

IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS



QUESTIONS RELATING TO
RESPONSES TO HIGHLY PATHOGENIC AVIAN INFLUENZA
AND TRANSBOUNDARY WETLANDS

FEDERAL STATES OF AVES

APPLICANT

V.

REPUBLIC OF RENAC

RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE 22ND STETSON MOOT COURT COMPETITION 2017-2018

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QUESTIONS PRESENTED

- I.** WHETHER RENAC'S RESPONSE TO HIGHLY PATHOGENIC AVIAN INFLUENZA VIOLATED INTERNATIONAL LAW.
- II.** WHETHER RENAC'S DELISTING OF THE ADEGURI MARSH AS A RAMSAR SITE VIOLATED INTERNATIONAL LAW.

STATEMENT OF JURISDICTION

Under Article 36(1) of the Statute of the International Court of Justice,¹ the Federal States of Aves (“Aves”) and the Republic of Renac (“Renac”) refer to the International Court of Justice (“Court”) the questions of international law stated in Annex A of the Special Agreement Between the Federal States of Aves and the Republic of Renac for Submission to the International Court of Justice of Differences Between Them Concerning Questions Relating to Responses to Highly Pathogenic Avian Influenza and Transboundary Wetlands (“Special Agreement”).

¹ “The jurisdiction of the Court comprises all cases which the parties refer to it.”

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STATEMENT OF FACTS

Aves and Renac are neighboring countries with primarily agricultural economies, based particularly on poultry production. Renac is a developing country, with a per capita GDP of US \$1,500, whereas Aves is a developed country, with a per capita GDP of US \$17,500, more than eleven times wealthier.²

Aves and Renac share a 20,000-hectare transboundary wetland, the Adeguri Marsh.³ In 2000, Aves and Renac designated their respective portions of the marsh as a Wetland of International Importance (Ramsar Site) under the Ramsar Convention.⁴ In 2008, they jointly listed the marsh as a Transboundary Ramsar Site, which they manage by informal cooperation.⁵

Near the marsh in both Aves and Renac are several large, privately owned commercial poultry facilities and hundreds of small-scale, privately owned subsistence poultry farms.⁶

In 2009 and 2012, Aves and Renac experienced outbreaks of highly pathogenic avian influenza (H5NX), localized to domestic poultry facilities near the marsh.⁷ Both states culled hundreds of thousands of domestic chickens to contain the outbreaks. The source of the outbreaks was unknown. Neither state reported human or waterbird infections.⁸

In late December 2013, Aves reported an outbreak of H5NX in a commercial poultry facility.⁹ Three weeks later, Renac experienced a severe outbreak of H5NX, which infected domestic poultry in Renac.¹⁰ The outbreak seems to have originated from the poultry facility in Aves and been transferred to Renac through cross-infection between domestic poultry and wild waterbirds near the marsh.¹¹ Several large commercial poultry facilities and at least ten

² Record ¶1.

³ Record ¶9.

⁴ *Id.*

⁵ *Id.*

⁶ Record ¶10.

⁷ Record ¶15.

⁸ *Id.*

⁹ Record ¶16.

¹⁰ *Id.*

¹¹ *Id.*

small poultry farms in Renac were infected.¹² Approximately 500 wild waterbirds, including around 150 of an estimated 600 blue-crowned cranes, were found dead near the Adeguri Marsh. Testing found them to be infected.¹³

Renac then notified Aves that it would cull domestic chickens in the poultry facilities and farms near the marsh in Renac, and potentially infected wild waterbirds in and around Renac's portion of the marsh.¹⁴ On 20 January 2014, Aves objected. On 30 January 2014, Renac responded, recognizing Aves's objections but explaining the urgent necessity of its response.¹⁵

On 2 February 2014, Renac contained the outbreak by culling infected domestic poultry and potentially infected wild waterbirds.¹⁶ Several poultry facilities were temporarily closed, the commercial facilities suffered financial losses, and the subsistence farmers and their families suffered food.¹⁷ Four persons in Renac contracted the virus, two of whom died of their infection.¹⁸

In early February 2015, a small outbreak of H5NX occurred in poultry in Aves. Soon after, another severe outbreak of H5NX occurred in Renac.¹⁹ The virus seems to have spread to Renac following drainage from Aves's poultry facilities, contaminating the wetland and cross-infecting the waterbirds in and around the marsh and Renac poultry facilities and farms.²⁰ The outbreak affected several large commercial poultry facilities and at least 15 small local farms, and killed around 250 wild waterbirds, including approximately 50 blue-crowned cranes. Testing found them to be infected.²¹

¹² *Id.*

¹³ *Id.*

¹⁴ Record ¶17.

¹⁵ Record ¶18.

¹⁶ Record ¶19.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Record ¶20.

