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General List No. 108

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IN THE INTERNATIONAL COURT OF JUSTICE

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New Madiera,  
Applicant,  
- against -  
Republic of Orlando,  
Respondent.

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Pursuant to Special Agreement Between  
New Madiera and the Republic of Orlando

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COPIED MEMORIAL FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Whether a newly independent island nation's endorsement of the use of driftnets spanning 3.0 kilometers on the high seas of the North Ocean is a violation of international law when there exists sufficient data that demonstrates the harmful effects of driftnet fishing, when there is evidence that the island nation is committing piracy, and when the island nation's actions violate the Rio Declaration, UNCLOS, and SHMFSA.
2. Whether a coastal nation may prohibit the newly independent island nation access to the North Ocean fishery, when the island nation fails to comply with standards established by a Regional Fisheries Management Organization and when the coastal nation gives the island nation adequate notice of its violations.

STATEMENT OF JURISDICTION

The governments of New Madiera and the Republic of Orlando submit this dispute to the International Court of Justice, pursuant to Article 40, paragraph 1, of the Statute of the International Court of Justice.

## Statement of Facts

In January of 2003, as the island of New Madiera began its first days as a newly independent nation, a fishing dispute arose between New Madiera and the Republic of Orlando. (R.6) This dispute involves the use of large-scale pelagic driftnets to fish the waters of the North Ocean. (R.3) After continued disagreement between New Madiera and Orlando, this application to the International Court of Justice (ICJ) was filed. (R.3-5)

The Republic of Orlando's eastern coast borders the North Ocean and is home to about 52 million people and a diversified economy. (R.6) Being a substantially developed nation, the Republic of Orlando is highly involved in international affairs. (R.6) The Republic of Orlando is a member of the United Nations, a member nation of the Food and Agriculture Organization of the United Nations (FAO), a party to the Vienna Convention on the Law of Treaties, a party to the Statute of the ICJ, a State Party to the United Nations Convention on the Law of the Sea (UNCLOS), and a signing party to the Convention on Biological Diversity (CBD). (R.6-7) In addition, the Republic of Orlando is a State Party to the Agreement for the Implementation of the UNCLOS of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (SHMFSA). (R.7)

New Madiera was an independent nation from the date of its first settlement until 1921. (R.6) In 1921, the Commonwealth of Socialist States (CSS) invaded this island in the North Ocean and declared it to be a territory of the CSS. (R.6) From 1921 until 31 December 2002, New Madiera remained a territory of the CSS. (R.6)

During the time the CSS claimed New Madiera as a territory, it was a member of several international organizations. (R.6) The CSS was a member of the United Nations, a member nation of FAO, a party to the Vienna Convention on the Law of Treaties, a State Party to UNCLOS, and a Signing Party to the CBD. (R.6-7) The CSS was not, however, a State Party to SHMFSA. (R.7)

In 1998, fifteen states that conducted fishing operations upon the North Ocean, including the Republic of Orlando and the CSS, established the North Ocean Fisheries Organization (NOFO). (R.7) This regional organization was created to regulate the fishing operations in the North Ocean's high seas. (R.7) NOFO institutes regulations through the vote of its members. (R.7) Once a regulation is passed by a majority of NOFO members, it is put into force. (R.7) If a NOFO member disagrees with a regulation and files a formal objection, that state will not be bound by the regulation. (R.7)

In January 2001, the NOFO issued a regulation prohibiting the use of large-scale pelagic driftnets on the high seas of the

North Ocean. (R.7) In defining this type of driftnet, NOFO looked to the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific. (R.7) Ultimately, a driftnet is defined under NOFO as "a gillnet or other net or a combination of nets which is more than 2.5 kilometers in length, the purpose of which is to enmesh, entrap or entangle fish by drifting on the surface of or in the water." (R.7) Thirteen of fifteen NOFO nations voted for this regulation; the CSS and the Kingdom of Deland abstained and then later formally objected. (R.7) Although the CSS was not bound by the driftnet regulation, from February 2001 through December 2002, fishing vessels flying the CSS flag and leaving from what is now New Madiera did not use driftnets that were more than 2.0 kilometers in length. (R.7)

On 1 January 2003, New Madiera declared its independence from the CSS. (R.6) At this time, New Madiera became a member of the United Nations. (R.6) Since its newfound independence, New Madiera has been selective in its international politics. (R.6-7) It has not individually become a member nation of the FAO, a party to the Vienna Convention on the Law of Treaties, a state party to UNCLOS, a state party to SHMFSA, or a member of NOFO. (R.6-7) New Madiera is, however, a Contracting Party to the CBD and a party to the Statute of the ICJ. (R.6,7)

On 15 January 2003, the *Dickerson*, a vessel from New Madiera, used a driftnet that spanned 3.0 kilometers in length while fishing in the North Ocean. (R.8) Bluepeace, an international non-governmental organization, reported this use. (R.8)

On 22 January 2003, the Republic of Orlando issued a diplomatic note to New Madiera regarding its vessel's use of a 3.0 kilometer driftnet. (R.8) In this note, the Republic of Orlando informed New Madiera of its violation of NOFO. (R.8) New Madiera responded with a similar diplomatic note, confirming the use of the 3.0 kilometer driftnet and noted that the vessel using this driftnet did so with the permission of the government of New Madiera. (R.8-9) After continuing disagreement in the form of several subsequent diplomatic notes, New Madiera and the Republic of Orlando filed this application to the International Court of Justice.

