



**IN THE ICJ AT THE PEACE PALACE
THE HAGUE, THE NETHERLANDS**

**THE CASE CONCERNING RESPONSES TO HIGHLY PATHOGENIC AVIAN
INFLUENZA AND TRANSBOUNDARY WETLANDS**

THE FEDERAL STATES OF AVES (APPLICANT)

v.

THE REPUBLIC OF RENAC (RESPONDENT)

MEMORIAL FOR THE RESPONDENT

**THE 2017-2018 STETSON INTERNATIONAL ENVIRONMENTAL
MOOT COURT COMPETITION**

NOVEMBER 2017

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LIST OF ABBREVIATIONS

Abbreviation	Full form
Adeguri	Adeguri Marsh
ARSIWA	Articles on State Responsibility for Internationally Wrongful Acts (2001)
BCC or BCCs	Blue Crowned Crane(s)
CBD	Convention on Biological Diversity
H5NX	Highly Pathogenic Avian Influenza
ICJ	International Court of Justice
RAMSAR	RAMSAR Convention
RD	Rio Declaration (2002)
R.	Record
WHO	World Health Organization
WOFAH	World Organization for Animal Health

QUESTIONS PRESENTED

1. WHETHER RENAC'S RESPONSES TO THE 2014 AND 2015 OUTBREAKS OF H5NX COMPLIED WITH INTERNATIONAL LAW
2. WHETHER RENAC'S DELISTING OF THE ADEGURI MARSH AS A RAMSAR SITE AND ITS SUBSEQUENT LISTING OF THE COASTAL MARSH, IN COMPENSATION, COMPLIED WITH INTERNATIONAL LAW

STATEMENT OF JURISDICTION

The Federal States of Aves and the Republic of Renac, pursuant to Article 40, paragraph 1 ICJ-Statute, submit the present dispute to the ICJ for resolution by virtue of a special agreement.

The parties signed said special agreement and submitted it to the Registrar of the Court on July 4, 2017, and the Registrar acknowledged receipt of the joint notification dated 4 July 2017 on July 10, 2017. *See* Special Agreement between the Federal States of Aves and the Republic of Renac for submission to the International Court of Justice of differences between them concerning questions relating to responses to Highly Pathogenic Avian Influenza and transboundary wetlands.

STATEMENT OF FACTS

Aves and Renac

Aves and Renac are neighboring States. Aves is a developed-country. Renac is a developing-country. Both countries' economies are based on agriculture, poultry production, and ecotourism (R. ¶1).

The Adeguri Marsh (Adeguri)

Aves and Renac share a 20,000-hectare transboundary wetland, the Adeguri, listed as a RAMSAR site since 2008 (R. ¶¶9, 12). Several commercial poultry facilities are located near Adeguri. (R.¶10). Also, this water system is habitat to migratory waterbirds, including the BCC. (R. ¶¶11, 13)

The Blue Crown Cranes (BCCs)

BCCs are listed as an endangered species in the CBD's Red List of Endangered Species (R. ¶13). Moreover, it is Aves' national bird (R. ¶14).

H5NX Outbreaks

In 2009 and 2012, Aves and Renac experienced H5NX outbreaks. However, both countries stopped the spread by culling infected domestic birds since it affected Renac's economy, food safety, and population (R. ¶¶15, 17).

In January 2014, Renac suffered a severe H5NX outbreak, apparently originating in Aves. Some commercial poultry facilities in Renac were infected, and 550 wild birds were found dead. (R.

¶16) Four people were confirmed to be infected two of them whom died. (R. ¶19) Renac notified Aves and carried out the culling of selected birds. (R. ¶17,19)

In 2015, another H5NX outbreak occurred in Renac, affecting many poultries facilities. The virus spread to Renac following drainage from Aves' poultry facilities. The spread killed 250 waterbirds, including BCC. (R. ¶20) Eight Renac citizens were reported infected with H5NX, three of whom died (R. ¶24).

Renac's Notifications

In February 2015, Renac notified Aves and carried out the culling of infected birds, and the dispensing of disinfectants into the Adeguri, as a response to the spread. (R. ¶¶21,22) The outbreak was controlled (R. ¶24) and no significant degradation in water quality occurred. (R. ¶25)

The Delisting

In March 2016, Renac notified RAMSAR parties of its decision to delist Adeguri. (R. ¶29) On October 4th 2016, Renac officially delisted Adeguri as a RAMSAR Site and Transboundary RAMSAR Site, based on urgent national interests like the necessity to protect human health, the Adeguri, and economy (R. ¶34)

SUMMARY OF ARGUMENTS

Renac complied with international law by culling the BCC individuals and dispensing disinfectant into the Adeguri. Culling is an appropriate measure to protect the species and public health under the CMS, CBD, AEWA and recognized by the WOFAH and WHO. Dispensing disinfectant was an adequate response to mitigate the damage caused to the Adeguri by Aves's draining facilities.

When delisting the Adeguri as a RAMSAR site, Renac acted in accordance with its international obligations as the notification procedures were complied with and the offered compensation was adequate.

If Renac's actions caused any damage to Aves, the wrongfulness of Renac's responses must be precluded as it proceeded under the state of necessity and all the requirements set forth in article 25 ARSIWA were fully met.

The adoption of bio-sanitary and safety measures to counter H5NX and the pollution of the Adeguri was Renac's obligation in accordance with the principle of common but differentiated responsibilities.

In the remote event Renac was found liable, Renac offers appropriate remedies of reparation and satisfaction.

