

TEAM NO. 2087

IN THE INTERNATIONAL COURT OF JUSTICE



AT THE PEACE PALACE

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING  
THE REINTRODUCTION OF BEARS

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THE FEDERAL STATES OF ARCTOS  
*APPLICANT*  
v.  
THE REPUBLIC OF RANVICORA  
*RESPONDENT*

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MEMORIAL FOR THE RESPONDENT

THE 2019 STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION

NOVEMBER 2019

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## **STATEMENT OF JURISDICTION**

Pursuant to Article 40, paragraph 1 of the Statute of the International Court of Justice, the Federal States of Arctos (“Applicant”) and the Republic of Ranvicora (“Respondent”) submit their dispute to this Honorable Court. On July 15, 2019. Applicant and Respondent submitted a copy of the Special Agreement to the Registrar of the Court. *See* Special Agreement Between the Federal States of Arctos and the Republic of Ranvicora for Submission to the International Court of Justice of Differences Between Them Concerning Questions Relating to Reintroduction of Bears, signed at Barcelona, Spain on July 11, 2019. The Registrar addressed notification to the parties on July 22, 2019.

## **QUESTIONS PRESENTED**

**I. WHETHER RANVICORA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS GREY BEAR REINTRODUCTION PROJECT.**

**II. WHETHER ARCTOS VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSES TO RANVICORA'S REINTRODUCTION OF GREY BEARS.**

## STATEMENT OF FACTS

The Federal States of Arctos (“Arctos”) and The Republic of Ranvicora (“Ranvicora”) are two neighboring developed countries sharing a 75-km border.<sup>1</sup> Arctos is located to the north of Ranvicora.<sup>2</sup>

The grey bear is a precious endangered species on the IUCN Red List of Threatened Species, Appendix II of the Bern Convention, and Appendix I of the CMS. It is of great cultural importance in Ranvicora, where its extinction in 1963 was considered a national tragedy.<sup>3</sup>

In 2008, Ranvicora began considering the possibility of reintroducing grey bears and spent the next five years working with a team of scientists and other professionals to plan a reintroduction project that occurred in phases, stretching from 2013 to 2026.<sup>4</sup> Based on results of the environmental impact assessment (EIA),<sup>5</sup> Ranvicora chose the largest remaining habitat suitable<sup>6</sup> for grey bears in the northern part of its territory. Ranvicora legally reintroduced and released 20 grey bears (14 females and 6 males), of which half fitted with GPS collars.<sup>7</sup>

Grey bears have been occasionally spotted in Arctos since September 2017.<sup>8</sup> Since the killing of a farmer’s horse in February 2018,<sup>9</sup> though with no witnesses,<sup>10</sup> Arctos authorities determined that grey bears had attacked horses and sheep on farms, damaged orchards and beehives, and killed endangered Trouwborst terns (not a listed species on any international treaty) in Arctos. Arctos then began setting out poisoned

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<sup>1</sup> R. 1.

<sup>2</sup> *Id.*

<sup>3</sup> R. 11.

<sup>4</sup> R. 11,14.

<sup>5</sup> R. 12.

<sup>6</sup> R. 13.

<sup>7</sup> *Id.*

<sup>8</sup> R. 16.

<sup>9</sup> R. 17.

<sup>10</sup> *Id.*

animal carcasses,<sup>11</sup> which poisoned four grey bears to death in January 2019.<sup>12</sup>

On 22 April 2019, two children were mauled by a female grey bear when trying to play with its cub.<sup>13</sup> One died and the other sustained injuries.<sup>14</sup> Two days later, Arctos issued an emergency regulation permitting citizens to shoot grey bears unconditionally.<sup>15</sup> As a result, a female grey bear and her two cubs were shot when wandering onto a farm and another pregnant female were killed.<sup>16</sup>

Failing to resolve the disputes, the parties agreed to submit the matter to the International Court of Justice.<sup>17</sup>

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<sup>11</sup> R. 19.

<sup>12</sup> *Id.*

<sup>13</sup> R. 20.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

## **SUMMARY OF ARGUMENTS**

I. Ranvicora did not violate any of its treaty obligations under the CBD, the Bern Convention and the CMS. It fulfilled its obligations of conserving biological diversity and endangered animals. It neither breached its duty to prevent transboundary harm evidenced by Article 3 of the CBD, nor the provision of cooperation.

II. Ranvicora did not breach its obligations under customary law for it acted in compliance with the precautionary principle with due diligence.

III. Arctos violated its treaty obligations. It breached the duty to protect biodiversity and implement in-situ conservation under the CBD, and the duty to protect endangered, wild and migratory species and their habitats under the CMS and the Bern Convention.

IV. Arctos breached its obligations under customary international law for causing transboundary harm and lack of due diligence.

## ARGUMENT

### **I. THE REPUBLIC OF RANVICORA DID NOT VIOLATE INTERNATIONAL LAW WITH RESPECT TO ITS GREY BEAR REINTRODUCTION PROJECT.**

#### **A. RANVICORA DID NOT VIOLATE ANY OF ITS TREATY OBLIGATIONS.**

##### **1. Ranvicora fulfilled the obligations of conserving biological diversity and endangered animals by adopting various measures.**

The obligation of conserving biodiversity is contained in the Convention on Biological Diversity (CBD),<sup>18</sup> which fundamentally requires the recovery of viable populations of species.<sup>19</sup> The Conservation of European Wildlife and Natural Habitats (Bern Convention) and the Convention on the Conservation of Migratory Species of Wild Animals (CMS) also pay particular attention to the conservation of endangered animals.<sup>20</sup>

The grey bear in this case, listed as an endangered animal on the IUCN list of threatened species, on Appendix II of the Bern Convention, and on Appendix I of CMS,<sup>21</sup> is considered to be “facing a very high risk of extinction in the wild”.<sup>22</sup> Ranvicora fulfilled its obligations by adopting measures for the recovery and protection of the grey bear in good faith.<sup>23</sup>

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<sup>18</sup> Convention on Biological Diversity, art. 1, 6 June 1992, 1760 U.N.T.S. 79 [CBD].

