

INTERNATIONAL COURT OF JUSTICE

APPLICATION

INSTITUTING PROCEEDINGS

filed in the Registry of the Court
on 28 March 1995

FISHERIES JURISDICTION

(SPAIN v. CANADA)

**I. THE AMBASSADOR OF SPAIN TO
THE NETHERLANDS TO THE REGISTRAR OF
THE INTERNATIONAL COURT OF JUSTICE**

[Translation]

The Hague, 28 March 1995.

I have been instructed by the Minister for Foreign Affairs of the Kingdom of Spain to inform you, in accordance with Article 40, paragraph 2, of the Rules of Court, that Mr. José Antonio Pastor Ridruejo, Director of the International Legal Service of the Ministry of Foreign Affairs, has been appointed Agent in the proceedings brought before the Court by Spain against Canada, by means of a written Application under Article 40, paragraph 1, of the Statute and Article 38, paragraph 1, of the Rules of Court.

I certify that the signature affixed to the Application is that of Mr. José Antonio Pastor Ridruejo.

In conformity with Article 38, paragraph 2, of the Rules, I would also inform you that the address for service of the Agent is the Spanish Embassy in The Hague.

(Signed) Rafael PASTOR RIDRUEJO,

Ambassador of Spain to the Netherlands.

II. APPLICATION INSTITUTING PROCEEDINGS

[Translation]

In conformity with Article 40, paragraph 1, of the Statute of the International Court of Justice and Article 38, paragraphs 1, 2 and 3, of its Rules, and following the instructions of the Minister for Foreign Affairs, I hereby, in my capacity as Agent of the Kingdom of Spain, file an Application instituting proceedings against Canada.

1. THE FACTS

A. On 12 May 1994, Canada passed an Act to amend the Coastal Fisheries Protection Act.

(a) In conformity with the Act as amended, an attempt was made to impose on all persons on board foreign ships a broad prohibition on fishing, in the NAFO Regulatory Area — that is, on the high seas, outside Canada's exclusive economic zone — for stocks straddling these zones, contrary to the protection measures taken in the framework of the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978. This Act gives the Canadian authorities discretion as regards the task of adopting the implementing regulations, together with the list of fish stocks for protection, the relevant protection measures and the categories of foreign ships to which these measures apply, and of stipulating the powers which may be used in order to ensure they are respected. The Act itself authorizes Canadian officials to board, examine and inspect foreign ships suspected of violation.

In addition, the Act concerned expressly permits (Art. 8) the use of force against foreign fishing boats in the zones that Article 2.1 unambiguously terms the "high seas". This contingency is provided for again in paragraph 25 (4) of the Criminal Code, as amended by the same Act, permitting "the peace officer", in specific conditions, to use "force, which is either likely to cause death [of the person to be arrested] or serious bodily harm, or used with the intention of causing such" *[translation by the Registry]*, in cases such as those concerning foreign fishing boats engaging in activities on the high seas in waters covered by the Canadian legislation.

(b) On 25 May 1994, the Canadian Government adopted the corresponding implementing regulations, which, in particular, stipulate the use of force by fishery protection officers against the foreign fishing boats covered by those regulations — in particular, ships without a flag or flying a flag of convenience — which infringe their mandates in the zone of the high seas within the scope of those regulations.

On 3 March 1995, the Canadian Government adopted new implementing regulations expressly permitting such conduct as regards Spanish and Portuguese ships on the high seas.

B. Following the measures taken on the basis of that legislation, on 9 March 1995, at 4.52 p.m. (Ottawa time), the boat *Estai*, flying the Spanish flag and with a Spanish crew, was stopped and inspected on the *high seas*, in the area of the Grand Banks, at co-ordinates 48° 03' N, 46° 26' W, some 245 miles off the coast, by the Canadian patrol boat *Cape Roger*, assisted by the patrol boat *Leonard J. Cowley* and the coastguard vessel *Sir Wilfred Grenfell*, also Canadian, after successive attempts at boarding by gunboats manned by individuals armed with automatic weapons, and at intimidation with warning shots fired from a 50-mm gun by the patrol boat *Leonard J. Cowley*, after, according to the Canadian Note of 10 March 1995, "the necessary authorizations" had been obtained.

