

IN THE INTERNATIONAL COURT OF JUSTICE

THE PEACE PALACE

THE HAGUE, THE NETHERLANDS



**THE CASE CONCERNING
QUESTIONS RELATING TO SUBSISTENCE USE AND TROPHY HUNTING**

ASTOR

(APPLICANT)

v.

RISHMAK

(RESPONDENT)

MEMORIAL FOR THE APPLICANT

29th Annual Stetson International Environmental Moot Court Competition

2024–2025

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LIST OF ABBREVIATIONS

| | |
|---------------|--|
| ASHTA | Astor Society for the Humane Treatment of Animals |
| ARTA | Astor-Rishmak Trade Agreement |
| CBD | Convention of Biological Diversity |
| CITES | Convention on International Trade of Endangered Species |
| COP | Conference of the Parties |
| GATT | General Agreement on Tariffs and Trade |
| ICJ | International Court of Justice |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| <i>Id.</i> | <i>Idem</i> |
| IWC | International Whaling Commission |
| WTO | World Trade Organization |
| p. | Page |
| pmbI | Preamble |
| § | Section |
| ¶ | Paragraph |

QUESTIONS PRESENTED

I. WHETHER THE TROPHY HUNTING OF THE ROYAL MARKHOR THROUGH THE AUCTION PROCESS VIOLATES CONVENTIONAL INTERNATIONAL LAW.

II. WHETHER THE BAN ON THE IMPORTATION OF ROYAL MARKHOR HUNTING TROPHIES COMPLIES WITH CONVENTIONAL INTERNATIONAL LAW.

STATEMENT OF JURISDICTION

In accordance with Article 40(1) of the Statute of the International Court of Justice (“**ICJ**”), Astor and Rishmak, transmitted a Special Agreement to the Registrar of the Court on July 1, 2024. The Special Agreement provided that the Parties agreed to the jurisdiction of the Court and would not dispute the Court’s jurisdiction in written or oral proceedings. Per the Special Agreement, the Parties submitted questions to the Court regarding substantive issues. The Registrar of the Court notified the Parties on July 31, 2024, of receipt of these questions and of entry of the case of Questions Relating to Subsistence Use and Trophy Hunting (Astor v. Rishmak) into the Court’s General List No. 175.

STATEMENT OF FACTS

Astor and Rishmak are sovereign Central Asian states sharing a border. Astor is a high-income country with a population of 220 million. Rishmak with a population of 3.5 million people, including an indigenous Dione Ginsu community, is a country with a low-income economy. The Royal Markhor is a critically endangered large wild goat that only lives in Rishmak and Astor, seasonally migrating between them.

Astor's national laws strictly prohibit the taking of the Royal Markhor. Rishmak's statute prohibits the taking with exception for the Dione Ginsu community, who has a special relationship with the Royal Markhor, whose horns have cultural and religious significance for them.

In 2009, after the Royal Markhor was added to the Convention on the Conservation of Migratory Species of Wild Animals (“**CMS**”) Appendix I, Rishmak instituted a lottery, allowing only 10 Royal Markhors to be hunted by Dione Ginsu annually. In 2016, the Dione Ginsu community started auctioning off the right to kill the Royal Markhor to foreign hunters. Accumulated money has been used by the community. The auction-winning hunters have been almost exclusively Astori nationals, who imported hide and horns back into Astor.

The Embassy of Astor forwarded a note to the Government of Rishmak, wishing to convey its concerns about taking of the Royal Markhor and open a dialogue on this matter. States have been exchanging diplomatic notes discussing whether such hunting should be permitted under the CMS. The Astor Society for the Humane Treatment of Animals (“**ASHTA**”), which has 12 million members, has launched a campaign calling for a trophy hunting ban. Polling among Astori nationals has shown consistent opposition to the trophy hunting practice. On December 11, 2022 national legislation of Astor enacted a law prohibiting the importation of hunting trophies.

On March 3, 2023, both States started diplomatic note exchanges, which did not resolve the dispute, therefore, states agreed to submit certain questions to the ICJ for determination.

SUMMARY OF ARGUMENTS

I. THE TROPHY HUNTING OF THE ROYAL MARKHOR THROUGH THE AUCTION PROCESS VIOLATES CONVENTIONAL INTERNATIONAL LAW

First, the trophy hunting of the Royal Markhor through the auction process violates the CMS, Appendix I to which confirms the endangered status of the Royal Markhor. The Royal Markhor hunting contradicts the object and purpose of the CMS, which aims to protect endangered species. Moreover, this unsustainable hunting fails to meet the CMS exception criteria as it undermines the Royal Markhor survival and does not accommodate the true needs of the Dione Ginsu community, leading to Rishmak's violation of its international obligations.

Second, since Astor is not a Party to the Indigenous and Tribal Peoples Convention, the ICESCR, and is a persistent objector to customary international law on indigenous peoples' specific rights, Astor does not accept any justification based on the Dione Ginsu community hunting rights for the trophy hunting of the Royal Markhor through the auction process.

II. THE BAN ON THE IMPORTATION OF ROYAL MARKHOR HUNTING TROPHIES COMPLIES WITH CONVENTIONAL INTERNATIONAL LAW

First, the ban on the importation of Royal Markhor hunting trophies complies with Article XIV(1)(a) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”), allowing States to adopt stricter domestic measures. Astor's exercise of this right also aligns with CITES's aim of wildlife conservation.

Second, Astor's ban is justified under ARTA provisions, including two exceptions under Article 20. The ban on importation is necessary, as it aims to protect public morals, with no alternative measures being available to protect values shared by the Astorians. Moreover, the ban is a measure related to the conservation of Royal Markhor, providing it is an exhaustible natural resource, and was

made effective in conjunction with measures which prohibit Markor taking on the domestic level. Moreover, the measure is not arbitrary and does not impose a disguised restriction on international trade, fulfilling the Chapeau to Article 20, therefore justifying Astor's ban on importation under the general exceptions.

