
24TH STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION, 2019

BEFORE
THE INTERNATIONAL COURT OF JUSTICE
LA COUR INTERNATIONALE DE JUSTICE



AT THE PEACE PALACE,
THE HAGUE, NETHERLANDS

GENERAL LIST NO. 24
YEAR 2019
CASE CONCERNING THE REINTRODUCTION OF GREY BEARS

FEDERAL STATES OF ARCTOS.....APPLICANT

REPUBLIC OF RANVICORA.....RESPONDENT

-WRITTEN SUBMISSION ON BEHALF OF THE APPLICANT-

TABLE OF CONTENTS

INDEX OF AUTHORITIES	iv
TABLE OF ABBREVIATIONS	xii
QUESTIONS PRESENTED	xv
STATEMENT OF JURISDICTION	xvi
STATEMENT OF FACTS	xvii
SUMMARY OF ARGUMENTS	xix
ARGUMENTS ADVANCED	1
I. RANVICORA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS GREY BEAR REINTRODUCTION PROJECT	1
1.1. The grey bears are IAS in Arctos.....	1
1.1.1. Reintroduced species as IAS.....	1
1.1.2. Impacts of IAS.....	3
1.1.3. Arctos is not a Range State.....	4
1.2. The Project Resulted in Transboundary Harm to Arctos.....	6
1.2.1. Principle of preventing transboundary harm.....	6
1.2.2. IAS and transboundary harm.....	7
1.3. Ranvicora violated international law by not conducting TEIA.....	8
1.4. Ranvicora violated its duty to notify and co-operate.....	10
1.4.1. Duty to cooperate.....	11
1.4.2. Duty to notify.....	12
1.5. Ranvicora is obligated to cease its activities and pay compensation.....	13
1.5.1. Cessation of Activities.....	13
1.5.2. Compensation for damage caused.....	14

II. ARCTOS DID NOT VIOLATE INTERNATIONAL LAW WITH ITS RESPONSES TO THE PROJECT.	15
2.1. Measures taken are permissible under conventional international law	15
2.1.1. Response is permissible under Article III(5)(d) of the CMS	15
2.1.2. Response is permissible under Article 9 of the Bern Convention	17
2.1.3. Response is permissible and mandated under the CBD	20
2.2. Measures Were Taken to Remedy and Prevent Further Transboundary Harm	21
2.2.1. Arctos has acted in furtherance of the precautionary principle	21
2.2.2. Measures Meet the Test of Due Diligence	22
2.2.3. <i>In arguendo</i> , measures are precluded from being considered an international wrongful act	24
2.3. The Trowborst Tern is a protected endangered endemic species	25
PRAYER	27

INDEX OF AUTHORITIES

JUDICIAL DECISIONS

Case C-247/85, Comm'n v. Belgium, 1987 E.C.R I-3029.....	19
Case Concerning Pulp Mills on The River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Rep. 14, ¶205.....	9, 22
Case Concerning the Gabčíkovo-Nagymaros Project, Judgement, 1997 I.C.J. Rep. 7 (Sept. 25)	7, 24
Certain Activities Carried Out by Nicaragua In the Border Area (Costa Rica v. Nicaragua), Judgement, General List No.150 (Feb. 2018).....	14
Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 22 (Apr. 9)	6, 11
Factory at Chorzów, (Ger v. Pol), Jurisdiction, 1927 P.C.I.J., Series A, No. 9 21 (July 26)..	14
Fisheries Jurisdiction, (F. R.G v. Iceland), Merits, 1974 I.C.J. Rep. 175 ¶71-76 (July 25)....	14
Island of Palmas Arbitration (Neth v. US) 2 R.I.A.A. 829, 831 (1928).....	7
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8)	7, 11
Ligue pour la protection des oiseaux and Others v Premier Ministre, Judgement, 2003 Case C-182/02, (Oct. 16).....	18
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, 1986 I.C.J. Rep. 14 (June 27)	14
North Sea Continental Shelf (Ger. v. Neth.; Ger. v. Den.), Judgment, 1969 I.C.J. 3, ¶77 (Feb. 20).....	22
Rainbow Warrior Case (New Zealand v. France), (1990) 20 U.N.R.I.A.A. 215 (Apr. 30). ...	13
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, ITLOS Rep. 10 ..	21

Territorial Jurisdiction of International Commission on the River Oder (U.K. v. Pol.) 1959 P.C.I.J. Ser. A, No. 23 (Sept. 10)	7
The Mox Plant Case (Ireland v. United Kingdom), Case No. 10, Order of Dec. 3 2001, ITLOS Rep. 95, ¶84.....	9
Trail Smelter Arbitration (U.S. v. Can.) 1938/1941, 3 R.I.A.A. 1905	7

INTERNATIONAL LEGAL INSTRUMENTS

Articles on Responsibility of States for Internationally Wrongful Acts and Commentary, art.30, G.A. Res. 56/83, 2002 (Jan. 28, 2002)	13, 14, 24
Charter of the United Nations, Oct. 24, 1945 1 U.N.T.S. 16	11
Conservation for the Protection of Migratory Birds Between the United States and Great Britain art.7, Aug.16, 1916.....	16
Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79	passim
Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309; LOSC art.206	9
Convention on the Conservation of European Wildlife and Natural Habitats art.11(2)(b), Sept. 19, 1979, 1284 U.N.T.S. 209.....	3, 16, 25
Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333.....	1, 4, 15, 17
Convention on the Transboundary Effects of Industrial Accidents art.4(4), Mar. 17, 1992, 2105 UNTS 457.....	9
Convention on Wetlands of International Importance especially as Waterfowl Habitat, Feb. 2, 1971, 996 U.N.T.S. 245.....	16
ILC Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries, 2 Y.B Int'l L Comm'n 392 (2001)	passim

ILC Principles on the Allocation of Loss in the Case of Transboundary Harm, Principle 4, 2(2) Y.B Int’IL Comm’n (2006).	14
International Convention on Oil Pollution Preparedness, Response and Cooperation art.4.7, 1990, 30 I.L.M. 733.....	11
Rio Declaration on Environment and Development, June 14, 1992, Principle 2, 31 I.L.M. 874	6, 9, 11, 12
Stockholm Declaration, Principle 21, 11 I.L.M. 1416	6, 11
United Nations Convention on the Law of the Sea art.123, 1982, 29 I.L.M. 1261.....	11
Vienna Convention for the Protection of the Ozone Layer art.2.2, 1985, 26 I.L.M. 1529	11
Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331	17

OTHER LEGAL AUTHORITIES

16 th Meeting of the CMS Scientific Council on Range State Classification, UNEP/CMS/ ScC16/24, ¶5 (Jun. 30, 2010).	4, 5
Bern Rec.No.158, 2012.	1
Bern Rec.No.56, 1997.	18
Bern Rec.No.57, 1997.	1
Bern Rec.No.59, 2012.	2
CBD CoP Decision VI/23, 2002, Guiding Principle 14.	20
CBD CoP Decision VI/23, 2002.	7
CBD CoP Decision, Principle 4, 2002.	11
CBD Decision on Alien Species that Threaten Ecosystems, Habitats or Species, CBD/COP/5/8 (May 26, 2000).	3
CBD Decision V/6, Principle 10, 2000.	9
CBD SBSTTA Rec.No.I/8, ¶16.....	3

- WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT-

CBD, Voluntary Guidelines on Biodiversity: Inclusive Impact Assessment, Background Document to CBD Decision VIII/28, CBD Technical Series No.26, 31 (2006).....	10
CMS Resolution 11.28, 2014.	9
CMS Resolution 3.1, 2009.	5
Guidance Document on Sustainable Hunting under the Birds Directive, 79/409/EEC, European Commission (Dec., 2008).....	19
Guidance Document on the Strict Protection of Animal Species of Community interest under the Habitats Directive, 92/43/EEC, European Commission.....	20
IUCN, <i>Global Strategy on IAS</i> , IUCN 26 (2001).....	17
IUCN, <i>Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management</i> , IUCN 1 (2007)	21
IUCN, <i>Guidelines for Reintroductions and Other Conservation Translocations</i> , IUCN 1 (2013).	2
IUCN, <i>Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species</i> , IUCN 51 (2000).....	3
Report of the Fifteenth Meeting of the Scientific Council, CMS (Nov. 28, 2008).	5
Standing Committee to the Bern Convention, European Strategy on IAS, T-PVS/Inf.2004 34,36 (Dec.1-5, 2003).....	17
Standing Committee to the Bern Convention, Interpretation of Article 9, T-PVS/Inf.2010 ¶2.2.2 (Oct. 27, 2010).....	19
Standing Committee to the Bern Convention, Revised Resolution No.2 on the Scope of Articles 8 and 9 of the Bern Convention, T-PVS.2011 (Dec. 2, 2011)	17

ARTICLES

- WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT-

A. Boyle, <i>Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited</i> , in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 76 (Boyle et al., eds., 1999).....	23
Arie Trouwborst, <i>Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species</i> , 2, Cornell Int'l L.J. 44, 41-46 (2014).....	16
Ben Packham, <i>Western Australian given Exemption from Federal Laws to Cull Sharks</i> , THE AUSTRALIAN, (Jan. 21, 2014, 3:41 PM).....	16
BirdLife International, <i>The Prioritization of Endemic Bird Areas</i> , BIRD LIFE DATA ZONE 39	25
C. Brown. <i>Tilapia and the Environment</i> , 4(2) TED CASE STUDIES, 208 (1995).....	3
Francesca Gherardi, Claudia Angiolini, <i>Eradication and Control of Invasive Species in BIODIVERSITY CONSERVATION AND HABITAT MANAGEMENT</i> (2009).	18
G. Sherley & S. Lowe, <i>Towards a Regional Invasive Species Strategy for the South Pacific: Issues and Options</i> , in INVASIVE SPECIES IN THE PACIFIC: A Technical Review and Draft Regional Strategy 7-8 (2000).....	4
G.M. Sikoyo & L. Goldman, <i>Assessing the Assessments: Case Study of an Emergency Action Plan for the Control of Water Hyacinth in Lake Victoria</i> , 23(3) INTERNATIONAL JOURNAL OF WATER RESOURCES MANAGEMENT 443 (2007).....	12
H. Abaza, R. Hamwey, <i>Integrated Assessment as a Tool for Achieving Sustainable Trade Policies</i> , 2(3) ENVIRONMENTAL IMPACT ASSESSMENT REVIEW 481, 498 (2001).....	9
Han Somsen, Arie Trouwborst, <i>Are pioneering coyotes, jackals and foxes alien species? Canid colonists in the Changing Conservation Landscape of the Anthropocene</i> , International Journal of Conservation 1, 5 (2018).	2

Ilias Plakokefalos, <i>Criminal Liability of States for Environmental Harm: The Perspective of International Law</i> , <i>Revue Internationale de Droit Penal</i> 1 (2016).....	13
J.H. Knox, <i>The Myth and Reality of Transboundary Environmental Impact Assessment</i> , 96(2) <i>A.J.I.L.</i> 291, 293 (2002).	8
John D. Linnell et al., <i>When is it Acceptable to Kill a Strictly Protected Carnivore? Exploring the Legal Constraints on Wildlife Management within Europe’s Bern Convention</i> , <i>NATURE CONSERVATION</i> 129-157 (2017).....	18
Kani ISIK, <i>Rare and Endemic Species: Why are they Prone to Extinction?</i> <i>Turk J Bot</i> 411, 411 (2011)	25
Kees Bastmeijer, Timo Koivurova, <i>Transboundary Environmental Impact Assessment: An Introduction</i> , in <i>THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT</i> 1-25 (Martinus Nijhoff 2008).	9
Levine J. M. & Hille Rislammers, <i>The Maintenance of Species Diversity</i> , 3(10) <i>Nature Education Knowledge</i> 5 (2010).....	8
Lyle Glowka et al., <i>A Guide to the Convention on Biological Diversity</i> , IUCN Gland and Cambridge 36 (1994).....	20
Mark Edwards, <i>A Review of Management Problems Arising from Reintroductions of Large Carnivores</i> , 27(3) <i>JOURNAL OF YOUNG INVESTIGATORS</i> (2014).....	8
P. Okowa, <i>Procedural Obligation in International Environmental Agreements</i> , L(17) <i>B.Y.B.I.L.</i> , 275-336 (1996).	10
Rene Lefeber, <i>Transboundary Environmental Interference and the Origin of State Liability</i> , in <i>DEVELOPMENTS IN INTERNATIONAL LAW</i> 54 (1996).....	8
Robert L Fischman et al., <i>The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance</i> , 28 <i>Va Env’tl LJ</i> 173 199 (2010).	17
Sophie Riley, <i>Preventing Transboundary Harm from IAS</i> , 18(2) <i>RECIEL</i> 201 (2009). ..	4, 6, 7

- WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT-

Tom Arup, <i>Greg Hunt Grants Western Australia Exemption for Shark Cull Plan</i> , THE SYDNEY MORNING HERALD (Jan. 21, 2014, 12:27 PM).....	15
UNEP, Fact-sheet on Yellow-eyed Penguin, UNEP WCMC	3

TREATISES, COMMENTARIES, DIGESTS AND BOOKS

ALEXANDER GILLESPIE, CONSERVATION, BIODIVERSITY AND INTERNATIONAL LAW 464 (2011)	21, 25
BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 8 (2008).....	22
MALCOLM L. HUNTER JR., FUNDAMENTALS OF CONSERVATION BIOLOGY 26 (3 rd ed., 2006)	25
MALCOLM N SHAW, INTERNATIONAL LAW 760 (5th ed., 2003)	7, 22
MARTINUS NIJHOFF, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS 75 (1987).....	6
MICHAEL BOWMAN ET AL., LYSTER’S INTERNATIONAL WILDLIFE LAW, 548 (2010).	16
P BIRNIE, A BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 113 (2009).	23
PATRICIA BIRNIE & ALAN BOYLE, International Law and the Environment 109 (2d ed., 2004)7	
PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 625-626 (3 rd ed., 2009).	20
PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 881 (4 th ed., 2018).....	7, 11, 15
STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 158 (2009); BERGKAMP, LIABILITY AND ENVIRONMENT 165 (2001).....	22

XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 164 (2003).	
.....	22

U.N. DOCUMENTS

G.A. Res. 37/7, ¶11(b)-(c) (1982)	9
Report of the International Law Commission, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 ¶7 (2001).....	22
UNEP, <i>Goals and Principles of Environmental Impact Assessment</i> , UNEP (1987)	9
UNGA Res. 61/36, Allocation of Loss in The Case of Transboundary Harm Arising Out of Hazardous Activities, Principle 5(c) (Dec. 18, 2006).	11
UNGA Res.37/7, World Charter for Nature (Oct. 28, 1982)	21

TABLE OF ABBREVIATIONS

1.	&: And
2.	¶: Paragraph
3.	ARSIWA: Articles on Responsibility of States for Internationally Wrongful Acts
4.	Art.: Article
5.	Bern Convention: Convention on the Conservation of European Wildlife and Natural Habitats
6.	Bern. Rec. No.: Recommendations by the Standing Committee to the Bern Convention
7.	C.: Clarification to the Stetson Record
8.	CBD: Convention on Biological Diversity
9.	CIL: customary international law
10.	CMS: Convention on Migratory Species
11.	Comm.: Commission
12.	E.T.S.: European Treaty Series
13.	EC: European Council
14.	ECJ: European Court of Justice
15.	Ed.: Edition
16.	EEC: European Economic Council
17.	EIA: Environmental Impact Assessment
18.	EU: European Union
19.	Eur. J. Int'l L.: European Journal of International Law
20.	G.A. Res.: General Assembly Resolution

- WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT-

21.	G.A.: General Assembly
22.	GAOR: General Assembly Official Records
23.	Hon'ble: Honourable
24.	I.L.M: International Legal Materials
25.	I.L.R.: International Legal Reporter
26.	IAS: Invasive Alien Species
27.	ILC: International Law Commission
28.	IUCN: The International Union for Conservation of Nature and Natural Resources
29.	para: Paragraph
30.	PCIJ: Permanent Court of International Justice
31.	pp.: Pages
32.	Project: Reintroduction Project of Grey Bears
33.	R.: Stetson Record
34.	Rio Declaration: United Nations Conference on Environment and Development at Rio De Janeiro, 1992
35.	S.A: Special Agreement
36.	SBSTTA: Scientific Body on Scientific, Technical and Technological Advice
37.	Ss.: Sections
38.	Stockholm Declaration: United Nations Conference on Human Environment held at Stockholm, 1972
39.	TEIA: Transboundary Environment Impact Assessment
40.	U.N. Doc.: United Nations Document
41.	U.N. GAOR.: United Nations General Assembly Official Records
42.	U.N.T.S.: United Nations Treaty Series

- WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT-

43.	UN GAOR Supp.: United Nations General Assembly Official Record
44.	UN: United Nations
45.	UNCLOS: United Nations Convention on the Law of the Sea
46.	UNEP: United Nations Environment Programme
47.	UNFCCC: United Nations Framework Convention on Climate Change
48.	v.: Versus
49.	VCLT: Vienna Convention on the Law of Treaties
50.	Vol.: Volume
51.	WCN: World Charter for Nature

QUESTIONS PRESENTED

- I. WHETHER THE REPUBLIC OF RANVICORA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS GREY BEAR REINTRODUCTION PROJECT?

- II. WHETHER THE ACTIONS OF THE FEDERAL STATES OF ARCTOS VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS RESPONSES TO RANVICORA'S REINTRODUCTION PROJECT?

- WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT-

STATEMENT OF JURISDICTION

In accordance with Article 40 of the Statute of the ICJ, the Federal States of Arctos [“Arctos”] and the Republic of Ranvicora [“Ranvicora”] have submitted by Special Agreement their differences concerning questions in Annex A, including the Clarifications, relating to the differences between them concerning questions relating to reintroduction of grey bears and transmitted a copy thereof to the Registrar of the ICJ on 15th July, 2019.

The Registrar of the Court addressed a notification to the parties on 22nd July, 2019. Therefore, Arctos and Ranvicora have accepted the jurisdiction of the ICJ pursuant to Article 36 (1) of the Statute and request the Court to adjudge the dispute in accordance with the rules and principles of international law, including any applicable treaties.

The parties have agreed to respect the decision of this Court.

STATEMENT OF FACTS

Background of Parties

Arctos and Ranvicora are neighbouring developed nations in Suredia, with Ranvicora sharing no other borders (C.¶8). They share a 75km long border consisting of forests and farms (C.¶10). They are parties to the VCLT, CBD, CMS, Bern Convention, UNFCCC, Kyoto Protocol, Paris Agreement and part of the consensus at various environmental conferences (R.¶¶2-7).

Reintroduction Project

The grey bear is endemic to Suredia and is listed as an endangered species in international conventions (R.¶9). They were culturally important to Ranvicora, and had migrated only within Ranvicora, but were extinct due to overhunting and habitat destruction. There were no historic/fossil records of the bears in Arctos, and there is no other large carnivore in the region (R.¶10).

Ranvicora planned a grey bear reintroduction project [“project”], and conducted only a national EIA before reintroduction. (R.¶12). The bears were released in the northern part of Ranvicora, the closest release only 50kms from a border that had no barriers, despite poleward movement in Paddington and Aloysius (C.¶9, R.¶13). A total of 20 bears, only half fitted with GPS collars, were released and successfully reproduced within a year (R.¶13).

Movement of the Bears

In 2017, the grey bears began moving back and forth between Ranvicora and Arctos, as noted by Ranvicora’s scientists (R.¶13). In 2018, the bears began attacking and killed 7 horses and 20 sheep, damaged apple orchards and beehives. The bears sniffed out and consumed the eggs

- WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT-

and nestlings of the Trouwborst tern, an endangered endemic species protected under Arctos's national law (R.¶17).

Diplomatic Exchanges

Arctos informed Ranvicora of its violation of international law and requested removal of the bears and compensation. Ranvicora denied responsibility and refused to withdraw its project (R.¶19).

In response, Arctos set poisoned animal carcasses on the farms where the attacks occurred, killing four grey bears (R.¶20). When a bear caused the death of a child and permanent paralysis of another, Arctos issue an emergency regulation [“regulation”] with immediate effect that expressly granted permission to its citizens to shoot any grey bear spotted in Arctos. This action resulted in the killing of a grey bear, her two cubs and a pregnant female bear (R.¶21).

Ranvicora accused Arctos of causing transboundary harm, and demanded revocation of its emergency regulation and poisoning (R.¶22). Arctos refused to do so.

Dispute

After further negotiations between Arctos and Ranvicora failed, the two countries entered into a Special Agreement to resolve the dispute by instituting proceedings at the ICJ and presenting the above questions (R.¶24).

SUMMARY OF ARGUMENTS

I. RANVICORA VIOLATED INTERNATIONAL LAW WITH ITS PROJECT.

The grey bears [“bears”] are IAS as they were introduced outside their indigenous range and have become invasive on account of climate change, prohibiting reintroduction. Moreover, Arctos is not a Range State as discretion lies with the State, and the bears were from a geographically separate location. Additionally, Ranvicora has caused transboundary harm, failed to conduct a transboundary EIA, and violated the duty to notify and cooperate.

Therefore, Ranvicora is liable to cease its activities and adequately compensate Arctos.

II. ARCTOS DID NOT VIOLATE INTERNATIONAL LAW WITH ITS MEASURES.

Arctos’s measures fall within the exceptions of extraordinary circumstances of Article III(5)(d) of the CMS, and Article 9(1) of the Bern Convention as no alternative solutions exist, and the measures would not be detrimental to the population’s survival. The measures were both permissible and mandated by the CBD to eradicate IAS.

Further, the measures were taken to remedy the transboundary harm caused by Ranvicora, in furtherance of the precautionary and due diligence approaches. *In arguendo*, they are precluded from being considered internationally wrongful acts as they were done in furtherance of the defence of necessity.

Therefore, the measures are in strict conformity with conventional and CIL.

ARGUMENTS ADVANCED

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

Ranvicora's project is in contravention of international law as it led to the invasion of an alien species within Arctos, which is not a "Range State" under the CMS¹ [1.1], caused transboundary harm [1.2], violated the obligation to conduct a TEIA [1.3], and violated the duty to notify and co-operate [1.4]. Therefore, Ranvicora is liable to cease activities and pay compensation for damage caused to Arctos [1.5].

1.1. The grey bears are IAS in Arctos.

The reintroduced bears are an IAS [1.1.1], that can cause significant impacts on ecosystems [1.1.2]. Further, the bear is not a migratory species and Arctos cannot be considered a Range State under the CMS [1.1.3].

1.1.1. Reintroduced species as IAS.

The reintroduction of a species outside its indigenous range could lead to such species becoming invasive.² "Introduction" is the accidental release of an organism belonging to non-native taxa in a given territory, applying to both accidental and intentional introductions.³ Ranvicora's reintroduction is outside the bears' indigenous range [a], and cannot qualify as a climate induced range shift [b]. Therefore, the species are an IAS and circumstances prohibit reintroduction.

¹ Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333 [hereinafter CMS].

² Bern Rec.No.158, 2012.

³ Bern Rec.No.57, 1997.

a. Reintroduction is outside their indigenous range.

Translocations outside indigenous ranges carry significant risks due to the lack of certainty over ecological relationships and outcomes, with species becoming invasive aliens and causing adverse impacts on biodiversity, ecology and human economic interests.⁴ Where the risk is high or uncertainty remains, a translocation should not proceed.⁵

Therefore, the project should not have proceeded considering the bear had never been present in Arctos and no other large carnivore lives on the continent,⁶ making the risk of negative ecological impacts, high.

b. Invasiveness due to climate change.

