[TEAM NO. 2467R]

IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING

QUESTIONS RELATING TO MOUNTAIN GORILLAS

AND IMPACT ASSESSMENT

ARINGUV

(APPLICANT)

v.

REPLOMUTÉ

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

28th Annual Stetson International Environmental Moot Court Competition

2023-2024

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QUESTIONS

PRESENTED

I. Whether or not Replomuté violated international law with respect to the preparation of an Environmental Impact Assessment.

II. Whether or not the actions of Replomuté with respect to the proposed oil extraction in the Democratic Republic of Ibirunga comply with international law.

STATEMENT OF JURISDICTION

In accordance with *Article 40 of the Statute of the International Court of Justice*, the Sovereign States of Aringuv and Replomuté have submitted to the International Court of Justice ("ICJ") their Special Agreement pertaining to questions concerning their differences relating to Mountain Gorillas and Impact Assessment. The Parties transmitted a copy of the Special Agreement to the Registrar of the ICJ on 24 July 2023, which the Registrar acknowledged receipt on 31 July 2023. The Parties agree that the Court has jurisdiction to decide the matter.

STATEMENT OF

FACTS

Aringuv is a sovereign State in central Africa that shares its eastern border with the Democratic Republic of Ibirunga ("DRI"). Aringuv is classified as a lower-middle-income country, while DRI is classified as a low-income country. Meanwhile, Replomuté is a sovereign State in Europe and is classified as a high-income country.

Both DRI and Aringuv are home States to Royal Mountain Gorillas *(Gorilla ibirungai royali)*, a critically endangered species protected under the Convention on the Conservation of Migratory Species of Wild Animals ("CMS"). Royal Mountain Gorillas have two populations: *First*, the northern population, which occupies a transboundary national park that frequently crosses the boundary between the DRI and Aringuv; *Second*, the southern population, which occupies a national park in the DRI and has rarely been sighted in Aringuv.

In 1981, DRI and Replomuté entered into a concession agreement, which contained a mandatory binding arbitration clause. The Parties agreed that the Lenoir Corporation,

a corporation wholly owned and operated by Replomuté, has the right to conduct oil exploration and extraction activities ("oil activities") in the area inhabited by the southern population of the Royal Mountain Gorillas in the DRI. Prior to signing the concession agreement, DRI conducted an Environmental Impact Assessment ("EIA"), in accordance with its national laws, subsequently taking into account its commitment to reduce its greenhouse gas emissions by 20% from 2022 to 2031.

In May 2012, DRI's new President, General Mina, ordered DRI's withdrawal from the 1981 DRI-Replomuté Agreement, unless Replomuté established a $50 million (USD) fund, the disposition of which shall be subject to General Mina's sole control. This prompted Replomuté to invoke the mandatory arbitration clause.

In 2015, Replomuté prevailed in the arbitration. The arbitral tribunal permitted Lenoir Corporation to proceed with its oil activities.

In November 2017, Aringuv's new President, Melanie Waitz, communicated with Replomuté, expressing her concerns about Replomuté's planned oil activities in DRI.

Aringuv contended that the EIA conducted by DRI is non-compliant with the Convention on Environment Impact Assessment in a Transboundary Context: Espoo Convention ("Espoo Convention"), among others, as it purportedly failed to consider the impacts of the oil activities on either the gorilla population or climate change. Replomuté maintains that the EIA conducted by DRI is valid.

Negotiations between Aringuv and Replomuté continued but failed to resolve the dispute. Hence, the two States entered into a Special Agreement to institute proceedings

before the ICJ. Replomuté agreed that Lenoir Corporation would not proceed with the project until the ICJ issues its judgment.

SUMMARY OF ARGUMENTS

First, Replomuté did not violate international law with respect to the preparation of an EIA. The conduct of the EIA relative to Lenoir Corporation's oil activities was done consistent with the Espoo Convention, Convention on Biological Diversity ("CBD"), United Nations Framework Convention on Climate Change ("UNFCCC"), Paris Agreement to the United Nations Framework Convention on Climate Change ("Paris Agreement"), customary international law ("CIL") and other international environmental instruments.

Second, the actions of Replomuté with respect to the proposed oil activities in the DRI comply with international law. Such activities did not violate the prohibition against transboundary harm. Replomuté has no direct responsibility since it is not a Range State under the CMS nor indirect responsibility since its acts did not constitute coercion, an internationally wrongful act ("IWA"), over DRI.

MAIN ARGUMENTS

I. REPLOMUTÉ HAS NOT VIOLATED INTERNATIONAL LAW WITH RESPECT TO THE PREPARATION OF AN EIA RELATIVE TO THE OIL EXPLORATION AND EXTRACTION ACTIVITIES.

An EIA is required with respect to proposed activities that are likely to cause significant adverse transboundary impact.[1] It must be undertaken by the State of origin[2] at the project level of the proposed activity[3] prior to its implementation.[4] A State "of origin" is the Contracting Party under whose jurisdiction a proposed activity is envisaged to take place.[5]

Replomuté did not violate international law when it did not prepare an EIA since the EIA conducted by DRI is: (a) valid and sufficient; and (b) consistent with CIL.

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[1] Convention on Environment Impact Assessment in a Transboundary Context Art. 2(2), *opened for signature* Feb. 25, 1991, 1989 U.N.T.S. 309 [hereinafter Espoo Convention].

