

IN THE INTERNATIONAL COURT OF JUSTICE



AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

**QUESTIONS RELATING TO
OCEAN FERTILIZATION AND MARINE BIODIVERSITY
(FEDERAL STATES OF AEOLIA/REPUBLIC OF RINNUCO)**

THE FEDERAL STATES OF AEOLIA
APPLICANT

V

THE REPUBLIC OF RINNUCO
RESPONDENT

**MEMORIAL FOR THE
APPLICANT**

THE 2017 STETSON MOOT COURT COMPETITION

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STATEMENT OF JURISDICTION

The Federal States of Aeolia [“Applicant”] and the Republic of Rinuoco [“Respondent”] submit this dispute to this Honorable Court, pursuant to Article 36(1) of the Statute of the International Court of Justice. On 4 April 2016, Applicant filed an application instituting proceedings against Respondent, to which Respondent filed its Preliminary Objection on 10 May 2016. On 11 July 2016, Applicant and Respondent submitted a Joint Written Statement to the Registrar, requesting that the Court decide the jurisdictional questions and merits of this matter on the basis of the rules and principles of general international law, as well as any applicable treaties, and that 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 Registrar addressed a notification to the parties on 23 June 2016.

QUESTIONS PRESENTED

I.

WHETHER THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION OVER
THE DISPUTE.

II.

WHETHER THE REPUBLIC OF RINNUCO VIOLATED INTERNATIONAL LAW BY
IMPLEMENTING ITS OCEAN FERTILIZATION PROJECT

STATEMENT OF FACTS

The Federal States of Aeolia [“Aeolia”] and Republic of Rinnuco [“Rinnuco”] are neighboring coastal states surrounded by the Muktuk Ocean(R¶1). Both are developed countries with diverse, industrialized economies and large fishing industries(R¶2).

Rinnuco unilaterally announced its plans to dump tons of iron into the Muktuk Ocean. Aeolia immediately objected on the ground that such dumping would damage the marine environment(R¶12). However, Rinnuco refused to listen(R¶14) and dumped 15,000 kg of iron in a 2,000-km² area located approximately 150–200 miles off Rinnuco’s coast(R¶16). Rinnuco also planned to conduct further dumping in successively larger areas(R¶15).

Barely two months later, nine narwhals were found dead off the coast of Rinnuco(R¶20). It was the first recorded instance of multiple narwhals being found dead off Rinnuco’s coast. Notably, narwhals are significant to Aeolia’s ecotourism and culture, with one coastal town holding an annual festival celebrating narwhals(R¶3). The dumping of iron by Rinnuco was the only recent disturbance in the Muktuk Ocean.

After more than a year of fruitless negotiation, Aeolia requested that Rinnuco agree to submit the dispute to the ICJ but Rinnuco refused(R¶22), leading to the filing of this application by Aeolia.

SUMMARY OF ARGUMENTS

The ICJ has jurisdiction. Aeolia and Rinnuco issued declarations binding them to submit disputes arising under UNCLOS, CBD, UNFCCC, and Kyoto Protocol to the ICJ. Rinnuco cannot invoke the London Protocol to prevent the ICJ from acquiring jurisdiction over the dispute, as it is not the sole instrument governing the dispute, and the cases cited by Rinnuco are inapplicable.

Rinnuco violated international law. It failed to comply with its obligation under UNCLOS to protect and preserve the marine environment; take appropriate and necessary measures for the conservation and protection of living resources in the marine ecosystem; not to transform one type of pollution from another; reduce, control, and prevent pollution by dumping; protect a shared resource; and to control marine pollution following global rules and standards.

Rinnuco likewise violated its obligation under CBD to ensure conservation and sustainable use of biological diversity; ensure that activities within a State's jurisdiction do not cause damage to the environment of other States; conduct *in-situ* conservation; comply with EIA requirements; and protect customary use of biological resources in accordance with traditional cultural practices.

Rinnuco caused transboundary harm and violated the precautionary principle.

Rinnuco cannot invoke its domestic legal system, the persistent objector rule, and climate change conventions to justify breach of its obligations under international law.

ARGUMENTS

I. THE INTERNATIONAL COURT OF JUSTICE HAS JURISDICTION OVER THE DISPUTE.

Under Art. 36(1) of the Statute of the International Court of Justice [“ICJ”], the Court has jurisdiction over all matters specially provided for in treaties and conventions in force.¹ Jurisdiction over this dispute is thus conferred on the ICJ by compromissory clauses of the relevant conventions, under which Aeolia and Rinnuco consented to the ICJ’s jurisdiction. Rinnuco is estopped from denying this consent, and cases it cites are inapplicable to the case at bar.

A. THE ICJ HAS JURISDICTION UNDER THE RELEVANT CONVENTIONS

The parties issued declarations binding them to submit disputes arising out of the application and interpretation of the United Nations Convention on the Law of the Sea [“UNCLOS”],² Convention on Biological Diversity [“CBD”],³ United Nations Framework Convention on Climate

¹ Statute of the International Court of Justice, art. 36(1), 18 April 1946, 33 U.S.T.S. 993 [hereinafter ICJ Statute].

² United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]; Record ¶9.

³ Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 79 [hereinafter CBD]; Record ¶6.

Change [“UNFCCC”],⁴ and Kyoto Protocol to the ICJ.⁵ The parties have complied with the prerequisite of negotiation under these conventions.⁶

1. THE ICJ HAS JURISDICTION UNDER THE UNCLOS

Both parties granted the ICJ jurisdiction to settle disputes concerning the interpretation or application of UNCLOS under Article 287.⁷

a. Rinnuco’s iron fertilization project [“RIFP”] violates its duties under UNCLOS.

The dispute involves interpretation and application of Rinnuco’s duty to 1) take measures to prevent, reduce and control pollution of the marine environment;⁸ 2) protect and conserve highly migratory species⁹ and marine mammals;¹⁰ 3) refrain from transferring damage or hazards or transforming one type of pollution into another;¹¹ 4) prevent, reduce, and control pollution by

⁴ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; Record¶10.

⁵ Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, 2303 U.N.T.S. 48 [hereinafter Kyoto Protocol]; Record¶10.

⁶ Record¶¶14,18,21.

⁷ Record¶9

⁸ UNCLOS, art. 194.

⁹ UNCLOS, art. 64.

¹⁰ UNCLOS, art. 65.

¹¹ UNCLOS, art. 195.

dumping;¹² 5) give due consideration to rights of other States which by reason of their geographical situation may be adversely affected thereby;¹³ 6) give due regard to rights and duties of other States in protecting a shared resource;¹⁴ and 7) take measures to prevent, reduce, and control marine pollution no less effective than global rules and standards,¹⁵ all of which Rinnuco violated.¹⁶

b. Rinnuco's belated revocation of its consent does not divest the ICJ of jurisdiction.

When read in conjunction with Article 36(1) of the ICJ Statute, a treaty provision may confer jurisdiction on the ICJ.¹⁷ Such provision must be in force on the date when the application is filed with the Court,¹⁸ but if it ceases to be in force between the parties after the filing of application, that fact does not deprive the ICJ of jurisdiction.¹⁹

In this case, the ICJ had jurisdiction at the time Aeolia filed its application on 4 April 2016,²⁰ pursuant to the parties' written declarations submitting disputes arising under UNCLOS to the

¹² UNCLOS, art. 210.

