

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE
THE HAGUE, 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 RESPONDENT

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STATEMENT OF JURISDICTION

The Federal States of Arctos (“**Arctos**”) and the Republic of Ranvicora (“**Ranvicora**”) have submitted by Special Agreement their differences concerning questions relating to the reintroduction of bears, and transmitted a copy thereof to the Registrar of the International Court of Justice (“**Court**”). The Registrar acknowledged receipt of the notification of the Parties regarding this matter. Therefore, Arctos and Ranvicora have accepted the jurisdiction of the Court pursuant to Article 40(1) of the Statute.

QUESTIONS PRESENTED

I.

WHETHER RANVICORA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS
GREY BEAR REINTRODUCTION PROJECT.

II.

WHETHER ARCTOS VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS
RESPONSES TO RANVICORA'S REINTRODUCTION OF GREY BEARS.

STATEMENT OF FACTS

Ranvicora and Arctos are neighboring, developed, sovereign States in Suredia. Ranvicora is situated to the south of Arctos, with both States sharing a 75km border consisting of forests and privately-owned farms (R.1,C.Q10). Endemic to Suredia, the grey bear is the sole apex predator in the continent (R.10) and lived in Ranvicora for centuries before the species' extinction in 1963 (R.9,10). The grey bear is also listed as "endangered" on the IUCN Red List of Threatened Species, Appendix II of the Convention on the Conservation of European Wildlife and Natural Habitats ("**Bern Convention**") and Appendix I of the Convention on Migratory Species ("**CMS**") (R.9).

In 2008, Ranvicora began planning the reintroduction of grey bears (R.11). As part of its planning process, Ranvicora conducted a national environmental impact assessment ("**EIA**") and other studies on the grey bears in all States within the grey bears' historic range (R.10,12,13). After five years of research, Ranvicora released 20 grey bears across six different locations (R.11,13,14). The project proved to be successful, motivating Ranvicora to release additional bears in multiple phases (R.15).

Despite Ranvicora's plea to protect the grey bears as endangered species (R.19), Arctos issued an emergency resolution allowing its citizens to shoot grey bears on sight (R.21) based entirely on unverified claims that the grey bears attacked and caused harm in Arctos. A total of nine bears were killed (R.14,20,21). Ranvicora appealed to Arctos, but Arctos refused (R.23), contrary to international law. After failed negotiations and mediation, Ranvicora and Arctos agreed to submit the dispute to the Court (R.24).

SUMMARY OF ARGUMENTS

Ranvicora did not violate international law. The grey bears are not invasive alien species (“**IAS**”), therefore, their reintroduction is both justified and necessary. In all stages of the grey bear reintroduction project (“**reintroduction project**”), Ranvicora observed due diligence and complied with its treaty obligations under the Convention on Biological Diversity (“**CBD**”), Bern Convention, and CMS (R.4,6).

Meanwhile, Arctos’ targeted killings of grey bears violate international law for: (1) being contrary to the CBD; (2) violating the prohibition on prohibited taking of species under the CMS; and (3) being a form of prohibited killing under the Bern Convention. In commissioning the killing of grey bears, Arctos also violated customary international law, particularly, the duty to cooperate, the duty to prevent transboundary harm, and the precautionary principle. Moreover, Arctos’ actions cannot be justified under the doctrine of necessity.

Thus, having complied with its international obligations in conducting the reintroduction project, Ranvicora is not liable to compensate Arctos. Rather, Arctos should compensate Ranvicora for violating its treaty and customary obligations.

ARGUMENTS

I. RANVICORA DID NOT VIOLATE INTERNATIONAL ENVIRONMENTAL LAW, BUT RATHER, FURTHERED ITS DUTY TO PROTECT AND CONSERVE ENDANGERED MIGRATORY SPECIES.

A. AT THE OUTSET, RANVICORA'S REINTRODUCTION PROJECT IS BOTH JUSTIFIED AND NECESSARY.

Ranvicora's justification in implementing the grey bear reintroduction project is two-fold. *First*, grey bears are not IAS, thus, their reintroduction did not violate the CBD, Bern Convention, and CMS. *Second*, the loss of grey bears — the only large carnivore species in Suredia — poses serious and irreversible injury to Ranvicora's ecosystem.¹ There being no substitute apex predator in Suredia (R.10), reintroduction became absolutely necessary to restore, maintain, and uplift biodiversity in Ranvicora.²

1. Grey bears are not IAS. Thus, their reintroduction did not violate the CBD, the Bern Convention, and the CMS.

According to Decision VI/23 of the CBD, IAS refers to an alien species whose introduction and/or spread threatens biological diversity.³ "Alien species" are those introduced outside their historically "natural range",⁴ or the locality where a species is indigenous or native.⁵ Accordingly,

¹ Baum and Worm, *Cascading top-down effects of changing oceanic predator abundances*, 78 JOURNAL OF ANIMAL ECOLOGY 699 (2009).

² Estes et al., *Trophic Downgrading of Planet Earth*, 333 SCIENCE 301 (2011) [hereinafter "Estes"].

³ Decision VI/23 adopted by the Conference of the Parties to the Convention on Biological Diversity at its Sixth Meeting, UNEP/CBD/COP/6/20 (2002).

⁴ IUCN/SSC, *Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species*, available at <https://portals.iucn.org/library/efiles/documents/Rep-2000-052.pdf> (last accessed Nov. 11, 2019).

