

IN THE
INTERNATIONAL COURT OF JUSTICE

April, 1973

CASE NO. 1

NEPTUNIUS, Applicant
v.
ATLANTICA, Respondent

MEMORIAL FOR RESPONDENT

Team No. 5

TABLE OF CONTENTS

	Page
Jurisdiction	2
Statement of Facts	2
Questions Presented	2
Summary of Argument	3
Argument	
I. ATLANTICA VALIDLY TERMINATED THE BILATERAL TREATY RELATING TO HADDOCK FISHERIES.	4
✓ A. A Fundamental Change of Circumstances Vitiated Atlantica's Continued Adher- ence to the Bilateral Treaty	4
✓ B. Atlantica is not Bound by the Treaty Because its Consent was Based on Essential Error	8
II. ATLANTICA'S EXCLUSIVE FISHERY CLAIM IS VALID UNDER INTERNATIONAL LAW	10
✓ A. Customary International Law Recog- nizes a Coastal Nation's Right to Claim Exclusive Fisheries Beyond Twelve Miles Under Special Cir- cumstances	10
✓ B. Atlantica's Special Situation Justifies Her Exclusive Fishery Claim	17
III. ATLANTICA'S LEGISLATION VALIDLY PLACES REASONABLE RESTRICTIONS ON THE RIGHT TO CONDUCT SCIENTIFIC RESEARCH WITH- IN ITS FISHERY ZONE	20
Conclusion (Prayer)	23
Table of Authorities	24

JURISDICTION

Jurisdiction of the International Court of Justice "comprises all cases which the parties refer to it." I.C.J. STAT. art. 36, para. 1. Both Atlantica and Neptunius have accepted the jurisdiction of the Court. Record. p. 5.

STATEMENT OF FACTS

An official Statement of Facts has been stipulated to by the parties to this controversy. However, a brief synopsis of the salient facts follows:

Since the turn of the century, the nation of Neptunius has fished off the coast of Atlantica. However, in 1960 the Neptunian fishing effort ceased, and for six years thereafter the nation of Atlantica fished the area exclusively. After the reappearance of Neptunian fishing vessels and due to alleged overfishing, Atlantica approached Neptunius for the purpose of limiting the haddock catch. The result of the foregoing negotiations was the 1970 bilateral treaty relating to the haddock fisheries.

By late 1970 Atlantica had discovered severe depletion of its coastal fisheries including the haddock. As a result Atlantica established an exclusive 200 mile fishery zone in which it also regulated scientific research. Finally, on March 15, 1971, a Neptunian fishing vessel, the Poseidon, was seized 50 miles off the coast of Atlantica and fined for illegally fishing and for conducting scientific research without a permit.

QUESTIONS PRESENTED

1. Whether one state may validly terminate a bilateral treaty with another state based on either changed conditions or mistake of fact?

2. Whether a coastal state may extend its exclusive fishery jurisdiction beyond twelve miles from its coastline?
3. Whether a coastal state may control the right of other nations to conduct scientific research in its maritime zones?

SUMMARY OF ARGUMENT

Atlantica's seizure and fining of the Neptunian fishing vessel Poseidon are valid under both conventional and customary international law.

The 1970 bilateral treaty relating to haddock fisheries was validly terminated by Atlantica. Late in 1970 Atlantica's fishery scientists discovered severe depletion of the haddock species. If the haddock catch under the treaty were not reduced the entire haddock stock would have been in danger of total economic extinction.

This depletion could only have occurred due to a fundamental change of circumstances or due to a mistake of fact in the treaty negotiations. In either event the treaty was validly terminated under well recognized doctrines of international law.

In late 1970, Atlantica passed legislation (1) establishing a 200 mile exclusive fishery zone and (2) regulating scientific research in the area. Customary international law recognizes that a coastal state may establish exclusive fishery zones beyond the normal 12 miles under "special circumstances". Atlantica's dependence on coastal fisheries to support her modest nutritional and living standard constitutes a special situation justifying her fishery zone.

In addition the regulation of scientific research is a necessary incident to Atlantica's fishery jurisdiction. Moreover, Neptunius is a signatory to the 1958 Continental Shelf Convention and is thereby required to recognize Atlantica's right to regulate research with respect to the continental shelf.