¹³ UNCLOS, art. 210(5).

¹⁴ UNCLOS, art. 56(2).

¹⁵ UNCLOS, art. 210(6).

¹⁶ *See infra* Part II.A.1.

¹⁷ Robert Kolb, *The International Court of Justice*, at 414 (2013).

¹⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Preliminary Objections, 2008 I.C.J. 437, ¶¶79-80

¹⁹ Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicar. v. Colom.), 2016 I.C.J. 155 (Mar. 17)

²⁰ Record ¶23.

jurisdiction of the ICJ.²¹ The subsequent effectivity of Rinnuco's revocation of consent on 28 June 2016²² is thus immaterial to the Court's jurisdiction .

2. THE ICJ HAS JURISDICTION UNDER THE CBD

Both parties declared in writing that they would submit disputes concerning the interpretation or application of CBD to the ICJ²³ pursuant to CBD.²⁴

a. The dispute involves the interpretation and application of the CBD.

The dispute requires interpretation and application of Rinnuco's duty to ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,²⁵ undertake *in-situ* conservation,²⁶ conduct impact assessment and minimize adverse impacts,²⁷ and protect and encourage customary use of biological

²¹ *Supra* note 7.

²² *See* UNCLOS, art. 287

²³ Record¶6.

²⁴ CBD, art. 27.

²⁵ CBD, art. 3.

²⁶ CBD, art. 8.

²⁷ CBD, art. 14.

resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements,²⁸ which it violated.²⁹

Furthermore, interpretation and application of Rinnuco's duties under Decisions IX/16, X/33, XI/20 of CBD³⁰ is required. Hence, the dispute must be settled under the CBD.

3. THE ICJ HAS JURISDICTION UNDER THE UNFCCC, THE KYOTO PROTOCOL, AND THE PARIS AGREEMENT

Both parties declared in writing that they will submit disputes arising from interpretation or application of UNFCCC and Kyoto Protocol to the ICJ.³¹ The provisions of Article 14 of UNFCCC on dispute settlement also apply *mutatis mutandis* to Paris Agreement;³² thus, the ICJ also has jurisdiction under said Agreement.

- a. Rinnuco has consistently invoked its obligations under the UNFCCC, the Kyoto Protocol, and the Paris Agreement as justification for Rinnuco's iron fertilization project. ³³**

²⁸ CBD, art. 10(C).

²⁹ See *infra* Part II.A.2.

³⁰ See *infra* Part II.A.2.c.

³¹ Record¶10.

³² UNFCCC, art. 14(8); Paris Agreement, art. 24, 12 December 2015.

³³ Record¶14.

According to Rinnuco, RIFP will enable it to fulfill its obligations under these conventions,³⁴ as RIFP will allegedly mitigate climate change, generate potential carbon offsets that Rinnuco might use to meet emission reduction targets or commitments,³⁵ and result in carbon sequestration.³⁶ The dispute thus involves the interpretation and application of Rinnuco's obligations under these conventions.

b. Rinnuco is estopped from denying the ICJ's jurisdiction under the above conventions.

Estoppel is a general principle of law,³⁷ recognized by ICJ and other tribunals.³⁸ Having alleged that its actions are justified under UNCLOS, Kyoto Protocol, and Paris Agreement, Rinnuco is estopped from denying ICJ's jurisdiction under these conventions. While the Paris Agreement had not been ratified³⁹ and was not yet effective at the time of RIFP,⁴⁰ Rinnuco itself puts its obligations in issue and is estopped from denying ICJ's jurisdiction under this Convention.

³⁴ Record¶21.

³⁵ Record¶21.

³⁶ Record¶14.

³⁷ Aust, *Handbook of International Law* (2010).

³⁸ *See* *Barcelona Traction (Belgium v. Spain)*, 1970 I.C.J. 50, ¶33,34; *Tinoco Arbitration (Great Britain v. Costa Rica)*, 1 U.N. Rep.Int'l.Arb. Awards 369 (1923); *North Sea Continental Shelf (Ger.v. Den.; Ger. v. Neth.)*, 1969 I.C.J. 3.

³⁹ Record¶10.

⁴⁰ Record¶21.

B. RINNUCO MAY NOT INVOKE THE LONDON PROTOCOL TO PREVENT THE ICJ FROM ACQUIRING JURISDICTION OVER THE DISPUTE.

There is no reason a State's act may not violate obligations under more than one treaty.⁴¹ Given its scale, purposes, and effects, any dispute arising out of OIF cannot be settled under the terms of a single treaty.

1. THE LONDON PROTOCOL ["LP"] IS NOT THE ONLY CONVENTION GOVERNING OCEAN IRON FERTILIZATION

OIF has never been governed solely under the terms of any single convention, or the terms of LP in particular. For instance, parties to both the London Convention/London Protocol ["LC/LP"] and CBD have discussed OIF under the respective frameworks of each convention.⁴² The relationship between OIF and harm to the marine environment has always been recognized.⁴³

2. OIF VIOLATES UNCLOS AND CBD.

Conclusion of an implementing convention, such as LC/LP, does not necessarily vacate obligations imposed by the framework convention, such as UNCLOS.⁴⁴ While the LC/LP specifies

⁴¹ Southern Bluefin Tuna (N.Z. v. Japan, Aus. v. Japan), I.T.L.O.S. Case No. 3(1999).

⁴² Rosemary Rayfuse & Shirley V. Scott, *International Law in the Era of Climate Change* (2012).

⁴³ *Id.*

⁴⁴ Southern Bluefin Tuna, *supra* note 41.

and explains what broad obligations⁴⁵ under UNCLOS entail, UNCLOS remains a source of these obligations.

With respect to CBD, there is no reason RIFP cannot violate Rinnuco's obligations under both CBD and LC/LP. It is commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty.⁴⁶

3. THE DISPUTE ARISES UNDER UNCLOS, CBD, UNFCCC, KYOTO PROTOCOL, AND PARIS AGREEMENT, IN ADDITION TO LC/LP.

A dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons.⁴⁷ There is a dispute over the interpretation or application of a treaty if the actions complained of can reasonably be measured against standards or obligations prescribed by that treaty.⁴⁸ It is beyond argument that RIFP can be measured against standards and obligations prescribed by UNCLOS, CBD, and climate change conventions, and not solely against those in LC/LP.

4. RINNUCO CANNOT INVOKE THE RULE OF *LEX SPECIALIS* TO LIMIT THE ICJ'S JURISDICTION TO THE LC/LP.

⁴⁵ See *supra* Part I.A.1.a, particularly dumping under Art. 210 of UNCLOS.

⁴⁶ *Id.*

⁴⁷ *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (ser. B) No.3 (Aug. 30)

⁴⁸ *Id.*

Under the Vienna Convention on the Law of Treaties [“VCLOT”], treaties must be interpreted in light of their object and purpose.⁴⁹ Provisions of treaties should be interpreted in such a way as to render them effective.⁵⁰ Rinnuco’s argument that the Court’s jurisdiction must be limited to LC/LP as the convention most specific to OIF is contrary to these rules, as this would render ineffective any other declaration of consent under other relevant conventions. Furthermore, the ICJ has interpreted dispute settlement clauses in treaties as also covering provisions of other treaties related to the treaty containing said clauses,⁵¹ contrary to Rinnuco’s overly restrictive reasoning.