[2] *Id.,* Art. 2(3).

[3] *Id.,* Art. 2(7).

[4] Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 205 (April 20).

[5] Espoo Convention, *supra* note 1, Art. 1(ii).

A. THE EIA CONDUCTED BY DRI IS VALID AND SUFFICIENT UNDER RELEVANT CONVENTIONS AND INTERNATIONAL INSTRUMENTS.

An EIA is a national procedure[6] which is more of a reference than a decisive component[7] in the conduct of an activity that may pose a significant risk of damage to other States.[8] While projects that are likely to have significant adverse effects on biological diversity require an EIA,[9] its conduct is nevertheless subject to the decision of the competent national authority.[10] The assessment of whether there is adverse impact lies with such national authority.[11]

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[6] Espoo Convention, *supra* note 1, Art. 1(vi).

[7] GILLESPIE, A. ENVIRONMENTAL IMPACT ASSESSMENTS IN INTERNATIONAL LAW. REV. EUR. COMP. INT. ENVIRON. LAW, 17(2), 221-233 (2008).

[8] *Pulp Mills on the River Uruguay*, 2010 I.C.J. 14, ¶ 204.

[9] Convention on Biological Diversity article 14 (a), *opened for signature* June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

[10] Rio Declaration on Environment and Development Principle 17, *opened for signature* June 3, 1992, A/CONF.151/26 (Vol. 1) [hereinafter Rio Declaration].

[11] *Id.*

The preparation of an EIA, which should be country-specific,[12] is within the ambit of a State's discretion.[13] This includes the specific contents of the EIA required in each case in a domestic law, having regard to the nature and magnitude of the proposed development.[14] The conduct of an EIA necessarily includes the duty of a State to observe due diligence, a recognized custom[15] which obligates States not to knowingly allow its territory to be used for acts contrary to the rights of other States.[16]

DRI faithfully observed the foregoing obligation when it conducted an EIA based on its national law before signing the concession agreement [R,17]. In particular, the EIA conducted by DRI considered the impacts on nearby human populations of the likely quantity of water to be used and waste to be produced, including the construction of the

[12] Commission for Environmental Assessment, *Biodiversity in EIA & SEA, Background Document to CBD Decision VIII/28: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment*, at 14 (Apr. 2006)(by Roel Stooweg, et al.).

[13] *Pulp Mills on the River Uruguay*, 2010 I.C.J. 14, ¶ 205.

[14] *Id.*, ¶ 205.

[15] *Id.*, ¶ 101.

[16] Corfu Channel (UK v. Alb.), Merits Judgment, 1949 I.C.J. 6, at 22 ¶ 101 (Apr. 9).

pipeline [R,17]. DRI's preparation of an EIA is sufficient compliance with its obligation to exercise due diligence.[17]

Consequently, Replomuté is not remiss in assessing the likely impact of the oil-related activities. It must be stressed that the said activities were meticulously planned by Replomuté and DRI [R,28] having been conducted by DRI taking into consideration its national laws [R,17] and any international obligations emplaced in 1981, such as the African Convention on the Conservation of Nature and Natural Resources ("Algiers Convention") [R,28]. DRI's act of conducting an EIA is consistent with Article 3 of the CBD which recognizes the sovereign right of a State to exploit their own resources pursuant to their own environmental policies.[18]

1. There is no obligation to conduct another EIA under international instruments to which Replomuté and Aringuv are signatories.

Rules of international law are established through consent of States, and all agreements between States are products of their sovereign wills.[19] The *doctrine of consent*

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[17] Certain Activities carried out by Nicaragua in the border area (CR v. Nic.) and Construction of a Road in Costa Rica along the San Juan River (Nic. v. CR), Judgment, 2015 I.C.J., at 665-742, ¶ 104.

[18] Convention on Biological Diversity, *supra* note 9, Article 3.

[19] CORNELIUS VAN BYNKERSHOEK, QUAESTIONES JURIS PUBLICI (QUESTIONS OF PUBLIC LAW), LEIDEN J. OF INT. L. 23, 269-276 (2010).

provides that consent of States voluntarily entering the international community constitutes the basis of the validity of international law.[20] Consent of a State to an international agreement is the bedrock of its obligation to behave or conduct itself in a specific manner, unless said obligation arises *en consensu*[21] or from CIL.[22] Thus, when a State consents to an international instrument, it binds itself to perform the obligations stated therein and the manner in which it must perform the same.

a. The application of the Espoo Convention by Aringuv is incorrect.

It is noteworthy that DRI became a Party to the Espoo Convention in 2015 while Replomuté became a Party in 1997 [R,12]. Clearly, both States were not yet parties to such convention when such States entered into a concession agreement [R,12].

The Vienna Convention on the Law of Treaties ("VCLT") provides that treaties generally do not apply retroactively unless a different intention appears from the treaty

[20] JIANMING SHEN, S.J.D.,THE BASIS OF INTERNATIONAL LAW: WHY NATIONS OBSERVE, VOL. 17: NO. 2, ART.3, PENN STATE INT. L. REV, 314 (1999).

[21] *Id.*, at 316.

