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BEFORE THE

**International Court of Justice**

March, 1973

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No. 001

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THE STATE OF NEPTUNIUS,  
*Applicant,*

—Against—

THE STATE OF ATLANTICA,  
*Respondent.*

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MEMORIAL FOR RESPONDENT

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Regarding An INTERNATIONAL FISHERIES DISPUTE

David M. Shapiro  
Lawrence M. Tuskey  
*Agents for Respondent*

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JURISDICTION

Jurisdiction has been conferred upon this Tribunal by agreement of the parties.

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#### QUESTIONS PRESENTED

- I. Whether Atlantica has the right to terminate unilaterally the haddock allocation treaty?
- II. Whether Atlantica's contiguous fishery zone is permissible under current international maritime law?
- III. Whether Atlantica had jurisdiction to seize and prosecute the Neptunian ship, Poseidon?
- IV. Whether the Neptunian ship Poseidon may be prosecuted under the "Atlantica Research Act of 1971"?

#### SUMMARY OF ARGUMENT

I. The withdrawal of Atlantica from its bilateral haddock treaty was in accord with international law. Atlantica has complied with the requirements of invoking the doctrine of rebus sic stantibus both as it has historically existed and as it is now codified in the Vienna Convention on the Law of Treaties.

II. " . . . [T]he day of freedom of the seas as Grotius knew it are over . . . .[W]e are in a period of evolving a new legal order for the oceans." Comments of Jared Carter, Assistant Legal Advisor for Economic Affairs, United States Department of State in 50 Ore. L. Rev. 491, 496 (1971). Atlantica, as a developing coastal nation highly dependent upon its fisheries resources, has extended its competence through a fishery conservation zone. As no universal rule concerning this matter exists in international maritime law at present, Atlantica must be judged by a subjective standard and by the present practices of other developing coastal states.

III. Anticipatory self-defense and the doctrine of protection validate Atlantica's jurisdiction in the fisheries zone over the Poseidon. Submission to I.C.J. jurisdiction affirms Atlantica's good faith.

IV. Once a State establishes an exclusive fishery zone, it has the right to protect the zone's resources from exploitation by other States. The "Atlantica Research Act of 1971" merely sets standards which must be met by those interested in doing research in the exclusive fishing zone. Finally, the criteria of the measure are not prohibitively harsh.

## ARGUMENT

### I. THE WITHDRAWAL OF ATLANTICA FROM ITS BILATERAL TREATY WITH NEPTUNIUS WAS NOT A VIOLATION OF INTERNATIONAL LAW.

#### A. THE DOCTRINE OF "REBUS SIC STANTIBUS" EXISTS IN INTERNATIONAL LAW.

After discovering that the stock of haddock had become severely depleted, and upon the refusal of Neptunius to modify the treaty, Atlantica terminated the haddock allocation treaty. Since the treaty by its own terms did not preclude termination before its normal expiration of two years, Respondent contends that it was within its right under customary international law in adopting this action in response to a severe conservation crisis. The basic doctrine on which Respondent relies is that of rebus sic stantibus or, as it is referred to by current commentators, "fundamental change of circumstances". Respondent admits that there has existed a lack of uniformity among legal scholars concerning the application of this doctrine. However, it will be shown that the doctrine, as codified in Article 62 of the Vienna Convention on the Law of Treaties, is applicable in this instance.

The idea that a State may terminate a treaty where certain circumstances have changed is one of the oldest rules of international conventions. It was applied in the ancient Greek and Islamic law and in the Canonic law of the Middle Ages. Shaker, The International Law Commission and the Doctrine Rebus Sic Stantibus, 23 Rev. Egyptienne de Droit International 109, 111 (1967). In subsequent centuries, it was taken over into civil law and was a maxim "convenio omnis intelligitur rebus sic stantibus". Paul, The Doctrine "rebus sic stantibus" in International Treaties, 17 Acta Universitatis Carolinae - Juridica (No. 2) 163, 164 (1970).

More recently, the doctrine was invoked by France in withdrawing from the integrated command of NATO. Although France did not invoke the rebus sic stantibus doctrine expressio verbis, the statements of General de Gaulle ("Nothing can cause an alliance to continue as it stands when the conditions in which it was created have changed . . .") left no doubt that France was relying on the doctrine. Stein and Carreau, Law and Peaceful Change in a Subsystem: "Withdrawal" of France from the North Atlantic Treaty Organization, 62 Am. J. Int'l L. 577 (1968).

That the United States recognizes the doctrine is also indisputable. When extricating itself from the Load Line Convention in 1941, the Acting Attorney General of the United States wrote, "the fundamental character of the change in conditions underlying the treaty . . . leaves the Government of the United States entirely free to declare the treaty inoperative or to suspend it for the duration of the present emergency." 40 Ops. Att. Gen. 119, 123 (1941). See also, Briggs, The Attorney General Invokes Rebus Sic Stantibus, 36 Am. J. Int'l L. 89, 90, 93 (1942). The doctrine is also expressed in the basic American treatise on foreign relations. Restatement (Second) of Foreign Relations Law of the United States §153 (1965).

Additionally, "fundamental change of circumstance" has been invoked in debates in the political organs of the United Nations. Briggs, Rebus Sic Stantibus Before the Security Council: The Anglo-Egyptian Question, 43 Am. J. Int'l L. 762, 769 (1949). The existence of the principle is not usually debated; only its specific application is questioned. The Secretary-General in a study concluded during the League of Nations era, fully accepted the existence of the principle in international law. Paul, supra at 175.