C. THE *SOUTHERN BLUEFIN TUNA* AND *FISHERIES JURISDICTION* CASES CITED BY RINNUCO CONFIRM THAT THE ICJ HAS JURISDICTION OVER THIS DISPUTE.

The *Southern Bluefin Tuna* and the *Fisberies Jurisdiction* cases cited by Rinnuco do not support its contention that the ICJ lacks jurisdiction.

1. The *Southern Bluefin Tuna*⁵² case

Under Article 281(1) of UNCLOS, if States which are parties to a dispute concerning the interpretation or application of UNCLOS have agreed to seek settlement of the dispute "by a peaceful means of their own choice", the dispute settlement procedures⁵³ of UNCLOS apply only (a) where no

⁴⁹ Vienna Convention on the Law of Treaties, art. 31(1), [1969] 1155 U.N.T.S 331 [hereinafter VCLOT].

⁵⁰ Alleged Violations Of Sovereign Rights And Maritime Spaces In The Caribbean Sea, *supra* note 19.

⁵¹ Kolb, *supra* note 17, at 435-436.

⁵² Southern Bluefin Tuna, *supra* note 41.

⁵³ See UNCLOS, Part XV.

settlement has been reached by recourse to such means and (b) the agreement between the parties "does not exclude any further procedure."⁵⁴

Rinnuco's argument that the reasoning of the Arbitral Tribunal in ruling that it had no jurisdiction is applicable in the present case and supports its contention that the ICJ has no jurisdiction under the LP, and thus no jurisdiction over the entire dispute, is incorrect, as there are several material differences between the two disputes. First, *Southern Bluefin Tuna* involved a dispute arising under only two conventions, UNCLOS and the Convention for the Conservation of Southern Bluefin Tuna ["CCSBT"]. The present dispute arises under UNCLOS, CBD, UNFCCC, LC/LP, and custom. Determination of the legality and consequences of RIFP will have important implications for Rinnuco's obligations under said conventions and custom, and for development of international law governing OIF. Second, the dispute resolution provisions of the CCSBT and the LP are dissimilar. While the CCSBT provides that "failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above,"⁵⁵ LP imposes no such duty, creating a situation where application of Article 281(1) would leave the parties with no possible forum from which to obtain relief. Such a situation is unacceptable in the present case, given RIFP's scale and potential for destruction.

2. *The Fisheries Jurisdiction*⁵⁶ case

⁵⁴ *Id.*

⁵⁵ Convention for the Conservation of Southern Bluefin Tuna, art. 16, [1994] 1819 U.N.T.S 360 [hereinafter CCSBT]

⁵⁶ Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. Rep. 432 (Dec. 4).

This case involved interpretation of a reservation made to an acceptance of jurisdiction under Article 36 of the ICJ Statute. The ICJ held that it had no jurisdiction due to the reservation to acceptance of jurisdiction made by Canada.⁵⁷

Rinnuco alleges that this case supports its view that the ICJ does not have jurisdiction. However, the case is patently inapplicable to the present dispute, which arises under several conventions with various dispute settlement clauses, and does not involve the interpretation of a reservation to jurisdiction.

⁵⁷ *Id.*

II. THE REPUBLIC OF RINNUCO VIOLATED INTERNATIONAL LAW.

OIF is Carbon Dioxide Removal [“CDR”] geoengineering⁵⁸ aimed at reducing atmospheric carbon concentrations by dumping iron in the ocean to encourage plankton bloom.⁵⁹ In conducting RIFP, Rinnuco violated its obligations under UNCLOS, CBD, LC/LP in relation to UNCLOS, and Convention on Migratory Species [“CMS”] in relation to UNCLOS and CBD. Rinnuco also caused transboundary harm and violated the precautionary principle [“PP”].

A. RINNUCO VIOLATED ITS OBLIGATIONS UNDER UNCLOS, THE CBD, THE LC/LP IN RELATION TO UNCLOS, AND THE CMS IN RELATION TO UNCLOS AND CBD.

1. RINNUCO VIOLATED ITS OBLIGATIONS UNDER UNCLOS.

a. Rinnuco breached its obligation to protect and preserve the marine environment.⁶⁰

Parties are required to undertake all possible measures necessary to prevent, reduce and control pollution of the marine environment from any source,⁶¹ including those necessary to protect

⁵⁸ *Geoengineering the Climate: Science, Governance, and Uncertainty* (The Royal Society), Sept. 2009 (defining Geoengineering as “deliberate large scale manipulation of the planetary environment to counteract anthropogenic climate change”).

⁵⁹ Benjamin Hale & Lisa Dilling, *Geoengineering, Ocean Fertilization, and the Problem of Permissible Pollution*, 36 *Science, Technology, & Human Values* 190 (2011). *See also* V. Smetacek, *The Next Generation of Iron Fertilization Experiments in the Southern Ocean*, 366 *Philosophical Transactions of The Royal Society A*; Karl Johnson, et.al., *Is Ocean Fertilization Credible and Creditable?*, 296 *Science, New Series* 467 (2002); Ken Buesseler, et.al., *Ocean Iron Fertilization: Moving Forward in a Sea of Uncertainty*, 319 *Science, New Series*, 162 (2008).

⁶⁰ UNCLOS, art. 192.

⁶¹ UNCLOS, art. 194(1).

and preserve rare or fragile ecosystems, as well as habitats of depleted, threatened or endangered species and other forms of marine life.⁶²

“Pollution” is introduction by man, directly or indirectly, of substances or energy into the marine environment, which results or is likely to result in deleterious effects such as harm to living resources and marine life.⁶³

The dumping of iron conducted by Rinnuco falls under the above provision. Studies note several possible deleterious effects of large-scale OIF, such as decrease in productivity of plankton communities, leading to a decrease in the ocean’s ability to support fisheries,⁶⁴ and lowered concentrations of oxygen below the surface layer,⁶⁵ which could lead to the decimation of fish populations.⁶⁶

b. Rinnuco failed to take strict measures for conservation and management of marine mammals, especially cetaceans,⁶⁷ in its exclusive economic zone.

⁶² UNCLOS, art. 194(5).

⁶³ UNCLOS, art. 1(1)(4).

⁶⁴ Anand Gnanadesikan, et.al., *Effects of Patchy Ocean Fertilization on Atmospheric Carbon Dioxide and Biological Production*, 17 *Global Biogeochem Cycles* 19 (2003).

⁶⁵ John J. Cullen & Phillip C. Boyd, *Predicting and Verifying the Intended and Unintended Consequences of Large-Scale Ocean Iron Fertilization*, 364 *Marine Ecology Progress Series* 295 (2008).

⁶⁶ T. J. Lueker, *Coastal Upwelling Fluxes of O₂, N₂O, and CO₂ Assessed From Continuous Atmospheric Observations at Trinidad, California*, 1 *Biogeosciences* 101 (2004).

