

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

**THE CASE CONCERNING
ALIEN INVASIVE SPECIES**

THE KINGDOM OF DeLAND,
Applicant

v.

THE DEMOCRATIC REPUBLIC OF OCSABAT,
Respondent.

**ON SUBMISSION TO THE
INTERNATIONAL COURT OF JUSTICE**

Fall Term 2004

Memorial for the Applicant

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STATEMENT OF JURISDICTION

The governments of the Kingdom of DeLand and the Democratic Republic of Ocsabat have referred this dispute, The Differences between the Kingdom of DeLand and the Democratic Republic of Ocsabat Concerning Alien Invasive Species, to the International Court of Justice at The Hague, Netherlands, pursuant to Article 36(1) of the Statute of the Court. The parties have also submitted notification of the Special Agreement signed at The Hague in the Netherlands on 11 May 2004, consistent with Article 40(1) of the Statute of the Court. The jurisdiction of this Honorable Court is not in question.

QUESTIONS PRESENTED

1. Whether the Guiding Principles of Decision VI/23 may stand as adopted at the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity; and
2. Whether Ocsabat is responsible for the environmental damage caused by the release of the nutria into the Raslobab Marsh.

STATEMENT OF FACTS

The Parties and the Raslobab Marsh

The Kingdom of DeLand (DeLand) is a developed country with a diverse economy and a population of approximately 76 million. (*Compromis* ¶ 2). The Democratic Republic of Ocsabat (Ocsabat) is a developing country of 27 million. (*Compromis* ¶ 1). The eastern coast of both countries borders the Gulf of Raslobab, adjacent to which lies the Raslobab Marsh (Marsh). (*Compromis* ¶¶ 1-2, 10). The Marsh is wholly located in the northern part of DeLand and is immediately south of Ocsabat. (*Compromis* ¶ 10).

The Marsh is a coastal habitat for endangered species and supports migratory birds. (*Compromis* ¶ 10). An important environmental site, the Marsh is protected as a Wetland of International Importance under the Ramsar Convention on Wetlands (Ramsar) and is a recognized biosphere reserve under UNESCO. (*Compromis* ¶¶ 11-13). Bluepeace, a non-governmental organization, has listed the Marsh as one of the 250 most important sites for biodiversity. (*Compromis* ¶ 14).

The Importation of Nutria by Ocsabat

The instant dispute arose following the importation of 10,000 nutria by Ocsabat in an effort to diversify its economy. (*Compromis* ¶ 15). Nutria are semi-aquatic rodents non-indigenous to DeLand and Ocsabat. (*Compromis* ¶ 17). The national government of Ocsabat approved the plan on 21 March 2002, which called for the nutria to be raised in southern Ocsabat near DeLand and the Marsh. (*Compromis* ¶ 15).

Upon learning of Ocsabat's importation plan, DeLand exchanged a series of diplomatic notes with Ocsabat regarding Ocsabat's obligations under the Guiding Principles of the Convention on Biological Diversity relating to the introduction of nutria to the region. (*Compromis* ¶ 18). Specifically, DeLand reminded Ocsabat of its obligation to prepare a risk

analysis, to which Ocsabat responded by disputing the validity of the Guiding Principles. (*Compromis* ¶ 18). Ocsabat assured DeLand no risk assessment was necessary because of the minimal risk posed by the government-regulated nutria. (*Compromis* ¶ 19). For the next several months, DeLand and Ocsabat continued to disagree over the validity of the Guiding Principles and the duties of Ocsabat thereunder. (*Compromis* ¶¶ 18-21).

The Dispute and Subsequent Special Agreement

On 4 December 2002, a tropical cyclone struck the eastern coast of Ocsabat, resulting in several deaths and significant destruction. (*Compromis* ¶ 24). In the past, similar storms have hit the area approximately once every twelve years. (*Compromis* ¶ 24). Contrary to Ocsabat's initial claim that the nutria had been destroyed by the storm, in January 2003, Bluepeace confirmed that the majority of the nutria had survived the storm and had migrated to the Marsh. (*Compromis* ¶¶ 25-26). DeLand became increasingly concerned about the effect of the nutria on the Marsh and instituted a "nutria eradication plan." (*Compromis* ¶ 28). In October 2003, DeLand also requested that the Marsh be added to Ramsar's Montreux List to heighten awareness about and secure additional funding for the nutria-related damage. (*Compromis* ¶ 27). DeLand further initiated a rehabilitation plan, whereby it conducted an evaluation of the environmental impacts of nutria on the Marsh. (*Compromis* ¶ 28).

In January 2004, DeLand requested that Ocsabat accept financial responsibility for the costs associated with DeLand's newly created program based on Article 3 of the CBD and Guiding Principle 12. (*Compromis* ¶ 29). Ocsabat disclaimed any legal and financial responsibility for DeLand's initiatives, claiming that the Guiding Principles had no legal effect since they were improperly adopted. (*Compromis* ¶ 30).

When they could not reach an agreement, DeLand and Ocsabat agreed on 11 May 2004, to submit the matter to this Court. (*Compromis* ¶ 31). One month later, on 17 June 17 2004, the UN Legal Counsel issued a legal opinion declaring that Decision VI/23 and the Guiding Principles at issue may stand as adopted at the COP meeting. (*Compromis* pg. 13-14).

