

INTERNATIONAL COURT OF JUSTICE

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 APPLICANT

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QUESTIONS PRESENTED

- I. WHETHER THE REPUBLIC OF RANVICORA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS GREY BEAR REINTRODUCTION PROJECT
- II. WHETHER THE FEDERAL STATES OF ARCTOS' ACTS IN RESPONSE TO THE REINTRODUCTION PROJECT VIOLATED INTERNATIONAL LAW

STATEMENT OF JURISDICTION

The Federal States of Arctos (“Arctos”) and the Republic of Ranvicora (“Ranvicora”) submitted questions relating to reintroduction of bears to this Honorable Court, pursuant to Article 36(1) of the Statute of the International Court of Justice (“the Statute of ICJ”) since both parties have transmitted their Special Agreement to the Registrar of the ICJ.

STATEMENT OF FACTS

Arctos and Ranvicora are both developed countries with a diversified economy located on the continent of Suredia. They are neighboring countries, and Arctos is located to the north of Ranvicora. Both States are Members of the United Nations and Parties to the Statute of ICJ, the Convention on Biological Diversity (“CBD”), the Convention on the Conservation of Migratory Species of Wild Animals (“CMS”), the Convention on the Conservation of European Wildlife and Natural Habitats (“Bern Convention”), and the Vienna Convention on the Law of Treaties (“VCLT”).

The grey bear (*Ursus smokeysius*) is an endangered migratory species protected under the CMS and the Bern Convention. It is also listed on the International Union for Conservation of Nature (“IUCN”) Red List of Threatened Species. The species lived in Ranvicora for centuries but was always isolated from bear populations in other countries on Suredia. Unfortunately, they went extinct in Ranvicora in 1963. Furthermore, the species is the only large carnivore in Suredia and according to scientific evidence has never appeared in Arctos.

Considering the species is of cultural importance to the country, Ranvicora started its reintroduction project in 2008. An environmental impact assessment (“EIA”) with regard to the reintroduction project was conducted. This EIA was national in scope. However, Ranvicora did not inform of or consult with other countries on the project since the grey bears only migrated within the country historically. Due to development and a range shifting hypothesis, Ranvicora decided to release the bears in its northern region close to the border with Arctos. In 2013, twenty bears acquired from Paddington and Aloysius were released. Half of the bears were fitted with GPS collars to track them.

Four years after the release of the bears, they were spotted in Arctos and started to cause

damage to livestock and local flora and fauna, including Arctos' endemic endangered species, the Trouwborst tern. Arctos forwarded a diplomatic note to Ranvicora, claiming that Ranvicora introduced an invasive alien species ("IAS") to Arctos and requesting to terminate the reintroduction project. Arctos also asked for compensation of the damage caused by the bears. All of Arctos' demands, however, were rejected.

Because more bears crossed the border and caused more damage, the problem became more serious. In response, Arctos placed poisoned animal carcasses near farms as a response. Four bears were killed in this way. Nonetheless, the measure did not stop the bears' intrusion and three months after the policy was implemented, two children were severely attacked by a bear. Arctos hence granted a shooting permission as an emergency regulation to control the situation and to protect its citizens. Other four bears were killed.

Ranvicora forwarded a diplomatic note to Arctos with regard to its responding measures to the reintroduction project. It demanded to end the policies threatening the survival of the bears and qualified them as a violation of international law. Arctos denied the accusations.

After failing to resolve the dispute by means of diplomatic negotiations, both Arctos and Ranvicora agreed to submit the matters to the ICJ to seek final settlement.

SUMMARY OF ARGUMENTS

Ranvicora's act as conducting reintroduction project of grey bears violated the CBD, Bern Convention, and customary international law. Ranvicora failed to perform the obligations including not to introduce IAS, cooperation, notification, taking appropriate measures to prevent transboundary harm and minimizing the risk.

Arctos' responses to Ranvicora's reintroduction project did not violate the CBD, CMS, Bern Convention, or customary international law as grey bears were an IAS to Arctos and Arctos was not held to conserve them. Even if Arctos was under such duty, Arctos' responses can be justified under international law.

ARGUMENTS

I. THE REPUBLIC OF RANVICORA’S GREY BEAR REINTRODUCTION PROJECT VIOLATED INTERNATIONAL LAW

Ranvicora launched its reintroduction project without a thorough EIA. While releasing grey bears nearby the border with Arctos, Ranvicora ignored the possibility of bear intrusion into Arctos. It also failed to notify Arctos and to prevent such consequence from happening. After 2017, Ranvicora did acknowledge that the grey bears were crossing the border, but again failed to control the spread of the bears. It meanwhile violated notification and cooperation obligations. Ranvicora’s acts have led to transboundary harm and violated international law.

