

Questions Relating to Ocean Fertilization and Marine Biodiversity

(Federal States of Aeolia v. Republic of Rinnuco)

RECORD



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STETSON LAW

**Questions Relating to Ocean Fertilization and Marine Biodiversity
(Federal States of Aeolia v. Republic of Rinnuco)**

NOTIFICATION, DATED 23 JUNE 2016, ADDRESSED TO THE MINISTER OF FOREIGN AFFAIRS
OF THE FEDERAL STATES OF AEOLIA

AND

THE MINISTER OF FOREIGN AFFAIRS OF THE REPUBLIC OF RINNUCO

The Hague, 23 June 2016.

On behalf of the International Court of Justice, and in accordance with Article 26 of the Rules of Court, I have the honor to acknowledge receipt of (1) the Application instituting proceedings against the Republic of Rinnuco, submitted by the Federal States of Aeolia and dated 4 April 2016; and (2) the Preliminary Objection, submitted by the Republic of Rinnuco and dated 10 May 2016. I have the further honor to inform you that the case of Questions Relating to Ocean Fertilization and Marine Biodiversity (Federal States of Aeolia v. Republic of Rinnuco) has been entered as 2016 General List No. 170.

During a meeting with the President of the Court held on 1 June 2016, the Parties agreed that the questions regarding the Court's jurisdiction raised in the Preliminary Objection are inextricably linked to the merits of the questions raised in the Application and that the questions regarding the Court's jurisdiction should therefore be heard and determined within the framework of the merits. Pursuant to Article 79, paragraph 10, of the Rules of Court, the Court will give effect to the Parties' agreement, and the Court thus will consider the questions as to its jurisdiction simultaneously with the questions on the merits raised in the Application. The written proceedings shall consist of memorials to be submitted to the Court by 18 November 2016. Oral proceedings are scheduled for 30 March–1 April 2017.

/s/

Registrar
International Court of Justice

JOINT WRITTEN STATEMENT OF THE FEDERAL STATES OF AEOLIA AND THE REPUBLIC OF
RINNUCO, DATED 11 JULY 2016, ADDRESSED TO THE REGISTRAR OF THE INTERNATIONAL
COURT OF JUSTICE

The Hague, 11 July 2016.

To the Registrar, International Court of Justice:

On behalf of the Federal States of Aeolia and the Republic of Rinnuco, we have the honor to submit this Joint Written Statement regarding the facts in the case of Questions Relating to Ocean Fertilization and Marine Biodiversity (2016 General List No. 170). Without waiving any claims, counter-claims, objections, or rights, the Federal States of Aeolia and the Republic of Rinnuco agree that the information provided in the attached Annex A accurately represents the factual background of this dispute and request the Court to decide this matter based on the facts contained in Annex A. In addition, a certified copy of the Application

instituting proceedings against the Republic of Rinnuco, submitted by the Federal States of Aeolia and dated 4 April 2016, is attached as Annex B, and a certified copy of the Preliminary Objection, submitted by the Republic of Rinnuco and dated 10 May 2016, is attached as Annex C. The Federal States of Aeolia and the Republic of Rinnuco further agree as follows:

1. The Federal States of Aeolia and the Republic of Rinnuco request the Court to decide the jurisdictional questions and merits of this matter on the basis of the rules and principles of general international law, as well as any applicable treaties.
2. The Federal States of Aeolia and the Republic of Rinnuco also request the Court to determine the legal consequences, including the rights and obligations of the Parties, arising from any judgment on the questions presented in this matter.
3. The proceedings shall consist of written pleadings and oral arguments.
4. The written pleadings shall consist of memorials to be submitted simultaneously to the Court by the Parties.
5. The written pleadings shall be consistent with the Rules of the 2016–2017 Stetson International Environmental Moot Court Competition (International Finals).
6. No changes may be made to any written pleading once it has been submitted to a National or Regional Round. A written pleading submitted to the International Finals must be an exact copy of the written pleading submitted to the National or Regional Round.
7. The Federal States of Aeolia and the Republic of Rinnuco shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

For the Federal States of Aeolia:

