Part VIII: Oceans and the Law of the Sea

[...]

III. Exploration and Exploitation of Marine Resources

[...]

2. High Seas Fisheries

[...]

The Greenland Halibut Dispute

In 1994-1995 a dispute arose between the European Union and Canada over the conservation and management of Greenland halibut stock¹ in the Northwest Atlantic Ocean which culminated in Canada's arrest of the Spanish trawler *Estai* in international waters in March 1995. The dispute concerned the exercise of fisheries jurisdiction, i.e, the prescribing of fishery regulations including the exclusion of fishing vessels, and the enforcement of those regulations, by Canada on the high seas.²

Fishing in the Northwest Atlantic Ocean is governed by the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries³ to which the European Union is

¹ The fish in question in this dispute, the Greenland halibut, is also known as black turbot or black halibut. The dispute is, for this reason, sometimes also referred to as the 'Turbot War' between the EU and Canada.

² On the law of the sea aspects EU/Canada dispute, see Okon Akiba, International Law of the Sea: The Legality of Canadian Seizure of the Spanish Trawler (Estai), Natural Resources Journal 37 (1997), 809-827; Peter A. Curran/Ronan J. Long, Fishery Law, Unilateral Enforcement in International Waters: The Case of the Estai, Irish Journal of European Law 5 (1996), 123-163; Peter, G.G. Davies, The EC/Canadian Fisheries Dispute in the Northwest Atlantic, International and Comparative Law Quarterly 44 (1995), 927-939; David Freestone, Canada and the EU Reach Agreement to Settle the Estai Dispute, International Journal of Marine and Coastal Law 10 (1995), 397-411; Christopher C. Joyner/Alejandro Alvarez von Gustedt, The Turbot War of 1995: Lessons for the Law of the Sea, International Journal of Marine and Coastal Law 11 (1996), 425-458; Derrick M. Kedziora, Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU Fishing Dispute and the United Nations Agreement on Straddling and Highly Migratory Fish Stocks, Northwestern Journal of International Law and Business 17 (1996-1997), 1132-1162; Andrew Schäfer, Canada-Spain Fishing Dispute: The Turbot War, Georgetown International Environmental Law Review 8 (1996), 437-449; Patrick Shavloske, The Canadian-Spanish Fishing Dispute: A Template for Assessing the Inadequacies of the United Nations Convention on the Law of the Sea and a Clarion Call for Ratification of the New Fish Stock Treaty, Indiana International & Comparative Law Review 7 (1996), 223-244; Yann-Huei Song, The Canada-European Union Turbot Dispute in the Northwest Atlantic: An Application of the Incident Approach, Ocean Development and International Law 28 (1997), 269-311; A. Springer, The Canadian Turbot War with Spain: Unilateral State Action in Defense of Environmental Interests, Journal of Environment and Development 6 (1997), 26-60; David R. Teece, Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High Seas Environment?, Colorado Journal of International Environmental Law & Policy 8 (1997), 89-125; A. Anna Zumwalt, Straddlinig Stock Spawn Fish War on the High Seas, U.C. Davis Journal of International Law and Policy 3 (1997), 35-56.

³ Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, done at Ottawa, 24 October 1978 (1135 UNTS 369), approved by Council Regulation (EEC) No 3179/78 of 28 December 1978 concerning the conclusion by the European Economic Community of the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries (OJ 1978 L 378, 30.12.1978, p. 1). The Convention replaced the International Convention for the Northwest Atlantic Fisheries (ICNAF), done at Washington DC, 8 February 1949

a party.⁴ The Convention has established the Northwest Atlantic Fisheries Organization (NAFO) whose object is to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fishery resources of the Northwest Atlantic Ocean.⁵ NAFO may regulate the fishing of certain species in the 'Regulatory Area', i.e. those areas of the Northwest Atlantic Ocean beyond the areas in which coastal States exercise fisheries jurisdiction.⁶ Decisions concerning the regulation of certain fish stocks in the Regulatory Area are made by the NAFO Fisheries Commission on the advice of the Scientific Council and other subsidiary bodies. The Fisheries Commission may decide on conservation, management and enforcement measures, including the establishment of the total allowable catch (TAC) and quotas for Contracting Parties. Decisions that have been adopted by the Fisheries Commission generally become measures binding on all Contracting Parties, except for those which have presented objections. In the case of the EU, the Council of Ministers allocates the share available to the Union -- the Union quota -- among the Member States in accordance with Article 8(4) of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture.⁷

Beginning in the early 1990s certain straddling fish stocks in the Northwest Atlantic Ocean, including Greenland halibut, faced serious depletion. Due to the biological unity of straddling stocks, overfishing them on the high seas will also deplete them within the zone under national jurisdiction. Claiming to act in order to conserve the imperiled straddling stocks, the Canadian

⁽¹⁵⁷ UNTS 157) after the North Atlantic coastal States had extended their jurisdiction over the living resources of their adjacent waters to limits of up to 200nm from the coast where they exercised sovereign rights for the purpose of exploring and exploiting, conserving and managing these resources.

⁴ On 11 February 1994, the European Commission advised the Executive Secretary of NAFO that henceforth the term 'European Union' should be used for the Contracting Party of NAFO. Other members are Bulgaria, Canada, Cuba, Denmark (in respect of the Faroe Islands and Greenland), France (in respect of Saint Pierre et Miquelon), Iceland, Japan, the Republic of Korea, Norway, the Russian Federation, Ukraine, and (as of 29 November 1995) the United States of America. In 1995, prior to their accession to the EU, members also included Estonia, Latvia, Lithuania, and Poland.

⁵ The NAFO 'Convention Area' comprises the waters of the Northwest Atlantic Ocean north of 35°00'N latitude and west of the line extending due north from 35°00'N latitude and 42°00'W longitude to 59°00'N latitude, thence due west to 44°00'W longitude, and thence due north to the coast of Greenland, and the waters of the Gulf of St. Lawrence, Davis Strait and Baffin Bay south of 78°00'N latitude.

⁶ Art. 1(2) of the NAFO Convention.

⁷ Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture: OJ 1992 L 389, 31.12.1992, p. 1.

There are four basic behaviour patterns of straddling stocks, of which any given stock may display one or more. In the first, the stock occurs partly on one side of the boundary and partly on the other, and neither the group nor the individual fish move around very much. In the second kind, although the group will stay in more or less the same area, the individual fish will swim a fair distance and may cross the boundary quite regularly. In the third type, the fish may spawn or juveniles may congregate on one side of the boundary, but live as adults on the other. The effect of uncontrolled fishing for straddling stocks beyond the 200-mile limit can be especially destructive where the spawning ground or nursery is on the high seas. Finally, some straddling stocks will cross the boundary on a seasonal basis; for example, spending the summer close to shore and the winter beyond the 200-mile zone. In this case, a large part of the stock may be wiped out by overfishing while it is wintering in the high seas, even if fishing is strictly controlled within the 200-mile limit. Consequently, with regard to all of these behaviour patterns, fishing just beyond the 200-mile limit could eventually deplete the entire stock, just as removing oil from one part of a deposit straddling a boundary will deplete the entire deposit. Greenland halibut display the latter three behaviour patterns and therefore the sustainability of the entire stock can be affected by overfishing beyond 200 miles (International Court of Justice, Fisheries Jurisdiction Case (Spain v. Canada), Counter-Memorial of Canada (Jurisdiction), February 1996, para. 19, n. 27).

