2055A

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

THE 24TH STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

NOVEMBER 2019

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QUESTIONS PRESENTED

I.

WHETHER RANVICORA IS INTERNATIONALLY RESPONSIBLE FOR THE TRANSBOUNDARY HARM CAUSED BY THE GREY BEAR RE-INTRODUCTION PROJECT?

II.

WHETHER THE INTENTIONAL POISONING AND KILLING OF GREY BEARS VIOLATED ARCTOS'S INTERNATIONAL OBLIGATIONS?

III.

WHETHER ARCTOS IS INTERNATIONALLY RESPONSIBLE FOR VIOLATING THE DUTY TO PREVENT SIGNIFICANT TRANSBOUNDARY HARM?

STATEMENT OF JURISDICTION

Pursuant to the Joint Notification dated July 15, 2019 and the Special Agreement dated 11 July 2019, signed between the Federal States of Arctos and the Republic of Ranvicora ["**Parties**"], in accordance with Article 40, paragraph 1 of the Statute of the International Court of Justice ["**ICJ Statute**"], the Parties hereby submit to the jurisdiction of the court their differences concerning questions relating to reintroduction of bears.

In accordance with Article II of the Special Agreement, the International Court of Justice ["**ICJ**"] is hereby requested to decide this matter on the basis of the rules and principles of general international law, as well as any applicable treaties.

In accordance with Article 36(1) of the Statute and Article IV of the Special Agreement, the court has jurisdiction to determine the legal consequences, including the rights and obligations of the Parties, arising from any judgment on the questions presented in this matter. Accordingly, the Parties shall accept the judgment of the court as final and binding upon them and shall execute it in its entirety and in good faith.

STATEMENT OF FACTS

BACKGROUND

The Republic of Ranvicora ["**Ranvicora**"] and the Federal States of Arctos ["**Arctos**"] are neighbouring states located in the continent of Suredia. Grey Bears ["**GB**"] are endemic to parts of Suredia and are listed as endangered under several multilateral treaties.

REINTRODUCTION OF GREY BEARS

For centuries, GB lived in Ranvicora, Paddington and Aloysius. GB were never found in Arctos. In 1963, GB became extinct from Ranvicora. Ranvicora conducted a national EIA, pursuant to which it re-introduced legally acquired GB from Paddington and Aloysius and released them into the northern region of its territory - the nearest release being merely 50kms from Arctos's border. GB were intermittently moving back and forth between Ranvicora and Arctos. Arctos's citizens complained of GB crossing the border, attacking horses and sheep on farms, damaging apple orchards, and killing the endangered Trouwborst tern (*an endangered endemic species protected under its national law*).

EXCHANGE OF DIPLOMATIC NOTES

Arctos sent a diplomatic note to Ranvicora stating that it has violated international law by reintroducing GB as they are invasive alien species in Arctos and were causing transboundary harm. Ranvicora replied that they are not responsible for the acts of the GB as they are wild in nature. Arctos placed poisoned carcasses as a result of which four GB died. Moreover, Arctos issued an emergency regulation whereby its citizens were permitted to shoot any GB at sight. Consequently, two female GB – one pregnant and two cubs were killed by the farmers of Arctos. Ranvicora contended that Arctos violated international law by killing GB and demanded an immediate revocation of the emergency regulation. In response to which, Arctos claimed that its measures were in compliance with the relevant exceptions qua its treaty obligations.

SPECIAL AGREEMENT

Given the failed negotiation efforts, Ranvicora and Arctos entered into a Special Agreement and submitted their differences in relation to the reintroduction of GB to the jurisdiction of the ICJ under Article 40, paragraph 1 of the ICJ Statute.

SUMMARY OF ARGUMENTS

I.

Ranvicora is internationally responsible for – *first*, the duty to prevent significant transboundary harm; *second*, in any event, significant transboundary harm has been caused by the Grey Bear Re-introduction Project. Therefore, the remedy of cessation *in toto* and compensation is warranted in the present case.

II.

The intentional killing and poisoning of Grey Bears did not violate Arctos's international obligations. The GB were invasive alien species in Arctos. The measures adopted by Arctos, inter alia, the intentional poisoning and killing of GB - *first*, did not violate the obligations under CMS; *second*, did not violate the obligations under CBD; *third*, did not violate the obligations under Bern.

III.

Arctos is not internationally responsible as it did not violate the duty to prevent significant transboundary harm. In any event, there existed a state of necessity. Further, the measures adopted by Arctos meet the permissibility threshold for countermeasures.

ARGUMENTS ADVANCED

I. RANVICORA IS INTERNATIONALLY RESPONSIBLE FOR THE TRANSBOUNDARY HARM CAUSED BY THE GREY BEAR RE-INTRODUCTION PROJECT

1. The dispute concerns the reintroduction of Grey Bears ["**GB**"] by Ranvicora and the subsequent transboundary harm caused to Arctos. The ILC Articles on Responsibility of States for Internationally Wrongful Acts ["**ARSIWA**"] is customary international law [1] ["**CIL**"] and accordingly, governs the present dispute. Accordingly, Ranvicora is internationally responsible for – *first*, the duty to prevent significant transboundary harm **[A]**. *Second*, in any event, significant transboundary harm has been caused **[B]**. Therefore, the remedy of cessation *in toto* **[C]** and compensation **[D]** is warranted in the present case.

