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TWENTY FOURTH ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL

MOOT COURT COMPETITION, 2019-2020



QUESTIONS RELATING TO REINTRODUCTION OF BEARS

THE FEDERAL STATES OF ARCTOS

(APPLICANT)

V.

THE REPUBLIC OF RANVICORA

(RESPONDENT)

MEMORIAL FOR THE RESPONDENT

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ABBREVIATIONS

&	And
Annex	Annexure
Art	Article
CBD	Convention on Biological Diversity
CMS	.....	Convention on the Conservation of Migratory Species
COP	.....	Conference of Parties
Conf	.....	Conference
Dec	.....	Decision
Dev	.....	Development
Doc	.....	Document
EIA	.....	Environmental Impact Assessment
et. al	.....	et alia, and others
IAS	.....	Invasive Alien Species
ICJ	.....	International Court of Justice
Id.	.....	Ibid
ILC	.....	International Law Commission
ILSA	.....	International Law Students Association
Iss	.....	Issue
IUCN	.....	International Union for Conservation of Nature

PRELIMINARY PAGES

L.J.....Law Journal
No.....Number
p.Page Number
Para.....Paragraph
Q.....Question
RIAA.....Reports of International Arbitral Awards (UN)
ScC.....Scientific Council
Stockholm Declaration.....1972 United Nations Conference on Human Environment
UN.....United Nations
UNEP.....United Nations Environment Program
UNGA.....United Nations General Assembly
UNFCCC.....United Nations Framework Convention on Climate Change
v.....Versus
VCLT.....Vienna Convention on Law of Treaties
Vol.....Volume

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QUESTIONS PRESENTED

- 1. WHETHER RANVICORA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS REINTRODUCTION PROGRAM**

- 2. WHETHER ARCTOS VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSE TO RANVICORA'S REINTRODUCTION OF GREY BEARS**

STATEMENT OF JURISDICTION

Pursuant to the Joint Notification dated 15th July, 2019, agreed to therein, between the Federal States of Arctos and the Republic of Ranvicora (collectively "the Parties"), and in accordance with Article 40(1) of the Statute of the International Court of Justice, the Parties hereby submit to this Court its dispute concerning Question Relating to Reintroduction of Bears.

In accordance with Article 36(1) of the ICJ statute, each party will accept the judgment of the court as final and binding.

In accordance with Article 1 of the Record, the Court is hereby requested to adjudge the dispute.

SUMMARY OF FACTS

Background

Arctos and Ranvicora are developed States in the Northern Hemisphere. They share a border which mainly consists of forests and private farms. Ranvicora was home to an endangered species of bears known as the Grey Bears, which went extinct from Ranvicora in 1963.

The Reintroduction Program

Owing to its cultural importance, Ranvicora decided to reintroduce the Grey Bears in 2008 and in furtherance of this, conducted a national EIA. Based on the findings, the first batch of reintroductions took place in the northern part of Ranvicora in 2013. Within a year, the population started growing and soon after, Grey Bears were spotted in Arctos. This was confirmed by the tracking collars on the bears. Subsequently, there were reports of crop and livestock damage in Arctos. Owing to increasing amounts of damage, Arctos requested Ranvicora to cease the reintroduction project and compensate Arctos. Ranvicora refused and maintain that their program is lawful.

Arctos's Response to the Reintroduction Project

Aggrieved by Ranvicora's refusal to cease the project, Arctos set up poisoned carcasses as bait, which resulted in the death of four bears. Further, after the mauling of two children, Arctos issued an emergency regulation permitting the killing of Grey Bears on sight. This led to four further deaths. Aggrieved by this response and being unable to resolve the dispute through negotiations, the parties approached this court.

SUMMARY OF ARGUMENTS

- I. A State may be held liable only for its transgressions and not for all the harms arising out of its activities. In the present case, Ranvicora has undertaken the reintroduction program as per the requirements of international law. Further, the program did not cause any significant transboundary harm to Arctos and contrary to Arctos's claim, the reintroduction is in furtherance of Ranvicora's treaty obligations. Hence, since there is no transgression by Ranvicora, it may not be held liable for the harm caused by the bears.

- II. The killing of the bears by Arctos was indiscriminate and was done without due diligence. This caused significant transboundary harm to Ranvicora and to the viability of the species. It also violated Arctos's obligation under the CBD to conserve biodiversity in their natural habitats, under CMS to protect migratory species and under the Bern Convention to conserve threatened species.

ARGUMENTS ADVANCED

I. RANVICORA DID NOT VIOLATE INTERNATIONAL LAW WITH RESPECT TO ITS REINTRODUCTION PROGRAM

1. The Republic of Ranvicora undertook the Grey Bear reintroduction program in order to repopulate an endangered species. Ranvicora cannot be held liable for the consequences of this program (A) as the reintroduction was carried out as per the rules of international law (B). Further, the reintroduction program caused no transboundary harm to Arctos (C) as the bears are not an invasive alien species (D). Lastly, the reintroduction was in furtherance of Ranvicora's treaty obligations (E).

