

**New Madiera, Applicant**

**v.**

**The Republic of Orlando, Respondent**

# **RECORD**

**Eighth Annual  
International Environmental  
Moot Court Competition  
2003**



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NOTIFICATION, DATED 16 MAY 2003, ADDRESSED TO  
THE MINISTER FOR FOREIGN AFFAIRS OF NEW MADERIA  
AND  
THE MINISTER FOR FOREIGN AFFAIRS OF THE REPUBLIC OF ORLANDO

The Hague, 16 May 2003.

On behalf of the International Court of Justice, and in accordance with Article 26 of the Rules of Court, I have the honor to acknowledge receipt of the joint notification dated 2 May 2003. I have the further honor to inform you that the case of New Madiera, Applicant v. the Republic of Orlando, Respondent, has been entered as 2003 General List No. 108. The written proceedings shall consist of memorials to be submitted to the Court by each Party on or before 7 October 2003. Oral proceedings are scheduled for 31 October - 1 November 2003.

/s/ \_\_\_\_\_  
Registrar  
International Court of Justice

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JOINT NOTIFICATION, DATED 2 MAY 2003, ADDRESSED TO  
THE REGISTRAR OF THE COURT

The Hague, 2 May 2003.

On behalf of New Madiera and the Republic of Orlando, and in accordance with Article 40, paragraph 1, of the Statute of the International Court of Justice, we have the honor to transmit to you an original copy of the English texts of the Special Agreement Between New Madiera and the Republic of Orlando for Submission to the International Court of Justice of Differences Between Them Concerning Fishing Practices in the North Ocean, signed at Tallinn, Estonia, on 2 May 2003.

For New Madiera:

For the Republic of Orlando:

/s/ \_\_\_\_\_  
S. Salar  
Minister for Foreign Affairs

/s/ \_\_\_\_\_  
L. Acutus  
Minister for Foreign Affairs

SPECIAL AGREEMENT  
BETWEEN  
NEW MADIERA  
AND  
THE REPUBLIC OF ORLANDO  
FOR SUBMISSION TO THE  
INTERNATIONAL COURT OF JUSTICE  
OF DIFFERENCES BETWEEN THEM  
CONCERNING  
FISHING PRACTICES IN THE NORTH OCEAN

New Madiera and the Republic of Orlando,

Recalling that New Madiera and the Republic of Orlando are Members of the United Nations and that the Charter of the United Nations calls on Members to settle international disputes by peaceful means,

Bearing in mind that New Madiera is a newly independent state,

Conscious that the Rio Declaration on Environment and Development, Chapter 17 of Agenda 21, the Johannesburg Declaration on Sustainable Development, and other international documents call for conservation and sustainable use of marine living resources,

Acknowledging that the Republic of Orlando is a State Party to the United Nations Convention on the Law of the Sea, a State Party to the 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, and a Party to the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas,

Observing that New Madiera is a Contracting Party to the Convention on Biological Diversity,

Recognizing that differences have arisen over the fishing practices in the North Ocean by New Madiera and the response by the Republic of Orlando,

Noting that New Madiera and the Republic of Orlando have been unable to settle their differences through negotiation,

Desiring that the International Court of Justice, hereinafter referred to as the Court, resolve these differences,

Desiring further to define the issues to be submitted to the Court,

Have agreed as follows:

## Article I

New Madiera and the Republic of Orlando, hereinafter referred to as the Parties, shall submit the questions contained in Annex A of this Special Agreement to the Court pursuant to Article 40, paragraph 1, of the Statute of the International Court of Justice.

## Article II

1. The Parties shall request the Court to decide this matter on the basis of the rules and principles of general international law, as well as any applicable treaties.

2. The Parties also shall request the Court to decide this matter based on the Agreed Statement of Facts, attached as Annex A, which is an integral part of this Agreement.

3. The Parties also shall request the Court to determine the legal consequences, including the rights and obligations of the Parties, arising from any Judgment on the questions presented in this matter. The Parties shall neither address nor request the Court to address the issue of monetary damages, which may be a subject of future discussions between the Parties.

## Article III

1. The proceedings shall consist of written pleadings and an oral hearing.

2. The written pleadings shall consist of memorials to be submitted simultaneously to the Court by the Parties.

## Article IV

1. The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

2. Immediately after the transmission of the Judgment, the Parties shall enter into negotiations on the modalities for its execution.

3. If the Parties are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article V

This Special Agreement shall enter into force upon signature.