Government on 10 May 1994 introduced into Parliament the Act to Amend the Coastal Fisheries Protection Act (Bill C-29).9 Bill C-29 provided for the conservation and management of straddling fish stocks and related enforcement matters, including the use of force by Canadian fishery protection vessels against foreign fishing boats, in the NAFO Regulatory Area, i.e. on the high seas. A new section 5.2 of the Coastal Fisheries Protection Act prohibited persons on board vessels of a prescribed class in the NAFO Regulatory Area from fishing or preparing to fish for prescribed straddling stocks in contravention of prescribed conservation and management measures. The vessels and stocks subject to the Act were to be stipulated in regulations, to be made pursuant to a new section 6. The relevant regulations were issued 15 days later, on 25 May 1994. 10 The regulations took the form of tables in which the various stocks of fish protected by the Coastal Fisheries Protection Act as well as the flag States whose vessels would be subject to the Act were set out. The regulations of 25 May 1994 specified the classes of vessels that posed the most immediate threat to the conservation of straddling stocks in May 1994: those flying the flags of States with open registries and those with no nationality at all. The regulations also prescribed particular stocks, such as Greenland halibut, as being straddling stocks, and therefore subject to prescribed conservation and management measures.

On the same day that Bill C-29 was introduced, Canada revised its declaration under Article 36(2) of the Statute of the International Court of Justice (ICJ) accepting the Court's jurisdiction as compulsory. In a new reservation it excluded from the jurisdiction of the Court all 'disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures'. 11

At its 1766th meeting in Luxemburg, on 10 June 1994, the Council of the European Union made a detailed examination of Canada's new Coastal Fisheries Protection Act and the relevant implementing regulations. The Council considered that the Act and its implementation were not only contrary to international law but also ran counter to the efforts made by the international community, notably in the framework of the Food and Agriculture Organization (FAO) and of the United Nations Conference on straddling stocks, to improve the management of fisheries resources, particularly on the high seas, and that they had been adopted despite the fact that the meeting of the United Nations Conference on straddling stocks was due to take place in the second half of August 1994. The Council therefore decided to deliver to the Government of Canada a Note Verbale indicating its position on the legal situation created by the adoption of the new Act and the relevant implementing regulations. The Note Verbale pointed out that both the European Community and its Member States:

'- consider that this Law and the regulation implementing it, conferring as they do on the Canadian authorities powers of intervention with regard to foreign vessels carrying out fishing activities on the high

⁹ Bill C-29 was adopted by Parliament and given Royal Assent on 12 May 1994: *Statutes of Canada*, 1994, c. 14. See Laurent Lucchini, La loi canadienne du 12 mai 1994: la logique extrême de la théorie du droit préférentiel de l'État côtier en haute mer au titre des stocks chevauchants, *Annuaire Français de Droit International* 40 (1994), 864-875.

¹⁰ Coastal Fisheries Protection Regulations, Amendment, SOR/94-362, 25 May 1994, Canada Gazette Part II, Vol. 128, No. 12, of 15 June 1994.

¹¹ ICJ Yearbook 1993-1994 (1994), pp. 82, 88.

¹² 1766th Council meeting - Fisheries - Luxembourg, 10 June 1994: PRES 94-104.

seas, constitute a unilateral act which is totally unacceptable.

- consider that this Law and its implementation are not only contrary to international law, but also run counter to the efforts made by the international community to improve the management of fisheries resources, particularly on the high seas. [...]
- reject the spirit and the provisions of the Law in question and of the regulation implementing it. They consider, in accordance with Article 89 of the United Nations Convention, that no State may validly purport to subject any part of the high seas to its sovereignty.
- consider that it is not for Canada to determine unilaterally a list of stocks to be considered as being straddling. [...]
- [the Canadian enactments cited above] are in contradiction with both the relevant instruments of international law and the action taken multilaterally, to both of which Canada has, nonetheless, made an important contribution.
- can only reject the implications of this Canadian law and the regulation implementing it. They consider that the latter constitutes a precedent that is all the more regrettable as it comes on the eve of the entry into force of the United Nations Convention on the Law of the Sea.'13

Considering that the stock of Greenland halibut had considerably diminished, the scientific advisory board of the NAFO, in its meeting from 8 to 22 June 1994, found that 'a catch quota exceeding 40 000 tonnes would not be adequate to restrain fishing and that the latter, in 1995, had to be substantially reduced in order to halt the tendency of the biomass to diminish.' In its 16th annual meeting from 19 to 23 September 1994 the NAFO Fisheries Commission therefore set a TAC for Greenland halibut for the first time. On the basis of a recommendation of the scientific advisory board, the European Union delegation proposed a TAC of 40 000 tonnes while Canada proposed a TAC of 15 000 tonnes. In the end, the NAFO Fisheries Commission settled for a Norwegian compromise proposal of a TAC of 27 000 tonnes (with the European Commission abstaining) which was to be applied in 1995 in NAFO sub-areas 2 and 3. This amounted to a reduction of more than 50% from the previous level of catches in that area, which had been 62 000 tonnes.

At the meeting of the Council of Ministers, held in Brussels on 23 November 1994, a request by Spain and Portugal to initiate the procedure for objecting to the TAC of 27 000 tonnes of Greenland halibut fixed by NAFO did not achieve the required majority¹⁴ despite a strong call by the European Parliament to initiate such action.¹⁵

On 20 December 1994, the Council adopted Regulation (EC) No 3366/94 laying down for 1995 certain conservation and management measures for fishery resources in the Regulatory Area. The seventh recital in its preamble recorded that the maximum catch level for Greenland halibut in NAFO sub-areas 2 and 3 in 1995 was as yet unallocated among NAFO Contracting Parties, that the NAFO Fisheries Commission was to convene a meeting to decide the allocation and that catches of Greenland halibut would be authorised in 1995 and counted against the quotas decided for Member States.¹⁶

¹³ Note Verbale from the European Community to Canada concerning the Coastal Fisheries Protection Law adopted on 12 May 1994: International Court of Justice, *Fisheries Jurisdiction (Spain v. Canada)*, Memorial of the Kingdom of Spain (Jurisdiction), September 1995, para. 19.

¹⁴ 1804th Council meeting - Fisheries - Brussels, 23 November 1994: PRES 94-240.

¹⁵ See Resolution on the recent agreement on NAFO fisheries quotas for 1995: OJ 1995 C 341, 05.12.1994, p. 262.

¹⁶ Council Regulation (EC) No 3366/94 of 20 December 1994 laying down for 1995 certain conservation and management measures for fishery resources in the Regulatory Area as defined in the Convention on Future Multilateral Cooperation in the North West Atlantic Fisheries: OJ 1994 L 363, 31.12.1994, p. 60.

At an acrimonious special meeting held in Brussels from 30 January to 1 February 1995, the NAFO Fisheries Commission allocated the TAC for Greenland halibut as follows: Canada - 60.37% (16 300 tonnes for 1995) and the European Union - 12.59% (3400 tonnes for 1995), with the remainder being divided principally between Russia and Japan. This represented an increase in the Canadian quota of over 300 percent over the previous years catch, and a decrease in the European Community quota to 8.5 percent of the previous years catch. This allocation was considered by the Commission to be 'unfair and discriminatory'. Fisheries Commissioner Emman Bonino set out the reasons for the objection of the EU:

'[...] the TAC of 27 000 tonnes adopted for 1995 by NAFO is a first conservation measure devised to reverse the trend of increasing fishing effort on this stock.

The Community has agreed to this TAC of 27 000, as have all other contracting parties. However, since the Community caught in previous years more than 40 000 tonnes of Greenland halibut and all other Contracting Parties together less than 10 000 tonnes, the Community considered the allocation of a quota of only 12,69% of the TAC of 27 000 very unfair. Moreover, at the NAFO meeting (30 January-1 February 1995), Canada forced a vote on these allocations thus breaching the principle of seeking consensus. Therefore, the Community had to object to this allocation in conformity with Article XI of the NAFO Convention. '18

On another occasion, she stated:

'[...] The decision adopted by NAFO, at the recent meeting of the Fisheries Commission which took place in Brussels on 31 January, allocating to the Community 12,59% of the TAC (total allowable catches) of this species for 1995 is not acceptable to the Commission. It is in total contradiction to the fishing pattern in recent years, the Community share being almost 80%.