⁵ SNH Ecosystems and Biodiversity Unit, *Natural Range Guidance*, SNH GUIDANCE NOTICE (2014).

to qualify as IAS: (1) the locality where a species is released must be outside its natural range; and (2) the species threatened the locality's biological diversity. Here, both elements are absent.

First, the grey bears were released within their natural range. The grey bears are endemic to Ranvicora, having lived and migrated only within Ranvicora for centuries (R.9,10,C.Q8). Therefore, when Ranvicora released grey bears within its territory, it was merely reintroducing a species in a locality to which it is indigenous or native. Clearly, the grey bears are not alien species.

The bears' movement within and outside Ranvicora did not convert their status to "alien". Recommendation No. 142 of the Bern Convention states that native species moving to neighboring areas and naturally extending their range — in response to climate change — are not alien species.⁶ Similarly, the movement of the grey bears was induced by the rising temperatures and shifting vegetation due to climate change (R.13). Accordingly, the grey bears' migration to Arctos did not convert their status to alien species.

Second, tested against CMS Resolution 11.28,⁷ the conduct and behavior of the grey bears do not qualify as "invasive." To be "invasive", alien species must successfully out-compete native organisms for food and habitat, spread through its new environment, and increase in population density in its new range.⁸

Although the grey bears caused minor damage to Arctos' ecosystem (R.17), the extent of the damage caused is negligible. The grey bear has neither out-competed any native organism for food and habitat, nor spread further in Arctos, since its range is confined to the area near the border

⁶ Recommendation No. 142 of the Standing Committee of the Bern Convention (2009).

⁷ Eleventh Meeting of the Conference of the Parties, Quito, Nov. 2014, *CMS Resolution 11.28 on Future CMS Activities Related to Invasive Alien Species*, UNEP/CMS/Resolution 11.28 (Nov. 2014) [hereinafter "CMS Resolution 11.28"].

⁸ Convention on Biological Diversity, *What are Invasive Alien Species?*, available at <https://www.cbd.int/invasive/WhatareIAS.shtml> (last accessed Nov. 10, 2019).

(R.16,17). There is also no increase in grey bear population in Arctos (R.16,17). Clearly, the grey bears are not “invasive” species.

Since grey bears are not IAS, Ranvicora could not have violated its obligation to prevent the introduction of, to control, or to eradicate alien species which threaten ecosystems as embodied in Articles 3, 5, and 8 and Decision VIII/27 of the CBD, and Article 11 and Recommendation Nos. 158 and 159 of the Bern Convention. Therefore, their reintroduction is certainly lawful and justified.

2. Being the only apex predator in the Suredia, it is imperative for Ranvicora to reintroduce the grey bears in accordance with Article 8 of the CBD.

CBD States-parties are obliged to establish protected areas to conserve biodiversity⁹ and provide guidelines for their management,¹⁰ manage biological resources¹¹ within or outside protected areas, to ensure their conservation and sustainable use,¹² promote the recovery of threatened species,¹³ and maintain legislation for their protection.¹⁴ Ranvicora furthered the foregoing CBD objectives through its reintroduction project.

Being the only large predators in Suredia (R.10), grey bears play a critical role in maintaining balance within the ecosystem of Suredia. Consequently, with the extinction of grey bears across Ranvicora, there is a persisting threat not only to Ranvicora’s biodiversity, but also to other Range States in Suredia, including Arctos.

⁹ Convention on Biological Diversity, June 6, 1992, 1760, art. 8, U.N.T.S. 79 [hereinafter “CBD”].

¹⁰ CBD, art.8(a).

¹¹ CBD, art.8(a).

¹² CBD, art.8(c).

¹³ CBD, art.8(f).

¹⁴ CBD, art.8(k).

More particularly, apex predators, such as grey bears, shape the structure and dynamics of ecosystems,¹⁵ and their continued and prolonged absence poses great risk of irreversible damage caused by trophic cascading, causing abnormal increase in the population of smaller predators thus resulting in increased predation pressure and diminished quality of biodiversity, ultimately resulting in the collapse of entire ecosystems.¹⁶

Worse, the loss of apex predators in one ecosystem could also impact the ecosystem of its Range States. To illustrate, in Serengeti, the decimation of large mammals led to the rise of herbivore population and changes in vegetation which thereby increased the frequency and intensity of wildfires.¹⁷

Hence, the reintroduction of the grey bears as apex predators is not only fundamental,¹⁸ their reintroduction is likewise the most cost-effective measure for biodiversity conservation¹⁹ in accordance with Article 8 of the CBD.

B. RANVICORA COMPLIED WITH ITS TREATY OBLIGATIONS IN EVERY PHASE OF THE REINTRODUCTION PROJECT.

Pursuant to the principle of *pacta sunt servanda*,²⁰ Ranvicora complied with its treaty obligations in good faith to minimize risk to other States by adopting the best reintroduction practices and observing safety measures under the CBD, Bern Convention, and CMS (R.4—6), and by exercising due diligence in all phases of the reintroduction project.

¹⁵ Estes, *supra* note 2.

¹⁶ Prugh et al., *The rise of the mesopredator*, 59 *BIOSCIENCE* 799 (2009).

¹⁷ Zielinski, *What Happens When Predators Disappear*, *SMITHSONIAN* (2011).

¹⁸ Estes, *supra* note 2.

¹⁹ The OECD Environment Programme, *SAVING BIOLOGICAL DIVERSITY: ECONOMIC INCENTIVES* (1996).

²⁰ Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331.

1. Throughout the reintroduction project, Ranvicora exercised due diligence and cooperated with other States to avoid transboundary harm in accordance with Articles 3 & 5 of the CBD.

