up transient space in that country's waters and may be feeding on natural organisms which are present. The passage of those salmon could be likened to the innocent passage of ships through such waters. Any interceptions there should be by agreement with the country of origin.

The Danish position has nothing to recommend it save the proposition that there is no rule of international law or treaty obligation prohibiting them from doing what they continue to do. And even this assertion, it will be shown, is questionable.

The assumptions underlying the Canadian position are valid; under any criteria of responsibility, practicality, economic efficiency or reasonableness Canada is not asking for anything more than it deserves as a matter of principle. However, the rights being claimed as a matter of principle are of no consequence unless recognized by nations upon whose conduct the efficacy of the exercise of the right depends. Moreover, effectiveness depends upon the creation of substantive legal obligations and not simply agreements for a given period of time on the basis of comity.

IV. Alternative Approaches

Choosing the appropriate vehicle for achieving a given objective assumes an importance equal to the objective itself. Canada has been working toward recognition of her fundamental interest in the control and management of her Atlantic salmon for the better part of a decade and has yet to be rewarded with any concrete achievement. The reasons for failure might be attributed as much to the mode of

63. Canada, House of Commons, Standing Committee on External Affairs and National Defence, Proceedings, No. 1, (March 12, 1974) at 34-35 (hereinafter cited as Standing Committee on Ext. Aff.).
64. Id.
approach as to the potential for acceptance of the objective by those members of the international community from whom acceptance is required. Indeed, it is submitted, the chosen method may be decisive in furthering or foreclosing receipt of the acceptance sought. In this respect, several avenues are deserving of assessment: resolution by a specialized international organization — ICNAF; bilateral negotiation of the controversy; and the creation of a binding international legal norm through international consensus. This latter process is exemplified by the current deliberations in the Third Law of the Sea Conference.

Canada first elected ICNAF as the appropriate venue for bringing her grievances against Denmark specifically and making her salmon claim at the international level. The failure of this appeal has already been discussed at some length. The Convention establishing the Commission gave it no regulatory powers as such and its recommendations are only effective upon those members who contract to be bound. Recently instituted procedures for a scheme of inspection of members' fishing vessels at sea by other contracting governments do nothing to materially alter the Commission's authority. "As an experiment in international fishery management," one scholar in the international law of fisheries has remarked, "this Convention is . . . a timid venture and the shared authorities of the contracting parties to exploit and conserve the resources in the convention waters are scarcely affected." 67

It would seem that ICNAF is incapable of itself to offer a solution to the Canadian dilemma. The very nature of the Commission protects Danish intransigence. Moreover, the continuance of Canada's membership in ICNAF is now subject to question. On June 4, 1976 the Minister of External Affairs, Allan MacEachen, announced the Government's intent to extend exclusive fisheries jurisdiction 200 miles beyond baselines demarcating Canada's coast. 68 This decision was presaged by a number of phasing out agreements with countries currently fishing in the new zone of

68. Canada, External Affairs, Statement, House of Commons, June 4, 1976
69. Agreement Between Canada and Norway, signed: Ottawa, December 2, 1975,
jurisdiction which would take account of "88 per cent of the foreign catch in that part of the ICNAF Convention area to be incorporated within Canada's 200 mile zone." This intention was confirmed by an Order-In-Council announced on November 2, 1976 rendering the extension of fisheries limits effective as of January 1, 1977. This unilateral action by Canada, together with the bilateral agreements supporting it may have rendered ICNAF superfluous to Canadian interests given that the new zone of fisheries jurisdiction serves as a guarantor of coastal fisheries interests; also the Commission has been unable to deal affirmatively with major problems, not the least being the salmon issue which continues unsolved.

Canada had indicated her possible departure from ICNAF at the annual meeting of the organization in June of 1976. However, just prior to Canada's placing into force of the 200 mile limit at the commencement of the new year, the Commission voted in favour of amending the Convention so as to restrict its management authority to the portions of the Convention area remaining outside national fisheries limits. Consequently Canada has not felt compelled to leave the Convention even though the continued utility of ICNAF might be considered negligible.

The shortcomings of ICNAF are all too apparent. As one interested party once put it: "Commissions are slow, and with the
best of intentions, by the time you get several governments to agree to do something you may well have lost the fishery that you are trying to protect.” Canada has been fortunate in that the salmon have given her enough time, but they cannot do so indefinitely.

Direct bilateral negotiations with Denmark have been similarly fruitless. The problem here, as within ICNAF, is that the element of compulsion is missing. It has been suggested from some quarters that Canada should “get tough” by placing economic sanctions against Denmark. The Americans tried this approach and on the surface it appeared to bring results. However, upon more careful analysis it has been shown that other more significant factors were impinging upon the situation to precipitate limited acquiescence on the part of Denmark. Most countries, and neither Denmark nor Canada are exceptions to the rule, will follow a given course of conduct provided it remains to their advantage to do so, and they will desist from this course only when a greater disadvantage weighs against continuance in that direction. Even if Canada should reach an agreement with Denmark it would provide no permanent protection for her Atlantic salmon fishery in the absence of further recognition of exclusive managerial authority of the state of origin. A durable solution requires a more comprehensive obligation that would bind Denmark — and any other country who exhibits an inclination to fish for Atlantic salmon on the high seas — over and above a transitory agreement not to fish for salmon while the right to fish them is still retained.