[22] JORDAN J. PAUST, CUSTOMARY INTERNATIONAL LAW: ITS NATURE, SOURCES AND STATUS AS LAW OF THE UNITED STATES, 12 MICH. J. INT. L. 59 (1990).

or is otherwise established.[23] The Espoo Convention also contains no explicit provision stating that it may be applied retroactively, rather it specifically mentions its entry in force,[24] thus presumed to be applied prospectively. Consequently, Replomuté and DRI are not duty-bound to observe the EIA requirement under the Espoo Convention.

Assuming otherwise, such convention cannot be invoked by Aringuv as it is not a Party thereto [R,12, C,7]. In *Pulp Mills* case, the Court ruled that the Espoo Convention is not applicable since the contending States are not parties thereto.[25] Therefore, no rights nor obligations have been created in Aringuv's favor[26] under the VCLT. Aringuv's understanding of the provisions of the Espoo Convention is incorrect. Nevertheless, even if Aringuv may invoke the Espoo Convention upon Replomuté, the latter's actions would still not constitute a violation thereof.

First, the required consultation[27] under Article 5 of the Espoo Convention applies only to the Party of origin or the Contracting Party under whose jurisdiction a proposed activity is envisaged to happen.[28] In this case, the oil activities are to be conducted within

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[23] Vienna Convention on the Law of Treaties Section 28, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[24] Espoo Convention, *supra* note 1, Article 18(1).

[25] Pulp Mills on the River Uruguay, *supra* note 4, ¶ 210.

[26] Vienna Convention, *supra* note 23, Section 34.

[27] Espoo Convention, *supra* note 1, Article 5.

[28] *Id.*, Article 1(ii).

the DRI [R,17], which makes it the Party of origin. Consequently, DRI had the obligation to initiate the said consultation,[29] and not Replomuté.

Second, Aringuv's claim that the advent of the Agreement on the Conservation of Gorillas and their Habitats ("Gorilla Agreement") and the climate change conventions constitute "additional information" [R,29], is erroneous. What constitutes "additional information" is the information's non-availability[30] at the time the decision to proceed with the proposed activity was made. Additional information is inexistent in this case.

As early as 1980, the Royal Mountain Gorilla was already listed under the International Union for Conservation of Nature ("IUCN") Red List [C,8]. In 1981, DRI's EIA [R,17] significantly considered IUCN — the most comprehensive compendium of information regarding the global conservation status of animal species.[31]

Likewise, DRI, Aringuv, and Replomuté, participated in the 1972 United Nations Conference on Human Environment[32] [R,6] which requires States to shape their actions with a more prudent care for environmental consequences.[33] With this, DRI already took

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[29] *Id.*, Article 5.

[30] Espoo Convention, *supra* note 1, Art. 6(3).

[31] IUCN, The IUCN Red List of Threatened Species, 2017-2020 Report (2022).

[32] United Nations Conference on the Human Environment, Stockholm, June 5-16 1972, A/CONF.48/14/Rev.1.

[33] Report of the United Nations Conference on the Human Environment (1973).

into consideration global climate when it prepared the subject EIA [R,29]. Verily, Aringuv's claim that there is "additional information" [R,29] rests on thin air.

Nevertheless, in the advent of additional information, the Espoo Convention merely obligates the concerned State to inform the other concerned State of such information and to request for consultation[34] as courses of action[35] prior to the commencement of the activity.[36] Consultations on the basis of additional information may relate to monitoring[37] and may be in the form of official letters,[38] which Replomuté had conformed to through periodic negotiations [R,26,35] and exchange of diplomatic notes [R,28,30,33].

[34] Espoo Convention, *supra* note 1, Article 6(3).

[35] *Id.*, Article 5 & Article 6(3).

[36] United Nations Economic Commission for Europe, Guidance on the Practical Application of the Espoo Convention - Convention on Environmental Impact Assessment in a Transboundary Context (UN/ECE) (2003).

[37] *Id.*

[38] *Id.*

b. There is no obligation to prepare another EIA based on the CBD.

The CBD espouses the responsibility of States to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or in areas beyond the limits of their national jurisdiction.[39]

Article 14.1 (a) of the CBD obliges a Contracting Party to introduce procedures requiring EIAs of proposed projects, as far as possible and appropriate, to avoid or minimize adverse effects on biological diversity.[40] Here, DRI conducted the EIA to the best of its capability taking into account its status as a low-income [R,1] and developing country [R,13].

Accordingly, what remains as the duty of DRI and Replomuté [R,7] per the CBD guidelines[41] is to conduct a "follow-up" EIA, and not another EIA. Such follow-up includes activities relating to monitoring, compliance, enforcement, and environmental

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[39] Convention on Biological Diversity, *supra* note 9, Article 3.

[40] Convention on Biological Diversity, *supra* note 9, Article 14 (a).

[41] Conference of the Parties to the Convention on Biological Diversity, Curitiba, Brazil, Mar. 20-31, 2006, *Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Eighth Meeting*, at 18 ¶ 44, UNEP/CBD/COP/DEC/VIII/28 (June 15, 2006).

auditing[42] which are all heavily dependent on the regulatory framework or national law of DRI.

c. Replomuté has no obligations under the UNFCCC and the Paris Agreement.

Aringuv raises that the EIA conducted by DRI must consider the climate impacts associated with oil activities, particularly the applicability of Article 4.1 (f) of the UNFCCC. [R,27]. Such contention lacks merit.

