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International Law of the Sea: The Legality of Canadian Seizure of the Spanish Trawler (Estai)

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ABSTRACT

Canada's marine policy recognizes that the living resources of the sea are not inexhaustible and that the freedom of fishing enjoyed on the high sea by distant water fishing nations is subject to regulation. Canada has initiated regulatory mechanisms to ensure optimal utilization, maintenance and enhancement of resources through international cooperation, in line with the 1982 United Nations Convention on the Law of the sea (UNCLOS). In particular, Canada has been forced to regulate European fishing. Diplomatic initiatives proved ineffective in securing support of the European Union towards curbing excessive fishing effort, and Spanish vessels continued to flagrantly violate the moratoria that had been imposed on 28 species of straddling stocks, including the highly endangered species of Greenland Halibut. Therefore, Canada amended its Coastal Fisheries Protection Act in March 1995, permitting enforcement action against the recalcitrant Spanish trawler, ESTAI. While the EU threatened sanctions against Canada, calling the seizure of ESTAI an act of piracy and blatant violation of international law, Canada maintained that unilateral action was necessary to protect depleted fish stocks, and to ensure rational utilization of dwindling stocks of Greenland Halibut. This paper explores the background of applicable international law and the state of necessity which defines the fortuitous set of circumstances that could permit conduct prohibited by international law. It concludes that all the particularly strict conditions for a genuine plea of necessity were in existence when Canada arrested the Spanish trawler, ESTAI. It further notes, with emphasis, that measures taken were precautionary in nature. They were taken under the pressure of exceptional circumstances, namely, the grave and imminent danger which foreign overfishing poses to Canadian essential interest on the Grand Banks.

The fish war that exploded in the spring of 1995, between Canada and the European Union (EU), effectively focused international diplomatic attention on the environmental consequences of foreign overfishing on the high seas. Specifically, it directed world moral opinion to the implications of the reluctance of distant-water fishing fleets, particularly those of

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Portugal and Spain, to comply with established measures for ensuring the conservation and sustainable use of marine living resources on the Grand Banks.

Since 1977 Canada has been in the forefront of coastal states, pushing the bounds of international law for the seaward expansion of its national jurisdiction, in the interest of protecting and managing fishery resources within and outside its 200-mile exclusive economic zone. Under the auspices of the Northwest Atlantic Fisheries Organization (NAFO), which was created in accordance with the 1982 United Nations Convention on the Law of the Sea (UNCLOS), Canada has sought implementation of strict decisions on the allocation of straddling fish stocks to foreign fleets.

In opposition to Canadian conservation interests, the European Union consistently exploited the objection clause in NAFO's conventions to set its own quotas unilaterally in excess of imposed targets. Moreover, EU's use of the objection clause specifically violated provisions of UNCLOS that require the coastal state and distant-water fishing states "to seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation and development of such stocks in the adjacent area."

1. There are roughly 254 vessels fishing in the Northwest Atlantic Fisheries off the coast of Canada. About 149 of these are from the European Community; of which 94 are from Spain and 44 from Portugal. Spain and Portugal represent roughly 93% of EU vessels; among foreign fleets, they possess the worst record in overfishing. At the time of the crisis, Ireland and South Africa had also arrested and detained several Spanish trawlers for alleged violation of several fishing regulations. See GOV'T OF NEWFOUNDLAND & LABRADOR, ST. JOHN'S, NEWFOUNDLAND, QUESTIONS AND ANSWERS ON FOREIGN OVERFISHING 1 (1992).


4. The objection clause in the NAFO convention releases a participant from the obligation of strict adherence to allocation decisions.

5. Against its officially allocated quota of 120,000 tons (for the 1986-1991 season), estimates suggest that the EU netted about 590,000 tons of fish. See Claude Emery, Overfishing Outside the 200-Mile Limit: Atlantic Coast, CURRENT ISSUE REVIEW, Sept. 13, 1994, at 6 (Canadian Library of Parliament: Political & Social Affairs Div., Ottawa).

