IN THE

INTERNATIONAL COURT OF JUSTICE

NEPTUNIUS

Applicant

v.

ATLANTICA

Respondent

MEMORIAL FOR APPLICANT

MARCH, 1973

INTRODUCTION

The present dispute between Atlantica and Neptunius arose out of the arrest and prosecution by Atlantica of the captain of the Poseidon, a fishing vessel under the flag of Neptunius, for a violation of the 1971 Atlantica Fisheries Act and the 1971 Atlantica Fisheries Research Act. In the first Act Atlantica extends is exclusive fishery jurisdiction to a line 200 miles from the baseline of its territorial sea or to the edge of the continental margin, whichever is further. The main purpose of this Act was to exclude foreign fishermen, particularly those of Neptunius, from harvesting the living resources of the area included in the extension. In the second Act Atlantica requires its consent for all research concerning the fishery resources of its exclusive fishery waters and the non-living resources of its seabed and subsoil - a requirement which curtails not only commercially oriented research, but also fundamental oceanographic and biological investigations.

On 15 March 1971 Atlantica arrested the Poseidon at a point approximately 50 miles from its coast and charged its captain with violations of both Acts. The captain was convicted and fined $ 25,000. On 1 May 1972 Neptunius instituted proceedings in the International Court of Justice against Atlantica on the ground that Atlantica had committed a breach of international law in prosecuting the captain of the Poseidon. The jurisdiction of the Court was established and arguments on the merits of the matter were ordered by the Court, although on rather short notice.

This memorial of Neptunius addresses itself to the following arguments: (I) that the 1971 Atlantica Fisheries Act is a violation of the freedom of the high seas;(I-A) that the 1971 Atlantica Fisheries Act can not be justified from the viewpoint of conservation; (I-B) that the 1971 Atlantica Fisheries Act can not be justified from the viewpoint of allocation; (I-C) that the 1971 Atlantica Fisheries Act is a breach of the 1970 Haddock Agreement between Atlantica and Neptunius; (II) that the 1971 Atlantica Fisheries Research Act is a violation of international law; and (III) that the prosecution by Atlantica of the captain of the Poseidon constitutes a breach of international law.

I THE 1971 ATLANTICA FISHERIES ACT IS A VIOLATION OF THE FREEDOM OF THE HIGH SEAS

The international law of the sea, which governs the conduct of nations in their use of the oceans, rests upon one fundamental principle: the freedom of the high seas. Originating in the works of Grotius (1), the freedom of the high seas has been a principle of customary international law for several centuries. (2) This is clearly stressed by the Preamble of the 1958 Geneva Convention on the High Seas (3), which states that the provisions of the Convention are "generally declaratory of established principles of international law". Consequently, Neptunius and Atlantica are required to respect this Convention, not only because they are parties to it, but also because it reflects customary international law binding on all States.

The Convention defines the "high seas" as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State" (Article 1). It also provides that the high seas are open to all nations and that no State may validly purport to subject any part of them to its sovereignty (Article 2). Freedom of the high seas comprises, *inter alia*, both for coastal and non-coastal States: (a) freedom of navigation; (b) freedom of fishing; (c) freedom to lay submarine cables and pipelines; and (d) freedom to fly over the high seas. These freedoms, and others which are recognized by the general principles of international law, must be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas (Article 2).

Thus, it is a firmly established principle of international law that all States have the right to engage in marine fisheries in the waters of the high seas. This right has also been recognized explicitly in the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas. (4) It is a right that is also enjoyed by Neptunius in the waters of the high seas off the coasts of Atlantica. However, Neptunius fully accepts that the freedom of fishing on the high seas is not absolute: it is subject to a number of restrictions both with respect to its area of applicability and with respect to its scope.

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(1) H. GROTIUS, MARE LIBERUM (see the Carnegie Endowment's edition with English translation 1916).

(2) S. ODA, INTERNATIONAL CONTROL OF SEA RESOURCES 111 (1963); Bierzanek, *La nature juridique de la haute mer*, 65 REV. GEN, DROIT INT'L PUBLIC 233-259, 242 (1961).

(3) 450 U.N.T.S. 82.

(4) 559 U.N.T.S. 286. Hereinafter referred to as the 1958 Fisheries Convention.