## SUMMARY OF THE ARGUMENT

Applicant, the Government of New Madiera, has violated generally accepted principles of customary international environmental law by refusing to cease its large-scale driftnet fishing on the North Ocean. In response to this internationally renounced pelagic practice, Respondent, the Republic of Orlando, has contacted the Government of New Madiera and requested that it comply with the generally accepted, yet binding customary law, as announced in a number of international environmental treaties.

However, as a newly independent State and a non-member of the most important marine conservation treaty, the United Nations Convention on the Law of the Sea (UNCLOS), New Madiera has argued that it does not have to abide by these principles, and shall continue its driftnetting operations on the high seas without the consent of the Republic of Orlando. But because UNCLOS is considered to be binding customary law and because the environmentally harmful actions of New Madiera are considered piracy under the language of UNCLOS, the Republic of Orlando is justified in deciding to refuse New Madiera access to its North Ocean fisheries.

Furthermore, even if New Madiera was not bound by customary international law, New Madiera has not met its burden of showing that its driftnet activities will not harm the marine

environment. Consequently, the Republic of Orlando has the right, under the precautionary principle, to restrict New Madiera's access to the North Ocean because New Madiera's driftnet fishing operations are almost universally decided to be substantially harmful to the national interests of the Republic of Orlando.

Therefore, for these reasons, the Republic of Orlando reserves the right to exercise jurisdiction over New Madiera and subsequently deny it access to its coastal waters.

## ARGUMENT

- I. NEW MADERIA'S INSISTENCE ON USING LARGE-SCALE DRIFTNETS GREATER THAN 2.5 KILOMETERS IN LENGTH IS A VIOLATION OF INTERNATIONAL LAW BECAUSE NEW MADEIRA IS IN OPPOSITION TO CUSTOMARY INTERNATIONAL LAW, BECAUSE NEW MADERIA IS COMMITTING AN ACT OF PIRACY, AND BECAUSE SUFFICIENT DATA EXIST TO SUPPORT A BAN ON DRIFTNET FISHING.

New Madiera's use of driftnet fishing operations in the North Ocean is in direct opposition to customary international law and should therefore be prohibited. Although New Madiera is not a State Party to the United Nations Convention on the Law of the Sea (UNCLOS), the Republic of Orlando and other coastal States have voluntarily recognized, as is general custom, that UNCLOS is a codification of the customary international law.<sup>1</sup> Therefore, under the customary international environmental law, the Republic of Orlando not only has the right to exercise unilateral jurisdiction over its exclusive economic zone (EEZ), but also has the obligation to conserve marine resources in the high seas.<sup>2</sup> In doing so, the Republic of Orlando has chosen to restrict the use of all driftnet fishing practices over the area in which it has jurisdiction, including restricting access over its costal borders. (R.7)

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<sup>1</sup> See generally, Mark W. Janis, *An Introduction to International Law*, Third Edition, p. 216, 221 (1999).

<sup>2</sup> See generally, United Nations Convention on the Law of the Seas, Dec. 10, 1982, 21 I.L.M. 1261 [hereinafter UNCLOS].

In addition, although the United Nations General Assembly may only make recommendations, Article 118 of UNCLOS provides that States whose nationals are exploiting the same resources "shall" work together and negotiate ways to conserve these resources.<sup>3</sup> By declining to ratify UNCLOS while still seeking to share in the Republic of Orlando's exploitation of the same resources, New Madiera has not only undermined the effective implementation of international environmental law but also has worked in direct opposition to the policies underlying international environmental law, to the detriment of all other nations.

The Republic of Orlando has set a goal to further the positive efforts already taken globally. Its goal in voluntarily joining the North Ocean Fishery Organization (NOFO) is to ensure that no additional damage is done to the environment and the fishery resources shared by it and other member States. (R.10, 11) To further this goal, the Republic of Orlando is authorized by UNCLOS to require that New Madiera comply with general principles of international customary environmental law.<sup>4</sup>

For these reasons, the Republic of Orlando respectfully requests that this Court find that New Madiera has violated

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<sup>3</sup> Id. at art. 118.

<sup>4</sup> Id.

customary international law, and order New Madiera to cease its unlawful practices.

A. New Madiera is in violation of international law because the use of large-scale driftnets exceeding 2.5 kilometers in length is illegal under customary international environmental laws and therefore the Republic of Orlando should apply the precautionary approach as defined in the Rio Declaration, UNCLOS and SHMFSA.

