

TEAM CODE: _____

STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION, 2012-13

2012 GENERAL LIST NO. 117

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

Case concerning Transboundary Haze and Species Protection

THE FEDERAL STATES OF ABELII

v.

THE REPUBLIC OF REDOX

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE RESPONDENT

REPUBLIC OF REDOX

ON SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE

MEMORIAL FOR THE RESPONDENT

THE REPUBLIC OF REDOX

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LIST OF ABBREVIATIONS

1. &: And
2. ¶: Paragraph
3. AMJIL: American Journal of International Law
4. Art.: Article
5. Brit. Y.B. Int'l L.: British Year Book of International Law
6. Cl.: Claims
7. Comm.: Commission
8. Denv. J. Int'l L. & Pol'y: Denver Journal of International Law and Policy
9. Doc.: Document
10. ECR: European Court Reports
11. Ed.: Edition
12. Eds.: Editors
13. EIA: Environmental Impact Assessment
14. Eur. J. Int'l L.: European Journal of International Law
15. E.C.H.R: European Court of Human Rights
16. G.A. Res.: General Assembly Resolution
17. GAOR: General Assembly Official Records
18. GC: General Conference
19. Harv. L. Rev: Harvard Law Review
20. I.L.M: International Legal Materials
21. I.L.R.: International Legal Reporter
22. ICJ: International Court of Justice
23. ILA: International Law Association
24. ILC: International Law Commission
25. Int'l: International

26. Int'l & Comp. L.Q.: International and Comparative Law Quarterly
27. J.: Journal
28. L. : Law
29. L.Q.: Law Quarterly
30. MNC: Multi-national Corporation
31. No.: Number
32. OECD: Organization for Economic and Social Development
33. p.: Page
34. P.C.I.J.: The Permanent Court of International Justice
35. Pol'y.: Policy
36. Pub.: Publication
37. Pvt.: Private
38. Rep.: Report
39. Res.: Resolution
40. s. : Section
41. Ser.: Series
42. Sess.: Session
43. Supp.: Supplement
44. Trib.: Tribunal
45. U.K.: United Kingdom
46. U.N. Doc.: United Nations Document
47. U.N.Doc.: United Nations Document
48. UNGA.: United Nations General Assembly
49. U.N.GAOR.: United Nations General Assembly Official Records
50. U.N.T.S.: United Nations Treaty Series
51. U.S.: United States
52. UN GAOR Supp.: United Nations General Assembly Official Record
53. UN: United Nations

54. UNCLOS: United Nations Convention on the Law of the Sea
55. UNEP: United Nations Environment Program
56. UNRIAA: United Nations Reports of International Arbitral Awards.
57. v.: Versus
58. Va. J. Int'l L: Virginia Journal of International Law
59. VNJTL: Vanderbilt Journal of Transnational Law
60. VCLT: Vienna Convention on the Law of Treaties
61. Vol.: Volume
62. Y.B. Int'l L.C.: Year Book of International Law Commission
63. Y. L.J.: Yale Law Journal

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QUESTIONS PRESENTED

- I. WHETHER OR NOT, REPUBLIC OF REDOX IS IN VIOLATION OF INTERNATIONAL LAW BY FAILING TO PREVENT TRANSBOUNDARY HAZE POLLUTION?
- II. WHETHER OR NOT, THERE EXISTS AN OBLIGATION ERGA OMNES PROVIDING THE FEDERAL STATES OF ABELII STANDING?
- III. WHETHER OR NOT, REPUBLIC OF REDOX HAS VIOLATED INTERNATIONAL LAW BY INTENTIONALLY AUTHORIZING THE EXTINCTION OF THE REDOX ORANGUTAN?

STATEMENT OF JURISDICTION

Pursuant to the Joint Notification and the *compromis* concluded on 25th June 2012, agreed to therein, between the Federal States of Abellii and the Republic of Redox (collectively "the Parties"), and in accordance with Article 40(1) of the Statute of the International Court of Justice, the Parties hereby submit to this Court its dispute concerning Question Relating to a Transboundary Haze Pollution and Species Protection. In accordance with Article 36(1) of the ICJ statute, each party will accept the judgment of the court as final and binding. In accordance with Article 1 of the *Compromis*, the Court is hereby requested to adjudge the dispute.

STATEMENT OF FACTS

Abelii and Redox are neighboring states located in the Heinze region. 10% of Abelii's GDP consists of the tourism industry. Whereas, Redox has an agricultural based economy, with 12% of its territory being peat swamp forest. Fahy Peatlands, home to the critically endangered, endemic Redox orangutans is located in Redox.

In 2007, a fire occurred in the Cienaga peatlands in Redox, owned by P-Eco, a multinational company. This fire caused haze pollution in Abelii, causing decline in tourism. In another fire in 2009, Cienagan officials identified the cause and two P-Eco employees, arsonists were duly punished.

Further, another fire occurred in January 2011, leading to a decline in tourism in Abelii. Various diplomatic notes were exchanged by both countries after this fire wherein Abelii stated that Redox must be held liable for causing transboundary haze pollution in its territory, to which Redox replied stating that its actions are not in violation of the existing customary international law and provisions of the Heinze Regional Agreement.

In 2012 the provincial government of Huiledepalme (in Redox) granted permission for a controlled burn to P-Eco. Abelii feared that this burn would lead to the extirpation of Redox orangutans and they believed that species protection was obligation erga omnes, they interceded to prevent Redox from conducting the burn.

Additional negotiations having failed to resolve the disputes regarding both, transboundary haze and species protection, parties agreed to submit the matter to the ICJ.