⁶⁷ UNCLOS, art. 65.

Rinnuco has an affirmative duty to take special measures for the protection and conservation of living resources in the marine ecosystem.⁶⁸ Narwhals, as marine mammals, enjoy special protection under Article 65 of UNCLOS.⁶⁹

Marine mammals are also the subject of several agreements, including CMS, to which both parties are bound.⁷⁰ The purpose of the CMS is conservation and effective management of migratory species.⁷¹

Narwhals are Appendix II species under CMS,⁷² and both parties are their Range States.⁷³ CMS contains guidelines for creating agreements that Range States should endeavor to conclude, listing measures to be taken by Range States.⁷⁴ These measures are intended to ensure conservation and management of migratory species by the parties,⁷⁵ and include protection of habitats from disturbances⁷⁶ and prevention, reduction, or control of the release into the habitat of migratory species of substances harmful to them.⁷⁷

⁶⁸ Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs, *The Law of the Sea: National Legislation on the Exclusive Economic Zone*, United Nations (1993).

⁶⁹ *Id.*

⁷⁰ Record ¶8.

⁷¹ Convention on the Conservation of Migratory Species of Wild Animals, Preamble, ¶3, 3 June 1979, 1651 U.N.T.S. 333 [hereinafter CMS].

⁷² CMS, Appendix II.

⁷³ Record ¶8.

⁷⁴ CMS, art. V.

⁷⁵ Cyril De Klemm, *Biological Diversity Conservation and the Law* (1993).

⁷⁶ CMS, art. V(5e).

⁷⁷ CMS, art. V(5i).

RIFP is clearly contrary to such measures. By dumping iron into the Muktuk Ocean, completely disregarding possible deleterious effects on the environment of narwhals, Rinnuco violated its obligation to take measures for conservation and management of marine mammals.

c. Rinnuco transformed atmospheric pollution to marine pollution.⁷⁸

In conducting RIFP, Rinnuco violated its obligation not to transform one type of pollution to another⁷⁹ and to take the necessary measures to minimize the release of toxic, harmful and noxious substances from or through the atmosphere to the fullest possible extent.⁸⁰ OIF, by design, introduces anthropogenic CO₂ from the atmosphere into the ocean,⁸¹ leading to increased marine levels of nitrous oxide and methane, damaging the ocean floor and marine biodiversity.⁸²

d. Rinnuco violated its obligation to take the necessary measures to prevent, reduce, and control marine pollution by dumping. ⁸³

“Dumping” is “any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or man-made structures at sea.”⁸⁴ Rinnuco’s deliberate disposal of iron in the ocean is clearly

⁷⁸ CMS, art. V(5i).

⁷⁹ UNCLOS, art. 195.

⁸⁰ UNCLOS, art. 194(3)(a).

⁸¹ Sallie W. Chisholm, et.al., *Dis-Crediting Ocean Fertilization*, 294 *Science* 309 (2001).

⁸² Randall S. Abate & Andrew B. Greenlee, *Sowing Seeds Uncertain: Ocean Iron Fertilization, Climate Change, and the International Environmental Law Framework*, 27 *Pace Env'tl. L. Rev.* 555 (2010).

⁸³ UNCLOS, art. 210.

⁸⁴ UNCLOS, art. 1(5)(a).

dumping prohibited by UNCLOS. Rinnuco likewise failed to comply with its obligation⁸⁵ to give due consideration to other States that might be adversely affected by RIFP in Rinnuco's EEZ by reason of their geographical location.

e. Rinnuco violated its obligation to give due regard to the rights⁸⁶ of Aeolia in exploiting a shared resource.

In exploiting shared resources in the EEZ, Rinnuco is required to give due regard to rights of other States. "Due regard" requires all states, in exercising their freedoms, to refrain from acts that might adversely affect the use of marine resources by other States.⁸⁷ Rinnuco failed to give due regard to Aeolia in conducting RIFP in the Muktuk Ocean, impairing the latter's rights over a shared resource, and in conducting RIFP despite Aeolia's objections.⁸⁸ Rinnuco also violated its duty to protect the Muktuk Ocean as a shared resource, and instead deliberately interfered with and altered it.⁸⁹

f. UNCLOS mandates that national laws, regulations and measures to prevent, reduce and control marine pollution shall be no less effective than global rules and standards.⁹⁰

⁸⁵ UNCLOS, art. 210(5)

⁸⁶ UNCLOS, art. 56(2).

⁸⁷ James Kraska, *Maritime Power and the Law of the Sea: Expeditionary Operations in World Politics* (2011).

⁸⁸ *See infra* Part II.D; Record¶¶14,17,20.

⁸⁹ Cullen & Boyd, *supra* note 65.

⁹⁰ UNCLOS, art. 210(6).

Global rules and standards governing OIF are universally considered to be those adopted under the 1972 London Convention [“LC”],⁹¹ superseded by the LP,⁹² to which Rinnuco and Aeolia are parties.⁹³ By violating the rules and standards of LC/LP, which prescribes the proper framework for assessing OIF projects, Rinnuco breached this duty.

Under Resolution LC-LP.1(2008),⁹⁴ OIF may only be considered for a permit if it is for legitimate scientific research.⁹⁵ Permissible OIF is limited to small-scale fertilization,⁹⁶ as there exists no adequate means to verify model predictions of the long-term side effects of OIF.⁹⁷ In Resolution LC-LP.2(2010),⁹⁸ the parties adopted an Assessment Framework [“AF”] specific to OIF. In LP.4(8),⁹⁹ the parties amended the LP, confirming that OIF specifically falls within the coverage of the LC/LP and that the AF under LC-LP.2(2010) contains the rules and standards governing OIF. Rinnuco disregarded the rules and standards of these Resolutions.¹⁰⁰

⁹¹ Louise De La Fayette, *The London Convention 1972: Preparing for the Future*, 13 Int'l. J. Marine & Coastal L. 515 (1998).

⁹² Saadi Radcliffe, *Geoengineering: Ocean Iron Fertilization and the Law of the Sea*, Victoria University of Wellington (2014).

⁹³ Record¶7.

⁹⁴ Resolution LC-LP.1 (2008) on the Regulation of Ocean Fertilization (31 October 2008).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Dr. Joe Romm, *Nature: Ocean fertilization for geoengineering “should be abandoned”*, ThinkProgress (2009), <https://thinkprogress.org/nature-ocean-fertilization-for-geoengineering-should-be-abandoned>.

⁹⁸ Resolution LC-LP.2 (2010) on the Assessment Framework for Scientific Research Involving Ocean Fertilization (14 October 2010) [Hereinafter LC-LP.2(2010)]

⁹⁹ Resolution LP.4(8) on the Amendment to the London Protocol To Regulate the Placement of Matter for Ocean Fertilization and Other Marine Geoengineering Activities (18 October 2013).

¹⁰⁰ Record¶18.

RIFP is large-scale OIF clearly outside the bounds of permissible OIF. When considered in terms of physical ocean processes, large-scale refers to a length of tens of kilometres.¹⁰¹ Past OIF projects, including Haida Gwaii Project (2012),¹⁰² LOHAFEX (2009),¹⁰³ and EisenEx (2000),¹⁰⁴ conducted over varying ocean areas, were deemed large-scale OIF and either prohibited or discontinued. RIFP's first phase already covers an area significantly larger than the previous OIF projects mentioned; each successively larger phase¹⁰⁵ would again constitute large-scale OIF in violation of the LC/LP.