For the foregoing reasons, Atlantica's seizure and fining of the Neptunian fishing vessel Poseidon are valid under international law.

ARGUMENT

I. ATLANTICA VALIDLY TERMINATED THE BILATERAL TREATY RELATING TO HADDOCK FISHERIES.

Atlantica entered into the 1970 bilateral treaty with Neptunius for the purpose of preventing overfishing and severe depletion of the haddock species. See Record p. 3. Despite this effort the haddock were severely depleted after only one season of the treaty's operation. See Record p. 3. There are only two possible explanations for this depletion: Either a fundamental change of conditions has occurred since the treaty was concluded, or Atlantica was mistaken about the facts on which the treaty was based. Under either explanation, Atlantica legitimately terminated the bilateral treaty.

A. A FUNDAMENTAL CHANGE OF CIRCUMSTANCES VITIATED ATLANTICA'S CONTINUED ADHERENCE TO THE BILATERAL TREATY.

Almost all modern jurists recognize the existence of the doctrine of changed conditions, often referred to as rebus sic stantibus. See Reports of the International Law Commission on the Second Part of Its Seventeenth Session and on Its Eighteenth Session, 2 Y.B. INT'L L. COMM'N 169, 256, U.N. DOC. A/6309/Rev. 1 (1966) (hereinafter cited as "1966 I.L.C. YEARBOOK II").

At present, the most authoritative source dealing with the international law on treaties is the 1969 Vienna Convention on the Law of Treaties. Prepared by both developing and developed countries, the Convention was adopted in Vienna on May 23, 1969, by a vote of 70 nations for, 1 against, with 19 abstentions. The principle of changed conditions is codified in Article 62 of the Vienna Convention

which states that a party may terminate a treaty because of a fundamental and unforeseen change of circumstances. Furthermore, the existence of the circumstances must have constituted an essential basis of the consent of the parties to be bound; and the change must radically transform the scope of treaty obligations still to be performed. See Article 62, Vienna Convention on the Law of Treaties adopted, May 23, 1969, U.N. DOC. A/CONF. 39/27.

The essential purpose of the treaty with Neptunius was to prevent the depletion of the haddock stock. However, after less than one year of the treaty's operation the haddock species had been so severely depleted as to be in danger of total economic extinction. It would be difficult to imagine a more clear cut example of fundamental change.

The preparatory history of Article 62 explains that this rule governing changed conditions applies to treaties of limited duration as well as to treaties containing provision for their termination. This carefully phrased version of the doctrine of fundamental change reflects existing international law rather than formulating a new norm. See Kearney and Dalton, The Treaty on Treaties, 64 AM. J. INT'L. L. 495, 542 (1970).

In addition to recognition and codification in the Vienna Convention, the doctrine of changed conditions has been approved by many nations in other treaties. See 1966 I.L.C. YEARBOOK II; I H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW at p. 942 n.1 (8th ed. 1955). These treaties have included provisions which refer expressly to change of circumstances as a valid basis for terminating treaty obligations.

The first step in the process of terminating a treaty

obligation is to notify the other party of the changed circumstances and to attempt renegotiation. After recognizing the impending crisis, Atlantica sought out Neptunius for the purpose of reaching an equitable solution. No further agreement could be reached. Atlantica was thereby compelled to enact the "Atlantica Fisheries Act of 1971" which served the dual purpose of protecting coastal fishery resources and terminating the bilateral treaty. That Neptunius was duly apprised of this action is evidenced by its diplomatic protests. See Record p. 5.

The doctrine of fundamental change corresponds to the general legal principles of frustration of purpose and supervening impossibility of performance, both of which are well recognized in municipal law. See I H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW at 938 (8th ed. 1955). These principles, like that of changed conditions, represent a policy of fulfilling the expectations of parties by terminating obligations substantially different from and more burdensome than those initially intended.

Basically two theories have been asserted as justification for the doctrine of fundamental change of circumstances. The first, the older and more frequently used, is the subjective expectation-of-the-parties approach. Under this theory the shared intentions, objectives, and expectations of the parties are paramount. In addition to express provisions, the implied terms of the agreement are essential to proper interpretation. One tacit condition, is that the parties may demand release from treaty obligations which, because of changed conditions, imperil their economic development. States, by entering into a treaty, seek to provide for a particular situation. Therefore, when fundamental change occurs, the treaty should not be

applied because its application would be contrary to the parties' shared expectations and would defeat their apparent objectives.

