

INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE

THE HAGUE, THE NETHERLANDS



THE CASE CONCERNING

THE GREY BEAR REINTRODUCTION PROJECT

THE FEDERAL STATES OF ARCTOS

APPLICANT

V.

THE REPUBLIC OF RANVICORA

RESPONDENT

MEMORIAL FOR APPLICANT

THE 2018-2019 STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT
COMPETITION NOVEMBER 2019/20

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QUESTIONS PRESENTED

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

STATEMENT OF JURISDICTION

The Federal States of Arctos (“Arctos”) and The Republic of Ranvicora (“Ranvicora”) have submitted to the International Court of Justice questions relating to the reintroduction of grey bears into Ranvicora and the transboundary impact of the bears on Arctos. Pursuant to Article 40(1) of the Statute of the International Court of Justice, Arctos and Ranvicora have entered into a Special Agreement and have thus accepted the jurisdiction of the court.

STATEMENT OF FACTS

The Federal States of Arctos and the Republic of Ranvicora are neighbouring sovereign states on the continent of Suredia who share a border of mainly forests and privately-owned farms. ¹ Both are developed countries with diversified economies. ²

The grey bear is an endemic species on Suredia, listed on the IUCN Red List of threatened Species, Appendix I of the CMS and Appendix II of the Bern Convention.³ It went extinct in Ranvicora in 1963, due to overhunting and habitat destruction and was not known to migrate out of Ranvicora.⁴ There are no historic or fossil records of the bear in Arctos.⁵ Ranvicora began planning a reintroduction project for the grey bears in 2008 because of its great cultural importance in the country.⁶ The EIA that the Ranvicora conducted was national in scope and they did not consult any other state or assess the potential impacts of the project on other countries.⁷ They began the reintroducing bears in 2013, with the nearest release about 50 km from Arctos border.⁸ The first grey bear was sighted in Arctos on September 19, 2017, with occasional sightings being reported over the next several months.⁹ The transboundary movement was confirmed by scientists involved with the reintroduction project.¹⁰

¹ See R. ¶1.

² *Id.*

³ R. ¶9.

⁴ R. ¶10.

⁵ *Id.*

⁶ R. ¶11.

⁷ R. ¶7.

⁸ R. ¶14.

⁹ R. ¶16.

¹⁰ *Id.*

The first attack occurred on February 27, 2018 when a farmer reported one of her horses had been killed.¹¹ Over the next five and a half months bears killed another 7 horses and 20 sheep on different farms across Arctos.¹² They were also damaging orchards and beehives and killing the Trouwborst Tern, and endangered species in Arctos.¹³

On August 9, 2018 Arctos forwarded a diplomatic note to Ranvicora informing them of the harm the bears were causing and stating the violations under international law.¹⁴ Arctos also asked that Ranvicora compensate the injured citizens, end the reintroduction project and capture and remove the bears from the wild.¹⁵ On August 21, 2018, Ranvicora responded with a diplomatic note denying any responsibility for the harm and refusing to compensate citizens of Arctos.¹⁶

Grey bears continued killing livestock and wildlife and damaging the environment in Arctos, prompting the state to set out poisoned carcasses near farms where attacks had previously occurred in order to protect its citizens, property and environment.¹⁷ Four bears died in January 2019 after eating the carcasses.¹⁸ In April 2019, a female grey bear attacked two children outside a farm, killing one of them.¹⁹ In response Arctos issued an emergency regulation, permitting citizens to shoot any

¹¹ R. ¶17.

¹² *Id.*

¹³ *Id.*

¹⁴ R. ¶18.

¹⁵ *Id.*

¹⁶ R. ¶19.

¹⁷R. ¶20.

¹⁸ *Id.*

¹⁹ R. ¶21.

grey bear in Arctos.²⁰ One month later, a farmer shot and killed a female bear and her cubs.²¹ Another pregnant bear was shot by a different farmer a day later.²²

Between June 5, 2019 and June 23, 2019 Ranvicora and Arctos exchanged diplomatic notes, each claiming the other breached various international treaties and obligations and denying their own violations.²³

After further negotiations failed to resolve the dispute both states entered into a Special Agreement to institute proceedings at the International Court of Justice(ICJ).²⁴

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ R. ¶22-23.

²⁴ R. ¶24.

SUMMARY OF ARGUMENTS

- I. Ranvicora violated International Law in its reintroduction project. It breached its due diligence obligation under the CBD, the Bern Convention and Customary International law. In addition, it violated its duty not to commit transboundary harm under the CBD and Customary international law. It also failed to cooperate with Arctos for the conservation and sustainable use of biological diversity under the CBD. It also failed to comply with Principle 11 of the UN Declaration on the Human Environment at Stockholm
- II. Arctos did not violate International Law in its responses to the reintroduction project. It has not violated its obligations under the CBD, CMS or the Bern Convention relating to the conservation of biological diversity. Likewise, it did not contravene its customary law obligations to prevent transboundary harm.