6. UNCLOS is weak in this regard because it fails to specify the role or function of the regional organization in facilitating negotiations. The Northwest Atlantic Fisheries Organization that was created in accordance with the provisions of the international rule is often constrained to provide guidance as to alternative actions when participating states fail to reach mutually acceptable agreements on measures for the conservation and development
Thus, the mechanisms of regional management proved ineffective in curbing EU's excessive fishing effort, and Spanish vessels continued to flagrantly violate the moratoria that had been imposed on 28 species of straddling stocks, including the highly endangered species of Greenland Halibut. Canada responded by amending its Coastal Fisheries Protection Act\(^7\) in March 1995 to permit enforcement action against Spanish and Portuguese vessels.

The chain of dramatic events that followed Canada's practical initiatives aimed at enforcing its new regulations are now familiar. The Spanish trawler Estai, which had been fishing on the Grand Banks under the protective flag of the European Union, was intercepted on the high seas, seized and detained in St. John's, Newfoundland by a Canadian naval destroyer. While the EU threatened sanctions against Canada, calling the seizure an act of piracy and a blatant violation of international law, Canada maintained that its unilateral action was necessary to protect depleted fish stocks, and to ensure rational utilization of dwindling stocks of Greenland Halibut.\(^8\)

On the heels of all the political maneuvering for fish, our attention focuses on questions about the legal basis of Canada's unilateral action. Was the seizure of the foreign trawler justifiable in law? What alternative actions could have been taken by Canada to safeguard its essential interest? Was the action limited to what was necessary to ensure conservation of the marine environment? These are the questions underlying the European Union's claim that Canada's amended Coastal Fisheries Protection Act constitutes an unprecedented jurisdictional claim which lacks justification in international law. The pivotal issue raised by international legal experts is whether a state of necessity defense may be used to justify Canada's action.

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8. The Canadian Government had to release an official response to most of the issues contended by the EU. See Gov't of Canada, Ottawa Tobin And Wells Respond to Misinformation on the Canada-EU Turbot Dispute, NEWS RELEASE NR-HQ-95-34E, Mar. 27, 1995, at 1-5.
The defense of necessity does exist in international law. The state of necessity denotes:

The situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another state.\(^9\)

The United Nations International Law Commission established many of the rules or foundation for the defense of necessity. Bearing in mind the risk of abuse,\(^10\) the legal experts were careful to exclude certain matters\(^11\) from the legal terrain on which the state of necessity might be held to operate. The criteria for establishing a state of necessity that then permits conduct otherwise prohibited by international obligation are: (1) an essential interest of the state must be in peril; (2) the peril must be grave and imminent; (3) the action taken by the state is the only one that could safeguard its essential interest; (4) the action has not gravely prejudiced the interest of the state against which the action is directed; (5) the action taken must be temporary in nature, and limited to what is necessary to face the peril; (6) the state relying on necessity has not contributed to the particular state of necessity.

The following analysis shows that under terms of these criteria the defense of necessity justifies Ottawa's action against the European Union, in particular the seizure of Spanish trawler Estai.

(1) **An essential interest of the state has to be in peril.** For a State to be entitled to invoke the existence of a state of necessity as justification for a course of action not in conformity with an international obligation, the specific interests in question must be clearly identified and seen by others to be genuinely threatened by grave and imminent peril. An essential interest of a state need not be limited only to the preservation of its very existence against an external military threat.

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10. The International Law Commission was conscious of the abuse to which the state of necessity concept might lend itself, particularly for the justification of war, annexation and such other acts of aggression in breach of territorial integrity and sovereignty. The restrictive conditions detailed for the admissibility of the defense of necessity are designed to prevent such abuses. See id. art. 33, ¶¶ 1-2, and commentary.
11. Excluded from the list of conditions sufficient for the plea of necessity are those cited in the preceding footnote plus treaties concluded between and among countries. For a documented profile of such treaties, see INTERNATIONAL LAW: THE ESSENTIAL TREATIES AND OTHER RELEVANT DOCUMENTS (Ingo von Munch & Andreas Buske eds., 1985).
In the Canadian case under examination, the interests being threatened by foreign overfishing were both ecological and economic. Although fishing does not occupy a major niche in Canada's economy, constituting less than one percent of the Gross Domestic Product (GDP), the fishing industry is imbued with a local significance that amplifies its economic importance. National employment statistics show that the industry provides about 50,000 jobs in the coastal provinces. In 1992 fish export contributed $2.5 billion to annual national income. Moreover, Canada has been ranked consistently among the top 15 world's largest fish producers. These economic attributes explain Canadian marine policy that recognizes fishing as an essential national interest and supports an investment of about six percent of its entire research budget on marine related development. Endowed with the Grand Banks, one of nature's most productive marine environments, Canada's offshore fishery resource base supports a growing number of domestic fishing operations and foreign fleets.

