

# The Turbot War: Gunboat Diplomacy or Refinement of the Law of the Sea?

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Article abstract

This article attempts an analysis of Canadian environmental diplomacy during the recent « turbot war ». The dispute included the Canadian arrest of a Spanish fishing vessel, the *Estai*, beyond the 200 mile zone. Turbot, also known as Greenland halibut, is considered a straddling fish stock because it is present both within and adjacent to the 200 mile zone. The Canadian response to the straddling stock issue involved a two-track strategy of unilateral action and multilateral negotiation. Canadian multilateral efforts included participation in the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. This paper examines the underlying causes of the straddling stocks issue as well as the rights and obligations of coastal and high seas fishing states.

# The Turbot War : Gunboat Diplomacy or Refinement of the Law of the Sea\* ?

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Michael KEIVER\*\*

*This article attempts an analysis of Canadian environmental diplomacy during the recent « turbot war ». The dispute included the Canadian arrest of a Spanish fishing vessel, the Estai, beyond the 200 mile zone. Turbot, also known as Greenland halibut, is considered a straddling fish stock because it is present both within and adjacent to the 200 mile zone. The Canadian response to the straddling stock issue involved a two-track strategy of unilateral action and multilateral negotiation. Canadian multilateral efforts included participation in the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. This paper examines the underlying causes of the straddling stocks issue as well as the rights and obligations of coastal and high seas fishing states.*

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*Le présent article examine la conduite de la diplomatie canadienne durant la « crise du turbot ». Pendant ce conflit, un vaisseau espagnol, l'Estay, avait été arraisonné par la marine canadienne au-delà de la limite des 200 milles marins. Le turbot est un poisson dont la fréquence se raréfie, tant à l'intérieur qu'à l'extérieur de la zone des 200 milles. Devant la menace de disparition de l'espèce, le Canada a doublé son action*

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\* This paper was prepared for Professor J. Maurice Arbour as part of the bachelor of civil law degree requirements at Université Laval. The author would like to acknowledge the assistance of David VanderZwaag of the Dalhousie University Faculty of Law, Ted McDorman of the University of Victoria Faculty of Law, and Judith Swan, CEO of Swansea Oceans Environment Inc. and former legal counsel for the South Pacific Forum Fisheries Agency. The author assumes sole responsibility for any errors of fact or interpretation.

\*\* B.A. (Dalhousie); maîtrise en relations internationales (Université Laval), and L.L.L. anticipated 1996 (Université Laval).

*unilatérale d'un effort intense de négociation multilatérale. Le présent article vise à exposer les causes de la réduction des stocks de turbot, ainsi que les droits et obligations des États dans le cadre des activités de pêche.*

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## 1. Introduction

### 1.1 Introduction

*The « turbot war » was about more than turbot.  
Turbot was the straw that broke the camel's back<sup>1</sup>.*

J. Alan BEESLEY and Malcolm ROWE

George Saville once observed, « [t]here is more learning required to explain a law than went into the making of it<sup>2</sup>. » The making of the law that allowed Canadian fisheries officers to board and arrest foreign fishing vessels on the high seas was less onerous than the subsequent explanations required after the Spanish fishing vessel *Estai* was arrested on the high seas by Canadian fisheries officers<sup>3</sup>. The task of justifying the Canadian enforcement action was made more burdensome because of its illegality under international law<sup>4</sup>. The counter-argument was that the Spanish vessel was not respecting its legal obligations under international law, specifically the United Nations Convention on the Law of the Sea.

If there is a framework of analysis to the international law questions involved in the events surrounding the arrest of *Estai*, also known as the « turbot war », it is within legal institutions such as the 1982 United Nations Convention on the Law of the Sea (UNCLOS)<sup>5</sup> and the Northwest Atlantic Fisheries Organization (NAFO). The failure of these two institutions to address the problem of fisheries management of straddling fish stocks resulted in Canadian efforts to establish the United Nations Conference on

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1. J.A. BEESLEY and M. ROWE, « The Basis in International Law for Canada's Actions in the « Turbot War », (December 1995) *Canadian Council on International Law Bulletin* 3. J. Alan Beesley is the former Canadian Ambassador to the U.N. Conference on Law of the Sea and Ambassador for Marine Conservation. Malcolm Rowe served as an advisor to the Canadian Fisheries Minister during the turbot dispute.
  2. English statesman (1633-1695) known for his opposition to the repeal of the Test and Habeas Corpus Acts.
  3. *Coastal Fisheries Protection Act*, R.S.C. 1985, c. C-33, amended by S.C. 1994, c. 14; SOR 94-362, SOR 95-136. The *Estai* was arrested on the high seas on March 9, 1995.
  4. According to the *United Nations Convention on the Law of the Sea*, specifically Articles 87 and 92 (1), vessels on the high seas not only benefit from the freedom of the high seas, they are subject only to the exclusive jurisdiction of their flag state while on the high seas (subject to conditions).
  5. The 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) came into force in November 1994 after 60 countries consented to ratification. The 1982 Law of the Sea Convention's provisions relating to the fisheries can be considered a codification of customary law. The International Court of Justice in *Libya v. Malta*, [1985] I.C.J. 13, 33 (June 3, 1985), found the 200 mile exclusive economic zone to be customary international law.

Straddling Fish Stocks and Highly Migratory Fish Stocks and the above-mentioned unilateral enforcement action against the Spanish fishing vessel.

On May 10, 1994, Canada amended its domestic fishing regulations, the *Coastal Fisheries Protection Act*, to enable Canadian fisheries officials to board and arrest any non-NAFO member fishing vessel<sup>6</sup>. In March, 1995, the legislation was again amended to include NAFO members, Spain and Portugal, after a dispute over turbot allocations. The dispute erupted after a major reduction in the turbot quota allocated to the European Union (EU) which represents Spain and Portugal as well as other EU members within the NAFO organization.

Canada had a two-track strategy to deal with EU and non-NAFO member overfishing practices vis-à-vis the straddling stocks problem. The first strategy was multilateral: it consisted of the so-called « legal initiative » with the objective of multilateral negotiations. The second strategy was unilateral: it resulted in the enactment of domestic legislation to allow unilateral enforcement action against non-NAFO member vessels and subsequently Spanish and Portuguese vessels.

The « legal initiative » consisted of a concerted effort to build a coalition among Law of the Sea experts as well as like-minded countries to lobby for changes which would address the straddling fish stock problem. The breakthrough in this diplomatic effort occurred during the June 1992 Rio Summit, also known as the Earth Summit, where a resolution was passed to establish a conference which ultimately became known as the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

The Canadian strategy was influenced by the domestic fisheries situation as well as the global fisheries crisis. In March 1995, the Food and Agricultural Organization (FAO) released a report entitled *The State of World Fisheries and Aquaculture* which declared that at the beginning of the 1990s about 69 per cent of the world's conventional species were fully exploited, overexploited, depleted or in the process of rebuilding as a result of depletion<sup>7</sup>. The straddling stocks issue is a fisheries management problem

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6. Non-NAFO member vessels include vessels from non-NAFO member states, stateless vessels, and « flags of convenience vessels ». « Flags of convenience » vessels are considered vessels that are registered under a nationality different than the true nationality of the vessel, for example, a Spanish vessel registers under the flag of Panama to avoid NAFO member regulations.

7. FOOD AND AGRICULTURAL ORGANIZATION, *The State of World Fisheries and Aquaculture*, Rome, FAO publication, 1995, p. 6.

for a number of countries such as Canada where the continental shelf extends beyond the EEZ<sup>8</sup>.

The straddling groundfish stocks managed by NAFO in the Northwest Atlantic, especially cod and flounder, were in a state of collapse. In 1987, the spawning stock biomass for 3NO cod was estimated to be 200,000 tonnes. The most dramatic is 2J3KL cod, where the spawning stock biomass has declined by about 90 per cent in the past two years<sup>9</sup>. It is understandable that with the collapse of the Atlantic groundfish fishing industry that there was considerable domestic pressure on the Canadian government for action to combat overfishing of straddling stocks by Spanish and Portuguese fishing vessels.

This paper will examine the Canadian strategy and action in an international law context. First, the paper will summarize the weaknesses of the existing legal regimes, UNCLOS and NAFO, which propelled the Canadian government into taking both unilateral and multilateral action. UNCLOS requires that coastal states and high seas fishing states cooperate within regional fisheries organizations such as NAFO. Unfortunately, NAFO lacks effective enforcement powers and a compulsory dispute settlement mechanism. These weaknesses are compounded by an objection procedure which allows any NAFO member to object and not be bound by NAFO resolutions regarding issues such as fish allocations.

Second, it is useful to examine the coastal state's rights and high seas fishing state's obligations vis-à-vis the conservation of straddling fish stocks under the UNCLOS regime. The provisions of Articles 63 (2) and 116 are examined because some observers believe these articles justify unilateral coastal state measures. These provisions, however, include specific limitations with regard to allocation and enforcement issues.

Third, the events that led to the ultimate arrest of the *Estai* are summarized because they reveal key elements necessary for the examination of the

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8. E. MELTZER, «Global Overview of Straddling and Highly Migratory Fish Stocks: The Non-sustainable Nature of High Seas Fisheries», (1994) *Ocean Development and International Law* 260-262. This article outlines global overfishing of straddling stocks: Pollock in the Bering Sea high sea «Donut Hole»; pollock in the Sea of Okhotsk «Peanut Hole»; hake, southern blue whiting, and squid off Argentina's Patagonian Shelf. The Canadian straddling stocks, cod, American plaice, yellowtail flounder, witch flounder, redfish, Greenland halibut (turbot), are fished on the «nose» and «tail» of the continental shelf beyond the EEZ. In some areas, the straddling stocks are fished beyond the continental shelf, often in very deep water: orange roughy is fished in Challenger Plateau off New Zealand; redfish in the Barents Sea «Loop Hole», and horse mackerel and squid off Chile and Peru.
  9. NAFO, *Meeting Proceedings of the General Council and Fisheries Commission for 1993*, Dartmouth, NAFO, 1993, p. 109.

legality of such actions. Fourth, it is important to assess the legality of the Canadian actions and their possible legal justifications under not only the UNCLOS regime but also according to the international law concept of necessity and its precedents.

Fifth, Canada's role will be examined in its multilateral efforts in the establishment and ultimate success of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. Finally, this paper assesses the success of the Canadian two-track strategy.

## 1.2 1982 United Nations Convention on the Law of the Sea<sup>10</sup>

The major accomplishment of the United Nations Convention on the Law of the Sea regarding fisheries management was the establishment of the 200-mile exclusive economic zone (EEZ). Article 56 gives the coastal state sovereign rights within the EEZ for the purposes of exploring, exploiting, conserving, and managing living resources of the seabed, subsoil, and superadjacent waters.

Article 61 allows the coastal state to determine the allowable catch of living resources within the EEZ and to ensure through proper conservation and management measures that the living resources are not endangered. Furthermore, Article 61, requires that the coastal state and competent international organizations, whether subregional, regional or global, shall cooperate to this end.

Straddling stocks, such as turbot (also known as Greenland halibut), migrate beyond the 200-mile zone into international waters<sup>11</sup>. Articles 63 (2) and 118 require the establishment of regional fisheries organizations to manage the straddling stocks between the interests of coastal states and distant water fishing states. Under Article 118, states shall cooperate to create subregional or regional fisheries organization to conserve and manage high seas resources. Article 63 (2) addresses the issue of management of straddling stocks through regional organizations :

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10. Canada has not yet become a contracting party to UNCLOS. The reluctance of Canada and other industrialized countries, notably the United States, are related to their concerns regarding the Convention's deep seabed mining provisions. In July, 1994, a number of compromises resulted in the revision of the deep seabed provisions which allowed them to become more acceptable to these countries.

11. The Canadian government argued that until 1987 there was no directed fishery for Greenland halibut outside 200 miles because the normal concentration of the halibut's biomass was inside 200 miles. The biomass concentration shifted during the late 1980's as the result of a change in environmental conditions (NAFO/FC Doc. 95/2, p. 27).

[...] the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

### 1.3 The Northwest Atlantic Fisheries Organization (NAFO)

Following the 1977 extension of the coastal jurisdiction to 200 nautical miles by Canada and the United States, the members of the International Commission for the Northwest Atlantic Fisheries (ICNAF)<sup>12</sup> decided to adopt a new convention. The new convention, the Convention on Multilateral Cooperation in the Northwest Atlantic Fisheries, was signed on October 24, 1978 and established the Northwest Atlantic Fisheries Organization (NAFO)<sup>13</sup>.

The objective of NAFO is «to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of fisheries resources» of the Northwest Atlantic<sup>14</sup>. The objective of «optimum utilization» has recently become controversial within NAFO because of the «two pillar» philosophy. Between 1979 and 1985, NAFO parties abided by the Total Allowable Catches (TAC) quotas which were determined by the «two pillars» of fisheries management: the more precautionary «F.O.1<sup>15</sup>» TAC *versus* «Fmax», the maintenance of the traditional allocation shares of NAFO member countries<sup>16</sup>.

