

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



QUESTIONS RELATING TO REINTRODUCTION OF BEARS

THE FEDERAL STATES OF ARCTOS

APPLICANT

v.

THE REPUBLIC OF RANVICORA

RESPONDENT

MEMORIAL FOR THE RESPONDENT

THE TWENTY-FOURTH STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT

COMPETITION

NOVEMBER 2019

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STATEMENT OF JURISDICTION

The Federal States of Arctos (“**Arctos**”) and the Republic of Ranvicora (“**Ranvicora**”) (collectively referred to as “**the Parties**”) have agreed to submit the present dispute to the International Court of Justice (“**ICJ**”) under the Article I of the Special Agreement between the Parties signed on 11th July 2019. Accordingly, this Court has jurisdiction to hear the present dispute pursuant to Article 36(1) of this Court’s Statute.

The Parties filed a joint notification dated 15th July 2019 in the Registry of this Court which was acknowledged on 22nd July 2019. The Parties have thus accepted the jurisdiction of the Court in accordance with the procedure set out under Articles 40(1) and 40(2) of this Court’s Statute. The Parties shall accept the judgment of this Court as final and binding and execute it in good faith in its entirety.

STATEMENT OF FACTS

I. BACKGROUND**A. THE PARTIES**

The Parties are neighbouring States on the Northern Hemisphere continent of Suredia. Arctos (approx. 540,000km²) is located to the north of Ranvicora (approx. 640,000km²) and share a 75-km border.¹ Both states are developed countries with diversified economies.

Ursus Smokeysius (“Grey Bear”) is endemic to parts of Suredia², and culturally venerated in Ranvicora³. Its endangered status is reflected in its listing on Appendix II of the Bern Convention and Appendix I of the CMS⁴. Desiring to uphold the spirit of conservation and restoration of biodiversity under aforementioned treaties, Ranvicora contemplated and executed a grey bear re-introduction project.

B. THE RE-INTRODUCTION PROJECT

Prior to their extinction in Ranvicora in 1963, grey bears were localized in Ranvicora and were not known to move into other countries. Therefore, the Government of Ranvicora saw it appropriate and sufficient to conduct a national Environmental Impact Assessment (“EIA”)⁵ while working alongside scientists and professionals in a 5-year plan for this project⁶, concluding that the largest remaining suitable habitat was north-Ranvicora⁷, in line with the poleward shift phenomenon of the bears⁸. Moreover, Ranvicora’s adopted a conservative “introduction-in-phases” approach by introducing 20 bears over a 5-year period⁹ in Phase I.

¹ Record, ¶1

² Record, ¶9

³ Record, ¶11

⁴ Record, ¶9

⁵ Record, ¶13

⁶ Record, ¶11

⁷ Record, ¶13

⁸ *Ibid.*

⁹ Record, ¶14

C. INSTANCES OF HUMAN-BEAR CONFLICT

Four and a half years into the reintroduction project¹⁰, grey bears were spotted moving back and forth along the forested border of the Parties¹¹. Closing on the 5-year mark, there were reports of human-bear conflicts involving damage to crops, livestock, and flora and fauna. Two years after the first sighting¹², two citizens of Arctos played with the cubs, triggering a hostile response from the mother bear. Six years¹³ into the reintroduction, this is the first and only incident of hostile interactions resulting in human injury.

D. ARCTOS' DELIBERATE SHOOTING AND POISONING OF GREY BEARS

Despite the lack of concrete assessment of aforementioned damage¹⁴, the Government of Arctos has resorted to the laying of poisonous animal carcasses targeted at all bears roaming the border, resulting in the death of four bears¹⁵ to date. On 22nd April 2019, the Government of Arctos passed a law legalizing the unrestrained killing of grey bears¹⁶. Within 4 weeks of this regulation, two cubs were shot, alongside with two females, one of which was pregnant¹⁷. Ranvicora's urgent plea for Arctos to revoke this regulation has fallen on deaf ears¹⁸, and this law continues to persist and bears are continually at risk of being shot as this dispute is ongoing.

II. APPLICABLE INTERNATIONAL LAWS

The Parties are Members of the United Nations and parties to the Statute of the ICJ¹⁹. The Parties are Parties to the Vienna Convention on the Law of Treaties ("VCLT")²⁰, and contracting parties to the Convention

¹⁰ Record, ¶14,16

¹¹ Record, ¶ 16

¹² Record, ¶16,21

¹³ Record, ¶14,21

¹⁴ Record, ¶20

¹⁵ Record, ¶20

¹⁶ Record, ¶21

¹⁷ Record, ¶21

¹⁸ Record, ¶22,23

¹⁹ Record, ¶2

²⁰ Record, ¶3

on Biological Diversity (“**CBD**”)²¹, the Convention on the Conservation of European Wildlife and Natural Habitats (“**Bern Convention**”)²², the Convention on the Conservation of the Migratory Species of Wild Animals (“**CMS**”)²³.

