
STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION,

2024

QUESTIONS RELATING TO
MOUNTAIN GORILLAS AND IMPACT ASSESSMENT

ARINGUV
(APPLICANT)

V.

REPLOMUTÉ
(RESPONDENT)

AT THE PEACE PALACE



WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT

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TABLE OF ABBREVIATIONS

No.	Abbreviation
1	Art: Article
2	ARSIWA: Draft Articles on Responsibility of States for Internationally Wrong Acts
3	CBD: Convention on Biological Diversity
4	CIL: Customary International Law
5	CMS: Convention of Migratory Species
6	Corporation the right to explore and extract oil from an area in the DRI
7	ICJ: International Court of Justice
8	DAC: Developemnt Assistant Committee
9	DRI: Democratic Republic of Ibirunga
10	EIA: Environmental Impact Assessment
11	Espoo Convention: Espoo Convention on Environmental Impact Assessment in a Transboundary Context
12	GA: Gorilla Agreement
13	LC: Lenoir Corporation
14	NCD: Nationally Determined Contribution
15	OECD: Organisation for Economic Co-operation and Development
16	R: Stetson Record
17	RACNNR: Revised African Convention of Nature and Natural Resources
18	UNFCCC: United Nations Framework Convention on Climate Change

19	VCLT: Vienna Convention on the Law of Treaties
20	1981 Agreement: The Concession Agreement that granted the Lenoir
21	§: Article (in footnotes)
22	¶: Paragraph

QUESTIONS PRESENTED

I.

**WHETHER THE FAILURE OF REPLOMUTÉ TO PREPARE AN EIA WITH
RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI
CONSTITUTES A VIOLATION OF INTERNATIONAL LAW**

II.

**WHETHER THE ACTIONS OF REPLOMUTÉ WITH RESPECT TO THE
PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI VIOLATE
INTERNATIONAL LAW**

STATEMENT OF JURISDICTION

In accordance with Article 40 of the Statute of the ICJ, Aringuv and Replomuté have submitted to the ICJ via Special Agreement, questions regarding environmental risk assessment obligations and oil extraction activities as contained in Annex A, including the Clarifications. The parties transmitted a copy of the Special Agreement to the Registrar of the ICJ on July 24, 2023.

The Registrar of the Court, in accordance with Article 26 of the Rules of the Court, addressed a notification of receipt of the Special Agreement to the parties on July 31, 2023.

The parties have accepted the jurisdiction of the ICJ. Consequently, they request the Court to adjudge the merits of this matter based on the rules and principles of general international law, as well as any applicable treaties. The parties further request this Court to determine the legal consequences, including the rights and obligations of the Parties arising from any judgment on the questions presented in this matter.

The parties have agreed to respect the decision of this Court.

STATEMENT OF FACTS

Background

Aringuv is located in central Africa, sharing a border with the Democratic Republic of Ibiringa (“the DRI”) (R¶2). Replomuté is a sovereign state located in Europe (R¶3). Aringuv claims that Replomuté has violated international law (i) in failing to carry out an Environmental Impact Assessment (“EIA”) in respect of proposed oil extraction activities in the region of the DRI, and (ii) in respect of the oil extraction activities themselves (R¶36).

The 1981 Agreement

In 1981 the Lenoir Corporation (“the LC”), which is owned by the state of Replomuté, entered into a concession agreement (“the 1981 Agreement”) with the DRI to explore and extract oil from an area in the DRI’s territory (R¶17). This area is inhabited by the southern population of the Royal Mountain Gorilla. Prior to entering into the 1981 Agreement, the DRI conducted an EIA in accordance with its own municipal laws in respect of the proposed oil extraction activities. This EIA considered impact on human populations, water usage and waste produced by the project (R¶17).

Oil exploration activities began in the region in 1983 but had to be halted on several occasions due to several issues impacting progress, such as civil unrest in the DRI and outbreaks of disease (R¶18, 19, 22, 24 and 32).

Mandatory Arbitration

The 1981 Agreement provided that binding arbitration should be the only mechanism to resolve disputes arising under same (R¶17). In 2012 the DRI’s new president, installed

following a military coup, declared that the DRI must either withdraw from the 1981 Agreement with LC or, in the alternative, that Replomuté must establish a \$50 million (USD) fund which would be under the control of the president of the DRI (R¶22). Replomuté then invoked the mandatory arbitration clause of the agreement. Replomuté were successful in the arbitration. The panel ordered that the DRI must allow the LC to proceed with the project or pay \$825 million in penalties (R¶23).