By admittedly using a driftnet of 3.0 kilometers on 15 January 2003 to catch fish on the high seas of the North Ocean, (R.8), New Madiera has violated international customary law. In order for New Madiera to claim a "right to fish" on the high seas, according to customary international environmental law, that state also must abide by the conditions specified in the law.<sup>5</sup> This Court should find that New Madiera's use of large-scale pelagic driftnets undermines and destroys the protective measures taken by the Republic of Orlando and other coastal states, and therefore violates international customary environmental law, UNCLOS, and the Agreement for the Implementation of the UNCLOS of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (SHMFSA).

"States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the

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<sup>5</sup>Linda M.B. Paul, *High Seas Driftnetting: The Plunder of the Global Commons* (1994), at <http://www.earthtrust.org/dnpaper/intllaw2.html>.

Earth's ecosystem."<sup>6</sup> This seventh principle of the Rio Declaration on Environment and Development (Rio Declaration) was established at the United Nations Conference on Environment and Development in June of 1992.<sup>7</sup> Building upon the Stockholm Declaration of 1972, which had already become customary international law, the Rio Declaration sought to increase awareness and protection of the global environment.<sup>8</sup>

Under the Rio Declaration, an action should not be undertaken if there is a likelihood of significant harm to the environment.<sup>9</sup> This assertion, articulated in Principle 15 of the Rio Declaration, is often called the "precautionary approach."<sup>10</sup> This approach has become customary international environmental law, as evidenced by Article 6 of UNCLOS, which mandates that:

States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.<sup>11</sup>

As a codification of the customary international law, UNCLOS binds both signatory and non-signatory states.<sup>12</sup>

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<sup>6</sup>United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, June 14, 1992, Principle 7, 31 I.L.M. 874 (1992) [Hereinafter Rio Declaration].

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id. at Principle 15.

<sup>10</sup> Id.

<sup>11</sup> UNCLOS, art. 6(1).

<sup>12</sup> See Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea (UNCLOS): Justice in Trade and Environment Disputes*, 25 *ECOLOGY L. Q.* 189, 209 (1998).

Established to protect and preserve the marine resources of Earth, UNCLOS formation was influenced by newly accepted principles of international environmental law.<sup>13</sup> One such principle, established in 1974 by this Court in Fisheries Jurisdiction (U.K. v. Ice.), holds that "one of the advances in maritime international law, resulting from the intensification of fishing, [is] that the former laissez-faire treatment of the living resources . . . in the high seas has been replaced by a . . . duty to have due regard to the rights of other States and the needs of conservation for the benefit of all."<sup>14</sup>

Freedom of the high seas, including the freedom to fish, is exercised under rules of customary international environmental law and by section 2 of UNCLOS.<sup>15</sup> Section 2 of UNCLOS establishes conditions for the use of the high seas.<sup>16</sup> Specifically, it states that due regard must be had for the interests of other states and for any rights bestowed under the Convention.<sup>17</sup>

In addition to UNCLOS, SHMFSA has also adopted the precautionary approach established in the Rio Declaration.<sup>18</sup> SHMFSA was established in December 1995 to "ensure the long-term conservation and sustainable use of straddling fish stocks and

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<sup>13</sup> See Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3 (July 25).

<sup>14</sup> Id. at 31.

<sup>15</sup> UNCLOS, art. 87.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> SHMFSA, art. 5(c).

highly migratory fish stocks.”<sup>19</sup> SHMFSA applies primarily to fish located in the high seas.<sup>20</sup> SHMFSA advocates the establishment of regional management fisheries organizations (RFMOs) to implement its conservation measures. It further details that the use of prohibited fishing gear is a serious violation SHMFSA.<sup>21</sup>

Because the Rio Declaration is applicable as customary law to both parties in the instant case, the Republic of Orlando has the right to take action against New Madiera using the precautionary principle. The use of large-scale pelagic driftnets is harmful to the marine ecosystems.<sup>22</sup> By using 3.0 kilometer driftnets on the high seas of the North Ocean, New Madiera is likely to cause significant harm to the marine environment, and is therefore violating customary law established by the Rio Declaration.

In addition, New Madiera’s decision to continue using large-scale driftnets to conduct its fishing operations in the North Ocean will lead to subsequent economic harm and degradation. As the United Nations General Assembly stated in its December 1989 Resolution, the practice is “widely considered to threaten the effective conservation of living marine

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<sup>19</sup> *Id.* at art. 2.

<sup>20</sup> *Id.* at art. 3.

<sup>21</sup> *Id.* at art. 21(11)(e).

