INTERNATIONAL COURT OF JUSTICE

THE STATE OF INDUSTRIA,
APPLICANT

v.

THE STATE OF LATIA,
RESPONDENT

MARCH, 1974 TERM

MEMORIAL FOR RESPONDENT

NO. 8

JAMES R. DeVITA

JAMES P. DONOHUE

GRANT H. GIBSON

THOMAS J. HAWLEY

JOSEPH G. RIEMER

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Jurisdiction

The parties to this case have waived any preliminary objection to the juisdiction of the court.

Statement of Facts

The parties have stipulated as to the facts, and a restatement of them is waived.

Questions Presented

1. Is the area referred to as Tract No. 1 within the Territorial Sea of Latia?

2. If not within the Territorial Sea, does Tract No. 1 lie on the continental shelf of Latia?

3. Did the actions of vessels Gatherer and Carrier constitute a violation of the sovereign rights of Latia with respect to the resources of the seabed and subsoil of either its Territorial Sea, or Continental Shelf, and therefor justify the actions of Interceptor and the prize court?

4. If Tract No. 1 was not within the jurisdiction of Latia, did the DOMA and the mining operation conducted pusuant thereto constitute violations of International Law and as such justify the actions of Interceptor and the prize court?

5. Is Latia entitled to conduct recovery operations in the area known as Tract No. 1, and elsewhere in the deep ocean beyond the jurisdiction of any state, as long as such deep ocean mining is done in a manner consistant with the principle of "the Common Heritage of Mankind"?

Summary of Argument

It is the Respondant's position that the mining operations which were being conducted on behalf of the Ocean Mining Company, a national of Industria, were in contravention of Latian sovereign rights to the mineral resources of the seabed and subsoil of the area of operation, which was within either the Territorial Sea or Continental Shelf of Latia, and in violation of Latian law. Latia was therefor justified in taking the actions which it did with respect to the vessels Gatherer and Carrier.

In addition, even if Tract No. 1 were beyond the jurisdiction of Latia, the mining operations of the Gatherer and Carrier were carried out in such a manner as to be in violation of the principle of customary international law that the natural resource of the area of beyond the jurisdiction of nations is the "common heritage of mankind" and that exploitation of them must be for the benefit of mankind as a whole. Since the operation was an illegal detention of property, if occurring on the high seas it constituted piracy and the actions of the Latian vessel Interceptor, and the prize court were justified.

Finally, since Latia proposes to conduct its recovery operations in a manner consistant with the principle "common heritage of mankind," its proposed actions in this regard will be lawful.

I. THE AREA KNOWN AS TRACT NO. 1 WAS WITHIN EITHER LATIA'S TERRITORIAL SEA OR CONTINENTAL SHELF.

Although the convention on the Territorial Sea and the Contiguous Zone[1] purports to limit the extent of the combined territorial sea and contiguous zone to twelve miles from the baseline of a coastal state,[2] that Treaty is no longer valid because of the rule of rebus sic stantibus, and because it conflicts with a peremptory norm of international law.

Article 62 of the Vienna Convention on the Law of Treaties[3] recognizes that a fundamental change of circumstance "which was not foreseen by the parties" can be a ground for termination or denunciation of a treaty when:

(a) The existence of the changed circumstances was an essential basis of the treaty, and

(b) The change radically transforms the extent of the obligations under the treaty.[4]

Although this treaty is yet to be ratified by the parties to this dispute, section 62 is nonetheless binding on these parties since

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[1]Convention on the Territorial Sea and the Contiguous Zone, done April 29, 1958, [1964] 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 [hereinafter the Territorial Sea Convention].

[2]Id. art. 24.

[3]Vienna Convention on the Law of Treaties, done May 23, 1969, U.N. Doc. A/Conf. 39/27, reproduced at 8 Intl. Legal Materials 679 (1969).

[4]Id. art. 62.

it is declarative of customary international law.[5] In the case of the Convention on Territorial Sea, the circumstance which has changed is the level of technology for exploitation of both the mineral and the living resources of the sea.[6] It could not have been foreseen at the time of the conclusion of the Territorial Sea Convention, in 1958, that any state or the nationals of any state would develop the technological capacity to exploit the living and mineral resources found off the coast of other, less technologically developed states, and upon which the economic development and welfare of those developing states depend. The acceptance, by developing nations, of a narrow territorial sea/contiguous zone area of twelve miles over which they could exercise sovereignty to prevent such plundering was based on an implicit assumption that such an area would be sufficiently broad for that purpose.[7] That basic assumption is no longer valid, due to the unanticipated technological advancements relating to the resources of the sea which have taken place since the conclusion of the convention. Recognition of this fundamental change is evidenced by

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[5] de Luna, Report of the International Law Commission to the General Assembly, [1966] 2 Y.B. Int'l L. Comm'n 257, U.N. Doc. A/6309/Rev. 1 (1966). The report states that the evidence of the principle in customary law is considerable. Id.

[6] G.A. Res. 2750C, 25 U.N. GAOR Supp. 28, at 26, U.N. Doc. A/8028 (1970).

