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IN THE INTERNATIONAL COURT OF JUSTICE

**KINGDOM OF DELAND,**  
Applicant

v.

**THE DEMOCRATIC REPUBLIC OF OCSABAT,**  
Respondent

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CASE CONCERNING ALIEN INVASIVE SPECIES

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## **STATEMENT OF JURISDICTION**

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The Kingdom of DeLand (DeLand) and the Democratic Republic of Ocsabat (Ocsabat) are both parties to the Statute of the International Court of Justice (Statute of the ICJ) (R. 6). On May 11, 2004, pursuant to Article 40(1) of the Statute of the ICJ, DeLand and Ocsabat notified the Registrar by submitting a special agreement of their present dispute concerning alien invasive species. Accordingly, under Article 36(1) of the Statute of the ICJ this court has jurisdiction to adjudicate this matter. Both DeLand and Ocsabat accept the Judgment of the ICJ as final and binding upon them and shall execute the Judgment in its entirety and in good faith (R. 4).

## **QUESTIONS PRESENTED**

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- I. WHETHER OCSABAT'S IMPORTATION OF NUTRIA WAS IN ACCORDANCE WITH INTERNATIONAL ENVIRONMENTAL PRINCIPLES
  
- II. WHETHER OCSABAT'S ACTIONS VIOLATED INTERNATIONAL OBLIGATIONS UNDER THE CONVENTION OF BIOLOGICAL DIVERSITY AND THE RAMSAR CONVENTION ON WETLANDS.
  
- III. WHETHER OCSABAT IS RESPONSIBLE UNDER INTERNATIONAL LAW FOR DAMAGES TO THE RASLOBAB MARSH CAUSED BY THE ESCAPED NUTRIA.

## **STATEMENT OF FACTS**

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The Democratic Republic of Ocsabat (Ocsabat) is a developing country (R. 6). Ocsabat's eastern coastline borders the Gulf of Raslobab and shares its southern border with the Kingdom of DeLand (DeLand) (R. 6). DeLand is a developed country, with a diversified economy (R. 6). DeLand's eastern coastline also borders the Gulf of Raslobab (R. 6). In addition, the Raslobab Marsh is located in a remote northern portion of DeLand, immediately south of the border shared with Ocsabat (R. 7). Raslobab Marsh is adjacent to the Gulf of Raslobab (R. 7).

Both Ocsabat and DeLand are parties to the Vienna Convention on the Law of Treaties and are also contracting parties to the Convention on Biological Diversity and the Ramsar Convention on Wetlands (R. 6). Representatives from both countries attended and participated in the 1972 United Nations Conference on the Human Environment at Stockholm, the 1992 United Nations Conference on Environment and Development at Rio de Janeiro, and the 2002 World Summit on Sustainable Development at Johannesburg (R. 6).

Ocsabat's constitution includes a provision, which states that general rules of public international law take precedence over national, regional, and local law (R. 6). Article 38 (1) of the Statute of ICJ defines general rules of public international law as including international conventions, international customs, the general principles of law recognized by civilized nations, and the judicial decisions and teachings of the most highly qualified publicists of the various nations (R. 6).

In March 2002, Ocsabat announced its intention to diversify its struggling economy (R. 7). Ocsabat's economic plan included farm-raising nutria for pelts and feed (R. 7). On March 21, 2002, Ocsabat permitted the importation of nutria (R. 7). Several farmers from DeLand contracted with nutria farmers in Ocsabat for the purchase of nutria meat for feed (R. 7).

On May 1, 2002, DeLand sent a diplomatic note to Ocsabat requesting consultation concerning Ocsabat's importation of nutria in light of the adoption of Decision VI/23 on April 19, 2002 by the Conference of the Parties (COP) to the Convention on Biological Diversity (CBD) (R. 8). The annex to Decision VI /23 contains the Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species that Threaten Ecosystems, Habitats or Species (Guiding Principles) (R. 8).

On May 21, 2002, Ocsabat sent a diplomatic note to DeLand disputing the purported adoption of Decision VI/23 by consensus because Australia formally objected to the adoption (R. 9). Ocsabat further informed DeLand that the nutria are maintained in secure enclosures and that government inspections of the enclosures are performed monthly (R. 9).

