THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE, THE HAGUE, NETHERLANDS

THE 28TH ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL LAW MOOT COURT COMPETITION

2023-24

QUESTIONS RELATING TO MOUNTAIN GORILLAS AND IMPACT ASSESSMENT

THE STATE OF ARINGUV

APPLICANT

v.

THE STATE OF REPLOMUTÉ

RESPONDENT

MEMORIAL *for the* **RESPONDENT**

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STATEMENT OF JURISDICTION

Aringuv and Replomuté have consented to submit the disputed questions contained in Annex A of the Special Agreement to the International Court of Justice ('ICJ'), in accordance with Article 40, paragraph 1 of the Statute of the International Court of Justice and Article 26 of the Rules of Court, by way of compromise transmitted to the registrar on 10 November 2023. The Parties agree that the Court has jurisdiction to decide this matter and that they will not dispute the Court's jurisdiction in the written or oral proceedings.

QUESTIONS PRESENTED

I. Whether Replomuté is responsible for violating international law when it failed to prepare an Environment Impact Assessment (EIA) with respect to the proposed oil extraction activities in the region.

II. Whether Replomuté is directly and indirectly responsible for violating the international law with respect to the proposed oil extraction activities in the Democratic Republic of Ibirunga (DRI).

STATEMENTS OF FACTS

The State of Aringuv (Aringuv) shares its eastern border with the Democratic Republic of Ibirunga (DRI) in central Africa. DRI is an under-developed state and has been classified as a low-income country by the World Bank, however, it is rich in oil resources of which 4.4 billion are recoverable using current technology.

Aringuv is classified as a lower-middle income country by the World Bank and relies on its strong and growing hospitality and wildlife industry which includes mountain gorilla tourism.

Aringuv and DRI are home to a critically endangered species of gorilla called the Royal Mountain Gorilla and they are divided into the northern and southern populations. The northern population occupies a transboundary national park and often moves across the boundary of Aringuv and DRI. The southern population occupies a national park of DRI, and the members of this population have rarely been sighted in Aringuv.

The State of Replomuté (Replomuté) is a European state and has been classified as a high-income state by the World Bank. Replomuté is among the world leaders in various sectors of industrial output in addition to the service sector.

In 1981, Replomuté and DRI entered into a concession agreement that granted a Replomuté owned and operated corporation, Lenoir Corporation, the right to explore and extract oil along with construction of pipeline to transport the extracted oil from the area occupied by the southern population of royal mountain gorillas to the tankers shipping it to Replomuté.

Prior to the signing of the concession agreement DRI conducted an Environment Impact Assessment (EIA) in compliance with their national laws however, they did not consider the potential impacts to the gorillas and their habitats as well as the climate change.

In 1983 the Lenoir Corporation started oil exploration activities and conducted them till 2009 with a few interruptions in between due to political uprisings and Ebola outbreaks where they had to suspend operations. The construction of the pipeline began in 2009 and in 2012 the Lenoir Corporation announced its plan to begin oil extraction upon completion of the pipeline.

During this period local and international nongovernmental organizations (NGOs) raised serious concern to all involved parties including the CMS Secretariat regarding the negative impacts of the proposed oil extraction activities that would occur and therefore called for abandonment of the project.

In June 2012, the new president of DRI, General Mina declared that in light of the Gorilla Agreement, DRI was compelled to withdraw from the concession agreement unless Replomuté established a USD 50 million fund to compensate DRI for societal and environmental impacts. Replomuté invoked the mandatory arbitration clause under the concession agreement in refusal to compensate. Replomuté prevailed in arbitration and DRI had to acquiesce to the oil extraction activities or pay more than USD 825 million in penalties.

From 11 December 2018 began a series of communications between the Ambassadors of Aringuv and Replomuté where Aringuv addressed the issues they had with the oil extraction activities.

In consequences of this, negotiations between Aringuv and Replomuté continued and were facilitated by Uganda whereby both states agreed to submit certain questions to the International Court of Justice (ICJ) and Replomuté agreed to suspend activities until ICJ issues a judgement.