Since this decision does not take into account historic catches, it is not in conformity with NAFO practices. The acceptance of the allocation key for Greenland halibut established in this way by contracting parties would constitute a dangerous precedent for the future.

The arguments put forward by Canada in favour of the allocation makes reference to coastal State preference (Canada). This is not in accordance with international rules and practices. [...].'19

On 16 February 1995, the European Parliament called the allocation of the TAC of Greenland halibut 'unfair, unbalanced and unjustified' and asked the Commission to argue before the Council of Fisheries Ministers that objections should be raised to that allocation.²⁰ On the recommendation of the Commission, the Council on 28 February 1995 adopted unanimously, by written procedure, a decision objecting to the Greenland halibut quota established by the NAFO Fisheries Commission for the Regulatory Area.²¹ On 3 March 1995, at a time when Spanish trawlers had already caught some 5 000 tonnes of Greenland halibut, the Council lodged a formal

¹⁷ See the Answer given by the Commissioner for Fisheries, Mrs Emma Bonino, on behalf of the Commission (31 July 1995) to Written question E-1981/95 concerning the NAFO Agreements of 8 July 1995: OJ 1995 C 273, 18.10.1995, p. 49.

¹⁸ Answer given by Mrs Bonino on behalf of the Commission (12 June 1995) to Written Question E-935/95 of 31 March 1995: OJ 1995 C 230, 04.09.1995, p. 17.

¹⁹ Answer given by Mrs Bonino on behalf of the Commission (5 April 1995) to Written question E-326/95 to the Commission of 13 February 1995: OJ 1995 C 257, 02.10.1995, p. 5.

²⁰ Resolution on allocation of the TAC of black halibut for 1995 in NAFO waters: OJ 1995 C 56, 06.03.1995, p. 103.

²¹ Council of Ministers Press Release PRES: 95-58, 1 March 1995.

objection to the quota allocation pursuant to Article XII.1 of the NAFO Convention with the Executive Secretary of that organisation, thus preventing that allocation from becoming binding on the European Union.²²

On the same day, apparently in reaction to the submission of that objection by the European Union, Canada amended its *Coastal Fisheries Protection Regulations*²³ and included Portugal and Spain in these Regulations,²⁴ the effect of which was that vessels registered in Portugal and Spain were prohibited from fishing Greenland halibut in the NAFO Regulatory Area and that offenders were subject to arrest, seizure of vessel and catch, and fines. Immediately after the amendment of the *Coastal Fisheries Protection Act*, the Canadian Prime Minister, Jean Chretien, telephoned the Commission President, Jacques Santer, to explain Canada's position and proposed a 60-day moratorium on Greenland halibut fishing to allow the two sides to negotiate. Canada gave the European Union three days to respond. The Union agreed to negotiate, but rejected the moratorium and denounced the Canadian amendments.

On 6 March 1995, the Council of the European Union adopted a statement in response to the Canadian legislative action on 'Fishing in the NAFO Area' which reads in part:

'The European Union having noted the latest developments and Canada's recent initiatives concerning fishing in the NAFO area, and in particular with regard to fishing for Greenland halibut,

- -- draws attention to the objection procedure and reaffirms the Union's position which was adopted in accordance with the Law of the Sea and the NAFO Convention. There is therefore no reason to accept a moratorium on fishing activities targeted at Greenland halibut in the NAFO area;
- -- confirms the Union's commitment to rational and responsible use of fishery resources by complying with the overall catch limits set;
- -- notes that the Commission gave a favourable reply to Canada's request that a bilateral meeting be organized, on the understanding that such a meeting should be continued within the multilateral NAFO framework and that the Community will request a meeting of the Contracting Parties for that purpose;
- -- denounces the unilateral action taken by the Canadian authorities in violation of the provisions of the Law of the Sea and calls on them to pursue the discussion in compliance with legal rules and principles. In this context the Council recalls its position opposing Canadian legislation controlling the fishing activities of non-Canadian vessels beyond the 200-mile limit and asks the Commission to submit to it at the earliest opportunity a legal analysis of the amendments made to the legislation on 3 March. The Union is waiting to see what démarches are needed in the light of that analysis.'²⁵

On 9 March 1995, the Spanish fishing vessel *Estai* was forcibly boarded and inspected by Canadian fisheries protection officers in the Regulatory Area some 245nm off the Canadian coast²⁶ pursuant to the Canadian *Coastal Fisheries Protection Act* and the freshly amended *Regulations*. The ship was seized and escorted to the Canadian port of St. John's, Newfoundland

²² Letter from the European Commission to the Executive Secretary of the Northwest Atlantic Fisheries Organization, 3 March 1995, reproduced in International Court of Justice, *Fisheries Jurisdiction Case (Spain v. Canada)*, Counter-Memorial of Canada (Jurisdiction), February 1996, Annex, p. 387.

²³ Coastal Fisheries Protection Regulations (CRC, c. 413) as amended by PC 1995-372, dated 3 March 1995, SOR/95-136, published in the Canada Gazette, Part II, Vol. 129, No. 6, of 22 March 1995.

²⁴ Spain and Portugal were the EU Member States with most vessels in the Regulatory Area.

²⁵ 1830th Council meeting - General Affairs - Brussels, 6 March 1995: PRES 95-66. See also International Court of Justice, *Fisheries Jurisdiction (Spain v. Canada)*, Memorial of the Kingdom of Spain (Jurisdiction), September 1995, para. 15.

²⁶ Canada maintains that the *Estai* was approximately 15nm outside of Canada's 200nm fishing zone.

(where it docked on 12 March 1995), and the master of the *Estai* was charged with unlawful fishing, failing to stop when required, obstructing a fisheries officer, and throwing fishing equipment overboard. No charges were brought against the Spanish crew. The Canadian authorities claimed that 79% of the *Estai's* catch of turbot was undersized, the catch was more than double what had been reported in the log book, the mesh of the nets of the *Estai* was below the minimum size allowed by NAFO and an even smaller-mesh lining inside. Spain lodged the most vigorous protests with the Canadian Government and demanded the immediate release of the crew and the vessel and reserved the right to claim appropriate compensation;²⁷ it also lodged a protest with the Secretary-General of the United Nations.²⁸ In a first reaction by the European Union, the Fisheries Commissioner called the Canadian action 'an act of organized piracy'. The European Parliament went even further, calling the seizure of the *Estai* 'an act of aggression against the community fleet'.²⁹ Canada, on the other hand, asserted that 'the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen'.³⁰ In a statement released by the European Commission on 11 March 1995, Commissioner Bonino said:

'[...] We condemn in the strongest terms this attempts by the Canadian authorities to apprehend a Spanish fishing vessel. It is a flagrant violation of international law. The European Union is not looking for an escalation, but if Canada does not stop its actions and refuses to respect international rules, the EU will be obliged to look at other actions to defend its legitimate rights.'³¹

In response to the Canadian action EU research ministers cancelled plans to sign a previously negotiated scientific co-operation agreement with Canada and threatened further action, including retaliation against Canada's \$1.6 billion fish and farm exports to Europe; Canada had reason to worry as its exports to the Union were worth nearly \$11.3 billion. The EU demanded that Canada immediately release the vessel, repair any damage caused, and cease and desist from its harassment of vessels flying the flag of Community Member States. Moreover, it demanded that Canada immediately repeal the legislation under which it acted to seize the Estai.