On June 21, 2002 DeLand responded to Ocsabat's diplomatic note. DeLand informed Ocsabat that the legal opinion by the United Nations Under-Secretary-General for Legal Affairs (Under-Secretary-General) stated that Decision VI/23 "may stand as adopted" despite the lack of consensus among the parties (R. 9 and 13). DeLand also expressed concern over Ocsabat's nutria farms (R. 9). DeLand implied that Ocsabat's actions might be a violation of international obligations and cited articles it deemed applicable from the Ramsar Convention and the CBD (R. 9 and 10).

On June 28, 2002, Ocsabat responded to DeLand's diplomatic note (R. 10). Ocsabat declared that it could not accept the legal opinion issued by the Under-Secretary-General for several reasons (R. 10). First, Ocsabat incorporates international law into its domestic law (R. 10). This imposition of international law upon Ocsabat results in significant domestic ramification (R. 10). Second, it is critically important that the procedures governing the adoption of international rules be transparent and consistent (R. 10). Finally, imposing rules despite

formal state objection would be an affront to sovereignty (R. 10). In addition, Ocsabat responded to DeLand's implication of international violation by pointing to the modifying language "as far as possible and as appropriate," contained in the CBD (R. 10).

In November 2002, the Eighth Meeting of the Conference of the Contracting Parties to the Ramsar Convention on Wetlands (Ramsar) was held. The contracting parties debated at length over the adoption of Resolution 18, "Invasive Species and Wetlands" (R. 11). Ultimately, Resolution 18 was adopted over Australia's formal objection.

On December 4, 2002, a tropical cyclone struck the eastern coastline of Ocsabat (R.11). On December 5, 2002, DeLand inquired Ocsabat about the fate of the nutria (R. 11). Ocsabat responded by informing DeLand that its recovery efforts were currently focused on human related casualties and that initial reports from the nutria farms indicated that all the nutria were killed (R. 11). In January 2003, it was confirmed that some nutria had survived the tropical cyclone and had migrated to Raslobab Marsh (R. 11).

In January 2004, DeLand requested that Ocsabat admit responsibility for the costs associated with the nutria eradication program, environmental impact study, and Raslobab Marsh rehabilitation efforts, incurred by DeLand (R. 12). In response, Ocsabat denied any legal and financial responsibility for the damage caused by the escaped nutria (R. 12). On May 11, 2004, Ocsabat and DeLand signed an agreement that submitted the dispute to the International Court of Justice (R. 12).

## **SUMMARY OF ARGUMENT**

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Ocsabat, a developing country, acted according to international environmental principles when it imported nutria into its country to improve its struggling economy. According to international environmental principles derived from the Rio and Stockholm conferences, developing countries owe a duty to protect the environment but their duty is different from those of developed countries. Although all countries have a duty to protect the environment, this duty is reduced for developing nations because, due to a lack of resources, their priority must be focused on providing basic needs to its citizens. By addressing its domestic economy, developing countries increase their ability to protect the environment in the future. Thus, the importation of nutria by Ocsabat does not violate international environmental principles.

Ocsabat acted in compliance with Articles 3 and 8 of the CBD and thus, is not responsible for damage caused by the escaped nutria. The language “as far as possible and appropriate”, found in Article 8 modifies the provisions to allow for special consideration of developing countries such as Ocsabat. The terms of Article 3 are similarly modified by the preamble to CBD, which encourages special consideration for Ocsabat due to its status as a developing nation. Under these special considerations, Ocsabat under took appropriate actions regarding the containment of nutria and fulfilled its obligations under CBD.

Decision VI/23 and the Guiding Principles have no legal status. First and foremost, the guiding principles were not properly adopted. Australia, Argentina, Canada, and Spain formally objected to these Guiding Principles, thereby blocking the consensus necessary for a proper adoption. Even if these Guiding Principles are considered properly adopted, they are non-binding. The introduction of the Guiding Principles explicitly states that the 15 principles are non-binding. If the Guiding Principles are considered to be properly adopted and binding, they

should not be applied retroactively to Ocsabat as a general principle of law. Ocsabat imported the nutria on March 21, 2002 and the Guiding Principles were not arguably adopted until April 2002. Additionally, principles of fair notice and due process should prevent the Guiding Principles from being applied to Ocsabat.

