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24th ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT
COMPETITION

In The
International Court Of Justice
At The Peace Palace, The Hague, Netherlands



QUESTIONS RELATING TO REINTRODUCTION OF BEARS

Federal States of Arctos

Applicant

v.

The Republic of Ranvicora

Respondent

MEMORIAL FOR APPLICANT

2019-2020

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QUESTIONS PRESENTED

I. Whether the Republic of Ranvicora violated international law with respect to its grey bear reintroduction project;

II. Whether the Federal States of Arctos did not violate international law with respect to its responses to Ranvicora's reintroduction of grey bears.

STATEMENT OF JURISDICTION

The Federal States of Arctos and the Republic of Ranvicora have agreed to submit this dispute to the International Court of Justice pursuant to articles 40 (1) of the Statute of the International Court of Justice and in accordance with the *Special Agreement* jointly notified to the Court on 15 July 2019.

Pursuant to article 36 (1) of the Statute, the Court has jurisdiction to decide all matters referred to it for decision. Both parties shall accept the Court's decision as final and binding upon them and shall execute it in its entirety and in good faith.

STATEMENT OF FACTS

The Parties of the Dispute

The Federal States of Arctos and the Republic of Ranvicora are neighboring developed countries situated on Suredia continent in the Northern Hemisphere. The 75-km border area between the countries comprises forests and private farms.

Relevant conventions and conferences

Both Arctos and Ranvicora are members of the United Nations. Both states are parties to the Vienna Convention on the Law of Treaties, the Convention on Biological Diversity [hereinafter CBD], the Convention on the Conservation of European Wildlife and Natural Habitats [hereinafter Bern Convention], the Convention on the Conservation of Migratory Species of Wild Animals [hereinafter CMS], the United Nations Framework Convention on Climate Change, the Kyoto Protocol, and the Paris Agreement.

The countries' representatives participated in the 1972 United Nations Conference on the Human Environment at Stockholm; the 1992 United Nations Conference on Environment and Development at Rio de Janeiro; the 2002 World Summit on Sustainable Development at Johannesburg; and the 2012 Rio+20 Conference at Rio de Janeiro and consented to documents adopted there.

Ursus smokeysius

The grey bear is included on the Red List of Threatened Species; Bern Convention, Appendix II; CMS, Appendix I.

For a long time, grey bears inhabited Ranvicora, Paddington and Aloysius, which are situated on the same continent, but they died out in Ranvicora in 1963 because of overhunting and habitat destruction. No evidence of grey bears living in Arctos exists.

Since 2008 and following five years Ranvicora worked with professionals to plan the reintroduction of grey bears and conducted the environmental impact assessment (EIA). The EIA was domestic in scope and lacked consultations with other countries regarding the impact of the reintroduction program.

Because of the climate change, Ranvicora decided to release the grey bears in its northern region near Arctos, which was questioned to be grey bears' historic range by some biologists.

Since 2013 Ranvicora released 20 grey bears, half of which had GPS collars, at six locations near Arctos border. The nearest location was approximately 50 km from the border.

Starting 19 September 2017 grey bears were seen in Arctos which was confirmed by scientists.

Over about five months from 27 February 2018 grey bears killed 7 horses, 20 sheep in Arctos farms and began damaging apple orchards, beehives, consuming the eggs and nestlings of the Trouwborst tern, an endangered endemic species in Arctos.

Correspondence between the countries

On 9 August 2018 Arctos sent diplomatic note to Ranvicora stating that Ranvicora had violated international law by grey bears' reintroduction.

Arctos requested to compensate its citizens' damages, to cease the reintroduction project and remove the grey bears from the wild.

On 21 August 2018 Ranvicora sent diplomatic note to Arctos stating that Ranvicora was not responsible for bears' actions.

Ranvicora mentioned that according to some experts the bears' range shift was due to the climate changes.

Ranvicora also refused to compensate to the Arctos citizens.

Further developments

Grey bears kept crossing the border of Arctos, killing horses, sheep, terns, damaging orchard and beehives.

On 22 April 2019 a grey bear attacked two children in Arctos, one of which died.

After that Arctos issued an emergency regulation granting permission for Arctos citizens to shot grey bears in Arctos.

On 5 June 2019 Ranvicora sent a diplomatic note to Arctos accusing Arctos of the violation of international law by intentionally poisoning and shooting grey bears from Ranvicora's reintroduction project. Ranvicora demanded that Arctos abolished the emergency regulation.

