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The Turbot War : The Arrest of Spanish Vessel *Estai* and its Implications for Canada-^{the}EU Relations

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The Turbot War:
The Arrest of the Spanish Vessel *Estai*
and its Implications for Canada-EU Relations.

by

Adam Gough

Thesis submitted to the
Faculty of Graduate and Postdoctoral Studies
In partial fulfillment of the requirements
For the MA degree in History

Department of History
Faculty of Graduate and Postdoctoral Studies
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Abstract:

On March 9, 1995, Canadian officials on fisheries patrol vessels fired warning shots, then boarded and seized the Spanish trawler *Estai*. Fishing on the Nose of the Grand Banks, but beyond Canada's 200-mile fishing zone, the *Estai* had been using an illegal net and had resisted previous boarding attempts. The European Union (EU) strongly objected to what it cast as a violation of international law. The objective of this thesis is to provide a comprehensive analysis of the *Estai* incident and its implications for Canadian fisheries policy and Canada's relations with the EU.

The *Estai* seizure and subsequent "Turbot War" formed an important chapter in Canada's diplomatic history, arousing national feeling while souring relations with the EU, at least in the short term. However, this action against foreign overfishing helped bring about much needed changes regarding international fish conservation. Agreements came into place with the EU and other NAFO members allowing for full observer coverage on vessels and other improvements. As well, the Turbot War fostered the emergence of the new United Nations Fisheries Agreement dealing with conservation, pollution reduction, and the right of member states to inspect another country's vessels to ensure compliance with internationally-agreed rules of regional fishing. Even so, problems resurfaced in the workings of NAFO, and fish stocks have seen only limited recovery.

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List of Acronyms:

CCG: Canadian Coast Guard

CFPA: *Coastal Fisheries Protection Act*

DFO: Department of Fisheries and Oceans

DWFN: Distant-water Fishing Nation

EEZ: Exclusive Economic Zone

EU: European Union

FFT: factory freezer trawler

ICNAF: International Convention for the Northwest Atlantic Fisheries

LTA: Long-term Agreement

MSY: Maximum Sustainable Yield

NAFO: Northwest Atlantic Fisheries Organization

OSY: Optimum Sustainable Yield

TAC: Total Allowable Catch

UNCLOS: United Nations Conference on the Law of the Sea

UNFA: United Nations Fish Agreement

Glossary:

(The following terms are reprinted with permission from *Fisheries Science and Management: a Handbook for Canadian Fish Harvesters*, published by the Canadian Council of Professional Fish Harvesters, Ottawa, 2008.)

Allocation: The amount or share of the fisheries resource assigned by the Minister of Fisheries and Oceans to those permitted to harvest the resource.

Anadromous: "Anadromous" species such as salmon spawn in fresh water but spend part of their lives in the ocean.

$F_{0.1}$ (pronounced "F. Oh. Point. One."): For many groundfish and pelagic and some shellfish stocks, Canada bases the TACs on a target fishing mortality target called " $F_{0.1}$." The aim of managing at $F_{0.1}$ is to assist both conservation and profitable fishing. It serves as an approximation of Optimum Sustainable Yield (OSY). Mathematically derived, it often works out for groundfish stocks to catching roughly two fish of every ten each year. It is somewhat similar to fishing at $2/3 F_{MSY}$.

F_{MAX} : The fishing mortality rate that would give the maximum yield-per-recruit from a particular stock. In theory, this would give the maximum catch year after year.

F_{MSY} : The fishing mortality rate that would, in theory, give the Maximum Sustainable Yield (MSY) from a particular stock year after year. F_{MAX} and F_{MSY} are similar ideas.

Maximum Sustainable Yield (MSY): The greatest sustainable yield for a particular stock. In theory, this catch will be sustainable year after year.

Observer coverage: Placing of trained observers, under contract, aboard domestic or foreign vessels to gather fishery information.

Optimum Sustainable Yield: The best sustainable yield for the combined purposes of the fishing industry, of conservation, and of the nation as a whole. It has no hard and fast definition. In Canada, the yield when fishing at $F_{0.1}$ is often used as a practical replacement for OSY.

Overfishing: Generally, this means catching so much fish that it reduces the stock's biomass and future catches below desirable levels. In an overfishing situation, fishermen would have better catch rates over the longer term by cutting back on fishing. Can mean yield (or growth) overfishing (fishing hard enough to reduce yield; fishing less would let the fishermen catch more); recruitment overfishing (pushing the spawning stock biomass down so far that hardly any little ones recruit to the fishable stock); economic overfishing (high fishing effort cutting profits below what they could be); or overrunning quotas or other conservation regulations.

Stock: A population of fish of one species found in a particular area, which is used as a basic unit for fisheries management. All of the fish in a stock should share similar growth and migration patterns.

Total Allowable Catch (TAC): The total amount of fish allowed to be caught from a particular stock by all resource users over a particular period of time.

Vessel Monitoring System: A common term for an electronic automatic location and communication device. It is placed aboard a fishing vessel and used to manage certain fisheries by monitoring time, date, vessel position, and vessel identification number in real time through satellites. Also known as a Black Box.

Introduction

On March 9, 1995, officials of the Department of Fisheries and Oceans and Royal Canadian Mounted Police fired warning shots from the fishery patrol vessel *Cape Roger*, then boarded and seized the Spanish trawler *Estai*. Fishing on the Nose of the Grand Banks, but beyond Canada's 200-mile fishing zone, the *Estai* had been using an illegal net in the turbot fishery, and had resisted previous boarding attempts. The European Union (EU)¹ strongly objected to the arrest, calling it a violation of international law. The ensuing "Turbot War" galvanized the Canadian nation, created world headlines, temporarily chilled relations with European countries, and helped change international fisheries law.

The conflict combined rivalry for fish and concern for conservation with feelings of national honour. Proud Spaniards played up their centuries-old history of fishing the Grand Banks, even though that fishery had often been insignificant.² Meanwhile, as is sometimes forgotten, Canada itself held a deep historical connection with the fishery. The commercial sea fishery exploited first by European and then by Canadian fleets was a keystone of commerce and a central element in early expressions of national sovereignty, such as the 1871 Treaty of Washington. Emotions over the fishery, particularly strong in Newfoundland and the Maritimes, coalesced with national pride and the energy and assertiveness of a rising young minister, Brian Tobin, to make the *Estai* conflict a landmark event in the Canadian mentality.

¹ For the purposes of this paper, the term European Union (EU) will be used in all cases, even for events preceding the 1993 Treaty of Maastricht that formally established the European Union in place of the European Community.

² Harold Innis, *The Cod Fisheries: The History of an International Economy*, New Haven, Conn.: Yale University Press, 1940, 92-93.

Following the Second World War, factory freezer trawlers from European nations increased fishing pressure off North America. The post-war formation of the International Convention on the Northwest Atlantic Fisheries (ICNAF) represented an ambitious attempt at international management of the fisheries. But ICNAF never took sufficient control of fishing effort to ensure conservation. Plunging fish stocks and the presence of huge fleets of European trawlers close to shore fuelled public demands that Canada declare a 200-mile fisheries limit, as some South American nations had already done.

After what is generally considered a masterful diplomatic campaign, Canada in 1977 extended fisheries jurisdiction to 200 miles. Canada also led the 1979 implementation of a successor organization to ICNAF: the Northwest Atlantic Fisheries Organization (NAFO). NAFO would govern international fisheries on the Nose and Tail of the Grand Banks, in the NAFO Regulatory Area beyond the 200-mile zone.

NAFO's early years went reasonably well, with European nations – they being the main fishing power, along with Canada, in the area – accepting NAFO-recommended quotas. But in 1986, the EU admitted Spain and Portugal as members. Both were widely regarded as aggressive when it came to commercial fishing. Their impact was evident in NAFO, where the EU began objecting to NAFO's recommended fish quotas. The EU unilaterally set its own, higher quotas, and exceeded even them by as much as four-fold. The worst offenders were Spain and Portugal. Indeed, the Canadian government had long been critical of Spain's fishing practices. Already, in September 1981, Minister of Fisheries Roméo LeBlanc was criticizing the Spanish for

ignoring NAFO quotas. “There is overwhelming evidence that the Spanish . . . have grossly exceeded their allocations . . . [by] as much as ten times,” Leblanc said.³

In Canada, the Liberal Party, in opposition during the late 1980s and early 1990s, vehemently criticized foreign fishing practices and the Conservative government’s supposedly soft diplomatic approach on the fisheries conservation issue. After taking power under Jean Chrétien, the Liberals, in 1994, amended the *Coastal Fisheries Protection Act* to enable control of certain foreign activities even outside the 200-mile fishing zone. Brian Tobin, Minister of Fisheries and Oceans, took an aggressive stance towards foreign fishing, far more so than what was generally recommended by officials within the Department of Foreign Affairs and the Department of National Defence. Indeed, André Ouellet, the Minister of Foreign Affairs, and David Collenette, the Minister of National Defence, speaking for their departments, strongly opposed seizing the *Estai*.

But Tobin and his department prevailed and the seizure took place, the immediate cause being friction over turbot quotas and European fishing practices. A high-pitched public-relations war ensued, with Tobin the ultimate victor. As David Bevan, a senior official of the Department of Fisheries and Oceans (DFO), describes it, the media war between Emma Bonino, the EU Fisheries Commissioner, and Tobin was like watching a welterweight fight a heavyweight.⁴ Relations soured between Canada and the EU, at least in the short-term. However, this action against foreign overfishing helped bring about much needed changes in the enforcement of international fish conservation. Agreements came into place with the EU and other NAFO members

³ Canada. Department of Fisheries and Oceans, News Release, “Canada Protests Spanish Overfishing,” NR-HQ-081-049E, 03 September 1981.

⁴ David Bevan, personal communication, 15 November 2007.

allowing for full observer coverage and satellite tracking of fishing vessels in the NAFO Regulatory Area. As well, a new United Nations Fisheries Agreement (UNFA) dealt with conservation and pollution reduction, and gave members states the right to inspect or even bring to port other countries' vessels, to ensure compliance with internationally-agreed rules of regional fishing. The UNFA also provided for a compulsory and binding dispute-resolution system.

That being said, the fruits of NAFO's post-*Estai* arrangements and of the UNFA agreement never ripened as fully as hoped. Despite seeming improvements then and later, most, though not all, fish stocks in the NAFO Regulatory Area remain depleted. Newfoundland and Labrador in particular continues to push for "custodial management," a loosely defined means for Canada to exert more control in the NAFO Regulatory Area.

Whatever the shortfalls of subsequent management, the *Estai* affair remains a signal event in Canadian and international fisheries history. This thesis gives background information on the international context and on key events leading up to the conflict. It gives most attention to the Turbot War itself, utilizing information from interviews with key actors and other primary sources to provide a detailed description of events. Finally, it summarizes the aftermath of the Turbot War in terms of fisheries and international relations.

Though the seizure of the *Estai* and its subsequent impact on Canadian foreign relations were important, there has not been extensive study of the issue. The primary works on the issue, Raymond Blake's *From Fishermen to Fish*⁵ and Michael Harris's

⁵ Raymond B. Blake, *From Fishermen to Fish: The Evolution of Canadian Fishery Policy*, Toronto: Irwin, 2000.

Lament for an Ocean,⁶ devote only a chapter to the incident. As well, both books rely heavily on media reports from the time of the incident. In fact, Blake explicitly states that his chapter on the *Estai* is “based largely on newspaper and magazine reports at the time of the crisis.” Harris, on the other hand, does not even cite sources. Still, both books are valuable sources and provide a good background to the issue.

The *Estai* incident has also been treated in academic journals. Notably, Donald Barry’s “The Canada-European Union Turbot War: Internal Politics and Transatlantic Bargaining”⁷ and Douglas Day’s “Tending the Achilles Heel of NAFO: Canada Acts to Protect the Nose and Tail of the Grand Banks”⁸ provide balanced analysis of the issue. From a legal standpoint, Okon Akiba’s article, “International Law of the Sea: The Legality of Canadian Seizure of the Spanish Trawler (*Estai*)”⁹ provides a sound summary of the intricacies of international law that applied to the seizure.

The other published resources of particular note when studying the *Estai* case are memoirs written by those involved. Chiefly, Brian Tobin’s memoir, *All in Good Time*,¹⁰ and James Bartleman’s memoir, *Rollercoaster: My Hectic Years as Jean Chretien’s Diplomatic Advisor, 1994-1998*,¹¹ provide valuable accounts. As well, Jean

⁶ Michael Harris, *Lament for an Ocean: The Collapse of the Atlantic Cod Fishery: A True Crime Story*, Toronto: McClelland & Stewart, 1998.

⁷ Donald Barry, “The Canada-European Union Turbot War: Internal Politics and Transatlantic Bargaining,” *International Journal*, 53, 2 (1998), 253-284.

⁸ Douglas Day, “Tending the Achilles’ heel of NAFO: Canada Acts to Protect the Nose and Tail of the Grand Banks,” *Marine Policy*, 19, 4 (1995), 257-270.

⁹ Okon Akiba, “International Law of the Sea: The Legality of Canadian Seizure of the Spanish Trawler (*Estai*),” *Natural Resources Journal*, 37 (1997), 809-828.

¹⁰ Brian Tobin, *All in Good Time*, Toronto: Penguin Canada, 2002.

¹¹ James Bartleman, *Rollercoaster: My Hectic Years as Jean Chretien’s Diplomatic Advisor, 1994-1998*, Toronto: McClelland & Stewart Canada, 2005.

Chrétien's memoir, *My Years as Prime Minister*¹² provides a brief recounting of the event.

Overall, there is a lack of dedicated scholarly research into the *Estai* incident and its long-term effect on Canada-European Union relations and on fishery conservation efforts. The aim of this thesis is to provide a more detailed picture, including high-level considerations within government.

¹² Jean Chrétien, *My Years as Prime Minister*, Toronto: Random House Canada, 2007.

CHAPTER ONE: How the Europeans Became Adversaries

Spain has a long fishing history on the Grand Banks, and in the heat of the *Estai* conflict, the Spanish Minister of Agriculture and Fisheries, Luis Atienza, even declared that Spain founded St. John's.¹³ But English fleets dominated the Avalon Peninsula by the late 1500s, and in subsequent centuries, English and French fleets took the biggest share of European catches in northwest Atlantic waters. North Americans also developed their own fisheries. By the 19th century, North American fishermen took the great majority of the catch in near-shore waters and also were strong on the offshore banks, including the Grand Banks.

The riches of the Grand Banks withstood centuries of fishing, first by individual hooks and lines, and then by longlines, hundreds of hooks fastened to rope lines running along the ocean bottom. In the late 19th and the 20th century, engine-powered vessels began using “drags” or “other trawls” – open-mouthed nets pulled along the bottom.

After the Second World War, the ancient art of fishing went through a new revolution, with better boats, engines, and hydraulic machinery; stronger lines and nets made of nylon and such materials; and electronic devices including radio, radar, sonar, and navigation systems such as the Global Positioning System and its forerunners. Electronic fish-finding devices have continued to improve.

Until about 1955, only a few nations – Canada, the United States, and five or six western European countries – fished the northwest Atlantic. Exploitation of the resource was still light. But the 1950s saw more countries such as the USSR and its satellite nations joining the fishery. Many countries used factory freezer trawlers

¹³ Luis Atienza, “*Estai*’s Boarding Tantamount to Piracy,” *The Financial Times*, 28 March 1995.

(FFT)s). These large vessels could catch great amounts of fish. With powerful engines and huge nets, they could stay on the fishing banks for long periods of time, filleting fish by machines and freezing them on board. Some acted as mother ships for smaller catching vessels. Many were built for winter conditions. The FFTs with their longer season greatly increased offshore catches.¹⁴ In 1968, for example, the northwest Atlantic catch was four times greater than had previously been considered normal.

These huge hauls were generally gathered at the expense of the local fishing operations. Cod off Newfoundland mostly belonged to a few large “stocks” – populations with similar characteristics – that often supplied both offshore and inshore fisheries through overlaps and migrations. A fish caught offshore could not be caught inshore. The Canadian fleet, especially the smaller inshore and midshore classes of vessel, did not possess the same technology as the distant waters fishing nations (DWFN), and consequently could not compete.¹⁵

ICNAF and UNCLOS III

Countries involved in the northwest Atlantic fisheries in 1949-50 set up the International Commission for the Northwest Atlantic Fisheries. ICNAF concerned itself mainly with restrictions on fishing gear, such as minimum mesh sizes. This did little to

¹⁴ Bonnie J. McCay and Alan Christopher Finlayson, “The Political Ecology of Crisis and Institutional Change: The Case of the Northern cod,” Presented to the Annual Meetings of the American Anthropological Association, Washington D.C., November 15–19 1995, 3.

¹⁵ Elizabeth R. DeSombre and J. Samuel Barkin, “Turbot and Tempers in the North Atlantic,” in Richard Matthew, Mark Halle, and Jason Switzer, eds., *Conserving the Peace: Resources, Livelihoods and Security*, Co-published by the International Institute for Sustainable Development and the World Conservation Union, Winnipeg, Manitoba, Online http://www.iisd.org/pdf/2002/envsec_conserving_peace.pdf <accessed 25 March 2009>, 325-349, 332.

slow down the fishery.¹⁶ By the late 1960s, scientists and some Canadian fishermen were sounding the alarm about fishery depletion.

The main targets for foreign vessels were groundfish – cod, haddock, pollock, flounders, redfish, and other such species, including turbot, with lighter-coloured flesh that lived near the ocean bottom. Groundfish were also the main support of Canada's Atlantic fishing industry and its communities. As their catches shrank, public pressure increased for a 200-mile limit. Some South American countries had already declared a 200-mile limit, and Iceland, in its much-publicized "Cod War" with the United Kingdom in the 1970s, was moving in that direction.¹⁷

ICNAF began setting Total Allowable Catches (TACs) for major stocks – that is, for separate populations within a fish species that have distinct characteristics and habits such as migration routes. The TACs were to be set at a level that would ensure Optimum Sustainable Yield (OSY) – a safer conservationist level than Maximum Sustainable Yield (MSY).¹⁸ In the 1970s, Canada and ICNAF typically began using, as an OSY proxy for finfish such as groundfish and herring, a level of fishing known as $F_{0.1}$. This technical term, derived from biological considerations, generally meant catching about one adult fish out of five. Maintaining an $F_{0.1}$ level of effort would mean catching less fish than at the Maximum Sustainable Yield and thus would give fish

¹⁶ Government of Canada, Department of Environment, Fisheries and Marine Service, *Policy for Canada's Commercial Fisheries*, Ottawa, May 1976, 29.

¹⁷ For a treatment of the British-Icelandic Cod War see Bruce Mitchell, "Politics, Fish, and International Resource Management: The British-Icelandic Cod War," *Geographical Review*. 66, 2 (1976), 127-138.

¹⁸ Optimum Sustainable Yield is the level of effort in a fishery that will ensure the best sustainable yield for the combined purposes of the fishing industry, conservation, and of the nation. There is no hard and fast definition of OSY. In Canada, $F_{0.1}$ is generally used as an approximation of OSY. Maximum Sustainable Yield is the theoretical level of effort that yields the maximum level of catch year after year. In practice fishing at OSY (or $F_{0.1}$) means catching less fish than fishing directed at MSY (F_{MSY} or F_{MAX}) levels. Fishing at OSY is therefore a more conservationist approach to the fisheries.

stocks more opportunity to recover and even grow. Fishing at $F_{0.1}$ is the safer conservation option.

ICNAF also divided the TACs into national quotas allocated to the different member countries. Canada would further subdivide the quotas among its various fleets. ICNAF also in the 1970s began giving Canada a preferential share as a coastal state. But public pressure for extension of jurisdiction only grew as foreign vessels loomed on the horizon, often within sight of coastal communities.

The total tonnage (a measure of shipboard volume) of the northwest Atlantic fleets, excluding inshore craft, more than tripled from the late 1950s to the early 1970s (500,000 tonnes to 1,700,000 tonnes). The groundfish catch more than doubled from the early 1950s to the latter 1960s, with special pressure on cod. Then catches began dropping. For Canada, groundfish catches fell by about one-third from 1968 to 1974 – at which time, it was less than it had been in 1951. Canada's percentage share of all groundfish caught was also dropping.¹⁹

Canadian representatives from the federal fisheries department and External Affairs became active and effective negotiators. International fishery dealings fell to some degree under the umbrella of the third United Nations Conference on the Law of the Sea (UNCLOS III).²⁰ The conference, convened in 1973, ultimately produced the United Nations Convention on the Law of the Sea (UNCLOS) in 1982. UNCLOS had

¹⁹ Environment Canada, *Policy*, 29.

²⁰ There were three UNCLOS conferences. The first, in 1958 resulted in four treaties: Convention on the Territorial Sea and Contiguous Zone, Convention on the Continental Shelf, Convention on the High Seas, and Convention on Fishing and Conservation of Living Resources of the High Seas. The first UNCLOS conference left open the issue of the breadth of territorial waters. The second UNCLOS conference, in 1960, produced no new agreements. The third UNCLOS conference was convened in 1973 in New York as an attempt to deal with outstanding issues of the Law of the Sea. UNCLOS III produced the UN Convention on the Law of the Sea in 1982. The UNCLOS convention signed in 1982 entered into force in 1994 and replaced the four previous agreements from the first UNCLOS conference in 1958. Full text of all relevant conventions can be found at <http://documents.un.org>.

multiple aspects, including rules regarding seabed resources and international navigation. Canada took a leading part in many aspects of the Law of the Sea, while also pursuing related initiatives, even before UNCLOS III began.

One initiative was 1964's Territorial Sea and Fishing Zones Act, which set up a nine-mile fisheries zone outside the existing three-mile territorial sea. Then, in 1970, after an American oil tanker, the *Manhattan*, went through the Northwest Passage, Canada passed the Arctic Waters Pollution Prevention Act, which extended Canadian control of Arctic waters to a limit of 100 miles. (Meanwhile, Canada sent an icebreaker to accompany the *Manhattan* on its voyage through what Canada considered its internal waters.) Given that the previous limit had been three miles, this legislation caused considerable international consternation. Nevertheless, the Canadian government remained firm in its belief that "international law is developed by state practice, that is, by unilateral measures gradually acquiesced in and followed by other states."²¹

Then, in March 1971, Canada established fisheries "closing lines" on the Atlantic in the Bay of Fundy and the Gulf of St. Lawrence and on the Pacific around the Queen Charlotte Islands. "Closing lines" are government-defined lines that act as borders for a country's territorial waters. Vessels from other states must get permission from the home state to cross the "closing lines" and, of course, to fish within the area bounded by the "closing lines." After the promulgation of the fisheries "closing lines," Canada negotiated, by the end of 1972, phase-out agreements with all countries who were involved in the area's fishery. The agreements provided a phased reduction and ultimate elimination of fishing effort by countries such as Denmark, Spain, Portugal, the

²¹ J. Alan Beesley, former legal advisor to the Department of External Affairs as quoted in Allen L. Springer, "The Canadian Turbot War with Spain: Unilateral State Action in Defense of Environmental Interests," *The Journal of Environment Development*, 6 (1997), 26-60, 30.

United Kingdom, and Norway within the zones delimited by the “closing lines.” Canada also signed an agreement with France that gave special recognition to their historical fishing rights and the presence of the islands of St. Pierre et Miquelon. However, the Canada-France agreement would prove to be a thorn in Canada’s side when a dispute arose over interpretation of the agreement. The dispute was finally resolved in the early 1990s.²²

The extension to a 200-mile Exclusive Economic Zone (EEZ) was looming.²³ Some South American countries, such as Argentina, in 1946, Chile and Peru, in 1947, and Ecuador in 1950 had already unilaterally extended their own jurisdictions to 200 miles. As well, Iceland extended its jurisdiction in 1972 to 50 miles setting off the “Cod War” with Britain.²⁴ Still, in 1976, Canada’s announcement of an extension of jurisdiction to 200 miles was on the leading edge of change. Many countries wanted 200-mile fishing zones, though several were still opposed. In fishery negotiations, Canada successfully pushed the notion of “surplus” – that is, countries with fishery resources in their future extended zone would take what their own people needed and share the surplus with others. Indeed, Canada made agreements with key fishing countries such as Norway, the USSR, and Poland that those countries would recognize Canada’s future jurisdiction. Some also recognized Canada’s special interest in stocks

²² For a full treatment of the Canada-France agreement and the subsequent dispute see L.S. Parsons, *Management of Marine Fisheries in Canada*, Ottawa: National Research Council of Canada and Dept. of Fisheries and Oceans, 1993, 309-321. Generally, for a description of the “closing lines” see Parsons, *Management*, 232-235.

²³ In 1977 when Canada extended jurisdiction, the common terminology was “200-mile limit” or “200-mile zone, rather than “Exclusive Economic Zone,” the term favoured in many other countries. Over time, references to Canada’s Exclusive Economic Zone (or EEZ) become more common, and the Oceans Act made that the official terminology.