Aringuv, Replomuté, and DRI signed and ratified the UNFCCC and Paris Agreement in 1992 and 2016, respectively, [R,13] or 11 years after DRI and Replomuté entered into a concession agreement [R,17]. Again, the VCLT provides that obligations do not apply to situations which occurred before the treaty took effect.[43] Hence, the obligations under said agreements and conventions were not binding upon Replomuté and DRI when it entered into a concession agreement in 1981 [R,17].

Even applying the provisions of UNFCCC,[44] such only provides the integration of climate change considerations during the conduct of an EIA to minimize adverse effects

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[42] Commission for Environmental Assessment, *supra* note 12, at 40.

[43] Vienna Convention, *supra* 23, Art. 28.

[44] United Nations Framework Convention on Climate Change art 4, *signed* 1992, FCCC/INFORMAL/84 GE.05-62220 (E) 200705 [hereinafter UNFCCC].

on the economy, public health, and the environment.[45] However, this is not a blanket mandate, since the same provision provides that the EIA must be done to the extent possible within the State's capability.[46]

With such, DRI's EIA weighed public health when it contemplated the effects of the oil-related activities on its citizens [R,17]. It even accounted the economy and the environment when it implemented its National Determined Contribution ("NDC") for the reduction of greenhouse gas emissions with 18.5% thereof to be achieved with external support [R,16] to which Replomuté is contributing [R,17,23,26].

Manifestly, the continuous monitoring of the EIA and the subsequent execution of the oil activities [R,18,19,20,23,24,32,33] are guided by DRI's NDC and the reduction of greenhouse gas emissions [R,16] in compliance with its obligations under UNFCCC.

[45] *Id.*

[46] *Id.*

i. Replomuté's actions are consistent with the principle of common but differentiated responsibilities ("CBDR").

Both the UNFCCC and Paris Agreement promote the principle of CBDR[47] which recognizes climate change as a universal issue requiring collective action, but efforts are commensurate to each State's capabilities to address inequalities.[48] Under the CBDR principle, standards of conduct apply to developed countries considering that they contribute more to global environmental problems and have greater technological and financial resources[49] to respond thereto.[50]

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[47] Ellen Hey & Sophia Paulini, Common but Differentiated Responsibilities, *available at* https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1568 (last accessed Nov. 7, 2023).

[48] Jonas Ebbesson, Common but differentiated responsibilities in the climate change-historic evaluation and future looks (2017) (thesis in International Environmental Law, Stockholm University).

[49] Rio Declaration, *supra* note 10.

[50] Lawyers Responding to Climate Change, Common but differentiated responsibilities and respective capabilities (CBDRRC), *available at* https://legalresponse.org/legaladvice/the-principle-of-common-but-differentiated-responsibilities-and-respective-capabilities-a-brief-summary/ (last accessed Nov. 8, 2023).

States must reflect CBDR in its NDCs greenhouse gas emission development strategies,[51] while considering the classification of State Party under UNFCCC.[52] DRI is classified as a Non-Annex 1 Party while Replomuté is an Annex 1 Party [R,13,15]. As a European State,[53] Replomuté demonstrates cooperation in addressing climate change issues contemplated in the CBDR principle. In fact, the European Union that covered Replomuté's NDC [R,15] submitted an update on its commitment of a 55% reduction in greenhouse gas emissions by 2030.[54]

Moreover, Replomuté and DRI can jointly utilize the Friendship Fund [R,23] to mitigate the effects of climate change. As a world's leader in gross value of industrial output [R,3], Replomuté can share environmentally-friendly technologies through developing equipment that can provide sustainability.[55]

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[51] Ellen Hey & Sophia Paulini, *supra* note 47.

[52] UNFCCC, *supra* note 44, Annex 1.

[53] The European Union, *Submission by Germany and the European Commission on Behalf of the European Union and its Member States* (Dec. 17, 2020).

[54] *Id.*

[55] The Paris Agreement to the United Nations Framework Convention on Climate Change, *adopted* Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

d. International environmental instruments do not require the conduct of another EIA but only emphasize cooperation and support among States.

Treaties and declarations signify cooperation and support among States in international matters related to the conservation and protection of the environment.[56] Nevertheless, the documents adopted in conferences to which Replomuté and Aringuv participated do not mandate another EIA [R,6]. These instruments call for cooperation concerning the protection and improvement of the environment, and support for programs of cooperation and assistance.[57] Cooperation requires States to coordinate their position and actions, resolve common problems, and create mutually acceptable decisions.[58] It does not require automatic submission by Replomuté nor DRI to the

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[56] MAX VALVERDE SOTO, GENERAL PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, VOL. 3:193, ILSA J. INT. & COMP. L. 194, 196 (1996).

[57] Declaration on the Human Environment Principle 24, *opened for signature* June 5, 1972, A/RES/2994 [hereinafter Stockholm Declaration]; Rio Declaration, *supra* note 10, Principle 17; World Summit on Sustainable Development, Johannesburg, South Africa, Aug. 26 - Sept. 4, 2002, *Report of the World Summit on Sustainable Development* ¶ 17, U.N. Doc. A/CONF. 199/20.