On 23 June 2019 Arctos disagreed with Ranvicora and explained that Arctos had no other choice for the protection its citizens and property because of Ranvicora's refusal to address consequences of the reintroduction project. Arctos tried to remedy the transboundary harm caused by Ranvicora and acted in accordance with relevant international conventions.

Referral to the Court

Failing negotiations, Arctos and Ranvicora have agreed to a special agreement, submitting it to the International Court of Justice on 15 July 2019.

SUMMARY OF ARGUMENT

I. Ranvicora violated international law by its reintroduction project both under applicable international treaties and under customary international law. Ranvicora violated the duty to regulate and control the risks associated with releasing the grey bears as mandated by the CBD. Moreover, Ranvicora violated CBD decision on sharing information concerning possible occurrence of alien species on territory of other State.

Additionally, Ranvicora failed to comply with its obligation under Bern Convention to strictly control the introduction of non-native species. The actions of Ranvicora also were not in conformity with Recommendations of the Standing Committee to the Bern Convention as Ranvicora did not carefully assess beforehand the all possible hazards during reintroduction of the grey bears.

Ranvicora also violated CMS as it did not properly control or eliminate grey bears and its environmental impact assessment did not contain risk assessments incorporating future climate change scenarios.

II. Ranvicora's grey bear reintroduction project violated customary international law as well. Specifically, Ranvicora's actions caused significant transboundary harm to Arctos endangering human health, flora and fauna therein. Moreover, Ranvicora did not comply with its due diligence obligations of not causing significant transboundary harm and did not conduct EIA in a proper way.

In addition, Ranvicora has no ground to invoke the circumstances stated in the Articles on Responsibility of States for Internationally Wrongful Acts or the circumstances not included in ARSIWA, but in any case precluding the wrongfulness.

III. The Federal States of Arctos did not violate international law with respect to its responses to Ranvicora's reintroduction of grey bears neither under applicable international treaties nor under customary international law.

Arctos acted in accordance with the CBD and its acts in no way intended or resulted to destruction of biological diversity.

The Federal States of Arctos has not violated the Bern Convention. Arctos has repeatedly tried to work with Ranvicora, but in vain. In addition, grey bears were not subspecies that ventured locally in Arctos, thus Arctos was not required to take action to maintain a population of these species. If there is a threat of harm to the survival of the population concerned or in the interests of public health and safety, air traffic safety or other essential public interests, the Convention allows exceptions to several articles which is applicable to our case.

Arctos did not violate CMS as it is not a ranging state for migratory species in the meaning of this convention. Even if Arctos can be considered a ranging state for grey bears, its actions are justified under extraordinary circumstances.

IV. Arctos did not violate customary international law in relation to its responses to grey bear reintroduction project as it did not cause significant transboundary harm to Ranvicora. Arctos also acted in accordance with the obligation to cooperate and, finally, in any event, Ranvicora came before this Court with unclean hands.

ARGUMENT

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

Ranvicora violated its obligations with respect to its grey bear reintroduction project both under applicable international treaties [A] and under customary international law [B]. Moreover, Ranvicora's actions cannot be justified under international law [C]

A. Ranvicora's grey bear reintroduction project violates its obligations under applicable international treaties

As a fundamental principle of international law,¹ States must comply with their treaty obligations in good faith.² Ranvicora did not comply with its obligations and violated the requirements of Convention on Biological Diversity [1], Convention on the Conservation of European Wildlife and Natural Habitats [2] and Convention on the Conservation of Migratory Species of Wild Animals [3].

1. The Republic of Ranvicora violated the requirements of CBD.

a. Ranvicora infringed article 8 (g) of CBD

Article 8 of CBD states that Each Contracting Party shall, as far as possible and as appropriate establish or maintain means to regulate, manage or control the risks associated with the use and release of living modified organisms resulting from biotechnology which are likely to have adverse environmental impacts that could affect the conservation and sustainable use of biological diversity, taking also into account the risks to human health.³

¹ Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals, Cambridge, 1994, 113; Watts, The International Law Commission 1948-1998, Vol. II, Oxford, 1999, 667.

² Vienna Convention on the Law of the Treaties, Jan. 27, 1980, 1155 U.N.T.S. 332, art. 26.

³ Convention on Biological Diversity (hereinafter CBD), Art 8 (g), (June 5, 1992), 1760 U.N.T.S. 79.

On April 22 2019, on a farm in Arctos, two children were mauled by a grey bear⁴. The Republic of Ranvicora did not establish sufficient means for controlling the release of the reintroduction project of grey bears and in the result one of the children died and the other one incurred significant permanent injuries. Therefore, Ranvicora did not comply with its obligation under article 8 (g) of CBD.

b. Ranvicora infringed article 8 (h) of CBD Convention

Article 8 of CBD also puts an obligation on States to prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species⁵.

