

BEFORE

THE INTERNATIONAL COURT OF JUSTICE

LA COUR INTERNATIONALE DE JUSTICE



AT THE PEACE PALACE,
THE HAGUE, NETHERLANDS

GENERAL LIST NO. 299, YEAR 2020
CASE CONCERNING THE PROTECTION OF BATS AND INTERNATIONAL TRADE
MEASURES

THE FEDERAL STATES OF ALDUCRA
(APPLICANT)
v.
THE REPUBLIC OF RUNBETI
(RESPONDENT)

-WRITTEN SUBMISSION ON BEHALF OF THE APPLICANT-

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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

On 24 July 2020, the Federal States of Alducra (“Alducra”) and the Republic of Runbeti (“Runbeti”), submitted the following dispute to the International Court of Justice (the ICJ) by Special Agreement, in accordance with Article 40(1) of the Statute of the ICJ. The Registrar of the ICJ addressed notification to the parties on 31 July 2020. Alducra and Runbeti have accepted jurisdiction of the ICJ pursuant to Article 36(1) of the Statute and request that the Court adjudge the dispute in accordance with the rules and principles of international law, including any applicable treaties.

STATEMENT OF FACTS

Alducra and Runbeti are neighbouring states located on the continent of Architerpo. Alducra has a developed economy, and Runbeti is considered to have a developing economy, with both relying heavily on agriculture (R.1).

The royal noctule and the Architerpan long-nosed bat are species endemic to Architerpo. They are ecologically important to the continent acting as indicator species and providing essential functions including pollination, seed dispersal and insect control. Both species are listed as ‘vulnerable’ on the IUCN Red List and are listed in CITES Appendix II, CMS Appendix II, and EUROBATS Annex 1. Both species are protected under Alducra’s national laws (R.14). In 2015, Alducra passed domestic legislation to protect the Architerpan long-nosed bat by requiring farmers to transition to bat-safe farming practices (R.15).

In January 2016, Runbeti authorised and issued permits to Pinwheel Energy Co. (PECO) to construct the first phase of a large wind farm project. The first phase was constructed just 5km from the border between Runbeti and Alducra (R.17) and began operating in December 2016 (R.19). Runbeti conducted a national Environmental Impact Assessment (EIA) before granting the permit (R.19).

The wind farm is located on a known migration route for the royal noctule and includes critical feeding and roosting areas (R.17). Before and during construction of the wind farm, Runbeti was warned of its negative impacts on bats by the Chiroptera Crusaders, a regional bat conservation group (R.18) (R.20). Runbeti rejected calls to implement any mitigation measures (R.20). Monitoring reports conducted during the first two years of the wind farm document 593 dead bats near the turbines (R.21).

In January 2019, Alducra advised Runbeti that it had violated international law and requested that the wind farm should be shut down and appropriate mitigation measures implemented (R.22). Runbeti denied responsibility for any transboundary harm caused to Alducra and refused to shut down the wind farm (R.23).

In order to protect the environment, bats and farmers, Alducra passed a statute in November 2019, imposing a tax on all sales of tapagium that had not been produced using bat-safe farming methods. The statute also required that all tapagium imported to and/or sold in Alducra include a label indicating whether the tapagium was “bat safe” or “not bat safe”. Alducra gave countries until the 29 August 2020 to comply with its provisions (R.26).

In December 2019, Runbeti objected to these trade measures. Alducra provided a complete response outlining that the measures were wholly consistent with the ARTA and made no distinction between domestically-produced tapagium and imported tapagium. Alducra emphasised that the objective of the measures was environmental protection (R.28).

The Parties agreed to submit the matter to the ICJ for determination (R.29).

SUMMARY OF ARGUMENTS

I. RUNBETI VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS WIND FARM PROJECT

The royal noctule and Architerpan long-nosed bat are vulnerable species protected internationally under the CBD, CMS and EUROBATS. Their habitats, roosting zones and migratory routes are similarly protected from disturbance. Runbeti has violated international law by permitting the wind farm project in a known bat habitat and migratory route causing harm to the species. Runbeti has caused transboundary harm which it has a duty to prevent, and failed its obligation to notify and cooperate with Alducra. Runbeti's actions cannot be justified under the UNFCCC or the Paris Agreement. Accordingly, Runbeti is obliged to shut down the wind farm and implement mitigation measures.

II. ALDUCRA DID NOT VIOLATE INTERNATIONAL LAW WITH ITS MEASURES

Alducra's measures do not violate the ARTA because they are based on a legitimate, process-based distinction. They are also justified under the Article X exceptions as they pursue the legitimate objective of environmental protection regarding vulnerable species of bats, are necessary to protect public morals, and do not constitute arbitrary discrimination.

