¿Un Acto de Piratería? A Legal and Political Analysis of the Dispute over Greenland Halibut between Canada and Spain

by

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Abstract

The open feuding between Canada and Spain in March and April of 1995 over Greenland halibut or Turbot concerned much more than just the one fish species. An unfortunate combination of history, fish biology, geography, economics and international law contributed to the tensions which made the dispute much larger and complicated than what met the untrained eye. The outcome of the dispute resulted in two arrangements which were signed in 1995 pertaining to the straddling fish stocks off the Newfoundland coast: one bilateral between Canada and the European Union; one global, negotiated at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. Despite the illegality in international law of Canada's arresting of the *Estai* on the high seas, Canada acted predictably in doing so. Canada also acted predictably in adhering to a two-track approach by simultaneously negotiating the bilateral and multilateral agreements. With no global hegemon weighing in on the issue, on balance, Canada's smaller size in the complex interdependent relationship with the EU enabled it to achieve much more than its larger adversary because it was able to present a more coherent and intense position. Given the importance of the two agreements negotiated to the issue of straddling stocks, this case study will analyze them both to reveal important aspects of the evolution of fisheries practices on the high seas, both in terms of coordinated international practices as well as international legal rules. While the agreements go a long way to resolving the disputes over straddling fish stocks off Canada's east coast, they still do not provide closure on the issue as unilateral actions by any party are still possible. As long as there can be unilateral acts in defiance of cooperation, the straddling fish stocks are not yet safe.

Acknowledgments

An academic undertaking such as this one can never be completed in a vacuum. I would first like to express my gratitude to Dr. Douglas A. Ross for his support and guidance in this project. Throughout all the changes and delays in my programme as well as in the thesis project, he has been unfailingly supportive; patient and positive. Indeed without his support, I very likely would not have completed the degree. In addition, I would like to thank Dr. Ted Cohn for his support and insight into earlier drafts of this thesis, and to Dr. Claire Cutler for her thought provoking comments. Thanks also goes out to Barnaby Dolman for his eagle eyed editing skills, as well as to Nina Abi-Aad of the Office of the Canadian Minister of Fisheries and Oceans, and Jill Courtice of the Delegation of the European Commission in Ottawa for their assistance and swift replies to my incessant and frequent queries. Finally, I would like to thank my parents. Without their support this work would not have been completed.

In memory of John Gray Rowntree who reminds me that there is more to life than pressing concerns on a global or national scale; that on a personal, human level, one must never forget to touch the lives of everyone we meet with integrity and love. For when one does, one is immeasurably rewarded. He will be fondly missed by all who knew him.

February 21, 1944 - March 12, 1996.

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Chapter One: Introduction

Canadá piratea un pesquero español en aguas internacionales read the headline of the weekly newspaper, *El Pais, Edición internacional*, on March 13, 1995, summarizing the rage felt by the Spanish, politicians and citizens alike, over Canada's seizing of the Spanish fishing vessel the *Estai* one week earlier. Indeed perhaps not since Charles de Gaulle's infamous *Vive le Québec Libre* speech in 1968 had Canada's relations with Europe become so poor. This time, over a fish species known as Greenland halibut or Turbot, 6 March 1995 was the day the not-so-friendly rivalry in the Northwest Atlantic between otherwise friendly distant neighbours, saw frayed nerves and limited measures of coercion.

The issues on both sides of the Atlantic seemed clear. Canada had imposed moratoria on several fisheries on its fishing fleet. The Europeans, the Spanish and Portuguese in particular, however, seemed indifferent to the ecological disaster playing out on Newfoundland's Grand Banks. Over the years, the foreign fishing fleets from the Canadian perspective had "stolen" cod and a number of other fish species with impunity. In Canada's view, this was not about to happen again and arresting the *Estai* to make it an example for other ships fishing in defiance of Canadian wishes was the last resort; that Canada did so after firing live ammunition across its bow was of little consequence. It was done safely with no intention to fire on the ship itself.

The Europeans saw the situation differently. For years, Canada had been unceremoniously pushing them off the Grand Banks, while taking an ever greater share of the fishery for itself. Recently, Canada had become bolder in its efforts to take over the

fishery, and more brazen about flaunting the booty by allowing "scientific" and "subsistence" fishing despite its own imposed moratoria. It had unilaterally and illegally extended its jurisdiction into the high seas to push the European fleet out of the fishing zone entirely.

The Europeans saw that principles associated with the high seas were at risk—principles which allowed them to fish without the risk of harassment by coastal states such as Canada. Before the seizure of the *Estai*, the principle of freedom to fish on the high seas ruled their policy; Canada's demands were only that of an equal member in the global society, with the demands themselves being illegal anyway. After the arrest of the *Estai*, with Canada clearly unwilling to submit to the rule of law, there was a need to reassert international law and to spell out the rights associated with high seas fishing.

However, as the discussion and analysis in the following chapters will show, the positions illustrated above were just the façades of the two players at one moment in time. Behind those façades are long-standing grievances, memories, and policies around which the simple issue of the arrest of a fishing trawler in the mid Atlantic made for such an explosive situation. Positions had become so entrenched, that on 6 March 1995, the day the *Estai* was brought to St. John's, it was seen as "being arrested" in Canada and "hijacked" in Spain.

The second chapter will look at the general context of the troubles on the Grand Banks. Four aspects will be investigated in detail. First, the history of the Grand Banks fishery will be examined. Indeed, as mentioned, the arresting of the *Estai* was the explosive culmination of tensions tracing back several decades. While the Spanish are believed to have had a presence on the Grand Banks since the 1100s, their presence on the Grand Banks has been challenged only since the 1950s.

The second aspect to be examined is the Spanish position. As this is a Canadian paper it is especially necessary to examine the Spanish need to fish off the Grand Banks. Most press articles covering the Spanish fishing fleet simply report it as a scavenging, amoral entity with an insatiable appetite for fish. While this perception, although exaggerated, has strains of truth, to simply leave it at that would hardly do the Spanish side justice. It is imperative to examine the necessity for the Spanish fleets to fish as aggressively as they do, to provide a more rounded understanding of the dynamics in the dispute.

Thirdly, the second chapter will look at the trawlers. The technology aboard the ships today is astounding. Little is left to reckoning as to where the fish are. Depth sounders and computerized nets measuring miles in length enable the ships to catch every living creature within their sights. The size of the freezer factory ships allow them to remain on the high seas for weeks at a time, processing, preserving, and storing the fish as they go. The fishing technology itself is very menacing and with disastrous consequences has outpaced states' ability to regulate its use.

Finally, at the end of Chapter 2, a discussion of the lowly turbot will ensue. Like its counterparts such as cod, American plaice, and others having different life cycles, Greenland halibut is biologically driven to swim in wide ranging waters which happen to be divided into different jurisdictions. The history of the turbot fishery itself is also examined. It is a short but impressive history, however, that began with less than one thousand tons of turbot being caught in 1963. By comparison, the EU alone caught 48 thousand tons in 1993.

The third chapter will look at the legal aspects of the dispute between Canada and Spain. Much of the dispute, as well as its resolution, hinges on international law. First, the

philosophical underpinnings of the Law of the Sea will be examined to show how there came to be a "freedom of the high seas". Competing and complementary philosophies to Hugo Grotius' predominant idea illustrate not only how the Europeans who controlled the oceans for centuries were able to justify doing so; they also show in an incremental fashion the pattern of development of the law, as well as its limitations. This is key, as it is within the limitations and weaknesses of the Law of the Sea that the dispute festered.

The modern day version of the Law of the Sea is found in the United Nations' Third Convention on the Law of the Sea, (UNCLOS III) which was initialled in 1982. This convention is seen to be progressive in light of environmental concerns. It also attempts to deal specifically with straddling fish stocks. However, despite this attempt, it falls short of this goal. The Convention is further complicated by the lack of ratified signatories. While the Convention was finalized in 1982 at Montego Bay, Jamaica, it has only been in effect since November 1994. Worse, in this instance, neither Canada nor Spain have ratified the Convention. A discussion of these aspects is pursued, to shed light on the strengths and liabilities the UNCLOS III treaty carries into the dispute over turbot.

The third item outlined in Chapter Three is the regional organization in the Northwest Atlantic, known as the Northwest Atlantic Fisheries Organization (NAFO). Regional Organizations are given high prominence in the UNCLOS III text and so carry much weight in the regulation of the fisheries in the high seas adjacent to Canada's exclusive economic zone (EEZ). A discussion will then ensue as to the relative success of NAFO, by juxtaposing Cyrille de Klemm's discussion of what must be found in a regional organization with the NAFO reality to see if it is effective.

Following this discussion of salient aspects of international law, a number of Canada's choices over the years will be outlined. David VanderZwaag outlines a number of options and shows the strengths and weaknesses, while Allan Gotlieb and Charles Dalfen show Canada's methodical approach to the question of straddling fish stocks and foreign fishing fleets. Some of Canada's actions, pointed out in the first chapter's historical discussion, will be restated in the legal context, to show which options Canada has chosen to follow in the past and why.

With the stage set for the dispute between Canada and Spain, Chapter Four will examine the actual dispute between Canada and Spain. Because of agreements within the European Union, the EU regulates and speaks for its members in the area of fishing. Consequently, while the dispute was between Canada and Spain, Canada negotiated with the European Union. Robert Keohane and Joseph Nye show that this requirement that the EU negotiate on the part of Spain contributed significantly to Canada's relative success in its policy objectives while receiving very little punishment in the form of sanctions.

Meanwhile, Brian Tobin, the Canadian Fisheries Minister, had a plan. It will be seen that this plan had very clear objectives, and had very well defined steps to be taken which not only took advantage of Canada's unique bargaining position as a smaller entity dealing with a very large one, but also domestic and international exasperation with overfishing on the Grand Banks and elsewhere. As will also be seen, the plan was a success, with the Europeans and Canadians coming to an accord only a month later. This agreement, included in its entirety in Appendix B, is also analyzed in Chapter Four. Issues of monitoring, enforcement and compliance are addressed in the bi-lateral agreement. The European

grievances were also settled, with Canada withdrawing jurisdiction on the high seas, and giving Europe a larger turbot quota, among other points.

The fifth chapter deals with the global agreement that was initialled in December 1995, but was scheduled to reconvene on March 27th. The Agreement of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks deals with those aspects of the UNCLOS III treaty which did not adequately cover the problems of straddling fish stocks—those fish such as Greenland halibut that spend part of their life inside an EEZ and part of their life outside the boundary— as well as and highly migratory fish stocks— fish such as tuna or shark, which are known to swim all seven seas. For the purpose of this study highly migratory fish stocks will be omitted.

The agreement, contained in Appendix C, is also analyzed here for its potential to change the political environment concerning straddling fish stocks. According to a number of negotiators, the UNCLOS III convention has a number of drawbacks which need to be addressed. Discussions in this chapter look first to see if those troubles were addressed, to see if general consensus is strong enough to see the agreement pass into law with the UNCLOS treaty. A more detailed discussion will then ensue, to see if the Canadian and European points were addressed specifically.

It is fair to say that both parties got what they wanted. Canada had a short and contentious wish list; Europe had a longer but easily achievable one. It is interesting to note that despite their differences, however, the two parties had four points in common. Their common desire for conservation, a binding agreement with a dispute resolution mechanism, and continuity between Canada's EEZ and the high seas, demonstrates that while Canada and

the EU have differences, they share a basic desire for sustainable fisheries. Each side's approach to the dispute, however, reflect their differences.

This historical and legal case study of the issue of straddling stocks was borne initially to look at the issue of Spanish overfishing off the Grand Banks of Newfoundland, but clearly has broadened to incorporate the wider question of straddling fish stock management, and how the world's countries, specifically Canada and the EU, have come to terms with straddling stocks in general, and the management of all fish stocks, including turbot, which straddle Canada's EEZ at a regional level. By the end of this analysis, it will be clear that the management of straddling fish stocks in the Northwest Atlantic stands to see improvement with the aid of two international agreements; the Canada- EU bilateral agreement, and the one completed at the final session of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks in December of 1995. It will also be clear, however, that despite these two international agreements, long term cooperation is not yet guaranteed and hence, neither is the long term survival of the fish stocks.

Chapter Two: The Battle Ground for *la Guerra del Fletán*: The Historical, Biological and Economic Context of the Dispute

Introduction

This chapter will examine a number of themes which surround the dispute between Canada and Spain over Greenland Halibut. First, a short study into the history of the Newfoundland fishery will be done. While the study in this chapter goes back to the turn of the millennium, it will be shown conclusively that Spain indeed does have the right to fish on the Grand Banks. Further, relative to the time the Spanish have been fishing in the area a brash newcomer like Canada acting like a "bull in a china shop" through its bravado in this matter will be seen to have only exacerbated problems over the fishery in the Northwest Atlantic.

Secondly, the chapter will look briefly at the Spanish dilemma; its need to press ever farther afield and more thoroughly for fish. A brief outline of the economy of Galicia, Spain's own "Newfoundland" will show that fishing is as much a part of the psyche there as it is on Canada's east coast despite attempts at diversification.

Third, a discussion on the impact of technological improvements to fishing is necessary, as it can be argued that the laws, regulations, and conventions have not kept pace with the technology introduced into the fishing industry since World War One. It has only

been fairly recently that national governments and international organizations[1] have begun to seriously scrutinize drift nets and ghost nets. The worst of the offenders, according to some, the deep sea trawler will be discussed, as its evolution has enabled the industry to outpace the stocks by catching the fish faster than they can reproduce.

Finally, a short discussion of the fish at the centre of this study, the Greenland Halibut, or Turbot, will ensue. While the entire study concerns itself primarily over turbot, much of this chapter will surround the history of the cod fishery, as the sentiments and effects of the far-reaching moratoria on cod, and other fish such as American plaice, yellowtail flounder and now Greenland halibut, are in many ways an outgrowth of the debates of earlier days over cod. While on the surface it might not make sense to look at the fish itself, but looking deeper into the dispute between the belligerents, the fish and its patterns become intrinsically key to the reasons behind the conflict.

These factors which will be discussed more completely below contribute to the affair in very profound ways. They shape not only the problem at hand, but also the solutions. While the law has been also a very important factor in this issue, it will be discussed separately as both countries, Canada and Spain, turned to the law to justify their respective actions and reactions. The law, to be investigated in the next chapter, has however, also been shaped by the factors to be discussed here.

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[1] Drift nets and their counterparts, ghost nets, float freely at sea and are almost completely unavoidable for fish which encounter them. Accounts mention driftnets to be as long as 30 km and as wide as 30 metres floating at or just under the surface of the water. Ghostnets are invisible or nearly so as they are made of non-biodegradable nylon. Because of their invisibility, fish and mammals alike cannot see them so as to swim around them. *See* Pol Chantraine, *The Last Cod Fish; the life and death of the Newfoundland way of Life*, Montréal, Robert Davies Publishing, 1993, p.95.

Historical Perspective

While the events of March 1995 were impressive and dramatic, they cannot be taken out of context. Indeed, much has taken place over the years since arrival of the first fishing boat off the coast of Newfoundland as early as 1100 AD and much of the dispute in which Canada found itself embroiled with the EU is deeply rooted in history which often goes back further than Canadian confederation. As will be shown, recent years have not been kind to Spain and its efforts to catch fish on the Grand Banks and in the Gulf of Saint Lawrence as Canada has asserted its rights under the new Law of the Sea Convention.

The history of the fishery on the Newfoundland coast goes back much farther than one might think. According to Pol Chantraine there was a healthy fishery here before the days of the great explorers.

> Even before the great explorers—Cabot, Cortereal, Cartier—came to confirm the discoveries made by early sailor-fishermen and to take possession of new territories in the names of their respective sovereigns, the Bretons, the Welsh, the Gaels, the Galicians, the Basques, and others knew about the phenomenal abundance of fish on the Banks of Newfoundland. By the time Giovanni Caboto (John Cabot, as the British called him) returned from a trip that had probably taken him to Cape Breton, and reported to the king of England that his ship could not move through the waters so thick was it [*sic*] with cod, they were already there, fishing.[2]

Indeed, by 1550, there were already over 125 ships of different nationalities actively fishing the Grand Banks.[3] There was actually little interest in the land of Newfoundland itself. The British were the first to use the land but still only the shoreline, to dry the fish.

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[2] Pol Chantraine, *The Last Cod Fish; the Life and Death of the Newfoundland way of Life*, (Montréal, Robert Davies Publishing), 1993, p.23-24.

[3] *ibid.*

The Spaniards, Portuguese and French were able to salt the fish in brine during the return trip home whereas the British had to dry their fish before the trip as Britain did not have the same salt resources. As an outgrowth of this need to dry the fish onshore, Newfoundland is not only a producer of fish, but is itself a product of the fishery.

According to Peter Sinclair, the fisheries are of great social significance for three reasons. First, fish are the only renewable resource in which Newfoundland has a comparative advantage. Second, fishing is still the largest employer in Newfoundland, and finally, fishing is the cultural anchor for its peoples. The fish culture pervades even the urban centres such that no one in the province escapes its importance.[4]

From a political economy perspective, Newfoundland lacks the various linkages normally associated with a primary resource such as fishing. While there are very few forward linkages, to the fishery as such and the industry workers' disposable income, such as the production of consumer goods, there are even fewer backward linkages. Indeed Lawrence Felt believes that the Newfoundland economy missed the opportunity to build these backward linkages, to industrialize, on the "backs of fish".[5] There do exist other industries, like the forest industry but it is considered to be a support industry for the fishing

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[4] Peter R. Sinclair, *A Question of Survival; Fisheries and Newfoundland Society*, (St. John's: Institute of Social and Economic Research, 1988), p.2. 24.8% of the total population is employed through fish harvesting, and a further 19.5% in fish processing.

[5] Lawrence F. Felt, "On the Backs of Fish: Newfoundland and Iceland's Experiences with Fisheries-Induced Capital Goods Production in the Twentieth Century", in *A Question of Survival*, Peter R. Sinclair ed, (St. John's: Institute of Social and Economic Research, 1988), p. 51.

community; fishermen during the off-season cut wood to heat their houses in the winter.[6]

The history of Newfoundland remained unchanged for a number of centuries, where almost the entire fishery was prosecuted at the shoreline and so this discussion can conveniently skip forward in time to 1952 and the creation of the International Commission on the Northwest Atlantic Fishery (ICNAF). Its purpose was to regulate the fishery but it floundered on inability to enforce its regulations as it was run by consensus.[7] Overfishing was a result of each fishing nations' refusal to limit its fishery during the 1950's and 1960's. Indeed, 1.9 million tons of cod alone was caught by the trawler fleets in 1968.[8] However concomitant with the good will associated with the opening of negotiations of UNCLOS III in 1973, Canada succeeded through the ICNAF for the first time to have a Total Allowable Catch (TAC) imposed with quotas assigned to each signatory country.[9]

However, until 1973 when the distant water fishing nations began accepting quotas, little success was evident. In 1964 Canada drew straight baselines[10] to make marginal gains

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[6] Barry Deas, "Ownership and Fleet Structure in the Inshore Fisheries of Newfoundland and Northeast Scotland", in *A Question of Survival*, Peter R. Sinclair, ed., (St, John's: Institute of Social and Economic Research, 1988), p.77.; Chantraine, *op. cit.*, p.19.; Michael J. L. Kirby, *Navigating Troubled Waters; A New Policy for the Atlantic Fisheries, Highlights and Recommendations (The Kirby Report)*, (Ottawa, Department of Supply and Services Canada, 1982), p.5.

[7] Chantraine, *op. cit.*, p.39.; Parzival Copes, "Canadian Fisheries Management Policy: International Dimensions", in Donald McRae and Gordon Monroe, eds., *Canadian Oceans Policy*, (Vancouver: UBC Press, 1989), p.5.

[8] Chantraine, *op. cit.*, pp. 39-41.

[9] Copes, *op. cit.*, p. 5.

[10] A baseline is the line which runs parallel to the coast at a set distance. However, with the use of straight baselines, the lines are divided into equal segments not longer than

(continued...)

in its territorial sea limits as well as extended a nine mile fishing zone beyond the three mile territorial sea.[11] However, the most gains were made in 1970, when Canada unilaterally extended its territorial sea to twelve miles while in so doing eliminating the nine mile zone. Canada was not in the forefront when it did so though, as there were more than sixty other coastal states which had already extended their national jurisdiction to twelve miles.[12]

Meanwhile, in 1972, Canada closed the fishery in the Bay of Fundy and in the Gulf of Saint Lawrence to distant water fishing nations like Spain because of severe overfishing:

> The fishing grounds situated within the Gulf of St. Lawrence and the Bay of Fundy had in fact been so depleted of cod that other countries raised only feeble protests when Canada, in 1972, proclaimed these two zones as "interior seas" and placed them under exclusive jurisdiction. It was simply no longer profitable for the large foreign units to trawl for so few fish![13]

It is very possible that it was this act by Canada which resulted in the favourable decision at the ICNAF the following year, however clearly the fishery was showing signs of serious trouble.

January 1, 1977 saw the most significant change to fisheries management on Canada's east coast with the unilateral imposition of the 200 mile Exclusive Economic Zone (EEZ).

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[10](...continued)
24 nautical miles with no part of the line closer than 200 miles from the coast with the residual effect of having more high seas water to fall under national jurisdiction. A more precise definition is given through the interpretation of Articles 5, 7, 8, 9, and 10 of the UNCLOS III Treaty.

[11] Barry Buzan, "Canada and the Law of the Sea", *Ocean Development and International Law Journal*, (Vol 11, No. 3/4), p. 157.

[12] *ibid.*, p.158.

[13] Chantraine, *op. cit.*, p.41.

This extension was in full compliance with international law as negotiations at the UNCLOS had concluded and accepted the 200 mile EEZ as conventional law by as early as 1974. Canada's motivations were clear when it imposed the EEZ. Canada saw the serious depletion of the fish stocks, most notably the cod fishery, and extended the EEZ to regulate the foreign trawlers with the eventual goal of shutting them out.[14] This also achieved two other goals, according to Copes. The imposition of the EEZ would lead first to fuller employment in the Canadian fishing industry and second, to show its solidarity with the industry frustrated with the fishing practices of the distant water fishing nations.[15]

Spain continued to exploit the fishery resources on the Grand Banks as the Canadian government immediately granted quotas for those stocks that were not fully utilized.[16] However, given the hostility toward the foreign fleets, the government withdrew these quotas once Canadians could fulfil the task of fully harvesting the stocks or else were assessed as depleted.[17] However, while there was an announcement that there would be no further recapitalization of the fishery to fill in the void left by the excluded foreign fleets,[18] market forces at play had this promise doomed from the start.

By the beginning of the 1980's the recession was hitting Newfoundland hard. Fish processing plant closings became the order of the day, and the average fisherman was

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[14] *ibid.*, p. 76.

[15] Copes, *op. cit.*, p. 7.

[16] *ibid.*, p. 8.

[17] Chantraine, *op. cit.*, p. 78.

[18] Copes, *op. cit.*, p. 9.

saddled with debt from taking advantage of the recovery of the fish stocks. In addition, there was a drop in American consumption of fish, making it all the harder to stay afloat.[19] Further, along with the political will which existed in Ottawa, the initial refusal by the Canadian government through the Foreign Investment Review Act (FIRA) to allow for recapitalization of the industry seemed assured. However, things in Ottawa had changed by 1984. Market pressures brought about by the recession, as well as the change in policy concerning foreign investment associated with the election of the Mulroney Conservatives, enabled the fish companies to recapitalize and purchase trawlers, which ironically, were precisely the same ships which were tied up in foreign ports, idled as a result of Canada closing its EEZ to them.[20] Consequently, the Canadian fishing fleet made up the difference, and hence became as guilty of overfishing as the foreigners once did. However, matters were made worse since the Spanish fished just outside the Canadian EEZ limit. In fact, for a number of reasons the Spanish fished as much as they could at the edge of the 200 mile EEZ. For the Spanish, first there was the matter of Canadian arrogance. Canada expelled the Spanish from the areas it had traditionally fished for hundreds of years with little consultation. Indeed, Pol Chantraine, a member of a Canadian delegation visiting Spain 1991 mentions:

> During our conversation, which took place at the Parliament of Galicia, in Santiago de Compostella, Lopez Veiga also told us that the Spanish and the Galicians were very proud people and suggested that perhaps Canada's attitude toward them with regard to the fisheries had not always taken this into

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[19] Sinclair, *op. cit.*, p. 16.

[20] Chantraine, *op. cit.*, p. 76.

account.[21]

This point is akin to the criticism of a person who lacks tact; the problem is not *what* the person says, as the content is accurate for the situation, but the problem lies rather with *how* it is said. According to Chantraine, the Spanish offered a ten year 'grace period' from 1981 during which time the Spanish would phase out all fishing on the Grand Banks and renounce its historical fishing rights on the Grand Banks, but after much negotiating, was summarily turned down.[22] "The failure of the agreement had the same effect on Spain as a red cape on a bull, stimulating national pride, combatitiveness, and not a little bitterness."[23]

A second element, again according to Chantraine, which made it hard for the Spanish to accept its new diminished role on the Grand Banks was an unfortunate error committed by Canada which looked very suspicious to the Spanish. The management strategy adopted by the Canadian government in 1977, while meaning to take 18 per cent of the stock per year, actually arrived at quotas of as much as 62 per cent in some years.[24] Canada, it seemed to the Spanish, was on a frenzy inside the 200 mile limit, while pleading for restraint on the high seas. This two faced-image was exacerbated by Canada's reticence to share information on fish stocks with other countries.[25] According to Copes, when surpluses actually existed, Canada has been "cautious in acknowledging surpluses and in making these available to

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[21] *ibid.* p. 73.

[22] *ibid.*, p. 76.

[23] *ibid.*, p. 78.

[24] *ibid.*, p.89.

[25] *ibid.*, p. 78.

foreign fleets".[26] As a result, Spain has fished regardless of Canadian scientific research results, given they have been proven dubious in the past.

The third reason for Spain's insistence on fishing on the Grand Banks is simply that they have had historical rights to do so. This fact is undeniable, given the Spanish fishing industry has been present off the Newfoundland coast long before Canada, or Newfoundland, for that matter even existed as political entities. Jose Loira Rúa, Spain's General Secretary of Maritime Fisheries stated so "categorically" to Pol Chantraine's delegation.[27] Even in the more recent events surrounding the Turbot, the same sentiments were expressed. The Presidential Minister made this point while leaving a cabinet meeting, "Spain does not renounce nor will renounce the right to fish in that zone".[28]

The Spanish Predicament

Particularly in light of the Spanish criticism of insensitivity on the part of Canadians, it would be productive to include a short profile of the Spanish region Galicia, from where the trawlers hail, as well as outline Spain's unfortunate geographic situation in that it lacks a significant continental shelf of its own.

Clearly, Spain has been a victim of the phenomenon of the ever-widening or "creeping jurisdiction" of coastal states with the advent of the EEZ. The EEZ has effectively

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[26] Copes, *op. cit.*, p. 7.

[27] Chantraine, *op. cit.*, p. 124.

[28] *"España no renuncia ni renunciará a pescar en esa zona" in* Javier Sampedro, "Madrid exige a Ottawa una indemización por apresar el 'Estai'", *El País, Edition Internacional*, Madrid: March 20, 1995, p.9.

brought 32% of the world's oceans under coastal state jurisdiction[29] making for a very difficult situation for some countries, most notably for this study, Spain, with very little useable EEZ for itself. As can be seen in Figure 1, Spain's EEZ off its Atlantic coast is very limited as compared to its neighbours, France and Portugal. Further, the usable portion of the EEZ, the continental shelf, is a mere sliver along its north coast. By the luck of the draw, the Biscay Abyssal Plain becomes the width of the EEZ just at the division point in the Bay of Biscay where it becomes French. Spain does have two other areas, those being its portion of the Mediterranean Sea as well as the EEZ surrounding the Canary Islands. However the waters off the south coast in the Mediterranean Sea is of no consequence to the deep sea trawler fleet. This is because the territorial waters in the Mediterranean leave very little room for EEZs and the catches in the Mediterranean are small.[30] The trawler fleet which operates out of the Canary Islands operate not only in the EEZ surrounding the islands but also down the west coast of Africa.

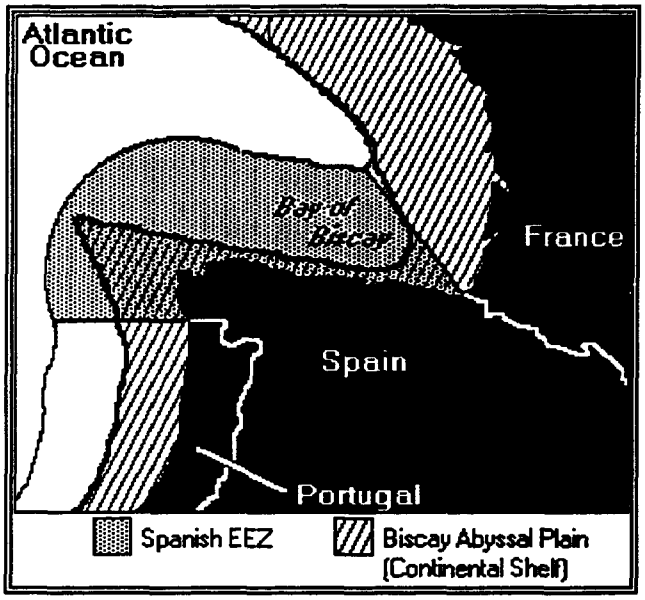

Figure 1. The Spanish EEZ and Adjacent Continental Shelf (*Adapted from:* Murray Barnard, *Sea, Salt and Sweat*, pp. 98-99.; Ken Booth, *Law, Force and Diplomacy at Sea*, foldout map, at p. 200.)

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[29] Ken Booth, *Law, Force and Diplomacy at Sea*, (London: George Allan & Unwin Publishers, 1985), p.137.

[30] Keith G. Salmon, *The Modern Spanish Economy; Transformation and Integration into Europe*, (London: Pinter Productions, 1991), p. 65.

For the Spanish, the 'urge' to fish is based on much more than just its historical rights to do so. Galicia, the region in Northwest Spain where the trawlers found on the Grand Banks are based, is a region not unlike Newfoundland. Indeed, for centuries, the fishery has been the cornerstone of the local economy. *Cofradias*, or fishing fraternity co-operatives have been the "basic unit of political and community structure in smaller towns".[31] The Spanish fishing industry is the second largest in Europe after Norway's[32] and is considered, like that in Newfoundland, to be an increasingly professional occupation, but is still used to provide a semi-subsistence supplement for some.[33] Faced with considerable challenges, including overfishing and closed fishing areas worldwide resulting from EEZ jurisdictions, the industry is responding by modernizing and moving to higher valued fish products as well as fish farming.[34]

However, as will be seen below, the modernization of the fishing fleet has its price. With dwindling fish stocks and equally significantly for the Spanish, decreasing space in which to fish, these new, technologically advanced, and extremely expensive ships are forced to fish with an intensity that can only be described as "carnage"[35]

While Galicia is considered to be the least developed region of Spain, at 80.8%

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[31] Sarah Keene Meltzoff, "Chasing Galicia", *Sea Frontiers*, Vol. 37, no.6, (Dec. 1991), p. 23.

[32] Salmon, *op. cit.*, p. 64.

[33] Salmon, *ibid.* p. 64.; Meltzoff, *op. cit.*, p. 17.

[34] Salmon, *op. cit.*, p. 66.

[35] Chantraine, *op. cit.*, p.44.

developed under the national average of development,[36] comparisons with Newfoundland end there. Unlike Newfoundland, Galicia's economy is not almost solely dependent on the fishery. With approximately 7.4% of Spain's total population, it produces some 5.8% of Spain's GDP.[37] In fact, Galicia supplies Spain with 25% of its agricultural products such as potatoes, 20% of its livestock, 30% of its forest products on top of 50% of Spain's fish landings. In addition, there is a large (subsidized) shipbuilding industry in Vigo which builds mostly distant-water freezer trawlers[38] as well as a Citroën assembly plant. Despite attempts to industrialize the region, the newest class of industrialists is still the freezer trawler owners.[39] Galicia still remains "firmly anchored in the traditional sectors".[40]

The Trawlers

Regardless of nationality, trawlers are seen to be the worst offender by Newfoundland's inshore fishing industry and the technology associated with a trawler is perceived to be out of control. Pol Chantraine poetically described the technology and the drive for further technological advancement. With fewer fish to catch, the trawlers, faced with mortgage payments, salaries, fuel and other costs, have had to upgrade their equipment

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[36] Kevin Bruton, *The Business Culture in Spain*, (Oxford: Butterworth-Hinemann, 1994), p. 11, Table 1.2. This table shows the percentage of development relative to the rest of the country, with the total mean as the 100 per cent benchmark. By comparison, Madrid sits at 115.5 per cent of the national average of development.

[37] *ibid.*

[38] Meltzoff, *op. cit.*, p.17.

[39] *ibid.* p. 17.

[40] Bruton, *op. cit.*, p. 143.

so that they might more successfully catch fish.

> The decline in fish populations had a perverse consequence: improvements in harvesting techniques. To make fishing trips profitable, larger and more effective trawlers were developed.... Thanks to the colour echo sounder, not only can the captain of a fishing vessel see the depth at which the fish are found and determine the length, width, and thickness of the school, he can ever get a good idea of the species, fish size, and so on. All he then has to do is lower his trawl to the indicated stratum—a trawl with a gaping mouth the size of a football field—and fill it. ...the trawl mouth is equipped with a sensor that measures the quantity of fish entering.... So far I have been talking about Canadian ship sizes: trawlers usually forty to fifty metres in length which constitute the main body of large high-seas fishing vessels.... They look like mere skiffs beside the giant draggers, the floating fish factories of the ex-U.S.S.R., Germany, France, and Spain. These mammoth ships 100 to 150 metres long, with engines boasting horsepower in the thousands, raise fish by the tens of tonnes at a time using colossal winches, chains, and cables.[41]

He then goes on to describe the Spanish technique of dragging in pairs, where two of these massive trawlers together pull one trawl over one and a half miles in length, destroying everything on the ocean floor, "denuding" and "decimating", leaving "only the tracks of the huge rubber bobbins on which the trawls roll". Every organism, from plants to crustaceans to every fish is hauled up.[42] The Spanish, he asserts, have even developed an "intelligent trawl", a computerized net which will not get snagged on the ocean floor.[43] No stone is left unturned. Even aircraft are used to find fish. The cost, it goes without saying, is enormous. What is more, the more technologically advanced a ship is, the more fish is must find to support its costs. The vicious circle becomes ever tighter.

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[41] Chantraine, *op. cit.*, pp. 42, 43.

[42] *ibid.*, p.43.

[43] *ibid.*, p.44.

The Fish

While the turbot itself is inconsequential to the discussions over the international law, a discussion of the fish itself, its migratory habits, its reproductive cycle as well as its status under the Northwest Atlantic Fisheries Organization (NAFO) very much are, and so these points will be discussed here. Many accusations and counter-accusations were passed between the European Union and Canada, some of them involving discussions over the fish itself. Before looking at those diplomatic debates, it would be prudent to understand some of the hard science behind the nature of the beast in this investigation.

