

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



**THE CASE CONCERNING
QUESTIONS RELATING TO REINTRODUCTION OF BEARS**

THE FEDERAL STATES OF ARCTOS

APPLICANT

v.

THE REPUBLIC OF RANVICORA

RESPONDENT

MEMORIAL FOR THE APPLICANT

THE 2019-2020 STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT

COMPETITION

NOVEMBER 2019

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QUESTIONS PRESENTED

- I. WHETHER RANVICORA VIOLATED INTERNATIONAL LAW BY CONDUCTING ITS GREY BEAR REINTRODUCTION PROJECT CLOSE TO THE BORDER WITH ARCTOS.
- II. WHETHER ARCTOS VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSES TO RANVICORA'S REINTRODUCTION PROJECT, NAMELY BY INTENTIONALLY POISONING AND SHOOTING THE GREY BEARS.

STATEMENT OF JURISDICTION

The Federal States of Arctos (“Arctos”) and the Republic of Ranvicora (“Ranvicora”) have submitted the present dispute to the International Court of Justice (hereinafter “the Court” or “ICJ”) by Special Agreement dated 11 July 2019 and transmitted a copy thereof to the Registrar of this Court pursuant to Article 40(1) of the Statute of the International Court of Justice. Both parties have accepted the jurisdiction of this Court under Article 36(1) of this Court’s Statute, and shall accept its judgment as final and binding and execute it in its entirety and in good faith.

STATEMENT OF FACTS

Arctos and Ranvicora are neighbouring sovereign countries located on Suredia. Arctos is to the north of Ranvicora, and both share a 75 km long border consisting primarily of privately owned farms and forests.

Both States are members of the United Nations (“UN”) and are parties to the Vienna Convention on the Law of Treaties (“VCLT”), the Convention on Biological Diversity, 6 June 1992, 1760 U.N.T.S. 798 (“CBD”), the Convention on the Conservation of European Wildlife and Natural Habitats (the “Bern Convention”), the Convention on the Conservation of Migratory Species of Wild Animals (“CMS”), the United Nations Framework Convention on Climate Change, and the Paris Agreement.. Both states are signatories to the 1972 Declaration of the United Nations Conference on the Human Environment and the 1992 Rio Declaration on Environment and Development.

In 2008, Ranvicora started planning for a grey bear (*Ursus smokeysius*) reintroduction project (the “Project”). The grey bear is a large, carnivorous migratory animal listed as Endangered on the IUCN Red List of Threatened Species, on Appendix II of the Bern Convention, and Appendix I of CMS. The grey bear has been extinct in Ranvicora since 1963, but still exist in Paddington and Aloysius. There is no historical evidence of grey bears living in Arctos.

Ranvicora conducted an environmental impact assessment (EIA) but excluded any considerations on the potential impact of the Project on Arctos. Available evidence indicates that in recent years the grey bear’s in Paddington and Aloysius have been ranging northward. In addition, some biologists questioned whether the northern region of Ranvicora was part of the grey bear’s historic range. Yet, they did not inform nor consult Arctos about the Project before proceeding. Ranvicora released the first batch of grey bears in the northern region of Ranvicora along the border with Arctos. The nearest was just 50 km from the border.

In the following years the grey bear population steadily expanded and began crossing into Arctos. On 27 February 2018 saw the first reported incident of a grey bear killing a farmer’s horse. In the subsequent five and a half months 7 more horses and 20 sheep were killed across several farms in

Arctos along the border. Furthermore, the bears harmed Arctos' apple orchards and beehives, and threaten the survival of the already endangered Trouwborst tern (*Sterna ariensis*), endemic to Arctos, by consuming its eggs and nestlings.

On 9 August 2018, Arctos sent a diplomatic note to Ranvicora requesting they halt the Project and remove the grey bears from the wild. On 21 August, Ranvicora simply responded that they had no control over the grey bears and even requested that Arctos assist with the Project. The grey bears continued destroying Arctos local wildlife and farming animals for nearly a year.

Hence, Arctos began laying poisoned animal carcasses but only at farms that the bears had attacked before, resulting the deaths of four grey bears in January 2019. Yet, grey bears continued to intrude into Arctos and on 22 April 2019 a grey bear killed a child and permanently wounded another. Arctos initiated emergency regulations and permitted its citizens to protect themselves and shoot any grey bear spotted in Arctos. In the following four weeks four bears were killed.

Despite the destruction the bears caused, Ranvicora accused Arctos on 5 June 2019 of violating international law and requested that Arctos cease its emergency regulation. Arctos denied any violation, reasoning that the emergency regulations were necessary given Ranvicora's refusal to address the destruction caused by the grey bears. Subsequent attempts to resolve this dispute failed, and on 11 July 2019 they entered into a Special Agreement to institute proceedings in the ICJ.

