BEFORE THE

International Court of Justice

March, 1973

No. 001

THE STATE OF NEPTUNIUS,
Applicant,

—Against—

THE STATE OF ATLANTICA,
Respondent.

MEMORIAL FOR APPLICANT

Regarding An INTERNATIONAL FISHERIES DISPUTE

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INTERNATIONAL AGREEMENTS

Convention on the Continental Shelf (done April 29, 1958) 15 U.S.T. 471 (1964), in force June 10, 1964. . . . . 11, 12, 18,19

Convention on the High Seas (done April 29, 1958) 13 U.S.T. 2312 (1962), in force Sept. 30, 1962 . . . . 11, 17, 19

Convention on the Territorial Sea and the Contiguous Zone (done April 29, 1958) 15 U.S.T. 1606 (1964), in force Sept. 10, 1964. . . . . 11, 14

CASES

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TREATISES

Brownlie, Principles of Public International Law (1966) 15

McNair, The Law of Treaties (1961). 4

BOOKS AND PAMPHLETS

D. Bowett, Law of the Sea (1967). 9

W. Burke, Marine Science Research and International Law (Law of the Sea Institute, U. of R.I., Occasional Paper No. 8, Sept. 1970). 19

C. J. Colombos, Int'l Law of the Sea (1967) 9, 10

P. Fye, Ocean Policy and Scientific Freedom (1972). 9, 19

Kasahara, Food Production From the Ocean (1967) 14

Knauss, Factors Influencing a U.S. Position in a Future Law of the Sea Conference (1971) 13, 15

D. McKernan, The U.S.-Peru Fishery Dispute and U.S. International Fishery Policy (1970) 8, 10, 13

J. Rousseau, Second Discourse (1755). 16

JOURNALS AND PERIODICALS

Bilder, The Canadian Arctic Waters Pollution Prevention Act: New Stresses on the Law of the Sea, 69 Mich. L. Rev. 1 (1971) 16

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Borgese, The Seas: A Common Heritage, 5 The Center Magazine 21 (March/April 1972) 19

Brown, Freedom of Scientific Research and the Legal Regime of Hydrospace, 9 Indian J. Int'l L. 327 (1969) 18, 19

Burke, A Contemporary Legal Problem in Ocean Development, 3 Int'l Lawyer 536 (1969) 10, 14

Clingan, Scientific Inquiry in the Oceans: Legal Regulation and Responsibility, 6 Lex et Scientia 77 (1969) 20

Dean, The Second Geneva Conference on the Law of the Sea, 54 Am. J. Int'l L. 751 (1960) 8, 10

Eisenbud, Understanding the International Fisheries Debate, 4 Natural Resource Lawyer 19 (1971) 10

Garner, Law of Treaties, 29 Am. J. Int'l L. Supp. 653 (1935). 3

Green, International Law and Canada's Anti-Pollution Legislation, 50 Ore. L. Rev. 462 (1971) 11

Loring, The U.S.-Peruvian Fisheries Dispute, 23 Stanford L. Rev. 391 (1971). 15

Oxman, The World Outlook for the International Law of the Sea, 1971 Law of the Sea Reports 3 (1972) 19

Shaker, Fundamental Change of Circumstances, or: The International Law Commission and the Doctrine Rebus Sic Stantibus, 23 Rev. Egyptienne de Droit Int'l 109 (1967) 4

Stang, Political Cobwebs Beneath the Sea, 7 Int'l Lawyer 1 (1973) . . . 10

Stevenson, Who is to Control the Oceans, 6 Int'l Lawyer 465 (1972). . . 9, 14

MISCELLANEOUS

Presidential Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf (1945), 3 C.F.R. § 67 (1943-48 Comp.) 12

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JURISDICTION

Jurisdiction has been conferred upon the International Court of Justice by agreement between the parties. I.C.J. Stat. art. 36, para. 1.

STATEMENT OF FACTS

The parties have stipulated to a specific statement of facts herein incorporated by reference to the Record.

QUESTIONS PRESENTED

I

Whether seizure of the Poseidon by Atlantica violates her treaty on haddock with Neptunius?

II

Whether Atlantica's unilateral extension of its exclusive fisheries zone beyond the accepted twelve mile limit violates international law?

III

Whether the "Atlantica Fisheries Research Act of 1971" violates international law?

SUMMARY OF ARGUMENT

I

Seizure of the fishing vessel Poseidon by Atlantica violates the two year, bilateral haddock treaty with Neptunius. The maxim pacta sunt servanda requires that Atlantica fulfill her obligations under the haddock treaty. Additionally, the slight decrease in haddock MSY alleged by Atlantica fails to allow unilateral termination of the haddock treaty under the doctrine "fundamental change of circumstances" (rebus sic stantibus). This doctrine does not apply because: (1) Atlantica fails to demonstrate a substantial change of circumstances; (2) any changes that did occur were foreseeable; and (3) the changes failed to radically transform the scope of Atlantica's obligations during the final months of the treaty.

II

Atlantica's unilateral extension of its exclusive fisheries zone beyond the accepted twelve mile limit serves to erode the historic doctrine of "freedom of the seas." The action violates the Territorial Sea and Contiguous Zone Convention, since that treaty stipulates that no country can extend a zone further than twelve miles seaward. In addition Atlantica's action is in contravention of the Conventions on the High Seas and Continental Shelf. Furthermore, such an arbitrary zone cannot effectively protect the salmon, and may well decrease the available protein supply needed for world consumption. A two-hundred mile exclusive zone will impair both freedoms of transportation and commerce. Atlantica's flagrant disregard of international law will set dangerous international precedent.