Discussion in relation to EIA Requirements

Further to informal discussion, on 11 December 2018, the state of Aringuv sent a diplomatic note to Replomuté, as the owner of LC, claiming that Replomuté was in breach of an obligation to carry out an EIA in the region due to potential for an adverse transboundary impact on Royal Mountain Gorillas, and the climate generally, arising out of LC's activities in the region. In support of these assertions, Aringuv referred to 1) Art. 5 of the Espoo Convention, 2) EIA requirements under the Revised African Convention of Nature and Natural Resources ("RACNNR"), 3) Art. 14(a) of the CBD and 4) Art. 4.1(f) of the United Nations Framework Convention on Climate Change ("UNFCCC") (R¶27).

On 21 March 2019, Replomuté responded, declining to carry out a new EIA, noting that the project had already been subject of the EIA completed by the DRI in 1981.

Replomuté asserted that 1) the said EIA was in compliance with the DRI's municipal laws and international obligations existing at that time, 2) that Aringuv is not a party to the Espoo Convention, so cannot invoke or rely on the provisions of same, and 3) Art. 14 of the Convention on Biological Diversity ("CBD") was most appropriately applied to projects being proposed in the territory of a Party (R¶28).

On 1 June 2019 Aringuv sent a further diplomatic note to Replomuté in rejoinder claiming that as the 1981 EIA did not consider the transboundary nature of the gorilla population or the

global climate, then the EIA must be revised due to “additional information on the significant transboundary impact of a proposed activity” under Art. 6.3 of the Espoo Convention.

Aringuv stated that customary international law requires EIAs to be conducted for activities with a potential transboundary impact (R¶29).

Replomuté responded once more on 24 September 2019 stating that the proposed activities would not have a transboundary impact as claimed – the Royal Mountain Gorilla does not “migrate” across state boundaries (R¶30).

Replomuté have also objected, substantively, to the project in the DRI.

In the diplomatic note of 1 June 2019, Aringuv claimed that 1) in proceeding with the project, Replomuté will be in breach of non-Range-state obligations under the Convention on Migratory Species (“CMS”) and 2) the DRI was subject to coercion by Replomuté, and accordingly, Replomuté is responsible for any breach of the Gorilla Agreement as per the ILC’s Draft Articles on Responsibility of States for Internationally Wrong Acts (R¶29).

Replomuté have rejected any claim of coercion and stated that they are not a Range State for the Royal Mountain Gorilla and therefore have no duties under Art. III CMS (R¶30). Aringuv and Replomuté have also been unable to reach consensus on the Royal Mountain Gorilla’s status as a transboundary species.

The pipeline has recently been delayed by the COVID-19 pandemic but is 98% complete. On 22 April 2022, Replomuté sent a diplomatic note to Aringuv stating that it intended to immediately resume the project in the DRI. The Government of Aringuv called for the DRI to revoke permits for the project. Negotiations between Replomuté and Aringuv facilitated by the Ugandan government ensued. Having failed to reach a resolution, the parties have agreed to submit this matter to the ICJ.

SUMMARY OF ARGUMENTS

I.

The failure of Replomuté to prepare an EIA with respect to the proposed oil extraction activities in the DRI is not in violation of international law. The oil extraction project was already subject to an EIA conducted by DRI before construction of the pipeline began. This EIA fully complied with DRI's municipal laws and any international obligations in existence at that time. Replomuté is not obliged to complete a second EIA further to that completed by the DRI.

Aringuv seeks to invoke the Espoo Convention to argue that the completed EIA was insufficient. However, the Convention didn't exist at that time, and there is no customary international law to suggest that the requirement to undertake an EIA is a retrospective one. In any event, Aringuv cannot invoke the Convention in circumstances where it has declined to ratify same, and cannot purport to be, an "affected party" as defined by the Convention. Moreover, Replomuté asserts that any potential environmental issue is not so significant as to warrant another EIA. The pipeline is now 98% completed, and it would be an academic and unnecessary exercise to carry out another assessment. The revenue generated by the oil extraction project will benefit the DRI's economic growth, and the government of Replomuté has established a 'Friendship Fund' to further bolster economic growth in the DRI. The net effect of the oil extraction project is of benefit to the DRI that outstrips any potential negative environmental impact – especially given that the construction is near completion.

II.

Replomuté's proposed oil extraction activities in the DRI are not in violation of international law. In terms of any direct responsibility assumed by Replomuté, they have not violated any international law in entering into this project. The DRI is a sovereign state, and its government has absolute competency to enter into concession agreements on behalf of the state. The government agreed to a mandatory arbitration clause in the initial agreement between the DRI and the Lenoir Corporation. Pursuant to a successful arbitration that found in favour of the Lenoir Corporation, Replomuté has agreed to engage in international judicial proceedings. Such is evidential of the respondent's willingness to abide by the law with respect between mutual states.

ARGUMENTS ADVANCED

QUESTION I: THE RESPONDENT'S FAILURE TO PREPARE AN EIA HAS NOT VIOLATED INTERNATIONAL LAW.

