
**THE CASE CONCERNING OIL POLLUTION IN THE MARINE
ENVIRONMENT**



**IN THE
INTERNATIONAL COURT OF JUSTICE
LA COUR INTERNATIONALE DE JUSTICE**
The Peace Palace, The Hague
Netherlands

The Federal States of Albacares

Applicant

v.

The Republic of Repelmuto

Respondent

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE APPLICANT

TABLE OF CONTENTS

| | | | | | | | | | | |
|---------------------------|---|---|---|---|---|---|---|---|---|-------|
| LIST OF ABBREVIATIONS | - | - | - | - | - | - | - | - | - | i |
| INDEX OF AUTHORITIES | - | - | - | - | - | - | - | - | - | v |
| STATEMENT OF JURISDICTION | - | - | - | - | - | - | - | - | - | -xii |
| STATEMENT OF FACTS | - | - | - | - | - | - | - | - | - | -xiii |
| QUESTIONS PRESENTED | - | - | - | - | - | - | - | - | - | - xv |
| SUMMARY OF PLEADINGS | - | - | - | - | - | - | - | - | - | -xvi |
| PLEADINGS | - | - | - | - | - | - | - | - | - | - 1 |

I. THE ACTIONS OF THE REPUBLIC OF REPELMUTO ARE IN CLEAR VIOLATION OF INTERNATIONAL LAW THEREBY ENTAILING PRIMARY RESPONSIBILITY **1**

| | |
|--|----|
| <i>A. Direct consequences of the failure to regulate the activities within their jurisdiction are attributable to the Republic of Repelmuto</i> | 1 |
| <i>A.1. The conducts of the various State organs are directly attributable to Repelmuto</i> | 1 |
| <i>A.1.1. The acts of REPO are attributable to Repelmuto as it constitutes an organ of the State</i> | 2 |
| <i>A.1.2. That the acts of MEA are attributable to the State</i> | 2 |
| <i>A.1.2.1. That the MEA officials constitute "State Organ"</i> | 2 |
| <i>A.1.2.2. State cannot absolve liability alleging abuse or excess of authority by the MEA officials</i> | 3 |
| <i>A.1.3. The acts of the Courts of Repelmuto can be attributed to Repelmuto</i> | 3 |
| <i>A.2. The actions of Fahy Oil can be attributed to Repelmuto</i> | 4 |
| <i>A.2.1 In the alternative, Fahy oil Corporation exercises Governmental Authority</i> | 5 |
| <i>B. The State of Repelmuto entails objective responsibility under International Law for breach of its customary and conventional obligations to prevent transboundary harm</i> | 5 |
| <i>B.1. Repelmuto Has Failed to observe 'due diligence'</i> | 7 |
| <i>B.2. Precautionary principle cannot justify the reckless attitude of Repelmuto</i> | 8 |
| <i>B.3. That the state of Repelmuto has violated its conventional obligations.</i> | 9 |
| <i>B.3.1. That the non-ratification of the UNCLOS does not absolve Repelmuto's liability under the Convention</i> | 9 |
| <i>B.3.1.1 Repelmuto cannot assert its rights under the UNCLOS unless it also acknowledges its obligations thereunder</i> | 10 |
| <i>B.3.2. The State of Repelmuto has violated the provisions of CBD</i> | 11 |

LIST OF ABBREVIATIONS

1. &: And
2. ¶: Paragraph
3. AJIL: American Journal Of International Law
4. Am. J. Int'l Law: American Journal of International Law
5. Am. U. J. Int'l L. & Pol'y: American University Journal of International Law and Policy
6. Art.: Article
7. ASEAN: Association of South East Asian Nations
8. Brit. Y.B. Int'l L.: British Year Book of International Law
9. CBD: Convention on Biological Diversity
10. Colum J. Envtl. L.: Columbia Journal of Environmental Law
11. Colum. L. Rev.: Columbia Law Review
12. Comm.: Commission
13. Dec.: December
14. Doc.: Document
15. E.T.S.: European Treaty Series
16. EC: European Council
17. ECE: Economic Commission for Europe
18. Ed.: Edition
19. Eds.: Editors
20. EEC: European Economic Council
21. EEZ : Exclusive Economic Zone
22. EIA: Environmental Impact Assessment

LIST OF ABBREVIATIONS

23. Eur. J. Int'l L.: European Journal of International Law
24. G.A. Res.: General Assembly Resolution
25. G.A.: General Assembly
26. GAOR: General Assembly Official Records
27. Ger. Y.B. Int'l L.: German Year Book of International Law
28. Harv. L. Rev: Harvard Law Review
29. Hon'ble: Honourable
30. I.L.M: International Legal Materials
31. I.L.R.: International Legal Reporter
32. ICJ: International Court of Justice
33. ILC: International Law Commission
34. ILM: International Legal Materials
35. Inc.: Incorporated
36. Int'l: International
37. Int'l & Comp. L.Q.: International and Comparative Law Quarterly
38. IUCN: The International Union for Conservation of Nature and Natural Resources
39. J. Transnat'l L. & Pol'y: Journal of Transnational Law and Policy
40. J.: Journal
41. J.: Judge
42. L.N.T.S.: League of Nations Treaty Series
43. LIAMCO: Libyan American Oil Company
44. Ltd.: Limited
45. MARPOL: International Convention for Prevention of Pollution from ships, 1973 as modified by the protocol relating thereto of 1978.
46. MEA : Mineral Extraction Agency

LIST OF ABBREVIATIONS

- 47. Neth.: Netherlands
- 48. No.: Number
- 49. OECD: Organization for Economic and Social Development
- 50. p.: Page
- 51. P.C.I.J.: The Permanent Court of International Justice
- 52. Pace Envtl. L. Rev.: Pace Environmental Law Review
- 53. para: Paragraph
- 54. pp.: Pages
- 55. Pub.: Publication
- 56. Pvt.: Private
- 57. R.Int'l. Arb. Awards: Revue International Arbitration awards
- 58. Rep.: Report
- 59. REPO : Repelmuto Environmental Protection Organization
- 60. Res.: Resolution
- 61. Rio Declaration : United Nations Conference on Environment and Development at
Rio De Janeiro
- 62. s. : Section
- 63. Sess.: Session
- 64. Ss.: Sections
- 65. Stockholm declaration : United Nations Conference on Human Environment held at
Stockholm.
- 66. Supp.: Supplement
- 67. U.K.: United Kingdom
- 68. U.N. Doc.: United Nations Document
- 69. U.N.Doc.: United Nations Document