The current Law of the Sea negotiations, in that they contain the potential for establishing a new world order for ocean management, furnish a fertile ground for Canada to resolve the issue of the Atlantic salmon in her favour. It was early recognized that “the thing has to be decided in the international forum of the United Nations, at the Law of the Sea Conference. It has to be established, as an international principle, that the country of origin has a special interest in those salmon. We cannot depend on countries just going

74. Standing Committee on Ext. Aff., No. 23, (May 4, 1971), at 24-25; E. L. Harrison, President of the Fisheries Council of Canada referring to a brief before the Committee
75. Standing Committee on Fisheries, No. 7, (May 4, 1972), at 18. The comments of Mr. McGrath are illustrative: “If we were able to put the same force behind our arguments as the Americans, we might get somewhere with the Danes. I think the only tool we have, quite frankly, is the economic one.” Cf. note 47 supra
76. Supra,” pp. 17-18, 19 in reference to the Danish-American treaty on salmon quotas, 23 U.S.T. 1278 (1972)
along with the idea because they like Canada. It must be established as a principle.\textsuperscript{77} No greater opportunity will arise where Canada will be able to obtain recognition of the principle requisite to her claim.

Canada has been pressing with diligence on the question of anadromous species in the relevant \textit{fori} of the Law of the Sea Conference. During the preparatory stages for the conference Canada made a joint submission together with India, Kenya and Sri Lanka of a draft article on anadromous species in line with her own declared position on the issue.\textsuperscript{78} Denmark submitted a draft article of its own on the subject — in essence a rebuttal of the Canadian contention:

The exploitation of anadromous species shall be regulated by agreement among interested States or by international arrangements through the appropriate intergovernmental fisheries organization.

All interested States shall have an equal right to participate in such arrangements and organizations. Any arrangement shall take into account the interests of the State of origin and the interests of other coastal States.\textsuperscript{79}

The Danish proposal, while making a small concession to "States of origin," sought in its terms to constrain a country like Canada within the same sort of frustrating circumstances that confronted her in ICNAF.

Canada again attempted to clarify and advance the substance of her claim in a working paper entitled \textit{The Special Case of Salmon — the most important anadromous species}.\textsuperscript{80} The language was diplomatic, the thrust of the argument familiar: "A regime must be found which assures for the State of origin the fruits of its efforts and so encourages it to continue to bear the costs. This requires curtailment of the fishing of salmon in the open sea outside national jurisdiction and co-operation with the State of origin by other States through whose zones the salmon may migrate." In the spring of 1975 the Minister of External Affairs, Allan MacEachen pointed to a "clear trend towards a three-tier concept" in the Law of the Sea negotiations. He referred first to the drive for an economic zone out

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\item \textsuperscript{77} \textit{Standing Committee on Ext. Aff.}, No. 1, (March 12, 1974), at 27
\item \textsuperscript{79} U.N. Doc. A/CONF.62/C.2/L.37, (5 August 1974)
\item \textsuperscript{80} U.N. Doc. A/CONF.62/C.2/L.81, (23 August 1974)
\end{itemize}
to 200 miles, then to the idea of the seabed beyond these zones being reserved under international supervision for the common heritage of mankind and last to "the application throughout the oceanic space of sound management principles for the use and preservation of the sea." Assuming these trends have been accurately identified, the issue of anadromous species fits neatly within the third trend delineated where "sound management principles" are considered to be synonomous with the exercise of authority of the State of origin. Perhaps the goal is an attainable one since voices outside Canada have acknowledged the possibility of such a consensus emerging: "For coastal and anadromous species, which have special natural relationships to the territory of the coastal state, some arrangement by which the flag follows the fish even when they wander beyond the limits of the coastal resource zone may well be worked out."

When the Chairman of the Second Committee of the Conference produced a single negotiating text embracing all the matters being dealt with in his Committee, the inclusion of a draft article on anadromous species constituted a significant breakthrough for Canada. "The text clearly recognizes the primary interest and responsibility of the State of origin in the anadromous stocks," remarked the Minister of External Affairs, Mr. MacEachen. "This I think, is a very important development because we had been fighting, so to speak, an uphill battle . . . ." In the spring of 1975 the Second Committee re-evaluated the text article by article and a revised single negotiating text was prepared.

Article 55 of the revised single negotiating text of the Second Committee, if accepted by the Law of the Sea Conference when and if a consensus is reached; will give Canada at least partial

81. Canada, External Affairs, Statements and Speeches, No. 25/8 at 5-6, text of address to Standing Committee on External Affairs and National Defence, March 11, 1975.
84. Canada, External Affairs, Statements and Speeches, No. 75/18; address to Standing Committee on External Affairs and National Defence, May 22, 1975
86. For the text of the article see Appendix II
recognition of her preferential interests in the Atlantic salmon. Paragraph 1 recognizes that "States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks." Paragraph 2 after pointing to the onus on the State of origin to ensure the proper conservation of stocks, permits that state to "after consultation with other States fishing these stocks, establish total allowable catches for stocks originating in its rivers." Paragraph 3 prohibits the exploitation of anadromous species on the high seas except where "this provision would result in economic dislocation for a State other than the State of origin," and provides further that the "State of origin shall co-operate in minimizing economic dislocation in such other States fishing these stocks . . . ." However, this introduction of an element of equity in the system does not remove the primary authority of the State of origin to manage the stocks since paragraph 3(e) further provides that the State of origin should give "special consideration" to those states contributing in some tangible fashion to the preservation and renewal of the species involved. Furthermore, clause (d) of paragraph 3 stipulates that those states, other than the State of origin, into whose waters of national jurisdiction the salmon migrate "shall co-operate with the State of origin with regard to the conservation and management of such stocks." This clause compels a State in Denmark's position to come to terms with the management authority of the State of origin, the result being a better world for countries like Canada though not the best of all possible worlds which exclusivity of exploitation would provide.

