Foreign Overfishing in the Northwest Atlantic -- The Abuse of Flag State Registration and Canada's Response

By Nicholas P. Katsepontes

Introduction

The current crisis in the Northwest Atlantic fishery poses unique challenges for Canadian fisheries policy, diplomatic relations and the current state of international law as relating to the law of the sea. The crisis involves the depletion of straddling stocks and highly migratory fish stocks such as cod, red fish, flounder and others which, once plentiful, are now threatened with commercial extinction. Efforts to address the problem of overfishing by foreign flag of convenience vessels who fish in violation of conservation and management measures has resulted in a Canadian diplomatic and legal initiative to deal with the problem. In addition, Canada has been at the forefront of international initiatives such as the United Nations Food and Agricultural Organization Agreement to Promote Compliance with International Conservation and Management Measures by Fishing vessels on the High Seas and the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks. The nature of the over-fishing problem for Canada has seen the long-term initiatives of the United Nations High Seas Conference and the FAO Compliance Agreement overtaken by the short-terms realities of continued fishing by flag of convenience vessels in violation of NAFO conservation and management measures.

The swift passage by Canada of domestic legislation allowing it to arrest vessels on the high seas which violate Canadian or NAFO conservation and management measures has been praised by some as advancing the current state of international law and criticized by others as constituting a violation of international law. From the Canadian perspective, the domestic legislation was viewed as necessary to deal with the short-term crisis in the high seas fishery on the Grand Banks given the absence of an effective international regime to

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2 Bill C-29, An Act to Amend the Coastal Fisheries Protection Act, R.S.C., 1985, c. C-33, as amended.
regulate the high seas fishery and in particular, flag of convenience fishing vessels.

This paper will attempt to evaluate the Canadian overfishing problem within the context of assessing the validity of the Canadian legislative initiative. The perspective for this analysis will be the nature of the crisis and the current and evolving scope of international law as relating to the use of flags of convenience by fishing vessels.

**The Nature of the Problem**

i) Depletion of the stocks and Non-contracting party vessels

The reasons for the current state the straddling and highly migratory fish stocks include: mismanagement of the resource by the responsible authorities; climatic changes causing a cooling of water temperatures impacting the spawning of species such as cod; the impact of seal herds in the NAFO area as a result of the banning of the seal hunt; and overfishing by both Canadian and foreign fishers. The nature of straddling stocks and highly migratory fish stocks is also of significance. These stocks do not contain themselves within the territorial jurisdiction of any one state and due to size of the stocks, geographical distribution or migratory nature claim as their natural habitat regulated waters as well as international waters beyond the regulation of states not parties to such regional organizations as NAFO. The contribution to the crisis of foreign overfishing has captured political and media attention as well as being blamed as the primary cause of fish stock depletions. The social

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3 This would include the Federal Department of Fisheries and Oceans and that jurisdiction that the Northwest Atlantic Fisheries Organization would exercise as the responsible regional organization.

4 The author has accompanied Department of Fisheries and Oceans (DFO) Officials on several surveillance flights to the Nose and the Tail of the Grand Banks and witnesses large seal herds at times of the year when historically seals were not present in the area. Interviews with DFO Surveillance and Enforcement personnel reveal estimates of a harp seal herd of 5-6 million seals which consume and, as natural predators, may disperse fish stocks.

5 For a complete assessment of the current crisis in the Atlantic fishery see Department of Fisheries and Oceans, Report of the Task Force on Incomes and Adjustment in the Atlantic Fishery, Charting a New Course: Towards the Fishery of the Future, Minster of Supply and Services, 1993 (hereinafter "Towards the Fishery of the Future") at. 14-19.

6 United Nations Convention on the Law of the Sea, U.N. Doc. A/CONF. 62/122 (1982), 21 Int. Leg. Mat. 1261 (UNCLOS), does not use the term "straddling stocks" but instead in Article 63 (2) refers to a "stock or stocks of associated species occurring both within the exclusive economic zone and in an area beyond and adjacent to the zone."
and economic impact of the crisis causes those most adversely affected, Newfoundlanders, to cast blame upon those who continue to fish when they cannot due to NAFO and Canadian moratoria. Much political pressure has thus been brought to bear upon the foreign fishing of the resources of the Northwest Atlantic.

While Canadian and foreign vessels continue to fish on the Grand Banks for less endangered species under quota from NAFO and have been banned from fishing endangered species, a small armada of foreign flag of convenience vessels fish without quotas targeting species which are the subject of moratoria. These vessels have come to be known as NAFO non-contracting party vessels (NCPS) and are viewed by Canada and its fellow NAFO members as maintaining a fishery in violation of NAFO conservation and management measures and directly threatening already depleted stocks.

ii) Geographical dimensions and jurisdiction

The ability of the NCP vessels to continue to fish the Grand Banks is in part attributed to the unique geographical circumstances of the Grand Banks. The continental shelf upon which the Grand Banks rests has historically been one of the richest fishing grounds in the world. The continental shelf in two areas extend beyond the 200 mile

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7 The initial and most traumatic moratorium upon northern cod was imposed by Department of Fisheries and Ocean Minister the Honourable John Crosby in July, 1992 which shut down the northern cod fishery. Subsequent moratoria by DFO Ministers Ross Reid (summer and fall 1993) and Brian Tobin (spring 1994) has shut down the remaining fishing of other species by Canadian fishers. A NAFO accepted moratoria also has imposed a total ban upon cod fishing in the division 3NO of the NAFO regulatory area (February, 1994).

8 The number of NCP vessels in the NAFO regulatory area varies according to season and has been as few as five vessels during the late winter of 1994 to as many as 60 in 1990 when NCP fishing was at its peak. Source: DFO Enforcement and Surveillance Reports, 1990-94, published weekly by DFO Regional Operations, St. John's, Newfoundland.

9 The political significance is that while the foreign NCP vessels continue to fish stocks subject to moratoria, Newfoundland vessels remain tied to the docks. Newfoundland Premier Clyde Wells has made much of this point in terms of indicating the sacrifices made by Newfoundlanders in terms of shutting down the fishery and such efforts being undermined by the continued fishing of NCPs. Premier Wells has advocated a position of stopping fishing by all foreigners, inclusive of NAFO vessels and NCP vessels in the Northwest Atlantic.

10 Towards the Fishery of the Future, supra. note 5 at 14-15.
jurisdiction of Canada. The map attached as Appendix A of the NAFO regulatory area illustrates these two areas - the northern area known as the Nose and the southern Tail. In addition, the area shown on the map as the Flemish Cap is targeted by NCP vessels and is also outside the Canadian jurisdiction and not a continuous extension of the continental shelf. While the 200 mile limit for the exclusive economic zone (EEZ) was generally accepted and established to extend to the outer limits of the continental shelf, the unique geography of the eastern seaboard left the Nose and Tail of the Grand Banks outside of the Canadian EEZ and thus beyond Canada's area of jurisdiction to regulate with regard to fisheries.

The Nose, Tail and Flemish Cap are within the regulatory area over which the Northwest Atlantic Fishery organization has jurisdiction. Such jurisdiction generally allows for regulation of: setting standards for gear; surveillance and enforcement; and most importantly, establishing conservation and management measures in the form of quota allocations between member states reflecting the abundance or depletion of fish stocks based upon scientific evidence. Thus while generally Canada has no jurisdiction over fishery matters outside 200 miles, NAFO has jurisdiction over the area outside 200 miles within the NAFO regulatory area (NRA) inclusive of the Nose, Tail and Flemish Cap. The effectiveness of NAFO in dealing with its own vessels which violate conservation and management measures is viewed as less than adequate given that members such as the EU states do not have the inspection and enforcement systems of Canada. Two factors apart

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11 Pursuant to UNCLOS, Canada has accepted the outer limit of 200 miles for its exclusive economic zone pursuant to Article 57 of UNCLOS. Canada was scheduled to ratify UNCLOS sometime in the summer of 1994 until the Canadian domestic legislation interrupted this timetable.


13 Pursuant to UNCLOS Article 77 coastal states do have jurisdiction beyond 200 miles over sedentary species. In addition, Canada has jurisdiction over its flag vessel on the high seas pursuant to the Canada Shipping Act.

14 NAFO regulations provide for all member states to allow inspections of member vessels for confirmation of compliance with NAFO conservation and management measures. Failure to comply with such measures results in the issuance of a NAFO citation by the inspecting NAFO vessel. Such citations are reported to the NAFO member flag state and the further investigation and prosecution of the NAFO citation is carried out in accordance with the domestic law of the NAFO member. Inconsistencies exist as between NAFO member states with regard to the resolve and efficiency with which NAFO citations are prosecuted.
from NAFO effectiveness prevent intervention against NCP vessels by NAFO and Canada. These are in the first instance the current 200 mile jurisdictional limit and flags of convenience utilized by NCP vessels.

The State of the Global High Seas Fishery and Distant Water Fishing Fleets

The current crisis in the Northwest Atlantic fishery is not an isolated phenomenon. On a global level high seas fisheries are in distress with the problem generally being too few fish being pursued by too many fishers. The United Nations Food and Agricultural Organization monitors 200 fisheries worldwide and all are fully exploited. Until 1976 the majority of world fish stocks were open to fishers from all nations with the result that conservation and management was virtually impossible. The 1976 unilateral adoption by a large number of coastal states of an extension of jurisdiction from 12 to 200 miles in the form of the exclusive economic zones facilitated management of the fisheries by the appropriate coastal state.

Coastal fisheries were closed and allowable fish catch was determined by individual countries and regional fisheries organizations (such as NAFO) based upon scientific evidence as to total allowable catch. The resulting regulatory regimes in developed countries incorporated limits as to the number of fishing vessels, restricted fishing seasons and the regulation of fishing gear (i.e., mesh size).

The regulatory mechanism was not without influence by commercial interests. When fishing was good and valuable stocks in abundance, market forces encouraged new fishers to pursue the high seas fishery. When stocks declined the resulting market response was to cause an increase in prices of impacted fish species. Higher prices again serve as an inducement for high seas fishing of species such as tuna, squid, shrimp and cod.

With many traditional high seas fishing nations such as Spain, Portugal, Japan and Canada faced with large investments in fishing vessels and infrastructure such as support vessels and fish processing plants, the regulators faced industry pressure, in many cases political, to allow for a full deployment of fish catching and processing capacity. Vessel and fish plant owners and operators faced mortgage payments whose recipients could not wait for idle assets to be employed in the catching and processing of fish. The result was that

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17 See FAO World Review of High Seas, supra., Note 15, at 10-12.
long-term conservation and management measures were over-looked in favour of short-term commercial concerns.

In addition to these market forces, mismanagement of the fishery has been heralded as a major cause of over-exploitation of global fish stocks. The imperfections of science in terms of understanding all factors influencing fish stocks has been realized only in recent years. In addition, such factors as: climatic change; unexplained migratory patterns of straddling and highly migratory stocks; an increase in the number of natural predators such as seals; global long-term cyclical patterns impacting many stocks; pollution; the impact of new fishing technologies and gear; all contribute to the miscalculations of expectations as to the capacity of the ocean resources to sustain the existing fishery.\(^{18}\)

The result is that global fish catch is estimated to be in decline. The most recent figures available as compiled by the FAO indicate world harvests for marine fishing peaked in 1989 at approximately 86.5 million tons and declined to 82.5 million tons by 1992.\(^{19}\) The FAO further estimates that 60 percent of all stocks for which it has information are fully overexploited or depleted.\(^{20}\) Scientists believe that experience learned from failed efforts to predict the size of fish stocks within fisheries management programmes may have under estimated the magnitude of the decline in world fish stocks.\(^{21}\)

Presently there are a number of fisheries in a state of over-exploitation due to foreign overfishing with massive declines of the top twelve stocks fished world-wide. These areas include: off the coasts of Chile and Peru (jack mackerel, blue whiting and horse mackerel); the Patagonian Shelf (squid and hake); the coast of Namibia (hake, horse mackerel); off the coast of West Africa (horse mackerel and squid); the Donut Hole (Alaska pollack, herring and cod); the Peanut Hole (Alaska pollack, herring and sole); off the coast of New Zealand (orange roughy) and the Grand Banks (northern cod, American plaice, redfish, flounder and witch flounder).\(^{22}\)

The situation in the Northwest Atlantic

The groundfish stocks managed by NAFO in the Northwest Atlantic have declined drastically in recent years. In 1992 the NAFO Scientific Council reported that southern Grand Banks cod stocks (division 3NO on map attached as Appendix A) was close to the lowest level ever recorded. Stocks entirely within the Canadian 200 mile jurisdiction have

\(^{18}\) See "The tragedy of the oceans", supra., Note 16, at 83-84.

\(^{19}\) FAO World Review of High Seas, supra., Note 15, at 12. See also "Major Fish Stocks Drop as Hi-Tech Subsidized Fishing Fleets Mine Oceans, FAO Reports: Urges Precautionary Fisheries Management and Increased Controls over Ocean Fishing", News Release, PR94/12, Food and Agricultural Organization of the United Nations, Rome.

\(^{20}\) Ibid.

\(^{21}\) Ibid., at 13.

\(^{22}\) "The tragedy of the oceans", supra., Note 18, at 86.
also suffered severe declines. In 1982 Canadian catches of Atlantic groundfish peaked at 775,000 tonnes.\textsuperscript{23} Total Canadian Atlantic groundfish catches are summarized in the following table for the period 1982-1993:\textsuperscript{24}

<table>
<thead>
<tr>
<th>Year</th>
<th>Tonnes</th>
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<tbody>
<tr>
<td>1982</td>
<td>775,000</td>
</tr>
<tr>
<td>1986</td>
<td>748,000</td>
</tr>
<tr>
<td>1988</td>
<td>688,000</td>
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<tr>
<td>1990</td>
<td>604,000</td>
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<tr>
<td>1992</td>
<td>418,000</td>
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<tr>
<td>1993 (as at 15 Sept.)</td>
<td>197,000</td>
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</tbody>
</table>

The most dramatic decline occurred to the catches of cod which decreased from 508,000 tonnes in 1982 to 183,000 tonnes in 1992.\textsuperscript{25} The estimated potential catch in the best case scenario, in 1993 is estimated at 50,000 tonnes for the ten key cod and flatfish stocks. This is a decline in catch of 90 percent over five years.\textsuperscript{26}

The consequences for such reductions in fish catches has been a dramatic impact upon Canada's east coast fishery. In July, 1992 the Canadian government imposed a two year moratorium on northern cod (NAFO Divisions 2J3KL) which was Atlantic Canada's most important commercial fish stock. NAFO had similar imposed a moratorium in February 1994 on this critical stock on the high seas for several years. Despite the implementation of a total ban on the fishing of this stock it has not recovered resulting in the extension of the moratorium into 1994 and possibly beyond.\textsuperscript{27}

On December 20, 1993, with the announcement of the Atlantic Groundfish Management Plan for 1994, all of the major cod fisheries in Atlantic Canada were closed and quotas for most other groundfish species were sharply reduced. Total allowable catches of groundfish across the region were reduced to 250,000 tonnes, a 75 percent decline from 1988.\textsuperscript{28} It is estimated that in 1993 up to 35,000 fishermen and plant workers in

\textsuperscript{23} Groundfish species include; northern cod, haddock, pollack, redfish, flatfish, Greenland halibut and other species such as American Plaice and yellowtail.

\textsuperscript{24} Towards the Fishery of the Future, supra., Note 5, at 26.

\textsuperscript{25} Ibid.

\textsuperscript{26} Ibid., at 19.

\textsuperscript{27} Ibid., at 19-20.

\textsuperscript{28} Ibid., at 21.
Newfoundland alone will be out of work as a result of the closures of the fishery having taken place since 1991.29

The Decline of Fish Stocks and Fishing Vessel Tonnage
The decline of fish stocks on a global level has not resulted in a corresponding reduction in the size of the global high seas fishing fleet. The FAO has summarized the global dimensions of the problem as follows:
"Since 1970 the world fleet has increased twice as fast as the world catches. As a result, the excess fishing capacity has reached alarming proportions and the returns on capital consume 46% of the annual total revenue earned from all landed catches. Faced with declining catch rates, part of the excess capacity has been transferred to other EEZ's (when economically accessible) and to the high seas."30

The number of fishing vessels on the high seas is estimated to have increased from 18,217 vessels in 1975 to 23,718 vessels in 1992. Total tonnage increased from 7,830,244 tonnes in 1975 to 11,146,416 tonnes in 1992.31 The resulting over-capacity resulted in commercial pressures for the vessels be fully utilized. Such vessels left their traditional fishing grounds to participate in fisheries in other parts of the world where fish were more plentiful or not subject to the same level of regulation.

One of the methods by which many vessels made this transfer to other fisheries was by reflagging. Reflagging is defined as registering a vessel in another country and has become a growing concern for fishery managers throughout the world.32 There are a number of reasons for reflagging - the simplest case involving an owner of a vessel in one country selling the vessel to a new owner in another country. In other cases, local requirements may require all joint venture fisheries vessels to fly the flag of one particular country. In the case of older, less efficient vessels, vessel operators may not be able to operate their vessel profitably in one country and may reflag to another country where taxes, fuel costs, and crew salaries are lower. The rationale for reflagging varies in accordance to the circumstances of the particular vessel.

One of the reasons for reflagging, which is emerging as a growing concern and threat to high seas fisheries management, is reflagging a vessel to avoid internationally

29 Ibid., at 21-22.
30 FAO World Review of High Seas, supra., Note 15, at 1.
32 Ibid., at 9.
agreed measures for conservation and management of living marine resources. The reflagging of a vessel to a country which is not a signatory to an agreement whose purpose is to manage living marine resources by the reflagged vessel may avoid the applicable measures in the jurisdiction specified by the agreement.

The decline in global fish stocks has set in motion a migration of fishing vessels as fishing fleet operators, motivated by the commercial aspects of the industry, and the demand for seafood in the home markets, seek to move vessels to areas of the world where regulation is absent or not as strict and fish more plentiful. The Nose and Tail of the Grand Banks is a perfect example of such an area where fish stocks have historically been more plentiful. In addition, straddling and highly migratory stocks exist outside of the Canadian jurisdiction on the Nose and Tail and NAFO regulation for flag of convenience vessels. Canada cannot under the existing international regime go beyond 200 miles on to the Nose and Tail of the Grand Banks to regulate such vessels and NAFO has no jurisdiction when the vessels are flagged to non-NAFO member states.

The participants in the world-wide high seas fishery in terms of number of vessels and gross registered tonnage is detailed in the following table:

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<thead>
<tr>
<th>Fishing Fleets</th>
<th>Number of Vessels</th>
<th>GRT</th>
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<tr>
<td>Baltic</td>
<td>358</td>
<td>1,200,000</td>
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<tr>
<td>East European</td>
<td>159</td>
<td>551,000</td>
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<tr>
<td>Asian</td>
<td>4,000</td>
<td>N/A</td>
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<tr>
<td>Commonwealth of Independent States</td>
<td>2,261</td>
<td>6,800,000</td>
</tr>
<tr>
<td>West European</td>
<td>804</td>
<td>868,000</td>
</tr>
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</table>

In recent years over 200 former Asian tuna vessels have reflagged to other countries. A total of 16 vessels from the three Baltic Republics were reflagged in the past 3 years. Over 40 Polish vessels were reflagged to countries all over the world in 1993. Since 1986 over 250 vessels have been reflagged to Latin American countries. Twenty vessels from Russia were reflagged in Panama, Cyprus and other countries in 1993. Six vessels from the Ukraine were reflagged in Panama, Malta, Russia and Estonia in 1993. The largest reflagging of vessels was the movement of over 100 vessels from Western Europe to other countries. The countries used most frequently for registering reflagged fishing vessels during the period 1990-93 include: Cyprus, Honduras, Malta, Panama. Belize, Cayman Islands, Dominican Republic and St. Vincent are less frequently used.

The consequences of reflagging for the Northwest Atlantic fishery has been the

33 [World Fishing Fleets, supra.], Note 31 at 3-4.

34 [FAO World Review of High Seas, supra.], Note 15, at 15.
migration of reflagged vessels to the NAFO regulatory area targeting the Nose, Tail and Flemish Cap just outside of Canadian jurisdiction. A historical overview of reflagged NAFO non-contracting party fishing vessels in the NAFO area is summarized in the following table:

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<tr>
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<td>30</td>
<td>30</td>
<td>29</td>
<td>41</td>
<td>47</td>
<td>44</td>
<td>35</td>
<td>35</td>
<td>32</td>
<td>22</td>
</tr>
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</table>

For the same period the estimated catch of NAFO non-contracting party vessels was as follows:

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<th></th>
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</thead>
<tbody>
<tr>
<td></td>
<td>23500</td>
<td>19300</td>
<td>29400</td>
<td>35200</td>
<td>35400</td>
<td>46800</td>
<td>47300</td>
<td>42600</td>
<td>11925</td>
<td>N/A</td>
</tr>
</tbody>
</table>

NCP vessel activity - fishing on the High Seas

Since the fishing activity of the NCP vessels has been limited to that area of the continental shelf just outside of the 200 mile territorial jurisdiction and on what is considered the high seas, both Canada and NAFO lack the jurisdiction and authority to deal with NCP vessels.

a) High Seas - Legal Definition

The high seas have been traditionally defined as 'all parts of the sea not included in

35 Non-Contracting Party Fishing Activity in the Regulatory Area, Preliminary Report, 01 January - 15 August, 1993, Standing Committee on Fishing by Non-Contracting parties in the Regulatory Area (STATFAC), prepared by the Canadian delegation (hereinafter the "STATFAC Report").

36 As of 18 July 1994.

37 STATFAC Report, supra., Note 35.
the territorial sea or in the internal waters of a state'. With the development of the concept of the EEZ and archipelagic waters, the definition of the high seas was further modified and defined the latest being Article 86 of the Law of the Sea Convention which provides that high-seas rules in the Convention apply to:
"... all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of a archipelagic State."39

The 'high-seas rules' as codified in the High Seas Convention and UNCLOS have been the subject of historical development and definition dating back to the fifteenth century. The fundamental 'rule' to emerge upon which all others are based is that of freedom of the high seas. This was not always taken for granted as in the fifteenth century a number of claims to sovereignty over extensive areas of the oceans were made by maritime states seeking to extend military and economic jurisdiction.40

Early advocates for the concept of an open sea were supported by the work of Grotius at the beginning of the seventeenth century who, in his seminal publication Mare Liberum, advanced the concept of the open seas. Fundamental to such a concept was "the importance of freedom of navigation in the service of overseas and colonial trade."41 By the eighteenth century the concept of the high seas as an area juridically distinct from national waters and beyond the appropriation by any state had emerged.42

The modern day codification of the customary principal of freedom of the high seas in the High Seas Convention, Article 2 includes the related freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines and freedom to fly over the high

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39UNCLOS, supra., Note 6, Article 86.


41Ibid., at p. 165

42 Ibid.
The right to fish on the high seas has always been closely linked to the freedom of the high seas. At the time of the negotiations leading to UNCLOS I in 1958 shortly after the Second World War states divided between those who sought regulatory rights over living resources and those long distance fishing states which opposed any infringement of the right to fish as a related right to that freedom of the high seas. The subsequent breakdown in negotiations left the issue unresolved almost indefinitely.44

The period following the High Seas Convention saw much dissatisfaction on the part of coastal states with distant water fishing fleets who could fish in close proximity to their shores. UNCLOS (1982) further defined the concept of freedom of the high seas by providing in Article 87 that "the high seas are open to all states" and that such freedoms shall compromise: freedom of navigation; of overflight; to lay submarine cables and pipelines; to construct artificial islands a conditional freedom to fish; and freedom of scientific research.45

The conditions imposed upon the freedom to fish generally constituted an obligation to respect an encourage conservation and management measures. For example, UNCLOS Article 116 clearly limited the right of a states nationals to fish on the high seas subject to treaty obligations and the rights and duties pursuant to the Convention. Article 117 require States to co-operate and adopt such measures for their respective nationals to "take such measures as are necessary or the conservation of living resources on the high seas."46 Article 118 requires States to co-operate by forming regional and sub-regional organizations to establish conservation measures on the high seas. Finally, Article 119 bases the establishment of conservation and management measures upon scientific evidence as to total sustainable catch.47

In general terms the freedom of the high seas and the corresponding right of freedom to fish on the high seas is still widely recognized as an unalienable right. The consequences for the Northwest Atlantic is that the Nose, Tail and Flemish Cap constitute the high seas

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43 High Seas Convention, supra., Note 38, Article 2. Article 2 further provides these freedoms extend to coastal as well as non-coastal states and are to be exercise by all States with reasonable regard to the interests of other States to exercise similar rights.

44 Managing Fishery Resources Beyond 200 Miles: Canada’s Options to Protect Northwest Atlantic Straddling Stocks, Oceans Institute of Canada, Prepared for the Fisheries Council of Canada, August, 1989, (hereinafter "the Oceans Institute of Canada") at 210-12 and Churchill, supra., Note 40, at 227-229.

45 UNCLOS, supra., Note 6, Article 87. The freedom to fish is subject to the conditions provided for in section 2 of UNCLOS providing for Conservation and Management of the Living Resources of the High Seas.