SUMMARY OF ARGUMENTS

I. Redox has not violated international law as the acts of the company, P. Eco are not attributable to the State of Redox. Further, Redox has complied with its obligations under the Heinz Regional Agreement by conducting due diligence of its burning activities and has not breached the object and purpose of the H.R.A.

II. An obligation *erga omnes* requires universality and solidarity. In the present case Abellii has no solidarity or legal interest in the conservation of a species on the territory of Redox and thus has no standing. It is merely interfering with internal matters of Redox.

III. Redox has exercised its permanent sovereign right over its natural resources and authorised the controlled burn of the Fahy Peatlands. Further, adequate conservation measures have been taken to protect the Redox Orangutan in the form of a captive breeding program, in compliance with its obligations under the Convention on Biological Diversity (hereinafter 'C.B.D.').

MERITS

I. THE REPUBLIC OF REDOX HAS NOT VIOLATED INTERNATIONAL LAW WITH RESPECT TO TRANSBOUNDARY HAZE POLLUTION

A state is responsible when its act or omission constitutes (1) breach of international obligations¹ (2) breach must be attributable to the state.² However, in the instant case neither of the two prongs of state responsibility have been met: *firstly*, being a signatory to the Heinze Regional Agreement ('H.R.A. '), Redox is not responsible for carrying out any positive obligations to enforce the treaty³; *secondly*, Redox has not breached customary international law ('CIL') because P.Eco. being a private entity, its actions will not be attributable to Redox, thereby relieving Redox of any international responsibility.

¹Gabčíkovo-Nagymaros Project (Hungary v. Slovakia) 1997 I.C.J. 7 (Apr. 9); Chorzow Factory Case (Germany v. Pol.) 1928 P.C.I.J. 47 (ser. A), N^o 17 (Sept. 13); Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.A.) 1986 I.C.J. 14 (June 27); Nuclear Tests Cases (New Zealand v. France) 1974 I.C.J. 4 (Aug. 8).

²I.L.C., Articles on the Responsibility of States for Internationally Wrongful Acts, GA U.N. Doc. A/56/10 (2001), art.2. ('ARSIWA'); CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002); Bodansky & Crook, *Introduction and Overview*, 96 A.J.I.L. 773, 778 (2002); Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR.J.INT'L.L. 435, 500 (1999); Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV.INT'L.L.J. 1, 10 (1988); Combacau & Alland, "Primary" and "Secondary" Rules in the Law of State Responsibility: *Categorizing International Obligations*, 16 NETH.Y.B.INT'L.L. 81, 85 (1985).

³Joni S. Charne, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO.WASH.J.INT'L.L.&ECON.71,78 (1976).

A. THE ACTIVITIES OF P. ECO ARE NOT ATTRIBUTABLE TO REDOX

A State is responsible only for acts of its organs or of persons acting under its control and authorization.⁴ It is impossible for a state to control all events on its territory;⁵ thus, territorial sovereignty *per se* cannot entail responsibility.⁶ Therefore, conduct of P.Eco, acting in a ‘purely private capacity’,⁷ cannot be considered an act of State.⁸ Only a State’s own positive failure to prevent private wrongful conduct or to apprehend and punish the wrongdoer, and not the conduct of the wrongdoer itself can be made attributable to it.⁹

1. Conduct of P. Eco has not been acknowledged and adopted by Redox.

One of the exceptions to the aforementioned rule of non-attribution of conduct is when the state acknowledges or adopts private conduct as its own.¹⁰ This does not mean mere factual acknowledgement,¹¹ i.e. to say mere ‘approval’ or ‘endorsement’ of conduct, does not involve assumption of responsibility.¹² Herein, Redox has acknowledged only the factual existence of the breaches¹³ but it has not assumed responsibility to adopt these

⁴ ARSIWA, *supra* note 2, art.8.

⁵ CRAWFORD, *supra* note 2, at 261.

⁶ Corfu Channel (Merits) (U.K. v. Albania) 1949 I.C.J. 4 (Apr. 9).

⁷ CRAWFORD, *supra* note 2.

⁸ R. Ago, *Fourth Report on State Responsibility*, 2 I.L.C. Yearbook 71 (1972).

⁹ Alan Tan, *Forest Fires in Indonesia: State Responsibility and International Liability*, 48(4) I.C.L.Q. 826, 855 (1999).

¹⁰ ARISWA, *supra* note 2, Art. 11.

¹¹ SHAW, *INTERNATIONAL LAW* 119 (2008).

¹² ARSIWA, *supra* note 2, art.11.

¹³ Annex A, ¶18.

activities as its own. It clearly denied the existence of any control of the government over such private acts.¹⁴

2. P. Eco does not exercise any elements of governmental authority.

Elements of governmental authority are exercised when a particular entity has been empowered by the law of that state to exercise functions of a public character normally exercised by state organs.¹⁵ Real test to determine such governmental authority is to check for state participation in its capital.¹⁶ In the current case, neither does the Cienagan government, nor does the Redox government have any capital interest in P. Eco. On the contrary, it is pertinent to note that an Abellii citizen is a majority shareholder in P. Eco.¹⁷ Further, there is no authorization of any acts of P. Eco by the government of Redox, thereby, absolving Redox of all responsibility for private acts of P. Eco.

3. P. Eco's conduct has not been directed or controlled by the government of Cienaga.

Conduct of private entities is attributable to the state when there exists a specific factual relationship between the entity and the state,¹⁸ and the entity is acting on the direction and

¹⁴ *Id.*

¹⁵ ARSIWA, *supra* note 2, art.5.

¹⁶ Hyatt International Corporation v. The Government of the Islamic Republic of Iran, 9 Iran-U.S.C.T.R., 72 (1985); CRAWFORD, *supra* note 2.