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12. The ICNAF was established in 1949 as the result of a conference convened in Washington by the American government to manage problems affecting the fisheries of the Northwest Atlantic. The United States and 17 other countries eventually became members of ICNAF. Presently, the United States has observer status in NAFO.
  13. The Convention came into force on January 1, 1979 following the deposit with the Government of Canada the instruments of seven signatories. There are presently 15 members of NAFO: Bulgaria, Canada, Estonia, Cuba, Denmark (in respect of the Faroe Islands and Greenland), the European Union (EU), Iceland, Japan, Republic of Korea, Latvia, Norway, Poland, Romania and the Russian Federation. (NAFO, *NAFO Handbook*, Dartmouth, NAFO Headquarters, 1994, introduction.)
  14. *Convention of Future Multilateral Cooperation in the Northwest Atlantic*, article II, para. 1 (hereinafter: «NAFO Convention»); NAFO, *NAFO Handbook*, Dartmouth, NAFO Headquarters, 1984, p. 12. The objective of «optimum utilization» has been interpreted by some critics not the equivalent of «maximum sustainable yield» and therefore not a conservation objective.
  15. F.o.1 sets TACs at a level below the «maximum sustainable yield» (MSY) and provides a cautionary level of protection against errors in scientific assessments of stocks.
  16. B. APPLEBAUM, «The Straddling Stocks Problem: The Northwest Atlantic Situation, International Law, and Options for Coastal State Action» p. 8 (unpublished). A previous version of this paper was presented at the 23rd Annual Conference of the Law of the Sea Institute, 12-15 June 1989, at Noordwijk Aan Zee, Netherlands.



These differences in management philosophy exist between NAFO and the European Union (EU). Until the accession of Spain and Portugal to the EU in 1986, the EU abided by all NAFO conservation decisions. Between 1986 and 1991, the EU which represents Spain and Portugal, took seven times the amount allocated to them<sup>17</sup>. The EU's defense of its unilaterally set quotas is based on NAFO's objection procedure under Article XII of the NAFO Convention. The objection procedure allows any NAFO member to object and not be bound by NAFO resolutions regarding issues such as fish allocations.

Canada contended that this overfishing was not only a breach of the UNCLOS but also the NAFO convention. Spain was accused of not only overfishing but also using destructive fishing practices such as the use of small mesh gear to catch immature fish stocks<sup>18</sup>. The objection procedure and the lack of a compulsory dispute settlement procedure were two major weaknesses of NAFO<sup>19</sup>. Furthermore, NAFO has no real mandate to enforce conservation measures.

During the 1988 NAFO annual meeting a resolution was passed that member countries avoid excessive use of the objection procedures. One option was to amend Article XII which would limit permissible objections. Unfortunately, in order to pass such an amendment, it would have to be supported by all member countries<sup>20</sup>. Another option would be to argue that NAFO Article XII does not provide a jurisdiction for overfishing by EU countries. Canada would have to argue that Article 117 of the 1982 UNCLOS has become part of customary international law and must guide any interpretation of Article XII<sup>21</sup>.

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17. W. GRAHAM, « International Law Issues in the 1995 Turbot War: A Brief Discussion », (1995) 1 *Canadian International Lawyer* 82-84.
  18. *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, C.T.S., 24 October 1978; J.A. BEESLEY and M. ROWE, *loc. cit.*, note 1, 3.
  19. NAFO Convention, article XII, allows a member which presents an objection within 60 days not to be bound by a proposal.
  20. OCEANS INSTITUTE OF CANADA, *Managing Fisheries Resources Beyond 200 Miles: Canada's Options to Protect Northwest Atlantic Straddling Stocks*, Ottawa, January 1990, p. 31.
  21. *Id.*, pp. 31-32. An interesting argument regarding Article 117 and the duty to cooperate was presented in OCEANS INSTITUTE OF CANADA, *op. cit.*, note 20, pp. 31-32: « The argument that the duty to cooperate with respect to the conservation of the living resources has become part of international law has considerable force not only in light of the consensus of state opinion embodied in the 1982 Convention, but also in light of widespread state practice concerning participation in international fisheries organizations such as ICNAF and NAFO since 1945. The notion that Article XII of the NAFO Convention must be interpreted in the context of this duty is supported by Article 31 (3) of *Vienna Convention on the Law of Treaties* which provides that in interpreting a

Another major problem that confronted NAFO was the unregulated fishing activities of non-NAFO members such as Panama, Belize, Honduras, Sierra Leone, Venezuela, Morocco, Vanuatu, and the Republic of Korea in the NAFO Regulatory Area. Many of these vessels were « flags of convenience » vessels i.e. the vessels were not registered under their true nationality which is often Spanish or Portuguese<sup>22</sup>. Flag-of-convenience vessels operating in the NAFO Regulatory Area increased harvests significantly during the second half of the 1980s to estimated peak of 47,300 tonnes in 1991. From 1984 to 1993 vessels from non-members harvested more than 20 per cent of all catches in the NAFO Regulatory Area, taking an estimated 325,000 tonnes of NAFO managed groundfish<sup>23</sup>.

## 2. Straddling Stocks and UNCLOS : The Rights of Coastal States and the Duties of High Sea Fishing States

### 2.1 UNCLOS Article 63 (2) : The Obligation to Seek to Agree

Various observers accused Spain of not meeting its obligations under Article 63 (2) as well as the high seas fishing obligations under Articles 116 to 119. This view suggests that Article 63 (2) creates an obligation for coastal and high seas fishing states to seek to agree regarding measures for the management of straddling stocks :

[...] the coastal State and the States fishing for such stocks in the adjacent area shall *seek*, either directly or through appropriate subregional or regional organizations, *to agree* upon the measures necessary for the conservation of these stocks in the adjacent area<sup>24</sup> [emphasis added].

Bob Applebaum, the Director-General of the International Directorate at the Canadian Fisheries Department during the « Turbot War », asserts an interesting interpretation of the obligation to « seek to agree » under Article 63 (2). Applebaum concludes that Article 63 (2) provides legal basis for the « consistency principle » i.e. the principle that the measures taken outside the zone « *must be consistent* » with measures taken entirely unilaterally by the coastal state *inside* the zone. Applebaum justifies this interpretation with the following: « the obligation arises solely by virtue of the coastal

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treaty, « There shall be taken into account, together with the context [...] (c) any relevant rules of international law applicable in the relations between the parties ». » Text of the Vienna Convention: see I. BROWNIE (ed.), *Basic Documents in International Law*, Oxford, Oxford University Press, 1983, p. 349.

22. NAFO, *op. cit.*, note 9, p. 73 ; OCEANS INSTITUTE OF CANADA, *op. cit.*, note 20, p. 30.

23. NAFO, *Meeting of Proceedings of the General Council and Fisheries Commission for 1994*, Dartmouth, NAFO, 1995, p. 92.

24. UNCLOS (1982), article 63.2.

state's legal status as such, with duties, rights and interests as regards this stock both inside and outside the zone<sup>25</sup> ».

Professor Barbara Kwiatkowska, Faculty of Law, University of Utrecht, commented on Canada's argument for a « consistency rule » and concluded it remained an open question :

[...] although at variance with Article 63 (2), [the consistency rule] does not appear to contradict the substance of the obligations there established. Whether this « consistency rule » could be perceived as testifying to a new legal concept of a coastal state's « special interest » in the 200-mile zone/high sea resources beyond 200 miles, as claimed by Canada and considered by some authors to reflect general customary law or at least a subregional custom in the North Atlantic, remains an open question<sup>26</sup>.

Interestingly, Applebaum also suggests that Article 63 gives the coastal state a « non-limiting effect » regarding the obligation to participate in a process of seeking to agree on measures outside its limits. This obligation is based on Article 61 which requires the coastal state to ensure the maintenance of the resources within its zone. It is Applebaum's application of the « non-limiting effect » which could be considered controversial insofar that he suggests that coastal states « have the right to take other steps » which seems to suggest unilateral action if there is no agreement on conservation measures :

[...] however the coastal state's obligation to « seek to agree » in *no way limits* the *rights* of the coastal state that flow from its duty to *ensure* the maintenance of the resources within its zone [...] In other words, having sought to agree, and failed, the coastal state has the duty and the right to take other steps<sup>27</sup>.

## 2.2 Articles 116 to 119 : Superior Rights of Coastal States

Article 117 is related to the question of the obligation to conclude a fisheries management agreement because it requires all States to take or cooperate in taking « such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas. » Article 118 requires states exploiting living resources in the same area of the high seas to « enter into negotiations with a view to taking measures necessary for the conservation of living resources concerned. » Article 119, entitled « Conservation of the living resources of the high seas », includes several paragraphs that outline the possible factors to be considered in

25. B. APPLEBAUM, *loc. cit.*, note 16, 6-7. Applebaum argues that the consistency rule has been incorporated into the NAFO Convention's Article XI, paragraph 3.

26. B. KWIAKOWSKA, « The High Sea Fisheries Regime : At a Point of No Return ? », (1993) 8 *The International Journal of Marine and Coastal Law* 326, 333-334.

27. B. APPLEBAUM, *loc. cit.*, note 16, 7.

establishing the maximum sustainable yield of fish stocks harvested on the high seas.

Article 116 has been suggested as justification for unilateral extension of fisheries management measures from the coastal state's zone into the high seas. According to this view, Article 116 gives states the right for their nationals to fish on the high seas, but the right is *subject* to the rights, duties and interests of coastal states<sup>28</sup>. Article 116 states :

All states have the right for their nationals to engage in fishing on the high seas subject to :

(a) their treaty obligations ;

(b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67 ; and

(c) the provisions of this section.

Edward Miles and William Burke consider that Article 116 grants the coastal state superior rights over straddling stocks, therefore, in the absence of agreed measures the coastal state could establish measures that would apply to all states fishing straddling stocks, including the high seas<sup>29</sup>. Burke, however, argues that the coastal state's superior rights are limited to conservation measures and does not extend to allocation issues on the high seas<sup>30</sup>.

Furthermore, Miles and Burke argue the coastal state could demand that these states comply, and if refused, seek a remedy through compulsory dispute settlement mechanism<sup>31</sup>. Canada has not yet become a party to UNCLOS, and therefore, it is not bound by the compulsory dispute settlement mechanism. If Canada decided to ratify UNCLOS, the amendments to the Coastal Fisheries Protection Act would be in conflict with the Convention's Articles on high seas fishing. Moreover, the non-parties to the Convention, would not be bound to adhere to the compulsory dispute settlement mechanism.

### 2.3 Dispute Settlement : The 1958 Convention Revisited

A second, if somewhat unorthodox option, is available : the provisions of the 1958 Convention on Fishing and Conservation of the Living

28. OCEANS INSTITUTE OF CANADA, *op. cit.*, note 20 p. 66.

29. E.L. MILES and W.T. BURKE, « Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks », (1989) 20 *Ocean Development and International Law* 343, 352.

30. W.T. BURKE, « The Law of the Sea Convention Provisions on Conditions of Access of Fisheries Subject to National Jurisdiction », (1984) 73 *Oregon Law Review* 113.

31. E.L. MILES and T. BURKE, *loc. cit.*, note 29, 352.

Resources of the High Seas which permit unilaterally prescribed conservation regulations by a coastal state over stocks for adjacent high seas fisheries in default of agreement to be submitted to binding dispute settlement on the basis of agreed scientific standards. The option exists if Canada does become a party to the 1958 Convention. Most importantly, Spain and Portugal are members to the 1958 Convention. Regarding the issue of compatibility, Article 311 (1) of UNCLOS requires that the 1982 Convention shall prevail, however, the word «prevail» does not mean replacement or lapse of the 1958 Convention<sup>32</sup>.

The perceived difficulty with the 1958 Convention is related to the argument that the Convention was intended to apply to fish stocks adjacent to the territorial seas (12 miles) and not the EEZ (200 miles). The counter-argument is that the 1958 Convention does not place an outer limit on the distance of adjacent fish stocks subject to coastal state preference<sup>33</sup>. Miles and Burke consider the extension of coastal state preference beyond the EEZ in a retrospective manner: «the 1958 provisions potentially concerned a far larger problem than coastal states now face, since fishing areas adjacent to 200-mile EEZs are a lot less significant than those outside a 12-mile exclusive zone<sup>34</sup>».

Despite the 1958 Convention's allowance for unilateral conservation measures by coastal states there are no enforcement measures specified. There are also uncertainty regarding unilateral enforcement measures beyond the 200-mile zone under of the 1982 UNCLOS provisions. Article 73 of UNCLOS allows coastal states enforcement rights *within* the exclusive economic zone.