On 10 March 1995, the Delegation of the Commission of the European Community in Canada transmitted a Note Verbale of the European Community and its Member States to the Department of Foreign Affairs and International Trade of Canada which included the following:

'In relation with the violent arrest of the fishing vessel Estai, flying the flag of Spain, by Canadian Patrol and Coast Guard vessels in international waters on 9 March 1995, the Community and its Member States wish to express their strongest condemnation of such an illegal and totally unacceptable act.

The arrest of a vessel in international waters by a State other than the State of which the vessel is flying the flag and under whose jurisdiction it falls, is an illegal act under both the NAFO Convention and customary international law, and cannot be justified by any means. With this action Canada is not only flagrantly violating international law, but is failing to observe normal behaviour of responsible

²⁷ See International Court of Justice, *Fisheries Jurisdiction (Spain v. Canada)*, Memorial of the Kingdom of Spain (Jurisdiction), September 1995, para. 14, and *Fisheries Jurisdiction (Spain v. Canda)*, ICJ Rep. 1998, p. 432 at p.443, para. 20.

²⁸ Letter dated 31 March 1995 from the Permanent Representative of Spain to the United Nations addressed to the Secretary-General: UN Doc. A/50/98-S/1995/252, 31 March 1995.

²⁹ Resolution on the illegal arrest of the Spanish vessel 'Estai': OJ 1995 C 89, 10.04.1995, p. 162.

³⁰ Fisheries Jurisdiction (Spain v. Canada), ICJ Rep. 1998, p. 432 at p. 443, para. 20.

³¹ Commission Press Release IP 95-234, 11 March 1995.

States.

This act is particularly unacceptable since it undermines all the efforts of the international community, notably in the framework of the FAO and the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, to achieve effective conservation through enhanced cooperation in the management of fisheries resources.

This serious breach of international law goes far beyond the question of fisheries conservation. The arrest is a lawless act against the sovereignty of a Member State of the European Community. Furthermore, the behaviour of the Canadian vessels has clearly endangered the lives of the crew and the safety of the Spanish vessel concerned.

The European Community and its Member States demand that Canada immediately release the vessel, repair any damages caused, cease and desist from its harassment of vessels flying the flag of Community Member States and immediately repeal the legislation under which it claims to take such unilateral action.

The European Community and its Members States are forced to reassess their relationship with Canada in the light of this deplorable situation and reserve their rights to take any action which they deem appropriate. '32

In a statement on 12 March 1995 Fisheries Commissioner Emma Bonino sent an unconcealed threat to the Canadian Government:

'[...] I would repeat what the European Union has made clear over and over again, that if Canada wishes to avoid a deterioration in its relations with the Union, it must return to compliance with the rules and principles of international law. This means unconditional release of the vessel illegally seized, its captain, its crew and its cargo.'³³

The master of the *Estai* was released the same day upon the posting of bail in the amount of Can\$8,000. The Committee of Permanent Representatives (COREPER) agreed on 13 March that clarificatory discussions should take place between the Commission and Canada in preparation for formal negotiations which could begin once the Canadian authorities had released the Spanish vessel.³⁴ Despite the release of the ship's captain tempers were running high as the master and the entire crew were evicted from the vessel and, on 14 March, Canadian officials commenced offloading of the cargo of fish on board. During her Press Conference on NAFO/Fisheries on 14 March 1995 Commissioner Bonino made the following Introductory Declaration:

'In view of the latest developments following the illegal seizure on the high seas of the Community fishing vessel "Estai", despite urgent exhortations addressed to Canada by the Council of the European Union, I would like to enlarge upon three basic aspects of this affair:

- 1. The illegality of Canada's actions.
- 2. The disinformation campaign organized by Canada about the management of resources in NAFO.
- 3. The commercial interests at stake.

³² International Court of Justice, *Fisheries Jurisdiction (Spain v. Canada)*, Memorial of the Kingdom of Spain (Jurisdiction), September 1995, para. 15, and *Fisheries Jurisdiction (Spain v. Canada)*, Judgement, ICJ Rep. 1995, p. 432 at 444, para. 20.

³³ Commission Press Release IP95-235, 12 March 2004.

³⁴ Cf. Commission Press Release IP: 95-268, 16 March 1995.

1. THE ILLEGALITY OF CANADA'S ACTIONS

On 3 March, Canada adopted national provisions allowing it to arrest Spanish and Portuguese vessels fishing for Greenland halibut in international waters beyond the 200-mile limit. At the same time, without consulting the other NAFO partners, and without any relevant technical or scientific basis in terms of conservation, Canada unilaterally decided to introduce a 60-day moratorium from 6 March on halibut fishing within the NAFO.

The Union issued a "Note verbale" on 6 March, urging Canada not to apply this law, which violates:

- (i) the rules of the United Nations Convention on the Law of the Sea;
- (ii) the rules and procedures agreed in the framework of the NAFO regional convention, to which both Canada and the European Community are party.

The Union also rejected a moratorium on principle, arguing that the opening of objection proceedings, notified to the NAFO on 3 March, meant that Union fishing vessels might legally continue their fishing activities.

Meanwhile, Canada stubbornly persisted in its attitude; despite promises not to seize any vessels, three 50mm cannon shots were fired at a Community vessel, the Estai, which was arrested and escorted by five Canadian vessels to the port of St John's.

The Union reacted promptly and firmly with another "Note verbale":

- -- requesting the release of the vessel as a sine qua non for resuming normal relations between the Union and Canada;
- -- suspending current discussions on various issues and forthcoming meetings involving Canada.

On 12 March, i.e. last Sunday, the Estai was moored in the harbour at St John's, and left exposed to the "tender marcies" of Canadian fishermen; legal proceedings were opened. I can confirm that the judge who will be summoning the captain of the Estai within the next few hours is certain to ask for bail of Can\$ 5 million.

Consequently, because Canada did not agree to act reasonably before it was too late, I take the view that the Canadian authorities must now suspend the application of the Act passed on 3 March 1995, which flouts international law. It seems to me that this is the only means by which the Estai, her captain, crew and cargo can be released, thus enabling normal relations between the Union and Canada to be resumed.

At all events, I am prepared to open negotiations tomorrow morning at 9 o'clock, as soon as the vessel, crew and cargo have been released. The most serious aspect of this matter is that it is a reflection of Canada's intention to extend its jurisdiction over the high seas. This organized violation of rules and principles of law is not an isolated incident; it is the result of a long-standing and pernicious strategy pursued by Canada against the law of the sea. Canada has arrogated to itself rights over a free international area, the high seas. No Government can stand by while one of its fishing vessels, which is not breaking any rules, is forcibly arrested in international waters.

For that matter, it would be interesting to know why Canada unilaterally withdrew, a few months ago, from the International Court of Justice for fisheries matters.

The message on this point must be quite clear: what Canada has now done is not just to seize a Union vessel to satisfy domestic needs and conceal inefficient fisheries management; Canada is holding the international community to ransom by presenting it with a fait accompli.

To complete the picture and return to the present situation, I should also mention that the Canadian authorities are imposing a reign of terror throughout the NAFO area, by means of a campaign of harassment by both radio and aircraft.

2. MISLEADING INFORMATION ON THE FISHERY RESOURCES CONSERVATION POLICY

The Canadian argument is designed to imply that this measure will help to improve the conservation of fisheries resources; I would like to make a number of points in reply. First, the resource conservation argument is meaningless, since the European Union has always stated that it would under no circumstances allow the NAFO catch limits for 1995 to be exceeded, i.e. 27 000 tonnes of Greenland halibut, a figure unanimously agreed in NAFO. Canada is trying to conceal the real subject of the quarrel, which is not how much we can fish; the Union, like all NAFO contracting parties, agrees on that one; the

real point at issue is who can fish!

