



COMMISSION EUROPÉENNE
Secrétariat général

INFO - NOTE

N° 15/95

**DIFFEREND DE L'E.U. AVEC LE CANADA
CONCERNANT LA PECHE
ARGUMENTAIRE II**

*Information aux
Délégations extérieures de la Commission*

(Envoi par valise diplomatique)

De la part du Secrétariat général
Service "Information des délégations"
Horst-Jürgen TITTEL - BREY 13/122 - tél. 52375/52125 - téléfax 296.59.96

EN - 30.03.1995



Bruxelles, le 30 mars, 1995

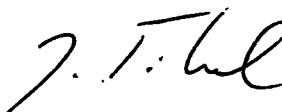
HJT/js

NOTE A L'ATTENTION DES DELEGUES

Objet : Différend de l'Union européenne avec le Canada concernant la pêche
Argumentaire II
Info-Note n° 15/95

Afin de permettre aux Délégations de faire valoir le bien fondé de la position de la Communauté en ce qui concerne la conservation des ressources de pêche, veuillez trouver ci-joint, un deuxième argumentaire (*) répondant aux critiques récentes formulées par le Gouvernement canadien.

Amitiés



Horst-Jürgen TITTEL

Conseiller

(*) (voir également Argumentaire I, supplément à l'EU-REVIEW n°638 du 17/3/95)



Is the EU serious about fish conservation?

The EU is determined to reinforce control and inspection on the high seas in order to safeguard the world's dwindling fish stocks. In addition to its current inspection procedures, which are among the toughest in the North-West Atlantic Fisheries Organisation (NAFO), the EU is proposing stronger multilateral rules in order to boost conservation of the world's fish stocks. These measures include:

- *Non-discriminatory inspection*
- *Improved transmission of information on infringements*
- *Increase of inspection activity and presence*
- *Improved hail system*
- *Satellite tracking of fishing vessels*
- *Minimum fish size, and improved enforcement for processed fish*
- *Stricter rules to reduce the quantity of fish caught unintentionally*
- *Dock-side inspection of 100% of boats*
- *Increased transparency in enforcement performance*
- *Definition of a class of major infringements*
- *Improved follow-up when serious infringements appear to have occurred.*

How does Canada's record stand on fish conservation?

Canada is severely criticised by its own authorities for overfishing and poor stock management

The Report of the Task Force on Incomes and Adjustment on the Atlantic Fisheries (the so-called "Cashin" Report), dated November 1993, accuses Canada of the following:

- *Destructive fishing practices such as highgrading, discarding and dumping of immature fish or non-target species;*
- *Failure to control expansion of fishing in a sector plagued by overcapacity, and the failure to minimise the damage caused by fishing technology;*
- *Over-optimistic setting of Total Allowable Catches for many stocks, based on inaccurate scientific projections, inadequate understanding of stock dynamics and imprecise data on commercial fishing activity.*

Canada has depleted stocks of Pacific salmon

This fishery, entirely managed by Canada, has nearly collapsed. According to the 1995 report of the "Fraser River Sockeye Public Review Board", a body formed by the Canadian Ministry for Fisheries and Oceans, stocks of the sockeye salmon face collapse because "Canada made a policy decision to pursue an 'aggressive fishing strategy'. Canadian fishers were encouraged to harvest as aggressively as possible on the west coast of Vancouver Island and in the Juan de Fuca Strait before the Fraser River sockeye became vulnerable to American interception closer to the mouth of the Fraser River. This strategy contributed to a 'grab all' attitude in the Canadian commercial fleet". Furthermore, the British Columbia Fisheries Survival Coalition claims that the Canadian Fisheries Ministry has repeatedly ignored warnings that failure to act could lead to a repeat of the salmon spawning disaster suffered in 1992, and has specifically asked the EU to raise the issue with the Canadian authorities.

Canada has depleted stocks of swordfish

Between 1988 and 1993, Canada increased catches of swordfish whilst its main fishing partners reduced their catches in line with scientific advice.

Canada has depleted stocks of flatfish

Despite Canadian claims that the EU destroyed stocks of flatfish, Canada appears to be the prime culprit of stock depletion in these species. For cod, 80% of the stock has been in Canadian waters. For Greenland halibut, stock depletion has reached its most serious levels in the shallower waters, where only Canadian boats have been fishing. Furthermore, the present collapse of certain groundfish stocks in the NorthWest Atlantic only took place after 1977, when Canada extended 'de facto' its jurisdiction up to 200 miles off the coast, expelling foreign boats in order to build up its own fishing industry. Canada's own Department of Fisheries and Oceans says that most groundfish stocks managed exclusively by Canada are in very poor shape. Canada's role in stock depletion is thoroughly documented by the NAFO Scientific Council, and can be seen in the report of a meeting experts in London (17-19 march 1992)

Canada has granted itself opt-outs from conservation measures, allowing moratoria to be side-stepped by those practising so-called "recreational" and "scientific" fishing. Despite the moratorium on cod, Canada has allowed recreational fishing to catch an estimated 20,000 tonnes. At the end of 1994, Canada also permitted a fishery in 1995 supposedly for scientific purposes, but which in fact goes beyond any principle of conservation under a moratorium.