A. Ranvicora has not complied with the duty of prevention

2. While authorizing the re-introduction of GB ["**project**"], Ranvicora did not comply with its CIL and treaty-based obligations – *first,* the duty to conduct an Environmental Impact Assessment ["**EIA**"] to prevent significant transboundary harm **[i]**; *second,* the duty to conduct continuous EIA **[ii]**; *third*, the duty to notify and consult with Arctos **[iii]**; *lastly,* the duty to exercise due diligence to prevent significant transboundary harm **[iv]**.

i. *Duty to conduct EIA to prevent significant transboundary harm*

3. The court in Pulp Mills Case noted the obligation to conduct an EIA in a transboundary context, wherein there lies a risk of significant transboundary harm.[2] First, the reintroduced GB were alien to Ranvicora. Second, the factors stated in Para 6 cumulatively indicate that the national EIA conducted did not account for the risk of *significant* transboundary harm posed by the project.

[1] JAMES CRAWFORD, STATE RESPONSIBILITY, Pg. 60; Bosnia v. Serbia, ¶398.
[2] Pulp Mills Case, ¶161, 205; Costa Rica v. Nicaragua Case, Separate opinion of Judge Weeramantry Pg. 108; CBD, art. 14(1)(a).

4. An alien species includes species introduced outside its '*natural*' past or present distribution.[3] GB were adopted from the neighbouring countries - Paddington and Aloysius ["**P & A**"].[4] The Ranvicoran population of GB had long been isolated from the populations in P & A and went extinct in 1963.[5] Hence, the present distribution of GB in Ranvicora represents introduction through *human mediated* as opposed to *natural* vectors.[6] Moreover, biologists questioned whether the chosen region for reintroduction formed part of the GB's natural past distribution.[7] Thus, the reintroduced GB were alien to Ranvicora.

5. Reintroduction is defined as the release of an organism inside its indigenous range from which it has disappeared.[8] Accordingly, *only* native species can be reintroduced in a territory, which formed part of its indigenous range. Given that GB were alien species in Ranvicora, an assessment to determine the risk of transboundary harm was not conducted in blatant disregard of the additional risk and high probability of harm that reintroduction of alien species have on the biodiversity, ecology and human livelihoods.[9] Further, the re-introduction of alien species, should be considered as harmful for biological diversity, unless there is a reasonable likelihood of it being harmless.[10]

6. The following factors cumulatively indicate that Ranvicora failed to discharge the higher obligation of prevention[11] as warranted in the present case. First, Ranvicora was well aware that the populations of GB in P & A were moving poleward in response to climate change.[12] Second, GB are wild[13] and are scientifically known to have a wide range.[14] Third, GB were reintroduced 48 years after their extinction.[15] Scientific reports indicate that such extended time lag acts a factor for the change in the behavior of species.[16] Notwithstanding the above stated, the GB were re-

[3] UNEP/CBD/COP/VI/23; IUCN, IAS Prevention Guidelines, Pg. 5.
[4] Record, ¶14.
[5] Record, ¶10.
[6] UNEP/CBD/COP/VI/23; IUCN, IAS Prevention Guidelines, Pg. 5; Bern, Rec 57; Bern, Rec 99.
[7] Record, ¶13.
[8] IUCN Reintroduction Guidelines, 1998, Pg. 6.
[9] Bern, Rec 158.
[10] IUCN, IAS Prevention Guidelines, Pg. 8.
[11] UNEP/CBD/COP/VI/23.
[12] Record, ¶13.
[13] Record, ¶19.
[14] Clark, *Bear Reintroductions*, Pg. 2; T-PVS (2000) 24, Pg. 22.
[15] Record, ¶14.
[16] Discussion forum on development of IAS.

introduced outside their historical range, in the north of Ranvicora, merely 50 kms from the Arctos' border.[17] Further, Ranvicora being a party to UNFCCC[18], Kyoto Protocol[19], Paris Agreement[20] and having fully participated in the Stockholm[21] and Rio Conferences[22] – was well aware that climate change is a common concern of all mankind and of its specific impact on biodiversity. In particular, the impact of climate change on the range of migratory species.[23]

7. Such factors were objectively foreseeable and cumulatively indicate that Ranvicora did not comply with the duty to prevent.[24] The EIA must not be national, rather ought to be conducted at an eco-system level[25] to account for transboundary impacts[26], especially given the migratory nature of GB.[27] Ranvicora failed to account for biodiversity considerations in the assessment and it is evident that there were indeed grave and far-reaching consequences for the biodiversity in Arctos.[28] Moreover, taking into account that the EIA concerned a reintroduction project, it must have been rigorously assessed[29] and must have been more scientific[30] and precise in nature.[31] Lastly, the actual harm caused creates a strong presumption that the duty of prevention has been violated.[32]
8. Pursuant to the waterway project by Ukraine, a national EIA was duly conducted. However, the project continued to cause significant transboundary harm. Accordingly, the suspension of the project was ordered until an EIA in compliance with international standards was undertaken.[33] Similarly, given the inadequacy[34] of the national EIA by Ranvicora, the suspension of the project is to be ordered by this court.[35]