SUMMARY OF ARGUMENT

- I. **Ranvicora violated international law.** Firstly, Ranvicora breached its duty under the CBD and the Bern Convention to prevent the introduction of invasive alien species (“IAS”). The grey bear is an IAS to Arctos because they historically never existed in Arctos and they threaten the biological diversity of Arctos. Ranvicora’s uncertainty concerning the grey bear’s status as an IAS does not absolve it from liability due to the precautionary principle. Secondly, Ranvicora breached the International Customary Law (“ICL”) to prevent transboundary harm. The transboundary harm caused by the Project to Arctos was significant, and Ranvicora failed to exercise due diligence because the EIA it conducted failed to assess the risk of transboundary harm from the Project to Arctos.

- II. **Arctos did not violate international law by killing the grey bears.** Firstly, Arctos did not violate the CMS because Arctos is not a Range State for the grey bear. Even if it is a “Range State”, its actions are exempted under Article III(5)(d). Secondly, Arctos did not violate its obligations under the CBD but instead acted in furtherance of the obligation under the CBD to eradicate harmful alien species, since the grey bear is an IAS to Arctos. Thirdly, Arctos did not violate the Bern Convention. Arctos is not required to maintain a grey bear population and Arctos’ actions are exempted under Article 9. It did not breach its duty to cooperate because there were no existing agreements between Arctos and Ranvicora concerning the Project. Fourthly, Arctos did not breach its duty to prevent transboundary harm because it was responding to the harm caused by Ranvicora’s project.

ARGUMENT

I. RANVICORA HAS VIOLATED INTERNATIONAL LAW

A. Ranvicora breached obligations under the CBD and Bern Convention in failing to prevent the introduction of invasive alien species (“IAS”)

1. *The grey bear is an alien species to Arctos*

An alien species refers to a species introduced outside its natural past or present distribution.¹ A species is considered “alien” if found in areas that are not part of its natural habitat, past or present. A native species naturally extending its habitat due to climate change could constitute an exception to the interpretation of the term “alien species”, but only after it has been assessed that the potential impact from extending the range on the affected ecosystem is minimal.²

Here, the grey bears are alien to Arctos as there are no historic or fossil records of the grey bears’ presence in Arctos.³ While the grey bears may be considered native to Ranvicora, its subsequent spread into Arctos should not be considered as an exception to the interpretation of “alien species” as no assessment of the impact of the grey bears on Arctos’ ecosystem was done to justify the exception.

2. *The grey bears are invasive as they threaten the biological diversity of Arctos*

A species is “invasive” if it threatens the endemic or endangered species and the functioning of the ecosystem of the injured State. “Invasiveness” is defined as threats to biological diversity.⁴ “Biological diversity” is defined as the diversity within species, between species and of ecosystems.⁵ For conservation purposes, the species that should be identified and monitored are endemic or

¹ Decision VI/23 Adopted by the Conference of the Parties to the Convention on Biological Diversity At Its Sixth Meeting, U.N. DOC. UNEP/CBD/COP/6/20 (7-19 April 2002) [hereinafter Decision VI/23], 257, fn 57.

² Bern Convention Standing Committee Recommendation No. 142 (2009).

³ Record, ¶ 10.

⁴ Decision VI/23, 257, fn 57.

⁵ Convention on Biological Diversity, art 2, June. 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

threatened species of the ecosystem.⁶ Furthermore, States have a primary obligation to conserve components of biological diversity in areas within the limits of its national jurisdiction.⁷ Thus a species that is protected by national law deserves the same, if not more, conservation efforts as species listed on international treaties.

Ecosystem refers to the interaction between components as a functional unit.⁸ The conservation of ecosystem focuses on the ecosystem structure and functioning that maintains the ecosystem service.⁹ The conservation of these interactions and processes is sometimes of greater significance than simply protection of species.

The grey bears are invasive as they threatened the biological diversity of Arctos. The grey bears threaten the survival of the endangered and endemic Trouwborst tern by consuming its eggs and nestlings.¹⁰ Additionally, the grey bears damaged the bees and apple orchards which provide important ecosystem functions. Flowers provide food for bees, and bees are important pollinators that support the growth of trees, flowers, and other plants, which serve as food and shelter for other animals.

Furthermore, the grey bears exhibit characteristics of invasive alien species. Upon introduction, the bears not only survived, but thrived,¹¹ as most female bears produced offspring within a year of being released,¹² predictably due to the lack of predators and competition from other large carnivore species which were absent in Suredia.¹³

Thus the grey bears, by threatening the endangered endemic Trouwborst terns and the ecosystems in Arctos, are invasive to Arctos.

⁶ *Id.*, Annex 1.

⁷ *Id.*, Art 4.

⁸ *Id.*, Art 2.

⁹ Decision V/6 Adopted by the Conference of the Parties to the Convention on Biological Diversity At Its Fifth Meeting, U.N. DOC. UNEP/CBD/COP/5/23 (May 2000), 106, Principle 5.

¹⁰ Record, ¶ 17.

¹¹ What are Invasive Alien Species?, <https://www.cbd.int/invasive/WhatareIAS.shtml>.

