

IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS



THE CASE CONCERNING

QUESTIONS RELATING TO PROTECTION OF BATS AND INTERNATIONAL
TRADE MEASURE

FEDERAL STATES OF ALDUCRA

APPLICANT

V.

REPUBLIC OF RUNBETI

RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE 25RD STETSON MOOT COURT COMPETITION 2020-2021

NOVEMBER 2020

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TABLE OF ABBREVIATIONS

1	¶: Paragraph
2	CMS: Convention on Migratory Species
3	CBD: Convention on Biological Diversity
4	EIA: Environmental Impact Assessment
5	Rio Declaration: United Nations Conference on Environment and Development at Rio De Janeiro, 1992
6	ICJ: International Court of Justice
7	NDCs: national determined contributions
8	Rio+20: United Nations Conference on Sustainable Development
9	ARS: Articles on Responsibility of States for Internationally Wrongful Acts
10	POW: Programme of Work on Climate Change and Migratory Species
11	EUROBATS: Agreement on the Conservation of Populations of European Bats
12	UNFCCC: United Nations Framework Convention on Climate Change,

STATEMENT OF JURISDICTION

In accordance with Article 40 of the Statute of the ICJ, the Federal States of Alducra [“Alducra”] and the Republic of Runbeti [“Runbeti”] have submitted by Special Agreement their differences concerning questions in Annex A, including the Clarifications, relating to the differences between them regarding questions relating to the construction of wind farms and bat survival. Alducra and Runbeti transmitted a copy thereof to the Registrar of the ICJ and after the Registrar of the Court addressed a notification to the parties.

Therefore, both countries have accepted the jurisdiction of the ICJ pursuant to Article 36 (1) of the Statute and request the Court to adjudge the dispute in accordance with the rules and principles of international law, including any applicable treaties.

The parties have agreed to respect the decision of this Court.

QUESTIONS PRESENTED

I WHETHER THE FEDERAL STATES OF ALDUCRA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS TRADE MEASURES FOR TAPAGIUM PRODUCTS?

II WHETHER THE ACTIONS OF REPUBLIC OF RUNNBETI VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS WIND FARM PROJECT?

STATEMENT OF FACTS

Alducra and Runbeti are neighboring countries situated on the Architerpo continent. Their economies are both based on agave, but Alducra is considered a developed country and Runbeti a developing country.

The countries entered into a regional trade agreement, the ARTA, in 2000. In January 2015, Alducra passed a domestic legislation requiring farmers to transition to bat-safe farming practices. In January 2015, Alducra passed domestic legislation requiring farmers to transition to bat-safe farming practices seeking to provide protection to the royal (*Nyctalus royalis*) and the Archterpan long-nosed bat (*Leptonycteris architerpae*).

In April 2015, Runbeti announced the construction of a wind farm to comply with its obligations under UNFCCC and Paris Agreement. The project included the construction of wind farms on a land owned by Pinwheel Energy Co. (PECO). However, the proposed location included royal's noctule migration route and the Chiropera Crusaders expressed concerns to Runbeti and PECO about the potential negative impact of the farm, and also notified Alducra.

An EIA was conducted in 2015 by Runbeti to approve the project, and it was authorized. From 2017 to 2018, the Chiropter Crusaders monitored the wind farm, reporting the survey to PECO, Runbeti and Alducra. Around 237 royal noctules were found dead near the wind farm in 2017 and 356 in 2018, alongside several dead specimens of bat species.

In January 2019, the Embassy of Alducra forwarded a diplomatic note, stating the significant negative effect of the wind farm. Also stated that several clauses of CMS, CBD and EUROBATS had been breached. A reply note was forwarded on 8 January, stating that Runbeti's efforts aimed to comply with its international commitments. On 10 January, the Government of Runbeti and PECO prohibited the Chiroptera Crusaders from monitoring the wind farm area.

Alducra passed, in November 2019, a statute that imposed a 20% tax on all sales of tapagium that had been produced using agave from farms that were not bat-safe and imposed labeling provisions. The tax applied to all national and imported tapagium. On 13 December, Runbeti responded stating that the taxation was prejudicial to its economic growth, however Alducra stated that It was a measure of protection towards the bats.

Unable to solve its dispute, both countries entered into a Special Agreement to institute proceedings in the International Court of Justice.

SUMMARY OF ARGUMENTS

By stimulating the construction of a Wind Farm in its territory, Runbeti complied with its treaty obligations and with customary international law. Its neighboring country, Alducra, by exercising resistance to the project's implementation, breached several treaty obligations and customary international law.

Aiming to assess climate change, Runbeti complied with (1) the Provision 8.4 of the EUROBATS Agreement, (2) principles of the UNFCCC, (3) the commitments established by the Paris Agreement, and (4) the commitments established by the Rio 92 and Rio +20 Declaration.

Runbeti also complied with international law customs, such as (1) the principle of preventive action, (2) the duty to inform its neighboring country about the project's execution, (3) the prevention of transboundary harm and (4) the duty to promote sustainable development.

