

Team code: 2492

STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

2024

QUESTIONS RELATING TO MOUNTAIN GORILLAS AND IMPACT ASSESSMENT

ARINGUV

(Applicant)

V

REPLOMUTÉ

(Respondent)



AT THE PEACE PALACE

THE HAGUE, NETHERLANDS

WRITTEN SUBMISSION ON BEHALF OF THE RESPONDENT

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STATEMENT OF JURISDICTION

In accordance with Article 40 of the Statute of the ICJ, the State of Aringuv and Replomuté have submitted to the ICJ by special agreement Questions Relating to Mountain Gorillas and Impact Assessment as contained in Annex A, including the Clarifications. The parties transmitted a copy of the Special Agreement to the Registrar of the ICJ on 16 June 2023

The Registrar of the Court, in accordance with Article 26 of the Rules of the Court, addressed a notification of receipt of the Special Agreement to the parties on 31 July 2023.

The parties have accepted the jurisdiction of the ICJ. Consequently, they request the Court to adjudge the merits of this matter based on the rules and principles of general international law, as well as any applicable treaties. The parties further request this Court to determine the legal consequences, including the rights and obligations of the Parties arising from any judgement on the questions presented in this matter.

The parties have agreed to respect the decision of this Court.

QUESTIONS PRESENTED

I

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

II

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

STATEMENT OF FACTS

Aringuv, Replomute and Democratic Republic of Ibirunga (DRI) are members of United Nations and parties to International Court of Justice statute and the Vienna Convention on the Law of Treaties (R. at 4-5). The three states are parties to Convention on Biological Diversity (CBD) and Convention on the Conservation of Migratory Species of Wild Animals (CMS) (R. at 7-8). They are also parties to United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement (R. at 13).

Aringuv and DRI are parties to the Gorilla Agreement and the Algiers Convention while Replomute is not a party to any of them (R. at 9 and 11). Aringuv and Replomute are parties to the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) while Aringuv is not a party to it (R. at 12)

In 1981, the DRI and Replomuté entered into a concession agreement that granted the Lenoir Corporation, a corporation wholly owned and operated by the government of Replomuté, the right to explore and extract oil from the area inhabited by the southern population of the Royal Mountain Gorilla. Prior to signing the agreement, which contained a mandatory binding arbitration clause as the exclusive mechanism for dispute resolution, the DRI conducted an environmental impact assessment (EIA) in accordance with its national laws which focused on the impacts on nearby human populations of the likely quantity of water to be used and waste to be produced by the proposed exploration and extraction activities, including the pipeline (R. at 17).

The Lenoir corporation began its oil exploration activities in the DRI based on the 1981 agreement the years following but were forced to suspend operations at different intervals due to civil unrest,

insurgency and ebola outbreak, labor strikes and whatnot in the DRI (R. at 18-19). Following the Lenoir's corporation announcement that it would begin oil extraction activities upon completion of construction of the pipeline in the DRI (R. at 20), local and international NGOs expressed serious concerns to the parties and to the CMS secretariat about the negative impacts to the Royal Mountain Gorillas that would likely occur as a result of oil extraction activities, and then called on the Lenoir Corporation to abandon the project (R. at 21).

Thereafter, following a military coup in the DRI, the DRI's new president General Mina, declared his intention to withdraw from the 1981 DRI-Replomuté agreement, unless Replomuté established a \$50 million (USD) fund, subject to the control of the DRI president, to compensate the DRI for environmental and societal impacts (R. at 22). The government of Replomuté accused General Mina of seeking to renegotiate the deal for his own personal profit and invoked the mandatory arbitration provision of the DRI-Replomuté agreement and prevailed in the binding arbitration, with the arbitral panel ordering the DRI to fulfill its obligations under the 1981 concession agreement by permitting the Lenoir Corporation to proceed with its oil exploration and extraction activities or be subject to more than \$825 million (USD) in penalties (R. at 22-23). Then, as a gesture of good will, the government of Replomuté established a \$10 million (USD) "Friendship Fund" for economic development activities in the DRI, to be administered jointly by representatives from both governments (R. at 23).

Then, in May 2018, the Aringuv Ministry of Foreign Affairs contacted the Replomuté Ministry of Foreign Affairs to express concerns about Replomuté's planned oil extraction activities in the DRI with respect to the activities' impact on the Royal Mountain Gorilla and the activities' implications for contributing to climate change (R. at 26). Diplomatic notes were then exchanged between the state of Aringuv and Replomute in the following months with the former contending that because

there is likely to be a significant adverse transboundary impact by the proposed oil extraction activities in the DRI, Replomuté is required by the Espoo Convention to conduct an environmental impact assessment (EIA) (R. at 27), that if the Lenoir Corporation proceeds with the oil extraction activities, Replomuté will be in breach of its non-Range-State obligations under the CMS, and also held responsible for any breach by the DRI of the Gorilla Agreement, as it is coercing the DRI to commit an internationally wrongful act (R. at 29).