Under Article 3 of the CBD, States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to areas beyond the limits of national jurisdiction. To this end, Article 5 of the CBD mandates States-parties to cooperate, as far as possible and appropriate, to prevent damage to other States' environment.

Contrary to Arctos' allegations, Ranvicora did not violate its CBD obligations because Ranvicora exhausted all means and observed due diligence throughout the reintroduction project to prevent harm to Arctos, or any of its neighboring States. Further, Ranvicora coordinated international scientific research with all of the affected States (R.10,13,14).

Due diligence refers to reasonable efforts to take appropriate and timely measures in order to address a contemplated procedure.²¹ As discussed below, Ranvicora exercised due diligence by undertaking all appropriate measures relating to the reintroduction project.

a. Ranvicora observed the best practices in conducting an EIA.

Article 14(1)(a) of CBD requires States-parties to conduct EIA when its proposed project is likely to have significant adverse effects on biodiversity, with a view of avoiding or minimizing such negative effects.²² Here, Ranvicora followed the best practices in conducting an EIA.²³

²¹ Report of the International Law Commission on the Work of the Fifty-Third Session (2001), 154, U.N. Doc. A/56/10 [hereinafter "53rd ILC Report"].

²² CBD, art. 14(1)(a).

²³ Arnold and Hanna, *Best Practices in Environmental Assessment*, CANADIAN INTERNATIONAL RESOURCES AND DEVELOPMENT INSTITUTE (2017) [hereinafter "Arnold and Hanna"]; Hanna and Noble, Using a Delphi study to identify effectiveness criteria for environmental assessment, 33 *IMPACT ASSESSMENT AND PROJECT APPRAISAL* 116 (2015).

First, Ranvicora conducted an EIA pursuant to its national laws (R.12). *Second*, as early as the planning phase and prior to implementation, Ranvicora already conducted an EIA (R.12). *Third*, Ranvicora's assessment is comprehensive. The EIA was national in scope (R.12) beyond the grey bears' historic range and considered the shift in the grey bear's range in other Suredian countries, rising temperatures, shifting vegetation due to climate change, as well as multiple reintroduction phases until 2026 (R.12,13). *Fourth*, the EIA was based on the best available evidence which formed the basis for the decision to proceed with the project.²⁴ Thus, Ranvicora released the grey bears in the northern region of Ranvicora in multiple phases and in six different locations, considering the abovementioned results of its assessment (R.13,14). *Fifth*, even if the grey bears historically migrated only within Ranvicora (R.10,12), and despite the history isolation of the Ranvicoran grey bears population (R.10), Ranvicora still considered the change in behavior and migratory patterns of the grey bears in other countries in Suredia (R.13). Clearly, Ranvicora complied with the best practices in conducting its EIA.

2. In the pre-implementation phase, Ranvicora complied with the risk assessment requirements under Article 11 and Recommendation No. 159 of the Bern Convention.

a. Ranvicora conducted other studies to identify and assess risks.

Under Article 11(2) of the Bern Convention, reintroduction projects are encouraged to contribute to the conservation of endangered species, *provided* that a study is first made to ensure effectiveness and acceptability.²⁵ Pursuant to Recommendation No. 158 of the Bern Convention, Ranvicora conducted the reintroduction project with: (1) clear objectives; (2) a long-term

²⁴ Arnold and Hanna, *supra* note 23.

²⁵ Convention on the Conservation of European Wildlife and Natural Habitats, arts 11(2), ETS No. 104 (September 19, 1979) [hereinafter "Bern Convention"].

management plan; (3) prior risk-identification and assessment; and (4) specified clear measures of performance.²⁶

First, Ranvicora had clear objectives of restoring ecological balance and provide access to cultural heritage (R.10,11) by reintroducing grey bears. *Second*, Ranvicora had an 18-year study and management plan, from studies conducted as early as 2008 until the last phase of reintroduction in 2026 (R.11). *Third*, Ranvicora assessed risks through its EIA. *Fourth*, Ranvicora proceeded with the project based on the finding of effectivity and acceptability from of its extensive EIA and studies (R.12). Thus, Ranvicora complied with its obligations under the Bern Convention.

b. Ranvicora fulfilled its obligation to assess the effects of projected climate changes.

Recommendation No. 159 of the Bern Convention requires an assessment of projected climate changes on a species' invasion potential.

Ranvicora likewise complied with this duty.²⁷ In its planning, Ranvicora studied the effects of climate change on the behaviors and migration patterns of grey bears (R.13) in accordance with Recommendation Nos. 158 & 159 of the Bern Convention.

3. Ranvicora released the grey bears in accordance with Recommendation No. 158 of the Bern Convention.

²⁶ Recommendation No. 158 of the Standing Committee of the Bern Convention (2012) [hereinafter "Recommendation No. 158"].

²⁷ Recommendation No. 159 of the Standing Committee of the Bern Convention (2012).

Recommendation No. 158 of the Bern Convention requires States to follow the revised IUCN Guidelines for Reintroductions and Other Conservation Translocations (“IUCN Guidelines”).²⁸

First, Section 7.1 of the IUCN Guidelines requires the release site to: (1) meet all practical needs for effective release; (2) meet all the species’ biotic and abiotic requirements; (3) be appropriate habitat for the species’ life stages; and (4) be large enough to meet the required conservation benefit.²⁹

Here, the release site met all the foregoing requirements. The release site was found to be “suitable to sustain a viable grey bear population”, taking into account their practical, biotic and abiotic needs, and the “largest remaining habitat” suitable for the reintroduction project (R.13). Other sites in Ranvicora were rejected precisely because they were not large enough to sustain a viable grey bear population (C.Q11).

