



IN THE INTERNATIONAL COURT OF JUSTICE



AT THE PEACE PALACE

THE HAGUE

OIL POLLUTION IN THE MARINE ENVIRONMENT

---

FEDERAL STATES OF ALBACARES

*APPLICANT*

v.

REPUBLIC OF REPELMUTO

*RESPONDENT*

---

MEMORIAL FOR THE RESPONDENT

THE 2010 STETSON MOOT COURT COMPETITION

NOVEMBER 2010

**TABLE OF CONTENTS**

INDEX OF AUTHORITIES ..... v

STATEMENT OF JURISDICTION..... xi

QUESTIONS PRESENTED..... xii

STATEMENT OF FACTS ..... 1

SUMMARY OF SUBMISSIONS ..... 2

SUBMISSIONS AND AUTHORITIES..... 3

**I. REPELMUTO’S REGULATION OF THE OIL EXPLORATION ACTIVITIES IN ITS EEZ IS IN ACCORDANCE WITH ITS DUTY TO PREVENT TRANSBOUNDARY HARM..... 3**

A. REPELMUTO HAS THE DUTY TO PREVENT TRANSBOUNDARY HARM UNDER INTERNATIONAL LAW ..... 3

B. THIS DUTY REQUIRES REPELMUTO TO OBSERVE DUE DILIGENCE..... 4

C. REPELMUTO OBSERVED DUE DILIGENCE. .... 5

    1. *It mandated the use of Best Available and Safest Technology (BAST)* ..... 5

        a. It required the use of hard-wired controller and “Dead Man” switch. .... 5

        b. The use of an acoustic trigger is not customary under international law..... 6

    2. *It conducted adequate and sufficient inspection*..... 7

D. REPELMUTO CANNOT BE LIABLE UNDER MARPOL AND UNCLOS. .... 8

    1. *The MARPOL Convention does not apply to Blue Ocean.* ..... 8

        a. MARPOL, as clarified by the Unified Interpretations, regulates only

<u>space machinery drainage</u> .....	8
b. <u>Even if MARPOL applies, Repelmuto has complied with its obligations</u> .....	9
2. <i>Repelmuto is not bound by the UNCLOS but has nevertheless acted consistent with its object and purpose</i> .....	9
a. <u>The UNCLOS is not binding upon Repelmuto</u> .....	9
b. <u>Even if UNCLOS is binding as customary law, Repelmuto's regulation is still consistent with it</u> .....	10
<b>II. REPELMUTO'S AUTHORIZATION OF THE USE OF CHEMEX IN RESPONSE TO THE SPILL IS CONSISTENT WITH INTERNATIONAL LAW</b> .....	11
A. IT HAS THE SOVEREIGN RIGHT TO DETERMINE AND USE ADEQUATE AND EFFECTIVE RESPONSE TO THE SPILL TO PREVENT TRANSBOUNDARY HARM.....	11
1. <i>The use of chemical dispersants is pursuant to human rights and environmental protection</i> .....	12
2. <i>Chemical dispersants have been proven to be an effective spill response</i> .....	12
B. THE USE OF CHEMEX IS CONSISTENT WITH THE DUTY TO PRESERVE BIODIVERSITY UNDER THE CBD.....	13
C. IT ALSO COMPLIED WITH THE PRECAUTIONARY APPROACH (PA).....	14
1. <i>Repelmuto is bound by PA</i> .....	14
2. <i>The PA is a customary norm</i> .....	14
3. <i>The use of ChemEx is in accordance with PA</i> .....	15

D. APART FROM THE DUTY TO PREVENT TRANSBOUNDARY HARM AND PRESERVE BIODIVERSITY, REPELMUTO ALSO ACTED IN ACCORDANCE WITH THE PRINCIPLE OF COOPERATION.....	16
<b>III. REPELMUTO IS NOT LIABLE FOR THE DAMAGES SUFFERED BY ALBACARES .....</b>	<b>17</b>
A. REPELMUTO IS NOT RESPONSIBLE FOR THE OIL SPILL.....	17
1. <i>The injury suffered by Albacares was due to Fahy Oil.</i> .....	17
2. <i>Fahy Oil's negligence is not attributable to Repelmuto</i> .....	17
3. <i>Under customary law, strict liability operates against Fahy Oil</i> .....	18
B. NEITHER CAN REPELMUTO BE HELD RESPONSIBLE FOR THE USE OF CHEMEX.....	18
1. <i>There is no clear and convincing evidence that the use of ChemEx resulted in transboundary damage</i> .....	18
2. <i>Even if there was harm, it was not transboundary</i> .....	19
3. <i>Supposing there was harm, it was insignificant</i> .....	20
4. <i>Assuming, without conceding, that the use of ChemEx violated international law, it is excused by the Doctrine of Necessity</i> .....	20
C. FINALLY, NO OBLIGATION TO COMPENSATE ALBACARES RESULTS FROM DECLARATIONS MADE BY REPELMUTO'S OFFICIALS .....	21
1. <i>The declarations do not amount to unilateral act to compensate Albacares</i> .....	21
2. <i>The undertaking to make Fahy Oil pay is not absolute</i> .....	22
CONCLUSION AND PRAYER.....	23

## **INDEX OF AUTHORITIES**

### **INTERNATIONAL AND REGIONAL TREATIES**

African Charter on Human and People's Rights, 21 I.L.M. 58 (1982)	12
Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention), UKTS No. 56 (1979)	20
Cartagena Protocol on Biosafety, 39 ILM 1027 (2000)	14
Convention for Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 16 ILM 1450 (1977)	18
Convention on Biological Diversity, 31 ILM 818 (1992)	3,13,14, 16
Convention on the Transboundary Effects of Industrial Accidents (CTEIA), 31 ILM 1330 (1992)	16
Declaration of the Hague on the Environment, 28 ILM 1989 (1989)	12
Framework Convention on Climate Change, 31 ILM 849 (1992)	14
Helsinki Rules on the Uses of Waters of International Rivers, 2 IPE 5741	3
International Convention on Civil Liability for Oil Pollution Damage, 973 UNTS 3 (1969)	18
International Convention on Oil Pollution Preparedness, Response and Cooperation (OPPR), 30 ILM 733 (1990)	16
Protocol Relating to the Convention for the Prevention of Pollution from Ships (MARPOL), ILM 246 (1978)	8,9
Offshore Pollution Liability Agreement (OPOL), 13 ILM 1409 (1974)	18
Protocol to the American Convention in the Area of Economic, Social and Cultural Rights	12
United Nations Charter, 892 UNTS 119 (1945)	16
United Nations Convention on the Law of the Sea (UNCLOS), 29 ILM 1261 (1982)	3,10,14, 16
Vienna Convention for the Protection of the Ozone Layer, 26 ILM 1529 (1985)	14,16

Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331 (1969)	9
WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 33 ILM 28 (1994)	14
<b>TREATISES AND DIGESTS</b>	
Bergkamp, <i>Liability and Environment</i> , Kluwer Law, (2001)	4,5
Birnie & Boyle, <i>International Law and the Environment</i> (2002)	4
Bodansky et al., <i>The Oxford Handbook of International Environmental Law</i> , Oxford Press, (2007)	15
Bothe, <i>Trends in Environmental Policy and Law</i> , Gland (1980)	5
Brownlie, <i>Principle of Public International Law</i> (5th ed. 1998)	11
Bratspies & Miller, <i>Transboundary Harm in International Law, Lessons from the Trail Smelter Arbitration</i> , Cambridge, (2006)	19
Crawford, <i>The International Commission's Articles on State Responsibility: Introduction, Text and Commentaries</i> (2002).	18
Gao, <i>Environmental Regulation of Oil and Gas</i> , Kluwer Law (1998)	8
Gundling, The Status in International Law of the Principle of Precautionary Action, 5 Int'l J. of Estuarine and Coastal L. 23,26 (1990)	14
Harris, <i>Cases and Materials on International Law</i> , Thomson Reuters (2010)	10,18
Henkin et al., <i>International Law: Cases and Materials</i> , 3rd edn., St. Paul, West Publishing Co. (1993)	20
Hunter et al., <i>International Environmental Law and Policy</i> , 3rd ed. (2007)	4
Klabbers, <i>Some Problems Regarding the Object and Purpose of Treaties</i> , VIII FYBRIL (1997)	10
Morrison & Wolfrun, <i>International, Regional and National Environmental Law</i> (2000)	4
Sands, Philippe. <i>Principles of International Environmental Law</i> , Cambridge; 2 <sup>nd</sup> edition (2003)	5,11,16

Shaw, <i>International Law</i> , 6th edition, Cambridge, (2008)	3,4,11
Smith, <i>State Responsibility and the Marine Environment: The Rules of Decision</i> , Claredon Press (1988)	4
Stephens, <i>International Courts and Environmental Protection</i> , Cambridge, 2009	4
Swanell & Daniel, <i>Effect of dispersants on Oil Biodegradation under Simulated Marine Conditions</i> , National Environmental Technology Centre citing Varadaj, R., M., L. Robbins, J. Bock et al., <i>Dispersion and Biodegradation of Oil Spills on Water</i> . 1995 Oil Spill Conference, API, USA available at <a href="http://www.iosc.org/papers/00596.pdf">http://www.iosc.org/papers/00596.pdf</a>	15
Trouwborst, <i>Evolution and Status of the Precautionary Principle in International Law</i> , Utrecht University, Kluwer Law International (2002)	14
Wilkinson, <i>Environment and Law</i> , (2002)	14
Xue, <i>Transboundary Damage in International Law</i> (2003)	3,19
 <b>ESSAYS, ARTICLES AND JOURNALS</b>	
Belore, <i>The History of Chemical Dispersants in the United States</i> , available at <a href="http://www.pcs.gr.jp/doc/esymposium/2004/2004_Randy_E.pdf">http://www.pcs.gr.jp/doc/esymposium/2004/2004_Randy_E.pdf</a>	13
Boyd, et al., <i>Effects of Oil and Chemically Dispersed Oil in the Environment</i> , at 16 available at <a href="http://www.discountpdh.com/course/oilandchemically/Effects%20of%20Oil%20and%20chemically%20disperd%20oil.pdf">http://www.discountpdh.com/course/oilandchemically/Effects%20of%20Oil%20and%20chemically%20disperd%20oil.pdf</a>	11
Bradley, <i>Unratified Treaties, Domestic Politics and the US Constitution</i> , Harv. Int'l L. J., (2007)	10
Cook, <i>Technology is not the Answer</i> available at <a href="http://www.1petro.org/mslib/servlet/1petropreview?id=00037895&amp;soc=SPE">http://www.1petro.org/mslib/servlet/1petropreview?id=00037895&amp;soc=SPE</a>	5
Fiocco & Lewis, <i>Oil spill dispersants</i> , Pure Appl. Chem. 71(1) (1999)	15
Freestone, <i>The Road from Rio: International Environmental Law After the Earth Summit</i> , 6 JEL (1994)	15

Gold et al, <i>Leaking Oil Well Lacked Safeguard Device</i> , Wall Street J., April 28, 2010, available at <a href="http://online.wsj.com/article/SB10001424052748704423504575212031417936798.html">http://online.wsj.com/article/SB10001424052748704423504575212031417936798.html</a>	6
Handl, <i>National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered</i> , 26 Natural Resources Journal 405, 412-27 (1986)	4,20
Hill, <i>Statistical Risk Analysis for Determining Best Available and Safest Technology (BAST)</i> available at <a href="http://www.doemre.gov/tarprojects/0309.htm">http://www.doemre.gov/tarprojects/0309.htm</a>	5,6
Jonas & Saunders. <i>The Object and Purpose of a Treaty: Three Interpretive Methods</i> , Vanderbilt J. of Transnat'l L. 3 May 2010	10
McIntyre & Mosedale. <i>The Precautionary Principle as a norm of customary international law</i> available at <a href="http://jel.oxfordjournals.org/cgi/pdf_extract/9/2/221">http://jel.oxfordjournals.org/cgi/pdf_extract/9/2/221</a> .	14
Schachter, <i>The Emergence of International Environmental Law</i> , Journal of International Law Affairs, vol. 44 (1991)	20
Shelton, <i>Human Rights, Health and Environmental Protection: Linkages in Law &amp; Practice: A Background Paper for the World Health Organization</i> . Health and Human Rights Working Paper Series No. 1 (2002)	12
Skubizewski, "Unilateral Acts of States", cited in Bedjaoui, <i>International Law: Achievements and Prospects</i> . Paris (1991)	14
 <b>CASES</b>	
Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4	4
Gabcikovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. 7 (September 25)	4
Legal Status of Eastern Greenland (Denmark v. Norway), PCIJ, Ser. A./B., No.53, 1933	22
Lac Lanoux (Fr. v. Spain), 12 R.I.A.A. 281 (1957)	4,16
Libya/Malta Continental Shelf Case, 81 ILR 238, 81 ILR 726 (1984)	10
Nuclear Tests case (New Zealand v. France) 57 ILR 605	14,15
Pedra Branca Case (Malaysia v. Singapore), Judgment, ICJ Reports 2008, p. 12	22

Trail Smelter Arbitral Decision (US v. Can.) 3 R.I.A.A. 1905 (1938/1941)	4,19
Tunisia/Libya Continental Shelf case (Merits) 67 ILR 4 (1982)	10
<b>MISCELLANEOUS</b>	
Earth Justice Legal Defense Fund, <i>Human Rights and the Environment</i> (Issue Paper) (December 2001)	12
European Commission, <i>Communication on the Precautionary Principle</i> , COM (2001)	15
European Maritime Safety Agency 2010, <i>Manual on the Applicability of Oil Spill Dispersants</i> , available at < <a href="http://www.emsa.europa.eu">www.emsa.europa.eu</a> > (last accessed November 13).	16
French & Schutenberg, <i>Evaluation of Net Environmental Benefit Using Fates and Effects Modeling</i> , International Oil Spill Conference Proceeding (1999)	13
Maritime Safety Authority of New Zealand, <i>Oil Spill Dispersants Guidelines For Use In New Zealand</i> (2000)	20
Office of Response and Restoration, <i>Emergency Response: Responding to Oil Spills</i> , National Oceanic and Atmospheric Administration (2007)	13
Website of International Tanker Owners Pollution Federation Limited < <a href="http://www.itopf.com/spill-response/clean-up-and-response/dispersants/">http://www.itopf.com/spill-response/clean-up-and-response/dispersants/</a> > (last accessed November 3, 2010)	15,21
WEST Engineering Services, <i>Evaluation of Secondary Intervention Methods in Well Control</i> , available at < <a href="http://www.boemre.gov/tarprojects/431/FinalReport431.pdf">www.boemre.gov/tarprojects/431/FinalReport431.pdf</a> > (last accessed October 15, 2010)	5,6
<b>UN DOCUMENTS</b>	
Articles of State Responsibility, G.A. Res. 56/83, Annex UN Doc. A/RES/58/83/Annex (January 28, 2002)	17,18, 21
Barboza, "Sixth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law," UN Doc. A/CN.4/428 (March 15, 1990)	20
Consideration of Prevention of Transboundary Harm from Hazardous Activities and Allocation of Loss in the Case of Such Harm, G.A. Res. 62/68 U.N.	19

