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INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING OIL POLLUTION IN THE MARINE ENVIRONMENT

THE FEDERAL STATES OF ALBACARES
(APPLICANT)

v.

THE REPUBLIC OF REPELMUTO
(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

2011

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STATEMENT OF JURISDICTION

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

QUESTIONS PRESENTED

I. **WHETHER THE REPUBLIC OF REPELMUTO VIOLATED INTERNATIONAL LAW.**

II. **WHETHER THE REPUBLIC OF REPELMUTO HAS A LEGAL OBLIGATION TO COMPENSATE ALBACARES FOR DAMAGES UNDER INTERNATIONAL LAW.**

STATEMENT OF FACTS

The Federal State of Albacares and the Republic of Repelmuto are coastal States that share a common territorial boundary [R.1].

Albacares is a developing country with approximately 10,000,000 inhabitants [R.2], the majority of which live along the coast [R.2]. Known for its beaches and coral reefs, its tourism is the second-largest source of hard currency [R.2].

Repelmuto has approximately 220,000,000 inhabitants [R.3]. As an industrialized country with the second highest GDP in the world, Repelmuto is committed to energy independence [R.3]. It authorized the increase of oil exploration and extraction activities within its Exclusive Economic Zone in the Sedna Gulf ("Gulf") [R.4].

In February 2009, *Blue Ocean*, a Fahy Oil-owned offshore oil rig located in the Gulf, exploded and sank [R.16]. The explosion made it impossible for Fahy Oil employees to activate the hard-wired controller that would trigger the blowout preventer [R.16]. Due to a dead battery, the "Dead Man" switch failed to activate the preventer [R.16]. Consequently, oil began to flow from a broken wellhead [R.16].

Repelmuto promptly notified and kept Albacares fully informed about the incident and its efforts to stop the oil flow [R.18]. To mitigate the environmental impacts of the incident [R.21], the State's environmental agency Repelmuto Environmental Protection Organization, authorized the use of the chemical dispersant, ChemEx-5000 [R.19]. Repelmuto assured Albacares that it is taking all available actions to halt the flow of oil and that the use of ChemEx is consistent with the Precautionary Principle [R.21].

On 4 July 2009, Fahy Oil finally succeeded in drilling a relief well that halted the flow of oil from the broken wellhead [R.28].

Albacares sought compensation from Repelmuto for damages caused by the *Blue Ocean* incident [R.31]. Repelmuto replied that Albacares should seek compensation from Fahy Oil as the responsible party [R.32].

Failing to resolve the dispute, parties agreed to submit the matter to the I.C.J [R.36].

SUMMARY OF ARGUMENTS

Repelmuto did not violate International Law. It complied with the principle of *"sic utere tuo et alienum non laedas"* in regulating the activities of *Blue Ocean*. It took all the necessary legislative, administrative and other actions to prevent harm. Furthermore, when the incident took place, it exercised due diligence in employing methods to halt the oil flow and mitigate its effects. The Precautionary Principle justified the use of ChemEx by Repelmuto.

Repelmuto does not have any legal obligation to compensate Albacares under International Law. Repelmuto is not liable for damages under the MARPOL, UNCLOS and the CBD. Moreover, the unilateral declaration of President Kempii does not obligate Repelmuto to compensate Albacares. On the contrary, Fahy Oil as the operator of the oil platform is civilly liable for the resulting environmental damage.

ARGUMENT

I. REPELMUTO DID NOT VIOLATE INTERNATIONAL LAW.

A State complies with its duty to avoid transboundary harm when it exercises due diligence,[1] whether or not harm already occurred.[2] In the oil industry, due diligence is satisfied when States provide for a regulatory framework over oil exploration and extraction activities.[3] A component of the regulatory framework is the use of emergency shut-off systems [*infra* Part I(A)(2)]. Here, Repelmuto complied with its international legal obligation by adopting and implementing a regulatory framework over oil exploration and extraction activities [R.12-14,19,24] and requiring the use of an emergency shut-off system [R.13].

A. REPELMUTO COMPLIED WITH INTERNATIONAL LAW IN REGULATING THE ACTIVITIES OF THE *BLUE OCEAN*.

1. Repelmuto complied with the duty to avoid transboundary harm by exercising due diligence.

Compliance with the duty to avoid transboundary harm underlying the International Convention for the Prevention of Marine Pollution from Ships ("MARPOL"),[4] the United Nations Convention on the Law of the Sea ("UNCLOS"),[5] the Stockholm Declaration,[6] the Rio

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[1] Convention on the Law of the Sea, Dec. 10, 1982, art.208, 1833 U.N.T.S. 3 [UNCLOS]; Pulp Mills in the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 55-56 (Apr. 20), *available at* <http://www.icj-cij.org/docket/index.php?p1=3&p2=1&PHPSESSID=999978d2d5b2f6997c05e80af78c1080&case=135&code=au&p3=4> (last accessed Nov. 17, 2010).

[2] Report of the International Law Commission on the Work of its Fifty-Third Session, 154, U.N. Doc.A/56/10 (2004) [53rd ILC Report].

[3] *Id.* at 156; ABRAHAMS , REGULATING CORPORATIONS: A RESOURCE GUIDE 6 (2002).

[4] International Convention for the Prevention of Marine Pollution from Ships, February 17, 1978, art.3, 1340 U.N.T.S 61 [MARPOL].

