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B. List of Abbreviations

IAC (International Arbitration Council): International IGO that submits arbitrary decisions when asked by ask complainant.

BIT (US-Ecuador Bilateral Investment Treaty): Signed August 23, 1993, entered into force May 11, 1997. Establishes relations regarding investments in Ecuador and the United States by nationals of the opposite nation.

EEZ (Exclusive Economic Zone): The area of sea claimed by 101 coastal states, within which the states have exclusive rights of conservation and consumption of all natural resources, except where bequeath to other states in treaties and agreement.

E.g. (exempli gratia): Abbreviation of a Latin phrase which means "for example".

Et al (et alii/aliae/alia): Abbreviation of a Latin phrase which, in law, refers to a number of individuals.

ICJ (International Court of Justice): The common abbreviation for the International Court of Justice, it is the primary judicial component of the United Nations and is located in the Hague, Netherlands.

LOS; LOS III (Law of the Seas III): The third and most recent compilation and codification of all customary and previously codified laws concerning the sea. LOS III defines the rights and responsibilities of nations in their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources. Codified by states in 1982.

PCIJ (Permanent Court of International Justice): Predecessor of the International Court of Justice, and shared many of the same functions (1922-1946).

Mexico (U.M.S. or United Mexican States): In this memorial, we will use Mexico as the standard abbreviation for the United Mexican States.

U.S. (United States): Abbreviation for the United States of America.

v. (versus): Abbreviation commonly used for "versus" in case names.

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D. Statement of Relevant Facts

Since 1952, the Republic of Ecuador has held that it has control over the 200-mile territorial sea off of its coastline. David Thomas, an American, would often send his fishing vessels into the territorial area that Ecuador clearly controlled in order to fish for tuna.

These actions culminated on February 17, 2004. One of the fleets owned by him, registered under the U.S. flag and manned by Americans, was fishing 185 miles off the Ecuadorian coastline when one of Ecuador's naval vessels caught sight of them. The naval vessel sent out a signal instructing the fishing fleet to prepare to be searched, and when this signal was ignored, the Ecuadorian vessel opened fire onto the American fleet.

At that point, Thomas's ships fled, leaving Ecuador's territorial sea and entering the high sea. Other Ecuadorian naval vessels joined the chase, and they pursued the three American tuna boats. The Ecuadorian ships caught up with Thomas's ships at 205 miles off the Ecuador coast. In the encounter that ensued, two of the fishing ships were destroyed, killing one American crew member and injuring several others. As American crewmen continued to resist arrest, an Ecuadorian was killed in the squabble onboard the only remaining American ship – the *Mercury*.

Immediately following the incident, there were legal actions taken in accordance with Ecuador's municipal law. The *Mercury* was confiscated; the American crewmen were taken into custody and prosecuted for resisting arrest and manslaughter. They were imprisoned for five months while awaiting trial, and were subsequently sentenced to 10-year terms. Thomas's property and holdings in Ecuador were confiscated by the government, holding with an Ecuadorian law that

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permits an alien to own property in Ecuador only so long as their activities do not conflict with the laws of the state.

International repercussions soon followed the actions taken by Ecuador under their municipal law. Thomas appealed to his home state and the state whose flag the ships sailed under— The United States. His goals were to secure the crew's release and to obtain reparations for the property Ecuador confiscated and the personal injury to the crew. Restitution for the improper confinement of the crew was also sought. The United States government subsequently agreed to represent Thomas and filed an application with the International Court of Justice on January 1, 2006 (only after exhausting all other legal or diplomatic means). At first, Ecuador objected, but the state has since decided to proceed with the case.

E. Issues

Ecuador has not violated international law

The counsel for Ecuador submits that the state has acted according to all available international law in treaties and customs regarding its actions related to this incident.

