

**IN THE  
INTERNATIONAL COURT OF JUSTICE  
AT  
THE PEACE PALACE, THE HAGUE  
THE NETHERLANDS**

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**THE CASE CONCERNING DRIFTNET PROHIBITION IN THE  
NORTH OCEAN**

**NEW MADIERA,  
APPLICANT,**

**V.**

**THE REPUBLIC OF ORLANDO,  
RESPONDENT.**

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**MEMORIAL FOR THE APPLICANT**

**2003 Stetson International Environmental  
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## STATEMENT OF FACTS

New Madiera is an island nation located in the North Ocean, and it is a developing country with approximately 1.5 million people. (R. 6, ¶ 1). In 1921, New Madiera lost its independence when it was invaded by the Commonwealth of Socialist States (hereinafter “CSS”). (R. 6, ¶ 1). New Madiera was a territory of the CSS until it formally regained its independence on 1 January 2003. (R. 6, ¶ 2-3).

The Republic of Orlando is a developed nation with a population of approximately 52 million people. (R. 6, ¶ 5). The Republic of Orlando is a costal state bordered by the North Ocean. (R. 6, ¶ 5).

Both New Madiera and the Republic of Orlando are Members of the United Nations (hereinafter “U.N.”). (R. 6, ¶ 4 & 6). New Madiera and the Republic of Orlando are parties to the Statute of the International Court of Justice (hereinafter “I.C.J.”). (R. 6, ¶ 8). New Madiera is a Contracting Party to the Convention on Biological Diversity (hereinafter “CBD”); the Republic of Orlando has signed the CBD but has not ratified it. (R. 7, ¶ 11).

Conventions and organizations to which the Republic of Orlando is a party, but not New Madiera, are as follows: U.N. Convention on the Law of the Sea (hereinafter “UNCLOS”); The Agreement for the Implementation of UNCLOS of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (hereinafter “the Straddling Stock Agreement”); the Vienna Convention on the Law of Treaties (hereinafter “VCLT”); North Ocean Fisheries Organization (hereinafter “NOFO”). (R. 3, 6-7).

NOFO is a regional fisheries organization comprised of sixteen states that conduct fishing operations in the high seas of the North Ocean. (R. 7, ¶ 14). NOFO regulations are effectuated by a majority vote of its members. (R. 7, ¶ 15). Members that object to a particular regulation

may opt out of that regulation and not be bound by it. (R. 7, ¶ 15). NOFO has promulgated a regulation that prohibits the use of driftnets greater than 2.5 kilometers in length on the high seas of the North Ocean. (R. 7, ¶ 16). The CSS and the Kingdom of DeLand exercised their option to object to the NOFO regulation; thus, these two member nations are not precluded from using driftnets greater than 2.5 kilometers. (R. 7, ¶ 17).

New Madiera is currently using 3.0 kilometer driftnets to procure food resources for its people. (R. 8, ¶ 19). The Republic of Orlando has expressed its displeasure with New Madiera's violation of NOFO driftnet prohibitions. (R. 8, ¶ 20). Throughout a series of diplomatic exchanges, New Madiera offered to engage in dialogue concerning its fishing operations, but the Republic of Orlando was not receptive. (R. 8-12).

New Madiera has expressed its concern about being "shackled" by NOFO regulations. (R. 11, ¶ 25). This concern is compounded by the fact that New Madiera is not a member of NOFO. (R. 11, ¶ 25). The Republic of Orlando has since restricted New Madiera's access to the North Ocean fisheries by threatening to use all necessary force, including the use of its Navy. (R. 12, ¶ 26).

Recognizing the gravity of the situation and the need for an expeditious resolution, both states have agreed to submit the matter to the I.C.J. (R. 12, ¶ 27-29). On 2 May 2003, both parties signed an agreement submitting the matter to the I.C.J. (R. 12, ¶ 29).

## **SUMMARY OF THE ARGUMENT**

New Madiera's driftnet fishing operations are legal pursuant to the principles of international law. International conventions and treaties, such as the U.N. Charter, the CBD, and UNCLOS, authorize New Madiera's efforts to procure food resources through the use of driftnets. Additionally, New Madiera's fishing practices are consistent with its duty of sustainable development. New Madiera is not a party to NOFO, nor has it consented to its regulations as a third state. Despite this, the Republic of Orlando seeks to impose NOFO regulations upon New Madiera. The Republic of Orlando relies on unbinding authority to justify this unwarranted imposition. Such authority includes the Wellington Convention and its progeny. Furthermore, the doctrine of state sovereignty protects New Madiera's fishing operations. Therefore, international environmental law authorizes New Madiera's use of driftnets that are 3.0 kilometers in length.

