

**IN THE INTERNATIONAL COURT OF JUSTICE  
AT THE PEACE PALACE**

**THE HAGUE**

**QUESTIONS RELATING TO TRANSBOUNDARY HAZE AND SPECIES PROTECTION**

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**FEDERAL STATES OF ABELII**

**APPLICANT**

**v.**

**REPUBLIC OF REDOX**

**RESPONDENT**

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**MEMORIAL FOR THE APPLICANT**

**THE 2013 STETSON MOOT COURT COMPETITION**

**NOVEMBER 2012**

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## STATEMENT OF JURISDICTION

The Federal States of Abellii and the Republic of Redox 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 25 June 2012, the parties signed a special agreement and submitted it to the Registrar of the Court. See Special Agreement between the Federal States of Abellii and the Republic of Redox for Submission to the International Court of Justice of Differences between Them Concerning Questions relating to Transboundary Haze and Species Protection, 25 June, 2012. The Registrar addressed notification to the parties on 27 June 2010.

**QUESTIONS PRESENTED**

I.

Whether the republic of Redox has violated international law by failing to enforce a zero burning policy that would prevent trans-boundary haze in Abellii

II.

Whether the Republic of Redox has violated international law by intentionally authorizing the extinction of the Redox orang-utan.

## SUMMARY OF THE CASE

The Federal States of Abelii (Abelii) and the Republic of Redox (Redox) are neighbouring states who share a common territorial sea. Abelii is a developing island nation with a population of 400 000 and has an economy which mainly relies on oil production and tourism. Redox on the other hand is a developing nation as well with a population of 20 million and has an agro based economy. 12% of Redox is peat swamp forest. One particular forest, the Fahy Peat lands is home to the endemic Redox orang-utan which is listed on the IUCN Red list of Endangered Species.

Both States are members of the United Nations and Parties to the Statute of the International Court of Justice, the Vienna Convention on the law of Treaties, Convention on Biological Diversity and the Ramsar Convention. Abelii and Redox attended and fully participated in the 1972 United Nations Conference on the Human Environment at Stockholm, United Nations on Environment and Development at Rio de Janeiro; the 2002 World Summit on Sustainable Development at Johannesburg and the 2012 +20 Conference at Rio de Janeiro. All States in the Heinze region except for Redox are party to the Heinze Regional Agreement on Transboundary Pollution (HRA). Redox signed but did not ratify the agreement. All HRA parties adopted a “zero burning” policy making open burning illegal. Redox has adopted zero burning as a national goal. Individual provinces have the discretion however to determine the extent of open burning. In 2007 and 2009 massive fires occurred in the province of Cienaga on land owned by P-Eco which resulted in haze pollution causing significant adverse effects on the tourism of Abelii with an average 67% decline on both cases. After the fires P-Eco planted palm trees. The cause of the first fire was never discovered but the second fire was attributed to two P-Eco low level employees who received \$1000 fines and commuted sentences to 30 days. Tourism in 2010 slightly rebounded but was still down 30% as compared to 2008. In January 2011, another fire occurred on P-Eco’s peat lands in Cienaga and it was clear that the smoke would cause haze pollution

On the 21st of January 2011 Abelii sent a diplomatic note to Redox highlighting the occurrence and its effects, demanding a halt to the fires causing transboundary haze pollution and intervention from the government of Redox. The government of Abelii also alleged that Redox was in violation of International law. On the 2nd of February 2011 Redox responded to the diplomatic note stating its constitution does not grant the central government authority in the provinces. Government thus could only consult with authorities in Cienaga concerning the fires. On the 9th of February Abelii responded with a note stating its grievances with Redox and reaffirming its contention that Redox indeed violated international law and that by signing the Heinze Regional Agreement, Redox should refrain from activities that defeat the object and purpose of the agreement.