<sup>19</sup> CBD, *supra* note 18, Preamble, art.8.

<sup>20</sup> Convention on the Conservation of European Wildlife and Natural Habitats, art. 1,3 19 Sept. 1979, ETS No.104 [Bern Convention]; Convention on the Conservation of Migratory Species of Wild Animals, art.2, 23 June 1979, 1651 U.N.T.S. 333 [CMS].

<sup>21</sup> R. 9.

<sup>22</sup> IUCN Species Survival Commission, *IUCN Red List Categories and Criteria: Version 3.1*, at 14 (2001).

<sup>23</sup> CBD, *supra* note 18, art. 9; Bern Convention, *supra* note 20, art.6; CMS, *supra* note

**a. Ranvicora's Reintroduction Project promoted the recovery the population of grey bears and conserved biodiversity**

States are obliged to promote the recovery of threatened species and are encouraged to reintroduce threatened species for biodiversity conservation.<sup>24</sup> Ranvicora has worked with a team of scientists and professionals since 2008 to plan the Reintroduction Project and completed the Project in phases according to the plan.<sup>25</sup> As a result, an increase of the grey bear population did occur, since most females produced offspring within a year of release, and only a few died.<sup>26</sup> In conclusion, the effective Reintroduction Project conducted by Ranvicora is in compliance with the conventions.

**b. Ranvicora conducted environmental impact assessments (EIA) and monitoring activities.**

States are required to perform EIAs for evaluating the likely impact of a proposed activity on the environment under various treaties.<sup>27</sup> The content of EIAs is not specified in the conventions, but rather left to regulation through domestic laws,<sup>28</sup> with

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20, art. 2; Vienna Convention on the Law of Treaties, art 26, 27 Jan. 1980, 1155 U.N.T.S. 331.

<sup>24</sup> CBD, *supra* note 18, art.8,9; Bern Convention, *supra* note 20, art 11; CMS, *supra* note 20, art 5 g).

<sup>25</sup> R. 11,14.

<sup>26</sup> R. 15.

<sup>27</sup> CBD, *supra* note 18, arts.8,10,14; Rio Declaration on Environment and Development, Principle 17, UN Doc. A/CONF.151/126(1992) [Rio Declaration]; Stockholm Declaration on the Human Environment, Principle15, UN Doc. A/CONF. 48/14/Rev.1 (1973) [Stockholm Declaration]. *See also*, NEIL CRAIK, THE INTERNATIONAL LAW OF ENVIRONMENTAL IMPACT ASSESSMENT, at 135 (Cambridge U. Press 2008).

<sup>28</sup> Report of the International Law Commission, UN GAOR, 56th Sess., Supp. No. 10, at 158, UN Doc. A/56/10 (2001) [56th ILC Report].

which Ranvicora has conducted the EIA in compliance.<sup>29</sup> The EIA was appropriate in terms of both geographical coverage and chronological phases. It considered multiple reintroduction phases ending in 2026, and was conducted in a national scope,<sup>30</sup> taking account of the species' biological attributes and life history.<sup>31</sup> Therefore, Ranvicora complied with treaties by conducting an appropriate EIA in advance.<sup>32</sup>

Moreover, Ranvicora corresponded to the requirements of monitoring, through sampling and other techniques, the components of biodiversity<sup>33</sup> by fitting half of the grey bears with GPS collars<sup>34</sup> during the Project.

## **2. Ranvicora did not breach its duty to prevent transboundary harm when exercising its sovereign right.**

States have the sovereign right to exploit their own resources pursuant to their own environmental policies and bear the responsibility to not cause damage to the environment of other State,<sup>35</sup> which is recognized as the duty to prevent transboundary harm.<sup>36</sup>

### **a. Ranvicora did not cause transboundary harm**

Article 3 of the CBD is evidence of the duty to prevent transboundary harm.<sup>37</sup>

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<sup>29</sup> R. 12.

<sup>30</sup> *Id.*

<sup>31</sup> IUCN Species Survival Commission, *Guidelines for Reintroductions and Other Conservation Translocations: Version 1.0*, at 8 (2013) [*Guidelines for Reintroductions*].

<sup>32</sup> Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, art. 3(2001) [*Draft Articles on Prevention*].

<sup>33</sup> CBD, *supra* note 18, art. 7.

<sup>34</sup> R. 14.

<sup>35</sup> CBD, *supra* note 18, art. 3.

<sup>36</sup> XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW, at 3 (2003).

<sup>37</sup> *See* Draft Articles on Prevention, *supra* note 32, at 869, 900, 930.



This customary rule<sup>38</sup> names four elements of transboundary harm, *i.e.*, (1) the physical relationship between the activity concerned and the damage caused; (2) human causation; (3) transboundary movement of the harmful effects, and (4) a certain threshold of severity that calls for legal action.<sup>39</sup> In the present case, the four elements have not been entirely fulfilled.

**i. There is no physical relationship between the Project and the damage caused.**

Establishment of a physical relationship requires at least a reasonably proximate causal relation,<sup>40</sup> namely that the cause directly produces an event and without which the event would not have occurred.<sup>41</sup> In the present case, the Reintroduction Project resulted directly only in the presence of grey bears within Ranvicora, rather than harm occurring in Arctos.<sup>42</sup> Moreover, dependent on the objective<sup>43</sup> fact that no grey bears had been identified in Arctos,<sup>44</sup> their boundary-crossing cannot be reasonably foreseen<sup>45</sup> by Ranvicora, thereby eliminating such relationship.

Besides, the evidentiary threshold for the causation has not been satisfied. The damage caused must be measured by factual and objective standards,<sup>46</sup> which in *Trail*

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<sup>38</sup> *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 242, ¶29(July 08); *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. 14, ¶101(Apr. 20); *Corfu Channel (U.K. and N. Ir. v. Alb.)*, Judgment, 1949 I.C.J. 22 (Apr. 9).