Although this Tribunal has not committed itself on the point, it has dealt with the principle. In the Case of the Free Zones of Upper Savoy and the District of Gex, [1932] P.C.I.J., ser. A/B, No. 46, the Court held that the facts did not in the particular controversy justify the application of the doctrine of "fundamental change of circumstances". The Court, however, expressly reserved its position with regard to future application of this principle. Professor Brierly, referring to the opinion states: "Despite the caution of the language of the Court, it seems to define clearly the scope of the doctrine," and also, "as defined by the Permanent Court the doctrine of rebus sic stantibus is clearly a reasonable doctrine which . . . international law should recognize . . ." J. Brierly, The Law of Nations, 336, 388 (1963). Lauterpacht agrees with Brierly and writes that the Court was obviously prepared to recognize the principle in the Free Zones case. H. Lauterpacht, The Development of International Law by the International Court 84 (1958).

B. ARTICLE 62 OF THE VIENNA TREATY ON TREATIES REPRESENTS A CODIFICATION OF EXISTING INTERNATIONAL LAW.

The Vienna Convention on the Law of Treaties was adopted by the United Nations Conference on the Law of Treaties in Vienna on 22 May 1969, by a vote of 79 to 1, with 19 abstentions. Since Article 84 necessitates 35 ratifications, the Convention has not entered into force. Nevertheless, Respondent asserts that the status of Article 62 is de lege lata and that it should be recognized by this Tribunal. Whatever may have been the law prior to the Vienna Convention adoption of 22 May 1969, a significant process of definition and consolidation of the customary international law of treaties has taken place through the work of the International Law Commission; and this customary international law became crystallized through the adoption of the Vienna Convention.

The International Law Commission's codification functions must be examined with reference to Article 38 of the Statute of the International Court of Justice. This article denotes the following as a source of international law:

Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, [are] subsidiary means for the determination of rules of law. I.C.J. Stat. art. 38, para. 1(d).

The International Law Commission more than satisfies this criterion since it is composed of "persons of recognized competence in international law" (Int'l L. Comm'n Stat. art. 2, U.N. Doc. A/CN.4/4/Rev. 1 (1962)). Members of the Commission are drawn from "the main forms of civilization and . . . principal legal systems of the world." Int'l L. Comm'n Stat. art. 8, U.N. Doc. A/CN.4/4/Rev. 1 (1962). As an international organization, national governments have the opportunity to comment on its drafts, thereby giving the commission a uniquely practical source of material to work into its formulations. H. Briggs, The International Law Commission (1965).

With regard to the Vienna Convention, one authority on international legislation notes that there existed general agreement that every article was to apply retroactively prior to its entry into force save Article 66 (dealing with procedures). Rosenne, The Temporal Application of the Vienna Convention on the Law of Treaties, 4 Cornell Int'l. L. J. 1, 23 (1971). Rosenne also states that, "it would be a rash legal advisor who, on the

technical ground that the Vienna Convention is not yet in force, . . . failed to have regard for [it] at least [with respect to] any international treaty concluded since May 22, 1969." Id. at 23. The treaty between Atlantica and Neptunius was signed in 1970.

Finally, this Tribunal in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. 16, 47, cited and in part quoted Article 60 stating, "The rules laid down by the Vienna Convention . . . may in many respects be considered as a codification of existing customary law on the subject."

C. THE TERMINATION OF THE HADDOCK AGREEMENT FULFILLED THE REQUIREMENTS OF ARTICLE 62.

There are six limiting conditions in Article 62. For the doctrine of fundamental change of circumstances to be available, Respondent must comply with each condition.

1. The Change Was Of Circumstances Which Had Not Existed At The Time Of The Conclusion Of The Treaty.

Atlantica asserted that research proved that the total catch had to be reduced to 3, 500 units. The analysis showed that the change had occurred. Thus, it is clear that the supply of fish existing in 1970, and upon which the 1971 quotas were based, changed dramatically.

2. The Possibility Of Such A Dramatic Drop In The Stock Within Two Years Was Not Foreseen By The Parties.

The most controversial phrase of Article 62 was that the change must be one that "was not foreseen by the parties." See Lissitzyn, Treaties and Changed Circumstances (Rebus Sic Stantibus), 61 Am. J. Int'l L. 895, 916 (1967). Respondent argues that the exact reason for the two year agreement was that it was assumed to be a safe period of time and that there was thought to be stability in the fishing stock. Had the parties felt that a conservation crisis could occur within that time, a shorter period (perhaps seasonal quotas) would have been formulated. Surely both parties realized that technological advancements had resulted in an increasing number of overfished stocks. Jacobson, Bridging the Gap to International Fisheries Agreement: A Guide for Unilateral Action, 9 San Diego L. Rev. 454, 459 (1972). But after careful negotiations, any type of seasonal arrangements were eschewed in favor of the two year treaty.

One must thus make this important and crucial distinction. That a crisis could occur in the future was surely foreseen. That a crisis could occur within the two-year treaty period, however, was necessarily unforeseen and certainly not contemplated in drawing up the terms of the bilateral agreement.

3. The Allocation Of Haddock Was The Essential Basis Of The Agreement.

Both parties entered the agreement exclusively to allocate the haddock catch. McNair cites this exact example as a timely application of the doctrine of fundamental change of circumstances. "When, however, we turn to the contractual kind of treaties, those which embody bargains between parties regulating their further conduct, or confer mutual rights . . . of fishing for their respective subjects . . . [i]t is submitted that it is in the sphere of this kind of treaty that the rebus sic stantibus doctrine will find its development." McNair, The Law of Treaties 691 (1961).

