IN THE

I N T E R N A T I O N A L   C O U R T   O F   J U S T I C E

AT THE

PEACE PALACE, THE HAGUE

(THE NETHERLANDS)

CASE CONCERNING DIFFERENCES BETWEEN PARTIES

IN THE MATTER OF ALIEN INVASIVE SPECIES

KINGDOM OF DELAND,

Applicant,

vs.

DEMOCRATIC REPUBLIC OF OCSABAT,

Respondent.

MEMORIAL FOR THE APPLICANT – KINGDOM OF DELAND

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LIST OF ABBREVIATIONS

- ⇨ Akron Law Review ...... A.L.R.
- ⇨ Annuaire Français de Droit International ...... A.F.D.I.
- ⇨ British Year Book of International Law ...... B.Y.B.I.L.
- ⇨ Columbia Journal of Transnational Law ...... C.J.T.L.
- ⇨ Conference of the Parties ...... C.O.P.
- ⇨ Convention on Biological Diversity ...... C.B.D.
- ⇨ Democratic Republic of Ocsabat ...... D.R.O.
- ⇨ International Court of Justice ...... I.C.J.
- ⇨ International Law Commission ...... I.L.C.
- ⇨ Kingdom of DeLand ...... K.o.D.

- ⇨ Organization of the United Nations ...... U.N.
- ⇨ Revista Española de Derecho Internacional ...... R.E.D.I.
- ⇨ Révue Génerale du Droit International Public ...... R.G.D.I.P.
- ⇨ United Nations Convention on Law of the Sea ...... U.N.C.L.O.S
- ⇨ Vienna Convention on the Law of Treaties ...... VCLT
- ⇨ Opus Citatus (“work already mentioned”) ...... op.cit.
- ⇨ Videbatur Supra (“see above”) ...... vid.spr.

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STATEMENT OF JURISDICTION

The Government of the Kingdom of DeLand and the Democratic Republic of Ocsabat have reached a special written agreement by means of which they submit the dispute concerning the responsibility of the Democratic Republic of Ocsabat to the International Court of Justice, according to article 40.1 of the Statute. This special agreement contains both the treaties to which the implied States are Parties, and the conditions in which they submit the question to the Court, which is to decide this matter on the basis of the rules and principles of general international law, as well as any applicable treaties. However, the Parties do not request the Court to address the issue of the amount of monetary damages, if any, which may be a subject of future discussions between the Parties.

QUESTIONS PRESENTED

1. Whether Decision VI/23 and the Guiding Principles for the Prevention, Introduction, and Mitigation of Impact of Alien Species that Threaten Ecosystems, Habitats or Species may stand as adopted at the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity.
2. Whether The Democratic Republic of Ocsabat is responsible under international law for damage caused by nutria, an alien invasive species, in the Raslobab Marsh.

SUMMARY OF ARGUMENT

The Kingdom of DeLand declares that Decision VI/23 and the Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species thath Threaten Ecosystems, Habitats or Species are valid and aplicable, and that therefore, by not applying those principles, the Republic of Ocsabat violates an international obligation and incurs in international state responsibility.

Even if the Republic of Ocsabat´s behaviour is not considered as contrary to the Decision VI/23 by the honorable Court, its violation of numerous treaties and principles of international environmental law, in particular with regard to transboundary damage, is flagrant and cannot be ignored.

Consequently, the Republic of Ocsabat has to compensate all damage caused by the introduction of the nutria in the Raslobab Marsh, including the costs originated by the nutria eradication programme and the ecosystem rehabilitation measures.

STATEMENT OF FACTS

The Democratic Republic of Ocsabat (hereinafter D.R.O.) is a developing country with a population of approximately 27 million people. Ocsabat's eastern coastline shares its border with the Kingdom of DeLand (hereinafter K.o.D).

The K.o.D. is a developed country with diversified economy and population approximately 76 million people. The K.o.D.'s eastern coastline also borders the Gulf of Raslobab.

Both The D.R.O. and K.o.D. are Members of the United Nations (hereinafter "U.N"), parties to the Statute of The International Court of Justice (hereinafter "I.C.J") and to the Vienna Convention on the Law of Treaties (hereinafter "VCLT"), as well as Contracting Parties to the Convention on Biological Diversity (hereinafter "C.B.D") and to the Ramsar Convention.

High-level representatives from the K.o.D. and the D.R.O. attended and fully participated in the 1972 U.N. Conference on the Human Environment at Stockholm, the 1992 U.N. Conference on Environment and Development at Rio de Janeiro, and the 2002 World Summit on Sustainable Development at Johannesburg.

