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29th STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT COMPETITION, 2024-2025

THE INTERNATIONAL COURT OF JUSTICE

AT THE PEACE PALACE,

THE HAGUE, THE NETHERLANDS

THE CASE CONCERNING

QUESTIONS RELATING TO SUBSISTENCE USE AND TROPHY HUNTING

SOVEREIGN STATE OF ASTOR

(*APPLICANT*)

V

SOVEREIGN STATE OF RISHMAK

(*RESPONDENT*)

MEMORIAL FOR THE APPLICANT

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LIST OF ABBREVIATIONS

¶	Paragraph
AB	Appellate Body of the World Trade Organisation
ARTA	Astor-Rishmak Trade Agreement
BQMA	Beverly-Qamanirjuaq Barren Ground Caribou Management Agreement
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
Clarifications	Clarifications to the 29th Annual Stetson International Environmental Moot Court Competition Record
CMS	Convention on the Conservation of Migratory Species of Wild Animals
DG	Dione Ginsu
GATT	The General Agreement on Tariffs and Trade
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRW	International Convention for the Regulation of Whaling
ILO	Indigenous and Tribal Peoples Convention 1989
JAMBA	Japan–Australia Migratory Bird Agreement
NDF	Non-detriment finding
NGO	Non-governmental organisations
OED	Oxford English Dictionary
Panel	Panel of the World Trade Organisation
R	29th Annual Stetson International Environmental Moot Court Competition Record
RM	Royal Markhor
Survey	The survey conducted in 2022 which was properly weighted to be nationally representative of key demographics
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

QUESTIONS PRESENTED

I. WHETHER RISHMAK'S ACTIONS WITH RESPECT TO THE AUCTION PROCESS AND SUBSEQUENT TROPHY HUNTING OF THE RM VIOLATES CONVENTIONAL INTERNATIONAL LAW.

II. WHETHER ASTOR'S ACTIONS WITH RESPECT TO THE BAN ON THE IMPORTATION OF RM HUNTING TROPHIES COMPLIED WITH CONVENTIONAL INTERNATIONAL LAW.

STATEMENT OF JURISDICTION

On 1 July 2024, in accordance with Article 40 of the Statute of the ICJ, Astor and Rishmak (collectively known as "the Parties") submitted to the ICJ by Special Agreement, questions relating to subsistence use and trophy hunting.

The Registrar of the ICJ has acknowledged receipt of the Special Agreement to the Parties on 31 July 2024, pursuant to Article 26 of the Rules of Court.

The Parties have accepted the jurisdiction of the ICJ. Accordingly, they request the Court to adjudge the merits of this case following the rules and principles of general international law, as well as any applicable treaties. The Parties further request this Court to determine the legal consequences, including the rights and obligations of the Parties arising from any judgement on the questions presented in this matter.

STATEMENT OF FACTS

Astor and Rishmak are Members of the UN, and Parties to the statute of ICJ, VCLT, CITES, CMS. Rishmak is a Party to the ILO and the ICESCR, while Astor is not.

Astor and Rishmak are neighbouring States with a shared border.[1] The RM, a critically endangered species of wild goat, migrates along this border, making both Parties Range States.[2]

Under the World Bank's classification system, Astor is a high-income country while Rishmak has a low-income economy. The DG community is an indigenous community in Rishmak, and have the highest poverty rates within Rishmak. Owing to their relationship with the RM since time immemorial, the DG community has an exemption to hunt 10 RMs annually.[3] However since 2016, the DG community have auctioned off their right to hunt the RMs and the winning bidders are almost exclusively Astori nationals.[4]

From 2022 to 2023, a series of diplomatic notes were exchanged between Astor and Rishmak.[5] Astor had initiated the start of the diplomatic notes, and expressed its concerns that the hunting of the RM by non-Indigenous and non-traditional subsistence users would be in violation of Article III.5 of CMS.[6] In response, Rishmak defended the practice via Article 23 of the ILO and Article 26 of UNDRIP.[7] With regard to CMS, Rishmak justified the taking of the RM via exception (b) and (c) of Article III.5.[8]

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[1] R¶4.
[2] R¶1.
[3] R¶¶14-15.
[4] R¶16.
[5] R¶¶.
[6] R¶19.
[7] R¶20.
[8] R¶21.