Turbot, (*Reinhardtius Hippoglossoides*), better known as Greenland Halibut[44] in fishing circles is an oily groundfish with little commercial value except in Spain and Portugal. Higher value fish, such as Northern Cod, American Plaice, Atlantic Halibut and Flounder to name a few are much more in demand in markets of Japan, North America, Britain and other European countries. Even in Spain and Portugal, until recently with the shortage of these other more valuable fish, the demand for Greenland Halibut was low. However, with the Spanish fishing fleet losing traditional fishing areas through the extension of the Exclusive Economic Zones worldwide, combined with the imposed moratoria or severely restricted fisheries within the NAFO, Greenland Halibut has become more in demand if only by default— there were no other fish to catch and consume.

The history of the Turbot fishery is relatively short. According to NAFO statistics,

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[44] Being a groundfish, a fish which essentially thrives on the floor of the continental shelf, the Greenland Halibut is given its name for its existence only in the Northern waters of the Atlantic Ocean. While numbers of Greenland Halibut are found in the northern reaches of the Pacific as well, they are best known for spawning in the Davis Strait— between Baffin Island and Greenland. Turbot and Greenland Halibut can and are used interchangeably.

less than one thousand tons was caught in 1963.[45] 1992 saw the catch reach a pinnacle of 63,000 tonnes with fishing levels staying at that level since. A sharp increase in fishing on the stock came in 1989 when the total catch grew to 47,400 tonnes from 18,900 tonnes in the previous year.[46] The Total Allowable Catch (TAC) established in 1992 and 1993 by NAFO was 50,000 tons, with 1994 seeing a halving of the TAC. The fishing practices, as can be seen in Table 1, have continued unabated.

	1975	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994
TAC	40	30	30	30	30	36	55	55	55	55	75	100	100	100	100	50	50	50	50	25
Catch	29	25	32	39	34	33	31	26	28	26.7	20.3	18.0	32.4	18.4	18.9	47.4	55†	63.0	62.	35*

† Conservative figure given for an estimate of between 55,000-75,000 tons.
* Figure shown reflects actual reported catch at time of printing of document. Projected catch was 52,000-62,000 tons.
All figures expressed in 000 tons

Table 1: Greenland Halibut TAC and Reported Catches in the NAFO and Canadian Regulatory Areas 2 and 3 (*Sources:* NAFO, *Scientific Council Report,* 1985; FRCC, *Report to the Minister of Fisheries and Oceans*, 1994.)

However, when one compares the Canadian catch against the European catch, the problem becomes much more poignant. Bruce Atkinson, Scientist for the Department of Fisheries and Oceans at the Northwest Atlantic Fisheries Centre in St. John's, very clearly points out, using a table (reproduced below) the rise in the European catch of turbot against the drop in the Canadian catch in the NAFO area.

According to Atkinson, Canada has never "prosecuted" Greenland Halibut outside its

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[45] Northwest Atlantic Fisheries Organization, *Scientific Council Reports, 1991*, (Dartmouth, NS: NAFO, 1991), p.82, (Fig. 32).

[46] Fisheries Resource Conservation Council. *Conservation; Staying the Course; 1995 Conservation Requirements for Atlantic Groundfish; Report to the Minister of Fisheries and Oceans*, (Ottawa: Ministry of Supply and Services Canada, 1994), p. 39.

200 mile EEZ.[47] Consequently, the turbot caught on the Nose and Tail of Newfoundland's Grand Banks, in Divisions 3KL are all caught by the Europeans. However, Atkinson also points out that the figures he uses are actually inaccurate themselves implying they are very conservative. "All of the catches shown above are from 'official' statistics. There is ample information in the NAFO scientific Reports going back to about 1988 or 1989 suggesting significant unreported catches from outside Canada's 200 mile limit as well."[48]

	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993
Canada	28	25	18	16	29	15	16	12	11	7	5
EU	0	2	2	2	3	4	3	17	24	45	48

All figures expressed in 000 tons

Table 2: **Canadian and European catches of Turbot between 1983 and 1993**
(*Source:* Bruce Atkinson, Department of Fisheries and Oceans, St. John's)

While the amount of turbot caught and where, are significant points for debate between the belligerents, what may be even more important is the age of the fish and whether they are "recruitable", or catchable using standard nets. Greenland Halibut a very slow growing fish, reach sexual maturity approximately in its ninth year for males and eleventh year for females.[49] In the ninth year of growth, both sexes attain a length of approximately 73 centimetres, whereas at full maturity in their thirteenth year, they range in size from 80 to 97 centimetres. The age and size of the fish when it becomes sexually

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[47] Bruce Atkinson, Department of Fisheries and Oceans, St John's NF, Letter to "fishfolk@mitvma.mit.edu" and "war@hed.bio.ns.ca", Mar 22, 1995.

[48] *ibid.*

[49] D.B. Atkinson, W.R. Bowering, D.G. Parsons, Sv. Aa. Horsted and J.P. Minet, "A Review of the Biology and Fisheries for Roundnose Grenadier, Greenland Halibut and Northern Shrimp in Davis Strait", *NAFO Scientific Council Studies,* 3: (April 1982), p.14.

mature is an extremely important point as it is, of course, the absolute worst fishing practice to catch fish which have not even had the chance to reproduce first.

When this paper looks at the 'facts' in this case, the size of the netting and the European regulations surrounding the Turbot issue, much of the information discussed here will become important. While diplomatic rhetoric and politicking can cloud an issue with officials and politicians working to put the right "spin" on their perspective, the basic fact remains the same; there are fewer fish and the fish do not control any aspect of the situation.

Conclusion

This chapter has looked at four issues surrounding the dispute between Canada and Spain over Turbot and the arrest in the high seas of the *Estai*. Historical rights are underplayed by Canada. It is, after all, hard to conceive of history which dates back longer than one's existence. A very good analogy of this is to think back to one's infancy. In one's younger years, a discussion of anything which took place before one's birth, whether in the lifetime of one's parents or in ancient history, is summarily lumped into the moniker "the olden days". "The olden days" is not a dismissive term. Rather it is used by children to summarize and avoid the incomprehensible detail and profundity associated with time before one's existence. This clearly is Canada's problem in this instance.

Insensitivity toward Spain which has viewed the Grand Banks as one of its fishing grounds is very apparent. Instead of conciliating and compromising with a very long-time co-fishing nation, Canada has been very dogmatic and inflexible asserting its jurisdictional rights particularly upon declaring its EEZ. Now, in this crisis over Turbot, Canada is

impatient because there are no fish left. While this is serious, urgency on the part of Canada is perceived to be impatience and insensitivity by those used to Canada's inflexible approach to the fishery on or adjacent to the high seas regardless of the cause.

Copes criticizes Spain for being a "free rider" on the Grand Banks, benefiting from its own obstinacy over quotas. However, in his same article, he mentions that Canada has been less than forthright with information concerning the fishery. This begs the question, who is being obstinate? For almost twenty years the Spanish have been forced on the defensive and have not been allowed to participate in finding a solution agreeable to both for its own withdrawal from the Grand Banks.

In a long festering dispute over fisheries in general such as this one, a look at the high politics of the situation will not suffice. Consequently, a look lower, into the economy of Galicia, its need to fish to feed its population and more significantly, its trawlers' mortgage payments provide motivations for what opponents might call "poor attitude". Not for the lack of trying otherwise, Galicia is dependent on the fishery for a significant portion of its income. The lack of a good fishing ground near to its coast has forced the Spanish fishing fleet to travel afar to find a catch. Now the shipbuilding industry based in Galicia is dependent on an ever increasing fishing effort, lest they lose business and go bankrupt. Is then, Galicia much farther down the road at diversification than Newfoundland, if the Spanish fishery collapses, and all the associated industry, such as the indigenous shipbuilding, built on the backs of the fish goes with it? It might even be argued that the Galician economy, with its industrial base tied to the fishery, is even more dependent on the fishery than Newfoundland.

Meanwhile trawlers are described in Pol Chantraine's book as nothing less than death machines that lay waste and barren every square centimetre of sea-bed or ocean stratum they touch. The trawler industry however, is caught in a very difficult situation. If the trawler and its associated industry were to be abandoned, unemployment both on board the ship and in the processing plants would be the result. However, if the trawler industry is allowed to exist at or near to the current size with ships as efficient as those described in Chantraine's book, the fish stocks are almost guaranteed destruction. The dilemma is easy to identify but the cycle is almost impossible to break.

It is interesting to note that Spain is on the receiving end of the wrath of the Canadian fishing industry for their seeming indiscriminate use of ultra-advanced ships. However, the Canadian contingent conveniently seems to forget that when the 200 mile EEZ was imposed and foreign trawlers from other countries, like the Faroe Islands and Norway, were made idle as a result, it was the Canadian offshore fishing industry that bought them for immediate use inside the EEZ.[50] No Canadian domestic shipbuilders even benefitted from such a callous move. One day, it was the nasty foreign fishing fleet scooping up all the fish with huge ships. The next day it was the local Canadian fish company using a few trawlers to fully utilize the fish stocks—the same ships, the same waters, the same fish! But "Canada made mistakes", Canadian Fisheries Minister Brian Tobin has admitted.[51]

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[50] Note *supra* 21.

[51] Brian Tobin, *Notes for an Address by the Honourable Brian Tobin Minister of Fisheries and Oceans for Canada to the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, United Nations, New York*, New York, March 27, 1995, p. 3.

However, for the Spanish, how can they be sure Canada has learned from its lesson? If it learned from its mistakes in the past, why was Canada still acting agressively and provocatively as before only now preaching conservation, forcing the issue by placing various fisheries under moratoria while still allowing itself "recreational" or "scientific" fisheries?[52] For the Spanish and the Europeans, it was clearly a case of *Plus ça change, plus c'est la même chose.*

Finally, the unsuspecting Greenland Halibut lies at the heart of this issue because while it is not up to Canada to break the trawler dependence cycle on the high seas, the Greenland halibut, along with all the other fish that live some times in the Canadian EEZ and other times just outside are lost to those voracious trawlers when the fish happen to be outside the EEZ and outside Canadian control. It is instinct that drives them there, and human instinct and motivation, aided by technology, that catches them.

The last three paragraphs, have been constructed so as to emphasize the European perspective in this issue. While conservation is the end result that all parties are seeking, it gets lost, like the forest, for the trees. Canada accuses Spain of fishing illegally, while Spain and the European Union argue Canada has acted illegally by arresting the *Estai*. With the associated issues discussed in this chapter, both sides should be seen to be correct. The failure of these paradigms to be reconciled explains why this dispute has had to arrive at a flash point so that it could be moved to negotiation. The next chapter will look closely at the law governing the fishery of those straddling fish stocks which spend some time within an

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[52] European Union, *Commission Calls on Canada to Negotiate in Good Faith*, Brussels: European Commission, March 29, 1995 (Reference Number IP/95/313), p.1.

EEZ and outside in the high seas, straddling fish stocks, to see whether it failed to help bring about a resolution to the problems off Newfoundland's coast.

Chapter Three: Dragnet: The Legal Aspects of the Straddling Fish Stocks Dilemma

While the previous chapter looked at a number of factors which contributed to the dispute, this chapter will look at one factor alone. At the heart of the dispute lies the law. The Europeans, and more specifically the Spanish have accused Canada of piracy on the high seas, while Canada has accused the Spanish of overfishing and ignoring the conservation provisions found in the same United Nations Convention on the Law of the Sea. Given the complexity of the international law surrounding this dispute, a full chapter is devoted to this subject and will look at a number of facets of the law in turn.

First, for the purpose of this study, it is necessary to investigate the philosophical underpinnings of the law of the sea as Spain is one of the world's oldest sea powers, while Canada is one the world's newest. Indeed, as a sea power, Spain has existed longer than much of the philosophy behind the law of the sea and as a result has greatly benefited from the established rules from their inception. Canada, on the other hand, is a relatively new player on the ocean and is philosophically poised opposite to the Spanish position.

Second, this study will look at the sources of international law. As shall be discussed later in this chapter, Canada has rejected the International Court of Justice's (ICJ) jurisdiction in matters concerning the fishery. Given that ICJ rulings is one of two sources of law, it is necessary to look at the arbitration source provided by the ICJ as well as the only alternative, negotiated settlements. For reasons which will rapidly become clear, Canada chose the latter option as the the scope of the ICJ in its dealings was too small and speed too slow.

Third, the central legal institution pertaining to the world's oceans is the United Nations Third Convention of the High Seas (UNCLOS III). Signed in 1982 and recently

coming into effect with the ratification of the sixtieth signature in November of 1994, it is the cornerstone of the legal cases of both sides. On the one hand, Canada contravened the piracy sections, while on the other, Spain contravened the conservation and management sections. In addition, each, according to the other, contravened the high seas fishing rights section. However, as will become very clear in this chapter, the UNCLOS III has a notable shortcoming in that as a document negotiated by sovereign states who jealously guard the privilege of sovereignty, the laudable attempt at addressing the issues of joint fish conservation and management are seriously compromised by the overriding concern of state sovereignty.

While there are many categories of fish discussed in the UNCLOS III document, including anadromous and catadromous fisheries, highly migratory fish stocks, which refers to tuna, for example, the only fishery type which is relevant for this discussion is that of straddling fish stocks, meaning those fish stocks which spend some time in the EEZ and some time in the high seas. As discussed in the previous chapter, the nature of the continental shelf off Newfoundland is such that many of the fish stocks are in fact straddling fish stocks including cod and Greenland Halibut which leaves them susceptible to the whims of the international fishing community. As a consequence of the complexity of the UNCLOS III agreement and the disparate articles concerning straddling fish stocks, this paper will include a clause-by-clause outline of the relevant articles as well as a discussion of each.

Fourth, defined as a regional organization by the UNCLOS III treaty, the Northwest Atlantic Fisheries Organization (NAFO) is also a featured institution in this discussion. Indeed, while the points of jurisprudence lie in various articles of the UNCLOS III, the

mechanics of conservation and management of the straddling fish stocks fall under the jurisdiction of NAFO. Indeed, Canada maintains it is the repeated Spanish (and hence the European Union's) objection to the quotas set by NAFO that has contributed most significantly to the collapse of the fish stocks. Consequently, notwithstanding the inherited weaknesses of UNCLOS III a discussion of NAFO will ensue which will look at its relevance and ability to conserve and manage the straddling fish stocks.

Finally, this chapter will look at the legal options available to Canada as well as look at Canada's historical patterns when it works with international law, to attempt to explain Canada's motivations behind the arresting of the *Estai* in international waters. While it is not the objective of this paper to pass sentence on Canadian or Spanish actions, it is contendable that the Canadian action was intended merely to create a crisis involving the Spanish to make the Europeans seriously negotiate at the table only three weeks later at the United Nations Conference on Highly Migratory Fish Stocks and Straddling Fish Stocks, convened on March 27th, 1995. While the final chapter of this study will look at the end result of these negotiations, it is noteworthy to mention that the discussions were concluded before year's end, now requiring only thirty ratifications before gaining the status of international law.

Philosophical Foundations of the Law of the Sea

At first glance, it may seem unnecessary to investigate the philosophy of the law of the sea. However "freedom of the high seas" is a cliché heard most often from sea powers such as the United States, and Britain. Spain, however is also a sea power both in the military sense as well as in the commercial sense, and used the argument of high seas

freedom as the cornerstone in its battle with Canada. Canada, on the other hand, while a sea power as well, found itself on the opposite side of the philosophical coin in this case defending what it believed to be its own, that being the right to control and manage the fish stocks. Consequently, this debate goes much deeper than just the newspaper headlines.

While the mainstream understanding of the Law of the Sea is associated with Hugo Grotius who, in 1618, published *Mare Liberum*, it has not been the only perspective over time. Indeed the Law of the Sea can be traced back to Rhodian Sea Law of the 9th century BC[53] Being political in nature, Grotius felt that the ocean, and particularly the high seas were a common heritage which was available to all nations, even land-locked ones. This provided justification for the Netherlands to sail freely through what was Portuguese waters in the East Indies.[54] Further, fellow Dutchman Cornelius van Bynkershoek wrote *De Domino Maris* in 1702 in which he said that only the ocean which was defendable by cannon shot from the coast belonged to the country. The rest of the ocean was high seas, where all resources, both under the sea bed and all the living resources belonged to all.

The idea behind these perspectives implied that with the exception of a very narrow sliver of ocean right on the coastline, the oceans were open territory to all who sailed. This conveniently allowed imperialist states of Europe to consider waters off the coast of South

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[53] Douglas M. Johnston, "Environmental Law of the Sea: Historical Development", *Environmental Law of the Sea,* (Siegburg, Switzerland: International Union for Conservation of Nature and Natural Resources, 1981), p. 20. [*As of the publication of this source, Johnston was a professor at Dalhousie University in Halifax, NS.*]

[54] Ken Booth, *Law, Force, and Diplomacy at Sea*, (London: George Allen & Unwin, 1985), p.12. [*As of the publication of this source, Booth was at University College of Wales, Aberystwyth.*]

America such as Chile as much theirs, as waters just off their own territory in Europe. In addition, this allowed them to freely sail the oceans without challenge. While this position allowed countries such as Chile to consider waters off the coast of Europe as theirs as well, the threat of a Chilean presence off the European continent in the 18th or even 19th century was remote indeed.

Being mere reflections of the *status quo* and a state's real capacity to physically defend its territory, these philosophies were obviously not "conceived" or "master-minded" by intellectuals, but it does stand to reason that they were laid out by diplomats of an European and imperialistic country. However, John Selden, responding to Grotius in 1635, wrote *Mare Clausum*, which has as its main thesis the idea that the sea is not of a common heritage but rather the property of coastal states.[55] Instead of the entire sea being common property, Selden asserted that the sea belonged to coastal states, and that it did so long as the state could defend it. This is to say in a modern context, that the Pacific Ocean off the coast of British Columbia would be Canadian between 49°N and 54°40'N until exactly the halfway point where jurisdiction of the waters would fall to the Asian coastal state or states which lie at those same latitudes.

While *Mare Clausum* was written specifically to defend British fishing interests off its own coasts, it was also written by association, to the benefit of newer and far-flung states which may be seeking to better control trade and movement through its waters. Following this philosophy, it would be much easier for countries such as Senegal or the Congo to control fishing off their coasts by very efficient fishing fleets from Europe such as Spain,

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[55] *ibid.* p.15.

Portugal, and Iceland. It comes as no surprise that the colonial powers of Europe did not subscribe to this philosophy, but it was nevertheless a credible response to the freedom inspired *Mare Liberum*. While the debate over fisheries between Canada and the European Union cannot be reduced to such a simple question of *Mare Liberum* versus *Mare Clausum*, the nature of the problem lies in part with the differences between these philosophies.

United Nations Third Convention on the Law of the Sea

Before looking more deeply at the dispute itself in the eye of international law, it is necessary first to look at the institutional factors surrounding the conflict. Canada's strong actions on the high seas come as a result of the European Union's refusal to adhere to the quotas set by the Northwest Atlantic Fisheries Organization. However Canada's position is weak, given the current state of the international law of the sea. This section is devoted to discussing the current Law of the Sea arrangement negotiated between 1973 and 1982 known as the United Nations Third Convention on the Law of the Sea (UNCLOS III).

According to some, UNCLOS III is the most comprehensive international treaty ever negotiated.[56] It covers aspects concerning the oceans from navigation, to deep sea mining, to fishing. Each topic is further subdivided into more specific points such that UNCLOS III can deal with any eventuality in international relations associated with the oceans. With this in mind, looking specifically at fisheries or living resources of the sea, there are many

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[56] John Warren Kindt, *"Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea", in Vanderbilt Journal of Transnational Law, (Vol 22) Winter 1989,* p. 1111. [*As of the publication of this source, Kindt was Professor at the University of Illinois.*]

categories of fisheries and several types of boundaries. This paper will look only at those articles in the UNCLOS III agreement which deal with fish stocks which straddle the boundary marking the outer edge of the Exclusive Economic Zone (EEZ) and the high seas.

The discussion that follows concerns the various articles which primarily come into play in this dispute under UNCLOS III and will be discussed here. Briefly, these are Articles 63(2), 116, 117, and 119. (The complete text of these articles are found in Appendix "A".) These articles have been singled out by various experts on the Law of the Sea including those such as William T. Burke, Edward Miles, Barbara Kwiatkowska, Cyril de Klemm, and David VanderZwaag, to name a few. Each article will be discussed individually.

As will be discussed below, the UNCLOS III treaty fails to definitively protect living resources of the oceans in general, and straddling stocks more specifically. It was, in part, this failure which led to the confrontation between Canada and Spain as interpretation of various clauses obviously clashed.

The first weakness to be discussed here of the UNCLOS III treaty, pointed out by VanderZwaag is that there is no concise definition of conservation on the high seas.

> "Article 119, which is entitled 'Conservation of the living resources of the high seas,' provides states with great flexibility in establishing harvest levels. Based on the best scientific evidence available, states are to harvest high seas species at the level of maximum stainable yield, as qualified by relevant environmental and economic factors.[57]

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[57] David VanderZwaag, in David VanderZwaag, ed., "The Management of Straddling Stocks: Stilling the Troubled Waters of the Grand Banks", *Canadian Ocean Law and Policy.* (Vancouver: Butterworths, 1992), p.126.

He goes further. While it is very highly likely that Canada would win in an arbitration case in this matter, under the new Law of the Sea treaty, these provisions in the UNCLOS III agreement are not yet in effect as sixty countries have yet to ratify thus bring into force the UNCLOS III of 1982. While this is no longer the case, neither Canada nor Spain have yet ratified the treaty. However, it must be stressed that UNCLOS III, initialled by Canada, Spain and the European Union among all others, in 1982 came into effect in November 1994, once sixty countries had ratified it. While none of the belligerents in this fisheries dispute discussed here have yet to ratify the agreement, many commentators consider the UNCLOS III treaty to have force and effect given that it is considered to be customary law since despite ratification, and international norm was established in 1982.[58]

Johnston points out that environmental law is relatively new. While it has been fairly recent since explicit agreements for the protection of the environment have been signed, the principle of environmental protection has existed since the end of the 19th century, when the notion of state responsibility was "sufficiently broadly framed... to encompass the modern concept of state liability for environmental damage to another state."[59] In arbitration cases, according to Johnston, international jurists are beginning to believe that environmentally significant areas of doctrine (e.g. right of self-defence, right of self-help) as well as the principle of neighbourliness and the principle of abuse of rights are "becoming general

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[58] Emma Bonino European fisheries minister makes this point explicit. *Please see*, Emma Bonino, *Commission Calls on Canada to Negotiate in Good Faith*, European Parliament, March 29, 1995, (IP/95/313), p. 8.

[59] Johnston, *op. cit.*, p.21.

principles of law which the international court is bound to apply".[60]

A second unfortunate disappointment in the UNCLOS III treaty, is that there is poor provision for straddling stocks. Miles and Burke continue by saying that application of Article 116 in conjunction with article 63(2) clearly give the coastal state the upper hand in dealings over the fishery in dispute.[61] However, in the absence of an agreement over conservation, the coastal state can simply demand that the fishing state follow conservationist practices on the high seas. Even if the two states are not ratified signatories to the UNCLOS III treaty, this is possible since, according to Miles and Burke, Articles 116 and 63(2) arguably reflect customary international law.

According to de Klemm, while Canada has no absolute jurisdiction on the Grand Banks just outside the 200 mile limit, provision has been made in article 63.2 of the United Nations Convention of the Sea III (UNCLOS III) allowing Canada to take a pre-eminent position in the conservation of the straddling stocks. While he points out that all parties concerned in the area must agree on actions to be taken he underlines that greater importance has been given to the coastal state (in this case, Canada) to manage the stock.

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[60] *ibid.*

[61] Edward L. Miles and William T. Burke, "Pressures on the United Nations Convention on the Law of the Sea of 1982 from New Fisheries Conflicts: The Problem of Straddling Stocks" in *Ocean Development and International Law* (20), July- August 1989, p. 351; William T. Burke, "The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction", *Oregon Law Review*, Vol. 63 (1984), p.113; Barbara Kwiatkowska, "The High Seas Fisheries Regime: at a Point of No Return?", *The International Journal of Marine and Coastal Law*, Vol. 8, No. 3 (1993), p.334. [Burke is a leading expert on the International Law of the Sea at the School of Law and Institute for Marine Studies at the University of Washington. Miles is a professor at the Institute for Marine Studies, University of Washington. Kwiatkowska is Associate Director of the Netherlands Institute for the Law of the Sea, Faculty of Law, University of Utrecht.]

However, it must be remembered that Canada has withdrawn from jurisdiction of the ICJ over any dispute involving fisheries making the above discussions somewhat moot. While it appears that Canada would benefit from a decision of an arbiter according to the authors, and that Canada maintains its position in this matter nevertheless, it emphasizes one point—traditional approaches to living ocean resources as being an infinitely harvestable commodity are no longer acceptable. Unfortunately, the LOS does not lay out how to enforce these provisions, nor how to arbitrate time-sensitive issues such as precipitously dwindling fish stocks.

Northwest Atlantic Fisheries Organization

The second institution to be discussed here is the Northwest Atlantic Fisheries Organization. It is, after all, at the eye of the storm in the fisheries dispute, as it is the quota set by NAFO to which the Spanish and EU object, leading to unilateral setting of quotas by the Europeans. The NAFO was created in 1978 to replace the International Commission on Northwest Atlantic Fisheries (ICNAF). Looking for more say in fisheries affairs on the Northwest Atlantic, the creation of NAFO was a logical extension to Canadian policy *vis à vis* international law according to Gotlieb and Dalfen, as will be discussed later.

Further to his discussion above, according to Cyrille de Klemm, there are five basic legal and institutional requirements for resource conservation and management which must be established to protect the marine resources.[62] They are jurisdiction, research, regulations,

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[62] Cyrille de Klemm, *Living Resources of the Ocean, in* Douglas Johnston, ed., *Environmental Law of the Sea*, (Siegburg, Switzerland: International Union for Conservation (continued...)

enforcement, and institutional arrangements. In the event of a dispute over any of these five points each could well be interpreted by the ICJ within the context outlined above.

Most of the five points are covered in the Northwest Atlantic by the Northwest Atlantic Fisheries Organization (NAFO). The signatories to NAFO agree that the jurisdiction of the high seas outside of Canada's EEZ on the Grand Banks must be managed. Using NAFO as the instrument for this management, jurisdiction is formally ceded by all the signatory states. While the Scientific Council is responsible for research into the stocks, the Fisheries Commission is responsible for their management. Additionally, the provisions within NAFO bind the signatories closer together, making it more difficult for them to act unilaterally.[63]

Jurisdiction

While territorial waters are only 12 miles, the Exclusive Economic Zone (EEZ)[64] is accepted to be the next 188 miles. Within these boundaries jurisdiction is no longer questioned. However, the problem for Canada in this instance is that the Continental shelf

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[62](...continued)
of Nature and Natural Resources (IUCN), 1981), pp. 85- 90. [*As of the publication of this source, de Klemm was a consultant for the IUCN.*]

[63] Northwest Atlantic Fisheries Organization, *Handbook*, (Dartmouth, NS: NAFO, January, 1994).

[64] According to many authors, the concept of the EEZ resolves a serious dilemma for naval powers like Britain and the United States. On the one hand, territorial waters which extend 12 miles off the coastline are owned by the coastal state, and hence can be closed to anyone and everyone. On the other hand, while all economic activity within the EEZ, that is to say, fishing, mining, and oil drilling, are the property of the coastal state, the area itself is considered to be common heritage and hence "high seas". However, the international waters beyond the EEZ, for the purpose of this paper will be considered the high seas, while the waters within the EEZ will be considered to be the Canadian EEZ.

extends slightly beyond the 200 mile limit. To facilitate the management of the North Atlantic fisheries straddling the Canadian EEZ boundary with others, most notably the Europeans, jurisdiction was established under the NAFO.

Research

Again according to de Klemm, research is vital to the conservation of fish stocks.

> The information required ranges from broad oceanographic data to the improvement of knowledge on the biology, ecology and population dynamics of individual stocks. It includes the results of research on such subjects as species critical habitats, species inter-relations, inter-specific competition, stock assessment as well as of the effects of fishing on individual stocks and on the ecosystem in general.[65]

Indeed, one of the most vital parts of the NAFO is the Scientific Council which is made up of researchers from each of the signatory countries. The results of each scientific team may differ from each other, but their final report presented to the General Council must be a consensus. If an agreement cannot be struck, then dissenting reports must be presented.

Regrettably, however, Canada has been accused of not sharing information not only in the past, but also in this dispute. While the Scientific Council of NAFO shares information amongst its member scientists, results of research within the Canadian EEZ seem not to be shared openly with NAFO to help determine in the eyes of all NAFO members, the true state of the fish stocks. Indeed, in the previous chapter, Chantraine pointed out that Canada refused to share information lest it reveal a surplus of fish that were not being exploited.[66] This complaint was also central to the dispute with the Europeans.

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[65] Johnston, *Environmental Law of the Sea*, p.86.

[66] Chantraine, *The Last Cod Fish.*, p. 78.

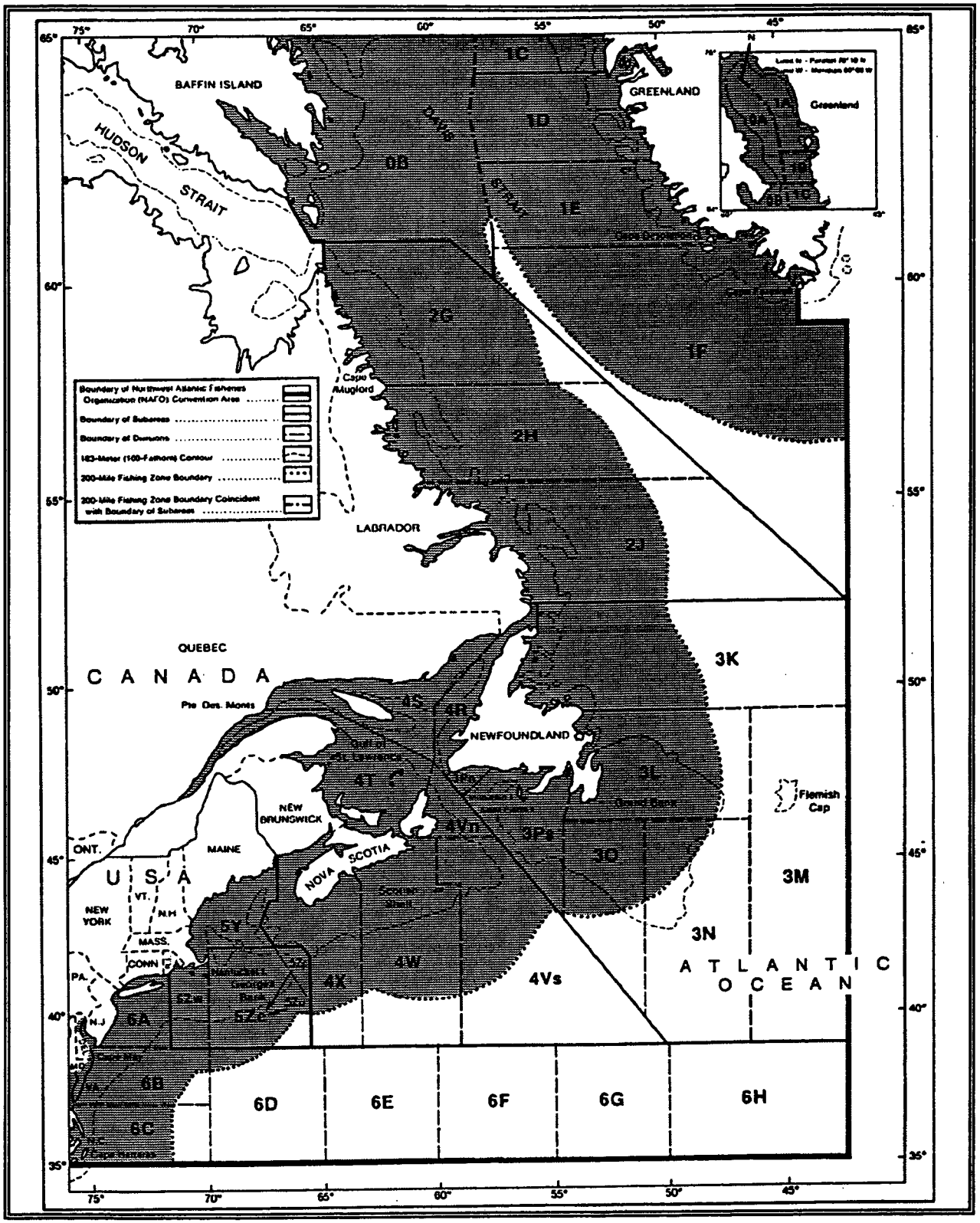

Figure 2. **Map of the Northwest Atlantic Fisheries Organization Convention Area** (*Source: NAFO Statistical Bulletin,* Vol. 41, 1995.)

European fisheries minister, Emma Bonino, mentioned on several occasions, including in the European Parliament that Canada had not been forthright in its information sharingwith its NAFO partners:

> *Le 03 mars le Canada adopte des dispositions nationales qui l'autorise à arrêter des navires espagnols et portugais pechant dans les eaux internationales, au large dès 200 milles du Canada. Par la même occasion, unilatéralement, sans consultation des autres partenaires de la NAFO et en l'absence de tous éléments scientifiques et techniques pertinents en matière de conservation, le Canada decide d'établir un moratoire de 60 jours à compter du 6 mars, pour la peche du flétan dans la NAFO.*[67]

Very clearly, this accusation not only shows that Canada acted without sharing information, it also appears to the Europeans that Canada was acting arrogantly and even impetuously.

Regulations

Regulations found in national legislation and international agreements apply to various aspects of the fishery. These include "regulation of fishing gear, such as net mesh size, the regulation of the size and number of fish to be retained or landed, the establishment of closed seasons and areas, the establishment of total allowable catches (TACs) and the regulation of fishing effort through licensing".[68] However when a fishery is exploited by two or more countries, the regulating of the fishery becomes much more complicated. Since one state cannot impose its will on another sovereign state, all regulations must be agreed to unanimously.

de Klemm mentions that this last point, that states are not bound to another's

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[67] Emma Bonino, *SPEECH/95/32; Intervention of Mrs Emma Bonino at the European Parliament - Strasbourg, 15 March, 1995.*

[68] *ibid.*, p.87.

decision, is circumvented by the establishment of a regulatory body in which all participating states have input. Decisions made by the body are then, in turn, binding on participating states unless they lodge an objection. Should more than half the states lodge an objection, then the decision would not come into effect.

Conversely, all states have the duty to co-operate with each other to arrive at solutions to problems around conservation of fish stocks when the stocks migrate between different jurisdictional zones. As mentioned earlier, section 63.2 provides that the coastal state and the participants in the adjacent zone, in this case the high seas on the nose and tail of the Grand Banks, "shall seek to agree upon the measures necessary for the conservation of these stocks".[69] Further, the interest of the coastal state is considered to be preeminent as fishing activities outside the coastal state may be detrimental to the status of the fish stocks within the EEZ.