Rinnuco cites U.N. General Assembly Resolution 62/215¹⁰⁶ to support its argument that RIFP is not prohibited under international law. However, while said Resolution “[e]ncourages States to support the further study and enhance understanding of OIF,” nowhere does it sanction violation of global rules and standards governing OIF in order to promote such further study and understanding.

2. RINNUCO VIOLATED ITS OBLIGATIONS UNDER CBD.

¹⁰¹ Intergovernmental Oceanographic Commission-UNESCO, *Statement of the IOC-AdHoc Consultative Group on Ocean Fertilization* (June 2008).

¹⁰² Geordon Omand, *Controversial Haida Gwaii ocean fertilizing experiment pitched to Chile*, CBC News (2016), <http://www.cbc.ca/news/canada/british-columbia/haida-gwaii-ocean-fertilizing-chile-1.3550783>; See also Barrera, *Haida company facing controversy over Pacific Ocean iron dust dump says it's "creating life"*, Geoengineering Motor (2012), <http://www.geoengineer.org/2012/10/haida-company-facing-controversy-over-pacific-ocean-iron-dust-dump-says-its-creating-life>.

¹⁰³ Michael C. Branson, *A Green Herring: How Current Ocean Fertilization Regulation Distracts from Geoengineering Research*, 54 Santa Clara L. Rev. 163 (2014); Press Release, Alfred Wegener Institute, LOHAFEX: An Indo-German iron fertilization experiment (2009).

¹⁰⁴ Grant Wilson, *Murky Waters: Ambiguous International Law for Ocean Fertilization and Other Geoengineering*, 49 Tex. Int'l. Law Journal 507 (2014).

¹⁰⁵ Clarifications, A16.

¹⁰⁶ Oceans and the Law of the Sea, G.A. Res. 62/215, U.N. Doc. A/RES/62/215 (22 December 2007).

CBD¹⁰⁷ mandates conservation of biodiversity and sustainable use of its components, emphasizing *in situ* conservation, or conservation of ecosystems and natural habitats and maintenance and recovery of viable populations of species in their natural surroundings.¹⁰⁸ In conducting RIFP, Rinnuco acted contrary to these objectives and failed to perform its obligations under CBD.

a. RIFP is contrary to conservation and sustainable use of biological diversity.

Parties are obliged to develop national plans and programmes for conservation and sustainable use of biological diversity.¹⁰⁹ This necessarily includes the duty to formulate strategies to avoid biodiversity loss. In complete contravention of this duty, Rinnuco dumped iron into the Muktuk Ocean, causing biodiversity loss.

The death of the narwhals¹¹⁰ is an Unusual Mortality Event [“UME”], which “involves a significant die-off of any marine mammal population.”¹¹¹ RIFP is the most likely cause of this UME, given the amount of iron the narwhals consumed. Narwhals eat as much as 10% of their body mass every day, their primary food being Greenland halibut, polar and Arctic cod, shrimp, and Gonatus

¹⁰⁷ CBD, art. 1.

¹⁰⁸ CBD, art. 2.

¹⁰⁹ CBD, art. 6.

¹¹⁰ Record ¶20.

¹¹¹ Marine Mammal Protection Act, §404.

squid.¹¹² Through the process of “biomagnification,”¹¹³ narwhals absorb the iron consumed by each of these species. Hence, with no previous instance of multiple narwhals being found dead off Rinnuco’s coast,¹¹⁴ no other recent disturbances in the Muktuk Ocean, and given narwhals’ diet, the only logical conclusion is that RIFP caused these deaths. While this may be circumstantial evidence, the ICJ has accepted circumstantial evidence to prove an assertion when based on a series of facts, linked together and leading logically to a single conclusion.”¹¹⁵

b. Rinnuco failed to ensure that activities within its jurisdiction or control do not cause damage to the environment of other States.¹¹⁶

Introduction of pollutants into aquatic systems during RIFP is a perturbation that can set off a complicated series of biological and chemical reactions¹¹⁷ not limited to a defined area. In conducting RIFP, Rinnuco affected not just the marine environment within its jurisdiction, but also that of other States, particularly Aeolia. Given the large-scale impact of RIFP, unexpected and larger-scale changes of ecosystems not limited to Rinnuco’s jurisdiction must be expected.¹¹⁸

¹¹² Bodil Bluhm & Rolf Gradinger, *Regional Viability in Food Availability for Arctic Marine Mammals*, Ecological Applications, 18(2) Supplement S77 (2008).

¹¹³ W.B. Neely, *Chemicals in the Environment: Distribution, Transport, Fate, Analysis*. Marcel Dekker 245.

¹¹⁴ Clarifications, A27.

¹¹⁵ *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, ¶22.

¹¹⁶ CBD, art. 3.

¹¹⁷ Edward Laws, *Aquatic Pollution: An Introductory Text* (2nd.ed. 1993).

¹¹⁸ P.W. Boyd & S.C. Doney, *The impact of climate change and feedback processes on the ocean carbon cycle*, in: Fasham (Ed.) *Ocean biogeochemistry — the role of the ocean carbon cycle in global change* (2003).

c. Rinnuco violated its duty of *in-situ* conservation.¹¹⁹

Rinnuco failed to promote protection of ecosystems, natural habitats and maintenance of viable populations of species in natural surroundings,¹²⁰ which may be done through legislatively based planning controls.¹²¹ These may include special management measures, which are listed in Decisions IX/16, X/33 and XI/20. While Decisions of the Conference of Parties [“COP”] are generally non-binding,¹²² they are authoritative interpretations¹²³ of states-parties’ duties under CBD.

Instead of protecting the marine ecosystem, Rinnuco conducted OIF, which intentionally alters the ecosystems and biogeochemical cycles of the oceans.¹²⁴ The first known casualties of RIFP were the nine narwhals, which, as keystone species in the arctic oceanic system,¹²⁵ play an important role in the balancing of the ecosystem. The possibility of more deaths may lead to their population being below the Minimum Viable Population, greatly increasing the risk of short-term extinction¹²⁶ and resulting in imbalance and danger to the ecosystem. Instead of taking special management measures to ensure the survival of the narwhals, Rinnuco conducted OIF in complete disregard of the Muktuk Ocean’s ecosystem.

¹¹⁹ CBD, art. 8.

¹²⁰ CBD, art. 8(d).

¹²¹ Lyle Glowka, *A Guide to the Convention on Biological Diversity*, International Union for Conservation of Nature [IUCN], at 41 (1994).

¹²² Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 *Leiden Journal Int’l. L.* 21 (2002).

¹²³ Georg Nolte, *Treaties and Subsequent Practice* (2013). *See also* Burrus M. Carnahan, *Treaty Review Conferences*, 81 *AJIL* 226, 229 (1987).

¹²⁴ Cullen & Boyd, *supra* note 65.

¹²⁵ *Narwhal (Monodon monoceros) - Order Cetacea*

¹²⁶ *Supra* note 126, at 42.