4. The Effect Of The Conservation Crisis Radically Transformed The Extent Of Obligations Still To Be Performed Under The Treaty.

The allotted haddock catch was placed at 750 units for Neptunius and 4,000 units for Atlantica. One cannot argue that the States should continue to adhere to these allocations in light of the recent data. Since it is highly unlikely that a stock of fish could be technologically exploited to extinction (except for slowly reproducing mammals like whales), the "total economic extinction" referred to by Atlantica's scientists is as drastic a development as could occur. F. Christy & A. Scott, The Common Wealth in Ocean Fisheries 6, 7 (1965). Thus, Atlantica contends that the scope of the initial commitment has in fact been radically transformed so as to render it intolerable to either State, thereby necessitating termination of the treaty.

5. Neither Of The Preclusions Cited In Article 62 Is Applicable In This Situation

The first exception to Article 62 deals with boundary disputes and is inapplicable here. The second exception in Article 62 disallows a breaching party to claim "fundamental change of circumstances". Respondent did not cause the over-exploitation; presumably all who fish in Blue Ocean are responsible. Neither was it a governmental change of policy, a main concern of the Vienna Conference with regards to the breach issue,

which precipitated the unilateral termination of the pact. Schwelb, Fundamental Change of Circumstances, 29 Zeitschrift fur Ausländisches Recht und Volkerrecht, 39, 59 (1969).

Neptunius may stress that, because of a breach of an international obligation owed to the world community by Atlantica (a member of the United Nations and F.A.O.), the doctrine of "fundamental change of circumstances" is unavailable. Presumably, this argument would imply that since the 1964 figures concerning maximum sustainable yield (MSY) were exceeded in 1965-1966, Respondent is unable unilaterally to terminate the treaty in 1970 because it precipitated the crisis.

The validity of such an argument is denied. One cannot "breach" in 1965 a treaty not negotiated and signed until 1970. This illogical reasoning would have to be accepted for such contentions to be sustained. It is quite true that MSY figures were exceeded. But Atlantica is not in the fishery business for profit, as is Neptunius. Atlantica fishes to feed its populace and nothing more. If the MSY was exceeded five years ago, it was to feed hungry people, and survival surely is not a breach of any international norm. Indeed, it would be unfortunate if this Court were to declare a nation in violation of international law merely because it was attempting to feed its citizens by fishing off its own coast. Thus, there was no breach of an international obligation by Respondent.

## II. THE DEVELOPING INTERNATIONAL LAW OF THE SEA AFFIRMS ATLANTICA'S RIGHT TO ESTABLISH A CONTIGUOUS FISHERY CONSERVATION ZONE.

### A. INTERNATIONAL MARITIME LAW IS A DYNAMIC PROCESS INFLUENCED BY TWO RELATED FACTORS.

#### 1. Global Oceanic Realities Dictate The Necessity Of Unilateral Action For The Survival And Economic Growth Of Developing Coastal States.

Respondent contends that the international order is a dynamic process through which significant changes in international law occur. Therefore,

a nation asserting unilateral fisheries jurisdiction can respond with some force to the argument that it is "breaking" the "law" . . . . [I]t can answer that it is only part of the trend away from strict application of the freedom to fish principle and that in the international community this is the traditionally accepted way of establishing new norms of conduct . . . ." Jacobson, supra, at 475.

Rather than "a mere static body of rules," international maritime law must be visualized as "a process of continuous interaction . . . . [I]t is a living, growing law . . . changing as . . . demands and exceptions are changed by the exigencies of new interests and technology and by other continually evolving conditions of the world arena." McDougal, The Hydrogen Bomb Test and International Law of the Sea, 49 Am. J. Int'l L. 356, 356-57 (1955). To determine the state of international law of the sea in regard to this present controversy necessitates an analysis of two important related factors: global oceanic realities and the preferential rights of the coastal state.

By oceanic realities, we mean living marine resources and the considerable effort to utilize or exploit these resources. While the population of developing nations comprises two-thirds of the world's total population and doubles every 18-27 years, their share of the fishing take seems disproportionately small. Marine Science Affairs, 2d Report of the President to the Congress on Marine Resources and Engineering Developments 46 (1968). Over the 10 year period, 1958-68, the take by developing nations in proportion to the world total fishing take increased by a mere 1%, from 22% to 23%. F.A.O.Y.B. Of Fishery Statistics 1968, Vol. 26 (Rome: FAO, 1968), Table A1-0. In addition, the total world demand for marine protein food increases 6% annually. Report of Panel on Marine Resources VII - 7-15 in 3 Panel Reports on the Commission of Marine Sciences, Engineering & Resources (1969). A further breakdown of this figure shows that the demand for fish meal, basically an industrial demand, increases dramatically at over 12% annually while the demand for food purposes exhibits a 4% annual increase. Christy, Fisheries and the New Convention on the Law of the Sea, 7 San Diego L. Rev. 455, 464 (1970). These statistics not only show that demand exceeds supply but also that commercial interests appropriate a larger percentage of living sea resources than do subsistence interests. In other words, commercial maritime powers take a larger share for profit than those nations whose people depend upon the oceans for survival. This dichotomy underscores the essential conflict of the present controversy. Economic profit motivates Neptunius, the world's second largest commercial fishing power, in her attempt to maintain unregulated ocean policy and, subsequently, unlimited exploitation of the sea. Atlantica's actions are essentially related to survival, that is, dependence upon the waters adjacent to its coast as

a primary source of food for its people.

