

TEAM NO. 2414

IN THE INTERNATIONAL COURT OF JUSTICE



AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING
THE MOUNTAIN GORILLAS
AND IMPACT ASSESSMENT

ARINGUV
APPLICANT

v.

REPLOMUTÉ
RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE 2023 STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

NOVEMBER 2023

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INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS

African Convention on the Conservation of Nature and Natural Resources (entered into force June 16, 1969).

Convention on International Trade in Endangered Species of Wild Flora and Fauna (entered into force Mar. 3, 1973).

Convention on the Conservation of Migratory Species of Wild Animals (entered into force Nov. 11, 1983).

Environmental Impact Assessment in a Transboundary Context (entered into force Sept. 10, 1997).

Statute of the International Court of Justice (entered into force Oct. 24, 1945).

United Nations Framework Convention on Climate Change (entered into force Mar. 21, 1994).

Vienna Convention on the Law of Treaties (entered into force Jan. 24, 1980).

Convention on Biological Diversity (entered into force Dec. 29, 1993).

Paris Agreement (entered into force Nov. 4, 2016).

JUDICIAL AND ARBITRAL DECISIONS

ICJ CASES

Asylum (Colom. v. Peru), Judgement, 1950 I.C.J. 14 (Nov. 20).

Corfu Channel (U.K. v. Alb.), Merits Judgment, 1949 I.C.J. 4 (Apr. 9).

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21).

Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, Judgment, 1986 I.C.J. 14 (June 27).

North Sea Continental Shelf (Ger. v. Neth.), Judgement, 1969 I.C.J. 3 (Feb. 20).

Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, 2015 I.C.J. 665 (Dec. 2015).

Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. U.K.), Preliminary Objections, Judgment, 2016 I.C.J. 851 (July 20).

Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20).

Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20).

ECtHR CASES

X v. Ir., App. No.4125/69, 1970 Y.B. Eur. Conv. on H.R. 198 (Eur. Comm'n on H.R.).

ICC CASES

Prosecutor v. Omar Hassan Ahmad al Bashir, ICC-02/05-01/09, Judgement (Apr. 3, 2018).

ITLOS CASES

Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion of Feb. 1, 2011 ITLOS Rep. 10.

OTHER CASES

American Bell International Inc. v. Iran, IUSCT, Award No.255-48-3, 12 Iran-United States Claims Tribunal and the European Court of Human Rights: Yeager 170 (Sept. 19, 1986).

Foremost Tehran, Inc. v. Iran, IUSCT, Award No.220-37/231-1, 10 Iran-United States Claims Tribunal and the European Court of Human Rights: Yeager, 228 (Apr. 11, 1986).

Gustav F. W. Hamester GmbH and Co KG v. Republic of Ghana, ICSID, Award No. ARB/07/24 (June 18, 2010).

Jan de Nul N.V. and Dredging International N.V. v. Egypt, ICSID, Award No. ARB/04/13 (Nov. 6, 2008).

Trail Smelter case (U.S. v. Can.), 3 R.I.A.A. 1965 (Apr. 16, 1938 and Mar. 11, 1941).

U.N. DOCUMENTS AND OTHER INTERNATIONAL DOCUMENTS

U.N. DOCUMENTS

G.A. Res. 56/10, Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001).

G.A. Res. 799(VIII), U.N. Doc. A/2630, Request for the Codification of the Principles of International Law Governing State Responsibility, at 52 (Dec. 7, 1953).

Stockholm Declaration on the Human Environment, princ.21, U.N. Doc. A/CONF. 48/14/Rev.1 (June 5, 1973).

OTHER DOCUMENTS

A History of “AGREEMENTS” under Article IV.3 and “agreements” under Article IV.4 in the Convention on Migratory Species, UNEP/CMS/COP11/Inf.31 (2014).

African Wildlife Federation, International Gorilla Conservation Program, and Eco Adapt (Eds), *The Implications of Global Climate Change for Mountain Gorilla Conservation in the Albertine Rift (2010).*

An Assessment of the Gas and Oil Pipelines in Europe, Eur. Parl. Doc. PE 416.239 (2009).

European Commission, *Best Available Techniques Guidance Document on Upstream Hydrocarbon Exploration and Production: Final Guidance Document (2019).*

Fifth Revised Draft Convention on Biological Diversity, Seventh Negotiating Session/Fifth Session of INC Nairobi, 11-19 May 1992.

ILC Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries, 2 Y.B Int’l Law Comm’n 392 (2001).

Int’l Law Comm’n, Rep. on the Work of Its Fifty-Six Session, U.N. Doc. A/56/10, Supp. No. 10 (2001).

Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001).

Int’l Law Comm’n, Rep. on the Work of Its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994).

International Energy Agency (IEA), *Emissions from Oil and Gas Operations in Net Zero Transitions (2023).*

International Union for Conservation of Nature Council (IUCN), *Guidelines for Applying Protected Area Management Categories (2008).*

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

Mr. G. G. Fitzmaurice, Special Rapporteur, *Fourth report on the Law of Treaties*, Doc. A/CN.4/120, 2 Y.B. Int'l Law Comm'n 70 (1959).

OECD, *Best Available Techniques for Preventing and Controlling Industrial Pollution, Activity 4: Guidance Document on Determining BAT, BAT- Associated Environmental Performance Levels and BAT-Based Permit Conditions* (2020).

Rep. of the Int'l Law Comm'n to the General Assembly, 2 Y.B. Int'l L. Comm'n 364 (1950).

Resolution 2.2. Adopted by the Conference of the Parties at its 2nd Meeting, UNEP/CMS/Resolution 2.2 (1988).

Second Revised Draft of the Convention on the Conservation of Migratory Species of Wild Animals (1978).

The Update of the Nationally Determined Contribution of the European Union and its Member States (Dec. 17, 2020).

BOOKS

Antonio Cassese, *International law* (2001).

Brownlie, *Principles of Public International Law* (2008).

Federal Ministry of Food, Agriculture and Forestry of the Federal Republic of Germany, *Convention on the Conservation of Migratory Species of Wild Animals 95* (1979), Report of the U.S. Delegation to the Conference to Conclude a Convention on the Conservation of

Migratory Species of Wild Animals (1979) (available from the Department of State, Washington, D.C.).

Ian Brownlie, *Principles of Public International Law* (2008).

Malcolm N. Shaw, *International Law* (2008).

Oscar Schachter, *International Law in Theory and Practice* (1991).

Xue Hanqin, *Transboundary Damage in International Law* (2003).

The Oxford Handbook of International Environmental Law (2021).

ESSAYS, ARTICLES, AND JOURNALS

An YJ et al., *Impact of geochemical stressors on shallow groundwater quality*, *Sci. Total Environ.* (2005).

Daniel Bodansky, *Paris Agreement*, United Nations Audiovisual Library of International Law (2021).

Field RA et al., *Air quality concerns of unconventional oil and natural gas production*, *Environ. Sci. Process Impacts*, 954-69 (2014).