¹² Record, ¶ 15.

¹³ *Id.*, ¶ 10.

3. *Ranvicora failed to prevent the introduction of grey bears which became invasive to other States under Article 8(h) of CBD*

Article 8(h) of CBD provides that each contracting party shall prevent the introduction of alien species which threaten ecosystems, habitats or species.¹⁴ The obligation imposed is two-fold: first, an obligation to prevent the introduction of IAS into its own territory; second, an obligation to prevent the introduction of alien species that could become invasive to other States. States should recognize the risk that activities within their jurisdiction may be a potential source of IAS to other States.¹⁵ This could include the *intentional* introduction of an alien species into their own State that subsequently spread to another State and become invasive.¹⁶ States that intentionally introduce alien species should take all efforts to permit only the introduction of species that are unlikely to threaten biological diversity.¹⁷ In particular, States should assess the risk of adverse impact on its neighbouring state and demonstrate that the risk is minimized and that the bears are unlikely to be invasive.¹⁸

When there is uncertainty due to a lack of sufficient scientific certainty and knowledge regarding the invasiveness of the alien species, the Precautionary Approach applies. Under this principle, the lack of scientific certainty about the various implications of an invasion should not be used as a reason for postponing or failing to take appropriate eradication, containment and control measures”.¹⁹ Where the adaptation of species in *in situ* conservation is unpredictable, such as under climate change, the Precautionary Approach should be adopted to avoid unintended ecological consequences including the spread of invasive alien species.²⁰ Where a species was once extinct from an ecosystem and subsequently reintroduced, the potential invasiveness of the species is difficult to predict because its

¹⁴ CBD, Art 8(h).

¹⁵ Decision VI/23, 258.

¹⁶ Decision VI/23, 260.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Decision X/33 Adopted by the Conference of the Parties to the Convention on Biological Diversity At Its Tenth Meeting, U.N. DOC. UNEP/CBD/COP/DEC/X/33 (29 Oct 2010), ¶ 8(e).

past habitat may undergo significant change during its absence. In such situations, States should likewise adopt the Precautionary Approach to assess the potential impact from the intentional reintroduction of the species on other states.

Furthermore, the reintroduction project could only be justified where the scale of expected benefits exceeds the absolute level of risk.²¹ According to IUCN Guidelines on Reintroduction, which are consistent with the “guiding spirit” of the CBD,²² any expected conservation benefits through a conservation introduction, for example, the improvement of the conservation status of the focal species locally or globally,²³ should be weighed against the potential environmental impact, considering the unpredictability of the pathways and the impacts on biological diversity of IAS.²⁴

Ranvicora failed to discharge the obligation to prevent the introduction of IAS as it did not adhere to the Precautionary Approach to assess the potential impact of the Project on Arctos notwithstanding the great uncertainty regarding the potential invasiveness of the grey bears. Firstly, the fact that the bears that were released were not originally from Ranvicora but acquired from Paddington and Aloysius would make predictions on how they would adapt to Ranvicora difficult.²⁵ The grey bears were also extinct from Ranvicora for almost 50 years at the time of the Project.²⁶ Secondly, the risk of the grey bears spreading into Arctos and becoming invasive is high since the grey bears are alien to Arctos, the release of the bears were very close to Arctos border,²⁷ and it was known that grey bears range in Paddington and Aloysius has been shifting poleward.²⁸ Thirdly, there was no scientific consensus on whether the selected reintroduction site was part of the grey bears’ historic range.²⁹ Lastly, it is uncertain if Ranvicora could justify the conservation benefits against the risks of the Project. Viable populations

²¹ International Union for Conservation of Nature [IUCN], *Guidelines for Reintroductions and Other Conservation Translocations*, IUCN/SCC viiii + 57pp (1st ed. 2013), 4, Section 3.7.

²² *Id.*, 39.

²³ *Id.*, 3, Section 2.

²⁴ *Id.*, Annex 2.3.

²⁵ Record, ¶ 14.

²⁶ *Id.*, ¶ 10.

²⁷ *Id.*, ¶ 14.

²⁸ Record, ¶ 13.

²⁹ *Id.*

of the grey bears already exist in Paddington and Aloysius, and the cultural benefit to Ranvicora alone arguably cannot justify taking the risks that grey bears could become invasive and severely harm the biological diversity of the neighbouring State.

4. Ranvicora breached the obligation under Article 11 (2)(b) of Bern Convention

Article 11(2)(b) of the Bern Convention provides that each contracting party should strictly control the introduction of non-native species.³⁰ As the implementation of measures regarding IAS under the Bern Convention should be consistent with those under the CBD, Ranvicora similarly breached the obligation under Article 11(2)(b) of the Bern Convention to control the introduction of the grey bears.