Restrictions concerning the area of applicability of the freedom of fishing on the high seas stem directly from the above definition of the high seas as the waters not included in the territorial sea or the internal waters of coastal States. This implies that the area of the high seas depends upon the breadth of the territorial sea and the coastal State's jurisdiction over internal waters. It is a well known fact that there is no universal international agreement with respect to the precise limits for the jurisdiction of coastal States over the adjacent parts of the seas. The 1930 League of Nations Codification Conference failed to reach agreement on this issue (5) and the same occurred at the 1958 Geneva Conference on the Law of the Sea.(6)

However, the 12 miles limit as a maximum for the extent of the jurisdiction of coastal States gained recognition in Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. (7) According to this Article coastal States are entitled to exercise in a zone of the high seas contiguous to their territorial sea control for a number of specifically enumerated purposes. However, this zone may not extend beyond 12 miles from the baseline of the territorial sea, which implies that *a fortiori* the territorial sea itself should not extend beyond this limit. It also indicates that in the 1958 Territorial Sea Convention coastal States are not entitled to exercise any kind of specific jurisdiction beyond the 12 mile limit, subject to certain rights explicitly recognized by international law. (8) It should be noted that Atlantica is a party to the 1958 Territorial Sea Convention.

The 1958 Geneva Conference on the Law of the Sea also adopted a Resolution in which it requested the General Assembly of the United Nations to convene a special conference to deal with the issue of the extent of the jurisdiction of coastal States. (9) This led to the 1960 Geneva Conference on the Law of the Sea. At this conference a proposal advanced

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(5) See Hudson, *The First Conference for the Codification of International Law*, 24 AM. J. INT'L L. 447-466, 455-458 (1930).

(6) See UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS, Geneva 24 February-27 April 1958, Volume III, *First Committee*, U.N. Doc. A/CONF. 13/39.

(7) 516 U.N.T.S. 220-2. Hereinafter referred to as the 1958 Territorial Sea Convention.

(8) See Article 2 of the 1958 Geneva Convention on the Continental Shelf, 499 U.N.T.S. 312-4, and Article 7 of the 1958 Fisheries Convention, 559 U.N.T.S. 290-2.

(9) Resolution of 27 April 1958, 450 U.N.T.S. 64.

by Canada and the United States for a territorial sea of 6 miles and an additional exclusive fishery zone of another 6 miles beyond the territorial sea failed to be adopted because of one country opposing rather than abstaining. (10) In subsequent years many coastal States did extend their jurisdiction over marine fisheries along the lines of the above proposal of Canada and the United States. Presently, at least 75 States exercise exclusive fisheries jurisdiction up to a 12 mile limit.(11) Consequently, the overwhelming majority of States adhere at present to a maximum of 12 miles for the extent of their exclusive fisheries jurisdiction.

In view of these observations Neptunius submits that as a general rule of established international law coastal States may not extend their exclusive fishery limits beyond a line 12 miles from the baseline of the territorial sea. By extending its exclusive fisheries jurisdiction over an area of at least 200 miles from its coast, Atlantica has violated a fundamental principle of international law, *i.e.* the freedom of fishing. Consequently, it has illegally debarred the fishermen of Neptunius from their right to fish in the waters of the high seas off Atlantica's coast.

The second category of restrictions on the freedom of fishing - those concerning its scope - are in essence based upon Article 2 of the 1958 Geneva Convention on the High Seas which provides, *inter alia,* that States must exercise the freedom of the high seas with reasonable regard for the interests of other States. This provision refers to possible conflicts which may arise between similar and dissimilar exercises of the freedom of the high seas.

The present dispute between Atlantica and Neptunius is not a conflict between dissimilar uses, since in using the seas for purposes other than fishing Neptunius has not affected the fishing operations of Atlantica. The actual controversy occurs between a similar exercise of the freedom of the high seas, *i.e.* the freedom of fishing, on the part of Atlantica and on the part of Neptunius.

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(10) See François, *La deuxième conference sur le droit de la mer,* 7 NETHERLANDS INT'L L. REV. 249-260 (1960); C.J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA 47-86 (6th ed. 1967); Bouchez, *The Concept of Effectiveness as applied to Territorial Sovereignty over Sea-Areas, Air Space and Outer Space,* 9 NETHERLANDS INT'L L. REV. 151-182, 164-5 (1962).

(11) See E.D. BROWN, CLAIMS TO INCREASING JURISDICTION OVER THE SEA AND THE PROBLEM OF ENFORCING JURISDICTION 6 (Paper presented at the Conference on New Directions in the Law of the Sea, London, February 1973); M.I. KEHDEN, DIE INANSPRUCHNAHME VON MEERESBODENZONEN DURCH KÜSTENSTAATEN (2nd ed. 1971); S. ODA, THE INTERNATIONAL LAW OF THE OCEAN DEVELOPMENT; BASIC DOCUMENTS 368-372 (1972). These limits are also incorporated in the 1964 European Fisheries Convention, 3 INT'L LEGAL MATERIALS 476 (1964).