The boat and its crew, whose security and integrity had been seriously endangered as a result of the coercive action by the Canadian flotilla, were forcibly escorted away and held incommunicado, in the Canadian port of St. John's, Newfoundland, where the captain of the boat was imprisoned and subjected to criminal proceedings for having engaged in a fishing activity on the high seas outside the Canadian exclusive economic zone, and for resisting authority; the boat's papers and part of the catch on board were confiscated. In order to obtain the captain's release and the freedom to use the boat, the owner, while asserting that he did not recognize Canadian jurisdiction, paid of 8,000 and 500,000 Canadian dollars respectively, set by a judge of the Provincial Court of Newfoundland (Terre-Neuve) Judicial Centre of St. John's. A new hearing is scheduled for 20 April next.

Incidents such as that involving the *Estai* may recur, in as much as the Canadian legislation provides a basis for a continuing internationally wrongful act. As is well known, the Canadian authorities have publicly expressed their intention to continue to apply the aforementioned legislation in every respect, in high seas zones against other Spanish ships present in the same sector.

2. THE LAW

A. The Kingdom of Spain considers that, quite apart from the violation of the provisions of the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, in particular Articles XI (7), XII, XVII and XVIII, the acts by Canada constitute a serious and flagrant violation of at least the following international principles and norms, which Spain invokes in support of its Application:

(a) The principle of general international law which proclaims the exclusive jurisdiction of the flag State over ships on the high seas, a principle codified by the Geneva Convention on the High Seas, 1958, Article 6, paragraph 1, and by the United Nations Convention on the Law of the Sea, 1982, Article 92 and other articles to the same effect;

(b) The principle of general international law which proclaims freedom of navigation on the high seas, a principle codified by the Geneva Convention on the High Seas, 1958, Article 2, and by the United Nations Convention on the Law of the Sea, 1982, Articles 87, 90 and other articles to the same effect;

(c) The principle of general international law which proclaims freedom of fishing on the high seas, codified by the Geneva Conventions on the High

Seas, 1958, Article 2, and by the United Nations Convention on the Law of the Sea, 1982, Articles 87, 116 and other articles to the same effect;

(d) The principle of general international law according to which no State may subject any part of the high seas to its sovereignty, codified by the Geneva Convention on the High Seas, 1958, Article 2, and by the United Nations Convention on the Law of the Sea, 1982, Article 89;

(e) The norm of general international law which rejects the right of hot pursuit on the high seas, outside the exclusive economic zone, a norm stated by the United Nations Convention on the Law of the Sea, 1982, Article 111;

(f) The norm of general international law which, except as otherwise agreed between the States concerned, prohibits imprisonment and corporal punishment as penalties for violations of fishing laws and regulations;

(g) The principle of general international law regarding the co-operation of States in the conservation of the living resources of the high seas, stated by the United Nations Convention on the Law of the Sea, 1982, Articles 63, 117, 118 and 119;

(h) The principle of general international law which prohibits the threat or use of armed force in international relations, codified by the United Nations Charter, Article 2, paragraph 4;

(i) The principle of general international law which makes it an obligation to settle international disputes by peaceful means in such a manner that peace, security and justice are not endangered, codified by the United Nations Charter, Article 2, paragraph 3;

(j) The principle of general international law according to which States may not invoke the provisions of their internal law as justification for their failure to observe the international norms in force which bind them, codified by Article 27 of the Vienna Convention on the Law of Treaties, 1969, in relation to treaty norms;

(k) The principle of general international law of good faith in fulfilling obligations assumed, codified by the United Nations Charter, Article 2, paragraph 2; a principle which, in the field of application of international treaties, takes the form of (1) the obligation to respect treaties approved: *pacta sunt servanda* (Vienna Convention on the Law of Treaties, 1969, Art. 26); (2) the obligation not to impede, prior to entry into force, the object and purpose of treaties adopted and authenticated by a State by signature, until it has made clear its intention not to be a party to the treaty, and of multilateral treaties already approved by that State, provided that entry into force is not unduly delayed (*ibid.*, Art. 18); and (3) the obligation to refrain from acts aimed at endangering the smooth conduct of negotiations while negotiations are in progress.

