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INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

QUESTIONS RELATING TO MOUNTAIN GORILLAS AND IMPACT ASSESSMENT

(ARINGUV/REPLOMUTÉ)

MEMORIAL FOR THE APPLICANT

ARINGUV

2024

LA COUR INTERNATIONALE DE JUSTICE

AU PALAIS DE LA PAIX

LE HAYE, PAYS-BAS

QUESTIONS RELATIVES AUX GORILLES DE MONTAGNE ET À L'ÉVALUATION DES IMPACTS

(ARINGUV/REPLOMUTÉ)

MÉMOIRE DE LA DEMANDERESSE

ARINGUV

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STATEMENT OF JURISDICTION

1. Aringuv and Replomuté hereby submit the present dispute to the International Court of Justice (**"the Court"**)[1] pursuant to Article 40(1) Statute of the Court (**"ICJ Statute"**),[2] in accordance with a Special Agreement,[3] together with the Clarifications to follow,[4] for submission to the Court of differences concerning questions relating to the Royal Mountain Gorillas (**"Gorillas"**) and impact assessment. Both States have accepted the jurisdiction of the Court pursuant to the Statute,[5] and the compromissory clauses stipulated in the Convention on Biological Diversity (**"CBD"**),[6] Convention on Environmental Impact Assessment in a Transboundary Context (**"Espoo Convention"**),[7] United Nations Framework Convention on Climate Change (**"UNFCCC"**),[8] and the Paris Agreement (**"PA"**).[9]

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[1] Special Agreement between Aringuv and Replomuté for Submission to the International Court of Justice of Differences between Them concerning Questions relating to Mountain Gorillas and Impact Assessment, June 16, 2023, Annex A, ¶35 [**Record**].

[2] Statute of the International Court of Justice, art.40(1), June 26, 1945, 33 U.N.T.S. 993 [**ICJ Statute**].

[3] Record pp.3-5.

[4] Clarifications to the Record, Sep. 22, 2023, [**Clarifications**].

[5] Statute, art.36(1).

[6] Convention on Biological Diversity, art.27(3)(b), June 6, 1992, 1760 U.N.T.S. 79 [**CBD**].

[7] Convention on Environmental Impact Assessment on Transboundary Context, art.15(2)(a), Feb. 25, 1991, 1989 U.N.T.S. 310 [**Espoo Convention**].

[8] United Nations Framework Convention on Climate Change, art.14(2)(a), May 9, 1992, 1771 U.N.T.S. 107 [**UNFCCC**].

[9] Paris Agreement, art.24, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 [**PA**].

QUESTIONS PRESENTED

2. Aringuv respectfully asks the Court:[10]

(a) As a procedural matter, whether Replomuté's failure to prepare an Environmental Impact Assessment (**"EIA"**) on the proposed oil extraction activities in the Democratic Republic of Ibirunga (**"DRI"**) violates international law; and

(b) As a substantive matter, whether Replomuté's proposed oil extraction activities in the DRI violate international law.

[10] Record,¶36.

STATEMENT OF FACTS

3. Aringuv and DRI are neighboring states located in the central Africa region. Aringuv's economy relies on its gorilla tourism industry.. In contrast, Replomuté is a high-income country situated in Europe and considers as one of the leaders in crude oil sectors.

4. Both Aringuv and Replomuté are members of the United Nations (**"UN"**), and parties to the ICJ Statute. They also becomes the parties to CBD, CMS, UNFCCC, PA, and Vienna Convention on the Law of Treaties (**"VCLT"**). Aside of those treaties, Replomuté ratified the Espoo Convention, while Aringuv is a signatory State to the Espoo Convention. Aringuv and DRI are parties to the Agreement on the Conservation of Gorillas and Their Habitats (**"Gorilla Agreement"**), and the African Convention on the Conservation of Nature and Natural Resources (**"Algiers Convention"**).

5. The Gorillas are included under Appendix I of the CMS and classified as critically endangered species on the International Union for Conservation of Nature (**"IUCN Red List"**) since 1980. Up to this date, there are 295 Gorillas in the southern population. The Gorillas and Mountain Gorillas (*Gorilla beringei beringei*) are identical to each other in terms of its size, appearance, and behavior.

6. In 1981, the DRI and Replomuté signed a 1981 Concession Agreement (**"Concession Agreement"**) that granted the Lenoir Corporation (**"Lenoir"**), State-owned enterprise (**"SOE"**) of Replomuté, the right to explore and extract oil on the DRI territory, where it resides the habitat of the southern population Gorillas. These rights to explore and extract oil from DRI are fully conducted by Replomuté's nationals. Before the signing of the Concession Agreement, the DRI conducted an EIA in accordance with its national laws limitedly to its impact on human population

and waste production, and did not take into account the impacts of Gorillas and its habitat, as well as the climate change. This Concession Agreement further stipulates that any disagreement relating to the Concession Agreement shall be resolved by the arbitration.

7. From 1983 to 2009, Replomuté was conducting its oil exploration activities. In 2012, Replomuté declared that it will conduct the extraction upon the completion of the pipeline construction, which were constructed since 2009 and were expected to be completed in June 2022. Currently, Replomuté claimed that it has completed 98% of its pipeline construction, however the oil extraction project are postponed until the Court render its judgment on this matter.

8. In June 2012, the DRI demonstrated its intention to withdraw from the Concession Agreement as the said Agreement contradicted its obligations under the Gorilla Agreement, and therefore, requested for compensation to Replomuté in amount of $50 million (USD) for environmental and societal rehabilitation.

9. Replomuté rejected the DRI's request, and brought this matter to the binding arbitration as mandated by the Concession Agreement. The arbitration rendered its Award in 2015 (**"Arbitral Award"**) and granted Replomuté a right to continue its business operations as per the Concession Agreement. In the event the DRI does not comply with the Arbitral Award, the DRI would be fined in amount of $825 million (USD). Ultimately, the DRI decided to grant the permission for Replomuté to continue its business, and in return, Replomuté gave $10 million (USD) as a "Friendship Fund" to the DRI in support of the DRI's economic development.