While Canada's fisheries offer enormous economic opportunities, foreign overfishing poses equally daunting challenges to Canadian fishery managers. For example, increased foreign fishing pressure outside the 200-mile limit contributes to severe depletion of fish stocks in domestic waters, including the key Atlantic fish stocks of cod, flounder, flatfish, redfish, and Greenland Halibut. In the last two decades such fish stocks have all experienced roughly 50 percent decline in their total abundance. This ecological malaise has caused deepening economic and social problems in the fisheries industry: sharp reductions in catch allocations to sectors of the domestic Canadian fleet, overcapacity in the corporate sector, vessel tie-ups, and unemployment particularly in East Coast provinces where access to alternative means of subsistence is particularly limited.

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16. See Emery, supra note 5, at 7; see also Oceans Institute of Canada, Managing Fishery Resources Beyond 200-Miles: Options To Protect Northwest Atlantic Straddling Stocks 15 (1990).

Responding to this crisis, the government committed about $1.9 billion towards relieving roughly 40,000 dislocated fishers. The size of this emergency social rescue package indicates the scale of the problem affecting Canadian economic interests. It also constitutes a drain in government financial resources that could have been invested to foster economic progress elsewhere in the Canadian economy.

Growing unemployment, together with deepening social restiveness, and the extra burden of the emergency rescue program on government budget, should serve as sufficient evidence that an essential economic interest of the State was in such peril that the Canadian Government was forced to adopt unilateral measures for dealing with intransigent foreign trawlers. Canada did not have to establish a proprietary right to the Greenland Halibut stocks, or other straddling fish stocks, in order to invoke the state of necessity. The paramount concern was the protection and enhancement of fish stocks, upon which the economic survival of coastal populations hinged.

(2) **The peril must be grave and imminent.** During the crisis in question, Fishery Minister Brian Tobin's central message to the EU and the United Nations was that, in the absence of collective regional cooperation in limiting the catch of the endangered Greenland Halibut, the species would soon be extinct.

A 1995 study by the Food and Agricultural Organization of the United Nations (FAO) found that the trend towards commercial extinction of major Canadian fisheries was largely attributable to the "unregulated nature of high sea fisheries" and the ecologically destructive effects of distant-water fishing nations. This study complements the report by the Scientific Council of NAFO which links the impact of excessive foreign fishing to the rapid rate of decline in the biomass of Greenland Halibut fish stocks, from 70,000 tons (1991) to 20,000 tons (1994). The total biomass of Greenland Halibut of spawning age also declined precipitously from 16,000...
tons (1991) to 2000 tons (1994). Figure 1 graphically confirms the direct contribution of the EU to the growing malaise of dwindling fish stocks. Between 1986-1987 the EU took roughly eight times more fish than was allocated to it by NAFO. Figure 2 shows that between 1986-1992 EU fleets reported catches of cod, redfish, and flounder to be three times greater than their NAFO quotas. A comparison of the volume of Greenland Halibut stocks taken inside and outside the Canadian 200-mile fishing zone is self-explanatory (Figures 3 and 4). Despite strict conservation measures, catches of the Greenland Halibut stocks by foreign fishers outside the 200-mile zone is on the rise, from less than 5,000 tons (1987), to 50,000 tons of fish in 1993. In the zone under Canadian control, the trend has been in the opposite direction, from roughly 30,000 tons (1987) to slightly more than 5,000 tons (1993). This trend is more in line with NAFO reductions in quota allocations for conservation purposes.

The downward trend in fish abundance, which is strongly related to foreign overfishing, supports Fisheries Minister Brian Tobin's position that uncontrolled exploitation would lead ultimately to the total extinction of Greenland Halibut stocks. In this context, it was necessary for Canada to act on behalf of its interest, to protect an endangered source of world food. Not to do so would result in the destruction of the fisheries as a way of living, not just for Canadians but for Europeans and the world community as well. This was also the central theme in Premier Clyde Wells' address to the Royal Institute of International Affairs at Brussels. In his address the Premier of Newfoundland reflected on the experiences of the past, in particular the failure of the Canadian Government to regulate and control fishing effort. Wells concluded that Canada has the obligation to conserve what remains of the fisheries, otherwise, "the world will lay the blame for the destruction of the resource squarely on the country's doorstep."

