TEAM No. 1339

IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING

TRANSBOUNDARY HAZE AND SPECIES PROTECTION

THE FEDERAL STATES OF ABELII

APPLICANT

v.

THE REPUBLIC OF REDOX

RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE 2012 STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

NOVEMBER 2012

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STATEMENT OF JURISDICTION

On 25 June 2012, the Republic of Redox and the Federal States of Abelii submitted the following dispute to the Court, in accordance with Article 40 of the Statute of the International Court of Justice. [Statute of the International Court of Justice, art. 40, T.S. No. 993(1945)]. The Registrar of the Court addressed notification to the parties on June 27, 2012. *See* Special Agreement Between the Federal States of Abelii 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.

QUESTIONS PRESENTED

I. **WHETHER REDOX VIOLATED INTERNATIONAL LAW BY CAUSING TRANSBOUNDARY HAZE POLLUTION.**

II. **WHETHER REDOX VIOLATED INTERNATIONAL LAW REGARDING THE EXTINCTION OF THE ENDANGERED ORANGUTAN.**

STATEMENT OF FACTS

The Republic of Redox ("Redox") and the Federal States of Abelii ("Abelii") share a common territorial sea. (R. ¶ 1). Both are developing island nations. (R. ¶¶ 2-3). Redox has a population of approximately 20 million people with an agriculturally based economy. Twelve percent of its territory is covered by peat swamp forest, one particular piece of which, the Fahy Peatlands, is home to the endemic Redox Orangutan. Meanwhile, Abelii has a population of approximately 400,000 people. 10% of its gross domestic product is consisted of tourism and 70% comes from crude oil and natural gas production. (R. ¶ 2).

The 1998 Heinze Regional Agreement on Transboundary Haze Pollution ("HRA") is a regional convention establishing "zero burning" policy. Redox has signed the HRA but not ratified it, and it has adopted "zero burning" as a national goal. (R. ¶ 3). However, according to the Redox Constitution, only the provincial governments have the authority to regulate land use activities in Redox. (R. ¶ 10).

In 2007, 2009 and 2011, three fires occurred on peatlands owned by P-Eco, a multinational timber company, in the province of Cienaga in Redox. (R. ¶¶ 12, 14, 17). The smoke from the fire caused haze pollution in Abelii, and Abelii's tourism declined accordingly. (R. ¶¶ 13, 16, 22). However, the causes of the fires in 2007 and 2011 were never determined. (R. ¶¶ 12, 14). Besides, two arsonists were punished for illegal burning by the Redox provincial authority in 2009, and they were punished in accordance with the provincial law of Redox. (R. ¶ 14). Subsequently, a series of diplomatic notes were forwarded to the Government of the Republic of Redox by

Abelii in 2011 criticizing Redox for causing transboundary haze pollution in Abelii. (R. ¶ 17).

In 2012, the provincial government of Redox granted permission to P-Eco for a controlled burning of the Fahy Peatlands. (R. ¶ 23). As the environmental impact assessment indicated, this particular burning would not significantly affect air quality in Abelii, and would likely result in no Redox Orangutan surviving in the wild. (R. ¶ 25). Redox's provincial government has embarked on a captive breeding program in conjunction with the Huiledepalme Zoo, which is now home to ten adult Redox Orangutans and two juvenile male Redox Orangutans. (R. ¶ 25). However, Abelii still objected this planned activity by diplomatic notes arguing that Redox was intentionally authorizing the extinction of the Redox Orangutan.

Redox emphatically opposed Abelii's claims regarding the transboundary haze pollution and the extinction of the orangutan, and stated that it has the sovereign right to exploit its own natural resources.

Failing to resolve the disputes, the parties agreed to submit the matter to the International Court of Justice.

SUMMARY OF ARGUMENTS

Redox has not violated any of its treaty obligations, because Redox is not bound by the HRA, and has not violated its interim obligation pursuant to Article 18 of the Vienna Convention on the Law of Treaties. Redox has not breached its obligations under customary law, because Redox has not caused transboundary harm, and the provisions of the HRA cannot constitute regional customary law.

The obligation to conserve biodiversity is not *erga omnes* and Abelii lacks the standing to institute proceedings before the Court. Besides, Redox has its sovereign right to exploit its natural resources and has complied with the Convention on Biological Diversity and Ramsar Convention and to conserve the Redox Orangutan during the exploitation. Thus, Redox has not violated any obligation under international law regarding the conservation of biodiversity.

ARGUMENT

I. REDOX HAS NOT VIOLATED INTERNATIONAL LAW REGARDING THE TRANSBOUNDARY HAZE POLLUTION.

A. Redox has not violated any of its treaty obligations.

A treaty only creates law as between the States which are parties to it.[1] Redox has signed but not ratified the 1998 Heinze Regional Agreement on Transboundary Haze Pollution ("HRA"), so that it has no obligation to be bound by it; while it is true that Redox is a party to the Vienna Convention on the Law of Treaties ("VCLT"), Redox's activities comply with the provisions of the VCLT concerned here.

