

IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS



QUESTIONS RELATING TO THE REINTRODUCTION OF BEARS

FEDERAL STATES OF ARCTOS

APPLICANT

v.

REPUBLIC OF RANVICORA

RESPONDENT

MEMORIAL FOR THE APPLICANT

THE 24th STETSON INTERNATIONAL ENVIRONMENTAL
MOOT COURT COMPETITION 2019 – 2020

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QUESTIONS PRESENTED

1. Whether the Respondent violated its international obligations under customary international law and treaty law, with respect to its reintroduction of bears in Ranvicora.
2. Whether the Applicant violated its international obligations under customary international law and treaty law, with respect to its response to the reintroduction of bears by the Respondent.

STATEMENT OF JURISDICTION

The Federal States of Arctos (“Arctos”) and the Republic of Ranvicora (“Ranvicora”) submit this dispute to the International Court of Justice (“ICJ”), pursuant to Article 36(1) of the Statute of the International Court of Justice.

The present dispute arises out of the Convention on Biological Diversity (“CBD”), the Convention on Migratory Species (“CMS”), and the Bern Convention. Arctos relies on Ranvicora’s declarations that it would submit disputes, with respect to the aforementioned treaties’ interpretation or application, to the ICJ.

The Parties in their Joint Written Statement have requested that the Court decide the merits of this matter on the basis of the rules and principles of general international law, as well as any applicable treaties. The Parties also accept the Judgement of the Court as final and binding and shall execute it in its entirety and in good faith.

STATEMENT OF FACTS

A. The Parties and Background to the Conflict

The Federal States of Arctos and the Republic of Ranvicora are developed,¹ sovereign states on the Continent of Suredia.² Arctos is located to the north of Ranvicora,³ sharing a border of forests and privately-owned farms.⁴ Ranvicora sought to reintroduce grey bears (*Ursus smokeysius*)⁵ after their extinction within Ranvicora in 1963.⁶ The grey bears are also found within Suredia, in Paddington and Aloysius.⁷

B. The Dispute

Ranvicora conducted a national Environmental Impact Assessment (“EIA”)⁸ and failed to consult, or inform, Arctos.⁹ Over a five-year period, beginning in 2013, Ranvicora released twenty bears, fourteen female and six male, at six locations in northern Ranvicora, near to Arctos.¹⁰ This was the largest remaining habitat suitable for a grey bear population, due to internal development.¹¹ The nearest release to Arctos was approximately 50 kilometres from the border.¹² Biologists questioned whether this was part of the grey bears’ historic range.¹³

¹ Record ¶1

² Id.

³ Id.

⁴ Id.

⁵ Record ¶11

⁶ Id.

⁷ Record ¶10

⁸ Record ¶12

⁹ Id.

¹⁰ Record ¶14

¹¹ Record ¶13

¹² Record ¶14

¹³ Record ¶13

Most female bears reproduced within a year of release and only few bears died within three years.¹⁴ On 19 September 2017, a grey bear was spotted in Arctos.¹⁵ Scientists confirmed that grey bears had been moving between Ranvicora and Arctos,¹⁶ as half were fitted with GPS collars.¹⁷

On 27 February 2018, a grey bear killed a horse on a farm in Arctos.¹⁸ Over a subsequent period of five and a half months, seven horses and twenty sheep were also killed on farms.¹⁹ Grey bears consumed the eggs and nestlings of the Trouwborst tern (*Sterna ariensis*), an endangered, endemic species protected under Arctos' national laws.²⁰ The grey bears also damaged apple orchards and beehives in Arctos.²¹

By Diplomatic Note dated 09 August 2018, Arctos notified Ranvicora of the extensive damage to its biodiversity and economy, but Ranvicora denied liability.²² Grey bears continued to cross the border into Arctos, killing more horses, sheep and terns and continuing to damage orchards and beehives.²³

In light of the extensive harm incurred, and Ranvicora's inaction, Arctos was required to protect its citizens, their property and the environment.²⁴ This was done by placing poisoned animal carcasses solely near farms where attacks occurred, which resulted in the death of four grey bears.²⁵

On 22 April 2019, two children in Arctos were mauled by a grey bear, resulting in significant permanent injuries and death.²⁶ Consequently, Arctos issued an emergency regulation, which permitted citizens to shoot grey bears spotted in Arctos.²⁷ Four grey bears that wandered onto farms

¹⁴ Record ¶15.

¹⁵ Record ¶16.

¹⁶ Id.

¹⁷ Record ¶14

¹⁸ Record ¶17

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Record ¶19

²³ Record ¶20

²⁴ Id.

²⁵ Id.

²⁶ Record ¶21

²⁷ Id.

were then killed.²⁸ Ranvicora alleged that Arctos violated international law.²⁹ Arctos vehemently disagreed, and communicated that it had no choice due to the imminent threat posed by grey bears.³⁰

Negotiations have failed to resolve the dispute. Arctos and Ranvicora entered into a Special Agreement to institute proceedings in the ICJ.³¹

²⁸ Record ¶22

²⁹ Id.

³⁰ Record ¶23

³¹ Record ¶24

SUMMARY OF ARGUMENT

1. The Respondent has violated its international obligations under customary international law and treaty law, with respect to its reintroduction of bears in Ranvicora.

2. The Applicant has not violated its international obligations under customary international law and treaty law, with respect to its response to the reintroduction of bears by the Respondent.