<sup>39</sup> XUE HANQIN, *supra* note 36, at 4.

<sup>40</sup> OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE*, at 366-68 (Dordrecht, Martinus Nijhoff, 1991).

<sup>41</sup> BLACK'S LAW DICTIONARY, at 250 (9th ed. 2009).

<sup>42</sup> R. 14, 16.

<sup>43</sup> Charles E. Carpenter, *Proximate Cause*, 16 S. Cal. L. Rev. 280 (1943).

<sup>44</sup> IEMCC Clarifications, at 2.

<sup>45</sup> Charles E. Carpenter, *supra* note 43.

<sup>46</sup> Draft Articles On Prevention, *supra* note 32, art. 2, Commentary 4.

*Smelter* was specified as “clear and convincing evidence”.<sup>47</sup> And it is the Applicant who bears the burden of proof for claiming such damage.<sup>48</sup> In *Pulp Mills*, the Court rejected Argentina’s claim due to its failure to establish a link between the nonylphenols found in its river and the mill.<sup>49</sup> Here, Arctos merely asserted through its own authority that the grey bears had caused the harm,<sup>50</sup> therefore failing to establish such physical relationship.

**ii. Even if there exists such physical relationship, there is no human causation between the act and the damage.**

The element of human causation examines the relation between the human factor and the harm. In the present case, the human factor is attributed to Ranvicora’s Reintroduction Project, a self-evident human activity. As was submitted above, there exists no causal relationship between the Project and the harm in Arctos. In the same vein, there is no human causation between them, either.

**iii. The severity of the damage caused is not of a significant degree.**

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<sup>47</sup> *Trail Smelter Arbitral Decision (U.S. v. Can.)*, 3 R.I.A.A. 1921 (1941). In *Trail Smelter*, the Tribunal observed that satisfactory data and experiments were provided among the evidence testifying the causation between the fumigation and the injury.

<sup>48</sup> *Pulp Mills on the River Uruguay*, *supra* note 38, 2010 I.C.J. 71, ¶162; *see also Maritime Delimitation in the Black Sea (Rou. v. Ukr.)*, Judgment, 2009 I.C.J. 86, ¶68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Mys./Sgp.)*, Judgment, 2008 I.C.J. 31, ¶45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (BIH v. Serbia and Montenegro)*, Judgment, 2007 I.C.J. 128, ¶204; *Military and Paramilitary Activities in and against Nicaragua (Nic. v. U.S.)*, Jurisdiction and Admissibility, Judgment, 1984 I.C.J. 437, ¶101.

<sup>49</sup> *Pulp Mills on the River Uruguay*, *supra* note 38, 2010 I.C.J. 88-89, ¶257.

<sup>50</sup> R. 17.

“Damage” in itself implies significance in nature.<sup>51</sup> In *Trail Smelter*, the “serious consequence” involved approximately 16 miles of waterway affected by the smoke of sulfur dioxide.<sup>52</sup> Similarly in *Lake Lanoux Arbitration*, damage to Spain was considered serious for it touched the most sensitive point of the Spain’s agronomy,<sup>53</sup> which suffers from water shortage. Here, the damage concerns two Arcto citizens and dozens of livestock as well as other animals, failing to reach the degree of severity required.

**b. Ranvicora exercised sovereign right on resources according to its policies**

States have Permanent Sovereignty to exploit their own natural resources pursuant to their own environmental policies.<sup>54</sup> In the present case, the grey bear “with actual or potential use or value for humanity” belongs to biological resources.<sup>55</sup> In light of its great cultural and emotional importance in Ranvicora,<sup>56</sup> to reintroduce the grey bear was in accordance with “the interest of their national development” and “the well-being of the people” of the State.<sup>57</sup> Therefore, Ranvicora’s sovereign right to reintroduce grey bears should be respected in the present case.

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<sup>51</sup> Draft Articles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, with commentaries, art. 2(2006),

<sup>52</sup> *Trail Smelter Arbitral Decision*, *supra* note 47, 3 R.I.A.A. 1970.

<sup>53</sup> *Lake Lanoux Arbitration (France v. Spain)*, 12 R.I.A.A. 281 (1957).

<sup>54</sup> CBD, *supra* note 18, Preamble, art.3; Stockholm Declaration, *supra* note 27, Principle 2; G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Judgment, 2005 I.C.J. 246, ¶226 (Dec. 19).

<sup>55</sup> CBD, *supra* note 18, art.2; R. 11.

<sup>56</sup> R. 11.

<sup>57</sup> G.A. Res.1803 (XVII), U.N. Doc. A/5344/Add.1 and Add.1Corr.1, A.L.412/Rev2 (14 Dec. 1962)

### **3. Ranvicora did not violate the CBD and the Bern Convention because the grey bear is not an invasive alien species**

Article 8 of the CBD prevents the introduction of invasive species<sup>58</sup> and Article 11 of the Bern Convention demands that states strictly control the introduction of non-native species.<sup>59</sup> Here, the grey bear is a native species. Even if they are non-native, the grey bears are not invasive and the Project was strictly controlled.

#### **a. The grey bear is native to Ranvicora, of which the reintroduction is encouraged**

A native species is one that has been observed in the form of a naturally occurring and self-sustaining population in historical times.<sup>60</sup> For centuries, the grey bear had lived in Ranvicora.<sup>61</sup> After its extinction, Ranvicora legally acquired grey bears and released them “inside their indigenous range from which they have disappeared”.<sup>62</sup> Thus, the grey bear is native to Ranvicora and the reintroduction of them is encouraged under the Bern Convention.<sup>63</sup>

#### **b. The grey bear is not an alien species to Arctos.**

Alien species do not include native species naturally extending their range in response to climate change.<sup>64</sup> As a native species to Ranvicora, the reintroduced grey bears moved poleward only in response to the shifting of vegetation caused by climate

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<sup>58</sup> CBD, *supra* note 18, art. 8.