Thomas's claims, brought forth by the United States of America, are contrary to available international law. These claims stem forth from four major arguments. Ecuador has acted within international law and within its rights concerning the incident, as stated in the following:

Counsel for Ecuador has worked carefully to siphon four key arguments arising from the conflict and dispute which occurred between Ecuador and the United States of America. We believe that all legal questions stem from these four issues, and that by addressing each of them it can be proven that Ecuador was acting in accordance with international law, both customary law and law dictated by the Law of the Seas Convention.

The first argument is that of maritime boundaries (e.g. the territorial seas, the exclusive economic zone and the high seas). Counsel for Ecuador holds, and facts support, that Thomas's fishing boats were well within the Ecuadorian exclusive economic zone. In this zone, Ecuador holds the right to all resources, except where a treaty allows another individual or state to consume these resources; such a treaty does not exist in this case. This issue brings to question whether Thomas's ships had a right to be pursuing Ecuadorian resources in this area: it will be proven that they did not.

Secondly, counsel for Ecuador plans to address the problems arising from hot pursuit and the use of force. The arguments present a series of questions of whether Ecuadorian ships were then able to chase

Thomas's fishing boats out of the EEZ and into the high seas, whether they were allowed to seize and arrest, and whether or not they employed the proper amount of force in this situation. Ecuador maintains that Ecuadorian ships were able to follow the US ships out of the exclusive economic zone because they were in hot pursuit of the US ships—a fact that will be proven in the arguments section. All force used was only the force that was necessary due to the refusal of the American crew to submit to law and violence on their part as well.

The second two arguments are deemed of lesser importance than the first two, as they deal with the fallout from the original conflict. These issues both relate to a state's treatment of aliens: one of the oldest instances of international law. The issue first questions if Ecuador's seizure of the property onboard the ships, the *Mercury*, and Thomas's holdings on Ecuadorian soil was justified by international law. In our arguments, we submit that it was. Secondly, we address the issue that questions whether or not Ecuador engaged in denial of justice, or the provision of the same rights for both aliens and citizens. Counsel for the United States insists that Ecuador has not, but we maintain that the Americans access to Ecuadorian courts equal to that of any Ecuadorian. Also to be addressed is whether Ecuador unlawfully detained the American seamen. As they were tried under municipal charges, the counsel for Ecuador submits that they were detained and imprisoned with valid reasons.

To reiterate, it is the view of the Ecuadorian counsel that these main issues compose the core arguments of this dispute. Listed in order of importance, they are: 1) maritime boundaries, 2) hot pursuit and the use of force, 3) the treatment of aliens with regard to expropriation and 4) the treatment of aliens with regard to denial of justice.

Through our arguments we will prove that concerning each issue, Ecuador was acting in compliance with available international law.

F. Summary of Arguments

Ecuador is in no way in the wrong within this case regarding the Tuna Boat Incident. Firstly, the expropriation of the property of the United States nationals by the state of Ecuador was justified, for the reason that the expropriation that occurred was a result of a civil disturbance. The expropriation is condoned by the bilateral investment treaty that exists between the United States and Ecuador; in no way did this treaty, due to the circumstances of the case, entitle the U.S. nationals to compensation within Ecuador's court system. The Americans moreover went directly to the U.S. court system against Article III paragraph II of this treaty.

Furthermore, there was no denial of justice within this case. Latin American states hold that a denial of justice only occurs when nationals are refused access to the arresting states municipal court system or denied due process. Since the aliens received a trial in Ecuador within five months of the original action (the time was under the one year requirement for due process, as defined by Robert's claim), no denial of justice occurred in this case.

Noting that the Ecuadorians were within their rights when they expropriated the property of the U.S. nationals and that there was no denial of justice, the fact also exists that Donald Thomas's ships did violate the terms of Ecuador's Exclusive Economic Zone (EEZ). According to Law of the Sea III (LOS III) the established EEZ of Ecuador is 200 miles away from Ecuador's shore, meaning that since the U.S. nationals were within 185 miles of the shore that the Ecuadorian officials had the right of pursuance. Also, following the precedent set in United Kingdom v. Iceland (1974), Donald Thomas was violating the EEZ of Ecuador by taking away their preferential access to the natural resources, including fish.