46 Ibid., Article 117.

47 Ibid., Article 119.
upon which vessels have the freedom to navigate and fish. The legal concept of freedom of the high seas and the corresponding right to fish the high seas comes into conflict with the obligations of States to cooperate in regard to conservation and management measures. The right to fish and the obligation to cooperate are both provided for in UNCLOS and in this regard are not easily reconciled. The enforcement of a right to fish is more easily attained by an individual vessel than by the enforcement of a State's right to cooperate in the promotion of cooperation and management measures. The tension between such a right and the obligations of States in promotion of conservation and management are at the root of the problem in the Northwest Atlantic fishery and other over-exploited fisheries.

b) NAFO’s jurisdiction in the Regulatory Area

The role of NAFO was to realize the regional co-operation envisioned by Article 118 of UNCLOS and build on its predecessor, the International Fisheries Commission for the Northwest Atlantic (ICNAF) whose founding Convention was denounced by its membership in 1979.48 The present membership of NAFO comprises 15 members the latest of which to join being the Republic of Korea in 1993.49

The purpose of NAFO is "to contribute through consultation and cooperation to the optimum utilization, rational management and conservation of the fisheries resources" in the Northwest Atlantic.50 This purpose is facilitated by the gathering of scientific data as to the 'optimum utilization' of the resource and establishing quotas based upon such evidence. NAFO also sets standards for gear, implements surveillance and enforcement programs and in general terms manages the Northwest Atlantic fishery resource with overlapping jurisdiction with Canada.51 The responsibilities and obligations of NAFO as set out in the governing Convention are applicable only to parties to the Convention. As a result NAFO cannot enforce its conservation and management measures against vessels whose flag states are not members of NAFO.

c) Roots of the NCP Problem

The operation of NAFO has not been without conflict in terms of setting quotas and

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48 Oceans Institute of Canada, supra., Note 44 at 77.

49 Contracting Parties to the NAFO Convention include: Bulgaria, Canada, Cuba, Denmark (in respect of the Faroes Islands and Greenland), Estonia, the European Union, Iceland, Japan, Korea, Latvia, Norway, Poland, Romania, Russia.


51 NAFO Handbook, supra., Note 12 at 9. The NAFO regulatory area includes waters within the 200 mile jurisdiction of Canada as well as waters within the jurisdiction of Greenland and the high seas.
the overfishing issue. One of the perceived weaknesses of the NAFO Convention is its Objection procedure whereby a member state may file an objection to a NAFO measure (in this instance a quota) established by the organization and any member state filing such an objection is not bound by the measure objected to.\textsuperscript{52} When NAFO would set a quota for a particular species, a member state if disagreeing with the quota as set, could file an objection pursuant to the objection procedure and continue to fish disregarding the quota. The utilization of the objection procedure by the European Union (EU) for years allowed its member countries to continue to fish without regard for the quotas set by NAFO thus establishing unilateral quotas.

The debates with NAFO continued for many years and have been summarized as competing philosophies as to resource management between Canada and the EU.\textsuperscript{53} The matter was finally resolved in 1992 as a result of a negotiated treaty the most important achievement of which was that the EU agreed that its members would respect and abide by the conservation and management quotas set by NAFO.\textsuperscript{54}

The Canada-EU Agreement in many ways indirectly gave rise to the overfishing problem by NCP vessels. Since the Canada-EU Agreement, a number of vessels flying the flags of Belize, Honduras, Panama, the Cayman Islands and St. Vincents have appeared in the NAFO regulatory area and fished without NAFO quotas just outside Canadian jurisdiction.

\begin{footnotesize}
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\item[52] Ibid., Article XII at 23.
\item[53] For good discussion of the problems and competing interest within NAFO see Oceans Institute of Canada, \textit{supra.}, Note 44, at 90-114.
\item[54] Memorandum of Understanding between the European Community and the Government of Canada on Fisheries Relations, Government of Canada, (hereinafter "the Canada EU Agreement"). See also Wiseman, E., \textit{Notes for a Presentation to the European NGO Roundtable on the UN High Seas Fishery Conference: A Canadian's Perspective}, The Canadian Mission to the European Communities, Brussels, Belgium, June 22, 1993, p. 4. The Canada-EU Agreement was initialed by both countries in September, 1992 pending ratification which took place by the EU in March, 1994. Canada has yet to ratify the Agreement as a result of the change of government in October of 1993 when the newly elected Liberal government indicated it would implement a policy extending jurisdiction over the Tail and Nose of the Grand Banks as set out in the Liberal Party Policy Red Book. The Department of Foreign Affairs and International Trade continues to lobby within the Government of Canada for ratification of the Agreement. The Agreement has taken a back seat to the domestic legislation initiative. Presently it does not appear the Canada-EU Agreement will be ratified by Canada given Canadian concerns over the NAFO citation system and abuses by EU flag vessels.
\end{footnotes}
\end{footnotesize}
on the Nose and Tail of the Grand Banks and on the Flemish Cap.\textsuperscript{55} The majority of these vessels had previously fished in the NRA under the flag of EU member states. What occurred as a result of the EU imposing the NAFO quotas upon its flag vessels, as a result of the Canada-EU Agreement, was that many of the vessels (or more precisely their owners), sought to avoid the requirement to obey NAFO conservation and management measures by reflagging to countries which are not members of NAFO. A closer examination of the ownership interests in the reflagged NCP vessels revealed, in most instances, off-shore corporate ownership the principals of which were either Korean, Spanish or Portuguese nationals or companies.\textsuperscript{56} The reflagged NCP vessels were thus able to fish without regard for NAFO conservation and management measures just outside of the Canadian 200 mile fishery jurisdiction and outside of NAFO's authority over its member's flag vessels.

The Canadian Initiatives to Deal with the Global Fisheries Crisis and Foreign Overfishing

Canada has recognized the need to pursue a solution to the problems related to the high-seas fishery on a global as well as regional solution. In this regard Canada was at the forefront of pursuing a binding international regime to deal with the high seas fishery in addition to implementing a domestic plan to deal with the more immediate and pressing concerns of foreign overfishing on the Grand Banks. The international initiatives were in the form of the UN High Seas Conference and the FAO Compliance Agreement. While the emphasis of this paper is the use of flag registration and the Canadian domestic legislation, the long-term benefits of establishing a global regime for the high-seas is relevant and these important international initiatives shall be summarized.

The U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks

UNCLOS established a framework for cooperation of conservation and management of marine living resources on the high seas. It provides that States fishing on the high seas and coastal States shall seek to agree on measures necessary for the conservation of straddling fish stocks.\textsuperscript{57} Further, UNCLOS provides that States shall co-operate with a view

\textsuperscript{55} An Agreement between Canada and the Republic of Korea signed in 1992 provided for a removal of all Korean flag fishing vessels from the NAFO regulatory area. Korea subsequently joined NAFO as a full member in February of 1993.

\textsuperscript{56} Eight of the total 13 vessels in the NRA in 1994 had a clearly established Portuguese ownership interest, three Spanish and three Korean ownership interest. Source: Katsepontes, N., NAFO Non-contracting Party Report, Office of the Ambassador for Fisheries Conservation, Department of Foreign Affairs and International Trade, May 12, 1994.

\textsuperscript{57} UNCLOS, supra., Note 6, Article 63(2).
to ensuring conservation of highly migratory fish stocks. These obligation enumerated in UNCLOS require a vehicle to be reinforced by practical measures.

The solution Canada and other maritime nations view as necessary to avert continued decline of straddling and highly migratory fish stocks includes; an effective regime, consistent with UNCLOS, for conservation and management that includes binding undertakings by all states fishing on the high seas.

In order to achieve this goal a legal regime containing binding undertakings must be developed to fill the gaps left by UNCLOS. Canada and other coastal states have taken steps to develop an international consensus to reach this objective. The process has been long and fraught with disagreement among the maritime nations and deep-sea fishing nations which at times have competing interests.

In 1990, Canada hosted a group of experts in international law of the sea at a meeting in St. John's, Newfoundland. The participants agreed on principles which they saw as fundamental to developing a conservation and management regime for the high seas.

The next meeting of experts was held in Santiago, Chile in May of 1991. There, Canada joined with other coastal states to develop a text of principles and measures, popularly known as the "Santiago Text." In March of 1992 these principles were incorporated in "L.16" and submitted to Preparatory Committee for the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro. This document was supported by a total of 40 coastal states.

During the lengthy negotiations leading up to UNCED, Canada was among the countries which took the lead in preparing the text on high seas fisheries problems. The text was largely incorporated in Agenda 21 - a series of non-binding recommendations - but an international blueprint for sustainable environment and development practices which came out

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58 Ibid., Article 64.

59 Conclusions to the International Conference on the Conservation and Management of the Living Resources of the High Seas, Institute of Fisheries and Marine Technology, St. John's, Newfoundland, 5-7 September 1990.

Rio participants had to address a wide diversity of subjects. World leaders, therefore, decided to hold a separate intergovernmental conference under United Nations auspices taking into account relevant activities at regional and global levels with the objective of promoting effective implementation of the UNCLOS provisions dealing with straddling and highly migratory fish stocks. The work of the U.N. Conference on Straddling Stocks and Highly Migratory Fish Stocks is to be fully consistent with UNCLOS, in particular the rights and obligations of coastal States and States fishing the high seas. The mandate was confirmed later in 1992 by the United Nations General Assembly. Conference participants are aiming to complete their work before the 49th session of the General Assembly in the fall of 1994.

The crisis in the Northwest Atlantic fishery as a background of overfishing that has resulted in a critical reduction of fish stocks, the U.N. Conference will need to establish a binding and effective regime for conservation and management of straddling and highly migratory fish stocks on the high seas. The regime must be reinforced by effective high seas enforcement and a dispute settlement mechanism so as to ensure renewal and maintenance of fish stocks at levels of sustainable development.

The United Nations Food and Agricultural Organization Agreement to Promote Compliance with International Conservation and Management Measures for Fishing Vessels on the High Seas (the FAO Compliance Agreement)

The FAO Compliance Agreement was adopted by the FAO in November of 1993. Canada was an active participant in the negotiations resulting in the agreement which is perceived as an important control mechanism against overfishing on the high seas when effectively implemented. Canada as the first nation to adopt the FAO Compliance Agreement by making the necessary amendments to its domestic legislation to implement the agreement. The Agreement will come into force when ratified by 25 states.


The objective of the FAO Compliance Agreement is to strengthen the effectiveness of conservation rules which have been established by global or regional fisheries organizations. The agreement sets a standard for what will be considered acceptable international fisheries behaviour. States party to the FAO Compliance Agreement must control their vessels on the high seas and comply with the conservation and management rules imposed by regional organizations such as NAFO - whether or not they are members of the organizations in question.

d) The Linkage between NAFO and the UN System

NAFO as a multilateral regional organization open to membership by all nations whether or not they currently fish in the Northwest Atlantic. Its object is the rational management and conservation of the fishery resources of the Convention area. The NAFO Convention is fully consistent with the UNCLOS. The preamble to the NAFO Convention states: “taking into account the work of the Third United Nations Conference on the Law of the Sea in the field of fisheries”.

Article 118 of UNCLOS requires co-operation between states in the conservation and management of living resources in the areas of the high seas. Article 118 further requires states to “as appropriate, co-operate to establish sub-regional or regional fisheries organizations”. Such organizations as provided for in UNCLOS Article 118 contemplate and include NAFO.

As well a resolution of the 1992 UN General Assembly dealing with the Law of the Sea provided as follows:

“noting with concern the use of fishing methods and practices, including those aimed at evading regulations and controls, which can have an adverse impact on the conservation and management of marine living resources.”

The same resolution at paragraph 20 provides:


65 Ibid., Preamble.

66 Ibid., Article V.

67 NAFO Handbook, supra., Note 12, Preamble.

68 Ibid.

69 UNCLOS, supra., Note 6, Article 118.

"... reiterates its call to states and other members of the international community to strengthen their cooperation and to take measures with a view to giving full effect to the provisions in the convention on the conservation and management of marine living resources, including the prevention of fishing methods and practices which can have an adverse impact on the conservation and management of marine living resources and, in particular, to comply with bilateral and regional measures applicable to them aimed at effective monitoring and enforcement."  

In addition, the United Nation's Earth Summit, Agenda 21 provides at paragraph 17.49 as follows:  
"States should take effective action, including bilateral and multilateral co-operation, where appropriate at the subregional, regional and global levels, to ensure that high seas fisheries are managed in accordance with the provisions of UNCLOS."  

More to the point the same chapter at paragraph 17.51 provides:  
"States should take effective action consistent with international law to monitor and control fishing activities by vessels flying their flags on the high seas to ensure compliance with applicable conservation and management rules."  

Applicable conservation and management measures in this instance would include NAFO conservation and management measures.  
Furthermore the Chairman's negotiating text of the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, which is currently in progress and which will form the basis for recommendations to the United Nations General Assembly as early as October of 1994, calls for non-members to a regional organization to not authorize their vessels to operate in areas where regional fisheries conservation and management organizations such as NAFO are in place. As well vessels from non-participants in regional organizations are directed to not fish in areas where conservation and

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71 Ibid., paragraph 20.  
72 Agenda 21: Programme of Action for Sustainable Development, supra., Note 61, Chapter 17 at 154.  
73 Ibid., at 155.  
74 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, UN DOC A/CONF.164/13REV.1, 30MAR, 1994 (hereinafter "the High Seas Convention").  
75 Ibid., Article 41.
management areas have been established.\textsuperscript{76} In addition, Articles 24 (b) and 25 of the draft High Seas Convention call for effective flag state control of vessels wherever they fish on the high seas.\textsuperscript{77}

The FAO Compliance Agreement has been drafted by an Experts Group and unanimously approved by the FAO Governing Council in November, 1993 is now open for acceptance. The FAO Agreement provides in part that:

"Each party shall take measures as may be necessary to ensure that fishing vessels entitled to fly its flag do not engage in any activity that undermines the effectiveness of international conservation and management measures". \textsuperscript{78}

Note as well that Article 3 (5) (a) of the FAO Agreement provides:

"no party shall authorize any fishing vessel previously registered in the territory of another party that has undermined the effectiveness of international conservation and management measures to be used for fishing on the high seas." \textsuperscript{79}

The role of NAFO is thus consistent with UNCLOS and emerging international law in terms of the High Seas Convention and the FAO Compliance Agreement. In enforcing NAFO conservation and management measures firm foundations exists in terms of the current state and future directions of the Law of the Sea. The consistency of NAFO with UNCLOS does however come into conflict with other traditional and established principles, customs and treaty law constituting the Law of the Sea in relation to ships, their registration and the freedom to navigate (and fish on the high seas).

The Legal Concept of Ship Registration

The freedom of the high seas as a fundamental principle of public international law gives rise to an unrestricted access of vessels belonging to all nations to all parts of the sea that are not included in the territorial sea or internal waters of a State.\textsuperscript{80} In order to maintain freedom of the high seas, within an organized system recognized by all States certain rules, recognized as customary practice, and codified in statute and convention law govern the navigation of vessels on the high seas.

Such "rules" are enforced by individual States through the exclusive jurisdiction they exercise over activities of vessels that claim their nationality. The laws of nations, by

\textsuperscript{76} Ibid., Article 41.
\textsuperscript{77} Ibid., Article 24 (b) and 25.
\textsuperscript{78} FAO Compliance Agreement, supra., Note 63, Article 3 (1) (a).
\textsuperscript{79} Ibid., Article 3 (5) (a).
custom, imposes a duty upon every State having ships owned by itself or its nationals. This duty includes the following: i) to insist on registration of all ocean-going vessels, and ii) to provide by its domestic law the conditions to be fulfilled before its vessels could be registered to sail under its flag with the necessary distinguishing marks.\textsuperscript{81}

The attribution of a national character to a vessel is usually achieved by the registration of the particular vessel in the public record of the State in which the vessel seeks registration.\textsuperscript{82} Nationality need be attained through registration since a vessel cannot be deemed to have a nationality when unregistered, without documentation evidencing that nationality, nor even when flying the flag of that State. Thus the act of registration of the vessel has become the universally acknowledged test for determining a vessel’s nationality.\textsuperscript{83} It is possible for a vessel to have nationality without registration. This being distinct and apart from the rights provided to a vessel as a result of registration and the right to fly a flag. A number of factors are considered in attempting to determine the nationality of a vessel and these include nationality of the crew and captain and that of the owner.\textsuperscript{84} One author has stated:

"The term 'nationality' of a merchant vessel is used in various senses. The sense in which it is used in a given case depends upon the purpose for which national character is to be ascertained. In matters pertaining to privileges or rights under national law, the usual practice is to look to the registry enrolment, or other documentation of the vessel. In matters of protection the usual practice, in addition to considering the documentation of the vessels, is to enquire into the nationality of the owner."\textsuperscript{85}

Thus nationality of a vessel may be attributed as a result of the nationality of owner and crew where other indicators such as flag and documentation are not present. The recognized practice of acquiring a nationality for a vessel is through registration. The registering State in turn issues to the vessel documentation evidencing the vessel’s nationality and attesting to the right to fly the national flag of that State.

Registration generally involves the recognition and protection of the shipowner’s title to the vessel as well as conferment of nationality.\textsuperscript{86} Registration therefore serves a public purpose of allowing for the regulation of vessels and a private purpose on behalf of the

\textsuperscript{81} Singh, Nagendra \textit{Maritime Flag and International Law}, Singhoff Leyden, 1978 at 23.

\textsuperscript{82} Ready, \textit{supra.}, Note 80 at 3.

\textsuperscript{83} \textit{Ibid.}, at 5.

\textsuperscript{84} Singh, \textit{supra.}, Note 81 at 23.


\textsuperscript{86} Ready, \textit{supra.}, Note 80 at 5-6.
owner of securing title to the vessel registered.\textsuperscript{87}

Since the conditions for the registration of vessels are the subject of domestic law, each state is free to fix such conditions. This has given rise to two types of shipping registries - closed and open registries.

In the case of closed registries, conditions are such that vessels which are eligible for registration have some form of direct tie with the State registering the vessel. Historically this has included such factors as the country where the vessel was built, nationality of the owner, nationality of crew and master.\textsuperscript{88}

The nations which historically possessed the largest maritime fleets and interests established the conditions for the registration of vessels as a means of limiting and controlling access to the high seas and trade routes. Establishing such conditions was a necessary pre-requisite in order to assert authority and offer protection to those vessels partaking in high seas trade. One of the basic conditions of registration under one of the historical maritime powers was nationality of the owner in the State of registration. In this manner the maritime powers were able to limit access to ship registration to their own nationals and the resulting access and protection associated with the flag state.\textsuperscript{89} By controlling the conditions for the registration of vessels, flag states could limit vessel traffic on the high seas.

Such was the case until just prior to the Second World War when countries such as Liberia and Panama established their own shipping registries with far more liberal conditions for registration which were not premised upon a genuine link with the flag state providing registration.\textsuperscript{90} Such shipping registries have come to be known as open registries or flags of convenience because of the ease of access to such shipping registries based on such admission criteria other than nationality or some other genuine link to the flag state.

The proliferation of open registries since the Second World War has been motivated by lower taxes, lower crewing requirements and standards, less demanding standards for ship safety and inspection - all of which constituted financial incentives to ship owners to move from closed registries to open or flag of convenience registries. In general terms, flag of convenience shipping registries are defined as:

"Functionally a 'flag of convenience' can be defined as the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for

\textsuperscript{87} This would include the securing of claims against a vessels such as mortgages and liens which affect the title of the owner.

\textsuperscript{88} For a more detailed discussion of the historical factors giving rise to the "genuine link" see Ready, supra., Note 80 at 14-16 and Meyers, H., \textit{The Nationality of Ships}, The Hague, 1967, at 280.

\textsuperscript{89} See Meyers, supra., Note 88 at 140-44.

\textsuperscript{90} Ready, supra., Note 80 at 13 and Chapter 2.
the persons registering the vessels.\textsuperscript{91}

The freedom of each state to set the conditions for the registration of vessels has been confirmed in the courts where this freedom has been defined and accepted as follows:

"Generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants."\textsuperscript{92}

The Muscat Dhows case involved the legality of the grant of the right to fly the French flag to dhows owned by the subjects of the Sultan of Muscat. The complaint, as referred to the Court, being that such a grant infringed treaty obligations and was used as a cover to enable the dhows to engage in slave-trading.

Although the Court found France's right to confer its nationality was limited by a treaty of 1892, the Court held that prior to that date:

"France was entitled to authorize vessels belonging to its subjects of His Highness the Sultan of Muscat to fly the French Flag, only bound by her own legislation and administrative rules."\textsuperscript{93}

Another case of relevance involves the United States registered vessel, the "Virginius" which was seized by Spanish warships on the high seas on suspicion of aiding forces opposed to the Spanish government on the island of Cuba which was then part of the Spanish empire.\textsuperscript{94} The Spanish position was that since the vessel was Cuban owned, then American registration papers must have been obtained by fraud and thus the vessel was not entitled to the protection of the American flag. The American response was that the question of whether or not the vessel was entitled to fly the American flag was a matter purely for US jurisdiction. The Spanish accepted the argument that only the courts of the flag state could be competent to determine the right to fly a national flag. Spain returned the vessel to the United States and paid reparations.\textsuperscript{95}

\begin{footnotes}

\textsuperscript{92} \textit{Case of the Muscat Dhows between Britain and France}, (hereinafter referred to as "the Muscat Dhows case") Permanent Court of Arbitration (1905) reported in Hague Court Reports [1916] at p. 93.

\textsuperscript{93} Ibid.

\textsuperscript{94} Moore, \textit{A Digest of International Law}, II, at 895.

\textsuperscript{95} \textit{op. cit.}
\end{footnotes}
This principle has also been accepted in more recent times in domestic courts as in the case of *Lauritzen* v. *Larsen* wherein the United States Supreme Court stated:

"Each State under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering State."

The expansion and appeal of flags of convenience was to some extent limited by the 1955 decision of the International Court of Justice in the Nottebohm case. Although the case dealt with the nationality of an individual and whether a State can exercise a right of protection over the individual in question. The question at issue before the Court was whether Liechtenstein, as a result of its unilateral grant of nationalization to Nottebohm, was entitled to exercise protection over Nottebohm against another State, or whether, the nationality of an individual presupposed the existence of a substantive connection between the individual and the State whose nationality he claimed. As noted in the case:

"... a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments together with the existence of reciprocal rights and duties."

The *Nottebohm* case has been utilized to make a linkage between the nationality of an individual and the nationality of merchant vessels. In fact the "over-extrapolation" of the *Nottebohm* decision has lead to much confusion.

A case of significance in dealing a death-blow to the concept of the genuine link and preserving and enhancing the stature of flags of convenience was the International Court of Justice Advisory Opinion in connection with the constitution of the Maritime Safety Committee of the Inter-governmental Maritime Consultative Organization.

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96 (1953) 345 U.S. at p. 571.


98 Ibid., at p. 23.


100 This organization was the predecessor to the present day International Maritime Organization (IMO). See Constitution of the Maritime Safety Committee of the inter-governmental Maritime
The reference to the International Court of Justice sought advice as to the interpretation of the Convention establishing the Organization and more specifically those members which could become members of the Maritime Safety Committee. The operation of the Committee was governed by Article 28(a) of the Convention which read in part:

"... [the Committee] shall consist of fourteen Members, elected by the Assembly from the Members governments having an important interest in maritime safety of which not less than eight shall be the largest ship-owning nations ..." The issue before the Court was in effect the meaning of the phrase "largest ship-owning nations". Did this simply include those States with the largest gross registered tonnage of shipping registered under their flag or did the phrase mean all the tonnage had to be beneficially owned by nationals of the flag States, so that the States concerned could "properly be regarded as the largest ship owning nations in a real and substantial sense..."

The implications of the decision were clear as to whether membership in the Committee shall extend to flag of convenience states or only maritime states which have genuine ownership interests in maritime tonnage. The Court reached the conclusion "that the determination of the largest ship owning nations depends upon the tonnage registered in the countries in question." This decision further dealt a blow to the establishment of a requirement for genuine link between the vessel seeking registration and the registering State in terms of removing any importance of the concept of the genuine link in determining who the shipping powers would be.

International Treaty Law and the Genuine Link

International politicking and diplomacy saw the introduction of the concept of genuine link into international treaty law and, in particular, the High Seas Convention of which Article 5 provides:

"Each State shall fix the conditions for the granting of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise


101 This Committee of the Organization with duties including the setting of standards for aids for navigation, construction and equipping of vessels, manning and safety procedures.

102 IMO Advisor Opinion, supra., Note 100 at 152.

103 Ibid.

its jurisdiction and control in administrative, technical and social matters over ships flying its flag."105 [emphasis added]

The High Seas Convention does not define "genuine link" nor is the provision included in the Convention for any sanctions in instances where there is an absence of a "genuine link". The genuine link if it does exist is created ex post facto following the registration of the vessel by the State.106

The United Nations Convention on the Law of the Sea signed at Montego Bay on the 10th day of December, 1982 did not advance the definition of the pre-conditions for establishing a genuine link.107 Article 91 of UNCLOS is substantially similar to Article 5 of the 1958 Convention. However, Article 94 of UNCLOS defines in far greater detail the obligation of the flag State in the effective "exercise of its jurisdiction and control in administrative, technical and social matters..."108 These obligations extend to all aspects of ship operation, safety and inspection.109

It is not until the 1986 United Nations Convention on Conditions for Registration of Ships that international treaty law attempts to define precisely what is meant by the "genuine link".110 The objectives of the 1986 Convention for the Registration of Ships are clearly set out in Article 1 which provides in part:

"...strengthening the genuine link between a state and ships flying its flag, and in order to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of ship owners and operators..."111

The operative provisions of the 1986 Convention provide for: participation by nationals in

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105 *High Seas Convention*, supra., Note 38, Article 5.

106 It is generally agreed that the underlying rationale of requiring a genuine link between the vessel and the State granting registration are: socio-economic, in terms of labour and safety standards; and, a matter of political consideration in terms of trade sanctions and embargoes. See further *Ready*, supra., Note 80 at 15 and *Sinan*, supra., Note 104 at 102-05.

107 *UNCLOS*, supra., Note 6.