ARGUMENTS ADVANCED

I. RUNBETI VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS WIND FARM PROJECT

A. Runbeti violated its obligations under the Convention on Biological Diversity (CBD), the Convention on the Conservation of Migratory Species of Wild Animals (CMS) and the Agreement on the Conservation of Populations of European Bats (EUROBATS)

1. Runbeti breached its treaty obligations regarding the protection of vulnerable species

Runbeti has violated its treaty obligations throughout the wind farm project by decimating a vulnerable bat species, killing at least 593 individuals. Article 7(a) of the CBD requires Parties to identify components of biological diversity important for its conservation, having regard to factors including whether species are threatened.¹ Article II(1) of the CMS requires Parties to take action to conserve migratory species, “paying special attention to migratory species the conservation status of which is unfavourable.”² Article III(6) of the EUROBATS requires each Party to “take such additional action as it considers necessary to safeguard populations of bats which it identifies as being subject to threat.”³

Contrary to these obligations, Runbeti authorised a wind farm project that causes serious harm to the royal noctule, which is internationally recognised as a vulnerable species. Bat species that migrate long distances at a high altitude, such as the royal noctule’s close relative the *Nyctalus noctula*, are at a particularly high risk from wind turbines, and the highest

¹ Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 79, Article 7(a) & Annex I [hereinafter CBD].

² Convention on the Conservation of Migratory Species of Wild Animals, 3 June 1979, 1651 U.N.T.S. 333, Article II(1) [hereinafter CMS].

³ Agreement on the Conservation of Populations of European Bats, EUROBATS, 4 December 1991, Article III(6) [hereinafter EUROBATS].

mortality for such populations is expected in the areas where they are most active, such as migration and commuting routes, important foraging areas, and close to bat roosts.⁴ Furthermore, bats from the genus *Nyctalus* may be attracted to wind turbines.⁵ Bat fatalities caused by wind turbines raise serious concerns about population-level impacts as bats have a long life-span and exceptionally low reproductive rates: therefore, their population growth is relatively slow, which severely impedes their ability to recover from declines and maintain sustainable populations.⁶

The risk posed to the royal noctule by the wind farm is extremely serious and Runbeti has failed in its obligations to protect this vulnerable species.

2. Runbeti violated its obligations to protect sites which are important for the conservation of bats

Under Article 8(a) of the CBD, Parties have an obligation to establish “a system of protected areas or areas where special measures need to be taken to conserve biological diversity.” Article III(2) of the EUROBATS requires each Party to identify “sites within its own area of jurisdiction which are important for the conservation status, including for the shelter and protection, of bats” and to “protect such sites from damage or disturbance.” Runbeti has a positive obligation to identify and protect bat habitats. EUROBATS Resolution 8.4 recommends that areas with a focus on bat protection should be excluded from wind energy

⁴ Luisa Rodrigues et al, *EUROBATS Guidelines for Consideration of Bats in Wind Farm Projects (Revision 2014)*, https://www.eurobats.org/sites/default/files/documents/publications/publication_series/pubseries_no6_english.pdf, 19 & 42.

⁵ European Commission, *Action Plan for the Conservation of All Bat Species in the European Union 2018-2024* (October 2018), https://ec.europa.eu/environment/nature/conservation/species/action_plans/pdf/EU%20Bats%20Action%20Plan.pdf, 56.

⁶ Edward B. Arnett et al, *Impacts of Wind Energy Development on Bats: A Global Perspective*, in *BATS IN THE ANTHROPOCENE: CONSERVATION OF BATS IN A CHANGING WORLD* (2016), <https://www.eurobats.org/node/874>, 296-297.

developments.⁷ CMS Resolution 7.5 calls upon Parties to identify areas where migratory species are vulnerable to wind turbines and to evaluate the possible negative impacts of wind turbines prior to granting permission.⁸

By approving the construction of the wind farm project Runbeti has violated these obligations. The choice of wind farm site is “the first and probably the most effective way” to avoid adverse impacts on bat populations.⁹ The EUROBATS Advisory Committee recommend that wind turbines should be located away from bat migration and commuting routes, and foraging and roosting areas.¹⁰ If this is not feasible, the Guidelines recommend that wind turbine locations should be abandoned.¹¹ Loss or damage to a roost can have a significant impact on a local population of bats, particularly where there is destruction of a maternity roost, which may result in all the breeding females from an area being unable to rear young for at least one year.¹² There are several examples of Parties to EUROBATS abandoning wind turbine projects due to inappropriate location with respect to bats.¹³

By proceeding to build the wind farm in such a patently unsuitable location, Runbeti has breached its treaty obligations and continues to harm the vulnerable bats.

3. Runbeti failed to monitor the impacts of the wind farm projects on bats

⁷ EUROBATS Resolution 8.4 (Oct. 2018), EUROBATS.MoP8.Resolution8.4, para 3.

⁸ CMS Resolution 7.5 (Sept. 2002), UNEP/CMS/Resolution 07.05.

⁹ Simon P. Gaultier et al., *Bats and Wind Farms: The Role and Importance of the Baltic Sea Countries in the European Context of Power Transition and Biodiversity Conservation*, (2020) 54 *Environmental Science & Technology* 10385, 10389.

¹⁰ Rodrigues et al, *supra* note 4, 11.

¹¹ *Id.*, 42.