The second point, and here again the Canadian authorities have given misleading information, is that the share-out of the 27 000 tonne TAC, as decided on 1 February by NAFO, is no longer valid, by reason of the objection presented by the European Community on 3 March, in accordance with NAFO rules and procedures.

Indeed, Canada's fishing claims, involving a considerable increase in catch possibilities in relation to recent years (from 12% to 60%, i.e. a 500% increase!), hardly reflect genuine ecological concern on the Canadian side. The approach rather seems to imply the existence of very powerful economic interests.

The latest example of misleading information from Canada is Mr Tobin's[35] statement yesterday evening to the effect that 79% of the cargo on board the Estai consisted of juveniles. What Mr Tobin carefully did not say was that there is no minimum halibut size imposed by NAFO rules; it would also be interesting to know the composition of catches by other vessels, in particular Canadian vessels. Let us not forget that Canada is laying a claim to 60% of the TAC of 27 000 tonnes. By the way, for biological reasons, only juveniles can be trawled; and as the Canadians also engage in trawling, they must also be catching juveniles.

3. THE INTERESTS AT STAKE

I will not dwell on this point, for the facts speak for themselves. I would just like you to know that in the fisheries sector, the balance of economic interest between the Union and Canada is in Canada's favour. The Union's exports to Canada represent ECU 20 million, compared with ECU 300 million in imports from Canada, including ECU 50 million for lobster alone. It is easy to understand that if any retaliation measures were needed, they could not be confined to trade in fisheries products.

CONCLUSION

Much as I welcome the Council's recent decisions against Canada, in particular those cancelling a series of meetings and measures involving Canada, or postponing them until this matter has been settled, showing that the Member States and the Commission can count on the solidarity required to denounce this act of piracy, I am still convinced that a significant initiative is needed on Canada's part before things can get back to normal; this can only mean restoring the situation as it was prior to 3 March.'³⁶

The *Estai* was released on 15 March 1995 upon the payment of a bond of Can\$500,000, and on 23 March the ship, crew and master returned to Spain.³⁷ On 26 March 1995, the Commission issued a statement on the inspection of the Estai on its return to Spain according to which the vessel complied with NAFO rules and that no irregularities were found.³⁸

Negotiations between Canadian and EU officials began on 16 March 1995 after the release

³⁵ Mr. Brian Tobin, the Canadian Fisheries Minister.

³⁶MEMO 95-44, 14 March 1995. See also the Answers of the President in Office of the Council to EP Question No. 13 (H-0129/95) to the Council on the EC-Canada Agreement on fisheries relations (*Debates of the European Parliament* No. 460, pp. 52-53 (14.3.1995) and EP Question No. 7 (H-0232/95) to the Council on Canadian claims to control international waters (*ibid.* No. 461, p. 59-6- (23.3.1995).

³⁷ The owner and master of the *Estai* have brought proceedings in the Canadian courts claiming damages for trespass, assault, malicious prosecution and negligent navigation, including special damages, general damages, punitive and exemplary damages, see *Jose Pereira E Hijos, S.A. v. Canada (Attorney General)*, [1997] 2 F.C. 84 (13 Dec. 1996); 2001 FCT 1434 (24 Dec. 2001); 2002 FCA 167 (1 May 2002); 2002 FCA 470 (25 Nov. 2002).

³⁸ Commission Press Release IP: 95-295, 26 March 1995. See also the Answer of 13 October 1995 to Written question 1480/95 to the Council of 22 May 1995 on the Seizure of the Spanish fishing vessel *Estai* in international waters: OJ 1995 C 300, 13.11.1995, p. 10: '1. The Council was informed by the Commission that the fishing vessel "Estai" was fishing absolutely legally. 2. The European Community and its Member States condemned the illegal actions of the Canadian authorities in a Note Verbale of 10 March 1995.'

of the Spanish vessel³⁹ but 10 days later hit rough waters, when a Canadian fisheries patrol vessel cut the nets of the *Pescamar Uno*, one of the Spanish vessels that had resumed fishing in the Regulatory Area, when it refused to allow Canadian officials to board.

At the 58th meeting of the Straddling Fish Stocks and Highly Migratory Fish Stocks Conference in New York on 27 March 1995, Fisheries Commissioner Emma Bonino restated the EU's firm commitment to ensuring sound and effective conservation of straddling and highly migratory fish stocks and their responsible and sustainable utilization in full consistency with UNCLOS. She said the priority of scientific aspects in the building up of conservation measures had to be acknowledged. Effective conservation could only be achieved by ensuring compatibility between measures taken on the high seas and in Exclusive Economic Zones. She said straddling and highly migratory fish stocks involved the rights of more than one State and sound and effective conservation could only be obtained through cooperation among all States concerned. Referring to the arrest of the Spanish fishing vessel *Estai*, she said that only the Canadian authorities had seen the fishing net in question. The vessel had been inspected on 17 January 1995 and nothing unusual had been found. She refuted Canadian statements that there had been abnormal use of the vessel's fishing gear and that catches had been falsely recorded.

On 28 March 1995, Spain instituted proceedings against Canada before the International Court of Justice. ⁴¹ As it were in support of the Spanish case, the European Union in a lengthy press release on 29 March 1995, inter alia, asked the question 'Where does Canada stand visavis international law?':

'On the basis of the Coastal Fisheries Protection Act, amended on May 12th 1994, and the subsequent implementing Regulations of March 3rd 1995, Canada arrested the "ESTAI" in international waters on March 9th.

This amounts to a claim to extend unilaterally coastal State jurisdiction to a part of the sea outside its exclusive economic zone and to which, in accordance with Article 86 of the UN Convention on the Law of the Sea of 1982 (UNCLOS)⁴², the provisions concerning the high seas apply.

The 200 mile limit constitutes the outer limit of sea areas that are recognized to fall under national jurisdiction of the coastal State (Article 57 of UNCLOS).

The arrest itself and legislation behind it therefore violate applicable international law in many respects:

- By imposing a fishing ban on foreign vessels outside the coastal State's 200 mile zone, they violate Article 87 and Article 116 of UNCLOS which approve the traditional freedom of the high seas and grant all States equal rights of access to the fisheries resources of the high seas.

³⁹ The release of the vessels was a precondition for negotiations on part of the European Union, see Commission Press Release IP: 95-268, 16 March 1995.

⁴⁰ Earth Negotiations Bulletin, Vol. 7, No. 41 (3 April 1995), p. 3, available at http://www.iisd.ca/download/pdf/enb0741e.pdf.

⁴¹ In response, on 21 April 1995, Canada, in a letter to the International Court of Justice, objected to the Court assuming jurisdiction, see International Court of Justice, *Fisheries Jurisdiction Case (Spain v. Canada)*, Counter-Memorial of Canada (Jurisdiction), February 1996, para. In its judgement of 4 December 1998, the Court found by twelve votes to five that it had not jurisdiction, ICJ Rep. 1998, p. 442 at p. 468. On this judgement, see, e.g., Robin R. Churchill, Fisheries Jurisdiction Case (Spain v. Canada), *Leiden Journal of International Law* 12 (1999), 597-611; Louise DeLaFayette, The Fisheries Jurisdiction Case (Spain v. Canada), *International and Comparative Law Quarterly* 48 (1999), 664-672; Barbara Kwiatkowska, Spain v. Canada Fisheries Jurisdiction Judgment of 4 December 1998, *Hague Yearbook of International Law* 12 (1999), 1-16.

 $^{^{42}}$ Fn. 1 in the original document said: 'Most of the UNCLOS fisheries provisions are now considered as reflecting customary international law.'