On 22 February in a diplomatic note to Abelii, Redox averred that it had done all it could under its Constitution and that it was in no way bound by the HRA and that the Trail Smelter case did not affect its rights or obligations. The 2011 fire lasted for three months causing haze pollution and causing a decline in tourism in Abelii. In January 2012 P-Eco was granted permission to carry out controlled burning after an Environmental Impact Assessment and the controlled burning would not significantly affect Abelii but on the 14th of February 2012 Abelii objected to the burning citing that it would be in violation of the CBD and customary international law as it would result in the extinction of the Redox orang-utan. Redox in a diplomatic note responding to Abelii cited its right to exploit its resources and disputed Abelii’s interests in Redox as the project does not affect the environment of Abelii. With regard to the issue of extirpation of the orang-utan, Redox argued that the provincial government of Huiledepalme and Huiledepalme Zoo have embarked on a captive breeding programme to maintain the population of the orang-utan.

Abelii then wrote a diplomatic note disputing that it has no right to intercede as averred by Redox as it is an obligation erga omnes according to the Barcelona Traction case. In another diplomatic note sent by Redox on the 10th of March the government rejected the applicability of the argument that the concept of erga omnes was applicable. In the same note, Redox stated that the majority shareholder of P-Eco was Rae Wheresuey an Abelii citizen. Additional negotiations between Abelii and Redox failed to resolve the disputes regarding transboundary haze and the Redox orang-utan. The parties have approached the International Court of Justice to consider the matter.

## **SUMMARY OF ARGUMENT**

Redox has failed to honour its obligations under the international law by failing to enforce a zero burning policy within its jurisdiction. This has been in breach of international conventions, regional customary international law and principles of customary international law.

Furthermore, Redox's decision to burn the Fahy Peat lands thereby resulting in the extermination of the Redox orang-utan is a breach of Abelli's rights under international law and a violation of Redox's obligations.

## **I. REDOX HAS VIOLATED INTERNATIONAL LAW BY FAILING TO ENFORCE A ZERO BURNING POLICY THAT WOULD PREVENT TRANSBOUNDARY HAZE IN ABELII.**

1. It is respectfully submitted that Abellii imputes liability for the damage suffered within its territory as a result of the burning in the latter's territory on three grounds.

Firstly, Redox has signed and in some cases ratified numerous international conventions which explicitly prohibit the causing of transboundary harm. Further it has signed the HRA whose spirit is to prevent haze pollution. Therefore its actions blatantly violate its conventional international law obligations;

Secondly, Redox is bound by customary international law which now which forbids transboundary harm and makes the perpetrator, in this case Redox liable to compensate the victim, Abellii.

Thirdly all supra national bodies within Redox are bound by Redox's international obligations. Therefore de-centralisation and semi-autonomy of provinces is not an excuse to escape liability under international law.

### **A. Redox is bound by International Agreements and Conventions explicitly prohibiting the causing of transboundary harm.**

2. The doctrine of *pancta sunt servada* is essential in regulating international agreement, it simply enunciates that agreements must be kept, and states cannot unilaterally alter the terms of an agreement.<sup>1</sup> Redox was a participant of the Rio and Stockholm Declarations; it was a signatory to the Heinze Regional Agreement on Transboundary Haze Pollution and the CBD, and hence is bound to respect any obligations under international law in respect to those agreements.
3. These international instruments provide that states should ensure that activities within their jurisdiction to not cause harm to the environment of other countries.<sup>2</sup> Redox and Abellii both participated in the UN Conference of 1972 in Stockholm which gave birth to the Stockholm Declaration.<sup>3</sup>
4. Principle 21 of the Stockholm Declaration states that states have the Responsibility

“to ensure activities within their jurisdiction do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”

This principle was restated in Principle 2 of the Rio Declaration, also borne from a conference to which Redox and Abellii were parties.<sup>4</sup> So integral is this principle to the body of international law that it has featured in most major international environmental law conventions.<sup>5</sup>

<sup>1</sup> Article 26 of the Vienna Convention on the law of Treaties.