[5] UNCLOS, art.208.

[6] Stockholm Declaration on the Human Environment, Prin.7, U.N. Doc.A/CONF.48/14/Rev.1 (1973).

Declaration,[7] and the Draft Articles on the Prevention of Transboundary Harm ("Draft Articles on Transboundary Harm"),[8] is by way of exercising due diligence.[9] Due diligence is the reasonable efforts to take appropriate measures, in a timely fashion, to address a contemplated procedure.[10] In this case, Repelmuto exercised due diligence by discharging all appropriate measures relating to the proper regulation of the *Blue Ocean* [R.12,14].

a. <u>Repelmuto exercised the requisite due diligence by establishing a regulatory framework to govern oil rig operations.</u>

The International Law Commission ("I.L.C.") explains that where the activities are conducted by private operators, the State's obligation to exercise due diligence is limited to establishing a regulatory framework and ensuring that private operators comply with State regulations.[11]

Repelmuto exercised due diligence by establishing a regulatory framework that would monitor oil rig operations [R.12,14]. First, Repelmuto has established laws and regulations, which private operators like Fahy Oil must adhere to [R.12]. In conformity with the practice of requiring (a) a primary control system; and (b) an emergency shut-off system (should the primary control system fail) to trigger the blowout preventer,[12] Repelmuto mandates that all oil rigs should have primary hard-wired controllers and a secondary "Dead Man" switch [R.13].

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[7] Rio Declaration on Environment and Development, Prin.14, U.N. Doc. A/CONF.151/26 (1992) [Rio Declaration].

[8] Consideration of Prevention of Transboundary Harm from Hazardous Activities and Allocation of Loss in the Case of Such Harm, art.3, G.A. Res. 62/68 U.N. Doc.A/RES/62/452 62nd sess. Agenda item 84 (2008) [CPTH].

[9] 53rd ILC Report, *supra* note 2, at 154.

[10] *Id.*

[11] *Id.* at 156.

[12] WEST ENGINEERING SERVICES, EVALUATION OF SECONDARY INTERVENTION METHODS IN WELL CONTROL FOR U.S. MINERALS MANAGEMENT SERVICE 5 (2003). [WEST ENGINEERING]

Second, the Minerals Extraction Agency ("M.E.A.") was established to grant licenses to private operators, and regulate oil drilling and extraction within Repelmuto's EEZ [R.12]. Further, the M.E.A. ensures the operators' compliance with Repelmuto's laws and regulations [R.12]. Accordingly, Repelmuto complied with the duty to avoid transboundary harm in the regulation of the *Blue Ocean*.

b. <u>Despite the occurrence of harm, Repelmuto exercised the requisite due diligence under International Law.</u>

Due diligence is an obligation of conduct; the responsibility of a State is engaged if it failed to take the necessary measures to address the harm.[13] In contrast, an obligation of result engages State responsibility once harm is proven regardless if the State exercised due diligence.[14]

That the duty to prevent transboundary harm to other States is an obligation of conduct has been settled by the International Court of Justice ("I.C.J.") in the 2010 *Pulp Mills in the River Uruguay* case.[15] In that case, Argentina claimed damages against Uruguay for the harm resulting from the pollution caused by the Uruguay pulp mills.[16] In deciding for Uruguay, the Court ruled that although Argentina presented proof of harm suffered by the river, it failed to establish that Uruguay did not exercise the requisite due diligence in the mills' operations.[17] This doctrine is supported by the I.L.C.'s pronouncements that due diligence is not a guarantee

[13] *Pulp Mills*, 2010 I.C.J. at 55-56; BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 455 (2008).

[14] BROWNLIE, *supra* note 13, at 455.

[15] *Pulp Mills*, 2010 I.C.J. at 55-56.

[16] *Id.* at 6.

[17] *Id.* at 55-56.

that significant harm will be totally prevented;[18] and if inevitable, the State is merely required to exert its best possible efforts to minimize the risk of harm.[19]

Repelmuto exercised due diligence not only by implementing regulations to prevent the oil spill [*supra* Part I(A)(1)(a)] but also by adopting measures to halt the oil flow [*infra* Part I(B)(1)] and mitigate the effects of the oil slick [*infra* Part I(B)(2)]. Thus, despite the occurrence of the oil spill, Repelmuto exercised the requisite due diligence.

2. Customary International Law does not require the acoustical trigger as the prescribed emergency shut-off system. Conversely, the use of any emergency shut-off system is sufficient compliance with the same.

a. <u>There is no State practice that demonstrates the use of acoustical trigger as the prescribed emergency shut-off system.</u>

For a norm to crystallize into custom, there must be extensive practice by States whose interests are especially affected.[20] Of the 100 oil-producing countries especially affected and interested in the oil industry,[21] only Norway and Brazil, which comprise a minimal amount of 6% of the global oil supply,[22] require the installation of an acoustical trigger [R.33]. The adoption of these two States of an acoustical trigger as the prescribed emergency shut-off system does not constitute sufficient number to evince the requisite State practice necessary to establish custom.

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[18] 53rd ILC Report, *supra* note 2, at 154 ¶7.

[19] *Id.* at 154, ¶7.

[20] North Sea Continental Shelf (F.R.G. v. Den.-Neth.), 1969 I.C.J. 3, 43; BROWNLIE, *supra* note 13, at 8.

