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Fishing for an International Norm to Govern Straddling Stocks: The Canada-Spain Dispute of 1995

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COMMENTS

FISHING FOR AN INTERNATIONAL NORM TO GOVERN STRADDLING STOCKS: THE CANADA-SPAIN DISPUTE OF 1995

I. INTRODUCTION	554
II. DEVELOPMENT OF THE LAW OF THE SEA	556
A. <i>Historical Perspective</i>	556
B. <i>Modern Law of the Sea: The Northwest Atlantic Fisheries Organization & The Third United Nations Convention on the Law of the Sea</i>	558
1. Creation of the Northwest Atlantic Fisheries Organization	558
2. The Third United Nations Convention on the Law of the Sea	559
III. CANADA AS A COASTAL STATE	561
IV. CANADIAN AND SPANISH CONFLICT AND RESOLUTION OF 1995	566
A. <i>Conflict</i>	566
B. <i>Agreement Under the Northwest Atlantic Fisheries Organization</i>	570
V. THE INTERNATIONAL COURT OF JUSTICE	573
A. <i>Jurisdictional Issue</i>	573

B. <i>Legal Considerations</i>	574
1. <i>The Fisheries Jurisdiction Case</i>	574
2. UNCLOS III	575
3. <i>New Test</i>	576
VI. UNITED NATIONS CONVENTION ON STRADDLING STOCKS	580
VII. CONCLUSION	581
VIII. MAP	583

I. INTRODUCTION

Humanity is sustained by the sea. Consequently, a large part of the world's population lives in coastal areas¹ in order to exploit the oceans' resources. As vast and inexhaustible as the those resources may appear, they are in decline, and among the most depleted resources are its fisheries.² In particular, Canada's Grand Banks, one of the world's premiere fishing grounds, has experienced a precipitous decline in resources.

While the United Nations (UN) and regional fishing organizations have attempted to manage and conserve ocean fisheries, they have thus far failed to provide adequate conservation. This failure stems mainly from the antagonism between coastal states, who claim preferential rights to adjacent sea resources, and distant water nations, who fish the adjacent seas.³ Under the freedom of the sea doctrine,⁴ nations may fish adjacent high

1. PETER WEBER, NET LOSS: FISH, JOBS, AND THE MARINE ENVIRONMENT 5-76 (Worldwatch Paper, No. 120, 1994) (stating that half of the world's population lives in coastal zones).

2. Michael Parfit, *Diminishing Returns*, NAT'L GEOGRAPHIC, Nov. 1995, at 2.

3. Adjacent seas are those high seas adjacent to the coastal state's 200 mile exclusive economic zone.

4. "Freedom of the high seas" means that any nation may fish and travel the high seas and that no nation may impede this right. While this right has been diluted in the past century through international regulation, nations may continue to fish and travel the high seas in a reasonable manner. See ALBERT W. KOERS, INTER-

seas despite the fact that fish taken on these seas often diminish the stocks within the coastal state's fishery jurisdiction. In the spring of 1995, this inherent tension between coastal states and distant water nations culminated in a brief conflict between Canada and Spain.⁵

Canada and Spain eventually settled the dispute by focusing upon the technical impediments to efficient conservation.⁶ However, they failed to address the volatile issue of coastal states' preferential rights to adjacent seas stocks and distant water nations' freedom to fish the adjacent seas. During the dispute, Spain filed a complaint with the International Court of Justice (ICJ), which is still pending. Independently of this dispute, the UN convened its Convention on Straddling Stocks and Highly Migratory Stocks⁷ in August of 1995. If ratified, it will provide a global framework for managing straddling stocks, delineating more precisely the rights and obligations between coastal states and distant water nations.⁸ In the interim, however, the ICJ's decision will establish the international norm for governing straddling stocks.⁹

This Comment presents a historical perspective on the competing interests of coastal states and distant water nations and the continued attempts of international law to resolve this conflict. Part III discusses Canada's development as a coastal state and leader in fisheries conservation. Part IV analyzes the Canada-Spain conflict and its subsequent accord. Part V proposes factors the ICJ should consider when resolving the long-standing

NATIONAL REGULATION OF MARINE FISHERIES: A STUDY OF REGIONAL FISHERIES ORGANIZATION 15-17 (1973).

5. See Parfit, *supra* note 2, at 10. Other international confrontations have recently arisen, including a Russian borderguard ship that shot at two Japanese vessels accused of fishing disputed waters off the Kuril Islands and an Argentine gunboat chasing and firing upon a Taiwanese vessel. *Id.*

6. See *infra* part IV.B.

7. U.N. GAOR, United Nations Convention on Straddling Stocks and Highly Migratory Stocks, 6th Sess., U.N. Doc. A/CONF. 164/33 (1995) [hereinafter Straddling Stock Convention].

8. See *infra* part VI.

9. The Third United Nations Convention on the Law of the Sea was opened for signature in 1982. On November 16, 1993, Guyana became the sixtieth nation to ratify this Convention, enabling it to come into force twelve months later in accordance with Article 308. See U.N. Chronicle, vol. 32, No. 1, at 8 (1995). If the history of the Third United Nations Convention on the Law of the Sea is any indication, the Straddling Stock Convention may not be ratified for years, if at all, making the ICJ's ruling all the more imperative.

dispute between coastal states and distant water nations. Part VI previews the UN's Straddling Stock Convention's strategies for the effective management of straddling stocks.

II. DEVELOPMENT OF THE LAW OF THE SEA

A. *Historical Perspective*

The origins of the law of the sea date to the Roman Era when the seas were considered *communis omnium naturali jure* — common to all men by the operation of natural law.¹⁰ In the seventeenth century, Dutch scholar Hugo Grotius advanced the notion of freedom of the high seas to challenge a treaty which divided the Atlantic between Spain and Portugal.¹¹ Grotius argued that while nations could not claim property rights in the high seas, they could claim territorial rights in the seas immediately adjacent to their shores.¹² Grotius carried the day; ocean law has since emphasized freedom of the high seas while relegating coastal states' jurisdiction to a narrow band of territorial sea.¹³

Although the territorial sea has since become an accepted concept, initial international attempts to standardize its breadth failed.¹⁴ The League of Nations Hague Conference in 1930, the

10. See Arvid Pardo, *The Law of the Sea: Its Past and Its Future*, 63 ORE. L. REV. 7 (1984).

11. *Id.* at 8-9. The Treaty of Tordesillas, signed between Spain and Portugal, demarcated the area west of the Cape Verde islands, granting Portugal the lands to the east and Spain the lands to the west. The treaty language strongly implied that each country owned the seas within its respective area. *Id.*

12. R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 59 (1988). The concept that a coastal state's rights extended to waters that could be protected from its shore was known as the "cannonshot doctrine." *Id.* at 65.

13. *Id.* at 66.

Territorial Waters [seas] refers to all inland waters, all waters between line of mean high tide and line of ordinary low water, and all waters seaward to a line three geographical miles distant from the coast line That part of the sea adjacent to the coast of a given country which is by international law deemed to be within the sovereignty of that country, so that its courts have jurisdiction over offenses committed on those waters

BLACK'S LAW DICTIONARY 1473 (6th ed. 1990).

14. CHURCHILL & LOWE, *supra* note 12, at 66 (explaining that several states sought territorial seas of three and six miles, while Scandinavian states sought their traditional four miles. Some states also sought the inclusion of a contiguous zone adjacent to their territorial zone to enable them to exercise limited authority beyond

First United Nations Convention on the Law of the Sea in 1958 (UNCLOS I), and the Second United Nations Conference on the Law of the Sea in 1960 (UNCLOS II), are all examples of failure to standardize the territorial sea's width.¹⁵ In 1982, however, the Third United Nations Conference of the Law of the Sea (UNCLOS III)¹⁶ codified limitations on the territorial sea.¹⁷

Despite the failure of early international conventions to reach agreement concerning the territorial sea's breadth, they succeeded in other ways. At UNCLOS I, agreements on the Territorial Sea and Contiguous Zone,¹⁸ the High Seas,¹⁹ High Seas Fishing and Conservation of Living Resources,²⁰ and the Continental Shelf²¹ adopted customary international ocean law to govern the exploitation of ocean resources.²² Furthermore, the Convention on High Seas Fishing and Conservation of Living Resources recognized that the freedom of high seas fishing could not be regulated or prohibited.²³

Regional fishery organizations also developed to improve the management and conservation of ocean resources.²⁴ In 1949, fishing nations founded the International Commission for Northwest Atlantic Fisheries (ICNAF or Commission) to apply scientific advancements to the conservation of fish stocks.²⁵ The

their territorial sea).