108 Ibid., Article 94.

109 Ibid., Article 94 (3).


111 Ibid., Article 1.
the ownership and/or manning of ships;\textsuperscript{112} the ownership of vessels flying its flag;\textsuperscript{113} the manning of ships and the qualifications and rights of seafarers;\textsuperscript{114} and requirements for the management of ship owning companies and ships.\textsuperscript{115}

The 1986 Convention will only enter into force twelve months after the date on which not less than 40 States, the combined tonnage of which amounts to at least 25 percent of world tonnage, become contracting parties.\textsuperscript{116} Opposition to the Convention by major maritime powers (inclusive of flag states and shipping companies), mainly for the resulting implications of the inherent genuine link, make it unlikely the 1986 Convention will ever come into force.\textsuperscript{117}

The current state of international vessel registration is described as a state whereby customary practice and international treaty law have come to recognize the necessity of vessel registration. Such registration is a recognized pre-requisite for all vessels that traverse the territorial and high seas. Failure to satisfy this registration requirement has repercussions in customary practice and the current state of international treaty law as well as jurisdiction over vessels for the purposes of fisheries regulation.

\textbf{The Status of Stateless Vessels in International Law}

The importance of the flag to any ship sailing the seas is paramount. Both case law, statute law or convention, and customary law remain clear as to the position when no flag, false flag or two flags are flown or even in circumstances where a flag has been changed.

In the well known case of \textit{Naim Monar v. Attorney-General for Palestine}\textsuperscript{118} it was ruled that a ship not sailing under the flag of any state had no right to freedom of navigation. The case involved a ship named the Asya moving immigrants to Palestine none of whom had travel documents or passports authorizing them to enter Palestine. When the Asya was approached by British naval forces the vessel raised the Turkish flag. Upon a boarding party arriving along side, the vessel lowered the Turkish flag and hoisted the Zionist flag. There was no passenger's list or usual ship's papers aboard the vessel.

The Supreme Court of Palestine affirmed an order of the District Court of Haifa whereby, on an application by the respondent, the Attorney-General for Palestine, under the

\begin{itemize}
  \item \textsuperscript{112} \textit{Ibid.}, Article 7.
  \item \textsuperscript{113} \textit{Ibid.}, Article 8.
  \item \textsuperscript{114} \textit{Ibid.}, Article 9.
  \item \textsuperscript{115} \textit{Ibid.}, Article 10.
  \item \textsuperscript{116} \textit{Ibid.}, Article 19.
  \item \textsuperscript{117} The tax, labour cost and liability benefits associated with flags of convenience galvanized major shipping interests against the 1986 Convention. See also Ready, \textit{supra.}, Note 80 at 18.
  \item \textsuperscript{118} (1948) A.C. 351 (hereinafter "the Asya").
\end{itemize}
provisions of section 12 of the Immigration Ordinance, 1941, that Court has confirmed and
ordered the forfeiture of the Asya to the Government of Palestine on the grounds that the
owner of the vessel had abetted the unlawful immigration of the passengers.

The case was appealed to the House of Lords and central to the appeal was whether
the Immigration Ordinance offended a principle of international law involving freedom of
the high seas by the seizure of the vessel and compulsory direction to a Palestinian port.

The House of Lords approved the dictum of Lord Awenstone C.J. in West Rand
Central Gold Mining Co. v. Rex\(^{119}\) wherein that Court referred to with approval the position
of a stateless vessel in the context of freedom of the high seas as pronounced by
Oppenheim\(^{120}\):

"...in the interest of order on the open sea a vessel not sailing under the maritime flag
of a State enjoys no protection whatever, for the freedom of navigation on the open
sea is freedom for such vessels only as sail under the flag of a State."\(^{121}\)

The Court further stated the necessity of a vessel to have a flag as a pre-requisite to a
right to freedom on the high seas in the following manner:

"For the freedom of the open sea, whatever these words may connote, is a freedom of
ships which fly, and are entitled to fly, the flag of a State which is within the comity
of nations. The Asya did not satisfy these elementary conditions. No question of
comity nor of any breach of international law can arise if there is no State under
which whose flag the vessel sails."\(^{122}\)

The Asya is still considered the leading case often cited in many present day cases addressing
the status of flagless vessels in international law. While the House of Lords did not have to
deal with the issue of the nationality of the passengers, the principle which clearly emerged
is that a vessel without a recognized flag and the registration under a flag state can seek the
protection of no state and is subject to the authority of whatever state encounters the vessel
on the high seas. In addition, it is interesting to note that the freedom to navigate on the high
seas is not without restrictions in terms of the requirement that the vessel claiming such right
must be properly registered under a recognized flag.

It is important to note that while a vessel may be deemed to be flagless, it may not
necessarily be without nationality.\(^{123}\) The nationality of a vessel's captain and crew can be

\(^{119}\) [1905] 2 K.B. 391 at 407.

\(^{120}\) Oppenheim, International Law, 6th ed., Vol. I at 546.

\(^{121}\) The Asya, supra., Note 110 at 368-69.

\(^{122}\) Ibid., at 369.

\(^{123}\) Supra., at 30-33.
ascertained and this nationality can be imparted upon the vessel which has not formally been registered and flying a flag evidencing that registration. The issue of the status of a vessel without formal registration is somewhat unclear and subject to state practice. While the general principle of no rights or protection for a flagless vessel is widely accepted and to some degree codified in international statute law, the individual maritime policies, governing legislation and practices of individual states will determine whether a flagless vessel will be the subject of action as in the case of the Asya.

For example, in the United States it has been suggested that the governing practice is that where a vessel is not formally registered and thus not under a legitimate flag, the nationality of the vessel becomes that of the owner of the vessel. The position is stated by O'Connell as follows:

".. when a ship loses it's formal nationality,... its status, then is a question for the municipal law of the owners , and is likely that this would then claim to regulate the ship, and, in that sense, to become a law of the ship’s nationality."

Such an approach if widely accepted, would prove problematic in an age when ship owners are veiled in layers of offshore companies in order to limit liability and motivated by commercial considerations. Ownership is therefore not genuinely linked to an owner of first interest be it a company or individual. The situation is further complicated when other linkages such as the nationality of the captain or crew are considered. The owners, officers and crew of many ocean-going vessels may all be of different nationalities.

Nationality for the vessel is therefore important in that the formal registration process (acquiring a flag) gives clear notice to the world which State shall have jurisdiction over the vessel. In instances where nationality must be determined from the nationality of owner, captain or crew, a degree of ambiguity exists. Such uncertainty does not serve the interests of the law of the sea as between nations in terms of providing notice as to the nationality of vessels as is facilitated by the requirement of formal registration. Nor does the establishment of separate standards as to what can be considered the criteria for determining the nationality of a vessel. There must exist a comity amongst nations in this regard.

The importance and rationale of clearly establishing the State which has jurisdiction over a vessel was summarized by one author as follows:

"The nationality of a vessel determines what nations it may trade with and what nations it may not, whether it may engage in the coastwise trade or fisheries of any nation, what law will be applied by the courts in case of disputes..."125

The same author further commented upon the global importance of vessel registration and the consequences of those without registration in the following terms:

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"The introduction of stateless vessels causes the international regime, predicated as it is on nationality, to breakdown and, with this breakdown there is an attendant loss of the protections afforded by the system."\textsuperscript{126}

The "loss of protections afforded by the system" implies that a vessel without a flag has no diplomatic or jurisdictional protection and is subject to the laws and jurisdiction of any State which encounters the vessel and wishes to challenge the flagless vessel.\textsuperscript{127} In instances where the practice of maintaining stateless status becomes commonplace, no protection can be afforded to even properly registered vessel given the resulting uncertainty as the nationality of vessels on the high seas. The consequence of such a state of circumstances is that the universal right of freedom of navigation on the high seas is threatened.

While little has been written about the stateless vessel phenomenon in international law, one of the leading authorities (Meyers)\textsuperscript{128} explored the legal consequences of statelessness. The limits of what a state can do in dealing with a stateless vessel are set out as follows; a state cannot assert exclusive jurisdiction over a stateless vessel since exclusivity is a function of nationality (or flag) and "no state will be permitted to qualify statelessness as unlawful" since international law does not make statelessness unlawful.\textsuperscript{129} Outside of these wide limits "every state may declare its law applicable to any stateless ship".\textsuperscript{130}

Meyers makes an important distinction between the use of a ship and ownership of a ship. Statelessness goes to use of the ship but protection of the ownership of the vessel is based upon the nationality of the owners.\textsuperscript{131} Thus a vessel without a flag can have its activities questioned and challenged by any state. On the other hand the activities of the owner of the vessel, be it corporate or individual, can only be questioned on a jurisdictional basis by the nation having jurisdiction over the individual or corporation.

The current state of international law does not require a vessel to be registered and have a flag. The relevant provisions of the High Seas Convention (Article 5 (1)) and UNCLOS (Article 91 (1)) provide that States are to fix conditions for the granting of the

\textsuperscript{126} Ibid., at p. 336.

\textsuperscript{127} See McDougal, Meyres S. "The Maintenance of Public Order at Sea and the Nationality of Ships" (1960) 59 American Journal of International Law 25, at 76-77. While the vessel itself may be without diplomatic protection, the captain, crew and owner are entitled to the protection of their national jurisdiction.

\textsuperscript{128} Meyers, supra., Note 88 at 318-21.

\textsuperscript{129} Ibid., at p. 319.

\textsuperscript{130} Ibid.

\textsuperscript{131} Ibid., at 321.
right to fly its flag, but not that a vessel must have a nationality.\textsuperscript{132}

It is interesting to note that the freedoms of the high seas set out in Article 87 (1) of UNCLOS are not restricted to vessels flying a flag but are generally available. The high seas rights set out in Article 87 (1) exist for the benefit of all states and consequently (and arguably) to the citizens of all states including those who may choose not to register their vessels.

Article 91 of UNCLOS provides for the right of a State to fix the conditions for the grant of nationality, registration and the right to fly its flag. There is no requirement that a vessel on the high seas must have a nationality resulting from registration.

UNCLOS Article 92 provides for the status of ships and prohibits a vessel from having more than one flag registration in more than one jurisdiction except as provided for by treaty. Changing a flag during a journey when a change of ownership has not taken place is prohibited as is using more than one flag in accordance to convenience. Again, it is noteworthy that the conditions set forth in Article 92 apply to vessels with flags. There is no implied requirement for vessels to obtain flag registration but only guidelines as to how vessels shall govern themselves upon having obtained registration with no obligations to register set forth for those vessels which are stateless.

The only direct legal consequences for stateless vessels is found in Article 110 of UNCLOS. Article 110 provides for the right of a warship to board or visit a foreign vessel on the high seas. Article 110 is an exception to the general principle of non-interference with vessels on the high seas and as a consequence is drafted in a constrained manner.

The prerequisites or conditions giving rise to the right to board and inspect are found in Article 110 (1) which provides that except by virtue of another treaty, a warship encountering a foreign vessel on the high seas is not justified in boarding unless there are reasonable grounds to suspect that the vessel is engaged in piracy, the slave trade, unauthorized broadcasting\textsuperscript{133}, though flying a foreign flag the vessel is the same nationality as the warship, or "the ship is without nationality".\textsuperscript{134}

The critical section within the context of this paper is "the ship is without nationality." UNCLOS provides:

"Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship."\textsuperscript{135}

\textsuperscript{132} A suggestion requiring a vessel to have a nationality was made during the drafting of the 1958 High Seas Convention but no formal proposal was put forward. See Meyers, supra., Note 88 at 310.

\textsuperscript{133}Article 109 provides special jurisdiction for warships to deal with vessel’s broadcasting illegally providing conditions for jurisdiction in the prosecution of such offending vessels.

\textsuperscript{134} UNCLOS, supra., Note 6, Article 110 (1) (e).

\textsuperscript{135} Ibid., Article 91 (1).
Within the context of UNCLOS, nationality is defined as an entitlement to a flag requiring a connection between the flag and the ship.

Permitting and encouraging such visitations by warships would act to prevent stateless vessels from becoming common place. As noted by Meyers, statelessness means that no state has international legal responsibility for the actions of the vessel and this is a legal vacuum situation which the international community does not wish to encourage. It is interesting to note that one of the early arguments in favour of requiring vessel traversing the high seas to have a flag and thus subject to some national jurisdiction was to protect merchant fleets from pirate vessels, and distinguish pirate vessels from legitimate commercial trade. Pirate vessel have thus gained universal condemnation and anyone participating in piracy is deemed *hostis humani generis* - an enemy of all humanity.

The counter argument can be made that the nationality or statelessness of a vessel cannot rest solely upon the formalities of registration (as contemplated by Article 91 and 110 of UNCLOS) but, where necessary, the nationality of the owner or other criteria which link a vessel to a state, should be considered. Upon examining such criteria, every vessel would have a nationality and stateless vessels would not exist. In the case of vessels which participate in illegal acts as enumerated in Article 110 of UNCLOS, jurisdiction is inherent in Article 110 with the right of a warship to act against the vessel in question.

An interesting question arises as to activities of vessels which are not clearly enumerated in UNCLOS Article 110 but which are considered to be acting contrary to the global interest of maritime states. The use of stateless vessels to fish in areas of the high seas in violation of conservation and management measures established by regional organizations such as NAFO could be deemed such activity. In the case of vessels which do not have formal registration, the presumption of nationality based upon and determined by ownership, or the nationality of the captain or crew is unworkable. In many instances the ownership of the owner may not be easily ascertainable given beneficial interest structures in the form of off-shore corporations. While the captain and crew usually have passports, seafarers books and qualification certificates substantiating nationality, the various nationalities on modern day vessels makes deriving a genuine link difficult. In instances where warships must act on short notice to apprehend a vessel suspected of being stateless and participating in a proscribed activity, the necessary checks necessary to verify ownership are not possible within a reasonable time. The importance of formal registration is therefore important in allowing for a reliable and speedy means of determining the nationality of a vessel.

The process by which a warship stops a vessel on the high seas to verify nationality

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138 Ibid.
or flag has been described by one author as follows:

"To effect a stoppage, the warship will hail the suspect vessel or, if this is impossible or ineffectual, fire across her bow. Should the suspect vessel prove obstinate, the warship may use reasonable force. The actual verification of flag takes place aboard the suspect vessel. The warship will send a boarding party under the command of an officer to the suspect vessel. Once aboard, the boarding party will examine the papers and documentation of the suspect vessel. If the ship's papers are in order and the exercise of the droit d'enquete du pavillon has discharged the original suspicions of the warship, the warship will allow the merchantman to go on her way."\(^{139}\)

In instances where the exercise of droit d'enquete du pavillon support or do not dismiss the suspicion the vessel is participating in some proscribed activity giving rise to the boarding of the vessel, the warship is entitled to search the subject vessel.\(^{140}\) The purpose of a search would be to produce evidence to substantiate the suspicions giving rise to the boarding. The right of search is wide in scope and includes:

"... not only a right to inquire into the national character, but to detain the vessel, to stop the progress of the voyage, examine papers, to decide on their regularity and authenticity, and to make inquisition on board... into the business which the vessel is engaged in. In other words, it describes the entire right of belligerent visitation and search."\(^{141}\)

There is a duty of due care in exercising the right of search which Oppenheim described as follows:

"Search is effected by an officer and some of the crew of the man-of-war, the master and crew of the vessel to be searched not being obligated to render any assistance whatever, except to open locked cupboards and the like. The search must take place in an orderly way, and no damage must be done to cargo. If the search proves everything to be in order, the searching party must carefully replace everything

\(^{139}\) Ibid., at 1175.

\(^{140}\) UNCLOS supra., Note 6, Article 110 (2). See also High Seas Convention, supra., Note 38, Article 22 (2) and Reuland, supra., Note 137 at 1175.

\(^{141}\) Letter of Mr. Daniel Webster, Secretary of State, to Mr. Everett (28 March 1843) reprinted in 3 F. Wharton, A Digest of the International Law of the United States (2d. ed. 1887) at 136.
removed, a memorandum of the search is to be made in the log-book, and the searched vessel is to be allowed to proceed on her course."142

If the search produces evidence which substantiates the suspicions of a proscribed activity, then the subject vessel may be arrested and taken to a port in further prosecution of the charges.143 It is important to note that should a vessel be determined to be without a flag, then the warship is free to apply the laws of its flag state since the flagless vessel is outside the jurisdiction of any state and without any form of diplomatic protection afforded by such jurisdiction and subject to the laws of any warship encountering the stateless vessel.

Should the search yield no evidence to substantiate the suspicions of the warship resulting in charges being laid for a proscribed activity, the warship may be liable for any loss or damages sustained by the boarded vessel as a result of the boarding and search.144

The vessel which is determined to be stateless as the result of a boarding and inspection by a warship can be subject to the jurisdiction of the country boarding it. Should Canada board and inspect the vessel and make the determination that the vessel was stateless, Canadian domestic law could be applied to the vessel. If the stateless vessel was fishing in the NAFO area in violation of that organization's conservation and management measures, then Canadian fisheries law both domestic and resulting from Canada's obligations under NAFO could be applied to the vessel. In this regard Canada must have the requisite legislative authority to act against stateless vessels. A recent example of a stateless vessel fishing in the NAFO area illustrated the problems faced when a coastal state wishes to challenge such a vessel pursuant to UNCLOS Article 110.

The Case of the M.V. GADUS

The fishing vessel GADUS was a Honduran registered vessel frequently sighted fishing on the Nose and Tail of the Grand Banks. The vessel was a NAFO non-contracting party vessel in that it fished in the NAFO area without quota allocations utilizing the protection of its Honduran flag of convenience. The vessel was sighted a total of 23 times in 1993 fishing in the NAFO regulatory area. The vessel was targeting cod in violation of the moratorium on that species and was known to have returned to the Iberian coast a number of times to off load its catch.

The Department of Fisheries and Oceans (DFO) surveillance plane was able to photograph the vessel fishing in the NAFO area and these same photographs revealed the sidemarkings of the vessel including registration numbers under the Honduran flag. Searches conducted at the Honduran shipping registry revealed the vessel was owned by a limited company incorporated in Panama and whose sole asset was the vessel. Further checks on the company revealed it to be beneficially owned by Portuguese interests. Consultations with


143 Reuland, supra., Note 137 at 1176.

144 UNCLOS, supra., Note 6, Article 110 (3).
DFO historical records revealed the vessel was formerly named the LOUKOS and registered under the Portuguese flag and having fished in the NAFO area as a Portuguese NAFO vessel. The vessel was a classic case of a NAFO member vessel reflagging to Honduras to avoid the application of NAFO conservation and management measures.

As part of the routine Canadian diplomatic initiative for dealing with NCP vessels, Canada made diplomatic representations to Honduran authorities in August of 1993. The basis of the representations was the continued presence of the vessel in the NAFO area fishing commercial endangered stocks in violation of NAFO conservation and management measures. Photo evidence was also provided to Honduran authorities at that time confirming the vessel's fishing activity in the NAFO area. The decision was subsequently made by Honduran authorities to deregister the vessel from the Honduran flag on 23 August 1993.

Upon the vessel being deregistered it left the NAFO area only to return one month later. On 25 September 1993 the vessel was sighted and approached by a DFO fisheries patrol vessel and a request was made of the captain of the GADUS to permit a "courtesy boarding" by the Canadian vessel. A routine part of such courtesy boardings by Canadian fisheries officials of the vessel is to confirm the registration of the vessel. This is usually done by asking the captain to confirm the flag of the vessel and if the captain is willing, production of the registration documents verifying this information. At the time of the boarding the captain was asked as to the flag of the vessel and the response given was that the vessel was still entitled to fly the Honduran flag. No documentation was produced to verify this statement. The response was a surprise to Canadian authorities. It was anticipated that for the vessel to return to the NAFO area to fish it would have sought and obtained another flag of convenience after Honduras deregistered the vessel. Such was not the case.

145 *Infra.*, se 71-74.

146 The basis of the deregistration by Honduran authorities was set forth in a resolution issued by the Honduran shipping registry on 23 August 1994 and citing the continued violation of NAFO conservation measures by the vessel and bringing the Honduran flag into disrepute.

147 Courtesy boardings are entirely at the discretion of the captain of the vessel in compliance with respect for the sovereignty of the vessel's flag. Since the vessel enjoys the diplomatic protection an immunity associated with the flag state, the vessel's captain (on behalf of the vessel owners) given the sovereign rights pertaining to the vessel.

148 One of the concerns which was raised during the Task Force meetings was whether it could be reasonably assumed that the captain had knowledge of the deregistration of the GADUS by Honduran authorities. The assumption was that made that he did have such notice. The Honduran authorities upon deregistering the vessel provided notice to this effect to the vessel's agents in Honduras and directly to the owners. The deregistration therefore came to
When the response of the captain of the GADUS was made known in Ottawa Canadian officials faced a dilemma. The purpose of the Canadian diplomatic initiative with regard to NCP vessels was to seek deregistration, or fines in lieu of deregistration, as a means of persuading NCP vessels to leave the NAFO area. The deregistration of a vessel was expected to make it vulnerable as a stateless vessel subject to boarding and arrest pursuant to UNCLOS Article 110 (1) (d) - the right to board on reasonable grounds to believe the vessel is stateless. The GADUS posed a problem which required a response if the Canadian diplomatic efforts were to remain productive.

As a preliminary step Canadian authorities conducted a form of due diligence by confirming with Honduran authorities, and through independently retained legal counsel in Honduras, that the vessel was deregistered as of 23 August 1993. When the deregistered status of the vessel was confirmed, Canadian authorities realized the GADUS was a ship without nationality in accordance with UNCLOS Article 110 (1) (d). In addition, the captain was alleging to be entitled to the Honduran flag when such was not the case and thus misrepresented the flag and status of the vessel.

Regular sighting reports confirmed that the GADUS remained in the NAFO regulatory area to fish. This led to the formation of a Task Force in Ottawa to deal with the specific issue of the GADUS and stateless vessels in general.\textsuperscript{149} The argument was advanced by External Affairs that the GADUS was a stateless vessel subject to boarding by a Canadian warship pursuant to UNCLOS Article 110 (1) (d) and given that the status of the vessel was not likely to change in the near future, the vessel’s fishing activities would be the subject of Canadian domestic law given that international law allows a stateless vessel to be boarded by warships.\textsuperscript{150} In such a case the GADUS could be charged under provisions of the Fisheries Act and the Coastal Fisheries Protection Act both of which provide for Canadian jurisdiction beyond 200 miles for vessel subject to Canadian law as would be the GADUS.\textsuperscript{151}

Time was of the essence in that the continued presence of the vessel in the NAFO

\textsuperscript{149} The Task Force was comprised of officials from the then Departments of External Affairs, Fisheries and Oceans, Justice, Transport (with responsibility for the Canada Shipping Act), the Canadian Coast Guard, Department of National Defence, RCMP and Privy Council Office.

\textsuperscript{150} Supra., at 44.

\textsuperscript{151} In effect the GADUS, because of its stateless status would be treated as a Canadian vessel for the purposes of applying Canadian law.
area was not a certainty. The Task Force was given the mandate of determining whether a boarding of the vessel by a Canadian warship pursuant to UNCLOS Article 110 (1) (d) was justified. This decision was to be made under the pressure of a time frame which may require a Canadian warship immediately departing a port in eastern Canada to intercept the GADUS.152 Ongoing efforts made by the Task Force to determine whether the vessel obtained a new flag. It would be impossible to determine definitively whether the vessel obtained a new flag short of conducting shipping registry searches at the appropriate registry to which the vessel may reflagged. Given the large number of open registries which would be available to the owners of the GADUS, this was not possible. If the vessel did obtain a new flag after deregistration, the captain would have related this information at the time of the boarding on 25 September 1993.153 If the vessel was stateless as of 25 September 1993, it was likely the vessel had not obtained a new flag. If at some point subsequent to 23 August 1993 and the time of the boarding the vessel obtained a new flag and convinced the boarding party of such registration, then the GADUS would be free to go and entitled to advance a claim for damages for any loss occasioned by the boarding.154

The Departments of External Affairs and Fisheries and Oceans as well as the Canadian military were comfortable with the prospect of a boarding pursuant to UNCLOS Article 110 (1) (d).155

152 An additional pressure was the costs of such an operation which were estimated at $2.5 million for a warship to undertake the boarding of the GADUS.

153 The assumption was made that the captain as the senior representative of the vessel owners on board the vessel would have been informed as to the deregistration of the vessel by Honduras. An argument could be made in support of this assumption that a duty existed on the part of the owners to inform the captain of the vessel as to the change of the registration status. The change of status was relevant for the operation of the vessel on the high seas and therefore was knowledge to be related to the captain. The assumption is further supported by the fact that modern communications place owners and their agents in almost daily contact with their vessels.

154 Supra., at 48-49.

155 See Fenrick W.J., "Legal Limits on the Use of Force by Canadian Warships Engaged in Law Enforcement" The Canadian Yearbook of International Law (1980) 113 at 115 which argues that in the enforcement of fisheries-related offenses against foreign vessels the use of force should be authorized by the governing statute. In the absence of such statutory authority, warships could rely upon the general provisions of the Criminal Code. Note that in such an instance an offence has been committed and the use of force against a warship is a means by which to bring the offending vessels before the Canadian courts should the vessel attempt to flee.
The benefit of the process undertaken by the GADUS Task Force was to bring to the attention of Canadian officials that Canada, through its domestic legislation, is not adequately equipped to enforce UNCLOS coastal state rights against stateless vessels. In this regard the acceptance of Canada of UNCLOS as customary international law did not automatically create the right of enforcement of UNCLOS provisions in domestic law.

While the GADUS could not be boarded pursuant to UNCLOS Article 110, the legislative amendments were made to cover stateless vessels pursuant to Canada's fisheries jurisdiction inside and outside the 200 mile limit. The matter of the GADUS was pursued with Honduras who, when advised of the claim to the right to fly the Honduran flag after deregistration, indicated this was contrary to Honduran shipping law.

**Freedom of the High Seas versus the Common Heritage of Mankind**

The inter-relationship between NAFO, the FAO Compliance Agreement and whatever instrument emerges from the UN High Seas Conference is an effort towards greater global regulation of fishing vessels on the high seas. The motivating principle and rationale is urgent need for effective implementation of conservation and management measures on a global scale. In addition, a means by which to compel those nations (and their vessels) who are outside the jurisdiction of regional fisheries organizations to respect conservation and management measures set by those organizations in their areas of jurisdiction without requiring flag states to be members of such regional organizations.

