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Globalization, Trade Treaties and the Future of the Atlantic Canadian Fisheries

Scott Sinclair

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5 **Summary**

12 **Introduction**

16 **1. Fisheries Trade and Tariffs**

22 **2. Fisheries Management, Regulation and Trade Treaties**
A. Non-Discrimination and Foreign Ownership Rules
B. Domestic Processing Requirements
C. Trade in Services Rules
D. Fisheries Subsidies
E. Co-management
F. Reservations For Fisheries Measures

51 **Conclusion**

54 **Appendix 1**

60 **Appendix 2**

62 **Bibliography**

66 **Notes**

Summary

INTERNATIONAL TRADE IS vital to the economic well-being of the Atlantic Canadian fisheries. When properly regulated within sustainable ecological limits, trade creates opportunities for both fish harvesters and local communities. Unfortunately, the broad scope of new trade and investment treaties and the corporate-led globalization they facilitate pose considerable threats to many aspects of fisheries regulation.

The next generation of trade and investment treaties, such as the Canada-EU Comprehensive Economic and Trade Agreement (CETA) and the Trans-Pacific Partnership (TPP), deal with matters far beyond tariffs and trade. Just as the freezer trawlers that ply the world's oceans today are far more extractive and destructive than earlier fishing vessels, so the latest trade and investment treaties are more intrusive than previous ones.

The Canadian fisheries sector, because of its strong export performance and Canada's already low tariffs on fish, is often touted as an unequivocal winner in the face of deeper trade liberalization. Yet the fisheries are also a sensitive sector, with many domestic policies at risk from the far-reaching provisions of these new trade and investment treaties.

At stake is the ability of Canadians to pursue public policies that curb domination of the fisheries by large corporations. These policies help spread the benefits of the fishery more widely among smaller, independent fishers and coastal communities. They also allow the regulation of the fishery for conservation and other public purposes without fear of undue pressure

from international corporations or the threat of challenge under unaccountable international trade treaty enforcement mechanisms.

1. Fisheries Tariffs and Trade

In recent years, demand for seafood — particularly wild-captured fish — has risen beyond most countries' available domestic supply. With some exceptions, tariffs on Canadian fish exports are modest and can be expected to fall in countries that depend heavily on fish imports to meet rising consumer demand.

A straightforward agreement to reduce or eliminate tariffs would give Canadian producers an opportunity to sell their products in foreign markets at more competitive prices. The 2009 trade agreement between Canada and the European Free Trade Association is an example of a tariffs-only agreement which enhanced trade and market access while leaving regulatory authority over the fisheries largely unaffected.

But reducing foreign trade barriers is not the most fundamental challenge facing the Atlantic Canadian fisheries. Protecting Canada's ability to regulate the fisheries for conservation purposes and to ensure that the benefits from fisheries are shared with independent fishers and coastal communities should be much higher priorities. Canadians should not make significant concessions in ongoing trade and investment negotiations that might impair these higher priorities, in order to attain the modest, and diminishing, benefits available from reducing the remaining foreign tariffs on fish and fish products.

2. Fisheries Management, Regulation and Trade Treaties

The potential conflicts between trade and investment treaty rules and Canadian fisheries regulations are numerous and profound. For this reason, successive Canadian governments have endeavoured, through various exceptions and exclusions, to shelter domestic fisheries management policies from the full impacts of trade and investment treaties.

National Treatment

National treatment is one of the core principles of international trade treaties. It requires that governments must extend the best treatment given to

domestic goods, services or investors to their foreign counterparts. The Atlantic Canadian fisheries are built around policies and regulations that favour Canadians and must be shielded from the application of these non-discrimination rules.

Policies that favour Canadians in the fisheries sector include:

- Fishing licences are restricted to Canadians. In the Atlantic inshore sector, only independent owner operators, who must be Canadian, can hold a fishing license. In the offshore sector, foreign corporations can only hold a minority interest (up to 49%) in a Canadian corporation that has a fishing licence.
- With few exceptions, only Canadian fishing vessels can be registered to be involved in a commercial fishery.
- Policies to assert domestic control of sectors, such as the northern shrimp fishery, rely on licensing restrictions, foreign ownership rules, crew requirements, and preferences for community-based groups that explicitly favour Canadians.
- Historical dependence and geographical adjacency policies ensure that fishers from communities located near a resource and those who have made their livelihoods in the fisheries for many generations get first consideration when fishing stocks are allocated.

All such policies are contrary to the national treatment and non-discrimination provisions of trade and investment treaties. To avoid challenge, these policies must be fully exempted. From a trade treaty perspective, they constitute discrimination based on nationality or local origin. Yet, for reasons of fairness and equity, these forms of positive discrimination are both desirable and morally compelling.

Domestic Processing Requirements

Provincial regulations in Newfoundland and Labrador and Quebec encourage domestic processing by restricting the export of unprocessed fish. Such provincial regulations are designed to maximize socio-economic benefits from processing, add value to products prior to export, and maintain employment in the processing sector. The Canadian courts have consistently upheld these measures as legally and constitutionally valid.

Minimum processing requirements provide provincial governments with critical leverage to influence the investment and production decisions of large fish processing companies. Without such regulation, these decisions would be left to companies to make with no consideration for any other factors than how it affects their corporate bottom line.

The EU is strongly pressuring Canada to abolish minimum processing requirements in the CETA. Even if these important regulations somehow survive under the CETA, they will immediately come under renewed attack in the TPP talks.

"Market Access" Restrictions

Although the fisheries are normally thought of as resource or goods-producing sectors, the rules governing international trade-in-services are also in play. Many fisheries-related activities, and even some fisheries themselves, are classified as services for the purposes of international trade and investment treaties. To complicate matters further, in the most recent Canadian trade and investment treaties, including the draft CETA, the market access restrictions have been shifted from the services to the investment chapter. This has greatly expanded their coverage.

The independent, inshore sector is the most important sector of the Atlantic Canadian fishery and a major contributor to the regional economy. The *fleet separation* policy, which forbids processors from acquiring fishing licenses, keeps ownership of the fish harvesting and processing sectors separate. Another key safeguard for the independence of the inshore fishery is the *owner-operator* policy, which requires the holders of fishing licences on small vessels to personally fish their licences. This prevents investors outside the fishery from buying fishing licences and hiring others to do the fishing.

Market access rules in next-generation investment treaties prohibit, among other things, limits on the numbers of service providers and investors and restrictions on the types of legal entities through which service suppliers and investors may operate. These restrictions create potential conflicts with Canadian policies to preserve the independence of the inshore fishery, including fleet separation, owner-operator requirements, and limiting entry by restricting the number of licenses.

There was no legal conflict between these vital fisheries policies and earlier Canadian trade and investment treaties, such as the NAFTA and the WTO General Agreement on Trade in Services (GATS). The NAFTA services chapter contains no binding "market access" restrictions. The GATS is a bot-

tom-up agreement, applying only to those sectors specifically included by a member government, and Canada wisely did not include fishing services in its commitments.

Subsidies

Harmful fisheries subsidies, those that contribute to overcapacity and overfishing, raise significant international trade and conservation issues. Subsidized fish can be sold at lower prices, reducing competitors' shares in the subsidizing country's domestic and export markets. A subsidized fleet that targets straddling or highly migratory stocks leaves other countries with fewer fish to harvest.

Foreign distant water fleets, especially European vessels, have a long history of overfishing in or adjacent to Canadian waters. There is little prospect, however, that Canada can succeed in disciplining, let alone eliminating, harmful fisheries subsidies through bilateral trade and investment negotiations, such as the CETA.

In the TPP talks, the risk is that the agreement will go too far and restrict almost all fisheries subsidies, including beneficial ones that promote conservation and support small-scale, sustainable fisheries. New Zealand and Chile, both influential members in the TPP talks, have led the charge for a broad prohibition of fisheries subsidies. Such top-down restrictions could adversely affect support for Canadian inshore fishers, including differential rules for how employment insurance treats workers in seasonal industries and marketing support for sustainably harvested fisheries products. An across-the-board prohibition of subsidies would simply further advantage the wealthier, corporate-controlled industry over the inshore sector.

Co-management

Co-management involves the sharing of power and responsibility between arms-length regulators, independent scientists, and those who make their livelihood in the fisheries. It cannot exist without strong state regulatory capacity and high levels of public investment in independent scientific expertise, along with industry, primary producer and coastal community involvement in policy-making.

Each of these three essential pillars of co-management is being undermined by recent federal government policy decisions, including

- ongoing cuts in science, research and regulatory capacity at the federal Department of Fisheries and Oceans (DFO)
- the weakening of DFO's authority to protect fish habitat, through amendments buried in the omnibus bill implementing the 2012 federal budget, and
- the disbanding of collaborative institutions, such as the Fisheries Resource Conservation Council.

The central emphasis on sharing control with *local* harvesters, coastal communities, and community-based fleets, puts co-management at odds with trade and investment treaties, which aim to root out such geographical discrimination. Co-management increasingly finds itself between a rock and a hard place. The expanding scope of these treaties, the ever-increasing series of bilateral and regional negotiations, and the steady erosion of safeguards for non-conforming fisheries policy and regulation exert long-term, indirect pressure on the foundational principles of co-management. At the same time, it faces direct threats from cutbacks, deregulation and the dismantling of supportive institutions.

Reservations For Fisheries Measures

Reservations are country-specific exceptions which protect otherwise non-conforming measures from the investment and services obligations of trade treaties. Given the high degree of inconsistency between domestic fisheries policies and international trade and investment treaty rules, strong exceptions are critical. Such reservations are the last line of defence for vital fisheries policies from any challenge under the investment and services rules of these treaties.

There are two different types of reservations. Annex I reservations exempt existing measures. They are *bound,* meaning that the measures can only be amended to make them more consistent with the treaty. If an exempted measure is amended or eliminated, it cannot later be restored. Annex II reservations are *unbound*. This means that they protect existing non-conforming measures and also allow governments to take new measures that would otherwise be inconsistent. An Annex II reservation provides stronger protection because it allows for future policy flexibility in an exempted sector.

The federal government has proposed an Annex II reservation under the CETA which, despite certain gaps, would protect its ability to restrict fish-

ing licenses to Canadians and to limit foreign ownership in the fisheries sector. Importantly, the proposed reservation would also exempt otherwise non-conforming licensing measures, including the fleet separation and the owner-operator policies. But the very fact that Ottawa must now, for the first time, rely on a reservation to safeguard policies crucial to the survival of the inshore sector is a cause for concern. Once a policy, or set of policies, requires protection from Canada's international trade and investment treaty obligations, it invariably becomes a bargaining chip and target in future negotiations.

There are very serious shortcomings in the reservations for provincial measures. If unaddressed, these would result in a serious erosion of provincial government authority over fisheries. Canada recently lost a NAFTA investor-state case brought by Exxon against minimum local research and development requirements in Newfoundland and Labrador. The case clearly demonstrates that provincial governments cannot rely upon an Annex I reservation to protect the discretionary authority of the minister and officials under existing legislation. To safeguard their full authority, they must take an Annex II, unbound reservation. Otherwise, these governments are surrendering their future legislative and constitutional power through which the wealth generated by fish and other natural resources could contribute to the sustainable development of their province.

Conclusion

Those who depend on the Atlantic Canada fisheries — from harvesters to the coastal communities themselves — cannot afford to be complacent about how the federal government's unprecedented trade and investment treaty agenda threatens their livelihoods. Without policy guidance, enforcement and, above all, governmental determination to use the leverage provided by public ownership of the resource, large corporations have little incentive to create local benefits in the fisheries. The hands-off approach facilitated under trade and investment agreements allows global fishing corporations to organize their activities for their own and shareholders' benefit without regard to fishers, coastal communities or marine ecosystems. A lack of vigilance could put the long-term sustainability of the Atlantic Canadian fisheries at risk.

Introduction

NO ONE SHOULD question the importance of international trade to the economic well-being of the Atlantic Canadian fisheries.[1] Canada exports an estimated 85 percent (by value) of its seafood production, with most going to U.S. markets.[2] Globally, fish is one of the world's most traded commodities, with approximately 40 percent of global production (by value) entering into international trade.[3] But there are critical questions that need to be asked about who benefits from this trade and about the role of public policy in ensuring that these benefits are shared as widely as possible.

The latest generation of trade and investment treaties cover many important public policy matters only marginally related to trade. As we are constantly reminded, the broad array of deals currently being pursued by the Canadian government are meant to be more far-reaching and ambitious than even the North America Free Trade Agreement (NAFTA), which set the previous high-water mark for protecting corporate and investor interests. Just as the massive freezer trawlers that ply the world's oceans today are far more extractive and destructive than earlier fishing vessels, so the latest trade and investment treaties are more intrusive than previous ones. While trade, properly regulated, can be a boon for the region's fisheries, the same cannot be blithely assumed about these sweeping new treaties and the corporate-led globalization they seek to engender.

Since taking office in 2006, the Conservative federal government has negotiated trade treaties with Colombia, Peru, Jordan, Panama, Honduras and the European Free Trade Association (known as EFTA, and consisting

of Switzerland, Iceland, Norway and Liechtenstein). Talks, at various stages, are also underway with Korea, Morocco, Singapore, Ukraine and the Caribbean Community.[4] Earlier agreements with Chile, Costa Rica and Israel are being renegotiated.

The current centrepiece of the government's negotiating efforts is the Canada-European Union Comprehensive Trade and Economic Agreement (CETA), which is in the final stages of negotiations. This agreement is just the first in a planned series of trade and investment treaties with major world powers including Japan, India, and possibly China. Furthermore, Canada has now joined the Trans-Pacific Partnership Agreement (TPP) talks with the U.S. and nine other Pacific Rim nations.[5]

No other country in the world has a more aggressive trade and investment treaty negotiating agenda than Canada. The current government is ideologically committed to its trade treaty agenda and appears willing to make deals with almost anyone. There is considerable variation among these treaties. For example, the EFTA and Jordan deals are traditional tariff-elimination agreements. By contrast, the agreements with Colombia and Peru are full-fledged trade and investment treaties and contain stronger, more controversial provisions in areas such as investor rights and investor-state dispute settlement.

It is the negotiations with major superpowers, however, that hold the greatest potential to radically transform the existing ground rules governing Canada's trade and investment treaties. In bilateral negotiations with smaller countries, Canada is able to work from its own trade and investment treaty template and can normally deflect concessions in sensitive policy areas, such as fisheries policy. Where change to the established rules occurs, it is usually driven by the Canadian government and Canadian commercial interests. Negotiations with superpowers such as the EU, Japan and the U.S. are a different matter entirely. To cut a deal the Canadian government must conform to the larger power's treaty template and faces intense pressure to make concessions in sensitive areas that have previously been excluded or insulated from treaty coverage.

It is widely acknowledged that many sectors of the Canadian economy, especially manufacturing, could be hard-pressed by deeper trade liberalization.[6] The Canadian fisheries sector, on the other hand, has a strong export performance and already very low tariffs on fish, and is often touted to be an unequivocal winner.[7] But the fisheries are also a sensitive sector, with many non-conforming domestic policies that are at risk from the most far-

reaching provisions of new trade and investment treaties. Such vital policies and regulations must be fully excluded from these treaties.

Many of the nations that Canada is currently negotiating with — including Japan, Korea, the U.S., New Zealand, Chile, Vietnam, China and some within the EU — are major fishing powers in their own right. The EU, for example, has a long history of overfishing within and adjacent to Canadian territorial waters. The U.S. has a strong trading relationship with Canada, but there have been cross-border tensions in certain fisheries sectors. Other nations involved in the TPP, notably New Zealand and Chile, have radically reformed and de-regulated their own domestic fishing industry and are now vociferous champions of full liberalization and neo-liberal deregulation of the global fishing industry.

The purpose of these sweeping and complex treaties is far more than simply boosting trade by opening foreign markets. This paper examines the full policy and regulatory implications of the new trade and investment treaty agenda for the future of the Atlantic Canadian fisheries. Among the key issues it considers are the potential impacts of the new, more far-reaching provisions of trade and investment treaty on the ability of Canadians to:

- pursue public policies that curb domination of the fisheries by large corporations and highly extractive vessels and help to spread the benefits of the fishery more widely among smaller, independent fishers and coastal communities, and

- regulate the fishery for conservation and other public purposes without fear of undue pressure from international corporations or the threat of challenge under secretive and unaccountable international trade treaty enforcement mechanisms.

In their relentless drive for international competitiveness, lower costs and higher profits, global fishing corporations have demonstrated a willingness to process fish in low-wage exporting zones, employ temporary foreign workers paid sub-standard wages in plants or aboard company vessels,[8] undercut the independence of inshore and artisanal fishers and, in too many cases, exploit fishing stocks beyond sustainable ecological limits.[9] In the absence of strong regulation, firms that resist this competitive logic are driven out by the more ruthless ones. There is growing evidence that this model of corporate-led globalization in the fisheries is neither socially desirable nor environmentally sustainable.