A. Ranvicora violated the obligations concerning the regulation of IAS

States have the obligation to prevent the introduction of and to control alien species under Article 8(h) of the CBD and Article 11.2(b) of the Bern Convention.¹ States have the obligation to carry out animal reintroductions carefully.² But Ranvicora failed to prevent the spread of the grey bears to Arctos after reintroducing them nearby the border in 2013. After bears were spotted in Arctos in 2017, Ranvicora failed to control the spread of the grey bears, an alien species, to Arctos. Obviously, Ranvicora breached the aforementioned obligations.

1. Ranvicora violated the duty to prevent the introduction of IAS

Article 8(h) of the CBD imposes an obligation to prevent the introduction of alien species.³ Ranvicora failed to assess the potential risk of its reintroduction project to other States and did not

¹ Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S 79, Article 8(h), [hereinafter “CBD”]; Convention on the Conservation of European Wildlife and Natural Habitats, September 19, 1979, E.T.S. 104, Article 11.2(b), [hereinafter “Bern Convention”]

² Recommendation No.158 Adopted by Convention on the Conservation of European Wildlife and Natural Habitats Standing Committee (Nov. 30, 2012), [hereinafter “Bern Convention Rec. No.158”]

³ CBD, art. 8(h)

take any steps to prevent the bears from crossing the border.⁴ Its reintroduction project thus resulted in the introduction of the grey bears in Arctos.

IAS are species that have been introduced outside their past or present natural distribution and threaten biodiversity.⁵ It is proved that no grey bears or any large carnivore has ever lived in Arctos.⁶ The intrusion of the grey bears caused damage to the habitat of the endangered species, Trouwborst terns. The bears also preyed on those terns. The grey bears therefore were a threat to biodiversity.

Ranvicora claimed that according to Recommendation No.142(2009) of the Standing Committee to the Bern Convention, native species naturally extending their range in response to climate change should not be considered alien species.⁷ However, the range extension of the bears was not due to climate change.

To confirm climate-induced effect requires data over decades or even centuries.⁸ It took decades for Paddington and Aloysius to observe the range shift of bears and develop a hypothesis that it was climate-induced. The hypothesis was not convincing to support Ranvicora's claim for two reasons. First, the data was not collected in Ranvicora. Second, five years were overly short to make an inference on the long-scale climate change. Thus, Ranvicora's contention was inconvincible.

2. Ranvicora violated the precautionary principle by failing to prevent the introduction of IAS

⁴ Record, ¶12

⁵ Decision VI/23 Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its 6th Meeting, U.N. Doc. UNEP/CBD/COP/DEC/VI/23 (Apr. 19, 2002), [hereinafter "CBD Decision VI/23"]; *See also* Recommendation No.142 Adopted by Convention on the Conservation of European Wildlife and Natural Habitats Standing Committee (Nov. 26, 2009), [hereinafter "Bern Convention Rec. 142"]

⁶ Record, ¶10

⁷ Record, ¶19; Bern Convention Rec. 142, *supra* notes 5, at sec. 1

⁸ Stocker, T.F. et al., *Climate Change 2013: The Physical Science Basis*, Intergovernmental Panel on Climate Change, 121 (2013), http://www.ipcc.ch/pdf/assessmentreport/ar5/wg1/WG1AR5_Chapter01_FINAL.pdf

The precautionary principle is applied to issues related to IAS in the CBD and the Bern Convention. Although the principle is not explicitly written in these conventions, supplementary documents indicate its application, for example, CBD Decisions VI/23 and X/33⁹ made by the Conference of Parties (hereinafter “COP”) to the CBD and Recommendation No.158 of the Standing Committee to the Bern Convention.¹⁰ The COP and the Standing Committee are the governing bodies of the respective conventions and advance their implementations. Documents from such governing bodies are relevant to the interpretation of the conventions. They therefore have often been used by the ICJ in international environmental law cases.¹¹ In general, treaty provisions must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purposes.¹²

The precautionary principle on IAS requires that States identify activities within their jurisdiction that may pose a risk to other States as a potential source of IAS.¹³ In the present case, Ranvicora’s reintroduction project posed such potential risk of invasion since the bears were released only 50 kilometers from the border with Arctos. Resolution 11.28 of the CMS clarifies that translocated migratory species may become IAS.¹⁴ It was foreseeable that an invasion of bears to Arctos would take place due to the species’ migratory nature: the bears are even listed as a migratory species in Appendix I of CMS.¹⁵ To maintain their minimum viable population, the

⁹ See, CBD Decision VI/23, *supra* note 5; see also, Decision X/33 Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its 10th Meeting, U.N. Doc. UNEP/CBD/COP/DEC/X/33 (Oct. 29, 2010). The decisions pointed out given the unpredictability of the pathways and impacts on biological diversity of invasive alien species, efforts to identify and prevent unintentional introductions as well as decisions concerning intentional introductions should be based on the precautionary approach.