By opposing the construction of the wind farm and creating taxes, Alducra violated treaty obligations, such as (1) the Article 20 of the CBD, (2) the Resolution 12.21 of the CMS, (3) ARTA, (4), (5) the Paris Agreement, and (7) the principles of the UNFCCC.

Failing to observe what has been established on such treaties, the country breached customary international law breaching the principle of autonomy and sovereign equality.

I. RUNBETI COMPLIED WITH INTERNATIONAL ENVIRONMENTAL LAW, WITH REGARDS TO THE IMPLEMENTATION OF THE WIND FARMS

1.1. Runbeti complied with its treaty obligations

1.1.1. Runbeti complied with the provisions of the EUROBATS Agreement.

Runbeti complied with the provisions of the EUROBATS Agreement¹. Article III, ¶5, says that each party shall assign to an appropriate body responsibility for the provision of advice on bat conservation and management within its territory. The parties also shall exchange information on their experiences in this matter, as the duty to inform is a general obligation of states to present general information (mainly related to scientific and technical material) on an *ad hoc* basis to other states.

For the matter of environmental treaties, this obligation can be a requirement among states, states, and international organizations, or, even among international organizations and non-state actors². As stated on ¶5 parties should assign the role of providing information and advice on bats to a particular body (or, potentially, bodies), being these government bodies or NGOs with competence in bat conservation and management³.

Runbeti, after announcing the wind farm project, conducted an extensive EIA⁴ for the construction of the first phase and approved the project, issuing the necessary permits for the first phase. Also, the local NGO Chiroptera Crusaders, which was authorized by Runbeti to monitor the wind farm area during 2017 and 2018, shared the information

¹ Agreement on the Conservation of Populations of European Bats, EUROBATS, (London, 1991).

² *supra* note 24, p. 829

³ A Guide to the Implementation of the EUROBATS Version 2, Anthony M. Hutson, Ferdia Marnell & Ruth Petermann (Bonn, 2019), p. 17.

⁴ Record, ¶19.

collected with the neighboring country on several occasions⁵. Therefore, Runbeti complied with the provisions of the EUROBATS agreement on advising on bat conservation and management regarding bats in buildings and on exchanging information.

1.1.1.1 Runbeti complied with the provisions of Resolution 8.4 of the EUROBATS Agreement

Runbeti complied with the provisions of the Resolution 8.4 of the EUROBATS Agreement. In accordance with topics 4, 6, 7 and 8 of Resolution 8.4⁶, the parties should encourage and ensure the engagement in research on the best methods for an appropriate EIA, monitoring and mitigation measures on bat mortality at wind turbines at the pre and post-construction phase and as long as needed, all that being supervised by authorities.

Bearing in mind that Resolution 8.4 “encourages a range of measures to minimize the impact of wind farms on bat populations”⁷, by conducting an extensive EIA for the pre-construction phase of the wind farm project, reviewing it and allowing the Chiroptera Crusaders to regularly monitor the area to determine the wind farm’s impacts on the bats and reporting the results of their surveys to PECO, Runbeti and Alducra, it is easy to perceive that Runbeti did follow the provisions set by the Resolution.

1.1.2. Runbeti complied with the principles of UNFCCC.

Runbeti complied with its duty to implement climate change mitigation measures, in accordance with the UNFCCC. In ¶ 3 from article 3 of the aforementioned convention states that the parties should take precautionary measures in order to anticipate, prevent

⁵ Record, ¶ 21.

⁶ *supra* note 1, Resolution 8.4

⁷ *supra* note 3, p. 18

and minimize causes of climate change mitigating its negative impacts⁸. Furthermore, it also sets that those policies and measures implemented should be cost-effective to fit the State's socio-economic context⁹. From a universal climate perspective, renewable energy policies are fundamental not only to mitigate climate change, but also to increase access to energy, and strengthen the resilience of the overall electricity system to potential climate variation impacts and natural hazards.¹⁰

By taking actions to reduce the impacts of climate change Runbeti complied with the UNFCCC.

1.1.3. Runbeti complied with its commitments under the Paris Agreement.

Runbeti's wind farm project is in accordance with the goals established in article 4, 7, and 11 of this convention¹¹. To minimize greenhouse gas emissions, the parties must submit NDCs, fundamental to the achievement of Paris Agreement long-term goals embodying the efforts made by each country to reduce national emissions and take adaptation measures to face the impacts of climate change¹² being publicly published by the secretariat¹³.

Furthermore, the efforts of developing countries to meet these objectives should be recognized as those mitigation measures represent a key component of the global response to climate change, aiming the protection of people, livelihoods and ecosystems, particularly taking into account the urgent needs of those most vulnerable to the adverse effects of climate change, the developing countries population¹⁴.

⁸ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. Article 3.

⁹ Record, ¶ 17.

¹⁰ United Nations Climate Change. Secretariat, 2015. Mitigation benefits of actions, initiatives and options to enhance mitigation ambition.[online] p.16.