III

The "Atlantica Fisheries Research Act of 1971" violates international law. The Act violates Atlantica's duty under both the Convention on the High Seas and the Convention on the Continental Shelf. Additionally, the research act violates the general, international principle supporting freedom of scientific research.

ARGUMENT

I. SEIZURE OF THE POSEIDON BY ATLANTICA VIOLATES HER TREATY ON HADDOCK WITH NEPTUNIUS.

A. THE ACTIVITIES OF THE POSEIDON RELATED ONLY TO HADDOCK, MAKING THE 1970 TREATY CONTROLLING.

The Poseidon was seized on March 15, 1971, by the Atlantica Coast Guard at a point fifty miles from the coast of Atlantica, in the haddock migratory route. (R. Annex A) As she was approximately forty-four miles from any point along the salmon migratory route, Neptunius contends that the proceedings against the Poseidon were based exclusively upon her catch of haddock.

In 1970, Atlantica signed a bilateral agreement with Neptunius regulating the allowable catch of haddock during the 1970 and 1971 fishing seasons. Under the treaty Atlantica agreed that Neptunius had the right to take 750 units of haddock each season. (R.3) The facts demonstrate no treaty violation by Neptunius, and if the Court finds the treaty in effect on March 15, 1971, Neptunius contends the seizure violated international law.

B. THE DOCTRINE OF PACTA SUNT SERVANDA MAKES ATLANTICA'S UNILATERAL ARROGATION OF THE HADDOCK TREATY INVALID.

In 1935, the Harvard Research Draft Convention spoke to *pacta sunt servanda* in Article 20 of their Law of Treaties:

> A State is bound to carry out in good faith the obligations which it has assumed by a treaty (*pacta sunt servanda*).

Garner, *Law of Treaties*, 29 Am. J. Int'l L. Supp. 653, 977 (1935). The Harvard Research comments upon Article 20 state that the maxim has never been repudiated by any tribunal and that it is a mere declaration of what is thought to be an universally accepted rule of customary international law. The doctrine was restated in 1949, by the International Law Commission in Article 13 of its draft Declaration on Rights and Duties of States.

Of primary interest, however, is the 1969 Vienna Convention on the Law of Treaties, which included *pacta sunt servanda* as Article 26:

> Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

Though not yet in force, the 1969 Vienna Convention has been considered by the International Court to represent a partial codification of existing customary law on the subject.

See, Advisory opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 47. The comments of the International Law Commission on the 1969 Vienna Convention state that pacta sunt servanda is "the fundamental principle of the law of treaties." Report of the Commission to the General Assembly, 1966 2 Y.B. Int'l L. Comm'n 172, 211 U.N. Doc. A/Cn.4/Ser.A/1966/add.1 (1967).

McNair discusses pacta sunt servanda and the general presumption against unilateral treaty termination with the statement that only through mutual agreement may a treaty containing no termination provision be broken, particularly when the terminating party has benefitted under the treaty. McNair, The Law of Treaties 494 (1961). Atlantica has benefitted under the 1970 bilateral haddock treaty in that Neptunius restricted its 1970 catch of haddock to half of the 1,500 units harvested in 1969. Atlantica cannot reap such benefit and then unilaterally denounce its treaty obligation for the 1971 season. There was a total absence of agreement by Neptunius to terminate the haddock treaty. In fact, Neptunius filed a formal diplomatic protest to Atlantica's unilareral termination, which denies effect to the latter's action. (R.5)

Atlantica's unilateral treaty arrogation reflects a new, dangerous tendency among developing States to view treaty obligations lightly and terminate them cavalierly. Shaker, Fundamental Change of Circumstances, or: The International Law Commission and the Doctrine Rebus sic Stantibus, 23 Rev. Egyptienne de Droit Int'l 109, 121 (1967). Accepting Atlantica's contention that they may disregard the maxim pacta sunt servanda will undermine the international treaty making process. Without confidence that the International Court and the world community will support the fulfillment of treaty obligations, this most important tool for the cultivation of international harmony will be damaged severely. To avoid such a catastrophe to world order, Neptunius prays that the Court hold Atlantica's actions against the Poseidon to be a breach under international law of the maxim pacta sunt servanda.

C. THE DOCTRINE "FUNDAMENTAL CHANGE OF CIRCUMSTANCES" (REBUS SIC STANTIBUS) DOES NOT PERMIT UNILATERAL TERMINATION OF THE HADDOCK TREATY BY ATLANTICA.

The assertion by Atlantica's scientists that the haddock stock was in danger of "total economic extinction" within two years if the annual catch was not reduced from

4,750 units to 3,500 units failed to justify unilateral termination of the haddock treaty under the doctrine "fundamental change of circumstances" (rebus sic stantibus). This doctrine is perhaps the most feared and severely limited maxim of international treaty law. Article 62 of the 1969, Vienna Convention on the Law of Treaties sets forth in narrow, negative terms the standards required to terminate a treaty due to "fundamental change of circumstances." Applicable portions of Article 62 provide that a "fundamental change of circumstanes" may not be invoked to terminate a treaty, unless: (a) a change occurs; and (b) the change was unforeseen; and (c) the effect of the change radically transforms the extent of obligations still to be performed under the treaty. As discussed below, if the claimed change did not clearly take place, or if the above requirements of Article 62 are not met, Atlantica's unilateral treaty termination violates international law.