The Raslobab Marsh is located in a remote northern portion of the territory of the K.oD, immediatly south of the border with D.R.O. The Raslobab Marsh was designated by The K.o.D. as a Wetland of International Importance in accordance with

Article 2 of the Ramsar Convention and recognized as a biosphere reserve under UNESCO's Programme on Man and the Biosphere in 1982.

In March 2002, The D.R.O announced its intention to diversify its economy. A key component of the government's plan was to permit the importation of 10,000 nutria from South America [nutria are not indigenous to the K.o.D. or the D.R.O], envisioning farmers to raise nutria in the south, within four kilometers of the border of the K.o.D. and the Raslobab Marsh.

The K.o.D. expresses its concern with regard to the introduction of nutria in this territory. The K.o.D. notes that the Conference of the Parties to the C.B.D. adopted Decision VI/23 that contains the Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species, stressing that is disregard constitutes a violation of international obligation.

The D.R.O observes that Decision VI/23 is not acceptable because its procedure displays serious flaws, denouncing the absence of consensus or unanimity.

On 4 December 2002 a tropical cyclone struck the eastern coastline of the D.R.O and nutria migrated to the Raslobab Marsh. The K.o.D. instituted a nutria eradication plan and an examination of the environmental impacts caused.

In January 2004, the K.o.D. requested the D.R.O to admit its responsibility and bear with the costs of the adverse effects. The D.R.O asserts that the Guiding Principles were not properly adopted and also disclaims any legal and financial responsibility.

Recognizing the need for an expeditious resolution, both states have agreed to submit the matter to I.C.J. and for this purpose both parties signed an agreement on 11th May 2004.

ARGUMENTS

I. THE DEMOCRATIC REPUBLIC OF OCSABAT VIOLATES ITS INTERNATIONAL OBLIGATIONS BY NOT APPLYING DECISION VI/23 AS ADOPTED IN SIXTH MEETING OF THE PARTIES TO THE C.B.D.

A. As a principle emanated from an International Organization it is of an obligatory application for the Contracting Parties.

The C.B.D., to which both the K.o.D. and the D.R.O. are parties, establishes in article 23 a "Conference of the Parties" (C.O.P. hereinafter) that is to hold meetings regularly. The task of this body is to "keep under review the implementation of this convention" (article 23.4, C.B.D). For this purpose, the C.O.P. will "consider and adopt, as required, protocols in accordance with Article 28" (article 23.4.c, C.B.D).

Decision VI/23 is adopted by the C.O.P. according to its procedure rules, as we shall later analyse. This decision, according to international law, can be considered a source of law envisaged in an international treaty, a "binding decision of an international organization", as Cassese[1] and many scholars put it. "Normally", he says, "when treaty rules establish norm-creating processes, they do so within the framework of an intergovernmental organization. A body of the organization is empowered to adopt binding legal standards, normally by majority vote. These rules enacted by the

[1] CASSESE, H. "International Law". Oxford University Press. New York, 2001. P. 150-151.

body entrusted with this function by the treaty bind only the member States of the organization”. Thus, Decision VI/23 is bound to be considered a source of obligations for the Parties.

B. The Democratic Republic of Ocsabat is responsible for not applying the guiding principles of Decision VI/23

In order to demonstrate that the D.R.O.´s responsibility for not applying the guiding principles of Decision VI/23, we will analyse each of the violations comitted in the light of the above mentioned principles.

Proceeding directly to a closer study of the facts, we have to announce the disrespect of guiding principle 1. The text obliges each State to base the introduction of invasive alien species on the precautionary approach, “in particular, with reference to risk analysis, in accordance with the guiding principles below”. In addition the principle should be applied “when considering eradication, containment and control measures in relation to alien species that have become established.” The current principle has been disregarded by the D.R.O., as it did nothing to prevent a potential harm, it did not even react when the K.o.D. insisted repeatedly on the necessity of a risk analysis in the diplomatic note, which was forwarded on 1st May 2002, and in which the lack of natural predators of nutrias in the area was clearly pointed out.

The D.R.O. definitely acted in a negligent manner, limiting its response to considering the risk associated with the nutrias as minimal and therefore seeing no need for further preventional measures, an attitude that proved to be wrong.

Secondly, guiding principle 4 reinforces that states should be aware of the risk that activities within their own jurisdiction may pose to other States as a potential

source of invasive alien species, insisting that they should take "appropiate individual and cooperative actions to minimize that risk, including the provision of any available information on invasive behaviour or invasive potential of a species." According to paragraph 2.b., between these activities is "the intentional introduction of an alien species into their own State if there is a risk of that species subsequently spreading (with our without human vector) into another State and becoming invasive". In the present case existed an obvious risk which should have been considered by the D.R.O., all the more since the D.R.O. must be aware of the status and importance of the Raslobab Marsh being a declared nature reserve and providing habitat for several endangered species.