The Harvard Research Draft Convention on the Law of Treaties (1935), which was the primary codification of the international law of treaties prior to the Vienna Convention, supports this expectation of-the-parties approach. According to the Harvard Draft, if parties enter a treaty with reference to certain facts which they envision will remain the same, a fundamental change in those facts operates to make the treaty voidable. See Harvard Research in International Law, Law of Treaties, 29 AL. J. INT'L. L. 653, 1097-1124 (Supp. 1935)

The second theory utilized in support of the doctrine of rebus sic stantibus is referred to as the intolerable-burden approach. The International Law Commission used this approach to explain that the doctrine of changed conditions is an objective rule of law founded on grounds of equity and justice. The Commission states that evidence of the acceptance of this doctrine in international law is so considerable that there is general recognition of this safety-valve in the law of treaties. 1966 I.L.C. YEARBOOK II.

As a safety-valve the principle of fundamental change of circumstances promotes stability, the basic goal of international law. When treaty provisions become outmoded and intolerably burdensome, a party without other remedies might resort to power politics, force, or other extra legal action. Therefore, attempts to compel performance of unduly burdensome obligations might actually threaten the maintenance of general stability and peace. On the other hand if both parties to a treaty realize that a fundamental change of conditions renders the treaty terminable, the prospects of renegotiation are enhanced. Thus stability is maximized by peaceful, orderly and necessary change.

B. ATLANTICA IS NOT BOUND BY THE TREATY BECAUSE ITS
CONSENT WAS BASED ON ESSENTIAL ERROR.

Error in a treaty vitiates the consent of a party to be bound and renders the treaty voidable. Article 48 of the Vienna Convention recognizes mistake as a basis for invalidating a treaty and provides:

A state may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that state to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by that treaty. Article 38, Vienna Convention on the Law of Treaties adopted, May 23, 1969, U.N. DOC. A/CONF. 39/27.

In its commentary to the 1967 draft, the International Law Commission discussed the doctrine of error and its significance. The Commission stated that the error must relate to a fact or situation assumed to exist at the time the treaty was concluded. See 1966 I.L.C. YEARBOOK II. Atlantica concluded the bilateral treaty with Neptunius assuming that 4,750 units was the maximum sustainable yield of haddock and if this limit was adhered to, depletion would be prevented. See Record p. 3. Subsequent events have proven this assumption erroneous, since the haddock species has drastically declined. See Record p. 3.

To vitiate consent the error must be essential; in other words, it must relate to a matter which formed the fundamental basis for entering into the treaty. A mistake does not automatically render a treaty void, but rather gives to a state whose consent was based on error, the right to invalidate the convention. See 1966 I.L.C. YEARBOOK II. Essential to Atlantica's consent was that the maximum sustainable yield was correct and that the annual harvest of haddock would not decline. See Record p. 3.

The doctrine of fundamental mistake has received general approval as a principle of international law among writers, scholars, and nations. See A. McNAIR, THE LAW OF TREATIES at 211 (1961); 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW at 262 (1970). A fundamental mistake goes to the very basis of the transaction; "but for" the existence of the error, the party would not have entered the treaty. Most nations recognize this principle of error in their municipal law. Mistake is a significant element in vitiating consent to a contract; likewise, the doctrine of mistake, either unilateral or mutual, is generally recognized as invalidating a treaty. See 1966 I.L.C. YEARBOOK II; A. McNAIR, THE LAW OF TREATIES at 211 (1961); 14 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW at 262 (1970).

This principle provides necessary relief for nations such as Atlantica which discover that because of an error they are parties to a treaty which, had they not been mistaken, they never would have entered. Therefore, the stability of treaties is maintained in two ways: First, states may vitiate their consent when it is based on essential error, thus avoiding treaty obligations which they never intended and cannot endure. It is unnecessary to resort to power politics, force, and extra-legal means to escape unintended and perhaps unjust burdens. Second, the principle is strictly limited in application by its requirement of essential error and faultless conduct. The doctrine cannot be used indiscriminately by states to invalidate treaties nor can it undermine the principle that treaties are to be observed.