During 2018 near the border of Arctos, in different farms, grey bears killed 7 horses and 20 sheep, they were damaging apple orchards and beehives, as well as Trouwborst tern which was an endangered endemic species in Arctos.⁶ Thus, the Republic of Ranvicora did not comply with its obligation to control or eradicate the grey bears which led to the negative impact on livelihood and environment of the Federal States of Arctos.

c. The Republic of Ranvicora violated the requirements of CBD

Decision VIII/27

CBD Decision VIII/27 urges Parties and other Governments to share information on domestic occurrences of alien species that may be invasive elsewhere, through appropriate information-sharing mechanisms.⁷

The grey bears are considered to be an invasive species in Arctos, which means that

⁴ R., ¶ 21

⁵ CBD, *supra note 3*, art. 8 (h)

⁶ R., ¶ 17

⁷ Decision adopted by the Conference of the Parties to the Convention on Biological Diversity at its eighth meeting VIII/27. “Alien species that threaten ecosystems, habitats or species (Article 8 (h)): further consideration of gaps and inconsistencies in the international regulatory framework”

Ranvicora had to inform Arctos on possible occurrence of grey bears on its territory which Ranvicora did not comply with.

2. The Republic of Ranvicora violated the requirements of Bern Convention

a. Ranvicora violated article 11 of Bern Convention

According to Article 11 of Bern Convention each Contracting Party undertakes to strictly control the introduction of non-native species⁸.

After releasing the grey bears, Ranvicora fitted half of them by GPS collars. Hence based on the tracking information, Ranvicora clearly knew that bears from time to time crossed the border of Arctos⁹ but did not take any measures for controlling the non-native species. The other half of grey bears was not fitted with GPS collars at all, hence, it could not be controlled.

b. The actions of Ranvicora are not in conformity with

Recommendation No. 158 (2012) of the Standing Committee to the Bern Convention

Point 3 of Recommendation No. 158 (2012) of the Standing Committee recommends Contracting Parties to the Convention and invites Observer States to carefully assess in advance the full range of possible hazards both during a translocation and after release of organisms, including any transboundary impact, taking into account that any translocation bears risks that it will not achieve its objectives and/or will cause unintended damage.¹⁰

⁸ Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19.IX.1979 (hereinafter Bern Convention), art. 11

⁹ R., ¶ 14

¹⁰ Recommendation No. 158 (2012) of the Standing Committee to the Bern Convention on “Conservation translocations under changing climatic conditions”

Though some biologists hesitated whether the northern part of Ranvicora, which borders with Arctos, was the historic range of the bears¹¹, Ranvicora anyway released them without assessing the possibility of transboundary impact on Arctos and its citizens.

c. The actions of Ranvicora are not in conformity with Recommendation No. 159 (2012) of the Standing Committee to the Bern Convention.

Point 1 of Recommendation No. 159 (2012) of the Standing Committee recommends to urgently implement the practical conservation measures that have been recommended by the Group of Experts and encourage appropriate national bodies involved in nature conservation to adopt and use them as resources permit; urgent action should more particularly focus on implementing adaptive management practices and strategies, enhancing the adaptive capacity of vulnerable species (rare/endemic/threatened), minimising pressures and threats on species and habitats that are most vulnerable to climate change, and implementing monitoring of, inter alia; species' population trends, species behavior, including phenology, and climate change impacts upon critical areas.¹²

Point 6 of Recommendation No. 159 (2012) of the Standing Committee recommends Contracting Parties to the Convention and invites Observer States to undertake knowledge transfer activities using existing mechanisms, to encourage awareness by other stakeholders and the general public of the challenges posed and opportunities presented by climate change when considering biodiversity conservation, including its links to other sectors and the opportunities for win–win solutions.

Point 8 of Recommendation No. 159 (2012) of the Standing Committee recommends to adopt the good practice, identified in the case of the United Kingdom, of implementing

¹¹ R., ¶ 13

¹² Recommendation No. 159 (2012) of the Standing Committee, adopted on 30 November 2012, on the effective implementation of guidance for Parties on biodiversity and climate change

measures for the assessment of introductions that include assessment of the impacts of projected climate changes on species' invasion potential.

The grey bear's range in Paddington and Aloysius has been shifting poleward, in response to rising temperatures and shifting vegetation due to climate change¹³. For these reasons, it was decided that the grey bears would be released in the northern region of Ranvicora close to the border with Arctos.¹⁴

In the sense of abovementioned point, Arctos was definitely a stakeholder and Ranvicora should have informed Arctos about possible challenges caused by climate change. Ranvicora neither considered climate change impact on grey bears nor informed Arctos about possible consequences of its reintroduction project. Ranvicora's EIA did not contain assessment of the impacts of projected climate changes on species' invasion potential.