²¹ Record ¶4

²² Record ¶5

²³ Record ¶6

QUESTIONS PRESENTED

- I. Whether Ranvicora violated international law with respect to its grey bear reintroduction project.
- II. Whether Arcos violated international law with respect to its responses with respect to its responses to Ranvicora's reintroduction of grey bears.

SUMMARY OF ARGUMENTS

I. Ranvicora's grey bear reintroduction project did not violate applicable international laws:

- 1) Grey bears are not an Invasive Alien Species ("IAS") under the CBD and Bern Convention;
- 2) The reintroduction project did not cause significant transboundary harm pursuant to the CBD and Customary International Law.

II. Arctos' actions violated applicable international laws:

- 1) Arctos' poisoning and killing of grey bears violates the specific prohibitions in the CMS and Bern Convention;
- 2) Arctos' conduct contravenes the spirit of promoting biological diversity under the CBD.

ARGUMENTS

I. RANVICORA'S REINTRODUCTION PROJECT DID NOT VIOLATE ITS TREATY OBLIGATIONS AND CUSTOMARY INTERNATIONAL LAW**A. RANVICORA DID NOT VIOLATE ITS OBLIGATIONS PERTAINING TO INVASIVE ALIEN SPECIES UNDER THE CBD AND THE BERN CONVENTION**

Both the CBD²⁴ and the Bern Convention²⁵ have provisions relating to invasive alien species. As the newer convention, the CBD articulates a more developed obligation on invasive alien species as compared to the Bern Convention²⁶. Therefore, the obligations relating to invasive alien species will be considered in the context of the CBD.

The relevant provision is Article 8(h), which states that Contracting Parties shall *as far as possible and appropriate prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.*²⁷

Under the relevant conventions, for a species that expands its range involving *terra incognita* to be considered an alien species in the new region, the species must originally be (1) introduced by human agency outside its natural past or present distribution²⁸, *or* (2) a native species from another region that has spread to new territory, unless the expansion is natural or due to climate change²⁹. In the present case, the grey bear is not considered an alien species because (1) it was reintroduced within its natural past distribution and (2) its range expansion from Ranvicora is due to climate change.

²⁴ Convention of Biological Diversity, 5 June 1992, 1760 U.N.T.S 79 [hereinafter CBD].

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

²⁶ The Bern Convention was open for signature in 1979 while the CBD was open for signature in 1992.

²⁷ CBD, Article 8(h).

²⁸ UNEP/CBD/COP/6/20, Decision VI/23, 7-19 April 2002.

²⁹ Bern Convention Recommendation No. 142, 26 November 2009, interpreting the CBD definition of invasive species to take into account climate change.

■ The grey bear is not an alien species in Ranvicora and Arctos

(a) The grey bear is not an alien species in Ranvicora

The grey bears are not an alien species in Ranvicora because they were reintroduced within their probable historical range. An alien species is defined as a species that is introduced by human agency outside its natural past or present distribution³⁰. Reintroduction projects which return native species to its historic range will not amount to an introduction of alien species³¹.

Where a species has been extirpated, there may be uncertainty as to the exact natural past distribution of the species³². Nonetheless, in such cases where there is inadequate evidence to confirm whether a release site was part of a species' historic range, the existence of a suitable habitat within ecologically appropriate proximity to proven range may be sufficient to establish previous occupation³³.

The US' Mexican grey wolf reintroduction program is one example. The Mexican Wolf Recovery Team accepted a map that defined the "probable historic range" of the Mexican grey wolf³⁴. The redefined map was significant as it expanded the number of suitable habitats³⁵. Further studies have highlighted that historic ranges are often underestimated. This unnecessarily limits the availability of suitable habitats for re-introduction projects³⁶.

³⁰ Supra Note 28.

³¹ *Ibid.*

³² Heffelfinger, J., Nowak, R. and Paetkau, D. (2017). Clarifying historical range to aid recovery of the Mexican wolf. *The Journal of Wildlife Management*, 81(5), pp.766-777.

³³ IUCN/SSC (2013). *Guidelines for Reintroductions and Other Conservation Translocations*. Version 1.0. Gland, Switzerland: IUCN Species Survival Commission, viiii + 57 pp; Hendricks, S., Sesink Clee, P., Harrigan, R., Pollinger, J., Freedman, A., Callas, R., Figura, P. and Wayne, R. (2016). Re-defining historical geographic range in species with sparse records: Implications for the Mexican wolf reintroduction program. *Biological Conservation*, 194, pp.48-57.

³⁴ Supra note 32.

³⁵ *Ibid.*

³⁶ *Ibid.*

The grey bears are native species in Ranvicora³⁷. They had lived in Ranvicora for centuries prior to their local extinction in 1963³⁸. Some biologists doubted whether the release site was part of the grey bears' historical range³⁹, showing that there was uncertainty as to the exact historic range of the grey bears. Nonetheless, the EIA indicated that the chosen site was the only suitable habitat remaining in Ranvicora⁴⁰, which is highly likely to be proximate to its known historical range within Ranvicora since the grey bears were known to migrate only within Ranvicora⁴¹. Thus, it can be inferred that the release site is a probable historic range that can be accepted as the grey bears' "historic range".