ARGUMENTS

I. THE REPUBLIC OF RANVICORA VIOLATED CUSTOMARY AND CONVENTIONAL INTERNATIONAL LAW WITH RESPECT TO ITS GREY BEAR REINTRODUCTION PROJECT

A. Ranvicora failed to comply with its due diligence obligation under Conventional and Customary international law

1. Ranvicora breached its customary obligation to exercise due diligence

a) Ranvicora failed to conduct an effective environmental impact assessment

Under customary international law, states are obliged to exercise due diligence to prevent significant transboundary environmental harm.²⁵ Due diligence requires States to take preventive action in relation to foreseeable harm when they possess scientific evidence that significant transboundary damage is likely.²⁶ States are obliged to use all the means at their disposal to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.²⁷ In order for States to meet their due diligence obligations, they must perform impact assessments for all activities that may reasonably be thought of as raising the risk of environmental damage.²⁸ The obligation requires a state to ascertain whether

²⁵ Certain Activities Carried Out by Nicaragua in the Border Area (Cost. v. Nic.) and Construction of a Road in Costa Rica along the San Juan River (Nic. v. Cost.), 2015 I.C.J. Rep. 665, ¶1 (Dec. 16) (Separate Opinion of Judge Donoghue)

²⁶ Duncan French and Tim Stephens, *International Law Association Study Group on Due Diligence in International Law First Report* 26, (2014)

²⁷ Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14 ¶ 101 (Apr. 20)

²⁸ International Law Association First Report on Due Diligence in International Law

there is a risk of significant transboundary harm prior to undertaking an activity having the potential to adversely affect the environment of another State. Where there is a risk of significant transboundary harm, the state pursuing the activity which poses the risk must conduct an EIA.²⁹ It is a requirement under general international law to undertake an EIA where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context.³⁰ The underlying principle applies generally to proposed activities not only industrial activities.³¹ “General international law” in the above context denotes a rule of customary international law requiring an EIA to be carried out where there is a risk of transboundary harm.³² *If a party planning activities that are likely to affect the environment did not undertake an EIA on the effects of such activities, then it has not exercised due diligence.³³ The grey bears’ range was shifting poleward in Aloysuis and Paddington.³⁴ This is significant because the bears were released in the Northern region of Ranvicora, only 50 km from the border shared with Arctos.³⁵ In addition, Arctos is north of Ranvicora.³⁶ Considering the shifting behaviors of the bears in their indigenous habitat, it is reasonable to infer that their migration northward would continue upon their translocation. Translocations outside the indigenous range have greater likelihood of negative socio-economic impact.³⁷ Any translocation

²⁹ *Certain Activities Carried Out by Nicaragua in the Border Area (Cost. v. Nic.) and Construction of a Road in Costa Rica along the San Juan River (Nic. v. Cost.)*, Judgment, 2015 I.C.J. Rep. 665, ¶153 (Dec. 16)

³⁰ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14, ¶ 204 (Apr. 20)

³¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Cost. v. Nic.) and Construction of a Road in Costa Rica along the San Juan River (Nic. v. Cost.)*, Judgment, 2015 I.C.J. Rep. 665, ¶104 (Dec. 16)

³² *Certain Activities Carried Out by Nicaragua in the Border Area (Cost. v. Nic.) and Construction of a Road in Costa Rica along the San Juan River (Nic. v. Cost.)*, 2015 I.C.J. Rep. 665, ¶ 16 (Dec. 16) (Separate Opinion of Judge Donoghue)

³³ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14, ¶ 204 (Apr. 20)

³⁴ R. ¶13

³⁵ R. ¶14

³⁶ R. ¶1

³⁷ *Guidelines for Reintroductions and Other Conservation Translocations*, s6 IUCN/SSC (2013). [hereinafter IUCN Guidelines for Reintroductions]

outside indigenous range carries further risks, due to an inability to predict ecological outcomes and the record of species moved outside their indigenous ranges that have become invasive aliens, often with extreme adverse impacts on native biodiversity, ecological services or human economic interests.³⁸ There was uncertainty as to whether the Northern region of Arctos was part of the grey bear's historic range.³⁹ Considering this uncertainty, Ranvicora ought to have taken account of the likelihood of the bears becoming invasive aliens and included Arctos. In addition, the grey bears are a dangerous carnivorous species and as such it foreseeable that they could cause environmental damage in Arctos if they migrate into the territory. The movement of the grey bears into an area where it is not indigenous poses risk of significant transboundary harm and as such Ranvicora had a duty to conduct a transboundary EIA.