[58] ALAVERDOV, ET AL., CHAPTER 8, CYBERTERRORISM AND ITS IMPACT ON CONTEMPORARY CONFLICTS AND SOCIETY (2023).

demands of Aringuv to conduct another EIA [R,27]. It merely requires both States, at the very least, to coordinate on and address issues concerning the environment.

Moreover, the Algiers Convention[59] and its Revised African Convention on the Conservation of Nature and Natural Resources[60] [R,11] both emphasize the necessity for contracting States to cooperate whenever any national measure is likely to affect the natural resources of any other State.[61] Notably, the provisions of the Algiers Convention apply only to independent African States which are signatories thereto.[62] Hence, Replomuté [R,3] is not within the scope of cited African Conventions.

[59] African Convention on the Conservation of Nature and Natural Resources, *signed* Sept. 15, 1968, CAB/LEG/24.1 [hereinafter Algiers Convention].

[60] Revised African Convention on the Conservation of Nature and Natural Resources, *signed* October 15, 2020.

[61] Algiers Convention, *supra* note 59, Art. XVI.

[62] *Id.*, Art. XXV.

B. THE EIA CONDUCTED BY DRI IS CONSISTENT WITH CIL.

A norm crystallizes into CIL when there is state practice and *opinio juris*.[63] CIL rests not merely upon the practice of States as such but ultimately upon the practice of all participants in the international legal process.[64]

There is no single correct approach of conducting EIAs.[65] Nevertheless, CIL requires a State to conduct an EIA before the commencement of a project[66] that may have a significant adverse impact in a transboundary context.[67] The specific contents of such EIA are left for each State to determine in its domestic legislation or in the authorization process for the project.[68]

DRI conducted an EIA prior to the project's commencement in accordance with its national laws [R,17] although the activities have no potential significant adverse impact in a transboundary context. Hence, the EIA is valid and consistent under CIL.[69]

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[63] North Sea Continental Shelf (Ger. v. NL), Judgment, I.C.J. Reports 1969, at 3, *available at* https://www.icj-cij.org/case/52 (last accessed Nov. 6, 2023).

[64] PAUST, *supra* note 22.

[65] Indus Waters Kishenganga Arbitration, (Pkst. v. IN), Final Award, ICGJ 478 (PCA 2013), Dec. 20, 2013, Permanent Court of Arbitration [PCA].

[66] *Pulp Mills on the River Uruguay*, 2010 I.C.J. 14.

[67] *Certain Activities Carried Out by Nicaragua in the Border Area*, I.C.J. G.L No. 15.

[68] *Pulp Mills on the River Uruguay*, 2010 I.C.J. 14.

[69] *Id.*, ¶ 204.

Once an EIA has been conducted and the project commences, what remains for the concerned State is to continuously monitor the environmental impacts for the duration of the project, if necessary.[70] Thus, the primary obligation to monitor is only imposed on DRI. However, Replomuté not only monitored the environmental impacts [R,26] but also supported DRI's economy, consistent with its NDC [R,15] by establishing a Friendship Fund [R,23].

In the *MOX Plant* case, the Court ruled that it is incumbent upon Ireland, the State alleging the insufficiency of the environmental assessment of the Thermal Oxide Reprocessing Plant, to establish what Ireland considers to be the applicable law in conducting an environmental assessment, and that the assessment was indeed carried out.[71]

Applying the foregoing, the burden[72] is upon Aringuv to prove that a significant risk exists in the planned oil activities. Aringuv also should prove that the existing EIA is insufficient which would necessitate the preparation of another EIA. However, Aringuv failed to adduce, even scant evidence on such.

Moreover, in the *Trail Smelter* case, the Tribunal opined that even if the operations of the Smelter may cause damage in the future, it ruled that the operations shall remain

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[70] *Id.*, ¶ 205.

[71] The MOX Plant Case (Ire. v. UK), Order, Request for Provisional Measures, ITLOS Case No. 10, ICGJ 343 (ITLOS 2001) (Dec. 3).

[72] *Pulp Mills on the River Uruguay*, 2010 I.C.J. 14., ¶ 164.

in full force unless and until modified, provided that the same is subject to some control in order to avoid damage from occurring.[73] Stated otherwise, even if the oil activities are found to cause some damage in the future, States, such as Replomuté, are not obliged to abandon the planned activities in question.[74]

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

Aringuv alleged that the proposed oil activities in DRI's territory will likely have a devastating impact on the southern population of Royal Mountain Gorillas [R,27]. It further alleged that Replomuté has violated its direct responsibility under the CMS and is indirectly responsible for the breach thereof by DRI which purportedly constitutes an IWA on the part of DRI [R,29]. These allegations are baseless.

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[73] Reports of International Arbitral Award, Trail Smelter Case (US v. CA), at 63, 3 R.I.A.A., (1938 and 1941), *available at* https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf (last accessed Oct. 12, 2023).

[74] The Obligation of EIA in the International Jurisprudence and its Impact on the BBNJ Negotiations by Yan Song, Faculty of International Law, China Foreign Affairs University, Beijing 100037, China, *available at* https://www.mdpi.com/2071-1050/15/1/487 (last accessed Nov. 8, 2023).