A. Ranvicora cannot be held Strictly Liable for the Consequences of the Reintroduction Program

2. It is submitted that Ranvicora is not *prima facie* responsible for the acts of the bears (a) and that they can be held liable only for a breach of their obligations (b).
 - a. **Ranvicora is not *prima facie* responsible for the acts of the bears**
3. Holding Ranvicora *prima facie* responsible for the acts of the bears imply the application of strict liability. The application of liability regime depends on the particular obligation in question¹. Strict liability is imposed on States undertaking ultra-hazardous activities such as space exploration² or nuclear tests³ to incentivize them to avoid such activities or

¹ PHILIPPE SANDS et al. PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, p. 711.

² Convention on International Liability for Damage Caused by Space Objects, 1972, Art. II.

ensure a high standard of care when conducting them⁴. Reintroduction programs do not involve the same level of threat and hence may not be considered ultra-hazardous.

4. The ILC opines that strict liability has no support even as a measure of progressive development of law⁵. Further, as a matter of policy, States are disincentivized to carry out activities which impose higher standards of care. Given the importance of reintroduction for the conservation of the environment, strict liability should not be imposed for reintroduction programs.

b. Ranvicora can be held liable only for the breach of its obligations

5. The legal regime of fault-based liability holds a State liable for its transgressions. This regime finds support in the ILC's Draft Articles on State Responsibility which provides that a State is said to commit an internationally wrongful act when it breaches an obligation⁶.
6. To establish wrongfulness, the compatibility of the act with the obligations of a State must be examined⁷ and for the imputation of wrongfulness to exist, there must be a violation of a duty imposed by an international juridical standard⁸ or a breach of engagement⁹.

³ W. Jenks, *The Scope and Nature of Ultra-Hazardous Liability in International Law*, 117 RDC 99 at 144 (1966).

⁴ *Id.*

⁵ P.S. Rao, First Report on the Legal Regime for Allocation of Loss in Case of Transboundary Harm Arising Out of Hazardous Activities, UN Doc. A/CN.4/566 (2006), Para 31

⁶ Art. 2(b)

⁷ United States Diplomatic and Consular Staff in Tehran, Judgment, 1. C. J. Reports 1980, p. 3

⁸ Dickson Car Wheel Company (U.S.A.) v. United Mexican States, UNRAUU, vol. IV (Sales No. 1951. V.1), p. 669

⁹(1928) PCIJ Series A No 17; Reparation for injuries suffered in the service of the United Nations, Order of December 11th, 1948: I.C.J. Reports 1948, p. 121.

7. All treaties dealing with the obligation to prevent environmental damage set forth a regime of responsibility for fault and States would be deemed responsible only to the extent that they have failed to meet their obligations or if they have not exercised due diligence¹⁰ Hence, it is submitted that in the present case the regime of fault based liability must be applied and for Ranvicora to be held liable under this regime, it must have violated its obligations.

B. The Reintroduction Program was carried out as per the rules of international law

8. It is submitted that Ranvicora undertook the requisite studies before commencing the reintroduction project (a) and exercised due diligence in its implementation (b)

a. Requisite studies were undertaken before the commencement of the reintroduction program

9. The CBD¹¹, the Bern Convention¹² and the UNFCCC¹³ requires parties to conduct an EIA before the commencement of any project which may have an impact on the environment. An EIA identifies the environmental effects of a proposed project and indicates appropriate measures to reduce or eliminate its adverse effects¹⁴. EIAs are to be started at the earliest possible stages of the design process to enable them to influence design from

¹⁰ Andrea Laura Mackielo, *Core rules on International law*, ILSA Journal of International Comparative Law, 2009, Vol. 16:1, p. 270.

¹¹Art. 14.

¹²Art. 11.2.a.

¹³Art. 4(f)

¹⁴ Glowka, L, et al., (1994), *A Guide to the Convention on Biological Diversity*, IUCN Gland and Cambridge. xii + 161pp.

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the beginning¹⁵. They should provide decision-makers with information on the environmental consequences of proposed activities¹⁶. The underlying rationale is that decisions must be influenced by information¹⁷.

10. In the present case, Ranvicora undertook an EIA when determining whether the reintroduction program was feasible and in determining the most suitable location for the reintroduction. It even considered phases of reintroduction and undertook the program based on this information¹⁸.

11. Further, this EIA cannot be considered invalid for not considering transboundary impacts. The content of an EIA must be determined on a case to case basis¹⁹. In the *Pulp Mills Case*²⁰, the ICJ held that an international EIA is required where there was a risk of significant Transboundary Harm. In the *Case Concerning Certain Activities Carried out by Nicaragua in the Border Area*²¹, the ICJ held that Nicaragua was not required to conduct an EIA as its activities were not likely to cause significant transboundary harm to Costa Rica.

12. The view that a transboundary EIA needs to be conducted only when there is an imminent threat of significant transboundary harm is supported by the CBD²² and the ILC²³. In the

¹⁵ *Id.*

¹⁶ SANDS, *Supra* Note 1.

¹⁷ *Id.*

¹⁸ Record, Para 12.

¹⁹ Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665.

²⁰ Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 14.