²⁴ Canada, Senate, Standing Committee on Fisheries and Oceans (hereafter SCFO), Fifth Report, “Straddling Fish Stocks in the Northwest Atlantic,” 37th Parliament, Second Session, June 2003, Appendix 3.

beyond its zone. Canada agreed, within the bounds of conservation, to share surplus fish with them. A string of such agreements took place, both before and after the 200-mile limit, including with countries with smaller fishing interests such as the German Democratic Republic, Cuba, Bulgaria, and Romania. The pre-1977 agreements helped pave the way for a smooth extension of jurisdiction.²⁵

In June 1976, Canada announced that effective January 1, 1977 it would extend its fisheries jurisdiction to 200 nautical miles from the coast. It couched the action as part of the “developing consensus” on the Law of the Sea. The completion of UNCLOS III in 1982 – although it would be two decades before Canada ratified the Convention – saw extended zones, as proclaimed by Canada, enshrined as a matter of international law. According to Article 57 of the Convention, “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”²⁶

Canada remained dissatisfied with the 200-mile regime on two key counts. Anadromous species that are born in fresh water but later live at sea, salmon being the chief example, often migrate far beyond the 200-mile limit, where they can fall prey to high-seas fisheries. Although Canadian pressure helped win recognition of the coastal state’s “special interest” in high-seas salmon, this fell well short of objectives.

The other major shortcoming stemmed from the nature of groundfish, which live mainly on fishing banks of the continental shelf. In some cases, the continental shelf reaches beyond the 200-mile limit, as on the Nose and Tail of the Grand Banks. In

²⁵ A sample treaty, between Canada and Bulgaria can be found at http://www.treaty-accord.gc.ca/ViewTreaty.asp?Treaty_ID=101417 <accessed 25 June 2009>.

²⁶ United Nations, Third United Nations Convention on the Law of the Sea, signed at Montego Bay, Jamaica, 10 December 1982, Section V, Article 57.

cases where a stock, such as cod, lived on or migrated to both sides of the 200-mile limit, competing versions of conservation could lead to further reductions of important fish stocks. Canadian representations at UNCLOS III for coastal state control to the edge of the shelf came to naught. Foreign overfishing of straddling stocks would become a major issue from the late 1980s onwards. Indeed, the situation with regard to the straddling stocks would ultimately lead to the *Estai* incident in 1995.

NAFO and the Straddling Stocks

Extension of Canadian jurisdiction in January 1977 brought jubilation, and expectations that good management and the expulsion of foreign vessels – as happened over time – would greatly increase Canada’s catches. The new limit brought most of the key groundfish stocks off Newfoundland under Canada’s control. For the rest, Canada proposed a “son of ICNAF,” functioning outside Canada’s zone. Until the new organization was set up, ICNAF agreed to confine its activities to that area and to seek multilateral co-operation in its management.

Canada’s main goal at ICNAF was to ensure that conservation measures outside the zone, on the Nose and Tail of the Grand Banks and on the Flemish Cap,²⁷ would be consistent with Canadian regulations. Canada would, as a coastal state, receive preferential allocation of TACs in this area. However, at meetings in March and June 1977, few countries in ICNAF expressed support for this position.

The ICNAF members reached a compromise on a new multilateral convention after Canada agreed to the phrase “The Commission shall seek to ensure consistency

²⁷ The Flemish Cap, in present-day NAFO division 3M, is not only outside Canada’s zone but constitutes a separate up-cropping beyond Canada’s continental shelf.

between its conservation measures for straddling stocks and measures taken by Canada.”²⁸ Moreover, an agreement was reached that tacitly approved giving Canada special consideration on the matter of straddling stocks.²⁹ The new multinational agreement was signed on October 24, 1978 and established a new organization, the Northwest Atlantic Fisheries Organization (NAFO), to replace ICNAF from 1979 onwards.

²⁸ L.S. Parsons, “Governance of Straddling Stocks in the Northwest Atlantic: A Review of the Northwest Atlantic Fisheries Organization,” prepared for the Advisory Panel on Straddling Stocks, March 2005, 10.

²⁹ Article XI.4 in the NAFO Convention states that “in the allocation of catches from the Grand Banks and Flemish Cap, Commission members shall give special consideration to the Contracting Party, whose coastal communities are primarily dependent on fishing for stocks related to these fishing banks.”

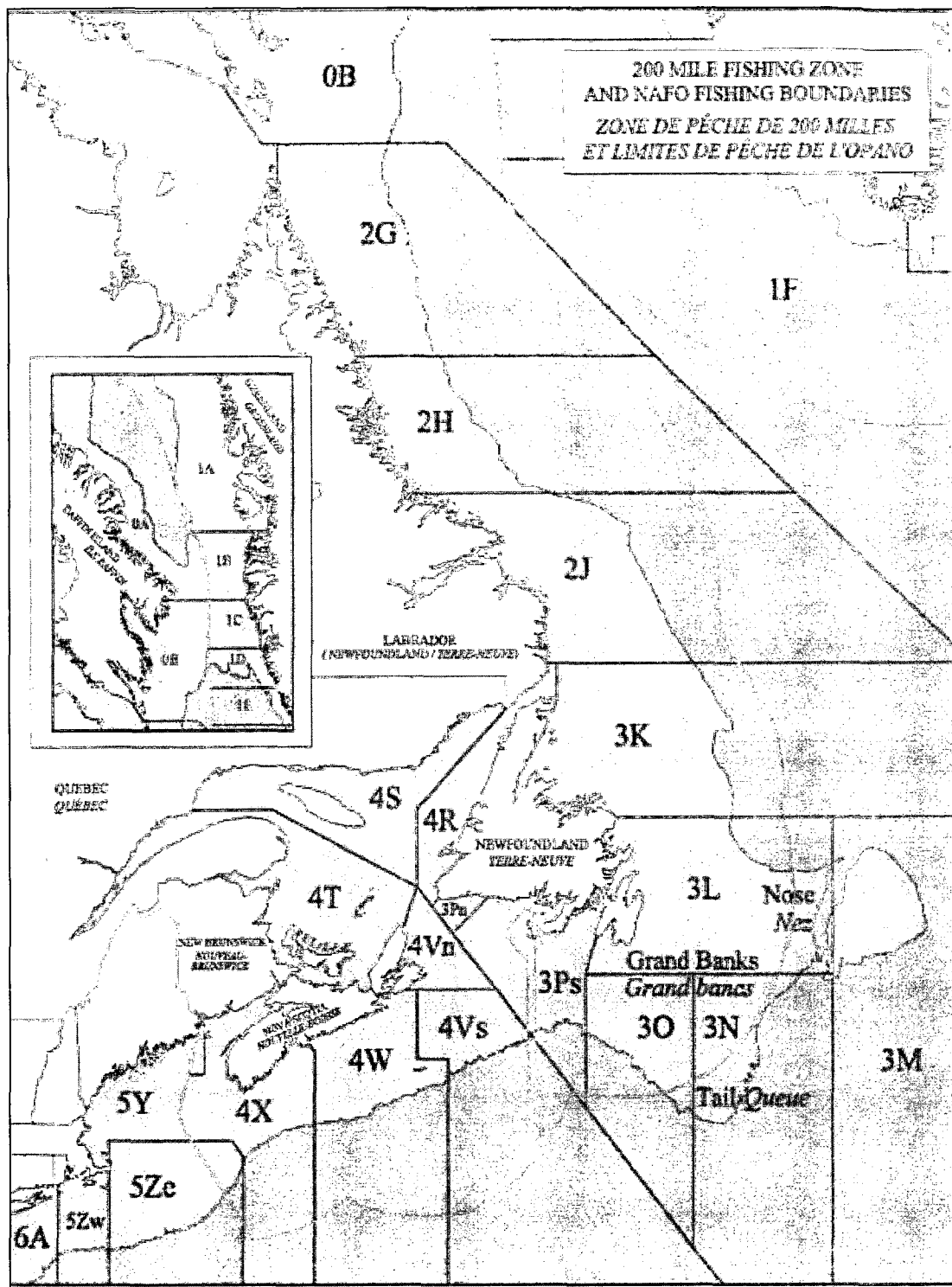


Figure 1

Map of NAFO Fishing Boundaries along Canada's Coast. The NAFO map, like that of ICNAF, shows divisions loosely based on biological and oceanographic characteristics. Some stocks overspread divisions, notably 2J3KL cod. This "northern cod" stock stretched from the middle coast of Labrador to the east coast of Newfoundland proper and the northern Grand Banks. Source: Department of Fisheries and Oceans.

NAFO, like ICNAF before it, employs an elaborate committee structure. Scientists from different nations sit on the Scientific Council; they compare notes and recommend Total Allowable Catches or other conservation measures. Another arm, the Fisheries Commission, sets the actual quotas of different stocks for different countries. The Scientific Council's advice is not binding on the Fisheries Commission that actually sets the quotas. Indeed, the Fisheries Commission would, at times, ignore the scientific advice and set their quotas in excess of the recommendations. And, as in ICNAF, the organization has no means to enforce quotas or other rules. A member state can simply ignore them. This loophole would find its use.

In NAFO's early years (1979-1985), Canada sought to ensure consistency between Canadian and NAFO conservation measures. Canada also pushed to ensure that TACs were set based on the best available conservation science and that Canada received the "special consideration" it was due as part of the NAFO treaty. Generally, Canada was successful in getting special consideration and setting a conservative management regime in NAFO. Meanwhile, Canada was still allocating surplus fish, especially northern cod, from its own zone; this explains some of the early co-operative atmosphere within NAFO.

At the outset of NAFO, Canadian fishery relations with the European Union were characterized by the seeking of a mutually beneficial relationship. This effort culminated in 1981 with the signature of a bilateral "Long-Term Agreement" (LTA) that would reduce EU tariffs on stocks of special interest to Canadians in exchange for allocation of non-surplus cod stocks. However, once the agreement was signed, the EU quickly introduced a new tariff rate quota system that substantially reduced the LTA's

benefit to Canada. In April 1987, Canada announced that the terms of the LTA would not be extended beyond December 31, 1987, and that there would be no non-surplus allocations after that date.³⁰ Canada's "surplus" allocations were already dwindling and would vanish in the latter 1990s, removing a lubricating element from fishery relations.

Spain Poses Continual Difficulties

During these early years of NAFO the main sticking point was Spain, which did not become a NAFO member until 1983 and thus was not party to the NAFO regulatory agreements. The Spanish fleet fished stocks at will and ignored NAFO quotas. In 1983, Spain joined NAFO and soon began to challenge NAFO's conservation and management structures. It fished above NAFO-recommended quotas both before joining and after, when it would use the objection procedure. NAFO did nothing to curb Spain's extensive fishing. Canada's own relations with Spain were characterized by repeated, protracted, and difficult negotiations.

Canada's fishery relations with Portugal (another state notorious for its overfishing) tended to be less acrimonious. However, in 1983, relations soured when Canada found evidence of Portuguese overfishing of their 3M (Flemish Cap) redfish quota. In 1984, the Portuguese fleet continued to overfish its redfish quota. Then, in 1985, Portugal launched an objection to the NAFO redfish quotas in 3LMN (Flemish Cap and part of Grand Banks). That same year, Portugal also overfished its quota of 3LNO (Grand Banks) American plaice (a form of flounder or flatfish), 3M (Flemish Cap) cod, American plaice, and redfish. The Portuguese overfishing, combined with the

³⁰ Parsons, *Management*, 275.

continued overfishing by Spain, heightened the conservation threat to important straddling stocks.

Meanwhile, Spain and Portugal were negotiating to become members of the European Union. By the 1985 round of NAFO meetings, the EU was being heavily influenced by the impending accession of the two powerful distant-water fishing nations (DWFNs). Both countries (although Spain especially) had large fishing fleets and the EU was trying hard to find fish for them, since part of the accession agreement prohibited Spain and Portugal from fishing in EU territorial waters for ten years following accession.³¹ The Spanish fleet was particularly ravenous for fish, since the government of Namibia had pushed a strong sector of the Spanish fleet out of its waters.³²

The EU tried to negotiate with Canada for increased cod allocations and fishing possibilities for its new members. The EU sought a large increase in the 2J3KL cod TAC, up to 40,000 tonnes. In addition, the EU wanted the privilege to allow EU vessels, including Spain, to fish their 2J3KL and 3NO cod quotas within the Canadian Exclusive Economic Zone. The EU also proposed a discussion of the “zonal attachment” approach (i.e. what share of the stock should go to the international community and what share to Canada). In return, the EU would refrain from fishing for 2J3KL cod and 3NO cod in the NAFO Regulatory Area, outside Canada’s 200-mile limit. The EU would also undertake to achieve cooperation by St Pierre et Miquelon to

³¹ Tobin, *All in Good Time*, 89. Also, see European Communities, concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Communities, “Commission Opinion of 21 May 1985, on the Accession to the European Communities by the Kingdom of Spain and the Portuguese Republic,” in *Official Journal of The European Communities*, 15. 11-85, 1-471, Articles 158-160.

³² William J. Rowat, former Deputy Minister of Fisheries and Oceans, personal communication, 21 September, 2007.

control transshipment by non-NAFO members fishing the NAFO Regulatory Area.³³

These suggestions were completely unacceptable to the Canadian government. It was already recognized that the cod stocks in the NAFO Regulatory Area were in sharp decline. Ottawa further felt that moratoria on certain NAFO areas were necessary. The EU disagreed, and began to invoke the objection principle.

The September 1985 NAFO meeting was particularly tense and proved to be a turning point in NAFO history and Canada-EU fisheries relations. At the meeting, the EU challenged the Canadian position that “northern cod” in the 2J3KL area – including the Nose and Tail of the Grand Banks, out beyond 200 miles – should be managed as one stock by Canada. The then-huge 2J3KL stock fed a major inshore fishery as well as offshore vessels. Indeed, it had provided the single biggest increase to Canadian catches since the implementation of the 200-mile limit.

In practice, ever since NAFO’s founding in 1979, the organization had allowed Canada, in conjunction with the NAFO Scientific Council, to set the cod quotas in the NAFO Regulatory Area. However, in 1985, the EU tried to split the management of the cod stocks and pushed hard for a separate 3L cod quota for 1986. Canada proposed a temporary restraint on fishing for 3L cod outside the 200-mile limit. The Canadian proposal was adopted.³⁴ At the same time, the EU began to attack NAFO conservation principles and, supported by Spain and Portugal, voted against the proposed Total Allowable Catches for many stocks. Pushing matters even further, the EU announced its intention to object to all NAFO decisions, including the moratorium on 3L cod. This

³³ Stig S. Gezelius, “Limits to externalisation: The EU NAFO policy 1979 - 1997,” *Marine Policy* (1998) 23: 2, 147-159, 151, and Karl M. Sullivan, “Conflict in the Management of a Northwest Atlantic Transboundary Cod Stock,” *Marine Policy* (1989), 118-136, 128.

³⁴ Northwest Atlantic Fisheries Organization, Minutes, Seventh Annual General meeting, September 1985. NAFO/FC Doc. 85/8.

was a major reversal of previous EU practice. To pacify and feed fish to Spain and Portugal while keeping them out of western European waters, the EU as a whole ignored internationally determined conservation recommendations for the northwest Atlantic.

In 1986, Spain and Portugal officially acceded to the European Union, which meant that their fishing fleets now fell under the EU's NAFO vote. The number of EU vessels on the Grand Banks jumped significantly. As a result, rather than following NAFO quotas, the EU began to set its own, much higher, quotas.³⁵ It then went on to exceed even its own unilateral quotas, often several times over. Figure 2 demonstrates EU quota overruns, which naturally resulted in the NAFO TAC overruns shown in Figure 3. It was a flagrant violation of both conservation and international co-operation. But, except at times in Newfoundland, Canadian public opinion never hardened to an extreme degree against the EU's behaviour. Until the late 1980s, Canadian catches within the 200-mile limit were growing, which softened attitudes.

³⁵ Paul C. Missios and Charles Plourde, "The Canada-European Union Turbot War: A Brief Game-Theoretic Analysis," *Canadian Public Policy* (1996) 22: 2, 144-150, 144.

TABLE Comparison of EC unilateral quotas, EC NAFO quotas, EC catches reported to NAFO for NAFO Groundfish stocks and 213KL cod for 1986-1991 and EC catches estimated by Canada for 1990-1991 (Quantities in tons).

| STOCK | 1985 | | | 1987 | | | 1988 | | | 1989 | | | 1990 | | | 1991 | | |
|---------|-----------------|---------------|---------------------------|-----------------|---------------|---------------------------|-----------------|---------------|---------------------------|-----------------|---------------|---------------------------|-----------------|---------------|---------------------------|-----------------|---------------|---------------------------|
| | EC UNILAT QUOTA | EC NAFO QUOTA | EC CATCH REPORTED TO NAFO | EC UNILAT QUOTA | EC NAFO QUOTA | EC CATCH REPORTED TO NAFO | EC UNILAT QUOTA | EC NAFO QUOTA | EC CATCH REPORTED TO NAFO | EC UNILAT QUOTA | EC NAFO QUOTA | EC CATCH REPORTED TO NAFO | EC UNILAT QUOTA | EC NAFO QUOTA | EC CATCH REPORTED TO NAFO | EC UNILAT QUOTA | EC NAFO QUOTA | EC CATCH REPORTED TO NAFO |
| 134COD | 7,500 | 6,465 | 11,073 | 7,930 | 6,465 | 6,441 | 0 | 0 | 960 | 0 | 0 | 343 | 0 | 0 | 0 | 0 | 0 | 0 |
| 330CEG | 15,400 | 14,750 | 20,470 | 20,470 | 13,315 | 21,885 | 26,450 | 14,750 | 13,816 | 24,820 | 9,220 | 30,011 | 1,000 | 6,750 | 6,820 | 9,016 | 9,016 | 9,900 |
| 3M | | | | | | | | | | | | | | | | | | |
| RESFISH | 1,100 | 1,100 | 31,570 | 12,050 | 1,100 | 22,610 | 12,050 | 1,100 | 1,257 | 12,050 | 1,100 | 13,062 | 32,000 | 3,350 | 31,700 | 31,700 | 31,700 | 32,311 |
| RES | | | | | | | | | | | | | | | | | | |
| RESFISH | 0 | 0 | 21,188 | 20,000 | 0 | 24,000 | 20,000 | 0 | 12,500 | 20,000 | 0 | 6,316 | 6,000 | 0 | 6,000 | 6,000 | 0 | 13,949 |
| 213A | | | | | | | | | | | | | | | | | | |
| PLAKE | 100 | 100 | 2,733 | 1,000 | 100 | 4,506 | 1,000 | 100 | 1,510 | 1,000 | 100 | 3,483 | 900 | 300 | 900 | 900 | 900 | 1,000 |
| 2130A | | | | | | | | | | | | | | | | | | |
| PLAKE | 100 | 100 | 21,465 | 9,000 | 600 | 17,014 | 9,000 | 900 | 8,926 | 6,820 | 335 | 11,895 | 900 | 337 | 862 | 923 | 923 | 923 |
| 2130 | | | | | | | | | | | | | | | | | | |
| YELLOW | | | | | | | | | | | | | | | | | | |
| TAIL | 300 | 300 | 3,982 | 3,000 | 300 | 3,215 | 3,000 | 300 | 1,200 | 1,670 | 100 | 1,276 | 300 | 100 | 119 | 119 | 119 | 225 |
| 2130 | | | | | | | | | | | | | | | | | | |
| WHICH | 0 | 0 | 3,788 | 4,000 | 0 | 3,567 | 4,000 | 0 | 1,853 | 4,000 | 0 | 1,920 | 1,200 | 0 | 1,058 | 1,058 | 0 | 1,007 |
| 10130B | 15,000 | 20,665 | 110,108 | 23,000 | 24,170 | 109,624 | 73,400 | 19,010 | 81,704 | 73,850 | 15,115 | 97,802 | 37,900 | 13,717 | 20,346 | 27,064 | 27,064 | 29,760 |
| 213L | | | | | | | | | | | | | | | | | | |
| 213L | 48,560 | 0 | 61,657 | 84,000 | 0 | 65,702 | 84,000 | 0 | 28,910 | 85,400 | 0 | 38,613 | 31,000 | 0 | 23,758 | 21,000 | 0 | 21,608 |
| GRAND | 152,400 | 21,665 | 172,180 | 210,900 | 24,170 | 145,842 | 161,400 | 19,010 | 81,743 | 152,250 | 15,115 | 93,476 | 94,600 | 14,717 | 46,624 | 51,073 | 51,073 | 58,988 |

1. In 1986 and 1987, Canada allowed 9,570 of 213L cod to be EC catches (Canada-EC Fisheries Agreement).
 2. EC catches are reported to NAFO for all stocks.
 3. Reported by EC in July 1991, 841,616 kg at 144,000.
 * EC reported NAFO catches in these stocks.
 ** EC also allowed 2130A and 2130B which.

Source: International Fisheries Research, Department of Fisheries and Oceans, Ottawa.

Figure 2
EC Catches 1986-1991

TABLE NAFO TAC overruns 1985-1991.

| SERIES | 1985 | | 1986 | | 1987 | | 1988 | | 1989 | | 1990 | | 1991 | |
|--------|--------|-------------|--------|-------------|--------|-------------|--------|-------------|--------|-------------|--------|-------------|--------|-------------|
| | TAC | EXCEEDED BY | TAC | EXCEEDED BY | TAC | EXCEEDED BY | TAC | EXCEEDED BY | TAC | EXCEEDED BY | TAC | EXCEEDED BY | TAC | EXCEEDED BY |
| 991100 | 12,295 | 1,990 | 12,295 | 2,170 | N/A | N/A | 0 | 2,091 | 0 | 4,000 | 0 | 2,000 | 13,000 | 5,000 |
| 992000 | 13,000 | 4,000 | 13,000 | 14,000 | 6,000 | 6,000 | 48,700 | 3,071 | 48,000 | 8,000 | 10,200 | 15,500 | 19,500 | 15,500 |
| 993000 | 20,000 | 1,400 | 20,000 | 9,000 | 16,000 | 16,000 | 2,000 | 18,000 | 2,000 | 18,000 | 5,000 | 4,000 | 5,000 | 0 |
| 994000 | 25,000 | 5,000 | 25,000 | 17,000 | 19,000 | 19,000 | 25,000 | 18,000 | 25,000 | 8,000 | 29,000 | 4,000 | 10,000 | 25,000 |
| 995000 | 1,000 | N/A | 1,000 | 1,200 | 1,000 | 1,000 | 2,000 | 1,000 | 2,000 | 1,000 | 2,000 | N/A | 3,000 | 5,000 |
| 996000 | 40,000 | 5,000 | 40,000 | 6,000 | 40,000 | 40,000 | 40,000 | 1,000 | 40,000 | 10,000 | 45,000 | 7,000 | 55,000 | 47,000 |
| 997000 | 5,000 | 4,000 | 5,000 | 4,000 | 5,000 | 5,000 | 5,000 | 1,000 | 5,000 | 5,000 | 5,000 | 5,000 | 5,000 | 5,000 |
| 998000 | 15,000 | 14,000 | 15,000 | 15,000 | 15,000 | 15,000 | 15,000 | 15,000 | 15,000 | 15,000 | 15,000 | 15,000 | 15,000 | 15,000 |

NAFO SEC 200L, 01/91

1. Available only for non-members and Contracting Parties.
2. Available only for non-members and Contracting Parties (01/85/86).
3. Includes only non-members and Contracting Parties.
4. Includes only non-members and Contracting Parties who do not report to NAFO.
5. Includes a percentage of the "funds for specific" contributions to NAFO by South Korea.
6. Includes only non-members and Contracting Parties.
7. Includes only non-members and Contracting Parties (01/86).
8. Includes only non-members and Contracting Parties (01/86).
9. As Not applicable.

Source: International Institute for Environment and Development, Department of Fisheries and Oceans, Ottawa.

Figure 3
NAFO TAC Overruns 1985-1991

Other EU actions worsened the NAFO situation. Under NAFO enforcement terms, there were provisions that allowed scientific observers aboard fishing vessels as part of the NAFO Scientific Observer scheme. These observers were meant to correct deficiencies in fishery statistics and research by member countries. Early in 1986, the EU began to refuse inspections by the NAFO observers. Shortly thereafter, the program was discontinued because of a “persistent lack of adequate coverage.”³⁶ As well, Spanish and Portuguese vessels returned to the Nose and Tail of the Grand Banks to fish for cod in defiance of the NAFO moratorium (in 3L – eastern Newfoundland and northern Grand Banks). In June, the EU gave notice of termination of the bilateral agreement with Canada on scientific observers. In addition, the EU announced its intention to withdraw from the NAFO Joint Enforcement Scheme.³⁷

The September 1986, NAFO meeting brought further acrimony. The EU was determined to get separate TACs for cod in the NAFO Regulatory Area and sought to legitimize the large catches of its new members, Spain and Portugal. With regard to the cod fishery, the NAFO Scientific Council noted that the maximum proportion of 2J3KL cod in the NAFO Regulatory Area was less than 10 percent in winter and 5 percent on average throughout the year.³⁸ In other words, Canada had the vast majority of the cod stock in its own territorial waters. The Canadian proposals were again adopted; the EU

³⁶ E. D. Andersen, “The History of Fisheries Management and Scientific Advice – the ICNAF/NAFO History from the End of World War II to the Present,” *Journal of Northwest Atlantic Fishery Science*, 23 (October 1998), 75-94.

³⁷ Parsons, “NAFO Report,” 16.