The Republic of Orlando has abused its treaty rights through bad faith dealings with New Madiera. New Madiera has the right to fish in the high seas free from the Republic of Orlando's interference. International law grants New Madiera this freedom from interference. International law also prohibits the Republic of Orlando's threat of force. Any use of force is an abuse of rights. Therefore, New Madiera may continue its driftnet fishing operations in the high seas of the North Ocean free from the Republic of Orlando's interference.

## ARGUMENT

Article 1 of the U. N. Charter establishes the principles governing the conduct of its Members in international affairs. *U.N. Charter* ch. I, art. 1 (June 26, 1945), 15 U.N.C.I.O. 336. These principles include: (1) friendly relations among states; (2) international cooperation in solving economic and social problems; (3) international peace and security; and (4) harmony among states for the attainment of these common goals. *Id.* The U.N. Charter promotes social progress and better standards of life. *U.N. Charter* preamble, para. 1.

The U.N. Charter provides that “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” *U.N. Charter* ch. XVI, art. 103. This supremacy clause “places the U.N. Charter at the apex in the hierarchy of international law norms, giving it a status on the international plane roughly comparable to that of a national constitution in national law.” Thomas Buergenthal & Sean D. Murphy, *Public International Law* 45 (3d ed., West 2002). New Madiera and the Republic of Orlando are Members of the U.N., and they must look to the U.N. Charter to determine their respective rights and obligations.

### **I. NEW MADIERA’S DRIFTNET FISHING OPERATIONS ARE LEGAL UNDER THE PRINCIPLES OF INTERNATIONAL LAW.**

The U.N. Charter promotes higher standards of living, as well as conditions of economic progress, social progress, and development. *U.N. Charter* ch. IX, art. 55. Without stability and well-being, nations are incapable of meeting the fundamental principles of the U.N. — peaceful and friendly relations among nations. *Id.* Additionally, the U.N. has recognized that “[n]o state has the right to intervene in the internal or external affairs of another.” *Agreements Between the United Nations and the United States of America Regarding the Headquarters of the United*

*Nations of June 26, 1974*, 11 U.N.T.S. 1676. Article 38(1) of the I.C.J. Statute enumerates the most authoritative sources of international law regulating relations among states. *Statute of the International Court of Justice* ch. II, art. 38, para. 1 (June 26, 1945), 59 Stat. 1031. Under the I.C.J. Statute, international conventions and international custom, respectively, are the two most authoritative sources of law. *Id.* New Madiera's driftnet fishing operations are supported by: (1) international conventions and treaties; (2) international custom; and (3) the notion of state sovereignty.

**A. International conventions and treaties authorize New Madiera's driftnet fishing operations.**

The relationships between states rest, ultimately, upon agreements between those states. Lawrence Ziring, Jack C. Plano, & Roy Olton, *International Relations: A Political Dictionary* 298 (5th ed., ABC-CLIO 1995). International conventions establish rules expressly agreed upon by the participating states. *I.C.J. Statute* ch. II, art. 38, para. 1. Treaties are another form of agreement among sovereign states, which establish the rights and obligations of the participating states. Ziring, *International Relations* at 266. In the event of a conflict between international agreements and the principles of the U.N. Charter, the U.N. Charter prevails between Member nations. *U.N. Charter* ch. XVI, art. 103.

The VCLT is the primary source for the law of treaties, and it provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in *good faith*.” *Vienna Convention on the Law of Treaties* pt. III, sec. 1, art. 26 (May 23, 1969), 1155 U.N.T.S. 331 (emphasis added). This notion, referred to as *pacta sunt servanda*, is “perhaps the most important principle of international law.” 1966 Report of the I.L.C., *reprinted in* 61 Am. J. Int'l L. 248 at 334 (1967).

New Madiera's driftnet fishing operations are supported by international conventions and treaties. Furthermore, the Republic of Orlando relies on inapplicable conventions and treaties, rendering its attempted fishing prohibitions invalid.

