Team Code: 2481

28TH STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

BEFORE

INTERNATIONAL COURT OF JUSTICE

LA COUR INTERNATIONALE DE JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

GENERAL LIST NO. 303, YEAR 2023

CASE CONCERNING QUESTIONS RELATING TO MOUNTAIN GORILLAS AND IMPACT ASSESSMENT

ARINGUV

(APPLICANT)

V.

REPLOMUTÉ

(RESPONDENT)

-WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT-

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1. The southern population of the Royal Mountain Gorilla is not a shared resource and any claim of prospective harm by Aringuv lacks standing.
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II. REPLOMUTÉ HAS NOT INDIRECTLY VIOLATED INTERNATIONAL LAW THROUGH ITS ACTIONS AND INACTIONS WITH RESPECT TO THE LENOIR CORPORATION PROJECT.

A. The DRI voluntarily acceded to the Concession Agreement with Replomuté.

1. The DRI exercised its sovereign right to freely adopt and implement the Concession Agreement with Replomuté.

a. The DRI expressly consented to be bound by the outcome of the Arbitration Panel by electing arbitration as the method for the peaceful settlement of disputes under the Concession Agreement.

b. Replomuté is contractually bound by the terms of the Concession Agreement to uphold the Arbitration Panel's ruling.

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QUESTIONS PRESENTED

I. WHETHER REPLOMUTÉ HAS DIRECTLY VIOLATED INTERNATIONAL LAW THROUGH ITS ACTIONS AND INACTIONS WITH RESPECT TO THE LENOIR CORPORATION PROJECT.

II. WHETHER REPLOMUTÉ HAS INDIRECTLY VIOLATED INTERNATIONAL LAW THROUGH ITS ACTIONS AND INACTIONS WITH RESPECT TO THE LENOIR CORPORATION PROJECT.

STATEMENT OF JURISDICTION

On 24 July 2023, Aringuv and Replomuté submitted by Special Agreement the following dispute to the International Court of Justice (**ICJ**), in accordance with Article 40(1) of the Statute of the ICJ. The Registrar of the ICJ addressed notification to the parties on 31 July 2023. Aringuv and Replomuté have accepted jurisdiction of the ICJ pursuant to Article 36(1) of the Statute and request that the Court adjudge the dispute in accordance with the rules and principles of international law, including any applicable treaties.

STATEMENT OF FACTS

Aringuv and the Democratic Republic of Ibirunga (**DRI**) are neighbouring states in central Africa classified by the World Bank as lower-middle income (R. 2) and low-income countries (R. 1), respectively. Replomuté is a high-income state located in Europe (R. 3).

The Royal Mountain Gorilla is a species of gorilla only found only in the DRI and Aringuv. The Royal Mountain Gorilla is listed as 'critically endangered' on the IUCN Red List of Threatened Species and in Appendix I of the Convention on the Conservation of Migratory Species of Wild Animals (**CMS**). The northern and southern populations are geographically separate and have no contact with each other. However, only the northern population crosses the boundary between the DRI and Aringuv (R. 9).

In 1981, the Lenoir Corporation, a company wholly owned and operated by the government of Replomuté, entered into a Concession Agreement with the DRI and was granted the right to explore, extract and transport oil from the DRI to Replomuté (R.17).

Prior to the signing of the Concession Agreement, an Environmental Impact Assessment (**EIA**) was conducted in accordance with DRI laws to evaluate the effects of the proposed project on the environment (R.17).

The Lenoir Corporation began its oil exploration activities in 1983 but experienced numerous delays and disruptions to operations due to civil unrest, outbreaks of infectious disease and labour challenges in the region. While the oil pipeline is 98% complete, construction has been suspended since 2020 (R.32).

In 2012, the President of the DRI threatened to withdraw from the Concession Agreement unless Replomuté established a $50 million (USD) fund. The issue was referred to arbitration as the prescribed method for the settlement of disputes under the Concession Agreement (R. 22). The arbitral panel ruled in Replomuté's favour ordering the DRI to permit the Lenoir Corporation to proceed with its oil exploration and extraction activities or be subject to more than $825 million

(USD) in penalties. As a goodwill gesture, Replomuté created a $10 million (USD) ‘Friendship Fund’ to aid economic development in the DRI (R.23).

In 2018, Aringuv raised concerns about the impact of the Lenoir Corporation’s activities on the southern population of the Royal Mountain Gorilla and demanded that a revised EIA be undertaken to assess the impact of the proposed development on the gorilla, the gorilla habitat and climate change (R. 27).

In 2019, Aringuv alleged that Replomuté’s actions in the DRI with respect to the proposed extraction activities violated international law and that the DRI was coerced into upholding its contractual obligations under the Concession Agreement. (R. 29).

Replomuté responded in both instances by noting that it had fully complied with its international law obligations.