A widely held objective in the Law of the Sea Conference is to hold out for what is becoming known as the "package deal" as represented by the entirety of the revised single negotiating text. If indeed the Law of the Sea Conference resolves down to an all or nothing situation, the passage of Article 55 of Part II of the text is by no means assured. This is not to say that a piecemeal approach to the negotiating text would be preferable, but the fact remains that the passage of the article cannot be relied upon by Canada. Canada's recent declaration of a 200 mile fisheries zone in anticipation of the adoption of Article 45 of Part II of the text or, it might be said, regardless of whether the article is adopted or not,

88. Canada, External Affairs, Communique No. 116, November 2, 1976, supra, note 71
exemplifies the sentiments of many countries to the effect that they cannot wait forever. The Minister of External Affairs enunciated the Canadian attitude to continued stalemate in unambiguous language before the thirtieth session of the United Nations General Assembly:

No government is more committed than my own to achieving agreement on a viable and balanced global regime for the seas. But I should be less than candid if I did not state clearly that the Canadian Government, like many other governments, cannot be expected to wait indefinitely for agreement....

Only if the multilateral approach fails — and at a certain point further delay or procrastination is failure — will my Government, and I assume others, resort to other solutions to protect fundamental national interests.90

Economic zones are one thing, the special problem of anadromous species another. The latter, unfortunately, does not lend itself to resolution through unilateral means.

The fact that Canada has advocated the inclusion of "a comprehensive system of compulsory dispute settlement in the Law of the Sea Convention"91 constitutes explicit recognition of the limitations inherent in both unilateralism and voluntarism (dispute resolution by mutual agreement) in the settlement of conflict. Dispute settlement mechanisms would be especially advantageous where a relevant legal rule exists to be applied by a third party. If Article 55 can be placed within the context of such a rule then the case for more comprehensive protection and preferential exploitation of anadromous species becomes much stronger. What is sought in the present instance is to introduce an element of potentially decisive weight into consideration aside from elusive agreements between parties and perhaps to shift the balance in favour of one adversary. A codification of the abstention principle as it would apply to anadromous species could give Canada the security sought for her beleagured salmon runs, not to mention the people whose livelihood and prosperity attaches thereto.

V. Justification In Law

The following argument proposes that the abstention principle is

the exclusive economic zone: The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

90. Canada, External Affairs, Statements and Speeches, No. 75/29, speech by Allan MacEachen, September 22, 1975
eligible for consideration as a rule in customary international law. A claim for the existence of such a rule imposes a two-fold requirement on the party seeking to make it: first, the presence of sufficient state practice in support of the rule taking into account its duration, scope and consistency;\(^9\) and second, the presence of *opinio iuris* being the "general recognition among States of a certain practice as obligatory."\(^9\) Article 38, paragraph 1 of the Statute of the International Court of Justice describes international custom "as evidence of a general practice accepted as law," thus embracing these two essential elements. Proof of a sense of obligation is the most crucial element to be established. "The sense of legal obligation, as opposed to motives of courtesy, fairness, or morality, is real enough," declares one perceptive scholar, "and the practice of states recognizes a distinction between obligation and usage. The essential problem is surely one of proof, and especially the incidence of the burden of the proof."\(^9\) Both the International Court and the Permanent Court before it have been strict in requiring that this burden of proof be satisfied.\(^9\)

Meeting this onus will remove a number of fundamental stumbling blocks to universal recognition of the abstention principle respecting anadromous species. A. W. Koers, in his study of international fisheries agreements, has pointed out that a state can only control its fisheries within zones of national jurisdiction. "As far as all other areas of the sea are concerned, the only way to bring about regulation of fishing operations is by international cooperation."\(^9\) Moreover, Koers notes that to date no international organization has been entrusted with the enforcement of a fisheries agreement and that such rights have been invariably retained by the flag state.\(^9\) This assumption would hold in all cases if the

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97. *Id.* at 17-20; the recently instituted inspection procedures in ICNAF giving
agreement itself constituted the only basis for the obligation. If, however, a recognized obligation existed apart from the terms of the agreement than the latter would not be the sole basis for compliance; under such circumstances a specific treaty might be better understood as a subspecies of a wider norm furnishing specific terms in consideration of the equities and particular circumstances of the individual-case. Thus, even if an agreement was only self-enforcing for the contracting parties, the presence of a general obligation underscoring the terms of the agreement would increase the onus on the parties to honour their commitments.

The abstention principle, while not a particularly new concept, remains a product of the twentieth century realization that the economic concepts of scarcity and competition for resource allocation were no longer foreign to the ocean regime. The abstention principle "reverses the Grotian argument about the impossibility of exhaustion (and therefore the unprofitability of investment to prevent it). It argues that if investment has taken place, and exhaustion has been prevented, the property ought to be conceded." 98 The depletion of fur seals and halibut in the early years of this century and the approaches adopted to deal with these problems, gave implicit recognition to this principle.