The role of the Bern Convention is to provide a regional framework for the implementation of the CBD in Europe.³¹ The strategies, legal frameworks and measures under the Bern Convention must follow and support the key approaches supported by the CBD Guiding Principles, specifically the Precautionary Approach and the Ecosystem Approach.³² Principle 3 of Ecosystem approach states that Ecosystem managers should consider the actual or potential effects of their activities on adjacent and other ecosystems.³³ Thus States should assess the full range of possible hazards of a translocation project, including any transboundary impact, any risk that will cause unintended damage³⁴ and impacts of projected climate changes on species' invasion potential³⁵. Further, applying the Precautionary Approach, a translocation should not be carried out if there is inadequate information to assess that a translocation outside indigenous range bears low risk³⁶. Thus Ranvicora breached the obligation to

³⁰ Convention on the Conservation of European Wildlife and Natural Habitats, Art 11(2)(b), September 19, 1979, 1284 U.N.T.S. 209 [hereinafter "Bern Convention"].

³¹ Piero Genovesi & Clare Shine, European Strategy on Invasive Alien Species 27 (2004).

³² *Id.*, 22.

³³ Decision V/6, 114.

³⁴ Bern Convention Standing Committee Recommendation No.158 (2012).

³⁵ Bern Convention Standing Committee Recommendation No.159 (2012).

³⁶ Bern Convention Standing Committee Recommendation No.158 (2012).

control the introduction of non-native species as it did not assess the potential impact of the grey bears on Arctos.

B. Ranvicora breached its duty not to cause transboundary harm

A State breaches its duty to prevent transboundary harm where the transboundary harm caused is “significant” and the State has failed to act with “due diligence”.³⁷

1. The Project caused ‘significant’ harm to Arctos

Harm is “significant” if it is more than “detectable” but need not be “serious” or “substantial” The harm must lead to “a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States”, and “[s]uch detrimental effects must be susceptible of being measured by factual and objective standards.”³⁸

The damage caused by the grey bears in Arctos, as described in the statement of facts, are clearly real and measurable by factual and objective standards. It is clear that the Project caused “significant” harm to Arctos.

2. Ranvicora failed to act with due diligence to prevent transboundary harm

Ranvicora failed to act with due diligence when it failed to assess the potential impact of the Project on Arctos and subsequently inform and consult Arctos about the Project. In order to act with “due diligence”, the origin State’s conduct must be “appropriate and proportional to the degree of risk of transboundary harm in the particular instance.”³⁹ Thus in order to fulfil this obligation, the risk of transboundary harm must be assessed which hence imposes on States to conduct effective EIAs. States have a duty to conduct EIAs as enshrined in the Draft Articles on the Prevention of Transboundary

³⁷ International Law Commission, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries’ (2001) UN Doc A/56/10 [hereinafter “ILC, Draft Articles on Prevention”], Art 1 & 3; Koivurova, T., 2010. Due Diligence. Max Planck Encyclopedia of Public International Law, [www.mpepil.com] [Koivurova], ¶ 11.

³⁸ *Report of the Commission to the General Assembly on the work of its fifty-third session*, U.N. DOC. A/CN.4/SER.A/2001/Add.1 (Part 2) (2001), 151.

³⁹ *Id.*, at 154.

Harm from Hazardous Activities,⁴⁰ and recognised as a general rule of international law in the *Pulp Mills* case.⁴¹

Though it is not specified what the contents of the EIA should be, the court *Costa Rica v Nicaragua* held that where there is a risk of significant transboundary harm the obligation to assess this risk arises.⁴² In that case, the court held that “the construction of the road by Costa Rica carried a risk of significant transboundary harm”, concluding that Costa Rica had an obligation to evaluate the environmental impact of the road project.⁴³

Ranvicora’s EIA is insufficient to meet the standard of due diligence because it was only national in scope.⁴⁴ There was significant risk of the grey bears migrating into Arctos and causing harm. There had been evidence to show that the grey bear’s range in Paddington and Aloysius has been shifting poleward.⁴⁵ Given that Arctos was only 50km north of where the bears were released, any properly informed observer will readily appreciate there was a risk that the bears might migrate poleward into Arctos’ territory. Although the bears had historically migrated within Ranvicora and had not lived in Arctos, this evidence is arguably outdated since grey bears had been extirpated in Ranvicora since 1963. Human-bear conflicts are also well-documented and recognised⁴⁶ and bears are known to cause property damage, injuries and even death to humans. Any properly informed observer would thus have assessed the risk of the Project to Arctos.

⁴⁰ ILC, Draft Articles on Prevention, Art 7.

⁴¹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, 2010 I.C.J. 18 (Apr 20), at para 204.

⁴² *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, 2015 I.C.J. 667., at para 156.

⁴³ *Id.*, para 155-156.

⁴⁴ Record, ¶ 12.

⁴⁵ Record, ¶ 13.

⁴⁶ See, e.g., Özgün Can et al, 2014. *Resolving Human-Bear Conflict: A Global Survey of Countries, Experts, and Key Factors*. *Conservation Letters*, 501-513.

