

IN THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS



THE CASE CONCERNING

QUESTIONS RELATING TO THE REINTRODUCTION OF BEARS

THE FEDERAL STATES OF ARCTOS

APPLICANT

v.

THE REPUBLIC OF RANVICORA

RESPONDENT

MEMORIAL FOR THE APPLICANT

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STATEMENT OF JURISDICTION

Article 36(1) of the Statute of the International Court of Justice, grants jurisdiction to the International Court of Justice (“ICJ”) to hear cases referred by parties to the United Nations.¹ Under Article 40(1) of the Statute,² the Federal States of Arctos (“Arctos”) and the Republic of Ranvicora (“Ranvicora”) submit the questions of international law to the ICJ, as stated in Annex A of the Special Agreement Between the Federal States of Arctos and the Republic of Ranvicora for Submission to the International Court of Justice of Differences Between Them Concerning Questions Relating to Reintroduction of Bears (“Special Agreement”).³

QUESTIONS PRESENTED

- I. WHETHER RANVICORA VIOLATED INTERNATIONAL LAW WHEN IT INTRODUCED GREY BEARS INTO THE FOREST ON THE BORDER OF RANVICORA AND ARCTOS.

- II. WHETHER ARCTOS VIOLATED INTERNATIONAL LAW IN ITS RESPONSE TO THE CIRCUMSTANCES CREATED BY THE GREY BEARS THAT CROSSED INTO ARCTOS.

STATEMENT OF FACTS

The Federal State of Arctos (“Arctos”) and the Republic of Ranvicora (“Ranvicora”) are neighboring states on the continent of Suredia.⁴ Arctos lies directly north of Ranvicora and has

¹ Statute of the International Court of Justice art. 36(1), 26 June 1945, T.S. 993 [hereinafter ICJ].

² *Id.* at art. 40(1).

³ R. at 3.

⁴ R. at 6.

no other neighboring states.⁵ Arctos and Ranvicora share a 75 kilometer- long border, which primarily consists of forests and privately-owned farms.⁶

The grey bear (*Ursinus Smokeysius*) is native to Ranvicora, as well as to two other Suredia states that border it, Paddington and Aloysius.⁷ The grey bears of Ranvicora, however, had been isolated from the Paddington and Aloysius bears.⁸ The grey bear has been listed as an endangered species on the IUCN Red List of Threatened Species, on Appendix II of the Bern Convention, and on Appendix I of CMS.⁹ Before the Ranvicora bear population went extinct, the bears migrated within Ranvicora but never left the state.¹⁰ Historical and fossil records show no evidence of grey bears ever existing in Arctos.¹¹ No other large carnivore species live anywhere else on the continent.¹²

In 1963, Ranvicora's grey bear population went extinct due to overhunting and habitat destruction.¹³ Because of the bear's cultural significance to the country, Ranvicora began plans to reintroduce the bear in 2008.¹⁴ Development and habitat destruction led Ranvicora to unilaterally conclude that the northern forest bordering Arctos was the best place to introduce the bears.¹⁵ Biologists have questioned whether the traditional range of the Ranvicora grey bears included this forest.¹⁶ By observing the behavior of the grey bears of Paddington and Aloysius, Ranvicora determined that the bears had been moving north due to climate change.¹⁷ While

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 7.

¹² *Id.*

¹³ *Id.* at 6-7.

¹⁴ *Id.* at 7.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

Ranvicora conducted an environmental impact assessment, it did not analyze the effect reintroduction could have on other countries.¹⁸ Ranvicora failed to inform, consult, or coordinate with Arctos before reintroduction.¹⁹

Starting in 2013, Ranvicora introduced 20 grey bears from Paddington and Aloysius into the northern forest.²⁰ By September 2017, Arctos citizens reported multiple sightings of grey bears in the Arctos side of the forest.²¹ Ranvicora scientists confirmed they were aware of the bears' crossing.²²

In February 2018, less than six months after the first bear sighting in Arctos, a grey bear attacked and killed the horse of an Arctos farmer.²³ In the next six months, grey bears killed 7 horses and 20 sheep, and damaged apple orchards and beehives within the country.²⁴ Grey bears also began eating eggs and nestlings of the Trouwborst Tern, an endemic endangered species protected under Arctos law.²⁵ Responding to its citizens' concerns, Arctos contacted Ranvicora on August 9, 2018, formally requesting that Ranvicora end its reintroduction program, remove the bears from the forest, and compensate Arctos citizens for their property damage.²⁶ Ranvicora responded, denying any liability or violation of international law.²⁷

To mitigate the damage of the grey bears to property and the environment, Arctos began leaving poisoned carcasses near Arctos farms that had been previously attacked.²⁸ Despite these

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 8.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 9.