[7] J.P.A. Francois, the Special Rapporteur of the International Law Commission reported in 1956 with regard to exploration and exploitation of seabed resources in the high seas, that it "was a purely theoretical question . . . [which] the Commission should not examine at present." Francois, Report of the International Law Commission to the General Assembly, [1956] 1 Y.B. Int'l L.

a 1970 General Assembly Resolution[8] which notes in its preamble:

> [T]hat political and economic realities, scientific development and rapid technological advances of the last decade have accentuated the need for early and progressive development of the law of the sea. . . .[9]

The resolution, which called for a Conference on Law of the Sea, directed the conferees to deal, inter alia, with the issue of the law of the sea, "including the question of its breadth."[10]

The 1958 Territorial Sea Convention is no longer binding by virtue of another provision of the Convention of the Law of Treaties. Article 64 provides:

> If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

Article 64 is declarative of customary international law and is therefore binding on the parties herein.[11] The provision of the Territorial Sea Convention which limits the breadth of the combined territorial sea and contiguous zone to twelve miles con-

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Comm'n 11, U.N. Doc. A/CN.4/97 (1956) [hereinafter cited as I.L.C. Commentary]. Francois later noted that 'the contingency of practical exploration in such submarine areas was so remote that he doubted the necessity of providing for it . . . [in the treaty]." Id. at 132, U.N. Doc. A/2456, A/CN.4/99/Add.1 and A/CN.4/102/Add. 1 (1956). While these discussions relate directly to the continental shelf, it would be unreasonable to assume that the Commission had a different frame of reference in drafting the Territorial Sea Convention, or that the parties to it concluded otherwise.

[8] G.A. Res. 2750C, 25 U.N. GAOR Supp. 28, at 26, U.N. Doc. A/8028 (1970).

[9] Id.

[10] Id.

[11] de Luna, Report of the International Law Commission to the General Assembly, [1966] 2 Y.B. Int'l. L. Comm'n 261, U.N. Doc. A/6309/Rev.1 (1966).

flicts with the emergent rule of international law that a unilateral approach[12] is proper for the determination of the seaward extent of the territorial sea of coastal states, and that coastal states ought to establish for themselves the limits of their maritime jurisdiction, utilizing reasonable criteria such as their geographical and geological characteristics and economic needs.[13]

Clearly, the rule of a narrow sovereign sea which succeeded for almost three centuries[14] and which is embodied in the treaty, no longer has the universal acceptance of the community of nations.[15] The economic circumstances which dictated the development of that rule, the dependence of trade on open seas, and a view of natural resources as inexhaustible, no longer prevail.[16]

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[12] Cf. opinion of the International Court in the Anglo-Norwegian Fisheries Case, [1951] I.C.J. 117, 132 [hereinafter cited as the Fisheries Case], holding that the delimitation of maritime areas "is necessarily a unilateral act," made with regard for international law. Id. at 95.

[13] Id. at 133; see also Id. at 150 (individual opinion of Judge Alvarez).

[14] The rule was first formally articulated by Hugo Grotius in 1608 in Mare Liberum; at the behest of the Dutch East India Trading Co. Grotius cited the dependence of trade on an open sea and the inexhaustibility of marine resources as supportive of his argument.

[15] See notes 23-24 infra and accompanying text.

[16] See note 8 supra and accompanying text.

The emergence of the peremptory rule has been very evident in recent years; yet it has not been sudden. The rule, which was first formally articulated by Hugo Grotius in 1608,[17] has gradually diminished in significance since the early eighteenth century.[18] In 1812 Norway abandoned a three mile territorial sea based on trace parallel in favor of a four mile sea measured from a series of base lines drawn along Norway's irregular coastline.[19] While no immediate dispute flowed from this act, subsequent extensions[20] resulted in a controversy which reached this court in the Fisheries Case. There the court allowed the Norwegian claim, holding that the almost exclusive use of the area in question[21] and the special circumstances of the Norwegian coast[22] justified the claim.

The Fisheries Case decision was the first formal step by an international authority away from the strict narrow sea rule. In the period following this decision a significant number of states

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[17] See note 15 supra.

[18] See, e.g. U.S.-France Treaty of Amity and Commerce, 8 Stat. 12 (1778); Treaty of Peace with Great Britain, Versailles, 8 Stat. 80 (1783); Convention with France, 8 Stat. 178 (1800); Convention with Great Britain, 8 Stat. 248 (1818) wherein the U.S. and others agreed to assert extra-territorial jurisdiction. Other states were also active. Cf. Soviet Decree of June 1, 1821 (Russia); Fisheries Act of July 13, 1868, 31 & 32 Vict., c. 45(Gt. Brit); Regulation No. 3 of 1811 For the Protection of Her Majesty's Pearl Banks of Ceylon, Mar. 9, 1811, reproduced in H. Crocker The Extent of the Marginal Sea 544 (1919).

[19] Royal Decree of Feb. 22, 1821; Fisheries Case at 134.

[20] Decree of Oct. 16, 1869; Fisheries Case at 134.

[21] Fisheries Case at 133-39, 142.

[22] Id.; see also id. at 150 (individual opinion of Judge Alvarez).

have abandoned the former narrow sea rule, in favor of a wide sea which reflects their peculiar economic and geographic circumstances. The Food and Agricultural Organisation reported in 1971 that twenty-three nations claimed seas beyond twelve miles.[23] By 1972 the number had risen to thirty,[24] and it continues to rise. Moreover, states which do not make broad claims themselves have given or have proposed to give recognition to wide claims. The Peoples Republic of China, while not asserting any claim beyond twelve miles for themselves, have specifically recognized the validity of the South American claims.[25] The United States has agreed with Brazil to fish for shrimp, subject to licenses granted by Brazil, within a 200 mile sea claimed by Brazil.[26]

While the parameters of the emerging rule are as yet unclear, one conclusion is patent: the strict narrow sea rule embodied in the treaty is inapposite to the modern norm which permits unilateral establishment of territorial sea limits in accordance with the needs and circumstances of the claiming state.