¹⁷ Annex A, ¶27.

¹⁸ ARSIWA, *supra* note 2, art. 8. See also, Zafiro case 1925, R.I.A.A. 60; Stephens case 1927, R.I.A.A. 267-268; Lehigh Valley Railroad Company & Others (U.S.A v. Germany) 1930, R.I.A.A. 84.

control of the State.¹⁹ However, Redox has not directed or controlled any activity by P. Eco, in fact, Redox has time and again pointed out its limitations in controlling such private activities as conducted by P. Eco.

4. Attributing P. Eco's conduct to Redox is against general principles of international law.

i. Attribution is against the 'polluter pays' principle

The 'polluter pays' principle, with its presence in various conventions and declarations,²⁰ has acquired the status of CIL. The principle states that, 'national authorities should promote practices to internalize the costs of pollution',²¹ i.e. the polluter must be made liable for the harm caused.²²

In the instant case, the responsibility rests with P.Eco as it qualifies as the polluter,²³ and hence should be made responsible for any damage incurred in Abellii.

¹⁹ Military and Paramilitary Activities in and against Nicaragua, *supra* note 1.

²⁰International Convention on Oil Pollution Preparedness, Response and Cooperation, *entered into force* May 13, 1995, 1891 U.N.T.S. 51; Convention on the Protection of the Alps, *entered into force* Nov. 7, 1991, 31 I.L.M. 767; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, *entered into force* March 17, 1992, 31 I.L.M. 1312; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, *entered into force* June 21, 1993, 32 I.L.M. 480; Convention for the Protection of Marine Environment of the North East Atlantic, Paris, *entered into force* Sept. 22, 1992, 32 I.L.M. 122 8; Declaration on the United Nations Conference on Environment and Development U.N. Doc. A/Conf.151/26/Rev.1(1993), Principle 16 ('Rio Declaration').

²¹ CRAWFORD, *supra* note 2, at 880.

²² Rio Declaration, *supra* note 20, principle 16.

²³ Foo Kim Boon, *The Rio Declaration and its Influence on International Environmental Law*, 4 SING.J.LEGAL STUD. 347, 355 (1992).

ii. Attribution is against international norms of civil liability

Various environmental treaties demonstrate a willingness of states to impose civil liability directly on corporations for certain violations of international environmental law.²⁴ Commentators refer to them as “civil liability” treaties.²⁵ These are “transboundary civil litigation” regimes wherein the MNCs are held liable for the harm caused by them.²⁶ Hence, Redox should not be held liable for the acts of a private company and responsibility, if any, ought to be first entailed on P.Eco.

**B. IN ARGUENDO, THE DAMAGE CAUSED DOES NOT QUALIFY AS
‘ENVIRONMENTAL DAMAGE’ AND IS NOT SUFFICIENT TO IMPUTE LIABILITY.**

The harm principle in *Trail Smelter*²⁷ demands that the state of origin is enjoined from causing transboundary environmental harm that reaches a certain threshold level of significance or seriousness,²⁸ and it is unlikely that all damage gives rise to liability.²⁹ State practice, decisions of international tribunals³⁰ suggest, this damage must be

²⁴ Mara Theophila, *Moral Monsters under the bed: Holding Corporations Accountable for Violations of the Alien Tort Statute after Kiobel v. Royal Dutch Petroleum Co.*, 79 FORDHAM L.REV. 2859 (2011).

²⁵ Boyle, *Making the Polluter Pay: Alternatives to State Responsibility in the Allocation of Transboundary Environmental Costs*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM, 363-67 (Francesco Francioni & Tullio Scovazzi eds., 1991); Karl Zemanek, *Causes and Forms of International Liability*, in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW, 319-327 (Bin Cheng & E.D. Brown eds., 1988).

²⁶ STEVEN RATNER, CORPORATIONS AND HUMAN RIGHTS: A THEORY OF LEGAL RESPONSIBILITY 456 (2001).

²⁷ Trail Smelter Arbitration (U.S. v. Canada) 1938/1941, R.I.A.A. 1905.

²⁸ *Id.*

²⁹ P. SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENT LAW 87 (1995).

³⁰ Nuclear Tests case, *supra* note 1, Trail Smelter Arbitration, *supra* note 27; Gabčíkovo-Nagymaros Project, *supra* note 1.

‘significant’ or ‘substantial’ i.e. it must cause ‘irreparable damage’ or ‘substantially prejudice’ the interest of another state.³¹

In the current case, the harm caused cannot be said to have caused irreparable damage to Abellii, as it merely affects a part of the ecotourism industry which contributes to only 10% of its GDP. In fact, the kind of damage that has occurred cannot even be classified as environmental damage. The definition of environmental damage is limited to damage to natural resources (air, water, soil, fauna and flora).³² Such damage does not include damage to persons; property etc.³³. Hence, damage to the ecotourism industry will not fall within the ambit of environmental damage, thereby absolving Redox of liability.

**C. REDOX’S ACTIONS ARE NOT IN VIOLATION OF ITS CUSTOMARY AND
CONVENTIONAL OBLIGATIONS OF PREVENTION OF TRANSBOUNDARY HARM**

There is a breach of an international obligation when conduct attributable to a State amounts to failure to comply with obligations incumbent upon it.³⁴ Such failure may *inter alia* be in the form of a breach of a treaty obligation³⁵ or of a principle of CIL³⁶. However, Redox has fulfilled its obligations under the H.R.A. as well as CIL and the

³¹ ULRICH BEYERLIN, THILO MARAUHN, INTERNATIONAL ENVIRONMENT LAW 87 (2011).

³² P. SANDS, *supra* note 29.