Furthermore, this «enforcement limitation» is highlighted by provisions regarding anadromous stocks, such as salmon, where enforcement of regulations beyond the 200-mile zone is only permitted if agreement has been reached with other fishing states (Article 66 (3) (d))<sup>35</sup>. Burke was very precise regarding unilateral enforcement beyond the 200-mile zone: «there is no basis in any source of law that would permit unilateral enforcement of exclusively prescribed management measures beyond an EEZ<sup>36</sup>».

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32. B. APPLEBAUM, *loc. cit.*, note 16, 11.

33. D. VANDERZWAAG, «The Management of Straddling Stocks: Stilling the Troubled Waters of the Grand Banks», in D. VANDERZWAAG, *Canadian Ocean Law and Policy*, Toronto, Butterworths, 1992, p. 136.

34. E.L. MILES and T. BURKE, *loc. cit.*, note 29, 353.

35. D. VANDERZWAAG, *loc. cit.*, note 33, 129.

36. W.T. BURKE, «Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of the Fisheries», (1989) 16 *Ecology Law Quarterly* 303.

A second issue concerns allocation measures unilaterally taken by the coastal state beyond the 200-mile zone. As mentioned in the preceding pages, the coastal state has no authority to prescribe regulations regarding fish stock allocations on the high seas. The 1982 Convention, UNCLOS, is silent on allocation criteria, and therefore, the coastal states would have to rely on customary law where there is no consensus on the subject<sup>37</sup>.

In conclusion, the reason why there was no Canadian attempt at any form of « dispute settlement » via UNCLOS<sup>38</sup> or the 1958 Convention was that the measures used to accomplish two major objectives in the turbot dispute, unilateral enforcement measures and regulation of allocations beyond the EEZ, would be considered not within the rights of the coastal state. Furthermore, it should be emphasized that many of these arguments were based upon unsettled legal concepts and would involve the high risk of a negative decision.

### 3. NAFO : A Place to Debate

#### 3.1 A New Approach in NAFO

*NAFO is not, I suggest, the place to debate questions of international law, though I can assure you that Canada believes its actions are defensible under international law*<sup>39</sup>.

W.A. ROWAT,  
Deputy Minister of Fisheries and Oceans Canada

The arrest of the *Kristina Logos* on April 2, 1994, a Canadian registered trawler which flew the Panamanian flag on the high seas, marked the beginning of an aggressive stance which was implemented by the new Canadian government's fisheries minister Brian Tobin. On May 10, 1994, Mr. Tobin introduced an amendment to the Coastal Fisheries Protection Act which would enable Canadian fisheries officers to board and arrest foreign vessels violating conservation measures in international waters. The

37. D. VANDERZWAAG, *loc. cit.*, note 33, 128.

38. J.G. MERRILLS, *International Dispute Settlement*, London, Sweet and Maxwell, 1984, p. 120, outlines the obligations under UNCLOS Article 287 which requires that states make a written declaration accepting that disputes may be referred to one or more tribunals: «Where both parties to a dispute have accepted the same procedure that procedure is to be used, unless otherwise agreed. Where, however, they have accepted different procedures (or one party has not accepted any procedure), then the dispute may be referred to arbitration.»

39. Statement by the Head of the Canadian Delegation on the New Canadian Legislation : REPORT OF GENERAL COUNCIL MEETING, *Meeting Proceedings of the General Council and Fisheries Commission*, Dartmouth, NAFO 19-23 September 1994, p. 94.

amendment included key phrases that emphasized the necessity of the measures :

5.1 Parliament [...] declares that the purpose of section 5.2 is to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding, while continuing to seek effective international solutions<sup>40</sup>.

The amendment was originally targeted against non-NAFO members which fished in the NAFO Regulatory Area, however, the EU correctly reasoned that the amendment could add the names of NAFO Contracting Party countries that Canada could consider unilaterally not to be fishing according to Canadian conservation requirements.

During the 1994 NAFO annual meeting, September 19-23, in Dartmouth, Nova Scotia, there were controversial presentations delivered by both the Canadian and EU representatives in response to the recent Canadian legislation. The Canadian representative began his presentation with an overview of the fishing crisis and the measures taken by the Canadian government. He admitted that there was a profound resource crisis in straddling stocks and that the problem was further exasperated by ecological factors such as water temperatures, salinity, and predator-prey relationships.

Canada had instituted a moratoria for cod and flounder stocks and decided that Greenland halibut (turbot) had become a threatened resource. In response, Canada reduced its domestic quotas for the NAFO zone 2+3 G. Greenland halibut from 25,000 tonnes to 6,500 tonnes (a 75 per cent reduction). These measures, however, related only to waters under Canada's national jurisdiction.

Regarding international waters and the NAFO Regulatory Area, the Canadian representative argued that the conservation measures taken there must match those measures taken in waters under Canadian jurisdiction. The Canadian representative emphasized that despite the Canadian belief in the ultimate success of the United Nations Convention of Straddling Fish Stocks and Highly Migratory Fish Stocks interim measures would be necessary.

The response by the EU representative to this threat of unilateral action was swift. He made reference to the FAO Compliance Agreement and that the EU had initiated procedures to ratify the Agreement. The Compliance Agreement, which will be part of the Code of Conduct for Responsible

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40. *The Coastal Fisheries Protection Act*, *supra*, note 3. Article 5.2—No person, being aboard a foreign vessel of a prescribed class, shall, in the NAFO Regulatory Area, fish or prepare to fish for a straddling stock in contravention of any of the prescribed conservation and management measures.

Fisheries<sup>41</sup>, is considered a critical measure in preventing fishing vessels from « reflagging » in order to circumvent international agreed upon conservation measures<sup>42</sup>.

There was no doubt that the EU representative was attempting to tie the two issues of the EU ratification of the Compliance Agreement as well as the negotiations at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks to the Canadian legislation, especially when he noted that other NAFO Contracting Parties shared the EU view that there was no consensus on this issue :

However, the law allows the Canadian Authorities to amend the Regulation overnight to cover any new species and any new Flag State including the Contracting Parties. [...] In this regard *one may ask the question why should we all do our best to endeavour to establish code of conduct for responsible fishing underway within the framework of FAO, and a model for the management of straddling fish stocks and highly migratory fish stocks under negotiations under the auspices of the United Nations*<sup>43</sup>. [Emphasis of EU Representative.]

The Canadian Deputy Minister of Fisheries continued to outline the difficulty in eliminating illegal fishing activities by vessels reflagged by countries such as Panama and Honduras : a joint NAFO demarche, with a deadline of April 1994, was made to these countries, however, the vessels remained. Despite indications of cooperation from these countries, the problem continued because the local fines had been small and ineffective<sup>44</sup>.

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41. The Code of Conduct for Responsible Fisheries was formulated upon instructions from FAO. It is to be consistent with the 1982 UNCLOS and to have as its purpose the concept of « responsible fisheries » i.e. the sustainable utilization of fishery resources. The code consists of five introductory articles : Nature and scope ; Objectives ; Relationship with other international instruments ; Implementation, monitoring and updating ; and Application of the code to developing states. The introductory articles are followed by seven articles : general principles, fisheries management, fishing operations, aquaculture development, integration of fisheries into coastal area management, post harvest practices and trade and fisheries research. The completed code was scheduled to be presented a Twenty-eighth Session of the FAO Conference in November 1995.

42. G. MOORE, « Current Legal Developments : The FAO Compliance Agreement », (1995) 10 *The International Journal of Marine and Coastal Law* 412-425. The FAO Agreement on Compliance was the result of a series of formal and informal negotiations initiated by the FAO during 1993 with FAO member countries and non-member countries as well as representatives of regional fishery bodies. An agreement was developed and the Twenty-Seventh Session of the FAO Conference in November 1993 approved the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (Compliance Agreement). It is now open for signature and will come into force upon the twenty-fifth signature.

43. NAFO, *op. cit.*, note 23, p. 90.

44. *Id.*, p. 93.



The Canadian Deputy Minister further supported his case by presenting statistics regarding fish catches by a total of 24 different Non-Contracting Party vessels that were sighted in the NAFO Regulatory Area :

January	4	vessels with an estimated catch of	425 tonnes
February	8		1,150 t
March	10		1,275 t
April	12		1,450 t
May	15		<u>2,500 t</u>
Total			6,800 t <sup>45</sup>

He also observed that while these illegal activities were taking place NAFO members were respecting moratoria on most straddling stocks especially Canada who closed the fishery for virtually all the stocks concerned. Furthermore, he added, since the amendment of the Coastal Fisheries Protection Act and its coming into force on May 30, 1994, fishing of straddling stocks by flag of convenience and stateless vessels has stopped<sup>46</sup>.

Turbot was also on the menu : NAFO established a Total Allowable Catch (TAC), for the first time ever, for Greenland halibut at 27,000 tonnes for 1995 in response to advice from NAFO's Scientific Council. This conclusion was reached after the Canadian representative had outlined 3 options for Greenland Halibut in the 2+3 zone :

[...] firstly, no fishing in 1995, secondly, to set a TAC at 25 % of the recent catch which would allow a TAC of about 15000 tons [sic] for 1995 which would be comparable to the Canadian reductions inside its zone... A third option would involve a higher risk to conservation and consist of a TAC of 20000 tons based on the average stable catches from 1981-1986 of 25000 tons<sup>47</sup>.

The Canadian representative concluded his summary of the options by stating that 15,000 tonnes was Canada's preference. It should be noted that Canada had already reduced its own 1994 quota for 2+3 Greenland halibut from 25,000 to 6,500 tonnes (75 per cent reduction)<sup>48</sup>. The response from the EU representative was that he interpreted the Scientific Council's advice as recommending that the fishing effort be reduced so as not to exceed a harvest of 40,000 tonnes. The Canadian representative responded that the Scientific Council was not recommending a TAC of 40,000 tonnes rather that

45. *Ibid.*

46. *Id.*, p. 94. The Canadian Deputy Minister was very precise in his statement how the new policy was implemented by Canadian officials : « Before the legislation came into force, every such vessel was visited by Canadian authorities at sea. The nature of the problem and the objectives of the new Canadian regulations was explained to them. We even provided Spanish and Portuguese translations of the Canadian legislation to these vessels to ensure they fully understood the situation ».

47. *Id.*, p. 128.

48. *Id.*, p. 66.

current fishing levels (1994) were estimated to catch 40,000 tonnes and there was a need for a significant cut in this effort<sup>49</sup>.

As a result of this divergence of interpretation, the EU proposed a TAC of 40,000 tonnes which was not supported by the other NAFO Contracting Parties. The representative of Norway proposed a compromise of a TAC of 27,000 tonnes. This proposal was adopted by the other NAFO members, however, the EU abstained<sup>50</sup>.

On February 1, 1995, at a special meeting in Brussels, Belgium, NAFO decided on the allocations of the 27,000 tonnes TAC for Greenland halibut for 1995. There were three proposals, Canadian, European, and Cuban. A vote was suggested on the Cuban proposal which allocated 3,400 tonnes (12.59 per cent) to the EU and 16,300 tonnes (60.37 per cent) to Canada. The proposed EU allocation represented only 12 per cent of the EU 1994 turbot catches.

The EU feared the outcome of a vote and suggested to the Chairman to take the exceptional measure of having a vote on whether to vote on the allocation. The Chairman concluded that the majority favoured a vote. A narrow vote, 6 to 5 with two abstentions, decided the controversial allocations which gave Canada 60.37 per cent and the EU 12.59 per cent of the 1995 quota<sup>51</sup>.

On February 5, 1995, Canadian Fisheries Minister Tobin wrote to the EU Fisheries Commissioner Emma Bonino indicating that Canada was prepared to consider « transitional measures » to allow the EU to adjust to the 1995 quota on the understanding the EU would not invoke the NAFO objection procedure<sup>52</sup>. The EU objected to the term « transitional measures » because it was considered the equivalent of a tacit acceptance of the Brussels allocations, and therefore, could be used a precedent for future allocations. The Canadian response proved inflexible regarding a change of terminology<sup>53</sup>.

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49. *Id.*, p. 129.

50. *Id.*, p. 131.

51. NAFO, *Report of the Fisheries Commission ; Special Meeting*, Brussels, NAFO, 30 January-1 February 1995, pp. 14-16. The vote was carried by six Parties in favour of the allocation (Canada, Cuba, Iceland, Japan, Norway, Russia). Two Parties abstained Denmark (on behalf of the Faroe Islands) and the Republic of Korea and five Parties were opposed (Estonia, the EU, Latvia, Lithuania and Poland).

52. FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, « Chronology of Key Events : Canada-EU Turbot Dispute » *Press Release*, (April 1995).

