
IN THE INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS



QUESTIONS RELATING TO REINTRODUCTION OF BEARS
FEDERAL STATES OF ARCTOS
APPLICANT
V.
REPUBLIC OF RANVICORA
RESPONDENT

MEMORIAL FOR THE APPLICANT

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QUESTIONS PRESENTED

1. WHETHER THE REPUBLIC OF RANVICORA VIOLATED INTERNATIONAL LAW WITH RESPECT TO ITS GREY BEARS REINTRODUCTION PROJECT.
2. WHETHER THE FEDERAL STATES OF ARCTOS VIOLATED 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 are Parties to the Statute of the International Court of Justice. Pursuant to Article 36, paragraph 1, of the Statute of the International Court of Justice the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force. Therefore, the Federal States of Arctos (“Arctos”) and the Republic of Ranvicora (“Ranvicora”) submitted the present dispute to the International Court of Justice.

Pursuant to Article 40(1) of the Statute of the International Court of Justice, States may bring cases before the Court by special agreement. On July 11, 2019 the parties signed a special agreement and submitted it to the Registrar of the Court. Registrar of the Court acknowledged receipt of the joint notification on July 22, 2019.

STATEMENT OF FACTS

The Federal States of Arctos and the Republic of Ranvicora are neighboring sovereign states located on the continent of Suredia in the Northern Hemisphere. Arctos and Ranvicora are considered developed countries, and their economies are diversified across all sectors. Arctos is located to the north of Ranvicora. The area along the 75-km border between the two countries consists primarily of forests and privately owned farms. Arctos does not share a border with any other countries.

In 2008, the Government of Ranvicora began considering the possibility of reintroducing grey bears (a species that is endemic to parts of Suredia and listed as Endangered on the IUCN Red List of Threatened Species). For centuries, grey bears lived in Ranvicora and went extinct in 1963. There are no historic or fossil records of grey bear presence in Arctos.

The grey bear reintroduction project occurred in phases, with the first release on 23 March 2013. The bears were released at six locations in the northern region of Ranvicora near the Arctos border. On 19 September 2017, a grey bear was spotted in Arctos. Based on the tracking information available, scientists involved with the reintroduction project confirmed that some of the grey bears had been intermittently moving back and forth between Ranvicora and Arctos.

On 27 February 2018, a farmer in Arctos reported that one of her horses had been attacked and killed. The farm was located 5 km from the Arctos-Ranvicora border. Authorities determined that a grey bear had killed the horse. Over the next five and a half months, 7 horses and 20 sheep were killed on different farms in Arctos near the border. Although there were no witnesses to any of the attacks, authorities determined that grey bears had killed the animals. Grey bears also began damaging apple orchards and beehives in Arctos, and it was determined that grey bears

were sniffing out the nests and consuming the eggs and nestlings of the Trouwborst tern (*Sterna ariensis*).

The Government of Arctos requested that the Government of Ranvicora compensate the farmers and other citizens whose property has been damaged by grey bears, and end its harmful reintroduction project. The Embassy of the Republic of Ranvicora answered “ That the grey bears have killed some animals in Arctos is unfortunate, but the bears are wild, and Ranvicora cannot control where the bears migrate and is not responsible for what the bears do”.

In an attempt to protect its citizens, their property, and the environment, the Government of Arctos began setting out poisoned animal carcasses in Arctos near the farms where the horses and other animals had been attacked. In January 2019, four grey bears died after eating the poisoned animal carcasses.

On 22 April 2019, a female grey bear mauled two children who were playing outside on a farm in Arctos. The children were trying to play with a bear cub, and the mother bear attacked them. One of the children died as a result of the attack, and the other received significant permanent injuries. Two days later, the Government of Arctos issued an emergency regulation, effective immediately, that expressly granted permission for the citizens of Arctos to shoot any grey bear spotted in Arctos. Four weeks after, a farmer in Arctos shot and killed a female grey bear and her two cubs that had wandered onto his farm. A day later, another farmer shot and killed a female grey bear that was pregnant.