Attempts to maintain the freedom of the seas principle result in undesirable economic and physical waste. In physical terms, fishing efforts build to a maximum catch, climax, and then inevitably diminish as a result of depletion of the stock. The economically efficient fishing fleets of the developed states then simply move on to other grounds. But the subsistence-oriented coastal state faces catastrophe because it has no distant water fishing fleet. Additional waste occurs in terms of excess application of capital and labor to a limited resource thus resulting in diminishing returns. Extrapolating from FAO studies, Professor Christy estimates; "[F]or the world as a whole, the waste may be on the order of several billion dollars a year--a waste caused by maintenance of free access under the principle of freedom of the seas." Christy, Marine Resources and the Freedom of the Seas, 8 Nat. Res. J. 424, 429 (1968). Thus, in place of the traditional freedom of the sea, a scheme of limited access and fisheries management must be implemented, conditioned upon the needs and considerations and deriving from the preferential rights of the coastal state. Such management becomes a matter of survival for a developing coastal state such as Atlantica. "If a fishing nation can be guaranteed complete control over a given fisheries, it can develop techniques for maximizing the annual harvest and for harvesting it as efficiently as possible . . . ." J.A. Knauss, Factors Influencing a U.S. Position in a Future Law of the Sea Conference 10 (1970).

2. Preferential Rights Of Coastal States Allow For A Management Scheme Of Limited Access And Also Require Of This Tribunal A Flexible Approach As In The Anglo-Norwegian Fisheries Case.

Article 6 of the Convention on Fishing and Conservation of the Living Resources of the High Seas (done April 29, 1958) 559 U.N.T.S. 285, in force March 20, 1966, specifically recognizes a coastal state's special interest in the maintenance of the productivity of living resources in the high seas adjacent to that state's territorial sea. While neither of the parties to this controversy are signatories to that convention, still the convention serves to formalize the preferential rights of a coastal state. Moreover, Article 1 of the International Covenant on Economic, Social and Cultural Rights declares that "[a]ll people may, for their own ends, freely dispose of their natural wealth and resources . . . . In no case may a people be deprived of its own means of subsistence." G.A. Res. 2200 (XXI)

(Annex), A/PV. 1496 at 28 (1966).

Atlantica is faced with a limited resource upon which its population is heavily dependent. As a developing coastal nation, economic and resource alternatives do not readily present themselves. Aware of her declining fishing yield, Atlantica has been warned by her scientists that her ocean resources are in imminent danger of total depletion. In short, a nation's lifeblood stands in the balance and it is at this point that an international tribunal must reject vague assertions of international delict as offered by Applicant here and consider "the need of flexibility in the rules of international law . . . . Considerations to be taken into account are those such as the vital economic interest in the regions involved, the practical needs and the local requirements of the coastal population . . . ." Evensen, The Anglo-Norwegian Fisheries Case and its Legal Consequences, 46 Am. J. Int'l. L. 609, 630 (1952).

Despite an I.C.J. opinion's non-binding effect on those not party to the decision, some valid analogies may be drawn between the Anglo-Norwegian Fisheries Case, [1951] I.C.J. 116, and the present controversy. First, powerful maritime states challenged both coastal states' measures as contrary to international maritime law. Secondly, the mitigating factors inducing the court to assume a flexible approach are similar in both cases. The populations of Norway and Atlantica depend heavily upon fishing resources, leading both states to subscribe to counter-measures against a commercial maritime power's exploitation of vital ocean resources. Therefore, respondent contends, the court in deciding the present controversy must likewise reject, "a fixed and inflexible set of rules governing all states and all situations," as was Britain's contention in the Fisheries case. Evensen, supra at 629. Instead, the court must take into account the Atlantikan "realities", as it did the Norwegian "realities", and subsequently consider the merits of Atlantica's measures taken in response to those realities.

B. PRESENT PRACTICES OF DEVELOPING COASTAL STATES IN LATIN AMERICA, AFRICA, AND ASIA EVIDENCE A PLURALITY OF REGIMES AS THE CONTEMPORARY "NORM" OF INTERNATIONAL MARITIME LAW.

The original impetus for a policy stance by developing Latin American states was supplied by the United States in its own unilateral assertions under the Truman Proclamation of control and jurisdiction over the resources of the continental shelf.

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.) Simultaneously there was enacted a fisheries order justifying the establishment of "conservation zones in those areas of the high seas contiguous to the coasts of the U.S. wherein fishing activities have been or in the future may be developed and maintained . . . ." Presidential Proclamation No. 2668, Policy of the U.S. with Respect to Coastal Fisheries in Certain Areas of the High Sea (1945); 3 C.F.R. §68 (1943-48 Comp.). In neither document are any international law principles mentioned. From this we may surmise that economic reasons for conservation and defense, based on national interests and the right of the coastal state, were deemed adequate justifications. The question thus arises: if a major maritime power may propound such a policy, how may developing states safeguard their vital interests?

