IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

21ST ANNUAL INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

QUESTIONS RELATING TO OCEAN FERTILIZATION AND MARINE BIODIVERSITY

THE FEDERAL STATES OF AEOLIA

(APPLICANT)

V.

THE REPUBLIC OF RINNUCO

(RESPONDENT)

MEMORIAL FOR THE APPLICANT

2017

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STATEMENT OF JURISDICTION

The Federal States of Aeolia ("Aeolia") and the Republic of Rinnuco ("Rinnuco") submit the following dispute to the International Court of Justice ("ICJ"). Pursuant to Article 40, paragraph 1 of the Statute of the ICJ ("the Statute"), States may bring cases before the Court by way of a written application. On 4th April 2016. Aeolia pursuant to Article 36 and Article 40 of the Statute and Article 38 of the Rules of the Court filed an application and submitted it to the Registrar of the ICJ. Rinnuco filed preliminary objection pursuant to Article 79 of the Rules of Court on 10th May 2016. On 23rd June 2016 the Registrar, noting the agreement of the parties on the dispute at hand and the issue of jurisdiction inextricably linked to merits, entered the matter (General List No. 170) as the case of **Questions Relating to Ocean Fertilization and Marine Biodiversity (Federal States of Aeolia v. Republic of Rinnuco).**

QUESTIONS PRESENTED

(1) WHETHER THE ICJ HAS JURISDICTION TO DETERMINE THE MATTER?

(2) WHETHER RINNUCO HAS VIOLATED INTERNATIONAL LAW BY CONDUCTING THE INITIAL PHASE OF ITS OCEAN FERTILIZATION PROJECT?

STATEMENT OF FACTS

1. The Federal States of Aeolia ("Aeolia") and the Republic of Rinnuco ("Rinnuco") are neighboring coastal States surrounded by the Muktuk Ocean (¶1, ¶2) that is inhabited by narwhals. Aeolia gives great importance to narwhals as they are culturally significant and form a part of their eco-tourism industry (¶3).
2. Rinnuco announced its plans to engage in an Ocean Iron Fertilization Project ("OIFP") on 21st November 2014. Aeolia on 2nd December 2014 condemned the same via a diplomatic note, stating it would negatively affect the biodiversity of the Muktuk Ocean (¶13). Rinnuco, paying no heed to Aeolia's concerns, passed a law approving the large-scale project to be conducted in its exclusive economic zone ("EEZ")(¶15).
3. Despite requests to reconsider from Aeolia, Rinnuco began depositing ferrous sulfate on 5th January 2015. Subsequently, 9 dead narwhals uncharacteristically washed ashore Rinnuco's coast (¶16).
4. Aeolia alleged that Rinnuco had violated the Convention on Biological Diversity ("CBD"), United Nations Convention on Law of the Sea ("UNCLOS"), Convention on Migratory Species ("CMS"), United Nations General Assembly ("UNGA") Resolutions and customary international law (¶20).
5. After negotiations and mediations failed in resolving the dispute, Aeolia requested the ICJ, under Article 287 of UNCLOS and Article 27 of the CBD, to resolve the matter (¶22). However, Rinnuco first rejected the request and subsequently revoked the jurisdiction of the ICJ under the UNCLOS (¶9).

SUMMARY OF ARGUMENTS

I. WHETHER THE ICJ HAS JURISDICTION TO DETERMINE THE MATTER?

The ICJ has jurisdiction over the dispute as it pertains to the UNCLOS, the CBD, and customary international law. Rinnuco had submitted to the UNCLOS and CBD's compulsory jurisdiction. Since, the dispute involves Rinnuco's OIFP that affected the biodiversity of Muktuk Ocean, it falls within the purview of the CBD. It also constitutes pollution and dumping to bring the dispute to the ICJ under the UNCLOS.

II. WHETHER THE REPUBLIC OF RINNUCO HAS VIOLATED INTERNATIONAL LAW BY CONDUCTING THE INITIAL PHASE OF ITS OIFP?

Rinnuco's OIFP is in violation of the precautionary principle and the duty to perform due diligence as its environment impact assessment ("EIA") was not as per the global standards set by the London Convention and London Protocol ("LC/LP"). Thus, it is not legitimate scientific research, being in contravention to the LC/LP. By causing transboundary harm and not being duly diligent about its OIFP, Rinnuco has violated customary international law and also its obligations the UNCLOS and the CBD.

ARGUMENTS

I. THE ICJ HAS JURISDICTION TO DETERMINE THE MATTER.

The ICJ has jurisdiction to determine the matter under **(A)** the CBD,[1] **(B)** the UNCLOS,[2] and **(C)** customary international law.

A. The ICJ has jurisdiction to determine the matter under the CBD.

(1) The present dispute pertains to the interpretation and application of the CBD, **(2)** therefore, the present dispute must be settled by the ICJ.

1. The present dispute pertains to the interpretation and application of the CBD.

Article 4 of the CBD defines its Jurisdiction Scope.[3] It prescribes that the CBD's provisions apply to activities, undertaken within the jurisdiction and control of contracting parties, which affect components of biodiversity.[4] Narwhals are a component of biodiversity. The present dispute between the parties *inter alia* is whether the OIFP, carried out by Rinnuco in its EEZ, has caused the death of nine narwhals and has thus violated Articles 3, 8 and 14 of the CBD.[5] Since Rinnuco's OIFP is within its control and jurisdiction, the provisions of the CBD apply to the present dispute.

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[1] Convention on Biological Diversity, June 5, 1760 U.N.T.S 79 (1972) [CBD].

[2] United Nations Convention on the Law of the Sea, Dec. 10, 1833 U.N.T.S 397 (1982) [UNCLOS].