The move towards greater high seas regulation appears destined to conflict with the traditional of freedom of the high seas. One dimension of the conflict is summarized by one author as follows:

"We are faced with the paradoxical position that, on one front, the principle of freedom of the seas is under attack by a principle of sovereignty motivated by the desire of coastal States to acquire exclusive rights in the fishery and mineral resources of the offshore zones, while, on another front, the principle of the freedom of the seas is being advanced in defense of exclusive rights to exploit seabed resources and against the attempt to establish these resources as a new species of *res communis*, a common heritage of mankind."\(^{156}\)

The irony is that UNCLOS, which supports the freedom of the high seas,\(^ {157}\) also provides for cooperation between nations in the advancement of conservation and management measures.\(^ {158}\)

Can the two concepts exist side by side in the same agreement? The answer may in part be that the freedom of the high seas is a right to be exercised only to the extent it does

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\(^{157}\) UNCLOS, Note 6, Articles 88, 89 and 90.

\(^{158}\) Ibid., Articles 192-200.
not infringe the rights of other States in terms of conservation and management of a resource upon which those States are dependent as provided for in UNCLOS Article 116. In addition, an unfettered freedom of the high seas creates the potential for a nation (or vessel) exercising that right violating and diminishing the interests of all nations. The common heritage of mankind conceptualizes common interests in a resource which must be protected from the free exercise of rights by a few which damage the interests of the many. A form of economic rationalization or cost-benefit analysis underscores such an approach whereby the long-term benefits of all nations must be considered as compared to the short-term gains of a few - ship owners basing their activities on freedom of the high seas and the corresponding freedom to fish pursuant to Article 116 of UNCLOS. Article 116 however does have limitations upon the right to fish as noted in subparagraphs (a) and (b).

The strictly legal perspective would advocate a position whereby:

"...the right of the use of the high seas may be exercised for any purpose not expressly prohibited by international law. Thus, the onus of proof lies on those seeking to assert the existence of a prohibitory rule."\(^{159}\)

Certainly those vessels which fish in violation of NAFO conservation and management measures can make such an assertion in that their activities are not in contravention of any international law by which they are bound. Until such time as an international regime is implemented and enforced to deal with the high-seas overfishing problem, vessels will continue to fish under the "legal loophole" of freedom of the high seas.

Another approach to the interpretation of international law is that it is an evolving process shaped as much by the practices of States as by the ratification of international treaties. In this regard international law can be shaped by States who react to unforeseen circumstances or new situations not provided for by the applicable and existing regime of international law. Such could be the case with the crisis in the Northwest Atlantic fishery. The current state of the law of the sea was not able to deal with the situation in the interim until the UN High Seas Conference and FAO Compliance Agreement are fully implemented, a gap exists in international law.\(^{160}\) It is in response to these shortcomings in international law that Canada undertook its initiative to deal with the foreign overfishing problem.

**The Canadian domestic initiative to deal with high-seas overfishing**

While both the UN High Seas Conference and the FAO Compliance Agreement

\(^{159}\) Brown, *supra.*, Note 156 at 536.

attempt to implement a global, long-term regime for high seas fisheries, the continued overfishing by NCP vessels in the NAFO area posed a more immediate concern on the part of Canada. While Canada continued to participate in the negotiation processes at the international level, a domestic initiative was mounted to deal with NCP vessels.

There were certain recognized limitations which governed and shaped Canada’s approach. These included: the limits of the existing state of international law in terms of an absence of regulation of the high seas fishery; the conflict between principles of conservation and management and the rights of vessels to fish on the high seas; the inability of NAFO to deal with its own member vessels which reflagged to avoid conservation and management measures; the realities of the slow, pain-staking process involved in negotiating international agreements to deal with high seas problem; and, the continued presence of NCP vessels in the NAFO area taking fish that Canadian fishers were forbidden to take in the name of conservation and management.

The Canadian Approach within NAFO

Canada sought a solution to the NCP overfishing problem within the NAFO system. In this regard Canada was at the forefront encouraging that organization to make representations to flag states. The basis for such representations would be that the vessels of the flag states are fishing in the NAFO regulatory area in violation of NAFO conservation and management measures. The responsibility for NCP vessels was delegated to a special standing committee with responsibility on behalf of NAFO. STATFAC has responsibility for keeping statistics on NCP vessels in the NAFO area and devising a strategy for dealing with the vessels. For example, NAFO undertook a joint diplomatic demarche to flag of convenience states including Panama, Honduras and Belize in February of 1994 making representations that the flag states remove their vessels from the NAFO area. The frequency of such joint efforts by NAFO are few and far between for the most part because of the difficulty in coordinating as between NAFO members and the varying importance

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161 Supra., at 20-21.

162 Supra., at 26-29.

163 Standing Committee of Fishing Activities of Non-contracting Parties in the NAFO Regulatory Area (STATFAC).

164 Data on Non-Contracting Parties Activities in the NAFO Regulatory Area, Meeting of the Standing Committee on Fishing Activities of Non-Contracting Parties in the NAFO Regulatory Area (STATFAC), Serial No. N2234, NAFO/GC Doc. 93/2, Dartmouth, Canada, 28-30 April 1993 at 1-3.

165 Participants in this demarche on behalf of NAFO included Canada, the EU and Japan. Correspondence Between NAFO Secretariat and Non-Contracting Parties, NAFO Secretariat, Serial No. N2284, GC Doc. 93/3, Northwest Atlantic Fisheries Organization, Dartmouth, Nova Scotia.
given to such representations by NAFO members. Canada, facing the crisis at its door step, placed greater emphasis upon such NAFO representations and being unsatisfied with the frequency of such efforts, initiated its own diplomatic initiative.

The Canadian Diplomatic Initiative

The factor most difficult for Canada to deal with was the outrage of the Province of Newfoundland which faced unprecedented unemployment because of the Grand Banks moratoria. The political stakes were high for the then Conservative government. Central to the entire Canadian approach was to stop NCP vessel from further decimating the already depleted fish stocks on the Nose and Tail.

The problem of NCP vessel and overfishing was for ten years prior to 1990 within the sole domain of the Department of Fisheries and Oceans (DFO). During the period 1980-90 the issue was always addressed within the context of the Canadian representations at NAFO which was the responsibility of DFO. With the acceleration of the depletion of fish stocks and the increase in the number of NCP vessels in the NAFO area, a more focused approach was deemed necessary.

The decision was made by the then Minister of Fisheries and Oceans to establish a special office whose rationale was to deal with the overfishing issue. The office was to be headed by a specially appointed Canadian Ambassador who filled the position of the Office of the Ambassador for Fisheries Conservation. The mandate of the Office was simple - to represent Canada in the negotiations with regard to the UN High Seas Conference and the FAO Compliance Agreement and, to deal with NCP vessels.

In dealing with NCP vessels a number of approaches and strategies were undertaken - all of which serve the objective of removing the NCP vessels from the NAFO regulatory area. This general objective has been attained by a concentrated effort to have flag states take action against NCP vessels for which they are responsible and to target individual NCP vessels. The details of such a strategy are outlined below.

i) Photographic evidence

The Department of Fisheries and Oceans as part of its surveillance program regularly monitors the activities of NCP vessels in the NAFO area by over flights of patrol aircraft. The aircraft are specially equipped with state-of-the-art radar equipment indicating the location of NCP vessel in relation to the 200 mile limit and the Nose and Tail of the Grand Banks. In addition, the aircraft are equipped with special photographic equipment which is utilized to photograph a NCP vessel when sighted fishing in the NAFO regulatory area. The photographic equipment records on the negative the longitude and latitude of the NCP vessel at the time the photograph is taken.

ii) Diplomatic Representations

Formal diplomatic representations to flag states whose vessels are sighted and photographed fishing in the NAFO regulatory area has been ongoing since 1991. The representations are meant to bring to the attention of the flag state that its flag vessels have been fishing in the NAFO area without quota allocations from NAFO. Individual vessels are brought to the attention of the authorities (usually those officials in charge of the shipping registry and appropriate ministries of foreign affairs) of the flag state with a request from Canada that they take action against the vessels in question.
The representations usually take the form of either a visitation to the flag state with the appropriate representations to that state’s officials. If a visitation cannot take place, the Canadian embassy or consulate with responsibility for the flag state will forward a Diplomatic Note noting the activity of the NCP vessels in the NAFO area. In the case of either type of representation, a photographic evidence package is forwarded which includes a photograph of the vessel or vessels together with a map indicating the location of the sightings on the Grand Banks.

The general objective of the diplomatic representations to the flag states is to compel the responsible state having jurisdiction over the vessel to take action against their vessels for their fishing activity in the NAFO area. In the case of the flag states such as Panama, Honduras, Venezuela whose vessels have regularly appeared in the NAFO regulatory area, those states have acted to deregister vessels which were repeat offenders and fine first time offenders. In 1992-93 a total of 23 NCP fishing vessels were fined by Panama for fishing in the NAFO regulatory area for a fines totalling $121,500.00 (US). During the same period flag states deregistered a total of 12 vessels for repeatedly fishing in the NAFO regulatory area. The basis for the deregistrations vary from flag state to flag state and will be subsequently discussed.

As follow up to diplomatic representations, when a vessel is deregistered by a flag state, Canada through its embassies and consulate abroad makes representations to other flag states with open registries by delivering diplomatic notes requesting they not accept deregistered vessels on their shipping registers. The basis of the request is noting the vessels were deregistered by their last flag state for violating NAFO conservation and management measures. Many states such as Panama and Honduras have complied with such a request.

iii) Individual Vessel Research and Intelligence

NCP fishing vessels, much like all other flags of convenience vessels, are commercial enterprises, sensitive to costs of operation. Canada attempted to make the continued presence of such NCP vessels in the NAFO area commercially expensive in hopes of persuading the vessels in question to leave the area. The fining and deregistration of a vessel would incur expenses for owners who in addition to the fines would have to incur costs of obtaining a new flag (if a flag could be obtained). Searches of shipping registries were

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166 Venezuela swiftly deregistered two fishing vessels under its flag found fishing in the NAFO area after only one Canadian representation. Note that a vessel will be fined twice and upon the third Canadian representation for fishing incident in the NAFO regulatory area the vessel would be fined and deregistered by Panama or Honduras.

167 NAFO Non-contracting Party Report, supra., Note 56 at 8 and 11.

168 Ibid. In 1992-93 the following vessel deregistrations took place as a direct result of Canadian representations - Panama - 6; Venezuela - 2; Honduras - 3; and Sierra Leone - 1.
conducted in all flag states in order to determine the identity of the registered owners and where possible the beneficial ownership interest in the vessels. In all cases ownership interest was linked to another state than that of the vessel's flag.

Detailed registry searches would confirm whether vessels were actually registered on the shipping registries as claimed by their sidemarkings. In addition, the search yielded information as to mortgages and liens against the vessel all of which could be utilized to bring pressure to bear upon the vessel owners. For example, a vessel that is deregistered by the flag state will find itself in difficulties with the holders of the mortgage or lien against the vessel given the deregistration invalidates the mortgage or lien which would be filed against the vessel on the shipping registry in question.

iv) Bilateral Agreements with Flag States

Continued representations to many flag of convenience states resulted in direct commitments to deal with their flag vessels by some nations in the form of bilateral agreements. In such instances the context of the presence of the flag state's vessels in the NAFO area is addressed in the broader context of diplomatic and economic relations with the flag state in question. In such instances Canada would rely upon broader pressure points to suggest that the flag state should do something about its vessel.

In the case of Korea, as recent as 1992 that country's vessels were responsible for half of all fish caught in the NAFO regulatory area by NCP vessels. The Korean vessel presence in the NAFO area was therefore substantial and of great concern to Canada. Continued diplomatic pressure by Canada resulted in bilateral meetings in Ottawa in February of 1993 whereby Korea agreed to remove all its flag vessels from the NAFO area by the end of April, 1993. Korea has honoured this commitment although a few of its vessels have reflagged to other states. One pressure point which was seriously considered was trade sanctions against Korea.

Second to Korea, Panamanian vessels were the next largest presence in the NAFO

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169 Supra., see page 2 and note 51.

170 Summary of Data concerning Fishing by Non-contracting Parties in the NAFO Regulatory Area 1992-93, Department of Foreign Affairs and International Trade, Ottawa, 22 October 1993 at 1.

171 "Korea Agrees to Remove Vessels from NAFO Area", News Release, Department of Fisheries and Oceans, 12 March 1992.

172 Three vessels have reflagged. The MOBY DICK to Panama, the DANICA to Honduras and the ST. THOMAS to Sierra Leone. Source: NAFO Non-contracting Party Report, supra., Note 56 at 5.

173 Korea was especially vulnerable to such sanctions with plans on the drawing board for a new Hyundai automobile plant in Ontario. Ultimately Korea was faced with the possibility of trade sanctions versus dealing with a number of fishing vessels. The cost and benefits of each certainly helped to persuade Korea to remove its vessels from the area.
regulatory area. In April of 1992 then Minister of Fisheries Crosby made a visit to Panama for the specific purpose of addressing the presence of Panamanian flag vessels in the NAFO area. The result of the visit was the signing of a Joint Communiqué whereby Panama agreed to fine or deregister all of its flag vessels proven to have fished in the NAFO area.\textsuperscript{174} It was this bilateral agreement which resulted in the large number of Panamanian fined and deregistered vessels.\textsuperscript{175}

\textbf{v) Ongoing Negotiations with Other Flag States}

Negotiations and representations have resulted in a number of flag of convenience states dealing with their vessels for their fishing activity in the NAFO regulatory area. The majority of presentations made to the countries named occurred in 1993-94. The results of these negotiations and representations are highlighted below.

\textbf{1. Panama}

Eight Panamanian flag vessels were sighted fishing in the Regulatory Area in 1994 as compared to 13 in 1993. Four of these vessels reflagged to Belize at some point in 1994. As a direct result of Canadian representations made as part of a NAFO Joint Demarche in February and a Canadian Demarche in May, Panama deregistered a total of 12 vessels and fined one vessel (the \textit{MOBY DICK} which was subsequently deregistered) in June.

Panama has agreed to amend its annual registration renewal procedure to facilitate dealing with flag of convenience fishing vessels which violate international conservation and management measures. In particular, Panama agreed to impose a requirement upon all fishing vessels which seek Panamanian registration, or renewal of an existing registration, to provide notice of the area in which the vessel intends to fish and the authorization of the vessel to fish that area. The draft renewal registration form provided by Panama will result in the issuance of navigation 'patente'.\textsuperscript{176} The patente will be issued conditional upon the following information being provided at the time of application: (1) specifics as to the type of fishing gear or tackle to be use; (2) the area or location (specifying latitude and longitude) in which the vessels intends to fish; (3) the species the vessel has received authorization to catch in the designated area with a copy of the authorizing document from the responsible

\textsuperscript{174} \textit{Joint Communiqué, Visit of the Minister of Fisheries and Oceans, Government of Canada to Panama, Panama City, 13 April 1994.}

\textsuperscript{175} \textit{Supra., see 64.}

\textsuperscript{176} Panama prepared and forwarded the draft registration form for Canada’s review in fulfilment of its commitment during Canadian representations made in Panama in May of 1994. A patente is the term referring to the document issued pursuant to Panamanian shipping legislation signifying either provisional or full registration on the Panamanian registry. See Ready, \textit{supra.,} Note 80, at 119 and \textit{Panama Registry: Maritime Laws & Regulations 1925-1984,} Republic of Panama, Ministry of Finance and Treasury, Directorate General of Consular and Maritime Affairs at 8-10.
regional organization responsible for the area specified in (2). The draft patente further provides on the form in bold print the following:

"Any variation/alteration of the conditions [(1), (2) and (3) noted above] upon which this navigation patente have been granted, will be cause for revocation by the Directorate General of Consular and Maritime Affairs."

Panama has made major concessions in order to deal with flag of convenience fishing vessels on its registry in part as a result of wishing to maintain the reputation of the Panamanian flag. Flag of convenience fishing vessels such as those brought to Panama's attention by Canada constitute only 10 percent of the total number of vessels on the Panamanian registry. Their importance to the Panamanian flag did not warrant leaving the matter raised by Canada as a result of continued representations unattended. Panama also realized with developments such as the FAO Compliance Agreement and the pending results of the UN High Seas Conference were the future direction of international law in terms of placing restrictions upon the registration of fishing vessels on the high seas.

Panama expressed concerned and objected to any actions by Canada against its flag vessels pursuant to the Canadian domestic legislation without first obtaining Panamanian consent for such actions. Such flag state consent would be important to Panama in order to maintain the stature of its shipping registry which would be undermined by Canadian actions without first obtaining Panamanian consent. The ability of Panama to protect its vessels on the high seas may only be an illusion - yet an illusion necessary to maintain in order to uphold the unalienable rights of an open shipping registry. A seizure of Panamanian registered vessels regardless of the fact they are fishing vessels violating conservation and management measures would cause merchant vessels to question the protection afforded them under the Panamanian flag.

The basis of Panamanian deregistration of its flag vessels was pursuant to the Joint

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178 Draft Navigation Patente as provided to Canadian Embassy officials in Panama on 04 August 1994 by Director General Garibaldo, Consular and Naval Affairs, Department of Finance and Treasury.

179 Ibid.


181 Meeting with Panamanian Director General Garibaldo, supra., Note 178.

182 Supra., at 30-33.
Communique made with Canada. The specific authority under Panamanian law was the general authority afforded to the Director General of Consular and Shipping Affairs pursuant to Article 10 of Law No. 2 which states as follows:

"The Directorate General of Consular and Shipping Affairs shall, "ex officio", or upon request by an interested party, declare cancelled the registration of a vessel in the National Merchant marine for any reasons specified by the Law."  

In addition, a special resolution required masters, owners and registered owners of vessels of registered vessels that fish in international waters to observe the provisions of international conventions.

Deregistration is effected by Panama providing written notice of the deregistration resolution to the vessel owners and their legal representatives in Panama. Deregistration is effective immediately upon issuance of the deregistering resolution. There is a 30 appeal period during which an appeal can be made of the vessel's deregistration. The nature of the appeal is such that cause must be shown by the appellant as to why the vessel should be reinstated under the Panamanian flag.

The resolutions issued by Panama deregistering vessels have in practice attempted to find some technical shortcoming in the registration of the vessel. For example, the subject vessel owners having missed a filing deadline or failed to pay registration or renewal fees on time. In other, less frequent instances, the resolutions including wording specifically addressing the overfishing activities of the deregistered vessel. For example, the resolution deregistering the vessel MOBY DICK reference was made to Resolution 603-04-151-ALCN and that there is a duty to obey the fishing bans imposed by NAFO. Further that "the Directorate General is empowered to impose sanctions on those who violate the relevant legal provisions of such conventions". Such conventions are specifically referred to include the NAFO Convention. There has been no explanation provided by Panama for the variance in basis for the resolutions since all vessels are the subject of Canadian representations and one

183 Supra., see note 174.
184 Article 10, Law No. 2, of 17 January 1980, National Legislative Committee, Republic of Panama.
186 Law No. 2, supra., note 183, Articles 14, 17 and 19.
187 Ibid., Article 14.
would expect some consistency as to the legal justification for deregistration.  

2. **Honduras**

Five Honduran flagged vessels fished in the NAFO Area in 1994 as compared to 6 in 1993. Two of the vessels were crewed by Koreans and three by Portuguese nationals. In February of 1994 Canada made diplomatic representations with regard to three vessels, the **THUNNUS**, **ESPADARTE** and the **DANICA**. The **THUNNUS** and **ESPADARTE** were deregistered and the **DANICA** fined as a result.

A NAFO Joint Demarche (EU, Canada and Japan supported by Russia) in late February produced a commitment to act against its flag vessels fishing in the NAFO area. A subsequent Canadian visit to Honduras in May resulted in the following commitments: (1) to deal with Honduran registered flag of convenience vessels in the NAFO area; (2) to not protest the arrest of any Honduran flag vessel arrested pursuant to the Canadian domestic legislation; and (3) an indication that legislation presently before the Honduran National Congress would amend the present shipping act to allow Honduran authorities to levy heavy fines to better address the issue of flag of convenience vessels fishing in violation of conservation and management measures.

The proposed amendment to Honduran shipping legislation noted above were part of sweeping amendments to the Honduran **National Merchant Navy Administration Act**. The amendments were largely the work of the mover of the proposed amendments, Jorge Roberto Maradiaga, Member of the Honduran Parliament. In the explanatory statement submitted by Mr. Maradiaga supporting the Draft Decree he noted the following:

"...the concrete requirements of a changing world have created an immediate need for the adoption and implementation of a new law incorporating changes in modern shipping law and the regulations contained in international conventions, reflecting the **...**

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189 Canada has not requested an explanation since to do so may appear to be meddling in internal Panamanian affairs. Canada has respected the sovereignty of the States to whom representations have been made. Speculating it may be that Panama is attempting to eliminate a basis of appeal by sticking to missed deadlines and payment of fees as the basis for deregistration. Deregistration for fishing activity contrary to NAFO measures presupposes facts indicating guilt on the part of the vessel. In effect the vessel is convicted (deregistered) without a trial and a form of due process where the photo evidence submitted by Canada can be questioned or the basis of cross-examination.

190 National Congress, Republic of Honduras of Decree No. 55, 22 March 1943.

need to protect human lives at sea and the marine environment." [emphasis added]\(^{192}\)

This wording was echoed in the preamble of the draft legislation which provided as follows:

'...amendments to [the Act] are essential to ensure that it appeals to the international shipping world and helps Honduras attract significant resources for its National Treasury, under the framework of the international conventions that protect human life at sea and the environment." [emphasis added]\(^{193}\)

One of the major objective of the amending draft Decree is to separate the Honduran Shipping registry from the Honduran Military Forces with authority to be vested in the new position of Directorate General of the National Merchant Navy with a list of 32 designated duties one of which includes:

"Ensure compliance with national and international standards designated to preserve and protect the marine environment."\(^{194}\)

While the cited provision is less detailed than Canada desires, the anticipated intent and application by Honduras is expected to allow for a broad interpretation of "preserve and protect the marine environment" to include the protection of living marine resources.

To a large extent Canada is relying upon Honduran past practice as exhibited in deregistrations of vessels resulting from Canadian representations. In this regard Honduras has affirmed its commitment to UNCLOS and conservation and management measures in that resolutions deregistering vessels include the following clauses in the preamble:

'WHEREAS:

Honduras is a signatory to the United Nations Law of the Sea Convention and recognizes this convention as part of customary international public law.

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\(^{193}\)Amendments to National Merchant Navy Administration Act, Supra., Note 191 at 3.

\(^{194}\) Article 90.18, Title XV, Special Title, Chapter I, Amendments to National Merchant Navy Administration Act, supra., Note 191 at 8-9.
WHEREAS:

Honduras is a responsible country that keeps its international commitments and therefore agrees in accordance with international law to cooperate and assist other States in dealing with global environmental problems.

WHEREAS:

In accordance with international law, Honduras recognizes the seas and oceans beyond its national jurisdiction as the common heritage of humanity and is aware of the need to take corrective measures for the conservation and continued existence of migratory deep-sea species.

WHEREAS:

The Northwest Atlantic Fisheries Organization (NAFO) is a result of agreement among countries friendly to Honduras for joint efforts to conserve migratory deep-sea fish in areas delimited by the organization, for the benefit of all mankind.\(^{195}\)

It is interesting to note that the current shipping legislation in Honduras allows for deregistration only in instances where: the vessel in question joins the navy of a country hostile to Honduras; the vessel if used routinely for smuggling, illegal or clandestine trade or piracy and if the vessel has obtained the flag of another country.\(^{196}\) Honduras in the past relied upon its general authority to control its flag vessel as vested in its domestic legislation and the inherent right to revoke its flag from vessels that participate in overfishing and thus act to the "detriment of Honduras' international reputation and image".\(^{197}\) In addition, Honduras deregistered vessels relying upon the general powers vested in UNCLOS Article 63 (2)\(^{198}\), 116\(^{199}\) and 119\(^{200}\).

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\(^{196}\) Title V, Cancelation of Registration and Ship's Passports, National Merchant Marine Administration Act, Decree No. 55, 02 March 1943, Republic of Honduras.

\(^{197}\) Resolution No.146, Supra., Note 195 at 2.

\(^{198}\) Obligation of States to agree upon regulatory measures through regional organizations to regulate straddling and migratory stocks.
Deregistration from the Honduran flag takes effect on the date of the issuance of the deregistration resolution with a sixty day appeal period during which the vessel can seek reinstatement based on just cause for reinstatement.\textsuperscript{201}

The proposed amendments are a positive steps in terms of recognizing environmental concerns especially with regard to living marine resources. The past practice of Honduras in deregistering vessels relying upon principles of conservation and management as noted in UNCLOS cited above are encouraging.

3. **Belize**

In 1994 a total of 4 vessels under Belizean flag were sighted in the NAFO regulatory area down from 7 in 1993. Unfortunately all four of the vessels were previously registered under the Panamanian flag. These vessels are ALBRI II, SANTA JOANA, PORTO SANTO and CIDADE DE AVEIRO. These vessels were able to obtain registration on the Belizean flag even after Canada forwarded a Diplomatic Note requesting these vessels not be accepted by other flag of convenience registries to which Belize replied with its own Diplomatic Note that it would not accept the vessels.\textsuperscript{202} This caused concern for Canada given the direct and specific commitment of Belize not to accept these vessels on its registry.\textsuperscript{203}

\textsuperscript{199} The right for a states nationals to fish on the high seas to be limited only by the State's treaty obligations and the rights, duties and interests of coastal states noted in Article 63 (2) and Articles 63 through and including 67.

\textsuperscript{200} The duty of states to cooperate with other states with regard to conservation and management measures.

\textsuperscript{201} Amendments to National Merchant Navy Administration Act, supra., Note 191, Title V, Article 14.

\textsuperscript{202} NAFO Non-contracting Party Report, supra., Note 56 at 19.