Subsequent to these U.S. assertions, a number of Latin American nations instituted similar unilateral acts culminating in 1952 in the multilateral Declaration of Santiago entered into by Chile, Ecuador and Peru. Translated in 1 Y.B. Int'l. L. Comm'n 169 (1956). To achieve the objectives of maintenance of food supply, development of state economy and conservation of natural resources, these states declared a 200 mile maritime zone of sovereignty and jurisdiction extending from their respective coasts. The declaration explicitly permitted innocent passage. Nor were these territorial sea claims, stricto sensu, but only "extensions of the competence . . . necessary to ensure the achievement of the purposes and objectives indicated." Garcia-Amador, Latin America and the Law of the Sea 3 (1972). This declaration in turn induced other Latin American nations to execute national legislation establishing extended coastal state competence over adjacent seas.

The recent Montivideo Declaration exhibits an even more forceful Latin American consensus on the law of the seas. Translated in 64 Am. J. Int'l L. 1021 (1970). In acknowledging scientific and technological advances in exploitation of ocean resources as causes of resource depletion, the statement reiterates the right of coastal states to take necessary measures for both the benefit of mankind and the coastal states within a 200 mile maritime zone adjacent to their coasts. Nine states signed the declaration. The basic contents of the Montivideo Declaration were reaffirmed by 14 nations in the

Lima Declaration with exception of the specified 200 mile limit. Translated in 10 Int'l Leg. Mat. 207 (1971). Again, the right of the coastal state to explore, conserve, exploit and regulate ocean resources was declared.

In summing up, the Latin American experience has set a valuable international precedent by establishing the prerogative of coastal nations as well as substantiating zones of ocean jurisdiction. In all, nine Latin American states subscribe to such a 200 mile limit. These include Chile, Peru, El Salvador, Nicaragua, Ecuador, Argentina, Panama, Uruguay and Brazil. Additionally, Costa Rica and Honduras have similar regulations designating a 200 mile limit. U.S. Dep't of State, Int'l Boundary Study, ser. A, No. 36 (1972).

Elsewhere, in Asia and Africa, at least 14 other nations have enacted jurisdictional claims to adjacent seas in excess of 12 miles. Notably, Korea and Sierra Leone have claimed 200 mile territorial seas and exclusive fishing zones while Ceylon, Ghana, Guinea, India and Pakistan register similar claims of 100 or more miles. Thus it becomes apparent that Atlantica by no means stands alone in her attitude toward maritime jurisdictional extensions. Id.

The diversity of geographical realities, economic interests and political responsibilities (depending upon development level) that exists among countries has prevented and in our judgment makes impossible, the establishment of a universal rule . . . . The failures of the Hague Codification Conference of 1930 and of the Conference of the Law of the Sea held in Geneva, 1958 and 1960, in finding such a rule, have left intact the right of each State to fix its own limits according to the said realities, interests and responsibilities.  
 . . .

[Perhaps] the only possible way to reach an agreement--definitive and satisfactory to all--is to accept a plurality of regimes according to the geographic realities and the needs and responsibilities derived from the different levels of development existing among nations. Foundations of the Maritime Sovereignty of Peru, Lecture by Ambassador Alfonso Arías-Schreiber, Director of Sovereignty and Frontiers of the Ministry for Foreign Affairs, given at the Centro de Altos Estudios Militares, 9 April 1970 [emphasis added].

Thus Respondent urges the court not to search vainly for a universal panacea in response to the present controversy. A just adjudication calls, instead, for a subjective finding in consideration of Atlantica's crucial interests and the particular realities of the situation. ". . . [U]nilateral fishery protection action beyond present limits of

jurisdiction need not be characterized as a step toward national lakes or as a precedent for jurisdictional extension . . . ." Jacobson, supra at 456. Respondent respectfully reminds the court, that Atlantica's extension is one of specialized competence, applicable to a specific situation, and is not indicative of nor need it constitute precedence for a universal application of a 200 mile rule. Hypothetical and grandiose admonishments by Applicant that a finding in favor of Atlantica will lead to global oceanic aggrandizement merely obscure the issues involved. Such fallacies are meant to induce a reactionary adherence to that anachronistic doctrine, freedom of the seas, when the real concern should be with a developing nation's freedom of destiny, i.e. its self-determination and economic development leading to parity among the community of nations and a decent life for its citizens.

III. ATLANTICA'S UNILATERAL ASSERTION OF JURISDICTION IS CONFIRMED BY RECENT CANADIAN AND ICELANDIC LEGISLATION AND THE SUBSEQUENT SEIZURE OF THE POSEIDON IS JUSTIFIED BY THE DOCTRINE OF ANTICIPATORY SELF-DEFENSE OR SELF-PROTECTION.

A. THE CANADIAN LEGISLATION EMPHASIZED THE COASTAL STATE'S RIGHT OF SELF-DEFENSE.

In June, 1970, Canada passed legislation regulating shipping in a zone up to 100 miles off the Arctic coast. Arctic Waters Pollution Act, 18-19 Eliz., C.47 (Can. 1970). With the designation of a major new oil shipping route through the Arctic, Canada perceived an imminent threat to the ecological balance of its pristine Arctic territory, since an oil spill of even relatively minor proportions would wreak havoc with that region's delicately balanced eco-system. Major shipping nations, whose rallying cry was "freedom of the seas," vigorously protested; but the unilateral action found a defense in the contiguous zone theory as an extension of coastal state jurisdiction. "It is not an assertion of sovereignty: it is an exercise of our desire to keep the Arctic free of pollution . . . ." Address by Prime Minister Trudeau to the Annual Meeting of the Canadian Press, Toronto, Ontario, 15 April, 1970, in 9 Int'l Leg. Mat. 600 (1970).

