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**TWENTY-EIGHTH ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT**

**COMPETITION, 2023 - 2024**

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2023 GENERAL LIST NO. 303

**QUESTIONS RELATING TO MOUNTAIN GORILLAS AND IMPACT**

**ASSESSMENT**

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**ARINGUV**

*(Applicant)*

v.

**REPLOMUTÉ**

*(Respondent)*

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**AT THE PEACE PALACE**

**THE HAGUE, NETHERLANDS**

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WRITTEN SUBMISSIONS *on behalf of the* RESPONDENT

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**QUESTIONS PRESENTED**

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**I.**

WHETHER REPLOMUTÉ VIOLATED INTERNATIONAL LAW WITH RESPECT TO THE PREPARATION OF AN EIA?

**II.**

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

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**STATEMENT OF JURISDICTION**

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On June 16, 2023, Aringuv and the Replomuté, submitted the following dispute to the International Court of Justice [“ICJ”] by Special Agreement, in accordance with Article 40(1) of the Statute of the ICJ. The Registrar of the ICJ addressed notification to the parties on 31 July 2023. Aringuv and Replomuté have accepted jurisdiction of the ICJ pursuant to Article 36(1) of the Statute and request that the Court adjudge the dispute in accordance with the rules and principles of international law, including any applicable treaties.

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**STATEMENT OF FACTS**

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**BACKGROUND**

Aringuv and the Democratic Republic of Ibirunga [“DRI”] are central African, neighboring, sovereign states. Replomuté is a sovereign state in Europe. The Royal Mountain Gorillas [“RMG”] are species found only in DRI and Aringuv and live in two completely isolated populations, the northern of which frequently migrates and the southern, almost never.

**CONCESSIONARY AGREEMENT**

Replomuté, entered into a Concessionary Agreement with DRI, which permitted its wholly owned and operated corporation, Lenoir Corporation, to conduct oil exploration and extraction in an area inhabited by the southern population of the RMG and construct an oil pipeline. The environmental impact assessment [“EIA”] conducted by DRI during the agreement's negotiation process adhered to its national laws.

**ACTIVITIES BY THE CORPORATION**

The corporation conducted oil exploration activities from 1983 until 2009, halted periodically due to factors such as war. The construction of the pipeline began in 2009 and extraction activities were set to commence post its completion in August 2014, as notified in 2012.

**OBJECTION BY NGOS, ARBITRATION**

Concerns regarding the potential harm to the RMG prompted local and international NGOs to call for the cessation of these activities. In June 2012, DRI's president threatened to withdraw from the agreement unless a compensation fund of \$50 million USD was established for DRI. Replomuté invoked the arbitration clause in the agreement and the panel ordered the DRI to

permit the activities or be subject to more than \$825 million (USD) in penalties, and the DRI agreed to the first.

**THE DISPUTE**

Aringuv raised objections about the adverse impacts of these activities on RMG and climate change, alleging that Replomuté's actions violated international obligations and asserting that DRI had been subjected to coercion. Aringuv further sought a suspension of the permits for pipeline construction and operation. Replomuté wholly refuted these claims. Following unsuccessful negotiations, the parties, initiated proceedings at the International Court of Justice ["**ICJ**"] by entering into a Special Agreement to address the aforementioned issues.

**SUMMARY OF ARGUMENTS**

**1. AS A PROCEDURAL MATTER, REPLOMUTÉ HAS NOT VIOLATED INTERNATIONAL LAW WITH RESPECT TO THE PREPARATION OF AN ENVIRONMENTAL IMPACT ASSESSMENT.**

Replomuté has not violated the Convention on Biological Diversity [“CBD”], the United Nations Framework Convention on Climate Change [“UNFCCC”] and customary international law [“CIL”] with respect to the preparation of an EIA.

**2. AS A SUBSTANTIVE MATTER, THE ACTIONS OF REPLOMUTÉ WITH RESPECT TO THE PROPOSED ACTIVITIES IN DRI DO NOT VIOLATE INTERNATIONAL LAW.**

Replomuté is not directly responsible under International Law and is not indirectly responsible for the International Wrongful Acts [“IWA”] by DRI under the Draft Articles on Responsibility of States for International Wrongful Acts [“ARSIWA”].



**ARGUMENTS ADVANCED**

**1. AS A PROCEDURAL MATTER, THE FAILURE OF REPLOMUTÉ TO PREPARE AN ENVIRONMENTAL IMPACT ASSESSMENT FOR THE PROPOSED ACTIVITIES DOES NOT VIOLATE INTERNATIONAL LAW.**

Replomuté’s failure to prepare an EIA for the proposed activities does not violate international law as it does not violate customary international law [“CIL”] [1.1] and treaty obligations [1.2].

**1.1. REPLOMUTÉ DOES NOT VIOLATE ITS OBLIGATIONS UNDER CIL.**

Replomuté has not violated its CIL obligation of due diligence to prevent or minimize transboundary harm [1.1.1], and its duty to cooperate, consult and notify [1.1.2].

**1.1.1. Replomuté has not violated obligation of due diligence to prevent or minimize transboundary harm.**

*Firstly*, the obligation to conduct an EIA is not one of due diligence [1.1.1.1], *secondly* Replomuté does not have an obligation to conduct an EIA [1.1.1.2], *thirdly*, the proposed activities are not likely to cause significant transboundary harm [1.1.1.3]. *Therefore*, Replomuté has not violated its CIL obligation of due diligence to conduct an EIA.