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[17] Record, ¶14.
[18] UNFCCC.
[19] Kyoto Protocol.
[20] Paris Agreement.
[21] Stockholm Declaration.
[22] Rio Declaration.
[23] IPCC Climate Change 2019, Pg. 6.
[24] CRAIK, THE INTERNATIONAL LAW OF EIA, Pg. 64.
[25] OIE Guidelines; UNEP/CBD/COP/VI/10; Bern, Rec 130.
[26] CRAIK, THE INTERNATIONAL LAW OF EIA, Pg. 64.
[27] CMS, Res 7.2.
[28] UNEP/CBD/COP/VI/23.
[29] UNEP/CBD/COP/VI/10.
[30] T-PVS (2002) 8.
[31] Bern, Rec 130.
[32] DRC v. Uganda Case, Judge Tomka, ¶4.
[33] Bern, Rec. 111; Australian EPA Report.
[34] Bern, Rec 129.
[35] Bern, Rec 66.

ii. ***Duty to conduct continuous EIA***

9. Ranvicora violated its CIL obligation to conduct continuous EIA, as mandated by this Court in various judgments.[36] States are obligated to conduct continuous assessment and evaluation to monitor the effects on the environment, throughout the life of the project. The absence of post-project monitoring and follow-up is primarily responsible for the ineffectiveness of an EIA.[37] Ranvicora did not comply with the obligation to conduct continuous EIA, even after acknowledging the transboundary harm caused by the project.[38]

iii. ***Duty to consult and notify Arctos in good faith***

10. States have the duty to notify and consult[39] in good faith[40], while deliberating on any project which carries a risk of causing *significant* transboundary harm.[41] As argued in *Section A (i) Para 6*, Ranvicora was well aware of all the factors which cumulatively indicated that its reintroduction project had objectively foreseeable repercussions on Arctos. The statements made in the diplomatic notes exchanged further indicate its knowledge qua the above stated factors.[42] Accordingly, Ranvicora is estopped from asserting to the contrary. Further, the duty subsists regardless of the scope of EIA being transboundary or not.[43] Therefore, Ranvicora did not comply with such duty as it did not make any meaningful[44] and bonafide efforts[45] to co-operate[46] with Arctos, neither did it

[36] Pulp Mills Case, ¶161, 205; Costa Rica v. Nicaragua Case, ¶161, 162; Gabcíkovo Nagymaros Case; Separate opinion of Judge Weeramantry Pg. 108.
[37] CMS/ScC12/Doc.8, Pg. 8,9,10.
[38] Bern, Rec 158.
[39] Bern, Rec 57.
[40] IUCN, IAS Prevention Guidelines, Pg.11; Gabcikovo Nagymaros Case; CBD, art. 17.
[41] Pulp Mills Case, ¶145, 146; Pulp Mills, Separate Opinion of Judge Greenwood, ¶16; Costa Rica v. Nicaragua Case, ¶104, 168.
[42] Record ¶19.
[43] WOOD, COMPARATIVE EVALUATION OF EIA, Pg. 89.
[44] Gabcíkovo Nagymaros Case, ¶141; Macedonia v. Greece Case, ¶132.
[45] Bolivia v. Chile Case, ¶6; Bern, Rec 101.
[46] IUCN, IAS Prevention Guidelines Pg. 19; Corfu Channel Case; Bern, Rec 162.

discharge the minimum burden of sharing any relevant information[47] qua the re-introduction project with Arctos.[48]

iv. *Duty of due diligence to prevent significant transboundary harm*

11. Ranvicora failed to exercise due diligence and take reasonable measures to prevent significant transboundary harm caused by the project.[49] The obligation to prevent harm is not merely discharged by conducting an EIA. It is contingent upon the "*failure of a state to take reasonable measures to prevent the transboundary harm.*[50]
12. In *Pulp Mills*,[51] the court noted that the obligation to exercise due diligence entails the formation of policies to exercise administration control, in order to limit the repercussions of the risk posed. Ranvicora did not adopt any policies to mitigate the potential risk.[52] Despite being aware of the irreversibility of the harm caused to humans[53] and other endangered species, it did not satisfy the higher standard of due diligence warranted under international law.[54] Moreover, Ranvicora failed to take into account that GB would increase in number, spread, disperse and invade other habitats and ecosystems, and consequently cause severe damage to the invaded habitats and ecosystems.[55]

B. Significant transboundary harm was caused by Ranvicora

13. Article 2 of ARSIWA lays down two essentials for determining whether a state has committed an Internationally Wrongful Act ["**IWA**"].[56] First, there must be a breach of an international obligation. Second, the act must be attributable to the state.[57]