10. From 2012 to this day, numerous local and international non-governmental organizations (**"NGOs"**) have consistently expressed their concerns regarding the potential negative effects of Replomuté's oil extraction project on Gorillas population and its habitat. After a series of fruitless

negotiations and mediation facilitated by Uganda, Aringuv and Replomuté agreed to bring this matter to the Court.

SUMMARY OF ARGUMENTS

PART I

11. Replomuté's non-perfomance and refusal to carry out an EIA over its proposed oil activities violated its treaty obligations under the CBD, UNFCCC, and Espoo Convention. Subsequently, Replomuté's proposed oil activities clearly unequivocal carried a risk in transboundary context, especially on climate change and biological diversity, including the Gorillas population and their habitat. Consequently, Replomuté refusal to perform an EIA violated its duty to perform an EIA before the project commencement under customary international law (**"CIL"**).

PART II

12. Replomuté's oil extraction activities in the DRI violated international law since it failed to comply with its treaty obligations under the CMS and CBD, UNFCCC, and PA. It also violated its customary obligations to prevent transboundary harm. Moreover, Replomuté is indirectly responsible for coercing the DRI to breach its international obligations in order to grant the continuance of its activities.

ARGUMENTS

PART I

REPLOMUTÉ'S FAILURE TO PREPARE AN EIA ON THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI VIOLATES INTERNATIONAL LAW

A. AT THE OUTSET, ARINGUV HAS LEGAL STANDING TO APPEAR BEFORE THE COURT

13. Notwithstanding Replomuté's proposed oil extraction activities are conducted in the DRI's territory,[11] Aringuv respectfully submits that it has a legal standing to appear before the Court, since **(1)** it suffers a direct injury, and subsequently, **(2)** on the basis of *erga omnes*.

1. Aringuv suffers a direct injury from transboundary harm caused by Replomuté's proposed oil extraction activities

14. The injured State may invoke another State's responsibility when it triggers a direct legal interest to the injured State under such treaties or principles.[12] Although Replomuté's proposed oil extraction activities are situated in DRI, Aringuv is of the view that such activities lead to transboundary harm[13] and are tantamount to breach Replomuté's international obligations under

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[11] Record,¶¶17,18,19,20.

[12] Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10 (2001), art.42(a) [**ARSIWA**]; United States Diplomatic and Consular Staff in Tehran (U.S.A v. Iran), Judgment, 1980 I.C.J. 3, ¶90 [**Tehran**].

[13] Memorial,¶45; The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser.A) No. 23, (2017) ¶97 [**OC-23/17**].

customary international law (**"CIL"**), as well as CBD, CMS, Espoo Convention, UNFCCC, and PA, in which both Aringuv and Replomuté are parties.[14] Henceforth, these circumstances generate Aringuv's direct legal interests in this matter.

2. Subsequently, Aringuv has legal standing on the basis of *erga omnes*

15. A State may bring a claim without any special interests when the subject-matter reflects the interests of all States as a whole (*erga omnes*) in upholding its international obligations,[15] including the obligation on environmental protection[16] as a "*common concerns of humankind*".[17] Accordingly, Aringuv may espouse *erga omnes* as a basis to submit its claims before the Court.

B. REPLOMUTÉ VIOLATES ITS TREATY OBLIGATIONS

16. Vanguarded by the *pacta sunt servanda* principle,[18] Replomuté bears the responsibility to exercise its international obligations under various conventions, such as the CBD, UNFCCC, PA and Espoo Convention, in good faith.[19] In the present case, Aringuv will prove that **(1)** these

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[14] Record, p.4, art.II.

[15] Questions relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Merits, 2012 I.C.J. 422, ¶69; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2022 I.C.J. 178, ¶108.

[16] The South China Sea Arbitration (Phil. v. China), Award, 2016 P.C.A. 2013-19, ¶927; RAJAMANI AND PEEL, THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, p.1045 (2nd ed., 2021).

[17] UNFCCC, preamble, ¶1; CBD, preamble, ¶3; *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (vol.I) (1992) Principle 21 [**Rio Declaration**].

[18] Vienna Convention on the Law of Treaties, art.26, May 23, 1969, 1155 U.N.T.S. 331 [**VCLT**].

[19] Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, ¶142 [***Gabčíkovo***].

conventions are applicable to both Parties. Furthermore, Aringuv also contends that Replomuté's refusal to perform an EIA violates its obligations under the **(2)** CBD, **(3)** UNFCCC and PA, as well as **(4)** the Espoo Convention.

1. The applicability of the treaties to Replomuté and Aringuv

17. Aringuv submits that **(a)** CBD, UNFCCC and PA are applicable due to Replomuté's status as a State Party to those instruments, and **(b)** the reciprocal obligation bound Replomuté and Aringuv to adhere to the Espoo Convention.

a. Replomuté and Aringuv are parties to the CBD, UNFCCC and PA

18. In VCLT, a State may express its consent to be bound by signature, ratification, or other forms whatever it has agreed.[20] As Replomuté and Aringuv have signed and ratified the CBD, UNFCCC and PA,[21] thus those instruments are applicable and relevant to determine Replomuté's responsibility in question.

b. The Espoo Convention is reciprocally binding to Replomuté and Aringuv

19. In relation to Aringuv's claim pursuant to the Espoo Convention, Replomuté cannot argue that Aringuv is proscribed to lodge its claim on the basis of the Espoo Convention due to its *status quo* as a signatory to the aforementioned Convention.[22] It is because both signatories and the ratified States are under the common obligations to uphold the object and purpose of the Espoo

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[20] VCLT, art.11.

[21] Record,¶¶7,13.

[22] Record,¶¶12,28.