In reply to the diplomatic note sent by Aringuv, Replomute declined the suggestion to conduct an EIA regarding the oil extraction activities in the DRI on the grounds that an EIA had already being conducted by DRI prior to its oil extraction activities, which complied with the DRI's national laws and any international obligations in place at that time, such as the Algiers Convention (R. at 28). It also refuted the claim that the duties contained in Article III, CMS apply to it on the grounds that it is not a Range State for the Royal Mountain Gorilla, and strongly rejected the contention that it is in breach of the Gorilla Agreement and the characterization that the DRI is the subject of any coercion because the DRI signed the concession agreement voluntarily and under no duress (R. at 30).

Aringuv and Replomute further exchanged notes with regard to the oil extraction activities in the DRI, and then, continued negotiations which was facilitated by the Government of Uganda and which led to the states agreeing to submit certain questions to the International Court of Justice (ICJ) (R. at 35).

SUMMARY OF ARGUMENTS

I

Replomuté is indeed in compliance with international law regarding the preparation of an EIA as it entered into the concession agreement with the DRI through the Lenoir Corporation for the purposes of oil exploration activities which was followed by an EIA which adhered to the laws of the DRI and other international obligations. The DRI undertook a comprehensive Environmental Impact Assessment (EIA) that specifically focused on evaluating the potential effects on nearby human populations, water usage, and waste management, which is in compliance with international standards.

Replomuté has also complied with the requirements of UNFCCC Article 4.1(f), which mandates the use of Environmental Impact Assessments to reduce unfavorable human influences on the climate.

II

The actions of Replomute with respect to the proposed oil activities in the DRI complies with international law. There is no obligation on Replomute to conduct an EIA as it is not the party of origin whose responsibility it is to conduct an EIA in the extant case. And so, the obligation to conduct an EIA as well as the other obligations under Article 2, 3, 4 and 5 of the Espoo Convention is on DRI who is the party of origin in the extant case and not Replomute.

Also, Replomute has neither a range state nor a non-range state obligations under the CMS as it is not a range state for any of the migratory species listed in the treaty. The provisions of Article III

of the CMS are not binding on it as it is not a range state for the Royal Mountain Gorilla, and as such, it cannot be held to be in breach of the treaty or any similar treaty.

Replomute did not commit an Internationally wrongful act as it has not committed an act that constitutes a breach of an international obligation neither has it done anything to coerce DRI to commit an act that is an internationally wrongful act. As such, it cannot be held indirectly responsible for breach of the Gorilla Agreement as in no way has the DRI been subjected to any form of coercion by Replomute.

ARGUMENTS ADVANCED

I. REPLOMUTE HAS NOT VIOLATED INTERNATIONAL LAW WITH RESPECT TO THE PREPARATION OF AN EIA

It is argued that Replomuté is indeed in compliance with international law regarding the preparation of an Environmental Impact Assessment¹ as it entered into this agreement with the Democratic Republic of Ibirunga (DRI) through the Lenoir Corporation for the purposes of oil exploration and transportation. This was followed by an EIA adhering to the laws of the DRI.²

A. REPLOMUTE HAS NOT VIOLATED INTERNATIONAL LAW (BOTH STATUTORY AND CUSTOMARY INTERNATIONAL LAW)

First, it is necessary to point out that there is no legal obligation arising from customary international law (CIL) that have been breached. In the case of Pulp Mills on the River Uruguay, *Argentina v Uruguay*³ and the Dispute regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*)⁴, it was clear that it is not only necessary to establish a physical relationship between the action or said activity and the resulting damage, the harm cause must meet a significant standard. Precasting is relevant when the resulting effects of inaction could be irreparable or irreversible.⁵ It is the due responsibility of the said State to assess the circumstances, and either determine whether or not scientific opinions are based on credible evidence and reliable

¹ Hereinafter referred to as the (EIA), An EIA is a procedure for evaluating the likely impact of a proposed activity on the environment, Convention on Environmental Impact Assessment in a Transboundary Context, Article 1(vi). See generally Wathern (ed), *EIA: Theory and Practice* (London, 1988).