[47] Bern, Rec 115.
[48] Bern, Rec 115.
[49] Pulp Mills Case, ¶101; Nuclear Weapons case, ¶29.
[50] CRAIK, THE INTERNATIONAL LAW OF EIA, ¶63; Corfu Channel Case; United States v. Canada Case.
[51] Pulp Mills Case, ¶197, 204.
[52] *Ibid.*
[53] Madonna*, Wolf in North America.*
[54] Gabcíkovo Nagymaros, ¶140.
[55] IUCN, IAS Prevention Guidelines, Pg. 23.
[56] ARSIWA, art. 2.
[57] JAMES CRAWFORD, STATE RESPONSIBILITY, Pg. 81.

14. While authorizing the re-introduction of GB Project ["**Project**"], Ranvicora was in violation of its treaty based and CIL obligation to not cause transboundary harm. Further, Ranvicora has not challenged attribution under Article 4 of ARSIWA[58] – accordingly, the same is presumed. The three conditions for harm to qualify as transboundary harm, are satisfied in the present case.

15. *First*, the harm caused to Arctos in terms of the attacks by the GB resulting in the killing of its citizens, horses and sheep on farms and endangered Trouwborst tern (*Sterna ariensis*)[59], along with, the damage caused to orchards and beehives[60], is a transboundary and physical consequence of the project.[61]

16. *Second*, the harm caused has a reasonably proximate causal relation to human conduct.[62] GB were never present in Arctos.[63] Given that Arctos only shares its border with Ranvicora[64], it can be reasonably contended that if it were not for the project by Ranvicora, GB would not have migrated into Arctos. Additionally, the assertion by Ranvicora that such migration is partly due to climate-induced range shift, does not negate the agency of Ranvicora in facilitating the migration by their project.

17. *Third*, the harm caused meets the standard of "*significant*" harm,[65] which includes any harm which is more than "*detectable*".[66] The harm caused to the citizens and biodiversity of Arctos is "*irreversible*".[67] Thus, Ranvicora violated the fundamental principle of *sic utere*[68], as it knowingly continued activities within its territory which caused significant transboundary harm. Moreover, the impacts of re-introduction projects are likely to be significant when they are extensive over time and space, as seen in the present case.[69]

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[58] ARSIWA, art 4.
[59] Oscar, *Ethics of the ecology of fear.*
[60] Record ¶17.
[61] Schachter, Pg. 463.
[62] Jervan, *Prohibition of Transboundary Environmental Harm,* Pg. 4.
[63] Record ¶10.
[64] Record ¶1.
[65] Pulp Mills Case ¶145, 146.
[66] Costa Rica v. Nicaragua Case, ¶21.
[67] Gabcíkovo Nagymaros Case, ¶140.
[68] Stockholm Declaration, Principle 1; Rio Declaration, Principle 21.
[69] ABAZA, EIA, Pg. 54; SADLER, REPORT OF THE EIA

C. The remedy of compensation is warranted in the present case

18. Under Article 36 of ARSIWA[70], payment of full compensation is an undisputed and frequently sought remedy for an IWA committed by a state.[71] The damage suffered as a result of the transboundary harm caused, is a *direct and proximate*[72] consequence of the project by Ranvicora. *Assuming but not conceding*, that climate change has a role to play in the attributability of the harm caused, ARSIWA provides a mere *general and flexible* causal relation requirement.[73] Further, the damage caused is financially accessible,[74] as it comprises damage caused to the citizens and property of Arctos. Such damage suffered by the citizens has been noted to be absorbed into the material damages suffered by the state as a whole.[75] Hence, Ranvicora is liable to pay compensation to the farmers and other citizens whose property has been damaged by GB.

D. The remedy of cessation is warranted in the present case

19. Article 30 of ARSIWA obligates a state to cease the commission of IWAs.[76] The project is still in operation and Ranvicora intends to continue the release of GB for an additional period of five years culminating in 2021. Given the irreversible character of transboundary harm caused, mere declaratory reliefs or the remedy of partial cessation will not be contextually appropriate. Therefore, the grant of the remedy of cessation *in toto*, is necessary and unavoidable.

II. THE INTENTIONAL POISONING AND KILLING OF GB DID NOT VIOLATE ARCTOS'S INTERNATIONAL OBLIGATIONS

20. GB were invasive alien species ["**IAS**"] in Arctos **[A]**. The measures adopted by Arctos, inter alia, the intentional poisoning and killing ["**killing**"] of GB - *first,* did not violate the obligations under

[70] ARSIWA, art. 36.
[71] Gabcíkovo Nagymaros Case.
[72] Sarah, Extraterritorial Jurisdiction, Pg. 1233-1234.
[73] Wittich, *Compensation,* Pg. 17.
[74] ARSIWA, art. 36(2).
[75] Wittich, *Compensation* Pg. 24.
[76] ARSIWA, art 30; Jurisdictional Immunities, ¶137.