*1.1.1.1. An obligation to conduct an EIA is not of due diligence and does not amount to CIL.*

An obligation to conduct an EIA is an independent obligation, separate and distinct from the CIL norm of due diligence.<sup>1</sup> Moreover, A CIL rule cannot be constituted, if it is inconsistent, contradictory and contains different core elements.<sup>2</sup> An EIA is essentially a domestic tool<sup>3</sup> as the process employed for carrying out an EIA is not set out in any international document,<sup>4</sup> and left to the determination of the state.<sup>5</sup> Moreover, as transboundary EIA is an outgrowth of

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<sup>1</sup> Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep.665 (Dec. 16, 2015) (Separate opinion of J. Dugard). [**“Certain Activities Dugard”**].

<sup>2</sup> Asylum (Columbia v. Peru), Judgment, 1950 I.C.J. Rep. 266, 277 (Nov. 20, 1950).

<sup>3</sup> SUMUDU A. ATAPATTU, EMERGING PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (2007).

<sup>4</sup> Alan Boyle, *Developments in International Law of EIA and their Relation to the Espoo Convention* [last visited Oct. 4, 2023].

<sup>5</sup> Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep 14 ¶205 [**“Pulp Mills”**]; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep.665 (Dec. 16, 2015) [**“Certain Activities”**]; Elizza Rouzzi, *The Obligation to Undertake an Environmental Assessment in the Jurisprudence of the ICJ: A Principle in Search of Autonomy*, 8, European J. of Risk Reg. (2017).

a domestic EIA,<sup>6</sup> there are no minimum binding standards that nation-states must follow, especially since such assessments are policy instruments.<sup>7</sup>

Therefore, in light of inconsistent core elements and insufficient state practice, obligation to conduct an EIA cannot constitute a CIL obligation.

*1.1.1.2. Replomuté does not have an obligation to conduct an EIA.*

Under international law, the obligation to conduct an EIA lies with State of origin.<sup>8</sup> Territory is the conclusive and dominant criterion for jurisdiction.<sup>9</sup> Even, in case of competing jurisdictions over an activity, the territorial jurisdiction would prevail.<sup>10</sup> Moreover, under a concession agreement, the ultimate sovereign powers over the land remain with the host state,

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<sup>6</sup> John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291 (2002).

<sup>7</sup> NEIL CRAIK, *THE INTERNATIONAL LAW OF ENVIRONMENTAL IMPACT ASSESSMENT* (Cambridge University Press 2008).

<sup>8</sup> Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001 in Report of the International Law Commission on the Work of its Fifty-Third Session [2006], 2 Y.B. INT. L. COMM. 2, U.N. DOC. A/56/10, 2006 [**“ILC Commentary”**].

<sup>9</sup> International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, U.N. Doc. A/56/10 (2001) [**“PTH”**] art. 1.

<sup>10</sup> *Id.*

and are not transferred to the corporation.<sup>11</sup> Additionally, a nation may even invoke exemptions to conduct an EIA, including internal disturbance, emergency, terrorism or natural disasters.<sup>12</sup>

Herein, the proposed oil extraction and exploration activities are to take place in the territory of DRI.<sup>13</sup> Even under the concession agreement, the ultimate sovereign powers remained with DRI. Alternatively, even if the obligation is placed on Replomuté, instances including civil war,<sup>14</sup> Ebola outbreak,<sup>15</sup> military coup,<sup>16</sup> and labor challenges, cumulatively relieved the exemption of Replomuté. Consequently, the liability to conduct an EIA did not arise on Replomuté.

*1.1.1.3. The proposed activities are not likely to cause significant transboundary harm.*

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<sup>11</sup> DANIEL ET AL., THE TAXATION OF PETROLEUM AND MINERALS: PRINCIPLES, PROBLEMS AND PRACTICE (Routledge, 2010).

<sup>12</sup> Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. Rep.665 (Dec. 16, 2015) (Separate opinion of J. Bhandari).

<sup>13</sup> *Record*, ¶17.

<sup>14</sup> *Id.*, at ¶18.

<sup>15</sup> *Id.*, at ¶19.

<sup>16</sup> *Id.*, at ¶22.

Harm is significant if its detrimental effect can be measured by factual and objective standards,<sup>17</sup> and it reaches a level of seriousness.<sup>18</sup> Furthermore, ‘significant’ environmental harm,<sup>19</sup> is to be determined by balancing the socio-economic utility of an activity against its detrimental effects on the environment.<sup>20</sup>

For climate change to constitute significant transboundary harm, there must be a concrete causal link between greenhouse gas emissions and climate change damage.<sup>21</sup> Illustratively, even Micronesia’s objections to the global CO<sub>2</sub> emissions and climate change concerns arising

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<sup>17</sup> Report of the International Law Commission on the Work of Its Fifty-Third Session, [2001] 2 Y.B. INT’L L. COMM’N 34, U.N. Doc. A/CN.4/SER.A/2001/Add.1.

<sup>18</sup> Trail Smelter Arbitration (U.S.A. v. Canada), 3 R.I.A.A 1907, 1965 (1941) [“**Trail Smelter**”]; Lake Lanoux Arbitration (France v. Spain), (1957) 12 R.I.A.A. 281.

<sup>19</sup> PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, at 878 (2nd ed. CAMBRIDGE U. PRESS 2003).

<sup>20</sup> Marte Jervan *The Prohibition of Transboundary Environmental Harm: An Analysis of the Contribution of the International Court of Justice to the Development of the No-Harm Rule* (2014) PluriCourts Research Paper No 14-17 (“Jervan (2014)”); Rene Lefeber *Transboundary Environmental Interference 269 and the Origin of State Liability* (Kluwer International Law, The Hague, 1996) (“Lefeber (1996)”).