There is a potential for introduced species already present in contracting States' territory to become invasive under future climate conditions.⁷ The *Nyctereutes Procyonides* introduction illustrates how species introduced by human agency continue to carry their alien species status when subsequently expanding by their own agency into neighbouring countries.⁸

Therefore, range shifts due to climate change cannot preclude the bear from becoming invasive, with it continuing to be invasive as it spreads to Arctos through its own agency.

⁴ IUCN, *Guidelines for Reintroductions and Other Conservation Translocations*, IUCN 1 (2013).

⁵ *Id.*

⁶ R.¶10.

⁷ Bern Rec.No.59, 2012.

⁸ Han Somsen, Arie Trouwborst, *Are pioneering coyotes, jackals and foxes alien species? Canid colonists in the Changing Conservation Landscape of the Anthropocene*, INTERNATIONAL JOURNAL OF CONSERVATION 1, 5 (2018).

c. Circumstances prohibit reintroduction.

The Bern Convention requires contracting parties to strictly control the introduction of non-native species.⁹ The CBD tasks each party with preventing the introduction of, controlling, or eradicating those alien species which threaten ecosystems, habitats or species,¹⁰ further affirmed by the SBSTTA in their direction to include such measures within States' national plans.¹¹ Moreover, decisions V/8 and VI/ 23 of the CBD emphasise that States should recognise the risk they pose as potential sources of IAS and take appropriate actions to minimise that risk.¹²

Therefore, by reintroducing the bears that inevitably became IAS close to the border,¹³ Ranvicora violated its obligations.

1.1.2. Impacts of IAS.

IAS are alien species that threaten native biological diversity,¹⁴ and lead to loss of habitat,¹⁵ direct predation on native species,¹⁶ and modification of ecosystems/habitats.¹⁷ The pressures

⁹ Convention on the Conservation of European Wildlife and Natural Habitats art.11(2)(b), Sept. 19, 1979, 1284 U.N.T.S. 209 [hereinafter Bern Convention].

¹⁰ Convention on Biological Diversity art.8(h), June 5, 1992, 1760 U.N.T.S. 79 [hereinafter CBD].

¹¹ CBD SBSTTA Rec.No.I/8, ¶16.

¹² CBD Decision on Alien Species that Threaten Ecosystems, Habitats or Species, CBD/COP/5/8 (May 26, 2000).

¹³ R.¶14.

¹⁴ IUCN, *Guidelines for the Prevention of Biodiversity Loss Caused by Alien Invasive Species*, IUCN 51 (2000).

¹⁵ *Id.* Section 1.

¹⁶ C. Brown. *Tilapia and the Environment*, 4(2) TED CASE STUDIES, 208 (1995).

¹⁷ UNEP, *Fact-sheet on Yellow-eyed Penguin*, UNEP WCMC (Jan. 20, 2012, 10:30 AM), http://www.unepwcmc.org/species/data/species_sheets/yellowey.htm.

of IAS are propelling species to extinction, leading to further loss of biodiversity.¹⁸ Thus, the damage caused by reintroducing and spread of IAS from one territory to another can breach CIL.¹⁹

In the short period that the grey bear has invaded Arctos, significant ecological and economic damage was caused, leading to the predation of an endangered endemic species²⁰ and the loss of human life.²¹ Therefore, Ranvicora's activities caused transboundary damaged and breached its obligations.

1.1.3. Arctos is not a Range State.

Arctos cannot be considered a Range State as discretion under the CMS lies with the State [a], and there was no geographically separate population of bears occurring in Arctos [b].

a. Discretion lies with the State.

“Range State” is defined as any State that exercises jurisdiction over any part of the range of that migratory species.²² Article VI(2) of the CMS gives discretion to the States to decide for which migratory species they consider themselves to be Range States, a view endorsed by the Scientific Council.²³ The CMS noted instances wherein countries were wrongly considered

¹⁸ G. Sherley & S. Lowe, *Towards a Regional Invasive Species Strategy for the South Pacific: Issues and Options*, in *INVASIVE SPECIES IN THE PACIFIC: A TECHNICAL REVIEW AND DRAFT REGIONAL STRATEGY* 7-8 (2000).

¹⁹ Sophie Riley, *Preventing Transboundary Harm from IAS*, 18(2) RECIEL 201 (2009).

²⁰ R.¶17.

²¹ R.¶21.

²² CMS, *supra* note 1, art.1(1)(h).

²³ 16th Meeting of the CMS Scientific Council on Range State Classification, UNEP/CMS/ ScC16/24, ¶5 (June 30, 2010).

Range States for certain species only on the basis of records of sightings rather than established patterns of migrations.²⁴ Therefore, Arctos cannot be considered a Range State merely because a few bears had crossed over the border.

b. Geographically separate population.

Under the CMS, read with Resolution 3.1, a country can be considered a Range State only when a significant proportion of geographically separate population of that species occasionally occurs in its territory.²⁵ Such classifications only on the basis of single records of occurrence of a particular species would be a burden on administrative and financial resources, without bringing any significant contributions to species conservation.²⁶

The exploratory, invasive pattern of movement of the bear is not migratory pattern, nor is Arctos a Range State. There exists no scientific evidence of the bear historically or traditionally migrating to Arctos,²⁷ nor does a significant proportion of a geographically separate population of the grey bear occur in the territory. In the absence of evidence of an established migratory pattern, Arctos does not consider itself a Range State, and cannot be compelled to be considered as such.

²⁴ *Id.* ¶8.

²⁵ CMS Resolution 3.1, 2009.

²⁶ Report of the Fifteenth Meeting of the Scientific Council, CMS (Nov. 28, 2008).

²⁷ R.¶10.

Therefore, as the historical range is also disputed,²⁸ any movement of the species into the territory of Arctos would not be an expansion of their range, but simply an invasion of an alien species operating outside of its traditional habitat.

1.2. The Project Resulted in Transboundary Harm to Arctos.

Ranvicora violated the CIL principle of preventing transboundary harm [1.2.1] in the reintroduction of an IAS. [1.2.2].

1.2.1. Principle of preventing transboundary harm.

Transboundary harm represents harm caused in the territory of a State other than the State of origin,²⁹ with this definition including the importation of species that “escape” into neighbouring States and beyond.³⁰

The CBD,³¹ the Stockholm Declaration,³² the Rio Declaration³³ and the ICJ³⁴ have reiterated the duty to prevent transboundary harm, stating that it is every State’s obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States.³⁵ In accordance with the maxim *sic utero tuo, ut alienum non laedas*, this principle has become

²⁸ R.¶13.

²⁹ ILC Articles on the Prevention of Transboundary Harm from Hazardous Activities with Commentaries, 2 Y.B INT’L L COMM’N 392 (2001) [hereinafter ILC Articles].

³⁰ Sophie Riley, *supra* note 19.

³¹ CBD, *supra* note 10, art.3.

³² Stockholm Declaration, Principle 21, 11 I.L.M. 1416 [hereinafter Stockholm].

³³ Rio Declaration on Environment and Development, June 14, 1992, Principle 2, 31 I.L.M. 874 [hereinafter Rio].

³⁴ MARTINUS NIJHOFF, ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT: LEGAL PRINCIPLES AND RECOMMENDATIONS 75 (1987).

³⁵ Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. 4, 22 (Apr. 9) [hereinafter *Corfu Channel*].

