Before The

INTERNATIONAL COURT OF JUSTICE

THE STATE OF NEPTUNIUS

Applicant

V.

THE STATE OF ATLANTICA

Respondent

Memorial of the Government of the State of Atlantica

James E. Roark
Olivia C. Bibb
Russell M. Clawqes, Jr.
Michael J. Farrell
William S. Clawell, Jr.

Agents for the
State of Atlantica

16 FEBRUARY 1973

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No. 1973

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AT THE

PEACE PALACE, THE HAGUE, NETHERLANDS

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MEMORIAL OF THE STATE OF ATLANTICA

MAY IT PLEASE THE TRIBUNAL:

JURISDICTION

Jurisdiction is conferred upon this Court by special agreement of the parties in accordance with Chapter II, Article 36, paragraph 1 of the Statute of the International Court of Justice.

STATEMENT OF FACTS

A statement of facts is omitted as per authorization by the Executive Secretary of the Association of Student International Law Societies.

QUESTIONS PRESENTED

I. Where a developing coastal nation, whose economy is dependent upon the conservation of fisheries resources in waters adjacent to its territorial sea, determines that these resources are in danger of extinction from exploitation caused by excessive fishing, may that nation unilaterally establish a contiguous zone of limited jurisdiction outside its territorial sea to protect these vital resources, in accordance with international law?

II. Does prevailing international law recognize that a coastal nation has a special interest in the maintenance and protection of the living resources of the sea adjacent to its coast?

III. Does the imposition of a geographically defined exclusive fisheries zone bear a reasonable relation to conservation when past practices of nations, similarly situated, are examined?

IV. Does international law recognize, in practice, a special status for developing nations which provides that they enjoy liberalized and equitable constructions of otherwise strictly construed principles of international law?

STATEMENT OF THE LAW

CHAPTER I

THE ATLANTICA FISHERIES ACT OF 1971 AND THE ATLANTICA FISHERIES RESEARCH ACT OF 1971 ARE REASONABLE AND LAWFUL ACTIONS OF A NATION UNDER CUSTOMARY INTERNATIONAL LAW.

A fundamental principle of international law recognizes that a coastal nation possesses sovereignty, or exclusive and absolute jurisdiction in its territorial sea, i.e. the sea which extends from a line running parallel to the shore to a specified distance therefrom, commonly fixed at three marine miles measured from the low-water mark. 1 L. Oppenheim, International Law § 185 (8th ed. H. Lauterpacht 1955); Cunard v. Mellon, 262 U.S. 100 (1923).

All waters outside the territorial sea are considered part of the high sea. The doctrine of freedom of the high sea is a basic principle of the international law of the sea. C. Fenwick, International Law 498 (4th ed. 1965). This doctrine was first enunciated by Grotius in 1609. C. Columbos International Law of the Sea 62 (6th ed. Rev. 1972). To Grotius, freedom of the seas was a comprehensive doctrine which included the various freedoms which are exercised in conjunction with the sea.

Defining these freedoms and balancing them against the traditional, as well as evolving, rights of coastal nations has been a recurrent problem in the development of the international law of the sea. The problem facing Atlantica, and other developing coastal countries whose economies are directly dependent upon their off-shore fishery resources, is compounded because of a lack of consensus surrounding this area of the law of the sea.

In the instant case, the new scientific data compiled by Atlantica's scientists compelled immediate action. In the face of such an economic crisis, Atlantica cannot be expected to await the agreement of the international community in this undefined area of the law. Even if such agreement is forthcoming as a result of the Law of the Sea Conference being convened later this

year, the changed circumstances of Atlantica's fishery resources coupled with the impending economic extinction of these resources preclude postponing action until the community of nations can arrive at a compromise solution.

A. The Atlantican Acts Establishing a Contiguous Zone for Fisheries and Fisheries Research Are Lawful and Reasonable Because Unrestricted Freedom of Fishing Is No Longer a Valid Constituent of the Principle of Freedom of the Seas.

To Grotius, freedom of the high sea included freedom of fishing. The inclusion of this freedom was based upon two misconceptions: that fish are physically unmanageable and that this resource is inexhaustible. It is axiomatic that neither of these conceptions remain valid in light of contemporary developments in maritime science and technology. Consequently, utilization of fishery resources under the freedom of fishing principle is economically wasteful, as well as biologically counter-productive. F. Christy, Jr. and A. Scott, The Common Wealth of Ocean Fisheries 6-16 (1965). For these reasons freedom of fishing is "... no longer a viable principle of sound fisheries management." Jacobson, Bridging the Gap to International Fisheries Management, 9 San Diego L. Rev. 454, 458 (1972); 1 L. Oppenheim, International Law § 259 (8th ed. H. Lauterpacht 1955).