³⁸ Northwest Atlantic Fisheries Organization, Report of the NAFO Scientific Council, Redbook, September 1986, Dartmouth, Canada.

again objected and set its own unilateral quotas, once again overfishing even those.³⁹

The outcome was much the same at the 1987 NAFO meetings.

By September 1988, it was clear that the fishery of the NAFO Regulatory Area was in a sharp decline. The NAFO Scientific Council advised significantly reduced TACs for many species, including cod, American plaice, and yellowtail flounder. At the same NAFO meeting, Canada launched a major diplomatic offensive in the General Council on the chronic overfishing outside the 200-mile limit:

In the last three years conditions in the Regulatory Area have taken a strong turn for the worst – to the extent that the progress that has been achieved for some stocks since 1978 is now in jeopardy. In short, NAFO is heading toward a resource crisis. One cause of that crisis is unregulated fishing leading to overruns of quotas and TACs and blatant disregard for other management measures.⁴⁰

Canadian representatives pressed hard for action. Canada pointed out the excessive catch levels of the EU boats and emphasized the EU's repeated use of the objection procedure, arguing that it was eroding the authority of NAFO to set and administer quotas. Indeed, the repeated EU objections placed NAFO's very future in jeopardy. (Figure 4 shows the repeated EU objections.) The head of the European delegation criticized the Canadian Department of Fisheries and Oceans (DFO) for "creating a heaven for fish and a hell for European fishing populations."⁴¹

³⁹ For example, in 1986 the EU was allocated a total quota of 25,665 tonnes, set a total unilateral quota of 102,460 tonnes (though they did not set unilateral quotas for all stocks) and reported a total catch to NAFO of 172,183 tonnes. See Figure 1.

⁴⁰ Parsons, "NAFO Report," 17.

⁴¹ Sullivan, "Conflict . . .," 126.

| Summary of NAFO Objections: 1979-1990 | | |
|---------------------------------------|--|---|
| Year | Proposal (P) | State(s) Objected |
| 1979 | Catch quota for Div. 3M Redfish | EEC |
| 1983 | Allocation of catch quotas for 1984 for Cod in Div. 3M and Redfish in Div. 3M and 3LN (P-1/83) | Spain |
| 1984 | Allocation of catch quotas for 1985 for Cod in Div. 3M and 3NO and Redfish in Div. 3LN (P-1/84) | Spain |
| | Allocation of catch quota for 1985 for Redfish in Div. 3LN (P-1/84) | Portugal |
| 1985 | Proposal for regulation of particular stocks, i.e., Cod in Div. 3M, Cod in Div. 3NO, Redfish in 3M and 3LN, American plaice in 3M and 3LNO, Yellowtail in 3LNO, Witch in 3NO, Capelin in 3NO, squid (<i>Illex</i>) in 3 and 4 for 1986 (P-1/85) | Spain (objected to proposal with the exception of zero TAC for Capelin in Div. 3NO) |
| | Allocation of catch quotas for 1986 for Cod in Divisions 3M and 3NO, Redfish in Divisions 3M and 3LN, American plaice in Divisions 3M and 3LNO, Yellowtail in Div. 3LNO and Witch in Div. 3NO (P-1/85) | EEC |
| | Allocation of American plaice in Div. 3M and 3LNO, Redfish in Div. 3M and 3LNO, Cod in Div. 3M and 3NO and Squid (<i>Illex</i>) in Subareas 3 and 4 (P-1/85) | Portugal |
| | Proposal for information regarding 3L cod (P-2/85) | Spain |
| | Proposal for moratorium on directed fishery for 3L Cod outside 200 miles, during 1986 (P-3/85) | Portugal, Spain |
| 1986 | Allocation of catch quotas for 1987 for Cod in Div. 3M and 3NO, Redfish in Div. 3M and 3LN, American plaice in Div. 3M and 3LNO, Yellowtail in Div. 3LNO, Witch in Div. 3NO, Capelin in Div. 3NO and Squid (<i>Illex</i>) in Subareas 3 and 4 (P-1/86) | EEC (later withdrawn as to Squid) |
| | Proposal for closing directed fishery for 3L Cod outside 200 miles during 1987 | EEC |
| 1987 | Allocation of catch quotas for 1988 for Cod in Div. 3M and 3NO, Redfish in Div. 3M and 3LN, American plaice in Div. 3M and 3LNO, Yellowtail in Div. 3LNO, and Witch in Div. 3NO (P-1/87) | EEC (later withdrawn as to zero TAC for 3M Cod in 1988) |
| | Proposal for closing directed fishery for 3L Cod outside 200 miles during 1988 (P-2/87) | EEC |
| 1988 | Allocation of catch quotas for 1989 for Cod in Div. 3NO, Redfish in Div. 3M and 3LN, American plaice in Div. 3M and 3LNO, Yellowtail 3LNO, and Witch in Div. 3NO (P-2/88) | EEC |

| Summary of NAFO Objections: 1979-1990 | | |
|--|--|--------------------------|
| Year | Proposal (P) | State(s) Objected |
| | Proposal for closing directed fishery for 3L Cod outside 200 miles during 1989 (P-3/88) | EEC |
| 1989 | Allocation of catch quotas for 1990 for Cod in Div. 3NO, Redfish in Div. 3LN, American plaice in Div. 3M and 3LNO, Yellowtail in Div. 3LNO, and Witch in Div. 3NO (P-1/89) | EEC |
| | Proposal for closing directed fishery for 3L Cod outside 200 miles during 1990 (P-2/89) | EEC |
| 1990 | Allocations of Redfish 3LN and Witch 3NO (P-1/90) FC Doc. 90/12 | EC |
| | Closing a directed fishery for 3L Cod outside 200 miles during 1991 (P-2/90) FC Doc. 90/12 | EC |

Figure 4

Source: Parsons, "NAFO Report," 67-68.

In response to Canada's pressure, NAFO adopted a weak resolution calling on all parties "not to abuse the objection procedure." All members of NAFO, except the EU, voted in favour.⁴² The EU then proceeded, once again, to invoke the objection procedure and set its own unilateral quotas.

The 1989 and 1990 NAFO meetings showed some signs of improvement. At the 1989 meeting, the EU adopted a more conciliatory tone. Instead of voting against the quotas, the EU simply abstained, except in the case of cod. The 1990 meeting showed even more promise, with Canada and the EU voting together on seven of ten stocks. Once again, the EU voted against the cod TAC.

However, much of this apparent improvement was only on paper. The EU was estimated to have caught 97,000 tonnes of NAFO-managed groundfish stocks in 1990 – more than six times the NAFO-recommended quota of 15,377 tonnes for the EU, and more than one-and-a-half times the EU's own unilateral quota of 59,400 tonnes.⁴³

For 1991, the EU again voted in favour of the NAFO-recommended TACs on six stocks but again voted against the TAC allocation for cod. And, once again, they set their own unilateral quota of 26,300 tonnes for cod in contravention of the NAFO moratorium.

By now, the situation on the Grand Banks had escalated into unprecedented danger. Canadian scientists warned again and again about the precipitous decline in the cod stocks. In June 1992, the NAFO Scientific Council confirmed the extremely low levels of cod in the NAFO Regulatory Area. According to Canada, the EU had

⁴² Northwest Atlantic Fisheries Organization, Proceedings of the 10th Annual Meeting of the General Council of NAFO, September, 1988, Dartmouth, Canada.

⁴³ See Figure 2 on EU quota overruns.

overfished the cod stock in 2J3KL so much that the species was on the verge of commercial extinction.⁴⁴

Then, on July 2nd, Canada took a major step and introduced a complete moratorium on the famed northern cod (2J3KL) fishery.⁴⁵ It fell to John Crosbie, the well-known Newfoundland politician who became Minister of Fisheries and Oceans in 1991, to make the announcement. The reaction from fishermen and those involved in related industries could only be described as shell-shock. Fred Woodman, a fish plant owner from New Harbour, on the Avalon Peninsula, summed up the prevailing attitude: “Everyone here will remember where they were when the cod fishery was shut down. It's going to be like when Kennedy was shot.”⁴⁶ Bruce Chapman, the head of an association representing 40 fish companies, described the devastating effects of the closure of the fishery by warning of the “many communities [in Newfoundland] that could literally die.”⁴⁷ Public opinion once again rose against the foreigners, and politicians would react. Crosbie himself, in announcing the moratorium, castigated the foreigners for their sins while acknowledging that Canada had overestimated the cod stock, which had led to the setting of quotas that were too high.⁴⁸

Initially the closure of the northern cod fishery was to be for two years. In fact, to date, the fishery has never reopened. The moratorium expanded in 1993 to take in most Canadian groundfish stocks. This meant that between 40,000 and 50,000

⁴⁴ McCay and Finlayson, “Political Ecology,” 5. Commercial extinction of a fishery means that it is no longer a viable fishery that can support anything other than subsistence fishing.

⁴⁵ John C. Crosbie, Notes for an Address to the People of Newfoundland and Labrador on The Fishery of Northern (2J3KL) Cod, July 2, 1992. This work and many others cited come from privately held archival sources that were made available to the author by Bob Applebaum. References to sources from this collection will henceforth be preceded by PBA.

⁴⁶ Beth Gorham, “Newfoundlanders shell-shocked as grim news sinks in,” *Vancouver Sun*, 03 Jul 1992, A4.

⁴⁷ Ibid.

⁴⁸ PBA, John C. Crosbie, “The Fishery of Northern (2J3KL) Cod.”

Canadians lost their jobs in the fishing industry.⁴⁹ Recovery in Canadian waters has been slow and small.

According to some within the EU, the decline was not its fault but rather, the result of mismanagement by the Canadian government.⁵⁰ They could claim an obvious rationale for this charge, given that Canadians managed the main northern cod fishery, and that many other stocks totally within the Canadian zone also shrank to moratorium levels. From the Canadian point of view, however, the foreign fishery may well have been the mortal blow for the biggest single fishery, that for northern cod. Year after year, the Europeans were taking major bites of the stock just outside the line. In the very cold year of 1991, unusual numbers of northern cod migrated out beyond the 200-mile zone. In that year, Spanish and Portuguese vessels took the lion's share of a total foreign catch of 47,000 tonnes on the Nose of the Grand Banks, the second-highest total since 1977, from an already depleted stock.⁵¹ While not the only actors, the foreign fleets were a large part of the problem, considering their vast overfishing that began in the 1960s, their continued objections and overfishing within NAFO, and the particular events of 1991, when they preyed on a seaward migration that turned out to be among the last major elements of the stock. Indeed, the stocks of the NAFO Regulatory Area were the first to get into major trouble, and have been among the last to show signs of widespread recovery. Even today, NAFO scientific reports continue to show excessive fishing on major species.⁵²

⁴⁹ Springer, "Turbot War," 34 and DeSombre and Barkin, "Turbot and Tempers," 333.

⁵⁰ Atienza, "*Estai's* boarding tantamount to piracy."

⁵¹ Joseph Gough, *Managing Canada's Fisheries: From Early days to the Year 2000*, Georgetown, Ontario: McGill-Queen's University Press, 2007, 417.

⁵² See Northwest Atlantic Fisheries Organization, *Annual Compliance Review, 2008*, NAFO/FC Doc. 08/20.

Early in 1992, the EU had declined once again to accept NAFO quotas, and established its own, despite having ratified a 1992 agreement to end overfishing.⁵³ NAFO was powerless to intervene.⁵⁴ But after Canada announced its moratorium, the EU, which had been experiencing declining catch rates for cod, finally announced that it would cease fishing cod in the 3L zone (long under a NAFO moratorium that the EU had ignored) until the fall of 1992. It was a small sign that things were no longer looking quite so bleak on the co-operation front.

When John Crosbie became DFO's Minister in 1991, Canadian officials were already striving diplomatically to curb the Europeans, and to create new international arrangements to curb overfishing. Crosbie stepped up and took part in the international campaign. Canadian officials, notably Bob Applebaum of DFO's international directorate, pushed for a new United Nations treaty on high seas and straddling stocks, one that would give non-flag states more power to take action against flag states that were violating fisheries agreements on the high seas. The 1992 United Nations Conference on Environment and Development then agreed to an international conference on high-seas fisheries. This conference, as it turned out, would be working in New York at the time of the *Estai* incident.⁵⁵

At the same time as the cod collapse, other important straddling stocks were also being plundered. The NAFO Scientific Council reported that 3LNO American plaice had suffered a sharp decline and recommended a significantly lower TAC for 1993.⁵⁶ In

⁵³ Canada did not ratify this agreement because of supposed EU violations in the NAFO areas. See Gezelius. "Limits to externalisation," 156 and Missios and Plourde, "The Canada-EU Turbot War," 145.

⁵⁴ DeSombre and Barkin, "Turbot and Tempers," 335.

⁵⁵ Gough, *Managing Canada's Fisheries*, 387.

⁵⁶ Northwest Atlantic Fisheries Organization, Report of the NAFO Scientific Council, Redbook, September, 1992.

September 1992, at the annual NAFO meeting, the EU agreed for the first time in almost a decade to abide by all NAFO TAC allocations and conservation decisions for 1993. NAFO also unanimously adopted a ban on fishing all cod outside the 200-mile limit in 3L for 1993 and agreed on improvements to surveillance and control systems to take effect in 1993.

The atmosphere between Canada and the EU with regard to the fisheries seemed to be improving. Indeed, in December 1992, Canada and the EU announced an agreement intended to end the long-standing fisheries dispute.⁵⁷ Unfortunately, the new agreement proved to be a case of “too-little, too-late.” Years of incessant overfishing in the 1980s and 90s had contributed to a wide-ranging collapse of groundfish resources, and there would be no quick recovery.

The truce of sorts imposed by the Canada-EU agreement proved to be more short-lived than anyone had thought. In fact, the good will generated by the 1992 agreement began to dissipate within a year. At the September 1993 NAFO annual meeting, tensions between Canada and the EU were once again on the rise, even as cod stocks in the NAFO Regulatory Area continued to decline. The Scientific Council again reported on the fish-stock crisis. The Council warned that the spawning biomass of many important stocks had undergone a precipitous decline. Canada proposed a continued moratorium on 3L cod. As well, the Scientific Council recommended extending the cod moratorium into the 3M division of NAFO, in the Flemish Cap area out beyond Canada’s continental shelf. But for that area, the Fisheries Commission adopted the EU proposal of an 11,000 tonne TAC, which was far from a moratorium.

⁵⁷ PBA, Canada, 1992, Notes for a Statement by the Honourable John C. Crosbie, Minister of Fisheries and Oceans, on an Agreement with the European Community regarding fisheries, St. John’s, Newfoundland, December 21, 1992.

Interestingly, the Canadian representative emphasized the need for information on Greenland halibut – equally well known as turbot – a stock deemed “very important” for Canada.⁵⁸ Traditionally a less desirable groundfish, turbot were becoming more prized as other species declined in volume. NAFO also agreed on a new pilot project for ship-board observers; flag states would assign the observers to their vessels to collect scientific and related fishery information. This at least was mild progress.

In February 1994, a special meeting of the NAFO Fisheries Commission took place in Brussels. At the meeting, the pilot observer scheme was reviewed and extended for six months. As well, Canada pushed again for a moratorium on 3NO cod – that is, southern Grand Banks cod, south of the 2J3KL northern cod. Canada won the day (the vote was 8 for, 3 abstentions) and the moratorium on cod now spread to the 3NO zone. This was a victory for Canada and for the cod.

The September 1994 NAFO annual meeting brought further stress to the Canada-EU relationship. More stocks were depleted, and the Scientific Council recommended imposing moratoria on several of them. At the meeting, the Fisheries Commission renewed the pilot observer scheme and set a goal of 20 percent observer coverage for vessels fishing Greenland halibut.

As well, the potential for a TAC for Greenland halibut was raised. The Scientific Council recommended a reduction in fishing effort and catches, which were climbing in 1994 to about 50,000 tonnes. The Canadian delegation presented several potential TACs for Greenland halibut, ranging from complete moratoria to a TAC of 25,000 tonnes. Canada’s compromise proposal was for a TAC of 15,000 tonnes. The EU rejected Canada’s proposals almost out of hand. In the end, Norway’s proposal of a

⁵⁸ Parsons, “NAFO Report,” 22.

27,000 tonne TAC was adopted. However, the decisions on allocations – the dividing up of the Total Allowable Catch – were deferred to a special meeting in February 1995.

At the end of 1994, then, Canada was faced with extreme depletion of stocks inside and outside the 200-mile zone, and had experienced years of the EU flouting scientific recommendations for conservation. In particular, there had been well over a decade of problems with Spain, the chief EU fish-catcher in the northwest Atlantic.

Another significant development had occurred in the 1980s. For years after declaring the 200-mile zone, Canada faced problems off southwest Nova Scotia, with American vessels sometimes crossing the offshore boundary line to fish scallops or groundfish. In 1987, DFO launched an “armed-boarding” policy for offshore patrol vessels. DFO patrol vessels were equipped with .50 calibre machine guns and crews were trained in the proper techniques for boarding resistant vessels. DFO officials established a distinct set of criteria and procedures to follow. If a vessel resisted, an Assistant Deputy Minister (ADM) could approve firing warning shots. Further action required approval from higher in the chain of command; in some cases, prime ministerial authorization was required.

The armed-boarding program led to some tense situations with the American fishermen. In October 1988, the Canadian patrol vessel *Cygnus* saw the American vessel *Donna Lynn* fishing, illegally, in Canadian waters. The *Cygnus* put the new policy into action. The ADM Atlantic Region, Wayne Shinnars, gave approval to fire warning shots well ahead of the *Donna Lynn*. Despite the warning shots, the *Donna Lynn* still refused to heave to. Instead, the *Donna Lynn* fled back to American waters and its home port in Massachusetts. Still, the shots served as a distinct warning to

American fishermen. The American government later charged the captain of the *Donna Lynn* under US law.

In December 1989, another incident again tested the armed-boarding program. At that time, a strike by civilian crews on DFO patrol vessels meant that fishery officers were aboard Canadian naval vessels helping to patrol the boundary lines. A Canadian frigate spotted an American vessel, the *Concordia*, fishing in Canadian waters. Despite warning shots being fired, this time by a Canadian naval vessel, the *Concordia* refused to heave to and again the American vessel fled to the safety of American waters, though not before causing some consternation when it appeared that the overzealous American fishermen aboard the *Concordia* were trying to ram the Canadian frigate.

The *Donna Lynn* and *Concordia* incidents served as a wake-up call to the Americans and ultimately led to a bilateral agreement being signed. In the agreement, signed in 1990, both countries agreed to impose penalties for home-state vessels that transgressed the other state's fisheries regulations. As well, United States Coast Guard (USCG) vessels increased their patrols of the boundary area. As a result of the accord and the increased patrols, poaching by fishermen in the area quickly subsided. Canada had got its way by a show of force. And DFO, traditionally more hawkish about foreign fishing than Foreign Affairs, had its own, though tiny, para-military force.

Political Turbulence Over Turbot

To this point, the narrative has focused largely on the political aspects of NAFO decisions in the context of Canada's relations with other countries. However, during the early 1990s Canada was undergoing political change at home. The Mulroney/Campbell Progressive Conservative government spectacularly lost the 1993 federal election and the Liberals, under Jean Chrétien, swept to power, winning 177 of the 295 seats in the House of Commons. During the election campaign, coming on the heels of the cod moratorium being announced, the Liberals had promised action on the fisheries. Brian Tobin, a fiery, 39-year-old Newfoundlander, was appointed Minister of Fisheries and Oceans on November 4, 1993. He was determined to protect the fish stocks and willing to do almost anything to maintain their long-term viability.

Two early events showed Tobin's mettle. Moratoria now applied on several stocks in the NAFO Regulatory Area, to match Canada's closures within the zone. But, "flag-of-convenience" vessels were becoming a problem. These were vessels, sometimes controlled by citizens of NAFO member states, sailing under the colours of other, non-member states and ignoring NAFO regulations.

One such vessel was the *Kristina Logos*, registered in Panama. By a fluke, the vessel had earlier been registered in Canada, and that registration had never run out. In April 1994, Canadian fishery patrols arrested the *Kristina Logos*. Inspection revealed an illegal net along with an even smaller inner liner and more than 100 tonnes of juvenile cod, flounder, and redfish.⁵⁹ Newfoundland's premier, Clyde Wells, brought "dirty pictures" from the *Kristina Logos* to Ottawa and Toronto. Many of the fish were less

⁵⁹ Brian Tobin, speech on Bill C-29, *Canada, House of Commons Debates*, 11 May 1994, 35th Parliament, 1st Session.

than seven inches long, and in one photo the “meatiest” part of the fish was almost totally obscured by a cigarette. The owner of the vessel was charged with two counts of “permitting the use of the vessel for fishing without a licence” and two counts of “permitting the use of the vessel for fishing without a registration card.”⁶⁰ On May 21, 1997, in the Supreme Court of Newfoundland, he was convicted on all four charges brought against him.⁶¹ The arrest of the *Kristina Logos* sent a loud alarm to flag-of-convenience operators,⁶² some of whom left the Nose and Tail, having judged that the risk of seizure outweighed the reward of continued fishing.

Another incident in the summer of 1994 involved two American vessels that set out to fish scallops outside the Canadian zone. But the Truman Proclamation of 1945, subsequent international conventions, and the Law of the Sea made clear that seabed resources of the continental shelf belonged to the coastal state.⁶³ Those resources included scallops, which live on the ocean bottom. There was some thought in the United States that because scallops sometimes left the bottom as they moved around, they were not truly resources of the seabed. But there was no doubt in Tobin’s mind, and patrol vessels took in the American vessels. DFO dropped its prosecution when American authorities agreed with the Canadian position regarding scallops.⁶⁴ The two incidents bolstered Tobin’s reputation as being ready to go to great lengths to protect Canada’s fishery.

⁶⁰ 2001 SCC 56.

⁶¹ 2001 SCC 56.

⁶² Gough, *Managing Canada’s Fisheries*, 393.

⁶³ The Truman Proclamation of 1945 (Presidential Proclamation no. 2667) stated that “the Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.” Full text available at <http://www.presidency.ucsb.edu/ws/index.php?pid=12332> <accessed 25 March 2009>.

⁶⁴ Gough, *Managing Canada’s Fisheries*, 393.

The *Coastal Fisheries Protection Act* and Amendments

By the late spring of 1994, Tobin had persuaded the government to prepare for action in the NAFO Regulatory Area. But, the situation was tense. Could a relatively new government, faced with a new and strong opposition party, the Bloc Québécois, which was dedicated to breaking up Canada, push through an aggressive policy on the fisheries or would they face roadblocks from the opposition? It would have been an easy way for the Bloc Québécois to “cut their teeth” in Parliament by obstructing proposed legislation amending the *Coastal Fisheries Protection Act* (CFPA) Brian Tobin approached all the party leaders in the House of Commons and stressed the importance of quick passage of the amendments. According to Tobin, the Bloc, under their charismatic leader Lucien Bouchard, could have easily decided to obstruct the passage of Bill C-29 and said “No, we’re not going to facilitate this, we’re a Québec bloc, Québec doesn’t have any offshore fishing territory or jurisdiction, and Québec is only interested in what happens in the Gulf.”⁶⁵ However, this is not what happened. Instead, the Liberal government and the opposition parties worked together to quickly pass the proposed amendments. Tobin considers it an “act of statesmanship” that the opposition parties, and especially Bouchard’s Bloc Québécois, cleared the road to ensure quick passage of the bill. Tobin called the overfishing a “genuine desecration” of the world’s food basket and said that the quick passage of the bill was an indication that Canadians were fed up with the normal course of diplomacy and that “all of our best Boy Scout behaviour was yielding nothing.”⁶⁶

⁶⁵ Brian Tobin, personal communication, 18 January 2008.

⁶⁶ Ibid.

Instead of months or even years of delay, the amendments were passed within days. Bill C-29, An Act to Amend the *Coastal Fisheries Protection Act*, passed first reading on May 10, 1994, and passed second and third reading, by unanimous consent, on May 11th.⁶⁷ In his speech to the House on May 11th, Tobin attacked the stateless and flag-of-convenience vessels that were decimating the fish stocks, stating that all they had in mind was exploiting the resource, not harvesting the resource and ensuring its long-term sustainability. Indeed, vessels from non-contracting parties and stateless and flag-of-convenience vessels accounted for an estimated 20 percent of the overall catches in the NAFO Regulatory Area between 1983 and 1994. This represented the removal of roughly 326,000 tonnes of NAFO-managed groundfish stocks.⁶⁸

Tobin's speech to the House stated: "These vessels . . . these pirates . . . these flags-of-convenience or stateless vessels . . . they do not have the mind of a farmer or a fisherman, they have the mind of a miner."⁶⁹ All they wanted to do, Tobin said, was to "take the resource."⁷⁰ The Senate passed Bill C-29 on May 12th. That same day, Bill C-29 was given Royal Assent.

Bill C-29 affected the CFPA in several ways. The amendments drew attention to an "urgent need for all fishing vessels to comply in both Canadian fisheries waters and the NAFO Regulatory Area with sound conservation and management measures for those stocks" and noted that "some foreign fishing vessels continue to fish for those stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of

⁶⁷ For the discussion on Bill C-29 see *Canada, House of Commons Debates*, 11 May 1994, 35th Parliament, 1st Session. All parties expressed their agreement to the amendments. Yvan Bernier (BQ) even congratulated Tobin on his courage in bringing forth the bill.

