

[TEAM NO. 63]

**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**

**29th Annual Stetson International Environmental Moot Court Competition**

**2024–2025**

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### **QUESTIONS PRESENTED**

- I. Whether or not the trophy hunting of the Royal Markhor through the auction process violates conventional international law
- II. Whether or not the ban on the importation of Royal Markhor hunting trophies complies with conventional international law.

## **STATEMENT OF JURISDICTION**

In accordance with *Article 40* of the *Statute of the International Court of Justice*, the Sovereign States of Astor and Rishmak have submitted to the International Court of Justice (“ICJ”) their Special Agreement pertaining to questions concerning their differences relating to Subsistence Use and Trophy Hunting. The Parties transmitted a copy of the Special Agreement to the Registrar of the ICJ on 1 July 2024, which the Registrar acknowledged receipt on of 31 July 2024. The Parties agree that the Court has jurisdiction to decide the matter.

## **STATEMENT OF FACTS**

The Royal Markhor is a wild goat that lives in Astor and Rishmak, which share a border over which Royal Markhors migrate. It is a critically endangered species: it was added to Appendix I of CMS in 2009. In 2003, Astor and Rishmak signed a bilateral trade agreement, which *inter alia* prohibited quantitative restrictions, except if they were necessary to protect public morals or to conserve exhaustible natural resources. The national laws of Astor strictly prohibit the taking of the Royal Markhor. Rishmak also prohibits the taking of the Royal Markhor, but with an exception for the Dione Ginsu, an indigenous community living in Rishmak.

After the Royal Markhor was added to CMS Appendix I, Rishmak instituted a lottery system for Dione Ginsu males reaching adulthood in which only ten Royal Markhors were permitted to be hunted annually. Beginning in 2016, rather than allowing male members who win the lottery to conduct a hunt, the Dione Ginsu community annually auctioned off the right to hunt the Royal Markhors to foreign hunters, subject to the numerical cap imposed by Rishmak. Bids for the hunting rights ranged from \$100,000–150,000 per Royal Markhor. The Dione Ginsu used 30% of the money for community housing expenses, 30% for community medical expenses, and 15% for community food expenses. 15% was allocated for Royal Markhor conservation programs, and 10% was paid to the casino and the convention organizer. The winning bidders at the auctions have been almost exclusively Astori nationals.

Starting from May 2022, the two countries exchanged diplomatic notes. Astor contends that the auction process did not fall within the scope of the exceptions available under the CMS: the primary purpose of the auction process was not enhancement of the propagation of the species under Article III(5)(b), and the use of the Royal Markhor for purposes other than traditional subsistence use was outside the scope of Article III(5)(c).

In December 2022, Astor banned the import of hunting trophies. Rishmak contends that the ban is an impermissible quantitative restriction under the bilateral trade agreement, not covered by the exceptions mentioned above.

Astor and Rishmak agreed to submit the following questions to the ICJ: (1) whether the trophy hunting of the Royal Markhor through the auction process, by hunters who are not Dione Ginsu, violates or complies with conventional international law and (2) whether the ban on the importation of Royal Markhor hunting trophies violates or complies with conventional international law.

## **SUMMARY OF ARGUMENTS**

### **I. The auction process does not violate conventional international law**

Rishmak's obligations under CMS are trumped by its other international law obligations. The obligations under CMS are superseded Rishmak's obligations to respect the right to self-determination of the Dione Ginsu, as well as its obligations to the Dione Ginsu under the ICESCR. *Alternatively*, the auction process does not violate CMS. The subsequent practice of the parties indicates that the auction process does not violate CMS. Articles III(5)(b) and (c) permit the auction process. Further, the auction process satisfies the requirements of the proviso to Art III(5).

### **II. The ban on the importation of Royal Markhor hunting trophies violates conventional international law**

The import ban violates ARTA. It is not provisionally justified under ARTA Article 20(a). It does not concern public morals; it was not designed to protect public morals, nor is it necessary for the protection thereof. It is also not provisionally justified under ARTA Article 20(g). It does not relate to the conservation of an exhaustible natural resource, and is not even-handed. Further, the ban does not meet the requirements of the chapeau to ARTA Art 20. Finally, the ban is inconsistent with CITES

## **MAIN ARGUMENTS**

### **I. The trophy hunting of the Royal Markhor through the auction process does not violate conventional international law**

Rishmak's obligations under the Convention on the Conservation of Migratory Species of Wild Animals ("CMS") are trumped by its other international law obligations [A]. *Alternatively*, the auction process does not violate CMS [B].

#### **A. Rishmak's obligations under CMS are trumped by its other international law obligations.**

Rishmak's obligations under CMS are secondary to its *jus cogens* obligation to protect the right to self-determination [1] and its obligations under the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), as an "existing treaty" [2].

##### *1. The right to self-determination supersedes Rishmak's CMS obligations*

Rishmak has a *jus cogens* obligation to protect the right of self-determination.<sup>1</sup> The Dione Ginsu, as a "people," possess the right to self-determination.<sup>2</sup> More specifically for the purposes of this

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<sup>1</sup> *East Timor (Port. v. Aus.)*, Judgement, 1995 I.C.J. ¶92.