Ranvicora demanded that Arctos revoke its emergency regulation and stop poisoning, shooting, or otherwise harming the grey bears. Arctos answered that there is no choice but to do what was

necessary to protect its citizens and their property from the imminent threat posed by the grey bears.

Further negotiations between Arctos and Ranvicora failed to resolve the dispute, and the two countries entered into a Special Agreement to institute proceedings in the International Court of Justice.

SUMMARY OF ARGUMENT

I. The Republic of Ranvicora violated international law with respect to its grey bear reintroduction project because Ranvicora's actions have directly resulted in transboundary harm and the grey bear is essentially an invasive alien species in Arctos.

II. The Federal States of Arctos did not violate international law with respect to its responses to Ranvicora's reintroduction of grey bears, as it has acted in accordance with the duty to prevent transboundary harm and has tried to remedy the transboundary harm that Ranvicora caused.

ARGUMENTS

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

As part of the planning process of the grey bear reintroduction project and pursuant to its national laws, the Government of Ranvicora conducted an environmental impact assessment.

¹The Government of Ranvicora did not inform or consult with other countries about the reintroduction project. Moreover, the environmental impact assessment conducted by the Republic of Ranvicora did not assess the potential impacts of the reintroduction project on other countries including the Federal States of Arctos. Meanwhile, there is a general obligation to ensure that any activity under the state's jurisdiction and control respects environment of other states or area beyond control.² The obligation to carry out an assessment is also envisaged by many international treaties, which both states are party of, in particular, the Rio Declaration on Environment and Development (Principle 17)³, Articles 205 and 206 of the 1982 UN Convention on the Law of the Sea⁴, etc.

This obligation implies that the states have to carry out an EIA in case there is a risk of a negative impact on another state⁵. Such assessment does not have to be limited to only one phase and can be repeated during the course of time⁶. Moreover, even if in the *Pulp Mills case* the EIA referred to industrial activities, the underlying principle of conduct of EIA applies

¹ R. at 12

² *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8), para 29

³ Rio Declaration on Environment and Development, UN Doc. A/CONF.151/126, (14 June 1992)

⁴ United Nations Convention on the Law of the Sea, 10 Dec. 1982, 1833 U.N.T.S. 107

⁵ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 2010 I.C.J. 1, 61 (Apr. 20).

⁶ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 1997 I.C.J. Rep. 7, 7 (Sept. 25); Marte Jervan, *The Prohibition of Transboundary Environmental Harm. An Analysis of the Contribution of the International Court of Justice to the Development of the No-harm Rule*, PluriCourts Research Paper No. 14-17, available at: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486421&download=yes>, accessed November 5, 2019

generally to proposed activities which may have a significant adverse impact in a transboundary context. Thus, to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment. Additionally, as the Court stated in the cases of *Certain activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, determination of the content of the environmental impact assessment should be made in light of the specific circumstances of each case. If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.⁷ Meantime, Federal States of Arctos was not notified and no attention was given to the fact that the grey bears introduction project could harm the neighboring state, meanwhile, according to Lac Lanoux arbitration, “according to the rule of good faith, the upstream state is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests”.⁸

⁷*Certain activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, paras. 101-105, summary available at https://www.icj-cij.org/files/case-related/152/18870.pdf?fbclid=IwAR0dCLqM_9MA78JXXbL2g061UOOz7ooJYqZh-x2t9YdMCbvGXX96y2WyVwI>accessed November 2, 2019

⁸ Lac Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281 (1957), para. 22

Nevertheless, an environmental impact assessment can be one of the criteria for determining whether a state has acted with an appropriate degree of due diligence in the exercise of its obligation to prevent transboundary harm. Additionally, according to article 3 of Draft articles on Prevention of Transboundary Harm from Hazardous Activities, “the State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof”⁹. However, the measures taken by the Republic of Ranvicora are not adequate enough to be considered as appropriate. The Article 3 is based on the fundamental principle *sic uteretur alienum non laedas*, which is reflected in principle 21 of the Stockholm Declaration as well, stipulating that States have, in accordance with the Charter of the United Nations and the principles of international law, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.¹⁰

Therefore, while the Parties are provided with permanent sovereignty over their natural wealth and resources¹¹ under customary international law¹² such right is not absolute. The Stockholm and Rio Declarations restrain Parties from engaging in activities that cause damage to the environment of other Parties or outside the limits of their national jurisdiction.¹³

In the *Pulp Mills judgment*, the ICJ importantly pronounced that states are “obliged to use all the means at its disposal in order to avoid activities, which take place in its territory, or in any area

⁹Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries 2001, art. 3.

