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IMPLICATIONS OF AN INTERNATIONAL LEGAL STANDARD FOR TRANSBOUNDARY MANAGEMENT OF GULF OF MAINE-GEORGES BANK FISHERY RESOURCES

Bruce N. Shibles*

I. INTRODUCTION

Nearly ten years ago, the International Court of Justice made its landmark decision delimiting the United States (U.S.)—Canadian maritime boundary in the Gulf of Maine.¹ That decision was expected to open a new chapter in U.S.—Canadian maritime relations by forcing cooperative management of transboundary² fishing stocks for one of the world's richest fishing grounds—Georges Bank.³ The shared management of this region was not considered problematic by the World Court

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2. "Transboundary fishery stocks" or "transboundary stocks" as used in this Article means those stocks of fish that at different times in their life cycle are found within the fisheries jurisdiction of two or more countries. This could mean, for example, that a stock might spawn under one jurisdiction and feed in another, or that within the course of its seasonal movements the stock crosses the boundary of two or more countries’ exclusive economic zones (EEZ).

3. Georges Bank supports a wide variety of commercially important fish species, including cod, haddock, yellowtail flounder, pollock, winter flounder, American plaice, and redfish. These species range over the entire Georges Bank and are thus divided by the new boundary line. Memorial of the United States (Can. v. U.S.), Pt. I, Ch. II, §§ 1-3 at 37, Fig. 7 and at 207, Fig. 36 (Sept. 27, 1982); Annexes to Counter-Memorial-Canada, Vol. I, Chs. III & IV and at 106, Fig. 60 (June 28, 1983).
due to the positive history of U.S.—Canadian relations. Until recently, however, there has been very little shared management in the Georges Bank region.

Fish stocks in Georges Bank have been steadily declining, and are currently at an all time low. This decline has occurred despite restrictions on open fishing areas and landing limits that have been imposed on the fisheries in that area since the passage of the Magnuson Fishery Conservation and Management Act. A recent, stark example of the effects of this decline is the joint closure of the New England haddock fishery by Canada and the U.S. due to severe depletion of stocks caused by overfishing. The current condition of the Georges Bank fishery indicates that the United States and Canada have not effectively managed the fishery resources within their own exclusive economic zones (EEZ). It further demonstrates the consequences of their failure to successfully manage the shared resources of Georges Bank.

In the past few years there have been limited efforts in cooperative fisheries management between the two countries. The recently approved Canada—United States Agreement of Fisheries Enforcement now requires that each country prohibit its fishermen from operating contrary to fisheries laws of the other country, while in that country's waters. Fishermen who violate the laws can no longer escape enforcement action.


5. The most obvious result from the lack of cooperative efforts has been the steady decline in groundfish stocks in the Georges Bank region. "[From 1965 to 1992], annual commercial landings of groundfish ... declined from 750,000 metric tons ... to roughly 175,000 metric tons." 138 CONG. REC. S8186 (daily ed., June 15, 1992) (statement of Sen. Mitchell).


7. 59 Fed. Reg. 26 (Jan. 3, 1994), Emergency Interim Rule. The Secretary of Commerce approved the adoption of Amendment 5 to the New England Fishery Management Council's Northeast Multispecies Fishery Management Plan (FMP) which will further limit the number of days the fishery will be open after the emergency January 3, 1994 to April 2, 1994 closing. In addition, it reduces landing limits to 500 pounds per trip and closes over 2000 square miles to fishing. These limits will cut in half the amount of haddock taken by U.S. fishermen from Georges Bank in 1993. Canada has agreed to join the U.S. in closing the haddock fishery until June 1, 1994. Janice M. Plante, What To Do About Haddock? COMMERCIAL FISHERIES NEWS, Dec. 1993 at 8A.

by retreating to their own waters. This agreement made a positive step toward reducing tensions in the boundary areas between the countries and toward improving U.S.—Canadian coastal conservation efforts.

Additionally, in recognition that cooperative fishery management plans between the two countries are more urgently needed than ever before, the U.S. Congress has renewed its efforts to pass the necessary enabling legislation\(^9\) to allow the U.S. to become a participating member of the Northwest Atlantic Fisheries Organization (NAFO).\(^{10}\) Although U.S. boats do not now regularly fish outside the EEZ, membership in NAFO would give the U.S. the opportunity to exchange scientific data about the fish stocks in the region, and would give the government leverage to negotiate a fishing quota for U.S. fishermen.\(^{11}\) Most critically for the Georges Bank region, the legislation authorizes negotiations between the U.S. and Canada to seek a mutually beneficial management agreement for transboundary stocks,\(^{12}\) particularly cod and

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9. Originally introduced in September, 1993 as H.R. 3058, the bill was combined with the Fisheries Enforcement in Central Sea of Okhotsk Act, and was passed in the House as H.R. 3188, 703d Cong., 1st Sess. (1993). The bill was still pending in the Senate as of March 1, 1994.

10. NAFO is the successor organization to the International Commission on Northwest Atlantic Fisheries (ICNAF). When States expanded their exclusive economic zones to 200 miles, the convention upon which ICNAF was based became obsolete and member states, including the U.S., withdrew. Later, the United States was very active in the negotiations which led to the development of the Northwest Atlantic Fisheries Convention, the agreement which established NAFO. The convention was ratified by the U.S. in 1983, but the enabling legislation was not enacted. 139 CONG. REC. E2159 (daily ed. Sept. 14, 1993) (remarks of Rep. Studds). The original signatories to NAFO were Canada, Cuba, the European Economic Community, the German Democratic Republic, Iceland, Norway, Portugal, Spain and the U.S.S.R. Subsequently, Bulgaria, Denmark, Japan, Poland, Romania, Estonia, Latvia, and Lithuania have joined. STAFF OF SUBCOMMITTEE ON FISHERIES MANAGEMENT, 103D CONG., 1ST Sess., CAPITOL HILL HEARING TESTIMONY ON INTERNATIONAL STRADDLING FISHERIES STOCKS (Fed. Doc. Clearing House, Wednesday, Sept. 22, 1993).


12. Senate approval of the bill has been delayed over objections to this agreement possibility by the New England Fishery Management Council. "Should any 'negotiation of an international fisheries management agreement of Transboundary Stocks' be initiated, the Council ... should have a 'more preeminent role' than the advisory status it receives under the bill." Congress Moves on Fisheries Legislation, COMMERCIAL FISHERIES NEWS, Dec. 1993 at 23A. For an interesting critique of the role of the Regional Councils in U.S. fishery management, see Ferdinand J. Gallo III, Comment, The Future of Fishery Management and Its Impact on the Seafood Industry: A Comparison of United States and Canadian Fishery Management Policies After UNCLOS
haddock. At a time when the United States is urging other countries to join fisheries management agreements, and advancing the general argument that fishing countries have a responsibility to participate in regional fishery conservation and management organizations, it should have a moral obligation, if not a legal one, to approve the NAFO legislation.

This Article will present a look at the international legal standard for fisheries management contained in Article 63 of the Convention of the Third United Nations Conference on the Law of the Sea (UNCLOS III). Specifically, it will consider whether Article 63(1), which imposes a limited duty on States to seek agreement on transboundary stock management issues, reflects a generally accepted legal standard and, if so, how this standard should affect fisheries management in the Gulf of Maine. The "legislative" history of both sections of Article 63 will be reviewed, although the analysis will focus on Article 63(1). The "straddling stocks" provisions of Article 63(2) and the broader extent of UNCLOS III negotiations are beyond the scope of this article.