¹⁰ See Bern Convention Rec. No. 158, at preamble. The recommendation states that while translocating species, the precautionary principle should be followed to avoid unintended ecological consequences, including the spread of IAS.

¹¹ Whaling in the Antarctic (Austl. v. Japan) Judgment, 2014 I.C.J. 226 ¶46 (Mar. 2014)

¹² Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Article 31(1), [hereinafter “VCLT”]

¹³ CBD Decision VI/23, at ¶4

¹⁴ CMS Resolution 11.28, Future CMS Activities related to Invasive Alien Species, UNEP/CMS/Resolution 11.28 (Dec. 2, 2014), ¶4

¹⁵ Record, ¶9

bears required large home range. Therefore, the location of reintroduction should be considered carefully.¹⁶ Lack of scientific certainty regarding above possibilities of an invasion should not be a reason for failing to take appropriate measures.¹⁷ Ranvicora ignored the risk and only conducted an EIA with national scope, which is not a reasonable measure in response to the risk. Thus, Ranvicora failed to adhere to the precautionary principle.

3. Ranvicora failed to control the alien species

Article 8(h) of the CBD and Article 11.2(b) of the Bern Convention mandate Parties to strictly control the introduction of alien species.¹⁸ However, Ranvicora neglected Arctos' concerns and did not control the introduction of alien species.¹⁹

After Arctos informed Ranvicora of the intrusion of the bears, Ranvicora replied with a diplomatic note, denying that the grey bears were an IAS and refusing to take any action.²⁰ There nevertheless were many measures that Ranvicora was required to take, such as mechanical, chemical, or biological control.²¹ Accordingly, Ranvicora violated its obligations under Article 8(h) of the CBD and Article 11.2(b) of the Bern Convention.

B. Ranvicora caused transboundary harm to Arctos

Article 3 of the CBD provides that States have the responsibility to ensure that activities within their jurisdiction or control do not pose damage to the environment of other States.²² This has also attained a customary status in international law.²³ It is widely included in declarations²⁴ and

¹⁶ Joseph D. Clark, *Aspects and implication of bear reintroduction*, in REINTRODUCTION OF TOP-ORDER PREDATORS 126 (Hayward et al. eds. 2009)

¹⁷ CBD Decision VI/23, at ¶10.2

¹⁸ See, CBD art. 8(h); Bern Convention art. 11.2(b)

¹⁹ Record, ¶18

²⁰ Record, ¶¶19-21

²¹ Robert W. Sutberst, *Climate Change and Invasive Species: A Conceptual Framework*, in INVASIVE ALIEN SPECIES: A NEW SYNTHESIS 211, 223, (Harold A. Mooney et al. eds. 2005)

²² CBD, art.3

²³ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226,19, ¶29 (July 8); *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgement, 2010 I.C.J. Rep. 14, ¶193 (Apr. 20), [hereinafter "Pulp Mills"]

²⁴ See, U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N.

international cases.²⁵

The scope of the responsibility is clarified by the following criteria. First, there must be a transboundary movement of harmful effects. Second, there must be a physical relationship between the activity and the damage. Third, there must be human causation. Lastly, the damage must meet a certain level of severity.²⁶ The following discussion will illustrate that Ranvicora's wrongful reintroduction of the bears fulfilled all the elements of establishing transboundary harm to Arctos. Ranvicora therefore did not act in accordance with its responsibility not to cause transboundary harm.

1. The harm resulted from Ranvicora's reintroduction project

The elements of transboundary movement, physical relationship and human causation require a physical linkage between an anthropogenic activity and the transnational damage.²⁷

Damage in Arctos is caused by Ranvicora's reintroduction project, which was a human activity. It is thus groundless for Ranvicora to claim that the damage should not be attributed to their reintroduction since the grey bears were wild and out of its control.²⁸ Evidently, the intrusion of the grey bears resulted from the reintroduction project carried out by Ranvicora. Had it not for Ranvicora to release the bears in the area bordering Arctos, the bears would have never appeared in Arctos and caused no damage. Therefore, the element of physical relationship is fulfilled.

Doc. A/CONF.151/26/Rev.1, Principle 2 (Aug. 12, 1992), [hereinafter "Rio Declaration"]; U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev. 1, Principle 21 (June 16, 1972)

²⁵ See, Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 905 (1941), at 1945, [hereinafter "Trail Smelter"]; Corfu Channel (U.K. v. Alb.), 1949 I.C.J. Rep. 4, ¶22

²⁶ XUE, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 4-9 (2003)

²⁷ *Id.* at 6

²⁸ Record, ¶16

2. The harm met the threshold of severity

Significance of harm is a key element in establishing transboundary harm. The threshold is reflected in the *Trail Smelter* case as well as the *Lac Lanoux* case, which respectively described the significant harm with the words “serious consequences” and “seriously”.²⁹

Harm includes harm to persons, property, or the environment.³⁰ The bears continued killing livestock, preying on Trouwborst terns, damaging terns’ habitat and farming property. The bears even killed a child in Arctos.³¹ Arctos suffered from the following harms: harm to property, harm to the environment, and harm to human safety.