/s/ _____

Cate Cane

Minister of Foreign Affairs

For the Republic of Rinnuco:

/s/ _____

Pierre X. Annora

Minister of Foreign Affairs

ANNEX A

1. The Federal States of Aeolia and the Republic of Rinnuco are neighboring coastal sovereign states located on Scheflutti, a continent that is completely surrounded by the Muktuk Ocean and is located near Greenland in the Arctic Circle.
2. Aeolia and Rinnuco are developed countries that have diversified, industrial economies. Both countries have large fishing industries, and Aeolia has a strong ecotourism sector.
3. The marine biodiversity of the Muktuk Ocean is similar to the marine biodiversity around Greenland and the other countries within the Arctic Circle. Narwhals (*Monodon monoceros*) and other cetaceans

inhabit the Muktuk Ocean, and narwhals are commonly seen in the waters off the coasts of Aeolia and Rinnuco. Aeolia's ecotourism industry includes numerous whale-watching and other excursions that focus on narwhals. Aeolia also has a small research institute (the Nautilus Research Institute, led by Dr. R. Downey) that studies narwhals, and one coastal town in Aeolia holds an annual festival celebrating narwhals.

4. Aeolia and Rinnuco are Members of the United Nations and are Parties to the Statute of the International Court of Justice (ICJ). Pursuant to Article 36, paragraph 2, of the Statute of the ICJ, Aeolia has unconditionally recognized the ICJ's jurisdiction as compulsory. Rinnuco has not recognized the ICJ's jurisdiction as compulsory.
5. Aeolia and Rinnuco are Parties to the Vienna Convention on the Law of Treaties.
6. Aeolia and Rinnuco are Contracting Parties to the Convention on Biological Diversity (CBD). In accordance with Article 27, paragraph 3, of the CBD, when Aeolia and Rinnuco ratified the CBD, both countries declared in writing that they would submit to the jurisdiction of the ICJ to resolve disputes concerning the interpretation or application of the CBD.
7. Aeolia and Rinnuco are Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) and are Contracting Parties to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London Protocol). When Rinnuco became a Contracting Party to the London Protocol, Rinnuco's instrument of ratification included the following declaration: "In accordance with Article 16, paragraph 5, of the London Protocol, the Republic of Rinnuco hereby notifies the Secretary-General of the International Maritime Organization that when the Republic of Rinnuco is a party to a dispute about the interpretation or application of Article 3.1 or 3.2 of the London Protocol, the Republic of Rinnuco's consent will be required before the dispute may be settled by means of the Arbitral Procedure set forth in Annex 3 of the London Protocol."
8. Aeolia and Rinnuco are Parties to the Convention on the Conservation of Migratory Species of Wild Animals (CMS). Narwhals are listed on Appendix II of CMS, and both countries are range states for narwhals. Neither country is a Party to the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS), and neither country is located within the Agreement Area of ASCOBANS.
9. Aeolia and Rinnuco are States Parties to the United Nations Convention on the Law of the Sea (UNCLOS). When Aeolia and Rinnuco signed UNCLOS, both parties made written declarations pursuant to Article 287 of UNCLOS and chose the ICJ for the settlement of disputes concerning the interpretation or application of UNCLOS. On 28 March 2016, Rinnuco deposited a notice of revocation of its written declaration pursuant to Article 287. The notice of revocation stated that Rinnuco would not submit disputes concerning the interpretation or application of UNCLOS to the ICJ.
10. Aeolia and Rinnuco are Parties to the United Nations Framework Convention on Climate Change (UNFCCC), are Parties to the Kyoto Protocol to the UNFCCC (Kyoto Protocol), and have signed (but have not yet ratified) the Paris Agreement. Under Article 19 of the Kyoto Protocol and Article 14 of the UNFCCC, both countries submitted written declarations stating that with respect to any dispute concerning the interpretation or application of the UNFCCC or the Kyoto Protocol, they would submit

the dispute to the ICJ. Pursuant to the Kyoto Protocol, Aeolia and Rinnuco each committed to reduce greenhouse gas emissions by at least 8% below 1990 levels in the commitment period of 2008–2012. Rinnuco met its quantified emission limitation or reduction commitment under the Kyoto Protocol, but Aeolia did not. Rinnuco also ratified the Doha Amendment to the Kyoto Protocol and committed to reduce its greenhouse gas emissions by at least 20% below 1990 levels in the second commitment period of 2013–2020. Aeolia has not ratified the Doha Amendment.