ARGUMENT

1. Ranvicora violated its international obligations under customary international law and treaty law, with respect to its reintroduction of grey bears

1.1. Ranvicora's reintroduction of grey bears violated the no-harm principle and caused irreparable damage to Arctos.

1.1.1. Reintroduction violated Article 3 CBD by causing damage to Arctos' environment.

While Ranvicora was entitled to exploit its resources pursuant to its environmental policies, **Article 3 CBD**³² imposed a concomitant obligation to ensure that activities within its jurisdiction did not cause damage to the environment of other States. **Article 3**, in pari materia with **Principle 21, 1972 Stockholm Declaration**,³³ does not qualify "damage". Therefore, damage must be assessed by the likelihood of harm to the environment and health of the population of another State, the ratio between prevention costs and potential damage, and the State's capacity to use its natural resources.³⁴ Specifically, States should recognize the risk that they may pose to other States as a potential source of invasive alien species ("IAS"), and should take appropriate actions to minimize that risk.³⁵

Ranvicora's reintroduction project violated **Article 3 CBD** as it posed reasonably foreseeable harm to Arctos, and Ranvicora failed to mitigate the risk. The magnitude of damage caused by the reintroduction satisfies the threshold of transboundary harm. In light of the reproductive tendencies of bears to produce up to six cubs per litter,³⁶ the bears were likely to migrate into Arctos in search of

³² Convention on Biological Diversity, June 6 1992, 1760 U.N.T.S. 79, Article 3 [hereinafter "CBD"].

³³ United Nations Conference on the Human Environment, 15 December 1972, A/RES/2994.

³⁴ Commission on Sustainable Development, Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, ¶51-6, 26-28 September 1995.

³⁵ Decision V/8, Adopted by the Conference of the Parties to the CBD at its Fifth Meeting, U.N. Doc. UNEP/CBD/COP/DEC/V/8, ¶4 (May 15-26, 2000).

³⁶ Bear Smart Society, Bear Reproduction, BEAR SMART (accessed Oct. 25, 2019), <http://www.bearsmart.com/about-bears/reproduction/>.

prey and cooler temperatures and become invasive.³⁷ As brown bears are associated with damage to beehives and agriculture,³⁸ there was a threat of significant harm to Arctos' environment, economy and citizens. Furthermore, prevention costs were relatively non-existent in relation to potential damage. Non-reintroduction was limited to negative socio-cultural impact on Ranvicora, compared to the loss of life, livestock and biodiversity in Arctos.

1.1.2. Reintroduction contravened customary international law by causing transboundary harm within Arctos.

A State is obligated not to precipitate changes in its territory which cause irreparable harm to, or substantially prejudice, another State's legal interests.³⁹ The threshold of harm is determined by balancing the socio-economic utility of an activity against its detrimental effects on the environment.⁴⁰

Ranvicora contravened its obligations under customary international law ("CIL") as grey bears mauled children, and damaged orchards, beehives, and nests of the Trouwborst tern.⁴¹ Irreparable harm to Arctos' interests was imminent as the bears were likely to cause further deaths, and extinction of IUCN-protected bees⁴² and the endemic Trouwborst tern,⁴³ whereas grey bears, although endangered, exist in Aloysius and Paddington.⁴⁴ The threshold of harm was satisfied as the loss of life in Arctos and extensive harm to its environment and economy outweighed the cultural significance of grey bears to Ranvicora.

³⁷Darryl Fears, As Ice Melts, Polar Bears Migrate North, WASHINGTON POST (accessed Oct. 14, 2019), <https://www.washingtonpost.com/news/speaking-of-science/wp/2015/01/07/as-ice-melts-polar-bears-migrate-north>.

³⁸ Carlos Bautista, *Patterns and Correlates of Claims for Brown Bear Damage on A Continental Scale*, 54 J Appl. Ecol. 282 (2017).

³⁹ Trail Smelter Arbitration (United States v. Canada), 3 U.N. Rep Int'l Arb Awards 1905 (1941).

⁴⁰ Riccardo Pisillo-Mazzeschi, *Transboundary Environmental Interference and the Origin of State Liability*, by R.J.M. Lefeber. Kluwer Law International, The Hague/London/Boston (1996).

⁴¹ Record ¶17.

⁴² IUCN, Nearly One In 10 Wild Bee Species Face Extinction In Europe While The Status Of More Than Half Remains Unknown (Mar. 19 2015), <https://www.iucn.org/content/nearly-one-10-wild-bee-species-face-extinction-europe-while-status-more-half-remains-unknown>.

⁴³ Record ¶17.

⁴⁴ Record ¶10.

1.2. Ranvicora has failed to comply with in-situ conservation practices required under Article 8 CBD.

States are obligated to promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.⁴⁵ A “viable population” faces minimal risk of extinction from demographic fluctuations and environmental variation.⁴⁶ Habitat fragmentation, due to lack of ecological corridors and buffer zones,⁴⁷ increases the vulnerability of species by reducing the habitat available and limiting opportunities for dispersal, migration and genetic exchange.⁴⁸

Ranvicora failed to maintain viable grey bear populations in their natural surroundings by failing to establish a territorial system of ecological stability. Although the reintroduction site was bordered by development, Ranvicora failed to establish ecological corridors to facilitate the migration of grey bears from degrading habitats, or from areas threatened by increasing temperatures and decline in prey.⁴⁹ Furthermore, Ranvicora failed to sustainably develop areas adjacent to the reintroduction site by not establishing buffer zones. Ranvicora did not consider bioclimatic variables, such as densities, vegetation characteristics and prey population, between the initial habitat and the reintroduction site. This imposed excessive pressures on the grey bear population, compelling grey bears to migrate poleward into Arctos.⁵⁰

⁴⁵ CBD, Article 8.

⁴⁶ IUCN, *Guidelines for Protected Area Management Categories*, (1994).