Helal, Mohamed, *On Coercion in International Law*. 52 *N.Y.U. J. Int'l L. & Pol.* 1 (2019-2020), Ohio State Public Law Working Paper No. 475 (2019).

Hickey, J.R. et al., *Gorilla beringei ssp. beringei (amended version of 2018 assessment)*, The IUCN Red List of Threatened Species 2020: e.T39999A176396749, at 18 (2020).

James D. Fry, *Coercion, Causation, and the Fictional Elements of Indirect State Responsibility*, 40 *Vand. J. Transnat'l L.* 611 (2007).

- Luis-Antonio López et al., *The Carbon Footprint of the U.S. Multinationals' Foreign Affiliates*, Nat. Commun. (2019).
- Moskovchenko DV et al., *Surface water quality assessment of the Vatinsky Egan river catchment, west Siberia*, Environ. Monit. Assess., 359–68 (2009).
- Naga Venkata Saidileep Korlapati et al., *Review and analysis of pipeline leak detection methods*, 2 J. Pipeline Sci. Eng. 10074 (2022).
- Plumptre et al., E.A.2016. *Gorilla beringei ssp. graueri*. The IUCN Red List of Threatened Species 2016: e.T39995A102328430 (2017).
- Rebecca K. Fuda et al., *Assessing the impacts of oil exploration and restoration on mammals in Murchison Falls Conservation Area, Uganda*, 56 Afr. J. Ecol. 806, (2018).
- Roberto Lavalle, *The Law of the United Nations and the Use of Force*, Under the Relevant Security Council Resolutions of 1990 and 1991, to Resolve the Persian Gulf Crisis, 23 Netherlands Y.B. Int'l L. 3 (1992).
- Simon Lyster, *The Convention on the Conservation of Migratory Species of Wild Animals (The Bonn Convention)*, 29 Nat. Res. J. 979 (1989).
- The Royal Society, *The Carbon Cycle: Better Understanding Carbon-climate Feedbacks and Reducing Future Risks* (2021).
- Tutilo Mudumba et al., *The Implications of Global Oil Exploration for the Conservation of Terrestrial Wildlife*, 11 Env't Challenges 100710 (2023)

LIST OF ABBREVIATIONS

<u>ABBREVIATION</u>	<u>TERMS</u>
¶	paragraph/paragraphs
Algiers Convention	African Convention on the Conservation of Nature and Natural Resources
1981 DRI-Replomuté agreement	the agreement DRI and Replomuté entered into in 1981
BAT	The Best available techniques
CBD	Convention on Biological Diversity
CMS	Convention on the Conservation of Migratory Species of Wild Animals
DRI	Democratic Republic of Ibirunga
e.g.	<i>exempli gratia</i> (for example)
EIA	environmental impact assessment
Espoo Convention	Environmental Impact Assessment in a Transboundary Context
et al.	<i>et alii/et aliae</i> (“and others”)
Gorilla	Royal Mountain Gorilla
Gorilla Agreement	Agreement on the Conservation of Gorillas and Their Habitats
<i>ibid.</i>	<i>ibidem</i> (“in the same place”)
ICJ	International Court of Justice
ILC	International Law Commission
IUCN	International Union for Conservation of Nature

Mountain Gorilla	Gorilla beringei beringei
NDC	Nationally Determined Contribution
p. / pp.	page/pages
RSIWA	Responsibility of States for Internationally Wrongful Acts
This project	The actions of Replomuté with respect to the proposed oil extraction activities
UN	United Nations
UN Charter	Charter of the United Nations
UNFCCC	United Nations Framework Convention on Climate Change
v.	<i>versus</i> (“against”)
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume

QUESTIONS PRESENTED

- I. WHETHER REPLOMUTÉ VIOLATED INTERNATIONAL LAW WITH RESPECT TO THE PREPARATION OF AN EIA.

- II. WHETHER REPLOMUTÉ VIOLATED INTERNATIONAL LAW BY ACTIONS WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI.

STATEMENT OF JURISDICTION

Pursuant to the Joint Notification concluded on 24 July 2023, agreed to therein, between the Aringuv and Replomuté, and under Article 40(1) of the Statute of the International Court of Justice (ICJ), the Parties hereby submit to this Court the following dispute. The Registrar of the Court addressed notification to the Parties on July 31, 2023. Under Article 36(1) of the Statute of ICJ, each party will accept the judgment of the court as final and binding. *See the Special Agreement Between Aringuv and Replomuté for Submission to ICJ of Differences Between Them Concerning Questions Relating to Royal Mountain Gorillas (Gorillas) and Impact Assessment on 16 June 2023.*

STATEMENT OF FACTS

Aringuv and the Democratic Republic of Ibirunga (DRI) are neighboring States in central Africa.¹ The DRI is a low-income country with rich oil resources.²

The Gorillas found only in these two countries are included in Appendix I of the Convention on the Conservation of Migratory Species of Wild Animals (CMS), whose northern population occupies a transboundary national park and its members frequently cross the boundary, while the southern population, which has no contact with the former, occupies a national park in the DRI and has rarely been sighted in Aringuv.³ Aringuv and the DRI are Parties to the Agreement on the Conservation of Gorillas and Their Habitats (Gorilla Agreement).⁴

Replomuté is a high-income European country among the world's leaders in mining and ore industries.⁵ All three countries are Parties to the CMS,⁶ the Convention on Biological Diversity (CBD),⁷ the Paris Agreement,⁸ and the United Nations Framework Convention on Climate Change (UNFCCC), to which Replomuté is an Annex I Party and Aringuv and the DRI are Non-Annex I Parties.

¹ Record, ¶ 2.

² Record, ¶ 1.

³ Record, ¶ 9.

⁴ *Ibid.*

⁵ Record, ¶ 3.

⁶ Record, ¶ 8.

⁷ Record, ¶ 7.

⁸ Record, ¶ 13.

In 1981, the DRI and Replomuté entered into an agreement (1981 DRI-Replomuté agreement) that contained a mandatory binding arbitration to permit the Lenoir Corporation, a corporation owned and operated by the government of Replomuté, to explore and extract oil from the habitat of the southern Gorillas, as well as to construct an oil transport pipeline from the DRI to a coastal city in the DRI.⁹ Before the agreement, the DRI conducted an environmental impact assessment (EIA)¹⁰ in accordance with its national laws.¹¹

From 1981 to 2012, the oil-related activities proceeded in fits and starts for various reasons. In June 2012, the DRI declared to withdraw from the 1981 DRI-Replomuté agreement.¹² Replomuté invoked the mandatory arbitration¹³ and then prevailed in 2015. Consequently, DRI acquiesced to the Lenoir Corporation's oil-related activities.

In 2018, Aringuv required Replomuté to conduct an EIA under the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention),¹⁴ to which Replomuté and DRI are Parties, while Aringuv signed but not ratified,¹⁵ and the Revised African Convention on the Conservation of Nature and Natural Resources, to which only Aringuv is a party. Replomuté declined the suggestion.¹⁶ By December 2019, various

⁹ Record, ¶ 17.