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The LOS III's doctrine of hot pursuit stands in the favor of Ecuador. Since the Ecuadorians first established contact with the U.S. nationals within their border and maintained contact as they chased them out into the high sea, they were therefore within their rights to fire upon the U.S. nationals. Also, when the two ships of Thomas' fleet were sunk, they were resisting arrest, a fact that is made more apparent with the killing of an Ecuadorian by the American crewmen. Therefore, the law of pursuit is within Ecuador's favor.

Ecuador did not violate the law of expropriation or deny the U.S. nationals justice. The United States clearly violated Ecuador's rights when they entered Ecuador's EEZ, and the law of pursuit also holds in Ecuadorian favor. In the end, Ecuador is not in the wrong within this case; the United State violated not only the laws of Ecuador, but also the treaty between the U.S. and Ecuador, meaning that they are responsible for any wrongdoing that has arisen.

G. Jurisdiction of the Court

Neither the United States nor Ecuador usually submits to the jurisdiction of the International Court of Justice, as neither state has signed the optional clause which gives the ICJ compulsory jurisdiction. The United States gave up its chances to refute jurisdiction when they brought the case concerning Ecuador to the ICJ. Ecuador at first refused to submit to the jurisdiction of the Court, but later relinquished this right, based on the strong case that they believed themselves to possess. Because Ecuador allowed the ICJ to have jurisdiction, the ICJ court case can proceed.

This case goes to the ICJ over the other international courts and tribunals because it deals with a conflict between states, not war crimes, crimes against humanity, or any other form of crime that the International Criminal Court deals with.

H. Arguments

H1. Maritime Boundaries

Ever since 1952, the state of Ecuador has claimed a 200 mile territorial sea. At the time this claim was a radical announcement, but since then the 200 mile territorial sea—or EEZ—has become implemented not only in customary international law, but in the Law of the Seas III Treaty. At one time, sovereignty over the sea extended only 12 miles from the coast. Within this area, called the territorial sea, the coastal states had complete sovereignty over resources and waters. This extended to fishing rights. LOS III established an addition to the customary 12-mile territorial sea—188 miles of the exclusive economic zone. Before and since then, 101 of the 138 coastal states have claimed their EEZ. This includes Ecuador, as well as the United States of America. The treaty gives the coastal state “sovereign rights for the purpose of exploring and exporting, conserving and managing the natural resources—and with regard to other activities for the economic exploitation and exploration of the zone” (LOS III, Section V, Article 56). Obviously, this provides Ecuador with the rights over all the economic resources within these waters. In the case of *Thomas v. Ecuador*, the American’s ships were fishing at 185 miles out from the coast. This is well within the 200-mile EEZ, and against Ecuadorian laws. Though the LOS says that when a state cannot possibly consume all of the EEZ’s resources other states can consume them, it requires the consuming state to give compensation to the coastal state. *Thomas’s* actions went against both provisions.

LOS III also states that there must be expressly written treaties and agreements giving permission for other states to utilize the resources of the EEZ (Part V, Article 62). Neither the United States, nor *Thomas*, was in the possession of such a document. Customary international law also provides for

the existence and rights of the EEZ. *United Kingdom v. Iceland* (1974), decided in the International Court of Justice, maintained in its decision that customary law since 1969 had provided for the existence of the EEZ.

Within the EEZ, the coastal state has "preferential access" to the resources within—including fish. Though the definition of the EEZ has changed some since then, the decision has not been repealed. It was reinforced later, in 1982, when the ICJ declared that the concept of the EEZ "may be regarded as a part of modern international law," followed three years later by its acceptance of the 200-mile limit. Ecuador has never been shy in claiming all the rights allowed concerning the EEZ. Thomas's fishing boats knowingly acted against Ecuadorian law, and against international written and customary laws concerning exclusive economic zones.