1. Redox is not bound by the HRA.

By simple signature[2] without ratification, a treaty cannot bind a State due to lack of consent to be bound by that State.[3] A State which has not yet ratified a treaty does not need to comply with the treaty itself.[4] This is because that if the opposite were true and the unratified treaty could be invoked against that State, the ratification

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[1] *Case Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.)*, 1926 P.I.C.J. Ser. A, No. 7, at 29.

[2] UN Treaty Section of the Office of Legal Affairs, Treaty Handbook, at 2-3, No. E.02.V2 (2002), *available at:* http://treaties.un.org/doc/source/publications/THB/English.pdf.

[3] Vienna Convention on the Law of Treaties, art.14(1)(a), May 23, 1969, 1155 U.N.T.S. 331 [VCLT].

[4] Anthony Aust, *Modern Treaty Law and Practice*, at 117 (2nd ed., Cambridge U. Press 2007).

procedure would be superfluous.[5] According to the Record, the HRA bans open burning in the Heinze Region, with eight other States in the region being parties to it,[6] while Redox has signed the HRA but has not ratified it.[7] Consequently, the provisions of the HRA cannot be invoked to bind Redox. Redox has no obligation under the HRA to enforce the zero burning policy to prevent transboundary haze pollution.

2. Redox has not violated its interim obligation under Article 18 of the VCLT.

Article 18 of the VCLT provides that a signatory of a treaty is "obliged to refrain from acts which would defeat the object and purpose of a treaty…until it shall have made its intention clear not to become a party to the treaty".[8] This article creates an interim obligation for States during the period between the signature of the treaty and its entry into force.[9] However, giving considerations to the interpretation of Article 18 as well as the objective of the HRA, it is untenable to say that Redox has not refrained from actions which would defeat the object and purpose of the HRA.

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[5] *Case concerning Territorial Jurisdiction of the International Commission of the River Oder (U.K. v. Pol.),* 1929 P.C.I.J. Ser. A, No. 23, at 609, 611.

[6] R. ¶ 10.

[7] R. ¶ 8.

[8] VCLT, *supra* note 3, art. (18)(1).

[9] Joni S. Charme, *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, at 25 (1991).

a. Article 18 of the VCLT does not impose affirmative duty on signatories.

Seeing from the plain wording and ordinary meaning[10] of Article 18 of the VCLT, the obligation under it is phrased in purely negative terms—not to do certain acts. Article 18 thus imposes no affirmative duty upon a signatory to do certain acts or to carry out specific provisions of the treaty,[11] but to do nothing which may be prejudicial to the Treaty by diminishing the significance of its provisions.[12] This rule was also echoed by the *Iloilo Claims* case, in the decision of which the arbitral tribunal refused to impose the affirmative obligation of keeping order upon the United States in the Philippines during the interval between the signing of the Treaty of Peace and its entry into force.[13]

In the present case, the provisions of the HRA explicitly require States which are parties to it to enforce the zero burning policy,[14] which is an affirmative duty. If Redox did enforce the zero burning policy in its national legislation just as other State parties to the HRA did,[15] Redox would be observing the treaty itself. Article 18,

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[10] VCLT, *supra* note 3, art. 31(1).

[11] Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 ME. L. REV. 263, at 272-288 (1980).

[12] *Megalidis v Turkey*, Turkish-Greek Mixed Arb. Trib., at 386 (1928).

[13] *Iloilo Claims (Gr. Br. v. U. S)*, 6 R.I.A.A.158-160 (1925).

[14] R. Annex C, art. 5.

[15] R. ¶ 10.

however, does not oblige a signatory State to specifically observe the treaty[16] or to abstain from all acts which will be prohibited after its entry into force.[17] Thus, it is against the spirit of Article 18 to demand Redox to enforce the zero burning policy.

b. Causing transboundary haze pollution is not an action which would defeat the object and purpose of the HRA.

It is obvious from Article 2 of the HRA that its objective is to prevent and monitor transboundary haze pollution as a result of land and/or forest fires.[18] However, the HRA also stipulates that Parties shall endeavor to achieve this goal in accordance with their respective needs, capabilities and situations.[19] This means that the HRA intends to prevent the transboundary haze pollution as much as possible, but it does not guarantee that no transboundary haze pollution will happen. It is true that transboundary haze pollution in Abelii happened due to three massive fires occurring in the Province of Cienaga of Redox. However, they happened either as accidents whose reasons could not be determined or as crimes which were committed by individual employees of the P-Eco Companies whose action cannot be attributed to the Redox government. Moreover, as a State not a Party to the HRA, Redox has done its best within its power and capability to prevent transboundary haze pollution so as to achieve its national goal of zero burning. Therefore, Redox's actions did not defeat

[16] Report of the International Law Commission, UN GAOR, 62nd Sess., Supp. No. 10, at 67, UN Doc. A/62/10 (2007) [62nd ILC Report].