In this dispute, two categories of obligations arise for the Court's consideration – as was the case in the authority in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*¹, both procedural and substantive questions arise. The first question before the Court is an entirely procedural one, and the Respondent's chief submission is that it is sufficiently independent of any substantive questions.

I.1. The DRI, rather than the Respondent, is responsible for the preparation of an EIA

From the 1970s onwards, the requirement that an EIA be completed has had the character of customary international law.² Unsurprisingly then, EIA obligations are ubiquitous in international legal instruments.³ However, in the absence of a specific EIA regime to which any of the parties in this dispute were state parties in 1981, custom must dictate the extent of the applicable obligation. There were no treaty obligations express or otherwise in 1981 on the Respondent to carry out an EIA with respect to proposed activities to be carried out within the DRI. The obligation to carry out an EIA with respect to the activities proposed as part of

¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010.

² Craik, N. (2020) The Duty to Cooperate in the Customary Law of Environmental Impact Assessment. *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY*, 69 (1), 239-259.

³ Neil Craik, "Environmental Impact Assessment" in Jorge Vianuales ed. *The Rio Declaration on Environment and Development*, 463.

the 1981 Agreement falls on the national authority within which the activities are intended to be carried out – namely the DRI.

I.1.a. Sovereign States Assume Responsibility for Activities Within their Jurisdiction

As participants in the 1972 United Nations Conference on the Human Environment, all relevant states in this case have indicated their approval of Principle 21 of the 1972 Declaration: that states retain the right to exploit their own resources as per their own environmental policies, and that they assume responsibility in ensuring that activities “within their jurisdiction or control” do not cause environmental damage to other states or areas beyond their jurisdiction. This principle has been the subject of academic praise⁴ and has also been applied in ICJ cases such as the *Corfu Channel* case.⁵ Indeed, Principle 21 “remains the cornerstone of international environmental law”.⁶

The ‘no-harm’ principle is *lex lata*,⁷ and advisory opinion from this Court has upheld the “general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States”.⁸ As a sovereign state, the DRI bears ultimate responsibility for activities taking place in its own territory. This dispute is not one in the vein of that in *Trail Smelter*, the relevant aspect of which was the “encroachment” of one state’s activities into another.

⁴ Such as from René Lefeber, *Transboundary Interference and the Origin of State Liability*, Developments in International Law, Volume: 24.

⁵ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania)* Judgement of 9th April 1949, page 22.

⁶ Sands and Peel, 2018, *International Environmental Law* (Cambridge University Press), p. 201.

⁷ *Theory and Practice of Transboundary Environmental Impact Assessment*, edited by C. J. Bastmeijer, and Timo Koivurova, 2007, page 4.

⁸ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion 6 July 1996, ICJ Reports 1996, para 29.

I.1.b. The DRI has its own Legal Framework for an EIA

As a procedural matter, the Respondent is not responsible for the preparation of an EIA. Guidance provided by the Development Assistance Committee (“the DAC”) of the OECD states that “the governments of the developing countries bear the ultimate responsibility for the state of the environment in their respective countries and for the design of the development projects”.⁹ The Respondent state itself is not a member of the OECD, however, the influence of the organisation in high-income countries (especially across Europe) means that its principles and practices are the subject of common practice by many states - the Respondent may have recourse to fundamental principles of the DAC as a matter of custom – since the early 1960s, the DAC has been effective in setting global standards and policy priorities.¹⁰ In direct relation to EIAs in developing countries, the DAC has stated that “Only in cases where the recipient country has not yet adopted a legal framework for environmental protection will the project sponsor be solely responsible for the EIA.”¹¹ As the DRI had its own legal framework for an EIA in their jurisdiction, the respondent is not responsible for the completion of same.¹²

I.2. The Completed EIA complied with domestic law, international obligations and international customary law

The Respondent maintains that they are not responsible for the completion of an EIA, but that the completed EIA did satisfy all relevant requirements. Having addressed that the EIA was not the responsibility of the Respondent, the sole remaining question is the extent to which, if

⁹ OECD Development Assistance Committee: Guidelines on Environment and Aid, No 1. Good Practices for Environmental Impact Assessment of Development Projects. OECD Paris 1992.

¹⁰ The OECD Faces a Decision Point in 2021, Report by Daniel F. Runde et al, on behalf of Center for Strategic and International Studies.

¹¹ n 1.

¹² Record ¶17.

any, the content of an EIA is prescribed by law. Simply put, international law does not prescribe the contents of an EIA.¹³ Instead, it leaves the determination of the precise requirements of an EIA to the discretion of states.¹⁴ It is not in dispute that the EIA carried out by the DRI was compliant with its municipal law.