[3] CBD, *supra* note 1, art. 4.

[4] CBD, *supra* note 1, art. 4(a)-4(b).

[5] R. ¶25-26.

Further, the COP, in its ninth, tenth and eleventh meeting, placed a moratorium on OIFPs that are undertaken without a scientific justification or without a thorough and transparent scientific impact assessment.[6] In the present dispute, Aeolia has alleged that Rinnuco's OIFP was carried out without conducting an adequate and transparent scientific impact assessment or without a scientific justification.[7]

Accordingly, the present dispute pertains to the interpretation or application of the CBD.

2. <u>The present dispute must be settled by the ICJ.</u>

Any dispute pertaining to the interpretation and application of the CBD must be settled as per its Settlement of Disputes provision under Article 27.[8] Under Article 27(1) and (2), before a dispute is submitted to the ICJ, it must first undergo negotiation and mediation.[9]

Aeolia and Rinnuco have had negotiations and mediations between January 2015 and March 2016.[10] However, since they failed to resolve the dispute, it must be settled by the ICJ as Rinnuco, at the time it ratified the CBD, had agreed to submit compulsorily to the ICJ under Article 27(3) of the CBD.[11]

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[6] CBD, COP 9, *Biodiversity and Climate Change - Decision IX/16*, UNEP/CBD/COP/DEC/IX/16, Annex. I, 2008 [COP, IX/16] ; CBD, COP 10, *Biodiversity and Climate Change - Decision X/33*, UNEP/CBD/COP/DEC/X/33 ¶8, 2010 [COP X/33]; CBD, COP 11, *Climate-related Geoengineering - Decision XI/20*, UNEP/CBD/COP/DEC/XI/20, ¶11, 2010 [COP XI/20].

[7] R. ¶14-17.

[8] CBD, *supra* note 1, art. 27(1).

[9] CBD, *supra* note 1, art. 27(1)-27(2).

[10] R. ¶22.

[11] R. ¶6.

Therefore, the ICJ has jurisdiction over the dispute.

B. The ICJ has jurisdiction to determine the matter under the UNCLOS.

(1) The present dispute falls within the purview of the UNCLOS and **(2)** must be settled by the ICJ.

1. The matter falls within the purview of the UNCLOS.

The UNCLOS is applicable to the present dispute as **(a)** it pertains to the interpretation and application of the UNCLOS. **(b)** Rinnuco cannot rely on the London Protocol ("LP") to absolve itself from its obligations under the UNCLOS.

a) The present dispute pertains to the interpretation and application of the UNCLOS.

For a matter to arise under the Settlement of Disputes provisions of the UNCLOS, there must be a dispute regarding the interpretation or application of the convention.[12]

The UNCLOS prohibits pollution and dumping that cause damage to the marine environment.[13] In the present dispute, it is alleged that Rinnuco acted contrary to the provisions of the UNCLOS as its OIFP constituted pollution and dumping.

Pollution is defined under Article 1(4) of the UNCLOS as an activity which "*results or is likely to result in such deleterious effects that cause harm to living resources and marine life*".[14] Scientific reports have clearly suggested that OIFPs cause harm to marine life.[15] Aeolia alleges

[12] UNCLOS, *supra* note 2, art. 279.

[13] UNCLOS, *supra* note 2, art. 194, 210.

[14] UNCLOS, *supra* note 2, art. 1.1(4).

[15] S.W. Chisholm, *Dis-Crediting Ocean Fertilization*, 294 SCIENCE 309-310 (2001) [Chisholm].

that Rinnuco's OIFP has harmed the marine environment around the Muktuk Ocean, thus causing Pollution.[16]

Dumping is defined under Article 1(5) of the UNCLOS as '*any deliberate disposal of waste or other matter from vessels'*.[17] '*Disposal*' means abandonment with no intention of recovery.[18] Rinnuco has deliberately added ferrous-sulphate, which falls within the ambit of '*other matter*',[19] to the Muktuk Ocean without any intention of removing it at a later stage. Therefore, Rinnuco's OIFP constitutes dumping.

Article 5(b)(ii), which provides for exceptions to the definition of dumping, inasmuch as dumping is permissible if it does not go against the aims of the convention.[20] However, Rinnuco's OIFP violates Part XII of the UNCLOS which lays down provisions for the "*Protection and Preservation of the Marine Environment"*[21] as it causes damage to fish production.[22]

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[16] R. ¶20.

[17] UNCLOS, *supra* note 2, art. 5(a)(i).

[18] Rosemary Rayfuse et al., *Ocean Fertilization and Climate change: The Need to Regulate Emerging High Sea Uses*, 23 INT'L J. MARINE & COASTAL L. 297, 312 (2008) ; David Freestone & Rosemary Rayfuse, *Ocean Iron Fertilization and International Law*, 364 MARINE ECO. PROGRESS SERIES 227, 229 (2008). [Rayfuse & Freestone]

[19] *Ibid*. Rayfuse & Freestone.

[20] UNCLOS, *supra* note 2, art. 5(b)(ii).

[21] UNCLOS, *supra* note 2, Part XII.

[22] WILLIAM C. G BURNS & ANDREW L STRAUSS, CLIMATE CHANGE GEOENGINEERING 282 (2015).

Thus, the dispute concerns the interpretation and application of the UNCLOS as Rinnuco's OIFP constitutes Pollution and Dumping which is prohibited under the UNCLOS.

b) Rinnuco cannot rely on the LP to absolve itself from its obligations under the UNCLOS.