SUMMARY OF PLEADINGS

I

Replomuté have followed the DRI's national laws, and Lenoir's activities are aligned with international law. There is no substantial damage and no significant transboundary harm caused by the Replomute. The application of the precautionary principle has been acknowledged as customary international law. To constitute a violation of this rule, not only a physical relationship between the activity concerned and the damage caused needs to be established, but the threshold of the harm caused which allows claims to be brought also should reach the standard of "significant. In this case, there is no conclusive evidence in record to show that Replomute has violated international law. Furthermore, the southern population of Royal Mountain Gorilla does not 'migrate' across boundaries in between Aringuv and DRI, Gorillas are not classified as migratory species. Replomuté has assisted DRI in achieving the objective, but also furthered its own non-binding obligation under the UNFCCC by financing a $10 million friendship fund pledged towards the development of DRI. Hence, there has been no breach of obligations arising out of Article 4.1(f) UNFCCC and ESPOO Convention.

II

Replomuté's actions in the context of the proposed oil extraction activities in the Democratic Republic of Ibirunga (DRI) are grounded in a multifaceted legal defense. First, Replomuté contends that it did not violate the Convention on the Conservation of Migratory Species of Wild Animals (CMS) as it lacks jurisdiction over the Royal Mountain Gorillas in the DRI, having not signed the Gorilla Agreement and, therefore, not being a Range State. Furthermore, Replomuté argues it fulfilled its treaty obligations under the Paris Agreement, serving as a developed state

assisting the DRI in accessing oil resources for economic development. The absence of coercion in the concession agreement is emphasized, pointing to express consent, compliance with environmental impact assessments, and the inclusion of a binding arbitration clause. The argument further asserts that there is no risk of significant transboundary harm, invoking legal thresholds and the principle of good faith, highlighting Replomuté's proactive efforts, such as establishing a "Friendship Fund" as a gesture of goodwill for economic development in the DRI. Collectively, Replomuté presents a comprehensive legal defense, asserting its adherence to international law, cooperation, and responsible practices in the pursuit of oil extraction activities.

PLEADINGS

I. As a procedural matter, Replomuté has not violated international law with respect to the preparation of an EIA.

A. Replomuté has not violated customary international law principles by not conducting EIA:

Replomuté and the Lenoir Corporation have formed an agreement with the DRI for oil exploration and transportation in a national park within DRI's territory. They have followed the DRI's national laws, and Lenoir's activities are aligned with international law.

i. EIA is not an obligation under general international law:

There is no substantial damage and no significant transboundary harm caused by the Replomute. In the Uruguay Paper Mills and the Costa Rica cases, it was held that it is recognized as customary international law to apply the precautionary principle. In order for there to be breach of obligation, not only there must be a physical connection between the conduct in question and the injury caused but the harm must also meet the "significant" criterion in order for claims to be filed. Precautionary principle applies when repercussions from inaction could be serious and irrevocable. It is especially important to exercise caution when there could be dire or irrevocable repercussions from inaction. Moreover, this duty does not require a State to supervise actions for which it could not have reasonably predicted negative consequences. In this case, there is no conclusive evidence in record to show that Replomute has violated international law.

ii. EIA carried out by the DRI.

When an activity's detrimental effects spread from one state to another, transboundary damage occurs. Even while all pollution has negative impacts and may cause environmental harm, not all harmful effects will make the state liable. There are no established international

standards that specify the threshold/level of environmental damage that gives rise to liability; instead, threshold may differ from case to case based on local or regional conditions. The threshold has been acknowledged by the International Law Commission as "significant," and it is imperative that the harm must cause actual harm to human health, industry, property, environment, or agriculture in other States.

According to the ICJ, states are required by general international law to conduct an environmental impact assessment (EIA) in cases where there is a possibility that a planned activity could have a substantial negative impact on a resource that is "shared." Lastly, it is necessary to prove the accused State's noncompliance, especially in cases when transboundary harm may occur. In this instance, the DRI carried out a thorough EIA with a focus on the effects on the local human population, water use, and waste management. It concluded that the project was sound. Following the DRI's national rules (Moot Problem, Para. 17), the EIA determined that the project would not cause transboundary impact and it does not give rise to CIL obligation.

iii. There is no possibility of significant transboundary harm.

