

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



THE CASE CONCERNING  
QUESTIONS RELATING TO SUBSISTENCE USE AND TROPHY HUNTING

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ASTOR  
*APPLICANT*

v.

RISHMAK  
*RESPONDENT*

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MEMORIAL FOR THE RESPONDENT  
2024-2025 STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT  
COMPETITION  
NOVEMBER 2024

## **TABLE OF CONTENTS**

INDEX OF AUTHORITIES

QUESTIONS PRESENTED

STATEMENT OF JURISDICTION

STATEMENT OF FACTS

SUMMARY OF THE ARGUMENTS

ARGUMENTS ADVANCED

### **I. THE TROPHY HUNTING OF THE ROYAL MARKHOR THROUGH THE AUCTION PROCESS, BY HUNTERS WHO ARE NOT DIONE GINSU, COMPLIES WITH CONVENTIONAL INTERNATIONAL LAW**

#### **A. The taking of the Royal Markhor by those other than the Dione Ginsu complies with the Convention on the Conservation of Migratory Species of Wild Animals (CMS)**

1. The ordinary meaning of Article III.5(c) permits the taking
2. The context and object and purpose of Article III.5(c) permits the taking
3. Relevant rules of international law permit the taking

#### **B. The taking of the Royal Markhor is to accommodate the needs of Dione Ginsu under the CMS**

1. The ordinary meaning of “subsistence” is satisfied
2. The traditional use requirement, if any, is satisfied

#### **C. The taking of the Royal Markhor is for the purpose of enhancing the survival of the species under the CMS**

1. The context and object and purpose of Article III.6(b) permits the taking
2. Supplementary means of interpretation

#### **D. Rishmak has complied with its obligations under international human rights law**

1. Rishmak has complied with its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR)
2. Rishmak has complied with its obligations under the Indigenous and Tribal Peoples Convention 1989 (ILO 169)

**II. THE BAN ON THE IMPORTATION OF THE ROYAL MARKHOR HUNTING TROPHIES VIOLATES CONVENTIONAL INTERNATIONAL LAW**

**A. Astor's ban on hunting trophy imports was not authorized by CITES**

1. Astor is in contravention of several resolutions of CITES
2. Astor has not complied with article XIV of CITES

**B. Astor has violated the ARTA**

1. Astor's measure is both a disguised restriction under article 20(a) of the ARTA and arbitrary in its application
2. Astor's measure is arbitrary in its application under article 20(g) of the ARTA

**CONCLUSION AND PRAYER FOR RELIEF**

## **INDEX OF AUTHORITIES**

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### **QUESTIONS PRESENTED**

- I.     **WHETHER THE TROPHY HUNTING OF THE ROYAL MARKHOR THROUGH THE AUCTION PROCESS, BY HUNTERS WHO ARE NOT DIONE GINSU, VIOALTES OR COMPLIES WITH CONVENTIONAL INTERNATIONAL LAW.**
  
- II.    **WHETHER THE BAN ON THE IMPORTATION OF ROYAL MARKHOR HUNTING TROPHIES VIOLATES OR COMPLIES WITH CONVENTIONAL INTERNATIONAL LAW**

## **STATEMENT OF JURISDICTION**

Astor (“the Applicant”) and Rishmak (“the Respondent”) submit their dispute to this Honorable Court, pursuant to Article 40, paragraph 1 of the Statute of the International Court of Justice. On July 1, 2024, the Applicant and Respondent submitted a copy of the Special Agreement to the Registrar of the Court. See Special Agreement Between Astor and Rishmak for Submission to the International Court of Justice of Differences Between Them Concerning Questions Relating to Subsistence Use and Trophy Hunting, signed at Ashgabat, Turkmenistan, on May 24, 2024. The Registrar addressed notification to the parties on July 31, 2024.

## **STATEMENT OF FACTS**

Tensions between Astor and Rishmak have escalated due to conflicting practices surrounding the conservation of the Royal Markhor, a critically endangered wild goat; the population now stands at approximately 2,200 individuals, now concentrated in Astor and Rishmak after decades of habitat loss, disease, and hunting. This migratory species, listed on Appendix I of the Convention on the Conservation of Migratory Species (CMS), winters in Rishmak and summers in the mountainous regions of Astor.

Astor and Rishmak are parties to international agreements which confer protections on the Royal Markhor. These agreements include the Convention on International Trade in Endangered Species (CITES) and the CMS, the latter of which obligates parties to prevent the “taking” of the species except under limited exemptions. The issues arising between the parties concern the legality of Rishmak’s auction-based trophy hunting of the Royal Markhor and Astor’s recent ban on the import of Royal Markhor hunting trophies.

Astor, a high-income nation, strictly prohibits the taking of the Royal Markhor, specifically, with domestic conservation laws aligning with its obligations under CMS. In contrast, Rishmak, a low-income nation, has laws allowing the indigenous Dione Ginsu community to hunt a limited number of Royal Markhors each year due to the cultural significance of the animal.

In 2016, the Dione Ginsu began auctioning these hunting rights in Astor, with the proceeds supporting the community’s essential needs and the Royal Markhor’s conservation. Each auction allows for up to ten hunts per year, generally purchased by wealthy Astor

nationals. This generates significant revenue for the Dione Ginsu community. Auction proceeds are allocated to housing, medical, and food expenses, with a portion directed towards conservation efforts focused on the Royal Markhor.

Astor's government raised concerns in 2022, asserting that Rishmak's practice of auctioning hunting permits to non-indigenous trophy hunters is inconsistent with the CMS. Astor argues that the CMS' exceptions only apply to the Dione Ginsu and contends that Rishmak's actions exploit this exemption by commercializing the hunt. Rishmak defends the practice, emphasizing that the auction revenue serves the subsistence needs of the Dione Ginsu and contributes to critical conservation efforts. Rishmak further argues that the CMS and human rights treaties support the Dione Ginsu's right to manage their own resources.