Ocsabat acted in compliance with Articles 3 and 5 of Ramsar and thus, is not responsible for damage caused by the escaped nutria. As in the CBD, Ramsar also allows special considerations for developing countries such as Ocsabat in its language and preamble. Because of these special considerations, Ocsabat was able to import nutria without violating its international obligations. Thus, by providing appropriate enclosures for the nutria and by performing monthly government inspections Ocsabat complied with obligations under Ramsar as it did under CBD.

Ocsabat has not violated Resolution 18, “Invasive Species and Wetlands,” of the Eighth Meeting of the Conference of the Contracting Parties to Ramsar. Resolution 18 encourages contracting parties to keep invasive species from damaging wetlands, but does not set out requirement or establish liability. Regardless, Ocsabat took precautions to secure the nutria and has not violated Resolution 18 of Ramsar.

Neither the Guiding Principles nor Resolution 18 should be considered customary international law (CIL) due to the insufficient passage of time that is required to establish CIL. No evidence exists that a majority of states have accepted these rules and have consistently followed them. Furthermore, Ocsabat has consistently opposed both the Guiding Principles and Resolution 18 since its inception.

Ocsabat is not responsible for damage caused by the escaped nutria due to public policy reasons, including economic growth and environmental protection. International environmental

agreements such as the CBD and Ramsar should not be interpreted to impose unreachable standards on developing nations. If such standards are imposed, developing countries will be unwilling to participate in international environmental treaties for fear their citizens' basic economic needs will be ignored. Furthermore, economic growth is necessary for the improvement of a nation's ability to protect the environment. Thus, Ocsabat acted responsibly in its attempt to improve its economic situation under international environmental agreements.

## ARGUMENT

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### **I. THE DEMOCRATIC REPUBLIC OF OCSABAT HAS ACTED ACCORDING TO INTERNATIONAL ENVIRONMENTAL PRINCIPLES.**

As in most environmental disputes, the economic status of developing nations alters the interpretation of international law and the obligations that international law establishes.

“International environmental law involves more than just the global environment. It also concerns economic development and invokes the geopolitics of global wealth distribution.”<sup>1</sup> The special consideration of developing countries is a principle that is emphasized in several multilateral international documents.

Both parties, The Kingdom of DeLand (DeLand) and the Republic of Ocsabat (Ocsabat), attended and fully participated in the 1972 United Nations Conference on the Human Environment at Stockholm, the 1992 United Nations Conference on Environment and Development at Rio de Janeiro, and the 2002 World Summit on Sustainable Development at Johannesburg. (R. 6). The participating nations adopted sets of principles to follow regarding activities that affect the environment. In this case, Ocsabat’s attempt to improve their economy by farming nutria was in accordance with such international environmental principles.

In the Rio Declaration on Environment and Development (Rio), Principle 3 acknowledges a nation’s “right to development”.<sup>2</sup> Principle 5 expands on this idea and states that the eradication of poverty is an “essential task” that is “an indispensable requirement for sustainable development”.<sup>3</sup> Principle 6 allows special treatment of developing nations and states that “The special situation and needs of developing countries, particularly the least

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<sup>1</sup> Mark A. Drumbl, *Northern Economic Obligation, Southern Moral Entitlement and International Environmental Governance*, 27 Colum. J. Envtl. L. 363, 363 (2002).

<sup>2</sup> Rio Declaration on Environment and Development, June 13, 1992, Principle 3, 31 I.L.M. 814.

<sup>3</sup> See *supra* Principle 5.

developed...shall be given special priority.”<sup>4</sup> Furthermore, Principle 7 articulates the concept of the “common but differentiated responsibilities” of states.<sup>5</sup>

Rio Principle 13 encourages a liability scheme for environmental damage. Nevertheless “for demonstrating a state responsibility claim: (i) the environmental damage must result from a violation of international law...(ii) a state is responsible both for its own activities and for activities of private corporations or individuals under its jurisdiction or control...(iii) there must be no justifying circumstances, such as consent by the affected state or an intervening cause, such as an act of God, (iv) the damage must be ‘significant’...”<sup>6</sup> As is detailed in this brief, Ocsabat has not violated any international law. Furthermore, the release of the nutria into Raslobab Marsh was a direct consequence of a tropical cyclone (an act of God).

The Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm) expresses themes similar to the Rio Declaration, for example that “the developing countries must direct their efforts to development, bearing in mind their priorities...”<sup>7</sup> Stockholm also states in Principle 11 that “The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries...”<sup>8</sup> Principle 23 adds that “it will be essential in all cases to consider...the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.”<sup>9</sup>

The message of these principles is clear, developing nations owe a duty to protect the environment, but the obligations of developing nations are much different than those of

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<sup>4</sup> See *supra* Principle 6.

<sup>5</sup> See *supra* Principle 7.

<sup>6</sup> David Hunter et al., *CIEL/UNEP, Concepts and Principles of International Environmental Law: An Introduction*, (1993) page 30.

<sup>7</sup> Stockholm Declaration of the United Nations Conference on the Human Environment, June 16, 1972, 21 UST 1749, 34 I.L.M. 847.

<sup>8</sup> See *supra* Principle 11.

developed countries. Special allowances are afforded to developing nations such as Ocsabat because the concern for long term environmental issues tends to be the priority of the “northern,” developed countries while developing nations such as Ocsabat are preoccupied with immediate domestic concerns such as food, water, and health. Ocsabat therefore submits that the efforts to boost their impoverished economy have been in accordance with international environmental principles.

## **II. OCSABAT IS NOT RESPONSIBLE FOR DAMAGE CAUSED BY THE ESCAPED NUTRIA UNDER THE CONVENTION ON BIOLOGICAL DIVERSITY (CBD).**

### **A. OCSABAT IS IN COMPLIANCE WITH ARTICLE 8 OF THE CBD.**

Article 8 of the CBD states that parties “shall, *as far as possible and appropriate*:... (h) Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species”.<sup>10</sup> It is clear that the language “as far as possible and appropriate” is intended to allow for special consideration of developing nations such as Ocsabat. Evidence of this can be found in the Preamble section of the CBD, which emphasizes the special conditions of the least developed countries and states specifically that “economic and social development and poverty eradication are the first and overriding priorities of developing countries”.<sup>11</sup> Using the preamble section to interpret the terms of a treaty provision is in accordance with the Vienna Convention on the Law of Treaties (Vienna Convention). The Vienna Convention states in Article 31(1) that “[a] treaty shall be interpreted...in accordance with the ordinary meaning to be given to the terms of the treaty in their context,” and in Article 31(2) that “[t]he context ...shall comprise...the text, *including its preamble*”.<sup>12</sup> The language in the Preamble, as well as the

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<sup>9</sup> See *supra* Principle 23.

<sup>10</sup> Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 842, Article 8(h).

<sup>11</sup> See *supra* Preamble.

<sup>12</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Article 31.

terms “as far as possible and appropriate” echo many of the themes found in the Rio Principles and other international documents that encourage special allowances for developing nations.

The nation of Ocsabat submits that it complied fully with Article 8 of the CBD because it undertook appropriate actions regarding the containment of the nutria and that it was not possible to take further action. Ocsabat took appropriate care to minimize the risk of the nutria farms by maintaining the animals in secure enclosures and also by implementing monthly government inspections of the farms. (R. 9). Also, it was not possible for Ocsabat to take further action because Ocsabat, as a developing nation, suffers from a lack of resources.

#### **B. OCSABAT IS IN COMPLIANCE WITH ARTICLE 3 OF THE CBD.**

Article 3 of the CBD grants that each state has “the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states...”.<sup>13</sup> However, Ocsabat’s status as a developing nation alters its obligations under the CBD because the CBD itself grants different rights and responsibilities to developing states than those granted to developed states.

The preamble, which is used for interpretation of the CBD, clearly stresses that economic growth and the elimination of poverty are the priorities of developing countries.<sup>14</sup> The CBD repeats the theme of altered obligations of developing states throughout the text. For example, Article 20(5) states that “[t]he Parties shall take full account of the specific needs and special situation of least developed countries in their actions with regard to funding and transfer of technology” and Article 20(4) recognizes that “the extent to which developing country Parties will effectively implement their commitments under this Convention will...take fully into

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<sup>13</sup> Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 842, Article 3.