In the third place we proceed to analyse guiding principle 8 which orders that all kind of relevant information has to be facilitated to affected States inmediately, in particular concerning species already identified as invasive as is the nutria. In the current dispute the K.o.D. denounces that no kind of cooperative actions has taken place, neither has the exchange of information. Even when the K.o.D. required about the fate of the nutria on 5 December 2002, the D.R.O. reported the death of the entire stock of nutria without having verified such supposition.

Coming back to the lack of cooperative efforts (principle 9), none of them have been realized in a satisfying manner by the D.R.O. Neither has there been any atempt to mitigate adverse effects of the introduction in our ecosystem. Not one of the appropiate steps with regard to eradication, containment or control contained in principle 12 and which should take place in the earliest possible stage has been adopted by the D.R.O.,nor is the responsible State willing to bear the costs of the control measures.

The three following principles (13-15) present another aspect of possible adverse effects (eradication, containment and control). As for the eradication, is must take place

in the earliest posible stage of the invasion, as on the contrary the longlasting adverse effects may cause serious harm to the affected ecosystem. Since the D.R.O. was not willing to cooperate in this sense, the K.o.D. was inable to prevent further harm and the adoption of the containment measures was also delayed.

Moreover, guiding principle 11 calls on the States to adopt provisions in order to address unintentional introductions which embody operational resources sufficient to allow for a rapid and effective action. It is evident that in the present case after having contemplated the harm done by the nutrias to our ecosystem, we can not speak of the adoption of “sufficient”, “rapid” or “effective” measures.

C. The procedure of Decision-making is valid and binding, allowing the adoption of measures even without unanimity.

Now that we have established the relevance of Decision VI/23 for the present case, we shall proceed to analyse whether it binds the D.R.O. or not, which is a topic to which the Parties have not reached an agreement.

To date, the C.O.P. has held 7 ordinary meetings, and one extraordinary meeting. All of them have given place to a series of decisions in order to implement the Convention’s objectives, as the Convention demands from the C.O.P.

How are these decisions taken? In article 23.3, the Convention states that “the Conference of the Parties shall by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules governing the funding of the Secretariat”. These rules of procedure were adopted in Decision I/1, during the first ordinary meeting of the C.O.P, in Nassau (Bahamas) in 1994, and are to be found in the Annex to that Decision. Of these, rule 40 refers to decision making within the C.O.P, but its paragraph 1, which detailed the majority

needed to approve a decision, was let out of the procedure rules at Decision I/1 by the C.O.P, and therefore it does not apply. However, practice shows that Rule 40 was actually followed by the contracting parties because decisions, like in most international environmental organizations, were adopted by consensus. It was nonetheless object of discussion at the 6th meeting whether "unanimity" and "consensus" should be considered synonyms or not. In this sense the discussions that took place among party States during the meeting of the 6th C.O.P[2], show that it was unclear what would be the outcome of Australia's opposition to Decision VI/23. As Rule 40 establishes consensus is the primary mecanism, but it also added that "if all efforts to reach consensus have been exhausted and no agreement reached, the decision shall, as a last resort, be taken by a two-thirds majority vote of the Parties present and voting (...)"

From a closer analysis of the above mentioned articles we conclude that, given a situation in which consensus as a synonym of unanimity cannot be attained, the most logical procedure according to the rules would be to adopt such Decision by majority of two thirds. During the process of adoption of Decision VI/23, many representatives stated that (*ibidem*, paragraph 315) "the Conference of the Parties should adhere to its established procedure and adopt the guiding principles, with the dissenting views being recorded in the report of the meeting". Thus, it was following the opinion of the majority that the Chair declared "the debate closed, and said that, following established practice, the Conference of the Parties would proceed to the adoption of draft decision UNEP/CBD/COP/6/L.13.", and that "the formal objections of dissenting Parties would be reflected in the report of the meeting" (*ibidem*, paragraph 316).

By approving Decision VI/23, the Chair was complying with Rule 40, paragraph 2, which underlines that "decisions of the Conference of the Parties on matters of

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[2] See: UNEP/CBD/COP/6/20 at www.biodiv.org/doc/meetings/cop/cop-06/official/cop-06-20-en.pdf, especially paragraphs 298-324.

procedure shall be taken by a majority vote of the Parties present and voting". Paragraph 3 of the same Rule also states that "if the question arises whether a matter is one of procedural or substantive nature, the President shall rule on the question." In addition, the Presidency (i.e, the Chair) is also granted the right to announce decisions and is in charge of the complete control of the proceedings, according to Rule 22. All this shows that Decision VI/23 was validly adopted. Moreover, the President respected Australia's views by pointing out (*ibidem*, paragraph 302) that all the opposing countries' views would be reflected in the report as reservations.