[21] Central Intelligence Agency, *The World Factbook 2009*, *available at* <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2173 rank.html> (last accessed November 17, 2010).

[22] *Id.*

b. <u>There is no *opinio juris* that supports the use of acoustical trigger as the prescribed emergency shut-off system.</u>

Opinio juris cannot be established if a certain form of behavior is only deemed discretionary.[23] There is discretion if a State uses vague and general language[24] showing legal uncertainty such as "*necessary or appropriate measures*" or "*best practices*" without indicating any criteria for determining compliance.[25]

In the oil industry, States merely set general environmental standards granting private operators the discretion to set the means of compliance.[26] Regulations of major oil-producing States including, but not limited to, the United States, United Kingdom, Australia, Canada and South Africa, employ words, which do not specifically require acoustical trigger.[27] For instance, U.S. regulations use the "*best technology available not entailing excessive costs*" to guide rig operators in choosing an emergency shut-off system.[28] U.K. and South African regulations rely on prudent, safe equipment operation "*as far as reasonably practicable,*" without specifying any shut-off system.[29] Nigeria, the biggest oil-producing country in Africa, only requires that oil rig operators "*take prompt steps to end pollution"* where it already occurred.[30] Similar standards

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[23] *North Sea Continental Shelf*, 1969 I.C.J. at 43.

[24] Vienna Convention on the Law of Treaties, May 23, 1969, art.31(1), 1155 U.N.T.S. 331 [VCLT]; Fisheries Jurisdiction (U.K. v. Ice.), 1973 I.C.J. 3, 6.

[25] MOX Plant, Order No. 3 (Ir. v. U.K.) Perm.Ct.Arb., 42 I.L.M. 1187, ¶63 (2003); Boustany, *The Development of Nuclear Law-Making or the Art of Legal "Evasion,"* 61 NUCLEAR L.BULL. 39, 45 (1998); Kimerling, *International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law*, 26 COLUM. J. ENVTL. L. 289, 297-298 (2001).

[26] Kimerling, *supra* note 25, at 393.

[27] GAO, ENVIRONMENTAL REGULATION OF OIL AND GAS 12 (1998).

[28] WEST ENGINEERING, *supra* note 12, at 18.

[29] *Id.* at 18.

[30] GAO, *supra* note 27, at 11.

using general and vague language are also contained in other State regulations.[31] Consequently, there is no *opinio juris* in requiring acoustical trigger as the prescribed emergency shut-off system.

c. <u>At best, State practice and *opinio juris* support the use of *any* emergency shut-off system. Repelmuto complied with this by requiring the "Dead Man" switch.</u>

Emergency shut-off systems are alternative means to operate the blowout preventer in the event of total loss of the primary control system.[32] The types of emergency shut-off systems are the "Dead Man" switch, acoustical trigger, AMF System, Emergency Disconnect System, Auto-Disconnect, Auto-Shear and ROV Intervention.[33] At most, what the majority of oil-producing States require is the use of **any** emergency shut-off system [*supra* Part 1(A)(2)(a)&(b)], leaving the choice to the private operator.[34]

Repelmuto requires the "Dead Man" switch as the emergency shut-off system [R.13]. The "Dead Man" switch, which is a stand-alone system similar to an acoustical trigger, automatically activates the blowout preventer without human intervention once the communication line between the oil rig and the drill pipe is severed by an accident [R.11].[35] On the other hand, the acoustical trigger uses encoded acoustic signals transmitted through the water to trigger the blowout preventer.[36] However, the acoustical trigger may not be able to send

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[31] Kimerling, *supra* note 25, at 393.

[32] WEST ENGINEERING, *supra* note 12, at 5.

[33] *Id.* at 13-15.

[34] GAO, *supra* note 27, at 12.

[35] WEST ENGINEERING, *supra* note 12, at 13.

[36] *Id.* at 81.

signals strong enough to penetrate a mud plume that would be present in a disconnect scenario[37] such as in this case [R.29]. Thus, even if Fahy Oil used an acoustical trigger, there is low probability that it would have triggered the blowout preventer.[38] Because of the probability of failure among all emergency shut-off systems, the practice is that any one of these systems may be employed.[39] Therefore, by requiring the "Dead Man" switch, Repelmuto complied with the duty to use an emergency shut-off system.

B. REPELMUTO COMPLIED WITH INTERNATIONAL LAW IN RESPONDING TO THE *BLUE OCEAN* INCIDENT.

The duty to avoid transboundary harm requires States to terminate the cause of the harm[40] and minimize its effects.[41] After the incident, Repelmuto complied with its obligation by requiring the sealing of the broken wellhead [R.18] and the mitigation of the effects of the oil slick [R.19].

1. Repelmuto exercised due diligence in requiring the use of methods to halt the oil flow.

In the *Trail Smelter Arbitration,* the Tribunal required the parties to effectuate mechanisms that would stop the continuing harmful pollution.[42] In the oil industry, States require private operators to implement all possible mechanisms to stop an oil spill.[43]

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[37] *Id.*

[38] AEROSAFE RISK MANAGEMENT, REVIEW OF SELECTED OFFSHORE PETROLEUM REGULATORY REGIMES 54 (2010); WEST ENGINEERING, *supra* note 12, at 81.