Under the UNCLOS, dumping must be prevented as per global rules and standards.[23] These global rules and standards are the LC/LP.[24] In the *Bluefin Tuna* case, the ITLOS rejected the argument that the law governing *lex specialis* agreements would override the obligations under the UNCLOS.[25] Thus, similarly, Rinnuco cannot rely on the LC/LP to absolve itself from its obligations under the UNCLOS.

2. <u>The ICJ has the jurisdiction to settle the present dispute under the UNCLOS.</u>

A dispute can only proceed to compulsory dispute settlement procedures under the UNCLOS if **(a)** the requirement under Section 1 of Part XV has been complied with. **(b)** The dispute must be submitted to the ICJ under Section 2 of Part XV. **(c)** Rinnuco cannot claim exception under Section 3 of Part XV.

[23] UNCLOS, *supra* note 2, art. 210.

[24] NORDQUIST, ET AL., THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY (2002).

[25] *Southern Bluefin Tuna (New Zealand v. Japan),* Provisional Measures, ITLOS Case No 3, 1999 38 ILM 1624, ¶52 (Aug. 4) [Bluefin Tuna].

[25] *Ibid.* art. 279, 286.

a) The requirement under Section 1 of Part XV has been complied with.

Under Section 1 of Part XV, a dispute can only proceed to compulsory dispute settlement procedures after engaging in peaceful means of settlement.[26] The parties have undertaken peaceful dispute settlement measures by conducting negotiations and mediation of the dispute.[27] A party is not obligated to continue Section 1 procedures if it concludes that there is no possibility of reaching a settlement.[28]

It is evident from the fourteen month long negotiations and mediations, and Rinnuco's diplomatic note dated 18th May 2015 insisting to continue the OIFP, that there is no possibility of settlement between the parties.

Since peaceful settlement mechanisms have failed, the dispute can be submitted to compulsory dispute settlement, as per Article 281 of the UNCLOS. Aeolia has the right to make its claims to the ICJ under Section 2.

Alternatively, Article 282, provides that states may enter into agreements to submit to the procedure for dispute settlement. The acceptance of the compulsory jurisdiction of the ICJ is considered an agreement under Article 282.[29] As there exists a declaration of acceptance by both parties, the ICJ has jurisdiction over the matter under Section 1.[30]

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[26] UNCLOS, *supra* note 2, art. 279, 286.

[27] R. ¶22.

[28] Bluefin Tuna, *supra* note 25, ¶41.

[29] *Report of the Chairman of the Drafting Committee to the Plenary, Recommendations of the Drafting Committee*, ILC, at Part XV, UN Doc A/CONF.62/L.75/Add.1 (1981); UNCLOS, *supra* note 2, ¶26-27.

[30] R. ¶9.

b) The dispute must be submitted to the ICJ as per Section 2 of Part XV.

Section 2 of Part XV entails the compulsory dispute settlement procedures of the UNCLOS. Under Article 287, Rinnuco, at the time of ratification, agreed to compulsorily submit any dispute arising under the UNCLOS to the ICJ.[31] Therefore, Rinnuco must submit to the ICJ.[32] However, on 21st March 2016, when Aeolia requested Rinnuco to submit to the ICJ, Rinnuco refused the request and subsequently on 28th March 2016, filed a revocation to the declaration of the acceptance of the ICJ's jurisdiction.

Such a revocation is invalid as **(i)** there exists no right under international law to revoke unilateral declarations immediately **(ii)** it violates the law of treaties and **(iii)** Rinnuco's acceptance of jurisdiction did not intend for immediate termination.

(i) There exists no right under international law to revoke unilateral declarations.

State practice demonstrates that there exists no inherent right under international law that allows parties to unilaterally terminate or modify their declarations towards the submissions to the optional clause.[33] Most states explicitly reserve a right to immediate termination.[34] The fact

[31] R. ¶9.

[32] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.)*, Jurisdiction of the Court and Admissibility of the Application, 1984 I.C.J. Reports 392, 418 ¶65 (Nov. 26) [Nicaragua]; *Right of Passage over Indian Territory* (*Portugal v. India)*, Preliminary Objections, 1957 I.C.J. Reports 125 (Nov. 26) [Right of Passage Case].

[33] Humphrey Waldock, *Humphry Waldock on the Optional Clause*, 32 Brit. Y.B. Int'l L. 263-265 (1955- 1956).

[34] ANDREAS ZIMMERMAN ET AL., THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE 565 (2006) [ICJ COMMENTARY].

that no such reservation is made shows that there is no expectation of an inherent right to terminate immediately.

The International Law Commission ("ILC"), in its Guiding Principles to Unilateral Declarations of States ("GPUD"),[35] states that for a revocation to be permitted, **[a]** the terms of the declaration must contain specific terms related to revocation, **[b]** extent to which obligations are owed must be considered, and **[c]** any fundamental change of circumstances must be considered.

The words specified in the declaration are unknown, however, the declaration cannot be interpreted as having an implicit arbitrary power of reconsideration.[36] Aeolia filed the application to ICJ's jurisdiction under Article 287.[37] It is therefore evident that Rinnuco did not make a reservation for immediate revocation under Article 287 and hence the revocation is arbitrary [a].

Rinnuco had declared to submit to ICJ's jurisdiction compulsorily under the CBD, Kyoto Protocol and the UNFCCC.[38] It can, therefore, be inferred that Rinnuco accepts ICJ's jurisdiction to the extent of environmental law related disputes. Therefore, the revocation, in light of the present dispute is arbitrary and prejudicial to Aeolia [b].

Lastly, there has been no fundamental change of circumstance from the time of accepting jurisdiction. Therefore the revocation is arbitrary. [c]

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[35] *Guiding Principles Applicable To Unilateral Declarations of States Capable Of Creating Legal Obligations* [2006], 2 Y.B. INT. L. COMM., U.N. DOC. A/61/10 2006. [GPUD].