<sup>2</sup> Principle 21 of the Stockholm Declaration, Principle 3 of the Rio Declaration, Article 3 of the CBD

<sup>3</sup> Paragraph 7, Memorials

<sup>4</sup> The 1992 United Nations Conference on Environment and Development at Rio de Janeiro, paragraph 7 Memorials

5. Redox and Abellii are also parties to the Convention on Biological Diversity (CBD)<sup>6</sup> which further states that states must act to prevent harm.<sup>7</sup> This convention was inspired by the world community's commitment to sustainable development and represents a dramatic step towards the preservation of a clean environment the world over. That Redox is a party to this convention is a clear indication that they are bound by the international consensus against transboundary harm. Any violation of this principle is therefore a violation of international law.
6. By allowing the burning of the Fahy Peat lands and being complicit in the actions of P-Eco, Redox stands in violation of international law. It follows therefore that the government of Redox is liable for the damage caused to Abellii's environment, its tourism and consequently its economy.<sup>8</sup> It is therefore a requirement of law that Redox, as the polluter should pay for its breach of international law.<sup>9</sup>

**i. Redox has violated the Heinze Regional Agreement on Transboundary harm.(HRA)**

7. Abellii is a party to the HRA. Redox has signed but not ratified the HRA.<sup>10</sup> It is a true fact in international law that a state is not bound by the provisions of a treaty unless it has ratified that treaty, if "the treaty provides for such consent to be expressed by means of ratification."<sup>11</sup> However, the Vienna Convention<sup>12</sup> further provides in Article 18 that when a state signs a treaty, it is "obliged to refrain from acts which would defeat the objects and purpose of the treaty." Many scholars have held that this obligation in Article 18 is now a matter of customary international law.<sup>13</sup>
8. By becoming a signatory to a treaty a state assumes a legal obligation to prohibit any action in bad faith which has the effects of depriving the other party of the benefits it "legitimately hoped to achieve from the treaty."<sup>14</sup> In the preamble to the HRA, the parties affirm a "commitment to strengthen international cooperation and to develop national policies for preventing and monitoring transboundary haze pollution."<sup>15</sup> This provision encapsulates the main purpose and object of the HRA, which was to be observed by its signatories in good faith. Redox has acted in bad faith and

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<sup>5</sup> See also Article 194 (2) to the United Nations Convention on the Law of the Sea (UNCLOS)

<sup>6</sup> Paragraph 6, Memorials

<sup>7</sup> Article 3 of the CBD states that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limit of national jurisdiction."

<sup>8</sup> Abellii has lost cumulatively large amounts of revenue as a result of the haze pollution caused by Redox

<sup>9</sup> The Polluter Pays Principle advocates that whoever is responsible for damage to the environment should bear the costs associated with it. It is an internationally accepted principle of international law, (See Bugge H. C., 1996. "The principles of polluter pays in economics and law", in Eide E. and van der Bergh R. (Eds) "Law and Economics of the Environment", Oslo: Juridisk Forlag, 1996.

<sup>10</sup> Paragraph 8 of the Record

<sup>11</sup> Article 14(1)(a), Vienna Convention on the Law of Treaties

<sup>12</sup> Both Redox and Abellii are parties to the Vienna Convention.

<sup>13</sup> Boisson de Chazournes and others (n 20) 382-83; Paolo Palchetti, 'Article 18 of the 1969 Vienna Convention: A vague and ineffective Obligation or a useful means of Strengthening Legal cooperation?'

<sup>14</sup> Documents of the 4<sup>th</sup> Session Including the Report of the Commission to the General Assembly on Vienna Convention [1953] 2 YB Int'l L Comm'n 54, UN Doc A/CN.4/SER.A/1952/Add. 1, See also the case of *Megalidis v. Turkey (Turkish-Greek Mixed Arb Trib 1928) 4 Ann Dig Pub Int'l L 395*. These two documents, in spite of being written before the Vienna Convention of 1969, reveal a growing understanding that was then codified in Article 18.

<sup>15</sup> Annex C to the Record, paragraph 4 of the preamble to the HRA

contrary to the objects of HRA. Instead of fostering international cooperation in preventing Haze pollution, it has repeatedly unilaterally allowed fires to burn damaging the environment of Abellii. Instead of developing national policies to monitor and prevent pollution, the provincial government has weakened those policies as the Federal government has turned a blind eye and refused to take responsibility. This was against the spirit and objects for which HRA was founded.