Thus, Ranvicora did not act in conformity with Recommendation No. 159 (2012) of the Standing Committee to the Bern Convention.

3. Ranvicora violates CMS

a. Ranvicora violates article III point 4 of CMS

CMS imposes an obligation on Parties that are Range States of a migratory species listed in Appendix I to endeavour to the extent feasible and appropriate, to prevent, reduce or control factors that are endangering or are likely to further endanger the species, including strictly controlling the introduction of, or controlling or eliminating, already introduced exotic species¹⁵.

¹³ R., ¶13

¹⁴ *Ibid*

¹⁵ Convention on the Conservation of Migratory Species of Wild Animals (hereinafter CMS), June 23, 1979, 19 I.L.M. 15, 1651 U.N.T.S. 28395, Article 3, ¶4, c

Grey bear is included on Appendix I of CMS¹⁶. Hence, Ranvicora, as a range state for grey bears, should control or eliminate introduced grey bears to prevent, reduce or control factors that are endangering or are likely to further endanger the species.

According to Ranvicora, Arctos's responses to its reintroduction project violate international law as they endanger the species¹⁷. In the meantime, Ranvicora does not control and refuses to eliminate grey bears from the wild in order to provide their protection¹⁸. Ranvicora fitted only half of the bears with GPS collars¹⁹ and no fact in the Record indicates using these collars for the purpose of protection of grey bear, e.g. preventing grey bears from crossing Arctos board.

b. Ranvicora did not act in conformity with CMS resolution 11.28

CMS resolution 11.28 invites Parties and non-Parties to take into account the risk of migratory species to become invasive themselves if translocated and/or introduced outside their natural range, by undertaking dedicated risk assessments incorporating future climate change scenarios for any movement of animals, including measures related to conservation actions targeting endangered species²⁰.

Ranvicora translocated grey bears from Paddington and Aloysius,²¹ which was their natural range.²² However, Ranvicora's environmental impact assessment (EIA) did not contain risk assessments incorporating future climate change scenarios²³ which was not in conformity with CMS 11.28 resolution.

¹⁶ R., ¶9

¹⁷ *Idem*, ¶22

¹⁸ *Idem*, ¶19

¹⁹ *Idem*, ¶14

²⁰ CMS resolution 11.28 on Future CMS Activities related to Invasive Alien Species, Adopted by the Conference of the Parties at its 11th Meeting (Quito, 4-9 November 2014)

²¹ R., ¶14

²² *Idem*, ¶10

²³ *Idem*, ¶12

B. Ranvicora’s grey bear reintroduction project violates its obligations under international customary law

1. Ranvicora causes transboundary harm to Arctos

States are not permitted to use their territory in a manner which can cause harm to other states.²⁴

The International Law Commission (ILC) in its codification works has confirmed, that a risk of a significant transboundary harm exists when there is either a high probability of causing a significant transboundary harm or even a low probability of causing a disastrous transboundary harm.²⁵

Besides, this harm must have a causal link²⁶ and must be significant. What constitutes “significant” is determined in relation to a specific factual context.²⁷ For transboundary harm to be significant there must be a real detrimental effect on matters such as human health²⁸,

²⁴ See, Corfu Channel (U.K. & Northern Ireland v. Albania), 1949 I.C.J. 4, 22. pp. 4, 23, Trail Smelter (United States, Canada), 3 U.N.R.I.A.A. 1905, 1965; Rio Declaration on Environment and Development, Jun. 14 1992, 31 I.L.M. 874, Principle 2.

²⁵ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, A/56/10, Yearbook of the ILC, 2001, vol. II, Part Two, article 2, p. 152.

²⁶ X. Hanqin, Transboundary Damage in International Law 6 (2003); J. Barboza, The Environment, Risk and Liability in International Law 11 (2011).

²⁷ Craik, The International Law Of Environmental Impact Assessment 60 (2008).

²⁸ Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, ¶29 (Jul. 8).

property or environment in other States,²⁹ the biological resources such as flora and fauna³⁰, and not simply noticeable³¹ *de minimis* harm³² or minor incidents causing minimal damages.³³

In our case, Ranvicora's grey bear reintroduction project constitutes significant harm to Arctos. More precisely, grey bear migrated to Arctos³⁴, killed 8 horses, 20 sheep there, damaged apple orchards and beehives and were sniffing out the nests and consuming the eggs and nestlings of the Trouwborst tern, an endangered endemic species in Arctos³⁵. This situation had a continuing character³⁶. The most tragic consequence of grey bear reintroduction project is a death and significant permanent injuries of two Aurokan children as a result of bears' attack³⁷.