**1. International conventions and treaties promoting sustainable development authorize New Madiera's efforts to procure food resources through the use of driftnets that are 3.0 kilometers in length.**

New Madiera should be allowed to continue fishing with driftnets, because these operations promote economic and social development. *See U.N. Convention on Biological Diversity adopted at Rio de Janeiro* preamble (June 5, 1992), 31 I.L.M. 818. Economic and social progress is a priority of developing countries. *Id.* The CBD recognizes the special needs of small island states, developing countries, and countries with economies in transition. *Id.* This notion was reaffirmed in environmental declarations as recently as 2002. *See Johannesburg Declaration on Sustainable Development* para. 24 (Sept. 4, 2002), <[http://www.johannesburgsummit.org/html/documents/summit\\_docs/1009wssd\\_pol\\_declaration.doc](http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.doc)>; *Rio Declaration on Environment and Development* principles 6-7 (June 14, 1992), <<http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>>.

New Madiera furthers the fundamental principles of the CBD by procuring food resources for its people through driftnet fishing. New Madiera is a state with special needs for three reasons: (1) it is an island nation of approximately 1.5 million people; (2) it is a newly liberated state faced with the challenges of economic and social development; and (3) it can no longer rely on the economic resources of the CSS. (R. 6-8). As a Contracting Party, New Madiera has an obligation under the CBD to strive for economic and social development. (R. 7, ¶ 11). New Madiera is fulfilling this obligation by procuring food resources through driftnet fishing.

In its diplomatic note dated 17 March 2003, the Republic of Orlando alleged that New Madiera's driftnet fishing operations on the high seas were causing damage to the environment in violation of the CBD. (R. 10, ¶ 24). However, the Republic of Orlando failed to recognize that the CBD is premised upon the interdependent and mutually reinforcing relationship between economic, social, and environmental interests of states. *CBD* art. 11. This relationship embodies the notion of state cooperation for sustainable development. *Id.*

State cooperation is fundamental to affect a sustainable balance between the intersecting challenges of environmental protection and national development. *U.N. Conference on Environment and Development Agenda 21 Ch. 17, § 17.2* (June 14, 1992), <<http://www.oceanlaw.net/texts/agenda21.htm>>. Developed nations, including as the Republic of Orlando, have an obligation to contribute to New Madiera's efforts to pursue sustainable development. *Id.* In the absence of state cooperation, “[e]nvironmental protection is a luxury developing nations cannot afford since their first objective is to feed . . . their people.” C. Russell H. Shearer, *International Environmental Law and Development in Developing Nations: Agenda Setting, Articulation, and Institutional Participation*, 7 *Tul. Envtl. L. J.* 391, 397-398 (1994). The Republic of Orlando must first cooperate with New Madiera's procurement of food resources, so that New Madiera can afford to adopt more environmentally-protective policies.

The special needs of developing countries and the duty of cooperation by developed states to achieve sustainable development are principles of the CBD, and the Republic of Orlando has endorsed these principles by signing the treaty. (R. 7. ¶ 11). Moreover, the U.N. Charter requires that the Republic of Orlando promote higher standards of living, as well as conditions of economic progress, social progress, and development. *U.N. Charter* ch. IX, art. 55. The Republic of Orlando has violated its duty of cooperation by enforcing NOFO's driftnet

fishing regulations, which impedes New Madiera's duty of sustainable development under the CBD.

The CBD and the U.N. Charter demand economic and social development. The NOFO fishing regulation at issue, imposed on an underdeveloped state by a developed state, contravenes the state cooperation embodied in the principle of sustainable development. Therefore, international conventions and treaties promoting sustainable development authorize New Madiera's fishing operations.

**2. International treaties and conventions do not support the Republic of Orlando's claim that New Madiera's use of driftnets is illegal.**

The Republic of Orlando asserts that New Madiera's driftnet fishing operations in the North Ocean are inconsistent with NOFO's regulations and New Madiera's international legal responsibilities. (R. 8, ¶ 20). This assertion is erroneous for two reasons: first, New Madiera is not bound by NOFO's regulations; second, NOFO's fishing regulations are premised on prior conventions that banned the use of large-scale pelagic driftnets. Large-scale pelagic driftnets are not at issue in this matter.