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[23] F.A.O. Report on the Limits and Status of the Territorial Sea, Exclusive Fishing Zones, and the Continental Shelf, reproduced at 10 Int'l Legal Materials 1255 (1971).

[24] Nine states joined in the Declaration of Montevideo, May 8, 1970, reproduced at 9 Int'l Legal Materials 1081 (1970); 8 in the Declaration of Santo Domingo, June 9, 1972, reproduced at 11 Int'l Legal Materials 892 (1972); for the remaining 13 see F.A.O. Report, supra note 23; see also J. Andrassy, International Law and Resources of the Sea (1970).

[25] Chinese Declaration In Support of 200 Mile Limit, reproduced in 11 Int'l Legal Materials 654 (1972).

[26] U.S.-Brazil Agreement on Shrimp Fishing (May 9, 1972), reproduced in 11 Int'l Legal Materials 453 (1972).

This is not to suggest that there are no limits to the territorial seas which may be claimed. Judge Alvarez declared in his individual opinion in the Fisheries Case that there are guidelines which determine the validity of territorial sea claims. He held that a state's claim is properly made:

> [P]rovided it [the state] does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying out the duties imposed by international law, that it does not infringe rights acquired by other states, that it does no harm to general interests, and does not constitute an abus de droit.[27]

The Latian claim to a 200 mile sea is consistent with those guidelines. The manner of the reasonableness of the claim is disposed of when the Latian claim is examined in the light of current international practice.[28] Latia's ability to exercise jurisdiction is evidenced by the licensing agreements which foreign flag vessels are required to obtain, and more dramatically, by the tenacity with which she opposed Industria's incursions in this area. Her claims to the area have been exclusive. The lack of protest to the Latian claim is indicative of the fact that no state's acquired rights or the general interests of the community of nations were infringed by the Latian territorial sea.

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[27] Fisheries Case at 108.

[28] Notes 23 and 24 supra and accompanying text.

Furthermore, claims to territorial sea may be justified on the basis of acquisition of prescriptive rights to the area in question. In order for such a claim to be justified:

> the acquisition of sovereignty [by a state] over a territory through continuous and undistrubed exercise of sovereignty over it [must be] during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.[29]

The court gave approval to this doctrine in the Fisheries Case wherein it cited the long undisturbed tenure of the Norwegians as a prescriptive basis for allowing their claims.[30] In the instant case, Latia has exercised sole jurisdiction in this area of the sea for several decades. Her claim of a wide sea has been unchallenged, and in fact, acquiesced to by other states.

Finally, careful attention ought to be given to the developing status of Latia's economy. The economic welfare and physical well-being of her people will be dependent upon the conservation and development of the resources contained in this area. It would be inequitable to bar this claim where the rules of international law have been complied with, a prescriptive basis exists for the claim, and the special circumstances of Latia's economy and geography require a dependence upon the resources within the delimited area.

If not a part of the validly declared Territorial Sea of Latia, then the seabed area within which Tract No. 1 lies is

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[29] 1 L. Oppenheim, International Law 576 (Lauterpacht ed. 1955.

[30] Fisheries Case 132 (individual opinion of Judge Alvarez).

continental shelf under the jurisdiction of Latia. This is true whether the Convention on the Continental Shelf[31] or the customary law concept of continental shelf is applied. This conclusion ineluctably follows from the opinion of the Court in the North Seas Continental Shelf Case,[32] wherein it was held that Sections 1-3 of the Convention were declarative of customary international law relating to the delimitation of continental shelf areas and rights inherent in those areas. The court held the principles outlined in Sections 1-3 of the Convention to exist "quite independently" of the treaty.[33]

Article 1 of the Convention defines the continental shelf as:

> the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of said areas. . . .[34]

The definition of continental shelf contained in the convention is not limited to the geological formation. The Commentary of the International Law Commission to the 1956 Draft Treaty clearly indicates this:

> While adopting, to a certain extent, the geographical test for the "continental shelf" as the basis of the juridical definition of the term, the Commission therefore in no way holds that the existence of a continental

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[31] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311 (1964) [hereinafter cited as Shelf Treaty].

[32] [1969] I.C.J. 1.

[33] Id. at para. 63.

[34] Art. 1 Shelf Treaty.

> shelf, in the geographic sense as generally understood, is essential for the exercise of the rights of the coastal State as defined in these articles. . . . Again, exploitation of a submarine area at a depth exceeding 200 metres is not contrary to the present rules, merely because the area is not a continental shelf in the geological sense.[35]

The requirements of the definition are met when the area in question continuously and without interruption, for a reasonable distance from the territorial sea of the state, either has a depth of 200 metres or less, or is exploitable.[36] Satisfaction of the requirement that either of the two determinative criteria be continually met establishes adjacency of the area.[37] The reason for the inclusion of the exploitability criterion is indicated by the International Law Commission comment to Article 1, which stated that the proponents of the inclusion recognized the 200 metre

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[35] I.L.C. Commentary at 297 (emphasis added). Interestingly the commission stated further that:

> There was yet another reason why the Commission decided not to adhere strictly to the geological concept of the continental shelf. The mere fact that the existence of a continental shelf in the geological sense might be questioned in regard to submarine areas where the depth of the sea would nevertheless permit of exploitation of the subsoil in the same way as if there were a continental shelf, could not justify the application of a discriminatory legal regime to these regions. Id.