States are further obligated to take concrete measures to conserve biodiversity and to ensure that its elements are used sustainably.¹²⁷ Conservation of biodiversity entails maintaining the populations of species and their interaction with the non-living environment.¹²⁸ Rinnuco failed to provide for conditions that are needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components¹²⁹ in conducting OIF without considering that one of its possible effects is decrease in nutrient supply and biological productivity, leading to reduction in economic activities such as fisheries.¹³⁰

d. Rinnuco failed to comply with the requirements of an Environmental Impact Assessment [“EIA”]¹³¹

First, Rinnuco failed to adopt appropriate procedures to assess any possible effects of RIFP,¹³² as it did not follow the requirements of the AF under LC/LP, which is recognized as containing the global rules and standards governing OIF.¹³³ Second, Rinnuco failed to introduce appropriate arrangements to ensure that the environmental consequences of RIFP are duly taken into account;

¹²⁷ Tore Henriksen, *Conservation and Sustainable Use of Arctic Marine Biodiversity: Challenges and Opportunities*, Arctic Review on Law and Politics (2010).

¹²⁸ *Id.*

¹²⁹ CBD, art. 8(i).

¹³⁰ *Id.*

¹³¹ CBD, art. 14.

¹³² CBD, art. 14(1)(a).

¹³³ *See supra* Part II.A.1.f.

instead, it conducted RIFP without acknowledging any of OIF's negative effects on the environment.¹³⁴

Third, Rinnuco failed to promote consultation on RIFP through conclusion of bilateral, regional or multilateral arrangements,¹³⁵ despite the fact that Aeolia houses the Nautilus Research Institute, the only research institute in Scheffutti¹³⁶ that studies narwhals.¹³⁷ This obligation is even more pressing when a shared resource is involved, which can only be protected through close and continuous co-operation between the adjacent States.¹³⁸

Finally, Rinnuco failed to take action to minimize the grave and imminent danger to the biological diversity of the Muktuk Ocean; nor did it promote national arrangements for emergency responses to RIFP or encourage international cooperation to establish joint contingency plans with Aeolia.¹³⁹ Rinnuco categorically stated that it will resume RIFP at its discretion, dismissing Aeolia's concerns and the death of the narwhals.¹⁴⁰

e. Rinnuco violated its duty to protect customary use of biological resources in accordance with traditional cultural practices.¹⁴¹

¹³⁴ See *supra* Part II.A.

¹³⁵ CBD, art. 14(1)(c).

¹³⁶ Clarifications, A26.

¹³⁷ Record ¶3

¹³⁸ Pulp Mills in the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 55-56, ¶82.

¹³⁹ CBD, art. 14(1)(e).

¹⁴⁰ Record ¶¶18,21.

¹⁴¹ CBD, art. 10(c).

Parties are required to protect and encourage customary use of biological resources, like narwhals, in accordance with traditional cultural practice, as such use serves as control mechanisms¹⁴² for their protection and conservation, with local people ultimately controlling the fate of these biological resources.¹⁴³ Rinnuco violated this obligation when it caused the death of the narwhals, which are culturally significant animals celebrated in an annual festival in Aeolia.¹⁴⁴

B. RINNUCO CAUSED TRANSBOUNDARY HARM AND VIOLATED THE PRECAUTIONARY PRINCIPLE [“PP”].

RIFP caused transboundary harm to Aeolia and violated PP, in breach of Rinnuco’s duties under both conventional and customary international law.

1. RINNUCO CAUSED TRANSBOUNDARY HARM.

No State has the right to make use of its own territory in any manner that might cause serious and clearly provable damage to the territory of another State.¹⁴⁵ The right to exploit and explore,

¹⁴² Jeffrey McNeely, *Diverse Nature, Diverse Cultures, People and the Planet* 2.3 (1993).

¹⁴³ M. Forster, *Some Legal and Institutional Aspects of Economic Utilization of Wildlife*, in: IUCN. Sustainable Use of Wildlife (a compendium of papers arising from a 1993 workshop held during the 18th Session of the IUCN General Assembly, Perth, Australia) (1993).

¹⁴⁴ Record ¶3.

¹⁴⁵ Trail Smelter Arbitral Decision (U.S. v. Can.), 3 R.I.A.A. 1905 (1938/1941); Stockholm Declaration, Principle 21, U.N. Doc. A/CONF.48/14/Rev.1 (16 June 1972) *See also* Harold Hohmann, et.al., *Precautionary Legal Duties and Principle of Modern International Law* (1994).

conserve and manage natural resources¹⁴⁶ must be exercised without causing transboundary harm, or damage upon a State caused by the acts of another in the territory of the State of origin.¹⁴⁷ This obligation is customary international law.¹⁴⁸

A violation of this obligation has four elements: the harm must result from human activity; there must be a physical relationship between the activity concerned and the harm; there must be transboundary transfer of the harmful effect; and the activity must involve “a risk of causing significant harm”.¹⁴⁹ All four elements are present in this case.

a. The harm was a result of human activity

Dumping of iron into the ocean can only be done through deliberate human action. It is not disputed that RIFP was conducted through Rinnuco’s actions.¹⁵⁰

b. There exists a physical relationship between the activity concerned and harm caused.

¹⁴⁶ UNCLOS, art. 56.

¹⁴⁷ Report of the International Law Commission [“ILC”], Articles on Prevention of Transboundary Harm from Hazardous Activities, U.N. GAOR, U.N. Doc. A/56/10 (2001); Corfu Channel, *supra* note 115; Trail Smelter, *supra* note 145.

¹⁴⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. 226 (1996); CBD, Principle 3.

¹⁴⁹ Report of the ILC, *supra* note 147, art.1; Oscar Schachter, International Law in Theory and Practice, at 336 (1991).

¹⁵⁰ Record¶16.

A physical relationship requires that the activity directly or indirectly involving natural resources¹⁵¹ results in bodily, materially or environmentally harmful consequences.¹⁵² RIFP affects the marine life and other natural resources in the Muktuk Ocean, and resulted in harmful consequences.¹⁵³

c. There was a transboundary transfer of the harmful effect.

Any harmful effect from RIFP will not be contained within the EEZ of Rinnuco. Due to the density of surface waters of the Arctic Ocean especially in winter, all intermediate and deep water in the Arctic Ocean is advected in from adjacent areas.¹⁵⁴ Thus, iron dumped into the ocean will be carried along the ocean circulation within the Arctic Circle.

d. Rinnuco's iron fertilization project involves a risk of causing significant harm.

“Risk of causing significant harm” refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact.¹⁵⁵ The risk need not be of high probability, so long as the harm caused is significant.¹⁵⁶

¹⁵¹ Xue Hanqin, *Transboundary Damage in International Law*, at 4 (2003).

¹⁵² *Supra* note 149, at 5.

¹⁵³ See *supra* Part II.B.1.a.

¹⁵⁴ Yvonne Herman, et.al., *Marine Geology and Oceanography of the Arctic Seas*, at 9 (1974); Rebecca Woodgate, *Arctic Ocean Circulation: Going Around at the Top of the World*, 4 *Nature Education Knowledge* 8 (2013).