Moreover, according to Section 7.2 of the IUCN Guidelines, the following are central to an effective release strategy: (1) the age and sex of founders, for optimal population growth; (2) the species’ life stage and season of release; (3) the numbers of individuals released and multiple release events; and (4) release at multiple sites simultaneously or sequentially.³⁰

Ranvicora executed an effective release strategy. *First*, Ranvicora released 14 females and six males (R.14) specifically for optimal reproduction purposes. Their maturity and reproductive capacity were considered as evidenced by the fact that most of the female bears produced offspring within a year of being released (R.15). *Second*, with the objective of translocation success,

²⁸ Recommendation No. 158, *supra* note 26.

²⁹ IUCN/SSC, Guidelines for Reintroductions and Other Conservation Translocations, *available at* <https://portals.iucn.org/library/efiles/documents/2013-009.pdf> (last accessed Nov. 11, 2019) [hereinafter “IUCN/SSC Guidelines”].

³⁰ *Id.*

Ranvicora considered the number of bears to be released (R.14) and multiple reintroduction phases ending in 2026 (R.12), considering the success or failure of each phase. In fact, with the success of the first phase, Ranvicora intends additional phased releases of grey bears beginning in 2021 (R.15). *Third*, to spread out the population, Ranvicora released and intends further release of the grey bears in six different sites sequentially (R.14,15). Clearly, Ranvicora's release strategy meets the standards under the IUCN Guidelines.

4. Even after the release of the grey bears, Ranvicora observed best practices in monitoring their activities.

According to Section 8 of the IUCN Guidelines, reintroduced species must be monitored post-release to enable the State to measure their performance, assess impacts, and provide basis for adjusting objectives or adapting management regimes.³¹

Here, Ranvicora tracked the movement patterns through GPS collars (R.14). Ranvicora also monitored their behavior by keeping track of recorded traffic collisions and violence amongst bears (R.15). Ranvicora also recorded no violence or harmful interaction among the grey bears and the citizens of Ranvicora (C.Q12). Clearly, Ranvicora exercised best practices in monitoring the post-release activities of the grey bears.

C. RANVICORA DID NOT VIOLATE CUSTOMARY INTERNATIONAL LAW, BUT IN FACT, ACTED IN ACCORDANCE THEREWITH.

1. Ranvicora did not violate the precautionary principle.

a. The precautionary principle does not apply to Ranvicora.

³¹ IUCN/SSC Guidelines, *supra* note 29.

The precautionary principle requires: (1) a threat of environmental damage; (2) of serious or irreversible character; and (3) scientific uncertainty.³² Here, all elements were absent.

i. There was no foreseeable harm.

Pursuant to the *Trail Smelter Arbitration*³³ and the *Corfu Channel Case*,³⁴ the obligation under the precautionary principle arises only when there is actual and serious harm which is likely to recur or when there is a known risk to other States. A State cannot thus be required to regulate activities of which it is not and could not reasonably have been aware to be potentially harmful.³⁵

Here, there is no foreseeable harm prior to the reintroduction project. Ranvicora conducted an extensive EIA³⁶ and various studies which yielded positive results and no indication of any violent habits of grey bears in the past (R.12,C.Q12). In fact, the first phase of the reintroduction project actually proved to be successful (R.15).

ii. Even assuming there was foreseeable damage, the threat was not significant.

Being similar to the brown bears (R.9), it can be reasonably inferred that the threat of damage was remote or insignificant, given the vast distance of the release site from Arctos' border. Notably, brown bears migrate an average of only 1.6km and a maximum of 10km.³⁷ Here, the grey bears were released 50km from the border of Ranvicora and Arctos (R.14). The distance is

³² IUCN Council, Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management, available at http://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf (last accessed Nov. 10, 2019).

³³ Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1938/1941) [hereinafter "Trail Smelter"].

³⁴ Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) [hereinafter "Corfu Channel"].

³⁵ BOYLE & REDGWELL, INTERNATIONAL LAW & THE ENVIRONMENT 153 (2009).

³⁶ See *supra* Part I(B)(1)(a).

³⁷ Kistchinski, *Life History of the Brown Bear (Ursus arctos L.) in North-East Siberia*, 2 BEARS: THEIR BIOLOGY AND MANAGEMENT 67, 71 (1972).

significant enough to dispel any foreseeable damage ostensibly attributable to unanticipated cross-border migration.

iii. There was scientific certainty regarding the impact of the reintroduction project.

Precautionary measures are necessary only when there is foreseeable harm and scientific uncertainty.³⁸

Here, the facts show scientific certainty on the lack of foreseeable harm. *First*, it took Ranvicora and its team of scientists five years to plan the reintroduction project (R.11). *Second*, Ranvicora conducted extensive EIA with multifarious considerations (R.12). *Third*, only 20 bears were initially released intermittently after a period of five years, and only if the preceding reintroduction phase is successful (R.14,15). Clearly, Ranvicora acted upon scientific certainty on the absence of any risk posed by the reintroduction project.

Even assuming there is uncertainty caused by climate change or the doubts of some biologists (R.13), the precautionary principle is still inapplicable. The elements of the precautionary principle are cumulative, and the absence of at least one will prevent its application.³⁹ There being no foreseeable significant harm, therefore, the precautionary principle does not apply.

b. Even assuming the precautionary principle applies, Ranvicora still enforced precautionary measures using the best available technique.

