

IN THE INTERNATIONAL COURT OF JUSTICE



AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING

PROTECTION OF BATS AND INTERNATIONAL TRADE MEASURES

THE FEDERAL STATES OF ALDUCRA

APPLICANT

v.

THE REPUBLIC OF RUNBETI

RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE 25TH ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL MOOT

COURT COMPETITION 2020-2021

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QUESTIONS PRESENTED

I.

WHETHER THE REPUBLIC OF RUNBETI VIOLATED INTERNATIONAL LAW
WITH RESPECT TO ITS WIND FARM PROJECT

II.

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

STATEMENT OF JURISDICTION

The Federal States of Alducra (“Alducra”) and the Republic of Runbeti (“Runbeti”) submit their dispute to this Honorable Court, pursuant to Art. 40 of the Statute of the International Court of Justice. On July 24, 2020, Alducra and Runbeti have submitted a copy of the Special Agreement to the Registrar of the Court. See Special Agreement Between Alducra and Runbeti for Submission to the International Court of Justice of Differences Between Them Concerning Questions Relating to Protection of Bats and International Trade Measures, signed at Mexico City, Mexico on April 22, 2020. The Registrar addressed notification to the parties on July 31, 2020.

STATEMENT OF FACTS

The Republic of Runbeti (“Runbeti”) and the Federal States of Alducra (“Alducra”) are neighboring States in Architerpo.(R¶1) Alducra is a developed country, while Runbeti is considered a developing country.(R¶1) Both countries’ economies rely heavily on agriculture.(R¶1)

Runbeti and Alducra produce tapagium, an agave spirit. Other countries in Architerpo do not grow agave or produce tapagium and instead import it from Runbeti and Alducra.(R¶11) Runbeti also exports a significant volume of tapagium to Alducra.(R¶12) To bolster trade relations, all Architerpan countries entered into a trade agreement called the Architerpo Regional Trade Agreement.(R¶12)

Thirteen species of bats live in Architerpo.(R¶14) These include the royal noctule and the Architerpan long-nosed bat, which are species almost identical to the common noctule and the lesser long-nosed bat, respectively.(R¶14)

To meet the growing demand for tapagium, agave farms in both countries turned to cloning the mother plant and cutting the stalks instead of allowing the agaves to flower.(R¶15) Decades later, Alducra required local agave farms to transition to certain farming practices before 2016.(R¶15)

To meet its commitments under various climate change conventions, Runbeti subsidized Pinwheel Energy Co.’s wind farm project after conducting and reviewing an extensive environmental impact assessment.(R¶19)

After construction, Runbeti allowed the Chiroptera Crusaders to regularly monitor the wind farm until 2018.(R¶21) The Chiroptera Crusaders found bat specimens that died of undetermined causes in the area.(R¶21)

In 2019, Alducra mandated additional tax and labelling requirements on the sale and import of tapagium within Alducra.(R¶¶25,26) First, Alducra imposed a 20% tax on sales of tapagium produced under certain farming methods.(R¶26) Second, Alducra imposed labeling requirements for tapagium imported and/or sold locally depending on the farming method used.

SUMMARY OF ARGUMENTS

I.

Runbeti did not violate international law with respect to its wind farm project. Runbeti complied with its treaty obligations under the Agreement on the Conservation of Bats in Europe, Convention on Biological Diversity, Convention on the Conservation of Migratory Species of Wild Animals, United Nations Framework Convention on Climate Change, and the Paris Agreement. Moreover, Runbeti did not violate its duty not to cause transboundary harm and the precautionary principle. Further, the Rio Declaration and the referenced resolutions are non-binding.

II.

Alducra violated international law with respect to its tax and labelling regulation concerning tapagium products. Alducra's tax and labelling regulation violated the trade discrimination prohibition of the ARTA. The tax and labelling regulation is not justified under any of the exceptions under the ARTA and does not satisfy the requirements of the introductory paragraph of Article X.

ARGUMENTS

I. Runbeti did not violate international law with respect to its wind farm project.

A. Runbeti complied with its treaty obligations.

1. Runbeti complied with the Agreement on the Conservation of Bats in Europe (“EUROBATS”).

Article III (4) of the EUROBATS states that each party shall take appropriate measures to promote the conservation of bats.¹ In interpreting the obligations in EUROBATS, EUROBATS Resolution 8.4 provides recommendations for the appropriate measures States could undertake.² Here, Runbeti followed such measures when it (1) conducted appropriate impact assessments before and after the construction of the wind farm project; and (2) avoided bat mortalities when it shut down turbines temporarily.

a. Runbeti conducted appropriate impact assessments before and after the construction of the wind farm project.

Paragraph 6 of EUROBATS Resolution 8.4, provides that States are recommended to ensure that appropriate impact assessments are undertaken pre- and post- construction, including mortality rate assessments regardless of the results of the preconstruction assessment.³

¹ Agreement on the Conservation of Bats in Europe, Jan. 16, 1994, art. III (4), [hereinafter, EUROBATS].

² EUROBATS Resolution 8.4 (4), Oct. 10, 2018 [hereinafter, Resolution 8.4].

³ Resolution 8.4 (6).

An environmental impact assessment (“EIA”) is a national procedure for evaluating the likely impact of a proposed activity on the environment.⁴ It was only upon conducting and reviewing the extensive EIA that Runbeti approved the wind farm project and issued the necessary permits,⁵ thus undertaking an impact assessment pre-construction. Additionally, Runbeti undertook a post-construction assessment when it conducted mortality rate assessments through the monitoring of the Chiroptera Crusaders.⁶

b. Runbeti avoided bat mortalities when it shut down turbines temporarily.