Negotiations between Aringuv and Replomuté ensued. Thereafter, the parties agreed to submit the matter to the ICJ for determination (R. 35).

SUMMARY OF ARGUMENTS

I. REPLOMUTÉ HAS NOT DIRECTLY VIOLATED INTERNATIONAL LAW THROUGH ITS ACTIONS AND INACTIONS WITH RESPECT TO THE LENOIR CORPORATION PROJECT.

Replomuté has not directly violated international law and has not committed any breaches of international obligations towards Aringuv. The responsibility to protect the endangered Royal Mountain Gorilla species is one that is shared between the DRI and Aringuv and in no way involves Replomuté. Replomuté, in carrying out an EIA prior to the commencement of the Lenoir Corporation project and in adhering to its treaty and customary international law obligations relating to the environment, has taken all precautions required of them to protect the Royal Mountain Gorilla species.

II. REPLOMUTÉ HAS NOT INDIRECTLY VIOLATED INTERNATIONAL LAW THROUGH ITS ACTIONS AND INACTIONS WITH RESPECT TO THE LENOIR CORPORATION PROJECT.

Replomuté and the DRI freely entered into a mutually beneficial concession agreement granting the Lenoir Corporation the right to explore, extract and export oil from the DRI. At all times, Replomuté has adhered to the terms of the concession agreement. Moreover, Replomuté has made it clear in its diplomatic notes that it is not responsible for any actions or inactions of the DRI.

ARGUMENTS ADVANCED

I. REPLOMUTÉ HAS NOT DIRECTLY VIOLATED INTERNATIONAL LAW THROUGH ITS ACTIONS AND INACTIONS WITH RESPECT TO THE LENOIR CORPORATION PROJECT.

A. All necessary measures have been taken to ensure that the Lenoir project sufficiently protects the Royal Mountain Gorilla.

1. An EIA was conducted in accordance with customary international law to protect and preserve the environment.

a. The DRI was entitled under customary international law to determine the 'specific content' of the EIA having regard to the nature and magnitude of the proposed development and its likely impact on the environment.

An EIA consistent with DRI laws was carried out prior to the commencement of the Lenoir Corporation project in compliance with Customary International Law (**CIL**). In *Pulp Mills*, the ICJ recognised the EIA as a practice that has been embedded as an obligation to protect and preserve the environment under CIL. According to the ICJ, CIL mandates states to undertake an EIA consistent with domestic rules and regulations governing the EIA prior to the implementation of a project where the proposed industrial activity *"may have a significant adverse impact in a transboundary context"*[1].

In accordance with its CIL duty, the DRI completed an EIA prior to the entry into force of the Concession Agreement based on scientific knowledge and human appreciation of the effects of oil rigging up to 1981. The ICJ confirmed in *Corfu Channel* that states are not responsible for harm resulting from any risks of which the state concerned was not or could not have objectively been aware.[2] Additionally, in *Certain Activities*, Judge Dugard warned against taking a *"backward*

[1] Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 ICJ Rep. 1417.

[2] Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), 1948 ICJ Rep. 6.

looking approach" to the assessment of the adequacy of an EIA, explaining that the EIA constitutes a procedural obligation and was not intended to be used to review the actual consequences of a development[3]. By analysing a policy decision in hindsight, there is a risk of undermining some of the key benefits of the EIA such as the improvement of the design of a project and the consideration of alternative options.[4] Therefore, the EIA was sufficient as it adopted a preventative approach and was undertaken prior to the authorisation of the oil exploration and extraction activities.

Furthermore, the scope and content of the EIA is not specified by CIL and there are presently no minimum binding standards that a nation state must follow when conducting an EIA[5]. As a result, the DRI was entitled to determine the 'specific content' of the EIA having regard to the nature and magnitude of the proposed development and its likely impact on the environment.[6] An EIA carried out in good faith on the basis of substantial scientific and technical evidence is unlikely to be set aside by an international court unless it is *"demonstrably inadequate"*[7]. Here, an EIA was conducted in compliance with the DRI's national laws and was naturally carried out in good faith as it focussed on the impact of the proposed development on nearby human populations.

b. An EIA was carried out in compliance with the principle of common but differentiated responsibility.

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[3] Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica), Judgment, 2015 ICJ Rep. 665.

[4] Eliza Ruozzi, *The Obligation to Undertake an Environmental Assessment in the Jurisprudence of the ICJ: A Principle in Search of Autonomy*, 8(1) European Journal of Risk Regulation, 158 (2017).

[5] Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica), Separate Opinion of judge ad hoc Dugard, 2015 ICJ Rep. 665.

[6] *Supra* 1 at 205.

[7] Alan Boyle, *Developments in International Law of the EIA and their Relation to the Espoo Convention* 21(1) Review of European Community and International Environmental Law (2012).