²¹ *Supra* Note 20.

²² Art. 14(c).

²³ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries 2001

present case, there was no risk of significant transboundary harm to Arctos as climate-induced migration and the harms thereof may not be considered significant transboundary harm²⁴. On the contrary, States have an obligation to anticipate and adapt to such migration²⁵. As such, it is submitted that Ranvicora was not required to undertake an international EIA with regard to its reintroduction project.

b. Ranvicora exercised due diligence in the implementation of the reintroduction

13. For a reintroduction to be lawful it must be justified on grounds such as ecological function²⁶. Migratory species are a significant component of biodiversity, underpinning ecosystems by facilitating ecosystem functioning and dynamics²⁷. Migratory species are threads that tie scattered ecosystems. Their regular visits across long distances demonstrate the interdependence between ecosystems²⁸. The Grey Bears are migratory species and their extinction poses the risk of untethering complex, interdependent ecosystems.

14. Secondly, Grey Bears are apex predator in Ranvicora²⁹. Their extinction leads to “trophic downgrading” which must be remedied as they play crucial roles in ecosystem

A/56/10, 402–3 (2001).

²⁴ Recommendation No. 142 (2009) of the Standing Committee, adopted on 26 November 2009, interpreting the CBD definition of invasive alien species to take into account climate change.

²⁵UNFCCC, Art 4; UNEP/CBD/COP/DEC VIII/5; IX/16; X/33; XI/21; XIII/4; XIV/5; Recommendation No. 135(2008); 143(2009); 158(2012); 159(2012).

²⁶ *Id.*

²⁷ Annex VII: Resolution 11.2, CMS COP 11 Proceedings: Part I, p. 185-186.

²⁸ Lyle Glowka, *A Guide to the Complementarities Between the Convention on Migratory Species and the Convention on Biological Diversity*, a study funded by UNEP and the Secretariat of the Convention on Migratory Species (CMS).

²⁹ Record, Para 10.

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functioning, disease regulation, and biodiversity maintenance³⁰. Hence, the reintroduction of Grey Bears can be justified on the grounds of ecological function.

15. Further, reintroductions must be implemented in accordance with the IUCN Guidelines for reintroduction³¹, which notes that a conservation translocation has intended conservation benefit, but also carries risks³² and hence, a reintroduction must be carried out only if the benefits outweigh the harms³³. In the present case, the risk of temporary prey naivety must be weighed against the restoration of balance in the ecosystem, which is the more crucial consideration.

16. Further, the reintroduction may not be considered unlawful as it was undertaken in a location that may have been outside the historic range of the Grey Bears. Though reintroduction into the original habitat is preferred³⁴, it may not always be possible. Hence, reintroduction may take place in another area provided it suits all practical needs of the species³⁵.

17. In deciding the location, the climatic conditions must be considered and it must be suitable for the foreseeable future³⁶. This is in conformity with the obligations of Ranvicora under the UNFCCC³⁷ and also with various CBD-COP Decisions, which

³⁰ ADRIAN C. STIER et al, Ecosystem Context and Historical Contingency in Apex Predator Recoveries.

³¹ *Supra* Note 27.

³² IUCN/SSC (2013). Guidelines for Reintroductions and Other Conservation Translocations. Version 1.0. Gland, Switzerland: IUCN Species Survival Commission, viiii + 57 pp, s. 3.1.

³³ *Id.* at s. 3.7.

³⁴ *Id.* at s. 3.

³⁵ *Id.* at s. 7.1.

³⁶ *Id.* at s. 5.1.3.

³⁷ Art. 4(f).

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require that countries consider the impacts of climate change when implementing programs³⁸.

18. It is submitted that Ranvicora considered the requirements of the Grey Bears when determining the location of reintroduction. This is evidenced by the fact the bears were released in a location which is large and possessed the required vegetation and climatic conditions, as determined by the migratory trends of bears³⁹.

19. However, as reintroduction is a process that involves unforeseeable consequences, States are required to monitor the reintroduced species. The CBD requires parties to identify processes which are important for conservation of biodiversity⁴⁰ and monitor them through methods such as sampling⁴¹ especially if they pose a threat to conservation⁴². In determining what processes to monitor, States may consider factors such threat level⁴³ and cultural importance⁴⁴.

20. Further, States are specifically required to monitor the demographic performance and behavioral patterns of the reintroduced species with a view to identify threats and refine processes⁴⁵. In the present case, Ranvicora, recognizing that the Grey Bears are threatened and may cause damage to the existing ecosystem, fitted half the bears with GPS collars⁴⁶ for the purposes of sampling and closely monitored their birth and death

³⁸ UNEP/CBD/COP/DEC VIII/5; IX/16; X/33; XI/21; XIII/4; XIV/5.

³⁹ Record, Para 14.

⁴⁰ CBD, Art. 7(a).

⁴¹ *Id.* at Art. 7(b).

⁴² *Id.* at Art. 7(c).

⁴³ *Supra* Note 14; *Id.* at Annex I.

⁴⁴ CBD, Annex I.

⁴⁵ *Supra* Note 36, at s. 8.