³³ XUE HANQUIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 110 (2010).

³⁴ Joni Charne, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT’L L. & ECON. 71.

³⁵ Military and Paramilitary Activities in Nicaragua, *supra* note 1.

³⁶ North Sea Continental Shelf (F.R.G v. Denmark; F.R.G v. Netherlands) 1969 I.C.J. 3 (Feb. 20); SS Lotus (France v Turkey) (Merits) 1927 P.C.I.J. (ser. A/B), N° 10 (Sept. 7).

breaches committed by P. Eco are not attributable to it, thereby absolving it of all liability.

1. Redox's actions are not in breach of the H.R.A.

As a signatory to the H.R.A.,³⁷ Redox is obligated to refrain from acts which defeat the object and purpose of a treaty.³⁸

a. Redox's actions are not in breach of the object and purpose of the H.R.A.

When determining whether a State's behaviour defeats the object of a treaty, the best possible test is a manifest bad faith-test, and such a test meets support in preparatory works of Art.18 VCLT³⁹, in literature⁴⁰ and in judicial decisions.⁴¹ The purpose of Art.18 is to prohibit action in bad faith deliberately aiming to deprive other parties of benefits which they hope to achieve from the treaty.⁴²

³⁷ Annex A, ¶8.

³⁸Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, art. 18, 25, 1155 U.N.T.S. 331 ('V.C.L.T. '); Paul Brown, *Landmines Banned but Threats Stay*, THE GUARDIAN, Mar. 2, 1999, at 45; Jonathan Charney, *Entry into Force of the 1982 Convention on the Law of the Sea*, 35 VA.J.INT'L.L. 381, 385 (1995).

³⁹ J Brierly, *Second Report: Revised Articles of the Draft Convention*, 2 Y.B.INT'L.L.COMM'N 70, 73 (1951); I.L.C., *Summary Records of the 788th Meeting*, 1 Y.B.INT'L.L.COMM'N 87 (1965).

⁴⁰ BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 111 (1953); JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 56 (1996); D. W. Greig, *Reciprocity, Proportionality, and the Law of Treaties*, 34 VA.J.INT'L.L. 295, 345 (1994).

⁴¹ Nuclear Tests case, *supra* note 1; The Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554, 574; S.S. Lotus, *supra* note 36.

⁴² Hersch Lauterpacht, *First Report on the Law of Treaties*, 2 Y.B. INT'L.L.COMM'N. 90, 108 (1953).

Here, no ‘bad faith’ on part of Redox can be inferred because the cause of the fires is unknown and the arsonists responsible for the 2009 fires were duly punished.⁴³

Moreover, to hold a State’s acts in violation of the treaty's object and purpose prior to ratification, is tantamount to saying that the treaty assumes legal force upon signature rather than ratification, which is unacceptable.⁴⁴ Further, such an act defeating the object and purpose should make the future enactment or enforcement of the treaty a redundancy,⁴⁵ and this is clearly not the case with acts committed by Redox.

b. Article 18, VCLT is an obligation in good faith

As per the VCLT, recourse may be made to the preparatory works of a treaty in order to interpret the treaty.⁴⁶ While drafting Art.18 of the VCLT, a Draft Convention on the Law of Treaties contained an article on the present Art.18, which noted that the provision concerned a duty of good faith rather than of international law. The draft article reads:

“... a State which has signed a treaty is under no duty to perform the obligations stipulated prior to the coming into force of the treaty; under some circumstances, however, good faith may require that the State shall, for a reasonable time after signature, refrain from taking action which would render performance by any party of obligations stipulated impossible or difficult.”⁴⁷

⁴³ Annex A, ¶14.

⁴⁴ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 94 (2000).

⁴⁵ JAN KLABBERS, *supra* note 40.

⁴⁶ V.C.L.T., *supra* note 38, Art. 32.

⁴⁷ *Harvard Draft Convention on the Law of Treaties*, 29 AM.J.INT'L.L. 657, 781 (1935).

Therefore, it is clear from the above that the obligation under Article 18 is one in good faith for the breach of which responsibility cannot be entailed.

c. The H.R.A. does not constitute regional CIL

Multilateral treaties may create CIL on coming into force,⁴⁸ upon meeting the following three conditions: (1) sufficient number of countries in the region have accepted the treaty;⁴⁹ (2) significant number of states whose interests are affected by the treaty are party to it;⁵⁰ (3) the treaty does not allow reservation to any party.⁵¹ The failure to fulfil even one condition will prevent the treaty from transforming into a custom.⁵² In the current case, the H.R.A. fails to fulfill the second requirement of being ratified by all significant states.

Pertinent states can be defined as those states whose participation in a treaty is required if the treaty has to have any real chance of achieving its intended objective.⁵³ This requirement is referred to as the ‘efficacy test’⁵⁴, i.e. if enough pertinent states adhere to

⁴⁸ R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT.Y.B.INT’L L. 230, 275 (1965-66); D’AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 120 (1971); Arthur Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND.J.TRANSNAT’L.L. 1, 10 (1988).

⁴⁹ Gary Scott, Craig Carr, *Multilateral Treaties and the Formation of Customary International Law*, 25 DENV.J.INT’LL.&POL’Y. 65, 71 (1996).

⁵⁰ Alberto Alvarez-Jimenez, *Methods for the Identification of Customary International Law in the International Court of Justice’s jurisprudence*, 60 I.C.L.Q. 681, 712 (2011).

⁵¹ North Sea Continental Shelf, *supra* note 36.

⁵² Catherine Redgwell, *Universality or Integrity: Some Reflections on Reservations to General Multilateral Treaties*, 64 BRIT.Y.B.INT’L.L. 245, 256 (1994).