First of all, with regard to damage to property, 7 horses and 20 sheep were killed within 6 months. Predation on livestock did serious harm to individual ranchers. For many farmers, even a small loss of livestock due to carnivores’ predation can have debilitating financial effects and bring an ordeal to their lives.³² Moreover, the grey bears also destroyed orchards and beehives.

Secondly, with regard to the environment, the bears not only hunted endangered Trouwborst terns, but also damaged their habitat. The grey bears pose a major threat to biodiversity since they are an IAS.³³ Studies indicate that the pressure of IAS is likely to lead to the extinction of native species and loss of biodiversity.³⁴ There used to be no large carnivores in Arctos. Since the bears are predators, their presence will definitely change the ecosystem and their presence consequently

²⁹ *Trail Smelter*, at 1965; *Lac Lanoux Arbitration (Fr. v. Spain)*, 12 R.I.A.A. 281 (1957)

³⁰ *See*, *Trail Smelter*, at 1965; Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries adopted by the International Law Commission at Its 53rd Session, U.N. Doc. A/56/10, 53rd Sess. (2001), Article 2, Commentary 8, [hereinafter “Draft Articles on Transboundary Harm”]

³¹ Record, ¶¶17, 20, 21

³² James G. Thompson, *Addressing the human dimensions of wolf reintroduction: An example using estimates of livestock depredation and costs of compensation*, 6 SOC. NAT. RESOUR. 165, 172 (1993) (Compensation Costs for Livestock Predation)

³³ *See*, Species Survival Commission of IUCN, *Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species* (2000), at sec. 1, <https://portals.iucn.org/library/sites/library/files/documents/Rep-2000-051.pdf>

³⁴ Sophie Riley, *Preventing Transboundary Harm from Invasive Alien Species*, 18 RECIEL 198, 199 (2009); e.g., G. Sherley & S. Lowe, *Towards a Regional Invasive Species Strategy for the South Pacific: Issues and Options*, in *INVASIVE SPECIES IN THE PACIFIC: A TECHNICAL REVIEW AND DRAFT REGIONAL STRATEGY* (G. Sherley ed., 2000), at 7-8

should be regarded as significant.³⁵ Thus, there was a significant environmental damage.

Lastly, with regard to human safety, it is clear that bear attacks already caused significant damage to people in Arctos. In 2019, a grey bear mauled two children who were playing outside on a farm in Arctos.³⁶ One of them died and the other one suffered permanent injuries.³⁷ The human safety was obviously harmed.

The harm from different aspects in sum definitely exceeds the threshold of seriousness. Consequently, the reintroduction project has caused significant harm in different aspects.

C. Ranvicora failed to act with due diligence in the process of reintroduction

Due diligence, which is a general principle of international law,³⁸ requires States to take measures to prevent their proposed projects from posing harmful outcomes to other States.³⁹ It applied to all phases of the project, such as planning, assessment of impact, decisions to proceed, implementations, post-implementation monitoring.⁴⁰ Thus, Ranvicora should exercise due diligence in the process of reintroduction to prevent harmful impacts to Arctos, which includes complying with obligations under conventions and customary international law.

1. Ranvicora violated due diligence by conducting an inconclusive EIA

As the exercise of due diligence, conducting EIA before the reintroduction is mandated.⁴¹ The EIA should include the potential effects of the activity on persons, property and the environment of other States.⁴² However, the EIA carried out by Ranvicora was only national in scope and failed to assess the potential impacts of the reintroduction project on other States.⁴³

³⁵ P. David et al., *Impacts of Invasive Species on Food Webs: A Review of Empirical Data*, 56 ADV ECOL RES. 165, 172-173 (2017) (Invasive Predators May Have Large Impacts on Resident Species)

³⁶ Record, ¶21

³⁷ *Id.*

³⁸ Timo Koivurova, *Due Diligence*, ¶1 (2010), <https://perma.cc/BP2E-A9TM>

³⁹ Pulp Mills, ¶1 (separate opinion by Dong,J.)

⁴⁰ *Id.*, ¶3

⁴¹ Pulp Mills, at 105; *See also* Draft Articles on Transboundary Harm, art. 7

⁴² Draft Article on Transboundary Harm, art. 7, cmt. 8

⁴³ Record, ¶12

Even if Ranvicora claimed EIA in national scope is sufficient since the bears historically only migrated within the country, it still failed to take into consideration that bears in Paddington and Aloysius have already shifted poleward.⁴⁴ As in the *Pulp Mills* Case, the ICJ held that project's nature, magnitude, and likely adverse impact on the environment should be taken into consideration.⁴⁵ It is of no ground for Ranvicora to believe that the bears it released would establish a different pattern.