While NAFO, by way of its General Council and its Scientific Council have set out regulations concerning net size and quotas, the European Union has registered objections to the quotas decided upon by them. This has enabled the EU to set its own quotas which have been consistently higher than those set by NAFO.[70]

Enforcement

While it goes without saying, but to quote de Klemm, "To be effective, regulatory

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[69] de Klemm, op. cit., p. 126.

[70] Bruce Atkinson, Department of Fisheries and Oceans, St John's NF, Letter to "fishfolk@mitvma.mit.edu" and "war@hed.bio.ns.ca", Mar 22, 1995.

measures must be adequately enforced".[71] He also right points out that fisheries operating across the globe are very difficult to manage with respect to enforcement of regulations. Two solutions are seen as possibilities to alleviate this problem. The first is to allow the fisheries commissions such as NAFO to enforce its own regulations. This would mean NAFO would have the resources, such as aircraft, ships, and inspection staff to enter the field and enforce its regulations. However, de Klemm points out that no fisheries commission has such power.

The other alternative is for member states to co-operate, thus allowing inspection teams from one state to board and inspect the activities and catches of another. If necessary, and with permission, they can seize catches or vessels of another state. However, should prosecution of the cases be carried out in the courts, the prosecution of the case would only be done by the flag state— the state under whose flag the vessel operates.

Institutional Arrangements

As de Klemm points out, the nature of fishing agreements, as with most conservation agreements, differ significantly from other international agreements on one point. Should one of the signatories not live up to its obligations, there is no direct recourse available to the others. In other words, should one state not live up to its agreed conservation levels and fish more than agreed to, the other states cannot "punish" that state by refusing to live up to their part of the agreement as well. Indeed, the victim to suffer the most in this instance would be the fish stock itself.

Consequently, de Klemm proposes that international conservation agreements be

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[71] de Klemm, *op. cit.*,p.88.

highly institutionalized, thus structurally and irrevocably binding the signatories to the agreement. With the establishment of a forum for discussion, a creation of methods for co-ordinating the activities of member states, and the establishment of procedures it becomes much more difficult for member states to "welch on the deal". Entailed in the organization ought to be two bodies which institutionalize the agreement. Firstly, a secretariat which liaises with the member states, provides reports, and administers the meetings. Secondly, where possible, a scientific committee should also be established to undertake the research required to provide quantitive as well as qualitative information on the fish stocks in question.

NAFO, through its committees, councils and secretariat, fulfil all of the institutional arrangement criteria set out by de Klemm. Unfortunately none of the arrangements are binding in the sense that if there is dissention within the member states, those dissenters can simply launch an objection to the item which they find unpalatable, and still remain unsanctioned members in good standing.

Worse, this problem exists to a greater degree with its consitution. Any of the contracting parties may propose ammendments but they must be ratified by three quarters of the membership. Should any party disagree strongly enough to an ammendment, they can file an objection with the secretariat where upon the ammendment would not take effect. Each country, in effect, holds a veto for constitutional change.[72] As is well demonstrated by Canada's own constitutional *inquiétude*, it is almost impossible to gain a unanimous

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[72] Northwest Atlantic Fisheries Organization, *NAFO Handbook*, Dartmouth: NAFO, 1994, p. 27.

agreement on 'the basics' with many interests demanding ammendments.

Canadian Options

While the de Klemm article provides a general background to international law and the fishing of straddling stocks, David VanderZwaag discussed the troubles on the Grand Banks more specifically in an article written in 1990. While the paper was written primarily in response to the problems of the Cod stocks, it is unquestionably relevant in this discussion of Greenland Halibut. In the article, he provides the Federal government two options for dealing with the international community in its attempt to manage the straddling stocks. He then provides reasons why each would either succeed or not.

Even to the untrained observer, the options are simple. The first option would be for Canada to pursue a diplomatic line to gain compliance by countries like Spain or Portugal. The second option would be for Canada to unilaterally extend its jurisdiction into the high seas beyond the limit of its EEZ. The first option was, in 1990, the one chosen by the Federal government at the time. Whereas it is a less aggressive method and has significant weaknesses, it is indeed the most desirable way of resolving disputes like the one of Greenland Halibut. The second option, seemingly chosen by Fisheries Minister Brian Tobin in the dispute over Turbot with Spain, has its advantages, according to VanderZwaag, but has very serious consequences as was seen in the dispute, but also as discussed in his article.[73]

Dispute Resolution

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[73] For further reading, please see David VanderZwaag, *op. cit.*, pp 125- 130.

The first option, that of pursuing a bi-lateral or multi-lateral dispute resolution policy as mentioned, is the option chosen in the cod fishery dispute and is more in keeping with Canada's preferred diplomatic stance of multilateral participation in international institutions. As mentioned by de Klemm, Article 117 requires that states co-operate to achieve conservation practices by their nationals working in the field. Given the ocean, and above all, the far-flung high seas, is a large field indeed, it makes most sense to co-operate and "share the burden" of regulation, inspection and enforcement.

As VanderZwaag points out, Canada could suggest that other states, such as Spain are not living up to their obligations as set out in Article 117 and possibly win at arbitration or adjudication, which would show countries like Spain to be poor neighbours and unworthy of trust and confidence. Additionally, countries like Spain could then be required to participate more fully in the management of the fisheries but as junior partners as they will have been seen to be truant and in need of an 'attitude re-alignment'.

While this option sounds easy and practicable, there are serious weaknesses in this option. As with all things international, there would be no enforcement of the decision, relying instead on suasion and morality. In addition, renouncing the Spanish as unneighbourly and untrustworthy could merely serve to inflame the already defensive Spanish in their dealings with other fishing nations and indeed exacerbate the poor relationships Spain has in the international fishing community.

The Unilateral Approach

The other option available to Canada, according to VanderZwaag is the unilateral extension of fisheries jurisdiction into the high seas. He asserts that such "jurisdictional

authority is implicit in the 1982 convention. Article 116 of the Convention grants states the right for their nationals to fish on the high seas, but the right is made *subject to* [sic] the rights and interests of coastal states". Drawing heavily on work of W.T. Burke, VanderZwaag shows the logic behind Article 116. While flag-states[74] are not directly obliged to follow coastal state conservation measures with respect to straddling stocks, the lack of adherence to coastal state regulations would, in effect undermine all the provisions set in the convention with respect to straddling stocks, and nullify the coastal state's right and ability to regulate the fishery within its own EEZ. While this inverted logic does not seem like a strong approach to the untrained eye, it does, nevertheless exist which is better than nothing at all.

The advantage to Canada should it unilaterally extend is jurisdiction into the high seas is simple. Canada would have the "upper hand". Objecting distant fishing states would then have attempt to resolve the issue through diplomatic opposition or dispute resolution. Regardless of the approach, the distant state would be the one on the defensive and would have to take the initiative, instead of the other way around.

However, according to VanderZwaag, there are three legal uncertainties behind such a move. The first is allocation of fish stocks. One of the points made by W.T. Burke is that should Canada, for example, choose to allocate one hundred percent of the Greenland Halibut stock for itself, it is not clear where Canada would be right in doing so. There is nothing said in the stock allocation in the UNCLOS III agreement and further, it can be

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[74] A Flag State is synonymous with Distant Water Fishing Nation. A ship flying a particular state's flag and is also registered in that country is considered to be sovereign territory; the ship is an extension of the flagged country's national territory.

argued that while Canada as a coastal state might have the final say in the total allowable catch (TAC) available to the fishing fleets, foreigners still have a right to fish a percentage- regardless of the size of the TAC.

A second uncertainty as discussed by VanderZwaag, is whether there is already a legal norm which limits states from unilaterally exerting jurisdiction on straddling stocks. As he points out, there is already a legal norm prohibiting states from unilaterally extending its maritime boundary which would affect an adjacent coastal state boundary. VanderZwaag suggests that this norm was set in the International Court of Justice *Gulf of Maine* case between Canada and the United States. The uncertainty lies in whether the decision is applicable to the boundary with the high seas.

The third uncertainty according to VanderZwaag is whether the extension of jurisdiction onto the high seas is actually a question of enforcement. This is to say that all countries can have policies on fishing limits and practices on the high seas- even land locked countries like Switzerland. However, it is up to the flag state to enforce those regulations. It is possible, through bi-lateral agreement, that coastal states can inspect and even seize ships and catches of foreign ships infracting regulations of their own government, but that this must be agreed to prior to the action or actions taking place. In addition, only the flag-state can actually prosecute the law breaking ship owner, captain and crew.

The extension of jurisdiction of a coastal state into the high seas is technically redundant. The coastal state already has jurisdiction there- along with every state in the world. The difference, however, is that the coastal state may try to impose its regulations on ships of other states by means of force. This is to say that net size or fish size deemed

illegal by the coastal state may be acceptable to the flag state. The imposition of the coastal state's standards on the flag ship by force is in effect the imposition of one country's enforcement measures on another- a provision explicitly seen to be in contravention of Articles 87[75] and 101. (See Appendix A.)

However, it should not have come as a surprise that Canada resorted to such action. In April 1982, Canada led a coalition of coastal states in introducing a proposal which would have taken unresolved disputes between coastal states and distant-water fishing states to the Law of the Sea Tribunal for settlement. However, because the Convention was in its final stages, in the face of heady opposition, the proposal was withdrawn.[76] Clearly, Canada was looking for recourse in the event disputes arose over straddling stocks.

Further, following its unilateral extension of its EEZ in 1976 and together with other countries, Canada established NAFO in 1978 to help regulate the fisheries in the Northwest Atlantic. As Miles and Burke point out, the objectives were simple and successful in the beginning. First Canada looked to "reward cooperation on conservation of stocks both inside and outside the zone, and (2) to reward arrangements that gave Canadian industry access to foreign markets." However after ten years, the objectives were becoming unravelled as there were new entrants into the NAFO area who were not signatories, there were serious disagreements with the EEC over the fishing operations of the Spanish and Portuguese as

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[75] Emma Bonino, *Commission Calls on Canada to Negotiate in Good Faith*, European Parliament, March 29, 1995, IP/95/313, p. 8.

[76] Miles and Burke, *op. cit.*, pp. 343- 344.

well as Canadian attempts at surveillance and enforcement.[77]

With the increased fishing by non-signatories and by those who file objections to the quotas set by NAFO each year, Canada's ability to manage its own stocks as well as the stocks in adjacent high seas is seriously compromised. "Since under customary law there can be no enforcement beyond 200 miles without agreement of the flag state, [Canada's method of setting quotas] has become increasingly ineffectual..." "As fishing effort remains high, domestic pressure from the Maritime Provinces on the Canadian national government increases and demands are beginning to be heard to extend Canadian jurisdiction beyond 200 miles."[78] However, in the event of a long standing dispute where a conservationist regime is not possible, Miles and Burke feel that the coastal state could "take actions to demand observance of a conservation regime on the high seas and justify this by reference to Article 116 and the articles referenced therein, claiming that these reflect customary international law".[79]

It must be stressed, however, that according to customary international law, the action of pursuing and arresting the *Estai* on the high seas was illegal. Miles and Burke make mention of this several times. "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."[80] They do allow for unilateral actions,

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[77] *ibid.*

[78] *ibid.*

[79] *ibid.*, p.352.

[80] *ibid.*, p.349.

but they are more diplomatic in nature, rather than coercive.

Indeed, Canada had other options in international law. Miles and Burke discuss these options at considerable length. "Diplomatic action (protests), domestic remedies (embargoes on fishery or other trade, refusal of access to ports for logistic support, denials of economic assistance, suspension of particular benefits), international sanctions (remedies available under international agreements, including trade agreements) are all possible instrumentalities.... If the 1982 Convention of the Law of the Sea were in force and effect between the states concerned, disputes about the applications of articles concerning high seas fishing would be subject to compulsory dispute settlement proceedings in part XV."[81]

With the invoking of Article 116, Canada could have made official protests to Brussels and Madrid. It could have imposed trade sanctions against Spain (on top of its embargo of Spanish fishing ships in Canadian ports), or followed remedies under international agreements.[82] Recalling the UN Charter Kindt succinctly lists these options available to Canada. "The Charter of the United Nations specifically imposes an obligation on its Member States to 'seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means...'"[83]

However, taken together, Allan Gotlieb and Charles Dalfen as well as Barry Buzan demonstrate as early as 1973 Canada's textbook approach to issues in international law, and

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[81] *ibid.*,pp. 349-350.

[82] *ibid.*, p.349.

[83] John Warren Kindt, *op. cit.*, p.1106, citing U.N. Charter, art. 33, para. 1.

more specifically in the fisheries dispute with the Europeans. In Gotlieb and Dalfen's article, Canada's approach is made simple and clear. Canadian officials work to ensure adoption of international laws which are of national interest to Canada. However, where the multilateral approach is "unrealistic", Canada looks to the international community for responsibility for damage incurred to Canada while at the same time pursues a unilateral approach "to make Canada less vulnerable to the external—or what are perceived to be external—dangers."[84]

They go further. They show and very briefly explain how Canada advances its position with respect to international law and specifically the Law of the Sea. Buzan's discussion to follow better fills out Canada's approach in a more recent context. According to Gotlieb and Dalfen Canada has focussed on areas in international relations which have three points:

(a) the areas relate generally to Canada's environment, resources, and geography *i.e.*, to its physical and economic integrity;
(b) the areas are affected, from a variety of different standpoints, by the rapid growth of technology;
(c) the areas have central international legal aspects.[85]

They continue by outlining Canada's pattern of behaviour to achieve its desired ends. Canada begins with working in international fora with proposals "affirming and extending state responsibility for activities that can harm the interests of other states through fault or otherwise". This approach might involve a judicial or quasi-judicial approach which would

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[84] Allan Gotlieb and Charles Dalfen, "National Jurisiction and International Responsibility: New Canadian Approaches to International Law", *American Journal of International Law* (Vol. 67), 1973, p. 232. [*As of the publication of this source, Gotlieb was Deputy Minister of Communications, and Dalfen was a member of the Faculty of Law, University of Toronto.*]

[85] *ibid.*, p.233.

determine culpability and responsibility. However, in the event recourse is not possible because the legal or procedural basis for such is nonexistent, Canada attempts to extend national jurisdiction for purposes of "preventing or regulating the harmful activities— first at the international level and, failing that, unilaterally". Should Canada unilaterally extend jurisdiction, according to Gotlieb and Dalfen, Canada's unilateral action is at times coupled with the "rejection of existing procedures for the international settlement of disputes".[86] As a last step toward achieving its goal of stopping harm on Canadian interests, Canada "may seek to achieve an international regime or international rules which embody both the elements of enhanced international responsibility and extended national jurisdiction" which would legitimate its national position.[87]

Following Gotlieb and Dalfen's discussion of the pattern set by Canada in its dealings with others in international law, Buzan's discussion of Canada's approach to the Law of the Sea almost fits like the last piece of a jigsaw puzzle. His treatment of the issue includes extensive discussions around pollution and deep sea mining, neither of which pertain to the subject being dealt with here but nevertheless the fisheries aspects directed the Canadian approach in negotiations much of the time in the latter stages of the UNCLOS III negotiations.

He summarizes Canada's approach to the fisheries issue in the international arena by showing Canada became increasingly interested in fisheries as time passed. In 1956, Canada proposed a three mile territorial zone, plus a nine mile fishing zone. When that proposal

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[86] *ibid.*

[87] *ibid.*

failed at UNCLOS I in 1958, Canada unilaterally imposed the same on its coastlines. However, opposition to this policy was great and implementation was weak which led to little change in the level of foreign fishing off Canadian coasts.[88] Canada extended its territorial sea to twelve miles in 1970 after more than 60 other countries had already done so.

Following Chile and others, Canada then went further in 1973 by unilaterally extending its 200 mile EEZ, a move which was soon incorporated as customary law— a key element in the UNCLOS III whose negotiations began the following year. However, strong opposition existed (and clearly still does exists) to extension of 200-mile EEZ. Consequently, Canada's needs were only partly addressed, as the continental shelf extends beyond the EEZ limit— a problem which makes Canada unique hence without allies to see a further extension of the EEZ limit.

However Canada was key in replacing the International Commission of North Atlantic Fisheries (ICNAF) with the NAFO. Through this action, Canada established a new international forum in which it had more control of the fishery— one which would be described by Gotlieb and Dalfen as an international regime which helped to legitimate Canada's national position. Buzan gives NAFO a glowing assessment of NAFO in 1982 as a policy success.[89] Things, however, were not to remain so rosy for long.

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[88] Barry Buzan, "Canada and the Law of the Sea", *Ocean Development and International Law Journal* (Vol 11 , no.3/4) 1982, pp.158-159. *As of the publication of this source, Buzan was a member of the Department of International Studies at the University of Warwick in Coventry.*

[89] *ibid.*, pp. 159-160.

The troubles began primarily in 1986 after the EC admitted Spain and Portugal into its fold.

> Since the 1985 NAFO Annual Meeting (preceding accession of the two states to the community on 1 January 1986), the EU has continuously attempted to accommodate in the NAFO regulatory area (beyond 200 miles) requests by Spain and Portugal for quotas from overfished EU waters.... Consequently, the Community has (since 1985) notoriously opted-out of the NAFO regulatory measures and established much higher EU unilateral quotas, thereby undermining the conservation regime applicable within the Canadian 200 mile zone and the NAFO regulatory area.

According to Barbara Kwiatkowska, one of the reasons for NAFO's success was that it set a precedent— albeit contentious— in international law known as the "Consistency Rule" potentially laid out already in the existing UNCLOS III treaty. The Consistency Rule implies an obligation on distant water states to keep their fishing practices consistent with the policies of the coastal state to ensure that the high seas fishery does not undermine the coastal state's fishery policy found in its own EEZ.[90] That it already exists in the UNCLOS III treaty lies in the disputable interpretation of Articles 63(2) and 116. This Consistency Rule was being broken given Canada's aggressive conservation measures imposed in its own EEZ and voted on in the NAFO regulatory area were clearly being undermined by the EU.

Conclusion

Given the desperate state of the fishery on Canada's Atlantic coast, what more could Canada have done before resorting to violence? The EU advocated adjudication by the ICJ, but Canada chose not to for the simple reason that in referring the issue to the ICJ, such a

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[90] Barbara Kwiatkowska, "The High Seas Fisheries Regime: at a Point of No Return?", *International Journal of Marine and Coastal Law*, (Vol. 8, no. 3) 1993, p. 333.

move would undermine the United Nations Conference on Straddling Stocks and Highly Migratory Stocks in which Canada was looking for a binding dispute mechanism.[91] Furthermore, the time it would take to have a decision rendered might have been too long to save the turbot stocks.[92]

Canada was not looking to create a precedent when it arrested the *Estai*. Instead, Canada was looking first to stop quickly the practise of overfishing by countries over which it normally did not have control. Secondly, Canada recognized that the ICJ was not going to interpret the law in a new fashion. Indeed, the ICJ would have been bound to look at the law as it existed and that law was stacked against Canada right from its basic philosophy.

Philosophically, the law of the sea is based on Grotius' idea of the freedom of the seas. Article 87 of the UNCLOS III treaty explicitly affirms this point and as such the ICJ would have no choice to keep the article at the forefront when making a decision. Secondly, while environmental provisions are included in the UNCLOS III text, such as articles 116 through 119, the actual mechanics of how these articles are lacking. Consequently, the court would be simply forced to instruct the disputants to negotiate a method to implement the broad directives set out in those articles. Clearly, the law would not have helped Canada even if it were to have allowed the ICJ jurisdiction in this matter. For Canada to succeed in

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[91] Department of Fisheries and Oceans, "Tobin and Wells Respond to Misinformation on the Canada-EU Turbot Dispute", *News Release*, March 27, 1995; Gotlieb and Dalfen, p. 235.

[92] Department of Fisheries and Oceans, *Notes for an Address by the Honourable Brian Tobin, Minister of Fisheries and Oceans to The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, The United Nations*, New York: March 27, 1995, pp. 8, 9.

making fundamental change to the problem of the straddling fish stocks, it had to find another way.

As will be seen in chapters four and five, Canada's *acto de piratería* was but the way to start an alternative method to see the needed fundamental change take place. Canada's arresting of the *Estai* got the Europeans to the table to seriously negotiate the problem of management of the straddling fish stocks, and enforcement and compliance of both NAFO *and* flag state regulations. The seizure of the fishing vessel also added emphasis and impetus to the negotiations about to reconvene at the United Nations in New York over straddling fish stocks worldwide which were looking to provide a global regime on not only straddling fish stocks, but highly migratory fish stocks as well.

Chapter Four: Tobin and the Trawlers: An Analysis of Canada's Strategy for Relief from overfishing and the resulting bilateral truce

It should not have come as a surprise that the Canadian government unilaterally extended its jurisdiction into the high seas. This chapter will attempt to fulfil three objectives to show this to be the case. First, two theoretical contexts will be explored. The questions surrounding the issue are numerous and one theory fails to explain the various aspects. Looking at Canada's behaviour, one question to be answered is in light of past behaviour, was Canada deviant in its actions? Kim Richard Nossal looks at Canada's normally expected behaviour, while Tom Keating asserts Canada's multilateralist approach. As it becomes evident that this was the case, David Dewitt and John Kirton then provide a possible explanation for Canada's deviant behaviour. The second approach will help to frame the successful outcome to Canada's initiative. Why was Canada so successful? With Canada set in a complex interdependent relationship, the work of Robert Keohane and Joseph Nye can help provide a plausible explanation to this important question.

With Canada's actions set in various theoretical contexts, this chapter will then examine Brian Tobin's plan to solve the outstanding problem of overfishing outside Canada's EEZ. Tobin's strategy was crafted like that of a chess player. The strategy was far reaching; like the chess master going for the "check-mate" against a neophyte, the strategy was a winning one even before it was played out. For this reason, it will be laid out here in detail. After looking at the various foreign policy perspectives, Gotlieb and Dalfen's policy approach as well as Keohane and Nye's theoretical context, it will be clear that Tobin not only knew what had to be done to succeed on the domestic front, he also understood what

had to be done to counter the "David and Goliath" nature of the relationship between Canada and the European Union to ensure success in the battle over straddling stocks.

Finally this chapter will look at the settlement of the dispute between Canada and Europe; the agreement, found in Appendix B, which ended the hostilities between them will be discussed at the end of this chapter, as it provides a further contextual basis for the respective Canadian and European approach to the United Nations Conference on Straddling and Highly Migratory Fish Stocks.

Theoretical Framework

To give the reader a reasonable sense of theoretical context, two theoretical approaches will be discussed here. The reason for the use of more than one approach is simple. Many questions will remain unanswered if both theories are not used. First, the action was highly unusual for Canada when one views its diplomatic past. Why did Canada act so decisively? And how could Ottawa justify its own actions given its longstanding commitment to multilateralism, liberal internationalism, and the rule of law? These two questions will no doubt be addressed by Canadian foreign policy experts for years to come. In addition, other non-specialist audiences will surely be interested in why Canada did so well in dealing with a very powerful world player.

Multilateralism and Canada as a Middle or Principal Power

Surprise appeared to be the first reaction on the part of the Europeans. As will be shown next in this chapter their reactions to the coordinated, aggressive Canadian stance demonstrate they were simply unprepared for the war of words Tobin waged. Policy makers

in Ottawa most certainly had diverged from Canada's traditional approach to its foreign policy and its customary way of dealing with others in times of conflict. Kim Richard Nossal, in *The Politics of Canadian Foreign Policy* succinctly outlined Canada's traditional approach to foreign policy and the expectations surrounding that policy. However, it can be said that Canada was not actually following its traditional approach. It is in fact a possibility that Canada was not acting as a traditional middle power, but rather, in taking initiative, was following the pattern of a principal power— a pattern the Europeans did not expect. Canada's expected traditional middle power role as well as its bolder principal power role are discussed below.

Since World War Two, Canada has consistently pursued a policy of internationalism which, according to Nossal, entails four interrelated points. The first is state responsibility. "Responsibility underwrites international statecraft: each state wishing to avoid war is responsible for playing a part in the management of interstate conflict."[93] The second point is that of multilateralism. States should work within a multinational framework and avoid unilateral acts in the "larger interest of the community of states".[94] Third comes a commitment to international institutions because according to Nossal, it is a natural outgrowth of multilateralism and "damps the unilateral impulses"[95]. Finally, there comes a willingness to make prior commitments to international institutions to ensure their viability.

Operating without the benefit of hindsight and dealing with each event at a time,

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[93] Kim Richard Nossal, *The Politics of Canadian Foreign Policy*, (Scarborough: Prentice-Hall Canada, 1985), p. 53.

[94] *ibid.*

[95] *ibid.*

rather than having the luxury of viewing the complete picture in its entirety, the Europeans would have seen a significant deviance from the well trodden Canadian track record. While Canada was calling for a heightened responsibility on the part of the Europeans and especially the Spanish, Canada was acting irresponsibly by unilaterally arresting the *Estai*.[96] Secondly, the act of arresting the *Estai* on the high seas was very far from a multilateral act. Even the amendment to the *Canadian Coastal Fisheries Protection Act*, which allowed Canada to enforce its own regulations, was a unilateral act which became intolerable for the Europeans given that Canada had acted on the regulations. Finally, Canada's refusal to admit jurisdiction of the ICJ in the dispute could very well be seen as a refusal to enter into prior commitments over adjudication. As events unfolded, the Europeans could only conclude that Canada had deviated wildly from its traditional internationalist approach; with that fact in their view, Canada was on the way to becoming a rogue in international law. However, with an *a postiori* perspective, this was not the case. Indeed, in taking the unilateral act against the *Estai*, Canada was actually confirming its multinational and internationalist approach. This can be seen by looking at the four points outlined by Nossal.

Immediately after the seizure, Canada demanded higher state responsibility from the Spanish and the European Union not only in negotiations, but more significantly in their actions on the high seas with respect to inspection and enforcement. Second, apart from working to find common ground bilaterally over the seizure, refusing adjudication and instead calling for discussions in the United Nations Conference on Straddling Fish Stocks

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[96] Emma Bonino, *quoted by* Department of Fisheries and Oceans, *Tobin and Wells Respond to Misinformation on the Canada-EU Turbot Dispute*, (Ottawa: March 27, 1995; Press Release NR-HQ-95-34E), p. 4.

and Highly Migratory Fish Stocks, Canada re-affirmed its faith in the multilateral approach. As a result, its faith in the multinational approach provided by the conference renewed its commitment to international institutions such as the United Nations and the UNCLOS III. Finally, with hindsight, Canada was not such a rogue after all, since it did not revoke any of its previous commitments to the United Nations, the UNCLOS Treaty, or bilaterally with the Europeans.

However, Nossal's discussion fails to explain the initial unilateral act. The traditional view of Canadian foreign policy as described by Nossal above would suggest that Canada's approach in the issue over Turbot was unusual. This assumes, however, that Canada was acting as a middle power. According to Tom Keating, Canada's middle power approach to politics was designed to propagate a stable environment to enhance trade. To have this stable environment, Canada would consistently work through international organizations toward achieving enhanced security and trade as well as currency stability. In doing so, Canada would avoid "rocking the boat" in its effort to "regulate and restrain" the actions of the great powers while at the same time advance middle-state interests.[97]

Conversely, David Dewitt and John Kirton prefer to think of Canada as a principal power in a non-hegemonic world. A principal power, according to them, requires three aspects: First, a principal power must be near the top of "international status ranking" and able to take initiative. Second, in taking that initiative, a principal power takes a leading role in international activities. Third and finally, a principal power takes a leading role in

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[97] Tom Keating, *Canada and World Order; The Multilateralist Tradition in Canadian Foreign Policy*, (Toronto: McClellend & Stewart, 1993), p. 17.

establishing, specifying and enforcing international order.

To be able to fulfil the requirements for membership in the "principal-power" club as defined above, Dewitt and Kirton indicate that two criteria be met. First, there needs to be surplus capacity.[98] Surplus capacity is defined by them as the ability of a state to have some measure of relative autonomy in its foreign policy from both internal and external pressures. In Canada's instance, internal pressure was not a significant problem, as support for the actions on the high seas gained a popularity rating in the high seventies. Canada clearly withstood the external pressures, as it unfailingly stood up to Europe's counterpoints.[99]

Secondly, a principal power follows interest based policy initiatives.[100] Any study of the foreign policies of the United States, Britain, France, or the former Soviet Union, undoubtedly principal powers, would reveal that their foreign policy is based on their

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[98] David B. Dewitt and John J. Kirton, *Canada as a Principal Power*, (Toronto: John Wiley & Sons, 1983), p. 38.

[99] The voice of the United States was deafening in its silence. The absence of the United States in this particular issue merely adds legitimacy to Dewitt and Kirton's argument that Canada can act as a principal power in the absence of a hegemon. If the United States were to have weighed in on the debate on either side, the validity of their theory would fall into serious doubt. If the United States agreed with the Canadian position, the Europeans would have had to concede to American pressure. On the other hand, if the U.S. were to have sided with the Europeans, Canada would have had no choice but to find a compromise with a much weaker outcome than what it ultimately aimed for. However, with the absence of the United States in the debate, Canada, left to act on its own, acted unilaterally with initiative and conviction— traits of a principal power.

On Canada's West coast, where the fishing dispute is exclusively with the United States, Canada cannot be seen as a principal power for this very reason. The United States, hegemon or not, is clearly in a position of strength. Canada's ability to assert any relative autonomy is limited to be sure. American human and natural resources in the Salmon dispute outclass Canada's by a very wide margin. Consequently, Canada is barely able to adequately respond and counter the American initiatives (illegal as they may be), much less take an active role and set the agenda.

[100] Dewitt and Kirton, *op. cit.*, p. 39.

interests, either domestic or security related. Canada's initiative in this instance, is clearly one of self interest as well. Canada's fishing industry on the Atlantic coast was in serious trouble as a result, among other reasons, of overfishing on the high seas of straddling fish stocks. Canada desired relief from the problem, and acted alone to achieve that end.

Dewitt and Kirton argue further that a principal power prefers bilateral relationships over multilateral ones. In pursuing bilateral relationships the principal power draws on resources specifically linked to each individual relationship, giving it a prestigious "multiprogram" nature.[101] One can go further to point out that such bilateral relationships, because of the specific resources linked to each specific relationship, emphasizes the principal power's special status and relative autonomy within the relationship.

Over turbot, Canada clearly did not follow its traditional pattern in its foreign policy as it did not follow the predictable behaviour of a middle power, but rather one of a principal power. Canada's actions were unilateral at the beginning, with the extension of the *Coastal Fisheries Protection Act* into the high seas and the arresting of the *Estai*, and bilateral in its negotiations with the EU and its refusal to submit to third party adjudication or arbitration. However there is one inconsistency in Canada's behaviour: Canada also worked at the United Nations Conference on Straddling Fish Stocks at the same time as it negotiated the bilateral agreement with the EU. As will be seen next in this chapter, this two track plan was no accident. It could be said that Canada recognized its limitations as principal power and hedged its bets by concurrently pursuing a middle power tack just as predicted by Gotlieb and Dalfen in 1973. First mentioned in the previous chapter, Gotlieb and Dalfen

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[101] *ibid.*,pp. 41-42.

show that Canada's approach to the troubles are quite predictable, and consistent with its approach to international relations and international law in the past by demonstrating that Canada often pursues a bilateral and a multilateral effort at the same time.

Gotlieb and Dalfen outline the Canadian approach to international law by saying that in 1968 the Canadian policy making community realized that Canada was vulnerable to outside forces because the country possessed the longest coastline and second largest continental shelf in the world. Secondly, they argue that international law bears weight on domestic affairs. Thirdly, they maintain that Canada was looking for greater international responsibility to be borne by all states, whether in space, on the high seas, in coastal areas or in the atmosphere. Fourthly, and perhaps most significantly, where multinational action seems unrealistic to protect Canadian national interests, "a tendency emerges towards claiming national jurisdiction in order to make Canada less vulnerable to external—or what is perceived to be external—dangers."[102] This is to say, Canada takes the initiative and unilaterally declares national jurisdiction.

In Gotlieb and Dalfen's view, Canada uses a consistent approach. Canada often attempts to remind states of their responsibility for activities which can harm other states, through judicial proceedings. Failing success in the multinational fora, Canada,

> may next decide to seek jurisdictional extensions for purposes of preventing or regulating the harmful activities—first at the international level and, failing that, unilaterally. This latter step may be coupled with a rejection of existing procedures for the international settlement of disputes. And finally, Canada may seek to achieve an international regime or international rules which embody both the elements of enhanced international responsibility and extended national jurisdiction and which thereby legitimate the national

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[102] Gotlieb and Dalfen, *note supra* 84, pp. 231- 232.

position.[103]

Consequently, it can be said that Canada's strategy was in fact not inconsistent with the traditional view of Canadian foreign policy; that the events which took place on the surface were a 'blip' in the Canadian approach. Canada's approach was consistent and predictable. However, it was only predictable if one assumed Canada was acting as a principal power.

Complex Interdependence Approach

While Dewitt and Kirton, Nossal, Keating, and Gotlieb and Dalfen shed light on *how* Canada pursued its policy against the European Union, they fail to provide enlightenment on *why* Canada succeeded to the extent that it did. To simply see Canada acting like a middle power in one instance and as a principal power in another ignores any external factors other than the presence or absence of a hegemonic power. Keohane and Nye provide the needed explanation.

Describing the relationship between Canada and the United States as one of complex interdependence, Keohane and Nye conclude that while the two countries differ greatly in size and power resources, Canada, fared surprisingly well. To arrive at this conclusion, they first outline the two dimensions of power in an interdependent relationship, those being sensitivity and vulnerability. They also touch on two traits which apply very well to the Canada/EU case; that Canada is a smaller, more cohesive country, and the European Union a more diffuse and preoccupied power. All four points will be discussed here as they apply very well to why Canada fared so well against a giant trading block. The Keohane and Nye model, however, does not fit exactly the situation that developed between Canada and the

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[103] *ibid.*, p. 233.

EU, and key differences between the model and actual events will be briefly discussed as well.

Keohane and Nye distinguish power in an interdependent relationship in light of two themes. The first is sensitivity. They continue by saying that sensitivity is the degree of responsiveness within a framework; where change within one country brings costly effects to another. The second country, in this instance, is sensitive to the changes in the first. Sensitivity, say Keohane and Nye, assumes that the framework does not change. The example they use is the oil crisis in 1973-1975 where the United States, Japan and Europe had no choice but to accept the higher prices brought about by the oil cartel. The United States, say Keohane and Nye, was less sensitive than Japan, as it had domestic sources of oil, but given the rapid price increases and long queues at gas stations was sensitive to the changes nevertheless.[104]

Vulnerability, on the other hand, rests on the "relative availability and costliness of the alternatives that various actors face."[105] Keohane and Nye go on to say, "In terms of dependence, sensitivity means liability to costly effects imposed from outside before policies are altered to try to change the situation. Vulnerability can be defined as an actor's liability to suffer costs imposed by external events even after policies have been altered."[106] Keohane and Nye give the example of a country being able to turn to alternative fuel types at a reasonable cost when oil prices change. While they use no countries specifically for

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[104] Robert O. Keohane and Joseph S. Nye, *Power and Interdependence, 2nd ed.*, (Glenview, Il: Scott, Foresman & co., 1989), p.13.