The principle of common but differentiated responsibility (**CBDR**) recognises the need for differentiation between states with respect to environmental standards depending on their level of development to foster equity.[8] The Charter of Economic Rights and Duties of States considers that environmental policies should *"enhance and not adversely affect the present and future development potential of developing countries"* [9]. The same sentiment is echoed in the Rio Declaration[10], the UNFCCC[11] and the Resolution Towards a New International Economic Order[12]. The extent of the DRI's duty to protect the environment is based on its contribution to environmental degradation and its ability to prevent, reduce or control such damage.[13] The DRI complied with its positive duty to prevent or mitigate significant harm to the environment by carrying out an EIA prior to the commencement of the Lenoir Project.[14] However, as a developing nation, the DRI was not required to exhaust its limited financial resources in implementing environmental measures.

c. An EIA was conducted in compliance with the principle of proportionality.

The principle of proportionality is relevant to the application of international environmental law obligations.[15] This is significant as operations were suspended on several occasions throughout the timeline of the Lenoir Corporation project due to factors outside the control of Replomuté. In particular, there were disruptions owing to a 15 year civil war from 1987 to 2002 and a military

[8] Philippe Cullet, *Differentiation* in Lavanya Rajamani & Jacqueleen Peel, The Oxford Handbook of International Environmental Law (2nd edn., 2021), 319-344.

[9] Article 30; UNGA Res 3201 (Feb. 25, 1974).

[10] Rio Declaration on the Human Environment, Principle 7.

[11] UNFCCC, Article 3(4)

[12] UNGA Res. 75/225 (Dec. 21, 2020)

[13] Philippe Sands et al., Principles of International Environmental Law (4th edn, 2018) 244.

[14] Iron Rhine Arbitration (Belgium v the Netherlands), XXVII RIAA 35 (24 May 2005) [59].

[15] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 254.

coup in 2015. During times of armed conflict, states are merely prohibited from employing *"methods or means of warfare which are intended or may be expected, to cause widespread, long- lasting and severe damage to the natural environment"*[16]. The International Committee of the Red Cross Guidelines on the Protection of the Environment in Armed Conflict provide that while the rules of international treaty law that protect the environment may continue to apply during times of armed conflict, they may be disapplied where it is expressly stated that a specific rule, or part of it, does not apply during armed conflict or where the application of a rule is incompatible with a rule of international humanitarian law.[17]

It follows that having conducted a complete EIA prior to the commencement of the project, it would be disproportionate to require a revised EIA to be undertaken once new information regarding the impact of the proposed activity came to light.

2. The adequacy of the EIA cannot be challenged based on provisions of the Espoo Convention, the Algiers Convention or the CBD.

Aringuv has sought a revised EIA on the basis of the Convention on Environmental Impact Assessment in a Transboundary Context (**Espoo Convention**), the Revised African Convention on the Conservation of Nature and Natural Resources (**Revised Algiers Convention**) and Article 14.1(a) of the Convention on Biological Diversity (**CBD**).

It is a fundamental principle of international law that states must consent to be bound by a treaty[18]. In *River Oder*, the PCIJ confirmed that a treaty will not produce effects on a signatory state 'independently of ratification'[19].

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[16] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 35(3).

[17] ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict (2020) [22].

[18] Vienna Convention on the Law of Treaties, May 23 1969, 1155 UNTS 331, Article 2.

[19] Territorial jurisdiction of the International Commission of the River Oder, Judgment, 1929 ICJ Rep 16.

In *North Sea Continental Shelf*, the ICJ clarified that only a *"very definite, very consistent course of conduct on the part of a State"* could justify a finding that a state, who has failed to comply with the formalities of ratification, has been bound in some other way[20]. Thus, Melanie Waitz's expression of intention to accede to the Espoo Convention during the Green Path Party's campaign does not constitute a unilateral declaration enforceable under international law. Having failed to ratify the Espoo Convention itself, Aringuv cannot seek to rely on its provisions to challenge the adequacy of the EIA. Similarly, Aringuv cannot rely on the reciprocity of the Revised Algiers Convention as neither Replomuté nor the DRI are parties to this treaty. Furthermore, this court has confirmed that Article 14.1(a) of the CBD does not create an obligation to carry out an EIA before undertaking an activity that may have significant adverse effects on biological diversity.[21] Therefore, there is neither a customary law nor treaty law basis by which to challenge the EIA.

3. There is no obligation to assess climate change impacts as part of the EIA.

In the context of climate change, the obligation to conduct an EIA lacks the elements of *opinio juris* and state practice necessary for the establishment of a rule of CIL.[22]

The transboundary EIA under CIL does not specifically require consideration of the transboundary impacts in the context of climate change. In *Responsibilities and obligations of states with respect to activities in the area*, the Seabed Disputes Chamber confined the EIA covering an area beyond national jurisdiction to *"the specific situation under discussion"* being *"resource deposits"* on the seafloor.[23]

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[20] North Sea Continental Shelf (Ger./ Den., Ger./ Neth.), Judgment, 1969 ICJ 327.

