

**IN THE INTERNATIONAL COURT OF JUSTICE**

AT THE PEACE PALACE,  
THE HAGUE, NETHERLANDS



QUESTIONS RELATING TO THE PROTECTION OF MAKO SHARKS AND TRADE RESTRICTIONS

THE FEDERAL STATES OF ALOPIAS  
APPLICANT

v.

THE REPUBLIC OF RHINCODON  
RESPONDENT

MEMORIAL FOR THE APPLICANT

THE 19<sup>TH</sup> ANNUAL STETSON INTERNATIONAL MOOT COURT COMPETITION

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Convention on the Conservation of Migratory Species of Wild Animals, June 5, 1979  
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G.A. Res. 62/177, U.N. Doc. A/RES/62/215 (Mar. 6, 2007). .... 19, 20

Memorandum of Understanding on the Conservation of Migratory Sharks, Sept. 27,  
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United Nations Charter, as amended June 26, 1945, 892 U.N.T.S. 119. ....1

United Nations Conference on Environment and Development, Rio de Janeiro, Braz.,  
June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc.  
A/CONF.151/26. .... 14, 15, 16

United Nations Conference on Human Environment, Stockholm, Swed., June 5-16,  
1972, *Declaration of the United Nations Conference on the Human Environment*, U.N.  
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United Nations Conference Sustainable Development, Rio de Janeiro, Braz., June 20-  
22, 2013, *Report of the United Nations Conference on Sustainable Development*, U.N.  
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United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3. 17, 18

World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 4,  
2002, *Johannesburg Declaration on Sustainable Development*, U.N. Doc.  
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UNEP TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW (Lal Kurukulasuriya & Nicholas A. Robinson, eds., 2006). .....	15

**ARTICLES AND OTHER**

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*Sharking Finning and the European Union*, HUMANE SOCIETY INT'L (June 29, 2011)  
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## **STATEMENT OF JURISDICTION**

The Federal States of Alopias (“Alopias”) and the Republic of Rhincodon (“Rhincodon”) submit 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, Statute of the International Court of Justice, art. 40(1), T.S. No. 993 (1945). On June 16, 2014 the parties signed a special agreement and submitted it to the Registrar of the Court. *See Special Agreement Between the Federal States of Alopias and the Republic of Rhincodon for Submission to the International Court of Justice of Differences Between Them Concerning Questions Relating to the Protection of Mako Sharks and Trade Restrictions.* (Record [“R.”] 2.) The Registrar of the Court acknowledged receipt of the joint notification on June 23, 2014. (R. 1.)



## **QUESTIONS PRESENTED**

- I. DOES RHINCODON'S BAN ON IMPORTS OF ALL FISH AND FISH RELATED PRODUCTS FROM ALOPIAS VIOLATE INTERNATIONAL LAW?
- II. IS ALOPIAS FULFILLING ITS OBLIGATIONS UNDER UNCLOS, CBD, CMS, AND CMS MOU?

## **STATEMENT OF FACTS**

Alopias and Rhincodon are both located in the Varium Sea region. (R. 5.) While Rhincodon is a developed nation with a diversified, industrial economy and a large population of 250 million people, Alopias is a developing nation with a significantly smaller population of five million people. (R. 5.) Alopias' two most significant economic activities are fishing and farming, and Rhincodon is Alopias' largest trading partner, accounting for approximately 30% of its exports. (R. 5-6.)

In 1999, Alopias and Rhincodon signed and ratified the Trade Agreement between Rhincodon and Alopias ("TARA"), a bilateral trade agreement with the purpose of strengthening the trade relationship between the two countries. (R. 6.) Rhincodon is a member of the World Trade Organization ("WTO"), and Alopias is an observer to the WTO. (R. 6.) Both nations are members of the United Nations and parties to the United Nations Convention on the Law of the Sea ("UNCLOS"). (R. 5.)

They are also parties to several international environmental agreements, including the Convention on Biological Diversity ("CBD"), the Convention on the Conservation of Migratory Species of Wild Animals ("CMS"), and they are signatories to the Memorandum of Understanding on the Conservation of Migratory Sharks ("MOU"). (R. 5.) Both nations participated in the 1972 United Nations Conference on the Human Environment at Stockholm, the 1992 United Nations Conference on Environment and Development at Rio de Janeiro, the 2002 World Summit on Sustainable Development at Johannesburg, and the 2012 Rio+20 Conference at Rio de Janeiro. (R. 5.)