<sup>2</sup> S. James Anaya, Indigenous People in International Law 77–80 (2000).

case, an obligation exists to protect the right to internal self-determination—that is, the pursuit of economic, social, and cultural development within the framework of an existing state.<sup>3</sup> The practice of hunting the Royal Markhor, as a rite of passage,<sup>4</sup> is an inherent part of the Dione Ginsu's economic and cultural development.<sup>5</sup> Moreover, this marks a distinction between the Dione Ginsu and the rest of the population and is essential to their identity<sup>6</sup>—and a ban on the auction process risks this cultural practice's eradication.

In other words, *even if* Rishmak's obligations under CMS are taken to include the prohibition of the taking of the Royal Markhor through the auction process, the practice of hunting, which has evolved to be expressed through the auction process, is part of their right to self-determination—which Rishmak must respect. Therefore, it would trump Rishmak's CMS obligations, and any violation thereof would be justified.<sup>7</sup>

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<sup>3</sup> UN Committee on the Elimination of Racial Discrimination, General Recommendation 20(48) on Article 5, ¶ 9, CERD/48/Misc.6/Rev.2, (1996). *See also* Allan Rosas, 'Internal Self-Determination' in *Modern Law of Self Determination* 225 (Christian Tomuschat ed. 1993).

<sup>4</sup> Record, ¶14.

<sup>5</sup> Aureliu Cristescu (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *The Right of Self-Determination: Historical and Current Development on the Basis of UN Instruments*, UN Doc. E/CN.4/Sub.2/404/Rev. 1 at 102 (1981).

<sup>6</sup> Anaya, *supra* note 2, at 3.

<sup>7</sup> Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].; Int'l Law Comm'n, Rep. on the Work of Its Sixty-Fifth session, U.N. Doc. A/68/10, at 85 (2013).



2. *Rishmak's obligations under ICESCR supersede its CMS obligations*

ICESCR is an “existing treaty” [a] that obliges Rishmak to respect the Dione Ginsu’s rights [b].

a. ICESCR is an “existing treaty”

A party’s obligations under CMS do not affect any obligations deriving from any “existing treaty.”<sup>8</sup> ICESCR, which came into force in 1976, preceded CMS, which became effective in 1983. Rishmak’s obligations under ICESCR are, therefore, not affected by those under CMS.

b. ICESCR obliges Rishmak to respect certain rights of the Dione Ginsu

ICESCR obliges Rishmak to respect the Dione Ginsu’s rights to self-determination [i] and cultural rights [ii].

- i. ICESCR obliges Rishmak to respect the Dione Ginsu’s right to self-determination

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<sup>8</sup> Convention on the Conservation of Migratory Species of Wild Animals, art. XII, June 23, 1979, 1651 U.N.T.S. 333 [hereinafter CMS].

There is an obligation under ICESCR on Rishmak to respect the Dione Ginsu's right to self-determination.<sup>9</sup> The economic dimension of self-determination, that all peoples can freely dispose of their natural resources, specifically includes the people's right against "being deprived of its own means of subsistence."<sup>10</sup>

The Dione Ginsu are therefore similarly protected under Rishmak's ICESCR obligations as they are under its *jus cogens* obligations, and Rishmak is justified in violating its obligations under CMS, if any.

ii. ICESCR obliges Rishmak to respect the Dione Ginsu's cultural rights

ICESCR protects the right "to take part in cultural life."<sup>11</sup> However, cultural rights cannot be determined in the abstract and must be determined in context,<sup>12</sup> and protection is afforded to indigenous peoples who have adapted the methods of carrying out traditional activities.<sup>13</sup>

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<sup>9</sup> International Covenant on Economic, Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>10</sup> OHCHR, General comment No. 12, U.N.Doc. HRI/GEN/1/Rev.9 (1984).

<sup>11</sup> ICESCR, *supra* note 9, art. 6.

<sup>12</sup> *Lansman et al. v. Finland*, Communication No. 511/1992.

<sup>13</sup> U.N. Doc. CCPR/C/52/D/511/1992 ¶ 9.3 (1994); Case of the *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (ser. C) No. 79 ¶164 (2001).

The Dione Ginsu have adapted their right to hunt the Royal Markhor from a rite of passage to the right to hunt through an auction facilitated by them<sup>14</sup> to satisfy their subsistence needs.<sup>15</sup> Therefore, Rishmak must follow its obligation to respect the Dione Ginsu's cultural right to carry out an action to facilitate its hunt of the Royal Markhor.

Resultantly, the auction process carried out by Rishmak is in line with its obligations under the right to self-determination and the ICESCR which override its obligations under CMS.

### **B. The taking of the Royal Markhor through the auction process does not violate CMS**

The parties' subsequent practice indicates that the auction process does not violate CMS [1]. CMS Article III(5)(b) permits the auction process [2]. Article III(5)(c) permits the auction process [3].