<sup>21</sup> RAYFUSE & SCOTT, INTERNATIONAL LAW IN THE ERA OF CLIMATE CHANGE 338 (2012) [“**Rayfuse**”].

from a Czech project did not lead to closure of the project.<sup>22</sup> The onus rests upon the claimant state to demonstrate the extent to which global warming is attributable to the defendant state.<sup>23</sup>

Further, the proposed activities are to take place in the area inhabited by the southern population of RMG. There is no contact between northern and southern populations<sup>24</sup> which precludes the possibility of any group interaction and transboundary harm. Moreover, there is no concrete evidence of significant impact on RMG. RMG are similar in behavior to Mountain Gorillas (*Gorilla beringei beringei*),<sup>25</sup> which have a strong inherent resilience to adversity.<sup>26</sup> They have a large thermal tolerance, obtain nutrition from multifarious plants and are not tied to permanent nesting sites, which buffers the impact of changes in the environment.<sup>27</sup> Therefore, the proposed activities are not likely to have a significant adverse transboundary impact.

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<sup>22</sup> CINNAMON P., GRAY & TARASOFKY, EDs., OXFORD HANDBOOK OF CLIMATE CHANGE AND LAW (Oxford University Press, 2016).

<sup>23</sup> Rayfuse, *supra* note 21, at 338.

<sup>24</sup> *Record*, ¶9.

<sup>25</sup> *Clarifications*, A9.

<sup>26</sup> African Wildlife Foundation, *The Implications of Global Climate Change for Mountain Gorilla Conservation in the Albertine Rift*.

<sup>27</sup> *Id.*

**1.1.2. Replomuté has not violated its CIL obligation of due diligence of consultation and notification.**

The obligation of consultation and notification only arises when an EIA has been conducted.<sup>28</sup> Moreover, the duty to consult and notify arises only with respect to potentially affected States,<sup>29</sup> when there is a risk of significant transboundary harm.<sup>30</sup>

*In casu*, firstly, the obligation to conduct an EIA was not on Replomuté. Secondly, as no risk of significant transboundary harm was present, no obligation to notify and consult Aringuv arose. Nevertheless, Replomuté has cooperated with Aringuv in a limited capacity with respect to the diplomatic exchange by ensuring open lines of communications<sup>31</sup> and further negotiations facilitated by Uganda<sup>32</sup> which fulfilled the obligation to cooperate. Therefore, Replomuté has not violated its obligation of consultation and notification.

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<sup>28</sup> *Id.*

<sup>29</sup> U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.I), annex I, at Principle 17 (Aug. 12, 1992) [**“Rio Declaration”**].

<sup>30</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.)* and *Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica)*, Judgment, 2015 I.C.J. Rep.665 (Dec. 16, 2015).

<sup>31</sup> *MOX Plant Case, Ireland v United Kingdom, Order, Request for Provisional Measures*, ITLOS Case No 10, ICGJ 343 (ITLOS 2001), 3rd December 2001, International Tribunal for the Law of the Sea 88 (Separate opinion. J. Rudiger Wolfrum)

<sup>32</sup> *Record*, ¶35.

**1.2. REPLOMUTÉ DID NOT VIOLATE ITS OBLIGATIONS UNDER TREATY LAW.**

Replomuté did not violate obligations under the Espoo Convention, [1.2.1], the CBD [1.2.2] and the UNFCCC and Paris Agreement [1.2.3].

**1.2.1. Replomuté did not violate obligations under the Espoo Convention.**

A state is a ‘party’ to a treaty, if it expresses its consent to be bound by the treaty,<sup>33</sup> and in its absence, there exist no rights to a state under that treaty.<sup>34</sup> Unless otherwise indicated, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty.<sup>35</sup> Under the Espoo Convention, signatory states are further required to ratify, accept or approve the Convention to be bound.<sup>36</sup> The obligation of the party of origin to conduct an EIA only lies towards parties to the treaty.<sup>37</sup>

Here, Aringuv has only signed the Espoo Convention but not ratified it.<sup>38</sup> Since Aringuv has not acceded to it, there exists no reciprocity between Replomuté and Aringuv,<sup>39</sup> *Therefore*, it

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<sup>33</sup> Vienna Convention on the Law of Treaties, art. 2(g), Vienna 23/05/1969, U.N.T.S. Vol. 1155, 331 [“VCLT”].

<sup>34</sup> VILLIGER, M., COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF THE TREATIES 176 (2009); *Id.*

<sup>35</sup> VCLT, *supra* note 33, art. 16.

<sup>36</sup> Convention on Environmental Impact Assessment in a Transboundary Context, art.17, Sep. 10, 1997, 1989 U.N.T.S 309. [“Espoo Convention”].

<sup>37</sup> *Id.*, arts. 3, 4, 5 & 6.

<sup>38</sup> *Record*, ¶12.

<sup>39</sup> *Clarifications*, A7.



does not have any rights under it and Replomuté did not violate any obligations under the Espoo Convention.

**1.2.2. Replomuté did not violate obligations under the CBD.**

At the outset, CBD does not create binding obligations [1.2.1.1]. *Alternatively*, Article 14.1(a) is inapplicable in this case [1.2.1.2]; and Article 14.1(c) has been complied with [1.2.1.3]; and *consequently*, the actions of Replomuté do not violate the CBD.