Unfortunately, the latest trade and investment treaties are heavily biased towards this deeply flawed model. In order to fully liberalize global markets, these treaties aim to eliminate all forms of local protection, remove safeguards for small producers and shrink the alleged burdens of public interest regulation on multinational corporations. Negotiations are shrouded in secrecy, except for multinational businesses and their lobbyists, who are given privileged access. Once concluded, the treaties are extremely difficult to change. They act as external constitutions, permanently restricting the authority of democratically elected governments to support the economic interests of small producers and coastal communities or to counterbalance the growing power of multinational corporations.

The paper also explores how the trade and investment treaty agenda might affect important conservation and management regulatory tools. Properly regulated fisheries trade can bring a variety of economic opportunities. But when global demand increases fishing efforts beyond sustainable limits, it can also bring ruin. The transformation of fish species into global commodities has too often led to biological collapse and commercial extinction.

Clearly, the importance of increased access to international market pales in comparison to the major conservation and regulatory challenges facing the fisheries. As an authoritative study of biodiversity in Canada's oceans and marine environment recently observed: "In 2009, Canada's fishery catches were half those of the late 1980s; the landed value of all fisheries in 2009 was almost the lowest since 1977. Atlantic fisheries, once predominantly for bottom-dwelling fishes, are now dominated by lobster, shrimp, and crab." [10] In one of its last reports, the now disbanded Fisheries Resources Conservation Council noted that "Almost 20 years after the severe stock declines of the early 1990s, very few [groundfish] stocks are healthy and productive."[11]

The fisheries must operate within strict ecological limits. Wild fish are one of the last remaining public, common resources. Effective policies and regulation are critical to sustaining the resource, fishing communities and the marine environment for current and future generations. A fisheries policy that prioritizes globalization and global markets at the expense of essential regulatory and socioeconomic policies is reckless and misguided.

1. Fisheries Trade and Tariffs

AS RECENTLY AS 1987, Canada was the world's leading exporter of fish. By 2011, Canada had dropped to eighth place among global fish exporters (see *Tables 1 and 2*). But the reasons underlying this reversal have little or nothing to do with the problem of foreign trade barriers. Instead, Canada's slippage resulted from other factors: the dramatic collapse of North Atlantic groundfish stocks due to mismanagement and overfishing (including by foreign fleets); the ensuing closure of the northern cod and other groundfish fisheries; and the rapid global growth of aquaculture, which vaulted countries such as Norway, Thailand and Chile ahead of Canada in total exports.

Today, Canada's main export destinations for fish and fish products are the U.S., the EU and Japan. In 2011, 61.8% (by value) of Canadian fish exports were destined for the U.S., 9.7% for the EU, and 6.2% for Japan. China is also a significant destination for Canadian fish (8.7% by value). China is a special case, however, because it imports Canadian fish not just for domestic consumption but for its fish processing industry, the world's biggest. Such fish, processed in China's low-wage export zones, is re-exported, including to Canada's most important market, the U.S., where it competes with and displaces other Canadian fish products.

Of Canada's major export markets, the EU maintains the highest tariffs on fish and fish products. In 2011, EU tariffs for fish averaged 10.84%, with higher tariff peaks of between 20 and 25% on certain processed fish.[12] Japan's

TABLE 1 Top 10 Fish Exporting Countries in 1989, Value in Thousands of U.S. Dollars

	Country	Value of Products Exported
1	United States	$2,532,468
2	Canada	$2,032,387
3	Thailand	$1,959,428
4	Taiwan	$1,801,174
5	Denmark	$1,754,000
6	Korea, Republic of	$1,677,897
7	Norway	$1,563,496
8	China	$1,039,516
9	Iceland	$1,026,990
10	Netherlands	$1,001,982

Source Fisheries and Agriculture Organization of the United Nations, Fishstat Plus

TABLE 2 Top 10 Fish Exporting Countries in 2009, Value in Thousands of U.S. Dollars

	Country	Value of Products Exported
1	China	$10,473,062
2	Norway	$7,107,237
3	Thailand	$6,248,891
4	Viet Nam	$4,311,738
5	United States	$4,225,019
6	Denmark	$4,002,236
7	Chile	$3,702,645
8	Canada	$3,262,738
9	Spain	$3,178,574
10	Netherlands	$3,162,079

Source Fisheries and Agriculture Organization of the United Nations, Fishstat Plus

average applied duty on fish and fish products is 5.5%.[13] Canadian fish and fish products enter the U.S. duty-free under the NAFTA. China's average applied duty is 10.9%[14], although Canadian-caught fish processed in China for re-export do not incur duties. By comparison, Canadian tariffs on fish and fish products are very low, averaging just 0.9%, with a maximum of 11%.[15]

Currently, foreign tariffs on cod and many other groundfish have limited impact on the east coast fishery because Canadian groundfish catches and export volumes have fallen so dramatically. Since the collapse of

TABLE 3 Average MFN Tariff Rates, 2011

	Lobster, Fresh	Lobster, Frozen	Shrimp, Fresh	Shrimp, Frozen	Crab, Fresh	Crab, Frozen	Halibut, Greenland, Fresh
U.S.	0%	0%	0%	0%	0%	0%	0%
EU	8.7%	11%	15%	13.2%	7.5%	7.5%	10.3%
Japan	4%	1%	2%	1%	4.8%	4%	3.5%
China*	7.5%	10%	9%	6.2%	10.5%	10%	12%
Korea	20%	20%	20%	20%	20%	17%	20%
Australia	0%	0%	0%	0%	0%	0%	0%
New Zealand	2.5%	0%	2.5%	0%	2.5%	0%	0%

	Halibut, Greenland, Frozen	Salmon, Atlantic, Frozen	Haddock, Fresh	Haddock, Frozen	Atlantic Cod, Fresh	Atlantic Cod, Frozen	Atlantic Cod, Dried
U.S.	0%	0%	0%	0%	0%	0%	0%
EU	10%	2%	7.5%	7.5%	12%	12%	13%
Japan	3.5 %	3.5%	3.5%	3.5%	10%	6%	15%
China*	10%	10%	12%	12%	12%	10%	16%
Korea	10%	10%	10%	20%	20%	10%	20%
Australia	0%	0%	0%	0%	0%	0%	0%
New Zealand	0%	0%	0%	0%	0%	0%	0%

* Numbers from 2009 (2011 not available)
Source World Trade Organization, United Nations Conference on Trade and Development, and International Trade Centre, World Tariff Profiles, 2011.

groundfish stocks and the closure of the Atlantic cod fishery in 1992, shellfish have displaced groundfish as Atlantic Canada's most important fish exports (see *Figure 1*). As a 2011 Fisheries Resource Conservation Council report observed: "During the 1980s, groundfish accounted for 63% by weight of Canadian landings of fish (including shellfish) from waters off eastern Canada. The 1990s saw a severe and rapid decline in groundfish landings and a steady increase in shellfish landings. During the first decade of the 2000s, groundfish accounted for just 16% of the landings."[16]

In recent years, demand for seafood — particularly wild fish — has risen beyond most countries' available domestic supply. Even in Canada, the ratio of domestically produced to imported seafood has shifted dramatically over the past two decades to the point that the country now imports almost as much fish at it produces domestically, including through aquaculture (See *Figure 2*).

FIGURE 1 Canadian Fish Exports by Species Group, Value in Canadian Dollars

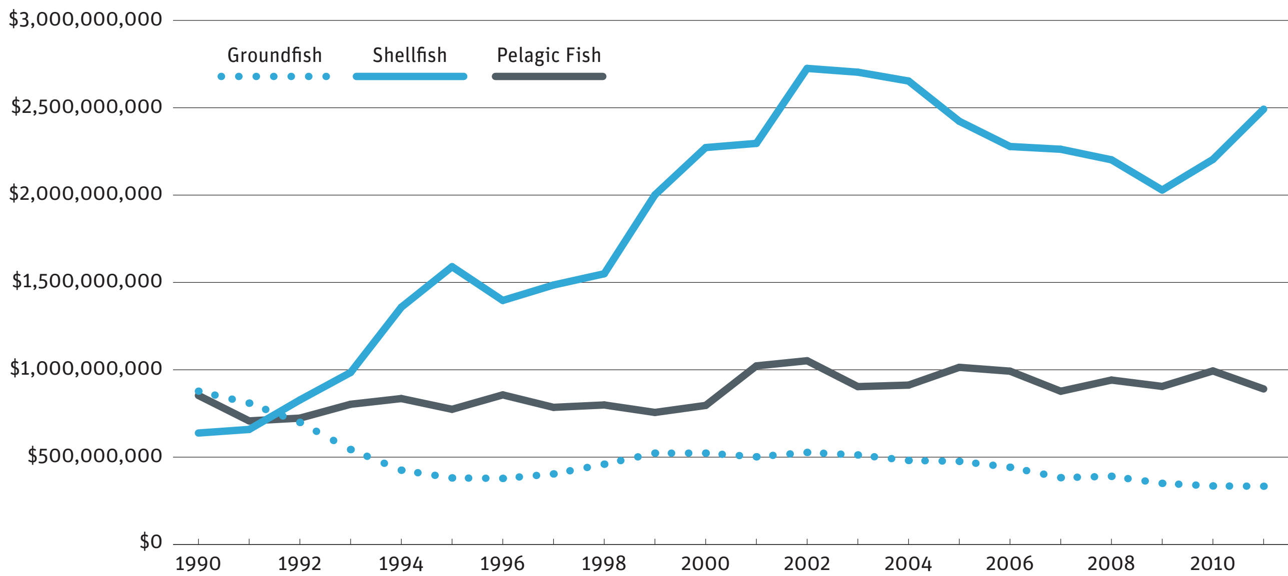
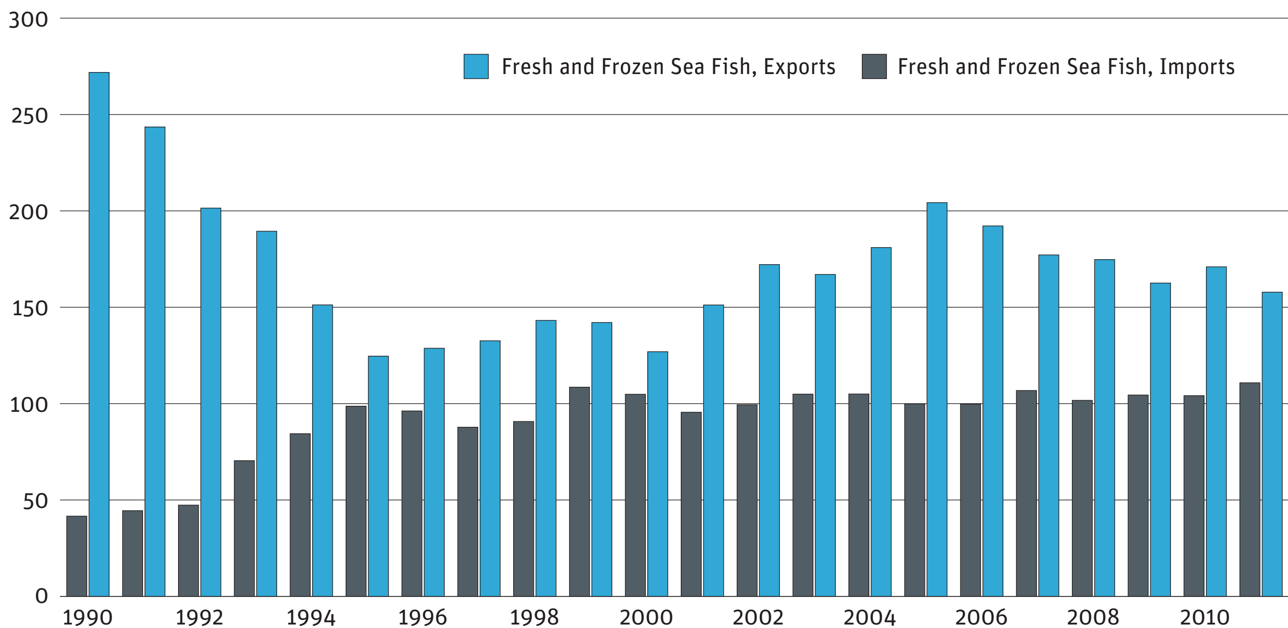


FIGURE 2 Supply and Disposition of Food In Canada, Annual, Thousands of Tonnes



Source CANSIM Table 002-0010

Rules of Origin In the Canada-EU CETA

Every bilateral or regional trade agreement includes *rules of origin*, establishing which goods qualify for preferential tariff treatment or duty-free status. Rules of origin set out the detailed conditions under which goods are deemed as "originating" in a specific country. Basically, they determine the economic nationality of a traded good. Without such rules, goods from third countries could be trans-shipped though the customs territory of a country (with little or no value added) simply to gain tariff-free access.

Under the CETA, tariffs on most fish and fish products entering Canada or the EU will likely either be eliminated immediately or phased out over a period of up to seven years. Tariff elimination, however, only applies to qualifying goods — that is, goods which originate in Canada or Europe.

In the case of Canadian fish being sold in the EU, the proposed CETA rules of origin stipulate that the fish must be taken "under the authority of a Canadian fishing license" and that the holder of that license must be either a Canadian national or an enterprise that is majority Canadian-owned, in order to receive preferential tariff treatment. In the case of EU fish being sold in Canada, the stipulation for preferential treatment is that fish must be taken by a vessel or factory ship that flies an EU member-state flag and is at least 50% owned by EU nationals or by EU-based corporations (See Annex 1, "CETA Fisheries, EU Consolidated Package, 25 October, 2012).

Canada has generally favoured liberal rules of origin because of its high degree of economic integration with the United States. Liberal rules of origin set the required levels of domestic content at fairly low levels, ensuring that Canadian products with significant levels of foreign content would qualify for preferential tariff treatment. In contrast, the EU tends to employ more restrictive rules of origin which set high levels of domestic content that must be met before a product qualifies as originating and therefore entitled to preferential tariff treatment.

To accommodate Canadian concerns that the EU's approach to rules of origin was too restrictive, the EU has apparently accepted a limited number of derogations to its strict rules of origin for fisheries products. For example, up to 2 million kilograms annually of cooked or frozen lobster may be exported duty-free from Canada to the EU. There is a similar proposed derogation for up to 5 million kilograms of prepared or preserved shrimp or prawns. As a result, up to these amounts of lobster and shrimp could be sourced from another country, such as the U.S., processed in Canada and still qualify for preferential treatment when entering the EU market.

In such a seller's market, the EU (which is the world's largest importer of fish and fish products and currently imports approximately 65% of the fish it consumes)[17] and other jurisdictions have voluntarily waived import tariffs on certain fish products. For example, since 2007, under its Autonomous Tariff Rate Quota program, the EU has voluntarily provided access to Canadian shrimp at reduced tariff rates into the European market. Since 2010, 20,000 metric tons of cooked and peeled shrimp annually enter the EU tariff-free.[18] The EU has also unilaterally relaxed its tariffs on certain groundfish, such as yellowtail flounder.

Tariffs on fish in Canada's major export markets are generally quite low and can be expected to fall in countries that depend mostly on imports to satisfy domestic demand. Nonetheless, straightforward agreements to reduce or eliminate tariffs in important markets could certainly create export opportunities for the Atlantic Canadian fisheries sector.

The 2009 trade agreement between Canada and the European Free Trade Association is an example of a tariffs-only agreement which enhanced trade and market access while leaving the signatory nations' regulatory authority over the fisheries largely unaffected.[19] It is basically a tariff-elimination agreement. It does not cover services, investment or intellectual property rights. In all these matters the Canada-EFTA agreement simply defers to the existing framework of WTO rules.

Two of the members of the EFTA — Norway and Iceland — are, like Canada, important fishing nations. The elimination of tariffs on fish and fish products under the deal enhances mutual opportunities for trade. But importantly for the fisheries, the absence of investment, services and other regulatory issues from the agreement leaves each jurisdiction free to manage its fishery as it chooses without fear of repercussions under the treaty.

In stark contrast to the EFTA treaty, the next generation of Canadian trade and investment treaties deal with a full range of sensitive matters beyond reducing tariffs. When examining the full impact of these agreements on fisheries, it is essential to put trade and tariff issues in context. Reducing or eliminating foreign tariffs can produce benefits. But with access to Canada's major export markets already largely open, these trade barriers are far from being the biggest challenge confronting the fisheries. Efforts to remove the remaining foreign trade barriers will bring diminishing returns.

Reducing foreign trade barriers should be a much lower priority than addressing more fundamental issues facing the fisheries: conservation, sound management and the sharing of benefits. In particular, protecting Canada's ability to regulate the fisheries for conservation purposes and to ensure that the benefits from fisheries are shared with independent fishers and coastal communities should be much higher priorities. Shifting emphasis from increasing the quantity of trade to enhancing the quality of trade is also a critical challenge. It is highly questionable whether Canadians should make significant concessions in ongoing trade and investment negotiations that might impair these higher priorities, in order to attain the modest and diminishing benefits available from reducing the remaining foreign tariffs on fish and fish products.

