THE PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

1973

Case Concerning a Dispute over Fishing Rights, Neptunius v. Atlantica, 1973.

Memorandum for Judges

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MEMORANDUM FOR JUDGES

This memorandum has been specially prepared for judges, with a view to summarize the issues raised in the problem. UNDER NO CIRCUMSTANCES IS IT TO BE SHOWN TO CONTESTANTS. Regional Administrators are urged to use utmost discretion in keeping this memorandum from the eyes of students.

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I. The issues.- There are two principal issues in this problem. First is the legality vel non of the establishment of an exclusive fishery zone by a coastal state beyond generally recognized limits of the territorial sea and exclusive fishery zones. Second is the validity vel non of the restriction of scientific research in the ocean, and the seabed and subsoil beneath, to extensive distances from a nation's coast and the imposition of conditions by the coastal state on the right of access.

In order to provide a fair balance between the two competing nations, the problem has been structured so that the first issue is very slightly favorable to the coastal state, Atlantica, and the second is more favorable to the distant water fishing nation, Neptunius.

II. Background material.

A. Fisheries Jurisdiction.

For those judges not already familiar with the current international law of the sea negotiations and particularly the international fishery management questions presented in the problem, I would strongly recommend Christy and Scott, THE

Common Wealth in Ocean Fisheries (1965) which presents in succinct and highly readable form all of the relevant biological, economic, legal, and political factors involved in managir. high seas fisheries resources. A much more compact piece covering most aspects of current high fishery management problems, and which will suffice for purposes of judging the arguments, is Eisenbud, "Understanding the International Fisheries Debate," 4 Natural Resources Lawyer 19 (1971). In lieu of presenting in this memorandum a substantive background section on fishery management problems, I recommend that all judges read the Eisenbud article. If they should then desire a more in-depth treatment of the subject matter, they should peruse the Christy volume.

For those who wish to go still deeper into the relationship between fishery management problems and the current international law of the sea negotiations, read Burke, "Some Thoughts on Fisheries and a New Conference on the Law of the Sea," Occasional Paper No. 9, Law of the Sea Institute, University of Rhode Island (March, 1971).

The similarity between this year's Jessup problem and certain aspects of the current dispute before the International Court of Justice between Iceland and the United Kingdom should be

noted. The issues in the problem are also similar to those in the continuing dispute between Chile, Ecuador, and Peru, on the one hand, and the United States, on the other, concerning fishery jurisdiction in the South Pacific Ocean. Any materials relevant to these disputes would also make good preparatory reading for judging the current Jessup Competition.

B. Scientific Research.

Probably the best overall analysis is Burke, "Marine Science Research and International Law," Occasional Paper No. 8, Law of the Sea Institute, University of Rhode Island (September, 1970). However, for a succinct introduction to the issues, I would recommend Clingan, "Scientific Inquiry in the Oceans; Legal Regulation and Responsibility," 6 Lex and Scientia 77 (1969). A slightly more detailed analysis can be found in Schaefer, "Freedom of Scientific Research and Exploration in the Sea," 4 Stanford Journal of International Studies 46 (1969). Again, with such excellent and brief introductory articles available, I see no value in reiterating here the factual and legal background of the problem.

III. Some Thoughts About the Issues.

A. Fisheries Jurisdiction.

As mentioned earlier, the overriding issue is the

legality vel non of the unilateral extension of an exclusive fishing zone beyond twelve miles. The basic arguments will probably be as follows:

Neptunius (i.e., against the extension).

Although there are no express international agreements concerning the breadth of the territorial sea or exclusive fisheries zones, the practice of states strongly evidences a rule of customary international law limiting such jurisdiction to twelve nautical miles from the baseline. Virtually all claims in excess of twelve miles have met with substantial and strong protest from most members of the international community. Thus it is not possible that a competing international practice has arisen, for the states purporting to exercise fisheries jurisdiction beyond twelve miles are too few in number and have been opposed too strongly, especially by those states with the greatest stake in maritime affairs, to have permitted the traditional customary international law rule to be overturned. That being the case, the customary and conventional international law governing fishing on the high seas (both Atlantica and Neptunius are parties to the Convention on the High Seas)1/ clearly permits any nation to take whatever fishery resources it can reduce to its possession, and no fishery resources located beyond the territorial sea are subject to appropriation

or other form of vested property interest prior to actual catch.

Further, before Atlantica laid claim to any ocean areas beyond three miles, Neptunius had for over half a century fished these waters, and in doing so had established an historic right of fishing in the area. Historic rights have been previously recognized (e.g., in the case of the extension of the United States exclusive fisheries zone to 12 miles, fishing rights of several foreign nations were expressly recognized and agreements made with respect thereto) and it would be a violation of international law for Atlantica to unilaterally oust Neptunius of a vested right to resources of the area.

Finally, Atlantica and Neptunius entered into a treaty in 1969 covering the 1970 and 1971 fishing seasons. Atlantica has breached that agreement by making it impossible (under her unilateral extension of jurisdiction) for Neptunius to take that portion of the stock which was allocated to her in the agreement. The counter argument, of course, is that the agreement only compelled Neptunius not to take in excess of a specified amount and therefore did not grant any vested interest in a portion of the stock. Nonetheless, the treaty does envision joint management of the resource which has now been made impossible by the unilateral action of Atlantica.

Atlantica (i.e., for the extension). Granted that the traditional "Western European" international law limited the breadth of the territorial sea to three miles, nonetheless rapid advances in the technology for exploiting living resources of the seas have called for a departure from previously existing norms in order to wisely manage the resource and prevent its extinction. Precedent for extension of maritime zones beyond the three or twelve mile limit can be found in the United States "Truman Proclamation" of 1945 where that nation unilaterally asserted jurisdiction over subsea petroleum and natural gas resources to extensive distances from its coast.[2/] The purpose of the United States unilateral act was to develop a resource of the adjacent maritime area in the most expeditious manner and in the manner most beneficial to the coastal state. The extension of an exclusive fisheries zone accomplishes the same purpose for those states not blessed with resources of living organisms near their coasts.