Furthermore, this Court also held that, when executing a project, States should monitor its effects throughout the entire process.⁴⁶ The monitoring should include assessing impacts and adjusting or activating an exit strategy when necessary.⁴⁷ Merely fitting GPS collars on the reintroduced bears was not sufficient to prevent any potential negative impacts. Ranvicora obviously failed to identify the possible threats posed by its project. Conclusively, Ranvicora violated due diligence as its EIA was flawed and inconclusive.

2. Ranvicora failed to perform the obligations of notification and consultation

Article 14.1(c) of the CBD states that Parties shall notify and consult with other States with regard to activities which are likely to have a significant adverse effect on the biodiversity to other States. States are obliged to sufficiently disclose all necessary information about the activity to potentially affected States in advance and provide an opportunity to review and discuss a planned activity.⁴⁸

In the *Pulp Mills* case, this Court held that States should fulfill the notification obligation.⁴⁹ States should provide information to other States even before the EIA result. Therefore States

⁴⁴ *Id.*

⁴⁵ *Pulp Mills*, ¶205

⁴⁶ *Id.*

⁴⁷ IUCN, *Guidelines for reintroductions and other conservation translocations*, at sec. 8.4, (2013), <https://portals.iucn.org/library/node/10386>

⁴⁸ DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 525 (DAVID HUNTER 3rd edition 2007)

⁴⁹ *Pulp Mills*, *supra* note 23, at 105

likely affected could conduct preliminary assessment as soon as possible.⁵⁰ Nonetheless, Ranvicora did not notify and consult with Arctos before carrying out the reintroduction project.⁵¹ In fact, scientists participating in the project found out that the bears have been crossing the borders since 2017.⁵² Ranvicora should have immediately notified Arctos about the movement of the bears and have taken steps to prevent any imminent danger and damage under Article 14.1(d) of the CBD.⁵³

3. Ranvicora did not comply with the duty of cooperation

According to Article 5 of the CBD and CBD Decision VIII/27(2006), States should cooperate to address issues related to IAS.⁵⁴ Ranvicora could have shared the bears' location and worked with Arctos to mitigate the damage, as set out in CBD Decision VIII/27.⁵⁵ However, Ranvicora deliberately and repeatedly failed to address Arctos' concerns regarding the reintroduction project. Its refusal to consider alternatives and mutual interests constitutes a violation of its obligation of international cooperation under Article 5 of the CBD.⁵⁶

II. THE FEDERAL STATES OF ARCTOS' ACTS IN RESPONSE TO THE REINTRODUCTION PROJECT DID NOT VIOLATE INTERNATIONAL LAW

The grey bears released under the reintroduction project moved into Arctos and caused damage which became increasingly serious with the passage of time. Arctos therefore carried out policies of placing poisoned carcasses and granting shooting permission to control and prevent further damages. Arctos' responses complied with international law.

⁵⁰ *Id.*

⁵¹ Record, ¶12

⁵² *Id.* ¶16

⁵³ CBD art. 14(d)

⁵⁴ *See*, CBD art. 5; CBD COP, Decision VIII/27, UNEP/CBD/COP/DEC/VIII/27 (June 15, 2006), [hereinafter "CBD Decision VIII/27"]

⁵⁵ *Id.* at para. 12

⁵⁶ *Id.* at para. 62

A. Arctos was not obliged to conserve the grey bears

Arctos highly values endangered migratory species and has abided by its duties under international law. Considering that the grey bears were an IAS to Arctos, Arctos did not violate the provisions on *in-situ* conservation of Article 8 of the CBD or the range State obligations under Article 2 of the CMS, and further complied with the duty to minimize the impact of IAS as mandated in Article 11.2(b) of the Bern Convention and Article 8(h) of the CBD. Even if the ICJ finds that Arctos violated international law by poisoning and permitting to shoot the bears, Arctos can still be justified by the clauses listed in Article 3.5 of the CMS and Article 9 of the Bern Convention.

1. Arctos did not violate any *in-situ* conservation obligation

Article 8 of the CBD provides the contents and regulations of *in-situ* conservation of biodiversity.⁵⁷ Seeing that IAS have clearly been recognized as a threat of biodiversity,⁵⁸ subclause (h) mandates States to eradicate IAS.⁵⁹ Arctos did not violate Article 8 of the CBD since the grey bears were an IAS to Arctos and posed significant harm to the biodiversity.