For the purpose of preventing such conflicts between high seas fishing operations the general clause of the above Article 2 has been worked out in more detail in a large number of special international fisheries conventions.(12) The two major areas of concern of these agreements are conservation and allocation. (13)

Neptunius' willingness to accomodate conflicts in respect of conservation and allocation is evident from the 1970 Haddock Agreement with Atlantica. In this agreement Neptunius recognized its obligations in respect of conservation by agreeing to a total catch limit of 4.750 units for the 1970 and 1971 fishing seasons. Although not obliged to do so, Neptunius also demonstrated its willingness to prevent allocation conflicts by agreeing to a distribution of the total catch; 4000 units for Atlantica as compared with 750 units for Neptunius. Consequently, Atlantica can not justify its 1971 Fisheries Act on the ground that Neptunius exercised the freedom of fishing on the high seas without reasonable regard for the interests of Atlantica. (14).

In view of these observations Neptunius submits that the 1971 Atlantica Fisheries Act is a violation of the freedom of fishing on the high seas. However, since conservation and allocation of the living resources of the high seas are the main incentives for the 1971 Atlantica Fisheries Act, it is necessary to examine in more detail whether or not Atlantica can justify the Act under international law by reference to special legal provisions concerning conservation and allocation of the living resources of the high seas.

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(12) See for a survey of such conventions A.W. KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES 77-119 (1973); D.M. JOHNSTON, THE INTERNATIONAL LAW OF FISHERIES 176-218, 326-332, 358-396 (1965); F.T. CHRISTY & A. SCOTT, THE COMMON WEALTH IN OCEAN FISHERIES 192-214 (1965).

(13) For conservation, see *e.g.* Preamble of the 1930 Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fisheries of the Fraser River System, 184 L.N.T.S. 306; Preamble of the 1946 International Convention for the Regulation of Whaling, 161 U.N.T.S. 74, 76; Preamble of the 1953 International Pacific Halibut Convention, 222 U.N.T.S. 78; Preamble of the 1957 Interim Convention on the Conservation of the North Pacific Fur Seals, 314 U.N.T.S. 106; Preamble of the 1959 North East Atlantic Fisheries Convention, 486 U.N.T.S. 158.
For allocation, see *e.g.* Article VII of the 1930 Convention for the Protection, Preservation and Extension of the Sockeye Salmon Fisheries of the Fraser River System, 184 L.N.T.S. 312; Article III, Par. 1 sub a and b, of the 1952 International Convention for the High Seas Fisheries of the North Pacific Ocean, 205 U.N.T.S. 84; Article IV and Annex of the 1956 Convention Concerning the High Seas Fisheries of the Northwest Pacific Ocean, 53 AM. J. INT'L L. 764, 766-8 (1959).

(14) Neptunius' share of the total haddock catch varied from 10% to 50% in the years 1966-69; as to the salmon species the figures were 5%-30% in the same years.

I-A THE 1971 ATLANTICA FISHERIES ACT CAN NOT BE JUSTIFIED FROM THE VIEWPOINT OF CONSERVATION

A first relevant aspect from the viewpoint of conservation concerns the biological characteristics of the stocks involved in the present dispute.

Salmon is an anadromous species (15): the stocks in question return to the Red River situated within the territory of Atlantica for spawning. As far as this spawning phase is concerned, Atlantica has a special responsibility with respect to salmon: it must ensure that sufficient numbers reach the spawning grounds. (16) However, this special responsibility is compensated by the fact that Atlantica's fishermen are in a privileged position in respect of access to the salmon fisheries, since they can catch salmon in the mouth of the Red River, rather than in the waters of the high seas. It is also of relevance that salmon spends most of its life cycle at sea (17) and it acquires most of its weight in this phase. Consequently, it is as much a high seas resource as a resource of the coastal State.

Haddock is a demersal species (18), which implies that it feeds on the bottom. However, it should be clearly distinguished from sedentary species, which at their harvestable stage either are immobile on or under the seabed, or are unable to move except in constant physical contact with the seabed and subsoil. (19) It is this characteristic which provides the basis for the sovereign rights of coastal States over the exploration and exploitation of sedentary species; this in pursuance of Article 2 of the 1958 Geneva Convention on the Continental Shelf. Demersal species, on the other hand, belong to the living resources of the high seas and, accordingly, fall within the scope of the principle of freedom of fishing. (20)

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(15) F. SCOTT & W. SCOTT, EXPLORING OCEAN FRONTIERS 94-5 (1970).

(16) See International Pacific Salmon Fisheries Commission, *1956 Annual Report* 5 (1957).

(17) *Examination of Living Resources associated with the Sea-Bed of the Continental Shelf with regard to the Nature and Degree of their Physical and Biological Association with such Sea-Bed,* Report presented by the F.A.O. at the 1958 Geneva Convention on the Law of the Sea (U.N. Doc. A/CONF. 13/13).