[105] *ibid.*

[106] *ibid.*

comparison, the allusion is clear. The United States was less vulnerable to the oil price change, as alternatives existed such as hydro-electricity, natural gas and others.

In the Canada/EU case, it is important to note the type of interdependence between the players. In this instance, the two players were not dependent on each other, but rather both were dependent on the same resource. In prisoner's dilemma fashion, their identical dependence on a common resource in turn, made them interdependent over the preservation of the fish stocks.[107] Both players were looking at a situation where they would not be able to easily recover from the death of the fishery. There were very few fish and if the situation were to worsen, there would be none at all. For the local fishing economies, the consequences of not having any fish to catch would have weighed heavily on both the Canadians and the Europeans. As seen in the second chapter, the economic development in Galicia was done on the backs of the fish as was the case, although to a lesser extent in Newfoundland. An idling of the fishery would throw out of work not only those involved directly in the fishery as well as those businesses which gain their income from the workers' purchases, but also the industry building the ships and equipment for the fleet. The behaviour of the Spanish fleet had to change anyway, whether on the Canadian's terms or else on the Europeans' as there would soon have been no fish at all. Canada, whose behaviour had already begun to change had to ensure that every party was on board to preserve the fish stocks. A defection from the game at this point would have seen no Pareto-

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[107] Gordon R. Munroe, "Evolution of Canadian Fisheries Management Policy under the New Law of the Sea: International Dimensions", *in* A. Claire Cutler and Mark W. Zacher, *Canadian Foreign Policy and interdependent economic relations*, (Vancouver: UBC Press, 1992), p. 295.

optimal outcome, but rather the worst-case scenario.[108]

An escalation in the dispute was in the offing when Spain proposed that trade sanctions be imposed against Canada. Canada would certainly have been sensitive to trade sanctions, but not simply vulnerable, given that Canada's main trading partner is the United States. The Europeans too would have been sensitive to Canadian sanctions should they have arisen, but not very vulnerable. In this instance, Canada and the EU found themselves in a symmetrically interdependent relationship, each needing the other, but neither so much so that denial would hurt enough to change tactics. Escalation would have been pointless. In an instance such as this, Keohane and Nye assert that the smaller country more often wins than loses.[109]

Keohane and Nye advance a number of reasons why the smaller state often fares better in an interdependent relationship. While they assert that some of the reasons are valid only in asymmetrical relationships, it is just as likely that they could be found in symmetrical relationships. For example, according to Keohane and Nye, the smaller country often controls the agenda.[110] In their study, using the American example, the American President's time is very limited and easily diverted to other matters. Consequently, there exists an "if it ain't broke, don't fix it" mentality which favours the status quo. When the status quo is no

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[108] The pareto-optimal outcome in this instance is a trade-off between Canada and EU in this instance. Canada would concede a small number of fish in its quota for increased enforcement and compliance. In a scenario where the outcome could easily be zero-sum, each side instead sees an improvement in expectations while costing neither side anything significant.

[109] *ibid.*, p. 203.

[110] *ibid*, p. 199.

longer acceptable for the smaller state, it is the smaller which often imposes change and the larger state must find the time to address the grievance.

In this case, relatively speaking while the EU is a principal power, and Canada a middle power, and despite the interdependent relationship being roughly symmetrical, the EU was truly faced with other issues abroad. Canada's grievance was not the sole problem on their plate. The troubles in ex-Yugoslavia and Chechnya, as well as Russian concerns of NATO's eastern expansion into the former Warsaw Pact countries were occupying much time at the EU headquarters. The key to a favourable outcome is not so much that the power relationship must be asymmetrical in one's favour, but rather that for a state to prevail, it must remain comparatively less distracted while concentrating on the dispute at issue.

The second reason according to Keohane and Nye for the Europeans to be at a disadvantage was that Canada, being a smaller country was able to be more intense and coherent in its bargaining position. Again looking at the Canadian/American relationship, Keohane and Nye mention,

> Whether it is a spontaneous reaction to transnational processes or a result of manipulation by government leaders, politicization from below involves mobilizing groups to put pressure on the government. That government is placed in a strong position to make demands on the United States, to resist American demands, or even to threaten retaliation that might from a strictly economic point of view be irrational. By contrast, politicization of issues from below in the United States is carried out by more narrowly based groups, focusing principally on Congress. The United States public does not consider either Canada or Australia important enough to generate broad, popular movements.... Thus the pressures of democratic politics usually favour the smaller state in the bargaining process, because for them, politicization from below tends to lead to tough negotiating behaviour and coherent stands by government, whereas for the United States such politicization leads to

fragmentation of policy.[111]

This pattern was very clearly illustrated in the dispute over turbot. As will be seen below, Brian Tobin's position was strongly reinforced across the fishing industry on the Atlantic coast, not to mention the entire Canadian population, with support in the polls reaching 89% for the action.[112] As a smaller power, Canada's position was not compromised by internal divisions. For example, Canada's policy was not stalled as a result of narrow interests where the Newfoundland fishing industry may have supported the action, while the Nova Scotian industry equally disapproved. By contrast, with much of the British fishing industry being equally adamant in their support as the Spanish were in their condemnation of Canada's position, the Europeans were not so coherent.

While the Spanish position was also intense and coherent against Canada, the Spanish had to allow the European Union to negotiate on its behalf. While the European Commission was concerned about the well-being of the Spanish fleet, the commission also had to incorporate, among others, the interests of the British fishing fleet, which, in its narrow interests, were in full support of the Canadians against the Spanish. As an outcome of the terms of admission into the EU, 1996 was to see the Spanish begin fishing in EU waters in the North Sea for the first time and the British fishing industry was anxious to see that their interests were advanced, or at least well defended, internally so as not to lose to the

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[111] *ibid.*, p. 206.

[112] Anthony Wilson-Smith, "Ottawa's fish tale", *Maclean's Magazine*, April 10, 1995, (vol. 8, no.5), p. 18.

Spanish within the EU before the Spanish even began to fish off the British coast.[113]

Within the European Parliament, significant dissension was evident. While the Spanish position was clear and coherent, with, for example, Spanish Member of the European Parliament, Mrs Carmen Estevez, declaring that Canada was attempting to extend its territorial waters by force and the inspection of the *Estai* jeopardized the interests of all EU countries, the position was mitigated by other viewpoints. Mrs Patricia McKenna of Ireland said that she knew the Spanish broke rules and that the Community, guilty of over-fishing, was in a bad position to be criticizing Canada. Mr Jup Webber of Greenland added that the inspection was fully justified and congratulated Canada for its determination to conserve the resource.[114]

This dissension within the European ranks demonstrates precisely what Keohane and Nye describe. The larger power's ability to act is significantly restricted by forces within itself. The smaller power, in this Canada, as shall be seen, was clearly able to handily outmanoeuvre the EU, counting on a diffusion of interests and the EU's inability to cohesively counter Canada's intense and united front.

Keohane and Nye decided that three characteristics had to exist to have a complex interdependent relationship. Those characteristics— multiple channels, an absence of hierarchy of issues and a minor role of military force— were not all present in the dispute over turbot, however. The relationship in a complex interdependent context rests mainly on

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[113] Paul Koring and Kevin Cox, "Scots support seizure of vessel", *The Globe and Mail*, March 11, 1995, p. A1.

[114] "Parliament condemns Canada's attitude but does not ask for freeze of agreements or suspension of meetings", *Europe*, Brussels: March 18, 1995 (no. 6443(n.s.), p. 13.

low politics with a broad agenda. Government department to government department consultations take place every day between countries with none of them dominated by questions of military participation or state sovereignty. Force is rarely used, if ever at all.

However in the case of the dispute over Greenland halibut, force was used. A multiplicity of channels between Europe and Canada were closed and yet the relationship remained one of complex interdependence. For this there are two salient reasons. First, the use of force was not sustained. Canada fired only three shots to carry out an administrative function. This administrative action, illegal as it may have been, was no act of war. Second, while various scientific and cultural exchanges were cancelled and visas imposed between Canada and Spain, trade sanctions were not imposed. Both sides called for cool heads to prevail, and quiet diplomacy carried on out of sight of the television cameras.

Clearly, just as before the arrest of the *Estai*, the relationship remained interdependent and based on the logic of prisoner's dilemma. Both Canada and the European Union were equally dependent on the fish which were vanishing and both were anxious to resolve the problem. The European side, paralyzed by powerful but divided interests in the fishing industry over Spanish behaviour, had been galvanized to action in light of the Canadian intervention on the high seas. Sufficient resources were found to deal with Canada, but the diffusion of the issue into the European Union as a whole precluded intensity and coherence on the issue found in Canada. There was little room to manoeuvre. The status quo on the Grand Banks was not sustainable. The Canadians had significantly lowered their fishing effort, and unless complete devastation of the fish stocks was their objective, the Europeans had no choice but to follow.

Both sides were vulnerable to the death of the fishery, and Canada was equally driven to force the European hand. The fish stock, which would have been the loser without an agreement, was ironically not the winner with an agreement. The fish will be caught regardless. However, with the agreement, all countries fishing on the Grand Banks, Canadians and foreigners alike, were the winners. For that collective victory, it was Brian Tobin who recognized, either consciously or intuitively, that the forces at play and the moment in time were precisely correct for the arrest of the *Estai*.

Some might say that the high seas fishing regime was changed as a result of Canada's actions but this presupposes that there ever was a regime to be changed in the first place. Certainly Canada failed to recognize any regime off the Newfoundland coast. Since the early 1970s Canada has clearly been disinterested in international cooperation preferring instead to work toward gaining sovereign rights over all the fishery on the Grand Banks. The best way, after all, to eliminate any vulnerability to others, is to eliminate their presence.[115]

Alternatives exist to the confrontational approach taken in recent years over the

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[115] This was the position of Jack Davis, Minister of Fisheries in 1973 when he said, "The long term is for Canadians. Canada is not only going to reach out and encompass all of the living resources off its continental shelf and slope, we are going to make sure that they are harvested by Canadians, in Canadian- owned vessels, and processed in Canada as well." *Quoted from* Gordon R. Munro, "Evolution of Canadian Fisheries Management Policy under the New Law of the Sea: International Dimensions", *in* A. Claire Cutler and Mark W. Zacher, *Canadian Foreign Policy and interdependent economic relations*, (Vancouver: UBC Press, 1992), p. 300.

It must be said at this juncture, that the assertion that there is a regime in existence on the high seas off the coast of Newfoundland is not an undebatable fact. Indeed, there is questioning as to the existence of regimes at all. The doubts cast upon regime theory by Susan Strange in her article "*Cave! hic dragones*" are worth serious consideration.

straddling fish stock question off the Newfoundland coast. Gordon Munro suggests that the agreement which regulates the straddling fish stocks fishery off the coast of New Zealand is an effective option.[116] In this case, domestic fish processors can, if they choose to, charter a foreign ship to fish within the EEZ. As a result, both domestic and foreign ships are subject not only to the rules and regulations of New Zealand, but also the laws of economics, and more specifically, the law of comparative advantage. Free trade would, in effect, be taking place between the EEZ and the high seas.

This alternative suggests, however that the need for employment in the industry is only a "semi-legitimate" reason for protecting the domestic Canadian industry. While Tobin was able to work under that premise, he succeeded in doing so because he insisted that the short term pain of unemployment would result in long term gain with the recovery of the fish stocks. The proposal advanced by Munro suggests that unemployment in the fishing industry in Newfoundland might be a necessary evil. However, as already mentioned in Chapter Two, the fishing industry is the basis for Newfoundland culture. The price to pay for the acceptance of a permanent diminishment of the domestic fishing industry for the survival and management of the fish stocks would be massive economic and social dislocation, not to mention political suicide for the government MPs in the area.

The second problem, however, is that even if Canada were to accept "free trade" in fishing services on the part of foreign fishing fleets within the Canadian EEZ, there still runs the risk of overfishing outside the EEZ on the high seas. Canada would still have significant difficulty ensuring that the fishery is well managed if a foreign country launches an objection

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[116] Munro, *op. cit.*, p. 304.

to a quota set by NAFO. Further, with foreign fish boats in the area waiting to act on charter orders within the EEZ there is a possibility that the problem of too many boats chasing too few fish outside the EEZ could be exacerbated.

However, buried within this economic alternative which clearly has problems, Munro draws upon Edward Miles and advances a second alternative.[117] Instead of allowing free trade on the high seas in fishing services to the detriment of the Canadian economy and Newfoundland society, Canada could simply trade a percentage of its fishery within its own EEZ to NAFO members in exchange for a binding quota mechanism within the NAFO. As well, by negotiating such an agreement, Canada would inexorably draw the other members of NAFO further into an interdependent relationship.

If a flag state started toward unilaterally objecting to quotas set by NAFO, Canada could threaten to refuse their share of Canadian fish stocks. This could have sufficient effect to keep the flag state from defecting from the NAFO quota system. However, should the country continue to fish in defiance of NAFO, the country could run the risk of being ejected from the NAFO pact. Once out of the pact, the country would be legally excluded from the NAFO convention area. It might even be speculated that it could be kept out by force were it necessary.

Yet this alternative, while more viable than Munro's first, would still have been difficult, if not impossible, to implement in 1995. The prevailing attitude in Newfoundland, was that the foreign fishing fleets were already taking too many fish; that the carnage outside the EEZ boundary resulting from the foreigners' irresponsible and defiant fishing practices

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[117] *ibid.*, p. 308.

would have continued even if Canada tried to gain leverage over them. But now that the fears of the Canadian fishing industry have been calmed somewhat, this alternative might be workable. However, since Canada played the "tough guy" over Greenland halibut, could it now soften its position and still remain credible?

Brian Tobin's Plan

Brian Tobin the turbot warrior proved over this issue that he was a master tactician. He had formulated clear objectives and clear measures for achieving those goals. He broke international law to achieve his goals, but played a media relations game perfectly to discredit his detractors, while downplaying the illegality of the act of arresting the *Estai*. It was, however, an action which achieved much more than just give a boost in the domestic polls for Tobin's Liberal government or to stop turbot fishing by foreigners. For it to have succeeded, it had to achieve more.

As seen in the first chapter, Tobin, as Minister of Fisheries, was dealing with a divided fishing community in Newfoundland. The inshore fishery, the subsistence family and village cohort, blamed all the trawlers, both Canadian and foreign, for the drop in the resource. In turn, the Canadian trawlers were forced to fish to pay the huge capital costs associated with the ships themselves. Both camps, however, looked at the foreign fishing fleet, most particularly the Spanish, flaunting NAFO quotas, and even those set by the European Union. Consequently, as Minister of Fisheries, Tobin had to stop the decline of the fish stocks. As Fisheries Critic before the 1992 election, Tobin had seen his predecessors make politically expedient decisions at the expense of the fish.

Appointed Fisheries Minister after the Liberal victory in the election of September 1992, Tobin began to fulfil his election promises. He began to work in the name of fish conservation above all else. In 1993 Tobin established the Fisheries Resource Conservation Council, (FRCC) the body which, in a transparent manner, makes recommendations on quotas for the upcoming year using the best scientific knowledge available on the status of the fish stocks, taking nothing else into account. It was this body that recommended quotas for turbot in 1994 to Tobin and NAFO that the Europeans found offensive. However, their objection to the 1995 Greenland halibut quotas followed years of objections to quotas over other fish stocks. To be credible both domestically and internationally, Tobin had to make a stand for the fish on the Grand Banks. The last possible stand was over Greenland halibut because it was the only straddling fish species on the Grand Banks not yet under complete moratoria.

With the dramatic decline in the fish stocks in recent years, and the impressively short history of the turbot fishery from its inception to near death, drastic measures were the only option in his view. In a speech made in Reykjavik, Iceland, he made his viewpoint clear. The Canadian government had failed to take the appropriate measures when signs of a seriously weakening resource began to appear.

> [Previous governments] thought that if quotas are cut back too far, too fast, then plants that might be saved would have to close. Vessel owners who might be able to make their payments to the banks on their vessels and the significant, and I mean significant, overcapacity that exists, then those vessel owners in the light of severe quota restriction, they too might be lost; that individuals, people and communities who [could] still work would be displaced. Where was the proof, said the government of the day, that plants should close... that vessels ought to be tied up... that people should be temporarily displaced from their employment, in the name of conservation? In short, at a critical moment when year over year the stocks decreased... TACs

> went down and down and down again... when the government should have intervened to protect the spawning biomass, the Government of Canada played poker. It gambled with the future of the resource in an attempt to save the industry and in the process it nearly lost both for a very long time.[118]

In the same speech, he also outlined the traditional way of solving any problem found in the industry in the past, and also clarified a new approach to the ministry.

> Every time there is a problem at a plant, a processing company, that is trying to make its five-year business plan work, cover the cost of its expansion or new investment work, the processing company or the industry sees the minister and says: "Minister, we have to make our investment plan work and we need more fish to cover the cost of the investment we've made". The same is true of boat owners who have invested in new technology, greater capacity at much greater cost that has to be paid for. And how is it paid for? With fish. The same with coastal fishermen, coastal societies, constantly putting pressure on the Minister to provide more fish. And the only capital of a Minister, the only way to respond to any of the problems that are raised, is for the Minister to pull out his symbolic wallet and to spend fish. Fish. The instant cure, the instant medication, for every problem in the industry. And every voice around the table is heard except one voice. The voice of the fish. I say to you, that I believe that Ministers of Fisheries are going to have to try, against this backdrop of pressure on stocks all over the world, to reverse their role. I say to you that I have come to the conclusion, I can only speak for myself and for Canada, that a Minister of Fisheries cannot manage a fishing fleet. At least I can't.... But one thing that a Minister of Fisheries might be able to do, might be successful at, is managing the resource.[119]

Using this as the context within which Tobin's actions are to be seen, it becomes obvious that this change in management strategy was going to lead to difficulties with others down the road. So that he might garner support for taking severe measures, he needed at

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[118] Brian Tobin, *Transcription of Minister Tobin's Speech at the Conference on Sustainable Exploitation of Fish Stocks*, (Reykjavik, Iceland: January 12, 1995), p. 5. *Please note the passage has been edited to eliminate oral repetition used by Tobin for emphasis.*

[119] *ibid.*, pp. 5-6.

least industry support, especially considering that his own electoral constituency was Cornerbrook, Newfoundland, is a region and city with many different stakeholders in the fishery.

Consequently, Tobin's first objective was to unite the divided fishing industry. He targeted foreign fishing fleets, a popular villain in the eyes of Canadian fishermen. He instantly achieved his first goal with the seizure of the *Estai*. "Nothing less will satisfy me than to see Spanish vessels towed in through the (St. John's Harbour) narrows under arrest,"[120] were words of encouragement indeed. A reporter for Maclean's Magazine noted: "It was a week [of the seizure] that saw the unlikely spectacle of 6,000 Newfoundlanders crowded onto the waterfront to pledge their unequivocal support for the federal government—the same villain that most of them have blamed for years for having fatally mismanaged their once-fabled fishery"[121] Such reports clearly demonstrate the public relations success Tobin had in Newfoundland over the arrest of the *Estai*.

The second objective sought by Tobin was consensus: Canada was indeed doing the right thing despite international law being broken. As Anthony Wilson-Smith put it, the Liberals "brilliantly stage-managed the crisis over turbot".[122] It came not only at a fortuitous time for them domestically, but it also came at a time when the Food and Agriculture

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[120] Earle McCurdy, head of the Fishermen, Food and Allied Workers Union, quoted by Jeff Sallot, and Kevin Cox, "Mounties help seize Spanish trawler", *The Globe and Mail*, Toronto: March 10, 1995, p. A13.

[121] John DeMont, "Conflicting Emotions", *Maclean's Magazine*, March 27, 1995, p. 20.

[122] Anthony Wilson-Smith, "Ottawa's fish tale", *Maclean's Magazine*, April 10, 1995, p. 18.

Organization (FAO) had forecasted "impending disaster for the word's fisheries unless present fishing practices are dramatically changed."[123]

The third objective that Tobin wished to achieve was to ensure that the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks be convened with an eye on enforcement. As will be seen in the next chapter, Canada asserted this position clearly, along with many of the other participants, including the Europeans. The swift conclusion of the Conference in December 1995 underscored the urgency of the issue as highlighted by Tobin. Tobin's plan worked perfectly.

One significant point which comes to mind when following this dispute is this: Canada refused to recognize the jurisdiction of the International Court of Justice over this matter, and given Canada's "boy scout" image on the international stage, and given Canada's willingness to go to arbitration over other issues including those of fisheries and boundaries,[124] it seems somewhat incongruous that it pursued this tack. Gotlieb and Dalfen explain why quite simply. Canada was looking for innovative ways to deal with the problems of overfishing on the Grand Banks, and any decision made by the ICJ would have severely restricted Canada's room to manoeuvre. "It was now free to act in the absence of agreement; it became free resolutely to pursue stringent and more absolute concepts of international responsibility when its national self-interest was affected and to implement these

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[123] *ibid.*

[124] Canada and France went to binding arbitration over the boundaries of St Pierre and Miquelon on the south coast of Newfoundland, as well as the boundaries with the United States in the Gulf of Maine.

concepts unilaterally in the absence of agreement."[125] More specifically relating to this dispute, when Canada passed amendments to the *Coastal Fisheries Protection Act*, allowing it to extend its jurisdiction into the NAFO regulatory area, it gave notice that it did not recognize the ICJ in this matter.[126]

The *Globe and Mail* interviewed Edward McWhinney, Liberal MP for Vancouver-Quadra and international law expert, who declared: "With measures like these you just go ahead and do it. Almost all law of the sea is based on unilateral action... The Europeans, cite 17th century maritime law that is as antiquated as claiming the legal right of colonial powers to plunder Africa and enslave Africans".[127] In other words, Canada was looking to have new law accepted based on conservation, rather than receive a judgement by a court which was bound by precedents set in old, antiquated law. Canada was looking rather to the upcoming UN Conference on Straddling Stocks to resolve the issue. "The purpose of the UN Conference on Straddling Stocks and Highly Migratory Stocks is to develop a new legal

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[125] Gotlieb and Dalfen, *op. cit.*, p. 235; "Thus from the standpoint of Canada's approach to international law, the most decisive act in the whole Canadian story over the past two decades was the placing in 1970 of new reservations on Canada's acceptance of the compulsory jurisdiction over 'Disputes arising out of or concerning jurisdiction or rights claimed or exercised by Canada in respect of the conservation, management or exploitation of the living resources of the sea, or in respect of the prevention or control of pollution or contamination of the marine environment in marine areas adjacent to the coast of Canada'".

While Canada's 1970 reservation was no longer in effect by the 1990s, Gotlieb and Dalfen's commentary on it still accurately serves to explain Canada's subsequent reservation to the ICJ when it extended the *Coastal Fisheries Protection Act* in 1994.

[126] Edward Greenspon, "'Baby fish caught, Tobin says", *The Globe and Mail*, Toronto: March 14, 1995, p. A10.

[127] Kevin Cox, "Spanish vessels back at Banks", *The Globe and Mail*, Toronto: March 9th, 1995, p. A4.

regime to resolve these problems".[128]

The Canadian position of refusing to allow the dispute to go to the ICJ also reflected the urgency of the situation. "Canada has pressed hard within the [UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks] for a binding dispute mechanism to address disputes like this one, and for an agreement which provides for effective enforcement by non-flag states. In the absence of this kind of comprehensive system, a reference to the International Court of Justice would not be meaningful, and the few remaining fish stocks of the Grand Banks would be destroyed while the legal process was underway."[129]

A Chronology of Events: Who Said What and When

To further shed light on the two camps' positions in the dispute, an event time line is briefly outlined here. It is hoped that by including this, along with interjections made by both sides as the events unfolded, a better general understanding of the two sides as they went into negotiations can be reached— both bilaterally to settle the dispute itself and in the multilateral arena at the United Nations Conference.

With the appointment of Brian Tobin as Minister of Fisheries, Canada changed course in its approach to fishing in general and Greenland halibut in particular. In September 1994, NAFO set its first ever TAC for turbot at 27,000 tonnes, less than half the amount caught in

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[128] Department of Fisheries and Oceans. *Tobin and Wells Respond to Misinformation on the Canada-EU Turbot Dispute*, (Ottawa: DFO, March 27, 1995), p. 4.

[129] *ibid.*

1994.[130] NAFO then set the quotas for each country based on a majority vote, a legal but very controversial method of setting quotas within the NAFO decision making process. These quotas saw Canada increasing its historical catch levels, from 3,000 tonnes to 16,300 tonnes with the EU being cut to only 3,400 tonnes from 50,000 tonnes. Europe objected almost immediately, based on the principle that in their opinion the decision should have been consensus driven, and that the cut to 3,400 tonnes was too drastic, especially in light of Canada's quota comprising 60% of the TAC.[131]

It should be noted here that NAFO's convention allows for these objections to take place for any reason. Upon launching an objection, the defecting country is then free to unilaterally set its own quota, thus undermining the entire NAFO arrangement and fish stock viability. This weakness in the NAFO convention to allow reservations lies at the heart of the troubles surrounding straddling fish stocks. For Tobin, this reservation was one too many, and so he decided to raise the stakes.

On 15 February 1995, Brian Tobin heated up the debate by saying "Since the late 1980s the Spanish have ignored [scientific] warnings and increased their catches and effort.... We will not allow the EU to devastate turbot the way it devastated American plaice,

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[130] Kevin Cox, "How the dispute developed", *The Globe and Mail*, Toronto: April 17, 1995, p. A4; Department of Fisheries and Oceans, "Tobin says NAFO must decide Equitable Sharing Arrangement for Greenland Halibut", *News Release*, (Ottawa: DFO, January 27, 1995; NR-HQ-95-08E).

[131] Department of Fisheries and Oceans, "Canada wins Critical Vote on Turbot at NAFO", *News Release*, (Brussels: DFO, February 2, 1995; NR-HQ-95-10E).; "In Sharing Out Fishing Rights for Greenland Halibut, NAFO grants Lion's Share to Canada- Emma Bonino Says the Union should contest the Decision", *Europe*, Brussels: February 3, 1995, (no. 6412 n.s.), p. 8.

yellowtail flounder, witch flounder, redfish and cod species in the 1980s". Answering to the European Union's intention to launch an objection at NAFO over its quota, Tobin added, "It's unacceptable for the EU to say 'we played, we lost, and we're not abiding by the majority decision of an international conservation body'. It is irresponsible of the EU to agree with NAFO decisions only when it is convenient to do so."[132]

March 3rd saw Canada unilaterally extend its jurisdiction into the high seas to ensure compliance of Canadian conservation laws concerning straddling fish stocks by Spanish and Portuguese trawlers.[133] Ships which fly flags of convenience (that is to say flags of countries not at all associated with the ship's actual registry or home base), were susceptible to arrest on the high seas if they were found to be illegally fishing. With the amended *Coastal Fisheries Protection Act,* Canada was now prepared to treat Spanish and Portuguese vessels in the same manner. This was, of course, immediately "condemned" by the Europeans, citing Canada's deviance from international law and the Law of the Sea.[134]

On March 6th, in an effort to ensure that the quotas set by NAFO would be respected, Tobin proposed a 60 day moratorium on fishing turbot on the high seas, pending an agreement on a transition period for the Europeans, but it was rejected by Bonino. In

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[132] Department of Fisheries and Oceans, "Tobin says Canada will not let the EU devastate Turbot", *News Release*, (Clarenville, Newfoundland: DFO, February 15, 1995; NR-HQ-95-21E).

[133] Department of Fisheries and Oceans, "Canada extends authority to protect straddling stocks on the high seas to include Spanish and Portuguese Vessels", *News Release*, (Ottawa: March 3, 1995; NR-HQ-95-27E).

[134] ECCO News Service, "Canada gives ultimatum to EU on fisheries", *Sources Say...*, Brussels, March 7, 1995, (no. 785), p. 3.

addition, Canada notified the EU that it would unilaterally start boarding European fishing vessels without European permission to do inspections.[135] This threat was countered by the EU's ambassador to Canada, John Beck, in the *Globe and Mail:* It would be a "very serious step, an illegal step and potentially a very dangerous step". The European foreign ministers rejected the idea of a moratorium. "Canada is in flagrant violation of all international laws governing the high seas", was the response from Alain Juppé, the French foreign minister at the time.[136] Meanwhile, according to *Europe*, there were 38 Spanish ships and 11 Portuguese ships in the area and all were warned that Canada could start boarding them.[137] The Globe and Mail reported that they moved off the Grand Banks, however. Tobin remained resolute in his warnings that Canada would board Spanish or Portuguese vessels if they fished in the disputed area. Tobin also added that "This is probably the first time ever, in living memory, that there are no foreign fishing vessels on the nose and tail of the Grand Banks. However short it may be, that's quite an exciting moment for this Canadian who hails from Newfoundland and Labrador".[138] However, as Tobin suggested, that hiatus was very short indeed.

While about 24 ships had left for home, fifteen of the ships were back on the Grand

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[135] Department of Fisheries and Oceans, *Excerpt, Brian Tobin's Press Conference*, Ottawa: March 6, 1995; "The Greenland Halibut Affair leads to further Tensions;", *Europe*, Brussels: 6/7 March, 1995 (no. 6434 n.s.), p. 9.

[136] Jeff Sallot, "Tobin threatens Europe over turbot", *The Globe and Mail*, Toronto: March 7, 1995, p. A1.

[137] "Council rejects Moratorium on Greenland Halibut;", *Europe*, Brussels: March 8, 1995, (no. 6435 n.s.), p. 9.

[138] Mackie, Richard, "Foreign boats heed warning", *The Globe and Mail*, Toronto: March 8, 1995.

Banks on March 8th, the next day. Canada did not enforce its rules that day because of rough seas.[139] However in the mid-afternoon of March 9th, Canada chased, fired warning shots across the bow, boarded, and arrested the *Estai* for fishing in contravention of the *Canadian Coastal Fisheries Protection Act.*[140] The ship was escorted to St. John's Newfoundland, where the ship and skipper were held under bail. Emma Bonino and Spanish Agriculture Minister Luis Atienza considered the action to be "organized piracy".[141]

In subsequent days, Canada then alleged that there were two sets of logbooks of the *Estai;* one for inspectors, and one for 'reality'; that the *Estai* was using an illegal liner in its net to catch undersized turbot; and that the *Estai* did, in fact, have a large percentage of juveniles in its hold. At the same time, while both sides recognized that bilateral talks were necessary to resolve the dispute, the European Union refused to talk so long as the *Estai* was held in St. John's. Indeed, upon learning that Canada had seized the *Estai*, the EU sent a "*Note verbale*" to Ottawa stating that the release of the vessel was a "sine qua non for resuming normal relations between the Union and Canada;" and that it was suspending all "current discussions on various issues and forthcoming meetings involving Canada",[142] particularly a scientific cooperation accord which was to be signed that week between Canada

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[139] Kevin Cox, "Spanish vessels back at Banks", *The Globe and Mail*, Toronto: March 9, 1995, p. A1.

[140] Department of Fisheries and Oceans, "Canada Seizes Spanish Trawler", *News Release*, (Ottawa: March 9th, 1995; NR-HQ-95-29E).

[141] "Spanish Fishing Boat Inspected by Canada affects Euro-Canadian Cooperation", *Europe*, Brussels: March 11, 1995, (no. 6438 n.s.), p. 13; Kevin Cox, "Eggs thrown at trawler captain, *The Globe and Mail*, Toronto: March 13, 1995, p. A4.

[142] Emma Bonino, *Introductory Declaration of Commissioner Bonino during her Press Conference on NAFO/Fisheries*, Brussels: March 14, 1995, (Memo 95.44), p. 2.

and the EU.[143]

On March 16th, a bond of C$500,000.00 was posted by the ship's owners, in lieu of the original C$5.0 million demanded, and the Canadian government released the ship. Upon its release, the EU considered themselves vindicated in their insistence that Canada acted illegally by seizing the ship and so claimed victory by stating,

> *La libération du navire espagnol est une victorie pour l'Europe. Nous avons toujours dit qu'il n'y aurait pas de négotiation avec les Canadiens tant que l'équipage et le bateau ne seraient pas libérés.... Maintenant, nous avons forcé les canadiens à mettre noir sur blanc l'engagement de libérer le navire. Le signal formel que nous avons reçu d'Ottawa témoigne de leur décision de revenir à la réalité et de choisir la voie du dialogue.*[144]

For its part, however, Canada did not consider that it had made any concessions. In Canada's eye, there was nothing for Europe to claim victory over. Canada, it turned out, wasn't looking to set any precedent after all: "We are not trying to persuade Madrid that our action [the arresting of the *Estai*] was legal".[145]

There were, however, still matters outstanding between the parties, such as a renegotiation of the quotas set over turbot, a rescinding of Canada's *Coastal Fisheries Protection Act* provisions that were in contravention of international law, as well as a resolution over enforcement issues (which might enable a similar dispute to be avoided in the

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[143] ECCO News Service, "EU Angrily Responds to Canadian Piracy", *Sources Say...*, Brussels: March 10, 1995, (no 793), p. 1.

[144] "Declaration de Mme. Bonino", *Europe*, March 15, 1995, p. 4.

[145] Jacques Roy, *Canadian Ambassador to the EU, quoted in*, Paul Koring, "EU unity may have been misjudged", *The Globe and Mail*, Toronto: March 16, 1995, p. A4.

future) still to be negotiated.[146]

To further strengthen its negotiating position, Canada went on the media offensive. "Baby" fish were caught, according to Tobin.[147] A full investigation in St. John's of the *Estai* showed that "79 per cent of the turbot catch was less than 38 centimetres in length and that some were 'baby' fish about the length of a ballpoint pen.[148] On March 17th, Canada accused the EU of being negligent in acting on charges laid by inspectors on the Grand Banks. The Department of Fisheries and Oceans laid 26 charges against European vessels in 1993, but to date has no information whether the charges were pursued once the vessels returned to their home ports. Indeed, the *Estai*, in May, 1994, was charged with misreporting its catch of American Plaice, and of having undersized Plaice as well—a familiar story in the tale over the Turbot.[149]

As with most aspects of the war of words which took place, the Europeans were on the defensive over the catching of undersized Turbot. In an *Argumentaire* issued by the EU on 14 March 1995 in a point-counterpoint format, the Europeans argue the contention that "The fishery by the EU is made only on juvenile, immature fish" by saying:

> EU: True, and the same applies to all other fishing countries, including Canada. Given the biology of the species, with a long life-span and a very old age at maturity, all fisheries, including the Canadian one, target mostly on immature fish. This fact does not omply [*sic*] any threat to the health of the stock by

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[146] Jacques Santer, President of the European Commission, *Letter to Canadian Prime Minister Jean Chrétien*, Brussels: European Commission, March 22, 1995.

[147] Greenspon, *op. cit.*, p. A1.

[148] *ibid.*

[149] Kevin Cox, "Many boats break fishing rules", *The Globe and Mail*, Toronto: March 17th, 1995, p. A1, A8.

itself, provided mature fish is [*sic*] left in the sea in sufficient numbers.[150]

There is very little doubt that Europe lost the media battle over the "baby fish" issue.