²⁰ *Id.*

²¹ *Id.*

After this fourth outbreak, Renac notified Aves that it planned to cull the infected domestic chickens and potentially infected wild waterbirds, and dispense disinfectants into the marsh to fight the virus and help prevent its spread.²²

On 9 February 2015, Aves objected to Renac's plans.²³ On 11 February 2015, Renac recognized and addressed Aves's objections, clarifying the urgent need for its actions, and explaining Aves's responsibility for the virus's spread: (1) Renac lacks the financial means to implement the biosecurity measures and relocate the agricultural facilities Aves suggests; (2) Aves *has* the financial means to implement its own suggestions but has not done so; and (3) the 2014 and 2015 H5NX outbreaks that originated in Aves would not have spread to Renac had Aves implemented its own suggestions.²⁴

On 12–14 February 2015, Renac dispensed disinfectants into the marsh, culled infected domestic poultry and wild waterbirds, and temporarily closed some poultry facilities and farms.²⁵ This caused financial losses, and food shortages for the subsistence farmers.²⁶ Eight persons in Renac contracted the virus, three of whom died of their infection.²⁷

Aves began monitoring the ecology of the marsh in February 2015 but found no harm from the disinfectants.²⁸ The water quality in the marsh in Aves has not degraded significantly.²⁹ There are fewer wild waterbirds at the wetland since February 2015, but the cause is unknown.³⁰

Following the 2015 outbreak, Renac considered inexpensive means to prevent future outbreaks, to give Renac greater flexibility to prevent and respond to future outbreaks.³¹ In

²² Record ¶21.

²³ Record ¶22.

²⁴ Record ¶23.

²⁵ Record ¶24.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Record ¶25.

²⁹ *Id.*

³⁰ *Id.*

³¹ Record ¶26.

April 2015, Renac informed the Ramsar Convention Secretariat, Ramsar Contracting Parties, and Aves that Renac was considering delisting the marsh as a Ramsar Site.³² Discussions among the parties followed.³³

In late 2015, Renac conducted an extensive environmental impact assessment of delisting the marsh as a Ramsar Site, involving relevant stakeholders (like Aves citizens and the Government of Aves).³⁴

On 3 March 2016, Renac notified the Ramsar Convention Secretariat, the Ramsar Contracting Parties, and Aves that Renac planned to delist the marsh and proposed a rural 17,000-hectare coastal salt marsh as compensation.³⁵ The coastal salt marsh provides habitat for some wild waterbirds, and Renac considers designating it as a Ramsar Site.³⁶

On 22 March 2016, Aves objected. On 7 April 2016, Renac responded, justifying the urgent necessity of its actions and explaining clearly their legality.³⁷ On 10 May 2016, Aves again objected. On 22 May 2016, Renac responded once more, patiently explaining both the legality and environmental responsibility of its decisions.³⁸

On 4 October 2016, after following the required process and citing urgent national interests, Renac delisted the Adeguri Marsh as a Ramsar Site and Transboundary Ramsar Site.³⁹

³² Record ¶27.

³³ *Id.*

³⁴ Record ¶28.

³⁵ Record ¶29.

³⁶ *Id.*

³⁷ Record ¶30.

³⁸ Record ¶32.

³⁹ Record ¶34.

SUMMARY OF THE ARGUMENT

I. Renac's responses to the 2014 and 2015 H5NX outbreaks complied with international treaty and customary international law. In compliance with the Ramsar Convention, Renac endeavored to conserve the Adeguri Marsh and use it wisely. In compliance with the CMS, CBD, and AEWA, culling poultry and waterbirds and dispensing disinfectants ultimately conserved migratory waterbird species: Renac's fast and effective responses prevented the further spread of H5NX. In compliance with customary international law, Renac caused no transboundary harm to Aves's portion of the marsh.

II. Renac complied with international law when delisting the Adeguri Marsh as a Ramsar Site, and the proposed compensation is adequate. The Ramsar Convention allows delisting Ramsar Sites for urgent national interests, including public health and safety and economic interests. The H5NX outbreaks did threaten and will again threaten the health and safety of Renac's citizens and economy. H5NX spread from Aves to Renac via the marsh. Renac must delist the marsh to manage it in a manner that will prevent further outbreaks. Furthermore, Renac complied with the delisting procedures of the Ramsar Convention, contacting all the required parties. Also, Renac delisted the marsh only after considerable deliberation and consultation, and caused no harm to Aves. Finally, the coastal salt marsh is adequate compensation. First, it is a habitat to water birds, and second, it is larger than the Adeguri Marsh. Renac did its best to offer proper compensation and still shows concern to conserve wetlands.

ARGUMENT

I. RENAC’S RESPONSES TO THE 2014 AND 2015 H5NX OUTBREAKS COMPLIED WITH TREATY LAW AND INTERNATIONAL CUSTOMARY LAW.

A. Renac’s Responses Complied with the Ramsar Convention.

1. Renac complied with the Ramsar Convention Article 3.

Ramsar Convention Article 3 requires Contracting Parties to “formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory.”⁴⁰ This article imposes two obligations: to promote the conservation of listed wetlands, and to use them wisely as far as possible. Renac has done both.

Renac’s responses promoted the conservation of the Adeguri Marsh and used it wisely as far as possible, because Renac’s avian culling and disinfectant dispersion prevented further harm to the marsh’s ecology. “A wise use of wetlands implements ecosystem approaches like sustainable development, which maintain wetlands’ ecological character.”⁴¹ H5NX is highly infectious, however, eventually killing infected birds.⁴² Had Renac not responded quickly, more waterbirds would have become sick and died, and the decomposition of their carcasses in the marsh would have poisoned plankton and other marsh inhabitants, harming the marsh’s ecology. This is called eutrophication, and a eutrophic wetland is called a dead zone. Renac’s responses prevented eutrophication, or harm to the wetland’s ecological character.