[39] AEROSAFE, *supra* note 38, at 54; WEST ENGINEERING, *supra* note 12, at 81.

[40] Cho, *Private Enforcement of NAFTA Environmental Standards Through Transnational Mass Tort Litigation: The Role of United States Courts in the Age of Free Trade*, 27 ST. MARY'S L.J. 817, 851 (1996).

[41] CPTH, art. 8; 53rd ILC Report, *supra* note 2, at 153 ¶1.

[42] Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1938/1941).

Repelmuto's President outlined her government's effort to stop the oil flow [R.24] for Fahy Oil to follow. Consequently, interim measures, including the "junk shot" technique and the "top hat" approach [R.22] were made right after the *Blue Ocean* incident [R.18,20], while the drilling of a relief well, a more permanent solution,[44] was being commenced [*infra* ¶3]. "Junk shot" involves materials like golf balls, rubber tire pieces and rope knots being injected directly into a port on the side of the blowout preventer to choke off the oil flow.[45] "Top hat" uses an upside down funnel to trap, siphon and channel oil into container ships.[46]

Ultimately, the oil flow was halted by a relief well [R.28], a method where a well is drilled several kilometers below the seabed to intersect a damaged oil well in order to divert the oil into the relief well.[47] While this is considered the best method to halt the oil flow,[48] it is difficult to achieve.[49] Because the intersection happens below the seabed, finding the precise location of the damaged oil well is a matter of trial-and-error, thus requiring several relief wells to be drilled until one well intersects with the oil well.[50] Generally, the successful drilling of a relief well takes relatively three months.[51] This explains why the oil flow was halted only on

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[43] GAO, *supra* note 27, at 10-12.

[44] O'CONNOR, THE DEEPWATER HORIZON CATASTROPHE: A FACTUAL OVERVIEW AND PRELIMINARY FIRST-PARTY ANALYSIS 15 (2010).

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] CONGRESSIONAL RESEARCH SERVICE, DEEPWATER HORIZON OIL SPILL: SELECTED ISSUES FOR CONGRESS 25-26 (2010) [CRS].

[49] *Id.*

[50] *Id.*

[51] *Id.*

July 4, 2009, or four months since the explosion [R.28]. Considering this four-month period, it may be reasonably inferred[52] that Repelmuto, from the time of the explosion, already required the drilling of the relief well while the interim measures were employed. Thus, Repelmuto undertook all necessary measures, in a timely fashion, to seal the broken wellhead.

Moreover, Repelmuto fully informed Albacares of the measures it undertook in addressing the *Blue Ocean* incident [R.18,21,32,34]. All these circumstances show that Repelmuto exercised utmost due diligence and complied in good faith with all its international obligations.

2. Repelmuto acted consistently with International Law in authorizing the use of ChemEx-5000 to mitigate the effects of the oil slick.

The Precautionary Principle states that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not preclude the use of cost-effective measures to prevent such threat.[53] Here, the use of the chemical dispersant, ChemEx-5000, is consistent with the Precautionary Principle. In any case, the use of ChemEx-5000 has beneficial purposes, which will offset any averred harm.

a. <u>There is a threat of serious or irreversible damage.</u>

An oil spill spanning thousands of kilometers is a classic example of a threat of serious or irreversible damage.[54] In this case, the oil spill spanned more than 85,000 square kilometers on the surface, while the precise extent of the underwater plume was uncertain [R.29], prompting Repelmuto's and Albacares' coastal populations to express grave concerns about the effects

[52] Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 108-09.

[53] Rio Declaration, prin.15.

[54] Romero, *Punishment for Ecological Disasters: Punitive Damages and/or Criminal Sanctions*, 7 U. ST. THOMAS L.J. 154, 154 (2009); Samy, *Cry "Humanitarian Assistance," and Let Slip the Dogs of War,* 2007-OCT ARMY LAW. 52, 56 (2007).

[R.23]. Because of the magnitude of the affected area, the coastal tourism and fishing industries of both States collapsed [R.29-30]. In Repelmuto, the threat of food poisoning from marine organisms that ingested oil caused the prohibition of commercial and recreational fishing operations [R.29]. Numerous organisms died of suffocation and intoxication from oil, resulting in the appearance of dead zones in Repelmuto's EEZ [R.29]. The above circumstances demonstrate threats of serious and irreversible damage and justify Repelmuto's immediate use of ChemEx-5000.

b. <u>There is lack of full scientific certainty regarding the effects of ChemEx-5000.</u>

Before REPO released its study on the effects of ChemEx-5000 [R.27], the alleged negative effects of the dispersants had not been scientifically established [R.19-20]. Meanwhile, practical [*infra* Part I(B)(2)(c)] and legal considerations (Precautionary Principle)[55] compelled Repelmuto to use ChemEx-5000 immediately. Studies indicate that the immediate use of dispersants ensures its effectiveness;[56] this induced Repelmuto to use ChemEx-5000 within 8 days from the *Blue Ocean* incident [R.19]. In any case, after the release of REPO's study, there is no indication in the Record that Repelmuto continued to approve ChemEx-5000. Thus, during the period that ChemEx-5000 was used, there was still lack of full scientific certainty as to its effects.

c. <u>Despite the lack of scientific certainty, Repelmuto may employ cost-effective measures to prevent the threat of the oil spill.</u>

[55] Rio Declaration, prin.15.