Relunctance of the treaty draftsmen to include the doctrine even in its severely limited form are reflected by the introductory comments of the International Law Commission:

> Most jurists, however, at the same time enter a strong caveat as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked; for the risk to the security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are obvious. The circumstances of international life are always changing and it is easy to allege that the changes render the treaty inapplicable.

Reports of the Commission to the General Assembly, supra at 257. Neptunius contends that Atlantica's assertion of "fundamental change of circumstances" exemplifies the exact misuse feared by the Commission. Allowing Atlantica to fine the captain of the Poseidon and ignore her treaty obligations on the grounds of "changed circumstances" will encourage nations to terminate treaties at their convenience every time fluctuations are predicted in any field related to a treaty.

1. The Alleged Change Is Without Scientific Foundation.

Atlantica fails to scientifically demonstrate a conclusive change of circumstances. Her scientists stated the haddock take must be reduced from the 4,750 units allowed under the treaty to 3,500 units as their estimated maximum sustainable yield, MSY, which is a decrease of approximately 26%. (R.3) Atlantica, however, has neither sophisticated

research facilities nor personnel. (R.1) In fact, the Food and Agricultural Origaniztion of the United Nations demonstrated error of 20%-25% in Atlantica's 1964 research efforts. (R.2) Since no evidence of improved scientific methods is found in the record, Neptunius asserts the Court should question the scientific validity of Atlantica's claimed haddock MSY decrease, particularly when the change nearly equals the 1964 degree of error.

Also, the claim of severe depletion of haddock stock during the 1970 season was based exclusively upon admittedly "incomplete data." (R.3) If Atlantica "abided by the bilateral agreement on haddock during the 1970 season," as stated in the Record (R.3), her 1970 take was 4,000 units. This represents a substantial INCREASE of 1,000 units or 33 1/3% from her 1969 catch, making questionable a claim that 1970 data reflected a "severe depletion in stocks."

2. If Any Changes Occurred, They Were Foreseeable At The Time The Treaty Was Executed, Which Prevents Application Of The Doctrine "Fundamental Change Of Circumstance."

Article 62 of the Vienna Convention on the Law of Treaties is limited to changes which were not foreseen by the parties when the treaty was executed. Neptunius asserts that a decline in haddock resources was not only foreseen by the parties, but was an important basis upon which this treaty was negotiated and executed.

The International Law Commission commented that the doctrine "fundamental change of circumstances" would seldom or never have relevance to treaties of limited duration. Reports of the Commission to the General Assembly, supra at 259. The haddock treaty was for an unusually brief term. Its two year duration indicates the States fully foresaw the haddock availability uncertainties for the years ahead and chose to conclude a short term treaty in that light.

The treaty was concluded on the basis of MSY estimates previously shown to be questionable. Additionally, a steady and substantial annual decline in the haddock take for the four years preceeding the execution of the 1970 haddock treaty is demonstrated. (R.2) One can hardly conclude that the parties did not foresee haddock stock fluctuations in the near future. Nestling such changes among emotional cries of "total economic extinction" fails to justify invocation of the narrow maxim rebus sic stantibus.

3. The Changes Fail To Radically Transform The Scope Of Obligations Still To Be Performed Under The Treaty.

Article 62 of the Vienna Convention of the Law of Treaties forbids assertion of the doctrine rebus sic stantibus unless the change radically transforms the scope of the obligations still to be performed under the treaty. The 26% decline in MSY for haddock, claimed by Atlantica as grounds for termination of the haddock treaty, does not transform anyone's obligations radically or otherwise.

Atlantica's questionable scientific data indicated a desire to reduce the total haddock catch to 3,500 units for the second and final year of her treaty obligation with Neptunius. (R.3) Atlantica could have achieved the desired MSY, and fulfilled her international treaty obligation, by reducing her catch to 2,750 units for one year. Such action would have been highly preferable to her decision to arrogate the treaty obligation in violation of international law.

A decrease of 1,250 units of haddock would not represent a new experience for Atlantica's haddock industry. In 1966, the Atlantica haddock catch dropped by 4,000 units and in 1967 by 2,500 units. (R.2) Absorbing the entire haddock decrease would leave Atlantica only 500 units below the 3,000 unit catch of the year preceeding execution of the treaty. Also, upon execution of the 1970 treaty Atlantica increased her take by 1,000 units and Neptunius, in good faith, accepted a fifty percent reduction in her allowable haddock catch. For Atlantica to absorb the 1,250 unit decrease for one year seems only fair in light of the generous bargain gained by Atlantica under the treaty.

Moreover, the unilateral action of Atlantica in totally excluding Neptunius failed to alleviate the haddock problem. Without Neptunius, the take was only reduced by 750 units; still 500 units short of the MSY level allegedly required to avoid "total economic extinction." Yet the record reflects no collateral domestic legislation to restrict Atlantica's catch to 3,500 units. A similar disregard for legitimate conservation concern is reflected by the fact that after determining a questionably high haddock MSY of 5,000 to 7,000 units in 1964, (R.1) Atlantica continued to increase her haddock catch at the excessive level of 10,000 units for both the 1965 and 1966 seasons. (R.2) Reduction of her own catch for 1971 was a viable alternative to treaty termination that

Atlantica could and should have pursued to obviate her possible haddock dilemma. Atlantica's assertion of a slight decrease in haddock MSY therefore fails to satisfy the requirement under the doctrine rebus sic stantibus that the alleged changes radically transformed the scope of her obligations during the final months of the treaty.