SUMMARY OF ARGUMENT

- I. The Guiding Principles may stand as adopted at the Sixth Conference of the Parties of the Convention on Biological Diversity (CBD). Ocsabat is bound by the Guiding Principles under international law and is thus responsible for all nutria-related damage. Ocsabat is estopped from challenging the validity of the Guiding Principles because it never objected to them, and it wrongfully relied on Australia's objections. Ocsabat's silence regarding the Guiding Principles can be interpreted only as tacit consent to their adoption. The Guiding Principles may also stand because at the time of their adoption, there was consensus, an ambiguous term that is not defined by the CBD. Consensus must mean something other than unanimity, because any other result would lead to unreasonable results. Lastly, the UN Legal Opinion concluded the Guiding Principles may stand as adopted and this Court has recognized the legitimacy of UN legal opinions as the voice of the United Nations. Therefore, the Guiding Principles are legally binding on Ocsabat, imposing responsibility on Ocsabat for nutria-related damage.

- II. Ocsabat is legally responsible for nutria-related damage under principles of customary international law contained within the Guiding Principles. Ocsabat violated customary international law when it failed in good faith to take proper measures to prevent the eventual harm to the Marsh. Ocsabat violated the precautionary approach and the requirement of conducting an environmental impact assessment by taking a "wait and see" attitude. In addition, now that damage has been caused to the Marsh, Ocsabat is in breach of the polluter pays principle for refusing to finance the reparation efforts. The precautionary approach, the requirement of an environmental impact assessment, and the polluter pays principle, all embodied within the Guiding Principles, are customary

international law because they reflect a consistent practice of States motivated by a sense of legal obligation. Ocsabat has violated these principles and is thus responsible for the ensuing damage.

III. Ocsabat is legally responsible for the transboundary harm caused by the nutria to the Marsh under principles of customary international law. Ocsabat is responsible under the customary international law principle called *sic utere tuo alienum non laedas* because it failed to prevent harm to DeLand while developing its fur industry. According to the International Law Commission, Ocsabat is legally responsible for the nutria-related harm under two theories. Because Ocsabat breached its international law obligations, it is responsible under the theory of state responsibility, which imposes liability upon a State for its wrongful acts in violation of international obligations. In addition, Ocsabat is responsible under the theory of international liability, which assigns responsibility upon a State even for lawful activities, such as nutria farming, when such activities cause transboundary harm. Ocsabat has no affirmative defenses to escape its responsibilities.

ARGUMENT

I. THE GUIDING PRINCIPLES MAY STAND AS ADOPTED.

A treaty is a written agreement between states, governed by international law.¹ Every treaty is binding upon all contracting parties and must be performed by them in good faith.² Ocsabat is a contracting party to the Convention on Biological Diversity (CBD), which establishes for Ocsabat a commitment to its sustainable use of the environment.³

The CBD establishes a Conference of the Parties (COP).⁴ The COP monitors State compliance with the Convention and serves “in a quasi-legislative capacity,” making decisions and interpreting the CBD.⁵ The COP is empowered to adopt protocols, amendments, annexes, and may “undertake any additional action ... required for the achievement of the purposes of [the CBD].”⁶ Under article 23(4) of the CBD, adopting guiding principles to further the objectives of the CBD is a valid and legal function of the COP. At the Sixth Meeting of the COP (COP6), Decision VI/23 regarding alien species and the annexed Guiding Principles were properly adopted. As a contracting party to the CBD, Ocsabat is bound by the Guiding Principles.⁷

¹ Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; LORD MCNAIR, *THE LAW OF TREATIES* 4 (1961).

² Vienna Convention, *supra* note 1, at art. 26; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L. L. 495, 516 (1970).

³ *Compromis* ¶ 5.

⁴ Convention on Biological Diversity, June 5, 1992, art. 23(1), 31 I.L.M. 818 [hereinafter CBD].

⁵ ALEXANDRE KISS & DINAH SHELTON, *INTERNATIONAL ENVIRONMENTAL LAW* 149 (Transnat’l Publishers, Inc., 3d ed. 2004).

⁶ CBD, *supra* note 4, at art. 23(4).

⁷ Vienna Convention, *supra* note 1, at art. 26.

The Guiding Principles may stand as adopted because: A) Ocsabat is estopped from challenging the validity of the Guiding Principles; B) there was consensus at the time of their adoption; and C) the UN Legal Counsel found that the Guiding Principles may stand as adopted.

A. Ocsabat is estopped from challenging the validity of the Guiding Principles.

Ocsabat may not rely on another State's objection to the adoption of the Guiding Principles to avoid its own responsibilities, because it did not object on its own behalf. In its diplomatic note to DeLand, Ocsabat states that "it reasonably relied on Australia's objection."⁸

This it cannot do. This Court has held that a State's silence can only mean tacit approval:

Passiveness in front of given facts is the most general form of acquiescence or tacit consent. Failure of a State to assert its right when that right is openly challenged by another State can only mean abandonment to that right. ... Failure to protest in circumstances when protest is necessary according to the general practice of States in order to assert, to preserve or to safeguard a right does likewise signify acquiescence or tacit recognition: the State concerned must be held barred from claiming before the international tribunal the rights it failed to assert or to preserve when they were openly challenged by word or deed.⁹

Ocsabat's silence during the adoption of the Guiding Principles estops it from challenging their validity in this Court.¹⁰ Thus, Ocsabat remains bound by the Guiding Principles.