CMS **[B]**; *second,* did not violate the obligations under CBD **[C]**; *third*, did not violate the obligations under Bern **[D]**.

A. The GB were invasive alien species in Arctos

21. An alien species includes species introduced outside its '*natural*' past or present distribution.[77] *First*, there are no historical records of the presence of GB in Arctos.[78] *Second*, the present distribution of GB in Arctos represents introduction through *human mediated* as opposed to *natural* vectors. Thus, GB were alien species to Arctos as it did not '*naturally*' form part of the past or present distribution of GB. Moreover, as the evidence on record demonstrates, GB *spread* and *threatened biological diversity* and hence, became invasive.[79]

22. GB have "*spread*" across Arctos. The first sighting of a GB occurred on September 19, 2017, within the proximity of the shared border.[80] Thereafter, the tracking information coupled with the sightings by local citizens demonstrates that such alien species were beginning to be spotted further away from the border hence, spread in number as well as in distribution.[81]

23. GB threatened biodiversity and consequently, became invasive. Ranvicora has acknowledged that GB have killed a child, leaving another permanently injured.[82] Further, they have killed 7 horses and 20 sheep and were also found sniffing out the nest, consuming the eggs and nestlings of the Trouwborst tern (*Sterna ariensis*), an endangered endemic species in Arctos.[83] Such occurrences significantly pass the muster of the potential harm threshold as required under CBD.[84] Hence, GB were invasive alien species ["**IAS**"] in Arctos.

24. Ranvicora placed reliance on the Bern Recommendation[85] which noted that invasive alien species do not include native species extending their natural range due to climate change. However, as

[77] UNEP/CBD/COP/VI/23; IUCN, IAS Prevention Guidelines at ¶5; Bern, Rec 57, ¶1; Bern, Rec 99, ¶1.
[78] Record, ¶10.
[79] *Ibid.*
[80] Record, ¶16.
[81] Record, ¶17.
[82] Record, ¶19.
[83] Record ¶17.
[84] UNEP/CBD/COP/DEC/XII/16; Lucia, International Regulation of IAS, ¶127.
[85] Bern, Rec 142.

argued in Section I (A)(i), GB were not native to Ranvicora. The recommendation does not concern species which were not previously "*native*" but are colonizing the territory from adjacent areas.[86] Most importantly, the recommendations do not impose any binding obligations on the parties.[87]

B. Arctos has complied with its obligations under CMS

25. Arctos is not a "*range state*" for the GB under Article I (1)(h) **[i]**.[88] *Assuming but not conceding,* that Arctos is a *"range state",* Article III (5) of the CMS provides exceptions under which range states can indulge in the taking of Appendix I species.[89] The burden of proof for proving that the actions by Artcos were contrary to its obligations under CMS, lies with Ranvicora **[ii]**.[90] The emergency regulation passed by Arctos in response to "*extraordinary circumstances*", comply with the exceptions **[iii]**.

i. *Arctos is not a range state of GB*

26. Range refers to the "*the areas of land that a migratory species inhabits, stays in temporarily or crosses at any time on its normal migration route.*"[91] The normal migration route of GB does not coincide with the territory of Acrtos. *First*, there were no historic or fossil records of GB presence in Arctos.[92] *Second*, the present distribution of GB in Arctos is not representive of the "*normal*" migration route of GB, rather is an Anthropocentric consequence of climate change and the project by Ranvicora.

27. Moreover, CMS Resolutions are non-binding and only serve to guide the interpretation of the convention text.[93] Resolution 12.21 notes that Article I (1)(c)(4) pertaining to the maintenance of species' favourable conservation status, *could* be interpreted in light of climate change to include

[86] B Huntley, ¶7.
[87] Scott, *Biofuels and Synthetic Biology at the CBD,* Pg. 248.
[88] CMS, art. 1(1)(c).
[89] CMS, art. 3(5).
[90] Trouwborst*, Shark Cull in Australia and CMS*, ¶44.
[91] CMS, art. I(1)(f).
[92] Record, ¶10.
[93] CMS, Res 11.6, ¶1.

conservation measures outside the historic range of species.[94] *First*, the resolution employs non-binding language. *Second*, it merely states that in order to maintain a species favourable conservation status, action must be taken beyond its historical range.[95] Such interpretation of "*favourable conservation status*" only applies qua the obligations for Appendix II species.[96] In Article III on the protection of Appendix I species, the phrase is not even mentioned.[97] Therefore, such interpretation is not applicable to the GB which is an Appendix I species. Neither does it alter the interpretation of the definition of range state under Article I (1)(h). Thus, Arctos is not a range state of GB.

ii. *The burden of proof lies on Ranvicora to prove non-compliance with CMS obligations*

28. The court in the *Australia v. Japan*[98] proceeded with the assumption that Japan's project which involved the killing of whales was in compliance with the exception of "scientific research". Similarly, the court while adjudging the availability of the exceptions under Article III(5)(d) of CMS, must presume that the emergency regulation authorizing the taking of GB, was "*broadly*" in compliance with Arctos' CMS obligations. Thus, the burden of proving to the contrary lies with Ranvicora.