LIST OF ABBREVIATIONS

70. U.N.GAOR.: United Nations General Assembly Official Records
71. U.N.T.S.: United Nations Treaty Series
72. U.N.T.S: United Nations Treaty Series
73. U.S.: United States
74. UN GAOR Supp.: United Nations General Assembly Official Record
75. UN: United Nations
76. UNCLOS: United Nations Convention on the Law of the Sea
77. UNECE: United Nations Economic Commission for Europe
78. UNFCCC: United Nations Framework Convention on Climate Change
79. v.: Versus
80. VCLT: Vienna Convention on the Law of Treaties
81. VCSST: Vienna Convention on Succession of States in Respect of Treaties
82. Vol.: Volume
83. WCN: World Charter for Nature
84. WSSD: World Summit on Sustainable Development
85. Y.B. Int'l L.C.: Year Book of International Law Commission
86. Y.B.: Year Book
87. Yale L.J.: Yale Law Journal

INDEX OF AUTHORITIES

INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS

1. Basel Convention on the control of Trans-boundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S 126; G.A. Res. 1974/3281 (XXIX); G.A. Res. 34/186 (1979) - - - - - 6
2. Cartagena Protocol on Bio-safety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M 1027 - - - - - 8
3. Charter of Economic Rights G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974) - - - - - 5
4. Climate Change Convention, 9 May 1992, 31 I.L.M. 849; Art 1(15) - - - - - 13
5. Communication on the Precautionary Principle, COM (2000)1 - - - - - 8
6. Convention on Long-Range Trans-boundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S 217 - - - - - 6
7. Convention on Long-Range Trans-boundary Air Pollution, Nov. 13, 1979, ,1302 U.N.T.S 217 - - - - - 13
8. Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London), 11 I.L.M. (1972) - - - - - 6
9. Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes, ILM 1312 (1992) - - - - - 13
10. Convention on the Regulation of Antarctic Mineral Resources, 2 June 1988, 27 I.L.M. 859 - - - - - 14

INDEX OF AUTHORITIES

| | | | | |
|-----|---|-----|---|-----|
| 11. | Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 32 ILM 1228 (1993) | - | - | -14 |
| 12. | Declaration of the United Nations Conference on the Human Environment, June, 16, 1972, 11 I.L.M 1416. | - | - | -6 |
| 13. | G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 17, U.N. Doc. A/5217 (1962) | - | | 5 |
| 14. | G.A. Res. 2158, 21 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/6316 (1966) | - | | 5 |
| 15. | G.A. Res. 2386, 23 U.N. GAOR, Supp. (No. 18) 24, U.N. Doc. A/7218 (1968) | - | | 5 |
| 16. | G.A. Res. 2692, 25 U.N. GAOR, Supp. (No. 28) 63, U.N. Doc. A/8028 (1970) | - | | 5 |
| 17. | G.A. Res. 3016, 27 U.N. GAOR, Supp. (No. 30) 48, U.N. Doc. A/8730 (1972) | - | | 5 |
| 18. | G.A. Res. 3171, 28 U.N. GAOR, Supp. (No. 30) 52, U.N. Doc. A/9030 (1973) | - | | 5 |
| 19. | Helsinki Rules on the Uses of the Waters of International Rivers, 52 Int'l L. Ass'n 477, 484 (1966) | - | - | -6 |
| 20. | I.L.C. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the 53rd Sess., I.L.C. (2001), G.A.O.R. 56th Sess., Supp. 10 | - | | 1 |
| 21. | ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, [2001] 2 Y.B Int'l L Comm'n 392 | - | - | 6 |
| 22. | Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J 226 (8 th July) | - | - | 6 |
| 23. | Rio Declaration on Environment and Development, June 13, 1992, 31 I.L.M 849 | - | | 6 |
| 24. | Rules on Water Pollution in an International Drainage Basin, 60 I.L.A 158 (1983) | -13 | | |
| 25. | The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL) | - | - | -11 |
| 26. | U.N Convention on Biological Diversity, Preamble, June 5, 1992, 31 I.L.M. 818 | - | | 8 |

INDEX OF AUTHORITIES

| | | | | | | | | | | | |
|-----|--|---|---|---|---|---|---|---|---|---|----|
| 27. | U.N. Convention on the Law of the Sea, Dec.10, 1982 | - | - | - | - | - | - | - | - | - | 6 |
| 28. | UNEP Principles on Conservation and Harmonious Utilisation of Natural Resources Shared By Two or More States, 17 I.L.M 1094 (1978) | - | - | - | - | - | - | - | - | - | 6 |
| 29. | Vienna Convention for the Protection of the Ozone Layer, 22 Mar. 1985, , 26 I.L.M. 1529 (1987) | - | - | - | - | - | - | - | - | - | 13 |
| 30. | Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Jurid Y.B. 153 | - | - | - | - | - | - | - | - | - | 9 |
| 31. | World Charter for Nature, UNGA Res. 37/7, 37 U.N. GAOR, Suppl. (No. 51)U.N.Doc. A/37/51 (Oct. 28, 1982) | - | - | - | - | - | - | - | - | - | 8 |

JOURNALS AND ESSAYS

| | | | | | | | | | | | |
|----|---|---|---|---|---|---|---|---|---|---|---|
| 1. | Allott, <u>State Responsibility and the Unmaking of International Law</u> , 29 Harv.Int'l.L.J. 1 (1988) | - | - | - | - | - | - | - | - | - | 1 |
| 2. | Bodansky & Crook, <u>Introduction and Overview</u> , 96 AJIL 773 (2002) | - | - | - | - | - | - | - | - | - | 1 |
| 3. | Combacau & Alland, <u>"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations</u> , 16 Neth.Y.B.Int'l.L. 81 (1985) | - | - | - | - | - | - | - | - | - | 1 |
| 4. | Crawford, Bodeau, & Peel, <u>The I.L.C.'s Draft Articles on State Responsibility: Toward Completion of a Second Reading</u> , 94 AJIL 660 (2000) | - | - | - | - | - | - | - | - | - | 1 |
| 5. | Crawford, Peel, & Olleson, <u>The ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading</u> , 12 Eur.J.Int'l.L. 963 (2001) | - | - | - | - | - | - | - | - | - | 1 |
| 6. | Crawford, <u>Revising the Draft Articles on State Responsibility</u> , 10 Eur.J.Int'l.L. 435 (1999) | - | - | - | - | - | - | - | - | - | 1 |

INDEX OF AUTHORITIES

-
7. Daniel Bodansky, Customary (and Not So Customary) International Environmental Law, 3 Ind. J. Global L. Stud. 105, 110 (1995) - - - - - 6
 8. I.C. MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L.Q. 468 (1958), at 468 - - - - - -16
 9. K.W. Cuperus and A.E. Boyle, Articles on Private Law Remedies for Transboundary Damage in International Watercourses, International Law Association, Report of the 67th Conference, Helsinki 407 (1986) - - - - - 4
 10. Kenneth F. McCallion, International Environmental Justice: Rights and Remedies, 26 Hastings Int'l. & Comp. L. Rev. 427, 429 - 431 (2003) - - - - - 7
 11. Prue Taylor, An Ecological Approach to International Law: Responding to Challenges of Climate Change, 70 (Routledge, 1998) - - - - - 6
 12. Zhiguo Gao, 'International Petroleum Exploration and Exploitation Agreements: a Comprehensive Environmental Appraisal', 240 (1994) 12 Journal of Energy and Natural Resources Law, 240-53 - - - - - 7

