

Team No. 2006

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



**THE CASE CONCERNING  
Questions Relating to Reintroduction of Bears**

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**Federal States of Arctos**

*(APPLICANT)*

v.

**Republic of Ranvicora**

*(RESPONDENT)*

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**MEMORIAL FOR THE APPLICANT**

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**THE 2010-2020 STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT  
COMPETITION**

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	2
INDEX OF AUTHORITIES .....	5
PAGE.....	5
TREATIES,CONVENTIONS AND DECLARATIONS .....	5
CASES .....	6
Corfu Channel, United Kingdom v Albania, Judgment, Compensation, (1949) ICJ Rep 244, ICGJ 201 (ICJ 1949), 15th December 1949 .....	6
Gabčikovo-Nagymaros Project, Hungary v Slovakia, Order, Site Visit, [1997] ICJ Rep 3, ICGJ 65 (ICJ 1997), 5th February 1997 .....	6
Nuclear Tests, New Zealand v France, Admissibility, Judgment, [1974] ICJ Rep 457, ICGJ 137 (ICJ 1974), 20th December 1974 .....	6
BOOKS .....	7
MISCLENIOUSES .....	8
QUESTIONS PRESENTED .....	9
STATEMENT OF JURISDICTION .....	10
STATEMENT OF FACTS.....	11
1. THE PARTIES .....	11
2. THE DISPUTE .....	11
SUMMARY OF ARGUMENTS .....	13
ARGUMENTS .....	14
<b>I. THE REPUBLI OF RANVICORA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS GREY BEAR RE-INTRODUCTION PROJECT .....</b>	<b>14</b>
1.1. THE GREY BEAR IS AN INVASIVE ALIEN SPECIES IN ARCTOS .....	14

1.2. RANVICORA’S ACTIONS VIOLATES ITS OBLIGATIONS NOT TO CAUSE TRANS-BOUNDARY HARM.....	15
1.3. RANVICORA’S ACTIONS VIOLATE THE PRECAUTIONARY PRINCIPLE.....	16
1.4. RANVICORA’S ACTIONS CONTRAVENE, THE CBD AND VARIOUS CBD DECISIONS .....	17
1.5. THE GOVERNMENT RANVICORA SHOULD COMPENSATE THE FARMERS AND OTHER CITIZENS WHOSE PROPERTY HAS BEEN DAMAGED BY GREY BEARS.....	18
1.6. RANVICORA IS OBLIGATED TO FORMALLY END ITS HARMFUL REINTRODUCTION PROJECT AND SHOULD CAPTURE AND REMOVE THE GREY BEARS FROM THE WILD. ....	18
II. THE FEDERAL STATES OF ARCTOS DID NOT VIOLATE INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSES TO RANVICORA’S REINTRODUCTION OF GREY BEARS .....	19
2.1. ARCTOS ACTED IN ACCORDANCE WITH ITS OBLIGATIONS UNDER THE CBD AND THE BERN CONVENTION .....	19
2.2. ARCTOS ACTIONS WERE TAKEN IN ACCORDANCE WITH THE PRINCIPLE OF NECESSITY. ....	20
2.2.1. ARCTOS ACTIONS ARE THE ONLY MEANS OF SAFEGUARDING ITS CITIZENS, THEIR PROPERTY AND THE ENVIRONMENT AGAINST A GRAVE AND IMMINENT PERIL .....	21
2.2.2. ARCTOS ACTIONS DO NOT SERIOUSLY IMPAIR ANY ESSENTIAL INTEREST OF RANVICORA.....	22
2.2.3. ARCTOS DID NOT CONTRIBUTE TO THE SITUATION OF NECESSITY .....	22
2.3. ARCTOS HAS ACTED IN ACCORDANCE WITH THE DUTY TO PREVENT TRANSBOUNDARY HARM. ....	22
2.4. ARCTOS CONDUCTED DUE DILIGENCE .....	23
2.5. ARCTOS HAS NOT ACTED IN CONTRAVENTION OF CMS .....	25