(b) The grey bear is not an alien species in Arctos

The grey bear cannot be considered an alien species in Arctos because they are native species of Ranvicora which have extended into Arctos' territory as part of a climate-induced range shift⁴².

The Bern Convention's Standing Committee clarified that "alien species" should not be interpreted to include native species naturally extending their range in response to climate change even though climate change is the result of human action⁴³, so as to prevent the unnecessary control of naturally migrating species⁴⁴. The fact that there are no prior records of the species in a particular region does not make it an alien species there⁴⁵.

This corresponds to the present situation. The fact that there are no historic or fossil records of grey bear presence in Arctos⁴⁶ alone does not render the grey bears an alien species in Arctos. In light of the evidence that

³⁷ Record, ¶9.

³⁸ Record, ¶10.

³⁹ Record, ¶13.

⁴⁰ *Ibid.*

⁴¹ Record, ¶12.

⁴² Record, ¶19.

⁴³ *Supra* note 29.

⁴⁴ Trouwborst, A., Krofel, M. and Linnell, J. (2015). Legal implications of range expansions in a terrestrial carnivore: the case of the golden jackal (*Canis aureus*) in Europe. *Biodiversity and Conservation*, 24(10), pp.2593-2610.

⁴⁵ *Ibid.*

⁴⁶ Record, ¶10.

the grey bears have been extending its range into Arctos due to climate change⁴⁷, the grey bears are not be interpreted as “alien species”.

■ The grey bears is not invasive species in Arctos because they have not harmed biological diversity in Arctos

Regardless of whether the grey bears are considered as alien species, they are nevertheless not *invasive* alien species under the relevant treaties. *Invasive* alien species are alien species whose introduction threaten biological diversity⁴⁸. Grey bears are not invasive because there is no evidence that they threaten ecosystems, habitats, or species in Arctos.

Arctos argues that their native species are threatened as the grey bears have been killing some Trouwborst terns⁴⁹ at the border. This argument is without merit. Killing individual members of a species does not necessarily amount to a threat to the viability of the species, which is essential to constitute a threat to biological diversity⁵⁰.

Ranvicora acknowledges that the grey bears have been extending its range into Arctos’ territory, and have unfortunately killed some Trouwborst terns while foraging⁵¹. However, Arctos has failed to provide evidence that the Trouwborst terns’ conservation status has in any way been negatively affected by the grey bears. Therefore, the grey bears do not adversely affect Arctos’ biological diversity as the viability of the species is not threatened.

On the contrary, not only are the grey bears not an alien invasive species, their arrival is a positive addition to biological diversity as it increases the variability of species within Arctos.

⁴⁷ Record, ¶19.

⁴⁸ Supra note 28.

⁴⁹ Record, ¶17.

⁵⁰ See CBD, Article 2 for definition of biological diversity; CBD Article 8(h).

⁵¹ Record, ¶19.

■ Ranvicora has satisfied the requirements of Article 8(h) by taking appropriate measures as far as it was possible.

Article 8(h) of the CBD states that Parties shall “as far as possible and as appropriate”⁵² prevent the introduction of alien species that threaten biological diversity. The term “as far as possible and as appropriate” is phrased in a broad and qualified manner such that Parties evidently have the discretion to decide what is ‘possible’ and ‘appropriate’ with regard to their individual circumstances⁵³.

In the context of conservation translocations, a Party planning a reintroduction project should conduct risk assessments in accordance to the best available scientific evidence at the time⁵⁴. This does not require a Party to prevent all risks that might eventuate.

Consistent with the CBD obligations, the guidelines in Bern Recommendation No. 158⁵⁵, 159⁵⁶ provide greater clarity on how conservation measures should be implemented under changing climatic conditions. Similarly, CMS Resolution 11.28 invites Parties to consider the risk of translocated migratory species becoming invasive if translocated outside their natural range⁵⁷. These guidelines assist Parties in the implementation of treaty obligations with the aim of reducing the risk of potential hazards⁵⁸.

In the present case, Ranvicora has done what is necessary to ensure that the reintroduction project complies with the provisions by taking into account the relevant considerations in the guidelines. To this end, Ranvicora conducted an EIA to determine the impact of the reintroduction project and proceeded with the reintroduction project based on the results of the EIA⁵⁹. It was reasonable for Ranvicora to conduct a national EIA

⁵² CBD, Article 8(h).

⁵³ Trouwborst, A. (2015). Global large carnivore conservation and international law. *Biodiversity and Conservation*, 24(7), pp.1567-1588 at 1579.

⁵⁴ *Supra* note 33.

⁵⁵ See Bern Convention Recommendation No. 158, 30 November 2012, conservation translocations under changing climatic conditions.

⁵⁶ See Bern Convention Recommendation No. 159, 30 November 2012, on the effective implementation of guidance for Parties on biodiversity and climate change.

⁵⁷ UNEP/CMS/Resolution 11.28, 4-9 November 2014, Future CMS activities related to invasive alien species.

⁵⁸ Bern Convention, Article 14.

⁵⁹ Record, ¶12.

as the grey bears had only migrated within Ranvicora for centuries, and it was not known to have moved into any other country, including Arctos⁶⁰.