⁵³ R.R. Baxter, *supra* note 48.

⁵⁴ D’AMATO, *supra* note 48.

some regulation by virtue of a treaty, then, the fact that the treaty proves efficacious determines its validity as a regional custom.⁵⁵

Considering the size of the Heinze Region and the proximity at which each of the states are located from each other, non adherence to the H.R.A. by even one of the states in the region will reduce the efficacy of the H.R.A. and defeat the H.R.A.'s objective of preventing haze pollution in that region. Therefore, till all the states in the region have ratified the H.R.A., it cannot gain the status of a regional custom.

2. Redox has not committed breach of the CIL principle of preventing transboundary harm.

The principle *sic utero tuo, ut alienum non laedas* is well established CIL which states that no state has the right to use its territory in a manner as to cause injury to the territory of another.⁵⁶ Hence, Redox is under the duty to prevent harm on any other State's territory. However, it has not caused breach of any such duty because *firstly*, the acts of P. Eco are not attributable to Redox; *secondly*, Redox has fulfilled its duty to conduct due diligence to prevent such harm; *Lastly, in arguendo*, these acts do not qualify as acts causing environmental harm for which liability may be imputed.

⁵⁵ Arthur Weisburd, *supra* note 48; D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND.J.TRANSNAT'L.L. 459, 465 (1988); D'Amato, *A Brief Rejoinder*, 21 VAND.J.TRANSNAT'L.L. 489, 495 (1988); Arthur Weisburd, *A Reply to Professor D'Amato*, 21 VAND.J.TRANSNAT'L.L. 473, 480 (1988).

⁵⁶ Trail Smelter Arbitration, *supra* note 27; Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1 (1973), Principle 21 ('Stockholm Declaration'); Rio Declaration, *supra* note 20, Principle 2; BIRNIE AND BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 168 (2004); McCallion, *International Environmental Justice: Rights and Remedies*, 26 HASTINGS INT'L. & COMP.L.REV. 427, 431 (2003); *Island of Palmas (U.S. v. Neth.)* (1928), 2 R.I.A.A. 829; *Lac Lanoux Arbitration (Spain v. France)* 1957, R.I.A.A. 281.

a. Fault liability standard applies on Redox

i. Strict liability cannot be imputed on Redox

Strict liability principle establishes liability for harm caused by abnormally dangerous activities on the original state irrespective of fault or ownership.⁵⁷ However, the disjunction between strict liability and states' interests precludes an international consensus for strict liability as such an automatic right ignores the special geographical situation in certain countries due to which harm may be caused, for eg: the up-stream State would have to continually pay compensation for the exclusive benefit of the downstream State.⁵⁸

Publicists also opine that strict liability is anathema to developing countries as they often lack the information needed to predict the extent of transnational harm that will result from domestic activities, especially the activities of foreign entities upon whom these states often rely for economic development.⁵⁹ Strict liability may also hinder developing states' ability to compete internationally and thus impede their economic growth.⁶⁰ Hence, states in the Heinze region being developing states, it is not prudent to impose upon them a strict liability regime which might impede their economic growth.

⁵⁷ John Kelson, *State Responsibility and Abnormally Dangerous Activities*, 13 HARV.INT'L.L.J. 197, 200 (1972).

⁵⁸ Dupuy, *International Liability for Transfrontier Pollution*, in TRENDS IN ENVIRONMENTAL POLICY AND LAW, 363-369 (M. Bothe ed., 1980).

⁵⁹ Magraw, *The International Law Commission's Study of International Liability for Non-prohibited Acts as It Relates to Developing States*, 61 WASH.L.REV. 1041 (1986).

⁶⁰ Robinson, *Problems of Definition and Scope*, in LAW, INSTITUTIONS AND THE GLOBAL ENVIRONMENT, 48-49 (1972).

Furthermore, the inclination of these states towards a fault based liability regime can be gauged from the due diligence requirements emphasized upon in the H.R.A.⁶¹

ii. Redox has fulfilled its duty to conduct due diligence

Under fault liability, the test of due diligence is accepted as a standard for the duty to prevent transboundary harm,⁶² and states are not automatically liable for damage caused.⁶³ It only requires reasonable efforts by a State to take appropriate measures in a timely fashion.⁶⁴ Nonetheless, the state's conduct should fall within international standards⁶⁵ that require a State to enact laws as a good government may be expected to enact to prevent pollution.⁶⁶

Redox has complied with all the above mentioned requirements of diligence. *Firstly*, despite being a mere signatory to the H.R.A., it made 'zero burning policy' its national goal.⁶⁷ *Secondly*, Cienagan environmental officials adhering to their due diligence duties of conducting investigation to prevent any further fires discovered the main cause of the 2009 fire.⁶⁸ *Lastly*, it can be inferred that there were laws and procedures in place for

⁶¹ Annex C.

⁶² *Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, 2001, in REPORT OF THE I.L.C. IN ITS 53RD SESSION, (2001); BIRNIE AND BOYLE, *supra* note 56; SHAW, *supra* note 11.

⁶³ SHAW, *supra* note 11 at 855.

⁶⁴ ARSIWA, *supra* note 2; STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 158 (2009); BERGKAMP, LIABILITY AND ENVIRONMENT 165 (2001).

⁶⁵ Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931 (1997).

⁶⁶ P. SANDS, *supra* note 29, at 882; OECD, RESPONSIBILITY AND LIABILITY OF STATES IN RELATION TO TRANSFRONTIER POLLUTION 4 (1984).

⁶⁷ Annex A, ¶10.

⁶⁸ Annex A, ¶14.

compliance with the policy as the P. Eco employees responsible for the fire were punished⁶⁹ as per such a legal framework to ensure compliance.