2.5.1. Arctos has complied with Article II of the CMS .....25

2.5.2. ARCTOS ACTIONS ARE JUSTIFIED UNDER THE ARTICLE III  
'EXTRAORDINARY CIRCUMSTANCES' EXCEPTION.....25

2.6. THE ACTIONS OF ARCTOS AMOUNTED TO COUNTER MEASURES .....26

**2.6.1. THE ACTIONS WERE TAKEN IN RESPONSE TO PREVIOUS WRONGFUL  
ACTS OF THE STATE OF RANVICORA.....27**

2.6.2. THE ACTIONS ARE DIRECTED AGAINST THE STATE OF RANVICORA .....27

CONCLUSION AND PRAYERS FOR RELIEF .....29

	<b>INDEX OF AUTHORITIES</b>	<b>PAGE</b>
	<b>TREATIES, CONVENTIONS AND DECLARATIONS</b>	
<b>BERN CONVENTION</b>	Convention on the Conservation of European Wildlife and Natural Habitats 1284 U.N.T.S. 209	
<b>CBD</b>	Convention on Biological Diversity, June 6, 1992, 1760 U.N.T.S. 79	
<b>CITES</b>	Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243	
<b>CMS</b>	Convention on the Migratory Species of Wild Animals, Jun. 3, 1979, 1651 U.N.T.S. 333.	
<b>ICJ STATUTE</b>	Statute of the International Court of Justice	
<b>KYTO PROTOCOL</b>	Kyoto Protocol UN Doc FCCC/CP/1997/7/Add.1, De	
<b>PARIS AGREEMENT</b>	Paris Agreement Dec. 12, 2015. U.N. Doc. FCCC/CP/2015/L.9/Rev/1	
<b>RIO DECLARATION</b>	Rio Declaration on Environment and Development, Principle 2, UN Doc.A/CONF. 151/26 (1992)	
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change	
<b>VCLT</b>	Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, 1155 U.N.T.S. 331.	

	<b>CASES</b>	
<b>CORFU CHANNEL</b>	Corfu Channel, United Kingdom v Albania, Judgment, Compensation, (1949) ICJ Rep 244, ICGJ 201 (ICJ 1949), 15th December 1949	
<b>Gabčíkovo</b>	Gabčíkovo-Nagymaros Project, Hungary v Slovakia, Order, Site Visit, [1997] ICJ Rep 3, ICGJ 65 (ICJ 1997), 5th February 1997	
<b>LAC</b>	Lac Lanoux Arbitration (Spain v. France) 1957, R.I.A.A 281	
<b>LOTUS</b>	Lotus Case, (Fr. v. Turk.), 1927 P.C.I.J. 5, 18 (Sept. 7)	
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<b>NUCLEAR WEAPONS</b>	Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 19, ¶ 29 (July 8).	
<b>PALMAS</b>	Island of Palmas (U.S. v. Neth.) (1928), 2 R.I.A.A. 829	
<b>PULP MILLS</b>	Pulp Mills in the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 55-56 (Apr. 20)	
<b>SHELF CASES</b>	North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 20	
<b>TRAIL SMELTER</b>	Trail Smelter Arbitration ( <i>United States v. Canada</i> ) (1938 and	

	1941) <i>3 R.I.A.A. 1905</i>	
<b>WALL OPINION</b>	Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004	
	<b>BOOKS</b>	
<b>HUNTER</b>	David Hunter, James Salzman & Durwood Zaelke, International Environmental Law and Policy, 491 (4th. Ed. 2011)	
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	Pollution, 46 Duke L.J. 931 (1997).	
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	<b>MISCLENIOUSES</b>	
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## **QUESTIONS PRESENTED**

- I.** WHETHER, the Republic of Ranvicora violated international law with respect to its grey bear re-introduction project
- II.** WHETHER, the Federal States of Arctos violated international law with respect to its responses to Ranvicora's reintroduction of grey bears.

## STATEMENT OF JURISDICTION

The Governments of the Federal States of Arctos and the Republic of Ranvicora submit this present controversy regarding the grey bear (*Ursus smokeysius*) a Critically Endangered Species. The parties seek final resolution by the International Court of Justice (ICJ) by Special Agreement pursuant to Article 36, paragraph 1, in relation to Article 40, paragraph 1, of the Statute of this Court. Both states have accepted the jurisdiction of this Court pursuant to Article 36(1).

## STATEMENT OF FACTS

### 1. THE PARTIES

1. The Federal States of Arctos and the Republic of Ranvicora are neighboring sovereign states located on the continent of Suredia in the Northern Hemisphere. Arctos and Ranvicora are considered developed countries, and their economies are diversified across all sectors. Arctos is located to the north of Ranvicora. They are in a forested region.
2. Both states are member states of the UN Charter and other conventions and covenants such as the VCLT, CBD, Berne Convention and CMS. They are also parties to the Paris Agreement, the Kyoto declaration, United Nations Framework Convention on Climate Change Rio Declaration and the Stockholm Declaration.

### 2. THE DISPUTE

1. The dispute revolves around the grey bear (*Ursus smokeysius*). It is a species that is endemic to parts of Suredia. The grey bear is similar to the brown bear in size and appearance. The grey bear is listed as Endangered on the IUCN Red List of Threatened Species, on Appendix II of the Bern Convention, and on Appendix I of CMS.
2. Being of cultural importance to the people inhabiting Ranvicora, its extinction was considered a national tragedy. The government in Ranvicora undertook to reintroduce the bear as a result. This would involve the taking of a number of bears from the neighboring countries. The government conducted a national Environmental Impact Assessment (EIA). On this basis the reintroduction plan was conducted.
3. The bears were reintroduced in phases with the first being on 23 March 2013 of 20 bears. These bears were fitted with GPS collars for monitoring. The second phase would be conducted in 2021.