DONE at Tallinn, Estonia, this second day of May 2003, in two copies, each in the English language, and each being equally authentic.

FOR NEW MADIERA:

FOR THE REPUBLIC OF ORLANDO:

/s/  
S. Salar  
Minister for Foreign Affairs

/s/  
L. Acutus  
Minister for Foreign Affairs

ANNEX A  
AGREED STATEMENT OF FACTS

1. New Madiera is an island nation located in the North Ocean. It is a developing country with a population of approximately 1.5 million people. New Madiera was an independent country until 1921, when it was invaded by the Commonwealth of Socialist States (CSS). From 1921 until 31 December 2002, New Madiera was declared to be a territory of the CSS.
2. On 14 July 2002, a referendum was held in New Madiera. The sole question concerned whether New Madiera should remain a territory of the CSS or whether New Madiera should declare its independence from the CSS. Ninety percent of the eligible voters participated in the referendum; eighty-eight percent voted in favor of New Madiera declaring its independence from the CSS.
3. On 1 January 2003, New Madiera formally regained its independence. The CSS acquiesced in this decision. On that date, New Madieran Prime Minister T. Albacares proclaimed, "On this New Year's Day, it is indeed a new day for New Madiera and its people. New Madiera is once again a free, independent, and sovereign nation. We once again have the right to control our domestic and foreign policies."
4. On 1 January 2003, New Madiera became a Member of the United Nations. New Madiera is not a member nation of the Food and Agriculture Organization of the United Nations (FAO). The CSS is a Member of the United Nations and a member nation of FAO.
5. The Republic of Orlando is a developed nation, with a diversified economy and a population of approximately 52 million people. The Republic of Orlando's eastern coastline borders the North Ocean.
6. The Republic of Orlando is a Member of the United Nations and a member nation of FAO.
7. The Republic of Orlando and the CSS are parties to the Vienna Convention on the Law of Treaties. New Madiera is not a party to the Vienna Convention on the Law of Treaties.
8. The Republic of Orlando and New Madiera are parties to the Statute of the International Court of Justice.
9. The Republic of Orlando and the CSS are State Parties to the United Nations Convention on the Law of the Sea. New Madiera is not a State Party to the United Nations Convention on the Law of the Sea.

10. The Republic of Orlando is a State Party to the 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 (the Straddling Stock Agreement). The CSS and New Madiera are not State Parties to the Straddling Stock Agreement.
11. New Madiera is a Contracting Party to the Convention on Biological Diversity. The Republic of Orlando and the CSS have signed the Convention on Biological Diversity, but neither has ratified it.
12. The Republic of Orlando and the CSS are members of the North Ocean Fisheries Organization (NOFO). New Madiera is not a member of NOFO.
13. NOFO is a regional organization that was established in 1998 to regulate fishing operations in the high seas of the North Ocean.
14. Fishing operations in the high seas of the North Ocean are conducted primarily by sixteen states. New Madiera is the only one of the sixteen states that is not a member of NOFO.
15. NOFO's regulations are promulgated based on a majority vote of its members. Members that object to a particular regulation have sixty days to lodge a formal objection and opt out of the regulation. If a member issues such an objection, it is not bound by the regulation.
16. In January 2001, after considering the Code of Conduct for Responsible Fisheries adopted by FAO, NOFO voted on a regulation that prohibited the use of driftnets on the high seas of the North Ocean. The definition of "driftnet" was patterned after the definition of "driftnet" appearing in the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific. Accordingly, NOFO defines "driftnet" 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." Thirteen members of NOFO voted in favor of the regulation. The CSS and the Kingdom of DeLand abstained.
17. In February 2001, the CSS and the Kingdom of DeLand formally objected to NOFO's prohibition of driftnets on the high seas of the North Ocean. Both countries stated that while they are not bound by NOFO's regulation, they have no present intention to permit their fishing fleets to use driftnets.
18. From February 2001 to December 2002, fishing vessels from New Madiera (flying the CSS flag) used driftnets that were up to 2.0 kilometers in length on the high seas of the North Ocean.

19. On 15 January 2003, Bluepeace, an international non-governmental organization that monitors the marine environment, reported that the *Dickerson*, a fishing vessel from New Madiera, was using a driftnet 3.0 kilometers in length.
20. On 22 January 2003, the following diplomatic note was forwarded to the Government of New Madiera:

The Embassy of the Republic of Orlando presents its compliments to the Government of New Madiera and has the honor to request that New Madiera enter into consultations with the Republic of Orlando and other members of the North Ocean Fisheries Organization (NOFO) with respect to the use of large-scale pelagic driftnets.