Additionally, Renac’s ability to use the wetlands as wisely as possible is limited by its status as a developing country. Renac’s per-capita GDP is US \$1,500, ranking 142 out of 185

⁴⁰ Convention on Wetlands of International Importance especially as Waterfowl Habitat art. 3 (Feb. 2,1971), U.N.T.S No. 14583.

⁴¹ See Ramsar Resolution IX.1 Annex A (2005) on the Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character, Nov.15 2005.

⁴² Record ¶16.

countries.⁴³ Therefore, even if a wealthier country could have responded better to the H5NX outbreak, Renac's responses were the only practicable ones given its means. Also, though Aves criticizes Renac's responses, culling infected animals and those suspected of infection is a common preventive measure adopted in many advanced countries like the Republic of Korea, the United States, Japan, and European countries.⁴⁴

Finally, Aves has not established that Renac's responses violated the conservation or wise use (as far as possible) of the Adeguri Marsh. Aves began monitoring the ecology of the Adeguri Marsh in February 2015 but has been unable to determine any harmful effects of the disinfectants on the wetland.

2. Renac complied with the Ramsar Convention Article 5.

Ramsar Convention Article 5 requires that "the Contracting Parties shall consult with each other." Also, though the parties must consult with each other, they need not obtain the other's permission to act or reach any agreement.⁴⁵ In this case, Renac informed Aves of its plans and consulted with Aves in an ongoing diplomatic dialogue, though Aves and Renac could not agree. Therefore, Renac complied with the Ramsar Convention Article 5.

B. Renac's Responses Complied with the Convention on Biological Diversity.

1. Renac endeavored to conserve the biological diversity of the Adeguri Marsh, which is a fundamental goal of the CBD.

The CBD's aims "are the conservation of biological diversity, the sustainable use of its components."⁴⁶ There are three levels of biodiversity: genetic, species, and ecosystem.⁴⁷ Ecosystem biodiversity refers to the number of ecosystems in an area. Ecosystems are all of

⁴³International Monetary Fund, "per capita", <<http://www.imf.org>> (last visited Oct. 27, 2017).

⁴⁴ Jum-yeong Ahn, Suggestions for Avian Influenza and its solutions, Fusion Research Policy Center, (Mar.6,2017), p.8.

⁴⁵ Cambridge English Dictionary, "consult", <<https://dictionary.cambridge.org>> (last visited oct. 27, 2017).

⁴⁶ Convention on Biological Diversity art. 1 (June 5, 1992), 1760 U.N.T.S. 79.

⁴⁷ Southeast Asian Fisheries Development Center, Aquaculture Department (1994). Genetic, species, and ecosystem diversity. Aqua Farm News, 12(3), 2-3. p.2.

the animals, plants, bacteria, and fungi as well as the physical components of the area. An ecosystem can be as large as a forest or as small as a clump of moss that provides a habitat for plants, microscopic invertebrates, and bacteria.⁴⁸ Waterbirds are a part of the food chain of wetlands; if their fatalities increase, it disrupts the food chain. Thus, stopping the spread of H5NX conserved wild waterbirds, including blue-crowned cranes, conserving the biological diversity of the Adeguri Marsh.

2. Renac complied with the CBD Articles 5 and 8.

CBD article 5 requires that Contracting Parties “shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations.” Renac has done so. First, Renac consistently communicated with Aves before implementing its plans, informing Aves directly of all issues and requesting feedback. Second, since Renac and Aves could not settle their differences by negotiation, Renac agreed to refer the issues to this Court. Therefore, Renac complied with the CBD Article 5.

CBD Article 8(a) through (m) enumerate the actions that Contracting Parties shall take, as far as possible and appropriate. Article 8(d) requires them to “promote the protection of ecosystems, natural habitats and the maintenance of viable population of species in natural surroundings.” Viewed long-term, Renac’s culling of infected waterbirds protected the population of waterbirds and blue-crowned cranes in the Adeguri Marsh. Poultry can be controlled because they live in human-managed facilities; blue-crowned cranes cannot, because they migrate seasonally following rainfall and food. One must respond quickly to H5NX because a single gram of bird feces infected with H5NX can infect one million chickens, and a significant proportion of migratory species cross one or more national

⁴⁸ Hulot, Nicolas, *One Planet: A Celebration of Biodiversity*. New York: Abrams, 2006.

boundaries.⁴⁹ H5NX eventually kills the waterbirds and blue-crowned cranes it infects, as 500 wild waterbirds found dead near the Adeguri Marsh in 2013 testify.⁵⁰ Had Renac not culled the waterbirds, H5NX could have spread globally, harming many waterbird populations and other species. Renac's immediate response stopped the spread of H5NX, greatly helping waterbird and blue-crowned crane populations in the long term.

C. Renac Complied with the Convention on the Conservation of Migratory Species of Wild Animals and the Agreement on the Conservation of African-Eurasian Migratory Waterbirds.