Convention,[23] especially noting the fact that Aringuv is intended to accede to the Espoo Convention.[24] Therefore, the Espoo Convention is applicable, and Aringuv has a reciprocal interest in Replomuté's fulfillment of its obligations under this Convention.[25]

2. Replomuté's refusal to conduct an EIA violates the CBD

20. In conformity with Aringuv's diplomatic note,[26] Replomuté's refusal to exercise EIA violates its obligations under **(a)** Article 14(1)(a) and **(b)** 14(1)(c) of the CBD.

a. Replomuté breached Article 14(1)(a) of the CBD

21. Article 14(1)(a) of the CBD obliges each Contracting Party to introduce appropriate procedures requiring an EIA of its proposed activities that are likely to have significant adverse effects on biological diversity.[27] As regards to this obligation, Replomuté defended itself by claiming that such provision applies "within a Party's own territory".[28]

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[23] VCLT, art.18(a)(b); Rogolf, *International Legal Obligations of Signatories to an Unratified Treaty*, 32 Marine Law Rev. 263, (1980) p.271.

[24] Record,¶25; Clarifications,¶7.

[25] VCLT, art.26; DÖRR AND SCHMALENBACH, VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY (2012) pp.441-442 [**DÖRR/SCHMALENBACH**].

[26] Record,¶27.

[27] CBD, art.14(1)(a).

[28] Record,¶28.

22. In contrast, Article 14(1)(a) cannot be read in a *stricto sensu*, since the said provision could also be applied in the area where the State has a "*control*", including physical control,[29] towards an activity, even when the activity is located beyond its territorial jurisdiction.[30] Here, Lenoir and Replomuté's nationals are fully controlling and operating the proposed oil extraction activities.[31] Thus, Article 14(1)(a) of the CBD is applicable in the case at hand.

23. Presently, Replomuté failed to adhere to its contractual obligation in introducing appropriate procedures requiring an EIA.[32] Such appropriate procedure could be achieved if a State is able to implement a detailed[33] "*screening, scoping, assessment, evaluation, reporting, and review*" the impact and the alternative way for mitigation.[34] None of these measures were taken by Replomuté before their oil extraction activities. Rather, Replomuté persistently opposed to undertake such an EIA.[35]

b. Replomuté contravened Article 14(1)(c) of the CBD

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[29] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16,¶118.

[30] CBD, art.4(b), 14(c); GLOWKA, ET AL, A GUIDE TO THE CONVENTION ON BIOLOGICAL DIVERSITY (1994) p.71 [**GLOWKA**].

[31] Record,¶17; Clarifications,¶13.

[32] CBD Decision VIII/28, *Impact assessment: Voluntary guidelines on biodiversity-inclusive impact assessment*, U.N. Doc. UNEP/CBD/COP/DEC/VIII/28 (2006),¶5.

[33] *Ibid*, Annex,¶16(a).

[34] *Ibid*, Annex,¶5(a)-(f).

[35] Record,¶28.

24. The CBD also requires the State party to promote notification, exchange of information and consultation on the activity under their control that is likely to causes significant harm to another State.[36] This provision embodies the principle of cooperation.[37] Unlike Replomuté's unilateral claim that "*[they] have fully complied*",[38] Aringuv asserts that such a claim is untenable.

25. The duty to notify the potential affected State was explained by the Court in *Corfu Channel* when Albania failed to notify the United Kingdom (**"UK"**) related to the minefield situated in the UK's warship route.[39] Here, Replomuté failed to cooperate with Aringuv by failing to notify the latter on the potential negative impact of the former's proposed oil extraction activities, as expressed by local and international NGOs.[40]

26. In *Lake Lanoux*, the tribunal asserts that duty to consult must be genuine and not only just formalities, in which France has proven guilty because they failed to consult with Spain where Spain is the potential affected State from France's project in a meaningful way.[41] Similarly, Replomuté did not genuinely take into account Aringuv's interests during series of communications via diplomatic channels.[42]

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36 CBD, art.14(1)(c).

37 *Ibid*, art.5; Charter of the United Nations, June 26, 1945, 1 U.N.T.S. 16, arts.1(3),33 [**UN Charter**]; *Stockholm Declaration of the United Nations Conference on the Human Environment*, Annex, U.N. Doc. A/RES/2994 (1972) Principle 24 [**Stockholm Declaration**].

38 Record,¶28.

39 Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, p.22 [**Corfu Channel**].

40 Record,¶21.

41 Lake Lanoux (Fr. v. Spain), 12 R.I.A.A. 281 (1957).

42 Record,¶¶26-31.

3. Replomuté's refusal to conduct an EIA violates the UNFCCC

27. Ambassador Fossy of Aringuv expressed her concern toward the negative implication of Replomuté's proposed oil activities to climate change.[43] Similarly, Aringuv Minister of the Environment highlighted Replomuté's proposed oil extraction activities, **(a)** that generate the adverse effects of climate change or a "climate crisis",[44] violated its obligations under the **(b)** UNFCCC.

a. Replomuté's proposed oil extraction activities could generate the adverse effects of climate change

28. Article 1(1) of the UNFCCC defines "*adverse effects of climate change*" as changes in the physical environment or biota that have significant deleterious effects on the composition, resilience, or natural productivity and ecosystem management.[45] The *travaux préparatoires* pointed out that the causative factors are the source of climate change's adverse effects, namely the greenhouse gasses, including carbon dioxide emissions.[46]

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[43] Record,¶¶26,31.

[44] Record,¶34.

[45] UNFCCC, art.1(1).

[46] Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its first session, U.N. Doc. A/AC.237/6 (1991) ¶80; Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the work of its second session, U.N. Doc. A/AC.237/9 (1991) ¶45.

29. Affirmed in the scientific reports, which the Court considered as an admissible evidence when there is no fact that goes against it,[47] Replomuté's oil extraction activities could produce carbon dioxide and methane emissions at a high-volume level,[48] including fossil fuel extraction and its pipeline transportation infrastructure, which cause a deleterious effects on the environment at large.[49] Such a risk to the environment was also highlighted in the Stockholm+50 Conference, in which Replomuté attended and participated the summit.[50] Accordingly, Replomuté's proposed activities on oil extraction in the DRI territory must be regarded as activities that could cause "*adverse effects of climate change*".

b. Replomuté breached Article 4(1)(f) of the UNFCCC

30. UNFCCC enumerates the State party's commitment to take climate impact into consideration and adopt appropriate methods of likely impact assessment, in order to minimize adverse effects and to extent feasible risk, on the environmental quality of projects.[51]

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[47] *Corfu Channel*, *n*.39, p.2; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nic.) and Construction of a Road in Costa Rica along the San Juan River (Nic. v. Costa Rica) 2015 I.C.J. 665, ¶5 [***Costa Rica-Nicaragua***].