⁴⁷ Decision IV/7, *Forest Biological Diversity*, Adopted by the Conference of the Parties to the CBD at its Fourth Meeting, UNEP/CBD/COP/4/27, Annex ¶ 52.

⁴⁸ CBD Technical Series No. 23 *Review of Experience with Ecological Networks, Corridors and Buffer Zones*.

⁴⁹ *Id.*

⁵⁰ Historical range, extirpation and prospects for reintroduction of saigas in China, Cui et al.

1.3. Ranvicora contravened the precautionary principle by failing to consider the adverse effects of reintroducing grey bears.

Considering the unpredictable migration patterns of alien species, intentional introductions should be based on the precautionary approach.⁵¹ Scientific uncertainty about implications of IAS should not be invoked for postponing or failing to take appropriate eradication and control measures.⁵² Priority should be given to preventing the introduction of IAS between States.⁵³ “Alien species” occur outside their past, or present, natural range or dispersal without human introduction.⁵⁴ The foreseeability of harm, in the sense of an objectively determined risk, is sufficient to engage the State’s duty of regulation and control.⁵⁵

The grey bears are “alien species” within Arctos as they only lived in Ranvicora, Paddington and Aloysius, and no fossil records of grey bears exist in Arctos.⁵⁶ Therefore, Arctos is not within the past or present natural range of the grey bears, and but for Ranvicora’s reintroduction, grey bears would not be found in Arctos. As grey bears are listed on **Appendix 1 CMS**⁵⁷ and migrate to feeding areas for hibernation, their cross-territory migration was foreseeable.⁵⁸ Furthermore, Ranvicora ought not to have discounted poleward migration trends exhibited by grey bears in Suredia due to scientific uncertainty.⁵⁹ The foreseeability of harm was sufficient so that reintroduction should not have been undertaken in northern Ranvicora.

⁵¹ Decision VI/23, Adopted by the Conference of the Parties to the CBD at its Sixth Meeting, U.N. Doc. UNEP/CBD/COP/DEC/VI/23, (Apr 7-19, 2002).

⁵² Rio Declaration on Environment and Development, UN Doc. A/CONF.151/126, Principle 15 (14 June 1992) [hereinafter “Rio Declaration”]; see also United Nations Framework Convention on Climate Change, 9 May 1992, 17771 U.N.T.S. 107, Article 3.

⁵³ Decision VI/23, *supra* note 51, Guiding Principle 2.

⁵⁴ IUCN Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species (IUCN Guidelines) Published by the Species Survival Commission of IUCN, Gland, Switzerland 2000; Decision V/23 of the Convention of the Parties.

⁵⁵ *Corfu Channel (U.K. v Alb)*, Merits, 1949 I.C.J. Rep 4, (Apr.9).

⁵⁶ Record ¶10.

⁵⁷ Record ¶9.

⁵⁸ Karen Noyce, *Seasonal migrations of black bears (Ursus americanus): Causes and consequences*, 65 Behavioral Ecology and Sociobiology 823 (2011).

⁵⁹ Record ¶13.

1.4. Ranvicora contravened its due diligence obligations to notify and consult Arctos prior to reintroduction.

1.4.1. Ranvicora violated Article 5 CBD, in failing to cooperate for the conservation and sustainable use of biodiversity.

States are required to collaborate with neighbouring countries to address cross-territory threats of migratory IAS to biodiversity.”⁶⁰ This duty includes exchanging information,⁶¹ and jointly evaluating environmental impacts.⁶²

Ranvicora failed to exchange information prior to reintroduction. Its sole consideration was a limited national EIA. As the grey bears were likely to become an IAS, Ranvicora violated its duty to cooperate. Ranvicora’s failure to cooperate is also evidenced in its responses to diplomatic notes, which were characterized by denial, disinterest and the shifting of responsibility.

1.4.2. Ranvicora contravened its obligations under customary international law to notify and consult.

States are required to notify and consult in good faith to determine the appropriate measures to prevent or mitigate any risks.⁶³ Subsequent to prior notification and an EIA,⁶⁴ States must send a more detailed notification, regarding the nature of the activity, its risks, and potential injury to neighbouring States.⁶⁵

⁶⁰ VI/23, supra note 51, ¶10 (g).

⁶¹ MOX Plant Case (Ireland v. U.K.), ITLOS Case No. 10 (Dec. 3 2001).

⁶² Fisheries Jurisdiction Case (U.K. v. Iceland), Merits, ICJ Reports 1974, ¶72. (July 25).

⁶³ 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, I.C.J. Reports 2015, ¶104 (Dec 16).

⁶⁴ McIntyre, The World Court’s Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay, (2011).

⁶⁵ Lac Lanoux Arbitration (France v Spain), Judgment, (1957) 12 R.I.A.A. 281 (Nov. 16).

Ranvicora violated its duty to preliminarily notify Arctos and to provide detailed notification upon completing the EIA. Arctos was denied the opportunity to determine appropriate measures to prevent or mitigate risks that grey bears posed.

1.5. Ranvicora failed to consider adverse environmental consequences on Arctos by conducting a substandard national EIA.

1.5.1. Ranvicora violated Article 14(b) CBD by disregarding impacts on biodiversity.

An EIA should show that anticipated benefits of reintroduction should strongly outweigh any adverse effects on neighboring States and related costs.”⁶⁶ In accounting for environmental consequences, States must consider the interaction between a species and its environment.⁶⁷ For large carnivores, this includes its survival requirements and effects on the environment.⁶⁸

Ranvicora’s EIA cannot satisfy these requirements. The decision to reintroduce grey bears in northern Ranvicora was premised on it being the largest remaining habitat.⁶⁹ Ranvicora failed to consider whether this region was part of the grey bear’s historic range. Therefore, Ranvicora neglected to effectively ascertain whether the area chosen had sufficient prey species, cover and den-sites for grey bears. Ranvicora’s failure to ensure that the environmental consequences of reintroduction did not have significant adverse effects on Arctos constituted a violation of the CBD.