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Record, ¶ 22.

¹³ *Ibid.*

¹⁴ Record, ¶ 27.

¹⁵ Record, ¶ 12.

¹⁶ Record, ¶ 28.

diplomatic notes were exchanged by both countries, but the dispute remained unresolved.

After the negotiations, both Parties agreed to submit certain questions to ICJ.¹⁷

¹⁷ Record, ¶ 35.

SUMMARY OF ARGUMENTS

I. REPLOMUTÉ HAS NOT VIOLATED INTERNATIONAL LAW WITH RESPECT TO THE PREPARATION OF AN EIA

Aringuv has no standing in this case because it is not the injured State.

Even if Aringuv has standing, DRI, instead of Replomuté, has the obligation to conduct an EIA. The EIA is in accordance with both national law and international law in 1981, such as African Convention on the Conservation of Nature and Natural Resources (the Algiers Convention). The CBD and the UNFCCC are not retroactive to the EIA; however, the EIA has not violated thereto.

Additionally, Replomuté has no obligation to revise the EIA under international law, because the prerequisite of the EIA was not satisfied, and Replomuté has no obligation to revise the EIA based on treaty obligation and reciprocity.

II. THE ACTIONS OF REPLOMUTÉ WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI COMPLY WITH INTERNATIONAL LAW

Replomuté has not violated international treaty obligations, including the CMS, the CBD, the UNFCCC, and the Paris Agreement. As it is not a party to the Gorilla Agreement, the Algiers Convention, and Revised African Convention on the Conservation of Nature and Natural Resource, it is not obligated to comply with these treaties. Replomuté has not violated the due diligence obligations, since it has not violated the precautionary principle

and the prevention principle.

Furthermore, Replomuté has no direct responsibility since the conduct of Lenoir Corporation cannot be attributed to Replomuté.

Replomuté has no indirect responsibility since it did not coerce DRI, and indirect State responsibility as committing coercion has no legal basis.

ARGUMENT

I. REPLOMUTÉ HAS NOT VIOLATED INTERNATIONAL LAW WITH RESPECT TO THE PREPARATION OF AN EIA

(A) Aringuv has no standing in this case; (B) even if Aringuv has standing, the EIA is in accordance with both international law and national law, and (C) Replomuté has no obligation to revise the EIA under international law.

A. Aringuv Has No Standing in This Case

Injured States have legal standing to institute proceedings before this Court.¹⁸ An injured State is one that has suffered a direct or specific impact or whose position has been radically changed due to another State's breach of obligations.¹⁹

In this case, the actions of Replomuté with respect to the proposed oil extraction activities (this project) was within the territory of DRI.²⁰ No specific impact mentioned in the record due to this project. Therefore, Aringuv has no standing before this court.

B. Even If Aringuv Has Standing, the EIA Is in Accordance with International Obligations and DRI's Domestic Law

¹⁸ Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. U.K.), Preliminary Objections, Judgment, 2016 I.C.J. 851; Questions Relating to Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, ¶ 68 (July 20); G.A. Res. 56/10, Responsibility of States for Internationally Wrongful Acts (Dec. 12, 2001), art. 42, 48 [hereinafter RSIWA].

¹⁹ *Ibid.*

²⁰ Record, ¶ 17.

Even if Aringuv has standing, **(1)** DRI, instead of Replomuté, has the obligation to conduct an EIA, and **(2)** the EIA is in accordance with international obligations and domestic law in 1981,²¹ and **(3)** the EIA has not violated the CBD and the UNFCCC.

1. DRI, instead of Replomuté, has the obligation to conduct an EIA

A State has the obligation to conduct an EIA if the proposed activities are in its territory or any area under its jurisdiction.²² In this case, the proposed activities are conducted in DRI's territory, which is out of the territory or area under the jurisdiction of Replomuté.²³ Thus, DRI has the obligation to conduct the EIA rather Replomuté.

2. The EIA is in accordance with the Algiers Convention

International obligations concerning this project was enshrined in the Algiers Convention in 1981.²⁴ This project has complied with Article VIII because **(a)** EIA satisfied the requirements, and **(b)** the impact on the Gorillas was considered in the EIA.

a. The EIA satisfied the requirement of Article VIII

Under Article VIII of the Algiers Convention, a State shall take particular responsibility for protecting the species listed in the Annex if they are only present in

²¹ Record, ¶ 17.

²² Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 20) [hereinafter Pulp Mills]; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, 2015 I.C.J. 665 (Dec. 2015) [hereinafter Costa Rica]; Espoo Convention (entered into force Sept. 10, 1997), art. 1(ii) and art. 2, ¶ 3 [hereinafter Espoo Convention].

²³ Record, ¶ 17, 18.

²⁴ *Ibid.*

its territory.²⁵ Particular responsibility requires States to prohibit the listed species from being hunting, killing, capture, or collected without the authorization of the highest competent authority.²⁶ And the national interest shall be considered.²⁷

In this case, the Gorillas is the species in the Annex.²⁸ However, since the Gorillas scatter both in DRI and Aringuv,²⁹ DRI is free from particular responsibility. Even if DRI is obliged to take the particular responsibility, DRI still satisfies the requirement. The project has proved less harmful than the activities stipulated in Article VIII.³⁰ Moreover, for the abundant recoverable oil is essential to the development of DRI's national economy, the project has gained the formal authorization.³¹ Therefore, EIA has satisfied these requirements.

b. The EIA took the impact on the Gorillas into account

Under Article VIII of the Algiers Convention, the Gorillas shall be totally protected. In *Pulp Mills*, impacts on water quality and air environment are required in EIA.³² These factors are important to Mountain Gorillas according to the IUCN Red

²⁵ Algiers Convention (entered into force June 16, 1969), art. VIII, Annex [hereinafter Algiers Convention].

²⁶ *Ibid.*, art. VIII, ¶1.1.

²⁷ *Ibid.*

²⁸ Algiers Convention, *supra* note 25, Annex.

²⁹ Record, ¶ 9.

³⁰ Hickey, J.R. et al., *Gorilla beringei ssp. beringei (amended version of 2018 assessment)*, The IUCN Red List of Threatened Species 2020: e.T39999A176396749, at 18 (2020) [hereinafter *Gorilla beringei ssp. beringei*].

³¹ Record, ¶ 1, 17.

³² *Pulp Mills*, *supra* note 22, ¶ 229-65.

List,³³ and Mountain Gorillas are similar to Gorillas in size, appearance, and behavior.³⁴

In this case, the EIA focused on the impact of used water and produced waste³⁵ that would affect water quality³⁶ and the air environment.³⁷ Therefore, the impact on the Gorillas was considered.