The Fur Seal Convention of 1911 between Great Britain (in right of Canada), Japan, Russia and the United States 99 came about as a result of a mutual desire to prevent the extinction of the fur seal due to indiscriminant pelagic sealing. The seals bred in three rookeries in the Northern Pacific, the largest being located in the Pribiloff Islands with smaller herds concentrating in the Commander Islands and Robben Island. The United States was to manage the Pribiloff herd and the Commander and Robben herds were to be managed by the Russians and Japanese respectively. A shared revenue arrangement was worked out where each country would manage its herd and pay a certain percentage of the proceeds to the other contracting parties in return for complete abstention for pelagic mutual inspection privileges to contracting members — what Koers would call a system of "mutual reinforcement" — provide an example of a partial derogation from the general pattern he cites. See ICNAF, 20 Proceedings 1969-1970, supra, note 66 at 20-22.


sealing by all concerned. Under this scheme the herds recovered and all parties benefited through increased harvests.\footnote{100}

It is interesting to note that the receipt of benefits under this treaty was contingent upon the responsibilities assumed. Three of the countries had rights to harvest because of their direct responsibilities to conserve and manage the resource, while one country received compensation for refraining from taking the seals outside management authority. The treaty lapsed during the Second World War; however, there was no renewal of large-scale pelagic sealing and a new agreement was negotiated between the parties in 1957.\footnote{101}

The success and longevity of these conventions gave early strength to the fledgling concept of abstention.

The Halibut Treaty of 1923\footnote{102} arose under similar circumstances and was a bilateral agreement between Canada and the United States with the original purpose of establishing a Commission to look into the problem of declining catches. After the Halibut Commission had submitted its report, a regulatory mechanism was added in 1930, again by treaty,\footnote{103} to plan and supervise the recovery of the fishery. As with seals, the renewal of the Pacific Halibut fishery has been spectacular.\footnote{104}

Both the seal and halibut conventions involved an application of the concept of abstention on a mutual basis by the contracting parties. Costs and responsibilities were shared as were the benefits. However, a factor of prime significance in both of these precedents is the absence of interference by third parties upon the respective international arrangements. The simple explanation was the absence of any other parties interested in the same resource; nevertheless, both cases serve as examples of \textit{de facto} observance of the abstention principle at the international level. It would be reasonable to assume that had any such interference occurred, there would have been a strong element of compulsion operating upon the

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104. See generally Tomasevich, \textit{supra}, note 100 at 141-215; esp. at 143-145.
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offender to respect the interests of the affected treaty members.

The Fraser River Convention for the protection of sockeye salmon, while more akin to the present topic in terms of its subject matter, is of less persuasive value. The agreement was signed in 1930 and ratified in 1937. It provided for the establishment of a commission with regulatory powers and a budget shared equally by both countries. The salmon run had been depleted drastically due to overfishing and the occurrence of a rockslide in 1913 blocking upstream migration. The Commission sponsored the construction of the world's largest fish ladder at Hell's Gate and this, together with the regulation of fishing methods and population management, have substantially restored the run. The agreement which is still operative provided for an equal division of the total catch between Canada and the United States, a division which some Canadian interests no longer consider equitable in view of the fact that the run is located entirely within Canada and the sacrifices entailed in the preservation of the river bed are born by her alone.

In 1937, American fishermen in Alaska became very upset when it was thought that Japanese fishing vessels were taking salmon off Bristol Bay. Secretary of State, Cordell Hull made a series of representations to Japan invoking preferential and exclusionary rights for Alaskan salmon fishermen. Despite the fact that the Japanese were fishing on the high seas, American authorities perceived the existence of a justifiable proprietal right possessed by their domestic salmon fishery. The incident was indicative of a growing concern over the west coast salmon industry as a whole.

The Truman Proclamations of 1945 pertaining to the extension of national jurisdiction over the continental shelf and the authority to establish "High Seas Fishery Conservation Zones contiguous to the coasts of the United States" were of fundamental significance in eroding the Grotian notion of absolute freedom of the seas beyond
Fisheries Jurisdiction the Atlantic Salmon: 635

the traditional three mile limit. The second, lesser-known, proclamation assumes importance here if only by virtue of the practical value the White House attached to the document, not to mention the authority which the Proclamation conferred.

As a result of the establishment of this new policy, the United States will be able to protect effectively, for instance, its most valuable fishery, that for the Alaska salmon. Through painstaking conservation efforts and scientific management the United States has made excellent progress in maintaining the salmon at high levels. However, since the salmon spends a considerable portion of its life in the open sea, uncontrolled fishery activities on the high seas... have constituted an ever present menace to the salmon fishery.111

The argument of the Americans in 1945 bears marked resemblance to the more recent Canadian plea for her own salmon fisheries.

The Truman Proclamation of Fisheries spurred several Latin-American states — Chile, Ecuador and Peru — to prematurely invoke 200 mile exclusive fisheries jurisdictions while other nations made similar though less extensive claims.112 However, its real significance lay in giving rise to the possibility of a state unilaterally imposing conservation measures on the resources of a portion of the high seas, “setting the precedent,” according to one analyst, “that such acts might generate international norms, at least if their motives (in this case conservation) were morally and scientifically acceptable.”113 While it was clear that some problems were not amenable to unilateral solutions the initiative had been created for invoking national conservation interests.