Counsel for Atlantica should assert that what is at issue is not the breadth of the territorial sea nor the breadth of an exclusive fishing zone, but an assertion of limited jurisdiction over offshore areas for purposes of national security. There is ample precedent for such assertion, including the United States claim of continental shelf jurisdiction in 1945, Canada's

assertion of a 100 mile pollution prevention zone, the United States "air defense identification zones," the zones of security in the Atlantic during the early years of World War II, and so on. The issue is national security (which includes economic security) for which international law has always recognized a state's right to act.

Further, there is a growing trend, evidenced in the national positions expressed in the deliberations of the United Nations Seabed Committee[3/] leading to the Third United Nations Conference on the Law of the Sea[4/] toward acceptance of an "economic resource zone" or "patrimonial sea" concept in which each costal state would have the exclusive or preferential right to harvest all of the living and non-living resources within a zone not to exceed 200 miles in breadth from the coastline. This development is based on a number of propositions, all of which are found in the facts of the problem relating to Atlantica and her adjacent fishery resources and include the arguments that:

(a) The adjacent fishery constitutes the essential foundation of Atlantica's economy;

(b) Coastal fishery resources are directly related to the geological feature of the continental shelf (the special conditions prevailing in the shelf area provide the necessary

environment for the fish stocks) and are an integral part of the natural resource base of the coastal state.

(c) Distant water fisheries do not have the vital interest in maintaining fish stocks in the area and have in the past tended to destroy one fishery area and proceed to another; Atlantica's dependence on the adjacent resource makes her the more appropriate manager of that resource. As the statistics in the problem indicate, the overfishing did appear to result, at least with respect to salmon, from the reentry of Neptunius into the fishery. However, with respect to haddock, Atlantica was already exceeding her own scientists' suggested maximum sustainable yield at the time Neptunius reentered the fishery.

Finally, and with specific reference to salmon, an anadromous species, the argument can be made (though it has not met yet with much success in the current international law of the sea negotiations) that because a state expends time and money in enhancing and preserving an anadromous species, it should as a result have some preference to catch once the species migrates beyond territorial waters. This is essentially an economic argument, and there are sufficient facts in the problem to justify its assertion.

B. Scientific Research.

As noted earlier, the principal issue is the legality vel non of the attempt by Atlantica to preclude scientific research in the 200 mile zone. The basic arguments will probably be as follows:

Neptunius (i.e., against the extension). Although not specified as such in the Convention on the High Seas, freedom of scientific research nonetheless is generally recognized as a legitimate freedom of the high seas.[5/] Scientific research is the foundation upon which the exploitation of all ocean wealth must be based and is therefore beneficial to all mankind.

Since both Atlantica and Neptunius are parties to the Convention on the Continental Shelf, the provisions of that agreement regarding scientific research are relevant. The Convention provides in Article 5(8):

> The 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 proviso 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.

Neptunius may argue that the Act of Atlantica violates the latter's express agreement in the Convention not to "normally withhold its consent" to research since the Act forbids such research except on compliance with rather strict conditions and the imposition of a fee (the latter not being contemplated by the Convention on the Continental Shelf). In short, the argument will be that the Act is incompatible with Atlantica's treaty obligations.

Atlantica (i.e., for the extension). There are a number of reasons why developing states regard with suspicion the scientific research efforts of technologically developed nations. Among these reasons are:

(a) Substantial research by developed nations into the coastal resources of a developing nation might prejudice the latter in negotiations with mineral and fishery extractive industries who would know more about the resource being bargained for than the resource owner. In the instant case, Atlantica may wish to license to Neptunius or other distant water fishing nations the right to take the excess stock up to "msy" which Atlantica is unable to harvest in a given year; in that situation Atlantica would want to have at least equality in bargaining for an appropriate license fee.

(b) Technologically advanced military powers might, under the guise of scientific research, endanger the security of developing nations.

(c) All scientific research has some ultimate application even though it is not known at the time of the conduct of the research, and this ultimate application might have detrimental effects on the offshore areas of the developing nation.

Thus, the argument will run, the coastal developing state has a vital security interest in its adjacent waters and a concomitant right to establish whatever measures it deems necessary in order to verify the innocence of activities taking place there.

Footnotes

1. The Convention provides, inter alia, that:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas . . . comprises, inter alia . . . (2) Freedom of fishing; . . . .

2. Truman Proclamation, Pres. Proc. No. 2667, 3 C.F.R., 1943-48 Comp., at 67 (1945); 13 State Dep't Bull. 485 (Sept. 30, 1945). One should note the similarity between the perambulatory justifications in the Truman Proclamation regarding oil and gas, and the arguments of Atlantica regarding fishery resources.

3. The Seabed Committee was created by General Assembly Resolution 2467A (XXIII) (1968) [8 Int'l Legal Materials 201 (1969)]. In December, 1970, the Committee was given the task of acting as the preparatory body for the Third U. N. Conference on the Law of the Sea.

4. General Assembly Resolution 2750C (XXV) (1970) called for a Third United Nations Conference on the Law of the Sea to be held sometime during 1973 unless postponed by the twenty-seventh session of the General Assembly in 1972 on the grounds of insufficient progress of preparatory work.

5. The Convention on the High Seas states that in addition to the four enumerated freedoms there must be included "others which are recognized by the general principles of international law". Scientific research was omitted from specific inclusion only because of uncertainties of definition (e.g., what distinguishes "pure scientific" research from "commercial" and "military" research).