

# THE CANADIAN-SPANISH FISHING DISPUTE: A TEMPLATE FOR ASSESSING THE INADEQUACIES OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA AND A CLARION CALL FOR RATIFICATION OF THE NEW FISH STOCK TREATY

## INTRODUCTION

In March of 1995, two nations, not usually known for their belligerent activities, faced off in the icy waters of the North Atlantic. In these waters, a Canadian flagged vessel fired on a Spanish ship some 225 miles off the coast of Newfoundland. The source of the controversy was neither a rich, newly discovered petroleum reserve nor the treasure trove of a sunken Spanish galleon. Rather, it was a slimy fish known as the Greenland halibut, or turbot, which is used primarily to make frozen fish sticks.<sup>1</sup>

This note will examine the dispute as a template through which the 1982 United Nations Convention on the Law of the Sea<sup>2</sup> (UNCLOS) can be assessed. Since UNCLOS has no enforcement regime for the high seas<sup>3</sup> fishing rights it affirms and the new reciprocal duties it enunciates, the Canadian-Spanish fishing dispute of March 1995 can be viewed as a natural result of this inadequacy in UNCLOS. Consequently, the dispute between these two usually peaceful nations should serve as a clarion call for ratification of the new Fish Stock Treaty.<sup>4</sup>

The note will begin by discussing the general framework which UNCLOS provides for high seas and straddling stock fisheries.<sup>5</sup> Part of this discussion will trace the historical roots of the exclusive economic zones (EEZ's) established by the convention. It will then recall the critical state of the economy in the Canadian maritime provinces and argue that the depressed economy there, coupled with the shortcomings of UNCLOS, created a situation that was ripe for the eruption of the Canadian-Spanish dispute. The note will then apply and analyze UNCLOS to the unique

---

1. Craig Turner, *Canada-Europe Flap Over Atlantic Fish Intensifies Environment*, L.A. TIMES, Mar. 15, 1995, available in WESTLAW, 1995 WL 2025121.

2. *U.N. Convention on the Law of the Sea*, Third U.N. Conference on the Law of the Sea, U.N. Doc. A/CONF.62/122 (1982) [hereinafter *UNCLOS* or the convention].

3. For purposes of this note, the terms *high sea(s)* and *international waters* should be considered synonymous.

4. *Agreement for the Implementation of the Provisions of the U. N. Convention on the Law of the Sea of 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, U.N. Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, 6th Sess., U.N. Doc. A/CONF.164/37 (1995) [hereinafter *Fish Stock Treaty*].

5. Straddling stocks refer to those species of fish that inhabit regions that transcend international boundaries—particularly the exclusive economic zones.

situation in the Grand Banks.<sup>6</sup> It will discuss possible Canadian and Spanish arguments that could be made under the regime and argue that neither the EEZ's established by the convention and customary international law nor the International Court of Justice's decision in the Fisheries Jurisdiction Case, *United Kingdom v. Iceland*<sup>7</sup> provide adequate administration for straddling stock fisheries. It will conclude with a brief overview of the Fish Stock Treaty and use the Canadian-Spanish dispute as an argument for its ratification.

## I. THE FRAMEWORK ESTABLISHED BY UNCLOS

UNCLOS, in its very broadest sense, represents a shift toward increased nation state control over the high seas.<sup>8</sup> In fact, this debate over who, if anyone, should control the high seas has been waged for hundreds of years. Two primary schools of thought exist: those who believe the high seas should be free from the control of any state (*mare liberum*) and those who have argued for nation state control over the high seas (*mare clausum*).<sup>9</sup>

The idea of *mare clausum* probably dates back to the Renaissance.<sup>10</sup> In its various forms, it has stood for the proposition that a nation state can exercise sovereignty and assert jurisdiction over the high seas. UNCLOS incorporates this notion through the establishment of territorial seas and exclusive economic zones.<sup>11</sup> Through these two concepts, coastal nations enjoy sovereign rights (though admittedly limited sovereign rights in the EEZ's) up to 200 miles beyond their coastal baselines. This represents a significant increase in nation state sovereignty over the world's oceans when compared to the previous territorial sea limit of three miles.

However, UNCLOS also attempts to incorporate the idea of *mare liberum* through the recognition in Article 116 of the right of all states "to engage in fishing on the high seas."<sup>12</sup> This right, though, is specifically limited by reference to Article 63<sup>13</sup> and a duty imposed by Article 117 "to

6. The Grand Banks of Newfoundland, once one of the world's richest fisheries, is an extension of the continental shelf that extends over 200 miles from the coast. The two portions of the Grand Bank that extend beyond the 200 miles are known as *the Nose and Tail of the Grand Bank*. The importance of this is that a habitat, capable of supporting exploitable fishing stocks, exists in international waters, though the fish may have originated within Canada's exclusive economic zone or vice versa.

7. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (Judgment of July 25).

8. See 1 D.P. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 552-53 (I.A. Shearer ed., 1982).

9. *Id.* at 1-10.

10. *Id.* at 3.

11. See generally, UNCLOS, *supra* note 2, arts. 2-3 and arts. 56-58.

12. *Id.* art. 116.

13. *Id.* art. 63.

cooperate with other states . . . in the conservation of living marine resources."<sup>14</sup> On balance then, while UNCLOS does pay some respect to the idea of *mare liberum*, its provisions in fact lead to increased coastal state control over the high seas along with a new duty of cooperation with other states in the exploitation and conservation of marine resources. Thus, not only does UNCLOS allow for increased sovereignty in geographic terms, it also restricts freedom of fishing in those areas that are still recognized as international in nature.

In addition to these rather specific provisions, Article 300<sup>15</sup> imposes a general duty on all signatory states to exercise in good faith the duties, rights, and jurisdiction granted in UNCLOS. Therefore, nation states always have recourse to a good faith argument when it would appear that the black letter of the convention has been violated.

But, what are the actual effects of these provisions? In other words, what rights and duties arise under the UNCLOS provisions establishing territorial seas and EEZ's? The concept of sovereignty is one construct through which the three regimes of control over the world's oceans can be understood. Sovereignty, of course, implies control, and with it comes jurisdiction to prescribe rules of law and enforcement measures for those rules.