Longfin and shortfin mako sharks are found within the territorial seas and exclusive economic zones of Alopias and Rhincodon. (R. 5.) Shark finning is banned in both countries: Rhincodon enacted the Humane Fishing Act in 2001, and Alopias

enacted the Shark Finning Prohibition Act in 2002. (R. 8.) Yet some Alopias nationals continue to defy the law, and Alopias lacks the resources to rigorously enforce the prohibition. (R. 9.) In negotiations with Rhincodon concerning the matter, Alopias requested assistance to bolster its law enforcement efforts, which Rhincodon declined to provide. (R. 8.) Alopias agreed to prosecute any known instances of shark spining, but budget concerns made amending the Shark Finning Prohibition Act impossible politically. (R. 10.) Alopias also encouraged Rhincodon to address the issue of shark finning through multilateral fora, focusing on the demand for shark fins. (R. 9.)

Negotiations continued until January 15, 2014, when Rhincodon accused Alopias of violating its international obligations under UNCLOS, the CBD, the CMS MOU, and the UN General Assembly. (R. 10.) Less than a month later, on February 2, 2014, Rhincodon imposed a ban on all fish and fish products from Alopias. (R. at 11). Alopias condemned the ban as a violation of TARA. Rhincodon asserts that the ban is justified under Article 15(a). After continued negotiation and mediation failed to resolve the dispute, the parties submitted the matter to the International Court of Justice (“ICJ”) on June 16, 2014. (R. 11.)

## **SUMMARY OF ARGUMENT**

Rhincodon's broad ban on the importation of all fish and fish products from Alopias violates international trade law. TARA Article 5 bars any quantitative restrictions on trade, and Rhicodon's ban is not justified under the TARA Article 15(a) exception. The ban is not 'necessary' to protect public morals because it does not contribute to the objective of decreasing shark finning and spining and less trade restrictive alternatives exist that *would* contribute to achievement of this objective. Further, the ban does not satisfy the requirements of TARA Article 15's introductory paragraph, which requires corresponding domestic measures. Because it is neither necessary nor applied even-handedly, the ban cannot be sustained.

Alopias has exercised its sovereign right to pursue its own policies regarding shark fishing within its EEZ consistent with its obligations under international law. Alopias is not in violation of the CBD, UNCLOS, the CMS, or the CMS MOU because Alopias has taken measures to protect sharks as far as is possible given the economic challenges it faces. Developing countries such as Alopias should not be punished when their good faith efforts fail to afford an optimum level of protection. The appropriate response under international law is cooperative action to build enforcement capabilities or reduce demand rather than punitive sanctions that endanger economic development.

## ARGUMENT

### **I. RHINCODON HAS VIOLATED INTERNATIONAL TRADE LAW BY BANNING THE IMPORTATION OF FISH AND FISH PRODUCTS FROM ALOPIAS**

#### **A. Jurisprudence under the GATT/WTO provides guidance for this Court.**

Jurisprudence under the GATT<sup>1</sup> and the WTO (hereinafter “GATT/WTO”) is relevant in interpreting the TARA. TARA Article 25 provides that, “decisions by the GATT and WTO panels or appellate bodies shall be considered subsidiary sources of law with respect to the interpretation of terms” of the agreement.<sup>2</sup> This provision squares with precedent maintaining that jurisprudence under the GATT/WTO can provide guidance for interpretation of similar agreements with similar language.<sup>3</sup>

Outside the clear mandate in TARA Article 25, there are also significant textual similarities between GATT and TARA. The language in TARA Article 5 is almost identical to GATT Article XI, with only a few minor changes to tailor TARA for bilateral purposes.<sup>4</sup> Also, the wording of the enumerated exceptions (a) and (b) of TARA Article 15 is identical to the enumerated exceptions (a) and (b) in GATT Article XX.<sup>5</sup> The parties also transposed language from enumerated exception (g) of GATT Article XX to the

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<sup>1</sup> GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 143 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT].

<sup>2</sup> R. at 7.

<sup>3</sup> Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Better Services*, WT/DS285/R (circulated April 20, 2005), para. 291

<sup>4</sup> GATT Article XI.

<sup>5</sup> GATT Article XX.

introductory paragraph of TARA Article 15.<sup>6</sup> Since Rhincodon, a member of the WTO, and Alopias, an observer to the WTO, are both familiar with the language of the GATT, use of this particular language is significant and the following arguments will be made in light of GATT/WTO jurisprudence.

**B. Rhincodon’s ban on the importation of fish and fish products from Alopias violates TARA Article 5.**

TARA Article 5 provides that “no prohibition or restrictions...or other measures shall be instituted by any Party regarding the importation of any product from the territory of any other Party.” Rhincodon’s ban completely prohibits importation of fish and fish products from Alopias. Therefore, Rhincodon’s ban violates TARA Article 5.