Clearly, the abovementioned situations cannot be considered as minimum harm and do constitute significant harm to the life and health of the people of Arctos, and the flora and fauna therein.

Hence, Ranvicora's grey bear reintroduction project violates its international obligations not to cause transboundary harm.

²⁹ 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 Case (U.K. v. Alb.), 1949 I.C.J. 4, 22.

³⁰ Eleventh Report of the Special Rapporteur on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law, A/CN.4/468, ¶6 (May 25, 1995) (Julio Barboza).

³¹ Cunningham, *Do Brothers Divide Shares Forever? Obstacles to the Effective Use of International Law in Euphrates River Basin Water Issues*, 21 U. PA. J. INT'L ECON. L. 131, 153 (2000).

³² Klein, et al., *Modernizing Water Law: The Examples of Florida*, 61 FLA. L. REV. 403, 447 (2009)

³³ Lac Lanoux (Fr. v. Spain), 12 UNRIAA 281 (1957).

³⁴ R., ¶16

³⁵ *Idem*, ¶17

³⁶ *Idem*, ¶20

³⁷ *Idem*, ¶21

2. *Even if transboundary harm is not significant, Ranvicora violated its due diligence obligations*

a. Ranvicora has not fulfilled its diligence obligation of not causing significant transboundary harm

The test of due diligence is accepted as a standard for the duty to prevent transboundary harm as the most appropriate standard to assess the obligation of not causing significant transboundary harm.³⁸ Hence, states are not automatically liable for damage caused.³⁹ The duty of due diligence is an obligation of conduct⁴⁰, not an obligation of result. It is not intended to guarantee that significant harm is totally prevented, but only that the State concerned exerts its best possible efforts to avoid or minimize the chance of occurrence of the harm⁴¹.

In the case at hand, Ranvicora did not exert any effort to avoid or minimize the harm in Aurok. Just the contrary, Ranvicora excluded its responsibility for bears' actions and refused to pay any compensation for the occurred harm⁴².

b. Ranvicora violated the principle of precaution

In accordance with the precautionary principle, which is considered to have customary character⁴³, states are required to reduce environmental damage and the risk of it⁴⁴. This means

³⁸ Birnie and Boyle, *International Law and the Environment*, 112.

³⁹ G. Handl, *Balancing of Interests and International Liability for the Pollution of International Watercourses: Customary Principles of Law Revisited*, 13 Canadian YIL, 1975, pp. 156,167-8.

⁴⁰Stockholm Declaration on the Human Environment, Prin.21, U.N. Doc.A/CONF.48/14/Rev.1 (1973), Pulp Mills on the River Uruguay, Case Concerning (Argentina v Uruguay) (Merits), ¶101, ICJ Rep 14 (2010), paras. 55-56.

⁴¹Rio Declaration on Environment and Development, Prin.2, U.N. Doc.A/CONF.151/26 (1992).

⁴² R., ¶19

⁴³ Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion of Feb. 1, 2011, 15 ITLOS Rep. 10, ¶ 135.

⁴⁴ Daniel Bodansky, *The Oxford Handbook of International Environmental Law* 598 (2007).

that states should avoid, foresee and diminish threats to the environment⁴⁵. At the same time, the state conducting the activity has the burden of proving that its activities do not endanger the environment or human health.

In our case, Ranvicora did not consider the possibility of the occurrence of harm in Arctos as a result of bears reintroduction project⁴⁶ and further refused to mitigate and compensate the occurred harm⁴⁷. Meanwhile, Ranvicora was aware that bears used to migrate⁴⁸ and should have anticipated the possible outcome of its project.

c. In any event, Ranvicora's environmental impact assessment was not conducted in a proper way

In the field of environment protection, the ICJ has affirmed that due diligence involves an obligation to carry out an EIA if there is a risk of significant transboundary harm.⁴⁹

In case of the risk of occurring transboundary environmental harm, conducting an EIA and informing the interested States about its results is fixed in different regulations of international organizations⁵⁰, in domestic legislations⁵¹, and also in multilateral international treaties⁵², thus this is a sufficient evidence for them to be considered customary norms.⁵³

⁴⁵ IUCN, Guidelines for Applying the Precautionary Principle1 (2007)

⁴⁶ R., ¶12

⁴⁷ *Idem*, ¶19

⁴⁸ *Idem*, ¶10

⁴⁹ Pulp Mills, *supra note* 39, ¶204-205.