The first regime of control established by UNCLOS is the territorial sea,<sup>16</sup> a concept not new to international law. Under UNCLOS, the concept is reaffirmed and its width is extended to twelve miles.<sup>17</sup> UNCLOS places the territorial seas under the direct control of the coastal state and makes them subject to a similar degree of sovereignty as that exercised by the coastal state on its land areas.

Another regime also recognized by UNCLOS and not new to international law is the high seas. This area is beyond the sovereignty of any state,<sup>18</sup> and all nations, whether coastal or landlocked, enjoy access to them and freedom of peaceful navigation upon them.<sup>19</sup> It comprises the vast majority of the world's oceans, being those waters more than 200 miles from the coastal baselines. However, as alluded to above, the concept is somewhat grayed by the provisions concerning straddling stock fishing.

The final regime established by UNCLOS, however, is new to international law. While recognized by customary international law since its

---

14. *Id.* art. 117.

15. *Id.* art. 300.

16. *See generally id.* arts. 2-32 (general provisions for the territorial sea and contiguous zones).

17. *Id.* art. 3.

18. *See id.* arts. 87, 89.

19. *Id.* arts. 87-88, 90.

widespread adoption in the late 1970's,<sup>20</sup> its rules and the parameters of sovereignty that may be exercised by a coastal state in it are codified by UNCLOS. Extending 200 miles beyond the coastal baseline, the EEZ is very much tied to the convention. The sovereignty exercised by a coastal state in the EEZ is expressed by UNCLOS as "sovereign rights for the purpose of exploring and exploiting . . . natural [marine] resources, . . . living or non-living."<sup>21</sup> A degree of sovereignty nonetheless exists since in regard to the natural resources, a coastal state is recognized as having jurisdiction to prescribe laws pertaining to, *inter alia*, "the protection and preservation of the marine environment."<sup>22</sup>

UNCLOS then has led to an immense increase in coastal state control over the world's oceans. Before UNCLOS, coastal states exercised jurisdiction three miles from their shores. Jurisdiction, albeit for limited purposes, now extends out 200 miles. Surely, this represents an erosion of the concept of *mare liberum*, especially since the extended jurisdiction is accompanied by implied coastal state control of at least part of the high seas beyond the 200 mile limit.

## II. THE BACKGROUND TO THE CANADIAN-SPANISH DISPUTE

### A. *Spain and the Northwest Atlantic*

*With a blacksmith do not wed;  
so much washing will there be!  
Marry a seaman, a sailor, instead;  
he comes home laundered from the sea!*<sup>23</sup>

As this rhyme suggests, the tie between the coastal villages of Spain and the sea is strong and indeed long standing. It was, after all, from Spain that Columbus set out on the first of his voyages that has forever changed the course of history for good or for ill. And, it was the defeat of a Spanish fleet in the North Sea in 1588 that set the stage for Great Britain, and eventually the United States, to rise to the status of world powers. Spain, then, is not a stranger to maritime disputes.

But as the poem suggests, the tie between Spain and the sea is much more than a political or economic link; it is also a tie that has shaped if not

---

20. O'CONNELL, *supra* note 8, at 570. Great Britain, however, argued as late as 1977 that this was not the case. *Id.* See also WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES* 1 (1994).

21. UNCLOS, *supra* note 2, art. 56(1)(a).

22. See *id.* art. 56(1)(b)(iii).

23. WILLIAM W. WARNER, *DISTANT WATER: THE FATE OF THE NORTH ATLANTIC FISHERMAN* 112 (1983) (Spanish seafaring rhyme).

dictated a culture of Spanish coastal peoples for hundreds of years. This tie is not merely to the sea in general, but to the Grand Banks itself. Spaniards who rely on the sea (and in particular the catches from the Northwest Atlantic) are quick to point out that their ships have been fishing in the area for many more years than Canada has existed as a nation. Soon after the 1497 discovery of the Grand Banks by the English explorer John Cabot, Spanish fishermen began making the annual trek across the North Atlantic—a trek that has continued now for nearly 500 years.<sup>24</sup> Admittedly, this predates the Canadian Confederation by some 350 years.

It was traditionally early to mid-April when the fishermen of Northwest Spain set out from their homes for a summer of distant water fishing. Proceeding first to the North Sea for a brief season of fishing off Norway and Iceland, they arrived on the Grand Banks in mid-May or early June and stayed there some years as late as September or October.<sup>25</sup> There, the catch was salted on board the smaller ships or processed aboard the behemoth factory ships,<sup>26</sup> which could consequently return to Spain earlier. The fishing industry then has not only shaped a culture; it has also shaped a way of life—one that has nearly ceased to exist as a result of chronic overfishing.

Aside from and in addition to the strong cultural ties between Spain and the sea, there is also a strong economic interest at stake for the people of the Spanish coastal villages. Before the establishment of the Canadian EEZ, Spain regularly hauled in over 200,000 tons of fish from the Grand Banks in each year between 1961 and 1972. In fact, in 1968, Spain reported a record catch of 341,000 tons—sixteen percent of Spain's total catch for the year.<sup>27</sup> During the same eleven-year period, frozen-fish production in Spain rose from 4000 tons in 1961 to 500,000 tons in 1972.<sup>28</sup> The ship building industry, as well, experienced similar fantastic growth.<sup>29</sup>

Consequently, the establishment of the Canadian EEZ on January 1, 1977, and the accompanying limits on the annual catch of distant-water fleets had a noticeable impact on the economy of Spain and, particularly, on its coastal villages. For example, in the late 1970's, Canada cut Spain's annual allowable catch from the Grand Banks from 85,000 tons (already about one-fourth of its record catch) to a mere 29,000 tons (not quite one-tenth of its record catch).<sup>30</sup> Now, Canada has excluded all distant water fishing within

---

24. Chris Wood, *Who Owns the Sea?*, MACLEAN'S, Mar. 27, 1995, at 14.

25. WARNER, *supra* note 23, at 132-33.

26. For a discussion of the impact of the large factory-like processing ships, see *infra* part II(c).

27. WARNER, *supra* note 23, at 119-20 (a significant figure for operations that took place more than 5000 miles from Spain).