By merely seeking to rectify a mistake, Atlantica has not undermined the principle that treaties are binding. Acting in good faith and fully intending to be bound, Atlantica approached Neptunius

with the intention of correcting the error relating to the maximum sustainable yield. The nation of Neptunius, however, unreasonably refused to enter into a new agreement. Therefore, Atlantica validly terminated the treaty under either the doctrine of fundamental change of circumstances or the principle of essential error, both well-recognized rules of customary international law.

II. ATLANTICA'S EXCLUSIVE FISHERY CLAIM IS VALID UNDER INTERNATIONAL LAW.

A. CUSTOMARY INTERNATIONAL LAW RECOGNIZES A COASTAL NATION'S RIGHT TO CLAIM EXCLUSIVE FISHERIES BEYOND TWELVE MILES UNDER SPECIAL CIRCUMSTANCES.

On March 15, 1971, Respondent, the nation of Atlantica, seized and fined the Neptunian fishing vessel Poseidon for violating the "Atlantica Fisheries Act of 1971". See Record p. 5. The seizure and fining of the Poseidon are valid under well recognized principles of customary international law.

The generally recognized hierarchy among the sources of international law in descending order of importance is convention, international custom, and the general principles of law recognized by civilized nations. See I.C.J. STAT. art. 38, para. 1.

In the present case the only relevant source of conventional international law is the bilateral treaty relating to haddock fisheries. See Record p. 3. However, as previously noted, this bilateral agreement is no longer in force by virtue of either the doctrine of changed conditions or the doctrine of essential error. See Memorial, supra, at pp. 4-10. In the absence of convention, international tribunals must apply the rules of customary international law in order to resolve cases submitted to them. See

generally, M. SORENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW at pp. 132-174 (1968); J. BRIERLY, THE LAW OF NATIONS at pp. 56-68 (1963).

Custom in its legal sense means more than mere habit or usage among nations; rather it is usage considered to be obligatory by those who follow it. M. SORENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW at 133 (1968). Analysis of prior decisions of the International Court of Justice reveals two requisites for establishing customary international law. First, there must be established a generally recognized practice among nations. Second, the emergent norm must be at its inception declaratory of a mandatory rule. See e.g., North Seas Continental Shelf Cases, (1969) I.C.J. 3; Rights of Passage Case, (1960) I.C.J. 40; Anglo-Norwegian Fisheries Case, (1951) I.C.J. 131; Case of the S. S. "Lotus", (1927) P.C.I.J., ser. A, No. 9. Customary international law can only be found by examining the actions, practices, and policies of nations. Evidence of international custom can be voluminous and diverse due to the multifarious occasions on which nations act. J. BRIERLY, THE LAW OF NATIONS at 60 (1963). Atlantica has catalogued various state actions which support her claim that international custom allows exclusive fishery zones beyond twelve miles. See Chart A and the footnotes thereto, infra at p. 16. Under customary international law a coastal state may claim preferential fishing rights beyond twelve miles when economic or nutritional factors necessitate such action.

Most coastal nations do not claim exclusive fishery zones beyond twelve miles. This alone does not establish that these same nations would refuse to recognize a claim beyond the twelve mile limit based on special circumstances. An analysis of international practice indicates that there are essentially three ways by which

nations recognize that fishery claims beyond twelve miles are justified due to special situations: (1) by making a claim in excess of twelve miles, (2) by treaty obligation and (3) by their voting patterns in the 1958 and 1960 Geneva Conferences on the Law of the Sea.

The first method of approving fishery zones in excess of twelve miles is by a coastal nation making such a claim. At least twenty-three out of one hundred and sixteen coastal states have extended their exclusive fishery jurisdiction beyond twelve miles by various kinds of claims. See Chart A and the footnotes thereto, infra at p. 16. The vast majority of these claims cited the economic, nutritional or conservation needs of the coastal nation as justifying the extended claims. See generally F. AMADOR, LATIN AMERICA AND THE LAW OF THE SEA (1972). In addition a great number of other nations have extended their authority for various reasons other than fishing beyond twelve miles. See II S. LAY, R. CHURCHILL & M. NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA at 835 et seq. (1973).