B. The Guiding Principles were properly adopted because there was consensus at the time of their adoption.

The Guiding Principles were properly adopted because there was consensus at COP6 at the time of their adoption. The CBD establishes that the COP "shall by consensus agree upon

⁸ *Compromis* ¶ 19.

⁹ Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 40 (Jun 15). See also Case Concerning the Right of Passage Over Indian Territory (Port. v. India), 1960 I.C.J. 6, 39 (Apr. 12).

¹⁰ Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6, ¶ 99 (Feb 3).

and adopt rules of procedure for itself.”¹¹ However, the CBD does not define the term “consensus.” Ocsabat challenges the adoption of the Guiding Principles and the subsequent UN Legal Opinion based on its own definition of consensus, which it claims cannot mean “something other than unanimity.”¹² However, Ocsabat has pointed to no source of authority in support of its assertion. Nowhere in the CBD is consensus defined as unanimity.

A term in a treaty may be interpreted “in accordance with [its] ordinary meaning.”¹³ However, consensus does not have a common definition in international law.¹⁴ Therefore, supplementary means may be used to determine its meaning when any other interpretation “leaves the meaning ambiguous” or “leads to a result which is manifestly absurd or unreasonable.”¹⁵ This Court has wide latitude in this regard.¹⁶ In this case, at most, the meaning of “consensus” is ambiguous as set forth in the CBD and defining consensus as unanimity would indeed lead to a result which is manifestly unreasonable. Thus, the use of supplementary means to interpret the term is appropriate.

1. The meaning of consensus as used in the CBD is ambiguous.

Consensus does not, and cannot, equal unanimity. Judge Lauterpacht, an esteemed judge of this Court, questioned defining consensus as unanimity, writing, “if universal acceptance alone is the hallmark of the existence of a rule of international law, how many rules of

¹¹ CBD, *supra* note 4, at art. 23(3).

¹² *Compromis* ¶ 21.

¹³ Vienna Convention, *supra* note 1, at art. 31(1).

¹⁴ *See generally* Anthony D'Amato, *On Consensus*, 8 CANADIAN Y.B. INT'L L. 104 (1970).

¹⁵ Vienna Convention, *supra* note 1, at art. 32.

¹⁶ Case Concerning Kasikili/Sedudu Island (Bots. v. Namib.), 1999 I.C.J. 1045, 1060 (Dec. 13).

international law can there be said to be in effective existence?”¹⁷ Consensus is “[a]n agreement of parties to the same thing; a meeting of the minds.”¹⁸ The UN Legal Counsel agreed, stating, “[T]he expressions ‘without a vote’, ‘by consensus’ and ‘by general agreement’ are, in the practice of the United Nations, synonymous and therefore interchangeable.”¹⁹ Even the President of the COP6 stated that “in the United Nations and other international organizations, consensus [does] not mean unanimity but, rather, broad agreement.”²⁰ “Substantial unanimity” is a more reasonable understanding of consensus.²¹

Consensus clearly does not equal unanimity and is best understood as a general agreement. Ocsabat has pointed to no source of law that proves otherwise. As such, Australia’s position does not destroy consensus in the adoption of the Guiding Principles. Thus, the Guiding Principles may stand as adopted.

¹⁷ HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 191 (Cambridge Univ. Press 1958).

¹⁸ BLACK’S LAW DICTIONARY 299 (Bryan A. Garner, ed. 7th ed. 1999).

¹⁹ Letter from Hans Corell, Under-Secretary-General for Legal Affairs, The United Nations Legal Counsel, to Hamdallah Zedan, Executive Secretary, Convention on Biological Diversity, 2 (June 17, 2002) [hereinafter UN Legal Opinion].

²⁰ *Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, U.N. Environment Programme, Conference of the Parties to the Convention on Biological Diversity, 6th Sess., ¶ 296, U.N. Doc. UNEP/CBD/COP/6/20 (May 27, 2002) [hereinafter *COP6 Report*].

²¹ Quincy Wright, *Custom as a Basis for International Law in the Post-War World*, 2 TEXAS INT’L L. FORUM 147, 158 (1966).

2. Defining consensus as unanimity would lead to an unreasonable result.

Defining consensus as unanimity would lead to a universally unreasonable result, because it would allow a lone wrongdoing State to hijack any process of international decision-making.²² Certainly, this is an undesirable result.

The dissent or objection of a lone wrongdoing State cannot disallow the adoption of principles otherwise nearly unanimously accepted by the international community. The *South West Africa* cases²³ before this Court in the 1960s illustrate the absurdity of such a conclusion. During that time, numerous General Assembly resolutions were adopted, condemning apartheid as illegal, to which South Africa consistently objected.²⁴ Requiring unanimity in that case would have allowed South Africa to continue to practice apartheid simply because “consensus” was not achieved in the adoption of those resolutions.