*1.2.2.1. CBD does not create binding obligations.*

The provisions of CBD, rather than being strict and binding duties, are stated as overarching objectives and policies, with detailed actions for execution to be defined in line with the circumstances and capacities of each Party.<sup>40</sup> Individual Parties are responsible for deciding how to implement the majority of the Convention's provisions at the national level because it does not have lists, specific targets, and annexes pertaining to sites or protected species.<sup>41</sup>

*1.2.2.2. Article 14.1(a) of the CBD is inapplicable.*

Parties to the CBD are to *as far as possible* and *as appropriate* introduce procedures requiring an EIA for their proposed projects likely to have significant adverse effects on biological diversity with a view to avoid or minimize such effects.<sup>42</sup> This article applies to the proposed

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<sup>40</sup> SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, GLOBAL BIODIVERSITY OUTLOOK 1 (2007).

<sup>41</sup> SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, FACTSHEET ON NATIONAL IMPLEMENTATION (2011).

<sup>42</sup> Convention on Biological Diversity, art. 14.1(a), June 5, 1992, 1760 U.N.T.S.79. [“CBD”].

projects within a Party’s own territory, as such procedures may be introduced through national legislation.<sup>43</sup> Furthermore, public participation, where appropriate, may be precluded in the conduct of an EIA, if the impact can be sufficiently considered without their inclusion.<sup>44</sup>

The proposed activities with respect to the oil extraction are being carried out in DRI, which is outside the jurisdiction of Replomuté,<sup>45</sup> and any other interpretation would be inconsistent with DRI’s sovereign rights over its own territory. *Therefore*, Article 14.1(a) is inapplicable in this case.

*1.2.2.3. Article 14.1(c) of the CBD has been complied with.*

Parties must “promote” notification, exchange of information and consultation by “encouraging” multilateral arrangements for those activities under their jurisdiction or control which are likely to have significant adverse effects on the biological diversity of other States.<sup>46</sup>

The interpretation of this provision calls for a low threshold for this obligation.<sup>47</sup>

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<sup>43</sup> LYLE GLOWKA, A GUIDE TO THE CBD, INTERNATIONAL UNION FOR CONSERVATION OF NATURE 59 (1994) [“Glowka”].

<sup>44</sup> Benoit Mayer, *Climate Assessment as an Emerging Obligation under Customary International Law*, 68(2) INT’L COMPAR. L. Q. 271 (2019).

<sup>45</sup> *Record*, ¶17.

<sup>46</sup> CBD, *supra* note 42, art. 14.1(c).

<sup>47</sup> Glowka, *supra* note 43.

*Firstly*, the proposed activities are not likely to cause significant adverse impacts on the biodiversity of other States.<sup>48</sup> *Secondly*, Replomuté has fulfilled its duty to foster multilateral arrangements by encouraging non-members of United Nations Economic Commission for Europe to join the Espoo Convention.<sup>49</sup> The Convention was open to ratification by Aringuv, but it has not yet done so.<sup>50</sup> *Consequently*, Replomuté is in compliance of Article 14.1(c) of CBD.

**1.2.3. Replomuté did not violate obligations under the UNFCCC and the Paris Agreement.**

*Firstly*, Article 4.1(f) of UNFCCC was complied with [1.2.3.1]; *secondly*, the commitments under the Paris Agreement are not legally binding [1.2.3.2]; and *consequently*, the actions of Replomuté do not violate the UNFCCC.

*1.2.3.1. Article 4.1(f) of the UNFCCC was complied with.*

UNFCCC mandates precautionary measures for mitigating climate change.<sup>51</sup> Contracting Parties to UNFCCC are required to take climate change considerations into account “to the extent feasible” and conduct impact assessment, “as formulated and determined nationally.”<sup>52</sup> In the pursuit of this, the parties shall take into account their common but differentiated

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<sup>48</sup> *Supra* Argument 1.1.1.3.

<sup>49</sup> *Record*, ¶28

<sup>50</sup> *Record*, ¶12; *Clarifications*, A7.

<sup>51</sup> United Nations Framework Convention on Climate Change, art. 4.1(f), June 4, 1992, 1771 U.N.T.S. 107 [“UNFCCC”].

<sup>52</sup> *Id.*, art. 3(3).

responsibilities [“CBDR”] and their specific national and regional development priorities and circumstances.<sup>53</sup> UNFCCC does not compel the parties to comply with any specific international standards for controlling climate change.<sup>54</sup> Indeed, a satisfactory EIA need not show that there will be no risk of global harm, and it will be sufficient if it provides necessary information about the project’s likely impact.<sup>55</sup>

The EIA conducted prior to the concession agreement did take into account the impact on water scarcity and the likely waste generation because of the oil exploration and extraction activities.<sup>56</sup> Further, the EIA did comply with the national laws of the DRI.<sup>57</sup> Moreover, the project’s analyses are based on the national development priorities of the DRI which are its own sovereign domain. Additionally, Replomuté has assisted DRI in their NDCs of 18.5% external support, through the establishment of the \$10 million friendship fund.<sup>58</sup> *Therefore*, the obligations under Article 4.1(f) have been complied with.

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<sup>53</sup> *Id.*

<sup>54</sup> P.W. BIRNIE & A.E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT, 11-13, 112-127 (1992). [“**Birnie**”].

<sup>55</sup> BOYLE & GHALEIGH, *Climate Change and International Law beyond the UNFCCC* in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 45 (2016).

<sup>56</sup> *Record*, ¶17.

<sup>57</sup> *Id.*

<sup>58</sup> *Record*, ¶16.