11. High-level representatives from Aeolia and Rinnuco attended and fully participated in the 1972 United Nations Conference on the Human Environment at Stockholm; the 1992 United Nations Conference on Environment and Development at Rio de Janeiro; the 2002 World Summit on Sustainable Development at Johannesburg; and the 2012 Rio+20 Conference at Rio de Janeiro.
12. On 21 November 2014, after conducting an extensive environmental impact assessment, the Government of Rinnuco announced its plans to engage in an ocean fertilization project that it hoped would stimulate the growth of phytoplankton blooms in the Muktuk Ocean. Rinnuco's stated purposes for the project were to (1) conduct rigorous scientific research on the short- and long-term benefits of ocean fertilization; (2) mitigate climate change; (3) generate potential carbon offsets that Rinnuco might use to meet emission reduction targets or commitments; and (4) stimulate fish production.
13. Rinnuco notified Aeolia about the planned ocean fertilization project, and on 2 December 2014, the following diplomatic note was forwarded to the Government of the Republic of Rinnuco:

The Embassy of the Federal States of Aeolia presents its compliments to the Government of the Republic of Rinnuco and wishes to convey its sincere concern over Rinnuco's planned ocean fertilization project. The effects of ocean fertilization, particularly ocean fertilization of this scale, are largely unknown, and this project could be disastrous for the marine environment in and around the Muktuk Ocean. Such a project could upset the entire food web and negatively impact the marine biodiversity of the Muktuk Ocean. A proliferation of phytoplankton could disrupt predator-prey relationships and affect numerous species of fauna and flora. In particular, Aeolia and its citizens are concerned about the potential effects of Rinnuco's ocean fertilization project on the narwhals and other cetaceans and fish in the Muktuk Ocean. Not only could this project have negative effects on the marine environment and biodiversity, but the project could adversely impact the economies of both Rinnuco and Aeolia. The Government of Aeolia urges the Government of Rinnuco to act in accordance with the precautionary principle and abandon this planned ocean fertilization project.

Please accept the assurance of my highest consideration.

/s/ _____

Ace M. Patinno

Ambassador

14. On 5 December 2014, the following diplomatic note was forwarded to the Government of the Federal States of Aeolia:

The Embassy of the Republic of Rinnuco presents its compliments to the Government of Aeolia and has the honor to acknowledge receipt of the diplomatic note dated 2 December 2014.

The Government of Rinnuco appreciates the concerns of the Government of Aeolia, but Rinnuco will proceed with its ocean fertilization project as planned. Rinnuco conducted an extensive environmental impact assessment before planning this project. Rinnuco is greatly concerned about the effects of climate change, and Rinnuco believes that its project will produce useful information and data about the potential benefits and uses of ocean fertilization, including its potential uses to mitigate climate change. It is Rinnuco's position that ocean fertilization has many possible benefits, including, *inter alia*, carbon sequestration, which could benefit the marine environment and biodiversity.

Please accept the assurance of my highest consideration.

/s/ _____
Lee J. Versun
Ambassador

15. On 15 December 2014, the Rinnuco legislature passed a law approving and fully funding the planned ocean fertilization project. According to the approved project plans, Rinnuco's ocean fertilization project would proceed in phases over the course of several years. During the initial phase, Rinnuco planned to add 15,000 kg of ferrous sulfate powder over the course of six weeks to a 2,000-km² area located approximately 150–200 miles off the Rinnuco coast within Rinnuco's exclusive economic zone (EEZ) in the Muktuk Ocean. Rinnuco would monitor the area during and after each phase of the project and collect data about the effects of the added iron. Each phase of the project would be successively larger.
16. The Government of Aeolia continued to urge the Government of Rinnuco to reconsider and halt the project, but Rinnuco moved ahead with its ocean fertilization project and began to implement the first phase. On 5 January 2015, one of Rinnuco's government research vessels, the *Stanlee*, captained by A. Stark, began depositing powdered ferrous sulfate approximately 175 miles off the coast of Rinnuco within Rinnuco's EEZ in the Muktuk Ocean.
17. On 6 January 2015, the Government of Aeolia sent a diplomatic note to the Government of Rinnuco that stated in part:

The Government of Aeolia regrettably notes Rinnuco's decision to move forward with its ocean fertilization project. The Muktuk Ocean is a precious shared resource, and Rinnuco has a duty to protect and conserve it. Aeolia adamantly opposes the current use of ocean fertilization because of the potential unknown negative effects on marine biodiversity.

It is the position of Aeolia that Rinnuco is violating international law by conducting this project. Perhaps most notably, Rinnuco is in violation of the precautionary principle and in violation of Article 3.1, Article 3.3, Article 4, Resolution LC-LP.1(2008), Resolution LC-LP.2(2010), Resolution LP.4(8), and other provisions of the London Protocol. The Government of Aeolia urges the Government of Rinnuco to suspend or terminate its ocean fertilization project immediately and meet with the Government of Aeolia to discuss this matter more fully and consider other options.

18. On 22 January 2015, the Government of Rinnuco sent a diplomatic note to the Government of Aeolia that stated in part:

The Government of the Republic of Rinnuco has not violated any international laws through its ocean fertilization project. Importantly, the London Protocol does not prohibit all ocean

fertilization, and Rinnuco's project is for scientific research and is not contrary to the aims of the London Protocol. In addition, the amendments to the London Protocol that were approved by Resolution LP.4(8) have not entered into force yet. Rinnuco did not follow the Assessment Framework provided for in Resolution LC-LP.2(2010); however, Rinnuco did conduct an environmental impact assessment, and Resolutions to the London Protocol are non-binding. Moreover, under Rinnuco's dualist domestic legal system, specific domestic implementing legislation is needed before a resolution to a multilateral environmental agreement (even a resolution adopted by consensus) becomes effective domestically. As the Government of Aeolia may recall, Rinnuco has consistently spoken in favor of ocean fertilization and has abstained from any votes at conferences or meetings of the parties of multilateral environmental agreements that would prohibit all ocean fertilization. Furthermore, Rinnuco has not taken domestic action to implement any of the London Protocol Resolutions noted by Aeolia in its diplomatic note dated 6 January 2015.

Rinnuco has not violated any international law, but in the spirit of cooperation, Rinnuco will temporarily suspend its ocean fertilization project once the initial phase is complete and will continue to engage in diplomatic discussions with Aeolia. Rinnuco will, however, resume the project at its discretion.

19. On 13 February 2015, the Government of Rinnuco temporarily suspended its ocean fertilization project. The *Stanlee* had completed the initial phase and deposited all of the planned 15,000 kg of ferrous sulfate. Rinnuco has not yet been able to make any final determinations about the results from the project and continues the process of collecting and analyzing data from the initial phase of the project.
20. On 22 April 2015, nine dead narwhals were found off the coast of Rinnuco. Researchers from Aeolia's Nautilus Research Institute conducted necropsies, but the results were inconclusive as to what caused the narwhals to die. On 4 May 2015, the Government of Aeolia sent a diplomatic note to the Government of Rinnuco that stated in part:

The unfortunate recent deaths of the nine narwhals further emphasize the importance of Rinnuco abandoning its ocean fertilization project. It is the position of Aeolia that Rinnuco's project may have contributed to the deaths of these nine narwhals and could have other devastating effects on the delicate marine environment in and around the Muktuk Ocean. Rinnuco's ocean fertilization project could harm many marine plants and animals and could cause irreparable harm to the marine ecosystem. Given the threat of serious damage to marine biodiversity, Aeolia urges Rinnuco to act in accordance with the precautionary principle and terminate the remainder of the ocean fertilization project.