MAIN ARGUMENTS

I. THE TROPHY HUNTING OF THE ROYAL MARKHOR THROUGH THE AUCTION PROCESS VIOLATES CONVENTIONAL INTERNATIONAL LAW

A. Trophy hunting of the Royal Markhor through the auction process violates the CMS

Both Astor and Rishmak are Parties to the Convention on the Conservation of Migratory Species of Wild Animals (“CMS”), Appendix I to which admits the endangered status of the Royal Markhor.¹ Considering such a significant level of protection, trophy hunting of the Royal Markhor is unjustified for three reasons. *First*, it is inconsistent with the object and purpose of the CMS. *Second*, it leads to Rishmak’s non-compliance with international obligations. *Third*, it does not fall within permissible exceptions under the CMS.

1. Trophy hunting of the Royal Markhor through the auction process is inconsistent with the object and purpose of the CMS

In the *Whaling in the Antarctic*, the ICJ emphasized the importance of respecting the object and purpose of the environmental treaties.² The main purpose of the CMS is to protect endangered migratory species and to establish a comprehensive framework for cooperation on a global scale.³

¹ Record, ¶8.

² *Whaling in the Antarctic* (Australia v. Japan), Judgment, 2014 I.C.J. Rep. 3. [“**Whaling in the Antarctic**”], ¶229; Elana Geddis & Penelope Ridings, *Whaling in the Antarctic: Some Reflections by Counsel*, 11 N.Z.Y.B. INT’L L., 143, 148 (2013).

³ Convention on the Conservation of Migratory Species of Wild Animals, 3 June 1979, 1651 U.N.T.S. 333 [“CMS”], pmbl; MELISSA LEWIS & ARIE TROUWBORST, *Bonn Convention on the Conservation*

Accordingly, the *raison d'être* of the CMS, which is to conserve and improve the status of all migratory species listed in CMS Appendices, shall not be undermined by the State's activity.⁴

Since the object and purpose of the CMS is to protect endangered migratory species, and thus, the Royal Markhor,⁵ allowing its taking through the auction process is incompatible with the CMS's object and purpose.

2. Trophy hunting of the Royal Markhor through the auction process resulted in Rishmak's violation of the obligations under Article III(4) of the CMS

The CMS enshrines straightforward duties regarding Appendix I endangered species in Article III(4), including obligations to protect them and take active conservation measures.⁶ Even though Article III(4) uses the word "endeavour", which can be perceived more gently than "must", this term should be interpreted in good faith in accordance with its ordinary meaning in the context of the object and purpose of the treaty.⁷ In the *Tasmanian Dam case*, the High Court of Australia ruled that

of Migratory Species of Wild Animals 1979, in MULTILATERAL ENVIRONMENTAL TREATIES 25, 25 (2017) [**"Lewis & Trouwborst (2017)"**].

⁴ Resolution 14.1 by the COP to the CMS, U.N. Doc. UNEP/CMS/Resolution 14.1, 2024 [**"UNEP/CMS/Resolution 14.1"**].

⁵ Record, ¶8.

⁶ CMS, art. III(4); Lewis & Trouwborst (2017); JACQUELINE PEEL ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, 417 (2018).

⁷ Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 [**"VCLT"**].

Australia was legally bound to adhere to the conservation provisions despite that they were prefaced by the term “endeavour”.⁸

Moreover, killing within the accepted quotas or a mere refraining from killing are inadequate to ensure the survival of the species, as the Parties must undertake proactive measures to secure collective welfare and thereby effectively comply with duties under the CMS.⁹

Therefore, both allowing hunting of the Royal Markhor through the auction process and avoiding taking active measures to preserve and expand the population of this species indicate that Rishmak’s actions/inactions are contrary to Article III(4) of the CMS.

3. Hunting of the Royal Markhor in Rishmak does not fall within the scope of permissible exceptions under Article III(5) of the CMS

Under the CMS “taking” of species includes hunting, fishing, deliberate killing, or attempting to engage in any such conduct.¹⁰ Contrary to Article III(4) of the CMS, Article III(5), which regulates “taking”, is not prefaced by a qualifying word “endeavour” strictly obliging the Range States to prohibit “taking” and allowing only a few narrowly defined, clear and precise exceptions.¹¹ These

⁸ The Tasmanian Dam Case (Commonwealth v. Tasmania), Judgment, 1983 C.L.R. 1; Simon Lyster, *The Convention on the Conservation of Migratory Species of Wild Animals (The Bonn Convention)*, 29 NAT.RESS.J. 4, 979, 987 (1989) [**“Lyster (1989)”**].

⁹ CMS, art. III(4); GUILLAUME FUTHAZAR, *Biodiversity, Species Protection, and Animal Welfare Under International Law*, in STUDIES IN GLOBAL ANIMAL LAW 95, 103 (2020).

¹⁰ CMS, art. I(1)(i).