**i. The HRA reflects principles of customary international law.**

9. If it is to be found that Redox has not violated the spirit and object of HRA, it is still bound by it because it reflects principles of customary international law. It is a well-known principle of international law that a State will be bound by those provisions of a treaty that reflects customary international law.<sup>16</sup> Article 3 (1) of the HRA, which prohibits the causing of transboundary harm reflects customary international law and hence is binding on Redox in spite of it not having ratified HRA.<sup>17</sup> The HRA codified this existing principle of no transboundary harm and Redox is bound by it in this regard. In light of this, the defence that Redox did not ratify the HRA falls does not absolve it from liability.

**B. Redox has violated customary international law on transboundary harm.**

10. The principle that states should prevent activities within their jurisdiction from causing transboundary harm has been considered a rule of customary international law first enunciated in the Trail Smelter Arbitration.<sup>18</sup> It was accepted by this court in its *Advisory opinion on the Legality of the threat or Use of Nuclear Weapons*. In its opinion, the ICJ stated that,

“The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.”<sup>19</sup>

In the *Corfu Channel Case*, the ICJ held that Albania was responsible for causing transboundary harm to the United Kingdom and was therefore liable to compensate.<sup>20</sup> It has become widely accepted that this principle forms a part of customary international law.

11. The repeated burning of the Fahy Peat lands by P-Eco took place within Redox’s jurisdiction,<sup>21</sup> and evidently caused pollution to the environment of Abellii and consequently massive economic losses. The government of Redox failed to take positive steps to prevent these environmental disasters and even admitted to its failure to act.<sup>22</sup> This was in spite of Redox’s obligation under customary law and

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<sup>16</sup>Brownlie, *Principles of International Law*, Second Edition, Oxford University Press; 1973, also enunciated in *North Sea Continental shelf case*, ICJ reports (1969), p.3. In this case, the International Court concluded, by eleven votes to six that only the first three Articles of the Hague Convention were emergent or pre-existing rules of customary law hence binding on the German Federal Republic which had not ratified.

<sup>17</sup> *Corfu Channel Case*.

<sup>18</sup> *Trail Smelter Case (United States v. Canada)* 16 April 1938 and 11 March 1941

<sup>19</sup> *1996 ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, paragraph 29 of the Judgement in ICJ Reports 1996, page 225

<sup>20</sup> *Corfu Channel Case (United Kingdom v. Albania)* 1949 ICJ Decision of April 9. Paragraph 23

<sup>21</sup> Paragraphs 12, 14 and 17 of the Record

<sup>22</sup> In the diplomatic note in paragraph 18 of the Record, the Government of Abellii stated that it had “no ability to regulate timber harvests and land clearing operation ..... on privately owned property...”

international legal instruments to do what is in its power to ensure that activities within its geographical boundary do not cause transboundary harm. In this regard, Redox is liable for a breach of international law.

**i. Redox has failed to exercise due diligence, which is a prerequisite of its duty to prevent transboundary harm.**

12. There are those who would argue that the duty to prevent transboundary harm does not prohibit all forms of transboundary harm.<sup>23</sup> If this argument is to be accepted, then this would obviously be subject to a limitation, namely that the duty to prevent transboundary harm carries with it the corollary responsibility to exercise due diligence.<sup>24</sup> Due diligence refers to the effort made by a state to take reasonable, appropriate and timeous measures to ensure that transboundary harm is prevented.<sup>25</sup> In simple terms, a state has to do all that is within its power and knowledge to regulate and administer all activities within its jurisdiction so as not to cause harm to the environment of another state.

13. In the present case, the fire that occurred in Cienaga in 2007 could possibly have passed off for an unexpected disaster, beyond the knowledge or control of the State of Abellí.<sup>26</sup> However, there is no evidence that, post the fire, which lasted four months, Redox took any serious steps to identify its causes and solve the problem, in exercise of its duty of due diligence. The second fire of 2009 resulted from an alleged arson.<sup>27</sup> The arsonists pleaded guilty and were fined the equivalent of 1,000 U.S. dollars and given a five year sentence that was then commuted to thirty days. The commuting of the sentence of a crime whose repercussions are so serious demonstrates a level of impunity on the part of Redox. Even after the occurrence of another fire in 2011, in spite of the negative impact the previous fires had had on Abellí's economy, Redox authorised yet another burning of the Fahy Peat lands.