¹² Bat Conservation Trust, *Man Fined for Destroying Bat Roost* (Jul. 2, 2013), http://bats_new.brix.fatbeehive.com/news.php/188/man_fined_for_destroying_bat_roost.

¹³ Rodrigues et al, *supra* note 4, 7.

Article 7(c)-(d) of the CBD imposes obligations to identify processes and activities which are likely to have significant adverse impacts on biodiversity, and to monitor their effects through sampling and other techniques. Runbeti breached this obligation by failing to implement any monitoring procedures during the construction and operational phases of the wind farm.

The dangers posed to bats by wind turbines are widely documented¹⁴ and the risk to biodiversity should have been identified. EUROBATS Resolution 8.4 recommends that Parties should undertake a mortality rate assessment before and after construction, and ensure that post-construction monitoring measures continue for as long as required.¹⁵

Runbeti violated its monitoring obligations by failing to gather evidence of the wind farm's adverse impact on bats. The fact that Runbeti initially allowed the Chiroptera Crusaders to monitor the area does not relieve Runbeti of its obligations. Moreover, Runbeti expressly withdrew this permission in January 2019.¹⁶ It appears that no monitoring of the site has taken place since.

4. Runbeti refused to implement mitigation measures

Finally, Runbeti breached its treaty obligations by refusing to implement mitigation measures to limit the adverse impact of the wind farm on bats, in particular the royal noctule. Studies on the impact of wind turbines on bat populations document two causes of mortalities, collision with blades and barotrauma caused by air pressure reduction near moving turbines.¹⁷ Article 8(1) of the CBD requires Parties, where a significant adverse effect on biological

¹⁴ Gaultier et al, *supra* note 9; Arnett et al, *supra* note 6.

¹⁵ EUROBATS Resolution 8.4, *supra* note 7, paras 6-7.

¹⁶ R¶24.

¹⁷ Die Staatliche Vogelschutzwarte des Landesamtes für Umwelt, Gesundheit und Verbraucherschutz Brandenburg, www.lugv.brandenburg.de/cms/detail.php/bb1.c.312579.de 105 – 107 (accessed Oct. 15, 2020).

diversity has been determined, to regulate or manage the relevant processes and categories of activities. Article 10(b) of the CBD obliges states to adopt measures relating to the use of biological resources to avoid or minimise adverse impacts on biological diversity. Article III(4) of EUROBATS requires Parties to take appropriate measures to promote bat conservation. EUROBATS Resolution 8.4 recommends Parties avoid or reduce bat mortality at wind turbines with measures including blade feathering, higher turbine cut-in wind speeds and shutting down turbines temporarily. Furthermore, Parties should ensure that proper mitigation measures are prescribed during the approval procedure and are being implemented effectively.¹⁸

Runbeti has consistently refused to implement any such mitigation measures. Over two years, 593 dead royal noctules were found near the wind turbines: the total number of fatalities is likely to be higher than the number of carcasses found.¹⁹ By way of comparison, the total number of reported *Nyctalus noctule* bat fatalities across twenty European countries over a period of eleven years was 778.²⁰

Mitigation measures should have been implemented from the outset. Most bat fatalities occur during relatively low wind conditions over a short period of time in late summer, and operational adjustments under these conditions are effective to reduce bat mortality.²¹ Several studies have shown that the economic cost of shutting down wind turbines during these periods is small, as low wind speed periods when bats are most active are also periods of low energy

¹⁸ EUROBATS Resolution 8.4, *supra* note 7, paras 13-14.

¹⁹ Rodrigues et al, *supra* note 4, 34.

²⁰ *Id.*, 124-125.

²¹ Arnett et al, *supra* note 6, 310.

production.²² In addition, raising turbine cut-in speed and feathering turbine blades have been shown to significantly reduce bat fatalities.²³

Runbeti has breached its treaty obligations by approving the wind farm project initially, and by failing to monitor and mitigate its adverse impacts during its construction and operational phases.

B. Runbeti failed in its duty to prevent transboundary harm

1. Runbeti is responsible for the transboundary harm caused to Alducra

The duty of states to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states is a rule of customary international law.²⁴ While states have the right to sovereignty over natural resources, there is a corollary responsibility to prevent transboundary environmental harm.²⁵ Runbeti has violated this duty.

Decisions including *Trail Smelter* and *Pulp Mills* demonstrate that States are responsible for protecting other States against harmful acts by private corporations within their jurisdiction.²⁶ A State cannot avoid the duties of prevention and mitigation by surrendering the wrongful activity into private hands.²⁷ Accordingly, the damage caused by the operation of PECO's wind farm is directly attributable to Runbeti.

In order to attract state responsibility, the transboundary harm must be "significant," which is something more than "detectable" but need not be at the level of "serious" or

²² Gaultier et al, *supra* note 9, 10389.

²³ Edward B. Arnett & Roel F. May, *Mitigating Wind Energy Impacts on Wildlife: Approaches for Multiple Taxa* (2016) 10(1) Human Wildlife Interactions 28, 32-33.

²⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 29.

²⁵ Island of Palmas Arbitration (Neth. v US) (1928) II RIAA 829, 839.