With regard to CMS, Astor responded that the primary purpose of the taking of the RM was not to enhance the survival of the species and that the taking was by non-traditional subsistence users, excluding the taking from exceptions (b) and (c) of the CMS.[9] Rishmak opposed the restrictive readings of Article III.5, following which Astor countered that the auction process falls on the commercial side.[10]

NGOs in Astor raised concerns about trophy hunting and called on the legislature to ban the importation of trophy animals.[11] Public attitudes in Astor also showed opposition to the practice of trophy hunting.[12] In December 2022, the national legislature of Astor enacted a law that prohibited the importation of hunting trophies.[13] In response to this, Rishmak declared that the ban was an infringement on the subsistence rights of the DG community and that it had violated ARTA as it was a quantitative restriction.[14] Even though Astor conceded that the ban was a quantitative restriction, it justified its actions under Article 20(a) and (g) of the ARTA, and CITES.[15] However, Rishmak rejected Astor's arguments and was of the view that the ban did not contribute to the conservation of the RM and deprived the DG community of appropriate funding.[16] Rishmak also opposes the use of CITES for justification.[17]

Negotiations between the Parties continued before agreeing to submit the matter to the ICJ.[18]

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[9] R¶21.
[10] R¶¶22-23.
[11] R¶¶24-26.
[12] R¶28.
[13] R¶29.
[14] R¶32.
[15] R¶33
[16] R¶34.
[17] R¶34.
[18] R¶35.

SUMMARY OF ARGUMENT

I. Rishmak's actions with respect to the auction process and the subsequent trophy hunting violates conventional international law

Firstly, Rishmak violated Article III.5 of the CMS by allowing the auction of the trophy hunting rights and the subsequent taking of the RM. Exceptions (b) and (c) in Article III.5 do not apply to justify the taking of the RM. Firstly, exception (b) does not justify the taking of the RM because it was not precise as to content and the taking operated to the disadvantage of the species. Secondly, exception (c) does not justify the taking of the RM because the taking did not constitute subsistence use.

II. Astor's actions with respect to the ban on importations of RM hunting trophies complied with conventional international law

Firstly, while the ban on importation of RM hunting trophies would *prima facie* be a quantitative restriction in breach of Article 11 of the ARTA, the ban falls within the scope of exceptions (a) and (g) of Article 20. As such, the ban on the importation of hunting trophies would not be a breach of the ARTA. Secondly, the ban does not violate any provisions under CITES. The ban is in fact in line with Article III, Article XIV and all relevant Resolutions of CITES.

ARGUMENTS

I. RISHMAK VIOLATED ARTICLE III.5 OF CMS IN FAILING TO PROHIBIT THE TROPHY HUNTING OF CRITICALLY ENDANGERED RMS THROUGH THE AUCTION PROCESS

In permitting the auction, Rishmak violated Article III.5 of CMS. As both parties are range states to the RM, a migratory species listed in Appendix I, both States are obligated to prohibit the taking of the RM, subject to exceptions.[19] Rishmak has failed to do so.[20] The exceptions to Article III.5 also do not apply.

A. The auction process facilitated the unlawful taking of the RM by trophy hunters

First, trophy hunters had taken the RM. The CMS defines "taking" as "taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct".[21] By that definition, hunting or killing the RM is sufficient to constitute "taking". The trophy hunters had taken the RM by hunting and deliberately killing, and in one instance had attempted to hunt and kill the RM.[22]

Taking by the Astori trophy hunters would be unlawful as their purpose of obtaining hunting trophies in the form of the RM's hide and horns,[23] does not fall within any Article III.5 exceptions.[24] No other purpose can be computed to their taking, since the Astori trophy hunters had immediately demanded a refund for their hunting licences when Astor banned the import of hunting trophies, suggesting that obtaining the hunting trophies was their sole purpose.[25]

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[19] Convention on the Conservation of Migratory Species of Wild Animals art. III ¶5, June 23 1979, 1651 UNTS 333 [Hereinafter "CMS"].
[20] Record, ¶1, 8 [Hereinafter "R"].
[21] CMS art. I ¶1(i).
[22] R¶17; Clarifications.
[23] R¶17.
[24] CMS art. III ¶5.
[25] R¶31.