ARGUMENTS

1. RENAC'S RESPONSES TO THE H5NX OUTBREAK WERE COMPATIBLE WITH INTERNATIONAL LAW

1.1 RENAC FULFILLED ITS INTERNATIONAL COMMITMENTS WHEN CULLING INFECTED WATERBIRDS

1.1.1 Renac complied its procedural notification obligations

Notification is an international procedural requirement related to the duty of cooperation¹, which obliges States to provide relevant information to other Parties that may suffer from environmental degradation.² RAMSAR imposes this obligation when a wetland is shared.³ Likewise, CBD obliges Parties to provide notification about activities taking place within their jurisdiction.⁴

In the present case, Renac consulted and informed Aves about the 2014 and 2015 culling plans through Diplomatic-Notes dated January 30th, 2014⁵ and February 11, 2015⁶, respectively.

Therefore, Renac abided by the international procedural standards by giving prior notice of the measures taken to confront H5NX.

¹ Mox Plant-Case, pg. 95

² Rio-Declaration. Principle 19; *see also* Dupuy, Pierre, Droit International Public, 2nd ed.1994, pg 493.

³ RAMSAR, article 5.

⁴ CBD, article 14 C.

⁵ R. ¶18.

⁶ R. ¶24.

1.1.2 Renac complied with the No-Harm Rule

The No-Harm Rule is a principle recognized as customary international law⁷ and state in treaty⁸. The ICJ in the *Pulp Mills* case, as well as Judge Donoghue's separate opinion in *the Pulp Mills* case⁹ defined it as the obligation "to not cause significant harm". If harm is caused, the State must be repaired.¹⁰

Here, there is no breach of this principle because (1) culling is allowed under CBD, CMS, and ; (2) there was no effective harm to Aves; and (3) nor does there exist a causal link between the alleged damage and Renac's actions.

1.1.2.1 Culling is allowed under CBD, CMS and AWEA and International Health Regulations

ARSIWA provides two elements to determine a wrongful act: attribution and treaty breach.¹¹ Attribution is not being discussed in the present case by parties' agreement. The issue here is whether culling is a breach to CBD, CMS and AWEA.

Exceptions to an international rule admit exclusion of international liability¹²: AWEA admits exceptions to species conservation¹³ for imperative reasons of public interest.¹⁴ CBD provides that, if there's a situation likely to have adverse impacts on the conservation of biological diversity, Parties must protect the threatened species.¹⁵ Specifically, CMS establishes

⁷ Argentina-Uruguay. ¶101.

⁸ Rio-Declaration. Principle. 2; *see also* Stockholm-Declaration on the Human Environment, Principle 21; CBD, article 3.

⁹ Costa Rica-Nicaragua. Advisory Opinion. ¶356

¹⁰ ARSIWA, article 31.

¹¹ *Ibid*, article 2.

¹² *Ibid*, article 27.

¹³ AWEA, articles 2.1.1, 2.1.2 Annex 3

¹⁴ *Ibid*, article 2.1.3, 2.3 Annex 3; *see also* CMS, article 5.

¹⁵ CBD, articles 7, 8.

animal takings are permissible for the survival of the affected species.¹⁶

In addition, WHO Law establishes the legality of implementing necessary measures to counter international public health emergencies.¹⁷ WOFAH prescribes culling as an appropriate measure to control H5NX, as vaccines are insufficient.

In this case, culling BCCs was an emergency measure to protect the BBC population and human health:

- During the 2014 outbreak, Renac culled 450 potentially infected BCCs and the spread was contained.¹⁸ The culling quantity was consistent with the results of the testing, which demonstrated that, out of 20 individuals tested 100% of them were found infected.¹⁹ Renac's measure protected biodiversity (by leaving 1,800 BCCs in the Adeguri), public safety²⁰, and prevented serious damage to the shared water source and human life.²¹
- During the 2015 outbreak, Renac culled over 100 infected BCCs.²² This was effective to stop the spread. Certainly, Renac was also acting to prevent transboundary harm by reducing the spread of this deadly virus".²³

Consequently, Renac's culling response to H5NX is lawful under international law as it is an exception aimed to protect BCCs and human.

¹⁶ CMS, articles III 5 (b), 6.

¹⁷ WHO-Precautionary.

¹⁸ R. ¶19.

¹⁹ R. ¶16.

²⁰ AEWa, article 2.1.3 (B) (E) Annex 3.

²¹ *Ibid*, article 2.1.3 (A) Annex 3.

²² R. ¶24.

²³ R. ¶23.

1.1.2.2 No transboundary environmental harm was caused to Aves.

Transboundary environmental damage occurs when a measure affects species and biodiversity within an ecosystem shared by two or more States²⁴, and it is prohibited under CBD, AEWA, CMS and RAMSAR.²⁵

However, culling does not represent indiscriminate killing or transboundary damage if conducted properly. Instead, “lethal control may play an important role in avoiding the spread of such behaviors through population”.²⁶

In this case, far from causing damage to the Adeguri’s BCCs, Renac’s culling was directed to counter the H5NX virus considering Aves’ reluctance to take measures.²⁷ Furthermore, there was no damage because, between the two moments of the culling, the species had a restoration period to recover its population density. According to BCCs breeding cycle, there was enough time for the species to be renewed with a generation of healthy waterbirds being born.²⁸ In 2015, the number of culled species decreased, but the population could recover (leaving over 3 flocks of 650 birds each).

Therefore, as the culling was focused on protecting the species considering its rebirth rates, there was no damage caused to BBC population. Ultimately, the birds survived as a migratory species on the shared resource. The essential requirement of transboundary harm has thus not been fulfilled.

1.1.2.3 No causal link was demonstrated by Aves

For international responsibility to exist, a causal nexus between Respondent’s action and

²⁴ Xue. Transboundary damage. pg, 4,5.

²⁵ Preambles CBD, CMS, AEWA.

²⁶ Woodroffe, 8:91-98.