<sup>22</sup> Linda M.B. Paul, *High Seas Driftnetting: The Plunder of the Global Commons; A Compendium*, May, 1994.

resources."<sup>23</sup> The Assembly also stated that "all members of the international community have a duty to co-operate globally and regionally in the conservation and management of living resources on the high seas."<sup>24</sup> (emphasis added)

Finally, New Madiera's actions violate UNCLOS and SHMFSA. First, under UNCLOS, New Madiera's action is without due regard for the interests of the Republic of Orlando and all other member nations of NOFO. NOFO was established to comply with SHMFSA, an agreement that should be incorporated as customary international environmental law. By failing to cooperate with NOFO, New Madiera has undermined its conservation measures. Second, New Madiera is in serious violation of SHMFSA. Large-scale pelagic driftnets are prohibited fishing gear under NOFO. Although New Madiera is not required to become a member of NOFO, it must comply and cooperate with the principles NOFO sets forth. By using driftnets larger than those permitted under NOFO, New Madiera has violated SHMFSA, and subsequently, customary international environmental law. Thus, this Court should find that New Madiera's use of large-scale pelagic driftnets, in excess of 2.5 kilometers, violates international customary law, as well as UNCLOS and SHMFSA.

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<sup>23</sup> United Nations General Assembly, Large-scale pelagic driftnet fishing and its impact on the living marine resources of the world's oceans and seas, Res. 44/225, Dec. 22, 1989, U.N. Doc. A/RES/44/225 (1990) [Hereinafter UNGA Res. 44/225].

<sup>24</sup> Id.

B. New Madiera should be ordered to cease its large-scale driftnet operations immediately, because New Madiera is committing an act of piracy and because sufficient data exist to demonstrate this is an environmentally harmful practice.

By refusing to cooperate with the Republic of Orlando and continuing its driftnet operations, New Madiera is committing an act of piracy, and this Court should order the Government of New Madiera to cease its illegal acts before irreparable harm is done to the environment.

Article 101(a)(ii) of UNCLOS defines piracy as "any act of depredation, committed for private ends by the crew . . . of a private ship . . . and directed . . . against . . . property in a place outside the jurisdiction of any State."<sup>25</sup> The high seas, being beyond the immediate jurisdiction of the Coastal States, are considered property held in common by mankind, and as such, all of those persons using the marine resources should be held accountable for their actions.<sup>26</sup> Driftnet fishing is a multinational business and should therefore be subject to multinational jurisdiction and sanctions.<sup>27</sup>

Additionally, over the past thirty years, numerous studies conducted on driftnet fisheries have found that a number of harmful results occur because of driftnet fishing. Some of these harmful results include substantial wasted by-catch of

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<sup>25</sup> UNCLOS, art. 101(a)(ii).

<sup>26</sup> Linda M.B. Paul, *High Seas Driftnetting: The Plunder of the Global Commons; A Compendium*, May, 1994.

<sup>27</sup> Id.

unregulated species of marine animals,<sup>28</sup> spoiled catch as high as 55 percent of the total catch, the mortality of hundreds of thousands of seabirds and marine mammals that become entangled in the mesh of the nets,<sup>29</sup> and lost and abandoned "ghost nets," the plastic netting that does not biodegrade and continues to float in the ocean and entangles marine animals, fish, and other vessels' propellers.<sup>30</sup>

United Nations Resolution 44/225 places a ban on large-scale pelagic driftnet fishing because of this detrimental impact on ocean life.<sup>31</sup> Additionally, the U.N. driftnet ban is based on the application of the precautionary principle.<sup>32</sup> Under the precautionary principle of enforcement, a lack of "full scientific certainty" shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation where there are serious threats of irreversible damage.<sup>33</sup>

In the instant case, New Madiera has committed an act of piracy by refusing to comply with international customary law, and instead seeking to continue its harmful driftnet operations

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<sup>28</sup> Id.

<sup>29</sup> Id.

<sup>30</sup> Robert Eisenbud, *Problems and Prospects for the Pelagic Driftnet*, 12 B.C. ENVTL. AFF. L. REV. at 473 (1985).

<sup>31</sup> UNGA Res. 44/225.

<sup>32</sup> In the 1993 U.N. Conference on Straddling and Highly Migratory Fish Stocks, coastal states advocated the use of the precautionary principle as widely as possible in application to the fisheries industry.

<sup>33</sup> See Linda M.B. Paul, *High Seas Driftnetting: The Plunder of the Global Commons; A Compendium*, May, 1994.

to the detriment of all NOFO members. As demonstrated by the above research, the environmental destruction and subsequent damage to numerous animal species that result from pelagic driftnetting should be considered acts of depredation of the living resources of the global ocean commons, and therefore illegal under the current circumstances. Further, New Madiera has blatantly disregarded its obligation to conserve environmental resources by insisting on using pelagic driftnets larger than 2.5 kilometers, and has failed to sufficiently take into account studies showing the irreparable harm to straddling species of migratory fish.