Based on the EIA, the release site was determined to be the only suitable remaining habitat in Ranvicora that can sustain a viable population of grey bears⁶¹.

While the release site may seem close to the border, Ranvicora released the bears at least 50 km away from the shared border as a generous buffer to prevent any unintentional introduction of the grey bears into Arctos⁶². Scientific evidence has shown that bears on average only have a home range of up to 1055km², which is equivalent to a radius of 18km⁶³. Thus, a 50km buffer is appropriate.

Ranvicora has appropriately exercised its discretion in line with the best available evidence at the time of the EIA by reintroducing the grey bears into the most suitable habitat within its probable historical range. Hence, Ranvicora acted in compliance with the CBD and other relevant guidelines.

Consequently, Ranvicora did not breach its obligations relating to invasive alien species.

B. RANVICORA IS NOT LIABLE UNDER THE TRANSBOUNDARY HARM PRINCIPLE

States are to prevent the causing of significant harm to other states under customary international law⁶⁴. This is embodied in Principle 21 of the Stockholm Declaration, which has been restated verbatim in Article 3 of the CBD⁶⁵. The obligation to prevent significant transboundary harm is not an absolute prohibition on any

⁶⁰ Record, ¶10.

⁶¹ IEMCC clarifications at 11.

⁶² Record, ¶14.

⁶³ Dahle, B. and Swenson, J. (2003). Home ranges in adult Scandinavian brown bears (*Ursus arctos*): effect of mass, sex, reproductive category, population density and habitat type. *Journal of Zoology*, 260(4), pp.329-335.

⁶⁴ *Pulp Mills on the River Uruguay* (Argentina/Uruguay) (Judgment) (2010) ICJ Rep 14 [*Pulp Mills*], ¶101

⁶⁵ Melinda Chandler, *The Biodiversity Convention: Selected Issues of Interest to the International Lawyer*, 4 *Colo. J. Int'l Env'tl. L. & Pol'y* 141, 146 (1993).

transboundary harm⁶⁶ but rather, a due diligence obligation⁶⁷ which requires states to take all appropriate measures to prevent or minimise the risk of harm.⁶⁸

A state may discharge its obligation of due diligence by conducting an environmental impact assessment where there is a risk that the proposed activity may have a significant adverse impact in the transboundary context.⁶⁹ A state may also discharge its due diligence obligation by co-operating with the affected state under Article 5 of the CBD⁷⁰.

However, it is questionable if Ranvicora is even subject to these due diligence obligations in the first place because there must be a risk of significant transboundary harm before these obligations arise.⁷¹

1. Ranvicora is not subject to the obligations of due diligence under the transboundary harm principle

Ranvicora did not owe any obligations of due diligence to Arctos under customary international law, Article 3 and Article 5 of the CBD. These obligations only arise when there is a risk of significant transboundary harm⁷². A risk of causing significant transboundary harm refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact⁷³. At present, (1) the risk of Ranvicora's grey bear reintroduction project causing transboundary harm is low and (2) the magnitude of the injurious impact that materialised is not significant. Accordingly, Ranvicora should not be subjected to the abovementioned due diligence obligations.

⁶⁶ Catherine Redgwell, *Transboundary pollution: principles, policy and practice*, Transboundary Pollution, 11-35, at pg 15

⁶⁷ *Ibid.* at pg 16

⁶⁸ *Supra* note 64.

⁶⁹ *Pulp Mills*, ¶204

⁷⁰ CBD, Article 5.

⁷¹ *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, U.N. Doc. A/56/10 (2001), Article 1, Commentary 2; *Pulp Mills*, ¶204; Catherine Redgwell, *Transboundary pollution: principles, policy and practice*, Transboundary Pollution, 11-35 at pg 18

⁷² *Ibid.*

⁷³ *Supra* Note 71, Article 1 Commentary 2

(a) The risk of the grey bear reintroduction project causing transboundary harm was low

For the purposes of transboundary harm, risk is assessed objectively—denoting an appreciation of possible harm resulting from an activity which a properly informed observer had or ought to have had⁷⁴. At present, it is clear that the risk of causing transboundary harm was low when Ranvicora reintroduced grey bears in the North.

Based on available scientific evidence at the beginning of the reintroduction project, it was highly unlikely for the grey bears to have moved into Arctos because there were no historic or fossil records of grey bear presence in Arctos. Furthermore, bears prefer to look for forests cover and tend to avoid roads and villages⁷⁵. This is confirmed in the present case as the grey bears were seen intermittently moving back and forth the forested border of Arctos and Ranvicora⁷⁶ indicating that the grey bears were likely to settle in the forested area between Arctos and Ranvicora as opposed to venturing further into Arctos.