As per facts of the case, the southern population of Royal Mountain Gorilla not ‘migrate’ across boundaries in between Aringuv and DRI, Gorillas are not classified as migratory species. It is insufficient to assume that just because a small number of gorillas belonging to this particular group have occasionally been observed crossing into Aringuv's territory, that group represents the entire population. Since there is no obvious threat of transboundary harm, the precautionary principle is not applied, and an EIA is not necessary because the best available data does not indicate a significant risk of adverse transboundary harm. It is well known that potential habitat loss can cause species to migrate.

In order for harm to be classified as transboundary, it must be demonstrated that there is a physical link between the activity and the damage, that there is human causation, that there is a threshold for severity at which legal action is required, and that there is a transboundary migration as a result of the negative outcomes. These factors should be considered in their entirety since transboundary harm does not occur if any one of them is absent. Similarly, when the harm is not deemed "significant," the transboundary harm duty does not apply; instead, there must be negative consequences resulting from the harm. Furthermore, these effects need to be measurable using precise, impartial criteria. Therefore, there is no possibility of significant transboundary harm.

B. Replomuté has not failed to address the issue of significant adverse impact on the environment.

i. Regarding the southern population of Royal Mountain Gorillas, there was no requirement to carry out an EIA in a transboundary setting.

According to environmental agreements, states are generally obligated to act as soon as there is a "likelihood of" or "reasonable concern for" harm. When "States have reasonable grounds for believing that planned activities cause significant and harmful changes to the environment," the United Nations Convention on the Law of the Sea (UNCLOS) imposes an obligation to conduct an Environmental Impact Assessment (EIA) and a duty to cooperate. The International Court of Justice upheld the duty "not to allow its territory to be used for acts contrary to the rights of other states" in the Corfu Channel Case, which lends support to this strategy. The word "knowingly" adds a subjective component to the assessment of liability.

In this case, transboundary damage resulting from the migration of the southern population of Royal Mountain Gorillas did not necessitate the conducting of an EIA. There is no

discernible pattern of the Gorilla *ibirungai royali* southern population "migrating" across the DRI-Aringuv border. The CMS has noted that migration patterns cannot be inferred from a small number of sightings records alone when considering Range State obligations.

It is insufficient to assume that the occasional sighting of a small number of gorillas belonging to this particular group crossing into Aringuv's territory serves as a representative sample of the entire population. Since there is no obvious threat of transboundary harm, the precautionary principle is not applicable, and an Environmental Impact Assessment is not necessary because the best available data does not suggest that there is a significant risk of adverse transboundary harm. It is well known that potential habitat loss can cause species to migrate. Therefore, Replomuté has performed an EIA in cases where there was a perceived risk of transboundary harm, in accordance with its obligation to prevent such harm. It has not broken any of its duties under customary international law and has acted in accordance with the principles of caution and cooperation.

ii. There has been no breach of obligations arising out of UNFCCC.

The UNFCCC's Article 4.1(f) mandates the use of EIAs to reduce harmful human impacts on the climate. However, the Preamble "recognizes that standards applied by some countries may be inappropriate and of unwarranted economic and social cost to... developing countries," and the proviso to Article 4 states that Parties shall take "into account their common but differentiated responsibilities, and their specific national, and regional development priorities, objectives, and circumstances."

The UNFCCC also recognizes the principle of Common but Differentiated Responsibility (CBDR), which dates back to the Kyoto Protocol and is applicable to the current Paris Agreement on climate change. This is because it recognizes the inherent flaw in requiring similar goals of sustainable development among nations at different stages of development,

which entails having different resources and capacities. The UNFCCC respects the right of developing nations to enact domestic legislation in order to catch up to developed nations and fulfill their ambitions for sustainable development.