4. The bears were spotted in Arctos as they would move across the border on a normal basis. A report filed in 27 February 2018 by a farmer claimed that his livestock were attacked. There were also reports of destruction to the Trouwborst tern's (*Sterna ariensis*) nest (This is an endangered species). The bears were also blamed for environmental and attacks on animals.
5. On 9 August 2018 the Government of Arctos sent a diplomatic note to Republic of Ranvicora claiming violation of international customary law owed to the reintroduction of the bears. The note was replied by the government of Ranvicora stating that they were following their international obligation under the Berne Convention by conserving natural species.
6. The attacks continued as the citizens in the affected regions began leaving out poisoned carcasses which killed four bears in the month of January 2019. On 22 April 2019 the bears attacked and mauled two children who were playing outside a farm in Arctos. The government in a bid to react gave permission for the citizens of Arctos to shoot any grey bear spotted in Arctos. As a result, four bears, one of which was pregnant were killed.
7. The government in Ranvicora wrote to Arctos decrying the grant of permission as a violation of international treaties namely the CBD and the CMS. A note to which the Government in Arctos replied stating that due to the government's inactivity to stop the damage the grant of permission was necessary to protect the citizens and their property from imminent threat posed by bears.
8. Both parties agreed and signed a special agreement granting jurisdiction to the ICJ to resolve the dispute.

## SUMMARY OF ARGUMENTS

1. The reintroduction of the grey bears project by the Republic of Ranvicora is a violation of international law as the bears are an invasive alien species in the territory of the Federal States of Arctos. The project violates its obligations not to cause transboundary harm as the project has resulted in serious harm in the territory of the Applicant state. This is a violation of the decisions in the CBD and the CMS. The Republic of Ranvicora should hence pay the Federal States of Arctos compensation for the losses and damage suffered.
2. The measures taken by the Federal States of Arctos are not a violation of international law obligations. These are countermeasures and acts necessary to prevent further damage caused as a result of the reintroduction project. These acts are in line with the principles and rules in international law.

## ARGUMENTS

### I. THE REPUBLIC OF RANVICORA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS GREY BEAR RE-INTRODUCTION PROJECT

#### 1.1. THE GREY BEAR IS AN INVASIVE ALIEN SPECIES IN ARCTOS

1. A species that has been introduced to a location (ecosystem or area) where it does not occur naturally is an alien species and if it causes (or has the potential to cause) harm to the environment, economies and/or human health, is deemed an alien invasive species.<sup>1</sup> A migratory species that has been introduced outside its natural range or that has been translocated becomes an invasive alien species if it has the potential to cause or if it actually causes harm to the environment, economies and /or human health.<sup>2</sup>
2. Ranvicora introduces the grey bears-which are migratory species that have been extinct for over 45 years - in the northern region of Ranvicora close to the border with Arctos. Clearly and considering the period in which the bears have been extinct, they cannot, even if exaggerated, be deemed to be natural to the Ranvocatoran environment. In fact, it is questionable whether the Northern region where the grey bears were introduced was their historic range. In any event, the re-introduced grey bears cause significant harm to Arctos attacking horses and sheep on farms, damaging orchards and beehives, and killing endangered Trouwborst terns as well as human life.
3. In view of the alien nature of the grey bears and the negative effects occasioned in Arctos by the bears, the bears are an invasive alien species.
4. Consequently, Ranvicora violates its international law obligations by re introducing an invasive alien species to the environment as subsequently discussed.

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<sup>1</sup> IUCN, Invasive Alien Species, Available at: <https://www.iucn.org/regions/europe/our-work/invasive-alien-species>

<sup>2</sup> CMS Resolution 11.28 Para 4.

## 1.2.RANVICORA'S ACTIONS VIOLATES ITS OBLIGATIONS NOT TO CAUSE TRANS-BOUNDARY HARM

5. Ranvicora's actions have directly resulted in trans-boundary harm.
6. Under the duty to prevent trans-boundary harm,<sup>3</sup> States must keep activities within their jurisdiction or control from causing damage to the environment in other States or outside the boundaries of national jurisdiction.<sup>4</sup> The duty is a recognized principle of customary international law.<sup>5</sup> This duty is breached when there is a physical connection between the activity concerned and the damage caused, human causation, harm that meets a level of gravity that demands legal action, and transboundary movement of injurious effects.<sup>6</sup>
7. In the *Corfu Channel* case, the ICJ articulated the general the principle that every State is obliged not to knowingly allow its territory to be used to commit acts against the rights of any other State.<sup>7</sup>
8. In the present case, the elements of the duty to prevent transboundary harm are met. The harm occasioned in question include: attacks on horses and sheep, damaging orchards and beehives, and killing endangered Trouwborst terns as well as human life. This harm occurs in Arctos hence the effects are of a transboundary nature. The harm is occasioned due to the human acts of Ranvicora in introducing an invasive alien species. The harm rises to a level of gravity that it demands legal action and the injurious effects cross boundaries because the grey bear is a migratory species.