\textsuperscript{203} The current state of Belizean shipping legislation does not allow for deregistration except in very specific instances. Section 25 of the Registration of Merchant Ships Act, 1989, No. 32 of 1989, 20 December 1989, as amended, Government of Belize, provides that:

"The Registrar shall have the right to revoke the registration of a vessel registered in IMMARBE if it is established in any court of law (whether in Belize or elsewhere) that such a vessel is engaged in the transportation of drugs or is involved in other illegal activities."

Note that the legislation does not provide for a definition of what constitutes "other illegal activity". The Government of Belize has not seen fit to give such latitude to the term to include vessels
Little is known of the Belizean registry as it is a relatively new registry. The number of foreign fishing vessels on the Belizean registry was limited to two vessels in early 1993. A series of events in late 1993 transformed the nature of the Belizean flag and its policies. The election of a new government in late 1993 resulted in the International Merchant Marine Registry of Belize (IMMARBE) being privatized. The Ashcroft Group of Companies obtained the rights to run IMMARBE on behalf of the Belizean government.

The change of policy in the operation of IMMARBE took place after the Ashcroft Group of Companies took over. It became common knowledge in the shipping world that the IMMARBE was actively recruiting vessels to transfer to the Belizean flag and, especially targeting fishing vessels. One source has stated the following about the change in policy concerning IMMARBE:

"Unconfirmed reports from Belize indicate that the Government has revised its registration policy and has approved several flag-of-convenience registrations in 1993. This appears to be primarily a decision resulting from the fee income which can be generated. One unconfirmed report suggests that foreign fishermen who in the past have registered their vessels in Panama are now considering Belize as a possible alternative."

The privatization of the Belizean flag explains in part the acceptance under the Belizean flag of the vessels noted above when the Government of Belize had indicated the subject vessels, which violate internationally accepted conservation and management measures.

The very creation of the registry is the subject of myth. One story related by a shipping official was that several German vessels in order to avoid an embargo in the late 1980's flew the Belizean flag. At the time Belize did not have shipping registry. The German vessels were eventually arrested and the resulting enquiries to Belize caused them to create a shipping registry in 1989.

The Ashcroft Group of Companies is controlled by the Ashcroft family. This family has substantial business interests in Belize and owns approximately half of all land in Belize as well as generating about fifty percent of the gross domestic product of Belize. The Ashcroft family was well positioned to request and obtain the exclusive rights to IMMARBE.


World Fishing Fleets Volume II, supra., Note 180 at 171.
as a matter of government policy, would not be accepted under the Belizean flag. The influence of government policy and undertakings did not bind the independently and privately run Belizean shipping registry.

A Canadian delegation visited Belize in June of 1994 and obtained the commitment of the Belizean government to deal with the situation with an amendment to Belizean shipping laws allowing the Belizean government to prevent such vessels from seeking registration on the Belizean flag. Belizean authorities were embarrassed by the breach of their commitments as outlined in their Diplomatic Note and recognized that some arrangement would have to be made with the managers of IMMARBE to deal with flag-of-convenience fishing vessels.

4. Cayman Islands

In 1994 detailed shipping registry searches revealed that the vessel PILGRIM, registered in Honduras until deregistered on 23 August 1993 as a result of Canadian representations, had a dual registration on the Cayman Island flag under the name PICT. The vessel was sighted in the NAFO area 52 times in 1993. Following the deregistration of the vessel by Honduras, it left the NAFO area only to return in January of 1994 under the name PICT. At the time of the vessels return it was bearing sidemarkings indicating Cayman Islands registration. Photo evidence comparisons with the PILGRIM confirmed it was the same vessel. The vessel had been registered in Honduras by way of a Honduran holding company.

Upon confirmation of the registration of the PICT under the Cayman flag representations were made immediately to the Caymans and the Foreign Office in London which has responsibility for foreign relations of the Caymans. The response of both levels of government was a commitment to sanction the PICT for maintaining a dual registration contrary to UNCLOS and the deregistration procedure was commenced by the Caymans in May of 1994. A substantial mortgage encumbering the vessel was registered on the Cayman’s registry. This mortgage had not been registered on the Honduran registry. The vessel was registered in the Caymans through a Grand Caymans holding company.

The Caymans indicated immediately that if the allegation of dual registration was

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209 NAFO Non-contracting Party Report, supra., Note 56 at 19-20. Whether such commitments to amend Belizean legislation will include provisions to deregister NCP vessels is yet to be determined.

210 NAFO Non-contracting Party Report, supra., Note 56 at 31-32.

211 Note that the circumstances of the PILGRIM (PICT) were also brought to the attention of the Honduran authorities who indicated that the dual registration was also a contravention of Honduran shipping law. In the case of the registry searches conducted in both Honduras and the Caymans instructions were provided to check for bareboat charter arrangements which would be the one means by which the vessel could appear on both registries. No such arrangements were recorded on either registry.
proven it would constitute a basis for deregistration from the Cayman’s flag for two reasons. In the first case, dual registration held by the vessel violated UNCLOS Article 92\(^{212}\) and the Geneva Convention on the High Seas Article 6\(^{213}\). In addition, the Caymans had a pre-existing policy in relation to flag of convenience fishing vessels preventing the registration of such vessels on the Caymans registry. This policy, first published in 1989, stated the following:

"The Cayman Islands Government (CIG) in 1989 decided to stop registering foreign-owned fishing vessels that were seeking flag-of-convenience registries. CIG now refuses to register foreign-owned vessels with no legitimate Cayman’s connection that are to be deployed on distant-water grounds. CIG has removed many of the non-local fishing vessels from its registry. CIG decided to cease making such registration because of the impracticality of regulating non-domestic fishing vessels.

CIG reports that only 15 foreign-owned vessels totalling less than 14,000 GRT now remains on the registry. CIG is currently systematically conducting safety surveys on the remaining vessels for compliance with the requirements of the 1977 Torremolinos Convention as interpreted by the United Kingdom. Those owners who fail to offer their vessels for survey under this regime will also be removed from the Cayman register. These measures have sharply reduced the flag-of-convenience fishing vessels flying the Caymans Flag."\(^{214}\)

Based upon these two factors the Caymans undertook to deregister the vessel.

The Cayman Islands also issued a new policy statement on 3 August 1994 as a result of the PICT which stated the following:

"The Cayman Islands Government reiterates its 1989 policy of not registering distant fishing vessels which have no legitimate Cayman connections. Furthermore, the

\(^{212}\) UNCLOS, supra., Note 6. A flag shall sail only under one flag Article 92 (1) and shall not sail under two flags using them according to convenience Article 92 (2). While the Cayman Islands, as a protectorate of the United Kingdom, had not ratified UNCLOS it was still considered customary international law.

\(^{213}\) High Seas Convention, supra., Note 38, Article 6. The wording and effect of Article 6 is similar to that of Article 92 of UNCLOS. The United Kingdom has ratified the Geneva High Seas Convention and thus Article 6 could be applied to the vessel PICT.

\(^{214}\) World Fishing Fleets Volume II, supra., Note 180 at 106. See also Letter from Office of the Governor, of the Cayman Islands dated 02 June 1994 to Mrs. Kathryn Hewlett-Jones, Canadian High Commissioner, Kingston (hereinafter "the Caymans letter") which reaffirmed this policy.
Cayman Islands itself has exemplary marine protection legislation of its own which it vigorously enforces and will not, either directly or indirectly assist distant fishing vessels to circumvent the fishing legislation of other nations.²¹⁵

A visit by a Canadian delegation to the Caymans in June of 1994 resulted in the following: (1) restatement by the Caymans Government of an existing policy not to allow flag of convenience fishing vessels to register in the Caymans (as noted above); (2) a commitment to enforce internationally agreed fisheries protection measures such as NAFO; and (3) a commitment to send a letter to all flag of convenience fishing vessels under the Caymans flag advising that to fish in the NAFO area would result in deregistration.

It is interesting to note that the Cayman Islands reported a foreign-owned high-seas fishing fleet of 14 fishing vessels (including the PICT) totalling nearly 14,000 GRT on the Caymans register in 1993.²¹⁶ The Cayman Islands policy of 1989 would not appear to have reduced its flag-of-convenience fishing fleet substantially.

The Canadian research and representations concerning the Pilgrim (PICT) came to the attention of a London maritime law firm who heard of the Canadian interest in the vessel through Lloyd's of London. The London law firm represented the financial institution which held the mortgage on the vessel as registered on the Caymans registry. The dual registration apparently violated the terms of the mortgage and the London law firm was instructed to locate and arrest the vessel.²¹⁷ After several months the vessel was located and this information related to the London law firm. The vessel was arrested in Vigo, Spain on the 9th of July by the London law firm pending trial in September of 1994.

The deregistration of the vessel by the Caymans is still pending.²¹⁸ The deregistration

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²¹⁵ The Caymans letter, supra., Note 214.

²¹⁶ World Fishing Fleets Volume II, supra., Note 180 at 113. Also confirmed by the Cayman Islands Government, Marine Survey Department, 8 October 1993.

²¹⁷ A standard provision in most vessel mortgages is one prohibiting the transfer of the vessel to another flag without first obtaining the permission of the mortgagee. See Paine, Frank The Financing of Ship Acquisitions, Fairplay Publication ltd., Surrey (1989) at 104 - 108.

²¹⁸ Section 9 (2), The Registration of Merchant Ships Law, 1991 (Law 20 of 1991), Supplement No. 5 Published with Extraordinary Gazette dated Wednesday, Nov. 6th, 1991, Cayman Islands. Article 9 (2) provides that:

"The Governor may revoke any dispensation granted by him under section 8 [provision granting ship registration] -

(b) if he is satisfied that any declaration made for the purpose of section 8 (4) (b) is false or misleading;
process under the Cayman Islands law provides for deregistration at the expiry of a 30 day appeal period following written notice of the pending deregistration to the ship owners and registered agents. Deregistration does not become effective until expiry of the 30 day appeal period in the absence of the filing of an appeal. In the case of the owners of the PICT, a series of appeals prolonged the deregistration.

5. **St. Vincents**

In 1994 a St. Vincent registered vessel the **FISHERMAN** entered the NAFO area to fish joining the vessel the **ARNARNES** which was also present in the area in 1993. Both vessels are Icelandic owned. Representations were made by Canada to St. Vincents through normal diplomatic channels as well as the visit of a Canadian delegation in June 1994. The visit of the Canadian delegation resulted in the following commitments by St. Vincents: (1) strong political support for Canada's domestic legislation to deal with foreign overfishing; (2) to provide notice to all fishing vessel registered on the St. Vincent flag to not fish in the NAFO area with no amnesty for violators; and (3) not to accept on the St. Vincent shipping register any flag of convenience fishing vessels. To the date of the writing of this paper no indication has been provided as to the efforts of St. Vincents to realize on that State's commitments to Canada.

6. **Venezuela**

(d) if it is not in the interests of the Cayman Islands that the dispensation should continue."

Ibid., Section 7.

The pending deregistration was strong motivation for the mortgage holders to seek the arrest of the vessel since deregistration of the vessel would undermine the mortgage as a lien against the vessel. It shall be interesting to note the eventual disposition of the legal proceedings against the vessel since the misrepresentations of the ship owners hiding the Honduran registration would also give rise to a forfeiture of the vessel to the Caymans pursuant to section 17 of The Registration of Merchant Ships Law, 1991, supra., Note 210. Section 17 states that sections 66 and 67 of the Merchant Shipping Act 1894, No. 1841, Statutory Instruments, Supplement No. 1 published with Gazette No. 6 of 1989, Cayman Islands shall apply to a declaration made under the 1991 Law. Sections 66 and 67 provide for forfeiture of the vessel to the Caymans upon the making of a fraudulent statement in the registration documentation. The PICT could therefore be subject to forfeiture and the issue of whether the Caymans will intervene in the proceeding in Spain has yet to be addressed.

NAFO Non-contracting Party Report, supra., Note 56 at 70-71.
In July of 1994 the Venezuelan registered pair trawlers PESCAGEL and BACANOVA returned to fish on the Flemish Cap. The vessels were previously deregistered by Venezuela as a result of Canadian representations in Caracas made in May of 1993. Subsequently the vessels were allowed back on the Venezuelan flag as a result of a change of government and personnel at the shipping registry. 221

Upon sighting the vessels in the NAFO area immediate presentations were made to Venezuelan authorities in July of 1994. Venezuelan authorities were not aware the vessels had returned to the NAFO area and confirmed this was contrary to Venezuelan law. Venezuela indicated that upon receiving a formal Diplomatic Note it would order the vessels to leave the NAFO area immediately. If the vessels did not comply within two weeks, or later returned to the area, their fishing licenses would be revoked which would prevent the vessel from fishing anywhere on the high seas. If the vessels persisted in fishing in the NAFO area after the lifting of their fishing licenses, Venezuela would seek Canadian assistance to enforce Venezuelan law. Venezuela also indicated that it was considering amendments to its shipping legislation as applicable to fishing vessels making it illegal for vessel to fish in the NAFO regulatory area in violation of that organization’s conservation and management measures. 222

A Diplomatic Note was forwarded in late July of 1994 formally noting the presence of the PESCAGEL and BACANOVA in the NAFO area and requesting action on the part of Venezuela commencing the procedure by which Venezuela would provide notice to the owners of the vessels.

7. Sierra Leone

One vessel, the ST. THOMAS fished in the NAFO regulatory area in 1994 until 31 May. It is crewed by Korean and Chinese nationals and owned by Korean interests. The vessel is one of the larger NCP factory ships to fish in the NAFO. The circumstances concerning the registration of the vessel are somewhat obscure. The vessel was boarded by Canadian authorities on 9 May 1993 and as recent as 20 May 1994 by Canadian officials for courtesy inspections. At the time of the boardings the vessel’s captain produced a set of registration papers indicating it was properly registered on the Sierra Leone registry since 17 February 1993. 223 Searches by a solicitor retained in Sierra Leone could find no record of the vessel on that registry. This caused Canadian officials considerable puzzlement and concern. The state of the political situation in Sierra Leone and the resulting accuracy of government records such as the shipping registry were initially cited as a possible

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221 The explanation provided by Venezuelan authorities for the vessels reregistration caused considerable embarrassment for Venezuela and concern for Canada.

222 Telephone interview 02 August 1994 with Canadian Embassy staff in Caracas, Venezuela after their representations to Venezuelan authorities.

explanation.

A subsequent enquiry of the Government of Sierra Leone and a shipping registry search conducted by a solicitor indicated that the ST. THOMAS was not registered on the Sierra Leone shipping registry. A notarized certificate was provided by the Government of Sierra Leone following the boarding on 17 February 1994 confirming the vessel ST. THOMAS had never been registered on the Sierra Leone shipping registry.224

The conclusion which was made as a result of the documentation provided by Sierra Leone was that the documents as provided by the captain of the vessel to Canadian officials indicating Sierra Leone registration were falsely obtained. The vessel was therefore considered to be without nationality pursuant to UNCLOS Article 110 (1) (d) and thus subject to boarding and detention.225

Lessons Learned from the NCP Vessel Experience

The Canadian diplomatic and legal initiatives in regard to NCP vessels has proven successful in terms of persuading some states to exert flag state control over their vessels. As illustrated in the case of Panama, the Caymans Islands and Honduras, those countries responded to Canadian representations to deal with specific vessels which violated NAFO conservation and management measures by deregistering vessels and seeking to make the necessary amendments to deal with NCP vessels.

The Canadian initiatives in relation to NCP also helped illustrate several deficiencies with flag state control over vessels and the current internationally accepted system of vessel registration. The Canadian diplomatic initiative presumed flag states could effectively deal with their vessels. The points are worth noting in terms of illustrating the weaknesses in the Canadian initiative.

i) Control by Flag States

Flag of convenience states are usually smaller states, in most instances less developed countries, who do not have the resources to effectively police their vessels on the high seas. In this respect the concept of flag state control on the part of the flag state in terms of a physical ability to control its vessels is a fiction. Any form of control is exerted solely by limiting, restricting or withdrawing the entitlement to the flag. As was illustrated with flag states such as Panama and Honduras, the ultimate weapon was the deregistration of the vessel.226 As a result of Canadian representations, the legal basis of the deregistrations was to be reinforced with amendments to the relevant shipping legislation making compliance with conservation and management measures a condition of initial registration and, continued registration.227 The Canadian representations were successful in bringing to the attention of flag states the detrimental fishing activities of their vessels and obtaining a

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224 Ibid., at 65.

225 UNCLOS, supra., Note 6, Article 110.

226 Supra., at 67-74.

227 Supra., at 68 and 72.
response from the responsible flag state.

ii) Provisional Registration as utilized by NCP Vessels

The shipping registry searches undertaken by Canada and deregistrations by flag states provided interesting information as to the management practices by owners of NCP vessels. As a result of the Joint Communiqué between Canada and Panama, Panama deregistered more NCP vessels than any other flag state based upon Canadian representations. In most instances, Panamanian flag vessels which were deregistered were only provisionally registered on the flag they claimed. In a review of the resolutions provided by Panama for the deregistration of NCP as a result of Canadian representations, nine of ten vessels deregistered were only provisionally or temporarily registered on the Panamanian shipping registry. The vessels in question, while present in the NAFO regulatory area, flew the flag and had sidemarkings of the provisional registration.

It is important to note the significance of provisional or temporary registration. Virtually all shipping registries have a form of provisional registration in their shipping legislation. Provisional registration facilitates the first step vessels seeking to obtain permanent registration on the registry in question. In achieving permanent registration, a number of conditions must be satisfied. These include details as to the registration of the

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228 Supra., at 64.

229 Panama was one of the few flag states to provide deregistration resolutions detailing the record of the subject vessel on the Panamanian shipping registry. Such resolutions provided a complete history of the vessel on that registry and most importantly specifying the precise nature of the registration.

230 Review of deregistration resolutions provided by the Republic of Panama in 1993-94 for the following vessels: SANTA JOANA, COLOMBO VI, CIDADE DE AVEIRO, COLOMBO V, ELLY, PORTO SANTO, KRISTINA LOGOS, GAFANHA DO CARMO and MOBY DICK.

231 Panama, Honduras and Belize all have provisional registration arrangements. See Maritime Law Handbook, supra., Note 230, for Panama at Part II, 2-3; also Ready, supra., Note 80, at 119-122. Panamanian provisional registration can be obtained by filing the necessary documents at the registry offices in Panama at one of over 30 consulates of Panama qualified to handle marine registrations in the main ports of the world. Permanent registration must be completed in Panama through the local legal representative of the vessel whose appointment is also required by Panamanian law. For Belize see Section 14, Registration of Merchant Ships Act, 1989, supra., Note 203 at 149 which provides for provisional and provides for the necessary terms. For Honduras see Article 14 (c), National Merchant Navy Administration Act, supra., Note 196. Honduran legislation like Panama’s allows provisional registration to take place at consular offices abroad.
vessel, ownership, details provided for in the surveyors certificate with, in most instances, a requirement that the vessel submit a new survey to prove the vessel complies with the requirements of the registry in which the vessels seeks to register; radio license; and, a variety of other certificates and requirements necessary to complete the registration under the flag in question.\textsuperscript{232}

Provisional registration can be utilized in two instances, when a vessel voluntarily seeks an new flag and in effective transfer from one flag to another while under the same ownership and, when a vessel is sold to a new owner who seeks to transfer the vessel to another flag and does so by seeking provisional registration on the new flag.\textsuperscript{233} The situation most applicable to the case of NCP vessels, with the exceptions previously noted, is the owner of the vessel seeking to transfer the vessel to another flag to avoid the application of conservation and management measures on the originating flag.\textsuperscript{234}

When such a transfer of a vessel to a new registry occurs, and provisional registration is granted by the vessel receiving the vessel, the registry from which the vessel is transferring must be closed off. One of the requirements of the accepting registry is that a certificate be provided by the old registry confirming that all matters pertaining to the vessel have been concluded under the old registry.\textsuperscript{235} When the new registry receives such a

\textsuperscript{232} For details as the registration requirements in general and for specific countries see Ready, supra., Note 80, at 4 - 11 and Chapters 6, 7, 8, 9 and 10.

\textsuperscript{233} In the case of a sale of the vessel provisional registration is obtained usually through a consular office with permanent registration taking place upon filing of the original Bill of Sale at the flag state’s registry together with the other necessary documents. The case of the KRISTINA LOGOS is an example of a NCP vessels which had sought provisional registration under the Panamanian flag as a result of the sale from Canadian vendors. See supra., at 85-88.

\textsuperscript{234} Supra., at 13.

\textsuperscript{235} Bareboat and time charter arrangements are provided for in most shipping registry legislation and are different from provisional registration arrangements. Bareboat charter provisions allow for a vessel registered in one state to fly the flag of a second state for determinate period of time. Such situation usually arise when a vessel is chartered to a party who for what ever reasons deems it advantageous to seek another flag for the vessel for the term of charter. In term of the registration process, a form of temporary registration is granted by the state receiving the vessel (the chartering in flag) and the vessel temporary leaves the original flag (chartering out flag). Such arrangements would usually require that the charter agreement to be registered at both registries and encumbrances registered on the chartering out flag
certificate and all other requirements of the receiving registry then provisional registration can be amended or ungraded to full registration. As illustrated by the case of the KRISTINA LOGOS such provisional arrangements are of importance when a vessel has an outstanding encumbrance under the old flag.\textsuperscript{236} Until such time as the encumbrance is addressed to the satisfaction of the lien holder, the subject vessel will not be issued the appropriate certificate indicating it has been removed from the shipping registry on which the encumbrance is registered.

Another purpose of provisional registration is to facilitate a transfer of a vessel between flags without creating unnecessary liabilities or delays. For example, a vessel that wishes to transfer to a new flag, may require some time to obtain the necessary certificates and clearance to fully comply with the new flag’s registration requirements. In addition, an existing mortgage on the vessel must be discharged to the satisfaction of the mortgage holder. The subject vessel cannot seek to satisfy all the requirements of the registry it is leaving and the new registry before making the application under the new flag.\textsuperscript{237} In most instances it takes time to satisfy the requirements of both registries in order to facilitate also be registered on the chartering in flag for the duration of the charter. Bareboat arrangements are not without controversy from the registration perspective since it is a form by which vessels maintain a dual registration \textit{prima facie} in violation of UNCLOS Article 92. The concept of the bareboat charter has received recognized in terms of the establishment of the circumstances in which it can take place pursuant to Article 11 and 12 of the 1986 United Nations Convention on Conditions for Registration of Ships, supra., Note 110.\textsuperscript{236} Supra., at 89–90.\textsuperscript{237} Provisional registration is valid for only a predetermined period of time. In the case of Panama provisional registration is valid for six months at the expiry of which an extension can be applied for and which is granted as a matter of course. It is normal for extensions to last for more than twelve months. See Maritime Law Handbook, supra., Note 230 at 2–6. In the case of Honduras provisional registration is granted for a six month term "during which time the ship must obtain a permanent registration and passport." An extension to the six month term can be granted only by the President of the Republic of Honduras based upon just cause. See Title VI Article 18 (c), National Merchant Navy Administration Act, supra., Note 196. In the case of Belize preliminary (same as provisional) registration is granted for six months during which time the vessel must apply for permanent registration. No reference is made to an extension to be granted for preliminary registration. See Registration of Merchant Ships Act, 1989, supra., Note 203, Section 15 (1).
deregistration from one and full registration to the other.\textsuperscript{238} The alternative would be to deregister a vessel from its current registry prior to seeking a new flag. If this were to be the case it would mean the vessel would have to deregister from the old flag (and thus become stateless) before seeking to make application under the new flag. For purposes of encouraging vessels to comply with UNCLOS Article 92 and for purposes of insurance coverage of vessels this is not practical.\textsuperscript{239}

Provisional registration thus facilitates the gradual transition from one flag to another within a limited time frame without leaving a vessel without flag. The purpose is to allow vessels to continue to go about their business in traversing the oceans, to protect those holding encumbrances registered on one registry when vessels reflag to another, and to maintain order in a system where vessels are free to transfer between national flag registries.

A vessel which is provisionally registered is essentially a vessel between two flags. The vessel has indicated an intention to transfer to the provisional registry and such an intention is accompanied by an obligation to complete outstanding matters to close off the old flag registration and perfect the provisional registration transforming it in to permanent registration. An interesting question which arises is what is the legitimate flag of the vessel during this interim period that the vessel is between the two flags. Since UNCLOS Article 92 provides that a vessel shall fly only one flag, which flag should a provisionally registered vessel fly? The one argument which can be advanced is that provisional registration constituting, only an intention to eventually acquire permanent registration on that flag, would not entitle the vessel to fly the provisional flag. Since the vessel is still permanently registered on a flag, that registration constitutes the proper registration of the vessel.\textsuperscript{240}

\textsuperscript{238} Note as well that a transfer of a vessel from one national registry to another is an international transaction involving at least two countries and possibly more depending upon how and where financing and insurance for the vessel is arranged. Simply arranging for the transfer of ship’s mortgages and registering the original bill of sale at the flag state registry could take some time.

\textsuperscript{239} UNCLOS, supra., Note 6. See also Ready, supra., Note 80 at 69.