Moreover, by declining to become a member of UNCLOS and by refusing to honor the ban on large-scale driftnet fishing as called for by the United Nations Resolution 44/225,<sup>34</sup> the Government of New Madiera is hampering the efforts of the Republic of Orlando and other member States to conserve the world's marine resources. Under this U.N. driftnet ban, the precautionary principle places the burden of proving that significant harm is unlikely to occur on those parties who propose to act. Therefore, unless the Government of New Madiera can demonstrate that its driftnet activities will not impose an unacceptable cost on migratory or other animal species, it

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<sup>34</sup> UNGA Res. 44/225.

should be prohibited from conducting these destructive activities.

Because New Madiera has failed to comply with its international environmental obligations, and has in fact committed an act of piracy against all NOFO member Parties according to UNCLOS and SHMFSA, this Court should enforce an immediate and permanent ban on New Madiera's large-scale driftnet activities.

II. NEW MADIERA SHOULD BE DENIED ACCESS TO THE NORTH OCEAN FISHERY BECAUSE IT HAS FAILED TO COOPERATE AND ADHERETO THE CONSERVATION MEASURES ESTABLISHED BY NOFO ANDCUSTOMARY INTERNATIONAL ENVIRONMENTAL LAW AND ACCORDINGLY, THE REPUBLIC OF ORLANDO HAS THE RIGHT TO LAWFULLY RESTRICT NEW MADIERA'S ACCESS TO THE NORTH OCEAN FISHERY BECAUSE IT HAS FAILED TO COMPLY WITH INTERNATIONAL ENVIRONMENTAL LAW.

New Madiera should be denied access to the North Ocean fishery because it has defied accepted notions of international environmental law. Specifically, New Madiera has a duty to cooperate with other nations in the conservation of Earth's environment.<sup>35</sup> However, New Madiera has failed to cooperate with other states in its own region, specifically those involved in the North Ocean Fishery Organization (NOFO). By failing to cooperate with NOFO, New Madiera is jeopardizing and undermining the marine ecosystems NOFO protects.

In addition, the Republic of Orlando should be permitted to deny New Madiera access to the North Ocean fishery. New

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<sup>35</sup> See generally, Convention on Biological Diversity, preamble, June 5, 1992, 31 I.L.M. 818[Hereinafter CBD]; Rio Declaration, principle 2.

Madiera's refusal to cooperate and maintain the regionally and globally accepted conservation measures regarding straddling fish stocks and highly migratory fish stocks causes transboundary pollution.<sup>36</sup> By using large-scale pelagic driftnets, which are accepted as harmful to the marine environment, New Madiera has damaged the North Ocean's ecosystem, and it is the Republic of Orlando's duty to ensure that further harm is prevented. Therefore, Respondent respectfully requests that this Court allow the Republic of Orlando to deny New Madiera access to the North Ocean fishery.

A. New Madiera should be denied access to the North Ocean fishery because it failed to cooperate with member states of NOFO, refused to participate in NOFO, and rebelled against the conservation measures established by NOFO.

New Madiera should be denied access to the North Ocean fishery because it has been uncooperative, uncompromising, and unlawful in its actions with respect to the Republic of Orlando and NOFO. This Court should find that New Madiera's blatant disregard for the conservation regulations established by NOFO violated UNCLOS, SHMFSA, the CBD, and customary law, and should deny New Madiera access to the North Ocean fishery.

**1. New Madiera's actions violated UNCLOS and SHMFSA.**

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<sup>36</sup> Stockholm Declaration on the Human Environment, June 1972, principle 21 [Hereinafter Stockholm Declaration].

States fishing on the "high seas" must adhere to UNCLOS.<sup>37</sup> UNCLOS, which was developed over a thirty year period, came into force on November 16, 1994.<sup>38</sup> UNCLOS establishes conservation and management provisions for the protection of marine life, recognizing that 70% of the Earth's surface is water.<sup>39</sup> UNCLOS's primary concern is to regulate and manage dealings with the oceans so as to preserve marine ecosystems.<sup>40</sup> In order to protect marine life, UNCLOS establishes four jurisdiction zones within the seas: (1) the territorial sea, (2) the exclusive economic zone (EEZ), (3) the continental shelf, and (4) the high seas.<sup>41</sup> UNCLOS focuses its conservation and management regulations on the high seas zone since no coastal state has the jurisdiction to apply its own law in that zone.<sup>42</sup>

UNCLOS has been called the "Constitution of the Oceans."<sup>43</sup> It is frequently "asserted that UNCLOS is not only a treaty but [also] a codification and articulation of the present state of the rules applicable to oceans, and it has ascended to the

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<sup>37</sup> Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea (UNCLOS): Justice in Trade and Environment Disputes*, 25 *Ecology L.Q.*, 187, 221 (1998).

<sup>38</sup> Id. at 208.

<sup>39</sup> Id. at 209.