28. *Id.*

29. *Id.*

30. *Id.* at 111.

its EEZ, restricting Spain's fishing rights to the area known as the nose and tail.<sup>31</sup> Like their counterparts in Newfoundland, the coastal villagers of Spain are seeing a culture and an economy die before their eyes.<sup>32</sup>

The Spanish fishermen have responded with defiance to these attempts by Canada to limit what they regard as ancient fishing rights. The Spanish government is openly upset with what it perceives as exceedingly low quotas, and Spanish fishermen have continued to fish in the areas just outside the Canadian EEZ.<sup>33</sup> But, every argument has two sides. Canada, too, has compelling claims to fishing rights on the Grand Banks.

### B. *Canada and the Grand Banks*

"I don't know what I'd be able to do if in five years I can't go fishing . . . . [Y]ou get in your boat, steam up the bay, see whales blowing . . . . Each day has its own beauty."<sup>34</sup>

The Grand Banks have historically been one of the world's richest fisheries containing large stocks of cod, flounder, halibut, herring, and the fish at issue here, turbot. Newfoundland, the Maritime province most intimately tied to the Grand Banks, has relied on them ever since its beginnings as an important economic resource. In fact, fishery related jobs accounted for nearly eighty percent of employment in the maritime provinces as of 1976, with most of these jobs related to offshore, as opposed to inland, fishing.<sup>35</sup> It should be readily apparent from this figure and the aforementioned quote that fishing is as ingrained in the culture of the Canadian Maritime Provinces as it is in the culture of the Spanish coastal villages.

As a consequence, Canadian fishermen are generally protectionist in their outlooks<sup>36</sup> and the federal government—which has primary responsibility for ocean fisheries, though each of the Maritime Provinces has its own fisheries ministry<sup>37</sup>—has responded to this outlook by passing two particularly protectionist measures. Namely, they are the Coastal Fisheries

---

31. *Id.* at 314.

32. See Bruce Wallace, *Enemies—With Much in Common*, MACLEAN'S, Mar. 27, 1995, at 18.

33. Parzival Copes, *Canadian Fisheries Management Policy: International Dimensions*, in CANADIAN OCEANS POLICY 13 (Donald McRae & Gordon Munro eds., 1989).

34. Craig Turner, *Way of Life is Dying Along with Fish in Canada Newfoundland*, L.A. TIMES, Mar. 20, 1995, at A6 (remarks of Robert McCarthy, a Newfoundland fisherman).

35. Barbara Johnson, *Canadian Foreign Policy & Fisheries*, in CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 55 (Barbara Johnson & Mark W. Zacher eds., 1977).

36. *Id.* at 54.

37. *Id.*

Protection Act<sup>38</sup> and the Canadian Laws Offshore Application Act,<sup>39</sup> both of which Canada relied upon to seize the Spanish ship at issue.

The original version of the Fisheries Act prohibited fishing by foreign ships within *Canadian* fisheries waters unless authorized by treaty or regulation and authorized protection officers<sup>40</sup> to board any fishing vessel at any time found within Canadian waters.<sup>41</sup> It also gave protection officers the right to arrest offenders without warrant upon probable cause<sup>42</sup> and instituted fines as high as \$100,000 for violating the act.<sup>43</sup> Although Canada was not a signatory to UNCLOS, these provisions are quite comparable to the parameters of jurisdiction set forth in the convention.

When considered in an international law context, the amended version of the Fisheries Act has much more drastic consequences.<sup>44</sup> In it, Canadian jurisdiction is extended to include the entire Northwest Atlantic Fisheries Organization (NAFO)<sup>45</sup> regulatory area. Particularly in its amended form, the Fisheries Act gives Canadian officials authority to board fishing vessels of other nations on the high seas, and the Canadian Laws Offshore Application Act reiterates similar sentiments by specifically restricting fishing on the continental shelf.<sup>46</sup>

But with an economy based on a single industry, this kind of an outlook is understandable. Since they were founded in the 1600's, fishing has been the mainstay of the Maritime Provinces' economies.<sup>47</sup> Without diversification, the collapse of the predominate industry can have disastrous effects. For example, since the government banned the fishing of cod in 1991, the unemployment rate in Newfoundland has soared to nineteen percent, leaving nearly one in five Newfoundlanders out of work with 71,600 of the 582,000 residents receiving government assistance.<sup>48</sup> The

---

38. Fisheries Act, R.S.C., ch. C-33 (1985) amended by ch. 14, 1994 S.C. 1 (Can.) [hereinafter Fisheries Act].

39. Act of Dec. 17, 1990, ch. 44, 1990 S.C. 847 (Can.).

40. Protection officers are essentially conservation officers or, more colloquially, game wardens.

41. Fisheries Act, *supra* note 38, §§ 3, 7.

42. *Id.* § 8.

43. *Id.* § 18(1).

44. See discussion *infra* part IV(a).

45. NAFO is one of the regional authorities mentioned in UNCLOS. Its primary purpose is to determine catch limits for member states within its boundaries. As an international organization, it has jurisdiction for the very limited purpose of proscribing catch limits in international waters. Specifically, for the purposes of this note, the international waters in question lie within the Nose and Tail of the Grand Banks. For a description of this geographic formation, see *supra*, note 6.

46. Act of Dec. 17, 1990, ch. 44, 1990 S.C. 847, § 13 (Can.).

47. See Turner, *supra* note 34, at A6.

48. *Id.*

collapse of this single industry was brought about by one problem—overfishing.