Similarly, Australia’s position, the primary opposition to the adoption of the Guiding Principles, does not change the fact that there was consensus at COP6. Thus, they may stand as adopted.

C. Even if this Court finds that there was no consensus, the UN Legal Opinion has concluded that the Guiding Principles may stand as adopted.

On 17 June 2002, the UN Legal Counsel found that, despite the controversy surrounding their adoption, the Guiding Principles may “stand as adopted.”²⁵ This Court has previously

²² Tomme R. Young, *Brief Thoughts on COP-6*, 32 ENVTL. POL’Y & L. 133, 135 (2002). See also Royal C. Gardner, *Perspectives on Wetlands and Biodiversity: International Law, Iraqi Marshlands, and Incentives for Restoration*, 2003 COLO. J. INT’L ENVTL. L. & POL’Y 1, 4.

²³ *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6, 344 (July 18).

²⁴ *Policies of Apartheid of the Government of South Africa*, G.A. Res. 36/172, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/172 (1981); *Situation in South Africa*, G.A. Res. 39/2, U.N. GAOR, 39th Sess., 13th mtg., U.N. Doc. A/RES/39/2 (1984).

²⁵ UN Legal Opinion, *supra* note 19, at 2.

cited, followed and affirmed legal opinions from the UN Legal Counsel.²⁶ This Court has also recognized that States properly look to UN legal opinions as the “principled position of the United Nations.”²⁷ In the series of cases titled *Case Concerning Legality of Use of Force*, this Court used a legal opinion issued by the UN Legal Counsel to interpret the meaning of a General Assembly Resolution.²⁸

Following the adoption of the Guiding Principles at COP6, the Executive Secretary of the CBD, based on the position taken by Australia, requested a legal opinion from the UN Legal Counsel on the validity of the Guiding Principles.²⁹ This opinion concluded that the Guiding Principles “may stand as adopted.”³⁰ Thus, they are legally binding on Ocsabat.

II. OCSABAT IS RESPONSIBLE UNDER PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW EMBODIED IN THE GUIDING PRINCIPLES.

Ocsabat is responsible for nutria-related damage under principles of customary international law contained within the Guiding Principles. Soft law instruments, such as the Guiding Principles, are not binding;³¹ however, this does not mean that the substance contained

²⁶ *See, e.g.*, Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, 1960 I.C.J. 150, 167 (June 8).

²⁷ *Case Concerning Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.)*, 1996 I.C.J. 595, 778 (Preliminary Objections of July 11).

²⁸ *Case Concerning Legality of Use of Force (Yugo. v. Belg.)*, 1999 I.C.J. 124, 230 (Feb. 21); (*Yugo. v. Neth.*), 1999 I.C.J. 542 (Feb.21); (*Yugo. v. Can.*), 1999 I.C.J. 259, 341 (Feb. 21); (*Yugo. v. Port.*), 1999 I.C.J. 656, 739 (Feb. 21); (*Yugo. v. U.K.*), 1999 I.C.J. 826, 900 (Feb. 21).

²⁹ *Compromis* ¶ 19.

³⁰ UN Legal Opinion, *supra* note 19, at 2.

³¹ KISS & SHELTON, *supra* note 5, at 69.

within a soft law provision is unenforceable.³² Soft law provisions can still impose a commitment on states.³³ The Ramsar Convention,³⁴ to which both DeLand and Ocsabat are a party,³⁵ began as a soft law instrument.³⁶ In recent years, States are more and more using soft law principles as an indicator of their legal obligations.³⁷

This Court may look to customary international law to help settle disputes.³⁸ Customary international law is the consistent practice of states motivated by a sense of legal obligation.³⁹ State practice and *opinio juris* make a customary rule of law binding on all nations⁴⁰ not because

³² PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 26 (Oxford Univ. Press, 2d ed. 2002).

³³ KISS & SHELTON, *supra* note 5, at 95; Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1879 (2002).

³⁴ Convention on Wetlands of International Importance Especially as Waterfowl Habitat, *opened for signature* Feb. 2, 1971, T.I.A.S. No. 11084, 996 U.N.T.S. 245 [Ramsar Convention].

³⁵ *Compromis* ¶ 6.

³⁶ Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 642 (2000).

³⁷ Naomi Roht-Arriaza, *Book Review: PRECAUTIONARY LEGAL DUTIES AND PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW*, 21 COLUM. J. ENVTL. L. 183, 191 (1996). *See, e.g.*, Stockholm Declaration of the United Nations Conference on the Human Environment, June 5-16, 1972, U.N. Doc. A/CONF.48/14/REV. 1, *reprinted in* 11 I.L.M. 1416 (1972) [Stockholm Declaration]; Johannesburg Declaration on Sustainable Development, United Nations World Summit on Sustainable Development, U.N. Doc. A/CONF.199/20 (2002), *revised by* U.N. Doc. A/CONF.199/20/Corr. 1 (2003), *available at* http://www.johannesburgsummit.org/html/documents/summit_docs.html (*last visited* Sept. 14, 2004).