15. *Id.* For an explanation of failures at UNCLOS II, see Arthur H. Dean, *The Second Geneva Conference*, 54 AM. J. INT'L L. 751 (1960).

16. See United Nations Conference on the Law of the Sea, *opened for signature* Dec. 10, 1982, U. N. Doc. A/Conf. 62/122 [hereinafter UNCLOS III]. UNCLOS III, Article 3 grants a twelve mile territorial sea. The more important issue addressed by UNCLOS III was the development of the exclusive economic zone, addressed in UNCLOS III, part V.

17. *Id.* art. 3; see CHURCHILL & LOWE, *supra* note 12, app. at 343. The width of the territorial sea began to lose importance when most nations recognized a twelve mile limit and the UNCLOS III adopted a 200 mile exclusive economic zone. See also *id.* art. 57.

18. Convention on the Territorial Seas and Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606.

19. Convention on the High Seas, *opened for signature* Apr. 29, 1958, 13 U.S.T. 2312.

20. Convention on Fishing and Conservation of Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138.

21. Convention of the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 138.

22. Jon L. Jacobson, *International Fisheries Law in the Year 2010*, 45 LA. L. REV. 1161, 1169 (1985).

23. See Convention on the High Seas, *supra* note 19, at art. 2(2).

24. See KOERS, *supra* note 4, at 77-118 (listing the international fisheries organizations).

25. International Convention for the Northwest Atlantic Fisheries, 1 U.S.T. 478

Commission, however, failed to resolve two of the most pressing issues of high seas fisheries, territorial seas and coastal state jurisdiction over fisheries.²⁶ Although the Commission provided a loose mechanism of management and enforcement, it ineffectively regulated high seas fishing.²⁷

B. Modern Law of the Sea: The Northwest Atlantic Fisheries Organization & The Third United Nations Convention on the Law of the Sea

1. Creation of the Northwest Atlantic Fisheries Organization

During the 1970s, coastal states began to expand their maritime jurisdiction in an attempt to protect diminishing fishery resources.²⁸ The formation of exclusive economic zones (EEZ)²⁹ altered the dynamics of regional fisheries organizations.³⁰ As a

(1949). Article VI details the Commission's responsibility for obtaining and collating information necessary to maintain fish stocks in the Convention area and permits the Commission to investigate, collect, analyze, study, hold hearings, conduct fishing operations, publish and disseminate reports of findings. Article VIII grants the Commission the authority to propose conservation measures over the Convention area by establishing open and closed seasons, closing portions of the sub-areas, establishing size limits, prohibiting fishing gear, and prescribing an overall catch limit for any species of fish.

26. *Id.* art. 1, ¶ 2 states that "[n]othing in this Convention shall be deemed to affect adversely (prejudice) the claims of any Contracting Government in regard to the limits of territorial waters or to the jurisdiction of a coastal state over fisheries."

27. See KOERS, *supra* note 4, at 94.

28. See CHURCHILL & LOWE, *supra* note 12, app. at 343 (listing nations that claimed exclusive economic zones during the 1970s).

29. The origin of the EEZ is found in President Truman's proclamation of 1945. See Proclamation No. 2668, 3 C.F.R. 1943-48 (1945).

[T]he 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. Where such activities have been or shall hereafter be developed by its nationals alone, the United States regards it as proper to establish explicitly bounded conservation zones in which fishing activities shall be subject to the regulation and control of the United States.

Id.

For the rationale behind the Truman Proclamation, see ANN L. HOOLICK, *U.S. FOREIGN POLICY AND THE LAW OF THE SEA* 45 (1981).

As a result of Truman's proclamation, Chile and Peru also claimed 200 mile sovereign maritime zones off their coasts by presidential decree. For Chile, see Declaration of President Gabriel Gonzales Videla, June 23, 1947. For Peru, see Supreme Decree No. 781, Aug. 1, 1947 of President Jose Luis Bustamante y Rivero.

30. The EEZ impacted regional fisheries organizations in two distinct ways.

result, members of ICNAF denounced their convention after Canada claimed its EEZ.³¹ On January 1, 1979, fifteen nations signed the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries³² to manage high seas fisheries beyond Canada's EEZ.³³ The Northwest Atlantic Fisheries Organization (NAFO) intended to promote "the conservation and optimum utilization of the fishery resources of the Northwest Atlantic . . . and to encourage international cooperation and consultation with respect to these resources."³⁴

In promoting optimum utilization of fishery resources, NAFO considers the effect on stocks fished, the coastal state's interest, and the interests of nations that have traditionally fished the area.³⁵ NAFO exists in a tenuous position because it must balance both the competing interests of coastal states and of distant water nations. In order to encourage compliance, NAFO must strike a balance between too stringent regulations, which would impede membership, and too relaxed regulations, which would undermine conservation.

2. The Third United Nations Convention on the Law of the Sea

During the 1970s and early 1980s, the Third United Nations Conference on the Law of the Sea (UNCLOS III) convened to create an international norm for ocean law. UNCLOS III changed existing customs of the sea by recognizing the coastal

First, regional organizations needed to regulate less area since coastal state jurisdiction extended 200 miles into the sea. Second, UNCLOS III, Article 63 mandates that regional organizations govern straddling stocks, providing these organizations with unprecedented authority.

31. See J.E. Carroz, *Institutional Aspects of Fishery Management Under the New Regime of the Oceans*, 21 SAN DIEGO L. REV. 513, 519 (1984) (discussing the establishment of regional fishery commissions).

32. 1979 Can. T.S. No. 11 [hereinafter NAFO Convention]. Signatories included Bulgaria, Canada, Cuba, Denmark, the European Union, Germany, Iceland, Japan, Norway, Poland, Portugal, Romania, Spain, the Soviet Union, and the United States. Of this group only Canada, Denmark, the European Union (individual members: France, Italy, Britain, Portugal, and Spain) Iceland, Norway, and the United States were former Commission members.

33. Commission nations joined NAFO under the premise that regulatory management was necessary to conserve fishery resources. Additionally, UNCLOS III, Article 63 requires regional organizations to regulate straddling stocks, providing nations that are members of regional organizations more control of the regulatory area's fisheries than non-member nations.

34. See NAFO Convention, *supra* note 32, pmbl. at 2.

35. See *id.* arts. 6, 7, and 11.

state's claim to a 200 mile EEZ,³⁶ proposing regional fisheries organizations to manage resources,³⁷ and creating a dispute settlement mechanism to strengthen enforcement.³⁸

UNCLOS III grants a coastal state the right to exploit, conserve, and manage the living and non-living resources of the ocean and seabed³⁹ within that state's 200 mile EEZ.⁴⁰ Coastal states under UNCLOS III do not, however, have plenary authority over their EEZ's resources. To prevent over-exploitation, UNCLOS III encourages coastal states to cooperate with international organizations in managing and conserving the EEZ's resources.⁴¹ In addition, coastal states must give "due regard to the rights and duties of the other states."⁴² Coastal states are therefore obligated to promote the EEZ's optimum utilization⁴³ by giving other states access to any surplus resources.⁴⁴ In addition, distant water nations are obliged to obey coastal state laws when fishing within an EEZ.⁴⁵

UNCLOS III also encourages the conservation and management of the high seas' living resources through regional fisheries organizations.⁴⁶ Specifically, UNCLOS III urges management of stocks that straddle the EEZ and high seas by the regional organizations.⁴⁷ By appointing regional organizations to manage

36. UNCLOS III, *supra* note 16, pt. V (covering the duties and obligations of coastal states and of distant water nations with regard to exploitation of the EEZ's resources).

37. *Id.* arts. 63, 118.

38. *Id.* pt. XV (detailing procedures for the settlement of disputes).

39. *Id.* art. 56, ¶ 1.

40. *Id.* art. 57.

41. *Id.* art. 61, ¶ 2 provides in part, "As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall co-operate to this end."

42. *Id.* art. 56, ¶ 2.

43. *Id.* art. 62, ¶ 2.