I.2.a. The Municipal Law of the DRI was complied with

Pulp Mills on the River Uruguay provides the most significant authority on transboundary EIAs in international law.¹⁵ The ruling in Pulp Mills stated that it was for each state to determine its domestic legislation in the authorisation of a project.¹⁶ In the first instance, the Respondent argues that as a Sovereign State, the determination of domestic legislation is an internal matter, falling outside the remit of challenge by external parties. The authority in Pulp Mills reinforces this position.¹⁷

I.2.b. The Espoo Convention is not Applicable

2.b.a. The Espoo Convention is an example of an instrument at international law which provides for more fully elaborated EIA commitments – indeed, while it has been argued that some of the specific requirements contained therein ought to be taken as evidence of growing consensus in international law of the required minimum contents of an EIA, these arguments have not been accepted.¹⁸ Accordingly, the specific requirements imposed by the Espoo

¹³ Neil Craik, “Environmental Impact Assessment” in Jorge Vianuales ed. *The Rio Declaration on Environment and Development*, 459.

¹⁴ Pulp Mills, para 205, ILC Draft Articles, Art.7, commentary 7.

¹⁵ Alan Boyle, *Developments in International Law of EIA and their Relation to the Espoo Convention*, Case Commentary on *Pulp Mills on the River Uruguay* (2010).

¹⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 205.

¹⁷ *ibid.*

¹⁸ Pulp Mills, para 205.

Convention, and invoked by the Applicant, are purely Treaty obligations. The requirements imposed by the Espoo Convention are the only possible analogue for the procedural obligations which arose in the Pulp Mills dispute, which arose out of the 1975 Statute of the River Uruguay. In circumstances where the Espoo Convention was yet to enter into force at the time when the EIA in this case was prepared, the Applicant's assertion that the EIA is not compliant with the requirements imposed by the Espoo Convention is illogical.

A close reading of the Espoo Convention nevertheless reveals that it has been improperly invoked by the Applicant in respect of the conduct alleged.¹⁹ Art. 2(3) of Espoo provides that the preparation of an EIA shall take place *prior* to a decision to authorise an activity with a potential transboundary impact.²⁰ It makes no provision, and imposes no codified requirement, for the preparation of a subsequent or revised EIA. As above, an EIA was prepared in accordance with the municipal law of the DRI prior to the Espoo Convention's entry into force - therefore, the initial EIA cannot be beholden to any substantive obligations of an EIA under the Convention.

I.2.b.b. The Respondent is not under a duty to revise the EIA

Aringuv has referred to an obligation to revise an EIA under Art. 6(3) of the Espoo Convention.²¹ The relevant content of this provision states: "If additional information on the significant transboundary impact of a proposed activity, which was not available at the time a decision was made ... becomes available to a concerned Party before work on that activity commences, that Party shall immediately inform the other concerned Party or Parties. If one of the concerned Parties so requests, consultations shall be held as to whether the decision

¹⁹ Record ¶27.

²⁰ Espoo Convention, § 2(3).

²¹ *Ibid*, § 6(3).

needs to be revised." The Applicant asserts that this should apply to threats to gorilla population and global climate that are 'now better understood'. However, the Respondent notes that this article applies to information that becomes available *before work on that activity* commences and thus cannot apply, given that the project commenced in 1983.²²

I.2.b.c. Aringuv is not a party to the Espoo Convention

We note further that the state of Aringuv is not a party to this same Convention as they have not ratified same.²³ The Vienna Convention (VCLT)²⁴ governs the applicability of treaties. The Convention states that a treaty or convention is only binding among its parties.²⁵ Furthermore, ratification of a treaty is the formal acknowledgment to other states that a state intends to be bound by its provisions.

The existing EIA was undertaken *prior* to the commencement of the project in 1983.²⁶ The Espoo Convention came into force on 10 September 1997.²⁷ The Applicant state signed the treaty in 2017 and yet, has not ratified same.²⁸ Signing a treaty is simply an indication to *undertake measures to express a consent* to be bound.²⁹ As Aringuv has not undertaken such measures, consent remains uncommitted by the Applicant.

As above, the project's EIA precedes any subsequent obligations provided in Espoo. There cannot be a binding international agreement where one party has failed to provide its consent

²² Record ¶18.

²³ Record ¶12.

²⁴ The Vienna Convention on the Law of Treaties 1969.

²⁵ *Ibid*, § 34.

²⁶ Record ¶17.

²⁷ Timo Koivurova, The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) Making Treaties Work: Human Rights, Environment and Arms Control (pp. 218-240).

²⁸ Record ¶12.

²⁹ UNEP Training Manual on International Environmental Law, p.4, para 19.

to be bound by its provisions. Therefore, Espoo cannot be invoked in relation to any subsequent or revised EIA due to the Applicant having failed to ratify same.