[56] NATIONAL RESEARCH COUNCIL, OIL SPILL DISPERSANTS: EFFICACY AND EFFECTS 1 (2010).

The use of chemical dispersants is a cost-effective measure, the effectiveness of which outweighs its threat of harm.[57]

On the one hand, the effectiveness of chemical dispersants is established.[58] Dispersants decompose oil to smaller droplets [R.19] which are less harmful to the environment than untreated oil.[59] Dispersants themselves are less toxic than the oils they break down as they are designed to dilute and biodegrade quickly.[60]

On the other hand, there are no established negative effects of dispersants [R.19,21]. If any, such negative effects are very much limited in scope *vis-à-vis* the harmful effects of an untreated oil slick if dispersants are not used.[61] In fact, REPO's report attributed only 35% of the deaths of marine organisms to ChemEx-5000 while the effects on the subsurface organisms remain uncertain [R.27]. Therefore, the threats are outweighed by the benefits from the use of ChemEx-5000.[62]

In sum, the use of chemical dispersants is consistent with the Precautionary Principle. Notwithstanding the lack of full scientific certainty on its effects, Repelmuto may use ChemEx-5000 to prevent environmental degradation as the oil spill posed a serious, irreversible threat to Repelmuto and Albacares; and its beneficial purposes offset any averred harm it may cause.

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[57] Scott, *From Brussels with Love: The Transatlantic Travels of European Law and the Chemistry of Regulatory Attraction*, 57 AM. J. COMP. L. 897, 904 (2009).

[58] Li, *Effects of Chemical Dispersants and Mineral Fines on Crude Oil Dispersion in a Wave Tank under Breaking Waves*, 54 MAR. POLLUT. BULL. 983, 991 (2007).

[59] TRUDEL, ET AL., TECHNICAL ASSESSMENT OF THE USE OF DISPERSANTS ON SPILLS FROM DRILLING AND PRODUCTION FACILITIES IN THE GULF OF MEXICO 540 (2001).

[60] *Id.*

[61] FEDERAL DRUG ADMINISTRATION, OIL SPILL CHEMICAL DISPERSANTS 1-2 (2010).

[62] *Id.*

II. REPELMUTO HAS NO OBLIGATION TO COMPENSATE ALBACARES UNDER INTERNATIONAL LAW.

A. REPELMUTO IS NOT OBLIGED TO COMPENSATE ALBACARES UNDER THE MARPOL, UNCLOS AND THE CBD.

1. Repelmuto is not liable for damages under the MARPOL.

The MARPOL is created to protect the marine environment by eliminating or minimizing deliberate or accidental release of oil and other harmful substances by ships.[63] Repelmuto did not violate its provisions because the source of the oil and harmful substances in this case is not a ship.

a. **The MARPOL does not apply to the *Blue Ocean* as it only applies to ships.**

Under the MARPOL, for liability to attach, the source of the pollution must be a ship.[64] A ship is a vessel capable of navigation or traversing the sea.[65] Its primary purpose is to transport goods and persons.[66] On the other hand, an oil platform is incapable of navigation.[67] An oil platform's primary purpose is to extract oil at a specific location [R.4,12,16,31].[68] The *Blue* Ocean is an oil platform, not a ship.[69] It is therefore not covered by the MARPOL.

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[63] MARPOL, preamble.

[64] MARPOL, art.3.

[65] 2 PAPADAKIS, THE INTERNATIONAL LEGAL REGIME OF ARTIFICIAL ISLANDS 99-102 (1977).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

The *Blue Ocean* is incapable of navigation because it is attached to the ocean floor [R.11,Figure 1].[70] Similar to other oil platforms, the *Blue Ocean* is connected to a drill pipe that extends below the sea floor, which limits its movement [R.11]. In fact, drastic movements in the position of the oil platform will trigger the blowout preventer and eventually suspend the drilling process.[71]

Even if it is not attached to the ocean floor, the *Blue Ocean* is incapable of navigation because of its massive size,[72] holding essential operational parts such as cranes, control rooms, helicopter landing pad, its own power plant and other facilities.[73] The size of the *Blue Ocean* renders it impractical and costly to place a propeller in the oil platform for navigational purposes; it weighs approximately 54 million kilograms and its weight requires the three world's largest container ship engines combined to make it capable of navigation.[74]

With the *Blue Ocean* clearly being incapable of navigation and hence not classified as a ship, the same cannot be covered by the MARPOL. Consequently, the MARPOL does not apply and no liability could be established therefrom.

b. <u>Even assuming that the *Blue Ocean* is a ship, the MARPOL still does not apply as the oil released here directly arose from the exploitation and extraction in the seabed, a circumstance expressly excluded under the MARPOL.</u>

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[70] HOLING, COASTAL ALERT: ECOSYSTEMS, ENERGY AND OFFSHORE OIL DRILLING 44 (1990).

[71] DEVEREUX, DRILLING FOR OIL & GAS: A NONTECHNICAL GUIDE 247 (1999).

[72] HOLING, *supra* note 70.

[73] *Id.*

[74] KEPPEL FELS, DSS 51 SEMISUBMERSIBLE DRILLING RIG 3 (2007); TRANSTAR, SHIPPING NEWS 3 (2010); TRANSMODAL, OCEAN CONTAINER INFORMATION 1 (2009).

