

TEAM 1516

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

Questions Relating to the Protection of Mako Sharks

The Federal States of Alopias,

Applicant.

v.

The Republic of Rhincodon,

Respondent.

Fall 2014

Memorial for the Applicant

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STATEMENT OF JURISDICTION

The Federal States of Alopias (“Alopias”) and the Republic of Rhincodon (“Rhincodon”) submit the following dispute to the International Court of Justice. Pursuant to Article 40, paragraph 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, T.S. No. 993 (1945). On 16 June 2014, the Parties signed a special agreement and submitted it to the Registrar of the International Court of Justice. *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. On the 23 of June 2014, the Registrar addressed notification to the Parties regarding this matter.

QUESTIONS PRESENTED

- I. **WHETHER ALOPIAS VIOLATED INTERNATIONAL LAW WITH RESPECT TO FINNING AND SPINING OF MAKO SHARKS BY ITS NATIONALS WITHIN ITS TERRITORIAL WATERS AND EXCLUSIVE ECONOMIC ZONE.**

- II. **WHETHER RHINCODON VIOLATED INTERNATIONAL LAW BY BANNING THE IMPORTATION OF FISH AND FISH PRODUCTS FROM ALOPIAS.**

STATEMENT OF FACTS

Alopias and Rhincodon are both States in the Varium Sea Region, the former a developing nation with a population of 5 million, and the latter a developed nation with a population of 250 million. (R.5, ¶1). In 1999, Alopias and Rhincodon signed and ratified a bilateral agreement, entitled Trade Agreement between Rhincodon and Alopias (“TARA”) to *inter alia* strengthen bonds of friendship and cooperation, expand regional trade, ensure predictable framework for business planning and investment, and enforce environmental laws and regulations. (R.6, ¶ 12, 13). TARA prohibits trade restrictions unless it is: necessary to protect public morals; necessary to protect human, animal or plant life or health; or relating to the conservation of exhaustible natural resources. (R. 7, ¶ 13). General Agreement on Tariffs and Trade (“GATT”) and World Trade Organization (“WTO”) panels and appellate bodies are considered subsidiary sources of law with respect to the interpretation of terms of the TARA. (R. 7, ¶ 13).

In 2001 Rhincodon enacted the Humane Fishing Act (“HFA”), which provided, in pertinent part, that it is illegal to land shark fins without the corresponding carcass. (R. 8, ¶ 15). Under this act, the President of Rhincodon is authorized to “impose appropriate trade restrictions, including an embargo on all fish and fish products, when it is determined that nationals of a foreign country are engaging in shark finning.” (R. 8, ¶ 15). After the enactment of the HFA, Rhincodon initiated negotiations with Alopias concerning the finning of sharks. (R. 8, ¶ 17). In response, Alopias enacted the Shark Finning Prohibition Act (“SFPA”). Under this act, shark fins can only be landed if the fins are “naturally attached” to the shark. (R. 8, ¶ 17).

Eight years later, in February 2010, Rhincodon again requested that Alopias enter into consultations concerning shark finning and offered to provide Alopias with educational programs

to bring Alopias' fishers into accord with international norms. (R. 8, ¶ 18). Alopias, recognizing that shark finning is primarily an economic matter, asked instead for much needed financial assistance to bolster national law enforcement efforts. (R. 9, ¶ 19). Rhincodon responded by using a domestic law to prohibit enforcement-related financial assistance. (R. 9, ¶ 20).

In June 2010, under pressure from non-governmental organizations (“NGOs”), Rhincodon asserted concerns with the continued finning, and now “spining” of mako sharks. (R.9, ¶ 21). “Spining” of mako sharks arose in an effort to comply with the “naturally attached” language of the SFPA and is done by “leaving the fins attached to the shark’s spine, rather than completely removing them.” (R.8, ¶ 17; R. 10, ¶ 22). In response, Alopias agreed to prosecute, and did prosecute, known instances of shark “spining.” (R. 10, ¶ 23). Alopias’ judicial branch disagreed with the federal government and ruled that “spined” sharks comported with the “naturally attached” of the SFPA. (R. 10, ¶ 24). The Alopias legislature was unable to amend the act to close the “spining” loophole because of prevailing economic development and budget concerns. (R. 10, ¶ 26).

Without an offer of further assistance, Rhincodon imposed trade restriction on all fish and fish products from Alopias (“Alopias fish products”) under TARA Article 15(a) – public morals; regardless of the fact that shark fins are not, and have never been, traded between the two countries. (R. 11, ¶ 30; Cl. 2, A15; R. 11, ¶ 30). Additionally, Rhincodon allows its nationals to operate 5,000 concentrated animal feeding operations (“CAFOs”). (Cl. 2, A 19). Alopias asserts that Rhincodon’s actions violate TARA and established international laws governing environmental, trade, and development matters between states. (R. 12, ¶ 34).

Failing to resolve the matter, Rhincodon and Alopias submitted the matter to the International Court of Justice for adjudication. (R. 11, ¶ 33).

SUMMARY OF THE ARGUMENT

Alopias has fully cooperated with Rhincodon for the purpose of conserving and sustainably harvesting mako shark species within its EEZ and territorial waters. As a developing nation, Alopias has taken substantial steps in accordance with international law towards preservation of the mako shark species.