Despite Ranvicora's knowledge of the risk of transboundary harm, the EIA did not contemplate the effects that the grey bear reintroduction project could have on the people, property and environment of Arctos.⁴⁰ The EIA was inadequate to the extent that it did not contemplate the project's effects on Arctos. Thus, Ranvicora failed to exercise due diligence in this regard.

b) Failed to notify and consult other contracting parties

States shall provide prior timely notification and relevant information to potentially affected States on activities that pose a risk of significant transboundary environmental effects and shall consult with those States.⁴¹ If the EIA confirms that there is a risk of significant transboundary harm,

³⁸ IUCN Guidelines for Reintroductions, *supra* note 35, S6(2)

³⁹ R.¶13

⁴⁰ R.¶12

⁴¹The United Nations Conference on Environment and Development, The Rio Declaration on the Human Environment, principle 19, 3-14 June 1992

the planning State is required to notify and consult in good faith with the potentially affected State⁴² As previously stated, Ranvicora did not include Arctos in the EIA and failed to consult with Arctos about the grey bear reintroduction project before its implementation. Thus, Ranvicora has failed to exercise due diligence in this regard.

c) Failed to consult the public likely to be affected in another state

States shall provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.⁴³ Before a decision is made on an activity the public should be allowed appropriate opportunity to comment on the EIA.⁴⁴ Ranvicora did not consult the citizens of Arctos before the implementation of the project. Thus, Ranvicora has not fulfilled this principle as required by their duty to exercise due diligence.

2. Ranvicora breached its obligation under Article 11 of the Bern Convention

The reintroduction of native species is encouraged on the condition that a study is first made in the light of the other contracting parties to establish that such an act would be effective and

⁴² Certain Activities Carried Out by Nicaragua in the Border Area (Cost. v. Nic.) and Construction of a Road in Costa Rica along the San Juan River (Nic. v. Cost.), Judgment, 2015 I.C.J. Rep. 665, ¶104 (Dec. 16)

⁴³ The International Law Commission, Draft articles on the Prevention of Transboundary Harm from Hazardous Activities, with commentaries, at art 13 & at commentary 1 art 13 , (A/56/10), 2001 [hereinafter Draft articles on the Prevention of Transboundary Harm]

⁴⁴ United Nations Environmental Programme Goals and Principles of Environmental Impact Assessment, Principle 7, January 16, 1987

acceptable⁴⁵. States are required to follow the IUCN Guidelines for Reintroductions.⁴⁶ “A risk assessment should carefully consider all information on the species’ biology, history of invasiveness in other geographical contexts, probability of potential impacts - including economic impacts, and available options for reversing those impacts.⁴⁷ The risk assessment should take into account all sources of uncertainty and apply them at an appropriate spatial scale.⁴⁸ Here Ranvicora did not assess the effects of the reintroduction project on Arctos and thus have failed to comply with its obligation.

States have an obligation to ensure that negotiations are meaningful.⁴⁹ The co-operation mechanism would be ineffective if the party initiating the planned activity were to authorize or implement it without waiting for conclusion of the negotiation.⁵⁰ If that were the case, the negotiations between the parties would have no purpose.⁵¹

Ranvicora did not consult the other countries about the reintroduction project and implemented the project based on results from an inadequate EIA.⁵² Additionally, Ranvicora based their reintroduction project on the fact that Grey bears had historically migrated only within Ranvicora. However, the Grey bears were released towards the northern region of Ranvicora due the

⁴⁵ Convention on the Conservation of European Wildlife and Natural Habitats, 1979, 1284 U.N.T.S. 209 art 11 [herein after Bern Convention]

⁴⁶ Recommendation No. 158 of the Standing Committee, on Conservation translocations under changing climatic conditions, ¶7, 30 November 2012

⁴⁷ IUCN Guidelines for Reintroductions, *supra* note 35, at Annex 6.1.2

⁴⁸ *Id.*

⁴⁹ North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969, p. 47, para. 85

⁵⁰ Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶147 (Apr. 20)

⁵¹ *Id.*

⁵² R ¶12

climate change⁵³. Arctos is north of Ranvicora, therefore translocation of grey bears that are prone to migrating due to climate change, it is reasonable to expect the Bears to migrate into Arctos. Moreover, biologists had doubts that the northern region of Ranvicora was even within the Grey Bear's historic region.⁵⁴ Hence, there is no justification for Ranvicora's failure to consult Arctos before they began the reintroduction project.

3. Ranvicora failed to prevent invasive alien species from threatening the biological diversity of other species, under Article 8(h) of the CBD

States are required to prevent or control invasive alien species which threaten ecosystems, habitats and other species.⁵⁵ "Invasive alien species" refers to alien species whose introduction and/or spread threaten biological diversity; (iii) "introduction" refers to the movement by human agency, indirect or direct, of an alien species outside of its natural range. ⁵⁶ This includes movement within a country or between countries/areas beyond national jurisdiction.

Parties are to evaluate the risk of migratory species becoming invasive if translocated outside their natural range. ⁵⁷ Ranvicora has not complied with these duties by not considering the possibility of the bears moving into Arctos.

Additionally, parties are urged to be proactive in preventing the introduction and spread of invasive alien species within their territories, for example by offering to help neighboring States to

⁵³ R ¶13

⁵⁴ *Id.*

⁵⁵ Convention on Biological Diversity, at Art 8(h), 6 June 1992, 1760 U.N.T.S. 79 [hereinafter CBD]

⁵⁶ 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/DEC/V1/23, ¶57(ii), (Apr. 19, 2002).