B. Further to the violation by Canada of the aforementioned principles and norms of international law, the principles of general international law governing the international responsibility of States may be applied, details of which will be given by the Kingdom of Spain in due course. It must be stressed in this regard that the conduct of Canada, while entailing damage to Spanish private interests, also infringes directly, and primarily, the rights of Spain and of other countries, particularly the right to exercise exclusive jurisdiction, on the high seas, over ships flying its flag and the right to have the freedoms of the high seas respected with regard to them.

3. THE DISPUTE

The Notes Verbales of protest, numbers 24 and 25, that were presented on 9 March 1995 by the Embassy of Spain in Ottawa to the Department of Foreign Affairs and International Trade of Canada, and the Note Verbale from the Spanish Ministry of Foreign Affairs presented on 10 March 1995 to the Embassy of Canada in Madrid, as well as the Note Verbale from the Department of Foreign Affairs and International Trade of Canada, of the same date, to the same Ministry, point up the existence of a legal dispute between the two States. The texts of those Notes are annexed hereto.

The Kingdom of Spain considers that the facts set forth in Section 1 constitute a crude, flagrant and very serious violation by Canada of the fundamental, customary and conventional norms of international law, relating principally to the freedoms of the high seas and to the exclusive exercise of jurisdiction over ships by the State whose flag they are flying. Accordingly, the Spanish Note Verbale of protest dated 10 March 1995 asserted, *inter alia*, that by boarding the *Estai*,

"the Canadian authorities breached the universally accepted norm of . . . international law codified in Article 92 and articles to the same effect of the 1982 Convention on the Law of the Sea, according to which ships on the high seas shall be subject to the exclusive jurisdiction of the flag State . . . , a serious offence . . . not in keeping with the usual conduct of a responsible State, carried out under cover of unilateral legislation not opposable to other States".

Spain accordingly called for the immediate release of the crew and the boat, reserving all its rights to take appropriate measures, including a demand for proper compensation.

The Note from the Canadian Department of Foreign Affairs and International Trade, dated 10 March 1995, referring to the Spanish Note of the same day, reveals Canada's obduracy in defending the recourse to measures of coercion on the high seas against ships flying a foreign flag, in spite of its manifest international wrongfulness, and the fact that it was prepared to resort to such measures again in future, in order to give effect to a policy of unilateral fishing in an area not under its jurisdiction.

It is therefore established that a dispute exists between the Kingdom of Spain and Canada, which, going beyond the framework of fishing, seriously affects the very integrity of the *mare liberum* of the high seas and the freedoms thereof, a basic concept and category of the international order for centuries, and implies, moreover, a very serious infringement of the sovereign rights of Spain, a disquieting precedent of recourse to force in inter-State relations which, if it is not sanctioned by the proper authority of a decision of the Court, could well

lead to an escalation of tension and violence that the Kingdom of Spain wishes to avoid by means of its Application, in order to bring the discussion back into the framework of international law, from which Canada has deliberately departed. Indeed, just recently, the Government of Canada acknowledged that:

"At this stage, international law does not permit a coastal State to take unilateral measures of management outside the 200-mile zone." (*Pêches et océans*, 7 May 1990, p. 7 [translation by the Registry].)

The Spanish Government is not aware of any change in international law since the date of that official declaration by the Government of Canada.

Recourse to an international judicial settlement, rather than unilateral coercion aimed at imposing its own objectives at any cost, constitutes for Spain — and we think that the same ought to hold good for Canada, an allied country which has always respected international law and the jurisdiction of the Court — the *necessary measure* for the peaceful settlement of disputes between States which respect each other and conduct themselves in an appropriate manner in their mutual relations and with other States.

4. THE JURISDICTION OF THE COURT

The Kingdom of Spain founds the jurisdiction of the Court on Article 36, paragraph 2, of the Statute. In fact, both Spain and Canada have, in accordance with that provision, made declarations of acceptance of the jurisdiction of the Court. The two States accordingly have the status of declarant States for the purposes of Article 36, paragraph 2, of the Statute.