[17] Aust, *supra* note 4, at 119.

[18] R. Annex C, art. 2.

[19] R. Annex C, art. 3(2).

the objective of the HRA.

In conclusion, Redox's activities could not be defined as actions which would defeat the object and purpose of the HRA. On the contrary, evidence shows that Redox has already done what it could do to safeguard the objective of the HRA within its power and capability pursuant to international law.

B. Redox has not violated its obligations under customary law.

1. Redox has not breached its obligation under customary international law of not causing transboundary harm.

The obligation not to cause transboundary harm has been acknowledged as customary international law.[20] To constitute a violation of this rule, not only a physical relationship between the activity concerned and the damage caused needs to be established,[21] but the threshold of the harm caused which allows claims to be brought also should reach the standard of "significant".[22] Besides, even if the

[20] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. 226 (1996); *Stockholm Declaration on the Human Environment*, Principle 21, UN Doc. A/CONF. 48/14/Rev.1 (1973) [Stockholm Declaration]; *Rio Declaration on Environment and Development*, Principle 2, UN Doc.A/CONF. 151/26 (1992) [Rio Declaration]; Convention on Biological Diversity, Principle 3, 31 I.L.M. 818 (1992) [CBD]; *Trail Smelter Arbitral Decision (U.S. v. Can.)*, 3 R.I.A.A. 1965 (1938/1941).

[21] O. Schachter, *International Law in Theory and Practice,* at 336-368 (Brill Academic Publishers 1991); Xue Hanqin, *Transboundary Damage in International Law*, at 4 (Cambridge U. Press 2003). *Trail Smelter Case* phrases this requirement as "the injury shall be established by clear and convincing evidence", but this approach has been gradually abandoned by international law considering that it goes against the precautionary trend in environmental management at national and international level. *See* Tim Stephens, *International Courts and Environmental Protection*, at 134 (Cambridge U. Press 2009).

[22] Report of the International Law Commission, UN GAOR, 56th Sess., Supp. No. 10, at 150-151, UN Doc. A/56/10 (2001) [56th ILC Report]; *Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. at 4, 22.

transboundary harm exists, the inobservance of the due diligence obligation on the part of the accused State must be established.[23] In the present case, the massive fires in Redox may have caused transboundary haze pollution to Abelii, but the haze pollution is not significant, and Redox has complied with its due diligence duty.

a. The transboundary haze pollution in Abelii is not sufficiently significant to constitute a departure from the obligation of not causing transboundary harm.

There are no agreed international standards that establish a threshold for environmental damage which triggers liability,[24] but it is commonly believed that since all human activity alters the environment, it is necessary to determine a proper threshold for inclusion of transboundary harm.[25] The International Law Commission has recognized the threshold as "significant" and emphasized that the harm must lead to a real detrimental effect on matters such as human health, industry, property, environment or agriculture in other States.[26]

In the present case, the only harm caused by the massive fires demonstrated from the Record is the decline of Abelii's tourism, which only accounts for 10% of

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[23] 56th ILC Report, *supra* note 22, at 154; *Pulp Mills in the River Uruguay Case (Arg. v. Uru.)*, 2010 I.C.J. at 55-56.

[24] Philippe Sands, *Principles of International Environmental Law*, at 878 (2nd ed. Cambridge U. Press 2003).

[25] Alexandre Kiss & Dinah Shelton, *International Environmental Law*, at 269 (2nd ed. Transnational Publishers Inc. 2000); *Trail Smelter Arbitral Decision*, *supra* note 20, at 1965 (1938/1941); *Lac Lanoux (Fr. v. Spain)*, 12 R.I.A.A. 281 (1957).

[26] 56th ILC Report, *supra* note 22, at 152.

Abelii's GDP[27] and is recovering right now.[28] Therefore, the transboundary harm in Abelii caused by the massive fires in Redox should not be considered as significant.

b. Even if the transboundary harm is significant, Redox has acted in consistent with the due diligence obligation.

The test of due diligence is generally accepted as the most appropriate standard to assess the obligation of not causing significant transboundary harm.[29] The Court of International Justice also recognized this test in the 2010 *Pulp Mills* case.[30] The duty of due diligence is an obligation of conduct, not an obligation of result.[31] It is not intended to guarantee that significant harm is totally prevented, but only that the State concerned exerts its best possible efforts to minimize the risk.[32] Meanwhile, the degree of observance of this obligation can differ from States with a well-developed economy and advanced systems of governance to those which are not so well placed.[33]

Redox is a developing country with a huge number of 20 million people to

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[27] R. ¶ 2.

[28] R. ¶ ¶ 13, 16, 22.

[29] Malcolm N. Shaw, *International Law*, at 855 (6th ed., Cambridge U. Press 2008).