In 2023, Astor responded by enacting a legislative ban on the importation of hunting trophies, including Royal Markhor trophies, directly impacting the Dione Ginsu's revenue stream. Rishmak protested the ban, claiming that it constitutes an unlawful quantitative restriction under the Astor-Rishmak Trade Agreement (ARTA), a bilateral agreement promoting regional cooperation and free trade between the two countries. Rishmak further claims the ban harms the Dione Ginsu's rights to secure income from their cultural practices. Astor, however, argues that the ban is a legitimate measure to protect public morals, citing significant public opposition to trophy hunting in Astor and a commitment to animal welfare.

Unable to resolve their differences, the states have submitted the dispute to the International Court of Justice (ICJ). Astor seeks a ruling affirming that the trophy hunting is inconsistent with its international obligations to protect the Royal Markhor and confirmation of the legality of its import ban. Rishmak, in turn, requests a declaration that the trophy hunting

complies with conventional international law and that Astor's ban unlawfully breaches ARTA, harming both conservation funding and the Dione Ginsu's subsistence rights.

## **SUMMARY OF ARGUMENTS**

Rishmak has not violated international law by auctioning off the right to hunt the Royal Markhor. Rishmak's carefully regulated auction-based hunting of the Royal Markhor, conducted by the indigenous Dione Ginsu community, complies with international conservation laws, especially the Convention on the Conservation of Migratory Species ("CMS"). The CMS allows exceptions for traditional subsistence users, which includes the Dione Ginsu. Revenue from these hunts supports the community's livelihood and conservation efforts.

Meanwhile, Astor's has violated international law by banning the importation of hunting trophies from Rishmak. Its trade restriction is not justified under Article 20 of the ARTA and is not valid under the Convention on International Trade in Endangered Species of Wild Flora and Fauna ("CITES"). Astor's trade measures are grossly coercive considering the damage the import ban causes Rishmak's developing economy.

## **ARGUMENT ADVANCED**

### **I. THE TROPHY HUNTING OF THE ROYAL MARKHOR THROUGH THE AUCTION PROCESS, BY HUNTERS WHO ARE NOT DIONE GINSU, COMPLIES WITH CONVENTIONAL INTERNATIONAL LAW.**

#### **A. The taking of the Royal Markhor by those other than the Dione Ginsu complies with the Convention on the Conservation of Migratory Species of Wild Animals (CMS)<sup>1</sup>**

##### **1. The ordinary meaning of Article III.5(c) permits the taking**

Astor and Rishmak are parties to the CMS.<sup>2</sup> The CMS prohibits both Astor and Rishmak as Range States of the Royal Markhor from allowing the taking of the species which is listed as an endangered migratory species in Appendix I.<sup>3</sup> The CMS defines ‘taking’ as hunting, fishing, capturing, harassing, deliberate killing or attempting to engage in any such conduct.<sup>4</sup>

The prohibition, however, is not total and is qualified by a number of exceptions inclusive of instances where the taking is to accommodate the needs of traditional subsistence users.<sup>5</sup> The trophy hunting of the Royal Markhor complies with this exception. It is well known that internationally, several species listed in Appendix I of the CMS are hunted for trophies annually including, *inter alia*, cervus elaphus barbarous,<sup>6</sup> bos grunniens<sup>7</sup> and addax

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<sup>1</sup> 23 June 1979, 1651 U.N.T.S. 333.

<sup>2</sup> R, ¶ 8.

<sup>3</sup> CMS, *supra* note 1, art. III, ¶ 5.

<sup>4</sup> CMS, *supra* note 1, art. I ¶ 1(i).

<sup>5</sup> CMS, *supra* note 1, art. III ¶ 5(c).

<sup>6</sup> Prinsner-Levyne, Y (2020) ‘Trophy hunting, canned hunting, tiger farming, and the questionable relevance of the conservation narrative grounding International Wildlife Law’, *Journal of International Wildlife Law & Policy*, 23(4), pp. 239–285. doi:10.1080/13880292.2020.1866236.

<sup>7</sup> *Id.*

nasomaculatus.<sup>8</sup> Rishmak, *inter alia*, relies on the exception for the benefit of the Dione Ginsu community living within its jurisdiction,<sup>9</sup> due to the Royal Markhor's importance to the religion, culture and subsistence needs of this group.<sup>10</sup>

The CMS is to be interpreted in accordance with the rules of customary international law on treaty interpretation, as codified in Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), and as such Article III.5(c), must be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”.<sup>11</sup> Interpretation must be based above all upon the text of the treaty.<sup>12</sup>

Bad faith on the part of Rishmak should not be presumed by Astor.<sup>13</sup> The ordinary meaning of Article III.5(c) cannot be understood as a mandatory requirement that the taking be by the traditional subsistence users, *per se*, only that the killing accommodates that group's needs. International law recognizes the special relationship between hunting of certain mammals and indigenous peoples.<sup>14</sup>

This can be contrasted with other conservation treaties that explicitly provide that the exception to the taking of protected species be by the particular traditional users themselves or by traditional methods.<sup>15</sup> The International Convention for the Regulation of Whaling (ICRW) permits “aboriginal subsistence whaling”, the definition of which explicitly prescribes that the

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<sup>8</sup> Humane Society International, Trophy hunting by numbers, The Role of the United States in International Trophy Hunting, [https://hsi.org/wp-content/uploads/2023/05/DIGITAL\\_2023-United-States-Trophy-Hunting-by-the-Numbers-Report-compressed.pdf](https://hsi.org/wp-content/uploads/2023/05/DIGITAL_2023-United-States-Trophy-Hunting-by-the-Numbers-Report-compressed.pdf) (last visited 5th November 2024).