<sup>59</sup> Bern Convention, *supra* note 20, art. 11.

<sup>60</sup> Bern Convention, Recommendation No. 57 to the 17th Meeting of the Bern Convention Steering Committee (1997).

<sup>61</sup> R. 10.

<sup>62</sup> *Guidelines for Reintroductions*, *supra* note 31, at 3; R. 13.

<sup>63</sup> Bern Convention, *supra* note 20, art. 5.

<sup>64</sup> CBD, Recommendation No. 142 of the Standing Committee (2009).

change. Therefore, they cannot be considered as an alien species.<sup>65</sup>

**c. Even if the grey bear is not native, they are not invasive and the project was strictly controlled.**

**i. The grey bears in the Project cannot be identified as invasive.**

Not all alien species are invasive alien species, while the latter specifically refers to an alien species whose introduction and/or spread threaten biological diversity.<sup>66</sup> Even if the grey bear is alien to the concerned region of Arctos bordering Ranvicora, it did not threaten biodiversity.

Firstly, evidence of the damage caused by the bears is not abundant because there were no witnesses to any of the alleged bear attacks.<sup>67</sup> Even if grey bears did cause damage, they are not invasive. Invasive species are any species that are able to establish themselves and often spread quickly, causing environmental or economic damage.<sup>68</sup> Conversely, the growth of grey bears is slow because a female breeds every three years and two at a time most frequently,<sup>69</sup> thus rendering the reintroduction and spread of grey bears far from invading the area. Besides, the consequences were not as serious as reducing biodiversity. The introduction of the Nile perch led to the disappearance of up to 200 native cichlid fish species, and Leidy's comb jelly led to the collapse of anchovy farms on the Black Sea.<sup>70</sup> In the present case and in stark contrast, despite damages to

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<sup>65</sup> R. 13.

<sup>66</sup> UNEP/CBD/COP/6/23 (2002).

<sup>67</sup> R. 17.

<sup>68</sup> *About Invasive Species*, International Association for Open Knowledge on Invasive Alien Species, <https://invasivesnet.org/about/what-are-invasive-alien-species/> (last accessed Nov. 11, 2019).

<sup>69</sup> *Brown Bear (Ursus Arctos)*, The International Association for Bear Research and Management, <https://www.bearbiology.org/bear-species/brown-bear/> (last accessed Nov. 11, 2019).

<sup>70</sup> *About Invasive Species*, *supra* note 68.

some animals and plants, no evidence indicates that the damage from only several bears threatened the existence of any species, let alone the whole ecosystem.<sup>71</sup> Conclusively, the grey bear is not invasive.

**ii. Ranvicora did not violate the Bern Convention because the Project was strictly controlled**

Article 11 requires strict control of the introduction of non-native species.<sup>72</sup> Here, the Reintroduction Project was undertaken according to a plan made by a team of scientists and professionals and was based on the results of EIA.<sup>73</sup> Thus, the Project was strictly controlled.

**4. Ranvicora did not violate the provision of cooperation under the CBD and the Bern Convention**

Cooperation is stressed in the conservation of biodiversity.<sup>74</sup> Ranvicora has fulfilled the obligation “as far as possible and as appropriate”.<sup>75</sup> First, Ranvicora made a quick response after receiving the diplomatic note from Arctos, confirming the legality of the Project.<sup>76</sup> Second, Ranvicora actively urged Arctos to stop hurting the grey bears and fulfil the duty of protecting biodiversity when the latter committed poisoning and shooting of them.<sup>77</sup> Therefore, Ranvicora complied with the principle of cooperation for biodiversity.

**B. RANVICORA ACTED IN COMPLIANCE WITH THE**

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<sup>71</sup> *The Destruction of Biodiversity, Crisis of Life*, <http://www.crisisoflife.net/the-destruction.html> (last accessed Nov. 11, 2019).

<sup>72</sup> Bern Convention, *supra* note 18, art 5.

<sup>73</sup> R. 11,12.

<sup>74</sup> CBD, *supra* note 18, art. 5,18.

<sup>75</sup> *Id*, art. 5.

<sup>76</sup> R. 19.

<sup>77</sup> R. 20, 21, 22.

## **PRECAUTIONARY PRINCIPLE DESPITE OF WHICH THE STATUS IN INTERNATIONAL LAW.**

### **1. Ranvicora fulfilled the requirements of precautionary principle.**

Ranvicora acted in accordance with the precautionary principle with due diligence. The precautionary principle generally entails three factors,<sup>78</sup> *i.e.*, (i) standard of utilizing best technology available, (ii) assessment of possible outcomes, and (iii) scientific research. Furthermore, this obligation thereunder is one of due diligence,<sup>79</sup> of which the degree shall be examined in terms of the conduct rather than result.<sup>80</sup> In the present case,

#### **a. Ranvicora acted in accordance with the standard of utilizing best technology available.**

The precautionary principle requires that state apply the best technology available<sup>81</sup>

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<sup>78</sup> Owen McIntyre & Thomas Mosedale, The Precautionary Principle as a Norm of Customary International Law, 9 J. Envtl. L. 221, 236 (1997); *see also* Ellen Hey, The Precautionary Concept in Environmental Policy and Law: Institutionalizing Caution, 4 Geo. Int'l Envtl. L. Rev. 303, 311 (1992).

<sup>79</sup> Draft Articles On Prevention, *supra* note 32, art.3, Commentary 7.

<sup>80</sup> Seabed Activities Advisory Opinion, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, ITLOS, Seabed Disputes Chamber 34, ¶110 (2011) .