14. The fact that Redox would authorise a burning in such a context, that after three burnings which Redox itself had alleged to be acts of arson to the point where they arrested the perpetrators shows that Redox has acted in bad faith. International law requires that parties act in good faith in the application of international law.<sup>28</sup> It is an act of bad faith when a nation continues to cause damage to the environment of another state and uses international law to justify its actions.

**C. All supra national bodies within Redox are bound by Redox's obligations under international law.**

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<sup>23</sup> A. E Boyle, "State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law" (1990) 39 International and Comparative Law Quarterly 1 at page 14-15. However, there remain also scholars who argue that the prohibition infers strict liability and therefore applies to all forms of transboundary harm, See S. E. Gaines, "Taking Responsibility for Transboundary Environmental Effects" (1991) 14 Hastings International and Comparative Law Review 781, at 796-797.

<sup>24</sup> Birnie and Boyle, International Law and the Environment, at 112; Report of the ILC on its 53rd Session, A/56/10, p. 392.

<sup>25</sup> Report of the ILC, 53rd Session, 159, UN Doc. A/56/10 cited in Stephens, supra note 9 at 158. The report is a commentary on the Draft Articles of Prevention, considered a codification of customary international law.

<sup>26</sup> Paragraph 1 of the Record. However, it should be mentioned that the fact that P-Eco planted palm oil plantations on the former peat lands is a suspicious chain of events, though not sufficient to impute liability to Redox.

<sup>27</sup> Paragraph 14 of the Record.

<sup>28</sup> Principle 27 of Rio Declaration

15. Redox has also frequently relied on the principle of state sovereignty to justify its actions, also arguing that in terms of its constitution provincial governments are responsible for the regulation of timber harvests and therefore the government is not liable.<sup>29</sup> This argument is untenable under international law. In terms of Article 4 of the Draft Articles on the Responsibility of States for Internationally Wrongful Act, the conduct of all organs of the state are considered acts of the state.<sup>30</sup> This principle has been has become part of modern jurisprudence and has been accepted in various cases.<sup>31</sup>
16. By subjecting itself to the aforementioned international treaties, Redox was implicitly agreeing that violation of these treaties constitutes an internationally wrongful act, thus surrendering certain aspects of absolute sovereignty in pursuit of treaty objectives.<sup>32</sup> Redox cannot therefore now hide behind its sovereignty and its constitution in breach of its international obligations as this is in clear violation of international law.
17. In the *Pellat Case*,<sup>33</sup> the French Mexican Claims Commission found Mexico responsible for the acts of its constituent member states, “even if the federal Constitution did not give the central Government the right to control the member states.”<sup>34</sup> A state is therefore bound by all its obligations under international law, and its constitution or domestic law should be in conformity with its international law obligations.<sup>35</sup> Thus, whilst the powers of the federal government in Redox may be weak as against the provincial government, this does not preclude the liability of Redox under international law for causing harm to the territory of Abellii.

<sup>29</sup> Diplomatic Note from government of Redox, paragraph 18 of Record

<sup>30</sup> Article 4 (1) of the Draft Articles states that “The conduct of any State organ shall be considered an act of that State under International Law, whether the organ exercises legislative, executive or judicial or any other functions... whatever its character as an organ of the central Government or of a territorial unit of the State.” The Draft Articles on the Responsibility of States for Internationally Wrongful Acts are a combination of codification and progressive development. While the articles are not binding, they have generally been well received and referenced by the ICJ.

<sup>31</sup> *Phosphates v. Morocco, Preliminary Objections*, 1938, P.C.I.J, Series A/B, No. 74 at page 28, *Corfu Channel* case at page 23, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, ICJ Reports 1986, page 14 at page 142 paragraph 283, 149, Para 292

<sup>32</sup> Thomas L. Jipping & Wendy Wright, CEDAW Treaty Would Undermine American Sovereignty (Federalist Society, Working Paper No, 2012)

<sup>33</sup> *Georges Pinson (France) v. United Mexican States, (Pellet Case)* 24 April 1928, Reports on International Arbitral Awards,