2. Fisheries Management, Regulation and Trade Treaties

THE BASIC PRINCIPLES of trade and investment treaties and fisheries regulation are like oil and water; they do not mix. Particularly in the areas of supporting the inshore fishery and coastal communities, the potential conflicts between trade and investment treaty rules and Canadian fisheries regulations are numerous and profound. For this reason, successive Canadian governments have endeavoured, through various exceptions and exclusions, to shelter domestic fisheries management policies from the full impacts of trade and investment treaties. There is a clear risk that aggressive demands to fully open foreign markets for Canadian fish exports through trade and investment treaty negotiations will provoke pressure to erode and gradually dismantle non-conforming domestic fisheries management policies.

It is therefore important to carefully analyse the nature and extent of inconsistencies between existing Canadian fisheries policies and regulations and the full application of international trade and investment regimes. Only through such analysis will Canadians be able to fully understand the importance of shielding key policies from these treaties, assess the costs and benefits of next-generation trade and investment agreements, and determine the most effective means of defending vital domestic fisheries interests.

A. Non-Discrimination and Foreign Ownership Rules

National treatment is a core principle of international trade treaties. It requires that governments extend the best treatment given to domestic goods, services or investors to their foreign counterparts. In the early years of the multilateral trading system, under the 1947 General Agreement on Tariffs and Trade (GATT), national treatment applied mainly to trade in goods. It ensured that once goods cleared the border, paid any applicable tariffs, and entered a country that they would be treated no less favourably than similar domestically produced goods.

In subsequent treaties, such as the 1994 NAFTA, national treatment obligations were extended beyond goods to cover trade in services and foreign investment. Since almost every government regulatory measure can be argued to affect foreign investors or cross-border service providers, this shift in coverage greatly expanded these rules' importance, scope and impact.

National treatment is a commitment to avoid discrimination on the basis of nationality; it is not a commitment to harmonize. In principle, governments remain free to adopt differing regulatory policies or standards, as long as these do not discriminate on the basis of nationality.

For the most part, however, the Canadian fisheries are restricted to Canadians. The Canadian — and particularly the Atlantic Canadian — fisheries are built around policies and regulations that favour Canadians and that therefore must be shielded from the application of non-discrimination rules in trade and investment treaties.

A.1 Fishing Licences Are Restricted to Canadians

Only Canadian citizens are eligible to hold fishing licences in Canada, which is a clear violation of the principle of national treatment. Moreover, in eastern Canada's small-boat fisheries, these individual licence holders must be both owner and operator of the fishing vessel. As a result of these policies, foreign individuals are completely prohibited from acquiring fishing licences in eastern Canada.

Canadian foreign investment rules are somewhat laxer for corporations (so-called "legal persons") than for individuals ("natural persons"). Foreign-owned corporations can acquire partial interests in Canadian fishing licences. In the off-shore sectors, foreign corporations can only hold a minority interest (up to 49%) in a corporation that has a fishing licence.[20]

Canadian fishing licences are held at the discretion of the crown. A fishing licence is "in no sense a permanent permission; it terminates upon expiry of the licence. The licensee is essentially given a limited fishing privilege rather than any kind of absolute or permanent 'right or property'."[21] If foreign interests acquire majority ownership of a corporation that holds a Canadian fishing licence the licence will not be reissued to that corporation when it expires (usually after 1 year).[22]

A.2 Vessel Registration

A further bulwark ensuring Canadian control of the fisheries is that all fishing vessels involved in a commercial fishery must be registered by the Department of Fisheries and Oceans (DFO). With few exceptions, only Canadian vessels can be registered.

One exception provides that where a Canadian vessel is disabled, foreign vessels may be leased for a period of up to two years. The leasing of foreign vessels, however, requires ministerial authorization and is subject to the following conditions:

- The leased foreign vessel must be crewed by either Canadian citizens or permanent residents, except where the Minister approves a specified number of non-Canadian crew members.
- The leased vessel is to be of similar catching capacity and must operate in accordance with the same fishing plan, and the catch must be delivered to the same plant or plants.
- Freezer trawlers may be leased to replace wetfish trawlers, but the processing (filleting) of traditional groundfish species at sea will not be permitted.
- All foreign vessels are required to carry an observer approved by DFO, at the expense of the licence holder.[23]

Of these conditions, the crew restrictions involve clear discrimination on the basis of Canadian nationality or residency and therefore are contrary to national treatment obligations.

Special rules and regulations also apply to large vessels, such as factory freezer trawlers (FFTs). For example, "FFTs must be registered immediately as Canadian vessels and crewed fully by Canadians."[24] There are also strict limits on how many FFTs may be operated. There are also restrictions on the

types of fish that such vessels are permitted to process and the geographical areas they are permitted to access. Only three groundfish factory freezer trawlers are permitted on the east coast, which, as will be discussed further, is a problematic restriction under the investment and services rules of the latest trade and investment treaties.

A.3 Canadianization of the Northern Shrimp Fishery

The high degree of incompatibility between Canadian fisheries management policies and the national treatment rules in trade and investment treaties is illustrated by policy efforts beginning in the late 1970s to achieve Canadian control of the northern shrimp fishery.[25]

After 1977, when Canada extended its fisheries jurisdiction to include waters up to 200 miles (322 km) from shore, it sharply curtailed fishing by foreign fleets within this Exclusive Economic Zone (EEZ).[26] In the case of northern cold-water shrimp, Canada undertook a thorough Canadianization, or domestication, of the fishery.

Prior to 1977, northern shrimp had been fished almost exclusively by factory freezer trawlers based in Denmark, Norway, and the Faroe Islands. After gaining control of these waters, licences were issued exclusively to Canadian entities, including several to "community based entities with no previous industrial fishing experience or processing capacity whose mandate was the social and economic development of a particular region or people". [27]

For environmental reasons that are still not well understood, in the 1990s the northern shrimp became more abundant and expanded their range to more southerly waters. The availability of northern shrimp benefitted the hard-pressed Newfoundland and Labrador fishing industry and since the mid-1990s a mid-shore fleet of over 300 boats has fished shrimp off the northeastern coast of the island of Newfoundland.

The process of Canadianization was not without difficulties, as explored by Allain in an exhaustive and insightful account of the domestication process.[28] The early regulations pushed Canadianization policies too quickly and certain enterprises encountered financial difficulties. Ultimately, however, the policy proved successful.

This success was the result of deliberate policy interventions aimed at ensuring Canadian control and maximizing local benefits. The domestication of the northern shrimp fishery demonstrates that such interventions can result in significant gains for local and national economies. Government policies that support local industry, harvesters and coastal commun-

ities can play a role in maximizing benefits from fisheries, even those that sell predominantly into highly competitive global markets.

The domestication experience also underlines "the potential of licensing community based socio-economic entities such as co-operatives as a means of redistributing the benefits of fisheries domestication to coastal communities."[29] Both Makivik, a corporation created to promote economic development for the Inuit people of northern Quebec, and the Labrador Fishermen's Union Shrimp Company Limited, were included in the initial group of licences for northern shrimp. Despite early obstacles and growing pains, these innovative, community-based and controlled fishing entities have flourished.[30] They underline the potential of such preferential policies to return "significant amounts of the profits from domesticated industrial fishing ventures to coastal communities for re-investment in local businesses including the inshore or artisanal fishery."[31]

In almost every aspect — licensing restrictions, ownership rules, crew requirements, preferences for community-based groups and processing restrictions — the policies that guided the Canadianization of the northern shrimp fishery — contradicted the key tenets of trade and investment agreements and would not have been possible if such treaties had fully applied.

A.4 Geographical Adjacency and Historical Dependence

Adjacency and *historical dependence* are bedrock principles of fisheries resource allocation in Atlantic Canada. These policies are intended to ensure that fish harvesters from communities located near a resource and those who have made their livelihoods in the fisheries for many generations get first consideration when fishing stocks are allocated.

Adjacency means that when allocating quota or granting new licences, DFO gives priority to people living adjacent to the resource. The Department is also mandated to strive to achieve a fair geographical distribution of benefits, particularly in the inshore fisheries. Prior to the 1970s, a licence, in principle, enabled the holder to fish anywhere in the entire Atlantic coastal region. But in responding to demands from fishers and coastal communities, the region was sub-divided into geographical sectors, and fishing licences were tied to particular districts.

This policy arrangement has achieved a regional distribution of benefits from the fishery, and promoted conservation by curbing the ability of licensees in one district to fish in another district. As a further means of ensuring that traditional fishing patterns were not disrupted, exceptions, or histor-

ical overlaps, were granted to fishers located near district boundaries who had traditionally fished in grounds located in adjacent districts. The policy also allows fisheries managers to recognize regional differences and variations in fisheries, and makes "it possible to expand or restrict the inshore fisheries in a particular region, without affecting other fisheries in regions where resource availability or social and economic conditions might differ."[32]

Similarly, the recognition of *historical dependence* gives priority in licensing and allocation to fishers and coastal communities that have a demonstrated attachment to the fishery and are dependent on the fishery for their livelihood. The principle of historical dependence is especially pertinent in the wake of major cuts in fisheries allocations, such as those following the collapse and closure of the cod fishery in Atlantic Canada. Traditional fish harvesters who were displaced by the moratorium, or who continued fishing at an allowable catch far below traditional levels, clearly deserve to be given priority when new quotas of fish that can be harvested sustainably become available.[33]

The principles of adjacency and historical dependence are both clearly contrary to the national treatment and non-discrimination provisions of modern trade and investment treaties. From a trade treaty perspective, they constitute discrimination based on nationality or local origin. Yet, for reasons of fairness and equity, these forms of positive discrimination are both desirable and morally compelling.

B. Domestic Processing Requirements

Provincial regulations in the Atlantic Provinces and Quebec encourage domestic processing by prohibiting the export of unprocessed fish. For example, under its Fish Inspection Act, the Newfoundland and Labrador government operates a licensing system that regulates the purchasing, processing and trading of fish. Unprocessed fish cannot be exported from the province without government approval. Similar rules are on the books in the other three Atlantic Provinces and in effect in Quebec. This is another area where key fisheries regulations clash with international trade agreements, specifically with the general prohibition of import and export restrictions found in trade treaties.[34]

Such provincial regulations are designed to maximize socio-economic benefits from processing, enhance value-added prior to export, and maintain employment in the processing sector. These controls have been a valu-

able policy tool, especially in Newfoundland and Labrador, where there have been repeated requests by major companies to send Canadian fish overseas for processing. While the rules are enforced flexibly and exemptions are often granted, the regulations nonetheless provide provincial governments with critical leverage to influence the investment and production decisions of large fish processing companies.

In certain fisheries permission has frequently been granted to export unprocessed or minimally processed fish. Such exemptions sometimes make economic sense in instances where the fresh frozen product can fetch a higher price than the locally processed product. But where fish or shellfish are destined for processing, provincial governments have usually been reluctant to grant export permission, since processing facilities and workers are operating well below capacity in most parts of Atlantic Canada. In some instances, temporary exemptions are granted for a quantity of fish in return for commitments to process a portion within the province.

In a recent example, the government of Newfoundland and Labrador initially turned down what it called an "unprecedented request" by Ocean Choice International (OCI) for a permanent exemption from minimum processing requirements that would allow the company to export yellowtail flounder and redfish without any restrictions. The company had sought permission in order to export flash-frozen, whole fish, some of which was destined to China for further processing.[35] In January 2012, the provincial government refused, highlighting the need to "ensure the long-term security of resources for the benefit of future generations of Newfoundlanders and Labradorians."[36] The OCI application was especially controversial, because the company had recently closed two processing plants in the province[37] and was involved in a bitter labour dispute with unionized trawlermen who worked on one of the company's fishing vessels.[38]

On December 21 2012, the provincial government announced that OCI had received conditional export processing exemptions for up to 75 per cent of its yellowtail flounder catch. In return, the company agreed to process the remaining 25 per cent at its plant in Fortune NL, which will create a minimum of 110 full-time jobs for at least five years. A separate agreement permits OCI to export all of its redfish quota without local processing, subject to certain conditions.

OCI's pressure tactics sharply divided the public, the union, the industry and political parties. While some plant workers and local politicians in Fortune support the company's bid for an exemption, many others, including the provincial fishermen's union, are strongly opposed. Whatever the

merits of the decision the provincial government made in this particular matter, the key point to bear in mind is that without the minimum fish processing regulations, the provincial government, and the citizens of Newfoundland and Labrador, would have no role or leverage at all. Such decisions would be left to companies such as OCI to make with no consideration for any other factors than how it affects their corporate bottom line.[39]

These provincial controls have been repeatedly challenged by fish processing companies in the domestic courts. International trade falls within exclusive federal constitutional jurisdiction and, over the years, a number of corporate plaintiffs have urged the courts to strike down the processing restrictions as *ultra vires* — that is, beyond the legal and constitutional authority of provincial governments.[40]

The Canadian courts, however, have consistently upheld these measures as a valid exercise of provincial authority. Even though the federal government has constitutional jurisdiction over both fisheries management and international trade, the courts have been "clear that, once caught, fish becomes a commodity which is subject to regulation under the provincial head of power over property and civil rights in the province."[41] The courts have generally taken the view that while "…the province has no jurisdiction to control exports *per se*, [it] may do so validly where such control is necessarily incidental to an otherwise valid scheme for regulating fish processing" and that "…any incidental effect on the federal jurisdiction over trade and commerce will not affect the constitutional validity of a licensing scheme having a core character that falls within provincial jurisdiction."[42]

Under Canadian law, then, the provinces have clear authority "to regulate the processing of fish in the province, even where the processed product is destined for the export market."[43] Despite recurring legal challenges from disgruntled companies, such legislation is constitutionally valid.

Unfortunately, the situation is not nearly as reassuring under international trade rules. Provincial restrictions on the export of unprocessed fish are at odds with both the national treatment rules and the prohibition of "import and export restrictions" found in most trade agreements. Accordingly, Canada's practice has been to exempt these provincial fish export regulations in all its bilateral and regional trade agreements. The NAFTA, for example, exempts controls by the Atlantic Provinces and Quebec on the export of unprocessed fish as they existed on August 12, 1992 (NAFTA Annex 301.3) from the application of the national treatment (NAFTA Article 301) and the export and import restrictions rules (NAFTA Article 309).[44]

But Canada has no such exemption for fish processing requirements under the WTO's General Agreement on Tariffs and Trade. Indeed, in the mid-1980s the U.S. successfully challenged Canadian regulations restricting the export of unprocessed herring and salmon from Canada's west coast under the GATT 1947, the predecessor to the GATT 1994, which was incorporated into the newly created World Trade Organization.

The panel ruled that Canada's processing regulations were prohibited under GATT Article XI, The General Elimination of Quantitative Restrictions. The GATT panel also rejected Canadian government arguments that the export restrictions, even though they impinged on trade, were "related to the conservation of exhaustible natural resources" and therefore justified under the general exceptions in the GATT Article XX.[45]

Despite their vulnerability, the Atlantic Canadian export processing restrictions have never been challenged under GATT or WTO rules. Most of Canada's trading partners that might have an interest in pursuing this issue have probably been reluctant to bring such a legal challenge for fear of provoking a backlash against their own restrictive measures. A similar situation prevails with other natural resources, such as raw logs, where U.S. commercial interests frequently object to BC log export controls, but the U.S. government has been reluctant to bring a trade treaty challenge because some U.S. states have their own raw log export restrictions.[46]

Each successive set of major bilateral and regional treaty negotiations, however, brings these rules under fresh scrutiny by Canada's negotiating partners.[47] So far, Canada has been able to exclude these measures under its previous bilateral and regional treaties, including the NAFTA. Recent news reports and leaked documents indicate the EU is pushing hard for Canada and the provinces to eliminate its domestic processing requirements under the CETA.[48] The EU is specifically targeting minimum processing requirements for fish maintained by Quebec and Newfoundland and Labrador.[49] This matter will likely be among those highly sensitive issues to be resolved at the political level at the very end of negotiations.[50]

If these minimum processing requirements are not abolished as a result of the CETA, they will certainly be attacked again in the Trans-Pacific Partnership negotiations. New Zealand and Chile, in particular, have been two of the most vociferous exponents of the full liberalization of fisheries under international trade and investment rules. Tim Groser, the current NZ trade minister and a driving force behind the TPP, was actually a member of the 1988 GATT panel which struck down the west coast processing regulations. Given the TPP members insistence on a high-standards agreement,

Canada's junior negotiating status in the talks,[51] and the possible inconsistency of the export processing restrictions with existing WTO rules, it will be very difficult for the Atlantic Canadian export processing restrictions to survive a final TPP agreement intact.[52]

C. Trade in Services Rules

C. 1 The meaning of "market access" restrictions in services

The rules governing cross-border trade in services are among the most novel and intrusive features of "state-of-the art" trade and investment treaties. They go far beyond a basic commitment to treat foreign services and investors equally to domestic ones.