On the other hand, Australia's concern (*ibidem*, paragraph 304) that "at some future time, the procedure used might be scrutinized by legal experts and, if it was found to be not legally valid, the decision taken would be null and void" was no longer of relevance after the Under-Secretary-General for Legal Affairs of the U.N. had clearly stated that "the decision on <<Alien species that threatened ecosystem, habitats or species>> may stand as adopted at the sixth meeting". Under-Secretary-General comes to this conclusion by pointing out that the countries opposing the Decision made reservations regarding the procedure, but "not a single delegation contested the fact that the decision had indeed been adopted". Hence, as we have already stated, the Decision is perfectly valid and applicable.

D. Even if the international decision was not obligatory for those States which had formerly expressed some kind of reservation, the Republic of Ocsabat would still be bound by the obligations resulting from the estoppel principle

On 21 May 2002, a diplomatic note was forwarded to the K.o.D. from the Embassy of the D.R.O., in which this country expressed "grave reservations" concerning the Guiding Principles, while at the same time admitting that (sic) "the

D.R.O. did not lodge an objection at that time because it reasonably relied on Australia's objection". By not having lodged an objection while the Decision was adopted, the D.R.O. has tacitly acquiesced to it, due to the international law configuration of "silence" and "estoppel". In words of U.N.'s Special Rapporteur for the Codification of Unilateral Acts, Mr. Rodríguez Cedeño, "silence (…) may produce legal effects by a <<non-existent unilateral act>>, where, for example, faced with a given situation, a State could have issued a protest but refrained from doing so"[3].

It is clear that in the current case, the silence of the D.R.O. meant acquiescence with the Decision, since all those States which desires to make a reservation, expressed their views in these terms, while the D.R.O. did not. As Special Rapporteur Rodriguez Cedeño stresses (*ibidem*) "the enormous number of protests that occur in international practice is, in our view, an important indicator that silence may have significant effects; therefore, each time there is a risk that a given situation with which a State disagrees might become more acute, the affected State or States will protest forcefully". Thus, in this context, the silence of the D.R.O. can only be understood as acquiescence, which in words of J. Salmon ("Les accords non formalises or <<solo consensus>>, A.F.D.I. 1999, vol. 45, p. 15) "is a consent imputed to a State by reason of its conduct, whether active or passive, towards a given situation". As an aftermath, the D.R.O. can raise no future complaint about a Decision to which they tacitly acquiesced . As Carrillo Salcedo expresses ("Funciones del acto unilateral en el régimen jurídico de los espacios marítimos", Estudios de Derecho Internacional Marítimo, Zaragoza, 1963) "it may be said that acquiescence is an admisión or acknowledgement of the legality of a controversial practice, or that it even serves to consolidate an originally illegal practice". As Rodriguez Cedeño, Rodriguez Carrion, Carrillo Salcedo and Pecourt Garcia agree it

[3] Seventh Report on Unilateral Acts of States, by Victor Rodriguez Cedeño, Special Rapporteur. Document at http://ods-dds-ny.un.org/doc/UNDOC/GEN/N04/321/97/PDF/N0432197.pdf?OpenElement.

is necessary that the party whose implicit consent is involved has had knowledge of the facts in question; in other words the facts must be generally known. A state´s attitude regarding a specific situation, to some extent forces it to continue behaving consistently, especially if it creates a certain expectation of good faith in third parties that this activity will adjust to the same parameters in the future.

Carrillo Salcedo (op. cit.) adds that "the State that has admitted or consented cannot raise future objections to the claim, by virtue of the principle of estoppel or <<contrary act>>".

Thus, in this case, the silence of the D.R.O. meant that they acquiesced to Decision VI/23, and this being so, their ulterior doubts about the procedure of adoption of the Decision, expressed only to the K.o.D. and by means of a diplomatic note, can only be considered a way of trying to avoid their obligations.

