

The turbot war

The fish need peace

Freedom to fish must now be circumscribed by international provisions to come up under the aegis of the UN

Apart from a handful of experts and the representatives of the governments directly involved, the world had barely taken note of the proceedings of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. The Law of the Sea Convention, negotiated between 1973 and 1982, had finally come into force in the fall of 1994 and surely whatever had been left out was not worth worrying about.

And then, suddenly, just before the UN Conference could start its fifth session in March of this year, news agencies around the world reported that Canada's Mounties (Federal police) had boarded the Spanish fishing vessel, the *Estai*, on the high seas, arrested it and taken it to the port of St. John's, Newfoundland, where charges were laid against the vessel and its captain.

What could have prompted peace-loving, peace-keeping Canada to apparently violate the sacrosanct freedom of fishing on the high seas against its long-standing friend and NAFO ally, Spain?

It had long been known that the UN Convention on the Law of the Sea (UNCLOS), even at its early stages of development, had ignored calls by countries such as Canada for a fisheries legal regime which would have granted coastal states exclusive rights to their offshore stocks throughout their range.

Instead, UNCLOS preferred a straightforward, if simplistic, all-encompassing limit of 200 miles. That this 200-mile limit brought great benefits to the world's coastal states is undeniable. But it left a gaping lacuna in so far as there existed in many areas of the oceans, such as the wide continental shelves off

Canada, fish stocks that lived and reproduced across the 200-mile line and other fish stocks whose long-range peregrinations bore no relevance to an arbitrary line on a map.

UNCLOS simply contained a perfunctory call for co-operation among states and thus the stage was set for eventual clashes between the coastal states that saw their resources inside 200 miles threatened by unregulated fishing outside and the distant-water fishing states (DWFS) who remained attached to the traditional unrestricted freedom of fishing on the high seas.

It is to fill this vacuum and prevent those clashes that the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks was convened but, unfortunately, not soon enough to be of use as regards the mounting tensions between Canada and the European Union (EU) over the Spanish fleet's fishing practices and the unavoidable consequent confrontation.

The immediate cause of the dispute was a matter of allocating quotas for Greenland halibut (turbot) to the EU out of an agreed Total Allowable Catch (TAC) of 27,000 tonnes. When the Northwest Atlantic Fisheries Organization (NAFO), a regional organization that regroups 15 countries, including Canada and the EU, allocated some 3,400 tonnes to the EU and a much larger share to Canada (over 16,000 tonnes), the EU then had recourse to NAFO's objection procedure, a legal device that meant that the NAFO allocation would not apply to them.

Unilateral

They further unilaterally allocated to themselves over 18,000 tonnes. Since everyone agreed that the TAC should

remain at 27,000 tonnes, it was obvious that the legal quotas when added to the EU's unilateral quotas would produce total catches greatly exceeding the TAC and further threatening the resource itself.

The two positions that could not be reconciled were based on a three-year old claim by the EU to a large portion of the stocks outside the 200-mile limit and on a Canadian claim based on 13 years (1977-89) of fishing for 75 to 80 per cent of the stock inside the 200-mile line.

The EU resort to the objection procedure was not without precedent. In the 1980s, interestingly enough, after Spain joined the EU, the Europeans had abandoned their traditional cooperation within NAFO and had taken, year after year, registering their objections to many of the quotas for stocks that straddled Canada's 200-mile limit, into areas that are called the Nose and Tail of the Grand Banks. Those areas are the more sensitive as they correspond to the spawning grounds for most of the stocks.

Canada, at that time, was beginning to realize that its principal fish stocks—northern cod, redfish and American plaice—were declining. Recognizing its own shortcomings and responsibility, Canada established ever more restrictive conditions on its fishermen, eventually total moratoriums.

Meanwhile, the EU unilaterally set its own quotas and fished the same stocks very hard on the Nose and Tail. Stock after stock simply disappeared as commercial assets. Throughout that period, there was nothing Canada could do to counter EU objections. Freedom to fish according to one's wishes, irrespective of legally agreed decisions in NAFO, appeared to be the only law.

