To Catch a Thief: Canadian Law and Practice in the Northwest Atlantic, 1992–1994

Wendell Sanford*

Author’s Note

One thing I learned from Douglas Johnston was that, notwithstanding his prodigious theoretical intellect, he was a man looking for practical solutions to the real problems of the day. The following is an account of how the Government of Canada used the international and domestic law available to it to address the problem of non-contracting party vessels fishing within the Northwest Atlantic Fisheries Organization (NAFO) area while, at the same time, developing new legal and operational tools to achieve more lasting solutions.1

Background

Freedom of the high seas and control of vessels on the high seas solely by their flag States is a customary international law concept dating from the 16th century.2 With the completion of the United Nations Convention on the Law of the Sea (LOS Convention) in 1982 a new series of

* Director, Oceans and Environmental Law Division, Department of Foreign Affairs and International Trade, Ottawa, Canada.

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international legal norms began to come into play. The relevant article of the LOS Convention states:

Article 116
Right to fish on the high seas
All States have the right for their nationals to engage in fishing on the high seas subject to:
(a) their treaty obligations;
(b) the rights and duties as well as the interests of coastal States provided for, inter alia in article 63, paragraph 2, and articles 64 to 67; and
(c) the provisions of this section.

While recognizing the basic right of freedom to fish on the high seas, the reference to Article 63, paragraph 2 indicates that the right is not an unfettered one.

Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly, or through appropriate sub-regional or regional organizations to agree upon the measures necessary for the conservation of these stocks in the adjacent areas.

Also, Article 117 states that “All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.” The duty to cooperate with Regional Fisheries Management Organizations (RFMOs) was made clear as well.

States shall co-operate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall

3 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, UN Doc. A/Conf.62/122 (1982); 21 I.L.M. 1261 (1982) [hereinafter LOS Convention]. While it is understood that the LOS Convention did not come into force until 1994 and a number of countries did not ratify until later dates (including Canada in 2003), for the purposes of this essay it is asserted that by 1992 the fishing provisions in the LOS Convention had been accepted as reflecting customary international law.

4 Ibid., Art. 63(2).