¹⁵⁵ Report of the ILC, *supra* note 147.

¹⁵⁶ *Id.*

“Significant” means greater than mere nuisance or significant harm normally tolerated. It is “something more than ‘detectable,’ but need not be ‘serious’ or ‘substantial.’”¹⁵⁷ The death of the narwhals is a significant loss to the marine biodiversity of Aeolia and its eco-tourism, heavily relied upon by Aeolia.¹⁵⁸

An activity may involve a risk of causing significant transboundary harm even though those responsible for carrying out the activity underestimated the risk or were unaware of it.¹⁵⁹ Thus, Rinnuco cannot claim unawareness of significant transboundary harm caused by RIFP to exculpate it from liability.

2. RINNUCO VIOLATED THE PRECAUTIONARY PRINCIPLE UNDER CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW

Both LC/LP and CBD incorporate PP, which is also customary international law. In conducting RIFP, Rinnuco committed an egregious breach of this obligation under both treaty and custom.

a. Rinnuco failed to observe PP under LP.

¹⁵⁷ Schachter, *supra* note 149.

¹⁵⁸ Record ¶¶2-3.

¹⁵⁹ Report of the ILC, *supra* note 147.

Under LP, Rinnuco is required to adopt “appropriate preventative measures” when an activity is “likely to cause harm” even when there is “no conclusive evidence to prove a causal relation between the inputs and their effects”¹⁶⁰.

Rinnuco breached this duty when it implemented RIFP despite the significant body of scientific work identifying harm likely to result from OIF.¹⁶¹ It again violated PP when it refused to discontinue RIFP despite the narwhals’ death.¹⁶²

The EIA conducted by Rinnuco¹⁶³ is not an “appropriate preventative measure.” The requirement of an AF specific to OIF is proof that an EIA does not provide sufficient standards by which to measure OIF. Following *lex specialis*, the specific AF adopted under LC/LP prevails over the general requirement of an EIA under customary law.¹⁶⁴

b. Rinnuco failed to observe the PP under CBD.

Parties are required to undertake appropriate measures to “avoid or minimize threats of significant reduction or loss of biological diversity, despite the lack of full scientific certainty.”¹⁶⁵ The PP under CBD thus imposes a dual obligation: first to avoid, and second to minimize, the above threats.

¹⁶⁰ 1996 Protocol to the Convention on the Prevention of Marine Pollution By Dumping of Wastes and Other Matter, art 3, (1996) 2006 A.T.S.1. [hereinafter London Protocol]

¹⁶¹ *See supra* Part II.A.

¹⁶² Record¶20.

¹⁶³ Record¶12.

¹⁶⁴ Antonio Cassese, *International Law*, at 199 (2004).

¹⁶⁵ CBD, Preamble.

In conducting OIF despite the threat posed to biological diversity,¹⁶⁶ Rinnuco failed to comply with the first half of this obligation. In subsequently failing to take action after the death of the narwhals, Rinnuco failed to comply with the second. The significant threat posed to the narwhals triggered Rinnuco's duty to minimize threats of significant reduction or loss of biological diversity. Rinnuco acted in complete disregard of this duty when it refused to discontinue RIFP or take any other measures to minimize the harm caused.

c. Rinnuco failed to observe PP as customary international law.

PP mandates that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.¹⁶⁷ There is sufficient state practice and *opinio juris* to consider PP custom.¹⁶⁸

Application of PP as custom requires threat of environmental damage, of a serious or irreversible nature, and scientific uncertainty, such that no causal link between an action and environmental damage can be established.¹⁶⁹ Each element is present.

¹⁶⁶ See *supra* Part II.A.2.

¹⁶⁷ Rio Declaration on Environment and Development, Principle 15, U.N. Doc.A/CONF.151/5/Rev.1 (16 June 1992)

¹⁶⁸ See Arie Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (2002); Agne Sirinskiene, *The Status of Precautionary Principle: Moving Towards a Rule of Customary International Law* (2009), David Freestone & Ellen Hey, *The Precautionary Principle and International Law* (1995); and Tim O’Riordan & James Cameron, *Interpreting the Precautionary Principle* (1994).

¹⁶⁹ IUCN Council, *Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management*, 67th Meeting (2007).

i. RIFP poses a threat of environmental damage.

Rinnuco's dumping of iron into the ocean poses a threat to the ecological balance and marine biodiversity of the Muktuk Ocean.¹⁷⁰

ii. The harm brought about by Rinnuco's iron fertilization project is of a serious and irreversible character.

The danger is undisputedly grave and irreversible. Nine narwhals were found dead off the coast of Rinnuco.¹⁷¹ These deaths took place after the first and smallest phase of RIFP; there is no way to predict or measure the extent of the harm that RIFP in successively larger phases will cause to the Muktuk Ocean and its biodiversity.

iii. There exists scientific uncertainty, such that no causal link between the Rinnuco's iron fertilization project and environmental damage can be established, requiring the application of PP.

The nature of OIF as a large-scale CDR measure,¹⁷² the number of variables at play,¹⁷³ and the dearth of conclusive scientific evidence as to all its possible effects on the environment and

¹⁷⁰ See *supra* Part II.A.2.c.

¹⁷¹ Record ¶20.

¹⁷² Rayfuse & Scott, *supra* note 42.

¹⁷³ Jennie Dean, *Iron Fertilization: A Scientific Review with International Policy Recommendations*, 32 *Environ. Env. Law and Policy Journal* 321 (2009).

biodiversity¹⁷⁴ result in a situation where requiring proof of a causal link between OIF and environmental damage before taking action would be impractical, if not impossible, and grave environmental harm would go unchecked.

Rinnuco violated PP as custom when it failed to adopt cost-effective measures to prevent environmental degradation resulting from RIFP, an activity which raises threats of serious and irreversible damage to marine biodiversity.¹⁷⁵

C. RINNUCO CANNOT INVOKE ITS DOMESTIC LEGAL SYSTEM TO JUSTIFY NON-COMPLIANCE WITH ITS OBLIGATIONS UNDER INTERNATIONAL LAW.

Rinnuco's failure to enact domestic implementing legislation for Resolution LC-LP.2(2010)¹⁷⁶ does not excuse Rinnuco from complying with its obligations under LC/LP.

1. A state may not invoke the provisions of its internal law as justification for its failure to perform a treaty.¹⁷⁷

Pursuant to international law, all obligations imposed by it must be fulfilled in good faith, and domestic law may not be invoked to justify non-fulfillment.¹⁷⁸ A State which has assumed valid

¹⁷⁴ See *supra* Part II.A.2.

¹⁷⁵ See *supra* Part II.A.

¹⁷⁶ Record ¶18.

¹⁷⁷ VCLOT, art. 27.

¹⁷⁸ International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention, Advisory Opinion, OC-14/94, Ser.A, No14, ¶35, 116 I.L.R. 320

international obligations is bound to make such modifications in its legislation necessary to ensure their fulfillment.¹⁷⁹

Rinnuco failed to comply with the LC/LP in good faith when it failed to enact domestic implementing legislation to make LC-LP.2 effective. As a Resolution interpreting states-parties' obligations under the LC/LP, good faith compliance with the LC/LP requires compliance with this Resolution.