<sup>34</sup> The Commission held that, “Mexico was responsible for the acts of its constituent Member States causing damage to foreigners even if the federal Constitution did not give the Central Government the right to control the member states or to require them to conform to the prescriptions of international law, and even if the member states had acknowledged, without paying, the debt; the sacking of Pellat’s commercial establishment and the requisitions were also acts for which Mexico was liable.” page 325 of Volume 5

<sup>35</sup> This position was also affirmed in the *ICJ’s Advisory Opinion relating to the Difference Relating to Immunity from Legal Process of A Special Rapporteur of the commission on Human Rights, 29 April 1999*, were the court held that the Malaysian government was under an obligation to convey information relating to the Conventional obligations to the judicial authorities in conformity with their obligations under international law.

## II. THE CONTROLLED BURNING OF THE FAHY PEATLANDS AND INTENTIONAL CAUSING OF THE EXTINCTION OF THE ORANGUTAN WAS IN VIOLATION OF INTERNATIONAL LAW.

18. It is respectfully submitted that by intentionally causing the burning of the Fahy Peat lands and knowingly causing the extinction of the Redox orangutan, Redox was in violation of international law for the following reasons:

Firstly, international law prohibits actions that result in the extinction of an endangered species because they negatively affect specie importance to the preservation of biological diversity; and

Secondly, the actions of Redox are tantamount to a violation of an obligation *erga omnes* to which Abellii has a right to intercede.

### i. Redox has violated the CBD

19. The Republic of Redox is a state party to the CBD. The CBD aims to deal with the “threat or significant loss of biological diversity,”<sup>36</sup> Biological diversity was defined to mean “variability among living organisms from all sources..., including diversity within species, between species and of ecosystems.”<sup>37</sup> Article 7 requires parties to identify and monitor endangered species<sup>38</sup> and in terms of Article 8 (k) of the CBD, each party should put in place legislation for the protection of threatened species.

20. Redox has acted against both the spirit and the letter of CBD in authorising P-Eco’s controlled burning of the Fahy Peat lands.<sup>39</sup> The Redox orang-utan is a critically endangered species which Redox, under CBD has the responsibility to protect. By unilaterally authorising the controlled burning, with no evidence of an EIA directly linked to the repercussions of the burn to the orang-utan, Redox has violated international law.

### ii. The intentional extirpation of a species in the wild violates an obligation *erga omnes* to which Redox cannot derogate.

21. International law places an essential distinction between obligations of a state towards another state on one hand, and on the other hand obligations of a state to the international community as a whole.<sup>40</sup> In the *Barcelona Traction Case*<sup>41</sup> the ICJ held that the obligations of a state to the international community (obligation *erga omnes*) are the concerns of all states in whose protection they all have legal interest.<sup>42</sup> These are usually things in which the international community as a whole has an active interest.

<sup>36</sup> Paragraph 8 of the preamble to CBD

<sup>37</sup> Article 2 paragraph 1 of CBD

<sup>38</sup> Article 7 should be read together with Section 1 of Annexure 1 which gives a list of protected species and this includes “endemic or threatened species.”

<sup>39</sup> Paragraph 23 of the Record

<sup>40</sup> B Simma, “From Bilateralism to Community Interest in International Law”, RDC 250 (1994), note 10, 296-297

<sup>41</sup> *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* 5 February 1970

<sup>42</sup> *Barcelona Traction Case at paragraph 33*

22. It is submitted that the international community as a whole has an interest in the protection of endangered species. The CBD is aimed at the protection of endangered species and has become a widely accepted and adopted treaty to which most nations are party.<sup>43</sup> The IUCN Red List of endangered species lists all species considered endangered and distinguishes between vulnerable and critically endangered species. The Redox orang-utan has been mentioned as critically endangered species.<sup>44</sup> The IUCN Red list is widely accepted by most nations.

23. It is clear from the foregoing that the need to protect species from becoming extinct is not simply a matter of one country but is a matter of international concern.<sup>45</sup> The entire international community has an interest in ensuring all species of animals do not become extinct. Redox is therefore violating an essential interest accepted by the international community as a whole by depriving the international community of the Redox orang-utan. Abeliu is therefore interceding on behalf of the international community against Redox for violating an obligation *erga omnes*.