This reasoning seems especially appropriate to the present case, where the denial to Latia, a state without a geological shelf, of its claimed jurisdiction would constitute the application of a discriminatory regime.

[36] E. Brown, Legal Regime of Hydrospace 36-37 (1971). An exception to the continuity requirement may be permitted, according to Brown, for interruptions by narrow troughs.

[37] Any suggestion that the adjacency term was intended as a limitation of the extent of the continental shelf must be rejected. That it merely indicates location of an area is clearly de-

criterion as sufficient for the needs of the time, but "they wished to recognize forthwith the right to exceed that limit if exploitation of the seabed or subsoil at a depth greater than 200 metres proved technically possible."[38]

The point at which the recovery operation was taking place is demonstrably within the area satisfying these requirements. The point at which Gatherer was operating obviously was at a depth which "admits of exploitation." Since the area between the coast of Latia and the point of operation, after a sharp drop to 600 metres, gradually slopes downward to the 2100 metre depth, at which the recovery operation was taking place, it must be presumed that it was continuously exploitable. Finally, in light of existing state practice, the extent of the continental shelf claimed is not unreasonable.

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monstrated by the fact that the term is used in the second paragraph of Article 6, dealing with the establishment of lateral limits of the shelf, and refers to states as "adjacent" to one another.

[38] I.L.C. Commentary 296. The invalidity of any assertion that the exploitability requires that the coastal state itself be able to exploit the area is obvious. Such an interpretation would be inconsistent with the provision in Section 2, Article 2 that a state need not actually explore or exploit the shelf in order to be entitled to such rights, which clearly implies that this is the case even where the reason for not doing so is the lack of technological capability. In addition, the result of such an interpretation would be to hold that a developing state could unilaterally extend its continental shelf merely by obtaining a technologically advanced apparatus from a developed state. See M. McDougal and W. Burke, The Public Order of the Oceans, 690 (1962).

That the practice of states is to recognize as continental shelf areas that extend as far as the 120 miles claimed by Latia is indicated by the number of states which exercise continental shelf rights in areas of equal or greater extent, either on the basis of exploitability[39] or a depth of less than 200 metres.[40] State practice under both criteria must be considered because it would again be discriminatory to hold that a continental shelf based on depth and extending as far as 200 miles is legal, while a shelf claim over an area extending 120 miles is unreasonable, and therefore, illegal, when based on the criterion of exploitability.

Another line of analysis also leads to the conclusion that the area referred to as "Tract No. 1" is within Latia's legal continental shelf. This Court termed "the most fundamental of all rules of law relating to the continental shelf," "enshrined in"

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[39] For example the United States has issued Exploitation Leases for the recovery of phosphates from an area 40 miles off the coast of California, in sea with a depth varying from 258 to 4,020 feet, but predominantly deeper than 600 feet. Stone, Some Aspects of Jurisdiction Over Natural Resources Under the Ocean Floor, 3 Natural Resources Law. 155, 166 (1970). Exploration Permits have been issued for drilling in the Gulf of Mexico in regions 100 miles from the United States shores in sea reaching a depth of 3000 feet; and on the Atlantic Seaboard, Exploration Permits for oil and gas have been issued covering areas 300 miles from shore and in depths of from 650 to 5000 feet. E. Brown, The Legal Regime of the Hydrosphere 18-20 (1971).

[40] For example the North Sea Continental Shelf boundary between Great Britain and Denmark, which face each other across the North Sea, is at points as far as 160 miles from the shores of each. Each exercises Continental Shelf rights to that point. 1 Lay, Nordquist, Churchill, New Directions in the Law of the Sea (Documents) 126 (1973). The Continental Shelf boundary between the Netherlands and Great Britain is at all points as distant as 156 miles from their respective shores. Id. at 128.

but existing independently of the Convention[41] the rule that:

> [T]he rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist ipso facto and ab initio by virtue of its sovereignty over the land. . . .[42]

This natural prolongation includes not only the geological shelf, but the continental slope[43] and continental rise[44] as well. Thus, each of the aforementioned geological formations is within the sub-sea area contemplated by the legal continental shelf. They are also within the Treaty definition of rights to the extent that their resources are exploitable.[45]

The continental slope is defined as "the declivity from the edge of the continental shelf or continental borderland into great depths."[46] The "great depth" or deep sea bed, occurs at a depth of approximately 4,000 metres, where the continental margin

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[41] North Sea Continental Shelf Cases, [1969] I.C.J. 1., para. 19.

[42] Id.

[43] "In terms of geology and in terms of geomorphology there would seem to be little room for doubt that the continental slope is just as much a part of and a prolongation of the continental land mass as the shelf is." Jennings, The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgement, 18 Int'l Comp. L.Q. 819, 829 (1969).

[44] Finlay, Outer Limit of the Continental Shelf, 64 Am. J. Int'l L. 42, 45, 60-61. This is essentially the position of Dr. F.V. Garcia-Amador, although he does not employ the term "continental margin." F.V. Garcia-Amador, The Exploitation of the Resources of the Sea 130 (2d ed. 1959).

[45] M. McDougal and W. Burke, The Public Order of the Oceans 683 (1962).

[46] J. Francois, Regime of the High Seas, [1956] 1 Y.B. Int'l L. Comm'n 131, A/CN.4/102/Add.1.

ends.[47] At a point prior to the deep seabed, at a depth of between 1,400 and 3,200 metres, the inclination of the seabed becomes more gradual and the continental slope becomes the continental rise.[48]

In light of the preceding discussion it seems clear that the area referred to as "Tract No. 1" was located on the continental slope of Latia, or at least the continental rise. Since both of these zones are part of the "natural prolongation" of Latia, they are within its legal continental shelf.