**(i). New Madiera is not bound by NOFO regulations.**

Under international law, New Madiera is not bound by NOFO regulations. The international law of treaties has largely been codified in the VCLT; *see generally* I. Sinclair, *The Vienna Convention on the Law of Treaties* (2d ed. 1984). The VCLT defines "treaty" as "an international agreement concluded between States in written form and governed by international law." *VCLT* pt. I, art. 2, § 1(a). VCLT Article 11 provides that the consent of a state to be bound by a treaty may be expressed by "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means so agreed." *Id.* at pt. II, sec. 1, art. 11. The VCLT establishes the general rule that treaties do not create obligations for

third states without their consent. *VCLT* pt. III, sec. 4, art. 34. A “third State” is defined as “a State not a party to a treaty.” *Id.* at pt. I, art. 2, § 1(h). The general rule on third states is clarified by Article 35, which provides that treaty obligations sought to be imposed on third states shall arise only by expressed written acceptance of the particular obligation by the third state. *Id.* at pt. III, sec. 4, art. 35. The Republic of Orlando is a party to the VCLT. (R. 6, ¶ 7). Therefore, NOFO’s fishing regulations may be binding on New Madiera through consent or written acceptance of the obligation as a third state.

New Madiera has neither consented to NOFO’s fishing regulations nor expressed written acceptance of NOFO’s ban on driftnets as a third state. New Madiera is not a member of NOFO. (R. 7, ¶ 12). New Madiera has not expressed acceptance of the NOFO driftnet ban, as evidenced by its diplomatic note dated 14 February 2003: “[i]t is important to note that New Madiera is not a member of [NOFO].” (R. 9, ¶ 21). Accordingly, the Republic of Orlando has no authority to dictate NOFO’s fishing regulations to a sovereign state such as New Madiera.

**(ii). NOFO’s fishing regulations are premised on prior conventions that banned the use of large-scale pelagic driftnets, which are not at issue in this matter.**

The Republic of Orlando’s assertion that NOFO’s prohibition on the use of driftnet fishing is a reaffirmation of existing international law is a misconception. (R. 9, ¶ 22). This misconception arises from an erroneous interpretation of the term “driftnet” as adopted by NOFO from the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific (hereinafter “Wellington Convention”). (R. 7, ¶ 16). The Wellington Convention defines the term “driftnet” as “a gillnet or other net or combination of nets which is more than 2.5 kilometres in length the purpose of which is to enmesh, entrap or entangle by drifting on the surface of or in the water.” *Convention for the Prohibition of Fishing with Long Driftnets in the*

*South Pacific* art. 1(b) (adopted at Wellington 24 Nov. 1989), 29 I.L.M. 1454. While NOFO adopted the Wellington Convention’s definition of driftnet, NOFO did not adopt the correct moratorium that arose from this convention.

The U.N. moratorium on driftnets concerns the use of “large-scale pelagic driftnets, which can reach or exceed 30 miles (48 kilometres) in total length.” U.N. Doc. A/RES/44/225 (1989) (first preambular paragraph). This is evidenced by the Wellington Convention’s formal title — “Convention for the Prohibition of Fishing with *Long Driftnets* in the South Pacific.” *Id.* (emphasis added). Additionally, the Wellington Convention is only concerned with large-scale driftnet fishing within a defined area of the South Pacific Ocean. *Id.* The Wellington Convention’s concern with large-scale driftnets is further evidenced by resolutions of the U.N. General Assembly. (R. 9, ¶ 22); *see also* U.N. Doc. A/RES/44/225 (1989); U.N. Doc. A/RES/46/215 (1991).

U.N. Resolution 44/225 does not prohibit New Madiera’s driftnet fishing operations; rather, it concerns the use of “large-scale pelagic driftnets, which can reach or exceed 30 miles (48 kilometres) in total length.” U.N. Doc. A/RES/44/225 (1989) (first preambular paragraph). The driftnets used by New Madieran vessels are only 3.0 kilometers in length, “or 1/16<sup>th</sup> the length of the nets that Resolution 44/225 discussed.” (R. 9-10, ¶ 23). Furthermore, this U.N. Resolution specifically notes that it does not address the small-scale driftnet fishing traditionally conducted by “developing countries.” U.N. Doc. A/RES/44/225 (1990) (third preambular paragraph). More importantly, U.N. Resolution 44/225 recognizes that small-scale driftnet fishing by a developing state, like New Madiera, “provides an important contribution to their subsistence and economic development.” *Id.* Therefore, these texts relied on by the Republic of Orlando are inapplicable to the driftnet fishing regulations at issue.

The Republic of Orlando erroneously relies on the Wellington Convention and its progeny to support its assertion that international law prohibits small-scale driftnet fishing. Therefore, New Madiera's driftnet fishing operations are legal.