¹¹ Lyster (1989), p.987; TECHERA (2017), p.101; BIOLOGICAL DIVERSITY CONSERVATION AND THE LAW: LEGAL MECHANISMS FOR CONSERVING SPECIES AND ECOSYSTEMS, 41 (Shine Clare et al. eds., 1993).

include “taking” to enhance the propagation or survival of the affected species or to accommodate the needs of traditional subsistence users of such species.¹² However, the application of this narrow set of exceptions should not lead to the disadvantage of the species.¹³

Taking of the Royal Markhor by hunting through the auction process, *firstly*, does not enhance the purpose of its survival. *Secondly*, it does not accommodate the needs of Dione Ginsu as traditional subsistence users of the Royal Markhor. And *thirdly*, it operates to the disadvantage of the Royal Markhor, resulting in Rishmak’s violation of Article III(5) of the CMS.

a. Hunting of the Royal Markhor does not enhance its propagation or survival

Exception under Article III(5)(b) of the CMS may allow hunting for “the purpose of enhancing the propagation or survival of the affected species”.¹⁴ The expression “the purpose” inherently negates the existence of alternative purposes inconsistent with the provision’s *raison d’être*.¹⁵ The ICJ in *Whaling in the Antarctic* analysed if Japan’s project’s design and implementation were “for purposes of scientific research”.¹⁶ The Court held that the scientific purposes should be interpreted narrowly, therefore, since Japan’s project lacks analysis on the lethal method usage as well as a clear research timeline, it pursues purposes broader than scientific ones.¹⁷

¹² CMS, art. III(5)(b)-(c).

¹³ Agenda Item 21 on the application of Article III of the Convention by the COP to the CMS, U.N. Doc. UNEP/CMS/COP13/Doc.21, 2019, ¶2 [“UNEP/CMS/COP13/Doc.21”].

¹⁴ CMS, art. III(5)(b).

¹⁵ Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, 2009 I.C.J. Rep. 213, ¶61.

¹⁶ Whaling in the Antarctic, ¶88.

¹⁷ *Id.*, ¶223-227.

In light of this, the primary purpose of Article III(5)(b) of the CMS exception is to enhance the existence of the Royal Markhor. Thus, fifteen percent of winning bids, allocated for the Royal Markhor conservation programs, are unreasonable and insufficient methods to achieve the Royal Markhor conservation objectives and do not satisfy “the purpose” of CMS Article III(5)(b).¹⁸

b. Hunting of the Royal Markhor does not accommodate the needs of traditional subsistence users of such species

Another exception enshrined in Article III(5)(c) of the CMS is hunting to “accommodate the needs of traditional subsistence users of such species”.¹⁹ Contrary to this provision, in the case at hand, neither the subsistence hunting was conducted but a commercial one (i) nor the actual needs of the Dione Ginsu community were satisfied (ii). Moreover, the hunting was not conducted by the Dione Ginsu as traditional users of the Roal Makhor (iii).

i. Trophy hunting of the Royal Markhor pursues primarily commercial benefit

It follows from the wording of Article III(5)(c) of the CMS that only the traditional subsistence taking of the endangered species could be allowed.²⁰ The ordinary meaning of the word “subsistence” is defined in the Cambridge Dictionary as “the state of having what you need to stay alive, but no more”.²¹ Additionally, there is a clear distinction between “subsistence hunting” and “commercial

¹⁸ Record, ¶21.

¹⁹ CMS, art. III(5)(c).

²⁰ *Id.*

²¹ *subsistence*, CAMBRIDGE DICTIONARY | ENGLISH DICTIONARY, TRANSLATIONS & THESAURUS, <https://dictionary.cambridge.org/uk/dictionary/english/subsistence> (last visited Nov. 12, 2024); to

hunting”. The former is defined as the one mostly conducted by marginal and indigenous groups with the purpose of obtaining the protein for hunters and their families.²² Examples of subsistence hunting can be found in Latin America, where campesinos practice “subsistence hunting” to obtain food for the family.²³ Poor rural and indigenous peoples in Argentina follow the same purpose of subsistence hunting since 70% of them are hunting peccaries for consumption.²⁴

On the contrary, “commercial hunting” refers to the practice of using the hunted animals for sale and profit.²⁵

An illustrative example of the contrast between “aboriginal subsistence whaling” and “commercial whaling” is set up in the International Convention for the Regulation of Whaling. The Convention allows aboriginal peoples to conduct the former in limited numbers to satisfy their nutritional and cultural needs.²⁶ However, this Convention imposes a complete ban on commercial

establish the ordinary meaning of the conventional terms, the ICJ referred to the Oxford English Dictionary in the *Oil Platforms (Iran v. US)*, Preliminary Objection, 1996 I.C.J. Rep. 803, ¶45.

²² JUHANI OJASTI, *WILDLIFE UTILIZATION IN LATIN AMERICA: CURRENT SITUATION AND PROSPECTS FOR SUSTAINABLE MANAGEMENT*, §2.1 (1996) [“**Ojasti (1996)**”].

²³ *Id.*, §2.3.

²⁴ Mariana Altrichter, *The sustainability of subsistence hunting of peccaries in the Argentine Chaco*, 126 *BIOLOGICAL CONSERVATION* 351, 354-355 (2005).

²⁵ OJASTI (1996), §2.1.

²⁶ MALGOSIA FITZMAURICE, *The International Convention for the Regulation of Whaling*, in *WHALING AND INTERNATIONAL LAW* 29, 49 (2015) [“**FITZMAURICE (2015)**”]; Lauren Evans, *Commercial Whaling 101*, BE A FORCE FOR THE FUTURE | NRDC (6 May 2020), <https://www.nrdc.org/stories/commercial-whaling-101#whatis> [“**Evans (2020)**”].

whaling, aimed at selling or trading whaling meat and other products.²⁷ Hence, subsistence hunting is usually recognized by States as a legitimate form of wildlife use, while commercial hunting is often expressly prohibited.²⁸

Since the Dione Ginsu community auctioned off the right to hunt the Royal Markhors with bids of USD \$100,000 and more per animal²⁹ and allowed to export hides and horns to Astor,³⁰ the community did not conduct the subsistence hunting but only the commercial one. Pursuing primarily economic benefits, such hunting clearly contradicts Article III(5)(c) of the CMS.

ii. Dione Ginsu's needs are not accommodated by trophy hunting on the Royal Markhor

To ensure that taking aligns with traditional subsistence users' needs, the International Whaling Commission ("IWC") requires the governments to outline the needs of their indigenous peoples in the form of a "needs statement" with a detailed description of the purposes of the community hunting.³¹ Among the needs, the cultural ones are of great importance.³² Indeed, bowhead whaling has significant cultural value to the Eskimos of Alaska since the intricacies of such aspect of hunting

²⁷ FITZMAURICE (2015), p.34; Evans (2020).