(18) *Idem.*

(19) See Article 2, Par. 4, of the 1958 Geneva Convention on the Continental Shelf.

(20) See Article 3 of the same Convention.

The foregoing observations make clear that the biological characteristics of the two species involved in the present dispute do not give support to the view that for conservation a deviation must be made from the law of the sea as it stands with respect to the matter of exclusive fisheries jurisdiction. Thus, both stocks are truly high seas resources whose conservation is a matter of international concern. (21)

Nevertheless, Atlantica may attempt to justify its 1971 Fisheries Act by reference to Articles 6 and 7 of the 1958 Fisheries Convention. Neptunius wishes to raise the following objections against such an argument:

(a) Neither Atlantica nor Neptunius are parties to the 1958 Fisheries Convention. This prevents Neptunius from being bound by the provisions of the Convention, except by those which incorporate rules of customary international law. (22) In the opinion of Neptunius the 1958 Fisheries Convention reflects "progressive development " rather than "codification" of international law with only two exceptions: first, all States have the right to engage in high seas fisheries (23) and second, all States are obliged to adopt conservation measures if necessary (24). The latter rule has been embodied in a great number of international fisheries conventions (25), of which many were concluded prior to the 1958 Fisheries Convention. It was adopted at the 1958 Conference on the Law of the Sea without any dispute as to its validity(26), and it has found universal acceptance in the community of States. Thus, the aforementioned rule clearly meets the requirements of customary international law: a general practice and an *opinio juris ac necessitatis*. (27)

Should Atlantica advance the argument that, nevertheless, the Articles 6 and 7 of the 1958 Fisheries Convention support its 1971 Fisheries Act, Neptunius submits that these provisions can not be invoked for this purpose.

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(21) *Cf.* Preamble of the 1958 Fisheries Convention. Reference might also be made to the point, that there will always be species which migrate across the boundaries of the areas in which coastal States have exclusive rights, even if these areas are very large; see KOERS *op. cit.* (note 12) at 237 with references.

(22) See North Sea Continental Shelf Cases, (1969) I.C.J. 40.

(23) Article 1, Par. 1.

(24) Article 1, Par. 2.

(25) For a list of such conventions, see *supra* note 13.

(26) ODA *op. cit.* (note 2) at 111.

(27) *Cf.* M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 44-5 (1971).

Article 6 provides that a coastal State has a special interest in maintaining the productivity of the living resources in any area of the high seas adjacent to its territorial sea, while Article 7 provides that under certain conditions coastal States may adopt unilaterally measures for the conservation of these resources. These provisions are solely concerned with conservation (28), and, for that reason alone, fail to support an Act whose major implications are in the field of allocation. Under Article 7 the only unilateral measures which coastal States may take are *conservation* measures. Thus, Article 7 can not be used by Atlantica for the purpose of excluding completely the fishermen of Neptunius from an area of the high seas which extends at least 200 miles from its coast. In addition, if Atlantica wishes to rely on Article 7, it should also respect the requirements of this Article to the effect that a coastal State may only take unilateral conservation measures for high seas stocks if (a) international negotiations have failed to produce results within six months; (b) there is a need for urgent application of conservation measures; (c) such measures are based upon appropriate scientific findings; and (d) such measures do not discriminate in form or in fact against foreign fishermen.(29) As far as these conditions are concerned Neptunius wishes to point out that (a) it has fully cooperated with Atlantica in adopting conservation measures by international agreement, which is evident from the 1970 Haddock Agreement; (b) the need for urgent application of conservation measures has arisen not out of the actions of Neptunius, but out of the fishing operations of Atlantica in the period 1960-1965 (30);

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(28) Article 6, Par. 1, reads: "A coastal state has a special interest in the maintenance of the productivity of the living resources in any area of the high seas adjacent to its territorial sea."
Article 7, Par. 1, reads: "Having regard to the provisions of paragraph 1 of Article 6, any coastal state may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other states concerned have not led to an agreement within six months."
See also the Preamble of the Convention.

(29) Article 7, Pars. 1 and 2.

(30) In 1964 Atlantica's fishery scientists estimated that the maximum sustainable yield of haddock and salmon were respectively in the range of 5000-7000 units and of 10.000-12.000 units annually. The F.A.O. estimates are 25% lower. If these F.A.O. figures are taken, Atlantica has overfished the haddock stock since 1960 and the salmon stock since 1962.