¹⁰UN Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, UN Doc.A/CONF.48/14/Rev.1, Principle.21 (June.16.,1972) (hereinafter Stockholm Declaration)

¹¹ UN G.A.Res..1803.(XVII), para 1.(Dec..14.,1962); UN G.A.Res..2158.(XXI).para.1.(Nov..25.,1966);G.A.Res. 3171 para.1(Dec..17.,1973), UN Conference on Environment and Development, Rio Declaration on Environment and Development, UNDoc. A/CONF.151/26/Rev.1, Principle 2 (Aug., 12, 1992) (hereinafter Rio Declaration), Convention on Biological Diversity, art. 8(c), June 5, 1992, 1760 U.N.T.S. 79 (hereinafter CBD). Preamble4;art.3

¹² *Armed Activities on the Territory of the Congo*, (D.R.C. v. Uganda), Judgment, 2005.I.C.J. Rep..168, para. 244(December 19)

¹³Stockholm Declaration, supranote 9, Principle.21; Rio Declaration, supranote 3, Principle 2

under its jurisdiction, causing significant damage to the environment of another State”. Moreover, the Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’, which was mentioned by *Corfu Channel* case as well.¹⁴ This is consistent with the Articles on Prevention of Transboundary Harm from Hazardous Activities¹⁵, where the International Law Commission implies that the obligation not to cause transboundary environmental harm includes a duty of prevention. The emphasis upon the duty to prevent as opposed to the obligation to repair, remedy or compensate has several important aspects. Prevention should be a preferred policy because compensation in case of harm often cannot restore the situation prevailing prior to the event or accident.

According to the Rio Declaration on Environment and Development (1992), “*States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith*”.¹⁶

In order to conscientiously take into account the interests of other states, the State is obliged to notify potentially affected states of the upcoming activity and provide them with all the necessary information related to this activity. This will enable neighboring states to assess the potential impact of activities in their territories. If an environmental impact assessment indicates that the activity will result in significant transboundary damage in the normal implementation process, then the consent of the affected states must be obtained. In our case at hand the Republic

¹⁴*Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 23 (April 9)p. 22

¹⁵ Draft articles, supra note 8

¹⁶Rio Declaration, supra note 3, principle 19

of Ranvicora did not comply with any of the provisions of the Convention as well as the previous precedents established by the respectable Court.

Additionally, the Rio Declaration on Environment and Development also provides that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and *the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*.¹⁷

Along the same lines, an arbitral tribunal considering the 1941 *Trail Smelter Case (United States v. Canada)* concluded that *under the principles of international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury in or to the territory of another or the property or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence*¹⁸(emphasis added).

Finally, in 1996 the ICJ also declared in an advisory opinion on *Legality of the Threat of Use of Nuclear Weapons* that the corpus of international law relating to the environment requires that States “ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control. There is no doubt that this obligation is part of general international law. And again more recently in *the Case concerning Pulp Mills on the River Uruguay*, the International Court of Justice expressly endorsed the obligation as a rule of international customary law. The statement was subsequently repeated in *Gabčíkovo-*

¹⁷Ibid, principle 2

¹⁸*Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1941)

Nagymaros, in addition to the classification of environmental concerns as an “essential interest” the reference to “newly developed norms” also strengthens the view.¹⁹

Besides, the Rio Declaration on Environment and Development obliges States effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

Thus, the Republic of Ranvicora had an obligation under customary and conventional international law to inform the Federal States of Arctos about its grey bear reintroduction project as well as about the potential risk of transboundary harm. Therefore, it has violated the fundamental principle *sic utere tuo alienum non leadas* (*you should use your property in such a way not to cause injury to your neighbor(s)*) reflected in Principle 21/2 of the Stockholm and Rio Declarations.