⁵⁷ Convention on Migratory Species, UNEP/CMS/Resolution 11.28. [hereinafter CMS]

deal with particular alien species that may cross borders.⁵⁸ Ranvicora was aware of the initial migration of the grey into Arctos as half of the released bears were fitted with GPS collars.⁵⁹ Ranvicora did not try to prevent the movement of the bears into Arctos and since their migration Ranvicora has refused to assist Arctos in removing the bears.⁶⁰ Therefore, Ranvicora has failed to comply with their obligation.

B. Ranvicora failed to act in accordance with its obligations under Conventional and Customary international law, to not commit transboundary harm

There are four conditions which must exist for environmental damage to fall within the definition of transboundary environmental harm.⁶¹ The harm must: be a result of human activity; result be a physical consequence of human activity; have some transboundary effect and be "significant" or "substantial".⁶²

States have the sovereign right to exploit their own resources, however they have a responsibility to manage their activities within their jurisdiction so as to prevent damage to the environment of other states or areas beyond the limits of its natural jurisdiction.⁶³ Ranvicora failed to comply with this conventional obligation.

⁵⁸ Decision VIII/27, Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Eighth Meeting, U.N. DOC. UNEP/CBD/COP/DEC/VIII/27.(Jun. 15, 2006)

⁵⁹ R. ¶ 14.

⁶⁰ R. ¶ 18.

⁶¹ O. Schachter, *International Law in Theory and Practice* 366-368 (1991)

⁶² *Id.*

⁶³ The Declaration of the United Nation Conference on the Human Environment at Stockholm, Principle 21, A/CONF.48/14/Rev.1 (June 15-16, 1972) [hereinafter UN Declaration at Stockholm]

A state is obliged to use all the means at its disposal to avoid activities which take place in its territory, causing significant damage to the environment of another State⁶⁴. This obligation is part of the corpus of international law relating to the environment, thus confirming the customary nature of the obligation not to commit transboundary harm⁶⁵. Every state is required not to knowingly allow its territory to be used to commit acts against the rights of any other state⁶⁶. Parties asserting the existence of environmental harm must 'establish the existence of such facts' and the 'applicant should submit the relevant evidence to substantiate its claims'.

The grey bears attacked and killed livestock, endangered species and damaged apple orchards and beehives in Arctos⁶⁷. The bears also threatened the lives of the citizens of Arctos and in fact mauled two children on a farm in Arctos.⁶⁸ It is evident, that the Grey bears were outside Ranvicora's territory and caused harm to people and environment of Arctos.⁶⁹ Thus, Ranvicora is in violation of the CBD article 3 and customary international law.

C. The Republic of Ranvicora breached its obligation under article 5 of the Convention on Biological Diversity (CBD)

States are required to cooperate with other contracting states in respect of areas beyond its national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.⁷⁰ Every treaty in force is binding upon the parties to it and must be

⁶⁴ Certain Activities Carried Out by Nicaragua in the Border Area (Cost. v. Nic.) and Construction of a Road in Costa Rica along the San Juan River (Nic. v. Cost.), 2015 I.C.J. Rep. 665, ¶ 16 (Dec. 16) (Separate Opinion of Judge Donoghue)

⁶⁵ Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶ 204 (Apr. 20)

⁶⁶ Corfu Channel, U.K. v. Albania, Judgment, 1948 I.C.J. 15, page 22, (Mar. 25)

⁶⁷ R. ¶ 17.

⁶⁸ R. ¶ 21.

⁶⁹ R. ¶ 17, 21.

⁷⁰ CBD, *supra* note 69, Art. 5.

performed by them in good faith.⁷¹ Environmental Impact Assessments of such activities should be done to address the risk of unintentional translocation of invasive alien species.⁷² In addition, once an invasive alien species has been detected states should take appropriate steps such as eradication, containment and control, to mitigate adverse effects.⁷³

On 19 September 2017, a grey bear was seen in Arctos with occasional reports of grey bear sightings in the months which followed.⁷⁴ Ranvicora was aware that the bears had begun migrating into Arctos, since some of the bears were fitted with GPS collars.⁷⁵ Given that Ranvicora was aware of the movement of the grey bears into Arctos, they ought to have taken steps to remove and prevent future migration of the bears. The grey bears have threatened the biological diversity of Arctos by attacking wildlife, damaging orchards, and killing endangered Terns. Despite Ranvicora's knowledge of these facts, they failed to cooperate with Arctos for conservation of its biological diversity and refused to take responsibility for its actions. Further, Ranvicora declined to compensate the citizens of Arctos for the damage caused by the grey bears. Thus, Ranvicora has failed to fulfil its obligation under article 5.

D. Ranvicora failed to comply with principle 11 of the UN Declaration on the Human Environment at Stockholm

States should not hamper the attainment of better living conditions for all and appropriate steps should be taken by States to reach an agreement on meeting the national and international economic

⁷¹ Vienna Convention on the Law of Treaties, art. 26 (Jan. 27, 1980) 1155 U.N.T.S. 331.

⁷² 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/DEC/V1/23, Guiding principle11(2) (Apr. 19, 2002).