Annex I of the MARPOL limits its coverage to the release of oil residues from generators, fuel tanks and pumps.[75] Particularly, the MARPOL excludes from its application, the "release of harmful substances directly arising from the exploration, exploitation and associated offshore processing of sea-bed mineral resources."[76] Here, the oil released as a result of the explosion directly arose from *Blue Ocean's* oil exploitation and extraction activities in the seabed [R.4,11,17], a situation expressly excluded under the MARPOL. Consequently, the MARPOL will not apply.

2. Repelmuto is not liable for damages under the UNCLOS.

a. <u>Repelmuto is not bound by the UNCLOS as it is not a State-party.</u>

Under the principle of *pacta tertiis nec nocent nec prosunt*, "a treaty does not create either obligations or rights for a third state without its consent."[77] In the *North Sea Continental Shelf* cases, the I.C.J. clarified that a State's consent to a treaty cannot be presumed when the formalities for its consent are agreed upon.[78] Accordingly, when the agreed formalities are not observed, there is no consent[79] and the State is not bound.[80]

Here, the UNCLOS requires both signing and ratification by a State in order for the treaty to become obligatory.[81] While Repelmuto signed the UNCLOS, it has not ratified the same

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[75] MARPOL, annex 1, app. 6.

[76] MARPOL, art.2(3)(b)(ii).

[77] VCLT, art.34.

[78] *North Sea Continental Shelf*, 1969 I.C.J. at 43.

[79] VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 210 (2009).

[80] VCLT, art.34.

[81] UNCLOS, art.306.

[R.8,32]. Repelmuto's consent to be bound by the UNCLOS is therefore not yet effective.[82] Consequently, Repelmuto is not yet bound by, and cannot be held liable for damages under the UNCLOS.

b. <u>Even if the UNCLOS applies, Repelmuto did not violate its object and purpose, and complied with its obligations.</u>

The object and purpose of the UNCLOS relevant to this case is the protection and preservation of the marine environment.[83] Article 194 obliges coastal States to prevent, reduce and control pollution of the marine environment through the use of the best practicable means.[84] For seabed activities, such as the operation of the *Blue Ocean*, Article 208 requires the coastal States to *adopt laws* requiring the use of such best practicable means.[85]

Repelmuto complied with the UNCLOS by promulgating laws that protect the marine environment [Cl.5]. Specifically, in relation to the operation of oil rigs, Repelmuto required the installation of hard-wired controllers and "Dead Man" switches [R.13].

The "Dead Man" switch is the best practicable means of preventing pollution. As previously discussed [*supra* Part I(A)(3)], the use of either the "Dead Man" switch or acoustical trigger complies with International Law. Additionally, the "Dead Man" switch is the more practicable and cost-effective option [R.13].[86] By requiring the use of the "Dead Man" switch

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[82] VILLIGER, *supra* note 79.

[83] UNCLOS, preamble; 3 NORDQUIST, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982: A COMMENTARY 288 (1995).

[84] UNCLOS, art.194.

[85] UNCLOS, art.208.

[86] MANNING, IRONIES OF COMPLIANCE 313 (1987); POWER, THE AUDIT SOCIETY: RITUALS OF VERIFICATION 61 (1997).

[R.13], Repelmuto therefore complied with the best practicable means requirement of the UNCLOS.

3. Repelmuto is not liable for damages under the CBD.

Article 14(2) of the Convention on Biological Diversity ("CBD") states that the issue on compensation is still under the examination of the Conference of the Parties ("COP"), which is the governing body of the CBD.[87] In the meantime, States may refer to other treaties as basis for compensation.[88] In this case, such other treaties pertain to the UNCLOS and the MARPOL under which Repelmuto cannot be held liable [*supra* Part II(A)&(B)]. Thus, Repelmuto is not liable for damages under the CBD.

B. THE UNILATERAL DECLARATION OF PRESIDENT KEMPII DOES NOT OBLIGATE REPELMUTO TO COMPENSATE ALBACARES.

For a declaration to bind a State, the unilateral act must consist of (1) a unilateral expression of its will by a State and (2) the intention to produce, by that means, legal effects under International Law.[89] Once determined to be a valid unilateral act, it becomes a binding obligation, to be executed in good faith in accordance with the principle of *acta sunt servanda*.[90] As recognized by the I.C.J. in *Nuclear Tests,*[91] the principle provides that "interested States may take cognizance of unilateral declarations and place confidence in them and are entitled to

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[87] Convention on Biological Diversity, 1992, art.14(2) & 23, 31 I.L.M. 818.

[88] Liability and Redress in the Context of paragraph 2 of article 14 of the Convention on Biological Diversity: An Analysis Of Pertinent Issues, ¶40, UNEP/CBD/EG-L&R/1/2/Rev.1 (2005).

[89] 51st ILC Report, 9, U.N. Doc.A/CN.4/500 (1999); 52nd ILC Report, 10, U.N. Doc.A/CN.4/505 (2000).

[90] ZIMMERMANN, TOMUSCHAT & OELLERS-FRAHM, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 707 (2006); Nuclear Tests (Austl. v Fr.), 1974 I.C.J. 253, 268, ¶46, (N. Z. v Fr.), 1974 I.C.J. 457,.473, ¶49; Goodman, *Acta Sunt Servanda? A Regime for the Unilateral Acts of States at International Law*, ANZSIL Conference (2005).