³⁸ RENN, ENCYCLOPEDIA OF ECOLOGY 2909 (2008).

³⁹ Boutillon, The Precautionary Principle: Development of an International Standard, 23 MICHIGAN JOURNAL OF INTERNATIONAL LAW 429 (2009).

Due diligence based on the “best available technique” involves careful consideration of the technology to be used.⁴⁰

Here, Ranvicora conducted an extensive EIA (R.12), studied the habits and migration patterns of grey bears in Ranvicora historically, and presently in Aloysius and Paddington (R.10,12,13). Ranvicora also studied the effects of climate change on the behaviors and migration patterns of grey bears and on the basis thereof, released the grey bears in northern Ranvicora (R.13). Further, the reintroduction project was implemented in phases (R.12,14,15) with the released bears tracked with GPS collars (R.14), considering the success or failure of each phase (R.12,14,15). Using the best available techniques, Ranvicora adopted precautionary measures throughout the reintroduction project.

2. Ranvicora did not violate the duty to prevent transboundary harm, but in fact, exercised due diligence.

a. The duty to prevent transboundary harm does not apply.

The duty to prevent transboundary harm requires: (1) physical relationship between the activity and the damage; (2) human causation; (3) severity; and (4) transboundary movement of the harmful effects.⁴¹ These elements are cumulative, and the absence of one will prevent its application.⁴² Here, all essential elements are absent.

i. The alleged damage was not proven.

⁴⁰ Pulp Mills in the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14 (Apr. 20) [hereinafter “Pulp Mills”].

⁴¹ HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 4 (2003) [hereinafter “HANQIN”].

⁴² SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 366 (1991).

In order to establish damage, the affected State must prove actual damage arising from activities in one State⁴³ and its causation by clear and convincing evidence.⁴⁴

Here, Arctos' allegations on the killing of its horses and sheeps were not and cannot be proven because of the lack of witnesses to all of the attacks (R.17). Consequently, the first element is lacking.

ii. There is no proximate causal relation between the reintroduction project and the alleged harm.

Transboundary damage should have a proximate causal relation to human conduct,⁴⁵ meaning, the damage is a foreseeable or normal consequence of the questioned act or omission.⁴⁶ Here, there is no proximate causal relation between the reintroduction project and the following: (1) the attacks against the apple orchards, beehives, and the Trouwburst terns; and (2) the attacks against the children.

First, according to the ILC Articles on Responsibility of States for Internationally Wrongful Acts ("ASR"), a State can only be held liable for acts attributable to it, namely: (1) conduct of organs of a State; (2) conduct of persons or entities exercising governmental authority; or (3) acts acknowledged and adopted by the State.⁴⁷

Here, the grey bears are neither organs of the State nor persons or entities exercising elements of governmental authority. They are wild animals beyond the State's control. Hence,

⁴³ HANQIN, *supra* note 41.

⁴⁴ Trail Smelter, 3 R.I.A.A. 1905; Lac Lanoux (Fr. v. Spain), 12 R.I.A.A. 281 (1957).

⁴⁵ HANQIN, *supra* note 41.

⁴⁶ Lighthouses Arbitration Case, (Fr. v. Gr.), I.L.R. 23 (1956); GARNER, BLACK'S LAW DICTIONARY 1225 (11th ed.).

⁴⁷ Articles on the Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 49, U.N. Doc. A/RES/56/83, art. 11 (Dec.12, 2001) [hereinafter "ASR"]

their alleged attacks against Arctos' farms and wildlife cannot be attributed to Ranvicora (R.17). In fact, Ranvicora has expressly refuted the grey bears' conducts as its own (R.19).

Second, there lacks a proximate causal relation between the attacks against the children and the reintroduction of the grey bears since the provocation on the part of the children is a sufficient intervening cause⁴⁸ (R.17). Further, no grey bear killings or attacks against citizens of Ranvicora have been recorded (C.Q12).

iii. The duty to prevent transboundary harm does not apply because the harm, if any, was not significant.

Mere occurrence of damage is not sufficient to hold States liable.⁴⁹ "Significant harm" must be determined proportionally by balancing a State's right not to suffer significant harm to its territory with the right of another State to development, as in the case of *Certain activities carried out by Nicaragua in the border area* (Costa Rica v. Nicaragua).⁵⁰

Here, the harm experienced by Arctos was not significant. The death of horses and sheep, and the destruction of apple orchards and beehives (R.17) are casual attacks that do not affect the ecosystem of Arctos. There was also no economic damage considering Arctos' diversified economy (R.1). Neither was the alleged harm upon Trouwburst terns (R.17) significant because there was no indication that the Trouwburst terns' population was decreasing unsustainably. Notably, the Trouwburst terns are not listed as endangered on any treaty (R.17). Clearly, there is no significant harm to Arctos.

⁴⁸ Ellsworth v. Sherne Lingerie, Inc., 495 A.2d 348, 355 (Md. 1985); Zablotzky, *Eliminating Proximate Cause as an Element of the Prima Facie Case for Student Products Liability*, 45 CATHOLIC UNIVERISTY LAW REVIEW 31 (1995).

⁴⁹ HANQIN, *supra* note 41; ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, 2001, art. 2(h), A/56/10.

⁵⁰ Pulp Mills, 2010 I.C.J. 14; *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v. Nicar.), 2015 I.C.J. 655 (Dec. 16).

b. Even assuming there was significant damage to Arctos, Ranvicora still exercised due diligence in all phases of the reintroduction project.