² Record ¶17

³ Order, Provisional Measures, ICJ GL No 135, [2006] ICJ Rep 113, (2006) 45 ILM 1025, ICGJ 2 (ICJ 2006), 13th July 2006, United Nations [UN]; International Court of Justice [ICJ]

⁴ Dispute Regarding Navigational and Related Rights, *Costa Rica v Nicaragua*, Judgment on the merits, ICGJ 421 (ICJ 2009), 13th July 2009, International Court of Justice [ICJ]

⁵ Alexandre Kiss & Dinah Shelton, *Guide to International Environmental Law* (Martinus Nijhoff Publishers. 2000) 94

methodology⁶. Particularly, in the Pulp Mills Case⁷, the court treated the issues of conducting an EIA as a “distinct and transboundary obligation in international law”⁸ as noted by the counsel of Uruguay in the said case, his aligns with Principle 17 of the Rio Declaration, the Espoo Convention, and Article 7 of the International Law Commission's draft articles on transboundary harm. However, the court also supports the idea that EIA is a crucial part of the due diligence obligation. In any case, the Court has affirmed that when necessary, an EIA must be conducted before undertaking a project that is likely to cause significant harm across borders⁹¹⁰.

The Precautionary principle applies in situations where:

1. A situation (that is, the use of a substance, and or behaviour exists).
2. That the said situation may threaten the environment or human health in a grave or irreparable way.
3. That there is serious risk that the threat will materialize¹¹

This principle requires the State to conduct an EIA if there is a risk that the said action/activity may have significant adverse impacts on human health, industry, property, environment and agriculture in other states, then the activity is considered as being potentially harmful¹². It is

⁶ Okeukwu, E.K., Okeke, O.C., Irefin, M.O., Ezeala, H.I., & Amadi, C.C. (2023). Environmental Impact Assessment and Environmental Risk Assessment: Review of Concepts, Steps and Significance. *IIARD International Journal of Geography & Environmental Management (IJGEM)*, 9(2), 2504-8821. [URL] www.iiardjournals.org

⁷ Supra note 3

⁸ Alan Boyle, Developments in International Law of EIA and their Relation to the Espoo Convention, <https://unece.org/fileadmin/DAM/env/eia/documents/mop5/>, Accessed 1 November, 2023, see generally, Alan Boyle, Pulp Mills Case: A Commentary, https://www.biicl.org/files/5167_pulp_mills_case.pdf, accessed 2nd November 2023

⁹ Supra

¹⁰ Supra, note 3, para 205

¹¹ Sonia Boil, 'The Precautionary Principle: Development of an International Standard' (2002) 23(2) Michigan Journal of International Law

¹² A popular definition of this principle is attributed to the Wingspread Declaration (Raf-fensperger and Tickner 1999: 8), When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not established scientifically. In this context the proponent of the activity, rather than the public, should bear the burden of proof, See also, Indur M. Goklany, The Precautionary Principle: A Critical Appraisal (2001), 2.

noteworthy to point out that this said obligation requires that a State must act once there is a likelihood of and/or a reasonable concern for harm¹³. In the The Trail Smelter Arbitration Case¹⁴, The tribunal emphasised that environmental damage does not encompass all forms of transboundary environmental harm and based on the conclusion of the tribunal, state responsibility only arises in the presence of substantial and legally provable harm to the environment. The tribunal elaborated that no State has the right to use its territory or allow its use in a way that causes harm to another State's territory through emissions, particularly when the consequences are serious and the injury is established through clear and convincing evidence. It was established that obligation only arises where the following steps have been fulfilled (paraphrased):

1. There must be transboundary movement of harmful effects.
2. A manifest link between the activity and damage
3. It must be of human causation
4. The transboundary damage being significantly adverse.

Based on the facts on Record, these requirements have not been met, therefore the aforesaid obligations have not been created.

Furthermore, In the Kishenganga case¹⁵, the arbitration tribunal linked obligation to prevent transboundary harm to the need to manage natural resources in a sustainable manner, and recognises this principle as one of customary international environmental law.

¹³ 1991 Convention on Environmental Impact Assessment in a Transboundary Context, Article 1(vi); Wathern (ed) EIA: Theory and Practice (London, 1988); Glasson, Therivel, Chadwick, Introduction to EIA (2nd ed, London, 2005); Wood, EIA: A Comparative Review (2nd ed, Harlow, 2003) Ch 1; Holder, Environmental Assessment (Oxford, 2004); Holder and McGillivray (eds) Taking Stock of Environmental Assessment (London, 2007).