No party is under any "binding top-down obligation" under the UNFCCC framework to reduce its carbon emissions by a specific amount in order to meet the overall emission-reduction goal. Parties must accomplish this through their own Nationally Determined Contributions (NDCs), and developed nations, which are better positioned to control their policies to promote sustainable development, must give developing nations the financial assistance, capacity-building, and technology transfer they need to help them meet their nationally determined goals.

Due to past obstacles, DRI remains a low-income nation despite having enormous reserves of natural resources, including oil. As was previously mentioned, DRI has the right to work towards social and economic development, and the oil extraction project with Lenior is one way to achieve this aim. Simultaneously, it acknowledges the imminent threat posed by climate change and, in light of this, has established a Nationally Determined Contribution (NDC) of 20% to be used towards reducing greenhouse gas emissions, of which 18.5% is anticipated to come from outside sources in order to maintain low-emission development. In addition to helping DRI accomplish that goal, Replomuté has fulfilled its non-binding commitment under the UNFCCC by funding a $10 million friendship fund that has been promised to support DRI's growth. Therefore, there hasn't been any violation of the UNFCCC's Article 4.1(f) obligations.

iii. Replomuté has not violated its obligations under ESPOO Convention

The obligation under ESPOO Convention extends to its member states only. It is crucial to note here that Aringuv has not ratified the ESPOO Convention and no international

reciprocity exists between Replomute and Aringuv with respect to the ESPOO Convention. International reciprocity typically implies mutual adherence to the same international agreements, and in the absence of such an agreement, no reciprocal obligations exist in this instant case. The ESPOO Convention states that EIA is a procedure to evaluate the likely impact of proposed activity on the environment. An EIA does not necessarily have to establish that there will be no environmental risk. It is adequate if it follows the right processes and provides the required information about the projected consequences of the project. Therefore, in this Replomute has fully complied with Article 14.1(c) of CBD,

iv. EIA obligations do not apply under the Revised African Convention on the Conservation of Nature and Natural Resources

Because DRI is not a party to the Maputo Convention, and Replomute is not a party to either the Algiers Convention or the Maputo Convention, the relationship between African states who are parties to the Revised African Convention on the Conservation of Nature and Natural Resources, known as the Maputo Convention, will be governed by Article XXXIV (1) of the Maputo Convention, which clearly states 'Parties which are bound by this Convention, only this Convention shall apply'.

II. <u>Replomuté's actions with reference to the proposed oil extraction activities in the DRI comply with international law.</u>

A. Replomuté did not violate international law:

i. Replomuté did not violate Convention on the Conservation of Migratory Species of Wild Animals (CMS)

Replomuté does not exercise any jurisdiction over the migratory species of Royal Mountain Gorillas in DRI. They did not sign the Gorilla Agreement due to which Replomute does not fall under the category of Range State for the purpose of CMS. Moreover, for Royal

Mountain Gorillas, Replomuté has no obligation for their conservation and protection. The existence of sovereign rights over wild animals means that the States have exclusive jurisdiction ratione loci over them in all areas under their jurisdiction and no jurisdiction outside their national jurisdictional limits. So, the animals that migrate from one jurisdiction to another are subject, in succession, to the sovereign right and jurisdiction of all the States where they migrate.[1] Royal Mountain Gorillas inhabit the national park which is under the jurisdiction of DRI; hence, Replomuté has no sovereign right over Royal Mountain Gorillas.

ii. Replomuté fulfilled its treaty obligations under Paris Agreement

Replomuté being a developed state for the purposes of Article 9 (1) and (3) of the Paris Agreement was fulfilling its obligation to "provide financial resources to assist developing country Parties" by helping them access the 4.4-billion-barrel oil resources[2] which would have helped them gain financial independence, thus allowing them to fulfill their commitments under the NDC[3]. Replomuté fulfilled its obligation as a developed state under the Paris Agreement by assisting DRI in gaining financial independence. Therefore, Replomute' fulfilled its obligation as a developed state under the Paris Agreement while assisting DRI in gaining financial independence.