<sup>14</sup> See *supra* Preamble.

account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties”.<sup>15</sup> In this case, Ocsabat cannot apply the same environmental practices of developing countries without threatening the economic well-being of its people.

Furthermore, “the duty to prevent harm may not be absolute, but requires at least that States diligently and in good faith make all reasonable efforts to avoid environmental damage.”<sup>16</sup> Ocsabat never purposely inflicted harm upon DeLand’s environment and, in fact, exhibited responsibility by keeping the nutria in secure enclosures and by instituting monthly government inspections. (R. 9). In importing the nutria, Ocsabat was merely trying to generate badly needed economic development for its people, and was not derogating from its responsibilities under the CBD.

C. DECISION VI/23 AND THE GUIDING PRINCIPLES FOR THE PREVENTION, INTRODUCTION, AND MITIGATION OF IMPACTS OF ALIEN SPECIES THAT THREATEN ECOSYSTEMS, HABITATS, OR SPECIES (GUIDING PRINCIPLES) OF THE SIXTH MEETING OF THE CONFERENCE OF THE PARTIES TO THE CBD, HAVE NO LEGAL STATUS.

1. THE GUIDING PRINCIPLES WERE NOT PROPERLY ADOPTED.

Proper procedure was not followed during the adoption process for the Guiding Principles. At the Sixth Meeting of the Conference of the Parties to the CBD, Australia, Argentina, Canada, and Spain formally objected to the adoption of the Guiding Principles, thereby blocking consensus. (R. 9). Ocsabat, which had similar disputes regarding the Guiding Principles as Australia, reasonably relied on Australia’s objection to prevent the adoption of the Guiding Principles because even one nations’ objection prevents a consensus from being reached. Ocsabat cannot accept the opinion of the United Nations Under-Secretary-General for

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<sup>15</sup> See *supra* Article 20(4) and 20(5).

Legal Affairs that the Guiding Principles stand as adopted. (R. 10). In the very same opinion, the Under-Secretary-General admits that a consensus is an agreement in the absence of any formal objection. (R. 13) The opinion further admits that “where there is formal objection, there is no consensus”. (R. 13). This is an unambiguous definition. Australia formally objected, therefore no consensus existed. In addition, the opinion also states that “the Chairman should not have proceeded to declare the decision adopted by consensus,” and that by doing so, “he clearly acted contrary to the established practice”. (R. 14). Because it is established practice to adopt the decisions of multilateral agreements by consensus, Ocsabat submits that it has become customary international law to adopt decisions by consensus in the proper manner, without formal objection. It is a breach of this custom to adopt a decision by consensus when a state has clearly and formally objected to the adoption.

There are also several policy reasons why the adoption of the Guiding Principles without consensus should not be recognized. The fundamental principle of sovereignty holds that sovereign nations should not be bound by international agreements unless they consent to them. This principle is of critical importance for many reasons. Some nations, such as Ocsabat, adopt international law as part of their domestic law. For a state to have its domestic law determined by the agreements of other nations without that states consent is in contradiction with the fundamental principle of sovereignty upon which all international law is based. Adopting international instruments without proper consensus procedure is a dangerous precedent and has especially dire implications for Ocsabat.

Furthermore, it is in the interest of all nations to have a predictable and transparent process for international lawmaking. The legitimacy of international law depends upon the

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<sup>16</sup> David Hunter et al., *CIEL/UNEP, Concepts and Principles of International Environmental Law: An Introduction* (1993) page 23.

integrity of its processes. If this tribunal allows the changing of the meaning of consensus and the altering of adoption procedures in mid-stream to stand, it brings into question the very legitimacy of international law. Fair notice and due process are general principles of international law. “If international law is to be accepted as a system of law...it must incorporate those procedural and administrative rules which are inherent in the concept of every legal system”.<sup>17</sup> Clearly, policy dictates that the Guiding Principles, which a sovereign nation formally objected to, should not be held to have been adopted by consensus.