The market access rules in services prohibit six types of government measures.[53] In covered sectors, there must be no limits on:

- the number of service suppliers
- the total value of service transactions,
- the number of service operations, or
- the number of natural persons that may be employed in a sector.

Such limits are prohibited, whether expressed "in the form of numerical quotas or the requirements of an economic needs test."[54]

The market access rules also prohibit restrictions on the types of legal entities through which suppliers may supply a service and limits on foreign capital participation. Therefore, in sectors covered by these obligations, public policies cannot favour small, owner-operated businesses, cooperatives or not-for-profit enterprises over large corporations (so-called "legal persons"). Nor can governments limit foreign ownership. Finally, governments "shall not maintain or adopt" any of these broad categories of measures "either on the basis of a regional subdivision or on the basis of its entire territory."[55]

As previously noted, national treatment requires that foreign goods, services, investments, service providers and investors be extended the best treatment given to domestic goods, services and investments. In principle, national treatment allows governments to adopt the policies they choose, so long as the policy measure does not discriminate against foreigners. By

contrast, the so called “market access” rules prohibit certain types of policies, whether they are discriminatory or not.

These rules, first established in Article XVI of the WTO’s General Agreement on Trade in Services (GATS), are being expanded in scope and application through ongoing bilateral and regional trade treaty negotiations. For example, whereas the GATS is a bottom-up agreement, applying only to those sectors specifically included by a member government, both the CETA and the TPP are intended to be top-down agreements that cover all sectors and measures unless they are expressly excluded by a signatory government.[56] [57]

C.2 The Application of Market Access Rules to Fisheries

There are two main reasons why the rules governing trade-in-services might affect the fisheries, which are normally thought of as resource or goods-producing sectors, not as service ones. First, the rules on services in the latest generation of trade and investment treaties intersect and overlap with the rules on goods. Second, many fisheries-related activities, and even some fisheries themselves, are classified as services for the purposes of international trade and investment treaties.

In practice, services and goods are virtually inseparable. Most commercial goods, including fish and fish products, embody some services (such as financing or inspection) and must be sold (wholesaling, retailing), marketed (advertising) and distributed (transportation). These closely related activities are classified as services. As previously discussed, provincial restrictions on the export of unprocessed fish are vulnerable to challenge under the WTO. In such a dispute, the complainant would almost certainly argue that they also violated the GATS, for example, by interfering with the distribution and retailing of fish, which are fully covered services under Canada’s WTO GATS commitments.[58]

The second important reason to pay careful attention to the trade-in-services rules is that some fisheries activities are classified as services under international trade agreements. While fishing itself is normally considered a goods-producing sector, there is an important category of fishing-related activities classified as “services incidental to fishing.”[59]

Canada has not yet made commitments covering “services incidental to fishing” in its existing trade treaties. Nor do any of its existing treaties clearly define which fishing and fishing-related activities fall within the category. But because all sectors are on the table in current negotiations, it is important to understand the implications of making commitments in this sector.

The classification system for services used by Canada in most of its existing trade treaties (the UN CPC Prov) does not contain explanatory notes for "services incidental to fishing." It is generally accepted by trade officials and experts, however, that when fishing is done on "a commercial basis" that it is considered a service. For example, where a fishing vessel is leased, rather than operated by its owner, its activities are classified as a service. Fish inspection and protection services, along with fish hatcheries and similar support services, are also classified as "services incidental to fishing."

The most detailed explanation of what falls within this category is found in the United Nations Statistics Division, Classification Profile: ISIC Rev.3 (0500).[60] In the document, "services incidental to fishing" include the following activities:

- Fishing on a commercial basis in ocean, coastal or inland waters.
- Taking of marine or freshwater crustaceans and molluscs.
- Fish farming, breeding, rearing, cultivation of oysters for pearls or food.
- Gathering of marine materials such as natural pearls, sponges, coral and algae.
- Processing of fish, crustaceans and molluscs aboard the fishing boats.
- Operation of fish hatcheries producing oyster spat, mussel and other molluscs seeds, lobsterlings, shrimp post-larvae and other crustaceans seeds and fish fry and fingerlings.
- Growing of laver and other edible seaweeds.
- Service activities related to marine and freshwater fisheries and to operators of fish hatcheries or fish farms.

According to this classification system, the shellfish industry — the healthiest sector of the Atlantic Canadian fisheries today — is a service industry and falls under the services rules of international trade treaties.

To make matters worse, in the most recent iterations of Canadian trade and investment treaties, including the draft CETA investment text, the market access restrictions have been moved from the services to the investment chapter. This shift greatly expands their coverage. The result is that the restrictions apply to policies affecting *all* investors, whether they provide services or goods. This means that not only the shellfish industry, but all sectors of the fishing industry, are, in principle, captured by these restrictions.

This is a prime example of how subtle changes in obscure trade treaty terms, which are rarely explained by negotiators and understood only by experts, can have important public policy impacts.

This expanding legal reach of market access restrictions could have serious legal implications for the future of the Atlantic fisheries under international trade and investment agreements. The prohibitions in the market access rules of the services and investment chapters conflict with vital policies that preserve the independence of the inshore fisheries in Atlantic Canada.

C.3 Preserving the Independence of the Inshore Fisheries

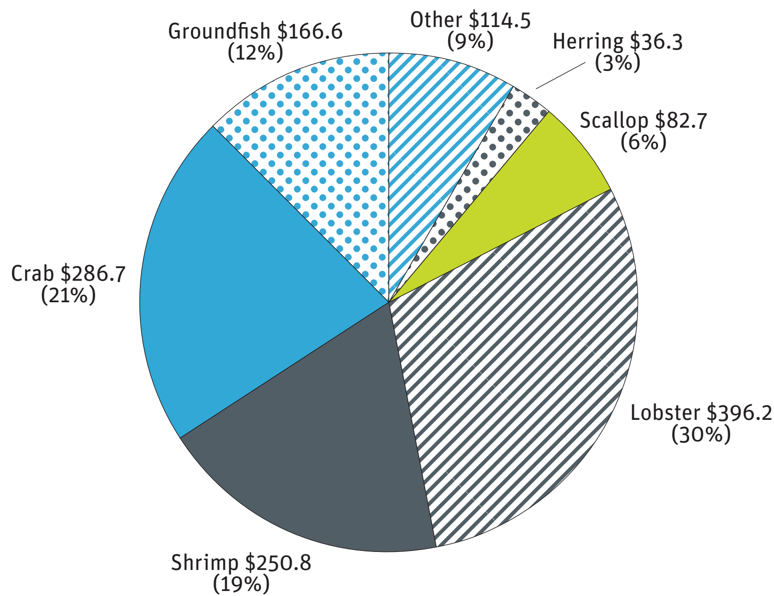
The independent inshore sector is the most important sector of the Atlantic Canadian fishery and a major contributor to the regional economy. It consists of over 10,000 independent licence holders, all of whom own and operate their own boats. These independent fishers directly employ an additional 20,000 workers as crew members.[61] As a broad-based umbrella group representing most of the Atlantic Canadian inshore and mid-shore commercial fleet recently observed:

> In 2010 our owner-operator fleets landed $396 million in lobster, $280 million in snow crab and $163 million in shrimp. The landed value of these three species alone accounted for 63% of the total value of Atlantic Canada's fisheries. When you add in the landed value of small and large pelagic (from herring to tuna) and groundfish it is clear that our fleets are collectively the dominant stakeholders in the Atlantic fishery.[62]

The diversified character of the inshore sector has significant economic benefits throughout the region. As the organizations representing the independent core fleet sector further emphasized:

> Most of the hundreds of millions of dollars in landed value that we generate…is spent in our communities: buying in our communities, hiring in our communities and supporting them in numerous other ways. Our independent fishing enterprises create healthier local economies that are diverse and not single industry in structure. Corporate fishing fleets on the other hand tend to be centralized in a few larger harbours and tend to be vertically integrated with supply chains outside the communities from [which] they harvest the resource (industrial aquaculture is also increasingly adopting this approach).[63]

FIGURE 3 2010 Atlantic Coast Commercial Landings, By Value In Millions of Dollars



Source Department of Fisheries and Oceans Canada

Because the inshore fishery tends to be decentralized and geographically dispersed, it plays an important role in widely distributing the benefits of the fishery among people in the Atlantic region and in maintaining the economic viability of many coastal communities.

The decentralized character of the inshore fisheries in eastern Canada is a deliberate result of public policy. Otherwise, the Atlantic Canadian industry would have gone much further in the direction of corporate concentration and centralization which has characterized other fisheries around the world. These public policies reflect the importance of the inshore sector to the health of Atlantic Canadian coastal communities, the organizing strength of the inshore sector and its deep support within the region.

C.4 Fleet Separation and Owner-Operator Policies

The *fleet separation* and *owner-operator* policies are the two main measures that ensure the independence of the inshore fishery sector in Atlantic Canada and eastern Quebec. Both are potentially at risk from the current push to expand Canada's international trade and investment treaties.

The purpose of the *fleet separation* policy is to keep ownership of the fish harvesting and processing sectors separate and distinct. The rationale for the policy is that allowing processors to own fishing licences weakens independent fishers' bargaining power and gives processors too much control over the price. Such a power imbalance would reduce independent harvesters to the status of contract workers for the big fish buyers. Accordingly, the fleet separation policy prevents corporations, including processing corporations, from acquiring the fishing licences of vessels less than 65 feet (20m).

The second key safeguard for independence of the inshore fishery is the *owner-operator* policy. This policy, which is closely related and complementary to fleet separation, requires the holders of fishing licences on vessels less than 65 (20m) feet to be present on their vessels and to personally fish their licences. This prevents investors outside the fishery from buying fishing licences and hiring others to do the fishing. On Canada's west coast, where the owner-operator policy has been abolished, fishing licences have been bought up by investors and large corporations. This has driven the cost of acquiring a licence beyond the reach of many traditional fishers and reducing those who operate the vessels and do the actual fishing to wage or contract workers.[64]

Fleet separation and owner-operator policies are well-established fisheries management tools, but they are not enshrined in legislation or formal regulation. As such, they are highly vulnerable to change or erosion by the federal government of the day. The federal government recently provoked great concern among Atlantic Canadian inshore fishers and coastal communities by undertaking a complete review of Canadian commercial fisheries policy. This exercise, announced by DFO in January 2012, caught many in the sector and the public by surprise. It was launched without advance notice, and with extremely tight timelines for public input.[65]

The federal discussion document, entitled *The Future of Canada's Commercial Fisheries,* championed "modernizing fisheries management" but gave few details about the federal government's plans.[66] It caused alarm in the inshore fishery because unlike previous federal policy statements, it did not affirm the importance of the fleet separation and owner-operator policies.

Indeed, in the eyes of many, it focused narrowly on increasing global competiveness and corporate profitability at the expense of protective regulation. A submission by a broad-based coalition of 36 organizations representing inshore and mid-shore fisheries groups in Atlantic Canada and Quebec warned:

> We find that much of the document is written in the ideological code of deregulation. This is alarming to us as it appears as a barely veiled attack on the Owner-Operator and Fleet Separation policies and a justification for hobbling even further our country's dwindling fisheries science capability.[67]

Others noted that the discussion document does not even mention coastal communities, let alone affirm their vital role in the Canadian fisheries.[68]

In September 2012, after months of uncertainty and an outpouring of concern from inshore fishers, the federal fisheries minister announced that the fleet separation and owner-operator polices would remain intact.[69] Organizations representing the inshore fishery expressed their relief, but left little doubt that they would continue to be vigilant and credited the unprecedented organizing by the sector as the catalyst to the federal minster's declaration.[70]

Seafood processors, who had been pushing the government to abolish these policies, voiced their disappointment at the federal government's climb-down.[71] Over the years, processors have repeatedly challenged or attempted to circumvent the fleet separation policy. Their continuing hostility to these policies means that future challenges are still likely.[72]

Trade treaties are frequently used to pursue unpopular domestic policy reforms that are difficult to achieve through democratic political processes.[73] External pressure can be enlisted to stealthily undermine policies that, if directly challenged, would inflict too high a political cost on a government.

Both the owner-operator and fleet separation policies are at odds with the services and investment obligations in Canada's imminent trade and investment treaties. This was not the case under previous treaties, including the NAFTA. As previously noted, the new, strengthened "market access" obligations stipulate that governments must not maintain or adopt measures which "restrict or require specific types of legal entity or joint venture through which an investor may perform an economic activity." But the explicit purpose of fleet separation is to bar corporations from acquiring licences. Similarly, the owner-operator policy favours ownership by "natural persons" (fishers) rather than "legal or juridical persons" (that is, corporations).

In principle, both these policies violate the trade and investment treaties that Canada is currently pursuing. It is also essential to grasp that these market access obligations prohibit any such measures, not just those that discriminate against foreigners. In other words, the fleet separation and owner-operator policies would be trade-treaty illegal whether or not a for-

eign corporation actually obtains, or tries to obtain, a Canadian fishing licence and whether or not foreign corporations are even present in the Canadian fishery. Consequently, the utmost care must be taken to fully exclude these fisheries investment restrictions from coverage.

C.5 Limited Entry Licensing

Limiting entry by restricting the number of licenses is a well-established fisheries management tool. By controlling the number of boats or license holders, regulators seek to limit fishing effort and to conserve fish.[74] Limiting entry can also improve the economic prospects for existing license holders and make a fishery more economically viable.

The traditional means of limiting entry to a fishery is strictly controlling the number of licenses. Generally, new entrants can only gain access to an existing fishery by having a license transferred to them by an existing license holder. This policy is employed, for example, in the Atlantic Canadian lobster fishery, where the number of fishing licenses is limited without restricting the overall catch.

Such a policy is, in principle, inconsistent with the full application of the services and investment obligations in the latest trade treaties. As previously noted, market access rules prohibit governments, in committed sectors, from limiting the number of service suppliers[75] or investors. Such numerical limits are prohibited, whether or not they discriminate against foreign service suppliers and investors.

A second form of limited entry, setting a total allowable catch (TAC) and dividing the TAC into quotas which permit holders to harvest a given quantity of fish — can be consistent with modern trade and investment treaties.[76] Such systems have been implemented in certain Canadian fisheries, notably in the Pacific fisheries (e.g. halibut) and, since 1982, in the large-vessel, offshore groundfish sectors of the Atlantic fishery.

In principle, such quota systems are consistent with modern trade and investment treaties (including the market access rules in services) so long as the individual quotas are allocated through market means and on a non-discriminatory basis. In practice, however, only majority Canadian-owned corporations can hold a fishing license. It is therefore still necessary for these measures to be reserved against national treatment. Unlike traditional limited entry systems, however, a reservation against the "market access" rules is not required.

Discouraging limited entry licensing systems is another way in which the latest trade and investment treaties are skewed towards market-based systems for allocating property rights to natural resources, including fish. Such systems, which are strongly favoured by free-market economists, allow the corporate concentration of property rights to fish and tend to marginalize small-scale and inshore fishers. This inherent bias towards neoliberal models for allocating fishing rights illustrates how far today's trade and investment treaties have strayed from bread-and-butter international trade issues, to embody laissez faire, pro-corporate economic philosophies and interests.

D. Fisheries Subsidies

Most developed countries, including Canada, provide direct or indirect financial support to their fishing industry. Subsidies that reduce fishing effort, for example, by buying out licenses or permanently retiring vessels, can be beneficial in conserving fish stocks. Support to sustainable — especially small-scale or artisanal — fisheries can also bring social, environmental and/or economic benefits.

At the same time, there are harmful fisheries subsidies that contribute to overcapacity and overfishing. Subsidies for large-scale industrial fishing, particularly to support distant water fleets, have contributed to the depletion of fish stocks and disruption of small-scale and artisanal fisheries. Globally, today's industrial fisheries are characterized by too much fishing power targeted at dwindling stocks. Fisheries scientists call the process of serial overexploitation of larger, higher-value species, then moving on to smaller, lower-value species *fishing down* the food web.[77] Curbing harmful fisheries subsidies, which exacerbate this unsustainable situation, is a critical conservation issue.

Harmful fisheries subsidies raise significant international trade issues. Subsidized fish can be sold at lower prices, reducing competitors' shares in the subsidizing country's domestic and export markets. As a technical paper for the UN Food and Agriculture Organization observes, a subsidized fleet that targets straddling or highly migratory stocks also leaves other countries with fewer fish to harvest sustainably.[78]

Regulating fisheries subsidies through international agreements is a complex and much-debated matter. But there is a broad consensus that the most harmful subsidies are those that finance distant water-fleets. Dis-

Port Access Under the CETA

The European Union has nearly attained its long-standing goal of guaranteeing access for its fishing vessels to Canadian ports. Under the CETA, Canada has reportedly committed to grant EU fishing vessels access to Canadian ports on a most-favoured nation basis (See Appendix 1).