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<sup>3</sup> U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1, Principle 2 (Aug. 12, 1992).

<sup>4</sup> Ibid

<sup>5</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 19, ¶ 29 (July 8).

<sup>6</sup> Xue Hanqin, *Transboundary Damage in International Law* 4 (2003).

<sup>7</sup> *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 23 (April 9).

### 1.3.RANVICORA'S ACTIONS VIOLATE THE PRECAUTIONARY PRINCIPLE

9. The precautionary principle mandates States to anticipate, avoid, and mitigate threats to the environment.<sup>8</sup> The precautionary principle is an established customary international law principle<sup>9</sup> requiring countries to avoid transboundary harm, minimize environmental damage, and reduce risk of harm.<sup>10</sup> Measures must be taken even if causal connections are not fully established by the scientific community.<sup>11</sup> Parties are obliged to avoid or minimize threats of significant reduction or loss of biodiversity, notwithstanding the lack of exhaustive scientific certainty.<sup>12</sup>
10. The precautionary principle lays down that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>13</sup> There must be a potentially risky activity and the proponent of the activity bears the burden of proving that the act does not pose a risk to the environment or human health.<sup>14</sup> . Two elements must be thus present; first, there must be a potentially risky activity; second, the proponent has the burden of proving that its proposed act poses no risk to the environment or human health.<sup>15</sup>

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<sup>8</sup> IUCN, *Guidelines for Applying the Precautionary Principle 1* (2007), [http://cmsdata.iucn.org/downloads/ln250507\\_ppguidelines.pdf](http://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf).

<sup>9</sup> Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 15 ITLOS Rep. 10, P 41, ¶ 135.

<sup>10</sup> Daniel Bodansky, et. al., *The Oxford Handbook of International Environmental Law* 598 (2007).

<sup>11</sup> Nicholas Ashford, et. al., World Health Org., *Wingspread Statement on the Precautionary Principle 1* (1998), [www.who.int/ifcs/documents/forums/forum5/wingspread.doc](http://www.who.int/ifcs/documents/forums/forum5/wingspread.doc).

<sup>12</sup> CBD, *supra* note 20, Preamble; U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1, Principle 15 (Aug., 12, 1992) [hereinafter Rio Declaration]; U.N. Conference on Sustainable Development, *Rio+20: The Future We Want*, ¶ 158 (2012). 110 R. ¶ 18.

<sup>13</sup> U.N Convention on Biological Diversity, Preamble, June 5, 1992, 31 I.L.M. 818 [Hereinafter CBD]; Principle 11, World Charter for Nature, UNGA Res. 37/7, 37 U.N. GAOR, Suppl. (No. 51), at 17, U.N.Doc. A/37/51 (Oct. 28, 1982); principle 15, Rio Declaration *supra* note 21; Art. 10, Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M 1027; See also David Freestone and Ellen Hey, *The Precautionary Principle and International Law: The Challenge of Implementation*, 10 (Kluwer Law Intl ,1st ed. 1996).

<sup>14</sup> Bodansky, *supra* note 95, at 598.

<sup>15</sup> Daniel Bodansky, et. al., *Oxford Handbook of International Law*, 598 (2007).



11. Each element is satisfied in the present case as the Grey Bears, which were an extinct species for over 45 years are a migratory species. Ranvicora fails to take precautionary measures to conduct a risk assessment of the effects of the bears to the neighboring state Arctos. Despite the assumption that the Grey bears initially migrated only within Ranvicora, they are introduced near the border and pose a serious risk of trans-border migration thus mandating precautionary measures to be taken. Further Ranvicora is informed of the harm already caused by the Re-introduced grey bears but it blatantly refuses to take any actions.

#### **1.4.RANVICORA’S ACTIONS CONTRAVENE, THE CBD AND VARIOUS CBD DECISIONS**

12. The CBD obligates Ranvicora; not to cause transboundary harm<sup>16</sup>;to cooperate with other states on other matters of mutual interest, for the conservation and sustainable use of biological diversity<sup>17</sup>; and to Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.<sup>18</sup>

13. Despite such clear obligations Ranvicora proceeds with the Re introduction project in blatant disregard. The project consequently leads to grave transboundary effects and Ranvicora fails to cooperate with Arctos to address the problem even when asked to do so. As such, Ranvicora violates the CBD.

14. The Bern Convention on the other hand obligates Ranvicora to strictly control the introduction of non-native species, an obligation which it violates by introducing the grey bears which are deemed nonnative, invasive and alien.