[21] *Supra* 3 at 164.

[22] Benoit Mayer, *Environmental Assessments in the context of climate change: the role for the UN Economic Commission for Europe* 28(1) Review of the European, Comparative and International Environmental Law 82, 93 (2018).

[23] Responsibilities and Obligations of states with respect to Activities in the Area, Advisory Opinion, ITLOS Rep. 10

Additionally, the implementation of the transboundary EIA in the context of climate change has not reached the threshold required to demonstrate sufficient state practice globally. In a domestic context, monitoring of climate change considerations are frequently not included as part of the EIA assessment. Many developing countries, including China and India, do not include an assessment of greenhouse gas emissions within the scope of the EIA. As for developed countries, domestic legislation is increasingly interpreted as requiring an analysis of climate change in the impact assessment for a project.[24] However, there is no settled method for assessing climate change in the impact assessment and the protocols circulated differ considerably in their form and details.[25] Furthermore, the integration of climate change into project-level EIAs has not been recognised by the United Nations Economic Commission of Europe (**UNECE**).[26]

Under the United Nations Framework Convention on Climate Change (**UNFCCC**), there is no strict requirement on states to cover climate change as part of the EIA for a proposed development. In particular, Article 4(f) of the UNFCCC, which Aringuv has sought to invoke to challenge the adequacy of the EIA, only requires states to take climate change considerations into account in their relevant social, economic and environmental policies and actions *"to the extent feasible"* and *"with a view to"* minimising adverse effects of projects on the economy, public health and the quality of the environment. The DRI complied with this obligation by assessing the likely quantity of water to be used and waste to be produced by the exploration activities, including the pipeline, as part of the EIA. Moreover, commitments under Article 4 of the UNFCCC are tailored according to the CBDR and the specific national and regional development priorities, objectives and circumstances of individual parties.

4. The precautionary approach is not customary international law.

[24] Supra 22.

[25] Michael Gerrard, *Climate Change and the Environmental Impact Review Process*, Vol.22, No. 3, Natural Resources and Environment, 20 (2008)

[26] UNECE, Minsk Declaration on the Espoo Convention, 16 June 2017.

The precautionary approach under Principle 15 of the Rio Declaration provides that *"where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation"*[27].

However, the legal status of the precautionary principle remains contested in the international legal order[28].

The ICJ and the International Tribunal for the Law of the Sea (**ITLOS**) have offered only paltry guidance on the precautionary approach, which has resulted in a continuing lack of certainty and confusion surrounding its application.[29] In *Gabcíkovo*, the ICJ recognised the *"often irreversible character of damage to the environment' but refrained from determining the status of the precautionary principle in international law"*[30]. Similarly, while the precautionary approach was invoked in written submissions in the *Nuclear Tests (New Zealand v France)*, the ICJ declined to recognise it as a principle of CIL.[31]

Like the ICJ, the ITLOS has yet to recognise the precautionary approach as having crystallised as a principle of CIL.[32] Notably, in *MOX Plant*, the ITLOS refused to comply with the request from

[27] Rio Declaration on the Environment and Development, June 14, 1992, Principle 15

[28] Yann Kerbrat & Sandrine Maljean- Dubois, *Les jurisdictions internationales face au principe de précaution, entre grande prudence et petites audaces*, Essays in honour of Professor Pierre- Marie Dupuy, Martinus Nijhoff (2015) *available at:* https://shs.hal.science/halshs-01225913

[29] David L. VanderZwaag, *The ICJ, ITLOS and the Precautionary Approach: Paltry Progressions, Jurisprudential Jousting*, 35 U. HAW. L. REV. 617 (2013), 621.

[30] Gabcíkovo- Nagymaros Project (Hungary/ Slovakia), Judgment, 1997 ICJ Rep. 7, 140.

[31] Nuclear Tests (New Zealand v France), Request for the Indication of Interim Measures of Protection, Order, 1973 ICJ Rep. 135.

[32] *Supra* 23

the applicant to compel the defendant to take conservation measures on the basis of the precautionary principle.[33]

Beyond the forums of the ITLOS and ICJ, the precautionary principle has also arisen in cases before the World Trade Organisation (**WTO**). In *Beef Hormones*, the US strongly opposed the precautionary principle, while the European Commission claimed that the precautionary principle was *"a general customary rule of international law or at least a general rule of international law"*[34]. The WTO held that the European Commission was wrong to suggest that the precautionary principle was a general principle of international law with no authority to that effect[35].