The second method by which a state may recognize the legality of extended fishery claims under special circumstances is by treaty obligation. Two major fishery treaties have dealt with the problem of a coastal state's extended claims to exclusive fisheries. In Article 11 of the Fisheries Convention of 1964, fourteen West European countries agreed that, subject to the approval of the contracting parties, a coastal state may extend its exclusive fishery jurisdiction beyond twelve miles in order to give preference to the local population if it is overwhelmingly dependent upon coastal fisheries. See 1964 European Fisheries Convention in force, March 9, 1964, 581 UNTS 57.

In addition, three major fishing powers, Japan, the United States and Canada, have by convention recognized preferential claims to coastal fisheries beyond twelve miles under special circumstances. 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean in force, May 9, 1952, 4 UST 380, TIAS 2786, 205 UNTS 65. These special conditions are embodied in the principle of abstention which recognizes that where a coastal state has exclusively developed and is fully exploiting a coastal fishery, other nations are required to abstain from fishing in that area. Thus in addition to the 23 nations that make fishery claims in excess of twelve miles, seventeen other nations have by treaty recognized the legitimacy of similar claims.

The third method by which nations may have expressed themselves on the delimitation of coastal fishery zones is by their voting records at the 1958 and 1960 Geneva Conferences on the Law of the Sea. These conferences were held under the auspices of the United Nations and were attended by all interested nations, including land-locked countries. On three different occasions the right of a coastal state to claim exclusive fisheries beyond twelve miles was debated and submitted to a vote.

The first occasion occurred when Iceland at an early stage in the 1958 Conference proposed that a coastal state has a preferential claim to adjacent fisheries. Such a claim was conditioned on the local population's ability to demonstrate overwhelming economic dependence. This proposal was approved in committee and received a majority vote in plenary session. U.N. DOC. A/CONF. 13/SR. 15, para. 44; see also Chart A infra at p. 16. While this proposal received majority approval, it failed to be enacted due to the two-

thirds majority procedure followed at the Geneva Conference. Even though this measure failed, those nations which supported it either in committee or plenary session placed themselves on record as recognizing exclusive claims beyond twelve miles when a coastal population demonstrates overwhelming economic dependence. U.N. DOC. A/CONF. 13/C. 3/L. 79 Rev. 1.

The second attempt in the 1958 Conference to resolve the coastal state's fishery right came when the Union of South Africa submitted a special resolution in plenary session. The South African resolution went further than the Icelandic proposal in that not only was overwhelming economic dependence recognized, but in addition, primary nutritional dependence was also seen as justifying a preferential claim. U.N. DOC. A/CONF. 13/L. 56. Moreover, in either situation the coastal state could exclude nations which had historically fished in the area. U.N. DOC. A/CONF. 19/C. 1/SR. 2, para. 21. When finally put to a vote, this resolution was overwhelmingly approved by 68 nations with no opposition and 10 nations abstaining. U.N. DOC. A/CONF. 13/SR. 16, para. 12.

The third major attempt to delimit the preferential fishing rights of a coastal state beyond twelve miles occurred during the 1960 Geneva Conference. This attempt took the form of an amendment to the United States/Canadian six mile territorial sea plus six mile exclusive fishery zone proposal. U.N. DOC. A/CONF. 19/L. 12. The Amendment was jointly sponsored by Brazil, Cuba, and Uruguay and allowed preferential fishing claims beyond twelve miles when a coastal state is "heavily dependent" on coastal fisheries for economic development or in order to feed its population. The real significance of this Amendment was that it recognized the same special circumstances relating to economics and nutrition as did the 1958

South African resolution but lowered the standard of dependence from "overwhelming or primary" dependence to "heavily dependent". See U.N. DOC. A/CONF. 19/L. 12; U.N. DOC. A/CONF. 19/C. 1/SR. 2, para, 18; D. JOHNSON, INTERNATIONAL LAW OF FISHERIES at 286-88 (1965). This amendment was adopted in plenary session by a vote of 58 nations in favor, 19 against, with 18 abstentions. U.N. DOC. A/CONF. 19/SR. 13, para. 16.

In summary, by one means or another, 100 nations have expressed their views on exclusive fishery claims beyond the twelve mile limit. Of these nations 93 or approximately 93% have placed themselves on record as supporting coastal claims beyond twelve miles under special circumstances relating to economics and nutrition. These results are summarized in Chart A attached hereto, infra at p. 16.