Furthermore, though subclauses (d)⁶⁰ and (f)⁶¹ of Article 8 require to protect threatened species and that the bears are endangered, Arctos still did not violate the Article. Regarding the CBD aims at conserving diversity within species, between species, and within ecosystem,⁶² State should not pursue the protection of a species at the sacrifice of losing biodiversity between species and within ecosystem. Since the bears brought severe pressure and harm to Arctos' ecosystem,⁶³ in order to conserve and reduce the threat to the biodiversity, Arctos acted in accordance with the

⁵⁷ CBD, art. 8

⁵⁸ Mick N. Clout & Sarab J. Lowe, *Invasive Species and Environmental Change in New Zealand*, in *INVASIVE ALIEN SPECIES: A NEW SYNTHESIS* 369,369 (Harold A. Mooney et al. eds. 2005)

⁵⁹ CBD, art. 8(h)

⁶⁰ CBD, art. 8(d)

⁶¹ CBD, art. 8(f)

⁶² CBD, art. 1, 2

⁶³ Record, ¶20

aim of the CBD by performing the duty of subclause (h) prior to subclause (d) and (f).

It is for minimizing the negative effect of invasive predators that Arctos poisoned and granted shooting permission as methods to control and eradicate IAS.⁶⁴ The bears were not only an IAS but also a formerly absent top predator⁶⁵ since it has never appeared in Arctos.⁶⁶ Thus, the impacts on the food-web and ecosystem are even more severe owing to the inexperience of their preys, since there was no such predator in evolution forcing local species to develop defense capacity.⁶⁷ The grey bears largely consumed their eggs and damaged their nests, which are located in dense colonies on the ground.⁶⁸ These threatened the tern's reproductive capacity.

Considering that the grey bears are an IAS and formerly absent top predators, Arctos had no choice but protecting the biodiversity in accordance with its obligations of *in-situ* conservation.

2. Arctos did not violate its range State obligations

CMS aims at protecting migratory species on a cross-national basis with Article 2 emphasizing the fundamental principles.⁶⁹ However, the obligations to conserve the species in the appendix I of the CMS are based on a status as a range State.⁷⁰ Arctos nevertheless was not listed as a range State of the grey bears.

There are two ways to qualify as a range State under the CMS. Firstly, a State can self-recognize as a range State to species concerned.⁷¹ Secondly, it can be defined as a range State in the proposal of inclusion of species to the appendix.⁷² The grey bears never appeared in Arctos

⁶⁴ Record, ¶23

⁶⁵ Sam Steyaert et al., *Human Shields Mediate Sexual Conflict in A Top Predator*, 283 PROC. R. SOC. B 285 (2016)

⁶⁶ Record, ¶10

⁶⁷ P. David et al., *Impacts of Invasive Species on Food Webs: A Review of Empirical Data*, 56 ADV. ECOL. RES. 165, 172-173 (2017) (Invasive Predators May Have Large Impacts on Resident Species)

⁶⁸ *Id.*

⁶⁹ Convention on the Conservation of Migratory Species of Wild Animals, Jun. 21, 1980, 1651 U.N.T.S. 333, 19 I.L.M. 15, Article 2, [hereinafter "CMS"]

⁷⁰ CMS, art. 3

⁷¹ CMS, art. 6.2

⁷² CMS Resolution 1.5, Format of Proposals for Amendment of the Appendices, UNEP/CMS/Resolution 1.5 (Oct. 26, 1985), ¶2

before they went extinct in Ranvicora in 1963⁷³ and the CMS was signed in 1979.⁷⁴ Arctos therefore was not listed in the appendix as the range State of the grey bears. Arctos also has consistently denied being a range State to the grey bears.⁷⁵ Therefore, Arctos was by no means a range State to the grey bears under the CMS.

In addition, Arctos did not correspond to the definition of range State under Article 1.1(f) and (h) of the CMS. States that exercise jurisdiction over any part of a species' range, the territory on its normal migration route, are a range State of that species.⁷⁶ Article 1.1(a) of CMS provides that predictably and cyclically crossing borders are elements when defining normal.⁷⁷ Cyclically refers to a cycle of any nature and frequency; predictably implies a phenomenon can be anticipated to recur in certain circumstances, though not necessarily regularly in time.⁷⁸ In addition, according to the CMS COP 12 Document 25.2, the proposing State shall be responsible for proving that there is a significant proportion of the species migrating.⁷⁹ It is Ranvicora's responsibility to prove the significant proportion of the grey bears.

Arctos is not on the normal migration route of the grey bears. The grey bears historically lived only within Ranvicora.⁸⁰ Even if a few bears were seen in Arctos' territory recently, they were just randomly and intermittently appearing,⁸¹ far from presenting a cyclical or predictable behavior to establish a normal migration route. Since Arctos is not covered by the range of the grey bears, it should not be considered a range State.