⁴⁶ Record, Para 15.

rates and causes. As such, it is submitted that Ranvicora ensured due diligence with respect to its reintroduction program and implemented it in a lawful manner.

C. Ranvicora did not cause Transboundary Harm to Arctos

21. It is submitted that there is no clear and convincing evidence to link the harms caused in Arctos to the Grey Bears (a) and even if there was proof, the harms were not significant (b) and as such, Ranvicora was not bound to notify and consult with Arctos (c).

a. Lack of clear and convincing linking of harms in Arctos to Grey Bears

22. States are required to provide clear and convincing evidence to prove the causal link between the activity allegedly causing harm and the harm⁴⁷. In the *Trail Smelter Case*, U.S.A's claim that fumigations conducted by the Canadian Copper Smelter caused damage to its trees failed as they could not clearly and convincingly establish that the fumigation was the *sole* reason for the damage.

23. Similarly, Arctos is unable to clearly and convincingly prove that the harm is attributable to the Grey Bears. None of the Grey Bear attacks in Arctos had any eye-witnesses⁴⁸. Mere sightings are not sufficient to draw a causal link between the bears and the casualties. Further, there have been no reported attacks in Ranvicora⁴⁹ despite even Ranvicora having private farms on its side of the border⁵⁰. This inconsistent behavior gives scope for doubt, and hence, there is no clear and conclusive causal nexus between the reintroduction and the harms.

⁴⁷ *Trail Smelter (U.S. v. Can.)* 3 R.I.A.A. 1905 (1949).

⁴⁸ Record, Para 17

⁴⁹ Clarifications to the Record, A.12

⁵⁰ Record, Para 1.

24. In the case of the Trouwborst Tern, even if it is conclusively proved that the bears were eating their eggs, this cannot be considered the sole reason for their dwindling populations as they were considered to be threatened even before the reintroduction of Grey Bears⁵¹. This indicates that their threatened status is due to other factors. Hence, following the rationale of the *Trail Smelter Case*⁵², the damage caused to the Trouwborst Tern should not be attributed to the reintroduction project.

25. Further, there is no evidence provided by Arctos indicating that the Tern faces a greater threat or imminent danger due to the introduction of the bears. As such, it is submitted that there is no clear and conclusive causal nexus between the reintroduction and the harms.

b. Even if there were clear and conclusive evidence, the harm caused is not significant

26. For a State to be held liable for causing transboundary harm, the harm should be significant⁵³. According to the ILC Draft Articles on Prevention of Transboundary Harm, ‘significant’ harm refers that which is more than noticeable⁵⁴, but need not be at the level of ‘serious’ or ‘substantial’⁵⁵. This harm must cause real detrimental effect on matters such as human health, property or environment in other States⁵⁶.

27. Presently, the Grey Bears led to the death of one person and a few livestock along with some crops⁵⁷. These are isolated cases and do not in any significant way affect human

⁵¹Record, Para 17

⁵² *Supra* Note 47

⁵³ ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities Art. 2.

⁵⁴ *Id.* at Comment 3.

⁵⁵ *Id.* at Art. 2 Comment 4.

⁵⁶ Report of the International Law Commission on the Work of its Fifty-Third Session (2001), 150-51, U.N. Doc. A/56/10 [ILC Report]; *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22.

⁵⁷Record, Paras 17, 21.

health, property or environment in Arctos. They are merely noticeable and do not meet the required threshold of harm.

28. Further, as climate change is altering vital aspects of the environment like temperature and atmospheric composition and land cover, ecosystems will get stresses and increase the chances of migration⁵⁸. These migrations do not invariably lead to significant transboundary harms⁵⁹ and ruling that the harms caused by Grey Bears in the present case is significant transboundary harm sets a low threshold, and on a policy consideration, would lead to States not undertaking reintroductions of migratory species or forcefully limiting their ranges in order to avoid transboundary liability. Neither of those responses are desirable. As such, it is submitted that the harm caused by the Grey Bears, if any, are not significant.

c. Ranvicora was not bound to notify and consult with Arctos

29. It is submitted that the CBD⁶⁰ and the ILC Draft Articles on Transboundary Harm⁶¹ require parties to notify and consult with other States regarding their projects only if there is a risk of significant transboundary harm.

30. In the *Pulp Mills Case*⁶², the ICJ held that if the EIA confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required to notify and consult with the potentially affected State. Similarly in *Case Concerning*

⁵⁸ DUKES JS AND MOONEY HA. 1999. 'Does global change increase the success of biological invaders?' *Trends in Ecology & Evolution* (4) 135-139; SIMBERLOFF, D. 2000. 'Global climate change and introduced species in United States forests.' *The Science of the Total Environment* (262) 253-261.

⁵⁹ James MacDonald, *Invasive Species: Pro and Con* <https://daily.jstor.org/invasive-species/>.

⁶⁰ Art. 8(1), Art, 14(c).

⁶¹ Art. 8(1).

⁶² *Supra* Note 23.

*Certain Activities Carried out by Nicaragua in the Border Area*⁶³, the ICJ held that Nicaragua was not bound to notify and consult with Costa Rica as there was no threat of significant harm.