⁵⁰ UNEP Principles of Environmental Impact Assessment, 1987 World Bank Operational Directive 4.00 (1989), Annex A: Environmental Assessment.

⁵¹ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, A/56/10, Yearbook of the ILC, 2001, vol. II, Part Two, pp. 156-160.

⁵² Convention on Environmental Impact Assessment in a Transboundary Context, 1991, articles 2, 3.; Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1992, art. 2(5)(a).

⁵³ Malcolm Shaw, International Law, 6th ed., Cambridge University Press, Cambridge, 2008, pp. 85-88.

Moreover, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken⁵⁴.

The ILC Prevention articles have affirmed the customary character of consultations, which is to find acceptable solutions concerning measures to be adopted in order to prevent significant transboundary harm, or at any event to minimize the risk thereof.⁵⁵

The principle of cooperation is one of the principles of international law.⁵⁶ Concerning the conducts containing the risk of transboundary environmental harm, the principle assumes that the interested States should cooperate to find mutually acceptable solutions for preventing the possible damage and persisting the environmental balance.⁵⁷ And the cooperation should be conducted in a good faith.⁵⁸

According to our case, Ranvicora conducted an EIA, which was national in scope and did not include consultations with affected states. No evidence of further monitoring of the effects of Ranvicora's project are present. Neither Ranvicora tried to cooperate with Arctos in good faith keeping denying its responsibility for grey bear reintroduction project⁵⁹.

Thus, we can conclude that EIA was not conducted in accordance with international law.

C. Ranvicora's actions are not justified under international law

Ranvicora could not invoke the circumstances precluding the wrongfulness of its acts. Particularly, Ranvicora has no ground to invoke the circumstances stated in the Articles on

⁵⁴ Pulp Mills, *supra note 39*

⁵⁵ Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, A/56/10, Yearbook of the ILC, 2001, vol. II, Part Two, p. 161.

⁵⁶ GA Res. 2625, UN, GAOR, 25th Sess., Supp. No. 28, p. 123.

⁵⁷ Gabčíkovo-Nagymaros Project (Hungary vs. Slovakia), Judgment, ICJ Reports 1997, p. 78, para. 140.; Pulp Mills, *supra note 39*, pp. 78-79, para. 194.

⁵⁸ Nuclear Tests (Australia v. France), ICJ Reports 1974, p. 268, para. 46.

⁵⁹ R., ¶19

Responsibility of States for Internationally Wrongful Acts (ARSIWA) [1] or the circumstances not included in ARSIWA, but in any case precluding the wrongfulness [2].

1. Ranvicora has no ground to invoke the circumstances precluding the wrongfulness of its acts stated in the ARSIWA.

Articles 20-24 of the ARSIWA state circumstances precluding the wrongfulness of an act. Particularly, the abovementioned Articles provide, that the wrongfulness of an act is precluded, in case of Consent, Self-Defense, Countermeasures in respect of an internationally wrongful act, Force majeure, Distress and Necessity.

None of the abovementioned circumstances can be applied in our case. Thus, Ranvicora has no ground to invoke them for precluding the wrongfulness of its acts regarding the grey bears reintroduction project.

2. Ranvicora has no ground to invoke the circumstances not included in ARSIWA, but in any case precluding the wrongfulness of its acts.

It is generally accepted, that there are circumstances, which are not included in ARSIWA, but in any case preclude the wrongfulness of its acts⁶⁰. These include:

1. Performance in conflict with a peremptory norm (jus cogens),⁶¹
2. The “exceptio inadimplenti non est adimplendum”,⁶²
3. The so-called “clean hands” doctrine.⁶³

None of the abovementioned circumstances is present in our case. Thus, Ranvicora’s actions cannot be justified under international law.

⁶⁰ Crawford James, “Second Report on State responsibility”, International Law Commission 51 session, Geneva, 1999, p. 37

⁶¹ *Ibid*, p. 38

⁶² *Ibid*, p. 41

⁶³ *Ibid*, p. 49

II. The Federal States of Arctos did not violate international law with respect to its responses to Ranvicora’s reintroduction of grey bears

A. Arctos did not violate applicable international treaties with respect to its responses to Ranvicora’s reintroduction of grey bears

1. Arctos did not violate the requirements of CBD.

a. The Federal States of Arctos did not violate article 1 of CBD

“The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.”⁶⁴

Arctos has complied with Article 1 because it did not violate the conservation of biological diversity. The mere fact of killing only eight bears⁶⁵ does not endanger the biodiversity of animals.

b. The Federal States of Arctos did not violate article 5 of CBD

CBD states that Contracting Parties shall cooperate with other Contracting Parties for the conservation and sustainable use of biological diversity as far as possible and as appropriate⁶⁶. While cooperation does not necessarily require an achievement of mutually acceptable solutions, the Government of Arctos undertook proper actions and forwarded a diplomatic note to the Government of the Republic of Ranvicora on 9 August 2018 expressing

⁶⁴ CBD, *supra note 3*, art. 1.