14. Id. For example, the United States is currently urging Mexico to join the International Commission for the Conservation of Atlantic Tuna (ICCAT), and has been urging Poland, Korea, Japan, and others to agree to a management treaty for pollock in the so-called Donut Hole in the Bering Sea. An agreement was reached in February 1994; see 10 OCEAN POLICY NEWS 4-5 (Dec. 1993) (Council on Ocean Law, Wash., DC).
15. The other section of Article 63, Article 63(2) has been the focus of additional United Nations efforts to develop cooperative fishery management for fish stocks which occur both within the EEZ and in the high seas. The UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks began in 1993 and is expected to report to the Secretary General by the end of the 49th General Assembly. G.A. Res. 47/192, U.N. Doc. A/RES/47/192, Jan. 28, 1993.
16. For a thorough discussion of the relationship between provisions (1) and (2) of Article 63, see ELLEN HEY, THE REGIME FOR THE EXPLOITATION OF TRANSBOUNDARY MARINE FISHERIES RESOURCES 54-57 (1989).
In order to trace the international legal standard for transboundary stock management, one must first understand the legal process by which such a standard is developed. One scholar has defined modern international law as "that body of [legal] rules and principles which States ... recognize as necessary for the maintenance of peace and good order among themselves, and habitually obey in order to maintain and preserve that good order." It is a law based upon the consent of States, where a breach of such consent subjects a State to those remedies available in international law. It follows from this that customary international law cannot be grounded upon mere convenience or courtesy, but must be evidenced by a consistent practice by the States in question based upon their recognition of the appropriate legal rules and regulations. Thus, the development of customary international law requires an agreement between two or more States on some norm which is based upon a perceived legal obligation to follow the norm in question.

To determine whether an international norm of cooperative management of transboundary or shared fish stocks exists, this Article reviews state practice in the years preceding the First United Nations Conference on the Law of the Sea (UNCLOS I) in 1958, including a general review of fisheries agreements for the North Atlantic and North Pacific, and agreements among European and Asian countries. A brief review of the cooperative management provisions of the 1958 Geneva Convention on Fishing and Conservation of the High Seas will follow. The next section will trace the legislative history of Article 63 at UNCLOS III, followed by a determination of whether Article 63(1) represents a codification of the customary law of the sea for cooperative fisheries management of transboundary stocks. This Article will then look at recent practices of cooperative management to determine if such practices are representative of an international standard. The conclusion will attempt to draw implications for the management of transboundary fish stocks on Georges Bank.

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19. Id. at 39.
20. Id. at 48.
II. COOPERATIVE FISHERIES MANAGEMENT UNTIL UNCLOS III

A. General Practice Regarding Cooperative Fisheries Management Until UNCLOS III

Before the advent of exclusive economic zones in the 1970s and general agreement by the international community on the right of coastal States to manage the living resources adjacent to their coasts, there was little need for principles of law regarding cooperative management of transboundary stocks. This was partly because very few commercial transboundary fish stocks occurred in the three-mile territorial sea, and also because fisheries management was a relatively new practice among coastal States.\(^2\) Cooperation in fisheries management, however, did begin in certain high seas fisheries as early as the mid-1800s when Great Britain and France agreed to establish a joint commission to set regulations for fishing in the nonterritorial waters between the two countries.\(^2\)

In the early 1900s there was growing evidence of overexploitation of the North Pacific halibut stocks by U.S. and Canadian fishermen. As a result, the U.S. and Canada signed the Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean in 1923.\(^2\) This was the first international fisheries agreement to provide for joint management of a fishery. The Convention created the International Fisheries Commission which was charged with the regulation of the fishery.\(^2\)

One of the original conservation provisions of this Convention called for a three-month closed season, but it was soon apparent that more conservation measures were needed. Thus, the Convention was strengthened by agreements reached in 1930, 1937, and 1953, giving the Commission more power to regulate the industry. Under this authority, the Commission set quotas, regulated gear, closed nursery areas, created regulations to control incidental catches, and created multiple seasons to

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23. In 1923, the commission managed oyster fishing by closing the waters to fishing during most of the summer months.
allow for a distribution of the fishing effort. The subsequent agreements also gave the Commission an express mandate to manage the fishery to achieve maximum sustainable yield levels. These provisions appear to have worked extremely well through the end of the 1950s.25

The halibut fishery, although a jointly exploited stock, was a high seas fishery and not a fishery exploited within the territorial waters of the two countries. Perhaps the first agreement for the management of stocks within the jurisdiction of more than one country was concluded in 1937 between the U.S. and Canada concerning the Fraser River salmon fisheries. The Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fishery of the Fraser River26 provided for the establishment of the International Pacific Salmon Fisheries Commission. The Commission was charged with ensuring adequate access of the salmon to spawning grounds and dividing the allowable catch of salmon between the fishermen of the two countries. The Commission had the authority to make decisions that were directly binding on the fishermen and did not require any government approval process.27

The first substantial multilateral agreement concerned with the conservation of jointly exploited fishery resources was the Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish concluded in 1946 among the fishing nations of Northern Europe.28 The main objective of this Convention was to prevent the catch of young, immature fish in the Northeast Atlantic by promulgating regulations for minimum mesh size and minimum fish size by species. Because this agreement tended to discourage the development of fisheries for smaller species, however, the Convention nations concluded a revised agreement, the Northeast Atlantic Fisheries Convention, in 1963.29 This revised agreement encompassed all fisheries and all species within the Northeast Atlantic area. Its main purpose was to make recommendations for achieving the rational exploitation of Northeast Atlantic fisheries. The new Convention continued the idea of regulating mesh size and fish size, but could not make recommendations concerning national quotas.30

25. Id. at 161-162.
27. ALBERT W. KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES 82-84 (1973).
29. 486 U.N.T.S. 158.
30. KOERS, supra note 27, at 90-92.
A similar agreement, the International Convention for the Northwest Atlantic Fisheries, was concluded in 1949 among the States fishing in the Northwest Atlantic. The agreement established the International Commission for the Northwest Atlantic Fisheries (ICNAF), which was charged with regulating fisheries to maintain maximum sustainable yields. The Commission was more successful in its research activities than in implementing its management recommendations.

In 1953, the Convention for the High Seas Fishery of the North Pacific Ocean came into force between the U.S., Canada, and Japan. The Convention established a Commission charged with the maintenance of maximum sustained productivity of the North Pacific area. The Convention was also the first to embody the principle of abstention, whereby each government agreed to refrain from entering the fishery of stocks that were already fully utilized by one or more of the contracting States.

In 1956, the Convention Concerning the High Seas Fisheries of the Northwest Pacific Ocean was concluded between Japan and the Soviet Union. The Convention recognized both a mutual responsibility with respect to the condition of the fishery resources in the area, and a pledge to work toward the maintenance of the maximum sustained productivity of the fisheries in the Northwest Pacific Ocean. The Convention

31. 157 U.N.T.S. 158. This agreement has been superseded. See supra, note 10 and accompanying text.


34. At the outset, the States agreed that North American salmon, Northeast Pacific halibut, and Northeast Pacific herring met this criteria, and Japan agreed not to fish for those stocks in the eastern North Pacific. Most of the Commission's efforts were devoted to the administration of the abstention principle, but it was also responsible for research on other fisheries, including king crab, and for making recommendations on quotas and closing nursery areas. Michael A. Jacobs, United States Participation in International Fisheries Agreements, 6 J. MAR. L. & COM. 471, 484-487 (1974-1975).


established a Commission to carry out the specific conservation provisions of the Convention Annex.  

B. UNCLOS I

It is clear, then, that by the close of the 1950s there was a growing number of voluntary agreements among nations for the purpose of conserving fishery resources. These agreements were an indication that the States involved were willing to restrict freedom of fishing on the high seas in the interest of maintaining fishery resources. There was growing evidence that properly enforced conservation measures could increase yields without endangering stocks, that conservation controls could not be effective unless based on adequate scientific research, and that control measures would be essentially useless until applicable to all States exploiting the fishery in question.

In response to these concerns, the International Law Commission (ILC) prepared draft fisheries articles to be used at the first United Nations Conference on the Law of the Sea (UNCLOS). These included determining the allowable catch by each State, conducting research on the fisheries, regulating season length and gear type, and making revisions in the annex as needed with regard to conservation and increase of the fishery resources in the Convention area. The annex originally contained conservation and other regulatory measures for the salmon, herring, and crab fisheries in the Northwest Pacific Ocean. See generally id. at 763-768.