³⁸ Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

³⁹ *S.S. Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7); *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

⁴⁰ *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

it was prescribed by any superior power,⁴¹ but because it has generally been accepted as a rule of conduct by States⁴² throughout the international community.⁴³ When a given policy is determined to be customary international law, that policy becomes binding and enforceable against any state in violation of that policy.⁴⁴

Ocsabat has violated established principles of customary international law, specifically: A) the precautionary principle; B) the obligation to perform an environmental impact assessment; and C) the polluter pays principle.

A. Ocsabat breached its obligations under the customary international law principle called the precautionary approach.

Ocsabat has violated the precautionary approach, a principle of customary international law. This principle asserts that each State has an obligation to prevent environmental damage before it occurs⁴⁵ and stresses that States should not “wait and see,” but rather, should act in anticipation of environmental harm to ensure that it does not occur.⁴⁶ The precautionary

⁴¹ *Paquete Habana*, 175 U.S. 677, 701 (1900).

⁴² *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 276-77 (Nov. 20).

⁴³ IAN BROWNLIE, *PRINCIPLES OF INTERNATIONAL LAW* 6-8 (Oxford Univ. Press, 5th ed. 1998).

⁴⁴ MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 130 (Cambridge Univ. Press 1998).

⁴⁵ *See* Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, June 3-14, 1992, U.N. Doc. A/CONF.151/5/Rev. 1, *reprinted in* 31 I.L.M. 874 (1992) [hereinafter Rio Declaration]; David Wirth, *Symposium: The Role of Science in the Uruguay Round and NAFTA Trade Disciplines*, 27 CORNELL INT’L L.J. 817 (1994).

⁴⁶ John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. 1, 61 (1998).

principle is included in many international environmental law treaties and agreements,⁴⁷ including the CBD⁴⁸ to which Ocsabat is a party.⁴⁹ This Court has recognized the precautionary approach⁵⁰ as an “environmental imperative,”⁵¹ stating that the precautionary principle “may now be a principle of customary international law.”⁵²

Ocsabat violated the precautionary approach, and therefore customary international law, when it decided to import nutria without considering the foreseeable potential harm the nutria could cause to its neighbors. Ocsabat cannot claim *force majeure* to avoid its responsibility in this case, because it was on notice that cyclones occurred in the area approximately once every twelve years.⁵³ A state is not required to know with a level of exact scientific certainty whether a condition will occur; but rather, the precautionary approach obligates States to take appropriate

⁴⁷ CBD, *supra* note 4, Preamble; World Charter for Nature, Principle 11, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N.Doc. A/37/51 (Oct. 28, 1982); Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, art. 10, 39 I.L.M. 1257. *See also* DAVID FREESTONE, THE PRECAUTIONARY PRINCIPLE AND INTERNATIONAL LAW: THE CHALLENGE OF IMPLEMENTATION (Kluwer Law Int'l 1996).

⁴⁸ CBD, *supra* note 4, Preamble.

⁴⁹ *Compromis* ¶ 5.

⁵⁰ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 502-03 (July 8) [hereinafter *Nuclear Weapons*]. *See also* Case 180/98, U.K. v. Commission, 1998 E.C.R. I-2265, 2 C.M.L.R. 1125 (1998).

⁵¹ Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 152 (Sept. 25) [hereinafter *Gabcikovo*].

⁵² Request for an Examination of Situation in Accordance with Paragraph 63 of Court's Judgment of 20 December 1974 in Nuclear Tests (N.Z. v. Fr.), 1995 I.C.J. 288, 412 (Sept. 22) [hereinafter *Request for Examination*].

⁵³ *Compromis* ¶ 24.

measures to prevent environmental harm *before* it occurs.⁵⁴ Ocsabat breached its duties under customary international law when it failed to take proper precautions to avert nutria damage to DeLand in the event of a foreseeable storm and is thus responsible for the resulting damage.

B. Ocsabat breached its duties under customary international law when it failed to perform an environmental impact assessment.

Ocsabat further violated customary international law because it failed to perform an environmental impact assessment (EIA) prior to importing the nutria. The EIA requirement calls for research and monitoring by the State introducing an alien species to the region.⁵⁵ An EIA allows a State to examine, analyze and assess proposed environmental activities into developmental planning to maximize the potential for sustainable development.⁵⁶ The EIA requirement is included in many international environmental law treaties and agreements,⁵⁷ including the CBD⁵⁸ to which Ocsabat is a party. Moreover, over sixty countries now require some form of EIA.⁵⁹ This Court has recognized that an EIA may have developed into a

⁵⁴ HAROLD HOHMANN, PRECAUTIONARY LEGAL DUTIES AND PRINCIPLES OF MODERN INTERNATIONAL ENVIRONMENTAL LAW 121 (Graham & Trotman 1994).

⁵⁵ *COP6 Report*, *supra* note 20, Annex I, Decision VI/23, Annex, Guiding Principle 7, at 253.

⁵⁶ DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAELEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 366 (Foundation Press 1998).