II. The Federal States of Arctos did not violate international law.

The Federal States of Arctos is accused of violating Articles 1 and 8 of the CBD, Article III of CMS, and Articles 1, 2, 6, 8, and 10 of the Bern Convention. Rather than accusing the Government of Arctos of violating international law, however, the Government of the Republic of Ranvicora should be held responsible for the violation of conventional international law. The Republic of Ranvicora is a party to the Convention on Biological Diversity (CBD) which obliges Parties to the Convention to “prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species”.²⁰

¹⁹The Prohibition of Transboundary Environmental Harm: An Analysis of the Contribution of the International Court of Justice to the Development of the No-harm Rule, available at:

<<https://www.duo.uio.no/bitstream/handle/10852/41416/213.pdf?sequence=1>>, accessed November 1, 2019

²⁰CBD, *supra* note 10, Article 8(h)

The grey bear is an invasive alien species for the Federal States of Arctos. An ‘invasive alien species’ (IAS) is a species that has been introduced or spread outside its natural range and has become established in natural or semi-natural ecosystems or habitat, is an agent of change and threatens native biological diversity by the damage it causes.²¹ “Introduction” refers to the movement by human agency, indirect or direct, of an alien species outside of its natural range (past or present). This movement can be either within a country or between countries or areas beyond national jurisdiction. Among all, according to the CBD Guiding principles based on the Conference of the Parties Decision VI/23, as well as the European Strategy on Invasive Alien Species, “Intentional introduction” refers to the deliberate movement and/or release by humans of an alien species outside its natural range.²² Though Decisions of the Conference of Parties are not generally binding,²³ they set forth an authoritative interpretation of international agreements.

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The grey bear is an invasive alien species for the Federal States of Arctos because:

- For centuries grey bears lived in 3 Suredian countries: Ranvicora, Paddington and Aloysius. There are no historic or fossil records of grey bear presence in Arctos. That means that the Federal States of Arctos was not considered a natural range for grey bears. The bears were released in the northern region of Ranvicora near the Arctos border and biologists, however, questioned whether this region was part of the grey bear’s historic range.

²¹IUCN, Guidelines for the prevention of biodiversity loss caused by alien invasive species (2000), <<https://portals.iucn.org/library/efiles/documents/Rep-2000-052.pdf>>, accessed November 3, 2019

²²CBD Guiding Principles (COP Decision VI/23) and the European Strategy on Invasive Alien Species: <<https://www.cbd.int/doc/external/cop-09/bern-01-en.pdf>> , accessed November 7, 2019

²³Jutta Brunnée, *Coping with Consent: Law-Makin Under Multilateral Environmental Agreements*, 15 Leiden J. Int’l. 21 (2002)

²⁴Philippe Sands, et. al., *Principles of International Environmental Law* 109 (2012)

- the grey bears threaten native biological diversity by the damage they cause to beehives and nestlings of the Trouwborst tern (*Sterna ariensis*) which is protected under national law in Arctos.

According to the Convention on Biological Diversity in the case of imminent or grave danger or damage, originating under its jurisdiction or control, to biological diversity within the area under jurisdiction of other States or in areas beyond the limits of national jurisdiction, each Contracting Party shall notify immediately the potentially affected States of such danger or damage, as well as initiate action to prevent or minimize such danger or damage.²⁵ After the actual occurrence of significant transboundary harm or in the real threat of such harm, the State of origin must take measures to mitigate the consequences of such an incident.

The transboundary harm caused by Ranvicora's grey bear reintroduction project was, indeed, significant. The ILC Draft Articles on Prevention of Transboundary Harm establish that "significant" harm must result in "a real detrimental effect on matters such as, for example, human health, industry, property, environment or agriculture in other States."²⁶ The grey bear reintroduction project caused death of citizens of Arcros as well as harm to flora and fauna of the Federal States of Arctos. It caused also economic damage.