I.3. An EIA is not retrospective and there is not sufficient risk to mandate a further EIA

The Espoo Convention defines the EIA as ‘a procedure for evaluating the likely impact of a proposed activity on the environment’.³⁰ In the *Kishenganga* international arbitration, the tribunal stated that there is no single, defined, correct process for the preparation of a compliant EIA.³¹ As such, the EIA carried out by the DRI in 1981 complied with the domestic laws of the state. As found in *Certain Activities Carried Out by Nicaragua* in 2015 (para 160-161), an EIA is solely *ex post facto* in its content – an EIA only assesses a future impact rather than being retrospective.³² As such, it is unreasonable for Aringuv to have expected the DRI (or Replomuté) to retrospectively change the content of its initial EIA. Any proposed updated assessment would only have recourse to any future risk posed by the pipeline, which is nearly completed.

³⁰ Espoo Convention, § 1(vi).

³¹ *Award in the Arbitration Regarding the Indus Waters Kishenganga between Pakistan and India*, 20 December 2013, Reports of International Arbitral Awards, Volum XXXI, pp. 1–358.

³² *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, I.C.J. Reports 2015, pp. 665–742.

QUESTION 2: THE RESPONDENT’S ACTIONS, WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI, DO NOT VIOLATE INTERNATIONAL LAW.

II. 1. The Applicant’s Assertion that the Respondent has Violated International Law is Unfounded

The Applicant relies upon a number of provisions and upon international legal custom to support its assertion that the Respondent has violated international law in relation to the proposed oil extraction activities. The Applicant’s assertion that the Respondent has violated international law is unfounded as detailed below.

II.1.a. The Espoo Convention

The Espoo Convention does not apply to the Respondent, but reflects obligations pursuant to international custom. Art. 2(1) of the Convention summarises the customary obligation of the Respondent "to take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities."³³ The emphasis within this Article is on a '*significant adverse transboundary impact*', which the Respondent asserts is the key concern of the related international custom. This concern ought not to apply to the Respondent.

II.1.b. Significant adverse transboundary impact - The Royal Mountain Gorillas

³³ Convention on Environmental Impact Assessment in a transboundary context (Espoo Convention) – Article 2(1)

The Applicant may be subject to customary obligations in line with the provisions of the Espoo Convention. However, the necessity to comply with these reflected provisions is dependent upon whether there is a significant adverse transboundary impact. Notwithstanding the migratory nature of the Royal Mountain Gorillas as a species, there should be consideration as to whether the southern population of Royal Mountain Gorilla's migratory patterns are disturbed by the proposed oil extraction activities and, if so, whether such a disturbance is such as to give rise to a transboundary effect.

The oil extraction activities are strictly limited to take place within the DRI National Park.³⁹ The DRI National Park is the sole habitat of the southern population of the Royal Mountain Gorilla.⁴⁰ The southern population have 'rarely' been seen to cross the border into Aringuv, as recorded in the 2020 census.⁴¹ The National Geographic Society defines a 'habitat' as '[containing] *all an animal needs to survive such as food and shelter.*'⁴²

By virtue of this definition, the northern and southern populations of the Royal Mountain Gorilla remain located within their respective habitats: the southern population to the DRI National Park. This national park does not extend into the Applicant's territory. There is no purpose for the gorillas to 'migrate' or otherwise move across the border into Aringuv. This would mean leaving their habitat. The Respondent argues that any 'rare' sighting to the contrary cannot constitute a '*significant adverse transboundary impact.*'

Additionally, the 16th Meeting of the CMS Scientific Council on Range State Classification found that migratory patterns cannot be determined based only on some records of sightings³⁴. CMS defines a migratory species as one "whose members cyclically and

³⁴ 16th Meeting of the CMS Scientific Council on Range State Classification on June 30, 2010.

predictably cross one or more national jurisdictional boundaries”.³⁵ As such, the evidence of sightings presented is insufficient to define the southern population of Royal Mountain Gorilla as migratory under the CMS. As such, their conservation is not a concern under the CMS or the Gorilla Agreement.

This is in contrast to the northern population whose habitat is a *transboundary* national park.³⁶ The northern population of Royal Mountain Gorilla regularly crosses this border within the confines of their habitat, not by virtue of being migratory *per-se*, but by virtue of the fact that a border happens to dissect their habitat. For absolute clarity, the location of the exploration, construction, and oil extraction is in the region of the southern population and not the northern population of gorillas.

There is no transboundary issue at the location of the oil project, whether or not the Royal Mountain Gorilla is appropriately defined as a migratory species under the CMS. This reinforces that the Respondent does not have to comply with international custom correspondent with the Espoo Convention.

II.1.c. The Absence of Evidence of Significant Disturbance, even within the DRI

In presenting concerns surrounding the impact of oil extraction activities on the southern population of the Royal Mountain Gorilla, the Applicant has not considered that there is no reported evidence of any disturbance whatsoever to the southern population of Royal Mountain

³⁵ Convention on the Conservation of Migratory Species of Wild Animals, Art.1(1)(a).