<sup>81</sup> *See* Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, art. 2(3)(b)(ii), 2354 U.N.T.S. 67; Convention on the Protection of the Marine Environment of the Baltic Sea Area, art. 23(3), 22 March 1974, 1507 U.N.T.S. 166; Annex II of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art. 3(1), 17 March 1992, 1936 U.N.T.S. 269; Convention on Long-Range Transboundary Air Pollution, 13 January 1979, art.6, 1902 U.N.T.S. 217.

to a good government,<sup>82</sup> and specifically incorporate technical expertise in translocation management.<sup>83</sup> Here, Ranvicora presented its best possible efforts by first, prior to the Reintroduction, collaborating with professionals with expertise,<sup>84</sup> then during the Reintroduction setting tracking devices on the released grey bears,<sup>85</sup> as well as afterwards monitoring them.<sup>86</sup>

**b. Ranvicora conducted adequate assessment of possible outcomes.**

The measures adopted shall be proportionate<sup>87</sup> and equitable<sup>88</sup> to the objectively established risk involved.<sup>89</sup> Specifically, an EIA shall be proportional in its extent to the level of identified risk<sup>90</sup> as a national procedure.<sup>91</sup> In the present case, the fact that no grey bears had been spotted in Arctos<sup>92</sup> or killed Ranvicorian citizens diminishes the risk of the Project,<sup>93</sup> rendering failure to the establishment of objective

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<sup>82</sup> Draft articles on Prevention, *supra* note 32, art.3, Commentary 17.

<sup>83</sup> *Guidelines for Reintroductions*, *supra* note 31, at 15.

<sup>84</sup> R. 11.

<sup>85</sup> R. 14.

<sup>86</sup> R. 15.

<sup>87</sup> IUCN Council, *Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management* (2007) [*Guidelines for Precautionary Principle*].

<sup>88</sup> *Id*, Guideline 11, 9.

<sup>89</sup> Seabed Activities Advisory Opinion, *supra* note 80, 36, ¶117.

<sup>90</sup> *Guidelines for Reintroductions*, *supra* note 31, at 15; *see also* UNEP, Goals and Principles of Environmental Impact Assessment, Principle 5(1987).

<sup>91</sup> Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 3 10, Art.1(vi); *see also*, Rio Declaration, *supra* note 27, Principle 11 (“States shall enact effective environmental legislation”); *Pulp Mills on the River Uruguay*, *supra* note 38, 2010 I.C.J. 83, ¶205.

<sup>92</sup> R. 12.

<sup>93</sup> IEMCC Clarification, at 2.



risk.

### **c. Ranvicora stimulated sufficient scientific research.**

The precautionary principle requires the best possible scientific evidence available<sup>94</sup> and the application of traditional and indigenous knowledge.<sup>95</sup> Despite the relative high level of responsibility for developed countries,<sup>96</sup> such responsibility still finds its limits in the means for full compliance at the state's disposal.<sup>97</sup> Here, Ranvicora demonstrated scientific collaboration with professionals,<sup>98</sup> and due consideration was given to the indigenous knowledge that the grey bears had only migrated within Ranvicora.<sup>99</sup>

## **2. The precautionary principle is not established customary international law.**

The precautionary principle does not constitute customary international law for a lack of *opinio juris*.<sup>100</sup> There is an ongoing debate on whether precaution has become

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<sup>94</sup> Negotiating Text prepared by the Chairman of the Conference, UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, A/CONF 164/13 (12-30 July 1993); *see also Guidelines for Precautionary Principle, supra* note 87, Guideline 5, 7.

<sup>95</sup> *Guidelines for Precautionary Principle, supra* note 87, Guideline 5, 7.

<sup>96</sup> Rio Declaration, *supra* note 27, Principle 7.

<sup>97</sup> 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, at 71 (2014); *see also* Koskenniemi & Martti, Peaceful Settlement of Environmental Disputes, 80 *Nordic JIL* 73 (1991).

<sup>98</sup> R. 11.

<sup>99</sup> R. 12.

<sup>100</sup> Statute of the International Court of Justice, art. 38, T.S. No. 993 (1945); Draft conclusions on Identification of Customary International Law, with commentaries, Conclusion 3(2018).

part of international customary law.<sup>101</sup> This was affirmed by this Court that As was enunciated by this Court, there has been merely a trend towards making it part of customary international law.<sup>102</sup>

## **II. THE FEDERAL STATES OF ARCTOS VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSES TO RANVICORA'S GREY BEAR REINTRODUCTION PROJECT.**

### **A. ARCTOS VIOLATED ITS TREATY OBLIGATIONS.**

#### **1. Arctos violated the CBD.**

One of the major objectives of the CBD is “the conservation of biological diversity”,<sup>103</sup> and is of great value in different aspects.<sup>104</sup>

#### **a. Arctos breached its duty to protect the biodiversity by failing to comply with its obligation to adopt measures to avoid or minimize adverse impacts on biodiversity under the CBD.**

The Principle of Preventive Action under the CBD mandates States to adopt measures to avoid or minimize adverse impacts on biodiversity.<sup>105</sup> In the present case, Arctos issued an emergency regulation that expressly granted permission to Arctos' citizens to shoot and poison any grey bear, regardless of them being cubs or pregnant.<sup>106</sup>

The grey bears are an endangered apex predators, which are important in protecting biodiversity through top-down influence on food webs.<sup>107</sup> Severe declines

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<sup>101</sup> *Guidelines for e Precautionary Principle*, *supra* note 87,.

<sup>102</sup> Seabed Activities Advisory Opinion, *supra* note 80, 41, ¶135.

<sup>103</sup> CBD, *supra* note 18, art. 1.

<sup>104</sup> *Id*, Preamble.

<sup>105</sup> PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 246–47 (2d ed. 2003).

<sup>106</sup> R. 20, 21.

<sup>107</sup> Hollings, T., et al., *Disease-induced decline of an apex predator drives invasive*

or extinction of apex predators can cause the menace of the marine and terrestrial ecosystems,<sup>108</sup> and can lead to more homogenized<sup>109</sup> and invaded<sup>110</sup> ecosystems.<sup>111</sup> Here, despite the endangered and important status of the grey bears, Arctos nevertheless refused to take measures. And by allowing poisoning and shooting in its territory, Arctos' citizens are now able to cause damage to the environment with impunity, which is in violation of its obligation .