On March 27th, the bilateral talks were almost scuttled as a result of Canada taking action against another Spanish vessel, the *Pescamaro Uno*, with a warp cutter,[151] and the chasing of the *Verdel* off the Grand Banks; both ships, according to DFO, were in fishing in contravention the same controversial provisions of the *Canadian Coastal Fisheries Protection Act*.[152] Tobin succeeded in making it appear that the Europeans were negotiating in bad faith. For her part, the European Fisheries Minister, Emma Bonino, accused Canada of turning the Grand Banks into "The Wild West", but Canada was prepared with an assertive and less emotive answer. "The Spanish fleet has always treated the Grand Banks as the wild west; a last frontier in which there was no control over their fishing operations, and where

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[150] Horst-Jürgen Tittel, "*Argumentaire*", *Note FLASH à l'intention des Délégations de la Commission européenne*, Brussels: European Commission, *Faxed to Ottawa, March 14, 1995*, p. 5. Canada's accusation that juvenile fish were being caught by the *Estai* included the accusation that these fish were being caught in a net liner. This liner had a mesh that was considerably smaller than the legal size. Mesh size is the size of the holes in the net. While the net itself was within European guidelines (but still smaller than Canada's legal size), a liner with very small holes or mesh was inside the net, making it impossible for fish the length of ballpoint pens to pass through. While this point in the *Argumentaire* suggests that the European negotiation position was formulated in ignorance of the existence of the net liner, a less charitable view would suggest that Emma Bonino's office was guilty of deliberate misrepresentation of the facts.

[151] A warp cutter is a huge scissors-like blade to cut the warps or trawl cables of a fishing net.

[152] Allan Freeman, "Canadians cut Spanish ship's nets", *The Globe and Mail*, Toronto: March 27, 1995, p. A1.

they broke all the relevant rules with impunity".[153]

This last crisis broke on the same day that multilateral talks at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks were to begin. Both Tobin and Bonino were in New York for the opening session, and Tobin was on the public relations offensive. In full view of the media and the television cameras, Canada raised the stakes further. Tobin took the illegally sized net liner of the *Estai* to New York, and on a barge in the East River, displayed it along with examples of the tiny fish which would be caught in it. It was at this moment, that Tobin said the most memorable words in the dispute, "'We're down now finally to one last lonely, unattractive little turbot clinging on by its fingernails to the Grand Banks... saying "Someone reach out and save me in this 11th hour"'".[154] At the same time, to the world's media assembled to view the net, Canada issued a press release responding directly to a number of accusations made by the Europeans in their *Argumentaire*[155] rendering the European position very weak at best and very likely discredited altogether.

Despite official positions of various countries around the world, such as France, Korea, and initially the U.K., many foreign fishing communities were firmly behind Canada in its dispute with Spain. Canada was shipping Canadian flags to the U.K. in huge quantities to meet the demand of local British fishermen wanting to show solidarity with Canada against

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[153] Department of Fisheries and Oceans. *Tobin and Wells Respond to Misinformation on the Canada-EU Turbot Dispute*, (Ottawa: DFO, March 27, 1995), p. 2.

[154] Brian Tobin, *quoted in* Paul Koring and Brian Milnar, "Progress made in fish talks", *The Globe and Mail*, Toronto: March 29, 1995, p. A10.

[155] Note *Supra* 153.

the Spanish, while *The Times* in its editorials came down firmly on the Canadian side.

> The Law of the Sea takes only half-hearted account of the problem of straddling stocks, calling for states 'to agree upon the measures necessary for the conservation of these stocks in the adjacent area'. The roots of the present dispute lie in the failure of the Northwest Atlantic Fisheries Organization, of which both Canada and the EU are members, to reach such agreement. The UN Conference on Straddling Fish Stock and Highly Migratory Fish Stock, due to reconvene in New York in a fortnight, could not have been given a more pressing reason to address its agenda with haste.... Canada has dealt a blow for conservation. Let the law now reflect its concerns.[156]

What kept the talks going and trade sanctions from being imposed on Canada was Britain's breaking of ranks with the EU on the issue. Britain used its veto at the European Commission to defeat a proposal to impose trade sanctions against Canada.[157] On this point, Germany also supported Canada.[158]

The new disagreement notwithstanding, the negotiations continued toward a resolution. Canada reverted to its traditional functional approach by negotiating surveillance and enforcement concessions from the Europeans by trading part of the turbot quota.[159] On April 16th, an agreement was struck.

The Bilateral Truce: An Assessment of the *Agreed Minute*

While the next chapter deals with the potential for long term success in Brian Tobin's

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[156] The Times of London, *Editorial*, London: March 14, 1995, p. 17.

[157] ECCO News Service, "Britain breaks EU Ranks on fishing dispute with Canada", *Sources Say...*, Brussels, March 29, 1995, p. 1.

[158] ECCO News Service, "Britain to veto sanctions against Canada", *Sources Say...*, Brussels: March 29, 1995, p. 1.

[159] Paul Koring, "EU Likely to win on fish quota", *The Globe and Mail*, Toronto: March 30, 1995, P. A1.

plan through the United Nations, the bilateral agreement signed between Canada and Europe to reach an accord over the specific dispute over Greenland halibut, and the arresting of the *Estai*, will be examined here. In so doing, it will be seen how the two parties arrived at common ground, before going into the United Nations conference.

The bilateral agreement, which the Europeans called "An *Agreed Minute*", has made considerable progress in how Canada and Europe, through NAFO, will manage the straddling stocks.[160] The agreement, discussed in detail below, appears to reconcile most of the outstanding differences, although both parties chose to emphasize their respective gains. While the Europeans stress the re-establishment of the rule of law and a reaffirmation of the Law of the Sea in the North Atlantic, they also underline the favourable aspects for them a newly established joint management scheme, and finally a more generous quota on Turbot. The Canadians, on the other hand, stress the vastly improved conservation, surveillance, and enforcement measures. The Europeans got back the *Estai*, while Canada got one hundred per cent on-board monitoring.

The agreement, consisting of five parts and two annexes, is concisely worded and uses strong language to emphasize the common ground and solidarity which was found in the negotiations. In addition, it includes five promissory notes which, although part of the final agreement, stand alone as policy dispatches and demonstrate shifts in the respective sides' policies. Without the signing of the letters, the agreement would not have been concluded.

In Part A *Control and Enforcement*, the parties recognize the need for enhanced

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[160] The full text of the agreement between Canada and the European Union is included in Appendix B.

cooperation and that Annex I would be presented jointly as proposed amendments to the control and enforcement section of the NAFO constitution. On a provisional basis, the following points go into effect immediately: 1) inspections; 2) transmission of information from inspections; 3) increase in inspection presence; 4) better hailing systems; 7) more frequent port inspections; 8) the implementing of fishing plans for heightened information sharing; 9 (a), (b), (c) definitions of major infringements; and e (i), (iii) immediate inspection on the part of suspicious ships by a duly authorized inspector of the ship's home state; and the sharing of information of infractions between the NAFO Secretariat and all the inspectors in the field; 10) transparency in prosecutions and semi-annual reporting to NAFO of results of those prosecutions and; 11) the implementation of a pilot project for on-board observers and satellite tracking.

As was seen in the previous chapter in the discussion on NAFO, one of the largest weaknesses of the organization is that it is completely a consensus driven body. That is to say, even in constitutional matters, when a party disagrees with the majority vote, that party can file an objection with the secretariat and that amendment would not apply to that country. However in this instance, where the two belligerents agree in advance to jointly present a number of amendments to strengthen control and enforcement and surveillance measures, and further, "shall make great efforts to obtain the signature to the Protocol of the other NAFO Contracting parties",[161] the success of the amendments seem assured. Indeed, according to Leonard Chepel, Executive Secretary of the organization, the NAFO amendments were

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[161] Agreement Constituted in the Form of an *Agreed Minute*, an Exchange of Letters, and Exchange of Notes and the Annexes thereto between the European Community and Canada on Fisheries in the Context of the NAFO Convention, Part A, Article 3.

unanimously approved and were in force by the time he responded to a query concerning this point on 13 February, 1996.[162]

Other articles in Part A include a heightened flow of information between Canada and NAFO. Canada will provide a report on conservation and enforcement measures taken in its EEZ in advance of each annual NAFO meeting. This article provides NAFO with the ability to provide consistency outside the Canadian EEZ with Canada's actions within. Consequently, while the straddling stocks may move from one jurisdiction into another, there will be a seamless transition, such that the high seas trawlers will not be waiting just on the other side of the boundary, nets deployed. In addition, an expert panel will be established to brief the Europeans on Canadian strategy and measures to facilitate this seamless application of policies and measures. Finally, under the guise of control and enforcement, Canada and the EU agreed to a pilot project using satellite monitoring systems, and having observers on board every fishing boat in the NAFO regulatory area.[163]

Part B of the *Agreed Minutes* redistributes the quotas set in February for Turbot. Neither country was interested in raising the TAC for turbot, but as shown in the time line, Canada gave part of its quota to Europe to help gain this accord. Part B Refers to Annex II, where Europe gained about 1613 tonnes to 5,013 tonnes of turbot for 1995, whereas from 1996 onward, the turbot quota would be set at a ratio of 10:3 for the (EU and Canada

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[162] Letter from Dr. L. I. Chepel, Executive Secretary, Northwest Atlantic Fisheries Organization, 13 February, 1996, reference number GF/96-065.

[163] The use of satellites to monitor fishing boats is not a new concept; it has been in existence already for a number of years. This project can be considered a precursor to the provisions included in the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks agreement. More is discussed on satellite monitoring in Chapter Five.

respectively). To reiterate the central point of the agreement, Europe got more fish and Canada got more enforcement.

Part C of the *Agreed Minutes* refers to Canada's unilateral extension of jurisdiction into the high seas of the Coastal Fisheries Conservation Act, and requires that Canada rescind that amendment to the Act. In addition, Article 1 explicitly states that Canada would be in breach of the agreed minutes if it extends its legislation in the future, implying that the agreement could be abrogated should that happen. Article 2 states that if the European Community fails in a "systematic and sustained" way to control its fishing vessels while they commit violations of a serious nature, Europe would be in breach of the agreement. Thus it appears these two articles were included so that fault might be found more quickly should either party take the other to arbitration over some future dispute. It could, however, also be said that they might provide justification for unilateral action.[164]

It will be seen in the next chapter in the close analysis of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks agreement, that much emphasis is put on regional or sub-regional fisheries organizations like the NAFO for conservation, surveillance and enforcement measures. Clearly until now, these measures have been sadly lacking in the NAFO convention, but stemming from these *Agreed Minutes*, there lies hope that consistent management, surveillance and enforcement measures will reign on the Northwest Atlantic both within and outside the Canadian EEZ. While the UN Agreement settles a number of general points, the amendments proposed by Canada and

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[164] While arbitration might be the better outcome of the two, unilateral action by one side or the other could be more easily justified not only domestically, but also internationally if the truant country could clearly be seen to be in contravention of the relevant article.

Europe should provide a definite change in how the fish stocks are managed.

There are, unfortunately, two caveats. In the letters of understanding associated with the agreement, the European Union asserts that it understands that it will, in perpetuity, receive a quota of 55.35% of all the turbot TAC on the high seas. If this is the case, and given that the quotas for Europe and Canada are done at a 10:3 ratio, then Canada will always be guaranteed 16.60% of the TAC on the high seas. Consequently, this leaves the other thirteen member states of NAFO only 28.045% of the TAC to be divided among themselves. What will happen if, in the future, one of the other parties launches an objection to the small quota they receive, in light of the large quota systematically given to the Europeans? Where does the flexibility lie to accommodate such an objection? It appears that this problem might only be solved depending on how much Canada continues to want peace on the high seas at any price; Might Canada be willing to trade more of its turbot quota, or part of its domestic catch inside its EEZ, or parts of its quota respecting another fish altogether to forge that peace? The second caveat is an extension of the first. This bilateral agreement over quotas applies only to Greenland halibut. What is to be done if any player launches an objection over quotas of other fish species? While tensions are lessening for the moment, what holds for the future?

Conclusion

Regardless of the theoretical approach used to view his actions, Brian Tobin's plan was a masterful piece of diplomacy. Following exactly as Gotlieb and Dalfen predicted, Tobin first unilaterally extended Canada's jurisdiction into the high seas, and then pursued a

two track bilateral and multilateral negotiating stance to resolve the "crisis" in international law and politics caused by the unilateral act. The Europeans, from their perspective, saw Canada acting not only illegally, in contravention of international law, but also irrationally.

If the Europeans were using the theoretical viewpoints made in Canada, as to whether Canada was acting as a middle power or as a principal power, they could certainly be forgiven for being confused over Canada's actions. Canada's actions were confusing. Considering Canada as a middle power, the Europeans could not understand why Canada was acting unpredictably as a 'tough guy' bullying the Spanish on the high seas.

A middle power does not aim to create instability, but rather the exact opposite. As Keating would point out, a middle power such as Canada looks to build and reinforce international institutions, to unambiguously contribute to stability. Why then, if Canada were a middle power, was it acting more like the United States— a superpower with nothing else to do except pick fights over contentious issues? If Canada persisted, other middle powers could follow and together, they could potentially undermine generally accepted international law with even more of the high seas falling under national jurisdiction. The Europeans clearly failed to read the Canadian negotiating position accurately.

However, Canada was not acting as a middle power at all. It was instead acting as a principal power although not without purpose. Canada chose to pick the fight because it had the resources to do so. Canadian fishing interests were at stake, and Canada acted to preserve those interests. Indeed, following Dewitt and Kirton's explanatory model, Canada acted unilaterally as it had the relative autonomy from external opposition to do so, and pursued a bilateral agreement with the EU as it had certain resources to use to its advantage.

In short, Canada had extra fish quotas to trade with the Europeans who were the culprits in the consistent undermining of the NAFO quota system. Canada had the fish to trade for better enforcement and compliance on the high seas. The Europeans wanted the fish to support their domestic industries, and had to agree to the Canadian terms to get the fish. Furthermore, Canada had shown the will to embarrass the EU over Spanish and Portuguese abuse of international conservation objectives. Their flagrant misbehaviour and Tobin's theatrics left them with few alternatives.

Canada was not looking to undermine the Law of the Sea either. All it wanted was better compliance and enforcement. At the multilateral level, Canada pursued the same position. As will be seen in the next chapter, it succeeded in getting this demand met as well. Taken with the other Canadian demands that were met in the United Nations multilateral agreement, the bilateral agreement was given greater legitimacy.

There is, unfortunately, a shortcoming in looking only at whether Canada acted as a principal or middle power . While these view points may explain part of the story, they do not help the analyst to understand why Canada succeeded so well in a coup against a principal power such as the EU. Canada might have acted as a middle power or acted as a principal power. Either way, Canada is still a middle power relative to the EU.

Keohane and Nye show through their analysis of the Canadian/American relationship that it is first of all possible that the smaller country can win disputes when the two countries are in a situation of asymmetrical interdependence. Smaller states like Canada can regularly minimize their vulnerability to American policy while exploiting American sensitivities and vulnerabilities. In addition to the chess game involved in equalizing the dependency between

the smaller country and the larger, tactical manoeuvring is much easier for the smaller country. Keohane and Nye show that intensity and coherence of argument is weaker in the larger country as the larger country has not only more concerns to be dealt with at the same time, but also the profusion of narrow interests found within the larger country weaken the resolution of its government. In a given policy area dominated by multiple interests, one group's demands are cancelled out by demands of another.

In the instance of the dispute over Greenland halibut on the one hand, Canada had not only a united fishing industry supporting the government, but also a vast majority of the population, politicized in the matter through Tobin's oratory. Extensive use of the media by the Canadian government ensured that much of the Canadian population knew every detail as each key event unfolded. Europe, on the other hand, saw a divided fishing industry and population, with the government and media concerned with other pressing issues.

Tobin's plan worked perfectly. The arrest of the *Estai* although illegal, united the Canadian Atlantic fishing industry behind him which made his measures to trim the size of the Canadian East coast fishing fleet credible. In the eye of the domestic fishing industry, while Tobin may have been attacking the fishing way of life in Canada, he was at least going after the source of the problem on the high seas too. For the Canadian fisherman, the action on the high seas made the loss of work in the industry, perhaps permanently so, much more palatable.

As a result of their creation of a manageable crisis, the Canadians saw the Europeans allow for a more significant system of conservation and enforcement with a reinforced goal of conservation within NAFO. At the same time, as will be seen in Chapter Five, it was

around the crisis that countries rallied at the United Nations to conclude the Agreement to the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

Unfortunately, even with the conclusion of the *Agreed Minutes* and the establishment of a new understanding between Canada and Europe, the best to hope for is, nevertheless, guarded optimism. While all in the name of conservation, a change for the better in the sharing of information and in the allocation of quotas within NAFO, in addition to improved compliance and enforcement measures, fewer grievances will be left to fester over months and years. However one fact still remains the same. Article XII of the NAFO convention remains unchanged. Countries are still allowed to launch objections to quotas and unilaterally set their own catch if they desire. The question of Greenland halibut has been resolved, but what of all the other straddling fish stocks? Should this scenario again come to pass, then once again, chaos will rule in the high seas fishing industry.

Chapter Five: Global Agreement: An Analysis of the United Nation's Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks Agreement

In the preceding chapters, it has been demonstrated that the dispute over greenland halibut runs much deeper than just a disagreement over the one species. Historically, the Spanish have been present off the coast of Newfoundland for longer than Canada has existed. In the eyes of the Spanish, Canada's brash and uncompromising approach to the fisheries question off the East coast has put them on the defensive. In addition, trawler technology, regardless of nationality, has made great advances and contributed to the degeneration of the fish stocks. Finally, the Law of the Sea itself has not improved matters either. Indeed, the international law concerning the few places on the globe where fish straddle the boundary between an EEZ and the high seas is today still a poorly explored yet very complex area.

As was seen in Chapter three, the Canadian fisheries Minister, Brian Tobin, was able to achieve a number of objectives by arresting the *Estai*. Besides curbing the overfishing of turbot, he united the inshore and offshore fishing industries. He prepared them for tough management in the future, and he created a crisis situation to which the Europeans had no choice but to react seriously. The Agreement,[165] signed on December 5, 1994, can be considered to be an achievement of Tobin as well. The negotiations were completed quickly, and they address many of the problems laid out in chapter one.

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[165] *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 Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, is the full title of the agreement.[Referred to in this chapter as "the Agreement", for a full reproduction of the text, please see Appendix C.]

This chapter will first outline the shortcomings of the UNCLOS III Convention prior to the start of negotiations leading to this Agreement as well as objectives laid out by the negotiators in their opening statements. Secondly, a short discussion will ensue to show that the Agreement met the most common of the demands of the negotiating countries. Third, the Canadian and European concerns will be examined. Specifically, the agreement will be examined to see if, on the one hand, Canada's grievances over conservation and conservation approaches, enforcement and the dispute resolution mechanism are met. On the other hand, the agreement will be similarly viewed to see if the EU's troubles over the application of international law, and the decision making process in setting quotas and policy are satisfied. Finally, once this third task is completed, potential shortcomings and problems will be discussed. Indeed, while Canada and the EU might be satisfied with the agreement, technical loopholes rendering it ineffectual will not bode well for the biomass in the oceans.

Shortcomings of UNCLOS and Objectives for Straddling and Highly Migratory Fish Stocks Conference

As discussed in the previous chapter, in hindsight it came as no surprise that Canada arrested the *Estai* in the opening days of March. Indeed, on March 27th at the United Nations in New York, the Conference on Straddling and Highly Migratory Fish Stocks was scheduled to reconvene. With the EU or Spanish being part of the problem at most straddling fish stock sites around the globe,[166] it was apparent that Spain and Europe were not

[166] Jill Vardy, "An Uneasy Calm;", *Financial Post*, Toronto: April 1, 1995, p. NEWS 13.

acting as good global citizens. The success of the negotiations come as vindication of Tobin's actions given their swift conclusion.

In a series of Press Releases issued by the United Nations at the convening of the Conference[167], the positions of 26 States and Organizations laid out their respective positions on an earlier draft and on what each felt was needed to better the state of fisheries management. Below, is a chart of the objectives hoped to be attained by each participant as outlined in the press release.

While these organizations listed on the left cannot be considered to be the only voices, they do, however, represent a significant number of participants. It is interesting to point out that while on opposite sides of the fence over the greenland halibut dispute, Canada and the EU agreed on many points going into the Straddling and Highly Migratory fish Conference. However, more significantly, are the differences seen between them. Indeed, any inconsistencies between them cannot be explained by approaches taken by ambassadors, as both legations' cases were presented by the main protagonists in the regional dispute, namely Brian Tobin and Emma Bonino.

Since the press releases provided summaries of the speeches made by the parties they provide the analyst with the very basic positions. As a result, Table 3 demonstrates and underscores the salient differences between Canada and the EU. While one must remember that the Conference involved other parties besides Canada and the EU and consequently the results of the Conference reflected the positions of all the participants. Nevertheless it is

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[167] United Nations Conference on Straddling and Highly Migratory Fish Stocks, *SEA/1475*, New York: 27 March, 1995); *SEA/1476*, New York, 27 March, 1995; *SEA/1477*, New York, 28 March, 1995.

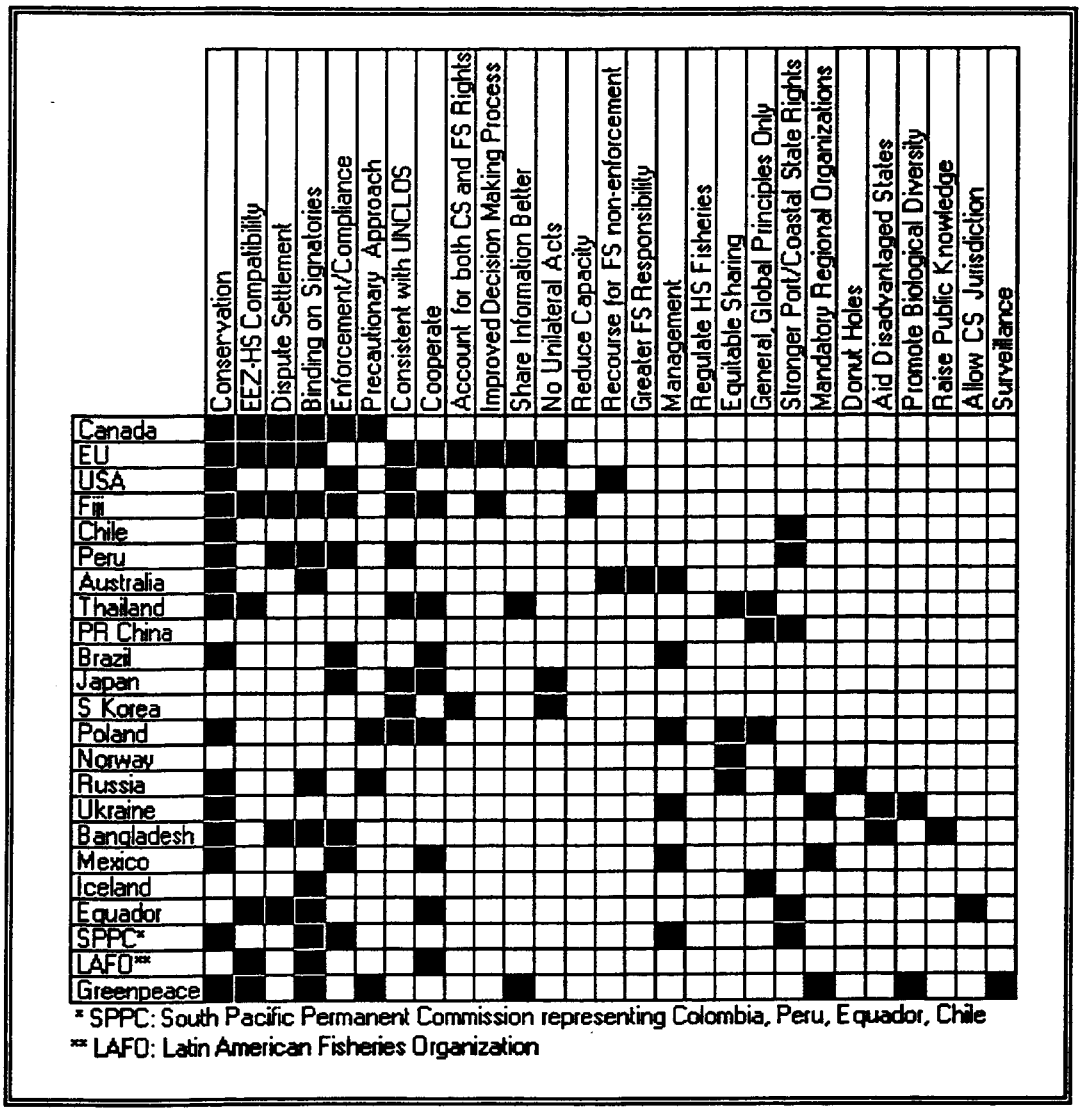

Table 3. **Compilation of objectives of a selection of States and Organizations at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks,** ***as outlined in Press Releases SEA/1475, SEA/1476, 27 March 1995; SEA/1477, 28 March, 1995.***

useful to do some bi-lateral comparisons.

Going into the Conference, while both Canada and the EU supported conservation, compatible high seas and EEZ fisheries management plans, an improved dispute settlement mechanism, as well as a desire that the agreement be binding in its entirety, that is about all

they agreed on. Canada, on the one hand, wanted stricter enforcement and compliance rules, and a precautionary approach to fishing. The EU wanted to ensure that any agreement was consistent with the UNCLOS III treaty, required a high level of cooperation, took both coastal state and flag state rights and needs into account, and improved decision making process through better sharing of information.

While there were still more points advocated by neither of the protagonists in this study, some of the points were implicity included in other positions. For example, Greenpeace demanded better surveillance. Improved enforcement measures demanded by many participants, including Canada, implicitly included better surveillance. However, Greenpeace explicitly made this point and without referring to enforcement measures, and so was included on the chart.[168]

On the other hand, other points shown can only be seen as mutually exclusive. Countries that held the idea that the Agreement stemming from this Conference ought to be just a set of general, loose guiding principles to be applied globally, did not wish it to be a binding document, nor saw participation in regional fishery organizations, such as NAFO or LAFO as mandatory.

Other participants in the Conference were concerned that the dispute between Canada and the EU would derail the progress on other areas,[169] while others, through their language or objectives sided either with Canada or the EU,[170] For example, countries such as South

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[168] United Nations, *Press Release SEA/1477*, New York, p.5.

[169] United Nations, *Press Release, SEA/1475*, New York, 27 march 1985, p.2.

[170] South Korea took a much more hard-lined stance than the Europeans. According (continued...)

Korea and Japan took similar, but more hard-lined positions to the European delegation while Ecuador, the South Pacific Permanent Commission, the Latin American Fisheries Organization and Greenpeace sided with Canada's concerns. Below is first a discussion of the demands of the participants other than Canada and the EU, followed by a look at the Canadian and European demands that were met in the Conference Agreement.

Many of the objectives set out by the various participants were achieved in the Agreement. Above all, the demand for conservation was heard from three quarters of the participants. Consequently, Article 2 of the Agreement outlines conservation and sustainable use as its main objective. Further, conservation and management is the context in which most of the other forty-nine other articles are couched. This was not the only demand of other countries that was met. Most of the objectives shown in Table 3 were in fact met, not just as principles or platitudes, but substantively in the mechanics of the Agreement.

Very briefly, it is easier to mention those items which were not addressed in the Agreement either in the principles or in the mechanics: the demand for binding and universal regulation of high seas fisheries; equitable sharing; that the Agreement be general, and consensus driven, and; that coastal states be allowed extend their jurisdiction into the high seas. Other items were mentioned as principles, but were not addressed in the details of

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[170](...continued)
to them, the text of the agreement leaned too far in favour of coastal state rights, to the detriment of flag states, especially on matters of enforcement and compatibility. Korea objected to a coastal State's right to board, inspect, arrest and detain a ship prior to an agreement specifically on this point. It also expressed concern over Canada's actions on the high seas. It is useful to point out that three distant water fishing nations to make their views known in the press release mentioned the abhorrence of unilateral acts on the high seas: the EU, Japan and South Korea.

the Agreement: the need to reduce fishing capacity; the promotion of biodiversity, and finally; the need to raise public opinion. The rest of the objectives were addressed substantively in this Agreement.

Canadian and European Positions

It is surprising to note that Canada and the European Union had many similar goals going into the conference in March. Indeed, in four of its six points, Canada agreed with the EU. These four points were the desire for conservation, compatibility between the Canadian EEZ and the High Seas, a dispute resolution mechanism (with Canada looking for resolution for the issues over enforcement and the EU over quota setting) and conclusion of a treaty that would be binding. These four points will be addressed below, along with Canada's need for stronger enforcement measures and a precautionary approach, and Europe's desire for greater cooperation, greater consistency with UNCLOS, better information sharing and an improved decision making process. Some of the European points shown in Table 3 were addressed under the points just mentioned here.

Canadian Negotiating Goals

As can be seen in Table 3, Canada had six concerns. In this agreement, all six of these concerns were addressed. Foremost of these was Canada's demand for improved surveillance and enforcement. Indeed, Part VI, containing articles 19 to 26 inclusively, addresses compliance and enforcement issues. While the actions taken by Canada to arrest the *Estai* would still not be considered legal under this Agreement, it must be added that Canada was not looking for vindication, but rather an acceptable regime to ensure that rules

could be enforced.[171]

Article 19 addresses specifically compliance and enforcement by the flag state. Flag states are obliged under this agreement to enforce conservation and management measures set out by regional or subregional organizations , and to investigate immediately any allegation of infractions committed by its fishing vessels. The flag state must also require its vessels to report position, gear, catches and fishing operations to investigating authorities; a high seas chase such as the one leading to the arrest of the *Estai* ought to become an historical anachronism. Article 19 also requires flag states to prohibit fishing operations of ships which still have outstanding sanctions against them for serious offenses previously committed. Finally, all investigations and judicial proceedings must be done without delay. General guidelines for sanctions are also outlined in the article.

Article 20 lays out the mechanics for international cooperation in enforcement. However, the most prescient part of Article 20 with respect to Canada's demands, is paragraph 6. In this paragraph, should Canada suspect an infraction committed by a flag state ship, Canada can demand and expect an immediate and full investigation conducted by that flag state. If the flag state chooses to allow it, Canada may be authorized to conduct that investigation.

However, it is in Article 21 that the mechanisms for communicating the evidence and

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[171] However, a problem exists in the Agreement at this point. Article 19(1)(e) requires that a "serious violation" take place before a truant ship can be held from operating. The lack of a definition of "serious" is perplexing. Later in the document, however, in Article 21 (11) a long and detailed definition of "serious violation" is spelled out. One wonders, despite the fact that Paragraph 11 is relevant to Article 21, whether it is also applicable to Article 19.

results of the judicial proceedings are made clear. This article outlines subregional and regional cooperation in enforcement. Indeed, it is on a regional basis that the routine for boarding, inspecting, and the actual procedures for securing evidence, and notifying the flag state of the infraction(s) are laid out. Additionally, Article 21 gives the flag state three days to respond to the initial notification so that it might fulfil its obligations under Article 19. In its response, Article 21 gives the responding flag state two choices; First, it can "investigate, and if the evidence so warrants, take enforcement action". Secondly, it can authorize the inspecting state to investigate.

Article 21 also provides for enforcement measures by the inspecting state when the flag state fails to respond. Should the flag state fail to take the necessary actions, the inspecting state is authorised by paragraph 8 to require the master of the fishing vessel suspected of having committed the infraction(s) to the nearest appropriate port . The investigating state is then required to inform the flag state where the ship is being taken as well as "ensure the well-being of the crew regardless of their nationality".

In addition to outlining enforcement measures, Article 21 defines a serious violation. These include: fishing without a valid licence; failing to maintain accurate records of catches; serious misreporting of catches; fishing in a closed area, season, or above the established quota; fishing for a species which is under moratorium; as well as using prohibited fishing gear.

Article 22 sets out the actual procedures for boarding and inspection of a vessel suspected of committing an infraction. It lays out explicitly how an inspection should take place. For example, the rights and duties of both the inspector and the inspected ship's

master are laid out such as technical points such as how an inspector should be accommodated, assisted, and not be obstructed or intimidated. Should the ship refuse to accept the boarding of an inspector, the inspecting state can prohibit the ship from fishing operations, and order that ship back to its home port. At the same time, the flag state would be informed of the order, and be required to take immediate action when the ship arrives in port.

Finally, Article 23 provides for measures to be taken by a port state. The port state is permitted to inspect documents, the gear and catch on board the vessels when they are in port, but can also prohibit landings and transshipments when "it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional and regional or global conservation and management measures on the high seas".

The second of Canada's demands which were not the same as those of Europe, was that a precautionary approach be taken when managing the fisheries. This is to say that when information is poor or lacking, one should take extra care to ensure that the stock is not overfished. When a fishery is becoming depleted, strong measures should be taken to allow the fishery to recover. In both these instances, TACs should then be lower accompanied with lower quotas for each player.

Article 6 of the agreement provides for the application of the precautionary approach. Paragraphs 1 and 2 require that States shall apply the precautionary approach, and that they should be more cautious when uncertain of information, but that they shall not postpone a more cautious approach because information is uncertain. The article then goes on in paragraph 3 to establish how the precautionary approach ought to be applied.

Paragraph 3 outlines four points which must be achieved to pursue a precautionary approach of which the latter three support the first. In the first subparagraph, there is the requirement for improved decision-making processes by obtaining and sharing the best scientific information possible. Subparagraph b refers to Annex II[172] which provides for reference points to use to bring the fish stock back to health. Subparagraph c requires that the approach be taken while taking into account reference points, uncertainties as to the size and productivity of the stock, fishing mortality, as well as existing and predicted oceanic, environmental and socio-economic conditions.

However, to achieve this goal of a precautionary approach, as mentioned in paragraph a, there would have to be an improved decision-making process which would vindicate the European contention as outlined in Chapter 2, that Canada has failed to share information in the past. Indeed one of Europe's demands was for an improved decision-making process which includes better sharing of information. This will be discussed below.

European Negotiating Goals

Europe, on the other hand, also had a number of items they wished to have covered in the agreement. These included: a requirement that states cooperate; a requirement that unilateral actions would not be acceptable, and thirdly, a stipulation that any agreement which settled this issue had to remain consistent with the UNCLOS III treaty. Second, Europe wanted to ensure that flag states needs were also taken into account with those of the

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[172]Annex II, not analyzed in this study, provides the guidelines to be used to set reference points; those points which give an indication of the relative health or lack thereof of a particular fish stock. It also provides for the guidelines for the management of the stock from an unhealthy state to one of relative health.

coastal state. Each of these points will be discussed in turn. As mentioned above, Europe and Canada agreed on four points that needed to be addressed, and they will be discussed below.