The Eastern Pacific was also the scene of several agreements between Japan and China beginning in 1955 that were interesting because they were concluded between nongovernmental fishery associations and they established certain zones off the Chinese coast where fishing activity was regulated. Park, Fisheries Issues in the Yellow Sea and the East China Sea, Law of the Sea Institute Occasional Paper No. 18, 13-15 (Sept. 1973) [hereinafter cited as LOS PAPER 18].


38. The ILC was formed in 1947 by the General Assembly of the United Nations to promote the progressive development and codification of international law. The ILC consists of 15 members who have a recognized competence in international law. The UN Document (A/504, 20 November 1947) recommending the formation, makeup, and duties of the ILC can be found at 42 AM. J. INT'L L. Supplement (1948), at 1. For a detailed and informed discussion of the early UN role in the development of international law and the formation of the ILC, see Yuen-Li Liang, The General Assembly and the Progressive Development and Codification of International Law, 42 AM. J. INT'L L. 66 (1948).

The Convention provided that every State's right to fish on the high seas was subject not only to its own treaty obligations and the provisions of the Convention, but also to certain interests and rights of the coastal States as defined in the Convention. The States were obligated to adopt, either alone or in cooperation with other States, living resources conservation measures to be followed by the fishermen of the respective States. The phrase "conservation of the living resources of the high seas" was defined as the aggregate of the measures necessary to maintain the optimum sustainable yield of the resources so as to assure a maximum supply of food and other marine products. The idea that

39. United Nations Report of the International Law Comm'n: Covering the Work of its Seventh Session, 2 May - 8 July 1955, 50 Am. J. Int'l L. 190, 209-210 (1956) [hereinafter cited as 1956 ILC-AJIL]. The ILC started work on the draft articles in 1951. The main intent of the ILC's work was to recognize the coastal State's interest in the conservation of fishery resources found in waters adjacent to its territorial sea. Because of the preliminary work of the ILC, a technical conference was convened in Rome in 1955 to discuss scientific aspects of international conservation of high seas fishery resources. The results of this conference were incorporated into the draft fisheries articles.

40. A general discussion of the 1955 ILC Draft Fisheries Articles can be found at Bishop ILC, supra note 37, at 629-631. The main points outlined in the draft fisheries articles were a recognition of the coastal State priority interest in the conservation of the living resources located in the waters adjacent to its territorial sea, conservation of the living resources of the high seas, and the creation of an arbitration process to settle disputes over the use or abuse of conservation principles.


States fishing alone in an area had a duty to adopt conservation principles for their nationals fishing in that area was also suggested in the Convention. 43

Article 8 of the Convention recognized that a State could have a valid interest in certain high seas fisheries not adjacent to its coast, regardless of whether its nationals fished in those areas. The coastal State could request that States fishing in the nonadjacent area take conservation measures necessary to protect the fishery, and, failing agreement, could resort to the arbitration procedures. The coastal State had to demonstrate that it had a special interest in the fishery of the nonadjacent area and present scientific reasons when making its request to the fishing States. 44

C. Cooperative Fisheries Management Practice from UNCLOS I to UNCLOS III

The period between the conclusion of the first U.N. Law of the Sea conference and the beginning of the third conference (UNCLOS III) was characterized by continued progress in cooperative management. Examples of this progress include fisheries agreements concluded between the U.S. and Mexico, Japan and Korea, and a multilateral European Fisheries Convention. It is interesting to note that each of

43. Id. at 852; In fact, Bishop, supra note 41, at 1217, makes a special note of the significance of establishing a duty upon the fishing State to adopt Conservation measures rather than merely allowing the fishing State to adopt the conservation measures if it so wishes.

44. See supra note 42, at 854. The Convention is silent as to what constitutes a "special interest," but the ILC comment to the draft version of Article 8 provides some clue to the provision's intent. It suggests that a special interest could arise where the exhaustion of the living resources in the nonadjacent area would affect the harvest in another area of the sea where the requesting State's nationals fish. In allowing the concerned State to act in this manner the ILC was creating a safeguard to the State's threatened interest. 1956 ILC-AJIL, supra note 39, at 213. In his comment on the 1958 Convention, Professor Bishop noted that special interests could possibly lie where the nonadjacent fishery was an important consumer product of the requesting State or where the requesting State desired to fish in the nonadjacent area at some future time. Bishop, supra note 41, at 1218, n.43. It is even possible that a special interest could be shown whenever there was a threat of overexploitation of that part of a shared stock that was being fished for in nonadjacent waters.
these agreements dealt with both the cooperative management of and access to fisheries within the fishery zones\(^4\) of the respective countries.

The European Fisheries Convention of 1964 was concluded for the purpose of defining a permanent fishery regime for the parties. The Convention created a six-mile zone measured from the territorial sea baseline, a zone within which the contracting coastal States had the exclusive right to fish, and exclusive jurisdiction over fisheries management. It also established a zone from six to twelve miles from the baseline where the right to fish was reserved for the coastal State and such other contracting States as had habitually fished in that zone between 1953 and 1963. These contracting States, however, could not fish for substantially different fish stocks or in new areas of the zone. The Convention also gave the coastal State the right to regulate the fisheries, and to enforce those regulations, including internationally agreed upon conservation measures, provided that the regulations were not discriminatory between the contracting States.\(^5\)

Japan and Korea ended nearly 500 years of disputes over fisheries\(^6\) with the 1965 Agreement Between Japan and the Republic of Korea Concerning Fisheries. The Agreement's preamble acknowledged that sustained productivity of the fisheries resources in the waters of mutual interest should be maintained, that conservation and rational exploitation of the living resources was in the interest of both countries, that intermingling of the respective fisheries occurred, and that mutual cooperation was desired for development of the fisheries. The Agreement set up twelve-mile exclusive fishery zones for each State and, more importantly, created a joint control zone with specific boundaries. It provided that within the joint control zone, management of dragnet

\(^4\) These fishery zones, usually 12 miles in breadth, were established by various nations in response to the failure of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone, 52 AM. J. INT'L L. 834 (1958), to satisfy the interests of certain coastal States in controlling the exploitation of coastal fish stocks. The Convention did not resolve the issue of the maximum permissible breadth of the territorial sea. The negotiators were unable to square the coastal States' concerns with the competing interests of the maritime States, who wanted to retain the concept of a very narrow territorial sea, and thus maintain maximum freedom of navigation. With the adoption of these extended zones of exclusive fishery jurisdiction, agreement among nations became necessary to maintain access and promote conservation.

\(^5\) NEW DIRECTIONS IN THE LAW OF THE SEA 41-48 (S. Houston Lay et al. eds., 1973) [hereinafter 1 NEW DIRECTIONS].

\(^6\) For a general background on these disputes and other issues leading to the 1965 Agreement see, LOS PAPER 18, supra note 36, at 4-12.
fishing, surrounding-net fishing, and large-boat mackerel fishing was to be undertaken according to provisional fishing control measures included in the Annex to the Agreement. Although the Agreement allowed for cooperative management of the joint control zone, it did not provide for cooperative management of stocks that migrated between the respective fishery zones.

After the U.S. and Mexico established exclusive fishery zones in the mid-1960s, the two governments reached an agreement in 1968 concerning reciprocal fishing rights in the respective zones. The main point of the agreement was access for fishermen of both countries to the coastal waters of the Gulf of Mexico and the Pacific Ocean between nine and twelve miles offshore, for the purpose of pursuing their traditional fisheries. Conservation measures in the agreement included the concept of status quo fishing, requiring that total catches by either side during the five years after the agreement date could not exceed total catches from the preceding five years. The agreement also required the governments to register and report to each other the number and types of fishing vessels that were to fish under the agreement. Each vessel fishing under the terms of the agreement had to use gear that was legal in that particular fishery zone. If additional regulations were needed for conservation purposes, consultation and notice were required. An agreement was also reached to formulate and execute a program of research and conservation of stocks of common concern off the Mexican coast.