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

[31] Report of the International Law Commission, UN GAOR, 49th Sess., Supp. No. 10, at 195, 237, UN Doc. A/49/10 (1994) [49th ILC Report].

[32] 56th ILC Report, *supra* note 22, at 155.

[33] *Id.*

support and an agriculturally based economy.[34] Its federal government has very limited power and authority in land use under the Redox Constitution.[35] Nevertheless, it has done all it can in its power and capability to comply with the due diligence obligation to prevent transboundary harm, particularly the transboundary haze pollution in Heinze Region. As early as in 1980s, each province in Redox had already enacted general provincial laws prohibiting any type of outdoor burning.[36] Immediately after the 1997-1998 Indonesia Fire, Redox participated in the negotiations and drafting of the HRA and eventually signed it. It is a signal that its executive government is approving the provisions of the HRA, and is willing to give weight to what the HRA is trying to pursue. Subsequently, the Redox government adopted "zero burning" as a national goal.[37] All these facts are sufficient evidence to demonstrate that Redox genuinely intends to prevent transboundary haze pollution, and it has been doing what it can with its best possible efforts, despite its unfavorable situation as a developing country.

Furthermore, the timber harvest season is a time when fires arise easily, given the fact that the peatlands are so fire prone by character and the dead trees and leaves scattering around after the harvest offer natural fuel for fires once they are ignited.[38]

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[34] R. ¶ 3.

[35] R. ¶ 11.

[36] R. Clarifications. A6.

[37] R. ¶ 11.

[38] UNDP, *Malaysia's Peat Swamp Forests: Conservation and Sustainable Use,* at 17 (2006).

At this time, even if Redox made all possible efforts to prevent the fires, it is hardly possible that all fires could be prevented. The reasons for the first fire and the third fire have never been determined.[39] As to the second fire, once the arsonists were discovered, they were soon punished.[40]

In conclusion, Redox has exerted its best possible efforts to observe its due diligence obligation. Hence, it has consistently acted in accordance with the customary international law of not causing transboundary harm.

2. Redox has not breached regional customary law because the provisions of the HRA cannot constitute regional customary law.

Custom, as is specified by Article 38.1 (b) of the Statute of the International Court of Justice, means "evidence of a general practice accepted as law".[41] It is widely recognized that there are two crucial elements in the make-up of customary law: State practice and *opinio juris*.[42]

Admittedly, the HRA, as a multinational treaty, is well-accepted in the Heinze Region, and it may have an important role to play in recording or developing regional rules, but the substance of the provisions of the HRA as regional customary law shall still be found "primarily in the actual practice and *opinio juris* of States."[43] However,

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[39] R. ¶ ¶ 12, 21.

[40] R. ¶ 14.

[41] Statute of the International Court of Justice, art. 38.1 (b) T.S. No. 993 (1945).

[42] Antonio Cassese, *International law*, at 119 (Oxford U. Press 2001); Shaw, *supra* note 29, at 74.

[43] *Continental Shelf Case (Libya v. Malta)*, 1985 I.C.J. 13 (June 3). *See also, Legality*

in the present case, neither the State practice element nor the *opinio juris* element is satisfied.

a. No constant, uniform or extensive State practice can be seen from the activities of Redox.

Generally, state practice demonstrates itself in various forms: treaties, national legislation, diplomatic correspondence, policies and etc.[44] Several relevant cases have decided the threshold for the evaluation of state practice. In the *North Sea Continental Shelf* case in 1969, it was required that state practice should be "both extensive and virtually uniform in the sense of the provision invoked".[45] In the *Asylum* case, it was stated that state practice should be "constant and uniform".[46]

Considering the activities of Redox, it can be clearly seen that there exists no such state practice in Redox, let alone to say that the practice were "constant and uniform". The provincial laws which were enacted in the late 1980s in Redox mainly focused on permission[47] and set out to regulating burning, instead of prohibiting burning or implementing zero burning policy. This can be demonstrated from the fact that the provincial government granted permission to the request from P-Eco

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of the Threat or Use of Nuclear Weapons, *supra* note 20, at 226.

[44] Yearbook of the International Law Commission, 1950, vol. II (Part Two), at 368-372; *see also,* Brownlie, *Principles of Public International Law,* at 6 (Oxford U. Press, 2008).

[45] *North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.),* 1969 I.C.J. 20.

[46] *Asylum Case (Colom. v. Peru),* 1950 I.C.J. 266.

[47] R. Clarifications at 6.

Company to clear the Fahy Peatlands.[48] Consequently, no constant, uniform or extensive state practice can be seen from the activities of Redox.

b. The essential ingredient of *opinio juris* is lacking.