²⁶ Trail Smelter Arbitration (US v. Can.) (1938 & 1941) III RIAA 1905; Pulp Mills on The River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. 14, para. 197.

²⁷ Patricia Birnie et al., *International Law & The Environment* (3rd ed., 2009), 214.

“substantial”.²⁸ Harm has been interpreted as encompassing environmental damage to biological resources such as migration as this serves important functions such as seed dispersal.²⁹ The harm caused by Runbeti’s project easily satisfies this threshold. The damage caused to the bats adversely affects Alducra’s ecological and economic interests, as bats provide crucial benefits including pollination, seed dispersal and insect control,³⁰ and is therefore sufficiently significant to constitute transboundary harm.

2. Runbeti breached its due diligence obligations

The obligation to take preventive measures to avoid transboundary harm is one of due diligence and is “a customary rule.”³¹ A state is required “to exert its best possible efforts to minimize the risk” of transboundary harm.³² Due diligence entails “a certain level of vigilance in their enforcement and the exercise of administrative control,”³³ as well as an evolving standard of technology and regulation.³⁴ Runbeti failed to exercise this standard of due diligence in its construction and operation of the wind farm.

The ICJ has linked a state’s due diligence obligations to prevent transboundary harm with the requirement to conduct an EIA,³⁵ and has also held that the undertaking of an EIA where there is a risk of an adverse impact in a transboundary context is “a requirement under

²⁸ International Law Commission (ILC) Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries, 2 Y.B. 392 (2001), 152.

²⁹ Robert L Fischman, & Jeffrey B Hyman, *The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance*, (2010) 112 Articles by Maurer Faculty 173.

³⁰ R¶12.

³¹ Pulp Mills Case, *supra* note 26, para. 101.

³² ILC Draft Articles on Transboundary Harm, *supra* note 28, Article 3, Commentary (7).

³³ Pulp Mills Case, *supra* note 26, para. 197.

³⁴ Birnie et al., *supra* note 27, 148.

³⁵ Certain Activities Carried out by Nicaragua in the Border Area/Construction of a Road in Costa Rica Along the San Juan River (Costa Rica v Nicaragua), Judgment, 2015 I.C.J. 665, para. 104.

general international law."³⁶ Article 7 of the ILC Draft Articles on Transboundary Harm states that authorisation of an activity shall be based on an assessment of the possible transboundary harm caused by that activity, including any EIA.³⁷ Conducting a transboundary EIA also forms part of a state's duty to cooperate.³⁸

While Runbeti did conduct an EIA prior to approving the wind farm project, there is no indication that this took into account the transboundary risk to Alducra and Runbeti has explicitly denied that any such risk existed.³⁹ Moreover, Runbeti failed to monitor the wind farm project during its construction and operational phases, which also constitutes a failure to act with due diligence.⁴⁰

Having failed to identify the risk of transboundary harm to Alducra, Runbeti also failed to take any measures to avoid or limit this harm. Acting in accordance with the precautionary principle has been described as part of a state's due diligence obligations.⁴¹ The principle is applicable when there is an uncertain threat of environmental damage of serious or irreversible character,⁴² such as exists here. There are many low-cost mitigation measures Runbeti could have implemented, such as blade feathering and temporary shut down of the turbines, as discussed at **A(4)**.

³⁶ Pulp Mills Case, *supra* note 26, para. 204.

³⁷ ILC Draft Articles on Transboundary Harm, *supra* note 28.

³⁸ Neil Craik, *The Duty to Cooperate in the Customary Law of Environmental Impact Assessment*, 69(1) I.C.L.Q. 239 (2020).

³⁹ R¶23.

⁴⁰ Birnie et al, *supra* note 27, 170.

⁴¹ Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (1 February 2011), Advisory Opinion, the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea, No 17, para 131.

⁴² IUCN, *Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management*, IUCN 1 (2007).

Runbeti also failed to allow public participation on environmental issues by excluding the Chiroptera Crusaders from the wind farm site, contrary to Principle 10 of the Rio Declaration.

Runbeti has therefore breached its due diligence obligation to prevent transboundary harm by failing to identify the risk of damage to Alducra, failing to monitor the wind farm project, refusing to implement mitigation measures, and preventing public participation.

C. Runbeti breached its duty to notify and cooperate with Alducra under the CBD and customary international law

1. Runbeti breached its duty to cooperate with Alducra

Article 5 of the CBD obliges states to cooperate with other parties for the conservation of biodiversity. Parties are specifically encouraged to cooperate in mainstreaming biodiversity in the energy sector.⁴³ There is also an obligation on a state of origin, on the occurrence of transboundary harm, to consult and cooperate with the affected state to mitigate the damage.⁴⁴ The duty also exists in customary international law.⁴⁵

Despite Alducra being a neighbouring country situated 5km from the first phase of the wind farm, Runbeti failed to cooperate in the planning or implementation of the project and did not involve Alducra in its EIA. Alducra sought tirelessly to warn Runbeti of the risk and urged Runbeti to implement reasonable mitigation measures to protect the bat species.⁴⁶ Runbeti failed to accede to these requests and therefore breached its duty to cooperate.