Alopias has not violated international law with respect to the finning and spining of mako sharks by its nationals within its territorial waters and EEZ. First, Alopias' actions are in compliance with every treaty that it is party to. Second, Alopias' harvest of mako sharks is not an internationally wrongful act. Third, Alopias is not in violation of customary law because there is no crystallized state practice or *opinio juris* which forbids shark finning. Last, Alopias' actions are in compliance with the principle of common but differentiated responsibilities and the precautionary principle of international law. For these reasons Alopias has not violated international law.

Conversely, Rhincodon has violated international law by banning Alopias' fish products. Rhincodon violated TARA when it imposed an import ban because Rhincodon's actions fail the necessity test established under GATT and WTO. First, Rhincodon's import ban does not achieve its principal objective of protecting public morals. Second, Rhincodon's trade measures are grossly coercive considering the damage the import ban causes to Alopias' developing economy. Third, Rhincodon's import ban violates principles of international environmental law. Fourth, Rhincodon could have used less restrictive trade measures to meet its goal of protecting public morals. For these reasons, Rhincodon has violated international law.

ARGUMENT

I. ALOPIAS IS NOT IN VIOLATION OF INTERNATIONAL LAW WITH RESPECT TO FINNING AND SPINING OF MAKO SHARKS BY ITS NATIONALS WITHIN ITS TERRITORIAL WATERS AND EXCLUSIVE ECONOMIC ZONE

A. Alopias has complied with its international treaty obligations.

A treaty creates binding legal obligations between states that are parties to it.¹ Alopias and Rhincodon are parties to the Convention on International Trade in Endangered Species (“CITES”), Convention on Biological Diversity (“CBD”), United Nations Convention on the Law of the Sea (“UNCLOS”), and Convention on the Conservation of Migratory Species of Wild Animals (“CMS”).²

i. Alopias did not violate CITES.

CITES is an international agreement, which uses trade measures to protect endangered and threatened species.³ More specifically, CITES forbids the international trade of listed species through a three-appendix listing regime: Appendix I heavily restricts trade of species at risk of extinction; Appendix II regulates species whose existence is affected by trade; Appendix III consists of “species that are protected in at least one country, which has asked other CITES Parties to garner international assistance in controlling their trade.”⁴ Compliance with CITES

¹ Vienna Convention on the Law of Treaties, art. 2, May 23, 1969, 1155 U.N.T.S. 331. [VCLT].

² R. 5, ¶ 5-9.

³ See Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 [CITES].

⁴ CITES, art. III-V.

requires that Parties to the Convention “take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof.”⁵

Neither species of mako shark is listed on any CITES appendix.⁶ Without a listing, the trade of mako sharks is not regulated under CITES. Therefore, *Alopias* has not violated CITES.⁷ Additionally, the absence of mako sharks from any CITES listing evidences a lack of international consensus toward regulating the trade of the sharks.⁸ Mako sharks are distinguished from sharks species listed on CITES, many of which are similarly targeted for their fins.⁹ However, unlike mako sharks, all have garnered the international consensus needed to regulate their trade.¹⁰ *Alopias*’ actions fully comport with its responsibilities under CITES, “to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof.”¹¹

ii. *Alopias* did not violate the CBD.

The CBD’s main objectives are to conserve biological diversity while at the same time recognizing “that economic and social development and poverty eradication are the first and overriding priorities of developing countries[.]”¹² To facilitate both the objectives and the

⁵ CITES, art. VIII(1).

⁶ See CITES, appendices I-III; *See also* R. 5, ¶ 7.

⁷ *Id.*

⁸ CITES, art. XV(1)(b).

⁹ *See* CITES, appendices I-III

¹⁰ *Id.*

¹¹ CITES, art. VIII(1).

¹² Convention on Biological Diversity, Preamble, Jun. 6, 1992, 1760 U.N.T.S. 79 [CBD].

overriding priorities of developing states, the CBD stresses the right of states to determine how their resources are utilized,¹³ mandates cooperation between contracting parties,¹⁴ and mandates that developed Parties provide financial resources to developing Parties for the purposes of the Convention.¹⁵

The CBD allows States “to exploit their own resources pursuant to their own environmental policies” so long as they “do not cause damage to the environment of other States[.]”¹⁶ While both Alopias and Rhincodon harvest mako sharks, existing data indicates that mako shark populations are not in decline within the Varium sea region.¹⁷ This data indicates that the utilization of mako sharks within the region is occurring at a sustainable level, and not damaging the environments of other States. Therefore, Alopias’ may “exploit their resources pursuant to their own environmental policies,” and Alopias’ harvesting of mako sharks does not violate the CBD. Even if Alopias’ actions were construed to damage the environment of other States, the SFPA is designed to, and can adequately, regulate the harvest of mako sharks in Alopias’ territorial waters and EEZ with financial assistance from Rhincodon.

In contrast, Rhincodon’s refusal to provide aid for Alopias’ regulatory efforts goes directly against Rhincodon’s obligations under Article 21 of the CBD: to provide “financial

¹³ CBD, art. 6.

¹⁴ CBD, art. 5.

¹⁵ CBD, art. 21.

¹⁶ CBD, art. 3.