⁶⁹ *Id.*

II. THERE IS NO EXISTENCE OF AN OBLIGATION ERGA OMNES AND HENCE ABELII
HAS NO STANDING

The *Barcelona Traction Case*⁷⁰ distinguishes between an obligation owed to a state and an obligation owed to the international community as a whole, the latter having an *erga omnes* character. According to the court, these obligations are few and “are such by their very nature.” Largely due to the lack of case law of international courts⁷¹ and because of the dense definition in the *Barcelona Traction Case*, the question has been left unanswered as to what specific criteria a norm must fulfill to be considered *erga omnes*.⁷² It is pertinent to note that all four examples given by the court in the above case of such obligations all fall under the ambit of human rights norms.⁷³ The case at hand is far removed from this and deals with the sovereign right of one state namely Redox to exploit its own resources and the right to protect species on its territory.

A. THERE EXISTS NO ERGA OMNES OBLIGATION IN THE PRESENT CASE

Every *erga omnes* obligation exhibits two characteristics: it is owed to the international community as a whole and every state has a legal interest in its performance.⁷⁴ Though the general concept of obligations *erga omnes* has gained quick acceptance, its precise

⁷⁰ *Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain)* 1970 I.C.J. 3 (Feb. 5).

⁷¹ Christian Tams, Antonios Tzanakopoulos, *Barcelona Traction at 40: The ICJ as an Agent of Legal Development*, 23 LEIDEN J. OF INT’L. L. 67 (2010).

⁷² CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 113 (2005).

⁷³ *Barcelona Traction*, *supra* note 70.

⁷⁴ *Id.*

scope and significance are still uncertain, in both state practice and judicial application.⁷⁵

Despite decades of discussion the question of which obligations qualify as *erga omnes* has still not been satisfactorily answered.⁷⁶ For an obligation to attain the status of *erga omnes* both conditions of universality as well as solidarity must be satisfied.⁷⁷

The applicant has alleged that the conservation of the Redox Orangutan is an obligation *erga omnes*.⁷⁸ More often than not, obligations *erga omnes* relating to the environment are those which are concerned with a global commons.⁷⁹ However, endangered species and habitats are not generally considered global common pool resources since they are under the national jurisdiction of state.⁸⁰ When a resource falls solely in the territory of one state, state sovereignty over that resource dominates.⁸¹ Thus no other state can be said to have a legal interest in the performance of an obligation towards such resource.

⁷⁵ MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* 203 (1997).

⁷⁶ OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 211 (1991); Torsten Stein, *Decentralized International Law Enforcement: The Changing Role of the State as Law-Enforcement Agent*, in *THE ALLOCATION OF LAW ENFORCEMENT IN THE INTERNATIONAL SYSTEM*, 115 (Delbrück ed., 1995).

⁷⁷ MAURIZIO RAGAZZI, *supra* note 75.

⁷⁸ Annex A, ¶26.

⁷⁹ MAURIZIO RAGAZZI, *supra* note 75.

⁸⁰ ELLI LOUKA, *INTERNATIONAL ENVIRONMENT LAW* 87 (2006).

⁸¹ DAVID HUNTER, JAMES SAZMAN, *INTERNATIONAL ENVIRONMENTAL POLICY* 187 (2002).

**B. ABELII IS MERELY INTERFERING IN THE INTERNAL MATTERS OF REDOX
AND HAS NO RIGHT TO INTERCEDE IN THE PRESENT MATTER**

1. Abellii has no standing.

Judge Skotnikov, in the case of *Belgium v. Senegal*⁸² observed that the ICJ has till date not heard a case where a state has instituted proceedings simply on the basis of being a party to an international instrument in which obligations were owed to the international community.⁸³ Merely by virtue of a particular state being a signatory to a treaty which has an obligation owed to the international community does not imply that there is a legal interest to ensure performance of that obligation from all other state parties.⁸⁴ Quoting the ARSIWA⁸⁵ he added that in invoking responsibility in the sense of the articles, some specific entitlement is needed, such as right of action specifically conferred.⁸⁶ As Abellii has no legal interest in Redox's controlled burning activities of the Fahy Peatlands and neither has any such right been conferred, it is submitted that Abellii does not have any standing in the present case.

⁸²Obligation to Prosecute or Extradite (Belgium v. Senegal) (Provisional Measures) 2009 I.C.J. 139 (May 28).

⁸³*Id.*, Judge Skotnikov: 'separate opinion'.

⁸⁴ *Id.*

⁸⁵ CRAWFORD, *supra* note 2; ARSIWA, *supra* note 2, art. 42.

⁸⁶ Obligation to Prosecute or Extradite, *supra* note 82.

2. **Abelii is merely interfering with the internal matters of Redox.**

Every state has a duty to refrain from intervention in the internal or external affairs of another state.⁸⁷ The ICJ approved the duty of non-intervention in the Corfu Channel Case.⁸⁸ Abelii conceded that the controlled burn authorized by the Huiledepalme Government would not cause any haze pollution, however it still objected to the activity.⁸⁹ Thus, Abelii in the present case is merely trying to disturb and hamper the implementation of the domestic policies of Redox.

C. *IN ARGUENDO*, REDOX HAS NOT BREACHED AN OBLIGATION

ERGA OMNES

The ILC maintains that state responsibility attaches only to internationally wrongful acts.⁹⁰ In the case at hand, Redox reiterates that there has been no commission of an internationally wrongful act; the State has only exercised its permanent sovereign right to exploit its natural resources. Thus, even if there did exist an obligation under international law, there was no breach of that obligation. The obligation to protect a critically endangered species was cast upon Redox and it is clear that they have performed this obligation by embarking on an ex situ method of conservation as envisaged by the CBD.⁹¹ The Huiledepalme Zoo has begun captive breeding for the

⁸⁷ I.L.C., *Draft Declaration on Rights and Duties of States*, 56 Y.B. INT'L L. COMM'N 178 (1949), art. 3.