II. ATLANTICA'S UNILATERAL EXTENSION OF ITS EXCLUSIVE FISHERIES ZONE BEYOND THE ACCEPTED TWELVE-MILE LIMIT VIOLATES INTERNATIONAL LAW AND, IF ALLOWED TO STAND, WILL HAVE ADVERSE GLOBAL RAMIFICATIONS.

A. FREEDOM OF THE SEAS IS ONE OF THE MOST BASIC CONCEPTS IN INTERNATIONAL ORDER, AND ANY EXTENSION OF A STATE'S EXCLUSIVE CONTROL OVER THE OCEAN BEYOND THE TWELVE-MILE LIMIT INFRINGES UPON THIS PRINCIPLE.

1. The "Freedom Of The Sea" Is An Historic International Doctrine.

Throughout history, nations have attempted to extend their exclusive national jurisdiction over broad areas of offshore waters. This ancient and conservative position, referred to as mare clausam, was evident as early as Roman days, when that civilization declared itself ruler of the oceans. Venice declared itself sovereign of the Adriatic, and Sweden and Denmark affirmed their control over the Baltic. The Papal Bull of 1493 divided the oceans between Portugal and Spain, the former receiving sovereignty over the Indian Ocean and the South Atlantic, and the latter receiving jurisdiction over the Pacific and the Gulf of Mexico. Dean, The Second Geneva Conference on the Law of the Sea, 54 Am. J. Int'l L. 751 (1960). In 1588, England defeated the Spanish Armada, which ended the ocean monopoly of Spain and Portugal. After this battle, economic and commercial trade greatly increased, Grotius declared the concept of freedom of the seas, and the oceans began to open up. By the beginning of the 19th century, claims of sovereignity over the high seas were universally restricted. The maximum control that a nation could claim over the ocean was limited to approximately three miles, based upon the medieval estimate of the effective range of a cannon mounted on the shore.

> It was natural that such a doctrine [mare clausam] should have prevailed in the age when man's horizons were narrow . . . . But when the great age of development of world-wide commerce came, that doctrine was found to be no longer useful and it was discarded in favor of the free use of the seas by all nations. The doctrine and practice of the freedom of the seas has served mankind well since that time.

D. McKernan, The U.S.-Peru Fishery Dispute and U.S. International Fishery Policy 2 (1970).

At the present time there is an increasing demand for use of the ocean and its resources. What is needed is increased resource development. Any extension of a nation's territorial sea results in a contraction in the high seas; thus the rights of all nations are subsequently curtailed. If a 200 mile limit, whether for sovereignty or fisheries, is adopted world-wide, more than 30%, and up to 50% of the ocean would no longer be high seas but would be subject to coastal state sovereignty. P. Fye, Ocean Policy and Scientific Freedom 6 (1972). Fauchille once said:

> The high seas does not form part of the territory of any State. No State can have over it the right of ownership, sovereignty or jurisdiction. None can lawfully claim to dictate laws for the high seas.

C. J. Colombos, Int'l Law of the Sea 62 (1967). An extension of natural jurisdiction over the seas is thus an antiquated doctrine that could push the law of the ocean back into the closed sea era of the 15th century.

2. According To International Law, The Maximum A State Can Extend Exclusive Control Over The Oceans Is Twelve Miles.

Although many states still insist that no state may claim more than the traditional three mile territorial sea, state practice no longer accords with that principle. State practice does, however, establish the twelve mile territorial sea as the maximum territorial sea that may be claimed by any state. Approximately 58 nations claim a territorial sea of twelve miles, with approximately 50 nations claiming less than twelve miles. Stevenson, Who Is to Control the Oceans, 6 Int'l Lawyer 465 (1972).

Although the Conventions passed in the 1958 Law of the Sea Conference substantially codified the law of the oceans, they failed to produce agreement in two primary areas. Agreement could not be reached concerning either the breadth of the territorial sea or fishery limits. Once again, in the 1960 Conference, no agreement could be reached concerning these issues. However a compromise proposal, offered by Canada and the United States, failed to gain the necessary two-thirds vote by only one vote, 54-28, with 5 abstentions. D. Bowett, The Law of the Sea 11 (1967). A clear majority of the nations felt, however, that the territorial sea should be no more than twelve miles. This accords with present state practice.

It is widely held that evidence of the acceptance by nations of rules of law may be regarded as binding upon the nations of the world. It is not necessary to demonstrate that all nations have accepted the rule as obligatory. See, C.J. Colombos, supra. Thus, since close to 90% of all coastal states, or slightly over 90 nations, limit their jurisdiction claims to twelve miles or less, it is apparent that a twelve mile territorial sea enjoys the status of customary international law, as evidenced by state practice. Stang, Political Cobwebs Beneath the Sea 7 Int'l Lawyer 1, n.9 (1973). It seems equally clear that a twelve mile fishery zone probably now enjoys the force and status of customary law. Eisenbud, Understanding the International Fisheries Debate, 4 Natural Resource Lawyer 19 (1971). However, at this time there is definitely no customary international law that allows for an extension of this boundary either for purposes of sovereignty or an exclusive fishery zone. In fact, it appeared at the 1958 and 1960 Conferences on the Law of the Sea that there was wide agreement that any claim exceeding twelve miles, for either purpose, was unlawful. Burke, A Contemporary Legal Problem in Ocean Development, 3 Int'l Lawyer 536 (1969). Unilateral pronouncements are a recognized method for creating international law, but a clear pattern must emerge, and no protest can be made by an affected state. Only approximately 20 nations maintain a greater claim than twelve miles. Of these, only about nine nations have adopted a 200 mile exclusive fishery zone, with an additional two nations claiming a 200 mile zone for other purposes. D. McKernan, supra. We contend that since less than 8% of the maritime nations have claims of 200 miles, this is clearly deficient to demonstrate the acceptance by states of such a zone. As Dean declares:

> . . . unilateral extension by municipal law of the limits of its territorial sea into the high seas . . . and the consequent reduction of the high seas area, or the establishment of an exclusive fishery zone in the high seas to try to exclude vessels of foreign nations, will not be valid in international law unless and until it is recognized by other states.

Dean, supra at 769. Neptunius filed a diplomatic protest to both Atlantica's acts, thereby not recognizing Atlantica's unilateral action. Atlantica does not have the right unilaterally to claim a zone longer than twelve miles and then enforce this claim against ships and citizens of foreign vessels. Thus, the seizure of the fishing vessel Poseidon by the Atlantica Coast Guard, while the ship was 50 miles off the coast of Atlantica, was delictual.

3. Atlantica Has Violated The 1958 Conventions On The Territorial Sea, The High Seas, And The Continental Shelf.

Part II, Article 24(2) of the Convention on the Territorial Sea and the Contiguous Zone (done April 29, 1958) 15 U.S.T. 1606 (1964), in force Sept. 10, 1964, states: "The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured." Atlantica is a signatory to this treaty; thus, it should obey its provisions. Since Atlantica has a territorial sea of three miles, its contiguous zone can only extend another nine miles. The high seas should begin twelve miles from the coast of Atlantica. However, by adopting the "Atlantica Fisheries Act of 1971," Atlantica created a contiguous fishery zone extending well beyond twelve miles. Thus Atlantica has violated the Convention on the Territorial Sea and Contiguous Zone. Atlantica is not fulfilling its international obligation to perform its treaties in good faith, or pacta sunt servanda.

Furthermore, Atlantica is in violation of the Convention on the High Seas (done April 29, 1958) 13 U.S.T. 2312 (1962), in force Sept. 30, 1962, of which it is also a signatory. Article 2 of that convention assures the right of any nation to fish, navigate, lay submarine cables, and to fly over the high seas. These four enumerated freedoms on the high seas could not be more explicit. How, therefore, can Atlantica's unilateral claim of an extended fishing zone into an area of the high seas possibly be valid? Atlantica's claim of an exclusive fishing zone extending 100 miles into the high seas, or up to the continental margin, depending upon which is farther, cannot be valid in the face of the High Seas Convention and is a direct violation of international law.

In addition, Atlantica is in breach of its legal obligations under the Convention on the Continental Shelf, to which it is a party. The Continental Shelf Convention was derived from the Truman Proclamation on the Continental Shelf, issued in 1945. Green, International Law and Canada's Anti-Pollution Legislation 50 Ore. L. Rev. 462 (1971). The Truman Proclamation referred only to the resources of the Continental Shelf, and it specifically stated: "The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected." Presidential Proclamation No. 2667, Policy of the United States with Respect to the

Natural Resources of the Subsoil and Seabed of The Continental Shelf (1945), 3 C.F.R. § 67 (1943-48 Comp.). The Convention on the Continental Shelf embodies these basic principles in Article 3, by ensuring the maintenance of the superjacent waters as high seas, and stating that the exploration and exploitation of the continental shelf "must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea. . . ." If Atlantica was satisfied in merely extending its exclusive fishery jurisdiction up to the Continental Shelf, it would even then have been in violation of the Convention, since the Convention only applies to exploitation of the natural resources of the seabed and subsoil. Atlantica was not so easily satisfied, however, and extended its fishery zone up to 200 miles, or to the Continental Margin, which ever distance is greater. The continental margin of Atlantica is, on the average, approximately 140 miles further seaward than is the continental shelf. There is absolutely no justification under any principle of international law to so extend a contiguous zone to the continental margin. Determining the fishery boundary by the continental margin transforms this zone into a geological zone rather than a fishery zone and clearly stands in contravention of the Convention on the Continental Shelf.

B. A 200 MILE EXCLUSIVE FISHERY ZONE CAN NOT ADEQUATELY PROVIDE FOR THE CONSERVATION OF THE INVOLVED SPECIES AND WILL HAVE ADVERSE EFFECT ON THE WORLD'S NEED FOR PROTEIN.

1. The Atlantica Fisheries Act of 1971 Cannot Provide Adequate Conservation Protection For Salmon.

Neptunius affirms its desire to see that an adequate and efficient exploitation of the living resources of the sea, with full regard for conservation, be implemented by the world community. Neptunius is also firmly committed to maintaining the maximum sustainable yield of the species involved. Applicant submits, however, that Atlantica's unilateral action will not tend to serve these laudable goals but will impede both conservation and rational exploitation of the species involved.

Anadromous species, like the salmon, cannot be protected by an arbitrary zone of so many miles. The salmon, a migratory species, does not respect artificial boundaries. The Atlantica scheme does not accord with biological realities. Unilateral demarcation, therefore, is insufficient to prevent over-fishing. There are various uncertainties in

individual state management. If each coastal state regulated its part of the ocean, there would be inconsistent quotas, limitations, and enforcements. Thus, although Neptunius fully understands and appreciates Atlantica's concern for its fish, their concern must be accommodated through international or regional agreements, rather than through its unilateral discretion.