⁶⁸ Parsons, "NAFO Report," 22.

⁶⁹ Tobin, "Speech on Bill C-29."

⁷⁰ *Ibid.*

sound conservation and management measures.”⁷¹ The new amendments were to enable the government to take action to prevent further stock depletion while still seeking international resolution to end illegal foreign fishing. To that end, the amended Act declared that:

No person, being aboard a foreign fishing vessel of a prescribed class, shall, in the NAFO Regulatory Area, fish or prepare to fish for a straddling stock in contravention of any of the prescribed conservation and management measures.⁷²

Further, the Department of Fisheries and Oceans was entitled to enforce this section of the CFPA through protection officers, as it further stated:

A protection officer may

a) for the purpose of ensuring compliance with this Act and the regulations, board and inspect any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area; and

b) with a warrant issued under section 7.1, search any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area and its cargo.⁷³

The amendments to the CFPA gave Canada the authority to take conservation action against stateless and flag-of-convenience vessels fishing for straddling stocks on the high seas, just outside Canada’s 200-mile limit.⁷⁴ If such vessels refused to comply with conservation efforts in the NAFO Regulatory Area they would be arrested. Before the legislation came into force, Canadian authorities visited all stateless and flag-of-

⁷¹ Canada. *Coastal Fisheries Protection Act*, amended May 1994, Section 5.1, paragraphs (c) and (d). From <http://laws.justice.gc.ca/en/C-33/35158.html> <Accessed 25 March 2009>.

⁷² *Coastal Fisheries Protection Act*, section 5.2.

⁷³ *Ibid.*, section 7.

⁷⁴ Tobin, “Speech on Bill C-29.”

convenience vessels fishing on the Grand Banks and explained that they would be arrested if they continued to fish illegally. The objectives and nature of the legislation were clearly outlined.

Fishing of straddling stocks by stateless and flag-of-convenience vessels ceased almost at once. No one was willing to risk arrest and these vessels all departed the Grand Banks. In one deft coup, the Canadian government had (seemingly) dealt with one of the major problems facing the fish stocks. In effect, Canada had managed to do single-handedly what NAFO had been trying to do since 1979. It was a huge victory. But the problem of illegal fishing by NAFO vessels, particularly the Spanish and Portuguese fleets, remained, as they were not of the “prescribed class” and were outside the scope of the legislation. However, Bill C-29 would ultimately become the basis for the seizure of the Spanish trawler, *Estai*.

These changes to fisheries policy can be interpreted in two ways. One, the Canadian government took it upon itself to ensure that NAFO regulations were being followed in areas adjacent to Canada’s Exclusive Economic Zone.⁷⁵ As previously mentioned, the EU’s continued use of the objection principle rendered NAFO impotent to stop overfishing. Since the EU would do nothing, it was up to Canada to take the moral high ground. The other interpretation is that Canada was taking unilateral steps, to NAFO’s detriment, in order to extend Canada’s control beyond the 200-mile zone to the entire Grand Banks area. In this view, Canada was more interested in extending sovereignty for economic reasons than for NAFO regulation and fish-stock preservation. The author has come across no evidence to support this contention, and during the

⁷⁵ Springer, “Turbot War,” 34.

dispute, Canada never advanced the view that it should unilaterally control the entire Grand Banks.

Either way, the amendments to the CFPA effectively extended Canadian jurisdiction to include NAFO Regulatory Area waters. This change was highly controversial: both the EU and the United States expressed their concern. The EU felt that the CFPA gave too much latitude to the Governor in Council to change which classes of ships were subject to regulation. The United States expressed its concern about the potential dangers posed to American fishing vessels in NAFO waters.⁷⁶

The same day that the CFPA was passed in Parliament, Canada took another step towards protecting its legal position. The government deposited an amended declaration of acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ). Like other international institutions, the ICJ was founded on voluntary membership, and nations could make reservations about certain types of disputes they did not want to fall under ICJ jurisdiction. Canada had previously exercised that right in 1985, with regard to disputes that fell strictly within Canada or in the Commonwealth, or could be settled by other means.⁷⁷ The new reservation dealt with NAFO, stating:

...the Government of Canada accepts...the jurisdiction of the International Court of Justice...subsequent to this declaration, other than ...
d) disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as

⁷⁶ Springer, "Turbot War," 34.

⁷⁷ Canada to the Secretary-General of the United Nations. "Declaration of acceptance of the compulsory jurisdiction of the International Court of Justice," 10 May 1994. Paragraphs 2 a) through 2 c). From International Court of Justice. Judgement: Fisheries Jurisdiction Case (Spain v. Canada): Jurisdiction of the Court, December 4, 1998. From: <http://www.icj-cij.org/docket/files/96/7533.pdf> <Accessed 25 March 2009>.

defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures.⁷⁸

From Canada's viewpoint, the filing of this reservation with the ICJ meant that actions taken by the DFO against illegal fishing could not be prosecuted under international law. This interpretation was to play an important role in the aftermath of the Turbot War.

The reaction from the EU to Bill C-29 and the ICJ exemption was decidedly negative. Leon Brittan, the EU Commissioner for External Trade, said that Canada's new legislation gave it "excessive and dangerous" power and expressed his "strong disagreement."⁷⁹ On May 20th, the European Union formally launched an objection to the Canadian amendment. Emma Bonino, the fiery EU Fisheries Commissioner, argued that the new Canadian law violated international law, and the French Foreign Minister contended that the Canadian legislation violated the UNCLOS agreement.⁸⁰ In Canada, the reaction was much different. The *Gazette* reported on May 13th that the "Tough fish law" had gotten "Senate OK," and that Ottawa had given the "pirates" fair warning.⁸¹ The law earned Tobin the nickname "the Pirate Hunter" from the *Ottawa Sun*.⁸²

Meanwhile, Spanish and Portuguese vessels continued to flout regulations and fish illegally on the Grand Banks. Reports showed that many vessels, including the

⁷⁸ Ibid., paragraph 2 d).

⁷⁹ PBA, BREEC, Telex to External Affairs Ottawa, "Meeting with Leon Brittan Re: New Canadian Fish Legislation," Dated 18 May 1994, 1.

⁸⁰ No author, "Canada flouting International Law - EU Commissioner," *Chronicle Herald*, 07 June 1994, A10.

⁸¹ Canadian Press, "Tough Fish Law Gets Senate OK." *The Gazette*, 13 May 1994, B1.

⁸² Michel, Gratton, "The Pirate Hunter," *Ottawa Sun*. 31 May 1994, 6. In a personal interview with the author, Tobin said that of all the various nicknames assigned to him over the years, his personal favourite was "Captain Canada."

Estai, were issued citations through NAFO authorities. Spanish vessels were cited on 32 separate occasions before September 1994.⁸³ In May, the *Estai* received citations for failing to record catch in their fishing and production logbooks, and for retaining American plaice, a species under moratorium, less than 25 centimetres long.⁸⁴

Often, vessels that were issued citations would return to ports other than their home port in order to off-load their catch and avoid inspection by home-state authorities, who had the responsibility for enforcing the citations issued on the high seas. In some cases, vessels would be inspected at sea and reports would be issued to the home-state authorities. Frequently, the home-state authorities would take no action and the illegal overfishing and the decimation of the stocks would continue.

One example of such neglect concerned the Spanish vessel *Santa Mafalda*. NAFO inspectors found that the *Mafalda*'s hold could store 1,073 tonnes of cod (under moratoria) and did, in fact, contain 500 tonnes of skate. The *Mafalda*'s log reported a catch of only six tonnes.⁸⁵ Spanish authorities took no action. Clearly, the situation wasn't really getting any better.

⁸³ PBA, Paul A. Lapointe, Telex to Madrid, Lisbon, Info: DFO, "Table of outstanding NAFO Citations, 1994," Dated 07 September 1994.

⁸⁴ PBA, Nick Katsepontes, Telex to BREEC, Bob Applebaum, Earl Wiseman, J.R. Hegan, Debbie Gill, Malcolm Rowe, Madrid, "NAFO Citations - Spanish vessel *Estai*," Dated 10 May 1994, 1. Also see Memorandum, Subject: Citations of Apparent Infringement – EU vessels, G. Traverse, Director Resource Management Division, Newfoundland Region to Earl Wiseman, International Directorate, no date.

⁸⁵ PBA, Nick Katsepontes, Telex to Lisbon, Madrid, Info: BREEC, DFO, Hon. Brian Tobin, Will Rowat, Victor Rabinovitch, Bob Applebaum, Malcolm Rowe, Earl Wiseman, J.R. Hegan, Amos Donohue, Debbie Gill, "NAFO Inspection - Spanish Vessel *Santa Mafalda*," No Date, 1.

CHAPTER TWO: Bullets Over Water

NAFO Sets a TAC For Turbot

A few months after Canada passed the amended CFPA in May 1994 and placed its amended notice of acceptance with the Secretary-General of the International Court of Justice, NAFO agreed to establish a Total Allowable Catch for turbot. At NAFO's general meeting in September, Canada made a "very strong case on turbot," arguing that the TAC should be set at 27,000 tonnes.⁸⁶ The EU was completely opposed and argued for a much higher TAC. According to Bill Rowat, the former Deputy Minister of Fisheries and Oceans, this was due in part to turbot being the last remaining unregulated groundfish stock, and, since the EU had nothing else to do with its massive, primarily Spanish, fleet it wanted to "hammer the hell out of [the turbot]."⁸⁷ At the end of the meeting, Canada won the vote and the TAC was set at 27,000 tonnes, "a significant reduction from annual catches of more than 60,000 tonnes in previous years when NAFO had not set a TAC for this stock."⁸⁸ The issue of national quota allocation was deferred to a special meeting in late January 1995.

In Cabinet, a heated debate on whether or not to carry out a seizure or other enforcement action went on. It is clear from all sides that Tobin and the fisheries department wanted assertive action, while the Foreign Affairs department, in particular, was hesitant and wanted to maintain a more diplomatic approach, so as to maintain good relations with Spain and the EU. Others varied, with some officials caught up on the Canadian side of the issue. James Bartleman, the Foreign Affairs Advisor in the Privy

⁸⁶ Rowat, pers. comm. 21 September, 2007.

⁸⁷ Ibid.

⁸⁸ Canada. Department of Fisheries and Oceans, "Why NAFO Members agreed upon a total allowable catch for Greenland halibut," Backgrounder [B-HQ-95-3E], March 1995.

Council Office, and, in effect, Chrétien's personal diplomatic advisor, set up a senior task force of deputy ministers on the issue, and himself brought up a long list of cautionary considerations; for example, what about European markets? And was Canada "prepared to fight?" According to Bartleman, "the questions fell on deaf ears. Normally pacific public servants had suddenly become warriors."⁸⁹ Tobin himself, Bartleman writes, called him at one point "to administer a vicious tongue-lashing at high volume."⁹⁰ As characterized by Bill Rowat, the "ones to beat" were Gordon Smith, the Deputy Minister at Foreign Affairs, Bartleman, and Eddie Goldenberg, the Prime Minister's Senior Political Advisor.⁹¹ The trio strongly urged caution and stressed the need to keep good relations with the EU. Implicitly, they argued that it wasn't worth alienating the European Union (and its trade dollars) over a few ugly fish. For their part, Tobin and Rowat argued that inaction would be the equivalent of "selling out Atlantic Canada," which had already been badly hurt by the collapse of the cod fishery.⁹² As well, Tobin reminded Prime Minister Chrétien of what he had said during the election campaign regarding the fisheries.⁹³ Though some meetings got nasty, Chrétien ultimately sided with the Fisheries Minister.

In one meeting, heated debate raged over the legality of any seizure. According to David Collenette, the Minister of Defence, and his Judge Advocate General, captains

⁸⁹ Bartleman, *Rollercoaster*, 93-96.

⁹⁰ Ibid. In Tobin's memoirs, he writes that he told Bartleman: "It's gutless people like you who have sold out fishermen year after year, in the interest of giving no offence to countries of the European Union!" See Tobin, *All in Good Time*, 118.

⁹¹ Rowat, pers. comm. 21 September, 2007.

⁹² Ibid.

⁹³ Chrétien made many references to the importance of preserving the fisheries during the 1993 election campaign. In the summer, Chrétien said he'd consider sending in Canada's navy if the overfishing didn't stop. See "Pullout from NAFO no answer," *Edmonton Journal*, 12 September 1993, A8. Another example would be "Kick out foreign fleets, extend limit, Liberals say," *Daily News*, 15 September 1993, 13. Indeed, the Liberal throne speech also made reference to the importance of the fisheries to Canada.

on DND vessels could refuse any action under any set of Rules of Engagement (ROE) because the ROE would not have been drawn up based on a legal approach. However, Allan Rock, the Minister of Justice argued that there was a moral, and hence a legal, argument for proceeding with a seizure. Since the Ministry of Justice carried more weight than National Defence, Rock's analysis helped tip the balance in favour of a seizure. David Collenette urged that the question of whether or not to proceed with a seizure should be taken to a full Cabinet meeting. In response, the Prime Minister allegedly said, "Sir, I am the Cabinet," slammed his briefing book shut, and walked out of the room.⁹⁴ The other ministers quickly pointed out to Collenette that if he wanted to keep his job he should hastily apologize to the Prime Minister.

Later on, in a full Cabinet meeting, the bureaucrats were asked to leave the room and Tobin proceeded to use intelligence data to show that the European vessels were committing illegal acts. Tobin's evidence included pictures of secret holds aboard vessels and reports of vessels refusing to allow Canadian inspectors on board.⁹⁵ As well, Canada had been monitoring the vessels on the Grand Banks and had intercepted radio transmissions of various captains who were openly discussing how they were rigging their books.⁹⁶ Tobin told Cabinet that Canada was past debating "whether something should be done" and simply needed to decide "what we are going to do about it."⁹⁷

The Prime Minister went around the Cabinet table asking each minister in turn what their position on a seizure was. Almost without fail, each minister parroted his

⁹⁴ Rowat, pers. comm. 21 September, 2007

⁹⁵ Tobin, *All in Good Time*, 97.

⁹⁶ *Toronto Sun*, "Trawlers Kept Fishy Records," *Toronto Sun*, 10 March, 1995, 3. For example, in mid-June 1994, the Portuguese trawler *Solsticio* reported fishing in closed Canadian zones and having 133,170 kg of cod aboard. In January, the Spanish trawlers *Estai* and *Sabaris* both recorded more than two tonnes of turbot as other species.

⁹⁷ Tobin, *All in Good Time*, 97.

department's recommendation to be cautious and not initiate a seizure. Then, it was time for Herb Gray, the Solicitor General and Deputy Prime Minister, to pass judgment. As Deputy Prime Minister, his opinion carried significant weight. Gray, like the other ministers, summarized the official position of the Solicitor-General's office and recommended caution. However, Gray then took off his "ministerial hat" and recommended that Canada take action. The Prime Minister once again went round the table. Again, most ministers said that their departments recommended caution. However, this time they almost all added that, on a personal note, Canada should take action.⁹⁸ Tobin understood and appreciated the cautious approach of ministers who were simply taking responsibility for their "line" departments. At the same time, he was pleased by each minister's personal pledge of support. According to Tobin, it would have been very easy for people to object and remain at arm's length should anything go awry. In essence, if the situation turned to disaster for Canada, ministers who had not supported the action could escape relatively unscathed and be able to shout "I told you so!" from the rooftops for their own political benefit.⁹⁹

Shortly afterwards, in the House of Commons, Brian Tobin was asked how Canada would ensure that NAFO commitments would be enforced. Tobin replied that thanks to the reduction of the size of the TAC and the work of the Parliament, "Canada will have for the first time the right to board and to inspect the vessels catching turbot and to ensure that the proper rules are being followed to conserve this important stock."¹⁰⁰ It seems that Tobin was referring to both the CFPA and NAFO regulations in

⁹⁸ Tobin, *All in Good Time*, 97-98 and Rowat, pers. comm., 21 September, 2007.

⁹⁹ Tobin, pers. comm. 18 January 2008.

¹⁰⁰ Brian Tobin. "Response to Francis G. LeBlanc during Question Period," September 26, 1994. Canada. "36th Parliament, 1st Session," Canada, House of Commons Debates. (1994-1995) 53.

this statement, although he did not specifically say where these inspections would take place.

Canada Wins in Turbot Allocation

At the end of January 1995, NAFO met and agreed on a turbot-sharing arrangement for the year. The negotiations were heated, with the Canadians and the EU pushing for vastly different TAC allocations. Behind the scenes, both delegations were diligently working on other NAFO members to secure their votes for the TAC allocation. The Canadian delegation managed to secure the vote of the Norwegians. However, at the last minute, the Norwegian delegation began vacillating on whether or not they would indeed vote with Canada at the next morning's meeting. Brian Tobin then called the Norwegian Minister of Fisheries, who was having dinner in Moscow with the Russian Minister of Fisheries, to explain the situation. As a result, the Norwegian Minister of Fisheries called his delegation in Brussels and told them in unequivocal terms that they were to vote with Canada on the turbot TAC allocation.¹⁰¹ Canada still needed more votes. The Canadian delegation made a similar intercession with the Japanese, who were initially planning to vote with the European Union. When Max Short, a Newfoundland fisheries union organizer and a trusted advisor to Minister Tobin, made it clear to the Japanese that Canada had a "bit of a crazy minister" and that it wasn't entirely without question that Japan might find it difficult to catch their share of international tuna quotas if they voted with the European Union, they decided to vote with Canada.¹⁰²

¹⁰¹ Tobin, pers. comm. 18 January 2008 and Rowat, pers. comm. 21 September, 2007.

¹⁰² Tobin pers. comm. 18 January 2008.

Still, Canada had to find another vote to break the deadlock and gain victory. The Canadian delegation turned their focus to the South Korean delegate. A smaller fishing nation, South Korea had not sent a fisheries representative to the negotiations. Instead, they sent a representative from their local staff in Brussels. South Korea was intending to vote with the EU. The South Korean delegate was not well-educated on fisheries issues. Indeed, he was described by one participant as “not being able to recognize the sharp end of a fish,” and highly erratic to boot.¹⁰³ Canada pushed hard on the South Koreans and, finally, after discussions that lasted into the night and a one-on-one meeting with Tobin, the Canadian delegates secured the abstention of South Korea. The abstention put Canada over the top. Going into the next day’s negotiations, Canada was now confident of victory, though so was the EU. Bill Rowat recalled the vote as “one of the most fun” of his entire career.¹⁰⁴ As he recounts it, the South Korean Head of Delegation was so erratic that even though he had promised to abstain he might have changed his mind overnight and voted with the EU when the time came. Thus, when the South Korean delegation abstained, giving the victory to Canada, Rowat was greatly relieved. On the other hand, the head of the EU delegation, who had been expecting victory, literally stormed out of the room in shock and anger.¹⁰⁵

Meanwhile, Brian Tobin was in a one-on-one meeting with his EU counterpart, Emma Bonino. As Tobin tells it, Bonino was “very warm, very charming, very friendly” and was “obviously very confident that she was being rather friendly to someone who was about to get bad news.”¹⁰⁶ Bonino stressed the need for co-operation

¹⁰³ Rowat, pers. comm. 21 September, 2007.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Tobin, pers. comm. 18 January 2008.

no matter the results of the vote: “Whatever happens here tonight, we have to work together. We have to be friends in the interest of the fishery and good international relations.”¹⁰⁷ However, Tobin knew that Canada would win the vote and was simply waiting on the official word from the meeting hall. When one of Bonino’s aides informed her that Canada had won the vote, she “turned white with shock, then red with anger,” and shot Tobin a “withering look.”¹⁰⁸ She simply said to Tobin, “I’m sure you’ll want to be briefed by your delegation now” and left the room, leaving Tobin alone to finish his coffee. It was an “incredible moment,” said Tobin, though there was “no point” in reminding her that she had been stressing co-operation, no matter the result, less than five minutes before.¹⁰⁹ The Canadians had outmaneuvered the EU, who had been so assured of their own victory at the TAC allocation vote. Figure 5 shows the result of the TAC allocation vote.

Figure 5

| 1995 NAFO turbot allocation | |
|------------------------------------|---|
| Canada | 16 300 tonnes (60.4 percent of TAC) |
| The European Union | 3 400 tonnes (12.6 percent) |
| Russia | 3 200 tonnes (11.9 percent) |
| Japan | 2 600 tonnes (9.6 percent) |
| Other NAFO members | 1 500 tonnes (5.5 percent) ¹¹⁰ |

¹⁰⁷ Ibid.

¹⁰⁸ Tobin, *All in Good Time*, 102, and Tobin, pers. comm. 18 January 2008.

¹⁰⁹ Tobin, pers. comm. 18 January 2008.

¹¹⁰ Fisheries and Oceans Canada, “Why NAFO members agreed . . .”

According to Spain, Canada purchased the votes needed to end up with 60 percent of the TAC allocation for itself. However, the EU wanted even more than that for its own fleet.¹¹¹ Indeed, the EU's own unilateral quota was set at 18,630 tonnes, or 69 percent of the TAC.

It is important to consider at this point how NAFO allocates its quotas. Generally speaking, NAFO takes into account historical catch levels of the countries involved in each stock's fishery when setting quotas. In the case of turbot, no quota existed before 1995, but the catch was still being tracked by NAFO. Examination of catch data makes a clear and compelling case that Canada had a long-standing and significant fishery and the EU did not. Indeed, the 35,000 to 40,000 tonne catches by the EU in the early 1990s was a distinct anomaly. According to NAFO's tracking, from 1986-1991, the EU fished a total of 46,504 tonnes of turbot. During the same time period, Canada fished a total of 95,482 tonnes of turbot. Thus, Canada enjoyed historical dominance. Yet, from 1992-1994, Spain alone fished 110,932 tonnes and the EU altogether took 137,340 tonnes, whereas Canada fished only 29,834 tonnes.¹¹² The EU was going all-out in attacking the turbot.

The EU was not happy with the results of the turbot TAC allocation. John Beck, the EU's ambassador to Canada, hinted that the EU would set its own quota and, unless Canada reconsidered the turbot quota, that trade and goodwill between Canada and the European Union would suffer.¹¹³ In response, Ron MacDonald, the MP from

¹¹¹ PBA, *Estai* Trial Transcript, 2005, 29.

¹¹² Statistics on Catch levels come from NAFO's STATLANT 21A table that is available at <http://nafo.int/fisheries/frames/fishery.html> <accessed 25 June 2009>. It should be noted that these catch figures are NAFO estimates. As shown earlier the catch reported to NAFO and the actual catch landed can vary greatly. It would be safe to assume that the EU fleet was catching upwards of 50,000 tonnes each year from 1992-1994.

¹¹³ Tobin, *All in Good Time*, 104.

Dartmouth, wrote a strongly worded letter to Beck stating that another EU objection would be “clearly unacceptable from both a resource conservation standpoint as well as respect for international organizations like NAFO.”¹¹⁴ MacDonald went on to detail how coastal communities “felt the real impact of Spain’s greed and the EU’s complicity” and had “seen their way of life destroyed.”¹¹⁵ MacDonald accused the EU of acting like “a spoiled child” and suggested that “if a turbot looked more like a baby seal,” perhaps the “European pirates could be more easily dissuaded from decimating the stock.”¹¹⁶

In the House of Commons, Tobin commented that “we [the government] have heard reports that the EU may object to the NAFO decision and set unilateral quotas. That is not acceptable to Canada ... Canada will not stand by and see more stocks destroyed.”¹¹⁷ The following week, when asked to clarify what response Canada would make if the EU continued to ignore NAFO quotas, Tobin answered:

We much prefer to talk. We much prefer to negotiate. We will go to the nth degree to settle our differences by agreement. However we warn all those who are listening that we will not sit and talk while the last fish is being caught.¹¹⁸

These were strong words, but they reflected Tobin and the government’s resolve.

¹¹⁴ Letter from Ron MacDonald, Member of Parliament for Dartmouth, Nova Scotia to John Beck, EU Ambassador to Canada as quoted in Tobin, *All in Good Time*, 105-106.

¹¹⁵ *Ibid.*, 105.

¹¹⁶ *Ibid.*, 106.

¹¹⁷ Brian Tobin. “Response to Francis G. LeBlanc during Question Period,” February 14, 1995, Canada. “36th Parliament, 1st Session,” Canada, House of Commons Debates, (1994–1995) 53.

¹¹⁸ Brian Tobin. “Response to Ted McWhinney,” February 22, 1995. Canada. “36th Parliament, 1st Session,” Canada, House of Commons Debates, (1994–1995) 53.

On February 2nd, Emma Bonino, the European Union's Fisheries Commissioner, issued a formal statement indicating the EU's plan to object to NAFO's division of the turbot stock and stating the EU's intention to set its own unilateral quota. Then, on February 6th, Minister Tobin wrote a letter to Bonino indicating Canada's willingness to transfer part of its NAFO allocation to the European Union for the 1995 fishing season provided the EU did not invoke the objection procedure.¹¹⁹ This offer was unprecedented in terms of NAFO and Canada-EU relations. Never before had a country offered to give up some of its own established quota. The offer was meant to ease the transition period for the EU fleet, which had previously been fishing over 50,000 tonnes of turbot.