Europe looked to the agreement to ensure that there would not be any further threat of unilateral action. Articles 27, and 28 effectively imply that unilateral acts are not acceptable.

Article 27 states that "States have the obligation to settle their disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." Given its obligation to follow a course of action laid out in Article 27, unilateral action is disallowed. In addition, Article 28 enforces the need for efficient decision making processes to avoid disputes, emphasising the need for States to cooperate above all else to prevent disputes. Again, cooperation excludes unilateral action.

However, Europe was looking for compatibility with the UNCLOS III treaty. It is clear that Canada was using this forum to attempt to change the rules concerning fish stocks that straddled its EEZ. Europe, however, embroiled in disputes around the globe sought to affirm its legal right to fish in those disputed areas. As a consequence, there was a great need by the EU to insure that the agreement was seen explicitly to be an addition to, rather than a replacement for the provisions concerning fishing in the UNCLOS III treaty.

Article 4[173] placated not only the Europeans, but also other distant water fishing nations, such

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[173] Article 4: Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in

(continued...)

as Japan, South Korea and Poland. The United States, Peru, and Fiji also pushed for this article.

The last two of Europe's demands, a better decision making process, which, among others, took flag state rights and needs into account along with the coastal state were both addressed in Article 7, entitled, "Compatibility of conservation and management measures". Conservation is clearly established in paragraph 2 through the requirement that policies in the EEZ be compatible with those adjacent to it. To achieve this end, and to meet the demand that flag states' needs be considered, among other requirements, respective dependence of the coastal state *and* the flag states ("the States fishing on the high seas") are taken into account along with insuring measures do not have a negative impact on the living marine resources in their totality (emphasis added). Clearly, under this provision, Canada will not simply be able to cut the quotas of a fishery as it did initially over turbot. As a result, Canada will have to consult with Europe more fully, and be more sympathetic to the needs, in this instance, of the fishing fleet and communities in Galicia.

Article 7 also addresses Europe's desire for an improved decision making process. Paragraph 7 requires that the coastal state "regularly inform" states participating in regional or subregional organizations measures they have taken concerning straddling and highly migratory fish stocks in their jurisdiction. This would include moratoria, restrictions, or regulations governing fishing gear, for example. Alternatively, paragraph 8 requires the fishing states to inform other fishing states including the coastal state, through the regional or

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[173](...continued)
the context of and in a manner consistent with the Convention.

subregional organizations, the measures they have adopted for their ships flying their flag.

To enhance the decision making process, scientific information must also be shared. Article 5(j) calls for States to "collect and share, in a timely manner, complete and accurate data... from national and international research programmes". As was mentioned earlier in this chapter, Canada's desire for a precautionary approach to fishing was not possible because of its reluctance to share information. Ironically, it is Europe's desire for an improved transparent decision making process through the complete and timely sharing of information, that will enable Canada to achieve its goal of a precautionary approach.

Canadian and European Common Negotiating Goals

As mentioned, of Canada's six objectives to be achieved at the negotiating table at the Straddling and Highly Migratory Fish Stocks Conference, four were also points to be achieved by the Europeans. On the other hand, of the Europeans' ten goals, these four represented only two fifths. Two of Europe's demands were nested; that is to say, the inclusion of one point, implicitly included another, such as was the case with the demand for no unilateral actions nested in the desire for greater cooperation and the improved sharing of information to help achieve a better decision making process.

Only one of those four points where Canada and Europe converge, however, indicates a point of commonality. Indeed, their desire for conservation of the fish stocks is perhaps the only point upon which they agreed for the same reason—that if the stocks are not conserved, there would be soon none left. The other three points, the requirement that the agreement be binding in its entirety, compatibility of measures taken inside and outside the EEZ, and the dispute settlement mechanism may in the end be the same, but each player

entered with those points making very different assumptions.

Article 42 does not allow for reservations or exceptions to be made to the agreement. On the one hand, for Canada, this article will ensure that the EU does not pick and choose the articles to which it wishes to adhere. On the other hand, for Europe, Canada will be bound to the agreement, and will not be able to decide to conveniently forget various parts of it and proceed again with unilateral measures.

The second demand that Canada and Europe each independently carried into the Conference was that the management of the fishery outside Canada's EEZ be compatible with the fisheries management adjacent to it on the high seas. The difference between them in their taking this point to the table was not as much a question of compatibility, but rather which side of the EEZ line was to take precedence in the effort to arrive at the compatibility. In this regard, Canada and Europe arrived at a stalemate.

Neither side was vindicated as while on the one hand, dependence on the fish stocks by both the coastal state and the flag state must be taken into account as called for in Article 7(2)(e), which requires Canada to be more sympathetic to the European dependence on the Grand Banks fishery, while on the other hand, Article 4 affirms its consistency with the UNCLOS III agreement which, in Article 116, states "All States have the right for their nationals to engage in fishing on the high seas subject to: [...] b) the rights and duties as well as the interests of the coastal States provided for, *inter alia*, in article 63 paragraph 2..."[174].

The third demand put forward by both Canada and the EU was for an improved dispute resolution mechanism. For Canada, it would be one which is more efficacious than

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[174] For a complete reproduction of Article 116, please see Appendix A.

the ICJ, and one which would be able to take more than just the current law into account. However, the Europeans achieved their goals in this matter. They wanted to ensure that when negotiating any point with coastal states, the coastal states would have to take European needs into account. Furthermore, they wanted to ensure that should the issue go to arbitration, the arbitrators would do the same. In short, Canada's swifter means of settling a problem was countered by Europe's ability to plead the needs of its fishing communities found thousands of kilometres from the site of the dispute.

Specifically, Article 30 provides procedures for the settlement of disputes. However, when the larger issues surrounding either the UNCLOS or this agreement come under dispute, States are directed to Article 287 of the UNCLOS III Treaty, which provides for procedures to settle the dispute.

While this seems to be a reinforcement of the status quo, that in the instance of a dispute with Spain, Canada would be forced to take unilateral measures to stop the fishing, or else take Spain to an arbiter or court while the fishing continued. However, as mentioned above, in instances where the flag state fails to take action on a particular infraction or series of infractions, Article 22 of this agreement allows the investigating state to take unilateral action by ordering the ship to the nearest port, or else to return to its home port. Under the combination of both sections 22 and 30, Canada effectively has the ability to protect fish without the use of force while pursuing a legal resolution through Article 287 of the UNCLOS Treaty.

This approach also satisfied the Europeans. Instead of having Canada unilaterally extend its own jurisdiction into the high seas while at the same time refusing to recognize the

jurisdiction of the International Court of Justice, the rule of law would prevail on the high seas even when problems of enforcement arose. Indeed, Canada could pursue the issue to arbitration or adjudication but still act within the bounds of international law when looking to ensure fish are not caught to the detriment of the stocks.

While both countries put forward four similar points which were included in the agreement, it cannot be said that either side "won" in the moral battle over those points. While each brought the four points to the table with very different motivations, and the agreement provides for all four, the wording of the final text is ambiguous enough to avoid coming down on one side or the other. The agreement itself has no fundamental contradictions and so does not remain ambiguous concerning the overarching goal of conservation, the binding nature of the agreement, the mechanisms for an improved dispute resolution mechanism and the need for compatibility inside and outside the EEZ. In the case of compatibility, where it leaves the states with the status quo, the agreement reinforces the necessity for states to cooperate—the sooner the better.

Canada's primary demand for improved compliance and enforcement measures were met unconditionally. In addition, should Canada be faced with another situation as it was in March of 1995, provisionary measures are provided in the agreement, where Canada can resort to requiring a ship to stop fishing and return back to its home port while pursuing the matter subject to Article 30. However, in the case of Canada, as seen in the previous chapter, the enforcement issue was more strenuously met under the Canada/EU bilateral agreement as compliance is almost guaranteed through the use of satellite links and one hundred per cent observer coverage on board fishing vessels in the NAFO area.

Canada's second key demand was for a precautionary approach to fishing in the NAFO area. However to achieve a precautionary approach, an improved decision making process was necessary—a point advanced by the Europeans. The Europeans demanded a better decision making process because the old one was seen to be too hidden and too conspiracy prone against them. Ironically, it might be seen that it was Canada's failure to more openly share information with the Europeans that led to the lack of a precautionary approach, as the Europeans were suspicious of Canada's motivations.

Europe, on the other hand, saw a number of items which strengthened their position included in the Agreement, including a confirmation of the UNCLOS III treaty and the need for conformity in all aspects of the Agreement to the Convention, not only in Article 4 of the Agreement, but also throughout the text. In addition, Europe gained cooperation as the required approach to bilateral and multilateral negotiations in Articles 7, 8, 20, 28, and 31. Cooperation in the context of the articles implies conciliation, something that as seen in Chapter One, Canada has been loathe to show in its dealings with Europe in the past.

The Agreement: A Critical Assessment

Despite the successes evident in the Agreement, there are serious shortcomings which quickly become evident, although most are technical in nature. They are serious, however, as any point which remains ambiguous is a point which can quickly become a loophole. It must remembered in all of this that the fish being caught continue to follow their instincts and it is the fishing community which must govern itself accordingly. A lack of clarity on one point could be the one point over which serious abuse continues to take place.

Firstly, in Article 5 (b), the Agreement refers to "minimum standards". As was seen in Chapter Three, differences lie in what constitutes a minimum standard. Mesh size of a net could be easily considered an item for minimum standards, but Europe contends that a mesh that is considerable smaller than Canada's is acceptable. This Agreement sheds no light on who might be right.

Secondly, Article 5 (e) calls for States to "adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks...". What is meant by "where necessary"? Is it not reasonable to assume that to maintain or restore fish populations it is always necessary? Are there circumstances, then, that a State could argue that it is not necessary to adopt such measures?

Thirdly, in the event of findings that a fish population is seriously threatened as a result of a natural phenomenon or other cause, Article 6 (7) allows for temporary emergency conservation plans to be enacted to allow the stocks to recover. However, the most poignant question is this: Who declares the emergency? How can a policy such as this be enforced if there is not unanimous agreement that an emergency exists? By all comparisons, the state of the cod, plaice, halibut, flounder fisheries on Canada's Atlantic coast are in a state of emergency, and it is hard to get agreement that there is an emergency, never mind any prescriptions and solutions to such an obvious case.

The final problem is deeper than technical. Elizabeth Kirk, in a recent thesis discusses the very slow and inconsistent move toward the primacy of international

environmental law.[175] The same problem applies to this Agreement. There is still no explicit guidance anywhere on the weight environmental aspects of international law should have when measured against state sovereignty. In other words, the Agreement stemming from the Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks should have at the least, shown some preference to those clauses in the UNCLOS III Convention which are considered environmental. Objectionable enough already to players such as South Korea, it comes as no surprise that the Agreement fails to explicitly give the environmental (and hence the conservation) clauses in the UNCLOS Convention the weight needed to ensure the security of fish stocks worldwide.

This casts a very long, dark shadow over the otherwise positive tone set by the Agreement. Good will is evident in the Agreement, but the words "conservation" and "management" and "sustainability" are unfortunately still just words. They remain subservient to State sovereignty and social needs of fishing communities associated with fishing fleets which travel to the antipodes to fish, or in Chanteraine's words, to conduct a massacre.

Fortunately, this shadow has its limits. Article 18 of the Agreement outlines in explicit terms the obligations of the flag state which are not outlined in the Law of the Sea Convention and will ensure that ships are more closely monitored. These range from the requirement that all equipment must be marked, to "national observer programmes" which will allow for a Canadian inspector, for example, to remain on board a Spanish vessel to

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[175] Elizabeth Agnes Kirk, *The Changing Shape of Sovereignty in International Environmental Law*, LLM Thesis, UBC, 1995, pp. ii-iii, 6.

ensure on-the-spot compliance,[176] to satellite monitoring.

The third example just mentioned, satellite monitoring, is significant because it is a new tool available only in recent years to States and their regulators to counter the tremendous advances in fishing trawler technology. It can be argued that much of the trouble caused by the trawlers is caused by the poor regulation of them since they often operate in very far flung areas of the globe from their home States, alone in the middle of the ocean. Until the arrival of this technology, one could never be sure of the location of all the ships of a particular State or their activity. However satellite monitoring is not completely new to the fishing industry. Indeed, there are already a number of satellite monitoring programmes, one which includes Canada, another including Europe. Both will be discussed here very briefly.

The system which includes Canada has been running since 1990 and involves Canada, the United States and Japan in the Pacific. In this case, 100% of the Japanese squid and large-mesh fishing vessels (totalling some 775 vessels) are equipped with a tamper-proof transmitter and global positioning system (GPS) which sends data including position, speed, and heading of each ship via satellite to the three States. The system provides this information in real-time—that is to say, monitors on shore know exactly what is happening with each ship without a time delay. The United States considers the programme to be a

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[176] This is similar to the stipulation enforced now by the United States that only that tuna caught in the presence of an American observer on the boat can be sold in the American market. In this case, which is now officially sanctioned by the UN as a result of this same clause, the Americans have been looking to ensure that the tuna are not caught in drift nets which, as mentioned in Chapter Two, cause serious damage to other living creatures in the sea, such as dolphins.

"huge success".[177]

The Europeans go further in their assessment. According to their report to the OECD, they mention three main functions that a satellite system can fulfil. First, FMCs (Fisheries Monitoring Centre) would be capable of data retrieval. Each vessel would transmit its position, speed and course. Second, the FMC could "manage the data", meaning the data could be analyzed with fishing regulations, to determine possible infractions before the ship arrived in port. Finally, FMCs could exchange data among themselves.

While the Europeans concede that a satellite system could never replace traditional monitoring of fishing vessels, they outline a number of advantages. First, with frequent and regular transmission of data, it would be easier to verify whether the ship log books are truly accurate. Second, unreported landings would no longer be possible. Third, it would be possible to impose and enforce restrictions only when they are "really necessary". Fourth, they would allow for "greater transparency between the appropriate authorities". Fifth, search-and-rescue costs would drop as it would be easier to pin-point the location of ships very accurately should they founder.[178]

However, as before, these measures must still be agreed to by all parties in their

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[177] S. C. Springer, "Monitoring High-Seas Fishing Vessel Operations by Satellite", Silver Spring, MA: U.S. Department of Commerce, National Oceanographic and Atmospheric Administration, National Marine Fisheries Service, *published in* Organization for Economic Co-operation and Development (OECD), *OECD Documents; Fisheries Enforcement Issues*, Paris: OECD, 1994, pp. 193-199.

[178] M. Verborgh, "Blueprint for a Satellite-Based System for the Monitoring of Fishing Activities", Brussels: European Commission, Directorate General of Fisheries, *published in* Organization for Economic Co-operation and Development (OECD), *OECD Documents; Fisheries Enforcement Issues*, Paris: OECD, 1994, pp. 227-235.

respective regional organizations, in this case, NAFO. Are Spain and hence, the European Union as well, willing to agree to these terms? One can only assume so. After all they both did initial the Agreement stemming from the Conference and presumably intend to ratify it.

Conclusion

These stronger clauses for enforcement provide a glimmer of hope. This Agreement overcame a significant stumbling block in the UNCLOS, that being the issue of straddling fish stocks and highly migratory fish stocks. While the rights of both coastal states and high seas flag states are very clear in the UNCLOS III Convention, this Agreement has clarified some of the concomitant responsibilities.

Once again, very briefly, these clarifications have created a mandatory dispute settlement procedure which, unlike the International Court of Justice that is bound by the law, is more flexible and able to look at other factors besides the law to arrive at a decision. While this new process can may make outcomes less predictable, flag States and Coastal States alike should be able to take comfort that while international law will be given great weight, decisions can be rendered taking a number of intervening variables into account.

Secondly, clauses surrounding surveillance and enforcement were outlined thus lessening ambiguity in these areas. It remains to be seen, however, whether enforcement on the high seas will actually be different as a result of this Agreement, given that the Law of the Sea is not abrogated or even modified and coastal states still cannot arrest ships unless the flag state refuses to do so itself, or else gives permission. In the latter case, cooperation would certainly be evident, but in the former, it is very foreseeable that the states involved

would quickly find themselves in a confrontation over jurisdiction just as Canada and Europe did over the *Estai*. The mechanics provided in this area of law, providing for not only satellite surveillance, but also on board observers is perhaps the most significant advancement in the Agreement.

Third, states must share information fully. This would aid in achieving another aspect of State responsibility, that being the attainment of a more transparent decision making process. States must cooperate, and act in an environment of conciliation, rather than confrontation, clearly messages directed at actors such as Canada which have recently shown a history of being dogmatic and arbitrary.

Finally, in this short review, the Agreement, although always susceptible to being denounced, is completely binding. States cannot choose to accept some parts of the Agreement and refuse to comply to others. Should one State be found truant even in this regard, it can be taken up in the dispute resolution mechanism.

It is interesting to note that many key aspects of this agreement refer to and are dependent on regional or subregional organizations to implement the principles found in the agreement. The Northwest Atlantic Fisheries Organization, being a regional organization bears that responsibility for the areas including the Grand Banks. In the previous chapter, the bilateral agreement between Canada and the EU over the NAFO was assessed as to its effectiveness. For the Northwest Atlantic, the United Nations agreement appears to be a qualified success.

The multilateral agreement provides for an important basis for international relations and the law of the sea. This basis, however, while satisfying most of the demands of many

of the participants in the negotiations, has a few weaknesses.

Ultimately, however, it remains to be seen as to whether this Agreement truly has the "teeth" needed to bring some order into the chaos of the high seas fishery. Actions will speak louder than words. Fortunately, there are now finally some actions to go with the many empty words spoken previously on this issue. With the bilateral agreement between Canada and the EU implemented with all contracting members agreeing to the changes, observers are on board ships and infractions are falling.[179] This is a significant albeit small step toward the recovery of the fishery in the Northwest Atlantic.

In the short term, it is easy to desire and strive for cooperation but it is entirely another matter as to whether cooperation in the long term can be achieved. While State positions can be pliable, one fact remains the same: despite the advances in this Agreement, surveillance and enforcement, a binding dispute mechanism, information sharing, and others, when there are no fish to catch, the industry is dead. It will be interesting to see how the various parties come to agreement should one of them become intransigent fully believing it is protecting endangered fish stocks and hence a fishery, while others find these circumstances and motivations unbelievable and suspicious.

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[179] Department of Fisheries and Oceans, "Fisheries Crisis in the Northwest Atlantic", *Press Release*, Ottawa: Department of Fisheries and Oceans, International Directorate, July 1995. (B-HQ-95-16E).

Chapter Six: Conclusion

The dispute between Canada and Spain, and hence Canada and the European Union, has been a long standing one. The brief moment of hostilities on the high seas, and the heated words which followed throughout the course of March and most of April of 1995, reflected only the climax to a very long simmering set of grievances. The flashpoint in the dispute could have taken place many years ago over a different fish species such as cod, but in earlier days, there were still alternatives to confrontation. With the cod under moratorium, as yet previously unexploited fish stocks could be fished while the cod stocks were rebuilt. However, those alternatives also quickly became overexploited, with the last of these species to fall under a moratorium being the Greenland halibut, on the verge of extinction after being fished only since 1963.

These grievances include long historical perceptions on both sides over the right of the Spanish to fish off Canada's coast, where naturally, Canada desires that the Spanish minimize their fishing operations, and the Spanish wish to continue as much as possible. In recent years, the Spanish have objected to NAFO quotas, and the EU has launched objections to enable them to have a higher catch limit. This contentious issue was at the forefront while the cod were fished to near extinction, along with other species, such as plaice, yellowtail and others. The Spanish, however, because of the economic imperative to finance the highly capitalized trawler fleet upon which regions of Spain such as Galicia have become so dependent for economic diversity and strength, have continued to fish aggressively in all parts of the globe, including the Grand Banks of Newfoundland.

A second factor contributing to the problem has been the technology of the fishing

trawlers. To borrow a term from the forest industry, the modern day trawler is the clear-cutting machine of a hapless and dwindling resource. A vicious circle is bred with fishing folk having to purchase and finance ever more expensive equipment to locate and catch the ever dwindling fish stocks. As the fish get harder to find, the equipment becomes more sophisticated and more costly to purchase and operate which, in turn, increases the need to catch fish to pay for the equipment. The fish then continue to be exploited with an ever decreasing chance of recovery, and so on. Nets measured in kilometres have clearly outpaced the regulations used to control them. Mesh size, or the size of the holes in the nets are regulated, but poorly enforced, as was seen in the *Estai* seizure, but nothing was said of the sheer size of nets in general at the time. Fish clearly do not have a fighting chance at survival in this day of active sonar location of the resource and massive trawl nets with mouths the size of football fields.

Finally, the law in this area has been severely lacking. Canada has attempted to remedy the problem over the years by expanding its jurisdiction into the high seas, but never without precedent. It first extended its territorial waters to twelve miles and finally its Exclusive Economic Zone in 1977. In extending its EEZ in 1977, it was hoped both within government and industry that fishing efforts would be substantially reduced as the Canadian fishing industry was not going to expand significantly. This however, turned out not to be the case as the industry purchased those vessels rendered redundant in other countries such as the Faroe Islands, Iceland and elsewhere by the new Canadian EEZ extension and prohibition of foreign fishing activity inside the EEZ.

The Law of the Sea did not adequately deal with those fish stocks that existed on the

Nose and Tail of the Grand Banks in addition to living closer inshore. These fish that "straddle" the EEZ limit are covered only directly by Article 63(2) of the Law of the Sea Convention. Other articles of the convention fail to clarify the predominant owner and manager of these fish, hence allowing them to fall into a grey area where no one was responsible for their management and survival.

Canada, following an approach described by Allan Gotlieb and Charles Dalfen in the 1970's, took a two track course. First, after the belligerent act of arresting the *Estai*, Canada concluded a bilateral agreement with the EU which dealt specifically with the issues at hand in the turbot war. At the same time, Canada's act impressed upon the negotiators about to reconvene at a United Nations conference (dealing with, among other things, straddling fish stocks), that the problem at hand was serious—not just because Canada's patience was growing short, but more importantly, because the fish species were becoming extinct. Canada was prohibiting its fishing industry from earning a living, while foreign fleets were seemingly scooping up fish with impunity.

Brian Tobin's relative success in dealing with the Europeans can be attributable to a number of factors. Following Dewitt and Kirton's behaviourial model, in the absence of a hegemonic power, Canada was able to act like a principal power. It was able to stand up to the Europeans because the fisheries problem on the Atlantic coast was clearly within its sphere of expertise. In addition, it had the resources, both in manpower on the high seas, and political support on the ground to take them on.

Using the theoretical approach of Keohane and Nye, one is able to take the assertion further by saying that Canada clearly had the advantage of being the smaller state in the

issue. While sentiment against Canada was very strident in Spain, the sentiment was considerably diffused by the time the issue was addressed in Brussels. The EU, charged with negotiating on Spain's behalf, had other concerns besides fishing off Canada's eastern shores. While the Canadian government was supported by almost the entire, well educated population on this issue, the Euroepan population outside of Spain in general was not as politicized. More significantly, those sectors of the European population that were knowledgable and concerned with the issue were deeply divided over Spanish fishing practices and the Canadian action, leaving the European government in a significantly weaker position to act decisively.

While in the complex interdependent relationship between Canada and the European Union they were not directly dependent on each other in the case of the fishery on the Grand Banks as they might be in military matters. Instead, they both needed the fish and so were dependent on each other's handing of their respective fishing industries. Both Canada and the EU were vulnerable to the dearth of fish and anxious to avoid escalation and opening themselves to further vulnerabilities. It is a classic example of the prisoner's dilemma

The main concern of the Canadians was that of enforcement and compliance with existing laws and regulations by the Europeans, not only of the Law of the Sea, but also of their own laws and regulations. In the bilateral agreement, it was decided that an experimental satellite monitoring system be initiated, along with one hundred percent observer coverage of the ships fishing in the NAFO area. In addition, it was decided to make communication lines more open, both to set quotas in a transparent fashion, and in the event that a flag state's ship is found in contravention of its laws by a different state such as

the coastal state.

Because Canada's actions on the high seas were so irregular when it arrested the *Estai*, the Europeans were most concerned about the stability of the Law of the Sea; that it not be undermined by others not so inclined to follow the rule of law as Canada normally is. In addition, because of the ambiguity in the Law of the Sea convention, the advantage falls in Europe's favour as its ships can fish on the high seas anywhere on the globe and yet still be answerable only to officials back home. Consequently, Europe was looking to both the bilateral and the multilateral agreements for Canadian and international reaffirmations UNCLOS III. The two agreements that Canada signed explicitly include reaffirmations to the LOS although they are based on a different philosophical basis than the UNCLOS III convention itself.

This philosophical difference between the LOS convention and the two agreements is that the LOS Convention is highly concerned with State sovereignty, while the two agreements analyzed in this paper look toward the conservation of fish stocks as the preeminent feature. It is also in this difference that success or failure of the agreements lie. If states are willing to keep fish conservation and management as the most important item when dealing with each other, with cooperation being a means to aid rather than to hinder those goals, then once the agreements come into effect, the fish stocks stand a very good chance of surviving. However, should states return to purely short-term self-interest, ensuring that each fishing community is allowed to catch as many fish as are needed to exist or to grow, in defiance of the opinions of neighbours, then these agreements will have been negotiated and concluded in vain.

Alternatives to Canada's position and policy over straddling fish stocks have been advanced, where Canada follows New Zealand's lead in allowing "free trade" in the fishing industry within the New Zealand EEZ. This option, while a possible way of seeing peace on the Grand Banks, is not only a very expensive one economically, it is also has serious problems socially and politically. The other alternative would see Canada relinquish a portion of its own domestic fishery within its EEZ to foreign fishing fleets in return for a binding quota system within the NAFO arrangement. This leverage gained through concessions in its own fishery could foster not only a sense of good will, it could also give Canada significant leverage over the actions of other countries and their fishing fleets once those fleets become dependent on the fish found in Canada's EEZ. This is an alternative that was not available to Canadian policy makers prior to 1995 as a result of the tense and sour environment policy environment. However it could be pursued now that domestic fishing interests are satisfied that the foreign fishing fleets have been targeted for their flagrant fishing practices.

These agreements when taken together, provide the necessary tools for states to interact positively and cooperatively to ensure the fish stocks which straddle Canada's 200 mile EEZ will return to health. While neither is profoundly radical, the bilateral agreement, on the one hand, gives the compliance and enforcement measures some teeth to ensure that quotas are followed and the operational end of the fishing industry is carried out honestly and in a transparent manner, while on the other hand, the global United Nations agreement provides the necessary communications protocol, allowing the policy making process and enforcement measures also to be done in a transparent fashion.

It comes as no surprise that Canada took the extreme actions that it did in March 1995. With the fish stocks dwindling to practical extinction, something had to be done. The current method of solving international grievances is a very long and time consuming process that simply would have taken too long to ensure the viability of the fish stocks off the coast of Newfoundland. Canada decided to take things into its own hands which has resulted in a start along the very slow road to a recovery in the fishery on the Grand Banks of Newfoundland.

With interdependence and the prisoner's dilemma ruling the relationship between states over fisheries management, it will be interesting to see if states have learned that everyone loses when one player defects from the game of prisoner's dilemma. While the United Nations Agreement makes advances in some aspects of high seas fisheries, the bilateral agreement which ended the dispute over turbot is limited in its application. Despite transparency and freer communications lines, the NAFO agreement can still be undermined by unilateral reservations of quotas.

While attempts at resolution either through arbitration or binding arbitration are possible, two troubling points remain. The first is technical. Given that there have not yet been any disputes which have gone to arbitration, no precedent yet exists. Will the decision favour the fish in absolute terms, or will social and economic considerations mitigate such conservationist resolve? The second point contains two broader questions. If a dispute must go to arbitration in the first place, is it not too late for the fish stocks anyway? Would the decision be rendered soon enough to save the fish stocks? With negotiations completed or a binding decision rendered, would the recalcitrant state suddenly become a willing and

reformed member of NAFO, satisfied with the pareto-optimal fishing levels which the interdependent relationship between states provides? Unfortunately there are not yet any conclusive answers.

Appendix A: United Nations Convention on the Law of the Sea III Articles relevant to Straddling Stocks

Below are the four articles which deal specifically with straddling stocks.[180] Article 63 deals both with straddling stocks between national EEZs as well as those fish stocks which straddle an EEZ and the high seas. Only the latter is relevant and so is included here. In addition, the two clauses used by the Europeans in their position against Canada, specifically Articles 101 and 87, are included here.

Article 63(2)

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

Article 116 *Right to fish on the high seas*

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[181]; and
(c) the provisions of this section.

Article 117 *Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas*

All States have the duty to take, or to co-operate 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.

Article 118 *Co-operation of States in the conservation and management of living resources*

States shall co-operate with each other in the conservation and management of

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[180] United Nations, *The Law of the Sea; United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Convention on the Law of the Sea*, New York: St. Martin's Press, 1983. Article 63(2), p.22; Articles 116, 117, 118, 119, p. 38; Article 87, pp. 30-31; Article 101, p. 34.

[181] These articles apply to highly migratory species, marine mammals, anadromous stocks and catadromous stocks.

living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, co-operate to establish subregional fisheries organizations to this end.

Article 119 *Conservation of the living resources of the high seas*

1. In determining the allowable catch and establishing conservation measures for the living resources in the high seas, States shall:
   (a) take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and generally recommended international minimum standards, whether subregional, regional or global;
   (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.
2. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned.
3. States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State.

Article 87 *Freedom of the high seas*

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
   (a) freedom of navigation;
   (b) freedom of overflight;
   (c) freedom to lay submarine cables and pipelines, subject to Part VI;
   (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
   (e) freedom of fishing, subject to the conditions laid down in section 2;
   (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms shall be exercised by all States with due regard for the

interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

Article 101 *Definition of Piracy*

Piracy consists of any of the following acts:

(a) any illegal acts of violence of detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Appendix B: Complete Text of the Bilateral Agreement and Annexes between Canada and Spain for the Resolution of the Dispute over Greenland Halibut and Exchange of Letters[182]

AGREED MINUTE

The European Community and Canada have agreed as follows:

A. CONTROL AND ENFORCEMENT

1. The European Community and Canada, in recognition of their commitment to enhanced cooperation in the conservation and rational management of fish stocks, and the pivotal role of control and enforcement in ensuring such conservation, agree that the proposals set out in Annex I shall constitute the basis for a submission to be jointly prepared and made to the NAFO Fisheries Commission, for its consideration and approval, to establish a Protocol to strengthen the NAFO conservation and enforcement measures.
2. The European community and Canada shall implement immediately on a provisional basis the control and enforcement measures contained in points II.1, II.2, II.3, II.4, II.7, II.8, II.9 (the proposed list of infringements and paragraphs (i), (iii) and (v) only, II.10 and II.ll of Annex I. In respect of point II.11.A, the Parties shall deploy observers on the vessels not later than fifteen days following the signature of the Agreed Minute. Regarding point II.11, the satellite tracking devices on 35% of the vessels shall be installed as rapidly as realistically possible when the vessels concerned make a port call or depart for fishing in the NAFO Regulatory Area.
3. The European Community and Canada commit themselves to seeking on an urgent basis the support of other NAFO Contracting Parties for the adoption of, and subsequent adherence to, the said Protocol in advance of special meetings of the NAFO Standing Committee on International Control (STACTIC) starting in April 1995 and of the NAFO Fisheries Commission to be convened as early as possible thereafter in May 1995 at the request of the European Community and Canada. The Protocol shall enter into force on the signature of a majority of NAFO Contracting Parties in the form agreed to. The European Community and Canada are convinced that by September 1995 a majority of the NAFO Contracting Parties will have subscribed to the measures. The European Community and Canada shall make great efforts to obtain the signature to the Protocol of the other NAFO Contracting Parties.
4. Canada shall submit to the NAFO Executive Secretary, in advance of each annual NAFO meeting, a report on the conservation and enforcement measures in effect in its 200-mile zone for NAFO-managed stocks. The report shall deal with the range of matters dealt with in the NAFO Conservation and Enforcement Measures.

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[182] European Union, *Official Journal of the European Communities*, (Brussels: December 21, 1995) (NO L.308/79[EN]).

5. European Community and Canada shall cooperate to improve conservation and enforcement measures. Toward this end, Canada shall invite experts from the European Commission to exchange information and to brief them on Canadian conservation and enforcement measures in effect in the Canadian 200-mile zone for NAFO-managed stocks.
6. Under the pilot project for observers and satellite tracking described in Annex 1, observers will act under the authority of the European Commission for the European Community and the Government of Canada for Canada, and will be placed on vessels as soon as possible in accordance with the provisions set out under point 2 above. Except in the case *force majeure*, vessels without an observer will not be allowed to continue fishing in the NAFO Regulatory Area beyond the period referred to in point 2 above. The European Community and Canada will both monitor on a regular basis the effectiveness and efficiency of the observer scheme as part of the evaluation of the said Pilot Project.

B. TOTAL ALLOWABLE CATCH AND CATCH LIMITS

In light of their mutual interest in conservation, the European Community and Canada reaffirm their commitment to the level of 27,000 tonnes as the total allowable catch of Greenland halibut for 1995 in NAFO Sub-areas 2 and 3. Bearing this in mind, and in the light of the particular circumstances associated with the management of the Greenland halibut resource in the NAFO Convention Area, the European Community and Canada agree to the management arrangements for Greenland halibut as set out in Annex II.

C. OTHER RELATED ISSUES

1. Canada shall repeal the provisions of the Regulation of 3 March 1995 pursuant to the *Coastal Fisheries Protection Act* which subjected vessels from Spain and Portugal to certain provisions of the Act and prohibited these vessels from fishing for Greenland halibut in the NAFO Regulatory Area. For the European Community, any reinsertion by Canada of vessels from any European Community Member State into its legislation which subjects vessels on the high seas to Canadian jurisdiction will be considered as a breach of this Agreed Minute.
2. For Canada, any systematic and sustained failure of the European Community to control its fishing vessels in the NAFO Regulatory Area which clearly has resulted in violations of a serious nature of NAFO conservation and enforcement measures may be considered as a breach of this Agreed Minute. The European Community and Canada shall consult before taking any action on the foregoing.

D. GENERAL PROVISIONS

1. The European Community and Canada maintain their respective positions on the conformity of the amendment of 25 May 1994 to Canada's *Coastal Fisheries*

Protection Act, and subsequent regulations, with customary international law and the NAFO Convention. Nothing in this Agreed Minute shall prejudice any multilateral convention to which the European Community and Canada, or any Member State of the European Community and Canada, are parties, or their ability to preserve and defend their rights in conformity with international law, and the views of either Party with respect to any question relating to the Law of the Sea.

2. Any limitation to the NAFO Regulatory Area or any parts thereof of the measures referred to in this Agreed Minute shall not be deemed to affect or prejudice the position of the European Community with regard to the status of the areas within which coastal States exercise their fisheries jurisdiction.

E. IMPLEMENTATION

The provisions of this Agreed Minute, with its annexes as an integral part of it, shall be provisionally implemented by the European Community and Canada upon signature, pending its final approval through an exchange of notes.

This Agreed Minute shall cease to apply on 31 December 1995 or when the measures described in this Agreed Minute are adopted by NAFO, if this is earlier.