Paragraph 13 of EUROBATS Resolution 8.4 recommends States to avoid or reduce bat mortality with measures such as shutting down turbines temporarily.⁷ Here, the wind farm project consisted of four construction phases, each successive phase dependent on the success of the initial phases.⁸ This allowed for the temporary shut down of the wind turbines. Thus, Runbeti avoided causing harm to the bats when it allowed for the temporary shutdowns of the turbines in between the phases.⁹

Article III (6) of the EUROBATS provides that States shall take such additional action as it considers necessary to safeguard populations of bats which it identifies as being

⁴ The Espoo Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, art. 1 (vi), 1989 UNTS 309, 30 ILM 800 (1991).

⁵ R. ¶ 19.

⁶ *Id.*

⁷ Resolution 8.4 (13).

⁸ R. ¶ 17.

⁹ *Id.*

under threat.¹⁰ Current climate change models predict an increase in the intensity of heat waves, thus exposing bats to more climatic extremes.¹¹ In 2014, a record-breaking heat wave in Australia resulted in the deaths of 45,000 bats.¹² Wind farm projects reduce greenhouse gas emissions, thereby benefiting biodiversity conservation.¹³ Here, Runbeti implemented the wind farm project to mitigate the negative impact of climate change that threaten bat species,¹⁴ thereby contributing to the welfare of the bats.

2. Runbeti complied with the Convention on Biological Diversity (“CBD”).

a) Runbeti promoted the protection and recovery of the migratory bats.

Article 8 (d) and (f) of the CBD require States to promote the protection of ecosystems, habitats, and maintenance of viable populations,¹⁵ and the recovery of threatened species.¹⁶

Here, Runbeti’s wind farm project promoted the protection of bats and their habitats from the negative effects of climate change. Studies show that climate change plays a

¹⁰ EUROBATS, art. III (6).

¹¹ Sherwin, et al., *The impact and implications of climate change for bats* 11 (2012).

¹² Voigt and Kingston, *Bats in the Anthropocene: Conservation of Bats in a Changing World* 519 (2016).

¹³ Ledec, et al., *Greening the Wind: Environmental and Social Considerations for Wind Power Development in Latin America and Beyond* 35 (2011) [hereinafter “Ledec”].

¹⁴ Solomon, *IPCC (2007): Climate Change, The Physical Science Basis* (2007).

¹⁵ Convention on Biological Diversity, June 6, 1992, art. 8(d), 1760 U.N.T.S. 79. [hereinafter, CBD].

¹⁶ CBD, art. 8(f).

massive impact on seasonal migration systems,¹⁷ putting migratory species at particular risk as they traverse large distances.¹⁸ The use of wind energy to replace conventional energy sources¹⁹ reduces the emissions of harmful gases.²⁰ Thus, by implementing the wind farm project to address climate change, Runbeti promoted the protection of the migratory bats.

1. Runbeti utilized wind energy consistent with its means.

The CBD expressly recognizes the principle of common but differentiated responsibilities (“CBDR”) which provides that States shall take full account of the special situation of least developed countries.²¹ Thus, economic and social development are considered as the overriding priorities of developing States in determining the extent of their commitments under the CBD.²²

The CBDR provides that although all States share the responsibility for environmental protection, States should contribute differently depending on their

¹⁷ Chilson, et al., *Aeroecology*, 16 (2017).

¹⁸ *Id.*

¹⁹ Saidur, et al. Environmental impact of wind energy 2425 (2011).

²⁰ *Id.*

²¹ CBD, art. 20 (7).

²² CBD, art. 20 (4).

capabilities,²³ shouldering varied responsibilities to protect the environment in accordance with their distinct situations.²⁴

By utilizing wind energy to address climate change, Runbeti used cost-effective measures consistent with its financial capacity as a developing State. The International Renewable Energy Agency (“IRENA”) reported that wind energy is one of the cheapest sources of energy.²⁵ IRENA also predicted that the cost of wind energy will further lessen overtime.²⁶ Thus, Runbeti utilized wind energy consistent with its means.

3. Runbeti complied with its obligation to enter into agreements under the Convention on the Conservation of Migratory Species of Wild Animals (“CMS”).

Under the CMS, States must conclude agreements covering the conservation and management of migratory species listed under CMS Appendix II.²⁷ Runbeti complied with the obligation to conclude agreements when it became a party to EUROBATS which endeavors to protect bat habitats from damage or disturbance.²⁸

²³ Kiss & Shelton, *Guide to International Environmental Law*, 107 (2007).

²⁴ *The Principle of Common but Differentiated Responsibilities: Origins and Scope*, CISDL LEGAL BRIEF (Aug. 26, 2002), available at http://cisdl.org/public/docs/news/brief_common.pdf. (last accessed Nov. 10, 2020).

²⁵ International Renewable Energy Agency, *Renewable Power Generation Costs in 2018*, 9 (2019), https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2019/May/IRENA_Renewable-Power-Generations-Costs-in-2018.pdf (last accessed Nov. 10, 2020) [hereinafter, IRENA].

²⁶ *Id.*

²⁷ Convention on the Conservation of Migratory Species of Wild Animals, art. II (3b), art. IV (3), June 23, 1979, 1651 UNTS 333.

²⁸ EUROBATS, Art, III (2).