The International Convention For the High Seas Fisheries of the North Pacific Ocean114 followed in the wake of the new approach delineated by Truman. Yet in many respects it employed principles and methods already tested on the previous problems of seals and halibut. The convention negotiated between Canada, the United States and Japan was signed at Tokyo on 9 May 1952; it established a comprehensive regulatory regime for the contracting parties. Article V of the Convention in the second paragraph stated that with

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111. Id., press statement, September 28, 1945
112. See Brownlie, supra, note 94 at 218, 229, 257
114. 205 U.N.T.S. 65 (1955)
respect to any stock of fish enumerated in the annex to the Convention "The Contracting Parties . . . accordingly agree that the appropriate party or parties shall abstain from fishing such stock and the party or parties participating in the fishing of such stock shall continue to carry out necessary conservation measures."  

Annex 1(c) of the Convention included salmon in this preferential list of stocks whereby Japan was prohibited from the pelagic fishing of salmon stocks east of 175 degrees west longitude, a line drawn to contain the range of all Pacific salmon of North American origin. The treaty was originally entered into for a period of ten years, but it remains in effect subject to annual agreement of the parties.

The relevant provisions of the North Pacific Convention constitute explicit recognition and practical application of the abstention principle to fisheries management. The provisions pertain to anadromous species — the Pacific salmon — and furnish longstanding state practice going to the special case for Atlantic salmon which Canada has pressed against Denmark. It has been pointed out that the treaty is in a precarious position while subject to a yearly treadmill of negotiation and that should negotiations break down or other countries intervene and take up pelagic fishing for salmon the whole North American fishery would be in peril. It is instructive to note, however, that over a significant length of time neither threat has materialized.

In contrast to such persuasive state practice, stands the failure of the joint submission by Canada and the United States of a draft article containing the abstention principle for inclusion in the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas.

The case for the principle of abstention had been made eloquently enough at Rome in 1955. And the draft article came up for discussion within the International Law Commission in 1956. The text read as follows:

Where, within reasonable limits, the maximum sustainable

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115. *Id.* at 90
116. *Id.* at 96
117. Crutchfield and Pontecorvo, *supra*, note 59 at 193
118. For text see U.N. Doc. A/CONF.13/L.54 (1958); 52 *A.J.I.L.* 851 (1958)
yield under current conditions of any stock of fish is already being obtained and the maintenance and further development of such yield is dependent on the conservation programme, including research, development and conservation being carried on by the State or States whose nationals are substantially fishing such stock, States not so fishing or which have not done so within a reasonable period of time, excepting the coastal State adjacent to the waters in which this stock is found, shall abstain from fishing such stock.

In commenting upon the article, Mr. Padilla Nervo noted that "there was a difference between measures for the conservation of resources which applied equally to nationals and foreigners, and the sole right of exploitation of resources, which involved the exclusion of foreign fishermen." He concluded, therefore, that while the position was justified "the abstention principle, being clearly discriminatory, could not be regarded as a measure of conservation," and for that reason it should be rejected from the convention.\footnote{Id. at 123-124.}

The arguments of the Commission were somewhat misplaced. The fact that the principle of abstention provides for the allocation of resources does not preclude it from also being a measure directed to the conservation of those same resources.\footnote{See M.S. McDougal and W. T. Burke, The Public Order of the Oceans (New Haven: Yale University Press, 1962) at 958} Further, the article applied to "any stock" of fish. Phrased in this fashion, the article gave the abstention principle a much wider range of application than is presently sought. Such a level of generality may have militated against the adoption of the article without necessarily ruling out the application of the principle in specialized cases.

Turning now to very recent precedents for the principle of abstention, specifically with respect to anadromous species, Canada has entered into four separate bilateral treaties\footnote{Agreement between Canada and Norway, in force May 11, 1976; agreement between Canada and Poland, in force May 14, 1976; agreement between Canada and the Soviet Union, in force May 19, 1976; agreement between Canada and Spain, in force, June 10, 1976, supra note 69} negotiated in conjunction with the extension of an exclusive Canadian fisheries zone to 200 miles\footnote{Order-In-Council, November 1, 1976; in force, January 1, 1977, supra note 69} wherein the principle is recognized. The wording of the relevant clauses are substantially the same in the
agreements concluded with Poland, the Soviet Union and Spain, Article III of the agreement concluded with the Soviet Union providing:

1. The Government of Canada and the Government of the Union of Soviet Socialist Republics recognize that States in whose fresh waters anadromous stocks originate have the primary interest in and responsibility for such stocks and agree in principle that fishing for anadromous species should not be conducted in areas beyond the limits of national fisheries jurisdiction. They will continue to work together for the establishment of permanent multilateral arrangements reflecting this position, taking into account all relevant factors.

2. Pursuant to paragraph (1), the Government of Canada and the Government of the Union of Soviet Socialist Republics shall take measures to ensure that their nationals and vessels avoid the taking of anadromous stocks spawned in waters under the jurisdiction of the other Contracting Party.

The negotiation of these agreements constitutes affirmative, contemporary recognition of the principle of abstention from significant representatives within the international community. Moreover, the agreements specify a practical commitment to the observance of the obligation.