²⁸ OJASTI (1996), §2.1.

²⁹ Record, ¶16.

³⁰ *Id.*, ¶17.

³¹ International Whaling Commission ["IWC"], Report of the IWC Expert Workshop on Aboriginal Subsistence Whaling, IWC/66/ASW Rep01, 2015.

³² *Id.*

pass down through generations.³³ For instance, after a successful hunt, community members attend a whaling festival to share the whale and perform other traditions.³⁴

In the instant case, the Royal Makhor hunting was traditionally conducted by male members of the Dione Ginsu community to get the horns.³⁵ The horns, considered to symbolize strength and prosperity, were displayed at the entrance of the homes and used in ceremonies, such as marriage or funeral.³⁶ This confirms the determinant cultural and religious value of horns for the Dione Ginsu community. Accordingly, the transfer of the right to hunt and possess this trophy to foreign hunters cannot be considered as accommodating the “needs” of the indigenous peoples under Article III(5)(c) of the CMS.

iii. Hunting was conducted by non-indigenous peoples who are not traditional subsistence users

Referring to the literal interpretation set in Article 31 of the Vienna Convention on the Law of Treaties (“VCLT”),³⁷ Article III(5)(c) of the CMS does not justify taking of the endangered species by non-traditional subsistence users.³⁸ The same approach is established by the IWC, stipulating that

³³ *Id.*

³⁴ Taqulik Hepa & Brower Harry, *Subsistence Hunting Activities and the Inupiat Eskimo*, HOMEPAGE | CULTURAL SURVIVAL (2009), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/subsistence-hunting-activities-and-inupiat-eskimo>.

³⁵ Record, ¶14.

³⁶ *Id.*, ¶14.

³⁷ VCLT, art. 31(1); Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgment, 1994 I.C.J. Rep. 6, ¶41; Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 11.

³⁸ CMS, art. III(5)(c).

the aboriginal subsistence whaling must be conducted by aboriginal, indigenous or native peoples.³⁹ Furthermore, the Agreement on the Conservation of Polar Bears allows hunting of polar bears “by local people using traditional methods in the exercise of their traditional rights”.⁴⁰ The term “local people” clearly stands for the indigenous peoples.⁴¹

The Natural Resources Transfer Agreement sets another example of exclusive hunting rights granted to Metis peoples in Manitoba.⁴² Since Indian peoples own these rights, non-indigenous peoples are permitted to accompany them during hunting but not allowed to set nets, shoot an animal, get the meat, carry a gun or exercise hunting rights in another manner.⁴³

In the instant case, only Dione Ginsu community members, who are indigenous peoples, may exercise exclusive hunting rights on the Royal Markhor.⁴⁴ Astori nationals and other hunters are non-

³⁹ IWC, Conformance in preparing Aboriginal Subsistence Whaling Needs Statements, USA, IWC/63/ASW4, 2011.

⁴⁰ International Agreement on Conservation of Polar Bears, 15 November 1973, 27 U.S.T. 3918, art. III(1).

⁴¹ Kamrul Hossain, *Hunting by Indigenous Peoples of Charismatic Mega-Fauna: Does Human Rights Approach Challenge the Way Hunting by Indigenous Peoples is Regulated?*, 10 INT'L CMTY. L. REV. 295, 308 (2008).

⁴² CANADA CONSTITUTION, CONSTITUTION ACT, 1982. CANADA (1982), §35.

⁴³ JAMIE MOSES, MANITOBA ANGLERS' GUIDE 2024, CANADA 11 (2024); BULLETIN ON FISHING, HUNTING & GATHERING THE RIGHTS AND RESPONSIBILITIES OF FIRST NATIONS PEOPLE IN MANITOBA (2009); Harvey Nepinak & Harvey Payne, *The hunting rights of Indian people in Manitoba: An historical overview and a contemporary explication toward enhanced conservation through joint management*, 24 ALCES 195, 197 (1988).

⁴⁴ Record, ¶19.

traditional subsistence users, who may only accompany them while hunting. Thus, since the hunting of the Royal Markhor was conducted solely by the non-indigenous peoples (mostly Astori nationals),⁴⁵ it does not fall within the exception under Article III(5)(c) of the CMS.

c. The exceptions operate to the disadvantage of the Royal Makhor as its hunting was conducted in an unsustainable manner

Considering that the goal of the CMS is to prevent the endangered species from extinction,⁴⁶ exceptions under Article III(5) of the CMS should be precise in content, limited in space and time and not operate to the disadvantage of the species.⁴⁷ The term “disadvantage” in this context requires the population to reach the threshold of a sustainably harvestable population, meaning that the population should be sufficiently robust to survive regular depredations from humans.⁴⁸

The “Goal 3” of the CMS Samarkand Strategic Plan for Migratory Species seeks to ensure that “any take, use and trade of migratory species listed in CMS Appendices is sustainable”.⁴⁹ The Convention of Biological Diversity (“**CBD**”), to which the CMS is a “lead partner” in the field of migratory species conservation,⁵⁰ defines sustainable use as the utilisation of biological diversity

⁴⁵ Record, ¶16; Clarification 6.

⁴⁶ CMS, pmbl.