⁷³ 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/DEC/V1/23, Guiding principle12(2) (Apr. 19, 2002).

⁷⁴ R. ¶ 16.

⁷⁵ R. ¶ 14, 16.

consequences resulting from the application of environmental measures.⁷⁶ Ranvicora has hampered the attainment of better living conditions for some of the people of Arctos by allowing the grey bears to ravage their farms. These farms contribute directly to the living conditions; whether through the provision of food or monetary contribution from the sale of the items of its owners and the failure of Ranvicora to take action to stop the bears from wandering into Arctos and causing mayhem contravenes principle 11 of the Declaration of the United Nations Conference on the Human Environment at Stockholm.

Secondly, the principle outlined notes that states have a duty to take appropriate steps to meet the national and international economic consequences resulting from the application of environmental measures. The destruction caused by the grey bears is a direct consequence of the grey bear reintroduction project implemented by Ranvicora. Nevertheless, Ranvicora has dismissed Arctos' request for compensation for the citizens of Arctos whose property has been destroyed by the grey bears and in fact has declared that compensation should be paid by Arctos. Thus, Ranvicora has failed to take appropriate steps to meet the international economic consequences resulting from the application of its environmental measures.

⁷⁶ UN Declaration at Stockholm, *supra* note 62, Principle 11

2. THE FEDERAL STATES OF ARCTOS DID NOT VIOLATE INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSES TO RANVICORA'S REINTRODUCTION OF GREY BEARS

A. Arctos has not violated Conventional Law

I. Arctos complied with the Convention on Biological Diversity

a) Arctos' responses complied with obligations under Article 1 of the CBD

Article 1 of the Convention on Biological Diversity (CBD) outlines the objectives of the Convention as “ the conservation of biological diversity, the sustainable use of its components.”⁷⁷ As the CBD is a framework convention, it is left to states to determine how to implement their provisions as they are expressed more as overall goals “rather than as hard and precise obligations.”⁷⁸ Arctos acted in conformity with its obligations in taking actions to protect its environment and wildlife from the grey bears. The conservation of all species in the ecosystem must be considered, as opposed to just concern for individual wildlife species. The grey bears had been damaging a variety of species of wildlife and flora, including the endangered Trouwborst Tern, upsetting the overall ecosystem and endangering biological diversity in Arctos.⁷⁹ The Trouwborst Tern, already endangered, is especially vulnerable to bears as they breed ‘on the ground in dense colonies’.⁸⁰ The negative impacts of alien species invasions on insular populations, where predators were absent before, can cause extensive population reductions and even local extinctions.⁸¹ Arctos' responses were in response to the harm and for the conservation of biological diversity.

⁷⁷ CBD, *supra* note 69, Art. 1.

⁷⁸ Lyle Glowka, A Guide to the Convention on Biological Diversity, International Union for Conservation of Nature [IUCN], (1994).

⁷⁹ R. ¶ 17.

⁸⁰ *Id.*

⁸¹ E. Schüttler, *Vulnerability of ground-nesting waterbirds to predation by invasive American mink in the Cape Horn Biosphere Reserve*, Chile Biol. Conserv. (2009)

b) Arctos' responses complied with obligations under Article 8 of the CBD

Article 8 concerns 'in-situ' conservation of biological diversity but does not apply to Arctos if the grey bear is an invasive, alien species and is not in its natural habitat. "Alien invasive species" refers to those alien species which threaten ecosystems, habitats or species.⁸² The grey bear, being outside of its normal range and threatening to the wildlife and ecosystem, is an invasive alien species in Arctos.

States are required to promote the protection of the ecosystems, natural habitats and the maintenance of viable populations of species in the natural surroundings.⁸³ By killing bears who were a direct threat to the animals in their natural habitats, Arctos has contributed to the protection of the ecosystem. As an invasive alien species, the bear is not in its natural habitat or range and does not fall under the protection of the Convention here. It is however a threat to the existing ecosystem and populations of species. Predation can lower the breeding numbers of the bird, negatively affecting the species ability to grow in the long term.⁸⁴ Arctos' responses complied with Article 8(d) in preserving the ecosystem and species.

Article 8(f) requires states to "Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species,". In continuously damaging orchards and beehives as well as killing wildlife over many months, the bears negatively impacted the ecosystem & population of affected wildlife.⁸⁵ Killing the bears gives the degraded ecosystems a chance restore itself. As ground nesting birds generally suffer higher nest predation rates than other birds, the increased killing by

⁸² Convention on Biological Diversity, UNEP/CBD/COP/DEC/V/8 .15 June 2006

⁸³ CBD, *supra* note 69, Art. 8(d).