²⁸ *Id.* at 9-10.

measures, on April 22, 2019, a grey bear mauled two children near an Arctos farm.²⁹ One child died, and the other suffered significant permanent injuries.³⁰ To prevent more loss of life, Arctos released an emergency regulation empowering farmers to shoot grey bears that crossed into Arctos.³¹ Four weeks later, farmers shot two grey bears.³² Ranvicora then wrote to Arctos demanding revocation of Arctos' emergency regulation. Arctos declined, and both sides subsequently agreed to resolve the dispute through the ICJ.³³

SUMMARY OF THE ARGUMENT

I. Ranvicora's actions violated its treaty and customary obligations to prevent transboundary harm, prevent the introduction of invasive species to other states, and to cooperate and communicate when taking action that could affect other states. In violation of Article 3 of the Convention on Biological Diversity ("CBD"), as well as customary obligation to not cause transboundary harm, Ranvicora introduced the bears close to Arctos and did not prevent their crossing, which harmed the flora, fauna, property, and safety of Arctos citizens. Since grey bears are not native to Arctos and have harmed Arctos' environments, by introducing the bears and allowing their crossing. Ranvicora failed its CBD Article 8(h) and Bern Convention Article 11 obligations to prevent or control the introduction of invasive species. Further, Ranvicora did not communicate or cooperate with Arctos prior to its introduction, in violation of Article 5 of the CBD, the Stockholm Convention ("Stockholm"), the Rio Convention ("Rio"), and Article 11 of the Bern convention.

²⁹ *Id.* at 10.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 11.

II. Arctos did not violate international law when it responded to the circumstances created by the grey bears that crossed into Arctos. The grey bear in Arctos is not a protected population. It is an invasive species in Arctos, and its movements are due to artificial introduction, not natural migration due to climate change. Further, even if the Court finds that it is a protected population, Arctos' responses fall under the exceptions to the relevant treaties. Arctos' actions meet the "extraordinary circumstances" exception under Article III (5)(d) of the Convention on the Conservation of Migratory Species of Wild Animals ("CMS"), and the "no other satisfactory solution" exception under Article 9(1) of the Bern Convention.

ARGUMENT

I. RANVICORA VIOLATED INTERNATIONAL LAW WHEN IT INTRODUCED GREY BEARS INTO THE FOREST ON THE RANVICORA-ARCTOS BORDER.

A. Ranvicora violated its treaty and customary obligations to prevent transboundary harm.

1. Ranvicora has a duty to prevent transboundary harm.

Article 3 of the Convention on Biological Diversity holds that states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."³⁴ The convention holds states responsible for any adverse effect their state has on environments beyond their jurisdiction.³⁵

Ranvicora also must follow the well-established obligation under customary international law to not cause transboundary environmental harm. This obligation derives from the principle that a state may not use their property in a way that harms the interests of another. Such a responsibility has been confirmed multiple times by the ICJ, notably in *The Corfu Channel*

³⁴ Convention on Biological Diversity art. 4, 6 June 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

³⁵ *Id.*

Case.³⁶ In *Corfu*, the ICJ found that Albania violated “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.”³⁷ This general obligation to avoid causing harm to others has been extended to include environmental harm in multiple international tribunals. One of the earliest instances of the recognition of the obligation to not harm the territory of other states is the 1941 *Trail Smelter Case* arbitration between the U.S. and Canada.³⁸ Finding that fumes from a Canadian smelter harmed people and property in the United States, the U.S.-Canada International Joint Commission found that international custom prohibited states from damaging the territory of another by fumes.³⁹ This duty to avoid damaging the environment of other states gained broad recognition in the 1972 United Nations Conference on the Human Environment in Stockholm (“Stockholm”). In Principle 21 of Stockholm, participants declared that states had a “responsibility to ensure that activities within their jurisdiction or control do not cause damage to other States.”⁴⁰ Ranvicora attended and fully participated in the Stockholm Convention, and emerged as among the consensus of all decisions reached.⁴¹ This participation confirms Ranvicora’s recognition of its responsibility to avoid harming the environment of other states.

Beginning in 1996, a string of ICJ decisions confirmed the status of this obligation to not damage environments of other states as an established custom of international law.⁴² In one of these cases, *Case Concerning Pulp Mills on the River Uruguay*, the ICJ analyzed in part a

³⁶ *Corfu Channel* (U.K. v. Albania), Judgment, 1949 I.C.J. 4, (Apr. 9).