1. *The subsequent practice of the parties indicates that the auction process does not violate CMS*

The subsequent practice of parties informs the interpretation of a treaty.<sup>16</sup> The auction process being attributable to Rishmak, and the grant of the appropriate CITES permits by Astor consistently for six years prior to the present dispute,<sup>17</sup> constitute relevant subsequent practice.

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<sup>14</sup> Record, ¶17.

<sup>15</sup> Record, ¶16.

<sup>16</sup> VCLT, *supra* note 7, art. 32.

<sup>17</sup> Record at ¶16.

Astor, in granting such permits, having full knowledge of the auction process, acknowledged that the auction process was permissible under CMS.

2. *CMS Article III(5)(b) permits the taking of the Royal Markhor through the auction process*

“[T]he purpose” does not mean *primary* purpose [a]. Given that “the purpose” does not mean *primary* purpose, the auction process falls within the exception [b].

a. “[T]he purpose” does not mean *primary* purpose

The anthropocentric object of the CMS [i], as well as CMS Article II [ii], support a reading where “the purpose” does not mean *primary* purpose

- i. The anthropocentric object of the CMS supports a reading where “the purpose” does not mean *primary* purpose

Article III(5)(b) should be interpreted according to its ordinary meaning, in its context and with regard to its object and purpose.<sup>18</sup> The ordinary meaning by itself does not suggest that purpose implies *primary* purpose. Moreover, the preamble to the CMS expresses its anthropocentric

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<sup>18</sup> VCLT, *supra* note 7, art. 31.

object.<sup>19</sup> It refers to the “ever-growing value of wild animals from [*inter alia*] scientific, aesthetic, recreational, ... social and economic points of view.”<sup>20</sup> It also states that wild animals “must be conserved for the good of mankind.”<sup>21</sup> A recognition that wild animals are taken for composite purposes that invariably involve human ends thus inheres in CMS’s object. The CMS Conference of Parties too has affirmed such a view: “sustainable use (both consumptive and non-consumptive) may provide incentives for conservation and restoration because of the social, cultural and economic benefits that people could derive from that use.”<sup>22</sup> Given such an object, a reading where “the purpose” does not involve *primary* purpose is correct.

- ii. CMS Article II supports a reading where “the purpose” does not mean the *primary* purpose

A reading of the exception must be informed by other provisions in CMS, which form part of the context.<sup>23</sup> CMS Article II provides that Rishmak must take action towards species conservation only “when possible and appropriate.”<sup>24</sup> Such a formulation does not impose strict obligations,<sup>25</sup>

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<sup>19</sup> M Bowman et al., Lyster’s International Wildlife Law 537 (2nd ed. 2010).

<sup>20</sup> CMS, *supra* note 8, Preamble.

<sup>21</sup> *Id.*

<sup>22</sup> CMS Res. Conf. 8.1 (Rev.CoP8) (2005).

<sup>23</sup> VCLT, *supra* note 7, art 31(2).

<sup>24</sup> CMS, *supra* note 8, art. II.

<sup>25</sup> Malgosia Fitzmaurice, International Protection of the Environment 224 (2002).

and allows for measures wherein conservation of the species may not be given highest consideration.<sup>26</sup> It accounts for inequality among formally equal states with differing powers due to varying social circumstances.<sup>27</sup> Rishmak is a low-income economy with poverty rates being the highest among the Dione Ginsu.<sup>28</sup> Thus, even if “the purpose” implies *primary purpose in general*, the scheme of differentiated obligations that the CMS lays down via Article II entails less stringent obligations on Rishmak. For Rishmak in its particular circumstances, “the purpose” does not imply *primary purpose*.

- b. Given that “the purpose” does not mean *primary purpose*, the auction process falls within the exception.

15% of the funds from the auction process allocated towards Royal Markhor conservation efforts primarily go toward vaccine development prevent *Mycoplasma capricolum* infections.<sup>29</sup> By taking merely ten goats a year, funds are being generated to mitigate a disease that kills 10–30% of the Royal Markhor population—these are funds that are otherwise not available. The taking

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<sup>26</sup> Alexander Gillespie, Conservation, Biodiversity and International Law 260 (2013).

<sup>27</sup> Phillippe Cullet, *Differentiation*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, 319 (Lavanya Rajamani and Jaqueline Peel eds., 2nd ed., 2021); Rachel Boyte, Common but Differentiated Responsibilities: Adjusting the Developing/Developed Dichotomy in International Environmental Law, 14 NZ. J. Env't. L. 63, 85 (2010).

<sup>28</sup> Record, ¶3.

<sup>29</sup> Record ¶ 18

through the auction process therefore demonstrably contributes to the enhancement of the survival of the species.

### 3. *Article III(5)(c) permits the auction process*

A treaty must be interpreted by considering any rules of international law applicable in the relations between the parties.<sup>30</sup> Although rules arising from obligations that *both* parties are subject to are of *particular* relevance, rules that *either* party is subject to are still significant.<sup>31</sup> Rishmak has obligations, to respect the right to self-determination and right to subsistence of the Dione Ginsu.