⁸⁴ Elke Schüttler, *Vulnerability of ground-nesting waterbirds to predation by invasive American mink in the Cape Horn Biosphere Reserve*, Chile Biol. Conserv. (2009)

⁸⁵ R. ¶ 17,20.

the bears has an especially detrimental effect on the Tern population. The presence of an aggressive, alien species like the grey bear also puts severe restraints on the ability of the Tern to effect meaningful restoration. Removing predators can have a large effect on the post breeding population size of ground-nesting species.⁸⁶

States are required to prevent the introduction of, `control or eradicate those alien species which threaten ecosystems, habitats or species”.⁸⁷ The grey bears are an invasive alien and once establishment of the species has been detected States should take appropriate measures such as eradication, in mitigating adverse effects.⁸⁸ Arctos’ responses are appropriate eradication measures as they were safe to humans, and the environment and agriculture. Where “eradication is not feasible or resources are not available for its eradication, containment and long-term control measures should be implemented”.⁸⁹ Control measures should focus on reducing the damage caused & reducing the number of the invasive alien species”⁹⁰. The poisoning and shooting of the bears qualify as control measures, used to reduce the damage that the bears were causing around private farms and in the wild.

⁸⁶ Isabelle Cote and William J Sutherland, *The Effectiveness of Removing Predators to Protect Bird Populations*, Conservation Biology 11(2):398(1997)

⁸⁷ CBD, *supra* note 69, Art. 8(h).

⁸⁸ 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/DEC/V1/23 (Apr. 19, 2002)./ Convention on Biological Diversity, UNEP/CBD/COP/DEC/V/8 .15 June 2006

⁸⁹ *Id.*

⁹⁰ *Id.*

II. Arctos did not contravene the Convention on the Conservation of Migratory Species of Wild Animals

a) Arctos' responses did not contravene obligations under Article III of the CMS

Article III concerns endangered migratory species listed under Appendix 1 of the CMS. Article III(4) requires parties that are Range States of a migratory species listed in Appendix I shall endeavor to prevent activities endangering species or preventing their migration.⁹¹ These provisions impose an obligation on parties that are range states of the relevant migratory species and as Arctos is not a range state of the grey bear these provisions do not apply to it. A range refers to “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”.⁹² A range state is one “that exercises jurisdiction over any part of the range of that migratory species.”⁹³ A species geographic range may further be defined using two parameters; extent of occurrence and areas of occupancy.⁹⁴ Under no definition of the phrase can Arctos be seen to be a range state of the grey bear as they had never lived in or crossed into Arctos' borders during its migration routes.⁹⁵ There are also no historic or fossil records of the bear at any time in the state, indicating absolutely no presence within Arctos.⁹⁶ Large carnivores generally wander across large home ranges, with many of the remaining population straddling into other countries.⁹⁷ Including vagrant individuals in population calculations has changed the perceived range

⁹¹ CMS, *supra* note 56 Art. 3

⁹² CMS, *supra* note 56 Art. 1 (f)

⁹³ CMS, *supra* note 45 Art 1 (h)

⁹⁴ Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law*, (1998)
Kevin J. Gaston, *How Large Is a Species' Geographic Range?*, 235 (1991)

⁹⁵ R. ¶12.

⁹⁶ R. ¶10.

⁹⁷ Arie Trouwborst, *Global large carnivore conservation and international law*, (2015)

extent of the grey bears making it seem larger than it is in reality.⁹⁸ There is evidence that the bear is completely foreign to the country and therefore Arctos cannot be a part of the historic range of this species.

Even if Arctos is determined to be a range state, Article III (5)(d) provides that exceptions to the ‘taking’ of the bears if “extraordinary circumstances so require; provided that such exceptions are precise as to content and limited in space and time.” Arctos have a ‘considerable degree of discretion in determining what are necessary circumstances in the case’.⁹⁹ The loss of life of its citizens and continued destruction of the environment are serious circumstances concerning the interests of the State. Even on a restrictive interpretation of the provision, Arctos lacked other ‘reasonable alternatives’ and taking the bears was the only available option.¹⁰⁰ Ranvicora’s refusal to aid in the capture and removal of the bears considerably limited other viable options.¹⁰¹

III. Arctos did not contravene the Bern Convention

a) Arctos’ responses complied with obligations under Article 1 of the Bern Convention

Article 1(1) of the Bern Convention outlines its aims to conserving wild flora and fauna and their natural habitats with particular emphasis is given to endangered and vulnerable species, including endangered and vulnerable migratory species.¹⁰² As grey bears are an invasive alien species, they do not fall under the protection of ‘endangered and vulnerable migratory species’ here. Arctos’ actions complied with as grey bears are a major threat to the conservation of wildlife and the ecosystem.

⁹⁸ Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law*, (1998)

Kevin J. Gaston, *How Large Is a Species’ Geographic Range?*, 236 (1991)

⁹⁹ <http://cornellilj.org/wp-content/uploads/2014/03/A.-Trouwborst-Shark-Cull-Response-Final.pdf>

¹⁰⁰ <http://cornellilj.org/wp-content/uploads/2014/03/A.-Trouwborst-Shark-Cull-Response-Final.pdf>

¹⁰¹ R. ¶ 19.