¹¹ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

¹² *supra* note 8

¹³ *supra* note 13, article 4

¹⁴ *id*, article 7

Like so, the necessity of developing countries to invest in effective climate change actions must be respected by the other parties. Thus, Runbeti as a developing country has every right, according to this convention, to invest in new technologies that are environmentally healthy.¹⁵

Nonetheless, the parties' initiatives of national mitigation contributions for the post-2020 period are fundamental for the achievement of the global warming limit goal of 2°C¹⁶. Overall, Runbeti is attempting to contribute to climate change mitigation by submitting their own first NDC¹⁷. The adoption of wind energy, a renewable power source, contributes not only to the reduction of greenhouse gas emissions in the State but also to the whole environment. Therefore, Runbeti's wind farm project meets its commitment to the Paris Agreement.

1.1.4. Runbeti complied with its commitments under the Rio+20.

In accordance to ¶ 69 of the Rio+20¹⁸, Runbeti has acted within its rights to partner with a private company in order to develop a sustainable energy initiative, as it states that not only that private businesses and industries are invited to contribute to sustainable development, but also that they have the duty to contribute to society¹⁹. Moreover, according to ¶ 69 the private segment should be encouraged in contributing to sustainable initiatives²⁰.

This is explained by the principle of social responsibility — which means acting towards a commitment to life in society with human dignity, whilst being responsible and committed to social problems that harm the world, like adverse effects of climate change.

¹⁵ *id.*, article 11

¹⁶ Kelly Levin, et al. *Ex-ante Clarification, Transparency, and Determined Mitigation Contributions*, World Resources Institute, 2014.

¹⁷ Record ¶ 16

¹⁸ Rio +20: The United Nations Conference on Sustainable Development. June 18, 2012.

¹⁹ *Id.*

²⁰ *Id.*

Considering this principle, corporations and businesses, as well as the government, have to take concrete actions to face those problems.

Therefore, Runbeti acted in accordance with this document when it partnered with PECO to construct the wind farms.

1.2. Runbeti complied with customary international law.

1.2.1. Runbeti complied with its obligations under the principle of preventive action

Formerly and foremost, Runbeti has complied with the principle of preventive action, since the implementation of wind farms was authorized after an EIA was conducted and approved by the government.

This principle requires action to be taken at an early stage and, if possible, before damage has actually occurred.²¹ That is, it prohibits activity which causes or may cause damage to the environment in violation of the standards established under the rules of international law.²²

The preventive approach has been endorsed directly by the 1972 Stockholm Declaration²³ and is implicitly supported in relation to transboundary resources by the awards in the *Trail Smelter* case and the *Lac Lanoux Arbitration*.²⁴ Also, it was supported in the pleadings of Australia in the *Nuclear Tests* case and be discerned in Hungary's

²¹ In the *Gabcikovo-Nagymaros* case, the ICJ noted that it was 'mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage': (1997) ICJ Reports 7 at 78, para. 140.

²² Principles of International Environmental Law. General Principles and Rules. Second Edition. Philippe Sands. Cambridge. page 247.

²³ Stockholm Declaration on the Human Environment, in *Report of the United Nations Conference on the Human Environment*, UN Doc.A/CONF.48/14, at 2 and Corr.1 (1972)

²⁴ *Id.*

Original Application to the ICJ in the case concerning the *Gabcikovo-Nagymaros Project*.

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After conducting and reviewing the EIA, Runbeti approved the wind farm project and issued the necessary permits for the first phase²⁶, in this regard, the activity did not represent a violation to the environment, otherwise, it would not even have been authorized.

The preventive principle may take several forms, including the need to carry out an EIA in relation to the conduct of certain proposed activities²⁷. As already mentioned in the ¶ above, Runbeti conducted an extensive EIA for the first phase of the wind farm project²⁸, then it is clear that the country and PECO fulfilled its obligation to conduct an EIA and, consequently, to respect the preventive principle.

In that sense, by conducting an EIA, Runbeti acted in accordance with the criteria established in the Rio 92 Declaration and article 14 of CBD. The 17th principle of the Rio 92 states that prior to undertaking activities that may have significant environmental impact, one must conduct an EIA. Article 14 of the CBD also established that each Contracting Party shall adopt appropriate procedures such as requiring an EIA of its proposed projects that may have significant adverse impacts on biodiversity, as well as allowing public participation in those procedures²⁹.

²⁵ *Id* page 248.

²⁶ Record ¶ 19.

²⁷ *supra* note 24. page 247.

²⁸ Record ¶ 19.

²⁹ The Convention on Biological Diversity of 5 June 1992 (1760 U.N.T.S. 69).

Moreover, to further demonstrate the importance of the procedure conducted, the International Court's 2010 judgment in *Pulp Mills on the River Uruguay*³⁰, held that prior assessment of transboundary impacts is not merely a treaty-based obligation but a requirement of general international law.