According to Law of the Sea III (LOS III) the established EEZ of Ecuador is 200 miles away from Ecuador's shore, meaning that since the U.S. nationals were within 185 miles of the shore that the Ecuadorian officials had the right of pursuance. This fact of a 200 mile EEZ is also reiterated in the 1970 Declaration of the Latin American State on the Law of the Seas. This later declaration further added that the decision to extend the jurisdiction beyond the territorial sea limits is a consequence of the dangers and damage resulting from indiscriminate and abusive practices in the extraction of marine resources as well as the utilization of the marine environment giving rise to grave dangers of contamination of the waters and disturbance of the ecological balance. This establishes the reasons for expanding the zone, as well as clearly enforcing that Ecuador has for over fifty years consistently maintained that it holds control of an EEZ extending 200 miles from the coastline. Since 1952 Ecuador has held that it possesses a 200 mile EEZ. Twenty years later they enforced the same claim once again, which contradicts

the opposing council's claim that Ecuador did not consistently enforce its 200 mile economic zone; this fact was enforced on numerous occasions in the time leading up to the Tuna Boat Incident.

Regarding the opposing council's stance that Ecuador did not offer their excess fish to other nations, there is no evidence that Ecuador has an excess of tuna to offer to other nations. In addition, Ecuador has never openly been opposed to a settlement regarding the fishing resources that exist within its EEZ. The United States never brought to Ecuador's attention any desire for this resource and this no settlement of any kind was ever drawn up. Due to this lack of a settlement or action towards a settlement on the part of the United States, Ecuador maintains that it was within its rights by pursuing and holding the Americans for their actions to take fish from Ecuador's EEZ. If such a settlement existed, the situation would have been very different, but as no such agreement is presently in existence, Ecuador holds the exclusive rights to the tuna in the 200 mile EEZ off of the coast of Ecuador.

H2. Hot Pursuit and Use of Force

The historical precedence of hot pursuit is present in Ecuadorian history by over 40 years, which qualifies as customary law, of a 200 mile territorial sea which was not contested due to a heavy dependence of Ecuador on the fishing resources there, similar to the United Kingdom of Great Britain and Northern Ireland v. Iceland case between Great Britain and Iceland regarding fishing jurisdiction. The Ecuadorians tried to establish contact with Thomas' fleet while it was 15 miles inside their territorial sea and when that failed they opened fire on the boats; that action resides

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within Ecuador's legal right.¹ The Ecuadorian vessels then chased the American fleet for twenty miles, where once three-fourths of the chase occurred within their EEZ. Based on the close proximity of the boats to one another throughout the chase, constant contact was likely maintained, at least by radar if not also by visual contact. The last quarter of the chase continued beyond the border of the territorial sea and proceeded out on the high seas, which is not a sanctuary since the initial law was broken within Ecuador's territory; thus Ecuador has the right to pursue legal violators beyond their territorial sea border. Law of the Seas III (LOS III) states that a coastal state can pursue ships that are committing crimes within the coastal state's 200 mile economic zone outside of this 200 mile limit as long as the pursuit is not interrupted which this one was not (Part VII, Article 111). The only requirement to begin pursuit, according to LOS III, is a visual or audio order to stop. When the two ships of Thomas' fleet were sunk, it was as they were resisting arrest. The resisting of arrest is all the more apparent because of Thomas' crew's killing of one of the Ecuadorian pursuers. The law of hot pursuit and all legal questions regarding subsequent events are on Ecuador's side. Similarly, compensation is not owed for damage done to the boats because according to LOS III, compensation is only due when the pursuing boat was wrongly pursuing and damaged the boat being chased, which was not the case here. LOS III is just the codification of customary law that both the United States and Ecuador have followed for decades. While Ecuador has ratified the treaty and the United States has not, America has followed nearly the entire treaty since its inception, with the exception of Article 11, an Article not related to this case.

¹ In response to opposing council's claim regarding Part XV of Law of the Seas, Part XV refers only to state parties who have signed and ratified the convention.