INTERNATIONAL CASES AND ARBITRAL AWARDS

1. Caire (France v. Mexico), Mixed Claims Commission, 5 R.Intl.Arb.Awards 516 - 3
2. Case Concerning the Barcelona Traction, Light and Power Company Limited, (Belg. v. Spain), 1970 I.C.J. 3, 6 (Feb. 5) - - - - - 6
3. Case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory opinion, 1999 ICJ 62 - 1
4. Continental Sea Shelf case (Tunisia v. Libya), ICJ Rep 1982 - - - - -10
5. Corfu Channel Case, (U.K. v. Alb.), 1949 I.C.J., 21 - - - - - 6

MEMORANDUM FOR THE APPLICANT

STATEMENT OF JURISDICTION

STATEMENT OF JURISDICTION

THE APPLICANT AND THE RESPONDENT HAVE THE HONOUR TO SUBMIT THE FOLLOWING DISPUTE TO THE INTERNATIONAL COURT OF JUSTICE BY SPECIAL AGREEMENT FOR RESOLUTION, PURSUANT TO ARTICLE 40(1) OF THE STATUTE OF THE COURT. IN ACCORDANCE WITH ARTICLE 36(1) OF THE ICJ STATUTE, EACH PARTY WILL ACCEPT THE JUDGMENT OF THE COURT AS FINAL AND BINDING.

STATEMENT OF FACTS

Coastal States, Federal States of Albacares and Republic of Repelmuto share a Common Territorial boundary bordering Gulf of Sedna. Albacares is a developing Country known for coral reefs and beaches, with majority of its people living along the coast. Its economy depends heavily on tourism, agriculture and fishing. Repelmuto is an industrialized country with second highest gross domestic product in the world and in its efforts to become energy independent authorized increased oil exploration within its EEZ, which it asserts under customary international law. Both are parties to ICJ, VCLT, MARPOL, CBD, and have attended Stockholm, Rio and sustainable development conferences. Albacares is a party to UNCLOS; Repelmuto has signed but not ratified it. **RECORD ¶¶1-10**

As oil rigs employs several methods to trigger the safety valve in case of an emergency, MEA mandated to have ‘hardwired controller’ and ‘dead man’ switches and did not require acoustical triggers. MEA officials failed to conduct rigorous inspections and also frequently accepted gifts from oil industry representatives, including drinks, meals, and trips to sporting events. One such example includes MEA regulators who attended a World Cup football match as guests of Fahy Oil, a corporation incorporated under the laws of Repelmuto. In 2008 National election, Conservation Party won and its leader Elle Kempii was elected the president. **RECORD ¶¶11-15**

On 2 February 2009, an offshore oil rig, *Blue Ocean*, owned by Fahy Oil, exploded and sank. Fahy Oil employees were unable to activate the hardwired controller; ‘dead man’ switch was inoperative due to dead battery. It did not have an acoustical trigger. As a result of the explosion, oil began to flow at the rate of 35,000 to 60,000 barrels per day. A later

investigation by Repelmuto Congress found that that Fahy Oil had ignored warnings indicating faulty safety systems leading up to the explosion. **RECORD ¶¶16**

REPO authorized the widespread use ChemEx-5000 at the source of the leak in an attempt to prevent oil from reaching the surface and shoreline. Repelmuto continued to employ the dispersant inspite of the warnings from Albacares as to its significant negative impacts on marine environment. President assured more than once, that Albacarean individuals would be compensated, including for the adverse effects caused by ChemEx-5000. Fahy Oil released approximately 7,600 kiloliters of ChemEx-5000 which was later found to kill up to 35% of organisms living 500 feet below the surface where the dispersant was used. On 4 July 2009, Fahy Oil succeeded in drilling a relief well that halted the flow of oil. The spill had devastating economic and environmental effects in Albacares. The tourism industry collapsed, coral reefs died and countries imposed ban on fish harvested from the Gulf.

RECORD ¶¶17-30

Repelmuto attempts to absolve its liability by conceding the damage caused, but attributing to previous Government's lack of oversight and denies its obligations to compensate Albacares under customary and conventional laws. Courts of Repelmuto approved the bankruptcy plan of Fahy, which led to its liquidation. Negotiations between Repelmuto and Albacares failed; hence an agreement was signed to submit the present matter before ICJ. **RECORD ¶¶31-38**

QUESTIONS PRESENTED

QUESTIONS PRESENTED

I. WHETHER THE ACTIONS OF THE REPUBLIC OF REPELMUTO ARE IN CLEAR VIOLATION OF INTERNATIONAL LAW THEREBY ENTAILING PRIMARY RESPONSIBILITY?

A. WHETHER DIRECT CONSEQUENCES OF THE FAILURE TO REGULATE THE ACTIVITIES WITHIN THEIR JURISDICTION ARE ATTRIBUTABLE TO THE REPUBLIC OF REPELMUTO?

B. WHETHER THE REPUBLIC OF REPELMUTO ENTAILS OBJECTIVE RESPONSIBILITY UNDER INTERNATIONAL LAW FOR BREACH OF ITS CUSTOMARY AND CONVENTIONAL OBLIGATIONS TO PREVENT TRANSBOUNDARY HARM?

II. WHETHER REUBLIC OF REPELMUTO IS LIABLE FOR REPARATION TO ALBACARES FOR THE TRANSBOUNDARY HARM CAUSED?

A. WHETHER FEDERAL STATES OF ALBACARES IS ENTITLED TO COMPENSATION OWING TO THE DAMAGE CAUSED?

B. WHETHER THE STATEMENTS BY THE PRESIDENT AND FOREIGN MINISTER AMOUNTS TO ESTOPPEL BY REPRESENTATION?

SUMMARY OF PLEADINGS

I. THE ACTIONS OF THE REPUBLIC OF REPELMUTO ARE IN CLEAR VIOLATION OF INTERNATIONAL LAW THEREBY ENTAILING PRIMARY RESPONSIBILITY

The Republic of Repelmuto failed to regulate the activities within its jurisdiction thereby entailing primary responsibility for the transboundary harm caused both in respect of oil spill and ChemEX-5000 administration. In accordance with the principles of International law, the conduct of various state organs could be attributable to the State of Repelmuto, thereby making Repelmuto directly liable for the acts and omissions of REPO (environmental agency of the State), MEA (State Organ) and Fahy Oil Corporation (de facto organ). Even the actions of the Court are attributable to Repelmuto as no distinction need to be made with the legislative, executive and the judicial organs.