²⁷ R. ¶23.

²⁸ Animal Diversity Web. UM. (Last Access: November 30th, 2017)

the alleged damage must be proven.²⁹

As Aves alleges that it suffered damage because of Renac's culling it must submit impending evidence to substantiate its claim. However, it failed to demonstrate that culling was the only factor that may have harmed BCC population.³⁰ As explained below at section 1.2, other factors, especially the dumping of poultry debris into the Adeguri may had an impact in the decrease of BCC population.

Hence, Respondent cannot be liable under international law, because there is no direct and exclusive attribution of any injury to the culling.³¹

Now, even if the culling was the sole factor decreasing BCC population, the mere causality of a conduct does not determine its legality under international law.³²

In conclusion, Aves' mere speculations do not demonstrate a causal link. Thus, the allegations of transboundary harm are unsubstantiated.

1.1.2.4 Aves, but not Renac, breached the international cooperation principle.

The existence of a general duty of cooperation is formulated in RD³³ and UNGA Resolution 26/25.³⁴ The principle prohibits activities within a States' territory contrary to the rights of other States. Pursuant to CMS³⁵, States must act in consonance with the cooperation

²⁹ Nuclear-NZ v France; *see also* Gabčíkovo-Nagymaros.

³⁰ R. ¶25

³¹ CBD, article 3.

³² Draft- ARSIWA. Art. 31 commentary (13)

³³ Rio-Declaration. Principle 27.

³⁴ Resolution 26/25. Principle 15.

³⁵ CMS, article II 3 (a)

principle to protect migratory species. CBD and provide that Parties must cooperate in emergency situations by endeavoring to implement remedial measures.³⁶

Aves failed to comply with the obligations arising from this principle because there is no evidence of any measure taken by Aves to contain the spread in 2014-2015³⁷, having regard to its financial sources as a developed country.³⁸

On the contrary, Renac acted to eradicate H5NX. The containment of the virus lead to positive results: the spread within the marsh stopped and further outbreaks were avoided.³⁹ After February 2015, no BBC or human being was found infected or dead by H5NX.⁴⁰

Therefore, Renac cooperated with Aves by taking measures that were correctly planned and executed to stop the spread and the lack of actions taken by Aves constitutes evidence of its omissions and non-compliance with its cooperation obligations.

1.1.3 In any case, Renac acted in accordance with the precautionary approach.

In cases of serious or irreversible threats to the health of humans or ecosystems, acknowledged scientific uncertainty should not be used as a reason to postpone preventive measures.⁴¹

1.1.3.1 Renac took precautionary measures to protect the Adeguri

Pursuant to RD Principle 15⁴², CBD⁴³, and UN Framework Convention on Climate Change⁴⁴, there is an approach for precautionary actions based on the cooperation principle.⁴⁵ In

³⁶ CBD, article 5; *see more* AEWa, article. III, 2 (e)(f)

³⁷ R. Footnote 3.

³⁸ R. ¶1.

³⁹ R. ¶24.

⁴⁰ R. ¶25.

⁴¹ WHO-Precautionary.

⁴² Rio-Declaration, principle 15.

⁴³ CBD. Preamble.

⁴⁴ UN-Climate Change, article 3.3.

⁴⁵ Weiss Future-Generations, pg. 198

Gabcikovo-Nagymaros it was stated that parties must strive to take precautionary measures to prevent or minimize environmental degradation.⁴⁶

Here, there was no scientific certainty about the H5NX's source. The spread was affecting poultry facilities all over Renac's boundary and the 20 BCCs tested turned out to be infected. As there was no opportunity to test the 450 blue-crowned cranes left in this flock and the virus was spreading, Renac opted for culling to avoid worse consequences.

Indeed, the threat was not contained only by chicken culling, and it was urgent to act as there were serious environmental affectations and deaths of the endangered species.

Aves, conversely, did not follow the principle as it drained the poultry facilities into the Adeguri. Discharging poultry waste into a natural marsh is likely to cause harm.⁴⁷ It is known by studies from international organizations, such as FAO and WOFAH, that waste draining severely affects a marsh ecosystem⁴⁸ and causes an enabling environment for viruses such as H5NX.⁴⁹

In conclusion, by draining poultry facilities into the marsh, the precautionary approach was not observed by Aves. With a lack of scientific certainty about negative effects of the draining, Renac was forced to take precautionary measures

1.1.3.2 Renac took precautionary measures to protect public health

The concept of precaution has also been at the heart of public health practices.⁵⁰ The WHO asserts health risks from macro levels must be anticipated.⁵¹ The principle seeks to take

⁴⁶ *Gabčikovo-Nagymaros*. ¶113

⁴⁷ WOFAH-Report

⁴⁸ FAO - Chapter 6

⁴⁹ WOFAH-Report

⁵⁰ WHO-Precautionary. Pg, 3.

⁵¹ *Ibidem*.

preventive actions in the face of uncertainty, and shifts the burden of proof to the proponents of an activity.⁵²

With the cullings, Renac took a preventive measure to face the H5NX infection. There was a serious risk of contamination in the whole Adeguri area. The virus infection to human population was imminent.

Renac acted consistently with the precautionary approach because the State preferred to protect health in the face of uncertainty.