[36] *Nuclear Tests (Australia v. France),* 1974 I.C.J. Rep. 253 ¶53 (Dec. 20) [Nuclear Tests].

[37] R ¶23.

[38] R. ¶6, 10.

Furthermore, the nature of submissions to Article 36(2) of the Statute sets a scheme where all parties bind each other to the same obligations towards the optional clause.[39] This creates an interlocking bond of the declaration that is consensual in nature.[40] Allowing an immediate unilateral termination would be in violation of this contractual nature,[41] as such a termination must receive mutual consent from other parties to be valid.[42]

Therefore, the revocation is invalid under international law.

(ii) The revocation is in violation of the Vienna Convention on the Law of Treaties.

Optional clause declarations **[a]** fall within the law of treaties. An immediate revocation is, **[b]** in violation of Vienna Convention on the Law of Treaties ("VCLT").

[a] Optional clause declarations fall within law of treaties.

The ILC in its 17th session stated that declarations come within the purview of instruments that constitute a treaty under Article 2(1)(a) of the VCLT.[43] This view has been affirmed by the ICJ.[44]

[39] ICJ Commentary, *supra* note, at 564.

[40] Right of Passage Case, *supra* note 32, 146.

[41] ICJ Commentary, *supra* note 34, at 564.

[42] MARJORIE M WHITEMAN, DIGEST OF INTERNATIONAL LAW 410, 427-31, 441 (1963).

[43] *ILC Summary Records of the First Part of the Seventeenth Session* [1965], Y.B. Int'l L. Comm'n., UN Doc.A/CN.4/ SER.A/1965.

[44] Nicaragua, *supra* note 32, ¶63.

[b] Rinnuco's revocation is in violation of the VCLT.

According to the principle of *Pacta Sunt Servanda*,[45]a treaty cannot be terminated '*at will*' by a single party.[46] The VCLT only allows for such a termination if the treaty itself lays down a procedure to do so.[47] Further, VCLT prescribes reasonable time of minimum 3 months for a withdrawal to manifest.[48] A similar rule is present in the UNCLOS.[49]

The immediate termination, is therefore in violation of the VCLT.

(iii) Rinnuco's acceptance of jurisdiction did not intend for immediate termination.

In order to determine if a state has the right to immediate termination, the intention of the state while accepting jurisdiction must be considered.[50]Rinnuco did not make any reservations under Article 287, reserving the right to terminate immediately. Further, as Rinnuco has also accepted compulsory jurisdiction under the CBD and the UNFCCC without making any reservations, it is evident that Rinnuco did not have the intention to avoid environmental law related disputes being settled in ICJ.

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[45] Nuclear Tests Case, *supra* note 36, ¶49; GPUD, *supra* note 35, prin. 1.

[46] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 684 (2009) [Villiger].

[47] *Vienna Convention on the Law of Treaties*, art. 42(2)(1), 23 May, 1155 U.N.T.S 331 (1969) [VCLT].

[48] *Ibid.* at art. 53-56(b).

[49] UNCLOS, *supra* note 2, art. 281.

[50] *Frontier Dispute (Burkina Faso v. Republic of Mali)*, 1986 I.C.J. Reports 574, ¶40 (Dec. 22); Nuclear Tests, *supra* note 36, ¶53.

c) Rinnuco cannot claim exception under Section 3 of Part XV.

Article 279(2) of Section 3 of Part XV under the UNCLOS provides that a state can be exempted from compulsory settlement procedures under section 2,[51] if the dispute is in relation to marine scientific research undertaken within a state's EEZ.[52]

However, if the dispute is regarding the "*contravention of specified rules and standards for the protection and preservation of the marine environment"*,[53] then the exception does not apply. As the dispute is concerned with the protection of narwhals and validity of the OIFP under the CBD and the LC/LP, the provisions of section 2 are applicable.

Therefore section 3 exceptions are not applicable to the matter. Thus ICJ has jurisdiction under Section 2 of the UNCLOS.

C. <u>The ICJ has jurisdiction as the dispute concerns violation of customary international law.</u>

Disputes regarding the violation of customary international law come within the purview of the ICJ.[54]

Aeolia has raised contentions about the violation of the precautionary principle and the duty to not cause transboundary harm.[55] These principles are customary in nature.[56] Therefore, the ICJ has jurisdiction of the matter without an international agreement concerning the same.

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[51] UNCLOS, *supra* note 2, art. 297.

[52] UNCLOS, *supra* note 2, art. 246.

[53] UNCLOS, *supra* note 2, art. 297(1).

[54] Nicaragua, *supra* note 32, ¶73.

[55] R. ¶Annex B.

[56] *MOX Plant (Ireland v. United Kingdom),* 2003 42 ILM 1187, ¶95 (Dec. 3) (Wolfrum J., separate) [MOX Plant].

II. RINNUCO HAS VIOLATED INTERNATIONAL LAW BY CONDUCTING THE INITIAL PHASE OF THE OIFP IN THE MUKTUK OCEAN.

Rinnuco's OIFP in the Muktuk Ocean is in breach of its obligations under **(A)** customary international law, **(B)** the UNCLOS, (**C**), the LC/LP **(D)** the CBD and **(E)** the Paris Agreement.

A. Rinnuco's OIFP in the Muktuk Ocean violates its obligations under customary international law.

Rinnuco's OIFP is in contravention to **(1)** the precautionary principle, **(2)** duty to perform due diligence and **(3)** amounts to transboundary harm.