4. Runbeti implemented its wind farm project pursuant to its obligation under the United Nations Framework Convention on Climate Change (“UNFCCC”) and the Paris Agreement.

a. Runbeti has the sovereign right to use its natural resources.

Under the UNFCCC, States have the sovereign right to exploit their own resources pursuant to their own environmental policies.²⁹ The principle of state sovereignty allows States to decide which activities to conduct within their own territories.³⁰ Here, Runbeti decided to harness its wind resources pursuant to its environmental policy to combat climate change.³¹

b. Runbeti maintained nationally determined contributions to the achievement of a long-term temperature goal.

As a response to the urgency of climate change, the Paris Agreement requires States to maintain nationally determined contributions to achieve a long-term temperature goal.³² Runbeti, a developing country,³³ undertook the construction of a wind farm project in compliance with its commitment under the Paris Agreement.³⁴

²⁹ United Nations Framework Convention on Climate Change, preamble, May 9, 1992, 1771 U.N.T.S. 107.

³⁰ Sands, et al., Principles of International Environmental Law (2012).

³¹ R. ¶ 23.

³² Paris Agreement to the United Nations Framework Convention on Climate Change, art. 4(2), Dec. 13, 2015, in Rep. of the Conference of the Parties on the Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1.

³³ R. ¶ 1.

³⁴ R. ¶ 14.

B. Runbeti did not violate its duty not to cause transboundary harm.

The duty not to cause transboundary harm is part of customary international law (“CIL”).³⁵

The three requisites of transboundary harm are as follows: (1) the environmental damage must be established by convincing evidence; (2) the damage must be significant; and (3) the causal link between the activity and the damage must be established.³⁶ Here, all three requisites have not been met.

1. The environmental damage was not established by convincing evidence.

In this case, there is no convincing evidence of the environmental damage that is substantiated by direct empirical data.³⁷ There is nothing in the record which supports the allegation that the wind turbines caused the bat mortalities. Studies claiming that wind turbines are a cause of bat deaths have been heavily criticized for lacking reliable statistics.³⁸ Moreover, Alducra claims that there was transboundary harm as the bats are a shared resource.³⁹ Even assuming that the bats are a shared resource, there is no evidence

³⁵ Case Concerning Pulp Mills on the River Uruguay, (Argentina v. Uruguay), Judgement, 2010, I.C.J. 1.

³⁶ Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), 2015, I.C.J. 712, ¶119.

³⁷ *Id.* at 733, ¶203.

³⁸ Alvarez-Castañeda, et al., *Managing coexistence for bats and wind turbines*, 505-513 (2015).

³⁹ R. ¶ 22.

of damage in the territory of Alducra as a basis for transboundary harm. All of the bat mortalities were found in Runbeti.⁴⁰

2. The significant damage was not established.

Assuming that the bats are a shared resource, Alducra must still prove significant damage. “Significant” is defined as more than detectable.⁴¹ For damage to be considered significant, it must lead to a real detrimental effect on matters such as the environment in other States.⁴² Here, the damage, if any, of the wind farm project on Alducra does not reach the threshold of “significant.” In West Virginia, which is only half the size of Runbeti, up to 4000 bats were estimated to have died due to windmills annually.⁴³ On the other hand, in Runbeti, only 237 dead royal noctules were found in 2017 and 356 in 2018.⁴⁴

3. There is no causal link between the activity and the damage.

Causal link between the activity and the damage is established if the activity is the sole reason for the damage.⁴⁵ The allegation of Alducra that the bat mortalities are a direct result of the wind farm project fails to recognize that bat mortalities may be caused by an array of factors.⁴⁶ Many species of bats are known to be in decline due to habitat loss,

⁴⁰ R. ¶ 21.

⁴¹ ILC, Draft Articles on Prevention, art. 2 comment 4.

⁴² *Id.*

⁴³ Curry, *Deadly Flights*, *Science*, 386-387 (2009).

⁴⁴ R. ¶ 21.

⁴⁵ *Trail Smelter (U.S. v. Can.)* 1949, 3 R.I.A.A.

⁴⁶ Arnett, et al., *Thresholds for bats killed by wind turbines*, 171 (2013).

white-nose syndrome, and other factors.⁴⁷ Thus, there was no causal link between the activity and the damage.

C. Runbeti did not violate the precautionary principle.

The precautionary principle, as enshrined in the Rio Declaration,⁴⁸ CBD,⁴⁹ and the UNFCCC,⁵⁰ states that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not preclude the use of cost-effective measures to prevent such threat.⁵¹ The precautionary principle requires (1) that there is a threat of environmental damage; (2) that it is of serious or irreversible character; and (3) that there is scientific uncertainty.⁵² Here, the first and second requisites are absent.

In any case, Alducra failed to discharge the burden of proving that there was a violation of the precautionary principle.

⁴⁷ Association of Zoos and Aquariums Bat Taxon Advisory Group, AZA Bat TAG Regional Collection Plan, 4 (2015), https://www.battag.org/uploads/6/2/7/6/6276216/rcp_bat2015-8f8ee468-final.pdf. (last accessed Nov. 5, 2020).

⁴⁸ *Id.*

⁴⁹ CBD, preamble.

⁵⁰ UNFCCC, art. 3 (3).

⁵¹ Rio Declaration, prin. 15.

⁵² IUCN Council, Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management, available at http://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf (last accessed Oct. 17, 2020); R. ¶ 17.