1.2 Renac acted accordingly to international commitments by dispensing disinfectant into the Adeguri.

1.2.1 Renac notified and consulted with Aves about implementing obligations arising from RAMSAR

RAMSAR article 5 establishes that parties shall consult with each other about implementing obligations arising from the Convention, especially in the case of a wetland extending over the territories of other Parties.⁵³ Here, Renac fulfilled this commitment on February 11th 2015, when its Government sent a Diplomatic-Note to Aves communicating its intention to dispense disinfectant into the marsh to counter H5NX influenza.⁵⁴

⁵² Kriebel, 91:1351–1355

⁵³ RAMSAR, article 5

⁵⁴ R. ¶ 23

1.2.2 Renac did not breach the No-Harm rule by dispensing disinfectants into Adeguri, which was already contaminated due to Aves' actions

1.2.2.1 There was not a breach of an international obligation

Under CBD, States have the responsibility to ensure that activities within their control do not cause damage to the environment of other States.⁵⁵ Under the CMS, parties should prevent and remove adverse effects of activities that seriously impede the migration of the species.⁵⁶ According to the AEWa article 2.1 Parties shall encourage the protection, rehabilitation and restoration of habitats of migratory birds⁵⁷ and article 3.1 of the RAMSAR holds that Parties shall formulate and implement their planning to promote the conservation of the wetlands.⁵⁸

Here, Aves' drainage further contaminated the wetland through which the H5NX spread, producing cross-infection between the waterbirds and their habitat.⁵⁹ It also impeded birds' migration and endangered them. In response, Renac formulated and implemented measures for habitat conservation removing the adverse effects of the drainage. The disinfectants restored the migratory waterbirds habitat into a non-infected habitat and did not cause damage with them (see section 1.2.2.2)

While Aves violated the No-Harm Rule by polluting, Renac's response was adequate because its aim was to prevent and control the spread of the H5NX⁶⁰ so birds can thrive again with no H5NX disease affecting them.

⁵⁵ CBD, article 3

⁵⁶ CMS, article III: 4b, 4c

⁵⁷ AEWa, article 2.1

⁵⁸ RAMSAR, article 3.1

⁵⁹ R. ¶20

⁶⁰ R. ¶21

1.2.2.2 There was no damage to the water of the marsh.

1.2.2.2.1 There was no harm caused to the Adeguri by the chlorine

Chlorine reduction occurs via photodegradation and reactions between it organic and inorganic materials that a wetland naturally possesses.⁶¹ Studies conducted on wetlands concluded that on a three-day period there is a reduction of more than 90 % of total chlorine.⁶²

The chlorine that Renac dispensed to the wetland, according to the scientific studies presented, is going to be reduced completely over a week.

Therefore, as natural wetland possesses enough organic matter to produce photochemical processes to reduce chlorine in its totality, Renac's chlorine dispensing would not have caused any measurable harm and should be completely disappeared from the marsh.

1.2.2.2.2 Chlorine use was appropriate

It is established by the WHO, that chlorine (0.5% sodium hypochlorite) is the best disinfectant against H5NX⁶³. Although it is referred to a H5N1 virus variant, the "H5" genes of the H5NX virus are formed from a monophyletic group evolved from the clade 2.3.4 from H5N1.⁶⁴ This means the two viruses descent from a common ancestor gene (H5) so their management should be the same.⁶⁵ Besides, the sodium hypochlorite is cheap and easily available disinfectant effective against influenza viruses⁶⁶.

⁶¹ Robert-H Wetlands

⁶² *Ibidem.*

⁶³ WHO-Guide.

⁶⁴ National Center for Biotechnology Information.

⁶⁵ Record. Clarification. Q.47

⁶⁶ WHO-Guide

Here, there was no damage to the water quality because Aves' monitoring of the marsh found that there had not been significant degradation.⁶⁷ Also, as a developing country⁶⁸ Renac needed to use this cheap but effective disinfectant.

Hence, there was no damage to the BCC and other waterbird populations since the dispensing of disinfectant was scientifically correct and aimed to achieve the conservation of these animals by stopping the spread of the disease.

1.2.2.3 There is no causal link between the wrongful act and the State.

Renac's actions against Aves' pollution of the wetland do not constitute damage as explained in 1.2.2.2. Aves' poultry farms drainage was dispensed into Adeguri.⁶⁹ Renac attacked that already existent pollution and animal infection with the dispensing of chlorine. Hence, the decrease in the animal population was done by Aves' actions and not by Renac's treatment of the water.

1.2.3 Aves did not act in accordance the Cooperation Principle

Under the CBD, Parties have responsibilities beyond national jurisdiction, on matters of mutual interest for the conservation and sustainable use of biological diversity.⁷⁰ AEWA holds that Parties must encourage the protection, rehabilitation and restoration of migratory bird's habitats.⁷¹

The disposal of the drainage from Aves' poultry farms on a transboundary wetland and the omission to act against the H5NX, as a matter of mutual interest, is contrary to the rights of Renac and to Adeguri's biological diversity. Renac but not Aves conserved Adeguri by

⁶⁷ R. ¶25

⁶⁸ R. ¶1

⁶⁹ R. ¶ 20

⁷⁰ CBD, article 5

⁷¹ AEWA, article 3.2 (C)

minimizing its degradation and losses of BCCs. Even more, Aves omitted to improve biosecurity at the agricultural facilities in Aves near the Adeguri.⁷²

As Aves omitted to establish any statutory or effective control of the pandemic,⁷³ Aves violated the cooperation principle. While, Renac chlorine disposal strategy, abated adverse impacts on the population's habitat.

1.2.4 Renac acted in accordance with the precautionary approach regarding its actions towards containing the epidemic and Aves' drainage

The principle is applicable when there is a threat of a serious or irreversible damage and scientific uncertainty.⁷⁴ Therefore, in order to act accordingly to this a rigorous scientific proof is not needed.⁷⁵ The application of the precautionary measure has to be: proportional between the measure and the desired level of protection⁷⁶ and be cost-effective.⁷⁷

Regarding the serious damage, the existence of the H5NX pandemic produces grave harm⁷⁸. The consequences are an irreversible risk to waterbirds life, the spread to the human population, and the detriment to Adeguri's ecosystem. Concerning the scientific uncertainty, there were not any conclusive tests on the matter. Regarding the proportionality, Renac's desired level of protection is for animals, humans and the Adeguri to be un-polluted with H5NX. Finally, in terms of cost-effectiveness, Renac's answer to Aves' drainage was aiming for a global benefit at the lowest possible cost.⁷⁹

⁷² R. ¶23

⁷³ AEW, Annex 3: 3.2.2, 3.2.3, 3.2.4

⁷⁴ IUCN-Guidelines

⁷⁵ Weiss-Precaution

⁷⁶ EU- Communication 2000

⁷⁷ Rio-Declaration Principle 15.