- By applying municipal law to foreign vessels in areas of the high seas and thus asserting national jurisdiction to prescribe conservation measures in those sea areas and to enforce such measures against foreign vessels and their crews, they violate Article 89 of UNCLOS which states that no State may validly purport to subject any part of the high seas to its sovereignty.
- -By claiming authority to take, and eventually by taking, enforcement action against foreign vessels on the high seas, they violate the exclusive right of the flag State to exercise legislative and enforcement jurisdiction over its vessels on the high seas. That prerogative of the flag State derives from a standing principle of customary international law which is reflected in both Article 6 (1) of the Geneva High Seas Convention of 1958 and in Article 92 (1) of UNCLOS.
- States other than the flag State may interfere with this prerogative only in very restricted cases such as piracy, slave trade, drug trafficking or unauthorized broadcasting and in all other cases only with the consent of the flag State to be given expressly by treaty (Article 110 of UNCLOS).

Furthermore, Canada has also broken its obligation to cooperate pursuant to Article 63 (2) of UNCLOS with regard to straddling stocks. That provision grants the coastal State a right to be involved in the corresponding cooperation but it does not grant any right of self-redress pending or failing agreement on necessary conservation measures.

The arrest of the "ESTAI" involved the use of force. Such action against a vessel which was neither bearing Canadian nationality nor operating in waters under Canadian sovereignty or jurisdiction constitutes also a violation of the prohibition to use force in international relations as contained in Article 2 (4) of the Charter of the United Nations.

Canada's action makes it liable for damages. Every subject of international law affected will be entitled to damages, i.e. Spain as the flag State concerned in the first place but the Union too whose rights enjoyed under international law have also been adversely affected.

In any case, claims to extended coastal State jurisdiction over areas of the high seas were definitively settled through the emergence of the concept of the exclusive economic zone. This has acquired value of customary international law and which has been approved by UNCLOS. Any revival of such claims bears the risk of impeding progress at the ongoing UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, whose mandate states clearly that the proceedings and results of the Conference have to be fully consistent with UNCLOS.'43

On 5 April 1995, Canadian patrol boats made a dangerous approach to the Spanish fishing boats *Ana Maria* and *José Antonio Nores* and damaged parts of their fishing gear. Responding to this further harassment of European fishing boats by Canada, the European Commission on 6 April 1995 issued the following statement:

'The European Commission considers it deeply regrettable that Canada has committed a further flagrant violation of international law on the high seas, especially as we have come so close to an agreement.

The President of the Commission, Jacques Santer, is writing to the Canadian Prime Minister, Jean Chretien, in order to express his deep concern and urging Canada to show the restraint required if a settlement is to be reached.

The Commission has also summoned the Canadian Ambassador to the EU immediately in order to protest vigorously at this hostile, illegal and dangerous act.

Canada's behaviour makes an already delicate negotiation even more difficult at a very crucial stage in the talks. The Commission nonetheless believes that we must push ahead with the talks, for it is only through negotiation, not confrontation, that this dispute can be solved. If Canada is really serious about these negotiations, it must show the necessary restraint in order for an agreement to be achieved.'44

⁴³ IP 95-313, 29 March 1995.

⁴⁴ Commission Press Release IP: 95-366, 6 April 1995.

Similarly, during the 1842nd meeting of the Fisheries Council in Luxembourg on 6 April 1995 the Presidency noted that 'a very large majority of delegations' subscribed to the following statement:

'(THE COUNCIL),

Having taken note of the latest developments in fishery relations between the Union and Canada in the NAFO area:

- condemns the latest unilateral action taken against vessels flying the flag of a Member State in violation of the rules and customs of international law and the provisions of the NAFO Convention;
- particularly deplores the fact that a serious incident should have occurred as a result of this action while discussions to find a negotiated settlement to the dispute were under way;
- reaffirms its position on the Canadian initiatives, as expressed in particular by the General Affairs Council on 6 March last, which is based on respect for the rules and principles of the Law of the Sea, non-discrimination and NAFO multilateral procedures;
- confirms the importance it attaches to responsible, sustainable and non-discriminatory exploitation of fishery resources in the area concerned;
- stresses the need for the Canadian legislation on the control of fishing activities by non- Canadian vessels outside the 200-mile limit to be withdrawn and for Community vessels to be granted fishing possibilities based on historical patterns in the area concerned;
- requests the Commission to continue discussions with Canada in order to reach an agreement in keeping with those principles. '45

The fact that the statement was not adopted as a formal Council conclusion shows a certain split between the EU Member States. At the same meeting, the Council adopted by a qualified majority, with the United Kingdom delegation voting against, Regulation (EC) No 850/95 amending Regulation No 3366/94. The Regulation established an autonomous Community quota limiting Community catches of Greenland halibut in NAFO sub-areas 2 and 3 for 1995 to 18 630 tonnes. This was the amount the EU had proposed unsuccessfully as its share at the NAFO meeting of 30 January to 1 February 1995. The autonomous quota was 15 230 tonnes more than the quota allocated by NAFO. The regulation made it clear that this autonomous quota should respect the conservation measure established for this resource, namely, the TAC of 27 000 tonnes and that it was necessary to provide for the possibility of stopping the fishery once the TAC had been reached, even before the autonomous quota was exhausted. Through the adoption of this regulation, which was seen as a precautionary measure intended to provide a legal guarantee for the Community fleet fishing in the areas in question, the Council increased the EU quota for Greenland halibut from 12,59% to 69% of the agreed TAC.

Negotiations between the European Union and Canada came to a successful conclusion, with the initialling on 16 April 1995 and the signature on 20 April 1995 of the 'Agreement constituted in the form of an Agreed Minute, an Exchange of Letters, an Exchange of Notes and the Annexes thereto between the European Community and Canada on fisheries in the Context of the NAFO Convention'. The agreement reached provided that the European fishermen were allowed to

⁴⁵ 1842nd Council meeting - Fisheries - Luxembourg, 6 April 1995: PRES 95-110, 26 March 1995.

⁴⁶ Council Regulation (EC) No 850/95 of 6 April 1995 amending Regulation (EC) No 3366/94 laying down for 1995 certain conservation and management measures for fishery resources in the Regulatory Area as defined in the Convention on Future Multilateral Cooperation in the North West Atlantic Fisheries: OJ 1995 L 86, p. 1. See also the Answer of 13 June 1995 to Written question E-325/95 to the Council (16 February 1995): OJ 1995 C 196, 31.07.1995, p. 26.

⁴⁷ By Council Decision 95/546/EC of 17 April 1995 on the signature and provisional application of the Agreement between the European Community and Canada on fisheries in the context of the NAFO Convention (OJ

catch 10 542 tonnes for the whole of 1995, a quantity half-way between the two positions, i.e. 3 400 and 18 630 tonnes. It also included enhanced control and enforcement measures such as setting limits on the size of fish allowed to be caught, 100% observer coverage and satellite tracking devices on board fishing vessels operating in the area as well as stepped up inspections of high seas vessels from the EU and Canada. The parties agreed to propose jointly to NAFO that these measures be adopted by all NAFO members for 1995 and beyond. In addition, the parties agreed to implement immediately, on a provisional basis, the various control and enforcement measures. With respect to the dispute about Canada's extension of its fisheries jurisdiction to areas of the high seas the Agreement provided:

'D. GENERAL PROVISIONS

1. The European Community and Canada maintain their respective positions on the conformity of the amendment of 25 May 1994 to Canada's Coastal Fisheries Protection Act, and subsequent regulations, with customary international law and the NAFO Convention. Nothing in this agreed minute shall prejudice any multilateral convention to which the European Community and Canada, or any Member State of the European Community and Canada, are parties, or their ability to preserve and defend their rights in conformity with international law, and the views of either Party with respect to any question relating to the Law of the Sea.'49