Vessels should always be admitted to ports when they or their crews are in peril. But fishing vessels are also sometimes denied access to Canadian ports if they, or other vessels from their country, are found to be fishing illegally in international waters or suspected of breaking other fisheries conservation rules.

For example, Canada and Norway in 1995 agreed to "allow the arrest of each other's vessels if found fishing illegally outside of each other's 200-mile zones. They also agreed to bar any country's trawlers from their ports if the ships violated the other country's rules."[110]

In fact, Canada only re-opened its ports to EU fishing vessels in 1996 after nearly a decade during which they were denied access following the so-called turbot wars. Granting guaranteed port access could make it more difficult for Canadian authorities to sanction European vessels suspected of flouting conservation rules and to pressure European domestic authorities to take action.

tant-water fleets ply the high seas and fishing grounds far from their country of origin, or fly flags of convenience from lightly regulated jurisdictions.

With the availability of more potent fishing technology, such vessels have exploited stocks in formerly little-fished areas, including the deep sea bottoms and polar regions. Fish species in these once hard-to-reach areas and their associated ocean ecosystems are especially vulnerable to disruption by bottom trawling and other destructive fishing techniques.[79]

The depletion of their national coastal fishing grounds has also propelled the distant water fleets of major fishing powers — notably, the EU, Japan, China, and Korea — to range further and further afield on the world's oceans. Many of these fleets receive significant direct and indirect financial support from their home governments. In fact, fisheries experts and economists have estimated that the bottom-trawl fleet fishing on the high seas would not be financially viable without such subsidies.[80]

Finally, since 1977, as coastal nations have asserted control over their exclusive economic zones, a handful of developed countries with distant water fleets have negotiated fisheries access agreements with developing countries. These agreements grant industrial fleets based in developed countries access to fish within the developing countries' exclusive economic zones, usually in return for development aid and cash transfers. Such access agreements

allow developed countries, in effect, to export their fishing overcapacity to developing countries.[81] This causes hardship to local and artisanal fisheries.

Many of Canada's new wave of trade and investment treaty negotiating partners are host to the world's largest distant-water fleets. As noted, these fleets have a deleterious impact on Canadian fisheries by depleting straddling and migratory stocks, degrading vital ocean ecosystems, and displacing Canadian fisheries products in foreign markets.

Foreign distant water fleets, especially European vessels, have a long history of overfishing in or adjacent to Canadian waters. Even after the collapse of many North Atlantic groundfish stocks, European fleets continued to fish on the nose and tail of the Grand Banks and the Flemish Cap, which fall outside Canada's 200 mile exclusive economic zone.

Certain European national fishing fleets are heavily subsidized. A recent two-year investigation uncovered evidence that the Spanish fishing industry is heavily subsidized by European taxpayers, despite a history of flouting conservation rules and breaking laws.[82] The October 2012 report estimated that the Spanish fishing industry had received €5.8 billion ($CAD 7.5 billion) in subsidies from the EU and Spanish governments since 2000.[83]

There is little hope, however, that Canada can succeed in disciplining, let alone eliminating, such harmful fisheries subsidies through bilateral trade and investment negotiations. Canada does not have a distant water fleet, so there is little incentive for others to agree to, in effect, one-sided disciplines.

Moreover, Canada is simply not big enough to achieve meaningful concessions in one-on-one negotiations with far larger and more powerful nations. In the CETA negotiations, for example the EU had proposed a complete exemption for fisheries subsidies from the subsidies disciplines of the agreement.[84] The current text merely provides for consultations if a Party considers that the other Party's government support or fisheries subsidies are adversely affecting their interests.[85] Accordingly, there is no prospect that the CETA will contain effective limits on, let alone reductions to, harmful European fisheries subsidies, including those for its distant water fleets.

Even in multilateral negotiations at the WTO and the United Nations, it has been difficult for the rest of the international community to pressure the handful of developed countries that host distant water fleets to accept strong disciplines on harmful fisheries subsidies. But for a mid-sized country such as Canada, multilateral negotiations provide by far the best prospect of success.

The TPP agreement could well include binding disciplines on fisheries subsidies. None of the countries in the TPP have a large distant-water fleet.[86]

But in the TPP talks, the risk is that the obligations will go too far and restrict almost all fisheries subsidies, not just harmful ones. In WTO talks on fisheries subsidies, New Zealand and Chile, both influential members in the TPP, have led the charge for a broad prohibition of subsidies, with limited exceptions.

Such top-down restrictions could adversely affect support for the Canadian inshore fishers, including differential rules for how employment insurance treats workers in seasonal industries and marketing support for sustainably harvested fisheries products. Such an across-the-board prohibition of subsidies would further advantage the better financially resourced, corporate-controlled industry over the inshore sector.

E. Co-management

Co-management can be defined as "the sharing of power and responsibility between government regulators and local resource users."[87] Co-management has become a prominent theme in Atlantic Canadian fisheries policy over the last two decades, as a result of the discrediting of hierarchical fisheries management models and practices in the aftermath of the collapse of the northern cod.

Many conservationists, critics of industrial fishing and fish harvesters argue that closely involving coastal communities and local harvesters in co-managing stocks is the key to achieving both ecological sustainability and economic viability. This is particularly true, they stress, in the case of depleted fishing stocks that need to be carefully rebuilt, and may never be capable of withstanding the disproportionate fishing power that can be exerted by modern industrial fishing fleets.

Effective conservation calls for highly refined and regulated fishing efforts, based on in-depth knowledge of how fish reproduce and survive in the wild and detailed understanding of fishing grounds and populations.[88] It has been forcefully argued that such understanding can best be achieved by a partnership between scientists, fisheries regulators, and "a hyper-local fleet of knowledgeable small-scale fishermen harvesting from discrete populations of [fish] in as precise a way as possible."[89]

Co-management should not be confused with industry self-regulation or outsourcing government's regulatory responsibilities, although co-management rhetoric can sometimes provide cover for deregulation. Genuine co-management involves the *sharing* of power and responsibility between

arms-length regulators, independent scientists, and those who make their livelihood in the fisheries. It entails strong state regulatory capacity and high levels of public investment in independent scientific expertise, along with industry, primary producer and coastal community involvement in policy-making.

Unfortunately, each of these three essential pillars of co-management is being undermined by recent federal government policy decisions.

While the federal government continues to pay lip service to conservation goals, its actions are seriously undercutting the financial resources required for scientific research and assessment, without which effective conservation and management are impossible. As a result of budget cuts, over 1,000 DFO employees have been notified that their positions are affected and an estimated 350 positions could be permanently eliminated in Atlantic Canada.[90] Field offices, fish hatcheries, departmental libraries and research stations are facing closure.[91] These ongoing cuts in science, research and regulatory capacity at DFO are hollowing out one of the indispensable partners in any viable co-management strategy and augur poorly for the future of the Atlantic fisheries.

There is also worrying evidence of a strong bias towards deregulation, including the weakening of DFO's authority to protect fish habitat, through amendments buried in the bill implementing the 2012 federal budget. The 400-page omnibus legislation implementing the 2012 federal budget amended dozens of unrelated pieces of federal legislation, including changes to environmental regulations and the Federal Fisheries Act. The controversial legislation, roundly criticized by both fisheries organizations and the environmental community across the country, gave broad discretionary powers to Cabinet and the Environment Minister to make decisions related to fish habitat protection, environmental assessment and endangered species.

The omnibus bill also included multiple amendments that weakened the federal Fisheries Act. Previously, the Fisheries Act prohibited "harmful alteration, disruption or destruction of fish habitat." Under the new Act, only carrying out works or activities that result in "serious harm" to fish is prohibited.[92] Serious harm is defined as the "death of fish or any permanent alteration to, or destruction of, fish habitat."[93] Furthermore, protection is now limited to "serious harm to fish that are part of a commercial, recreational, or Aboriginal fishery, or to fish that support such a fishery and their habitat," rather than, as previously, to all fish and all fish habitat in Canada.[94] In other words, the temporary alteration or destruction of fish habitat is not prohibited unless it can be shown to have resulted in the death

of "useful" fish. The amendments also gave broad powers to the Minister under Section 35(2) to exempt authorized work or activities from the "serious harm" prohibition.[95]

Finally, the federal government's commitment to co-management has been called into question by other recent developments. In October 2011, the government announced the disbanding of the Fisheries Resource Conservation Council (FRCC). This advisory body was created in 1993 as a forum where all sectors of the fishing industry, DFO regulators, and independent scientists could meet to discuss, analyse and develop conservation strategies for the Atlantic fisheries.

Co-management is no panacea. As experts caution, in some instances it can even justify the exclusion of marginalized groups, reinforce the power of local elites, lead to regulatory capture and be "used as a pretext to co-opt community management and extend the power of the state."[96] A leading authority suggests that to counter these potential abuses requires a firm grasp of all the essential ingredients of successful co-management: "In addition to legitimacy and compliance, justice, equity, and empowerment are also relevant because the basic idea behind co-management is that people whose livelihoods are affected by management decisions should have a say in how those decisions are made."[97]

From this perspective, authentic co-management necessarily involves prioritizing local control and participation.[98] The central emphasis on sharing control with *local* harvesters, coastal communities, and community-based fleets puts co-management at odds with trade and investment treaties, which aim to root out such geographical discrimination. Co-management is increasingly finding itself between a rock and a hard place. The expanding scope of these treaties, the ever-lengthening series of bilateral and regional negotiations, and the steady erosion of safeguards for non-conforming fisheries policy and regulation exert long-term, indirect pressure on the foundational principles of co-management. At the same time, it is coming under more direct threat through cutbacks, deregulation and the dismantling of collaborative institutions.

F. Reservations For Fisheries Measures

Reservations are country-specific exceptions which protect otherwise non-conforming measures from the investment and services obligations of trade treaties. Because of the high degree of inconsistency between domestic fish-

eries policies and international trade and investment treaty rules, strong exceptions are critical. For many of Canada's vital federal and provincial fisheries policies, such reservations are the last line of defence from any challenge under the investment and services rules of these treaties.

Effective reservations are especially important because the services and investment rules of modern treaties are enforceable through investor-state dispute settlement. This controversial mechanism allows foreign investors to bring claims directly against governments. Investors do not need to seek consent from their home governments and are not obliged to try to resolve a complaint through the domestic court system. Tribunal decisions are final, although they may be reviewed on narrow procedural grounds in the domestic courts. While tribunals cannot force a government to change inconsistent measures, they can award monetary damages to investors. These damage awards are fully enforceable in the domestic courts.

There have been over 30 claims against Canada under NAFTA's investor-state dispute settlement mechanism. These disputes have involved a broad range of public policy measures, including environmental protection and natural resource management. Canada has lost or settled five claims, paying foreign investors damages of approximately $160 million. Claims against Canada are escalating. In the last few months of 2012, Canada was hit by three controversial NAFTA investor-state claims: by a U.S. energy company against a moratorium on natural gas fracking by Quebec, by a New York-based investment group challenging a moratorium on offshore wind turbines on Lake Ontario, and, most recently, by a multinational drug company after the Canadian courts invalidated patent protection on a drug deemed to have insufficient new therapeutic value.[99]

Both the CETA and the TPP include investor-state dispute settlement and employ a full negative list approach.[100] This means that all sectors and government measures are covered by the treaty except for those that are specifically excluded by listing them as reservations. If a program, policy or sector is not explicitly exempted by a reservation, it would be exposed to the full force of the services and investment obligations and possible investor-state challenge.

There are two different types of reservations. Annex I reservations exempt *existing* measures. They are *bound,* meaning that the measures can only be amended to make them more consistent with the treaty. If an exempted measure is amended or eliminated, it cannot later be restored. In other words, the protection afforded by Annex I reservations is designed to disappear over time.

Annex II reservations are *unbound*. This means that they protect *existing* non-conforming measures and also allow governments to take *new* measures that would otherwise be inconsistent. An Annex II reservation provides stronger protection because it allows for future policy flexibility in an exempted sector.

Reservations can only be taken against certain obligations of a treaty. They are usually permitted against the national treatment, most-favoured-nation, market access, performance requirements, and "senior management and boards of directors" obligations. No reservations are allowed against other provisions, notably the expropriation and minimum standards of treatment clauses. These two obligations, which are among the most problematic provisions in investor-state disputes, apply to all sectors and government measures without exception.

The draft Canadian reservations on fisheries in the CETA negotiations, which were leaked in early 2012, help to illustrate the strengths and weaknesses of reservations.[101] The reservations for federal fisheries policies, despite certain gaps, are quite strong. By contrast, there are major shortcomings in the reservations for provincial measures. If unaddressed, these would result in a serious erosion of provincial government authority over fisheries.

At the federal level, the government of Canada has submitted a draft Annex II reservation for the fisheries sector. The draft reservation exempts measures under the Fisheries Act, the Coastal Fisheries Protection Act, the Coastal Fisheries Protection Regulations, the Commercial Fisheries Licensing Policy, and the Policy on Foreign Investment in the Canadian Fisheries Sector, 1985. This reservation applies against national treatment, most-favoured-nation treatment and market access. It would protect the ability of the federal government to restrict fishing licenses to Canadians and to limit foreign ownership in the fisheries sector. By reserving against the market access rule of the CETA, it would also protect otherwise non-conforming licensing measures, including the fleet separation and the owner-operator policies. Because the federal reservation is an Annex II, or unbound reservation, it would also provide future policy flexibility for Canada to strengthen these licensing policies.

In fact, Canada's draft reservation is stronger than those taken for federal fisheries measures under the NAFTA.[102] The CETA reservation for federal measures would provide for future policy flexibility, unlike the NAFTA reservations, which were Annex I, and therefore only excluded existing non-conforming measures. This discrepancy between the CETA and NAFTA fed-

eral reservations, however, raises legal issues which could be exploited by EU investors through investor-state arbitration.

Despite the step taken by the federal government to protect future policy flexibility in the fisheries, an EU investor could assert that under the general most-favoured-nation treatment obligations of the CETA, that it was entitled to the best treatment offered by Canada to any U.S. or Mexican investor under the NAFTA.[103] Unless closed, this loophole means that EU investors could challenge new policy measures by the Canadian government, which, for example, toughened foreign ownership restrictions in the fisheries, on the grounds that they were NAFTA- inconsistent, and therefore violated Canada's most-favoured-nation commitments under the CETA.

Another gap in the federal protection is that the Annex II reservations do not apply against the expropriation or minimum standards of treatment obligations of the CETA. This could lead to further problems. Under Canadian law and policy, a fishing license grants permission to harvest fish or marine plants, but it "confers no property or other rights which can be legally sold, bartered or bequeathed."[104] Yet investor-state arbitral tribunals are not bound by Canadian policy in this regard. Such tribunals have the power to order compensation if, in their judgement, terminating or refusing a license is equivalent to expropriation or offends minimum standards of treatment under international law.

For example, Canadian fisheries regulations require that if a foreign investor gains control of a Canadian corporation that holds a fishing license, this license will not be renewed upon expiration. A European investor that lost a license in this manner would be able to bring a claim under the investor-state provisions of the CETA, demanding compensation for any losses. Indeed, there is a high probability that an investor-state tribunal would award compensation to a European investor for any financial losses stemming from the involuntary surrender of a fishing license. The amount of compensation to be paid would be a matter determined solely by the tribunal.

The draft Canadian federal-level reservation mirrors a similar draft Annex II reservation for fisheries submitted by the EU.[105] But, unlike Canada's situation, there are no issues for the EU related to exposure under the NAFTA most-favoured-nation obligations, since the EU is not a party to the NAFTA. Moreover, the EU reservation excludes fisheries-related measures by member states, as well as measures taken at the European level. This results in an imbalance because, while sub-federal fisheries measures in Europe would be fully protected by the EU's Annex II reservation, the provinces have had to list their own reservations for provincial legislation and measures relat-

ed to the fisheries. These provincial reservations are not nearly as strong as either the Canadian federal or the EU-wide reservations.

For the most part, the provinces' reservations for fisheries protect only existing non-conforming measures. These measures are under a legal ratchet; they cannot be amended in any way that makes them more CETA-inconsistent. If these non-conforming measures are eliminated, they cannot be restored by any future government.

The only provincial Annex II reservations for fisheries are against the market access rule. This unbound reservation protects certain provinces' policy flexibility to maintain or adopt measures regulating the fisheries, such as restrictions on the types of legal entities engaged in the fisheries or limits on the number of fishing or processing operations, that would otherwise be inconsistent with the market access obligations. With respect to other CETA obligations, preserving provincial authority over the fisheries depends entirely on the more limited Annex I reservation.