As previously noted, Rinnuco's ocean fertilization project is in contravention of the London Protocol. In addition, Rinnuco is in violation of the duty not to cause transboundary harm, as well as Article 3, Article 8, Article 14, and Decisions IX/16, X/33, and XI/20 of the CBD. Furthermore, the project violates CMS, and it violates numerous articles of UNCLOS, including, but not limited to, Articles 192, 194, 195, and 210, as well as Articles 64 and 65, which include narwhals. Aeolia also would like to highlight United Nations General Assembly Resolution 66/288, United Nations General Assembly Resolution 62/215, and United Nations General Assembly Resolution 67/78, all of which support Aeolia's position on this matter.

21. On 18 May 2015, the Government of Rinnuco sent a diplomatic note to the Government of Aeolia that stated in part:

While the deaths of the nine narwhals were certainly unfortunate, there is nothing to suggest that these deaths were in any way related to Rinnuco's ocean fertilization project. Rinnuco has acted in accordance with the CBD; Rinnuco has not caused any transboundary harm to Aeolia or any other state, and Rinnuco conducted an environmental impact assessment and notified Aeolia about its plans for the ocean fertilization project. Likewise, Rinnuco has not violated CMS or UNCLOS because Rinnuco has not harmed the marine environment or marine biodiversity. Indeed, Rinnuco's ocean fertilization project could benefit marine biodiversity, stimulate fish production, and provide invaluable scientific information, and the project is authorized under UNCLOS Article 246. In addition, United Nations General Assembly Resolutions are non-binding, and United Nations General Assembly Resolution 62/215 "[e]ncourages States to support the further study and enhance understanding of ocean iron fertilization," which is what Rinnuco is seeking to achieve with its ocean fertilization project.

As Aeolia may be aware, on 27 February 2015, Rinnuco submitted its intended nationally determined contribution (INDC) in anticipation of the Paris Climate Change Conference and committed to reduce greenhouse gas emissions by 50% by 2030 compared to 1990 levels. This substantial INDC demonstrates Rinnuco's dedication to reducing greenhouse gas emissions and mitigating climate change, and Rinnuco's ocean fertilization project and other ocean fertilization projects could help to sequester carbon dioxide and mitigate climate change. This, in turn, could benefit marine biodiversity, including the narwhals, fish, and other animals and plants in and around the Muktuk Ocean. Rinnuco's project could eventually help it to meet its INDC commitments. Accordingly, Rinnuco plans to resume its ocean fertilization project within the next year.

22. From January 2015 through March 2016, additional negotiations, followed by mediation, were conducted between the Federal States of Aeolia and the Republic of Rinnuco, but the process failed to resolve the dispute regarding Rinnuco's ocean fertilization project. In March 2016, Aeolia requested that Rinnuco agree to submit the matter to the ICJ in accordance with Article 287 of UNCLOS, but Rinnuco refused.
23. Aeolia submitted an Application instituting proceedings against the Republic of Rinnuco, dated 4 April 2016 (Annex B), and Rinnuco submitted a Preliminary Objection, dated 10 May 2016, contesting the ICJ's jurisdiction over the matter (Annex C).
24. The Government of Rinnuco maintains its objection to the ICJ's jurisdiction but has agreed to continue to suspend its ocean fertilization project until the ICJ can consider the matter.
25. The Federal States of Aeolia seeks an order from the ICJ declaring that (1) the ICJ has jurisdiction to determine the matter; and (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.
26. The Republic of Rinnuco opposes the claims in paragraph 25 above and seeks an order from the ICJ declaring that (1) the ICJ does not have jurisdiction to determine the matter; and (2) even if the ICJ has jurisdiction, the Republic of Rinnuco has not violated international law with respect to its ocean fertilization project.

ANNEX B

APPLICATION INSTITUTING PROCEEDINGS, DATED 4 APRIL 2016, ADDRESSED TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

The Hague, 4 April 2016.

To the Registrar, International Court of Justice:

On behalf of the Federal States of Aeolia and pursuant to Article 36 and Article 40 of the Statute of the International Court of Justice and Article 38 of the Rules of Court, the undersigned, being duly authorized by the Government of the Federal States of Aeolia, have the honor to submit to the International Court of Justice the present Application instituting proceedings against the Republic of Rinnuco.