¹⁷ Clarifications to the Record at page 2 (“Cl. 2”), Answer (“A”) 12.

resources to developing country Parties”¹⁸ and Article 5 of the CBD: to “cooperate with other Contracting Parties . . . in respect of areas beyond national jurisdiction . . . for the conservation and sustainable use of biological diversity.”¹⁹ To combat this violation, Rhincodon will likely argue that its offer to provide educational programs to Alopias fulfills its duty to cooperate under the CBD; however, education alone is an insufficient and unrealistic approach to change an industry fueled by escalating external demands from developed countries coupled with an individual’s desire to make a living in a developing country.²⁰ In recognition of this, Alopias rightfully and respectfully declined Rhincodon’s impracticable offer.

Furthermore, if Rhincodon is truly concerned about the finning of mako sharks, it should provide the financial assistance required under Article 21, instead of using domestic legislation to avoid its international obligations.²¹ Between 2010 and 2012, 6% of biodiversity related aid (\$120 million dollars) was given to developing countries by developed countries to conserve biodiversity through improvements to their national fishing sectors.²² Rhincodon could have contributed to this number because Rhincodon’s national law solely prohibits funding to “foreign

¹⁸ CBD, art. 21.

¹⁹ CBD, art. 5.

²⁰ See *The International Trade of Shark Fins: Endangering Shark Populations Worldwide* (March 2010), available at <http://oceana.org/en/news-media/publications/reports/the-international-trade-of-shark-fins-endangering-shark-populations-worldwide> (emphasizing shark fin exports); See also Arun Agrawal et al., United Nations Forum on Forests, *ECONOMIC CONTRIBUTIONS OF FORESTS* (Mar. 20, 2013), <http://www.un.org/esa/forests/pdf/sessiondocuments/unff10/EcoContrForests.pdf> (analogizing shark finning pressure to deforestation pressures in the global south - “Illegal and unsustainable harvesting in many countries, at times accompanied by political violence and social unrest, make problems related to forest economic contributions a matter of national concern and competition.”).

²¹ CBD, art. 21.

²² *Aid to Biodiversity, OECD DAC STATISTICS* (Mar. 2010) available at <http://www.oecd.org/dac/environment-development/Biodiversity-related%20aid%20Flyer%20%20May%202014.pdf>.

law enforcement agencies[;]”²³ Rhincodon’s national law does not prevent it from providing funds to alternative programs to achieve the same enforcement goal. Rhincodon could, in compliance with its national legislation: provide funds to purchase geographic positioning systems to aid in the oversight of fishing fleets, or transfer superior technology to aid in an efficient and ethical target of shark stocks. Rhincodon’s national law does not support its actions.

Furthermore, even if Rhincodon had a valid national law prohibiting all funding to other States, national legislation does not excuse its international obligations under the CBD.²⁴ As a developing nation, Alopias has complied with its responsibilities under the CBD. Rhincodon has failed in its duty, as a developed nation and contracting party, to assist Alopias in furthering the objectives of the CBD.

iii. Alopias did not violate the United Nations Convention on the Law of the Sea.

The United Nations Convention on the Law of the Sea (“UNCLOS”) is considered by some to be “the most comprehensive and progressive international environmental law of any modern international agreement.”²⁵ UNCLOS provides a “regulatory and conservation scheme

²³ R. 9, ¶ 20.

²⁴ VCLT, art. 18.

²⁵ Charney, *The Marine Environment and the 1982 United Nations Convention on the Law of the Sea*, 28 INT’L LAW 879, 882 (1994).

for the world's oceans."²⁶ Under UNCLOS, nations have "a general duty . . . to preserve and protect the marine environment and [their] natural resources."²⁷

a. UNCLOS does not regulate Alopias' fishing methods.

UNCLOS is concerned with the protection of highly migratory species for the purposes of achieving their "optimum utilization."²⁸ Optimum utilization is achieved whenever highly migratory species are fully exploited without endangering the species to over-exploitation.²⁹ Thus, optimum utilization is concerned with the quantity of sharks caught in relation to their reproductive rates; it does concern the method used to catch them.³⁰ Mako shark populations are currently stable in the Varium Sea region, suggesting that the stocks are not over-exploited. Therefore, Alopias' harvesting of mako sharks is not in violation of UNCLOS.³¹

²⁶ *Id.*

²⁷ LAKSHMAN GURUSWAMY, INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL, 16 (4th Ed. 1997).

²⁸ UN Convention on the Law of the Sea, art 61, 10 Dec.1982, 21 I.L.M.1261 [UNCLOS] (describing optimal utilization as the maintenance or restoration of populations "above levels at which their reproduction may become seriously threatened.").

²⁹ *Id.*

³⁰ Christopherson, *Toward a Rational Harvest: The United Nations Agreement on Straddling Fish Stocks and Highly Migratory Species*, 5 MINN. J. OF GLOBAL TRADE 357, 366-377 (1996) ("UNCLOS envisions an era of international negotiation and cooperation in which states come to terms with their respective needs and the demands of a sensible harvest.").

³¹ *See* UNCLOS; *See also* Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug.4, 1995, 2167 U.N.T.S. 3 [Straddling Stocks Agreement].

b. Alopias has the sovereign right under UNCLOS to explore, exploit, conserve, and manage mako sharks within its exclusive economic zone even though mako sharks are a highly migratory species.