Article 2 sets forth the rights of a coastal state to its continental shelf, providing that such a state has "sovereign rights for the purpose of exploring it and exploiting its natural resources."[49] These rights belong exclusively in the coastal state, regardless of whether or not it expressly proclaims them or actually exercises them, or whether or not it occupies the shelf in any manner.[50] Thus, the fact that the respondent may not have been exercising its continental shelf rights at the time of Industria's intrusion is irrelevant, as is the question of whether respondent's last protest prior to the incident constituted an express proclamation of its continental shelf rights.

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[47] Federation of American Scientists Newsletter, Hearings on S. 1134 Before the Subcomm. on Minerals, Materials, and Fuels of the Senate Comm. on Interior and Insular Affairs, 93d Cong., 1st Sess., 584, 586.

[48] Id.

[49] Article 2, Para. 1, Shelf Treaty.

[50] Article 2, Para. 2 & 3, Shelf Treaty.

II. MEASURES TAKEN BY LATIA AGAINST CARRIER AND GATHERER WERE LAWFUL UNDER CUSTOMARY INTERNATIONAL LAW AND THE 1958 GENEVA CONVENTION ON THE HIGH SEAS.

Customary international law provides for an exception to the general rule of the immunity of ships on the high seas[51] under the doctrine of "hot pursuit."[52] Thus "a vessel may be pursued upon the high seas and there seized when she, or a person on board her, commits a violation of the laws of a foreign state while within its territorial waters."[53] Although this right to hot pursuit is an institution of the law of nations, and accordingly does not require legislative sanction,[54] this right was codified by the 1958 Convention on the High Seas.[55] As generally

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[51] United States v. Louisiana, 363 U.S. 1,33 (1960) ("the high seas . . . are generally conceded by modern nations to be subject to the exclusive sovereignty of no single nation."); The Marianna Flora, 24 U.S. (11 Wheat.) 1, 41 (1826) ("upon the ocean . . . in time of peace, all possess an entire equality"). See generally 4 M. Whiteman, Digest of International Law 501-510 (1965) [hereinafter cited as Whiteman].

[52] This disruption of the general tranquility of the high seas is justified as a "continuation of an act of jurisdiction which has been begun, or which, but for the accident of immediate escape, would have been begun, within the territory itself and . . . it is necessary to permit it in order to enable the territorial jurisdiction to be efficiently exercised." Hall, A Treatise on International Law 309 (1924). This perogative of the coastal state is generally recognized as a principle of international law. See Whiteman 510.

[53] C. Colombos, The International Law of the Sea 168 (6th ed. 1967).

[54] The Ship 'North' v. The King, 37 Can. Sup. Ct. 385 (1906) ("the Admiralty Court when exercising its jurisdiction is bound to take notice of the law of nations and . . . by that law when a vessel within foreign territory commits an infraction of its laws . . . she may be immediately pursued into the open seas beyond the territorial limits and there taken.") (emphasis added).

[55] Done April 29, 1958, [1962] 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

declarative of principles of international law,[56] this Convention establishes certain prerequisites which concededly must be met in order to invoke this right. Thus, pursuit must stem from a violation of the law of the pursuing state,[57] commence within a prescribed geographical area,[58] and be "not"[59] and continuous.[60]

Carrier's knowing transport of contraband manganese nodules, illegally extracted by Gatherer in violation of the law of Latia[61]

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[56]The preamble to this Convention provides in pertinent part that ". . . the United Nations Conference on the Law of the Sea . . . adopted the following provisions as generally declaratory of established principles of international law . . . ." Id. (emphasis added).

[57]See, e.g., The Marianna Flora, 24 U.S. (11 Wheat.) 1, 41 (1826).

[58]For the language employed by the 1958 Geneva Convention on the High Seas in delineating this area see text accompanying footnote 60 infra. Although there conceededly exists some dispute in the international arena as to the area from which the right of hot pursuit may be exercised, there is substantial authority for the following propositions: (1) That pursuit may commence "while the vessel is still within the territorial waters or has only just escaped from there." Hall, A Treatise on International Law, 309 (1924); (2) that "hot pursuit commenced in the contiguous zone is as valid and reasonable as [that] commenced in the territorial waters." 3 G. Gidel, Le droit international public de la mer 349 (1934); (3) that pursuit "may even begin when the offending ship has reached the high seas." 1 L. McNair, International Law Opinions 253 (1956).

[59]There is no question that pursuit was hot in the instant case, even if this term is understood to relate to the immediacy of the pursuit. See The Ship 'North' v. The King, 37 Can. Sup. Ct. 385 (1906); Poulantzas, The Right of Hot Pursuit Especially Under the Geneva Convention on the High Seas, 14 Revue Helenique De Droit Int'l 196, 201 (1961).

[60]Article 23 of the Geneva Convention on the High Seas states inter alia, that pursuit ". . . may only be continued outside the territorial sea or the contiuous zone if the pursuit has not been interrupted." Interceptors pursuit of Carrier was not interrupted and accordingly the prerequisite of continuity was satisfied.