Consequently, although the grey bears may be disposed to moving poleward as a result of climate change⁷⁷, the extent of the poleward movement was likely to be limited to movement up to the forested border of Arctos and Ranvicora. Therefore, when Ranvicora reintroduced the grey bears in the North, the probability of the grey bears moving into Arctos and causing transboundary harm was low. The mere fact that the bears eventually caused harmed in Ranvicora does not mean that the reintroduction project involved a risk⁷⁸: a properly informed observer could not have been aware of the risk in light of the evidence presented above.⁷⁹

(b) The magnitude of the injurious impact that materialised was not significant

⁷⁴ *Ibid.*, Article 1, Commentary 14

⁷⁵ Guido Tosi et al., *Brown bear reintroduction in the Southern Alps: To what extent are expectations being met?*, 26 *Journal for Nature Conservation* 9-19 (2015). at pg 16

⁷⁶ Record, ¶16

⁷⁷ Record, ¶13

⁷⁸ *Supra* note 71. Article 1, Commentary 14

⁷⁹ *Ibid.*, Article 1, Commentary 14

Significant harm is something more than detectable harm⁸⁰. The harm must be physical⁸¹ and must lead to a real detrimental effect on matters such as human health, industry, property, environment or agriculture in the affected State⁸². Such detrimental effects must be susceptible of being measured by factual and objective standards⁸³. In the present case, the harm is at best detectable. While the grey bears damaged property, flora and fauna, these attacks occurred on farms located near the Arctos-Ranvicora border⁸⁴. Attacks at the outskirts of a 570,000 km² cannot be considered significant.⁸⁵ Although the killing of a local endangered species in Arctos is unfortunate, the facts do not show that the grey bear's consumption of Trouwborst tern in Arctos has negatively affected the conservation status of the species. Furthermore, the Trouwborst tern is not a listed species on any international treaty⁸⁶ indicating that the special position of the species is not widely recognised by the international community. Therefore, the harm to the species is not a sufficiently "factual and objective" at the international plane for it to be considered significant.

While the grey bear attacks on the two children are unfortunate, these attacks cannot be considered in the analysis of whether the harm is significant. The degree of harm must first be foreseeable⁸⁷. In the present case, the harm occasioned by the attacks on the children was not foreseeable. The mother bear only attacked the children because they "were trying to play with a bear cub"⁸⁸. In other words, the only reason why the mother bear turned violent against the citizens was because their offspring were threatened. Bears represent a limited threat to human safety and to avoid direct contact with humans⁸⁹. In fact, in the extensive 20-month period since the first grey bear was sighted in Arctos, the grey bears have never been violent against humans except for this isolated incident⁹⁰.

⁸⁰ *Ibid.*, Article 2, Commentary 4

⁸¹ *Ibid.*, Article 1, Commentary 16

⁸² *Ibid.*, Article 2, Commentary 4

⁸³ *Ibid.*, Article 2, Commentary 4

⁸⁴ Record, ¶17

⁸⁵ Record, ¶1

⁸⁶ Record, ¶17

⁸⁷ *Supra* note 71. Article 3, Commentary 18

⁸⁸ Record, ¶21

⁸⁹ *Supra* note 75. at pg 17

⁹⁰ Record, ¶21

Therefore, the harm to the children was clearly unforeseeable.

When the foreseeable harm of the grey bears is examined in totality, it is evident that the harm inflicted by the same bears is not significant at all. Accordingly, there was no risk of significant transboundary harm and Ranvicora is not subject to any due diligence obligations.

2. Ranvicora has taken adequate precautions that discharge any due diligence obligations that may arise

Even if due diligence obligations arose in the present case, Ranvicora exercised reasonable care to discharge these obligations. The required degree of care is proportional to the degree of hazard involved⁹¹. In determining what is a reasonable standard of due diligence, factors such as the size of the operation, its location and special climate conditions should be considered⁹².

At present, although the grey bears were placed near the Arctos-Ranvicora border and evidence suggests potential poleward movement⁹³, Ranvicora's conservatively incremental introduction regime of twenty bears over a five-year period discharges its due diligence obligation⁹⁴ because it complies with the IUCN Guidelines on Reintroduction⁹⁵. The Guidelines state that the optimum number will be "a trade-off between impact on the source population and reducing the risk of the founder population failing to establish because of random effects on a small population"⁹⁶. Ranvicora's reintroduction project is broadly consistent with the practice of other states when implementing projects of the same kind⁹⁷. By aligning itself with widely-adopted state practices, the introduction of 4 grey bears per year⁹⁸ is a judicious and optimum number. Consequently, Ranvicora has acted in a

⁹¹ Supra note 71. Article 3, Commentary 18

⁹² Supra note 71. Article 3, Commentary 11

⁹³ Record, ¶13

⁹⁴ Record, ¶14

⁹⁵ IUCN/SSC (2013). Guidelines for Reintroductions and Other Conservation Translocations. Version 1.0. Gland, Switzerland: IUCN Species Survival Commission, viiii + 57 pp

⁹⁶ *Ibid.*, pg 24

⁹⁷ Slovenia Forest Service, Lessons Learned from Past Reintroduction and Translocation Efforts with an Emphasis on Carnivores 1-43 (2019) at pg 27-34

⁹⁸ Record, ¶14

precautionary and cautious manner and has sought to keep the risk of significant transboundary harm to a minimum.