I. Subject of the Dispute

The present Application concerns the Republic of Rinnuco's ocean fertilization project in the Muktuk Ocean, which is in breach of its obligations under international law, including, but not limited to, violations of several multilateral environmental agreements. Rinnuco's ocean fertilization project is in contravention of the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 (London Protocol), the Convention on Biological Diversity (CBD), the United Nations Convention on the Law of the Sea (UNCLOS), and the Convention on Migratory Species of Wild Animals (CMS). Rinnuco's actions also are in violation of, *inter alia*, the precautionary principle and the duty not to cause transboundary harm.

* * *

II. Jurisdiction of the Court

The Court has jurisdiction over this dispute in accordance with Article 27 of the CBD, as well as Article 287 of UNCLOS. Rinnuco has submitted to the jurisdiction of the ICJ under the CBD and UNCLOS, and this dispute arises directly under the CBD and UNCLOS. Several CBD Decisions relate directly to ocean fertilization, and UNCLOS explicitly addresses ocean dumping, the conservation of the marine environment, and the protection of the *Monodontidae* family, which includes narwhals, and other cetaceans.

* * *

[REMAINDER OF APPLICATION INTENTIONALLY OMITTED]

For the Federal States of Aeolia:

/s/ _____

Cate Cane

Co-Agent of the Federal States of
and Minister of Foreign Affairs
of the Federal States of Aeolia

/s/ _____

Greta H. Badunnelli

Co-Agent of the Federal States of Aeolia
Aeolia

ANNEX C

PRELIMINARY OBJECTION OF THE REPUBLIC OF RINNUCO, DATED 10 MAY 2016, ADDRESSED TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

The Hague, 10 May 2016.

To the Registrar, International Court of Justice:

On 4 April 2016, the Federal States of Aeolia lodged with the Registrar of the International Court of Justice an Application by which it instituted proceedings before the Court against the Republic of Rinnuco regarding the Republic of Rinnuco's ocean fertilization project in the Muktuk Ocean. In accordance with Article 79, paragraph 1, of the Rules of Court, the Republic of Rinnuco has the honor to submit the present Preliminary Objection, which relates to the jurisdiction of the Court. The Republic of Rinnuco respectfully requests the Court to declare itself to be without jurisdiction to hear the matter submitted by Aeolia.

The Application submitted by Aeolia alleged that "[t]he Court has jurisdiction over this dispute in accordance with Article 27 of the CBD, as well as Article 287 of UNCLOS." The Republic of Rinnuco submits this Preliminary Objection because the Court does not have jurisdiction to hear this matter as alleged by Aeolia. The issues in this matter arise primarily under the London Protocol because the London Protocol and its Resolutions are most relevant to ocean fertilization. The Court does not, however, have jurisdiction because Rinnuco has not agreed to submit the dispute to the Court under Article 16 of the London Protocol.

Additionally, this matter does not arise under UNCLOS, but even if the Court were to find that it does, Rinnuco deposited a notice revoking its declaration that it would submit to the Court for UNCLOS disputes. Although Rinnuco has agreed to submit disputes arising under the CBD to the Court, this matter also does not arise under the CBD. The Award on Jurisdiction and Admissibility in the Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, dated 4 August 2000 and issued by the Arbitral Tribunal constituted under UNCLOS, supports Rinnuco's position that the Court does not have jurisdiction over this matter. The Court's judgment in the Fisheries Jurisdiction Case (Spain v. Canada), dated 4 December 1998, also lends support to Rinnuco's position that the Court lacks jurisdiction.

* * *

[REMAINDER OF PRELIMINARY OBJECTION INTENTIONALLY OMITTED]

For the Republic of Rinnuco:

/s/ _____

Pierre X. Annora
Co-Agent for the Republic of Rinnuco
and Minister of Foreign Affairs for
the Republic of Rinnuco

/s/ _____

Cora L. Pod
Co-Agent for the Republic of Rinnuco