CIL,³⁶ and is *lex lata*.³⁷ Moreover, numerous decisions have supported absolute/strict liability for transboundary harm.³⁸

1.2.2. IAS and transboundary harm.

Article 8(h) of the CBD imposes overarching obligations to prevent the introduction of alien species which threaten ecosystems, habitats or species. Articles 3 and 5 of the CBD read with Article 8(h) make it is apparent that States are under an obligation to ensure that they do not introduce alien species and cause damage to the environment of other States.³⁹ The CBD acknowledges that activities may lead to an unintentional introduction of IAS, even if the species is harmless in the State of origin.⁴⁰

The sudden reintroduction of a large carnivore such as the grey bear in an unprepared ecosystem can have significant ramifications for the endemic flora fauna, especially in the

³⁶ PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 109 (2d ed., 2004); Trail Smelter Arbitration (U.S. v. Can.) 1938/1941, 3 R.I.A.A. 1905; Territorial Jurisdiction of International Commission on the River Oder (U.K. v. Pol.) 1959 P.C.I.J. Ser. A, No. 23 (Sept. 10); Island of Palmas Arbitration (Neth v. US) 2 R.I.A.A. 829, 831 (1928); MALCOLM N SHAW, INTERNATIONAL LAW 760 (5th ed., 2003) [hereinafter SHAW].

³⁷ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶29 (July 8) [hereinafter *Legality*]; Case Concerning the Gabcikovo-Nagymaros Project, Judgement, 1997 I.C.J. Rep. 7 ¶53 (Sept. 25) [hereinafter *Nagymaros*].

³⁸ PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 881 (4th ed., 2018) [hereinafter SANDS].

³⁹ Sophie Riley, *supra* note, at 203.

⁴⁰ CBD CoP Decision VI/23, 2002.

absence of a suitable control mechanisms and natural predators,⁴¹ as in Arctos. This also affects the availability of suitable prey, leading to altered preying patterns which work to the detriment of native ecosystems.⁴²

The transboundary damage caused is directly attributable to Ranvicora, particularly in its introduction of a large carnivore to a region where one had never existed.⁴³ The project significantly impacted the ecology and biodiversity of Arctos,⁴⁴ apart from leading to loss of life⁴⁵ and considerable economic damage to citizens.⁴⁶ Therefore, “significant” is something more than detectable but not at the level of “serious” or “substantial”,⁴⁷ a threshold easily met by the damage caused by Ranvicora’s project.

1.3. Ranvicora violated international law by not conducting TEIA.

The State of origin must conduct a TEIA⁴⁸ in order to observe the no-harm principle,⁴⁹ and causing damage after not assessing the transboundary impact of proposed project would

⁴¹ Levine J. M. & Hille Rislambers, *The Maintenance of Species Diversity*, 3(10) NATURE EDUCATION KNOWLEDGE 5 (2010).

⁴² Mark Edwards, *A Review of Management Problems Arising from Reintroductions of Large Carnivores*, 27(3) JOURNAL OF YOUNG INVESTIGATORS (2014).

⁴³ R.¶10.

⁴⁴ R.¶17.

⁴⁵ R.¶21.

⁴⁶ R.¶¶17, 20.

⁴⁷ ILC Articles, *supra* note 29, at 152.

⁴⁸ J.H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96(2) A.J.I.L. 291, 293 (2002).

⁴⁹ Rene Lefeber, *Transboundary Environmental Interference and the Origin of State Liability*, in DEVELOPMENTS IN INTERNATIONAL LAW 54 (1996).

constitute a breach.⁵⁰ An EIA must be carried out prior to the implementation of a project that is likely to cause significant transboundary harm,⁵¹ even if the risk is small,⁵² as a general international law requirement.⁵³ TEIAs, the first step to preventing transboundary harm,⁵⁴ require an assessment wide enough to cover a geographical scope according to the extent to which impacts are expected to extend, including transboundary implications.⁵⁵ The CBD further states that EIAs should also be carried out to assess potential offsite impacts of activities.⁵⁶

The CMS recognises the risks involved with migratory species becoming invasive if translocated outside their natural range, and invites parties to undertake dedicated risk assessments incorporating future climate change scenarios movement of animals.⁵⁷ If the intended activity would result in the extinction of a population of a localised endemic species

⁵⁰ Kees Bastmeijer, Timo Koivurova, *Transboundary Environmental Impact Assessment: An Introduction*, in THEORY AND PRACTICE OF TRANSBOUNDARY ENVIRONMENTAL IMPACT ASSESSMENT 1-25 (Martinus Nijhoff 2008).

⁵¹ Case Concerning Pulp Mills on The River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Rep. 14, ¶205 [hereinafter *Pulp Mills*].

⁵² The Mox Plant Case (Ireland v. United Kingdom), Case No. 10, Order of Dec. 3 2001, ITLOS Rep. 95, ¶84.

⁵³ *Pulp Mills*, *supra* note 51, at ¶204.

⁵⁴ Rio, *supra* note 33, Principle 17; G.A. Res. 37/7, ¶11(b)-(c) (1982); UNEP, *Goals and Principles of Environmental Impact Assessment*, UNEP (1987); Convention on Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 1989 U.N.T.S. 309; LOSC art.206; Convention on the Transboundary Effects of Industrial Accidents art.4(4), Mar. 17, 1992, 2105 UNTS 457; I.L.C. Articles, *supra* note 29, art.7.

⁵⁵ H. Abaza, R. Hamwey, *Integrated Assessment as a Tool for Achieving Sustainable Trade Policies*, 2(3) ENVIRONMENTAL IMPACT ASSESSMENT REVIEW 481, 498 (2001).

⁵⁶ CBD Decision V/6, Principle 10, 2000.

⁵⁷ CMS Resolution 11.28, 2014.

of scientific, ecological or cultural value, States must refrain from engaging in the activity.⁵⁸ A State that has failed to assess the impact of its harmful activities on the territories of other States cannot argue that it has taken all possible measures to prevent damage.⁵⁹

Ranvicora did not inform or consult with Arctos or any other countries about the reintroduction project,⁶⁰ nor was an attempt made to assess the potential impacts of a project that was highly likely to cause transboundary harm considering it took place in close proximity to the border.⁶¹ Therefore, Ranvicora did not comply with the no-harm principle, and is in contravention of conventional and customary law.

1.4. Ranvicora violated its duty to notify and co-operate.

Ranvicora is in violation of the duty to co-operate [1.4.1.] and the duty to notify Arctos about the project [1.4.2.]

⁵⁸ CBD, Voluntary Guidelines on Biodiversity: Inclusive Impact Assessment, Background Document to CBD Decision VIII/28, CBD Technical Series No.26, 31 (2006).

⁵⁹ P. Okowa, *Procedural Obligation in International Environmental Agreements*, L(17) B.Y.B.I.L., 275-336 (1996).

⁶⁰ R.¶12.

⁶¹ R.¶12.

1.4.1. Duty to cooperate.

CIL obligates States to cooperate with respect to environmental matters.⁶² The principle is contained in many treaties,⁶³ international instruments,⁶⁴ and supported by State practice,⁶⁵ particularly in relation to hazardous activities and emergencies,⁶⁶ sustaining the view that it is CIL.⁶⁷ The CBD obliges States to co-operate with other contracting parties for the conservation and sustainable use of biodiversity,⁶⁸ an obligation emphasised in the Rio Declaration⁶⁹ and the Stockholm Declaration.⁷⁰

The CBD specifically encourage States to consider the likelihood of transboundary harm when they are importing a species, and mandates cooperation to minimise the harmful impact of those species.⁷¹ On occurrence of transboundary harm, the State of origin must consult and cooperate with the affected State to mitigate the damage and eliminate the source.⁷²

⁶² *Corfu Channel*, *supra* note 35, at ¶22; *Legality*, *supra* note 37, at ¶2.

⁶³ CBD, *supra* note 10, art.5; United Nations Convention on the Law of the Sea art.123, 1982, 29 I.L.M. 1261; Vienna Convention for the Protection of the Ozone Layer art.2.2, 1985, 26 I.L.M. 1529; International Convention on Oil Pollution Preparedness, Response and Cooperation art.4.7, 1990, 30 I.L.M. 733.

⁶⁴ Charter of the United Nations, art.74, Oct. 24, 1945 1 U.N.T.S. 16; Stockholm, *supra* note 32, Principle 24; Rio, *supra* note 33, Principles7, Principle 27.

⁶⁵ Rio, *supra* note 33; ILC Articles, *supra* note 29, art.17.

⁶⁶ SANDS, *supra* note 38, at 249.

⁶⁷ *Id.* at 842.