The Dione Ginsu have the right to internal self-determination (“RISD”),<sup>32</sup> and the right to subsistence. Rishmak has conventional<sup>33</sup> and customary<sup>34</sup> obligations to respect these rights.

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<sup>30</sup> VLCT, *supra* note 7, art. 31(3)(c).

<sup>31</sup> M. Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission (Helsinki: Erik Castrén Institute, 2007 ¶ 21.

<sup>32</sup> *Supra* notes 2 and 3, with accompanying text

<sup>33</sup> ICESCR, *supra* note 9, arts. 1 and 2.; International Labour Organization, Indigenous and Tribal Peoples Convention, No. 169, arts. 13, 14, 15, 16, 23 July 1, 1989, 28 I.L.M. 1382 [Hereinafter ILO 169].

<sup>34</sup> See United Nations Declaration on the Rights of Indigenous Peoples, GA Res. 61/295, arts 3, 4, 20, 21, 23, 25, 26, 32. U.N. Doc. A/61/L.67 (Sept. 13, 2007) *for* status as an expression of customary international law [Hereinafter UNDRIP].

Per ICESCR, the Dione Ginsu must be allowed to “freely dispose of their natural wealth and resources”, and may not ‘be deprived of its own means of subsistence.’<sup>35</sup> Further, Rishmak is mandated to ensure the provision of essential foodstuff, primary healthcare, and basic shelter and housing.<sup>36</sup> Under the Indigenous and Tribal Peoples Convention, 1989, as well the United Nations Declaration on the Rights of Indigenous Peoples, which is an expression of established customary law,<sup>37</sup> Rishmak is obligated to protect the rights of indigenous peoples over their land and natural resources.<sup>38</sup>

Additionally, the scope of subsistence extends to the taking up of new economic opportunities and is not restricted to traditional activities.<sup>39</sup> The phrase “accommodate the needs

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<sup>35</sup> ICESCR, *supra* note 9, art. 1(2).

<sup>36</sup> UN Committee on Economic, Social and Cultural Rights, Article 2.1, The Nature of States Parties’ Obligations General Comment No. 3, E/1991/23 (Dec. 14, 1990); Yakyé Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125 ¶ 167 (2005); ILO 169, *supra* note 34.

<sup>37</sup> Siegfried Wiessner, ‘United Nations Declaration on the Rights of Indigenous Peoples’, United Nations Audiovisual Library of International Law (2009); Siegfried Wiessner, Re-Enchanting the World: Indigenous Peoples’ Rights as Essential Parts of a Holistic Human Rights Regime, 15 UCLA J. Int’l L. Foreign Aff., 239 (2010).

<sup>38</sup> UNDRIP, *supra* note 35.

<sup>39</sup> ILO 169, *supra* note 34; International Labour Organization (ILO), Convention on Indigenous and Tribal Peoples, 1989 (No.169): A manual, at 56 (Dec. 16, 2003), [https://www.ilo.org/public/libdoc/ilo/2003/103B09\\_345\\_engl.pdf](https://www.ilo.org/public/libdoc/ilo/2003/103B09_345_engl.pdf).



of traditional subsistence users” thus cannot be restricted to how the Royal Markhor was traditionally used.

4. *The auction process satisfies the requirements of the proviso to Art III(5)*

The proviso to Article III(5) requires that the exception be precise as to content [a], limited in time and space [b] and not to the disadvantage of the Markhor [c].

a. The exception is precise in content

The hunting process is under strictly supervised restrictive conditions.<sup>40</sup> The trophy hunters may hunt only ten male Markhors annually and are required to hire Dione Ginsu guides, who use the scent as bait to lure male Royal Markhors to ensure a successful hunt.<sup>41</sup> Thus, the exception is precise as to content.

b. The exception is limited in space and time

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<sup>40</sup> Yaffa Epstein et al., *When is it Legal to Hunt Strictly Protected Species in the European Union?*

1(3) Conservation Science and Practice Feb. 2019, at 10.

<sup>41</sup> Record, ¶17.

Per the proviso, the taking is valid only during a particular time-period and in a particular area.<sup>42</sup> Since hunting is limited to the territory of Rishmak during the fall and winter season, the exception is limited in space and time.

c. The exception is not to the Royal Markhor's disadvantage

Disadvantage does not refer to an “unfavourable” conservation status.<sup>43</sup> Disadvantage requires the satisfaction of maintaining a sustainably harvestable population<sup>44</sup> so as to be able to withstand regular depredations by humans.<sup>45</sup> Well-managed and sustainable trophy hunting is consistent with and contributes to species conservation.<sup>46</sup> Additionally, since exclusively adult male markhors are hunted, the female and younger male population remains undisturbed, thereby causing no interference in the reproduction cycles or disturbance in the growth rates.<sup>47</sup>

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<sup>42</sup> Epstein et al., *supra* note 41, at 6.

<sup>43</sup> CMS, *supra* note 8, art. 1(1)(c)(4).

<sup>44</sup> Robert L Fischman & Jeffrey B. Hyman, The Legal Challenge of Protecting Animal Migrations as Phenomena of Abundance, 28 Va. Env'tl. L.J. 173, 199 (2010).