A. THE PROPOSED OIL ACTIVITIES WILL NOT RESULT IN SIGNIFICANT TRANSBOUNDARY HARM.

States are obliged to ensure that activities within their jurisdiction or control will not result in harm to other States.[75] The burden of proving a breach of this obligation lies on the claimant State or Aringuv, in this case.[76]

Aringuv must establish based on clear and convincing evidence[77] the following elements: 1) the physical relationship between the oil activities and the damage caused; 2) the severity of such damage; and the 3) transboundary movement of the harmful effects.[78] However, Aringuv failed to establish the existence of any of the elements in its allegations of transboundary harm against Replomuté [R,27,31].

Aringuv also failed to establish any actual harm nor any direct link between the alleged harm caused within its territory and the oil activities in DRI. The potential harm to the habitat of Royal Mountain Gorillas is merely an expression of concern, with no relative scientific study to stand on [R,21,26,31].

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[75] International Law Commission, *Report of the International Law Commission on the Work of its Fifty-third Session*, U.N. Doc. A/56/10, at 154 (Apr. 23 - June 1 & July 2 - Aug. 10, 2001).

[76] *Id*.

[77] *Id.*

[78] XUE HANQIN,TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 4 (2003).

1. The oil activities are confined within the territory of DRI.

The obligation to prevent significant transboundary harm or minimize the risk thereof applies only to activities that involve a risk causing "serious consequences" to the territory of another State.[79] Such is not the case here.

Replomuté's oil activities are strictly confined within the territory of DRI [R,17]. In particular, the oil is extracted from the national park in DRI and is thereafter transported through a pipeline to a coastal city in DRI [R,17]. Accordingly, the alleged detrimental effects of the extraction activities will not transcend to the territory of Aringuv.

The purported harm of the extraction activities to the southern population of the Royal Mountain Gorillas does not equate to transboundary harm on the part of Aringuv as such population is "rarely sighted" therein [R,9].

[79] International Law Commission, *Yearbook of the International Law Commission, 2001,* Vol. II, Part Two (2012).

2. Assuming that transboundary harm exists, Aringuv failed to establish the threshold of risk.

The threshold of risk requires a level that is deemed "significant" and "detectable."[80] It evokes the word "peril" which is "grave" and "imminent"[81] at a relevant point in time.

Relatedly, the *Trail Smelter* case provides that a transboundary harm is significant if it results in "serious consequence" and the injury is established by "clear and convincing evidence."[82] Such a threshold was not established in this case.

The assessment of what is "significant" requires factual considerations.[83] It cannot be based on surmises and conjectures. In essence, the supposed harm must lead to a real detrimental effect on human health, property, industry, environment, and/or agriculture, among others, of other States.[84] Such an effect must be susceptible to being measured by factual and objective standards.[85]

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[80] International Law Commission, *supra* note 79.

[81] Case Concerning The Gabcikovo-Nagymaros Project, (HU v. Svk.), at 39, 1997, *available at https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf* (last accessed Nov. 7, 2023).

[82] *Trail Smelter Case*, 3 R.I.A.A, at 87.

[83] International Law Commission, *supra* note 79.

[84] *Id.*

[85] *Id.*

Accordingly, any transboundary impact, so long as it has not reached the level of "significant," is considered tolerable.[86]

Aringuv failed to specifically allege, much less prove, the particular harms of the extraction activities, which have spanned for more than decades, upon the gorillas, their habitat, and their territory. It likewise failed to precisely assert and substantiate how the extraction activities affect climate change. The plain assertion of Aringuv that such activities will likely have a devastating impact on the southern population of the Royal Mountain Gorillas [R,27] is insufficient.

3. There is no transboundary movement of harmful effects.

Transfer of harm arises when a State suffers the adverse physical effects caused by another State's actions.[87] Clearly, the oil activities did not introduce any harm to Aringuv's territory or even to the Royal Mountain Gorilla population.

B. REPLOMUTÉ'S ACTIONS DO NOT VIOLATE THE CMS.

In 1983, Aringuv, Replomuté, and DRI became parties to the CMS [R,8] — an international treaty aimed at conserving migratory species and their habitats.[88] Here,

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[86] International Law Commission, *supra* note 79.

[87] *Trail Smelter Case,* 3 R.I.A.A., at 1905 ¶ 684; *Corfu Channel Case*, 1949 I.C.J. 6, at 23; HANQUIN, *supra* note 78.

[88] Convention on the Conservation of Migratory Species of Wild Animals Art. II(3), *signed* 1979, U.N.T.S. 1651 [hereinafter CMS].

Aringuv argues that Replomuté violated its obligation under CMS [R,30]. This argument fails to impress.

1. The duties contained in Article III of CMS apply to Range States only.

Article III (4) of the CMS enumerates the duties of a Range State in the protection and conservation of migratory species listed under Appendix I thereof.[89] However, Replomuté is not a Range State[90] since it is neither a neighboring State of DRI and Aringuv [R,2] nor an African State [R,3], much less exercise jurisdiction over the range[91] of Royal Mountain Gorillas. Evidently, Replomuté has no direct responsibility over the conservation of Royal Mountain Gorillas under the CMS.

2. Replomuté's nor DRI's actions do not constitute 'taking'.

Article III (5) of the CMS states that Parties that are Range States of a migratory species listed under Appendix I shall prohibit the taking of such species.[92] Taking is defined as "taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct."[93]

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[89] CMS, *supra* note 88, Art. III(4).