22. Following this, a total allowable catch of 27,000 tons was adopted by NAFO, representing a reduction of more than 50% from catches of about 60,000 tons in 1992-1994. See Gov't of Canada, Ottawa Canada Wins Critical Vote on Turbot at NAFO, NEWS RELEASE NR-HQ-95-10E, Feb. 2, 1995, at 1.

23. History tells us that the collapse of certain important Canadian fisheries was due largely to overfishing by foreign fleets: species of lake sturgeon, Grand Banks haddock, Georges Bank herring, and more recently, the northern cod, are a few examples.

24. See Premier Clyde Wells, Canada is Right to Act to Protect the Turbot Stocks, GLOBE & MAIL, Mar. 13, 1995, at A22; see also Premier Clyde Wells, Address at the Royal Institute for International Affairs (Apr. 28, 1992).
Figure 1 EU NAFO Quotas and Reported Catches of NAFO Managed Groundfish Stocks, adapted with modifications from NAFO Statistical Bulletins (1985-1993).
Figure 2 EU Fleets Reported Catches 3 Times Greater than their NAFO Quotas (1986-92), adapted with modifications from NAFO Statistical Bulletins (1985-1993).
Figure 3 Catches of Greenland Halibut outside the Canadian 200 miles fishing zone, adapted with modifications from NAFO Statistical Bulletins (1979-1993).
Figure 4 Catches of Greenland Halibut inside the Canadian 200 mile fishing zone, adapted with modifications from NAFO Statistical Bulletins (1979-1993).
In these words, we hear echoes of sustainable development which informs the precautionary ecological principle elaborated in the Stockholm and Rio Declarations, and was embodied in the United Nations Conference Chairman’s Draft Convention on Straddling Stocks and Highly Migratory Fish Stocks. Aside from the legal provisions of the state of necessity, Canada’s action against the defaulting Estai may also be justified by the emergent, and more radical, precautionary principle which encourages coastal states to take pre-emptive action where there is a perceived risk of severe and irreversible damage to resources.

(3) The action taken by the state is the only one that could safeguard its essential interest.

Having established that the ecological peril was grave and imminent, the question remains whether the means used by Ottawa were the only ones available in the circumstance. This requires proof that Canada had fully explored all alternative diplomatic avenues of resolving the hotly contested issue before arresting the defiant vessel Estai.

25. Sustainable development has been defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” See World Commission on Environment & Development, Our Common Future 43 (1987). Nevertheless, long before this notion of sustainable development became fashionable through the works of the World Commission on Environment and Development, the Haidi First Nation of Canada’s Pacific Coast was the first to remind us that “we do not inherit the land from our forefathers, we borrow it from our children.” See Videotape: Indigenous People (Gov’t of Canada: Fed. Ministry of Information 1967) (on file with the Toronto Public Library).


29. In other words, nations are encouraged to become constructive ‘warriors’ in the struggle to protect the environment. A more radical strand of the precautionary principle requires nations to take pre-emptive action, even in the absence of certainty about the impact or the causal relationships between human action and the environment. See Andre Tahindro, Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 28 OCEAN DEV. & INT’L L. 1, 12 – 15 (1997); FAO, supra note 20, at 10.
Ottawa initiated diplomatic measures to achieve a mutually peaceful solution to the problem. Information derived from diplomatic letters confirms that following sharp EU disagreement with NAFO decision to limit its quota of turbot catch to 3,400 tons (representing only 12 percent of 1994 catches), Canada convened an emergency meeting aimed at resolving the problem as early as March 1995, in Vancouver. However, negotiations during the early sessions involved inflammatory exchanges between the EU and Canadian representatives with little progress towards compromise. While the Canadian proposal for a 60-day moratorium on fishing for Greenland Halibut was rejected by the EU Secretariat, Spanish trawlers that had temporarily fled from the Grand Banks on the eve of the announcement of the new enforcement legislation returned in full force to fish. Information revealed Spanish catches to be in excess of NAFO allocated quotas.