Tobin's overtures were soundly rejected. On February 13th, Sir Leon Brittan, the European Commissioner for External Trade, confirmed to Roy MacLaren, Canada's Minister of International Trade, that the EU still intended to use the formal NAFO objection procedure. This meant that once again the EU would set its own unilateral quota in excess of the NAFO allocation. And, just as likely, it meant that the EU would again overfish its own unilateral quota, further reducing the depleted fish stocks. The Premier of Newfoundland, Clyde Wells, wrote a letter to the Prime Minister condemning the EU's intent to object and urged action: "In the face of this approach by the EU, I believe Canada has no choice but to act, and I urge you to apply Bill C-29 . . . and take action against EU vessels."¹²⁰

¹¹⁹ PBA, Letter, Hon. Brian Tobin to Emma Bonino, 6 February 1995.

¹²⁰ PBA, Letter, Premier of Newfoundland Clyde Wells to Prime Minister Jean Chretien. 21 Feb 1995.

On February 22nd, the EU's COREPER (Comité des Représentants Permanents)¹²¹ announced it was setting a unilateral EU quota of 18,630 tonnes for turbot, roughly six times the NAFO-recommended quota. Canada's fisheries scientists regarded the new EU quota as excessive. Overfishing continued and, by the end of February, DFO estimated that EU vessels, mainly Spanish and Portuguese, had caught 6,000 tonnes, already almost double the NAFO quota of 3,400 tonnes.

Around this time, Tobin went on a "whirlwind" world tour, meeting with ambassadors from the European Union and its member countries, and other NAFO countries including Cuba, Japan, and Russia. Tobin unequivocally warned them that Canada was going to stop the abuse of the fisheries and of the objection procedure. Canada, Tobin made clear, would act unilaterally and make arrests on the high seas if other countries did not rein in their fishing fleets. According to Tobin, "no one could possibly have been surprised" and "they couldn't have missed my message."¹²² Still, Tobin felt in his "heart and soul and bones that [Canada] would have to act unilaterally."¹²³ The bottom line, Tobin continued, was that despite the repeated warnings, the EU simply did not believe that Canada would actually make a seizure. At the same time, the Department of Fisheries and Oceans ramped up publicity by issuing a string of press releases and media backgrounders on the overfishing situation. T-shirts were created, with "Get off my Nose" emblazoned on the front and "Get off my Tail" on the back, and sold to raise money for the United Way and, of course, to raise awareness of the issue. Bill Rowat even recruited Don Cherry, the bombastic Hockey Night in

¹²¹ COREPER is composed of the resident ambassadors of each EU country in Brussels and allows countries to represent their interests on a day-to-day basis.

¹²² Tobin, pers. comm. 18 January 2008.

¹²³ Ibid.

Canada television personality, to the cause. He bellowed on camera to millions of watching Canadians, “Way to go Tobin! Way to go DFO! Get those people off our Nose and Tail!”¹²⁴

Calls for Action – Canada Seizes the *Estai*

Once the EU had declared their unilateral quota, it became increasingly clear that concrete action would be necessary. As a result, the Canadian government drew up Rules of Engagement (ROE) to clarify the action that Canadian enforcement agents could take. As proposed, the ROE would allow the enforcement officers to first fire warning shots and then, if the vessel still failed to stop, to give sufficient warning and time for the vessel’s crew to clear the aft deck and then to fire shots into the propeller. At this point, the vessel would be dead in the water and unable to maintain steerage. If the vessel continued to resist, the Prime Minister could authorize, as the ultimate step, the firing of shots directed at the wheelhouse.¹²⁵

On the Grand Banks, EU trawlers continued to fish with seeming impunity while diplomatic efforts to reach a solution continued. On March 2nd, Canadian ambassadors to all EU countries were given identical letters to deliver. The letter outlined the decimation of the fish stocks, the continued overfishing, and Canada’s determination to prevent the complete destruction of the remaining fish stocks.¹²⁶ On March 3rd, Prime Minister Jean Chrétien sent a similar, strongly worded, letter to EU President Jacques Santer, requesting that the EU fleets immediately cease all fishing operations for turbot

¹²⁴ Tobin, *All in Good Time*, 120-121.

¹²⁵ Rowat, pers. comm. 21 September, 2007.

¹²⁶ Tobin, *All in Good Time*, 112-114.

in Canadian and NAFO waters.¹²⁷ Later that same day, Chrétien proposed a sixty-day moratorium on both Canadian and EU fishing for turbot. Chrétien also called the German Chancellor, Helmut Kohl, and the Belgian Prime Minister, Jean-Luc Dehaene, to outline Canada's position on the matter.

At the same time, Canada's ambassador to Spain, David Wright, was called to the Spanish Minister of Foreign Affairs' office for "serious talks," this being *diplomatic-speak* for being raked over the coals. Spain, the minister offered, was prepared to halve its presence on the Nose and Tail but would not publicly acknowledge the re-deployment of the fleet because it would upset Spanish citizens. Ambassador Wright countered that Spain was welcome to have as many vessels as they wanted in the area, provided they did not fish. The ambassador also pointed out that by Canadian estimates, the Spanish had already fished almost 7,000 tonnes of turbot, more than double the allocated NAFO quota of 3,400 tonnes. In response, the minister charged that it was impossible that Spain had caught that much turbot because the stock simply was not that big.¹²⁸

That same day, the Canadian government amended the Coastal Fisheries Protection Regulations that accompanied the *Coastal Fisheries Protection Act*. The amendments focused on identifying foreign fishing vessels that were proscribed from fishing in Canadian waters. The amendments added Spain and Portugal to the list of proscribed nations, and prohibited them from

...fishing for, or catching and retaining,
Greenland halibut [turbot] in Division 3L,
Division 3M, Division 3N or Division 3O

¹²⁷ PBA, Letter, Jean Chretien, Prime Minister of Canada, to Jacques Santer, President of the European Union, 3 Mar 1995.

¹²⁸ Tobin, *All in Good Time*, 122.

during the period commencing on March 3 and terminating on December 31 in any year.¹²⁹

At first, it appeared that the new regulations would work to deter overfishing. In the days following the passing of the CFPA amendment, much of the European Union's fleet left the Nose and Tail areas of the Grand Banks. Even so, the Canadian government continued with its plans and deployed fisheries patrol vessels to the Nose and Tail should arrests of offending vessels be deemed necessary. On March 7th, Canadian patrol vessels in the area reported that of the 45 EU ships that had been on the Grand Banks, only 16 remained and it appeared that they would soon leave.¹³⁰ However, on March 8th, it became clear that some EU vessels had remained on the Nose and Tail of the Grand Banks and were again starting to fish. It was now deemed time to take concrete and forceful action.

At this point, Canada was monitoring the Spanish and Portuguese ships on the Nose and Tail of the Grand Banks and elsewhere in the NAFO Regulatory Area using a combination of patrol vessels, aircraft, and satellite technology. Of particular interest was the Spanish vessel *Estai* which had received citations in May 1994 for failing to record catch of American plaice and for retaining undersize flounder.¹³¹ When it became clear that Spanish and Portuguese vessels had remained behind and had once again begun to fish, further decimating the stocks and showing complete disregard for the agreed-upon NAFO quota, the Canadian government made the decision to seize a vessel under the provisions of the amended CFPA. The *Estai* was chosen as the vessel

¹²⁹ Canada. Coastal Fisheries Protection Regulations, section 21:2, paragraph d). Quoted in International Court of Justice. Judgement: Fisheries Jurisdiction Case.

¹³⁰ Tobin, *All in Good Time*, 123.

¹³¹ PBA, Memorandum. Subject: Citations of Apparent Infringement – EU vessels. G. Traverse, Director Resource Management Division, Newfoundland Region to Earl Wiseman, International Directorate, no date.

to be seized in large part because of its continued presence on the Grand Banks and its earlier citations.¹³²

On March 9th, at approximately 06:00 (NST) final approval was given for the boarding operation to commence. Bill Rowat, the Deputy Minister of Fisheries and Oceans, made the call. At 11:30, the position of the monitored ship, the *Estai*, was passed to Canadian fisheries patrol vessels the *Cape Roger* and the *Leonard J. Cowley* as well as to the Canadian Coast Guard vessel *Sir Wilfred Grenfell*. The three vessels began to pursue the *Estai*. The *Estai*'s crew was told to heave to and prepare to be boarded for an inspection. The *Estai*'s crew repeatedly refused to stop their vessel and ready it for boarding and inspection.

At approximately 13:45 the *Cape Roger* dispatched an armed boarding team comprising fishery officers and RCMP. The *Estai*'s crew resisted the boarding attempt, casting the boarding party's ladder and, consequently, some of its members into the freezing cold Atlantic Ocean.¹³³ According to Enrique Davila, the captain of the *Estai*, the initial attempt to board the *Estai* was made without any contact from the *Cape Roger*, i.e., without warning. Canada acknowledged that there was no radio contact made before the initial boarding attempt. But, international signal pennants meaning "Stop and prepare to be boarded" were clearly displayed by the *Cape Roger*.¹³⁴ Captain Dávila, believing his vessel was soon to be a victim of unlawful boarding on the high

¹³² PBA, Nick Katsepontes, Telex to BREEC, Bob Applebaum, Earl Wiseman, J.R. Hegan, Debbie Gill, Malcolm Rowe, Madrid. "NAFO Citations - Spanish vessel *Estai*." Dated 10 May 1994.

¹³³ Tobin, pers. comm. 18 January 2008.

¹³⁴ PBA, Amended Statement of Defence, *Hijos and Gonazalez vs. Canada* (Attorney General), filed 22 May 2003, Court File No.: T-1602-95, 3.

seas, ordered the net cut.¹³⁵ At this point, the *Estai* cut her warps, altered course, and increased her speed in an attempt to evade capture.¹³⁶ A high-speed, high-seas chase ensued, through bad weather and dense fog. In the opinion of Spain, Canadian vessels were coming dangerously close to the *Estai*.¹³⁷ Canada claimed that the *Cape Roger* approached the *Estai* only as close as was necessary to permit the boarding in accordance with the *Coastal Fisheries Protection Act*.¹³⁸

At approximately 14:10, the RCMP's Emergency Response Team (ERT) took the lead on the boarding operation. Once again, the boarding team was repelled and team members ended up in the Atlantic Ocean. At the same time, other Spanish vessels in the area had assumed collision courses with the *Leonard J. Cowley* in an attempt to intimidate the Canadians and protect their comrades. The *Wilfred Grenfell* fired a burst from its water cannon to open water in an attempt to deter the other Spanish vessels from interfering in the seizure.¹³⁹ Within minutes, the RCMP's ERT team was recovered from the freezing waters and pursuit of the *Estai* was resumed. By 17:00, a third boarding attempt was made. Once again, the crew of the *Estai* repelled the boarding party.

Meanwhile, diplomatic activity was reaching a fever pitch. The EU condemned "in the strongest possible terms" the attempted boarding by the Canadians. The EU's

¹³⁵ PBA, Statement of claims filed by Dávila and José Pereira e Hijos, S.A. (owner of the *Estai*) against the Attorney-General of Canada and the Minister of Fisheries and Oceans on July 28, 1995.

¹³⁶ PBA, Pearcey, Dawn. Briefing Note for the Minister. Issue: Arrest and seizure of Spanish Trawler *Estai* for Fishing Greenland Halibut Contrary to 5(2) of *Coastal Fisheries Protection Act* as amended. No date.

¹³⁷ PBA, Statement of Claim by Davila, CDA claims ships came no closer than necessary [see statement of claim/defence]

¹³⁸ PBA, Amended Statement of Defence, Hijos and Gonazalez vs. Canada (Attorney General), filed 22 May 2003, Court File No.: T-1602-95, 4.

¹³⁹ Ibid.

statement went on to say that the EU supported the 27,000 tonne turbot quota.¹⁴⁰ This was a questionable statement given that the EU had abstained from the quota vote, objected to the level set, and had unilaterally set their own quota which they were in the process of exceeding (having already overrun their NAFO quota).

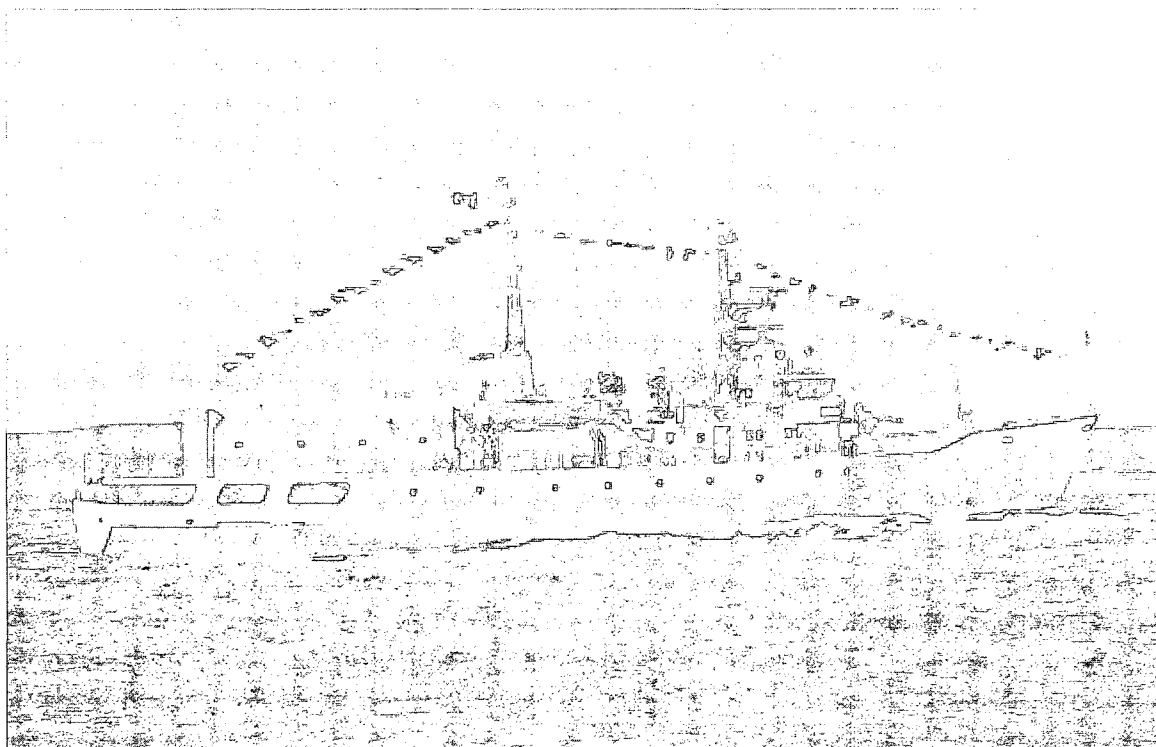


Figure 6

The DFO patrol vessel *Cape Roger* which captured the *Estai*. Shortly after the *Estai* incident, DFO and the Canadian Coast Guard merged, and DFO vessels became known as Coast Guard vessels. But the only Coast Guard vessels that actually “guard,” in the sense of bearing armament, are two fisheries patrol boats, based in Newfoundland, that are geared for armed boarding. Photo: Courtesy of DFO.

Back on the high seas, the situation continued to intensify. Bill Rowat, the Deputy Minister of Fisheries and Oceans, situated in the so-called “war room” in

¹⁴⁰ European Union, “Commission Statement on Canada’s attempted seizure of EU fishing vessel.” 09 March 1995.

Ottawa, had the authority to approve the firing of warning shots.¹⁴¹ Tobin, James Bartleman, and Gordon Smith were also present in the war room. After consulting with Tobin, the decision was reached to approve the firing of warning shots and to make an attempt to get Smith and Bartleman “on side.” As Rowat recounts it, they got caught up in the moment and all four men signed the authorization. Once the approval was signed, they phoned the captain of the *Cape Roger* and informed him that he was authorized to proceed.¹⁴² At approximately 17:55, after a more than three-hour chase, repeated radio requests asking the *Estai* to stop, and verbal warnings that the *Cape Roger* would open fire, the *Cape Roger*’s crew fired four short bursts across the bow of the *Estai*.¹⁴³ In the words of Bill Rowat, the *Cape Roger*’s crew “splashed some water.”¹⁴⁴ At this point, the *Estai*’s crew finally heaved to and a boarding party was once again dispatched. By 18:12, the boarding party had seized the *Estai* and arrested the captain, Enrique Davila, without further incident.

Had the *Estai* not heaved to, the authorization to fire warning shots advised that the *Cape Roger* was to notify the *Estai*’s crew members to clear the rear decks and, after giving sufficient time for them to do so, disable the *Estai* by shooting out her propeller, effectively making her dead in the water. Had the *Estai*, even then, continued to resist arrest, the Canadians on scene could be authorized to fire bursts into the wheelhouse.¹⁴⁵

¹⁴¹ The “war room” was the Peter Mitchell room in DFO headquarters at 200 Kent Street in Ottawa. During the time of the crisis it was staffed almost twenty-four hours a day.

¹⁴² Rowat, pers. comm. 21 September 2007 and PBA, Rowat, William, “Authorization to Fire Warning Shots - .50 calibre Machine Gun on Board Department of Fisheries and Oceans Patrol vessel - *Cape Roger*.” Dated 1600, 09 March 1995.

¹⁴³ PBA, Pearcey, Dawn. Briefing Note for the Minister. Issue: Arrest and seizure of Spanish Trawler *Estai* for Fishing Greenland Halibut Contrary to 5(2) of *Coastal Fisheries Protection Act* as amended. No date. The *Cape Roger* expended twenty-three rounds of ammunition according to Amended Statement of Defence, *Hijos and Gonazalez vs. Canada* (Attorney General), 4.

¹⁴⁴ Rowat, pers. comm. 21 September, 2007.

¹⁴⁵ *Ibid.*

Such an action, had it taken place, would have undoubtedly endangered the lives of the *Estai*'s crew and ratcheted up the tension even more.

After the seizure, the Canadians began towing the *Estai* back to harbour in St. John's, Newfoundland. Meanwhile, the EU and Spain roundly condemned Canada's unilateral action in two Notes Verbales sent on March 9th. These called the seizure an act of "unilateral aggression" and a "flagrant violation of international law."¹⁴⁶ The Notes went on to further condemn Canada's actions, by stating:

The Spanish Government considers that the wrongful act committed by ships of the Canadian navy [sic] can in no way be justified by presumed concern to conserve fisheries in the area...¹⁴⁷

Spanish newspapers called the seizure "an act of piracy," as did the head of fisheries for one Spanish region. John Beck, the EU's ambassador to Canada, echoed the piracy claims and proclaimed "Who is the bull now?" Tobin posited in his memoirs that an apt response would have been "Who's been waving the red flag?"¹⁴⁸ However, the reaction from elsewhere in the European Union was much different. Fishermen from Britain and elsewhere voiced their support for Canada's action. One British fisherman, Ian Mitchell, said "It's about bloody time somebody stood up to the Spanish."¹⁴⁹ An article in Britain's *Sunday Telegraph* claimed that "if it comes to

¹⁴⁶ PBA, Note Verbale from Spanish Embassy to the Department of Foreign Affairs and External Trade, March 9, 1995. Quoted in ICJ. Judgement: Fisheries Jurisdiction Case, part 20.

¹⁴⁷ Ibid.

¹⁴⁸ Tobin, *All in Good Time*, 126.

¹⁴⁹ Marion Findlay, "Cornish Fishermen give Canada a hearty well done," *Toronto Star*, 19 March 1995, E6. Other articles detailing the public reaction in Britain and elsewhere appeared, lambasting the Spaniards and the EU politicians and praising the Canadians for taking action. One such example is "Spanish fleets have serious PR problem," *St. John's Evening Telegram*, 19 March 1995, 12 which detailed the response in Britain's *Daily Mail* and quoted a member of the German federal parliament who called on Spain and the EU to honour the turbot quota. Other examples include the *Daily Mail*'s 11

gunfire between Canada and Spanish vessels, there can be few Britons who will not wish the Spaniards at the bottom of the ocean.”¹⁵⁰

In Canada, the seizure received wide praise in the national press.¹⁵¹ Tobin was cheered for taking action to protect the dwindling stocks on the Grand Banks and against the Spanish “pirates.” On the diplomatic front, the Department of Foreign Affairs and International Trade (DFAIT) responded to the EU’s criticism of the seizure by stating that that the *Estai* had resisted boarding attempts and that the arrests were necessary for the conservation and preservation of the fishery.

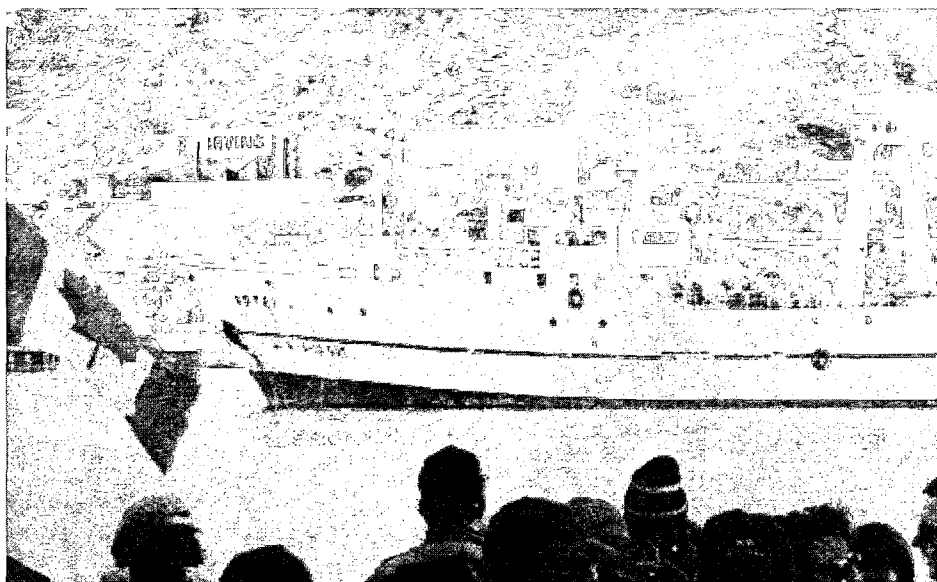


Figure 7

The *Estai* entering St. John's under escort (Canadian Press / Fred Chartrand)

March 1995, editorial, “Good Luck to Canada,” which noted how the Spanish consistently ignored quotas and landed undersized fish. Of the major British dailies, only *The Times* gave more prominent coverage to the European position. See DFO, “International Media Coverage: Greenland Halibut Dispute,” 11 March 1995. Other stories were carried in Germany, France and other EU countries as well as in Spain and Portugal. The coverage in Spanish and Portuguese papers was more supportive of the Spanish and called the seized crew members “Canada’s hostages.” See DFO, “International Media Coverage: Greenland Halibut Dispute,” 13 March 1995.

¹⁵⁰ As quoted in DFO, “International Media Coverage: Greenland Halibut Dispute,” 12 March 1995.

¹⁵¹ For examples see major stories in *The Globe and Mail*, *The Toronto Star*, *The Montreal Gazette*, *The Vancouver Sun*, and the *St. John's Telegram* among many, many others. In the days following the arrest of the *Estai* hundreds of articles appeared.

On March 12th, the *Estai* arrived in St. John's. Thousands of Canadians (according to Davila, more than 10,000) turned out in St. John's harbour.¹⁵² The crowd cheered the Canadians and jeered the *Estai* and hurled obscenities at the Spanish crew and captain. Minister Tobin "very deliberately" chose to remain in Ottawa to avoid any appearance that Canada was gloating about the seizure or that the arrest was for anything other than substantive conservation purposes.¹⁵³ According to news reports and Statements of Claim filed by Davila's legal representative, some members of the crowd threw eggs at Davila. The published news reports indicate that a German diplomat, who was accompanying Davila, was hit with an egg.¹⁵⁴ Captain Davila was taken to the courthouse where he was charged under the provisions of the *Coastal Fisheries Protection Act*. Davila's lawyer, John Sinnott, noted to the Court that Spain did not recognize the jurisdiction of Canada in the case and were only paying the \$8,000 bail for Davila in order to prevent him from spending the night in jail.¹⁵⁵

Canadian officials inspected the *Estai*. EU officials were invited to participate in the inspection but refused. In fact, the EU inspector on site in St. John's later said that he was under strict orders not to participate.¹⁵⁶ According to Tobin, the EU wanted to be able to invoke "plausible deniability" regarding any evidence collected from the *Estai*.¹⁵⁷ The inspection revealed two sets of logs. The "Owner's Log" recorded the actual, and illegal, catch level and fishing effort while the "NAFO/Official Log" showed

¹⁵² PBA, Statement of Claim. Hijos and Davila. According to news reports in major Canadian dailies the size of the crowd was between 5,000 - 7,000. See the front page stories in the *Globe and Mail*, the *Ottawa Citizen*, the *Toronto Star*, the *Victoria Times-Colonist*, and the *Kingston Whig-Standard* among others, 13 March 1995.

¹⁵³ Tobin, pers. comm.. 18 January 2008.

¹⁵⁴ Various news reports from 13 March 1995, as cited above.

¹⁵⁵ *Globe and Mail*, 13 March 1995, A1.