B. Replomuté has acted in accordance with treaty law relating to the environment.

1. Replomuté is not in breach of the CBD as it does not set out binding obligations.

While the CBD is a useful guiding principle, the terms set out in Articles 7, 8, 10 and 14 are not absolute.[36] Terms such as *"as far as possible and appropriate"* do not set out precise commitments of the parties. In *Costa Rica v Nicaragua*, the ICJ held that Article 14 CBD did not create an obligation to carry out an EIA before undertaking an activity that may have significant adverse effects on biological diversity.[37] It is clear that the articles in the CBD are intended to be used as goals and objectives, rather than being enforced as strict obligations.[38]

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[33] MOX Plant (Ireland v UK), Provisional Measures, Order of 3 December 2001 ITLOS Rep. 10.

[34] Appellate Body Report, European Commission- Measures Concerning Meat and Meat Products (Hormones), WT/DS48/ AB/ R (Jan. 16, 1998)

[35] Giandomenico Majone, *What Price Safety? The Precautionary Principle and its Policy Implications* 40(1) JCMS 89 (2002)

[36] Patricia Birnie et al., International Law & The Environment (3rd Ed. 2009), 617.

[37] *Supra* 3 at 163.

[38] Lyle Glowka, *A Guide to the Convention on Biodiversity*, Environmental Policy and Law Paper 30, at 1 (1994) *available at:* https://portals.iucn.org/library/efiles/documents/EPLP-no.030.pdf.

2. Replomuté complied with the CMS and owes no duties under the Gorilla Agreement.

a. Replomuté has complied with Article II(3)(b) CMS.

Replomuté is acting in-line with the terms of the CMS to *"endeavour to provide immediate protection"* to the Royal Mountain Gorilla.[39] By taking positive action to limit instability and conflict in the DRI, as detailed above, Replomuté is actively taking steps to conserve the species and regain its status as favourable.

As noted in the reports of the CMS Conference of Parties, the instability of the Range States of the gorilla *beringei beringei* was the sole primary concern shared by the council, ultimately influencing the recommendation to maintain its status as critically endangered on Appendix I CMS.[40] Further, "security is an overriding factor impacting conservation"[41]as demonstrated in the Virungas where between 12-17 of these gorillas, representing 4-5% of the population at that time, were killed due to a period of political instability between 1992 and 2000.[42]

Therefore, without confidence in the future stability of the DRI, the Royal Mountain Gorilla will likely remain critically endangered until there is no imminent threat of conflict, which can only occur if there is greater economic activity and poverty is alleviated. Having stability in the DRI is the greatest form of immediate protection for the Royal Mountain Gorilla.

b. The CMS does not impose binding obligations upon Replomuté.

Alternatively, Replomuté's non-range state duties set out in Article II are vague and do not clearly state what it must do to "*endeavour*" to protect the species. "*Endeavour*" can merely be

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[39] Article II (2)(b), CMS.

[40] CMS, *Proceedings of the Seventh Meeting of the Conference of the Parties*, at 176 (18-24 Sept. 2002) *available at:* https://www.cms.int/sites/default/files/publication/consolidated_part_I_and_II_en.pdf.

[41] E. Williamson & K. Fawcett, *Long-term research and conservation of the Virunga mountain gorillas*, at 215 (2008).

[42] José Kalpers, et. Al, *Gorillas in the crossfire: population dynamics of the Virunga mountain gorillas over the past three decades*, Oryx Vol.37 No.3 (2003) 331.

considered a declaration of goodwill and is not absolute.[43] The negotiation of this wording at the Final Conference demonstrates the importance of having the obligation to "*endeavour*" instead of "*shall*" as the former is non-binding.[44]

The CMS places stricter obligations on states who exercise jurisdiction over a migratory species, defined as Range States, as set out in Article III(4). Replomuté is not a Range State as it does not host the Royal Mountain Gorilla. Therefore, there is no breach of any range state obligations as Replomuté does not owe them as such.

c. No duties are owed under the Gorilla Agreement.

Replomuté is not a party to the Gorilla Agreement and therefore owes no obligations arising from such. Any breaches under the Gorilla Agreement are owing to the DRI as a party to the agreement and whose jurisdiction such activities take place in.

C. Replomuté will not cause transboundary harm under customary international law.

1. The southern population of the Royal Mountain Gorilla is not a shared resource and any claim by Aringuv of prospective harm lacks standing.

As held in *Pacific Fur Seal*[45], a state cannot claim to have a property right or a right of protection over a natural resource found outside of its territorial limits. The southern population of the Royal Mountain Gorilla, situated wholly in the DRI, is geographically separate from the northern population and they are not in contact with each other.[46]

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[43] JES Fawcett, *The Legal Character of International Agreements*, Brit. Y. B. Int'l, at 391 (1953).

[44] Simon Lyster, *The Convention on the Conservation of Migratory Species of Wild Animals (the "Bonn Convention")*, Natural Resources Journal, Vol. 29, No.4, The International Law of Migratory Species, at 987 (1989).

[45] Pacific Fur Seal Arbitration (United States of America v. Great Britain) 1 Moore's Arbitration Awards, 755 (15 August 1893).