⁶⁸ CBD, *supra* note 10, art.5.

⁶⁹ Rio, *supra* note 33, Principle 7.

⁷⁰ Stockholm, *supra* note 32, Principle 24.

⁷¹ CBD CoP Decision, Principle 4, 2002.

⁷² UNGA Res. 61/36, Allocation of Loss in The Case of Transboundary Harm Arising Out of Hazardous Activities, Principle 5(c) (Dec. 18, 2006).

Ranvicora did not co-operate in the planning or implementation of the project despite Arctos being a neighbouring country situated 50 kms from the site of reintroduction,⁷³ nor did it accede to Arctos's request to mitigate and prevent further transboundary harm.⁷⁴ Therefore, Ranvicora did not fulfil its duty to co-operate.

1.4.2. Duty to notify.

The principle to cooperate also mandates the immediate notification to other States of any activities likely to produce harmful effects on their environment,⁷⁵ and to provide them with all relevant and useful information thereto.⁷⁶ States are obligated to notify prior to such activities taking place, and have a duty to consult at an early stage.⁷⁷ The CBD contains obligations to notify, exchange information and consult,⁷⁸ especially in emergency situations which could cause harm to the biological diversity of another State.⁷⁹ States breach CIL where they have not notified with respect to the potential introduction of an IAS.⁸⁰

Despite Ranvicora deciding to reintroduce the bears close to its border with Arctos, no attempt was made to give prior notification to Arctos. Though scientists involved project were aware

⁷³ R.¶14.

⁷⁴ R.¶19.

⁷⁵ Rio, *supra* note 33, Principle 18.

⁷⁶ ILC Articles, *supra* note 29, art.17.

⁷⁷ Rio, *supra* note 33, art.19.

⁷⁸ CBD, *supra* note 10, art.14(1)(c).

⁷⁹ *Id.* art.14(1)(d).

⁸⁰ G.M. Sikoyo & L. Goldman, *Assessing the Assessments: Case Study of an Emergency Action Plan for the Control of Water Hyacinth in Lake Victoria*, 23(3) INTERNATIONAL JOURNAL OF WATER RESOURCES MANAGEMENT 443 (2007).

that bears had crossed into Arctos,⁸¹ Ranvicora made no attempts to communicate or notify Arctos of such invasive movements, leading to significant ecological and economic damage.⁸² Therefore, Ranvicora has violated the duty to notify.

1.5. Ranvicora is obligated to cease its activities and pay compensation.

Ranvicora is obligated to cease the project [1.5.1] and pay compensation for the damage caused [1.5.2].

1.5.1. Cessation of Activities.

If a State breaches the cardinal obligation to protect the environment either customarily or conventionally, the State becomes internationally responsible.⁸³ Where the responsibility of the State is established, an obligation arises to discontinue the wrongful conduct and put an end to its breach.⁸⁴ Cessation is concerned with securing an end to continuing wrongful conduct,⁸⁵ with two conditions needing to be fulfilled: *first*, that the wrongful act must have a continuing character; and *second*, the violated rule must still be in force at the time.⁸⁶ The reintroduction project (the wrongful act) is an ongoing violation.⁸⁷ Therefore, by introducing an IAS in

⁸¹ R.¶14.

⁸² R.¶17.

⁸³ Ilias Plakokefalos, *Criminal Liability of States for Environmental Harm: The Perspective of International Law*, REVUE INTERNATIONALE DE DROIT PENAL 1 (2016).

⁸⁴ Articles on Responsibility of States for Internationally Wrongful Acts and Commentary, art.30, G.A. Res. 56/83, 2002 (Jan. 28, 2002) [hereinafter ARSIWA].

⁸⁵ *Id.* at 88.

⁸⁶ Rainbow Warrior Case (New Zealand v. France), (1990) 20 U.N.R.I.A.A. 215 (Apr. 30).

⁸⁷ R.¶19.

Arctos⁸⁸ and causing significant transboundary harm,⁸⁹ Ranvicora committed an internationally wrongful act⁹⁰ and is obligated to cease its activities.

1.5.2. Compensation for damage caused.

States are obligated to pay compensation for damage caused by internationally wrongful acts,⁹¹ and take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage.⁹² The CBD obligates States to examine restoration and compensation in situations of damage to biodiversity.⁹³

A court which has jurisdiction over a claim has the power to award compensation for damage suffered.⁹⁴ In *Nicaragua*,⁹⁵ the ICJ concluded that Nicaragua had an obligation to make full reparations for environmental damage caused, and determined the amount for compensation by calculating the value assigned for restoration and the loss caused due to the damage.⁹⁶

⁸⁸ See *supra* §1.1.

⁸⁹ R.¶17.

⁹⁰ See *infra* §2.2.4.

⁹¹ ARSIWA, *supra* note 84, art.36.

⁹² ILC Principles on the Allocation of Loss in the Case of Transboundary Harm, Principle 4, 2(2) Y.B INT'L L. COMM'N (2006).

⁹³ CBD, *supra* note 10, art.14(2).

⁹⁴ *Factory at Chorzów*, (Ger v. Pol), Jurisdiction, 1927 P.C.I.J., Series A, No. 9 21 (July 26); *Fisheries Jurisdiction*, (F. R.G v. Iceland), Merits, 1974 I.C.J. Rep. 175 ¶¶71-76 (July 25); *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States*), Merits, 1986 I.C.J. Rep. 14 (June 27).

⁹⁵ *Certain Activities Carried Out by Nicaragua In the Border Area* (*Costa Rica v. Nicaragua*), Judgement, General List No.150 (Feb. 2018).

⁹⁶ *Id.* ¶¶29-30, 41.

Ranvicora is obligated to pay suitable compensation to Arctos in light of the economic and ecological damage caused to the citizens and the State,⁹⁷ particularly since the damage caused to the ecology cannot be restored.

II. ARCTOS DID NOT VIOLATE INTERNATIONAL LAW WITH ITS RESPONSES TO THE PROJECT.

2.1. Measures taken are permissible under conventional international law.

The measure taken by Arctos are permissible under the CMS [2.1.1], the Bern Convention [2.1.2] and the CBD [2.1.3].

2.1.1. Response is permissible under Article III(5)(d) of the CMS.

“Taking” under the CMS⁹⁸ is subject to the wide exceptions in Article III(5) which permits taking only if “extraordinary circumstances” so require.⁹⁹ These circumstances may include attacks carried out by the species,¹⁰⁰ and must be interpreted not just in favour of conservation, but for the “good of mankind”.¹⁰¹

⁹⁷ R.¶17.

⁹⁸ CMS, *supra* note 1, art.1(1)(j).

⁹⁹ SANDS, *supra* note 38, at 507.

¹⁰⁰ Tom Arup, *Greg Hunt Grants Western Australia Exemption for Shark Cull Plan*, THE SYDNEY MORNING HERALD (Jan. 21, 2014, 12:27 PM), <https://www.smh.com.au/politics/federal/greg-hunt-grants-wa-exemption-for-shark-cull-plan-20140121-315zk.html>.

¹⁰¹ CMS, *supra* note 1, Preamble.

A Party must merely show that it lacked reasonable alternatives, and killing was the only available option¹⁰² owing to extraordinary circumstances. States are granted a considerable degree of discretion in determining when it should be invoked,¹⁰³ with this principle being employed in several conservation agreements¹⁰⁴ and ecologically necessary circumstances.¹⁰⁵

The measures meet the CMS's standards as, *first*, they are precise in their content;¹⁰⁶ the measures permitted the taking only in Arctos's territory.¹⁰⁷

Second, the measures were limited in time and space; the poisoned carcasses were only placed in areas where the grey bears had already carried out attacks, and could not have harmed any other species as there are no other large carnivores in the region.¹⁰⁸ The regulation was limited to sightings of the grey bears in Arctos.¹⁰⁹

¹⁰² Arie Trouwborst, *Aussie Jaws and International Laws: The Australian Shark Cull and the Convention on Migratory Species*, 2, CORNELL INT'L L.J. 44, 41-46 (2014).