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<sup>16</sup> CBD article 3

<sup>17</sup> CBD article 5

<sup>18</sup> CBD article 8(1)

**1.5.THE GOVERNMENT RANVICORA SHOULD COMPENSATE THE FARMERS  
AND OTHER CITIZENS WHOSE PROPERTY HAS BEEN DAMAGED BY  
GREY BEARS.**

15. It is a rule of customary international law that every international wrongful act of a state entails international responsibility of that state.<sup>19</sup> The ICJ acknowledged that any breach of an engagement involves an obligation to make reparations<sup>20</sup>.This creates an obligation to Ranvicora to make reparation for breach of its engagements in relation to Arctos. Irreparable damage has been suffered thus occasioning reparation for the injury suffered<sup>21</sup>.
16. Reparation should be done through payment of a sum corresponding to a value which restitution in kind would bear the award. If need be of damages for loss sustained which would not be covered by restitution in kind, payment in place of compensation.<sup>22</sup>
17. Ranvicora being the responsible state for the injury caused is under an obligation to compensate for the damage caused<sup>23</sup>, as it can't be made good by restitution.

**1.6.RANVICORA IS OBLIGATED TO FORMALLY END ITS HARMFUL  
REINTRODUCTION PROJECT AND SHOULD CAPTURE AND REMOVE THE  
GREY BEARS FROM THE WILD.**

18. States must stop the act in violation or the duty and other assurances and guarantees.<sup>24</sup> Ranvicora therefore, continuing with the project violates international law. Cessation of conduct in breach of an international obligation is the first requirement in eliminating the

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<sup>19</sup> *Corfu channel case, Nicaragua case, Gabcikovo-Nagymaros project case.*

<sup>20</sup> *Phosphates in Morocco Case.*

<sup>21</sup> Article 4 ILC draft articles on state responsibility

<sup>22</sup> *Corfu Channel Cases.*

<sup>23</sup> *Phosphates in Morocco case.*

<sup>24</sup> Article 29, ILC articles on state responsibility.

consequences of wrongful conduct<sup>25</sup>. Cessation thus functions, to put to an end the violation of international law and to safeguard the continuity, validity and effectiveness of the underlying primary rule.<sup>26</sup> Therefore, any further continuation of the project in the Sedan Sea amounts to a violation of international law. Cessation moreover is not subject to any limitations relating to proportionality and Ranvicora has no option but to stop.<sup>27</sup>

19. The twin essential requirements for cessation intimately linked together have been met. That is the wrongful act- the project has a continuing character and moreover the violated rule is still in force.<sup>28</sup> The project violates international laws still in force. It thus has to be stopped.

## **II. THE FEDERAL STATES OF ARCTOS DID NOT VIOLATE INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSES TO RANVICORA'S REINTRODUCTION OF GREY BEARS**

20. The Government of Arctos vehemently disagrees that its response actions infringe on any international law.

### **2.1.ARCTOS ACTED IN ACCORDANCE WITH ITS OBLIGATIONS UNDER THE CBD AND THE BERN CONVENTION**

21. Article 5, CBD states that Contracting Parties shall cooperate with other Contracting Parties for the conservation and sustainable use of biological diversity as far as possible and as appropriate.<sup>29</sup> Arctos acted in accordance with its obligations to cooperate and expressed its

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<sup>25</sup> WT/DS1 26/RW.

<sup>26</sup> *Rainbow warrior arbitration case*

<sup>27</sup> ILC articles on state responsibility-commentary to article 29.

<sup>28</sup> *Rainbow warrior arbitration case*.

<sup>29</sup> See also BOYLE, *The Rio Convention on Biological Diversity*, in *International Law and the Conservation of biological diversity* (1996), 42  
12 Article 8(m), CBD.

willingness to remedy the situation but Ranvicora refused to do anything to address the serious negative effects of its reintroduction project.

22. Article 8 CBD also places an obligation on Contracting Parties to conserve, as far as possible and appropriate, its biological resources with a view to ensuring their sustainable use. Parties must also promote the protection of ecosystems within their territories and ensure that viable populations of species are maintained in their natural habitats. The “as far as possible and appropriate” qualifier provides states with considerable scope for interpreting<sup>30</sup> how it chooses to uphold its obligations.<sup>31</sup>
23. Arctos also has not violated the Bern Convention, but in any event, Arctos’s actions are appropriate pursuant to the exceptions in Article 9.

## **2.2.ARCTOS ACTIONS WERE TAKEN IN ACCORDANCE WITH THE PRINCIPLE OF NECESSITY.**

24. In light of Ranvicora’s inaction, Arctos had no choice but to do what was necessary to protect its citizens and their property from the imminent threat posed by the grey bears. In the event that Arctos is found to have breached international law in its responses to the effects of the re-introduction project, its actions are justified under the defence of necessity.
25. In the *Gabcikovo-Nagymaros Project* case, the ICJ held that necessity may be invoked to preclude the wrongfulness of an act in the following circumstances: (1) the act “must have been occasioned by an ‘essential interest’ of the acting state; (2) that interest must have been threatened by a ‘grave and imminent peril,’ and (3) the act being challenged “must have been the ‘only means’ of safeguarding that interest.” Furthermore, “the state which is the author of

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<sup>30</sup> Wolfrum et al., *The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity*, Max Planck Yearbook of United Nations Law, 2000, 474

<sup>31</sup> Burhenne-Guilmin et al., *The Convention on Biological Diversity: A Hard-Won Global Achievement*, Yearbook

that act must not have ‘contributed to the occurrence of the state of necessity.’<sup>32</sup> These elements are satisfied in the instant case.