The Canadian defenders, moreover, heralded the act as formulative of international law where none had previously existed. In this respect, the legislation constituted a "current initiative of striking importance and relevance in the context of the dynamic, creative development of international law." Statement by Professors of Int'l Law at the

U. of Toronto delivered at the Annual Conference of the Am. Soc'y of Int'l L., New York City, 29 April, 1970. This argument served to provide Canada with a means of avoiding International Court of Justice jurisdiction over the matter.

Most importantly, Canada affirmed her unilateral measure as "based on the overriding right of self-defense of coastal states to protect themselves against grave threats to their environment." Canadian Note Handed to the U.S. on 16 April 1970, in 9 Int'l Leg. Mat. 607, 610 (1970). As to whether the UN Charter has circumscribed a member's customary right of self defense, "Article 51 itself . . . can surely not have destroyed the broader area of the license of self-defense and self-redress where the security council is not acting and there is no inconsistency with the purpose of the U.N." J. Stone, Aggression And World Order 44 (1958). Thus, in view of the fact that no countermanding international law exists in this area, Canada (and Atlantica) have reserved to themselves the right of anticipatory self-defense. "[I]n practice the interest a state may have in the safe preservation of the national economy, of its essential economic interests, may be equally as great as its interest in safeguarding its territory, its political independence, or its people." D. W. Bowett, Self Defence in International Law 231 (1958). Following this rationale, a strong case for economic self-defense presents itself in favor of Atlantica as a nation dependent on its fishery resources for economic survival.

B. THE DOCTRINE OF SELF-PROTECTION HAS BEEN WIDELY UTILIZED TO EXTEND STATE JURISDICTION OVER THE OCEANS AS EVIDENCED BY THE UNITED STATES PRACTICES.

Protection is widely recognized and practiced in international law as a basis of jurisdiction. Restatement (Second) of Foreign Relations Law of the U.S. §10 (1965). Even Neptunius subscribes to the protection doctrine, having promulgated a 25 mile pollution zone and a 12 mile exclusive fishery zone. Thus it seems that Applicant condones unilateral protective measures when convenient and self-serving but not when other states' measures conflict with Neptunian interests.

The United States, traditionally an advocate of freedom of the seas and delimited national jurisdiction, has repeatedly made pervasive jurisdictional extensions based on the protection principle. The Anti-Smuggling Act of 1935 authorized the President to proclaim an area of jurisdiction 100 miles north and south from the point where a sus-

pected foreign ship was hovering, including all seas in a 62 mile radius of the coast. 19 U.S.C. §1701 (1964). The Presidential Decree of September 5, 1939, organized a neutrality patrol to observe belligerents' activities as far as 200 miles from the coast of the U.S. and the West Indies. Exec. Order No. 8233 (1939), 3 C.F.R. 570 (1938-43 comp.). The U.S. observes an Air Defense Identification Zone 300 miles in depth and also bans shipping from large areas of the high seas pending nuclear bomb tests. 14 C.F.R. §620.20 et seq. (Supp. 1957). All these interests are distinctly national in nature and derive jurisdiction from the protection principle.

This strong precedent for protective jurisdiction in U.S. law is applicable to international law.

Among the circumstances justifying an exercise of jurisdiction over foreign ships on the high seas are the proximity of the waters to the coast and the nature of the coastal states rights or interests which may be affected or threatened . . . Mr. Chief Justice Marshall's exposition on the test of reasonableness in this context has never been refuted or improved upon. Jessup, The United Nations Conference on the Law of the Sea, 59 Colum. L. Rev. 234, 244 (1959).

Judge Jessup refers here to the venerable case of Church v. Hubbard 6 U.S. (2 Cranch) 187 (1804), which involved the right of Portugal to seize an American-owned ship on the high seas, allegedly engaged in illegal trade with Portuguese colonies. "[A nation's] power to secure itself from injury may certainly be exercised beyond the limits of its territory . . . and it has a right to use the means necessary for its protection . . ." 6 U.S. (2 Cranch) at 235.

C. BECAUSE ATLANTICA HAD THE REQUISITE JURISDICTION UNDER THE PROTECTION DOCTRINE, THE SEIZURE OF THE POSEIDON DID NOT INTERFERE WITH INNOCENT PASSAGE.

Article 14 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, holds that passage of foreign fishing vessels fails to constitute innocent passage if such vessels do not observe laws and regulations of the coastal state against fishing. While this paragraph speaks in regard to the territorial sea, Respondent submits that under its extension of specialized competence in the contiguous zone, "the coastal state would [have] identical . . . or similar . . . rights to those it enjoys in its internal waters and its terri-

torial sea in respect to fishing." F. V. Garcia-Amador, The Exploitation and Conservation of the Resources of the Sea 67 (1963). Therefore, the Poseidon's presence as a foreign fishing vessel in Atlantica's contiguous zone fails to qualify as innocent passage and Respondent's subsequent action likewise cannot be regarded as a breach of international law. The existence of Atlantica's regulation could hardly have been unknown to the Poseidon, yet that vessel was apprehended within 50 miles of the Atlantikan coast, over 150 miles within the proscribed limit. Such a position cannot be treated as an oversight and one must assume the presence of the fishing vessel was intentional and in flagrant violation of Atlantica's regulation, thus necessitating self-protective action on Atlantica's part.

D. THE ICELANDIC REFUSAL OF I.C.J. JURISDICTION EMPHASIZES ATLANTICA'S GOOD FAITH IN SUBMITTING TO JUDGMENT BEFORE THIS TRIBUNAL.