1. There is no threat of environmental damage.

The wind turbines constructed have a low risk of harm due to their tall height. Most bats species fly only up to 30 meters high when foraging for food, well beneath Runbeti's turbines which are 115 meters high.⁵³ Additionally, since larger turbines need to be spaced further apart, bats are more likely to find their way safely between individual turbines.⁵⁴ As Runbeti's wind turbines are tall and widely spaced apart, the wind farm does not threaten the environment.⁵⁵

2. The threat, if any, is not of serious character.

Assuming that there is a threat, it is not of serious character. There is a serious consequence if the act of one State will cause irreparable damage to another.⁵⁶

There has been a continued increase in bat populations since 2003,⁵⁷ attributable to targeted successful conservation policies over the years.⁵⁸ Following this trend, it could be inferred that negative effects towards bats, if any, would not be irreparable due to successful conservation efforts.

⁵³ Ledec, *supra*, 13.

⁵⁴ *Id.*

⁵⁵ R. ¶ 17.

⁵⁶ Certain Phosphate Lands in Nauru, Nauru v Australia, Preliminary Objections, Judgment, ICJ Rep 240, 1992, ICGJ 91.

⁵⁷ European Environmental Agency, *European bat population trends*, 28 (2013).

⁵⁸ *Id.*

Further, at the La Venta II project in Mexico, monitoring has revealed that 20 or more migratory birds may be killed per year.⁵⁹ Nonetheless, this is a very small proportion of the several million birds passing through the wind farm on an annual basis.⁶⁰ Interestingly, more than half of the bird mortality at La Venta II is of non-migrating species.⁶¹ Given the similarities between birds and bats,⁶² it is reasonable to infer that the affected bats constitute a very small portion of the total amount of the 13 species found in Architerpo.⁶³ Thus, the threat, if any, does not fall under the threshold required.

The elements of the precautionary principle are cumulative in nature.⁶⁴ Thus, the absence of the first two elements renders the principle inapplicable in this case.

D. The Rio Declaration and the referenced resolutions are non-binding.

“Soft law” are instruments which States cannot use to induce other States to conform to without their consent.⁶⁵ Non-legally binding instruments include declarations, resolutions, and programs of actions.⁶⁶

⁵⁹ Ledec, *supra* note 13.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Hedenstrom, et al., *Bird or bat: Comparing airframe design and flight performance*, 1 (2009).

⁶³ R. ¶ 14.

⁶⁴ Boutillion, *The Precautionary Principle: Development of an International Standard*, Michigan Journal of International Law 460 (2009).

⁶⁵ *supra* note 23, at 17-49.

⁶⁶ *Id.*

Here, Alducra claims that Runbeti violated principles of the Rio Declaration, CMS Resolutions 7.5 and 11.27 and EUROBATS Resolution 8.4.⁶⁷ The Rio Declaration and the referenced resolutions fall under the category of “soft law” and are thus non-binding.

⁶⁷ R. ¶ 22.

II. Alducra violated international law with respect to its tax and labelling regulation for tapagium products.

A. Alducra’s tax and labelling regulation violated the trade discrimination prohibitions of the Architerpan Regional Trade Agreement (“ARTA”).

The ARTA prohibits trade discrimination between “like” agricultural products from different Architerpan States based on the principle of national treatment. In this case, Alducra's imposition of a tax and labelling regulation on “like” tapagium products from Runbeti constitutes trade discrimination in violation of the ARTA.

a. ARTA’s trade discrimination prohibition applies to this dispute as tapagium from Alducra and Runbeti are “like” products.

Articles VII and VIII of the ARTA apply only to “like” products originating from different Architerpan States. To determine likeness, the following factors are considered: (1) the products’ end uses in a given market; (2) consumers’ tastes and habits; and (3) the products’ physical traits.⁶⁸ Under these factors, tapagium from both Runbeti and Alducra are considered “like” products.

⁶⁸ Appellate Body Report, *Japan - Taxes on Alcoholic Beverages*, p. 20, WTO Doc. WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R (1996) [hereinafter *Japan - Alcoholic Beverages II*]; Appellate Body Report, *Canada - Certain Measures Concerning Periodicals*, p. 21, WTO Doc. WT/DS31/AB/R (1997) [hereinafter *Canada - Periodicals*]; see also Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes From The Philippines*, ¶ 5.47, WTO Doc. WT/DS371/R (2011) [hereinafter *Thailand - Cigarettes*].

1. The end use of tapagium from both countries is as a recreational alcoholic beverage.

“Like” products must have similar functions or end uses in a given market.⁶⁹ In *Spain-Unroasted Coffee*,⁷⁰ different types of washed or unwashed coffee were considered “like” one another because their end use was as a “well-defined and single product intended for drinking.” Here, since tapagium from both States are sold and consumed in Alducra as a recreational alcoholic beverage, they have the same end use in the market.

2. Consumers of tapagium use tapagium as an alcoholic beverage.

Consumers must be willing to use the products in a similar way in the performance of its end use function.⁷¹ Here, because of the large demand for tapagium, Alducra has to import 10 million liters from Runbeti annually.⁷² Thus, it could be reasonably inferred that consumers in Alducra use tapagium from both States as a recreational alcoholic beverage.

⁶⁹ Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 117, WTO Doc. WT/DS135/AB/R (2001) [hereinafter, EC - Asbestos].

⁷⁰ Panel Report, *Spain-Tariff Treatment of Unroasted Coffee*, ¶ 4.7, WTO Doc. L/5135 - 28S/102, (1981) [hereinafter, Spain - Unroasted Coffee].