This agreement appears to have been in effect until both countries enlarged their respective fishery zones to 200 miles in the mid-1970s. Reciprocal agreements were negotiated in 1976 and 1977 to allow

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48. Agreement Between Japan and the Republic of Korea Concerning Fisheries, 22 June 1965, Japan-Korea, 4 INT'L LEGAL MATERIALS 1128-1133 (1965). These fishing control measures included limitations on the number of vessels that could operate in the zone by size, fishery, and seasonal periods, maximum and minimum vessel size limits by fishery, minimum mesh sizes for dragnet fishing based on vessel size and for certain mackerel species, and fish-luring light brightness standards for surrounding net fisheries and mackerel fisheries.

49. Id.


51. 1 NEW DIRECTIONS, supra note 46, at 78-84.
continued fishing in the respective zones. The two agreements were similar and made note of the need to cooperate in the conservation and management of fishery resources, but no provisions were included to require cooperative management of transboundary stocks, nor were any dispute procedures set up to handle disagreements on management issues. The management of each fishery was left to the total discretion of the respective governments, and fishermen licensed under the agreements had to abide by the decisions of the government controlling the waters being fished.

III. COOPERATIVE FISHERIES MANAGEMENT AND THE EXCLUSIVE ECONOMIC ZONE: ARTICLE 63(1)

State actions in the wake of the Geneva LOS Conventions were important steps toward establishing a principle of cooperative management of transboundary stocks. The key to understanding today's transboundary stock management obligations, however, is Article 63(1) from the latest law of the sea conference, UNCLOS III. Article 63(1) represents the first statement made about the duties of States sharing fish stocks as a result of the most significant legal development regarding fishery resources adopted in the twentieth century, the regime of the Exclusive Economic Zone (EEZ). What follows is the "legislative history" of Article 63, which in its final form reads as follows:

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through

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53. The Exclusive Economic Zone is an area beyond and adjacent to the territorial sea, to a distance not exceeding 200 miles from the territorial sea baseline. Within the EEZ, the coastal State has sovereign rights for conserving, exploiting, and managing the living and nonliving natural resources in the water and on or under the seabed, and jurisdiction with regard to the use of artificial islands, marine scientific research, and the protection and preservation of the marine environment. RENATE PLATZODER, THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA—DOCUMENTS OF THE GENEVA SESSION 1975 411-412 (ed. 1982); United Nations, THE LAW OF THE SEA, Official Text of the U.N. Convention on the Law of the Sea With Annexes and Index, U.N. Sales No. E.83.V.5 (1983) [hereinafter cited as OFFICIAL TEXT].
appropriate subregional organizations, to agree upon the
measures necessary to co-ordinate and ensure the conservation
and development of such stocks without prejudice to the other
provision of this Part.

2. Where the same stock or stocks of associated species occur
both within the exclusive economic zone and in an area beyond
and adjacent to the zone, the coastal State and the States fishing
for such stocks in the adjacent area shall seek, either directly or
through appropriate subregional or regional organizations, to
agree upon the measures necessary for the conservation of these
stocks in the adjacent area.\textsuperscript{54}

\textit{A. The Early Negotiations on Article 63}

1. \textit{Pre-UNCLOS III}

Prior to the start of formal negotiations of UNCLOS III at Caracas,
Venezuela, several proposals on fisheries and the EEZ had been
submitted to Sub-Committee II\textsuperscript{55} of the U.N. Committee on the Peaceful
Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National
Jurisdiction.\textsuperscript{56} Although some of the proposals were changed or replaced
by subsequent submissions in Caracas,\textsuperscript{57} the proposals offer insight into
the attention accorded the conservation of transboundary stocks in the
emerging law of the sea.\textsuperscript{58}

\textsuperscript{54} OFFICIAL TEXT, supra note 53, at 22.
\textsuperscript{55} See generally Official Records of the General Assembly [GAOR], 27th Sess.,
A/9021, Vol. IV (XXXX). Sub-Committee II was set up to discuss, review, and make
recommendations on traditional law of the sea topics such as maritime boundaries,
fisheries, and navigation.
\textsuperscript{56} Id.
\textsuperscript{57} See, e.g., statement by Mr. Stevenson concerning the fact that U.S. proposals
at Caracas were meant to replace U.S. articles submitted to Sub-Committee II. II
UNCLOS III Off. Rec. 291 (1975) [hereinafter cited as II UNCLOS III].
\textsuperscript{58} The U.S. delegation at UNCLOS III submitted a comparative table to the
Second Committee in Caracas which summarized proposals that dealt with the living
resources of the sea made by various delegations to Sub-Committee II at the United
Rec. V (1975) (referred to in Table of Contents as mimeographed separately)
Japan introduced several points relevant to cooperative management, although transboundary stocks were not specifically mentioned. The Japanese proposals included the concept of cooperative management of jointly exploited stocks at the request of any State fishing for such stocks; a requirement that where a management scheme was developed between jointly exploiting States, any State subsequently entering the fishery would be required to adopt conservation measures for its nationals that were as stringent as the existing management scheme; and a recognition that the coastal State had a special interest in the conservation of fisheries in its adjacent waters.  

Malta proposed that the coastal State should have an obligation to cooperate with other States of the region "in the formulation and implementation of programmes of conservation of the living resources of [its] national ocean space when there is a need for the application of regional conservation measures [based on] the existing knowledge of the fishery." Similar measures were proposed for living resources which migrate from national ocean space to the international ocean space.  

The U.S. proposed that "coastal ... resources which are located in or migrate through waters adjacent to more than one coastal State [should] be regulated by agreement among such States." Canada, joined by five other nations, was of a similar mind with regard to regional cooperation and agreement, but focused only on exploitation and conservation of resources outside the EEZ. Nothing in the Canadian proposal related directly to transboundary stock management.  

Although the concept of transboundary stock management was only specifically covered by the U.S. proposal, it is clear that all of the proposals in some way added to the concept of agreement between States in the management of the ocean's living resources. There was a move toward joint development of, or agreement on, management practices in all areas where two or more States were involved with a fishery. A

[hereinafter cited as UN Doc. A/CONF.62/C.2/L.1].

59. UN Doc. A/CONF.62/C.2/L.1, supra note 58, at 10. (Note that all the document excerpts in this UN document came from separate U.N. documents that start with the classification UN Doc. A/AC.138/SC.II#).

60. Id. at 16, 20.

61. Id. at 17.

62. Id. at 19. Other proposals that dealt in some way with cooperation in fisheries management or in establishing cooperative conservation measures were received from Afghanistan, which joined with others, Argentina, Zaire, and Columbia, with Mexico and Venezuela. Id. at 9, 11, 19.
realization of the relative fragility of the stocks in question, and the futility of managing such stocks if other States were not observing similar management strategies, might have contributed to this result.

2. Caracas

The first fisheries proposals were submitted to the Second Committee,\(^63\) the committee responsible for fisheries and EEZ issues during the second session of UNCLOS III. Most of the fishery provisions were included in EEZ draft article proposals. Although few of the proposals specified principles of cooperative management of transboundary stocks, they did suggest that States agree on joint exploitation and management.

Members of the European Economic Community (EEC) joined in presenting specific articles on fisheries. One of the proposals would have allowed the coastal States, by mutual agreement, to request that regional fishery organization set allowable catch levels for jointly exploited stocks. The EEC also proposed the formulation of regional or species-specific fishery organizations to oversee the exploitation and conservation of the living resources in the region.\(^64\)

The U.S. proposed specific fisheries articles within its provisions on the EEZ and continental shelf. These provisions perhaps came the closest to specifying transboundary stock management standards at the Caracas sessions. For example, Draft Article 14 of the U.S. proposal would have allowed agreements to be concluded between neighboring States to fish in specified areas of their respective EEZs, with details to be worked out by negotiations between the States. Provisions related to international cooperation among States also recognized the special status

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\(^63\) The negotiations at UNCLOS III were mainly conducted within the parameters set by the three main committees. These committees were patterned after the Sub-Committees set up to work under the auspices of the U.N. Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction. The First Committee dealt with issues concerning deep seabed mining and the Third Committee handled negotiations on marine pollution control and marine scientific research. The Second Committee considered jurisdictional issues, such as the territorial sea, continental shelf, and EEZ, navigation, delimitation of maritime boundaries, fisheries, and others. III UNCLOS III OFF. REC. 97-98 (1975) [hereinafter cited as III UNCLOS III].