### **2.2.1. ARCTOS ACTIONS ARE THE ONLY MEANS OF SAFEGUARDING ITS CITIZENS, THEIR PROPERTY AND THE ENVIRONMENT AGAINST A GRAVE AND IMMINENT PERIL**

- 26.** Protecting the lives of its citizens and environment clearly constitutes Arctos ‘essential interests.’ The Commentary on the ILC Articles (‘ILC Commentary’) notes that an ‘essential interest’ is to be decided on a case-by-case basis and does not refer exclusively to preserving the existence of the state.<sup>33</sup> Examples include the economic survival of a state, the survival of a sector of its population, and the preservation of the environment of its territory or a part thereof.<sup>34</sup>
- 27.** For a peril to be “grave and imminent,” it must have been a threat to the interest at the time the measures were taken.<sup>35</sup> It is irrelevant that another outbreak may not have occurred immediately: a peril may be grave and imminent even if it threatens long-term rather than immediate consequences.<sup>36</sup>
- 28.** In *Gabcikovo-Nagymaros*, this Court observed that the cost of possible alternatives to internationally unlawful conduct is not a determinative factor in evaluating whether the conduct was the only means available. For the conduct to qualify as the only means, the

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<sup>32</sup> *Gabcikovo-Nagymaros (Hung. v. Slovak.)*, 1997 I.C.J., 52

<sup>33</sup> CRAWFORD, INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), 183

<sup>34</sup> Yearbook of the International Law Commission, vol. II, Part One (1980), 2

<sup>35</sup> *Supra* note 49, 54

<sup>36</sup> Fitzmaurice, *Necessity in International Law*, Netherlands Yearbook of International Law, vol.41, 2011, 177

additional cost of the alternative means must be of such magnitude that to resort to it would threaten an essential interest of the state.<sup>37</sup>

### **2.2.2. ARCTOS ACTIONS DO NOT SERIOUSLY IMPAIR ANY ESSENTIAL INTEREST OF RANVICORA**

29. To rely on the doctrine of necessity, the essential interest being safeguarded must be of greater importance than the interest of the foreign state being sacrificed. The issue is one of proportion between the two interests, rather than absolute interest.<sup>38</sup> While Arctos actions may impact upon Ranvicora's re introduced bears, these actions are taken to protect citizens from an invasive alien species.

### **2.2.3. ARCTOS DID NOT CONTRIBUTE TO THE SITUATION OF NECESSITY**

30. The Grey bear re introduction project is solely a Ranvicoran project and Arctos plays no hand in it.

### **2.3. ARCTOS HAS ACTED IN ACCORDANCE WITH THE DUTY TO PREVENT TRANSBOUNDARY HARM.**

31. Contrary to Ranvicora's assertions, Arctos has acted in accordance with the duty to prevent transboundary harm. If anything, Arctos has tried to remedy the transboundary harm that *Ranvicora* caused.

32. A state has the obligation to supervise activities within its jurisdiction or control, so that such activities do not cause significant environmental harm either to the territory or resources of

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<sup>37</sup> Boed, *State of Necessity as a Justification for Internationally Wrongful Conduct*, Yale Human Rights and Development Journal vol.3, 2014, 18

other States.<sup>39</sup> However, the occurrence of transboundary damage in itself does not necessarily equate to State responsibility.<sup>40</sup> There is a threshold criterion in that transboundary damage should reach a certain degree of severity.<sup>41</sup> Mere occurrence of damage is not sufficient to render a state liable as a certain degree of harm is inherent in interaction among states.<sup>42</sup> To be legally relevant, the damage should be at least greater than the mere nuisance or insignificant harm which is normally tolerated.<sup>43</sup> In the opinion forwarded by the ILC, there is no breach without the actual occurrence of transboundary environmental interference causing significant harm.<sup>44</sup> There should be environmental damage, physical injury, or loss of life and property occurring in one country caused by activities conducted in the territory of another country.<sup>45</sup>

**33.** In the present case, the Grey bear, which are alien invasive species, was a threat to human life, property and the environment. The measures taken by Arctos cannot therefore, even if exaggerated amount to transboundary harm. In fact, the responses taken were in the best interests of all the states involved.

#### **2.4.ARCTOS CONDUCTED DUE DILIGENCE**

**34.** It is well established that the obligation of a State to prevent transboundary harm is one of due diligence“, or best effort“ obligation; which requires all States to have taken all reasonable or necessary measures to prevent a given event from occurring.<sup>46</sup>In complying with a State’s duty to prevent transboundary harm, the standard of conduct required to be

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<sup>39</sup> Riccardo P. Mazzechi, *Forms of International Responsibility for Environmental Harm*, in *International Responsibility for Environmental Harm* (Francesco Francioni & Tullio Scovazzi eds, 2001).