⁴³ CBD Decision 14/3 (Nov. 2018), CBD/COP/DEC/14/3.

⁴⁴ UNGA Res. 61/36, Allocation of Loss in The Case of Transboundary Harm Arising Out of Hazardous Activities (Dec. 18, 2006), Principle 5(c).

⁴⁵ Trail Smelter Case, *supra* note 26; North Sea Continental Shelf (Ger./Den., Ger./Neth.), Judgment, 1969 I.C.J. 327, 3; Fisheries Jurisdiction (U.K. & N.Ir. v. Ice.), Judgment, 1974 I.C.J. 395.

⁴⁶ R¶22&25.

2. Runbeti breached its duty to notify Alducra

The duty to cooperate requires notification to other states of any activities likely to produce harmful effects on their environment,⁴⁷ and to provide them with all relevant and useful information.⁴⁸ Article 14(1)(c) of the CBD places an obligation on Parties to notify and consult with others with regard to activities which are likely to have a significant adverse effect on biodiversity.

Despite Runbeti's construction of a wind farm close to the border, no attempt was made to give prior notification to Alducra. Alducra persistently made efforts to engage with Runbeti regarding an important shared resource which Alducra protects in its national laws.⁴⁹ However, Runbeti made no attempts to communicate with or notify Alducra.

D. Runbeti cannot rely on the provisions of the United Nations Framework Convention on Climate Change (UNFCCC) or the Paris Agreement to justify its actions

Although Runbeti has invoked the provisions of the UNFCCC and the Paris Agreement to justify its actions, there is nothing in either treaty which required Runbeti to implement the wind farm on a known bat migration route and roosting area.

Article 4 of the Paris Agreement⁵⁰ requires Parties to communicate successive nationally determined contributions (NDCs), but does not prescribe their content. Therefore, Runbeti was in no way compelled to implement the wind farm on this highly unsuitable location to comply with its climate change obligations.

⁴⁷ Rio Declaration on Environment and Development, June 14, 1992, Principle 18.

⁴⁸ ILC Draft Articles on Transboundary Harm, *supra* note 28, Article 17.

⁴⁹ R¶14.

⁵⁰ Paris Agreement to the UNFCCC, 12 December 2015, in Report of the Conference of the Parties on its Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Paris Agreement].

Regardless of Runbeti’s commitments regarding climate change, they remain bound by their obligations to protect biodiversity. In the Preamble of the Paris Agreement, Parties note the importance of ensuring the integrity of all ecosystems and the protection of biodiversity. Therefore, Runbeti is acting contrary to the spirit of the agreement by actively damaging the environment. Runbeti must apply its treaty obligations to mitigate climate change and to protect biodiversity in such a way that both purposes can be realised.

II. ALDUCRA COMPLIED WITH ALL RELEVANT OBLIGATIONS WITH RESPECT TO ITS TRADE MEASURES FOR TAPAGIUM PRODUCTS

A. Alducra has not imposed any trade-restrictive measures contrary to the Architerpo Regional Trade Agreement (ARTA)

1. The trade measures do not violate the National Treatment obligation

The trade measures introduced by Alducra comply with the National Treatment obligation under Article VIII of the ARTA, which prohibits Parties from treating imported products less favourably than like domestic products.

i. The measures do not discriminate between ‘like products’

Article VIII(2) provides that imported products shall not be taxed at a rate in excess of that applied to like domestic products, while Article VIII(3) provides that internal regulations shall not treat imported products less favourably than like domestic products. Neither the tax nor the labelling requirements violate these provisions as tapagium produced using non bat-safe farming is not a “like product” to tapagium produced using bat-safe farming.

The concept of ‘likeness’ is relative and varies according to “the context and the circumstances that prevail in any given case.”⁵¹ Relevant criteria include consumers’ tastes and habits.⁵² In *EC – Asbestos*, the Appellate Body emphasised that the list of criteria determining ‘likeness’ is non-exhaustive, and all relevant evidence must be considered on a case-by-case basis.⁵³ They criticised the Panel’s refusal to consider asbestos-related health risks in the determination of likeness.⁵⁴ This demonstrates that non-economic values are relevant in the determination of likeness,⁵⁵ and there is no fixed definition of ‘like products’.⁵⁶

The assessment of likeness may take into account process and production methods (PPMs) that do not alter the product’s physical characteristics. Recent GATT decisions acknowledge that PPMs may have a direct impact on consumers’ tastes and habits, given the increasing number of consumers sensitive to environmental concerns.⁵⁷ Between 2013 – 2018, the market for sustainable products grew exponentially in comparison to the market for non-sustainable goods.⁵⁸ The growth of markets for eco-labelled products, including organic foods and Fair Trade, demonstrates the potential for environmental concerns to factor into consumer tastes.⁵⁹

⁵¹ Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R;WT/DS10/AB/R;WT/DS11/AB/R (adopted Nov. 1, 1996), 21.

⁵² Appellate Body Report, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R;WT/DS403/AB/R (adopted Jan. 20, 2012), paras 142-157.