## 2. IF THE GUIDING PRINCIPLES ARE CONSIDERED ADOPTED, THEY ARE NON-BINDING.

Despite Ocsabat’s firm belief that the Guiding Principles were not properly adopted, if the tribunal finds that they stand as adopted, the Guiding Principles are explicitly non-binding. The meaning of the term “Guiding Principles” itself clearly indicates that the principles are aspirational in nature, and that they are not strict rules. Liability for destruction caused by alien invasive species has never been considered under the CBD and the Guiding Principles.<sup>18</sup>

The Guiding Principles are prefaced by an introduction section. In this introduction, it is clearly stated that “each country faces unique challenges and will need to develop context-specific solutions”, that the Guiding Principles give governments “a set of goals to aim toward”, and also that “the extent to which these Guiding Principles can be implemented ultimately depends on available resources”.<sup>19</sup> This language is hardly binding and clearly makes allowances for developing nations such as Ocsabat. Furthermore, the introduction explicitly

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<sup>17</sup> Ian Brownlie, *Principles of Public International Law*, (6th ed 2003).

<sup>18</sup> Lyle Glowka, *Bioprospecting, Alien Invasive Species, and Hydrothermal Vents: Three Emerging Legal Issues in the Conservation and Sustainable Use of Biodiversity*, 13 *Tul. Env'tl. L.J.* 329, 329 (2000).

<sup>19</sup> *Alien Species that Threaten Ecosystems, Habitats, or Species*, Conference Report of Convention on Biological Diversity COP, Decision VI/23, Annex, (2002).

states that “these 15 principles are non-binding”.<sup>20</sup> Therefore, Ocsabat cannot be held in any way responsible for noncompliance with the Guiding Principles.

**3. IF THE GUIDING PRINCIPLES ARE CONSIDERED ADOPTED AND BINDING, THEY MAY NOT BE APPLIED RETROACTIVELY.**

That laws may not be applied retroactively is a general principle of law. As mentioned regarding the procedural problems with the adoption of the Guiding Principles, concepts of fair notice and due process are of the utmost importance for any legal system, including international law.<sup>21</sup> With these ideas in mind, it would be unfair and inappropriate to hold Ocsabat liable for damage caused by the nutria pursuant to the Guiding Principles. In March 2002, Ocsabat announced its intention to improve its struggling economy by importing and farming nutria. (R. 7). Ocsabat imported the nutria on March 21, 2002. (R. 7). The Guiding Principles were arguably adopted at The Conference of the Parties to the CBD in April 2002, after Ocsabat had already commenced its nutria-farming program. Therefore, Ocsabat submits that the Guiding Principles, although they were improperly adopted and are non-binding, should not be applied retroactively to the nutria situation.

**III. OCSABAT IS NOT RESPONSIBLE FOR DAMAGE CAUSED BY THE ESCAPED NUTRIA UNDER THE RAMSAR CONVENTION ON WETLANDS (RAMSAR).**

**A. OCSABAT HAS NOT VIOLATED ARTICLES 3 AND 5 OF RAMSAR.**

Article 3 of Ramsar states that contracting parties, “shall formulate and implement their planning so as to promote the conservation of the wetlands included in the List [List of Wetlands of International Importance], and as far as possible the wise use of wetlands in their territory.”<sup>22</sup> Ocsabat is in compliance with Article 3 in that the implementation of importing nutria to bolster

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<sup>20</sup> See *supra* Annex.

<sup>21</sup> Ian Brownlie, *Principles of Public International Law*, (6th ed 2003).

its economy was done with minimal risk to the Raslobab Marsh. The nutria were maintained in secure enclosures and subjected to monthly government inspections. (R. 9). Ocsabat is able to promote the conservation of wetlands all the while improving their struggling economy. Further, the latter part of Article 3 is not applicable to Ocsabat because the Raslobab Marsh is not located within the Ocsabat territory. (R. 7).

Ocsabat is also in compliance with Article 5 of Ramsar which states that

contracting parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavor to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna.<sup>23</sup>

The Raslobab Marsh does not extend over into the territory of Ocsabat. (R. 7). In addition, there is no evidence that Ocsabat and DeLand share this water system. Due to these factors alone, Ocsabat cannot be in violation of Article 5. Ocsabat does “support present and future policies...concerning the conservation of wetlands...,” but this must be weighed against the importance of increasing a developing country’s dragging economy.<sup>24</sup>

**B. OCSABAT HAS NOT VIOLATED RESOLUTION 18, “INVASIVE SPECIES AND WETLANDS,” OF THE EIGHTH MEETING OF THE CONFERENCE OF THE CONTRACTING PARTIES TO RAMSAR.**

Resolution 18 of the Eighth Meeting of the Conference of the Contracting Parties to Ramsar was adopted in November 2002. Australia, in regards to Resolution 18, provided a statement reiterating their formal objection to the Guiding Principles of the CBD.<sup>25</sup> The objective of Resolution 18 of Ramsar was to further the same ideals and concepts as the Guiding

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<sup>22</sup> Ramsar Convention on Wetlands, February 2, 1971, 11 I.L.M. 963, Article 3.