iii. *Arctos's measures were compliant with the exception of "extraordinary circumstances"*

29. *Assuming but not conceding*, that Acrtos is a range state, its authorization of killing of GB was compliant with Article III(5)(d). "*Extraordinary circumstances*" has not been defined or listed in CMS. As per Article 27(3)(b) of VCLT, subsequent practices of States can be used to interpret the scope of that obligation.[99] Australia authorized the culling of white sharks, under its domestic laws,[100] to *protect its residents from the actual and potential harm caused.*[101] GB were *actively*

[94] CMS, Res 12.21, ¶9.
[95] *Ibid.*
[96] CMS, art. IV.
[97] Trouwborst*, Transboundary wildlife conservation in a changing climate,* Pg. 279.
[98] Whaling in Antarctic, ¶59.
[99] VCLT, art. 27(3)(b).
[100] Biodiversity Act, Australia.
[101] Oliver Millman, Shark cull: government in breach of International Obligations.

harming citizens of Arctos. Moreover, apart from South Africa, none of the other range states of sharks objected to the measures adopted by Australia [102] - thereby, indicating their tacit acceptance[103] of such measures as contextually appropriate. Further, there is ample state practice to demonstrate that states have adopted measures qua killing of species to safeguard their citizens.[104]

30. The purpose of Article III(5) is to maximize the all-encompassing protective intent of CMS.[105] The scope of the protection provided by the CMS is not limited to barring actions that are prejudicial to the Appendix I species, but also includes any action that would harm the ecosystem as a whole.[106] Thereby, enabling Arctos to exercise discretion in relation to taking action against the spread of IAS.

31. Further, the emergency regulation passed for the taking of GB was the *only* alternative available to adequately address the spread of IAS.[107] Other measures such as consultation with Ranvicora to remove GB had failed. In any event, the IUCN Guidelines suggest that when a potential or actual IAS has been detected, eradication is the best management option[108] and must be given priority.[109] Such measures are exceedingly financially viable than ongoing control and are proven to be more desirable for the environment.[110]

32. Further, eradication of IAS[111] has been a successful method of controlling the spread of IAS, which were similarly endangered.[112] For instance, culling of brown bears is regularly carried out by states like Romania and Norway.[113] State practice indicates that killing has become a routine and

[102] Oliver Millman, Shark cull could harm migration; WA Shark Cull.
[103] Sophia, *State Conduct*.
[104] H5N1 Avian Influenza Virus; Feare, *Avian Influenza*; Thronley, *Thai Tigers*; Plowwright, *Hendra Virus Infection.*
[105] Trouwborst*, Shark Cull in Australia and CMS,* Pg. 44.
[106] *Ibid.*
[107] UNEP/CBD/COP/DEC/VIII/27.
[108] T-PVS (2002) 8; GENOVESI, EUROPEAN STRATEGY ON IAS, Pg. 40; CBD Guiding Principle 12.
[109] T-PVS (2002) 8; IUCN, IAS Prevention Guidelines, Guiding Principle 12.
[110] *Ibid.*
[111] European Code of Conduct on Hunting and IAS, Pg. 8.
[112] Genovesi, *IAS Bulletin*, Pg. 8.
[113] T-PVS (2000) 24.

commonly accepted management tool[114] in relation to the spread of IAS.[115] Thus, Arctos has complied with Article III(5)(d) of CMS.

C. Arctos has complied with its obligations under CBD

33. Scientific reports explicitly recognize that reintroduced species have indeed moved outside their indigenous range and become IAS,[116] often with *extreme adverse impacts* on native biological diversity, ecological services or human livelihoods health and economic interests.[117] Further, eradication is the best and most preferred option as it curtails the spread of IAS before it reaches a certain level of population and/or range expansion.[118] Hence, by way of a rapid response and in order to prevent the spread of IAS, the measures taken by Arctos were in compliance with CBD.

D. Arctos has complied with its obligations under the Bern Convention

35. The measures adopted by Arctos were in accordance with the exceptions provided under Article 9 of Bern.[119] Arctos derogated from its obligations as - *first*, there was a lack of other satisfactory solutions; *second*, the derogation was not detrimental to the survival of the population of GB[120] **[i]**. Further, the authorization of killing was in compliance with the non-cumulative specific reasons for which the exceptions may be invoked, as listed under Article 9 **[ii]**.[121]

i. *The authorization of killing was the only satisfactory solution available and did not threaten the survival of GB*

36. Arctos through its diplomatic note expressed its concerns with the spread of IAS, given the explicit and uncontested harm it was causing in its territory. However, such intimation did not lead to any action by Ranvicora to cooperate in mitigation measures, neither did it take responsibility for the