*1.2.3.2. Replomuté cannot be made liable under the Paris Agreement.*

Paris Agreement [“PA”] requires States to promote the mitigation of greenhouse gas [“GHG”] emissions, while fostering sustainable development,<sup>59</sup> by setting targets of Nationally Determined Contributions [“NDCs”].<sup>60</sup> The textual inclination towards soft-legal obligations and extrinsic contextual evidence<sup>61</sup> present the Paris Agreement as overall a non-binding international agreement akin to a political commitment.<sup>62</sup>

Alternatively, emissions from oil and gas activities are responsible for just under 15% of total energy-related GHG emissions.<sup>63</sup> Pipelines are safer and emit fewer greenhouse gas emissions than other ways to move liquid energy.<sup>64</sup> U.S.A. and Saudi Arabia, the largest crude oil importers in the world, have low upstream GHG emissions.<sup>65</sup> Further, climate change is a

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<sup>59</sup> Paris Agreement, art. 7 U.N. Doc. FCCC/CP/2015/L.9/REV.1 (Dec. 12, 2015).ra

<sup>60</sup> *Id.*, art. 4(2).

<sup>61</sup> OSCAR SCHACHTER, *The Twilight Existence of Nonbinding International Agreements* (1977) 71 AM J INT'L L 296, 297.

<sup>62</sup> DURNEY, JESSICA. *Defining the Paris Agreement: A Study of Executive Power and Political Commitments*. CARBON & CLIMATE LAW REVIEW, vol. 11, no. 3, 2017, pp. 234–42.

<sup>63</sup> International Energy Agency, EMISSIONS FROM OIL AND GAS OPERATIONS IN NET ZERO TRANSITIONS (2023).

<sup>64</sup> Liquid Energy Pipelines, *Toolkit: Pipelines are Better for the Environment*.

<sup>65</sup> S&P Global Commodity Insights, *The Right Measure*; Saudi Aramco, *Study Shows Record Low Carbon Intensity of Saudi Crude Oil* (2018).

global problem requiring a global solution.<sup>66</sup> Reducing oil production and extraction by a single country may not necessarily reduce GHG emissions if the global demand for oil is not reduced.<sup>67</sup> Conversely, it may increase oil production elsewhere, and increase global emissions if replacement fuels are carbon intensive and affect sustainable development goals.<sup>68</sup>

Here, the extracted oil is transported across DRI through pipelines,<sup>69</sup> which mitigates GHG emissions to comply with the NDCs. Further, shutting down the activities would not necessarily decrease global demand. Conversely, it may result in high oil prices and increase oil production in other parts of the world. Moreover, the import of crude oil supports Replomuté's economic activity<sup>70</sup> and it could lose out on the economic advantages of oil production without reducing global GHG emissions. *Therefore*, Replomuté complied with the PA.

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<sup>66</sup> United Nations, Global Problems Need Global Solutions, *UN Officials Tell Ministers at Development Forum*.

<sup>67</sup> Samantha Gross, *Reducing US oil demand, not production, is the way forward for the climate*, BROOKINGS, Sept. 2023.

<sup>68</sup> *Id.*

<sup>69</sup> *Record*, ¶17.

<sup>70</sup> *Record*, ¶3.

**2. AS A SUBSTANTIVE MATTER, THE ACTIONS OF REPLOMUTÉ WITH RESPECT TO THE PROPOSED ACTIVITIES IN DRI DO NOT VIOLATE INTERNATIONAL LAW.**

*Firstly*, Replomuté is not directly responsible for its actions under international law [2.1], and *secondly*, is not indirectly responsible for DRI's actions under international law [2.2].

**2.1 REPLOMUTÉ IS NOT DIRECTLY RESPONSIBLE FOR ITS ACTIONS UNDER INTERNATIONAL LAW.**

Replomuté has not violated its obligations under CIL [2.1.1] and its treaty obligations under CMS [2.1.2]

**1.2.4. Replomuté is not violating CIL.**

*Firstly*, Replomuté is violating its duty to prevent transboundary harm to the global commons [2.1.1.1], *secondly*, Replomuté is not violating the precautionary principle [2.1.1.2], *thirdly*, Replomuté is upholding the principle of sustainable development [2.1.1.3], and *consequently*, is not violating CIL

*1.2.4.1. Replomuté is not violating its duty to prevent transboundary harm to the global commons.*

The principle of transboundary harm, being a CIL norm,<sup>71</sup> obligates a state to regulate the activities within its jurisdiction so that they do not cause harm to the territory of other states.<sup>72</sup> There must be a clear and tangible connection between the transboundary movement

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<sup>71</sup> Rio Declaration, *supra* note 29, Principle 21; CBD, *supra* note 42, art. 3.

<sup>72</sup> ILC Commentary, *supra* note 8.

of damage and the human induced activity,<sup>73</sup> and the harm caused must be significant.<sup>74</sup> Such damage or likelihood of damage must be ascertained by clear and convincing evidence.<sup>75</sup> In order to invoke state responsibility, the severity<sup>76</sup> of harm must reach a certain threshold of being ‘significant’.<sup>77</sup> A mere nuisance or a tolerable harm does not attract the state responsibility<sup>78</sup> and there must be an occurrence of environmental damage.<sup>79</sup> The obligation of not causing transboundary harm has to be fulfilled with procedural requirement of due diligence,<sup>80</sup> requiring states to exert its best possible efforts to minimise the risk.<sup>81</sup>

It has been established that the proposed activities are not likely to lead to any significant adverse transboundary impact. Further, the requisite standards of due diligence have been met as an EIA was conducted prior to the signing of the concession agreement,<sup>82</sup> a public

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<sup>73</sup> XUE HANQIN, *TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW*, CAMBRIDGE UNIVERSITY PRESS 4 (2003) [“**Hanqin**”].

<sup>74</sup> *Id.*

<sup>75</sup> *Trail Smelter*, *supra* note 18.