⁴⁷ CMS, art. III(5); UNEP/CMS/COP13/Doc.21, ¶2.

⁴⁸ Fischman Robert & Jeffrey Hyman, *The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance*, VA. ENV'T L.J., 173, 198 (2010).

⁴⁹ UNEP/CMS/Resolution 14.1.

⁵⁰ Decision VI/20 by the COP to the CBD, U.N. Doc. UNEP/CBD/COP/6/20, 2002, ¶23; ERIKA J. TECHERA, *Species-based conservation*, in BIODIVERSITY AND NATURE PROTECTION LAW 97, 101 (2017) [“**TECHERA (2017)**”].

components in a manner that does not result in the long-term deterioration of biodiversity but preserves its capacity to fulfil the needs of present and future generations.⁵¹ An example of unsustainable use may be taking which exceeds these capacities⁵² *inter alia* the harvests which are greater than production or which lead to the reduction of reproductive rates.⁵³ To avoid such consequences, the States must adopt effective measures relating to the use of biological resources⁵⁴ including the ban on unsustainable hunting. For this purpose, for instance, the Member States of IWC prohibited commercial whaling.⁵⁵ Similarly, Fiji, aiming to replenish the turtle population, imposed a moratorium on their harvesting.⁵⁶

The current Royal Markhor population of 2200 individuals is threatened by hunting of exclusively the adult males, which might further result in the reduction of effective reproduction and extinction of the species.⁵⁷ In view of this, the hunting on the Royal Makhor was unsustainable and operated to its disadvantage, resulting in non-applicability of Article III(5) of the CMS exceptions.

⁵¹ Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 79 [“**CBD**”], art. 2 & art. 10.

⁵² Decision VII/12 by the COP to the CBD, U.N. Doc. UNEP/CBD/COP/DEC/VII/12, 2004 [“**UNEP/CBD/COP/DEC/VII/12**”].

⁵³ ROBERT NASI ET AL., CONSERVATION AND USE OF WILDLIFE-BASED RESOURCES: THE BUSHMEAT CRISIS, 7 (2008).

⁵⁴ UNEP/CBD/COP/DEC/VII/12; Decision XII/12 by the COP to the CBD, U.N. Doc. UNEP/CBD/COP/DEC/XII/12, 2014.

⁵⁵ Evans (2020).

⁵⁶ Serena Solomon, *On a Fijian Island, Hunters Become Conservators of Endangered Turtles*, YADUA ISLAND J (2017).

⁵⁷ Record, ¶1.

B. Astor has no obligation to recognize the hunting rights of the Dione Ginsu

Article 34 of the VCLT establishes that a treaty does not create either obligations or rights for a third State without its consent.⁵⁸ *Pacta sunt servanda* general principle also confirms that a treaty is binding only between its Parties.⁵⁹ Furthermore, the ICJ in the *North Sea Continental Shelf case*, took an approach that a treaty does not become obligatory to non-parties solely because it is ratified by numerous states; such norms are binding only if they form part of customary international law.⁶⁰ However, if the State objects to the norm/principle at a “decisive stage of the formative process”, it could be considered a persistent objector,⁶¹ resulting in the absence of the obligations under the further established customary rule.⁶²

Astor’s non-ratification of the Indigenous and Tribal Peoples Convention and the International Covenant on Economic, Social and Cultural Rights makes it a third party not subject to the obligations under these treaties, following the principle of *pacta sunt servanda*. Moreover, the abstention from voting for the Declaration on the Rights of Indigenous Peoples at the outset confirms

⁵⁸ VCLT, art. 34.

⁵⁹ Jean Salmon, *1969 Vienna Convention: Article 26 Pacta sunt servanda*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY, OXFORD COMMENTARIES ON INTERNATIONAL LAW, (Olivier Corten & Pierre Klein eds., 2011); RONI INDRA, *THE PRINCIPLE OF PACTA SUNT SERVANDA IN ENFORCEMENT INTERNATIONAL CRIMINAL LAW*, 1 RATIO LEGIS J., 919 (2022).

⁶⁰ North Sea Continental Shelf Cases (Germany v. Denmark), Judgment, 1969 I.C.J. Rep. 3, ¶71.

⁶¹ Domingues v. United States, Merits, 2002, Inter-American Commission on Human Rights, Report No. 62/02, OEA/Serv.L./V/II.1117, ¶48.

⁶² Shelly Aviv Yeini, *The Persistent Objector Doctrine: Identifying Contradictions*, 22 CHI. J. INT'L L., 581, 595 (2022).

Astor's persistent objector status towards the specific rights of indigenous peoples.⁶³ Consequently, Astor is not obliged neither to recognise the hunting rights of the Dione Ginsu community other than those enshrined in the CMS, nor to accept any rights-based justification for the trophy hunting of the Royal Makhor through the auction process.

⁶³ Record, ¶10.

II. THE BAN ON THE IMPORTATION OF ROYAL MARKHOR HUNTING TROPHIES COMPLIES WITH CONVENTIONAL INTERNATIONAL LAW

A. Astor's ban on importation complies with the CITES

1. Astor exercises its right to adopt stricter domestic measures under Article XIV(1)(a) of the CITES

CITES Article XIV(1)(a) allows States to adopt stricter domestic measures than those required by the CITES provisions, including complete or partial prohibition of the export, import, hunting or transport of specimens of specific species.⁶⁴ Even though Article III of the CITES regulates the trade in Appendix I species and granting of the import permits,⁶⁵ it does not entail that a State Party to the CITES must allow such import.⁶⁶ By virtue of this provision, India as a Party to the CITES has completely prohibited the trade in hunting trophies,⁶⁷ highlighting that machinery for controlling illegal trade around the Globe is inadequate.⁶⁸

⁶⁴ Implementation of the Convention in individual countries, CITES Standing Committee Doc. SC.41.13 (1999).