⁷³ Record, ¶10

⁷⁴ *Supra* note 69

⁷⁵ Record, ¶18

⁷⁶ CMS, art. 1.1(f), (h)

⁷⁷ CMS, art. 1.1(a)

⁷⁸ CMS Resolution 2.2, Guideline for the Application of Certain Terms of the Convention, UNEP/CMS/Resolution 2.2 (Oct. 13, 1988), Article 1(a)

⁷⁹ CMS COP, Document 25.2, Revision of the Template and Guidelines for the Drafting of Proposals for the Amendment of the Appendices, UNEP/CMS/COP12/Doc.25.2 (May 23, 2017), Annex I, Section 3.2

⁸⁰ Record, ¶10

⁸¹ *Id.* ¶16

3. Even if Arctos is considered obliged to conserve the grey bears, Arctos can still be justified

The grey bears are listed in the appendix of the CMS and the Bern Convention.⁸² However, both conventions provide exceptions for taking of endangered species.

Article 3.5(b) and (d) of the CMS allow taking of species to enhance the survival rate of other species or due to extraordinary circumstances.⁸³ These exceptions, however, must be “precise as to content”, “limited in space and time” and “should not operate to the disadvantage of the species”, as the Article mentions.⁸⁴

Article 9 of the Bern Convention also provides exceptions when three elements are fulfilled. First, the exception is made for one of the purposes stated in Article 9; second, there is no other satisfactory solution; third, the exception will not be detrimental to the survival of the population concerned.⁸⁵

Firstly, placing poisoned carcasses could be justified by both articles. Its purpose was to protect and enhance species’ survival as listed on Article 3.5(b) of the CMS and Articles 9.1.1 and 9.1.2 of the Bern Convention. These include protecting Trouwborst terns and bees as well as orchards and livestock from serious damage.⁸⁶ Regarding the limit to time and space, Arctos only placed the poisoned carcasses in places near the farms where bear attacks had taken place,⁸⁷ which set limits to location and time to execute the measures.

As for the requirement that no other satisfactory solution was available,⁸⁸ this measure was the most feasible one. It could effectively stop the bears from moving further into the farms or forest in short time. Furthermore, the measure was carried out within 12 months,⁸⁹ which is in line

⁸² *Id.* ¶9

⁸³ CMS, art.3.5(b), (d)

⁸⁴ CMS, art.3.5

⁸⁵ Bern Convention, art.9

⁸⁶ Record, ¶20

⁸⁷ *Id.*

⁸⁸ *Supra* note 85

⁸⁹ Record, ¶¶16, 20

with the suggestion that it is best to eradicate IAS in an early stage before they build a large and stable population.⁹⁰ Other methods including physical separation, hormone repelling, and human capture were costly, inefficient and could not terminate the harm in time, especially considering the scope of a 75-kilometer border,⁹¹ and would also impede other animals' movement and disturb the habitat.⁹²

The shooting permission was in accordance with the applicable exception clauses. It fell into the categories of Articles 9.1.2 and 9.1.3 of the Bern Convention to safeguard the interests of public safety and to prevent serious damage to livestock. The policy was also implemented to face the extraordinary circumstances of loss of an Arctos citizen's life, loss of livestock, and damage to the environment as listed in Article 3.5(d) of the CMS.⁹³ Since the permission was only an emergency regulation,⁹⁴ it was intended to be into force only for a while as a time limitation.

Furthermore, it was the increasing severity of harm that made the poisoning measure no longer sufficient, leaving Arctos with no choice but to permit shooting as a measure of last resort. Had Arctos foresee when and where the bears would appear, Arctos would not have had to carry out such strong policy. The permission to shoot the bears was the only satisfactory way that could protect the life of citizens and livestock, especially in the situation of the tragedy where two children were attacked.⁹⁵

As for the requirement not to be detrimental to species' survival,⁹⁶ though both actions did cause death to the individual bears,⁹⁷ the main population of the species remained unaffected.

⁹⁰ CBD Decision VI/23, at ¶13

⁹¹ Record, ¶1

⁹² McDonald, W., & St. Clair, C., *The Effects of Artificial and Natural Barriers on the Movement of Small Mammals in Banff National Park*, 105 OIKOS, 397, 398 (2004) (discussing the effects of artificial and natural barriers on mammals)

⁹³ Record, ¶21

⁹⁴ *Id.*

⁹⁵ Record, ¶21

⁹⁶ *Supra* note 84, 85

⁹⁷ Record, ¶¶20, 21

Seeing that the grey bears only intermittently entered Arctos' territory,⁹⁸ the responding actions only had effect on few animals rather than the main population in Ranvicora or even in Paddington and Aloysius, making the actions far from being a disadvantage or detrimental to the species as a whole.

In sum, Arctos complied with all requirements and could be justified by Article 3.5 of the CMS and Article 9 of the Bern Convention.

B. Arctos did not cause transboundary harm

The duty to prevent transboundary harm is viewed as part of customary international law⁹⁹ and is also enshrined in various conventions.¹⁰⁰ As set out above,¹⁰¹ it requires States to ensure that activities within their jurisdiction do not cause damage to the environment under the control of other States.¹⁰² The threshold of significance is an essential element to transboundary harm.¹⁰³ However, the harm was neither caused by Arctos nor significant enough to meet the threshold of significance, as explained below.