⁶⁵ R., ¶20, 21

⁶⁶ CBD, *supra note 3*, art.5

its concern about the reintroduction of grey bears in Ranvicora. However, the answer from the Republic of Ranvicora was disappointing as it refused to stop the reintroduction project⁶⁷.

Thus, Arctos has complied with Article 5 of the CBD.

c. The Federal States of Arctos did not violate article 8 of CBD

Arctos has complied with Article 8 of the CBD. Article 8 CBD places an obligation on Contracting Parties to conserve, as far as possible and appropriate, its biological resources with a view to ensuring their sustainable use⁶⁸. Hence, the CBD requirement is much not whether to harvest or exploit wildlife but how to ensure that such use is sustainable over the long term.

In addition, article 8 States that risks to the safety of human life must be taken into account.

In this case Ranvicora has not taken any measures to prevent adverse effects and risks to the safety of the people of Arctos appeared. In any event, Arctos's killing of several grey bears does not endanger the sustainable use of grey bears.

2. The Federal States of Arctos did not violate the requirements of Bern Convention.

a. Arctos did not violate article 1 of Bern Convention

Article 1 states that the aims of this Convention are to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the co-operation of several States, and to promote such co-operation.⁶⁹

The conservation of grey bears depends on both countries, and Arctos made several attempts to cooperate with Ranvicora but in vain. Therefore, Arctos did not infringe the provisions of article 1.

⁶⁷ R., ¶ 19

⁶⁸ CBD, *supra note 3*, art. 8 (g), (h)

⁶⁹ Bern Convention, *supra note 8*, art. 1

b. Arctos did not violate article 2 of Bern Convention

According to article 2, the Contracting Parties shall take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally.⁷⁰

In the sense of abovementioned article, the grey bears were not sub-species at risk locally in Arctos, therefore Arctos was not obliged to take measures for maintaining the population of these species.

c. Arctos did not violate article 6 of Bern Convention

According to article 6 of Bern Convention, each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II. Among the actions prohibited for these species all forms of deliberate capture and keeping and deliberate killing is mentioned.⁷¹

It is clear from the context of article 6 that all actions taken against species included in Appendix II must be deliberate. As has already been noted, the actions of Arctos were due to violations on the part of Ranvicora, and were intended only to protect their citizens and territories. Hence, the purpose of killing of grey bears was not the killing itself, but the protection of human life in Arctos, which precludes the possibility of premeditation.

d. Arctos did not violate article 8 of Bern Convention

In cases where, in accordance with Article 9, exceptions are applied to species specified in Appendix II, Contracting Parties shall prohibit the use of all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species, and in particular, the means specified in Appendix

⁷⁰ *Idem*, art. 2

⁷¹ *Idem*, art. 6

IV.⁷²

The actions of Arctos were not capable of causing disappearance of grey bears. They were only a way of preventing more serious consequences. Moreover, Arctos did not use any indiscriminate means of capture and killing of grey bears⁷³. Hence, Arctos in no way violated article 8 of Bern convention.

e. Even if Arctos violated articles 6 or 8 of Bern convention, its actions are justified under article 9

Article 9 of Bern Convention states that Each Contracting Party may make exceptions from the provisions of Articles 4, 5, 6, 7 and from the prohibition of the use of the means mentioned in Article 8 provided that there is no other satisfactory solution and that the exception will not be detrimental to the survival of the population concerned: in the interests of public health and safety, air safety or other overriding public interests.⁷⁴

Arctos's actions were proper in accordance with the exceptions provided by Article 9. Arctos referred to Ranvicora to eliminate the negative consequences of the reintroduction project but Ranvicora refused to do it. Hence, Arctos had no other solution but to take necessary measures for the protection of the interests of public health and safety.

f. Arctos did not violate article 10 of Bern Convention

Article 10 states that the Contracting Parties undertake, in addition to the measures specified in Articles 4, 6, 7 and 8, to co-ordinate their efforts for the protection of the migratory species specified in Appendices II and III whose range extends into their territories.⁷⁵

⁷² *Idem*, art. 8

⁷³ R., ¶21

⁷⁴ Bern Convention, *supra note* 8, art.9

⁷⁵ *Idem*, art. 10

In the sense of this provision, the territory of Arctos was not a range for grey bears. There are no historic or fossil records of grey bear presence in Arctos⁷⁶. Consequently, Arctos had no obligation under article 10 of Bern Convention.