\(^64\) \textit{Id.} at 217-219, Draft Articles 7(3), and 13-18 (1975). (Note that all official documents cited in this Article are found in the Official Records of UNCLOS III and that Committee II documents were classified as A/CONF.62/C.II/#).
of transboundary stocks. Draft Article 16(2) stated that coastal States in a particular region should "with respect to fishing for identical or associated [or transboundary] species, agree upon the measures necessary to coordinate and ensure the conservation ... of such species."\^{65}

The final submission on fisheries at Caracas was included in draft articles on the EEZ proposed by members of the Organization of African Unity (OAU). Although not spelled out specifically, two of the articles could be interpreted as providing a framework for transboundary stock management. Draft Article 7 stated that "States in a region [could] establish regional or subregional arrangements for the purposes of developing and managing the living resources [of the region]." Draft Article 9 made it clear that any exploitation activities within a State's EEZ should be conducted in such a manner so "as not to interfere with the legitimate interests of other States in the region."\^{66}

At the conclusion of the Caracas session, an informal working paper was produced which incorporated the main trends of the Second Committee negotiations.\^{67} It is interesting to note that most of the fisheries proposals discussed above were included among the main trends in that working paper.\^{68} Although the session ended with no specific proposals for transboundary stock management, the trend was clearly in the direction of agreement between parties, rather than unilateral management.

**B. The Development of Article 63**

When the conference reconvened in Geneva on 17 March 1975, the Second Committee was prepared to review the "main trends" informal

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\^{65} Id. at 222-224, Draft Articles 11-21.

\^{66} Id. at 240-241. Three other EEZ/fisheries proposals were received from Nigeria, U.S.S.R. and other socialist States, and the land-locked and other geographically disadvantaged States (LLGOS). None of these made specific cooperative management recommendations, but they did express a recognition of the need for regional cooperation and the need for conservation measures to be applied in managing fisheries resources. See generally III UNCLOS III, \textit{supra} note 63, at 199, 214, and 216 (Draft Article 2) and II UNCLOS III, \textit{supra} note 57 at 172, §§ 13, 18 and 221, § 52.

\^{67} III UNCLOS III, \textit{supra} note 63, at 107-142.

\^{68} See e.g., \textit{id.} at 122 (Provision 98, Formula C) (OAU proposal); 123-124 (Provision 104, Formula B and Provision 108, Formula C(2)) (U.S. proposals); 128-129 (Provision 128, Formula B(3) and Provision 130, Formulas B(1) and B(4)) (EEC proposals).
working paper discussed above. The basic tenor of work included a second reading of the "main trends" document to consolidate the options therein, with informal working groups set up to reconcile divergent views. Although the informal working group meetings were no doubt very productive, leading as they did to the first negotiating text, there is no real record of the discussion leading up to the articles produced for the full Committee. Because it is difficult to uncover the position of the individual members of the various groups on specific issues, the results of one of the more successful groups, the so-called Evensen Group, will be considered.

The Evensen Group consisted of thirty to fifty States, including the U.S. and Canada, from all geographic areas and interest groups, although membership was weighted in favor of coastal States and those States with broad continental shelves. The Evensen Group had been working on a package of all the Second Committee issues since 1973, and by Geneva it had almost concluded work on a draft package of EEZ issues. The final Article 63 provisions are very similar to paragraphs

69. See generally IV UNCLOS III OFF. REC. 27, 29-31, 36, 73-80 (1975) [hereinafter cited as IV UNCLOS III].

70. For example, the records for the EEZ informal group indicate that it met four times and considered the specific content of the EEZ. It is also known that discussions about the specific content of the EEZ included conservation and management of the living resources of the EEZ, and fishery agreements with neighboring States. Id. at 13, ¶ 28 and at 196, ¶ 16.

71. For a general discussion of the input of the Evensen and other negotiating groups to the work of the Second and Third committees at UNCLOS III, see Edward Miles, An Interpretation of the Geneva Proceedings-Part II, 3 OCEAN DEV. AND INT’L L. 303 (1976).

72. Id. at 317 (letter by members of Landlocked and Geographically Disadvantaged States (LLGDS) Group discussing makeup of the Evensen Group and problems thereof).

73. Id. at 304. The Evensen Group Draft, along with positions from other informal groups, was forwarded to the Chairman of the Second Committee to be considered for inclusion in the Informal Single Negotiating Text (Single Text). Id. at 308. The Single Text was the first of three negotiating texts developed during UNCLOS III negotiations. The Single Text can be found at IV UNCLOS III, OFF. REC. 137 (1975). The Single Text was followed by the Revised Single Negotiating Text in 1976, Parts I, II, and III of the Revised Text can be found at V UNCLOS III OFF. REC. 125 (1976) [hereinafter cited as V UNCLOS III] and Part IV can be found at VI UNCLOS III OFF. REC. 144 (1977). The Revised Text was followed by the Informal Composite Negotiating Text in 1977. The entire Composite Text and Explanatory Memorandum by the Conference President can be found in VIII UNCLOS III OFF. REC. 65 (1978) [hereinafter cited as
2 and 3 of the Evensen Group's Draft Article 7. According to one commentator, the other two provisions of Article 7 and the "equitable allocation" language of paragraph 2 were omitted because they encroached too severely upon coastal States' authority within the EEZ. Thus, by 1976, relatively early in UNCLOS III negotiations, draft treaty language emerged that contained Article 63 substantially as it appears in the final treaty.

VIII UNCLOS III.

74. Article 7 of the Evensen Group Draft (16 April 1975) reads in its entirety:

Cooperation

1. States shall cooperate, without prejudice to the provisions of articles 5 and 6, in seeking to elaborate standards and guidelines for conservation and rational utilization of the living resources in the economic zone, directly or within the framework of appropriate international fisheries organization, whether universal or regional.

2. Where the same stock or stocks of associated species occur within the economic zones of two or more coastal States, these States shall seek either directly or through appropriate regional or sub-regional organizations to agree upon the measures necessary to co-ordinate and ensure the conservation and equitable allocation of such stocks without prejudice to the other provisions of this Chapter.

3. Where the same stock or stocks of associated species occur both within the economic zone, and in an area beyond and adjacent to the economic zone, the coastal State and States fishing for such stocks in the adjacent area shall seek either directly or through appropriate regional or sub-regional organizations to agree upon the measures necessary for the conservation of these stocks in the adjacent areas.

4. Coastal States shall give timely notice of conservation and management regulations.

Paragraphs 2 and 3 of Article 7 are substantially the same as Article 63 of UNCLOS III, although "equitable allocation" is replaced by "development" in the final version of Article 63(1). The entire Evensen Group Draft on the EEZ can be found in Miles, supra note 71, at 326.

75. Miles, supra note 71, at 309-310.

76. Note that Article 52 in the Single Text is renumbered as Article 63 in the final version of UNCLOS III.

77. A review of the other informal working group submissions reveals that, besides the Evensen Group, only the EEC Group had a provision dealing with transboundary stocks. Yet the EEC transboundary stock provision was merely a condensed version of the Evensen proposal discussed above. PLATZODER, supra note 53, at 299, Article C(2) (ed. 1982).