44. *Id.* This provision provides that "[t]he coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall . . . give other States access to the *surplus of the allowable catch* . . ." *Id.* (emphasis added). While UNCLOS III does not explicitly define "surplus," Article 63 indicates that a surplus is considered the difference between the coastal state's total allowable catch and the amount it actually catches.

45. *Id.* art. 58. *See also* art. 62 (explaining the policies which should guide the coastal state's exploitation of the living resources within its EEZ).

46. *Id.* art. 118.

47. *See id.* art. 63 (applicable to stocks occurring within the EEZs of two or more coastal states or within both the EEZ and an area beyond and adjacent to it).

ocean resources, UNCLOS III shifts authority away from coastal states to a more neutral policy maker. As members of the regional organizations, coastal states and distant water nations can work together in conserving the resources utilized by each.

Disputes arising under UNCLOS III⁴⁸ between states who have ratified or acceded to the convention⁴⁹ are to be adjudicated by an agreed-upon tribunal.⁵⁰ While UNCLOS III provides a basic mechanism for resolving disputes, the participants must first elect to utilize this option and abide by the tribunal's judgment.⁵¹ This resolution mechanism departs significantly from previous international conventions.⁵²

III. CANADA AS A COASTAL STATE

Despite its rich fishery resources, Canada did not establish a territorial sea until 1964⁵³ when it claimed a three mile sea and an additional nine mile fishing zone.⁵⁴ Dissatisfied with the protection this zone afforded its coastal resources, Canada extended its territorial sea to twelve miles and advanced its fishing zone farther into the Atlantic.⁵⁵ By 1975, Canada, like

48. *Id.* art. 286.

[A]ny dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1 (which details the general provisions of settlements of disputes), be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.

Id.

49. *Id.* art. 287, ¶ 1.

50. *Id.* The Article provides:

the following [are] means for the settlement of disputes concerning the interpretation or application of UNCLOS III:

- a) the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- b) the International Court of Justice;
- c) an arbitral tribunal constituted in accordance with Annex VII;
- d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

Id.

51. See Roberto Ago, "Binding" Advisory Opinions of the International Court of Justice, 85 AM. J. INT'L L. 439 (1991) (criticizing the ICJ's advisory opinions).

52. See generally UNCLOS I, *supra* notes 17-20.

53. S.C. 1964, c. 22, pt. 1, ¶ 3, § 1. For a general history of Canada's development as a coastal State and its role in the Law of the Sea, see WILMA BROEREN, CANADA'S ROLE IN THE LAW OF THE SEA 1927 TO 1975 (1977).

54. S.C. 1964, c. 22, pt. 1, ¶ 4, §§ 1, 2.

55. S.C. 1970, c. 68, § 3, subsec. 1. See also Parzival Copes, *Canadian Fisheries*

many nations, felt an increasing necessity to protect coastal resources threatened by fishing fleets from distant water nations.⁵⁶ Canada responded in 1977 by again extending its maritime jurisdiction, claiming a 200 mile EEZ.

Canada's fisheries management also changed as a result of its new EEZ. In accord with international obligations,⁵⁷ Canada granted distant water nations' fleets quotas of under-utilized fish stocks within its EEZ.⁵⁸ In exchange, Canada expected "commensurate benefits," such as distant water nations use of Canadian processing plants and ports.⁵⁹ Canada also embarked upon an expansionist national fishing policy.⁶⁰ Licensing of Atlantic fishermen increased forty-five percent between 1974 and 1981⁶¹ and processing facilities expanded by thirty-five percent between 1977 and 1981.⁶² Furthermore, annual groundfish harvest within the EEZ leapt from 470,000 tons in 1976 to 779,000 tons in 1981.⁶³ Canada's expansive fisheries policy depended upon maximum production to sustain its growth and combat market downturns.⁶⁴ Such a policy could not exist indefinitely.

Management Policies, in CANADIAN OCEANS POLICY 3, 4 (Donald McRae & Gordon Munro eds., 1989).

56. See Copes, *supra* note 55, at 4. See also MICHAEL J. KIRBY, TASK FORCE ON ATLANTIC FISHERIES, NAVIGATING TROUBLED WATERS: A NEW POLICY FOR THE ATLANTIC FISHERIES 16-18 (1982) [hereinafter KIRBY REPORT].

57. See UNCLOS III, *supra* note 16, art. 62.

58. See Copes, *supra* note 55, at 8.

59. *Id.* The benefits Canada sought included access to Canadian fish products in foreign markets; processing in Canadian shore plants of all or part of the catch taken by foreign vessels; over-the-side sales of fish caught by fishermen to foreign factory vessels; fishing on contract by Canadian boats for delivery to foreign factory vessels; increased use of Canadian ports, ship repair facilities and chandlery services by foreign vessels; continuing abstention from high seas fishing for Canadian salmon; recognition of Canadian leadership in NAFO, relating to Canada's special interest in stocks adjacent to Canada's 200-mile EEZ; and acquisition of new technology by Canadian fishing companies through "development charters" engaging foreign vessels. *Id.* at 8.

See J.W.C. Tomilson & P.C. Brown, *Joint Ventures With Foreigners as a Method of Exploiting Canadian Fishery Resources Under Extended Fisheries Jurisdiction*, 5 OCEAN MGMT. 251 (1979).

60. See KIRBY REPORT, *supra* note 56, 19-21.

61. *Id.* at 31 (stating that the number of licensed, though not necessarily active, fishermen in the Atlantic as a whole increased from about 36,500 to 53,500 between 1974 and 1981).

62. *Id.* (stating that processing facilities increased from 519 to 700 between 1977 and 1981).

63. *Id.* at 23.

64. *Id.* at 32. See also Copes, *supra* note 55, at 7 (explaining the two main reasons for Canada's expansion of its fishing operations to maximum capacity. First,

The Canadian government commissioned a task force to identify developing problems in its rapidly expanding Atlantic fishing industry and to create a viable plan to manage its Atlantic fisheries.⁶⁵ The task force issued a report identifying several issues presenting particular difficulties in the effective management of Canadian Atlantic fisheries.⁶⁶ According to the task force, the most fundamental problem of fisheries management stemmed from the "common property"⁶⁷ nature of fish stocks,⁶⁸ which leads coastal communities to view fishing as a right, not a privilege. As a result, fishermen compete for a maximum share of the resource before quotas are fulfilled.⁶⁹ Such intense exploitation, however, ultimately leads to diminished resources and lower incomes for fishermen.⁷⁰ To combat these problems, the task force specified three major objectives⁷¹ and several minor recommendations to remove the impediments to effective management and conservation.⁷²

the Canadian government recognized a dire need for additional employment opportunities in the depressed coastal communities of Atlantic Canada. Second, the government wanted to demonstrate solidarity with the fishing industry in its anger and frustration over past depredations by foreign fishing fleets, and to reserve Canadian fish stocks for Canadian fishermen to the fullest extent possible).

65. See generally KIRBY REPORT, *supra* note 56.

66. See *id.* at 197-344 (noting the impediments included international issues, the harvesting sector, resource-short plants, utilization of northern cod stock, the northern fisheries, quality, the port market, improving fish plant profitability, marketing, fishermen's incomes, financial assistance, the herring seine fleet, and dealing with differing views).

67. *Id.* at 211-13. "Common property" means that the resource is common to all and therefore cannot be owned by anyone. *Id.*

68. *Id.* at 211.

69. *Id.*

70. *Id.*

71. *Id.* at 185-194. Major objectives include the following: 1) the Atlantic fishing industry should be economically viable on an ongoing basis, where being viable implies an ability to survive downturns with only a normal business failure rate and without government assistance; 2) employment in the Atlantic fishing industry should be maximized subject to the constraint that those employed receive a reasonable income as a result of fishery-related activities, including fishery-related income transfer payments; 3) fish within the 200 mile Canadian EEZ should be harvested and processed by Canadians in firms owned by Canadians wherever this is consistent with objectives 1 and 2 and with Canada's international treaty obligations.

72. *Id.* at 197-344 (including issues and recommendations on international issues, the harvesting sector, resource-short plants, utilization of northern cod stock, the northern fisheries, quality, the port market, improving fish plant profitability, marketing, fisherman's incomes, financial assistance, the herring seine fleet, dealing with differing views, and consultation and decision-making processes).