⁷⁸ *Ibidem.*

⁷⁹ UN-Climate Change, article 3.3

As stated in Section 1.1.2.2, when the viruses are present in migrating wild aquatic birds, the virus contributes to the circulation of avian influenza.⁸⁰ Therefore, there is an irreversible risk to the BCC and civilians because the spread of the disease could be deadly⁸¹. For that reason, due to the mere knowledge of the presence of H5NX, based its actions on the precautionary approach, to eradicate the disease and to prevent further environmental degradation.

1.2.5 If Renac is found liable for the chlorine dispensing, such an act should be considered as a valid countermeasure.

Countermeasures justify an internationally unlawful conduct.⁸²The requirements for a countermeasure to be internationally lawful are (i) that the injured state must have called upon the responsible State to cease; and (ii) that countermeasure must be proportional, reversible and temporary in character⁸³.

Aves committed an internationally wrongful act, and Renac responded to it. Renac called upon Aves to cease when it addressed the issue on its diplomatic note February 11th 2015 regarding the improvement of biosecurity at its agricultural facilities.⁸⁴ The act was proportional; as explained because the use of the chlorine is the appropriate measure in containing avian influenza. It is reversible because the chlorine will return the marsh to an un-contaminated state. Finally, it was temporary because, the chlorine dispensing did not extend over time.

In short, Renac's chlorine dispensing was an appropriate international environmental law countermeasure because it fulfilled all the criteria demanded for its validity and so, there should not be international liability.

⁸⁰National Center for Biotechnology Information.

⁸¹ Record ¶¶ 19,24.

⁸² *Gabčikovo-Nagymaros*, pg 56-57; *see also* Draft- ARSIWA, article 22

⁸³ ARSIWA, articles 49 - 53

⁸⁴ R. ¶23

2. BY DELISTING ADEGURI AS A RAMSAR SITE, RENAC DID NOT VIOLATE INTERNATIONAL LAW.

2.1. The urgent national matter legitimated the delisting of the Adeguri

RAMSAR contemplates the possibility to delist a protected area to prevent a serious or imminent biological impact.⁸⁵ According to the Resolution VII 20 of RAMSAR, when a country is immersed in a situation of urgent national interest⁸⁶, the delisting of a protected area is authorized, as long as compensation is proposed.⁸⁷

Renac is a developing country, which economy depends mainly on the ecotourism activities near to the Adeguri and on poultry farms.⁸⁸ Given the occurrence of influenza outbreaks, and the rapid spread, this country has suffered significant economic losses and numerous deaths of human beings.⁸⁹ The imminent harms coming from the outbreaks should enable actions to reduce the damages that are not permitted under RAMSAR regulations.

The delisting gives an alternative to Renac to protect animals, the Adeguri, ecotourism, and the lives of its citizens from the H5NX, according to its conditions as a developing country. Hence, it is necessary to invoke the urgent national interest (as stated below at 3.2), because by delisting the Adeguri, Renac would be able to contain future outbreaks in the short term, thereby assuring food safety and economic stability and health protection for many people, animals and the ecosystem.

⁸⁵ RAMSAR, article 4.2

⁸⁶ R. ¶29

⁸⁷ RAMSAR, article 2.5; *see also* Resolution VII-RAMSAR.

⁸⁸ R. ¶1

⁸⁹ R. ¶24

2.1.1. Renac acted accordingly to duty to consult under RAMSAR

Despite the implications of listing a territory as a protected area, RAMSAR requires Renac to consult Aves about the related topics to the shared protected area.⁹⁰ The ICJ clarified in *Costa Rica-Nicaragua* that such provision of consult it is understood fulfilled when RAMSAR Secretariat is notified.⁹¹

Renac in several occasions sent diplomatic notes to Aves, in which expressed the concern of the spreading of H5NX⁹², for this reason, among other measures adopted (refereed at section 1), given the urgent national matter invoked, the most appropriate measure was the request of the delisting of Adeguri to the RAMSAR secretariat.

Hence, Renac fulfill with the obligation of consult to Aves the delisting of Adeguri. Renac aims to take corrective and faster measures to prevent future outbreaks and therefore prevent a greater damage.

2.2. Renac correctly notified the delisting according to RAMSAR

Articles 3.2 and 8.2 of the RAMSAR set forth the notification procedure to inform changes on the ecological character of a wetland. Within the requirements, the most important are: (i) To notify the RAMSAR secretariat, and (ii) To notify all the Parties of the convention.⁹³

In April 2015, Renac informed the RAMSAR secretariat about its intention to delist Adeguri.⁹⁴ On March 3, 2016, when the delisting became official, Renac notified the RAMSAR Secretariat and all the parties of the RAMSAR including Aves⁹⁵ and therefore, the above-mentioned procedural notification requirements were fully complied.

⁹⁰ RAMSAR, article 5

⁹¹ *Costa Rica-Nicaragua* ¶172

⁹² R. ¶23

⁹³ RAMSAR, articles 3.2, 8.2

⁹⁴ R. ¶27

⁹⁵ R. ¶29

2.3. Renac's compensation is appropriate under International Law

According to the article 2 of RAMSAR and the Resolution VII 20, to delist a protected area, along with the notification, parties must provide adequate compensation⁹⁶. On this regard, article 4.2 of RAMSAR establishes that as compensation additional nature reserves should be created either in the same area or *elsewhere*.