\textsuperscript{240} This matter was addressed by this author with the International Maritime Organization (letter from IMO dated 13 May 1994) and UNCTAD which has responsibility for the 1986 United Nations Convention on Conditions for the Registration of Ships, supra., Note 110, (letter received from UNCTAD 25 May 1994). In both instances no definitive response was received as to the proper registration of a vessel which is in transition between permanent and provisional registration. For insurance purposes Lloyd’s Register noted in a letter to Canadian High Commission in London by letter dated 9 May 1994 the following:

"...for those vessels for which we are empowered to issue Certificates of Registration, we ensure that when a transfer
The intent of the vessel owners would be of relevance in determining which flag is the intended flag of the vessel. One indicator would be the length of time that vessels remained under provisional registration on the "flagging in state". The following table indicates date of grant of provisional registration and date of deregistration:

<table>
<thead>
<tr>
<th>Name of Vessel</th>
<th>Date of Provisional Registration</th>
<th>Date of Deregistration</th>
</tr>
</thead>
<tbody>
<tr>
<td>PORTO SANTO</td>
<td>17 APRIL 1980</td>
<td>18 FEBRUARY 1994</td>
</tr>
<tr>
<td>SANTA JOANA</td>
<td>25 JUNE 1984</td>
<td>18 FEBRUARY 1994</td>
</tr>
<tr>
<td>KRISTINA LOGOS</td>
<td>30 JANUARY 1992</td>
<td>24 MARCH 1994</td>
</tr>
<tr>
<td>GAFANA DO CARMO</td>
<td>09 JULY 1991</td>
<td>24 MARCH 1994</td>
</tr>
<tr>
<td>MOBY DICK</td>
<td>22 AUGUST 1991</td>
<td>07 MARCH 1994</td>
</tr>
<tr>
<td>COLOMBO V</td>
<td>29 MARCH 1989</td>
<td>07 JANUARY 1992</td>
</tr>
<tr>
<td>CIDADE DE AVEIRO</td>
<td>17 JANUARY 1980</td>
<td>08 JANUARY 1993</td>
</tr>
</tbody>
</table>

Source: Resolutions Deregistering vessels as issued by Republic of Panama.

The table indicates that in every case the vessel noted maintained provisional registration for a prolonged period of time. While prolonged provisional registration in cases such as the KRISTINA LOGOS are explainable where an outstanding mortgage was at issue, the cases of the other vessels noted are not so easily justified.²⁴¹ The conclusion that can be reached is that there would appear a clear intent on the part of the vessel concerned to maintain provisional registration and not complete the outstanding items required to receive permanent registration.

As noted in the case of the PILGRIM (PICT) the abuse of flag registrations is relatively easy where the intention of the vessel owner is to do so. Vessels which are provisionally registered create an additional problem in that they are between flags having

of flag is involved, the 'losing' flag certificates are either destroyed or surrendered to us [Lloyd's] before the 'gaining' flag certificates are issued."

We [Lloyd's Register] feel that the problem should be tackled through the International Maritime Organization (IMO), member states submitting that before a permanent or provisional Certificate of Registration be issued, any existing certificates be destroyed or rescinded."

²⁴¹ The actions of the flag state which allows a provisional registration to be maintained for such a long period of time are also an issue.
given notice of leaving the jurisdiction of one flag and soon to enter that of another and thus more difficult to regulate.

iii) Misrepresentation by NCP Vessels and Stateless Status

The rules which govern vessels and their registration are subject to considerable abuse. In the case of the ST. THOMAS as noted, detailed registry searches could not locate the vessel on the shipping registry it claimed. The probable explanation is some form of fraudulent act by the vessel owners to obtain the documents presented to the Canadian fisheries officials boarding the vessel.\(^{242}\) Either false documents were obtained and the vessel was not registered on the Sierra Leone registry or the vessel is registered on that registry under another name and the documents have been falsified as to name.\(^{243}\) The misrepresentations of the ST. THOMAS create a situation in which no flag state can be held accountable for the vessels fishing activities in the NAFO area.

The case of the GADUS illustrated another area of concern in terms of vessels, which had been deregistered returning to fish in the NAFO area without any flag.\(^{244}\) The GADUS was not an isolated incident of such behaviour by NCP vessels. In 1993-94 a total of five vessels which had been deregistered as a result of Canadian representations returned to fish in the NAFO area without obtaining another flag to substitute for the flag lost as a result of deregistration.\(^{245}\) While these vessels would be subject to a boarding by a warship pursuant to UNCLOS Article 110, the absence of Canadian legislation applying to such stateless vessels as was proven by the GADUS case, created a regulatory problem for Canada.\(^{246}\)

In both the case of the GADUS and the ST. THOMAS both vessels were able to place a barrier in the way of the efforts to regulate their activity. The inability to determine which flag state had responsibility for the vessels, if any, further frustrated Canadian efforts to deal with NCP vessels. These vessels, while the extreme example, illustrated that NCP vessel owners were prepared to play well outside the accepted rules for ship registration and the resulting flag state responsibility in order to pursue a high seas fishery.

It was such individual incidents such as the KRISTINA LOGOS, GADUS and PILGRIM (PICT) that indicated Canada’s diplomatic initiative would not remove from the NAFO area NCP vessels intent upon fishing. Such vessels, which resort to such tactics utilizing provisional registration and flagless status, would traverse the world’s oceans using such status to avoid regulation. Once the truth was learned as the result of the appropriate registry searches, the flagless or provisional registrated vessels, months could have lapsed.

\(^{242}\) Supra., at 84-86.

Lloyd’s Registry has confirmed that Sierra Leone registration paper are obtainable on the black market in select Northwest African ports. Source: Telephone conversation with Lloyd’s Registry personnel, 01 April 1994.

\(^{244}\) Supra., at 53-55.

\(^{245}\) NAFO Non-contracting Party Report, supra., Note 56 at 2.

\(^{246}\) Supra., at 56-58.
The vessels in question could be fishing another area on the high seas when a coastal state finally determines the status of the vessel.\textsuperscript{247} The issue dealing with these vessels is further complicated in that in order to bring pressure to bear upon the owners of the vessels one must know who the owners are. In the case of a vessel which has falsified its registration or maintained stateless status, such identification is difficult. The situation is further complicated when vessel may "jump" between flags and provisional registration keeping the vessel and its owners one step ahead of those who seek to regulate or hold the subject vessel accountable.

\textbf{The Canadian Domestic Legislation}

\textbf{i) Background}

The first indication that Canada may adopt a more aggressive approach in dealing with foreign overfishing than the previous government was the election policy statements of the Liberal Party of Canada. The promise to do something about the foreign overfishing problem was a response to the political and social upheaval the shut down of the East Coast fishery caused in Newfoundland. The policy was first stated in the Liberal Party’s Red Book which stated:

"Conservation and rebuilding of fish stocks will be the top priority of Liberal fisheries policy - a policy that will also encompass broader ecological and environmental dimensions. A Liberal government will implement effective conservation measures immediately, because if the remaining stocks are not conserved now, there will be no fisheries industry left on which to build sustainable development.

\textit{A Liberal government will deal with foreign overfishing outside the 200-mile limit and scrutinize foreign quotas within the 200-mile limit.} [emphasis added]\textsuperscript{248}

The Red Book also made a commitment to promote sustainable development throughout the world, to work for achievement of this goal through the United Nations, and that "We [Canada] will ratify the Law of the Sea Convention".\textsuperscript{249} The potential for contradiction is apparent in the policies set out in the Red Book. Any effort by Canada to deal with foreign overfishing beyond 200 miles would require some form of extension of

\textsuperscript{247} In the case of the ST. THOMAS approximately six months passed before a definitive shipping registry search could be conducted and a notarized certificate obtained from the Sierra Leone authorities. See \textit{NAFO Non-contracting Party Report, supra.}, Note 56 at 66.

\textsuperscript{248} \textit{The Red Book}, Liberal Party of Canada, 1993 at 57.

\textsuperscript{249} \textit{Ibid.}, at 70.
jurisdiction by Canada. This would be inconsistent with and in violation of Article 89 of UNCLOS which provides that "no state may validly purport to subject any part of the high seas to its sovereignty."^250

The question to be addressed was what the Liberal Party was prepared to do if elected in regard to the foreign overfishing problem. With the large Liberal majority on October 25, 1993 the stage was set for implementation of the polices set out in the Red Book which the Liberal government elect quickly indicated it intended to implement. There were numerous influence which were brought to bear upon the decision making process. A large elected Atlantic contingent of MPs sensitive to the importance of the fishery to Eastern Canada was one factor. Another was the influence of the government of Newfoundland under the leadership of Premier Clyde Wells. Premier Wells was a proponent of custodial management which, if implemented, required Canada to take full management control over the fishery on the Nose, Tail and Flemish Cap. Such extension of regulatory authority as envisioned by Premier Wells was to apply to NCP vessels and the vessels of NAFO. In satisfying the definition of custodial management as advanced by Premier Wells, Canada would be required to impose its fishery regulatory authority over that of NAFO. The NAFO are claimed by custodial management would therefore become an exclusive Canadian enclave with Canada granting permission to other countries to fish the area.251

If the government of Canada were to follow and implement Newfoundland's definition of custodial management, it would mean not only violating UNCLOS Article 89 with regard to subject an area of the high seas to Canadian jurisdiction, but Canada unilaterally terminating its involvement in NAFO. In addition, there could be serious consequences for the Canadian lead initiatives at the UN High Seas Fishery Conference, the FAO Compliance Agreement and ultimately the Canadian ratification of UNCLOS. A Canadian policy initiative in the form of a unilateral extension of jurisdiction, scuttling NAFO in the process, would change the international political environment with regard to the high seas fishery. The ambiguous wording of the Red Book allowed some degree of latitude on the part of the government elect in terms of agreeing to deal with the problem without precisely defining how. Such wording allowed for the policy options to remain open as how the new government approached the problem.

The position of the government was revealed to some extent in a speech delivered by the Honourable Brian Tobin, Minister of Fisheries and Oceans wherein he stated:

"In 1988, Canada's negotiator for the Law of the Sea Convention, Alan Beesley, wrote:

250 UNCLOS, supra., Note 6, Article 89.

251 See Changing Tides: A Consultative Document on the Fishery of the Future, Department of Fisheries, Government of Newfoundland and Labrador, March 1993 at 25-29. Canadian withdrawal from NAFO would not be automatic. Article XXIV, NAFO Handbook, supra., Note 12 at 28 provides: "Any Contracting Party may withdraw from the Convention on 31 December of any year by giving notice on or before the preceding 30 June to the Depository, which shall communicate copies of such notice to other Contracting Parties."
'[Regarding] the conservation of the living resources of the oceans and preservation of the marine environment ... we must not only take into account the fisheries and environmental provisions of the [Law of the Sea] Convention. we must focus on whether they are being implemented or ignored.'

For too long the provisions and purposes of the Law of the Sea have been ignored. That must end. Freedom of the high seas can no longer mean freedom to overfish. The technicalities of international law no longer provide a safe haven for fisheries pirates.

The Government of Canada will no longer tolerate a situation where our fishermen have stopped harvesting a resource inside 200 miles, but others continue to plunder that resource outside 200 miles.

*Foreign overfishing will be stopped by agreement, if possible. Foreign overfishing, will be stopped by unilateral action, if necessary.* [emphasis added]²⁵²

The Speech from the Throne which marked the opening of the 35th Parliament further indicated the approach of the new government. The following statement of policy was made:

"The East Coast fishery, which has provided livelihood to thousands of families in the Atlantic provinces and Quebec, confronts significant challenges due to the groundfish resource collapse. The Government, working with industry and the provinces, will help those involved to become self-supporting. The Government will take the action required to ensure that foreign overfishing of East Coast stocks comes to an end."²⁵³

The commitment was to end foreign overfishing. Again the precise agenda of action was left unclear keeping all the policy options open. At the center of the problem was conflicting advice from the senior civil servant which conflicted with the government agenda. The Department of External Affairs was firm in its resolve that Canada must not take any action inconsistent with UNCLOS and move to ratify that Convention as soon as possible. The strategy suggested was to continue to pursue a solution to the problem at the UN High Seas Conference and the negotiations leading to finalization of the FAO Compliance Agreement. Similar advice was echoed by Department of Fisheries and Oceans officials.

²⁵² Notes for an address by the Honourable Brian Tobin, Minister of Fisheries and Oceans to the National Fish Harvesters Professionalization Conference, Moncton, New Brunswick, November 16, 1993, Fisheries and Oceans.

²⁵³ Speech from the Throne, Debates of the Senate, 1st Session, 35th Parliament, Volume 135, Number 2, Tuesday, January 18, 1994 at 5.
The dilemma facing the Government was clear. The pressing political problem of continued foreign overfishing by NCP vessels created an intolerable situation requiring immediate action. The environmental concerns with continued overfishing by NCP vessels in light of moratoria established by Canada and NAFO threatened to push the sensitive fish stocks to commercial extinction. Canada did not have the luxury of waiting for international negotiations to possibly find a solution at some undetermined point in the future. In addition, much of the scientific evidence which was becoming available indicating that existing moratoria were not helping to rejuvenate the depleted stocks. This supported the position that continued overfishing by NCP vessels were impacting the depleted fish stocks. In fact, additional and expanded moratoria were deemed necessary by Canada and also imposed by NAFO in order to deal with dwindling groundfish stocks. This result was a sense of urgency from both the political and environmental perspective to deal with NCP vessels. The NCP vessels were thus viewed as the sole issue in dealing with the continued depletion of fish stocks. The perception was that until NCP vessels were stopped the fish stocks would continue to decline with no chance of recovery.

In a tour of European capitals to promote Canada’s efforts to deal with overfishing on the high seas outside Canada’s 200-mile limit, Minister Tobin sought the then European Communities (now the European Union (EU)) support to deal with NCP vessels. During this visit, Minister Tobin acknowledged the EC’s efforts to deal with the NCP problems through NAFO which also impacted its quota shares under NAFO. The Minister made it clear as to Canada’s resolve to "take direct action - as necessary to ensure that stocks are protected from high seas overfishing."

In his address to the UN High Seas Conference in New York in March of 1994, Minister Tobin reiterated Canada’s commitment to work towards an international agreement creating a binding and effective international regime for regulating the high sea fishery. No mention was made by the Minister at the UN High Seas Conference of Canadian intentions

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255 The Fisheries Resource Conservation Council (FRCC), an advisory body to the Minister of Fisheries and Oceans, recommended conservation measures for Greenland halibut, News release, Fisheries Resource Conservation Council, 20 June 1994. NAFO decided to impose a complete ban on all cod in 3NO in compliance with Canada’s request at a special meeting of NAFO in Brussels, February 15-17, 1994, "No Fishing for 3NO cod: A Victory for Conservation", News Release, 17 February, 1994, Department of Fisheries and Oceans. See also Report on the Status of Groundfish Stocks in the Canadian Northwest Atlantic, DFO Atlantic Fisheries, Stocks Status Report 94/4, June 1994.

256 "Tobin on European Mission to End High Seas Overfishing", News Release, NR-HQ-94-01, 09 January 1994, Fisheries and Oceans,
to extend jurisdiction. 257

What emerges from these various statements and representations is an affirmation of Canada's resolve to deal with foreign overfishing promptly and a desire to work within NAFO and at the United Nations to address the problem with a long term solution. Canada did not, and would eliminate the possibility of unilateral action in dealing with flag-of-convenience and stateless vessels. The urgency of the political and environmental dimensions were the critical factors which motivated Canada to act.

ii) The Canadian Overfishing Legislation -- Legislative Agenda

On May 10, 1994 Minister Tobin tabled an Act to Amend the Coastal Fisheries Protection Act. 258 In a statement made by the Minister the day the amendments were tabled, he emphasized the severe depletion of fish stocks in the Northwest Atlantic and the sacrifices Canada had made in imposing tough conservation and management measures to preserve the stocks and allow for their rejuvenation. 259 Minister Tobin noted the efforts of NAFO member States in imposing and respecting conservation measures while flag of convenience vessels were not. In indicating what vessels were targeted by the legislation, Minister Tobin stated the following:

"This legislation is not to deal with vessels from countries genuinely trying to conserve resources and able to control their vessels. Instead, this legislation will be used against vessels that are undermining conservation... that are not effectively controlled by any country. These are the "pirates"... the vessels that operate under flags-of-convenience or no flag at all... the vessels that break every rule in the book." 260

The Minister's statement also committed Canada to continuing to work towards solving the problem of high seas fishing at the United Nations and that the Canadian legislation was a temporary measure pending implementation of an international regulatory mechanism that was both binding and enforceable. 261

The legislative objective of the Government was to seek swift passage of the

257 Statement by the Honourable Brian Tobin, Minister of Fisheries and Oceans to The United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, New York, March 14, 1994, Government of Canada.

258 Bill C-29, supra., Note 2.

259 Statement by The Honourable Brian Tobin, Minister of Fisheries and Oceans on An Act to Amend the Coastal Fisheries Protection Act, May 10, 1994, Ottawa, Ontario, Fisheries and Oceans at 2.

260 Ibid., at 2.

261 Ibid., at 3.
amending legislation within the shortest possible time frame allowable by the rules of Parliament. As was the case of the drafting of the legislation, the legislation was driven by the efforts of the Prime Minister's Office which insisted the legislation advancing promptly.\textsuperscript{262} In order to achieve this objective, all Party support and consent was required and obtained in the House of Commons. Similarly, all Party support and consent was obtained in the Senate. The result was that the Act, tabled as Bill C-29, passed the Senate and received Royal Assent, Proclamation and Promulgation by May 30, 1994.\textsuperscript{263}

iii) Bill C-29 Clause by Clause Analysis

Section 1 of the Act amends definitions which are of significance to the operation of the new legislation. This section adds the "NAFO Regulatory Area" as defined by Article 1 of the NAFO Convention.\textsuperscript{264} The inclusion of the NAFO regulatory area is important in that the prohibition against fishing provided for in the new legislation is to apply only to the NAFO area.\textsuperscript{265} Section 1 also provided the new legislation to be applicable only for straddling stocks. Straddling stocks are generally those stock which exit both inside and outside Canadian jurisdiction and to be defined by regulation.\textsuperscript{266}

Both the inclusion of the NAFO regulatory area and the application of the new legislation to straddling stocks is ancillary to the primary purpose of the legislation as set out in section 5.2 of the Act - to deal with foreign vessels fishing in the NAFO Regulatory Area as defined in Bill C-29. Both section 5.1 and 5.2 are critical to understanding the new legislation and will be analyzed in detail.

\textsuperscript{262} Supra., See note 2.

\textsuperscript{263} The speed with which Bill C-29 progressed through the legislative process is testament to the seriousness with which all political parties viewed the matter of foreign overfishing. Even the Reform and Bloc Québécois Parties supported the Government’s initiative in the form of Bill C-29.

\textsuperscript{264} NAFO Handbook, supra., Note 12, Article 1.

\textsuperscript{265} The NAFO regulatory area includes the Nose, Tail and Flemish Cap all of which have been areas fished by NCP vessels. A careful review of the longitude and latitude coordinates provided for in the new legislation revealed that the area defined in the legislation included the Nose and Tail but excluded the Flemish Cap. Thus while the legislation makes clear reference throughout to its application to the "NAFO Regulatory Area", the jurisdiction of Bill C-29 is a smaller area. The explanation provided by DFO officials was that since the Flemish Cap was not a continuous extension of the continental shelf Canada would have less colour of right in international law in claiming jurisdiction over the Flemish cap. There is also an indication that this was a drafting oversight in the preparation of the Bill.

\textsuperscript{266} Bill C-29, supra., Note 2, Article 1.
Section 5.1

This section provides critical background for the operation of Bill C-29. The entire section is a preamble which provides for a context within which the legislation has been enacted.

a) Section 5.1 (a)

"... that straddling stocks on the Grand Banks of Newfoundland are a major renewable world food source having provided a livelihood for centuries to fishers,"

This section places the Canadian legislation within a global setting recognizing the importance of the ocean resources in question to the world. The implication is clearly that the Government recognizes (and acknowledges in the legislation) the global fishing interests beyond those of Canada which are at stake and addressed by the legislation. The linkage to the resource "providing a livelihood to fishers" further recognizes the social impact upon those dependant upon the exploitation of the resource.

b) Section 5.1 (b)

"that those stocks are threatened with extinction,"

This section although brief, states clearly the recognized fact that fish stocks are severely depleted. The basis for this statement of fact is the scientific research undertaken by both Canada and NAFO. The provision helps to emphasize the context of the legislation in terms of the emergency nature of the problem resulting from the greatly depleted state of the straddling fish stocks.

c) Section 5.1 (c)

"that there is an urgent need for all fishing vessels to comply in both Canadian fisheries waters and the NAFO Regulatory Area with sound conservation and management measures for those stocks, notably those measures that are taken under the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, done at Ottawa on October 24, 1978, Canada Treaty Series 1979 No. 11,"

This section sets the standard in terms of conservation and management measures which shall be imposed upon vessels which fish in the area Canada seeks to regulate. There is specific reference to those measures as passed by NAFO. By implication there is reference to measures in "Canadian fisheries waters" which could be interpreted as compliance with Canadian measures. An interesting question in the future application of this section is

267 Ibid., Section 5.1 (a).

268 Supra., Notes 267 and 268.

269 Supra., Note 2, Article 5.1 (c).
whether Canadian measures shall be given precedence over those of NAFO. A plain reading of the section would possibly given priority to those measures of NAFO given that they are specifically referred to in the provision. In support of this position the wording "notably those measures that are taken under the [NAFO Convention]" would appear to distinguish NAFO from the measures imposed by Canada and indicate an added importance to the NAFO measures. The provision further acknowledges an urgent need for the imposition of such standards which indicates the emergency nature of the situation to be addressed by the legislation.

d) Section 5.1 (d)

"that some foreign fishing vessels continue to fish for those stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of sound conservation and management measures." 270

The Act in this provision makes specific reference to those foreign vessels which have continued to fish the straddling stocks in violation of conservation and management measures. The context of the provision is clearly referring to the flag of convenience vessels and stateless vessels as the term "foreign fishing vessel" is further defined by regulation. The Act gives clear notice in this provision of its application to vessel which fish in violation to conservation and management measures as recognized in the section 5.1 (c).

e) Section 5.1 - concluding provision

"Parliament, recognizing [all of the above sections]

 declares that the purpose of section 5.2 is to enable Canada to take urgent action necessary to prevent further destruction of those stocks and to permit their rebuilding, while continuing to seek effective international solutions to the situation referred to in paragraph (d)." 271

This concluding provision sets the goal of conservation and management of the straddling stocks as the ultimate objective of the legislation with the rejuvenation of the stocks as the desired result. The legislation makes specific reference to the continued pursuit of a solution to the overfishing problem at the international level and in this regard Canada is stating a commitment to the rule of international law as it may evolve with regard to high seas fishery regulation. This provision is important in terms of Canada taking a step away from the current state of international law (UNCLOS Article 89) but indicating the continued commitment of Canada to finding a solution to the problem at the international level. The contradiction is apparent in that a state cannot reject the current international law yet commit to uphold the system in search of a solution. Essentially Canada recognizes

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270 Ibid., Section 5.1 (d)

271 Ibid., Section 5.1.
with this provision its interests are not served by the present regime. The one limiting factor is that such international efforts must be effective. In the case they are not, Canada is reserving the right to pursue its own course of action to deal with the problem. The section also emphasizes the urgency of the action taken by Canada giving the problem of overfishing of depleted stocks. The context of the action taken by Canada is also clearly emphasized in terms of the motivation for the legislation as the preservation of the endangered fish stocks.

f) Section 5.2

"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."

This section is the main thrust of Bill C-29. It creates a broad prohibition that is linked to regulations to be made pursuant to the Act. These regulation shall specify which foreign fishing vessels shall be subject to the legislation, which straddling stocks such vessels shall be prohibited from fishing and, what conservation and management measures shall be applicable. It is interesting to note that Canada reserves the right to determine by regulation all of the above. In this sense a wide discretion has been granted to determine the application of the legislation. The plain reading of the section appears to allow for unlimited application to any vessels, fish stocks and, in compliance with any conservation and management measures as determined by regulation. Dealing with these matters by way of regulation allows for revisions to add flag of convenience states, fish species and conservation and management measures without having to undertake a more time consuming amendment to the enabling legislation. In this manner Canada can react to developments in all three areas. For example, a new flag states vessel may appear and commence fishing in the NAFO area. The application of the Act shall be to the entire NAFO regulatory area which is an error since the definition of NAFO Regulatory area as found in section 1 excludes the Flemish Cap and restricts itself to the Nose and the Tail.

The Regulations to the Act incorporate two important definitions one for flag-of-

272 The initial regulation passed incorporated flag-of-convenience vessels, those NCP flag states which had vessels in the NAFO area at the time the legislation was written and those straddling stocks fish for which NAFO had imposed moratoria and regulatory conservation and management measures. See Coastal Fisheries Protection Regulations, SOR/94-362, 25 May 1994, Section 21 and Table I and Table II for straddling stocks and Table III to the Regulations for flags of convenience.

273 Amendments to regulations can take up to two to three weeks, need not be brought before Parliament and can be passed by Order in Council.
convenience vessels and "vessel without nationality". In the case of flag-of-convenience vessels, the definition of what countries shall be deemed as such was by way of a schedule of countries incorporated in the Regulations. The Regulations as made pursuant to Bill C-29 included Belize, the Cayman Islands, Honduras, Panama, Saint-Vincent and the Grenadines and Sierra Leone. These named flag states had vessels in the NAFO Regulatory Area in the period prior to passage of the legislation. The inclusion of flag-of-convenience vessels was one of the more controversial aspects of the legislation in terms of prima facia violating recognized international law with regard to the sole right of the flag state to regulate its vessels on the high seas.

In the case of "vessels without nationality" such vessels were deemed to include a foreign fishing vessel that:

- (a) is not registered or licensed under the laws of any state or to which no state has issued a document granting the foreign fishing vessel the right to fly the flag of that state;
- (b) has no visible markings indicating its name or home port;
- (c) is flying a flag of a state that it is not entitled to fly;
- (d) is not flying a flag of any state; or
- (e) is sailing under the flags of two or more states and flying the flags according to convenience.

The definition of "vessels without nationality" is broad and influenced by UNCLOS Article 92 and Article 110 (1) (e). The provision certainly contemplated including vessels such as the PICT, GADUS, KRISTINA LOGOS and those vessels which utilized provisional registration leaving their status between two flags in order to elude flag state responsibility. Drawing upon the experience of the vessel GADUS, this section empowers Canada to deal with stateless vessels as contemplated by Article 110 of UNCLOS which Canada was not able to do in the case of that vessel. The operation of this definition of "vessels without nationality" within the context of Bill C-29 would appear to be consistent with international law.