31. As mentioned in the preceding paragraphs, there is no threat⁶⁴ or occurrence⁶⁵ of significant transboundary harm. As such, Ranvicora was not bound to notify and consult with Arctos regarding the reintroduction project. It is hence submitted that no transboundary harm was caused to Arctos.

D. The Bears are not an Invasive Alien Species

32. It is submitted that the bears are native to the location in which they have been reintroduced (a) and have not displayed traits that would warrant considering them IASs (b) and even if they have, that they may not be considered IASs as they are native species extending their range due to climate change (c).

a. The bears are native to the location in which they have been introduced

33. Native species are those species which been observed in the form of a naturally occurring and self-sustaining population in historical times⁶⁶. The Grey Bears have been observed as such in the location in which it was introduced. The view that this may have been outside their historic range is a speculation and may not be used to conclusively argue that the bears are alien to that area.

⁶³ *Supra* Note 24.

⁶⁴ Written Submission on behalf of the Respondent, Paras 14, 15.

⁶⁵ *Id.* at paras 29-31.

⁶⁶ Recommendations No. 57 and 99 of the Standing Committee of the Convention on the Conservation of European Wildlife and Natural Habitats.

34. *Arguendo*, if it were outside their historic range, it is submitted that animals found within the dispersal potential of a species should also be considered native⁶⁷. Owing to high dispersal potential among bears⁶⁸, the location in which it has been introduced may reasonably be considered a part of its dispersal potential. In any case, as discussed earlier States are not required to reintroduce animals into the location in which they were last found.⁶⁹

b. The bears have not displayed traits that warrant considering them IASs

35. For a species to become invasive, it must successfully out-compete native organisms, spread and harm ecosystems in its introduced range. Common characteristics of IAS include rapid reproduction and growth, high dispersal ability, phenotypic plasticity and ability to survive in a wide range of environmental conditions⁷⁰. The ultimate impact of the introduction of alien species on global biodiversity is the extinction of native species⁷¹.

36. In the present case, the harms caused by the bears are speculative. The effect on the Tern is uncertain and the dwindling population may be a result of other factors. There are no indications of the bears competing for food or preying on indigenous species in Arctos. As such, there are no grounds to consider the bears invasive.

⁶⁷ Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species (2000). Approved by the IUCN Council, Feb 2000.

⁶⁸ TETSUJI ITOH, et al., "Effective Dispersal of Brown Bears (*Ursus arctos*) in Eastern Hokkaido, Inferred from Analyses of Mitochondrial DNA and Microsatellites," *Mammal Study*, 37(1), 29-41, (1 March 2012)

⁶⁹ IUCN, *Supra* 36, Section 5.

⁷⁰ <https://www.cbd.int/invasive/WhatareIAS.shtml>.

⁷¹ M. N. Clout, *XXV IUGB Congress Biodiversity Loss from Invasive Alien Vertebrate Species*.

c. Even if the Bears are invasive, they may not be considered as such.

37. Climate change facilitates the spread and establishment of many alien species and creates new opportunities for them to become invasive⁷². Further, ranges of migratory species are changing and the distribution of many species is expected to coincide less with areas occupied historically⁷³.

38. Hence, States considering such species IASs would lead to adverse effects on their populations owing to eradication efforts. To prevent this, States are required to not consider such species alien⁷⁴ and instead incorporate them into their national biodiversity plans and make efforts to understand their effects and adapt accordingly⁷⁵.

39. Admittedly, some of the Grey Bears crossed over into Arctos and caused damage. Firstly, this may not be considered invasion. But even if it is considered an invasion, Ranvicora cannot be held liable for it, as it exercised due diligence in the implementation of the reintroduction program and the shift in range was outside its control.

E. Ranvicora's acts were in Furtherance of their Treaty Obligations

40. It is submitted that Ranvicora reintroduced the bears in furtherance of their obligations under the CBD (a) and the Bern Convention (b).

a. Fulfillment of Obligations under the CBD

41. One of the objects of the CBD is to maintain biodiversity⁷⁶. Specifically, parties are required to rehabilitate or restore degraded ecosystems⁷⁷. Parties are required to take

⁷² <https://www.iucn.org/resources/issues-briefs/invasive-alien-species-and-climate-change>.

⁷³ CMS COP Resolution 9.7 on Climate Change Impacts on Migratory Species; Rome, Italy, 5th December 2008

⁷⁴ *Supra* Note 24.

⁷⁵ UNEP/CBD/COP/DEC/VI/23.

⁷⁶ CBD, Art. 1.

action to restore ecosystems and⁷⁸ bring damaged systems back towards their natural condition, or at least a sustainable condition⁷⁹. Further, the COP to the CBD has specifically encouraged parties to restore forest ecosystems⁸⁰.