Canada has failed to ratify the bilateral agreement with the EU

This agreement would help resolve fishing disputes, strengthen conservation and provide access to each other's ports, without giving European boats any extra access to Canadian waters. It therefore would have constituted a major step towards reducing tension. The EU ratified the agreement in 1993. Despite a long list of statements and promises from the Canadians, they have still refused to ratify the accord.

Canada has sought to mask its own responsibility for stock depletion with the following claims:

NAFO has recommended that fishing be spread evenly over the fish habitat, and the EU has ignored this advice.

The NAFO Scientific Council has never recommended evenly spreading fishing over the habitat. At most, the Scientific Council has recommended spreading fishing over a wider area. The Union tried to conclude an agreement to this effect with Canada. Before the EU starting fishing in this region, the Scientific Council repeatedly recommended fishing deeper and in more Northerly areas. Canada has repeatedly ignored this advice, while the EU is fishing in very deep waters where few boats have fished before.

The EU fishes predominantly immature fish.

The Greenland halibut has a long life-span and reaches sexual maturity at a relatively advanced age. It is quite possible for young halibut, therefore, to be caught through legal fishing methods, as they can grow to a considerable length. All fishing, including by Canada, can therefore affect immature fish. This fact does not pose a serious threat to the health of the stock by itself, provided mature fish are left in the sea in sufficient numbers. Indeed, NAFO experts have factored it in when calculating the Total Allowable Catch, which the EU will respect.

The EU has increased the number of boats in 1995 by 15 % as compared to 1994.

Fishing is measured by a combination of fleet size (represent fishing power) and fishing time. 100 vessels fishing during 200 days exert the same fishing effort as 200 vessels fishing during 100 days. Canada knows the size of the fleet during the first two months of the year, but does not know how many EU vessels will be fishing during the rest of the year, or for how long. It cannot therefore forecast that EU fishing in 1995 will reach levels comparable to 1994. Spain has recently reduced its presence in the fishing grounds from 30 to 17 vessels.

In any case, all these considerations would only apply if there were in place a management by direct limitation of fishing effort. However, the NAFO scheme only foresees an indirect management of fishing effort, via TAC and quotas. The basis for this system is that fishing effort ceases whenever a certain quota associated to it has been fished. In this regard, any contracting party may use as many boats as it wishes to fish the associated quota. Canada's arguments are therefore irrelevant.

According to Canada's reasoning, the turbot management plan announced by the Canadian authorities for 1995 would be totally contrary to scientific advice: they are prepared to increase the fishing effort, allowing new fleets to fish for Greenland halibut, and to increase catches from a level of 3 000 tonnes in 1994 to their disputed quota of 16 300 tonnes in 1995.

Intensive fishing by the EU is responsible for the decline of the stock.

The decline, as described by the Scientific Council, is observed on the stock occupying shallower waters, and started in 1983, well before EU boats began fishing. EU fishing furthermore has focussed only on the fraction of the stock occupying deep waters. Given that in the period prior to 1990 the fishery was managed and conducted mostly by Canada, the perceived decline must reflect serious mismanagement by Canada itself.

Canada argues that the decline in catches in its waters is due to curbs imposed in order to protect stocks. This is totally false. None of the TACs implemented at that time in the Canadian zone were restrictive. They were set on the basis of actual fishing possibilities if fishing were expanded to deeper and more northerly areas, as recommended by scientists. But the Canadian fishing industry was unable to follow this advice and continued fishing in the shallower and traditional fishing grounds. This resulted in overfishing of those grounds, prompting a decline of catch rates and total catch.

The Union is not committed to conservation.

The Union has made an enormous effort in inspection and control, including the deployment of inspection vessels 10 months a year, extensive dock-side inspections and deployment of observers. EU boats were boarded 430 times last year in this region, often by Canadian inspectors, from among a total of 630 inspections. Infringements were reported in 13% of cases. Numerous technical discussions between EU and Canadian inspection services have revealed the efficiency of the European inspectors. These are among the toughest of all NAFO controls.

These actions led the Canadian Ambassador in Belgium to write to the Belgian Agriculture Minister (Belgium held the Council's presidency at the time) that as far as fisheries conservation was concerned "I want to assure you that NAFO members, and particularly the EU, are not our problem today" and that "I hope that the Canada-EU fisheries agreement will be ratified in due course. The agreement formalizes the new approach to fisheries relations between us, and it will help prevent problems in the future". This statement came in just before the Council of Ministers had to ratify the bilateral agreement.