3. The EIA has not violated the CBD and the UNFCCC

(a) The CBD and the UNFCCC are not retroactive to the EIA. Even if the CBD and the UNFCCC does have retroactive effect, the EIA has not violated (b) the CBD and (c) the UNFCCC.

a. The CBD and the UNFCCC are not retroactive to the EIA

Under Article 28 of Vienna Convention on the Law of Treaties (VCLT), a treaty must follow the principle of non-retroactivity. Treaty do not bind a party in relation to any act took place before the entry into force of the treaty.³⁸ In *Pulp Mills*, the EIA is an act prior to the implementation of the project.³⁹ In this case, the EIA took place

³³ Gorilla beringei ssp. Beringei, *supra note* 30, at 20, 21.

³⁴ Clarifications, A.9.

³⁵ Record, ¶ 17.

³⁶ Moskovchenko DV et al., *Surface water quality assessment of the Vatinsky Egan river catchment, west Siberia*, Environ. Monit. Assess., 359–68 (2009); An YJ et al., *Impact of geochemical stressors on shallow groundwater quality*, Sci. Total Environ., 257-66 (2005).

³⁷ Field RA et al., *Air quality concerns of unconventional oil and natural gas production*, Environ. Sci. Process Impacts, 954-69 (2014).

³⁸ VCLT, (entered into force Jan. 24, 1980), art. 28 [hereinafter VCLT].

³⁹ *Pulp Mills*, *supra note* 22, ¶ 205.

before the entry into force of the CBD and the UNFCCC.⁴⁰ Thus, the CBD and the UNFCCC are not retroactive to the EIA.

b. The EIA has not violated the CBD

i. Article 14.1(a) of the CBD does not apply herein

Article 14.1(a) of the CBD stipulates the Parties to conduct an EIA within its own territory if the project is likely to affect the biological diversity of other States significantly.⁴¹ Such an obligation is limited to activities within their jurisdiction or control.⁴² Notably, the term “beyond the limits of national jurisdiction” Stated in the non-binding draft of the CBD⁴³ has been deleted. Under article 32 of VCLT, the preparatory work of the treaty is a supplementary mean of interpretation.

In this case, this project is not in the territory of Replomuté⁴⁴ and the prerequisite condition “significant transboundary harm” is not satisfied.⁴⁵ Moreover, this project is under the control of Lenoir Corporation.⁴⁶ Although this corporation wholly owned by Replomuté economically,⁴⁷ the State has no control over specific act. Thus, Article 14.1(a) of the CBD does not apply herein.

ii. Replomuté has complied with Article 14.1(c) of the CBD

⁴⁰ Record, ¶ 7, 13, 17.

⁴¹ CBD, (entered into force Dec. 29, 1993), art. 14.1(a) [hereinafter CBD].

⁴² CBD, *supra note* 41, art. 3.

⁴³ Fifth revised draft convention on biological diversity, Seventh negotiating session/Fifth session of INC Nairobi, 11-19 May 1992.

⁴⁴ Record, ¶ 18.

⁴⁵ See memo, I.C.i.

⁴⁶ Record, ¶ 17.

⁴⁷ *Ibid.*

Article 14.1(c) of the CBD proscribes that States shall notify, exchange information, and consult with probable adversely affected States and encourage bilateral arrangements.⁴⁸

In this case, DRI conducted an EIA that comprehensively notified the probable impacts.⁴⁹ Still, Replomuté consulted and exchanged information with DRI, and they agreed in 1981 to execute this project.⁵⁰ Therefore, Replomuté took appropriate measures to observe the CBD.

c. The EIA has not violated the UNFCCC

Pursuant to Article 4.1. (f) of the UNFCCC, climate change should be considered to the extent feasible in their relevant social, economic, and environmental policies and actions and employ appropriate methods, e.g., impact assessments.⁵¹ States have the discretion to take necessary, appropriate, and feasible measures.⁵²

However, based on various UN resources, exploring and extracting oil is not listed in the causes of climate change.⁵³ Furthermore, the little emission from the project could barely influence temperature change.⁵⁴ Therefore, it is justifiable that the EIA focused on other impacts under DRI's domestic laws.⁵⁵

In conclusion, the EIA fully complied with international obligations and DRI's national laws.

⁴⁸ CBD, *supra note* 41, art. 14.1(c).

⁴⁹ Record, ¶ 17.

⁵⁰ Record, ¶ 18.

⁵¹ UNFCCC, (entered into force Mar. 21, 1994), art. 4.1(f) [hereinafter UNFCCC].

⁵² Xue Hanqin, *Transboundary Damage in International Law*, 164 (2003).

⁵³ UN, *Causes and Effects of Climate Change*, <https://www.un.org/en/climatechange/science/causes-effects-climate-change>.

⁵⁴ *See memo*, II.A.1.b.i.

⁵⁵ Record, ¶ 17.

C. Replomuté Has No Obligation to Revise the EIA Under International Law

Replomuté has no obligation to revise the EIA under international law because (1) the prerequisite of the EIA was not satisfied, and (2) Replomuté has no obligation to revise the EIA under international law.

1. The prerequisite of the EIA was not satisfied

The prerequisite of the EIA is the risk of significant transboundary harm.⁵⁶ Clear and convincing evidence must prove the existence of significant transboundary harm and causation.⁵⁷ In this case, (a) this project did not cause transboundary harm, and (b) it lacks causation.

a. This project did not cause transboundary harm

i. This project has no transboundary impact

Transboundary harm refers to harm caused in the territory of a State other than the State of origin.⁵⁸ In this case, the southern population of the Gorillas did not “migrate” across boundaries, and they have no interaction with those of the northern.⁵⁹ Besides, this project is within the territory of DRI,⁶⁰ and no harm exists for the Gorillas in Aringuv. Therefore, this project did not have a transboundary impact.

⁵⁶ Pulp Mills, *supra* note 22, ¶ 205; Costa Rica, *supra* note 22, ¶ 104.

⁵⁷ Trail Smelter case (U.S. v. Can.), 3 R.I.A.A. 1965 (Apr. 16, 1938 and Mar. 11, 1941).

⁵⁸ ILC Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries, 2 Y.B Int’l Law Comm’n 392 (2001).

⁵⁹ Record, ¶ 9, 30.

⁶⁰ Record, ¶ 9.

ii. The impact cannot meet the threshold of “significant”

The threshold of harm is “significant” which emphasizes a real detrimental effect on matters such as human health, industry, property, environment, or agriculture in other States.⁶¹ The degree of probable impact could be assessed based on the project’s nature, magnitude, and context.⁶²

In this case, the pipeline produces lower emissions than the other transportation means.⁶³ After drilling period, negative impacts could recover⁶⁴ and benefit the Gorillas and their habitat.⁶⁵ Furthermore, advanced techniques could be applied to inspect the oil leakage.⁶⁶ Therefore, the impact of this project is not significant.

b. No Causation exists between this project and the alleged harm

The condition of human causation requires the damage to be proximately caused by the alleged acts.⁶⁷ However, in the record, no transboundary harm exists. In *Pulp Mills*, ICJ held that Argentina, the party asserting the harm, did not carry its burden of proof, so it ruled in Uruguay’s favor.⁶⁸ In this case, Aringuv fails to submit evidence to establish the causation between the project and the alleged harm.