**B. New Madiera's driftnet fishing operations are legal under customary international law.**

Customary international law does not prohibit the use of driftnets. Customary international law derives from "a general and consistent practice of states followed by them from a sense of [a] legal obligation." American Law Institute, *Restatement of the Foreign Relations Law of the United States (Third)* § 102(2) (1987). In addition to conventions and treaties, "the rules of law binding upon States . . . emanate from usages generally accepted as expressing principles of law." *France v. Turkey*, [1927] P.C.I.J. (ser. A) No. 10 at 21.

The notion of *opinio juris* precludes inconsistencies from becoming customary international law. The objection option enjoyed by NOFO members is an inconsistent application of the driftnet prohibition. (R. 7, ¶ 17). *Opinio juris* requires that state practice or conduct sought to be considered a rule of international law must be accepted by states as being legally binding. Buerghenthal & Murphy, *Public International Law* at 21-22. If states believe that they are legally free to depart from the custom at any time, the practice does not satisfy the requirement of *opinio juris*. *Id.* The passage of a short period of time is not a bar to the formation of custom, if the practice is both extensive and uniform. *See e.g., North Sea Continental Shelf Cases* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20); *Continental Shelf (Libya/Malta)*, 1985 I.C.J. 13 (June 3). Prohibitions and affirmative practices of customary international law must be proven by the state relying upon them. *France v. Turkey*, [1927] P.C.I.J. (ser. A) No. 10 at 21. The notion of *opinio juris* defeats the Republic of Orlando's claim that customary international law prohibits driftnet fishing.

New Madiera's driftnet fishing operations are supported by customary international law. Furthermore, the Republic of Orlando's assertions to the contrary are unfounded.

**1. New Madiera's driftnet fishing operations are supported by customary international law.**

New Madiera's procurement of food resources is the foundation of its endeavors to establish a viable economic order. An international economic order that is just and equitable is a goal of UNCLOS. *U.N. Convention on the Law of the Sea, 10 Dec. 1982* preamble, 21 I.L.M. 1261. UNCLOS has been recognized as a codification of customary international law. 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, 219-221 (1998). Even under customary international law, "the special interests and needs of developing countries" are taken into consideration. *UNCLOS* preamble & sec. 3, art. 203. One such consideration is the right bestowed on all states to engage in fishing on the high seas. *UNCLOS* sec. 2, art. 116. Therefore, New Madiera's exercise of its right to engage in fishing operations on the high seas is consonant with customary international law.

The freedom of the high seas carries a concomitant duty of cooperation. UNCLOS mandates a duty on all states to cooperate in the management of marine resources. *UNCLOS* sec. 2, art. 118. Regional fisheries organizations are a cooperative measure provided for in UNCLOS. *Id.* These regional organizations shall not discriminate in form or fact against the fishermen of any state. *UNCLOS* sec. 2, art. 119 § 3. Regional fisheries organizations have a special directive that conservation measures for the living resources in the high seas must be "qualified by relevant environmental and economic factors including the special requirements of developing States." *Id.* at 1(a). NOFO's regulations as enforced by the Republic of Orlando have failed to take into consideration the special requirements of developing states in their

driftnet fishing prohibition and are discriminating against New Madiera. The Republic of Orlando's actions are in derogation of the duty of cooperation mandated by UNCLOS.

The Republic of Orlando is threatening New Madiera for its failure to comply with the regulations of NOFO, rather than fulfilling its customary duty to consider the special needs of developing countries. New Madiera has offered to engage in a dialogue with the Republic of Orlando concerning possible cooperative measures for the development of the New Madieran economy. (R. 8, ¶ 21). Furthermore, the Republic of Orlando has failed to consider the conservation measures undertaken by New Madiera. These measures are evidenced by New Madiera's use of driftnets that are a mere 1/16<sup>th</sup> of the size of those prohibited by the U.N. (R. 9-10, ¶ 23). Thus, the Republic of Orlando cannot claim that New Madiera is failing its international responsibilities of conservation and cooperation.

The Republic of Orlando is not working toward the creation of a just or equitable international order, as required by customary international law. UNCLOS is not a blanket prohibition on driftnet fishing; rather, cooperation between states and nondiscrimination are its goals.