The agreement with Norway parallels the other agreements in the first paragraph of Article III. However, this paragraph constitutes the entire provision of the article and the prescription for abstention contained in the second paragraph to the articles in the Spanish, Polish and Russian texts was not included. Nevertheless, considering that Norway was at one time an active participant in the West Greenland salmon fishery, the inclusion of the article even in reduced form stands as a remarkable achievement and attests to a growing acceptance of the Canadian position on the salmon issue.

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The foregoing discussion has delineated a significant body of treaty law both bilateral and multilateral in character going to both the recognition and application of the principle of abstention, predominantly as this principle relates to the special case of anadromous species. It is, of course, self-evident that a treaty in itself is binding only upon the parties to the agreement. However, it is here contended that the aforementioned body of treaty law may be considered as evidence of a rule of customary international law,
inasmuch that the rule covers the exploitation and conservation of anadromous species and specifically salmon.

In furthering this contention, the writer adopts the rationale originally advanced by Anthony D’Amato. The primary function of treaties is that they immediately bind the contracting parties in law to the terms contained therein. This much is recognized.

What has not been sufficiently recognized in the literature of international law is a secondary, yet significant, effect of treaties. Not only do they carve out law for the immediate parties, but they also have a profound impact upon general customary law for nonparties. For a treaty arguably is a clear record of a binding international commitment that constitutes the “practice of states” and hence is as much a record of customary behavior as any other state act or restraint. International tribunals have clearly recognized this effect of treaties upon customary law, and historically treaties have a decisive impact upon the content of international law.

The argument follows that “generalizable provisions in bilateral and multilateral treaties generate customary rules of law binding upon all states.” It is important to note that the provision must indeed have general application in order to be generative of customary international law. Specific military or economic aid agreements between countries do not contain this characteristic, nor would for example, the terms of an agreement relating to the navigation of a particular river.

If, however, the general applicability of the provision can be established, then it has the potential for giving rise to a rule of customary law binding upon all states. “The claim made here,” again quoting Prof. D’Amato, “is not that treaties bind nonparties, but that generalizable provisions in treaties give rise to rules of customary law . . . The custom is binding, not the treaty.”

The Vienna Convention on the Law of Treaties, as Prof. D’Amato indicates, expressly recognizes the dual function of treaties as contracts establishing law between the parties and as

126. Id. at 104
128. D’Amato, supra, note 125 at p. 107
129. Id. at 107
sources of customary international law Articles 34 to 37 of the Convention deal with the operative effect of treaties on third states, the general rule being stated in article 34 to the effect that "A treaty does not create either obligations or rights for a third state without its consent." But, immediately following, Article 38 states unequivocally that "Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a customary rule of international law, recognized as such." Keeping in mind that it is the provision which is generative of the rule and not the treaty in itself, the two articles are entirely consonant with one another.130

Moreover, the International Court of Justice has shown itself to be aware of this secondary but important law-making function of treaties. In the North Seas Continental Shelf Cases131 the Court rejected Denmark's claim that Article 6 of the 1958 Geneva Convention on the Continental Shelf,132 prescribing the equidistance principle as a criterion for the delimitation of jurisdictional boundaries between nations was binding as a rule of law upon the Federal Republic of Germany which had not ratified the convention. Denmark had argued first that Article 6 was merely a codification of a pre-existing customary rule of international law. The Court could find no uniform state practice to this effect and dismissed the contention.133

Denmark then attempted to assert that even if Article 6 did not point to pre-existing customary international law the article itself gave rise to a norm binding Germany. The Court observed the basis of the contention and remarked:

... it clearly involves treating that article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law and is now accepted as such by the opinio iuris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur; it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been obtained.134

130. For text see 63 A.J.I.L. 875, 886-887 (1969)
132. For text see 52 A.J.I.L. 851 at 853 (1958)
134. [1969] I.C.J. Rep. 3 at 41
Having recognized the validity of the approach, the Court again rejected the Danish position since Article 6 was subject to the general reservation clause in Article 12 of the convention\textsuperscript{135} permitting any signatory to excise it from the whole thereby negating the general applicability of the provision. Only Articles 1 to 3 were immune from this reservation clause giving them the general force of application that Article 6 lacked. Therefore, the Court concluded, “it is the Convention itself which would . . . seem to deny to the provisions of Article 16 the same norm-creating character as, for instance, Articles 1 and 2 possess.”\textsuperscript{136}

The decision of the World Court clearly confirms the norm generative function of treaties. Moreover, it will be shown, there is sufficient practice across a sufficiently broad spectrum for the claim being made with respect to the present problem at issue. It should also be pointed out that previous to its direct consideration of the norm-generative function of treaties in the \textit{North Seas Continental Shelf Cases}, the International Court has applied treaties by themselves as indicative of customary international law binding upon non-signatories.\textsuperscript{137}

The present contention applies pre-eminently to situations where principles of international law and the practice of states have not spoken to the matter such that there is a pre-existing rule. The 1967 Convention on Outer Space serves as a case on point.\textsuperscript{138} Where, however, norm-creating provisions of treaties are of sufficient specificity they may qualify an existing principle of international law without necessarily coming into direct conflict with it. Thus, it may be asserted that the abstention principle in the context of the special problem of anadromous species could stand alongside the wider principle of freedom to fish on the high seas codified in the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas.\textsuperscript{139} So viewed the seemingly contrary

\begin{itemize}
\item \textsuperscript{135} 52 \textit{A.J.I.L.} 851 at 858 (1958)
\item \textsuperscript{136} [1969]I.C.J. Rep. 3 at 43
\item \textsuperscript{137} \textit{Nottebohm Case (Second Phase)}, [1955]I.C.J. Rep. 4, at 21-23
\item \textsuperscript{138} Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and other Celestial Bodies; for text see 61 \textit{A.J.I.L} 644 (1967)
\item \textsuperscript{139} 559 U.N.T.S. 285 (1966), Article 1.(i): “All states have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations, (b) to the interests and rights of coastal states as provided for in this convention, and (c) to the provisions contained in the following articles concerning conservation of the living resources of the high seas.” Note that paragraph (c) is explicit acknowledgement that such exceptions are possible.
\end{itemize}
notions expressed in these principles need not be regarded as mutually exclusive of one another.