Such taking of critically-endangered migratory species for sport is precisely what the CMS aims to prevent.[26] This is emphasised in its preamble, where the goals of conservation and wise utilisation of natural resources are set out.[27] Therefore, the auction of RM hunting licences to trophy hunters violated the CMS Article III.5.[28]

B. Article III.5 exceptions do not apply, as the general requirements pertaining to all exceptions have not been met

(1) Exception (b) was not precise as to content as it was not drafted in Rishmak's legislature

CMS Article III.5 allows States to make such exceptions as listed, "provided that such exceptions are precise as to content and limited in space and time". This was understood to mean that the exceptions must be clearly drafted, geographically limited, and timebound.[29] The word "provided" suggests that any exception made according to the CMS must be contingent on these requirements.[30] If these requirements are not met, the exception does not come into effect and the State would still be obliged under Article III.5 to prohibit the taking.[31] This is to ensure that the exceptions allowing the taking of such critically endangered species are not arbitrarily made by States to excuse unlawful taking, according to the intent of the convention to "provide immediate protection for migratory species included in Appendix I".[32]

Rishmak has made no prior exception under exception (b) that the taking of RM may be permitted for the purpose of enhancing its propagation and survival.[33] On the facts, domestic

[26] CMS art. III ¶5.
[27] CMS Preamble.
[28] CMS art. III ¶5.
[29] CMS COP 13.
[30] OED page 1430.
[31] CMS art. III ¶5.
[32] CMS art. II ¶3(b).
[33] R ¶14.

law in Rishmak "strictly prohibits" the taking, with the sole exception made for the DG community for their subsistence use.[34] An exception under (b) could not have been precise as to content, not having been drafted at all.[35] Therefore, exception (b) has no application in Rishmak, and the taking was unlawful. Thus, Rishmak violated CMS Article III.5 by failing to prohibit the unlawful taking of the RM.

(2) The taking operates to the disadvantage of the RM

CMS Article III.5 qualifies that the exceptions can only be made where the takings they permit do not operate to the disadvantage of the species. The trophy hunting practice in Rishmak is a form of selective harvesting which would be detrimental to the long-term quality and survival of the RM.

This practice does not conform to the standards of other States in which trophy hunting is currently permitted in accordance with CMS and CITES.[36] In Pakistan, a similar auction process for the trophy hunting rights of the Markhor is used. However, the hunting process in Pakistan is restricted to older males that are no longer reproductively viable.[37] This is in contrast with the hunting in Rishmak, where using female estrus as lure facilitates the taking of male RMs which are still sexually active and able to produce offspring.[38]

Additionally, the taking of the RM would have negative implications on the rest of the population. Outward traits such as horns borne by male RMs, are traits used in sexual signalling and contests.[39] These particular traits show condition dependence: males with larger secondary

[34] R ¶14.
[35] R ¶14.
[36] CITES Resolution Conf. 10.15 (Rev. CoP14).
[37] Joni E. Baker, *Trophy hunting as a sustainable use of wildlife resources in southern and Eastern Africa*, 5 Journal of Sustainable Tourism 306–321 (1997); Lei No. 5.197, de 3 de novembro de 1967 (Braz.).
[38] R ¶17.
[39] Samuel Deakin et al., Ewe are what Ewe wear: Bigger horns, better ewes and the potential consequence of trophy hunting on female fitness in Bighorn Sheep, 289 Proceedings of the Royal Society B: Biological Sciences (2022).

sexual traits have better genetic quality.[40] As RMs are known and trophy hunted for their distinctive iridescent spiral horns, it is likely this would cause the selective harvest of male RMs with larger horns.[41] Therefore, as a consequence of selective hunting in a small population of 440, removing the males with the largest horns would lead to a loss of genetic variation and weaken the genetic pool of the RMs, hence reducing offspring of high genetic quality, and leading to an increased probability of extinction. As such, the trophy hunting is likely to disadvantage the RM's survival as a species, and would not be permitted under any exception pursuant to Article III.5.