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274 "Vessels without nationality" was a term used to describe stateless vessels as defined in Article 92 of UNCLOS, supra., Note 6.

275 Supra., at 35-39.

276 Coastal Fisheries Protection Regulations, supra., Note 285, section 21 (1).

277 Supra., see PICT at 87-90; GADUS at 56-58; KRISTINA LOGOS at 94-97 and provisional registration at 102-107.
law as codified in Articles 92 and 110 (1) (e) of UNCLOS. Bill C-29, in relation to "vessels without nationality" has provided Canada a means by which to enforce UNCLOS coastal state rights. The application of Canadian measures and those of NAFO would be valid in the inherent right of a state which encounters a vessel without nationality to apply its laws to such a vessel.

The operation of section 5.1 is critical to section 5.2 in that it is generally recognized that Canadian courts will enforce Canadian law even if it is contrary to international law if the Canadian law is clear and unambiguous. In this regard section 5.1 provides a clear description of the purpose of the legislation in section 5.2 even if on the face of it the purpose of the legislation is contrary to international law.

Straddling stocks are also defined by the regulations as constituting any stock of fish that occurs both within Canadian fisheries waters and in an area beyond and adjacent to Canadian fisheries waters.

Use of Force and Prosecution of Vessels

The regulation making authority pursuant to the Act included significant amendments allowing enforcement against, and prosecution of, foreign vessels. In the case of section 8.1 the use of force is authorized in order to stop and arrest a vessel found to have violated section 5.2. The problem of high seas arrest of vessels is that unless the vessel to be arrested

278 See Chung Chi Cheung v R. [1939] A.C. 160 at 167-68, [1938] 4 All E.R. 786 wherein Lord Atkin stated:

"It must be remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure."

This case was cited with approval in Gordon v R. in Right of Canada [1980] 5 W.W.R. 668 (B.C.S.C.) aff'd [1980] 6 W.W.R. 519 (B.C.C.A.) wherein the B.C. Court of Appeal stated at page 678:

"... even if Canadian law contravenes "customary international law," Parliament, as here, has acted unambiguously, the courts of this country are bound to apply the domestic law."

279 In this case the violation of international law would be the regulation of vessels of flag-of-convenience states beyond the recognized 200-mile jurisdiction of a state to regulate.

280 Bill C-29, supra., Note 2, section 6.

281 The specifics as to force to be used are a graduated use of force in accordance with Department of National Defence operational guidelines.
willingly subjects itself to arrest, some action must be taken to compel compliance with the arrest. The use of force is therefore necessary from the enforcement perspective. 282

Following the arrest of the foreign vessel, prosecution of the vessel in Canadian courts must take place. Section 18.5 provides the authority by which foreign vessels can be prosecuted by a Canadian court pursuant to the Act. The section applies the Canadian Criminal Code in proceedings against such vessels. 283

With regard to both use of force and prosecution, the lessons of the GADUS case illustrated the need for clear statutory authority for Canadian officials to act against foreign vessels. This certainly would alleviate the concerns of many fisheries enforcement officials including RCMP, Department of National Defence and Fisheries and Oceans. Such concerns include the possibility of law suits and charges against Canadian officials.

An important part of the enforcement aspect of Bill C-29 is the right to search a foreign vessel which is within the NAFO Regulatory Area. Section of Bill C-29 amends the existing Act to expand the authority of the Coastal Fisheries Protection Act to allow a search of a vessel in the NAFO Regulatory Area. 284 This is the primary enforcement provision of Bill C-29 allowing Canadian authorities to perform the important functions of inspection and search. In order to determine whether a foreign fishing vessel has fished a prohibited straddling stock, the vessel in question may have to be searched to inspect the holds of the vessel.

In order to pass any challenge pursuant to the Canadian Charter of Rights and Freedoms, a search warrant must be first obtained authorizing the search of the vessel. Section 7.1 of Bill C-29 provides for such a search warrant requirement. 285 Section 7.1 (1) requires an application be made for the search warrant to a justice of the peace who may grant the warrant on the basis of an ex parte application and "when by information on oath that there are reasonable grounds to believe that ... a contravention of this Act or regulation has occurred." 286

Section 7.1 (2) provides for searches without a warrant if, by reason of exigent circumstances, it is not practical to obtain such a warrant. Exigent circumstances would include circumstances where the delay necessary to obtain a warrant would result in the danger to human life or safety, or result in the destruction of evidence. In the case of vessels

282 Supra., at 48-49.

283 Bill C-29, supra., Note 2, Section 3 (b.5). This would include the issuance of an information and summons pursuant to the Criminal Code.

284 Bill C-29, supra., Note 2, Section 7.

285 Ibid., section 7.1. Interestingly the amendment applies to all vessels including foreign vessels given that prior to the amendment no such search warrant provision was included thus leaving open the possibility of a Charter challenge.

286 Ibid.
which may not willingly allow themselves to be stopped and searched, section 7.1 (2) would appear justified in that ample opportunity exists for the master and crew aboard the vessel to destroy evidence such as casting fishing nets adrift or throwing catch overboard.

In the case of both Section 7.1 (1) and (2) the importance of the search warrant provisions will help to avoid a Charter challenge if and when a search on the high seas takes place. Note that the application of the Criminal Code is thus authorized outside of Canada’s 200-mile jurisdiction as relating to the application of Bill C-29.

Penalties Pursuant to Bill C-29
Section 18 of Bill C-29 provides that a conviction on indictment under the Act is subject to a maximum fine of $750,000.00 and on summary conviction by a maximum fine of $150,000.00.287 No substantive changes have been made to this the penalty section of the Coastal Fisheries Protection Act with the exception that the penalties now apply to violation pursuant to the new section 5.2 which incorporates those offences which take place in the NAFO Regulatory Area as defined in Bill C-29.

Application of Canadian Law and Courts
Section 18.1 of Bill C-29 provides a general legal framework for extending Canadian laws and court jurisdiction in relation to the enforcement of the Coast Fisheries Protection Act. Pursuant to section 18.1, any act or omission that would be an offence under federal law is deemed an offence in Canada if it occurs in the course of enforcing section 5.2 or in the course of pursuit commenced in Canadian waters or in the NAFO Regulatory Area as defined in the amendments to the Act.288 The purpose of section 18.1 is to apply Canadian criminal law to the NAFO Regulatory Area but only with respect to offences that occur in the course of enforcing Bill C-29. Regardless of the limits placed upon the application of Canadian Criminal law by section 18.1, the result is nonetheless the extension (although limited) of Canadian law beyond the 200 miles.

Section 18.2 (2) creates enforcement powers relating to a criminal offence pursuant to section 18.1 providing that such powers can be exercised on a foreign fishing vessel or, when pursuit has been commenced in the NAFO Regulatory Area, outside the territorial waters of another state.289 This authority is limited by section 18.2 (3) which places a restriction on the exercise of enforcement powers in respect of a criminal offence by requiring such powers be exercised only with the consent of the Attorney General of Canada.

The application of Canadian criminal law may be important in relation to an arrest of foreign fishing vessels when the efforts by Canadian authorities to arrest result in criminal acts by the crew or master of the foreign vessel. In such instances Canadian criminal law is applicable. Likewise, in the case of the use of force to compel arrest, the Canadian officials may apply excessive force and they themselves be subject to Canadian criminal law pursuant

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287 Ibid., Section 8 (1) and (2).

288 Ibid., section 18.1.

289 Ibid., section 18.2 920.
to this provision.

While the argument to the contrary is made by the proponents of Bill C-29, sections 18.1 and 18.2 apply Canadian criminal law beyond the jurisdiction of Canada. 

Prima facie this is an extension of Canadian jurisdiction by applying Canadian criminal law in the NAFO Regulatory Area beyond Canada's traditional area of jurisdiction. The limitation that such offenses can be prosecuted only with the consent of the Attorney General of Canada is an attempt to indicate this is a very limited extension of jurisdiction to proceed only in special instances and with pre-approval thus differentiating from offenses prosecuted in the normal course of the enforcement of the laws of Canada. In this sense the argument can be advanced that Canada is not extended jurisdiction in the fullest extent which it could pursuant to Canadian law. It is not uncommon to obtain the consent of the Attorney General where it is necessary to ensure consistency in prosecutions involving national interests. In this case foreign policy considerations may influence the decision of the Attorney General.

In assessing this extension of prosecutorial capacity pursuant to UNCLOS, Article 89 clear prohibits any state from validly purporting to "subject any part of the high seas to its sovereignty." The question of whether Bill C-29 is Canada subjecting a section of the high seas to its sovereignty is arguable. The use of the term sovereignty always implies jurisdiction. Jurisdiction may not always imply sovereignty.

Canada has made no claim in Bill C-29 to appropriate, as part of the sovereign territory of Canada, the NAFO Regulatory Area as defined in Bill C-29. What Canada has done is extend a form of "territorial jurisdiction" over the NAFO Regulatory Area for purposes of implementing the primary objective of Bill C-29 as defined in section 5.2 thereof. The objective of Bill C-29 is not based upon the extension of sovereignty by Canada.

**Prosecution against Vessels**

Section 18.5 authorizes prosecutions against vessels. Prior to this amendment prosecutions were limited to the master of vessels and based upon aerial surveillance since in most cases a patrol vessel would not be in close proximity to conduct an inspection of the offending vessel. As a result prolonged investigations were necessary in order to gather enough evidence to establish the probable cause necessary to warrant an inspection. Given the nature of the fishing activity of many vessels, they may depart the area only to return with new masters thus requiring the investigation to start again. This required Fisheries and Oceans in the past to determine who was the captain of the vessel at the time of the arrest. Section 18.5 provides for prosecution of the vessel itself in addition to the master.

In relation to foreign vessels this provision is useful in terms of allowing to bring before the courts those guiding the fishing activity of the vessel - the owners. The arrest of

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290 UNCLOS, supra., Note 6, Article 89.

the vessel also allows it to constitute security, for any fines resulting from a successful prosecution.

Canadian Representations to the World concerning Bill C-29

The nature of Bill C-29 was expected to receive less than approving responses from other coastal states. In addition, Canada was concerned that it reaffirm it commitment to working at the international level at the United Nations Conference on High Seas fishery and in its commitment to the FAO Compliance Agreement. It was important for Canada to fully explain the motives underlying Bill C-29 so that the international community did not interpret that Canada was unilaterally taking action and becoming isolationist in dealing with the high seas overfishing problem. This in some respects could be a logical conclusion in that the passage of Bill C-29 constituted a measure by an individual state counter to the current state of international law (i.e., UNCLOS). Another way of viewing Bill C-29 was as a temporary measure to deal the legal vacuum pending the results of the UN High Seas Conference and ultimate implementation of the FAO Compliance Agreement. The portrayal to those countries who would be concerned as to the intent of Bill C-29 was that the Canadian legislative initiative was an interim measure pending further developments in international law and that it was in philosophy consistent with the move towards greater international regulation of the high seas fishery and the vessels which undertake such activity. The diplomatic strategy executed simultaneously to the introduction of Bill C-29 was to have Canada’s diplomatic corps make representation to their host countries providing a copy of Bill C-29 and delivering an Aide Memoire explaining Canada’s position. In addition to the Aide Memoire, Canadian diplomats provided a verbal representation and briefing materials as to the state of the fishery in the Northwest Atlantic, the new legislation, and the particular problems with flag-of-convenience and stateless vessels.

The Aide Memoire delivered by Canada to foreign governments stated in part:
"The Government of Canada must act to see these moratoria and all other conservation and management measures [NAFO and Canadian measures] are respected in order to save this vital resource."

With regard to the specific vessels targeted by the legislation the Aide Memoire noted:

"Stateless vessels are currently sitting just outside our fishing zone pillaging what is left of the fish stocks which straddle our 200-mile limit. International law permits Canada to act against these stateless vessels and we intend to do so under new Regulations.

There are also a number of vessels from flag of convenience states -- those states which maintain an open registry permitting any fishing vessel to register there. We have succeeded in encouraging a number of these flag of convenience states, notably Panama and Honduras, to deregister vessels, rendering them stateless. We will

continue to seek the further cooperation of flag of convenience states."293

The Aide Memoire clearly stated the point that the new Canadian legislation was targeting stateless vessels and flag of convenience vessels. The Aide Memoire also drew a distinction between the aforementioned vessels and NAFO vessels which it noted "the vast majority of which [NAFO vessels] are not violating NAFO conservation and management measures." and that Canada would attempt to continue to address the matter within NAFO.294 The Aide Memoire also emphasized Canada's intention to continue to work at the international level, in particular, the UN and to ratify the FAO Compliance Agreement.

A common theme in the briefing notes, the Aide Memoire and a formal statement of Canadian policy was that Canada was acting to preserve the living resources of the Northwest Atlantic.295 The official statement of policy adds one additional point:

"The Government has stated, however, that to save the resource it is prepared to take unilateral action. The new legislation will permit such action. Canada trusts that the implementation of the proposals outlined above will make further action unnecessary."296

The response to the passage by Canada of Bill C-29 was formally protest by a number of coastal states who delivered Diplomatic Notes to Canada.297 The central theme to all Diplomatic Notes delivered to Canada was that Bill C-29 constituted an unilateral extension of Canadian jurisdiction contrary to the current state of international law as incorporated in UNCLOS.

The Note Verbale delivered by the EU was the strongest worded formal response received by Canada.298 The underlying concern on the part of the EU was the impact of Bill C-29 upon NAFO and the EU's membership in that regional fishery organization. The EU

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293 Ibid.

294 Ibid.


297 Diplomatic Notes were delivered by the United States, United Kingdom, Korea, the EU, Australia and Japan.

298 Note Verbale delivered by the Commission of the European Communities, Delegation in Canada to The Department of Foreign Affairs and International Trade, 13 June 1994.
noted that Bill C-29 is a "unilateral act which is totally unacceptable." Bill C-29 was also cited as being contrary to international law and "counter to the efforts made by the international community to improve the management of fisheries resources, particularly on the high seas." 

The EU also made reference to Bill C-29 placing at risk the entry into force of the FAO Compliance Agreement and compromise the progress made at the UN High Seas Conference. Reference to Bill C-29 running counter to the interests of NAFO was also including in the Note Verbale. The EU made specific reference to the past efforts of NAFO to ensure flag states not members of NAFO comply with conservation and management measures. The reference was to the limited number of NAFO diplomatic demarches made to flag-of-convenience states.

In the case of all diplomatic representations made to Canada concerning Bill C-29, considerable sympathy was expressed as to the situation in the Northwest Atlantic. The legal position was a black letter law approach in terms of Bill C-29 not satisfying the current state of international law. What was not addressed by any of the countries forwarding protests to Canada was what other short-term recourse was available to Canada to deal with the immediate problem of NCP vessels in the NAFO area.

A part of the diplomatic initiative in support of the passage of Bill C-29 included visits to all flag-of-convenience countries which were named in the regulations to Bill C-29. These included Panama, Honduras, Belize, the Cayman Islands and St. Vincents and the Grenadines. The sixth country named on the list, Sierra Leone was not visited, given that travel to Sierra Leone could not be easily arranged. In the case of all five countries visited, all understood the difficulties faced by Canada in the Northwest Atlantic. None of the five countries indicated they would file a diplomatic protest should Canada arrest one of their flag vessels pursuant to Bill C-29. One conclusion that can be drawn from this commitment is that these flag states viewed the problems of overfishing, (or at least the diplomatic problems) caused by their vessels as substantial enough to overlook the important aspect of the sole right of jurisdiction over their vessels.

The International Court of Justice - Possible Challenge to Bill C-29

299 Ibid., paragraph 2.
300 Ibid., paragraph 3.
301 Ibid., paragraph 7 and 8.
302 Ibid., paragraph 10.
303 Supra., at 60-61. The vast majority of diplomatic representations to flag of convenience states were made by Canada without the assistance of NAFO. The claim in the EU's Note Verbale that NAFO had a significant impact upon flag-of-convenience vessels through NAFO representations is overstated.
i) Jurisdiction of the International Court of Justice

One concern of Canada was possible challenges to Bill C-29 before the International Court of Justice. Pursuant to Article 36 of the Statute of the International Court of Justice (ICJ), the Court has jurisdiction:

"1. by mutual consent of the parties to the dispute;

2. under a treaty or other international instrument providing for the jurisdiction of the Court;

3. where the states concerned have by unilateral declarations accepted the compulsory jurisdiction of the Court." \(^{304}\)

In regard to a case brought against Canada, there would be no consent to the jurisdiction of the Court and jurisdiction would not be available pursuant to UNCLOS until such time as Canada ratified that Convention. There is not any other instrument which Canada is a signatory to which would be applicable. Canada would however be vulnerable to an application by another state that has declared its acceptance of the compulsory jurisdiction of the Court.

Canada has accepted the compulsory jurisdiction of the ICJ pursuant to Article 36(2) of its Statute on condition of reciprocity and subject to a number of reservations.\(^ {305}\) Other states not presently accepting the compulsory jurisdiction of the ICJ could file a declaration of acceptance and bring a claim against Canada. Two other conditions precedent would have to be present in order for the Court to assume jurisdiction. The first is the existence of a legal dispute. In this instance the fact that prima facie Bill C-29 is contrary to international law would appear to be enough to constitute a dispute as a country could oppose the legislation as contrary to international law. The second aspect is that of standing and the applicant must have legal standing, a legal interest in the case. In the case of Bill C-29 a flag state whose vessels would be subject to arrest pursuant to the Canadian legislation would have such standing. An arrest of a flag state’s vessel would prima facie violate that state’s exclusive right of jurisdiction over its flag vessels in international waters.

While five of the six flag states named in the regulations to the legislation indicated


\(^{305}\) Declaration Recognizing Jurisdiction on Behalf of Canada, 10 September 1985, United Nations, New York. The reservation provide for other dispute settlement methods, disputes as between Commonwealth countries and question of international law that fall exclusively with Canadian jurisdiction. The reservation against Commonwealth countries would exclude an application by either Sierra Leone and Belize. See also St. J. Macdonald, R., "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice" (1970), Can. Y.B. Int.L. 3.
they would not protest an arrest of one of their vessels pursuant to the Canadian legislation, the interpretation of non-protest may be limited to that of a diplomatic nature and still allow the pursuit of a legal remedy. An extension of jurisdiction as to what states would be affected by Bill C-29 could also be made by the ICJ within the context of the principle of *locus standi*. In addition to parties named in the regulations to the legislation, flag states whose vessels have historical fished the NAFO area and are not named in the legislation may have a basis to seek a remedy before the Court as being adversely affected by Bill C-29. In support of this argument would be the proposition of the freedom of all states to fish on the high seas (UNCLOS Article 116). Therefore the ICJ may extend jurisdiction to any country advancing a claim to such a right.\(^{306}\)

**ii) Canada’s Reservation to the Compulsory Jurisdiction of the Court**

The decision was made by the Government of Canada to avoid the jurisdiction of the ICJ in respect to Bill C-29 and on the same day the Bill was tabled a Reservation to the jurisdiction of the International Court of Justice Declaration was deposited with Boutros Boutros-Ghali, Secretary General of the United Nations. Canada gave formal notice it was terminating its compulsory acceptance of the jurisdiction as previously declared and noting further limitation to the jurisdiction of the ICJ in relation to Canada.\(^{307}\) In addition to the limitation provided in Canada’s pre-existing Declaration to the jurisdiction of the ICJ filed in 1985, Canada added the following:

"(d) disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures."\(^{308}\)

The added limitation to Canada’s acceptance of the ICJ jurisdiction was excluding any application to the ICJ arising from Bill C-29. The context of the limitation itself indicated Canada position of imposing conservation and management measures in the NAFO Regulatory Area and no mention is made to any form of extension of jurisdiction or claim of sovereignty.

It is worthy noting that Canada has previously amended its compulsory acceptance of the jurisdiction of the ICJ. In 1970 with regard to the passage by Canada of the **Arctic**

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\(^{306}\) This could include NAFO members who, such as Portugal and Spain, have a historical presence and right as well as legal right to fish the NAFO area pursuant to the NAFO Convention.


\(^{308}\) *Ibid.*
Waters Pollution Prevention Act\textsuperscript{309}, which together with amendments to the Territorial Sea and Fishing Zones Act\textsuperscript{310} provided for the extension of the territorial sea to 12 miles in breadth, the assertion of pollution jurisdiction within a 12 mile contiguous zone and the creation of exclusive fishing zones in the Gulf of St. Lawrence, the Bay of Fundy, Dixon Entrance, Hecate Strait and Queen Charlotte Sound.\textsuperscript{311}

In 1970 Canada did not wish to risk the challenge to the aforementioned legislation and the amendment to the reservation before the ICJ was filed. The argument Canada advanced at the time in support of its reservation of the jurisdiction of the ICJ was that the state of international law was not sufficiently advanced to support the Canadian case and that international law was evolving in the direction of the Canadian measures.\textsuperscript{312} A similar argument could be advanced with regard to Bill C-29 as the current state of international law is not sufficient to deal with the issue of high seas fishing of straddling stocks by flags-of-convenience and stateless vessels. Also the current direction of international law clearly is towards a greater regulation of fishing vessels on the high seas as formulated in the UN High Seas Conference and the FAO Compliance Agreement.

iii) Precedents before the International Court of Justice

There have been two important fisheries related cases before the ICJ which are of some relevance. The Anglo-Norwegian Fisheries Case of 1951\textsuperscript{313} and the Fisheries Jurisdiction Cases of 1974.\textsuperscript{314} In both case the U.K. was the high seas fishing state challenging what it believed to be excessive coastal state jurisdiction; in neither case did it


\textsuperscript{310} SOR85/872, made pursuant to the Territorial Sea and Fishing Zones Act, R.S.C. 1970, c. T-7, s. 5 (i) as amended by Statutes of Canada 1969-70, c.68, s.3.


\textsuperscript{312} Canada's position was justified in that international law moved in the direction of providing for special protection for ice-covered areas being included in UNCLOS and the law similarly developing to endorse the establishment of a 12 mile territorial sea, 200 mile exclusive fishing zones, and pollution jurisdiction throughout a 200 mile exclusive economic zone.

\textsuperscript{313} Fisheries Case (U.K. v. Norway), ICJ Reports 1951.

In the Anglo-Norwegian Fisheries Case there is little relevance to the present Canadian situation with regard to Bill C-29. The U.K. challenged the validity in international law of the particular method used by Norway to establish a four mile fishing zone extending from straight baselines that did not follow the coast but were drawn using the outer points of the highly indented coast and the fringe of small islands and drying rocks. The ICJ held that the method used by Norway for the delimitation of fisheries zones was not contrary to international law. In its reasons, the Court referred to the consideration of "certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by long usage".

In the case of the Fisheries Jurisdiction Case, at issue was regulations to extend fisheries jurisdiction by the coastal state as a response to the depletion of the stock; a threat of enforcement action against a foreign distant water fishing fleet; litigation before the ICJ by the flag state contesting the validity of the coastal state regulations; and provisional measures ordered by the ICJ before the regulations came into effect. Of relevance to the Canadian legislative initiative is that Iceland was brought before the ICJ before the contested regulations came into effect and the U.K. was able to obtain a provisional measure from the ICJ prohibiting enforcement of the regulations against U.K. flag vessels until disposition of the matter by the Court. Similarly if Canada were not to file a reservation to the compulsory jurisdiction of the ICJ it likewise could be the subject of a provisional ruling by the Court.

The resulting decision on the merits of the case did not directly respond to the question posed by the U.K. as to the validity in international law of the regulations as contemplated by Iceland. However, the Court did recognize the dependance of a coastal state upon the resources of the seas and that such dependance would give rise to a form of "preferential rights", not exclusive jurisdiction, in the fishery beyond its 12 mile exclusive fishing zone and that the Iceland regulations were not opposable to the U.K., at least in part because the U.K. enjoyed historic fishing rights and its fishermen and coastal communities were also dependant on the stocks. The Court further noted that the solution to the dispute was a matter for negotiations between the parties based upon the listed factors noted by the Court.

The precedent of the two fisheries-related cases noted above indicated that Canada was probably well advised in making a reservation to its compulsory jurisdiction of the ICJ in light of the potential of a state seeking provisional measures pending ultimate disposition of the matter before the Court. While the likelihood of such an application for provisional measures would not appear to be forthcoming from the five flag states whose vessels were in the NAFO area, the potential of a application by the EU collectively, or one of its members,

315 Anglo-Norwegian Case, supra., note 328.

316 Ibid.

317 Fisheries Jurisdiction Case, supra., note 329.

318 Ibid.
could have jeopardized the intention of Bill C-29 in providing a swift remedy to deal with flag-of-convenience and flagless vessels in the NAFO area.  

Canada could come under considerable criticism for not submitting to the jurisdiction of the ICJ in terms of seeking an advanced ruling as to the validity under international law of Bill C-29. In this regard Canada's credibility in supporting and complying with international dispute resolution mechanisms could be drawn into question. However, the critical nature of the Northwest Atlantic fishery and threatened commercial extinction of straddling stocks as such a vital interest to Canada, together with the inadequacies of the current state of international law, justify Canada decision to reserve the compulsory jurisdiction of the ICJ in relation to Canada.

Bill C-29 and its Status in Relation to the Current State of International Law

The question then to be addressed is can Bill-C29 be justified under the current state of international law and any exceptions thereto. The arguments as to the prima facie violation of international law with regard to UNCLOS Article 89 are apparent. In addition, arguments as advanced by the EU in its Note Verbale protesting Bill C-29 suggest the issue of foreign overfishing is to be addressed by the responsible regional regulatory authority - NAFO. Both these arguments have merit on the surface. The violation of UNCLOS Article 89 is clear. In regard to pursuing the matter at the NAFO level, Canada has pursued recourse within NAFO without a satisfactory solution resulting from such efforts.