Doc.A/RES/62/452 62nd sess. Agenda item 84 (2008)	
Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Report of the ILC on its 53rd Session , 159, UN Doc. A/56/10	4,16
Draft Declaration of Principles on Human Rights and the Environment, UN Doc. E/CN.4/Sub.2/1994/9 (1994)	12
Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, Yearbook of the International Law Commission, 2006, vol. II, Part Two (2006)	21,22
Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) (1992)	3,11,14,16
Stockholm Declaration on the Human Environment, UN Doc.A/CONF.48/14/ Rev.1 (1973)	3,16,19
The Need to Ensure a Healthy Environment for the Well-Being of Individuals, G.A. Res. 45/94, U.N. Doc. A/45/40 (1990)	12
UN Commission on Human Rights Res. 1990/41 (1990)	12

**STATEMENT OF JURISDICTION**

The Republic of Albacares and the Republic of Repelmuto submit the following dispute to the International Court of Justice. Pursuant to Article 40 of the Statute of the International Court of Justice, States may bring cases before the Court by special agreement [Statute of the International Court of Justice, art. 40, T.S. No. 993 (1945)]. On June 16, 2010, the parties signed a special agreement and submitted it to the Registrar of the Court. See Special Agreement Between the Republic of Albacares and the Republic of Repelmuto for Submission to the International Court of Justice of Differences Between Them Concerning Oil Pollution in the Marine Environment, June 16, 2010. The Registrar addressed notification to the parties on June 30, 2010.

**QUESTIONS PRESENTED**

- I. WHETHER REPELMUTO'S REGULATION OF THE OIL EXPLORATION IN ITS EEZ IS CONSISTENT WITH ITS DUTY TO PREVENT TRANSBOUNDARY HARM.**
- II. WHETHER THE USE OF CHEMEX IN RESPONSE TO THE OIL SPILL IS CONSISTENT WITH INTERNATIONAL LAW.**
- III. WHETHER REPELMUTO IS RESPONSIBLE FOR THE DAMAGES SUFFERED BY ALBACARES.**

**STATEMENT OF FACTS**

To become energy independent, Repelmuto allowed the increase of oil exploration and extraction activities within its Exclusive Economic Zone (EEZ) (R.4).

The offshore oil rig, *Blue Ocean*, in the EEZ owned by Fahy Oil, exploded and sank. Fahy Oil had ignored warnings indicating faulty safety systems in the days leading up to the explosion (R.16). The explosion caused the oil rig to separate from the subsea unit resulting in a spill. Repelmuto promptly notified Albacares of the explosion and subsequent spill, keeping it fully informed about its state, the oil's projected movement, and Repelmuto's efforts to stop it (R.16-18).

To prevent greater damage from oil reaching the coastal areas of both countries, Repelmuto authorized the use of ChemEx, a chemical dispersant, at the source of the leak. The oil flow was eventually halted (R.28). Albacares sent a diplomatic note expressing its dissatisfaction of Repelmuto's alleged indifference toward the economic and environmental impacts associated with the spill and its use of ChemEx and asking for compensation (R.33). Repelmuto asserted that it properly regulated the *Blue Ocean* and authorized the use of ChemEx with the best interest of both countries' people and the environment in mind consistent with its international obligations; thus, not responsible for compensation.

Failing to resolve the dispute, parties agreed to submit the matter to the ICJ (R.1).

**SUMMARY OF SUBMISSIONS**

1. Repelmuto's regulation of the oil exploration activities within its EEZ is in accordance with its duty to prevent transboundary harm. Due diligence is the standard of care required under this duty. Repelmuto exercised due diligence by enacting regulatory laws and inspecting the Blue Ocean. MARPOL does not apply to Repelmuto, and while it is not bound under UNCLOS, its acts are nonetheless consistent with its object and purpose.
  
2. Repelmuto's use of ChemEx is consistent with international law. It has the sovereign right to determine and use adequate and effective response to the spill, including the use of chemical dispersants. It complies with Repelmuto's obligation to preserve biodiversity and to observe the Precautionary Approach. Apart from these obligations, Repelmuto followed the Principle of Cooperation.
  
3. Repelmuto cannot be held responsible for the damages caused by the negligence of Fahy Oil because it did not acknowledge or adopt Fahy Oil's conduct as its own. Neither can it be held responsible for the use of ChemEx because no transboundary damage actually resulted, and assuming without conceding that it violated international law, it is excused under the Doctrine of Necessity. Finally, no obligation to compensate Albacares results from the declarations made by Repelmuto's officials.

## **SUBMISSIONS AND AUTHORITIES**

Harmful consequences to other States would not give rise to international liability unless they resulted from a failure on the part of the acting State to observe its international obligations.<sup>1</sup> Unfortunate as the spill may be, Repelmuto cannot be held responsible for the damages suffered by Albacares since it complied with its international obligations, particularly its duty to prevent transboundary harm. It properly regulated activities within its jurisdiction and undertook all measures necessary to control and minimize the effects of the spill consistent with international law.

### **I. REPELMUTO'S REGULATION OF THE OIL EXPLORATION ACTIVITIES IN ITS EEZ IS IN ACCORDANCE WITH ITS DUTY TO PREVENT TRANSBOUNDARY HARM.**

#### **A. REPELMUTO HAS THE DUTY TO PREVENT TRANSBOUNDARY HARM UNDER INTERNATIONAL LAW.**

The obligation to prevent transboundary harm is a well-established customary norm in international law expressed in declarations<sup>2</sup> and crystallized in conventions.<sup>3</sup> It imposes a basic obligation upon states not to act as to injure other states.<sup>4</sup> Repelmuto is bound by this obligation under treaty<sup>5</sup> and custom.<sup>6</sup>

---

<sup>1</sup> Xue, *Transboundary Damage in International Law* at 314.

<sup>2</sup> Stockholm Declaration on the Human Environment, UN Doc.A/CONF.48/14/ Rev.1 (1973) (Stockholm Declaration), Principle 21; Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I)(1992) (Rio Declaration), Principle 2.

<sup>3</sup> Convention on Biological Diversity (CBD), 31 ILM 818 (1992), art.3; Helsinki Rules on the Uses of Waters of International Rivers, 2 IPE 5741, Art.X(1)(a); United Nations Convention on the Law of the Sea (UNCLOS), 29 ILM 1261 (1982), art.194.

<sup>4</sup> Shaw, *International Law*, 6th edition, Cambridge (2008) at 851.

<sup>5</sup> CBD, *supra* note 3, art.3.

<sup>6</sup> Trail Smelter Arbitral Decision (US v. Can.) 3 R.I.A.A. 1905 (1938/1941); Gabcikovo-Nagymaros Project (Hung. v. Slov.) 1997 I.C.J. 7 (September 25); Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4; Lac Lanoux (Fr. v. Spain), 12 R.I.A.A. 281 (1957).