This passage seems to have been included in the Agreement in order to safeguard the legal position of Spain in its proceedings against Canada before the International Court of Justice.⁵⁰

On the occasion of the initialling of the Agreement Fisheries Commissioner Bonino made the following statement:

'I am delighted to announce that, following the respective internal consultations, the European Commission and the Canadian negotiators have initialled an agreement to solve the longstanding Greenland halibut dispute. After a lengthy and difficult negotiation process, we have agreed on a text

¹⁹⁹⁵ L 308, 21.12.1995, p. 79), the Council had authorised the Commission to sign that agreement and stated that the latter was to be applied provisionally upon its signature. The Council approved the Agreement in Council Decision 95/586/EC of 22 December 1995 concerning the conclusion of the Agreement constituted in the form of an agreed minute, an exchange of letters, an exchange of notes and the Annexes thereto between the European Community and Canada on fisheries in the context of the NAFO Convention (OJ 1995 L 327, 31.12.1995, p. 35). The text of the Agreement may also be found in *Law of the Sea Bulletin*, No. 28 (1995), p. 34; *International Legal Materials* 34 (1995), p. 1260. On the applicability of the EC/Canada Agreement, see the Opinion of the Advocate General in Case C-179/97 *Spain v Commission*, [1999] ECR I-1251, paras. 9-15.

⁴⁸ In Communication 95/C 118/06 on fisheries in the NAFO Regulatory Area, the Commission on 5 May 1995 informed the member States and captains of European fishing vessels of the provisions of the EU-Canada Agreement concerning fisheries in the NAFO regulatory area and their direct applicability without further Community legislation: OJ 1995 C 118, 13.05.1995, p. 5.

⁴⁹ Agreement constituted in the form of an Agreed Minute, an Exchange of Letters, an Exchange of Notes and the Annexes thereto between the European Community and Canada on fisheries in the context of the NAFO Convention: OJ 1995 L 308, 21.12.1995, p. 80-91.

⁵⁰ Cf. the Answer of 10 June 1996 to Written Question P-1231/96 to the Commission of 15 May 1996: OJ 1996 C 297, 08.10.1996, p. 110: '[...] The fisheries conflict of 1995 was formally resolved by the bilateral agreed minute signed on behalf of the Community and Canada on 20 April 1995. The provisions of the agreed minute were then adopted at the September 1995 meeting of the North atlantic fisheries organisation (NAFO). The final chapter in the dispute was the adoption by the Council of a decision on the conclusion of the agreed minute and of regulations implementing the NAFO agreement in December 1995. The Commission is not involved in the case initiated by Spain before the International court of justice. The agreed minute provided that nothing contained within it would prejudice the ability of Member States to preserve and defend their rights in conformity with international law. [...].'

which includes a number of proposals the European Union and Canada will jointly submit to NAFO, as soon as possible, possibly as early as in May. It has been a painstaking job, for which negotiators deserve congratulations.

Let me briefly resume the main points of the agreement:

Canada has agreed to repeal the provision of the Regulation of 3 March 1995 that subjected vessels from Spain and Portugal to certain provisions of the Coastal Fisheries Protection Act and prohibited these vessels from fishing Greenland halibut in the NAFO Regulatory Area.

The Canadian Attorney General has confirmed in writing the decision, on ground of public interest, to stay the charges against the vessel ESTAI and its masters. Therefore, according to the agreement, the bond, bail and catch or its proceeds will be returned to the master. The EU will sign the agreement after this has happened.

Both sides acknowledge that this agreement is the basis for a submission to be made jointly to the NAFO Fisheries Commission to establish a Protocol to strengthen the NAFO Conservation and Enforcement Measures.

In order to strengthen Control and Enforcement measures, the European Union and Canada have agreed to implement a Pilot Project for observers on board and satellite tracking. We have decided to propose that each contracting party shall require its vessels operating under NAFO Convention to accept observers. Satellite tracking devices on some 35 per cent of the vessels operating in the area shall also be established as rapidly as realistically possible.

Finally we come to the allocation of the 27 000 ton TAC of Greenland Halibut. Let me recall that we never put this figure into question, as its acceptance was a sign of our commitment to a responsible management of stocks.

For 1995, taking into account the record of catches of Greenland Halibut realised by the EU Fleet, the latter will be entitled to fish 5 013 tons more than 16 April. From 1996 onwards, the share of the Community shall be fixed at least at 55.35 per cent of the TAC in area 3LMNO (the area comprises all the fishing grounds where EU vessels exert their fishing activities.

The European Commission has several reasons for satisfaction at the end of what the Press has throughout called the "Fish War with the Canadians":

The rule of Law has been restored on the High Sea. European fishermen are again rightly and fully entitled to fish in the Grand Banks off Canada's coast, including the Nose, the Tail and the Flemish Cap. The agreement clearly states that European vessels, operating in full respect of International Law and NAFO regulations, may not be prevented from fishing. Reestablishing security and International Law was our primary aim during all these negotiations. We wanted all arrangements to be multilateral. We have all reasons to think that we have accomplished these tasks.

The deal we have agreed is a new and concrete step towards a better joint conservation policy. Canada and the European Union have confirmed their commitment to protect fish stocks. In the multilateral framework of NAFO, we will jointly push for a strengthening of control and inspection rules. This is a sound victory in itself. For fish and for the fishermen.

During the negotiations, the Union has obtained that Canada step down from the position it maintained during and after the last NAFO meeting in February. Then, the EU was allocated 12 per cent of the 27 000 tons TAC decided last autumn. It was an unacceptable decision. Now we have well over the 40 per cent of the quota. It is a major accomplishment.

The last element I would like to draw the attention to is the way we have been conducting negotiations during the past month. We never threatened anybody. We never broke the law. We always acted in the framework of NAFO Regulations and in full respect of International Law. Since we have now come to an agreement, I must confess that I feel proud of the way we behaved.

You see that it could be easy to claim victory. But, believe me, this is not what we want. The winners are International Law and Conservation. We have just given them a hand. [...]. *51

⁵¹ IP/95/390, 16 April 1995.

In parallel with the signing of the agreement, on 18 April 1995, the proceedings in Canada against the *Estai* and its master were discontinued; on 19 April 1995, the bond was discharged and the bail repaid with interest; subsequently the confiscated portion of the catch was returned at the expense of the Canadian Government;⁵² and, on 1 May 1995, the *Coastal Fisheries Protection Regulations* were amended to remove Spain and Portugal from the list of States whose vessels could be subject to the provisions of the *Coastal Fisheries Protection Act* and *Regulations*.⁵³ The proposals for improving fisheries control and enforcement contained in the Agreement of 20 April 1995 were adopted by the NAFO Fisheries Commission in the form of amendments to the NAFO Conservation and Enforcement Measures at its annual meeting held in September 1995 and became measures binding all Contracting Parties with effect from 29 November 1995.⁵⁴ On 30 October 1995, Commissioner Bonino could report in reply to a parliamentary question that:

'[...] Decisions within the Northwest Atlantic Fisheries Organization (NAFO) are taken at the annual meeting which is usually held in September each year. At this year's 17th annual meeting held 11-15 September 1995 NAFO was able to take decisions which effectively multilateralize provisions of the fisheries agreement between the Community and Canada of 16 April 1995 pertaining to strengthened enforcement and control measures and to the allocation of Greenland halibut in 1996. [...].'55

The 'multilateralization' of the control and enforcement measures could, however, affect only the 15 NAFO parties. In reply to a parliamentary question, whether the current overall monitoring programme should be developed and extended so as to supervise the catches of fishing vessels and, in particular, of those which are flying flags of convenience or flags of countries which are not Contracting Parties, Commissioner Bonino stated:

'[...] There is no provision at present in the NAFO convention or in international law obliging vessels flying the flag of a non-Contracting Party and fishing in the convention area to abide by NAFO rules. Thus, it is not legally possible to place observers on board the vessels concerned.