**C. Rhincodon’s ban is not justified under the 15(a) exception.**

Rhincodon’s ban is not “necessary to protect public morals,” and does not satisfy the language in the introductory paragraph of TARA Article 15. Under GATT/WTO jurisprudence, to qualify for an exception under GATT Article XX, the challenged measure must satisfy the following three steps: first, the measure must correspond to one of the purposes listed in Article XX; second, the measure must be sufficiently connected and tailored to the objective, which, under Article XX(a) requires demonstrating that the measure is ‘necessary’ to protect public morals; and finally, the measure must meet the requirements of the Article XX chapeau.<sup>7</sup>

The same three-part test will be applied to TARA Article 15(a) to demonstrate that Rhincodon’s ban does not qualify as an exception under TARA Article 15(a). The first step need not be considered at length because Rhincodon contends its ban

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<sup>6</sup> GATT Article XX.

<sup>7</sup> Katie Sykes, *Sealing Animal Welfare Into the GATT Exceptions: The International Dimension of Animal Welfare in WTO Disputes*, 13(3) WORLD T.R. 490–91 (2014).

corresponds to the purpose of protecting public morals under TARA Article 15(a) and under GATT/WTO jurisprudence, parties are given broad scope to define and apply for themselves the concept of ‘public morals.’<sup>8</sup> Even assuming Rhincodon’s ban satisfies the permissive standard for implicating public morals, it is not ‘necessary,’ nor does it conform to the requirements of the Article 15 chapeau.

1. Rhincodon’s ban is not ‘necessary’ to protect public morals under TARA Article 15(a).

Under TARA, the Article 15(a) exception is only available if the measure is “necessary” to achieve its purpose. This language parallels GATT exceptions XX(a), XX(b), and XX(c).<sup>9</sup> The meaning of “necessary” has been interpreted in several cases in the GATT context.

In *Korea—Various Measures on Beef*, the Appellate Body determined whether a measure is “necessary” by first weighing and balancing three factors: (1) the contribution made by the measure to the achievement of its objective, (2) the importance of the common interest or values protected by that measure, and (3) the impact of the measure on imports or exports. It is the burden of the country imposing the measure, here Rhincodon, to prove that the factors are met.<sup>10</sup> Assessment of these three factors is a preliminary inquiry rather than a stopping point, however. If this initial step in the analysis suggests the measure is necessary, then the measure must be compared with possible alternatives.

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<sup>8</sup> *Id.* at 492.

<sup>9</sup> See GATT Article XX(a)–(c).

<sup>10</sup> Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (adopted May 20, 1996) p. 21.

- a. *Rhincodon's import ban does not contribute to decreasing the incidence of shark finning and spining.*

An import ban can be said to contribute to the achievement of its objective when there is a “genuine relationship of ends and means between the objective pursued and the measure at issue.”<sup>11</sup> Furthermore, when a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it should only be considered if it is apt to make a *material* contribution to the achievement of its objective.<sup>12</sup> Thus, the meaning of “necessary” is “significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution.’”<sup>13</sup>

The ban is severely restrictive and should not be considered “necessary” unless it is apt to make a material contribution to the achievement of its objective: decreasing the incidence of shark finning and spining. The measure is not apt to make a material contribution to the achievement of its objective, and may not even simply “make a contribution.” Rhincodon already bans the importation of shark fins that are not naturally attached to a carcass. Shark finning continues in Alopias because there are other markets for shark fins. An overall ban on fish and fish products does nothing to reduce this market. The ban will have a deleterious overall effect on Alopias’ economy because fishing is one of Alopias’ two main economic activities and Rhincodon is its primary trade partner. This economic pressure could actually drive Aopias’ fisherman to increase shark finning since they are able to make more money this way. Additionally, Alopias’ government will be in an even worse position to enforce their existing ban

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<sup>11</sup> Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, (adopted Dec. 17, 2007) para. 145.

<sup>12</sup> *Id.* at para. 150.

<sup>13</sup> Appellate Body Report, *United States–Measures Affecting the Cross-Border Supply of Gambling and Better Services*, WT/DS285/R (circulated April 20, 2005).



absent revenues from fish and fish products exports. The measure here may effectively punish Alopias for not adopting the domestic policies advocated by Rhincodon, but it will do little, if anything, to decrease the incidence of shark finning and spining.

*b. The public interest in humane shark fishery is not of paramount importance.*

The values Rhincodon cites to justify the ban are certainly important; in fact, they are shared by Alopias, which has made a good faith effort to prevent shark finning. However, the public interest in humane shark fishery has limited weight in this inquiry given the other values implicated by the ban, such as the shared interest in building the capacities of developing countries and in encouraging international cooperation and trade. If the measure at issue aimed at the conservation of an endangered species, which mako sharks do not qualify as, or the elimination of a hazard to human health then it would be due greater consideration.

*c. The ban has a severe impact on imports and exports.*

This factor weighs heavily in favor of Alopias since, as noted by the Panel in *Brazil—Tyres*, an import ban is “by design as trade-restrictive as can be.”