The context of the problem is further complicated by the UN High Seas Conference and the FAO Compliance Agreement both of which seek to put in place a regime to govern the high seas fishery and, in particular, the regulation of high seas fishing vessels. The future direction of international law is clear in terms of these two initiatives. The question is entirely one of whether Canada can wait for these initiatives to mature providing an effective solution in the Northwest Atlantic. The requirement for an immediate response was the motivation for Bill C-29 and the critical dimension to be addressed in terms of an acceptable exception to the current state of international law.

There are a number of exceptions which have been developed in international law.

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319 The assumption is also made that no state would challenge the validity of Bill C-29 to challenge stateless vessels given the current state of international law as stated in UNCLOS Article 110 which would allow a state to apply its own jurisdiction and laws to a stateless vessel.

320 A similar argument was advanced in relation to the Arctic Waters Pollution Prevention Act, supra., note 324. Then Prime Minister Trudeau noted this point of "vital Canadian interests" in defending the Arctic legislation in a speech in the House of Commons, 8 April 1970.

321 Supra., at 126-27.

322 Supra., at 61-62.
which may constitute a basis for justifying Bill C-29. The fact that Bill C-29 will not be the subject of a legal proceeding before the ICJ does not diminish the requirement for justification in international law.

Three arguments which could be advanced in support of Bill C-29 stem from the work of the International Law Commission (ILC). The work of the ILC, although not formally recognized as international law, certainly helps shape it. In each case there is a requirement for the action on the part of the state, where such action would normally breach international standards and obligations, not to be wrongful where such action was taken in one of three circumstances. These include: (1) taken in a state of necessity; (2) as a countermeasure to a wrongful act of another state or, (3) as a temporary protective measure to protect the rights of the state implementing the questionable measure until such time as the dispute is settled by other means.323

1) The Doctrine of Necessity

The ILC strongly upholds the doctrine of necessity as emerging from the 19th century, and now defunct, principle of self-preservation, together with other principles such as force majeure and the right to self-defence.324

What is required pursuant to the doctrine of necessity for the state claiming it is that the state act as a matter of urgency, of "abnormal conditions of peril", of grave and imminent danger or "vital" interests of the state. The vital interest to be protected need not be so critical as to threaten the existence of the state. It must however be of such a magnitude as to threaten the survival of a portion of the population, such as an ecological disaster of a substantial magnitude and generally be of such a critical nature as to compel the impacted state to act.

One critical element is that the action taken by the state must be the only effective means of averting the imminent peril. Should some other recourse be available which does not constitute a breach of an international obligation, then the state has an obligation to pursue the measures not violating an international obligation.325

The ILC cited two cases which are of particular relevance given their ecological context in which the doctrine of necessity justified the wrongful actions of a state.

a) The Behring Sea Fur Seals Case

In 1893, the Russian Government issued a decree prohibiting seal hunting in areas of the high seas off its Siberian coast. The reason for the measure by Russia was severe overharvesting by British and American vessels to an extent of threatening the extinction of the seal herds. In a letter to the then British Ambassador explaining the action, the Russian Foreign Minister noted the action had been taken because of the upcoming hunting season


324 Ibid., at 34-52.

325 Ibid.
and the "absolute necessity of immediate provisional measures". The Russian Minister further emphasized that the measure was taken because of exceptional circumstances.

The relevance to the Canadian Bill C-29 is quite striking in terms of conservation measures implemented on the high seas for the protection of living resources under threat of extinction. In both the Russian case and the present Canadian case a perceived imminent peril - was the extinction of the resource in question due to excessive harvesting.

2) The "Torrey Canyon" Oil Spill

This well known case of a Liberian tanker going aground off of the Cornish coast (and outside of British territorial waters), created the potential for an ecological disaster were the leaking oil to eventually reach the Cornish coast. With the failure of salvage efforts and all efforts to dispense the oil, the British bombed the wreck, setting it ablaze, with the result that most of the oil was burned off.

The ILC noted that a state of necessity was present in this case as the potential of an ecological disaster impacting miles of coastline was a real possibility. The actions of the British were justified as evidenced by the fact that no one protested the action, not the ship owner, or the flag state.

The "Torrey Canyon" and other subsequent oil spills motivated the incorporation into UNCLOS of a provision allowing a threatened coastal state to intervene to prevent oil pollution on the high seas.

The "Torrey Canyon" incident prompted the ILC to make the following statement of principle:

"...a state of necessity can still be invoked, in areas not covered by these rules, as a ground for state conduct not in conformity with international obligation in cases where such conditions proves necessary, by way of exception, in order to avert a serious and imminent danger, which even if not inevitable, is nevertheless a threat to a vital ecological interest, whether such conduct is adopted on the high seas, in outer space or -- even this is not ruled out -- in an area subject to the sovereignty of another state."

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326 Ibid., at 39.
327 Ibid.
328 The "Torrey Canyon", Cmnd. 3246, April 1967.
329 The potential of a sizeable liability claim against the ship owners and possibly the flag state had the oil reached the British coast may have influenced the failure to protest. In fact the flag state and vessel owners may have owed a debt of gratitude to the British for effectively dealing with the problem and averting further ecological disaster.
330 UNCLOS, supra., note 6, Article 221.
The ILC proposed a draft article as to the doctrine of necessity and when it can be invoked by a state, the actual wording of which is as follows:

"**Article 33 - State of Necessity**

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

   a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

   b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

   a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

   b) if the international obligation with which the act of the State is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

   c) if the State in question has contributed to the occurrence of the state of necessity."

In the case of the Northwest Atlantic there is no doubt an essential interest of Canada is at risk in terms of the East Coast fishery with the livelihood of thousands at risk and already affected. An essential interest also exists from the perspective of a global concern in that the threatened straddling fish stocks are considered a vital world food resource as specifically referred to in Bill C-29.333

The imminent peril was addressed by the only means available to Canada. Both Canada and NAFO imposed bans on the fishing of certain stocks which were not respected by either NCP or stateless vessels. With the UN High Seas Conference and the FAO Compliance Agreement not having force of law as yet, Canada could argue it took the only alternative available. The counter-argument could be advanced that there was an obligation

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332 *Ibid.*, at 34.

333 *Bill C-29, supra.*, note 2, section 5.1 (a). See also * supra.*, at 110.
for Canada to allow the UN Conference to provide an solution to the problem or to further pursue the matter at NAFO. In either case the pressing nature of the problem required an immediate response as in the case of the Russian Behring Seal Case were the measures were implemented prior to the forthcoming sealing season. There is also the possibility that neither the UN Conference or further efforts through NAFO would produce a solution. In the meantime if the foreign overfishing is allowed to continue, there may be no fish left to preserve after another fishing season.

The issue as to whether the actions of Canada would impair an essential interest of the state towards which an obligation existed, the only clear obligation that would appear to exist would be the interests of the flag states of the vessel Canada arrested pursuant to Bill C-29. There would clearly be no obligation in the case of stateless vessels, which by their very definition, are outside the protection of any state. The obligation in the case of the NCP flag-of-convenience vessels would be in terms of respecting the sovereignty and sole right of the flag state to control its ships. Since the flag state relationship in the case of NCP vessels is that of a flag-of-convenience, no genuine link exists with the flag state except in terms of statutory requirements in the form of registration specifications. The interests of the flag state in such instances can not be deemed to be of "essential interest" as noted in the ILC Article 33 (1) (b). The indication by the flag states named in the regulations to Bill C-29 that they would not protest an arrest of one of their vessels pursuant to the Canadian legislation further supports the proposition that the interests of those states are not essential.334

Pursuant to the ILC Article 33, (2) (a) the validity of Bill C-29 can be based upon the responsibility of fishing vessels to respect conservation and management measures which is part of the freedom to fish the high seas noted in Article 116 of UNCLOS. Therefore while Canada is violating Article 116 it is also helping to enforce those provisions of the Article requiring compliance and respect for conservation and management measures (Article 116 (a) (b) and (c)).

There would appear to be no treaty which explicitly or implicitly prohibits Canada from taking the action it is taking. While Article 89 of UNCLOS prohibits Canada from extending a sovereign claim to the high seas, such is not the nature of the claim as advanced by Canada in the form of Bill C-29. Similarly while inconsistent with Article 89 of UNCLOS, Bill C-29 does attempt to impose a temporary regime until such time as international law develops to provide for an effective and enforceable means of implementing the conservation and management provisions of UNCLOS as is the stated purpose of the UN High Seas Conference.335

Finally, Canada could be preclude from acting if it some how contributed to the imminent peril it now seeks to prevent (ILC, Article 33, (2) (c)). It certainly can be argued that Canada individually, and as a member of NAFO, contributed to the overfishing. However, the basis of the overfishing may have been misunderstanding as to the real size of the fish stocks and their ability to rejuvinate as influenced by other factors which only

334 Supra., at 127.

335 Supra., at 27-28.
became apparent after the fact.\textsuperscript{336} What is clear is that Canada did not intentionally overfish thus creating the imminent peril now necessitating action. In this regard no state could be deemed to be at fault.

In satisfaction of the elements of the doctrine of necessity as set out in the ILC’s Article 33, Canada could advance the cause of Bill C-29.

2) Counter-Measures

A counter-measure is a unilateral remedy constituting a violation of international law resorted to by an injured state in response in direct response to wrongful act committed by another state. In this context a counter-measure is accepted by the ILC as a circumstance precluding the wrongfulness of the counter-measure by the injured state.\textsuperscript{337}

While counter-measures are used primarily as reprisals, the term has now been given a wider meaning not necessarily requiring a military response. The rationale for a counter-measure is to compel the state having committed the wrongful act to cease the act, repair the damage, not to repeat the violation or, at least, agree to a mechanism for the peaceful settlement of the dispute.

The conditions which must be present to justify counter-measures include:

i) The existence of an illegal act;

ii) the resort to a counter-measure must be preceded by a protest of the illegal act, a demand for cessation. In other words the injured state must communicate its complaint to the state causing the harm and allow it to rectify the situation;

iii) the ILC views that counter-measures are not viable unless other peaceful measures have attempted to resolve the dispute;

iv) There must be proportionality between the harm done and the counter-measure;

v) counter-measures must respect existing international norms and law in terms of human rights and the prohibition upon the threat of the use of force; and

vi) The counter-measure cannot have an impact upon a third party.\textsuperscript{338}

\textsuperscript{336} Supra., at 3.


\textsuperscript{338} Ibid.
In the case of Bill C-29 the existence of the illegal act could be deemed the failure of the flags-of-convenience to control their vessels and thus imposing conservation and management measures upon such vessels. The right of exclusive jurisdiction to regulate the activities of its flag vessels has a corresponding obligation in terms of controlling such vessels to the extent their activities are not in violation of any international laws. While UNCLOS provides for the exclusive jurisdiction of a flag state to regulate its vessels (Article 94), freedom of the high seas (Article 87) and freedom to fish (Article 116), there also exist corresponding obligations under UNCLOS which limit such rights.

For example, Article 116 is limited by Article 63 (2) and Article 64 to 67 which broadly speaking provide for vessels requiring cooperation as between states in the management of straddling stocks and other living marine resources that do not confine themselves to the high sea and one jurisdiction. The effect is to limit the right of freedom to fish the high seas.

Another example are the provisions of UNCLOS providing for cooperation of states in the conservation and management of the resources of the high seas (Articles 117, 118, 119 and 120). Such obligations likewise limit the rights of the states to allow their vessels to operate freely on the high seas. The illegality may be the lack of flag state control compelling vessels to comply with the appropriate provisions of UNCLOS in furtherance to conservation and management of high seas living resources.

In the case of Canadian diplomatic efforts, the harm caused to the Canadian as well as Northwest Atlantic fishery have been stated on numerous occasions to the flag states in question with specific requests that they control their vessels. As noted previously, some states have attempted to comply. However, central to the entire problem is the fiction of flag-of-convenience states having the ability to control their vessels. Thus flag-of-convenience states have been unable to rectify the problem in the short-term.

The ability of Canada to pursue all other remedies available poses a problem that by removing the jurisdiction of the ICJ to deal with the dispute, Canada has not pursued all legal recourses available before implementing the counter-measure. Further, if the failure of the flag-of-convenience states to control their vessels constitutes an illegal act, then Canada would have recourse against such states before the ICJ and could implement Bill C-29 as a provisional measure pending resolution of the dispute. The failure of Canada to view the activities as an illegal act, in terms of failing to control their flag vessels in compliance with all provisions of UNCLOS, giving rise to a legal challenge before the ICJ does not support the categorization of Bill C-29 as a counter-measure. This form of provisional counter-measure pending resolution of the dispute will be addressed in greater detail below.

The other two requirements as noted in (v) and (vi) would appear to be satisfied as no internationally unacceptable measures are used to implement Bill C-29 and that it targets only countries considered to have committed the illegal act as appearing on the list of countries specified in the regulations and thus not limiting rights of other, third party states on the high seas. The argument could however be made that Bill C-29 applies to all vessels including NAFO vessels as limited only by the regulations which target flag-of-convenience and stateless vessels. The potential application of the Bill itself would potentially give rise to a claim by a third party.
3) Provisional Measures of Protection

Provisional measures of protection are a special form of counter-measures, distinguishable by their purpose - to provide protection of the rights and interests of an aggrieved state until such time as the dispute can be resolved. The provisional measure can be a unilateral form of measure that might be ordered by a court pending disposition of the dispute. The basis for the imposition of such measures is the same as would be required for a similar application to a court in terms of an emergency requiring the measures pending resolution by a competent court.

This provides another option which could have been exercised by Canada in implementing Bill C-29. This would have involved passing the legislation on the stipulation that Canada would be seeking legal recourse before the ICJ against the flag states whose vessels fished the NAFO area. The measure could be further supported by requesting the ICJ confirm or replace the measures put in place by Canada with a comparable measure which would prevent continued overfishing of the NAFO area by foreign vessels.

The exercise of such an option by Canada was not utilized and there are a number of reasons which may have eliminated ultimate submission to the ICJ following the implementation of a provisional measure in the form of Bill C-29. Subjecting to the jurisdiction of the ICJ would be a prolonged process and the complicated nature of the dispute further delaying an ultimate resolution. This would be unacceptable to Canada given the urgency of the situation governed by the depleted state of fish stocks. The speed of a response would have to be measured in light of the anticipated outcome of the UN High Seas Conference and ratification and enforcement of the FAO Compliance Agreement which would, in all probability, solve the problem prior to a determination by the ICJ. Finally there is always the possibility of the ICJ requesting Canada remove the provisional measure in the form of Bill C-29 prior to disposition of the dispute.

The legal possibilities must also be tempered by the fact that the flag states in all instances have cooperated with Canada to address the problem of foreign overfishing and would not appreciate a challenge before the ICJ based upon their inability to control their flag vessels. Essentially this would question the validity of their flags-of-convenience and undermine progress to date in terms of concessions made by flag states.

4) The Effects Doctrine

The effects doctrine or as it is also known the objective territoriality principle provides for a justifiable right for a state to extend its jurisdiction to acts that occur outside the area of its territorial sovereignty if those acts result in adverse effects upon areas within

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339 Arango-Ruiz, supra., Note 352.

340 This could be facilitated by the ICJ authorizing Canada, under direction, to regulate the area in question preventing NCP vessels from entering the area until such time as the dispute is resolved.

341 Supra., for Panama at 68 and Honduras at 72.
The effects doctrine was utilized by the ICJ in the Lotus Case which dealt with jurisdiction over collisions at sea.\textsuperscript{342} The doctrine bases jurisdiction for a state to act upon the fact that the adverse effect occurs within the territory or jurisdiction of a state, even though the act occurs outside it. The effect is considered to be a constituent element of the wrongful act. The effects doctrine is an established principle of customary international law. When the effects are physical, substantial and, within reason, foreseeable, application of the doctrine is unquestionable.

The doctrine has also been recognized within the context of UNCLOS by specific rules which allow for the extension of jurisdiction beyond territorial waters on to the high seas. For example, Article 60 (1) (c) provides jurisdiction to a coastal state over installations without an economic purpose that may have effects within the states exclusive economic zone. This is an exception to the general rule that a state can regulate only economic activities within its zone.

Another example, is Article 220 (6) which provides a right to a coastal state to detain a vessel and institute proceedings where clear evidence exists of a vessel navigating in the territorial sea or economic zone and therein committing a pollution resulting in a threat or damage to the coastline of the coastal state.

Finally, Articles 109 and 110 of UNCLOS work together to allow coastal states to intervene on high seas to prohibit unauthorized broadcasting. Likewise the right to seize pirate vessels on the high seas extends a states jurisdiction. (Article 105).

One common element in all of the activities which give rise to the extension of jurisdiction and right to act against the vessels perpetrating the act is that the act is usually universally recognized and accepted as against the common interests of nations thus justifying the right of states to act on the high seas.

In the case of the overfishing activities of NCP vessels two arguments based upon the effects doctrine can be raised. In the first case overfishing has impacted the social and economic fibre of Canada and more specifically, the Province of Newfoundland. However, it must be recognized that foreign overfishing nay not be the only reason for the social and economic upheaval in Newfoundland for, example government policy, the seal population and climatic changes impacting fish stocks. The second case involves the very nature of straddling fish stocks. Fishing outside of Canada's jurisdiction of straddling stocks will impact straddling stocks inside the jurisdiction of Canada. the characteristic of straddling stocks, whereby they are one biological unit overlapping national as well as international waters, would appear to give rise to a legitimate claim to act, as in the form of Bill C-29, pursuant to the effects doctrine.

The United States Drug Legislation

One "activity" which has recently come to light and gained the attention of international law and coastal states is that of the illicit trafficking in narcotics. The problem has received recognition by the UN as a serious global concern and is the subject of an

\textsuperscript{342} P.C.I.J., Series A, No. 10, 1927 18.
international convention stating the universal condemnation of the problem.\textsuperscript{343}

With the universal condemnation of drug trafficking as the background, the United States passed legislation to deal with the problem and the illegal importation the drugs into the US by vessel. The application of the effects doctrine is that vessels outside the US jurisdiction clandestinely bring those drugs into the American jurisdiction. The impact of drugs on the social, health and criminal aspects of American society need not be restated. The effects doctrine applied in terms of activities of drug-laden vessels outside of American jurisdiction causing a severely adverse effect in the jurisdiction of the US.

The US legislative initiative was in the form of amendments to the existing 1970 \textit{Comprehensive Drug Abuse Prevention and Control Act} by adding a new section which explicitly prohibits any person on board a United States vessel, or on board a vessel subject to the jurisdiction of the United States on the high seas which knowingly distribute or possess with intent to distribute a controlled substance.\textsuperscript{344} The law does not require that the drugs be destined for the US jurisdiction with possession alone sufficient to be an offense under the legislation. The law also prohibits similar acts by American citizens on board any vessel\textsuperscript{345} or by any persons on board any vessel within the customs waters of the United States.\textsuperscript{346} The law also contains a broad prohibition against any person, wherever located, who possesses, distributes or manufactures a controlled substance intending or knowing that it will be unlawfully imported into the United States.\textsuperscript{347}

The term "vessel subject to the jurisdiction of the United States on the high seas" includes: a vessel without nationality; or, a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas 1958.\textsuperscript{348} This section of the legislation has been the subject of considerable controversy and court challenge on the grounds that in accordance to international law there is no jurisdiction over a stateless vessel.\textsuperscript{349} This resulted in numerous challenges to the law by defendants based upon the law constituting a violation of international law by claiming to apply to non-United

\textsuperscript{343} \textit{Convention against Traffic in Narcotic Drugs and Psychotrophic and Related Activities, October 1984, New York United Nations reprinted in I.L.M. 1165.}

\textsuperscript{344} 21 U.S.C. §955a (a). The amendments are general known as the 1980 Marijuana on the High Seas Act.

\textsuperscript{345} 21 U.S.C.§955a (b).

\textsuperscript{346} 21 U.S.C. §955a (c).

\textsuperscript{347} 21 U.S.C. §955a (d).

\textsuperscript{348} 21 U.S.C. §955a (2) (d).

States citizens and non-United States vessels.  

The result of the continued court challenges to the drug law was further amendments in 1986 in the form of the *Maritime Drug Law Enforcement Act*.  
The 1986 amendments were significant for a number of reasons. In the first instance a provision was added to the law whereby only another nation could challenge the drug law with regard to compliance with international law. The amendments further provided that the prosecution not be required to prove that there was an intention to distribute the drugs in the United States, clarifying several of the challenges which were made to the 1980 amendment by defendants. The inherent assumption is made that the drugs will have an adverse impact in the jurisdiction of the United States and need not be proven to be destined for the US. The 1986 amendment also codified judicial interpretations of the 1980 law for obtaining foreign state consent, by informal means (radio, telephone etc.) in order to enforce the drug law against foreign vessels.

The 1986 law also provided a new definition of what vessels would be subject to the legislation. The earlier definition is expanded to include foreign vessels where flag nation consent has been obtained even if such vessels are in the territorial water of another nation. The definition of a stateless vessel includes a vessel without nationality; in accordance to article 6 of the 1958 High Seas Convention; and instances where the flag of the vessel is concealed or not ascertained upon boarding of the vessel.

The critical development with the 1986 law was that a stateless vessel outside of the US coast could be subject to the legislation in that there need not be a nexus to the US. Simply the fact that the vessel is stateless would allow the US courts to take jurisdiction over the vessel. It is interesting to note that as a result of the 1986 amendments requiring no

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356 46 U.S.C.A. §1903 (c) (2) (West Supp. 1988)

357 Stieb, *supra.*, note 364 at 129.
requirement to prove intent for the drugs to be distributed into the US, the effects doctrine would appear unapplicable and unnecessary in defence of the law.\textsuperscript{358}

Comparison to Bill C-29

In both instances the ultimate purpose of the US drug law and Bill C-29 is to regulate the activities of vessels who are not nationals of the country attempting to regulate beyond the jurisdiction to regulate. It is interesting to note that Bill C-29 goes further than the US drug legislation in that it is prepared to allow for the arrest of flag state vessels without consent of the flag state as provided for in the American legislation. Since flag state consent is not required by Bill C-29, a policy decision may have to be made to seek such consent before arresting such a vessel. Such consent of the flag state would make the US legislation consistent with the UNCLOS provisions as to sovereign right of the flag state to regulate the vessel. While clearly indicating that Bill C-29 flies in the face of the UNCLOS provisions by including no such consent of flag state provisions... Therefore, \textit{prima facie} the US drug legislation violates only Article 89 of UNCLOS in so far as no state can claim sovereignty over the high seas. Bill C-29 would appear \textit{prima facie} to be more offensive to customary international law as found in UNCLOS than the American drug law by violating those provisions of UNCLOS dealing with flag state control over vessel (Articles 92 and 94).

It is interesting to note as well that the illicit trafficking of drugs and overfishing are the subject of ongoing efforts at the United Nations with a global recognition that both activities are contrary to global interests. If one had to measure the more negative act, as between drug trafficking or overfishing, drug trafficking would appear to have a greater negative impact upon mankind and thus justify the more intrusive legislation to eliminate. This may be too simple an analysis but would illustrate that the proportionality of Bill C-29 in allowing action against flag vessels may be excessive when compared to the US drug legislation that allows such action only with flag state consent. In both cases the fact that at an international level neither activity has been declared illegal as in the case of piracy (Articles 110-105) makes the matter more difficult to assess. One conclusion which would not be contested is that drug trafficking is considered morally illegal and universally unacceptable. Overfishing has not been present on the international stage as long and thus not earned the same wide-spread condemnation.

Conclusion

The overfishing problem in the Northwest Atlantic required Canada to act in order to address the fragile state of the high seas fishery. Bill C-29 was a measure to deal with the

\textsuperscript{358} Note the US Court have recognized four ways in which US criminal law can have extraterritorial application in addition to the effects doctrine. They include: territorial jurisdiction – based upon where the offence takes place; national jurisdiction – where jurisdiction is based upon the nationality of national character of the offender; universality – the custody of the offender gives jurisdiction under this principle and passive personality – where jurisdiction is based on the nationality or national character of the victim. See Rivard v. United States \textsuperscript{375} f. 2nd 882 (1967) at 885-86.
overfishing problem of foreign overfishing by vessels which flaunted the conservation and management measures self-imposed by Canada and NAFO.

The gaps in international law, particularly UNCLOS, allowing flag-of-convenience vessels to fish straddling stocks while frustrating, is based on the historic and entrenched principle of flag state control and freedom to fish the high seas. What is apparent is that these principles are no longer beyond challenge and the UN High Seas Convention and FAO Compliance Agreement will limit such rights. Bill C-29 has taken an extreme attack on these rights. What will be interesting is the response of the Canadian courts to the legislation should it ever be challenged on the basis of its consistency with international law. To date that does not appear a likelihood in that since the passage of Bill C-29 all NCP vessels which previously fished in the NAFO area left and have not returned.

The context of Bill C-29 will only be ascertained with the passage of time. The results of the UN High Seas Conference may erode the concept of flag state control of fishing vessels and freedom to fish the high seas. As for how Canada arrived at Bill C-29, considerable criticism may be directed at a nation that acted unilaterally contrary to black letter international law. On the other hand the process of international law is not a rigid one as noted by Professor Myres S. McDougal as follows:

"...[T]he international law of the sea is not a mere static body of rules but is rather a whole decision-making process, a public order which includes a structure of authorized decision-makers as well as a body of highly flexible, inherited prescriptions. It is, in other words, a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation states unilaterally put forward claims of the most diverse and conflicting character to the use of the world’s seas, and in which the decision-makers... weigh and appraise these competing claims in terms of the interests of the world community and of the rival claimants, and ultimately accept or reject them. As such a process, it is a living growing law..."359

The decision has yet to be made as to the proper historical context of Bill C-29. Should an international regime emerge which can effectively address the problem of high seas overfishing at some future date, Bill C-29 may have only been a short-term exercise to protect a long-term interest. No matter what the outcome, the Canadian experience giving rise to Bill C-29 will cause reflection on the use of flags-of-convenience and freedom of the high seas in light of the constantly growing environmental and ecological pressures imposed upon oceans and their resources.

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