¹⁰² Bern Convention, *supra* note 45, Art 1(1).

b) Arctos' responses complied with obligations under Article 2 of the Bern Convention

States are required to maintain or adapt the population of wild flora and fauna a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally.¹⁰³ In killing the livestock of farmers, bears had been jeopardizing their livelihood and ability to earn. The bears had also been causing extensive ecological damage to the environment and wildlife. Inaction could end up 'threatening the entire region's biodiversity, public health and economic interests'.¹⁰⁴ Arctos attempted to 'adapt' the population of bears to a level where they could not severely affect the wildlife and citizens of the state. Most female grey bears had produced offspring while only a few bears died in the initial years of the project and two of the bears involved in later incidents had cubs present with them, evidencing a growing bear population.¹⁰⁵ If bears continue to grow they will move past an appropriate level for ecological and economic requirements. The deliberate killing of a species is not automatically contrary to the objects of this Convention.¹⁰⁶ 'Protection' and 'maintenance' are seen as 'context- dependent tools' for overall conservation as opposed to the objective being the protection of each individual in a species from killing.¹⁰⁷ Arctos' responses adapted the population to an appropriate level.

¹⁰³ Bern Convention, *supra* note 45, Art 2.

¹⁰⁴ Piero Genovesi and Clare Shine, *European strategy on invasive alien species*, Council of Europe Publishing, (2004)

¹⁰⁵ R. ¶15.

¹⁰⁶ John Linnell and Arie Trouwborst, *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: 138 (2017)

¹⁰⁷ *Id.*

**c) Arctos' responses did not violate prohibitions under Article 6 or
Article 8 of the Bern Convention**

Parties are required to take administrative measures for the protection of wild fauna listed in Appendix II, prohibiting them from all forms of deliberate killing and the deliberate disturbance of wild fauna, particularly during the period of breeding, rearing and hibernation.¹⁰⁸ They are also prohibited from using any “indiscriminate means” in killing or capturing the relevant species, referring to large-scale and non-selective ways and means of capture and killing.¹⁰⁹ Exceptions can be made where: “for the protection of flora and fauna”; “to prevent serious damage to crops, livestock, forests... other forms of property” or “in the interests of public health and safety... other overriding public interests”.¹¹⁰ These exceptions are lawful provided there is no satisfactory alternative and no detrimental effect on the survival of the population.¹¹¹ Arctos' actions are justified under each of these grounds.

The taking of the grey bears directly contributed to the protection of flora and fauna, which they had been destroying for over a year.¹¹² The case for this exception is strongest where the actions reduce the ‘negative impacts on endangered and vulnerable species’.¹¹³ This ground is then relevant in regards to the endangered terns who are already especially vulnerable to the bears. There is also no minimum damage threshold to be proved, therefore Arctos are not required to prove any exceptional level of harm.¹¹⁴

¹⁰⁸ Bern Convention, *supra* note 45, Art 6.

¹⁰⁹ Bern Convention, *supra* note 45, Art 8. / Council of Europe, Explanatory Report to the Convention on the Conservation of European Wildlife and Natural Habitats, (1979)

¹¹⁰ Bern Convention, *supra* note 45, Art 9.

¹¹¹ *Id.*

¹¹² R. ¶17,21.

¹¹³ Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats, Interpretation of Article 9 of the Bern Convention 7 (2010)

¹¹⁴ *Id.*

Grey bears have also caused serious harm to the livelihood of the farmers by killing their livestock and property. To determine “serious” harm the intensity and duration of the actions should be evaluated.¹¹⁵ In killing several horses and sheep across different farms for over a year, the bears causes harm well beyond a ‘mere nuisance and normal business risk’. The damage caused by poisoned carcasses was proportional to the damage done to livestock in that it was contained to areas where previous attacks had already occurred, it was not widespread.

The attack leading to the death of one child and injury of another shows the immediate threat to life and public health that the bears represent, and the emergency regulation was put in place to prevent further harm. The bears are drawn to farms where farmers and citizens reside, increasing the risk to the public. When balanced against the conservation interests of the Convention, the overriding character of the threat to citizens’ lives satisfies this public interest test.

There were no other satisfactory solutions to the problems caused by the grey bears. The existence of satisfactory alternatives depends on the motive for derogation from the obligations.¹¹⁶ Considering the public health and safety motive, other measures would not have been as effective as the emergency regulation in protecting citizens from further attacks. The poisoned carcasses were only set near farms where the bears had already been killed, showing the intention of the state to prevent further harm to the affected farmers and livestock. There is also no evidence in the facts that the poisoned carcasses had any negative effect on the any other wildlife species.