<sup>45</sup> *Id.* at 198.

<sup>46</sup> CITES Res. Conf.17.9 (Rev.CoP19) (2016).

<sup>47</sup> Food and Agriculture Organization and International Council for Game and Wildlife Conservation, Best Practices in Sustainable Hunting: A Guide to Best Practices From Around the World 27 (2008).

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

The measure in question—a ban on the import of hunting trophies—violates the Astor-Rishmak Trade Agreement (“ARTA”) [A] and CITES [B].

### **A. The measure violates ARTA**

The measure is not provisionally justified under Article 20(a) [1] and 20(g) of ARTA [2]. It does not meet the requirements of the chapeau to Article 20 [3].

#### *1. The measure is not provisionally justified under ARTA Article 20(a)*

The measure does not concern a public morals objective [1]. It is not designed to protect public morals [2]. Assuming that it concerns a public morals objective, the measure is not necessary to protect public morals [3].

##### *a. The measure does not concern a public morals objective*

To establish whether a measure concerns a public morals objective, it must be shown that (a) the concern in question exists in that society, and (b) whether such concern falls within the scope of

“public morals” as “defined and applied” in that state “in its territory, according to its own systems and scales of values.”<sup>48</sup>

Astor has the burden to establish “that the alleged public policy objective at issue is indeed a public moral objective according to its value system.”<sup>49</sup> Astor is likely to place reliance on surveys of the Astori public, that show opposition to the practice of trophy hunting.<sup>50</sup> In *Seals*, the probative value of public opinion polls relied on by the European Union was found to be very limited. They were found to “exhibit the existence of a certain level of public awareness and concern on seal welfare, but “insufficient to establish moral concerns among the European Union public.”<sup>51</sup>

The Astor survey results similarly have very limited probative value for two reasons. *First*, the questions asked on the survey have to do with opposition to trophy hunting in general, without accounting for differing range of factors over time that are essential to account for in order to

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<sup>48</sup> Panel Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 7.383, WTO Doc. WT/DS400/R; WT/DS401/R (adopted Jun. 16, 2014) [hereinafter *Seals* PRs].

<sup>49</sup> Panel Report, *United States—Tariff Measures on Certain Goods from China*, ¶ 7.131, WTO Doc. WT/DS543/R (adopted Sep. 15, 2020) [hereinafter *Tariffs*].

<sup>50</sup> Record, ¶ 28.

<sup>51</sup> Appellate Body Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.135, WTO Doc. WT/DS400/AB/R; WT/DS401/AB/R (adopted May 22, 2014) [hereinafter *Seals* ABRs].

constate public morals.<sup>52</sup> The most specific question as regards the present case has to do with the trophy hunting of internationally protected animals.<sup>53</sup>

It is impossible to disentangle, in this survey result, *specific* attitudes towards the trophy hunt of the Royal Markhor via auction in Rishmak from general attitudes towards the trophy hunting of internationally protected animals. Unlike many other trophy hunts, the hunt in Rishmak is carried out under the stewardship of the Dione Ginsu and operates to the benefit of the Royal Markhor as well as the Dione Ginsu. *Secondly*, there is no evidence that the opposition shown by the survey results is a *moral* opposition to the trophy hunting of the RM. Astor has failed to discharge its burden of proof.

b. The measure is not *designed* to protect public morals

To evaluate whether a measure is designed to meet a particular objective, an adjudicator must look at its content, structure, and expected operation.<sup>54</sup> Nothing in the content or expected operation of the import ban demonstrates that it seeks to address moral concerns regarding trophy hunting. Moreover, an evaluation of the structure of a measure includes an evaluation of the context in which it is instituted. If the import ban *were* addressing such moral concerns, it would be more than reasonable to expect a domestic ban on trophy hunting within Astor, yet no such law exists.

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<sup>52</sup> Panel Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, ¶ 6.461, WTO Doc. WT/DS285/R (adopted Apr. 20, 2005).

<sup>53</sup> Among which the Royal Markhor is listed as an example.

<sup>54</sup> *Tariffs*, *supra* note 50, ¶ 7.145.

The import ban is a misguided attempt to promote the conservation of the Royal Markhor and cannot said to be *designed* to protect public morals.

- c. Assuming that the measure concerns a public morals objective, it is not *necessary* to protect public morals

The necessity requirement involves weighing and balancing the right of a country to invoke an exception, with its duty to respect substantive treaty obligations (such as market access).<sup>55</sup> This consists of an assessment of a series of factors: the relative importance of the pursued policy objective [i], the measure's restrictive impact [ii], and the contribution of the measure to the realization of the objective pursued [iii].<sup>56</sup>

- i. Astor has not shown the relative importance of the objective

Assuming that the measure involves a public morals objective, Astor must show evidence of the measure's relative importance to Astori society, rather than merely making an assertion to that effect. To this end, Astor may point to public survey results showing public opposition to trophy hunting. However, these results do not show the importance of the measure's objective *relative* to other societal priorities. Astor has therefore not shown the relative importance of the objective.

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<sup>55</sup> *Id.* ¶ 7.155.