The outcome in these cases shows that an EIA must be undertaken if there is some evidence of a risk of significant harm to the human or natural environment – even if the risk is uncertain and the potential harm not necessarily irreparable.³¹

Recognizing the importance of the EIA and to fulfill their duty, adopted by the International Court of Justice, Runbeti conducted a prior study capable of predicting adverse risks, before carrying out the implementation of its project, guaranteeing the safety of the business in general, protecting society and conserving the environment.

Lastly, besides conducting an EIA, Runbeti allowed the Chiroptera Crusaders to regularly monitor the wind farm during 2017 and 2018, as well as report the results of their surveys to PECO and both Parties³².

In the Separate Opinion appended in the *Gabcikovo-Nagymaros* case, Judge Weeramantry established that the duty to conduct an EIA also means a duty of monitoring the environmental impacts of any project during its operation³³. Thus, it remains evident that Runbeti evaluated the environmental, social and economic impacts of the project before the decision was made, as well as after, allowed monitoring in order to identify any

³⁰ 2010 ICJ Reports. The author was counsel for Uruguay in this case, but the views expressed here are given in a personal capacity.

³¹ Alan Boyle. Developments in International Law of EIA and their Relation to the Espoo Convention.

³² Record ¶ 21.

³³ Case Concerning the Gabcikovo-Nagymaros Project, Judgement, 1997 I.C.J. Rep. 7 (Sept. 25)

further damage and thus complied with another unfolding of the principle of preventive action.

1.2.2. Runbeti complied with its duty to inform Alducra with regards to the wind farm project.

By submitting its first NDC, the State fulfilled the duty to inform. Being part of the Paris Agreement, the Parties agreed to a long-term goal aiming adaptation to the negative impacts of climate change and to foster climate resilience and low greenhouse emissions development³⁴. According to Article 4, ¶ 2 of the Paris Agreement, the Parties are required to prepare, communicate, and manage successive NDCs that it intends to achieve³⁵. The goal is to display the country's post-2020 climate actions, taking into account its domestic economic capability.³⁶ More important, approved NDCs are cataloged in the NDC Registry publicly available and organized by the UNFCCC secretariat³⁷, likewise, the communicated NDCs are also published, being available at the interim NDC Registry.³⁸ Thereby the publication makes the submitted NDC information available for anyone who accesses the UNFCCC pages that compiles those projects.

Complying with the State's duty under The Paris Agreement and UNFCCC, Runbeti submitted its first NDC in May 2016³⁹ which included the subsidy program for approved alternative energy projects, leading to PECO's multiphase wind farm project. In

³⁴ *supra* note 13

³⁵ *id.*, Article 4

³⁶ *supra* note 13

³⁷ *id.*, article 4.

³⁸ *supra* note 13

³⁹ Record ¶ 16

that way, there is no doubt that the country had the intention to share the information regarding the program.

In fact, by submitting the NDC, as seen before, it already turned the wind farm project public. Therefore, Alducra's shutdown request⁴⁰ after 2 years of operation of the wind farm is unfair, once in order to effectively inform, Runbeti not only submitted the NDC, but also allowed a bat specialized local non-governmental organization, the Chiroptera Crusaders, to monitor the construction area and spread information collected concerning the project.

All things considered, Runbeti acted according to its commitments under the Paris Agreement and the UNFCCC by submitting its NDC, complying, as well, with its duty to inform.

1.2.3. Runbeti did not violate the duty to prevent transboundary harm

The duty to prevent transboundary harm does not apply once not all the essential elements of the transboundary harm duty were regarded. The duty mentioned is restricted by four elements: (1) physical relationship between the activity and the damage; (2) human causation; (3) a certain threshold of severity that calls for legal action; and (4) transboundary movement of the harmful effects".⁴¹ These elements are cumulative, and the absence of one will prevent its application⁴².

In this context, there is no evidence that the construction of the wind farm is linked with the death of the bats⁴³. It is correct to affirm that the appearance of dead bats around

⁴⁰ Record ¶ 22.

⁴¹ O. Schachter, *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff, 1991), pp.366-368.

⁴² *id.*

⁴³ Record ¶ 22

the area does not mean it was caused by the wind farm, as Alducra itself declared not to know how that would have happened. Thus, the bats' deaths should not be claimed by Alducra as a result of Runbeti's wind farm project⁴⁴.

Furthermore, transboundary damage should have a proximate causal relation to human conduct⁴⁵, the damage needs to be proved as a foreseeable or normal consequence of the questioned act or omission⁴⁶. There is no actual information about the population number of Royal Noctule before and after the wind turbines, and it is not possible to cease a project due to unfounded data. Additionally, there is no notification of people seeing bats hitting objects at the construction, or even being harmfully thrown by the wind.

Likewise, the transboundary harm duty does not apply once the harm cannot be defined as "significant". Significant harm is understood as more than "detectable" harm: there must have detrimental effects arising from this harm. In addition, these effects must be liable to be measured by accurate and objective standards⁴⁷. Therefore, the harm experienced by Alcucra cannot be affirmed as significant once the bats' deaths are a common occurrence, and, for so, Rubenti cannot allege that it has impacted its environment. Moreover, as affirmed before, there is no data about how many bats used to die in the area, hence, there is no possible way to measure accurately the harm so that it can be defined as "significant".