1. Rinnuco's OIFP is in contravention to the precautionary principle.

The precautionary principle obliges states to mitigate or prevent significant harm caused to the environment by activities under their jurisdiction[57] It is a part of customary international law,[58]

[57] Rio Declaration on Environment and Development, prin.15, June 14, U.N. Doc. A/CONF.151/26 (1992) [Rio]; PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 120 (2002) [Birnie & Boyle].

[58] ANTON & SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 85 (2011); FITZMAURICE, ET AL., RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 195 (2010) ; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (N.Z. v. Fr.),* 1995 I.C.J. 228, ¶91 (Dec. 20) (Palmer, J., dissenting).

and is enshrined in the Rio Declaration,[59] CBD,[60] LC/LP,[61] and UNCLOS,[62] which are binding on Rinnuco. The precautionary principle stands invoked when **(a)** there is scientific uncertainty with respect to the measure being undertaken and **(b)** there is threat of serious and irreversible environmental damage.[63]

a) There is scientific uncertainty in relation to the measure being undertaken.

There exists uncertainty about OIFPs affecting natural elements and processes leading to problematic climatic situations for marine biodiversity.[64] Therefore, Rinnuco's OIFP has been undertaken amidst scientific uncertainty.

b) There is a threat of serious or irreversible environmental damage.

In case of a likelihood of significant harm to the environment, States must act to mitigate or

[59] RIO, *supra* note 57.

[60] CBD, *supra* note 1, Preamble.

[61] Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Art 3.1- 3.3, Nov. 17, 36 ILM 1 (1997) [LP].

[62] UNCLOS, *supra* note 2, annex I.

[63] IUCN Council, Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management, *available at* http://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf (last accessed Oct. 28, 2016).

[64] *Scientific Synthesis of the Impacts of Ocean Fertilization on Marine Biodiversity*, Secretariat of the Convention on Biological Diversity, Montreal Technical Series No. 45, 53 (2009).

prevent this harm before it materializes.[65] There is no requirement that the harm must have occurred before a claim for said harm is made.[66]

OIFPs have a potential for causing an alteration of subsurface macronutrient ratios that have catastrophic effects on the fragile Arctic species with highly specialized dietary and habitat conditions.[67] Narwhals are on the red list of threatened animals as per the IUCN.[68] Thus harm to the species would be serious and irreversible, as it would result in a substantial reduction in population of a near threatened species. Therefore by proceeding with the project and allowing for the harm to materialize, Rinnuco has violated the precautionary principle.

Further, the precautionary principle required Rinnuco to use '*all the means at its disposal'* and put forth its '*best approach possible*' in conducting the EIA.[69] To satisfy this obligation, Rinnuco required an EIA as per the global standards under LC/LP.[70] The nature and magnitude of the proposed OIFP were so considerable that non-adherence to the LC/LP has rendered

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[65] RIO, *supra* note 57; Birnie & Boyle, *supra* note, at 57; PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 270 (2003) [Sands].

[66] *Ibid.*

[67] Patricia M. Glibert et al., *Ocean urea fertilization for carbon credits poses high ecological risks*, 56 MARINE POLLUTION BULLETIN 1049-1056 (2008).

[68] *Monodon Monoceros (Narwhal, Unicorn Whale),* Iucnredlist.org, http://www.iucnredlist.org/details/13704/0 (last updated 2016) [Mondon].

[69] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Reports 226, ¶29 (July 08).

[70] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. Reports 14, ¶205 (July 12) [Pulp Mills].

Rinnuco's EIA deficient.[71]

2. Rinnuco's OIFP is in contravention to the duty to perform due diligence.

The test of due diligence is accepted as the most appropriate standard for the duty to prevent transboundary harm.[72] This customary rule is imposed on all states to ensure that their activities do not cause damage to areas beyond their national jurisdiction.[73] For a breach of this duty, States are liable irrespective of any fault.[74]

In the *Pulp Mills* case, the ICJ held that where there exists a shared resource, there exist a duty to notify, inform and consult each nation about proposed activities that have potentially serious transboundary impacts.[75]In the *Lake Lanoux* case, the Arbitral Tribunal called on the parties concerned to pursue *'good faith consultations*' with a view of reaching an agreement.[76] The ICJ in the *Gabcikovo-Nagymaros* and *North Sea Continental Shelf* Case, held that the

[71] R. ¶18; *Ibid.* at ¶*207-214*.

[72] *ILC Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, [2006], 2 Y.B. INT. L. COMM. 2, U.N. DOC. A/56/10, 2006 [Transboundary Draft Articles]; Birnie & Boyle, *supra* note, at 56.

[73] MALCOLM N SHAW, INTERNATIONAL LAW 855 (6 ed. 2008).

[74] *Ibid.* at 762.

[75] Pulp Mills, *supra* note 70, ¶205; HANQIN XUE, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 133 (2003) [Hanqin].

[76] *Lake Lanoux Arbitration (Spain v. France)*, 1957 12 UNRIAA 281 (Nov. 16); J.G LAMMERS, INTERNATIONAL ENVIRONMENTAL LAW 517 (1997).

consultations must be '*meaningful*'.[77]

Till such procedural mechanism has been met the State initiating the planned activity must not authorize or carry it out. If consultations fail to produce a solution, the State of origin shall nevertheless take into account the interests of the affected State.[78] Rinnuco did not engage in any consultations with Aeolia with the intent of reaching an agreement in minimizing the risks from their OIFP. Thus, Rinnuco has not complied with its duty to perform due diligence.

3. Rinnuco's OIFP is in contravention of the duty not to cause transboundary harm.

The duty to not cause transboundary harm is a part of customary international law,[79] and is enshrined in the UNCLOS,[80] CBD,[81] and CMS.[82]

Rinnuco has caused transboundary harm as there exists **(a)** a causal relation, **(b)** a severe harm and **(c)** transboundary movement of harm.[83]

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[77] *North Sea Continental Shelf (Germany v. Denmark/Netherlands)*, 1969 I.C.J. Reports 3 (Feb. 20) [North Sea].