⁵³ Appellate Body Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R (adopted Apr. 5, 2001), paras 102-103.

⁵⁴ *Id.*, para. 113.

⁵⁵ Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* (3rd ed., 2013), 391.

⁵⁶ Jason Potts, *The Legality of PPMs under the GATT: Challenges and Opportunities for Sustainable Trade Policy*, IISD (2008) www.iisd.org/system/files/publications/ppms_gatt.pdf, 14.

⁵⁷ Van den Bossche & Zdouc, *supra* note 55, 393.

⁵⁸ Tensie Whelan & Randi Kronthal-Sacco, *Research: Actually, Consumers Do Buy Sustainable Products*, Harvard Business Review (19 June 2019) <https://hbr.org/2019/06/research-actually-consumers-do-buy-sustainable-products>.

⁵⁹ Potts, *supra* note 56, 14.

WTO jurisprudence indicates that labelling requirements will be legitimate if applied in an even-handed way and based on a legitimate regulatory distinction.⁶⁰

Measures targeting PPMs should be upheld where they pursue a non-protectionist regulatory policy, particularly where activities outside the importing country have effects within it.⁶¹ Alducra's measures advance two vital, non-protectionist objectives: promoting consumer awareness and bat conservation. These objectives are consistent with the Preamble of the ARTA which refers to the objective of 'sustainable development' including environmental protection. Therefore, the PPMs used in producing tapagium are integral to the assessment of likeness.

ii. The measures do not afford protection to domestic production

The second sentence of Article VIII(2) relates to internal taxation of 'directly competitive or substitutable products', a category broader than 'like products'.⁶² However, a measure will only contravene this provision if applied so as to afford protection to domestic production. Whether a measure's objectives are protectionist may be determined by examining its design, architecture and structure.⁶³ Alducra's domestic legislation draws on best environmental practice, and all tax revenue will be distributed in support of bat conservation.⁶⁴ The legislation's design and structure is therefore not protectionist, and Alducra's measures are fully consistent with Article VIII(2).

⁶⁰ Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted May 16, 2012), para. 298.

⁶¹ Robert Howse & Donald Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy* (2000) 11(2) E.J.I.L. 249, 260 & 278.

⁶² Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R; WT/DS84/AB/R (adopted Feb. 17, 1999), para. 118.

⁶³ Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R; WT/DS110/AB/R (adopted Jan. 12, 2000), para. 71.

⁶⁴ R¶15&26.

iii. There has been no less favourable treatment of like imported products

Tapagium produced in a way that does not endanger the Architerpan long-nosed bat, a vital shared natural resource, receives the same treatment in Alducra regardless of where it was produced. Alducra's measures are origin-neutral and process-based, they are not based on the national origin of products but on the production methods, and therefore do not breach the national treatment obligation.⁶⁵ Such an approach avoids penalising economic actors who are willing to meet the required environmental standards.⁶⁶

Alducra's internal regulations do not result in less favourable treatment of imported products. As held in *Dominican Republic – Cigarettes*, "the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product."⁶⁷ Any detrimental effect on tapagium produced using farming practices which are harmful to bats is not related to product origin. Therefore, Alducra has fully complied with its obligations under Article VIII of the ARTA.

2. The trade measures do not violate the Most-Favoured-Nation Treatment obligation

Alducra has not violated the Most-Favoured-Nation Treatment obligation (MFN) under Article VII of the ARTA, which prohibits discrimination between 'like products' originating in different countries.⁶⁸ In relation to MFN, relevant criteria in the assessment of likeness

⁶⁵ Howse & Regan, *supra* note 61, 252.

⁶⁶ Steve Charnovitz, *The Law of Environmental "PPMs" in the WTO: Debunking the Myth of Illegality* (2002) 27(1) Yale J. Int'l L. 59, 69.

⁶⁷ Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R (adopted May 19, 2005), para. 96.

⁶⁸ Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R; WT/DS142/AB/R (adopted June 19, 2000), para. 84.

include the products' physical characteristics, end-use, and the tariff regimes of other Members.⁶⁹ Consumers' tastes and habits are also relevant.⁷⁰

Tapagium is produced only in Alducra and Runbeti, and no reference is made to similar products imported from other countries or how such products are treated under Alducra's laws or how they are regarded by consumers. Accordingly, there is no evidence to suggest that Alducra has breached the MFN obligation.

3. The trade measures do not constitute quantitative restrictions

The measures introduced by Alducra are not quantitative restrictions under Article IX of the ARTA because they do not prohibit or restrict the importation of tapagium from Runbeti. Unlike the measures in the *Shrimp-Turtle Case*, which banned any imports from countries which had not been certified under US domestic legislation, Alducra's legislation does not prohibit the importation of tapagium from Runbeti.

While imports are subject to a labelling requirement, the same requirement applies to domestic products. The Appellate Body held in *Dominican Republic – Cigarettes* that not every measure affecting the opportunities for market access would constitute a quantitative restriction, but "only those measures that constitute a prohibition or a restriction on the importation of products."⁷¹ There is no restriction on the volume of tapagium that may be imported from Runbeti once it complies with the labelling requirement, and therefore there is not a quantitative restriction.