The proposals on the EEZ by the major informal groups to the Chairman of the Second Committee can be found in PLATZODER, id., at 262 (Group of 77), 273 (Evensen Group), 285 and 290-294 (LLGDS Group), (EEC Group).
Article 63 did receive further consideration during the remaining sessions of UNCLOS III, but the negotiations and proposed amendments focused on Article 63(2). This section of Article 63 addresses the management of "straddling stocks,"78 those which occur both within the EEZ and in the area beyond or adjacent to the EEZ. Argentina and Canada introduced a series of compromises for Article 63(2) in an effort to strengthen coastal States' rights in managing stocks adjacent to their EEZs. These actions kept all of Article 63 under discussion until the end of the Conference in 1982.79

Silence by the other groups on the issue could indicate that transboundary stock management was not considered as vital or controversial an issue as some others, and acquiescence on this issue by the European group, an area where transboundary stocks could frequently occur, indicates initial acceptance of Article 63 by the international community as the standard for transboundary stock management. This view is reinforced by the fact that the Revised Text only added the title to the Article 63 provision.

It appears that after an article-by-article reading of the Single Text, issues besides transboundary stock management, such as the rights of land-locked States to exploit EEZ resources, delimitation of the EEZ and continental shelf, and inclusion of the EEZ in the definition of the high seas, were determined to require more extensive negotiations. V UNCLOS III, supra note 73, at 153 ¶ 9, 11-14. By the end of 1976, Article 63 was essentially complete.

The end of the sixth session of UNCLOS III in 1977 produced a new draft treaty that incorporated changes, inter alia, in the area of the legal status of the EEZ, a more precise definition of the continental shelf, rights of access by the land-locked and other geographically disadvantaged States, and archipelagic State rights. VII UNCLOS III, supra note 73, at 68-69. However, no substantial changes were made to the content of Article 63. Id. at 15 (Note that in the composite Text Article 63 is numbered Article 63).

78. These stocks are distinguished from transboundary stocks in that they move from an area of coastal State jurisdiction to an area of the high seas.

79. Argentina sought to amend Article 63(2) by replacing the word "seek" with "be obliged," and by adding language specifying measures to be included in fishing agreements with other States and requiring any State fishing for the stocks to abide by the coastal State's fishery management regulations. XII UNCLOS III OFF. REc. 93 (1980) (reporting on a suggestion made by Argentina).

At the Ninth session of UNCLOS III in 1980, Canada expressed its support for the Argentine proposal by circulating a compromise proposal that would have given coastal States even greater recognition of their interests in fish stocks overlapping the 200-mile limit. XIII UNCLOS III OFF. REc. 8, ¶ 21 (1981) [hereinafter cited as XIII UNCLOS III].

The Canadian Compromise Article 63(2) [10 April 1980] reads in its entirety:

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall
seek either directly or through appropriate subregional or regional organizations to agree upon the measures necessary for the conservation of these stocks in the adjacent area and, in any event, shall adopt or co-operate in adopting such measures. In the event that agreement is not reached within a reasonable period and proceedings are instituted before the appropriate tribunal pursuant to article 286, that tribunal shall determine the measures to be applied in the adjacent area for the conservation of these stocks and shall determine provisional measures if definitive measures cannot be determined within a reasonable period. In establishing such measures, the tribunal shall take into account those measures applied to the same stocks by the coastal State within its exclusive economic zone and the interests of States fishing these stocks.

XII UNCLOS III, supra, at 104.

Canada was very concerned that the existing Article 63(2) provisions left the stocks overlapping the 200-mile limit vulnerable to predatory practices of distant water fishing fleets. XIII UNCLOS III, supra, at 103, ¶ 20, It is probable that Canada was also concerned with the maintenance of healthy Grand Banks fish stocks which occurred outside its 200-mile EEZ.

The debate on Article 63(2) continued throughout the resumed ninth session of UNCLOS III in 1980. Argentina and fourteen other States proposed a further rewording that would have brought Article 63(2) in line with Article 117, which requires States to regulate the high seas fishing of their nationals.

Article 117 reads in its entirety:

_Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas._

All States have the duty to take, or cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

OFFICIAL TEXT, supra note 53, at 38.

Canada supported this proposal, XIV UNCLOS III OFF. REC. 154, ¶¶ 10-11 (1982) [hereinafter cited as XIV UNCLOS III] but in light of continued opposition from distant water fishing nations, offered an amended version of Article 63(2) that received favorable response from many of the nations involved, including those with distant water fishing fleets. XIV UNCLOS III, supra, at 154, ¶ 10.

The Amended Canadian Compromise (3 October 1980) reads in its entirety:

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the other States fishing for such stocks in the adjacent area shall co-operate either directly or through appropriate subregional or regional organizations in adopting such measures for their respective nationals as may be necessary for the conservation of these stocks in the adjacent area.

XIV UNCLOS III, supra.

The U.S. delegation concluded that opposition to the Argentine and Canadian proposals came from States concerned with expanding coastal State jurisdiction. The delegation noted that the initial acquiescence to the scaled down amendment turned into
The Draft Convention\(^8\) that was produced at the end of the ninth session of UNCLOS III contained no changes in Article 63(2), apparently because no consensus could be reached on the need to strengthen those provisions. The production of the Draft Convention did not, however, stop attempts to change Article 63(2). The tenth session saw a continued attempt by Argentina and Canada to strengthen Article 63(2), but the move continued to be opposed by States with distant water fishing fleets.\(^8\)

At the eleventh and final negotiating session of UNCLOS III, one last attempt was made by Argentina and Canada to encourage increased cooperation for the conservation of straddling stocks, but the effort to achieve a consensus on this issue was blocked by the Soviet Union on procedural and substantive grounds.\(^8\) Thus, despite these attempts to strengthen Article 63(2), Article 63 remained virtually unchanged from its initial form early in UNCLOS III negotiations to the presentation of the final version of UNCLOS III for signature in 1982.

**IV. Article 63(1) as a Codification of Customary International Law**

Conflicting statements about whether UNCLOS III reflects a codification of international law cast some doubt as to the international opposition by the end of the session. It also noted that despite Canadian and Argentine concerns, the dispute settlement provisions of UNCLOS III would be applicable in those areas of the seas beyond the EEZ where violations of internationally recognized conservation measures occurred. Report of the U.S. Delegation to the Ninth Session (Resumed) at UNCLOS III in Geneva, 1982, Reports of the United States Delegation to the Third United Nations Conference on the Law of the Sea (Myron H. Nordquist and Choon-ho Park eds., Law of the Sea Institute Occasional Paper No. 33, 441 (1983)) [hereinafter cited as LOS PAPER 33].


81. LOS PAPER 33, supra note 79, at 465. The Drafting Committee of UNCLOS III also considered harmonizing Article 63(2) with Article 117. However, the Committee could not agree on sending this and other related problems back to competent conference committees. Id. at 492, 499.

82. LOS PAPER, supra note 79, at 549. A move to put an amendment to a vote was stopped because of the efforts by the President of UNCLOS III to avoid as many votes as possible on substantive issues. Id.
legal status of Article 63. It is necessary, therefore, to review fisheries agreements in effect at the time of UNCLOS III to determine if Article 63(1) reflected actual state practice. In conducting this review it should be noted that the duty evidenced in Article 63(1) that States "shall seek ... to agree upon the measures" is very limited in its legal application.

Of all the fishery management agreements discussed above, only the Fraser River Salmon Convention specifically concerned itself with the management of a transboundary fishery. Yet the Fraser River Salmon Convention was not necessarily born out of a perceived legal obligation to manage the transboundary stocks. It was more likely the result of a realization that the salmon stocks of the Fraser River were seriously threatened without such cooperation. The Fraser River Salmon Convention, which preceded UNCLOS III by 45 years, did continue the negotiating procedures set by Canada and the U.S. in the previous Halibut Convention. Nevertheless, these procedures were not the result of any perceived legal obligation to cooperate in the management of the respective stocks.