[78] Transboundary Draft Articles, *supra* note 72.

[79] Rio, *supra* note 57, art. 2; ALAN E BOYLE, CODIFICATION OF INTERNATIONAL ENVIRONMENTAL LAW AND THE INTERNATIONAL LAW COMMISSION: INJURIOUS CONSEQUENCES REVISITED 68 (2012).

[80] UNCLOS, *supra* note 2, art. 194(2).

[81] CBD, *supra* note 1, art. 3.

[82] *Convention on the Conservation of Migratory Species of Wild Animals*, art. 2, 4 (3), June 3, 1651 U.N.T.S. 28395 (1979); R. ¶8.

[83] Hanqin, *supra* note 75, at 4.

a) There exists a causal relation.

Transboundary damage should have 'some reasonably proximate causal relation to human conduct.'[84] In the *Corfu Channel case,* even if it could not be established with complete certainty that the mines caused damage, the court ruled some degree of certainty would suffice as proof to establish causality.[85] Thus, a claim relating to environmental damage cannot be dismissed on the basis that the scientific evidence is not certain enough.[86]

There exist a causal link as OIFPs have potential for causing an alteration of subsurface macronutrient ratios leading to the ocean becoming anoxic and thus the death of fish and krill.[87] Owing to highly specialized dietary and habitat conditions, this could lead to the death of the narwhals as fish and krill are its main dietary supplement.[88] International law tribunals have used the *"but for test"* or the *"sine qua non"* formula as tools to establish causation.[89] The marine life within the Muktuk Ocean is a shared resource.[90] Even if a clear scientific cause of

[84] OSCAR SCHACHTER & MAURIZIO RAGAZZI, INTERNATIONAL RESPONSIBILITY TODAY 366 (2005).

[85] ICJ Commentary, *supra* note 34, at 1265.

[86] RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW 261 (2005).

[87] Secretariat of the Convention on Biological Diversity, An Updated Synthesis of the Impacts of Ocean Acidification on Marine Biodiversity (S. Hennige, J.M. Roberts & P. Williamson). Montreal, Technical Series No. 75 (2014).

[88] National Marine Mammal Laboratory, Afsc.noaa.gov (2016), http://www.afsc.noaa.gov/nmml/education/cetaceans/narwhals.php (last visited Nov 6, 2016).

[89] *Second Report on State responsibility by* Arangio-Ruiz, 2 Y.B. Int. L. Comm. A/44/10 (1989); CHRISTIAN GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 169 (1996).

[90] R. ¶1.

death cannot be ascertained, the deaths of the narwhals occurring for the first time, right after the OIFP, indicate that if not for the OIFP, the narwhals would still be alive.

b) There exists severe harm.

For a harm to constitute transboundary harm, it must be '*greater than insignificant harm which is normally tolerated.*'[91] The determination of the threshold of the harm must be seen in the context of the affected state.[92] Narwhals are of immense value to Aeolia as they, not only form a part of Aeolia's ecotourism industry but are also culturally significant.[93] Further, narwhals are on the Red List of threatened species.[94] Therefore, the death of nine narwhals, causes a significant reduction in their population, satisfying the threshold of a severe harm.

c) There exists transboundary movement of harm.

Since OIFPs are transboundary in nature, and narwhals are highly migratory species that travel between the coasts of Aeolia and Rinnuco,[95] the location of the bodies in Rinnuco does not negate the transboundary effect of harm.[96]

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[91] *Sixth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law by Julio Barboza*, Special Rapporteur, 2 Y.B. Int'l L. Comm. UN Doc. A/CN.4/428 (1990).

[92] Transboundary Draft Articles, *supra* note 72, art. 2.

[93] R. ¶3.

[94] Monodon, *supra* note 68.

[95] UNCLOS, *supra* note 2, Annex 1.

[96] R. ¶8,3.

Narwhals are a key species in the marine food chain, regulating levels of large and small predators.[97] As such, a threat to the narwhals causes overall '*habitat degradation*' in Muktuk Ocean,[98] a shared resource,[99] thus affecting Aeolia. Thus harming a migratory species like narwhals is a violation of the duty to avoid transboundary harm.

B. Rinnuco's OIFP is in contravention of the UNCLOS.

Rinnuco's OIFP is in contravention of the UNCLOS as it has **(1)** violated its duty to prevent, reduce, and control pollution of the marine environment, **(2)** not conducted an adequate EIA and **(3)** violated Articles 64 and 65 of the UNCLOS.

1. Rinnuco has violated its duty to prevent, reduce, and control pollution of the marine environment.

Under Articles 192 and 193, States Parties are required to protect and preserve the marine environment and under Article 194 they are to take measures to prevent pollution. Further, measures are to be taken to protect and preserve rare and fragile ecosystems such as the Arctic region.[100] Rinnuco's OIFP is in violation of Article 192 as the addition of ferrous-sulphate to the Muktuk ocean is '*deliberate*' and has negative impacts on the marine environment.[101]

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[97] Narwhal, Species, World Wildlife Fund (2016), http://www.worldwildlife.org/species/narwhal (last visited Nov 6, 2016).

[98] R. BARBAULT AND S. D. SASTRA PRADJA, GENERATION, MAINTENANCE AND LOSS OF BIODIVERSITY. GLOBAL BIODIVERSITY ASSESSMENT, 193–274 (1995).

[99] R. ¶2.