<sup>9</sup> R, ¶ 14.

<sup>10</sup> *Id.*

<sup>11</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, article 31.

<sup>12</sup> Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994, 22.

<sup>13</sup> Lake Lanoux Arbitration (Spain/France) (1957) 12 RIAA 281 [9].

<sup>14</sup> Firestone, J. and Lilley, J. (2005) ‘Aboriginal subsistence whaling and the right to practice and revitalize cultural traditions and customs’, *Journal of International Wildlife Law & Policy*, 8(2–3), pp. 177–219. doi:10.1080/13880290590965339.

<sup>15</sup> Agreement on the Conservation of Polar bears, 15 November 1973, 2898 U.N.T.S. 243, Art. III(1)(d), (e).

use of whale products be for local aboriginal consumption but envisages the taking being carried out by “*or on behalf of*” aboriginal, indigenous or native tribes.<sup>16</sup>

The Dione Ginsu are not prohibited from auctioning off or sharing of this right to non-indigenous people. This is evidenced through the trophy hunting of the cheetah (*Acinonyx jubatus*) by foreign nationals in the CMS range state of South Africa<sup>17</sup> which is an endangered species listed in Appendix I of the CMS<sup>18</sup> and a species threatened with extinction in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>19</sup> Thus, Astori nationals are permitted to conduct the hunting on behalf of the Dione Ginsu community in order to accommodate their needs.

If there is a special meaning imputing a requirement as to the agent of the taking under the CMS, it is for Astor to prove that is the case.<sup>20</sup> Even if such an agency requirement is found to exist, the broad definition of taking under the CMS, inclusive of the capturing and harassment of an endangered species, is satisfied by the requirement that members of the Dione Ginsu be employed as guides for the duration of the hunt,<sup>21</sup> luring males with previously collected urine samples from female Royal Markhor.<sup>22</sup>

## 2. The context and object and purpose of CMS Article III.5(c) permits the taking

The interpretation of any legal rule is a process of “progress encirclement” through the elements contained in Article 31 VCLT.<sup>23</sup> The context of the CMS confirms the ordinary

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<sup>16</sup> Donovan G, Reports of the International Whaling Commission (Special Issue 4) Aboriginal/Subsistence Whaling (with special reference to the Alaska and Greenland fisheries). International Whaling Commission, 86.

<sup>17</sup> Ross H, *Trophy hunting in South Africa: is it worth it? An evaluation of South Africa's policy decision to elevate trophy hunting as a key conservation tool*, (Good Governance Africa Working Paper), 2022.

<sup>18</sup> CMS, *supra* note 1, app 1.

<sup>19</sup> Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 993 U.N.T.S. 243, app 1.

<sup>20</sup> Legal Status of Eastern Greenland Case, PCIJ (1933) Ser. A/B No. 53, 49.

<sup>21</sup> R, ¶ 17.

<sup>22</sup> R, ¶ A3.

<sup>23</sup> *Aguas del Tunari, S.A. v. Bolivia*, ICSID Case No. ARB/02/03, Decision on Respondent's Objections to Jurisdiction (Oct. 21, 2005), 91.

meaning; the preamble underscores the object and purpose of the CMS, being the conservation of migratory species of wild animals, as motivated by the benefit these species provide to human beings;<sup>24</sup> there is no indication that this benefit should be denied to those groups closely associated with the species under protection, particularly when it is explicitly provided for.

3. Relevant rules of international law permit the taking

The general rule of interpretation contained in the VCLT further provides that any relevant rules of international law applicable in the relations between the parties shall be considered in interpreting a treaty.<sup>25</sup> This is inclusive of treaties to which Astor and Rishmak are party as well as customary international law.<sup>26</sup>

Astor and Rishmak as parties to the Astor-Rishmak Trade Agreement (ARTA) and as such resolve to promote broad-based economic development to reduce poverty,<sup>27</sup> of direct relevance to the auction of the hunting rights by the Dione Ginsu, a group with the highest poverty rates in Rishmak.<sup>28</sup>

Rishmak is party to the Indigenous and Tribal Peoples Convention, 1989 (ILO Convention 169).<sup>29</sup> The United Nations Declaration of Rights of Indigenous Peoples (UNDRIP) includes extant customary international law obligations such as respect for the right to self-determination and the right to autonomy or self-government with respect to indigenous peoples.<sup>30</sup> The autonomy of the Dione Ginsu, in exercising discretion as to how to use their hunting rights, should be respected.

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<sup>24</sup> Sellheim N, Increasing the Effectiveness of the Bonn Convention on the Conservation of Migratory Species, 25 J. Int'l Wildlife L. & Pol'y 367 (2022), 370.

<sup>25</sup> *Supra* note 11, art. 31(1)(c).

<sup>26</sup> Int'l Law Comm'n, Report on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10 (2006), 21.

<sup>27</sup> R, ¶ 12.

<sup>28</sup> R, ¶ 3.

<sup>29</sup> R, ¶ 9.

<sup>30</sup> Int'l Law Ass'n, *Resolution No. 5/2012 Rights of Indigenous Peoples* (2012).