Article 56 of UNCLOS grants coastal states sovereign control over living resources within their respective EEZs.³² Article 64 of UNCLOS specifies state responsibilities regarding the cooperation and utilization of highly migratory species.³³ However, Article 64 notes that its provisions “apply in addition to the other provisions” of Part V, for which Article 56 is included.³⁴ Therefore, according to the plain language interpretation of these two articles, states maintain their sovereign rights over highly migratory species that are within their EEZs.³⁵ Therefore, Alopias retains its sovereign rights over mako sharks despite the fact that they are a highly migratory species.

c. The SFPA furthers UNCLOS’ mandate for nations to conserve and manage living resources within their EEZ.

By enacting the SFPA, Alopias complied with its obligations under UNCLOS. UNCLOS, and its subsidiary Straddling Fish Stocks Agreement, require that coastal states “ensure through proper conservation and management measures that the maintenance of the living resources in the [EEZ] is not endangered by over-exploitation.”³⁶ The SFPA furthers UNCLOS’ requirement because the SFPA limits the manner by which mako sharks can be

³² UNCLOS, art. 56.

³³ UNCLOS, art. 64.2.

³⁴ *Id.*

³⁵ Aikman, *Island Nations of the South Pacific and Jurisdiction over Highly Migratory Species*, 17 VICTORIA U. WELLINGTON L. REV. 101, 103 (1987).

³⁶ UNCLOS, art. 61.2; Straddling Stocks Agreement, Art. 7.

harvested.³⁷ Even though mako sharks are not in decline in the Varium sea region, Alopias passed and is enforcing the SFPA within the bounds of the country's financial capabilities.³⁸ The SFPA limits the manner by which Alopias fishermen can land mako sharks through a "naturally attached" requirement. Therefore, the SFPA furthers UNCLOS' conservation and management objectives.

d. Alopias has complied with the UNCLOS mandate to cooperate with Rhincodon regarding the conservation and management of transboundary species.

Alopias has complied with the UNCLOS mandate to cooperate with other states regarding the conservation and management of mako sharks.³⁹ At the request of Rhincodon, Alopias passed the SFPA, made an official request for enforcement assistance, and prosecuted an Alopias citizen.⁴⁰ Alopias' actions demonstrate good faith efforts to cooperate with Rhincodon for the purposes of conserving and optimally utilizing the mako shark species.

e. Rhincodon's import ban violates UNCLOS.

In contrast, Rhincodon has violated UNCLOS because Rhincodon's import ban against Alopias is contrary to Rhincodon's duty to provide Alopias with the adequate enforcement assistance. According to UNCLOS, "[c]ompetent international organizations . . . with [the] participation by all states concerned" are to "cooperate" in order to protect particular living

³⁷ R. 8, ¶ 17.

³⁸ R. 10, ¶ 26.

³⁹ Straddling Stocks Agreement, art. 8.3; UNCLOS, art. 61.5, art. 64.

⁴⁰ See R. 8-10.

resources.⁴¹ Paradoxically, Rhincodon initiated trade sanctions against Alopias despite the fact that developed nations are called to assist developing nations with surveillance and enforcement needs.⁴² Rhincodon, despite being a developed nation, initiated trade sanctions against Alopias that are in direct contravention of its duties under UNCLOS.

iv. Alopias complied with the CMS and the Memorandum of Understanding on the Conservation of Migratory Sharks.

Alopias complied with the CMS regarding its actions concerning the conservation of mako sharks because Alopias concluded an agreement with Rhincodon to pass the SFPA. Under the CMS, nations working to conserve migratory species listed under Appendix II are “to conclude Agreements covering the conservation and management of [the particular] migratory species.”⁴³ Alopias passed the SFPA in order to further conserve mako sharks in the Varium sea region.⁴⁴ The purpose of the SFPA comports with the purpose of the CMS. Therefore, Alopias has fully complied with the CMS concerning its actions towards mako sharks.

Alopias has fulfilled its obligations under the Memorandum of Understanding on the Conservation of Migratory Sharks (“MOU”) by enacting and enforcing the SFPA. The MOU requires that nations “enact legislation or regulations to prohibit shark finning” so that “sharks

⁴¹ UNCLOS, art. 61.5, art. 64.

⁴² Straddling Stocks Agreement, Art. 24, 2(c), Art.25, 3(c) (unequivocally stating that developed nations are to assist developing nations, directly or indirectly, with the adequate resources necessary to perform proper enforcement measures, and that developing nations must take care to avoid a “disproportionate burden of conservation action onto developing states.”); Aikman, *supra* note 34 at 103. (Alopias’ predicament is similar to island governments in the south pacific who struggle to enforce fishery laws. These island governments suffer from inadequate financial, technical, and human resources sufficient for proper fishery enforcement. The article recognizes developed nations duty to aid developing nations with surveillance and enforcement measures.)

⁴³ Convention on Migratory Species, art. 2.3, June 23, 1979, 1651 U.N.T.S. 333 [CMS].

⁴⁴ *See generally* R. 8.

[are] landed with each fin naturally attached.”⁴⁵ Alopias directly incorporated the language of the MOU into the SFPA. Thus, Alopias has fulfilled its MOU obligations.⁴⁶ Further, even if Alopias’ actions were construed to violate the MOU, the MOU is a non-legally binding instrument. As such, a violation of the MOU is not an illegal act under international law.⁴⁷

v. Alopias has not committed an internationally wrongful act under the Articles of State Responsibility.