Furthermore, the ICJ maintained in the *Kishenganga case* that the threshold of 'significant' harm may change over time as environmental conditions change:

⁴⁴ Record ¶ 22

⁴⁵ Hanqin, *Transboundary Damage in International Law* 4 (2003).

⁴⁶ *Lighthouses Arbitration Case*, (Fr. v. Gr.), I.L.R. 23 (1956); GARNER, BLACK'S LAW DICTIONARY 1225 (11th ed.)

⁴⁷ Draft articles on Prevention of Transboundary Harm from Hazardous Activities. Commentary (4).

[...] a degree of uncertainty is inherent in any attempt to predict environmental responses to changing conditions... the Court is cognizant that flows in the Kishenganga/Neelum may come to differ, perhaps significantly, from the historical record as a result of factors beyond the control of either party, including climate change.⁴⁸

In conclusion, the facts do not meet with the requirements necessary to impose the prevention of transboundary harm as a duty to a State, consequently, in this case, this duty does not apply to Runbeti.

b. Even assuming there was significant damage to Alducra, Runbeti complied with the duty to prevent transboundary harm:

Runbeti fulfilled its duty to prevent transboundary harm when it conducted an EIA prior to the beginning of the construction, as already mentioned. No decision was made before an extensive study on the wind farm and its possible damages to the environment, therefore, evidently, Runbeti observed the duty of preventing transboundary harm.

1.2.4. Runbeti complied with the duty to promote sustainable development

By adopting a renewable, clean and green energy source, Runbeti ensures its own needs, not only for the present but for future generations, creating a healthy economy, eradicating poverty and satisfying basic human needs, having, as ICJ Judge Cançado Trindade puts, an “underlying temporal dimension”⁴⁹. Alducra’s opposition to the wind farm construction, then, may be impeding sustainable development.

In the Separate Opinion of Judge Cançado Trindade on the ICJ *Pulp Mills Case*, the judge, in chapter X, The Underlying Temporal Dimension: Sustainable Development, states that sustainable development is underlined by a temporal dimension, meeting, by

⁴⁸ Kishenganga case (Pakistan v. India), ¶ 117.

⁴⁹ Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 I.C.J., p. 184, separate opinion of Judge Cançado Trindade.

definition, the needs of the present without compromising the possibility of future generations to meet their own needs⁵⁰. Because of that, it has come to be regarded as encompassing the fostering of economic growth, making possible the eradication of poverty and the satisfaction of basic human needs, like health, nutrition, education, housing, etc⁵¹. So, sustainable development came to be perceived as a link between the right to development and the right to a healthy environment. Decision making, now, considers the environment and development upon the issues of the satisfaction of basic human needs.

In this Opinion, Judge Trindade also states that important treaties, such as Rio Declaration and Vienna⁵² Declaration, gave projection to the formulation of sustainable development turned to the fulfillment of the necessities of present and future generations⁵³.

Also, the CMS considers sustainable development as a priority, by having incorporated in the Convention Text that is “Aware that each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely”⁵⁴.

The construction of the wind farm by Runbeti, as it was mentioned, has an extended usage, for present and future generations. Also, by being a country that is currently in development, Runbeti’s wind farm comes as a step towards developmentship.

Furthermore, by implementing the construction of a renewable energy source, Runbeti complies with the Convention on Biological Diversity. The CBD⁵⁵, aiming to

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Vienna Declaration and Programme of Action, UN World Conference on Human Rights, U.N. A/Conf.157/23 (vol. 1), 25 June 1993.

⁵³ *Id.*

⁵⁴ Convention on Migratory Species, COP 12, *Climate Change and Migratory Species*, Resolution 12.21 (October 2017).

⁵⁵ COP 14, Decision Adopted By The Conference of the Parties to the Convention on Biological Diversity, Decision 14/3, (17-29 November 2018).

prevent the climate change impacts on biodiversity, encourages the parties to implement policies in the sectors of energy and mining, infrastructure, manufacturing and processing within the Strategic Plan for Biodiversity 2011-2020 and the 2030 SDG's⁵⁶. Item "h" of the CBD COP14 Decision 3, article 13⁵⁷ incorporates important statements regarding sustainable development. Amongst these we can highlight the promotion of sustainable consumption and production in the energy sectors.

In that sense, Runbeti is also complying with item "r" by constructing the energy farm as an alternative renewable energy source, as this item states that "Mainstreaming of biodiversity in the energy and mining, infrastructure, manufacturing and processing sectors" by constructing the energy farm as an alternative renewable energy source. By that, the country is, under the CBD, complying with the Strategic Plan and 2030 SDGs.

Lastly, Runbeti's efforts to implement a national framework aiming to create a sustainable energy source were encouraged by the CMS, supporting the 2030 SDG's. This Agenda established 17 goals,⁵⁸ aiming to stimulate action in areas of critical importance for humanity and the planet. Among all the goals, comes relevant Goal 7 and Goal 13: i. ensure access to affordable, reliable, sustainable, and modern energy for all; ii. Take urgent action to combat climate change and its impacts⁵⁹.