The High Seas Convention, to which Atlantica and Neptunius are signatories, purported to express the customary law in this area, and attempted to guarantee freedom of fishing. Convention on the High Seas, April 29, 1958, [1962] 13 U.S.T. 2312, T.I.A.S. No. 5200. Demonstrably, this treaty failed to codify these still fluctuating principles of international law. This is evidenced by its lack of acceptance among nations and the continued international debate which necessitated the calling of another conference.

Consequently, this Convention should not be interpreted to freeze the principles enunciated therein. Furthermore, no agreement could be reached in the contemporaneous Convention on the Territorial Sea and Contiguous Zone

regarding the extent of a coastal state's jurisdiction over fisheries. April 29, 1958 [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639. Thus, the freedom of fishing guarantee means little. Eisenbud, Understanding the International Fisheries Debate 4 Nat. Res. Law. 19, 23 (1971).

By 1968, seventy-six nations including Neptunius, claimed exclusive jurisdiction over fishing in waters adjacent to their coasts for distances of at least twelve miles or more. National Commission on Marine Resources and Engineering Development (1968), as cited in Eisenbud, Id. at 23. Both reason and the contemporary practices of many nations indicate that the customary law of unrestricted freedom of fishing has changed.

Although the point at which a continued practice becomes a custom is a question of fact

> ... whenever and as soon as a line of international conduct frequently adopted by States is considered ... legally right, the rule which may be abstracted ... is a rule of customary international law. 1 L. Oppenheim, International Law § 17 (8th ed. H. Lauterpacht 1955).

Indeed, it is one of the anomalies of international law that a series of arguably illegal acts may eventually become a general legality.

Therefore, in light of the contemporary practices of nations, underlined by the conclusions of modern scientists, it is irrefutable that unrestricted freedom of fishing is no longer reasonable under international law, any Convention to the contrary, notwithstanding.

B. Atlantica's Establishment of a Contiguous Zone for Fishery Conservation and Research is Necessary for Her National Security and Therefore Lawful and Reasonable Under International Law.

International law recognizes certain jurisdictional rights of a nation beyond the territorial sea whenever necessary for the nation's protection. M. McDougal and W. Burke The Public Order of the Oceans 612-617 (1962). The United States has exercised limited customs jurisdiction in contiguous zones

outside her territorial sea since 1790. W. Bishop, International Law 521 (2d ed. 1962). The United States Supreme Court affirmed that a nation's "power to secure itself from injury may certainly be exercised beyond the limits of its territory." Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804).

In Croft v. Dunphy, [1933] A.C. 156, the Privy Council recognized that the authority of a coastal nation in a contiguous zone was compatible with international law and instructed that:

> ... [w]hatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a state may enact laws affecting the seas surrounding its coast to a distance seaward which exceeds the ordinary limits of its territory. Id. at 162. (Emphasis added.)

Surely, international law acknowledges that there are dangers to national security other than threats of force. At Atlantica's stage of development, the threats of national starvation or economic dependency which the spectre of fishery depletion presents to her national security, are as real as those of war.

C. Atlantica's Action Is the Logical and Reasonable Extension of the Truman Proclamation and the Resultant Convention on the Continental Shelf.

In 1945 the Truman Proclamation was issued, stating that

> ... [T]he Government of the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control, Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf, 59 Stat. 884 (1945).

The motivation for this extension of jurisdiction was national self-interest and self-protection. 4 M. Whiteman, Digest of International Law 754-55 (1965). Indeed, other nations lacked the technological expertise to compete for these resources; therefore, the claim could scarcely be justified by an argument that

conservation was necessary to prevent the depletion or exhaustion of these resources.

The principle set forth in the Truman Proclamation was subsequently embodied in the 1958 Convention on the Continental Shelf. April 29, 1958 [1964] 15 U.S.T. 471, T.I.A.S. No. 5578. In the North Sea Continental Shelf Cases [1969] 41 I.L.R. 29 (International Court of Justice), this Tribunal accepted this principle as a customary rule of international law. More recently the Truman Proclamation has been relied upon as precedent by Canada in establishing a pollution control zone. Arctic waters Pollution Act, Can. Rev. Stat. c.47 (1970). Iceland also cited this principle as precedent for her extension of fishing jurisdiction in an argument before this court. Fisheries Jurisdiction Case, (Great Britain v. Iceland), 11 Int'l. Leg. Mat. 1069, 1073 (1972), (See dissenting opinion of Nervo, J.).