(c) the discrepancy between the maximum sustainable yield estimates of the F.A.O. and of Atlántica raise the question of whether or not Atlantica is capable of basing its conservation measures on adequate scientific findings; and (d) the 1971 Atlantica Fisheries Act categorically fails to meet the requirement of non-discrimination, since its very purpose is to prohibit the fisheries of Neptunius and other nations. (31)

I-B THE 1971 ATLANTICA FISHERIES ACT CAN NOT BE JUSTIFIED FROM THE VIEWPOINT OF ALLOCATION

In examining the 1971 Atlantica Fisheries Act from the viewpoint of allocation, attention must be given to the nature of the fisheries of Atlantica and Neptunius. Those of Atlantica are essentially coastal in nature, which implies that they are carried out by relatively small vessels which must return frequently to their home port. Neptunius' fisheries, on the other hand, are distant water fishing operations which do not depend upon a home port. (32)

Atlantica could use this difference for arguing that it is economically dependent upon the salmon and haddock fisheries off its coast, particularly in view of the fact that it is a developing country. Atlantica could then invoke its economic dependency as a basis for justifying its 1971 Fisheries Act. However, under present international law the only universal rule for the allocation of the living resources of the high seas is that they are allocated on the basis of free competition among fishing States. (33) The only specific allocation arrangements have been made so far on a regional basis and for particular species, including the 1970 Haddock Agreement between Atlantica and Neptunius. (34)

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(31) See Section 1 of the 1971 Atlantica Fisheries Act, taking also into account that fishing by foreign fishing vessels in the territorial waters of Atlantica is prohibited by Atlantica law.

(32) See on this difference McKernan, *International Fishery Regimes; Current and Future,* in L.M. ALEXANDER (ed.), THE LAW OF THE SEA; NATIONAL POLICY RECOMMENDATIONS 336, 343 (Proceedings of the Fourth Annual Conference of the Law of the Sea Institute, June 23-June 26, 1969, Kingston, Rhode Island 1970).

(33) ODA, *Some Observations on the International Law of the Sea,* 11 JAP. ANNUAL INT'L L. 37-50, 47-9 (1967).

(34) See also the conventions listed *supra* note 13.

Atlantica could also invoke the Resolution on Special Situations Relating to Coastal Fisheries (35) in support of its 1971 Fisheries Act. In this Resolution the 1958 Geneva Conference on the Law of the Sea recommended "That where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States".

As regards the relevancy of this argument, Neptunius wishes to make the following observations: (a) the Resolution envisages recognition of coastal State preferential requirements solely within the scope of conservation measures; (b) recognition of preferential requirements may under specific conditions result in certain *preferential* rights of Atlantica, but is not intended to bring about an extension of an exclusive fishery zone as embodied in the 1971 Atlantica Fisheries Act; (c) such recognition must be based on international agreement; and (d) the above Resolution as such has no binding force.

In spite of these observations Neptunius has shown its willingness to act in accordance with the spirit of the 1958 Resolution by concluding the 1970 Haddock Agreement under which Neptunius' annual catch was reduced from 1,500 units to 750 units. Unfortunately, Atlantica has unilaterally terminated this agreement by adopting its 1971 Fisheries Act.

In attempting to justify the 1971 Atlantica Fisheries Act, Atlantica could also make reference to certain recent developments within the international community, particularly to the deliberations concerning the international law of the sea in the United Nations Seabed Committee. It its *Draft Ocean Space Treaty*, submitted on 23 August 1971, Malta proposes to extend the

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(35) 450 U.N.T.S. 62.

jurisdiction of coastal States to a line 200 miles from the coast. (36) A similar approach is embodied in the *Draft Articles on Exclusive Economic Zone Concept* submitted by Kenya on 7 August 1972 (37) and in the joint proposal of Australia and New Zealand. (38) The latter proposal merely states that a coastal State must have jurisdiction in an "adequately wide zone of the high seas adjacent to its territorial sea" without committing itself specifically to the 200 mile limit. With respect to such proposals Neptunius wishes to point out: (a) that they do not represent definitive arrangements; (b) that they envisage an extension of the exclusive fishery limits of coastal States through international agreement; and (c) that a number of other proposals submitted to the United Nations Seabed Committee follow a completely different approach.

As regards the first observation, the proposals advanced by Malta, Kenya, Australia and New Zealand find support in the proposals and practice of Latin American countries, which claim exclusive fishing rights in a 200 mile zone.(39). However, these proposals and practice are essentially limited to one region of the world and, in addition, have provoked so many conflicts that they have clearly never been accepted by other States. (40) Consequently, it is impossible to take the view that these three proposals reflect a distinct consensus emerging in the United Nations deliberations; the third of the above observations is an additional argument in support of this conclusion.

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(36) U.N. Doc. A/AC. 138/53.

(37) U.N. Doc. A/AC. 138/SC. II/L. 10.

(38) *Principles for a Fisheries Regime*, Working Paper submitted on 11 August 1972, U.N. Doc. A/AC. 138/SC. II/L. 11.