[114] T-PVS (2000) 65 revised 2, Pg. 9.
[115] Piero, *Eradication of IAS in Europe,* Pg. 2.
[116] Madonna, *Wolf in North America;* Drethen, *The return of the Wild in Anthropocene.*
[117] Bern, Rec 158.
[118] GENOVESI, EUROPEAN STRATEGY ON IAS, Pg. 39.
[119] T-PVS/INF (2010) 16.
[120] Bern Convention, art. 9.
[121] T-PVS/Inf (2011) 23, Pg. 26.

harm caused which was clearly detectable and attributable to their project. Given the failure of its consultative efforts and the consequent violation of Article 11 by Ranvicora,[122] Arctos passed an emergency regulation, authorizing its citizens to kill GB - primarily, for the protection of flora and fauna qua the survival of humans.[123] Moreover, GB were posing a major threat to their native biodiversity, in particular, endangered and endemic species of Trouwborst tern. Such circumstances, warranted the taking of necessary and effective measures against GB.[124]

37. Recommendation 57 has granted the authorities the power to declare an "*ecosafety emergency"* in order to attempt to eradicate IAS by empowering administrative authorities to kill IAS such as GB.[125] The emergency regulation passed by Arctos was in response to such ecosafety measure.

38. Bern permits the taking of endangered IAS, provided that such measures do not threaten the survival of the species as a whole.[126] GB were intermittently moving between Arctos and Ranvicora.[127] However, the evidence on record demonstrates that *only* the GB which had migrated to Arctos were turning invasive, as opposed to the part of the population which retained in Ranvicora.[128] Evidence is suggestive of the fact that most females GB produced offsprings within a year of being reintroduced, indicating that the species were beginning to spread in their number as well as distribution.[129] Further, the reasons for the loss of life of bears post re-introduction were not similar to the reasons for their extinction.[130] Therefore, the taking of merely the IAS of GB in Arctos, did not wholly threaten the survival of the species.

ii. *The authorization of killing was in compliance with the non-cumulative specific reasons*

39. *First*, the interests of public health and safety[131] has been noted to have an overriding effect, while considering the appropriateness and reasonableness of the measures adopted. *Second*, such

[122] Bern Convention, art. 11(1)(a).
[123] Lewis, *Legal Response to Human Wildlife Conflict.*
[124] T-PVS (2002) 8.
[125] Bern, Rec 57.
[126] Bern Convention, art. 9; T-PVS/Inf (2011) 23, Pg. 10.
[127] Record, ¶16.
[128]GENOVESI, EUROPEAN STRATEGY ON IAS, Pg. 40; UNEP/CBD/COP/VI/23.
[129] Record, ¶15.
[130] Record, ¶10,15.
[131] Bern Convention, art. 9(1).

measures were adopted to prevent serious damage to crops, livestock and other forms of property in Arctos.[132] Moreover, such derogations in respect to the above stated are supported by uniform and widespread state practice[133] - as indicated by the measures adopted by countries such as Albania, Finland, Iceland and Luxembourg.[134]

40. The motives for the derogations are not spelled out in Article 9 therefore, states are free to decide the reasons for such derogations and to adopt measures which are in consonance with the the condition of "*no other satisfactory solution*".[135] Further, the Bern Standing Committee can only examine whether the State who presents the report on derogations, mentions the underlying motive for such derogation.[136] It does not possess the authority to invalidate such derogation. As indicated above, a wide range of discretion which is conferred upon states to adopt measures in response to the above stated derogations. Therefore, Arctos complied with Article 9 and Recommendation 143 and 158, which particularly emphasise on efforts to be taken to prevent the establishment and spread of IAS.[137]

III. ARCTOS IS NOT INTERNATIONALLY RESPONSIBLE AS IT DID NOT VIOLATE THE DUTY TO PREVENT SIGNIFICANT TRANSBOUNDARY HARM

41. Article 2 of ARSIWA lays down two essentials for determining whether a state has committed an IWA. First, there must be a breach of an international obligation. Second, the act must be attributable to the state.[138] Arctos did not violate its international obligations qua the duty to prevent transboundary harm **[A]**. In any event, there existed a state of necessity **[B]**. Further, the measures adopted by Arctos meet the permissibility threshold for countermeasures under Article 49 of ARSIWA **[C]**.

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[132] *Ibid.*
[133] Wood, *State Practice.*
[134] T-PVS/Inf (2011) 23, ¶14; UNEP/CBD/COP/DEC/XII/17.
[135] T-PVS/Inf (2011) 23, ¶26.
[136] *Ibid,* ¶25.
[137] Bern, Rec 143; Bern, Rec 158.
[138] ARSIWA, art. 2.