⁶¹ Int’l Law Comm’n, Rep. on the Work of Its Fifty-Six Session, U.N. Doc. A/56/10, Supp. No. 10, ¶ 152 (2001).

⁶² Costa Rica, *supra note 22*, ¶154.

⁶³ An Assessment of the Gas and Oil Pipelines in Europe, Eur. Parl. Doc. PE 416.239, at 11(2009).

⁶⁴ Rebecca K. Fuda et al., *Assessing the impacts of oil exploration and restoration on mammals in Murchison Falls Conservation Area, Uganda*, 56 Afr. J. Ecol. 806, at 806 (2018) [hereinafter *Assessing the impacts*].

⁶⁵ Tutilo Mudumba et al., *The Implications of Global Oil Exploration for the Conservation of Terrestrial Wildlife*, 11 Environmental Challenges 100710, 2-4 (2023).

⁶⁶ Naga Venkata Saidileep Korlapati et al., *Review and analysis of pipeline leak detection methods*, 2 J. Pipeline Sci. Eng. 10074 (2022).

⁶⁷ Oscar Schachter, *International Law in Theory and Practice*, 366 (1991).

⁶⁸ *Pulp Mills*, *supra note 22*, ¶ 276.

2. Replomuté has no obligation to revise the EIA under international law

a. Aringuv has no right to request a revision of the EIA based on the Espoo Convention

According to Article 5 and Article 6.3 of the Espoo Convention, the party of origin shall conduct an EIA for further consultations with the affected party and revise the EIA and decision when the concerned party requests. A non-contracting Party to this convention is not entitled with such right.⁶⁹ Since Aringuv is not a Party to the Espoo Convention,⁷⁰ it has no right to request a revision of the EIA based on the Espoo Convention.

b. Aringuv has no right to request a revision of the EIA based on reciprocity

Reciprocity⁷¹ means that if one State fails to perform its international obligations in a particular respect, other States absolve the corresponding obligations in relation to that State.⁷² In *Namibia*, a party that disowns or does not fulfill its own obligations cannot be recognized as retaining the rights that it claims to derive from the relationship.⁷³ In this case, Aringuv did not ratify the Espoo Convention, which implied the propensity of not intending to shoulder the obligations of EIA under

⁶⁹ Espoo convention, *supra note* 22, art. 1.

⁷⁰ Record, ¶ 12.

⁷¹ Mr. G. G. Fitzmaurice, Special Rapporteur, *Fourth report on the Law of Treaties*, Doc. A/CN.4/120, 2 Y.B. Int'l Law Comm'n 37, 70 (1959).

⁷² *Ibid.*

⁷³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, 46 (June 21).

Espoo Convention.⁷⁴ As a result, this obligation of Replomuté is absolved. Therefore, Aringuv's request to revise the EIA and decision is groundless.

II. THE ACTIONS OF REPLOMUTÉ WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI COMPLY WITH INTERNATIONAL LAW

The actions of Replomuté have been complied with international law because **(A)** Replomuté has not violated international obligations; **(B)** Replomuté has no direct responsibility, and **(C)** Replomuté has no indirect responsibility.

A. Replomuté Has Not Violated International Obligations

Replomuté has not violated international obligations because **(1)** it has not violated treaty obligations; **(2)** it has not violated customary international law.

1. Replomuté has not violated treaty obligations

a. Replomuté has not violated the CMS

CMS applies only to migratory species.⁷⁵ **(i)** The southern Gorillas shall not be classified as a migratory species; **(ii)** even if the southern Gorillas is a migratory species, Replomuté has not violated its obligation as a non-Range-State, but in accordance thereto.

i. The southern Gorillas shall not be classified as a migratory species

Migratory species should have two characteristics: ***first***, geographically separate,

⁷⁴ Record, ¶ 12.

⁷⁵ CMS, (entered into force Nov. 11, 1983), art. 1 [hereinafter CMS].

and *second*, acting cyclically and predictably.⁷⁶ In this case, the southern Gorillas do not meet these requirements.

First, the two populations of Gorillas are geographically separate. Geographically separate populations of a species, parts of which are within particular geographical boundaries, can be considered independently under the CMS.⁷⁷ Prevalent international practices indicate that a national park is a “clearly defined geographical space”.⁷⁸

In this case, Gorillas’ northern and southern populations live in two separate national parks, so they are within two clearly defined geographical spaces. Moreover, the two populations have no contact,⁷⁹ suggesting they inhabit independently.⁸⁰ Therefore, the southern Gorillas should be separately considered as a non-migratory species because the members of them have rarely been sighted in Aringuv.⁸¹

Second, Gorillas does not act cyclically and predictably. Even if two populations are considered as a whole, the Gorilla species are not properly classified as migratory species. “Cyclically” is related to “a cycle of any nature, such as astronomical, life or climatic”.⁸² Species living in border areas should not be considered migratory unless their transboundary movement is in response to seasonal or long-term environmental

⁷⁶ *Ibid.*; Simon Lyster, *The Convention on the Conservation of Migratory Species of Wild Animals (The Bonn Convention)*, 29 Nat. Res. J. 979, 982-84 (1989).

⁷⁷ Convention on International Trade in Endangered Species of Wild Flora and Fauna, (entered into force Mar. 3, 1973), art. I (a), Mar.3, 1973, 993 U.N.T.S.243.

⁷⁸ IUCN Council, *Guidelines for Applying Protected Area Management Categories* (2008), at 8; UNEP, National Park, <https://leap.unep.org/en/knowledge/glossary/national-park>.

⁷⁹ Record, ¶ 9.

⁸⁰ CMS, *supra note 75*, art. 1(1)(a).

⁸¹ Record, ¶ 9.

⁸² Resolution 2.2. Adopted by the Conference of the Parties at its 2nd Meeting, UNEP/CMS/Resolution 2.2 (Oct. 1988) [hereinafter Resolution 2.2].

influences.⁸³

In this case, the northern Gorillas live in a transboundary national park, which is a border area.⁸⁴ Although Mountain Gorillas are listed in Annex I in the CMS,⁸⁵ current scientific studies cannot determine whether they are cyclical and predictable.⁸⁶ In addition, even though the Gorillas is similar in behavior to the Mountain Gorillas,⁸⁷ no indication in the Record suggests their movements are in “a cycle of any nature”⁸⁸ or in response to seasonal influences. Therefore, the Gorillas cannot be categorized as a migratory species.

ii. Even if the southern Gorillas is a migratory species, Replomuté has not violated its obligation as a non-Range-State, but in accordance thereto

First, Article III of the CMS do not apply to Replomuté. Only the Range State can exercise jurisdiction over any part of the range of that migratory species.⁸⁹ In this case, even if the Gorillas are included in Appendix I of the CMS, the protection duties under Article III of the CMS do not apply to non-Range States, Replomuté.⁹⁰

Second, Replomuté has acted in accordance with Article II of the CMS. Under

⁸³ Federal Ministry of Food, Agriculture and Forestry of the Federal Republic of Germany, Convention on the Conservation of Migratory Species of Wild Animals 95, at 95 (1979), Report of the U.S. Delegation to the Conference to Conclude a Convention on the Conservation of Migratory Species of Wild Animals 2-4 (Oct. 17, 1979) (available from the Department of State, Washington, D.C.). [hereinafter FRG publications].