[100] Arctic - National Wildlife Federation, Nwf.org (2016), http://www.nwf.org/wildlife/wild-places/arctic.aspx (last visited Nov 6, 2016).

[101] Chisholm, *supra* note 15; KL Denman, *Climate change, ocean processes and ocean iron fertilization*, 364 MARINE ECOLOGY PROGRESS SERIES 219-225 (2008).

Moreover, States Parties are obligated to prevent pollution of the marine environment from the use of technologies under their jurisdiction or control.[102] The OIFP violates the objectives of the UNCLOS as the ferrous-sulphate introduced by Rinnuco has a potentially damaging effect on human health, living resources and marine life.[103] As shown before, such potential impact characterize the OIFP as pollution, prohibited under the UNCLOS. Rinnuco has, thus, violated the articles to prevent, reduce, and control pollution of the marine environment from any source.[104]

2. Rinnuco has not conducted EIA as per the requirements specified under the UNCLOS.

Rinnuco has violated Article 204 and Article 206 that deal with monitoring of risks or effects of pollution, by failing to adhere to the accepted global standards, the LC/LP, for EIA as mandated by Article 210. Thus the EIA conducted by Rinnuco is not appropriate under UNCLOS.

3. Rinnuco has violated Articles 64 and 65 of the UNCLOS.

Rinnuco had a duty of ensuring conservation and promotion of the optimum utilization of highly migratory species under Article 64 and Article 65.[105] Narwhals are highly migratory

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[102] *The Thirtieth Meeting of the Contracting Parties to the London Convention and the third meeting of the Contracting Parties to the London Protocol on the Regulation of Ocean Fertilization,*, Annex. 6, Oct. 31, LC/LP.1 LC 30/16 (2008) [LP/LC.1].

[103] Chisholm, *supra* note 15; UNCLOS, *supra* note 2, art.194;

[104] UNCLOS, *supra* note 2, art. 1(1),(4).

[105] R. ¶18.

species as per Annex 1 of the UNCLOS.[106] By conducting the OIFP that led to the death of 9 narwhals, Rinnuco has acted in contravention to its obligations under the UNCLOS.

C. Rinnuco's ocean fertilization project is in contravention of the LC/ LP.

(1) The LC/LP form part of customary international law. **(2)** Rinnuco's OIFP does not meet the requirements of legitimate scientific research as required by the LC/LP.

1. LC/LP and its resolutions form part of customary international law.

The LC/LP and the resolutions thereunder set out a regulatory framework for OIFPs including the requirements for EIAs.[107] This framework forms a part of customary international law, as there is extensive state practice demonstrated by the 35th CBD COP,[108] and several regional conventions, like the OSPAR Conventions, that contain provisions based on the LC/LP and their resolutions.[109] Further, UNGA Resolutions 62/215 and 67/78, and the International Maritime Organization's 2007 Statement of concern, requires States to use the utmost caution

[106] UNCLOS, *supra* note 2, Annex. 1.

[107] Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, art. 3, Nov. 13, 1046 U.N.T.S 120 (1972); LP, *supra* note 61, art. 1.4.1; Resolution 2008, *supra* note 106*;* Assessment Framework For Scientific Research Involving Ocean Fertilization, Oct. 14, Res. LC/LP.2, 2010 [LC/LP.2].

[108] IMO, *Report Of The Thirty-Fifth Consultative Meeting And The Eighth Meeting Of Contracting Parties Eighth Meeting Of Contracting Parties To The London Protocol*, Annex 4, LC 35/15, (Oct. 13, 2013).

[109] Convention for the Protection of the Marine Environment of the North-East Atlantic, Sept. 22, 32 ILM 1069 (1993).

when considering proposals for OIFPs.[110] The state practice is accompanied by sufficient *opinio juris* as Rinnuco is a contracting party to the LC/LP and did not object to the regulatory framework of the same.[111] It further showed a clear intention to be bound by the principles enshrined in it as they appear in the CBD, UNCLOS, Rio Declaration and the Stockholm declaration that Rinnuco is a party to.

2. Rinnuco's ocean fertilization project violates the LC/LP as it does not constitute legitimate scientific research.

An obligation to carry out EIAs exists in situations where there is a risk of transboundary harm.[112] Under Article III(1) of the LC, Article 1.4.1.1 of LP, dumping or introduction of ferrous-sulphate into the marine environment constitutes '*disposal of other matter*' and is therefore prohibited under the LC/LP. The only exception provided for under the LC/LP is when OIFPs are carried out for legitimate scientific research. Under LC/LP.1 such OIFPs for legitimate scientific research are regarded as placement as opposed to dumping.[113]

LC/LP.2 requires parties to act with caution and stipulates abandonment of projects where adverse effects are predicted.[114]An OIFP that is not carried out in accordance to the assessment

[110] International Maritime Organization, *Statement of Concern regarding Iron Fertilization of the Oceans to sequester CO2*, July 13, LC/LP.1/Circ.14 (2007); International Maritime Organization, *Compliance Procedures And Mechanisms Pursuant To Article 11 Of The 1996 Protocol To The London Convention 1972*, annex 7, LC 29/17, 2007.

[111] LC/LP.1, *supra* note 103.

[112] Pulp Mills, *supra* note 70, ¶204.

[113] LC/LP.1, *supra* note 103.

[114] LC/LP.2, *supra* note 108.

framework as per LC/LP.2 will not be regarded as legitimate scientific research.[115] Rinnuco did not carry out its EIA as per the LC/LP.2, therefore its OIFP is not legitimate scientific research.[116]

D. Rinnuco's OIFP is in contravention of the CBD.

Rinnuco's OIFP is in contravention of the CBD as Rinnuco has violated **(1)** the provisions of the CBD and **(2)** COP decisions.