⁶⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 U.N.T.S. 243 [“CITES”], art. III.

⁶⁶ TARUN KATHULA, *Regulation of Import of Hunting Trophies of Exotic Species into India by Framing a Look-Alike Policy to Conserve Indigenous Wild Fauna, in CITES AS A TOOL FOR SUSTAINABLE DEVELOPMENT* 334, 335 (2023) [“Kathula (2023)”].

⁶⁷ *Id.*

⁶⁸ *Id.*

After giving significant consideration to the matter, Astor enacted a law prohibiting the importation of hunting trophies.⁶⁹ The enacted legislation falls under the scope of Astor's right to adopt stricter domestic measures in compliance with Article XIV(1)(a) of the CITES.

a. Astor undertook reasonable efforts to discuss the situation regarding the Royal Markhor prior to the imposition of stricter domestic measures

Resolution 17.9 calls upon Parties adopting stricter domestic measures to make every reasonable effort to notify Range States of species concerned prior to the adoption of such measures.⁷⁰ The Government of Astor had forwarded a diplomatic note to the Government of Rishmak wishing to open a dialogue on taking of the Royal Markhor. Such actions underline Astor's desire to notify Rishmak about its concern and cooperate on this matter.

b. Alternatively, the CITES does not contain any legally binding obligation on prior notification and consultation

Notwithstanding the importance of recommendations given in Resolution 17.9, they are not legally binding.⁷¹ Thus, the Astor is not obliged to notify the range States of the adoption of stricter domestic measures regarding trade in Royal Markhor's hunting trophies.

⁶⁹ Record, ¶29.

⁷⁰ Trade in hunting trophies of species listed in Appendix I or II, CITES COP Res. 17.9, ¶8, 17th Meeting of the COP (2016).

⁷¹ Peter H. Sand, *Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment*, 8, EJIL, 29, 35 (1997).

2. The importation ban law enacted by Astor aligns with the CITES's aim of wild fauna conservation

The preamble to the CITES recognizes that States are and should be the best protectors of their fauna and flora.⁷² Reaffirming this statement, Resolution 18.3 further establishes a Strategic Vision⁷³ to guide States on the implementation of the CITES, a shared characteristic for Strategic Vision plans can be highlighted, such as the objective 1.4 “The Appendices correctly reflect the conservation needs of species”.⁷⁴ It therefore implies that species listed in Appendix I, which are “any species that is or may be affected by trade”,⁷⁵ are proven to require the utmost standard of conservation.⁷⁶ Although limited trade is allowed for Appendix I species, it does not fully satisfy the conservation needs of certain species and in many cases such trade leads to increased poaching.⁷⁷ Legal trade in hunting trophies may be used by poachers to launder illegal wildlife products *en route* to the black market.⁷⁸ The case of smuggling African rhinos, with the use of Thai and Vietnamese residents

⁷² CITES, pmbl.

⁷³ CITES Strategic Vision: 2021-2030, CITES COP Res. 18.3, 18th Meeting of the COP (2019).

⁷⁴ Revised mapping of the CITES Strategic Vision: 2008–2020 objectives and the Aichi Targets in the Strategic Plan for Biodiversity 2010-2020, CITES Secretariat (2016).

⁷⁵ Interpretation and Implementation of the Convention: New criteria for amendment of Appendices I and II, CITES COP Doc. 9.41, Ninth meeting of the COP (1994).

⁷⁶ CITES, art. II.

⁷⁷ Stephen Hernick, *Banning Imports of Hunting Trophies and Protecting Endangered Wildlife*, 50, Denv. J. Intl'l L. & Pol'y, 1, 9 (2021).

⁷⁸ JORDAN CASAMITJANA, *KILLING FOR TROPHIES. AN ANALYSIS OF GLOBAL TROPHY HUNTING TRADE*, 7 (2016).

posing as trophy hunters, illustrates this practice.⁷⁹ Besides, wild animals that are being hunted (including for trophies) have very low reproductive rates, meaning that it is rather difficult to restore the populations of these animals to their original sizes.⁸⁰

Considering that the Royal Markhor requires an ultimate level of conservation, Astor has implemented a trade ban policy to conserve this species in light of the CITES objectives.

B. The ban on importation complies with ARTA provisions

Article 20 of ARTA, which follows the structure of Article XX of GATT, delineates limited and conditional exceptions (General exceptions) from obligations under other provisions of ARTA. In the *US-Gasoline case*⁸¹ the Appellate Body presented a two-tiered analysis under Article XX: the measure must come under one of the particular exceptions and it must satisfy the requirements established by the opening clause (Chapeau) of Article XX.⁸² In the present case, two exceptions are invoked: the protection of public morals under Article 20(a)(1) and the conservation of exhaustible natural resources made effective in conjunction with domestic measures under Article 20(g)(2).

⁷⁹ *Id.*

⁸⁰ Kathula (2023), p.336.

⁸¹ Appellate Body Report, United States — Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/AB/R (1996) [**“US-Gasoline”**], ¶IV.

⁸² WTO ANALYTICAL INDEX, GATT 1994 - Article XX.