**B. THIS DUTY REQUIRES REPELMUTO TO OBSERVE DUE DILIGENCE .**

The test of due diligence is accepted generally as the most appropriate standard for the duty to prevent transboundary harm.<sup>7</sup> This custom-based rule of due diligence is imposed on all states to ensure that activities within their jurisdiction do not cause damage to the environment of other States, or of areas beyond the limits of their national jurisdiction.<sup>8</sup> The absence of a liability regime in the case of exploration and extraction of offshore mineral resources, and the fact that most states are reluctant to apply strict liability,<sup>9</sup> support the applicability of the standard of due diligence in this case.<sup>10</sup>

Under this standard, states in general are not automatically liable for damage caused irrespective of all other factors,<sup>11</sup> unlike in strict liability. Due diligence does not require an absolute guarantee against the occurrence of harm;<sup>12</sup> rather it involves reasonable efforts by a State to take appropriate measures in a timely fashion.<sup>13</sup> Its test imports an element of flexibility into the equation and must be tested in light of the circumstances of each case.<sup>14</sup> Nonetheless, its conduct should fall within international minimum standards.<sup>15</sup>

---

<sup>7</sup> Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001, Report of the ILC on its 53<sup>rd</sup> Session, A/56/10, p. 392. *See also* e.g. Handl, 'State Liability' at 539–40; Birnie and Boyle, *International Law and the Environment*, at 112

<sup>8</sup> Bergkamp, *Liability and Environment*, Kluwer Law, (2001) at 165; Shaw, *supra* note 4 at 855.

<sup>9</sup> Bergkamp, *id.* at 163; Stephens, *International Courts and Environmental Protection*, Cambridge, 2009 at 158; *See also* Hunter et al., *International Environmental Law and Policy*, 3rd ed. (2007) at 483.

<sup>10</sup> Morrison & Wolfrun, *International, Regional and National Environmental Law* (2000) at 179; Shaw, *supra* note 4 at 764.

<sup>11</sup> Shaw, *supra* note 4 at 855.

<sup>12</sup> Stephens, *supra* note 9 at 158; Bergkamp, *supra* note 8 at 166.

<sup>13</sup> Report of the ILC, 53<sup>rd</sup> Session, 159, UN Doc. A/56/10 *cited in* Stephens, *supra* note 9 at 158. The report is a commentary on the Draft Articles of Prevention, considered a codification of customary international law.

<sup>14</sup> Shaw, *supra* note 4 at 855.

<sup>15</sup> Smith, *State Responsibility and the Marine Environment: The Rules of Decision*, Claredon (1988) at 40.

C. REPELMUTO OBSERVED DUE DILIGENCE.

Due diligence requires a State to enact laws and procedures as a good government<sup>16</sup> may be expected to enact to prevent substantial pollution.<sup>17</sup> Repelmuto enacted laws necessary to regulate and ensure the safety of the oil extraction activities (R.12).

1. *It mandated the use of Best Available and Safest Technology (BAST).*

BAST is one of the international standards in measuring due diligence for offshore installation operations.<sup>18</sup> This regime requires mechanisms that will assure the safety and protection of personnel, equipment, natural resources and the environment.<sup>19</sup> Under US experience, this regulatory framework has served the industry and the public well.<sup>20</sup> Compliance with BAST regime shows Repelmuto's due diligence.

a. It required the use of hard-wired controller and "Dead Man" switch.

A secondary intervention system is a required component of blowout prevention (BOP) systems under BAST.<sup>21</sup> One such back-up system is the "Dead Man" switch, which is a fully automatic control system that operates a specified BOP in the event of a "catastrophic failure that includes total loss of signal communication and hydraulic supply

---

<sup>16</sup> Dupuy, *International Liability for Transfrontier Pollution*, cited in Bothe, *Trends in Environmental Policy and Law*, Gland (1980) at 363.

<sup>17</sup> Bergkamp, *supra* note 8 at 165. Sands, *Principles of International Environmental Law*, Cambridge; 2<sup>nd</sup> edition (2003) at 882, citing OECD, Report by the Environment Committee, *Responsibility and Liability of States in Relation to Transfrontier Pollution* (1984) at 4.

<sup>18</sup> Cook, *Technology is not the Answer available at* <http://www.1petro.org/mslib/servlet/1petropreview?id=00037895&soc=SPE>; Hill, *Statistical Risk Analysis for Determining Best Available and Safest Technology (BAST) available at* <http://www.doemre.gov/tarprojects/0309.htm>; WEST Engineering Services, *Evaluation of Secondary Intervention Methods in Well Control*, available at <[www.boemre.gov/tarprojects/431/FinalReport431.pdf](http://www.boemre.gov/tarprojects/431/FinalReport431.pdf)>.

<sup>19</sup> WEST, *supra* note 18 at 17.

<sup>20</sup> Cook, *supra* note 18 at 99.

<sup>21</sup> WEST, *supra* note 18 at 20.

from the surface".<sup>22</sup> It is a stand-alone system which works well within adverse environmental conditions.<sup>23</sup>

Consistent with BAST standard, Repelmuto required the use of the Dead Man switch as a back-up system in case the primary BOP system, the hard-wired controller, should fail (R.13).

- b. The use of an acoustic trigger is not customary under international law.

The purpose of BAST is to encourage the use of best practices throughout the industry,<sup>24</sup> and does not require that regulations incorporate the very latest technology at all times.<sup>25</sup> The mere fact, therefore, that an acoustic trigger is one of the latest BOP developed is irrelevant, especially since it is not one of the best practices in the oil industry.

An acoustic trigger uses "encoded acoustic signals transmitted through the water."<sup>26</sup> Countries like the US and the United Kingdom, as well as many regulatory agencies,<sup>27</sup> do not require its use. There are significant doubts in regard to its ability "to provide a reliable emergency back-up control system during an actual well-flowing incident,"<sup>28</sup> since environmental factors may prevent reliable actuation of stack functions with acoustics.<sup>29</sup> Its capability to transmit acoustic signals has not been tested under the noise level during a

---

<sup>22</sup> *Id.* at 13.

<sup>23</sup> *Id.* at 74.

<sup>24</sup> Hill, *supra* note 18 at 5-13.

<sup>25</sup> *Id.* at 5-10.

<sup>26</sup> Gold et al, *Leaking Oil Well Lacked Safeguard Device*, Wall Street J., April 28, 2010, available at <http://online.wsj.com/article/SB10001424052748704423504575212031417936798.html>.

<sup>27</sup> These include the MMS, American Petroleum Institute (API) and the International Association of Drilling Contractors (IADC).

<sup>28</sup> *supra* note 26

<sup>29</sup> WEST, *supra* note 18 at 60.

blow out or where there is a significant flow of oil.<sup>30</sup> Presence of mud plumes may also affect the transmission of signal. In fact, there has been no reported incident where an acoustic system has been used to operate a BOP.<sup>31</sup>

There is no consistent and general state practice on requiring the use of an acoustic trigger in oil exploration. There is neither *opinio juris* to conclude that requiring its use has become customary. Hence, Repelmuto did not violate any international obligation, and neither was it negligent in not requiring the use of an acoustic trigger, especially when its efficiency during a blow out remains untested.

**2. *It conducted adequate and sufficient inspections.***

The Mineral Extraction Agency (MEA) conducted inspections of Fahy Oil's operation to ascertain and ensure its compliance with environmental standards (R.12). Repelmuto cannot be expected to conduct rigorous inspections of the day-to-day activities and systems of the Blue Ocean, since this would constitute undue interference of the normal operations of Fahy Oil.

MEA's inspections of Fahy Oil to ensure that the requirements of BAST are complied with satisfies the due diligence requirement. It is within Repelmuto's discretion to decide on matters regarding the conduct of inspection to achieve its primary purpose of complying with environmental standards.

---

<sup>30</sup> *Id.* at 59.