*d. The ban is not necessary, and alternative measures do exist.*

Rhincodon must prove that the ban is justified under the three-factor analysis. Because Rhincodon is unable to establish that the ban will decrease the incidence of shark finning, and because the ban is severely trade restrictive without protecting a compelling interest, the ban cannot be upheld as necessary within the meaning of the 15(a) exception and alternative measures need not be considered. Nonetheless, alternatives to the extremely broad and punitive ban do exist. Rather than banning all fish and fish products, Rhincodon could better enforce its existing ban on imports of

shark fins without the corresponding carcass, which would directly address incidents of shark finning. Education efforts to reduce the demand for shark fins are another measure that would actually contribute to a decrease in shark finning and spining. Rather than acting unilaterally, Rhincodon could pursue multilateral solutions to the problem, which may be moored in greater educational efforts, increased support for developing countries, or some combination of these and other approaches.

2. Rhincodon’s ban does not meet the requirements of the introductory paragraph of TARA Article 15.

Even if the Court finds that Rhincodon’s ban was necessary to protect public morals under TARA Article 15(a), the ban would still fail the three-step test because the ban does not satisfy the introductory paragraph of TARA Article 15. To qualify as an exception under GATT Article XX, a measure must do more than satisfy one of the specific provisions.<sup>14</sup> It must also satisfy the Article XX “chapeau.”<sup>15</sup> Here, although the parties diverted from the language of the chapeau found in GATT Article XX, the incorporation of the language from GATT Article XX(g) into the introductory paragraph of TARA Article 15 indicates that the parties intended TARA to maintain the three-step test. If the parties had intended to exclude the third step in the three-step test and rely solely on whether the measure satisfied one of the enumerated exceptions, the parties would have simply removed the Chapeau language, rather than replacing it with language from GATT Article XX(g).

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<sup>14</sup> ANDREW T. GUZMAN & JOOST H.B. PAUWELYN, INTERNATIONAL TRADE LAW 391 (Vicki Been et al. eds., 2012)

<sup>15</sup> *Id*; See Appellate Body Report, *United State–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted Nov. 6, 1998).

The introductory paragraph of TARA Article 15 provides: “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures, *so long as such measures are made effective in conjunction with restrictions on domestic production or consumption...*”<sup>16</sup> The italicized language is borrowed from GATT Article XX(g). Language from a similar provision may be relevant for the interpretation of an analogous provision in a separate agreement if the provisions have “textual similarities.”<sup>17</sup> Because the language in the introductory paragraph of TARA Article 15 is borrowed directly from GATT Article XX(g), GATT/WTO jurisprudence on interpreting the relevant language in GATT Article XX(g) should be applied to the introductory paragraph in this case.

The Appellate Body has interpreted the relevant language from GATT Article XX(g) as requiring “even-handedness in the imposition of restrictions...upon the production or consumption...resources”<sup>18</sup> The term “even-handedness” means that the adoption of a measure should similarly affect domestic and imported products.<sup>19</sup> Further, if the measures are only imposed on imported products, “such measures will hardly be justifiable... and will instead be considered protectionist and discriminatory in favor of local products or producers. A restriction imposed on foreign products thus needs to be accompanied with corresponding restrictions on the domestic consumption of...the resource.”<sup>20</sup>

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<sup>16</sup> R. at 7.

<sup>17</sup> See Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted 25 Sept. 1997) p. 591.

<sup>18</sup> *US–Gasoline*, supra note 10.

<sup>19</sup> *Id.*

<sup>20</sup> STEFAN ZLEPTING, *NON-ECONOMIC OBJECTIVES IN WTO LAW: JUSTIFICATION PROVISIONS OF GATT, GATS, SPS AND TBT AGREEMENTS* 169 (Mads Andenas ed. 2010).

The GATT Panel in *US–Canadian Tuna* concluded that the US prohibition on imports had not “been made effective in conjunction with restrictions on US domestic production or consumption on all tuna and tuna products” because the actions taken by the US applied to all Canadian imports of tuna and tuna products, whereas restrictions on domestic production and consumption applied only to some selected species of tuna.<sup>21</sup> The Panel further noted that the US could not prove that domestic consumption of tuna and tuna products had been restricted.<sup>22</sup>

Here, similar to *US-Canadian Tuna*, the ban is not made effective in conjunction with corresponding restrictions on Rhincodon’s domestic production or consumption of fish and fish products. Like the US in *US–Canadian Tuna*, Rhincodon has not provided any evidence that any fish or fish products are banned in Rhincodon. In fact, shark fin soup is still legal in Rhincodon, so long as the entire body of the shark is landed. This minor restriction on the domestic consumption of shark fin soup is far from “even-handed” when compared to the ban on all imports of *Alopias* fish and fish products. Therefore, the ban does not satisfy the introductory paragraph of TARA Article 15.