¹⁰³ *Id.* at 42.

¹⁰⁴ Convention on Wetlands of International Importance especially as Waterfowl Habitat art.4, Feb. 2, 1971, 996 U.N.T.S. 245; Bern Convention, *supra* note 9, art.4, art.9; Conservation for the Protection of Migratory Birds Between the United States and Great Britain art.7, Aug.16, 1916.

¹⁰⁵ Ben Packham, *Western Australian given Exemption from Federal Laws to Cull Sharks*, THE AUSTRALIAN, (Jan. 21, 2014, 3:41 PM), <https://www.theaustralian.com.au/national-affairs/western-australia-given-exemption-from-federal-laws-to-cull-sharks/news-story/3a4336468c06bb681dfb86f7f75e6deb>.

¹⁰⁶ MICHAEL BOWMAN ET AL., *LYSTER'S INTERNATIONAL WILDLIFE LAW*, 548 (2010).

¹⁰⁷ R.¶20,21.

¹⁰⁸ R.¶10.

¹⁰⁹ R.¶21.

Third, the measures will not operate to the disadvantage to the species; disadvantage does not mean “unfavourable” conservation status requiring an abundant population,¹¹⁰ but merely an overall sustainable threshold.¹¹¹ Since the grey bears were already present in Paddington and Aloysius,¹¹² fitting them within the exception will not operate as a disadvantage. Therefore, the measures meet the threshold of extraordinary circumstances of Article III(5)(d).

2.1.2. Response is permissible under Article 9 of the Bern Convention.

Article 9 requires two general conditions to be met before the exceptions may be triggered: there must be no alternative satisfactory solutions **[a]**, and the exception must not be detrimental to the survival of the population **[b]**.¹¹³

a. No alternative satisfactory solutions.

Eradication is considered the most effective,¹¹⁴ environmentally safe and economical measure of dealing with IAS, and is a practicable option only for a limited period of time before IAS reach a certain population/range expansion, making rapid implementation particularly important.¹¹⁵ Only where a science-based assessment shows that eradication is no longer

¹¹⁰ CMS, *supra* note 1, art.1(1)(c)(4); Vienna Convention on the Law of Treaties, art.31, May 23, 1969, 1155 U.N.T.S. 331.

¹¹¹ Robert L Fischman et al., *The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance*, 28 VA ENVTL LJ 173 199 (2010).

¹¹² R.¶10.

¹¹³ Standing Committee to the Bern Convention, Revised Resolution No.2 on the Scope of Articles 8 and 9 of the Bern Convention, T-PVS.2011 (Dec. 2, 2011) [hereinafter Revised Resolution].

¹¹⁴ IUCN, *Global Strategy on IAS*, IUCN 26 (2001).

¹¹⁵ Standing Committee to the Bern Convention, European Strategy on IAS, T-PVS/Inf.2004 34,36 (Dec.1-5, 2003).

feasible should alternate long-term measures be considered.¹¹⁶ Therefore, eradication was feasible and effective in the present context as the IAS were small in number and were not yet widely spread out.

b. Not detrimental to the survival of the population.

The survival of the population is evaluated based on the state of the *entirety* of the population of a species, not just the local community in question.¹¹⁷ Ecological factors have greater consideration over cultural factors,¹¹⁸ as evidenced by the exclusion of cultural considerations in the guidelines for listing species under the Bern convention.¹¹⁹ The cultural value of grey bears cannot outweigh ecological considerations of protecting an endangered endemic species such as the tern from the threat of extinction. The grey bears are not endemic to Ranvicora,¹²⁰ and the eradication of the grey bears in one location will not affect the other populations in any manner.

As the general conditions have been satisfied, the following specific conditions in Article 9(1) may be applied:

i. Condition 1: Protection of flora and fauna is satisfied.

¹¹⁶ Francesca Gherardi, Claudia Angiolini, *Eradication and Control of Invasive Species* in BIODIVERSITY CONSERVATION AND HABITAT MANAGEMENT (2009).

¹¹⁷ Ligue pour la protection des oiseaux and Others v. Premier Ministre, Judgement, 2003 Case C-182/02, (Oct. 16).

¹¹⁸ John D. Linnell et al., *When is it Acceptable to Kill a Strictly Protected Carnivore? Exploring the Legal Constraints on Wildlife Management within Europe's Bern Convention*, NATURE CONSERVATION 129-157 (2017).

¹¹⁹ Bern Rec.No.56, 1997.

¹²⁰ R.¶10.

Use of the derogation is strongest for actions that reduce negative impacts on endangered and vulnerable species, consistent with Article 1.¹²¹ It is not limited by the threshold of proving likely seriousness of damage.¹²² The bear caused *continued* damage to the ecology and led to the loss of life,¹²³ therefore, rendering the triggering of this condition justifiable.

ii. Condition 2: Serious damage criteria is satisfied.

The *extent test* of “seriousness” goes beyond mere nuisance, and takes into account the scale of destruction or deterioration.¹²⁴ Damage need not be widespread (e.g. limited geographical area/a farm/group of farms).¹²⁵ It is considered sufficient to demonstrate strong likelihood that damage will take place in the absence of action, without proof of actual damage.¹²⁶

Considering the damage caused by the bear since around February 2018,¹²⁷ there exists a strong likelihood that damage will continue to take place. Therefore, triggering this condition is justifiable.

iii. Condition 3: Applicability of overriding public interest.

¹²¹ Standing Committee to the Bern Convention, Interpretation of Article 9, T-PVS/Inf.2010 ¶2.2.2 (Oct. 27, 2010) [hereinafter Interpreting Article 9].

¹²² Guidance Document on Sustainable Hunting under the Birds Directive, 79/409/EEC, European Commission (Dec., 2008) [hereinafter Guidance Document];

¹²³ R.¶¶20, 21.

¹²⁴ Case C-247/85, Comm’n v. Belgium, 1987 E.C.R I-3029.

¹²⁵ Guidance Document, *supra* note 122; Revised Resolution, *supra* note 113.

¹²⁶ Interpreting Article 9, *supra* note 121.

¹²⁷ R.¶17.

This criterion is applied on a case-to-case basis,¹²⁸ with courts recognising situations in which legitimate goals of economic and social policy, justify restrictive measures and satisfy the public interest test.¹²⁹ In the present case, public safety is at risk since the grey bears caused the loss of life and damage to property.¹³⁰ The condition excepts Arctos's measures.

Therefore, Arctos's actions fall under the conditions prescribed under Article 9.

2.1.3. Response is permissible and mandated under the CBD.

The CBD requires parties to take measures against IAS,¹³¹ making quick action vital to preventing further damage being caused.¹³² Eradication is recognised as the best course of action against IAS in the early stages of invasion, when populations are small¹³³ and localized.¹³⁴ These measures are recognised under the CBD.¹³⁵ Therefore, the eradication of the grey bears is permissible.

¹²⁸ *Id.*

¹²⁹ Guidance Document on the Strict Protection of Animal Species of Community interest under the Habitats Directive, 92/43/EEC, European Commission (Feb. 2007).

¹³⁰ R.¶21.

¹³¹ Lyle Glowka et al., *A Guide to the Convention on Biological Diversity*, IUCN GLAND AND CAMBRIDGE 36 (1994).

¹³² *Id.* at 47.

¹³³ CBD CoP Decision VI/23, 2002, Guiding Principle 14.

¹³⁴ *Id.* Guiding Principle 13.

¹³⁵ PATRICIA BIRNIE ET AL., *INTERNATIONAL LAW AND THE ENVIRONMENT* 625-626 (3rd ed., 2009).

2.2. Measures Were Taken to Remedy and Prevent Further Transboundary Harm.

The measures taken to prevent transboundary harm are in furtherance of the precautionary principle [2.2.1], and meet the test of due diligence [2.2.2]. *In arguendo*, even if it is considered to violate international obligations, they are precluded from being considered international wrongful acts as they were taken in furtherance of the defence of necessity [2.2.3].