There are good reasons to doubt the effectiveness of the Annex I reservations for fisheries. To be effective, a reservation for provincial legislation must be interpreted not merely to exempt specific pre-existing measures, but also the discretionary authority that follows reasonably from the broad authority granted to the minister or officials under the excluded legislation.

Draft reservations for fisheries legislation and policy taken by the four Atlantic provinces are clearly intended to protect this discretionary authority. For example, Newfoundland and Labrador has submitted a draft reservation for several pieces of provincial legislation. These include the Fisheries Act, Aquaculture Act, Fish Inspection Act, Fishing Industry Collective Bargaining Act, Fish Processing Licensing Board Act, Professional Fish Harvesters Act and parts of the Lands Act.

The draft reservation reads as follows:

> The above measures allow the Province to regulate and issue various authorizations relating to the production, processing or marketing of fish and aquaculture fish products, including the transfer, delivery or transmission of marine products by fish harvesters, aquaculturalists and subsequent purchasers. Without limiting the generality of the foregoing, such measures *may involve discretionary decisions based on various factors*, limitations on investment or market access, imposition of performance requirements and/or discrimination in favour of Newfoundland and Labrador persons, investors and service providers (emphasis added).[106]

This reservation is written to encompass not just pre-existing regulations and authorizations — as frozen in time at the entry into force of the treaty — but also other measures that may be adopted in the future as authorized under the existing legislation. It is obviously intended to preserve the province's existing broad authority to maximize benefits from the development of the fishery resource while providing clear ground rules to all investors, foreign or domestic, regarding the provincial regulatory environment.

This reasonable interpretation, however, has already been rejected by a NAFTA investor-state tribunal. In November 2007, two U.S. multinational energy companies, Exxon-Mobil[107] and Murphy Oil, launched an investor-state claim. They challenged Canadian guidelines stipulating that energy companies active in the offshore must invest minimum amounts in research and development activities within Newfoundland and Labrador. In May 2012, the tribunal sided with the investors by a 2-1 majority, ruling that the R&D requirements were NAFTA-inconsistent performance requirements.[108]

Exxon-Mobil, the world's largest oil and gas company, is a partner in the Hibernia and Terra Nova oil and gas fields off the coast of Newfoundland and Labrador. Murphy Oil Corporation is a U.S. oil and gas company also active in the Newfoundland offshore. Both companies admit that they agreed to make R&D expenditures in Newfoundland and Labradors as a condition of their licenses. But they objected to 2004 guidelines by the Offshore Petroleum Board stipulating that companies spend a fixed minimum amount on local research and development. The claimants successfully argued that these guidelines were stricter than pre-existing local benefits agreements, which were expressly reserved from the NAFTA by Canada.[109]

Canada argued unsuccessfully that the guidelines were clearly aimed at achieving the intent of the legislation, which was exempted from the NAFTA. They were put in place after R&D expenditures in the Atlantic offshore fell below national averages for the energy sector. The claimants had challenged these guidelines in the Canadian courts and lost.

The authority to ensure that resource companies active in the offshore invested in R&D within the province was enshrined in federal and provincial legislation to implement the Atlantic Accords. These Acts and all subordinate measures were exempted from the NAFTA through an Annex I reservation. Nevertheless, the tribunal concluded that the guidelines were new, more non-conforming measures, which fell outside the protective scope of the Annex I reservation and therefore were prohibited by the NAFTA.

The companies have demanded up to $65 million in compensation. The tribunal is currently deciding the amount of monetary damages to be award-

ed to the claimants. Damages, however, will be ongoing. They will continue to accumulate as long as the R&D guidelines remain in effect. While the federal government is legally responsible for paying these fines, it is unclear whether it might try to recover a share from the provincial government, or put pressure on the Offshore Petroleum Board to eliminate the offending measures.

In the fisheries, as in the energy sector, provincial governments have an important role in effecting or negotiating local benefits including, but not limited to: local content requirements, preferences for local goods and/or services, local training obligations, local hiring preferences, hiring preferences aimed at disadvantaged groups, the construction of facilities, infrastructure or other works within the province, the establishment of a local office or other business facilities with accompanying local executive and managerial employees, and local research and development activities.

The lessons of Canada's loss in the Exxon/Murphy investor-state case are clear. In important areas such as the fisheries, provincial governments cannot afford to rely upon an Annex I bound reservation to protect the full, discretionary authority of the minister and officials under existing legislation. To safeguard their authority, they must take an Annex II, unbound reservation. Otherwise, these governments are effectively, and knowingly, surrendering their future legislative and constitutional power to ensure that the wealth generated by fish and other natural resources contributes to the sustainable development of their province and its citizens.

Conclusion

ANY ANALYSIS OF the new generation of trade and investment treaties being pursued by the Canadian government must consider not only purported commercial opportunities for Canadian exporters and investors, but the full range of potential impacts.

Some of the most important of these include:

- The impact of extended terms of patent protection on Canadian drug costs and the sustainability of the Canadian health care system
- The effects of powerful foreign investor rights and investor-state dispute settlement on democratic authority and the right to regulate in the public interest.
- The loss of provincial and municipal government autonomy to use government purchasing as a tool for local and regional economic development,
- The curtailment of Canada's ability to create new public services or to reverse failed privatizations, without facing litigation and demands for compensation from affected foreign investors, and
- The erosion of the ability of governments at all levels to pursue policies that add value to natural resources prior to export and maximize local benefits.

The Atlantic Canadian fisheries sector is frequently touted by the federal government and the corporate sector as a clear winner from deeper trade liberalization. While there are benefits to be had from removing the remaining tariffs on fish in Canada's major export markets, these should not be overstated. Nor should this be the only consideration. As we have seen, even considering the impacts on fisheries sector in isolation, the federal government's aggressive new trade and investment treaty agenda gives rise to many serious concerns. All too often, these concerns are either unacknowledged or brushed aside.

As experience shows, policy errors in the development of renewable resources such as fish can lead to drastic and irreversible consequences. Similarly, blunders that are made in the negotiation of trade and investment treaties can be difficult, or impossible, for future governments to correct.

Particularly in support for the inshore fishery and coastal communities, there are many clear conflicts between new trade and investment treaty rules and Canadian fisheries regulations and regulatory authority. One of the first casualties is likely to be minimum processing requirements, which remain an important policy lever for provincial governments in eastern Canada. But the adverse implications for sustainable development of the fisheries are much broader, largely because of the inherent limitations of the reservations to protect regulatory authority, especially at the provincial level.

Without policy guidance, enforcement and, above all, governmental determination to use the leverage provided by public ownership of the resource, large corporations have little incentive to create local benefits in the fisheries. The hands-off approach facilitated under trade and investment agreements allows the largest, global corporations to organize their activities for their own and shareholders' benefit without regard to fishers, coastal communities or marine ecosystems.

Canadian fisheries policies must, undoubtedly, encourage commercially viable and internationally competitive enterprises. But another fundamental goal should be to, as far as possible, maximize benefits to national and local economies. The logic underlying the new trade and investment treaties makes achieving such a balance next to impossible. These agreements are designed to, over time, eliminate public policies that favour local or national control and, under the guise of laissez-faire, to subordinate public policy to the interests of multinational corporations.

Previous Canadian governments have attempted to shield fisheries management policies from the full effects of trade and investment treaties through various exceptions and exclusions. Yet, each successive major treaty con-

tains more intrusive obligations that increase the incompatibility of international trade and investment regime with Canada's core fisheries policies. Each negotiation also puts the vital exclusions insulating the fisheries back on the table. As this discordance deepens, the pressure to synchronise domestic regulation with international trade and investment treaty regimes heightens. In addition, powerful domestic corporate interests stand to gain from more intensive globalization and the full application of trade and investment treaty rules.

It is vital for fish harvesters, their representatives and coastal communities not to be complacent about how the current federal government's unprecedented trade and investment treaty agenda threatens their future livelihoods. Otherwise, the long-term sustainability of the Atlantic Canadian fisheries will be put at serious risk.

Appendix 1

CETA Fisheries
EU Consolidated Package (25 October, 2012)

ROO – Wholly obtained rule non aquaculture
Text agreed:
1. The following shall be considered as wholly obtained in the territory of a Party:
…
(f) fish, shellfish and other marine life taken from outside any territorial sea by a vessel;
(g) goods produced on board of a factory ship from the goods referred to in subparagraph (f);
2. For the purpose of subparagraphs 1(f) and (g), the following conditions shall apply to the vessel or factory ship:
(a) the vessel or factory ship must be:
(i) registered in a Member State of the European Union or in Canada; or
(ii) listed in Canada, if such vessel:
a. immediately prior to its listing in Canada, is entitled to fly the flag of a Member State of the European Union and must sail under that flag; and
b. fulfills the conditions of either 2(c)(i) or 2(c)(ii) below
(b) the vessel or factory ship must be entitled to fly the flag of a Member State of the European Union or of Canada and must sail under that flag;
and,

(c) with respect to the European Union the vessel or factory ship must be:

(i) at least 50% owned by nationals of a Member State of the European Union; or

(ii) owned by companies which have their head office and their main place of business in a Member State of the European Union, and which are at least 50% owned by a Member State of the European Union, public entities or nationals of those States;

(d) with respect to Canada, the vessel or factory ship must take the fish, shellfish or other marine life under the authority of a Canadian fishing licence. Canadian fishing licences comprise Canadian commercial fishing licences and Canadian aboriginal fishing licences issued to aboriginal organizations. The holder of the Canadian fishing licence must be either:

(i) a Canadian national;

(ii) an enterprise that is no more than 49 per cent foreign owned and has a commercial presence in Canada;

iii) a fishing vessel owned by a person referred to in subparagraph (i) or (ii) that is registered in Canada, entitled to fly the flag of Canada and must sail under that flag; or

iv) an aboriginal organization located in the territory of Canada. A person fishing under the authority of a Canadian aboriginal fishing licence must be a Canadian national.

ROO – Wholly obtained aquaculture

Text agreed:

The following shall be considered as wholly obtained:

...

(e)...

ii) Products of aquaculture raised there

A Note to chapter 3 is added as follows (in line with the drafting used in other notes for other chapters of agricultural products):

Aquaculture goods of Chapter 3 will only be considered as originating in a Party if they are raised in the territory of that Party from non-originating or originating seedstock such as eggs, fry, fingerlings or larvae.

ROO Derogations – products and volumes

Text agreed:

HS heading	Product description	Production [Precise wording to be determined]	Annual quota for exports from Canada into the EU (in ‘000 kilograms)
ex 030612	Cooked and frozen lobster	A change from any other subheading	2000
160530	Prepared and preserved lobster	A change from any other chapter	240
160411	Prepared or preserved salmon	A change from any other chapter	3000 /5000*
160412	Prepared or preserved herring	A change from any other chapter	50
ex 160413	Prepared or preserved sardines, sardinella and brisling or sprats, excluding *Sardina pilchardus*	A change from any other chapter	200
ex 160590	Prepared or preserved scallops excluding *Pecten maximus* and *Aequipecten opercularis*	A change from any other chapter	100
160520	Prepared or preserved shrimps and prawns	A change from any other chapter	5000
ex 030429	Frozen fillets of cod (*Gadus morhua, Gadus macrocephalus, Gadus ogac*) and of fish of the species *Boreogadus saida*	A change from any other heading	211
ex 160510	Prepared or preserved Crab excluding *Cancer pagurus*	A change from any other chapter	44
ex 030429	Frozen fillets of halibut excluding *Rheinhardtius hippoglossoides*	A change from any other heading	10

*: an extra 2000 tonnes on top of the already conceded 3000 tonnes is conditional upon closing negotiations of the complete fisheries cluster, including lifting export restrictions.

<u>Derogations – growth and revision</u>

<u>Growth</u>

Text agreed:

The above volumes can be increased, on a product by product basis, along the following lines:

Formula: V(n+1)= V(n) x 1,1

Where V(n) is the volume of the quota for one given product for year n

V(n+1) will be increased only if more than 80% of V(n) have been used during year n.

The growth provision will apply for the first time after the expiry of the first complete calendar year following the entry into force of the agreement. It will

be applied for 4 consecutive years in total. After the last of these four consecutive years, no further increase will be possible.

Revision

Text agreed:

After the completion of the third calendar year following the entry into force of this Agreement, at the request of a Party, the Parties will engage in a discussion on possible revisions to the [above] [derogations].

Access to ports

Canada committed to grant MFN treatment to EU vessels.

Export restrictions

The EU fisheries package is conditional upon CAN lifting export restrictions, including those attached in Annex.

Subsidies (competition)

Text agreed:

Article x4

Consultations on subsidies related to agricultural goods and fisheries products

1. The Parties share the objective of working jointly to reach an agreement:

(a) to further enhance multilateral disciplines and rules on agricultural trade in the WTO; and,

(b) to help develop a global, multilateral resolution to fisheries subsidies.

2. If a Party considers that a subsidy, or the provision of government support, granted by the other Party, is adversely affecting, or may adversely affect, its interests with respect to agricultural goods or fisheries products, it may express its concerns to the other Party and request consultations on the matter.

3. The requested Party shall accord full and sympathetic consideration to that request and will use its best endeavours to eliminate or minimize the adverse effects of the subsidy, or the provision of government support, on the requesting Party's interests with regard to agricultural goods and fisheries products.

Canadian request for a Sub-committee on fisheries

The EU position is that fisheries issues will be discussed in various relevant committees, such as the Committee on Trade in Goods or the Committee on Sustainable Development, as appropriate.

Sustainable development

EU insists on the inclusion of a fisheries article in the sustainable development chapter. A language is under negotiation.

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Annex

Indicative list of minimum processing requirements in Canadian Provinces

A. Newfoundland and Labrador

MINIMUM PROCESSING REQUIREMENTS

The following minimum processing requirements apply to all fish intended for sale outside Newfoundland and Labrador:

Species	Minimum Processed Forms
Arctic Char, Dogfish, Salmon, Shark, Swordfish, Trout, Tuna	gutted
Billfish, Hagfish, Smelt	whole packaged in frozen form
Blackback Flounder	whole packaged
Capelin, Mackerel	salted and packed in a carton not to exceed 110 kilograms or whole packaged in frozen form
Clams, Cockle, Periwinkle, Quahog	shucked, whole packaged, or whole packaged in frozen form
Crab other than Snow Crab	cooked and meat extracted
Eel	live or whole packaged in frozen form
Fish Roe (all species)	salted
Greysole	whole packaged
Groundfish (all species other than Monkfish, Halibut, Blackback Flounder, Greysole, Yellowtail Flounder and Turbot)	filleted or split and salted
Halibut	head on gutted and packaged
Herring	salted and packed in a carton not to exceed 110 kilograms or whole packaged in frozen form or whole fresh in bulk during the period May 1 to June 15, and November 1 to December 31.
Lobster	live
Monkfish	head on gutted with stomach tube attached and in frozen form
Mussels	washed, declumped, and graded
Scallop	shucked
Sea Cucumber	gutted and packaged in frozen form
Sea Urchin	gonads removed
Seal	meat, oil or pelts tanned to meet specifications for final end use
Shrimp	cooked and peeled
Snow Crab	sectioned or whole cooked and 10% of all raw material purchases in a calendar year to be processed into one or more of the following forms: (i) individually scored “snap and eat” leg segments; (ii)cap on or cap off cocktail claws (iii) 907 gram consumer packs; (iv) meat removed from shell; or (v) other value added form as approved by the minister

Squid	whole packaged in frozen form
Turbot	Head on gutted and packaged in frozen form
Whelk	whole frozen
Yellowtail Flounder	For each fish that is less than 380 grams, whole packaged in frozen form or for each fish that is 380 grams or more, filleted

B. Quebec

An operator shall comply with the following minimum processing standards in preparing or canning any of the marine products designated below:

English Name	Latin Name	Minimum processing standards
(1) Cod	Gadus Morhua	in fillets or in steaks;
(2) Redfish	Sebastes sp. Sebastes marinus Sebastes fasciatus Sebastes mentelle	in fillets or beheaded, eviscerated and frozen, where it measures 30 cm or more before processing;
(3) American plaice	Hippoglossoides platessoides	in fillets or beheaded, eviscerated and frozen; where it measures 32 cm or more before processing;
(4) Greenland halibut	Reinhardtius hippoglossoides	in fillets, in steaks, or beheaded, eviscerated and frozen;
(5) Mackerel	Scomber scombrus	frozen, treated to destroy toxic micro-organisms, processed by salting, smoking, pickling, kippering or marinating and packaged in such manner that it remains safe for human consumption for not less than 6 months solely by refrigeration, or refrigerated and packed other than in a bin referred to section 9.6.1 of the Regulation respecting food (c. P-29, r. 1);
(6) Eel	Anguilla rostrata	frozen;
(7) Soft shell clam	Mya arenaria	meat extracted;
(8) Whelk	Buccinum undatum Neptunea despecta tornata	cooked or frozen;
(9) Pink shrimp	Pandalus sp. Pandalus borealis Pandalus montagui	cooked or frozen;
(10) Snow crab	Chionoecetes opilio	whole and frozen or in sections cooked or frozen;
(11) Lobster	Homarus americanus	cooked or frozen, where not marketed live.

