Canada Asserts Jurisdiction over High Seas Fisheries

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Canada has enacted legislation that will allow it to search and seize foreign fishing vessels on the high seas. It is aimed at preventing the over-exploitation of the living marine resources, particularly cod and flounder, of the Grand Banks of Newfoundland, in the Northwest Atlantic Ocean, by allowing the government to enforce conservation and management measures adopted by the Northwest Atlantic Fisheries Organisation (NAFO), which regulates fishing in the region. The bill was introduced in the House of Commons on 10 May 1994 and received its second and third readings the next day. On 12 May it was approved by the Senate and received the Royal Assent. Diplomatic protests, describing the new legislation as contrary to international law, have been lodged.

Introduction

The regulations promulgated under the legislation identify specified straddling stocks[1] and provide that the law and regulations may be enforced against stateless vessels and those of specified flag-of-convenience (FOC) states (Canada, 1994a). The government has informally defined FOC states as those that *"exercise no controls over the fishing activities of these vessels"*[2] and has identified the flags of Panama, Honduras, and Belize as being the most prominent flags of convenience in the Northwest Atlantic (Canada, 1994c). The stateless vessels at which the legislation is targeted appear to be vessels that set to sea while on the registry of a flag-of-convenience state but whose registration was cancelled by that state at the request of the Canadian government (Canada, 1994c), thus rendering the vessel stateless and removing much of the protection it may have had under the International Law of the Sea (LOSC, 1982: Article 110; Churchill and Lowe, 1988: 172).

The fish stocks that the new legislation is immediately designed to protect are in the Grand Banks of Newfoundland, once a particularly productive area of the north-west Atlantic Ocean on the continental shelf of the Canadian province of Newfoundland. In the mid-1960s, stocks of cod, tuna, and other species declined sharply as a result of over-exploitation by Canadian and foreign fishing vessels. After establishing a 200-mile exclusive fishery zone (EFZ) in 1977 (Fishery Zones Act, 1976), Canada imposed strict regulations on fishing in the zone; the decline in fish stocks is perceived as so severe that today Canadian fishermen may not catch cod even for their own personal use.

It is generally believed that if the moratoriums and other restrictions are maintained and followed, the fish stocks will eventually return to a level where they can be harvested on a sustainable basis. The problem arises because two corners of the Grand Banks, comprising about 10% of the total area, fall outside the Canadian 200-mile limit. The two areas, known as the nose and the tail of the Grand Banks (see map), have been persistently overfished by foreign vessels beyond Canada's jurisdiction, and the fish stocks, which straddle the boundary between the Canadian EFZ and the high seas, are consequently still endangered.

In 1979, the Northwest Atlantic Fisheries Organisation took responsibility for conserving fish stocks beyond the 200-mile limit, and vessels of its 15 members[3] have, by and large, conformed to NAFO regulations[4]. Vessels of non-member states, however, have continued to fish in the area despite a moratorium imposed in February 1994. On 2 May 1994, 11 trawlers, either stateless or flying flags of convenience, were in the area, according to a Canadian government statement (Canada, 1994c).

The New Legislation

Canada's Coastal Fisheries Protection Act already prohibited foreign fishing vessels from operating without permission in Canadian waters (Act: section 3), and authorised the government to board, inspect, arrest, and seize any fishing vessel found in Canadian fisheries waters (Act: sections 7-10). The catch may be sold and the funds retained by the Receiver General (Act: section 11). Upon conviction and imposition of a fine, the vessel may be sold and the proceeds, along with those from the sale of the catch, may be retained by the government and applied towards satisfaction of the fine (Act: sections 12-16).

Generally speaking, the 1994 amendments apply the existing provisions of the Act to foreign vessels

fishing in the nose and tail of the Grand Banks for stocks that straddle the boundary between Canadian waters and the high seas. Specifically, the new amendments establish a general prohibition against fishing, or preparing to fish, for straddling stock in the NAFO Regulatory Area, in contravention of prescribed conservation and management measures, while aboard certain foreign vessels[5] (Amendment: sec. 2; Act: sec. 5.2), and make violation of the prohibition an offence (Amendment: sec. 6; Act: sec. 18(1)). The legislation authorises a maximum fine of $750,000 (Act: sec. 18(1)).