⁷¹ EC - Asbestos, *supra* note 69

⁷² R. ¶ 11.

3. Tapagium from both countries have similar physical traits.

The products must also have similar physical traits.⁷³ The tapagium of Runbeti and Alducra are both spirits made from agave, similar to tequila in taste and production.⁷⁴ Thus, the products are physically identical.

4. Compliance or noncompliance with Alducra’s tax and labelling regulation does not make the products dissimilar.

In the *US-Tuna* cases, tuna products that were not caught pursuant to “dolphin-safe” standards were considered “like” compliant tuna products.⁷⁵ Differences in cultivation or processing methods are insufficient grounds to consider products as “unlike.”⁷⁶ The compliance of Alducra’s farmers does not make its tapagium an “unlike” product from tapagium imported from Runbeti as it is the products’ characteristics which are controlling, not the characteristics of the producer itself.⁷⁷

⁷³ Japan - Alcoholic Beverages II, *supra* note 68.

⁷⁴ R. ¶ 11.

⁷⁵ Sifonios, Environmental Process and Production Methods (PPMs) in WTO Law. *European Yearbook of International Economic Law*, 109 (2018).

⁷⁶ Spain - Unroasted Coffee, *supra* note 71, at ¶ 4.5; Panel Report, *Japan - Taxes on Alcoholic Beverages*, ¶ 5.6, WTO Doc. WT/DS8/R; WT/DS10/R; WT/DS11/R (1996) [hereinafter *Japan - Alcoholic Beverages I*]; Panel Report, *United States - Measures Affecting Alcoholic And Malt Beverages*, ¶ 5.19, WTO Doc. WT/DS23/R - 39S/206 (1992) [hereinafter, *US - Malt Beverages*].

⁷⁷ Panel Report, *United States — Standards for Reformulated and Conventional Gasoline*, ¶ 6.11, WTO Doc. WT/DS2/R (1996) [hereinafter *US - Gasoline*].

b. Alducra's tax and labelling regulation is contrary to the national treatment principle under Article VIII of the ARTA.

Article VIII of the ARTA provides that States are prohibited from: (1) directly or indirectly imposing internal taxes on imported products in excess of those on “like” domestic products; (2) dissimilarly taxing directly competitive or substitutable products so as to afford protection to domestic production; and (3) treating imported products less favorably than “like” domestic products with regard to requirements affecting their internal sale.⁷⁸ Here, the tax and labelling regulation fails all three obligations.

1. The tax on imported tapagium is in excess of the tax imposed on domestic tapagium.

The prohibition contemplates a direct internal tax applied in excess of the tax on domestic products. Under the strict standard used to define the phrase “in excess,”⁷⁹ even the smallest amount of excessive tax is prohibited.⁸⁰

Here, Alducra imposed an additional 20% sales tax on all tapagium sold domestically if the tapagium was not produced using agaves farmed by prescribed methods.⁸¹ Due to a prior 2015 legislation,⁸² all farmers in Alducra are compliant with the

⁷⁸ ARTA, art. 8

⁷⁹ Japan - Alcoholic Beverages II, *supra* note 68, at p.23; Panel Report, *Argentina — Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, ¶ 11.243, WTO Doc. WT/DS155/R (2001) [hereinafter, *Argentina – Hides and Leather*].

⁸⁰ Sifonios, *Environmental Process and Production Methods (PPMs) in WTO Law*. *European Yearbook of International Economic Law*, 109 (2018).

⁸¹ R. ¶ 26.

⁸² R. ¶ 16.

prescribed methods, and all tapagium produced locally is exempt from the 20% sales tax.⁸³ Tapagium from Runbeti is produced using agaves from non-compliant farmers, and are thus subject to the tax.⁸⁴ Therefore, Alducra's regulation is a breach of the first obligation under Article VIII.

2. The requirement is applied to directly competitive imported tapagium so as to afford protection to domestic production.

In *Japan-Alcoholic Beverages*, a trade regulation violates the prohibition if all elements are present: (i) the imported and domestic products are directly competitive or substitutable; (ii) the products are not similarly taxed; and (iii) the dissimilar taxation is applied so as to afford protection to domestic production.⁸⁵ Here, Alducra's tax and labelling regulation satisfies all elements.

⁸³ R. ¶ 26; Clarificatory statement ¶ 15.

⁸⁴ *Id.*

⁸⁵ Japan - Alcoholic Beverages II, *supra* note 68, at p. 24; Appellate Body Report, *Korea — Taxes on Alcoholic Beverages*, ¶ 156, WTO Doc. WT/DS75/AB/R; WT/DS84/AB/R (1999) [hereinafter *Korea - Alcoholic Beverages*]; Canada - Periodicals, *supra* note 68, at pp. 24-25; Appellate Body Report, *Chile — Taxes on Alcoholic Beverages*, ¶ 47, WTO Doc. WT/DS87/AB/R; WT/DS110/AB/R (2000) [hereinafter, *Chile - Alcoholic Beverages*].

i. Imported and domestic tapagium are directly competitive or substitutable.

Directly competitive or substitutable products encompass all that are alternative ways of satisfying a particular need or taste,⁸⁶ including those with different production processes or raw materials.⁸⁷ In this case, tapagium from Runbeti and tapagium from Alducra are physically identical, are sold in Alducra, and are exported to the other Architerpan countries.⁸⁸ They are directly competitive and substitutable.