The Articles of State Responsibility address what happens when a “state breaches an international obligation by act or omission.”⁴⁸ There is a two-part test for determining if a state has engaged in an internationally wrongful act.⁴⁹ First, the action must be “attributable to the State under international law”; and second, the action must constitute a breach of an international obligation.⁵⁰

Alopias has not committed an internationally wrongful act because (1) there is no wrongful conduct that can be attributed to Alopias, and (2) Alopias has not breached any international obligation. First, Alopias has not committed a wrongful act because no member or organ of the Alopias government has finned or spined a mako shark. This dispute only concerns

⁴⁵ Memorandum of Understanding on the Conservation of Migratory Sharks 13, ¶ h, March 2010, *available at* http://sharksmou.org/sites/default/files/Migratory_Shark_MoU_English.pdf [MOU].

⁴⁶ *See generally* R. 8. (stating that the SFPA’s naturally attached language comports with the UN General Assembly Resolution 62/177.).

⁴⁷ MOU, art.1.1.

⁴⁸ Boon, *The Law of Responsibility: A Response to Fragmentation*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 395, 399 (2012).

⁴⁹ I.L.C., Articles on the Responsibility of States for Internationally Wrongful Acts, Art. 2, GA U.N. Doc. A/56/10 (2001) [ARSIWA].

⁵⁰ *Id.*

the private actions of Alopias nationals. As such, no wrongdoing can be attributed to the State of Alopias. Second, Alopias has not violated its international obligations under any ratified international treaty, customary law, or general principle of international law. Therefore, Alopias has not committed an internationally wrongful act under the Articles of State Responsibility.⁵¹ In conclusion, Alopias has not committed an internationally wrongful act under the Articles of State Responsibility.

B. Alopias has not violated its obligations under customary international law.

i. Shark finning is not prohibited under customary international law.

While Alopias support efforts to humanely and sustainably harvest mako sharks, there is no customary international law (“CIL”) obligation governing the method by which sharks are harvested. Legally binding CIL obligations are created through two compulsory elements: state practice – the “rule of consistent and uniform usage” and *opinio juris* – a showing that states actions stem from the belief that such practice is required by law.⁵² The movement to ban the practice of shark finning, while emerging, does not meet the requisite widespread state practice and *opinio juris* necessary to create a binding legal obligation.

State practice can be demonstrated in various forms: national legislation, diplomatic correspondences, government statements etc.,⁵³ and must be “both extensive and virtually uniform in the sense of the provision invoked.”⁵⁴ While many countries (including both Alopias

⁵¹ ARSIWA, art. 12.

⁵² Lal Kurukulasuriya & Nicholas Robinson, Training Manual on International Environmental Law, IUCN Academy of Environmental Law, (2006), available at <http://www.iucnael.org/online-resources/unep-training-manual.html>.

⁵³ GURUSWAMY, *supra* note 26, at 16.

⁵⁴ North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), 1969 I.C.J. 20.

and Rhincodon), Regional Fisheries Management Organizations (“RFMOs”)⁵⁵, and multilateral agreements⁵⁶ restrict the method by which sharks are harvested, the methodologies are not uniform in any way. Approaches to sustainable shark populations range from outright prohibitions on fishing sharks, to requiring that the sharks be landed with fins “naturally attached,” to regulations which explicitly allow for the finning of sharks.⁵⁷ This range in harvesting methods does not constitute state practice.

Even if the differing methodologies were construed as state practice, the second requisite, *opinion juris*, has not been met. “If a practice is regarded as discretionary . . . rather than obligatory, it is an example of usage that does not possess the critical element of *opinio juris* and therefore is not considered customary law.”⁵⁸ The absence of a uniform method by which sharks should be harvested, mentioned *supra*, evidences a clear lack of obligation. Additionally, many states, including Indonesia, Thailand, Spain, China, Japan, Korea, and Portugal continue to legally fin sharks, suggesting that shark harvesting regulations are discretionary and have not risen to the level of CIL.⁵⁹

⁵⁵ *National law, multi-lateral agreements, regional and global regulation on shark protection and shark finning*, HUMANE SOCIETY INTERNATIONAL, (Oct. 2014), http://www.hsi.org/assets/pdfs/shark_finning_regs_2014.pdf.

⁵⁶ *Id.*

⁵⁷ *See id.* (allowing sharks to be finned through the weight-fin ratio method of harvesting sharks).

⁵⁸ GURUSWAMY, *supra* note 26, at 17.

⁵⁹ HUMANE SOCIETY INTERNATIONAL, *supra* note 54 (allowing finning of sharks so long as in compliance with the weight to fin ratio. Also, lack of legislation as evidenced from absence on the list).

- a. Alopias' actions comport with the Customary International Law: Principle 21 of the Stockholm Declaration.