³⁶ Record, para 9.

Gorilla by this project – even with construction of the pipeline having been at near completion.³⁷

The Respondent, given its practice of co-operation with³⁸ and providing assistance to³⁹ other states, would certainly consider evidence of significant disturbance to the Royal Mountain Gorilla as a courtesy to the Applicant and in the spirit of environmental conservation with regard to its concern of a “devastating impact” the proposed activities will likely have.⁴⁰ However, no such evidence has been advanced.

Not only has this project not caused significant disturbance, it stands to be of benefit in the long-term. Once the project concludes and eventually moves from its site, the ‘abandoned wells’ thus arising have been noted to be grounds of relative prosperity for indigenous fauna⁴¹, which in the long-term will benefit the southern population of Royal Mountain Gorilla who have a diet of 85% leaves, shoots and stems.⁴²

It is instructive to refer to international agreements⁴³, which underscore the general principle that environmental agreements require states to act only once there is a “likelihood of” or a “reasonable concern for” harm. There is no evidence that oil extraction activities will harm the

³⁷ Record ¶32.

³⁸ Record ¶17.

³⁹ Record ¶23.

⁴⁰ Record ¶27, the diplomatic note forwarded to the Government of Replomuté dated 11 December 2018.

⁴¹ Fuda, R.K., Ryan, S.J. Cohen, J.B., Hartter, J. and Frair, J.L., 2018. Assessing the impacts of oil exploration and restoration on mammals in Murchison Falls Conservation Area, Uganda. *African Journal of Ecology*, 56, 804-817; Davidsen, P.I., Sterman, J.D., & Richardson, G.P. (1990). *A petroleum life cycle model for the United States with endogenous technology, exploration, recovery, and demand*. *System Dynamics Review*, 6(1), 66-93.

⁴² WWF, ‘Top 10 Facts about Mountain Gorillas’ <<https://www.wwf.org.uk/learn/fascinating-facts/gorillas>> accessed 2 November 2023.

⁴³ Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (January 29, 1991); the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (March 17, 1992); the Convention on the Protection of the Baltic Sea Area (April 9, 1992); and the UN Framework Convention on Climate Change (May 9, 1992)

southern population of Royal Mountain Gorilla. Nor is there any evidence which ought to give rise to a reasonable concern that this may be the case.

II.2. Climate Change Considerations

The Applicant asserts that Art. 4.1(f) of the UNFCCC⁴⁴ applies to the project, in relation to climate change implications attached to the oil extraction activities⁴⁵. The Respondent acknowledges that climate change should be a consideration in state policies and asserts that this has been complied with to the extent specified by the UNFCCC.

II.2.a. Common but Differentiated Responsibility of the DRI

The Respondent observes that the exact actions that parties must take to consider climate change under Art. 4.1(f) have not been stipulated – ‘impact assessments’ suggested in the provision are simply an example of suggested action. In any event, the Respondent notes that these assessments must be ‘determined nationally’ as per this provision, contradicting the Applicant’s assertion that the Respondent is responsible for an EIA.

The Respondent notes the principle of ‘common but differentiated responsibilities’ of parties under Article 4 of the UNFCCC⁴⁶. Encyclopaedia Britannica defines this principle as a balance between “the need for all states to take responsibility for global environmental problems” and “the need to recognize the wide differences in levels of economic development between states.”⁴⁷ As such, the DRI retains the prerogative to utilise its natural oil resources through the

⁴⁴ UNFCCC, Art.4.1(f).

⁴⁵ Record, ¶27.

⁴⁶ UNFCCC, Art.4.

⁴⁷ Epstein, C. (2023, March 20). "common but differentiated responsibilities". *Encyclopedia Britannica*.

1981 Agreement to the benefit of its own development – the 20th preambular paragraph of the UNFCCC specifically states that it recognises ‘the special difficulties of those countries, especially developing countries, whose economies are particularly dependent on fossil fuel production, use and exportation’.⁴⁸ The Respondent asserts that the correct interpretation of the UNFCCC is that countries such as the DRI are entitled to ‘benefit from the fossil-based path to the industrialization enjoyed by developed nations’ as worded by Mohan et al.⁴⁹

II.2.b. The Respondent has provided sufficient financial support to mitigate climate impact

The Respondent as an Annex I developed country⁵⁰ acknowledges a duty to financially assist developing countries like the DRI with mitigating climate change implications as ratified under Art.9 of the Paris Agreement.⁵¹ However, there is no codified provision in the Paris Agreement of how a developed country must assist.⁵² The Respondent submits that they have substantively satisfied this general obligation - they have established a \$10 million (USD) fund for economic development in the DRI which can be used to diversify industry in the state away from fossil fuel resources.⁵³ By extension, this fund could be used to directly facilitate the DRI’s NDC obligations⁵⁴.