1. Rinnuco has violated provisions of the CBD.

Article 3 of the CBD prohibits States from using their territory for acts contrary to the rights of other states.[117] Article 8 of the CBD deals with in-situ conversation.[118] In the cases of imminent or grave danger to biodiversity of another state, parties in control are to initiate action to prevent such danger or damage.[119] Thus, owing to the reports by various institutions indicating adverse effects of OIFP,[120] Rinnuco was obligated to abandon its OIFP.

Article 14 of the CBD mandates *'appropriate procedures'* of impact assessment to be undertaken. However, since the term *'appropriate procedures'* has not been defined,

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[115] *Ibid.*

[116] R. ¶18.

[117] 2 Y.B. Intl L. Comm. 1 Add., 46-56, 86-87 (1985).

[118] CBD, COP, *Decision III/9 - Implementation of Articles 6 and 8 of the Convention*, ¶9(a), UNEP/CBD/COP/3/9, 1996.

[119] CBD, COP, *Report Of The Open-Ended Ad Hoc Group Of Experts On Biosafety - Decision II/7*, ¶1- 2, UNEP/CBD/COP/2/7, 1995.

[120] CG Trick, *Iron Enrichment Stimulates Toxic Diatom Production In High-Nitrate, Low-Chlorophyll areas*, 107 PROC NATL. ACAD. SCI. USA 13 (2010).

interpretation as per COP decision VIII/28, that requires EIAs as per global standards, must be seen.[121] Since the LC/LP.2 framework has not been followed, Article 14 has been violated.

2. Rinnuco's experiment is in violation of COP Decisions.

(a) Rinnuco's experiment is in violation of COP decisions as **(b)** Rinnuco has violated COP decisions IX/16, XI/20 and X/33.

a) COP decisions are legally binding on Rinnuco.

By application of Art 31(3)(a) and 32 of the VCLT, every decision of the COP is a legally binding interpretation of the convention.[122] It amounts to subsequent agreement regarding application of the treaty, establishing agreement of the parties, as COP decisions are always adopted in consensus.[123] Since CBD does not deal with OIFPs specifically, in order to confirm its position with regards to the same, COP decisions are binding.[124]

Alternatively, Rinnuco is prohibited from acting in an inconsistent manner.[125] Rinnuco's participation in LC/LP, UNCLOS, UNFCC, UNGA 67/78, Rio Protocol, Stockholm Conference, Kyoto Protocol and COP decisions IX/16, X/33, XI/20 and the nature of the consensus process reveals that Rinnuco acceded to the principles in these decisions

[121] CBD, COP, *Decision VIII/28- Impact Assessment*, Annex 1, ¶1.

[122] VCLT, *supra* note 47, art. 31- 32; Mark E. Villiger, *supra* note 46, at 431.

[123] *Rules of Procedure for Meetings of the Conference of the Parties To The convention On Biological Diversity*, United Nations Environment Programme, at Rule 40 (2010).

[124] Report of ILC on Subsequent agreements And Subsequent Practice In Relation To The Interpretation of Treaties, A/CN.4/L.813 (May 24, 2013).

[125] *Case Concerning the Payment of Various Serbian Loans Issued in France (France v. Kingdom of Serbs, Croats and Slovenes)*, 1929 P.C.I.J., Ser. A No. 20/21, 6 (39) (July 12).

consistently.[126] Thus Rinnuco is bound by consistency.

b) Rinnuco has violated COP decisions IX/16, X/33 and XI/20.

COP decision IX/16, X/33 and XI/20 reaffirmed the precautionary principle to be complied with while conducting OIFPs. [127] They declared large-scale ocean fertilization impermissible.[128] The exception to the moratorium on OIFPs only extends to '*small-scale scientific research'*.[129] However, the term '*small scale*' has not been defined. The ENMOD Convention of 1976 holds that widespread means an area on the scale of several hundred square kilometers.[130] This refers to state practice supporting the idea that OIFPs cannot be considered as small scale as they exceeds several hundred kilometers. Therefore, since Rinnuco's OIFP spanned on an area of 2000 sq.km,[131] it is a large scale project and is thus prohibited by the CBD.

E. Rinnuco's OIFP is not permissible under the Paris Agreement.

Obligations under Paris Agreement are not binding on Rinnuco as it has not ratified it.[132] Further, Warsaw COP decision calls for intended nationally determined contributions measures

[126] R. ¶20.

[127] COP XI/20, *supra* note 6.

[128] *Ibid.*

[129] Melissa Eick, *A Navigational System for Uncharted Waters: The London Convention and London Protocol's Assessment Framework on Ocean Iron Fertilization*, 46 TULSA L. REV. 362 (2010).

[130] R. Rayfuse, *supra* note 18.

[131] R. ¶15.

[132] R. ¶10.

to be in consonance with existing legal obligations.[133] Since Rinnuco's OIFP is in violation of the LC/LP, UNCLOS, CBD, it cannot be permissible under the Paris Agreement either.

[133] *Report of the Conference of the Parties on its nineteenth session*, United Nations Framework Convention on Climate Change, 19th Sess., ¶2(b), FCCC/CP/2013/10/Add.1 (Sep. 24, 2014).

CONCLUSION AND PRAYER

In light of the foregoing arguments, the Federal State of Aeolia, respectfully prays to the Court to adjudge and declare that:

1. The International Court of Justice has jurisdiction to determine the matter;
2. The Republic of Rinnuco violated international law by conducting the initial phase of its ocean fertilization project in the Muktuk Ocean and that any re-initiation of this project would violate international law.

Respectfully Submitted

Agents for the Federal Republic of Aeolia