1. Renac endeavored to conserve migratory waterbirds, which is a fundamental goal of both CMS and AEWA.

CMS and AEWA aim to conserve migratory waterbirds.⁵¹ H5NX can significantly harm migratory waterbirds as well as domestic poultry and human.⁵² In part, Renac contained H5NX's spread to conserve migratory waterbirds. Culling and dispensing disinfectants are the fastest, most-effective means to prevent further fatalities to migratory waterbirds.⁵³ In fact, after Renac's response, the outbreak spread no further, nor has there been another outbreak since. In a "migratory species," a significant proportion of its members cyclically and predictably cross one or more national jurisdictional boundaries.⁵⁴ H5NX could have spread globally, harming many waterbird populations and other species.

⁴⁹ *Monarch Watch*, "a single gram of bird feces" <<http://www.monarchwatch.org>> (last visited Oct. 17, 2008).

⁵⁰ Record ¶16.

⁵¹ AEWA, "AEWA Introduction", <<http://www.unep-aewa.org/en/legalinstrument/aewa>> (last visited Oct. 27, 2017). & CMS, "Convention of conservation of Migratory Species Introduction", <<http://www.cms.int/en/legalinstrument/cms>> (last visited Oct. 27, 2017).

⁵² Special Agreement, Art. 5 (Jul. 4, 2017).

⁵³ A proposal of avian influenza and its solution, "Highly pathogenic avian influenza culling", <<https://crpc.kist.re.kr/common/attachfile/attachfileNumPdf.do?boardNo=00005845&boardInfoNo=0021&rowNo=1>> (last visited Nov. 1, 2017).

⁵⁴ Convention on the Conservation of Migratory Species of Wild Animals art.1 (June. 23, 1979), 1651 U.N.T.S. 333.

2. Renac's responses complied with the CMS Article 3.

First, CMS Article 3.4 uses limited language like 'endeavour'. To endeavour means to try or to make an effort; it does not require success.⁵⁵ Renac did not violate CMS if it endeavoured to "prevent or minimize the adverse effects of activities or obstacles that seriously impede or prevent the migration of the species."⁵⁶ In addition, according to VCLT Article 31.1,⁵⁷ a treaty shall be interpreted in good faith, giving the ordinary meaning to the terms of the treaty in their context and in the light of its object and purpose. To interpret a treaty in good faith means not interpreting it to condemn the other party.⁵⁸ In this case, it is evident that Renac endeavoured to minimize H5NX's adverse effects: that is why Renac culled infected poultry and potentially infected wild waterbirds, and dispensed disinfectants.

Second, Article 3.5 includes an exception for extraordinary circumstances like these, permitting the taking of protected birds to enhance the survival of the species. Renac's responses fall within this exemption, minimizing the damage and enhancing the survival of the affected species. In addition, Renac used humanitarian methods—like shooting, netting, and asphyxiation—and committed no unnecessary taking.⁵⁹ Therefore, Renac's responses satisfy the Article 3.5.

D. Renac's responses complied with AEWA.

AEWA Article 2 par. 1 requires "co-ordinated measures to maintain migratory waterbird species in a favourable conservation status . . . To this end, [Parties] shall apply within the limits of their national jurisdiction the measures prescribed in Article 3, together with the specific actions determined in the Action Plan provided for in Article 4, of this

⁵⁵ Oxford English Dictionary, "endeavor", <http://www.oed.com/view/Entry/61902?rskey=n1Qr8p&result=2&isAdvanced=false#eid> (last visited Oct. 20, 2017).

⁵⁶ *see* CMS art. 3 sec. 4.

⁵⁷ Vienna Convention on the Law of Treaties, art. 31 sec. 1 (Jan. 27, 1980) 1155 U.N.T.S. 331.

⁵⁸ Oxford English Dictionary, "in good faith", <http://www.oed.com/view/Entry/363783?redirectedFrom=in+good+faith#eid290404865> (last visited Oct. 21, 2017).

⁵⁹ IEMCC Clarifications at 42.

Agreement.”⁶⁰ “To this end” means that the measures in Article 3 and the actions in the Action Plan constitute the obligatory co-ordinated measures of Article 2 par. 1. Therefore, if Renac violated neither Article 3 nor the Action Plan, then it neither violated Article 2 par. 1. We consider Article 3 and the Action Plan separately below.

Article II par. 2 requires Renac to “take into account” the precautionary principle in carrying out Art. II par. 1. “To take into account” means “to make allowance for,”⁶¹ which means “to consider (something) when one makes a calculation.”⁶² The 1998 Wingspread Conference on the Precautionary Principle defines the precautionary principle as, “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 fully established scientifically.”⁶³ The principle also includes the caveat, “When the health of humans and the environment is at stake, it may not be necessary to wait for scientific certainty to take protective action.”⁶⁴ Renac considered the precautionary principle in responding to H5NX and concluded that the caveat applied. The urgent threat that H5NX posed to public safety meant that Renac had to take protective action and could not wait for scientific certainty of harm from its responses.

Renac also complied with Article 3. Article 3 par. 1 requires that Renac “take measures to conserve migratory waterbirds,” and par. 2 specifies the measures. Par. 2(a) requires Renac to apply Article 3 par. 4, 5 of the Convention on the CMS. As discussed above, Renac complied with CMS. AEWA par. 2(b) requires “that any use of migratory waterbirds . . . is sustainable for the species as well as for the ecological systems that support

⁶⁰Agreement on the Conservation of African-Eurasian Migratory Waterbirds art. 2 para. 1.