1. The ban is a moral imperative ensuring species are not exploited for non-essential purposes, which complies with Article 20(a) of ARTA

Article XIV of the GATS provides general exceptions in the same manner as Article XX of the GATT. In the *US-Gambling case*,⁸³ the Panel applied a two-tier test to determine whether a “public morals” exception applies to a specific case. Measure therefore must be designed to protect public morals (a) and be “necessary” to protect public morals (b).⁸⁴

a. The ban on importation is constructed to protect public morals

The Panel in the *US-Gambling case* established a definition of “public morals” using the Shorter Oxford English Dictionary as “standards of right and wrong conduct maintained by or on behalf of a community or nation”.⁸⁵ Exception in Article XX(a) grants Member States the right to determine the level of protection “that they consider appropriate...”⁸⁶ prior to its invocation. Countries such as the United Arab Emirates, Tunisia, Brunei, Qatar, and Morocco exemplify that States can determine the public morals and appropriate protection level based on the conduct maintained among their nationals, for example, relying on religious beliefs.⁸⁷

⁸³ Panel Report, United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WTO Doc. WT/DS285/R (2005) [**“US-Gambling”**], ¶6.455.

⁸⁴ *Id.*

⁸⁵ US-Gambling, ¶6.465.

⁸⁶ Appellate Body Report, Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef, WTO Doc. WT/DS161/AB/R ; WT/DS169/AB/R (2001) [**“Korea-Beef”**], ¶176.

⁸⁷ Katarina Jakobsson, The dilemma of the moral exception in the WTO (2013) (Independent thesis, Stockholm University).

“ASHTA”, Astor’s largest Animal protection organization, which includes 12 million members, established a campaign demanding the national legislature to ban the importation of hunting trophies.⁸⁸ Moreover, Astori nationals’ public attitude of strong opposition towards the practice of hunting trophies importation illustrates the perception of public morals among Astori nationals. It is in response to ASHTA’s call for a trophy hunting ban and based on the public opposition to the practice that Astor’s legislature enacted such a ban. Thus, Astor’s actions aim at the protection of the moral standards of its citizens, on the basis of the State’s right to define and protect its own moral framework.

b. The ban is “necessary” to protect public morals

Provision enshrined in Article 20(a) of ARTA operates the word “necessary” creating additional requirements for the application of the General Exceptions.⁸⁹ Following the GATT/WTO Case law, the Panel first explicated the word “necessary” in the *US-Section 337 case* with respect to the provision in Article XX(d) of the GATT, which created a set of criteria for future cases.⁹⁰ The determination of “necessary” involves, in every case, a process of weighing and balancing a series of factors,⁹¹ establishing a three-tier “necessity” test.⁹² Astor has successfully fulfilled its

⁸⁸ Record, ¶25.

⁸⁹ NATALIE DOBSON, *Article XX GATT as guardian of the environment*, in ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW 200, 206 (Michael Faure, 2023) [**“Dobson (2023)”**].

⁹⁰ Panel Report, United States — Section 337 of the Tariff Act of 1930 and Amendments thereto, WTO Doc. L/6439 - 36S/345 (1989) [**“US-Section 337”**], ¶3.59.

⁹¹ Korea-Beef, ¶166.

⁹² Panel Report, United States — Standards for Reformulated and Conventional Gasoline, WTO Doc. WT/DS2/R (1996) [**“Panel, US-Gasoline”**], ¶6.20.

requirements on the importance of the interest or values protected (i), the contribution of the measure to the objective (ii), and the availability of other WTO-consistent alternatives (iii).

i. Values protected by an enacted law hold significant importance to Astor

According to the Appellate Body in the *US-Gambling case*, States should be more flexible at defining and implementing the public morals “according to their own systems and scales of values”.⁹³ Polls among the nationals of Astor were conducted, and consistent opposition to the practice was found,⁹⁴ reflecting the grave importance of wildlife protection to the nation as a whole.

ii. Astor’s measures are vital in propelling the objective towards a realisation

Appellate Body in *Korea-Beef case* clarified that the greater is the contribution that the State makes by implementing certain trade measures, the more easily a measure might be considered to be “necessary”.⁹⁵ Moreover, a complete ban might constitute the required measure.⁹⁶ A complete ban on the importation of hunting trophies enacted by Astor demonstrates its will to make a great contribution in order to protect public morals and thus is justified

⁹³ US-Gambling, ¶6.461.

⁹⁴ Record, ¶28.

⁹⁵ Korea-Beef, ¶163.

⁹⁶ *Id.*, ¶178.

iii. No viable alternative measures are available to protect public morals

In *Brazil-Tyres case* the right of WTO members to determine the level of protection they consider appropriate in a given context was identified.⁹⁷ In order to prove the necessity of the measure, no other WTO-consistent measures must be available.⁹⁸ Relying on the public attitudes toward trophy hunting and the legislature's concerns, Astor applied the highest level of protection by enacting an importation ban law. Therefore, the decision to prohibit the importation of hunting trophies reflects Astor's right to determine the highest possible protection level, which could not have been achieved by alternative means.

2. Astor's ban on importation complies with Article 20(g)

a. The ban is vital for the conservation of exhaustible natural resources

Article 20(g) of ARTA allows an exception relating to the conservation of exhaustible natural resources. Although there is no general definition of "exhaustible natural resources", animals, though chiefly seen as mere goods, sometimes fall within this category.⁹⁹ Notably, Article XX of the GATT was drafted with the understanding that "fisheries and wildlife were in fact covered by the language conservation of exhaustible natural resources".¹⁰⁰

⁹⁷ Appellate Body Report, Brazil — Measures Affecting Imports of Retreaded Tyres, WTO Doc. WT/DS332/AB/R (2007) [**"Brazil-Tyres"**], ¶210.

⁹⁸ Korea-Beef, ¶166.

⁹⁹ CHARLOTTE BLATTNER, PROTECTING ANIMALS WITHIN AND ACROSS BORDERS: EXTRATERRITORIAL JURISDICTION AND THE CHALLENGES OF GLOBALIZATION, 109 (2019).