While the method by which sharks should be harvested is not governed by CIL, the actions of Alopias and Rhincodon are governed by Principle 21 of the Stockholm Declaration, a recognized CIL.⁶⁰ Principle 21 establishes that States have “the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction . . . do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”⁶¹ These intertwined concepts of sovereignty and responsibility not to cause environmental damage “are widely-regarded as the underpinnings of international environmental law.”⁶² Principle 21 has been reaffirmed by many treaties, and was recognized by the ICJ as CIL in 1996.⁶³ Alopias comports with both aspects of Principle 21 by asserting its sovereign right to determine its national environmental policies and by harvesting sharks in a manner has not impacted the population in the region.⁶⁴

⁶⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. 226 (1996); Stockholm Declaration on the Human Environment, Principle 21, UN Doc. A/CONF. 48/14/Rev.1 (1973) [Stockholm Declaration]; Rio Declaration on Environment and Development, Principle 2, UN Doc.A/CONF. 151/26 (1992) [Rio Declaration]; CBD Art. 3; Trail Smelter Arbitral Decision (U.S. v. Can.), 3 R.I.A.A. 1965 (1938/1941).

⁶¹ Stockholm Declaration, Principle 21.

⁶² GURUSWAMY, *supra* note 26, at 23.

⁶³ See sources cited *supra* note 59.

⁶⁴ See Cl.2, A12 (“studies suggest that the populations [of mako sharks] are not currently in decline.”)

C. Alopias' actions comport with the general principles of international law.

General principles are a source of international law under Article 38 (1)(c) of the Statute of the International Court of Justice.⁶⁵ General principles of international law are emblematic of the basic principles of law found within various municipal legal systems around the world.⁶⁶ Moreover, the general principles of international law serve as a foundation of the international legal order for which states can depend and rely upon.⁶⁷

i. Alopias, but not Rhincodon, has complied with the principle of common but differentiated responsibilities regarding its actions towards mako sharks.

The principle of common but differentiated responsibilities (“CBDR principle”) is based on “equity and pragmatism.”⁶⁸ The principle holds that all states have the common responsibility to protect the environment; however, these responsibilities are differentiated amongst states due to differing circumstantial factors.⁶⁹ These differing circumstantial factors include “social, economic, and ecological situations” between states.⁷⁰ Thus, the differing circumstantial factors between states create the impetus for varied state responsibilities relating

⁶⁵ Statute of the International Court of Justice, June 26, 1945, Art. 38(1)(C), 33 U.N.T.S. 993 [I.C.J. Statute].

⁶⁶ Hicks, *International Order and Article 38(1)(c) of the Statute of the International Court of Justice*, 2 SUFFOLK TRANSNAT'L L.J. 7 (1978).

⁶⁷ *Id.*

⁶⁸ Boyte, *Common but Differentiated Responsibilities: Adjusting the Developing/Developed Dichotomy in International Environmental Law*, 14 N.Z. J. ENVTL. L. 63, 64 (2010).

⁶⁹ The Principle of Common but Differentiated Responsibilities: Origins and Scope, CISDL LEGAL BRIEF (Aug. 26, 2002), available at http://cisdl.org/public/docs/news/brief_common.pdf.

⁷⁰ *Id.*

to environmental protection.⁷¹ This concept has been recognized by a plethora of international law sources.⁷²

Alopias accepts its responsibility to implement and enforce laws that further the sustainable use of mako sharks. The steps that the Alopias government has taken are indicative of this. However, as a developing nation, Alopias depends on Rhincodon for proper enforcement assistance in order to fully achieve the conservation and sustainable use of mako sharks. Under the CBDR principle, Rhincodon should willingly contribute funds to Alopias for the purposes of conserving mako sharks.⁷³ Conversely, not only has Rhincodon failed to take any measure to assist Alopias, Rhincodon has initiated trade sanctions which ironically work to further impede Alopias' ability to enforce the SFPA. Therefore, Rhincodon's actions are in gross contradiction to the CBDR principle.

ii. Alopias has followed the precautionary principle regarding its actions towards mako sharks.

The precautionary principle holds that nations proceed slowly “in the face of uncertainty, constantly testing and monitoring the effects of their activities” relating to the environment.⁷⁴ A fundamental aspect of the principle is that the accumulation of scientific studies and environmental impact statements should be attained before development or depletion of

⁷¹ *Id.* (the principle of common but differentiated responsibilities is recognized in the Rio Declaration, The Stockholm Declaration, the Framework Convention on Climate Change, WTO law, Agenda 21, the 1972 London Convention, and the 1987 Montreal Protocol, the 1976 Barcelona Convention, and the UNCLOS.).

⁷² *Id.*

⁷³ *Id.* (recognizing that financial and technological transfers from developed to developing nations are instrumental to developing nations for the practical purposes of effectuating environmental protection.).

⁷⁴ BRINGING NEW LAW TO OCEAN WATERS, 359 (David Caron and Harry Scheiber eds., 2004).

environmental resources occurs.⁷⁵ Furthermore, the Rio Declaration states that a “lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”⁷⁶

Alopias has complied with the precautionary principle. Shark finning in Alopias is common and has become more prevalent within the past ten years.⁷⁷ Despite this, current studies suggest that the populations of mako sharks in the Varium sea region are not in decline.⁷⁸ This data, along with Alopias’ implementation of the SFPA, evidences compliance with the precautionary principle.

As a whole, it is clear that Alopias’ actions comport with the nation’s obligations under international treaties, customary international law, and international law principles. In contrast, it is apparent that Rhincodon’s actions go against international obligations as a co-party to many treaties, and as a neighboring developed state.