Furthermore, since fish mate in shallow water, most fish are caught near the shore.

> With the exception of whales and tuna, all major fisheries are conducted (or could be conducted) either in shallow water or very close to shallow water. Salmon is the other major fish caught in the open ocean, but since salmon are anadromous they could be caught, and caught much more efficiently, as they begin their run upstream.

J. Knauss, Factors Influencing a U.S. Position in a Future Law of the Sea Conference 11 (1971). Thus Atlantica's extension of its fisheries control is not mandated by any real conservational concern nor is it required in order to maintain its present harvest. It is designed to prevent foreign fishing vessels from competing with its industry. This is not an adequate justification for such an extension, since precedential values and the ramifications of such an act are indeed costly to the entire world community.

2. A 200 Mile Extension May Decrease The World's Protein Supply.

Neptunius is firmly committed to the objective of encouraging the development of the resources of the sea and in widening the distribution of these benefits in order to fight world hunger and malnutrition. Neptunius does not deny that Atlantica has a legitimate interest in exploiting the fisheries off its coast, but all fish stocks must be made available to the world at large, as well as to the people of Atlantica. The world demand for resources is expected to double by 1985, and triple by 2000. It is the consensus of the world scientific community that, although there have been great increases in fish harvests, much more fish could be caught at a sustainable level. D. McKernan, supra at 3. The riches of the ocean cannot be wasted. Atlantica does use its resources fully as pertaining to haddock, but this cannot be said as to other species of fish along its coast. If nations like Atlantica continue to expand their fishery zones, productivity would decrease while the world demand increases! Most developing coastal states, including Atlantica, cannot fully exploit all the species in their exclusive areas. At the same time, these developing nations exclude foreign fishermen. The countries with the most

efficient fishing fleet would be banned, and the result would be less fish for the world. Burke, A Contemporary Legal Problem in Ocean Development, supra at 536. All evidence supports the conclusion that coastal nations have not increased productivity. A free seas regime will enable developing countries to achieve a viable fishery industry, free of unilateral restrictions of coastal states. Kasahara, Food Production from the Ocean 36 (1967).

Allowing developing nations like Atlantica to expand exclusive fishery limits will foster a decrease in the food supply available to nations desperately in need of protein. Nothing of consequence can be gained by allowing such unilateral expansion, while much would be lost. The traditional freedom of the seas would be impinged, states without a coast line might well suffer from inequitable distribution, and valuable resources would be lost to the world. At a time when the world is crying for protein, what is needed is the greatest possible freedom of access to the ocean and its resources, in order to increase ocean productivity. Therefore, Atlantica's unilateral creation of an exclusive fishery zone is opposed to the needs of the world community, and must be held invalid.

C. A 200 MILE EXCLUSIVE ZONE WILL IMPAIR BOTH FREEDOMS OF TRANSPORTATION AND COMMERCE.

1. Available Air And Sea Space, Needed For Commercial Activities, Will Be Decreased.

If Atlantica is allowed to so extend its control over the high seas, other coastal nations will likely follow suit. A coastal state, then, would be able to enforce certain regulations in their exaggerated contiguous zone to "Prevent infringement of its customs, fiscal, immigration or security regulations within its territories or territorial sea." Convention on the Territorial Sea and Contiguous Zone, supra. Thus each coastal state may well have different regulations, and the discretion to enforce these regulations would seriously hamper high seas travel. Stevenson, Who Is to Control the Oceans, 6 Int'l Lawyer 465 (1972).

Applicant contends that even more dangerous and serious ramifications would result if coastal states eventually change the status of their contiguous zones to territorial seas. If all coastal nations had a universally recognized territorial sea of 200 miles, free air as well as free sea space would be dramatically reduced. The result would be disastrous. According to Article 2 of the Convention on the Territorial Sea, the

sovereignty of a state extends to the air space above its territory. Since there is no right of innocent passage afforded an aircraft flying over another nation's territorial waters, air travel by all nations would be curtailed. New treaties would then have to be entered into, or old treaties would have to be revised; otherwise more costly and lengthy circuitous routes would have to be resorted to, with the result that aerial and naval movements would be greatly restricted, if not made impossible by the creation of these "high seas lakes." The seas must be kept open to all nations, so it can serve as an "international highway." To allow Atlantica to extend its control over the high seas, therefore, is to set a dangerous precedent, which may well have adverse effects for the entire world.

2. Other Coastal States Will Follow The Pattern Of "Creeping Jurisdiction."

"Creeping jurisdiction" is a dangerous concept. In short, "creeping jurisdiction" means the extension of jurisdiction for one purpose leads inevitably to expansion of the jurisdiction into a territorial sea. Peru is a perfect example. In a matter of 22 years, Peru's jurisdiction has "crept" from a modest fishery claim to absolute sovereignty. Loring, The U.S.-Peruvian Fisheries Dispute, 23 Stanford L. Rev. 391 (1971). "What is certain is that claims to jurisdiction have always tended to harden into claims to sovereignty." Brownlie, Principles of Public International Law at 170 (1966). Neptunius feels it mandatory that extensions of jurisdiction are thwarted at the beginning, so as to prevent free seas from becoming "national lakes."