**b. Arctos failed to observe its duty under Article 8 by not implementing in-situ conservation.**

Arctos has acted in contradiction to Article 8 for failing to apply the measures therein of in-situ conservation, which is the fundamental requirement of the conservation of biodiversity.<sup>112</sup> According to Article 8, an “area adjacent to protected area” has the duty to promote environmentally sound and sustainable development.<sup>113</sup> In the present case, after assessment concluding it as the only remaining habitat suitable

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*dominated states and threatens biodiversity. Ecology*, Vol. 97, No. 2, 394-405 (Feb., 2016), <http://www.jstor.org/stable/24703099> (last accessed Nov. 10, 2019).

<sup>108</sup> Caroline Fraser, *The Crucial Role of Predators: A New Perspective on Ecology*, *Yale Environment 360*, Yale School of Forestry & Environmental Studies (Sept. 15, 2011), <https://e360.yale.edu> (last accessed Nov. 10, 2019).

<sup>109</sup> James A. Estes, *Trophic Downgrading of Planet Earth*, *Science* 333, 301 (July. 15, 2011), <https://science.sciencemag.org/content/333/6040/301.full> (last accessed Nov. 10, 2019).

<sup>110</sup> Arian D. Wallach, et al., *Predator control promotes invasive dominated ecological states*, *Ecology Letters*, Volume 13, Issue 8: 1008–1018 (Aug., 2010), <https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1461-0248.2010.01492.x> (last accessed Nov. 10, 2019).

<sup>111</sup> Hollings, T., *supra* note 107, at 394-405.

<sup>112</sup> CBD, *supra* note 18, Preamble.

<sup>113</sup> *Id.*, art. 8 (e).

for grey bears to sustain a viable population,<sup>114</sup> the northern region of Ranvicora bordering Arctos was selected as the area for releasing and protecting the grey bears, thereby becoming a designated “protected area” under Article 2.<sup>115</sup> Accordingly, Arctos is rendered an “area adjacent to protected area” and born with such duty under Article 8.<sup>116</sup> However, by poisoning and shooting grey bears, it imposed on the grey bears a toxic environment and unsustainable development in violation of such duty.

## **2. Arctos violated the CMS.**

### **a. Arctos breached its duty under Article III by not conserving and restoring habitats.**

First, Arctos is a Range State for the grey bear.<sup>117</sup> The meaning of “*normal*” in the interpretation of “*Range*”<sup>118</sup> can be defined as “setting a standard”.<sup>119</sup> In this case, the grey bear, being a migratory species,<sup>120</sup> stayed in Arctos temporarily near the border<sup>121</sup> and intermittently moved back and forth between Ranvicora and Arctos.<sup>122</sup> This moving pattern formed a standard of its migratory routes, thereby making this specific area of Arctos’ territory a range to the grey bear.

Since Arctos was a State expected to become a Range State due to climate change<sup>123</sup> and now has already become one, it shall endeavor the duty to feasibly and

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<sup>114</sup> R. 13.

<sup>115</sup> CBD, *supra* note 18, art. 2,

<sup>116</sup> *Id.*, art. 8 (e).

<sup>117</sup> CMS, *supra* note 20, art. I , 1, h).

<sup>118</sup> *Id.*, art. I , 1, f).

<sup>119</sup> BLACK’S LAW DICTIONARY, *supra* note 41.

<sup>120</sup> R. 9, 10.

<sup>121</sup> R. 16.

<sup>122</sup> *Id.*

<sup>123</sup> UNEP/CMS/Resolution 12.21 (2017).

appropriately conserve and restore habitats<sup>124</sup> of the grey bears. Such measures are of importance in removing the species from danger of extinction,<sup>125</sup> and full participation and proper adaption are required.<sup>126</sup> However, Arctos did not perform its duty.

**b. Arctos' responses of poisoning and shooting grey bears are not permissible under Article III.**

The CMS expressly regulates that prohibition of taking migratory species listed in Appendix I, with exceptions only in extraordinary circumstances. However, it should be noted that the premise of this provision provides that “such taking should not operate to the disadvantage of the species”.<sup>127</sup> Here, Arctos' responses are not permissible.

**c. Arctos failed to take actions to conserve migratory species beyond the species' historic range, especially due to climate-induced range shifts.**

States must be the protectors of the wild migratory species that live within or pass through their national jurisdictional boundaries,<sup>128</sup> and immediate protection for species included in Appendix I is required.<sup>129</sup> Hence, it's the obligation of Arctos to take actions to conserve endangered migratory species.

CMS Resolution 12.21 calls for action to conserve migratory species like the grey bear beyond the species' historic range, especially in the case of climate-induced range shifts.<sup>130</sup> In the present case, grey bears had never lived in Arctos<sup>131</sup> and its entry into Arctos would belong to “beyond historic range”. And principle hypothesis of climate

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<sup>124</sup> CMS, *supra* note 20, art. I , 1, g).

<sup>125</sup> *Id*, art. III, 4, a).

<sup>126</sup> Resolution 12.21, *supra* note 123.

<sup>127</sup> CMS, *supra* note 20, art. III, 5, d).

<sup>128</sup> *Id*, Preamble.

<sup>129</sup> *Id*, art. II, 3, (b).

<sup>130</sup> R. 19.

<sup>131</sup> R. 10.

change was also provided.<sup>132</sup> However, Arctos failed to do so.

### **3. Arctos violated the Bern Convention.**

#### **a. Arctos failed to protect endangered, wild and migratory species.**

The Bern Convention mandates States to adopt measures for the recovery and rehabilitation of threatened species. The grey bear is listed in the IUCN Red List of Threatened Species as “Endangered”<sup>133</sup> and “Vulnerable”.<sup>134</sup>

#### **i. Arctos is obliged to adopt measures for the recovery and rehabilitation of threatened wild species.**

As the grey bear is a vulnerable species,<sup>135</sup> recovery and rehabilitation measures are imperative to the restoration of their viable population. One of the aims of the Bern Convention is to conserve wild fauna and particular emphasis is given to endangered and vulnerable migratory species.<sup>136</sup> Co-ordination of efforts for the protection of species specified in Appendix II whose range extends into their territories is required as well.<sup>137</sup> However, Arctos did not adopt any conservation method or put in any efforts, thereby breaching its duty.