The State is also made liable for the breach of its customary obligations to prevent transboundary harm. It has failed to comply with the principle of good neighbourliness, and the very standard basis for environmental protection requiring due diligence. Owing to the reckless attitude in maintaining the bare minimum security systems they had, a direct and proximate relationship between the inaction and the harm could be perceived which facilitated the harm to cross the boundaries. Moreover precautionary principle embodied under Principle 15 of the Rio Declaration cannot be invoked as a justification for the imprudent application ChemEx-5000, since Repelmuto continued to administer the same inspite of warnings from Albacares as to its significant negative impacts. Republic of Repelmuto also stands in contravention of its conventional obligations laid down under CBD and MARPOL. They are also liable under the provisions of UNCLOS as they have already

SUMMARY OF PLEADINGS

signed the convention which points to an eventual attitude of complying with the same, moreover, when they assert a right for EEZ they cannot evade the obligations laid thereunder.

II. REPUBLIC OF REPELMUTO IS LIABLE FOR REPARATION TO ALBACARES
FOR THE TRANSBOUNDARY HARM CAUSED

Grave and substantial damage has been caused to Albacares due to the lack of reasonable diligence and arbitrary actions of Repelmuto. Therefore in compliance with the polluter pays principle, Albacares is entitled to the right to claim compensation. Furthermore, the President is estopped from denying the assured compensation and succession in Government doesn't affect the rights and obligations arising therein.

PLEADINGS

I. THE ACTIONS OF THE REPUBLIC OF REPELMUTO ARE IN CLEAR VIOLATION OF INTERNATIONAL LAW THEREBY ENTAILING PRIMARY RESPONSIBILITY

An internationally wrongful act is committed by a State only when a conduct consisting of an action or omission is attributable to that State under international law;¹ and that conduct constitutes a breach of an international obligation of that State.² The Applicant seeks to establish in the below mentioned manner that the Republic of Repelmuto stands in clear contravention of the international obligations casted upon it.

A. DIRECT CONSEQUENCES OF THE FAILURE TO REGULATE THE ACTIVITIES WITHIN THEIR JURISDICTION ARE ATTRIBUTABLE TO THE REPUBLIC OF REPELMUTO

A.1. The conducts of the various State organs are directly attributable to Repelmuto

According to well-established customary rules of international law, the conduct of any organ of a State must be regarded as an act of that State.³ That the State is responsible for the

¹ Art. 2, I.L.C. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the 53rd Sess., I.L.C. (2001), G.A.O.R. 56th Sess., Supp. 10. [Hereinafter I.L.C Draft Articles on State Responsibility]; Bodansky & Crook, Introduction and Overview, 96 AJIL 773 (2002); Crawford, Revising the Draft Articles on State Responsibility, 10 Eur.J.Int'l.L. 435 (1999); Allott, State Responsibility and the Unmaking of International Law, 29 Harv.Int'l.L.J. 1 (1988); Combacau & Alland, "Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations, 16 Neth.Y.B.Int'l.L. 81 (1985).

² Art. 2, Art. 12 and Art. 13, I.L.C Draft Articles, supra note 1; Crawford, Bodeau, & Peel, The I.L.C.'s Draft Articles on State Responsibility: Toward Completion of a Second Reading, 94 AJIL 660 (2000); Crawford, Peel, & Olleson, The ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading, 12 Eur.J.Int'l.L. 963 (2001).

³Case concerning the Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory opinion, 1999 ICJ 62 at 87(para.62); Art. 4(1), I.L.C. Draft Articles, supra note 1; Art.4 Para 6, James Crawford, I.L.C. Draft Articles on State Responsibility: Introduction, Text,

conduct of its own organs, acting in that capacity, has long been recognized in international judicial decisions.⁴

A.1.1 The acts of REPO are attributable to Repelmuto as it constitutes an organ of the State

The ILC Articles on State Responsibility define a state organ as "any person or entity which has that status in accordance with the internal law of the state."⁵ It includes an organ of any territorial governmental entity within the State on the same basis as the central governmental organs of that State.⁶ REPO, the Repelmuto's environmental agency, is thus, a state organ within the norms of established International law.

A.1.2. That the acts of MEA are attributable to the State

As submitted above, the acts of MEA in (a) granting licenses without complying with the procedures established by international law, (b) failing to regulate activities of Fahy Oil, and (c) failing to act with due diligence, are attributable to the State, since:

A.1.2.1. That the MEA officials constitute 'State Organ'

The reference to a State organ covers all the individual or collective entities which make up the organization of the State and act on its behalf. Also in principle, the State's responsibility is engaged by conduct incompatible with its international obligations, irrespective of the level

and Commentaries, (Cambridge University Press, 1st ed. 2002) [Hereinafter commentaries on I.L.C Draft Articles on State Responsibility].

⁴ Rainbow Warrior Case (Newzland v. France) Reports of International Arbitral Award, Vol. XX, pp.215-284; Youmans cliam (United States Mexico Claims Tribunal) UNRIAA, vol. IV, p. 110 (1916), at p. 116; United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 ICJ Rep.3.

⁵ Art. 4(2), ILC Draft Articles on State Responsibility, supra note 1.

⁶ Articles 4(1), I.L.C. Draft Articles on State Responsibility, supra note 1; *Also see* Art 4 para 1, Commentaries on I.L.C Draft Articles on State Responsibility, supra note 3.

of administration or government at which the conduct occurs; thus making Repelmuto liable for MEA's acts.⁷

A.1.2.2. State cannot absolve liability alleging abuse or excess of authority by the MEA officials

Where a person acts in an apparently official capacity or under colour of authority, the actions in question will be attributable to the State.⁸ This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence.⁹ State practice and judicial pronouncements support this proposition.¹⁰ In the instant case, Repelmuto cannot absolve liability alleging abuse or excess of authority by the officials of MEA, as they acted under their official capacity.

A.1.3. The acts of the Courts of Repelmuto can be attributed to Repelmuto

The acts of any organ of the State can be attributed to the State. No distinction is made for this purpose between legislative, executive or judicial organs.¹¹ The right of equal access to permits the transboundary applicant to raise questions concerning the permissibility of the activity, appeal against the decisions of the Court or the administrative authority and seek measures necessary to prevent damage "to the same extent and on the same terms as a legal entity of the State in which the activity is being carried on". Similarly the transboundary

⁷ Id.

⁸ Art 7, para 13, Commentaries on I.L.C Draft Articles on State Responsibility, supra note 3.

⁹ Art 7, Commentaries on I.L.C Draft Articles on State Responsibility, supra note 3.

¹⁰ Art 7, para 3, Commentaries on I.L.C Draft Articles on State Responsibility, Supra note 3. *Also see Caire* (France v. Mexico), Mixed Claims Commission, 5 R.Intl.Arb.Awards 516 at p. 531. *Maal*, UNRIAA, vol. X, p. 730 (1903) at pp. 732-733; *La Masica*, UNRIAA, vol. XI, p. 549 (1916), at p. 560; *Youmans*, UNRIAA, vol. IV, p. 110 (1916), at p. 116; *Mallen*, UNRIAA, vol. IV (1925), p. 173, at p. 177; *Stephens*, UNRIAA, vol. IV, p. 265 (1927), at pp. 267-268; *Way*, UNRIAA vol. IV, p. 391 (1925), at pp. 400-01. *Royal Holland Lloyd v. United States*, 73 Ct. Cl. 722 (1931); *A.D.P.I.L.C.*, vol 6, p. 442.