⁶¹Merriam-Webster, Merriam-Webster Dictionary, Definition of ‘take into account’, <https://www.merriam-webster.com/dictionary/take%20into%20account>, (last visited October 13, 2017).

⁶² *Id.*

⁶³ The Science and Environmental Health Network, Wingspread Conference on the Precautionary Principle, <http://sehn.org/wingspread-conference-on-the-precautionary-principle/>. (last visited October 14, 2017).

⁶⁴ *Id.*

them.” Renac culled as few waterbirds as possible, using acceptable humanitarian methods like shooting, netting, and asphyxiation.⁶⁵ Moreover, Renac’s release of disinfectants into the marsh has not harmed its ecology, supporting migratory waterbirds. Par. 2(f) through 2(k) are inapplicable to this dispute. Lastly, par. 2(l) requires parties to cooperate to assist each other to implement the Agreement. Renac followed this requirement, also, as confirmed by Renac’s voluntary participation in the settlement of its dispute with Aves before the ICJ.

In Annex 3, the Action Plan lists specific actions to conserve migratory waterbird species. Par. 2.1.3 exempts Parties from the prescriptions of par. 2.1.1 and 2.1.2 “where there is no other satisfactory solution . . . in the interests of . . . public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature.” When Renac formulated its responses to the 2014 and 2015 outbreaks, there was no other satisfactory solution, and there were imperative reasons of overriding public interest. For example, twelve persons in Renac contracted H5NX, five died of their infection, and culling poultry caused financial losses for commercial facilities and food shortages for subsistence farmers and their families. Thus, the outbreaks threatened Renac’s public health, public safety, and economy, all imperative reasons of overriding public interest, corresponding to the exemption.

E. Renac Complied with Customary International Law.

Aves argues that Renac’s responses violated customary international law, including the duty not to cause transboundary harm.⁶⁶ Even if human conduct has a certain effect on the environment, it requires a legal evaluation to be converted into a concept of damage.⁶⁷

International practice deals only with the serious, significant or substantial level of damage as

⁶⁵ IEMCC Clarifications at 42.

⁶⁶ Record ¶22

⁶⁷ Kigap Park, Prevention of Air Pollution between Countries in International Law and its Regulation Trends, Review of international law, No.1 p.170 (1993).

a regulation target of international law.⁶⁸ Therefore, to establish transboundary harm, the harm must be significant.⁶⁹ In this case, there is no significant harm to the Adeguri Marsh. Since 2015, Aves has monitored the ecology of the Adeguri Marsh but found no harm.⁷⁰ Aves claims that dispensing the disinfectants reduced wild waterbird populations, yet a 2015-2017 environmental survey conducted by an Aves authority found no link.⁷¹ There is neither significant harm to the Adeguri Marsh nor evidence that dispensing disinfectants harmed the marsh. Therefore, Renac did not violate customary international law, including the duty not to cause transboundary harm.

F. The Resolutions of the Ramsar Convention, CMS, and AEWA Do Not Prohibit Renac's Responses.

Neither resolutions nor recommendations prohibit Renac from culling waterbirds likely infected with H5NX or dispensing disinfectants into the Adeguri Marsh.⁷² As already shown, Renac's responses to the H5NX outbreaks 'wisely used' the marsh. Ramsar Resolution IX.23 addresses actions not considered a 'wise use' of wetlands, stating "destruction or substantive modification of wetland habitats with the objective of reducing contact between domesticated and wild birds does not amount to wise use as urged by Article 3.1." However, Renac neither destroyed nor substantively modified the wetland habitats.

Moreover, the resolutions and recommendations permit Renac's responses. For instance, Renac considered the concern of the WHO, FAO, and OIE, that lethal responses such as culling to eliminate H5NX in wild bird populations are infeasible and may exacerbate the problem by further dispersing infected birds.⁷³ Therefore, Renac prevented the waterbirds

⁶⁸ Ministry of Environment, A study on the Responsibility of Environmental Damage under International Law, p.11 (2007).

⁶⁹ Lakshman D. Guruswamy with Mariah Zebrowski Leach, International environmental law: in a nutshell, p.532 (4th ed., 1939).

⁷⁰ Record ¶25

⁷¹ *Id.*

⁷² See Marko Divac Öberg, The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ, 16 EUR. J. INT'L L. 879 (2005) p.892.

⁷³ Appears in numerous treaties. For example, see Ramsar Convention Resolution IX.23.

from dispersing by using shooting, net trapping, and asphyxiation, enabling Renac to control the wild bird's vectors.⁷⁴

In accordance with Ramsar Convention Resolution IX.23, Renac has acknowledged the need to develop strategies that limit the risk of disease transmission between wild and domestic birds through enhanced biosecurity.⁷⁵ Since the H5NX outbreaks, Renac considers enhancing biosecurity by developing a drainage system near farms and erecting bird scarers.