¹⁴ The Trail Smelter Arbitration (US v. Canada) of 1941, documented in 3 U.N.R.I.A.A. 1938 (1949)

¹⁵ Indus Waters Kishenganga Arbitration, Pakistan v India, Final Award, ICGJ 478 (PCA 2013), 20th December 2013, Permanent Court of Arbitration [PCA]

B. THE DRI CARRIED OUT AN EIA

The DRI undertook a comprehensive Environmental Impact Assessment (EIA) that specifically focused on evaluating the potential effects on nearby human populations, water usage, and waste management¹⁶, which is in compliance to international standard¹⁷. The findings of the EIA, conducted in accordance with the national laws of the DRI, led to the determination that the project was environmentally sound. In the Pulp Mills judgment, the court stated, unequivocally, that “it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment¹⁸.”

Notably, the EIA, consistent with the DRI's legal framework, concluded that the project did not pose a risk of transboundary harm, thereby failing to satisfy the fourth criterion of the applicable test and consequently not triggering Customary International Law (CIL) obligations¹⁹.

The International Court of Justice (ICJ) has ruled that general international law mandates states to conduct an Environmental Impact Assessment (EIA) when there is a risk of a proposed activity causing significant harm to a 'shared' resource²⁰. Regarding the impact on natural resources like forests, although oil extraction is inherently risky, empirical studies suggest that the ecological effects of oil exploration and extraction are likely confined to local communities. Substantial alterations in human settlements similarly have localized consequences.

¹⁶ Record ¶17

¹⁷ The Myth and Reality of Transboundary Environmental Impact Assessment, 96(2) A.J.I.L. 291, 293 (2002)

¹⁸ Supra, note 3, para. 205

¹⁹ Record ¶17

²⁰ Supra, note 4

The impact on natural resources, such as water, is generally limited to the immediate surroundings. Moreover, when projects conclude and give rise to 'abandoned wells,' these areas have been observed to become habitats for indigenous fauna, potentially mitigating adverse effects on animal populations over the long term. It is crucial to establish the inobservance of the accused state in cases of transboundary harm. Additionally, the duty to consult the affected state arises only when there is a reasonable inference of the possibility of significant negative implications across borders. In the 1991 Convention on Environmental Impact Assessment, states parties are obligated to "notify any Party which it considers 'may' be an affected Party."

In this case, it is a matter of fact that the DRI conducted an EIA which was primarily focused on the impacts on human populations, usage of water and management of waste and the conclusions were to the effect that the project was indeed sound. This EIA was made in accordance and observance of DRI's national laws,²¹ therefore, the project fails the fourth requirement therefore no international law obligations are created.

Furthermore, an EIA does not apply to minor or transitory impact, that is, the harm must be significant and, this threshold has been adopted by the International Law Commission 2001²²

For clarity, it is noteworthy to state that, the interplay among African states signatory to the Revised African Convention on the Conservation of Nature and Natural Resources²³, is delineated by Article XXXIV (1) . This provision unambiguously declares that "Parties which are bound by this Convention, only this Convention shall apply." As the entity designated as DRI is not party to

²¹ Record ¶17

²² ILC, 2001 Articles on Transboundary Harm, Articles 1, 2(a) 7; 1987 UNEP Goals and Principles of EIA, Article 4(1) Principle 1; 1982 UNCLOS, Article 206; 1991 Convention on Transboundary EIA, Article 2(3); 1992 Convention on Biological Diversity, Article 14; 1992 Convention on the Protection of the Baltic Sea Area, Article 7; 1989 Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South East Pacific, Article 89. See Craik, *The International Law of EIA*, Ch 5

²³ AFRICAN CONVENTION ON THE CONSERVATION OF NATURE AND NATURAL RESOURCES Adopted by the 2nd Ordinary Session of the Assembly Maputo, Mozambique - 11 July 2003. Entered into force on 23 July 2016.

the Maputo Convention, and Replomute is likewise not a party to either the Algiers Convention or the Maputo Convention, they are not bound by its provisions. Consequently, the obligations set forth in the Maputo Convention are not applicable to them. DRI, Replomute, and Aringuv are parties to the Vienna Convention on the Law of Treaties (VCLT). Pursuant to Article 14 (a) of the VCLT²⁴, the expression of a State's consent to be bound by a treaty is effectuated through ratification when the treaty provides for such a mode of expression. Article 34 of the VCLT²⁵ emphatically asserts that no obligations or rights are conferred upon a third state without its consent.