Certainly, Renac offered a portion of land that constituted 85% of the original wetland⁹⁷ and complied with the substantial criteria for a RAMSAR site. Indeed, The Coastal-Salt Marsh provides protection to species and ecological communities attending to the substantial criteria of conservation.⁹⁸

Thus, as the offered compensation has similar conditions to the Adeguri, contemplates a 17,000-hectare of coastal salt marsh and is about 300 miles from the Adeguri⁹⁹, Renac fully complies with this requirement.

3. RENAC PROCEEDED UNDER THE STATE OF NECESSITY

Even assuming Renac's responses were not in full conformity with international law, the wrongfulness of its actions is precluded. Pursuant article 25 of the ARSIWA, the state of necessity denotes an exceptional situation where the state safeguards an essential interest threatened by a grave and imminent peril with the adoption of measures that could result in the breach of an international obligation.¹⁰⁰ However, the admissibility depends on the fulfillment of

⁹⁶ Resolution VII-RAMSAR.

⁹⁷ R. ¶29

⁹⁸ Ramsar-Manual

⁹⁹ R. ¶29

¹⁰⁰ Draft- ARSIWA, note 2

cumulative conditions set forth in article 25¹⁰¹ of the ARSIWA which is liable in the present case as it constitutes customary international law.¹⁰²

Certainly here, the circumstances surrounding Renac's responses justify the adoption of measures that might not be in conformity with its international obligations but the State is excused from liability as the conditions mentioned are fully met.

3.1 The H5NX poses a grave and imminent peril to the public health

The first condition requires that the actions taken by a state may be the only way to safeguard an essential interest against a grave and imminent peril. First, the extent to which a given interest is "*essential*" relies on all the circumstances surrounding a specific situation, the particular interests of the State and its people, as well as of the international community as a whole.¹⁰³ In *Gabcikovo-Nagymaros*, the ICJ made clear that a State's protection of its environment constitutes an essential interest of the State.¹⁰⁴ It is also essential to protect the very existence of the State and its people in a time of public emergency by ensuring the safety of a civilian population¹⁰⁵, including the protection of public health.

In that sense, The Plan of Implementation adopted at the World Summit on Sustainable Development in 2002, stresses the importance of public health and calls upon states to assess health and environment linkages, and to create more effective national and regional policy responses to human health problems caused by environmental threats.¹⁰⁶

Secondly, the threat to a State's essential interest must rise to the level of "*grave and imminent*". The ICJ in *Gabcikovo-Nagymaros*, stated that "imminence" was synonymous with

¹⁰¹ Report-ILC (1980)

¹⁰² *Gabčikovo-Nagymaros* ¶52

¹⁰³ Draft- ARSIWA, note 15.

¹⁰⁴ *Gabcikovo-Nagymaros* ¶53

¹⁰⁵ Draft- ARSIWA, note 14.

¹⁰⁶ Report- Sustainable Development.

immediacy or proximity and goes far beyond the concept of “possibility”, and interpreted peril as danger when a situation evokes the idea of risk rather than “material damage”.¹⁰⁷

In mid-2003, in Asia, the disease caused by the H5N1 infection in humans followed an unusually aggressive course resulting in rapid deterioration of health and high human fatalities. The virus left over 120 confirmed human cases, of which more than half died.¹⁰⁸

In this case, as recognized by Renac and Aves Renac in the special agreement to submit the dispute to the International Court of Justice, the H5NX may have serious negative effects on domestic poultry and human health, as well as wild birds. So it qualifies as an imminent peril because there is proximity and aptitude to produce adverse effects on human and animal health. In fact, on February 2, 2014, two people died¹⁰⁹ and then in February 2015, eight people were reported with the infection and three reportedly died.¹¹⁰

Thus, Renac’s situation poses grave and imminent peril to the public health. As such, the State had the duty to ensure the protection of the population’s health, acting in compliance with the provisions of the Rio-Declaration and the World Summit on Sustainable Development.

3.2 Renac’s responses do not impair any essential interest belonging Aves.

The second condition to invoke the state of necessity implies a weighing of the essential interest of the defending State that invokes necessity and the interest of the State claiming a breach.¹¹¹

Certainly, this requirement supports Renac’s claim of necessity, as the effects of the outbreaks have been devastating for RENAC’s entire economy (based largely on poultry), health

¹⁰⁷ Gabcikovo-Nagymaros ¶54

¹⁰⁸ INFOSAN-Note

¹⁰⁹ R. ¶19

¹¹⁰ R ¶24

¹¹¹ Boed

and the safety of its citizens.¹¹² As explained above in sections 1 and 2 there was no damage done to Aves and the State will also benefit from the containment of the H5NX.

Renac responded by promoting the conservation of the Adeguri and protecting human health since such acts were directed at containing the outbreak by reducing the spread of this deadly virus, which certainly did not constitute a grievance for the interests of Aves.

3.3 None of the international obligations alleged to be disregarded by RENAC, exclude the possibility of invoking necessity.

Even though under international law many instruments expressly establish that necessity may not be invoked¹¹³, this is not the case for the rules applicable to the present dispute. For instance, the AEWA explicitly includes an exemption for “the interests of public health and public safety, or for other imperative reasons of overriding public interest.”¹¹⁴ Additionally article 2.5 of the RAMSAR convention contains the possibility to delete or restrict the boundaries of wetlands, because of “urgent national interests”.¹¹⁵

Therefore, Renac is not barred from invoking the state of necessity argument as international instruments contemplate these events and urge States to take the measures that are necessary in order to protect an essential interest of the state.