⁸⁴ Record, ¶ 9.

⁸⁵ *Ibid.*

⁸⁶ FRG publications, *supra note* 83.

⁸⁷ Clarifications, A.9.

⁸⁸ Resolution 2.2, *supra note* 82.

⁸⁹ CMS, *supra note* 75, art.1(1)(h).

⁹⁰ Record, ¶ 9, 29.

Article II, the Parties are under strict responsibility⁹¹ that they shall endeavor to provide immediate protection for migratory species included in Appendix I. The Parties have discretion in deciding the specific protection measures.⁹²

Furthermore, in international practice, it is substantiated⁹³ that using Best Available Techniques (BAT), a part of the European environmental policy,⁹⁴ is the best for minimizing emissions and ecological impacts.⁹⁵ In this case, Lenoir Corporation, owned by a European country,⁹⁶ follows the BAT when conducting the project. Therefore, Replomuté has endeavored to protect those species.

b. Replomuté has not violated the CBD

i. Replomuté has acted under Article 1 of the CBD

The objective of the CBD is the conservation of biological diversity.⁹⁷ In this case, the project will not have a negative impact on the Gorillas and their habitats.

First, the project will not have a negative impact on the Gorillas. Globally, the carbon emission from oil exploration is insufficient to cause a temperature rise.⁹⁸

⁹¹ *A History of “AGREEMENTS” under Art. IV.3 and “agreements” under Art. IV.4 in the Convention on Migratory Species*, UNEP/CMS/COP11/Inf.31, at 6 (Sep.25, 2014); Second Revised Draft of the Convention on the Conservation of Migratory Species of Wild Animals (1978).

⁹² The Oxford Handbook of International Environmental Law 563 (2021).

⁹³ OECD, *Best Available Techniques for Preventing and Controlling Industrial Pollution, Activity 4: Guidance Document on Determining BAT, BAT-Associated Environmental Performance Levels and BAT-Based Permit Conditions*, 14 (2020) [hereinafter BAT].

⁹⁴ European Commission, *Best Available Techniques Guidance Document on Upstream Hydrocarbon Exploration and Production: Final Guidance Document*, 14 (Feb. 27, 2019).

⁹⁵ *Ibid.*; BAT, *supra* note 93, at 18.

⁹⁶ Record, ¶1, 17.

⁹⁷ CBD, *supra* note 41, art. 1.

⁹⁸ The Royal Society, *The Carbon Cycle: Better Understanding Carbon-climate Feedbacks and Reducing Future Risks* (June 25, 2021) (“a rise in global average surface temperature of 0.8°C to 2.5°C requires 1 trillion tonnes of carbon emission”); International Energy Agency, *Emissions from Oil and Gas Operations in Net Zero Transitions*, at 9 (May 2023) (“globally, the carbon emission from oil exploration is far below 1 trillion tonnes in 2022”).

Moreover, the Mountain Gorillas may tolerate the heat to a certain degree.⁹⁹ Since the Gorillas is similar to the Mountain Gorillas,¹⁰⁰ they may adapt to climate change.¹⁰¹

Second, the projects will not have a negative impact on the Gorillas' habitats. The oil drilling is predicted to have a low impact on the habitats.¹⁰² Also, the restoration of oil exploration can be effective.¹⁰³ Mammals may even be attracted to the conservation areas¹⁰⁴ and positive effects occur on the continuous regeneration of primary productivity in habitats that are previously disturbed.¹⁰⁵ Therefore, Replomuté did not violate Article 1 of the CBD.

ii. This project is in accordance with Article 7(c) of the CBD

Under Article 7 (c) of the CBD, Parties are required to identify processes likely to have significant negative impacts on the conservation of biological diversity.¹⁰⁶ In this case, the EIA has already identified the negative impacts.¹⁰⁷

c. Replomuté has not violated the UNFCCC and the Paris Agreement

i. Replomuté has not violated Article 3 and 4 of the UNFCCC

⁹⁹ African Wildlife Federation, International Gorilla Conservation Program, and Eco Adapt (Eds), *The Implications of Global Climate Change for Mountain Gorilla Conservation in the Albertine Rift* (2010).

¹⁰⁰ Clarifications, A.9.

¹⁰¹ Gorilla *beringei* ssp. *Beringei*, *supra note* 30, at 18.

¹⁰² *Ibid.*

¹⁰³ Assessing the impacts, *supra note* 64, at 806-07, (“the negative impact could be recovered within six years”).

¹⁰⁴ Assessing the impacts, *supra note* 64, at 806, 812.

¹⁰⁵ Tutilo Mudumba et al., *The Implications of Global Oil Exploration for the Conservation of Terrestrial Wildlife*, 11 *Env't Challenges* 100710 (2023).

¹⁰⁶ CBD, *supra note* 41, art. 7(c).

¹⁰⁷ Record, ¶ 17; see memo I.B.2.b.

Article 3 and 4 of the UNFCCC stipulates Annex I Parties' obligations to adopt measures to minimize climate change impacts.¹⁰⁸ The multinational enterprise's footprint is allocated to the located country.¹⁰⁹ In this case, the carbon emission is neutralized in DRI. DRI is a coastal country in central Africa¹¹⁰ where the second largest rainforest is located.¹¹¹ Consequently, carbon dioxide emitted by the project could be absorbed by the rainforest.¹¹² Therefore, since the project could barely cause climate change,¹¹³ Replomuté, an Annex I Party of the UNFCCC, has not violated its mitigation obligations.

ii. *Replomuté has acted in accordance with Article 3 of the Paris Agreement*

According to Article 3 of the Paris Agreement, Parties are required to meet the objective of strengthening the global response to climate change by submitting NDC. Additionally, Nationally Determined Contribution (NDC) is not legally binding for the Parties.¹¹⁴

In this case, Replomuté's NDC is covered by the European Unions' NDC¹¹⁵

¹⁰⁸ UNFCCC, *supra note 51*, art. 3.

¹⁰⁹ Luis-Antonio López et al., *The Carbon Footprint of the U.S. Multinationals' Foreign Affiliates*, *Nat. Commun.*, 3 (2019).

¹¹⁰ Record, ¶ 1.

¹¹¹ World Wildlife Found, Congo Rainforest and Basin, <https://www.worldwildlife.org/magazine/issues/winter-2014/articles/how-can-we-help-mountain-gorillas-deal-with-climate-change>.