53. F. KINGSTON, Delegation of the European Commission in Canada, interview, Ottawa, November 16, 1995.

February 14, 1995, Brian Tobin announced that the 40 Spanish and Portuguese boats on the Grand Banks must cease their fishing operations. The EU Fisheries Commissioner argued the turbot allocation was unfair and that the Europeans would continue to fish because she claimed they were entitled to a unilateral quota of 19,000 tonnes<sup>54</sup>.

March 3, 1995, Brian Tobin introduced regulations imposing a 60-day moratorium on Spanish and Portuguese boats fishing turbot in NAFO waters outside the 200-mile zone. These regulations allowed Canadian fisheries officers to arrest European vessels and to remove fishing nets. March 6, 1995, the European Council of Ministers rejected the proposal for a 60-day moratorium.

Tobin, however, announced that the Department of Fisheries and Oceans and Canadian Coast Guard vessels, backed up by a naval destroyer, were patrolling the nose and tail of the Grand Banks and would intercept foreign fishing trawlers. After the announcement, about half the Spanish boats left<sup>55</sup>.

March 9, 1995, Canadian fisheries officers boarded and seized the Spanish fishing vessel *Estai* for fishing contrary to Canadian law. Three days later, the *Estai* was docked in St. John's where the captain and the vessel were charged with fishing for a straddling stock, Greenland halibut, in contravention of the Coastal Fisheries Protection Act<sup>56</sup>. After the arrest of the *Estai* several attempts were made to reach a negotiated settlement. On April 15, 1995, a bilateral agreement was reached between Canada and the EU which was ratified the following day<sup>57</sup>.

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54. K. COX, «How the Dispute Developed» *The Globe and Mail* (April 17, 1995) A-4. February 22, 1995, the EU Commission of Permanent Representatives decided to set a unilateral quota of 18,630 tonnes for 1995. The EU Commission did not disagree with the 27,000 tonne TAC, however, they objected to the quota allocated to the European Union (see also FOREIGN AFFAIRS AND INTERNATIONAL TRADE CANADA, *loc. cit.*, note 52).

55. K. COX, *loc. cit.*, note 54.

56. *Ibid.*

57. D. FREESTONE, «The Canada/European Union: Canada and EU Reach Agreement to Settle the Estai Dispute», (1995) 10 *The International Journal of Marine and Coastal Law*, 397-411. As a result of the agreement, Canada withdrew the application of the Coastal Fisheries Protection Act to Spain and Portugal. The illegal fishing charges against the *Estai* were subsequently dropped. The owners and captain of *Estai* have started a civil action against the Canadian government in the Federal Court of Canada. The government of Spain has asked the International Court of Justice in the Hague for leave to bring a case against Canada. See «Who Won the Great Turbot War?» *The Globe and Mail* (March 16, 1996) A-3.

### 3.2 The Bilateral Canada-EU Agreement

*The less important part of the agreement dealt with turbot quotas. The more important part dealt with new control measures. The centre piece of these new control measures is 100% observer coverage for EU and Canadian fleets in waters under NAFO jurisdiction<sup>58</sup>.*

Brian TOBIN, Canadian Fisheries Minister

*As with many fisherman's tales, Brian Tobin's version of the agreement that ended the six-week dispute resembles in some respects the big one that got away<sup>59</sup>.*

*The Globe and Mail*

Canada and Spain came within hours of a naval gunboat confrontation before the EU ambassadors decided to ratify the bilateral fishing agreement with Canada. The threat of the naval gunboats and last-minute Canadian concessions are considered to have influenced a diplomatic settlement of the dispute. Canada agreed not to pursue a legal case against the captain of the *Estai* who had been accused of overfishing. The EU reserved the right to request a larger allocation of turbot the next year when the quotas are negotiated by NAFO. Furthermore, Spain and Portugal were allowed an additional 5,000 tonnes of turbot in 1995 as a «last-minute deal sweetener<sup>60</sup>».

Canadian officials were criticized because the Agreement «turns a blind eye» to large amounts of turbot that had already been caught. During the last few days of negotiations, Mr. Tobin had reduced previous Canadian estimates of turbot caught to date by the Spanish to between 4,000 to 7,000 tonnes<sup>61</sup>.

Canadian officials in their original negotiations in Brussels had claimed an additional 5,000 tonnes had been caught to date. EU officials, however, argued that the original Canadian estimates were too high. If the original Canadian estimates had been used in the Agreement, the Spanish

58. B. TOBIN, «The Need for a New Conservation Ethic», notes for an address to a joint conference of the Fisheries Council of Canada and the National Fisheries Institute, Boston, October 12, 1995, 8.

59. P. KORING, «Spanish Nets Still Bulging» *The Globe and Mail* (April 17, 1995) 1, 4.

60. J. SALLOT, «Naval Threat Brought Turbot Deal» *The Globe and Mail* (April 17, 1995) 1, 4.

61. P. KORING, *loc. cit.*, note 59, 4.

government would have been obliged to order its vessels to immediately cease fishing in the NAFO Regulatory Area because they would have caught their allocation<sup>62</sup>.

The EU increased their share of the 1995 turbot allocation from 3,400 tonnes (12.59 per cent) to 10,000 tonnes (37 per cent) of 27,000 tonnes of the total allowable catch. Canada reduced its original 1995 quota from 16,300 tonnes (60.37 per cent) to 10,000 tonnes (37 per cent). Russia and Japan retained their 1995 quotas respectively at 3,200 tonnes (11.85 per cent) and 2,600 tonnes (9.63 per cent). The quota for « other » members remained at 1,500 tonnes (5.56 per cent).

The Agreement also was significant because it proposed the division of the zone, which contained straddling turbot stock, into two parts. It was later approved, that the 1995 Canadian turbot allocation of 10,000 tonnes was divided into two zones: a new northern zone which is entirely within Canadian waters (2+3K) and a southern zone (3LMNO) which includes the nose and tail of the Grand Banks and the Flemish cap beyond the 200-mile-limit<sup>63</sup>.

Therefore, Canada received a 1995 turbot allocation for the northern zone of 7,000 tonnes and 3,000 tonnes for the southern zone. Only Canada can receive allocations from the northern zone even though it is included in the calculation for the total allowable catch of turbot.

The Bilateral Agreement also proposed the 1996 total allowable catch at 27,000 tonnes<sup>64</sup>. Robert Rochon, Director-General of Foreign Affairs' Legal Bureau, and William Rowat, Deputy Minister of Fisheries (Canada), were engaged in shuttle diplomacy to Moscow and Tokyo to persuade Russia and Japan to reduce by 20 per cent their turbot allocations for 1996 in order to meet the EU's demand for an increase<sup>65</sup>. The EU increased their allocation from 10,000 tonnes to 11,070 tonnes. The EU emphasized they needed to increase their share from 50 per cent to 55.35 per cent of the 20,000 tonnes available in the southern zone (3LMNO)<sup>66</sup>.

The Agreement included a new measures to ensure compliance with NAFO measures: such as observers required aboard *all* fishing vessels

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62. *Ibid.*

63. Adopted at the NAFO Special Meeting, June 7-9, 1995 in Toronto.

64. NAFO's allocation key for 1996 and thereafter for Greenland halibut in 3LMNO will be in the ratio of 10:3 for the EU and Canada (aside from allocations to other Contracting Parties). (EC-Canada Bilateral Agreement, annex II.)

65. E. WISEMAN, Acting Director-General, International Directorate, Canadian Department of Fisheries and Oceans, interview, Ottawa, November 16, 1995.

66. B. STEINBOCK, International Directorate, Canadian Department of Fisheries and Oceans, interview, Ottawa, January 30, 1996.

(100 per cent coverage), a satellite tracking system (35 per cent coverage), dockside inspections of all vessels at each port of call, special powers to order a vessel to port for inspection, and authority to seal fish holds in order to preserve evidence.

There were a few conservation measures which remained outstanding such as a minimum fish size to protect juvenile Greenland halibut which was later set at 30 cm during the NAFO Annual Meeting in September, 1995<sup>67</sup>. This should be considered inadequate protection of the turbot's ability to reproduce: a turbot's reproductive maturity is at three years and it should measure 60 to 65 cm.

The Bilateral Agreement proposed to discuss the controversial mesh size of 120 millimetres, which was aboard the *Estai* when it was arrested. NAFO later established the minimum mesh size at 130 mm for all ground-fish and flatfish during NAFO's annual meeting in September, 1995<sup>68</sup>.

At the NAFO annual meeting in September, 1995, the measures outlined in the Bilateral EU-Canada Agreement were extended to apply to all NAFO members. There remains two unresolved issues: compulsory dispute settlement and the NAFO objection procedure. Earl Wiseman, Acting Director-General of International Directorate of the Canadian Fisheries Department, hopes to soon pursue the subject of compulsory dispute settlement on a bilateral basis. Presently, there are no plans to resolve the objection procedure problem<sup>69</sup>.

#### 4. The Legality of the *Estai* Arrest

*Necessity if necessary but not necessarily necessity.*

Apologies to W.L. MacKenzie King,  
Canadian Prime Minister 1935-1948

##### 4.1 The Doctrine of Necessity

There is considerable controversy regarding the legality of the arrest of the Spanish vessel *Estai*. Legal justification used for unilateral action is not a new concept, as illustrated by Daniel Patrick Moynihan in his book *On the Law of Nations*:

From the *Caroline* affair of 1837 (Canadian militia having crossed onto the American side of the Niagara River and destroyed a steamboat used by rebels) we have

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67. FISHERIES COMMISSION, *Report of the Fisheries Commission*, 17th Annual Meeting, Dartmouth, 11-15 September 1995, p. 10.

68. *Ibid.*

69. E. WISEMAN, *loc. cit.*, note 65.

Daniel Webster's celebrated dictum that the right of self-defence may extend to such incursions when « the necessity of that self-defence is instant, overwhelming, and leaving no choice of means, and no moment of deliberation<sup>70</sup>. »

One of the legal justifications for the incursion is the concept of necessity which is often confused in doctrine and in practice with right of self-defence. This distinction was outlined in a memorandum, dated April 19, 1994, on the doctrine of necessity prepared by the Legal Bureau of Foreign Affairs (Canada) :

Unlike self-defence and counter-measures, which also preclude wrongdoing, the operation of the doctrine of necessity does not presuppose the existence of a wrongful act committed by another State whose right is infringed by the State acting out necessity. In circumstances of necessity, the other State may be innocent or guilty<sup>71</sup>.

It is important to remember that doctrine of necessity was used to justify the arrest of « stateless », reflagged vessels, or flag of convenience vessels<sup>72</sup> such as *Kristina Logos*<sup>73</sup> as well as Spanish and Portuguese vessels, such as the *Estai*. The Legal Bureau of the Canadian department of Foreign Affairs prepared the following justification for enforcement measures against flag of convenience vessels :

An act that would otherwise constitute a breach of an obligation is not wrongful if taken in a state of necessity, where an essential interest of the state is threatened by a grave and imminent peril threatening the livelihood of scores of thousands of Canadians and the economy of the Atlantic provinces [...] In the short term enforcement action on the high seas is the only way to stop the fishing and save the stocks<sup>74</sup>.

The recent Canadian action on the high seas is certainly not the first time that necessity was invoked to justify conservation measures. In 1893, the Russian Imperial Government had been concerned regarding the in-

70. D.P. MOYNIHAN, *On the Law of Nations*, Cambridge, Harvard University Press, 1990, p. 132.

71. P. KIRSCH, « Canadian Practice in International Law », in *Canadian Yearbook of International Law*, vol. 32, Vancouver, U.B.C. Press, 1994, p. 312.

72. T.L. MCDORMAN, « Stateless Fishing Vessels, International Law and the U.N. High Seas Fisheries Conference », (1994) 25 *Journal of Maritime Law and Commerce* 531, outlined some situations where fishing vessels may be considered stateless : « For fishing vessels, statelessness may arise where the vessel's existing flag State has accepted an international agreement to reduce or stop high seas fishing in a given area and the vessel does not wish to be subject to the flag State's law, so it revokes its flag and does not acquire another one. A fishing vessel may find itself as stateless if it utilizes several flags, changing as a matter of convenience [it becomes a flag of convenience vessel]. »

73. The *Kristina Logos* was arrested on April 2, 1994, for illegal fishing on the high seas by the Canadian government. It had been reflagged as a Panamanian vessel, however, its registration was cancelled after it had been determined that it had a Portuguese crew and there was evidence of Canadian ownership.

74. P. KIRSCH, *loc. cit.*, note 71, 312.

crease in sealing activities by British and American fishermen *near* Russian territorial waters. To avert the danger of extermination of the seals, and despite the fact that the seal hunt took place *outside* Russian territorial waters, the Russian government issued a decree that prohibited the seal hunt in an area that formed part of the high seas.

The Russian government justified its actions because of «absolute necessity» in view of the imminent opening of hunting season. The government had emphasized the provisional nature of the measure and it proposed the negotiation of an agreement as a permanent solution to the problem. Robert Ago, in his presentation on the subject of necessity to the International Law Commission concluded that the *Seal fisheries off the Russian Coast* was a useful example because it not only illustrates the concept of necessity but introduces the strict conditions necessity required if invoked<sup>75</sup>.