Products may still fall under this obligation even if consumers do not currently consider them substitutable as long as they are *capable* of being substitutable.⁸⁹ Though Alducra's regulations may cause discrimination between the two, the products would still be substitutable without such regulations.

ii. Imported and domestic tapagium are not similarly taxed.

The dissimilar taxation between the products must be to an extent that there is a heavier tax burden, more than *de minimis*, on imported products compared to domestic products.⁹⁰ As previously stated, tapagium from Alducra is exempt from the excessive tax rate of 20% imposed on tapagium from Runbeti.⁹¹

⁸⁶ Korea - Alcoholic Beverages, *supra* note 85, at ¶ 115

⁸⁷ Panel Report, *Korea — Taxes on Alcoholic Beverages*, ¶ 10.38, WTO Doc. WT/DS75/R; WT/DS84/R (1999).

⁸⁸ R. ¶ 11.

⁸⁹ *Id.* ¶ 116; Canada - Periodicals, *supra* note 68, at p. 28

⁹⁰ Japan - Alcoholic Beverages II, *supra* note 68, at p. 27; Canada - Periodicals, *supra* note 68, at p. 68; Chile – Alcoholic Beverages, *supra* note 68, at ¶ 49

⁹¹ *Supra*, see R. ¶ 26; Clarificatory statement ¶ 15

iii. The dissimilar taxation is applied so as to afford protection to domestic production.

Alducra cannot argue the legislative intent behind its statute to deny its protectionist nature because the obligation is solely concerned with how the measure is applied.⁹² Even if Alducra's intent can be considered, it cannot overcome the protectionist nature which manifests in the dissimilar taxation,⁹³ the structure, and overall application of the tax.⁹⁴

The tax is dissimilar, as it increases the prices of imported tapagium by 20%.⁹⁵ Exemption requires compliance with farming practices prescribed by Alducra, without allowances for alternative practices that may forward Alducra's alleged goal of conservation. The tax also exempts all domestic tapagium producers,⁹⁶ while all producers from Runbeti are affected.⁹⁷ Further, as Runbeti's farmers generally cannot afford to comply,⁹⁸ its tapagium producers may instead choose to shift operations to Alducra or import agave from Alducra's farmers in order to avoid the heavy tax burden. Given that Alducra currently imports a significant amount of tapagium from Runbeti, these factors

⁹² Japan - Alcoholic Beverages II, *supra* note 68, at p. 28

⁹³ *Id.*, at p. 33

⁹⁴ *Id.*, at p. 29; Canada - Periodicals, *supra* note 68, at p. 32; Korea – Alcoholic Beverages, *supra* note 85, at ¶ 150; Chile – Alcoholic Beverages, *supra* note 85, at ¶ 71;

⁹⁵ R. ¶ 26

⁹⁶ R. ¶ 26; Clarificatory statement ¶ 15.

⁹⁷ R. ¶ 15; R. ¶27.

⁹⁸ R. ¶ 27.

indicate that the regulation stimulates the protection of Alducra’s agave and tapagium industry.

3. The regulation imposes less favorable requirements on imported tapagium than those imposed on domestic tapagium.

Determining whether a regulation is “less favorable” requires a finding that there is an inequality of competitive conditions⁹⁹ between imported and domestic products. Such inequality need not be proven, as less favorable requirements with minimal or no proven market effects fall under the prohibition.¹⁰⁰ Inequality caused by an allegedly legitimate regulatory distinction is still a less favorable requirement under this obligation.¹⁰¹ For instance, a regulation was deemed to be less favorable when it required gasoline importers to make financial concessions in order to meet a certain statutory baseline but did not require the same from domestic distributors.¹⁰² In this case, Alducra’s regulation is less

⁹⁹ Panel Report, *Japan — Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.379, WTO Doc. WT/DS44/R (1998); Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.108, WTO Doc. WT/DS400/AB/R; WT/DS401/AB/R (2014) [hereinafter, EC - Seal Products]; See *Japan - Alcoholic Beverages II*, *supra* note 68 at p. 16.

¹⁰⁰ Panel Report, *United States — Certain Measures Relating to the Renewable Energy Sector*, ¶ 7.265, WTO Doc. WT/DS510/R (2019).

¹⁰¹ EC Seal Products, *supra* note 99; Appellate Body Report, *Thailand — Customs and Fiscal Measures on Cigarettes From The Philippines*, ¶ 128, WTO Doc. WT/DS371/AB/R (2011); see also Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, note 372 to ¶ 179, WTO Doc. WT/DS406/AB/R (2012).

¹⁰² US - Gasoline, *supra* note 77, at ¶ 6.10.

favorable to imported tapagium whether or not Runbeti's producers comply with its requirements.

Runbeti's farmers and tapagium producers generally cannot afford to comply with the requirements and must make financial concessions to remain competitive.¹⁰³ This is because the regulation imposes a large, glaring label that declares products as not compliant¹⁰⁴ and applies an excessive 20% sales tax therefor.¹⁰⁵ On the other hand, domestic tapagium is positively labeled and not subject to the 20% tax,¹⁰⁶ skewing the market in its favor.

If they attempt to comply, Runbeti will nevertheless be burdened. The current agave propagation method allows for one to two new plants each year¹⁰⁷ until the original plant is harvested. A requirement to allow 5% of the plants to flower, preventing both harvesting and propagation for seven to nine years,¹⁰⁸ limits both the farmers' crop yield and the sustainability of their production.