<sup>23</sup> See *supra* Article 5.

<sup>24</sup> See *supra* Article 5.

<sup>25</sup> *Wetlands: Water, Life, and Culture*, Conference Report of Ramsar COP, 8<sup>th</sup> Meeting, Agenda Item 18, (1971), Paragraph 91.

Principles; therefore, Australia objected for the same reasons.<sup>26</sup> Australia “would not have been agreeable to a direct reference in the Resolution to the adoption by the CBD of Guiding Principles...as had been proposed by some Contracting Parties,” but they were “able to support the revised Draft Resolution” because these references were removed.<sup>27</sup>

Ocsabat has not violated the requirements set out in Resolution 18. The Resolution makes statements recognizing current situations regarding invasive species and “urges” contracting parties to take appropriate action in order to decrease the risk an invasive species poses to wetlands.<sup>28</sup> There are never any requirements set out mandating contracting parties to take certain actions. As established by Article 31 of the Vienna Convention, treaty terms should be interpreted in accordance to its ordinary meaning.<sup>29</sup> The “ordinary meaning” of the term “urges” does not mean shall. Resolution 18 was meant to encourage contracting parties to keep invasive species from damaging wetlands. Ocsabat took precautions in containing the nutria and did not violate the Resolution.

#### **IV. THE GUIDING PRINCIPLES AND RESOLUTION 18 ARE NOT CUSTOMARY INTERNATIONAL LAW.**

A means for deciding when a practice of states becomes a rule of customary international law (CIL) is by using the Wilson’s Theorem<sup>30</sup>. The theorem states that an opinio juris sive necessitates (a State’s subjective belief) plus the state practice (the objective component) multiplied by time will result in CIL (**OJ [Opinio Juris] + CSP (T) [Consistency of State Practice (Time)] → Customary International Law**).<sup>31</sup> For Opinio juris to exist it must appear that the states follow the practice out of a sense of legal obligation. For state practice to

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<sup>26</sup> See *Supra* Paragraph 91.

<sup>27</sup> See *Supra* Paragraph 91.

<sup>28</sup> *Wetlands: Water, Life, and Culture*, Conference Report of Ramsar COP, 8<sup>th</sup> Meeting, Resolution VIII. 18, (1971).

<sup>29</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Article 31.

<sup>30</sup> D.J. Harris, *Cases and Materials on International Law*, 34 (Sweet &M 2002) page 30.

exist the practice must be “general and consistent”.<sup>32</sup> Although general practice does not require a universal following, a wide acceptance should exist among the states involved in the relevant activity.<sup>33</sup> Thus, general and consistent state practice arising from a sense of legal obligation must exist for a sufficient amount of time before customary international law crystallizes.

Neither the Guiding Principles nor Resolution 18 has crystallized into customary international law due to the insufficient passage of time. Resolution 18 and the Guiding Principles were controversially adopted in November 2002 and April 2002 respectively. Two years is not a long enough period of time on the international scale for such rules to be considered customary international law. Furthermore, there is no evidence in the record that the majority of states has accepted these rules and has consistently followed them in order to form customary international law.

Furthermore, “a State is not bound by a customary rule if it has consistently opposed that rule from inception.”<sup>34</sup> Ocsabat has consistently opposed the Guiding Principles and Resolution 18 since their inception (R. 9).

## **V. OCSABAT IS NOT RESPONSIBLE FOR DAMAGE CAUSED BY THE ESCAPED NUTRIA DUE TO PUBLIC POLICY REASONS.**

Ocsabat should not be held responsible for damage to the Raslobab Marsh due to public policy reasons, including economic growth and environmental protection. Sustainable development has become a major goal of international environmental law. Sustainable development has been defined as “the development that meets the needs of the present without

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<sup>31</sup> North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.), 1969 I.C.J. (February 20) page 31.