Even if the risk to Arctos was uncertain, Ranvicora should have taken the Precautionary Approach to assess the risk of the Project on Arctos in their EIA. Hence, Ranvicora failed to act with due diligence by failing to assess the risk of the Project to Arctos in its EIA.

II. ARCTOS HAS NOT VIOLATED INTERNATIONAL LAW

A. The killing of grey bears is not a violation of the CBD

Contracting Parties under the CBD are to, *inter alia*, “promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings”⁴⁷ and to “rehabilitate and restore degraded ecosystems and promote the recovery of threatened species”.⁴⁸

However, these obligations are imposed on Contracting Parties only “as far as possible and as appropriate”.⁴⁹ Furthermore, Arctos also has an obligation to control or eradicate alien species which threaten ecosystems, habitats or species.⁵⁰ As discussed, the grey bear is essentially an invasive alien species in Arctos and is causing harm to the environment in Arctos.

Hence, it is submitted that in the present instance, it is not appropriate for Arctos to take efforts to conserve the introduced population of grey bears which are essentially an alien species.

Thus, Arctos’ actions were not in violation of and was, in fact, in furtherance of the CBD in prioritising the conservation of its local biodiversity and to control invasive alien species in Arctos.

B. The killing of grey bears is not a violation of CMS

1. Arctos is not a Range State for the grey bear and therefore not subject to the obligations found under Article III(5) of the CMS

⁴⁷ CBD, Art 8(d).

⁴⁸ *Id.*, Art 8(f).

⁴⁹ *Id.*, Art 8.

⁵⁰ *Id.*, Art 8(h).

Arctos should not be considered a “Range State” of the grey bear and therefore is not subject to the prohibition of “the taking of [grey bears]”.⁵¹

“Range State”, in relation to a particular migratory species, is defined by the CMS to mean “any State that exercises jurisdiction over any part of the range of that migratory species”.⁵² “Range” is defined as “all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time on its normal migration route”.⁵³ Further, CMS Resolution 3.1 has adopted the guideline that a State should be considered a “Range State” for a migratory species when a significant proportion of a geographically separate population of that species occasionally occurs in its territory.⁵⁴

However, the CMS Scientific Council has interpreted that Article VI of the CMS⁵⁵ clearly leaves it to the discretion of the Contracting Parties to declare themselves as Range States for particular species, presumably in cases that are not unambiguously treated by the Convention.⁵⁶ This refers to situations where the definition of “Range State” and “range” do not clearly show whether a State ought to be considered as a “Range State”.

It is submitted that the present case is precisely such a situation where the straightforward application of the Range State classification is not possible. The present case involves the situation where geographically isolated populations of grey bears from Paddington and Aloysius were introduced⁵⁷ into a region which biologists had questioned whether it was part of the grey bear’s historic range,⁵⁸ and where the bears have now crossed over into Arctos, a territory where there had been no

⁵¹ CMS, Art III(5).

⁵² *Id.*, Art I(1)(h).

⁵³ *Id.*, Art I(1)(f).

⁵⁴ Resolution 3.1 Adopted by the Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals, U.N. DOC. UNEP/CMS/COP12/Doc.21.1.1 (19 May 2017)

⁵⁵ See CMS, Art V(1) (“A list of the Range States of migratory species listed in Appendices I and II shall be kept up to date by the Secretariat *using information it has received from the Parties*”) (emphasis added); *id.*, Art V(2) (“The Parties shall keep the Secretariat informed in regard to which of the migratory species listed in Appendices I and II *they consider themselves to be Range States...*”) (emphasis added).

⁵⁶ Document 24 of the CMS 16th Scientific Council Meeting, U.N. DOC. UNEP/CMS/ScC16/Doc24 (June 2010), ¶ 5.

⁵⁷ Record, ¶ 14.

⁵⁸ *Id.*, ¶ 13.

historic records of their presence.⁵⁹ It is unclear whether Arctos should be considered a “Range State” merely because the grey bears is found in Arctos’ territory.

As such, it is up to its own discretion for Arctos to declare itself as a Range State for grey bears.⁶⁰ Since Arctos has not made any indication to the Secretariat to be considered a Range State of the bears, it should not be considered as one and therefore not subject to the prohibition under Article III(5) of the CMS.

Even though CMS Resolution 12.21 suggested generally that there is a need to undertake conservation action beyond the historic range of migratory species due to climate-induced range shifts,⁶¹ Arctos has good reason not to consider itself a Range State of grey bears because they are essentially an invasive alien species. This is notwithstanding that the grey bear is listed under Appendix I of the CMS.

Migratory species protected under the CMS can be considered as invasive alien species and subject to eradication. The Sacred Ibis is an example. While listed under Appendix II of the CMS, an agreement under the auspices of the CMS had expressly called for its containment and eradication in areas where “the species is present as a non-native species”.⁶² Furthermore, the CMS has recognised that migratory species can become invasive if introduced outside their natural range.⁶³

2. Arctos actions were justified under the exception found in Article III(5)(d) of CMS

Even if Arctos is considered a Range State of grey bears, it has not breached Article III(5) of the CMS because its actions can be justified under the exceptions made to the prohibition of taking of the grey bears under Article III(5)(d) of the CMS. Exceptions may be made if “extraordinary circumstances

⁵⁹ *Id.*, ¶ 10.