Finally, Alducra's farmers were given 12 months to comply with the similar domestic legislation in 2015, which did not have a corresponding tax or labelling penalty,

¹⁰³ R. ¶ 27.

¹⁰⁴ R. ¶ 26; Appendix 1.

¹⁰⁵ R. ¶ 26.

¹⁰⁶ R. ¶ 26; *supra* Part II.A.b.3

¹⁰⁷ Díaz-Martínez, et. al., Polymorphism and methylation patterns in *Agave tequilana* Weber var. "Azul" plants propagated asexually by three different methods. *Plant Science*, 185-186, 321–330 (2012).

¹⁰⁸ Escobar-Guzmán, et. al., Seed production and gametophyte formation in *Agave tequilana* and *Agave americana*. (2008).

while Runbeti's farmers and producers only have nine months to comply. Thus, tapagium from Runbeti is afforded less favorable treatment than tapagium from Alducra.

B. Alducra's tax and labelling regulation is not justified under Article X of the ARTA.

Article X provides for a two-tiered test to determine the validity of otherwise violative provisions.¹⁰⁹ First, it must fall under at least one of the general exceptions; and second, it must satisfy the requirements imposed by the introductory paragraph or chapeau. Here, the tax and labelling regulation fails both tiers of the test.

a. The tax and labelling regulation does not fall under any of the permitted exceptions under Article X.

A regulation may be justified under Article X of the ARTA provided it falls under any of the given exceptions: "(1) necessary to protect public morals; or (2) necessary to protect human, animal or plant life or health."¹¹⁰ Here, Alducra's tax and labelling regulation does not fall under any of these exceptions.

1. The tax and labelling regulation does not address an issue of public moral concern.

To fall under this exception, Alducra must sufficiently demonstrate that the regulation addresses an issue of moral concern involving standards of right and wrong conduct.¹¹¹ In this case, there is no evidence that the farming practices of Runbeti are

¹⁰⁹ Appellate Body Report, *US-Gasoline*, WT/DS2/AB/R (1996) DSR 1996:I, 3, 22.

¹¹⁰ ARTA, art. 10.

¹¹¹ EC Seal Products, *supra* note 99, at ¶ 5.199.

related to Alducra's moral concerns. In fact, these practices were done by farmers from Alducra for 20 years prior to the passing of domestic legislation in 2015.¹¹² Furthermore, the legislative intent behind the domestic legislation and the 2019 regulation addresses the protection of the environment without stating that it is a concern of Alducra's public.¹¹³

2. The tax and labelling scheme is not necessary for the protection of bats.

While the regulation was allegedly passed for the protection of bat health, the same must be proven to be necessary for the protection of the bats in order to fall under the exception.¹¹⁴ Further, even if the regulation is proven to be necessary, there must be no other less trade restrictive alternatives. Here, the regulation is neither necessary nor the least restrictive.

¹¹² R. ¶ 15.

¹¹³ R. ¶ 26.

¹¹⁴ R. ¶ 13.

i. The tax and labelling requirement is not necessary.

Factors to be considered¹¹⁵ to determine the necessity of a measure are: (1) the importance of the interest or values protected;¹¹⁶ (2) the contribution of the measure to the objective;¹¹⁷ and (3) the trade restrictiveness of the measure.¹¹⁸

It is conceded that the regulation was passed to protect the health of bats and the environment. However, the regulation is particularly trade-restrictive and does not contribute to the values it supposedly forwards.

¹¹⁵ Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 156, WTO Doc. WT/DS332/AB/R (2007) [hereinafter, *Brazil – Retreaded Tyres*]; Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WTO Doc. WT/DS161/AB/R; WT/DS169/AB/R (2001) [hereinafter *Korea - Various Measures on Beef*]; Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 306, WTO Doc. WT/DS285/AB/R (2005).

¹¹⁶ *Brazil – Retreaded Tyres*, *supra* note 115, at ¶ 179.

¹¹⁷ Appellate Body Report, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 252, WTO Doc. WT/DS363/AB/R (2010) [hereinafter *China - Publications and Audiovisual Products*]; see also *Brazil – Retreaded Tyres*, *supra* note 115, ¶ 151.

¹¹⁸ Panel Report, *Indonesia — Measures Concerning the Importation of Chicken Meat and Chicken Products*, ¶ 7.227, WTO Doc. WT/DS484/R (2017).

1. The regulation does not contribute to its objective.

A measure's contribution exists when there is a genuine relationship of ends and means between the objective pursued and the challenged measure.¹¹⁹ However, a panel must always assess the actual contribution made by the measure to the objective pursued.¹²⁰

Here, there is no proof that the regulation makes any actual contribution to the objective. It has been five years since Alducra enacted its domestic legislation, yet Alducra has not provided any evidence showing the effectiveness of the statute.

Furthermore, there is no genuine relationship of means and ends between the regulation and its objective. Runbeti's farmers generally cannot afford to comply with the prescribed farming methods.¹²¹ If they attempt to comply, they may expand their farms to recoup the losses from the regulation. This may reduce other important foraging sources of the Architerpan long-nosed.¹²² This loss of other food sources cannot be compensated for by the 5% that is allowed to flower, as the seven-to-nine year flowering cycle of commercially-farmed agaves¹²³ means that, at best, bats will only benefit from this regulation after seven to nine years. As there is neither proof of actual contribution to the

¹¹⁹ Brazil – Retreaded Tyres, *supra* note 115, at ¶ 145.

¹²⁰ China - Publications and Audiovisual Products, *supra* note 117.