¹¹² UNEP, <https://www.unep.org/news-and-stories/story/critical-ecosystems-congo-basin-peatlands>; The World Bank, <https://www.worldbank.org/en/news/feature/2022/10/24/journey-into-the-congo-basin-the-lungs-of-africa-and-beating-heart-of-the-world>.

¹¹³ *See memo*, II.A.1.c.i.

¹¹⁴ Daniel Bodansky, Paris Agreement, United Nations Audiovisual Library of International Law (Sept. 15, 2021).

¹¹⁵ Record, ¶ 15.

which is one of the most aggressive targets in the world.¹¹⁶ Therefore, Replomuté has acted in accordance with the Paris Agreement.

d. Replomuté is not a party to the Gorilla Agreement, Algiers Convention, and Revised African Convention on the Conservation of Nature and Natural Resource

Under Article 34 of VCLT, a treaty cannot create obligations for a third State without its consent.¹¹⁷ Replomuté never consents to be bound by and is not a party to the Gorilla Agreement, Algiers Convention, and Revised African Convention on the Conservation of Nature and Natural Resource.¹¹⁸

In this case, Replomuté is not obligated to comply with these treaties. Therefore, Replomuté is not bound by strict conservation for the Gorillas under Article III in the Gorilla Agreement, particular responsibility for the Gorillas under Article VIII in the Algiers Convention and Article X in Revised African Convention on the Conservation of Nature and Natural Resource.

2. Replomuté has not violated the due diligence obligations

Due diligence is an obligation of conduct instead of result.¹¹⁹ The precautionary principle is part of the due diligence obligations,¹²⁰ and the prevention principle

¹¹⁶ The Update of the Nationally Determined Contribution of the European Union and its Member States, at 7 (Dec. 17, 2020) (“to reduce emissions by at least 55% below 1990 levels by 2030”); *Climate Action Tracker*, <https://climateactiontracker.org> (last accessed Nov. 1, 2023).

¹¹⁷ VCLT, *supra note* 38, art. 34; *See also* in situation in Darfur, Sudan in the case of the Prosecutor v. Omar Hassan Ahmad al Bashir, ICC-02/05-01/09, Judgement, ¶10 (Apr. 3, 2018).

¹¹⁸ Record, ¶ 10, 11.

¹¹⁹ Int’l Law Comm’n, Rep. on the Work of Its Forty-Sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10, at 195, 237 (1994).

¹²⁰ IUCN, *Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management*, IUCN 1 (2007); Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion of 1 Feb. 2011, ITLOS Rep. 10.

originates from it.¹²¹ In this case, Replomuté has not violated **(a)** the precautionary principle, and **(b)** the prevention principle.

a. Replomuté has not violated the precautionary principle

i. The prerequisite to apply the precautionary principle was not met

Under Principle 15 of the 1992 Rio Declaration on Environment and Development limits the scope of the precautionary principle to the threats of “serious or irreversible damaging”. In this case, since this project will not cause harm to the Gorillas, their habitats and the climate,¹²² threats of serious or irreversible damage are lacking.

ii. Replomuté has acted in accordance with the precautionary principle

Conducting an EIA is a precautionary measure.¹²³ And this precautionary principle should be considered during decision-making.¹²⁴ Furthermore, implementing precaution needs to respond to and balance costs, benefits, and competing objectives.¹²⁵ The Stockholm Declaration declares that in the developing countries must direct their efforts to development,¹²⁶ so the circumstances and particular requirements of them should be taken into account when considering one State’s environmental obligations.¹²⁷ Moreover, proportionality confines

¹²¹ Pulp Mills, *supra note 22*, ¶ 101.

¹²² See memo, II.A.1.b.i., II.A.1.c.i.

¹²³ IUCN, Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management, IUCN 32 (2007).

¹²⁴ *Ibid*, at 25.

¹²⁵ *Ibid*, at 35.

¹²⁶ *Stockholm Declaration on the Human Environment*, Preamble, ¶ 4, U.N. Doc. A/CONF. 48/14/Rev.1, (June 5, 1973).

¹²⁷ *Ibid*, princ.12.

precautionary principle involving a balancing act of threats, benefits, and uncertainties across environmental, economic and social realms.¹²⁸

In this case, DRI has conducted an EIA prior to the 1981 DRI-Replomuté agreement,¹²⁹ which substantiates that it took precautionary principle into decision-making. Besides, the EIA conducted by DRI is in accordance with both international law and domestic laws.¹³⁰ DRI is a low-income country in Africa with abundant oil resources,¹³¹ it has the right to grant such project for development. They have carried out environmental obligations to take precautionary measures proportionally.

b. Replomuté has not violated the prevention principle

Under the prevention principle, a customary rule,¹³² the State is obliged to use all the means to prevent activities in its territory, or any area under its jurisdiction, from causing significant effects on the environment of another State.¹³³ In *Corfu Channel*, ICJ confined this duty to averting the risk emanating from states' own territories.¹³⁴ In this case, the entire project took place in DRI, which is not the territory or within the jurisdiction of Replomuté.¹³⁵ Thus, Replomuté did not breach this principle because it does not apply herein.

B. Replomuté Has No Direct Responsibility

¹²⁸ IUCN, Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management, IUCN 36 (2007).

¹²⁹ Record, ¶ 17.

¹³⁰ *Ibid.*

¹³¹ Record, ¶ 1.

¹³² Pulp Mills, *supra note* 22, ¶ 101.

¹³³ *Ibid.*

¹³⁴ Corfu Channel (U.K. v. Alb.), Merits, Judgement, 1949 I.C.J. 4, ¶ 22 (Apr. 9).

¹³⁵ Record, ¶ 17.

Under Article 8 of Responsibility of States for Internationally Wrongful Acts (RSIWA), the conduct could be attributed to the State if the State instructs or controls it. Replomuté did not *(1)* instruct this project, and *(2)* control this project.

1. Replomuté did not instruct this project

Although the DRI and Replomuté entered into an agreement that granted Lenoir Corporation the right to construct and transport oil,¹³⁶ no indications suggests that Replomuté did not instruct any specific conduct of the company.

2. Replomuté did not control this project

In *Nicaragua v. U.S.*, “effective control” requires both general control over the entity and specific control over the particular act by the State.¹³⁷ If the State uses its ownership interest in or control of a corporation to achieve a particular result,¹³⁸ the conduct could be attributed to the State.¹³⁹ In this case, although Lenoir Corporation is wholly owned and operated by the government of Replomuté,¹⁴⁰ no evidence shows that Replomuté implemented specific control over the corporation’s act nor to achieve its particular interest. Therefore, Replomuté should not be responsible for this project.