A State complies with its duty to avoid transboundary harm when it exercises due diligence,⁵¹ whether or not harm already occurred.⁵² Due diligence is an obligation of conduct and not one of result.⁵³ Thus, the duty to prevent transboundary harm is still complied with when a State exercises the best possible efforts to prevent harm.⁵⁴

Here, as established in Part I(B), Ranvicora observed best practices according to internationally recognized guidelines and standards in all the stages of the reintroduction project, and has thus complied with its duty to prevent transboundary harm.

II. ARCTOS VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSE TO RANVICORA'S REINTRODUCTION PROJECT.

A. ARCTOS BREACHED ITS TREATY OBLIGATIONS UNDER THE CBD, CMS AND BERN CONVENTION.

1. Arctos violated the CBD.

Not being IAS,⁵⁵ grey bears qualify as threatened species which States-parties must conserve and protect pursuant to the CBD.⁵⁶

a. Arctos violated its duty to conserve biodiversity under Article 1 of the CBD.

⁵¹ Pulp Mills, 2010 I.C.J. 14.

⁵² 53rd ILC Report, *supra* note 21.

⁵³ Koivurova, *Due Diligence*, 3 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 242 (2010); Takano, *Due Diligence Obligations and Transboundary Environmental Harm: Cybersecurity Applications*, 7 LAWS 36 (2018) [hereinafter "Takano"].

⁵⁴ Takano, *supra* note 53.

⁵⁵ See *supra* Part I(A)(1).

⁵⁶ CBD, arts. 8(f), 8(k) & 3.

The CBD mandates States to conserve and protect biodiversity⁵⁷ within its territory.⁵⁸ As previously discussed,⁵⁹ the loss of grey bears poses serious threat on the biodiversity of States across Suredia. This notwithstanding, Arctos recklessly poisoned and allowed the shooting of the grey bears — disguised as “emergency” regulations — in contravention of the CBD (R.21).⁶⁰

b. Arctos' actions violate Articles 8(f) & 8(k) of the CBD.

Articles 8(f) and (k) of CBD obligate States to promote the recovery of viable population of species and to develop necessary protective legislation.⁶¹ As discussed,⁶² the grey bears are not IAS. Thus, Arctos is under the obligation to protect the grey bears within its territory (R.18,19).⁶³

Assuming that the grey bears demonstrated aggressive behavior, States must adopt environmentally safe and ethically acceptable techniques for containment or control.⁶⁴ Given Arctos' economic capabilities (R.1), it could have easily implemented early detection systems and regular monitoring to contain the species.⁶⁵ Yet, Arctos arbitrarily resorted to violence contrary to the CBD (R.20,21).

2. Arctos violated the CMS.

⁵⁷ CBD, art. 1.

⁵⁸ CBD, art. 4.

⁵⁹ *See supra* Part I(A)(2).

⁶⁰ CBD, preamble.

⁶¹ CBD, arts. 8(f) & (k).

⁶² *See supra* Part I(A)(1).

⁶³ CBD, art. 8(k).

⁶⁴ BARTLEY AND FLEISCHER, MECHANISMS ON THE CONVENTION ON BIOLOGICAL DIVERSITY FOR THE CONTROL AND RESPONSIBLE USE OF ALIEN SPECIES IN FISHERIES 40, (2005) [hereinafter “BARTLEY AND FLEISCHER”].

⁶⁵ BARTLEY AND FLEISCHER, *supra* note 64, at 41.

The CMS obligates States to protect migratory species within their territory and prohibits activities that constitute prohibited taking of species listed in Appendix I,⁶⁶ which includes grey bears (R.9). Here, Arctos' vicious recourses of setting out poisoned carcasses and the intentional shooting of grey bears constitute prohibited taking in violation of the CMS (R.20,21).

a. Arctos is obligated under Article III(4) of the CMS to undertake conservation actions despite being outside the historic range of grey bears.

Article III(4) of CMS mandates Range States of migratory species listed under Appendix I to conserve and restore their habitats to remove them from the danger of extinction.⁶⁷ Relevantly, under CMS Resolution 12.21, conservation action must be taken beyond the species' historic range to ensure favorable conservation status to addressing climate-induced range shifts.⁶⁸

Consequently, Arctos is bound to undertake conservation actions in favor of grey bears crossing its territory due to climate change (R.13,16,19) although Arctos is outside the grey bears' historic range (R.10). Arctos' failure to prevent to undertake such conservation measures violate the CMS.

b. Arctos' responses constitute prohibited taking under Article III(5) of the CMS.

⁶⁶ Convention on the Conservation of Migratory Species of Wild Animals, arts. 2(1) & 3(4)(5), Jun. 3, 1979, 1651 UNTS 333 [hereinafter "CMS"].

⁶⁷ CMS, art. III(4)(b).

⁶⁸ Twelfth Meeting of the Conference of the Parties, Manila, Oct. 2017, *CMS Resolution 12.21 on Climate Change and Migratory Species*, UNEP/CMS/Resolution 12.21, ¶9 (Oct. 2017); CMS Resolution 11.28, *supra* note 7, ¶7.

Article III(5) of CMS prohibits the taking of “endangered” species listed under Appendix I, which includes grey bears (R.9).⁶⁹ Taking includes harassing and deliberate killing of species.⁷⁰ In the *Whaling* case, the ICJ held Japan guilty of prohibited taking of whales, after Japan granted special permits to kill them.⁷¹ Similarly, Arctos also engaged in prohibited taking by authorizing the indiscriminate shooting of grey bears (R.21).