Developing coastal nations like Atlantica find it difficult to understand "... [w]hy the seabed and its resources should be governed differently from the superadjacent water and its resources." L. Henkin, "The Once and Future Law of the Sea," in Transnational Law in a Changing Society 155 (ed. Friedmann 1972). Consequently, Atlantica's economic dependence upon these vital resources entitles her to claim rights analogous to those first asserted by the United States.

D. Atlantica's Establishment of a Contiguous Zone of Limited Jurisdiction for Specified Activities Is a Restrained and Reasonable Action, and Lawful Under Customary International Law.

Many developing nations, and significantly, some industrialized nations, claim more extensive jurisdictions than Atlantica has in the instant case. Indeed, a majority of Latin American countries claim a two hundred mile wide territorial sea. Jacobson, supra at 455. In the Montivideo Declaration on the Law of the Sea, nine Latin American countries stated that all nations have the right to claim as much of the sea and seabed near their coasts as they deem

necessary to protect their actual and potential off-shore wealth. 64 Am. J. Int'l. L. 1021 (1970). Other Latin American nations have signed the similar Declaration of Lima. 10 Int'l. Leg. Mat. 207 (1971). Such claims are unilateral extensions of the territorial sea. But Atlantica has only claimed jurisdiction or control over fishery resources in areas adjacent to her territorial sea. As heretofore demonstrated, the right of a coastal nation to exercise such protective jurisdiction has long been accorded the status of a customary principle of international law. Such jurisdiction is lawful if the purpose is limited and specific, and involves only the exercise of control - in contradistinction to the exercise of sovereignty- over waters contiguous to the boundary of the territorial sea. 4 M. Whiteman, Digest of International Law 51 (1965). The Atlantican Fisheries and Fisheries Research Acts of 1971 do not attempt to extend sovereignty past the present limits of Atlantica's three mile territorial sea.

Many nations have extended exclusive jurisdiction over areas adjoining their coasts with respect to specific activities as Atlantica has done. For example, Canada has established contiguous zones for the purposes of pollution control, fisheries conservation and shipping. India, Pakistan and Ceylon have established fisheries conservation zones extending one hundred miles beyond the territorial sea. W. Friedmann, International Law 98 (Supp. 1972). Even Neptunius maintains contiguous zones for pollution control and fishing.

That Atlantica has acted reasonably is irrefutable. She has not extended her territorial sea. Faced with impending crisis, Atlantica only seeks to protect the fishery resources, upon which her economy is dependent, from economic extinction.

E. Atlantica Terminated the Haddock Agreement with Neptunius in Strict Adherence to the Traditional Doctrine of Rebus Sic Stantibus, a Lawful Exception to the Doctrine of Pacta Sunt Servanda According to International Law.

The fundamental international law affecting treaties is grounded upon the doctrine of pacta sunt servanda; that treaties must be performed in good faith.

14 M. Whiteman, Digest of International Law 282-298 (1970). There are, however, traditionally recognized exceptions to this rule which allow treaties to be lawfully terminated by one party; one of these is rebus sic stantibus. 1 L. Oppenheim, International Law § 539 (8th ed. H. Lauterpacht 1955).

Essentially, rebus sic stantibus, or "vital change of circumstances" means

> ... that every treaty implies a condition that, if by an unforeseen change of circumstances an obligation provided for in the treaty should imperil the existence or vital development of one of the parties, it should have a right to demand to be released from the obligation concerned. Id. (Emphasis added.)

The 1970 agreement between Atlantica and Neptunius which established haddock quotas was the result of several attempts made by Atlantica to negotiate quotas on haddock and salmon. In 1969 depletion of these stocks were evident, due to the 1966 re-entry of the Neptunius fishing fleet into the fisheries off the Atlantican Coast after a lapse of five years.

Atlantica's expectations were that this agreement would result in the conservation of haddock stocks, and that the 1964 "msy" level would be maintained, if not increased. The combined catch of both parties was limited to 4,750 units, which was well within the level suggested by Atlantican scientists of 5,000-7,000 units, and that advised by the Food and Agriculture Organization of the United Nations of 3,750-5,600 units per year.