<sup>31</sup> *Id.*

**D. REPELMUTO CANNOT BE LIABLE UNDER MARPOL AND UNCLOS.**

**1. The MARPOL Convention does not apply to Blue Ocean.**

Although MARPOL has a broad definition of “ships”, it does not cover operational pollution from offshore installations *stricto sensu*.<sup>32</sup> MARPOL expressly excludes the release of certain harmful substances directly arising from the exploration, exploitation and associated offshore processing of seabed mineral resources.<sup>33</sup>

- a. MARPOL, as clarified by the Unified Interpretations, regulates only space machinery drainage.

The Unified Interpretations<sup>34</sup> clarified that only the discharge of machinery space drainage and contaminated ballast may be the subject of MARPOL.<sup>35</sup> Machinery space drainage includes drainages produced by generators, fuel tanks and pumps.<sup>36</sup> Other types of drainages, including offshore processing drainage, are expressly excluded.<sup>37</sup> There are presently no global rules and standards applicable to these effluents, and are the subject of regional conventional regimes and national regulations.<sup>38</sup>

Here, the discharge did not originate from any generator, fuel tank or pumps, but rather from the broken wellhead (R.17). This cannot be categorized as machinery space drainage; hence, not covered by MARPOL.

---

<sup>32</sup> Gao, *Environmental Regulation of Oil and Gas*, Kluwer Law (1998) at 103.

<sup>33</sup> Protocol Relating to the Convention for the Prevention of Pollution from Ships (MARPOL), ILM 246 (1978), art.(2)(3)(b)(ii).

<sup>34</sup> Unified Interpretations to the Revised MARPOL, Annex I.

<sup>35</sup> *Id.* to Regulation 39, art.2(3)(b)(ii).

<sup>36</sup> *Id.* Annex 5.

<sup>37</sup> *Id.* to Regulation 39, art.2(3)(b)(ii).

<sup>38</sup> Gao, *supra* note 32 at 106.

- b. Even if MARPOL applies, Repelmuto has complied with its obligations.

Fixed and floating rigs, when engaged in the exploration and exploitation of seabed mineral resources, must comply with the requirements of Annex I applicable to ships of 400 tonnes and above.<sup>39</sup> Therefore, they are prohibited from any discharge of oil into the sea.<sup>40</sup> MARPOL, however, provides for exceptions, which include instances when there is damage to a ship or its equipment, provided all reasonable measures have been taken to prevent or minimize the damage.<sup>41</sup>

Since *Blue Ocean* is an oil rig, it is subject to the same exception. The oil leak was due to immense damage resulting from the explosion. Repelmuto, however, has complied with its obligation to prevent or minimize the damage. It legislated reasonable and appropriate regulations for the operations of the oil industry within its jurisdiction (R.13). Also, it minimized damage when it utilized different techniques (R.22) to stop the flow of oil.

2. *Repelmuto is not bound by the UNCLOS but has nevertheless acted consistent with its object and purpose.*

- a. The UNCLOS is not binding upon Repelmuto.

Repelmuto is not a Party to the UNCLOS and is, therefore, not bound by it.<sup>42</sup> As a mere signatory (R.8), its only obligation is to refrain from actions that would defeat the object and purpose of the UNCLOS.<sup>43</sup> The meaning of "object and purpose" must be

---

<sup>39</sup> MARPOL, *supra* note 33, Annex I, Regulation 21.

<sup>40</sup> *Id.* Regulation 9.

<sup>41</sup> *Id.* Regulation 11.

<sup>42</sup> See Vienna Convention on the Law of Treaties (VCLT), 1155 UNTS 331 (1969), art.14,34; See also UNCLOS, *supra* note 3, art.306, which provides that the Convention is subject to ratification by signatory States;

<sup>43</sup> VCLT, *id.* art.18(a). Cf. art.12 in relation to art.11, VCLT.

determined on a case by case basis with due consideration for the circumstances involved.<sup>44</sup>

Here, Repelmuto's conduct was in conformity with the object and purpose of the UNCLOS, which recognizes the significance of establishing a legal order for and the peaceful use of the seas, the conservation of its resources and the preservation of the marine environment.<sup>45</sup>

That particular provisions of the UNCLOS, including the right of a State to claim an EEZ<sup>46</sup>, forms part of customary international law does not mean that the Convention as a whole has reached the status of custom<sup>47</sup> and therefore binding on Repelmuto as such.

- b. Even if UNCLOS is binding as customary law, Repelmuto's regulation is still consistent with it.

Assuming the UNCLOS is binding on Repelmuto as custom, the actions it adopted in ensuring the prevention of marine pollution was consistent with said Convention. By mandating licenses, imposing technology requirements and conducting inspections through the MEA (R.12-14), Repelmuto undertook "all measures necessary to ensure that activities under their jurisdiction are so conducted as not to cause damage by pollution to other States and their environment."<sup>48</sup> The determination of means sufficient to carry out

---

<sup>44</sup> Klabbbers, *Some Problems Regarding the Object and Purpose of Treaties*, VIII FYBRIL (1997) at 140; see also Bradley, *Unratified Treaties, Domestic Politics and the US Constitution*, Harv. Int'l L. J., (2007) at 307; and Jonas & Saunders. *The Object and Purpose of a Treaty: Three Interpretive Methods*, Vanderbilt J. of Transnat'l L. 3 May 2010 at 565.

<sup>45</sup> UNCLOS, *supra* note 3, preamble.

<sup>46</sup> See *Libya/Malta Continental Shelf Case*, 81 ILR 238, 81 ILR 726 (1984); and *Tunisia/Libya Continental Shelf case (Merits)* 67 ILR 4 (1982).

<sup>47</sup> Harris, *Cases and Materials on International Law*, Thomson Reuters (2010) at 324.

<sup>48</sup> UNCLOS, *supra* note3, art.194

this policy lies within the discretion Repelmuto, consistent with its sovereign right to explore, exploit, conserve and manage natural resources within its EEZ.<sup>49</sup>

## **II. THE AUTHORIZATION OF THE USE OF CHEMEX TO CONTROL THE SPILL IS CONSISTENT WITH INTERNATIONAL LAW.**

Repelmuto allowed the use of ChemEx to prevent greater damage to the environment and injury to human rights considering the adverse effects of untreated oil.<sup>50</sup>

### **A. REPELMUTO HAS THE SOVEREIGN RIGHT TO DETERMINE AND USE ADEQUATE AND EFFECTIVE RESPONSE TO THE SPILL.**

States have the sovereign right to exploit their natural resources pursuant to their environmental and developmental policies<sup>51</sup> within limits established by international law, free from external interference.<sup>52</sup> Corollary to this, the principle allows states to conduct or authorize such activities as they choose within their territories,<sup>53</sup> provided it does not violate legitimate rights.<sup>54</sup>

The general rule, therefore, is that international law permits freedom of action for states, unless there is a rule constraining such. There is no such binding rule against the use of chemical dispersants. Neither can its application here be said to have resulted in any transboundary damage. On the contrary, it is pursuant to its duty to prevent transboundary harm.

---

<sup>49</sup> *Id.* art.56, 60(1)

<sup>50</sup> Boyd, et al., *Effects of Oil and Chemically Dispersed Oil in the Environment* at 16, available at <<http://www.discountpdh.com/course/oilandchemically/Effects%20of%20Oil%20and%20chemically%20disperd%20Oil.pdf>>

<sup>51</sup> Rio Declaration, *supra* note 2, Principle 2.

<sup>52</sup> Sands *supra* note 17 at 237; See also Brownlie, *Principle of Public International Law*, (5<sup>th</sup> ed. 1998)

<sup>53</sup> *Id.* at 236.

<sup>54</sup> Shaw *supra* note 4, at 211.