<sup>56</sup> *Id.* ¶ 7.159.

ii. Astor chose the most trade-restrictive measure possible

The measure's restrictive impact must be seen in the context of less trade-restrictive alternative measures that are reasonably available to Astor as policy options.<sup>57</sup> Out of all the options available to Astor, it chose to adopt the *most trade-restrictive* measure possible. In lieu of a blanket ban, the measure could have been structured to have differential operation for hunting trophies of different species, depending on their level of endangerment.

Moreover, instead of an outright ban, the measure could have consisted of differential tariffs: the more endangered a species, the higher the tariffs. The funds raised via these tariffs could then be invested into the conservation of the species, making the trophy hunting of select species work to the advantage of the conservation of that species—consistent with international best practices on sustainable trophy hunting.<sup>58</sup> Thus, Astor had less trade-restrictive alternatives reasonably available to it.

iii. The measure fails the necessity test on a holistic assessment

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<sup>57</sup> *Id.* ¶ 7.159; Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, ¶ 310, WTO Doc. WT/DS363/AB/R (adopted Jan. 19, 2010).

<sup>58</sup> International Union for Conservation of Nature, Informing Decisions on Trophy Hunting 5 (2016).

The third and final factor is the contribution of the measure to the realization of the objective pursued. The measure has incontrovertibly prevented hunting trophies from being imported into Astor; it has contributed to the objective of the measure as defined by Astor. However, that the assessment of necessity is a *holistic* one. The public morals exception has not been properly invoked;<sup>59</sup> even if the measure falls within the public morals exception, it has not been shown to pursue an important objective, and that it is far too trade-restrictive. On a holistic view, the measure does not pass the necessity requirement.

2. *The measure is not provisionally justified under ARTA Article 20(g)*

Article 20(g) of the ARTA states that otherwise ARTA-inconsistent measures constitute an exception to the prohibitive measures in the ARTA if they relate to the conservation of exhaustible natural resources and if such measures are made effect in conjunction with restrictions on domestic production or consumption. The measure at issue does not “relat[e] to” the conservation of exhaustible natural resources [1], nor is this measure about exhaustible natural resources [2]. The measure, moreover, is not even-handed [3].

a. The measure does not “relat[e] to” the conservation of exhaustible natural resources

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<sup>59</sup> See discussion *infra* Section II(C)(1).



The “relating to” test will operate to investigate the relationship between a trade-restrictive measure and its object under Article 20(g).<sup>60</sup> Under this test: *first*, the objects and purposes of the measure must be “genuine”; and *secondly*, there must be a “close and real” relationship between the measure and its object.<sup>61</sup>

It is conceded that the object and purpose of the prohibition on the importation of hunting trophies—the conservation of animals hunted for trophies—is genuine. However, there is no “close and real” relationship between the ban and the conservationist object because trophy hunting positively affects conservationist efforts [i]. *Alternatively*, the ban is not “reasonably related” to conservation [ii].<sup>62</sup>

i. Trophy hunting has a net positive effect on conservation efforts

Trophy hunting has been found to benefit the preservation of endangered species, with “significant links with conservation.”<sup>63</sup> The Royal Markhor, though an endangered species, is hunted in a highly regulated way—only ten male Royal Markhors may be killed a year, with the proceeds

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<sup>60</sup> Peter Van den Bossche, The Law and Policy of the World Trade Organization (5th ed. 2022).

<sup>61</sup> Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 136, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *U.S.—Shrimp*].

<sup>62</sup> *Id.* at ¶ 141.

<sup>63</sup> Food and Agriculture Organization and International Council for Game and Wildlife Conservation, *Contribution of Wildlife to National Economies* (2010).

from the hunt go towards conservation efforts, especially research to develop vaccines for deadly diseases.<sup>64</sup>

Hunting is therefore not the only threat to the Royal Markhor, and funds generated from the trophy hunting process create a situation where trophy hunting is a net positive for conservation efforts. This, therefore, controverts any possible “direct[] connect[ion]”<sup>65</sup> between the ban on the import of hunting trophies and the *conservation* of animals hunted for their trophies, and likely negatively affects conservation efforts by drying up an important source of their revenue.

ii. *Alternatively*, the measure is not “reasonably related” to conservation

Even if Rishmak concedes that trophy hunting is not wholly positive, a ban *simpliciter* on the import of hunting trophies is not permitted by Article 20(g). The “relating to” test places focus on the “design and structure” of the measure.<sup>66</sup> A measure cannot be a “simple, blanket prohibition” or “disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of [the species].”<sup>67</sup> In other words, the means must be “reasonably related to the ends.”<sup>68</sup>

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<sup>64</sup> Record, ¶ 18.

<sup>65</sup> *U.S.—Shrimp*, *supra* note 62, ¶ 140.

<sup>66</sup> Panel Report, *China—Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, ¶ 7.290, 7.379, WTO Doc. No. WT/DS433/R (adopted Aug. 29, 2014).

<sup>67</sup> *U.S.—Shrimp*, *supra* note 62, ¶ 141.