¹¹ Salvador Commercial Company case, (U.S. v. Republic of Salvador), In U.S. Department of States, Papers Relating to the Foreign Relation of the United States, (1903) 859-73.

victim could seek compensation for damage caused on terms no less favourable than the terms under which compensation is available in the State of origin.¹² This principle is also reflected in Principle 10 of the Rio Declaration and in Principle 23 of the World Charter for Nature. It is also increasingly recognized in national constitutional law regarding protection of the environment.¹³

In the present matter under consideration, the bankruptcy plan of Fahy Oil Corporation approved by the Repelmuto Courts, without effective notice to Albacarean citizens, led to the liquidation of the corporation.¹⁴ By doing so, the courts of Repelmuto have violated the principle of equal access and non-discrimination. The action of which is clearly attributable to the state of Repelmuto.

A.2. The actions of Fahy Oil can be attributed to Repelmuto

It is an act of a State under international law, if a person or group of persons is acting on the instructions of, or under the direction or control of that State in carrying out its conduct.¹⁵ In the present matter, Fahy Oil Corporation is incorporated under the laws of Repelmuto acting under the direction and control of the State of Repelmuto, which makes it a de facto organ of

¹² Stephen C. McCaffrey, Private Remedies for Transfrontier Environmental Disturbances (IUCN and Natural Resources, Morges, Switzerland, 1975), pp. 85-87. The main contribution of the Convention is the creation of a Special Administrative Agency to supervise the transboundary nuisances in each State party for more intensive intergovernmental consultation and cooperation. The Agency is given standing before the courts and administrative bodies of other contracting States. The Convention does not however apply to pending causes. It does not have an express provision for waiver of State immunity. It is also silent on the question of the proper applicable law for the determination of liability and calculation of indemnities, though it is assumed that the proper law for the purposes will be the law of the place where the injury is sustained. In contrast the OECD recommended to its members a more gradual implementation of flexible bilateral or multilateral accords on measures for the facilitation at the procedural level of transnational pollution abatement litigation; *Also see* Principle 6(3), I.L.C Draft principles on the Allocation of loss in the case of Transboundary harm arising out of hazardous activities, Report of the 58th Sess., Y.B.Int'l.L.C. vol. II, Part Two (2006).

¹³ K.W. Cuperus and A.E. Boyle, Articles on Private Law Remedies for Transboundary Damage in International Watercourses, International Law Association, Report of the 67th Conference, Helsinki 407 (1986).

¹⁴ Record ¶ 35.

¹⁵ Article 8, ILC Draft Articles on State Responsibility, supra note 1.

the State. Moreover the ‘specific operation’¹⁶ of exploration, which is directed and controlled by Repelmuto forms the “integral part of the operation”¹⁷, thereby making the action of Fahy Oil attributable to Repelmuto.

A.2.1 In the alternative, Fahy oil Corporation exercises Governmental Authority

The term ‘entity’ reflects the wide variety of bodies which, though not organs, may be empowered by the law of a State to exercise elements of governmental authority i.e. empowered to exercise functions of a public character normally exercised by State organs and the conduct of the entity relates to the functions of the governmental authority concerned.¹⁸ Activities relating to optimum utilisation of natural resources viz. oil exploration fall within the realm of exercise of governmental authority. In the instant case, licence has been granted to Fahy Oil Corporation for the above mentioned purpose making it an “entity” which exercises governmental authority.

B. THE REPUBLIC OF REPELMUTO ENTAILS OBJECTIVE RESPONSIBILITY UNDER INTERNATIONAL LAW FOR BREACH OF ITS CUSTOMARY AND CONVENTIONAL OBLIGATIONS TO PREVENT TRANSBOUNDARY HARM

¹⁶ Id.

¹⁷ Article 8, Commentaries on I.L.C Draft Articles on State Responsibility, supra note 3.

¹⁸ G.A. Res. 1803, 17 U.N. GAOR, Supp. (No. 17) 17, U.N. Doc. A/5217 (1962); G.A. Res. 2158, 21 U.N. GAOR, Supp. (No. 16) 29, U.N. Doc. A/6316 (1966); G.A. Res. 2386, 23 U.N. GAOR, Supp. (No. 18) 24, U.N. Doc. A/7218 (1968); G.A. Res. 2692, 25 U.N. GAOR, Supp. (No. 28) 63, U.N. Doc. A/8028 (1970); G.A. Res. 3016, 27 U.N. GAOR, Supp. (No. 30) 48, U.N. Doc. A/8730 (1972); G.A. Res. 3171, 28 U.N. GAOR, Supp. (No. 30) 52, U.N. Doc. A/9030 (1973)., Charter of Economic Rights G.A. Res. 3281, 29 U.N. GAOR, Supp. (No. 31) 50, U.N. Doc. A/9631 (1974).

In accordance with the principle of *sic utero tuo, ut alienum non laedas* or ‘principle of good neighbourliness’ it is a well established custom of international environmental law that no state has the right to use or permit the use of its territory in such a manner as to cause injury to the territory of another or the properties or person therein.¹⁹ Every state is thus under an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States;²⁰ and to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control. This obligation underpins the concept of sustainable development and has been sanctified by wide state practice, and is so recognized in various international instruments;²¹ and has further been reaffirmed in very many judicial decisions.²² The duty to prevent transboundary harm has even attained the status of customary international law relating to environment.²³ Hence, it is unequivocally

¹⁹ Patricia Birnie and Alan Boyle, International Law and the Environment 109 (Oxford University Press, 2nd ed, 2004); Trail Smelter Arbitration, (U.S. v. Can.), 35 Am. J. Int'l L. 684 (1941) [Hereinafter Trail Smelter Arbitration Case]; International Commission on the River Oder Case, (Denmark, Czechoslovakia, Fr, Ger, U.K, Swe v. Pol) PCIJ, Series A, No. 23 (1959); Island of Palmas Arbitration, (Neth v. US) 2 R. Int'l. Arb. Awards, 829, 831 (1928); Malcolm N Shaw, International Law 760 (Cambridge University Press 5th ed., 2003) [Hereinafter Shaw].

²⁰ Corfu Channel Case, (U.K. v. Alb.), 1949 I.C.J, 21; Lac Lanoux Arbitration (Fr v. Spain) 24 I.L.R (1957) [Hereinafter Lac Lanoux Arbitration].