<sup>40</sup> Id.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> Id.

status of customary IEL, binding on both signatories and non-signatories."<sup>44</sup>

As a codification of the rules of the oceans, UNCLOS is comprehensive and inclusive. Article 197 mandates that "States shall co-operate . . . on a regional basis . . . in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features."<sup>45</sup> Thus, UNCLOS requires nations to cooperate in the conservation and maintenance of marine life.

"Only those states which are members of [a regional fisheries management] organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization of arrangement shall have access to the fishery resources to which those measures apply."<sup>46</sup> Soon after the principles of UNCLOS were established, environmentalists found it necessary to add further protection for certain marine species. In SHMFSA, coastal states are encouraged to establish regional fisheries management organizations (RFMOs), and to implement standards to

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<sup>44</sup> *Id.* See also Martin H. Belsky, *The Ecosystem Model mandate for a Comprehensive United States Ocean Policy and Law of the Sea*, 26 San Diego L.Rev. 417, 470 (1989).

<sup>45</sup> UNCLOS, art. 197.

<sup>46</sup> SHMFSA, art. 8.

conserve the straddling stocks and highly migratory fish stocks of the area.<sup>47</sup>

According to SHMFSA, a nation which chooses not to become a member or participant in an RFMO or which does not agree to apply the conservation regulations established by the RFMO does not have to cooperate with the RFMO.<sup>48</sup> However, "such [nation] shall not authorize vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks which are subject to the conservation and management measures established by [the RFMO]."<sup>49</sup> In fact, where there exists an agreed upon RFMO, states must impose measures consistent with the regulations of the RFMO upon vessels flying their own flag.<sup>50</sup>

Thus, UNCLOS requires cooperation among nations to preserve and protect the marine life of their region. A suggestion for the fulfillment of this requirement is outlined in SHMFSA, which encourages membership and compliance with RFMOs.

Although New Madiera is not a State Party to UNCLOS or SHMFSA and is not a member of NOFO, it should be bound by the conservation and management measures established therein. First, UNCLOS should be interpreted as customary international

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<sup>47</sup> Id. at art. 5.  
<sup>48</sup> Id. at art. 17.  
<sup>49</sup> Id.  
<sup>50</sup> Id.

environmental law.<sup>51</sup> It is most commonly referred to as the "Constitution of the Oceans," and as such, should govern all nations in their actions involving marine life. Second, UNCLOS's formation over a thirty-year period took into consideration developing principles of international environmental law, so UNCLOS should be seen as a codification of these principles.

Furthermore, this Court should also apply SHMFSA as customary law. Nearly every region on Earth has established RFMOs in accordance with SHMFSA.<sup>52</sup> Moreover, in the instant case, even the CSS and the Kingdom of Deland, who are not bound by the driftnet regulation due to a formal objection, are members of NOFO. Furthermore, before New Madiera established its independence, every state that conducted fishing operations on the high seas was a member of NOFO. Since most nations with fishing operations covered by SHMFSA established RFMOs, and especially since all nations conducting fishing operations in the North Ocean except New Madiera are members of NOFO, this Court should find that SHMFSA is a general practice accepted as law, and therefore a custom according to Art. 38(1)(b), Statute of ICJ. Thus, New Madiera should be bound by the requirements

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<sup>51</sup> Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea (UNCLOS): Justice in Trade and Environment Disputes*, 25 Ecology L. Q., 187, 209 (1998).

<sup>52</sup> United Nations General Assembly, *Oceans and the law of the sea*, A/58 ... [Hereinafter UNGA Oceans].

set forth in UNCLOS and SHMFSA since both treaties elaborate principles of customary international environmental law.

New Madiera violated UNCLOS and failed to meet the requirements of coastal and flag states under SHMFSA. New Madiera failed to cooperate with the Republic of Orlando, as required under Article 197, UNCLOS. In so doing, New Madiera challenges the preservation measures established to protect the straddling fish stocks and highly migratory species of the North Ocean region. Furthermore, although New Madiera is not required to become a member nation of SHMFSA or NOFO, by encouraging vessels flying their flag to engage in actions specifically prohibited by NOFO, it has compromised all that NOFO has worked toward in protecting the marine environment of the North Ocean. Since New Madiera's actions are wholly inconsistent with the accepted principles of international environmental law, this Court should find that the Republic of Orlando has the right to deny New Madiera access to the North Ocean fishery.

**2. New Madiera's actions violated the CBD.**

Even if this Court finds that New Madiera should not be governed by UNCLOS or by SHMFSA, New Madiera should still be denied access to the North Ocean fishery since it violated the CBD, to which it is a contracting party.