The defence of necessity is subject to seven conditions as enumerated by Yves Le Bouthillier :

1. An essential interest of the state has to be in peril.
2. The peril must be grave and imminent.
3. The action taken by the state is the only one that could safeguard its essential interest.
4. The action has not gravely prejudiced the interests of the state against which the action was directed.
5. The action is temporary in nature.
6. The action taken is limited to what is strictly necessary to face the peril.
7. The state relying on necessity has not contributed to that necessity<sup>76</sup>.

These seven conditions, based on Robert Ago's presentation to the International Law Commission, have also been summarized by Alan Beesley and Malcolm Rowe in their defence of the Canadian action which essentially repeats the Yves Le Bouthillier's enumeration<sup>77</sup>.

Beesley and Rowe also argued that Canada's action can be justified under the doctrine of retorsion, as defined by Kelsen (1959) and elaborated by Miles and Burke (1988)<sup>78</sup>. Hans Kelsen, however, defined retorsion in his book *Principles of International Law*, as the following :

75. R. AGO, « State of Necessity », in *Yearbook of the International Law Commission 1980*, New York, United Nations, 1981, p. 158.

76. Y. LE BOUTHILLIER, « Can Canada Plead Necessity in Seizing the Spanish Trawler? » *The Globe and Mail* (March 16, 1995) A-23. See also by Y. LE BOUTHILLIER, « L'affaire du turbot », *Le Devoir* (April 13, 1995) A-9.

77. J.A. BEESLEY and M. ROWE, « Sound Basis in International Law for Canada's Action in the « Turbot War » », (1995) 1 *Canadian International Lawyer* 177-180.

78. J.A. BEESLEY and M. ROWE, « Canada and Spain : A Conservation Dispute », in *L.O.S. Lieder*, Honolulu, Law of the Sea Institute, 1995, p. 3.



the conduct by which a state violates some interest of another state may not delict, that is to say, the state whose interest is violated may not be authorized to execute a sanction by taking an enforcement action against the state which has violated its interest ; but it may react by a similar violation of an interest of the latter state. Such a reaction is called a retorsion. It is no sanction, for it is *not an enforcement action — the employment of physical force in case of resistance not being permitted*<sup>79</sup> [emphasis added].

Edward Miles and William Burke were precise that retorsion measures did not include physical force: « Nothing in the 1982 treaty or in other customary law, however, authorizes one high seas fishing state to take action on the high seas to enforce a conservation obligation owed to it by another state<sup>80</sup>. » Nevertheless, Miles and Burke concluded there were other recourses available : diplomatic action (protests), domestic remedies (refusal of port access), and international trade sanctions<sup>81</sup>.

Retorsion was one of the four policy options suggested by Bob Applebaum. The Canadian government has employed diplomatic action (protests) and refusal of port access against EU and non-NAFO members fishing the NAFO Regulatory Area<sup>82</sup>.

The three other options Applebaum suggested were : reprisals in conformity with international law<sup>83</sup>, dispute settlement<sup>84</sup>, and incorporation of provisions related to the coastal state's preferential rights over straddling stocks<sup>85</sup>.

Applebaum's starting point for the third option, regarding the incorporation of provisions related to the coastal state's preferential rights over straddling stocks, involves an interpretation of options outlined by Miles and Burke. They concluded that according to UNCLOS, coastal states can

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79. H. KELSEN, *Principles of International Law*, New York, Rinehardt and Company Inc., 1959, p. 25.

80. E.L. MILES and W.T. BURKE, *loc. cit.*, note 29, 351. This work was presented to the Joint Soviet Maritime Law Association/Law of the Sea Institute Symposium on the Law of the Sea, Moscow, 28 November-2 December, 1988.

81. *Id.*, 351-352.

82. B. APPLEBAUM, *loc. cit.*, note 16, 17.

83. B. APPLEBAUM *loc. cit.*, note 16, 19, writes on the subject of reprisals : « under certain circumstances, a state which permits its nationals to fish straddling stocks outside the 200 mile limit of a coastal state has violated the rights of that coastal state, and its own obligations under international law to that state, and has thus committed an international delict ». Applebaum concludes the range of possible reprisal actions is very limited in practical terms because states try to minimize disruptions to their normal relations.

84. B. APPLEBAUM *loc. cit.*, note 16, 18, concludes that governments are reluctant to engage in compulsory dispute settlement for a number of reasons, including the heavy costs involved in personnel and money, and time required to obtain results.

85. *Id.*, 16.

prescribe measures for states fishing straddling stocks and demand that these states observe these measures and if refused, seek remedy through a compulsory dispute mechanism<sup>86</sup>.

Applebaum extrapolates beyond Miles and Burke's conclusion which results in dispute settlement with the suggestion that the coastal state is to incorporate in its domestic legislation provisions relating to its preferential rights over straddling stocks outside its 200 mile limit :

Such incorporation could provide for regulations applicable outside its 200 miles limit and for enforcement of these regulations outside 200 miles in, for example, cases where there are bilateral or multilateral agreements providing for such enforcement<sup>87</sup>.

It should be considered it a leap in logic to go from dispute settlement suggested by Miles and Burke to unilateral enforcement measures against stateless vessels fishing on the high seas. It is an even greater extension of legal reasoning to consider these actions against other contracting parties of an international fishery organization such as NAFO.

Some jurists may consider it legally justifiable to arrest so-called stateless vessels because they are not registered under a « flag state » as « required » by UNCLOS Article 92 (1) : « Ships shall sail under the flag of State only ». This is an incorrect interpretation, according to the Legal Bureau of the Canadian Department of Foreign Affairs which concluded the legislative history of Article 92 (1) does not indicate that the drafters of that provision and its precursors considered statelessness in and of itself to be contrary to international law<sup>88</sup>.

Stateless vessels, therefore, should not be considered illegal under international law. This consideration, however, does not prevent any state from applying its domestic law to stateless vessels. Ted McDorman summarized the elements of this legal argument and emphasized there were limitations :

Regarding a stateless vessel, *prima facie*, because a stateless vessel is not the territory of *any* State, there is no extraterritorial application of law. Since a State can prescribe and enforce laws against its own vessels on the high seas, it can also prescribe and enforce these laws against stateless vessels. But this is not to say that

86. *Ibid.* See also E.L. MILES and T. BURKE, *loc. cit.*, note 29, 352.

87. B. APPLEBAUM, *loc. cit.*, note 16, 17. According to Applebaum, provisions for non-flag state enforcement on the high seas has already been made in at least one international fisheries management convention, the International Convention for the High Seas Fisheries of the North Pacific Ocean in force since 1953 (Article X).

88. P. KIRSCH, *loc. cit.*, note 71, 311. The memo continues : « If the numerous experts who conceived and refined UNCLOS over a period of some thirty years had considered the failure to sail under a flag to be repugnant to the history, goals or purposes of international law, they had every opportunity to say so in the clearest of terms. »

no limitations based on extraterritorial considerations exist as regards stateless vessels<sup>89</sup>.

Professor Francis Rigaldies, a member of the Law Faculty of Université de Montréal, considers the recent amendment to the Canadian Coastal Fisheries Act as a unjustified use of the concept of stateless persons (*apatride*) in order to enforce fishing violations against stateless vessels :

La Loi canadienne de 1994, qui autorise expressément la saisie et l'emploi de la force à l'encontre du navire apatride, ne saurait donc être justifiée, même si son objectif était de lutter contre les navires sans nationalité. *A contrario*, le Canada n'est pas justifié à utiliser les règles du droit international relatives à apatride pour sanctionner les violations à ses règlements de pêche<sup>90</sup>.

Rigaldies' reasoning relates to UNCLOS Article 110 which allows a ship to be boarded if there is reasonable grounds to believe the ship is without nationality (stateless). Article 92.2 considers vessels which sail under flags of convenience to be without nationality, and therefore, may also be boarded. Despite these powers to board and even to arrest, Rigaldies contends there is no power to seize or confiscate the vessel nor to take sanctions against the captain and crew<sup>91</sup>.

Rigaldies also believes there is difficulty in establishing that a vessel is stateless. Article 91.1 of the 1982 treaty requires a « genuine link », however, the efforts to have stricter requirements for vessel registration such as the 1993 FAO Compliance Agreement are considered a failure<sup>92</sup>.

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89. T.L. McDORMAN, *loc. cit.*, note 72, 543. States are not explicitly permitted under UNCLOS to enact or enforce laws regarding fishing activities by foreign vessels on the high seas except for anadromous species such as salmon.

90. F. RIGALDIES, « La nouvelle Loi canadienne ou l'unilatéralisme retrouvé », *Espaces et ressources maritimes*, n° 8, 1994, p. 265.

91. *Id.*, 264-265. It is the context of Article 92.2 that Rigaldies discusses the *The Lotus Case, France c. Turkey*, (1927) 10 PCIJ Reports, Series A. It is useful to examine because it deals with the « effects doctrine » being superceded by customary law as outlined in Article 92.2. The Court concluded : « If therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in a foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting accordingly, the delinquent. This conclusion could only be overcome if it were shown that there was rule of customary international law which, going further than the principle stated above, established the exclusive jurisdiction of the State whose flag was flown.» In 1927, the French government was unable to prove to the court the existence of such a rule of customary international law.

92. *Id.*, 265-266. The Compliance Agreement requires contracting parties to ensure that vessels flying their flags do not engage in any activity that undermines the effectiveness of conservation. Many observers believe that the Agreement is weak and ineffective.

Rigaldies attacks the concept of self-defence which he considers to rely on the theory of necessity. In his opinion, the concept of self-defence is supported only by certain « anglo-saxon » authors. Rigaldies rejects self-defence because it is related to the « effects » doctrine which would authorize a state to rule on infractions committed outside its territory but that have an injurious effect with the state's territory<sup>93</sup>.

Professor David VanderZwaag, of Dalhousie University Law Faculty, examined the « objective territoriality » or « effects principle » as a justification for the extension of enforcement measures by a coastal state which would include powers of arrest and prosecution of vessels fishing straddling stocks<sup>94</sup>.

VanderZwaag applied the « effects » principle to the straddling stock problem with the following rationale :

[...] that the conduct of foreign fishing on the high seas is having an effect on fish stocks within the national 200 nautical mile fishing zone or economic zone and on dependant coastal communities. Assuming that the 1982 Law of the Sea Convention grants coastal states the right unilaterally to make laws applicable to straddling stocks on the high seas where international negotiation fails, the « effects » principle would be a basis for applying national enforcement power to the adjacent high seas area as well<sup>95</sup>.

VanderZwaag admitted that the « effects » principle is not a sure foundation for extending enforcement jurisdiction over foreign fishing vessels on the high seas. He conceded, that even outside of the UNCLOS context, application has been controversial. Interestingly, Canada has not favoured the detrimental effects principle alone but has « intertwined » the approach with the nationality and protective principles<sup>96</sup>.

93. *Id.*, 271. Rigaldies quotes J.M. ARBOUR, *Droit international public*, 2nd ed., Cowansville, Éditions Yvon Blais, 1992, pp. 236-237: « L'autoprotection n'est pas sans rapport avec la doctrine dite « de l'effet », qui « autorise un État à juger des infractions commises à l'étranger, mais dont l'effet préjudiciable se fait sentir dans cet État. » »

94. D. VANDERZWAAG, *loc. cit.*, note 33, 133. VanderZwaag presents a second foundation for this option—the « effective administration of justice » doctrine (p. 135): « The doctrine, closely related to the « effects » principle, has been viewed as the underlying rationale for the right of hot pursuit [...] However, even if the validity of such a legal principle is accepted, a coastal state again faces the difficult question of the legal status of Article 92 » [of UNCLOS]. Article 92 requires: « Ships shall sail under the flag of one State only and [...] shall be subject to its exclusive jurisdiction on the high seas. »

95. *Id.*, 132.

96. H. KINDRED *et al.*, *International Law: Chiefly as Interpreted and Applied in Canada*, 4th ed., Toronto, Edmond Montgomery, 1987, pp. 468-470. Kindred defines these principles:

« *Nationality Principle*: The nationality of the offender is accepted as the basis of jurisdiction and is utilized extensively by civil law countries. Common law countries [...] have been reticent in their use of the nationality principle » (p. 469).

Ted McDorman commented on VanderZwaag's «effects» principle and concluded it had been superseded by the provisions of the 1982 UNCLOS as well as its 1958 predecessors which explicitly permitted the freedom of fishing on the high seas and recognized the exclusive jurisdiction of flag states on the high seas:

It is my opinion that the international law of the sea exists as a complete code regarding high seas fishing activities, such that State jurisdiction has to be based on the foundation of the law of the sea rather than the more general foundation of the «effects» or protective doctrine<sup>97</sup>.