Under the amendments, Canadian fisheries protection officers may board and inspect any fishing vessel found within Canadian fisheries waters[6] or the NAFO Regulatory Area[7](Amendment: sec. 5; Act: sec. 7(a)) and, with a warrant issued by a justice of the peace, to search any fishing vessel found there (Amendment: sec. 4; Act: sec. 7(b)). If conditions for obtaining a warrant exist *"but, by reason of exigent circumstances, it would not be practical to obtain a warrant"*, a protection officer may search a vessel without a warrant (Amendment: sec. 4; Act: sec. 7.1(2)). Force may be used to disable a foreign fishing vessel if an officer *"believes on reasonable grounds that the force is necessary for the purpose of arresting the master or other person"* (Amendment: sec. 5; Act: sec. 8.1(b)). Brian Tobin, the minister for fisheries and oceans, has said that in addition to the regular fishery patrols the government will use the Navy, the Coast Guard, and the Royal Canadian Mounted Police to police the area (Cox, 1994a: A2).

The Governor in Council is authorised to make regulations prescribing the species of straddling stock (Amendment: sec. 3; Act: sec. 6(b.1)) and the applicable classes of foreign vessels to which the Act will apply (Amendment: sec. 3; Act: sec. 6(b.2)); the latter include stateless vessels and those of Panama, Honduras, Belize, the Caymen Islands, St Vincent and Sierra Leone (Regulations, 1994: Table 3). The regulations list 29 species of fish, the most important of which are cod, flounder and redfish. (Regulations, 1994: Tables 1 and 2).

Background

Despite efforts by Canada, Argentina, and other coastal states to have the problem of straddling stocks resolved by the Third United Nations Conference on the Law of the Sea (UNCLOS III), the issue was left unresolved by the conference and the convention it produced, the 1982 United Nations Convention on the Law of the Sea (LOSC, 1982).

The developing law of the sea, as reflected in the LOSC, gave coastal states broad jurisdiction over the conservation and management of living marine resources within 200 miles of its coast. The failure of UNCLOS III adequately to address the straddling stocks problem,[8] however, meant that stocks protected within the 200-mile limit could be persistently overfished when they crossed the boundary into the high seas. The LOSC effectively left the problem to be worked out between coastal states and the states whose vessels fish for straddling stocks on the high seas (LOSC, 1982: Article 63(2)). While the LOSC does provide mechanisms for the settlement of disputes (LOSC, 1982: Articles 279-299), it will not come into effect until 16 November 1994; furthermore, Canada is not a party to the convention.

NAFO was established in 1979 by the Convention on Future Multilateral Cooperation in the Northwest Atlantic (NAFO Convention, 1978) to regulate the north-west Atlantic fisheries outside the Canadian 200-mile limit. Its primary function is to set, on the basis of advice from scientists of all member states, total allowable catch (TAC) limits and other conservation measures for the stocks within its remit and to allocate quotas to member states. NAFO inherited from its predecessor organisation, the International Commission for the Northwest Atlantic Fisheries, a strong history of firm and detailed management (Applebaum, 1989: 284).

From 1979 to 1986, two major problems faced the coordinated management of fishing stocks. At first Spain, whose vessels had fished in the area for many years, declined to join NAFO and continued to fish in the NAFO Regulatory Area (NRA) but not subject to the NAFO TAC limits and quotas. It had been hoped that when Spain joined the European Community (EC) on 1 January 1986 it would join the NAFO framework with the rest of the EC. Instead, the EC sought a higher TAC and higher national quotas and, when NAFO rejected the higher limits, effectively dropped out of the NAFO framework. By lodging annual objections to the NAFO management measures, the EC was able, under NAFO rules, to establish its own quota and to continue fishing without regard to NAFO's TAC limit (Kwiatkowska, 1993: 335; Sullivan, 1989: 126-132). This continued to some extent until 1992, when the EC agreed to accept NAFO conservation decisions (Canada, 1994b: 2).