[46] R. ¶ 9.

A species may be listed in Appendix I CMS as a whole 'in principle' where a significant proportion of the species migrates across jurisdictions.[47] As a guiding principle, the CMS permits geographically separate populations of a migratory species to be considered independently, meaning that the southern habitat of the species can be studied in isolation. The definition of a 'migratory species' sets out that a population of the species must migrate 'cyclically' or 'predictably' across jurisdictional borders in a "*given set of circumstances*".[48] The southern population does not meet this definition as it has only ever been "*rarely sighted*" in Aringuv.[49] Although the species as a whole is listed in Appendix I CMS due to the threat of extinction, this is done merely 'in principle'[50] given the fact that the majority of the species are based in the northern habitat in the transboundary park and is the only population which migrates between DRI and Aringuv.

The southern population of the Royal Mountain Gorilla is situated wholly outside the jurisdiction of Aringuv and does not migrate. Therefore, it cannot be considered a shared resource between the DRI and Aringuv. Aringuv does not have standing to make a claim of protection for a resource that is situated wholly beyond its jurisdiction.

2. The principle of prevention does not apply to Replomuté in these circumstances.

The ICJ has held that it is *"every State's obligation not to allow knowingly <u>its territory</u> to be used for acts contrary to the rights of other States."*[51] The principle of prevention, "*part of the corpus of international law*,"[52] applies to the state in which activities with a harmful transboundary effect

[47] CMS, Report of the 1st Meeting of the CMS Scientific Council, at 4 (11-14 Oct. 1988) *available at:* https://www.cms.int/sites/default/files/document/ScC_report_01_0.pdf.

[48] *Id at 4.*

[49] R. ¶ 9.

[50] S*upra* 47 at 4.

[51] *Supra* 2 at 22; *Supra* 3 at [104].

[52] *Supra* 15 at [29]

take place. In this instance, the DRI is responsible for upholding the principle of prevention, not Replomuté.

The DRI is *"obliged to use all means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.*"[53] The Lenoir Corporation conducted its oil-exploration activities under the sole jurisdiction and control of the DRI, a sovereign nation. It is the responsibility of the DRI to prevent activities which cause an injurious effect to other states.

Alternatively, when assessing whether a state has complied with the principle of prevention, the court will assess (1) if activities which take place under its jurisdiction cause damage to the environment of another state, (2) whether such damage is 'significant' and (3) the measures that state must take to comply with this obligation.[54]

As detailed above, Aringuv is not entitled to claim protection over this portion of the Royal Mountain Gorilla species and, as such, cannot claim to suffer significant damage. Therefore, any claim by Aringuv that a failure to prevent transboundary harm on Replomuté's exists, "*in particular, on a shared resource,*"[55] lacks standing.

Replomuté has followed all procedural obligations required of it under CIL and operated under the jurisdiction of the DRI. Replomuté is not the party responsible and Aringuv does not have a right of claim over this resource.

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[53] Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Separate Opinion of Judge Donoghue, 2015 ICJ Rep. 665, [8].

[54] Advisory Opinion, IACtHR, The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity - interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights*)*, OC-23/17 (15 November 2017), Series A No. 23, [130-139].

[55] *Supra* 3, [204].

3. Replomuté will act consistently with international law in developing the DRI's interests and needs.

The eradication of poverty and prevention of conflict is necessary to achieve sustainable development and protect the Royal Mountain Gorilla. Replomuté is actively supporting sustainable development and the protection of the Royal Mountain Gorilla species in the DRI. "*In developing countries, most of the environmental problems are caused by under-development*."[56] In order to achieve sustainable development and protect biodiversity, Replomuté is promoting economic activity, access to new financial resources and alleviating poverty.[57] This, in the context of development of economically vulnerable nations, is recognised as a "*special priority*." in international law. [58]

Political conflict and armed militias cause an acceleration of harmful impacts such as loss of habitat, illegal killings and deaths by infectious diseases.[59] Further, the United Nations has emphasised that without peace, it is impossible to achieve other goals, such as sustainable development.[60] The DRI, a low-income country, has a history of armed conflict and it is necessary, for the purpose of ensuring the survival of the Royal Mountain Gorilla species and sustainable development, that it does not repeat such conflict. Replomuté seeks to bring peace to the DRI through introducing economic stability, access to new financial resources and promoting

[56] Stockholm Declaration on the Human Environment, June 16, 1972, Proclamation 4.

[57] *Supra* 10, Principle 5.

[58] *Supra* 10, Principle 6.

[59] *Supra* 42 (2003).

[60] Khalida Bouzar, *No Peace, No Sustainable Development: A Vicious Cycle that We Can Break',* UN Chronicle (Apr. 2015) *available at:* https://www.un.org/en/chronicle/article/no-peace-no-sustainable-development-vicious-cycle-we-can-break#:~:text=As%20resources%20become%20scarcer%20and,resources%20and%20disrupt%20food%20production.

long-term sustainable development.[61] This will, in turn, provide immediate protection for the Royal Mountain Gorilla species from the negative impacts of conflict.