#### 4.2 Conclusion

*When you're weak on facts, argue the law.  
When you're weak on the law, argue the facts.  
When you're weak on both the law and the facts, you  
attack the prosecution.*

Old adage

The «necessity» principle is no longer applicable at the present time because of the development of international law. There are at least two past examples where necessity was used and later confirmed by international law recognition. In 1967, the United Kingdom relied on the necessity principle when it bombed a Liberian oil tanker *Torrey Canyon* in international law waters to prevent further pollution of the British coast. This action was taken after the British Government had failed to disperse the oil by using detergents on the surface of the sea. An attempt was made to salvage the vessel, however, the hull broke and more oil was released. The bombing was successful because it ignited and burned off the oil before it could spread.

There are several elements that should be remembered with the *Torrey Canyon* incident: the British authorities did not claim any legal justification for the bombing of the ship and in public statements, it emphasized the danger was extreme and the decision to bomb was made only after all other methods had failed. It was generally accepted a state of necessity existed because the flag state nor the shipowner protested the action<sup>98</sup>.

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«Protective Principle»: Under this principle a state may exercise jurisdiction over acts committed abroad which are prejudicial to its security, territorial integrity and political independence» (p. 470).

«Objective Territorial [Effects] Principle»: [...] provides that the state where the act is consummated or where the last constituent element occurs or effects are felt takes jurisdiction over the offence» (p. 468).

97. T.L. MCDORMAN, *loc. cit.*, note 72, 545.

98. P. KIRSCH, *loc. cit.*, note 71, 313.

The International Law Commission commented on the «Torrey Canyon» incident and concluded a state of necessity can be invoked as a basis for state conduct not in conformity with international obligations :

[...] where such conduct proves necessary, by way of exception, in order to avert a serious and imminent danger which, even if not inevitable, is nevertheless a threat to a vital ecological interest, whether such conduct is adopted on the high seas, in outer space or — even this is not ruled out — in an area subject to the sovereignty of another state<sup>99</sup>.

The actions taken during the «Torrey Canyon» incident received further recognition in UNCLOS Article 221 :

Nothing [...] shall prejudice the right of States, pursuant to international law, both conventional and customary, to take and enforce measures beyond the territorial sea proportionate to the actual orthreatened damage to protect their coastline or related interests, including fishing, from pollution or threat of pollution following upon a maritime casualty.

A second recent example where the doctrine of necessity was used and later recognized was Canada's *Arctic Waters Pollution Prevention Act*<sup>100</sup>. Enacted in 1970, the legislation established a pollution prevention zone to a distance 100 miles from the coast of Canada. It enabled Canada to protect the Arctic marine environment without recourse to full-scale claim to sovereignty over the waters<sup>101</sup>. Ivan Head and Pierre Trudeau explained their legal justification regarding the *Arctic Waters Pollution Prevention Act* in their book *The Canadian Way: Shaping Canada's Foreign Policy* :

We would emphasize we were not acting in *breach* of international law, rather, in the special Arctic circumstances, we were acting on behalf of the international community in the *absence* of applicable law<sup>102</sup>.

Ultimately, the Canadian initiatives were recognized and largely accepted by the international community. The 1973 Law of Sea Conference accepted the Canadian concept of Arctic environmental protection and later included an article regarding ice-covered areas, Article 234, in the 1982 Law of the Sea treaty.

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99. *Ibid.*

100. *Arctic Waters Pollution Prevention Act*, R.S.C. 1970 (1st Supp.), c. 2.

101. D.M. McRAE, «Arctic Waters and Canadian Sovereignty», *International Journal*, Vol. 38, No. 3, Summer 1983, p. 478.

102. I. HEAD and P. TRUDEAU, *The Canadian Way: Shaping Canada's Foreign Policy, 1968-1984*, Toronto, McClelland and Stewart, 1995, p. 39. It should be remembered that Canada deposited a reservation to Canadian acceptance of the compulsory jurisdiction of the International Court of Justice (it was withdrawn in 1985). A similar reservation was also made after the 1994 amendment to the *Coastal Fisheries Protection Act*, *supra*, note 3.

There are some critics who believe these unilateral attempts at functional jurisdiction are part of a larger diplomatic effort to set the agenda in multilateral forums. They consider the 1994 amendment to *Coastal Fisheries Protection Act* and the arrest of the *Kristina Logos* as a manoeuvre to further the Canadian agenda at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks :

[...] la loi canadienne semble avoir pour double fonction d'encourager l'accélération des travaux de la Conférence sur les stocks chevauchants en même temps qu'elle marque la détermination du Canada à contrecarrer la surpêche étrangère au large de ses côtes<sup>103</sup>.

There are also some observers who believe that the arrest of the *Estai* was part of a Canadian negotiating strategy at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. Canadian Fisheries Minister Brian Tobin said Canada's seizure of the Spanish vessel convinced the EU countries that they should accept the final draft of the convention<sup>104</sup>.

Distinctions should be made between the application of enforcement measures against vessels flying flags of convenience and vessels that are under the responsibility of flag states such as Spain and Portugal. An argument can be made regarding the arrest of flag of convenience vessels which sail under the flag of more than one state in contravention of UNCLOS Article 92.1.

It is a very different argument to seize the vessels of another flag state such as Spain and Portugal. Even if the Canadian government could convince the international community that the seven conditions of necessity were present in the arrest of the *Estai*, it would have to convince them that the defence of necessity allows the use of force.

Yves Le Bouthillier observed that the International Law Commission was unable to resolve this issue and the United Nations Charter would therefore apply :

According to many people, the UN Charter allows resort to force in only two cases : self-defence, and actions under the authority of the Security Council. Even if we concede for argument's sake that necessity constitutes another exception permitting force, a state would have a hard time establishing that force was the only means open to it, given the clear obligation of states to resolve their disputes peacefully<sup>105</sup>.

103. J.-L. PRAT, « La loi canadienne du 12 mai 1994 sur la protection des pêches côtières » ou « L'unilatéralisme canadien réactivé », *Espaces et ressources maritimes*, n° 8, 1994, p. 277.

104. D. WESTELL, « High-seas Police Get UN Clout », *Globe and Mail* (August 4, 1995) 1.

105. Y. LE BOUTHILLIER, *loc. cit.*, note 76, A-29.

The obligation of states to resolve disputes peacefully could be considered analogous to the third condition of necessity — «the action taken by the state is only one that could safeguard its essential interest.» There remains some doubt that all avenues of negotiation and dispute settlement were considered before the arrest of the Spanish vessel.

Despite the precedents of the *Arctic Waters Pollution Prevention Act* and the *Torrey Canyon* incident there seems to be a clear distinction between the arrest of foreign nationals on the high seas and the introduction of standards for tanker traffic in the Arctic or the destruction of a vessel and its potentially dangerous cargo after the failure of a salvage attempt. This distinction will never be decided upon by the International Court of Justice, because when Canada amended the *Coastal Fisheries Protection Act* it made a reservation regarding its acceptance of the compulsory jurisdiction of the International Court of Justice<sup>106</sup>.

Furthermore, there remains the question whether Canada, the state relying on doctrine of necessity, has not contributed to that state of necessity. Yves Le Bouthillier remarked that «[t]he ILC [International Law Commission] seems to say that all contributions of a state, whether intentional or negligent, to a situation of necessity prevent it from invoking that defence<sup>107</sup>.»

It could be argued that Canada contributed to creating a state of necessity by provoking a vote on the NAFO allocation that it knew would not be acceptable to the EU during the February 1, 1995, NAFO meeting in Brussels. Moreover, the EU asked the Chairman for the exceptional measure of having a vote on whether to vote on the allocations. A narrow vote, 6 to 5 with two abstentions, decided the quotas. Finally, it should be emphasized, the Canadian Fisheries Minister insisted on the term «transitional measures» which the EU considered would be equivalent to tacit acceptance of the Brussels meeting's allocations which would be used as an «allocation key» in the determination of future quotas<sup>108</sup>.

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106. Currently, Spain is challenging the legality of the Canadian reservation to the International Court of Justice.

107. Y. LE BOUTHILLIER, *loc. cit.*, note 76, A-29.

108. Interview with F. KINGSTON, *supra*, note 53; NAFO, *op. cit.*, note 51, pp. 14-16. It could also be argued that Canada contributed to a state of necessity because of its own fishing activities within the 200-mile zone.



## 5. The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks

### 5.1 The Road to the Rio Summit

*There's a riddle now that might baffle all the lawyers  
backed by the ghosts of the whole line of judges :  
—like a hawk's beak it pecks my brain.*

*I'll, I'll solve it though!*

Captain Ahab, in *Moby Dick*.

In 1990, Canada launched what it called the « legal initiative » to combat Canadian frustration with the existing UNCLOS framework. The initiative involved consultation with like-minded countries, the publication of legal and scientific articles, and the organization of conferences<sup>109</sup>. In September, 1990, a conference was held in St. John's, Newfoundland, regarding the conservation and management of biological resources on the high seas. Legal and scientific experts from 16 countries discussed the problem of straddling stocks in the context of the Law of the Sea<sup>110</sup>.

The experts agreed on four principles : 1) distant water fishing states should cooperate with coastal states ; 2) members of regional fishing organizations have the duty to ensure their vessels respect conservation measures and do not « reflag » ; 3) distant water fishing states should ensure their fishing activities do not endanger stocks within the coastal state's competence ; and 4) the « consistency rule » : the management regime for high seas straddling stocks should be coordinated with measures adopted for stocks within the coastal states EEZs. The last two principles were not adopted unanimously because it raised the controversial issue of coastal state sovereignty over the management of fish stocks within the EEZ<sup>111</sup>.

The next instrumental conference was in Santiago, Chile, in May, 1991. Experts from Canada, Chile, and New Zealand recommended a series of measures that were inspired by the conclusions of the St. John's conference. This became known as the Santiago text, which emphasized the coastal state's special interest, coordination of conservation measures between the high seas fishing states and coastal states, and protection from the negative impact caused by high seas fishing activities on resources within the EEZ<sup>112</sup>.

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109. P. FAUTEUX, « L'initiative juridique canadienne sur la pêche en haute mer », in *The Canadian Yearbook of International Law*, vol. 31, Vancouver, U.B.C. Press, 1993, p. 56.

110. These countries included Argentina, Australia, Cape Verde, Chile, the Cook Islands, Iceland, Mauritius, Morocco, New Zealand, Peru, Senegal, the United States, Uruguay and the former USSR.

111. P. FAUTEUX, *loc. cit.*, note 109, 55.

112. *Id.*, 56.

The Santiago text influenced a proposal presented by 13 states, which included Canada, three months later, during the third session of the Prep-Com for the United Nations Conference on Environment and Development (UNCED)<sup>113</sup>. The PrepComs were involved in the preparations for UNCED, otherwise known as « The Earth Summit », planned for June 1992 in Rio de Janeiro, Brazil. The 1991 Proposal of 13 states emphasized the conservation problems caused by the lack of effective implementation of UNCLOS Articles 63 (2), 116 and 117. They proposed nine measures which included the « consistency rule<sup>114</sup> ».

In March to April, 1992, during the fourth and final session of the UNCED PrepCom, the 13 states were joined by 27 developing countries and resubmitted a revised version of the 13 state proposal which also emphasized the consistency principle<sup>115</sup>. These 40 states co-sponsored document that became known as L.16<sup>116</sup>.

The Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was obtained as compromise by these 40 countries for the exclusion of L.16 from the oceans chapter of Agenda 21 during Earth Summit in Rio (UNCED) in June, 1992. Chapter 17 of Agenda 21 required that the conference should be organized :

with a view to promoting effective implementation of the provisions of the United Nations Convention on the Law of the Sea on straddling fish stocks and highly migratory fish stocks<sup>117</sup>.

On the basis on the UNCED recommendation, the 47th session of the UN General Assembly adopted, December 22, 1992, resolution 47/192 which officially convened the conference<sup>118</sup>.

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113. *Conservation and Management of Living Resources of the High Seas-Principles and Measures for an Effective Regime Based on the UN Convention on the Law of the Sea*, UN Doc. A/CONF.151/PC/WG.II/L.16 (August 15, 1991). The thirteen countries included Argentina, Barbados, Canada, Chile, Guinea, Guinea-Bissau, Iceland, Kiribati, New Zealand, Peru, Samoa, Solomon Islands and Vanuatu. P. FAUTEUX, *loc. cit.*, note 109, 57, refers to « dix-sept États côtiers » [17 coastal states], however, he only lists thirteen countries.

114. B. KWIATKOWSKA, *loc. cit.*, note 26, 347.

115. *Id.*, 349.

116. UN Doc. A/CONF.151/PC/WGII/L.16/Rev.1 (March 16, 1992).

117. UNITED NATIONS, *Agenda 21: Programme of Action for Sustainable Development*, Conference on Environment and Development, New York, UN Dept. of Public Information, 1993, p. 155.