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

The measure at issue is not “narrowly focused” on the conservation objective. Highly regulated trophy hunting has been shown to reduce the harms of hunting while enhancing the species-conserving benefits.<sup>69</sup> Instead, it issues a simple prohibition that is disproportionately wide in that it encompasses even species-enhancing trophy hunting within its ambit.

b. The measure is not about the conservation of “exhaustible natural resources”

The measure is not about “conservation” [i]. *Alternatively*, not all animals covered by the import ban are “exhaustible natural resources” [ii].

i. The measure is not about “conservation”

The measure and conservation are at cross purposes.<sup>70</sup> Trophy hunting benefits endangered species, and discouraging trophy hunting via a prohibition on the import of hunting trophies would foreclose a species-enhancing avenue and place the Royal Markhor at risk of extinction. Therefore, it is not about “conservation.”

ii. *Alternatively*, not all animals covered by the measure are “exhaustible natural resources”

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<sup>69</sup> See, e.g., Kim Parker et al., Impacts of a trophy hunting ban on private land conservation in South African biodiversity hotspots, 2 Conservation Science and Practice 1 (2020).

<sup>70</sup> See discussion *supra* Section II.B.1.a.

The measure embraces within its sweep a broad array of animals. Admittedly, the Royal Markhor is an “exhaustible natural resource” as it is a CITES Appendix I species. However, several other animals are hunted for trophies—and are thus covered by the import ban. In Central Asia, where Astor and Rishmak are located, there are several species hunted for trophies which are CITES Appendix II species—that is, species not necessarily threatened with extinction, but which may become so unless trade is controlled, and “look-alike” species.<sup>71</sup>

“[T]hreatened with extinction” has been collapsed into “exhaustib[ility]”—or, in other words. This informs the Appellate Body’s earlier determination that a species must be “susceptible of [...] extinction.”<sup>72</sup> Since the ban applies to all species hunted for trophies, including those not susceptible of extinction, it is not about “exhaustible natural resources.”

### 3. *The import ban is not “even-handed”*

The element “made effective in conjunction with” is an “even-handedness” requirement.<sup>73</sup> Restrictions must be imposed not just on the imported commodity but also on the domestic commodity.<sup>74</sup>

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<sup>71</sup> See Convention on International Trade in Endangered Species of Wild Fauna and Flora, Jul. 1, 1975, 993 U.N.T.S. 244; *see also* Bowman et al., *supra* note 19, at 495.

<sup>72</sup> *U.S.—Shrimp*, *supra* note 62, ¶ 128.

<sup>73</sup> Bossche, *supra* note 61.

<sup>74</sup> Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, ¶ 6.33, WTO Doc. WT/DS2/R (adopted May 20, 1996) [hereinafter *U.S.—Gasoline*].

Astor has imposed restrictions on the importation of hunting trophies. However, a bid to ban domestic trophy hunting—or, in other words, place restrictions on domestic hunting trophies—failed in committee. Therefore, Astor’s ban is not even-handed.

4. *The measure does not meet the requirements of the chapeau to Article 20*

In order for any measure to fall within the general exceptions under ARTA Article 20, it must fall within the chapeau requirements of to “avoid[] abuse or illegitimate use of the exceptions to substantive rules available in Article [20].”<sup>75</sup> The chapeau prohibits the enforcement of measures which are “arbitrary” and “disguised restriction[s] on international trade.”<sup>76</sup> Astor’s ban on the import of hunting trophies amounts is arbitrary [1] and a disguised restriction on international trade [2].

a. The measure is an “arbitrary” measure

A measure is “arbitrary” when its rationale bears no relationship to its objective, justified in this case under Article 20(g).<sup>77</sup> This can be the case *even when* it is the outcome of a “rational decision

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<sup>75</sup> *Id.*

<sup>76</sup> Record, ¶ 12.

<sup>77</sup> Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶ 232, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007).

or behaviour.”<sup>78</sup> Astor’s ban on the import of hunting trophies has no relationship to its objective because it harms the goal of species conservation.<sup>79</sup> It is therefore an “arbitrary” measure.

b. The measure is a “disguised restriction on international trade”

“[D]isguised restriction on international trade” includes “disguised *discrimination* in international trade.”<sup>80</sup> Discrimination occurs “when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.”<sup>81</sup>

The measure, as it is applied, envisages a complete ban on trophy hunting, without allowing Rishmak to make specific inquiry into its own conditions—which would accordingly modify its regulations. However, Rishmak, which depends financially on exporting the hunting trophies of the Royal Markhor, is denied any financial benefit from the hunting of the Royal Markhor.

**B. The measure violates CITES**

The import ban runs afoul of Astor’s CITES obligations. It is not saved by the Article XIV exception [1]. Moreover, Article II, read with CITES Resolution 2.11, creates a binding obligation

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<sup>78</sup> *Id.*

<sup>79</sup> See discussion *supra* Section II.B.1.a.

<sup>80</sup> *U.S.—Gasoline*, *supra* note 75.

<sup>81</sup> *U.S. Shrimp*, *supra* note 62, ¶ 165.

on Astor to accept Rishmak's non-detriment findings [2]. Alternatively, the Resolution clarifies the content of Astor's CITES obligations as an instrument of soft law [3].