### C. *Overfishing: The Basis for the Dispute*

If there is a single cause for the dispute that arose between Spain and Canada, it is the problem of chronic overfishing. And so the question arises: If stocks are so depleted, why do the world's fishermen continue to harvest fish in such large numbers? One answer to the question is tied up in economics. In the current legal environment, no individual fisherman or fleet sees any benefit in practicing restraint because the rules drawn-up by the international community are themselves designed to protect the fishing industry's economic interests. For example, the Food and Agricultural Organization (FAO) estimates that the world's fishing fleets generate an estimated \$54 billion *loss* per year with much of the loss being met by government subsidies.<sup>49</sup> The Canadian government, for example, continued to subsidize and encourage fishing throughout the 1980's, relying on gross overestimates of the actual fish population.<sup>50</sup> Without market forces to curtail this pillaging of marine resources, many fishing operations continue long after a truly free market would have driven them out of business.<sup>51</sup>

A second answer to the question lies in the sophistication of technology now available to fishermen. Simply put, nature has been unable to keep pace with human technological advances that have made it possible to catch enormous quantities of fish. The most conspicuous of these innovations is the factory trawler. With a processing plant and freezing facilities on board, some of these ships can catch and process 50,000 to 100,000 pounds of fish on a four to five day voyage.<sup>52</sup> In particular, the large freezing capacities allow the ships to stay at sea for an even longer amount of time pursuing stocks that would have to have been abandoned without the refrigeration available for the processed stocks.<sup>53</sup>

In addition to enabling ships to stay at sea for longer periods, the immense refrigeration and storage capacity of these ships also makes it profitable to catch more fish than can be sold fresh. Instead, the surplus stocks can be stored for sale when the particular species would traditionally have been "out of season."<sup>54</sup>

---

49. See *The Economics of the Sea*, THE ECONOMIST, Mar. 18, 1995, at 48.

50. Turner, *supra* note 34, at A6.

51. Poly Ghazi et al., *The Rape of the Oceans*, THE GUARDIAN, Apr. 2, 1995, available in WESTLAW, 1995 WL 7592550.

52. WARNER, *supra* note 23, at vii-viii, 3.

53. ELLEN HEY, THE REGIME FOR THE EXPLOITATION OF TRANSBOUNDARY MARINE FISHERIES RESOURCES 16 (1989).

54. *Id.* at 17.



Other technological advances have also led to the emergence of chronic overfishing. For example, many of today's fishing trawlers are equipped with sonar that is so sensitive that the very species of fish can be identified by the soundings.<sup>55</sup> Satellite hookups, as well, allow fishermen to track the migration of huge schools of fish—sometimes pinpointing locations to within 100 meters.<sup>56</sup>

Finally, the development of synthetic materials has made it possible to develop much more sturdy nets and artificial bait.<sup>57</sup> All of these developments, along with the "leaky" nature of UNCLOS, have contributed to an environment that brought Canada and Spain to the brink of naval confrontation.

### III. THE DISPUTE: CANADA AND SPAIN ON THE BRINK

The dispute between Canada and Spain truly began when NAFO set the quotas for the 1995 turbot catches to 16,300 tons for Canada and 3400 tons for the entire European Union (EU), of which Spain is but one of fifteen other members.<sup>58</sup> While member governments continued to protest, Canadian officials estimated that EU boats had already hauled in 7000 tons by the first two weeks of 1995.<sup>59</sup> Accordingly, Canada, on March 3rd, called for a sixty-day moratorium on all turbot fishing while the conflict was being resolved.<sup>60</sup> After the request was ignored, Brian Tobin, the Canadian Fisheries Minister, announced on March 6th that Canada would seize any vessels found to be fishing for turbot off the east coast.<sup>61</sup> Through all of this, negotiations continued in vain.

Then, relying on the amended Fisheries Act, Tobin took decisive action. On March 7, 1995, a fisheries vessel carrying a team of Royal Canadian Mounted Police approached the Spanish trawler *Estai* just outside Canada's EEZ and attempted to board her.<sup>62</sup> When this first attempt failed, the Spanish ship cut its nets and attempted to flee<sup>63</sup> with other Spanish ships attempting to frustrate the Canadians' efforts to board the *Estai*.<sup>64</sup> A chase ensued as the ships dodged each other for four hours in thick fog and finally ended when the Canadian vessel fired a machine gun blast across the *Estai*'s

---

55. Wood, *supra* note 24, at 16.

56. *Id.*

57. HEY, *supra* note 53, at 16.

58. John DeMont et al., *Gunboat Diplomacy*, MACLEAN'S, Mar. 20, 1995, at 11.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Turner, *supra* note 1.

bow.<sup>65</sup> At that point, the Spanish surrendered, and the *Estai* was forced off the high seas and into St. John's Harbor in Newfoundland<sup>66</sup> where the captain was arrested and the ship was impounded.<sup>67</sup> Bail for the captain was set at \$8000 and a bond was placed on the ship for \$500,000.<sup>68</sup>

In short, the situation amounts to this: a Spanish flagged vessel was fired upon and halted by a Canadian warship<sup>69</sup> in international waters, boarded by Canadian officers, and forced to return to a Canadian port. Issues then arise as to whether or not this was a legal act under international law. The remainder of this note will deal with the analysis of this question and the shortcomings of UNCLOS made readily apparent by the passage of the Fisheries Act.

#### IV. ANALYSIS OF CANADA'S ACT IN AN INTERNATIONAL LAW CONTEXT

##### A. *Analysis under Canadian Law*

When viewed in the context of existing Canadian Law, the seizure of the Spanish ship was entirely legal. As discussed, the amended version of the Fisheries Act clearly gives Canadian fisheries officers the power to inspect fishing trawlers on the high seas. Specifically, Section 7 states that "[a] protection officer may . . . for the purpose of ensuring compliance with this Act and the regulations, board and inspect any fishing vessel found within Canadian fisheries waters or the NAFO Regulatory Area."<sup>70</sup> Therefore, since the *Estai* was undoubtedly in the NAFO regulatory area, the Canadian vessel had every right under Canadian law to board and inspect her.

Moreover, Section 8.1 specifically grants the authority to disable a vessel if the fishery officers are proceeding to arrest the captain.<sup>71</sup> Consequently, the firing of a shot across the *Estai's* bow was also within the authority granted under the Fisheries Act.