[61]See text accompanying note 56, supra.

and of Article 2 of the 1958 Geneva Convention on the Continental Shelf,[62] triggered a right to the hot pursuit of Carrier by Latia's naval ship Interceptor. The Latian law making illegal the unlicensed exploitation by foreign nationals of natural resources within its jurisdiction is indicated by its declaration, prior to Gatherer's recovery operation, of an intent to oppose the operation by force.[63] Significantly, it is not the nature but the existence of an offense against the laws of that state committed within its territorial waters that gives rise to a right of hot pursuit.[64] Article 23 of the Convention on the High Seas[65] provides support for this position:

> 1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal state have good reason to believe that the ship has violated the laws and regulations of that state.[66]

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[62] This Article bestows exclusive rights in the coastal state to explore and exploit the natural resources of its continental shelf. Subdivision 2 of this Article declares in part that ". . . no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal state." As Latia not only refused consent to Industria and its licensee, Ocean Mining Company, but also denounced their claim to the right to exploit Tract No. 1, the activities of Gatherer and Carrier clearly violated this Article and customary international law.

[63] This declaration can be found on page 3, lines 3-4 of the problem.

[64] Thus the mere violation of local regulations requiring a license for fishing in territorial waters was held to trigger a right to hot pursuit in The Ship 'North' v. The King, 37 Can. Sup. Ct. 385 (1906); accord, Whiteman 677; Williams, The Juridical Basis of Hot Pursuit, 20 Brit. Y.B. Int'l L. 83, 92-93 (1939) (". . .the right of pursuit here is a general one, for it is immaterial whether the particular law infringed relates to fisheries, customs, shipping, neutrality, or anything else.")

[65] Done April 29, 1968, [1962] 13 U.S.T. 2313, T.I.A.S. No. 5200, 450 U.N.T.S. 82.

[66] Id. (emphasis added).

Clearly "competent authorities" of Latia had good reason to believe that Carrier's activities constituted violations of the law of Latia.

The pursuit of Carrier commenced within the geographic area delineated by Article 23 of the 1958 Geneva Convention on the Law of the Seas.[67] This Article specifies that pursuit is to be "commenced, . . . within the internal waters or the territorial sea or the contiguous zone of the pursuing State . . . ."[68] Interceptor commenced pursuit of Carrier within the territorial sea of Latia notwithstanding the fact that Interceptor apparently did not comply with the literal requirement of Article 23 that an auditory or visual signal be given to the pursued vessel from within the delineated geographical area in order for pursuit to commence. While it is conceded that pursuant to customary international law such a signal normally is a prerequisite to the commencement of hot pursuit,[69] an exception to this rule arises where, as here, the fleeing vessel is carrying contraband and is aware of being pursued since, "as a practical matter, it would be useless to signal by a blast or horn, or by firing shots, when the vessel was attempting to escape."[70] Thus the Court in The Newton Bay[71] upheld

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[67] Id.

[68] Id.

[69] See, e.g., Gillam v. United States, 27 F.2d 296 (4th Cir. 1928).

[70] The Newton Bay, 36 F.2d 729, 731 (2d Cir. 1929). Significantly, support for this position is found in comments submitted to 1956 International Law Commission to the 1958 Geneva Convention on the Law of the Sea by the office of the General Counsel of the United States Coast Guard:

> A vessel with a powerful and sensitive radar can detect another ship, such as a police vessel, several miles beyond auditory or visual range to give the required signal the offending vessel may have been able to escape to an area where hot pursuit

the pursuit of a vessel carrying contraband from within territorial waters despite a failure to give visual or auditory signals.[72] As generally declarative of principles of international law, Article 23 should be read as incorporating the rule established in The Newton Bay.

Should the Court find that the rule enunciated in The Newton Bay is applicable but that pursuit did not commence within the territorial sea, it should hold that pursuit was correctly commenced from within the waters lying over Latia's continental shelf. While the geographical description in Article 23 defining the area for commencement of hot pursuit once a foreign ship has left its territorial waters,[73] it is submitted that such a reading is inconsistent with the wide powers granted to a coastal State by the Geneva Convention on the Continental Shelf.[74] Article 2 of that convention establishes sovereign rights in the coastal state over the resources of the continental shelf.[75] As the I.L.C.

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may not begin. It is in such a circumstance that the doctrine of The Newton Bay, supra, would be applicable. Quoted in Whiteman 685. It can be logically surmised that Carrier was so equipped and took flight upon picking up Interceptor's signal. For further support of the holding in The Newton Bay see Beck & Stafford, The Doctrine of Hot Pursuit, 9 Cah. Bar Rev. 192-193 (1931).

[71] 36 F.2d 729 (2d Cir. 1929).

[72] Id. at 731.

[73] This Article states that pursuit may be commenced from inland waters, the territorial sea or the contiguous zone but is silent in regard to a right to commence pursuit from water overlying the continental shelf. See text accompanying footnote 60 supra.

[74] Done April 29, 1958 [1969] 15 U.S.T. 471, T.I.A.S. No. 5578, 499 U.N.T.S. 311.

[75] See footnote 55 supra.

stated in its 1956 Report to the General Assembly, this right of sovereignty includes ". . . all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf."[76] This includes "jurisdiction in connection with suppression of crime,"[77] or, as stated in the 1956 Report, "such rights include jurisdiction in connection with the prevention and punishment of violations of the law."[78] Inasmuch as Gatherer and Carrier violated Latia's exclusive right to exploitation of their continental shelf, their activities constituted violations of international and municipal law and subjected them to hot pursuit, seizure, confiscation of cargo and adjudication in prize.

III. IF THE AREA KNOWN AS TRACT NO. 1 WAS BEYOND THE JURISDICTION OF LATIA, THEN THE ACTIONS OF GATHERER AND CARRIER CONSTITUTED PIRACY ON THE HIGH SEAS JUSTIFYING THEIR SEIZURE AND ADJUDICATION AS PRIZES.