The second problem was the arrival of fishing vessels of states that had not traditionally fished in the area and that remained outside the NAFO framework. For the most part flying flags of

convenience, they continue to fish, unregulated by NAFO and by their own flag states. It is these vessels at which the new Canadian legislation is primarily directed.

In July 1992, Canada imposed a two-year moratorium on northern cod (in the 2J3KL zone) and renewed the moratorium for 1994 when the stock failed to recover. On 20 December 1993, Canada announced its Atlantic Groundfish Management Plan for 1994, closing all the major cod fisheries in Canadian waters and reducing the TAC for other Groundfish species by 75% (Canada, 1994b). At the NAFO annual meeting in September 1993, Canada, the EC, Japan, and Russia agreed to make a high-level joint *démarche* to non-member states whose vessels were fishing in the area. As a result, the Honduras and Panamanian governments agreed to address the problem on a priority basis (Canada, 1994c). Nevertheless, a vessel's registration can be transferred from one FOC state to another with relatively little difficulty, and what little regulation there is can readily be avoided.

In 1993 NAFO imposed a moratorium on three flounder stocks in the tail of the Grand Banks, but rejected a Canadian request for a moratorium on southern (3NO) cod (see map), approving a TAC of 6,000 tonnes for 1994. At a special meeting in February 1994, at Canada's request, NAFO reversed the decision and imposed a moratorium consistent with Canada's moratorium for Canadian fishermen (Canada, 1994b). The decline in fish stocks and the subsequent moratoriums have had a serious impact on the economy of Canada's Atlantic provinces and Quebec, and the Canadian government has committed $1.9 billion over five years for income replacement, retraining fishermen and plant workers, and relieving other social and economic consequences of the moratoriums. As of summer 1994, fishing for southern cod in the 3NO NAFO zone has been halted, with the exception of the stateless and FOC vessels fishing in the tail of the Grand Banks just outside the Canadian EFZ. It is in this context that Canada has asserted enforcement jurisdiction over those vessels on the high seas.

Legal and Political Implications

On its face, the new legislation appears to contravene generally accepted principles of customary and conventional international law that protect vessels on the high seas from interference by states other than their own flag states. The European Union (EU), as the EC is now called, has delivered a *note verbale* informing Canada that the Council regards the legislation as contrary not only to international law, but also:

> *"to the efforts made by the international community, notably in the framework of the FAO and the United Nations Conference on straddling stocks, to improve the management of fisheries resources, particularly on the high seas ..."* (EU Council, 1994).

In a diplomatic note to the Government of Canada, the United States acknowledged the severity of the circumstances leading to the Canadian action, but asserted that:

> *"unilateral steps of this sort by coastal states, contemplated by the legislative and regulatory amendments in question, exceed the fair balance of interests reflected in the relevant provisions of the 1982 United Nations Convention on the Law of the Sea which, in the view of most members of the international community, including Canada and the United States, reflects customary international law. The convention does not provide for coastal states to board, inspect or arrest foreign flag vessels on the high seas, or to prosecute such vessels for fishing operations conducted on the high seas, absent the consent of the flag state. ... The Government of the United States believes that unilateral action in violation of international law of the sort threatened by Canada encourages unilateral action by other states in violation of international law, with attendant damage to the integrity of the law of the sea ...."* (United States, 1994: 2).

In its response to the EU *note verbale*, Canada assured the European commissioners that the regulations were directed only at stateless vessels and those flying flags of convenience: *"No vessels entitled to fly the flags of NAFO member countries are affected"* (Ouellet and Tobin, 1994).

A number of factors demonstrate that Canada is keenly aware of the sensitive nature of the jurisdiction it is asserting over foreign vessels beyond the Canadian EFZ. Most conspicuously, Canada has begun taking action against its own fishing vessels on the high seas. At the end of March, fisheries protection officers seized the *Stephen B.*, one of five Canadian longliners that had been fishing for bluefin tuna beyond the 200-mile limit in disregard of the NAFO regulations and Canadian law. The vessel was seized in the high seas south of Nova Scotia and east of Maryland,

about 100 miles beyond the Canadian EFZ (Tobin, 1994: 4213), and was towed to St. John's, Newfoundland (Canada NewsWire, 1994). The master and the owner have pleaded not guilty to charges of illegal fishing for bluefin tuna without a license (Montreal Gazette, 1994).