## **B. The taking of the Royal Markhor accommodates the needs of the Dione Ginsu under the CMS**

### **1. The ordinary meaning of “subsistence” is satisfied**

Article III.5(c) requires that the taking accommodates the needs of traditional subsistence users. “[T]raditional subsistence users” serves here as the object denoting a characterization of those individuals who have traditionally used such species for their subsistence. Such a construction can be contrasted with that employed in other conservation treaties where the positioning of “needs” is substituted by “subsistence”, or a variation thereon, denoting that the use must be for subsistence purposes.<sup>31</sup> For example, the Polar Bear Agreement provides so far as relevant that the taking be carried out:

“(d) by local people using traditional methods in the exercise of their traditional rights and in accordance with the laws of that Party...”<sup>32</sup>

However, a consistent or accepted definition of either term has never been provided for in international law.<sup>33</sup> Notwithstanding the above, and as appropriate to the investigation of the ordinary meaning, the dictionary definition of “subsistence” is the “fact of providing support for human or animal life; the provision of food or provender. In modern use often with reference to a bare or minimum level of existence”.<sup>34</sup> Usages of the term in international law, favor the ‘modern use’ equating the term broadly to a basic standard of living inclusive of adequate food, housing and medical care.<sup>35</sup>

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<sup>31</sup> Inter-American Convention for the Protection and Conservation of Sea Turtles 2 May 2001, 2164 U.N.T.S. 29.

<sup>32</sup> *Supra* note 15.

<sup>33</sup> Doubleday N, ‘Arctic Whales: Sustaining Indigenous Peoples and Conserving Arctic Resources’ in Milton M. R. Freeman and Urs Kreuter (eds.), *Elephants and Whales. Resources from Whom?* (Basle: Gordon and Breach Science Publishers, 1994), 241 – 264, 254.

<sup>34</sup> Oxford English Dictionary (online ed., Oxford Univ. Accessed 2024), Url [subsistence, n. meanings, etymology and more | Oxford English Dictionary](#).

<sup>35</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, art. 11-12.

Of particular relevance are those conservation treaties recognizing the sale of animal products from protected species as constituting a means of securing the subsistence needs of the traditional users as opposed to mandating their subsistence be singularly predicated on the consumption of such products.<sup>36</sup> In the context of the ICRW, commercial whaling, for which there is a moratorium, is distinguished from aboriginal subsistence whaling. However, the latter includes ‘consumption’ for the purposes of subsistence permits the sale of whaling by-products.<sup>37</sup>

2. The traditional use requirement, if any, is satisfied

As above, the object of Article III.5(c) being the “traditional subsistence users” is most reasonably read as a characterization of those individuals who have traditionally used such species for their subsistence.

The traditional use of the Royal Markhor has included the consumption of meat by the Dione Ginsu community as well as the use of the horns in religious and cultural ceremonies and the adornment of the households.<sup>38</sup> The meat continues to be shared with members of the Dione Ginsu on all occasions<sup>39</sup> and as such can be said to satisfy any traditional use requirement if one is to be inferred from an interpretation of the CMS.

Conventional international law recognizes the subsistence needs of traditional communities. A combined seventy-five percent of the auction proceeds are used by the Dione Ginsu for community housing, medical and food expenses.<sup>40</sup> This mirrors the indigenous Khwe San and the Mbukushu (around 5000 people) in Bwatwata National Park who are some of the

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<sup>36</sup> Inter-American Convention for the Protection and Conservation of Sea Turtles, 10th Conference of the Parties, Resolution CIT-COP10-2022-R5 (June 15-17, 2022, Panama).

<sup>37</sup> Malgosia Fitzmaurice, *Whaling and International Law* (Oxford University Press 2015), 250.

<sup>38</sup> R, ¶ 14.

<sup>39</sup> R, ¶ 17.

<sup>40</sup> R, ¶ 19.

poorest people in Namibia but earned around N\$2.4 million per year through payments made by foreign nationals.<sup>41</sup>

From the foregoing, the context of Article III.5(c) can be understood as an outline of measures to be adopted to remove the threat of extinction from Appendix I species, the CMS itself being a framework treaty, an instrument that “sets out general obligations, creates the basic institutional arrangements, and provides procedures for the adoption of detailed obligations in a subsequent protocol(s)”.<sup>42</sup> The CMS places no consideration on the *modus operandi* of such measures, leaving same to the discretion of the Parties that are Range States of the migratory species in question albeit subject to the overriding proviso that any measure constituting a taking not operate to the disadvantage of the species.

Finally, the requirement that the interruption be in good faith as linked by this Court to the overall object and purpose of a treaty<sup>43</sup> safeguards against an interpretation that conflicts with the intentions of the parties in concluding the CMS, being the conservation of migratory species of wild animals. The taking of the Royal Markhor by non-indigenous, non-traditional subsistence users complies with the CMS.

### **C. The taking of the Royal Markhor is for the purpose of enhancing the survival of the species under the CMS**

#### **1. The context and object and purpose of Article III.6(b) permits the taking**

The ordinary meaning of the term “the purpose” as understood by Astor should be taken only as a “fleeting starting point” in the Court’s interpretation of Article III.5(b).<sup>44</sup>

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<sup>41</sup> Naidoo, R., Weaver, L.C., Diggle, R.W., Matongo, G., Stuart-Hill, G., and Thouless, C. 2016. Complementary benefits of tourism and hunting to communal conservancies in Namibia. Conservation Biology DOI: 10.1111/cobi.12643.

<sup>42</sup> Phillippe Sands, Jacqueline Peel, Adriana Fabra, Ruth Mackenzie, *Principles of International Environmental Law* (Cambridge University Press, 4<sup>th</sup> Edition, 2018), 106.

<sup>43</sup> The Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgement) [1997] ICJ Rep 7, 142.

<sup>44</sup> Gardiner R, Treaty Interpretation (Oxford University Press 2008), 162.

Viewed in the light of the immediate context of Article III.5(b), the surrounding exceptions (a), (c) and (d), the use of the conjunctive “or” following the penultimate exception underscores the independence of the exceptions from one another and the permissibility of a Range State relying on more than one exception to justify a taking, as is common practice among parties to the CMS.<sup>45</sup> The taking for the purpose of enhancing the survival of the Royal Markhor need not be the only exception relied upon.