¹⁵⁶ PBA, Department of Fisheries and Oceans, "*Estai's* Fishing Practices - Canada's Case," No date, 2-3.

¹⁵⁷ Tobin, pers. comm. 18 January 2008.

compliance with NAFO regulations. For example, for January-February, 1995, the Owner's Log showed catches of 131 tonnes of turbot whereas the NAFO log recorded only 75 tonnes.¹⁵⁸ The "Owner's Log" was consistent with the inventory of product on board the *Estai*.

As well, the inspection found that much of the *Estai*'s catch of turbot was undersized. A subsequent scientific analysis showed that 97.95 percent of the *Estai*'s turbot catch was less than 60 centimetres long, the average length of an "adult" turbot. Furthermore, more than 55 percent of the catch was less than 37 centimetres long,¹⁵⁹ and many were less than the length of an average ballpoint pen.¹⁶⁰ The inspection also revealed that there was a secret hold on the *Estai* that contained American plaice, a species under complete moratorium.

Still, despite the mountain of evidence that the inspection of the *Estai* yielded, a key piece of the puzzle remained missing: the *Estai*'s net. The Canadian fishing vessel *Zandvoort* was enlisted to search for the *Estai*'s net. Using sophisticated equipment including a Global Positioning System (GPS) in the search, the *Zandvoort* managed to recover the *Estai*'s net from the bottom of the ocean. It was recovered with live fish still in it, indicating that the net had only recently been jettisoned to the bottom of the sea.¹⁶¹ By matching the cables on the net to the cut cables on the *Estai* through forensic analysis, Canada was able to prove, unequivocally, that the net belonged to the *Estai*. According to NAFO regulations in force at the time, the minimum mesh size for a turbot

¹⁵⁸ PBA, DFO, "*Estai*'s Fishing Practices - Canada's Case," No date, 2.

¹⁵⁹ PBA, William Brodie, Facsimile to Leo Strowbridge and Jim Beckett. "Turbot Length Frequency Estimated From *Estai*," 16 March 1995. For a Greenland halibut [turbot] to be considered mature and capable of reproduction it must be longer than 60cm.

¹⁶⁰ Edward Greenspon, "'Baby' Fish Caught, Tobin Says," *Globe and Mail*, 14 March 1995, A1.

¹⁶¹ PBA, No Author, Briefing Note for the Minister, Issue: Search for Cut Gear belonging to Spanish Vessel *Estai*, 15 March 1995.

net was 130 millimetres. A net this size would allow immature fish to escape. The *Estai*'s net had a smaller mesh size of 115 millimetres, and a "liner," a net within a net, of only 80 millimetres.¹⁶² Despite the overwhelming evidence of the *Estai*'s blatant contravention of NAFO regulations, the EU insisted that the *Estai* had broken no rules and was in full compliance with NAFO regulations and that Canada's accusations were unfounded.¹⁶³

On the diplomatic front, the EU refused to negotiate while the *Estai* and its crew was still being held by Canada. The Canadian government was also under pressure in the House of Commons from the opposition parties, who demanded to know when Canada and the EU would resume negotiations to settle the dispute. Even so, Bloc Québécois leader, Lucien Bouchard, said that "Canada had to do what it did. The protection of the turbot has become imperative."¹⁶⁴ The Reform Party fisheries critic, John Cummins, was more obstreperous. He called the seizure a "PR exercise" that was "absolutely disgusting" and "outrageous."¹⁶⁵

Tobin replied to his critics on March 15th that Canada would not negotiate with the EU while illegal fishing continued, and that a negotiation team was in place in Brussels to begin talks when both sides were ready.¹⁶⁶ That same day, the owners of the *Estai* posted a \$500,000 bond to secure the *Estai*'s release. Upon its release, the *Estai*, along with other Spanish fishing ships, returned to Spain.

¹⁶² PBA, Department of Fisheries and Oceans, "*Estai*'s Fishing Practices - Canada's Case." No date, 1. The author has personally seen a segment of the *Estai*'s net and it is hard to imagine that many fish would be able to escape its clutches.

¹⁶³ PBA, European Union, News Release: "Le Navire *Estai* est conforme aux règles de la NAFO. Les Accusations Canadiennes ne sont pas Fondées," 25 March 1995.

¹⁶⁴ Tobin, *All in Good Time*, 127.

¹⁶⁵ Ibid.

¹⁶⁶ Brian Tobin, "Response to Lucien Bouchard during Question Period," 15 March 1995. Canada. "36th Parliament, 1st Session," Canada, House of Commons Debates (1994-1995) 53.

However, by March 21st, Spanish vessels had returned to the Grand Banks, this time accompanied by a Spanish naval patrol boat, the *Vigia*.¹⁶⁷ The Spanish navy was given orders to fire on any Canadian boarding party.

Negotiations and Resolution

The release of the *Estai* enabled Canada's negotiation team in Brussels to get to work. At the table, two main EU-Canada groups formed. A "senior" group would focus on the political and legal matters and on the quota issue. A second "technical" group consisting of fisheries experts would focus on conservation and enforcement measures. The senior group held two sessions on the opening day of negotiations and reached a preliminary agreement on quota allocation. However, this did little to solve the overall issue since Canada argued that the quota issue required agreement on strict enforcement and conservation measures in order to be effective. In effect, the senior group needed to wait for the technical group's conclusions before it could effectively work. Spain argued that the quota allocation and conservation/enforcement issues should remain separate. However, Spain was forced to abandon this position when it became clear that it did not have the full support of the EU.

The technical group was making headway. By the evening of March 17th it had produced a document containing the proposal of both parties. Indeed, Canada was surprised to find that the EU negotiating team was now putting forward several measures that the EU had rejected when they were suggested by Canada at previous NAFO meetings. Still, sticking points remained. Chief among them was Canada's insistence on 100 percent observer coverage and the EU's insistence on a satellite-based

¹⁶⁷ Springer, "Turbot War," 36.

tracking system (rejected as inadequate by Canada).¹⁶⁸ Despite the hiccups in the negotiations, a general “fish for enforcement” consensus began to emerge. Canada would accept a smaller share of the turbot TAC allocation in exchange for tougher enforcement measures, and the EU would accept the tougher enforcement measures in exchange for a higher TAC allocation for the Spanish fleet. Both sides would have to accept trade-offs in order to get that which they most cherished.

The Newfoundland and Labrador fishing industry, as well as the province itself, supported this idea. However, their counterparts in Spain did not. Spanish fishing organizations criticized the Spanish government for even negotiating with Canada in the first place. As far as they were concerned, Canada was in breach of international law. The head of the ship owners’ association based in the Spanish port of Vigo strongly condemned the negotiations: “We’re completely against this. We understand they’re going to sell us out.”¹⁶⁹ In Madrid, the Spanish government expressed its displeasure by suspending all bilateral meetings and instituting visa requirements for visiting Canadians.¹⁷⁰

Still, the negotiations pressed onwards. On March 22nd, EU President Jacques Santer, in a letter to Prime Minister Jean Chrétien, proposed that further negotiations take place in Vancouver during the preparatory meeting for the upcoming G-7 summit. Canadian authorities welcomed the gesture, but Tobin warned that if no progress was made, further enforcement action would be taken against any offending vessels. As

¹⁶⁸ Canada, Department of Foreign Affairs and International Trade, News Release, 18 March 1995. “Conservation and Enforcement primary concerns in fisheries dispute.”

¹⁶⁹ Juliet O’Neill, “Spanish Crews Warn of Violence after “sellout” by European Union,” *Ottawa Citizen*, 17 March 1995, A1.

¹⁷⁰ Judy Schultz, “Spanish visa trips travellers; It’s no longer so easy to visit sunny Spain,” *Edmonton Journal*, Edmonton, Alta.: 01 April 1995, F3.

mentioned, Spanish vessels had, by then, returned to the fishing grounds on the Nose and Tail of the Grand Banks. Tobin now revealed that two fisheries patrol boats had been outfitted with warp cutters designed to sever the steel cables, or warps, that attached the bottom trawl net to the vessel.¹⁷¹

By March 25th, the Vancouver discussions had produced nothing substantive and the negotiations collapsed. The next day, Canada made good on the threat of further conservation action. A Canadian patrol vessel, the *Sir Wilfred Grenfell*, cut the warps of the *Pescamar Uno*, one of the Spanish trawlers that had returned to fish on the Grand Banks. During the operation, the *Vigia*, in an attempt to deter the Canadians, cut across the bow of the *Grenfell*, coming within 20 metres. However, the *Grenfell*'s trailing warp cutters managed to slice through the *Pescamar Uno*'s warp cables and sent its net to the bottom. Ironically, the captain of *Vigia* later had to ask permission to enter St. John's harbour so he could re-fuel and re-supply his ship and allow his seasick crew to recover their sea legs.¹⁷²

In response to the warp cutting, the Spanish government made plans to dispatch a second naval patrol vessel. As mentioned previously, the Spanish naval vessels had orders to shoot at any Canadian boarding parties. Meanwhile, the Canadian boats and aircraft on patrol carried signed orders from the Prime Minister to fire on the Spanish naval vessels should they uncover their guns.¹⁷³

¹⁷¹ Joan Bryden, "Spanish trawlers to face net-cutters, Greenpeace," *The Vancouver Sun*, 24 March 1995, A6.

¹⁷² Brian Tobin, pers. comm. 18 January 2008.

¹⁷³ Raymond B. Blake, "Water Buoy the Nation: Fish and the Re-emergence of Canadian Nationalism," *Ahornblätter: Marburger Beiträge zur Kanada-Forschung (Maple Sheets: Marburg Contributions to Canadian Research)* (1998) 12, 11.

At this point, both Bonino and Tobin were in New York to attend the United Nations Conference on Straddling and Highly Migratory Fish Stocks, a conference set in motion years earlier by Canada. Tobin reported that the cutting of the warps on the *Pescamar Uno* had forced the remaining Spanish ships to withdraw from the area. Emma Bonino, the EU Fisheries Commissioner and Tobin's counterpart, was apoplectic. She accused Canada of endangering the lives of the Spanish crew and of turning the Atlantic Ocean into the "Wild West, with one state acting as the lawmaker, the sheriff, and the judge."¹⁷⁴ Cutting the warps on a ship could present a danger of the cables, under tension, snapping back into the vessel and injuring crewmen. However, Minister Tobin and the Newfoundland premier, Clyde Wells, argued that the warps were cut at a sufficient depth to ensure the safety of the crew. Furthermore, the technology used had been developed in Canada and carefully tested before use.¹⁷⁵ Bonino was not satisfied.

Tobin and Wells argued that Bonino did not understand the NAFO system. If she did, they said, she would have known that the TAC system was an overall limit on catches, with each NAFO member entitled to catch its allocated share. A country exceeding its individual quota would exceed the overall TAC, which would defeat the purpose of conservation.¹⁷⁶ In response to Bonino's accusations that Canada had misused NAFO, Tobin and Wells countered that the EU had constantly objected to

¹⁷⁴ Brian Milner and Paul Koring, "EU threatens to suspend talks Grand Banks being turned into Wild West, fisheries commissioner says," *The Globe and Mail*, Toronto, Ont.: Mar 28, 1995, A1 and Interviews with Emma Bonino and Brian Tobin, *Prime Time News - CBC Television*, Toronto: 27 March, 1995.

¹⁷⁵ Fisheries and Oceans Canada, "Tobin and Wells Respond to Misinformation on the Canada-EU Turbot Dispute," News Release [NR-HQ-95-34E], 27 March, 1995.

¹⁷⁶ *Ibid.*

NAFO quotas, whereas Canada had never once used the objection principle.¹⁷⁷ Tobin and Wells rejected Bonino's statement that the dispute should be settled in the International Court of Justice, arguing that the solution lay instead with the development of a new legal regime via the UN Conference on Straddling Stocks and Highly Migratory Stocks.¹⁷⁸

Luis Atienza, the Spanish Minister of Agriculture, Fisheries and Food, published a "personal view" in the *Financial Times* on March 28th. Atienza compared the boarding of the *Estai* with piracy, and said that "Canada's justification that it is safeguarding stocks is a fabrication to cover up bad management of its own fishing grounds."¹⁷⁹ Atienza went on to say that Canada had to announce that it would not apply domestic law internationally, that it would return the bond posted for the *Estai*'s release, and that it would compensate the EU for damages. Only then would Spain be satisfied.¹⁸⁰

In a similar vein, Javier Solana, the Spanish Minister of Foreign Affairs stated that "we [Spain] will not tolerate that any other Spanish trawler be seized by the Canadian authorities."¹⁸¹ He hinted that Spain would not hesitate to use force to protect its fleet. Solana pointed out that as far as Spain was concerned, Canada's behaviour could not be more provocative, especially the day before a meeting within the

¹⁷⁷ Fisheries and Oceans Canada, "Tobin and Wells Respond to Misinformation."

¹⁷⁸ Ibid.

¹⁷⁹ Luis Atienza. "Estai's Boarding Tantamount to Piracy," *The Financial Times*, March 28, 1995.

¹⁸⁰ Ibid.

¹⁸¹ Javier Solana, "Statements to the Media," March 27, 1995. From <http://www.sispain.org/english/history/fisherie/position/disputes/index.html> <accessed 29 June 2009>.

framework of the United Nations was slated to deal with the issues surrounding the fishery.¹⁸²

At the UN meeting, within the context of the Conference on Straddling Stocks, the heated rhetoric continued. Bonino charged that Canada had fabricated the evidence against the *Estai* in order to cover up its own mismanagement of the stocks. She said that no one had seen any evidence against the *Estai* and that inspection of the *Estai* on its return to port in Spain had shown no irregularities. This echoed previous EU press releases contending that the *Estai* was in “full compliance” with regulations, though when the *Estai* was initially inspected in port in St. John’s, the EU officials who were invited to attend declined.¹⁸³ Bonino still was not done with her accusations. She even remarked sarcastically that she expected to hear that drugs had been found on board the *Estai*: “I would be surprised if they don’t find heroin, cocaine – I don’t know what next,” she said.¹⁸⁴

In response, Tobin denounced the “ecological madness” of uncontrolled fishing and accused the EU of failing to monitor or enforce measures to conserve the depleted fish stocks. Instead of refuting Bonino’s accusations on a point-by-point basis, Tobin stuck to his prepared text. He argued that the current international law was ineffective, and that Canada’s actions were based on a “new ethic of conservation which isn’t founded upon loopholes and international trickery.”¹⁸⁵ Tobin accused a number of nations, including Spain, of taking advantage of other straddling stocks in the Bering Sea and the Sea of Okhotsk, to the point that fish stocks in both areas had collapsed.

¹⁸² Javier Solana, “Statements to the Media.”

¹⁸³ Bill Rowat, pers. comm. 21 September, 2007.

¹⁸⁴ Tobin, *All in Good Time*, 131.

¹⁸⁵ Brian Tobin, as quoted in Blake. “Water Buoys the Nation,” 13

Canada's actions outside the 200 mile-limit were not illegal, but rather part of "new international law and Canada [was] on the leading edge."¹⁸⁶

As he finished and stepped down from the podium to be mobbed by reporters, Tobin asked them if they would like to see the evidence against the *Estai*. Naturally, the reporters jumped at the chance. Tobin was, of course, pleased to play the "pied piper" as he led conference delegates and throngs of reporters outside the United Nations' building where yellow buses were waiting to transport everyone to the docks on the East River. Upon arrival at the docks, the reporters found a barge with the *Estai*'s massive net – the size of a football field – hauled up on a crane for all to see. In fact, it was so large that the barge could not raise the net to its full height for fear of toppling the crane into the East River.¹⁸⁷ Not only could everyone plainly see the illegal net, but Tobin also produced turbot that could fit in the palm of his hand and American plaice – a species under moratorium – that had both been recovered from the *Estai*'s hold. Tobin, well known for his oratory, thundered:

We're down to the last, lonely, unloved,
unattractive turbot, clinging by its
fingernails to the Grand Banks of
Newfoundland, saying "someone reach out
and save me in this eleventh hour as I'm
about to go down to extinction."¹⁸⁸

¹⁸⁶ Brian Tobin, as quoted in Blake. "Water Buys the Nation," 14.

¹⁸⁷ David Bevan, pers. comm. 15 November 2007.

¹⁸⁸ Brian Milner and Paul Koring, "Progress made in fish talks – Illegal net belonging to Spanish trawler 'ecological madness,' Tobin says," *The Globe and Mail*: Mar 29, 1995, A1 and Stephen Handelman, "Tobin shows world 'guilty' net, tiny fish – N.Y. river barge Canada's stage in Turbot War," *Toronto Star*, Mar 29, 1995, A1, among others.

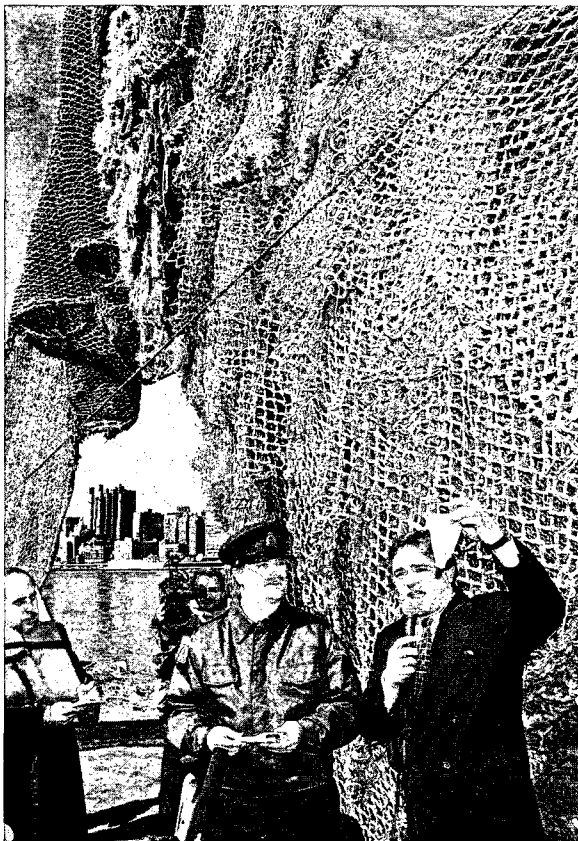


Figure 8

Brian Tobin speaks to the media in front of the seized *Estai's* net by the East River in New York City
(Canadian Press / Richard Drew)

Tobin's surprise press conference had the desired effect. Bonino quickly backed off and took a far more measured tone. Instead of talking about the "Wild West," Bonino quickly began to talk about the need for an "end to the war of words" and for a way to solve the dispute.¹⁸⁹

At the same time, the solidarity of the EU began to show cracks. On March 29th, the Comité des Représentants Permanents (COREPER) met in Brussels to discuss possible trade sanctions against Canada. Britain declared that it would veto any attempt to punish Canada for its actions regarding the *Estai*. The British government was

¹⁸⁹ No author, "Spain angry, U.K. friendly," *Halifax Daily News* Mar 30, 1995, 12 and Paul Koring, "EU likely to win on fish quota – Deal shaping up would tighten monitoring, but Canada's share of turbot would shrink," *The Globe and Mail*, Mar 30, 1995, A1.

responding to domestic pressure. British fishermen, who had their own problems with foreign vessels, vociferously supported Canada. DFO seized the occasion to ship over thousands of Canadian flags that the Canadian High Commission distributed to fishermen. The Canadian flags on British boats showed up on international newscasts.¹⁹⁰

Besides the United Kingdom, the governments of Germany, the Netherlands, Ireland, Denmark, and Sweden were reportedly against any action that might inflame the dispute. However, despite the objections, EU ambassadors prevailed on the Commission to send a strongly worded Note Verbale to Ottawa presenting the EU's version of the events surrounding the warp cutting of the *Pescamar Uno* and condemning Canada's actions in the matter.¹⁹¹

COREPER continued to work on the issue. On March 30th, after the EU failed to draw up a list of countermeasures to use in case of further Canadian action, Spain unleashed its anger on Britain. Luis Atienza, the Spanish Minister of Agriculture, said that British vessels, many flying Canadian flags, would not be helped by "backing violent behaviour" in international waters.¹⁹² Spain also feared that if the EU did not present a united front against Canada, it would put at risk "the very credibility of the EU and its member states." Any split would be seen as a "sign of weakness" and would jeopardize the image of the EU.¹⁹³

Despite Spain's misgivings, the cracks in the EU continued to widen. John Major, the British Prime Minister, voiced his support for Canada, though he cautioned

¹⁹⁰ David Bevan, pers. comm. 15 November 2007.

¹⁹¹ European Union, News, "Canada-EU fisheries dispute," NR (95) 18, 30 March 1995.

¹⁹² Barry, 272.

¹⁹³ Ibid.

against further action against the Spanish fleet. Tobin, perhaps wisely, chose not to comment on the growing rupture in the EU. Instead, he suggested that rising public pressure in the EU had forced the EU to the negotiation table. “There’s almost nobody in the EU who supports the notion that we don’t have a problem and that we don’t need to fix it,” Tobin said.¹⁹⁴

Meanwhile, in an effort to win over the court of public opinion, the EU released a lengthy document challenging the Canadian government’s case and detailing its fisheries management failures. Tobin freely admitted that Canada had made mistakes in the past, but was mending its ways. It was time, Tobin said, for the EU to do the same. At the same time, a report came to light that further damaged the EU’s position. London’s *Daily Telegraph* printed the results of a British investigation that showed that Spain routinely overfished its quotas, landed undersized fish, and was prepared for more international confrontations to protect its distant water fishing fleet.¹⁹⁵

Despite the public acrimony, negotiations continued to slowly grind their way forward and the EU requested a new round of talks. Bill Rowat, fearful that Foreign Affairs would concede too much to the Europeans if it headed the negotiating team, quickly jumped on a plane and flew to Brussels where he assumed the duties of head of delegation. A few days later, Gordon Smith, from Foreign Affairs, arrived. Smith had formerly been Canada’s ambassador to the EU and was returning to the “old boys” club where he knew all of the players. As a result, Rowat faced challenges on both sides. First, Rowat had to face the challenge of the skilled European negotiators, an expected part of international diplomacy. But he also faced impediments from the Department of

¹⁹⁴ Ibid., 273.

¹⁹⁵ David Brown, “Fishy secrets of La Coruna revealed (Daily Telegraph reporter David Brown spent a week in Spain),” *Halifax Chronicle-Herald* Mar 30, 1995. B12.

Foreign Affairs, represented by Smith, who, at coffee breaks, would circulate with his old friends and assure them that the Department of Fisheries and Oceans was just blustering and that the Prime Minister was growing tired of the fishery dispute. This threw yet another hitch into the negotiations as the Europeans played for time, hoping that Canada would eventually get tired of the issue and settle on terms favourable to the EU.¹⁹⁶

Still, negotiations managed to progress. As one Commission source put it: “Even as the Brian and Emma show goes on . . . while they are throwing dirt in public, we are negotiating in private.”¹⁹⁷ As before, the negotiations continued with a senior team tasked with diplomatic, legal, and quota issues and a junior team dealing with the technical issues surrounding any proposed control and enforcement measures. For the most part, the two teams met separately, though there were occasional plenary sessions where members of both groups could share progress.

By early April, a consensus began to emerge. The proposal called for Spain and Canada both to receive a 10,000 tonne turbot allocation and for comprehensive conservation and enforcement measures to be instituted. But Spain rejected the deal, since it wanted a higher proportion of the turbot allocation. Spain would only be satisfied if half of the 27,000 tonne turbot TAC was allocated to the EU, the charges against the *Estai* were dropped, and the bond and cargo of the *Estai* returned.¹⁹⁸ These last two issues posed a problem to the Canadian negotiating team, since only the federal Attorney General could make such a decision.

¹⁹⁶ Info for preceding paragraph all culled from personal communication with Bill Rowat (21 September 2007).

¹⁹⁷ Paul Koring, “EU likely to win on fish quota. Deal shaping up would tighten monitoring, but Canada's share of turbot would shrink,” *The Globe and Mail*: Mar 30, 1995, A1.

¹⁹⁸ Barry, 273.

By April 5th, an agreement seemed imminent, still based on 10,000 tonnes each to Canada and Spain. The draft deal included a full observer program, satellite surveillance on a two-year pilot-project basis, and new procedures regarding inspections and infringements. Further, Canada would repeal the provisions of the CFPA that had allowed for the arrest of Spanish and Portuguese vessels in international waters.