3. If All Coastal States Claimed A Territorial Sea Of 200 Miles, The Oceans Would Be Effectively Partitioned, And Most International Straits Will Be Closed.

Neptunius is deeply concerned with the right of free transit through international straits. If a twelve mile territorial sea gains universal acceptance, and states uniformly adopt a twelve mile territorial sea instead of three miles, 116 straits would be affected. J.Knauss, supra at 3. If the territorial sea was uniformly extended to 200 miles, the problems posed become even more formidable since this would effectively prevent entrance to the Baltic, the Sea of Japan, the South China Sea, all passages to the Artic, the Carribean and the Gulf of Mexico. J. Knauss, supra at 4. A vast area of ocean, equal in size to the Atlantic Ocean, would be placed under national control,

leaving only pockets of high seas, with access controlled by the coastal states. This possibility should not be permitted to occur.

D. ATLANTICA'S ACTIONS SETS DANGEROUS PRECEDENTS IN DISREGARD OF INTERNATIONAL LAW.

The world must attempt to live by the rule of law, rather than by the rule of force. There is a great need for general respect of international law. It must continue to grow and adapt to the changing needs of the time. Unilateral action, especially action that is contrary to established rules of law, should not be permitted. Unilateral action thwarts the aims of collective action and impedes the progressive development of international law, besides setting dangerous precedents. Thus a nation acting illegally should not be able to justify its actions by declaring that it is helping to develop international law. Bilder, The Canadian Artic Waters Pollution Prevention Act: New Stresses on the Law of the Sea, 69 Mich. Law Rev. 1 (1971). If coastal states are able to extend their seaward limits whenever they so desired, the result would be both international conflict and chaos. They only way to reverse the trend of unilateral extensions of sovereignty would be by the use of force. The stronger nations would probably emerge the victor. The seas might well quickly become partitioned and dominated by a few nations, to the disadvantage of the entire world.

Neptunius is firmly convinced of the equity of "freedom of the seas." Atlantica's unilateral extension of jurisdiction over fisheries to 200 miles or up to the continental margin, whichever is greater, is an archaic and isolationist viewpoint. It would obstruct numerous activities desperately needed by the world community, and would evenutally be based upon who had the stronger military force. Atlantica chould not be permitted to "fence in" the oceans. The philosopher Jean Jacques Rousseau once said:

> The first person who, having fenced off a plot of ground, took it into his head to say this is mine and found people simple enough to believe him. . . . What crimes, wars, murders, what miseries and horrors would the human race have been spared by someone who, uprooting the stakes or filling in the ditch, had shouted to his fellow-men: Beware of listening to this imposter; you are lost if you forget that the fruits belong to all and the earth to no one!

J. Rousseau, Second Discourse (1755). Today we stand on the threshold of another frontier, the frontier of the ocean. Today this court can uproot the stakes for good, and proudly

declare, "The fish belong to all, and the ocean to no one!" Such a stand is necessary to perserve equity among the nations of the earth.

III. THE "ATLANTICA FISHERIES RESEARCH ACT OF 1971" VIOLATES INTERNATIONAL LAW.

The record fails to demonatrate any evidence that the Poseidon was engaged in research at the time she was seized. She is a fishing vessel, and there is no reasonable explanation for Atlantica's attempting to bolster her charges by invoking the "Atlantica Fisheries Research Act of 1971." (R. Annex C) Assuming arguendo that the Poseidon was violating the research statute, Neptunius contends, for the reasons discussed below, that the research statute is contrary to international law and, therefore, the prosecution under it is void.

A. THE RESEARCH ACT IS A BREACH OF ATLANTICA'S DUTY UNDER THE CONVENTION ON THE HIGH SEAS.

Both Atlantica and Neptunius are parties to the Convention on the High Seas, supra. (R. Annex D). Under Article 1 of the Convention, "high seas" are defined as "all parts of the sea that are not included in the territorial sea or in the internal waters of a State." Atlantica claims a "territorial sea" of three miles. Those portions of the Blue Ocean in excess of three (3) miles from the Atlantician coast are "high seas." The Poseidon was seized and fined for allegedly conducting research "approximately fifty miles off the coast" of Atlantica. (R.5) The Poseidon was therefore seized and fined for allegedly conducting research on the "high seas."

Article 2 of the Convention on the High Seas provides that "the high seas being open to all nations, no state may validly purport to subject any part of them to its sovereignty." Article 2 enumerates four freedoms a state may exercise on the high seas: Navigation, fishing, laying submarine cables and pipelines, and overflight. However, these freedoms are not exclusive, for Article 2 acknowledges other freedoms "recognized by the general principles of international law. . . ," which include freedom of scientific research. The Commentary of the International Law Commission states, with regard to Article 2:

> The list of freedoms of the high seas contained in this article is not restrictive. The Commission has merely specified four of the main freedoms, but is aware that there are other freedoms such as freedom to undertake scientific research on the high seas (emphasis added). . . .

II I.L.C. Yearbook 278 (1956). Thus, the research act is a direct violation of Atlantica's duty as a party to the Convention on the High Seas.

B. THE RESEARCH ACT IS A BREACH OF ATLANTICA'S DUTY UNDER THE CONVENTION ON THE CONTINENTAL SHELF.

Both Atlantica and Neptunius are parties to the Convention on the Continental Shelf, supra. (R. Annex D). Article 5(1) provides in full:

> The exploration of the continental shelf and the exploitation of its natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other scientific research carried out with the intention of open publication. (Emphasis added.)