1. *The use of chemical dispersants is pursuant to environmental protection and human rights.*

Repelmuto recognizes the inextricable link between quality human environment and the enjoyment of basic human rights.<sup>55</sup> Among these rights is the right to a healthy environment<sup>56</sup> embodied in the constitutions of about 100 states<sup>57</sup>, recognized by international bodies such as the UN General Assembly<sup>58</sup> and the UN Committee on Human Rights<sup>59</sup>, and found in many international instruments<sup>60</sup> and regional human rights treaties.<sup>61</sup>

In determining the most adequate and effective response to the spill, Repelmuto considered the significant harm to the environment and injury to the human rights posed by the spill against the cost of inaction.

2. *Chemical dispersants have been proven to be an effective spill response.*

The use of chemical dispersants has been proven to be an effective response to oil spills especially in open sea<sup>62</sup>, and in many cases<sup>63</sup>, their use was found to be justifiable due to their potential for reduced damage to shoreline habitats and bird populations.<sup>64</sup>

---

<sup>55</sup> Draft Declaration of Principles on Human Rights and the Environment, UN Doc. E/CN.4/Sub.2/1994/9 (1994).

<sup>56</sup> Protocol to the American Convention in the Area of Economic, Social and Cultural Rights, art.11; See Earth Justice Legal Defense Fund, *'Human Rights and the Environment'* (Issue Paper) (December 2001).

<sup>57</sup> Shelton, *Human Rights, Health and Environmental Protection: Linkages in Law & Practice: A Background Paper for the World Health Organization*. Health and Human Rights Working Paper Series No. 1 (2002) at 22.

<sup>58</sup> The Need to Ensure a Healthy Environment for the Well-Being of Individuals, G.A. Res. 45/94, U.N. Doc. A/45/40 (1990).

<sup>59</sup> See e.g. Res. 1990/41 (1990).

<sup>60</sup> Declaration of the Hague on the Environment, 28 ILM 1989 (1989).

<sup>61</sup> African Charter on Human and People's Rights, 21 I.L.M. 58 (1982), art.24.

<sup>62</sup> Committee on Effectiveness of Oil Spill Dispersants, *Using Oil Dispersants on the Sea*, National Academy Press (1989)

<sup>63</sup> *Id.*

Recently developed dispersants are much less toxic such that dispersing oil before it reaches inshore habitats could be a net environmental benefit in the long term.<sup>65</sup> Greater harm to the environment and to the peoples of Albacares and Repelmuto would have been wrought had Repelmuto failed to act.

**B. ITS USE OF CHEMEX IS CONSISTENT WITH THE DUTY TO PRESERVE BIODIVERSITY UNDER THE CBD.**

Under the CBD, Repelmuto has the obligation, “as far as possible and as appropriate”<sup>66</sup> to preserve biodiversity.<sup>67</sup> The term “as far as possible” and “as appropriate” universally suggest discretion of the State concerned.<sup>68</sup> In view of the tradeoffs that had to be made, the timely utilization of ChemEx, together with other mechanical clean-up, has been deemed the most appropriate measure to preserve and minimize the damage to biodiversity under the circumstances since the effects of dispersed oil are short-lived compared to untreated oil.<sup>69</sup>

---

<sup>64</sup> Belore, *The History of Chemical Dispersants in the United States*, available at [http://www.pcs.gr.jp/doc/esymposium/2004/2004\\_Randy\\_E.pdf](http://www.pcs.gr.jp/doc/esymposium/2004/2004_Randy_E.pdf), at 3.

<sup>65</sup> French & Schutenberg, *Evaluation of Net Environmental Benefit Using Fates and Effects Modeling*, International Oil Spill Conference Proceeding (1999) at 2.

<sup>66</sup> CBD, *supra* note 3, arts.5,6,7,8,9,10,11,14.

<sup>67</sup> *Id.* art.6.

<sup>68</sup> Hathaway & Cusick, *Refugee Rights are not Negotiable*, 14 GEO. IMMIGR. L.J. 481, 510 (2000).

<sup>69</sup> Office of Response and Restoration, *Emergency Response: Responding to Oil Spills*, National Oceanic and Atmospheric Administration (2007).

C. IT IS ALSO CONSISTENT WITH THE PRECAUTIONARY APPROACH (PA).

1. *The PA is binding upon Repelmuto.*

International instruments<sup>70</sup> of environmental protection have long compelled State parties to proceed on the basis of a PA<sup>71</sup> in recognition of the State's duty to protect the environment from harm or prospective harm despite the lack of scientific certainty.<sup>72</sup> Repelmuto is bound to observe precaution both under CBD<sup>73</sup> and international custom. Its authorization of the use of ChemEx, despite the fact that its long-term effects to aquatic life are still unknown, is guided by PA.

2. *The PA is a customary norm.*

The PA is not only found in the Rio Declaration but also in other international instruments<sup>74</sup> which show consistent and general state practice coupled with *opinio juris*.<sup>75</sup> It states that when there is a threat 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.<sup>76</sup> This requires that "action should be taken to control or abate possible environmental damage even though there may still be scientific uncertainty as to

---

<sup>70</sup> UNCLOS, *supra* note 3; Rio Declaration, *supra* note 2, Principle 15; Framework Convention on Climate Change, 31 ILM 849 (1992), art.3.3; Cartagena Protocol on Biosafety, 39 ILM 1027 (2000), Preamble; *see* Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, Utrecht University, Kluwer Law International (2002) at 64.

<sup>71</sup> McIntyre & Mosedale, *The Precautionary Principle as a Norm of Customary International Law*, available at [http://jel.oxfordjournals.org/cgi/pdf\\_extract/9/2/221](http://jel.oxfordjournals.org/cgi/pdf_extract/9/2/221).

<sup>72</sup> Wilkinson, *Environment and Law* (2002).

<sup>73</sup> *See* CBD, *supra* note 3, preamble;

<sup>74</sup> 1985 Vienna Convention, *supra* note 26, preamble, art.2.2. *Refer also* WTO Agreement on the Application of Sanitary and Phytosanitary Measures, 33 ILM 28 (1994), art.5 par.7.

<sup>75</sup> *See* Gundling, *The Status in International Law of the Principle of Precautionary Action*, 5 Int'l J. of Estuarine and Coastal L. 23,26 (1990).

<sup>76</sup> Rio Declaration, *supra* note 2, Principle 15.

the effects of the activities"; it is a "tool for decision-making in a situation of scientific uncertainty."<sup>77</sup>

3. *The use of ChemEx is consistent with the PA.*

PA arises if there is actual and serious harm to the environment which is likely to occur.<sup>78</sup> The oil pollution is one such actual harm. In the absence of evidence showing a real risk of harm, precaution could not warrant a restraint on the use of ChemEx as a cost-effective measure to prevent environmental degradation. Uncertainty does not justify inaction.<sup>79</sup>

As no response is likely to satisfy all parties and protect all resources, Repelmuto had to make a tradeoff.<sup>80</sup> Any oil spill response aims to minimize the damage that could be caused by the spill,<sup>81</sup> and while clean-up responses may cause damage it may be justifiable because of overriding benefits<sup>82</sup> such as the protection of coastal amenities, sea birds and marine life.<sup>83</sup>

The use of ChemEx is premised on considerations of "prudence and caution" with the best interest of both countries in mind. Dispersants improve the surface and shoreline,<sup>84</sup> especially of sensitive and economically-important areas like tourism beaches,<sup>85</sup> upon which Albacares's economy heavily depends (R.2).

---

<sup>77</sup> Freestone, *The Road from Rio: International Environmental Law After the Earth Summit*, 6 *JEL* (1994) at 211.