3. Arctos did not violate CMS

a. Arctos is not a ranging state for grey bears

"Range State" in relation to a particular migratory species means any State that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species⁷⁷.

Meanwhile "range" means all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time on its normal migration route⁷⁸.

This means that any state can be considered a ranging state if a migratory species inhabits, stays in temporarily, crosses or overflies the territory of that state at any time on its normal migration route. In the case at hand grey bears crossed the territory of Arctos⁷⁹, however this was not bears' normal migration route⁸⁰. Hence, Arctos cannot be considered grey bears' ranging state.

b. Even if Arctos is a ranging state for grey bears, their taking is justified under CMS

Grey bear is listed as endangered on Appendix I of CMS⁸¹. The Article III.5 of the CMS contains an open-ended clause which permits the taking of migratory species if "extraordinary

⁷⁶ R., ¶12

⁷⁷ CMS, *supra note 15*, art. I ¶1(h)

⁷⁸ *Idem*, ¶1(f)

⁷⁹ R., ¶16, 20

⁸⁰ *Idem*, ¶10, C., A14

⁸¹ *Idem*, ¶9

circumstances so require.”⁸² It grants states a considerable degree of discretion in determining when it should be invoked.

Extraordinary means something very unusual, special, unexpected, or strange⁸³.

Migration of grey bears to Arctos is very unusual⁸⁴ and Arctos had to undertake measures and do what was necessary to protect its citizens and their property from the imminent threat posed by the grey bears. Consequently, extraordinary circumstances justify Arctos’s responses to Ranvicora’s grey bears reintroduction project.

B. Arctos did not violate customary international law with respect to its responses to Ranvicora’s reintroduction of grey bears

1. Arctos did not cause significant transboundary harm to Ranvicora

As already mentioned, for transboundary harm to be significant there must be a real detrimental effect on matters such as human health, property or environment in other States.⁸⁵

Arctos killed only eight bears as a result of its responses to Ranvicora’s reintroduction of grey bears⁸⁶, which does not constitute any harm to the human health, property or environment in Ranvicora, let alone significant harm.

2. Arctos complied with its obligation to cooperate

Although the obligation to cooperate does not require to reach an agreement⁸⁷, Arctos has undertaken several attempts to negotiate with Ranvicora addressing negative consequences

⁸² CMS, *supra note 15*, art. III ¶ 4

⁸³ For this, see: [<https://dictionary.cambridge.org/dictionary/english/extraordinary>]

⁸⁴ R., ¶10, C., A14

⁸⁵ Corfu Channel (U.K. & Northern Ireland v. Albania), 1949 I.C.J. 4, 22.

⁸⁶ R., ¶20, 21

⁸⁷ Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 42 (Oct. 15), para. 31.

of the grey bears reintroduction project and asked Ranvicora to end the harmful project and remove the grey bears from the wild⁸⁸. However, Ranvicora denied its responsibility for the consequences of the project.

3. In any event, Ranvicora came before the Court with unclean hands

In accordance with “clean hands” doctrine or *ex dolo malo non oritur actio* principle recognized under international law, a party cannot present a claim if it violated international in relation to the subject of its claim itself.⁸⁹

The doctrine of clean hands deprives a state of standing when it complains of illegalities itself has committed as was described by this Court⁹⁰.

As long as Ranvicora caused significant transboundary harm to Arctos and did not comply with its due diligence obligations it cannot blame Arctos for the same violations. Arctos has tried to remedy the transboundary harm that Ranvicora caused as Ranvicora refused to do anything⁹¹.

⁸⁸ R., ¶¶18, 23

⁸⁹ ILC, Fifty-seventh session, Sixth report on diplomatic protection, A/CN.4/546, pp. 2-5; Bin Cheng, General Principles Of Law as Applied by International Courts and Tribunals, reprinted, Cambridge, 1987, 156; The Good Return Case, Ecuadorian-United States Claims Commission, (1862) 3 Int. Arb., p. 2743

⁹⁰ Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), [1986] ICJ Rep 14 ¶392-394

⁹¹ R., ¶ 23

CONCLUSION AND PRAYER FOR RELIEF

Arctos respectfully requests the Court to adjudge and declare that:

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

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

Respectfully submitted

AGENTS OF THE APPLICANT