The exclusion of the jurisdiction of the Court in relation to disputes which may arise from management and conservation measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area and the enforcement of such measures (Declaration of Canada, para. 2 (*d*), introduced as recently as 10 May 1994, two days prior to the amendment of the Coastal Fisheries Protection Act), does not even partially affect the present dispute. Indeed, the Application of the Kingdom of Spain does not refer exactly to the disputes concerning those measures, but rather to their origin, to the Canadian legislation which constitutes their frame of reference. The Application of Spain directly attacks the title asserted to justify the Canadian measures and their actions to enforce them, a piece of legislation which, going a great deal further than the mere management and conservation of fishery resources, is in itself an internationally wrongful act of Canada, as it is contrary to the fundamental principles and norms of international law; a piece of legislation which for that reason does not fall exclusively within the jurisdiction of Canada either, according to its own Declaration (para. 2 (*c*) thereof). Moreover, only as from 3 March 1995 has an attempt been made to extend that legislation, in a discriminatory manner, to ships flying the flags of Spain and Portugal, which has led to the serious offences against international law set forth above. The question is not the conservation and management of fishery resources, but rather the entitlement to exercise a jurisdiction over areas of the high seas and the opposability of such measures to Spain.

5. THE COMPLAINT

As for the precise nature of the complaint, the Kingdom of Spain requests:

- A. that the Court declare that the legislation of Canada, in so far as it claims to exercise a jurisdiction over ships flying a foreign flag on the high seas, outside the exclusive economic zone of Canada, is not opposable to the Kingdom of Spain;
- B. that the Court adjudge and declare that Canada is bound to refrain from any repetition of the acts complained of, and to offer to the Kingdom of Spain the reparation that is due, in the form of an indemnity the amount of which must cover all the damages and injuries occasioned; and
- C. that, consequently, the Court declare also that the boarding on the high seas, on 9 March 1995, of the ship *Estai* flying the flag of Spain, and the measures of coercion and the exercise of jurisdiction over that ship and over its captain, constitute a concrete violation of the aforementioned principles and norms of international law.

6. JUDGE AD HOC

In order to give effect to the provisions of Article 31 of the Statute of the International Court of Justice and Article 35, paragraph 1, of the Rules of Court, the Kingdom of Spain now declares its intention of exercising its right to choose a judge *ad hoc*.

7. RESERVATION OF RIGHTS

The Kingdom of Spain reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

8. PROVISIONAL MEASURES

The Kingdom of Spain likewise reserves the right to request the appropriate provisional measures, in accordance with the provisions of Article 41 of the Statute of the Court and Articles 73 *et seq.* of the Rules of Court.

The Hague, 28 March 1995.

(Signed) José Antonio PASTOR RIDRUEJO,

The Agent of the Kingdom of Spain.

ANNEXES

[Certified by the Agent of the Kingdom of Spain. *[Note by the Registry]*]

Annex 1

**Note Verbale No. 24/95 of 9 March 1995,
from the Embassy of Spain in Canada to the
Department of Foreign Affairs and International Trade of Canada**

[Translation]

Embassy of Spain
No. 24/95

NOTE VERBALE

The Embassy of Spain presents its compliments to the Department of Foreign Affairs and International Trade and refers to the message transmitted a few minutes ago by the Director-General of the Western Europe Relations Bureau, Mr. Paul Dubois, to the Minister-Counsellor of this Embassy, Mr. Ramón Sáenz de Horedia, in the following terms:

1. Canada is prepared to take any measures to put a stop to over-fishing, mentioning, this time in English: "disabling force on vessels".
2. That the message be passed on to the fleet not to resist the application of Canadian law.
3. Responsibility for any damage which might arise from resistance lies with Spain.

The Embassy of Spain requests the Department of Foreign Affairs and International Trade to confirm the terms of this message in writing.

Ottawa, 9 March 1995.