C. THE EIA CONDUCTED BY THE DRI MEETS INTERNATIONAL STANDARDS

It is acknowledged that the EIA conducted did not factor certain levels of impact, in this case, the impact on gorillas and their habitats. However, in response to this, it is contended that Repolumute did not violate its obligations under customary international law. This is underscored by the absence of any form of obligation to conduct an EIA in a transboundary context concerning the southern population of the Royal Mountain Gorilla unless the project likely to cause a significant environmental effect. It is noteworthy to mention that, States are only primarily obligated to diligently prevent and control foreseeable risks²⁶. And as to the forgeability of likelihood of harm and its effect on the environment, the Trail Smelter arbitration case²⁷. In the Corfu Chanel case²⁸, it was provided that the obligation only exists when there is known risk to other states, and this is

²⁴ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331

²⁵ Supra note 24

²⁶ BOYLE & REDGWELL, *INTERNATIONAL LAW & THE ENVIRONMENT* 153 (2009).

²⁷ Supra note 14

²⁸ Report of the International Law Commission, UN GAOR, 56th Sess., Supp. No. 10, at 150-151, UN Doc. A/56/10 (2001) [56th ILC Report];

Corfu Channel Case (United Kingdom v. Albania); Merits
, International

Court of Justice (ICJ), 9 April 1949. (hereinafter Corfu Channel Case

determined objectively. The International Law Commission (ILC), in its 2001 Articles on Transboundary Harm, defines risk to include both a low probability of causing disastrous harm and a high probability of causing significant harm²⁹.

In this case, there was no apparent need to carry out an EIA specifically as regards to the transboundary damage caused by the migration of the Southern Population of the Royal Mountain Gorilla. According to the precautionary principle, it is the responsibility of States to take action based on the the available information on the effect of proposed activities through scientific findings³⁰. States, are as a matter of fact, under an obligation to prevent transboundary pollution in areas outside their jurisdiction.

It is worthy to note that the obligation only arises for a state to take action where there is scientific evidence which indicates that certain proposed activities would posed threat and could lead to significant environmental damage. In absence of such, no action is deemed necessary. It is a matter of fact that the southern population of the Gorilla Ibirungai Royal does not exhibit a clear pattern to migration across the boundary between the DRI and Aringuv³¹. Therefore, it can be reliably inferred that the occasional presence of a few gorillas from the total pollution in the Aringuv territory should not be considered a representative pattern for the entirety of the population. While the potential loss of habitat can lead to migration among species, there is not evident threat of any transboundary harm, therefore, the precautionary principle, as argued earlier is not triggered.

²⁹ Article 2 and commentary in *ILC Report (2001) GAOR A/56/10*, 387 paras (2)–(3). For the ILC’s earlier approach, which lists categories of ‘activities involving risk ’see Barboza, *6th Report*, draft Article 2, UN Doc A/CN 4/428 (1990). Compare the approach to risk assessment adopted by the WTO Appellate Body in *EC Measures Concerning Meat and Meat Products*, WT/DS26/AB/R (1998) para 184: ‘Although the utility of a two-step analysis may be debated, it does not appear to us to be substantially wrong; *ILC Report (2001) GAOR A/56/10*, 385, paras (14)–(15), 387, paras (1)–(3).

³⁰ *Supra* note 23, 152

³¹ Record ¶9

Therefore, the argument that EIA may not be sufficient is grossly misleading and inadequate, at least to the extent of the available facts on Record.

D. REPLOMUTE COMPLIED WITH THE DUTY TO CONSULT AND CONDUCT ITSELF IN GOOD FAITH

A State intending to engage in or sanction activities with the potential to substantially affect the environment of another jurisdiction is obligated to notify the affected jurisdiction. The notifying entity should convey relevant project details, unless prevented by domestic legislation or relevant international agreements from making such disclosures³². Where a state is affected, it is the duty of the Replomuté to consult with the affected state.

Replomuté has complied with the responsibility to consult and has acted in good faith while dealing with Aringuv. The obligation to consult, which is fundamental to customary international law pertaining to transboundary harm, mandates that in the case of a major adverse transboundary effect, the acting state have meaningful consultations with the injured state. By responding to complaints, resolving Aringuv's concerns, and actively engaging in negotiations—including ones requiring third-party mediation—Replomuté performed this obligation.

E. THERE HAS BEEN NO BREACH OF OBLIGATIONS PURSUANT TO THE PROVISIONS OF THE UNFCCC

Replomuté has also complied with the requirements of UNFCCC Article 4.1(f)³³, which mandates the use of Environmental Impact Assessments to reduce unfavourable human influences on the climate.