⁶⁰ CMS, Art VI.

⁶¹ Resolution 12.21 Adopted by the Conference of the Parties to the Conservation of Migratory Species of Wild Animals at its 12th Meeting, U.N. DOC. UNEP/CMS/Resolution 12.21 (October 2017) [hereinafter Resolution 12.21].

⁶² Agreement on the Conservation of African-Eurasian Migratory Waterbirds [hereinafter AEWA] Resolution 4.5, U.N. DOC. UNEP/AEWA/MOP4/Res. 4.5 (September 2008).

⁶³ Resolution 11.28 Adopted by the Conference of the Parties to the Conservation of Migratory Species of Wild Animals at its 11th Meeting, U.N. DOC. UNEP/CMS/Resolution 11.28 (November 2014).

so require...provided that such exceptions are precise as to content and limited in space and time. Such taking should not operate to the disadvantage of the species”.⁶⁴

(a) The situation was an “extraordinary circumstance”

The current situation was an “extraordinary circumstance” that “required” the taking of grey bears. The grey bears that moved into Arctos were causing property damage and endangering human safety, as well as threatening local biodiversity.

In particular, the grey bears were consuming the eggs and nestlings of the Trouwborst tern, an endangered species that is endemic to Arctos.⁶⁵ The grey bears were also causing damage to livestock, orchards and beehives.⁶⁶ In addition, the grey bears had caused a child to die and another to sustain significant permanent injuries, thereby threatening the safety of Arctos’ citizens.⁶⁷

Academics have suggested that the phrase “as required” implies that there was “a complete absence of reasonable alternatives to the taking of [the grey bears] when responding to extraordinary circumstances”.⁶⁸

It is submitted that Arctos had no reasonable alternatives. The measures adopted were necessary for the safety of its citizens and livelihood, and the preservation of its local environment. Since there were no grey bears present in Arctos before, its citizens are arguably not familiar with managing the presence of bears. This is further exacerbated by the lack of cooperation from Ranvicora to manage the situation, leaving Arctos with little room for alternative management methods.

(b) The exceptions are precise as to content and limited in space and time

⁶⁴ *Id.*, Art III(5)(d).

⁶⁵ Record, ¶ 17 and 20.

⁶⁶ *Id.*

⁶⁷ *Id.*, ¶ 21.

⁶⁸ Arie Trouwborst, *Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species*, Cornell International Law Journal 2, at 41-46 (2014) [hereinafter Trouwborst, *Aussie Jaws and International Law*].

The exceptions are precise as to content because this was not a targeted effort by the government or citizens to actively hunt down and kill the bears. Instead, the killing only took place where the bear posed an immediate threat to property or human life.

In addition, the exception to taking are limited in space and time because the taking only occurs near the farms. The poisoned animal carcasses were only set out near the farms,⁶⁹ whereas the “shoot-on-sight” emergency regulation⁷⁰ generally means that bears will only be shot around inhabited areas.

(c) The taking did not operate to the disadvantage of the species

On a textual analysis, it is unclear whether Article III(5)(d) refers to adverse effects on local populations or at the species level.⁷¹ However, it is submitted that the latter interpretation ought to be taken to best achieve the object and purpose of the CMS and allow Contracting Parties to meet their obligations under the CMS.

A treaty is to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁷²

The object and purpose of the CMS are to promote the conservation of migratory species and their habitats.⁷³ Further, Contracting Parties have an obligation to “strictly [control] the introduction of, or [control] or [eliminate], already introduced exotic species”.⁷⁴

An interpretation that Article III(5)(d) refers to adverse effects on local populations will offer undeserved protection to listed species where they are invasive alien species in non-native areas. It will prevent Contracting Parties from fulfilling its obligations to eliminate introduced exotic species where they so happen to be listed species.

⁶⁹ Record, ¶ 20.

⁷⁰ *Id.*, ¶ 21.

⁷¹ Trouwborst, *Aussie Jaws and International Law*, at 43-44.

⁷² Vienna Convention on the Law of Treaties art. 31, May. 23 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁷³ CMS, Article II.

⁷⁴ CMS, Article III(4)(c).

On the other hand, the latter interpretation should be favoured as it will allow Contracting Parties to eliminate Appendix I and II species where they are exotic, thus fulfilling their obligations under Article III(4)(c) and achieving the overall purpose of conserving migratory species and their habitats against exotic species. Indeed, the call for eradication of the Sacred Ibis under the AEWA was to combat the “threats posed by the introduction of non-native waterbird species on global diversity”.⁷⁵

Arctos’ actions were only in relation to what is essentially an introduced population of grey bears which were non-native in Arctos. There are other populations in Paddington and Aloysius which were unaffected by Arctos’ actions. Therefore, Arctos’ actions could not have operated to the disadvantage of the grey bears at the species level.