1. Arctos did not cause harm to biodiversity of Ranvicora

Ranvicora claimed that the death of the grey bears was a decrease in biodiversity within Ranvicora and thus was harm to their environment.¹⁰⁴ However, there was no harm caused and even if there was any harm, it was not significant. It is out of record that Ranvicora suffered the harm of ecology loss as it had claimed. Moreover, the bears were killed in Arctos, and since the bears are an IAS to Arctos, their unfortunate death protected biodiversity rather than harming it.

Even if there was harm to biodiversity in Ranvicora, this harm should not be viewed as

⁹⁸ Record, ¶16

⁹⁹ *Supra* note 23

¹⁰⁰ *Supra* note 24

¹⁰¹ *See* Section I.B

¹⁰² *Supra* note 22

¹⁰³ *Supra* note 29

¹⁰⁴ Record, ¶22

significant. The word “significant” refers to serious consequence, the harm should have led to a real detrimental effect.¹⁰⁵ However, biodiversity is not that vulnerable that it could be detrimentally harmed by the loss of a few bears. The assessment of biodiversity contains various aspects and data, including species richness and evenness.¹⁰⁶ Richness refers to the numbers of species in an area.¹⁰⁷ Evenness refers to how close in numbers each species in an environment is, which contains the calculation of the entire ecosystem.¹⁰⁸ Since a few bears only account for a small portion of the ecosystem, their death could hardly affect the balance among species and thus alter the richness and evenness. Considering the indecisive change of richness and evenness of biodiversity, the damage was far from significant.

2. Arctos did not cause significant harm to the grey bear species

The goal of reintroduction is to re-establish a population of species.¹⁰⁹ Arctos only have effect on a few bears moving into Arctos’ territory, leaving the main population intact. Furthermore, grey bears have multiple populations among countries. The few bear casualties only accounted for a small and subtle portion of the grey bear species. Considering that the policies would not ultimately reduce population size, it could not be viewed as a serious consequence that has a detrimental effect to the grey bear species.

Since Arctos did not cause harm to biodiversity of Ranvicora nor significant harm to the grey bear species, Arctos did not cause transboundary harm.

C. Arctos did not violate the precautionary principle

Precautionary principle is equally mentioned in the Rio Declaration, CBD, and CMS to protect

¹⁰⁵ Draft Article on Transboundary Harm, art. 2, 4, 6

¹⁰⁶ Gray Stirling & Brian Wilsey, *Empirical Relationships between Species Richness, Evenness, and Proportional Diversity*, 158 AMER. NAT. 286, 286 (2001)

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Supra* note 47, at section 2

the environment.¹¹⁰ Both Ranvicora and Arctos are signatory Parties to those conventions.¹¹¹ State is required to apply the principle when there is scientific uncertainty of having a serious and irreversible harm.¹¹² However, the harm Arctos caused was not serious or irreversible. In addition, the burden of proof should be borne by Ranvicora.

1. Ranvicora should bear the burden of proof

Invoking the precautionary principle does not mean shifting the burden of proof as seen in the *Pulp Mills Case*, where the ICJ held that “the principle does not operate as a reversal of burden of proof.”¹¹³ Therefore, it is for Ranvicora to bear the burden of proof that Arctos caused transboundary harm. Ranvicora cannot merely speculate and state that Arctos’ acts cause a risk of harm to their biodiversity or the species. Instead, it should support such claims with sufficient convincing evidence.

2. Arctos did not cause serious or irreversible harm

Though there was uncertainty about the impact of the responding acts of Arctos, the exact content of the damage and whether it was serious and irreversible can be questioned. The killing of bears only caused damage to the individual animal rather than to the entire species. Except from claim made by Ranvicora,¹¹⁴ there was no evidence showing that the death of few bears caused serious or irreversible harm to Ranvicora’s biodiversity. Furthermore, Arctos’ responding actions had little to do with harming the reproductive capacity of the entire species. Seeing this, the damage to only a few individual bears should not be seen as serious or irreversible.

To conclude, Arctos did not cause serious and irreversible harm and the burden of proof rested

¹¹⁰ CBD, preamble; CMS Resolution 12.21, Climate Change and Migratory Species, UNEP/CMS/Resolution 12.21 (Dec. 15, 2017); Rio Declaration, principle 21

¹¹¹ Record, ¶¶4, 6, 8

¹¹² Rio Declaration, principle 21; TROUWBORST, PRECAUTIONARY RIGHTS AND DUTIES OF STATES 30 (2006)

¹¹³ Pulp Mills, ¶164

¹¹⁴ Record, ¶22

on Ranvicora. Arctos did not violate the precautionary principle.

CONCLUSION

Applicant, the Federal States of Arctos, respectfully requests the ICJ to adjudge and declare that:

1. The Republic of Ranvicora violated international law with respect to its grey bear reintroduction.
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