Spain's provocation at sea, exacerbated by EU's initial reluctance to endorse NAFO's revised proposals on new fish quota allocations, convinced the Canadian government that it was necessary to play the military card. Although the general rule of international law frowns on military actions, the steady shift in world opinion towards stricter environmental enforcement policy supported strong measures. For example, the governments of Ireland and South Africa had contemplated legally banning Spanish fleets from their waters.

Nevertheless, the decision to arrest the Estai was taken after due concern for political consequences of such an action. Ottawa had been concerned that an act of coercion on the high seas could risk Canada's international image of benign peace broker. The government was also

30. Initial diplomatic initiatives did not receive the publicity that was lavished on the more dramatic events that surrounded the seizure of Estai. For highlights of the spate of diplomatic moves preceding the aggressive intervention, see Atlantic Fish: Battle Stations, THE ECONOMIST, Mar. 18, 1995, at 46—48; Jeff Sallot, Diplomacy Prevails as Canadian Warships Sail Toward Confrontation with Spain, GLOBE & MAIL, Apr. 17, 1995, at A2, A4; Gov't of Canada, Ottawa, Chronicle of Key Events: Canada-EU Turbot Dispute, BACKGROUNDER B-HQ-95-11E, Apr. 1995, at 1—5.


32. The EU had been very critical of NAFO, protesting that the organization has become a front for Canada's manipulation to increase its control over the allocation of stocks in its favor. Calling Canada's conservation measure a hoax, an attempt to "create a heaven for fish, and hell for European fishing populations," the EU decided to set up an autonomous quota. See Emery, supra note 5, at 6.

aware that such an action could set a precedent for countries with less prudent intentions than conservation. However, after balancing probable political costs with the environmental consequences of inaction, the government of Canada concluded that force was the indispensable means of ensuring the preservation of Canadian threatened essential interests.

(4) The action taken is not discriminatory or gravely prejudiced. The matter of prejudice might have been resolved through litigation. The Spanish Government had filed a case against Canada in the International Court of Justice at the Hague. However, in response to the emergency situation in the fisheries sector, Canada had amended its acceptance of the compulsory jurisdiction of the Court, precluding any challenge on its authority to enforce new regulations on the protection of straddling stocks. Since the Court can adjudicate on an action only when all parties to a dispute agree to submit their differences for consideration, legal decision of the World Court on this case may never be available on record.

If Canada had submitted to the Court’s jurisdiction, the Court would have been required, in making a ruling, to balance the prejudice Canada caused to Spain in acting against the Estai, against the benefit that Canada and the international community would reap from the protection of endangered fish stocks. Secondly, the general rule of international law on the exploitation of shared natural resources does not require proof that both parties’ interests have been affected. The European Union would not have been required to prove that Canada had breached its duty to the EU. Rather, the law assumes that the State adopting a unilateral action to protect its marine living resources has been affected. Thus, the burden of proof would be on Canada to show why its action should not be considered discriminatory.

Officials of the fisheries ministry have publicly argued that the prejudice that Canada and the international community would otherwise have suffered, in permitting the depletion of turbot fish stocks, far outweigh the cost of Canada’s conduct in breach of obligation owed to Spain and the EU. Citing European fishery management record, which confirms that EU’s poor management has led to the commercial extinction, sometimes total extinction, of several species, Canada argued that stiff measures

34. See Justice for All from a Global Courtroom, THE LAWYER, Mar. 19, 1996, at 9; Spain Brings a Case Against Canada, I.C.J., Communiqué No. 95/8, March 29, 1995; Paul Koring and Brian Milner, Progress Made in Fish Talks, GLOBE & MAIL, Mar. 29, 1995, at A1.
35. For comments on this legal issue see, HEY ET AL., supra note 6, at 9.
against foreign fleets were necessary to prevent a duplication of the European experience in the Northwest Atlantic.