Appendix 2

Canada's draft Annex II reservation for fisheries measures at the federal level, 15 October 2012.
Sector: Fisheries
Sub-Sector: Fishing and Services Incidental to Fishing
Industry Classification: CPC 04, 882
Type of Reservations: National Treatment (Articles X)
Most-Favoured Nation Treatments (Article X)
Market Access (Articles X)
Description: Cross-Border Trade in Services and Investment
Canada reserves the right to adopt or maintain any measure with respect to licensing fishing or fishing related activities, including entry of foreign fishing vessels to Canada's exclusive economic zone, territorial sea, internal waters or ports and use of any services therein.
Existing Measures: *Fisheries Act*, R.S.C. 1985, c. F14
Coastal Fisheries Protection Act, R.S.C. 1985, c.33
Coastal Fisheries Protection Regulations, C.R.C. 1978, c. 413
Commercial Fisheries Licensing Policy
Policy on Foreign Investment in the Canadian Fisheries Sector, 1985

Newfoundland and Labrador's draft Annex I reservation for fisheries measures, 15 October 2012.
Sector: Fisheries
Sub-Sector: Fish and other fishing products, prepared and preserved fish, wholesale trade services of fisheries products and services incidental to fishing

Classification: CPC 04, 212, 62224, 882
Type of Reservation: National Treatment
Performance Requirements
Senior Management and Boards of Directors
Level of Government: Provincial - Newfoundland and Labrador
Measures: *Fisheries Act*, SNL 1995, c.F-12.1
Aquaculture Act, RSNL 1990, c.A-13
Fish Inspection Act, RSNL 1990, c.F-12
Fishing Industry Collective Bargaining Act, RSNL 1990, c.F-18
Fish Processing Licensing Board Act, SNL 2004, c.F-12.01
Professional Fish Harvesters Act, SNL 1996, c.P-26.1
Lands Act, SNL 1991, c. 36
Water Resources Act, SNL 2002 c. W-4.01
Description: Cross-Border Trade in Services and Investment
The above measures allow the Government of Newfoundland and Labrador to regulate and issue various authorizations relating to the production, processing or marketing of fish and aquaculture fish products, including the transfer, delivery or transmission of marine products by fish harvesters, aquaculturalists and subsequent purchasers. Without limiting the generality of the foregoing, such measures may involve discretionary decisions based on various factors, the imposition of performance requirements and/or preferences for Newfoundland and Labrador persons, investors and service providers.

Newfoundland and Labrador's draft Annex II reservation for fisheries measures, 15 October 2012.
Sector: Fishing and Hunting
Sub-Sector: Edible products of animal origin, raw skins of other animals, fish and other fishing products, other meat and edible offal, fresh, chilled or frozen, animal oils and fats, crude and refined, tanned or dressed fur skins, prepared and preserved fish, sales on a fee or contract basis of food products, beverages and tobacco, wholesale trade services of fishery products.
Industry Classification: CPC 0295, 02974, 04, 21129, 2162, 2831, 212, 62112, 62224, 8813 and 882
Type of Reservation: Market Access
Level of Government: Provincial - Newfoundland and Labrador
Description: Cross-Border Trade in Services and Investment
Newfoundland and Labrador reserves the right to adopt or maintain any measure limiting market access in the sub-sectors noted above.

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Notes

1 For the purposes of this paper, the Atlantic Canadian fisheries refers to fisheries based in the four Atlantic Provinces (Newfoundland and Labrador, New Brunswick, Nova Scotia and Prince Edward Island), as well as in Eastern Quebec and Nunavut.

2 Department of Fisheries and Oceans, "Canadian Fishing Industry Overview," Economic Analysis and Statistics Branch, March, 2011. http://www.apcfnc.ca/en/fisheries/resources/Aboriginal%20Fisheries%20in%20Canada%20-%20Overview%20-Canadian%20Market%20Trends%20-%20David%20Millette.pdf (accessed November 9, 2012)

3 This proportion is probably an underestimate, since fish caught by a nationally flagged vessel outside its territorial waters and landed in a home port is considered domestically produced for the purposes of international trade statistics. See International Centre for Trade and Sustainable Development, "Fisheries, International Trade and Sustainable Development," Policy Discussion Paper. Geneva, Switzerland, October, 2006, xi.

4 CARICOM member states are Antigua & Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts & Nevis, St. Lucia, St. Vincent & the Grenadines, Suriname, Trinidad & Tobago.

5 Canada already has trade and investment treaties with four of the current TPP members (U.S., Chile, Peru and Mexico). As economist Jim Stanford has noted, the other six (Australia, New Zealand, Malaysia, Singapore, Brunei, and Vietnam) combined account for less than one per cent of Canada's exports. See Jim Stanford, "Trans-Pacific Partnership: A Few Questions," *Progressive Economics Forum*, June 19, 2012. http://www.progressive-economics.ca/2012/06/19/trans-pacific-partnership-a-few-questions/ (accessed November 18, 2012).

6 Jim Stanford, "Out of Equilibrium: The Impact of EU-Canada Free Trade on the Real Economy," *Canadian Centre for Policy Alternatives*, October 27, 2010.

7 Remo Zaccagna, "EU Envoy: Trade deal would aid fisheries," *The Chronicle Herald*, October 22, 2012. http://thechronicleherald.ca/business/152511-eu-envoy-trade-deal-would-aid-fisheries. (accessed Nov. 10, 2012).

8 A recent exposé detailed near-slavery conditions among Indonesian crews on Korean-captained vessels that had been chartered by large New Zealand processors to fish in New Zealand waters. E. Benjamin Skinner, "The Cruelest Catch," *Business Week*, February 27–March 4, 2012, 70–76.

9 Charles Clover, *The End of the Line: How Overfishing is Changing the World and What We Eat* (University of California Press, 2006).

10 Royal Society of Canada, "Sustaining Canada's Marine Biodiversity: Responding to the Challenges Posed by Climate Change, Fisheries, and Aquaculture," An Expert Panel Report, February 2012, 11.

11 Fisheries Resource Conservation Council, "Towards Recovered and Sustainable Groundfish Fisheries in Eastern Canada: A report to the Minister of Fisheries and Oceans," September, 2011, 5. See also the Royal Society of Canada Expert Panel Report entitled "Sustaining Canada's Marine Biodiversity: Responding to the Challenges Posed by Climate Change, Fisheries, and Aquaculture," February, 2012, 193. This report also observed that some Atlantic groundfish stocks are still threatened and there is no viable plan for their recovery: "For example, 20 years after the collapse of Newfoundland's northern cod (once one of the largest fish stocks in the world), DFO has yet to articulate a quantitative recovery target, yet alone a rebuilding timeline, for this stock. The Panel finds this unacceptable."

12 Miriam García Ferrer, Directorate-General for Trade of the European Commission, "Rules of origin and certification of fish products with a view to their access to the EU market" (Presentation to the European Parliament. June 29, 2011).

13 World Trade Organization, United Nations Conference on Trade and Development, and International Trade Centre, "World Tariff Profiles, 2011," 97.

14 Ibid, 60.

15 Ibid, 57.

16 Fisheries Resource Conservation Council, "Towards Recovered and Sustainable Groundfish Fisheries in Eastern Canada: A report to the Minister of Fisheries and Oceans", September 2011, 15.

17 Miriam García Ferrer, Directorate-General for Trade of the European Commission, "Rules of origin and certification of fish products with a view to their access to the EU market" (Presentation to the European Parliament, June 29, 2011). Furthermore, many of the fish consumed in Europe are caught by its long-distance fleet in international or foreign waters, sometimes under controversial bilateral agreements with developing countries. Such fish, if processed aboard EU-flagged factory freezer trawlers or landed in EU ports, counts as domestically produced fish in international trade statistics.

18 While welcome to Canadian shrimp producers, the ATRQ remains problematic because it includes end use restrictions that oblige Canadian exporters, taking advantage of the reduced rates, to sell to European processors and prevents them selling directly to the retail or consumer market. Canada also negotiated an additional 500-ton duty-free tariff rate quota as compensation for lost trade opportunities when Austria, Sweden and Finland joined the EU in 1995.

19 Free Trade Agreement Between Canada and the States of the European Free Trade Association, Final Text. http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/efta-agr-acc.aspx?lang=en&view=d (accessed November 12, 2012).

20 Department of Fisheries and Oceans, "Commercial Fisheries Licencing Policy for Eastern Canada, 1996," Chapter 3, Article 14. http://www.dfo-mpo.gc.ca/fm-gp/policies-politiques/licences-permis/ch3-eng.htm#FOURTEEN (accessed October 1, 2012).

21 Department of Fisheries and Oceans, "Commercial Fisheries Licencing Policy for Eastern Canada, 1996," Chapter 1, Article 5(b). http://www.dfo-mpo.gc.ca/fm-gp/policies-politiques/licences-permis/ch1-eng.htm#FIVE (accessed October 1, 2012).

22 Department of Fisheries and Oceans, "Commercial Fisheries Licencing Policy for Eastern Canada, 1996," Chapter 3, Article 14. http://www.dfo-mpo.gc.ca/fm-gp/policies-politiques/licences-permis/ch3-eng.htm#FOURTEEN (accessed October 1, 2012).

23 Department of Fisheries and Oceans, "Commercial Fisheries Licencing Policy for Eastern Canada, 1996," Chapter 3, Article 13. http://www.dfo-mpo.gc.ca/fm-gp/policies-politiques/licences-permis/ch3-eng.htm (accessed October 1, 2012).

24 Department of Fisheries and Oceans, "Commercial Fisheries Licencing Policy for Eastern Canada, 1996," Chapter 3, Article 26. http://www.dfo-mpo.gc.ca/fm-gp/policies-politiques/licences-permis/ch3-eng.htm (accessed October 1, 2012).

25 The analysis in this section draws on a first-rate, unpublished account of the Canadianization of the northern shrimp fishery by Marc Allain entitled "Lessons learned from the domestication process of the Canadian Cold Water Shrimp fishery," *Greenpeace International*, August 15, 2010.

26 The EEZ was recognized by other nations under the UN Law of the Sea. The 200 mile limit left portions of the continental shelf and important fishing banks outside Canada's EEZ. Foreign fleets continued to fish in these regions, such as the Flemish Cap and the nose and tail of the Grand Banks. Canada may yet extend its jurisdiction to the edge of its contiguous continental shelf, as authorised by the Law of the Sea if strict conditions are met. See, for example, Randy Boswell, "Canada poised to claim ownership of vast underwater territory bigger than Quebec", *National Post*, Oct 4, 2012. http://news.nationalpost.com/2012/10/04/canada-poised-to-claim-ownership-of-vast-underwater-territory-bigger-than-quebec/ (accessed October 5, 2012).

27 Such entities included "the Labrador Fishermen's Union Shrimp Company Limited, and Makivik, a corporation created to promote economic development for the Inuit people of northern Quebec." See Marc Allain, "Lessons learned from the domestication process of the Canadian Cold Water Shrimp fishery," *Greenpeace International*, August 15, 2010, 5.

28 Marc Allain, "Lessons learned from the domestication process of the Canadian Cold Water Shrimp fishery," *Greenpeace International*, August 15, 2010.

29 Ibid, 2.

30 For example, from humble beginnings in the 1970s, the Labrador Fishermen's Union Shrimp Company Limited has grown to where it now "employs over six hundred people on a seasonal basis and services eight hundred fishermen throughout Newfoundland and Labrador." It has invested in a number of successful ventures, including a state-of-the art shrimp processing facility. "In 1984, when the Bank of Montreal pulled out of L'anse au Loup, and the people from the area decided to set up their own Credit Union, the Company helped and supported the new Credit Union by paying $13,000 towards the manager's wages for one year and investing $100,000 to get the Credit Union started. Today, the Eagle River Credit Union, with its main office in L'anse au Loup, has branches in both Mary's Harbour and Cartwright. It has proven to be a highly successful enterprise." Labrador Fishermen's Union Shrimp Company Limited, "Company Profile," http://labshrimp.com/?page_id=18 (accessed December 12, 2012).

31 Marc Allain, "Lessons learned from the domestication process of the Canadian Cold Water Shrimp fishery," *Greenpeace International*, August 15, 2010, p. 2.

32 Department of Fisheries and Oceans, "Fisheries Management Policies on Canada's Atlantic Coast," Atlantic Fisheries Policy Review, last updated on July 12, 2010. http://www.dfo-mpo.gc.ca/afpr-rppa/Doc_Doc/FM_Policies_e.htm (accessed November 12, 2012).

33 "The Department of Fisheries and Oceans should recognize the re-opening of closed fisheries or the continuation of existing fisheries at TAC levels far below traditional levels as a special situation in which priority would be given to fleets depending on adjacency, length of attachment to the particular fishery, availability of other fishing opportunities and other criteria." See Fish Food and Allied Workers Union (FFAW/CAW), "Brief to the Atlantic Fisheries Policy Review," April 11, 2001. http://www.ccpfh-ccpp.org/e_dbViewer.asp?cs=policy&id=28 (accessed November 12, 2012).

34 See, for example, under GATT Article XI, "The General Elimination of Quantitative Restrictions" or NAFTA Article 309, "Import and Export Restrictions."

35 The company asserts that it "is filleting a very small portion of its flatfish outside Newfoundland and Labrador." See "OCI sets the record straight on the export of fish species; says giveaways not on the table," Ocean Choice International, News Release, January 17, 2012. http://www.oceanchoice.com/media-room/media-releases (accessed October 1, 2012).

36 "Ocean Choice International Denied Permanent Redfish Exemption," Government of Newfoundland and Labrador, News Release, January 6, 2012. http://www.releases.gov.nl.ca/releases/2012/fishaq/0106n01.htm (accessed October 1, 2012). See also, Canadian Press, "Newfoundland won't grant Ocean Choice International fish processing exemptions," *Cape Breton Post*, February 9, 2012. http://www.capebretonpost.com/News/Canada---World/2012-02-09/article-2890894/Newfoundland-won%26rsquo%3Bt-grant-Ocean-Choice-International-fish-processing-exemptions/1 (accessed October 1, 2012).

37 CBC News, "Marystown, Port Union plants closed permanently, Ocean Choice International shutdown displaces 410 workers," Dec 2, 2011. http://www.cbc.ca/news/canada/newfoundland-labrador/story/2011/12/02/nl-oci-plants-future-1202.html (accessed October 2, 2012).

38 The 44 workers on the Newfoundland Lynx were locked out by Ocean Choice International (OCI) in early February, after the company demanded deep cuts to their wages and compensation. At one point, the striking workers blockaded the vessel to prevent replacement workers from boarding it. OCI won a court injunction to remove the blockade. After 10 weeks, the labour dispute was finally settled in mid-April 2012. See Canadian Press, "Workers for Ocean Choice International fishing trawler ratify tentative deal," *Winnipeg Free Press*, April 15, 2012.

39 Newfoundland and Labrador, Department of Fisheries and Aquaculture, "New Agreements with OCI Revitalize Fortune Fish Plant Operation," News Release, December 21, 2012. http://www.releases.gov.nl.ca/releases/2012/fishaq/1221n08.htm.

40 Under the Agreement on Internal Trade, the NS government has also questioned NL restrictions on the transfer of unprocessed snow crab and shrimp caught in Newfoundland and Labrador waters. But, to date, the Newfoundland and Labrador government has successfully defended its position that an exemption from the provincial Fish Inspection Act is required for snow crab and shrimp caught in Newfoundland and Labrador waters to be sold to processors in other provinces. See Agreement on Internal Trade Secretariat, Working Group on Processing of Natural Resources, "2001–2002 Annual Report," 2. http://www.ait-aci.ca/en/reports/archive/sectoral/2001_2002/01-02%20Chap%2011%20report_eng.pdf (accessed October 1, 2012).

41 Dandy Dan's Fish Market Ltd. v. Newfoundland and Labrador, NLCA 26, 2007.

42 Port Enterprises Limited and Peerless Fish Company Limited v. Newfoundland, Supreme Court Of Newfoundland and Labrador Court of Appeal, Judgement, June 16, 2006.

43 Ibid.

44 North American Free Trade Agreement, Final text, December 17, 1992. Chapter 3.

45 Canada asserted that while the landing and export processing requirements were not primarily conservation measures, they were *related* to conservation because they facilitated the collection of data that were essential for conservation purposes. The panel disagreed, ruling that to be covered by the Article XX (g) exception a measure had to be "primarily aimed" at conservation, and that the Canadian export restrictions were primarily socio-economic in purpose. See "Canada — Measures Affecting Exports of Unprocessed Herring and Salmon", BISD 35S/98, Adopted March 22, 1988.