(39) See 1952 Declaration on the Maritime Zone (Declaration of Santiago), *Laws and regulations on the regime of the territorial sea*, UNITED NATIONS LEGISLATIVE SERIES 723-4 (1957) and F.V. GARCIA AMADOR, LATIN AMERICA AND THE LAW OF THE SEA 3 (Law of the Sea Institute, University of Rhode Island, Occasional Paper No 14, 1972). See also 1972 Specialized Conference of Carribean Countries Concerning the Problems of the Sea (Declaration of Santa Domingo), 11 INT'L LEGAL MATERIALS 892-3 (1972).

(40) E. GARCIA SAYAN, NOTAS SOBRE LA SOBERANIA MARITIMA DEL PERU. DEFENSA DE LAS 200 MILLAS DE LA MAR PERUANA ANTE RECIENTES TRANSGRESIONES 51-7 (1955); De Azcarraga, *Onassis' Walfänger und der völkerrechtliche Begriff der Hoheitsgewässer*, (1956/57) ARCHIV DES VOELKERRECHTS 41; OUR NATION AND THE SEA; A PLAN FOR NATIONAL ACTION, Report of the Commission on Marine Science, Engineering and Resources 109 (U.S. Gov. Printing Office 1969).

As far as the second observation is concerned, it will be evident that an extension of exclusive fishery limits through international agreement reflects an approach totally different from the unilateral extension of such limits contained in the 1971 Atlantica Fisheries Act. This difference is of such decisive importance that it effectively bars Atlantica from finding support in the above proposals.

Finally, the proposals referred to under the third above observation envisage the granting of preferential rights to coastal States, rather than an extension of their exclusive fishery limits. Preferential rights schemes are contained in the proposals of the United States (41), Canada (42), Japan (43) and the Soviet Union (44). Generally, coastal States would have the right to reserve to themselves such portion of the allowable catch as they can harvest. The United States proposal would give this right to all coastal States, the Soviet proposal would give it to developing States only, while the Japanese proposal would give developing States preferential rights based upon their fishing capacity and developed States a right to reserve a portion of the catch in order to protect their small scale coastal fisheries. Foreign fishermen would continue to have the right to take those species not harvested by the fishermen of the coastal State , or to take under certain conditions that portion of the allowable catch that coastal State fishermen do not harvest. This right of foreign fishermen is not only to their own advantage, but also to the advantage of the world community as a whole, since it ensures the fullest possible utilization of the living resources of the seas. (45) Neptunius wishes to emphasize that the 1970 Haddock Agreement, under which the share of Atlantica in the total haddock catch was about six times as large as that of Neptunius, can be considered as an indication of the willingness of Neptunius to accept certain preferential rights for Atlantica.

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(41) 4 August 1972, U.N. Doc. A/AC. 138/SC. II/L. 9.

(42) 27 July 1972, U.N. Doc. A/AC. 138/SC. II/L. 8.

(43) 14 August 1972, U.N. Doc. A/AC. 138/SC. II/L. 12.

(44) 18 July 1972, U.N. Doc. A/AC. 138/SC. II/L. 6.

(45) *Cf.* Report of the Commission on Marine Science, Engineering and Resources *supra* note 40 at 90-1.

Finally, it should be observed that the 1971 Atlantica Fisheries Act does not provide for any phasing out arrangements on behalf of the fishermen of Neptunius. Such phasing out arrangements would at least enable the fishermen of Neptunius to gradually reduce their catches off Atlantica's coast and to adapt their operations to the new situation. Several countries have made provisions in their laws for recognition of "traditional" or "historic" fishing rights for foreign fishermen, whereas there are also several examples of bilateral agreements that provide for phasing out regulations. (46)

I-C THE 1971 ATLANTICA FISHERIES ACT IS A BREACH OF THE 1970 HADDOCK AGREEMENT BETWEEN ATLANTICA AND NEPTUNIUS

Under the 1970 Haddock Agreement Neptunius acquired the right to catch 750 units of haddock during the 1970 and 1971 fishing season in the waters of the high seas off Atlantica's coast. The 1971 Atlantica Fisheries Act prevented Neptunius from exercising this right during the 1971 fishing season. Consequently, the Act constitutes a breach of the obligations of Atlantica under the 1970 Haddock Agreement. (47)

Atlantica may submit that it is no longer bound by this agreement in view of the fact that a reduction in the abundance of haddock constitutes

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(46)For international practice, see Windley, *International Practice regarding Traditional Fishing Privileges of Foreign Fishermen in Zones of Extended Maritime Jurisdiction,* 63 AM. J. INT'L L. 490-503, 491 (1969).