**2. NOFO's objection option is discriminatory against New Madiera in violation of UNCLOS.**

The driftnet fishing prohibition sought to be imposed with deadly force upon the sovereign state of New Madiera by the Republic of Orlando is fatally undermined by the objection option NOFO grants to its exclusive membership. The Republic of Orlando and the CSS are members of NOFO; New Madiera is not a member of NOFO. (R. 7, ¶ 12). Membership in NOFO carries the privilege of opting out of its regulations. (R. 7, ¶ 15). The CSS and the Kingdom of DeLand have exercised this privilege. (R. 7, ¶ 17). As a result, the

CSS and the Kingdom of DeLand are under no present threat of deadly aggression by their fellow NOFO member, the Republic of Orlando.

The duty not to discriminate as mandated by UNCLOS is violated by NOFO in its disparaging treatment between NOFO members and NOFO non-members. Under the present regional fishery regime, New Madiera could foreseeably become a NOFO member, formally object to the driftnet regulation, and then continue its present fishing operations. NOFO's prohibition on driftnets is irreconcilable in light of the objection option NOFO members may exercise in regards to the regulation at issue. This contradiction undermines the Republic of Orlando's assertion that the NOFO regulation is a reflection of customary international law.

The Republic of Orlando states that the ban on driftnet fishing is a "*jus cogens*." (R. 11, ¶ 26). A *jus cogens* is a peremptory norm of general international law. *See generally* M. Ragazzi, *The Concept of International Obligations Erga Omnes* ch. 3 (1997). The VCLT defines "a peremptory norm of general international law" as follows: "a norm accepted and recognized by the international community of States as a whole as a norm from which *no derogation is permitted* and which can be modified only by a subsequent norm of general international law having the same character." *VCLT* pt. V, sec. 2, art. 53 (emphasis added).

Since NOFO provides for a derogation from its driftnet prohibition, a ban on driftnet fishing cannot logically be a *jus cogens*. Moreover, New Madiera as a sovereign nation has not consented to the NOFO regulations, the imposition of which does not comport with the just and equitable international order envisioned by UNCLOS. Therefore, a prohibition on driftnet fishing is not a reaffirmation of customary international law.

**C. International law recognizes the right of a sovereign nation to enact its own policies regarding the procurement of food resources.**

The right of sovereignty, which prohibits foreign intervention in international affairs, is a fundamental principle of international law. *U.N. Charter* ch. I, art. 2(1). International law thus protects the idea of a “reserved domain” of states, whereby interference in a state’s affairs requires that state’s consent. *Resolution of the Institute of International Law, Annuaire de l’Inst.* 45 (1954), ii 292, 299. Under principles of sovereignty, states should be able to exempt themselves from rules by which they do not wish to be bound. Jonathan Charney, *Universal International Law*, 87 A.J.I.L. 529, 530 (1993). By attempting to impose NOFO regulations on a non-member state, the Republic of Orlando is violating the state sovereignty protections afforded to New Madiera by the U.N. Charter.

If a state persistently objects to a practice prior to its recognition as customary international law, such custom will not be binding upon that state. *See United Kingdom v. Norway*, 1951 I.C.J. 116 (Dec. 18). The notion of persistent objector is based upon the idea of ultimate sovereignty of all states. Charney, 87 A.J.I.L. at 540. The CSS abstained from the January 2001 vote on the NOFO prohibition of driftnets greater than 2.5 kilometers. (R. 7, ¶ 16). One month later, the CSS formally objected to the prohibition. (R. 7, ¶ 17). New Madiera has informed the Republic of Orlando that it will continue to use driftnets of 3.0 kilometers in length on the high seas of the North Ocean. (R. 8, ¶ 21). New Madiera’s use of driftnets is a continuance of the persistent objector status established by its predecessor.

New Madiera’s driftnet fishing operations are legal under the principles of international law. International conventions and treaties, such as the U.N. Charter, the CBD, and UNCLOS, authorize New Madiera’s efforts to procure food resources. Additionally, New Madiera’s fishing practices are consistent with the concept of sustainable development. The Republic of Orlando’s

justification for imposing NOFO's prohibition on fishing with driftnets is based on authority which is not binding upon New Madiera. This authority includes the Wellington Convention and its progeny. The Republic of Orlando has no authority under international law to regulate the fishing practices of New Madiera, because New Madiera is a sovereign nation and a non-member of NOFO. Therefore, international environmental law authorizes New Madiera's use of driftnets that are 3.0 kilometers in length.