⁶⁶ V/8, supra note 35, Guiding Principle 10.

⁶⁷ Guidelines for Population Level Management Plans for Large Carnivores Contract nr. 070501/2005/424162/MAR/B2 Linnell JDC, Guidelines For Population Level Management Plans For Large Carnivores In Europe. A Large Carnivore Initiative For Europe Report Prepared For The European Commission (Contract 070501/2005/424162/MAR/B2) (July 1, 2008), [hereinafter “2008 Guidelines”].

⁶⁸ Id.

⁶⁹ Record ¶13.

1.5.2. Considering the insufficiency of the EIA, Ranvicora did not discharge its obligations regarding the conduct of its EIA.

1.5.2.1 Ranvicora violated Article 11(2) Bern Convention and customary international law as the EIA ought to have been transnational.

To reintroduce grey bears, a study must first be conducted that considers the experiences of other States to establish that reintroduction would be acceptable.⁷⁰ Prior assessment of transboundary impacts is a requirement of general international law.⁷¹ An EIA must be conducted where there is risk that proposed activities may have significant adverse consequences across territories,⁷² with respect to socio-economic, cultural and human-health impacts.⁷³

A preliminary assessment of the possibility of harm must be undertaken.⁷⁴ If the assessment determines that a risk exists, the State must undertake an EIA including corollary procedural obligations such as the duty of notification.⁷⁵ Finally, there must be post-project assessment.⁷⁶ The assessment of risk must relate the risk to the possible harm to which the risk could lead.⁷⁷ Furthermore, there must be assessments of the project's potential harmful transboundary effects on people, property and environment of other States.⁷⁸

⁷⁰ Bern Convention on the Conservation of European Wildlife and natural habitats, Art 11 (2), Jan. 6 1982, ETS No. 104, [hereinafter "Bern Convention"].

⁷¹ Pulp Mills on the River Uruguay (Arg. V Uru.), Judgment, 2010 I.C.J. 1, 14 (Apr. 20).

⁷² CBD, Article 14.; Pulp Mills, supra note 71, ¶84.

⁷³ R. Sloomweg, *Biodiversity in EIA and SEA Background Document to CBD Decision VIII/28: Voluntary Guidelines on Biodiversity-Inclusive Impact Assessment* (April 2006), at chapter 5.

⁷⁴ Nicaragua v Costa Rica, supra note 63, ¶104 Judgement of Judge Bandhari.

⁷⁵ Id.

⁷⁶ Pulp Mills, supra note 71.

⁷⁷ ILC Rep. (2001) Document A/56/10: Report of the International Law Commission on the work of its fifty-third session (Aug. 2001) pp. 405, 7.

⁷⁸ International Law Commission, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (2001), Art 7, para (8).

The necessity of a transnational EIA was exacerbated by known poleward migration of grey bears in Suredia,⁷⁹ and the contiguous border of Arctos and Ranvicora.⁸⁰ As Ranvicora failed to comply with its obligations to consider other States' experiences, Ranvicora failed to effectively ascertain whether reintroduction would be acceptable. The foreseeable risks, that grey bears would have preyed upon Arctos' animals, killed civilians and negatively affected biodiversity, necessitated a transnational EIA.

1.5.2.2. Ranvicora violated its obligation to continuously monitor the effects of reintroduction.

Monitoring is required after a project has started, and is fundamental in controlling former EIA predictions and providing information to determine whether further measures are necessary.⁸¹ This requires continuing assessment and evaluation throughout the project.⁸² Continuous monitoring is necessary, as a prior EIA cannot anticipate every possible environmental danger.

Following reintroduction, another EIA should have been completed. Monitoring mechanisms fell short of requisite standards as only half of the grey bears were fitted with trackers.⁸³ Additionally, there was no procedure to account for the bears' reproduction. As reintroduction encroached into Arctos, continuous monitoring was necessary due to extensive environmental variables.

1.6. Ranvicora's extensive habitat destruction and deforestation violated its climate change obligations.

Countries should conserve and enhance sinks and reservoirs of greenhouse gases, including forests.⁸⁴ Parties must take precautionary measures to mitigate adverse effects of climate change and

⁷⁹ Record ¶13.

⁸⁰ Clarification Question 9.

⁸¹ ILC Rep. A/56/10, supra note 77, p. 420.

⁸² Gabčíkovo-Nagymaros Project, (Hungary v. Slovakia), 1997 I.C.J. 88 (September 25th).

⁸³ Record ¶14.

⁸⁴ Paris Agreement, Art. 5, U.N. FCCC/CP/2015/L.9/REV.1 (12 Dec. 2015)

scientific uncertainty cannot justify postponing such measures.⁸⁵ Grey bears are particularly vulnerable to climate change.⁸⁶ Human land-use constrains the ability of grey bears to modify migratory routes and may increase the stress induced by climate change.⁸⁷

Ranvicora has engaged in extensive habitat destruction and deforestation to facilitate development, thereby increasing carbon emissions.⁸⁸ Ranvicora was obligated to mitigate adverse effects of climate change by desisting from deforestation, pursuant to the precautionary principle.⁸⁹

In response to rising temperatures, the black bear population move more than 10 miles per decade.⁹⁰ Similarly, in response to the deforestation and increased temperatures attributable to Ranvicora, grey bears migrated poleward into Arctos in pursuit of cooler temperatures and increased forest coverage.