⁵⁷ *See, e.g.*, Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, arts. 2(2) & 2(5), U.N. Doc. E/ECE/1250, *reprinted in* 30 I.L.M. 800, 806 (*entered into force* Sept. 10, 1997); Convention on Climate Change, May 29, 1992, art. 4(1)(f), 31 I.L.M. 849 (*entered into force* Mar. 21, 1994); North American Free Trade Agreement, Dec. 8 & 17, 1992, U.S.-Can.-Mex., art. 10.7, 107 Stat. 2057, 32 I.L.M. 296 (1993) & 32 I.L.M. 605 (*entered into force* Jan. 1, 1994); Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Oct. 6, 1996, art. 3(1)(h), 31 I.L.M. 1312 (1992) [hereinafter *Convention on Transboundary Watercourses*].

⁵⁸ CBD, *supra* note 4, at art. 14.

⁵⁹ HUNTER, *supra* note 56, at 366. *See also* C-474/99, *Commission v. Spain*, 2002 E.C.R. I-05293.

customary international law norm”⁶⁰ and has gone so far as to find that the duty of EIA may be read into treaties considered to have a significant impact upon the environment, regardless of whether the treaty expressly so provides.⁶¹

The procedural obligation of EIA exists to demonstrate a state’s good faith in upholding international law obligations and to provide structure to substantive obligations.⁶² Ocsabat declined the opportunity to illustrate its good faith in upholding its international obligations when it refused to conduct an EIA. Therefore, Ocsabat breached its duties under customary international law.

C. Ocsabat is in breach of its duty under the customary international law principle called polluter pays.

In refusing to pay for the nutria-related damage,⁶³ Ocsabat is in violation of the polluter pays principle, which is customary international law. The polluter pays principle establishes that a state is required to pay for the damage it causes,⁶⁴ even if the damage results from acts that do not violate customary or conventional international law.⁶⁵ Although the principle remains controversial among developing countries,⁶⁶ the polluter pays principle has been codified in

⁶⁰ *Request for Examination*, 1995 I.C.J. at 412. See also HOHMANN, *supra* note 54, at 89.

⁶¹ *Gabcikovo*, *supra* note 51, at 112.

⁶² ANDRE NOLLKAEMPER, *THE LEGAL REGIME FOR TRANSBOUNDARY WATER POLLUTION* 151 (Graham & Trotman 1993).

⁶³ *Compromis* ¶ 30.

⁶⁴ Organization for Economic Co-Operation and Development, *Council Recommendation on the Implementation of the Polluter-Pays Principle*, 14 INT’L LEG. MAT. 238 (1975).

⁶⁵ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *OEC AND THE ENVIRONMENT* 8 (1986).

⁶⁶ Case 445/00 R, *Austria v. Council of the European Union*, 2001 E.C.R. I-1461, 2 C.M.L.R. 14.

numerous treaties and international agreements,⁶⁷ including the Rio Declaration⁶⁸ to which Ocsabat is a party.⁶⁹

This Court has recognized the legitimacy of the polluter pays principle⁷⁰ and has further acknowledged that the obligation to make reparations is a principle of international law.⁷¹ The polluter pays principle has now developed into customary international law.⁷² Thus, in failing to pay for nutria-related damage, Ocsabat is in breach of its duties under customary international law, and remains responsible for the ensuing damage.

III. OCSABAT IS RESPONSIBLE UNDER CUSTOMARY INTERNATIONAL LAW THEORIES OF LIABILITY FOR TRANSBOUNDARY HARM.

The prohibition against introducing harmful matter into another's territory is "a feature of law both ancient and modern."⁷³ In 1949, this prohibition was restated by this Court as the duty of each State not to use its territory for acts contrary to the sovereignty of other States.⁷⁴ This

⁶⁷ See, e.g., *Report of the United Nations Conference on Environment and Development*, U.N. Department of Economic and Social Affairs, Agenda Item 21, ¶ 2.14 & 30.3, U.N. Doc. A/CONF.151/26 (1992); *Convention on Transboundary Watercourses*, *supra* note 57, at art. 2(5)(h).

⁶⁸ Rio Declaration, *supra* note 45, Principle 16.

⁶⁹ *Compromis* ¶ 7.

⁷⁰ *Nuclear Weapons*, *supra* note 50, at 503.

⁷¹ *Chorzów Factory* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 13, at 47 (Sept. 13).

⁷² Sumudu Atapattu, *Evolution and the Status of the Precautionary Principle in International Law*, 96 AM. J. INT'L L. 1016, 1017 (2002).

⁷³ *Nuclear Tests* (Austl. v. Fr.), 1974 I.C.J. 253, 388 (Dec.11) [hereinafter *Nuclear Tests*].

⁷⁴ *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) [hereinafter *Corfu Channel*].

principle, *sic utere tuo ut alienum non laedas* (*sic utere*), is now firmly entrenched in customary international law.⁷⁵

A. Ocsabat is responsible based on the customary international law principle called *sic utere*.

Ocsabat is responsible for nutria-related damage based on the principle of *sic utere*, which means, “one should use one’s own property so as to not injure that of another.”⁷⁶ A state cannot use its own resources, even to further development, in a way that would cause harm or injury to another state.⁷⁷ *Sic utere* is codified in the UN Charter and the CBD, both to which Ocsabat is a party.⁷⁸

This Court has affirmed *sic utere* as a principle of customary international law, holding that a state may not abuse its sovereignty and make national decisions that result in damage transcending its national borders.⁷⁹ *Sic utere* has been reaffirmed in numerous judicial pronouncements.⁸⁰ Furthermore, State practice indicates an acceptance of this principle as

⁷⁵ See Stockholm Declaration, *supra* note 37, at Principle 21; Lakshman Guruswamy, *International Environmental Law: Boundaries, Landmarks, and Realities*, 10-FALL NAT. RESOURCES & ENV'T 43, 45 (1995).