Brussels, 20 April 1995

On behalf of the European Community

Gianluigi GIOLA

On behalf of the Government of Canada

Jacques S. ROY

ANNEX I

PROPOSAL FOR IMPROVING FISHERIES CONTROL AND ENFORCEMENT

I. BASIS FOR CONSERVATION AND ENFORCEMENT STRATEGY

The strategy underlying this proposal comprises the following elements:

a) Simplification and strengthening of existing rules, making them more enforceable.
b) Establishment and enforcement of minimum fish sizes compatible with meshes in use in order to minimize discarding.
c) Encouragement of the practice of selective fisheries, with minimal by-catch.
d) Improvement of hail system.
e) Increased inspection on fishing grounds and on landings.
f) Increased transparency.
g) Pilot project for observers and satellite tracking system.
h) A system for immediate response to alleged major infringements.
i) Reporting rules.
j) Use of legal process.
k) Penalties.
l) Effort control.

Any proposals to be adopted by NAFO shall take into account cost benefit analysis and existing legal systems of Contracting Parties, including the principles of non-discrimination, proportionality and the right of appeal by fishermen.

II. PROPOSALS TO AMEND THE NAFO CONSERVATION AND ENFORCEMENT MEASURES

II.1. Inspections.

Inspections of vessels shall be carried out in a non-discriminatory way. The number of inspections shall be based on fleet size, taking also into account their compliance records. Contracting Parties shall ensure that their inspectorates take special care to avoid damage to the cargo or the gear being inspected. Interference with fishing activities and normal activities on board shall be minimised. Crews and vessels operating in conformity with the NAFO Conservation and Enforcement Measures shall not be harassed. Inspections shall only aim to ascertain that NAFO rules are respected and not unduly hinder the activities of specific vessels, while at the same time not limiting the capability of NAFO inspectors to carry out their mandate.

II.2. Transmission of information from inspections.

Any information on suspected illegal practices and any evidence of apparent infringements shall be transmitted swiftly to the inspection authorities of the Contracting

Party of the vessel and to the NAFO Executive Secretary.

II.3. Increase of the inspection presence.

Each Contracting Party having 10 or more vessels operating in the NAFO Regulatory Area (NRA) shall deploy at least one inspection vessel. Contracting Parties with fewer than 10 vessels shall cooperate in the deployment of inspection vessels.

Every Contracting Party shall have at least one inspector present in the NAFO Convention Area (NCA) when vessels of that Contracting Party are opening in the NRA.

II.4. Improved hail system.

A system of reporting of catch on board upon entry into and exit from the NRA will be associated with the hail system currently in practice.

Vessels with a satellite-based system of position reporting shall not be required to hail but shall submit catch reports to the NAFO Executive Secretary. Contracting Parties remain responsible for transmitting the hail information to the NAFO Executive Secretary. Contracting Parties whose vessels are so equipped shall notify the NAFO Executive Secretary of the names of such vessels.

II.5. Additional Enforcement Measures.

In order to improve conservation and rationalize enforcement, the next STACTIC meeting will study the issues of the protection of juvenile fish and the by-catch of regulated species and will make recommendations thereon to the next NAFO Fisheries Commission meeting.

In particular, the following issues shall be addressed:
- the addition of Greenland halibut to the list of species subject to a minimum fish size with a length of (X) cm;
- the applicability of current discard rules in the NRA;
- the development of special rules for fish products, e.g. processed length equivalents;
- the problem of on-board production of fish meal and similar products;
- further measures to protect juvenile fish, e.g. area/seasonal closures;
- amendments to incidental by-catch limit measures so that where an "others" quota or an individual Contracting Party quota has been taken or, on a case-by-case basis, a directed fishery has been prohibited, the incidental by-catch for that stock is not retained on board.

II.6. Mesh size.

The derogation of 120 mm when using polyamide-type fibres shall be phased out in a

period to be fixed by the Fisheries Commission.

II.7. Dockside inspection

Each Contracting Party shall ensure that all vessels engaged in fishing in the NRA for stocks subject to NAF0 Conservation and Enforcement Measures undergo a dockside inspection at each port call. Results of these inspections shall be provided to other Contracting Parties on request Results of these inspections shall also be cross-checked with log books and results reported to the NAF0 Executive Secretary on an annual basis.

Annual checks shall be made of the fish holds in order to certify the correctness of the fish hold plans.

II.8. Effort plans and catch reporting.

For 1995, each Contracting Party shall inform the NAF0 Executive Secretary of the fishing plan for the Greenland halibut fishery in the NRA and shall, at the end of the year, report on its implementation. If this system proves useful, it shall be extended to other fisheries.

For 1995, catches of Greenland halibut in the NRA shall be reported to the NAFO Executive Secretary no less frequently than every 48 hours, in accordance with the NAF0 Conservation and Enforcement Measures.

II.9. Major Infringements

NAF0 should establish a class of major infringements, to include:

a) refusal to cooperate with an inspector or an observer;
b) misreporting of catches;
c) mesh size violations;
d) hail system violations;
e) interference with the satellite tracking system.

i) If a NAFO inspector cites a vessel for having committed, to a serious extent, a major apparent infringement, the Contracting Party of this vessel shall ensure that the vessel concerned is inspected by a duly authorized inspector of that Contracting Party within 48 hours. In order to preserve the evidence, the NAFO inspector shall take all necessary measures to ensure security and continuity of the evidence, including, as appropriate, sealing the vessel's hold, and may remain on board the vessel until the duly authorized inspector arrives.

ii) Where justified, the inspector of the Contracting Party of the vessel concerned shall, where duly authorized to do so, require the vessel to proceed immediately to a nearby port, chosen by the master, which should be either St. Pierre, St. John's, the Azores or the home port of the vessel for a thorough inspection under the authority of the flag State and in the presence of a NAFO

inspector from any other Contracting Party that wishes to participate. If the vessel called to port, the Contracting Party must provide due justification to the NAFO Executive Secretary in a timely manner.

iii) Where a NAFO inspector cites a vessel for having committed a major apparent infringement, the inspector shall immediately report this to the NAFO Executive Secretary, who shall in turn immediately report, for information purposes, to the other NAFO Contracting Parties with an inspection vessel in the NRA.

iv) Where a vessel is required to proceed to port for a thorough inspection pursuant to paragraph ii) above, a NAFO inspector from another Contracting Party may, subject to the consent of the Contracting Party of the vessel, board the vessel as it is proceeding to port, may remain on board the vessel as it proceeds to port and my be present during the inspection of the vessel in port.

v) If an apparent infringement of the NAFO Conservation and Enforcement Measures has been detected which in the view of the duly authorized inspector is sufficiently serious, the inspector shall take all necessary measures to ensure a security and continuity of-the evidence including, as appropriate, sealing the vessel's hold for eventual dockside inspection.

II.10. Follow Up on apparent infringements

There shall be a transparent and effective legal process to follow up apparent infringements using all necessary evidence available from all sources, including evidence from other Contracting Parties as required for effective prosecution. The Parties shall make a semi-annual report to the NAFO Executive Secretary on the status of legal proceedings on a case- by-case basis, in sufficient detail for transparency, subject to domestic law, particularly, when convictions are imposed, regarding level of fines, value of forfeited fish and/or gear, and including an explanation if no action is taken.

The penalties provided in legislation shall be such as to provide an effective deterrent. Such penalties may include refusal, suspension or withdrawal of the authorization to fish in the NRA.

II.ll. Pilot Project for Observers and Satellite Tracking.

In order to improve compliance with NAFO Conservation and Enforcement Measures for their vessels fishing under the NAFO Convention, the Contracting Parties agree to implement a Pilot Project to provide for properly trained and qualified observers on all vessels fishing in the NRA and satellite-tracking devices on 35% of their respective vessels fishing in the NRA. Contracting Parties shall take all necessary measures; to ensure that observers are able to carry out their duties and that the master and crew of the Contracting Party vessels extend all necessary cooperation to observer Contracting Parties shall provide to the NAFO Executive Secretary lists' of the observers they will be

placing on vessels in the NRA

A. Observers

1. Each Contracting Party shall require its vessels operating under the NAFO Convention to accept observers on the basis of the following:
   a) each Contracting Party shall have the primary responsibility to obtain, for placement on its vessels, independent and impartial observers;
   b) in cases where a Contracting Party has not placed an observer on a vessel, any other Contracting Party may, subject to the consent of the Contracting Party of the vessel, place an observer on board until that Contracting Party provides a replacement in accordance with paragraph;
   c) no vessel shall be required to carry more than one observer pursuant to this Pilot Project at any time.
2. Observers shall monitor a vessel's compliance with the relevant NAFO Conservation and Enforcement Measures. In particular the observers shall:
   a) record and report upon the fishing activities of the vessel and shall verify the position of the vessel when engaged in fishing;
   b) observe and estimate catches taken with a view to identifying catch composition, monitor discarding, by-catches and the taking of undersized species;
   c) record the gear, mesh sizes and attachments employed by the master;

   d) verify entries made to the logbooks (species composition and quantities, round and processed weight, and hail reports).
3. Observers shall collect catch and effort data on a set-by-set basis. This data shall include location (latitude/longitude), depth, time of net on the bottom,' catch composition and discards.
4. Observers shall carry out such scientific work, for example, collecting samples, as requested by the Fisheries Commission based on the advice of the Scientific Council.
5. In the case where the observer is deployed on a vessel equipped with devices for automatic remote position recording facilities, the observer shall monitor the functioning of, and report upon any interference with, the satellite system. In order better to distinguish fishing operations from steaming and to contribute to an a posteriori calibration of the signals registered by the receiving station, the observer shall maintain detailed reports on the daily activity of the vessel.
6. When an apparent infringement is identified by an observer, the observer shall, within 24 hours, report it both to a NAFO inspection vessel, using an established code, and to the NAFO Executive Secretary.
7. Within 30 days following completion of an observer's assignment on a vessel, the observer shall provide a report to the Contracting Party of the vessel and to the NAFO Executive Secretary who shall make it available to any Contracting Party that requests it.
8. Subject to any other arrangements between the Parties, the salary of an observer shad be covered by the sending Contracting Party. The vessel on which an observer is placed Shall provide suitable. foot and lodging during his deployments

B. Satellite Tracking

1. Contracting Parties agree that 35% of their respective vessels fishing in the NRA shall, be equipped with an autonomous system able to transmit automatically satellite signals to a land-based receiving station permitting a continuous tracking of the position of the vessel by the Contracting Party of the vessel. Contracting Parties shall endeavour to test several systems of satellite tracking.
2. Contracting Parties whose vessels fish a minimum of 300 days in the NRA are subject to satellite based position monitoring [183].
3. Each Contracting Party shall install at least one receiving station associated to the satellite tracking system.
4. Each Contracting Party shall transmit, on a real-time basis, entry and exit messages for its vessels equipped with satellite devices to the NAFO Executive Secretary, who in turn shall transmit such information to Contracting Parties with an inspection vessel in the NRA. Contracting Parties shall cooperate with other Contracting Parties which have a NAFO inspection vessel or aircraft in the NRA in order to exchange information on a real-time basis on the geographical distribution of fishing vessels equipped with satellite devices and, on specific request, information related to the identification of a vessel.
5. Subject to any other arrangements between Contracting Parties, each Contracting Party shall pay all costs associated with the satellite tracking system.

C. Analysis

1. Each Contracting Party shall prepare a report on the results of the Pilot Project from the perspective of efficiency and effectiveness, including:
   a) overall effectiveness of the Project in improving compliance with NAFO Conservation and Enforcement Measures;
   b) the effectiveness of the different components of the Project,.
   c) costs associated with observers and satellite tracking;
   d) a summary of observed reports, specifying type' and number of observed infractions or important events;
   e) estimations of fishing effort from observers as compared to initial estimation by satellite monitoring;
   f) analysis of the efficiency in terms of cost/benefit, the latter being expressed in terms of compliance with rules and volume of data received for fisheries management.

2. The reports shall be-submitted to the NAFO Executive Secretary in time for their consideration at the NAFO Annual Meeting of September 91997 Land, based on these reports, the Parties agree to establish a permanent scheme that will ensure that the degree of control and enforcement in the NRA provided by the Project, as indicated above, is maintained.

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[183] Canada will, in any case, apply the Scheme on its vessels fishing in the NRA.

ANNEX II

QUOTAS FOR GREENLAND HALIBUT

I. NAFO DECISIONS FOR 1995

The European Community and Canada will jointly propose to NAFO for 1995:

(a) the TAC for 2+3 Greenland halibut shall be divided as follows:
- 2+3 K (Canadian 200' miles): 7,000 tonnes,
- 3LMNO: 20,000 tonnes;

(b) the 7,000t allocation for 2+3K (within Canadian 200 miles) for Greenland halibut shall be allocated to Canada.

II. VOLUNTARY ARRANGEMENTS FOR 1995

(a) Canada's catches by its vessels for Greenland halibut will not exceed 10,000 tonnes, subject to any more stringent conservation decisions that Canada may take in light of further scientific advice.

(b) The European Community's further catches by its vessels for Greenland halibut will not exceed 5,013 tonnes from April 16, 1995

(c) The European Community and Canada will not permit their vessels to fish for species covered by the NAFO Convention in the NAFO Regulatory Area beyond the fifteen-day period referred to under point A.2 of the Agreed Minute until the improved fisheries control and enforcement measures set out therein are being implemented.

Beyond agreed catch limits, no by-catches of Greenland halibut shall be retained on board.

III. 1996 AND THEREAFTER

The European Community and Canada will jointly propose to NAFO for 1996 and thereafter:

(a) NAFO will manage Greenland halibut in 3LMNO. The allocations will be in the ratio of 10:3 for the European Community and Canada (aside from allocations to other Contracting Parties).

(b) On the basis of NAFO Scientific Council advice, Canada will manage Greenland halibut in Canadian waters in 2+3K.

(c) NAFO Scientific Council will provide scientific advice on Greenland halibut for units 0+1, 2+3K and 3LMNO.

Letter from Canada

Brussels, 16 April 1995

Sir,

With reference to the 16 April 1995 Agreed Minute between the European Community and Canada, I can confirm that the posting of a bond for the release of the vessel *Estai* and the payment of bail for the release of its master cannot be interpreted as meaning that the European Community or its Member States recognize the legality of the arrest or the jurisdiction of Canada beyond the Canadian 200-mile zone against fishing vessels flying the flag of another State.

I can also confirm that, expeditiously, the Attorney General of Canada will consider the public interest in his decision on staying the prosecution against the vessel *Estai* and its master; in such case, the bond, bail and catch or its proceeds will be returned to the master.

Please accept, Sir, the assurance of my highest consideration.

For the Government of Canada

Jacques S. ROY

Letter from the European Community

Brussels, 16 April 1995

Sir,

I have the honour to acknowledge receipt of your letter of today's date, which reads as follows:

> 'With reference to the 16 April 1995 Agreed Minute between the European Community and Canada, I can confirm that the posting of a bond for the release of the vessel *Estai* and the payment of bail for the release of its master cannot be interpreted as meaning that the European Community or its Member States recognize the legality of the arrest or the jurisdiction of Canada beyond the Canadian 200-mile zone against fishing vessels flying the flag of another State.
>
> I can also confirm that, expeditiously, the Attorney General of Canada will consider the public interest in his decision on staying the prosecution against the vessel *Estai* and its master; in such case, the bond, bail and catch or its proceeds will be returned to the master.'

In reference to the second paragraph of your letter, I should point out that, for the European Community, the stay of prosecution against the *Estai* and its master is essential for the application of the said Agreed Minute, and therefore the bond, bail and the catch of its proceeds must be returned to the master on the date of the signature of the Agreed Minute.

I have the further honour to inform you that, with this understanding, the European Community is in agreement with the contents of your letter.

Please accept, Sir, the assurance of my highest consideration.

On behalf of the European Community

Gianluigi GIOLA

Note from Canada

Brussels, 16 April 1995

Sir,

To facilitate adoption by other NAFO Contracting Parties of the measures set out in Annex I to the Agreed Minute, where necessary, Canada is ready to pay the cost, other than room and board, of observers on board the vessels of such NAFO Contracting Parties. With reference to Annex I, point II.11 to the Agreed Minute, Canada will facilitate the deployment of the observers on the European Community vessels.

For the Government of Canada

Jacques S. ROY

Note from the European Community

Brussels, 16 April 1995

Sir,

I have the honour to acknowledge receipt of your note of today's date which reads as follows:

> 'To facilitate adoption by other NAFO Contracting Parties of the measures set out in Annex I to the Agreed Minute, where necessary, Canada is ready to pay the cost, other than room and board, of observers on board the vessels of such NAFO Contracting Parties. With reference to Annex I, point II.11 to the Agreed Minute, Canada will facilitate the deployment of the observers on the European Community vessels.'

Furthermore, I would like to inform you that in respect of Annex I, point II.11, the European Community, under point A.2 of the Agreed Minute, will make every effort to install the said satellite tracking devices within the next two months. If, for technical reasons, this is not possible, it is agreed that the European Community and Canada will discuss the matter further.

I have the honour to inform you that the European Community, with this understanding, is in agreement with the contents of your note.

On behalf of the European Community

Gianluigi GIOLA

Letter from the European Union to the Government of Canada

Brussels, 19 April 1995

Sir,

I have the honour to inform you that, for the European Community, the Agreed Minute of 16 April 1995, and in particular paragraph III(a) of Annex II, implies that the Community quota for Greenland halibut for 1996 and for ensuing years in zone 3LMNO will in any event be fixed at 55.35%.

The European Community hopes that, owing to joint efforts, additional quotas may be obtained, in full compliance with historic and legitimate rights of all the NAFO states.

On behalf of the European Community

Leon BRITTAN

Appendix C: Complete text of the 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 Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[184]

The States Parties to this Agreement,

Recalling the relevant provisions of the United Nations Convention on the Law of the Sea of 10 December 1982,

Determined to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks,

Resolved to improve cooperation between States to that end,

Calling for more effective enforcement by flag States, port States and coastal States of the conservation and management measures adopted for such stocks,

Seeking to address in particular the problems identified in chapter 17, programme area C, of Agenda 21 adopted by the United Nations Conference on Environment and Development, namely, that the management of high seas fisheries is inadequate in many areas and that some resources are overutilized; noting that there are problems of unregulated fishing, over-capitalization, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States,

Committing themselves to responsible fisheries,

Conscious of the need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimize the risk of long-term or irreversible effects of fishing operations,

Recognizing the need for specific assistance, including financial, scientific and technological assistance, in order that developing States can participate effectively in the conservation, management and sustainable use of straddling fish stocks and highly migratory fish stocks,

Convinced that an agreement for the implementation of the relevant provisions of the Convention would best serve these purposes and contribute to the maintenance of international peace and security,

Affirming that matters not regulated by the Convention or by this Agreement continue to be governed by the rules and principles of general international law,

Have agreed as follows:

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[184] United Nations, *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 management of Straddling Fish Stocks and Highly Migratory Fish Stocks*. (New York: Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, September 8, 1995).

PART I
GENERAL PROVISIONS

Article 1
Use of terms and scope

1. For the purposes of this Agreement:
   (a) "Convention" means the United Nations Convention on the Law of the Sea of 10 December 1982;
   (b) "conservation and management measures" means measures to conserve and manage one or more species of living marine resources that are adopted and applied consistent with the relevant rules of international law as reflected in the Convention and this Agreement;
   (c) "fish" includes mollusks and crustaceans except those belonging to sedentary species as defined in article 77 of the Convention; and
   (d) "arrangement" means a cooperative mechanism established in accordance with the Convention and this Agreement by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks.
2. (a) "States Parties" means States which have consented to be bound by this Agreement and for which the Agreement is in force.
   (b) This Agreement applies *mutatis mutandis*:
      (i) to any entity referred to in article 305, paragraph 1 (c), (d) and (e), of the Convention and
      (ii) subject to article 47, to any entity referred to as an "international organization' in Annex IX, article 1, of the Convention which becomes a Party to this Agreement, and to that extent "States Parties" refers to those entities.
3. This Agreement applies *mutatis mutandis* to other fishing entities whose vessels fish on the high seas.

Article 2
Objective

The objective of this Agreement is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Convention.

Article 3
Application

1. Unless otherwise provided, this Agreement applies to the conservation and

management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention.

2. In the exercise of its sovereign rights for the purpose of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction, the coastal State shall apply *mutatis mutandis* the general principles enumerated in article 5.

3. States shall give due consideration to the respective capacities of developing States to apply articles 5, 6 and 7 within areas under national jurisdiction and their need for assistance as provided for in this Agreement. To this end, Part VII applies *mutatis mutandis* in respect of areas under national jurisdiction.

Article 4
Relationship between this Agreement and the Convention

Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.

PART II
CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS

Article 5
General Principles

In order to conserve and manage straddling fish stocks and highly migratory fish stocks, coastal States and States fishing on the high seas shall, in giving effect to their duty to cooperate in accordance with the Convention:

(a) adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilization;

(b) ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global;

(c) apply the precautionary approach in accordance with article 6;

(d) assess the impacts of fishing, other human activities and environmental factors on

target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks;

(e) adopt, where necessary, conservation and management measures for species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened;

(f) minimize pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species, (hereinafter referred to as non-target species) and impacts on associated or dependent species, in particular endangered species, through measures including, to the extent practicable, the development and use of selective, environmentally safe and cost-effective fishing gear and techniques;

(g) protect biodiversity in the marine environment;

(h) take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources;

(i) take into account the interests of artisanal and subsistence fishers;

(j) collect and share, in a timely manner, complete and accurate data concerning fishing activities on, *inter alia*, vessel position, catch of target and non-target species and fishing effort, as set out in Annex I, as well as information from national and international research programmes;

(k) promote and conduct scientific research and develop appropriate technologies in support of fishery conservation and management; and

(l) implement and enforce conservation and management measures through effective monitoring, control and surveillance.

Article 6
Application of the precautionary approach

1. States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.

2. 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.

3. In implementing the precautionary approach, States shall:

(a) improve decision-making for fishery resource conservation and management by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty;

(b) apply the guidelines set out in Annex II and determine, on the basis of the best scientific information available, stock-specific reference points and the action to be taken if they are exceeded;

(c) take into account, *inter alia*, uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points,

levels and distribution of fishing mortality and the impact of fishing activities on non-target and associated or dependent species, as well as existing and predicted oceanic, environmental and socio-economic conditions; and

(d) develop data collection and research programmes to assess the impact of fishing on non-target and associated or dependent species and their environment, and adopt plans which are necessary to ensure the conservation of such species and to protect habitats of special concern.

4. States shall take measures to ensure that, when reference points are approached, they will not be exceeded. In the event that they are exceeded, States shall, without delay, take the action determined under paragraph 3 (b) to restore the stocks.

5. Where the status of target stocks or non-target or associated or dependent species is of concern, States shall subject such stocks and species to enhanced monitoring in order to review their status and the efficacy of conservation and management measures. They shall revise those measures regularly in the light of new information.

6. For new or exploratory fisheries, States shall adopt as soon as possible cautious conservation and management measures, including, *inter alia*, catch limits and effort limits. Such measures shall remain in force until there are sufficient data to allow assessment of the impact of the fisheries on the long-term sustainability of the stocks, whereupon conservation and management measures based on that assessment shall be implemented. The latter measures shall, if appropriate, allow for the gradual development of the fisheries.

7. If a natural phenomenon has a significant adverse impact on the status of straddling fish stocks or highly migratory fish stocks, States shall adopt conservation and management measures on an emergency basis to ensure that fishing activity does not exacerbate such adverse impact. States shall also adopt such measures on an emergency basis where fishing activity presents a serious threat to the sustainability of such stocks. Measures taken on an emergency basis shall be temporary and shall be based on the best scientific evidence available.

Article 7
Compatibility of conservation and management measures

1. Without prejudice to the sovereign rights of coastal States for the purpose of exploring and exploiting, conserving and managing the living marine resources within areas under national jurisdiction as provided for in the Convention, and the right of all States for their nationals to engage in fishing on the high seas in accordance with the Convention:

(a) with respect to straddling fish stocks, the relevant coastal States and the States whose nationals fish for such stocks in the adjacent high seas area shall seek, either directly or through the appropriate mechanisms for cooperation provided for in Part III, to agree upon the measures necessary for the conservation of these stocks in the adjacent high seas area;

(b) with respect to highly migratory fish stocks, the relevant coastal States and other States whose nationals fish for such stocks in the region shall cooperate, either

directly or through the appropriate mechanisms for cooperation provided for in Part III, with a view to ensuring conservation and promoting the objective of optimum utilization of such stocks throughout the region, both within and beyond the areas under national jurisdiction.

2. Conservation and management measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety. To this end, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of such stocks. In determining compatible conservation and management measures, States shall:
   (a) 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;
   (b) take into account previously agreed measures established and applied for the high seas in accordance with the Convention in respect of the same stocks by relevant coastal States and States fishing on the high seas;
   (c) take into account previously agreed measures established and applied in accordance with the Convention in respect of the same stocks by a subregional or regional fisheries management organization or arrangement;
   (d) take into account the biological unity and other biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the geographical particularities of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction;
   (e) take into account the respective dependence of the coastal States and the States fishing on the high seas on the stocks concerned; and
   (f) ensure that such measures do not result in harmful impact on the living marine resources as a whole.
3. In giving effect to their duty to cooperate, States shall make every effort to agree on compatible conservation and management measures within a reasonable period of time.
4. If no agreement can be reached within a reasonable period of time, any of the States concerned may invoke the procedures for the settlement of disputes provided for in Part VIII.
5. Pending agreement on compatible conservation and management measures, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature. In the event that they are unable to agree on such arrangements, any of the States concerned may, for the purpose of obtaining provisional measures, submit the dispute to a court or tribunal in accordance with the procedures for the settlement of disputes provided for in Part VIII.
6. Provisional arrangements or measures entered into or prescribed pursuant to

paragraph 5 shall take into account the provisions of this Part, shall have due regard to the rights and obligations of all States concerned, shall not jeopardize or hamper the reaching of final agreement on compatible conservation and management measures and shall be without prejudice to the final outcome of any dispute settlement procedure.

7. Coastal States shall regularly inform States fishing on the high seas in the subregion or region, either directly or through appropriate subregional or regional fisheries management organizations or arrangements, or through other appropriate means, of the measures they have adopted for straddling fish stocks and highly migratory fish stocks within areas under their national jurisdiction.

8. States fishing on the high seas shall regularly inform other interested States, either directly or through appropriate subregional or regional fisheries management organizations or arrangements, or through other appropriate means, of the measures they have adopted for regulating the activities of vessels flying their flag which fish for such stocks on the high seas.

PART III
MECHANISMS FOR INTERNATIONAL COOPERATION CONCERNING STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS

Article 8
Cooperation for conservation and management

1. Coastal States and States fishing on the high seas shall, in accordance with the Convention, pursue cooperation in relation to straddling fish stocks and highly migratory fish stocks either directly or through appropriate subregional or regional fisheries management organizations or arrangements, taking into account the specific characteristics of the subregion or region, to ensure effective conservation and management of such stocks.

2. States shall enter into consultations in good faith and without delay, particularly where there is evidence that the straddling fish stocks and highly migratory fish stocks concerned may be under threat of over-exploitation or where a new fishery is being developed for such stocks. To this end, consultations may be initiated at the request of any interested State with a view to establishing appropriate arrangements to ensure conservation and management of the stocks. Pending agreement on such arrangements, States shall observe the provisions of this Agreement and shall act in good faith and with due regard to the rights, interests and duties of other States.

3. Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such

organization or arrangement. States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

4. Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.

5. Where there is no subregional or regional fisheries management organization or arrangement to establish conservation and management measures for a particular straddling fish stock or highly migratory fish stock, relevant coastal States and States fishing on the high seas for such stock in the subregion or region shall cooperate to establish such an organization or enter into other appropriate arrangements to ensure conservation and management of such stock and shall participate in the work of the organization or arrangement.

6. Any State intending to propose that action be taken by an intergovernmental organization having competence with respect to living resources should, where such action would have a significant effect on conservation and management measures already established by a competent subregional or regional fisheries management organization or arrangement, consult through that organization or arrangement with its members or participants. To the extent practicable, such consultation should take place prior to the submission of the proposal to the intergovernmental organization.

Article 9

Subregional and regional fisheries management organizations and arrangements

1. In establishing subregional or regional fisheries management organizations or in entering into subregional or regional fisheries management arrangements for straddling fish stocks and highly migratory fish stocks, States shall agree, *inter alia*, on:

   (a) the stocks to which conservation and management measures apply, taking into account the biological characteristics of the stocks concerned and the nature of the fisheries involved;

   (b) the area of application, taking into account article 7, paragraph 1, and the characteristics of the subregion or region, including socio-economic, geographical and environmental factors;

   (c) the relationship between the work of the new organization or arrangement and the role, objectives and operations of any relevant existing fisheries management organizations or arrangements; and

(d) the mechanisms by which the organization or arrangement will obtain scientific advice and review the status of the stocks, including, where appropriate, the establishment of a scientific advisory body.

2. States cooperating in the formation of a subregional or regional fisheries management organization or arrangement shall inform other States which they are aware have a real interest in the work of the proposed organization or arrangement of such cooperation.

Article 10

Functions of subregional and regional fisheries management organizations and arrangements

In fulfilling their obligation to cooperate through subregional or regional fisheries management organizations or arrangements, States shall:

(a) agree on and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks;
(b) agree, as appropriate, on participatory rights such as allocations of allowable catch or levels of fishing effort;
(c) adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations;
(d) obtain and evaluate scientific advice, review the status of the stocks and assess the impact of fishing on non-target and associated or dependent species;
(e) agree on standards for collection, reporting, verification and exchange of data on fisheries for the stocks;
(f) compile and disseminate accurate and complete statistical data, as described in Annex I, to ensure that the best scientific evidence is available, while maintaining confidentiality where appropriate;
(g) promote and conduct scientific assessments of the stocks and relevant research and disseminate the results thereof;
(h) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement;
(i) agree on means by which the fishing interests of new members of the organization or new participants in the arrangement will be accommodated;
(j) agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner;
(k) Promote the peaceful settlement of disputes in accordance with Part VIII;
(1) ensure the full cooperation of their relevant national agencies and industries in implementing the recommendations and decisions of the organization or arrangement; and
(m) timely access to the records and reports of such organizations and arrangements, subject to the procedural rules on access to them.

Article 13

Strengthening of existing organizations and arrangements

States shall cooperate to strengthen existing subregional and regional fisheries management organizations and arrangements in order to improve their effectiveness in establishing and implementing conservation and management measures for straddling fish stocks and highly migratory fish stocks.

Article 14
Collection and provision of information and cooperation in scientific research

1. States shall ensure that fishing vessels flying their flag provide such information as may be necessary in order to fulfil their obligations under this Agreement. To this end, States shall in accordance with Annex I:
   (a) collect and exchange scientific, technical and statistical data with respect to fisheries for straddling fish stocks and highly migratory fish stocks;
   (b) ensure that data are collected in sufficient detail to facilitate effective stock assessment and are provided in a timely manner to fulfil the requirements of subregional or regional fisheries management organizations or arrangements; and
   (c) take appropriate measures to verify the accuracy of such data.
2. States shall cooperate, either directly or through subregional or regional fisheries management organizations or arrangements:
   (a) to agree on the specification of data and the format in which they are to be provided to such organizations or arrangements, taking into account the nature of the stocks and the fisheries for those stocks; and
   (b) to develop and share analytical techniques and stock assessment methodologies to improve measures for the conservation and management of straddling fish stocks and highly migratory fish stocks.
3. Consistent with Part XIII of the Convention, States shall cooperate, either directly or through competent international organizations, to strengthen scientific research capacity in the field of fisheries and promote scientific research related to the conservation and management of straddling fish stocks and highly migratory fish stocks for the benefit of all. To this end, a State or the competent international organization conducting such research beyond areas under national jurisdiction shall actively promote the publication and dissemination to any interested States of the results of that research and information relating to its objectives and methods and, to the extent practicable, shall facilitate the participation of scientists from those States in such research.

Article 15
Enclosed and semi-enclosed seas

In implementing this Agreement in an enclosed or semi-enclosed sea, States shall take into account the natural characteristics of that sea and shall also act in a manner consistent with Part IX of the Convention and other relevant provisions thereof.

Article 16

Areas of high seas surrounded entirely by an area under the national jurisdiction of a single State

1. States fishing for straddling fish stocks and highly migratory fish stocks in an area of the high seas surrounded entirely by an area under the national jurisdiction of a single State and the latter State shall cooperate to establish conservation and management measures in respect of those stocks in the high seas area. Having regard to the natural characteristics of the area, States shall pay special attention to the establishment of compatible conservation and management measures for such stocks pursuant to article 7. Measures taken in respect of the high seas shall take into account the rights, duties and interests of the coastal State under the Convention, shall be based on the best scientific evidence available and shall also take into account any conservation and management measures adopted and applied in respect of the same stocks in accordance with article 61 of the Convention by the coastal State in the area under national jurisdiction. States shall also agree on measures for monitoring, control, surveillance and enforcement to ensure compliance with the conservation and management measures in respect of the high seas.
2. Pursuant to article 8, States shall act in good faith and make every effort to agree without delay on conservation and management measures to be applied in the carrying out of fishing operations in the area referred to in paragraph 1. If, within a reasonable period of time, the fishing States concerned and the coastal State are unable to agree on such measures, they shall, having regard to paragraph 1, apply article 7, paragraphs 4, 5 and 6, relating to provisional arrangements or measures. Pending the establishment of such provisional arrangements or measures, the States concerned shall take measures in respect of vessels flying their flag in order that they not engage in fisheries which could undermine the stocks concerned.

PART IV
NON-MEMBERS AND NON-PARTICIPANTS

Article 17
Non-members of organizations and non-participants in arrangements

1. A State which is not a member of a subregional or regional fisheries management organization or is not a participant in a subregional or regional fisheries management arrangement, and which does not otherwise agree to apply the conservation and management measures established by such organization or arrangement, is not discharged from the obligation to cooperate, in accordance with the Convention and this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks.
2. Such State shall not authorize vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks which are subject to the

conservation and management measures established by such organization or arrangement.

3. States which are members of a subregional or regional fisheries management organization or participants in a subregional or regional fisheries management arrangement shall, individually or jointly, request the fishing entities referred to in article 1, paragraph 3, which have fishing vessels in the relevant area to cooperate fully with such organization or arrangement in implementing the conservation and management measures it has established, with a view to having such measures applied de facto as extensively as possible to fishing activities in the relevant area. Such fishing entities shall enjoy benefits from participation in the fishery commensurate with their commitment to comply with conservation and management measures in respect of the stocks.

4. States which are members of such organization or participants in such arrangement shall exchange information with respect to the activities of fishing vessels flying the flags of States which are neither members of the organization nor participants in the arrangement and which are engaged in fishing operations for the relevant stocks. They shall take measures consistent with this Agreement and international law to deter activities of such vessels which undermine the effectiveness of subregional or regional conservation and management measures.