#### **ii. Arctos breached its duty by intentionally poisoning and shooting wild fauna species specified in Appendix II of the Bern Convention.**

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<sup>132</sup> R. 13.

<sup>133</sup> R. 9.

<sup>134</sup> IUCN, Ursus smokeysius, <https://www.iucnredlist.org/search/list?query=Ursus%20smokeysius&searchType=species> (last accessed Nov. 10, 2019).

<sup>135</sup> IUCN Standards and Petitions Subcommittee, *Guidelines for Using the IUCN Red List Categories and Criteria: Version 9.0* (2011).

<sup>136</sup> Bern Convention, *supra* note 20, art. 1.

<sup>137</sup> *Id.*, art. 10.

The Bern Convention requires that legislative and administrative measures shall be taken to ensure the special protection, and all forms of deliberate harm are prohibited in particular for species specified in Appendix II.<sup>138</sup> It also stipulates all means capable of causing serious disturbance to populations of a species are prohibited,<sup>139</sup> particularly during the period of breeding and rearing.<sup>140</sup>

However, Arctos not only set out poisoned animal carcasses to poison grey bears to death, but also worse, granted permission to Arctos' citizens to shoot any grey bear, leading to the direct killing of a female bear with her two cubs, and another pregnant female bear.<sup>141</sup> This course of action seriously violated the Bern Convention.

Arctos claimed that, in any event, its actions are appropriate pursuant to the exceptions in Article 9. However, the precondition of making exceptions under this Article is a situation with "no other satisfactory solution", which has not been satisfied in this case.

**b. Arctos also failed to comply with its obligations under the Bern Convention to conserve and restore habitats of endangered, wild and migratory species.**

The conservation of habitats is a vital component of the protection of wild fauna,<sup>142</sup> and must receive importance.<sup>143</sup> Especially, special attention shall be given to the species specified in Appendix II and in circumstance where habitats are situated in the frontier areas.<sup>144</sup> In the present case, the location of the grey bears is of such frontier nature.<sup>145</sup> However, faced with this obligation, Arctos didn't take any appropriate

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<sup>138</sup> *Id*, art. 6, a.

<sup>139</sup> *Id*, art. 8.

<sup>140</sup> *Id*, art. 6, c.

<sup>141</sup> R. 20, 21.

<sup>142</sup> Bern Convention, *supra* note 20, Preamble.

<sup>143</sup> Stockholm Declaration, *supra* note 27, Principle 4.

<sup>144</sup> Bern Convention, *supra* note 20, art. 4.

<sup>145</sup> R. 9, 14.

legislative or administrative measures. Besides, the Bern Convention promotes cooperation between States,<sup>146</sup> but Arctos showed no sign of cooperating. Consequently, Arctos violated its obligations.

## **B. ARCTOS VIOLATED CUSTOMARY INTERNATIONAL LAW.**

### **1. Arctos breached its obligation under customary international law of not causing transboundary harm.**

Transboundary harm is defined as “harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border”.<sup>147</sup> The duty not to cause transboundary harm holds that no state has the right to cause an injury of serious consequence to another state<sup>148</sup> which is a rule of conventional<sup>149</sup> and customary international law.<sup>150</sup> Each state is thus under an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.<sup>151</sup>

This rule has four elements,<sup>152</sup> all of which are satisfied in the present case:

#### **a. Poisoning and shooting resulted in transboundary harmful effects.**

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<sup>146</sup> Bern Convention, *supra* note 20, art. 1, (1).

<sup>147</sup> Draft Articles On Prevention, *supra* note 32, art.2 (c).

<sup>148</sup> *Trail Smelter Arbitration*, *supra* note 47, 3 R.I.A.A. 1965; *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 38, 1996 I.C.J. 242, ¶29; Stockholm Declaration, *supra* note 27, Principle 21; Rio Declaration, *supra* note 27, Principle 2; BIRNIE & BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT*, at 168(2nd ed. Oxford U. Press 2004).

<sup>149</sup> CBD, *supra* note 18, art.3.

<sup>150</sup> *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 38, 1996 I.C.J. 242, ¶29

<sup>151</sup> *Corfu Channel*, *supra* note 38, 1949 I.C.J. 4; *Lac Lanoux*, *supra* note 53, 2 R.I.A.A. 281.

<sup>152</sup> XUE HANQIN, *supra* note 36, at 4.



The term transboundary stresses the element of boundary-crossing in terms of the direct or immediate consequences of the act for which the source State is held responsible.<sup>153</sup> Therefore, harm must have been caused in a State other than the State of origin.<sup>154</sup> In this case, Arctos deliberately poisoned and shot grey bears, directly harming Ranvicora's property and biodiversity and causing a huge loss to the culture and history of Ranvicora.<sup>155</sup> Therefore, the activities conducted in the territory of Arctos produced losses suffered in the territory of Ranvicora.<sup>156</sup>

**b. There is a physical relationship between the measures of the Government of Arctos and the deaths of grey bears.**

A physical relationship requires that the activity directly or indirectly involving natural resources<sup>157</sup> results in bodily, materially or environmentally harmful consequences.<sup>158</sup> Here, several grey bears died due to Arctos' intentional poisoning and shooting.<sup>159</sup> Ranvicora's Reintroduction Project is directly damaged and its biodiversity is therefore adversely affected.<sup>160</sup>

**c. The harm was a result of human activity.**

Transboundary damage should have "some reasonably proximate causal relation to human conduct".<sup>161</sup> It is clear that the harm results from the actions of Arctos. More

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<sup>153</sup> *Id.*, at 9.