Additionally, Sections 18.1 and 18.1(a) of the amended Fisheries Act deem any offense occurring within the NAFO Regulatory Area to have occurred in Canada if it occurs during the enforcement of the Act.<sup>72</sup> The

---

65. DeMont, *supra* note 58, at 11.

66. *Id.*

67. See John Demont, *Conflicting Emotions*, MACLEAN'S, Mar. 27, 1995, at 20.

68. *Id.*

69. For a discussion as to whether fisheries vessels qualify as *warships*, see W.J. Fenrick, *Legal Limits on the Use of Force by Canadian Warships Engaged in Law Enforcement*, 1980 CAN. Y.B. INT'L L. 113.

70. Fisheries Act, *supra* note 38, § 7.

71. *Id.* § 8.1.

72. *Id.* §§ 18.1, 18.1(a).

choice of law then—at least as far as the Canadians would be concerned—is undoubtedly Canadian law and as such, it would appear that any charge levied against the captain for resisting arrest would also be possible under this section of the Act.

Finally, Sections 18.2(1) and 18.2(1)(a) provide that, “[e]very power of arrest, entry, search or seizure or other power that could be exercised in Canada . . . may be exercised . . . on board the foreign fishing vessel.”<sup>73</sup> In essence, the Act then gives Canada the right to exercise sovereign rights on the high seas and to seize foreign nationals on the high seas.

A question then arises as to whether the amended Fisheries Act itself is legal in an international law context. If the first duty of the sovereign is the protection of the realm and its citizens, protecting the environment would certainly be within the ambit of the sovereign’s power. The problem here is that the part of the environment in question, the turbot, was not located in Her Majesty’s realm of Canada. To the contrary, the turbot were located on the high seas more than 200 miles from the Canadian coast.

For international law purposes, the question is whether a sovereign can reach beyond its territories into the high seas for the purposes of protecting that sovereign’s environment, or more cynically, its economy. Unfortunately, the answer to this question is quite difficult to divine from the various United Nations’ Conventions on the Law of the Sea or, more particularly, from the provisions recognized as customary international law regarding the EEZ’s.

#### B. *Analysis under UNCLOS and Previous United Nations Conventions*

Canada has never ratified UNCLOS.<sup>74</sup> However, the provisions set forth in UNCLOS governing EEZ’s have been so widely adopted that they are now considered part of customary international law.<sup>75</sup> This section of the note will apply UNCLOS to the Canadian-Spanish dispute and offer the application as examples of the convention’s shortcomings.

As previously noted, UNCLOS attempts to advance the cause of competing interests by both affirming and limiting freedom of fishing on the high seas while decidedly favoring increased coastal state sovereignty.<sup>76</sup> Article 87 is the best example in the convention of *mare liberum*; though like the rest of the convention sections dealing with high seas fisheries, it is at once emphatic and ambiguous. Specifically, Article 87 states:

---

73. *Id.* §§ 18.2(1), 18.2(1)(a).

74. Wood, *supra* note 24, at 15.

75. BURKE, *supra* note 20, at 40.

76. *See generally* discussion *supra* part I.

1. The high seas are open to all States, whether coastal or land-locked . . . . It comprises, *inter alia*, both for coastal and land-locked states . . . (e) freedom of fishing, subject to the conditions laid down in section 2 . . . .
  
2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of freedom of the high seas . . . .<sup>77</sup>

Freedom of fishing on the high seas is plainly affirmed; yet at the same time, fishing states must exercise this freedom with "due regard" to other states. A question then arises as to the meaning of due regard. To Canada, due regard means a moratorium on fishing. However, is the Canadian position one that shows due regard for the rights of Spain to exercise its right to freedom of fishing on the high seas? Here, the ambiguity of UNCLOS is quite clear since there is no accepted definition for due regard or an enforcement regime for compelling states to exercise due regard—whatever the phrase may mean.

The Canadian-Spanish dispute particularly highlights this shortcoming of Article 87 in that a question arises to the actions of both states. Was continued fishing by Spain an exercise of due regard for the rights of Canada? Was the seizure of a Spanish ship on the high seas due regard for the rights of Spain? Neither of these questions can be answered under an UNCLOS analysis.

In fact, other provisions of UNCLOS, when viewed through the Canada-Spain template, simply "muddy" the waters further. Article 89, for example, states, "[n]o state may validly purport to subject any part of the high seas to its sovereignty."<sup>78</sup> Certainly, firing upon and boarding a foreign flagged vessel are acts demonstrating the exercise of sovereignty over that vessel. If Article 89 is then recognized as controlling in the situation, Canada has violated this article by its seizure of the *Estai*. Thus, the same act that appears to be sanctioned by Article 87 is condemned by Article 89.

Another example of this "muddying of the waters" becomes readily apparent when Article 110 is considered. In relevant part, it states:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship . . . is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is

---

77. UNCLOS, *supra* note 2, art. 87.

78. *Id.* art. 89.

engaged in unauthorized broadcasting . . . ; (d) the ship is without nationality; or (e) though flying a foreign flag . . . the ship is, in reality, of the same nationality as the warship.<sup>79</sup>

Following the maxim *expressio unius est exclusio alterius*, the laundry list of occasions permitting the boarding of a foreign flagged vessel excludes all other occasions not listed. Since none of the provisions justifying the visit of another ship on the high seas is present in the Canada-Spain dispute, an analysis of the facts in light of Article 110 would then appear to condemn Canada's action as contrary to the treaty and international law.<sup>80</sup>

But, if these factors seem condemnatory of Canada's action, other articles of the convention seem to mitigate the seriousness of Canada's act. For example, Article 63(2) states:

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 subregional or regional organizations, to agree upon the measures necessary for the conservation of those stocks in the adjacent area.<sup>81</sup>

This article then implies that the coastal state (in this case Canada) has some kind of right in the area beyond the EEZ when a fish stock exists or migrates between the EEZ and the high seas. And so, the question arises, what is the nature of this right? Is the right tantamount to a sovereign right? If not, is there a kind of geographic gray area where some kind of quasi-sovereignty exists?

At this point, it will be useful to examine more closely the concept of nation state sovereignty in the EEZ context. Since the convention became effective, the meaning of *sovereign rights* as opposed to *sovereignty* has been the subject of intense debate.<sup>82</sup> Traditionally, sovereignty is defined as "[t]he power to do everything in a state without accountability—to make the laws [and] to execute and to apply them."<sup>83</sup> In his comprehensive treatise on the law of the sea, D.P. O'Connell affirmed this traditional definition of

79. *Id.* art. 110.