As required by *opinio juris*, state practice should be conducted in such a way as to show a general recognition that a rule of law or legal obligation is involved.[49] It is necessary to infer that the State concerned has been conscious of the existence of such a duty.[50] With respect to regional customary law in particular, the standard of proof is higher than in cases where a general rule is alleged.[51] In this sense, when considering o*pinio juris*, the positive acceptance of all parties to the rule is indispensable.[52]

However in the present case, Redox adopted zero burning policy only as a national goal, and its provinces have the discretion to decide how and to what extent each will seek to achieve the goal of zero burning.[53] Taking into consideration the practices of Redox described above, Redox has never regarded zero burning as an obligation, and its permission of fires for the purposes of land clearing has been deemed a legitimate exercise of its national sovereignty,[54] rather than a deviation

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[48] R. ¶ 23.

[49] *N. Sea Cases*, 1969 I.C.J. 43.

[50] *Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. Ser. A, No. 10, at 28-29.

[51] Shaw, *supra* note 29, at 93.

[52] *Id.*

[53] R. ¶ 11.

[54] R. ¶ 25.

from international duties. In sum, the essential ingredient of *opinio juris* is lacking.

Since neither state practice nor o*pinio juris* is established in the present case, and the criteria required for the establishment of a regional custom, the positive acceptance of all parties to the rule, is not satisfied, the provisions of the HRA cannot constitute regional customary law, and Redox has no obligation to abide by any of its provisions.

In conclusion, since Redox has not violated its treaty obligation, nor has it breached any of its obligations under customary law, Redox has not violated international law regarding the transboundary haze pollution.

II. REDOX HAS CONDUCTED ITSELF IN CONSISTENT WITH INTERNATIONAL LAW IN EXPLOITING ITS OWN NATURAL RESOURCES.

In any event, the obligation to conserve biodiversity cannot constitute obligations *erga omnes*, and Abelii lacks the standing to institute proceedings before the Court. Besides, Redox has the sovereign right to exploit its natural resources according to its development policy, and Redox has never violated any obligation under international law to conserve the Redox Orangutan during the exploitation.

A. The obligation to conserve biodiversity is not *erga omnes* and Abelii lacks the standing to institute proceedings before the Court.

The obligation to conserve biodiversity is not *erga omnes*. Even if Redox is

under an obligation *erga omnes* to conserve biodiversity, the obligation *erga omnes* does not confer standing before the Court.

1. The obligation to conserve biodiversity is not *erga omnes*.

a. The obligation to conserve biodiversity is not sufficiently important so as to achieve the status of *erga omnes*.

The obligations *erga omnes* have been recognized in the *Barcelona Traction* case, which is referred to as the obligations of a State towards the international community as a whole.[55] When deciding whether an obligation is *erga omnes* in nature, the Court addressed the issue in a material approach, suggesting that obligations acquire *erga omnes* status because of their heightened importance.[56]

Most rules of substantive *jus cogens* necessarily apply *erga omnes*,[57] as they are usually (not exclusively) considered to protect the very important values of the international community as a whole.[58] *Jus cogens* are those rules from which no derogation is permitted.[59] However Article 20(d) of the CBD has limited the implementation of this obligation by stating that the effectiveness of measures taken by developing country Parties to conserve biodiversity depends on financial resources

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[55] *Barcelona Traction Case (Belgium v. Spain)*, 1970 I.C.J. para. 33-34.

[56] Christian J. Tams, *Enforcing Obligations Erga Omnes In International Law*, at 153 (Cambridge U. Press 2005).

[57] Yearbook of the International Law Commission, 1998, Vol.II (Part Two), at 69, para. 279, 76, para. 326.

[58] Tams, *supra* note 56, at 153.

[59] VCLT, *supra* note 3, art. 53.

and technology transferred from developed countries.[60] This is an indication that the obligation to conserve biodiversity has been derogated. Therefore, the obligation to conserve biodiversity does not derive from *jus cogens*.

Meanwhile, obligations *erga omnes* may also derive from dispositive rules of international law.[61] Some factors may be considered when deciding whether the obligations could be deemed sufficiently important to achieve the status of *erga omnes*,[62] for instance, its recognition in treaties, preferably universal treaties.[63] The obligation to conserve biodiversity is highlighted in the CBD, it has been recognized as the common concern of all human kind.[64] However, the preamble only has an indicative value without binding force. Further, the CBD has 193 parties but only 168 signatures, and 25 countries including the United States have failed to neither engage the consent of the global community of States in the context of cooperative regulation, compliance and enforcement.[65] Therefore, this obligation cannot be deemed towards

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[60] Lyle Glowka et al., *A Guide to the convention on the Biological Diversity*, Environmental Policy and Law Paper, at 105 (1st ed. World Conservation Union 1994).

[61] Commentary on the Articles on State Responsibility, Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, 202-03, UN Doc. A/56/10; GAOR, 56th Sess., Supp. 10 (2001).

[62] Tams, *Supra* note 56, at 153.