Yet, even if this Court finds that Renac violated any resolutions or recommendations, they are not legally binding. A resolution is a 'formal expression of an opinion, intention, or decision by an official body or assembly.'⁷⁶ The binding effect is limited to organizational matters such as the budget, or admission, suspension, etc.⁷⁷ Thus, resolutions exhort rather than oblige.⁷⁸

G. The Republic of Aves Violated the Ramsar Convention, CBD, and Customary International Law.

1. Aves negligently violated the Ramsar Convention article 3.

Ramsar Convention Article 3 requires Contracting Parties to "formulate and implement their planning so as to promote the conservation of the wetlands included in the List, and as far as possible the wise use of wetlands in their territory."⁷⁹ The Convention binds Aves to this duty of care, yet Aves breached its duty in two important respects. In early February 2015, H5NX broke out in Aves's poultry facilities, contaminated the marsh through Aves's drainage systems, infected the marsh's waterbird populations, and thereby spread to Renac's poultry facilities and farms.⁸⁰ Nor has Aves denied that the outbreak originated in

⁷⁴ IEMCC Clarifications at 42.

⁷⁵ See para.22 of Ramsar Resolution IX.23 on Highly pathogenic avian influenza and its consequences for wetland and waterbird conservation and wise use, 15 Nov.2005.

⁷⁶ See Black's Law Dictionary (7th ed. 1999).

⁷⁷ See *Id.* at ¶72 p.883.

⁷⁸ See Andrew T. Guzman, *International Soft Law*, 2 J. Legal Analysis 171 (2010), p.3 *supra* note2.

⁷⁹ See Ramsar Convention.

⁸⁰ Record ¶20.

Aves's territory.⁸¹ Though the outbreak originated in Aves, Aves did nothing to contain it. After noticing that the H5NX outbreaks happened in their poultry facilities, they should have prepared countermeasures. Aves and Renac share the wetland, and Aves's drainage system drains into that wetland. However, Aves negligently breached this duty of care. As a result, the virus crossed the wetland and caused considerable harm to Renac. Also, though Aves had the financial means to improve biosecurity at its agricultural facilities near the marsh, it did not. The H5NX outbreaks seriously harmed not only the waterbirds, but also Renac's people and economy, causing deaths, economic loss, and widespread hunger. Had Aves attempted to contain the outbreak or implemented more stringent biosecurity measures in the first place, the outbreak might never have spread to Renac.

2. Aves violated CBD Article 3 by causing transboundary harm.

CBD Article 3 requires States "to ensure that activities within their jurisdiction or control [do not] cause damage to the environment of other States or of areas beyond the limitations of national jurisdiction."⁸² This imposes a duty not to cause transboundary harm, yet Aves violated Art. 3 by causing transboundary harm to Renac via the marsh.

Aves's drainage system carried infected water from its farms into the marsh, infecting wild waterbirds, which then carried H5NX to Renac's poultry farms. Aves does not deny that the H5NX outbreaks originated in Aves. Aves's negligent biosecurity policy caused biological pollution, which forced Renac to shut down more than 15 major poultry facilities and cull infected poultry, causing financial losses to commercial facilities and food shortages for subsistence farmers and their families. This in turn caused greater economic loss, since Renac's economy is based largely on poultry production. Moreover, the 2014 and 2015 outbreaks infected 12 persons in Renac, 5 of whom died of their infection.

⁸¹ IEMCC Clarifications at 54.

⁸² See CBD art. 3.

This is like the *Trail Smelter Case (United States-Canada)*,⁸³ in which the Tribunal held that a State must at all times protect other states from harmful acts by individuals within its jurisdiction. Furthermore, the Tribunal found that Trail Smelter had damaged American lands and awarded America compensatory damages.

It is evident that, but for Aves's negligent biosecurity measures, the infection would not have spread from Aves's poultry facilities to the wild waterbird population, infecting Renac's poultry farms and citizens and causing harm to Renac's people and economy. We ask the Court to recognize Aves's transboundary harm to Renac in violation of CBD Article 3 and award compensatory damages.

II. RENAC COMPLIED WITH INTERNATIONAL LAW WHEN DELISTING THE ADEGURI MARSH AS A RAMSAR SITE AND AS A TRANSBOUNDARY SITE, AND THE PROPOSED COMPENSATION IS ADEQUATE.

A. Renac Delisting the Adeguri Marsh as a Ramsar Site and as a Transboundary Site Accords with Ramsar Convention Article 2.5, Ramsar Resolution VIII.20, and Ramsar DOC.SC25-8

1. Renac has the right to delete or restrict the boundaries of those wetlands already included in the list.

Ramsar Convention Article 2.3 states, "The inclusion of a wetland in the List does not prejudice the exclusive sovereign rights of the Contracting Party in whose territory the wetland is situated."⁸⁴ Listing the Adeguri Marsh does not restrict Renac's sovereign rights. Moreover, Ramsar Convention Article 2.5 states, "Any Contracting Party shall have the right . . . because of its urgent national interests, to delete or restrict the boundaries of wetlands already included by it in the List."⁸⁵ Delisting the Adeguri Marsh is Renac's right,

⁸³ Trail Smelter Arbitration (United States v. Canada), 3U.N. Rep Int'l Arb Awards 1905 (1941).

⁸⁴ See Ramsar Convention, art. 2 sec. 3.

⁸⁵ See Ramsar Convention, art. 2 sec. 5.

provided an urgent national interest, and determining ‘urgent national interests’ is Renac’s sovereign right. Also, Ramsar Resolution VIII.20 3.1 through 3.12 and Ramsar DOC.SC25-8 paragraph 63 through 70 provide guidance to interpret ‘urgent national interests.’ We consider these examples below and show that Renac took them into account in concluding that the outbreaks threatened urgent national interests.