1.7. Ranvicora is obligated to compensate Arctos for the harm caused by reintroducing grey bears.

1.7.1. Ranvicora committed an internationally wrongful act.

An internationally wrongful act is conduct consisting of an action or omission attributable to a State under international law and constitutes a breach of international obligations.⁹¹ An act or omission is attributable to the State if executed by an organ of the State.⁹² A breach exists when an act of that

⁸⁵ United Nations Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107, Article 3(3).

⁸⁶ Zoological Society of London, Effects of Climate Change on the Vulnerability of Migratory Species, UNEP/CMS/ScC17/Inf.9 (June 2011).

⁸⁷ David S. Wilcove, *Animal Migrations: An Endangered Phenomenon*, *Science Technology* 71-78 (2008).

⁸⁸ United Nations Forum on Forests, Forests and Climate Change (March 2019).

⁸⁹ CMS resolution 9.7: Climate Change Impacts on Migratory Species, Adopted by the Conference of the Parties to the CMS at its Ninth Meeting, (Feb 2017).

⁹⁰ National Geographic, Migratory Species and Climate Change (2017) *available at* <https://www.nationalgeographic.com/news/2017/04/climate-change-species-migration-disease/>.

⁹¹ International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Article 2, [hereinafter “ARISWA”].

⁹² Id. Article 4.

State contravenes its international obligations.⁹³ Mere damage is insufficient to render a State liable.⁹⁴ To be legally relevant, the damage should be greater than mere nuisance or insignificant harm, which is normally tolerated.⁹⁵

The reintroduction, which resulted in significant harm to Arctos, was initiated by the Government of Ranvicora.⁹⁶ The harm to the environment, economy and civilians of Arctos is greater than mere nuisance as Arctos suffered severe losses. Reintroduction violated Ranvicora's international obligations under the CBD, Bern Convention and customary international law.

1.7.2. Ranvicora is liable to compensate Arctos.

An injured State is entitled to compensation, from the State which has committed an internationally wrongful act, for resultant damage.⁹⁷ A State is liable to compensate another to remedy consequences of illegal acts and to re-establish the situation which would have existed had the act not been committed.⁹⁸

Ranvicora's failure to comply with its international obligations resulted in irreparable damage to Arctos, thereby requiring Ranvicora to compensate Arctos.

⁹³ Id. Article 12.

⁹⁴ Nicholas de Sadeleer, *Environmental Principles From Political Slogans to Legal Rules*, 67, (Oxford University Press, 2002).

⁹⁵ Xue Hanqin, *Transboundary Damage In International Law*, CAMBRIDGE STUDIES IN INTERNATIONAL AND COMPARATIVE LAW 164 (2003), p. 40.

⁹⁶ Record ¶11.

⁹⁷ Gabčíkovo-Nagymaros, *supra* note 82.

⁹⁸ *Factory at Chorzow (Germany v. Poland)* 1928 P.C.I.J. (ser. A) No. 17 (June 28th).

2. Arctos has not violated its international obligations under customary international law and treaty law, with respect to the reintroduction of grey bears.

2.1. Arctos has not caused transboundary harm to Ranvicora.

2.1.1. Arctos' protective measures did not violate Article 3 CBD.

Article 3 CBD,⁹⁹ empowered Arctos to exploit its resources subject to the responsibility to not damage the environment of other States. This obligation should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁰⁰ This obligation must be construed in light of the CBD’s fundamental objective of holistically conserving biodiversity.¹⁰¹ The CBD’s Preamble reaffirms State responsibility for sustainable development, thereby implying the scope for compromises concerning measures to achieve conservation of large carnivores, in light of human interests.¹⁰²

Arctos has balanced its duty to conserve biodiversity with its responsibility to not harm Ranvicora’s environment. Considering the CBD’s object and purpose, a carte blanche prohibition of all harm to Ranvicora was unreasonable. Total prohibition would have resulted in the extinction of Arctos’ biodiversity and the continued threat to the physical security of Arctos’ citizens.

Prior to any defensive actions, Arctos attempted to cooperate with Ranvicora to address the negative effects of reintroduction.¹⁰³ Arctos also furthered the CBD’s aim by limiting its response to the grey bears that directly and actively threatened its biodiversity. This response was necessary and

⁹⁹ CBD, Article 3.

¹⁰⁰ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Art. 31.1.

¹⁰¹ CBD, Article 3.

¹⁰² Guidance Document on the Strict Protection of Animal Species of Community Interests under the Habitats Directive, European Commission Working Group, 92/43/EEC (2007).

¹⁰³ Record ¶18.

proportionate as Arctos was required to protect its IUCN-protected bees¹⁰⁴ and the endemic Trouwborst tern, which may become extinct.

2.1.2. Arctos did not cause transboundary harm, under customary international law.

2.1.2.1. Arctos' protective measures did not infringe Ranvicora's rights.

States have the sovereign right to exploit their own resources in accordance with the Charter of the United Nations and the principles of international law, as well as the responsibility to ensure that activities within their jurisdiction do not impinge upon the rights of other States.¹⁰⁵ Notably, a claim of transboundary harm demands that a boundary lies at the heart of the contention.¹⁰⁶

The emergency regulation and poisoned carcasses neither harmed Ranvicora's environment nor infringed upon its rights. As transboundary harm excludes activities which cause harm only in the territory of the State within which the activity is undertaken,¹⁰⁷ the necessary killing of grey bears in Arctos was excluded from its ambit.