[48] IPCC, Special Report: Carbon Dioxide Capture and Storage (2005) p.53; IPCC, Special Report, (2012) p.33; UNEP, Emissions Gap Report 2022, (2022) p.5.

[49] IPCC, Special Report: The Impacts of Global Warming of 1.5°C above Pre-industrial Levels and related Global Greenhouse Gas Emission Pathways (2018) pp.244,323,342.

[50] Record,¶6; *Stockholm+50: a healthy planet for the prosperity of all - our responsibility, our opportunity*, U.N. Doc. A/CONF.238/9 (2022) ¶136.

[51] UNFCCC, art.4(1)(f).

31. As widely practiced in UK,[52] United States (**"US"**),[53] South Africa,[54] New Zealand,[55] Germany,[56] and the European Union (**"EU"**),[57] States are required to undertake an EIA that examine the GHGs emission and climate impact that are produced by the industrial activities.[58] In *Sierra Club*, any permit on the construction of pipeline could be revoked if the EIA does not take any climate impact assessment into account.[59]

32. Similarly, Replomuté persistently declines Aringuv's suggestion to perform an EIA. including the climate impact assessment, associated with the former's proposed oil extraction activities.[60] Thus, such refusal constituted a violation of its obligation under the UNFCCC.

4. Replomuté's refusal to conduct an EIA violates the Espoo Convention

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52 R ex rel. Griffin v. Borough Council, EWHC 53 (2011).

53 Center for Biological Diversity v. National Highway Traffic Safety Administration, 538 F.3d 1172 (9th Cir. 2008) pp.10857,10876.

54 Earthlife Africa Johannesburg v. Minister of Environmental Affairs (case 65662/2016) ZAGPPHC 58 (2017) ¶126.3.1.

55 Greenpeace New Zealand v. Northland Regional Council, NZRMA 87 (2007), ¶56.

56 Germany, Environmental Impact Assessment Act, No. 80 (1990) §2(1).

57 European Commission, Report on the Application and Effectiveness of the EIA Directive (2009) pp.9-10; European Parliament, Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment, No.2014/52/EU (2014), Preamble ¶13, Annex IV ¶¶4,5(f).

58 Mayer, *Climate Impact Assessment as an Emerging Obligation under Customary International Law*, C.U.H.K Law 16, (2018) [**Mayer**].

59 Sierra Club v. Federal Energy Regulatory Commission, 867 F.3d 1357 (D.C. Cir. 2017).

60 Record,¶28.

33. Considering the applicability of the Espoo Convention with the present dispute,[61] Aringuv, **(a)** as the Affected Party, contends that Replomuté's refusal to conduct an EIA as a violation of **(b)** Articles 2(2) and (7), as well as **(c)** Articles 3(1), and 5 of the Espoo Convention.

a. Aringuv shall be regarded as an "Affected Party" under the Espoo Convention

34. The Espoo Convention translates the notion of "*Affected Party*" as a party to the Espoo Convention that is likely to be affected by the transboundary impact of a proposed activity.[62] In a similar vein, Aringuv shall be regarded as the "*Affected Party*" since Replomute's oil extraction activities will cause transboundary impact on the former.[63]

b. Replomuté infringed its obligation to undertake an EIA under Articles 2(2) and (7) of the Espoo Convention

35. Under the Espoo Convention, the Contracting Party shall establish an EIA procedure that permits public participation and preparation of the EIA documentation as a minimum requirement under Appendix II, and shall be undertaken at the project level of the proposed activity listed in Appendix I.[64] None of these duties were taken by Replomuté.

36. Despite the fact that Replomuté's construction of the pipeline has been enlisted in Appendix I of the Espoo Convention,[65] Replomuté cannot deviate its obligation to prepare an EIA

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61 Memorial,¶19.

62 Espoo Convention, art.1(iii).

63 Memorial,¶45.

64 Espoo Convention, arts.2(2)(7).

65 Espoo Convention, Appendix I,¶8.

documentation solely by relying upon the previous EIA made the DRI.[66] The DRI's EIA did not involve public participation,[67] not fulfilling the requisites under Appendix II,[68] and was not conducted at the project level.[69] Conclusively, Replomuté's failure to prepare an EIA at the project level breached its contractual obligation under the Espoo Convention.

c. Replomuté failed to notify and consult with Aringuv as per Articles 3(1) and 5 of the Espoo Convention

37. In the spirit of cooperation,[70] the Espoo Convention also affirmed the importance of adequate and effective notification and consultations with the "*Affected Party*" concerning the potential transboundary impact of the proposed activity after the completion of the EIA documentation "*without undue delay*".[71]

38. Presently, in the absence of proper EIA documentation from Replomuté as mandated by this Convention,[72] Replomuté must therefore be deemed *mutatis mutandis* failed to enter into adequate and effective notification and consultations with Aringuv as the "*Affected Party*".

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66 Record,¶28.