B. The measures introduced are justified under Article X of the ARTA

1. The trade measures are necessary to protect public morals under Article X(1)(a)

⁶⁹ Panel Report, *Spain – Tariff Treatment of Unroasted Coffee*, L/5135-28S/102 (adopted June 11, 1981), para.4.6-4.8.

⁷⁰ Van den Bossche & Zdouc, *supra* note 55, 327.

⁷¹ Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R (adopted May 19, 2005), para. 7.261.

Turning to the Article X General Exceptions to the ARTA, Alducra's measures are necessary to respond to moral concerns concerning the impact of harmful farming practices on bats and farmers. In *US – Gambling*, the Panel held that 'public morals' denotes standards of rightful and wrongful conduct in a community.⁷² Members have scope to define and apply the concept according to their value systems.⁷³ The necessity of a measure is determined by the objective pursued and the contribution that measure has to protection of 'public morals', weighed against any trade-restrictive impact.⁷⁴

Protection of animal welfare for moral reasons can be a legitimate basis for restricting trade.⁷⁵ In *EC – Seals*, it was accepted that there were public moral concerns regarding seal-killing in the European Union (EU). It was confirmed that necessity analysis involves a balancing test and any proposed alternative measure will not be considered 'reasonably available' where it prevents the Member achieving its desired level of protection with respect to the objective.⁷⁶

Alducra has introduced measures in line with moral requirements to protect bats and farmers. The measures make a significant contribution to that objective, and are less restrictive than the import prohibition upheld in *EC – Seals*.

⁷² Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005), para. 6.465.

⁷³ *Id.*, para. 6.461.

⁷⁴ Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010), para. 240.

⁷⁵ Rob Howse, Joanna Langille & Katie Sykes, *Sealing the Deal: The WTO's Appellate Body Report in EC – Seal Products*, 18(12) ASIL Insights (June 4, 2014), <https://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products>.

⁷⁶ Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R;WT/DS401/AB/R (adopted June 16, 2014), paras. 5.261-5.280 [hereinafter *EC – Seals*.]

2. The trade measures are necessary to protect animal life or health under Article X(1)(b)

The measures are necessary to protect the life and health of bats, particularly the Architerpan long-nosed bat. This ground requires firstly that the policy objective is protection of animal life or health, and secondly that the measure is necessary to fulfil that objective.⁷⁷ A similar necessity test to that outlined at **B.1** applies.⁷⁸ As determined in *EC – Asbestos*, the more important the societal value pursued, the more likely the measure is to be considered necessary.⁷⁹ The Appellate Body held it is for Members to determine the level of protection of health or the environment which they consider appropriate, and other Members cannot challenge the level of protection chosen.⁸⁰

Modern agave farming techniques have led to the loss of an important food source for the lesser long-nosed bat, a species almost identical to the Architerpan long-nosed bat.⁸¹ This loss may have a domino effect as many plants rely on lesser long-nosed bats for pollination, which in turn provide food and shelter for a host of other animals.⁸² Lesser long-nosed bats play a crucial role as pollinators because their long tongue allows them to feed on the nectar stored at the bottom of the agave flower.⁸³ These bats “depend not only on the plants in a given region,

⁷⁷ Van den Bossche & Zdouc, *supra* note 55, 554.

⁷⁸ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007), para. 178.

⁷⁹ *EC – Asbestos*, *supra* note 53, para. 172.

⁸⁰ *Id.*, para 168.

⁸¹ IUCN, *Bat-Friendly Tequila Factsheet*, https://www.iucn.org/sites/dev/files/bat-friendly_tequila_factsheet.pdf (accessed Nov. 6, 2020).

⁸² Don E. Wilson, *Long-Nosed Bats and Agaves: The Tequila Connection*, 5(4) *Bats Magazine*, <https://www.batcon.org/article/long-nosed-bats-and-agaves-the-tequila-connection/> (accessed Nov. 6, 2020).

⁸³ U.S. Fish and Wildlife Service (USFWS). Featured Pollinator: Lesser Long-Nosed Bat, https://www.fws.gov/pollinators/Features/Lesser_long-nosed_bat.htm/ (accessed Nov. 12, 2020)

but on a continuous supply of food along their migratory routes.”⁸⁴ Recent studies pinpoint the need for conservation measures to consider the migratory patterns of this species,⁸⁵ who time their migratory flights to coincide with local peak flower availability of the plants it pollinates. This timing reflects the evolution of the species over thousands of years, and the co-dependent relationship essential for mutual survival. Introducing bat-safe farming practices can have a significant impact: following the introduction of such measures, the lesser long-nosed bat became the first mammal to be de-listed as a threatened species in Mexico.⁸⁶

The measures introduced by Alducra are fundamental for the vital objective of protecting the life and health of Architerpan long-nosed bats.