³⁷ *Id.*, at 22.

³⁸ *Trail Smelter Case* (Canada v. U.S.), 3 R.I.A.A. 1905 (1941) (hereinafter *Trail Smelter*).

³⁹ *Id.*

⁴⁰ United Nations Conference on the Human Environment at Stockholm, 16 June 1972, A/CONF.48/14/REV1 [hereinafter *Stockholm*].

⁴¹ R. at 6.

⁴² See, e.g., *In the Matter of the Indus Waters Kishenganga Arbitration* (Ind. v. Pak.), Partial Award, 2011 PCA 01 (2013).

bilateral treaty containing similar language to Principle 21 of Stockholm.⁴³ The ICJ concluded that the obligation to prevent harm to other states entails adoption of affirmative laws and regulations, but also vigilance in enforcement and administrative control.⁴⁴ While the ICJ has not yet expressed directly the standard by which states should be held responsible for violations of this principle, cases like *Pulp Mills* suggest that states must exercise due diligence, and that they can be held responsible if their negligence leads to environmental harm outside their territory.⁴⁵

2. Ranvicora violated its duty to prevent transboundary harm when it introduced grey bears into Arctos.

By failing to take any measure to keep grey bears in Ranvicora, or even to consider the effect of its introduction on other countries, Ranvicora failed its obligation to exercise due diligence to prevent transboundary harm. Ranvicora introduced the grey bears on the northern border of Ranvicora, an area it cannot confirm fell in the bears' historic natural range.⁴⁶ Ranvicora had observed the bears in Paddington and Aloysius moving north but took no precaution to prevent its introduced bears from migrating further north into Arctos.⁴⁷ Rather than exercise the "due diligence" implied in cases like *Pulp Mills*, Ranvicora took no steps to ensure that its project would not adversely affect territory outside its control.⁴⁸

By introducing grey bears on the border of Arctos and allowing them to cross, Ranvicora damaged Arctos' environment, which in turn harmed flora, fauna, private property, and human lives. Like the fumes in *Trail Smelter*, grey bears adversely affected wildlife, property, and citizens' well-being. Because Arctos has never had any large carnivores like the grey bear exist

⁴³ Case Concerning Pulp Mills on the River Uruguay, (Argentina v. Uruguay), Judgement, 2010 I.C.J. 1, 61 (Apr. 20) (hereinafter *Pulp Mills*).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ R. at 7.

⁴⁷ R. at 7-10.

⁴⁸ *Pulp Mills*, *supra* note 43; R. at 7-10.

anywhere in the country, the bears' introduction had a profound effect on the environment. Trouwborst tern, an endangered species endemic in Arctos, have been given protection under Arctos law.⁴⁹ The grey bears have attacked the nests of the terns, eating the eggs and threatening the survival of the species.⁵⁰ Further, the grey bears have damaged beehives and apple orchards within Arctos.⁵¹ This damage to flora and fauna constitutes a violation of the CBD and customary prohibition against transboundary environmental harm.

But the introduction of bears harmed far more than the native flora and fauna of Arctos. Within six months of the bears' crossing, the bears killed 7 horses and 20 sheep that belonged to Arctos farmers.⁵² After Ranvicora refused Arctos' request to act, the bears killed even more.⁵³ Most egregiously, the grey bears attacked two children in Arctos, killing one and severely injuring the other.⁵⁴ This harm to private property and bodily integrity constitutes a direct harm to Arctos, a harm prohibited both by CBD Article 3 and customary obligation.

B. Ranvicora violated its treaty obligations when it introduced an invasive alien species into Arctos.

1. The grey bear is an invasive alien species in Arctos.

Determining whether a population of a species in a given area constitutes an invasive alien species requires two determinations: (1) whether the species is alien to the environment, and (2) whether the species' presence disrupts the ecosystem to the point of becoming "invasive".⁵⁵

⁴⁹ R. at 8.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*, at 9.

⁵⁴ *Id.*, at 10

⁵⁵ Sixth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity, Decision VI/23 (19 April 2002).

The CBD has defined alien species as those “introduced outside its natural past or present distribution.”⁵⁶ In other words, a species is alien if it exists in an area due to human action, rather than natural phenomena. An alien species becomes an invasive alien species when its introduction or spread acts as an agent of change and threatens biological diversity.

Here, Grey bears in Arctos are an alien species. The grey bears of Ranvicora never lived in Arctos. Scientists even debate whether the grey bears ever lived in the Ranvicora side of the northern forest. The grey bears only entered Arctos, a territory outside the historical range of the grey bear, because Ranvicora artificially introduced the bears at the Ranvicora-Arctos border.