In the *Whaling in the Antarctic Case*, this Honorable Court held that the meaning of “for purposes of scientific research” as an exception to the prohibition on commercial whaling, did not preclude the sale of whale meat and the allocation of the revenue to fund research.<sup>46</sup> It was further considered that motivations behind the taking going further than scientific research did not preclude a conclusion that a program is for purposes of scientific research, the determining factor was considered to be whether the program was reasonable in relation to its stated objective.<sup>47</sup>

The wider context of Article III when read as a whole, the provision being singularly concerned with those migratory species of greatest concern and therefore listed in Appendix I due to the danger of their extinction<sup>48</sup> evidences the nature of the threats facing such animals to be manifold and the reasonableness of Rishmak’s approach to enhancing the survival of the Royal Markhor. Article III.4 obliges parties that are Range States of such species to conserve and restore their natural habitats<sup>49</sup> and to prevent, reduce or control other factors such as contact

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<sup>45</sup> ‘National Report of Bolivia (COP13)’, ‘National Report of Brazil (COP13)’ reporting on the granting of simultaneous exceptions under both Article III.5(b) and (c) in the most recent reporting round.

<sup>46</sup> *Australia v. Japan: New Zealand intervening*, I.C.J. Reports 2014, 94.

<sup>47</sup> *Supra* note 37, 96.

<sup>48</sup> CMS, *supra* note 1, art. III ¶ 2.

<sup>49</sup> CMS, *supra* note 1, art. III ¶ 4(a).

with exotic species,<sup>50</sup> both noted causes of the Range of the Royal Markhor diminishing from an area spanning six countries to two, Astor and Rishmak.<sup>51</sup>

To adopt Astor's strict interpretation of Article III.5(b) undermines Rishmak's endeavors to fulfil the positive obligation under Article III.4(c) to control a factor endangering the Royal Markhor, the spread of *Mycoplasma capricolum* from domesticated livestock to support the survival of the Royal Markhor.<sup>52</sup> The auction proceeds generate revenue for conservation programs to develop vaccines and treatments as well as workshops to address the underlying cause of the disease.<sup>53</sup> When Article III.5(b) is read alongside Article III.4 it can be seen that the purpose of the taking addresses a predominant cause of the species' endangerment and in that sense is for *the* purpose of enhancing the species' survival.

Organized trophy hunting can enhance the survival of CMS Appendix I species as evidenced by studies conducted into the snow leopard<sup>54</sup> which compared a well-managed trophy hunting concession with a similar area where grazing and poaching was unmanaged.<sup>55</sup> The results illustrated that the density of snow leopards was higher in the hunting concession thus trophy hunting is a viable tool for achieving conservation goals.<sup>56</sup> In the same vein, the limited hunting of male Royal Markhor can directly contribute to population growth through the removal of males that may compete with calves and females.<sup>57</sup> Therefore, Rishmak are permitted to take the Royal Markhor in this manner to conserve the species.

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<sup>50</sup> CMS, *supra* note 1, art. III ¶ 4(c).

<sup>51</sup> R, ¶ 1.

<sup>52</sup> R, ¶ 18.

<sup>53</sup> R, ¶ 18.

<sup>54</sup> CMS, *supra* note 1, app 1.

<sup>55</sup> Kachel SM, McCarthy KP, McCarthy TM, Oshurmamadov N, Investigating the potential impact of trophy hunting of wild ungulates on snow leopard *Panthera uncia* conservation in Tajikistan. *Oryx* 2017; 51(4): 597-604.

<sup>56</sup> *Id.*

<sup>57</sup> IUCN, Informing decisions on trophy hunting, Briefing Paper, September 2016, available at [https://wwfint.awsassets.panda.org/downloads/iucn\\_informingdecisionsontrophyhuntingv1\\_1.pdf](https://wwfint.awsassets.panda.org/downloads/iucn_informingdecisionsontrophyhuntingv1_1.pdf).

Further, it is common practice that revenues from trophy hunting operations are used to remunerate guides and support the organization of hunts,<sup>58</sup> and such an accounting of 15% of the funds accrued to conservation is not a whole reflection of the efforts behind this allocation.

## 2. Supplementary means of interpretation

Article 32 of the VCLT permits the use of supplementary means of interpretation, including the preparatory work of the treaty to confirm the meaning resulting from the application of the general rule of interpretation.

The second revised draft CMS submitted by the Federal Republic of Germany in December 1978, being the initial basis on which the parties negotiated and concluded the final draft, provided for an exception to the taking of Appendix I species on the basis of extraordinary circumstances only. In the course of the negotiations, the United States of America proposed an amendment to Article III permitting the taking for the extant exceptions, however, these were amalgamated into one heading (a) with (b) operating as the detriment qualification.<sup>59</sup>

The parties, having contemplated this amendment adopted the subsequent proposal of the Federal Republic of Germany resulting in the formulation of Article III.5 as it exists in its present form. Recourse to the preparatory work therefore evidences the construction of the extant Article III.5(b) and the use of the definite article in its original context and undermines the interpretation of same as explicitly requiring that the taking be for the primary purpose.

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<sup>58</sup> Foote, L, and Wenzel, G.W. 2009. Polar Bear conservation hunting in Canada: economics, culture and unintended consequences. In M.M.R. Freeman and L. Foote (eds.), *Inuit, Polar Bears, and Sustainable Use: Local, National and International Perspectives*. CCI Press; pp 13 –24.