Many important I.C.J. decisions come to the same conclusion. For instance, in the case of the Temple of Preah Vihear (Judgement of 15/VI/1962), the discussion was whether Thailand, by not having explicitly agreed with the delimitation of its borders with Cambodge established in a series of maps, could try to settle new ones *a posteriori*, as though it was still a non-regulated matter. The decision of the I.C.J. states that "the real question (…) which is the essential one in this case, is whether the Parties did adopt the Annex I map, and the line indicated on it (…) thereby conferring on it a binding character. Thailand denies this so far as she is concerned, representing herself as having adopted a merely passive attitude in what ensued. She maintains also that a course of conduct, involving at most a failure to object, cannot suffice to render her a consenting party (…) The Court sees the matter differently (...) if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so (…) and thereby must be held to have acquiesced. *Qui tacet consentire videtur si loqui debuisset*

ac potuisset. (…)"[4]. The analogy in between this case and the current behaviour of the D.R.O. is very clear and need not be explained. As Pecourt Garcia (PECOURT GARCÍA, E. "El principio del «Estoppel» y la sentencia del Tribunal Internacional de Justicia en el caso del Templo de Preah Vihear". R.E.D.I. 1963) expresses in this context that "the parts cannot go against its own acts, that is, they cannot allege an interpretation of the treaty that contradicts their own behaviour", while Lauterpacht makes the following reasoning: "the absence of protest may, in addition, in itself become a source of legal right inasmuch as it is related to –or forms a constituent element of- estoppel or prescription[5]".

Another well-known case law example is the Judgement of 18/XII/1951, the "Fisheries Case", in which the I.C.J. stated that "the general toleration of foreign States with regard to the Norwegian practice is an unchallenged fact (…) the United Kingdom could not have been ignorant of the Decree of 1869 which had at once provoked a request for explanation by the French Government (…) the Court notes that, in respect of a situation which could only be strengthened with the passage of time, the U.K. Government refrained from formulating observations"[6]. As an aftermath of the preceding, the I.C.J. decision resulted in the support of the Norwegian views, because the U.K. had made no formal complaints about the Norwegian laws before, thereby acquiescing tacitly with them, in the same way that the D.R.O. acquiesced with Decision VI/23, until it became a problem to comply with the obligations that it established.

Lastly, in the recognition of jurisdiction of the I.C.J. concerning the "Military and Paramilitary Activities in and against Nicaragua" (1984), the Court stated that the

[4] I.C.J. Reports, 1962, p. 22-24
[5] LAUTERPACHT, "Soverignty over submarine areas", B.Y.B.I.L. 1950, p. 395.
[6] I.C.J. Reports, 1951, p. 138-139.

silence of the government of a State, when it had been addressed an accusation before the Court, could only be interpreted as an acceptance of its submission to the Court.

II. THE REPUBLIC OF OCSABAT VIOLATES ITS INTERNATIONAL OBLIGATIONS EVEN CONSIDERING DECISION VI/23 INAPPLICABLE.

A. The Democratic Republic of Ocsabat breaches obligations contained in International Treaties.

1. The Convention on Biological Diversity prohibits to damage another State's environment and contains connected obligations.

In addition to the breach of Decision VI/23, as explained in Part I, the D.R.O. hasn't complied with the following international obligations established by the C.B.D. (C.B.D. hereinfater)

Firstly we remark a flagrant breach of the principle which is expressed in article 3 of the CBD. in the following terms: "States have, in accordance with the Charter of the U.N. and the principles of international law (...) the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.". As it is widely known, the prohibition to cause transboundary harm is not only a rule of this Convention, but one of the most established principles of international environmental law.

Secondly, the D.R.O. did not intend to cooperate with the K.o.D. in the way article 5 of the C.B.D requires with regard to the contracting parties, since this text calls on each contracting party to "cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas

beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity". In the light of the facts the D.R.O. did not in any way approach the K.o.D. in order to solve out or even discuss this kind of questions.

Moreover, the K.o.D. critizices its neighbour's lack of preparation with regard to prevention measures. As a consequence the D.R.O. violates the duty which reflects art.8. (h) of the C.B.D declaring that "each Contracting Party shall, as far as possible and as appropriate: (h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species (...)".

As far as the obligation to prepare impact assessment and to minimize adverse effects is concerned, the D.R.O. did not adopt the appropriate procedures that requires article 14 of the C.B.D. Among these obligations it should be highlighted the introduction of appropriate arrangements "to ensure that the environmental consequences of its programmes and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account (...)", a duty that has not been fulfilled by the D.R.O.

Neither did it respect the obligation imposed by the letter (d) of the same article, according to which "in the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage". The D.R.O. did not even inform the K.o.D. of the danger which represented the posible invasion of the nutrias; actually, which is worse, our neighbouring country's report lied when it declared the death of the entire stock of nutria.

2. Ramsar Convention calls for the protection of Wetlands

According to the article 3 of the Ramsar Convention the contracting parties are called to "promote the conservation of the wetlands included in the List". In the case of the Raslobab Marsh its inclusion in the above mentioned list is a generally known fact, and therefore all contracting parties must respect the present principle. The behaviour of the D.R.O. has had the opposite effects of those mandated in article 3. It also violates its duty to address the K.o.D. in order to "coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna."(article 5). Details on the implementation of this principles have been thoroughly developed by different authors, such as Gardner[7].