1. *The measure is not saved by Article XIV, paragraph 1(a)*

Astor has argued that the import ban is authorized under CITES Article XIV, paragraph 1(a), which allows Parties to adopt stricter conditions on the trade of specimens of species in Appendix 1, or a complete prohibition on trade thereof. However, as Rishmak has pointed out in correspondence with Astor, a Party may only restrict or prohibit trade under Article XIV, paragraph 1(a) if such restriction/prohibition is not in breach of some other international obligation.<sup>82</sup> Astor's import ban is a violation of ARTA, and is therefore not saved by Article XIV, paragraph 1(a).

Given that the import ban is illegal under international law, Astor must fulfil its CITES obligations relating to the trade in Royal Markhor hunting trophies in good faith.<sup>83</sup> CITES Article II lays down the procedure applicable to the trade of the Royal Markhor trophies. Once the State of export has granted an export permit, the State of import shall grant an import permit when its Scientific Authority has advised that the import will be for purposes which are not detrimental to the survival of the species, and its Management Authority is satisfied that the specimen is not to be used for primary commercial purposes. Therefore, Astor must grant the CITES import permits.

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<sup>82</sup> Record, ¶ 34.

<sup>83</sup> VCLT, *supra* note 7, art. 31.

2. *CITES Resolution 2.11 creates an obligation on Astor to accept Rishmak's non-detriment finding*

CITES Resolution 2.11, “considering the need of uniform interpretation of the Convention with regard to hunting trophies,” recommends that the Scientific Authority of the importing country accept the non-detriment finding of the Scientific Authority of the exporting country, unless there is scientific or management data to indicate otherwise.<sup>84</sup>

CITES Article XI, paragraph 3(e), sets out that at Conferences of the Parties (“CoPs”), Parties may “where appropriate, make recommendations for improving the effectiveness of the present Convention.” As a recommendation, the Resolution does not in itself constitute a binding obligation. However, given that the CoP is a plenary body in which all States are represented and can actively participate, Resolution 2.11 is both a “subsequent agreement” and “subsequent practice.”<sup>85</sup> It is an agreement on how to uniformly interpret the procedure under CITES Article 3 and is reflective of the practice of States in carrying out their Article 3 duties.<sup>86</sup>

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<sup>84</sup> CITES Conference of Parties [CITES CoP] Resolution Conf. 2.11 (Rev.), as amended at the ninth meeting of the CoP.

<sup>85</sup> VCLT, *supra* note 7, art. 31, paras 3 lit a, b.

<sup>86</sup> See Peter Davies, Non-Compliance: A Pivotal or Secondary Function of CoP Governance? 15(1) International Community Law Review 77, 84 (2013); Robin Churchill and Geir Ulfstein, Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law 94(4) American Journal of International Law 623, 641 (2000); Malgosia Fitzmaurice, *Law-making and International Environmental Law: The Legal*



This view of CoP resolutions is affirmed by the ILC in their Draft Conclusions on Subsequent Agreements and Subsequent Practice in the Interpretation of Treaties.<sup>87</sup> States Parties to CITES have thus by subsequent agreement, and subsequent practice, interpreted their obligations under CITES Article II as requiring the Scientific Authority of an importing country to accept the non-detriment finding of the Scientific Authority of an exporting country, unless there are significant scientific or management data to indicate otherwise. Astor issued permits for the import into its territory of the Royal Markhor trophies for a period of 6 years from 2016–22. It has arbitrarily ceased to issue the permits post that period and has not shown any scientific or management data indicating detriment to the species. Astor is, therefore, in breach of its obligations under CITES Article II when read with Resolution 2.11.

3. *Alternatively, the Resolution clarifies the content of Astor's CITES obligations as a soft law instrument*

*Even if* the argument that the Resolution is a “subsequent agreement” and “subsequent practice” is not accepted, it is submitted that the Resolution is in the nature of *soft law*. It elaborates what the

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*Character of Decisions of Conferences of the Parties, in* INTERNATIONAL LAW-MAKING 190, 199 – 201 (Rain Liivoja and Jarna Petman, eds., 2013).

<sup>87</sup> International Law Commission (ILC) Draft Conclusions on Subsequent Agreements and Subsequent Practice in the Interpretation of Treaties, 2 Y.B. 392 (2001), 152, Conclusion 11.

substance of the obligations under the treaty are—when the treaty is implemented in good faith—thereby making its implementation more effective.<sup>88</sup>

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<sup>88</sup> Bowman et al., *supra* note 19, at 488; P. H. Sand, Whither CITES? The Evolution of a Treaty Regime in the Borderline of Trade and the Environment (1997) 8 E.J.I.L. 29, at 35.

## **CONCLUSION**

Rishmak requests the Court to adjudge that: (1) the trophy hunting of the Royal Markhor through the auction process complies with conventional international law and (2) the ban on the importation of Royal Markhor hunting trophies violates conventional international law.

**Respectfully submitted,**

Agents of Respondent