<sup>59</sup>Second Revised Draft of the Convention on the Conservation of Migratory Species of Wild Animals (1978)

#### **D. Rishmak has complied with its obligations under international human rights law**

##### **1. Rishmak has complied with its obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR)**<sup>60</sup>

Rishmak, in implementing a statutory exception for the Dione Ginsu within its jurisdiction to the prohibition on the taking of the Royal Markhor and subsequently respecting the wishes of the Dione Ginsu to transfer this right,<sup>61</sup> fulfilled its obligation as a party to the Covenant to respect the right of members of this community to an adequate standard of living, including adequate food, clothing and housing;<sup>62</sup> the right to physical health;<sup>63</sup> and the right to cultural identity.<sup>64</sup> The imposition of a limit on the number of Royal Markhor permitted to be taken annually is consistent with these obligations as set within the bounds of the maximum available resources,<sup>65</sup> prescribed by law and pursued for the promotion of the general welfare in democratic society.<sup>66</sup>

The Committee on Economic, Social and Cultural Rights (CESCR), the body tasked with monitoring the implementation of the ICESCR,<sup>67</sup> held that the Covenant imposes a minimum core obligation to ensure the minimum essential levels of each of the rights, specifically an obligation to ensure the provision of “essential foodstuffs, of essential primary health, of basic shelter and housing ...”.<sup>68</sup>

The failure of a party to guarantee these essential prerequisites automatically violates the Covenant, unless it can be demonstrated that the failure is (1) due to the lack of available

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<sup>60</sup> *Supra* note 35.

<sup>61</sup> R, ¶ 14, 20.

<sup>62</sup> ICESCR, *supra* note 51, art. 11.

<sup>63</sup> ICESCR, *supra* note 51, art. 12.

<sup>64</sup> ICESCR, *supra* note 51, art. 15.

<sup>65</sup> ICESCR, *supra* note 51, art. 2(1).

<sup>66</sup> ICESCR, *supra* note 51, art. 4.

<sup>67</sup> ICESCR, *supra* note 51, art. 16.

<sup>68</sup> General Comment No. 3, The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant), U.N. Doc. E/1991/23 (1990), 10.

resources, and (2) every effort has been made to use all resources at its disposal in an effort to satisfy those minimum obligations as a matter of priority.<sup>69</sup>

Rishmak, as a low-income country,<sup>70</sup> demonstrably lacks the available resources to meet the minimum essential levels of the social rights outlined above. The Gambia, by way of example, being in the middle bracket of low-income countries,<sup>71</sup> spends per head \$25.84 on health care.<sup>72</sup> The allocation of 30% of the trophy hunting revenue for community medical expenses by the Dione Ginsu,<sup>73</sup> by a conservation estimate amounting to \$3750,000, results in a spend per head<sup>74</sup> on health care of \$93.75.

If this Honorable Court were to accede to Astor's overly restrictive and incorrect interpretation of the CMS, Rishmak would be in automatic violation of the Covenant, would not be in a position to demonstrate that every effort was made to satisfy those minimum obligations, and, further would have deprived the members of the Dione Ginsu community of their own means of subsistence, an action explicitly and totally prohibited by Article 1 of the ICESCR.

Further, even if a restrictive reading of subsistence were to be inferred from the CMS, or any relevant rules of international law, the principle of non-retrogression prohibits any intentional reversal of the standards of such rights that cannot be justified by a lack of available resources or *force majeure*.<sup>75</sup> Rishmak cannot justify the restriction by a lack of available resources, the resource in question is patently available, and a judgment of this Honorable Court evidently cannot be relied upon as constituting *force majeure* where it has itself found

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<sup>69</sup> Supra note 59.

<sup>70</sup> R, ¶ 3;

<sup>71</sup> World Population Review, Low Income Countries, World Population Review (accessed Oct. 27, 2024), <https://worldpopulationreview.com/country-rankings/low-income-countries>.

<sup>72</sup> Ministry of Health, 'The Gambia Health Accounts Study FY2016 & FY2017' quoted in Hassan Nije et al., 'Willingness to pay for a National Health Insurance Scheme in The Gambia' 38 *Health Policy and Planning* 61 (2022), 62.

<sup>73</sup> R, ¶ 16

<sup>74</sup> R, ¶ 3

<sup>75</sup> Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/C.12/1987/17 (1987).

against, for example, the dissolution of the Eastern Bloc<sup>76</sup> or the Iranian Revolution<sup>77</sup> as events legitimately precluding the performance of a treaty obligation. The ultimate conclusion of Astor's interpretation of the CMS would be the committing of an internationally wrongful act by Rishmak.<sup>78</sup> This position as asserted is intolerable.

2. Rishmak has complied with its obligations under the Indigenous and Tribal Peoples Convention, 1989 (ILO Convention 169)<sup>79</sup>

Rishmak, in enabling the trophy hunting scheme,<sup>80</sup> fulfilled its obligation as a party to ILO Convention 169 to, *inter alia*, safeguard the rights of the Dione Ginsu to the natural resources pertaining to the lands they occupy being inclusive of the right of the community to participate in the use, management and conservation of these resources.<sup>81</sup> In the preparation of the Convention, there was widespread agreement that indigenous peoples should be enabled to control those animal species of fundamental importance to the continuation of their traditional lifestyles.<sup>82</sup> As above, an acceptance of the interpretation proffered by Astor would result in Rishmak being in breach of its obligations towards the Dione Ginsu and as such cannot be tolerated.

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<sup>76</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, 1997 I.C.J. 7 (Sept. 25).

<sup>77</sup> *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

<sup>78</sup> Int'l Law Comm'n, Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, at 43 (2001).

<sup>79</sup> June 27, 1989, I.L.O. No. 169.

<sup>80</sup> R, ¶ 14, 20

<sup>81</sup> ILO Convention 169, *supra* note 70, art. 15.