<sup>154</sup> G.A. Res. 62/68 U.N. Doc. A/RES/62/452 62nd sess. Agenda item 84 (2008); Stockholm Declaration, *supra* note 27, Principle 21.

<sup>155</sup> R. 11.

<sup>156</sup> XUE HANQIN, *supra* note 36, at 10.

<sup>157</sup> *Id.*, at 4.

<sup>158</sup> *Id.*, at 5.

<sup>159</sup> R. 22.

<sup>160</sup> R. 9.

<sup>161</sup> OSCAR SCHACHTER, *supra* note 40.

than nine grey bears have died, because Arctos set out poisoned animal carcasses<sup>162</sup> and issued the emergency regulation which permitted its citizens to shoot grey bears.<sup>163</sup>.

**d. Arctos' actions involve a risk of causing significant harm.**

The “risk of causing significant harm” refers to the combined effect of the probability of occurrence of an accident and the magnitude of its injurious impact.<sup>164</sup> Despite absence of international standards,<sup>165</sup> the International Law Commission has emphasized that the harm must lead to a real detrimental effect on matters such as human health, industry, property, environment or agriculture in other States.<sup>166</sup> The damage should be at least “greater than the mere nuisance or insignificant harm which is normally tolerated”.<sup>167</sup> Here, the adverse effects of the actions of Arctos are widespread and uncontrollable: the deaths of grey bears caused irreversible damage to the grey bears' reproduction and Ranvicora's biodiversity, culture and history, since the endangered grey bear is of great cultural importance in Ranvicora and its extinction in Ranvicora was considered a national tragedy.<sup>168</sup> Therefore, the transboundary harm was significant.

**2. Arctos violated the precautionary principle and failed to fulfill its duty of due diligence.**

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<sup>162</sup> R. 20.

<sup>163</sup> R. 21.

<sup>164</sup> Draft Articles On Prevention, *supra* note 32, art.2, Commentary 2.

<sup>165</sup> PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, at 878 (2nd ed. Cambridge U. Press 2003).

<sup>166</sup> 56th ILC Report, *supra* note 28, at 152.

<sup>167</sup> J. Barboza, Sixth Report on International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law, art.2(b)(e), UN Doc. A/CN.4/428(1990)

<sup>168</sup> R. 11.

**a. The precautionary principle can be applied in the present case.**

The precautionary principle provides that, “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.<sup>169</sup> The application of this principle requires three elements: a threat of environmental damage, the uncertainty of the threat, and the serious or irreversible nature of the threatened harm.<sup>170</sup> All elements are satisfied in this case.

First, Arctos’ actions pose a threat of environmental damage not only to the grey bear, but also to biodiversity. Second, the number of the grey bears crossing into Arctos is unknown. Third, since the grey bear is already endangered,<sup>171</sup> actions of poisoning and shooting will lead to the extinction of the grey bear again in Ranvicora, thereby rendering the threat of damage conceivably serious and irreversible. Therefore, the threshold of applying the precautionary principle is met in this case.

**b. Arctos violated the precautionary principle and failed to fulfill its duty of due diligence.**

The precautionary principle, which mandates states to anticipate, avoid, and mitigate threats to the environment,<sup>172</sup> is generally recognized to entail three factors.<sup>173</sup> Furthermore, the obligation of a State to take preventive or minimization measures is one of due diligence,<sup>174</sup> which requires a State to act in accordance with a good government.<sup>175</sup> In the present case,

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<sup>169</sup> Rio Declaration, *supra* note 27, Principle 153.

<sup>170</sup> *Guidelines for Precautionary Principle*, *supra* note 87.

<sup>171</sup> R. 9.

<sup>172</sup> *Guidelines for Precautionary Principle*, *supra* note 87.

<sup>173</sup> See *supra* note 78.

<sup>174</sup> Draft articles on Prevention, *supra* note 32, art.3, Commentary 7.

<sup>175</sup> Draft articles on Prevention, *supra* note 32, art.3, Commentary 17; Dupuy, International Liability for Transfrontier Pollution, cited in Michael Bothe, Trends in

**i. Arctos did not act in accordance with the standard of utilizing best technology available.**

The precautionary principle requires that state apply the best available technology.<sup>176</sup> The actions of poisoning<sup>177</sup> and shooting,<sup>178</sup> cannot be considered as best technology available.

**ii. Arctos conducted no assessment of possible outcomes.**

The need for anticipation and assessment of the possible outcomes of any planned action is fundamental to the application of the precautionary principle.<sup>179</sup> The link between carrying out EIA and the precautionary principle was also emphasized in the Nuclear Tests Application case.<sup>180</sup> Here, Arctos' setting out of poisoned animal carcasses based on no assessment, and its emergency regulation was issued in merely two days, suggesting the risks and outcomes can hardly be considered.<sup>181</sup>

**iii. Arctos failed to stimulate sufficient scientific research.**

Precautionary principle is almost always accompanied by a commitment by State parties to exchange information and cooperate in research.<sup>182</sup> Here, Arctos determined that grey bears had killed the animals, although there were no witnesses,<sup>183</sup> and did not inform or cooperate with Ranvicora before the actions were taken.<sup>184</sup>

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<sup>176</sup> *See supra* note 81.

<sup>177</sup> R. 20.

<sup>178</sup> R. 21.

<sup>179</sup> Owen McIntyre & Thomas Mosedale, *supra* note 78.

<sup>180</sup> *Id.*

<sup>181</sup> R. 20.

<sup>182</sup> Owen McIntyre & Thomas Mosedale, *supra* note 78.

<sup>183</sup> R. 17.

<sup>184</sup> R. 20,21.

## **CONCLUSION AND PRAYER FOR RELIEF**

Respondent, the Republic of Ranvicora, respectfully requests the Court to adjudge and declare that:

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

RESPECTFULLY SUBMITTED,  
AGENTS OF RESPONDENT