Thus, the Republic of Ranvicora had an obligation under the Convention on Biological Diversity to notify about transboundary harm and to initiate action to prevent or minimize the damage caused in the result of its grey bear reintroduction project.

Furthermore, Arctos has not acted in contravention of Convention on the Conservation of Migratory Species of Wild Animals, because Arctos is not even a Range State for the grey bear,

²⁵CBD, supra note 10, Article 14(d)

²⁶ILC Draft Articles, supra note 8, Article 2 Commentary 4

but even if it were, Arctos's responses are permissible under CMS Article III(5)(d) which states that taking of animals can be permitted if extraordinary circumstances so require.

Arctos also has not violated the Bern Convention, but in any event, Arctos's actions are appropriate pursuant to the exceptions in Article 9. According to Article 9 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:

- For the protection of flora and fauna
- To prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property;
- In the interests of public health and safety, air safety or other overriding public interests.

Arctos did not violate international law, because it acted in the frames of main function of each state, which is to protect its citizens, their health, property, rights as well as ecosystem of the territory under its jurisdiction. Meantime, Ranvicora's actions contradict the principles of state sovereignty and territorial integrity of Arctos. This obligation of states to respect the territory of others is often referred to as the concept of "territorial integrity". The link between territorial sovereignty and territorial integrity is enshrined in the *Island of Palmas arbitration*, where the Permanent Court of Arbitration stated that Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.²⁷

²⁷*Island of Palmas arbitration, Netherlands v. the United Kingdom*, 1928, RIAA vol. 2, at p. 839.

As Oppenheim noted in 1912: A State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighboring State. Thus, the principle of territorial sovereignty finds its limitations where its exercise touches upon the territorial sovereignty and integrity of another State.²⁸

Moreover, Arctos did not violate environmental international law, as the grey bear is an invasive alien species in Arctos. Conference of the Parties of the Convention on Biological Diversity Decision VI/23 on Alien species that threaten ecosystems, habitats or species²⁹ established that, in the context of alien invasive species, in cases of activities that could be a risk for another State including the intentional or unintentional transfer of an alien invasive species to another State (even if it is harmless in the State of origin), the intentional or unintentional introduction of an alien species into their own State if there is a risk of that species subsequently spreading into another State and becoming invasive and activities that may lead to unintentional introductions, even where the introduced species is harmless in the state of origin, the parties should take appropriate individual and cooperative actions to minimize that risk, including the provision of any available information on invasive behaviour or invasive potential of a species. In the case at hand, Arctos acted according to guiding principle 12, as once the establishment of an alien invasive species has been detected, States should take steps such as eradication, containment and control, to mitigate the adverse effects. Mitigation measures should take place in the earliest possible stage of invasion, on the basis of the precautionary approach. Hence, early detection of new introductions of potentially invasive or invasive species is important, and needs to be

²⁸Sovereignty vs. trans-boundary environmental harm: The evolving International law obligations and the Sethusamuduram Ship Channel Project (2006)
<https://www.un.org/depts/los/nippon/unnff_programme_home/fellows_pages/fellows_papers/mendis_0607_sri_lanka.pdf?fbclid=IwAR0YvKDKXXQn35abCC7SG3iU3Pq6r4-7yEBgn017jheRCMe0V_D-JFEPhyw> , accessed November 9, 2019

²⁹CBD COP Decision, supra note 21, Alien species that threaten ecosystems, habitats or species
<<https://www.cbd.int/kb/record/decision/7197?RecordType=decisionSubject=IAS>> , accessed November 5, 2019

combined with the capacity to take rapid follow-up action. Moreover, in compliance with the guiding principle 13, eradication, where it is cost-effective, should be given priority over other measures to deal with established alien invasive species.³⁰

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the Federal States of Arctos respectfully requests this 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 acted in accordance with its duties and did not violate international law with respect to its responses to Ranvicora's grey bear reintroduction project.

³⁰Ibid