<sup>82</sup> 'Report VI (1), Appendix, Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), 1986, para. 98 (1988)' quoted in International Labor Organization, Understanding the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) A tool for judges and legal practitioners (2021),

## II. THE BAN ON THE IMPORTATION OF ROYAL MARKHOR HUNTING TROPHIES VIOLATES CONVENTIONAL INTERNATIONAL LAW

### A. Astor's ban on hunting trophy imports was not authorized by CITES

#### 1. Astor is in contravention of several resolutions of CITES

CITES does not regulate trophy hunting, *per se*, however it has an indirect effect as it regulates the trade of endangered species trophies.<sup>83</sup> Rishmak has implemented a sustainable hunting program that is fully compliant with CITES requirements.<sup>84</sup>

The Conference of Parties of CITES has granted trophy hunting quotas to specific countries on the basis that it would promote conservation of the species.<sup>85</sup> Rishmak complies by having a small quota of 10 Royal Markhor which are permitted to be killed annually.<sup>86</sup> Similar quotas exist for other Appendix I species including the African Leopard (*Panthera pardus*),<sup>87</sup> the Markhor (*Capra falconeri*),<sup>88</sup> and the Black Rhinoceros (*Diceros bicornis*).<sup>89</sup> These examples are evidence that the hunting program is in concord with other internationally recognized sustainable programs. The Scientific Authority of Rishmak has advised that the limited export of Royal Markhor is not detrimental to the survival of this Appendix I species, and the Scientific Authority of Astor is obliged to accept this non-detriment finding.<sup>90</sup>

Furthermore, pursuant to Resolution 17.9 CITES, the trade of hunting trophies is prohibited unless an export permit from the country of origin and an importation permit from the importing state are issued. Rishmak has complied with this procedure.<sup>91</sup> Astor's failure to

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<sup>83</sup> Prisner-Levyne, Y, *Supra* note 5, 243.

<sup>84</sup> R, ¶ 32.

<sup>85</sup> Wijnstekers, W (2011) *The evolution of CITES: A reference to the Convention on International Trade in Endangered Species of Wild Fauna and Flora*. Budapest: International Council for Game and Wildlife Conservation, CIC, 9<sup>th</sup> ed.

<sup>86</sup> R, ¶ 15.

<sup>87</sup> Res. Conf. 10.1427 (Rev. CoP16),

<sup>88</sup> Res. Conf. 10.1528 (Rev.CoP14),

<sup>89</sup> Res. Conf. 13.529 (Rev. CoP18).

<sup>90</sup> Conf. 2.11 (Rev.), Trade in Hunting Trophies of Species Listed in Appendix I, 2d mtg., San José, Costa Rica, 1979, amended by Com. 9.14 & Com. 9.21, revised after the 9<sup>th</sup> mtg. (1994).

<sup>91</sup> Res. Conf. 17.9

grant an import permit, thereby refusing to recognize the legally obtained permit and NDF is in breach of Resolution 2.11.

Astor likewise asserts and seeks to rely upon Resolution 13.7 CITES as a means to authorize the importation ban. Rishmak notes that the process by which the Royal Markhor is imported does not fall under the permitted bounds of this exception.<sup>92</sup> There is no evidence that hunting trophies of the Royal Markhor are being sold as “tourist souvenirs”.<sup>93</sup> Rishmak asserts that it is complying with Article III. Astor’s contention to the contrary is misconceived.

## 2. Astor has not complied with Article XIV of CITES

Article XIV(1) permits stricter domestic measures to be implemented by parties, however these must be implemented in concord with Article XIV(3). Article XIV(3) clearly states that the provisions of CITES shall in no way affect the obligations deriving from, *inter alia*, regional trade agreements between parties; in this case, the ARTA. Astor may not implement such measures which are not in compliance with ARTA. Astor’s ban exceeds this permissible scope and disrupts the international trade agreement in place between Astor and Rishmak. In effect, the proposed grounds of implementation under CITES are subservient to ARTA and therefore not binding upon Rishmak.

## **B. Astor has violated the ARTA**

No party to ARTA is permitted to implement quantitative restrictions on the “*importation of any product from the territory of any other Party.*”<sup>94</sup> Astor have already conceded that the impugned measure is in breach of ARTA in its Diplomatic Note of 22 April 2023<sup>95</sup>. The Applicant’s purported justification of this measure is also discordant with the

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<sup>92</sup> Res. Conf 13.7 (Rev. CoP17).

<sup>93</sup> Ibid, paragraph 3(d).

<sup>94</sup> R, ¶ 12.

<sup>95</sup> R, ¶ 33.

terms of Article 20(a) and (g); the grounds upon which their departure is justified<sup>96</sup>. Per ARTA Article 20, each state may adopt and enforce measures to restrict the importation of goods so far as they are “not arbitrary” or a “disguised restriction”, “necessary to protect public morals” or “to the conservation of exhaustible natural resources”<sup>97</sup>

Astor has, ostensibly under the authority conferred on it by Article 20 of the ARTA, banned the importation of Royal Markhor ‘*hunting trophies*’ by way of national enactment. Whilst Rishmak concedes that Astor has an Article 20 competency, the impugned measure is by its nature: (1) a disguised restriction, and (2) arbitrary in its application, in contravention of Article 20: nullifying any protections afforded.

1. Astor’s measure is both a disguised restriction under Article 20(a) of the ARTA and arbitrary in its application

Astor maintains that the implementation of the quantitative measure is justified in the first instance by Article 20(a) of ARTA; in so doing, it relies upon<sup>98</sup> the Appellate Body’s decision in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*<sup>99</sup>. But, Astor has failed to take account of paragraph 5.169 of the aforementioned decision, which says (so far as relevant):

*“The burden of proving that a measure is “necessary to protect public morals” within the meaning of Article XX(a) resides with the [party asserting same] ”.*<sup>100</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> R, ¶ 12.