⁴⁸ N49, preambular paragraph 20.

⁴⁹ Aniruddh Mohan et al, UNFCCC must confront the political economy of net-negative emissions, *One Earth*, Volume 4, Issue 10, 2021, Pages 1348-1351.

⁵⁰ UNFCCC Annex I.

⁵¹ Paris Agreement, Article 9.1.

⁵² Geden, O. (2016), The Paris Agreement and the inherent inconsistency of climate policymaking. *WIREs Clim Change*, 7: 790-797.

⁵³ Record, ¶23.

⁵⁴ Record, ¶16.

II.2.c. Revised African Convention on the Conservation of Nature and Natural Resources

The Applicant contends that the Respondent should comply with the Revised African Convention on the Conservation of Nature and Natural Resources (“RACCNNR”).⁵⁵ Neither the DRI nor Replomuté is a Party to this Convention.⁵⁶ The Vienna Convention (VCLT) dictates that States who are not parties to a convention are not bound by them⁵⁷ so the Respondent is not bound by RACCNNR and the Applicant is incorrect to assert that it ought to comply with same.

The DRI has been, however, party to the African Convention on the Conservation of Nature and Natural Resources since 1969. The Respondent to this application is not party to that Convention. If the Applicant wishes to enforce the provisions of this Convention against the DRI, they ought to address that wish to the DRI.

II.2.d. Convention on Biological Diversity (CBD)

Principally, the Respondent asserts that the Convention on Biological Diversity (“CBD”) only imposes obligations on states in respect of activities within a party’s own territory.⁵⁸ The territory in question is the DRI and not the territory of the Respondent. The DRI is not a party to the CBD and thus, pursuant to the Vienna Convention (VCLT) as argued above, cannot be bound by the provisions of the CBD.

⁵⁵ Record, para 27.

⁵⁶ Record, para 28.

⁵⁷ VCLT

⁵⁸ Record, para 28.

Article 14.1(a) of the CBD introduces the obligation for a Contracting Party to conduct an EIA 'of its proposed activities that are likely to have significant effects in biological diversity...'.⁵⁹

An EIA was prepared by the DRI in this regard which complied with all relevant municipal law. In any event, the Respondent asserts that the EIA prepared complies with the requirements of the CBD.

II.3. CMS compliance and the Gorilla Agreement

II.3.a. Non-Range State Obligations

It is accepted that the Royal Mountain Gorilla is included in Appendix 1 of the CMS.⁶⁰ Both the Applicant and Respondent became parties to the CMS in 1983. 'Range-state' is defined within the CMS as; "*any State that exercises jurisdiction over any part of the range of that migratory species...*".⁶¹ The Range State of the migratory species is the DRI. The Respondent is not a Range State for the Royal Mountain Gorilla because that would require it to exercise jurisdiction over any part of the 'range' of the Royal Mountain Gorilla. It does not. It has no Range State obligations. Whilst the CMS also has a role in facilitating cooperation between Range States and non-Range States, it cannot be said that any independent obligations arise at international law. Therefore, the Respondent does not have any non-Range-State obligations under the CMS and so cannot be in breach of same. The Applicant is mistaken in its assertion the Respondent, as a non-Range State, is in breach of so-called 'non-Range State obligations' under the CMS.

⁵⁹ Convention on Biological Diversity, Art 14.1(a).

⁶⁰ Record, para 9

⁶¹ Convention on the Conservation of Migratory Species of Wild Animals, Article 1(1)h.

II.3.b. CMS is not triggered anyway

In any event, the Respondent does not accept that the oil extraction activities fall within the remit of the CMS.

In their diplomatic note sent on 1 June 2019, the Applicant observes that the “Gorilla Agreement (Article III, paragraph 2(a)) requires the DRI to “accord the same strict conservation for gorillas” as provided for under CMS Article III, paragraph 4”⁶¹. The Applicant is correct to observe that this section of the Gorilla Agreement (“GA”), signed and ratified by the DRI in 2007⁶², does specify that those obligations set out in Article III paragraph 4 of the CMS are extended to bind parties to the GA in relation to the Royal Mountain Gorilla.

The Respondent has not signed the GA⁶², nor is it a Range State within the meaning of same⁵⁹. Self-evidently then, the Respondent is under no obligation under the GA to adhere to its terms.

II.3.c. CMS / GA not contravened in any event.

In any event, and notwithstanding the Respondent’s submissions in relation to its obligations (or lack thereof) under the CMS and GA, the Applicant cannot show a clear breach of any obligations which may have arisen under either instrument.

Appendix 1 of the CMS looks to protect the Royal Mountain Gorilla’s; (i) habitat, (ii) species, and (iii) to prevent interference with any of its migration. The GA provides for the same protection as the CMS.