Grey bears have caused sufficient damage to the biological diversity of Arctos to constitute an invasive alien species. Before Ranvicora released the bears that entered Arctos, no large carnivores had ever existed in Arctos. When humans introduce large carnivores to areas with no history of large carnivores, they inhabit a new niche, significantly altering the food web balance. In a study measuring the effects of alien foxes on an Australian island without any native carnivores, for example, researchers found that the foxes added an entirely new dimension to the food web, outcompeting native birds for carrion at night by a wide margin.⁵⁷ Similarly, in Arctos, grey bears have attacked the eggs and nestlings of the endangered Trouwborst tern, and have damaged beehives and apple orchards throughout the forest.⁵⁸

2. Ranvicora violated its treaty obligations when it introduced an invasive alien species.

Article 8(h) of the CBD mandates that states, as far as is possible and appropriate, “prevent the introduction of, control or eradicate those alien species which threaten ecosystems,

⁵⁶ *Id.*

⁵⁷ Brown MB et al, Invasive Carnivores Alter Ecological Functions and Enhance Complementarity in Scavenger Assemblages on Ocean Beaches, 10.1890/15-0027.1 (Oct. 2015).

⁵⁸ R. at 8.

habitats or species”.⁵⁹ Article 11 of the Bern Convention (“Bern”) holds that states must “strictly control the introduction of non-native species”.⁶⁰

Rather than working to prevent introduction of a threatening alien species, Ranvicora’s introduction of bears directly resulted in the introduction of an invasive alien species into Arctos. Ranvicora, with knowledge of the bears’ recent tendency to move north, introduced grey bears on its northern border shared with Arctos.⁶¹ Ranvicora took no action prior to the bears’ crossing to prevent their entering Arctos.⁶² After Arctos communicated its concerns, Ranvicora refused to take any action to control or eradicate the bear population in Arctos.⁶³ This inaction cannot constitute “strict control” of introduction of non-native species, in violation of Article 11 of Bern.⁶⁴ Nor can Ranvicora’s actions be characterized as a “prevention” under Article 8(h) of the CBD.⁶⁵ By facilitating the entry of an alien invasive species into Arctos, Ranvicora has violated each of these treaty obligations.

C. Ranvicora violated its treaty and customary obligations when it failed to communicate or cooperate with Arctos.

1. Ranvicora has a duty to cooperate on matters affecting areas outside its jurisdiction.

Article 5 of the CBD mandates that states have a responsibility to cooperate between contracting parties or through international organizations when its actions could affect issues of mutual interest or areas outside their jurisdiction.⁶⁶ Article 11 of Bern holds that contracting parties must cooperate whenever appropriate, and whenever cooperation would enhance the

⁵⁹ CBD, at art. 8(h)

⁶⁰ Convention on the Conservation of European Wildlife and Natural Habitats at art. 11, 19 Sept. 1979, 1284 U.N.T.S. 209 [hereinafter Bern].

⁶¹ R. at 7.

⁶² *Id.*, at 7-10.

⁶³ *Id.*, at 9.

⁶⁴ Bern, at art. 11.

⁶⁵ CBD, at art. 8(h).

⁶⁶ *Id.*, at art. 5.

goals of conservation.⁶⁷ While the CBD and Bern do not detail the degree to which parties must cooperate to meet their treaty obligations, examining states' duty to study consequences of their actions, as well as the customary obligation of Good Neighborliness and Duty to Cooperate fill in this gap.

Article 11 of the Bern Convention holds that contracting states may only reintroduce native flora or fauna to contribute to conservation only if a study is made considering other contracting parties to ensure the reintroduction would be "effective and acceptable."⁶⁸ This duty to study effects on other countries is an essential aspect of states' duty to cooperate on matters of mutual interest because studies play an important role in pinpointing whether matters of mutual interest exist.

The obligations of Good Neighborliness and Duty to Cooperate have been recognized in both the 1972 Stockholm Convention and the 1992 United Nations Conference on Environment and Development at Rio de Janeiro ("Rio").⁶⁹ Ranvicora fully participated and agreed with the consensus at these conferences. The principle of Good Neighborliness has existed as a tenant of international customary law for over 200 years.⁷⁰ This general duty of reciprocity and cooperation was recognized in Article 1.3 of the United Nations Charter, and was further elaborated upon in the 1970 *UN Declaration of Principles on International Law*.⁷¹ Explicitly applied to international environmental law after the Stockholm and Rio conferences, the

⁶⁷ Bern, at art. 11.