¹²¹ R. ¶ 27.

¹²² Fleming, et. al., Seasonal changes in the diets of migrant and non-migrant nectarivorous bats as revealed by carbon stable isotope analysis, *Oecologia*. 94 (1): 72–75 (1993).

¹²³ Escobar-Guzmán, et al. Seed production and gametophyte formation in *Agave tequilana* and *Agave americana*, *Botany*, 86(11), 1343–1353 (2008).; Nabhan, *Return of the Pollinators, Food from the Radical Center*, 145 (2018).

objective nor a genuine relationship of means and ends between the objective and the measure, the factor of contribution is lacking.

2. The regulation is trade restrictive.

A measure that incentivizes the purchase of domestic products through tax credits has been considered a “particularly trade-restrictive” measure.¹²⁴ Here, tapagium from Runbeti is negatively labeled and excessively taxed, while tapagium from Alducra is positively labeled and tax-exempt. Thus, purchase of domestic products is incentivized.¹²⁵ Runbeti is a developing country with an agriculture-reliant economy.¹²⁶ As Runbeti exports approximately 10 million liters of tapagium to Alducra,¹²⁷ the latter’s regulation incentivizing its domestic tapagium industry is not only particularly trade restrictive, but also greatly impacts Runbeti’s developing economy.

Given these factors, Alducra is clearly misdirecting its efforts into a regulation that, at best, will take seven to nine years before fruition.¹²⁸ This regulation also restricts trade in violation of the ARTA. It is therefore not necessary for the protection of bats in Alducra.

¹²⁴ Panel Report, *Brazil — Certain Measures Concerning Taxation and Charges*, ¶ 7.927-28, WTO Doc. WT/DS472/R; WT/DS497/R (2019).

¹²⁵ *Supra* Part II.A.b.3.

¹²⁶ R. ¶ 1.

¹²⁷ R. ¶ 11.

¹²⁸ *Supra* Part II.A.b.3.

ii. There are less restrictive and reasonably available alternatives.

Even if a measure is necessary, it cannot be resorted to when less restrictive alternatives are available. This is the case where there are options that: (1) are less inconsistent with the ARTA;¹²⁹ (2) can be reasonably expected to be employed by the State;¹³⁰ and (3) allow the State to achieve its desired level of protection with regard to the objective.¹³¹ Here, there are multiple less restrictive alternatives that are consistent with ARTA.

Agave used for tapagium is not the bat's primary food source as they principally feed on other plants.¹³² In other countries, the commercial harvesting of agaves for alcohol production does not "significantly affect [the bat's] forage resources."¹³³ Thus, Alducra can engage Runbeti in talks to sponsor the cultivation of these plants, such as wild agave species,¹³⁴ across both States, without impacting commercial agave production. Alducra

¹²⁹ Panel Report, *Thailand — Restrictions on the Importation of and Internal Taxes on Cigarettes*, ¶ 75, WTO Doc. DS10/R - 37S/200 (1990).

¹³⁰ Korea - Various Measures on Beef, *supra* note 117, at ¶ 166.

¹³¹ Brazil – Retreaded Tyres, *supra* note 115, at ¶ 170.

¹³² Stoner, Biodiversity and Conservation, 12(2), 357–373 (2003); Ober, Journal of Wildlife Management: Resource and Spatial-Use Patterns of An Endangered Vertebrate Pollinator, the Lesser Long-Nosed Bat, 69(4), 1616 (2005).

¹³³ Munson, et. al., Forecasting climate change impacts to plant community composition in the Sonoran Desert region. *Global Climate Change Biology* (2012).

¹³⁴ Burwell, Bootlegging on a desert mountain: the political ecology of agave demographic change in the Sonora River Vally, Sonora, Mexico. *Human Ecology*, 407-432 (1995).

can also protect both these forage sites and the caves where the long-nosed bat roosts.¹³⁵ All these measures are consistent with ARTA, are reasonable for Alducra to employ, and would have a greater impact in protecting animal health than the current regulation adopted.

b. ARTA's tax and labelling regulation does not meet the requirements of the chapeau of Article X.

The chapeau of Article X requires that a trade measure invoking justification as an exception must “not be applied in manner which would constitute a means of arbitrary or unjustifiable discrimination between the same countries where the same conditions prevail; or a disguised restriction on international trade.”¹³⁶ Here, Alducra’s tax and labelling regulation constitutes a means of arbitrary or unjustifiable discrimination.

In *US-Shrimp*, when environmental legislation is not initially discussed with the affected States, this obligation is violated as the domestic State is imposing its domestic environmental policy on other States.¹³⁷ Similarly in this case, Alducra is wrongfully trying to impose its own environmental policy agenda on other countries.¹³⁸

¹³⁵ Fleming, et. al., Roosting Behavior of the Lesser Long-Nosed Bat, *Leptonycteris curasoae* (1998); Federal Register / Vol. 83, No. 75, pp. 17097-98.

¹³⁶ ARTA, art. 10.

¹³⁷ Appellate Body Report, *US-Shrimp*, WT/DS58/AB/R (1998) DS58, pg. 55

¹³⁸ R. ¶ 27.

CONCLUSION AND PRAYER

Respondent, the Republic of Runbeti, respectfully requests the court to adjudge and declare that:

1. Runbeti did not violate International Law with respect to its wind farm project.
2. Alducra violated international law with respect to its trade measures for tapagium projects.

RESPECTFULLY SUBMITTED,

AGENTS OF THE RESPONDENT