A. Arctos did not violate the duty to prevent transboundary harm

42. Arctos did not violate the duty to prevent transboundary harm as *–first*, it complied with the duty to notify and consult **[i]**; *second,* the measures adopted did not result in any actual or significant harm **[ii]**.

i. *Arctos complied with the duty to notify and consult*

43. The diplomatic note dated August 9, 2018 notified Ranvicora that GB have entered into Arctos and are causing damage to their native biodiversity.[139] Thereby, Arctos requested Ranvicora to capture and remove GB and put an end to their project. Additionally, the diplomatic note dated June 23, 2019 expressed concern in regard to Ranvicora's inaction and non-cooperation qua the transboundary harm caused by GB.[140] The above stated exchange between the states indicates Arctos' bonafide efforts to notify and consult[141] with Ranvicora, prior to the passing of the emergency regulation. In any event, the duty to notify and consult exists only in the case of risk of *significant* transboundary harm.[142]

ii. *The measures adopted did not result in any actual or significant harm*

44. Significant transboundary harm is something that is more than merely detectable[143] and need not be "*serious*" or "*substantial*".**[144]** As argued in Section II(D) Para 38, the mere killing of the invasive GB in Arctos, does not threaten the survival of the species as a whole – whose distribution was spread across P & A and Ranvicora. Thus, in the absence of significant or actual harm, the duty to exercise due diligence is not invoked.[145] Moreover, such measures were merely adopted to remedy

[139] Record, ¶18.
[140] Record, ¶23.
[141] Djibouti v. France Case, ¶150.
[142] Costa Rica v. Nicaragua Case, ¶104,168; Pulp Mills Case, ¶113.
[143] Costa Rica v. Nicaragua Case, Separate Opinion of Judge Bhandari, Pg. 21.
[144] Costa Rica v. Nicaragua Case, ¶21; CRAIK, THE INTERNATIONAL LAW OF EIA Pg. 61; ILC, Commentary on Prevention of Transboundary harm.
[145] CRAIK, THE INTERNATIONAL LAW OF EIA, Pg. 66.

the prevailing situation and were in not in the nature of a project or plan, which posed a risk of significant harm.[146]

B. There existed a "state of necessity" under international law

45. In any event, there existed a state of necessity which precluded the harmfulness of the measures adopted, *if any*.[147] There are three elements to determine a state of necessity – *first*, it must relate to an essential interest of a state; *second*, such interest must be threatened by a '*grave and imminent threat*'; *third*, the measures adopted must be the *only* means to protect such interest.[148]

46. *Assuming but not conceding*, that Arctos violated its international obligations by authorizing the killing of GB, such measures were adopted in response to the essential interest of the state to protect its citizens and their property. Further, as argued in Section I (B), GB posed *a grave and imminent threat* to Arctos' citizens and their property. Moreover, the urgency of the situation and the irreversibility of the threat to human life and native biodiversity[149], indicate that the measures adopted were the *only* means to remedy the situation.

47. Further, it must be noted that climate change defies the common sense applicability of general international law.[150] It has foreseeable catastrophic consequences such as floods, draughts, wars - a common response to which is the declaration of emergency, as was done by Arctos in the present case.[151] In times of emergency, international human rights treaties allow for derogations of many human rights.[152] Similarly, climate change being an emergency situation of equal measure, precludes the applicability of general international law principles such as the duty to prevent and the no harm principle.

C. The application of countermeasures by Arctos is justified in law

[146] Costa Rica v. Nicaragua Case ¶108.
[147] MALGOSIA, STATE RESPONSIBILITY, Pg. 206.
[148] ARSIWA, art. 33; Gabcíkovo Nagymaros, ¶52.
[149] UNEP/CBD/COP/DEC/XI/28.
[150] Zahar, International Law Principles on Climate Change.
[151] Climate Change and Human Rights Pg. 5.
[152] Ibid.

48. Article 49 of ARSIWA permits the taking of countermeasures against a state responsible for IWA.[153] The essential ingredients for the permissibility of such countermeasures, as laid down by the court in *Gabcíkovo-Nagymaros* is satisfied in the present case.[154] *First*, the measures adopted were in response to the IWA committed by Ranvicora, as argued in Section I. *Second*, the countermeasures were directed against Ranvicora's breach of the no-harm principle. *Assuming but not conceding,* that the countermeasures had an effect on the species of GB, such effects were merely *incidental and collateral*[155] to the rights of other range states such as P & A. Moreover, the duty to adopt countermeasures which are reversible is not absolute.[156] *Third*, the emergency regulation indicates that such measures were merely temporal in nature, in response to the prevailing state of necessity.[157] *Fourth*, Arctos asked Ranvicora to cease the project and pay compensation for the damage caused. *Lastly and most importantly*, the countermeasures were the only means to remedy the injury suffered and hence, met the threshold of proportionality.[158] Hence, the application of countermeasures is justified in law.

[153] ARSIWA, art. 49.
[154] Gabcíkovo-Nagymaros Case, ¶106.
[155] JAMES CRAWFORD, STATE RESPONSIBILITY, Pg. 285.
[156] Gabcíkovo-Nagymaros Case, ¶87.
[157] JAMES CRAWFORD, STATE RESPONSIBILITY, Pg. 285.
[158] MALGOSIA, STATE RESPONSIBILITY, Pg. 206.

CONCLUSION AND PRAYER FOR RELIEF

Ranvicora respectfully requests this Court to adjudge and declare that:

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

RESPECTFULLY SUBMITTED

AGENTS OF THE APPLICANT