Parenthetically, Arctos' actions are not exempt under Article III(5)(d) of CMS because there exists no extraordinary circumstances requiring such extreme measures.⁷² Arctos failed to observe the standards for the exception to apply, *i.e.*, the taking must be precise as to content, limited in space and time, and not disadvantageous to the species.⁷³

Arctos effectively issued an order to kill permitting the shooting of any grey bear spotted in Arctos (R.21), without limit in area and period of effectivity, to the detriment of grey bears, an endangered species and previously extinct in Ranvicora. Undeniably, Arctos violated the CMS prohibition on unlawful taking.

3. Arctos violated the Bern Convention.

a. Arctos violated Articles 1 and 2 of the Bern Convention by failing to conserve and maintain the grey bears' population.

Articles 1 and 2 of the Bern Convention obligates States to conserve and maintain endangered species.⁷⁴

⁶⁹ CMS, art. 2(1).

⁷⁰ CMS, art. I(1)(i).

⁷¹ *Whaling in the Antarctic (Austl. v. Jap.)*, Judgment, 2014 I.C.J. 226, 299 (Mar. 31).

⁷² CMS, art. III(5).

⁷³ CMS, art. III(5).

⁷⁴ Bern Convention, arts. 1 & 2.

Arctos enforcement of measures eradicating the grey bears within its territory (R.21) is contrary to the objective of the Bern Convention.

b. Arctos' responses constitute deliberate killing in violation of Article 6 of the Bern Convention.

Article 6 of Bern Convention prohibits deliberate killings of species under Appendix II, which includes grey bears (R.9).⁷⁵ Deliberate killing includes intentional poisoning or killing.⁷⁶ Here, Arctos engaged in deliberate killings of grey bears by setting out poisoned animal carcasses and authorizing citizens to haphazardly shoot at them (R.9,20,21) in violation of the Bern Convention.

c. Arctos' recourses are prohibited means of killing under Article 8 of the Bern Convention.

Article 8 of Bern Convention prohibits the use of indiscriminate means of killing species, such as poisoned bait and semi-automatic weapons.⁷⁷

Arctos' use of poisoned animal carcasses as bait (R.20) and the permit to kill the grey bears are prohibited means of killing (R.21).

d. Arctos' responses are not exempt under Article 9 of the Bern Convention.

Under Article 9 of Bern Convention, States-parties may be exempted from Articles 6 and 8 if there is no other satisfactory solution, and the proposed solution is not detrimental to the species' survival.⁷⁸

⁷⁵ Bern Convention, arts. 6(a) & 8.

⁷⁶ Commission of the European Communities v. Kingdom of Spain, 2005 E.C.R. C-221/04, ¶54 (Dec. 15).

⁷⁷ Bern Convention, art. 8 & Appendix IV.

⁷⁸ Bern Convention, art. 9.

Notwithstanding the existence of other satisfactory solutions,⁷⁹ Arctos resorted to violent and extreme measures of poisoning and shooting to the detriment of the grey bears' survival (R.20,21). Clearly, Article 9 of Bern Convention does not exculpate Arctos from liability.

e. Arctos violated Article 10 of the Bern Convention.

Article 10 of Bern Convention requires Arctos to coordinate efforts for the protection grey bears whose range extends into its territory.⁸⁰ Here, Arctos did not coordinate efforts with Ranvicora to address the migration of grey bears into its territory except for a diplomatic note sent almost a year from the first sighting of grey bears (R.18,23) contrary to the Bern Convention.

B. ARCTOS VIOLATED ITS CUSTOMARY INTERNATIONAL ENVIRONMENTAL OBLIGATIONS.

The duty to cooperate,⁸¹ prevent transboundary harm,⁸² and precautionary principle⁸³ have crystallized into custom in view of intensive State practice and *opinio juris*.⁸⁴ Here, Arctos' violent responses to the reintroduction project violated these customary obligations.

1. Arctos violated its duty to cooperate in the protection of threatened migratory species.

The duty to cooperate entails an obligation to coordinate with other States to prevent environmental damage.⁸⁵

⁷⁹ See *supra* Part I(A)(1)(b); BARTLEY AND FLEISCHER, *supra* note 64.

⁸⁰ Bern Convention, art. 10.

⁸¹ Rio Declaration, prins. 7, 9, 14, & 27; Corfu Channel (UK v. Alb), 1949 I.C.J. 4 (April 22).

⁸² Rio Declaration, prins. 2 & 19; Consideration of Prevention of Transboundary Harm from Hazardous Activities and Allocation of Loss in the Case of Such Harm, art. 3, G.A. Res. 62/68 U.N. Doc.A/RES/62/452 62nd sess. Agenda item 84 (2008).

⁸³ ANTON & SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 85 (2011) [hereinafter "ANTON & SHELTON"]; FITZMAURICE ET AL., RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 195 (2010).

⁸⁴ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 253 (July 8).

⁸⁵ CBD, art. 17; Corfu Channel, 1949 I.C.J. 4, 22.

Arctos violated this duty by failing to collaborate, much less communicate, with Ranvicora before resorting to violence. From the first sighting of grey bears in Arctos, until the alleged attack on farm animals and the purported mauling of the children, Arctos had approximately two years to coordinate with Ranvicora in enacting measures to address the alleged security concerns, without compromising its species' protection obligations.