B. The Democratic Republic of Ocsabat violates general principles that have been shaped into customary norms.

1. The Stockholm Declaration and the Rio de Janerio Declaration establish a series of principles repeatedly violated by The Democratic Republic of Ocsabat: a) Obligations to cooperate and exchange information to protect the environment b) Good faith c) Duty to notify quickly potentially harmful situations d) Pollute-pay principle.

The D.R.O. violates several general principles as portrayed in different international Declarations and Conventions.

First of all, the general obligation of all states to protect the environment which is clearly established, e.g, by article 192 of the U.N. Convention on Law of the Seas (U.N.C.L.O.S. hereinafter) underlining that "States shall take (...) all measures (...) that are necessary to prevent, reduce and control pollution of the marine environment from

[7] GARDNER, R.C. "Rehabilitating Nature: A Comparative Review of Legal Mechanisms That Encourage Wetland Restoration Efforts", 52, Catholic University Law Review, Washington, 2003. P. 573-620.

any source, using for this purpose the best practicable means at their disposal". The D.R.O. has breached this principle clearly, as well as the general obligation to cooperate in the protection of the environment. In this sense, Principle 24 of the Stockholm Declaration of 1972 points out that "international matters concerning the protection (...) of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing". The I.C.J. in Judicial Decision 25th of September 1997 (Gabcikovo-Nagymaros Case) came to a conclusion which reaffirms the idea of the principle of cooperation: "for the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabcíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river".[8] The D.R.O. did not even contact the K.o.D. to report about the risk the nutrias represent to the Raslobab Marsh, what is more, when K.o.D. addressed the government of D.R.O, they explicitly refused to prepare any formal risk analysis whatsoever.

In the same sense, Principle 19 of the Rio Declaration stresses that "States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early age and in good faith." Once more we face the resistance of the D.R.O. with respect to the preparation of "a formal risk analysis", even in spite of the insistence in good faith of the K.o.D, on this point, in several diplomatic notes. The D.R.O.'s. behaviour displays bad faith, that is to say an absolute lack of good faith which according to Principle 19 of the Rio Declaration has

[8] I.C.J. Reports, 1997. P. 78, paragraph 140.

to preside the relations of neighbouring countries. Also, Resolution 2995 (XXVII)[9] of the General Assembly is about the cooperation between States in the field of the environmental issues; in it, the General Assembly "recognizes that (...) cooperation towards the inplementation of Principles 21 and 22 of the Declaration of the U.N. Conference on the Human Environment, will be effectively achieved if official and public knowledge is provided of the technical data relating to the work to be carried out by States within their national jurisdiction, with a view to avoiding significant harm that may occur in the environment of the adjacent area".

In the third place a possible violation of the the obligation to notify rapidly and to assist other states in situations which are likely to provoke a serious danger has to be mentioned. Principle 18 of the Rio Declaration establishes that "States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted." When the D.R.O. communicates to the K.o.D. that according to the initial reports from the nutria farms "the tropical cyclone apparently has resulted in the death of entire stock of nutria", it acts in a negligent manner, as it silences the fact, later proved, that the majority of the nutrias survived the cyclone and emigrated to the Raslobab Marsh where they caused significant harm. Bad faith could also be spotted in the response to the diplomatic note sent by the K.o.D, by which the D.R.O. disclaimed "any legal and financial responsibility for the K.o.D.´s nutria eradication program, the environmental impact study, and the rehabilitation efforts in Raslobab Marsh". This refusal of any help clearly breaches Principle 18 quoted above.

[9] Web access from the un.org website at: http://ods-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/270/25/IMG/NR027025.pdf?OpenElement

Moreover, the principle of reparation of the environmental harm ("polluter-pays priniciple") is described in Principle 13 of the Rio Declaration: "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction". Thus, the D.R.O. must bear the cost of the eradication and rehabilitation program. In fact point 16 of the Rio Declaration reinforces that "National authorities should endeavour to promote the internalization of environmental costs(...), taking into account the approach that the polluter should, in principle, bear the cost of pollution".

According with Smets[10] the polluter pays principle has become a completely global and applicable principle; it may include the costs which the reparation of certain accidental contamination implies, as well as indemnizations and other punitive measures which derive from the comission of illicit acts that violate contamination norms.