¹⁰⁰ Steve Charnovitz, *Exploring the Environmental Exceptions in GATT Article XX*, 25, J. World Trade, 37, 46 (1991) [**"Charnovitz (1991)"**].

The Royal Markhor, belonging to wildlife and being susceptible to extinction as a result of human activities,¹⁰¹ falls within the “exhaustible” category, which must also be read in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.¹⁰² What is more, with the Royal Markhor being “renewable”, it does not mean that it is not “exhaustible”.¹⁰³

The regulatory measures taken by Astor were necessary, considering that free trade in the specimen could threaten the Royal Markhor with extinction. Scientifically sound policy for the protection of endangered species may, in some circumstances, require control of indirect trade effects as well.¹⁰⁴ Drawing parallels to the *Shrimp-Turtle case*, Astor took measures to restrict indirect trade by restricting trade in hunting trophies, contributing to the conservation of this exhaustible natural resource.

¹⁰¹ Record, ¶1.

¹⁰² Appellate Body Report, United States — Import Prohibition of Certain Shrimp and Shrimp Products, WTO Doc. WT/DS58/AB/R (1998) [“**US-Shrimp**”], ¶129.

¹⁰³ Dobson (2023), p.204.

¹⁰⁴ Sanford Gaines, *The WTO’s Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT’L L., 739, 750 (2001).

b. Astor's ban on the importation enhances the domestic prohibition of the Royal Markhor taking

In the *China-Raw Materials* case, the Appellate Body explained that international and domestic restrictions in Article XX(g) of GATT must “work together”.¹⁰⁵ This is demonstrated in the *Prohibition on Imports of Tuna* case, where the Panel noted that the United States failed to provide evidence that domestic consumption has been restricted.¹⁰⁶ The Panel has stated that sub-paragraph (g) is aimed at ensuring the “even-handed” distribution of responsibility between foreign and domestic users.¹⁰⁷ Highlighting the statement, measures do not have to be the same, yet they must contribute equally.

Contrary to the United States in the *Prohibition on Imports of Tuna* case, Astor has completely prohibited the taking of the Royal Markhor on the national level, which practically prohibits the Royal Markhor trophy hunting. Considering that the importation ban aims for the conservation of the Royal Markhor, an exhaustible natural resource as demonstrated in the preceding argument, Astor has restricted its nationals from the importation of hunting trophies, therefore prohibiting them from hunting the Royal Markhor. Thus, Astor's ban on the importation of hunting trophies is a measure

¹⁰⁵ Appellate Body Report, China — Measures Related to the Exportation of Various Raw Materials, WTO Doc. WT/DS394/AB/R; WT/DS395/AB/R; WT/DS398/AB/R (2012) [**“China-Raw Materials”**], ¶47.

¹⁰⁶ Panel Report, United States — Prohibition of Imports of Tuna and Tuna Products from Canada, WTO Doc. L/5198 - 29S/91 (1982) [**“US-Tuna”**], ¶4.11.

¹⁰⁷ Appellate Body Report, China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, WTO Doc. WT/DS431/AB/R; WT/DS432/AB/R; WT/DS433/AB/R (2014) [**“China-Rare Earths”**], ¶5.130.

taken in order to make domestic restrictions more effective, as they work in conjunction with international trade restrictions.

3. Astor's measures satisfy the requirements of Article 20 Chapeau

The Chapeau to Article 20 of ARTA, similarly to Article XX of the GATT, has a specific purpose to prevent abuse or misuse of the exemptions provided.¹⁰⁸ In order for a State to successfully invoke Article XX of GATT, the Chapeau requirements have to be considered and met. In the *US - Shrimp case*, the Appellate Body stated that the manner in which the measure is applied plays an important role in determining whether the measure satisfies the Chapeau.¹⁰⁹ In particular, the measure must not be arbitrary (a) and must not constitute a disguised restriction on international trade (b).¹¹⁰

a. Astor's measures cannot be considered to be "arbitrary"

In the original context of the GATT Chapeau, "arbitrary" meant that the measure had no proper purpose. However, as of now, "arbitrary measure" is defined as one, which has no rationale offered.¹¹¹ Astor's measures are well reasoned and based on the nationwide ethical and environmental concerns along with its aim as a State to protect the wildlife. Moreover, such actions comply with ARTA's purposes, including strengthening cooperation and expanding regional trade in a manner that is consistent with environmental protection and conservation.¹¹²

¹⁰⁸ US-Shrimp, ¶119.

¹⁰⁹ *Id.*, ¶160.

¹¹⁰ Record, ¶12.

¹¹¹ Lorand Bartels, *The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction*, 109, AJIL, 95, 123 (2015).

¹¹² Record, ¶12.

As demonstrated above, Astor has solid justification for implementing such measures, thus they cannot be regarded as arbitrary.

b. Measures taken by Astor do not constitute a disguised restriction on international trade

When defining a measure that does not constitute a disguised restriction on international trade, the transparency of the measure can be an exonerating factor.¹¹³ Astor was transparent with Rishmak about the concerns about the Royal Markhor's protection while enacting an importation ban law. The ban aimed at prohibiting trade in hunting trophies and was enacted under the same purpose and name.

Astor acted with due transparency and consistency in pursuance of the aims to improve the conservation status of the Royal Markhor and protect public morals, therefore, its ban on the importation of hunting trophies cannot be regarded as a measure that constitutes a disguised restriction on international trade.

¹¹³ Charnovitz (1991), p.48.

CONCLUSION AND PRAYER FOR RELIEF

Applicant, Astor, respectfully requests the Court to adjudge and declare that:

I. The trophy hunting of the Royal Markhor through the auction process violates conventional international law, and

II. The ban on the importation of Royal Markhor hunting trophies complies with conventional international law.

Respectfully Submitted,

Agents of Applicant