On 2 April, the *Kristina Logos*, a Canadian registered vessel, flying the Panamanian flag, owned by a Portuguese native with Canadian citizenship, and carrying a Portuguese crew, was seized 28 miles beyond the 200-mile limit and was towed into port in St. John's (Tobin 1994:4213). It appears that, prior to its registration with Panama, the *Kristina Logos* had been a Canadian flag vessel, and that the Canadian registration had not been cancelled when the vessel took up Panamanian registry. When, at the request of the Canadian government, Panama cancelled the registry of the *Kristina Logos*, its registration reverted to Canada, which then regained, and exercised, enforcement jurisdiction over the vessel on the high seas.

These seizures of Canadian vessels have political, if not legal, significance. They demonstrate that Canada is apparently serious about enforcing the rules universally and not only against foreign vessels. Observing that Canadian vessels had occasionally participated in the overfishing, Mr Tobin told the House of Commons:

> *"Let us have the courage, the integrity and the honesty to admit that and stop the overfishing. We have demonstrated in the last months that where a Canadian vessel breaks the rules Canada shall reach out the long arm of its enforcement power and impose proper conservation measures. ... We are not asking the world to accept a standard that we do not impose on ourselves first"* (Tobin, 1994: 4213).

In a sense, the policy of seizing both Canadian and foreign vessels on the high seas is analogous to the consistency principle that is widely accepted in the NAFO framework and other regulatory regimes for straddling stocks (Kwiatkowska, 1993: 333) and that has been found to be implicit in the LOSC fisheries provisions (Applebaum, 1989: 289, 295). Rather than assuring that the international regulations imposed on the high seas are consistent with the regime imposed on the adjacent exclusive economic zone (EEZ)[9] by the coastal state, this variant assures that the coastal state imposes consistent enforcement measures on its own and foreign vessels on the high seas. This is hardly a justification of Canada's unilateral measures, but it is most surely a minimum condition without which they could never be accepted, if indeed they ever are.

In addition, official statements have stressed Canada's commitment to international law and to international controls over high seas fishing and its intention to use the new powers only where other means to protect threatened straddling stocks have failed (Tobin, 1994: 4214). *"We do not want to confront a single vessel on the high seas"*, Mr Tobin told the House of Commons. *"We do not want to arrest a single vessel on the high seas. We do not want to interfere with a single crew, wherever it comes from, whatever flag of convenience it flies on the high seas. But we will confront and we will arrest and we will seize and we will prosecute each and every one if they do not pull up their nets and leave the zone."* (Tobin, 1994: 4213)

Anticipating a legal challenge if Canada should interfere with a vessel of another state on the high seas, Mr Tobin and Foreign Affairs Minister Andre Ouellet announced on 10 May 1994 that Canada has amended its acceptance of the compulsory jurisdiction of the International Court of Justice to deny the ICJ jurisdiction to hear any cases arising out of Canadian actions under the new legislation. The ministers called the decision *"a temporary step in response to an emergency situation"* and said that it was designed to preclude any challenge which might undermine Canada's ability to protect the stocks (Cox, 1994b).

This legal tactic is reminiscent of Canada's pre-emptive qualification of ICJ jurisdiction 24 years earlier, in the wake of another statute that was thought by many to violate the same principles of international law. The Arctic Waters Pollution Prevention Act (AWPPA, 1970) declared a 100-mile pollution-control zone in Arctic coastal waters and asserted jurisdiction over maritime activities within the zone. While enacting the statute, Canada simultaneously amended its acceptance of ICJ jurisdiction to exclude disputes concerning pollution control in coastal waters (Canadian Declaration, 1970). This was well before the Third United Nations Conference on the Law of the Sea (UNCLOS III) recognised the legitimacy of the 200-mile exclusive economic zone (LOSC, 1982: Part 5) and of special environmental jurisdiction in ice-covered areas of the EEZ (LOSC, 1982: Article 234). The 1970 Act was widely criticised as a violation of international law to the extent that Canada was claiming jurisdiction to control shipping beyond the 12-mile territorial sea (e.g., Department of State, 1970). Nevertheless, the answer to Louis Henkin's question in his aptly entitled article - "Does

Canada break, or make, international law?" (Henkin, 1971) - turned out to be that Canada was making it.