II. RANVICORA HAS ACTED IN ACCORDANCE WITH THE SPIRIT OF THE CBD IN PROMOTING BIOLOGICAL DIVERSITY

The Preamble⁹⁹ of the Convention recognizes in-situ conservation as the primary means of achieving the CBD's fundamental objective of conserving biological diversity¹⁰⁰. In addition, article 8(f) of the CBD mandates that Parties shall as far as possible and appropriate, rehabilitate and restore degraded ecosystems and promote the recovery of threatened species¹⁰¹. The term "promote" creates a positive commitment¹⁰², while rehabilitating and restoring ecosystems include re-introducing predators¹⁰³ such as the grey bears.

Large carnivores are known to be important for conservation of biological diversity as they maintain the structure and function of diverse ecosystems¹⁰⁴. The grey bears, being the sole large carnivore in Ranvicora, has an irreplaceable function in Ranvicora's ecosystem¹⁰⁵. Thus, by reintroducing the grey bears, Ranvicora has restored a vital species in furtherance of promoting biological diversity. By re-establishing the grey bears, Ranvicora has complied with the CBD by *promoting* the conservation of an endangered species.

On the other hand, Arctos' responses run counter to the spirit of the CBD in conserving biological diversity. Consistent with the CBD, CMS Resolution 12.21, *urges* Parties to promote conservation measures of

⁹⁹ CBD, Preamble.

¹⁰⁰ Glowka, L., MacNeely, J., Burhenne-Guilmin, F. and Synge, H. (1999). A guide to the convention on biological diversity. Gland: IUCN-The World Conservation Union; CBD, Article 1; Rees, P. (2001). Is there a legal obligation to reintroduce animal species into their former habitats?. *Oryx*, 35(03), p.216.

¹⁰¹ Supra note 28.

¹⁰² Supra note 42 at 44.

¹⁰³ *Ibid.*

¹⁰⁴ Supra note 53.

¹⁰⁵ Record, ¶10.

migratory species which have moved beyond its historic range and into their territories as a result of climate change¹⁰⁶.

However, instead of taking positive action to conserve the grey bears, Arctos has acted to the contrary by deliberately poisoning and shooting endangered grey bears¹⁰⁷. Recovering the population of large mammals which have slower reproduction rates requires significant time and effort. The grey bears were enjoying a promising recovery rate prior to Arctos' responses¹⁰⁸. However, the recovery of viable populations of grey bears are now at risk due to Arctos' indiscriminate killings.

Furthermore, Arctos demands the removal of the grey bears from the wild, which goes against the spirit of the CBD to conserve a culturally important endangered species in its natural surroundings¹⁰⁹.

III. ARCTOS' INTENTIONAL SHOOTING AND POISONING OF BEARS VIOLATES INTERNATIONAL LAW

A. ARCTOS' ACTIONS VIOLATE THE CMS

Article III(5) of the CMS expressly prohibits the taking of Appendix I species by range states except under narrow exceptions. Arctos' deliberate killing¹¹⁰ constitutes "taking"¹¹¹ and qualifies as a range state under the *present* range of *Ursus amoyanus*. The bear's historic range¹¹² is immaterial owing to the express employment of the *present tense* definition of "range"¹¹³. In any case, the present range falls within the probable past historic range.

Arctos' actions forbid the invocation Art III(5)(d) because none of the pre-requisites are met. A valid

¹⁰⁶UNEP/CMS/Resolution 12.21 October 2017, Climate change and migratory species.

¹⁰⁷ Record, ¶21.

¹⁰⁸ Record, ¶15.

¹⁰⁹ CBD, Preamble.

¹¹⁰ Record, ¶21,22

¹¹¹ CMS, Art I(1)(k); Trouwborst, A. Transboundary Wildlife Conservation in A Changing Climate: Adaptation of the Bonn Convention on Migratory Species and Its Daughter Instruments to Climate Change. *Diversity* 2012, 4, p282

¹¹² Record, ¶13

¹¹³ CMS, Art I(1)(h)

invocation of Art III(5)(d) requires derogations to be (1) “precise as to content”, (2) “limited in space and time” and (3) not disadvantage the bear species.¹¹⁴ Arctos’ “kill-at-will” legislation imposes no quota, and exists indefinitely¹¹⁵, failing pre-requisites (1) and (2). Given the early stages of the reintroduction project, any non-natural deaths will threaten the success of the project and goes against the “zero-tolerance” commitment to killing of endangered species¹¹⁶. *A fortiori*, Arctos’ “kill-at-will” derogation would, if left unchecked by this Court, exterminate the bear species entirely, running totally contrary to goal to conserve migratory species¹¹⁷, thereby failing the final pre-requisite (3).

Furthermore, Arctos does not fulfil the substantive requirement of Art III(5)(d). “Extraordinary” must be read restrictively¹¹⁸, consistent with the strictness of prohibitions under Art III(5)(d)¹¹⁹. The words “so require” implies a requirement of a complete absence of reasonable alternatives¹²⁰. Arctos had been cognizant of bear presence since 2017¹²¹, but had shown no intention to consider, a bear management plan or recourse to a smorgasbord of other documented best practices available¹²². Accordingly, this Court should find that Arctos is precluded from relying on any exceptions and has violated the CMS.