II. REPLOMUTÉ HAS NOT INDIRECTLY VIOLATED INTERNATIONAL LAW THROUGH ITS ACTIONS AND INACTIONS WITH RESPECT TO THE LENOIR CORPORATION PROJECT.

A. The DRI voluntarily acceded to the Concession Agreement with Replomuté.

1. The DRI exercised its sovereign right to freely adopt and implement the Concession Agreement with Replomuté.

States are only held responsible for the acts of other states in exceptional circumstances.[62] There is no evidence that the Concession Agreement was not entered into voluntarily by the DRI and consequently, there has been no coercion by Replomuté of the DRI. The right to exercise jurisdiction, by entering into legal agreements of this kind, with other states is inherent in the notion of statehood.[63]

Replomuté has not used an unlawful instrument to compel Aringuv to comply with its demands.[64] State sovereignty allows states to enter mutually beneficial agreements, such as the Concession Agreement. By extension, permanent sovereignty over natural resources, which has been recognised as a customary rule of international law in numerous ICJ decisions[65], allows states to

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[61] *Supra* 10, Principle 5.

[62] James D. Fry, *Coercion, Causation, And The Fictional Elements Of Indirect State Responsibility*, 40 Vand. J. Transnat'l L. 611 (2007), 622. *available at:* Https://Scholarship.Law.Vanderbilt.Edu/Vjtl/Vol40/Iss3/1

[63] Antonios Tzanakopoulos, *The Right To Be Free From Economic Coercion*, 4 Cambridge J. Int'l & Comp. L. 616 (2015).

[64] Mohamed Helal, *On Coercion in International Law*, 52 N.Y.U. J. Int'l L. & Pol. 1 (2019).

[65] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Rep 226, 254; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, 1971 ICJ Rep. 16, Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United

enter agreements to harness the potential of their natural resources. The DRI expressly consented to be bound by the outcome of the Arbitration Panel by electing arbitration as the method for the peaceful settlement of disputes under the Concession Agreement.

a. The DRI expressly consented to be bound by the outcome of the Arbitration Panel by electing arbitration as the method for the peaceful settlement of disputes under the Concession Agreement.

Arbitration is a recognised method for the peaceful settlement of disputes.[66] Arbitration clauses are widely adopted in bilateral state agreements and have played an important role in the development of international environmental law in certain interstate cases such as the *Pacific Fur Seal*[67] arbitration and *Trail Smelter*.[68] The United Nations has outlined methods of dispute resolution which should be considered when seeking to settle international disputes, including arbitration.[69] This further underlines the DRI's decision to be bound by arbitration under the Concession Agreement is in line with common practice of other states.[70] The DRI has not alleged

States of America) 1986 ICJ Rep. 14, 97-98; Texaco Overseas Petroleum Company/ California Asiatic Oil Co. and the Government of the Libyan Arab Republic (Texaco v Libya), Award on the Merits, 1997 LLM 17.

[66] UN Charter, Article 33(1); UNGA Res 2625 (XXV) (Oct. 24, 1970); Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America), Merits 1986 ICJ Rep 14.

[67] Pacific Fur Seal Arbitration (United States of America v. Great Britain) 1 Moore's Arbitration Awards, 755 (15 August 1893), 755.

[68] Trail Smelter Arbitration (United States v. Canada) (1938 & 1941) III R.I.A.A. 1905. Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* 179 (4th edn Cambridge University Press 2018).

[69] UN Charter, Article 33(1).

[70] *Supra* 68 (Sands and Peel) 178.

that they were coerced to enter into the concession agreement. The suggestion that they were coerced undermines their sovereignty and the presumption of equality under international law.[71]

b. Replomuté is contractually bound by the terms of the Concession Agreement to uphold the Arbitration Panel's ruling.

Arbitration rulings in the context of international environmental disputes are legally binding and as such Replomuté must uphold the ruling of the arbitration panel.[72] Furthermore, it has been noted that "*recourse to arbitration implies an engagement to submit in good faith to the award"*.[73] By upholding the arbitration panel's ruling, Replomuté is ensuring adherence with its contractual obligations under the Concession Agreement and submitting to the arbitration panel's ruling in good faith.

The $825 million arbitral penalty cannot be considered to be coercion by Replomuté as the figure was determined by the independent arbitration panel. The obligation on states to respect arbitral agreements is consistent with the principle of sovereignty over natural resources, as confirmed by resolution of the UN General Assembly and by the award in the *Liamco* arbitration[74]. It follows that Replomuté did not violate the DRI's sovereignty over its natural resources by relying on the decision of the independent arbitral panel.