⁶² Record, para 10

II.3.c.i. Habitat

It is of comfort to all parties that during the exploration and substantially complete construction of the pipeline, that there has been no reported degradation of the gorillas' habitat (as above at II.1.c). The Applicant has not presented any evidence as to the impact of the proposed oil extraction activities on the habitat.

II.3.c.ii. Species

The species have remained within the area of the DRI National Park post exploration and construction of the pipeline.

II.3.c.iii. Migration

Again, the Applicant has not presented any evidence of the southern population of the Royal Mountain Gorilla's migratory patterns having been affected (as above at II.1.c).

II.4.Draft Articles on Responsibility of States for Internationally Wrongful Acts

II.4.a. The International Law Commission has acted Beyond its Mandate

The Applicant is alleging that the Respondent "is responsible for any breach by the DRI of the Gorilla Agreement, as Replomuté is coercing the DRI to commit an internationally wrongful act"⁶³. In making this allegation, the Applicant relies on Art.18 of the International Law Commission's ("ILC") Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA"). Art.18 means that the Respondent would be vicariously responsible for the proposed oil extraction activities violating the GA because, but for the coercion, the DRI would not be in violation of the GA. The Applicant alleges that the Respondent has coerced the DRI to permit the proposed oil extraction activities.

The Respondent rejects the Applicant's assertion of vicarious responsibility because the ILC's work on ARSIWA goes beyond its mandate. In many instances, the Draft Articles do not codify customary international law but impose new substantive rules. For coercion to have taken place, under customary international law, there must be a state practice of same, rather than one instance; and this important element of coercion is notably lacking at Art.18 of ARSIWA, which purports to present a brand-new standard.⁶⁴ For this reason, the Respondent rejects that ARSIWA have any effect on its international obligations.

II.4.b. No coercion to enter the 1981 agreement on the facts

⁶³ Record, 29.

⁶⁴ James D. Fry, *Coercion, Causation, at the Fictional Elements of Indirect State Responsibility*, 40 Vand. J. Transnational Law 611 (2007).

In 1981 the DRI freely entered an agreement with the Respondent which granted the LC the right to explore and extract oil in its territory. Being an independent, sovereign state; the DRI has the right to decide how its resources should be used and it did so by that Agreement. The Applicant's suggestion, in the absence of any supporting evidence, that the DRI was coerced into making the 1981 Agreement is manifestly unfounded.

The 1981 Agreement included a binding arbitration clause as the exclusive mechanism for dispute resolution of any issues which may arise in relation to the Agreement. For 31 years, no grievances were raised by either the DRI or the Respondent in relation to the Agreement.

II.4.c. No colonial extortion (coercion) in the course of the 1981 agreement on the facts

Following a military coup in the DRI in 2012, new president General Mina raised a concern that the DRI may be compelled to withdraw from the 1981 agreement in order for it to honour its obligations under the GA if the Respondent did not agree to establish a \$50million fund subject to his control. General Mina, newly installed as president after a destabilising military coup, sought to extort the Respondent for his own personal profit.

With even basic regard is had to the actual beneficiary of the 1981 Agreement as it stands, lazy recourse to allegations of neo-colonialism made by the Respondent simply in light of the parties' respective geographical locations, are manifestly unfounded. The Applicant has no basis to infer a power imbalance or direction of influence in relation to the 1981 Agreement from the basic fact that the Respondent is considered a high-income European country while the DRI is a low-income coastal state in central Africa.

If General Mina had believed that the DRI was compelled to withdraw from the 1981 Agreement following its ratification of the GA, the compensation of \$50 million sought to allow the project to continue would be no remedy to this problem. Given that the \$50 million was compensatory, the impact of the project on the legal obligations of the DRI under the GA would remain unchanged.

Following arbitration, the independent panel ordered the DRI to permit the LC to proceed with the project or be subject to more than \$825million in penalties. The DRI acquiesced to this order.

Without the 1981 Agreement, the independent arbitration panel would have no jurisdiction over either the DRI or the Respondent. The 1981 Agreement would not exist were it not for the DRI and the Respondent having freely made it. It is not accurate for the Applicant to imply that the panel is acting as a foreign body to exert inappropriate power over a less economically developed country when the panel derives its jurisdiction from that very same less economically developed country. To argue that the finding of the panel against the DRI is “colonial extortion” is to argue that the DRI has suffered an injustice by being subject to a court of its very own making. Such a suggestion is without basis or logic.

CONCLUSION AND PRAYER FOR RELIEF

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

- (1) Replomuté's failure to prepare an EIA with respect to the proposed oil extraction activities in the DRI is not in violation of international law.
- (2) Replomuté's actions with respect to the proposed oil extraction activities in the DRI do not violate international law

RESPECTFULLY SUBMITTED

AGENTS OF RESPONDENT