<sup>40</sup> Hanqin, *supra* note 48, at 39.

<sup>41</sup> *Ibid.*

<sup>42</sup> Nicolas De Sadeleer, *Environmental Principles* 67 (Oxford University Press, 2002).

<sup>43</sup> Hanqin, *supra* note 48, at 40.

<sup>44</sup> Lefeber, *supra* note 34, at 24.

<sup>45</sup> Hanqin, *supra* note 48, at 42

<sup>46</sup> Trail Smelter, *supra* note 19.

observed is due diligence.<sup>47</sup> The test of due diligence is accepted generally as the most appropriate standard for the duty to prevent transboundary harm.<sup>48</sup> This custom-based rule of due diligence is imposed on all states to ensure that activities within their jurisdiction do not cause damage to the environment of other States, or of areas beyond the limits of their national jurisdiction.<sup>49</sup>

**35.** Under this standard, states in general are not automatically liable for damage caused irrespective of all other factors,<sup>50</sup> unlike in strict liability. Due diligence does not require an absolute guarantee against the occurrence of harm;<sup>51</sup> rather it involves reasonable efforts by a State to take appropriate measures in a timely fashion.<sup>52</sup> Its test imports an element of flexibility into the equation and must be tested in light of the circumstances of each case.<sup>53</sup> Nonetheless, its conduct should fall within international minimum standards.<sup>54</sup>

**36.** Due diligence leaves room for States to determine which measures are necessary, appropriate, feasible and available within their capacities to achieve the given objective.<sup>55</sup> It only requires reasonable efforts by a State to take appropriate measures in a timely fashion.<sup>56</sup>

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<sup>47</sup> Convention on Biological Diversity, 1992, art.3, 31 I.L.M. 818; Stockholm Declaration on the Human Environment, Prin.21, U.N. Doc.A/CONF.48/14/Rev.1 (1973); Rio Declaration on Environment and Development, Prin.2, U.N. Doc. A/CONF.151/26 (1992).

<sup>46</sup> *Id.* 53rd ILC Report.

<sup>48</sup> Commentary on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001, Report of the ILC on its 53rd Session, A/56/10, p. 392. *See also* e.g. Handl, „State Liability“ at 539–40; Birnie and Boyle, *International Law and the Environment*, at 112

<sup>49</sup> Bergkamp, *Liability and Environment*, Kluwer Law, (2001) at 165; Shaw, *supra* note 4 at 855.

<sup>50</sup> Shaw, *supra* note 4 at 855

<sup>51</sup> Stephens, *supra* note 9 at 158; Bergkamp, *supra* note 8 at 166.

<sup>52</sup> Report of the ILC, 53rd Session, 159, UN Doc. A/56/10 *cited in* Stephens, *supra* note 9 at 158. The report is a commentary on the Draft Articles of Prevention, considered a codification of customary international law

<sup>53</sup> Shaw, *supra* note 4 at 855

<sup>54</sup> Smith, *State Responsibility and the Marine Environment: The Rules of Decision*, Clarendon (1988) at 40.

<sup>55</sup> Xue Hanqin. *Transboundary Damage in International Law*, Cambridge Studies in International and Comparative Law 164 (Cambridge University Press, 2003).

<sup>56</sup> ARSIWA, *supra* note 2; Stephens, *International Courts and Environmental Protection* 158 (2009); Bergkamp, *Liability and Environment* 165 (2001)



In fact, the obligation to observe due diligence in preventing pollution is absolute, and for the breach, the states are liable irrespective of any fault.<sup>57</sup>

## **2.5.ARCTOS HAS NOT ACTED IN CONTRAVENTION OF CMS**

**37.** Arctos has not acted in contravention of CMS; Arctos is not even a Range State for the grey bear, but even if it were, Arctos's responses are permissible under CMS Article III(5)(d).

### **2.5.1. Arctos has complied with Article II of the CMS**

**38.** Article II CMS requires Arctos to conserve migratory species wherever and whenever possible. This means that Arctos should endeavor to provide protections to the Grey bear but may take action as appropriate, which may not have conservation at the foremost.<sup>58</sup> The use of such qualifiers strengthens conventions, as the alternative would hold even developing states, to a strict liability standard regardless of extenuating circumstances.<sup>59</sup> To safeguard the environment, the safety of its citizens and property it was necessary for Arctos to take action against the invasive alien species.