Despite these recommendations, Canada's Atlantic fisheries took a turn for the worse in recent years. In early 1992, Canada cut its annual northern cod quota within its EEZ from a mid-1980s level of 265,000 tons to only 120,000 tons in an attempt to save dwindling stocks.⁷³ Shortly thereafter, the Canadian Department of Fisheries and Oceans imposed a two year moratorium on northern cod fishing.⁷⁴ Canada also urged NAFO to ban northern cod fishing for 1994⁷⁵ in the NAFO Regulatory Area (NRA).⁷⁶ In an attempt to further improve conservation, Canada amended its Coastal Fisheries Protection Act, enabling Canada to inspect⁷⁷ and seize⁷⁸ vessels fishing within the NRA.⁷⁹

73. Julian Beltrame, *Polite, Diplomatic meeting brings no resolution to Cod Fishing*, MONTREAL GAZ., Apr. 24, 1992, at B1.

74. *Canada Bans Northern Cod Fishing for Two Years*, UPI, July 2, 1992, International Section. At printing the moratorium is still effective.

75. NORTH ATL. FISHERIES ORG. NEWS, No. 1, at 3 (1994). NAFO has also banned fishing of the following species in parts of the Convention area: American plaice, yellowtail flounder, witch flounder, and capelin. *Id.*

76. See NAFO Convention, *supra* note 32, art. 1, ¶ 2. "[T]he area referred to in this Convention as 'the Regulatory Area' is that part of the Convention Area which lies beyond the areas in which coastal States exercised fisheries jurisdiction." *Id.*

Article 1, ¶ 1 provides:

The area to which this Convention applies, hereinafter referred to as "the Convention Area", shall be the waters of the Northwest Atlantic Ocean north of 35° north latitude and west of a line extending due north from 35° north latitude and 42° west longitude to 59° latitude, thence due west to 44° west longitude, and thence due north to the coast of Greenland, and the waters of the Gulf of St. Lawrence, Davis Strait and Baffin Bay south of 78° north latitude.

Id.

See *infra* part VIII.

77. Bill C-29, An Act to amend the Coastal Fisheries Protection Act, as passed by the House of Commons May 11, 1994, 128 C. Gaz. No. 12, pt. 12 2222-227 (June 15, 1994), reprinted in 33 I.L.M. 1383 (1994). Section 7 provides:

A protection officer may a) 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; and b) with a warrant issued under section 7.1, search any fishing vessel found within Canadian fisheries waters or the NAFO regulatory Area and its cargo.

Id.

78. The seizure section was part of the original Fisheries Protection Act but was limited to Canada's EEZ. See Ch. C-33, § 9, providing,

Where a protection officer suspects on reasonable grounds that an offence under this Act has been committed, the officer may seize:

a) any fishing vessel by means of or in relation to which the officer believes on reasonable grounds the offence was committed;
b) any goods aboard a fishing vessel described in paragraph (a), including fish, tackle, rigging, apparel, furniture, stores and cargo; or

Based upon Canada's special interest as a coastal state, the amendment subjected the "nose" and "tail"⁸⁰ of the Grand Banks to Canadian jurisdiction and banned certain nations from fishing the NRA.⁸¹ Canada also filed a reservation with the ICJ, asserting that Canada's domestic law applied to the high seas Grand Banks and denying the ICJ jurisdiction over matters arising under the Coastal Fisheries Protection Act.⁸²

c) any fishing vessel described in paragraph (a) and any of the goods described in paragraph (b).

Id.

The amendment of May 11, 1994, *infra* note 79, extended the Fisheries Protection Act to the high seas portions of the Grand Banks.

79. Bill C-29, An Act to amend the Coastal Fisheries Protection Act, as passed by the House of Commons May 11, 1994, § 5.1, which provides:

Parliament, recognizing

- a) that straddling stocks on the Grand Banks of Newfoundland are a major renewable world food source having provided a livelihood for centuries to fishers,
- b) that those stocks are threatened with extinction,
- c) that there is an urgent need for all fishing vessels to comply in both Canadian fisheries waters and the NAFO Regulatory Area with sound conservation and management measures for those stocks, notably those measures that are taken under the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, done at Ottawa on October 24, 1978, Canada Treaty Series 1979 No. 11, and
- d) that some foreign fishing vessels continue to fish for those stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of sound and management measures.

Id.

See also id. § 5.2 provides: "No person, being aboard a foreign fishing vessel of a prescribed class, shall, in the NAFO Regulatory Area, fish or prepare to fish for a straddling stock in contravention of any of the prescribed conservation and management measures." *Id.*

80. *See infra* part VIII for location of the Grand Banks' "nose" and "tail."

81. Coastal Fisheries Protection Regulations, § 21(2) provides:

For the purposes of section 5.2 of the Act:

(b) the following classes of foreign fishing vessels are prescribed classes, namely:

- (i) foreign fishing vessels without nationality,
- (ii) foreign fishing vessels that fly the flag of any state set out in Table III to this section, and

(c) in respect of a foreign fishing vessel of a class prescribed by subparagraph (b)(i) or (ii), prohibitions against fishing for the straddling stocks set out in Table I or II to this section, preparing to fish for those straddling stocks and catching and retaining those straddling stocks are prescribed conservation and management measures; and Table I includes straddling stocks located in division 3-L, 3-N or 3-O Table II includes straddling stocks located in division 3-M, solely Greenland Halibut Table III includes: Belize, Cayman Islands, Honduras, Panama, Saint-Vincent and the Grenadines, Sierra Leone.

Id.

82. 93-94 I.C.J. Pleadings, vol. 10, p. 88 (1994) [hereinafter Canada's Reserva-

IV. CANADIAN AND SPANISH CONFLICT AND RESOLUTION OF 1995

A. Conflict

As Canada intensified conservation measures within its EEZ, it also advocated improved management efforts in the NRA.⁸³ On Canada's urging, NAFO's Fisheries Commission decreased the NRA's Greenland halibut quota from 60,000 to 27,000 tons for 1995.⁸⁴ Because NAFO considers both a member's historical dependance on fishing the NRA⁸⁵ and its most recent quota level in setting a quota allocation, the European Union (EU) expected to obtain a substantial percentage of NAFO's Greenland halibut allocation.⁸⁶ Previously, the EU had received seventy-five percent of NAFO's Greenland halibut quota.⁸⁷ The Fisheries Commission, however, awarded the EU only about twelve percent or 3,400 tons of the total allowable catch, while providing Canada with nearly sixty percent, or 16,300 tons.⁸⁸

Dismayed by the quota allocation, the EU invoked a procedural objection which suspended the allocation formula but maintained the ceiling of 27,000 tons.⁸⁹ Shortly after the EU's

tion].

83. NORTH ATL. FISHERIES ORG., 1991 ANNUAL REPORT, STATEMENT BY CANADIAN REPRESENTATIVE ON EFFECTIVE INTERNATIONAL CONTROL 89, annex 3.

84. NORTH ATL. FISHERIES ORG. NEWS, No. 2, at 2 (1995).

85. NAFO Convention, *supra* note 32, art. XI, ¶ 4 states:

Proposals adopted by the Commission for the allocation of catches in the Regulatory Area shall take into account the interests of Commission members whose vessels have traditionally fished within that Area, and in the allocation of catches on the Grand Banks and Flemish Cap, Commission members shall give special consideration to the Contracting Party whose coastal communities are primarily dependent on fishing for stocks related to these fishing banks

Id.

86. *Defiant Bonino Vows to Block NAFO Turbot (Greenland halibut) Decision*, EUR. REP., Feb. 22, 1995, § 2018.

87. *Id.*

88. NORTH ATL. FISHERIES ORG. NEWS, No. 2, at 2 (1995) (explaining that member nations on the NAFO Fisheries Commission voted to distribute the 27,000 ton Greenland halibut quota as follows: Canada 16,300, European Union 3,400, Russia 3,200, Japan 2,600 and the remaining member nations 1,500 tons).