II. RHINCODON VIOLATED ITS OBLIGATIONS UNDER TARA WHEN IT IMPOSED AN IMPORT BAN ON ALOPIAS’ FISH PRODUCTS.

Rhincodon’s import ban on Alopias’ fish products is a clear violation of Article 5 of TARA, which prohibits the use of import bans by either party. Rhincodon seeks to excuse its illegal import ban under Article 15(a) of TARA, which allows import bans if doing so is “necessary to protect public morals.”⁷⁹ However, Rhincodon’s public morals argument is invalid

⁷⁵ *Id.*

⁷⁶ Rio Declaration, Principle 15.

⁷⁷ Cl.1, A8.

⁷⁸ Cl.2, A9.

⁷⁹ R. 7, Art.(a).

for three reasons: (1) Rhincodon fails the “necessity” test put forth by GATT/WTO case law; (2) Rhincodon’s import ban was not the least-restrictive method to achieve its objective of protecting public morals and; 3) international environmental law strongly discourages the implementation of unilateral trade sanctions against developing nations.

A. Rhincodon’s import ban violates TARA because the import ban fails the “necessity” test put forth by GATT/WTO panels.

The necessity test used by GATT/WTO panels to determine the validity of a public morals exception “weigh[s] and balance[s]” a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.”⁸⁰ Additionally, a comparison between the challenged measure and possible alternatives should be undertaken.⁸¹

i. Rhincodon fails the GATT necessity test because Alopias’ shark finning does not affect Rhincodon’s public morals.

The necessity test requires the court to weigh the importance of Rhincodon’s objective, which is to protect public morals from what it believes to be the inhumane practice of shark finning.⁸² While the enactment of the HFA and the presence of anti-shark finning NGOs in Rhincodon signifies that shark finning is a concern, the connection between Alopias’ shark finning and Rhincodon’s public morals is tenuous at best.⁸³ Rhincodon has never imported shark

⁸⁰ Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014 [EC-Seal Products].

⁸¹ *Id.* at 153.

⁸² R. 11, ¶ 31.

⁸³ R.7, ¶ 15; R. 9 ¶ 21.

fins from Alopias,⁸⁴ and Alopias' shark finning has only taken place in its EEZ or territorial waters.⁸⁵

Additionally, Rhincodon's concern over the welfare of sharks seems contradictory when Rhincodon maintains CAFOs within its own borders.⁸⁶ CAFOs confine large numbers of livestock into a small space where the animals have no room to roam.⁸⁷ The confinement of CAFOs causes stress and mental illness in the livestock.⁸⁸ Confinement also results in the quick spread of disease among livestock, and animals are repeatedly pumped with antibiotics to survive.⁸⁹ If Rhincodon truly upholds animal welfare as an important public moral, it should consider changing its own inhumane practices.

ii. Rhincodon fails the GATT necessity test because the import ban does not meet its objective of protecting public morals.

Even if Alopias' shark finning affects Rhincodon's public morals, Rhincodon's import ban is not justified because there is no connection between the import ban and the objective of protecting public morals.⁹⁰ In *EC-Seal Products*, the WTO upheld the European Union's (EU)

⁸⁴ Cl.5, A 40.

⁸⁵ R. 11, ¶ 28.

⁸⁶ R. 11, ¶ 30.

⁸⁷ US Environmental Protection Agency, *What is a CAFO?*, <http://www.epa.gov/region07/water/cafo/index.htm> (last visited Nov. 15, 2014).

⁸⁸ Elizabeth Overcash, *Overview of CAFOs and Animal Welfare Measures*, Animal Legal & Historical Center <https://www.animallaw.info/article/overview-cafos-and-animal-welfare-measures> (last visited Nov. 15, 2014).

⁸⁹ *Id.*

⁹⁰ *EC-Seal Products*, *supra* note 78.

ban on inhumanely produced seal products.⁹¹ In that case, the ban was justified because the EUs import ban contributed to the objective of protecting public morals in two ways: 1) the import ban decreased the demand for inhumanely produced seal products, thus decreasing the number of seals killed and; 2) the public morals of EU citizens were protected because the ban prevented them from patronizing an inhumane industry.⁹²

Contrastingly, Rhincodon's ban on Alopias' products does nothing to protect Rhincodon's public morals. First, Rhincodon's import ban will not decrease demand for Alopias' shark fins because Alopias' shark fins have never been sold in Rhincodon, meaning that there is no demand in Rhincodon that the ban could decrease.⁹³ Second, because Alopias' shark fins were never sold in Rhincodon before the ban, Rhincodon is not protecting its citizens from purchasing inhumanely harvested shark fins from Alopias.⁹⁴ Thus, the connection between Rhincodon's import ban and the protection of public morals does not exist, and Rhincodon has failed the second prong of the GATT necessity test.

iii. Rhincodon fails the GATT necessity test because the import ban is unnecessarily trade-restrictive.

Finally, the court should weigh the trade-restrictiveness of Rhincodon's import ban on all of Alopias' products and find that the import ban is excessively restrictive.⁹⁵ Alopias is a developing country that exports 30% of its fish and fish products (none of which are shark fins)

⁹¹ *Id.*

⁹² *Id.* at 163, 155.