118. According to P. FAUTEUX, *loc. cit.*, note 109, 67, the adoption of the resolution was only achieved after months of difficult negotiations because of the positions taken by EU regarding the mandate and duration of the Conference. The EU attempted to enlarge the mandate of the Conference to include management of fish stocks within the EEZ. Regarding duration, the EU did not want the Conference to extend beyond 1993.

## 5.2 The Organizational Session : April 1993

The organizational session for the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was held at the UN headquarters in New York, April 19-23, 1993<sup>119</sup>. Ambassador Satya N. Nandan (Fiji), the former UN Under-Secretary-General and Special Representative of the Secretary-General for the Law of the Sea, was elected Chairman of the conference. The Chairman was requested to draft a document to address the issues to be discussed and to call for submissions from delegates.

## 5.3 The First Substantive Session : July 12-30, 1993

The first substantive session of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was opened by Chairman Nandan, July 12, 1993, in New York. The Chairman's Guide (A/CONF.164/10) was presented and it outlined several issues that later became part of the draft negotiating text (A/CONF.164/13\*) at the conclusion of the first substantive session.

A so-called «Core Group», composed of Canada, Chile, Iceland, Argentina, and New Zealand, represented coastal states' interests by submitting a «Draft Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks on the High Seas<sup>120</sup>».

The first substantive session was significant because two divergent positions became clear: coastal states' rights and the interests of distant water fishing nations. Perhaps the most controversial issue was that of the management of a fish stock as one biological mass versus the division of a fish stock along political/territorial boundaries. This raised the issue of sovereignty, the EEZs of coastal states and the question of interference in the domestic management of fish stocks by distant water fishing nations.

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119. Two other conferences on high seas fishing recommended a more effective implementation the straddling stocks provisions of UNCLOS: the FAO Technical Consultations on High Seas Fishing, held September 1992 in Rome, and the International Conference on Responsible Fishing held May 1992 in Cancun which was convened by Mexico in consultation with FAO. The conference in Cancun recommended, among other principles, that «States should take effective action, consistent with international law, to deter reflagging of vessels as a means of avoiding compliance with applicable conservation and management rules for fishing activities on the high seas.» (Declaration of Cancun, p. 4, Article 13.)

120. UN DOC. A/CONF.164/L.11, later revised as UN Doc. A/CONF.164/L.11/Rev.1.

Some coastal states argued that any reference to EEZs should be eliminated from the negotiating text<sup>121</sup>.

A second controversial issue was discussed regarding flag state responsibilities for vessels on the high seas as well as those of coastal states, port states, and regional organizations. As the result of the debate on flagging or reflagging fishing vessels a consensus document was produced under the framework of the Food and Agriculture Organization (FAO): the « Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas<sup>122</sup> ».

A third issue was the precautionary approach debate. The EU, Japan, and Korea argued that the precautionary approach is taken directly from the Rio Declaration's Principle, which applies to pollution, and does not apply to fisheries management<sup>123</sup>.

#### 5.4 The Second Substantive Session : March 1994

The second substantive was held in New York, March 14-31, 1994. This session consisted primarily of reviewing and revising the negotiating in informal sessions. Interestingly, some « Core Group » coastal states (which expanded during the third session to include Peru and Norway) proposed to adopted unilateral measures to control high seas fishing if agreement could not be reached regarding an acceptable regime<sup>124</sup>.

Canadian Fisheries Minister Brian Tobin outlined four objectives that a new convention should recognize : the need for a precautionary approach, binding and compulsory dispute settlement mechanisms, compliance regarding conservation measures, and the special interests of coastal states. The response from Japan was that the present process should not include any new concepts or rights that go beyond the provisions of UNCLOS. Japan was not in favour of the precautionary approach because it could lead

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121. E. MELTZER, « Global Overview of Straddling and Highly Migratory Fish Stocks : The Nonsustainable Nature of High Seas Fisheries », (1994) 25 *Ocean Development and International Law* 26.

122. *Ibid.* The Agreement was adopted in 1993 and will enter into force with the 25th instrument of acceptance (agreement distributed at the third session of the conference in March 1994). The FAO also began to draft an International Code of Conduct for Responsible Fishing.

123. P. CHASEK, « Summary of the Resumed Precom for the Conference on the Sustainable Development of Small Island developing States, 7-11 March 1994 », *Earth Negotiations Bulletin*, July 12, 1993, p. 1. Other countries, which included Australia, Norway, New Zealand, Papua New Guinea, Iceland, Canada, Chile, Indonesia, Trinidad and Tobago, the Solomon Islands and the United States, argued that the precautionary approach as outlined in the Rio Declaration was relevant in all fields of natural resource management.

124. E. MELTZER, *loc. cit.*, note 121, 327.

to moratoria, and consequently limit the efforts of the Japanese long-distance fleet<sup>125</sup>.

The United States supported the ecosystem approach to maintain associated species, the precautionary approach, the need for regional cooperation, and assistance to the developing countries. Interestingly, the EU representative emphasized the importance of regional fisheries organizations and that the multilateral approach is irreplaceable. The EU interest in the preserving the multilateral status quo could have been their reluctance to be bound by an international convention whereas, currently, in NAFO they have the option of invoking the objection procedure<sup>126</sup>.

Informal sessions were held during the first week which discussed the question of coastal state sovereignty *versus* the freedom to fish on the high seas. The resulting debate involved the distant water states which argued for the biological unity of fish stocks whereas coastal states regarded this concept as intrusion on their sovereign rights and invasion of their EEZs<sup>127</sup>.

### 5.5 The Third Substantive Session : August 15-26, 1994

After the Chairman's opening remarks, informal sessions were convened to discuss the Revised Negotiation Text (A/CONF.164/13/Rev.1). After some discussion, the Chairman produced a new draft of the negotiating text, which was in the form of a legally-binding draft agreement (the « Draft Agreement »)<sup>128</sup>. At the end of the second week of negotiations the Draft Agreement was again revised into the Chair's Draft Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and

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125. L. CLIFTON, « Straddling Fish Stocks and Highly Migratory Fish Stocks Conference Highlights, Monday, 14 March 1994 », *Earth Negotiations Bulletin*, March 15, 1994, p. 1.

126. *Id.*, 1-2.

127. *Id.*, 2.

128. The legally binding issue was controversial because the mandate given to the Conference by the General Assembly was only to formulate « appropriate recommendations ». Several coastal states, including Canada, Chile, Colombia, Ecuador, Iceland, Norway and Peru emphasized their interest in a legally binding instrument. The high seas fishing nations, such as the EU, Japan, and Poland, preferred non-binding guidelines. The U.S. expressed a desire for a non-binding instrument. M. HAYASHI, « United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks : An Analysis of the 1993 Sessions », in *Oceans Yearbook 11*, Chicago, University of Chicago Press, 1994, p. 34.

### Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (A/CONF.164/22)<sup>129</sup>.

This new draft agreement included a 31-page revised negotiating text with 47 articles in thirteen parts. Chairman Nandan stated that with further improvements the draft agreement would respond to the concerns of the Rio Declaration and Chapter 17 of Agenda 21 because it included several important proposals. First, there were several effective mechanisms suggested for compliance and enforcement of those measures on the high seas. Second, it provided for a globally-agreed framework for regional cooperation in fisheries conservation. Third, it recognized the need for the settlement of disputes relating to fisheries matters through compulsory binding dispute settlement<sup>130</sup>.

#### 5.6 The Fourth Substantive Session : March 27-April 12, 1995

The fourth substantive session was marked by the Canadian arrest of the Spanish fishing vessel *Estai* on March 9, 1995. Canadian Fisheries Minister Brian Tobin emphasized the need for five objectives to be achieved : a legally binding UN Convention ; the implementation of a precautionary approach ; compatibility between conservation measures inside and outside 200 miles ; binding and compulsory dispute settlement resolution measures ; and high seas enforcement<sup>131</sup>.

There remained two contentious articles : Article 14 dealing with high sea enclaves and Article 21 regarding compliance and enforcement. There were two intersessional meetings : a June meeting in Washington and « pre-session » consultation in New York from 19-21 July, 1995. At the Washington meeting, hosted by the American government, various coastal state and distant water countries, including Argentina, Canada, the European Union, Japan, Korea, and Korea, discussed the compliance and enforcement issue under Article 21. The New York « pre-session » consultations held at UN Headquarters was attended by approximately 20 delegations. The discussion focused on the circulation of a « non-paper » prepared by the American delegation. The European Union and Japan presented two alternative texts.

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129. L. CLIFTON, « Summary of the Third Session of the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 15-26 August 1994 », *Earth Negotiations Bulletin*, August 29, 1994, p. 8.

130. *Id.*, 11.

131. L. CLIFTON, « Fish Conference Highlights, 27-31 March 1995 », *Earth Negotiations Bulletin*, April 3, 1995, p. 3.

The American non-paper became to be considered a « catalyst in attempting to seek a middle ground position<sup>132</sup> ».

In conclusion, despite the inter-sessional discussions there remained difficulty in the final wording of Article 14 and Article 21 of the Chairman's Draft Agreement which continued into the fifth and final substantive session.

## **5.7 The Successful Conclusion : The Fifth Substantive Session**

The ultimate success of the negotiations culminated in a final text of the Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks. On August 4, 1995, Chairman Nandan outlined three essential « pillars » of the Agreement. The first pillar requires management be based on the precautionary approach. The second pillar ensures that the primary enforcement responsibility of the flag State is reaffirmed and the framework for action by States other than the flag States is set out with clear safeguards against abuse. The third pillar provides for the possibility of non-binding settlement, nevertheless, every dispute can be submitted to a tribunal for a binding decision<sup>133</sup>.

### **5.7.1 Pillar I: Conservation Measures**

#### **5.7.1.1 The Precautionary Approach**

Article 5 (b) reemphasizes the principle that measures are based on the best scientific evidence available to determine the level of maximum sustainable yield (MSY) which is already contained in UNCLOS Article 119. Article 5 (c) mentions the application of the precautionary in accordance with Article 6.

It is important to remember when UNCLOS was adopted there was no precautionary approach included. Moritaka Hayashi, Director of the United Nations Division for Ocean Affairs and Law of the Sea, believes that the precautionary approach principle was developed since the mid-1980s in

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132. C. CARPENTER, « A Brief History of the Conference », *Earth Negotiations Bulletin*, July 24, 1995, p. 2.

133. S.N. NANDAN, *Closing Statement*, United Nations, Sixth Session August 4, 1995, p. 2. M. COLLETT, « Achieving Effective International Fishery Management: A Critical Analysis of the UN Conference on Straddling Fish Stocks », (1995) 4 *Dal. J. Leg. Stud.* 1, defined the precautionary approach as including two notions: (i) that environmental control measures should not depend on or wait for scientific certainty of cause-effect link; and (ii) the presumption that it is better to err in decision-making on the side of caution.

domestic and regional legal instruments for the protection of the terrestrial and subsequently marine environment<sup>134</sup>.

Therefore, Article 6.2 is significant because «States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information *shall not* be used as a reason for postponing or failing to take conservation and management measures<sup>135</sup>» (emphasis added).

Article 6.3 (b) and Annex II establish the guidelines to determine the precautionary approach reference points. The guidelines recommend the use of two types of «precautionary» reference points: conservation (or limit) reference points and management (or target) reference points. Conservation reference points set boundaries which are intended to constrain harvesting within safe biological limits within which the stocks can produce maximum sustainable yield, while management reference points are intended to meet management objectives. Article 6.4 requires that when reference points are approached they will not be exceeded and in the event that they are exceeded, States shall take action immediately. These reference points would seem to clarify the «F.O.1» versus «Fmax» debate within the NAFO organization<sup>136</sup>.

#### 5.7.1.2 Compatibility between Conservation Measures

The Agreement is also significant because it attempts to resolve the issue of compatibility of conservation and management measures adopted for areas under national coastal state jurisdiction and those adopted for the high seas. Article 7 provisions are more specific than UNCLOS Article 63 (2) which requires coastal and high seas states fishing straddling stocks to «seek to agree upon the measures necessary for the conservation of the stock<sup>137</sup>».

Moritaka Hayashi considered compatibility a difficult issue during the negotiations for the Agreement and «at the heart» of the issue was the

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134. M. HAYASHI, «The 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks: Significance For the Law of the Sea Convention», in *Ocean Yearbook 12*, Chicago, University of Chicago Press, 1995, p. 5.

135. The general rules are outlined in Article 6 and the specific applications are outlined in «Guidelines for the application of precautionary reference points in conservation and management of straddling fish stocks and highly migratory fish stocks» which is contained in Annex II to the Agreement.