89. See NAFO Convention, *supra* note 32, art. XII, ¶¶ 1, 3, providing that, If any Commission member presents to the Executive Secretary an objection to a proposal within sixty days of the date of transmittal specified

objection, Canada declared a sixty day moratorium on Greenland halibut for EU vessels in the NRA, specifically on the high seas portion of the Grand Banks.⁹⁰ When the EU disobeyed Canada's NRA moratorium, Canada added Spain and Portugal⁹¹ to the list of nations it had banned from fishing the high seas Grand Banks.⁹² Several days later, Canada chased and

in the notification of the proposal by the Executive Secretary, the proposal shall not become a binding measure until the expiration of forty days following the date of transmittal specified in the notification of that objection to the Contracting Parties. Thereupon any other Commission member may similarly object prior to the expiration of the additional forty-day period, or within thirty days after the date of transmittal specified in the notification of the Contracting parties of any objection presented within that additional forty-day period, whichever shall be the later. The proposal shall then become a measure binding on all Contracting Parties, except those which have presented objections, at the end of the extended period or periods for objecting. If, however, at the end of such extended period or periods, objections have been presented and maintained by a majority of Commission members, the proposal shall not become a binding measure, unless any or all of the Commission members nevertheless agree as among themselves to be bound by it on an agreed date.

Id.

90. Robert Kozak, *Canada Seizes Spanish Fishing Ship on High Sea*, REUTERS, Mar. 10, 1995.

91. Canada has viewed Spain and Portugal as major offenders of international fishing agreements. See Robert Applebaum, *Straddling Stocks — International Law and the Northwest Atlantic Problem*, in CANADIAN BULLETIN OF FISHERIES AND AQUATIC SCIENCES, PERSPECTIVES ON CANADIAN MARINE FISHERIES MANAGEMENT 193-210, 194, 196 (L.S. Parsons & W.H. Lear eds., 1993) (arguing that while Spain had traditionally fished the Northwest Atlantic, it did not join NAFO upon its formation. Instead, Spain heavily fished the area outside the NAFO conservation framework, targeting cod, and fishing at a level higher than that set aside for Spain by NAFO. In addition, once Spain joined NAFO, it began to fish stocks above levels set by NAFO. When Spain and Portugal joined the European Community (EC), the EC adopted a noticeably more conservative position at NAFO meetings, which Canada blamed on Spain and Portugal's membership). *Id.*

92. CANADA GAZ., pt. II, vol. 129, No. 6, at 653 provides:

The primary threat to the recovery of the Greenland halibut stocks is, accordingly, posed by vessels of Spain and Portugal which will, unless stopped fish significantly over the EU quota of 3,400t. As an additional and significant problem, Spanish and Portuguese vessels have, starting in 1994, significantly increased the rate at which they are violating NAFO regulations, in particular regarding the recording of catch and minimum mesh sizes. Continuation of these violations will lead to under-reporting of catches of Greenland halibut and high catches of juveniles, further exacerbating the over fishing of the stock, and will cause the same problem for other stocks.

These amendments to the Coastal Fisheries Protection Regulations:

(a) add vessels of Spain and Portugal as a class of foreign fishing vessel

fired upon a Spanish vessel fishing the NRA,⁹³ eventually towing it back to a Canadian port where investigation revealed that the vessel held catches of immature Greenland halibut, used illegal fishing nets, and contained twenty-five tons of American plaice⁹⁴ — also under a NAFO moratorium.⁹⁵ Canada based its actions upon the 1994 amendment to its Coastal Fisheries Protection Act.⁹⁶

Canada asserted that, as a coastal state, it possessed a special interest in preserving fish stocks straddling its EEZ. Because the “nose” and “tail” of the Grand Banks extend beyond Canada’s EEZ, the quantity of fish taken on the “nose” and “tail” diminishes the quantity of fish within Canada’s EEZ.⁹⁷ As a result, fish stocks allocated to Canada as a coastal state may be plundered by distant water nations fishing the high seas. Canada cited limitations on high seas fishing under UNCLOS III.⁹⁸ UNCLOS III, Article 116 addresses straddling stocks, providing that “[a]ll 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 the Coastal States* provided in Article 63.”⁹⁹ Freedom of the seas, Canada argued, does not afford distant water nations a *carte blanche* to

that is subject to the prohibition section 5.2 of the Coastal Fisheries Protection Act on fishing for listed straddling stocks in the NAFO Regulatory Area (outside Canada’s 200 mile zone) contrary to listed conservation measures

Id.

93. *Id.*

94. *Canada Cites New Evidence of Illegal Fishing*, REUTERS, Mar. 15 (1995).

95. NORTH ATL. FISHERIES ORG. NEWS, No. 1, at 4 (1994) (identifying the five major stocks under a fishing moratorium in portions of the NRA. These include cod, American plaice, yellowtail flounder, witch flounder, and capelin).

96. See Kozak, *supra* note 90; see also Bill C-29, Act to amend the Coastal Fisheries Protection Act, *supra* note 79.

97. Donald M. McRae, *Approaches to the Resolution of Atlantic and Pacific Ocean Problems*, 16 ECOLOGY L.Q. 227, 241 (1989); see William T. Burke, *Fishing in the Bering Sea Donut: Straddling Stocks and the New International Law of Fisheries*, 16 ECOLOGY L.Q. 285 (1989) (explaining the conflict between coastal state and distant water nations regarding high seas fishing).

98. See UNCLOS III, *supra* note 16, art. 87, ¶ 2, providing that, “[t]hese freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.”

99. See *id.* art. 116 (emphasis added). Article 117 provides “[a]ll States have the duty to take, or to co-operate 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.”

fish straddling stocks.

Spain adamantly contested Canada's unilateral extension of its jurisdiction to the high seas.¹⁰⁰ Spain argued that such an extension violated UNCLOS III Article 89 which provides that "no State may validly purport to subject any part of the high seas to its sovereignty."¹⁰¹ In addition, Spain claimed that Canada's ban on fishing Greenland halibut on the high seas violated customary international law which permits all states equal rights of access to high seas fishery resources.¹⁰² Spain also argued that Canada's high seas seizure violated Spain's right as a flag state to exercise exclusive jurisdiction over its high seas vessels.¹⁰³ While admitting that international law sometimes permits seizure of foreign vessels on the high seas, Spain argued that this instance did not satisfy those exceptions.¹⁰⁴ Canada should have sought and received Spain's con-

100. *Commission Calls on Canada to Negotiate in Good Faith*, RAPID, Mar. 30, 1995.

101. *Id.* See also UNCLOS III, *supra* note 16. UNCLOS III, Article 87 provides: the high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States: . . . e) freedom of fishing, subject to the conditions laid down in section 2 . . .

Id.

Section 2, Article 119 pertinently provides "States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State." *Id.* Conservation and Management of the Living Resources of the High Seas, UNCLOS III, sec. 2, art. 119, ¶ 3.

102. *Commission Calls on Canada to Negotiate in Good Faith*, *supra* note 100; see UNCLOS III, *supra* note 16, arts. 87, 116.

103. UNCLOS III, *supra* note 16, art. 92, ¶ 1 provides in part, "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subjected to its exclusive jurisdiction on the high seas."

104. *Id.* art. 110. This Article grants the right to visit a high sea vessel:

Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 (Immunity of warships on the high seas) and 96 (Immunity of ships used only on government non-commercial service), 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 engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109 (Unauthorized broadcasting from the high seas);
- (d) the ship is without nationality; or
- (e) though flying a foreign flag or refusing to show its flag, the

sent before boarding its vessel. Spain also argued that Canada failed to abide by its obligation to cooperate with regard to straddling stocks.¹⁰⁵

Although Canada released the Spanish fishing vessel shortly after the seizure,¹⁰⁶ Spain, contesting Canada's extension of its coastal state jurisdiction into the high seas, filed a complaint with the ICJ,¹⁰⁷ currently pending before the ICJ.¹⁰⁸

B. Agreement Under the Northwest Atlantic Fisheries Organization

Canada and the EU resolved their dispute on April 16, 1995.¹⁰⁹ While the agreement does not address Canada's extension of its coastal state jurisdiction into the Grand Banks high seas, it reaffirms the parties' "commitment to enhanced co-operation in the conservation and rational management of fish stocks"¹¹⁰ and requires Canada to repeal its March 3, 1995 act prohibiting Spain and Portugal from fishing the Grand Banks.¹¹¹ The agreement upholds the 27,000 ton Greenland halibut allocation and ensures a ratio of ten to three in favor of

ship is, in reality, of the same nationality as the warship.

Id.

105. See *id.* art. 63, ¶ 2.

106. *Canada Cites New Evidence of Illegal Fishing*, REUTERS, Mar. 15, (1995).