<sup>32</sup> Barry E. Carter et al., *International Law*, §2, 121 (4<sup>th</sup> ed. 2003)

<sup>33</sup> *Id.*

<sup>34</sup> M. Akerhurst, *Custom as a Source of International Law*, 47, British J. Int'l L., 1, 1-53 (1975).

compromising the ability of future generations to meet their own needs.”<sup>35</sup> In Ocsabat’s case, meeting the needs of the present is a much more pressing issue and, as Principle 1 of the Rio Declaration suggests, environmental efforts should emerge in the improvement of human condition.<sup>36</sup> However, in the process of attaining sustainable development, developing countries such as Ocsabat must meet their basic domestic needs such as food, water, and shelter. Economic growth is the only way to meet such needs. For Ocsabat, the goal of sustainable development must be in accordance with the nation’s reality.

The high costs involved with enforcing the policies suggested by international agreements obstruct the ability of developing countries to implement many sustainable environmental practices. Most developing nations fear that overly strict environmental regulations will harm potential economic growth. Therefore, an essential step towards achieving sustainable development is the eradication of poverty.<sup>37</sup> It is obvious that there cannot be adequate environmental protection if a nation has no means to enforce specific environmental regulations.

As a developing nation with basic needs to satisfy, it was necessary for Ocsabat to import the nutria in order to improve their economy and to create new economic relationships. In fact, mink farmers from DeLand, the very nation contesting Ocsabat’s actions, signed contracts with nutria farmers in Ocsabat, agreeing to purchase nutria meat. (R. 7). Considering the inseparable nature of economic development and environmental protection, Ocsabat’s actions have been consistent with environmental policy ideals.

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<sup>35</sup> David Hunter et al., *CIEL/UNEP, Concepts and Principles of International Environmental Law: An introduction* (1993) page 6.

<sup>36</sup> Rio, Principle 1.

<sup>37</sup> *See supra*, Principle 5.

It is evident that the CBD and Ramsar Conventions, as well as other Multilateral Environmental Agreements (MEA), are meant to increase a countries awareness and encourage improvements, not to make unattainable demands. “[I]f conservationists simply criticize development and poverty alleviation without offering realistic alternatives, they will consign themselves to perpetual irrelevance.”<sup>38</sup> This concept was recently demonstrated at the World Summit on Sustainable Development held in Johannesburg during August-September of 2002. In the process of negotiating and adopting two documents during this Summit, “differences emerged over the binding nature of the instruments and if so, the strength of the obligations therein.”<sup>39</sup> This tension became apparent in all negotiations, not in just those two documents. Countries were “weary of taking on new commitments that are unlikely to be met... [preferring] a more soft-law declaratory approach.”<sup>40</sup> If MEA’s “cannot connect short-term human betterment with conservation for long-term sustainability, they will lose the opportunity to influence the future of global public policy. The challenge for conservationists is to show how poverty can be alleviated with minimal additional damage to wild places and wild creatures.”<sup>41</sup>

As an important policy consideration, international agreements such as the CBD and Ramsar should not be interpreted to impose unreachable standards on developing nations. Ocsabat acted responsibly in its attempt to improve its economic situation. This economic improvement will in turn increase Ocsabat’s ability to protect the environment in the future.

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<sup>38</sup> Steven Sanderson, *The Future of Conservation*, Council on Foreign Affairs, 4 (2002).

<sup>39</sup> Kevin R. Gray, *Environmental Law: Accomplishments And New Directions*, ICLQ 52.1 (256), 1 (2003).

<sup>40</sup> *Id.*

<sup>41</sup> *See supra.*

**CONCLUSION**

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For the foregoing reasons, the Democratic Republic of Ocsabat respectfully requests that this Honorable Court:

1. declare that Decision VI/23 and the Guiding Principles were not properly adopted at the Sixth Meeting of the Conference of the Parties to the CBD, and accordingly have no legal status whatsoever; and
2. declare that Ocsabat is not responsible under international law for damages to the Raslobab Marsh.

Respectfully submitted,

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Agents for the Democratic Republic of Ocsabat