3. The trade measures relate to the conservation of exhaustible natural resources and are made effective in conjunction with restrictions on domestic production or consumption under Article X(1)(g)

The measures introduced are justified as they relate to the conservation of an exhaustible natural resource. Interpretation of the equivalent GATT provision has recognised that living species constitute exhaustible natural resources as they are susceptible of depletion and extinction.⁸⁷ Regarding migratory species, a “sufficient nexus” with the territory of the state concerned will suffice to invoke the exception.⁸⁸ The provision must be interpreted in a

⁸⁴ Wilson, *supra* note 82.

⁸⁵ Angelica Menchaca et al., *Conservation Units and Historical Matrilineal Structure in the Tequila Bat (Leptonycteris yerbabuena)*, 23 *Global Ecology and Conservation* (Sept. 2020), <https://www.sciencedirect.com/science/article/pii/S2351989420307058>.

⁸⁶ Andrea Jiménez Arratibel, *Este biólogo preserva a los murciélagos que salvan los agaves, la planta origen del tequila y el mezcal*, EL PAÍS (June 13, 2020) https://elpais.com/elpais/2020/06/11/planeta_futuro/1591875213_101000.html.

⁸⁷ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT Doc. WT/DS58/AB/R (adopted Nov. 6, 1998), para. 128 [hereinafter *Shrimp-Turtle*].

⁸⁸ *Id.*, para. 133.

dynamic manner incorporating contemporary concerns surrounding environmental conservation.⁸⁹ The test for whether measures “relate to” conservation is based on a “close and genuine relationship of ends and means.”⁹⁰ Measures are to be employed in conjunction with domestic measures as a requirement of even-handedness, but that does not mandate identical treatment.⁹¹ The requirement is that the measure works together with restrictions on domestic production.⁹²

Measures introduced by Alducra are closely related to the conservation of the Architerpan long-nosed bat, an exhaustible natural resource. The measures were made effective in conjunction with domestic restrictions under the 2015 Act.⁹³

4. The trade measures do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade under Article X

Alducra’s measures therefore fall within three of the specific exceptions provided for under Article X(1) of the ARTA. In addition, the way they have been applied satisfies the requirements of the introductory paragraph of Article X: they do not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade.

When considering whether measures constitute arbitrary or unjustifiable discrimination, Appellate Body decisions have stressed the importance of engaging in bilateral or multilateral

⁸⁹ *Id.*, para. 129.

⁹⁰ Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R (adopted Feb. 22, 2012), para. 355.

⁹¹ Appellate Body Report, *United States – Standards for Reformulated Gasoline*, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996), 21.

⁹² *China – Raw Materials*, *supra* note 91, para. 360.

⁹³ R¶26.

negotiations before resorting to unilateral measures.⁹⁴ States must make serious efforts to secure a cooperative solution first.⁹⁵ Alducra introduced measures only after engaging with Runbeti, who refused to take action.

While measures should not impose an inflexible regulatory programme on other countries,⁹⁶ it should not be assumed that requiring compliance with, or adoption of, certain policies prescribed by the importing country renders a measure incapable of justification.⁹⁷ It is acceptable to condition market access on the adoption of a programme comparable in effectiveness, as this allows for sufficient flexibility.⁹⁸ Alducra's legislation satisfies this test as it allows for bat-safe farming "equivalent to" the requirements imposed in Alducra.⁹⁹

In *Shrimp-Turtle*, it was noted that shrimp caught using identical methods to those employed in the US were excluded from market access solely because they were caught in the waters of countries that had not been certified under the US system.¹⁰⁰ In contrast, Alducra's legislation is targeted to the process by which agave is produced on individual farms, rather than certifying particular countries. Process-based measures are preferable as they focus on production methods, rather than forcing states to adopt a certain policy.¹⁰¹

⁹⁴ *US – Gasoline*, *supra* note 91, 27; *Shrimp-Turtle*, *supra* note 87, para. 166.

⁹⁵ Philippe Sands et al., *Principles of International Environmental Law* (4th ed., 2018), 870.

⁹⁶ *Shrimp-Turtle*, *supra* note 87, paras. 163-164.

⁹⁷ *Id.*, para. 121.

⁹⁸ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc. No. WT/DS58/AB/RW (adopted Nov. 21, 2001), para. 144.

⁹⁹ R¶26.

¹⁰⁰ *Shrimp-Turtle*, *supra* note 87, para. 165.

¹⁰¹ Barbara Cooreman, *Addressing Environmental Concerns Through Trade: A Case for Extraterritoriality?* (2016) 65(1) I.C.L.Q. 229, 244.

Equally, the measures are not disguised restrictions on trade as they do not pursue trade-restrictive objectives.¹⁰² These measures do not seek to restrict international trade, but to protect bats, the wider environment and farmers, in accordance with Alducra's obligations to protect biodiversity. Having regard to these vitally important, non-protectionist objectives, the measures should be upheld as fully consistent with the ARTA.

¹⁰² Panel Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc. WT/DS135/R (adopted Apr.5, 2001), para. 8.236.

CONCLUSION

The Applicant, the Federal States of Alducra, respectfully requests the Court to adjudge and declare that:

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

Respectfully submitted,
Agents for the Applicant