(47) The Act, therefore, conflicts with the indisputable rule of international law: *pacta sunt servanda.* See BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW, AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 112-4 (1953); McNAIR, THE LAW OF TREATIES 493-4 (1961). Article 26 of the 1969 Vienna Convention on the Law of Treaties, 8 INT'L LEGAL MATERIALS 690 (1969), confirms the rule in the following wording: "Every treaty in force is binding upon the parties and must be performed by them in good faith."; it is worth mentioning that the adoption of the 1969 Vienna Convention on the Law of Treaties was the result of the combined action of the developing countries, while the developed countries were in a stalemate position; see Vallat, *The Vienna Convention on the law of Treaties 1969,* 40 YEARBOOK OF THE ASSOCIATION OF ATTENDERS AND ALUMNI OF THE HAGUE ACADEMY OF INTERNATIONAL LAW XI-XXVIII, XV (1970).

a fundamental change of circumstances in the sense of Article 62 of the 1969 Vienna Convention on the Law of Treaties. (48) However, a more detailed examination of this Article points out that Atlantica is not in a position to invoke this argument, since it is required that the change of circumstances was not foreseen at the time of the conclusion of the agreement – a requirement that is clearly not fulfilled, since the 1970 Haddock Agreement was prompted by the very realisation of the two countries that the abundance of haddock was declining. Both parties had foreseen this change in the factual situation underlying the agreement. Thus, the 1971 Atlantica Fisheries Act amounts to a clear breach of the 1970 Haddock Agreement.

II THE 1971 ATLANTICA FISHERIES RESEARCH ACT IS A VIOLATION OF INTERNATIONAL LAW

The conclusions of the preceding sections that the 1971 Atlantica Fisheries Act is a violation of the freedom of fishing on the high seas and can not be justified from the viewpoint of conservation and allocation have a direct bearing upon the validity of the 1971 Atlantica Fisheries Research Act under international law.

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(48) 8 INT'L LEGAL MATERIALS 702 (1969) Article 62, Pars. 1 and 2, reads:
1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
(a) if the treaty establishes a boundary; or
(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

This holds good in particular for the provisions of the Act concerning fisheries research. If the exclusive fishery zone claimed by Atlantica would be valid under international law, it could be argued that Atlantica would have the right to require its consent for fisheries research in this zone. However, the fact that the Act amounts to a violation of international law implies that Atlantica can not invoke this argument: the illegality of the 1971 Atlantica Fisheries Act leads to the illegality of those provisions of the 1971 Atlantica Fisheries Research Act that concern marine fisheries, since these are merely an implementation of the Fisheries Act.

Examining the 1971 Atlantica Fisheries Act on its own merits, Neptunius submits that the Act is a breach of international law since it unjustifiably interferes with the freedom of scientific research on the high seas. Although Article 2 of the 1958 Geneva Convention on the High Seas does not explicitly mention the freedom of scientific research (49), it is generally recognized as one of the freedoms of the high seas. (50) Neptunius fully acknowledges that the freedom of scientific research - like the other freedoms - is not absolute and that it is subject to certain general restrictions, but it submits that the specific restrictions contained in the 1971 Atlantica Fisheries Research Act are a violation of international law. Neptunius submits that there is no indication whatsoever that other States, including Neptunius, have conducted scientific research in the waters of the high seas off the coast of Atlantica without reasonable regard for the interests of Atlantica, as required by Article 2 of the 1958 High Seas Convention. Consequently, Atlantica can not refer to the above Article 2 in attempting to justify the 1971 Fisheries Research Act.

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(49) *Supra* at 1.

(50) See *I.L.C. Report, Supplement no 9*, U.N. Doc. A/3159 at 43 - point 10 (1956); W.T. BURKE, MARINE SCIENCE RESEARCH AND INTERNATIONAL LAW 1 (Occasional Paper No 8, Law of the Sea Institute, University of Rhode Island, 1970); Schaefer, *Freedom of scientific research and exploration in the sea*, 4 STAN. J. INT'L STUDIES, 46-70, 61-2 (1969); Oda, *International Law of the Resources of the Sea*, 127 RECEUIL DES COURS 363-479, 475 (1969).

The same applies to the restrictions on the freedom of scientific research which stem from Article 5, Par. 8, of the 1958 Geneva Convention on the Continental Shelf (51), to which Convention both Atlantica and Neptunius are parties.

First of all, it is evident that the types of research covered by the Act are not identical to those covered by the Convention: the Convention provides that it is necessary to obtain the consent of the coastal State for "any research concerning the continental shelf and undertaken there", whereas the Act requires the consent of Atlantica for any form of scientific research within the exclusive fishery zone related to: (a) fishery resources; or (b) the non-living resources of the seabed and subsoil. Regardless of the precise meaning of the words "any research concerning the continental shelf and undertaken there" (52), it is evident that Atlantica can not rely on this clause of the 1958 Geneva Convention on the Continental Shelf for the purpose of justifying those provisions of the 1971 Fisheries Research Act that apply to fisheries research.

