LEX CLIMATICA MOOT COURT

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CASE STUDY

1. The Democratic Republic of Ibirunga (hereinafter, **DRI**) is a sovereign coastal state in Central Africa with a population of 50 million inhabitants. According to the World Bank, for the fiscal year 2021/22, the DRI's gross national income per capita was US$820, ranking it among the low-income countries. Its economy is mainly based on agriculture, although it is rich in natural resources.

2. The United Republic of Zayiki (**URZ**) is a group of five small islands in the Indian Ocean. Its beautiful beaches and attractive landscapes make it a very popular touristic destination. Its geographical diversity, varied climate and decades of political stability are often cited as major assets. Organised as a federation since its independence, the country is regarded as a model of democracy, whose generous tax regime has enabled many businesses to develop within its borders. Such is the case of ECOBAL, a company set up in 2010 and headquartered in Yamazouko, the capital of URZ. ECOBAL specialises in the design and manufacture of electric vehicles in Zayiki, particularly for the touristic industry.

3. The process of industrialisation and diversification of the Ibirungan economy is an essential part of the country's development programme. Since 2015, DRI has taken advantage of increasing trade openness to integrate its economy into regional and international value chains and attract foreign capital. The country is also benefiting from the transformation of the pan-African trade model encouraged by the entry into force of the Agreement Establishing the Continental African Free Trade Area (AfCFTA) on 30 May 2019. The DRI, like the URZ, is also a party to the Investment Protocol (hereinafter, **IP** or the **Protocol**) of the Agreement Establishing the AfCFTA, which it has duly ratified, and which has been in force since 1er November 2021[1] in both countries.

4. In this context, DRI adopted a highly controversial amendment to the Environmental Code in July 2015, with the aim of accelerating the transition toward sustainable societies through business deregulation. Section 14(3) of the Code exempts "*businesses involved ... in the sourcing, processing, supply or production of renewable energy or any material used primarily for the transition from fossil fuels to renewable energy"* from a number of due diligence and other regulatory requirements. The other provisions of the Code remain unchanged, including article 2 of the Environment Code, which sets out the obligation for all individuals and legal entities operating on national territory to "*respect, at all times, the precautionary principle with regard to spaces, resources and natural terrestrial and marine environments that belong to the common heritage of the nation*."

5. ECOBAL is keen to take advantage of this easing of regulations and is taking a close interest in the economic opportunities offered by DRI. The company requires a continuous supply of cobalt to manufacture the batteries for its electric vehicle production. ECOBAL would also like to diversify its activities and intends to capitalise on the exponential development of the digital sector, as part of the African Union's digital transformation strategy. Such digital transition requires large quantities of cobalt to manufacture batteries for electronic devices.

6. In this context, on 9 January 2016, ECOBAL signed a farmout agreement (the **Contract**) with KP Mining, a private company established in DRI specialising in cobalt extraction. In 2005, KP Mining obtained an exploration permit in the NGUBA mining zone in DRI, which led it to locate a large cobalt deposit after several years of research. Following this discovery, the DRI Ministry of Industry launched the NGUFU project, under which KP Mining was granted a licence in December 2014 to produce and export Ibirungan cobalt for a period of 30 years (*i.e.*, until 2044), subject to obtaining the necessary financing to develop the site. In order to secure its long-term revenues, KP Mining opted to enter into a contractual agreement with ECOBAL. Under the terms of the contract, ECOBAL is granted KP Mining's rights to exploit the cobalt deposit using the facilities provided by KP Mining and to export its production to URZ, in return for a fixed royalty paid annually to KP Mining and a retrocession of 10% of its revenues, paid to the State. The DRI government, which originally granted the production and export licence to KP Mining (which remains the licence holder), approved this operation by decree on 15 February

[1] For purposes of the present moot court competition, participants will take for granted the entry into force and application of the AfCFTA Investment Protocol and its Annex with respect to DRI and URZ as from 1st November 2021.

2016. ECOBAL began operating the NGUBA site on 1 March 2017, relying mainly on the facilities already established on the site by KP Mining.

7. In addition, URZ and DRI are parties to the 1992 United Nations Framework Convention on Climate Change (**UNFCCC**) and the 2015 Paris Agreement, adopted at the 21st Conference of the Parties (**COP 21**). The DRI's first Nationally Determined Contribution (**NDC**) under the Paris Agreement (which it submitted ahead of COP 21 as a NDC), focused on adaptation and contained a commitment to reduce economy-wide greenhouse gas emissions by 5-10% compared to the business-as-usual scenario by 2050, subject to international support.