**II. ALOPIAS IS NOT IN VIOLATION OF ANY OBLIGATIONS UNDER THE CBD, UNCLOS, CMS MOU, OR CUSTOMARY INTERNATIONAL LAW WITH RESPECT TO THE FINNING AND SPINING OF MAKO SHARKS.**

**A. Alopias has the sovereign right to exploit its resources pursuant to its own environmental polices.**

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<sup>21</sup> Panel Report, *United States–Prohibitions of Imports of Tuna and Tuna Products from Canada*, L/5198, (adopted Feb. 22, 1982) para 4.12.

<sup>22</sup> *Id.* at para 4.10(f).

International obligations center on the principle of the States' sovereign equality.<sup>23</sup> Thus, Alopias may exercise its State sovereignty however it deems appropriate as long as international law does not prohibit its actions.<sup>24</sup> Alopias' exercise of its state sovereignty through its own environmental policies is consistent with its obligations under the CBD, UNCLOS, and CMS MOU.

**B. Alopias is not violated the CBD in regards to shark finning and spining.**

1. Alopias has sovereign rights over its own biological resources and its actions are not damaging the environment.

Both the preamble and Article 3 affirm the sovereignty of States to exploit their biological resources pursuant to their own environmental policies.<sup>25</sup> This right is qualified by states' "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment . . . beyond the limits of national jurisdiction."<sup>26</sup> Alopias' environmental policies include a ban on shark finning, but any illegal harvesting of sharks within Alopias' territory is not endangering the population of the mako sharks and therefore not negatively impacting other states or areas beyond its jurisdiction.

2. Alopias is fulfilling the CBD's objective to conserve and sustainably use biological resources.

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<sup>23</sup> United Nations Charter art. 2, as amended June 26, 1945, 892 U.N.T.S. 119.

<sup>24</sup> *Id.*

<sup>25</sup> Convention on Biographical Diversity, art. 3, Preamble ¶4, June 5, 1992, 1760 U.N.T.S. 79. [hereinafter CBD] This is in accordance with the Charter of the United Nations and the principles of international law. *Id.*

<sup>26</sup> *Id.* at art. 3.

“States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner.”<sup>27</sup> Article 2 defines “sustainable use” as using “components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity.”<sup>28</sup> Article 10 lays out different ways in which States can sustainably use their biological resources, including integrating sustainable use into national decision making and adopting measures to minimize adverse impacts on biological diversity.<sup>29</sup> However, States are only required to implement these provisions “as far as possible and appropriate.”<sup>30</sup> In regard to the harvesting of sharks, Alopias is taking conservation measures “as far as possible and appropriate”; it enacted a ban on shark finning and has enforced it to the best of its ability with its limited resources.

3. The CBD does not require developing nations to exhaust their limited financial resources implementing environmental measures.

The CBD creates a “legal relationship between the conservation and sustainable use obligations of developing countries and the financial obligations of developed countries.”<sup>31</sup> International cooperation and resources are needed to help developing countries carry out their environmental responsibilities.<sup>32</sup> Developed countries are required to provide financial resources to help developing States meet the costs of

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<sup>27</sup> *Id.* at Preamble ¶5.

<sup>28</sup> *Id.* at art. 2.

<sup>29</sup> *Id.* at art. 10.

<sup>30</sup> *See generally* CBD.

<sup>31</sup> UNEP TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, 192 (Lal Kurukulasuriya & Nicholas A. Robinson, eds., 2006).

<sup>32</sup> United Nations Conference on Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment*, Preamble ¶7, U.N. Doc. A/CONF.48/14/Rev. 1 (June 16, 1972).

implementing CBD obligations, and may effectuate this obligation through bilateral and other multilateral channels.<sup>33</sup>

Alopias lacks the resources to thoroughly enforce the ban on shark finning. While Alopias asked Rhincodon for development assistance to bolster its law enforcement efforts to stopping shark finning, Rhincodon declined. It is appropriate for Alopias to allocate its resources to economic development over enforcing the shark finning ban. The objectives and obligations of the CBD take into account that “economic and social development and eradication of poverty are the *first* and *overriding* priorities of the developing countries.<sup>34</sup>

4. Alopias has continually cooperated with Rhincodon in efforts to eliminate shark finning.

CBD stresses international cooperation, “as far as possible,” for the conservation and sustainable use of biological diversity.<sup>35</sup> Alopias has cooperated with Rhincodon as far as possible on matters related to sustainable shark fishing. Alopias enacted the Shark Finning Prohibition Act in 2002 after negotiations on the topic with Rhincodon. When Rhincodon sent a diplomatic note in 2010 expressing concern over continued reports of shark finning, Alopias responded conveying its shared concern regarding shark finning by its nationals and asked Rhincodon for development assistance to better enforce its ban on finning. As a result of further negotiations with Rhincodon in 2011, Alopias agreed to prosecute all known instances of shark spining. Alopias could not predict that its Supreme Court would find that spining does not violate the “naturally attached”

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<sup>33</sup> CBD, *supra* note 30, art. 20. [hereinafter Stockholm]

<sup>34</sup> *Id.* at art. 20(4), Preamble ¶20 (emphasis added).