2.1.2.2. Arctos' protective measures did not cause significant or substantial harm.

To breach the no-harm principle, damage should surpass mere nuisance or insignificant harm which is normally tolerated.¹⁰⁸ The harm must objectively lead to detrimental effects on human health, industry, property, environment or agriculture in other States.¹⁰⁹

The necessary killing of grey bears was limited to circumstances where there was a direct threat to biodiversity conservation and human life. Based on an objective assessment of the circumstances,

¹⁰⁴ Bee Species Face Extinction, supra note 42.

¹⁰⁵ Corfu, Supra, note 55.

¹⁰⁶ Hanqin, supra note 95.

¹⁰⁷ Draft Articles on Prevention of Transboundary Harm, supra note 78.

¹⁰⁸ Hanqin, supra note 95.

¹⁰⁹ ILC Rep. A/56/10, supra note 77, pp. 391-392.

the mitigation strategies undertaken to preserve Arctos' biodiversity must be construed as harm which is normally tolerated and justifiable.

2.1.2.3. Arctos was not required to prevent all harm.

Arctos was not required to guarantee that significant harm was totally prevented in cases where it was not possible to do so.¹¹⁰ Accordingly, what is required is for a State to “exert its best possible efforts to minimize the risk.”¹¹¹ A State’s failure to take reasonable steps to prevent harm triggers the obligation.¹¹²

Ranvicora was not obligated to ensure that its actions did not cause any significant harm, as this was not possible without compromising the lives of its citizens and its biodiversity. Arctos has satisfied its obligations as it has exerted its best possible efforts to minimize the risks of harm by attempting to cooperate and consult with Ranvicora and by adopting the most restrictive approach to the killing of bears.

2.2. Arctos adhered to in-situ conservation practices under Article 8 CBD to protect its IUCN-protected bees and endemic Trouwborst tern.

Arctos was not obligated to facilitate in-situ conservation of grey bears and has upheld its obligations under the CBD.

2.2.1. Arctos adhered to its obligations to eradicate alien species which threatened ecosystems, habitats or species under Article 8(h) CBD.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Id.

2.2.1.1 The grey bears were an invasive alien species in Arctos.

According to the **IUCN Guidelines**,¹¹³ an alien species is one that occurs outside its past or present natural range or dispersal, being the range it could occupy without direct or indirect introduction by humans.¹¹⁴ An IAS is an alien species that threatens ecosystems, habitats and other species.¹¹⁵

Grey bears were “alien species” within Arctos, as there were no historic records of grey bear presence in Arctos.¹¹⁶ Further, grey bears can be classified as an IAS as grey bears have caused extensive harm in Arctos. Grey bears killed extensive livestock¹¹⁷ and destroyed orchards,¹¹⁸ beehives and nests of the Trouwborst Tern,¹¹⁹ thereby increasing the likelihood of extinction of the bees and tern. Arctos did not breach its obligations under the CBD by its necessary killing of grey bears.

2.2.1.2. Arctos has complied with its obligation to eradicate the grey bears, pursuant to Article 8(h) CBD.

Eradication is recommended to address the introduction of IAS, especially in the early stages of invasion, when populations are small and localized.¹²⁰ As grey bears were IAS, Arctos was obligated to eradicate them as they threatened ecosystems, habitats and species. Arctos has complied with its international obligations under the CBD to eradicate alien species by laying out poisoned carcasses and issuing an emergency regulation permitting citizens to shoot any grey bears spotted within Arctos.

¹¹³ Decision V/23, supra note 51.

¹¹⁴ IUCN Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species, Approved by the 51st Meeting of the IUCN Council, (Feb. 2000).

¹¹⁵ CBD, Article 8(h).

¹¹⁶ Record ¶10.

¹¹⁷ Record ¶17.

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Decision V/23, supra note 51, Guiding Principle 13.

2.3. Arctos did not violate the Convention on Migratory Species as it was not obligated to conserve grey bears beyond its historic range.

2.3.1. Arctos owed no obligation under Article 4(a) CMS, as Arctos was not a range state for grey bears.

““Range state” in relation to a particular migratory species means any State that exercises jurisdiction over any part of the range of that migratory species.”¹²¹ “Range” means all areas of land or water that a migratory species inhabits, stays in temporarily or crosses on its normal migration route.¹²²

Grey bear migration has historically been restricted to Ranvicora.¹²³ Arctos was not within the normal range of the grey bears as there was no evidence that Arctos formed part of their normal migration route.¹²⁴ The normal migration route of bears involves movement within areas less than 40 kilometers in diameter.¹²⁵ This placed Arctos outside of the normal migration route as the Arctos-Ranvicora border is not less than 50 kilometers away from the reintroduction point.¹²⁶ Arctos was not a range state for the grey bears.

2.3.2. CMS Resolution 12.21 was not binding on Arctos.

CMS Resolutions are not binding and cannot impose mandatory obligations on Member States. **CMS Resolution 11.6** explains that Resolutions are intended to provide guidance with respect to interpretation and implementation of the Convention.¹²⁷

¹²¹ Convention on the Conservation of Migratory Species of Wild Animals (June. 23, 1979), 1651 U.N.T.S. 333, [hereinafter “CMS”], Art 1 (h).

¹²² CMS, Art 1 (f).

¹²³ Record ¶10.

¹²⁴ Id.

¹²⁵ Lynn Rogers, Bears and Other Carnivores, in *Fantastic Journeys: The Marvels of Animal Migration*, 184-193 (1991).

¹²⁶ Record ¶14.

¹²⁷ CMS resolution 11.6: Review of Decisions, Adopted by the Conference of the Parties to the CMS at its 12th Meeting, (October 2017).