³² Ibid 5, p. 100

³³ United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107 (hereinafer UNFCCC)

From the very inception of the Kyoto Protocol, to the current Paris Agreement which addresses climate change, the UNFCCC also recognizes the concept of Common but Differentiated Responsibility (CBDR)³⁴, which factors the various duties and situations that both developed and developing nations face. Thus understanding is largely attributed to the understanding that imposing uniform sustainable goals on countries at different levels of development, with different levels of capabilities, is in itself inherently flawed. The UNFCCC therefore recognizes the right of developing countries to create national policies that provide them the opportunity to measure up developed countries and realise the end goal of sustainable development. Within this framework, no party is obligated to reduce its carbon emissions by a specific amount to meet the overall emission-reduction goal through a binding top-down obligation. Instead, parties are required to outline their commitments through their own Nationally Determined Contributions (NDCs).

The DRI recognises the immediate threat posed by climate change and has established an NDC with the goal of reducing greenhouse gas emissions by 20%, of which 18.5% is expected to come from outside sources³⁵. In addition to helping DRI accomplish this goal, Replomuté satisfies its non-binding commitment made to the UNFCCC by allocating a \$10 million friendship fund to DRI's advancement. As a result, there is no violation of the UNFCCC's Article 4.1(f) requirements. The DRI is allowed to pursue economic and social growth, including oil extraction operations, while concurrently addressing climate change issues through its Nationally Determined Contributions, even though it is a low-income nation³⁶. Replomuté has actively aided the DRI in

³⁴ Pauw, P. Mbeva, K. & van Asselt, H. (2019). Subtle differentiation of countries' responsibilities under the Paris Agreement. *Palgrave Communications* 5, 86 (2019)

³⁵ Record ¶16

³⁶ Record ¶1

this endeavour, helping it to satisfy its own non-binding commitments made to the UNFCCC by financing a \$10 million fund which was pledged towards the development of the DRI³⁷.

In summary, Replomuté has fulfilled its duties under UNFCCC and customary international law. It has also carried out an EIA where necessary and complied with the cooperative and precautionary principles. Replomuté has also complied with its duty to prevent transboundary harm.

II. THE ACTIONS OF REPLOMUTE WITH RESPECT TO THE PROPOSED OIL EXTRACTION ACTIVITIES IN THE DRI COMPLY WITH INTERNATIONAL LAW

The proposed oil extraction project in the DRI is the brainchild of a concession agreement entered into by the State of Replomute and the Democratic Republic of Ibirunga in the year 1981.³⁸ The concession agreement is recognized under international law as an international agreement due to the fact that it is a legally binding agreement concluded between states having the intention to be bound by the terms of the agreement.³⁹ To this end, the actions of Replomute in the extant case, which flows from the aforementioned concession agreement, complies with international law.

A. THERE IS NO OBLIGATION ON REPLOMUTE TO CONDUCT AN ENVIRONMENTAL IMPACT ASSESSMENT (EIA)

³⁷ Record ¶23

³⁸ Record ¶17

³⁹ See the *Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal, Bangladesh v Myanmar*, ICGJ 448 (ITLOS 2012)

An EIA refers to a national procedure for evaluating the likely impact of a proposed activity of an environment.⁴⁰ According to Mayer,⁴¹ an EIA procedure is process through which a public authority decides whether a proposed activity likely to cause environmental harm can be conducted.

The relevance of an EIA in international law is underscored by the fact that in numerous instances and in various international conventions, treaties and/or international agreements, states have recognized the importance of an EIA, and thus, have accepted the responsibility to carry out an EIA prior to the approval of certain activities within their environment.⁴² A convention of utmost importance here is the Convention On Environmental Impact Assessment in a Transboundary Context (Espoo Convention) as it is the convention that contains comprehensive provisions which governs the procedure for the preparation of an EIA, the proposed activities that requires the preparation of an EIA, the contents of an EIA and every other ancillary matters relating to an EIA. The convention also contains clear provisions that helps to determine the state parties that has the obligation to prepare and/or conduct an EIA in specific circumstances.⁴³

Under the Espoo Convention, it is provided that prior to making a decision authorizing a proposed activity that is likely to cause a significant adverse transboundary impact, an environment impact assessment shall be undertaken.⁴⁴ While the instruction to conduct a EIA cannot be contested or

⁴⁰ Art 1, Espoo Convention

⁴¹ Mayer, Benoit, Climate Impact Assessment as an Emerging Obligation Under Customary International Law (October 4, 2018). The Chinese University of Hong Kong Faculty of Law Research Paper No. 2018-16, Available at SSRN: <https://ssrn.com/abstract=3090793>

⁴² For example, both the Stockholm Declaration on the Human Environment and the Rio Declaration on Environment and Development restated that States have ‘the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.’