⁹³ Cl. 5, A40.

⁹⁴ *Id.*

⁹⁵ EC-Seal Products, *supra* note 78.

to Rhincodon.⁹⁶ In contrast, these exports translate into a mere 5% of Rhincodon's total fish imports.⁹⁷ Additionally, Alopias' economy relies heavily on fishing and agriculture.⁹⁸ Therefore, Rhincodon's import ban fails to meet its objective while disproportionately affecting Alopias' developing economy. In *Brazil-Retreaded Tyres*, a WTO panel emphasized that import bans are extremely difficult to justify unless the ban greatly contributes to the objective.⁹⁹ As was discussed earlier, Rhincodon's import ban does not materially contribute to the objective. Therefore, under *Brazil-Retreaded Tyres*, the court should find that the trade-restrictiveness of Rhincodon's measure is overbearing, coercive, and unnecessary.

The ineffectiveness of Rhincodon's import ban to protect public morals or mako sharks speaks to the coercive nature of the ban. Rhincodon is attempting to use TARA to pressure Alopias into changing its domestic legislation to match Rhincodon's stance on shark finning. In *Tuna-Dolphin*, a GATT panel held that the United States could not impose an import ban on Mexico simply because Mexico's fishing regulations did not comport with the United States' domestic Marine Mammal Protection Act.¹⁰⁰ The panel realized that allowing the US to ban imports from another country simply because that country has different environmental legislation would result in "an open-ended route for any country to apply trade restrictions unilaterally . . .

⁹⁶ Cl. 5, A43.

⁹⁷ *Id.*

⁹⁸ R. 5, ¶ 2.

⁹⁹ Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, para. 7.635.

¹⁰⁰ World Trade Organization, *Mexico etc. versus US: 'tuna-dolphin'* http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm (last visited Nov. 15, 2014).

to impose its own standards upon other countries[.]”¹⁰¹ which would “conflict with the main purpose of the multilateral trading system.”¹⁰² This court should uphold the panel’s findings in *Tuna-Dolphin* and invalidate the coercive actions of Rhincodon.

B. International law strongly discourages the use of unilateral trade measures against developing countries like Rhincodon.

Coercive economic acts by a wealthy state like Rhincodon against a developing state like Alopias contradict the purpose of the WTO, which aims to eliminate poverty through amicable trade agreements.¹⁰³ The WTO encourages the expansion of trade in goods and services, while allowing for the optimal use of the world’s resources.¹⁰⁴ The WTO also respects that countries are at different levels of economic development and asserts that developing countries should “secure a share in the growth of international trade.”¹⁰⁵ Additionally, international environmental law prohibits unilateral trade sanctions because they contravene the concept of sustainable development.¹⁰⁶ A UN Resolution on Sustainable fisheries “urges States to eliminate barriers to trade in fish and fisheries products which are not consistent with their rights and obligations under the [WTO] agreements, taking into account the importance of the trade in

¹⁰¹ *Id*

¹⁰² *Id.*

¹⁰³ BRADLY J. CONDON, ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW, 23 (1st. ed. 2006).

¹⁰⁴ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, Preamble (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

¹⁰⁵ *Id.*; BRADLY J. CONDON, *supra* note 101 at 22.

¹⁰⁶ Rio Declaration, Principle 12.

fish and fisheries products, particularly for developing countries.”¹⁰⁷ For these reasons, it is clear that Rhincodon’s import ban against Alopias violates its obligations under the WTO and, more generally, contravenes the principles of sustainable development embraced by the Rio Declaration and the UN General Assembly.

Overall, Rhincodon fails the necessity test put forth by GATT/WTO panels for three reasons: (1) Rhincodon’s import ban of Alopias’ fish products does not achieve its objective of protecting public morals; (2) Rhincodon’s trade measures are grossly coercive considering the damage this import ban will cause for Alopias’ developing economy; and (3) Rhincodon’s ban violates the general purpose of the WTO and principles of international environmental law.

C. Instead of implementing an import ban, Rhincodon could have utilized less trade-restrictive alternatives to protect public morals.

After the necessity test has been applied, the court must determine whether there are any less-restrictive alternatives that the importing country could have implemented in lieu of the import ban.¹⁰⁸ In this case, Rhincodon could have avoided the import ban by: 1) fulfilling its international obligations under the CBD by providing financial assistance to Alopias;¹⁰⁹ 2) forming a multilateral agreement with states in the Varium Sea Region that would place restrictions on shark finning; or 3) renegotiating TARA with Alopias. Import bans should be implemented as a last resort, when all other remedies have been exhausted.¹¹⁰ Rhincodon did not explore these less-restrictive alternatives before implementing the import ban, and therefore, violated its obligations under TARA

¹⁰⁷ ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 2209/2010, 201 ¶ 17 (Oceana eds., 2011).

¹⁰⁸ EC-Seal Products, *supra* note 78 at 152-153.

¹⁰⁹ CBD, art. 21.

¹¹⁰ Rio Declaration, principle 12.

CONCLUSION AND PRAYER

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

1. **Declare that Alopias did not violate international law with respect to finning and spining of mako sharks by its nationals within its territorial waters and exclusive economic zones.**
2. **Declare that the Republic of Rhincodon violated international law by banning the importation of fish and fish products from Alopias.**