Given that background, Canada, in 1995, could simply not tolerate a repetition of the disastrous practices of the past and

strongly argued with the EU that their action, although legal in the strict narrow sense, amounted to total disregard and complete undermining of NAFO's endeavours to properly manage and safely conserve the resource.

The EU, refusing any negotiation on the substance of the dispute, went its merry way and established its unilateral quota. Canada was left with the alternative of either caving in and watching its last commercial stock disappear or standing firm on the grounds of necessity.

Canada stood firm!

Much has been made of the events that followed. Shots across the bow when the *Estai* refused to stop at first, boarding by an armed party which is the norm, anyway), the recovery of the net which the *Estai* discarded and which turned out to be undersize and included an even smaller liner, a catch consisting of mostly juvenile fish, fraudulent logbooks, also a hidden compartment with an excessive amount of by-catch, etc., etc.

It proved beyond the shadow of a doubt that the Spanish fishing fleet had been fishing for everything it could catch, in complete disregard of existing regulations and simple conservation standards. Previous observation and some NAFO inspections had already pointed out these violations to relevant authorities but the EU and Spain whose flag protected these vessels were either unwilling or unable to correct the situation.

No more encounters

Apart from the clean cutting of the warp of another Spanish vessel, the *Pescamaro Uno*, no further physical contact took place on the high seas during the following five weeks, even though the north-west Atlantic Ocean in winter time is not to be compared for comfort to a Swiss lake. Fortunately, there were no accidents.

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Canada and the EU eventually entered into serious negotiations and on 20 April 1995 signed an agreement which not only settles the quota allocation question (10,000 tonnes each for Canada and the EU) but, more importantly, establishes, as a pilot project, a scheme that will ensure the presence of an impartial observer on every EU or Canadian ship fishing on the high seas. Many other enforcement mechanisms are also provided for.

The lesson from all of this is quite clear—and leads us back to the UN Conference. With 70 per cent of the world fisheries resources being either fully or overexploited, coastal states' regimes must be reinforced and the lacuna that exists for straddling fish stocks and highly migratory fish stocks must be covered.

Freedom of fishing on the high seas, which, under UNCLOS, was already subject to the rights, duties and interests of coastal states, need not be abolished but it must be exercised according to binding, enforceable rules, as agreed by the international community as a whole or by regional or sub-regional fisheries management and conservation organizations.

And that is what one may optimistically predict is about to happen at the UN Conference.

At its recently concluded Fifth Session, the Chairman of the Conference, Ambassador Nandan of Fiji, produced a new revision of a draft agreement that reflects the views of the large majority of participating states and embodies provisions which will ensure that the end product will be a binding instrument, enforceable and subject to sound, practical settlement of dispute procedures. There will be a number of improved rules for the proper management and conservation of the resources, both inside and outside the 200-mile limit such as the precautionary approach, which will serve as useful tools for those responsible for the sustainable utilization of the resources.

Most importantly, the revised text now contains an article of enforcement (Article

21) which, for the first time, attempts to provide reasonable solutions for the kind of problems Canada was recently faced with, i.e. what does one do when agreed rules are disregarded and when the state responsible is unwilling or unable to act? A new text, in the first instance provides, under the umbrella of regional organizations or arrangements, for right of a member state to board and inspect the vessels of any other state whether or not the latter is a member of the regional organization.

Secondly, it recognizes that it is the right of the flag state to intervene and take appropriate action in respect of an alleged violation, but it goes further than existing international law by allowing the inspecting state to act by itself if the flag state does not choose to do so within three working days. At last, we will have the assurance that something will be done when it has to be done and it will no longer be necessary to resort to extraordinary and dangerous measures to solve problems.

Freedom with restraint

There will now be a sixth and last session of the Conference in July/August this year. Hopefully, by then, some of those distant-water fishing states that have so far been reluctant to renounce one iota of their cherished freedom will have come around to understanding that, given the state of world fisheries, that freedom must be exercised with some restraint. As indicated above, the rights of the flag states are not being denied; flag states are only being forced to exercise their rights properly.

Canada, which has been at the forefront of the UN efforts, can look forward to if establishment of new international provisions that will go a long way to enable it to protect and conserve the resources of the sea that are an integral part of its economy. 3

This position has been articulated by Brian Tobin, Minister of Fisheries and Oceans, Canada