PART V
DUTIES OF THE FLAG STATE

Article 18
Duties of the flag State

1. A State whose vessels fish on the high seas shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures.

2. A State shall authorize the use of vessels flying its flag for fishing on the high seas only where it is able to exercise effectively its responsibilities in respect of such vessels under the Convention and this Agreement.

3. Measures to be taken by a State in respect of vessels flying its flag shall include:
   (a) control of such vessels on the high seas by means of fishing licenses, authorizations or permits, in accordance with any applicable procedures agreed at the subregional, regional or global level;
   (b) establishment of regulations:
      (i) to apply terms and conditions to the license, authorization or permit sufficient to fulfil any subregional, regional or global obligations of the flag State;
      (ii) to prohibit fishing on the high seas by vessels which are not duly licensed or authorized to fish, or fishing on the high seas by vessels otherwise than

in accordance with the terms and conditions of a licence, authorization or permit;

(iii) to require vessels fishing on the high seas to carry the license, authorization or permit on board at all times and to produce it on demand for inspection by a duly authorized person; and

(iv) to ensure that vessels flying its flag do not conduct unauthorized fishing within areas under the national jurisdiction of other States;

(c) establishment of a national record of fishing vessels authorized to fish on the high seas and provision of access to the information contained in that record on request by directly interested States, taking into account any national laws of the flag State regarding the release of such information;

(d) requirements for marking of fishing vessels and fishing gear for identification in accordance with uniform and internationally recognizable vessel and gear marking systems, such as the Food and Agriculture Organization of the United Nations Standard Specifications for the Marking and Identification of Fishing Vessels;

(e) requirements for recording and timely reporting of vessel position, catch of target and non-target species, fishing effort and other relevant fisheries data in accordance with subregional, regional and global standards for collection of such data;

(f) requirements for verifying the catch of target and non-target species through such means as observer programmed inspection schemes, unloading reports, supervision of transshipment and monitoring of landed catches and market statistics;

(g) monitoring, control and surveillance of such vessels, their fishing operations and related activities by, *inter alia*:

(i) the implementation of national inspection schemes and subregional and regional schemes for cooperation in enforcement pursuant to articles 21 and 22, including requirements for such vessels to permit access by duly authorized inspectors from other States;

(ii) the implementation of national observer programmes and subregional and regional observer programmed in which the flag State is a participant, including requirements for such vessels to permit access by observers from other States to carry out the functions agreed under the programmes; and the development and implementation of vessel monitoring systems, including, as appropriate, satellite transmitter systems, in accordance with any national programmes and those which have been subregionally, regionally or globally agreed among the States concerned;

(h) regulation of transshipment on the high seas to ensure that the effectiveness of conservation and management measures is not undermined; and

(i) regulation of fishing activities to ensure compliance with subregional, regional or global measures, including those aimed at minimizing catches of non-target species.

4. Where there is a subregionally, regionally or globally agreed system of monitoring, control and surveillance in effect, States shall ensure that the measures they impose on

vessels flying their flag are compatible with that system.

PART VI
COMPLIANCE AND ENFORCEMENT

Article 19
Compliance and enforcement by the flag State

1. A State shall ensure compliance by vessels flying its flag with subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks. To this end, that State shall:
   (a) enforce such measures irrespective of where violations occur;
   (b) investigate immediately and fully any alleged violation of subregional or regional conservation and management measures, which may include the physical inspection of the vessels concerned, and report promptly to the State alleging the violation and the relevant subregional or regional organization or arrangement on the progress and outcome of the investigation;
   (c) require any vessel flying its flag to give information to the investigating authority regarding vessel position, catches, fishing gear, fishing operations and related activities in the area of an alleged violation;
   (d) if satisfied that sufficient evidence is available in respect of an alleged violation, refer the case to its authorities with a view to instituting proceedings without delay in accordance with its laws and, where appropriate, detain the vessel concerned; and
   (e) ensure that, where it has been established, in accordance with its laws, a vessel has been involved in the commission of a serious violation of such measures, the vessel does not engage in fishing operations on the high seas until such time as all outstanding sanctions imposed by the flag State in respect of the violation have been complied with.
2. All investigations and judicial proceedings shall be carried out expeditiously. Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities. Measures applicable in respect of masters and other officers of fishing vessels shall include provisions which may permit, *inter alia*, refusal, withdrawal or suspension of authorizations to serve as masters or officers on such vessels.

Article 20
International cooperation in enforcement

1. States shall cooperate, either directly or through subregional or regional fisheries management organizations or arrangements, to ensure compliance with and enforcement of subregional and regional conservation and management measures for

straddling fish stocks and highly migratory fish stocks.

2. A flag State conducting an investigation of an alleged violation of conservation and management measures for straddling fish stocks or highly migratory fish stocks may request the assistance of any other State whose cooperation may be useful in the conduct of that investigation. All States shall endeavour to meet reasonable requests made by a flag State in connection with such investigations.

3. A flag State may undertake such investigations directly, in cooperation with other interested States or through the relevant subregional or regional fisheries management organization or arrangement. Information on the progress and outcome of the investigations shall be provided to all States having an interest in, or affected by, the alleged violation.

4. States shall assist each other in identifying vessels reported to have engaged in activities undermining the effectiveness of subregional, regional or global conservation and management measures.

5. States shall, to the extent permitted by national laws and regulations, establish arrangements for making available to prosecuting authorities in other States evidence relating to alleged violations of such measures.

6. Where there are reasonable grounds for believing that a vessel on the high seas has been engaged in unauthorized fishing within an area under the jurisdiction of a coastal State, the flag State of that vessel, at the request of the coastal State concerned, shall immediately and fully investigate the matter. The flag State shall cooperate with the coastal State in taking appropriate enforcement action in such cases and may authorize the relevant authorities of the coastal State to board and inspect the vessel on the high seas. This paragraph is without prejudice to article 111 of the Convention.

7. States Parties which are members of a subregional or regional fisheries management organization or participants in a subregional or regional fisheries management arrangement may take action in accordance with international law, including through recourse to subregional or regional procedures established for this purpose, to deter vessels which have engaged in activities which undermine the effectiveness of or otherwise violate the conservation and management measures established by that organization or arrangement from fishing on the high seas in the subregion or region until such time as appropriate action is taken by the flag State.

Article 21
Subregional and regional cooperation in enforcement

1. In any high seas area covered by a subregional or regional fisheries management organization or arrangement, a State Party which is a member of such organization or a participant in such arrangement may, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such State Party is also a member of the organization or a participant in the arrangement, for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement.

2. States shall establish, through subregional or regional fisheries management organizations or arrangements, procedures for boarding and inspection pursuant to paragraph 1, as well as procedures to implement other provisions of this article. Such procedures shall be consistent with this article and the basic procedures set out in article 22 and shall not discriminate against non-members of the organization or non-participants in the arrangement. Boarding and inspection as well as any subsequent enforcement action shall be conducted in accordance with such procedures. States shall give due publicity to procedures established pursuant to this paragraph.
3. If, within two years of the adoption of this Agreement, any organization or arrangement has not established such procedures, boarding and inspection pursuant to paragraph 1, as well as any subsequent enforcement action, shall, pending the establishment of such procedures, be conducted in accordance with this article and the basic procedures set out in article 22.
4. Prior to taking action under this article, inspecting States shall, either directly or through the relevant subregional or regional fisheries management organization or arrangement, inform all States whose vessels fish on the high seas in the subregion or region of the form of identification issued to their duly authorized inspectors. The vessels used for boarding and inspection shall be clearly marked and identifiable as being on government service. At the time of becoming a Party to this Agreement, a State shall designate an appropriate - authority to receive notifications pursuant to this article and shall give due publicity of such designation through the relevant subregional or regional fisheries management organization or arrangement.
5. Where, following a boarding and inspection, there are clear grounds for believing that a vessel has engaged in any activity contrary to the conservation and management measures referred to in paragraph 1, the inspecting State shall, where appropriate, secure evidence and shall promptly notify the flag State of the alleged violation.
6. The flag State shall respond to the notification referred to in paragraph 5 within three working days of its receipt, or such other period as may be prescribed in procedures established in accordance with paragraph 2, and shall either:
   (a) fulfil, without delay, its obligations under article 19 to investigate and, if evidence so warrants, take enforcement action with respect to the vessel, in which case it shall promptly inform the inspecting State of the results of the investigation and of any enforcement action taken; or
   (b) authorize the inspecting State to investigate.
7. Where the flag State authorizes the inspecting State to investigate an alleged violation, the inspecting State shall, without delay, communicate the results of that investigation to the flag State. The flag State shall, if evidence so warrants, fulfil its obligations to take enforcement action with respect to the vessel. Alternatively, the flag State may authorize the inspecting State to take such enforcement action as the flag State may specify with respect to the vessel, consistent with the rights and obligations of the flag State under this Agreement.
8. Where, following boarding and inspection, there are clear grounds for believing that a vessel has committed a serious violation, and the flag State has either failed to respond or failed to take action as required under paragraphs 6 or 7, the inspectors

may remain on board and secure evidence and may require the master to assist in further investigation including, where appropriate, by bringing the vessel without delay to the nearest appropriate port, or to such other port as may be specified in procedures established in accordance with paragraph 2. The inspecting State shall immediately inform the flag State of the name of the port to which the vessel is to proceed. The inspecting State and the flag State and, as appropriate, the port State shall take all necessary steps to ensure the well-being of the crew regardless of their nationality.

9. The inspecting State shall inform the flag State and the relevant organization or the participants in the relevant arrangement of the results of any further investigation.

10. The inspecting State shall require its inspectors to observe generally accepted international regulations, procedures and practices relating to the safety of the vessel and the crew, minimize interference with fishing operations and, to the extent practicable, avoid action which would adversely affect the quality of the catch on board. The inspecting State shall ensure that boarding and inspection is not conducted in a manner that would constitute harassment of any fishing vessel.

11. For the purposes of this article, a serious violation means:
    (a) fishing without a valid license, authorization or permit issued by the flag State in accordance with article 18, paragraph 3 (a);
    (b) failing to maintain accurate records of catch and catch-related data, as required by the relevant subregional or regional fisheries management organization or arrangement, or serious misreporting of catch, contrary to the catch reporting requirements of such organization or arrangement;
    (c) fishing in a closed area, fishing during a closed season or fishing without, or after attainment of, a quota established by the relevant subregional or regional fisheries management organization or arrangement;
    (d) directed fishing for a stock which is subject to a moratorium or for which fishing is prohibited;
    (e) using prohibited fishing gear;
    (f) falsifying or concealing the markings, identity or registration of a fishing vessel;
    (g) concealing, tampering with or disposing of evidence relating to an investigation;
    (h) multiple violations which together constitute a serious disregard of conservation and management measures; or
    (i) such other violations as may be specified in procedures established by the relevant subregional or regional fisheries management organization or arrangement.

12. Notwithstanding the other provisions of this article, the flag State may, at any time, take action to fulfil its obligations under article 19 with respect to an alleged violation. Where the vessel is under the direction of the inspecting State, the inspecting State shall, at the request of the flag State, release the vessel to the flag State along with full information on the progress and outcome of its investigation.

13. This article is without prejudice to the right of the flag State to take any measures, including proceedings to impose penalties, according to its laws.

14. This article applies *mutatis mutandis* to boarding and inspection by a State Party

which is a member of a subregional or regional fisheries management organization or a participant in a subregional or regional fisheries management arrangement and which has clear grounds for believing that a fishing vessel ~ flying the flag of another State Party has engaged in any activity contrary to relevant conservation and management measures referred to in paragraph 1 in the high seas area covered by such organization or arrangement, and such vessel has subsequently, during the same fishing trip, entered into an area under the national jurisdiction of the inspecting State.

15. Where a subregional or regional fisheries management organization or arrangement has established an alternative mechanism which effectively discharges the obligation under this Agreement of its members or participants to ensure compliance with the conservation and management measures established by the organization or arrangement, members of such organization or participants in such arrangement may agree to limit the application of paragraph 1 as between themselves in respect of the conservation and management measures which have been established in the relevant high seas area.

16. Action taken by States other than the flag State in respect of vessels having engaged in activities contrary to subregional or regional conservation and management measures shall be proportionate to the seriousness of the violation.

17. Where there are reasonable grounds for suspecting that a fishing vessel on the high seas is without nationality, a State may board and inspect the vessel. Where evidence so warrants, the State may take such action as may be appropriate in accordance with international law.

18. States shall be liable for damage or loss attributable to them arising from action taken pursuant to this article when such action is unlawful or exceeds that reasonably required in the light of available information to implement the provisions of this article.

Article 22
Basic Procedures for boarding and inspection pursuant to article 21

The inspecting State shall ensure that its duly authorized inspectors:

(a) present credentials to the master of the vessel and produce a copy of the text of the relevant conservation and management measures or rules and regulations in force in the high seas area in question pursuant to those measures;
(b) initiate notice to the flag State at the time of the boarding and inspection;
(c) do not interfere with the master's ability to communicate with the authorities of the flag State during the boarding and inspection;
(d) provide a copy of a report on the boarding and inspection to the master and to the authorities of the flag State, noting therein any objection or statement which the master wishes to have included in the report;
(e) promptly leave the vessel following completion of the inspection if they find no evidence of a serious violation; and
(f) avoid the use of force except when and to the degree necessary to ensure the

safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

2. The duly authorized inspectors of an inspecting State shall have the authority to inspect the vessel, its license, gear, equipment, records, facilities, fish and fish products and any relevant documents necessary to verify compliance with the relevant conservation and management measures.

3. The flag State shall ensure that vessel masters:
   (a) accept and facilitate prompt and safe boarding by the inspectors;
   (b) cooperate with and assist in the inspection of the vessel conducted pursuant to these procedures;
   (c) do not obstruct, intimidate or interfere with the inspectors in the performance of their duties;
   (d) allow the inspectors to communicate with the authorities of the flag State and the inspecting State during the boarding and inspection;
   (e) provide reasonable facilities, including, where appropriate, food and accommodation, to the inspectors; and
   (f) facilitate safe disembarkation by the inspectors.

4. In the event that the master of a vessel refuses to accept boarding and inspection in accordance with this article and article 21, the flag State shall, except in circumstances where, in accordance with generally accepted international regulations, procedures and practices relating to safety at sea, it is necessary to delay the boarding and inspection, direct the master of the vessel to submit immediately to boarding and inspection and, if the master does not comply with such direction, shall suspend the vessel's authorization to fish and order the vessel to return immediately to port. The flag State shall advise the inspecting State of the action it has taken when the circumstances referred to in this paragraph arise.

Article 23
Measures taken by a Port State

1. A port State has the right and the duty to take measures, in accordance - with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.

2. A port State may, *inter alia*, inspect documents, fishing gear and catch on board fishing vessels, when such vessels are voluntarily in its ports or at its offshore terminals.

3. States may adopt regulations empowering the relevant national authorities 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.

4. Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

PART VII
REQUIREMENTS OF DEVELOPING STATES

Article 24
Recognition of the special requirements of developing States

1. States shall give full recognition to the special requirements of developing States in relation to conservation and management of straddling fish stocks and highly migratory fish stocks and development of fisheries for such stocks. To this end, States shall, either directly or through the United Nations Development Programme, the Food and Agriculture Organization of the United Nations and other specialized agencies, the Global Environment Facility, the Commission on Sustainable Development and other appropriate international and regional organizations and bodies, provide assistance to developing States.
2. In giving effect to the duty to cooperate in the establishment of conservation and management measures for straddling fish stocks and highly migratory fish stocks, States shall take into account the special requirements of developing States, in particular:
   (a) the vulnerability of developing States which are dependent on the exploitation of living marine resources, including for meeting the nutritional requirements of their populations or parts thereof;
   (b) the need to avoid adverse impacts on, and ensure access to fisheries by, subsistence, small-scale and artisanal fishers and women fishworkers, as well as indigenous people in developing States, particularly small island developing States; and
   (c) the need to ensure that such measures do not result in transferring, directly or indirectly, a disproportionate burden of conservation action onto developing States.

Article 25
Forms of cooperation with developing States

1. States shall cooperate, either directly or through subregional, regional or global organizations:
   (a) to enhance the ability of developing States, in particular the least-developed among them and small island developing States, to conserve and manage straddling fish stocks and highly migratory fish stocks and to develop their own fisheries for such stocks;
   (b) to assist developing States, in particular the least-developed among them and small island developing States, to enable them to participate in high seas fisheries for such stocks, including facilitating access to such fisheries subject to articles 5 and 11; and
   (c) to facilitate the participation of developing States in subregional and regional

fisheries management organizations and arrangements.

2. Cooperation with developing States for the purposes set out in this article shall include the provision of financial assistance, assistance relating to human resources development, technical assistance, transfer of technology, including through joint venture arrangements, and advisory and consultative services.

3. Such assistance shall, *inter alia*, be directed specifically towards:
   (a) improved conservation and management of straddling fish stocks and highly migratory fish stocks through collection, reporting, verification, exchange and analysis of fisheries data and related information;
   (b) stock assessment and scientific research; and
   (c) monitoring, control, surveillance, compliance and enforcement, including training and capacity-building at the local level, development and funding of national and regional observer programmes and access to technology and equipment.

Article 26
Special assistance in the implementation of this Agreement

1. States shall cooperate to establish special funds to assist developing States in the implementation of this Agreement, including assisting developing States to meet the costs involved in any proceedings for the settlement of disputes to which they may be parties.

2. States and international organizations should assist developing States in establishing new subregional or regional fisheries management organizations or arrangements, or in strengthening existing organizations or arrangements, for the conservation and management of straddling fish stocks and highly migratory fish stocks.

PART VIII
PEACEFUL SETTLEMENT OF DISPUTES

Article 27
Obligation to settle disputes by Peaceful means

States have the obligation to settle their disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Article 28
Prevention of disputes

States shall cooperate in order to prevent disputes. To this end, States shall agree on efficient and expeditious decision-making procedures within subregional and regional fisheries management organizations and arrangements and shall strengthen existing decision-making procedures as necessary.

Article 29
Disputes of a technical nature

Where a dispute concerns a matter of a technical nature, the States concerned may refer the dispute to an ad hoc expert panel established by them. The panel shall confer with the States concerned and shall endeavour to resolve the dispute expeditiously without recourse to binding procedures for the settlement of disputes.

Article 30
Procedures for the settlement of disputes

1. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement concerning the interpretation or application of this Agreement, whether or not they are also Parties to the Convention.

2. The provisions relating to the settlement of disputes set out in Part XV of the Convention apply *mutatis mutandis* to any dispute between States Parties to this Agreement 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 the Convention.
3. Any procedure accepted by a State Party to this Agreement and the Convention pursuant to article 287 of the Convention shall apply to the settlement of disputes under this Part, unless that State Party, when signing, ratifying or acceding to this Agreement, or at any time thereafter, has accepted another procedure pursuant to article 287 for the settlement of disputes under this Part.
4. A State Party to this Agreement which is not a Party to the Convention, when signing, ratifying or acceding to this Agreement, or at any time thereafter, shall be free to choose, by means of a written declaration, one or more of the means set out in article 287, paragraph 1, of the Convention for the settlement of disputes under this Part. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is a party which is not covered by a declaration in force. For the purposes of conciliation and arbitration in accordance with Annexes V, VII and VIII to the Convention, such State shall be entitled to nominate conciliators, arbitrators and experts to be included in the lists referred to in Annex V, article 2, Annex VII, article 2, and Annex VIII, article 2, for the settlement of disputes under this Part.
5. Any court or tribunal to which a dispute has been submitted under this Part shall apply the relevant provisions of the Convention, of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living marine resources and other rules of international law not incompatible with the Convention, with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish

stocks concerned.

Article 31
Provisional measures

1. Pending the settlement of a dispute in accordance with this Part, the parties to the dispute shall make every effort to enter into provisional arrangements of a practical nature.
2. Without prejudice to article 290 of the Convention, the court or tribunal to which the dispute has been submitted under this Part may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent damage to the stocks in question, as well as in the circumstances referred to in article 7, paragraph 5, and article 16, paragraph 2.
3. A State Party to this Agreement which is not a Party to the Convention may declare that, notwithstanding article 290, paragraph 5, of the Convention, the International Tribunal for the Law of the Sea shall not be entitled to prescribe, modify or revoke provisional measures without the agreement of such State.

Article 32
Limitations on applicability of Procedures for the settlement of disputes

Article 297, paragraph 3, of the Convention applies also to this Agreement.

PART IX
NON-PARTIES TO THIS AGREEMENT

Article 33
Non-parties to this Agreement

1. States Parties shall encourage non-parties to this Agreement to become parties thereto and to adopt laws and regulations consistent with its provisions.
2. States Parties shall take measures consistent with this Agreement and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this Agreement.

PART X
GOOD FAITH AND ABUSE OF RIGHTS

Article 34

Good faith and abuse of rights

States Parties shall fulfil in good faith the obligations assumed under this Agreement and shall exercise the rights recognized in this Agreement in a manner which would not constitute an abuse of right.

Part XI
RESPONSIBILITY AND LIABILITY

Article 35
Responsibility and liability

States Parties are liable in accordance with international law for damage or loss attributable to them in regard to this Agreement.

PART XII
REVIEW CONFERENCE

Article 36
Review conference

1. Four years after the date of entry into force of this Agreement, the Secretary-General of the United Nations shall convene a conference with a view to assessing the effectiveness of this Agreement in securing the conservation and management of straddling fish stocks and highly migratory fish stocks. The Secretary-General shall invite to the conference all States Parties and those States and entities which are entitled to become parties to this Agreement as well as those intergovernmental and non-governmental organizations entitled to participate as observers.
2. The conference shall review and assess the adequacy of the provisions of this Agreement and, if necessary, propose means of strengthening the substance and methods of implementation of those provisions in order better to address any continuing problems in the conservation and management of straddling fish stocks and highly migratory fish stocks.

PART XIII
FINAL PROVISIONS

Article 37
Signature

This Agreement shall be open for signature by all States and the other entities referred

to in article 1, paragraph 2(b), and shall remain open for signature at United Nations Headquarters for twelve months from the fourth of December 1995.

Article 38
Ratification

This Agreement is subject to ratification by States and the other entities referred to in article 1, paragraph 2(b). The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 39
Accession

This Agreement shall remain open for accession by States and the other entities referred to in article 1, paragraph 2(b). The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 40
Entry into force

1. This Agreement shall enter into force 30 days after the date of deposit of the thirtieth instrument of ratification or accession.
2. For each State or entity which ratifies the Agreement or accedes thereto after the deposit of the thirtieth instrument of ratification or accession, this Agreement shall enter into force on the thirtieth day following the deposit of its instrument of ratification or accession.

Article 41
Provisional application

1. This Agreement shall be applied provisionally by a State or entity which consents to its provisional application by so notifying the depositary in writing. Such provisional application shall become effective from the date of receipt of the notification.
2. Provisional application by a State or entity shall terminate upon the entry into force of this Agreement for that State or entity or upon notification by that State or entity to the depositary in writing of its intention to terminate provisional application.

Article 42
Reservations and exceptions

No reservations or exceptions may be made to this Agreement.

Article 43
Declarations and statements

Article 42 does not preclude a State or entity, when signing, ratifying or acceding to this Agreement, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws and regulations with the provisions of this Agreement, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Agreement in their application to that State or entity.

Article 44
Relation to other agreements

1. This Agreement shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Agreement and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Agreement.
2. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Agreement, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Agreement, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Agreement.
3. States Parties intending to conclude an agreement referred to in paragraph 2 shall notify the other States Parties through the depositary of this Agreement of their intention to conclude the agreement and of the modification or suspension for which it provides.

Article 45
Amendment

1. A State Party may, by written communication addressed to the Secretary-General of the United Nations, propose amendments to this Agreement and request the convening of a conference to consider such proposed amendments. The Secretary-General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Secretary-General shall convene the conference.
2. The decision-making procedure applicable at the amendment conference convened pursuant to paragraph 1 shall be the same as that applicable at the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, unless otherwise decided by the conference. The conference should make every effort to reach agreement on any amendments by way of consensus and there should be no voting on them until all efforts at consensus have been exhausted.
3. Once adopted, amendments to this Agreement shall be open for signature at United Nations Headquarters by States Parties for twelve months from the date of adoption,

unless otherwise provided in the amendment itself.

4. Articles 38, 39, 47 and 50 apply to all amendments to this Agreement.

5. Amendments to this Agreement shall enter into force for the States Parties ratifying or acceding to them on the thirtieth day following the deposit of instruments of ratification or accession by two thirds of the States Parties. Thereafter, for each State Party ratifying or acceding to an amendment after the deposit of the required number of such instruments, the amendment shall enter into force on the thirtieth day following the deposit of its instrument of ratification or accession.

6. An amendment may provide that a smaller or a larger number of ratifications or accessions shall be required for its entry into force than are required by this article.

7. A State which becomes a Party to this Agreement after the entry into force of amendments in accordance with paragraph 5 shall, failing an expression of a different intention by that State:
   (a) be considered as a Party to this Agreement as so amended; and
   (b) be considered as a Party to the unamended Agreement in relation to any State Party not bound by the amendment.

Article 46
Denunciation

1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, denounce this Agreement and may indicate its reasons. Failure to indicate reasons shall not affect the validity of the denunciation. The denunciation shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

2. The denunciation shall not in any way affect the duty of any State Party to fulfil any obligation embodied in this Agreement to which it would be subject under international law independently of this Agreement.

Article 47
Participation by international organizations

1. In cases where an international organization referred to in Annex IX, article 1, of the Convention does not have competence over all the matters governed by this Agreement, Annex IX to the Convention shall apply *mutatis mutandis* to participation by such international organization in this Agreement, except that the following provisions of that Annex shall not apply:
   (a) article 2, first sentence; and
   (b) article 3, paragraph 1.

2. In cases where an international organization referred to in Annex IX, article 1, of the Convention has competence over all the matters governed by this Agreement, the following provisions shall apply to participation by such international organization in this Agreement:
   (a) at the time of signature or accession, such international organization shall make a

declaration stating:

(i) that it has competence over all the matters governed by this Agreement;

(ii) that, for this reason, its member States shall not become States Parties, except in respect of their territories for which the international organization has no responsibility; and

(iii) that it accepts the rights and obligations of States under this Agreement;

(b) participation of such an international organization shall in no case confer any rights under this Agreement on member States of the international organization;

(c) in the event of a conflict between the obligations of an international organization under this Agreement and its obligations under the agreement establishing the international organization or any acts relating to it, the obligations under this Agreement shall prevail.

Article 48
Annexes

1. The Annexes form an integral part of this Agreement and, unless expressly provided otherwise, a reference to this Agreement or to one of its Parts includes a reference to the Annexes relating thereto.

2. The Annexes may be revised from time to time by States Parties. Such revisions shall be based on scientific and technical considerations. Notwithstanding the provisions of article 45, if a revision to an Annex is adopted by consensus at a meeting of States Parties, it shall be incorporated in this Agreement and Shall take effect from the date of its adoption or from such other date as may be specified in the revision. If a revision to an Annex is not adopted by consensus at such a meeting, the amendment procedures set out in article 45 shall apply.

Article 49
Depositary

The Secretary-General of the United Nations shall be the depositary of this Agreement and any amendments or revisions thereto.

Article 50
Authentic texts

The Arabic, Chinese, English, French, Russian and Spanish texts of this Agreement are equally authentic.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorized thereto, have signed this Agreement.

OPENED FOR SIGNATURE at New York, this fourth day of December, one thousand nine hundred and ninety-five, in a single original, in the Arabic, Chinese, English, French, Russian and Spanish languages.

ANNEX I
STANDARD REQUIREMENTS FOR THE COLLECTION AND SHARING OF DATA

Article 1
General Principles

1. The timely collection, compilation and analysis of data are fundamental to the effective conservation and management of straddling fish stocks and highly migratory fish stocks. To this end, data from fisheries for these stocks on the high seas and those in areas under national jurisdiction are required and should be collected and compiled in such a way as to enable statistically meaningful analysis for the purposes of fishery resource conservation and management. These data include catch and fishing effort statistics and other fishery-related information, such as vessel-related and other data for standardizing fishing effort. Data collected should also include information on non-target and associated or dependent species. All data should be verified to ensure accuracy. Confidentiality of non-aggregated data shall be maintained. The dissemination of such data shall be subject to the terms on which they have been provided.
2. Assistance, including training as well as financial and technical assistance, shall be provided to developing States in order to build capacity in the field of conservation and management of living marine resources. Assistance should focus on enhancing capacity to implement data collection and verification, observer programmes, data analysis and research projects supporting stock assessments. The fullest possible involvement of developing State scientists and managers in conservation and management of straddling fish stocks and highly migratory fish stocks should be promoted.

Article 2
Principles of data collection, compilation and exchange

The following general principles should be considered in defining the parameters for collection, compilation and exchange of data from fishing operations for straddling fish stocks and highly migratory fish stocks:

(a) States should ensure that data are collected from vessels flying their flag on fishing activities according to the operational characteristics of each fishing method (e.g., each individual tow for trawl, each set for long-line and purse-seine, each school fished for pole-and-line and each day fished for troll) and in sufficient detail to facilitate effective stock assessment;
(b) States should ensure that fishery data are verified through an appropriate system;
(c) States should compile fishery-related and other supporting scientific data and

provide them in an agreed format and in a timely manner to the relevant subregional or regional fisheries management organization or arrangement where one exists. Otherwise, States should cooperate to exchange data either directly or through such other cooperative mechanisms as may be agreed among them;

(d) States should agree, within the framework of subregional or regional fisheries management organizations or arrangements, or otherwise, on the specification of data and the format in which they are to be provided, in accordance with this Annex and taking into account the nature of the stocks and the fisheries for those stocks in the region. Such organizations or arrangements should request non-members or non-participants to provide data concerning relevant fishing activities by vessels flying their flag;

(e) such organizations or arrangements shall compile data and make them available in a timely manner and in an agreed format to all interested States under the terms and conditions established by the organization or arrangement; and

(f) scientists of the flag State and from the relevant subregional or regional fisheries management organization or arrangement should analyze the data separately or jointly, as appropriate.

Article 3
Basic fishery data

1. States shall collect and make available to the relevant subregional or regional fisheries management organization or arrangement the following types of data in sufficient detail to facilitate effective stock assessment in accordance with agreed procedures:

(a) time series of catch and effort statistics by fishery and fleet;

(b) total catch in number, nominal weight, or both, by species (both target and non-target) as is appropriate to each fishery. [Nominal weight is defined by the Food and Agriculture Organization of the United Nations as the live-weight equivalent of the landings];

(c) discard statistics, including estimates where necessary, reported as number or nominal weight by species, as is appropriate to each fishery;

(d) effort statistics appropriate to each fishing method; and

(e) fishing location, date and time fished and other statistics on fishing operations as appropriate.

2. States shall also collect where appropriate and provide to the relevant subregional or regional fisheries management organization or arrangement information to support stock assessment, including:

(a) composition of the catch according to length, weight and sex;

(b) other biological information supporting stock assessments, such as information on age, growth, recruitment, distribution and stock identity; and

(c) other relevant research, including surveys of abundance, biomass surveys, hydro-acoustic surveys, research on environmental factors affecting stock abundance, and oceanographic and ecological studies.

Article 4
Vessel data and information

1. States should collect the following types of vessel-related data for standardizing fleet composition and vessel fishing power and for converting between different measures of effort in the analysis of catch and effort data:
   (a) vessel identification, flag and port of registry;
   (b) vessel type;
   (c) vessel specifications (e.g., material of construction, date built, registered length, gross registered tonnage, power of main engines, hold capacity and catch storage methods); and
   (d) fishing gear description (e.g., types, gear specifications and quantity).
2. The flag State will collect the following information:
   (a) navigation and position fixing aids;
   (b) communication equipment and international radio call sign; and
   (c) crew size.

Article 5
Reporting

A State shall ensure that vessels flying its flag send to its national fisheries administration and, where agreed, to the relevant subregional or regional fisheries management organization or arrangement, logbook data on catch and effort, including data on fishing operations on the high seas, at sufficiently frequent intervals to meet national requirements and regional and international obligations. Such data shall be transmitted, where necessary, by radio, telex, facsimile or satellite transmission or by other means.

Article 6
Data verification

States or, as appropriate, subregional or regional fisheries management organizations or arrangements should establish mechanisms for verifying fishery data, such as:
(a) position verification through vessel monitoring systems;
(b) scientific observer programmes to monitor catch, effort, catch composition (target and non-target) and other details of fishing operations;
(c) vessel trip, landing and transshipment reports; and
(d) port sampling.

Article 7
Data exchange

1. Data collected by flag States must be shared with other flag States and relevant coastal States through appropriate subregional or regional fisheries management

organizations or arrangements. Such organizations or arrangements shall compile data and make them available in a timely manner and in an agreed format to all interested States under the terms and conditions established by the organization or arrangement, while maintaining confidentiality of non-aggregated data, and should, to the extent feasible, develop database systems which provide efficient access to data.

2. At the global level, collection and dissemination of data should be effected through the Food and Agriculture Organization of the United Nations. Where a subregional or regional fisheries management organization or arrangement does not exist, that organization may also do the same at the subregional or - regional level by arrangement with the States concerned.

ANNEX II
GUIDELINES FOR THE APPLICATION OF PRECAUTIONARY REFERENCE POINTS IN CONSERVATION AND MANAGEMENT OF STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS

1. A precautionary reference point is an estimated value derived through an agreed scientific procedure, which corresponds to the state of the resource and of the fishery, and which can be used as a guide for fisheries management.
2. Two types of precautionary reference points should be used: conservation, or limit, reference points and management, or target, reference points. Limit reference points set boundaries which are intended to constrain harvesting within safe biological limits within which the stocks can produce maximum sustainable yield. Target reference points are intended to meet management objectives.
3. Precautionary reference points should be stock-specific to account, *inter alia*, for the reproductive capacity, the resilience of each stock and the characteristics of fisheries exploiting the stock, as well as other sources of mortality and major sources of uncertainty.
4. Management strategies shall seek to maintain or restore populations of harvested stocks, and where necessary associated or dependent species, at levels consistent with previously agreed precautionary reference points. Such reference points shall be used to trigger pre-agreed conservation and management action. Management strategies shall include measures which can be implemented when precautionary reference points are approached.
5. Fishery management strategies shall ensure that the risk of exceeding limit reference points is very low. If a stock falls below a limit reference point or is at risk of falling below such a reference point, conservation and management action should be initiated to facilitate stock recovery. Fishery management strategies shall ensure that target reference points are not exceeded on
6. When information for determining reference points for a fishery is poor or absent, provisional reference points shall be set. Provisional reference points may be established by analogy to similar and better-known stocks. In such situations, the

fishery shall be subject to enhanced monitoring so as to enable revision of provisional reference points as improved information becomes available.

7. The fishing mortality rate which generates maximum sustainable yield should be regarded as a minimum standard for limit reference points. For stocks which are not overfished, fishery management strategies shall ensure that fishing mortality does not exceed that which corresponds to maximum sustainable yield, and that the biomass does not fall below a predefined threshold. For overfished stocks, the biomass which would produce maximum sustainable yield can serve as a rebuilding target.

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