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Barbara Kwiatkowska, an expert on Law of the Seas III, states in her book "The 200 Mile Exclusive Economic Zone in the New Law of the Sea":

"Thus hot pursuit may, according to Article III, paragraphs 1 and 2, be undertaken when the coast state has a "good reason" to believe that the foreign ship has, within its EEZ/continental shelf, including safety zones around artificial islands, violated laws and regulations of that state "applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones"

thus, challenging the opposing council's assertion that Ecuador did not have the right to pursue the American ships in hot pursuit.

As a further dispute to the opposing council, United States v. F/V Taiyo Mar found that "...hot pursuit is an exception to the exclusive jurisdiction of the flag state over its ship, the conditions of that right are of direct importance to the scope of the navigational freedom of third states within the EEZ/Continental shelf." This claim demonstrates Ecuador's right to board the American ship, a right that the opposing council has contested in their memorial. The right to board the foreign ship is given the home state when hot pursuit has occurred prior, thus supporting Ecuador's actions.

H3. Responsibility towards Aliens: Expropriation of Property

The general custom that the United States practices holds that persons or corporations must be compensated by a state if property is expropriated by another State [Davis Robinson, Journal of International Law (January 1984); Schachter, Journal of International Law (January 1984)]. Nearly all of the instances that the United States has dealt with have regarded expropriation

of property due to nationalization [Banco Nazionale de Cuba v. Sabbatino (U.S. Supreme Court); Case Concerning the Factory at Chorzow (PCIJ)]. Another common reason for filing claims of expropriation is if one state refuses to pay for services completed by a company or corporation of a different state [North American Dredging Co. of Texas Claim (United States v. Mexico, heard before General Claims Commission)]. The Tuna Boat Massacre case is different, though, because the Mr. Thomas's property was expropriated due to the intentional illegal nature of the acts undertaken by his comrades and company. The overall stance concerning expropriation when a United States national or company violates law in another country is very gray. In 1993, the United States and Ecuador signed the US-Ecuador Bilateral Investment Treaty (BIT); the treaty entered into force in 1997. This treaty lays out, among many other things, the situations when expropriation can occur and the policies surrounding this dispute. The treaty holds that when international law is violated, Ecuador holds the right to expropriate property if the due process of law is followed. Under all other circumstances, compensation must be provided, but if the loss occurs as a result of a civil disturbance, compensation is not guaranteed with regard to expropriation, dependent upon the circumstances (BIT Article III, Paragraph II).

Based on the illegal actions of the United States, Ecuador can hold that the actions made by the United States created a civil disturbance and thus, the holdings may be expropriated. Thomas also failed to fight the expropriation of his property in Ecuadorian courts, instead jumping straight to United States intervention, an action that directly goes against what is described in Article III, Paragraph II of the treaty. Also, when Thomas, as a United States citizen, developed business prospects in Ecuador, he agreed to abide by the laws of Ecuador. Thomas clearly violated this trust when he

allowed his ships and crew to fish in the territorial sea off of the coast of Ecuador. Based on all of these factors and statements in the US-Ecuador Bilateral Investment Treaty, Ecuador acted within its rights in expropriating Thomas's property.

H4. Responsibility towards Aliens: Denial of Justice and Unlawful Detainment

Denial of justice is defined in the international law dictionary as the provision of the same rights for both aliens and citizens. In other words, when an alien is denied the ability to have efficient access to the municipal court systems they are denied justice (the main symptoms are that the state's actions were wrongful, attributable, and caused an injury to an alien). Denial of justice, as defined by Slomanson, affirms that "within Latin American states, a "denial of justice" can occur only when the state has completely refused access to its courts - or, its courts will not take the necessary steps to render a decision" (Slomanson 222). Therefore, since the state of Ecuador allowed the American nationals access to their court systems, a denial of justice did not occur within this case. In addition, due to the fact that the aliens received court access in under a year, exhibits that they were given due process in accordance with Ecuadorian law and Robert's claim as brought forward to the U.S.-Mexico general claims commission in November 1926. Also, this proves to be the case as exhibited by the U.S. Supreme Court case Hines v. Davidowitz et al in 1991, where they found that no injurious discriminations could take place against an alien. Therefore, absolving the police officers of all liabilities in so much as all of their actions were recognized, approved, and endorsed by the state. Furthermore, the Calvo Clause¹ is not implemented within the case of the state of Ecuador v U.S. nationals for the reason that the Tuna Boats destruction were not deliberate; they resulted from an altercation between said U.S.