What is the status of Canada's claims against the Estai?

Canada has alleged that the "Estai" has cut the trawl wires in order to discard the nets and prevent Canadian inspectors from taking evidence of its (allegedly) illegal mesh size.

This allegation is completely without foundation. The ESTAI was obliged to release its fishing gear in order to enable it to manoeuvre safely and to avoid its propeller becoming fouled when armed Canadian personnel attempted to illegally board the vessel. After more than three hours of pursuit, the Canadians fired shots across the vessel's bow. In order to protect the lives of his crew, the ESTAI's skipper stopped the vessel and made no attempt to resist it being taken over.

The captain of the ESTAI was under no obligation to stop his vessel since the NAFO Conservation and Enforcement measures clearly state that a vessel shall not be required to stop when fishing. Moreover, the rules state that the use and carriage of arms is prohibited, the maximum number of inspectors allowed to board is three and the presence of the patrol vessel must be notified to NAFO. None of these NAFO rules were complied with by the Canadians. Furthermore, the Canadians appear to have completely ignored international Signalling and Collision Regulations.

Recently Canada has announced that 79 % of the catch of Greenland halibut stored in the vessel "Estai" was undersized, and that the vessel will be charged on that basis.

Firstly, there is no minimum landing size for Greenland halibut in the NAFO legislation. If by "undersized" it is meant "immature", then this is another case. This species has a very long life span and old age at maturity, and immature fish are caught by all contracting parties with no harm for the stock. If by "undersized" they mean that the length composition of the catch does not correspond to the use of a legal mesh size, this is very difficult to prove, given the normal variability of the selection power of the net in commercial use. Recent experiments on net selectivity in the same area and fishing for the same species, made last February by Community scientists, support this fact.

The vessel had a hidden hold containing about 25 tonnes of flatfish

The inspection, carried out by EU inspectors (of British nationality) once the boat had returned to Spain, showed this allegation to be completely false. Equally false was Canada's claim that the skipper had been using a double log-book to conceal illegal catches. The second book was in fact a continuation of the first.

The Canadians retrieved the Estai's net and showed it to be illegal

In New York the Canadians have paraded a net which they claim comes from the Estai. The EU has always said that it will act swiftly and sternly if European boats are proved to have infringed NAFO rules. But Canada has presented no hard

evidence whatsoever that this net belongs to the Estai. In order to assess whether a second inner net, or 'sock', was used, you need to look at the composition of the catch. British NAFO officials who visited the Estai on its return to Spain confirmed that the catch had not involved the use of such a device.

Given that almost all of Canada's "evidence" so far, notably concerning the Estai's alleged "double log-book" and "secret hold", has proved to be false under closer inspection, it is hard to take subsequently allegations seriously.

On the three occasions during the latest fishing trip on which the ESTAI was inspected, twice by Canadian inspectors, the net in use was found to comply with NAFO regulations. The boat was boarded as recently as January 27 this year by Canadian NAFO inspectors, who confirmed that the net was legal. During the whole of 1994 this vessel was boarded twelve times, often by Canadian inspectors, and no gear infringement was discovered.

The Estai landed American flounder which are currently under moratorium

This accounted for under 5% of the boat's total catch, which would be considered a relatively small portion by any analysis.

Where does Canada stand vis-à-vis international law?

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

This amounts to a claim to extend unilaterally coastal State jurisdiction to a part of the sea outside its exclusive economic zone and to which, in accordance with Article 86 of the UN Convention on the Law of the Sea of 1982 (UNCLOS)⁽¹⁾, the provisions concerning the high seas apply.

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

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

⁽¹⁾ *Most of the UNCLOS fisheries provisions are now considered as reflecting customary international law*

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

- By applying municipal law to foreign vessels in areas of the high seas and thus asserting national jurisdiction to prescribe conservation measures in those sea areas and to enforce such measures against foreign vessels and their crews, they violate Article 89 of UNCLOS which states that no State may validly purport to subject any part of the high seas to its sovereignty.

- By claiming authority to take, and eventually by taking, enforcement action against foreign vessels on the high seas, they violate the exclusive right of the flag State to exercise legislative and enforcement jurisdiction over its vessels on the high seas. That prerogative of the flag State derives from a standing principle of customary international law which is reflected in both Article 6 (1) of the Geneva High Seas Convention of 1958 and in Article 92 (1) of UNCLOS.

- States other than the flag State may interfere with this prerogative only in very restricted cases such as piracy, slave trade, drug trafficking or unauthorized broadcasting and in all other cases only with the consent of the flag State to be given expressly by treaty (Article 110 of UNCLOS).

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

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

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

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