²¹ Art. 3, ILC Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, [2001] 2 Y.B Int'l L Comm'n 392, [Hereinafter I.L.C. Draft Articles on Transboundary harm]; Principle 21, Declaration of the United Nations Conference on the Human Environment, June, 16, 1972, 11 I.L.M 1416; Art. 2, Rio Declaration on Environment and Development, June 13, 1992, 31 I.L.M 849 [Hereinafter Rio declaration]; Art. X, Helsinki Rules on the Uses of the Waters of International Rivers, 52 Int'l L. Ass'n 477, 484 (1966) [Hereinafter Helsinki Rules]; Art. 194, U.N. Convention on the Law of the Sea, (Hereinafter UNCLOS), Dec.10, 1982; 1833 U.N.T.S 3, 397; Principle 3, UNEP Principles on Conservation and Harmonious Utilisation of Natural Resources Shared By Two or More States, 17 I.L.M 1094 (1978); Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter (London), 11 I.L.M. (1972), 1294; Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S 217; Basel Convention on the control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S 126; G.A. Res. 1974/3281 (XXIX); G.A. Res. 34/186 (1979).

²² Trail Smelter, supra note 19; Lac Lanoux supra note 20; Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A., 1976 E.C.R. 1735 (Neth.); Case Concerning the Barcelona Traction, Light and Power Company Limited, (Belg. v. Spain), 1970 I.C.J. 3, 6 (Feb. 5); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J 226 (8th July); Gabčíkovo-Nagymaros Project case, (Hung. v. Slov.) 1997 I.C.J 7 (Sept. 25).

²³ Prue Taylor, An Ecological Approach to International Law: Responding to Challenges of Climate Change, 70 (Routledge, 1998); Daniel Bodansky, Customary (and Not So Customary) International Environmental Law, 3

clear that under customary international law, Repelmuto is under a strict obligation to prevent transboundary harm.

B.1. Repelmuto has Failed to observe ‘due diligence’

It is the primary duty of the states to try to prevent harmful activities within their States and as far as the obligation to prevent is concerned there is no doubt that it is conditioned by due diligence. It is well established that the obligation of a State to prevent transboundary harm is one of ‘due diligence’, or ‘best effort’ obligation; which requires all States to have taken all reasonable or necessary measures to prevent a given event from occurring.²⁴ Due diligence is the standard basis for environmental protection and is also expounded in the widely supported ILC Draft Articles.²⁵ In fact, the obligation to observe due diligence in preventing pollution is absolute, and for the breach, the states are liable irrespective of any fault.²⁶

Albacaes also seeks to submit that, the necessary causal connection is satisfied when the damage is a foreseeable or a normal consequence of the act or omission in question²⁷ and hence in the instant case, the damage is a direct and proximate result of the transboundary impact, fully satisfying the requirement of causation owing to the dead batteries, inability to operate the blowout preventer, lack of acoustic triggers and imprudent ChemEX-5000

Ind. J. Global L. Stud. 105, 110 (1995); Kenneth F. McCallion, International Environmental Justice: Rights and Remedies, 26 Hastings Int'l. & Comp. L. Rev. 427, 429 - 431 (2003).

²⁴ Trail Smelter, supra note 19.

²⁵ I.L.C Draft Articles on Transboundary Harm, supra note 21 at 392.

²⁶ Shaw, supra note 19 at 762.

²⁷ Lighthouses Arbitration Case, (Fr. v. Gr.), I.L.R. 23 (1956).

administration.²⁸ Hence, Repelmuto's omission or failure to act with due diligence has actually facilitated the transboundary harm caused.

B.2. Precautionary principle cannot justify the reckless attitude of Repelmuto

The precautionary principle lays down 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.²⁹ The precautionary principle has been quite controversial because it advocates action despite the lack of scientific certainty as taking action under such condition could be proven wrong. Moreover, this does not mean that science ceases to be relevant in judging the existence of risk, or that states are required or permitted to act on the basis of mere hypothesis or purely theoretical assessments of risk.³⁰ On the contrary, recourse to the precautionary principle presupposes that potentially dangerous effects deriving from a phenomenon, product or process have been identified, and that the scientific evaluation does not allow the risk to be determined with sufficient certainty.³¹ Hence it is humbly requested that the reckless attitude of Repelmuto in ChemEX-5000 administration, in spite of constant warnings about its significant negative effects should not be permitted to be justified on the ground of the precautionary principle.

²⁸ Record ¶ 16.

²⁹ U.N Convention on Biological Diversity, Preamble, June 5, 1992, 31 I.L.M. 818 [Hereinafter CBD]; Principle 11, World Charter for Nature, UNGA Res. 37/7, 37 U.N. GAOR, Suppl. (No. 51), at 17, U.N.Doc. A/37/51 (Oct. 28, 1982); principle 15, Rio Declaration supra note 21; Art. 10, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M 1027; See also David Freestone and Ellen Hey, The Precautionary Principle and International Law: The Challenge of Implementation, 10 (Kluwer Law Int'l, 1st ed. 1996).

³⁰ Id.

³¹ EC, Communication on the Precautionary Principle, COM(2000)1, at pg.4.

B.3. That the State of Repelmuto has violated its conventional obligations

The acts of Repelmuto in causing transboundary harm, not complying with the international law requirements of notice and EIA, lack of adequate regulations and enforcement measures, among others, have contravened the provisions of various Conventions to which they are party.

B.3.1. That the non-ratification of the UNCLOS does not absolve Repelmuto's liability under the Convention

Signature constitutes the first step to participation in the convention and it would express and proclaim the eventual attitude of the signatory state.³² Thus, upon signature of a treaty by a State, the international community is entitled to rely on a bona fide belief or expectation that the provisions of the same will be complied through ratification.

It has also been reiterated in the Vienna Convention that, where a treaty is subject to ratification, acceptance, or approval, signatory states are under an obligation of good faith to refrain from acts calculated to defeat the object of the treaty until they have made their intention clear of not becoming parties.³³ Therefore, a state is bound by good faith not to persist in a posture fundamentally at variance with the treaty until it has definitely disavowed its intention to proceed to the ratification of the treaty that it has signed.³⁴ Even in the

³² ICJ's Advisory opinion rendered on 'Reservations to the Conventions on the Protection and Punishment of the crime of Genocide on 28th May 1951', ICJ Reports 1951 Pg. 15., 'without going into the question of legal effect of signing an international convention, which necessarily varies in individual cases, the Court considers that signature constitutes the first step to participation in this convention.'

³³ Art. 18, Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Jurid Y.B. 153.