<sup>98</sup> R, ¶ 33.

<sup>99</sup> European Communities - Measures Prohibiting the Importation and Marketing of Seal Products, Appellate Body Report, WT/DS400/AB/R (adopted May 18, 2014).

<sup>100</sup> *Id.* 5.169.

Rishmak asserts that the use of the public morals exception is, instead, a cloak for a measure which by its nature constitutes a disguised restriction breaching Article 20 of ARTA. It cannot prove that the measure is necessary to protect public morals. Whilst Astor note that the measure intends to protect the public with genuine concerns surrounding the practices of hunting the Royal Markhor, no such measure has been introduced with respect to domestic trophy hunting<sup>101</sup>. This places an arbitrary distinction between hunting trophies harvested internationally and domestically, undermining Astor’s “public morals” argument. Rishmak notes that there is no distinguishable difference, *in the minds of the people of Astor themselves*, in the hunting of certain species of animals either domestically or internationally<sup>102</sup>. Consequently, it is Rishmak’s submission that the measure is not grounded on a reasoned basis of Article 20(a), but instead is a clear breach, cloaked.

Moreover, the decision to ban internationally hunted trophies is arbitrary in another sense; and is incompatible with the authority in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*<sup>103</sup>. Astor notes that the decision recognizes animal welfare concerns and distinguishes between indigenous hunting and commercial hunting; insinuating the measure restricts commercial hunting<sup>104</sup>. This is not in issue. However, Astor fails to account for the fact that the Dione Ginsu people annually auction off all ten licenses to hunt the Royal Markhor<sup>105</sup>. For the past eight years, indigenous hunting has not occurred, instead through primarily Astori hunters<sup>106</sup>. Whilst the transfer of the license involves a commercial element, the characterization that such is “*commercial hunting*”<sup>107</sup> is

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<sup>101</sup> R, ¶ 30.

<sup>102</sup> R, ¶ 38.

<sup>103</sup> European Communities - Measures Prohibiting the Importation and Marketing of Seal Products, Panel Reports, WT/DS400/R & WT/DS401/R (adopted June 18, 2014).

<sup>104</sup> R, ¶ 33.

<sup>105</sup> R, ¶ 15 & 16.

<sup>106</sup> R, ¶ 17.

<sup>107</sup> R, ¶ 33.

incorrect. Therefore, Rishmak notes that the implementation of such a measure does not meet the objective sought by the Applicant, therefore arbitrary in its application.

2. Astor's measure is arbitrary in its application under Article 20(g) of the ARTA

With respect to Article 25 of ARTA, Rishmak refers to the Appellate Body's decision, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*<sup>108</sup>, chiefly, the implementation of a restrictive measure, without consulting through usual diplomatic means with affected parties, in breach of the *chapeau* principle<sup>109</sup>. The short compliance window in that case, of only four months, was also considered unreasonable<sup>110</sup>. Astor gave Rishmak preliminary notice on 22 May 2022 of their concerns<sup>111</sup>, implementing such a measure on 11 December 2022<sup>112</sup>; this six month window – which is not meaningfully longer than the window in *Certain Shrimp and Shrimp Products* - is similarly unreasonable and therefore a breach of ARTA.

Furthermore, the Applicant has failed to consider, properly or at all, relevant alternatives which ultimately achieve the same aim but impose less restrictive barriers to trade<sup>113</sup>. In other words, the measure is disproportionate. The Dione Ginsu, through the auction process, reinvest fifteen percent of the money raised directly into the conservation of the Royal Markhor.<sup>114</sup> It is well documented that in nations where sustainable management programs are practiced (like Rishmak's licensing scheme), there has been at times increased wildlife population numbers<sup>115</sup>. Scientific data places the high mortality rate of the species between ten

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<sup>108</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R (adopted Nov. 6, 1998).

<sup>109</sup> *Id.*, 172 & 177.

<sup>110</sup> *Id.*, 173.

<sup>111</sup> R, ¶ 19.

<sup>112</sup> R, ¶ 29.

<sup>113</sup> *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, Appellate Body Report, WT/DS381/AB/R, fn 645 (adopted June 13, 2012).

<sup>114</sup> R, ¶ 21.

<sup>115</sup> Gunn A, *Ethics and the Environment*, Spring 2001, Vol. 6, No. 1, at 85 (2001).

and thirty percent.<sup>116</sup> Without specific plans from Astor to promote further conservation, Rishmak maintains that the current regime in place is the only reasonable measure available<sup>117</sup>. A failure to provide such allowances could see an increase in illegal hunting, having a conflicting effect<sup>118</sup>. The true objective of the measure will not suffice in its current form; this is necessarily an arbitrarily implemented measure.

### **CONCLUSION AND PRAYER FOR RELIEF**

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<sup>116</sup> R, ¶ 18.

<sup>117</sup> United States - Measures Affecting the Importation of Fresh, Chilled and Frozen Beef, Appellate Body Report, WT/DS161/AB/R (adopted Dec. 11, 2000), and European Communities - Measures Affecting Asbestos and Asbestos-Containing Products, Appellate Body Report, WT/DS135/AB/R (adopted Mar. 12, 2001).

<sup>118</sup> Prisner-Levyne, Y, *Supra* note 83, at 84.

For the foregoing reasons, Rishmak respectfully requests that this Honorable Court to adjudge and declare that:

1. **Rishmak did not violate international law with respect to the trophy hunting of the Royal Markhor through the auction process, by hunters who are not Dione Ginsu.**
2. **Astor violated international law by banning the importation of hunting trophies from Rishmak.**

RESPECTFULLY SUBMITTED

**AGENTS OF RESPONDENT**