67 Record,¶17.

68 Record,¶17; Espoo Convention, Appendix II.

69 Record,¶17.

70 UN Charter, arts.1(3),33; Stockholm Declaration, Principle 24.

71 Espoo Convention, arts.3(1),5.

72 Memorial,¶¶36-37.

C. REPLOMUTÉ VIOLATES ITS CUSTOMARY OBLIGATIONS TO EXERCISE DUE DILIGENCE MEASURES

39. International court jurisprudence finds that environmental due diligence measures are CIL, in which all States must perform due diligence before embarking on any activities that potentially cause transboundary harm.[73] As cited in Aringuv's diplomatic note,[74] the Court finds in *Costa Rica-Nicaragua* cases that the customary due diligence obligation is divided into **(a)** a duty to carry out an EIA, and **(b)** a duty to notify and consult in good faith with the potentially affected State.[75]

1. *Costa Rica-Nicaragua* cases cited by Aringuv acknowledged Replomuté's customary duty to carry out an EIA

40. The State's duty to carry out an EIA prevails when its proposed activity **(a)** poses a significant adverse impact in **(c)** a transboundary context

a. The risks pose a significant adverse impact

[73] Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14, ¶¶101,204 [***Pulp Mills***]; Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion, 2011 ITLOS 17, ¶¶141-148.

[74] Record,¶29.

[75] *Costa Rica-Nicaragua*, ¶¶101,104.

41. The Court[76] and the International Law Commission ("**ILC"**)[77] describe "*significant adverse impact*" as a damage to the environment of another State that shall be more than "*detectable*", however it is not necessarily to be "*serious*" or "*substantial*".[78]

42. Replomuté's proposed oil extraction activities carried a likely risk to climate change as discussed above,[79] and to the Gorillas' population and its habitat. As Gorillas are an endangered species with a small live population of approximately 295 individuals,[80] which any harm to them will lead to their extinction.[81] Further, the significant impact of such proposed activities on the livelihood of Gorillas' population will also be detrimental to Aringuv's major economy in Gorilla tourism.[82]

b. Transboundary effect

43. The Court in *Costa Rica-Nicaragua* examines the potential transboundary effect based on the location and geographic condition of the planned activity.[83] In the present case, the potential transboundary effect of Replomute's proposed oil extraction activities are manifested by the fact

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[76] *Costa Rica-Nicaragua*, ¶¶190,192.

[77] Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, U.N. Doc. A/56/10 (2001), art.2(a), ¶4 [**DAPT Commentary**].

[78] *Ibid*.

[79] Memorial,¶¶28-29.

[80] Record,¶9.

[81] CMS Preparatory Work, *Mountain Gorilla* (*Gorilla beringei beringei*), U.N. Doc. UNEP/CMS/GOR1/5d (2007) p.5.

[82] Record,¶2.

[83] *Costa Rica-Nicaragua*,¶155.

that these extraction activities are situated in the "*area inhabited [fully] by the southern population of the Gorillas*",[84] which is known as a migratory species.[85]

2. *Costa Rica-Nicaragua* cases cited by Aringuv acknowledged Replomuté's customary duty to notify and consult in good faith with Aringuv

44. The duty to notify and consult with the potentially affected State in good faith[86] is depend upon the issuance of the EIA documentation.[87] In *Costa Rica-Nicaragua,* the Court underscores on the importance of notification and consultation in good faith after the commencement of the EIA.[88] In the absence of proper EIA documentation from Replomuté,[89] Replomuté must therefore be deemed *mutatis mutandis* failed to enter into adequate and effective notification and consultations with Aringuv.

D. *ARGUENDO*, REPLOMUTÉ CANNOT INVOKE DRI'S NATIONAL LAW, AND THE ALGIERS CONVENTION TO JUSTIFY NON-COMPLIANCE WITH ITS INTERNATIONAL OBLIGATIONS

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84 Record,¶17.

85 Record,¶9; Convention on the Conservation of Migratory Species of Wild Animals, Appendix I, June 23, 1979, 1651 U.N.T.S. 333 [**CMS**]; Memorial,¶56.

86 VCLT, art.26.

87 *Costa Rica-Nicaragua*,¶¶111,173.

88 *Costa Rica-Nicaragua*,¶104.

89 Memorial,¶¶41-46.

45. Replomuté's refusal to undertake its own EIA due to its reliance on the 1981 DRI's EIA[90] is immaterial because the former cannot rely upon the latter's EIA that is deemed complied with the DRI's domestic laws and the Algiers Convention.[91]

46. Pursuant to a general principle of law,[92] all international obligations imposed by it must be fulfilled in good faith and national law may not be invoked to justify non-fulfilment.[93] A State, which has assumed valid international obligations, is bound to make such modifications in its legislation necessary to ensure their fulfilment.[94] As such, Replomuté's assertion that the existing 1981 EIA has complied with the DRI national laws cannot justify the former's failure to undertake an EIA as required under the CBD, UNFCCC, PA, Espoo Convention and CIL.

47. Additionally, notwithstanding Replomuté's claim that the 1981 DRI's EIA comport with the threshold contained in the Algiers Convention,[95] it cannot abrogate Replomuté's obligation to carry out an EIA as required by the CBD in good faith.[96]

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90 Record,¶28.

91 Record,¶28.

92 International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, Inter-Am. Ct. H.R. (ser.A) No.14, (1994) ¶35.

93 VCLT, arts.26-27; ARSIWA, art.3.

94 Exchange of Greek and Turkish Populations (Greece v Turk.), Advisory Opinion, 1925 P.C.I.J. (ser.B) No.10, p.20.

95 Record,¶28; African Convention on the Conservation of Nature and Natural Resources, September 15, 1968 U.N.T.S. 14689, art.V.

96 CBD, art.22.

PART II

REPLOMUTÉ'S OIL EXTRACTION ACTIVITIES IN THE DRI VIOLATE INTERNATIONAL LAW

A. REPLOMUTÉ IS DIRECTLY RESPONSIBLE FOR THE DEVELOPMENT OF ITS OIL EXTRACTION ACTIVITIES UNDER INTERNATIONAL LAW

48. With respect to Lenoir's oil extraction activities in the DRI's territory, Aringuv contends that Replomuté is directly responsible for the violations of its international obligations. A State is directly responsible if it commits or ommits an internationally wrongful act,[97] which requires the cumulative elements of attribution and breach of international obligations.[98]

49. In the present case, **(1)** Lenoir's conducts are attributable to Replomuté, and it violated Replomuté's **(2)** treaty and **(3)** customary obligations. In any event, **(4)** the Concession Agreement and the Arbitral Award cannot justify Replomuté's direct responsibility.