107. *Spain brings a case against Canada* (Spain v. Can.) 1995 I.C.J. Pleadings No. 95/8 (Mar. 29, 1995) [hereinafter *Spanish Complaint*].

108. See *infra* part V.

109. Northwest Atlantic Fisheries Organization Agreement (Can.- EU) Apr. 16, 1995, A(1) [hereinafter *NAFO Agreement*].

110. *Id.*

111. *Id.* at C(1). See CANADA GAZ., pt. II, vol. 129, No. 10 (description). The description provides:

By this amendment to the Coastal Fisheries Protection Regulations, the vessels of Spain and Portugal will no longer be included in any of the classes of foreign fishing vessels to which specific protection and conservation measures apply with respect to fishing for straddling stocks in the Northwest Atlantic Fisheries Organization (NAFO) Regulatory Area outside Canada's 200-mile zone.

On April 20, 1995, Canada and the European Union (EU) resolved their dispute regarding effective control of Spanish and Portuguese vessels fishing for Greenland halibut and other listed straddling stocks in the NAFO Regulatory Area. Canada can now remove the fishing vessels of Spain and Portugal from the class of foreign vessels in which they were listed.

Id.

the EU and Canada for future Greenland halibut quotas.¹¹² It also focuses primarily upon improved control and enforcement of NAFO fisheries through inspections, elaborating major infringements and vessel observers for the NRA.¹¹³ At NAFO's annual meeting in September 1995, members adopted the Canada and EU Agreement as a NAFO regulation, effective January 1, 1996.¹¹⁴

The agreement targets standard inspection procedures and increases the presence of inspectors in an attempt to improve compliance with NAFO regulations.¹¹⁵ Under the agreement, when inspectors suspect illegal activity, they must not unduly hinder fishing vessels¹¹⁶ but should instead swiftly contact the flag state and NAFO's Executive Secretary.¹¹⁷ In addition, members' vessels fishing stocks under NAFO regulations¹¹⁸ must undergo dockside inspection at each port of call¹¹⁹ and must report catches of Greenland halibut to NAFO within forty-eight hours.¹²⁰

The agreement delineates major infractions, such as the refusal to cooperate with inspectors, misreporting catches, mesh-size violations, hail system violations, and interference with the satellite tracking system.¹²¹ The agreement also creates procedures for citing violators. If NAFO inspectors cite a vessel for commission of a major infringement, the flag state shall inspect the vessel within forty-eight hours.¹²² NAFO inspectors must

112. *Id.* annex II.

113. *See generally* NAFO Agreement, *supra* note 109, annex 1, § II(1) Inspections, II(9) Major Infringements, II(11) Pilot Project for Observers and Satellite Tracking.

114. NAFO Press Release, 17th Annual Meeting of NAFO, at 11-15, Sept. 1995.

115. *See* NAFO Agreement, *supra* note 109, annex I, § II(1)-(4) for standards of inspection procedure.

116. *Id.* annex I, § II(1). *See also id.* annex 1, § II(3) (detailing the method outlined for increased inspection presence).

117. *Id.* annex I, § II(2).

118. NORTH ATL. FISHERIES ORG. INFORMATION BOOKLET (1993), at 14 (identifying the ten major species of the NAFO Convention Area as: cod, herring, redfish, capelin, silver hake, mackerel, pollock, American plaice, greenland halibut, haddock). *Id.* (published with permission). *See* NAFO Agreement, *supra* note 109, art. 1, § 4, excluding certain species from NAFO regulations.

119. *Id.* annex I, § II(7).

120. *Id.* annex I, § II(8).

121. *Id.* annex I, § II(9)(a)-(e).

122. *Id.* annex I, § II(9)(i).

report the infringement to NAFO's Executive Secretary¹²³ and may take the necessary means to secure evidence.¹²⁴ Because flag states prosecute their own vessels violating international law,¹²⁵ the agreement improves NAFO's case monitoring by requiring member nations to make semi-annual reports to NAFO's Executive Secretary on the status of each proceeding,¹²⁶ thus, ensuring that penalties provide an effective deterrent.¹²⁷

Furthermore, the agreement creates a pilot project for observers and a satellite tracking system.¹²⁸ Each contracting party¹²⁹ is required to place an independent and impartial observer on each vessel operating within the NRA to monitor the vessel's compliance with NAFO's conservation and enforcement measures.¹³⁰ As a result, all vessels fishing the NRA will have observers on board, providing a framework for stricter compliance with NAFO regulations. In addition, contracting parties will equip thirty-five percent of their vessels fishing the NRA with an autonomous satellite system to enable all contracting parties to track vessels fishing the regulatory area.¹³¹

Although the agreement enhances NAFO's enforcement mechanism, it fails to address the crux of the dispute — Canada's assertion that, as a coastal state, it possesses special interests in managing straddling stocks and may exercise extra-jurisdictional authority to protect those stocks in the Grand Banks' "nose" and "tail." In fact, the agreement declares that the parties "maintain their respective positions on the Conformity of the Amendment of 25 May, 1994 to Canada's Coastal Fisheries Protection Act."¹³² Canada still maintains its special interest, and Spain has not withdrawn its complaint before the ICJ.¹³³

123. *Id.* annex I, § II(9)(iii).

124. *Id.* annex I, § II(9)(i).

125. *See* UNCLOS III, *supra* note 16, art. 92, § 1.

126. *See* NAFO Agreement, *supra* note 109, annex I, § II(10).

127. *Id.* annex I, § II(10), ¶ 2. Such penalties may include suspension or withdrawal of permission to fish the NRA. *Id.*

128. *Id.* annex I, § II(11)(a), (b).

129. A "contracting party" is a nation which has assented to the NAFO Convention.

130. NAFO Agreement, *supra* note 109, at annex I, § II(11)(a)(1)-(2).

131. *Id.* at annex I, § II(11)(b)(1).

132. *See id.* Agreed Minute, art. D, § 1.

133. *See* Canada's Reservation, *supra* note 82.

V. THE INTERNATIONAL COURT OF JUSTICE

A. *Jurisdictional Issue*

The threshold issue is whether the ICJ has jurisdiction over the dispute.¹³⁴ Jurisdictional questions usually concern whether the parties are under an obligation to accept the ICJ's judgment,¹³⁵ whether the case comes within the scope of the consent given by the parties for the ICJ to exercise jurisdiction,¹³⁶ or whether the ICJ should refrain from exercising jurisdiction.¹³⁷

The ICJ has only a "consensual basis of jurisdiction," as it is always contingent upon the parties' consent.¹³⁸ Both Canada and Spain acceded to UNCLOS III,¹³⁹ thereby agreeing to submit disputes to the appropriate tribunal¹⁴⁰ and providing the ICJ with consensual jurisdiction.¹⁴¹ In addition, UNCLOS III, Article 288 provides that the ICJ "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."¹⁴² Because the dispute hinges on interpreting states'

134. 1 SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 99 (1965).

Where the Court declines to decide the merits of a contentious case on the ground of lack of jurisdiction . . . it declares that the law between the parties does not include the obligation to submit the concrete dispute to the decision of the Court. This does not necessarily mean, however, that the dispute is not governed by international law.

Id.

135. *Id.* at 303.

136. *Id.* at 304.

137. *Id.*

138. *Id.*

139. Canada signed UNCLOS III on Dec. 31, 1994; Spain signed UNCLOS III on Dec. 4, 1984. See *Multilateral Treaties St/leg/ser.e/13*.

140. See UNCLOS III, *supra* note 16, pt. XV, § 2, art. 286, providing that, "[s]ubject to section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section." *Id.*

141. *Id.* art. 287 provides in part:

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of the Convention:

(b) the International Court of Justice . . .

Id.

142. *Id.* art. 288, ¶ 1. "A Court or tribunal referred to in article 287 [see *supra*

rights under Article 116, the case comes within the scope of the ICJ's jurisdiction pursuant to Article 288.¹⁴³

The primary impediment to the ICJ exercising jurisdiction is Canada's reservation, which denies international tribunals jurisdiction over Canadian actions taken on the high seas Grand Banks and imposes the Coastal Fisheries Protection Act as the governing law.¹⁴⁴ However, "even if a matter in principle comes within domestic jurisdiction, where an international treaty is relevant to the discussion, that treaty will involve recourse to international law, and hence exclude the application of the exception."¹⁴⁵ The ICJ should, therefore, disregard Canada's reservation and claim jurisdiction over the dispute.