This last point is important when one considers that until UNCLOS I there was no legal obligation to cooperatively manage any fish stocks, primarily because of the limited breadth of territorial waters and the high seas freedom of fishing. The codification process of UNCLOS I, however, recognized the growing trend of multilateral and bilateral agreements for cooperative management of high seas fisheries and imposed a legal duty upon States both to respect the coastal State's interest in fisheries off its coasts and to cooperate in the management of those stocks that were jointly exploited. It may also be argued that this practice had become so widespread as to make it binding upon nonsignatory States in the interest of conserving the ocean's living resources. It is unfortunate that the actual practice was not as widespread with respect to transboundary stock problems as envisioned in Article 63(1), but this is partly because of the relative newness of the 200-mile EEZ concept.

This lack of actual practice, however, does not necessarily mean that Article 63(1) cannot be considered a codification of customary law on the subject. The main reasons for this are found in the evolution of Article 63 and in the form of negotiation at UNCLOS III. As discussed above, Article 63 was essentially settled in its final form at the end of the first Geneva negotiating session in 1975. The Article survived attempts by Canada and Argentina to strengthen the straddling stocks provision. The fact that the Article was open to scrutiny until the end of the negotiations and emerged unchanged, strengthens the argument that it represents a codification of internationally accepted State practice.

The negotiation process at UNCLOS III also supports the codification argument. UNCLOS III was negotiated, until the final vote, by the process of consensus, or decision making by consent without resort to voting. In practice, this meant that each of the negotiating texts developed by the chairmen of the various committees, were based on the results of proposals and discussions put forward at various times by delegations and informal groups, such as the Evensen Group, at the Conference. These texts were in turn distributed for review by the delegations and their respective governments. The results of these reviews were transmitted back to the committee chairmen. Silence on any particular Article played a large role in determining the final form of UNCLOS III because no objection became a sign of acquiescence or consensus. Thus, Article 63, which survived seven years of negotiating within this consensus method, emerged as the generally accepted practice in international law with regard to transboundary stock management.

Before examining the use of this standard, however, it should be emphasized that the duty referred to in Article 63(1) is limited in regard to its legal application. Article 63(1) addresses activities occurring within the EEZ of the respective States. Within the EEZ, disagreements dealing with fisheries are not subject to the compulsory dispute settlement procedures of other provisions of UNCLOS III. Even if one of the coastal States alleges gross failure on the part of a neighboring coastal State to apply conservation measures or other UNCLOS III fisheries provisions to its EEZ, the conciliation procedure cannot be used to override the coastal State’s discretion in managing its EEZ living

Thus, as one State Department observer has commented, with or without Article 63(1), the States sharing transboundary stocks need to sit down and talk. In fact, this same observer and others have noted that it is entirely possible that the legal leverage to be applied in gaining agreement on the cooperative management of straddling stocks is much greater than the leverage that can be applied for transboundary stock management agreements. There was an attempt by the U.S., Japan, and the Soviet Union to include compulsory dispute settlement procedures for EEZ management problems, but this was strongly opposed by, among others, Latin American countries. We are, therefore, left with an international standard in Article 63(1) that is relatively easy to understand and apply, but imposes only a limited duty to act.

Despite its apparent weakness in forging agreement on transboundary stock management problems, and its lack of guidance on the management of shared stocks, Article 63(1) does provide a starting point. It recognizes the special status of transboundary stocks and the associated problem of effectively managing those stocks. It also recognizes the importance of other species associated with the transboundary stocks within the ecosystem and allows for their inclusion in any management agreement. Finally, while the Article only requires neighboring States to discuss transboundary stock management, it may also be seen as imposing something of a moral obligation to agree on cooperative management to ensure the conservation and development of the transboundary stocks.

85. OFFICIAL TEXT, supra note 53, at 494-496, Articles 296(3)(a), 296(3)(c).
86. Interview with Bill Sullivan, Dep't of State, Office of Fishery Affairs (June 27, 1985).
87. See text accompanying supra note 78.
89. Interview with former Ambassador Thomas Clingan, Univ. of Miami School of Law (June 28, 1985).
V. STATE ACTION WITH REGARD TO TRANSBOUNDARY STOCK MANAGEMENT SINCE 1980

With these ideas in mind, the following discussion focuses on three agreements that address transboundary management issues. All of the negotiations were started prior to the presentation of the draft treaty at UNCLOS III, but were concluded afterward and, therefore, with the full knowledge of the contents of Article 63. There is also a discussion of the 1979 East Coast Fisheries Agreement between the U.S. and Canada, which, although unratified, demonstrated the recognition by these parties of the basic principle embodied in Article 63(1).

A. The Baltic Sea Convention on Fishing and Conservation of Living Resources

In September, 1973, the Convention on Fishing and Conservation of Living Resources in the Baltic Sea and the Belts (Gdansk Convention) was signed by the Soviet Union, Finland, Sweden, Denmark, West Germany, East Germany, and Poland. The Gdansk Convention recognized the joint responsibility of the parties for the conservation and rational exploitation of the living resources of the Baltic Sea Basin, as well as the need to expand cooperation on these issues. In fact, the Convention imposed a duty on the States to cooperate closely on preserving, conserving, and increasing the yield of the living resources, and to prepare and put into effect the necessary organizational and technical means to carry out the measures necessary to meet the duty. The Convention covered all fish species and other living resources of the Baltic Sea Basin.

In 1983, the Council of European Communities approved the accession of the EEC to the Gdansk Convention with the express purpose of contributing to the conservation of the living resources of the Baltic Sea Basin where EEC fishermen also fish. The Convention was

90. For a discussion of additional agreements relating to transboundary stocks concluded during this time period, see HEY, supra note 16 at 147-53, 161-63, 165-68.
amended at that time to strengthen the Baltic Sea Fishery Commission's duties to allow for more coordination of management and scientific research of the living resources of the area, and for more analysis of the data supplied by contracting States with regard to the implementation of Commission recommendations.93

While no mention is specifically made of transboundary stock management, it is clear that the aim of the Gdansk Convention and the subsequent Protocol was cooperation in the management, conservation, and utilization of all the resources of the Baltic Sea Basin by the States that fish that area. It is equally clear that the States in question did seek to agree and, in fact, did agree on the measures necessary to ensure the effective management of all fish stocks, including transboundary stocks, in the Baltic Sea.

B. The Common Fisheries Policy of the EEC

Beginning with the European Fisheries Convention, discussed above, the European Community has recognized a continuing need to cooperate on fisheries issues. In October, 1970, the Council of the European Communities issued a regulation laying down a common structural policy for the fishing industries of the EEC in an attempt to harmonize all fishery operations. The regulation recognized the need for member States to have equal access to all the waters of the EEC and at the same time to adopt measures to safeguard and conserve the fish stocks in the waters of the EEC.94

The accession of Denmark, Ireland and the United Kingdom to the EEC in 1972 created some changes to the 1970 EEC regulations. The Articles of Accession allowed fishing within six miles of the coasts of member States, and within twelve miles in certain instances, to be restricted to those vessels which had traditionally fished in those areas, or which operated from ports in the geographical coastal area. However, these new restrictions could not prejudice any special fishing rights enjoyed at the end of January, 1971. These changes were not mandatory for States which wished to maintain the existing situation, and six years

after accession, the Council was to determine the status of fishing conditions with regard to protecting fishing grounds and conserving the biological resources of the sea. The exceptions to the 1970 EEC regulations could be used until the end of 1982.95

In October 1976, with an eye toward the extension of EEC member States' fishery zones to 200 miles, the Council adopted a regulation that called for the establishment of an EEC system for the conservation and management of fishery resources within the 200-mile zones.96 A few weeks later the Council issued a statement announcing the official extension of the fishing zones off EEC member States' coasts to 200 miles. The statement noted that until EEC measures were in place on conservation of resources, no unilateral conservation measures were to be implemented. The statement did allow for such unilateral action, dependent upon continued consultation with member States, if EEC measures were not forthcoming for 1977.97