First, the outbreaks correspond to three items in Ramsar Resolution VIII.20: Article 3.1, “the national benefits of maintaining the integrity of the wetlands system and its related benefits;”⁸⁶ 3.2, “whether maintaining the status quo threatens a national interest;”⁸⁷ and 3.5, “whether a national interest is being increasingly threatened.”⁸⁸ They also correspond to Ramsar DOC.SC25-8 paragraph 63, “The affected interest must be clearly defined in national context;”⁸⁹ par. 64, “The recipient of the benefit must be set forth;”⁹⁰ par. 66, “The benefit of the project should be set forth in detail;”⁹¹ and par. 69, “It should be clear whether a national interest is being increasingly threatened.”⁹² In this case, H5NX threatens Renac’s citizens and economy, and Renac has a duty to protect its citizens’ health, safety, and economy. The frequency of H5NX outbreaks increased since 2009, as did the cross-infection between wild birds and poultry. Renac had to cull infected poultry, devastating its economy and causing food shortages for subsistence farmers. Furthermore, each subsequent outbreak of H5NX also infected and killed more humans. Renac delisted the Adeguri Marsh to provide greater flexibility in responding to future outbreaks, but also to maintain the integrity of the marsh.⁹³

⁸⁶ See Ramsar Resolution VIII.20 art.3.1 on General guidance for interpreting “urgent national interests” under Article 2.5 of the Convention and considering compensation under Article 4.2, Nov.26 2002.

⁸⁷ *Id.* art.3.2.

⁸⁸ *Id.* art.3.5.

⁸⁹ See Ramsar DOC.SC25-8 para.63 on Analysis and recommendations of IUCN’s Environmental Law Centre (Decision SC24-10) on Revisions to Ramsar sites boundaries, interpretation of articles 2.5 and 4.2 (Resolution VII.23, paragraphs 9, 10, 11 & 13) Action requested: The Standing Committee is requested to consider the advice, Oct.27 2000.

⁹⁰ *Id.* para.64.

⁹¹ *Id.* para.66.

⁹² *Id.* para.69.

⁹³ Record ¶26.

Had Renac kept the marsh listed and implemented no measures, past outbreaks show it would harm Renac's national interests. Delisting the marsh enables Renac to implement measures to benefit not only Renac's public health and safety and economy, but also to conserve the marsh better.

Second, the current situation corresponds to Article 3.4, "whether the immediate action is required to avert a significant threat;"⁹⁴ 3.10, "whether, over the long term, the proposed action offers greater benefits;"⁹⁵ and Ramsar DOC.SC25-8 par.70, "It should be clear whether the situation is critical, presenting a significant danger imminently posed by the action of inaction."⁹⁶ One cannot predict H5NX outbreaks, but given past outbreaks, another will likely happen soon. Therefore, Renac must immediately implement measures to avert a significant threat to its people's health, safety, and economy. Moreover, Renac will offer greater benefits like enhanced biosecurity of the Adeguri Marsh by developing drainage areas that drain the marsh near farms, and erecting bird scarers. In the long term, Renac seeks to make the marsh more secure from future H5NX outbreaks.

2. Renac informed the Ramsar Convention Secretariat and Contracting Parties, including Aves, that Renac was considering delisting the Adeguri Marsh as a Ramsar Site.

Ramsar Convention Article 2.5 requires that a Contracting Party deleting a site from the List for urgent national interests "inform the organization or government responsible for the continuing bureau duties specified in Article 8 of any such changes."⁹⁷ Renac notified them, the Ramsar Convention Secretariat, and the Contracting Parties during 2015 and 2016. Also, Renac continuously consulted with Aves. Though Renac desired to reach an agreement

⁹⁴ See Ramsar DOC.SC25-8 para 64.

⁹⁵ *Id.* art.3.10.

⁹⁶ *Id.* para.70

⁹⁷ See Ramsar Convention, art. 2 sec. 5.

with Aves, it could not. It is not essential, however, that they do.⁹⁸ Because Aves shares the marsh with Renac, it thoughtfully considered Aves's opinion. In addition, Renac conducted an extensive environmental assessment before delisting, including the expected impact on Aves's citizens and government. All this demonstrates Renac's good intentions, over a long time, to reach a satisfactory settlement with Aves. Renac's decision to delist is not arbitrary, but considered, after mutual exchanges of opinions.

B. Renac Delisted the Adeguri Marsh as a Ramsar Site and Transboundary Site in Accordance with Ramsar Convention Article 2.5.

1. Renac fully considered its international responsibilities to conserve, manage, and wisely use the migratory stocks of waterfowl.

Though Renac delisted the Adeguri Marsh, Renac remains as a member of AEWA and CMS, obligated to conserve and effectively manage migratory species of wild animals, including the blue-crowned crane. In addition, Renac participated in the 1972 United Nations conference on the Human Environment at Stockholm, the 1992 United Nations Conference on Environment and Development at Rio de Janeiro, the 2002 World summit on Sustainable Development in Johannesburg, and the 2012 Rio +20 Conference at Rio de Janeiro.⁹⁹ This record of environmental responsibility demonstrates Renac's commitment to environmental conservation. Renac has also continued to conserve the Adeguri Marsh since delisting it.