³⁴ Starke, International Law, 416 (Oxford University Press, 6 ed., 1996).

alternative, the provisions of the Convention are generally held to reflect customary international law.³⁵

B.3.1.1 Repelmuto cannot assert its rights under the UNCLOS unless it also acknowledges its obligations thereunder

All rights of an international character involve international responsibility.³⁶ Hence, since the State of Repelmuto has asserted its rights to claim a maritime zone and the right to exploit and explore natural resources therein, which is essentially a right circumscribed by the provisions UNCLOS³⁷, it cannot claim to be absolved of the obligations established under the same.³⁸ Further, though the concept of the EEZ may be deemed to have become part of customary international law, in view of its almost universal acceptance, the details of rights and obligations in it can only be invoked within the 1982 Convention.³⁹

Also the acts of committed and authorised by Repelmuto are in palpable contravention of the provisions of the UNCLOS,⁴⁰ as it casts an obligation *erga omnes* upon the States to protect and preserve the marine environment by employing ‘best practicable means at their disposal

³⁵ Maritime Delimitation and Territorial Question Between Qatar and Bahrain (Qatar v. Bahrain), ICJ Reports 2001, at 103, para 213; Continental Sea Shelf case (Tunisia v. Libya), ICJ Rep 1982, at 61, para 75; Land and Maritime Boundary Between Cameroon and Nigeria, (Cameroon v. Nigeria), ICJ Rep 2002, at 442, para 291; North Sea Continental Shelf Case, (Federal Republic of Ger v. Neth) ICJ Rep 1969, at 49, para 91.

³⁶ Judge Huber, Spanish Zone of Morocco Claims, Translation; French text, RIAA ii. 615 at 641

³⁷ See Part V, Arts 55-75 UNCLOS supra note 21.

³⁸ Indeed when the US intention not to sign the Convention became known, the President of UNCLOS III, Tommy Koh, insisted that the Convention was an integral package and that “it is not possible for a State to pick what it likes and to disregard what it does not like.”; James K Sebenius, Negotiating the law of the Sea (Cambridge: Harvard University Press. 1984), 93, quoted in Charlotte Ku and Paul F. Diehl (eds), International Law: Classic and Contemporary Readings, (Viva Books Private Ltd., 2nd ed., 2004).

³⁹ Peter Bautista Payoyo (ed), Ocean Governance: Sustainable Development of Seas, (United Nations University Press, 1994).

⁴⁰ Arts., 192, 193, 194 of the UNCLOS supra note 21.

in accordance with their capabilities'. Repelmuto was negligent in maintaining the safety requirements that they had.

B.3.2. The Republic of Repelmuto has violated the provisions of CBD

Repelmuto has blatantly disregarded the recognised principles of sustainable development and general principles of international law as embodied under the CBD as it makes it obligatory for the contracting parties to identify and monitor those categories of activities which have or is likely to have 'significant adverse impact' on the conservation and sustainable use of biodiversity.⁴¹

B.3.3. The Republic of Repelmuto has violated the provisions of MARPOL as it applies to offshore oil platforms

The contention of Repelmuto that MARPOL⁴² is not applicable to oil platforms is baseless. Article 2(4) of MARPOL defines ship, "ship" means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms". It defines 'discharge' as, "any release howsoever caused from a ship and includes any escape, disposal, spilling, leaking, pumping, emitting and emptying".⁴³ The mere perusal of the definition of "ship" appended to MARPOL would indicate the fact that oil platforms like *Blue Ocean*, established by Fahy oil Corporation as in the instant case would nevertheless form a part of definition "ship". Moreover, *Blue Ocean* exploded and sank on 2nd February 2009,⁴⁴ resulting in massive oil

⁴¹ Art. 7(c), Art.10 of the CBD, supra note 29.

⁴² The International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL).

⁴³ Article 2(3) (a) of MARPOL, Supra note 42.

⁴⁴ Annexure A¶16.

‘spill’ in the Gulf of Sedna. As *Blue Ocean* is a ‘ship’ and whose activity has resulted in ‘discharge’ within the meaning of MARPOL, it is subject to its applicability.

In addition applicability of MARPOL, to oil platform in the context of oil pollution can be traced to Regulation 21 of Annexure I⁴⁵ specifically deals with drilling rigs and other platforms. It provides that fixed and floating rigs, when engaged in exploration, exploitation, and associated offshore processing of seabed mineral resources, must comply with the requirements of Annexure I applicable to ships of 400 tonnes gross tonnage and above other oil tankers. Consequently, in accordance with Regulation 9, which deals with the control of discharge of oil, offshore platforms are prohibited from any discharge for oil or oily mixtures into the sea except when the oil content of the discharge without dilution does not exceed 15 parts per million.⁴⁶ The exceptions to this requirement are provided in Regulation 11, and include possible discharges of oil, oily mixture or of substances containing oil in the following cases: (a) when it is necessary for the purpose of securing the safety of an offshore installations or saving life at sea. (b) Damage to a ship or its equipment, provided that all reasonable measures have been taken to prevent or minimize the discharge. No such exceptions exists in the instant case, hence *Blue Ocean* cannot take protection under them.

It is imperative to note that the application of MARPOL to oil platform is limited by Article 2(3) (b) which states that the definition of ‘discharge’ under MARPOL does not include “(i) dumping within the meaning of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; or (ii) release of harmful substances directly arising from exploration, exploitation and associated offshore processing of seabed mineral

⁴⁵ Annexure I, Reg.21, MARPOL 73/78, “special requirements for drilling rigs and other platforms”.

⁴⁶ See Zhiguo Gao, International Petroleum Exploration and Exploitation Agreements: a Comprehensive Environmental Appraisal, 240 (1994) 12 *Journal of Energy and Natural Resources Law*, 240-53.

resources.” The application of MARPOL is thus confined to non-operational discharges, i.e. those not associated with the exploration, exploitation, and associated offshore processing of seabed minerals.⁴⁷ In the instant case, as provided in the Annexure A,⁴⁸ *Blue Ocean* has exploded and sank, and that has consequentially resulted in an oil spill. Such an oil spill was due to the explosion followed by the subsequent sinking of *Blue Ocean*, and not due to any such activity mentioned in Article 2 (3)(b). Hence the so called exception provided under the above mentioned provision of MARPOL, is not applicable to *Blue Ocean*. Thus it is humbly submitted that The Government of the Republic of Repelmuto cannot argue that MARPOL is inapplicable to oil platforms.

II. REPUBLIC OF REPELMUTO IS LIABLE FOR REPARATION TO ALBCARES FOR THE TRANSBOUNDARY HARM CAUSED

It has now been firmly established by State practice and treaty provisions that, where the transboundary harm in question is of serious and substantial consequences⁴⁹ to the environment, and has resulted in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, and material property, and impair or interfere with amenities and other legitimate uses of the environment,⁵⁰ the polluting state is responsible for the damage caused, and is liable to make reparations to the injured state.

⁴⁷ The case of south pacific regional protocol, Chester Brown, (1998) 17 AMPLJ 109.

⁴⁸ Ibid.

⁴⁹ Helsinki Rules supra note 21, Art. XI, Rules on Water Pollution in an International Drainage Basin, 60 I.L.A 158 (1983).