By providing that coastal State's activities must not result in any interference with research, paragraph 1 accords a greater degree of protection to scientific research than to navigation, fishing or the conservation of the living resources of the sea; all of which are safeguarded against only unjustifiable interference. Brown, Freedom of Scientific Research and the Legal Regime of Hydrospace, 9 Indian J. Int'l L. 327, 353 (1969). Article 5(1) preserves the position of the International Law Commission taken in 1956, that "freedom to conduct research in the waters superjacent to the Continental Shelf was in no way affected by the coastal state's exclusive rights in the Continental Shelf." Id. at 354.

Atlantica's research act forbids scientific research relating to "fishing resources" not only above the Continental Shelf, but above the entire 200 mile plus "exclusive fisheries zone" she illegally claims (see arg. II, supra). Since the Poseidon is a fishing vessel, the charges under the research act would relate to "fishing research." And Article 5(1) of the Convention on the Continental Shelf forbids Atlantica from any interference with scientific research. Seizing the Poseidon constituted this forbidden interference; thus, the research law permitting such an act by Atlantica in derrogation of her commitment under Article 5(1) of the Convention on the Continental Shelf is a violation of international law.

Additionally, Article 5(8) of the Convention on the Continental Shelf provides in part: "The consent of the coastal State shall be obtained in respect of any research concerning the continental shelf undertaken there. . . . (Emphasis added.) Consent for

research is herein required only regarding "any research concerning the continental shelf undertaken there." As noted by Brown, "It is thus not applicable to research concerning the Continental Shelf not undertaken there but conducted from the superjacent waters and involving no physical contact with the sea-bed or subsoil." Brown, supra at 355. Thus, the restrictions of Section 1(b) of the "Atlantica Fisheries Research Act of 1971" forbidding scientific research without consent related to "the non-living resources of the seabed and subsoil" conflicts with Atlantica's obligation under Article 5(8) of the Convention on the Continental Shelf.

C. THE RESEARCH ACT VIOLATES FREEDOM OF SCIENTIFIC RESEARCH, WHICH IS A GENERAL PRINCIPLE OF INTERNATIONAL LAW.

Scientific research, regardless of who conducts it, benefits all mankind and must be encouraged. Oxman, The World Outlook for the International Law of the Sea, 1971 Law of the Sea Reports 3, 9 (1972). Unfortunately, developing nations such as Atlantica have become generally suspicious of the research activities of more developed states like Neptunius. See, W. Burke, Marine Science Research and International Law (Law of the Sea Institute, U. of R.I., Occasional Paper No. 8, Sept. 1970). Developing states distrustinly view freedom of research as freedom of research for the rich. Borgese, The Seas: A Common Heritage, 5 The Center Magazine 21 (March/April 1972). As stated above, the comments on Article 2 of the Convention of the High Seas reflects the fact that "freedom of scientific research" is one of the fundamental freedoms of the sea under customary international law. (See, Arg. III A, supra.) Yet the increasingly vocal developing nations, confusing economic exploitation and national security with the true objectives of scientific research, have taken a stand reflected by Atlantica's research act opposing scientific freedom of the seas. P. Fye, Ocean Policy and Scientific Freedom 8 (1972). Such a position is unfortunate, not only for the states able to conduct research, but for the developing states themselves. Neptunius concedes that Atlantica may exercise reasonable control over research conducted within twelve miles of her coast. An Atlantican is welcome aboard research vessels within twelve miles, and he will be given complete access to instruments relevant to the experiments being conducted. Similarly, all data and the results of the research will be made available to Atlantica. In this

respect Neptunius has long supported "open publication" of research results, which will ultimately benefit both Atlantica and the world community. However Atlantica's two-hundred mile exclusive research zone, and her minimum fee stipulations are unreasonable.

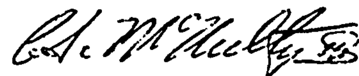
If States are allowed to forbid scientific research more than two-hundred miles from their coast, scientists will no longer be able to study the ocean as an integrated system. "If significant areas of the system are to be declared 'off limits,' then the conclusions resulting from scientific research could be subjected to gaps and erroneous speculations." Clingan, Scientific Inquiry in the Oceans: Legal Regulation and Responsibility, 6 Lex et Scientia 77, 86 (1969). If upheld by this Court, the "Atlantica Fisheries Research Act of 1971," and similar acts which other developing States will enact if Atlantica is not stopped, will stifle international oceanographic research.

Similarly, Atlantica's minimum $1,000 per day research fee under Section 2(c) of the Act is unreasonable. Atlantica sets no maximum; thus fees of $10,000 or $100,000 per day could be extorted from nations desiring to conduct research. Even the $1,000 per day fee will prevent research by vessels of other developing nations. The Act provides that consent "shall require" a fee, consequently Atlantica must charge even the poorest nations the minimum fee of $1,000 a day. If all States begin charging huge research fees, the world's scientific community will be suffocated. World fishery resources will either be overfished, as exemplified by Atlantica's excessive haddock catches during 1965 and 1966, or left unharvested while populations go hungry.

CONCLUSION

For the reasons stated, Neptunius respectfully urges that this Court find the seizure and fining of the Poseidon illegal under international law.

Respectfully submitted,



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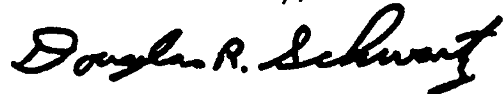

Douglas R. Schwartz