2. The Democratic Republic of Ocsabat has violated the general prohibition of transboundary damages

Furthermore, the obligation to prevent transboundary environmental damage is reflected in Principle 21 of the Stockholm Declaration de 1972, affirming that "States have (...) the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". The present principle is based on the idea of the due diligence, the equitative use of the natural resources and the good faith. Definitely, it is a mirror of the

[10] SMETS, H. "Le principe polleur payeur, un principe économique erigé en principe de Droit de l'Environnément". R.G.D.I.P. 1993, p. 349-354.

basic rule of good neighbourliness. In accordance to Resolution 2995(XXVII)[11] the General Assambly "emphasizes that, in the exploration, exploitation and development of their natural resources, States must not produce significant harmful effects in zones situated outside their national jurisdiction" (paragraph 1), and in addition "further recognizes that the technical data referred to in paragraph 2 above will be given and received in the best spirit of cooperation and good neighbourliness".

Important authors' doctrine has also shaped the content of the principles above. Thus, Lakshman Guruswamy declares in "International Environmental Law"[12] that "the obligation prohibiting transboundary harm is perhaps the most established of customary international law obligations and creates an obligation of effect-or a rule- premised on the broader principle of *sic utere tuo ut alienum non laedus (*use your own property in such a manner as not to injure that of another)." The text goes on saying that this principle "has been supported by the practice and opinio iuris of states".

Kiss, on the other hand[13], affirms that Principle 21 of the Stockholm Declaration is a rule of international customary law which can be considered the general fundament of the prohibition of transboundary contamination. In the same manner, the I.C.J. pointed out recently that "the existence of the states' general obligation to ensure that the activities within its jurisdiction or control respect the environment of other states or areas beyond the national control now have become part of of the international environmental law corpus" (while talking about the Legality of Nuclear Weapons[14]).

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[11] Op. Cit. Vid. Spr.
[12] GURUSWAMY, L.D. & HENDRICKS, B.R. "International Environmental Law in a Nutshell". West Publishing Co. St. Paul, Minnesota. 1997. P. 29-30.

[13] KISS, A. & SHELTON, D. "International Environmental Law". Transnational Publishers. New York. 1991. P. 347-375.
[14] Taken from DIEZ DE VELASCO, M. "Instituciones de Derecho Internacional Público". Ed. Tecnos. Madrid. 2001. P. 644.

Article 194.2 U.N.C.L.O.S. is a mirror of the above mentioned principle, underlining that “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights”.

The Trail Smelter Arbitration has become the *locus classicus* in this field. In this case the state responsibility for injury issuing from another State’s territory was proved in a definite manner. The tribunal underlined the prohibition to cause transboundary damage by stating that “under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence”[15]. As a consequence the Dominion of Canada was found responsible for the damages whose cause had been originated in its territory.

Another significant judicial decision is the one adopted by the I.C.J. in the Corfu Channel Case[16]. The question examined was if the minefield had been laid with the connivance of the Albanian government or not, coming to the conclusion that in this case the mere connivance implied international responsibility. Albanian´s obligation consisted in notifying the existence of a minefield in Albanian territorial waters, a duty based on one of the general principles of international law already mentioned: every State´s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

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[15] McNAIR & LAUTERPACHT. “Annual Digest of International Law Cases”. 1937-1938. P. 268-269.
[16] I.C.J. Reports, 1949. P. 18-22

The same conclusion as to the force of these principles arises from the study of the case between Australia and France over the French Nuclear Tests in the Pacific[17], or the consequence brought about in the dispute between Canada and the U.S.S.R. called "Cosmos 954"[18].

III. BREACH OF THE INTERNATIONAL OBLIGATIONS DESCRIBED ABOVE MAKE THE DEMOCRATIC REPUBLIC OF OCSABAT INTERNATIONALLY RESPONSIBLE FOR WRONGFUL ACTS.

A. The Democratic Republic of Ocsabat has deliberately committed an illicit omission.

A state incurs in responsibility by commiting a wrongful act each time it breaches an international obligation. In accordance to Lakshman Guruswamy[19] it is evident for this reason "that all obligations contained in treaties as well as in customary law have the potential to give rise to state responsibility".

According to article 2 of the draft articles on state responsibility for international wrongful acts (adopted by the I.L.C, 2001) an international wrongful act of a state consists of an action or omision which is "attributable to the state under international law" which in addition "constitutes a breach of an international obligation of a State".

Generally, the doctrine enumerates as elements of an international wrongful act: a) Existence of a conduct (action or omision) which is relevant in the area of international law, and the fact that by adopting this conduct the state violates an obligation established by an applicable rule of international law, as well as b) The possibility to attribute this conduct to a subject of international law, and moreover the

[17] I.C.J. Reports 1974. P. 27.
[18] GALLOWAY, C.F. "Nuclear-powered satellites: the U.S.S.R. Cosmos 1954 and the Canadian Claim", 12 A.L.R, 1979. P. 401-413.
[19] GURUSWAMY, L.D. & HENDRICKS, B.R. "International Environmental Law in a Nutshell". West Publishing Co. St. Paul, Minnesota. 1997. P. 60.

circumstance that the harm has been produced as a consequence of the action or omision contrary to the obligation[20].