B. ARCTOS’ ACTIONS VIOLATE THE BERN CONVENTION

1. Arctos has violated Article 2

Arctos violated Article 2 of the Bern Convention by further reducing the population level of already-endangered grey bears. Article 2 of the Bern Convention requires parties to maintain or achieve a population level that corresponds to ecological, scientific and cultural requirements.¹²³ Although the population level to be

¹¹⁴ CMS, Art III(5)

¹¹⁵ Record, ¶21

¹¹⁶ UNEP/Cairo Declaration on the Illegal Killing, Taking and Trade of Migratory Birds in the Mediterranean Region

¹¹⁷ CMS, Preamble; Article II(1)

¹¹⁸ International Union for the Conservation of Nature, The IUCN Amphibia-Reptilia Red Data Book (1982), Part 1201, p.204.

¹¹⁹ Ralph Osterwoldt, Implementation and Enforcement Issues in the Protection of Migratory Species: Two Case Studies: Waterfowl in North, Seals in Europe, 29 Nat. Resources J. 1017 (1989) p.1022.

¹²⁰ VCLT, Article 31; Trouwborst, Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species, Cornell Intl L. Jour. Online, vol.2, 2014, 42

¹²¹ Record, ¶16

¹²² European Parliament. Study for the PETI Committee (2018). Large Carnivore Management Plans of Protection: Best Practices in EU Member States p. 18

¹²³ Bern Convention, Article 2

maintained for any wildlife species is not precisely defined, this level must be “well above that at which a species is in danger of extinction”, in line with the Bern Convention’s goals.¹²⁴

In the present case, it is abundantly clear that Arctos breached Article 2 by poisoning the grey bears and legalizing the indiscriminate killing of the same. The grey bear is listed as Endangered on the IUCN Red List of Threatened Species¹²⁵. It is also a CMS Appendix I Species which underscores the grey bear’s “danger of extinction throughout all or a significant portion of its range”¹²⁶. In further reducing the absolute number of grey bears which are already endangered, Arctos has acted in complete violation of its obligation under Article 2.

2. Arctos has violated Article 6, 8 and is forbidden from relying on exceptions under Article 9

a. Arctos is liable under Article 6(a)

Article 6(a) expressly prohibits *all* forms of “deliberate killing”¹²⁷ of Appendix II species. Poisoning¹²⁸ and shooting¹²⁹ of Ranvicora’s bears was deliberate and must fall under “*all* forms”¹³⁰. Accordingly, Arctos breached Article 6(a).

b. Arctos’ manner of killing breached Article 8

Appendix IV expressly prohibits the use of poisoned bait or snares¹³¹, which Arctos has clearly contravened¹³², thereby violating Article 8.

c. Arctos is forbidden from relying on exceptions under Article 9

Arctos does not satisfy any pre-condition for invoking Article 9 for any purposes. An exception is valid

¹²⁴ Arie Trouwborst, Floor M. Fleurke & John D.C. Linnell, *Norway’s Wolf Policy and the Bern Convention on European Wildlife: Avoiding the “Manifestly Absurd”*, 20 *Journal of International Wildlife Law & Policy* 155-167 (2017) at pg 159

¹²⁵ Record, ¶9

¹²⁶ CMS, Article I(1)(e)

¹²⁷ Bern Convention Article 6(a)

¹²⁸ Record, ¶20

¹²⁹ Record, ¶21

¹³⁰ Bern Convention Article 6(a)

¹³¹ Bern Convention Standing Committee. Appendix IV to the Bern Convention (1979), Prohibited means and methods of killing, capture and other forms of exploitation

¹³² Record, ¶21

only if there are “no other satisfactory solution(s)” and it is “not detrimental to the survival of the population”. Given the contraventions of Articles 6(a) and 8, Arctos must justify resorting to killing and the *means* of killing¹³³.

The first pre-condition is not satisfied because of Arctos’ inaction in considering alternatives for almost two years¹³⁴ preceding the derogations. Under the first precondition, “the requirement to consider seriously other alternatives is of *primary importance*”¹³⁵, further, any derogation must be “objectively limited to the extent necessary”¹³⁶. Any derogation must be a “last resort”¹³⁷. At present, Arctos has neither contemplated non-prohibited alternatives¹³⁸, nor were their derogations limited¹³⁹. Accordingly, Arctos is unjustified in killing the bears. Pertaining to means of killing, Arctos has failed to consider, *inter alia*, electric fences and livestock guard dogs¹⁴⁰. Instead, Arctos has directly contravened Appendix IV by using poisoned carcasses as bait¹⁴¹

The second pre-condition is not satisfied because Arctos’ deliberate killing is highly detrimental to the survival of the grey bears. Detriment must be assessed based on the “state of population”, “size, distribution and future prospects”¹⁴². In addition to aforementioned reasons¹⁴³, the slow reproduction rate is a pertinent factor. Female bears only reproduce every three years, and it takes up to 8 months for a cub to be born¹⁴⁴. To date, Arctos

133 Bern Convention Article 9

¹³⁴ Record, ¶17&20

¹³⁵ European Commission. (2007). Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive 92/42/EEC ¶38 ; Bern Convention Standing Committee. Appendix to Bern Convention Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention ¶7

¹³⁶ *Ibid*

¹³⁷ *Ibid* ¶38; Linnell JDC, Trouwborst A, Fleurke FM (2017) 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 p142

¹³⁸ Record, ¶17-20; *supra* point III(A)

¹³⁹ *Ibid*

¹⁴⁰ *Supra* note 122.