Department of Foreign Affairs
and International Trade

Western Europe Relations Bureau (RWD)
Ottawa

(Seal of the Embassy of Spain)

Annex 2

**Note Verbale No. 25 of 9 March 1995,
from the Embassy of Spain in Canada to the
Department of Foreign Affairs and International Trade of Canada**

[Translation]

Embassy of Spain
No. 25

NOTE VERBALE

The Embassy of Spain presents its compliments to the Department of Foreign Affairs and International Trade and has the honour to transmit to it the following communiqué just issued by the Spanish Government:

"The Spanish Government categorically condemns the pursuit and harassment of a Spanish vessel by vessels of the Canadian Navy, in flagrant violation of the international law in force, since these acts are taking place outside the 200-mile zone.

The Spanish Government has lodged the most vigorous protest with the Canadian Government, demanding immediate cessation of the persecution.

The Spanish Government has reported this lamentable action to the member States of the European Union and to the Commission, pointing out that on 6 March last the Council of the European Union declared itself categorically against the threats made by the Canadian authorities."

The Embassy of Spain takes this opportunity to reiterate to the Department of Foreign Affairs and International Trade the assurances of its highest consideration.

Ottawa, 9 March 1995.

Department of Foreign Affairs
and International Trade

Office of the Assistant Deputy Minister (RGB)
Ottawa

(Seal of the Embassy of Spain)

Annex 3

Note Verbale No. 10 from the Ministry of Foreign Affairs of Spain to the Embassy of Canada in Spain

A

Original Spanish Text

B

Translation from the French into English

A

Original Spanish Text

Ministerio de Asuntos Exteriores

Nota Verbal No. 10

El Ministerio de Asuntos Exteriores de España saluda atentamente a la Embajada de Canadá en Madrid, y en relación con el apresamiento del buque de pesca con pabellón español *Estai* realizado por las autoridades canadienses el día 9 de Marzo de 1995 en aguas internacionales manifiesta lo siguiente:

Que al efectuar el referido apresamiento, las autoridades canadienses han violado la norma universalmente aceptada de derecho internacional consuetudinario, codificada en los artículos 92 y concordantes de la Convención de 1982 sobre derecho del mar, según la cual el Estado del pabellón posee jurisdicción exclusiva sobre los buques en alta mar. Ante este grave acontecimiento, que ha causado daños importantes a ciudadanos españoles, España presenta su más enérgica protesta, al tiempo que exige la inmediata liberación de la tripulación y el buque y se reserva el derecho a exigir las indemnizaciones pertinentes.

El Gobierno español considera que el acto ilícito cometido por buques de la Armada canadiense no puede de ninguna manera ampararse en supuestas preocupaciones de conservación de las pesquerías de la zona, al violar lo establecido por la Convención NAFO de la que Canadá es parte.

La detención del barco es una infracción grave del derecho internacional, que no corresponde al comportamiento usual de un Estado responsable, efectuada al amparo de una legislación

unilateral no oponible a otros Estados. El Gobierno español exige en consecuencia la anulación de la legislación mencionada.

El Gobierno español se ve forzado, a la luz de estos acontecimientos, a reconsiderar sus relaciones con Canadá, reservándose los derechos para tomar aquellas acciones que estime oportunas.

El Ministerio de Asuntos Exteriores aprovecha la oportunidad para reiterar a la Embajada de Canadá en España su alta consideración.

Madrid, 10 de Marzo de 1995.

A la Embajada de Canadá en España

[Translation from the French by the Registry]

B

Translation into French

Ministry of Foreign Affairs
[Unofficial Translation]

NOTE VERBALE No. 10

[Certified as accurate by the Agent of the Kingdom of Spain. *[Note by the Registry]*]

The Ministry of Foreign Affairs of Spain presents its compliments to the Embassy of Canada in Madrid and, in connection with the boarding of the fishing boat Estai, flying the Spanish flag, by the Canadian authorities on 9 March 1995 in international waters, makes the following statement:

In carrying out the said boarding operation, the Canadian authorities breached the universally accepted norm of customary international law codified in Article 92 and articles to the same effect of the 1982 Convention on the Law of the Sea, according to which ships on the high seas shall be subject to the exclusive jurisdiction of the flag State. In the light of this serious incident, which has caused substantial damage to Spanish nationals, Spain lodges the most vigorous protest and at the same time demands the immediate release of the crew and the vessel and reserves the right to claim appropriate compensation.