In 1972, Iceland announced the extension of its 12 mile exclusive fisheries zone to 50 miles, roughly the extent of its continental shelf. Resolution of the Althing [Parliament] of 15 February 1972. In doing this, Iceland gave notification of the termination of the 1961 bilateral fishing agreements with the United Kingdom and the Federal German Republic. The latter two countries retaliated with protests and instituted proceedings before this tribunal. Yet Iceland denied I.C.J. jurisdiction and ignored the interim measures prescribed by the court. Like Canada, Iceland exhibited a reluctance to entertain jurisdiction by an international tribunal in a matter of vital coastal state interest.

Both Iceland and Atlantica, almost totally dependent on fishing both for economic survival and subsistence, faced the menacing intrusion of large and technologically superior foreign fishing fleets. "After destroying one fishing bank these big fleets . . . are looking for new areas to exploit. We know that if they come to Icelandic waters, fishing in Iceland will be destroyed within two or three years . . . [W]e have to extend the limit now in order to protect our only means of economic survival as well as the long term interests of others." Address by Prime Minister Johannesson to Foreign Journalists at Thingvoellun, Iceland, on 18 July 1972. Having recounted both Canada's and Iceland's reason for averting I.C.J. jurisdiction, we note a major difference between those states' conduct and Atlantica's.

Despite the vital fishing resources at stake, despite the untraditional (but not unprecedented) claim, and despite the conduct of similarly situated states, Atlantica has in good faith specially agreed to the jurisdiction of this tribunal. Nor is this submission to be taken lightly, for it indicates a faith in the international adjudicatory process that even "reasonable" states are presently not wont to express as evidenced by the example of Canada and Iceland. Nor is this the attitude of a state likely to have exercised flagrantly delictual conduct. Rather, it is representative of a nation that, having taken necessary and decisive action, assumes its transnational responsibility by subjecting itself to international judicial review. Such action merits an adjudication of commensurate good faith, reaching to the particulars of the case. Upon consideration of the particulars, Atlantica stands well within the bounds of international law.

IV. THE "ATLANTICA RESEARCH ACT OF 1971" IS A VALID MEASURE UNDER INTERNATIONAL MARITIME LAW.

A. ATLANTICA HAS THE RIGHT TO PROTECT THE EXCLUSIVE FISHING ZONE.

Over the past decade, lawyers and scientists have been unable to agree upon what constitutes "fundamental" or "pure" research and how this differs from "applied", "commercial" or "military" research. Brown, Freedom of Scientific Research and the Legal Regime of Hydrospace, 9 Indian J. Int'l L. 327, 329 (1969). Respondent presents what it considers to be the most cogent statement on the problem:

The difficulty is in differentiating between the two because similar or identical actions may be involved, including the taking of fish in scientific research and doing physical oceanography in fisheries research. What matters here is essentially what matters on the Continental Shelf - motivation. Sullivan, Freedom of Scientific Inquiry, in The Law of the Sea: National Policy Recommendations 364, 371 (L. Alexander ed. 1969).

It is for the precise reason that differentiation is impossible that Respondent has been forced to require that all organizations seeking to undertake research operations obtain clearance and meet certain conditions. If "pure" research did exist and could be defined, Respondent would certainly allow it within the exclusive fishing zone. Indeed, Atlantica would allow it within its territorial sea. But the fact is that "pure" scientific research is exceedingly rare and cannot be defined. The vast majority of such research is useful to the commercial fishing industry. Likewise, oil concerns can utilize

almost all geological data. Brown, supra at 329.

Respondent shares with many other developing nations the concern that if scientific investigations are freely permitted, coastal resources will be unfairly exploited. P. Eye, Ocean Policy and Scientific Freedom 7 (1972). For Respondent, a State overwhelmingly dependent upon the sea, to allow complete freedom is to invite economic disaster. Exploitation by advanced nations under the pretext of purely scientific research offers too great a temptation of abuse unless controls are imposed. To be blunt, "freedom of research inevitably means freedom of research for the rich nations." Borgese, The Seas: A Common Heritage, 5 The Center Magazine 21 (1972).

Besides the ultimate use to which such research is put, the immediate result may be the exploitation by foreign nations of Respondent's resources. An allegedly "pure" research expedition could in fact be a disguised operation gathering fish in commercial quantities. Donald L. McKernan of the United States Department of State has observed:

Some countries . . . employ what they call fishery research vessels. These often are stern-end trawlers, which are in fact exploratory vessels with the capability of taking literally thousands of tons of fish during their exploratory cruises. What they are trying to do is define populations of fish, locate them, and in some cases direct commercial fleets to them. In the process these vessels take commercial quantities of fish. McKernan, quoted in The Law of the Sea: The Future of the Sea's Resources 118 (L. Alexander ed. 1967).

Such exploitation need not encompass a large scale. Indeed, single fishing trawlers operating under the guise of "research vessels" are capable of exploiting resources within the exclusive fishing zone.

Thus, both the immediate and ultimate results of research are that Respondent is harmed unless the conditions set forth are accepted. Furthermore, Respondent is not impinging on the freedom of "pure" scientific inquiry. Rather, Respondent is trying to be certain that only bona fide scientific inquiry occurs.

**B. BILATERAL FISHING TREATIES EXPLICITLY PROVIDE FOR RESTRICTIONS UPON RESEARCH IN EXCLUSIVE FISHING ZONES.**

Neptunius would have this Court believe that Atlantica has taken an unprecedented step in international law. This is not true. Atlantica is merely following the trend set by other States, including the more developed.