⁴³ See Art. 2(3-4), Espoo Convention.

⁴⁴ Ibid.

denied with respect to the proposed activity in the extant case, however, it is submitted that the obligation to conduct or prepare an EIA is not on the state of Replomute as it is not a party of origin⁴⁵ within the definition of the Espoo Convention.

1. The obligation to conduct an EIA under the Espoo Convention is not on Replomute

Under the Espoo Convention, it is required that for a proposed activity such as the one in the extant case, an EIA shall be conducted. However, the obligation to do so in the extant case is not on Replomute as Replomute is not a party of origin in this case. The relevant treaty provisions here is Espoo Convention Article 2(3)-(4) which provides that:

3. The Party of origin shall ensure that in accordance with the provisions of this Convention an environmental impact assessment is undertaken prior to a decision to authorize or undertake a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

4. The Party of origin shall, consistent with the provisions of this Convention, ensure that affected Parties are notified of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact.

A party of origin as defined in the Espoo Convention, means the party under whose jurisdiction a proposed activity is envisaged to take place.⁴⁶ Based on this definition, the obligation to conduct an EIA is clearly on the Democratic Republic of Ibirunga (DRI) and not on Replomute, as the

⁴⁵ Art 1 of the Espoo Convention defines a party of origin as the contracting party or parties under whose jurisdiction a proposed activity is envisaged to take place.

⁴⁶ Ibid

former is the party under whose jurisdiction the proposed activity i.e oil extraction activities, is envisaged to take place.⁴⁷

Also, the other obligations provided under Article 3, 4 and 5 of the Espoo Convention are not on Replomute but on DRI as the former is neither the party of origin nor the affected party in light of the circumstances of the extant case. Thus, the provisions of the Espoo Convention are not binding or applicable to Replomute based on the circumstances of the extant case.

In the same vein and by extension, the requirements to carry out an EIA under the Convention on Biological Diversity⁴⁸ are not binding or applicable to Replomute. This is on the grounds that the Espoo Convention is the convention that governs the preparation of an EIA in cases such as the present one. Its provisions are superior to that of the Convention on Biological Diversity and every other similar treaty based on the '*lex specialis*' doctrine which states that if two laws govern the same factual situation, a law governing a specific subject matter (*lex specialis*) overrides a law governing only general matters (*lex generalis*).⁴⁹ As such, the requirements of Article 14 CBD are binding on DRI and not on Replomute.

Also, it is important to note that prior to the decision authorizing the oil extraction activities in the DRI, the latter conducted an EIA in line with its national laws which was in compliance with the international obligations and standards required at the time.⁵⁰ Thus, not only is the obligation to

⁴⁷ Record ¶17

⁴⁸ Article 14, CBD

⁴⁹ This Latin term is derived from the legal maxim in the interpretation of laws, both in domestic and international law: '*lex specialis derogat legi generali*', and it essentially means that more specific rules will prevail over more general rules. See https://casebook.icrc.org/a_to_z/glossary/lex-specialis#:~:text=This%20Latin%20term%20is%20derived,prevail%20over%20more%20general%20rules.

⁵⁰ Record ¶17

conduct an EIA under the Espoo Convention not on Replomute, but that this obligation has been discharged by the party upon whom the obligation rests.

It is also important to state that the proposed oil extraction activities in the DRI will not have a transboundary impact as the southern population of the Royal Mountain Gorillas does not migrate across boundaries. Rather, they occupy a national park in the DRI.⁵¹ Consequently, the actions of Replomute with respect to the proposed oil extraction activities in the southern population of the DRI complies with international law.

2. Replomute has neither a range state nor a non-range state obligations under the CMS or any other similar treaty.

Replomute is no doubt a party to the Convention on the Conservation of Migratory Species of Wild Animals and is thus, bound by its provisions.⁵² However, this is so only when it is a range state of any one of the migratory species contained in the treaty.⁵³ In other words, Replomute can only be held bound by the provisions of the CMS where it is a range state of any one of the listed migratory species.

Under the record, it is clearly stated that Replomute is not a range state for the Royal Mountain Gorilla.⁵⁴ As such, the provisions of the CMS are not binding on it. Based on this analysis, it is submitted that the duties contained in Article 3 of the CMS applies to range states only, and

⁵¹ Record ¶9

⁵² Record ¶8

⁵³ See Art. 2(1) and Art. 3(4), CMS

⁵⁴ Record ¶9

because Replomute is not a range state for the RMG, the duties under the aforementioned article do not and cannot apply to it.