B. *Legal Considerations*

Because the ICJ will likely claim jurisdiction, this Comment will next analyze the primary issues for resolution. Although *stare decisis* does not guide the ICJ,¹⁴⁶ the *Fisheries Jurisdiction* case between Iceland and the United Kingdom (UK)¹⁴⁷ may provide an appropriate context for analyzing the Canada-Spain dispute.

1. *The Fisheries Jurisdiction Case*

In 1961, the UK and Iceland agreed upon an Exchange of Notes in which the UK acquiesced to the creation of a twelve mile Icelandic fishery zone while Iceland worked to extend its fishery jurisdiction. Once completed, Iceland would give the UK six months notice prior to implementing its new fishery jurisdic-

note 141] shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purpose of this Convention, which is submitted to it in accordance with the agreement." *Id.*

This means that future disputes concerning the Straddling Stock Convention will also come under the jurisdiction of international tribunals and courts as an extension of UNCLOS III.

143. *Id.*

144. See Canada's Reservation, *supra* note 82.

145. See ROSENNE, *supra* note 134, at 395. See also *Spanish Complaint*, *supra* note 107.

146. See Note, *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, 83 MICH. L. REV. 597, n.72 (1984).

147. *Fisheries Jurisdiction (U.K. v. Ice.)* 1974 I.C.J. 3.

tion.¹⁴⁸ The Note also provided for the ICJ to resolve any dispute concerning Iceland's extended jurisdiction. In early 1971, Iceland terminated the fishery jurisdiction agreement with the UK and announced plans to extend its exclusive fishery jurisdiction.¹⁴⁹ The UK disputed Iceland's actions and appealed to the ICJ for resolution.¹⁵⁰ In July 1971, however, Iceland extended its fishery jurisdiction fifty miles and prohibited all foreign vessels from the zone.¹⁵¹

In deciding the case, the ICJ recognized two governing principles of international law, both established at UNCLOS II. First, coastal states could claim exclusive fisheries jurisdictions beyond their territorial seas.¹⁵² Second, in situations where a coastal state was exceptionally dependent upon its fisheries, that state possessed preferential fishing rights in waters adjacent to its exclusive fishing zone.¹⁵³ The ICJ, however, narrowed the scope in which coastal states could invoke their preferential fishing rights, noting that coastal states may exercise their preferential rights only when extensive exploitation required intervention.¹⁵⁴ In addition, the ICJ stated that coastal states could not unilaterally determine the extent of their preferential rights by eclipsing other states' rights¹⁵⁵ but must also consider the other states' historical dependence on the fishery zone.¹⁵⁶ Finally, coastal states' preferential rights are based upon the extent of their dependence on adjacent waters, and fluctuate as that dependence changes.¹⁵⁷

2. UNCLOS III

With the inception of UNCLOS III, the law of the sea has changed dramatically from the time of the *Fisheries Jurisdiction*

148. 28 I.C.J.Y.B. 109, 111 (1973-74).

149. *Id.* at 112.

150. *Id.* The UK argued that "the Exchange of Notes was not open to unilateral denunciation and that in its view the measure contemplated 'would have no basis in international law.'" *Id.*

151. *Id.*

152. Fisheries Jurisdiction (U.K. v. Ice.) 1974 I.C.J. 3, 23, ¶ 52. This principle evolved into the 200 mile EEZ; see UNCLOS III, *supra* note 16, art. 57.

153. Fisheries Jurisdiction (U.K. v. Ice.) 1974 I.C.J. 3, 23 ¶ 52.

154. *Id.* at 24, ¶ 60.

155. *Id.* at 30-31, ¶ 71.

156. *Id.*

157. *Id.* at 30, ¶ 70.

decision. Subsequent to that decision and prior to UNCLOS III, coastal states enjoyed expansion of their fishing zones.¹⁵⁸ Today, by contrast, international law confines coastal states' fishing zones to 200 miles.¹⁵⁹ The trend under UNCLOS III is not expansion of coastal state jurisdiction, but rather preservation of the current limit.¹⁶⁰ In addition, UNCLOS III enumerates coastal states' and distant water nations' rights and obligations concerning high seas fishing.¹⁶¹

While Article 116 grants coastal states special interests in high seas fishing, it is too vague to provide adequate guidance.¹⁶² It does not explicitly grant coastal states the right to regulate adjacent seas fishing. Instead, it apparently obliges distant water nations to restrict their fishing in consideration of coastal states' fishing policies. In addition, Article 63, paragraph 2, urges coastal states and distant water nations that fish straddling stocks to agree upon conservation measures for those stocks on the adjacent seas.¹⁶³ In further defining the duties and obligations created under these articles, the ICJ should consider the principles applied in the *Fisheries Jurisdiction* case and contemporary international law.

3. New Test

The threshold issue in settling disputes concerning straddling stocks should be whether the offending distant water nation is a member of the regional fishing organization. If the

158. See CHURCHILL & LOWE, *supra* note 12, app. at 343.

159. See UNCLOS III, *supra* note 16, art. 57.

160. States advocating the "Presential Sea" doctrine reserve the high seas for their own economic and scientific needs. Those Pacific South American nations that spawned the exclusive economic zone (see *supra* note 29) have recently advanced this expansionist doctrine, threatening a stable ocean law regime. Alison Rieser, *ASIL Observer Comments on UN Conference on Straddling and Migratory Fish Stock*, ASIL NEWSLETTER, Nov. 1993. See also Francisco Orrego Vicuña, *Towards an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea*, delivered at the 23rd Annual Law of the Sea Institute at Genoa, Italy, June 24, 1992, at 415, 427-29. However, The Straddling Stock Convention effectively eviscerates the concept of the "Presential Sea" by mandating that high seas fishing nations abide with the regional organization's regulations. Therefore, coastal states do not need to expand their jurisdictions because regulatory organizations will conserve ocean resources.

161. See UNCLOS III, *supra* note 16, arts. 87, 147, 166.

162. *Id.* art. 116.

163. *Id.* art. 63, ¶ 2.

offending nation is a member, then the regional organization's regulations should govern enforcement within the regulatory area pursuant to UNCLOS III, Article 63, paragraph 2.¹⁶⁴ As a member of the regional organization, the coastal state should enforce the regional organization's regulations, but should not apply its domestic law to the regulatory area. Instead, the regional organization's seniority in the regulatory area should be affirmed and buttressed by ICJ rulings for two reasons. First, UNCLOS III specifically directs regional organizations to govern straddling stock issues.¹⁶⁵ The ICJ's ruling, therefore, should be framed by the UN's intent concerning the structure of the regional organization's regulatory authority. Furthermore, the ICJ will strengthen the regional organization's authority over the regulatory area by upholding UNCLOS III provisions delegating governing power to regional organizations. Second, nations that have become NAFO members have voluntarily assented to the NAFO Convention which grants NAFO, not individual states, authority to govern the regulatory area. To permit coastal states' regulatory authority over NAFO members on adjacent high seas would penalize nations which have complied with international law.¹⁶⁶ Furthermore, a policy distinguishing between nations that comply with international law and those that do not will have the greatest impact in forcing independent distant water nations (IDWN)¹⁶⁷ to join the regional organization.

If, by contrast, a nation fishing the adjacent high seas is not a member of the regional organization, the IDWN should then be presumed to practice unreasonable fishing procedures within the regulatory area. This presumption is based upon the fact that international law mandates nations that fish straddling stocks to either enter the regional organization or create a bilateral agreement with the coastal state whose adjacent high seas are fished.¹⁶⁸ A nation failing to fulfill either of these requirements disregards international law and should not benefit from

164. *Id.*

165. *Id.*

166. *Id.*

167. An independent distant water nation is a distant water nation that has not joined the regional organization. Therefore, it is not a contracting party that has assented to the regional organization's governing authority. See NAFO Convention, *supra* note 32, for use of term "contracting party."

168. See UNCLOS III, *supra* note 16, art. 63, ¶ 2.

the regional organization's regulations. Such a presumption of unreasonable fishing practice would shift the burden of proof away from the coastal state, who had been required under the *Fisheries Jurisdiction* case to show intensive exploitation before it could assert its preferential rights. To rebut this presumption, the IDWN may either satisfy the requirements of Article 63, or show that its fishing the adjacent high seas results in minimal impact to straddling stocks.