Consequently, the K.o.D. denounces the omission committed by the D.R.O. which did not fulfil its international obligations with regard to the guidelines and principles above mentioned. The judicial decision adopted by the I.C.J. in the Corfu Channel Case[21] clearly supports our argument, as in this case the omision commited by the Albanian government consisted in not notifying the existence of the minefield.

With respect to the culpability Rodríguez Carrión underlines that the crucial point is not the psicological attitude of the individuals which act as state organs, but the objective conduct of the State *per se*[22].

The objective element is represented by the violation of an international obligation. This obligation can be of conventional or of customary nature. As expressed in article 12 in the draft articles of the I.L.C. project on responsibility, a violation exists "when an act of a State is not in conformity with what is required of it by its obligation regardless of its origin or character". In a nutshell, and quoting the words of Ago we assist to a breach whenever there is a contrast between the real behaviour and the one that law-abidingly should have been adopted[23].

Regarding the attribution of the wrongful act to a State, it has to be performed by organs of the state in question. In a lot of similar cases this is a point largely discussed, but in the present case the attribution of the wrongful act to the government of Ocsabat is clear and definite.

[20] JIMÉNEZ DE ARÉCHAGA, "El derecho internacional contemporáneo". Montevideo. 1980. P. 97-99.
[21] Op.Cit.Vid.Supr.
[22] RODRIGUEZ CARRIÓN, "Lecciones de Derecho Internacional Público". Ed. Tecnos. Madrid. 2002. P. 322-324.
[23] AGO, R. "Scritti sulla responsabilità internazionale degli stati". Ed. Jovene. Naples. 1978. P. 106.

B. As an aftermath of this illicit omission The Democratic Republic of Ocsabat must paid off the damage caused to The Kingdom of DeLand.

The harm produced to the affected state consists in the inmediate injury of its right or interests. In accordance to article 31 of the project of articles of the I.L.C. the State has to make “full reparation”, stressing that “the injury includes any damage, whether material o moral, caused by the internationally wrongful act of a State”.

In the Case concerning the factory at Chorzów[24] the judges considered an essential principle the fact that the reparation “must, as far as posible, wipe out all the consequences of the illegal act and reestablish the situation which would have existed if that act had not been committed”. The amount of the compensation, according to the decision, will be constituted by “restitution in kind, or, if not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered restitution in kind or payment in place of it (...)”.

IV. EVEN IF ALL THE ARGUMENTS ABOVE WERE DISMISSED THE DEMOCRATIC REPUBLIC OF OCSABAT WOULD STILL BE RESPONSIBLE FOR THE TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES.

States responsibility for environmental harm produced by acts not prohibited by international law is a largely discussed issue which the I.L.C. is still analysing. According to Goldie “the Trail Smelter, Corfu Channel and Lac Lanoux cases clearly point to the emergence of strict liability as a principle of public international law”[25].

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[24] McNAIR & LAUTERPACHT. “Annual Digest of International Law Cases”. 1928. P. 271-272.
[25] GOLDIE, L.F.E. “Liability for Damage and the Progressive Development of International Law” 9 C.J.T.L. , 1970. P. 306.

In this sense international law establishes a mecanism of obligatory reparation meant to restrict the states liberty in this field. Goldie argues that “if they may not be prohibited, their potentiality for harm can be reduced by the imposition of either strict liability or absolute liability”. As an example of diplomatic practice we cite the *Lucky Dragon* incident where the judges considered that the payment of the United States to Japan “reflects the United State´s concern and sense of moral obligation, despite the lack of proven fault on its part”[26]. It goes on declaring that “its concern reflects a basic sentiment of justice and stands as an important signpost in the legal evaluations of the liability to be adscribed to developing scientific activities, particularly with placed in perspective with the Trail Smelter, Corfu Channel and Lac Lanoux cases”.

[26] NANDA, V. “Settlement of Japanese Claims for Personal and Properties Damage resulting from nuclear tests in the Marshall Islands” 3160, R.E.D.I., 1975. P. 45 onwards.

CONCLUSION AND PRAYER FOR RELIEF

In consideration of the aforementioned, the Kingdom of DeLand respectfully requests this honorable Court to:

1. declare that Decision VI/23 and the Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species may stand as adopted in the 6th Meeting of the Conference of the Parties to the Convention on Biological Diversity, and to
2. declare that the Democratic Republic of Ocsabat is responsible under international law for damage caused by nutria, an alien invasive species, in the Raslobab Marsh.

Respectfully submitted,

Agents for the Kingdom of DeLand