Once again, a hitch developed. The captain of a Spanish vessel that had returned to fish on the Grand Banks reported that the Canadians had attempted to board his ship. The allegations, though unfounded, resulted in a breakdown of negotiations. The EU Fisheries Commission formally adopted the EU's autonomous quota, over Britain's objection, and sent a strongly worded missive to Canadian authorities protesting the alleged action. As well, close to 3,000 demonstrators marched on the Canadian embassy in Madrid. Javier Solana, the Spanish Foreign Minister, warned the British that "our memory is long" and that the conflict could lead to a "deep crisis" in Europe. Tobin commented wryly: "We know now that the person making foreign policy on behalf of the European Union is some Spanish fishing captain floating around somewhere off the coast of Newfoundland."¹⁹⁹

Jacques Santer, the EU President, and Emma Bonino pressed the EU for quick approval of the tentative April 5th agreement lest the Easter break (April 16th that year) further delay negotiations or even lead to more incidents on the high seas. Santer called for Spain to be flexible on the quota issue. Bonino also supported flexibility, a departure from her previous staunch support of Spain. But France pressed for a strong, united stand. France's position combined with the strong pressure from the Spanish and Portuguese governments led the EU on April 10th to simply call for continued

¹⁹⁹ Barry, 274.

negotiations. Tobin was disappointed with the lack of progress and hinted that further action was likely if the negotiations continued to drag on. Canada, Tobin affirmed, was not prepared to renegotiate the substance of the April 5th agreement.²⁰⁰

On April 12th, COREPER made it clear that any final agreement would have to be completed under the auspices of NAFO. At the same time, Spain was being pressured by other EU member states not to stretch the fragile consensus by pushing for further concessions from Canada and greater TAC allocations. Santer noted that it was important to “safeguard the solidarity within the European Union, but also . . . to safeguard the interests of our allies and friends in Canada.”²⁰¹ Given the intransigence of Spain during the negotiations, this could be viewed as a subtle way of telling Spain that it should sit down at the table and stop holding up a final resolution to the *Estai* incident and the allocations of fishery resources.

Despite Santer’s veiled warning and the pressure from other EU countries, Spain remained unwilling to cede further ground. On April 13th, the Canadian and European delegations completed their discussions. Both sides were committed to securing quick approval of the accord by NAFO. As well, as part of the diplomatic settlement, Canada agreed that the Attorney General would consider lifting the charges against the *Estai* and returning its cargo and bond. Still, there was no agreement on Spain’s insistence on a larger percentage of the TAC allocation. COREPER held two lengthy meetings on April 14th in an effort to achieve a final consensus on the issue.

Finally, with France acting as a go-between, Canada made two concessions in a last-ditch effort to secure agreement from Spain. Canada agreed to accept the EU’s

²⁰⁰ Barry, 274-275.

²⁰¹ Ibid.

lower estimate of how much turbot had actually been caught, thus allowing Spain to fish another 5,000 tonnes of the new 10,000 tonne quota. Canada also accepted the EU claim of 55.35 percent of the TAC in future quota allocations in international waters.²⁰² Part of the agreement dealt with splitting the turbot TAC into international and Canadian jurisdictions. Canada would have exclusive access to the TAC in Canadian waters and would have a lower share of the international turbot TAC. Spain and Portugal, however, still refused to go along.

Despite pressure from Canada and other EU countries, Spain continued to be the sticking point in negotiations. As a result, the Chrétien government decided that a strong response would be necessary in order to bring about an agreement. On the evening of April 14th, Chrétien met with the Ministers of Fisheries and Oceans, National Defence, Foreign Affairs, and Justice. Together, they decided that the best course of action was to order further arrests of Spanish vessels on the Grand Banks. To that end, they dispatched two Canadian naval vessels (a frigate and a destroyer) to the Grand Banks to back up the Canadian Fisheries and Coast Guard patrol vessels already on station. The Canadian naval vessels had orders to fire on the Spanish naval vessels that were still in the area if the Spaniards uncovered their weapons or fired at any Canadian ship.²⁰³ Tobin told reporters that he held Spain responsible for the impasse in negotiations and that further enforcement action could be taken as early as the next day (April 16th).²⁰⁴

²⁰² No author, "Tobin ready to act against EU vessels, Canada tells envoys - 'Set your alarm clock for the morning,' minister tells press after talks stall in Brussels," *The Globe and Mail*: Apr 15, 1995, A1.

²⁰³ Blake, "Water Buys the Nation," 7.

²⁰⁴ Barry, 276.

Negotiations in Brussels were stalled. Rowat reported to Tobin that Canada needed to take some concrete action “to show that we’re still serious.”²⁰⁵ The next day, Rowat awoke in Brussels to reports that a Canadian vessel had almost side-swiped a Spanish fishing trawler. These incidents came to be called the “close encounters.” Canadian vessels would make high-speed runs in the middle of the night, with their running lights off, towards Spanish vessels.²⁰⁶ At the last moment the Canadian vessels would swing away and reveal their .50 calibre machine guns to the terrified crews of the Spanish fishing vessels. Indeed, one Spanish captain was so incensed that he got on the radio to the Spanish naval vessel, the *Vigia* and accused the Spanish navy of being worthless and failing to properly do their job of protecting the Spanish fishermen. He would have continued his radio tirade but excused himself to go change his soiled underwear.²⁰⁷

Of course, these reported “near-misses” raised objections from the EU. In Tobin’s memoirs he referred specifically to the incident and the fact that he had been asked many times whether or not he had ordered the “near-misses” in an attempt to intimidate the Spanish. In his memoirs, Tobin refused to comment on this issue. In an interview with the author he said that he could neither “confirm nor verify” that he had ordered such action, but was far from denying it. He explained that the crews of the Canadian vessels had been consulted on whether or not to continue and that, to a man, they affirmed their desire to participate in enforcement actions.²⁰⁸ Bill Rowat, Tobin’s former deputy, said that after he and Tobin had discussed options, word went out via Pat

²⁰⁵ Tobin, *All in Good Time*, 135.

²⁰⁶ A ship in the middle of the ocean, in the middle of the night, with its running lights off can be all but invisible.

²⁰⁷ Tobin, pers. comm. 18 January 2008.

²⁰⁸ *Ibid.*

Chamut, the Assistant Deputy Minister for Fisheries Operations, that enforcement vessels should be asked to “virtually side-swipe” some Spanish ships.²⁰⁹

The close encounters refocused diplomatic attention on the turbot dispute. As the Canadian warships arrived on the Grand Banks, tension was again at a peak. It appeared that another incident could easily happen. And, this time, with both Canadian and Spanish warships in the area, the potential consequences were dire. The arrival of the Canadian warships and the threat of further arrests of Spanish vessels proved to be the proverbial straw that broke the camel’s back for the EU. The French and Spanish foreign ministers were galvanized into action and quickly telephoned their Canadian counterpart, André Ouellet, to see if Canada would honour the agreement as it stood. Ouellet assured them that Canada would honour the deal. But Canada wanted a signed letter of acceptance of the deal from the EU’s President Jacques Santer. The letter arrived on the afternoon of April 16th. That evening, Tobin called a news conference and proudly announced that the crisis on the Grand Banks was over. On April 17th, the EU’s Council formally adopted the agreement, with only Portugal opposed. The final agreement was signed between Canada and the EU on April 20th.

The provisions of the final Agreed Minute were fundamentally the same as they had been at the beginning of April. Under control and enforcement measures, the parties agreed to:

- 1) Independent, full-time observers onboard vessels at all times;
- 2) Enhanced surveillance via satellite tracking;
- 3) Increased inspections and quick reporting of infractions;
- 4) Verification of gear and catch records;
- 5) Timely and significant penalties to deter violations;
- 6) New minimum fish size limits; and,
- 7) Improved dockside monitoring.

²⁰⁹ Rowat, pers. comm. 21 September, 2007.

The second key component was the resolution of the quota-sharing issue. The parties agreed to the following arrangements:

- 1) For 1995, Canada's catches would not exceed 10,000 tonnes including turbot caught within 200 miles;
- 2) After 16 April 1995, the EU could catch a maximum of 5013 tonnes in 1995;
- 3) For 1996 and thereafter, the EU and Canada proposed that the management of the turbot stock in the Regulatory Area (3LMNO) be separated from that inside the Canadian zone (2+3K). The TAC for 1995 would be split – 7,000 tonnes in 2+3K and 20,000 tonnes in 3LMNO. Canada would receive exclusive access to the TAC in 2+3K. The EU would receive 50 percent of the TAC in the Regulatory Area, Canada 15 percent and the other Contracting Parties 35 percent.

The third component of the agreement saw Canada agree to repeal the provisions of its legislation of March 3, 1995 pertaining to the power to arrest Spanish and Portuguese vessels fishing in the Regulatory Area.²¹⁰

Reaction in Canada was overwhelmingly positive. André Ouellet, the Minister of Foreign Affairs, stated that:

We can now put this dispute behind us, secure in the knowledge that we have a fair, workable and sensible agreement. We can also be pleased that our strong stand on conservation will contribute to the formulation of stronger international rules covering the harvesting of endangered fish stocks elsewhere in the world.²¹¹

Tobin said that if there was a winner in the dispute, it was the fish. Bonino added that the agreement was “good for Canada, the European Union, fishing, and fishermen.”²¹²

Still, the different viewpoints were clearly visible. Chrétien called the agreement a “major breakthrough on conservation and enforcement” while Bonino claimed that “the

²¹⁰ PBA, Canada-EU Agreed Minute, 16 April 1995.

²¹¹ Fisheries and Oceans Canada, “Canada-EU reach agreement to conserve and protect straddling stocks,” News Release [NR-HQ-95-36E], April 15, 1995.

²¹² Barry, 276.

rule of law has been restored on the high seas.” She went on to claim that “European fishermen are again rightly and fully entitled to fish in the Grand Banks off Canada’s coast.”²¹³

In Canada, the government and fishing groups welcomed the deal. The Canadian media declared a Canadian victory in the Turbot War. The *Globe and Mail*, however, was concerned about the effects Tobin’s hard-nosed approach – he had picked up the nicknames of “Captain Canada” and “The Tobinator,” after the hero of the “Terminator” action movies – would have on how Canada would be perceived internationally. In an editorial, the *Globe* cautioned against similar situations in the future, contending that: “If this action prefigures more acts of coercion on the high seas, the cost will be integrity, reliability and effectiveness in the councils of the world. Canada ... will be trusted less.”²¹⁴ The *Ottawa Citizen* was also cautious about celebrating victory over Spain. In an article published on April 18, 1995, the *Citizen* expressed concern about the “un-Canadian methods by which it [the “victory”] was achieved. Threats of warships and seizure of vessels on the high seas don’t exactly fit with our image as Mr. Peacekeeper.”²¹⁵

The Spanish government called the deal “the best possible, under the circumstances” and openly criticized Britain’s support for the Canadian position. As well, the Spanish government refused to withdraw its complaint to the ICJ and kept visa requirements in place for visiting Canadian for another few months. Unlike their Canadian counterparts, Spanish fishermen reacted angrily to news of the deal. “We are

²¹³ Emma Bonino, “Statement on the occasion of the initialing of the agreement between the European Union and Canada on fisheries (Greenland halibut),” April 15, 1995, From: <http://www.sispain.org/english/history/fisherie/position/disputes/bonino.html> <Accessed 29 June 2009>.

²¹⁴ Editorial, “A dubious victory in the fish war,” *Globe and Mail*, April 18, 1995, A24.

²¹⁵ Editorial, “Victory at sea,” *The Ottawa Citizen*, April 18, 1995, A14.

faced with a very bleak future because of Canada's illegal aggression and the lack of support by the EU," said one fishing industry official. Portugal's Prime Minister also chimed in: "EU solidarity hasn't been very strong for a while now. The negotiation wasn't easy precisely because Canada knew this."²¹⁶

Despite the agreement on the turbot issue, things on the diplomatic front did not immediately return to normal. In May 1995, when Leon Brittan, then the Vice President of the European Union, visited Canada, he criticized Canada for its "apparent willingness to resort to gunboat diplomacy" and made it clear that the dispute would "inevitably continue to have repercussions outside the fisheries sector."²¹⁷ In response, Prime Minister Chrétien cancelled a planned meeting and André Ouellet issued a statement defending Canada's actions regarding the *Estai*.²¹⁸ In July 1995, Spain took over the presidency of the EU and used its position to exclude Canada from discussions leading to an Action Plan for closer trade and for security co-operation between the EU and the United States. By contrast, in February 1996, soon after Italy assumed the presidency, a similar plan was offered to Canada.²¹⁹ Even so, Spain still insisted that the EU negotiators be bound by the wishes of individual member states.

Canada and the EU worked together to gain NAFO approval of the measures in the Agreed Minute. At NAFO meetings in June 1995, and again at the annual meeting in September, Canada and the EU pushed for agreement. The agreed changes were officially adopted by NAFO at the September meeting, with only minor changes

²¹⁶ "EU showed weakness in turbot tilt: Portuguese PM," *Montreal Gazette*, May 1, 1995, A9.

²¹⁷ Joan Bryden, "Chrétien drops meeting with EU official over turbot remarks," *Montreal Gazette*, May 3, 1995, A9.

²¹⁸ Ibid.

²¹⁹ Madelaine Drohan, "Deal with Europe a top priority," *Globe and Mail*: Jan 2, 1996, B4.

regarding the fishing area and how the TAC for turbot was split. It seemed that matters were taking a turn for the better. Still, tensions lingered.

CHAPTER THREE: The Aftermath

The International Court of Justice

The seizure of the *Estai* caused a rift in relations between Canada and the European Union. Spain in particular nursed a grudge, and tried to win its case in court. On March 28, 1995, Spain filed an application with the International Court of Justice for proceedings against Canada relating to the May 12, 1994 amendment to the CFPA and to the seizure of the *Estai*. Spain contended that Canada had no “jurisdiction over ships flying a foreign flag on the high seas, outside the exclusive economic zone of Canada.”²²⁰ Canada, Spain argued, was legally bound to refrain from such acts, and should pay reparations to Spain. Specifically, the Court should declare Canada’s actions regarding the *Estai* illegal.²²¹

The Canadian government replied that in its opinion, the ICJ lacked jurisdiction in this case because of Canada’s declaration of May 10, 1994.²²² On May 2, 1995, the president of the Court informed both parties that the proceedings would address the issue of jurisdiction before anything else.²²³

On June 15, 1998, Spain presented its oral submission to the Court. Reiterating several arguments in the initial filing, Spain contended that the issues presented did not fit into Canada’s reservation as to the jurisdiction of the Court. By subordinating its reservation to its national legislation, Canada was denying the ICJ’s competence to

²²⁰ International Court of Justice, Judgement: Fisheries Jurisdiction Case (Spain v. Canada): Jurisdiction of the Court, December 4, 1998, paragraph 10. From: <http://www.icj-cij.org/docket/files/96/7533.pdf> <Accessed 25 March 2009>

²²¹ Ibid.

²²² Canada had filed a reservation with the International Court of Justice that exempted fishery conservation actions from the jurisdiction of the court. See footnote 78.

²²³ Ibid., para. 4.

determine its own jurisdiction.²²⁴ Finally, Spain accused Canada of violating its own *Charter of Rights and Freedoms* by using force against the *Estai* and harassing other Spanish vessels. Canada's own submission was simple. On June 17, 1998, the Canadian government asked the Court to "adjudge and declare that the Court has no jurisdiction to adjudicate upon the Application filed by Spain on 28 March 1995."²²⁵ This would be Canada's position throughout the case.

Throughout their court presentations, the two nations' characterizations of the nature of the dispute continued to differ sharply. Spain said that Canada had acted without legal authority and had violated Spain's rights under international law, thus entitling Spain to reparation. Canada's view was that the dispute concerned the adoption of measures for conservation and management of fisheries stocks within the NAFO Regulatory Area, and the enforcement of those measures.²²⁶

In making its judgment, the ICJ noted that with regard to Canada's declaration of May 10, 1994,

it is evident from the parliamentary debates and the various statements of the Canadian authorities that the purpose of the new declaration was to prevent the Court from exercising its jurisdiction over matters which might arise with regard to the international legality of the amended legislation and its implementation.²²⁷

The Court disagreed with Spain's claim that the *Estai* incident fell outside the reservation made by Canada in its declaration of May 10, 1994. After carefully

²²⁴ Ibid.

²²⁵ International Court of Justice, Judgment: Fisheries Jurisdiction Case (Spain v. Canada), para 4. Where is the source located?

²²⁶ Ibid., para. 23.

²²⁷ Ibid., para. 60.

analyzing the semantics and syntax of the CFPA, the related Regulations, the NAFO convention, and other relevant legal documents, the Court found that

The use of force authorized by the Canadian legislation and regulations falls within the ambit of what is commonly understood as enforcement of conservation and management measures and thus falls under the provisions of paragraph 2 (d) of Canada's declarations. This is so notwithstanding that the reservation does not in terms mention the use of force.²²⁸

In other words, in the opinion of the Court, Canada's actions were not punishable by the ICJ. On December 4, 1998, therefore, the ICJ ruled that it had no jurisdiction in the matter, and Spain's application for settlement of the dispute was denied. Canada had won in court as on the water. But the battle for conservation was not over.

UNFA

Shortly following the seizure of the *Estai* and the subsequent signing of the bilateral agreement between Canada and the EU, the United Nations Fish Stocks Conference came to a successful conclusion. Indeed, some analyses of the United Nations Fish Stocks Agreement (UNFA) Conference credit the seizure of the *Estai* with creating the climate in which UNFA could succeed.²²⁹

The conference, started due to Canadian pressure in 1992, produced the UNFA in August 1995. Dealing specifically with issues surrounding fisheries for straddling

²²⁸ International Court of Justice, Judgment: Fisheries Jurisdiction Case (Spain v. Canada), para. 84.

²²⁹ Art May, "Breaking New Ground, An Action Plan for Rebuilding the Grand Banks Fisheries," Report of the Advisory Panel on the Sustainable Management of Straddling Fish Stocks in the Northwest Atlantic, Art. W. May, Chair, 35.

stocks, UNFA focused on long-term sustainability and on eliminating overfishing. In this respect, the UNFA agreement represented a departure from the idea of the “inexhaustibility of the oceans.”²³⁰ Canada hailed the UNFA agreement as a victory. Brian Tobin welcomed the agreement as a “means to end foreign overfishing permanently.”²³¹

UNFA was meant to bolster the *Law of the Sea* regarding fisheries. The UNCLOS agreement, the most significant regulation on the high seas, is a stunningly large document that comprises more than 300 articles along with seven annexes. However, UNCLOS dealt with the fishery only in a limited capacity, with Articles 116 to 120 providing a generic guideline for the regulation of international fisheries.

Although the UNFA agreement was opened for signature in August 1995, it was not until 1999 that Canada ratified the agreement. And it was still later, in 2003, that Canada ratified the 1982 UNCLOS treaty. Canada was initially reluctant to ratify UNCLOS because doing so could have potentially tied Canada’s hands and prevented such actions as the seizure of the *Estai*. However, UNFA’s provisions addressed these concerns since they allowed coastal states to board, inspect, and seize vessels fishing in contravention of regulations outside a coastal state’s Exclusive Economic Zone when the flag state took no action.

The UNFA agreement included far-reaching and forward-looking policies and regulations. Its 50 articles provided a much-needed buttress to international fisheries conservation and enforcement efforts. Key provisions dealt with the use of Regional

²³⁰ May, “Breaking New Ground,” 37.

²³¹ SCOFO, Fifth Report, 2003, 36 and Canada, Senate, Standing Committee on Fisheries and Oceans, Report, “The Management of Atlantic Fish Stocks: Beyond the 200-mile Limit,” 39th Parliament, First Session, February 2007, 4.

Fisheries Management Organizations (RFMO) to manage fish stocks in international waters; the boarding and inspection of vessels; the precautionary and ecosystem approaches to resource management; and measures aimed at minimizing pollution and protecting biodiversity. Another major facet of UNFA was the push to prevent and eliminate overfishing and excess fishing capacity.

A prime example of excess fishing power was, of course, the Spanish fleet in the late 1980s and early 1990s. Spain's large fleet had enough fishing capacity to thoroughly overfish its quotas from RFMOs such as NAFO. Indeed, even though much of the large Spanish factory freezer trawler fleet that had been fishing off the coast of Namibia had been decommissioned, the reduced Spanish fleet that began to aggressively fish off the Grand Banks still had more than enough capacity to decimate fish stocks of cod, flounder, and turbot in the region.

UNFA also promoted the collection and sharing of scientific data and the conduct of joint scientific research by contracting parties. Finally, and perhaps most important, the UNFA agreement had strong language directed at conservation and enforcement measures (monitoring, control, and surveillance) and binding dispute-resolution procedures. In these respects, a few articles bear closer examination. Article 20 dealt with international cooperation in enforcement and the jurisdiction of coastal states to enforce conservation and control measures on the high seas. Article 20(6) outlined the flag state's responsibility to take action when notified of infringements of a RFMO's rules by a coastal state. Article 20(7) went on to state that coastal states may

deter vessels which have engaged in activities which undermine the

effectiveness of or otherwise violate . . .
 conservation and management measures
 . . . from fishing on the high seas in the
 subregion or region until such time as
 appropriate action is taken by the flag
 State.²³²

Further to the same point, Article 21 authorized coastal state authorities to engage in boarding, inspection, and seizure of flag-state ships if there is no response from the flag state. In effect, Article 21 of UNFA recognized the right of Canada to seize offenders like the *Estai*. Another important element of the UNFA agreement, Article 22.1(f), authorized the use of force to the “degree necessary to ensure the safety of the inspectors.”²³³

The dispute-resolution procedures of UNFA, Articles 27 to 32, set out the obligation of states to seek peaceful solutions to disputes and to work together to prevent them from arising. UNFA’s provisions also called on the dispute-resolution procedures laid out in UNCLOS.

The UNFA agreement represented a large step forward in fisheries conservation measures and in international fisheries cooperation. In particular, the provision for high-seas arrest of offending vessels seemed to open new possibilities for conservation. However, these advances would all be for naught if they were not consistently and forcefully applied. To date, neither Canada or any other signatory of UNFA has pressed for aggressive action under UNFA. Although the enforcement provisions, like the rest of UNFA, may have influenced attitudes, the provisions for arrest on the high seas

²³² United Nations, United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, “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,” A/CONF.164/37, Article 20(7), hereafter cited as UNFA.

²³³ UNFA, Article 22.1(f).

remain largely untested in the real world. Bob Applebaum, a leading figure in Canada's push for UNFA, sees this as a lost opportunity.²³⁴

NAFO After the *Estai*

The other main factor affecting fishery regulation in the northwest Atlantic was, of course, NAFO. Indeed, it was NAFO quotas, and violation thereof, that precipitated the seizure of the *Estai*. For years before the *Estai* incident, a tense atmosphere in NAFO negotiations generally pitted Canada against the EU. However, the Turbot War seemed to wake up the member nations of NAFO. The years immediately following the incident saw reduced tensions between Canada and the EU, as the goodwill from the signing of the bilateral agreement and the UNFA agreement carried over into NAFO negotiations.

In 1996, for example, there was broad agreement that Canada would determine the cod TAC in the 2J3KL zone, both inside and outside the 200-mile limit. As well, a working group on dispute-resolution procedures was convened. In Canada's view, the goal of the working group was to see how UNFA's provisions could best be implemented into the NAFO Conservation and Enforcement Measures (CEM). Canada's main objective was to try and modify the objection procedure which had caused so much consternation in the lead-up to the *Estai* incident.

In 1997, improved relations continued. The head of the Canadian delegation to NAFO expressed his satisfaction with the improvement in the enforcement measures. He noted that the number of infringements was sharply down as a direct result of the observer program and that there was a marked increase in compliance with NAFO

²³⁴ Bob Applebaum, pers. comm., 10 December 2007.

regulations.²³⁵ Non-Contracting Parties (NCP) reached agreements on measures to deter fishing in the NAFO area. The friendlier atmosphere persisted into 1998.

Meanwhile, Canada was pleased at the progress being made in conservation and enforcement efforts. NAFO instituted a series of programs including 100 percent observer coverage, increased reporting, and the introduction of the Vessel Monitoring System (VMS), which used satellites to track the position of vessels on the fishing grounds.

The most prominent improvement was the observer program. After earlier pilot efforts, NAFO formally adopted 100 percent observer coverage in 1998. The observer program placed an independent observer aboard every NAFO vessel in the Regulatory Area. Observers were tasked with monitoring fishing effort and catch levels, and ensuring that the equipment used met NAFO guidelines. Observers also analyzed the catch to determine its composition, including the amount of undersize fish and the amount of discards and bycatch. Finally, the observers monitored the entry of data into the various logbooks kept on each vessel and ensured that no one tampered with the Vessel Monitoring System. Sometimes, the observers would carry out scientific work at the request of NAFO's Fisheries Commission. If observers found any instances of non-compliance, NAFO's Conservation and Enforcement Measures provided a system for them to report the infringement as a first step towards action against the offending vessels. In theory, the observer scheme was a good one. Independent, impartial observers with the ability to secure evidence and to cause a ship to be hauled into port for an indefinite period of time would serve as an effective deterrent to overfishing. However, the deterrent effect of observers soon waned as it became clear that flag and

²³⁵ Parsons, "NAFO Report," 29.

coastal states did not effectively carry out enforcement measures against reported ships.

Other issues remained contentious. By 1999, the failure to establish an agreed-upon dispute-resolution procedure was beginning to cause a rift between Canada and the EU. As well, there was a dispute over the allocation of the cod TAC for 2J3KL (“northern cod”). Canada allocated itself a small catch inside and set up a complete moratorium outside the 200-mile limit. According to Canada, the small interior quota (exclusively Canada’s) was to gather scientific information on stock levels. However, the EU was not pleased with the allocation or Canada’s reasoning for it.

The new millennium brought more acrimony. Still upset about Canada’s allocation of the cod TAC, the EU issued a press release warning that “management measures may not be consistent throughout the NAFO area.”²³⁶ By 2001, there was a noted increase in non-compliance. A stock of particular interest was 3M (Flemish Cap) shrimp, where there was a noted lack of adherence to NAFO allocation decisions.