1. Lenoir's oil extraction activities are attributable to Replomuté

50. State-owned or controlled entities' acts are attributable to the State.[99] Therefore, the conducts of Lenoir, Replomuté's SOE,[100] are attributable to Replomuté.

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[97] ARSIWA, art.1; Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, art.1, ¶3, U.N. Doc. A/56/10 (2001) [**ARSIWA Commentary**]; KELSEN, PRINCIPLES OF INTERNATIONAL LAW (2ND ED.1966) p.22.

[98] ARSIWA, art.2; ARSIWA Commentary, art.2,¶4; *Tehran*,¶56; *Gabčíkovo*,¶78.

[99] ARSIWA, art.5; Encana Corporation v. Republic of Ecuador, LCIA Case No. UN3481, Award (2006) ¶154.

[100] Record,¶17.

2. Replomuté is in breach of its treaty obligations

51. With respect to Replomuté's oil extraction activities, Aringuv contends that Replomuté violated its treaty obligations under the **(a)** CMS, **(b)** CBD, **(c)** UNFCCC and PA.

a. Replomuté violates its obligations under CMS

52. Echoing the concerns from Aringuv Ministry of Foreign Affairs,[101] as well as the local and international NGOs[102] on the negative impacts of Replomuté's oil extraction activities on the Gorillas, **(i)** as a migratory species, and its population, Aringuv asserts that such conduct does tantamount to **(ii)** a breach of Replomuté's obligation under Article II of the CMS as a non-Range-State.[103]

i. <u>Gorilla is a migratory species under CMS</u>

53. The purpose of CMS is the conservation and effective management of migratory species.[104] In the case at hand, Gorilla has been enlisted as an endangered migratory species under Appendix

[101] Record,¶26.

[102] Record,¶21.

[103] Record,¶29; CMS, art.II.

[104] CMS, Preamble,¶6, art.II(1).

I of the CMS[105] and classified as critically endangered by the IUCN Red List[106] due to its critical condition with 295 individuals remaining.[107]

ii. Article II of the CMS applies to Replomuté

54. Although Replomuté was not considered a Range State,[108] Article II of the CMS still applies to non-Range-State as long as they are Parties to the CMS.[109] This provision obliged non-Range-State to conserve migratory species wherever and whenever possible.[110] This means that Replomuté should endeavour to provide immediate protection for migratory species included in Appendix I, such as the Gorillas.[111]

55. To safeguard to the continuity of Gorillas' population, practice in Virunga National Park of the Democratic Republic of Congo highlighted the importance of collaborative partnership between the private sector, civil society and the national park to maintain the Mountain Gorillas' population therein.[112]

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[105] CMS, art.III(1).

[106] IUCN RED LIST CATEGORIES AND CRITERIA (2ND ED. 2000) p.16.

[107] Record,¶9.

[108] Record,¶10.

[109] CMS, art.II(1); Melissa Lewis & Arie Trowborst, *Large Carnivores and the Convention on Migratory Species*, Front. Ecol. Evol. 7:491 (2019) p.4.

[110] CMS, art.II(1).

[111] *Ibid*, art.II(3)(b).

[112] Bergen, "Virunga Mountain Gorilla Population is Growing. Can Tourist Maintain it Long-term?", Re:Wild, (2019) <https://www.rewild.org/news/virungas-mountain-gorilla-population-is-growing-can-tourism-help-sustain-it-long-term>.

56. In contrast, Replomuté is showcasing no interests in fulfilling its obligation to provide immediate protection to the Gorillas in the DRI national park, as the former did not seek any collaboration with the relevant NGOs and the DRI's national park in conducting its proposed oil extraction activities. Consequently, it violates Replomuté's obligation under Article II of the CMS.

b. Replomuté violates its obligations under CBD

57. Normatively, CBD requires its member States, including Replomuté,[113] to **(1)** ensure the latter's activities within their control do not cause damage to other States' environment,[114] and **(2)** to cooperate with other parties for the conservation and sustainable use of biological diversity.[115] Aringuv contemplates that Replomuté failed to fulfil its obligations under the CBD.

58. ***Firstly***, as proven *supra*,[116] it is inevitable that Replomuté's proposed oil activities caused a transboundary harm to Aringuv. Hence, it constitutes Replomuté's breach of Article 2 of the CBD.[117]

59. ***Secondly***, in the absence of Replomuté's willingness to collaborate and cooperate with other stakeholders as mentioned above,[118] this circumstance leads to Replomuté's non-compliance with its obligation to cooperate with other parties under Article 5 of the CBD.[119]

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[113] Record,¶7.

[114] CBD, art.3; Rio Declaration, Principle 2; Stockholm Declaration, Principle 21.

[115] CBD, art.5.

[116] Memorial,¶45.

[117] CBD, art.3.

[118] Memorial,¶57.

[119] CBD, art.5.

c. Replomuté violates its obligations under UNFCCC and PA

60. Previously, Aringuv Minister of Foreign Affairs[120] and Minister of the Environment,[121] claims that Replomuté's proposed oil extraction activities in the DRI contribute to climate change and cause a "*climate crisis*".[122] In Aringuv's view, this stems from Replomuté's non-compliance with its treaty obligations under the UNFCCC and PA to **(1)** adhere to the principle of common but differentiated responsibilities and respective capabilities ("**CBDR-RC**"),[123] and **(2)** undertake and communicate its own NDC.[124]

61. ***Firstly***, both the UNFCCC and PA mandate its member States to uphold the CBDR-RC principle.[125] Such principle could be achieved only if the developed country could take the lead in combating climate change and the adverse effects thereof.[126] As a high-income country[127] or developed country,[128] Replomuté failed in combating the climate change by remain authorizing Lenoir to extract oil in the DRI's territory that could bring the adverse effects of climate change.[129]

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[120] Record,¶26.

[121] Record,¶34.

[122] Record,¶¶26,34.