**iii. Redox's Captive breeding program in conjunction with the Huiledepailme Zoo does not preclude its liability for causing extinction of endangered species.**

24. Redox has sought to argue it is not liable for causing the extinction of the orang-utan because the provincial government of Huiledepalme has embarked on a captive breeding program at the Huiledepalme Zoo.<sup>46</sup> However, this argument cannot hold because in spite of the existence of such a program, Redox remains in violation of the CBD. The CBD distinguished between in-situ and ex-situ conservation measures. In-situ conservation refers to the conservation of natural species "in the surroundings where they have developed their natural properties."<sup>47</sup> Ex-situ conservation on the other hand, which is what the provincial government of Huiledepalme is attempting to do at the zoo, refers to "conservation of components of biological diversity outside their natural habitats."<sup>48</sup> In terms of Article 9 of the CBD, ex-situ measures exist only to complement in-situ measures.<sup>49</sup>

25. The Huiledepalme zoo is an ex-situ measure occurring far from the natural habitat of the Redox orang-utan. Redox's actions are leading to the extinction of the orang-utan in its natural habitat thus threatening the biosphere in clear violation of the CBD. An ex-situ measure is therefore not sufficient in remedying its actions. Redox cannot use

**iv. The Environmental Impact Assessment (EIA) conducted by REDOX is not valid under international law.**

<sup>43</sup> CBD was entered into force in 1992 and to date has 191 members

<sup>44</sup> Paragraph 24 of the Record

<sup>45</sup> Paragraph 2 of the preamble to the CBD states, "Conscious also of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere."

<sup>46</sup> Diplomatic note in paragraph 25 of the Record.

<sup>47</sup> Paragraph 12 of Article 2 to the Convention on Biological Diversity.

<sup>48</sup> Paragraph 8 of Article 2 to the Convention of Biological Diversity

<sup>49</sup> Article 9 of CBD states that, "Each Contracting Party shall, as far as possible and as appropriate and predominantly for the purpose of complementing in-situ measures.... Adopt measures for ex-situ conservation.

26. The Republic of Redox has held an EIA for their controlled burning exercise and concluded that any smoke from the controlled burn would not significantly affect the territory of Abellii.<sup>50</sup> An EIA is a requirement under treaties to which both Redox and Abellii are parties.<sup>51</sup> International law on EIA's requires that Redox should assess the magnitude of the impact to the environment of a particular project, its potential to cause internal and transboundary harm and the steps that may be taken to prevent such harm.<sup>52</sup> The EIA conducted by Redox was at best haphazard and in violation of the generally accepted methodology of conducting an EIA and in violation of customary international law.

**v. Redox's EIA was domestic rather than transboundary**

27. The EIA conducted by Redox was a domestic project conducted without the participation or notification of the affected party. When a state is involved in a project with the potential to cause harm to the environment of another state, international law requires that state to conduct a transboundary EIA as opposed to one of a domestic nature.<sup>53</sup> The rise prominence of an EIA in the international law circles as seen by its inclusion in various legal documents<sup>54</sup> was a response by the international community to the environmental effects that cross borders.<sup>55</sup> EIA in a transboundary context ensures states give extraterritorial impacts the same scrutiny as domestic impacts.

28. In the same vein, Redox should not have confined its EIA to its boundaries but should have instead ensured that it works together with Abellii to assess the transboundary impact of the controlled burning, as is required under international law. States are required to promote reciprocity, notification and exchange of information when conducting an EIA of a transboundary nature.<sup>56</sup> In the *Nuclear Test Case*,<sup>57</sup> it was stated that at the level of prevention, a transboundary EIA is to be undertaken according to accepted international standards, and the obligation of the state party concerned to communicate its assessment and its effects is consistent with the principle.