[63] *East Timor Case (Portugal v. Australia)*, 1995 I.C.J. (Weeramantry, dissenting), at194, 196 and 213-216.

[64] CBD, *supra* note 20, Preamble.

[65] CBD Secretariat, *List of CBD Parties*, *available at*: http://www.cbd.int/convention/parties/list/.

the international community as a whole and thus is not important enough to achieve the status *erga omnes*.

b. Jurisprudence is not sufficient to prove its *erga omnes* character.

Considering the jurisprudence on this norm, the most widely accepted and recognized obligations *erga omnes* includes the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.[66] All obligations *erga omnes* involved are in the strict sense of the term, to the exclusion of other fundamental legal conceptions, and the obligations are essentially prohibitions rather than positive obligations with no derogation.[67]

However, outside the human-rights context, international courts have made little use of the concept of *erga omnes* obligations.[68] No jurisprudence has ever regarded biodiversity conservation as one of *erga omnes*. Therefore, jurisprudence is not sufficient to prove the obligation to conserve biodiversity is *erga omnes*.

2. In any event, the obligation to conserve biodiversity is *erga omnes*, it does not confer the standing of Abelii to institute proceedings before the Court.

The Court's statement concerning the dictum of *erga omnes* raised in the

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[66] *East Timor (Portugal v. Australia)*, 1995 I.C.J. 90; ILC Commentary on the Draft Articles on Responsibility of States, Yearbook of the International Law Commission, 2001, vol. II (Part Two), at 85.

[67] Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, at 153 (Clarendon Press 1997).

[68] Birnie & Boyle, *International Law and the Environment*, at 131(2nd ed. Oxford U. Press 2002).

Barcelona Case is that the obligation is "towards the international community as a whole"[69] and "all States can be held to have a legal interest in their protection".[70] This statement indicates that it is not the individual State but rather the international community as a whole which is the bearer of a right to response.[71] A State which is not the injured State can only initiate the proceedings when there is a collective decision by the international community to that effect.[72]

To allow a State to proceed in the absence of a collective decision would also lead to an action of highly subjective character and the abuse of litigation before the Court,[73] and may also affect sovereign rights of States.[74] Therefore, the obligation *erga omnes* must be taken *cum grano salis*, which otherwise will be chaotic and self-serving. Therefore, even if Abelii has a right to protect the interest of humankind concerning biodiversity, it lacks the standing to bring this case before the Court.

Consequently, Abelii has no right to interfere with the internal matters of Redox,[75] which has infringed Redox's sovereign right. Therefore, to preserve

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[69] *Barcelona Traction Case*, 1970 I.C.J. at para. 33.

[70] *Id.*

[71] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia-Herzegovina* v. *Yugoslavia*), 1996 I.C.J. Judge Oda's Declaration 626, para.4; *Case Concerning East Timor* (*Portugal v. Australia*), 1995 I.C.J. Australian counter-memorial, para.263.

[72] *Id.*

[73] *Id.*

[74] Juan Antonio Carrillo Salcedo, *Review of the Concept of International Obligations Erga Omnes*, Am. J. Intl. L., Vol.92, No.4. at 791-793 (1998).

[75] Declaration on Principles of International Law Concerning Friendly Relations

Redox's independence,[76] the domestic affairs of Redox to implement its own policies should not be interfered.

B. Redox has the sovereign right to exploit its natural resources in accordance with its own policy.

Redox has the sovereign right to exploit the Faphy Peatlands. The exploitation of the Faphy Peatlands is an urgent need in accordance with Redox's own development policy.

1. Redox has the sovereign right to exploit the Fahy Peatlands.

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 and developmental policies.[77] Therefore, Redox's sovereign right to dispose of its natural wealth and resources in accordance with its national interest should be respected in the present case.

2. The exploitation of the Fahy Peatlands is conducted in accordance to Redox's own policy.

The CBD clearly demonstrates that economic and social development and

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and Co-operation among States, annex, 25 UNGA Res.2625 (XXV), UN GAOR, Supp. (No.28), UN Doc. A/5217 (1970), at 121; United Nations Charter, art. 2 (7), *as amended* June 26, 1945, 892 U.N.T.S. 119 (1945). *See also*, Shaw, *supra* note 29, at 488.

[76] Brownlie, *supra* note 44, at 290 (Oxford U. Press 2008).

[77] CBD, *supra* note 20, art.3. Convention on Wetlands of International Importance especially as Waterfowl Habitat, 2 February 1971, U.N.T.S. 14583. *As amended* by the Paris Protocol, 3 December 1982, and Regina Amendments, 28 May 1987 [Ramsar Convention]; Stockholm Declaration, *supra* note 20, Principle 2.

poverty eradication are the first and overriding priorities of developing countries.[78] The Stockholm Declaration also declares that in the developing countries most of the environmental problems are caused by under-development, and the developing countries must direct their efforts to development.[79] Therefore, the circumstances and particular requirements of developing countries should be taken into account when considering one State's environmental obligations.[80] Besides, as the right to development is an inalienable human right,[81] States have the right and the duty to formulate appropriate development policies to make improvements of the well-being of the entire population.[82]

In the present case, Redox is a developing nation with the population of 20 million people and an agriculture-based economy. Unfortunately, among the total area of its limited territory, as large as twelve percent is peat swamp forest.[83] Therefore, under such circumstances, to change the land use in a legal and reasonable way is in accordance with Redox's own development policy.