[123] UNFCCC, art.3(1); PA, art.2(2); MAYER AND ZAHAR (EDS.), DEBATING CLIMATE LAW (2021) p.63.

[124] PA, art.4.2.

[125] UNFCCC, art.3(1); PA, art.2(2).

[126] UNFCCC, art.3(1); PA, art.4(4).

[127] Record,¶3.

[128] Country Classification, World Economic Situation and Prospects (WESP) (2014) p.144.

[129] Memorial,¶29.

62. ***Secondly***, as part of its commitment to strengthen the global response to the threat of climate change, State parties to the PA, including EU Member States,[130] such as Replomuté,[131] is required to submit its own NDC.[132] In amidst of the controversies behind Replomuté's proposed oil activities that lead to the "*climate crisis*",[133] Replomuté remains failed to undertake[134] and communicate its own NDC to other members, such Aringuv and the DRI.[135]

3. Replomuté failed to perform its customary obligation to prevent transboundary harm

63. In conformity with CIL,[136] which stemmed from the *sic utere tuo ut alienum non laedas* principle,[137] a State is responsible for ensuring the activities within their control respect the environment of other States.[138] As a country that fully control Lenoir,[139] Replomuté failed to perform its obligation for not causing harm since Lenoir's proposed oil extraction activities carried

[130] Nationally Determined Contribution of the European Union and its Member States, (2020) p.8.

[131] Record,¶13.

[132] PA, arts.3,4(2).

[133] Record,¶34.

[134] Record,¶15.

[135] Record,¶13.

[136] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226,¶29.

[137] Rio Declaration, Principle 2; Stockholm Declaration, Principle 21.

[138] Corfu Channel, p.22; *Gabčíkovo*,¶53; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226,¶29.

[139] Record,¶17; Memorial,¶53.

transboundary implications towards climate change and the Gorillas and its habitat,[140] as Aringuv could establish the existence of **(a)** *nexus*, and **(b)** severity of harm caused by Replomuté's conducts.[141]

a. Nexus

64. The acts that are likely to give rise to transboundary damages are those acts that "*directly*" or *"indirectly*" involve natural resources.[142] Here, Replomuté's proposed oil extraction activities have potential adverse effects on climate change and the Gorillas' population and its habitat, as explained above.[143]

b. The severity of harm to the Gorilla and climate change

65. Aringuv asserts the harms caused by Replomuté's proposed oil extraction activities are severe to the Gorillas' population as critically endangered species[144] and to the climate change.[145]

4. In any event, the Concession Agreement and the Arbitral Award cannot abrogate Replomuté's treaty obligations

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[140] Record,¶¶26,31.

[141] *Costa Rica-Nicaragua*, ¶119; XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW (2003) p.4 [**HANQIN**].

[142] HANQIN, p.4.

[143] Record,¶¶26,31,34; Memorial,¶¶43,44.

[144] Memorial,¶44.

[145] Memorial,¶28.

66. Notwithstanding the fairness and validity of the Arbitral Award,[146] it cannot negate Replomuté's responsibility to perform its treaty obligations in good faith.[147] This is because CIL governs that there is no distinction between contractual and unlawful responsibility.[148] Accordingly, the State remains responsible for its treaty obligations without prejudice to its responsibilities towards another treaty.[149] Thus, Replomuté cannot preclude its wrongfulness by relying on the Arbitral Award, which arises from the Concession Agreement.[150]

B. SUBSEQUENTLY, REPLOMUTÉ IS INDIRECTLY RESPONSIBLE FOR COERCING DRI TO BREACH ITS INTERNATIONAL OBLIGATIONS

67. Replomuté is indirectly responsible[151] for any breach by the DRI to the Gorilla Agreement, as the former is coercing the latter to commit an internationally wrongful act.[152] In contrast to Replomuté's claim on the absence of CIL,[153] **(1)** Aringuv will prove that indirect responsibility is a CIL, and therefore, **(2)** Replomuté is responsible for its own coerced towards the DRI.

1. The notion of indirect responsibility of coercion constitutes a customary norm

[146] Clarifications,¶12.

[147] VCLT, art.26.

[148] Rainbow Warrior (Fr. v. N.Z.), 20 R.I.A.A. 217 (1990), ¶75.

[149] DÖRR/SCHMALENBACH, pp.1249-1250; VCLT, art.30(5); CMS, art.XII; CBD, art.22.

[150] Record,¶¶17,23.

[151] Ago (S.R. State Responsibility), *Eighth Rep. on the State Responsibility*, U.N. Doc. A/CN.4/318 (1979) pp.4-26.

[152] Record,¶29.

[153] Record,¶30.

68. The indirect responsibility is considered a CIL as it already met the cumulative elements of the **(a)** uniform State practices and **(b)** *opinio juris*.[154] In any event, (**c**) Replomuté cannot be deemed as the persistent objector.

a. State Practices

69. The Court in *Jurisdictional Immunities* finds that State practices may be found in the domestic court decisions and domestic laws,[155] and activities on the international stage, such as treaty-making.[156] As regards the notion of indirect responsibility,[157] it previously occurred in the Treaty of Fez, when diplomatic and consular agents of France were indirectly responsible for Moroccan external affairs.[158] Similar events were also founded on numerous State practices in

[154] *Costa Rica-Nicaragua*, ¶185; North Sea Continental Shelf (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3 ¶37 [**North Sea**].

[155] Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening) 2012 I.C.J. 99,¶55.

[156] SHAW, INTERNATIONAL LAW (2018) p.60.

[157] ARSIWA,art.18.