80. It should be noted here that Articles 87, 89, and 110 are not in UNCLOS provisions dealing with the exclusive economic zones. However, these provisions are substantially similar (with the exception on the limitation of free fishing on the high seas) to earlier high seas conventions to which Canada and Spain were both parties. See, e.g., Convention on the High Seas, Apr. 29, 1958, arts. 2 & 22, 450 U.N.T.S. 82.

81. UNCLOS, *supra* note 2, art. 63.

82. See generally O'CONNELL, *supra* note 8, at 575-78.

83. BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

sovereignty when he wrote: "[a] claim to exclusive rights in the sea, however framed on paper, is inherently a claim to dominion, and there is no limit to the extent of the claim short of the exercise of the faculties of sovereignty."<sup>84</sup> If this statement were still valid, the analysis of sovereignty in the UNCLOS context could end here as some degree or kind of sovereignty is granted to the coastal state.

However, sovereignty in the EEZ's is less expansive. Article 56 of UNCLOS provides that:

1. In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and its subsoil, . . . [and] (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: . . . (iii) the protection and preservation of the marine environment.<sup>85</sup>

Therefore, it is generally recognized that the coastal state may exercise sovereign rights in the EEZ only for the limited purpose of preserving the natural environment.<sup>86</sup> It logically follows then that *sovereign rights* are somehow inferior to complete sovereignty. Thus, it is generally accepted that a coastal state has plenary powers in the EEZ regarding limits on access to and the use of living resources in the zone, and that these rights are within the exclusive prerogative of the coastal state.<sup>87</sup> In addition, the convention itself provides in Article 58(1) that other states enjoy freedom of navigation and other rights generally attributable to the high seas in the EEZ's.<sup>88</sup> Thus, the EEZ's are high seas for all purposes other than for exploring and exploiting the marine environment.

O'Connell suggests that it useful to think of this means of control as a jurisdictional grant as opposed to a grant of sovereign rights.<sup>89</sup> However, he also recognizes a psychological importance in limiting the analogies drawn between high seas and the EEZ since this can lead to rather thorny theoretical debates on the issue of nation state control of the oceans. Recognizing the EEZ as similar to the high seas, according to O'Connell, would mean that there is a definite limit to the jurisdiction a coastal state can exercise while recognizing the EEZ as similar to the territorial sea would mean that there is really no limit as to what jurisdiction a coastal state might

---

84. O'CONNELL, *supra* note 8, at 575 (quoting Morin, 1964 CAN. Y.B. INT'L LAW 88).

85. UNCLOS, *supra* note 2, art. 56.

86. BURKE, *supra* note 20, at 39.

87. *Id.*

88. UNCLOS, *supra* note 2, art. 58.

89. O'CONNELL, *supra* note 8, at 576.

claim over the high seas in the future.<sup>90</sup> This all may seem like an academic argument that has no real significance or at least a question of mere semantics.

However, O'Connell makes a salient point. When the Dutch scholar Hugo Grotius first suggested that the width of the territorial sea should be roughly the same distance as that that would be within the range of a canon, the world was a much larger place than it is now. In the early 1600's, there were still vast areas of the globe that were still susceptible to the ever-growing lust for territory exhibited by European states. Africa, for example, would not fall under direct European control for another 200 years, and only small inroads had been made by the Dutch and the British into India. Now, there is little land on the earth's surface left "up for grabs." In fact, the only real area of expansion left, with the possible exception of outer-space which is well beyond the scope of this note, is the world's oceans. When this fact is coupled with the economic consequences of overfishing, it becomes painfully understandable as to why disputes such as the one between Canada and Spain would arise. There is then strong reason for classifying the EEZ as a new and unique type of jurisdiction.

At any rate, perhaps the construct suggested by O'Connell of viewing the control exercised by the coastal state in the EEZ as jurisdictional is a useful one since the use of the term sovereign rights carries with it many of the attributes of sovereignty which simply cannot be imported into the EEZ's. But, whether the control exercised by the coastal state in the EEZ is thought of in jurisdictional or sovereign terms, the control still represents an immense increase in the right of the coastal state. When the widespread recognition of the preferential rights of coastal states in the high seas over the past fifty years is considered, this shift seems entirely reasonable—particularly when the coastal state's economy is tied inextricably to the seas. To the credit of UNCLOS' drafters, the convention is explicit as to these rights. But, as alluded to earlier, such shifts in control are likely to be painful.

However, as this note has consistently noted, the problem with UNCLOS does not lie in its codification of the customary international law relating to the EEZ's or in its reiteration of the traditional rights associated with the high seas. Rather, the major shortcoming of UNCLOS is its attachment of vague duties and restrictions to high seas fishing without suggesting any parameters for these duties, let alone an enforcement regime or a list of appropriate sanctions that may be sought for violation of these duties. The principle example of this shortcoming can be seen in Article 116 which states:

---

90. *Id.*

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 (c) the provisions of this section.<sup>91</sup>

Herein lies the rub, as the language at once suggests—albeit subtly—that there is some kind of right, sovereign or jurisdictional, vested in the coastal state in the high seas. The very language of the article implies such an interpretation when it states “subject to . . . the rights and duties as well as the interest of the coastal State.”<sup>92</sup> And so the questions remain: Are the rights of the coastal states in the high seas adjacent to their EEZ’s the same or similar to their rights in the EEZ’s, and can a coastal state force a foreign flagged vessel off the high seas as Canada did? A hint, and only a hint, at the answer to these unresolved questions may lay in the Fisheries Jurisdiction Case.<sup>93</sup>

### C. *Analysis under the Fisheries Jurisdiction Case*

The facts in the Fisheries Jurisdiction case are strikingly similar to those that underlie the dispute between Canada and Spain. In 1948, the Icelandic Parliament enacted a law which allowed the fisheries ministry to exert jurisdiction over Iceland’s continental shelf for the limited purpose of conserving fishery stocks.<sup>94</sup> As a rationale for the law, the government of Iceland explained:

It is well known that the economy of Iceland depends almost entirely on fishing in the vicinity of its coast. For this reason, the population of Iceland has followed the progressive impoverishment of fishing grounds with anxiety. Formerly, when fishing equipment was far less efficient than it is today, the question appeared in a different light . . . . It seems obvious, however, that measures to protect fisheries ought to be extended in proportion to the growing efficiency of fishing equipment.<sup>95</sup>

The United Kingdom, which had enjoyed access to these previously international fishing grounds, protested this measure and entered into negotiations with Iceland culminating in the 1958 Geneva Convention on the

---

91. UNCLOS, *supra* note 2, art. 116.

92. *Id.*

93. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (Judgment of July 25).