Furthermore, Renac has not withdrawn from the Ramsar Convention, but only delisted the Adeguri Marsh, and this not to harm the marsh, but for urgent national interests. Furthermore, Renac offers the coastal salt marsh as compensation,¹⁰⁰ demonstrating its commitment to conserve wetlands. Even after delisting the marsh, Renac has followed the Ramsar Convention to use the wetland wisely.

⁹⁸ *Id.*

⁹⁹ Record ¶8.

¹⁰⁰ Record ¶29.

C. The Coastal Salt Marsh that Renac Proposes as Compensation for Additional Nature Reserves Satisfies Ramsar Convention Article 4.2 and Ramsar DOC.SC25-8

Ramsar Convention Article 4.2 requires: “Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.”¹⁰¹

Though Renac delisted its portion of the Adeguri Marsh, it offers a coastal salt marsh as an additional nature reserve (1) for waterfowl and (2) for the protection of an adequate portion of the original habitat, i.e., a wetland or marsh. Moreover, the compensation meets the guidelines in Ramsar DOC.SC25-8, which list factors that can help determine whether compensation is sufficient.

First, additional nature reserves should be for waterfowl. The Convention specifies only ‘waterfowl,’ not ‘blue-crowned cranes.’ The coastal salt marsh that Renac proposes is a habitat for waterfowl, satisfying the first requirement. Whether blue-crowned cranes inhabit the coastal salt marsh is immaterial.

Second, the additional nature reserves should protect an adequate portion of the original habitat. In this situation, the Adeguri Marsh and the coastal salt marsh are both wetlands or marsh, and the portion is adequate. Though the coastal marsh is not freshwater, both the Adeguri Marsh and the coastal salt marsh are wetlands that waterbirds inhabit. Moreover, Renac has only five other shallow freshwater wetlands, all of which are small, privately owned, and provide no significant habitat to migratory waterbirds.¹⁰² As a result, the

¹⁰¹ See Ramsar Convention, art. 4.2.

¹⁰² IEMCC Clarifications at 27.

coastal salt marsh is the best compensation Renac has to offer. In addition, it is larger than Renac's portion of the Adeguri Marsh.

Third, Renac offers the coastal salt marsh in accordance with Ramsar Resolution VIII.20. Renac has considered Article 4.1, "the maintenance of the overall value of the Contracting Party's wetland area included in the Ramsar List at the national Global level,"¹⁰³ and 4.2, "the availability of the compensatory replacement."¹⁰⁴ The coastal salt marsh was chosen over other marshes because it offers habitats for numerous waterbird species. Though blue-crowned cranes do not inhabit it, many types of seabirds do. Therefore, the compensation is adequate under Ramsar Resolution VIII.20.

Finally, Renac has followed the guidelines for sufficient compensation in Ramsar DOC.SC25-8, par. 76–81. Par.78 states, "The compensation should adequately replace the lost habitat," and Renac has shown above that it does. Par. 78 states, "The compensation should be timely," and it was, offered before delisting the Adeguri Marsh. Finally, par. 78 states, "The loss of the wetland must not be irreparable." Since Renac offers an even larger waterbird habitat in compensation, the loss of the Adeguri Marsh is not irreparable. Thus, Ramsar DOC.SC25-8 also shows that Renac's offered compensation is adequate.

Even if this Court finds that Renac violated this Resolution, however, Ramsar Convention resolutions are not binding.¹⁰⁵

D. Renac Complied with the Ramsar Convention Article 5.

Ramsar Convention Article 5 only requires parties to consult each other about convention obligations. However, Article 2.5 states that "parties have the right to delete wetland boundaries they listed."¹⁰⁶ That is, Renac may delist its portion of the Adeguri Marsh as a Ramsar Site, and it is obligated only to discuss these actions with Aves. Renac did this,

¹⁰³ See *Id.* at ¶99 art.4.1.

¹⁰⁴ *Id.* art.4.2.

¹⁰⁵ See *Id.* at ¶72 p.892.

¹⁰⁶ See Ramsar Convention, art. 2.5.

not only with Aves, but also with the Ramsar Convention secretariat and other Ramsar Contracting Parties.

E. Renac Complied with Customary International Law

The Ramsar Convention Article 2.5 recognizes that delisting the Adeguri Marsh is Renac's right, nor does it infringe on Aves's rights. Moreover, though Renac delisted the Adeguri Marsh, it still protects it. Renac remains a member of the Ramsar Convention, AEWA, CMS, and CBD, with all those obligations. Moreover, Aves and Renac have for years cooperatively managed the wetland and continue to. Renac delisted the marsh not to damage it, but to manage it more effectively. In conclusion, Aves's claims are improper because Aves has no evidence of adverse effects from Renac delisting the Adeguri Marsh.

CONCLUSION AND PRAYER FOR RELIEF

Respondent, the Republic of Renac, respectfully requests the Court to hold:

1. The Republic of Renac did not violate international law with respect to its responses to the 2014 to 2015 outbreaks of highly pathogenic avian influenza.
2. The Republic of Renac did not violate international law by delisting the Adeguri Marsh as a Ramsar Site and as a Transboundary Ramsar Site, and the proposed compensation was adequate.

RESPECTFULLY SUBMITTED,

AGENTS OF RESPONDENT