C. Exception (b) does not apply as the primary purpose of the taking was not to enhance the propagation or survival of the RM

Even if the general requirements were met, the taking would not be excused under exception (b). Exception (b) allows the taking of Appendix I species if "the taking is for the purpose of enhancing the propagation or survival of the affected species".[42] The specific use of the word "the" in exception (b) would indicate that the exception should only apply when the propagation or survival of the affected species is the sole or primary purpose of the taking.[43] Taking into account the intent of the CMS, which is to "avoid any migratory species becoming endangered",[44] allowing parties to rely on this exception when conservation is not the primary purpose would undermine its intention. On this basis, the 15% allocation of funds for research and conservation would be considered too meagre to constitute the sole or primary purpose of

[40] Robert J. Knell & Carlos Martínez-Ruiz, Selective harvest focused on sexual signal traits can lead to extinction under Directional Environmental Change, 284 Proceedings of the Royal Society B: Biological Sciences 20171788 (2017).
[41] R¶1.
[42] CMS art. III ¶5(b).
[43] CMS art. III ¶5(b); Vienna Convention on the Law of Treaties, art. 26, May 25, 1969, art. 31 ¶1, 1155 U.N.T.S. 331 [Hereinafter "VCLT"].
[44] CMS art. II ¶2.

the taking, as it might result in hunters exploiting the exception by hunting a critically endangered animal in exchange for a small contribution made towards its conservation.[45]

D. The taking would not fall under CMS Article III.5 exception (c)

As aforementioned, the trophy hunters had taken the RM for the purpose of obtaining their horns and hide as trophies. This purpose is not excused by any exception. However, even proceeding on the basis that the RM was taken by the DG community despite being killed by trophy hunters, the purpose of their taking still would not fall under exception (c).

(1) Exception (c) requires the taking be for subsistence use

Exception (c) allows the taking of Appendix I species if it is done to accommodate the needs of traditional subsistence users of that species.[46] The OED defines "subsistence" as "the action of fact of maintaining or supporting oneself at a minimum level". This court has on multiple occasions referred to the OED to define terms in treaties.[47] This definition leads to the inference that if a group does not use the animal for subsistence and is still able to maintain themselves as a group, they would not constitute "traditional subsistence users". Since traditional subsistence users of the species would not be able to maintain their lives or the culture that defines their group without the subsistence use of the animal, their "needs" must refer to subsistence use. Hence, the requirement that the purpose of the taking should be for subsistence use is inherent to exception (c).

This interpretation of the provision's ordinary meaning is further supported by its object and purpose. The intent of this exception was to achieve a balance between the goal of wildlife conservation and the rights of indigenous communities reliant on the animal for subsistence,

[45] R¶16.
[46] CMS art. III ¶5(c).
[47] Oil Platforms (Iran v. USA) (1996) ¶45; Maritime Dispute (Peru v Chile) (2014) Decl. President Tomka, ¶12; (Bosnia v Serbia) (2007) Decl. Judge Keith, ¶3.

which can also be sustainably leveraged to enhance conservation.[48] This intent is shared by the BQMA, which regulates the taking of an endangered migratory species which indigenous communities traditionally depend on for subsistence with a similarly-worded provision allowing for traditional users to hunt caribou.[49]

In Section A(3) of the BQMA, "traditional users" are defined as " persons recognised by communities on the caribou range as being persons who have traditionally and currently hunted caribou for subsistence".[50] This definition substantiates the interpretation of the CMS, as it shares its wording and intent with exception (c)..[51]

Even though the caribou is not an Appendix I species, the BQMA has limited the rights to take the species to only traditional users, defined narrowly as those currently dependent on the animal for subsistence.[52] The phrase "traditional subsistence users" in exception (c) is analogous in plain wording as well as intent.[53] It should thus be interpreted similarly.

Even if the requirement of subsistence use cannot be universally applied in the reading of exception (c), it would still apply in the current dispute. Per the VCLT Article 31(4), a special meaning shall be given to a term if it is established that the parties so intended. Here, both parties understood the exception to require that the species taken must be for subsistence use. In the diplomatic note forwarded to Astor on the 16th of June 2022, Rishmak initiated the argument that the purpose of their taking does constitute "subsistence" and hence should fall under exception (c).[54] The title of the Record, "Questions Relating to Subsistence Use and

[48] CMS art. III ¶5(c); CMS Resolution 14.17; The Strategic Plan for Migratory Species 2015-2023, Goal 4 Target 11, prepared in response to CMS COP10.
[49] Beverly-Qamanirjuaq Barren Ground Caribou Management Agreement, sect. A ¶3 [Hereinafter "BQMA"].
[50] BQMA sect. A ¶3.
[51] BQMA, Section A ¶3; Species at Risk Act, First Schedule Part 2.
[52] BQMA, Section A ¶3.
[53] CMS art. III ¶5(c).
[54] R¶20.