2. Economic coercion is not prohibited under customary international law.

Whilst Replomuté is not guilty of coercion of any form, Aringuv's's argument that Replomuté exercised economic coercion over the DRI lacks standing, as there is no general rule against

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[71] Guilherme Del Negro, *The Validity Of Treaties Concluded Under Coercion Of The State: Sketching A Twail Critique*, 10 Eur. J. Leg. Stud. 39 (2017) 56.

[72] Malgosia Fitzmaurice, Meagan S. Wong and Joseph Crampin, *International Environmental Law* (2022 Edward Elgar) 508.

[73] Convention for the Pacific Settlement of International Disputes (Hague Convention I), Oct. 18, 1907, Article 37.

[74] UNGA Res 1803 (XVII) Permanent Sovereignty over Natural Resources (14 December 1962); Libyan American Oil Company v. The Government of the Libyan Arab Republic, 1981 20 ILM 1, 78.

economic coercion under CIL.[75] The principle enunciated in the Lotus case states that anything which is not expressly prohibited under international law is permissible.[76] Article 52 of the Vienna Convention renders a treaty void where there is coercion by the threat or use of force.[77] Although the Vienna Convention does not expressly define coercion, this has been interpreted as referring only to armed force, and not to economic force.[78] Furthermore, there is an absence of state practice and *opinio juris* to conclude that a rule against economic coercion has become part of CIL.[79] The ICJ has held that agreement may only be invalidated on the grounds of coercion where there has been an illegal threat or use of physical force.[80]

Additionally, Aringuv has argued coercion under the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA). Article 18 of ARSIWA has recommended attributing responsibility for an internationally wrongful act to a coercing state if the act would, but for the coercion, be an internationally wrongful act of the coerced state and if the coercing state acted with knowledge of the circumstances of the act.[81] However, recommendations of the ILC are not legally binding.[82]Article 18 of ARSIWA also

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[75] *Supra* 62, 622.

[76] S.S. Lotus (France v Turkey), Judgment, 1927 PCIJ Rep. 10.; An Hertogen, *Letting Lotus Bloom*, Eur. J. Int. Law. 26 (2016) at 901.

[77] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Article 52.

[78] *Supra* 63, 621.

[79] *Id* 624.

[80] *Supra* 66 (Nicaragua v. United States), 97-98.

[81] International Law Commission, *Draft Articles on Responsibility of State for Internationally Wrongful Acts*, 2 YB 2001, 31.

[82] Prosecutor v. Furundžija (IT-95-17/1-T) (ICTY) 10 December 1998, [227]; Sotirios-Ioannis Lekkas, *The Uses of the Outputs of the International Law Commission in International Adjudication: Subsidiary Means or Artefacts of Rules?* 69 Neth. Int. Law Rev. (2022), 327-359.

appears to be limited to armed force, in line with the article 2(4) of the U.N. Charter prohibition on the threat or use of force.[83] There is little state practice to support this and the two most relevant cases *Shuster* and *Romano-Americana* are weak in this regard as neither are sufficient to support this theory of indirect responsibility.[84] Irrespective of this, Replomuté denies that any economic coercion has taken place.

3. Alternatively, Aringuv failed to meet the high threshold to establish coercion under international law.

An agreement may only be invalidated on the grounds of coercion where there has been an illegal threat or use of physical force. Article 52 of the Vienna Convention on the Law of Treaties will not invalidate a treaty which was concluded as a result of economic coercion as the Article is too intrinsically linked to the United Nations Charter and the prevailing interpretation which has been placed on that instrument, namely that it does not reach economic intimidation.[85] Extending coercion to economic pressure upon a state opens the door to the evasion of treaty obligations very wide.[86]

Coercion which can lead to a treaty being considered void under Article 52 of the Vienna Convention requires the coercive act to involve the threat or use of force.[87] Replomuté's enforcement of the arbitral penalty cannot be considered to be coercion as it stems from a lawful arbitration clause within the Concession Agreement. Compliance with an international obligation cannot be considered to be an internationally wrongful act by a coerced state.[88]Therefore, the

[83] *Supra* 63, 622.

[84] *Supra* 62, 624.

[85] Charles E. Partridge, Jr., *Political and Economic Coercion within the Ambit of Article 52 of the Vienna Convention on the Law of Treaties*, 5 The International Lawyer 755 (1971)

[86] *Supra* 71.

[87] *Supra* 63, 621.

[88] *Id* 622-623.

DRI's compliance with the lawful arbitral penalty is not capable of being deemed to be a wrongful act and consequently, there has been no coercion of the DRI by Replomuté.

CONCLUSION

Replomuté, respectfully requests this court to adjudge and declare that:

A. The actions and inactions of Replomuté with respect to the Lenoir Corporation project did not directly violate international law.

B. The actions of Replomuté with respect to the proposed oil extraction activities did not indirectly violate international law.

Respectfully submitted,

Agents of the Respondent