[90] *Id.*, Art I (1)(h).

[91] *Id.*

[92] *Id.*, Art. III(5).

[93] *Id.*, Art. I (i).

While the Royal Mountain Gorillas belong to Appendix I of the CMS [R,9], neither DRI's nor Replomuté's actions are considered 'taking.' Hence, Lenoir Corporation's oil activities have no adverse effects on the southern gorilla population or its habitat.

As a Party to the Gorilla Agreement, [R,9] Aringuv has the obligation to take proactive measures in the protection and preservation of the endangered population of the Royal Mountain Gorillas.[94] However, it failed to exert any significant effort to comply with such obligation. Instead, Aringuv erroneously shifts the blame to Replomuté, a non-Party to the Gorilla Agreement [R,10] nor a Range State [R,2,3], for the former's issues and shortcomings in its duty of preservation. [R,26]

Furthermore, Aringuv's wildlife tourism industry itself [R,2] poses several negative effects to the Royal Mountain Gorillas such as, but not limited to, human-induced light and sound, disruption of foraging, disturbance of parental behavior, unintentional trampling of wildlife, vegetational changes, and soil compaction.[95] Aringuv failed to protect the Royal Mountain Gorillas which is violative of its international environmental obligations.

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[94]Agreement on the Conservation of Gorillas and their Habitats Art 3(2)(a), *signed* Apr. 25, 2008, UNTS Code, 45400 [hereinafter Gorilla Agreement].

[95] RONDA GREEN & KAREN HIGGINBOTTOM, NEGATIVE EFFECTS OF WILDLIFE TOURISM ON WILDLIFE, IN WILDLIFE TOURISM RESEARCH REPORT SERIES: NO. 5 (2001).

3. Replomuté is not in violation of its obligations as a non-Range State under the CMS.

Under the CMS, the direct responsibility of Replomuté only pertains to the promotion, cooperation, and immediate protection of migratory species included in Appendix I.[96] Aringuv failed to substantiate its allegations that the oil activities will run counter to such obligations. It failed to present any evidence regarding the matter [R,29,31].

Notably, prior to the ratification of Aringuv and DRI of the Gorilla Agreement in 2007 [R,9], Lenoir Corporation cooperated with DRI by suspending its operation in DRI when an Ebola outbreak occurred [R,19]. This is to prevent unwanted transmission and spread of the disease that will affect both humans and gorillas.[97]

Moreover, when NGOs raised its concerns [R,21] and General Mina declared his supposed withdrawal from the concession agreement in light of the Gorilla Agreement [R,22], Replomuté invoked the mandatory arbitration provision [R,22]. The arbitral panel's decision to proceed with the oil activities [R,23] only concludes that the concern with regard to the impact of the said activity to the gorillas has been rendered nugatory.

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[96] CMS, *supra* 88, Article 2.

[97] Stuart Butler, The Ebola virus outbreak had an impact on not only humans, it also affected gorilla populations in the Congo and Uganda, *available at* https://geographical.co.uk/wildlife/the-devastating-2014-2016-ebola-outbreak-on-gorillas-in-west-africa (last accessed Nov. 5, 2023).

Replomuté established a $10 million (USD) Friendship Fund to support economic development activities in the DRI [R,23] which can be used to promote and support research relating to migratory species. Replomuté's actions implicate its high regard with its obligation under CMS.

The threats to the Royal Mountain Gorillas and its habitat can be attributed to multiple factors: Ebola outbreak [R,19], civil war and insurgent activities in the area [R,18], and Aringuv's mountain gorilla tourism [R,2]. These factors cannot be imputed to Replomuté but to Aringuv and DRI.

C. REPLOMUTÉ HAS NO INDIRECT RESPONSIBILITY THROUGH ALLEGED COERCION OF THE DRI.

Aringuv alleged that Replomuté coerced the DRI to commit an IWA [R,29]. Aringuv's basis is Article 18 of the International Law Commission's ("ILC") Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ARSIWA").[98] However, Aringuv's argument is misplaced.

[98] International Law Commission, *Draft Articles on responsibility of States for internationally wrongful act, 2001,* Vol. II, Part Two (2012), [hereinafter ARSIWA].

1. ILC's ARSIWA is not legally binding.

ARSIWA has not yet crystallized into CIL and thus, currently, is a non-binding instrument.[99] While its principles are influential, it did not undergo codification to become a legally binding instrument.[100]

Specifically, Article 18 of ARSIWA lacks State practice or legal effect as to its provision, reflecting its ineffectiveness as a legal fiction that does not represent actuality.[101] Hence, Aringuv's argument based on ARSIWA [R,29] has no leg to stand on.

Assuming that ARSIWA is legally binding, the same remains inapplicable insofar as the oil activities are concerned. The prohibition against coercion is confined to cases

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[99] Cf. Written Comments of Germany and the Netherlands in 'Responsibility of States for Internationally wrongful acts. Comments and information received from Governments' UN Doc A/65/69 (May 14, 2010) at 3 and 5-6.