[91] *Nuclear Tests*, 1974 I.C.J. 253, 1974 I.C.J. 457.

require that the obligation thus created be respected."[92] Here, however, President Kempii's statement simply recognizes the effects of the *Blue Ocean* incident and the culpability of Fahy Oil. There is no declaration that Repelmuto is responsible for the incident and that it will compensate those injured through public funds.

1. There was no unequivocal manifestation of Repelmuto's will to compensate Albacares for damages.

A unilateral act must have a clear manifestation that allows third parties to believe that the State knowingly consented to the act that was undertaken.[93] It is from the actual substance of this manifestation and the circumstances attending its making that the legal implications of these acts must be deduced.[94]

In this case, the declaration of Repelmuto's President only assured the public that those who had been injured by the accident would be fully compensated [R.24,26]. President Kempii never admitted that Repelmuto was at fault and thus liable for damages. Rather, President Kempii's unequivocal statement relates only to Fahy Oil's liability as the oil rig operator. She categorically stated in her speech that "[Repelmuto] will make sure that Fahy Oil pays" [R.24]. This fact was later on reiterated in the diplomatic note where Repelmuto recognized Fahy Oil as the responsible party for the pollution [R.32,34]. In fact, Repelmuto vehemently denied its liability for the environmental damage caused to Albacares when it stated that "[Repelmuto] is not responsible for the damages that [Albacares] has suffered" [R.34]. Repelmuto only assured Albacares that the victims would be adequately compensated by Fahy Oil [R.32].

2. The declaration did not create any legal obligation on Repelmuto.

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[92] *Nuclear Tests*, 1974 I.C.J. at ¶46.

[93] 52nd ILC Report, *supra* note 89, at 8.

[94] *Id.* at 8,19.

A unilateral declaration concerning a legal or factual situation would only create legal obligations for a State if it had indicated an intention to be bound according to the terms of the declaration.[95]

In *Border Dispute,* the I.C.J. held that a statement by Mali's President at a press conference did not create legal obligations on Mali since the unilateral declaration was not directed to any particular recipient.[96] Similarly, in *Nicaragua v. U.S.,* the I.C.J. found nothing in the content of the communication transmitted by the Junta from which it could be inferred that any legal undertaking was intended to exist.[97] The declaration merely listed the Junta's objectives and cannot be construed as a binding commitment of Nicaragua to organize free elections.[98]

Here, President Kempii only recognized the existence of a factual situation and merely outlined her government's efforts to stop the oil spill [R.24]. Her statement implies no legal obligation on Repelmuto's part [R.24,26].[99] Moreover, the parties did not execute any formal agreement establishing the binding character of the statements made during the press conference. Since President Kempii's oral declaration neither created any legal undertaking nor constituted as an oral "conclusive" conduct, Repelmuto is not bound by the terms of the unilateral declaration made by its President.

3. In any case, the declaration should be given a restrictive interpretation.

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[95] Border Dispute (Burk. Faso v. Mali), 1986 I.C.J. 554.

[96] *Border Dispute*, 1986 I.C.J. at ¶¶36,40; 52nd ILC Report, *supra* note 89, at 8.

[97] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 132, ¶261.

[98] *Nicaragua*, 1986 I.C.J. at ¶261.

[99] ZIMMERMANN, ET AL., *supra* note 90; Hollis & Newcomer, *"Political" Commitments & the Constitution*, 49 *VA.* J. INT'L L. 507, 517 (2009); MCNAIR, THE LAW OF TREATIES 6 (1961).

In *Nuclear Tests*, the I.C.J. categorically stated that a restrictive interpretation is applied when States make statements by which their freedom of action is to be limited.[100] In interpreting the content of such obligations, weight is given to the text of the declaration, together with the context and the circumstances in which it was formulated.[101] The legal effects of a unilateral act could only be such that a State affirms a pre-existing right, undertakes an obligation, or, exceptionally, acquires a new right.[102]

Here, President Kempii's speech did not affirm a pre-existing right, undertake an obligation, or acquire a new right. Her statements merely outlined Repelmuto's efforts on addressing the oil pollution [R.24]. Such statements cannot be a source of any international legal obligation.[103] Since Repelmuto did not commit itself to perform any legal obligation based on its President's statements [R.24,26], the declaration should not bind Repelmuto.

C. ON THE CONTRARY, FAHY OIL, AS OPERATOR OF THE BLUE OCEAN, IS CIVILLY LIABLE FOR THE RESULTING ENVIRONMENTAL DAMAGE.

1. Repelmuto is only required to conduct general inspection and its failure to conduct rigorous inspection is not a breach attributable to it.

State responsibility presumes that a duty is breached.[104] In this case, there are two types of duties being imposed upon Repelmuto: (a) general inspection required by International Law

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[100] *Nuclear Tests,* 1974 I.C.J. at ¶44.

[101] *Nuclear Tests*, 1974 I.C.J. at ¶¶43, 46, 51, 53; Armed Activities on the Territory of the Congo (Con. v. Rwa.), 2005 I.C.J. 116, ¶¶50, 52.

[102] 53rd ILC Report, 5, art.10, U.N. Doc.A/CN.4/525/Add1 (2001).