Among those nations supporting the "special circumstances" exception it is generally agreed that the demonstration of overwhelming economic or primary nutritional dependence justifies the exclusion of nations which have historically fished in the area. See U.N. DOC. A/CONF. 19/L. 12; U.N. DOC. A/CONF. 19/C. 1/SR. 2, para 21.

Furthermore, states which have not historically fished in the area may be excluded by the coastal state when she is heavily dependent on those fisheries in order to support either the economic development or the animal protein requirements of her population. See U.N. DOC. A/CONF. 19/L. 12; U.N. DOC. A/CONF. 19/C. 1/SR. 2, para. 22.

Respondent, the sovereign nation of Atlantica, cites the foregoing as well recognized and mandatory rules of customary international law.

B. ATLANTICA'S SPECIAL SITUATION JUSTIFIES HER EXCLUSIVE FISHERY CLAIM.

A coastal state's preferential claim to contiguous fisheries beyond twelve miles ripens into an exclusive claim when certain antecedent conditions are met: First, the coastal nation must demonstrate a special situation sufficient to justify her preferential claim beyond twelve miles. Second, the preferential claim ripens into an exclusive claim when the fisheries are being fully exploited by the coastal population. Third, the exclusive claim must take into consideration the equities of the situation, as well as any historic fishing rights of other nations. Finally, notice must be given to the interested parties before enforcement procedures may be undertaken. Respondent, has complied with all of these conditions, thereby rendering her exclusive fishery legislation valid under customary international law and legitimizing the seizure of the Neptunian fishing vessel Poseidon.

The first requisite of an exclusive fishery claim beyond twelve miles is the demonstration of a special situation based on economic or nutritional dependence. The level of dependency will ultimately determine whether the coastal nation's preferential claim will ripen into an exclusive claim. Thus if a coastal population has overwhelming economic or primary nutritional dependence, historic fishing rights may be terminated. On the other hand, if historic rights are not involved, the local population need only be heavily dependent on coastal fisheries in order to claim exclusive rights. See D. JOHNSON, THE INTERNATIONAL LAW OF FISHERIES at 286-87 (1964).

The Record discloses that Atlantica's population is "heavily dependent on fish and fish products for its modest nutritional and

living standard." Record p. 1. In order to correctly characterize Atlantica's level of dependence on coastal fisheries, the standard of living of the coastal population must be considered. Dependency is a relative concept. To a prosperous man overwhelming or primary dependence may constitute a greater quantitative measure than it would to a man living barely above subsistence level. Atlantica is a developing nation with a standard of living only slightly above the level of subsistence. See Record p. 1. Therefore, in relative terms, her economic dependence on coastal fisheries is indeed overwhelming!

Moreover, when analyzing a coastal state's nutritional needs, only "primary dependence" is necessary in order to justify exclusive fishery claims beyond twelve miles. In other words when the coastal population's basic "right to eat" is involved, "heavy dependence" translates into "primary dependence" at an even lower threshold than when considering economic development. Simply stated, basic human needs require that "subsistence fishing" such as that carried on by Atlantica is of a higher priority than the "commercial fishing" of Neptunius.

It is the contention of Respondent that her heavy dependence on coastal fisheries to support her modest protein requirements must be considered "primary dependence" since the sharing of those fisheries could plunge her population below a minimum nutritional level. This situation is particularly critical in underdeveloped countries, such as Atlantica, which are chronically plagued by problems of uneven distribution. Even in countries with modest standards of living, uneven distribution causes large numbers of people to suffer from malnutrition and the general anguish of poverty. Thus in relative

terms, Atlantica's nutritional dependence on coastal fisheries is truly "primary", just as her economic dependence is "overwhelming."

Moreover, even if the Record were given a literal as opposed to a relative interpretation, Atlantica is at the very minimum "heavily dependent" on coastal fisheries. See Record p. 1, 4. Under such circumstances, international custom recognizes that a coastal state's preferential claim may ripen into an exclusive claim, so long as historic rights are not involved. Any historic fishing rights which Neptunius may have had prior to 1965 were extinguished by the failure of Neptunius to fish in the area during the six year period beginning in 1960. See Record p. 1.

The foregoing discussion leads quite naturally to an analysis of the final three conditions precedent to the establishment of an exclusive fishery zone beyond twelve miles, i.e., (1) full exploitation; (2) notice; (3) weighing the equities.