The state practice presented in support of the abstention principle as applied to anadromous species points to the recent establishment of a customary rule of international law prohibiting the free exploitation of these fish. The recent series of bilateral treaties negotiated by Canada with Norway, Poland, the Soviet Union and Spain\textsuperscript{140} should be regarded as determinative of the present existence of the rule. When combined with the long standing North Pacific Fisheries Convention\textsuperscript{141} and the genesis of state practice preceding it, these treaties form a comprehensive testimonial to the binding nature of the principle. This is true for a number of reasons. First, it will be recognized that in view of Canadian interests and the subject matter of the North Pacific Convention these treaty provisions pertain in particular to the control and conservation of salmon fisheries.

Second, it is important to note that only a few countries in the world are either producers of salmon in significant quantities or fish for salmon on a large scale. Canada, the United States and the Soviet Union are the chief producers while the countries of Western Europe — individually at least — are secondary contributors. The major producers are also the major fishermen. Apart from the West Greenland salmon fishery, Japan is the only other country which engages in a large commercial salmon fishery and this fishery is regulated in accordance with the abstention principle. Thus, all the countries of the world with important salmon interests — even Norway, a former supporter of Denmark’s position — have recognized the abstention principle and are putting it into operation, if they have not done so already.

The fact that a decisive majority of the world salmon fishing fraternity have bound themselves to the abstention principle is persuasive evidence of customary rule of international law. While the club is small it is sufficient to generate the norm in a view of the limited number of parties directly affected.

At this point it is essential to recognize that the case being made goes to \textit{general} customary international law. It might be contended that, considering the limited number of interests affected, even if a norm does exist it is constitutive only of special (local) customary

\textsuperscript{140} \textit{Supra}, notes 122, 69

\textsuperscript{141} \textit{Supra}, note 113
international law which operates solely on the basis of the free consent of all parties involved. If this argument provided a correct view, then a country such as Denmark, in the absence of free consent, would not be bound.

Such a view, it is submitted, does not apply to the customary rule presently advocated. Special custom is by definition locally delimited and has relevance only by virtue of its local context. In contrast, the norm delineated is generalizable to the extent that it is applicable to any member of the international community who chooses to fish for anadromous species. Indeed, the abstention principle has no value unless so generalized. Salmon range over all the oceans of the northern hemisphere. The problem in its very nature and extent speaks to the necessity of a general rule.

VI. Conclusions

The chronicle of the dispute between Canada and Denmark over the Atlantic salmon reveals one country seeking to protect an investment which had long been taken for granted. Then, when the prospect of losing all the capital suddenly rendered it vital, causing the party even to forego dividends for awhile, the question of entitlement to those dividends — no longer as generous as before — became an important issue. The other country had briefly and copiously enjoyed the dividends from surplus capital the investor had never missed. But when the surplus was exhausted what had also been taken for granted as a natural right of access became bitterly contested.

142. The requirement of consent is recognized as being obligatory in cases of special arrangements between states giving rise to a customary practice. This element is introduced primarily because the custom has no relevance for third parties; the specialized nature of the custom such as Portugal’s contended right of passage through the territory of India has no generalizable application to any other state. Right of Passage Case [1960] I.C.J. Rep. 4 at 39-44. Therefore the fact of consent is the primary determinant of the existence of the custom. For further recognition of the distinction between special and general custom and the requirement of consent see European Commission of the Danube, Advisory Opinion (1927), P.C.I.J. Ser. B, No. 14, 4 at 17; Free City of Danzig, Advisory Opinion, P.C.I.J. Serv. B, No. 18, 6 at 12-13 (1930); Asylum Case, [1950] I.C.J. Rep. 266 at 277; U.S. Nationals in Morocco, [1952] I.C.J. Rep. 176 at 199-200. See generally D’Amato, “The Concept of Special Custom in International Law” (1969), 63 A.J.I.L. 211 D’Amato, supra, note 125 at 233-263; H.W.A. Thirlway, International Customary Law and Codification (Leiden: A. W. Sijthoff, 1972) at 59-60, 134-9; M.S. McDougal et al., Studies in World Public Order (New Haven: Yale University Press, 1960) at 15.
The Canadian claim for exclusive exploitation of Atlantic salmon coming from Canada's rivers by virtue of her status as a State of origin is congruent with valid principles of conservation and economic efficiency. Moreover it is a reasonable claim. A shrinking global environment and a growing propensity for making political decisions on the misguided and destructive assumption that "if we do not somebody else will," should be cause enough to provide incentives for intelligent conservation. It is noteworthy that despite external frustrations Canada has pressed forward to protect the Atlantic salmon even though there exists no firm guarantee of being rewarded for her efforts. On any sort of cost-benefit analysis establishing an entitlement to reap the benefits of delivering the Atlantic salmon from near extinction, Canada certainly merits a preferred position.