(5) The action taken is temporary in nature and limited to what is strictly necessary to face the peril. Canada's action was a temporary one. For example, the statement of purpose in the amended portion of the Fisheries Protection Act, aims at enabling "Canada to take action necessary to prevent further destruction of straddling stocks and to permit their rebuilding, while continuing to seek international solutions,"38 (emphasis added). However, for some critics the emphasis on attempts to conclude further agreements with distant-water fishing nations was not persuasive evidence of limited means. Sections of the British House of Lords, and diplomats elsewhere, at Brussels, were concerned that the Parliamentary Act, under which the amendments were articulated, gave the new fishery measures a sense of permanency. Reiterating his government's commitment to a negotiated settlement of the question of foreign participation in the Greenland Halibut fisheries, Minister Brian Tobin sought to reassure the world community at the United Nations on March 24, that the legislation was adopted as a temporary measure solely to deal with an emergency situation; and, that "Canada takes no pride in being forced to come to the conclusion that unilateral action is required to end the problem of foreign overfishing."39 Ultimately, Canada was successful in securing an interim agreement limiting, but not excluding, the EU from further participation in the Grand Banks fisheries. The negotiated settlement confirms that the action taken against the Estai was temporary, and that Ottawa was flexible as to the means of achieving the goal40 of rational fisheries management.

At a different level, the question remains whether or not the conduct in question was limited to what was strictly necessary for the purpose? Some have answered in the negative, concluding that it was wrongful of Canada to have subjected the captain of the Spanish vessel to criminal charges,41 and imposing heavy fines on him and the boat. The

38. See Minister of Fisheries Brian Tobin, Remarks to Parliament on the Coastal Fisheries Protection Act 3 (May 10, 1994) (transcript available in Fisheries and Oceans of Canada Resource Library).


40. See Gov't of Canada, Ottawa, Canada-EU Reach Agreement to Conserve and Protect Straddling Stocks, NEWS RELEASE NR-HQ-95-36E, Apr. 15, 1994, at 1 – 2.

41. At the domestic court in St. John's, the arrested crew was accused of "plundering the last of halibut stocks"; specific charges against the captain included overfishing with illegal gear, under-reporting of catches, and excessive harvesting of juvenile fish. See Gov't of Canada, Ottawa, Canada Seizes Spanish Trawler, NEWS RELEASE NR-HQ-95-29E, Mar. 9 1995,
punishment stems from Canada’s unilateral extension of domestic law to international waters. In Canada, fishery regulations have the status of criminal law. Under the Coastal Fisheries Protection Act, violators are subject to fines of up to $750,000, and possible forfeiture of their vessel, fishing gear and catch. These are the legal elements in Canada’s domestic fisheries management regime, which were extended beyond the 200-mile limit during the emergency. Equally, the legal authority granted to coastal states (Canada) in international law “to take such measures, including boarding, inspection, arrest, and judicial proceedings as may be necessary to ensure compliance with the laws and regulation adopted [in the exclusive economic zone],” were also extended beyond Canada’s exclusive economic zone.

Under the circumstance of emergency, the actions taken were relatively mild. For example, the law was not applied in full measure, as the captain was released after posting bail for $8,000. While the Estai was released on a $500,000 bond, no charges were laid against the crew. Even at the height of the controversy, the government of Canada continued to reassure the international community that Ottawa’s relations with the EU would not suffer any permanent damage.

(6) The state in question (Canada) has not contributed to the prevailing state of necessity. In more specific terms, the majority opinion among legal experts of the International Law Commission is that “a state claiming the benefit of the existence of a state of necessity must not itself have provoked, either deliberately or by negligence, the occurrence of the state of necessity.”

Canada’s past history reflects an absence of regulatory vigor. Between 1945-1977, government marine policy shifted steadily towards the development of a strong corporate sector for offshore fishing. Against the background of steady advances in electronic fishing technology, government’s failure to control expansion of corporate operations contributed to the pressure which was driving the mortality of fish stocks beyond their capacity to replenish and regenerate. The collapse of Northern

at 30; see also Gov’t of Canada, Ottawa, Spanish Captain Released on Bail, NEWS RELEASE NR-NF-95-22E, Mar. 12, 1995, at 30.

42. See FISHERIES ACT, supra note 7, §§ 78-86. For analysis of the Fisheries Act, see R.W. Crowley & H. Palsson, Rights-Based Fisheries Management In Canada, 7 MARINE RESOURCE ECON. 1, 1-4 (1992).

43. International law prohibits imprisonment or prolonged detention of the captain and crew of an arrested foreign vessel. See UNCLOS, supra note 3, art. 73, ¶ 2-4. None of these laws were impugned by the action in question.

44. For an account of the events leading up to the release of the Estai and its crew, see Spanish Captain Released on Bail, supra note 41.