⁶⁸ *Id.*

⁶⁹ Stockholm; Rio Declaration on Environment and Development, 14 June 1992, UN Doc. A/CONF.151/126 [hereinafter Rio].

⁷⁰ Peter H. Sand, *The Evolution of International Environmental Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (Daniel Bodansky et al., ed. 2008).

⁷¹ U.N. Charter art. 1(3); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, GA U.N. Doc. A/RES/26256 (XXV) (1970).

principles of Cooperation and Good Neighborliness have been understood to require prior notice and good faith cooperation.

The 1992 Rio conference requires states to provide “prior and timely notification and relevant information” to states that may face transboundary harm due to their action.⁷² This duty to notify has nearly always been linked with a duty to consult in good faith. The ILC Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities suggest a series of procedural steps for notification and consultation.⁷³ These steps include notifying potentially affected states with available technical specifications, a six-month waiting period for the potentially affected state to respond, and a good faith balancing of interests of all involved parties.⁷⁴

2. Ranvicora failed to properly cooperate with Arctos in its introduction of grey bears.

By introducing grey bears on the border between Ranvicora and Arctos, Ranvicora took action that risked transboundary harm. Ranvicora violated its duty to study by not measuring the effects of its introduction program on any other states.⁷⁵ Even though they did not conduct a study on how Arctos could be affected, Ranvicora knew the bears moved around a wider range and that the bears of Paddington and Aloysius tended to extend their range north.⁷⁶ Ranvicora scientists tracked the bears as they crossed into Arctos, but did not notify Arctos until farmers in Arctos reported seeing the bears.⁷⁷ This failure to notify Arctos before taking action, as well as the failure to notify even after transboundary harm occurred, constitutes a violation of the

⁷² Rio.

⁷³ International Law Commission Draft articles on Prevention of Transboundary Harm from Hazardous Activities art. 2(c), GA U.N. Doc. A/56/10 (2001).

⁷⁴ *Id.*

⁷⁵ R. at 7.

⁷⁶ *Id.*

⁷⁷ *Id.* at 8.

obligation to cooperate detailed in CBD, Stockholm, and Rio.⁷⁸ And because Ranvicora never notified Arctos, the two countries never consulted with one another in good faith, in violation of international customary law.

Ranvicora never studied the potential effects of the grey bears on Arctos. Had they consulted with Arctos, perhaps they would have better understood the risks to conservation and biodiversity their actions posed. Since cooperation would have enhanced goals of cooperation, Ranvicora's failure to communicate constitutes a violation of Article 11 of the Bern Convention.⁷⁹

II. ARCTOS DID NOT VIOLATE INTERNATIONAL LAW WHEN IT RESPONDED TO THE CIRCUMSTANCES CREATED BY THE GREY BEARS THAT CROSSED INTO ARCTOS.

A. The grey bear in Arctos is not protected because is an invasive population and was artificially introduced by Ranvicora.

1. The grey bear is an invasive species in Arctos and is therefore not protected under the relevant treaties.

The grey bear population that Ranvicora introduced does not qualify as a protected migratory species under either CBD or the Convention on the Conservation of Migratory Species of Wild Animals ("CMS"), because, as elaborated above, it is an invasive population introduced outside of its natural range. First, Arctos did not violate CBD. Under CBD, party states have an active duty to protect against invasive species. Article 8(h) states that parties shall "[p]revent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species."⁸⁰ Here, Arctos did not violate CBD, because it is bound by the Article 8(h) duty to eradicate this grey bear population as an alien species in Arctos.

⁷⁸ CBD, Stockholm, Rio.

⁷⁹ Bern, at art. 11.

⁸⁰ CBD, at art. 8(h).

Second, Arctos did not violate CMS because the actions did not constitute a taking under CMS. In order for an action to qualify as a “taking” under Article III(5) of CMS, the population must be within a natural “range state” of that migratory species.⁸¹ The “range” under CMS is defined as, “all areas of land or water that a migratory species inhabits... at any time on its normal migration route.”⁸² Here, as elaborated above, this grey bear population is outside the species’ natural range. Ranvicora artificially introduced the population into a region the bears had historically never entered.⁸³ This population therefore does not meet the requisite elements to be protected against “takings” under CMS.