[158] Agreement between the French Republic and the Kingdom of Morocco on the Issue of the French Protectorate in Morocco, art. 6, Fr.-Morocco, Mar. 30, 1912 **[Treaty of Fez]**

Cuba,[159] Morocco,[160] Egypt,[161] and Kuwait.[162] These State practices encompass the "*widespread*" and "*representative*" requirements to establish customary norms.[163]

b. Opinio Juris

70. In *Nicaragua*, the Court claimed that *Opinio Juris* may be deduced from the "*attitude*" of States towards certain General Assembly Resolutions.[164] The United Nations General Assembly Resolutions have adopted the Articles on Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**").[165] Moreover, no State has objected to or commented on Article 18 during the adaptation.[166] As affirmed by this Court, the United Nations General Assembly has established the ILC to codify customary norms,[167] and the Court is consistently considering the ILC's draft articles

[159] Agreement between the United States and the Kingdom of Spain on the Issue of Ending the War, art.1, U.S.-Spain, Dec. 10, 1898.

[160] Treaty of Fez, art.6.

[161] Agreement between the United Kingdom and Egypt on the Issue of the Immunities and Privileges by the British Forces in Egypt, U.K.-Egypt, Dec. 10, 1936.

[162] Agreement between the United Kingdom and Kuwait on the Issue of the Protection of Kuwait Territorial Integrity, U.K.-Kuwait, Jan. 23, 1899.

[163] *North Sea*,¶73.

[164] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14,¶188.

[165] G.A. Res. 56/83, U.N. Doc. A/RES/56/83, (2002),¶1.

[166] U.N. Doc. A/62/63 (2007) pp.2-7; U.N. Doc. A/74/156 (2019) pp.5-7; U.N. Doc. A/77/198 (2022) pp.4-5.

[167] *Costa Rica-Nicaragua*,¶190; North Sea Continental Shelf (Ger./Den.; Ger./Neth.) 1969 I.C.J. 3, pp. 242-243 (Dissenting Opinion Sorensen).

for its decision.[168] Accordingly, Article 18 of the ARSIWA expressly states that a State should be indirectly responsible when it coerces another State to perform a wrongful act.[169]

c. Replomuté is not a persistent objector to the customary norm

71. A State can be considered a "*persistent objector*" and may not be bound by the rule, if the State persistently and openly expressed its objection while the rule was in the process of formation and development.[170] In *Asylum*, the Court finds Peru as a persistent objector since it repudiated the customary rule by persistently refraining from ratifying.[171] It is quite different here, Replomuté did not persistently and openly resist this international custom,[172] they only made it once.[173] As a result, Replomuté is bound to this norm.

2. Replomuté is indirectly responsible under CIL for coercing DRI to breach its international obligations

72. CIL governs that the State is responsible for another State's act when the former is coercing the latter to breach its international obligations.[174] On this note, the coercing State is also required

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[168] *Gabčíkovo*,¶123.

[169] ARSIWA, art.18(1).

[170] Report of the International Law Commission Seventieth Session, ILC Yearbook (2018-II) p.121.

[171] Asylum (Colom. v. Peru) 1950 I.C.J. 266, p.277-278.

[172] *Ibid*; Fisheries (U.K. v. Nor.) 1951 I.C.J. 116, p.131.

[173] Record,¶30.

[174] ARSIWA, art.18.

to possess knowledge related to the circumstances of its conduct toward the coerced State.[175] Likewise, Replomuté **(a)** Replomuté coerced the DRI to breach its international obligations, while **(b)** Replomuté was aware of the circumstances of the DRI's internationally wrongful act.

a. Replomuté coerced the DRI to breach its international obligations under the Gorilla Agreement and CMS

73. A State is prohibited to "*coerce another State to obtain subordination of the exercise of another State [...] to secure from its advantage of any kind*."[176] Coercion can take the form of "*extortion*",[177] consists of imposing costs on the victim State, to cause it to change its decision-making calculus and policy choices,[178] referred as economic duress.[179] In this instance, the Aringuv Ministry of the Environment already claimed Replomuté's as "colonial extortion".[180]

74. In 1985, the US coerced Japan into entering the "Plaza Accord" by forcing the yen to appreciate which led to the rapid expansion of Japan's domestic economic bubble.[181] The situation is quite similar here, as Replomuté has given the DRI severe economic duress by asking $825

[175] *Ibid.*

[176] G.A. Res. 2625 (XXV), U.N. Doc. A/RES/2625(XXV) (1970).

[177] Milanovic, *Revisiting Coercion as an Element of Prohibited Intervention in International Law*, 117:4 Am. J. Int'l L, 605 (2023).

[178] *Ibid.*

[179] ARSIWA Commentary, art.18,¶3.

[180] Record,¶34.

[181] America's Coercive Diplomacy and Its Harm, Ministry of Foreign Affairs of the People's Republic of China, MFA News, (2023).

million penalties if the DRI withdraws from the Concession Agreement.[182] Considering the DRI's status as a low-income country,[183] it is left with no effective choice but to remain in the Concession Agreement.[184] Thus, it ultimately negates Replomuté's statement that DRI signed the said Agreement under "*no duress*".[185] As a consequence of such coercion, the DRI is prone to breach of its obligations under the Gorilla Agreement and CMS. [186]

b. Replomuté was aware of the circumstances of DRI's internationally wrongful act

75. The coercing State must aware of the factual circumstances which entailed to the coerced State conduct.[187] Therefore, Replomuté is unequivocally aware that whenever the DRI granted the continuance of the proposed activities, it would contravene with its treaty obligations, as the DRI has explicitly stated its intention to withdraw from the Concession Agreement based on its "*responsibility under the Gorilla Agreement*".[188]

[182] Record,¶23.

[183] Record,¶1.

[184] Record,¶17.

[185] Record,¶30.

[186] CMS, art.III(4)(c); Agreement on the Conservation of Gorillas and Their Habitats, art.III(2)(a), Oct. 26, 2007 U.N.T.S. 2545.

[187] ARSIWA, art.18(2).

[188] Record,¶22.

CONCLUSION

76. For the foregoing reasons, Aringuv respectfully requests the Court to:

(a) **DECLARE** that, as a procedural matter, Replomuté's failure to prepare an EIA on the proposed oil extraction activities in the DRI violates international law; and

(b) **DECLARE** that, as a substantive matter, Replomuté's proposed oil extraction activities in the DRI violate international law.

Respectfully submitted,

[*signed*]

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Agents for Aringuv, 2442A