Even should the Court find that the area known as Tract No. 1 was not within the territorial sea, continental shelf, or economic resource zone of Latia, and was deep ocean as the applicant contends, the mining operation of the vessel Gatherer was in violation of international law, and, under Articles 14, 15, and 19 of the 1958

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[76] Francois, Report of the International Law Commission to the General Assembly, [1956] Y.B. Int'l L. Comm'n 297, U.N. Doc. A/3159 (1956).

[77] Id., Lauterpacht, [1953] 2 Y.B. Int'l L. Comm'n 214, U.N. Doc. A/2456 (1953).

[78] Id. Francois, [1956] 2 Y.B. Int'l L. Comm'n 297, U.N. Doc. A/3156 (1956).

Convention on the High Seas,[79] Latia was fully justified in seizing the vessels Gatherer and Carrier and in constituting a prize court to determine what actions would be taken with respect to those vessels and their cargo.

With the unanimous adoption by the United Nations General Assembly in 1970 of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction,[80] as much of the ambiguity surrounding the status of the deep seabed as possible was dispelled pending the outcome of a comprehensive Law of the Sea Conference.[81] The first operative paragraph of the Declaration "solemnly declares that:"

> 1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

Although the phrase "common heritage of mankind" is not unambiguous,

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[79] 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (1962).

[80] G.A. Res. 2749, 25 U.N. GAOR Supp. 28, at 24, U.N. Doc. A/8097 (1970). For 108, against 0, abstain 14. [hereinafter referred to as "Declaration of Principles"].

[81] This conference, which will "deal with the establishment of an equitable international regime...for the area and resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, a precise definition of the area, and a broad range of related issues including those concerning the regimes of the high seas, the continental shelf, the territorial sea...and the contiguous zone, fishing and conservation of the living resources of the high seas...the preservation of maritime environment...and scientific research..."was called for by the General Assembly on December 17, 1970. G.A. Res. 2750C, 25 U.N. GAOR Supp. 28, at 26, U.N. Doc. A/8028 (1970).

its meaning and content are given substance by subsequent provisions, as discussed infra.[82]

While resolutions of the General Assembly are not binding on members of the United Nations, they are not without significances:

> [W]hen they are concerned with general norms of international law, then acceptances by a majority vote constitutes evidence of the opinions of governments in the widest forum for the expressions of such opinions. Even when they are framed as general principles, resolutions of this kind provide a basis for the progressive development of the law and the speedy consolidation of customary rules.[83]

A resolution is especially entitled to close consideration as evidence of existing or emerging customary international law where, as here, it is adopted without a negative vote.

The actions of Industria, in adopting the Deep Ocean Mining Act, and the actions of the Ocean Mining Company in conducting mining operations thereunder, were in several respects in violation of customary international law as declared in the Declaration of Principles. Paragraph 2 and 3 of this Declaration give insight into what is meant by the term "common heritage of mankind". They provide that:

> 2. The area shall not be subject to appropriation by any means by states or persons, natural or juridicial and no state shall claim or exercise sovereignty or sovereign rights over any part thereof.
>
> 3. No state or person, natural or juridicial, shall claim, exercise, or acquire rights with respect to the area or its resources incompatible with the international regime to be established and the principle of this Declaration.

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[82] See text accompanying notes 75 and 72, infra.

[83] I. Brownlie, Principles of Public International Law, 14 (2nd ed. 1973).

The recovery operation, and DOMA are clearly violative of this Declaration. Both contravened the prohibition of Paragraph 3 against the exercise or acquisition of rights with respect to the area's resources "incompatible with the principles of this Declaration." Paragraph 7 states:

> 7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole. . . taking into particular consideration the interests and needs of developing countries. (emphasis added)

The provisions of DOMA relating to the establishment of a fund from license fees and tax revenues for the benefit of developing nations are a mere token lip service to the principle of "common heritage of mankind" represented in Paragraph 7. First, the amount of revenue to be deposited is miniscule when compared to the total revenue to be derived from recovery operations by the licensee, Ocean Mining Co. The fund is to consist of 25% of the license fees collected, and merely 10% of the tax revenue attributable to the recovery of hard minerals pursuant to licenses issued under DOMA[84] This cannot be regarded in any meaningful sense, as carrying out the exploitation of the area "for the benefit of mankind as a whole." Even this meager deposit is contingent upon the matching of such deposits by other industrial states with similar legislation. If one reciprocating nation makes no contribution to the trust fund, then Industria will make no contribution. Finally, the benefit of the fund is available only to those developing nations which adopt reciprocal legislation of the DOMA variety; nations which are, in other words, willing

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[84] DOMA sec. 6.

to recognize the "rights" granted by the industrial nations to licensees. This can hardly be considered "taking into particular consideration the needs of developing countries."

The passage of DOMA and the licensing of the Ocean Mining Company thereunder also violated Paragraph 12 of the Declaration, which provides:

> 12. In their activities in the area, including those relating to its resources, states shall pay due regard to the rights and legitimate interests of coastal states in the region of such activities, as well as of all other states, which may be affected by such activities. Consultations shall be maintained with the coastal states concerned with respect to activities relating to the exploration of the area dnt ehe exploitation of its resources with a view to avoiding infringement of such rights and interests.