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[78] CBD, *supra* note 20 art. 20(4).

[79] Stockholm Declaration, *supra* note 20, Preamble para.4.

[80] Stockholm Declaration, *supra* note 20, Principle 12.

[81] Declaration on the Right to Development, art.1, GA Res. 41/128, Annex, 41 UN GAOR Supp. No. 53 at 186, UN Doc. A/41/53 (1986).

[82] *Id.*, art. 2(3).

[83] R. ¶ 25.

C. Redox has never violated any obligation under international law to conserve the Redox Orangutan.

Redox has complied with the obligations under the CBD and the Ramsar Convention to conserve the Redox Orangutan during the exploitation of the Faphy Peatlands.

1. Redox has fulfilled the obligations to conserve biodiversity under the CBD.

a. Redox has timely adopted series of measures to prevent extinction of the Redox Orangutan.

International law requires States to conduct environmental impact assessments for evaluating the likely impact of a proposed activity on the environment.[84] Redox has conducted the environmental impact assessment before the exploitation to avoid or minimize adverse impacts on biological diversity.[85]

Furthermore, the provincial government of Huiledepalme has already embarked on a captive breeding program in conjunction with the Huiledepalme Zoo early before Redox issued permission to exploit the peatlands.[86] Since the conduct of any State

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[84] CBD, *supra* note 20, arts.10,14; Rio Declaration, *supra* note 20, Principle 17; Stockholm Declaration, *supra* note 20, Principle 15. *See also*, Neil Craik, *The International Law of Environmental Impact Assessment*, at 135 (Cambridge U. Press 2008).

[85] CBD, *supra* note 20, arts.10,14; Stockholm Declaration, *supra* note 20, Principle 15; R. ¶ 23.

[86] R. ¶ 25.

organ shall be considered an act of that State under international law,[87] the long and effective preparation for captive breeding program, which needs time, financial funds and painstaking cares, has demonstrated the great efforts made by Redox to conserve biodiversity. Redox has never conducted the extinction of the Redox Orangutan which Abelii has submitted.[88]

b. The program taken by Redox is most efficient in conserving the Redox Orangutan.

Abelii may contend that instead of adopting captive breeding programs, the *in-situ* conservation is the best and preferential method to protect the Redox Orangutan. However, according to the specific situation of the Redox Orangutan, the *in-situ* conservation shall not be applied in the present case.

The Redox Orangutan is listed as a critically endangered species which is considered to be facing an extremely high risk of extinction in the wild.[89] The CBD clearly notes that *ex-situ* conservation plays an important role in biological protection.[90] All critically endangered species in the wild should be subject to *ex situ*

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[87] Yearbook of the International Law Commission, 2001, vol. II (Part Two), at 40 (2001).

[88] R. ¶ 29.

[89] IUCN Species Survival Commission, *IUCN Red List Categories and Criteria: Version 3.1,* at 14 (2001). *See also,* IUCN Standards and Petitions Subcommittee, *Guidelines for Using the IUCN Red List Categories and Criteria,* Version 9.0 (2011); R. ¶ 3.

[90] CBD, *supra* note 20, Preamble and art.9. *See also,* World Wildlife Fund (WWF), *Policy Statement on Captive Breeding* (2007), *available at*: http://wwf.panda.org/?uNewsID=103860.

management to facilitate the recovery of threatened species against extinction in nature.[91] The typical measures of *ex-situ* conversation include captive breeding of animals and collecting living organisms for zoos for research and public education and awareness.[92]

In the present case, to adopt the captive breeding programs in conjunction with zoos is a must to prevent the Redox Orangutan's extinction in the wild. The vulnerable habitat has posed great threats to the survival of the Redox Orangutan, particularly considering that the dry peat is extremely prone to fire which can quickly spread uncontrollably over vast areas.[93] However, the *ex-situ* conservation facilities can allow for the temporary growth of the Redox Orangutan's population in a stable and low-risk environment. Such environment provides the Redox Orangutan food supplements, expert health care, reduced exposure to parasites and disease.[94] As the Fahy Peatlands is not the only habitat for the Redox Orangutan,[95] Redox would also adopt the re-introduction of the Redox Orangutan to the remaining peat swamp

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[91] IUCN, *Technical Guidelines on the Management of Ex-situ populations for Conservation* (2002), *available at*:http://data.iucn.org/Themes/ssc/publications/policy/exsituen.htm/. *See also*, Michael Bowman, Catherine Redgwell, Inte*rnational Law and the Conservation of Biological Diversity*, at 135-142 (Kluwer Law International Sterling House 1996).