After the agreement had been in effect for one year, data compiled by Atlantican scientists, indicated a severe depletion of both stocks, and the danger of complete economic extinction of the haddock species within two years if the total catch were not reduced to 3,500 units by 1971.

The agreement, therefore, "imperiled the existence" of Atlantica by promoting the very depletion of those resources "vital to her development" which the agreement was designed to prevent. Could this eventuality have been foreseen, different quotas would have been negotiated. However, it cannot be reasonably argued that Atlantica must await the expiration of the agreement and passively

observe the economic extinction of her most vital natural resource.

Although rebus sic stantibus is viewed as a controversial doctrine, particularly by the industrialized powers, it has been recognized by international tribunals. Free Zone of Upper Savoy and the District of Gex, [1927] P.C.I.J., ser. A/B No. 46. Even those nations which question its soundness have, when past occasions necessitated, invoked the doctrine to justify unilateral action taken in violation of existing treaty commitments. For example, the United States invoked the doctrine to authorize unilateral withdrawal from the International Loadlines Convention. [1933] 47 Stat. 2228, T.S. 858; 14 M. Whiteman, Digest of International Law 483-85 (1970). Significantly, in that case the official opinion of the United States Attorney General stated a liberal definition of the principle:

> [I]t is a well-established principle of international law, rebus sic stantibus, that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially changed. Suspension of the convention in such circumstances is the unquestioned right of a state adversely affected by such essential change. Id. at 485. (Emphasis added.)

However, in the traditional view of commentators, as well as the recent efforts to "codify" this doctrine in treaty form, there are conditions precedent which must be met by the party seeking to invoke the doctrine.

As soon as she was advised of the haddock conservation crisis, she attempted to renegotiate the agreement. Unilateral action was taken only after no agreement could be reached as required by international law in order to invoke rebus sic stantibus. 1 L. Oppenheim, International Law § 539 (8th ed. H. Lauterpacht 1955). Another requirement for invoking the doctrine is the submission of the disputed issue to judicial determination. Id. Because rebus sic stantibus has frequently been invoked as a cloak for an intended breach of the law, refusal to submit to the jurisdiction of an international tribunal is prima facie evidence of bad faith. Id. Heretofore, all nations that have asserted similar unilateral claims have refused to submit to a formal test of legality.

Jacobson, supra at 457. But Atlantica demonstrates her good faith belief in the legality of her action, and in the gravity of the conditions requiring such action, by submitting to the jurisdiction of this court.

CHAPTER II

COASTAL NATIONS HAVE A SPECIAL INTEREST IN THE MAINTENANCE AND PROTECTION OF THE LIVING RESOURCES OF THE SEA ADJACENT TO THEIR COASTS.

This special interest was first embodied in two international conventions. International Convention for the High Seas Fisheries of the North Pacific Ocean, art. 3, 4, May 9, 1952, [1952] 4 U.S.T. 380, T.I.A.S. No. 2786; Northwest Atlantic Fisheries Convention, art. 4(2), Feb. 8, 1949, [1950] 1 U.S.T. 477, T.I.A.S. No. 2089. The prerequisite for action under these agreements was a substantial economic investment by the coastal nation in the adjacent waters. Applying this standard, Atlantica has demonstrated the expenditure of large sums of money to protect and propagate the salmon species in its Red River project. While these conventions are persuasive as representing actual practice by maritime nations, the Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas must be considered. This Convention, in Articles 6 and 7, authorizes unilateral conservation measures by a coastal nation upon the showing of a legitimate conservation crisis without regard for a showing of a substantial economic investment in the waters. Atlantica's scientists relying on their own research, and figures compiled by the Food and Agriculture Organization of the United Nations, have substantiated that a crisis exists. The fact that neither Neptunius nor Atlantica are signatories to this convention is of little significance since this Convention embodies the prevailing international law of the sea regarding the achievement of fisheries conservation by unilateral action. Therefore Atlantica's claim to a 200 mile exclusive fisheries zone is consistent with contemporary international law which recognizes the special interest of a coastal nation.