The Government of the Republic of Orlando notes its concern about recent reports that New Madieran vessels are engaged in driftnet fishing operations in the North Ocean. The Government of the Republic of Orlando wishes to observe that such actions would be inconsistent with NOFO's regulations and New Madiera's international legal responsibilities. The Government of the Republic of Orlando requests an explanation concerning these reported fishing operations and welcomes the opportunity to discuss these matters at the highest levels.

Please accept the assurance of my highest consideration.

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L. Kempii  
Ambassador

21. On 14 February 2003, the following diplomatic note was forwarded to the Government of the Republic of Orlando:

The Embassy of New Madiera presents its compliments to the Government of the Republic of Orlando and has the honor to acknowledge receipt of the diplomatic note dated 22 January 2003.

At the outset, the Government of New Madiera welcomes the opportunity to engage in a dialogue concerning food resources upon which the people of New Madiera depend. The Government of New Madiera can also confirm that a fishing vessel from New Madiera has used and will continue to use a driftnet of 3.0 kilometers in length on the high seas of the North Ocean. This

vessel does so with the express permission of the Government of New Madiera. It is important to note that New Madiera is not a member of the North Ocean Fisheries Organization (NOFO). Accordingly, NOFO has no authority to dictate regulations to a sovereign state such as New Madiera. (Indeed, it may be observed that not even all members of NOFO are bound by the driftnet regulations.) An attribute of sovereignty is the inherent ability to determine whether a nation will subject itself to certain international obligations. The Government of New Madiera has decided that, at this time, New Madiera will not become a member of NOFO.

Please accept the assurance of my highest consideration.

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L. Campechanus  
Ambassador

22. The Government of the Republic of Orlando responded on 27 February 2003 with a diplomatic note that stated in part:

It is instructive to recall that NOFO's prohibition on the use of such driftnets is but a reaffirmation of existing international law. In 1989, the United Nations General Assembly called for a moratorium for "all large-scale pelagic driftnet fishing" by 1992. U.N. Doc. A/RES/44/225 (1990). Soon thereafter, the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 29 I.L.M. 1454 (1990), was concluded and entered into force in 1991. The Convention, known as the Wellington Convention, requires Parties to prohibit their nationals and vessels documented under their laws from engaging in driftnet fishing activities. The United Nations General Assembly then demanded that states ban driftnet fishing "on the high seas of the world's oceans and seas" by 31 December 1992. U.N. Doc. A/RES/46/215 (1991). The United Nations General Assembly reaffirmed the ban most recently in December 2002. U.N. Doc. A/RES/57/142 (2003).

23. The Government of New Madiera responded on 10 March 2003 with a diplomatic note that stated in part:

Our Office of Legal Affairs takes issue with several points raised in the diplomatic note of 27 February 2003.

First, although New Madiera is a new Member of the United Nations, it is our understanding that the United Nations General

Assembly may only discuss matters and make recommendations; it cannot, by itself, create binding international law through its resolutions. Second, Resolution 44/225 expressed concern about “the increase in the use of large-scale pelagic driftnets, which can reach or exceed 30 miles (48 kilometres) in total length.” The driftnets used by New Madieran vessels are a mere 3.0 kilometers in length, or 1/16 the length of the nets that Resolution 44/225 discussed. Third, the Office of Legal Affairs questions the relevance of the Wellington Convention, especially when the Wellington Convention does not apply to the North Ocean and neither New Madiera nor the Republic of Orlando (nor, for that matter, the Commonwealth of Socialist States) is a party.

While the Government of New Madiera welcomes further dialogue, it must be emphasized that we find it objectionable that our newly won sovereignty would be subject to such attacks.

24. The Government of the Republic of Orlando responded on 17 March 2003, with a diplomatic note that stated in part:

Driftnet fishing is also illegal under the United Nations Convention on the Law of the Sea (UNCLOS). Although New Madiera has chosen not to sign UNCLOS at this time, UNCLOS has been recognized as codifying customary international law. *E.g.* 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). As such, New Madiera is bound by these principles, even if New Madiera is not a party to UNCLOS.