C. Replomuté Has No Indirect Responsibility

¹³⁶ *Ibid.*

¹³⁷ Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Merits, Judgment, 1986 I.C.J. 14 (June 27), ¶115 (June 27) [hereinafter *Nicaragua v. U.S.*]; *Jan de Nul N.V. and Dredging International N.V. v. Egypt*, ICSID, Award No.ARB/04/13, ¶ 173 (Nov. 6, 2008); *Gustav F. W. Hamster GmbH and Co KG v. Ghana*, ICSID, Award No.ARB/07/24, ¶ 179 (June 18, 2010).

¹³⁸ *Foremost Tehran, Inc. v. Iran*, IUSCT, Award No.220-37/231-1, 10 Iran-United States Claims Tribunal and the European Court of Human Rights: Yeager, 228 (Apr. 11, 1986); *American Bell International Inc. v. Iran*, IUSCT, Award No.255-48-3, 12 Iran-United States Claims Tribunal and the European Court of Human Rights: Yeager 170 (Sept. 19, 1986).

¹³⁹ *X v. Ir.*, App. No.4125/69, 1970 Y.B. Eur. Conv. on H.R. 198 (Eur. Comm’n on H.R.).

¹⁴⁰ Record, ¶ 17.

Replomuté has no indirect responsibility because *(1)* Replomuté did not coerce DRI, and *(2)* indirect State responsibility as committing coercion has no legal basis.

1. Replomuté did not coerce DRI

a. The nature of Replomuté's action was not coercion

In *Nicaragua v. U.S.*, economic coercion is a threatened or actual imposition of economic costs on one State by another to extract a policy concession.¹⁴¹

In this case, DRI is a low-income country with abundant recoverable oil resources,¹⁴² and the objective of this project is mutual benefit because it helps DRI with its development.

b. Replomuté's action did not meet the standard of coercion

Article 18 of RWISA uses the language “but for the coercion”, which sets an exceedingly unreachable standard.

First, the conduct must force the will of the coerced State, giving it no effective choice but to comply with the wishes of the coercing State.¹⁴³ In this case, DRI signed the agreement to conduct and acquiesced to continue the project under its free will as a sovereign State.¹⁴⁴

Second, economic coercion should meet the standard of interference.¹⁴⁵ In *Nicaragua v. U.S.*, America significantly reduced exportation, issued a trade embargo, and blocked the fundamental bank loans of Nicaragua,¹⁴⁶ which still cannot meet the

¹⁴¹ *Nicaragua v. U.S.*, *supra* note 137, ¶ 241.

¹⁴² Record, ¶ 1.

¹⁴³ Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 69 (2001).

¹⁴⁴ Record, ¶ 1, 17, 23.

¹⁴⁵ *Nicaragua v. U.S.*, *supra* note 137, ¶ 205.

¹⁴⁶ *Ibid.*, ¶ 22.

standard for coercion. In this case, the penalty at issue, if DRI dropped the project, was the order from the justice arbitral panel.¹⁴⁷ The fund given by Replomuté is for DRI's economic development.¹⁴⁸ Therefore, none of them satisfy the definition and standard of coercion.

2. Indirect State responsibility as committing coercion has no legal basis

Pursuant to Article 38.1 (b) of the Statute of ICJ, customary law entails two elements,¹⁴⁹ however, indirect State responsibility as committing coercion does not have *(a)* state practice, and *(b)* *opinio juris*.

a. Indirect State responsibility as committing coercion does not constitute constant and uniform state practice

State practice demonstrates itself in various forms: treaties, national legislation, diplomatic correspondence, policies, etc.¹⁵⁰ In *Asylum*, it was stated that state practice should be “constant and uniform”.¹⁵¹

Yet international law has neither defined coercion nor has it developed an understanding of the nature, processes, or legality of coercion.¹⁵² Internationally wrongful act for coercion is only enshrined in Article 18 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, but no state practice or

¹⁴⁷ Record, ¶ 23.

¹⁴⁸ *Ibid.*

¹⁴⁹ Antonio Cassese, *International law*, 119 (2001); Malcolm N. Shaw, *International Law*, 74 (6th ed., 2008).

¹⁵⁰ Rep. of the Int'l Law Comm'n to the General Assembly, 2 Y.B. Int'l L. Comm'n 364, at 368-72 (1950); see Ian Brownlie, *Principles of Public International Law*, 6 (Oxford Univ. Press, 2008).

¹⁵¹ *Asylum (Colom. v. Peru)*, Judgment, 1950 I.C.J. 266, 276 (Nov. 20).

¹⁵² Helal, Mohamed, *On Coercion in International Law* (March 21, 2019). 52 N.Y.U. J. Int'l L. & Pol. 1 (2019-2020), Ohio State Public Law Working Paper No. 475, 2 (2019).

legal effect appears to derive from this provision.¹⁵³ It is not regulated in international conventions, treaties or other forms. Thus, internationally wrongful act of coercion has no state practice.

b. The opinio juris of indirect State responsibility as committing coercion is insufficient

As required by *opinio juris*, State practice should be conducted in such a way as to show a general recognition that a rule of law or legal obligation is involved.¹⁵⁴ In this sense, when considering *opinio juris*, the positive acceptance of all Parties to the rule is indispensable.¹⁵⁵

First, all Parties is not likely to accept this provision regulated by ILC.¹⁵⁶ U.N. General Assembly requested the ILC to “undertake the codification of the principles of international law governing State responsibility.”¹⁵⁷ This mandate expressly does not allow the ILC to contribute to the progressive development of State responsibility.¹⁵⁸ Second, there is no international judicial or arbitral determination¹⁵⁹ which could form a general recognition. Therefore, the *opinio juris* of internationally wrongful act for coercion is insufficient.

Therefore, the actions of Replomoté with respect to the proposed oil extraction

¹⁵³ See Roberto Lavalle, *The Law of the United Nations and the Use of Force*, Under the Relevant Security Council Resolutions of 1990 and 1991, to Resolve the Persian Gulf Crisis, 23 Netherlands Y.B. Int'l L. 3 (1992).

¹⁵⁴ North Sea Continental Shelf (Ger. v. Neth.), Judgement, 1969 I.C.J. 3, 43 (Feb. 20).

¹⁵⁵ Malcolm N. Shaw, *International Law*, 93 (6th ed., 2008).

¹⁵⁶ RSIWA, *supra note* 18, art. 18.

¹⁵⁷ G.A. Res. 799(VIII), U.N. Doc. A/2630, Request for the Codification of the Principles of International Law Governing State Responsibility, at 52 (Dec. 7, 1953).

¹⁵⁸ James D. Fry, *Coercion, Causation, and the Fictional Elements of Indirect State Responsibility*, 40 Vand. J. Transnat'l L. 611, 620 (2007).

¹⁵⁹ *Ibid.*

activities in the DRI comply with international law.

CONCLUSION

The Respondent, Replomuté, respectfully requests the Court to adjudge and declare that:

1. Replomuté has not violated international law with respect to the preparation of an EIA.
2. The actions of Replomuté with respect to the proposed oil extraction activities in the DRI comply with international law.

Respectfully Submitted

Agents on Behalf of the Respondent State