A second point is that even for continental shelf research the Act exceeds the scope of Article 5, Par. 8, of the 1958 Geneva Convention on the Continental Shelf. Although this Convention does not specify a precise outer limit for the submarine areas to which it applies (53), it clearly links its area of applicability to the natural prolongation

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(51) 499 U.N.T.S. 316. Article 5, Par. 8 reads: 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.

(52) See Bouchez, *The legal regime of scientific research on the sea-bed,* in SYMPOSIUM ON THE INTERNATIONAL REGIME OF THE SEA-BED, ROME PROCEEDINGS 1970, 591-618, 600 (1970); BURKE, INTERNATIONAL LEGAL PROBLEMS OF SCIENTIFIC RESEARCH IN THE OCEANS 51 (Clearinghouse for federal scientific and technical information, PB 177 724 (1967); Brown, *Freedom of Scientific Research and the Legal Regime of Hydrospace,* 9 INDIAN J. INT'L L. 327-380, 355-6 (1969); Menzel, *Scientific Research on the Sea-Bed and its Regime,* in SYMPOSIUM ON THE INTERNATIONAL REGIME OF THE SEA-BED 619-647, 623 (1970).

(53) See Article 1 of the Convention, which reads: "For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 [illegible] that limit to wh[illegible] the depth of the superjacent

of the land territory into and under the sea. (54) In applying its 1971 Research Act not only to the edge of the continental margin, but also to a 200 mile limit if this limit is further, Atlantica requires its consent for scientific research also for those areas which undoubtedly fall outside the area to which the Continental Shelf Convention applies. (55)

In addition, Article 5, Par. 8, stipulates that the coastal State may not normally withhold its consent for continental shelf research if a request is made by a qualified institution with a view to purely scientific research. The 1971 Atlantica Fisheries Research Act, on the other hand, categorically prohibits all foreign research, although under certain conditions an exception can be made. (56) This approach of the 1971 Atlantica Fisheries Act does constitute a violation of the obligation of Atlantica under the 1958 Geneva Convention on the Continental Shelf to grant its consent for certain types of continental shelf research.

A last aspect in which the Act clearly exceeds the powers of coastal States under Article 5, Par. 8, concerns the conditions to which Atlantica subjects its consent under the 1971 Atlantica Fisheries Research Act. (57)

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waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

(54) Continental Shelf Cases, (1969) I.C.J. 22.

(55) On the problem of the precise outer limit of the continental shelf, see Oxman, *The Preparation of Article 1 of the Convention on the Continental Shelf*, 3. J. MARITIME L. COMMERCE, 245-305, 445-472, 683-723 (1971-72). See also Henkin, *The Extent of the Legal Continental Shelf*, Alexander, *Alternative Regimes for the Continental Shelf*, and Bouchez, *The Outer Boundary of National Jurisdiction*, in PACEM IN MARIBUS 1970, Vol. II LEGAL FOUNDATION OF THE OCEAN REGIME 15-30, 31-43, 50-66 (1971).

(56) See Sections 1 and 2 of the 1971 Atlantica Fisheries Research Act.

(57) Section 2 of the Act.

Article 5, Par. 8, justifies the first condition laid down in the Act, *i.e.* that at least one national of Atlantica be on board any foreign research vessel.(58) However, it does not give any support to the condition that a fee of at least $ 1,000 a day be paid. This condition amounts to an evident violation of the freedom of scientific research on the high seas.

III THE PROSECUTION BY ATLANTICA OF THE CAPTAIN OF THE POSEIDON CONSTITUTES A BREACH OF INTERNATIONAL LAW.

Considering that the 1971 Atlantica Fisheries Act is a violation of the freedom of the high seas, that this Act can not be justified from the viewpoint of conservation or from the viewpoint of allocation, that this Act is a breach of the 1970 Haddock Agreement and that the 1971 Atlantica Fisheries Research Act is a violation of international law, Neptunius submits that the prosecution by Atlantica of the captain of the Poseidon constitutes a breach of international law.

CONCLUSIONS

For the reasons hereinbefore advanced, supplemented as may be required in later stages of these proceedings, Applicant prays and requests the Court to adjudge and declare:

(1) that all of Respondent's submissions be dismissed;
(2) that Atlantica in prosecuting the captain of the Poseidon did commit a breach of international law;
(3) that Atlantica be obligated to pay adequate compensation for any and all damage caused to Neptunius by the implementation of the 1971 Atlantica Fisheries Act and the 1971 Atlantica Fisheries Research Act.

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(58) *Supra* note 51.

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