<sup>35</sup> *Id.* at art. 5, Preamble ¶15.

language of Alopias' shark finning law, and pressing economic development and budget concerns took precedence over amending the Shark Finning Prohibition Act.

In January 2014, Rhincodon threatened trade sanctions if Alopias did not stop its nationals from finning and spining sharks, and one month later imposed a restriction on *all* fish and fish products from Alopias. Fishing is one of Alopias' two most significant economic activities and Rhincodon is its largest trading partner. Alopias has continually cooperated with Rhincodon to the best of its ability in regards to sustainable shark fishery, but Rhincodon has abandoned cooperation in favor of bully tactics.

**C. Alopias is not violating the UNCLOS in its exercise of sovereignty over its waters.**

1. Rhincodon does not have authority to dictate how Alopias manages fishing activity within its EEZ.

The EEZ is the part of the sea extending from the coastline up to 200 nautical miles.<sup>36</sup> Within its EEZ, a coastal state has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, . . . and with regard to other activities for the economic exploitation and exploration of the zone.”<sup>37</sup> This right and authority also comes with the duty to protect and preserve the marine environment<sup>38</sup> and ensure that living resources are not endangered by over-exploitation.<sup>39</sup>

Any shark finning or spining takes places within Alopias' EEZ, and Alopias' exercise of its sovereign rights in establishing its own policies regarding shark fishing

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<sup>36</sup> United Nations Convention on the Law of the Sea, art. 55, 57, Dec. 10, 1982, 1833 U.N.T.S. 3. [hereinafter UNCLOS]

<sup>37</sup> *Id.* at art. 56(1)(a) (emphasis added).

<sup>38</sup> *Id.* at art. 193.

<sup>39</sup> *Id.* at art. 61(2).



has not allowed for over-exploitation. There is no indication that Alopias' shark fishing is adversely affecting the mako shark population; studies suggest that the populations of the longfin and shortfin mako sharks are not currently in decline.

Yet even if Alopias were over-exploiting the mako sharks, the mandate for maintenance and restoration of harvested species is “qualified by relevant environmental and *economic factors*, including . . . the special requirements of developing states.”<sup>40</sup> Alopias, a developing nation, cannot be expected to afford the same measure of protection as Rhincodon, a much larger and wealthier nation, when its resources do not allow it. “Developing countries must direct their efforts to development” while still being mindful of safeguarding the environment.<sup>41</sup> International economic conferences continually emphasize the priority of human beings and eradicating poverty in sustainable development.<sup>42</sup>

2. Alopias is fulfilling its UNCLOS obligation with respect to the mako shark as a highly migratory species.

States that fish for any of the highly migratory species<sup>43</sup> must cooperate through international organizations with an aim to ensuring conservation and optimal utilization of these species.<sup>44</sup> Alopias is a contracting party to the CBD, UNCLOS, CMS and a

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<sup>40</sup> *Id.* at art. 61(3).

<sup>41</sup> Stockholm, Preamble 4.

<sup>42</sup> *Id.* at Preamble 5, Principle 11;

United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, ¶¶1, 5, U.N. Doc. A/CONF.151/26; World Summit on Sustainable Development, Johannesburg, S. Afr., Aug. 26-Sept. 4, 2002, *Johannesburg Declaration on Sustainable Development*, ¶¶14,15,17, U.N. Doc. A/CONF.199/L/6/Rev.2; United Nations Conference Sustainable Development, Rio de Janeiro, Braz., June 20-22, 2013, *Report of the United Nations Conference on Sustainable Development*, ¶¶ 2,6, U.N. Doc. A/CONF.216/16.

<sup>43</sup> UNCLOS, *supra* note 41, at Annex I.

<sup>44</sup> *Id.* at art. 64(1).

signatory to the CMS MOU. Alopias is making a good faith effort to comply with the obligations and duties of these international treaties.

**D. Alopias is in compliance with its obligations under both the legally binding CMS treaty and the non-binding CMS MoU instrument.**

1. Alopias has fulfilled its obligations under the CMS.

The 1979 Convention on the Conservation of Migratory Species of Wild Animals<sup>45</sup> (“CMS”) takes two different approaches to conservation of migratory species. For species listed in Appendix I, which are considered endangered, party states must provide immediate protection through the mandatory regime specified in the CMS.<sup>46</sup> States need not take any particular steps to protect the species listed in Appendix II, which are considered to have an unfavorable conservation status but are not endangered; instead, states are to enter into agreements for the benefit of the species.<sup>47</sup> The CMS offers considerable flexibility in concluding these agreements. Non-treaty arrangements including less formal, non-binding memorandums of understanding can fulfill a party state’s obligations under the CMS.<sup>48</sup>

The shortfin mako and longfin mako are listed only in Appendix II.<sup>49</sup> Thus, Alopias’ obligation in regard to these species is to enter into an agreement for their benefit. Alopias did just this by becoming a signatory to the Memorandum of

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<sup>45</sup> Convention on Migratory Species, 1651 U.N.T.S. 333, June 23, 1979.