<sup>76</sup> *Hanqin*, *supra* note 73.

<sup>77</sup> *Id.*

<sup>78</sup> *Hanqin*, *supra* note 73.

<sup>79</sup> ILC Commentary, *supra* note 8; *Birnie*, *supra* note 54.

<sup>80</sup> *Pulp Mills*, *supra* note 5, ¶101.

<sup>81</sup> Rep. of the Int’l Law Comm’n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* U.N. DOC. A/56/10; GAOR 53d Sess., Supp. No. 10 (2001); *Corfu Channel Case (U.K. v. Alb.)* 1949 I.C.J. 4, 22.

<sup>82</sup> *Record*, ¶17.



announcement of the proposed activities took place<sup>83</sup> and Replomuté also participated in consultation through diplomatic notes, Therefore, Replomuté has acted with due diligence and has not violated its duty to prevent transboundary harm.

*1.2.4.2. Replomuté does not violate the precautionary principle.*

The precautionary principle has been sparsely adopted by States,<sup>84</sup> and is only recommendatory or mandatory in nature,<sup>85</sup> Therefore, the precautionary principle does not constitute CIL due to lack of widespread consistent state practice.

*Alternatively*, the principle requires states to take mitigating measures<sup>86</sup> if serious, significant, or irreversible harm is anticipated,<sup>87</sup> by being cautious and vigilant.<sup>88</sup> Precautionary Principle cannot be extended to minor harm, as any development activity would effectively be stalled if the State is to avoid responsibility and liability, resultantly denying as State its sovereign right

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<sup>83</sup> *Record*, ¶20.

<sup>84</sup> Birnie, *supra* note 52.

<sup>85</sup> *Id.*

<sup>86</sup> U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, Principle 15, U.N. Doc. A/CONF.151/26/Rev.1 (Aug. 12, 1992).

<sup>87</sup> ARNIE TROUWBORST, PRECAUTIONARY RIGHTS AND DUTIES OF STATES (2006), 121.

<sup>88</sup> *Id.*; Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgement, 1997 I.C.J. Rep. 7, ¶139 (Sept. 25).

to control activities within its territory and the use of natural resources.<sup>89</sup> Herein the precautionary principle would be inapplicable since it is not of a binding nature and the proposed activities are not likely to cause significant irreversible harm.

*1.2.4.3. Replomuté complied with the principle of sustainable development.*

The right of sustainable development, which maintains a balance between intergenerational and intragenerational equity,<sup>90</sup> is recognized under CIL.<sup>91</sup> Importance must be placed on meeting the basic needs of people in developing nations.<sup>92</sup>

Even though DRI possesses oil resources exceeding 9.5 billion barrels, DRI is still an agrarian-based economy.<sup>93</sup> Further natural resource extraction, specifically oil extraction, has proven to

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<sup>89</sup> R.D. MUNRO & J.G. LAMMERS, EDS., ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS (London: Graham and Trotman, 1986).

<sup>90</sup> Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 EUR. J. OF INT'L L. 377 (2012).

<sup>91</sup> Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgement, 1997 I.C.J Rep 3, (Feb. 5) (Separate Opinion by Weeramantry, J.); Philippe Sands, *International Courts and the Application of the Concept of "Sustainable Development"*, 3 MAX PLANCK UNYB 389 (1999).

<sup>92</sup> Darryl Reed, *Extraction Industries in Developing Countries*, 39(3) J. OF BUS. ETHICS 199 (2002); Report of the World Commission on Environment and Development: Our Common Future, annex, UN Doc. A/42/427 (1987).

<sup>93</sup> *Record*, ¶1.

register positive growth of economic development.<sup>94</sup> Additionally manufacturing sector is a driver of sustained economic development which is being augmented by the oil extraction activity.<sup>95</sup> *Therefore*, right of sustainable development is being upheld by Replomuté.

**1.2.5. Replomuté is not violating CMS.**

The CMS is inapplicable [2.1.2.1]. *Alternatively*, Replomuté has not violated any obligations that it may have under the Convention [2.1.2.2].

*1.2.5.1. CMS is inapplicable.*

The applicability of the CMS is contingent on the species being migratory in nature.<sup>96</sup> Migratory species refers to the entire population or any geographically separate part of the population of any species, a *significant* proportion of whose members *cyclically* and *predictably* cross one or more national jurisdictional boundaries.<sup>97</sup> A species may not be considered migratory, despite some members of its population migrating. For instance, all

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<sup>94</sup> Cavalcanti *et al.*, *Winning the Oil Lottery: The Impact of Natural Resources Extraction on Growth* (International Monetary Fund, WP/16/61).

<sup>95</sup> Haraguchi, *The Importance of Manufacturing in Economic Development: Has this Changed?* (United Nations Industrial Development Organization, WP 1, 2016).

<sup>96</sup> Convention on the Conservation of Migratory Species of Wild Animals, art. I(1)(a), June 6, 1979, 1651 U.N.T.S. 333 [“CMS”].

<sup>97</sup> *Id.*, art 1(a).

individuals of the white crowned sparrow (*zonotrichia leucophrysdo*) do not migrate,<sup>98</sup> so it is not a migratory species under the CMS.<sup>99</sup> Additionally, classifying species solely on the basis of sightings and not migration patterns, may constitute administrative and financial burdens on the parties.<sup>100</sup>

Here, while the RMG is similar in size, appearance and behaviour to the *gorilla beringei beringei*,<sup>101</sup> the southern population has rarely been sighted in Aringuv<sup>102</sup>, and consequently their migration is not cyclic and predictable.<sup>103</sup> Thus, the Southern population of the RMG is not a migratory species.