nationals and Ecuadorian officials, therefore it is within the legal limits.

Also, as referenced in the Ecuadorian Constitution Part VIII Chapter 4, all persons convicted within the municipal system of Ecuador must serve out their sentence within Ecuador. Within this line of reasoning, in order for an individual who commits a crime within a nation to pay its debt and be rehabilitated, it is necessary for them to serve out their term within the prosecuting nation. Not to mention the fact that the United States' nationals employed their right to consular relations as laid out in the 1963 Vienna Convention Article 3, 5, and Chapter 2 Article 36 Section B and that it was not until all of the legal and diplomatic means were exhausted that the United States petitioned the ICJ.

In addition to this, the United States has exhibited in the past its contempt for consular relations in cases, such as, Avena and other Mexican Nationals, the LaGrand Case, and Paraguay v. the United States of America. The actions represented in these cases is not consistent with the behavior of Ecuador within this case, because consular relations were granted, however, the United States' contempt for the Vienna Convention of 1963 should be taken into account within this case, where they wish for The Calvo Clause, as defined by *Law Among Nations 6th ed.*, which states that the destruction of property must be a deliberate and hostile against aliens outside of territorial boundaries. The United States has a steady record of opposing consular relations, so for them to now call upon the Vienna Convention on Consular Relations in this instance goes against the customary legal precedent that they have set for themselves in the last few decades.

Article 292 of LOS III permits the flag state to make an application to any court or tribunal agreed by the parties, or failing such agreement within ten days of the detention, to the Tribunal, meaning the ICJ. The United

States did not file their claim within the ten days or attempt to negotiate with the Ecuadorian government, as laid out in this statute. Their first action involving the ICJ was on January 1, 2006 when they filed their claim regarding the dispute with Ecuador. In addition, Ecuador followed the ruling laid out in Roberts Claim, that any detainees must be given a trial within one year. The Ecuadorian docket, on average, takes around five to six months for a case to go through the system. The American received as much of a due process court case as any Ecuadorian national.

Taking into account the lack of a claim of self-defense until this tribunal, it is impossible to justify the non-accountability that the United States is asking Ecuador to show the American crewmen. Ecuador prosecutes for murder; the American crewmen were resisting arrest when the Ecuadorian national was killed, not responding in a manner of self-defense like the United States is now claiming. The American crew is not just in violation of intruding upon Ecuador's EEZ; they are also liable for manslaughter and resisting arrest.

H. Submissions

For the aforementioned reasons the court is asked to find that:

- Ecuador has in no way violated any international rules;
- Neither the United States, nor Ecuador has signed the optional clause giving the ICJ jurisdiction over this case, however Ecuador has decided that it will submit to the jurisdiction;
- Ecuador is not obligated to compensate Thomas (the United States) for the loss of the Mercury and all other assets or for the incarceration of the United States nationals, because Thomas was violating the law by encroaching upon the territory of Ecuador;
- That the United States was dually warned of their presence within Ecuadorian territory and chose to continue its resist arrest as shown by the death of the Ecuadorian official, therefore Ecuador was within their rights to prosecute the U.S. nationals;
- Since the U.S. nationals were given the right to consular relations and exhausted this option, and since there was no denial of justice or due process the state of Ecuador shall retain the U.S. nationals for their given term of incarceration in order to be completely rehabilitated.