### **2.5.2. ARCTOS ACTIONS ARE JUSTIFIED UNDER THE ARTICLE III 'EXTRAORDINARY CIRCUMSTANCES' EXCEPTION**

**39.** The text of Article III.5 is an open-ended clause which permits the taking of migratory species if 'extraordinary circumstances so require.' The extraordinary circumstances

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<sup>57</sup> Shaw, *supra* note 19 at 762

<sup>58</sup> Gillespie, *Conservation, Biodiversity and International Law* (2013), 260

<sup>59</sup> Burhenne-Guilmin et al., *The Convention on Biological Diversity: A Hard-Won Global Achievement, Yearbook of International Environmental Law*, vol. 3, 1992, 52. See also Beyerlin Et Al., *International Environmental Law* (2014), 61 And Rajamani, *Differential Treatment In International Environmental Law* (2006), 12

exception is a common feature of many conservation agreements.<sup>60</sup> It grants states a considerable degree of discretion in determining when it should be invoked.<sup>61</sup>

40. The government of Western Australia invoked this exception in 2014 to justify the culling of sharks.<sup>62</sup> The government cited research showing that shark attacks had increased from once a year in the mid-1990s to two or three times annually from 2010 to 2013. The Federal Minister for the Environment explained that "One does not have to agree with a policy to accept that a national interest exemption is warranted to protect against imminent threat to life, economic damage and public safety more generally." He also stated that the matter was of national significance, as a loss of confidence in water-based activities has an impact on tourism and consequently the Australian economy.<sup>63</sup>

41. The re introduced grey bears attacking horses and sheep on farms, damaging orchards and beehives, and killing endangered Trouwborst terns clearly shows that the bears are harming livelihood of Arctos citizens and the environment and could affect their safety.

## **2.6.THE ACTIONS OF ARCTOS AMOUNTED TO COUNTER MEASURES**

42. The actions of the Applicant state were non-forcible countermeasures channeled at procuring its cessation and to achieve reparation for the injury. As stated in the *Gabčíkovo-Nagymaros Project* case,<sup>64</sup> countermeasures might justify otherwise unlawful conduct when "taken in

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<sup>60</sup> Article 4, Ramsar Convention; Article 4, Article 9, Conservation of European Wildlife and Natural Habitats, Article VII, Convention for the Protection of Migratory Birds between the United States and Great Britain

<sup>61</sup> Trouwborst, *Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species*, Cornell Intl L. Jour. Online, vol.2, 2014, 42

<sup>62</sup> Arup, *Greg Hunt Grants Western Australia Exemption for Shark Cull Plan*, The Sydney Morning Herald (January 21, 2014)

<sup>63</sup> Packham, *Western Australian given Exemption from Federal Laws to Cull Sharks*, The Australian, (January 21, 2014)

<sup>64</sup> *Ibid.*

response to a previous international wrongful act of another State and where directed against that State.<sup>65</sup>

**2.6.1. THE ACTIONS WERE TAKEN IN RESPONSE TO PREVIOUS WRONGFUL ACTS OF THE STATE OF RANVICORA.**

43. The actions have to be seen as a response to a wrongful act of another state.<sup>66</sup> The action cannot be taken in isolation or be found to be an action on its own. In the *Air Service Agreement arbitration*,<sup>67</sup> the term “countermeasures” was meant to mean a response or a means of self-help. This had to be against the acts of another state.

44. In the current case, the Applicant state takes measures against the Respondent state in response to the attacks by the bears. Bears that the state of Ranvicora released and aided in procuring. These acts having been attributed to the Respondent state are countered by the actions of the Applicant government of granting permission to the citizens to kill bears.

**2.6.2. THE ACTIONS ARE DIRECTED AGAINST THE STATE OF RANVICORA**

45. The counter measures are targeted at causing cession of the attacks to their property and people. The acts are directed at stopping bears that released by Ranvicora from causing more transboundary harm. It is clear that the actions of the Applicant state are directed against the Respondent State alone and no other states.

46. All other conditions for counter measures have been met.<sup>68</sup> That is the state has called the respondents to act on its obligation under international law,<sup>69</sup> it has notified the respondents

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<sup>65</sup> *Ibid* at paragraph 83.

<sup>66</sup> *Portuguese Colonies case (Naulilaa incident)*, UNRIIAA, vol. II (Sales No. 1949.V.1), paragraph. 1011, at page. 1025–1026 (1928).

<sup>67</sup> *Ibid*.

<sup>68</sup> Article 52 ILC Draft Articles on State Responsibility.

<sup>69</sup> *Supra* note 34.

of its actions,<sup>70</sup> the actions have not ceased and the matter had not been submitted before a court or tribunal for determination.

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<sup>70</sup> *Ibid.*

## CONCLUSION AND PRAYERS FOR RELIEF

The Federal States of Arctos respectfully requests this Court to adjudge and declare:

### I.

The Republic of Ranvicora violated international law with respect to its grey bear re-introduction project the bear being an alien species in the territory of the state of Arctos; and

### II.

The Federal States of Arctos did not violate international law with respect to its responses to Ranvicora's reintroduction of grey bears.

*Respectfully Submitted,*

*Agents of the Government of the Federal States of Arctos.*