With regard to the requirement of full exploitation, the Record shows that Atlantica's population was fully exploiting the coastal fisheries beyond twelve miles as early as 1962 for the haddock species and 1967 for the salmon species. See Record p. 2. Furthermore, the Record evidences that these fishery resources owe their very existence to the substantial conservation measures of Atlantica. See Record p. 5.

In addition, Neptunius had been fully apprised of Atlantica's exclusive fishery claim prior to the seizure of the Poseidon as evidenced by the lodging of a Neptunian diplomatic protest. See Record p. 5.

The only remaining requisite is a consideration of the general equities surrounding Atlantica's fishery claim. The equities of the

situation weigh heavily in favor of Atlantica; an underdeveloped country struggling to improve the modest standard of living of its population. Atlantica's population is extremely dependent on fish and fish products for its modest nutritional and living standard.

On the other hand, Neptunius is a powerful "developed country with an extensive program of government subsidies" to her fishing industry. These subsidies have enabled Neptunius to accumulate the world's largest and most efficient distant water fleet. The Neptunian fishing effort off the coast of Atlantica accounts for less than 2% of her total annual catch whereas Atlantica's effort in the same area accounts for over 87% of her total catch. A nation with a program of extensive subsidies to her fishing industry can well afford the loss of less than 2% of her total catch, while a nation engaged in "subsistence fishing" cannot afford to deny her people the basic "right to eat."

Based on the foregoing, Atlantica's fishery legislation meets all the requisites of international law and therefore the seizure and fining of the Poseidon are valid.

III. ATLANTICA'S LEGISLATION VALIDLY PLACES REASONABLE RESTRICTIONS ON THE RIGHT TO CONDUCT SCIENTIFIC RESEARCH WITHIN ITS FISHERY ZONE.

In 1970 the legislature of Atlantica enacted the "Atlantica Fisheries Research Act." This act provides that within Atlantica's exclusive fishery zone, no foreign vessel may conduct scientific research in relation to fisheries or the seabed without the express consent of Atlantica. This consent is conditioned on (1) a national of Atlantica being allowed on board any research vessel, (2) all data collected being provided to Atlantica, and (3) payment of a

daily fee of \$1,000. The Neptunian fishing vessel Poseidon was seized and fined for violating the above mentioned legislation. The seizure and subsequent penalties are valid under international law.

The 1958 Geneva Convention on the Continental Shelf defines the rights of a coastal state to regulate scientific research. Among the Geneva Conventions, the one dealing with the Continental Shelf has received the greatest acceptance and approval by the community of nations. See II S. LAY, R. CHURCHILL & E. NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA at 805 (1973). Moreover, both Atlantica and Neptunius are signatories of the Continental Shelf Convention and are expressly bound by its provisions. See Record Annex D.

Article 5 (8) of the Convention provides that:

(T)he consent of the coastal state shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal state shall not normally withhold its consent if the request is submitted by a qualified institution with a view to purely scientific research into the physical or biological characteristics of the continental shelf, subject to the provision that the coastal state shall have the right, if it so desires, to participate or to be represented in the research, and that in any event the results shall be published. Article 5 (8), Convention on the Continental Shelf in force, June 10, 1964, 15 UST 471, TIAS 5578, 499 UNTS 311.

The above provision expressly requires the consent of the coastal state in order to conduct scientific research on the continental shelf. In addition, it provides that a coastal state must be allowed to place a representative on every research vessel and to have access to all data obtained. Atlantica's "Fisheries Research Act" implements the foregoing treaty obligations with the additional requirement of a fee to cover the reasonable costs of administration.

Atlantica's exclusive fishery zone is coextensive with its

"continental shelf" claims as defined in Article 1, of the 1958 Continental Shelf Convention. The term "continental shelf" is legally defined as "referring to the seabed and subsoil of the submarine areas adjacent to the coast . . . to where the depth of the superjacent waters admits of the exploitation of the natural resources of the . . . area." Article 1, Convention on the Continental Shelf in force, June 10, 1964, 15 UST 471, TIAS 5578, 499 UNTS 311. Under present technological capabilities the area covered by Atlantica's fishery zone is fully exploitable and thus legally constitutes Atlantica's "continental shelf." See e.g. OFFSHORE EXPLORATION CONFERENCE, 1969 PROCEEDINGS OF OEGON IV at pp. 45, 51 (1971).