3.4 Renac did not contribute to the consolidation of the situation of necessity.

In the case at hand, there is no scientific certainty about the direct source of the outbreak.¹¹⁶ However, the 2014 outbreak is believed to have originated in Aves and to have been transferred to Renac through cross-infection.¹¹⁷

¹¹² R. ¶31

¹¹³ Hoelck.

¹¹⁴ AEWA, Annex 3: article 2.1.1 (C)

¹¹⁵ RAMSAR, article 2.5

¹¹⁶ R. ¶15

¹¹⁷ R. ¶16

Moreover, considering that the causes of the outbreaks are unknown, it is not possible to determine whether Renac contributed to the consolidation of the situation. However, what can be shown is that Renac adopted adequate actions to contain it.

4. RENAC, NOT AVES, COMPLIED WITH THE PRINCIPLE OF COMMON BUT DIFFERENTIATED RESPONSIBILITY REGARDING ITS ACTIONS.

4.1. Renac's measures were in accordance with the principle of common but differentiated responsibilities.

In accordance with Principle 7 of the Rio Declaration¹¹⁸, and based on the principle of International of Cooperation¹¹⁹, all States have common responsibilities to protect the environment, however, because of different social, economic, and ecological situations, countries must assume different responsibilities.¹²⁰

Renac adopted bio-sanitary and safety measures to counteract the H5NX and the pollution of the Adeguri to protect the public health of its inhabitants and preserve the integrity of the Adeguri, using the financial and technological resources available for the state as a developing country.¹²¹

Therefore, Renac complied with its international responsibilities in accordance with its economical means.

¹¹⁸ Rio-Declaration, principle 7.

¹¹⁹ CBD, article 5.

¹²⁰ US-Shrimp, pg. 269-290

¹²¹ R. ¶1

4.2 The culling of infected birds and the discharge of disinfectant at the Adeguri were appropriate under the R.D.

Pursuant to the Rio Declaration¹²², State's special needs must be prioritized due to vulnerable environmental status. In that sense, CBD asserts that States must act accordingly to their technical, technological and financial capacities, and regarding their current national priorities.¹²³

The culling and the chlorine, as explained on sections 1.1 and 1.2, were not only the most scientifically appropriate measures but also were the most accurate given Renac's economic situation and its technical capacities. Vaccinating birds is not the most efficient way to treat H5NX¹²⁴ and water treatment plants could further disturb a natural wetland. Nevertheless, the H5NX had to be contained to protect the health, the security and well-being of the inhabitants.¹²⁵ The States must act according to their technical, technological capacity, financial and current priorities. The measures used were the only mechanisms consistent with Renac's financial disposition that would effectively combat the virus by helping to prevent its spread.¹²⁶

4.3 Maintaining Adeguri as a RAMSAR site may be of an unwarranted economic and social cost to Renac under Rio Declaration

Principle 11 of the Rio Declaration, states that there should be environmental standards and management objectives that reflects the developmental context to which they apply. The RAMSAR convention also enacts these effective environmental regulations and recognizes that their application to developing countries can result in disproportionate negative effects considering its situation as emerging economies and produce a high social cost.

¹²² Rio-Declaration, principle 6.

¹²³ CBD, article 20

¹²⁴ WOFAH-Prevention.

¹²⁵ CBD, article 6 (A).

¹²⁶ Stockholm-Declaration, principle 12.

Developed and developing nations must be treated differently regarding the application of environmental standards, determining different contributions and obligations to guarantee the social, economic and environmental justice based on material equality between the States.¹²⁷

In this sense, considering Renac's social priorities, its environmental context and the H5NX situation, complying with a treaty represent an excessive assumption. Delisting is not a pretext for not advocating the conservation of the Adeguri, on the contrary, it offers a wider margin to counteract the H5NX outbreaks and their consequences within the framework of Renac's special circumstances.

5. IF RENAC IS TO BE FOUND INTERNATIONALLY LIABLE, THESE ARE THE REMEDIES RENAC PROPOSES

If Renac is to be found liable for an international wrongful act, Renac proposes the following remedies in accordance with Aves' needs and Renac's socio-economic status as a developing country.

5.1. Renac would not offer restitution

Restitutions under international law request to reestablish the situation prior to the damage¹²⁸ and should be materially possible.¹²⁹ In this case there is no natural and legal possibility to perform any restitution since the BCCs cannot be revived and the chlorine cannot be un-dispensed.

Hence "the possibility of restitution may be practically excluded, because the property in question has been destroyed or fundamentally changed in character or the situation cannot be

¹²⁷ Common but differentiated responsibilities: Scope. CISDL.

¹²⁸ ARSIWA, article 31.

¹²⁹ *Ibid* article 35.

restored”¹³⁰ Thus, Renac would offer other types of reparation because Aves’ situation cannot be re-established to the *status quo ante*¹³¹.

5.2. Renac would offer compensation in the form of a hatchery for wild birds, especially BCCs

Regarding the culling measures, Renac is willing to offer compensation granting Aves a hatchery of BCC’s eggs. It would be managed according to guidelines established by the IUCN.¹³²

Apart from counteracting the damage caused by the culling, this measure could cover financially assessable damage including loss of profits¹³³, as Aves stated its economy is also based on ecotourism and considering that the Adeguri is the habitat of that endangered species, with the hatchery, the new BCCs could return to the marsh and it could once again become a place for bird watching and thrive with visitors.