<sup>78</sup> European Commission, *Communication on the Precautionary Principle*, COM (2001) at 4.

<sup>79</sup> Bodansky et al., *The Oxford Handbook of International Environmental Law*, Oxford Press, (2007).

<sup>80</sup> *supra* note 69.

<sup>81</sup> Fiocco & Lewis, *Oil Spill Dispersants*, *Pure Appl. Chem.* 71(1) (1999).

<sup>82</sup> *supra* note 69.

<sup>83</sup> See website of International Tanker Owners Pollution Federation Limited <<http://www.itopf.com/spill-response/clean-up-and-response/dispersants/>> (last accessed November 3, 2010).

<sup>84</sup> *supra* note 69.

<sup>85</sup> Richard P.J. Swanell, Fabian Daniel, *Effect of dispersants on Oil Biodegradation under Simulated Marine Conditions*, National Environmental Technology Centre citing Varadaj, R., M., L. Robbins, J. Bock, S. Pace and D.

**D. APART FROM THE DUTY TO PREVENT TRANSBOUNDARY HARM AND PRESERVE BIODIVERSITY, REPELMUTO ALSO ACTED IN ACCORDANCE WITH THE PRINCIPLE OF COOPERATION.**

The Principle of Cooperation is contained in many treaties<sup>86</sup> and international instruments<sup>87</sup>, and supported by state practice<sup>88</sup>, particularly in relation to hazardous activities and emergencies<sup>89</sup>, sustaining the view that it is customary international law<sup>90</sup>. The principle states that “international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big or small, on an equal footing.”<sup>91</sup> It involves immediate notification to other states of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those states,<sup>92</sup> and to provide them with all relevant and useful information thereto,<sup>93</sup> although the duty to notify does not include that of obtaining prior consent of the state notified.<sup>94</sup>

---

MacDonald, *Dispersion and Biodegradation of Oil Spills on Water*. 1995 Oil Spill Conference, API, USA, pp. 101-106.

<http://www.iosc.org/papers/00596.pdf>; <http://www.altimateenvirocare.com/files/downloads/miyabi/MiyabiSpillControlBro03.pdf>; Manual on the Applicability of Oil Spill Dispersants. European Maritime Safety Agency 2010. [www.emsa.europa.eu](http://www.emsa.europa.eu).

<sup>86</sup> CBD, *supra* note 3, art.5; United Nations Convention on the Law of the Sea (UNCLOS), 29 ILM 1261 (1982), art.123; Vienna Convention for the Protection of the Ozone Layer, 26 ILM 1529 (1985 Vienna Convention), art.2.2; International Convention on Oil Pollution Preparedness, Response and Cooperation (OPPR), 30 ILM 733 (1990), art.4,7.

<sup>87</sup> United Nations Charter, 892 UNTS 119 (1945), art.74; Stockholm Declaration, *supra* note 2, Principle 24; Rio Declaration, *supra* note 2, Principle 7 and 27.

<sup>88</sup> See Rio Declaration, *supra* note 2; Draft Articles (DAPTH), art.17.

<sup>89</sup> Sands, *supra* note 17, at 249.

<sup>90</sup> *Id.* at 842.

<sup>91</sup> Rio Declaration, *supra* note 2, Principle 24.

<sup>92</sup> *Id.* Principle 18; OPPR, *supra* note 86, art.4; Convention on the Transboundary Effects of Industrial Accidents (CTEIA), 31 ILM 1330 (1992), art.10.

<sup>93</sup> DAPTH, *supra* note 88, art. 17; OPPR, *supra* note 86, art.7,12.

<sup>94</sup> Lac Lanoux, *supra* note 6.

Repelmuto acted consistent with this principle when it immediately informed Albacares after the incident, and effectively kept the latter fully informed about the state of the spill and its response including the use of ChemEx (R.18). On the contrary, Albacares did not do anything.

### **III. REPELMUTO IS NOT RESPONSIBLE FOR THE DAMAGES SUFFERED BY ALBACARES.**

#### **A. REPELMUTO IS NOT RESPONSIBLE FOR THE OIL SPILL.**

##### **1. *The injury suffered by Albacares was due to Fahy Oil.***

An investigation initiated by Repelmuto revealed that in the days leading up to the explosion, Fahy Oil had ignored warnings of faulty safety systems (R.16). Had Fahy Oil undertaken the precautionary measures required by the circumstances, the damage caused to both countries could have been averted. Unlike Fahy Oil, Repelmuto had no knowledge of the faulty system that could have caused the explosion. It was neither informed nor was its assistance sought by Fahy Oil to deter the explosion.

##### **2. *Fahy Oil's negligence is not attributable to Repelmuto.***

Internationally wrongful acts of States arise when there is an act or omission attributable to said State, which constitutes a breach of an international obligation.<sup>95</sup> Hence, conduct of private individuals or entities, not acting on behalf of the State, is not

---

<sup>95</sup> Articles of State Responsibility (ASR), G.A. Res. 56/83, Annex UN Doc. A/RES/58/83/Annex (January 28, 2002), art.2.

considered as an act of the State under international law.<sup>96</sup> Such conduct may be attributed to the State if and only to the extent that it has acknowledged and adopted said conduct as its own<sup>97</sup>, clearly and unequivocally.<sup>98</sup>

The negligence committed by Fahy Oil through its employees cannot be attributed to Repelmuto because it did not acknowledge nor adopt the conduct of Fahy Oil. It has consistently condemned the actions of Fahy Oil and declared it as the party responsible for the incident (R.24,32). Therefore, no action for damages will lie against Repelmuto.

**3. *Under customary law, strict liability operates against Fahy Oil.***

The prevalence of Conventions<sup>99</sup> addressing oil pollution is evidence of customary international law that the cost of damage as a result of the oil pollution is to be incurred by the private entities, or common funds to which they make contributions, which operate the installation or structure that caused the discharge of oil. Therefore, no liability accrues to the State. Moreover, as the maximum limit of civil liability is provided for in the conventions, it is apparent that not all damages will be compensated.

**B. NEITHER CAN REPELMUTO BE HELD RESPONSIBLE FOR THE USE OF CHEMEX.**

**1. *There is no clear and convincing evidence that the use of ChemEx resulted in transboundary damage.***

---

<sup>96</sup> *Id.* art.11, in relation to arts.5-10; Harris, *supra* note 63 at 431.

<sup>97</sup> ASR, *supra* note 95.

<sup>98</sup> Crawford, *The International Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) at 123.

<sup>99</sup> International Convention on Civil Liability for Oil Pollution Damage, 973 UNTS 3 (1969); Convention for Civil Liability for Oil Pollution Damage Resulting from Exploration for and Exploitation of Seabed Mineral Resources, 16 ILM 1450 (1977); Offshore Pollution Liability Agreement (OPOL), 13 ILM 1409 (1974).

In order to hold Repelmuto liable to Albacares for the use of ChemEx, there must be clear and convincing evidence<sup>100</sup> that 1) Albacares suffered serious injury, and 2) that it is caused by the use of ChemEx. Admittedly, Albacares suffered injury as a result of the spill. However, there is nothing to show that the release of ChemEx caused the injury suffered by it (R.27).