⁵⁰ Art. 1 (2) ,31, Convention on the Protection and Use of Transboundary Watercourses and International Lakes, ILM 1312 (1992); Art.1, Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, ,1302 U.N.T.S 217; Also see Art 1 (4), UNCLOS supra note 21; Art. 1(2), Vienna Convention for the Protection of the Ozone Layer, 22 Mar. 1985, , 26 I.L.M. 1529 (1987); Art. 1(1), Climate Change Convention, 9 May 1992, 31 I.L.M. 849; Art 1(15), Convention on the Regulation of Antarctic Mineral Resources, 2 June 1988, 27 I.L.M.

**A. FEDERAL STATES OF ALBACARES IS ENTITLED TO
COMPENSATION OWING TO THE DAMAGE CAUSED**

Where the responsibility of the state is established, an obligation arises first to discontinue the wrongful conduct, second to offer guarantees of non repetition, and the third to make full reparation for the injury caused.⁵¹ Draft Article⁵² on State Responsibility defines full reparation as ‘restitution, compensation and satisfaction, either singly or in combination.’ And restitution as ‘to re-establish the situation which existed before the wrongful act was committed’, that is, to establish the *status quo ante*. The United Nation Compensation Commission also in a claim relating to environmental damage stated that ‘primary emphasis must be placed on restoring the environment to pre invasion conditions, in terms of its overall ecological functioning, rather than on removal of specific contaminants or restoration of the environment to a particular physical condition.’⁵³

The basic principle that a State should ensure payment of prompt and adequate compensation for hazardous activities could be traced back as early as the *Trail Smelter Arbitration* case. Since then numerous treaties, some important decisions, and extensive national law and practice which have evolved giving considerable weight to claims for compensation in

859; Art. 2 (7) (c), Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, 32 ILM 1228 (1993).

⁵¹ Arts. 30-31, 35-37, ILC Draft Articles on State Responsibility, supra note 1; Patricia Birnie, Alan Boyle, Catherine Redgewell, International Law and the Environment, 226 (Oxford University Press, 3rd ed., 2009).

⁵² Article 34, I.L.C. Draft Articles on State Responsibility supra note 1.

⁵³ UNCC F4 Claims 3rd Decision (2003) paras 47-8.; Also see In the case of Iraq’s unlawful invasion of Kuwait, UNSC Res 687(1991) and UNCC Res 687(1991).UNCC Gov Council, Decision 7, Revised 16 March 1992, para 35.

respect of trans-frontier pollution and damage. Some commentators even regard this as a customary law obligation.⁵⁴

Additionally, in any case of delay in the payment of the compensation, the injured State is entitled to interest.⁵⁵ It has also been concurrently surfaced that an international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.⁵⁶

Hence it is most respectfully submitted owing to the grave and substantial damage caused to Albacares due to the lack of reasonable diligence and arbitrary actions of Repelmuto and in compliance with the polluter pays principle,⁵⁷ Albacares is entitled to the right to claim compensation and Repelmuto cannot in any case evade the responsibility for the environmental damage caused.

B. THAT THE STATEMENTS BY THE PRESIDENT AND FOREIGN MINISTER AMOUNTS TO ESTOPPEL BY REPRESENTATION

The underpinning of estoppel in international law is that a state must not be permitted to benefit by its own inconsistency to the prejudice of another State.⁵⁸ Such a demand may be

⁵⁴ Requirement for compensation is also affirmatively held in Chrozow Factory case 1928, P.C.I.J., Series A, No. 17, p. 47 and Gabčíkovo-Nagymaros Project case, supra note 22.at p. 45.

⁵⁵ Article 38, ILC Draft Articles on State Responsibility, supra note 1, Illinois Central Railroad case, UNRIAA, vol. IV, p. 134 (1926); the Lucas case (1966) I.L.R., vol. 30, p. 220; see also Administrative Decision No. III of the United States-German Mixed Claims Commission, UNRIAA, vol. VII, pp. 66 (1923).

⁵⁶ Factory at Chorzów, (Ger v. Pol), Jurisdiction, 1927, P.C.I.J., Series A, No. 9, p. 21; Fisheries Jurisdiction, (F.R.G v. Iceland), Merits, I.C.J. Reports 1974, p. 175, at pp. 203-205, paras. 71-76; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, I.C.J. Reports 1986, p. 14, at p. 142.

⁵⁷ Principle 16 of Rio declaration supra note 21.

⁵⁸ The Temple of Preah Vihar (Cambodia v. Thail.), 1962 I.C.J. 6, at 39-51; The International Court of Justice also examined estoppel in some detail in the Barcelona Traction Light and Power case, Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1964 I.C.J. 6, and the North Sea Continental Shelf cases, North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 3.

rooted in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct⁵⁹ and is often grounded on considerations of good faith.⁶⁰

An undertaking of this kind, if given publicly, and with intent to be bound, even though not made within the context of international negotiations, is binding.⁶¹ Thus Kempii is stopped from denying the assured compensation to Albacares. Nevertheless, the party invoking estoppel must show that the opponent induced the invoking party to act or to refrain from acting⁶² and also that that it has suffered some injury or damage in its reliance upon the representations. It is submitted that both these elements are satisfied in the instant case. Furthermore, the form of such declaration is not relevant.⁶³ Whether a statement is made orally or in writing makes no essential difference, for if such statements made in particular circumstances may create commitments in international law, it does not require that they should be couched in written form.⁶⁴ The Hon'ble Court may also consider that in spite of

⁵⁹I.C. MacGibbon, Estoppel in International Law, 7 Int'l & Comp. L.Q. 468 (1958), at 468.

⁶⁰ Ibid.

⁶¹ Nuclear Tests Case (Australia & New Zealand V. France), 1974 I.C.J. 253, 457, In the Legal Status of Eastern Greenland, Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 5), for example, the P.C.I.J. accepted a claim of Denmark that was nominally based upon estoppel by representation. The court did find that Norway was bound by her prior acts and by the assurances given by her foreign minister. Here the Court considered it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

⁶² Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 4 (Feb. 5), at 17.

⁶³ Temple of Preah Vihear case supra note 57, Nuclear Tests Case, supra note 61.

⁶⁴ Principle 5, ILC, Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations 2006 (A/61/10).

PLEADINGS

having ample opportunity to retract; Repelmuto deepened its legal commitments by further statements.⁶⁵

There is also no case of succession here as in the case of succession of Governments, it is well established that the new regime takes the place of the former regime in all matters affecting the international rights and obligations of the State. Therefore this also estopp's Repelmuto from evading its responsibility by conceding damage as the result of the previous Government's lack of oversight.

⁶⁵ Record ¶ 26.

PRAYER

PRAYER

For the foregoing reasons the Applicant respectfully requests that this Hon'ble Court:

- (A) Declare that the Republic of Repelmuto has failed to properly regulate the activities within its jurisdiction.
- (B) Declare that widespread unwise and imprudent widespread use of chemical dispersants in response to the oil spill is not in consistent with Principle 15 of Rio Declaration.
- (C) To pass an order that the Republic of Repelmuto is liable for reparation to Federal States of Albacares for the transboundary harm caused.

Place: The Hague

S/d _____

Date:

(Agents for the Applicant)