2.3.3. CMS Resolution 12.21 did not obligate Arctos to conserve grey bears since migration was not climate-induced.

The migration of the grey bears northward was not climate-induced but the result of other factors. Migration by carnivores is dictated primarily by movements of prey and as such, migration tends to be less predictable.¹²⁸ Furthermore, bioclimatic variables, such as den-sites, vegetation characteristics and prey population, likely imposed excessive pressures on the grey bear population. These cumulative factors compelled the grey bears to migrate polewards into Arctos¹²⁹ and therefore, the elements of climate-induced range shift under **Resolution 12.21** were not satisfied.

2.3.4. CMS Resolution 12.21 did not impose a strict obligation on Arctos to conserve grey bears since Arctos was also obligated to conserve its domestic biodiversity.

The purpose of a treaty shall be interpreted to include its Preamble.¹³⁰ The CMS must be construed according to its Preamble which recognizes “that wild animals in their innumerable forms are an irreplaceable part of the earth's natural system which must be conserved for the good of mankind.”¹³¹

Therefore, all animals, regardless of their CMS-protection status, ought to be conserved. Arctos fulfilled its obligation to balance its duty to conserve its bees and Trowberst tern, which were directly threatened by the grey bears, with its obligation to conserve grey bears. Since grey bears were solely of cultural value to Ranvicora and existed elsewhere, Arctos’ response was justified as the bees were critical to its food security and the Trowborst tern was endemic.

¹²⁸ Lynn Rogers, Bears and Other Carnivores, supra note 125.

¹²⁹ Shaopeng Cui et al, Historical range, Extirpation and Prospects for Reintroduction of Saigas in China, Vol 7, 44200 (2017).

¹³⁰ VCLT, supra note 100, Art. 31.

¹³¹ Preamble, CMS.

2.3.5. Arctos' response was permissible under Article III (5)(d) CMS.

Exceptions to deliberately taking species protected under Appendix 1 CMS include extraordinary circumstances, provided that such exceptions are precise as to content, limited in space and time and such taking should not operate to the disadvantage of the species.¹³² Notably, the conditions precedent will be satisfied where the legislation itself does not comply with the CMS but its implementation does.¹³³

2.3.5.1. The emergency regulation was justified by the extraordinary circumstances.

Extraordinary circumstances justified the emergency regulation as Ranvicora has failed to accept responsibility for the grey bears. The bears have extensively harmed Arctos' flora and fauna,¹³⁴ likely culminating in future extinction of bees and Trouwborst terns. Furthermore, the bears have attacked and killed children.¹³⁵ These attacks have negatively impacted upon farming. This likely had damaging economic impacts and precipitated numerous social ills. Thus, the circumstances were extraordinary to justify the emergency regulation sanctioning the taking of grey bears.

¹³² CMS, Article III (5)(d).

¹³³ Conference of the Parties, Report on the Implementation of the Concerted Action for the Whale Shark (Rhincodon Typus (Prepared by Sea Shepherd Legal), Oct. 10 2019, UNEP/CMS/COP13/Doc.28.1.7a, 2020.

¹³⁴ Record ¶17.

¹³⁵ Record ¶21.

2.3.5.2. The emergency regulation's implementation satisfied the requirements of being precise as to content and limited in space and time.

Legislation applying Article III(5)(d) has been critiqued for failing to implement the narrow scope of exceptions to the prohibition against taking.¹³⁶

Though the emergency regulation lacked precision in relation to content, space and time, its implementation satisfied the requirements under Article III(5)(d) CMS, thereby facilitating Arctos' compliance with the CMS. In its implementation, there was precision as to content and space since killing was limited to bears spotted within Arctos. Finally, the absence of retroactive effect provided a limit regarding time.

2.3.5.3 The emergency regulation did not disadvantage the grey bear species.

The favourable conservation status of a species ought to be determined at a global level.¹³⁷ Where the population in another State is healthy and unlikely to suffer detrimental effects from a derogation, even if the picture at the biogeographic level is less good, the derogation would naturally be easier to justify.¹³⁸

In light of the thriving bear populations in Aloysius and Paddington and the reproductive patterns of the bears in Ranvicora, the bear population likely satisfied the required favourable conservation status. Furthermore, derogation was justifiable since the grey bear population was healthy and capable of adapting to harsh conditions.¹³⁹ It was not strictly necessary for the grey bear population to be at a favourable conservation status for a derogation to be permissible.¹⁴⁰

¹³⁶ Report on the Implementation of the Concerted Action for the Whale Shark, *supra* note 133.

¹³⁷ Report on the Conservation Status and Threats for Wolf (*Canis Lupus*) in Europe, Council of Europe, T-PVS/Inf 16, (2005).

¹³⁸ Strict Protection of Animal Species, 92/43/EEC, *supra* note 102.

¹³⁹ Lynn Rogers, Bears and Other Carnivores, *supra* note 125.

¹⁴⁰ Strict Protection of Animal Species, 92/43/EEC, *supra* note 102.

2.4. Arctos' conservation practices complied with Article 1 Bern Convention.

The aims of the Convention are to conserve wild flora and fauna, especially those species and habitats whose conservation requires cooperation between States.¹⁴¹ Arctos, by seeking to conserve its endangered Trouwborst tern and natural habitats, furthered the aims of the Bern Convention and was therefore, in compliance with its duties. In these circumstances, fulfilling the aims of the Bern Convention would have required Arctos to adopt and implement measures geared towards the eradication of bears to quell threats to its biodiversity.