B. There is no coercion by Replomuté against DRI for the fulfillment of the concession agreement[4]

i. Express consent and agreement:

The concession agreement between the DRI and Replomuté was entered into voluntarily, demonstrating a clear expression of consent from both parties. The agreement, signed in 1981, granted the Lenoir Corporation exploration and extraction rights within the area

[1] DE KLEMM, CYRIL. "Migratory Species in International Law." Natural Resources Journal 29, no. 4 (1989): 935–78. http://www.jstor.org/stable/24883419.
[2] Moot Record, Para 1
[3] Moot Record, Para 16
[4] Moot Record, Para 30

inhabited by the southern population of the Royal Mountain Gorilla. This grant was a product of mutual agreement and negotiation.

ii. Environmental Impact Assessment (EIA):

Prior to entering the agreement, the DRI conducted an Environmental Impact Assessment (EIA) in accordance with its national laws. The focus of the EIA was on the impacts of the proposed activities on nearby human populations, and it complied with national laws. The completion of a comprehensive EIA demonstrates a careful consideration of environmental and social factors, emphasizing a commitment to responsible and lawful practices.

iii. Binding arbitration clause:

The concession agreement contained a mandatory binding arbitration clause as the exclusive mechanism for dispute resolution. The inclusion of such a clause reflects a consensual approach to dispute resolution, providing a fair and agreed-upon mechanism for addressing potential conflicts.

iv. No coercive elements evident:

Coercion typically involves an element of force, intimidation, or undue pressure. The facts presented do not indicate any coercive tactics employed by Replomuté against the DRI in the negotiation or execution of the concession agreement. The absence of coercion is further supported by the fact that the DRI, as a sovereign entity, engaged in a thorough assessment of the environmental impacts before entering into the agreement.

C. There is no risk of significant transboundary harm:

Under International Law the risk of causing significant transboundary harm refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact. It is, therefore, the combined effect of risk and harm which sets the

threshold, and the combined effect should reach a level that is deemed significant.[5] A legal threshold is reflected in the Trial Smelter award which used the words “serious consequences”[6], as well as the Lake Lanoux award[7], which also used “significant”, “serious” or “substantial” as the threshold. It is to be understood that “significant” is something more than detectable but need not always be at the level of serious or substantial.

i. Good faith principle

As per Article 26 of Vienna Convention on the Law of Treaties (VCLT), "every treaty in force is binding upon the parties to it and must be performed by them in good faith." Replomuté's actions throughout the arbitration process and the subsequent execution of agreements underscore its commitment to good faith dealings. Upon prevailing in the binding arbitration in March 2015, Replomuté could have merely insisted on the enforcement of the arbitral panel's order. However, as a demonstration of goodwill and cooperative diplomacy, Replomuté took a proactive approach. The government of Replomuté not only permitted the Lenoir Corporation's oil exploration and extraction activities, aligning with the arbitral decision, but it went further. Establishing a $10 million (USD) "Friendship Fund" for economic development activities in the DRI showcased Replomuté's genuine intention to foster a positive relationship. The fund, administered jointly by representatives from both governments, exemplifies a commitment to collaborative economic development, emphasizing the spirit of cooperation and good faith in Replomuté's international engagements.

[5] Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities commentary, Article 2 (a), (b), (c).
[6] Trail smelter case (United States, Canada), 16 April 1938 and 11 March 1941, VOLUME III pp. 1905-1982.
[7] Ake Lake Lanoux Arbitration (France v. Spain) (1957) 12 R.I.A.A. 281; 24 I.L.R. 101 Arbitral Tribunal.1 November 16, 1957.

PRAYER FOR RELIEF

Replomuté respectfully requests this Court to adjudge and declare that:

A. Replomuté is not responsible for violating international law regarding the preparation of an Environment Impact Assessment (EIA) with respect to the proposed oil extraction activities in the region.

B. Replomuté is not directly and nor indirectly responsible for violating international law with respect to the proposed oil extraction activities in the Democratic Republic of Ibirunga (DRI).

Respectfully submitted,

AGENTS FOR RESPONDENT