[92] Lyle Glowka et al., *Supra* note 60, at 52 (1994).

[93] Christian Nelleman et al.,*The last stand of the orangutan--State of emergency: Illegal logging, fire and palm oil in Indonesia's national parks*, at 31 (UNEP 2007), *available at:* http://www.unep.org/publications/search/pub_details_s.asp?ID=3920.

[94] Edward O. Guerrant, Jr. et al., *Conservation: Supporting Species Survival in the Wild*, at 89 (Island Press 2004).

[95] R. ¶ 3.

forests[96] after rehabilitation.[97] Besides, the CBD clearly notes that *ex-situ* measures can also provide excellent opportunities for research on the components of biological diversity conserved.[98] Redox's great efforts of initiating the program to develop educational and public awareness of conserving the Redox Orangutan should never be underestimated, either.

In sum, Redox's measures should be deemed a long-term guarantee to protect the Redox Orangutan, which could conceivably suffer greater depredations and loss in future years were they to remain in the wild.

2. The exploitation of the Faphy Peatlands complied with the Ramsar Convention.

Redox has never designated or classified the Fahy Peatlands as "wetland of international importance" or a "forest of high value" under any international document.[99] Therefore, Redox has no obligations under the Ramsar Convention to comply with the standard for listed wetland. It might be contended that Redox has violated Article 3 of the Ramsar Convention for not wisely using wetlands in its territory.[100] However, in the present case, Redox has acted in accordance with the idea of wise use in utilizing natural resources.

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[96] R. Clarifications, A14.

[97] CBD, *supra* note 20, art.9(c).

[98] CBD, *supra* note 20, art. 9. *See also*, Lyle Glowka, *supra* note 60, at 54.

[99] R. Clarifications, A4.

[100] Ramsar Convention, *supra* note 77, art. 3(1).

The definition of wise use is closely combined with the context of sustainable development.[101] As eradicating poverty is an indispensable requirement for sustainable development,[102] utilizing some wetlands to development the economy is inevitable for a developing country as long as the State has already facilitated the development in sustainable ways.[103] However, in the absence of concrete concept of sustainable development and given the different social, political and economic values, a specific State has considerable discretion on to how to implement the sustainable principle in each case.[104]

In the present case, Redox has conducted wise use of its peatlands. First, as is addressed above, the *ex-situ* conservation measure adopted by Redox is the most effective way to conserve the Redox Orangutan from extinction. Combined with the fact that the Fahy Peatlands is not the only habitat for the Redox Orangutan and the exploitation response to the needs of people, Redox has already wisely used the

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[101] *A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character* (COP9, Resolution IX.1 Annex A, 2005). *See also,* Ramsar Convention Secretariat, *Wise use of wetlands: Concepts and approaches for the wise use of wetlands,* Ramsar handbooks for the wise use of wetlands, 4th ed., vol. I (2003).

[102] Birnie & Boyle, *supra* note 68, at 116; *See also,* Report of the World Commission on Environment and Development: Our Common Future, at 43, UN Doc. A/42/427, Annex (1987); Sands, *supra* note 24, at 266.

[103] Ramsar Convention Secretariat, *supra* note 101. *See also, A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character* (COP9, Resolution IX.1 Annex A, 2005).The Ramsar Strategic Plan 2003-2008 (COP8, Resolution VIII.25, 2002); Rio Declaration, *supra* note 20, Principle 5.

[104] Birnie & Boyle, *supra* note 68, at 126.

wetland in its territory. Besides, Redox has carried out environmental impact assessments, and the exploitation of the peatlands is under Redox's permission to develop the green economy,[105] which has minimized the environmental impact and maximized economic development after balancing the interests of biodiversity conservation and people's survival.

In sum, Redox has successfully integrated development and environmental considerations in their decision-making,[106] and also has taken account of the needs of intra-generational and inter-generational equity for the purpose of facilitating sustainable development.[107] Therefore Redox has done whatever it can to comply with the idea of wise use under Ramsar Convention.

[105] Rio+20 United Nations Conference on Sustainable Development, The Future We Want, at 23, UN Doc. A/CONF. 216/L.1 (2012).

[106] Rio Declaration, *supra* note 20, Principle 4.

[107] Birnie & Boyle, *supra* note 68, at 127; Rio Declaration, *supra* note 20, Principle 3.

CONCLUSION AND PRAYER

For the foregoing reasons, Redox respectfully requests that this Court:

1. Declare that the Republic of Redox has not violated international law regarding the transboundary haze pollution.
2. Declare that the Republic of Redox conducted itself in consistent with international law in exploiting its own natural resources.

Respectfully Submitted.

Team 20131104

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