<sup>46</sup> *Id.*, Article III.

<sup>47</sup> *Id.*, Article IV.

<sup>48</sup> See MICHAEL BOWMAN ET AL., *LYSTER’S INTERNATIONAL WILDLIFE LAW* (2d ed. 2011), Ch 13.

<sup>49</sup> Convention on Migratory Species, Appendix I, II.

Understanding on the Conservation of Migratory Sharks (“CMS MoU”).<sup>50</sup> Alopias is not in violation of its obligations under the CMS, but instead has acted precisely as contemplated by the CMS by working with other states, NGOs, and other interested actors to conclude an agreement for the protection of mako sharks.

2. Alopias cannot be in violation of the CMS MOU.

By its own terms, the CMS MoU is a “non-legally binding instrument.”<sup>51</sup> Rather than dictating what any state must do, non-binding agreements “capture the steps that should be encouraged” and serve to “inspire” states.<sup>52</sup> Since the CMS MoU is an aspirational document, the range of steps to be undertaken by states is extensive.<sup>53</sup> However, per the language of the agreement, signatories are encouraged to use the Conservation Plan “as a whole or only parts of it.”<sup>54</sup> And since the obligations are not legally binding, a state cannot be held liable for conduct failing to meet the extensive and demanding standards set forth.

One function of non-binding norms is to allow states to gradually make changes “according to their own priorities and resources.”<sup>55</sup> Indeed, the CMS MoU repeatedly uses language that underscores this point: “taking into account the socio-economic and other values of these species for the people,” “every effort, as appropriate and subject to the availability of necessary resources,” “implemented taking into account the

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<sup>50</sup> Memorandum of Understanding on the Conservation of Migratory Sharks, CONVENTION ON MIGRATORY SPECIES (2010), [http://www.cms.int/species/sharks/MoU/Migratory\\_Shark\\_MoU\\_Eng.pdf](http://www.cms.int/species/sharks/MoU/Migratory_Shark_MoU_Eng.pdf).

<sup>51</sup> *Id.* at 2.

<sup>52</sup> SHARKS: CONSERVATION, GOVERNANCE AND MANAGEMENT (Erika J. Techera & Natalie Klein eds., 2014), 35.

<sup>53</sup> *Id.*

<sup>54</sup> Annex 3 to the MOU: Conservation Plan (2012), [http://www.cms.int/sites/default/files/document/Outcome\\_1\\_2\\_Annex3\\_to\\_MoU\\_Conservation\\_Plan\\_E\\_o.pdf](http://www.cms.int/sites/default/files/document/Outcome_1_2_Annex3_to_MoU_Conservation_Plan_E_o.pdf).

<sup>55</sup> SHARKS: CONSERVATION, GOVERNANCE AND MANAGEMENT, 34.

competencies and capabilities of Signatories.”<sup>56</sup> Thus, the non-binding nature of the CMS MoU allows its signatories to explore what steps would be ideal while incentivizing all countries to remain at the table and contribute to the discussion even if the ideal is not yet within their reach. The very structure of the CMS MoU means that Alopas or any other signatory’s failure to fully implement its extensive strategies cannot constitute a violation of treaty law. Enunciating provisions does not make them legally binding, and it is important to separate those that create legal norms from those that set goals.<sup>57</sup>

**E. Customary law does not require the prevention of shark finning.**

While customary law can arise from conventions that were not originally binding, the provisions at issue must be generally and consistently applied by states from a sense of legal obligation.<sup>58</sup> Even considered broadly, protection of endangered species is not a requirement of customary law due to the limited implementation of environmental conventions and the fact that many states still exploit most species<sup>59</sup>, let alone the protection of animal welfare in the case of non-endangered species. Quite simply, the prohibition of shark finning is not a part of customary law. While less than forty countries have signed on to the CMS MOU, which encourages but does not mandate a ban on shark finning (instead suggesting signatories “consider” such a ban<sup>60</sup>), less than thirty countries have banned shark finning in 2013.<sup>61</sup> A ban on shark finning may be

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<sup>56</sup> Memorandum of Understanding on the Conservation of Migratory Sharks, 5-7.

<sup>57</sup> PATRICIA BIRNIE ET AL., INTERNATIONAL LAW AND THE ENVIRONMENT 700 (3d ed. 2009).