## **II. NEW MADIERA HAS THE RIGHT TO FISH IN THE HIGH SEAS FREE FROM INTERFERENCE BY THE REPUBLIC OF ORLANDO.**

The primary purpose of the U.N. is to maintain international peace and security. *U.N. Charter* ch. I, art. 1(1). The U.N. Members must collectively take effective measures for the prevention and removal of threats to the peace. *The Current Legal Regulation of the Use of Force* 3 (A. Cassese ed., Martinus Nijhoff 1986). The U.N. Charter thus requires members to settle their disputes by peaceful means. *U.N. Charter* ch. I, art. 2(3). Additionally, Article 2 of the U.N. Charter provides that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” *U.N. Charter* ch. I, art. 2(4).

New Madiera may continue to fish in the North Ocean because: (1) the Republic of Orlando would violate international law if it restricted access to the high seas; and (2) international law prohibits the threat or use of force against New Madiera.

### **A. International law provides for the freedom of the high seas.**

Freedom to fish the high seas is expressly provided for in UNCLOS. *UNCLOS* pt. VII, sec.1, art. 87. All states are bound to refrain from acts which unreasonably interfere with the

exercise of this freedom. *UNCLOS* pt. VII, sec.1, art. 87. Thus, New Madiera's access to the high seas of the North Ocean may not be restricted by the Republic of Orlando.

The principle of *res communis* provides that no state may exercise its jurisdiction over any part of the high seas. *UNCLOS* pt. VII, sec. 1, art. 89. This concept is rooted in one of the most traditional and fundamental principles of international law: the freedom of the high seas. Oscar Schachter, *International Law in Theory and Practice* 274 (Martinus Nijhoff 1991). Therefore, the high seas cannot be attached to the possessions of any particular nation. *Id.* at 275.

The Republic of Orlando will block New Madiera's access to the North Ocean fishery, so long as New Madiera continues fishing with driftnets. (R. 12, ¶ 26). This blockade is in response to New Madiera's refusal to comply with NOFO's driftnet prohibition. (R. 12, ¶ 26). New Madiera is not a member of NOFO and is not bound by its mandates. (R. 12, ¶ 27). The North Ocean fishery is part of the *res communis*; therefore, the Republic of Orlando violates this long standing and deeply-rooted principle of the freedom of the high seas.

In its diplomatic note date 1 April 2003, the Republic of Orlando accused New Madiera of plundering the sea and its shared resources through its driftnet fishing operations. (R. 12, ¶ 28). It is illogical to assume that a 3.0 kilometer driftnet can cause a more significant amount of damage to the environment than would a 2.5 kilometer driftnet allowed by NOFO. Furthermore, the Republic of Orlando fails to recognize the possibility that other NOFO members, including the Kingdom of DeLand and the CSS, may be using driftnets larger than those approved by the Organization. Therefore the principle of freedom of the high seas supports New Madiera's continued fishing operations.

**B. International law prohibits the Republic of Orlando's threat or use of force.**

Both the U.N. Charter and UNCLOS demand that the high seas be used for peaceful purposes. *See U.N. Charter* ch. I, art. 2(4); *UNCLOS* pt. VII, sec. 1, art. 88. Additionally, states are required to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.” *U.N. Charter* ch. I, art. 2(3). The Republic of Orlando's threat of force against New Madiera is a blatant violation of international law and an abuse of rights under treaty obligations.

**1. Any threat or use of force by the Republic of Orlando against New Madiera's fishing vessels is a violation of international law.**

All of the conventions, treaties, and customary law by which the Republic of Orlando and New Madiera are bound, call for peaceful resolutions of disputes and prohibit the threat or use of force in an unjustified manner. The threat or use of force is a direct violation of the U.N. Charter. *U.N. Charter* ch. I, art. 2(4). The U.N. Charter also emphasizes the peaceful settlement of dispute. *U.N. Charter* ch. VI, art. 33. Other conventions and customary international law also demand that states refrain from such actions and settle disputes in a peaceful manner. *UNCLOS* pt. XV, art. 279; *see also Vienna Convention* preamble; *Rio Declaration* principles 25-26; *Agreement for the Implementation of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* art. 30 (Dec. 4, 1995), <<http://www.oceanlaw.net/texts/unfsa.htm>>. The threat or use of force has only been recognized as legitimate in international law when used for purposes of self-defense. *U.N. Charter* ch. VII, art. 51. Thus, New Madiera has a right to continue its fishing operations in peace.