In this context, Runbeti also complies with the CMS Manila Declaration on Sustainable Development and Migratory Species⁶⁰ by creating an alternate sustainable energy source, as it has been established by the 2030 Agenda. By that, Runbeti ensures its needs on a long-term basis, aiming to become a developed country, all that by adopting

⁵⁶ United Nations, General Assembly, *Transforming our world: The 2030 Agenda for Sustainable Development*, A/RES/70/1 (25 September 2015).

⁵⁷ *supra* note 55, item "h"

⁵⁸ *supra* note 56

⁵⁹ *supra* note 56, Goal 7 and 13

⁶⁰ Convention on Migratory Species, COP 12, *Manila Declaration on Sustainable Development and Migratory Species*, Resolution 12.3 (October 2017)

a sustainable development agenda, and Alducra’s opposition to it will be an impeding factor

II. ALDUCRA BREACHED INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSE TO THE IMPLEMENTATION OF THE WIND FARMS

2.1. Alducra breached its treaty obligations.

2.1.1. Alducra breached Article 20 of CBD

Financial support is a commitment provided by developed countries to incentive the developing ones to meet, according to its national plans, the costs of implementing measures to achieve the objectives of the Convention⁶¹. Article 20 from CBD states as well in its fourth ¶ the importance of “economic and social development and eradication of poverty as the first and overriding priorities of the developing country Parties” when it comes to developed countries supporting financially others — it is known in ¶ 1 of Annex A that Runbeti is considered to have a developing economy, being categorized as a developing country in this matter, and that a construction of a wind farm, besides generating sustainable energy, contributes as well with economic development, creating “green jobs”⁶².

It is known that a wind farm is a source of renewable energy, identified as “green energy”. Conserving biodiversity and maintaining ecosystem services are key pillars of the efforts to transition to a Green Economy⁶³, provided using wind farms. However, biodiversity conservation is not only about rescuing unique species from extinction.

⁶¹ *supra* note 30, Article 20,

⁶² Gasparatos, A., Doll, C. N. H., Esteban, M., Ahmed, A., & Olang, T. A. (2017). *Renewable energy and biodiversity: Implications for transitioning to a Green Economy*. *Renewable and Sustainable Energy Reviews*, 70, 161–184.

⁶³ Gasparatos, A. (Ed.), Willis, K. (Ed.). (2015). *Biodiversity in the Green Economy*. London: Routledge

Eventually, the Country's future depends upon its natural resources to protect the State from natural calamities⁶⁴, and for that, technological developments are needed for sustainable energy.

That being said, Alducra breached Article 20 from CBD by not supporting financially and incentivizing Runbeti to accomplish its commitments under the Convention.

2.1.2. Alducra breached article 1 and 2 of Resolution 12.21 of CMS

Alducra's opposition to Runbeti's wind farm plan is harmful to the environment, as Runbeti's actions aim to reduce climate change, acting accordingly with CMS, more specifically, Resolution 12.21 of COP12⁶⁵. Concerned with climate change, Resolution 12.21 encourages the parties to take the necessary measures to prevent climate change since its impacts on migratory species are significant, welcoming the Paris Agreement of the UNFCCC framework and recognizing that facing new circumstances, CMS instruments may need to adapt to the variations⁶⁶. Runbeti's wind farm may be a long-term measure in the conservation of species, and Alducra's opposition may cause an adverse result.

As is stated in Article 1, the POW encourages the parties to put in place appropriate and necessary measures, including the incorporation of such measures in national climate change strategies, as a matter of priority in regards to fighting climate change, and to be applicable to the extent possible given the circumstances of each Party. Also, as stated by Article 2, the Conference urges the parties to not delay related decision-making and action,

⁶⁴ Republic of Mauritius (RoM), 2017. National Biodiversity Strategy and Action Plan (NBSAP) 2017 – 2025.

⁶⁵ *supra* note 54, Resolution 12.21

⁶⁶ *Id.*

despite the remaining uncertainty surrounding the full scale of the impacts of climate change on migratory species⁶⁷.

By opposing the urgent action taken by Runbeti, Alducra doesn't seem complacent nor express support with its neighboring country agenda, that it has been molded under the mentioned resolution. Therefore, Alducra's non-observation to the CMS Resolution 12.21 results in its violation, as it opposes necessary action aimed to fight climate change.

2.1.3. Alducra breached its duties under ARTA

2.1.3.1 Alducra failed to comply with ARTA's commitments established in Article VIII, Paragraph 2.

Alducra failed to comply with ARTA's commitments regarding internal taxation and regulation. Paragraph 2 of Article VIII states that no product made in one contracting party and destined to another (i.e. an imported product) shall be subject to internal charges in excess to those applied to like domestic products⁶⁸. The statute passed in Alducra in late 2019 imposes a 20% tax on all sales of tapagium that had been produced without bat-safe farming practices; this taxation doesn't apply to domestic production, for Alducra has, since 2015, legally obliged its farmers to use only bat-safe practices⁶⁹. That being so, even though the new statute hasn't explicitly targeted foreign production, it couldn't possibly have contemplated domestic production, for that would be admitting that their own farmers fail to follow a law which has been around for at least 4 years, and had an adaptation period.