1.2.5.2. Alternatively, Replomuté has not violated the CMS.

Non-range states do not have any obligations under the CMS.<sup>104</sup> Even for range states, the provisions of CMS are not obligatory in nature, and merely provide for the right to be

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<sup>98</sup> Lisovski et al., *Migration pattern of Gambel's White-crowned Sparrow along the Pacific Flyway*, 160 J. OF ORNITHOLOGY 1097 (2019).

<sup>99</sup> CMS, *supra* note 96, Appendix I & II.

<sup>100</sup> UNEP/CMS, 16th Meeting of the CMS Scientific Council on Range State Classification, UNEP/CMS/ScC16/24, ¶ 5 (June 30, 2010).

<sup>101</sup> *Clarifications*, A9.

<sup>102</sup> *Record*, ¶9.

<sup>103</sup> *Id.*

<sup>104</sup> CMS, *supra* note 96.

exercised.<sup>105</sup> For example, habitat conservation is not an obligation for range states.<sup>106</sup> Furthermore, only range states are entitled to take joint conservation measures.<sup>107</sup>

Herein, as Replomuté is not a Range State,<sup>108</sup> it does not have any mandatory obligation to be fulfilled as per the responsibilities laid down under the convention. Therefore, Replomuté has not violated the CMS.

**2.2 REPLOMUTÉ IS NOT INDIRECTLY RESPONSIBLE FOR DRI'S ACTIONS UNDER INTERNATIONAL LAW.**

*Firstly*, Article 18 of ARSIWA does not constitute CIL [i]; *secondly*, Replomuté has not coerced DRI to commit any IWA under Article 18 [ii] and *consequently*, Replomuté is not indirectly responsible for any IWA committed by the DRI.

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<sup>105</sup> *Id.*

<sup>106</sup> Nele Matz, *Chaos or Coherence? – Implementing and Enforcing the Conservation of Migratory Species through Various Legal Instruments*, 65 Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht 197-215 (2005).

<sup>107</sup> Klemm Cyril De, *Migratory Species in International Law*, 29(4) INT'L L. OF MIGRATORY SPECIES 935 (1989).

<sup>108</sup> *Record*, ¶10

2.2.1 Article 18 of ARSIWA does not constitute CIL.

The ILC was given a mandate to undertake only the codification of the principles of international law governing State responsibility.<sup>109</sup> However, under Article 15 of the ILC Statute,<sup>110</sup> progressive development of law is different<sup>111</sup> from codification, which means formulation of rules as seen from State practice.<sup>112</sup> The mandate given does not permit innovation through progressive development without adequate grounding in CIL.<sup>113</sup> The substance of customary law must consist of widespread state practice and *opinio juris*.<sup>114</sup>

But *firstly*, the state practice on indirect responsibility through coercion is scant, and the conclusions derived from the cases cited by the ILC in its Commentaries involve counterfactual

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<sup>109</sup> Request for the Codification of the Principles of International Law Governing State Responsibility, G.A. Res. 799 (VIII), U.N. GAOR, 8th Sess., at 52, U.N. Doc. A/2630 (Dec. 7, 1953).

<sup>110</sup> Statute of the International Law Commission at 3, U.N. Doc A/CN.4/4/Rev.2, U.N. Sales No. E.82.V.8 (1982).

<sup>111</sup> Luis Barrionuevo Arvalo, *The Work of the International Law Commission in the Field of International Environmental Law*, 32 B.C. ENV'T L. AFF. L. REV. 493, 499 (2005); North Sea Continental Shelf Cases (Germany/Denmark), 1969 I.C.J. (Feb.20).

<sup>112</sup> Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 445 (2004).

<sup>113</sup> James D. Fry, *Coercion, Causation, and the Fictional Elements of Indirect State Responsibility* 40 VAND. J. TRANSNAT'L L. 611 (2007) ["Fry"].

<sup>114</sup> Continental Shelf, Libya v. Malta, Merits, Judgement [1985] ICJ Rep 13.

reasoning and are insufficient.<sup>115</sup> The *Shuster case*<sup>116</sup> would not fall within Article 18 of ARSIWA<sup>117</sup> because it was a case of territorial occupation.<sup>118</sup> In the *Romano-Americana Company case*<sup>119</sup>, the instigation from Britain against Romania was considered insufficient to create a basis for liability.<sup>120</sup> *Secondly*, the work of the ILC itself cannot be equated with State practice or provide evidence for *opinio juris* because its members participate in a personal capacity rather than as representatives of their states.<sup>121</sup>

*Therefore*, Article 18 of ARSIWA does not constitute CIL as there is scant state practice in addition to the International Law Commission [“ILC”] venturing beyond its mandate to codify Article 18.

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<sup>115</sup> Fry, *supra* note 113.

<sup>116</sup> Clement L. Bouvé, *Russia's Liability in Tort for Persia's Breach of Contract*, 6 AM. J. INT'L L. 389 (1912).

<sup>117</sup> International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, art.18(b), U.N. Doc. A/RES/56/83 (2002) [“ARSIWA”].

<sup>118</sup> JAMES CRAWFORD, INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES (Cambridge University Press, 1st ed. 2002) [“Crawford”].

<sup>119</sup> HACKWORTH, DIGEST OF INTERNATIONAL LAW: VOLUME V 702 (1943).

<sup>120</sup> Crawford, *supra* note 118.

<sup>121</sup> Thirlway, *The Law and Procedure of the International Court of Justice: Part Two*, 61 BRIT. Y.B. INT'L L (1990).