A. The United States and Russia Have Exercised Their Special Interest in the Sea Adjacent to Their Coasts Through Establishment of Conservation Zones

Toward the end of World War II, the American fishing industry's concern about renewed foreign fishing competition in the post war period prompted the Truman Proclamation on the Conservation and Protection of Fishery Resources. 59 Stat. 885 (1945). The Legal Adviser to Department of State subsequently stated that "[t]he sole purpose of the proclamation was to make possible by appropriate legal means the prevention of the depopulation and destruction of international fishing grounds." 32 Dep't. State Bull. 934, 937 (1955). Despite provisions for consultation when areas were jointly fished by two nations, the proclamation unilaterally reserved exclusive American conservation zones where fishing activities "have been or in the future may be developed and maintained" solely by American nationals. 59 Stat. 885 (1945). In 1956, the Soviet Union, concerned about the unregulated fishing of salmon off its coast, restricted all salmon fishing on the high seas adjacent to their coast by unilateral decree. 4 M. Whiteman, Dig. Int'l. L. 1020 (1965). This unilateral action was "[w]ith the aims of safeguarding and guaranteeing the high stable level of the stocks of Far-east salmon, the catching of which is the principal occupation of the population of the Soviet Far East" after domestic scientific data reflected the threat of salmon extinction. Id. at 1021. Moreover in 1966, after severe depletion of coastal fishery resources by Japanese and Russian fleets, the United States took unilateral action through domestic legislation by creating a nine mile exclusive fisheries zone adjacent to the existing three mile territorial sea. 16 U.S.C. §§ 1091-94 (1970). This legislation represented a departure from the United States position, at the Geneva Conferences, that a three mile fisheries zone was the prevailing international law of the sea. Enforcement of this legislation resulted in substantial fines imposed on foreign intruders. Exemplary of these fines were the $10,000 paid by the Russian trawler SRTM-8457 in March, 1967, and the $50,000 paid by the Japanese KYOYO

MARU which was seized in September, 1971. Oliver, Wet War-North Pacific, 8 San Diego L. Rev. 621, 626, 629 (1971). Furthermore in 1967, the United States and Russia bilaterally decalred a moratorium on fishing certain anadromous species in a 4,600 mile square area in the Middle Atlantic. Agreement on Certain Fisheries Problems on the High Seas in the Western Areas of the Middle Atlantic, Nov. 25, 1967, [1967] 18 U.S.T. 2864, T.I.A.S. No. 6377. Even though this agreement purports to limit only American and Russian fishing, other fishing nations were expected to respect the moratorium as a legitimate conservation measure. When the United States and Russia asserted their unilateral and bilateral claims, they were praised for their conservation consciousness. Atlantica has enacted lawful and reasonable domestic legislation, designed to achieve conservation, with the expectation of receiving international cooperation.

B. The Special Interest of Other Nations is Reflected in Their Claims to Extended Territorial Seas and Exclusive Fisheries Zones in Recent Years

From its inception, the International Law Commission of the United Nations recognized the right of coastal nations to implement unilateral conservation measures. 4 M. Whiteman, Dig. Int'l. L. 1116 (1965). The role of the coastal nation to use fishery resources to benefit its populace was embodied in the Santiago Declaration, signed by Chile, Ecuador and Peru in 1952, which affirmed in Article 1 that "governments are bound to insure for their peoples access to necessary food supplies and to furnish them with the means of developing their economy." U.N. Doc. No. ST/LEG/SER. B/16 (1952). Consequently, this responsibility of coastal states was approved by the 1955 Rome Technical Conference in Articles 28 and 29; which served as the model for a similar provision in the 1958 Geneva Convention on Fishing and Conservation of Living Resources. U.N. A/CONF. 10/6 (1955).

Atlantica's emphasis on the humanitarian and conservation aspects of the Latin American claims has been intentionally stressed since this is the basic similarily between the two positions. Atlantica believes that the companion

claims of these countries to a 200 mile territorial sea is not in the best interests of the international community and freedom of navigation. Atlantica views its conservation zone as analogous to that prescribed by the Truman Proclamation on Fisheries Conservation in that "free and unimpeded navigation are insured." 59 Stat. 885 (1945). Atlantica, along with Costa Rica, El Salvador and Nicaragua realize that a limited claim for conservation purposes can operate in harmony with commercial intercourse when the 200 mile claim extends only to fisheries jurisdiction.