Is it likely that Canada will again find itself in the position of international trendsetter, on the cutting edge of the law, rather than branded an international lawbreaker? Newfoundland Premier Clyde Wells's observation, *"This is an act of international leadership on the part of Canada"* (Cox, 1994a: A1), should probably be regarded more as political opinion than legal analysis. A respected legal analyst, Professor David VanderZwaag of Dalhousie University in Halifax, called the legislation a *"creative approach"* and said that it may be on *"the edge of international law"*. He went on to observe that the states that would be able to challenge any seizures on the high seas - the flag states of the vessels seized - would be unlikely to do so, as they would be subject to charges of not having met their own obligations under the Law of the Sea to regulate the fishing activities of vessels flying their flag (Cox, 1994b).

Perhaps one of the keys to the international acceptance of the 1970 Arctic Waters Act was the fact that Canada never enforced it on the high seas. There is no reason to believe that Mr Tobin was not serious when he said that, although Canada was prepared to arrest foreign vessels on the high seas, it did not want to do so. Indeed, the government appears to be trying hard to avoid any such confrontation by frightening foreign fishermen from the Grand Banks. That is one obvious effect of seizing two vessels, one flying a Panamanian flag, on the high seas two weeks before the legislation was enacted. If the reported details about the *Kristina Logos* registration are accurate, the seizures simultaneously demonstrated Canada's resolve to rid the Grand Banks of unregulated fishing and Panama's lack of interest in protecting vessels that engage in it. Even if Canada is violating international law, how many fishermen are likely to wager half a million dollars that their flag-of-convenience state will go to court for them?

Notes

1 The Act defines straddling stock as *"any stock of fish that occurs both within Canadian fisheries waters and in an area beyond and adjacent to Canadian fisheries waters"* (Act: Section 6(b.1); Amendment: Section 3). This is in accordance with Article 63(2) of the LOSC, which, without using the term *"straddling stock"*, applies *"[w]here the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone"*.
Fish stocks that occur in two or more EEZs are the subject of a separate provision (LOSC, 1982: Article 63(1)) and are usually referred to as *"transboundary stocks"* (Hayashi, 1993: 245).

2 In other contexts, the terms *"flag of convenience"* or *"open registry"* are *"generally taken to refer to States that permit foreign shipowners having no real connection with these States ... to register their ships under the flags of these States"* (Churchill and Lowe, 1988: 206-208).

3 Bulgaria, Canada, Cuba, Denmark (for the Faröe Islands and Greenland), Estonia, the EU, Iceland, Japan, Korea, Latvia, Lithuania, Norway, Poland, Romania, and Russia.

4 Until 1992, the EC regularly opted out of NAFO TAC limits and national quotas. See section III, below.

5 *"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"* (Amendment: sec. 2; Act: sec. 5.2).

6 *"Canadian fisheries waters"* means all waters in the Canadian fishing zones and territorial sea and all internal waters (Act: sec. 2).

7 The NAFO Regulatory Area, for purposes of this Act, refers to the high seas portion of the area of the Northwest Atlantic that within the NAFO convention area: *"(a) the waters of the Northwest Atlantic Ocean north of 35°00' north latitude and west of a line extending due north from 35°00'north latitude and 42°00' west longitude to 59°00' north latitude, thence due west to 44°00' west longitude, and thence due north to the coast of Greenland, and (b) the waters of the Gulf of St. Lawrence, Davis Strait and Baffin Bay south of 78°10' north latitude."*

8 LOSC Article 63(2) does place an obligation on coastal and fishing states to *"seek ... to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks ...."* This is generally regarded not as an obligation to conclude an agreement but as an obligation to enter into negotiations in good faith. See Hayashi, 1993: 249. For a contrary argument, see Hey, 1989: 53-56.

9 EEZ is used generically to indicate any maritime zone established in accordance with the provisions of Part 5 of the LOSC, whether it is designated *"exclusive fishery zone",* as in the case of Canada, or the more common *"exclusive economic zone"* as in the LOSC.

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