2.2.1. Arctos has acted in furtherance of the precautionary principle.

The precautionary principle¹³⁶ has attained the status of customary international law,¹³⁷ applicable when there is an uncertain threat of environmental damage of an irreversible nature,¹³⁸ which includes indirect and long-term threats.¹³⁹

Deliberate transport of species¹⁴⁰ combined with climate change, produce conducive conditions for the establishment and spread of IAS,¹⁴¹ resulting in the decline or extinction of native

¹³⁶ 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, ITLOS Rep. 10 ¶135.

¹³⁷ALEXANDER GILLESPIE, CONSERVATION, BIODIVERSITY AND INTERNATIONAL LAW 464 (2011) [hereinafter GILLESPIE].

¹³⁸ UNGA Res.37/7, World Charter for Nature (Oct. 28, 1982); IUCN, *Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Management*, IUCN 1 (2007) [hereinafter IUCN Precautionary Guidelines].

¹³⁹ IUCN Precautionary Guidelines, *supra* note 138, Guideline 6.

¹⁴⁰ *Id.* at 20.

¹⁴¹ *Id.*

species.¹⁴² The irreversible effects of invasions coupled with uncertainty of potential damage requires the adoption of this principle.¹⁴³

Therefore, while Arctos lacked scientific certainty in not being able to predict where the bear would cause damage or injury next, the precautionary principle obligated the taking of necessary measures to prevent further harm.

2.2.2. Measures Meet the Test of Due Diligence.

Due diligence is an accepted standard for the duty to prevent transboundary harm,¹⁴⁴ and States are not automatically liable for damage caused.¹⁴⁵ The test requires reasonable efforts to take appropriate measures in a timely fashion,¹⁴⁶ with States having discretion to take measures which are necessary, appropriate, and feasible.¹⁴⁷ States may become liable if they fail to take measures to address transboundary harm caused,¹⁴⁸ and are considered to have fulfilled their duty when due diligence is exercised,¹⁴⁹ whether or not harm has already occurred.¹⁵⁰ Due

¹⁴² *Id.* at 6.

¹⁴³ *Id.* at 24.

¹⁴⁴ ILC Articles, *supra* note 29, ¶11.

¹⁴⁵ SHAW, *supra* note 36, at 855.

¹⁴⁶ STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 158 (2009); BERGKAMP, LIABILITY AND ENVIRONMENT 165 (2001).

¹⁴⁷ XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 164 (2003).

¹⁴⁸ *Pulp Mills*, *supra* note 51, at 55-56.

¹⁴⁹ *Id.*

¹⁵⁰ Report of the International Law Commission, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 ¶7 (2001) [hereinafter ILC Report].

diligence is not a guarantee that harm will be prevented,¹⁵¹ but an obligation for a State to exert its best efforts to minimise risk.¹⁵²

While customary law does not specify what diligent conduct entails,¹⁵³ a State which complies with the requirements of the circumstances may not be held liable “however devastating the harm may be.”¹⁵⁴

Arctos first acted through diplomatic means,¹⁵⁵ in furtherance of the CIL principle of cooperation. The request to cease the project was refused by Ranvicora,¹⁵⁶ and the grey bear continued to cross the border and cause significant damage,¹⁵⁷ including the death of a child.¹⁵⁸ Therefore, given the potential extinction of the tern due to the predatorial behaviour of the bear,¹⁵⁹ Arctos was compelled to take targeted and necessary measures to prevent further adverse and irreversible damage, and to protect its citizens.

¹⁵¹ *Id.*

¹⁵² North Sea Continental Shelf (Ger. v. Neth.; Ger. v. Den.), Judgment, 1969 I.C.J. 3, ¶77 (Feb. 20); BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 8 (2008).

¹⁵³ P BIRNIE, A BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 113 (2009).

¹⁵⁴ A. Boyle, *Codification of International Environmental Law and the International Law Commission: Injurious Consequences Revisited*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 76 (Boyle et al., eds., 1999).

¹⁵⁵ R.¶18.

¹⁵⁶ R.¶19.

¹⁵⁷ R.¶20.

¹⁵⁸ R.¶21.

¹⁵⁹ R.¶17.

2.2.3. *In arguendo*, measures are precluded from being considered an international wrongful act.

A State may invoke a necessity argument when its action: (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) does not seriously impair an essential interest of the State or other States,¹⁶⁰ with such invocation precluding wrongfulness.¹⁶¹

The ICJ has held that “ecological necessity” will constitute an essential interest,¹⁶² forming the basis for the defence of ecological necessity.¹⁶³ While what is “essential” depends on particular circumstances,¹⁶⁴ safeguarding ecological balance has come to be considered an “essential interest” of all States.¹⁶⁵ Imminence requires “a threat to the interest at the actual time”, with the only condition for ‘peril’ be that it is objectively established, and not merely apprehended as possible.¹⁶⁶ While the doctrine is generally invoked on an exceptional basis,¹⁶⁷ the crisis in Arctos meets that standard.

In response to the internationally wrongful act of causing transboundary harm, Arctos was forced to invoke the defence of necessity and take measures to prevent further damage to its essential ecological interests. Considering the reintroduced bears already killed several terns

¹⁶⁰ ARSIWA, *supra* note 84, art.25.

¹⁶¹ Nagymaros, *supra* note 37.

¹⁶² *Id.* at 41.

¹⁶³ *Id.* at 33-37.

¹⁶⁴ ARSIWA, *supra* note 84, art.25.

¹⁶⁵ *Id.* at 39.

¹⁶⁶ *Id.* at 19.

¹⁶⁷ *Id.* at 40.

and their young,¹⁶⁸ the peril was imminent and ongoing. Therefore, the situation meets the prescribed threshold, and is precluded from wrongfulness.

2.3. The Trowborst Tern is a protected endangered endemic species.

An endemic species refers to a species found only in a defined geographic area,¹⁶⁹ with emphasis placed on promoting policies for the conservation of endangered endemic species.¹⁷⁰ Endemic species have evolved special characteristics to live only in particular habitats,¹⁷¹ making them incapable of competing elsewhere.¹⁷² Species that are both endemic and endangered have small populations,¹⁷³ little genetic variability and require stable and nearly constant environments to grow,¹⁷⁴ making them vulnerable to extinction at a faster rate than other species.¹⁷⁵ Alien species are commonly recognized as a fundamental threat to many endemic species and their ecosystems.¹⁷⁶

¹⁶⁸ R.¶17.

¹⁶⁹ MALCOLM L. HUNTER JR., FUNDAMENTALS OF CONSERVATION BIOLOGY 26 (3rd ed., 2006) [hereinafter HUNTER].

¹⁷⁰ Bern Convention, *supra* note 9, art.3(1).

¹⁷¹ Kani ISIK, *Rare and Endemic Species: Why are they Prone to Extinction?* TURK J BOT 411, 411 (2011) [hereinafter ISIK].

¹⁷² HUNTER, *supra* note 169, at 130-131.

¹⁷³ Bird Life International, The Prioritization of Endemic Bird Areas, BIRD LIFE DATA ZONE 39, http://datazone.birdlife.org/userfiles/file/EBAs/EBAPDFs/p039-44_PRIORITI.pdf.

¹⁷⁴ ISIK, *supra* note 171, at 416.

¹⁷⁵ *Id.*

¹⁷⁶ GILLESPIE, *supra* note 137, at 264.

While the grey bears have viable populations in Paddington and Aloysius,¹⁷⁷ the tern is endangered and endemic only to Arctos,¹⁷⁸ and protected under national law.¹⁷⁹ Therefore, predation of the tern by the bear¹⁸⁰ could lead to global extinction of the tern. Arctos is justified in prioritising the conservation of this critical species.

¹⁷⁷ R.¶10.

¹⁷⁸ R.¶17.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

PRAYER

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

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

Therefore, the it is humbly prayed for the Hon'ble Court to pass appropriate directions to stop the project and grant adequate compensation to the Applicant.

(Respectfully Submitted)

Agents on behalf of the Applicant State.