The failures of the Hague Codification Conference of 1930 and of the Geneva Conferences on the Law of the Sea, in 1958 and 1960, to set territorial sea limits has left each State with the responsibility to fix its own limits. A few nations, notably Great Britain, have forcefully resisted the movement to extended fisheries jurisdiction. The United States has tacitly recognized numerous claims to such fisheries zones by compensating foreign nations directly (paying fines) or indirectly (reimbursing fishermen) for intrusions into these exclusive fisheries. In 1971 alone, the United States paid Ecuador $3,000,000.00 for violations by American fishermen. N.Y. Times, Jan. 31, 1972, at 2, col. 1. More recently, the United States signed an agreement with Brazil under which Washington agreed to limit the number of American shrimp boats in Brazil's 200 mile territorial sea. 11 Int'l Legal Mat. 453 (1972). Furthermore, the United States agreed to cease fishing in spawning areas, to pay Brazilian fishing fees and limit the type of fishing gear employed with 200 miles of the coast. Despite the reluctance of the United States to officially recognize the Brazilian claim, these acts of payment and voluntary limitation constitute acceptance of the 200 mile claim.

Significantly China has recently changed her posture regarding the international law of the sea and now supports the right of a coastal nation to claim jurisdiction to adjacent waters extending 200 miles. N.Y. Times, Mar. 20, 1972,

at 12, col. 1. Iceland's concern for its economic survival coupled with a need for conservation necessitated extension of its fisheries jurisdiction to 50 miles during 1972. N.Y. Times, Sept. 2, 1972, at 2, col. 3. The fundamental rights of coastal nations are best collected in the Declaration of Latin American Countries on the Law of the Sea, signed by fourteen nations, which recognized:

> (1) The right of the coastal State to exploit the resources of the sea adjacent to its shore in order to develop the economy of its inhabitants and to raise their standard of living.
>
> (2) The right of the coastal State to establish the limits of its maritime sovereignty and jurisdiction according to reasonable criteria...
>
> (3) The right of the coastal State to supervise and protect its waters from contamination.
>
> (4) The right of the coastal State to regulate the above-mentioned principles without prejudice of the freedom of navigation. 10 Int'l Legal Mat. 207 (1971).

Respecting the principle of negotiation in the event of a conservation crisis, as embodied in the Geneva Convention on Fishing and Conservation, Atlantica contacted Neptunius concerning the crisis caused by the overfishing in an attempt to initiate negotiations. The resort to unilateral domestic action was taken only after these negotiations failed and Atlantican scientists warned that possible extinction of the species was possible unless prompt remedial action began. Therefore Atlantica, as a coastal nation with a special interest in the conservation of the anadromous salmon and demersal haddock, undertook the only lawful and reasonable course of action by enacting the Atlantica Fisheries Act of 1971 and the Atlantica Fisheries Research Act of 1971.

CHAPTER III

ATLANTICA'S CLAIM TO AN EXCLUSIVE FISHERIES ZONE IS REASONABLY RELATED TO THE CONSERVATION CRISIS

A. The Erratic and Distinctive Habits of the Salmon Species Necessitates the Imposition of Exclusive Control of the Fisheries to Insure Effective Conservation

The salmon, reknowned for their ability to return to their spawning grounds, are subject to excessive exploitation by commercial fishermen who are able to

locate the migratory path and drop their nets. F. Christy and A. Scott, The Common Wealth of the Ocean Fisheries 77 (1965). Similarly the salmon are vulnerable to exploitation because of the biological phenomena, peculiar to the species of milling and blocking. H. Crutchfield, The Pacific Salmon Fisheries 28 (1968). The salmon's acute sense of odor differentiation, thought to account for their ability to return to original spawning waters, also causes them to mill, i.e. remain stationary in large concentrations, in the coastal waters when the spawning streams are chemically unbalanced or too low to allow access. Some salmon, while in their migratory path, tend to block, i.e. bunch into large groups while moving, as they approach their fresh water source. H. Crutchfield, supra at 25. Whether the salmon actually stop, as in milling, or block while moving, the fisherman with access to coastal waters can indiscriminately annihilate an entire species.

The distinctive breeding habits of the anadromous salmon are critical to resolution of this dispute in that the anadromous species yields only one or two classes of young salmon each year and the continued existence of the species depends on their return as adults to spawn. Contrasted with the anadromous species are the demersal and pelagic salmon which send representatives of all age groups on migratory trips while retaining a sufficient number of adults to continue spawning despite excessive exploitation occurring during any one season. H. Crutchfield, supra at 23. The high probability of physical extinction because of the peculiar breeding habits of the anadromous salmon demanded the imposition of immediate conservation measures by Atlantica. Therefore, the necessity of closing the entire fishery and claiming 200 miles is logical since the erratic and discontinuous nature of the salmon movement would render any action short of an exclusive fishery ineffective.