2. Ranvicora’s artificial introduction accounts for the grey bear population in Arctos, not climate change.

Migration due to climate change does not explain the presence of grey bears in Arctos, Ranvicora’s introduction plan does. The Standing Committee to the Bern Convention, in Recommendation No. 142, reiterated its definition of ‘introduction’ as “the movement by human agency, indirect or direct, of an alien species outside of its natural range (past or present)...”⁸⁴ Such introduction is antithetical to natural species migration.⁸⁵ This exact distinction prompted the Bern Convention Standing Committee to issue Recommendation No. 142. The Committee wanted to distinguish species that moved to new regions naturally due to human-caused climate change from species in new regions due to artificial human introduction.⁸⁶ For a migratory

⁸¹ Convention on the Conservation of Migratory Species of Wild Animals art. III(5), 23 June 1979, 1651 U.N.T.S. 333 [hereinafter CMS].

⁸² CMS, at art. 1(1)(f).

⁸³ R. at 7.

⁸⁴ Recommendation No. 142 Adopted by the Convention on the Conservation of European Wildlife and Natural Habitats Standing Committee, (Nov. 26 2009), https://search.coe.int/bern-convention/Pages/result_details.aspx?ObjectId=0900001680746184.

⁸⁵ *Id.*

⁸⁶ *Id.*

species to qualify under this recommendation, it must be “naturally extending [its] range”, without direct human agency.⁸⁷

CMS Resolution 12.21 similarly calls for the definition of the “historic range” of protected migratory species to be expanded to account for climate change.⁸⁸ Coverage under this new definition hinges on the natural shift in species movement. Neither the original text of the CMS, nor Resolution 12.21 make any indication that artificial introduction of a species into a new range could qualify as a “climate-induced range shift.”⁸⁹

Here, the grey bear population at issue did not naturally migrate northward into Arctos due to climate change. Ranvicora directly and artificially introduced a new grey bear population, sourced from the non-bordering countries of Paddington and Aloysius, into the northern Ranvicora forest, at the border with Arctos.⁹⁰ This introduction program falls squarely within the Bern Convention’s definition of ‘introduction.’⁹¹ Because all of the grey bears naturally living in Ranvicora went extinct in the 1963, but for Ranvicora’s ‘human agency’ over the bears, they never would have been at the border between Ranvicora and Arctos, no matter how powerful the forces of climate change.⁹² This causal gap also excludes the population from protection under CMS Resolution 12.21 because the changed range cannot be traced to climate change.⁹³

Notwithstanding this distinction, Arctos need not consider climate change induced range changes because CMS Resolution 12.21 is not binding. CMS Resolution 12.21 merely “invites” party states to adopt an interpretation of Article I (1)(c)(4) in such a way that incorporates

⁸⁷ *Id.*

⁸⁸ Resolution 12.21 Adopted by the Conference of the Parties at its 12th Meeting, UNEP/CMS/Resolution 12.21 (Oct. 2017).

⁸⁹ *Id.*

⁹⁰ R. at 7.

⁹¹ Standing Committee Rec. 142, *supra* note 84.

⁹² R. at 6.

⁹³ CMS Res. 12.21, *supra* note 88, at 4.

changes in migration due to climate change.⁹⁴ This terminology reveals that party states to CMS are not legally bound by the interpretation suggested in CMS Resolution 12.21 in itself. Nor has this interpretation garnered the widespread practice of states or *opinio juris* necessary to qualify as an international custom under Article 38 of the ICJ Statute.⁹⁵ Even if the grey bears had moved northward naturally, Arctos is not legally bound by the CMS redefinition of “historic coverage” due to climate change.⁹⁶ Regardless of how the grey bears came to be in Arctos, CMS Article I (1)(c)(4) would not expand the “historic coverage” of grey bears to include Arctos territory.

B. Even if the ICJ finds that the grey bear population is protected, Arctos’ responses fall under the exceptions to the relevant treaties.

1. The events that prompted Arctos’ response qualify as extraordinary circumstances under the Convention on the Conservation of Migratory Species of Wild Animals.

Even if the Court finds that this grey bear population is protected under CMS, Arctos’ actions do not qualify as a taking because they fall under the “extraordinary circumstances” exception in CMS Article III (5)(d).⁹⁷ To qualify as an exception under Article III (5), an action must be: (1) precise as to content, (2) limited in space and time, and (3) not disadvantageous to the species.⁹⁸ If the action meets these elements, it is not considered a prohibited taking. Under Article III (5)(d), a valid exception exists if “extraordinary circumstances so require.”⁹⁹ While other terms are defined in Article I where the convention calls for a specialized interpretation, the convention does not further define “extraordinary circumstances.”¹⁰⁰ This level of generality

⁹⁴ *Id.*

⁹⁵ ICJ at art. 38; North Sea Continental Shelf Cases (Ger. v. Den.), Judgment, 1969 I.C.J. Rep. 3 (February 20).