⁶⁷ *supra* note 54, Resolution 12.21, Article 1 and Article 2 (October 2017).

⁶⁸ Stetson Law University. Record Moot Court Competition, 2020-2021. Architerpo Regional Trade Agreement. p.2

⁶⁹ *id*, p.13.

It's clear that no matter the lack of explicitness, this new taxation is directed to and only to foreign production, thus blatantly contradicting ¶s 2 and 3 of article VIII, once they aim to ensure like treatment of domestic and foreign products.

By approving the November 2019 statute, Alducra acted in a protectionist fashion and in direct violation of the article and it's ¶s.

2.1.3.2 Alducra failed to observe the ARTA's concerns about economic development equality

Alducra violated ARTA's concerns about the respect of different levels of economic development when it took the economic measures of taxing products. According to ARTA, the parties should recognize the different levels of economic development at all articles, since developed countries have a privilege, an advantage, in relation to those in development⁷⁰. The need to treat countries in different economic development conditions is found, for example, in the principle of equity⁷¹. *The Continental North Sea Platform*⁷² (Denmark and Netherlands versus the Federal Republic of Germany) ICJ trial in 1969, was an example of a decision based on "equity considerations". The Court considered several factors of geographic, geological, and economic nature, highlighting the importance of analyzing the situation of countries, in order to match them.

Thus, when Alducra did not consider the condition that Runbeti was by consequence it did not agree with ARTA or with the principle of equity. Therefore, Alducra violated ARTA's concerns about the need to analyze the economic situation of countries when applying the rules of the agreement.

⁷⁰ *id*, p.7.

⁷¹ Humberto Ávila, *Teoria dos Princípios: da definição à aplicação dos princípios jurídicos*, 15ª ed, São Paulo: Malheiros, 2014.

⁷² ICJ North Sea Continental Shelf Cases (Federal Republic of Germany Denmark; Federal Republic Germany Netherlands) Judgment of 20 February 1969, p. 3.

2.1.4. Alducra breached its commitments under Paris Agreement

Alducra did not consider that as a developed country, they should act as to help undeveloped and developing countries, i.e. Runbeti, in adapting their actions in order to contribute to fighting climate change.

Article 11 of the Paris Agreement recognizes that developing countries, such as Runbeti, are especially vulnerable to climate change, and as such, should take action to mitigate the country's impact on worsening the climate crisis⁷³. The article also states that the countries with greater capacity, that is, developed countries, should help enhance the less developed and therefore less capacitated countries in terms of technology, act towards fighting climate change⁷⁴.

Runbeti is committed, as per article 11, to investing in green initiatives in order to contribute to the fight against climate change. However, Alducra, by requesting that Runbeti shut down the wind farm, is not only failing in their duty to help enhance developing countries' actions and investments to fight climate change, but also thwarting Runbeti in fulfilling the latter's commitment (and right) to invest in sustainable initiatives. Alducra's request to shut down the wind farm thus completely disregards the commitments they pledged to comply within Article 11 of the Paris Agreement.

2.1.5. Alducra breached the principles of UNFCCC.

Alducra violated several provisions under UNFCCC. Moreover, as declared in Resolution 53⁷⁵, the climate is a common concern of mankind since it represents the fundamental condition for the maintenance of life on earth⁷⁶. In ¶2 of article 3 of the

⁷³ *Supra* note 12, Article 11.

⁷⁴ *Id.*

⁷⁵ Made by the General Assembly of the United Nations, in 1989.

⁷⁶ Hildebrando Accioly et al., *Manual de Direito Internacional Público* 694 (24th ed. 2019, p. 694).

UNFCCC⁷⁷, it is stated that the Parties should consider the specific needs and special situations of other States, especially of developing country Parties.

It is also mentioned that the parties should preserve the climate system, specially developed country Parties, that should take the lead to defend it for the benefit of present and future generations of humankind⁷⁸. Moreover, gathered in Japan in 2008, the leaders of developed countries instructed their representatives in the World Trade Organization to promote cooperation in the delicate sphere of climate change⁷⁹.

Regarding the wind farm project⁸⁰, it is known that the climate should be considered as a bond responsibility that relapses on the international community as a whole since the atmosphere and other elements of climate is not bound to any kind of states' sovereign right⁸¹. However, this cooperative thinking is not shared by Alducra as the country tries to impose its own environmental priorities on other states by the adoption of trade measures, failing to comply with the State's duty to consider developing country's necessities and ignoring the importance of adopting measures to reduce the impacts of climate change, Alducra violated UNFCCC.