94. *Id.* at 10.

95. *Id.*



Law of the Sea.<sup>96</sup> However, when this Convention failed to resolve the differences between the two nations, Iceland unilaterally announced the existence of a twelve mile exclusive fishery zone; the United Kingdom protested this measure and a second conference on the law of the sea was convened in 1960.<sup>97</sup> Meanwhile, a series of "cod wars" had occurred between the two nations involving minor skirmishes between Icelandic patrol boats, British trawlers, and the Royal Navy.<sup>98</sup> As a consequence, Iceland and the United Kingdom exchanged a series of notes which permitted the United Kingdom to fish in the outer six miles of this zone, at the same time subjected the U.K. to certain catch limitations, and recognized Iceland as having preferential rights in fish stocks found outside the twelve mile limit.<sup>99</sup> The controversy then subsided for a decade until Iceland issued a new edict in July of 1971 terminating the agreement with Great Britain and proclaiming the existence of a fifty mile exclusive fishery zone around Iceland.<sup>100</sup>

The United Kingdom protested this unilateral move by Iceland as being contrary to international law as it then existed<sup>101</sup> and submitted the case to the International Court of Justice for a final determination.<sup>102</sup> Iceland, however, withdrew its recognition of the court's jurisdiction in the case and took no part in any of the subsequent proceedings.<sup>103</sup>

While some of the issues placed before the court have become moot since the recognition by international law of exclusive economic zones, one of the issues is substantially the same as that presented by the Canada-Spain controversy, i.e., "that . . . [a nation state] is not entitled unilaterally to exclude . . . [another nation state's] fishing vessels from the area of the high seas . . . or unilaterally to impose restrictions on the activities of such vessels in that area."<sup>104</sup> Consequently, the dispute between Canada and Spain can be viewed as a new twist on an old problem: what rights does a coastal state have in the adjacent waters beyond its jurisdiction?

The World Court failed to give any concrete answers to this question in rendering its decision in the Fisheries Jurisdiction Case, mainly because a third international conference on the law of the sea (UNCLOS) was in its initial stages and the court wished to avoid, "anticipat[ing] the law before the legislator [had] laid it down."<sup>105</sup> Nevertheless, the court did state some useful

---

96. *Id.* at 11.

97. *Id.* at 12-13.

98. Roger A. Briney, *The Icelandic Fisheries Dispute: A Decision is Finally Rendered*, 5 GA. J. INT'L & COMP. L. 248, 249 (1975).

99. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 13 (Judgment of July 25).

100. *Id.* at 13-14.

101. *Id.* at 15.

102. *Id.*

103. *Id.* at 8.

104. *Id.* at 7.

105. *Id.* at 23-24.

propositions in rendering what was in every respect a final judgment on the merits. Moreover, since it has been demonstrated by this note that UNCLOS fails miserably to provide concrete parameters that nation states can follow in high seas waters adjacent to EEZ's, any pronouncements that the court made on the nature of these waters and the rights of coastal and foreign states is of paramount importance in the resolution of the dispute between Canada and Spain and similar disputes.

First, the court recognized the international practice of according coastal states a preferential right in the living marine resources in the high seas adjacent to its coastal waters—especially when that nation is “in a situation of special dependence on coastal fisheries.”<sup>106</sup> The court, however, refined this right further by declaring that

[t]he preferential rights of the coastal State come into play only at the moment when an intensification in the exploitation of fishery resources makes it imperative to introduce some system of catch limitation and sharing of those resources, to preserve the fish stocks in the interest of their rational and economic exploitation.<sup>107</sup>

The interest of the coastal state in its adjacent high seas is not then a natural extension of its rights by virtue of its geographic location. Rather, there must be some “economic” or “rational” need for the coastal state to declare the existence of a right in adjacent high seas. As such, the coastal state can make no claim that the right is inherent in its sovereignty. In other words, it arises; it is not innate.<sup>108</sup>

More importantly, the court held that “[t]he concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled to preferential rights is not free, *unilaterally and according to its own uncontrolled discretion*, to determine the extent of those rights.”<sup>109</sup> The court then went on to hold that this was particularly true in a situation in which the foreign state had an historic interest in the fishery;<sup>110</sup> as a consequence, Iceland had no right under international law to exclude the United Kingdom, wholesale, from its high seas fisheries.

Like the action of Iceland unilaterally attempting to exclude British vessels from the high seas adjacent to its coastal waters, Canada's act would

---

106. *Id.* at 24.

107. *Id.* at 27.

108. This raises an interesting question as to whether or not the right would be extinguished if the economic or rational need ceased to exist. However, the current ecological condition of the Grand Banks will preclude such a situation indefinitely.

109. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 27 (Judgment of July 25) (emphasis added).

110. *Id.* at 28.

be an attempt to accomplish the same ends. Canada's parliament passed the Amended Fisheries Act on its own accord and under its own "uncontrolled discretion." If the decision of the World Court has any precedential value, it must follow that Canada's unilateral act is similarly invalid.

However, the court also held that:

Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States.<sup>111</sup>

The court, in essence, instituted a balancing test for disputes between coastal and distant water fishing states backsliding on the apparently absolute language enunciated earlier. From this, it can be argued that at least three factors must be considered when pronouncing judgments in these matters: 1) conservation; 2) dependence of the coastal state on the fishery; and 3) the historic interest of the distant water state.