2.5 Arctos has maintained the population of wild flora and fauna pursuant to Article 2 Bern Convention.

The obligation to maintain bear population at a level which corresponds to ecological, scientific and cultural requirements does not prescribe a minimum or maximum requirement.¹⁴² Given the Convention's goals, this level "can safely be assumed to be well above that at which a species is in danger of extinction."¹⁴³ Furthermore, population requirements are not specific to countries and thus, a transboundary approach that examines global population levels can be adopted.¹⁴⁴

Thus, although a policy was adopted to effectively decrease the number of grey bears in Arctos, this did not contravene the Bern Convention. In the absence of historic records of grey bears in Arctos, there were no ecological, scientific and cultural requirements for the population level. Furthermore, Arctos' eradication efforts were limited to the confines of Arctos and did not threaten

¹⁴¹ Bern Convention, Article 9.

¹⁴² Arie Trouwborst, *Norway's Wolf Policy and the Bern Convention on European Wildlife: Avoiding the "Manifestly Absurd"*, 20:2 *Journal Of International Wildlife Law & Policy* 155-167 (2017).

¹⁴³ Bowman et al; Chris W. Backes, Annelies A. Freriks and Jan Robbe, *Hoofdlijnen Natuurbeschermingsrecht* (2nd ed., 2009), 34.

¹⁴⁴ 2008 Guidelines.

the global population with extinction.¹⁴⁵ Thus, an appropriate transboundary population-level was maintained so that Arctos was not in violation of the Bern Convention.

The balancing exercise was therefore important as the Trouwborst tern was an endangered endemic species in Arctos and as such, there were ecological, scientific and cultural requirements for its population. Compromises concerning the measures adopted to achieve conservation of large carnivores were permissible to take other interests into accounts.¹⁴⁶ Thus, Arctos was required to eradicate grey bears to limit the threats to the survival of the Trouwborst tern population.

2.6. Arctos' protective measures were permissible, thereby complying with Article 9 Bern Convention.

Article 9 exempts a State from the prohibition against killing certain fauna, provided that there is no other satisfactory solution and that the exception will not be detrimental to the population's survival.¹⁴⁷ **Article 8** stipulates that “in cases where, in accordance with **Article 9**, exceptions are applied to species specified in Appendix II, States shall prohibit usage of indiscriminate means of killing.”

2.6.1 Arctos was within the permissible exceptions.

These exceptions include preventing serious damage to agriculture and other property and furthering interests of public health and safety.¹⁴⁸ “Serious” must be evaluated in terms of the intensity and duration of the prejudicial action, the direct or indirect links between the action and the results, and the scale of the destruction or deterioration committed.¹⁴⁹ “Serious” does not necessarily mean

¹⁴⁵ Norway's Wolf Policy, supra note 142.

¹⁴⁶ 2008 Guidelines.

¹⁴⁷ Bern Convention, Article 9.

¹⁴⁸ Directorate of Democratic Governance, Culture and Diversity Resolution, Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention No. 2, ¶8.

¹⁴⁹ Id. ¶6.

that the damage was widespread but the item of property affected may cover only a limited geographical area or even a particular farm or group of farms.¹⁵⁰

Exceptional circumstances arose and limited the scope of sanctioned killings to the direct threat posed by grey bears, thereby supporting that the killings were not indiscriminate and in contravention of **Article 8**. This element was satisfied as the attacks on flora, fauna, and citizens within Arctos have occurred over a lengthy period, throughout numerous farms in Arctos, were of a severe nature and significantly prejudiced the people of Arctos.

2.6.2. Considering the urgency of threats of harm, Arctos had no other satisfactory solutions.

The existence of another satisfactory solution should be appreciated by considering alternatives and selecting one with the least adverse effect on the species.¹⁵¹ The exceptions should be proportional to damage suffered. Where an isolated farm sustains damage, killing of a species over a very wide area is unjustified, unless damage could extend to other areas. It is sufficient if serious damage in all likelihood will occur.¹⁵²

Arctos adopted lethal control as it offered utility. Considering the widespread harm to human life and significant environmental damage, there were no other satisfactory solutions. Alternative forms of control were likely to fail due to Ranvicora's lack of cooperation and the likelihood that, given the migratory nature of the grey bears, damage was likely to extend to other areas. Arctos was therefore not in breach of the Bern Convention.

¹⁵⁰ Id. ¶16.

¹⁵¹ Id. ¶16.

¹⁵² Id. ¶16.

2.6.3. The exception was not detrimental to the population's survival.

In the case of transboundary populations, their entire habitat and subpopulations should be considered in light of its population size, distribution, habitat and future prospects.¹⁵³ A transboundary approach to the grey bear population allowed for the usage of lethal control in exceptional circumstances as the populations in Aloysius and Paddington¹⁵⁴ were unimpacted. Furthermore, the reproductive patterns of the bears reintroduced by Ranvicora¹⁵⁵ likely enable the bear population to sustain itself, without significant detriment.

¹⁵³ Id. ¶16.

¹⁵⁴ Record ¶13.

¹⁵⁵ Record ¶15.

CONCLUSION AND PRAYER

The Applicant, the Federal States of Arctos, respectfully requests the ICJ to adjudge and declare that:

1. The Republic of Ranvicora violated its international treaty and customary obligations with respect to its reintroduction project.
2. The Federal States of Arctos was justified in its protection of its citizens against grey bears, and thus, has not violated its international obligations.
3. The Republic of Ranvicora is to cease the harmful re-introduction project.
4. The Republic of Ranvicora is to pay all compensation due to Arctos.

RESPECTFULLY SUBMITTED

AGENTS OF THE APPLICANT