To determine any detrimental effect of derogations on the survival of a species, both the biogeographic and population levels of the whole species must be considered.¹¹⁷ For transboundary populations the overall natural range should be considered, this includes bears in Ranvicora. There

¹¹⁵ Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats, Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, (2011)

¹¹⁶ *Id.*

¹¹⁷ Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats, Interpretation of Article 9 of the Bern Convention 7 (2010)

is no evidence on the facts that Arctos' responses had any effect on the overall population of bears. The responses also meet the fundamental requirement that measures are applied to deal with specific situations, namely to protect its citizens and environment.¹¹⁸

d) Arctos' responses complied with obligations under Article 10 of the Bern Convention

Parties are required to co-ordinate their efforts for the protection of the migratory species specified in Appendices II and III whose range extends into their territories. Notwithstanding that it is not a range state for the grey bear.¹¹⁹ Arctos did undertake to co-ordinate measures for the conservation of the bears when they first requested that Ranvicora capture and remove the grey bears from the wild.¹²⁰ Arctos initiated the exchange of diplomatic notes and attempted to implement measures which would protect both its citizens and the grey bears which were roaming into its territory.¹²¹

B. Arctos did not violate Customary International Law

I. Arctos complied with its obligation to prevent transboundary harm

a) Arctos' responses did not violate CIL in killing grey bears

¹¹⁸ *Id.*/ R. ¶20.

¹¹⁹ Bern Convention, *supra* note 45, Art 10.

¹²⁰ R. ¶18.

¹²¹ *Id.*

There is a general duty of states not to cause transboundary environmental law stemming from their “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction”.¹²² This obligation has been affirmed in several judicial decisions and was later recognized as forming part of the substance of customary law.¹²³ There are four conditions/elements which must be met in order for the alleged damage to be classified as transboundary environmental harm: 1) the physical relationship between the activity concerned and the damage caused; (2) human causation; (3) a threshold of severity that calling for legal action; and (4) transboundary movement of the harmful effects. These elements serve to limit the scope of what can be considered transboundary damage.¹²⁴ Arctos’ responses had neither any transboundary effect on the species and Ranvicora nor did they rise past required threshold for harm. The words “transboundary harm” are intended to exclude activities which cause harm only in the territory of the State within which the activity is undertaken without the possibility of any harm to any other State.¹²⁵ There was no physical effect of killing the grey bears that crossed national borders affecting Ranvicora. There was no detrimental effect on either the persons, property or environment of Ranvicora, therefore no ‘harm’ was done.¹²⁶ The deaths of the bears and bear cubs does not meet the level of severity of harm required. Transboundary harm is only actionable when it passes the level of “significant” or “substantial” harm.¹²⁷ As there is no conclusive definition of ‘significant’ for these purposes, harm is determined

¹²² UN Declaration at Stockholm, *supra* note 62, Principle 21

¹²³Trail Smelter (United States, Canada), 3 U.N.R.I.A.A. (1905)/ Corfu Channel, U.K. v. Albania, Judgment, 1948 I.C.J. 15 (Mar. 25) /

¹²⁴ Xue Hanqin, Transboundary Damage in International Law 4 (2003)./ Draft articles on the Prevention of Transboundary Harm, *supra* note 43 Art. 1.

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¹²⁵ Draft articles on the Prevention of Transboundary Harm, *supra* note 43 Art 1.

¹²⁶ *Id.*

¹²⁷O. Schachter, International Law in Theory and Practice 366-368 (1991)

within the context of each case.¹²⁸ This ‘ad hoc’ assessment is done according to factual & objective standards.¹²⁹ This is done by balancing the socio-economic utility of an activity against its detrimental effects on the environment, with the ‘tolerable level of harm becoming higher as the economic and developmental advantages of the activity increase’.¹³⁰ The social and economic utility of the poisoning and shooting are extremely high in the circumstances. A bear has already attacked young children, killing one child, and there is a real risk of them attacking and killing other citizens. They are drawn to farms where they could endanger nearby citizens. Bears killing livestock for sustained periods of months has the effect of reducing the farmers ability to earn from his property. Killing farmers’ livestock negatively affects their livelihood and economic ability. Conversely, the seriousness of harm to the bears and Ranvicora is relatively low. The burden of proof rests on Ranvicora to show that the activities caused affected the state and grey bear population.¹³¹ There is nothing in the record to suggest a decline in the bear population following Arctos’ responses. In fact, three of the bears involved separate incidents were breeding or rearing young, evidencing a growing bear population.¹³² A second approach applies a de minimis threshold to determine “significant”

¹²⁸ Marte Jervan, *The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-harm Rule*, PluriCourts Research Paper No. 14-17, 54 (2014)

/ Draft articles on the Prevention of Transboundary Harm, *supra* note 43, Art. 1.

¹²⁹ Draft articles on the Prevention of Transboundary Harm, *supra* note 43, Art. 1.

¹³⁰ Marte Jervan, *The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-harm Rule*, PluriCourts Research Paper No. 14-17, 54(2014)

¹³¹ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 14, ¶162 (Apr. 20)]/ Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law*, (1998)

¹³² R. ¶ 21.

harm as something “more than detectable”¹³³. The damage caused by the bears across the border has led to real detrimental effects on the ecosystem and society of Arctos, satisfying this requirement.¹³⁴

¹³³ Draft articles on the Prevention of Transboundary Harm, *supra* note 43, Art. 2.

¹³⁴ *Id.*

CONCLUSION AND PRAYER FOR RELIEF

The Applicant, the Federal States of Arctos asks the court to declare the following:

1. Ranvicora violated international law with respect to its grey bear reintroduction project
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