2. Arctos violated its duty to prevent transboundary harm.

Unlike Ranvicora, all elements and standards of transboundary harm⁸⁶ are satisfied by Arctos' deliberate killings of the grey bears.

a. There is physical relationship and human causation between Arctos' responses and the damage caused.

The physical relationship and human causation between Arctos' intentional poisoning and shooting of the grey bears and the ensuing death of nine out of 20 grey bears (R.14,20,21) and their potential re-extinction is undeniable.

3. The harm is significant and irreversible.

Being akin to brown bears (R.9), grey bears also have long gestation period, reaching breeding maturity only at four to nine years old, and giving birth to only two cubs every three years.⁸⁷ Considering that only 20 grey bears were released, the death of even one grey bear accelerates their re-extinction (R.9,20,21), and poses serious and irreversible damage to the environment.⁸⁸

4. There is transboundary transfer of harm.

⁸⁶ See *supra* Part I(C)(2).

⁸⁷ McNeil River, Reproductive Biology of Female Brown Bears, *available at* https://www.bearbiology.org/wp-content/uploads/2017/10/Glenn_Lentfer_Faro_Miller_Vol_3.pdf (last accessed Nov. 11, 2019).

⁸⁸ See *supra* Part I(A)(2).

Being migratory species now shared by Arctos and Ranvicora,⁸⁹ the targeted killings of grey bears in Arctos accelerates their re-extinction (R.9), the re-occurrence of which poses spillover effects on the entire ecosystem of Suredia.⁹⁰ Hence, Arctos violated its obligation to prevent transboundary harm.

3. Arctos violated the precautionary principle.

The precautionary principle estops States from proceeding with activities potentially inimical to the environment.⁹¹ In Arctos' case, all elements and standards⁹² of precautionary principle concurred.

a. There was foreseeable harm.

Having signed various species conservation treaties and conferences (R.4—8), Arctos has constructively foreseen the environmental damage on Ranvicora's biodiversity, perpetrated by the unsustainable killing of grey bears.

b. The foreseeable harm was significant.

At the time Arctos commissioned the shooting of grey bears, 20 grey bears in Ranvicora have been released (R.14,21). Certainly, slaughtering nine grey bears, or 45% of their entire population, pose unprecedented risk on their survival, considering the species' long gestation period as established in Part II(B)(2)(b).

⁸⁹ Glowka et al., *Complementarities Between The Convention on Migratory Species and The Convention on Biological Diversity*, 3 JOURNAL OF INTERNATIONAL WILDLIFE LAW AND POLICY 205 (2000); Klemm, *Migratory Species in International Law*, 29 NATURAL RESOURCES JOURNAL 210 (1989).

⁹⁰ See *supra* Part I(A)(1).

⁹¹ ANTON & SHELTON, *supra* note 83; Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, 96 KLUWER LAW INTERNATIONAL 1016 (2002).

⁹² See *supra* Part I(C)(a)(i).

c. There was scientific uncertainty regarding the impact of the targeted killings.

The lack of grey bear fossil records in Arctos (R.10) and their scientifically questioned historic range (R.13) evoke scientific uncertainty.⁹³

C. ARCTOS' ACTIONS ARE NOT JUSTIFIED UNDER THE DOCTRINE OF NECESSITY.

According to Article 25 of the ASR, necessity may only be invoked when an injured State's actions are: (1) the only way to safeguard an essential interest; (2) against a grave and imminent peril. Here, both elements are absent.

1. The deliberate killings of the grey bears were not the only way to safeguard an essential interest.

As previously discussed,⁹⁴ being a developed State, Arctos had every opportunity and capability to exhaust measures, both ethical and environmental,⁹⁵ to ensure the safety of its citizens without resorting to violence.

2. There was no grave or imminent peril present.

In *Gabčíkovo-Nagymaros*, there must be an immediate and existing threat or risk⁹⁶ which must be extremely serious.⁹⁷ Here, Arctos sanctioned deliberate killings on sight (R.21), even if no immediate risk was present. Evidently, Arctos' regulation was patently disproportionate to the risk addressed.

D. RANVICORA HAS NO OBLIGATION TO COMPENSATE ARCTOS.

⁹³ See *supra* Part I(A)(2).

⁹⁴ BARTLEY AND FLEISCHER, *supra* note 64.

⁹⁵ See *supra* Part II(A)(1)(b).

⁹⁶ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 I.C.J. Rep. 7, ¶¶49-59 (Sept. 25).

⁹⁷ Thjoernelun, *State of Necessity as an Exception From State Responsibility For Investment*, 13 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 437 (2008).

The obligation to compensate emanates from a breach of an obligation.⁹⁸

As discussed in Part(I)(B)(1)(a), Ranvicora did not breach any of its international obligations, but acted in furtherance thereof. Accordingly, Arctos' demand for compensation has no basis.

Rather, Arctos is liable to compensate Ranvicora for unjustifiably killing grey bears in violation of treaty⁹⁹ and customary law.¹⁰⁰

⁹⁸ Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.), 2018 I.C.J. 1, ¶29 (Feb. 2).

⁹⁹ CMS, art. III(4)(b); CBD 14(2); ASR, art. 36.

¹⁰⁰ CMS, art. III(4)(b).

CONCLUSION

Ranvicora respectfully requests the Court to adjudge that:

1. Ranvicora did not violate international law with respect to its grey bear reintroduction project; and
2. Arctos violated international law with respect to its responses to Ranvicora's reintroduction of grey bears.

Respectfully submitted,

AGENTS FOR RESPONDENT