⁹⁶ CMS Res. 12.21, *supra* note 88, at 4.

⁹⁷ CMS, at art. III(5)(d).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ CMS, at art. I.

indicates that this term was left intentionally broad, as to address a range of situations that party states may encounter. In fact, subsequent statements from Meetings of the Parties have explicitly treated it as such, and even broadening the exception further.¹⁰¹

Here, Arctos acted in response to extraordinary emergency circumstances created by the bears and Ranvicora's inaction. Before Arctos took any action, grey bears killed numerous horses and sheep¹⁰² on farms in Arctos, destroyed apple orchards and beehives,¹⁰³ and threatened the locally endangered Trouwborst Tern.¹⁰⁴ After Ranvicora refused to act, bears also mauled two children, revealing the direct danger the bears posed to the lives of Arctos' citizens.¹⁰⁵ In the wake of these attacks, the citizens of Arctos demanded immediate action to ensure that no one else would die.¹⁰⁶

Arctos' actions also meet the three general elements of an Article III(5) exception. Satisfying the first two elements, the actions were precise, and spatially and temporally limited.¹⁰⁷ When Ranvicora declined to engage in Arctos' initial attempt to negotiate,¹⁰⁸ Arctos placed poisoned carcasses only near the farms that bears had previously attacked.¹⁰⁹ Because the carcasses were only placed near vulnerable farms, and no other large predators exist in the region that would eat them,¹¹⁰ this was a precise and limited action. After the children were mauled,¹¹¹ Arctos' emergency regulation was only employed by farmers, against bears already on their

¹⁰¹ See, e.g., Agenda Adopted by the Conference of the Parties at its 5th Meeting, "Interpretation of Certain Terms," UNEP/CMS/Conf. 5.16 (March 1997) (finding that the unpreventable accidental takings are not a taking, under the "extraordinary circumstances so require" exception).

¹⁰² R. at 8, 9.

¹⁰³ *Id.*

¹⁰⁴ R. at 9.

¹⁰⁵ R. at 10.

¹⁰⁶ R. at 8.

¹⁰⁷ CMS, at art. III(5).

¹⁰⁸ R. at 8.

¹⁰⁹ R. at 9-10.

¹¹⁰ R. at 7.

¹¹¹ R. at 10.

land.¹¹² These responses were specifically executed to protect personal safety and property. Each of these actions therefore meet the first two elements of Article III (5).¹¹³

The actions also meet the third elements because they did not disadvantage the species as a whole.¹¹⁴ The grey bear populations in their original native states of Paddington and Aloysius¹¹⁵ will not be affected, nor will any bears that remain in Ranvicora. The species as a whole will therefore not be disadvantaged by Arctos' protections. Because Arctos reacted to extraordinary emergency circumstances, and acted within the elements of a CMS Article III(5) exception, Arctos' actions are exempt from a CMS taking, and did not violate international law.¹¹⁶

2. The events that prompted Arctos' response qualify as circumstances to which there was no other satisfactory solution under the Bern Convention.

Even if the Court finds that this grey bear population is protected under the Bern Convention, Arctos' actions fall under the "no other satisfactory solution" exception in Article 9(1) and therefore do not qualify as a violation of the Convention.¹¹⁷ In order to qualify as an exception, two elements must be met: (1) there must be no other satisfactory solution, and (2) it must not be detrimental to the survival of the population concerned.¹¹⁸ The Convention does not, however, specify a minimum population size to meet Article 9.¹¹⁹ The actions must also fall under one of the five listed categories of reasoning, including in relevant part, the protection of

¹¹² R. at 10.

¹¹³ CMS, at art. III(5).

¹¹⁴ *Id.*

¹¹⁵ R. at 7.

¹¹⁶ CMS, at art. III(5).

¹¹⁷ Bern Convention, at art 9(1).