[103] *Nicaragua,* 1986 I.C.J. at ¶261; Legality of the Threat or the Use of Nuclear Weapons, 1996 I.C.J. 226, 251, ¶59; Hollis&Newcomer, *supra* note 99, at 520.

[104] Responsibility of States for Internationally Wrongful Acts, art.2, G.A. Res. 56/83,Annex, U.N. Doc. A/RES/58/83/Annex (2002).

[*supra* Part I(B)(1)] and complied with by Repelmuto, and (b) the rigorous inspection being imposed by Albacares [R.31], the breach of which cannot be attributed to Repelmuto.

a. <u>Repelmuto complied with the duty to conduct general inspection.</u>

Under the UNCLOS, a State's duty with respect to monitoring the risks or effects of pollution to the marine environment is only to the extent that is practicable,[105] provided that compliance must not be less effective than the international rules, standards, and recommended practices and procedures.[106] Internationally, the rule is that the government adopts a set of general safety standards,[107] the compliance of which is secured through licensing and inspection by State organs.[108]

Here, MEA complied with its duty that is on a par with international standards. By providing licenses and conducting inspections [R.12], MEA ensured that operators have included hard-wired controllers and "Dead Man" switches in their design.[109] Therefore, Repelmuto is not liable for the resulting environmental harm because it did not breach any of its obligations under International Law.

b. <u>The lack of oversight as regards the rigorous inspection cannot be attributed to Repelmuto.</u>

The rigorous inspection of the oil rig is a duty of the operator and not the State.[110] In contrast to Albacares' contention [R.31], Repelmuto is not obligated to conduct rigorous

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[105] UNCLOS, art.204.

[106] UNCLOS, art.208(3).

[107] ABRAHAMS, *supra* note 3.

[108] CRS, *supra* note 48, at 14-16

[109] CRS, *supra* note 48, at 14-16

[110] ABRAHAMS, *supra* note 3.

inspections, which includes checking the adequacy of the batteries of the blowout preventer.[111] It is Fahy Oil, which is obligated to do so.[112]

2. Fahy Oil's negligence in maintaining the integrity of "the Dead Man" switch caused the *Blue Ocean* incident.

Fahy Oil, as operator [R.16], has the duty to formulate the details of general safety standards promulgated by Repelmuto,[113] including the implementation of measures for the maintenance of the blowout preventer.[114]

The *Blue Ocean* incident occurred because of a dead battery in the "Dead Man" switch [R.16]. Conversely, Fahy Oil failed to implement measures that will maintain the integrity of the "Dead Man" switch. Worse, it ignored prior warnings indicating faulty safety systems [R.16]. Therefore, it is Fahy Oil, which is liable for the resulting environmental harm [R.16-17].

For liability to attach, there must be "evidence of causation between the injury and the alleged cause."[115] Here, the evidence points to the insufficient charging of the "Dead Man" switch's battery [R.16] as the cause of the oil spill. It is Fahy Oil's duty to ensure proper maintenance of the blowout preventer.[116] Since Fahy Oil failed to ensure that the switch had sufficiently charged batteries [R.16], Fahy Oil, and not MEA, should be held responsible for the resulting environmental harm.

D. The liquidation of Fahy Oil does not make Repelmuto liable for damages.

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[111] CRS, *supra* note 48, at 14-16.

[112] *Id*.

[113] ABRAHAMS, *supra* note 3.

[114] International Seabed Authority, *Standard Clauses for Exploration Contract,* ISBA/6/A/18, annex, ¶10.1(b) (2000).

[115] XUE, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 178-79 (2003); Lac Lanoux (Fr. v. Spain), 12 R.I.A.A. 281 (1957).

[116] CRS, *supra* note 48; 30 C.F.R. §§250, 901-04 (U.S.).

The approval by the Repelmuto courts of the bankruptcy plan, which led to the liquidation of Fahy Oil [R.35] does not make Repelmuto liable for damages. In *AMTO v. Ukraine*,[117] the Tribunal held that although failure to ensure adequate funding of a corporation for its obligations may have negative implications, it is not one, which qualifies as an international breach.[118] It declared that there is insufficient evidence to establish bad faith on the part of Ukraine.[119] Absent any demonstrated procedural irregularity or interference, the Tribunal held that there is no denial of justice.[120]

Here, consistent with due process and the presumption of regularity,[121] it may be reasonably inferred[122] that the Repelmuto courts conducted hearings in approving Fahy Oil's bankruptcy plan [R.35]. Accordingly, its approval by Repelmuto courts, not being an international breach, cannot make Repelmuto liable for damages.

[117] AMTO v. Ukraine, SCC Case No.080/2005 (2008).

[118] *AMTO,* SCC Case No.080/2005 at ¶62.

[119] *AMTO,* SCC Case No.080/2005 at ¶108.

[120] *AMTO,* SCC Case No.080/2005 at ¶¶80-84.

[121] BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 305 (2006).

[122] *Corfu*, 1949 I.C.J. at 18.

CONCLUSION AND PRAYER FOR RELIEF

Respondent, Republic of Repelmuto, respectfully requests that the I.C.J. adjudge and declare that:

1. Repelmuto did not violate International Law; and
2. Repelmuto does not have any international legal obligation to compensate Albacares.

Respectfully submitted,

AGENTS OF RESPONDENT