**2. *Even if there was harm, it was not transboundary.***

A boundary lies at the heart of every transboundary harm.<sup>101</sup> The term transboundary stresses the element of boundary-crossing in terms of the direct or immediate consequences of the act for which the source State is held responsible.<sup>102</sup> Therefore, harm must have been caused in a State other than the State of origin.<sup>103</sup>

When Repelmuto used ChemEx to prevent greater damage, only the organisms below the surface in areas where the dispersant was used were affected, which were all within its EEZ (R.27). Albacares did not prove that these organisms were part of its natural resources, thereby causing it harm. That organisms are common between both countries is not in itself proof of their transboundary nature; they may simply occur in both areas. Since both the harm and the activity which caused the harm were limited to Repelmuto, such cannot be characterized as transboundary.

---

<sup>100</sup> Trail Smelter, *supra* note 6.

<sup>101</sup> Bratspies & Miller, *Transboundary Harm in International Law, Lessons from the Trail Smelter Arbitration*, Cambridge, (2006) at 4.

<sup>102</sup> Xue, *supra* note 1 at 9.

<sup>103</sup> Consideration of Prevention of Transboundary Harm from Hazardous Activities and Allocation of Loss in the Case of Such Harm, art.2(c), G.A. Res. 62/68 U.N. Doc.A/RES/62/452 62nd sess. Agenda item 84 (2008); Stockholm Declaration, *supra* note 2, Principle 21.

3. *Supposing there was harm, it was insignificant.*

States are enjoined only from causing transboundary harm that is serious, significant, substantial, or similarly qualified<sup>104</sup>, and not merely *de minimis*.<sup>105</sup> To be legally relevant, damage should be at least "greater than the mere nuisance or insignificant harm which is normally tolerated."<sup>106</sup> It must have a real detrimental effect on matters such as human health, industry, property, environment or agriculture in other States.<sup>107</sup>

The dispersed oil could not have significant adverse effects on Albacares considering that dispersants are generally less harmful than the highly toxic oil leaking from the source and biodegrade in a much shorter time span.<sup>108</sup> Similarly, the potential harm posed on Albacares's coral reefs is minimal considering that their health have already declined in recent years (R.2).

4. *Assuming without conceding that the use of ChemEx violated international law, it is excused under the Doctrine of Necessity.*

Transboundary damage does not necessarily give rise to international liability in all cases.<sup>109</sup> Necessity precludes the wrongfulness of acts of States under certain

---

<sup>104</sup> See Handl, *National Uses of Transboundary Air Resources: The International Entitlement Issue Reconsidered*, 26 *Natural Resources Journal* 405, 412–27 (1986) at 412.

<sup>105</sup> See Commentary on the Draft Articles on Prevention, art.2.

<sup>106</sup> See Barboza, "Sixth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law," March 15, 1990, UN Doc. A/CN.4/428 (Article 2(b) and (e)), reproduced in *Yearbook of the ILC* (1990), vol. II (Part One), p. 83, at 88-89,105.

<sup>107</sup> Report of the ILC, *supra* note 7.

<sup>108</sup> Maritime Safety Authority of New Zealand, *Oil Spill Dispersants Guidelines For Use In New Zealand* (2000).

<sup>109</sup> Schachter, *The Emergence of International Environmental Law*, *Journal of International Law Affairs*, vol. 44 (1991) at 457; Henkin et al., *International Law: Cases and Materials*, 3rd edn., St. Paul, West Publishing Co. (1993) at 1377. See also Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention), UKTS No. 56 (1979)

circumstances<sup>110</sup>, which are present in this case. *First*, given the greater harm to the environment and its people posed by the spill, Repelmuto had no choice but to authorize the use of ChemEx. No other response could have safeguarded the essential interest of preventing the oil pollution and the consequent damage to the environment and injury to human rights. *Second*, given the short-term effects of dispersed oil and the present condition of Albacares's coral reefs, there can be no serious impairment of the latter's interest. Repelmuto did not contribute to the situation of necessity.

The timely utilization of ChemEx is essential in optimizing its effectivity inasmuch as oil viscosity, which is responsible for increasing its resistance to dispersants, also increases with time.<sup>111</sup> A trade-off had to be made and it rightfully tipped in favour of using ChemEx.

**C. FINALLY, NO OBLIGATION TO COMPENSATE ALBACARES RESULTED FROM DECLARATIONS MADE BY REPELMUTO'S OFFICIALS.**

**1. *The declarations do not amount to a unilateral act to compensate Albacares.***

Repelmuto did not admit to any responsibility for the damage suffered by Albacares. Instead, it has consistently pointed to Fahy Oil as the responsible party (R.16,23,32,34). The totality of these declarations<sup>112</sup>, considered in light of the circumstances, does not amount to a unilateral act of undertaking to compensate Albacares for its losses, but to make Fahy Oil pay in accordance with the laws of Repelmuto.

---

<sup>110</sup> ASR, *supra* note 95, art.25(1).

<sup>111</sup> <http://www.itopf.com/spill-response/clean-up-and-response/dispersants/>

<sup>112</sup> See Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, Yearbook of the International Law Commission, 2006, vol. II, Part Two (2006) (GPUD). Commentary to guiding principle 5 explains that in the *Nuclear Tests Case*, the Court considered the totality of declarations of French authorities as constituting a whole.

A unilateral act, in order to be binding on its author, must express his true intention.<sup>113</sup> The declarations made were not coupled by an intention on the part of the State to assume the liability of Fahy Oil (R.24,32); they were meant merely to assure Albacares that Repelmuto would do everything in its power to minimize the negative impact of the incident to Albacares (R.24).

**2. *The undertaking to make Fahy Oil pay is not absolute.***

To result in an obligation, a unilateral declaration must be made in clear and express terms; in case of doubt as to its scope, such obligation must be interpreted restrictively.<sup>114</sup> Unlike the "Ihlen Declaration"<sup>115</sup> where the declaration was absolute, Repelmuto's undertaking to make Fahy Oil pay is qualified to be made "in accordance with the laws of Repelmuto"(R.32). In fact, Repelmuto made Fahy Oil pay (R.35). Unfortunately, its limited resources were not sufficient to cover all losses, including those suffered by Albacares (R.35). It cannot be faulted for approving the bankruptcy plan of Fahy Oil because 1) the liquidation of the company made it possible to accumulate funds to answer for the damages sustained (R.35), and 2) its obligation to make Fahy Oil pay does not extend to force companies to provide resources it no longer has.

---

<sup>113</sup> Skubizewski, "Unilateral Acts of States", cited in Bedjaoui, *International Law: Achievements and Prospects*. Paris (1991) at 230,233; *See also* Nuclear Tests case (New Zealand v. France) 57 ILR 605, par. 46.

<sup>114</sup> GPUD, *supra* note 69, Principle 7; Nuclear Tests Case, *id.* par. 47, as reiterated in the Pedra Branca Case (Malaysia v. Singapore), Judgment, ICJ Reports 2008, p. 12.

<sup>115</sup> Legal Status of Eastern Greenland (Denmark v. Norway), PCIJ, Ser. A./B., No.53, 1933. Norwegian Foreign Minister Ihlen's statement respecting the issue of Denmark's sovereignty over Greenland that "the Norwegian Government would not make any difficulty in the settlement of this question," was held to be "unconditional and definitive," thereby debarring Norway from contesting Danish sovereignty over Greenland.

**CONCLUSION AND PRAYER**

WHEREFORE, considering the foregoing submissions, Repelmuto most respectfully requests the Honorable International Court of Justice to adjudge and declare that:

1. Repelmuto's regulation of the oil exploration activities within its EEZ is in accordance with its duty to prevent transboundary harm;
2. Repelmuto's authorization to use ChemEx is consistent with international law; and
3. Repelmuto is not responsible for the damages suffered by Albacares.

RESPECTFULLY SUBMITTED.

X\_\_\_\_\_

Agents for Repelmuto