⁷⁶ *Gabcikovo*, *supra* note 51 at 193.

⁷⁷ David R. Teece, *Global Overfishing and the Spanish-Canadian Turbot War: Can International Law Protect the High-seas Environment*, 8 COLO. J. INT'L L. & POL'Y 89, 99 (1997).

⁷⁸ *Compromis* ¶ 3 & 5; U.N. CHARTER art. 74; CBD, *supra* note 4, at art. 3.

⁷⁹ *Corfu Channel*, *supra* note 74, at 4; *Nuclear Tests*, *supra* note 73, at 253; *Gabcikovo*, *supra* note 51, at 7.

⁸⁰ See, e.g., *Trail Smelter Arbitration* (U.S. v. Can.), 3 R.I.A.A. 1911 (1941) [hereinafter *Trail Smelter*]; *Lake Lanoux Arbitration* (Spain v. Fr.), 12 R.I.A.A. 281, 24 I.L.R. 101 (Nov. 16, 1957); *Case 21/76, Handelskwekerij G.J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, 1976 E.C.R. 1735 (Neth.); *Case Concerning the Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), 1970 I.C.J. 3, 6 (Feb. 5).

well.⁸¹ For example, in a number of cases stemming from nuclear tests conducted in the Pacific Ocean, States conducting the tests paid compensation for damages caused.⁸² Although in most cases the polluting State did not admit liability, the enormous settlements paid can be seen to reflect *opinio juris*.⁸³ Although DeLand does not seek damages from this Court, it requests a judgment finding Ocsabat responsible⁸⁴ under the customary international law principle of *sic utere*.⁸⁵

B. The work of the International Law Commission further imposes responsibility on Ocsabat.

The International Law Commission (ILC), established by the UN General Assembly, promotes the progressive development of international law and its codification.⁸⁶ This Court has recognized and cited the work of the ILC in numerous cases.⁸⁷

⁸¹ PRUE TAYLOR, *AN ECOLOGICAL APPROACH TO INTERNATIONAL LAW: RESPONDING TO CHALLENGES OF CLIMATE CHANGE* 70 (Routledge 1998).

⁸² *See, e.g.*, Gut Dam Arbitration, Settlement of Claims (U.S. v. Can.), Sept 27, 1968, 8 ILM 118 (1969); Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1992 I.C.J. 240 (Preliminary Objections of June 26).

⁸³ TAYLOR, *supra* note 81, at 72.

⁸⁴ *Compromis* ¶ 32. *See also* Case Concerning the Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 99-100 (Dec. 2).

⁸⁵ *Compromis* ¶ 8.

⁸⁶ *Statute of the International Law Commission*, G.A. Res. 174(II), U.N. GAOR, 2d Sess., 123rd mtg., U.N. Doc. A/519, at 105 (Nov. 21, 1947).

⁸⁷ *See, e.g.*, Lagrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466, 521-522 (June 21); Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahr.), 2001 I.C.J. 40, 76-77, 137, 203, 208 (Mar. 16); Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2000 I.C.J. 182, 189 (Dec. 8); Case Concerning the Aerial Incident of 10 August 1999 (Pak. v. India), 2000 I.C.J. 12, 54, 58, 87 (Jun. 21); Fisheries Jurisdiction Case (Spain v. Can.), 1998 I.C.J. 432, 636-637, 669 (Dec. 4); Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nig.), 1998 I.C.J. 275, 293-294 (Jun. 11); Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.),

The ILC assigns responsibility for transboundary harm in two cases: 1) when the harm results from the breach of a State's international obligations, as outlined in the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility)*;⁸⁸ and 2) when there is no such breach, and yet harm results, as outlined in the *Draft Articles on International Liability for Injurious Consequences Arising out of Act Not Prohibited by International Law (Articles on International Liability)*.⁸⁹ Both documents further impose responsibility on Ocsabat for nutria-related damage.

1. Ocsabat is responsible based on the principle of state responsibility.

Ocsabat is responsible for nutria-related damage under the *Articles on State Responsibility*, which apply to wrongful conduct attributable to a State constituting a breach of its international obligations.⁹⁰ This Court has previously cited and relied on these articles in its decisions.⁹¹ The *Articles on State Responsibility* recognize a breach “of an international obligation of essential importance for the safeguarding and preservation of the human

1993 I.C.J. 38 (June 14); Fisheries Jurisdiction (U.K. & N. Ir. v. Ice.), 1974 I.C.J. 3, 69-70 (July 25).

⁸⁸ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) [hereinafter *Articles on State Responsibility*].