In the dispute between Canada and Spain, the first factor, conservation, is almost a given. As previously discussed, the Grand Banks have been almost totally depleted by both Canada and distant water fishing states. The numbers of cod, for example, once one of the most prevalent of species in the Grand Banks, have dropped ninety-nine percent from previous levels with haddock catches plummeting eighty percent.<sup>112</sup> Clearly, there is an interest in conserving the already woefully overfished stocks of the Grand Banks.

The second factor of coastal state dependence on the fishery is less clear, however, and might be a source for concern in regard to Canada's case. Specifically, as the world's second largest nation, Canada has been blessed with far more natural resources than the volcanic island of Iceland. Granted, much of this territory is either heavily forested or arctic tundra, but the fact still exists that the Canadian prairie provinces comprise part of the earth's richest farmland. And, there is a ribbon of heavy industry that cuts across Canada's southern border from Quebec to western Ontario as well as along the southwestern coast of British Columbia. As aptly demonstrated above, the maritime provinces are certainly dependent at present on the fishing industry for their economic existence. However, with the sovereign power vested in the federal as opposed to the provincial governments for the

---

111. *Id.* at 31.

112. Wood, *supra* note 24, at 16.

purposes of delineating international boundaries, an important factual question exists as to the impact of distant water fishing upon the Canadian economy as a whole. There are then striking differences between the Canadian and Icelandic economies and the ramifications on them which are a result of distant water fishing.

The third factor, the historic interest of the distant water fishing state in the economy, is a bit clearer though. Spain, in this instance, has certainly demonstrated an historic interest in the Grand Banks' fisheries. And, when Spain's economic interest is considered, it is clearly safe to believe that this third factor of consideration would be met.

However, nothing in the Fisheries Jurisdiction case conclusively resolves the underlying issue in the Canadian-Spanish dispute. The inescapable conclusion of all of this is that international law has simply not evolved a mechanism or scheme of governance for the areas of the high seas adjacent to the exclusive economic zones.

#### V. CONCLUSION — CHANGES TO UNCLOS AND THE LAW OF THE SEA AS A RESULT OF THE FISH STOCK TREATY: A STEP TOWARDS A WORKABLE ADMINISTRATIVE REGIME

The overriding theme of this note has been that neither UNCLOS nor the Fisheries Jurisdiction Case provide an adequate framework on which governance of high seas straddling stock fisheries can be based. While speaking of reciprocal rights and duties, neither UNCLOS nor the Fisheries Jurisdiction Case adequately describe these duties let alone provide effective enforcement regimes. Canada's unilateral act was a natural result of the inadequacies of these regimes. The Canadian government simply took steps to fill a vacuum of authority.

But, regardless of the effectiveness of the Fisheries Protection Act, the fact still remains that one sovereign acted unilaterally to restrict the rights of another sovereign in an area of the world traditionally recognized as having no sovereign. As the International Court of Justice stated in an earlier fisheries case, "[t]he delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law."<sup>113</sup> Recognizing the continued validity of this holding,<sup>114</sup> the world's fishing states have finally addressed this issue through amendment to UNCLOS.

---

113. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 22 (Judgment of July 25) (quoting Fisheries (U.K. v. Nor.) 1951 I.C.J. 116, 132) (holding that in certain instances a state with a heavily indented coast could draw straight coastal baselines).

114. See *Fish Stock Treaty*, *supra* note 4, art. 8(1)-(2).

Concluded in December of 1995, the Fish Stock Treaty makes significant strides in closing the gaps in the law of the sea that were created by UNCLOS. Unlike Canada's Fisheries Act where primary enforcement responsibility remains with the coastal state, primary responsibility for the preservation of straddling stock fisheries in the Fish Stock Treaty is placed on the nation state whose flag is flown by any fishing vessels that may be engaged in illegal fishing.<sup>115</sup> Only when a so-called "flag state" is negligent in its duty of investigating violations may a coastal state take primary responsibility for investigation.<sup>116</sup> However, a coastal state may board a vessel fishing in a protected straddling stock fishery for the purposes of inspection.<sup>117</sup> Reasonable force may also be used by a coastal state in detaining a vessel for inspection.<sup>118</sup> In addition, the regional fishing authority (in this case NAFO) is given increased regulatory and enforcement power under the Treaty.<sup>119</sup> Finally, the Fish Stock Treaty imposes a duty of cooperation and conservation on all states exploiting the straddling stock fishery.<sup>120</sup>

From just these few provisions, the severity of the Canadian-Spanish dispute would probably have been significantly lessened if the Fish Stock Treaty had been in force in early 1995. Rather than relying on a domestic act of Parliament, Canada could have relied on this treaty to board and inspect the *Estai*, and if Spain had proven recalcitrant in investigating the ship's activities, Canada still could have pursued the matter. In sum, this treaty could have prevented this bitter and at times hostile dispute had it been in effect at the time of the incident.

In the end, the Canadian-Spanish fishing dispute of 1995, or the Turbot War, should serve as more than an interesting side note in the annals of either state's foreign relations. Instead, it should serve as an example of how vague and incomplete international agreements can precipitate conflict in

---

115. *Id.* arts. 18-19, 20(6).

116. *See id.* art. 21(8).

117. *Id.* art. 21(1).

118. *Id.* art. 22(1)(f).

119. Mark Christopherson, *Toward a Rational Harvest: The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species*, 5 MINN. J. GLOBAL TRADE 357, 373-74 (1996).

120. *Fish Stock Treaty*, *supra* note 4, art. 8.

sensitive areas. It can also serve as a clarion call for why the Fish Stock Treaty should be ratified by the nations of the world. For without it, fishing nations will be left to their own devices in the conservation of marine resources and the conflicting commands of a partly flawed convention on the law of the sea.

*Patrick Shavloske\**

---

\* J.D. candidate, 1997, Indiana University School of Law - Indianapolis; B.S., *summa cum laude*, 1993, Indiana State University. This note is dedicated to my mother, Rosemary Shavloske, whose love and support made the note possible. I would also like to thank my partner, Joel Miller, for his perseverance and comments throughout the note's composition and editing.