The framework outlined in the 1976 EEC regulations was put into place over the next few years.98 One legal scholar noted that one of the reasons it took the EEC so long to adopt a Common Fisheries Policy was the problem of agreeing on the allocation of stocks that were "common".99 During this period, the EEC concluded separate agreements with Norway concerning the establishment of a total allowable catch for transboundary stocks, an allocation of that catch between the EEC, Norway, and any other third parties, and the setting of other conservation measures.100 In 1983, more EEC regulations were issued that provided for EEC decisions on conservation measures and on the use and distribution of the resources. Specific regulations were issued on

95. Treaty of Accession of Denmark, Norway, Ireland, and the United Kingdom - Fishing Rights, 1 NEW DIRECTIONS, supra note 46, at 57-59.
97. 1976 Hague Resolution Declaring an EEC 200-Mile Fishing Zone, 10 NEW DIRECTIONS, supra note 94, at 494-495.
98. For a detailed discussion of the political maneuvering and other debates concerning EEC common fisheries development see JOHN FARNELL & JAMES ELLES, IN SEARCH OF A COMMON FISHERIES POLICY (1984) [hereinafter cited as EEC FISHERIES].
minimum mesh sizes, by-catch rates, minimum fish sizes, and fishing limits as to areas, time periods, and gear.\textsuperscript{101}

The EEC, while making few specific regulations concerning trans-boundary stock management,\textsuperscript{102} has provided a framework for its use. In fact, as with the Baltic Sea fisheries, the parties in question recognized a problem and agreed to work on an acceptable solution. In this instance, the standard of Article 63(1) has been used through the auspices of a regional body to agree on cooperative management and conservation measures for shared fisheries.

\textit{C. 1979 East Coast Fisheries Agreement}

In March, 1979, the U.S. and Canada signed the Agreement on East Coast Fisheries Resources,\textsuperscript{103} which would have created a framework for joint management of transboundary stocks in the Gulf of Maine—Georges Bank region. The Fisheries Agreement proposed establishing a joint East Coast Fisheries Commission with seven members from each country and two co-chairs. In addition, the Agreement divided the species in question into three groups: "A" stocks were transboundary and were to be managed jointly by the commission; "B" stocks were those of mutual interest and were to be managed primarily by one country, under a plan approved by both; and "C" stocks were to be managed completely by one country under its own domestic fishery management regulations. Any unresolvable disputes would have been submitted to binding arbitration.\textsuperscript{104}

\textsuperscript{101} EEC FISHERIES, supra note 98, at 203-204.

\textsuperscript{102} One commentator explains the lack of specific language concerning trans-boundary stocks in the EEC agreement by concluding that for the purposes of the EEC "there are no transboundary stocks....all marine resources are treated as if they were resources of the Community and not of individual member states." HEY, supra note 16, at 141.

\textsuperscript{103} Annexes to Counter Memorial, supra note 1, at Vol. 1, 251-326.

While the Commission was to determine overall yearly catch totals for each species in Annexes A and B, the agreement specified the percentages each country would receive. For example, the U.S. would have received most of the groundfish (83 percent of cod, 79 percent of haddock, and 90 percent of silver and red hake). In return, Canada would have received 73.35 percent of the scallops from east of the Great South Channel, leaving 26.65 percent of the scallop catch for the United States.\(^{105}\)

After extensive hearings before the U.S. House of Representatives and preliminary hearings before the Senate Foreign Relations Committee, President Reagan withdrew the Agreement from the Senate in March, 1981, in response to strong opposition to its ratification. Reasons expressed at the hearings included the fact that the Agreement would have been permanent and subject to only minor changes in allocations once ratified;\(^{106}\) it fixed the U.S. share of scallops at a time when the industry was growing; and it limited the authority of the regional fishery management councils created by the Magnuson Fishery Conservation and Management Act of 1976 (MFCMA).\(^{107}\)

During the proceedings of the Gulf of Maine case, Canada took the position that the Fisheries Agreement, while not binding upon the parties,
was evidence of Canada's traditional participation in the fisheries of Georges Bank and represented the "best objective evidence of what the Parties themselves considered an equitable solution" in relation to fisheries. The U.S. on the other hand, dismissed the Fisheries Agreement outright because the rights to Georges Bank fishery resources granted to Canada by the Agreement were inconsistent with rights accruing to the U.S. under the jurisdiction of the 200-mile EEZ. The U.S. also argued that it was contrary to the intent of the MFCMA. It should be noted that although both sides used the Fisheries Agreement to their advantage in their pleadings before the Special Chamber, neither side denounced the principles behind the negotiations that led to the Agreement, nor did either side abandon the principle of seeking to agree on transboundary stock management issues.

While the Agreement never entered into force, it was negotiated and signed by both countries, demonstrating that the U.S. and Canada did seek to agree on a transboundary management issue. At the time of the negotiations, the U.S. and Canada were following the growing consensus emerging at UNCLOS III on the standard embodied in Article 63(1); the fact that the Agreement never became binding should not diminish the attempt to agree on these fisheries issues. The fact that the Agreement was negotiated is evidence of U.S. and Canadian acceptance of Article 63(1) as the international legal standard for cooperative management of transboundary fish stocks.

VI. CONCLUSIONS

The early history of fishery agreements was characterized by negotiations for access. This trend began to change in the early 1900s when agreements introduced the ideas of preservation and cooperative management of the living resources of the high seas. These types of agreements continued through the end of the 1950s, by which time the emphasis had switched to the theme of coastal State preference for managing and utilizing the living resources adjacent to its coasts. This concept was codified in UNCLOS I, which gave coastal States a much greater voice in the conservation, management, and utilization of the living resources in the high seas adjacent to their coasts. The interim period between UNCLOS I and UNCLOS III was characterized by a

108. Reply-Canada, Gulf of Maine Case, supra note 1, at 105, ¶¶ 248, 250.
return to access issues, in addition to continued management concerns, as more and more States increased the scope of their fishery jurisdictions. By the middle of the 1970s and the negotiations at UNCLOS III, however, management issues had become a higher priority for the concerned countries. This period also signaled the emergence and acceptance of the 200-mile EEZ, giving coastal States additional authority to manage and utilize the living resources off their coasts.

Article 63(1) emerged from early UNCLOS III negotiations in its final form. It creates a duty for those coastal States that exploit transboundary stocks to discuss together the management of such stocks, and a moral obligation actually to agree on those measures necessary to coordinate conservation and utilization of those stocks. Article 63(1) does not, however, create a framework for such coordination, nor does it specify which factors, such as biology, traditional fishing rights, or social and economic considerations, should be weighed in reaching such agreements. Nevertheless, the Article does represent a codification of the customary international law on the subject because of the nature of the consensus negotiation process used at UNCLOS III and in light of recent State practice.

Canada and the U.S. face many decisions concerning the future of their shared fishery resources. By attempting to conclude the East Coast Fisheries Agreement, the U.S. and Canada signaled their acceptance of Article 63(1) as the international legal standard to apply in cooperative management of transboundary fish stocks. Regardless of the individual U.S. or Canadian stance with respect to UNCLOS III as a whole, customary international law as codified in Article 63(1) on transboundary stock management imposes an obligation on the two States to follow that standard. This is enforced by the knowledge, as was previously apparent with the Baltic Sea Agreement, and as is now apparent given the critical state of the Georges Bank fishery, that some agreement must be reached in light of the ominous consequences of nonagreement.

The precipitous drop in stock levels in the Georges Bank region indicates that it is more urgent than ever that Canada and the U.S. find management approaches that can rebuild those stocks. One such approach is contained in the proposed enabling legislation concerning U.S. participation in NAFO. This legislation authorizes and encourages the Secretary of State to initiate negotiations with Canada for the purpose of entering into a fishery agreement, with particular emphasis on the cooperative management of transboundary stocks occurring in the
George Bank region. Although the bill has been opposed by the Regional Councils, which believe they should have a more significant role in developing such cooperative management plans, the Senate must not allow internal political issues to unduly influence its deliberations. The Senate has an obligation to consider the larger responsibility of the U.S. to comply with the duty imposed by Article 63(1), and to follow the international legal standard by approving the NAFO legislation.