Also, Replomute has no non-range state obligations under the CMS. This is because nowhere in the treaty are obligations or duties given non-range states to fulfill. Thus, the contention that Replomute has non-range states obligations which it has breached in this case is blatantly erroneous and nothing more than conjecture.

B. REPLOMUTE DID NOT COMMIT AN INTERNATIONALLY WRONGFUL ACT

A state commits an internationally wrongful act when its conduct is attributable to the state and when that conduct constitutes a breach of an international obligation of the state.⁵⁵ A state can also be held to have committed an internationally wrongful act where it coerces another state to commit an act that but for the coercion is an internationally wrongful act of the state.⁵⁶

In view of the above, it is submitted that Replomute has not committed an act that constitutes a breach of an international obligation neither has it done anything to coerce DRI to commit an act that is an internationally wrongful act. As such, Replomute cannot be held to have committed an internationally wrongful act.

1. DRI has not been subjected to any form of coercion by Replomute

According to Robert Ago, coercion under international law is when a state forces another state to commit an internationally wrongful act where there is no standing relationship of control or dominance between the two states, but where control is manifest only at the time of the wrongful

⁵⁵ Article 2, ILC Draft Articles on State Responsibility

⁵⁶ Article 18, ILC Draft Articles on State Responsibility

act in question.⁵⁷ A holistic perusal of the record shows that at no point in time was Replomute exercising manifest control over DRI so as to force the latter into committing an Internationally wrongful act. Consequently, the contention that the DRI is the subject of any form of coercion from Replomute is strongly rejected. As such, Replomute cannot be held indirectly responsible for any breach of the Gorrila Agreement or any similar treaty by DRI as the latter has in no way been subjected to any form of coercion by Replomute to commit an internationally wrongful act.

Furthermore, the contention that the Replomute's invocation of the mandatory binding arbitration clause constitutes coercion is erroneous and conjecture at best. This is because the arbitration clause was a fundamental term of the concession agreement between Replomute and DRI which both parties voluntarily agreed shall be the "exclusive mechanism for dispute resolution."⁵⁸ It was upon the DRI-Replomuté agreement that the Replomute invoked the mandatory arbitration clause to settle the dispute that arose after the DRI's new president General Mina sought to unilaterally renege and pull out of the concession agreement under which Replomute had already made significant investments and financial outlays.⁵⁹ Thus, it is submitted that the invocation of the mandatory binding arbitration clause by Replomute does and cannot constitute a form of coercion on DRI.

2. The concession agreement between Replomute and DRI is valid, binding and thus cannot be revoked or set aside

⁵⁷ Eighth Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur, U.N. Doc. A/CN.4/318, 2(1) Y.B. Int'l L. Comm'n 3 (1979)

⁵⁸ Record ¶17

⁵⁹ Record ¶22

The record shows that in the year 1981, a concession agreement was entered into between Replomute and DRI.⁶⁰ This agreement was entered into voluntarily by both parties without any form of duress, coercion or manipulation on either side of the parties. The agreement is valid and legally recognized as an international agreement in international law and thus, binding between the parties. It is thus submitted that the agreement cannot be revoked or set aside as there is no basis upon which it can validly be set aside. Rather, both parties should endeavor to exercise and perform their obligations under the agreement in good faith based on the principle of *pacta sunt servanda*,⁶¹ which simply means that promises must be kept.

Furthermore, the ICJ in the case of Cameroun v. Nigeria,⁶² considered good faith to be a well-established principle of international law and one of the basic principles governing the creation and performance of legal obligations. Thus, it is an expectation in international relations that international obligations to which states have consented to be bound must be observed by them in good faith.⁶³ In view of this, it is submitted that the DRI-Replomute concession agreement is a legally recognized agreement that is valid and legally binding among the parties which cannot be revoked or set aside.

⁶⁰ Record ¶17

⁶¹ See the case concerning the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 2010 I.C.J. Rep. 14

⁶² See the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria, Cameroon v Nigeria*, Judgment, Preliminary Objections, [1998] ICJ Rep 275, ICGJ 64 (ICJ 1998)

⁶³ Ibid, 13

CONCLUSION AND PRAYERS

The Respondent, Replomute, respectfully requests the Court to adjudge and declare that:

1. Replomuté has not violated international law with respect to the preparation of an EIA.
2. The actions of Replomute with respect to the proposed oil extraction activities in the DRI comply with international law

RESPECTFULLY SUBMITTED

AGENTS OF RESPONDENT