It is obvious that the DOMA legislation and licensing by Industria in no way "pay[s] due regard to the rights" of Latia, which is a coastal state "in the region of such activities." Nor was any "consultation" maintained with Latia, as this paragraph requires. No provision in the legislation makes any provision for regarding the "rights and legitimate interests" of any coastal state in a region to be the subject of a "license" under DOMA. Nor does DOMA give any recognition or consideration to the "legitimate interests" of such states as Candia, whose economies depend on the export of hard minerals which would be the subject of the recovery operations contemplated by DOMA and which would be adversely affected by such recovery operations. Such interests are entitled to due regard under the strictures of paragraph 12.

Further evidence of the status of the "common heritage of mankind" concept elaborated in the Declaration of Principles as an

emergent rule of customary international law is the reaction of the nations of the world, first to the DOMA legislation, and second to the actual commencement of recovery operations by Ocean Mining Company. Sixty-four states protested the DOMA legislation because it violated, inter alia, "the declarations and statements adopted under United Nations auspices in recent years" (a direct reference to the Declaration of Principles), "the sovereign rights of peoples to the resources of the deep ocean," and the "resources rights of nations." When the Ocean Mining Company began its operation, and arranged for the processing of the extracted minerals in Francia, Candia protested and stated that it would not recognize title to the nodules because Industria had no sovereignty over "Tract No. 1," and because the "nodules [were] held in trust for the peoples of the world. Sixty other nations joined Candia in this position.

If the area known as "Tract No. 1" constitutes deep ocean, beyond the jurisdiction of any nation, then the recovery and transport operations undertaken by the vessels Gatherer and Carrier constituted piracy on the high seas within the definition set forth in Article 15 of the Convention on the High Seas. Piracy is defined therein as:

> (1) Any illegal act of . . . detention or any act of depredation, committed for private ends by the crew . . . of a . . .
>
> (2) Against . . . property in a place outside the jurisdiction of any state; . . .

It is clear that Carrier and Gatherer were private vessels, and that the recovery operation was conducted for the private ends of the Ocean Mining Company. The recovery operation and transport of the minerals recovered were, as pointed out earlier, "illegal acts of detention," in that they violated customary international law as expressed in the Declaration of Principles, and were directed against property, viz. the manganese nodules, which are the property of the peoples of the world.[85]

Article 19 of the Convention on the High Seas provides:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ship . . . or property . . . .

Article 14 commands that "[a]ll states shall cooperate to the fullest possible extent in the repression of piracy on the high seas. . . ." The International Law Commission Commentary on this article interpreted it to mean that "[a]ny state having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law."[86] Thus, the seizure of Carrier and Gatherer were not only authorized but required by international law, and the adjudication of the vessels and their cargoes as prizes and transfer of title to the Latian Government by the Prize Court was fully justified.

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[85] That Tract No. 1 is in the area outside the jurisdiction of any state has been assumed for the purposes of discussion.

[86] I.L.C. Commentary at 282.

IV. LATIA MAY LEGALLY CONDUCT RECOVERY OPERATIONS IN THE AREA REFERRED TO AS "TRACT NO. 1", AND MAY CONDUCT SUCH OPERATIONS IN THE AREA BEYOND THE JURISDICTION OF NATIONS AS LONG AS IT DOES SO IN A MANNER CONSISTENT WITH THE PRINCIPLE OF THE "COMMON HERITAGE OF MANKIND."

Respondent asks the court to declare that its conduct of recovery operations in the area known as Tract No. 1 is lawful. As evidence of its good faith, Respondent intends to conduct such operations in trust for all people and states, and particularly for developing countries, despite its position that the area lies within either its territorial sea or its continental shelf.[86] The Respondent asks further that the Court declare lawful the exploitation of the deep seabed beyond the national jurisdiction of states as long as it is conducted in the same manner. Both determinations would be consistent with the Declaration. Paragraph 7 of the Declaration recognizes the right to exploit the area beyond the jurisdiction of nations as long as it is done for the benefit of mankind as a whole. Since Francia and the Respondent are the "coastal states concerned," and Francia has been consulted by Latia concerning its recovery operations in "Tract No. 1," the requirements of Paragraph 12 are met. Similar consultation would be had with coastal states in any other area of exploitation.

There is a significant difference between the manner in which Latia proposes to conduct its operations and Industria's approach. The proportion of benefit dedicated to the "trust" by Latia is significantly greater than that so dedicated by Industria,[87] and Latia makes neither its contribution to the trust, nor the participation of developing

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[87] See text accompanying notes 84 supra.

states therein conditional, as does Industria in its legislation.[88] With respect to the amount to be placed in trust, Respondent has demonstrated flexibility by inviting proposals for a royalty regime. Should it be found that 10% is insufficient, Latia is open to suggestion by, and will follow any direction of the court, as to what would constitute a sufficiently high royalty to give effect to the principle of the "common heritage" in the exploitation of the resources in the area beyond the jurisdiction of nations. In all respects, therefore, Latia's recovery operations in that area will be in accord with the customary international law.

CONCLUSION

This analysis clearly demonstrates that the actions taken by Interceptor with respect to Gatherer and Carrier, and the subsequent prize court were justified under International Law either as measures enforcing its law with respect to an area within its jurisdiction, or as measures directed toward the suppression of piracy on the High Seas. Additionally, the Respondent is entitled to conduct operations for the recovery of hard minerals, the seabed of the deep ocean as long as it is done in a manner consistent with the principle of the "common heritage of mankind."

Wherefore, Respondent respectfully submits that all relief requested by the Applican should be denied and further that Respondent is entitled to a declaration of the validity of its proposed recovery operation.

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[88] Id.