After the failure of the Canadian-United States proposal concerning an exclusive fishing zone at the Second U.N. Conference on the Law of the Sea, Off. Rec. Summary Rec.30 (1960), many nations either entered into bilateral treaties or unilaterally established such zones. Respondent contends that the language of many of these treaties and of related national legislation creates zones where the coastal state enjoys not only exclusive rights in relation to fishery exploitation but also exclusive rights in relation to fishery research. One of the clearer claims to jurisdiction over fishery research is that made by the United States (16 U.S.C. §§1091-94 (1970)) which makes it unlawful for any vessel other than that of the United States to engage in fisheries within its territorial waters or exclusive fishing zone. Under this legislation, the United States claims the right to prohibit "fishery research" (including the taking of fish specimens) without its prior consent. Schaeffer, Freedom of Scientific Research and Exploration of the Sea, 4 Stan. J. of Int'l Studies 46, 63 (1969).

Additionally, the European Fisheries Convention, done Mar. 9, 1964, Gr. Brit. T.S. No. 35, Cmd. 3011, (1966) in force Mar. 15, 1966, provides in Article 2 that "The coastal state has the exclusive right to fish and exclusive jurisdiction in matters of fish . . ." Under Article 5, the coastal state has the power, within the exclusive fishing zone "to regulate the fisheries and to enforce such regulations, including regulations to give effect to internationally agreed measures of conservation . . ." In the absence of any qualification, the presumption must be that "matters of fisheries" and "to regulate the fisheries" include fishery research. Brown, supra at 343. Thus, many developed States restrict research within their exclusive fishing zones.

C. THE ACT IS MORE LENIENT THAN ARTICLE 5(8) OF THE CONTINENTAL SHELF CONVENTION.

Both Applicant and Respondent have ratified the Continental Shelf Convention, done April 29, 1958, 15 U.S.T. 471 (1964), in force June 10, 1964. This Convention will be examined to demonstrate the rights of a coastal state with regard to the continental shelf. It will then be shown that as much, if not more, freedom is granted by the "Atlantica Fisheries Research Act of 1971" as in the Convention.

Article 5(8) states:

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 . . . 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.

Quite clearly, the Convention does not grant complete freedom of scientific research. A request has to be made to the coastal state. The organization seeking permission must prove that it is not only "qualified" but also that it is engaged in "purely scientific research." The problems encountered when dealing with this vague term have already been discussed. Even if these criteria are met, consent is not automatic. There is little of an imperative nature in the phrase that consent should not "normally" be withheld. Clingan, Scientific Inquiry in the Oceans: Legal Regulations and Responsibility, 6 Lex et Scientia 77 (1969).

Thus, States may limit research under the Continental Shelf Convention to a greater extent than Atlantica could do under the Act in question. This fact is demonstrated only to illustrate that there has not been, for the past two decades, complete freedom of scientific research.

#### D. THE TERMS OF ATLANTICA'S RESEARCH ACT ARE NOT PROHIBITIVELY HARSH.

##### 1. Mandatory Publication Of Data Is Accepted By All As Necessary.

Requirements that all information must be openly published are equitable. Article 5(8) of the Continental Shelf Convention mandates this result. Respondent has been unable to find any advocate of open scientific research who is against mandatory publication of data. Respondent, however, is not even demanding open publication. Much less is required. The only requisite in this regard is "that data, both raw and interpreted, be provided to Atlantica as soon as possible upon completion of the expedition."

Respondent does not restrict the scientific community's privilege of publishing data openly. Rather, it only requires that it be provided such data. Furthermore, Respondent recognizes that interpreting results is a rather lengthy matter. Thus, no time limit is included in the section - only that the interpreted data be provided "as soon as possible."

##### 2. Stipulating That An Atlantikan Be On Board The Vessel Is Necessary To Prevent Fraud.

Atlantica seeks by this provision not actively to participate in the research but rather to make sure that the vessel is doing what the sponsoring organization claims. The potential harm is too great to rely simply on an organization's promise and published data. Even commentators committed to obtaining the fewest possible restrictions readily agree that "the coastal state has the right to put somebody aboard to participate in the work." Schaeffer, The Changing Law of the Sea - Effects on Freedom of Scientific Investigation in The Law of the Sea: The Future of the Sea's Resources 113, 118 (L. Alexander ed. 1967).

3. The Fee Ultimately Will Develop The Scientific Capacity Of Respondent To A Point That Will Allow It To Utilize The Data Available On A Comparable Basis With Other Nations, Including Applicant.

The fee, admittedly the most controversial measure, is an extremely crucial research provision. Regardless of publication, dissemination of data, and the presence of Atlanticans aboard the vessels, the value of the information only becomes realizable when it can be applied to one's practical ends. Less developed members of the scientific community must be assisted in using data derived from projects for which they have given consent. Charging a fee is one method of securing international assistance. Revenue received from this source can be funnelled into developing the scientific capacity of Respondent and in the future achieving technological independence. As one authority emphasizes:

. . . the real problem is participation. Until the ability of developing nations to participate in general scientific research becomes a reality, suspicion will remain and measures of safeguard will be maintained. L. Macedo of Brazil quoted in Borgese, supra at 21.

The fee is a device which ultimately aids in achieving real participation.

#### CONCLUSION

Based on the above arguments, particularly the resource imperatives of a developing coastal state and the good faith submission to this Tribunal's jurisdiction, Atlantica submits that its actions are consistent with international law.

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