On the other hand, the United Nations (UN) Convention on the law of the sea contains an obligation for States to cooperate in view of the measures which are necessary for the conservation of the stocks. The flag State's responsibility has also been underlined in the Food and Agriculture Organization agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas. The UN conference on straddling stocks and highly migratory species aims to find means to reinforce international cooperation for these problems.

The Community, like all NAFO Contracting Parties, is however, undertaking numerous initiatives at diplomatic and political level in order to persuade the respective flag States to take steps to prevent

⁵² The Canadian Government paid Can\$41.000 to return the fish to its Spanish owners. See the Answer of 16 June 1995 to Written question E-945/95 to the Commission of 31 March 1995 (OJ 1995 C 230, 04.09.1995, p. 18) and the Answer of 31 July 1995 to Written question 1720/95 to the Commission of 21 June 1995 (OJ 1995 C 273, 18.10.1995, p. 35).

⁵³ Coastal Fisheries Protection Regulation, Amendment, SOR/95-222, 1 May 1995: Canada Gazette Part II, Vol. 129, No. 10, of 17 May 1995, p. 1445.

⁵⁴ See also Council Regulation (EC) No 3067/95 of 21 December 1995 amending Regulation (EEC) No 1956/88 adopting provisions for the application of the Scheme of Joint International Inspection adopted by the Northwest Atlantic Fisheries Organization: OJ 1995 L 329, 30.12.1995, p. 1.

⁵⁵ Answer of 30 October 1995 to Written question E-2315/95 to the Commission on the Fisheries agreement between the EU and Canada (1 September 1995): OJ 1995 C 51, 21.02.1996, p. 10.

these vessels from fishing in the NAFO regulatory area.'56

In accordance with the agreement, the Council on 29 June 1995 adopted Regulation (EC) No 1761/95, which, taking into account the catches made by Community fishermen between 1 January und 16 April 1995, established for 1995 with effect from 16 April 1995, a Community quota of 5 013 tonnes for catches of Greenland halibut in NAFO sub-areas 2 and 3.⁵⁷ By Regulation (EC) No 2565/95 of 30 October 1995,⁵⁸ the Commission recorded that the Community quota for 1995 established by Regulation No 1761/95 was exhausted and therefore, declared a halt to fishing for Greenland halibut in NAFO sub-areas 2 and 3.

Spanish fishermen were not satisfied with the resolution of the fisheries dispute and on 16 October 1995 brought an action before the Court of First Instance of the European Communities for annulment of Regulation No 1761/95, in which they pleaded that the fisheries agreement with Canada was unlawful, and on 26 January 1996 they brought an action for annulment of Regulation No 2565/95 concerning the stopping of fishing for Greenland halibut by vessels flying the flag of a Member State. The actions were dismissed as inadmissible. On 2 September 1999, the Spanish fishermen brought another -- unsuccessful -- action before the Court of First Instance claiming compensation for the loss suffered by them on account of the Commission's attitude during the negotiations held under the NAFO Convention with a view to establishing a TAC for Greenland halibut for 1995, on account of the Council's failure to challenge the TAC which was established, and on account of the negotiation and approval of the bilateral fisheries agreement and the adoption of Regulation No 1761/95. It is of interest to note in this connection that the Court of First Instance held that the 'conservation of the biological resources of the high seas constitutes on the of the most fundamental principles of international and Community regulation of fishing activities'.

The question of extraterritorial application of Canadian fisheries legislation in the NAFO Regulatory Area resurfaced again when Canada, on 3 August 1999, ratified the Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (Straddling Stocks Agreement).⁶² In reply to a written question on the 'Situation of the fishing fleet in the NAFO area in the context of bilateral relations between the European Union and

⁵⁶ Answer given by Mrs Bonino on behalf of the Commission (14 July 1995) to Written Question E-1646/95 of 15 June 1995: OJ 1995 C 277, 23.10.1995, p. 16.

⁵⁷ Council Regulation (EC) No 1761/95 of 29 June 1995 amending, for the second time, Regulation (EC) No 3366/94 laying down for 1995 certain conservation and management measures for fishery resources in the Regulatory Area as defined in the Convention on Future Multilateral Cooperation in the North-west Atlantic Fisheries: OJ 1995 L 171, 21.07.1995, p. 1.

 $^{^{58}}$ Commission Regulation (EC) No 2565/95 of 30 October 1995 concerning the stopping of fishing for Greenland halibut by vessels flying the flag of a Member State: OJ 1995 L 262, 01.11.1995, p. 27.

⁵⁹ Case T-194/95 Area Cova and Others v Commission and Council [1999] ECR II-2271; Case T-12/96 Area Cova and Others v Commission and Council [1999] ECR II-2301; appeals dismissed by the ECJ (Fourth Chamber), Cases C-300/99P and C-388/99P Area Cova and Others v Commission and Council [2001] ECR I-983 and Case C-301/99P Area Cova and Others v Commission and Council [2001] ECR I-1005.

⁶⁰ Case T-196/99 Area Cova and Others v Commission and Council [2001] ECR II-3597.

⁶¹ Case T-196/99 Area Cova and Others v Commission and Council [2001] ECR II-3597, para. 132.

⁶² 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, done at New York, 4 August 1995: UN Doc. A/CONF.164/37; *International Legal Materials* 34 (1995), p. 1542; *Law of the Sea Bulletin* No. 29 (1995), p. 25. The Agreement entered into force on 11 December 2001.

Canada' Franz Fischler, the member of the European Commission responsible for Agriculture, Rural Development and Fisheries, stated on 25 October 1999:

'[...] It should also be noted that, in recent dealings about the new legislation enabling Canada to implement the 1995 United Nations (UN) Agreement on straddling fish stocks and highly migratory fish stocks (so-called Bill C-27), Canada restated in writing that 'further to the 1995 Canada/EU Agreed Minute, Canada took Spain and Portugal off the list of States against which the provisions of Bill C-29 could be applied; those two countries are still off that list and the adoption of Bill C-27 does not change anything in that respect'.

The Commission believes that firmness on principles offers the best prospects for the avoidance of a repetition of the events of 1995. In line with this, the Commission has consistently taken exception to extra-territorial aspects of Canadian fisheries legislation. Furthermore, it has emphasised and continues to emphasise the importance of the rule of law in international fisheries relations, the priority of international law (i.e. the NAFO Convention and customary international law in the present instance) over pieces of domestic legislation and the need for appropriate procedures for the peaceful settlement of international disputes. In the latter context, the Commission has insisted on a continuation and acceleration of work on a specific dispute settlement mechanism in the framework of NAFO. At this year's annual meeting of NAFO, which was held from 13 to 17 September 1999, and against initial resistance from Canada, this motion remained successful.'

Under the Straddling Stocks Agreement Canada may now lawfully board and inspect fishing vessels flying the flag of a EU Member State in the NAFO Regulatory Area.⁶⁴ On the other hand, the Agreement provides for the compulsory settlement of disputes such as the *Estai* dispute between the EU and Canada.⁶⁵

⁶³ Answer of 25 October 1999 to Written Question E-1505/99 to the Commission of 1 September 1999: OJ 2000 C 170, 20.06.2000, pp. 25-26.

⁶⁴ Cf. Art. 21, 22 of the Straddling Stocks Agreement. The EU ratified the Agreement on 19 December 2003. On the EU and the Straddling Stocks Agreement, see below?

⁶⁵ Cf. Art. 30 of the Straddling Stocks Agreement.