C. Arctos did not violate the Bern Convention

1. *Arctos did not violate Article 1 and 2*

Article 2 provides the main obligation imposed on parties to the Bern Convention in order to achieve the aims stated in Article 1.⁷⁶ Parties are required to “maintain the population of wild flora and fauna at...a level which corresponds in particular to ecological, scientific and cultural requirements”.⁷⁷

Arctos is not required to maintain any grey bears within its border. Under Article 2, there is no fixed population level to be maintained and concerns in addition to the conservation of the species can be accounted for to determine this “level”.⁷⁸ Article 2 expressly states that the population can be “adapted” to not only ecological but, *inter alia*, cultural and economic interests as well.⁷⁹

⁷⁵ AEWA Resolution 4.5.

⁷⁶ *Explanatory Report Concerning the Convention on the Conservation of European Wildlife and Natural Habitats* [hereinafter Bern Convention Explanatory Report], ¶ 21.

⁷⁷ Bern Convention, Art 2.

⁷⁸ Arie Trouwborst, *Wilderness Protection Under the Bern Convention*, in *Wilderness Protection in Europe – The Role of International, European and National Law* 160-176, 163 (2016) [hereinafter “Trouwborst, *Wilderness*”].

⁷⁹ Linnell JDC, et al., *When is it acceptable to kill a strictly protected carnivore? Exploring the legal constraints on wildlife management within Europe’s Bern Convention*. *Nature Conservation* 21: 129–157, , at 139 (2017).

Arctos is not required to maintain the population of grey bears in the current circumstances. Firstly, the grey bears pose a threat to the safety of the people of Arctos, as evidenced by the grey bear attack on the two children.⁸⁰ Secondly, Arctos is not the natural habitat of the grey bears⁸¹ and as argued they are an IAS. And detrimental to native flora and fauna.⁸² Allowing the bears to continue to endangering the survival of the endangered Trouwborst tern is against ecological interests and contrary to Article 1(1) of the Bern Convention.⁸³ Thirdly, the grey bears are detrimental to the economy and livelihood of the farmers Arctos farmers.

2. Arctos' actions are permitted under Article 9

Under Article 9, Arctos' acts of killing the grey bears via poisoned meat and permitting its citizens to shoot them are exempted from Articles 6 and 8.⁸⁴ For an act to be exempted under Article 9: (i) the exception must be made for one of the purposes listed under Article 9(1); (ii) there "is no other satisfactory solution"; and (iii) the exception "will not be detrimental to the survival of the population concerned".⁸⁵ All three conditions are met in the present case.

Condition (i): Arctos' acts of killing the grey bears were for the purposes of (a) protection of flora and fauna, (b) prevention of serious damage to crops, livestock and other forms of property, and (c) the public interest. As already argued, the grey bears are detrimental to Arctos wildlife.⁸⁶ Regarding (b), it was stated in the Standing Committee Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9, that what constitutes as "serious damage" depends on the intensity and duration of the prejudicial action and the scale of the destruction committed.⁸⁷ Serious damage that is likely to occur

⁸⁰ Record, ¶ 21

⁸¹ *Id.*, ¶ 12

⁸² *Id.*, ¶ 17

⁸³ Bern Convention, Art 1(1).

⁸⁴ Bern Convention, Art 9.

⁸⁵ Trouwborst, *Wilderness*, 168.

⁸⁶ Record, ¶ 17

⁸⁷ Revised Resolution No. 2 (1993) on the scope of Article 8 and 9, Adopted by the Convention on the Conservation of European Wildlife and Natural Habitats Standing Committee at its 31st Meeting (Dec 2011) [hereinafter "Revised Resolution 2"], Appendix ¶ 16.

must also be considered. Purpose (b) is clearly satisfied because the grey bears have killed multitudes of farm animals over a span of at least 16 months, with no indication of halting. Regarding (c), the IUCN (an organ of the UN) Guidelines for Population Level Management Plans for Large Carnivores in Europe states that removal of aggressive animals that demonstrate unwanted behaviour constitutes as acting in public interest. This clearly applies since the grey bears have killed a child.⁸⁸

Condition (ii): Arctos' measures in dealing with the grey bears were necessary and they had no other satisfactory solution to the problems. The Standing Committee stated that the solution chosen must be proportionate to the problem faced and have the least adverse effects on the species.⁸⁹

The measures adopted by Arctos are proportionate because they are necessary for the preservation of human safety and livelihood. Further, Article 11(2)(b) permits States to eradicate non-native species under the obligation to strictly control the introduction of non-native species.⁹⁰ Simply capturing and returning the grey bears to Ranvicora will not prevent future intrusions because Ranvicora showed no intention of co-operating with Arctos to address the destruction caused by the bears even after being notified of it on 9 August 2018.⁹¹ Setting up borders such as electric fences is also undesirable because it can cause serious harm to the wildlife along the border.⁹²

Additionally the killing of grey bears is limited to situations where the grey bears can potentially cause harm to either humans or livestock. Arctos has not permitted the active hunting of the grey bears to fully eradicate their presence within Arctos.