[100] *See* statement made by the representative of the Russian Federation at the meeting of the Sixth AG Committee held on Oct. 15, 2019, UN Doc A/C.6/74/SR.13 (Feb. 28, 2020) at 6 para 36. In terms of legal scholarship, the 'paradox' of the absence of an international convention on the topic of State responsibility is highlighted by P Bodeau-Livinec, 'Responsibility of States and International Organizations' in S Chesterman, DM Malone, S Villalpando, A Ivanovic (eds) *The Oxford Handbook of United Nations Treaties* (OUP 2019) 599-600.

[101] JAMES D. FRY, COERCION, CAUSATION AND THE FICTIONAL ELEMENT OF INDIRECT STATE RESPONSIBILITY, 40 VANDERBILT L. REV., 611, AT 621.

involving the use of armed force.[102] It does not encompass mere allegations of attempts to exert control over one another.[103] Hence, Replomuté did not coerce DRI.

2. Replomuté did not coerce DRI to commit an IWA.

Contrary to the allegation of Aringuv, Replomuté did not coerce DRI to violate the Gorilla Agreement and the CMS [R,29].

In *Nicaragua v. USA*, the Court explained coercion as one where a State unlawfully intervenes in matters which another State is permitted to decide freely, through force, either in the direct form of military action within another State, or in the indirect form of support for subversive or terrorist armed activities within another State.[104] None of these instances exist in this case.

Furthermore, coercion exists if a conduct of one coercing State forces the will of the coerced State, giving it no effective choice but to comply with the wishes of the former.[105] At any event, Replomuté did not coerce DRI. Nowhere in the events show that

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[102] FRY, *supra* note 101.

[103] *Id.*

[104] Military and Parliamentary Activities in and against Nicaragua, Nicaragua Case (Nic. v. US), I.C.J. G.L. No. 70, *available at* https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf (last accessed Nov. 7, 2023).

[105] JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSIONS ARTICLES ON STATE RESPONSIBILITY 152-56 (2002).

Replomuté employed force, directly or indirectly, against DRI from the time of entry into the 1981 DRI-Replomuté agreement [R,17], during the arbitration settlement [R,22,23], and up until the time the case is brought before the Court for resolution [R,35].

The accusation of Aringuv that Replomuté is responsible for "any" breach by DRI of the Gorilla Agreement, as the former is coercing the latter to commit an IWA [R,29] is obviously lacking ascertainment. The use of the word "any" reflects Aringuv's inability to pinpoint how the coercion was allegedly committed and what violation of the Gorilla Agreement constitutes IWA [R,29].

a. Replomuté did not coerce DRI to violate the Gorilla Agreement and the CMS.

The Gorilla Agreement requires DRI to accord the same strict conservation for gorillas as provided for under Article III (4) of the CMS.[106] The cited article directs DRI to conserve gorilla habitat and to prevent, reduce, or control factors that are endangering or are likely to further endanger such species.[107]

When DRI ratified the Gorilla Agreement in 2007 [R,9], the concession agreement between DRI and Replomuté had already been in effect for 26 years [R,17]. In fact, in 2009, DRI permitted the resumption of the oil activities in its territory and the subsequent construction of the pipeline therein [R,19].

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[106] Gorilla Agreement, *supra* note 94, Art 3(2)(a).

[107] CMS, *supra* 88, Art. 3(4).

The continuous operation of the oil activities—amidst the intent of DRI's new president to withdraw therefrom—does not constitute coercion, as such matter was upon the directive and order of the arbitral panel in a mandatory binding arbitration [R,23], and not Replomuté. DRI voluntarily participated in the arbitration and acquiesced to the decision of the arbitral panel [R,23]. Therefore, Replomuté did not coerce DRI to violate the same.

3. The arbitral penalty amounting to $825 million (USD) does not constitute "colonial extortion."

Aringuv claims that the arbitral penalty amounting to $825 million (USD) which the arbitral panel imposed upon DRI [R,23] constitutes "colonial extortion" [R,34]. Such claim is palpably erroneous.

"Extortion" is a crime that involves extracting money or other assets from a person through threats or intimidation.[108] In extortion, the victim consents to the crime of paying off the aggressor out of fear of retaliation for not complying.[109] The said consent is obtained in an illegal manner.[110]

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[108] Martin G. Weinberg, What Are Types of Extortion & Their Penalties?, *available at* Extortion & Penalties | Martin G. Weinberg Attorney at Law (martinweinberglaw.com), (last accessed Nov. 5, 2023).

[109] *Id.*

[110] *Id.*

Replomuté, a mere party to the arbitration, could not have committed extortion in relation to the arbitral penalty imposed by the arbitral panel upon DRI [R,22,23]. To state otherwise is akin to an unfounded and malicious allegation that Replomuté exercised control and influence over the arbitral panel —a distinct and separate entity from Replomuté.

The decision promulgated by the arbitral panel which imposed a penalty of $825 million (USD) to DRI [R,23] is in line with the panel's authority to resolve disputes between DRI and Replomuté pursuant to the 1981 DRI-Replomuté agreement [R,17]. Remarkably, at its own discretion, Replomuté established a Friendship Fund to aid DRI's economy [R,23]. Therefore, the arbitral penalty of $825 million (USD) cannot amount to colonial extortion.

Conclusion

Replomuté requests the Court to adjudge that: (1) Replomuté has not violated international law with respect to the preparation of an EIA; and (2) the actions of Replomuté with respect to the proposed oil activities in the DRI comply with international law.

Respectfully submitted,

Agents of Respondent