42. In the present case, Ranvicora has acted in furtherance of these obligations and guidelines. The extinction of the Grey Bears no doubt had undesirable effects on the ecosystems as ecosystems are built and function as a single unit owing to the interactions of its components⁸¹. The loss of even a single component affects the functioning of the ecosystem, especially if the component was a migratory⁸² apex predator⁸³. As such, their reintroduction is required for the restoration of the ecosystem.

b. Fulfillment of obligations under the Bern Convention

43. The Bern Convention requires parties to undertake the reintroduction of species⁸⁴ if it contributes to its conservation. Generally, reintroductions are undertaken to augment species populations⁸⁵. Ranvicora undertook an EIA and found that it was feasible to implement the reintroduction. It must be noted that the reintroduction has been a successful one and has led to an increase in Grey Bear numbers, with only a few cases of

⁷⁷ CBD, Art. 8.

⁷⁸ UNEP/CBD/COP/DEC/III/9, Para 6.

⁷⁹ Supra 15.

⁸⁰ UNEP/CBD/COP/DEC/V/4 Para, 10.

⁸¹ CBD. Art 2; Supra 74, p. 20.

⁸² ROBERT A. ROBINSON et al., Climate Change and Migratory Species, BTO Research Report 414.

⁸³ CAROLINE FRASER, The Crucial Role of Predators: A New Perspective on Ecology, Yale Environment 360, Published at the Yale School of Forestry & Environmental Studies.

⁸⁴ Art. 11.2.a.

⁸⁵ FRANKHAM, RICHARD et al., (2004-01-01). Introduction to Conservation Genetics. United Kingdom: Cambridge University Press. pp. 419–470.

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natural deaths⁸⁶. As such, it is submitted that the reintroduction project is in furtherance of the Bern Convention as well. In conclusion, it is submitted that Ranvicora's reintroduction program is not violative of international law.

⁸⁶Record, Para 15.

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

44. It is submitted that the Grey Bears are threatened, migratory species changing their range due to climate change. Ranvicora, with its reintroduction program, is making efforts to restore this species. Arctos however, instead of supporting efforts to conserve biological diversity, undertook the killing of the bears. This killing of the bears has caused significant transboundary harm to Ranvicora (A) and is in violation of Arctos's treaty obligations (B).

A. Arctos caused Significant Transboundary Harm to Arctos

45. It is submitted that Arctos caused significant transboundary harm to Ranvicora (a) by failing to exercise due diligence (b). Further, Arctos may not justify their killing of the bears under the state of necessity (c).

a. The killing of a migratory predator amounts to causing significant transboundary harm.

46. States may use their territory in a manner that does not cause any harm to other States⁸⁷. This principle has crystalized into custom⁸⁸. For a country to be held liable for causing transboundary harm, the harm must be significant⁸⁹. The discussion as to what constitutes significant harm has already been undertaken in the preceding paragraphs⁹⁰.

⁸⁷ Stockholm Declaration, Principle 21; Rio Declaration, Principle 2; CBD, Art. 3.

⁸⁸ Australia v. France (1974) ICJ Reports 253 at 389; Catherine Tinker, *Responsibility for Biological Diversity Conservation under International Law*, 28 Vanderbilt Journal of Transnational Law, 777, 778 (1995).

⁸⁹ *Supra* Note 58.

⁹⁰ Written Submissions on behalf of the Respondent, Para 29.

47. The Grey Bears play a valuable role in the ecosystem and culture of Ranvicora. Migratory species serve ecosystems in multiple ways such ecosystem engineering, modulation of climate and pest control⁹¹. For example, Grizzly Bears directly regulate prey populations and help prevent overgrazing⁹².
48. They also have crucial predatory roles. For instance, the removal of bears from the Grand Teton National Park, led to a demographic eruption of the moose, which led to the subsequent alteration of vegetation structure and density by unregulated herbivory which in turn led to the reduction of avian migrants in the impacted areas⁹³.
49. Disappearance of a bear species from an ecosystem might precipitate a cascade of subsequent extinctions, and this would constitute a substantial decrease in biodiversity. Many species in species-rich ecosystems belong to groups of functional equivalents, and so long as at least one representative of each group remains, the system will continue to function more or less normally. Removal of the last individual in any functional group will destroy the entire system⁹⁴.
50. The reintroduction project undertaken by Ranvicora has the potential to remedy the harms of the Grey Bear extinction. The newly introduced bears immediately start functioning in the new ecosystem as regulators and facilitators of ecological processes and thereby revitalize the ecosystem which was affected by their extinction. The killing of individual

⁹¹ Theodore H. Fleming et al., *Sonoran Desert Columnar Cacti and the Evolution of Generalized Pollination Systems*, 71 *Ecological Monographs* 511, 512–513 (2001).

⁹² <http://westernwildlife.org/grizzly-bear-outreach-project/biology-behavior/>.

⁹³ JOEL BERGER et al., *A Mammalian Predator–Prey Imbalance: Grizzly Bear and Wolf Extinction Affect Avian Neotropical Migrants*.

⁹⁴ SIMBERLOFF, DANIEL. “Biodiversity and Bears: A Conservation Paradigm Shift.” *Ursus*, vol. 11, 1999, pp. 21–27.

bears reduces their ability to function effectively, leading to a stall in the improvement of the ecosystem, which causes serious harms to the environment of Ranvicora.