136. M. COLLETT, *loc. cit.*, note 133, 19. F.o.1 is considered the more precautionary approach.

137. NAFO's Article XI (3) (a) requires the NAFO Commission to seek «to ensure consistency» between any measure that applies to a stock occurring both with the Regulatory Area and within an area under the fisheries jurisdiction of a coastal state.



coastal state argument that it had a special interest or preferential rights<sup>138</sup>. There were some coastal states that claimed their supremacy over foreign fleets on the adjacent high seas, that in the case of conflict, the coastal states rights would be superior<sup>139</sup>. In fact, the Core Group Draft Convention (also known as Five-Power Draft Convention) presented by the delegations of Argentina, Canada, Chile, Iceland and New Zealand proposed that the Agreement should « [r]ecognize and give effect to the special interest of coastal states in straddling fish stocks and highly migratory fish stocks occurring both in their exclusive economic zones and on the high seas<sup>140</sup>. »

There are some observers who believe that the new Agreement recognizes the coastal states' contention that in determining conservation measures for straddling stocks the coastal state should have a superior position. There may be some misplaced justification for this because of Article 7.2 (a) requires that states shall :

take into account the conservation and management measures adopted and applied in accordance with article 61 of the Convention in respect of the same stocks by coastal states within areas under national jurisdiction and ensure that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures<sup>141</sup>.

The theory of coastal state superiority could be challenged, however, by the curious juxtaposition of Article 7.2 (a) vis-à-vis Articles 7.2 (d) and 7.2 (e). Article 7.2 (d) takes into account biological unity including the extent to which the stocks occur and are fished in areas under national jurisdiction. Article 7.2 (e) takes into account the « *respective dependence* » of the coastal States and the States fishing on the high seas of the stocks concerned.

## 5.7.2 Pillar II : Effective Enforcement

### 5.7.2.1 Regional Fisheries Organizations

As mentioned in preceding pages, UNCLOS Article 63 (2) only required states to « seek to agree » for compatibility and NAFO sought to have « consistency » of conservation measures. Article 118 of UNCLOS required that « States shall co-operate with each other in the conservation and management of living resources in the areas of the high seas [...] [and] co-operate to establish subregional or regional fisheries organizations. »

138. M. HAYASHI, *loc. cit.*, note 128, 42.

139. *Ibid.*

140. UN Doc. A/CONF.164/L.11/Rev.1, *supra*, article 4 (a) (iii).

141. UN Doc. A/CONF.164/33, article 7.2 (a) ; Article 7.1 affirms that compatibility will be without prejudice to the sovereign rights of the coastal states.

Article 8.3 directly strengthens the role of regional fisheries organizations. Article 8.3 requires states fishing for stocks on the high sea and concerned coastal States :

shall give effect to their duty to cooperate by becoming a member of such organization [...] or by agreeing to apply the conservation and management measures established by such an organization.

There can be no doubt in the obligatory nature of regional fishery organization according to the requirements of Article 8.4: «Only those States which are members of such an organization [...] or which agree to apply the conservation and management measures establish by such an organization [...] shall have access to the fishery resource to which those measures apply.»

#### **5.7.2.2 Duties of Flag States**

The Agreement has a number of obligations that the flag state must agree to before its vessels are allowed to fish in a regulatory area. Hitherto, UNCLOS Article 117 only required in a general manner: «All states have the duty to take, or cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.»

The new Agreement emphasizes the effective control of vessels from the flag state by various requirements as listed under 18 (3): control by means of fishing licenses that are in accordance with the flag state obligations to the regional fishing organization, the establishment of a national record of authorized fishing vessels, and timely reporting of vessel position and fish catches.

Also included in Article 18 provisions are measures for monitoring and surveillance, such as the implementation of observer programs and satellite surveillance, which were part of the recent bilateral agreement between Canada and the European Union (later extended to all NAFO members). Articles 19 and 20 require compliance and enforcement measures by the flag state.

#### **5.7.2.3 Port State Jurisdiction**

UNCLOS Article 218 empowers Port States to undertake investigations and where evidence so warrants, institute proceedings if the vessel is voluntarily within a port. Article of 23 (2) of the Agreement allows the port state to inspect documents, fishing gear, and catch on board the vessel. Article 23 (3) gives new powers to port states «to prohibit landings and transshipments where it has been established that the catch has been taken

in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas. »

#### 5.7.2.4 Cooperation in Effective Enforcement

Article 21 was considered the *most* contentious issue during the six sessions<sup>142</sup>. The issue was largely resolved during an informal meeting hosted by the Americans between the fourth and fifth substantive sessions. Article 21 (1) gives a state which is a member of the regional organization the right to board and inspect vessels flying the flag of another state party *whether or such a state party is not a member of the regional organization*. The only caveat, however, is that both state parties must be signatories of the new Agreement.

Article 21 (2) makes the adoption obligatory of boarding and inspection measures as outlined in Article 21 (1). Article 21 (2) requires that if within two years of the adoption of the Agreement, any regional organization has *not* adopted such boarding and inspection measures, any future enforcement procedures will be based on those outlined in Article 21 and 22.

Article 21 (5) is an aggressive approach to non-enforcement by flag states : it gives the flag state three days (72 hours) following boarding and inspection to respond to notification, investigate, and to take enforcement measures if necessary. If the flag state does not respond within the delay the inspecting state is empowered to inspect and take enforcement measures. If there are clear grounds to believe there has been a « serious violation », Article 21 (7) allows the inspecting state to bring the vessel to the nearest port. In reference to these new provisions, Canadian Fisheries Minister Brian Tobin announced that « a clear right [has been] established for coastal states to take direct enforcement measures on the high seas beyond 200 miles<sup>143</sup> ».

#### 5.7.3 Pillar III: Dispute Settlement

The provisions relating to the settlement of disputes set out in Part XV of UNCLOS apply *mutatis mutandis* to any dispute between parties

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142. The other contentious issue, Article 16 (formerly known as Article 14) regards high seas enclaves surrounded by an area under the national jurisdiction of single state. This is a rare situation particular to the Sea of Okhotsk and the Russian Federation sought special provisions. Various states involved in fisheries in area opposed these measures. Only after protracted negotiations was Article 16 accepted which required states to « pay special attention to establishment of compatible conservation and management measures for such stocks pursuant to article 7. »

143. D. WESTELL, *loc. cit.*, note 104, A-1, A-4.

*whether or not the parties to the Agreement are also parties to UNCLOS* (Article 30 (1)). Therefore, these provisions would apply to any dispute between state parties «concerning the interpretation or application of a subregional, regional or global fisheries agreement relating to straddling fish stocks or highly migratory fish stocks to which they are parties, including any dispute concerning the conservation and management of such stocks, » *whether or not they are also parties to UNCLOS* (Article 30 (2))<sup>144</sup>.

A Canadian newspaper, *The Globe and Mail*, considers the new dispute settlement mechanism as a means of preventing unilateral quotas within NAFO:

In the past, when NAFO assigned quotas, members who disagreed could opt out and set their own limits. Now quotas must be consistent with the policy set by the coastal state which shares the stock, and if one member tries to undermine that decision with its own quota, the dispute can be taken to an independent tribunal set up under the UN's Convention on the Law of the Sea<sup>145</sup>.

## Conclusion

*Canada has a mythology, but it is only now, after about 400 years of history, being forced to decide what it is going to do about it*<sup>146</sup>.

Robertson DAVIES

Canada has a certain international myth of multilateralism and quiet diplomacy to preserve. Are Canada's recent unilateral actions a betrayal of the multilateral tradition? Some observers recall the aggressive unilateral Canadian action during the enactment of the 1970 Arctic Waters Pollution Prevention Act. Other observers, such as Professor Ted McDorman, commented that these memories are of *alleged* aggressive Canadian action to protect its Arctic interests in the 1970s<sup>147</sup>.

Other commentators, such as Professor Michael M'Gonigle, questioned Canada's motives during the United Nations Straddling Fish Stocks and Highly Migratory Fish Stocks Conference. M'Gonigle observed: «Despite its conservationist posturing, no one is sure on whose side Canada

144. M. HAYASHI, *loc. cit.*, note 134, 5.

145. D. WESTELL, *loc. cit.*, note 104.

146. R. DAVIES, «Signing Away Canada's Soul», *Harper's Magazine*, January 1989, p. 43.

147. T.L. MCDORMAN, «Canada's Aggressive Fisheries Actions: Will They Improve the Climate for International Agreements?», *Canadian Foreign Policy*, Vol. 2, No. 3, Winter 1994, p. 7. He is an Associate Professor in the Faculty of Law at University Victoria.

will stand<sup>148</sup>. » The concern over Canada's position during the Conference related to its reluctance to embrace the « consistency rule ».

The consistency rule is important to the application of the precautionary approach of fisheries management. The rule requires that *both* coastal states and high seas fishing states abide by the same approach. Some coastal states, however, believe that the imposition of the consistency rule infringes upon their sovereignty. Canada was criticized because it was perceived to have diluted its support for the consistent application of the precautionary approach. Canada had not changed its position, however, it had become less vocal because another member of the so-called Core group, Chile, had reservations regarding the effects of the consistency rule to Chile's sovereignty<sup>149</sup>.

To judge the success of the Canadian government's two-track strategy, the unilateral and multilateral approaches, a careful examination of the two resulting agreements is required. The major accomplishment of the Canada-EU Bilateral Agreement (later made multilateral to apply to all NAFO members) was the establishment of the observer program with 100 % coverage on *all NAFO member fishing vessels*. The program does not apply to the non-NAFO member countries, stateless vessels, nor flag of convenience vessels<sup>150</sup>.

The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks suggests the implementation of observer programs (Article 18). Furthermore, it has provisions that can apply to flag of convenience vessels: Article 21 (1) allows a contracting party to the Agreement, which is a member of a regional fisheries organization, the right to board and inspect fishing vessels of another contracting party *even if such a party is not a member of the regional organization*.

The famous F.O.1 and Fmax debate within NAFO still remained after the Canada-EU Bilateral Agreement. The UN Agreement has adopted the precautionary approach and requires that states apply it within *both* areas

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148. M. M'GONIGLE and D. BABICKI, « The Turbot's Last Stand ? » *The Globe and Mail* (July 21, 1995) A-19. Michael M'Gonigle is a professor of law at University of Victoria and Dominica Babicki is a graduate student at Simon Fraser University.

149. Interview with A. DONOHUE, former Senior Policy Adviser to the Ambassador for Fisheries Conservation, Ottawa, Department of Foreign Affairs and International Trade, November 16, 1995.

150. The 100 % observer program is considered a success: since it was implemented by Canada and the EU in May, Canadian inspectors have found only one violation by EU vessels compared to 19 during the same period last year. « Tobin Welcomes Tough Fisheries Enforcement Measures », *News Release*, September 15, 1995, NR-HQ-95-108E.

of national jurisdiction and the high seas to straddling and highly migratory stocks (Articles 3 (1), 5 (c) and 6).

The controversial NAFO objection procedure still remains a challenge to NAFO decisions. The UN Agreement's Article 30 (2) emphasizes the UNCLOS dispute settlement provisions can be applied by parties to the Agreement to disputes concerning the application and interpretation of a regional fisheries organization's agreement, to which they are members, *whether or not* these states are also parties to UNCLOS<sup>151</sup>.

Canada has always been aware of the necessity of careful coordination between aggressive unilateral action and multilateral negotiation. Ted McDorman remarked that the dilemma was whether Canada's aggressive actions had improved the climate for international agreements<sup>152</sup>. The two-track strategy is often compared to the strategy outlined during the enactment of the 1970 Arctic Waters Pollution Prevention Act. The strategy relies on the belief that existing international law can be developed by what may be considered unilateral and illegal action.

McDorman believes the enactment of the Arctic Waters Pollution Prevention Act is not a good analogy because Canada's aggression was *alleged*, in fact, no country's direct interests were challenged<sup>153</sup>. Many Canadians also seemed to have forgotten that while Canada continued to work on the drafting of regulations for the Arctic Waters Pollution Prevention Act, it was also engaged in widespread consultation with interested countries<sup>154</sup>.

Therefore, instead of trying to excuse Canadian unilateral action by justifications under UNCLOS or the concept of necessity, the Canadian government *should have emphasized* that it was acting in the development of international law in *consultation* with other countries. In 1970, Pierre Trudeau articulated these elements :

We have told our friends and neighbours that the Canadian step, designed to protect Arctic waters, will not lead to anarchy ; it is not a step which diminishes the international rule of law ; it is not a step taken in disregard of the aspirations and interests of other members of the international community. Canadian action is instead an assertion of the importance of the environment<sup>155</sup>.

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151. The EU has given its intention to become a party to the UN Agreement pending EU internal procedures.

152. T.L. McDORMAN, *loc. cit.*, note 147, 5.

153. *Id.*, 27.

154. P. TRUDEAU and I. HEAD, *op. cit.*, note 102, p. 62.

155. *Id.*, p. 64.