¹⁴¹ Record, ¶20

¹⁴² Bern Convention Standing Committee. Appendix to Bern Convention Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention ¶7

¹⁴³ *Supra* point I(A)(1)(a)

¹⁴⁴ Brown Bears - Bears (U.S. National Park Service), Nps.gov (2019), <https://www.nps.gov/subjects/bears/brown-bears.htm#brownlifecycle> (last visited Nov 13, 2019).

has killed at least two female bears, one pregnant, and two cubs¹⁴⁵. The judgments of the Court of Justice of the European Union is non-binding on non-EU states, but they represent a position *prima facie* consistent with the Bern Convention¹⁴⁶. By way of analogy, in *Commission v Poland*, regionally restricted hunting (by hunting permits) has been held to operate to the detriment of the conservation status of the species¹⁴⁷. *A fortiori*, Arctos' legislation legitimizing unrestrained killing must certainly be detrimental to the conservation status. This Court must not allow such derogations which are contrary to the spirit of conservation sacrosanct to this convention¹⁴⁸.

In any case, Arctos does not fulfil the substantive requirements of the exceptions *viz.* the exception of "serious damage"¹⁴⁹ and "overriding public interest"¹⁵⁰. As a large carnivore species, its natural activity entails hunting¹⁵¹, and thus should not be considered as "damage". Furthermore, "serious" must be construed in light of intensity and duration¹⁵². Given the small population of bears, damage cannot be considered "serious". In any case, Arctos' actions are not "proportional to the damage suffered"¹⁵³. To date, the Government of Arctos has yet to comprehensively prove damage beyond sporadic instances¹⁵⁴. This hardly warrants unrestrained killing of bears.

Arctos' must not be allowed to invoke the exception of "overriding public interest". While the attack on Arctos' citizens was unfortunate, human-bear conflicts are a perennial issue. The present circumstance presents no "real and imminent risk" compared to yardsticks recommended by the Standing Committee which are

¹⁴⁵ Record, ¶21

¹⁴⁶ Epstein, Y. (2014). The habitats directive and Bern convention: Synergy and dysfunction in public international and EU law. *Georgetown International Environmental Law Review*, 26, 139.

¹⁴⁷ N. Beeton, & H. McCallum, "Models Predict that Culling is not a Feasible Strategy to Prevent Extinction of Tasmanian Devils from Facial Tumour Disease", *Journal of Applied Ecology*, 2011 Vol. 48, Issue 6, p. 1315; *Commission v Poland* (C-441/17, EU:C:2018:255, e.g. paras 162±180)

¹⁴⁸ *Commission v UK* C-6/04, EU:C:2005:626, paras 112, 113

¹⁴⁹ Bern Convention Article 9(2)

¹⁵⁰ *Ibid.* Article 9(3)

¹⁵¹ *Supra* note 122

¹⁵² *Supra* note 142 ¶16

¹⁵³ *Ibid.*

¹⁵⁴ Record, ¶17&20

essentially epidemic in nature (e.g. abatement of rabies)¹⁵⁵. This Court must not allow an essentially *pro forma* invocation¹⁵⁶ of this exception, which would set an unhealthy precedent allowing states to carry out unrestrained culling where there is true “overriding public interest”.

For the aforementioned reasons, Respondent prays for this Court to find Arctos’ liable under the Bern Convention.

3. Arctos has violated Article 10

Parties have to co-ordinate their efforts for the protection of such species whose range extends into their territories¹⁵⁷. This duty to co-operate includes the creation of migration corridors to facilitate connectivity amongst populations¹⁵⁸. In the present case, Arctos’ inaction and failure to establish migration corridors for the safe passage of the grey bears into the Federation is a breach of its obligation under Article 10(1).

¹⁵⁵ Bern Convention Standing Committee. Explanatory Report to the Bern Convention ¶39

¹⁵⁶ Bowman M, Davies P, Redgwell C (2010) *Lyster's International Wildlife Law*, 2nd ed. Cambridge University Press, Cambridge, pg 318

¹⁵⁷ Bern Convention, Article 10(1)

¹⁵⁸ Bern Convention Recommendation No. 82, 1 December 2000, urgent measures concerning the implementation of action plans for large carnivores in Europe

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Republic of Ranvicora, respectfully requests this Honourable Court to **declare** that:

1. The Republic of Ranvicora did not violate its international law obligations under customary international law, the CBD, CMS and Bern Convention
2. The Federation of Arctos violated its international law obligations under the CMS and Bern Convention

Respectfully submitted,
Agents of the Respondent