46 "The United States has frequently objected to British Columbian log export restrictions on the grounds that such restrictions depress the price of logs in British Columbia and give lumber producers an unfair advantage. However, The United States has never initiated a GATT or WTO complaint respecting the log export restrictions, because the United States maintains its own restrictions on the export of logs." See Jón Ragnar Johnson, "Analysis of the Free Trade Agreement Between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway And Switzerland)," 30. www.iceland.is/iceland-abroad/.../analysis_of_canada_efta_fta.pdf (accessed July 11, 2012).

47 For example, an Icelandic official closely involved in the Canada –EFTA negotiations pointedly observed that although Canada had secured an exception for provincial fish processing restrictions in that agreement: "None of these restrictions can be justified under any of the exceptions to GATT 1994." Jón Ragnar Johnson, "Analysis of the Free Trade Agreement Between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway And Switzerland)," 30. www.iceland.is/iceland-abroad/.../analysis_of_canada_efta_fta.pdf (accessed July 11, 2012).

48 "CETA Fisheries: EU Consolidated Package," 25 October, 2012. This document is attached as Appendix 1.

49 James McLeod, "Trade Deal could threaten N.L. fish processing", *St. John's Telegram*, October 26, 2012.

50 In a briefing call for civil society organizations on October 5, 2012, Canada's chief negotiator reported that the EU has been pressuring Canada to remove its domestic processing requirements for fish. He stated that this issue had not been be resolved by negotiators and would likely be among those issues referred to trade ministers for resolution at the political level.

51 Scott Sinclair, "Canada's Humiliating Entry into TPP Trade Deal," *The Tyee*, June 26, 2012. http://thetyee.ca/Opinion/2012/06/26/TTP-Trade-Deal/ (accessed October 2, 2012).

52 Federal regulations also restrict the processing of certain types of fish (notably groundfish) at sea in factory freezer trawlers. Like the provincial regulations, these too will come under scrutiny and possible challenge by Canada's negotiating partners.

53 See the General Agreement on Trade in Services, Article XVI. These market access restrictions have also been incorporated in recent bilateral trade and investment agreements, including in the investment chapter of the Canada-Colombia Free Trade Agreement.

54 Monopolies and exclusive service supplier arrangements are expressly prohibited as restrictions on the number of services supplier.

55 See, for example, General Agreement on Trade in Services, Article XVI.

56 By contrast, the NAFTA services chapter was much less intrusive. It simply requires federal governments to list non-discriminatory quantitative restrictions on the number of service providers or the operations of service providers in an annex. But this list is merely for transparency purposes. NAFTA Article 1207 provides for further negotiations on these lists, but these have never occurred. Local government measures need not be listed.

57 Such market access rules apply not only to cross-border trade in services, but also to service investors. The GATS mode 3 obligations pertaining to foreign investment apply to those foreign service providers that have a "commercial presence" within a country. However, when these rules are included in the investment chapter of a trade treaty, as in the Canada-Colombia FTA, this incorporates a much broader definition of investment than in the GATS applying, for example, not just to foreign services investors that are already established, but also to those that are seeking to invest (pre-establishment) and not merely to foreign direct investment, but also to other forms, such as portfolio investment.

58 In one of the first disputes under the new WTO rules, the U.S. successfully challenged preferential treatment for bananas imported into the European Union from former European colonies. Even though the preferential tariffs themselves were exempted, the dispute panel agreed that the EU's licensing scheme for bananas discriminated against U.S.-based multinational corporations who were "service providers" engaged in the wholesale trade and distribution of bananas in the European market and therefore violated European Community commitments under the GATS. See World Trade Organization, "European Communities — Regime for the Importation, Sale and Distribution of Bananas: Complaint by the United States," Report of the Panel, 22 May 1997.

59 United Nations Department of Economic and Social Affairs, Statistics Division, "Provisional Central Product Classification (CPC prov)," Section 8, Division 88, Group 882, "Services incidental to fishing." http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=88 (accessed November 13, 2012).

60 United Nations Department of Economic and Social Affairs, Statistics Division, "International Standard Industrial Classification of All Economic Activities: ISIC Rev. 3.1," Updated February 21, 2002. http://unstats.un.org/unsd/statcom/doc02/isic.pdf (accessed November 13, 2012).

61 "Response of Atlantic Canada's Independent Core fleet sector organizations to 'The Future of Canada's Commercial Fisheries'", February 29, 2012, 1. www.curra.ca/documents/future_of_fisheries_doc07_EN.pdf (accessed September 12, 2012).

62 Ibid, 3.

63 Ibid, 3.

64 Tony Charles, "Why Fishy News Matters, Charlottetown Guardian, March 14, 2012. http://www.theguardian.pe.ca/Opinion/Letters%20to%20editor/2012-03-14/article-2926482/Why-fishy-news-matters/1 (accessed September 17, 2012).

65 The review was announced in January. The deadline for public comment was March 1, 2012, which was later extended to March 14, 2012.

66 Department of Fisheries and Oceans, "The Future of Canada's Commercial Fisheries: Discussion Document," January 2012. www.curra.ca/documents/future_of_fisheries_DFO_doc_EN.pdf (accessed September 12, 2012).

67 "Response of Atlantic Canada's Independent Core fleet sector organizations to *The Future of Canada's Commercial Fisheries*," February 29, 2012, 6–7. www.curra.ca/documents/future_of_fisheries_doc07_EN.pdf. (accessed September 12, 2012).

68 Evelyn Pinkerton, "Coastal Communities in the 21st Century: challenges, opportunities," School of Resource & Environmental Management, Simon Fraser University. (Presentation at the Coastal Communities Symposium, University of Victoria, February 27, 2012) http://www.curra.ca/documents/future_of_fisheries_doc14.pdf (accessed November 13, 2012).

69 CBC News, "Owner-operator fleet separation policy to stay intact," September 21, 2012. http://www.cbc.ca/news/canada/prince-edward-island/story/2012/09/21/pei-owner-operator-fleet-separation-to-remain-intact.html (accessed November 13, 2012).

70 Robert McLeod, "Minister won't change owner-operator or fleet-separation policies," *St. John's Telegram*, September 22, 2012. http://www.thetelegram.com/News/Local/2012-09-22/article-3081065/Minister-wont-change-owneroperator-or-fleetseparation-policies/1 (accessed November 13, 2012).

71 Paul MacLeod, "Processors oppose fleet policy," *Halifax Chronicle Herald*, September 18, 2012. http://thechronicleherald.ca/canada/136976-processors-oppose-fleet-policy (accessed November 13, 2012).

72 One way that processors had attempted to circumvent the fleet separation policy was through trust agreements and other financing arrangements which bind indebted fishers to particular processors, even though there is no formal transfer of the license. In 2007, after extensive consultation and controversy, the DFO put in place a policy for the Preservation of the Independence of the Inshore Fishery in Atlantic Canada (PIIFCAF). PIIFCAF banned trust and other controlling agreements between processors and fishers. "A Controlling Agreement (CA) is defined as an agreement between a licence holder and an individual or entity that permits someone other than the licence holder to control or influence the licence holder's decision to submit a request to DFO for a licence 'transfer'." Existing CA partners were given seven years in which to terminate the agreement or make amendments to bring them in line with the PIIFCAF policy. That 7-year grace period expires in 2013, which could reignite the fleet separation issue. See Department of Fisheries and Oceans, "Preserving the Independence of the Inshore Fleet in Canada's Atlantic Fisheries: Information Note," http://www.dfo-mpo.gc.ca/fm-gp/initiatives/piifcaf-pifpcca/note-bulletin-eng.htm (accessed November 13, 2012).

73 Extending patent protection for brand-name drugs, thus increasing costs to Canadians, through the CETA is a prime example of a policy that would be politically difficult, if not impossible, for any government to pursue outside the context of a trade and investment negotiation. See Heather Scoffield, "EU drug demands would cost Canadians up to $2B a year: federal research," *Canadian Press*, October 14, 2012. http://www.winnipegfreepress.com/canada/eu-drug-demands-would-cost-canadians-up-to-2b-a-year-federal-research--174100881.html?device=mobile (accessed November 13, 2012).

74 Limited entry, on its own, is insufficient for conservation purposes. Other fisheries management regulations, such as minimum size, gear restrictions, trap limits, and closed seasons are also essential to curb overfishing and conserve fish stocks.

75 As previously noted, according to international classification systems, the lobster and other shellfish fisheries may be considered service industries under international trade treaties.

76 Quota systems can take different forms, including stock certificates, individual transferable quotas and enterprise allocations.

77 "Fishing down" refers to the long-term trend from fishing species in higher trophic levels to lower level ones. The term was devised by UBC fisheries scientist Daniel Pauly. See Daniel Pauly et. al., "Fishing Down Marine Food Webs," *Science* 279 (1998): 1015–22.

78 William E. Schrank, "Introducing Fisheries Subsidies", FAO Fisheries Technical paper 437, *Food and Agriculture Organization*, 2003, 51.

79 U. Rashid Sumaila, "Is an all or nothing WTO fisheries subsidies agreement achievable?" paper presented at *Trade And Development Symposium, Perspectives on the Multilateral Trading System*, International Centre for Trade and Development, Geneva, 2012. p. 3.

80 Sumaila, U. Rashid, Khan, A., Teh, L., Watson, R., Tyedmers, P., Pauly, D. "Subsidies to high seas bottom trawl fleet and the sustainability of deep sea benthic fish stocks," *Marine Policy* 34(3) (2010): 495–497.

81 World Wildlife Fund, “Underwriting Overfishing,” Endangered Seas Campaign, Issues Summary no. 19, 1999.

82 Kate Willson, Mar Cabra and Marcos Garcia Rey. “Nearly €6 billion in subsidies fuel Spain’s ravenous fleet” in *Looting the Seas II* ed. by The International Consortium of Investigative Journalists and The Center for Public Integrity, October 2, 2011.

83 Ibid, p. 6. Subsidies to the Spanish fishing industry include: construction and modernization of vessels, €558 million; private security services, €2.8 million; payment for fisheries access rights in developing countries, €803 million; marketing and promotion, €83 million; scrapping or retiring vessels, €330 million; and fuel tax exemptions: €2 billion.

84 “Article x 3 [Prohibited Subsidies], x 4[Other Subsidies] and x 8 [Review Clause] of this [Chapter] shall not apply to fisheries subsidies, subsidies related to products covered by Annex 1 of the WTO Agreement on Agriculture and other subsidies covered by the WTO Agreement on Agriculture.” See EU proposal for Subsidies chapter in the Canada-EU CETA Draft Consolidated Text, June 23, 2011, 93.

85 According to leaked documents, the agreed text (as of October 2012) reads: “If a Party considers that a subsidy, or the provision of government support, granted by the other Party, is adversely affecting, or may adversely affect, its interests with respect to agricultural goods or fisheries products, it may express its concerns to the other Party and request consultations on the matter.” See “CETA Fisheries: EU Consolidated Package,” 25 October, 2012. This document is attached as Appendix 1.

86 The U.S. has a small Pacific distant water fleet which is much better regulated than those in other jurisdictions. See Greenpeace International, “Taking Tuna Out of the Can: Rescue Plan for the World’s Favourite Fish,” December, 2007, 11.

87 Fikret Berkes, “Evolution of co-management: Role of knowledge generation, bridging organizations and social learning,” *Journal of Environmental Management* 90 (2009): 1692.

88 Paul Greenberg, *Four Fish: the Future of the Last Wild Food* (London: Penguin Books, 2010), 185–188.

89 Ibid, 187.

90 See Michael Bourgeois, Joanne Hussey, Christine Saulnier, and Sara Wuite (2012) “Public Disservice: The Impact of Federal Government Job Cuts In Atlantic Canada,” Canadian Centre for Policy Alternatives, November 27, 2012, p. 25. http://www.policyalternatives.ca/publications/reports/public-disservice.

91 CBC News, “Coast guard takes brunt of fisheries department cuts, 1,000-plus employees could be on the chopping block,” May 17, 2012. http://www.cbc.ca/news/canada/newfoundland-labrador/story/2012/05/17/nl-dfo-cuts-517.html (accessed November 11, 2012).

92 Parliament of Canada, “Division 5: Fisheries Act” in “Bill C-38: An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures.” Section 35(1). http://parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5697420&File=356 (accessed November 15, 2012).

93 Ibid, Section 2(1).

94 Ibid, Section 35(1).

95 Ibid, Section 35(2).

96 Fikret Berkes, “Evolution of co-management: Role of knowledge generation, bridging organizations and social learning,” *Journal of Environmental Management* 90 (2009): 1693.

97 Ibid, 1692.

98 According to many analysts, there are two broad, significantly different approaches to co-management: the communitarian and the neo-liberal. The first approach "acknowledge(s) the value of Local Ecological Knowledge (without denying the worth of formal scientific understanding), recognize(s) the importance of the fishing economy to the (generally small and scattered) places in which fishing families live, and envisage(s) the possibilities of effective community stewardship." The second market-oriented, or neo-liberal, approach is described as "mutual coercion mutually agreed upon through the self-organizing disciplinary power of the market's invisible hand." See Graeme Wynn, "Preface," in *Managed Annihilation: An Unnatural History of the Newfoundland Cod Collapse*, ed. Dean Bavington (Vancouver: UBC Press, 2010), xvi.

99 See Les Whittington, *Toronto Star*, "Ottawa faces $250-million suit over Quebec environmental stance," November 15, 2012. http://www.thestar.com/news/canada/politics/article/1288637--ottawa-faces-250-million-suit-over-quebec-environmental-stance. John Spears, *Toronto Star*, "Wind farm files $475 million NAFTA claim over Ontario offshore moratorium," November 23, 2012. http://www.thestar.com/business/article/1292225--wind-farm-files-475-million-nafta-claim-over-ontario-offshore-moratorium. Eli Lilley and Company, "Notice of intent to submit a claim to arbitration under NAFTA Chapter Eleven", Eli Lilley and Company v. Canada, November 7, 2012. http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/eli_archive.aspx?lang=en&view=d.

100 NAFTA for example employed a negative list approach for federal measures, but all existing, non-conforming measures at the provincial level were excluded through a general reservation under Annex I.

101 It must be stressed that these are draft reservations that have been proposed by Canada. They may, or may not, be agreed to by the EU in the final text of the CETA. The draft Canadian reservations are available at: http://www.rqic.alternatives.ca/CETA_Serv_Inv_fed_annex1_reservations.pdf and http://www.rqic.alternatives.ca/CETA_Serv_Inv_fed_annex2_reservations.pdf (accessed November 8, 2012).

102 North American Free Trade Agreement, Final text, December 17, 1992. Annex I-C-30 and I-C-31.

103 In addition to being a bound reservation that only protects existing measures, the NAFTA reservations for fisheries apply against only the National Treatment and Most-Favoured-Nation Treatment rules. See North American Free Trade Agreement, Final text, December 17, 1992. Annex I-C-30 and I-C-31.

104 See Department of Fisheries and Oceans, "Commercial Fisheries Licensing Policy for Eastern Canada — 1996," Chapter 1, Section 5. http://www.dfo-mpo.gc.ca/fm-gp/policies-politiques/licences-permis/index-eng.htm (accessed November 5, 2012). As the policy further explains, "A 'fishing licence' grants permission to do something which, without such permission, would be prohibited. As such, a licence is an instrument by which the Minister of Fisheries and Oceans, pursuant to his discretionary authority under the *Fisheries Act*, grants permission to a person including an Aboriginal organization to harvest certain species of fish or marine plants subject to the conditions attached to the licence. This is in no sense a permanent permission; it terminates upon expiry of the licence. The licensee is essentially given a limited fishing privilege rather than any kind of absolute or permanent 'right or property'."

105 The draft EU reservation provides "reserves the right to adopt or maintain any measure, in particular within the framework of the Common Fisheries Policy, and of fishing agreements with third countries, with respect to access to and use of the biological resources and fishing grounds situated in maritime waters coming under the sovereignty or within the jurisdiction of Member States of the EU."

106 "CETA — Services and Investment — Federal Government — First Offer — Annex I Reservations" http://www.rqic.alternatives.ca/CETA_Serv_Inv_fed_annex1_reservations.pdf (accessed November 8, 2012).

107 Mobil Investments, which filed the claim, is the U.S.-based holding company for the ExxonMobil group's investments in Canada.

108 See Jeff Gray, "Canada loses NAFTA battle to Exxon," *Globe and Mail*, June 1 2012. http://www.theglobeandmail.com/report-on-business/economy/canada-loses-nafta-battle-to-exxon/article4224936/ (accessed November 8, 2012).

109 The investors also alleged that the provincial R&D guidelines represented a "fundamental shift" in regulation that undermined the investors' "legitimate expectations", in violation of minimum standards of treatment. The tribunal rejected this argument. Ibid.

110 Memorial University Libraries, Management of the Northern Cod Fishery: Chronology of Key Events and Publications, http://www.library.mun.ca/qeii/cns/cod/chrono.php.

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