51. Further, the bears even play a role in the culture of Ranvicora. Migratory species often have cultural significance to populations in terms of dietary and religious practices⁹⁵. Bears, specifically, have historically been symbols of strength and wisdom in many parts of the world. This cultural significance, among other economic benefits, leads to people travelling to States and spending large amounts of money on eco-tourism programs such as safaris⁹⁶. Hence, the killing of Bears leads not only to the hurting of sentiments in Ranvicora, but also to its economy, by virtue of lost revenues from activities to which the Bears were instrumental.

52. The ILC opines that harm to health, property or environment of another State, which is more than just noticeable but not necessarily serious, amounts to significant transboundary harm⁹⁷. In the present case, Actos's acts causes significant harm to the environment of Ranvicora by impeding its ability to recover fully. As such, it is submitted that Arctos's acts cause significant transboundary harm to Ranvicora.

b. The harm caused is due to Arctos's failure to exercise due diligence

53. States are required to prevent damage to the environment, and otherwise control activities that might cause such damage⁹⁸. This duty is a part of general international law⁹⁹. The

⁹⁵Daniel L. Bottom et al., *Reconnecting Social and Ecological Resilience in Salmon Ecosystems*, 14 *ECOLOGY & SOC'Y*, no. 14, 2009.

⁹⁶ Joanna Burger et al., *Ecotourism and Birds in Coastal New Jersey: Contrasting Responses of Birds, Tourists, and Managers*, 22 *ENVTL. CONSERVATION* 56, 56, 59 (1995).

⁹⁷ ILC Draft Articles on Prevention of Transboundary Harm Article 2, Commentary 4.

⁹⁸ Sands, p 200; D. GOBA, *Principle of Prevention in International Law*, 36 *Revue Ivoirienne de Droit* 9 (2004).

⁹⁹ Award in the Arbitration Regarding Iron Rhine Railway between the Kingdom of Belgium and the Kingdom of Netherlands; *Supra* Note 20, at Para 101

ILC's Draft Articles also require States to take all appropriate measures to minimize the risk of transboundary harm¹⁰⁰. It was held in the *Pulp Mills case* that the obligation entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement. To put briefly, States are required to exercise due diligence.

54. EIAs are a requisite of such due diligence. Principle 17 of the Rio Declaration provides that States *shall* conduct an EIA before undertaking environmentally harmful activities. This mandatory language confirmed that EIAs are now required by general international law¹⁰¹. This requirement is also seen in various instruments, to which Arctos is a signatory.
55. Further, when States find that an activity may cause significant transboundary harm, they are bound to inform the country which is likely to be affected¹⁰². This is a customary requirement under the obligation to co-operate and the principle of good neighborliness¹⁰³.
56. The killing of bears would invariably affect the ecosystem of Ranvicora. In the present case, Arctos failed to conduct an EIA and communicate its intention to kill the bears to Ranvicora. The diplomatic note dated 9th August 2018 may not be considered a notification as it simply requested Ranvicora to cease the reintroduction and not inform Ranvicora of its intention to kill the Bears. As such, it is submitted that Ranvicora undertook the killing of Bears without exercising due diligence.

¹⁰⁰ ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Art. 3.

¹⁰¹ SANDS *Supra* Note 1, at p. 602

¹⁰² CBD. Art 14(c); Rio Declaration Principle 17; UNGA Resolution 2995; *Supra* Note 20.

¹⁰³ SANDS *Supra* Note 1, at p.634

c. The state of necessity defense is inapplicable

57. Countries may invoke the state of necessity defense to preclude the wrongfulness of their act¹⁰⁴. The State mounting this defense must establish that it was done to protect an essential interest and that it was the only means available.
58. In the present case, no essential interest of Arctos has been threatened as discussed earlier. Even if it were, Arctos is required to adapt to these changes pursuant to their obligations under biodiversity and climate change conventions as the bears are entering Arctos due to a climate change induced migration.
59. *Arguendo*, if it is found that an essential interest of Arctos is threatened, it may not kill the bears as it is not the only means available. The ICJ has adopted the ILC view that the “only means” available requirement was to be strictly interpreted, implying that the peril must not have been escapable by any other means¹⁰⁵.
60. Eradication, though effective, is not the only means available. States may adopt measures to contain or control invasions with strategies such as, habitat management and biological control¹⁰⁶. States may also contain IASs to prescribed areas and take measures to prevent their spread with border management strategies¹⁰⁷. As such, it is submitted that there exists other lawful alternatives to killing the bears. Hence, all the requirements of establishing the state of necessity have not been fulfilled.

¹⁰⁴ ILC Draft Articles on State Responsibility, Art 25

¹⁰⁵ ROMAN BOED, State of Necessity as a Justification for Internationally Wrongful Conduct, 3 YALE HUM. RTS. & DEV. L.J. 1, 7 (2000);

¹⁰⁶ *Supra* Note 75

¹⁰⁷ HAROLD A. MOONEY et al., Invasive Alien Species: A New Synthesis.