Coastal states, therefore, should be permitted to apply domestic law to IDWNs fishing straddling stocks on the adjacent seas. Regulations of regional organizations should not govern disputes between coastal states and IDWNs because IDWNs should not benefit from an organization they do not support and, in fact, willfully ignore. The ICJ should view the dispute as one between two nations interested in a common resource, in which one nation — the coastal state — has a priority over those resources. The coastal state's domestic law will apply to IDWNs only on the adjacent sea, which should be defined as either a narrow band of high sea running parallel to the EEZ, or the high seas portion of fishery grounds that extends beyond the coastal state's EEZ. By granting the coastal state authority to regulate IDWNs on the adjacent seas, the ICJ would create an environment that encourages IDWNs to abide by international law.

While coastal states may exercise domestic jurisdiction over adjacent seas, limitations should exist to guard against coastal state bias against IDWNs. One such limitation would be that the coastal state could act unilaterally against IDWNs on the adjacent seas only to the extent to which it has regulated itself within its EEZ. If, for example, the coastal state has imposed a moratorium upon certain stocks within its EEZ, the IDWN may not fish those stocks on the adjacent seas. In addition, if the coastal state regulates fishing equipment within its EEZ, then the IDWN's use of equipment falls under those regulations. Limiting the coastal state's regulatory authority on adjacent seas to the extent of self-imposed regulation within its EEZ will prevent coastal states from unreasonably and arbitrarily controlling the IDWNs fishing the adjacent seas. This limitation incorporates the *Fisheries Jurisdiction* rule that a coastal state's preferential rights to adjacent seas are contingent on its dependence to those resources because the coastal state's restrictions will vary as stocks increase or decrease within its EEZ. When stocks flour-

ish, few regulations will restrict fishing within the EEZ and, therefore, fewer limitations will exist on IDWNs fishing the adjacent seas. On the other hand, when straddling stocks are limited, EEZ restrictions will increase, giving the coastal state broader authority to enforce conservation on the adjacent sea.

If the coastal state imposes quotas upon straddling stocks within its EEZ, the IDWN may fish those stocks provided it demonstrates that its fishing will be in a reasonable manner and with minimal impact. In other words, the presumption of an IDWN's unreasonable fishing may be rebutted by a proper showing. Coastal states would not, however, make this determination. Instead, the regional organization would apply both the coastal state's domestic regulations and the regional organization's considerations in determining a reasonable allocation for the IDWN. The IDWN could then fish the straddling stock to its allotted amount. If the IDWN over-fishes its allocation, the coastal state could impose its domestic jurisdiction. Such enforcement would impact regional fishing in two important ways. First, it would strengthen the authority of the regional organization over the regulatory area by making it the ultimate arbiter in disputes between coastal states and IDWNs. Second, it would limit the coastal state's extension of jurisdiction on the high seas. While the coastal state's preferential rights exist on adjacent high seas, tempering those rights will curb aggressive coastal state encroachment.

Applying these considerations to the instant dispute would prevent Canada from acting unilaterally against Spain. Instead, Canada would have been required to appeal to NAFO's regulatory body to enforce the quota allocation.¹⁶⁹ On the other hand, if an IDWN nation had fished straddling stocks on the adjacent sea, Canada's boarding and seizure of the fishing vessel, pursuant to the Coastal Fisheries Protection Act, would have been permissible. The IDWN, therefore, would be subject to Canada's EEZ regulations. If the stocks fished were subject to a Canadian moratorium, then the IDWN would too be barred from fishing those stocks under Canadian law. On the other hand, if Canada had placed quotas upon stocks fished by the IDWN, the IDWN could fish those stocks subject to NAFO's determination of the quota's reasonableness.

169. See NAFO Convention, *supra* note 32, arts. XVII, XVIII, and XIX.

VI. UNITED NATIONS CONVENTION ON STRADDLING STOCKS

Once ratified,¹⁷⁰ the United Nations Convention on Straddling Stocks and Highly Migratory Stocks¹⁷¹ (Convention) will improve the management of this contentious area of high seas fishing. While a thorough analysis of the Convention is outside the scope of this Comment, a brief description of how it will change the rights of coastal states and of nations fishing adjacent seas is valuable to understanding the future of straddling stock fishing.

The Convention bestows a great deal of authority on regional organizations such as NAFO. On the subject of coastal states' preferential rights versus distant water nations' ability to fish adjacent seas, the Convention wisely grants regional organizations the authority to regulate straddling stocks.¹⁷² The Convention notes that "states fishing for the stocks on the high seas . . . shall give effect to their duty to cooperate by becoming a member of such organization . . . or by agreeing to apply the conservation measure and management measures established by such an organization."¹⁷³ Those nations refusing to abide by the regional organization's regulations do not escape unregulated, as the Convention applies the regional organization's regulations "de facto as extensively as possible to fishing activities in the relevant area."¹⁷⁴ Therefore, because regional organizations will govern all vessels fishing the adjacent seas, management will improve.

The Convention also enables member nations to enforce the regional organization's regulations. Members may board and inspect any fishing vessels within the regulatory area to ensure straddling stock conservation.¹⁷⁵ In addition, Convention mem-

170. See Straddling Stock Convention, *supra* note 7, arts. 37-40. These articles cover the requirements for ratification. The convention will enter into force upon deposit of thirty instruments of ratification or accession. See *id.* art. 40. As of March 1, 1996, the Convention has twenty-nine signatories. The convention has yet to be ratified by any of the signatories' legislatures or deposited with the Secretary-General of the UN, as required by Article 38.

171. See *id.* arts. 37-40.

172. The very issue contested in the Canada-Spain conflict.

173. Straddling Stock Convention, *supra* note 7, art. 8, ¶ 3.

174. *Id.* art. 17, ¶ 3.

175. See *id.* art. 21, ¶ 1.

bers may secure evidence of violations and bring the offending vessel to the nearest port.¹⁷⁶ The Convention, however, requires the inspecting nation to give the seized vessel's flag state notice of the pending inspection.¹⁷⁷

By granting regional organizations management authority, the Convention chose the most equitable solution. Nations fishing regionally regulated areas may join the governing body and advocate their interest. Member nations will enjoy all the benefits and obligations of membership, but most importantly they will have access to the regional area's resources. If the Convention had instead given coastal states the exclusive right to manage straddling stocks, distant water nations could be unilaterally excluded from the fishing zone with no viable recourse.

VII. CONCLUSION

During the past century, coastal states have enjoyed immense expansion of their fishing zones. At the same time they continue to lay claim to preferential rights to manage straddling stocks. This places straddling stock management at a significant crossroads since coastal states have yet to relinquish their interest to the increasingly influential regional fishing organizations. The opportunity to affirm the international community's preference of the authority of regional organizations over coastal states is before both the ICJ in connection with the Canada-Spain dispute and the world fishing community in connection with the Convention.

As it is uncertain whether the Convention will be ratified, the ICJ should decisively rule whether coastal states may act unilaterally on the high seas. This Comment urges the ICJ to affirm regional organizations' authority over their members and resources. The ICJ should also use coastal states' interests in straddling stocks as a means to influence IDWNs to abide by their international obligations. On the other hand, ratification of

176. See *id.* art. 21, ¶ 8. If this provision had been in force at the time of Canada's seizure of the Spanish vessel, Canada's action would have been justified. The Spanish vessel was accused of violating NAFO regulations by fishing with prohibited gear (see NAFO Convention, *supra* note 32, art. 21, § 11(e)) and fishing American plaice, a stock subject to a NAFO moratorium (see NAFO Convention, *supra* note 32, art. 21, § 11(c)).

177. See Straddling Stock Convention, *supra* note 7, art. 21, ¶ 4.

the Convention by the international community will grant regional organizations, not coastal states, *de facto* power over IDWNs.

A resolution for straddling stocks issues appears within reach. The ICJ's pending decision as advocated in this Comment, and the Convention's implementation will curb coastal states' preferential rights. While coastal states may lose their preferential rights, the strengthening of regional organizations will provide for the conservation and management of straddling stocks in the most equitable manner, thus preserving the sea's resources for future generations.

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VIII. MAP

Enlarged map of the main fishing grounds of the Regulatory Area - the Flemish Cap and Grand Bank