The 2001 annual meeting was cancelled because of the September 11th terrorist attacks. By 2002, overfishing was again becoming a major problem. In January, Canada raised alarm at a special NAFO meeting, detailing the marked increase in NAFO TAC overruns. “Despite measures taken,” Canada argued, “many stocks continue to be at historically low levels and the slow progress towards recovery remains fragile.”²³⁷ Canada also pointed out that NAFO’s own Scientific Council reports showed that “unsustainable fishing practices [were] not necessarily a thing of the past.”²³⁸ The head of the Canadian delegation highlighted American plaice and cod, two species under moratoria, which had both seen an increase in catches in the preceding years. Despite

²³⁶ Parsons, “NAFO Report,” 30.

²³⁷ Ibid., 31.

²³⁸ Parsons, “NAFO Report,” 31.

the moratoria, catches of American plaice had doubled in a year and cod catches had shot up 500 percent over four years. Further, the increasing catches and disregard for quotas and moratoria were paired with a directed fishery and stocks that were under moratorium.

Canada went on to detail other serious issues regarding excessive catches, misreporting of catches, exceeding of quotas, and mesh size violations. Overall, Canada noted a marked increase in citations and apparent infringements of NAFO's Conservation and Enforcement Measures. Regarding turbot, the EU pressed for a TAC of 44,000 tonnes while Canada raised concerns about the high bycatch rates and the number of juvenile turbot being caught. NAFO's Scientific Council recommended a TAC of no more than 40,000 tonnes. In the end, the EU's proposal for a TAC of 44,000 tonnes for 2002 was adopted against the advice of the Scientific Council.

Canada was greatly disappointed with the results of the January 2002 NAFO meeting. In a news release, Canada criticized the outcome of the meetings:

It is very disappointing that, even when presented with strong evidence, NAFO would reject some of our proposals, particularly those which would have helped address the increasing trend toward non-compliance.²³⁹

At the September 2002 meeting, Canada again expressed great concern about the increase in overfishing. For 2003, the Scientific Council recommended a TAC of no more than 36,000 tonnes on turbot. Again, the EU moved to have the TAC set higher. Ultimately, the TAC was set at 42,000 tonnes for 2003. Turbot was the only quota for which the EU did not accept the Scientific Council's advice. Canada again made strong

²³⁹ Canada, Department of Fisheries and Oceans, "Canada Disappointed with outcome of NAFO meeting," News Release, NR-HQ-02-05 E.

representations regarding increased overfishing, even identifying specific examples of non-compliance by particular contracting parties. Canada argued that the observer program effectively detected and quantified such non-compliance and should be further strengthened.

In 2003, Fisheries Minister Robert Thibault again raised the conservation issue with the fisheries ministers of countries with a stake in the northwest Atlantic fisheries. Thibault acknowledged that much progress had been made but noted that overfishing remained a serious problem and that there was still more work to be done.²⁴⁰ At the September NAFO meeting, Canada again presented a litany of non-compliance issues, namely: directed fishing and excessive bycatch of species under moratoria; exceeding allocations misreporting catches; and use of illegal gear. As well, Canada raised questions about the impartiality of observers and non-submission or late submission of observer reports.

NAFO in general was looking ineffective, and turbot remained a particular problem. At the September 2003 NAFO meeting, the Scientific Council reported that all indicators for the stock were negative, and called for a sharp reduction in the TAC. Indeed, a catch of more than 16,000 tonnes would further deplete the stock. After intense negotiations, the Fisheries Commission agreed on a multi-year rebuilding plan for turbot. The total TAC would be reduced to 20,000 tonnes and, by 2007, to 16,000 tonnes. Even though the final TAC for 2004 was higher than the Scientific Council's recommendation, given the reduction of more than 50 percent from the previous year, this was at least a progressive step.

²⁴⁰ PBA, Canada, Department of Fisheries and Oceans, Speaking Notes for the Honourable Robert Thibault, Minister of Fisheries and Oceans, to open the eighth annual North Atlantic Fisheries Ministers Conference, 17 June 2003.

At the September 2004 NAFO meeting, Canada charged that some fishing fleets were targeting species under moratoria under the guise of fishing for species unregulated by NAFO. As a result, NAFO adopted new quotas for previously unregulated fisheries. Also adopted were new conservation and enforcement measures that would make at-sea and in-port inspections more effective.

By 2004, NAFO had been responsible for managing northwest Atlantic fisheries in the NAFO Regulatory Area for 25 years. Despite seeming improvements and innovations, it was seen by many as a “toothless tiger.” Primarily, this view resulted from the use of the objection procedure to circumvent the advice of the Scientific Council and to ignore quota allocations, just as had happened in the years before the *Estai* incident.²⁴¹ According to Alan Beesley, a noted legal scholar, “the Objection Procedure ... is a loophole big enough to drive a factory trawler through.”²⁴² Gus Etchegary, a notable figure in Newfoundland’s fishing and processing industry, echoed this sentiment in 2003 on behalf of the Fisheries Crisis Alliance. “The Objection Procedure,” he told the Senate Committee on Fisheries, “makes a complete farce of the process of the Commission Members accepting the Scientific Committee stock assessment(s) and the subsequent allocation of quotas to Member Nations.”²⁴³ The organization still had no effective dispute-resolution system. Another major issue was the lack of general compliance with NAFO measures and the routine overfishing of quotas and of species under moratorium. As discussed, Canada made a series of strong

²⁴¹ From 1996 to 2002 the objection procedure was invoked by at least two NAFO countries each year. Iceland, Latvia, and the Russian Federation were the most frequent objectors. See Parsons, “NAFO Report,” 70-71.

²⁴² Dr. Alan Beesley, as quoted in SCOFO, 2003 Report, 20.

²⁴³ Gus Etchegary, as quoted in SCOFO, 2003 Report, 20.

representations detailing the perceived problems but was largely unsuccessful in promoting change.

The fisheries committees of the House of Commons (in 2002 and 2003) and the Senate (in 2003) both produced detailed reports on the fishing situation on the Grand Banks and for stocks straddling the 200-mile limit. Chief among the recommendations in the 2002 Commons report was the call for Canada to inform NAFO that it planned to withdraw and institute a “custodial management” regime in its place. The idea was not to claim offshore fish and displace foreigners as with the 200-mile limit, but to extend Canadian authority for conservation and protection of the resource without prejudice to foreign shares. The House committee’s 2003 report echoed these recommendations. The 2003 Senate committee report further elaborated the problems with NAFO. According to the report, NAFO had not “been provided sufficient resources for the task at hand,” was “decentralized to a fault,” and had “little authority to function effectively.”²⁴⁴ The committee noted that it was “in the long-term interests of all the parties concerned . . . that NAFO be modernized.”²⁴⁵ However, the Senate committee did not go as far as the House committee and chose not to recommend the adoption of a custodial management regime.

In December 2004, the Minister of Fisheries and Oceans, Geoff Regan, mandated an Advisory Panel on the Sustainable Management of Straddling Fish Stocks in the Northwest Atlantic to examine the issues surrounding straddling stocks, such as turbot and cod, and the international management of the fisheries through Regional Fisheries Management Organizations like NAFO. Chaired by Dr. Art May, a former

²⁴⁴ SCOFO, 2003 Report, 59.

²⁴⁵ SCOFO, 2003 Report, 59.

Deputy Minister of Fisheries and Oceans, the Advisory Panel commissioned a number of independent reviews that examined various scientific, legal, and institutional considerations as well as Canada's foreign allocations policy and the role of the European Union's Fisheries Policy.²⁴⁶

The Advisory Panel's final report, issued in June 2005, made a number of recommendations. The primary one was that Canada act to replace NAFO with a new Regional Fisheries Management Organization incorporating the UNFA agreement and other international agreements that had been concluded in recent years. The report highlighted the need for the new RFMO to give preferential status to coastal states while respecting existing shares of the stocks for current NAFO members. As well, the report emphasized that the new RFMO should not have an objection procedure and that any disputes should go to a compulsory and binding dispute-resolution procedure. The idea was to remove the giant loophole of the oft-abused objection procedure. The addition of enhanced enforcement measures, the report noted, would make this new RFMO a model for the management of the world's straddling fish stocks. Finally, the report touched on the issue of custodial management, noting that the creation of a new RFMO would be the preferable option and that such an organization would achieve the same benefits as a custodial-management approach.²⁴⁷

The government essentially ignored this extensive report, not even using the "replace NAFO" recommendation as a bargaining chip in international relations.²⁴⁸ Despite the calls for something better, Canada continued to work through NAFO, where non-compliance issues remained a problem. From 2004 to 2007, vessels fishing in the

²⁴⁶ May, "Breaking New Ground."

²⁴⁷ May, "Breaking New Ground," 79.

²⁴⁸ Bob Applebaum, pers. comm. 10 December 2007.

regulatory area were often cited for infringements of NAFO's Conservation and Enforcement Measures. The most common violations were by far the bycatch requirements and the misreporting of catches.²⁴⁹

Canada's Actions

Meanwhile, after making mostly unheeded representations to NAFO, Canada began taking tougher measures to fight the increasing overfishing. In March 2002, Canada closed its ports to vessels from the Faroe Islands because of continued violations of NAFO conservation measures. In April, it did the same to vessels from Estonia. That June, the House of Commons Standing Committee on Fisheries and Oceans tabled its report on foreign overfishing, mentioned above. The report addressed the increasing non-compliance within NAFO and harked back to the *Estai* incident, which, in the eyes of the Committee, had proved to be a "hollow victory."²⁵⁰ In September 2002 Minister Thibault announced that Canada would implement a new approach that would close its ports to any vessels believed to have committed serious infractions of NAFO regulations. In December 2003, Canada modified the *Coastal Fisheries Protection Act* to allow closure of ports on a vessel-by-vessel basis. The option to banish entire fleets was kept.²⁵¹

The new tough line continued in 2004. In January, Minister of Fisheries and Oceans Geoff Regan called for improvements to NAFO and an increase in Canada's

²⁴⁹ NAFO/FC Doc. 08/20, 4. In 2004 and 2005 there were seven citations for misreporting, 2006 saw an increase to ten citations and in 2007 the number jumped to 18. By comparison, the total over all four years for citations for illegal gear was only nine.

²⁵⁰ Canada, House of Commons, Standing Committee on Fisheries and Oceans, "Foreign Overfishing: Its Impacts and Solutions – Conservation on the Nose and Tail of the Grand Banks and the Flemish Cap," 10th Report, 37th Parliament, 1st Session, June 2002, 5, hereafter cited as FOPO.

²⁵¹ May, "Breaking New Ground," 95-96.

enforcement capacity within NAFO.²⁵² In March, he announced expanded aerial surveillance and at-sea patrols. The infusion of cash to conduct operations meant that the number of at-sea patrol days would increase by 40 percent. Minister Regan used strong language to condemn the conservation and enforcement situation, stating:

The Government of Canada recognizes that non-compliance by foreign fleets outside the 200-mile limit is a serious problem. Blatant disregard for the priority of conservation cannot and will not be tolerated. Six of nine groundfish stocks managed by NAFO are under moratoria. There are increasing indications that vessels from some member countries of NAO deliberately fish for these species. This is totally unacceptable.²⁵³

In May, more money was announced to enhance Canada's enforcement and surveillance in the NAFO Regulatory Area. Again, Minister Regan attacked the "blatant disregard for international rules and obligations."²⁵⁴

Custodial Management

Lurking in the background by now was the idea of "custodial management." The above-mentioned 2002 report of the House of Commons Standing Committee on Fisheries and Oceans on foreign overfishing outside the 200-mile limit had examined the options available to Canada and concluded that unilateral extension of the Exclusive Economic Zone to the edge of the continental shelf and beyond, that is, over the Nose and Tail of the Grand Banks and the Flemish Cap (a separate outcropping beyond the edge of the continental shelf) would be extremely difficult. First, there was no international support for unilateral extension of Exclusive Economic Zones. Second,

²⁵² Canada, Department of Fisheries and Oceans, "Cod recovery, NAFO issues dominate Minister's first visit," News Release, NR-NL-04-01.

²⁵³ Canada, Department of Fisheries and Oceans, "New \$17.5 million investment expands NAFO enforcement," News Release NR-HQ-04-21-E.

²⁵⁴ Canada, Department of Fisheries and Oceans, "Government of Canada announces new measures to combat foreign overfishing," News Release, NR-HQ-04-45-E.

unilateral extension would be contrary to international fisheries priorities established by Canada since the creation of modern Exclusive Economic Zones. Third, repudiating such a fundamental tenet of UNCLOS as the 200-mile Exclusive Economic Zone would make it hard for Canada to fully partake in the rights, duties, and organizations created by the Convention. Finally, unilateral extension of the Exclusive Economic Zone would practically guarantee a long drawn-out legal battle and there would be no guarantee that Canada would win.²⁵⁵

Instead, the committee proposed that Canada adopt a custodial-management regime on the Grand Banks and the Flemish Cap. According to the committee, Canada would assume sole responsibility for the management and conservation for the area beyond 200 miles. This would include the Nose and Tail of the Grand Banks and the Flemish Cap. The inclusion of the Flemish Cap in the area for custodial management meant that the House committee was going beyond the strict issue of straddling stocks. However, historical allocations would be respected. That is, countries fishing in the area would not be forced to abandon their fishery and move somewhere else. Under a custodial-management regime, Canada would “conduct the science, set the TACs, and implement and administer a conservation-based management system that would include monitoring and enforcement.”²⁵⁶

In November 2002, the Canadian government’s response to the committee’s report rejected the custodial management option. According to the Department of Fisheries and Oceans, “unilateral extension by Canada of its jurisdiction beyond the

²⁵⁵ FOPO, 2002, 17-18.

²⁵⁶ FOPO, 2002, 19.

generally accepted international norms will not accomplish our objectives.”²⁵⁷ The government believed that the most effective way to combat overfishing was to continue working within NAFO to achieve progress on conservation and enforcement issues.

Despite the government’s negative reaction to custodial management, the House committee continued to examine the issue. Its 2003 report repeated, almost verbatim, the recommendations from its 2002 report.²⁵⁸ The Senate Committee on Fisheries and Oceans touched on the idea in their 2003 report, *Straddling Fish Stocks in the Northwest Atlantic*. The report concluded that “having a central authority to manage the fisheries on behalf of all participants would lead to more effective fisheries management.”²⁵⁹ However, the government still resisted the calls to implement custodial management or to take the more moderate step of seeking a new RFMO to replace NAFO. The government preferred instead to continue working within the confines of NAFO to combat overfishing.

The Advisory Panel on Straddling Stocks, mentioned earlier, set aside custodial management and recommended, to no avail, replacing NAFO. Custodial management again came into focus during the 2006 election campaign when Stephen Harper’s Conservatives promised to implement it: “It is our responsibility to the planet to ensure that these resources are managed and regulated and used responsibly, not raped the way they’re being now,” Harper said.²⁶⁰ Harper went on:

From the day we’re elected, we are going to indicate to
NAFO – which has failed in its management and its

²⁵⁷ Canada, Government Response to the House of Commons Standing Committee on Fisheries and Oceans. 10th Report – Foreign Overfishing its Impacts and Solutions. NR-HQ-02-140 E.

²⁵⁸ House Committee on Fisheries, 2003 report, Custodial Management Outside Canada’s 200-Mile Limit.

²⁵⁹ SCOFO, June 2003, 49.

²⁶⁰ “Tories to protect offshore fish stocks: Harper,” CBC

<http://www.cbc.ca/story/canadavotes2006/national/2005/12/06/elxn-harper-nl.html> <accessed 29 June 2009>.

regulation and its oversight of these resources – we're going to send a pretty clear signal: we're moving toward custodial management if they don't do something.²⁶¹

Still, despite their pledges, the Conservatives have, as yet, done little to implement a custodial-management regime. Instead, the Department of Fisheries and Oceans has supported further NAFO reforms.

In September 2006, under the new Conservative government, DFO Minister Loyola Hearn, who in opposition had been a prominent advocate of custodial management, claimed a victory for Canada and a new beginning for NAFO. Part of the improvement would be new arrangements under the existing NAFO convention, most significantly a “return-to-port” policy whereby Canadian or other international inspectors could immediately order an offending vessel to port for further investigation. The fishing time lost was seen as a major deterrent. Hearn and NAFO also promised a new and better convention. This would incorporate a more robust dispute-resolution procedure that would reduce the use of the much-abused objection procedure. Later, in 2008, Minister Loyola Hearn went so far as to claim that Canada had instituted custodial management.

However, Canada remains part of NAFO and continues to engage in negotiations for stock allocations in the NAFO Regulatory Area. Responding to Hearn’s claim regarding custodial management, Trevor Taylor, the Minister of Fisheries and Agriculture for the government of Newfoundland and Labrador, noted that: “If the federal government had assumed custodial management in the NAFO regulatory area, there would be no need for the Canadian delegation to negotiate for fish inside this

²⁶¹ “Harper targets Overfishing,” *Globe and Mail*, 07 Dec 2005, A1.

area.”²⁶² Indeed, Minister Taylor went on to say that either the Conservative government did not have an understanding of custodial management or they were deliberately trying to mislead the Canadian people.

With regard to NAFO, a quartet of former fisheries officials – Bill Rowat, Bob Applebaum, Scott Parsons, and Earl Wiseman²⁶³ – castigated the proposed new convention as a “sellout” of Canadian sovereignty. They were particularly incensed by a provision that, they said, could enable management by NAFO of fisheries inside the 200-mile limit, right up into the Gulf of St. Lawrence. According to Applebaum, the proposed wording of the new convention would allow NAFO, in theory, to close fisheries inside Canada’s 200-mile limit in order to preserve fisheries within the NAFO Regulatory Area.²⁶⁴ They also charged that the dispute-settlement provisions under the proposed new convention were mostly “smoke and mirrors” with no real clout to enforce decisions. At the time of writing, the proposed new treaty was being circulated for approval by NAFO member nations.

²⁶² Government of Newfoundland and Labrador, Department of Fisheries and Agriculture, News Release, “Province Questions Statement on Custodial Management,” 2008-10-08, <http://www.releases.gov.nl.ca/releases/2008/fishaq/1008n08.htm> <Accessed 29 June 2009>.

²⁶³ Bill Rowat, as previously mentioned, was the Deputy Minister of Fisheries and Oceans under Brian Tobin. Bob Applebaum served as Director-General, International Branch for many years and participated in the negotiation of the original NAFO convention and the UNFA. Scott Parsons served as Assistant Deputy Minister of Atlantic Fisheries, Science, and Oceans. Earl Wiseman also served as Director-General, International Branch, and coordinated Canada’s ratification of UNFA.

²⁶⁴ SCOFO, 2007 report, 25.

Summary and Conclusion

Canada possesses a major fishery and was a leading country in establishing the rules of the *Law of the Sea*. This fits with Canada's international image and self-image as a civil, moderate, and progressive country. But the fishery also tends to bring out the more assertive side of the Canadian character. Aggressive fishery actions in the Confederation era helped cement Canada's independence. Later, in 1923, the country's first independent treaty involved halibut. When Fisheries Minister Roméo LeBlanc closed Canadian ports to Soviet fishing vessels in 1975, it provoked international headlines. So did the warning shots fired across the bow of American vessels in 1988 and 1989. But no marine incident fired up the Canadian public like the Turbot War.

After years of playing "Mr. Nice Guy" in international fisheries negotiations and elsewhere, Canada finally stood up to protect not only its own fisheries resources but also the principle of international conservation of ocean resources. Canada's actions were certainly out of character for a nation often characterized as an "international boy scout." As Brian Tobin, the former Minister of Fisheries and Oceans, described it, Canada was known in international fisheries circles as "good old go-along Canada."²⁶⁵ Thus, despite the repeated warnings and threats of unilateral action, many in the international community did not truly believe that Canada would act. When Canada ultimately seized the *Estai*, then cut the warps on the *Pescamar Uno*, and still threatened further action, it sent a strong message to the international community that Canada was indeed very serious about conserving fish stocks.

²⁶⁵ Tobin, pers. comm. 18 January 2008.

The *Estai* seizure was not done on a whim or for simply political gains.

Although the events of 1995 required quick thinking and fast footwork, the planning and execution was the end result of many years of frustrated diplomatic efforts. The failure of initiatives aimed at reducing catches, the rising public sentiment against foreign overfishing, and the determination and drive of Brian Tobin all helped pave the way towards the arrest.

The lead-up to the seizure of the *Estai* saw a number of intertwined factors at play, starting with the decrease in fishery abundance. Canada's own record of fisheries management inside the 200-mile zone had its flaws. In the NAFO Regulatory Area, when one also adds in the rabid overfishing of foreign fleets, especially the Spanish and Portuguese and vessels flying flags of convenience, it should come as no surprise that the stocks suffered so great a collapse. The decimation of once-great stocks, most notably of cod, in the late 1980s and early 1990s, fuelled a climate where countries would begin to risk more for the fish that remained. Nations like Spain and Portugal ratcheted up their efforts in order to increase (or even just to maintain) the profits gained from the fishery. They took greater risks by continuing to fish illegally, despite repeated warnings and citations from international organizations like NAFO. On the other hand, Canada stuck its neck out and pushed hard for increased protection of the dwindling resource. Some nations accused Canada of acting purely in self-interest in a quest to land more fish. However, countries acting in their own best interests could hardly be expected to close a major fishery and cause the loss of tens of thousands of related jobs. Canada did just that when it closed the famed northern cod fishery on July 2, 1992.

By 1994, it became clear that Canada's efforts in the international community were coming to naught. NAFO had failed to effectively deter or combat overfishing, and Canada decided to initiate the seizure of foreign vessels that were violating the conservation measures laid out by the organization. First, Canada seized the *Kristina Logos*, a Panamanian-flagged ship that was still registered in Canada, and charged the owner with violations of the *Coastal Fisheries Protection Act*. Then, Canada amended the *CFPA* to allow the arrest of vessels flying flags of convenience. Canada went on, using pre-existing regulations, to seize American scallopers fishing in international waters. Though the charges against them in Canadian court were eventually dropped, they were later charged in the United States.

Despite these actions and continued representations to the international community by Canada, overfishing continued. In March 1995, Canada seized a Spanish trawler, the *Estai*, in international waters, outside Canada's 200-mile limit. The pursuit of the *Estai* took more than three hours, involved other Spanish fishing ships attempting to interfere, the use of water cannons, and, ultimately, the firing of warning shots by a .50 calibre machine gun. The *Estai* was towed to St. John's where the captain and the owner were charged and convicted of violations of the *Coastal Fisheries Protection Act*.

As a result of the seizure, relations between Canada and the European Union quickly soured. Spain, the angriest of the EU nations, launched proceedings at the International Court of Justice, instituted visa requirements for Canadians travelling to, or through, Spain, and, shortly after, used its term in the presidency of the EU to block Canada from negotiations meant to foster closer trade and security ties. However, from a fisheries standpoint, the *Estai* incident paved the way for an "orders of magnitude"

improvement in NAFO's conservation and enforcement record and helped establish the climate in which UNFA could be signed.²⁶⁶

Perhaps the greatest legacy of the *Estai* incident is the UNFA agreement. UNFA provided a huge step forward in terms of conservation and enforcement capabilities. However, the improvements on paper must be used in the real world to truly be effective. To date, no country that has ratified UNFA has challenged UNFA's scope but neither have they explored the full extent of its powers in the fight against overfishing.

The other major area where there are still questions to be answered is that of custodial management. That is, the idea that Canada should extend its jurisdiction over the Nose and Tail of the Grand Banks and even over the Flemish Cap and take over sole responsibility for setting quotas and conducting enforcement operations in the area. Both the House of Commons and Senate Fisheries Committees have examined the issue in various reports. In 2006, the Conservative Party promised during the election campaign to take steps to institute custodial management, and the government of Newfoundland and Labrador continues to espouse the concept. Yet, no concrete action has been taken. Instead, Liberal and Conservative governments have continued pursuing NAFO reform, which has yet to be resolved. There have been continued reports of overfishing, misreporting of catches, and use of illegal gear. Recovery of stocks has been limited for some, non-existent for others. Some critics believe that Canada has lost its touch in international fisheries diplomacy. Proposed changes to the NAFO convention, touted by the current government, could potentially open up waters inside the 200-mile zone to international management. At the time of writing, the proposed changes to the NAFO convention are being circulated to member countries for

²⁶⁶ Bevan, pers. comm. 15 November 2007.

review. Brian Tobin has said that, were he involved, he would never give up Canadian sovereignty to an international organization such as NAFO. Ultimately, Tobin says, the solution lies with Canada pursuing an extension of its jurisdiction over the Nose and Tail of the Grand Banks and instituting a unified regime of conservation and enforcement measures to protect the few remaining fish of a supply that was once thought to be inexhaustible.²⁶⁷

It is clear that the current regime in the NAFO Regulatory Area remains unsatisfactory for conservation. It is also clear that by forcing the issue with the *Estai* arrest and leading the way to UNFA, Canada moved forward the hopes and potential for international fisheries management. It remains to be seen whether Canada and other nations can fulfill those hopes.

²⁶⁷ Tobin, pers. comm. 18 January 2008.

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