Futhermore, the Government of the Republic of Orlando wishes to recall the legal obligations imposed by the Convention on Biological Diversity, an international treaty to which New Madiera is a party. Article 3 emphasizes that States have “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.” Driftnet fishing operations on the high seas, which are akin to stripmining the oceans, undoubtedly cause severe damage to the environment.

25. The Government of New Madiera responded on 20 March 2003, with a diplomatic note that stated in part:

If there is one principle of customary international law enshrined in UNCLOS, it is the freedom of the high seas, including the freedom of fishing. Please be assured that the fishing operations conducted by New Madieran vessels do not derogate the interests of any other state.

The Government of New Madiera disagrees with the notion that customary international law prohibits the use of fishing nets 3.0 kilometers in length. Even if such a rule existed, New Madiera would consider itself a “persistent objector” and not be bound. Ian Brownlie, *Principles of Public International Law* 10 (5<sup>th</sup> ed., Clarendon Press 1998).

With respect to the Convention on Biological Diversity, our Office of Legal Affairs observes that, because the Republic of Orlando is not a party to this convention, the Republic of Orlando is in no position to assert any rights flowing from it.

Once again, the Government of New Madiera is compelled to emphasize that, having just been liberated, New Madiera is not anxious to be shackled.

26. The Government of the Republic of Orlando responded on 27 March 2003 with a diplomatic note that stated in part:

The Government of the Republic of Orlando firmly believes that the prohibition on driftnet fishing has become a *jus cogens*: It is a peremptory norm from which no derogation is permitted. Accordingly, whether New Madiera considers itself a persistent objector is immaterial.

The Government of the Republic of Orlando wishes to advise the Government of New Madiera that continued violations of international law with respect to driftnet fishing will not go unanswered. The Government of the Republic of Orlando notes that Article 8 of the Straddling Stock Convention calls on nations to cooperate for conservation and management of shared resources. In particular, regional fisheries management organizations – such as the North Ocean Fisheries Organization – are to be established. Article 8, paragraph 4, of the Straddling Stock Convention provides that

Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.

Because New Madiera has chosen to refuse to apply NOFO's conservation measures, because New Madiera has chosen to violate international law, it is the responsibility of the Republic of Orlando to ensure that New Madiera does not have access to the North Ocean fishery, so long as New Madiera permits its vessels to operate driftnets. Please be advised that the Republic of Orlando will use all necessary force, including the use of the Republic of Orlando's Navy, to deny access to the North Ocean fishery.

27. The Government of New Madiera responded on 29 March 2003 with a diplomatic note that stated in part:

The Government of New Madiera expresses its outrage that the Republic of Orlando would threaten the use of force to exclude New Madieran vessels from the high seas. We find it unfathomable that a convention to which New Madiera is not a party can be interpreted to deny New Madiera long-held rights. Any force employed by the Republic of Orlando against peaceful New Madieran fishing vessels would be the most egregious violation of international law.

The situation is grave and must be resolved expeditiously. The Government of New Madiera will seek to have the matter heard by the International Court of Justice.

28. The Government of the Republic of Orlando responded on 1 April 2003 with a diplomatic note that stated in part:

The Government of the Republic of Orlando concurs that the situation is grave. Every day that driftnetting operations continue is another day that the sea and its shared resources are plundered. Accordingly, the Government of the Republic of Orlando also wishes to resolve the matter expeditiously.

29. After continued discussions, the Government of New Madiera and the Government of the Republic of Orlando signed an agreement on 2 May 2003 that submits the matter to the International Court of Justice.

30. During the pendency of this matter before the International Court of Justice, New Madiera agrees that its fishing vessels will only use driftnets up to 2.0 kilometers in length, and the Republic of Orlando agrees not to restrict New Madiera's access to the North Ocean fishery.

31. New Madiera opposes the claims in paragraph 32 of this Annex and seeks an order declaring (1) that New Madiera's vessels may legally conduct driftnet fishing operations and (2) that New Madiera may continue to have access to the North Ocean fishery and, accordingly, the Republic of Orlando would violate international law if it restricts the access of New Madiera to the North Ocean fishery.
  
32. The Republic of Orlando opposes the claims in paragraph 31 of this Annex and seeks an order declaring (1) that the driftnet fishing practices of New Madiera (i.e., the use of nets greater than 2.5 kilometers in length) are illegal under international law and (2) that New Madiera may be denied access to the North Ocean fishery and, accordingly, the Republic of Orlando may lawfully restrict New Madiera's access to the North Ocean fishery.