Attempts at utilizing alleged legal norms from any position other than a retrospective and comfortable hindsight are necessarily artificial and prone to abstraction. The previous foray in support of the abstention principle certainly falls within this nebulous category of the marginal and tenuous; nevertheless, theoretical make-weights may serve to illuminate issues whether or not they are ultimately successful in substantiating a given argument. Unfortunately, however, even if it should not prove overly presumptuous to attribute legal validity to the principle of abstention in relation to anadromous species, the problem of obeisance remains; enforcement that would be effective cannot seriously be contemplated.

It is hardly likely that Canada will enjoy the right of sole access to her own salmon. The Canadian claim suffers further prejudice in that the notions of exclusivity and equity are generally regarded as incompatible, even though the unique problem of the salmon would appear to render exclusive rights also equitable. But, predictably, the nature of diplomatic negotiations demands compromise. It can only be hoped that for the sake of the Atlantic salmon and all they mean to Canada, the best solution obtainable will prove to be good enough.
APPENDIX I

Table I

Catch quantities and landed value for Atlantic Coast Salmon (1964-1974).

<table>
<thead>
<tr>
<th>Year</th>
<th>Quantity '000 lb. (liv)</th>
<th>Landed Value $'000</th>
</tr>
</thead>
<tbody>
<tr>
<td>1964</td>
<td>4533</td>
<td>2,073</td>
</tr>
<tr>
<td>1965</td>
<td>4623</td>
<td>2,221</td>
</tr>
<tr>
<td>1966</td>
<td>5163</td>
<td>2,536</td>
</tr>
<tr>
<td>1967</td>
<td>6290</td>
<td>3,087</td>
</tr>
<tr>
<td>1868</td>
<td>4634</td>
<td>2,330</td>
</tr>
<tr>
<td>1969</td>
<td>4291</td>
<td>2,285</td>
</tr>
<tr>
<td>1970</td>
<td>4611</td>
<td>2,727</td>
</tr>
<tr>
<td>1971</td>
<td>4035</td>
<td>2,250</td>
</tr>
<tr>
<td>1972</td>
<td>3355</td>
<td>2,130</td>
</tr>
<tr>
<td>1973</td>
<td>4796</td>
<td>3,471</td>
</tr>
<tr>
<td>1974</td>
<td>4883</td>
<td>3,657</td>
</tr>
</tbody>
</table>


Table II

Catch quantities and landed value for salmon in the Province of New Brunswick (1963-1974)

<table>
<thead>
<tr>
<th>Year</th>
<th>Quantity '000 lb. (liv)</th>
<th>Landed Value $'000</th>
</tr>
</thead>
<tbody>
<tr>
<td>1963</td>
<td>640</td>
<td>379</td>
</tr>
<tr>
<td>1964</td>
<td>1038</td>
<td>633</td>
</tr>
<tr>
<td>1965</td>
<td>1196</td>
<td>643</td>
</tr>
<tr>
<td>1966</td>
<td>1214</td>
<td>705</td>
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<td>1967</td>
<td>1436</td>
<td>856</td>
</tr>
<tr>
<td>1968</td>
<td>797</td>
<td>508</td>
</tr>
<tr>
<td>1969</td>
<td>583</td>
<td>421</td>
</tr>
<tr>
<td>1970</td>
<td>572</td>
<td>508</td>
</tr>
<tr>
<td>1971</td>
<td>266</td>
<td>246</td>
</tr>
<tr>
<td>1972</td>
<td>22</td>
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<td>1973</td>
<td>20</td>
<td>26</td>
</tr>
<tr>
<td>1974</td>
<td>6</td>
<td>13</td>
</tr>
</tbody>
</table>

APPENDIX II


Article 55

Anadromous Stocks

1. States in whose rivers anadromous stocks originate shall have the primary interest in the responsibility for such stocks.

2. The State of origin of anadromous stocks shall ensure conservation by the establishment of appropriate regulatory measures for fishing in all waters landwards of the outer limits of its exclusive economic zone and for fishing provided for in subparagraph (b) of paragraph 3. The State of origin may, after consultation with other States fishing these stocks, establish total allowable catches for stocks originating in its rivers.

3. (a) Fisheries for anadromous stocks shall be conducted only in the waters landwards of the outer limits of exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin.

   (b) The State of origin shall co-operate in minimizing economic dislocation in such other States fishing those stocks, taking into account the normal catch and the mode of operations of such States, and all the areas in which such fishing has occurred.

   (c) States referred to in subparagraph (b), participating by agreement with the State of origin in measures to renew anadromous stocks, particularly by expenditures for that purpose, shall be given special consideration by the State of origin in the harvesting of stocks originating in its rivers.

   (d) Enforcement of regulations regarding anadromous stocks beyond the exclusive economic zone shall be by agreement between the State of origin and the other States concerned.

4. In cases where anadromous stocks migrate into or through the waters landwards of the outer limits of the exclusive economic zone of a State other than the State of origin, such State shall co-operate with the State of origin with regard to the conservation and management of such stocks.

5. The State of origin of anadromous stocks and other States fishing these stocks shall make arrangements for the implementation of the provisions of this article, where appropriate, through regional organizations.