States must make certain that actions within their own jurisdiction do not harm the environment of nations or regions

outside the scope of their own jurisdiction.<sup>53</sup> The CBD was established in 1992 and “[Stressed] the importance of and the need to promote international, regional and global cooperation among states and intergovernmental organizations and non-governmental sectors for the conservation of biological diversity and the sustainable use of its components.”<sup>54</sup> The purpose of the CBD is to “enhance and complement existing international arrangements for the conservation of biological diversity and sustainable use of its components.”<sup>55</sup>

In order to complement existing international arrangements, including UNCLOS, the CBD gives states the sovereignty to “exploit their own resources pursuant to their own environmental policies.”<sup>56</sup> However, the CBD does not give omnipotent or unrestricted authority to contracting parties.<sup>57</sup> Balanced with the sovereignty given to Contracting States lies “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”<sup>58</sup>

In ensuring that its activities do not damage the environment of other nations or regions, each contracting party

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<sup>53</sup> See generally, CBD.

<sup>54</sup> Id. at preamble.

<sup>55</sup> Id.

<sup>56</sup> Id. at art. 3.

<sup>57</sup> Id.

<sup>58</sup> Id.

to the CBD is required to cooperate with other contracting parties or with international organizations in order to protect biological diversity.<sup>59</sup> In addition, Article 22 of the CBD, which enumerates the relationship of the CBD with other international conventions, requires that "Contracting parties . . . implement this convention [the CBD] with respect to the marine environment consistently with the rights and obligations of states under the law of the sea."<sup>60</sup> Thus, application of the CBD must not be inconsistent with UNCLOS, the customary international law of the sea.

New Madiera is a contracting party to the CBD. As such, it may implement its own environmental policies so long as it does not damage the environment of surrounding nations like the Republic of Orlando. In implementing its own policies, it must act consistently with the principles of law established in UNCLOS.

New Madiera violated the CBD by failing to cooperate with the Republic of Orlando and with NOFO. In addition, by acting in an obstinate manner with respect to the Republic of Orlando and NOFO, New Madiera threatened the biological diversity of the North Ocean. New Madiera also failed to comply with the customary international law of the sea, as required by the CBD.

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<sup>59</sup> Id. at art. 5.  
<sup>60</sup> Id. at art. 22.

Because New Madiera's fishing practices threaten the sustainable use and conservation of the North Ocean, this Court should deny New Madiera access to the North Ocean fishery.

- B. The Republic of Orlando should be permitted to lawfully restrict New Madiera's access to the North Ocean fishery because New Madiera has failed to cooperate with the Republic of Orlando or NOFO and because New Madiera may substantially harm the marine environment by using large-scale pelagic driftnets forbidden by NOFO.

The Republic of Orlando should be permitted to restrict New Madiera's access to the North Ocean fishery because New Madiera has been uncooperative in maintaining the preservation and protection of the North Ocean marine environment. This Court should find that the Republic of Orlando may legally restrict New Madiera's access to the North Ocean fishery because New Madiera poses a major threat to the marine environment of the North Ocean.

**1. The Republic of Orlando may restrict New Madiera's access to the North Ocean fishery under UNCLOS and SHMFSA.**

Fishing States must conserve living marine resources of the high seas.<sup>61</sup> UNCLOS requires that nations cooperate with each other to preserve and protect the ecosystems of the oceans.<sup>62</sup> All nations, whether or not a State Party to UNCLOS, are governed by UNCLOS because it codifies customary international

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<sup>61</sup> UNCLOS, art. 117.

<sup>62</sup> Id.

environmental law and is in essence the "Constitution of the oceans."<sup>63</sup>

"State parties [to SHMFSA] shall take measures consistent with this agreement and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of this agreement."<sup>64</sup>

SHMFSA was established in an effort to conserve and protect specific species of marine life found in the high seas.<sup>65</sup> SHMFSA broadened the protection established by the jurisdictional zones of UNCLOS by setting up special rules for Straddling Stocks and Highly Migratory Fish Stocks.<sup>66</sup> In order to protect these specific species, SHMFSA encourages nations to create and adhere to RFMOs.<sup>67</sup>

In addition to encouraging the creation of RFMOs, SHMFSA also requires that "State parties . . . encourage non-parties to [SHMFSA] to become parties thereto and to adopt laws and regulations consistent with its provisions."<sup>68</sup> In order to meet this requirement, coastal states must inform states fishing on the high seas of regulations the region has adopted for

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<sup>63</sup> Lakshman Guruswamy, *The Promise of the United Nations Convention on the Law of the Sea (UNCLOS): Justice in Trade and Environment Disputes*, 25 *Ecology L. Q.* 187, 209 (1998).

<sup>64</sup> SHMFSA, art. 33.

<sup>65</sup> Id. at preamble.

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> Id. at art. 33.

straddling fish stocks and highly migratory fish stocks.<sup>69</sup> A coastal state may inform such a state fishing on the high seas of these regulations either directly or through the region's RDMO.<sup>70</sup>

In determining whether a state should be a new member or participant of an RFMO, SHMFSA outlines several considerations for member states.<sup>71</sup> One such consideration is "the respective contributions of new and existing members or participants to conservation and management of the stocks."<sup>72</sup> Presumably, if a new member or participant has wholly failed to comply with the standards in place under the RFMO, that RFMO may deny the new participant state admission to the fishery. Thus, under SHMFSA, a coastal nation or state party must inform non-parties of regulations adopted for straddling fish stocks and highly migratory fish stocks, and must take measures to deter such non-parties from acting in a manner which would undermine the purpose of SHMFSA and RFMOs.<sup>73</sup> Furthermore, a coastal nation or state party may deny a new member access to the fishery if the contribution of that new member is detrimental to the conservation and management of the stocks.<sup>74</sup>

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<sup>69</sup> Id. at art.7.