⁸⁹ *Report of the International Law Commission on the Work of Its Fifty-third Session*, 56 U.N. GAOR, Supp. No. 10, at 370-77, U.N. Doc. A/56/10 (2001) [hereinafter *Articles on International Liability*].

⁹⁰ *Articles on State Responsibility*, *supra* note 88, at art. 1.

⁹¹ *See, e.g.*, Case Concerning Oil Platforms (Iran v. U.S.), 42 I.L.M. 1334, 1403-1404 (I.C.J. 2003) (separate opinion of Judge Kooikmans); Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 43 I.L.M. 581, 635 (I.C.J. 2004) (separate opinion of Judge Parra-Aranguren); Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62, 87 (Apr. 29).

environment.”⁹² A breaching State is obligated to make full reparation for the injury caused by the wrongful act.⁹³ Ocsabat violated numerous principles of customary international law in its conduct surrounding the importation and farming of nutria and should thus be held responsible for the damage.

2. Ocsabat is responsible for harm caused as a result of its lawful activities.

Ocsabat is responsible for damages under the *Articles on International Liability*, which apply to lawful activities involving “a risk of causing significant transboundary harm through their physical consequences.”⁹⁴ Ocsabat’s nutria farming industry, although not unlawful *per se*, is an activity which caused substantial harm to DeLand.

Much of the law of state responsibility, including the *Trail Smelter* case, is concerned with lawful activities which have caused harm, and that it is not the activity itself which is prohibited, but the harm which it causes.⁹⁵ These articles recognize that even the lawful activities of man have come to pose a serious threat to the world’s environment.⁹⁶ Thus, they place an affirmative duty upon a State “to prevent, or to minimize the risk of, significant transboundary harm.”⁹⁷

⁹² *Articles on State Responsibility*, *supra* note 88, art. 19, ¶ 3.

⁹³ *Id.* at art. 31.

⁹⁴ *Articles on International Liability*, *supra* note 89, at 371.

⁹⁵ BIRNIE & BOYLE, *supra* note 32, at 182.

⁹⁶ Daniel Barstow Magraw, Transboundary Harm: The International Law Commission Study of “International Liability,” 80 AM. J. INT’L L. 305, 321 (1986). *See also Trail Smelter*, *supra* note 80, at 1911.

⁹⁷ *Articles on International Liability*, *supra* note 89, at 372.

The obligation of a State to prevent transboundary harm is one of due diligence,⁹⁸ a standard found in numerous international conventions.⁹⁹ Ocsabat failed to exercise due diligence in preventing the introduction of nutria into Marsh. Despite DeLand's repeated requests, Ocsabat stubbornly refused to perform a risk analysis prior to its importation of the nutria, stating that it did not see "the necessity of preparing a formal risk analysis."¹⁰⁰

The ILC has adopted a broad definition of due diligence, requiring a diligence proportioned to the resources of the State involved.¹⁰¹ On 28 June 2002, Ocsabat invoked its status as a developing nation to avoid performing a risk analysis.¹⁰² However, Ocsabat cannot hide behind its economic status to avoid its due diligence in importing the nutria.¹⁰³ A State's economic status may not be used to discharge its obligations under the *Articles on International Liability*.¹⁰⁴ Developing nations cannot have a different set of rules whereby they are allowed to

⁹⁸ *Id.* at 391-92.

⁹⁹ *See, e.g.*, Convention on the Law of the Sea, Dec. 10, 1982, art. 194, ¶ 1, 1833 U.N.T.S. 3 (*entered into force* Nov. 16, 1994); Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, Dec. 29, 1972, arts. I, II & VII(2), 26 U.S.T. 2403, 1046 U.N.T.S. 120; Vienna Convention for the Protection of the Ozone Layer, *opened for signature* Mar. 22, 1985, art. 2, 1513 U.N.T.S. 293 (*entered into force* Sept. 22, 1988); Convention on the Regulation of Antarctic Mineral Resources Activities, June 2, 1988, art. 7, ¶ 5, 12 U.S.T. 794, 402 U.N.T.S. 71.

¹⁰⁰ *Compromis* ¶ 18-20.

¹⁰¹ *Articles on International Liability*, *supra* note 89, at 393. *See also* The Geneva Arbitration (The Alabama case), in J. B. MOORE, I HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 572-573 (Amsterdam Press 2001).

¹⁰² *Compromis* ¶ 21.

¹⁰³ *Articles on International Liability*, *supra* note 89, at 394.

¹⁰⁴ *Id.* at 394.

pollute based simply on their economic status.¹⁰⁵ Thus, regardless of its status as a developing State, Ocsabat is responsible for all nutria-related damage under the *Articles of International Liability*.

¹⁰⁵ Do Nascimento e Silva, *Pending Problems on International Law of the Environment*, 1984 ACAD. DROIT G.E. INT'L COLLOQ 217, 224-25.

CONCLUSION

In consideration of the foregoing facts, the Kingdom of DeLand respectfully requests this Honorable Court:

1. Declare the Guiding Principles of Decision VI/23 may stand as adopted at the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity; and
2. Declare Ocsabat is responsible for the environmental damage caused by the release of the nutria into the Raslobab Marsh.

Respectfully submitted,

Agents for Kingdom of DeLand