⁸⁸ Corfu Channel, *supra* note 6.

⁸⁹ Annex A, ¶24.

⁹⁰ CRAWFORD, *supra* note 2.

⁹¹ Convention on Biological Diversity, *entered into force* Dec. 29, 1993, 1760 U.N.T.S. 79, art.8 ('C.B.D.').

protection of the Redox Orangutan and houses 12 animals currently⁹²; thus clearly showing that Redox has not breached its obligation but taken measures to perform the same.

⁹² Annex A, ¶25.

**III. REDOX HAS EXERCISED ITS PERMANENT SOVEREIGN RIGHT OVER
NATURAL RESOURCES AND HAS NOT BREACHED INTERNATIONAL LAW**

The sovereignty of a state is an integral part of its existence along with a permanent population, a defined territory and government.⁹³ A State is permitted to freely determine and apply laws and policies governing their people and territory and choose their own political, social and economic systems.⁹⁴ In the instant case the Huiledepalme government has exercised this right to exploit natural resources and authorized a control burn on its land, not in violation of International Law.

**A. REDOX HAS FULL AND PERMANENT SOVEREIGN RIGHTS OVER
ITS BIOLOGICAL AND NATURAL RESOURCES**

The sovereignty over natural resources includes the right to possess, use and manage its own resources.⁹⁵ Redox has exercised these rights while allowing the controlled burn of the Fahy Peatlands.⁹⁶ One of the limitations of a states permanent sovereign right over its own natural resources is that it has to be exercised for the national development and well

⁹³ SHAW, *supra* note 11.

⁹⁴ U.N. CHARTER, art. 2(1); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, *entered into force* Oct. 24, 1970, 25 U.N.T.S. 345; Corfu Channel *supra* note 6; Island of Palmas, *supra* note 56; A. CASSESE, INTERNATIONAL LAW 52 (2005); BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 281 (2008).

⁹⁵ R BARNES, PROPERTY RIGHTS AND NATURAL RESOURCES 121 (2009); Nico Schrijver, *Natural Resources and Permanent Sovereignty*, 7 E.P.I.L. 535 (2012).

⁹⁶ Annex A, ¶23.

being of its people.⁹⁷ Redox has adhered to this requirement as the burn is for the development of its largely agriculture based economy.⁹⁸

**1. The Principle of Permanent Sovereignty over Natural Resources
(‘PSNR’) is a well established international custom.**

PSNR can be traced back to a number of resolutions passed by the UNGA.⁹⁹ This principle has been widely used and practiced by states and has now attained the status of CIL.¹⁰⁰ Further, Article 3 of the CBD¹⁰¹ reproduces *verbatim* Principle 21 of the Stockholm Declaration¹⁰², recognizing that States have the sovereign right to exploit their own resources pursuant to their own environmental policies.¹⁰³ Principle 2 of the Rio Declaration¹⁰⁴ adds this may be pursuant to a state’s developmental policies as well. A

⁹⁷G.A. Res. 17/1803, U.N. GAOR, 17th Sess., at 15, U.N. Doc. A/RES/17/5217 (1962); International Convention on Civil and Political Right, *entered into force* March 23, 1976, art.1(2), 999 U.N.T.S. 171 (‘ICCPR’).

⁹⁸Annex A ¶3.

⁹⁹G.A. Res. 7/626, U.N. GAOR, 7th Sess., at 6, U.N. Doc. A/RES/7/2361(1952); G.A. Res. 15/1515, U.N. GAOR, 15th Sess., at 9, U.N. Doc. A/RES/15/4648 (1960); G.A. Res. 27/3016, U.N. GAOR, 27th Sess., at 27, U.N. Doc. A/RES/27/3016 (1972); G.A. Res. 17/1803, U.N. GAOR, *supra* note 97.

¹⁰⁰Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons 1996 I.C.J. 254, (July 8); Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) 1971 I.C.J. 16 (June 21); Military and Paramilitary Activities in and against Nicaragua, *supra* note 1; Award on the Merits in Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Co. and the Government of the Libyan Arab Republic (Texaco v. Libya) 1977 17 I.L.M. 1, (Jan. 19); G. J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 86 DUKE L.J. 883, 890 (1983); Armed Activities on the Territory of the Congo (Congo v. Uganda) 2003 I.C.J. 3 (Jan. 29).

¹⁰¹C.B.D., *supra* note 91, Art. 3.

¹⁰² Stockholm Declaration, *supra* note 56.

¹⁰³ L. GLOWKA, A GUIDE TO THE CONVENTION ON BIOLOGICAL DIVERSITY 145 (1994).

¹⁰⁴ Rio Declaration, *supra* note 20.

number of international conventions¹⁰⁵ have also laid down that the inherent right of all people to enjoy and utilize fully and freely their natural wealth and resources can never be impaired. Thus the common repetition and recitation of previous resolutions serve as proof of a strong *opinion juris* that the principle of PSNR has been accepted as a norm of CIL¹⁰⁶

2. Redox allowed the controlled burn in pursuance of its sovereign right over its natural resources.

It has been stated that, for areas within the limits of its national jurisdiction, a State can determine rules for the areas in question and the resources found there, such as the components of biodiversity. It can also regulate all processes and activities occurring there—whether by nationals or foreigners.¹⁰⁷ Redox has merely applied its power derived from its sovereignty and allowed P.Eco to conduct the controlled burn thus exploiting its own resources. This burn of the peatswamp forest is likely to give way to palm oil plantations and thus benefit the agricultural as well as commercial economy of Redox, which is a developing country.