B. The Resort to Abstention by the United States and Canada in the Northwest Pacific Salmon Fisheries Demonstrates the Difficulty of Maintaining An Open Fishery Where Anadromous Salmon Are Endangered

The practice of abstention from fishing has been utilized by the United States and Canada since 1923. The basic precepts of the doctrine were embodied in the report of the International Law Commission in 1956:

> (a) When States have created, built up, or restored productive resources through the expenditure of time, effort and money on research and management, and through restraints on their own fishermen, and
>
> (b) The continuing and increasing productivity of these resources is the result of and dependent on such action by the participating States, and
>
> (c) Where the resources are being so fully utilized that an increase in the amount of fishing would not result in any substantial increase in the sustainable yield, then:
>
> (d) States not fishing the resources in recent years, except for the coastal State, should be required to abstain from fishing these stocks as long as these conditions are fulfilled. 4 M. Whiteman, Dig. Int'l L. 968-969 (1965).

The United States and Canada presented a joint proposal at the Geneva Convention of 1958 that the doctrine of Abstention be recognized as international law; the proposal received majority approval but fell short of the required two-thirds vote. Id. at 969. The applicability of this principle to Atlantica's salmon fishery is irrefutable. Atlantica has expended large sums of money in developing the Red River spawning areas and continued spending to develop the species is certain. Furthermore the record reflects that Atlantica is fully utilizing the "msy" and that Neptunius had not been fishing the Atlantican waters for the five year period prior to this crisis, 1960-1965.

Noteworthy, in the inclusion of abstention in the Convention for the High Seas Fisheries of the North Pacific Ocean is the recognition that precise forecasting of the salmon runs was impossible because of their erratic and discontinued nature. In addition to abstention, this treaty provides for complete closure of the fishery when absolute control of fishing is necessitated. [1952] 4 U.S.T. 380, T.I.A.S. No. 2786. Closure, as a conservation tool, is now employed

by the United States and Canada on the average of four to five days per week during the catching season with total closure imposed during the winter months. H. Crutchfield, supra at 144. (Emphasis added.) Realistically the differences between Atlantica's exclusive fisheries zone and the doctrine of closure are insignificant. Both achieve the same result of strict conservation controls because of the movement patterns of the salmon. If the United States and Canada with their sophisticated research capabilities rely on closure for absolute control, it is reasonable that Atlantica, with limited research capabilities, should rely on a comparable exclusive fisheries zone.

Moreover the alternative of reducing the efficiency of Neptunius' fleet by imposing restrictions on net sizes, use of electronic fish finding devices or a ban on traps results in economic waste to the fisherman and uncertain conservation effectiveness. The added costs of fishing with these handicaps encourages overfishing and disregard of the law in that several large illegal catches will more than equal the fine. Therefore, the claim to an exclusive fisheries zone by Atlantica parallels the conservation techniques of abstention and closure recognized and employed by a majority of the countries attending the Geneva Convention and should be approved by this Tribunal.

C. Exclusive Control of the Fishery is Also Necessary to Allow Atlantican Scientists the Opportunity to Restore the Depleted Salmon by Artificial Means

Salmon propagation can take the form of replacing natural habitats, transplanting runs, and supplementing existing spawning areas. S. Shapiro, Our Changing Fisheries 464 (1971). Regardless of which system of restoration is utilized, the control of the migratory area is vital. The use of hatcheries, spawning channels or incubation boxes each requires close observation of the experiences of the young salmon. Should fishing powers, such as Neptunius, be free to disrupt these artificial projects, thousands of dollars of research will be wasted. These artificial runs of salmon can be developed along the entire coastline of Atlantica with each group of adults developing its own migratory route to and from

the spawning stream or reservoir. It is anticipated that these migratory routes will pass through the demersal haddock feeding grounds. While it is presently impossible to predict that the migrating salmon will not be exploited beyond the 200 mile zone, the increased difficulty for the fisherman in identifying the migratory path should provide comprehensive protection. Furthermore the fisherman's use of conventional salmon and haddock gear at water depths beyond 200 miles will substantially reduce their efficiency. F. Christy, supra at 91. When migratory paths cannot be located, the salmon fisherman will normally use hand lines rather than nets. Id. These hand lines are ill-equipped to fish effectively at the depths normally found 200 miles from a coastline. The basic commercial fishing gear for haddock is the trawl which consists of a bag or funnel shaped net normally drawn across the ocean bottom. Id. at 90. The effective use of these trawls presupposes the presence of large schools of haddock. Appendix A to the record in this case reveals that the haddock feed and live almost exclusively within the 200 mile Atlantican conservation zone. Demonstrably the imposition of Atlantica's zone is a conservation measure in that it protects the salmon and haddock in their vulnerable migratory routes and feeding grounds. The need to save the endangered fish, to propagate new fish through research projects and to feed the populace of Atlantica sufficiently justifies the action taken.