The Spanish Government considers that the wrongful act committed by ships of the Canadian navy can in no way be justified by presumed concern to conserve fisheries in the area, since it violates the established provisions of the NAFO Convention to which Canada is a party.

The boarding of the vessel constitutes a serious offence against international law, not in keeping with the usual conduct of a responsible State, carried out under cover of unilateral legislation not opposable to other States. Consequently, the Spanish Government demands the repeal of the legislation in question.

The Spanish Government finds itself constrained, in the light of these events, to reconsider its relations with Canada, and reserves the right to take whatever measures it considers appropriate.

The Ministry of Foreign Affairs takes this opportunity to reiterate to the Embassy of Canada in Spain the assurances of its highest consideration.

Madrid, 10 March 1995.

To the Embassy of Canada in Spain

*(Seal of the Ministry of Foreign Affairs —
Ministry of State to the European Communities)*

Annex 4

Note Verbale from the Department of Foreign Affairs and International Trade of Canada to the Embassy of Spain in Canada

[Translation]

No. JLO 0247

The Department of Foreign Affairs and International Trade presents its compliments to the Embassy of Spain and, with reference to its Notes Verbales Nos. 24 and 25 of 9 March and Nos. 28 and 29 of 10 March, has the honour to confirm that Canada was obliged to arrest a Spanish trawler, the *Estai*, at about 4.50 p.m. on 9 March.

The *Estai* resisted the efforts to board her made by Canadian inspectors in accordance with international practice. The crew of the *Estai* threw the boarding ladders into the sea and then cut its trawl net in order to flee the scene. The *Estai* continued to move away despite repeated calls by the Canadian patrol boat which ordered it to stop. Other Spanish vessels surrounded the three Canadian vessels which were pursuing the *Estai* and attempted to obstruct the boarding operation. The Canadian patrol boat was therefore obliged, after obtaining the necessary authorizations, to resort to firing four warning shots across its bows. The captain of

the *Estai* then stopped trying to escape and the boarding operation could proceed normally without the use of force. The captain was arrested and the *Estai* was seized because there were reasons to believe that they had committed one or more offences under the law and regulations on the protection of coastal fisheries.

The *Estai* is currently en route to St. John's where it is expected between 8.30 p.m. on Saturday 11 March and 8.30 a.m. on Sunday 12 March. Upon their arrival at St. John's, the members of the crew will be free to return to Spain. The Crown Prosecutors are currently considering what charges will be brought against the boat and its captain under the above-mentioned law and regulations.

The Department wishes to assure the Embassy that all steps will be taken to ensure respect for the dignity and well-being of the captain and his crew.

The Department would point out that the arrest of the *Estai* was necessary in order to put a stop to the overfishing of Greenland halibut by Spanish fishermen. The attached communiqué [Not deposited. *[Note by the Registry]*] of 9 March expresses the disappointment of the Honourable André Ouellet, Minister of Foreign Affairs, regarding the position of the European Union which has forced Canada to take measures of coercion for this purpose.

The Department would also point out that the Prime Minister of Canada proposed to the President of the European Commission a 60-day moratorium on fishing for Greenland halibut beyond Canada's 200-mile zone, in order to facilitate the search for a negotiated solution. As a token of good faith, the Honourable Brian Tobin, Minister of Fisheries and Oceans, announced on 9 March that Canada would not allow its own fishermen to fish for Greenland halibut over a period of 60 days, both within and outside the 200-mile zone. At the present time, it is the Department's understanding that no Spanish boat is fishing for Greenland halibut on the Nose and Tail of the Grand Banks. The Department requests the co-operation of the Embassy to ensure that this situation is maintained so as to make possible the resumption of negotiations.

The Department of Foreign Affairs and International Trade takes this opportunity to renew to the Embassy of Spain the assurances of its highest consideration.

Ottawa, 10 March 1995.