**vi. Redox did not take all procedures required for an EIA under international law.**

29. International law sets out procedures required for the conducting of an EIA. In the *Pulp Mills Case*,<sup>58</sup> the ICJ stated that it was now a "requirement under general international law to undertake an environmental impact assessment where there is risk that the proposed activity may have adverse impacts in a transboundary context."<sup>59</sup> In such activities, the necessity of a transboundary EIA is presumed, even if the actual risk is small.<sup>60</sup> The mere fact that a party conducted an EIA is no

<sup>50</sup> Paragraph 23 of the Record

<sup>51</sup> The concept of EIA is a requirement under Principle 17 of the Rio Declaration

<sup>52</sup> Alan Boyle, *Developments in International Law of EIA and their Relation to the Espoo Convention*. At page 1

<sup>53</sup> UN Econ and Soc Council (ECOSOC). Econ Comm'n for EU, Meeting of the parties to the Convention on EIA in a Transboundary Context at 40. UN Doc. ECE/MP.EIA/7 (2006)

<sup>54</sup> Principle 17 of the Rio Declaration,

<sup>55</sup> Charles M Kersten, *Rethinking Transboundary Environmental Impact Assessment: Yale Journal of International Law* (Vol. 34: 173 at 176)

<sup>56</sup> See Article 14 of the CBD

<sup>57</sup> *Nuclear Test Case (Australia & New Zealand v. France ICJ Judgment 20 Dec 1974*

<sup>58</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay) 2010 ICJ Reports*

<sup>59</sup> At Para. 204

<sup>60</sup> *MOX Plant Case (Provisional Measures) ITLOS No. 10 (2001)*

sufficient defence for transboundary harm.<sup>61</sup> A transboundary EIA should thus be conducted in the jurisdiction of the country to be affected “with a degree of detail commensurate with the likely environmental significance.”<sup>62</sup>

30. It is clear that the EIA Redox alleged to have made was done only within the boundaries of Redox and without the knowledge or cooperation of the Government of Abellii. However, the actions of Redox will have far reaching repercussions on Abellii’s environment, its tourism and more importantly its economy. Redox has violated International law relating to EIA and is therefore liable for the effect of its actions on Abellii.

### **III. RAE WHERESUEY’S ABELII CITIZENSHIP DOES NOT CHANGE REDOX’S OBLIGATIONS UNDER INTERNATIONAL LAW.**

31. An argument has been raised that the majority shareholder in P-Eco, Rae Wheresuey is in fact an Abellii citizen.<sup>63</sup> This argument seems to imply that Redox’s can be exonerated under international law because of the citizenship of the culprit company’s major shareholder. This argument is entirely without merit. Firstly, because it ignores the importance of geography in imputing liability for transboundary harm. Mores, precedence has held that it is a well-recognised doctrine of international law that when a citizen ventures into a commercial enterprise in a country other than his own, he is liable to the laws of the country in which he practices business. His state has no right of claim for him as against his commercial ventures.<sup>64</sup> In the same way, Redox cannot escape liability on the basis that a citizen of another country has stake in a company within its jurisdiction. It is still liable under international law and any attempt to escape that liability is not based on law.

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<sup>61</sup> *Southern Bluefin Tuna Case* para 79, See also *Land Reclamation Case, (Case Concerning Land Reclamation by Singapore in and around the Straights of Johor (Malaysia v. Singapore))* Reports on International Arbitral Awards 1 September 2005

<sup>62</sup> Alan Boyle, *Developments in International Law of EIA and their Relation to the Espoo Convention* at page 7

<sup>63</sup> Diplomatic Note, paragraph 27 of the Record.

<sup>64</sup> *Rosa Gelbrunk claim (1902) Salvador v. The United States*, page 463. This decision was upheld in the Barcelona Traction case. The court held in the Gelbrunk case that, “A citizen or subject of a nation who, in pursuit of a commercial enterprise, carries on trade within the territory of and under the protection of the sovereignty of a nation other than his own is to be considered as having cast his lot with the subjects or citizens of the state in which he resides and carries on business.”

**CONCLUSION AND PRAYER**

**WHEREFORE**, considering the foregoing submissions, Abelii most respectfully requests the Honourable International Court of Justice to adjudge and declare that:

1. Redox's failure to enforce a zero burning policy that would prevent transboundary haze in Abelii is in violation of International law.
2. Redox's intentionally authorizing the extinction of the Redox orang-utan is a violation of international law.

RESPECTFULLY SUBMITTED.

X\_\_\_\_\_

Agents for Abelii