¹⁰⁵ ICCPR, *supra* note 97; International Covenant on Economic, Social and Cultural Rights, *entered into force* Dec. 16, 1966, Art.25, 993 U.N.T.S. 3; The African Charter on Human and Peoples' Rights, *entered into force* Oct. 21, 1986 567 U.N.T.S. 435; Convention On Wetlands Of International Importance Especially As Waterfowl Habitat, *entered into force* Dec. 1975, Art 2(3), 996 U.N.T.S. 245 ('Ramsar Convention').

¹⁰⁶ K. N. Gess, *Permanent Sovereignty over Natural Resources— An Analytical Review of the United Nations Declarations and Its Genesis*, 13 I.C.L.Q. 400, 410 (1964); SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES – BALANCING RIGHTS AND DUTIES 400 (2008).

¹⁰⁷ G. ELIAN, THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES, 16 (1979); SCHRIJVER, *supra* note 106; GLOWKA, *supra* note 103.

**B. REDOX HAS ACTED IN CONFORMITY WITH THE CONVENTION ON
BIOLOGICAL DIVERSITY**

The legal remit of the C.B.D. extends to the conservation of biodiversity and the sustainable use of its components.¹⁰⁸ Redox by its actions of allowing the controlled burn as well as conserving an endangered species is acting in conformity with both these aspirational goals of the convention.

1. The captive breeding measure undertaken by Redox is an *ex-situ* method of conservation recognized by the CBD.

Interpretational conclusions to be drawn from the preamble of a treaty are binding upon the parties as those from any other part of the treaty.¹⁰⁹ The preamble of the CBD¹¹⁰ lays down that *ex-situ* approaches have a valuable role to play; in particular they provide an "insurance policy" against species.¹¹¹ *Ex-situ* conservation is the conservation of biological components outside of their natural habitat, necessary to protect species from degeneration and extinction.¹¹² The IUCN endorses captive breeding, as a proactive conservation measure and recommends it as a vital conservation action for Critically Endangered Species.¹¹³

¹⁰⁸ C.B.D., *supra* note 91, art.1; Alison Rosser, *Approaches to Sustainable Use: CITES Non-Detriment Findings and C.B.D. Sustainable Use Principles*, 10 J.OF.INT'L.WILDLIFE.L.AND.POL'Y. 200, 210 (2007).

¹⁰⁹ BROWNIE, *supra* note 94; V.C.L.T., *supra* note 38, art 31.

¹¹⁰ C.B.D., *supra* note 91.

¹¹¹ GLOWKA, *supra* note 103.

¹¹² ELENA BLANCO, JONA RAZZAQUE, GLOBALIZATION AND NATURAL RESOURCES LAW 97 (2011).

¹¹³ Captive Breeding: A Last Resort?, http://www.edgeofexistence.org/amphibian_conservation/captive_breeding.php (last visited Oct. 29, 2012).

Thus it is clear that the captive breeding programme undertaken by the Huiledepalme Government in conjunction with the Huiledepalme Zoo is recognized under the CBD as an *ex-situ* measure and Redox has acted in conformity with its obligations under the treaty.

2. Redox has a Common but Differentiated Responsibility towards the Conservation of Biodiversity under the CBD.

Countries at different stages of development have different capacities, and consequently, different levels and kinds of responsibility for dealing with international environmental issues.¹¹⁴ The CBD provides qualified commitments, and their implementation depends on particular national circumstances and priorities of individual parties and resources available to them.¹¹⁵ The obligations related to conservation and sustainable use, have all been prefaced by phrases limiting their application. This is to make the level of implementation commensurate to the capacities of each Party to meet the obligation at hand.¹¹⁶ The State parties are only obliged to take action ‘as far as possible and as appropriate’, leaving a broad level of discretion to parties to implement the Convention at the national level.¹¹⁷ Thus, there is a commonality in the responsibility to conserve biodiversity but a differential obligation towards its implementation. Principle 7 of Rio

¹¹⁴ Graham Mayeda, *Ethical and Legal Approaches to Sustainable Development in Context of International Environmental Law*, 29 COLO.J.INT'L.ENVTL.L.&POL'Y. 120, 135 (2004); Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, 49 INT'L.&COMP.L.Q. 35 (2000).

¹¹⁵ ELENA BLANCO, JONA RAZZAQUE, *supra* note 112.

¹¹⁶ GLOWKA, *supra* note 103.

¹¹⁷ C.B.D., *supra* note 91, arts.5, 6, 8, 9.

Declaration¹¹⁸ also echoes the same belief. Further, Article 20(4) of the CBD lays down that the economic and social development and eradication of poverty are the first and overriding priorities of all developing country parties.

Thus the responsibility that Redox owes toward the conservation of its own biodiversity is contingent upon the economic condition, developmental priorities, capabilities, availability of resources and other requirements of its population. As a developing country Redox¹¹⁹ has taken these limitations into account and embarked on a conservation method that balances its responsibilities owed under international law as well as towards its own people.

¹¹⁸ Rio Declaration, *supra* note 20.

¹¹⁹ Annex A, ¶3.

SUBMISSIONS TO THE COURT

For the foregoing reasons, the Republic of Redox, Respondent, respectfully requests the Court to adjudge and declare that the Republic of Redox has not violated international law with respect to:

1. Transboundary haze pollution in Abellii.
2. Exercising its sovereign right to exploit its own natural resources.

All of which is respectfully submitted.

X
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Agents for the Respondent