CHAPTER IV

INTERNATIONAL LAW RECOGNIZES, IN PRACTICE, A PREFERRED POSITION FOR DEVELOPING NATIONS AND PROVIDES THAT THEY ENJOY LIBERALIZED AND EQUITABLE INTERPRETATIONS OF OTHERWISE STRICTLY CONSTRUED PRINCIPLES OF INTERNATIONAL LAW

Established principles of international law may be advantageous to a developed nation and have an adverse effect on a developing nation. Such principles may not hinder a world power, but work a ruinous hardship upon an emerging nation. It can be logically asserted, then, that principles of international law are allocaters of advantages and disadvantages. Historically, developed nations have been the recipients of such advantages, while developing nations are often disadvantaged by strict adherence to traditional principles of international law. Further, such principles rest largely upon the past

practices of the few developed nations, law developed without the participation or consent of most developing nations. R. Falk, Status of Law In International Society 513 (1970); see also Barcelona Traction Case, [1970] I.C.J. 1, 3. World stability demands that principles of international law should be construed to encourage, not discourage, the economic and social progress of developing nations. Such an approach is not novel. Developing nations such as Atlantica now occupy a special status in many areas of international law, most notably as members of the United Nations. U.N. Charter arts. 55-59; see also General Agreement on Tariffs and Trade, Oct. 30, 1947, [1948] 61 Stat. (5)(6), T.I.A.S. No. 1700, particularly arts. 36-38. In 1970, the United Nations Conference on Trade and Development approved a comprehensive system of generalized tariff preferences for developing nations. U.N. Docs. TD/B/329/Add.5 (1970). Clearly, the emphasis of traditional trade preferences for the sole benefit of developed countries has shifted to similar preferences extended to developing nations, because they are developing nations. 14 M. Whiteman, Dig. Int'l L. 781-82 (1970). New variable standards for compensation after expropriation is another example of the evolutionary adjustment of international law to the special needs of developing nations. R. Falk, supra at 340.

Finally, it is generally recognized that

> ...[e]quity is an element of international law itself...its function is to liberalize and temper the application of law, to prevent extreme injustice in particular cases, to lead into new directions for which received materials point the way. M. Hudson, The Permanent Court of International Justice 1920-1942 617 (1943).

Article 38 of the Statute of the International Court of Justice does not expressly authorize this Court to apply equity; it does direct the application of general principles of law recognized by civilized nations. In many countries principles of equity are a part of the legal system. Independently of Article 38, this Court is free to apply principles of equity. River Meuse Case, [1937] P.C.I.J., ser. A/B, No. 70. Equitable principles are demanded. Atlantica catches 87% of its fish from its adjacent coastal waters, Neptunius a mere .0025% there. Prior to 1966 Neptunius had not fished this area for five years. At present, the world's second largest fishing fleet can simply fish elsewhere. Therefore Atlantica urges this Court to consider principles of equity, and Atlantica's preferred status as a developing coastal nation.

PRAYER

ON THE PRECEDING PRESENTATION OF ARGUMENT AND AUTHORITIES:

May It Please The Tribunal

to DISMISS the Application of the Government of Neptunius against the Government of Atlantica.

May It Please The Tribunal

to ADJUDGE and DECLARE that the Atlantica Fisheries Act of 1971 and the Atlantica Fisheries Research Act of 1971 are lawful exercises of Authority under customary international law and RECOGNIZE that coastal States have a special interest in the living resources of their adjacent sea which can be lawfully protected by unilateral action when a conservation crisis is demonstrated and that traditionally underdeveloped nations have been accorded preferential treatment in their attempts to achieve parity, and to ORDER the Government of Neptunius to respect the provisions of the 200 mile exclusive fisheries and research zone adjacent to the Atlantican coast.

For ALL OF WHICH the Government of Atlantica now prays be GRANTED.

RESPECTFULLY SUBMITTED

Olivia Cooper Bibb

William Stuart Calwell

Russell Maxwell Clawges, Jr.

Michael Joseph Farrell

James Edward Roark