Notwithstanding, the International Court of Justice Jurisprudence clarifies that developed countries have the duty to treat developing countries in a careful way, mainly when related to trade dependence⁸². As the *Fisheries Jurisdiction Case* states, it should be regarded as a sample of the ICJ position about developing countries. The disagreement occurred between the United Kingdom and Northern Ireland related to the extension of

⁷⁷ *supra* note 8, Article 3.

⁷⁸ *supra* note 8

⁷⁹ A Declaration of Leaders Meeting of Major Economies on Energy Security and Climate Change.

⁸⁰ Record ¶ 17.

⁸¹ *supra* note 83, p. 694

⁸² Fisheries Jurisdiction (United Kingdom v. Zeeland), Merits, Judgment, I.C.J. Reports 1974, p. 3

fishing areas, where the Court entitled Iceland as the preferential share in the distribution of fishing resources because of the special dependence of its people upon coastal fisheries, as well as the principle that each state must pay due regard to the interests of the other in the conservation and equitable exploitation of the resources⁸³.

According to ¶ 4 from the same article⁸⁴, Runbeti has the right to promote sustainable development, and, moreover, in ¶ 5⁸⁵ is exposed that the Parties should stimulate an open economic international system to gain a sustainable economy (particularly the contracting Parties of developing countries). Also, in ¶ 5⁸⁶, mentions that even unilateral measures to combat climate change should not represent ways to discriminate or disguised restrictions on international trade. Alducra imposed legislation on the imported product, imposing a labeling provision requiring that all imported and/or sold should include a specific label on the bottle indicating if the input was bat-safe or was not bat- safe⁸⁷. Thus, Alducra violated UNFCCC's principles and clearly did not follow the International Court of Justice Jurisprudence.

2.2. Alducra breached customary international law

2.2.1. Alducra violated Runbeti's sovereign right to use its natural resources

Alducra violated Runbeti's sovereign right to use its natural resources to construct a wind farm. Following the 1958's GA which established the Commission on Permanent Sovereignty Over Natural Resources, "the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of

⁸³ Ibid.

⁸⁴ *supra* note 8

⁸⁵ Ibid.

⁸⁶ *supra* note 8

⁸⁷ Record ¶ 26.

their national development and of the well-being of the people of the State concerned⁸⁸”. Similarly, article 3 from CBD, Principle 21 of the Stockholm Declaration and Principle 2 of Rio Declaration states that every State can exploit its own resources⁸⁹⁹⁰⁹¹.

In the present case, Runbeti, a developing country, as part of its efforts to meet its commitments under the conventions agreed, exploited its own territory to develop sustainable energy in favor of a better environment for its people and an opportunity to increase its economy.

Consequently, the construction of the wind farm impacts directly on nature: being a renewable type of energy, it has the advantages of not emitting polluting gases nor does it generate residues. Meanwhile, besides helping the environment, it also creates jobs and a saving fund due to less acquisition of CO2 emission rights for complying with the Paris Agreement⁹². For all means, it’s an encouraging sustainable method to develop a country while meeting its commitments and acting according to its rights.

On the *Lake Lanoux Arbitration 1957 (France v Spain)* dispute, did allude "to the possibility of natural resources such as the water of a lake being exploited 'in the common interests of everybody⁹³". Also, in the *North Sea Continental Shelf*, the ICJ states that States are allowed to explore its natural resources, as an inherent right. In that sense, no legal or special process should be needed⁹⁴.

⁸⁸Resolution adopted by the General Assembly [on the reports of the Second Committee (A/5344/Add.1 and Add.1Corr.1, A.L.412/Rev2)]: 1803 (XVII). Permanent sovereignty over natural resources, United Nations General Assembly Seventeenth Session, Resolution No. A/RES/1803/(XVII), 14 December 1962.

⁸⁹ *supra* note 30, article 3.

⁹⁰ *Supra* note 23, principle 21

⁹¹ Rio Declaration on Environment and Development, in *Report of the United Nations Conference on Environment and Development*, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992, Annex, principle 2.

⁹² *supra* note 13, Article 6, ¶ 4 (c).

⁹³ Blockmans, S. (2002). *International Law*, by Antonio Cassese, Oxford University Press, Oxford/New York, 2001.

⁹⁴ *supra* note 72, ¶ 19.

Therefore, as Alducra continuously targets Rubeti's wind farm, demanding its shut down⁹⁵ and hindering its functionality, the Party is undoubtedly impeding the concretization of Runbeti's sovereign right to explore its own territory established on the previous Conventions agreed.

CONCLUSION

The Applicant, the Republic of Runbeti, respectfully requests the Court to adjudge and declare that:

1. The Republic of Runbeti did not violate international law with respect to its wind farm project.
2. The Federal State of Alducra violated international law with respect to its trade measures for tapaguim products.

Therefore, it is humbly prayed for the Hon'ble Court to pass appropriate directions to stop the trade measures and grant adequate compensation to the Applicant.

⁹⁵ Record ¶ 22.

(Respectfully Submitted)

Agents on behalf of the Respondent State.