<sup>70</sup> Id.

<sup>71</sup> Id. at art. 11.

<sup>72</sup> Id.

<sup>73</sup> Id.

<sup>74</sup> Id.

The Republic of Orlando has complied with UNCLOS and SHMFSA in informing New Madiera of its violations. First, after Bluepeace reported that a fishing vessel from New Madiera violated a NOFO regulation regarding driftnet fishing, the Republic of Orlando sent a diplomatic note to New Madiera regarding the violation. (R.8) In further correspondence with New Madiera, the Republic of Orlando encouraged New Madiera to become a member of NOFO. (R.8) However, when New Madiera refused to become part of NOFO or comply with NOFO's established conservation measures, the Republic of Orlando, concerned that New Madiera's action would cause detriment to the North Ocean fishery, correctly brought this issue before this Court. Because New Madiera has violated UNCLOS and SHMFSA and because the Republic of Orlando has complied with these treaties, this Court should allow the Republic of Orlando to deny New Madiera access to the North Ocean fishery.

**2. The Republic of Orlando may restrict New Madiera's access to the North Ocean fishery under the Stockholm Declaration and the Rio Declaration.**

States are required to cooperate with each other to conquer environmental problems.<sup>75</sup> The Stockholm Declaration enumerates twenty-six principles established by the Stockholm Conference of

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<sup>75</sup> Stockholm Declaration.

1972.<sup>76</sup> These principles are accepted as customary international law and are incorporated into many subsequent conventions.<sup>77</sup>

Principle 21 of the Stockholm Declaration specifically prohibits transboundary pollution.<sup>78</sup> This principle is reaffirmed in several later treaties, including the CBD.<sup>79</sup> In essence, a State may not participate in an activity that will harm the environment of its neighbor.

In addition to a general bar against transboundary pollution, sustainable development has become a foundation of international environmental law.<sup>80</sup> The Rio Declaration codifies the idea of sustainable development.<sup>81</sup> "The principle of sustainable use of natural resources requires states and people to pay due care to the environment and to make rational use of the natural wealth and resources of the areas within their jurisdiction."<sup>82</sup>

Further, the Rio Declaration applies the precautionary principle, which states, "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not

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<sup>76</sup> Id.

<sup>77</sup> Lakshman Guruswamy and Brent Hendricks, *International Environmental Law in a Nutshell*, (1997), 399.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> Rio Declaration

<sup>82</sup> Department For Policy Coordination And Sustainable Development, United Nations Commission On Sustainable Development, Report Of The Expert Group Meeting On Identification Of Principles Of International Law For Sustainable Development, Background Paper #3, Geneva, September 26-28, 1995, [Hereinafter Sustainable Development Report].

be used as a reason for postponing cost-effective measures to prevent environmental degradation.”<sup>83</sup> Under the fundamental interpretation of this principle, the burden of proof is upon the acting party to show that their activity will not damage the environment.<sup>84</sup> The purpose of the precautionary principle is to guide the development of international environmental law and to ensure that in the process of this development, the environment is protected.<sup>85</sup>

Pursuant to the Stockholm and Rio Declaration, the Republic of Orlando should be permitted to deny New Madiera access to the North Ocean fishery. Many studies have shown that the use of large-scale pelagic driftnet fishing is harmful to the marine environment, and specifically harmful to straddling fish stocks and highly migratory fish stocks.<sup>86</sup> New Madiera’s use of these harmful nets on the high seas of the North Ocean affects the several other states which fish on the same seas. In essence, New Madiera is polluting the fish stocks of its neighbors. In addition, under the precautionary principle, the Republic of Orlando may deny New Madiera access to the North Ocean fishery because the harm done by the driftnets used is irreparable and because New Madiera has not shown that the nets used by the vessels flying its flag will not damage the protected fish

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<sup>83</sup> Rio Declaration, principle 15.

<sup>84</sup> Sustainable Development Report.

<sup>85</sup> Id.

<sup>86</sup> UNGA Oceans.

stocks of the North Ocean. Therefore, this Court should allow the Republic of Orlando to deny New Madiera access to the North Ocean fishery.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Republic of Orlando respectfully requests that this Honorable Court:

1. declare that New Madiera's use of 3.0 kilometer driftnets on the high seas of the North Ocean violates international law; and,
2. declare that the Republic of Orlando may deny New Madiera access to the North Ocean fishery.

Respectfully Submitted,

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Agents for the Republic of Orlando