Atlantica's legislation also regulates research with respect to fisheries. International law recognizes that a coastal state has "a special interest" in scientific research conducted on local fisheries. See Article 6(2), Convention on Fishing and Conservation of the Living Resources of the High Seas in force, March 20, 1966, 17 UST 138, TIAS 5969, 559 UNTS 285. This "special interest" is a necessary and proper measure for the protection of Atlantica's preferential fishing rights. As a practical matter there are many ways in which research vessels may interfere with fishing operations. The physical presence of research installations could create navigational hazards. Moreover, the coastal state has an interest in preventing commercial fishing in the guise of research. In order to avoid such infringements, Atlantica seeks to regulate research activities within its fishing zone.

It should be noted that Atlantica's legislation is regulatory rather than prohibitory in nature. As long as certain antecedent conditions relating to safety and protection of Atlantica's economic

and security interests are met, her consent will be granted.

In summary, Atlantica's "Fisheries Research Act of 1971" validly imposes reasonable conditions on the right to conduct scientific research within its fishery zone.

CONCLUSION

Atlantica respectfully requests a declaration by the International Court of Justice that Atlantica legitimately terminated the 1970 bilateral fishing treaty, that its legislative acts are valid under international law, and, therefore, that the seizure and fining of the Poseidon were in all respects legal.

Finally, Atlantica requests such further relief as the Court may deem proper.

TABLE OF AUTHORITIES

Page

TREATIES AND OTHER INTERNATIONAL AGREEMENTS

Convention on Fishing and Conservation of the Living Resources of the High Seas <u>in force</u> , March 20, 1966, 17 UST 138, TIAS 5969, 559 UNTS 285	22
Convention on the Continental Shelf <u>in force</u> , June 10, 1964, 15 UST 471, TIAS 5578, 499 UNTS 311	21, 22
European Fisheries Convention <u>in force</u> , March 9, 1964, 581 UNTS 57	12
High Seas Fisheries of the North Pacific Ocean <u>in force</u> , May 9, 1952, 4 UST 380, TIAS 2786, 205 UNTS 65	13
Statute of the International Court of Justice	2, 10
Vienna Convention on the Law of Treaties <u>adopted</u> , May 23, 1969, U.N. DOC. A/CONF. 39/27	4, 5, 8

CASES

Anglo-Norwegian Fisheries Case, (1951) I.C.J. 131	11
Case of the S.S. "Lotus," (1927) P.C.I.J., ser. A, No. 9	11
North Seas Continental Shelf Cases, (1969) I.C.J. 3	11
Rights of Passage Case, (1960) I.C.J. 40	11

TREATISES, DIGESTS, RESTATEMENTS

F. AMADOR, LATIN AMERICA AND THE LAW OF THE SEA (1972).	12
J. BRIERLY, THE LAW OF NATIONS (1963)	11
D. JOHNSON, INTERNATIONAL LAW OF FISHERIES (1964)	15, 17
H. LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW (8th ed. 1955)	5, 6
S. LAY, R. CHURCHILL & M. NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA (1973)	12, 21
A. McNAIR, THE LAW OF TREATIES (1961)	9
OFFSHORE EXPLORATION CONFERENCE, 1969 PROCEEDINGS OF OECOM IV (1971)	22
M. SORENSEN, MANUAL OF PUBLIC INTERNATIONAL LAW (1968).	11
M. WHITEMAN, DIGEST OF INTERNATIONAL LAW (1970)	9

JOURNALS

Harvard Research in International Law, Law of Treaties, 29 AM. J. INT'L. L. 653, 1097-1124 (Supp. 1935)	7
Kearny and Dalton, The Treaty on Treaties, 64 AM. J. INT'L. L. 495, 542 (1970)	5

U.N. DOCUMENTS

U.N. DOC. A/6309/Rev.1(1966).	4,5,7,8
U.N. DOC. A/CONF. 13/SR. 15	13
U.N. DOC. A/CONF. 13/SR. 16	14
U.N. DOC. A/CONF. 13/C.3/L. 79 Rev. 1	14
U.N. DOC. A/CONF. 13/L.56	14
U.N. DOC. A/CONF. 19/SR. 13	15
U.N. DOC. A/CONF. 13/C.1/SR.2	14, 15
U.N. DOC. A/CONF. 19/L.12	14, 15