New Madiera welcomed the opportunity to engage in a dialogue with the Republic of Orlando regarding its acquisition of critical food resources at the outset of diplomatic exchanges.

(R. 8, ¶ 21). Despite this, the Republic of Orlando adopted a hard-line attitude, insisting that New Madiera abide by NOFO regulations. (R. 9-12). The Republic of Orlando's lack of cooperation culminated in a diplomatic note dated 27 March 2003, wherein the Republic of Orlando accused New Madiera of violating international law by declining to follow NOFO. (R. 12, ¶ 26). Further, the Republic of Orlando claimed a responsibility "to ensure that New Madiera does not have access to the North Ocean fishery ... ." (R. 12, ¶ 26). The Republic of Orlando has warned New Madiera of its plans to terrorize its fishing fleet and to deny access to the North Ocean fishery. (R. 12, ¶ 26). The Republic of Orlando has threatened to use all necessary force, including its Navy, against New Madieran vessels. (R. 12, ¶ 26). These actions equate to an egregious violation of international law.

The Republic of Orlando's use of force is unjustified. New Madiera should be allowed to continue to conduct its fishing operations in peace, without any interference from the Republic of Orlando. Furthermore, the Republic of Orlando's actions are not in self-defense. Therefore, the Republic of Orlando is in direct violation of the U.N. Charter.

**2. The Republic of Orlando violates the doctrine of abuse of rights by failing to comply with its treaty obligations in good faith.**

The Republic of Orlando has conducted itself in bad faith throughout its course of dealings with New Madiera. International treaties and customs demand that states fulfill their obligations in good faith, in a manner which would not constitute an *abuse of rights*. See *Straddling Stock* pt. X, art. 34; *VCLT* pt. III, sec. 1, art. 26. The doctrine of *abuse of rights* is recognized as a general principle of international law. See 1 *Oppenheim's International Law: Treatise* 345-346 (Jennings & Watts eds., 8th ed.); see also Lauterpacht, *The Function of Law* 298 (1993). In international law an *abuse of rights* refers to a state exercising a right in a way different from

which the right was created, resulting in the injury of another state. *See generally, Encyclopedia of Public International Law* vol. 1 (Amsterdam: North-Holland, 1992).

The Republic of Orlando has acted in bad faith in the following ways: (1) failing to engage in reasonable discussions with New Madiera regarding its procurement of food resources; (2) ignoring international law provisions regarding the special needs of developing states; (3) attempting to impose NOFO regulations on a non-member, sovereign state; and (4) threatening New Madiera with the use of force. These bad faith actions constitute an *abuse of rights* under the Republic of Orlando's treaty obligations. As a result, New Madiera has faced unnecessary difficulty and delay in its struggle to rebuild its economic and social order.

The Republic of Orlando may argue that New Madiera has violated its duties of state responsibility by failing to cooperate with the Republic of Orlando in establishing conservation measures for the North Ocean fishery. This argument is unfounded for two reasons: (1) New Madiera's use of driftnets that are a mere 1/16<sup>th</sup> the size of those banned by the U.N.; and (2) New Madiera offered to engage in dialogue concerning its fishing operations. A state commits a wrongful act when its conduct constitutes a breach of an international obligation of that state. *U. N. Resolution on the Responsibility of States for Internationally Wrongful Acts* art. 2, note 2 (Jan. 28, 2002), U.N. Doc. A/56/589. The Republic of Orlando's actions are in breach of its international obligations. Furthermore, New Madiera's actions are not in derogation of any conventions, treaties, or international agreements to which it is a party. Thus, New Madiera has not violated international law.

The Republic of Orlando has abused its treaty rights through bad faith dealings with New Madiera. New Madiera has the right to fish in the high seas free from the Republic of Orlando's interference. International law grants New Madiera this freedom from interference.

International law also prohibits the Republic of Orlando's threat of force. Any use of force is an abuse of rights. Therefore, New Madiera may continue its driftnet fishing operations in the high seas of the North Ocean free from the Republic of Orlando's interference.

**CONCLUSION AND PRAYER FOR RELIEF**

In consideration of the aforementioned, New Madiera respectfully requests this honorable Court to:

- 1) **declare that** New Madiera's driftnet fishing operations are legal under international law;  
and
- 2) **order that** New Madiera continue to have access to the North Ocean fishery without interference from the Republic of Orlando.

Respectfully Submitted,

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Agents for New Madiera