¹¹⁸ *Id.*

¹¹⁹ Bern Convention, at art 9(1).

public health and safety, protection of flora and fauna, and prevention of serious damage to crops and livestock.¹²⁰

It is true that Appendix IV to the Bern Convention lists ‘poisoning’ among a group of universally barred methods of “indiscriminate” killing, to which even Article 9 exceptions are bound.¹²¹ However, the Explanatory Report that accompanied the Convention’s release in 1979 elaborated on broader exceptions in emergency situations.¹²² In explaining Article 9, the Report states, “...there might be emergency cases where exceptions would have to be made without all conditions having been fulfilled...”¹²³ The two elements of Article 9(1) exceptions may therefore be more loosely applied in the face of emergency situations.¹²⁴

Here, by the time Arctos took action, no other satisfactory solution existed. When the bear attacks in Arctos began, the government’s first response was to reach out to Ranvicora and request an end to the introduction program.¹²⁵ And when the two children were mauled, Arctos again looked to Ranvicora for collaboration on a solution,¹²⁶ as the Bern Standing Committee has repeatedly called for.¹²⁷ As elaborated above, Ranvicora did not engage, leaving Arctos with only the options to act unilaterally, or do nothing. The mauling revealed that the attacks were increasing in severity, and the risk of future attacks compelled action.

Arctos’ actions were not detrimental to the survival of the grey bear population. As elaborated above, the original population in Paddington and Aloysius from which these bears

¹²⁰ *Id.*

¹²¹ Bern Convention, at app. IV.

¹²² Bern Convention, *Explanatory Report to the Convention on the Conservation of European Wildlife and Natural Habitats*, ¶ 39, E.T.S. No. 104 (Sept. 19, 1979).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ R. at 8.

¹²⁶ R. at 10.

¹²⁷ See, e.g., Recommendation No. 163 Adopted by the Convention on the Conservation of European Wildlife and Natural Habitats Standing Committee, (Nov. 30 2012), https://search.coe.int/bern-convention/Pages/result_details.aspx?ObjectId=090000168074668.

originated,¹²⁸ will not be affected. And Ranvicora is not barred from employing the remainder of the introduction program in a safer, more suitable region. Because the Convention does not specify any quantitative benchmarks for this element, Arctos is not bound to protect this population with any more specificity than the survivability of the population as a whole. Further, because Arctos is responding to emergency conditions caused by the bear attacks, the actions do not necessarily need to meet these two elements.¹²⁹

Actions under any one of categories enumerated in Article 9(1) would sufficiently meet the exception; here Arctos' actions meet three. (1) Arctos acted "in the interests of public health and safety..." (2) Arctos acted "for the protection of flora and fauna," and (3) Arctos acted "to prevent serious damage to crops [and] livestock..."¹³⁰ First, Arctos enacted emergency measures to protect public health and safety.¹³¹ On April 22, 2019, a grey bear mauled two children.¹³² One of the children died, and the other faces life-long injuries.¹³³ An area once free from any large carnivores now faced life-threatening bears. Further, that these children were playing just outside a family farm showcases that the bears are already entering populated areas. Arctos could not risk further loss of life.

Secondly, Arctos acted to protect the flora and fauna of the state.¹³⁴ The very objective of the Bern Convention is nature conservation.¹³⁵ When the bears began eating the Trouwborst Tern eggs, a locally endangered species within Arctos, the vitality of the Arctos ecosystem was threatened.¹³⁶ Additionally, because neither grey bears nor any other large carnivores have ever

¹²⁸ R. at 7.

¹²⁹ Bern Convention, *Explanatory Report*, at ¶ 39

¹³⁰ Bern Convention, at art 9(1).

¹³¹ *Id.*

¹³² R. at 10.

¹³³ *Id.*

¹³⁴ Bern Convention, at art 9(1).

¹³⁵ Bern Convention, at art 1.

¹³⁶ R. at 8.

been native to Arctos, the ecosystem as a whole is not equipped to handle their introduction. Because Ranvicora did not include Arctos in its environmental impact assessment on the introduction program, the full extent of the ecosystem damage has not been assessed.¹³⁷

Third, Arctos acted to protect against further damage to local crops and livestock.¹³⁸ Bears killed more than 8 horses and 20 sheep on Arctos farms, with numbers only escalating before Arctos stepped in.¹³⁹ Bears have also destroyed Arctos crops, including apple orchards and beehives.¹⁴⁰ These attacks threaten the livelihood of Arctos farmers. Ultimately, the severity and repeated nature of the attacks warranted Arctos' intervention for the protection of public health and safety, domestic flora and fauna, and crops and livestock under Article 9 of the Bern Convention.

CONCLUSION AND PRAYER FOR RELIEF

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

1. Ranvicora violated international law when it introduced grey bears into the forest on the Ranvicora-Arctos border.
2. Arctos did not violate international law when it responded to the circumstances created by the grey bears that crossed into Arctos.

RESPECTFULLY SUBMITTED,
AGENTS OF THE APPLICANT

¹³⁷ R. at 7.

¹³⁸ Bern Convention, at art 9(1).

¹³⁹ R. at 8.

¹⁴⁰ *Id.*