Condition (iii): Arctos' acts are not detrimental to the survival of the grey bears because there is no evidence to suggest that their population's chances of extinction increased as a result of Arctos'

⁸⁸ Record, ¶ 21

⁸⁹ Revised Resolution 2, ¶ 7.

⁹⁰ Michael Bowman et al., *Lyster's International Wildlife Law* (2010) [hereinafter "Bowman, Lyster's"]

⁹¹ Record, ¶ 29.

⁹² Arie Trouwborst. et al., *Border Fences and their Impacts on Large Carnivores, Large Herbivores and Biodiversity: An International Wildlife Law Perspective* in RECIEL 25: 291-306, at 293-294 (2016).

actions.⁹³ Reference should be made to the European Court of Justice case of *Commission v Finland*.⁹⁴ The case concerned Finland's breach of the 1992 Habitats Directive, Article 16 (regarding permissibility of derogation).⁹⁵ This decision is relevant as the Habitats Directive serves to implement the Bern Convention in the European Union.⁹⁶ The court held that in exceptional situations killing of species in unfavourable conservation status may be permitted as long as the conservation status is not worsened or prevented from becoming favourable.⁹⁷

Hence, under Article 9, Arctos' acts are exempted from Articles 6 and 8.

3. *Arctos did not breach Article 10*

Article 10 requires parties to "co-ordinate their efforts for the protection of the migratory species specified in [Appendix] II...whose range extends into their territories".⁹⁸ In order for Arctos to have violated Article 10, Ranvicora had to have attempted to co-ordinate with Arctos in the first place when it initiated the Project..

Several Standing Committee recommendations prescribe that parties collectively implement action plans for increased international co-operation for the conservation of large carnivorous species inhabiting border areas.⁹⁹ However Ranvicora made no attempts to work with Arctos before implementing the reintroduction program.¹⁰⁰ Arctos cannot be expected to be burdened with expending

⁹³ Bowman, *Lyster's*, 320.

⁹⁴ C-342/05, *Commission v Finland*, 2007 E.C.R. I-04713.

⁹⁵ Council Directive 92/43/EEC, Art 16, 1992 O.J. (L 206) 7.

⁹⁶ Yaffa Epstein, *The Habitats Directive and Bern Convention: Synergy and Dysfunction in Public International and EU Law*, Georgetown International Environmental Law Review 26,149 (2014)

⁹⁷ *Commission v Finland*, ¶ 29.

⁹⁸ Bern Convention, Art 10(1).

⁹⁹ Bowman, *Lyster's*, 320-321; Bern Convention Standing Committee Recommendation No. 37 (1992) (on the Conservation of the Cantabrian Bear); Bern Convention Standing Committee Recommendation No. 115 (2005) (on the Conservation and Management of Transboundary Populations of Large Carnivores) ; Bern Convention Standing Committee Recommendation No. 137 (2008) (on Population Level Management of Large Carnivore Populations).

¹⁰⁰ Record, ¶ 12.

effort and resources to assist in the program when no prior plans were made between the parties concerning such matters. Hence, Arctos did not breach its obligation to co-ordinate under Article 10.

D. Arctos did not violate its duty to prevent transboundary harm under CIL

Arctos did not violate the duty to prevent transboundary harm (the ‘no harm’ principle) by killing the grey bears because Arctos was merely responding to the harm caused by the grey bears who originated from Ranvicora’s Project. The basis of the ‘no harm’ principle is that a state’s sovereign rights to use its territory as it wishes must be limited by the obligation not to infringe on the rights of other states.¹⁰¹ The principle is thus applicable in scenarios where a state must still take into account the interest of other states while pursuing its own interests. However, this principle should not apply in scenarios where a state is forced to resolve a problem on its own land brought about by another state.

Hence Arctos killing the grey bears is not a violation of the no harm principle since it was not done primarily in pursuance of its own objectives, but in response to a problem brought about on its own land by Ranvicora.

¹⁰¹ Brunnée, J, 2010, *Sic utere tuo alienum non laedas*, Max Planck Encyclopedia of Public International Law, [<http://opil.ouplaw.com>].

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Arctos respectfully requests this Court to declare that:

1. Ranvicora violated its duty to prevent the introduction of IAS under Article 8(h) of the CBD and Article 11(2) of the Bern Convention and that Ranvicora breached its duty to prevent transboundary harm.
2. Arctos' acts of killing the grey bears did not violate the CMS, CBD or Bern Convention and that Arctos did not breach its duty to prevent transboundary harm.

RESPECTFULLY SUBMITTED,

AGENTS OF THE APPLICANT