2. Rinnuco cannot invoke its failure to adopt the necessary implementing legislation as justification for failure to comply with the Assessment Framework provided by Resolution LC-LP.2 (2010)

This resolution is an authoritative interpretation of the duties of state parties under the LC/LP.¹⁸⁰ As such, good faith in the performance of its obligations under LC/LP requires Rinnuco to comply with this AF.

In disregarding Resolution LC-LP.2(2010), Rinnuco acted contrary to the rule of *pacta sunt servanda*. Rinnuco implemented RIFP in bad faith, deliberately bypassing the requirements of the AF despite its knowledge that AF was adopted by the Conference of the Parties as the proper procedure by which parties to the LC/LP could conduct OIF while still complying with obligations under LC/LP.¹⁸¹ No effort was made to comply with the requisites of the AF, despite Rinnuco's resources and capabilities as a developed country.¹⁸²

¹⁷⁹ Exchange of Greek and Turkish Populations (Greece v. Turk.), Advisory Opinion, 1925 P.C.I.J., Ser.B, No.10.

¹⁸⁰ LC-LP.2(2010), *supra* note 98, Annex 6, 1.5.

¹⁸¹ LC-LP.2(2010), *supra* note 98.

¹⁸² Record¶2.

D. RINNUCO CANNOT INVOKE THE PERSISTENT OBJECTOR RULE.

Rinnuco's consistent stance in favor of OIF, as well as its refusal to vote for a measure completely banning it¹⁸³ do not justify breach of its obligations under international law.

1. The persistent objector rule is not applicable.

This rule has been proposed in situations wherein a new rule of customary law is developing and a State objects to said rule, resulting to its inapplicability to that State.¹⁸⁴ It finds no application in situations where the disputed rules are conventional law. Rinnuco's declarations and statements in favor of OIF and against a complete ban were made during conferences or meetings of the parties of multilateral environmental agreements.¹⁸⁵ They were thus made within the context of the interpretation of states-parties' obligations under conventional law, and not in response to the emergence of a new norm of customary law.

Moreover, there is no state practice to support this rule, and commentators question its very existence.¹⁸⁶

¹⁸³ Record¶18.

¹⁸⁴ Malcolm Shaw, *International Law* (6th ed. 2008).

¹⁸⁵ Record¶18

¹⁸⁶ Malcolm Evans, *International Law*, at 127 (3rd ed. 2010).

E. RINNUCO CANNOT INVOKE ITS OBLIGATIONS UNDER CLIMATE CHANGE CONVENTIONS AS JUSTIFICATION FOR BREACH OF ITS OBLIGATIONS UNDER INTERNATIONAL LAW.

Rinnuco has maintained that OIF is beneficial to the oceans and marine biodiversity, and that its obligations under climate change conventions justify RIFP. However, current scientific research denies Rinnuco's first claim, and international law refutes the second.

1. Iron fertilization will not enable Rinnuco to comply with its obligations under the UNFCCC and related climate change conventions.

Rinnuco claims that OIF will result in the mitigation of climate change. However, current scientific research does not support this claim. First, technical challenges and large uncertainties surrounding large-scale OIF, along with long delays in the climatic response, mean that it would take decades to have any notable effect.¹⁸⁷ Second, it is suggested that other factors may prevent successful fertilization, and models indicate that the potential gains of even completely successful fertilization are small.¹⁸⁸ Third, because deep ocean CO₂ reservoirs are eventually re-exposed to the atmosphere through global ocean circulation, this would not be a permanent solution.¹⁸⁹ Finally, some suggest that

¹⁸⁷ Jason Blackstock & Jane Long, *The Politics of Geoengineering*, 327(5965) *Science* 527 (2010).

¹⁸⁸ J.A. Fuhrman & D.G. Capone, *Possible Biogeochemical Consequences of Ocean Fertilization*, 36 *Limnol. Oceanogr.* 1951 (1991)

¹⁸⁹ Chisholm, et.al., *supra* note 81.

the enhanced release of nitrous oxide could totally negate any potential benefit from fertilization and likely worsen global warming and ozone depletion.¹⁹⁰

Rinnuco also claims that OIF will result in carbon sequestration¹⁹¹ and could generate potential carbon offsets that Rinnuco might use to meet emission reduction targets or commitments.¹⁹² Again, these claims are unsupported by conclusive scientific research.¹⁹³

2. Breach of one treaty in order to comply with another is contrary to *pacta sunt servanda*.

Regardless of any alleged benefits of OIF, Rinnuco's obligations under climate change conventions cannot justify the conduct of RIFP in breach of Rinnuco's obligations under UNCLOS, CBD, LC/LP in relation to UNCLOS, and CMS.

The rule of *pacta sunt servanda* is clear: every treaty in force is binding upon the parties to it and must be performed by them in good faith.¹⁹⁴ The ICJ has held that this rule consists of two elements of equal importance.¹⁹⁵ First, *every* treaty in force is binding upon the parties to it: a state which is party to several conventions cannot choose to comply with one treaty at the expense of another. Second, good faith under *pacta sunt servanda* obliges parties to a treaty to apply treaties in a reasonable way and

¹⁹⁰ Fuhrman & Capone, *supra* note 188.

¹⁹¹ Record¶14.

¹⁹² Record¶20.

¹⁹³ Lampitt, et.al., *Ocean Fertilization: a Potential Means of Geoengineering?*, Phil. Trans. R. Soc. A 366 (2008).

¹⁹⁴ VCLOT, art. 26.

¹⁹⁵ Gabčíkovo–Nagymaros Project (Hung. v. Slov.), 1977 I.C.J. 7 (1997).

in such a manner that their purpose can be realized:¹⁹⁶ state parties to multiple conventions owe this duty of good faith under each convention.

Good faith compliance with treaty obligations thus requires compliance in a manner that does not breach any other treaty obligation. *Pacta sunt servanda* requires that Rinnuco fulfill its obligations under climate change conventions through means that do not violate its obligations under UNCLOS and CBD. Rinnuco bound itself to comply with the obligations of each convention, and cannot now evade liability for breach of obligations to which it gave its consent.

3. Alleged compliance with its obligations under climate change conventions does not justify Rinnuco's violation of its duty not to cause transboundary harm and PP.

Article 38 of the ICJ Statute provides that both custom and treaty are sources of law.¹⁹⁷ There exists no hierarchy between the two sources.¹⁹⁸ Custom and treaty equally being sources of law, Rinnuco cannot invoke its obligations under UNFCCC and related climate change conventions to justify breach of obligations under customary international law, i.e. its duty not to cause transboundary harm and its duty to observe the precautionary principle.

¹⁹⁶ *Id.*

¹⁹⁷ ICJ Statute, art. 38.

¹⁹⁸ Cassese, *supra* note 164.

CONCLUSION AND PRAYER FOR RELIEF

Applicant, the Federal States of Aeolia, respectfully requests the Court to adjudge and declare that:

1. The International Court of Justice has jurisdiction over the dispute; and
2. The Republic of Rinnuco violated international law by conducting the RIFP, and that any re-initiation of this project would violate international law.

Respectfully submitted,

AGENTS FOR THE APPLICANT