<sup>58</sup> *Id.* at 607.

<sup>59</sup> *Id.*

<sup>60</sup> Annex 3 to the MOU: Conservation Plan, 6.

<sup>61</sup> *Sharking Finning and the European Union*, HUMANE SOCIETY INT’L (June 29, 2011) [https://www.hsi.org/world/europe/work/shark\\_finning/facts/shark\\_finning\\_Europe.html](https://www.hsi.org/world/europe/work/shark_finning/facts/shark_finning_Europe.html).

admirable, but it is still controversial, neither consistently implemented nor treated as a closed legal question, and therefore does not qualify as international customary law.

**F. Alopias has made a good faith effort to prevent shark finning.**

Alopias has neither a treaty nor customary obligation to prevent shark finning, yet it has made a good faith effort to do so. Alopias outlawed shark finning in the 2002 Shark Finning Prohibition Act, a full decade before the adoption of the CMS MOU's Conservation Plan and a year before the European Union adopted a similar ban.<sup>62</sup> Alopias' ban on shark finning uses the same "naturally attached" language endorsed by the CMS MOU<sup>63</sup>, UN General Assembly<sup>64</sup>, International Union for the Conservation of Nature<sup>65</sup>, many other NGOs, and even suggested by Rhincodon itself. Alopias makes every effort to enforce the Shark Finning Prohibition Act despite its limited resources and the adverse impact that ending shark finning will have on Alopias' economy.

In addition to its domestic efforts, Alopias has been an active participant in international conservation efforts. Alopias is a party to the CBD and CMS and a signatory to the CMS MOU. As contemplated by these agreements, which emphasize open communication and coordination among states, Alopias has continually cooperated with Rhincodon in working toward sustainable shark fishing, entering into negotiations on the subject multiple times over the past decade. The CMS MOU encourages developing nations to "seek assistance... for the financing and implementation of their strategies" and notes that developed nations should "endeavor

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<sup>62</sup> *Id.*

<sup>63</sup> Memorandum of Understanding on the Conservation of Migratory Sharks, 6.

<sup>64</sup> G.A. Res. 62/177, U.N. Doc. A/RES/62/215 (Mar. 6, 2007).

<sup>65</sup> Int'l Union for Conservation of Nature [IUCN], Resolutions and Recommendations from the World Conservation Congress (Oct. 5–14, 2008), rec. 4.114.

to assist... in the implementation and financing” of conservation measures.<sup>66</sup> As contemplated by the foregoing provision, Alopias has sought assistance with the economic challenges that arise from the ban on shark finning as part of its efforts to further improve compliance and enforcement. Although Rhincodon declined to provide assistance to build enforcement capacity, Alopias has nonetheless been amenable to following Rhincodon’s lead as far as its resources allow. For example, Alopias agreed to prosecute any known instances of shark spining. After the failure of this tactic, Alopias continued talks with Rhincodon on the subject, but further action to address shark spining was not feasible due to economic development and budget concerns.

**G. Disparities in resources must be considered when evaluating conservation efforts.**

Commentators have emphasized that “both the taking of necessary conservation measures and the non-exploitation of wildlife can have adverse economic consequences” and that may be “especially serious for developing states.”<sup>67</sup> Thus, it has been suggested that more states would join in conservation instruments and enact conservation measures if they could be compensated for the economic costs that come with such restrictions.<sup>68</sup> Developed countries might help developing countries through compensation for loss of export income that results from new conservation measures or by paying the enforcement costs of stopping poaching or illegal practices.<sup>69</sup> While Alopias does not argue that Rhincodon should violate its own domestic laws, there are a variety of approaches Rhincodon could use to help build Alopias’ capacity rather than

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<sup>66</sup> Memorandum of Understanding on the Conservation of Migratory Sharks, 7.

<sup>67</sup> BIRNIE ET AL., *supra*, note 57, at 670.

<sup>68</sup> *Id.*

<sup>69</sup> See Michael J. Glennon, *Has International Law Failed the Elephant?* 84 AM. J. INT’L L. 1, 28 (1990).

further adding to the economic stress that inhibits effective action by Alopias in the first place. If a country such as Alopias, an early adopter of a shark finning ban and an active participant in the major conservation conventions, is not just denied help after asking for assistance with enforcement but actually punished for its imperfect enforcement, then other developing countries will be discouraged from taking part in international conservation efforts, a result that would clearly contradict the spirit of the UNCLOS, CBD, CMS, and CMS MOU.

### **CONCLUSION**

For the foregoing reasons, the Federal States of Alopias respectfully requests that this Court:

1. Declare that Alopias is fulfilling its obligations under international law.
2. Declare that Rhincodon's ban on importation of fish and fish related products from Alopias is in violation of international law.

Respectfully submitted,

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Agents for the Federal States of  
Alopias