5.3. Renac would offer the construction of a monument to Aves’ national bird as satisfactory reparation.

Satisfaction implies “acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.”¹³⁴

In this case, considering the moral damages alleged by Applicant,¹³⁵ Renac offers to build a monument of Aves’ national bird, the BCC, to emphasize its cultural and historical significance. To keep costs down, given its status as a developing nation, Renac proposes to use recycled metals, in order to ensure the monument as a form of non-material reparation.

¹³⁰ Draft-ARSIWA, Commentary 4.

¹³¹ UN-Materials on ARSIWA

¹³² IUCN-Species Survival Commission Guidelines

¹³³ UN-Materials on ARSIWA

¹³⁴ ARSIWA, article 37

¹³⁵ UN-Materials on ARSIWA

5.4. Aves contributed to, but did not mitigate, the damage.

Aves is expected to act reasonably when confronted by the injury. So, “failure to mitigate by the injured party may preclude recovery to that extent”.¹³⁶ Aves took no measures to contain the H5NX pandemic regarding the infected animals or the polluted marsh ecosystem. Thus, Aves failed to take the necessary measures to limit the damage sustained and cannot claim compensation for that damage which could have been avoided¹³⁷. In conclusion, Aves should not be entitled to recover the full amount of its claim, but rather accept what Renac is offering if it is found liable.

¹³⁶ ARSIWA, article 31

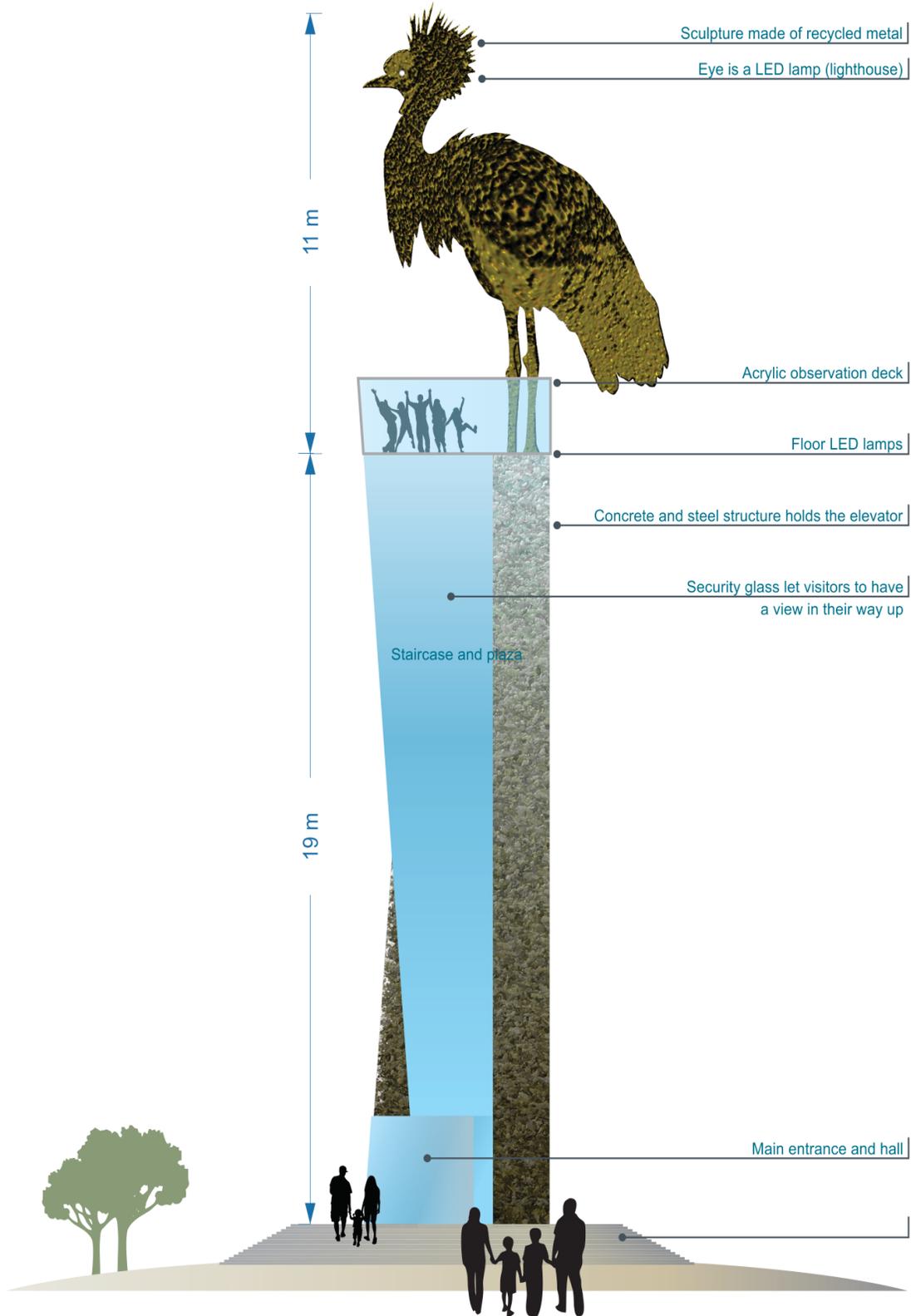
¹³⁷ Gabčíkovo-Nagymaros.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Renac respectfully requests that this Court:

- I. Declares that Renac complied with international law in its responses to the 2014 and 2015 outbreaks of H5NX.
- II. Declares that Renac complied with international law by delisting the Adeguri Marsh as a RAMSAR Site and as a Transboundary RAMSAR Site, and that the proposed compensation was adequate.
- III. Declares Aves violated international law by failing to comply with the obligations which arose from the cooperation principle (by failing to react to the damages caused by the H5NX) and the No-Harm Rule by the draining the poultry facilities into the Adeguri.

ANNEX A



Blueprints for the Construction of the Blue Crowned Crane's Monument