**2.2.2 Alternatively, Replomuté is not indirectly responsible under Article 18.**

*Firstly*, there is no IWA for which responsibility may be transferred [2.2.2.1]. *Secondly*, DRI is not subjected to coercion. [2.2.2.2] *Thirdly*, there is a lack of causation to attribute the IWA to Replomuté [2.2.2.3]. *Lastly*, Replomuté is not aware of the circumstances which would, but for the coercion, entail the wrongfulness of DRI's conduct [2.2.2.4]. *Consequently*, Replomuté is not indirectly responsible under Article 18.

*2.2.2.1 There is no IWA.*

The responsibility of the coercing state owed to the injured state derives not from the act of coercion but from the IWA of the coerced state.<sup>122</sup> Since no international obligation of DRI has been breached yet, there is no IWA for which the responsibility may be indirectly imputed.

*2.2.2.2 DRI is not subjected to coercion.*

Under Article 18 of ARSIWA, the conduct of coercion must be similar to a situation of *force majeure* under Article 23.<sup>123</sup> Accordingly, a state would be subjected to coercion if there is an irresistible force that creates material impossibility for the coerced state to resist the coercing state.<sup>124</sup> Increased difficulty of performance or compliance does not amount to material

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<sup>122</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, Fifty-Third Session, U.N. G.A.O.R., 56th Sess., Supp. No. 10, art. 2, at 34, U.N. Doc. A/56/10 (2001) ["**ARSIWA Commentary**"]

<sup>123</sup> *Id.*, at ¶69.

<sup>124</sup> *Id.*, at ¶76.



impossibility.<sup>125</sup> In the *Russian Indemnity* case, the payment of the debt was not considered materially impossible.<sup>126</sup>

Here, the arbitration clause was envisaged beforehand in the concession agreement, which the DRI willingly entered into with consent.<sup>127</sup> Replomuté had no control over the arbitral panel's decision and DRI neither challenged the validity of the concession agreement nor the arbitral panel order.<sup>128</sup> Further, fines imposed by the arbitral panel may only increase difficulty, but does not amount to material impossibility, for DRI to comply. *Therefore*, DRI was free to withdraw from the concession agreement by complying with the decision and is not subjected to coercion.

2.2.2.3 *There is lack of causation to attribute the IWA to Replomuté.*

Under Article 18(a), coercion itself is not considered an IWA.<sup>129</sup> The imputation of indirect responsibility requires legal causation between the conduct of the coercing state and the coerced state's act.<sup>130</sup> Accordingly, coercion should necessarily cause the coerced state to commit an IWA.<sup>131</sup> Sufficiency and proximity must be demonstrated between the cause and the

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<sup>125</sup> *Id.*

<sup>126</sup> Russia/Turkey, Reports of International Arbitral Awards, Vol. XI (Sales No. 61.V.4,) (1912).

<sup>127</sup> *Record*, ¶17.

<sup>128</sup> *Record*, ¶23.

<sup>129</sup> ARSIWA, *supra* note 117, art. 18(a).

<sup>130</sup> Fry, *supra* note 113.

<sup>131</sup> ARSIWA Commentary, *supra* note 122, at ¶70.

effect.<sup>132</sup> Sufficiency requires the existence of the cause to assure the effect and proximity requires a “but-for” test,<sup>133</sup> that the effect could not have happened but for the cause.<sup>134</sup>

The breach of any substantive obligations by DRI is a matter of its internal policies and sovereign decision-making. The concession agreement was voluntarily entered with consent by DRI,<sup>135</sup> and DRI cooperated with Replomuté before and after the arbitration. Therefore, DRI’s conduct would be its sovereign decision and not necessarily because of Replomuté’s actions.

*2.2.2.4 Replomuté was not aware of the circumstances which would, but for the coercion, entail the wrongfulness of DRI’s conduct.*

“Circumstances” in Article 18(b) of ARSIWA refers<sup>136</sup> to the factual situation rather than the coercing State’s judgement of the legality of the act.<sup>137</sup> Accordingly, if the coercing State is unaware of the circumstances in which its conduct would be acted upon by the other State, it bears no international responsibility.<sup>138</sup>

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<sup>132</sup> Castellanos-Jankiewicz, *Causation and International State Responsibility* ACIL, Research Paper No. 2012-56.

<sup>133</sup> Honoré, *Causation and Remoteness of Damage*, 11 INT. ENCL. COMP. LAW (1983).

<sup>134</sup> HART & HONORÉ, *CAUSATION IN THE LAW*, 2<sup>ND</sup> EDN., OXFORD UNIVERSITY PRESS 110 (1985).

<sup>135</sup> *Record*, ¶17.

<sup>136</sup> ARSIWA, *supra* note 117, art. 18(b).

<sup>137</sup> ARSIWA Commentary, *supra* note 122, at ¶70.

<sup>138</sup> *Id.*

Here, Replomuté's only intention was for DRI to comply with the concession agreement since Replomuté suspected that the DRI's new president sought to renegotiate the deal for his own personal profit.<sup>139</sup> While the Gorilla Agreement had been signed and ratified by DRI in 2007 itself,<sup>140</sup> DRI's objections to the proposed activities came only in 2012, after the military coup, five years after ratification.<sup>141</sup> Replomuté was not aware if the concession agreement would necessarily coerce DRI to commit an IWA. *Therefore*, Replomuté is not aware of the circumstances.

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<sup>139</sup> *Record*, ¶22.

<sup>140</sup> *Record*, ¶9

<sup>141</sup> *Record*, ¶22

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**CONCLUSION**

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

1. Replomuté did not violate 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 for the respondent.