B. The Killing of the Bears is in Violation of Arctos's Treaty Obligations

61. The killing of the Bears amounts to a violation of the CBD (a), the CMS (b) and the Bern Convention (d).

a. Violation of the CBD

62. The CBD, recognizing the intrinsic value of biodiversity and its components and being concerned that biodiversity is being significantly reduced by certain human activities¹⁰⁸, obligates parties to conserve biodiversity¹⁰⁹. The Grey Bears, irrespective of their location, are a crucial part of the world's biodiversity and are currently threatened and hence, states are required to make efforts to conserve the species.

63. Further, states are specifically required to conserve species in their natural habitats¹¹⁰, maintain viable species of populations¹¹¹ and promote the recovery of threatened species¹¹². A viable population is one that has genetic diversity and faces a minimal risk of extinction¹¹³. Arctos, by killing Bears, and specifically female bears and bear cubs affect the viability of the species. This also violates their obligation to promote threatened species.

64. If the biodiversity of Arctos is indeed threatened, they may not look at Art. 8(h) in isolation and apply it to justify their killing of the bears. States are required to interpret treaties in good faith and in a manner that fulfills their object and purpose¹¹⁴. As such,

¹⁰⁸ CBD, Preamble

¹⁰⁹ CBD. Art. 1

¹¹⁰ CBD. Art. 8

¹¹¹ CBD. Art. 8(d)

¹¹² CBD.. Art. 8(f)

¹¹³Supra 14, P. 42

¹¹⁴Vienna Convention on the Law of Treaties, Art, 31

Arctos should have taken recourse to means that protected its interest while also not harming the Grey Bears populations, by adopting strategies such as the aforementioned habitat restrictions or biological controls.

b. Violation of the CMS

65. Range includes all the areas that a migratory species inhabits, stays in temporarily or crosses at any time on its normal migration route¹¹⁵. Due to the northward migration of the bears, it is occurring in increasingly large numbers in Arctos and this is in conformity with the requirement that a significant portion of the population occur in the state¹¹⁶. Hence, Arctos must be considered a part of the Grey Bears' range.

66. The CMS requires range states to reduce factors that are endangering those species which are listed in Appendix I¹¹⁷. Since the Grey Bears are in the Appendix, the act of poisoning and authorizing the indiscriminate killing of bears is in violation of this obligation as it is bound to further endanger the species.

67. Further, the exception mentioned in Art. III.5 (d) is not applicable as there exists no extraordinary circumstance in the present case, as discussed earlier. Australia applied this exception to justify the killing of great white sharks and the general consensus was that it was not an acceptable interpretation of extraordinary circumstances¹¹⁸.

68. However, even if it were considered to be an extraordinary circumstance, the exceptions should be limited in time and space and should not operate to the disadvantage of the species¹¹⁹. In the present case, Arctos allowed the indiscriminate killing of bears with no

¹¹⁵CMS. Art. II(f)

¹¹⁶ Resolution 3.1, Listing of Species in the Appendices of the Convention (UNEP/CMS/COP12/doc.21.1.1)

¹¹⁷CMS. Art. III.4(c)

¹¹⁸ Arie Trouwborst, *Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species*, Cornell International Law Journal.

¹¹⁹CMS. Art. III.5

qualifications. Such killing is bound to harm the populations as more Grey Bears are bound to migrate to Arctos in the foreseeable future. As such, the killing is in violation of Arctos's obligations under the CMS.

c. Violation of the Bern Convention

69. Under the Bern Convention, states are required to protect flora and fauna, with special emphasis laid on vulnerable migratory species¹²⁰. States are required to prohibit the deliberate killing of species in Appendix II¹²¹. Further, states are required to cooperate with other contracting states in order to protect migratory species¹²².

70. However, exceptions may be made upon the fulfilment of three conditions. Firstly, the killing must be in furtherance of human health, protection of crops and livestock or for the conservation of flora and fauna. Secondly, it must be the only satisfactory option and thirdly, it must not disadvantage the species concerned¹²³.

71. Presently, there is no threat to human health, biodiversity or agriculture. Even if there were, the killing must be in consistent with the overall aims of the Convention¹²⁴. The emergency regulation allows the indiscriminate killing of the Bears which is against the overall aim of the convention and is not the only means available to mitigate the harms caused. As such, it is submitted that Arctos is in violation of the Bern Convention. Hence, it is submitted that Arctos's response to the reintroduction violated international Law.

¹²⁰Convention on the Conservation of European Wildlife and Natural Habitats, Art. 1

¹²¹ *Ib.* Art. 6

¹²² *Ib.* Art. 10

¹²³ *Ib.* Art. 9

¹²⁴ Judgment of 8 June 2006, WWF Italia and others, Case-60/05, ECR 2006, p.5083, §41

PRAYER AND CONCLUSION

The Respondent, The Republic of Ranvicora, for the aforementioned reasons, respectfully requests this Court to adjudge and declare that

1. Ranvicora did not violate international law with respect to its Reintroduction Program

2. Arctos violated international law with respect to its response to Ranvicora's Reintroduction of Grey Bears

Respectfully Submitted

Agents for the Republic of Ranvicora