8. The signing of the Contract coincides with major climatic upheavals in DRI. Climate change is having an impact on public health and the country's societal structures. Increasingly frequent droughts and unpredictable floods are making farming difficult, causing peaks in malnutrition, growing economic inequalities and conflict situations. Forest fires caused by extreme heat are also destroying much of the vegetation and forests. The militant Ibirungan environmental movement is growing in strength, firmly opposing the various investment projects, whether extractive activities (extraction of hydrocarbons, gas, minerals, timber) or industrial farming and livestock activities, which require the felling of trees and therefore constituting a threat to forests. Faced with this unprecedented crisis, the political party in power in DRI was succeeded by the Ibirungan Ecological Party (**IEP**), following a nationwide media, civil and political campaign. The IEP campaigned against the destruction of ecosystems and the consequent loss of biodiversity. Addressing the country in February 2021 on the occasion of National Celebration Day, the new president of DRI, a member of the IEP, declared that: "*The Ibirungan forests are the green lung of Africa. Not only are they full of biodiversity, but they also capture a large proportion of our national greenhouse gas emissions. How can we meet our targets under the Paris Agreement if mining projects are destroying the nation's natural heritage? While global warming is a fundamental challenge that DRI alone cannot solve, DRI must develop a systematic and comprehensive strategy to address it. This starts with a new, more ambitious nationally determined contribution. And we will put an end to the harmful practices of foreign companies on our territory, starting with ECOBAL and its NGUFU project.*"

9. Various environmental groups have expressed concern about the practices of ECOBAL on the NGUBA site. In particular, the company is suspected of having discharged chemical residues into a nearby lake, thereby contaminating water reserves used for agriculture and household consumption, and of being responsible for massive deforestation, leading to landslides and soil degradation.

10. It is against this context that DRI published a new NDC in July 2021, committing to reduce economy-wide greenhouse gas emissions by 40% from *business as usual* by 2030, subject to securing the expected financial support from the international community in this regard. The second DRI NDC also notes that "*DRI reaffirms its commitment under the Paris Agreement to achieve, with the help of the international community, carbon neutrality by 2050, a goal that can only be reached with a greater contribution from the private sector.*"

11. By decree dated 1 February 2022, the Ministry of Industry of the DRI immediately revoked the exploration and export licence held by KP Mining. The government justifies its decision not to compensate KP Mining by citing the excessive contribution of mining activities to the country's greenhouse gas emissions, which it believes have exacerbated climate change in recent years. In a press release dated the same day, the Minister affirmed that "*continuing such a project until 2044 would make it impossible to achieve the DRI objectives under the Paris Agreement and our 2021 NDC*." As a result of the decree and in the absence of a valid operating licence, KP Mining was forced to terminate its contract with ECOBAL with immediate effect. The consequences of this termination are dramatic for ECOBAL, which had concentrated most of its cobalt supplies in DRI. ECOBAL has been forced to suspend its activities in the URZ because of the interruption in the supply of cobalt, with significant financial consequences.

12. On 14 April 2022, ECOBAL notified the DRI of its intention to submit a request for arbitration pursuant to Article 5 of Annex 1 to the Protocol, as it wished to resolve its dispute with DRI as quickly as possible (KP Mining was deemed insolvent).

13. Facing DRI's failure to answer, ECOBAL submitted a request for arbitration to the Kigali International Arbitration Centre (KIAC) on 15 October 2022 (the **Request**), pursuant to Article 5 of the KIAC Arbitration Rules 2012 (the **Rules**).

14. In its Application, ECOBAL requests that the Arbitral Tribunal:

- Confirm its jurisdiction to settle the dispute and rule on all its claims;
- Declare DRI liable under Articles 14 and 19 of the Protocol for its actions and omissions in relation to ECOBAL's investment;
- Declare DRI liable under the minimum standards of fair and equitable treatment of foreigners under customary international law;
- Order DRI to pay compensation of USD 15 billion for the damage sustained by ECOBAL, the evidence of which will be provided at a later stage in the proceedings;
- Order DRI to pay all the costs of the proceedings.

15. In its Reply sent on 15 December 2022, DRI requests that the Arbitral Tribunal:

- Declare that it does not have jurisdiction for lack of protected investment within the meaning of Article 1 of the Protocol;
- Declare that it does not have jurisdiction for lack of jurisdiction *ratione voluntatis*, in the absence of consent to arbitration by DRI as required by Articles 6 and 9 of Annex 1 to the Protocol;
- Declare that it lacks jurisdiction *ratione temporis* under Article 3 of the Protocol;
- In the alternative, rule that the Paris Agreement and the DRI 2020 NDC part of the applicable law by virtue of Article 19 of Annex 1 to the Protocol;
- In the alternative, dismiss all the claims on the merits;
- In the alternative, declare ECOBAL liable under Articles 31, 32 and 34 of the Protocol for its breach of DRI's environmental laws;
- Order ECOBAL to pay a compensation of USD 30 million for damages caused to DRI, to be proven at a later stage of the arbitral proceeding.
- In any event, order ECOBAL to pay the costs of the arbitration.