45. See Y.B. INT’L L. COMM’N, supra note 9, ¶ 34.
cod and West Coast salmon fisheries, including the commercial extinction of several key Atlantic species of flounder, haddock and swordfish, are manifestations of negligent home-based fishing practices. The divisive race for fish by foreign distant-water fleets could be seen as an exacerbation of these domestic practices.46

On the surface, given its past record, Canada would be disqualified from applying the plea of necessity. Nevertheless, fresh debates on the contribution of a State to the state of necessity indicate a narrowing of doctrinal differences on the legal condition in question, producing modifications47 in law which permit a state with past record of negligence in the management of fisheries to rely on the defense of necessity. According to this view, a State’s contribution to the occurrence of the state of necessity would have to be deliberate or intentional for it to be precluded from relying on the defense of necessity. Additionally, since the above-mentioned restrictive condition coexists with other relevant requirements of equal importance, a state with proven good record in current fisheries management may not be precluded from the benefits of the defense of necessity.

Applied to the case under examination, few would doubt that Ottawa has been a frontrunner in recent efforts towards the conservation of ocean resources. From 1977 onwards, Canada’s initiative in NAFO towards strengthening existing international law, diplomatic and public information campaigns, tough conservation decisions, and the strict enforcement of regulatory measures against defaulting domestic vessels,48 are clear indica-

46. Contesting the contribution of foreign overfishing to this problem, the legal department of the EU Secretariat produced a document showing that in the last five years there has been an 80% decline in groundfish stocks located entirely within Canadian waters; and that this situation has been due mainly to the destructive fishing practices of Canadian fishers. See Sir Leon Brittan, Memo to Clyde Wells: ‘Canada Has Broken All the Laws of the Sea’, BULL. EUR. UNION, March 15, 1995 (Commission of the European Communities, Brussels).


48. The following high seas fishers came under strict Canadian legal scrutiny in 1994 alone: Canadian vessel Stephen B was arrested for fishing tuna off the coast of Bermuda; one month later, a Panamanian registered vessel, Kristina Logos, was also apprehended and charged with several violations including the use of illegal mesh gear. The captain of each of the vessels was indicted in accordance with Canadian law. While Washington was still expressing displeasure over the seizure (January 21) of two American scallop boats outside Canada’s 200-mile limit, about 300 American salmon boats were arrested (March 2) and forced to pay $1,500 in license fees. They were also charged with depleting Canadian stocks. In effect, without prejudice against Spain, Canada has been even-handed in punishing all defaulting fishers. For a general discussion of practical problems in government enforcement measures see A. Bruce Arai, Policy and Practice in the Atlantic Fisheries: Problems of Regulatory Enforcement, 20 CANADIAN PUB. POL’Y 353, 354–64 (1994).
tions of a rising national conservationist consciousness. They may also be seen as acts of atonement for the legacies of past fisheries mismanagement. The arrest of the Estai was borne out of necessity. The action may also be seen in political terms. In this view the action against the Spanish vessel, in breach of the rules of international law, was aimed at pressuring the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks to accelerate ongoing negotiations for reforms in fishery practices; to focus world attention on the urgency of recognizing coastal states' proprietary right to manage those fish stocks facing extinction in adjacent waters.

CONCLUSION

The arguments in this paper indicate that all the particularly strict conditions for a genuine plea of necessity were in existence when Canada arrested the Spanish vessel Estai. Justifying this action in law, our emphasis is on the precautionary nature of measures, which were taken under pressure of exceptional circumstances. The grave and imminent threat which overfishing by recalcitrant distant-water fishing nations poses to Canadian essential interest on the Grand Banks justifies the action. All coastal states have the responsibility in law to take such action to protect not only their interests, but also the rights of the international community to marine living resources in adjacent waters.

Further justification for Canada's unilateral action may be found in a few precedents which include the case of Fur Seal fisheries off the

49. Prime Minister Trudeau’s unilateral declaration of the 1970 Arctic Water Pollution Act (later recognized by UNCLOS and codified in article 234) is relevant. In adopting this unilateral measure, the government of Canada had to reconcile two apparently conflicting national interests: commitment to the principle of international law on the freedom of high sea navigation/shipping, and the need for stringent measures towards protecting its marine environment (essential national interest) against ship-generated pollution. For codification of this Canadian law into international law, see UNCLOS, supra note 3, art. 234. For commentaries on the legal implications of article 234, see McRea et al., Environmental Jurisdiction in Arctic Waters: The Extent of Article 234, 16 U. B.C. L. REV. 22, 30—31 (1982); Gerald R. Ottenheimer, Patterns of Development in International Fishery Law, XI CAN. Y.B. INT’L L. 37, 42 (1973).

50. The U.S. Truman Proclamation (1945), is also a relevant precedent for justifying Canada’s action. With respect to coastal fisheries in certain areas of the high seas, it reads thus:

In view of the pressing need for conservation and protection of fishery resources, the Government of the United States regards it as proper to establish conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed and maintained on a substantial scale. (emphasis added).
Russian coast,\textsuperscript{51} 1893.

In this case, the Russian Government issued a decree prohibiting exploitation of endangered seals, in water areas contiguous to its coast, by British and American fishers. Reference can also be made to the case of \textit{United Kingdom vs. Iceland},\textsuperscript{52} 1960, and the Torrey Canyon\textsuperscript{53} incident.

Lastly, although the state of necessity provides an opportunity for coastal states\textsuperscript{54} to protect their essential interests by means other than those expressly provided for in international law, in practice its use is fraught with controversy. To ensure orderly relations in the exploitation of high seas living resources, the current international fisheries management regime will


\textsuperscript{51} The government of Russia emphasized two points of particular relevance to this study: it stated clearly that the action was a provisional measure, and that it was taken because of "absolute necessity" to prevent extermination of seals. \textit{See U.N. Doc. of the 32nd Session, [1980] 2 Y.B. Int'l L. Comm'n 27, A/CN.4/SER.A/1980/Add.1 (pt. 1). For a summary of the negotiated agreement, \textit{see Government Printing Bureau, Ottawa, U.K. Government Report of the British Agent (Robert Venning): Provisional Agreement Entered Into Between Her Majesty's Government and That of Russia for the Protection of the Seal Fishery During 1893} (1894).}

\textsuperscript{52} In this case the British government failed to persuade the International Court that the unilateral declaration of a 200-mile territorial sea by the government of Iceland, to protect imperiled stocks of cod fish, was prejudicial and in breach of relevant international law respecting the freedom of the high seas. The I.C.J.'s decision on the validity of Iceland's claims to extended fisheries jurisdiction was significant for the following reasons: recognition of the right of a coastal state to extended fisheries jurisdiction beyond the territorial sea, for the purpose of conservation; nevertheless, the rights of the coastal state would be 'preferential'; in other words, the coastal state could not oust the rights of other distant water nations to resources; competing traditional rights of foreign nations would be taken into account in the allocation of catches and granting of access rights to fisheries. \textit{See Fisheries Jurisdiction (United Kingdom v. Ice.), 1972 I.C.J. 12 (Interim Protection Order of Aug. 17).}

\textsuperscript{53} This incident involved the British decision to bomb the wreckage of a Liberian tanker that had gone aground, spilling oil and polluting the water areas off the coast of England. The following points were stated by the UK Government as justification for the bombing: Torrey Canyon had gone aground and was apparently abandoned by the shipowner; about 30,000 tons of oil had split into the sea off Cornwall, constituting a grave danger to living marine resources; after the vessel broke into pieces, all efforts at dispersing the oil which began to spread over the surface of the sea proved impossible; the threat to marine resources was safeguardable only by bombing in order to burn up the oil remaining on board the wrecked vessel. On this case, \textit{see White Paper issued by the British Government: The Torrey Canyon, Cmnd. 3246} (London, H.M. Stationary Office, 1967).

\textsuperscript{54} The precedents cited are largely contemporary ones, suggesting also the newness of global environmental consciousness and the idea that protecting world ecological balance (the global village) is an essential interest of humankind. Nevertheless, the reality of a growing competition over scarce resources, coupled with self-evident weaknesses in certain aspects of international law, means that the concept of "necessity" will be put to use more frequently in the future.
have to be further strengthened with clearly defined mechanisms for the allocation of allowable catches, and strict enforcement measures including effective monitoring, control, and surveillance system. These are the essential elements driving the initiative towards international acceptance of a binding convention\(^5\) on straddling fish stocks.