Trophy Hunting", further indicates both parties' intention to construe the terms of the exception to require the taking be for "subsistence use".[55]

(2) Subsistence use precludes commercial use

The OED further elaborates on its definition of "subsistence", stating that "minimum level" would refer to "a level that is sufficient only for one's own use or consumption, without any surplus for trade". This definition should be taken in the characterisation of "subsistence use" to preclude commercial purposes, as the ordinary meaning of the term of the treaty in its context per VCLT Article 31(1).

In the ICRW Schedule paragraph 13(b)(3), there is a requirement that an exception may only be made to cater to the subsistence needs of aborigines if the meat and products are to be used exclusively for local consumption.[56] This use of the term "subsistence" in the context of international law relating to indigenous peoples is in line with the definition found in the OED.[57] This supports the reading that exception (c) should only permit the taking of Appendix I species for subsistence use in the narrow sense, precluding commercial trade.[58]

Where exception (c) has been adopted in the subsequent practice of States that are parties to the CMS, it has been construed similarly to distinguish subsistence and commercial use. This is evident in the 1981 bilateral agreement between Australia and Japan for the protection of migratory birds in danger of extinction and their environment, drafted with reference to the CMS.[59] There, exception (c) was phrased "to allow the hunting and gathering of specified birds or their eggs by the inhabitants of certain regions who have traditionally carried on such

[55] R.
[56] ICRW Schedule ¶13(b)(3).
[57] OED.
[58] Membership, https://iwc.int/members (last visited Nov 8, 2024).
[59] JAMBA.

activities for their own food, clothing or cultural purposes, provided that the population of each species is maintained in optimum numbers and that adequate preservation of the species is not prejudiced".[60] This clearly characterises "subsistence use" to exclude trade in the species. Australia has since signed the same agreement with China and Korea.[61] Brazil has also implemented exception (c) in its national laws to distinguish subsistence hunting and commercial hunting, permitting only the former.[62] Such practice in the application of the treaty is considered in its interpretation.[63]

(3) The taking of the RM by the DG cannot be justified under exception (c) of the CMS as it was motivated by commercial interests instead of subsistence use

In the 2014 case of *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, the AB held that an exception to trade restriction imposed upon seal products cannot be afforded to indigenous taking of seals when the taking was for a commercial purpose.[64] This exception was phrased similarly to exception (c), providing for "seal products [that] result from hunts traditionally conducted by the Inuit and other indigenous communities and contribute to their subsistence".[65]

Regarding the interpretation of the "subsistence use" requirement in the seal products exception, the court was "troubled" by the EU's position that "once a seal hunt has been classified as an IC hunt, the degree of commercialisation is irrelevant".[66] This suggests that the court did not condone the arbitrary distinction between commercial activities done by

[60] JAMBA Article II.1(d).
[61] CAMBA 1988; KAMBA 2007.
[62] Chiara Bragagnolo et al., Hunting in Brazil: What are the options?, 17 Perspectives in Ecology and Conservation 71–79 (2019).
[63] VCLT, Article 31(3)(b).
[64] European Communities - Measures Prohibiting the Importation and Marketing of Seal Products, Report of the Appellate Body, WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) [Hereafter "*EC - Seal Products*"].
[65] *EC - Seal Products*, ¶5.322.
[66] *EC - Seal Products*, ¶5.326.

indigenous communities and that done by non-indigenous peoples. If an indigenous community commercialises their taking, such that it is no longer for subsistence use, it should be characterised as commercial activity and precluded from exception (c).

The court took this position notwithstanding the Inuit community's consumption of the seal meat, the sustainability of its taking and the relative inelasticity of supply compared to non-indigenous commercial hunting.[67] These facts are analogous to the DG's taking of the RM.

The DG community has neither allowed the RM to be hunted by males reaching adulthood as a rite of passage, nor kept the horns for their cultural significance.[68] Instead, they have auctioned it off to trophy hunters for revenue.[69] They obtained approximately USD $150,000 per RM.[70] Moreover, for each hunt, the trophy hunters are required to hire DG guides.[71] These are commercial transactions which do not constitute "direct personal or family consumption".[72] Therefore, the taking of the RM was not for subsistence use and there is no longer justification for them to continue being allowed to take the RM per exception (c).

[67] *EC – Seal Products* ¶2.173 and ¶2.174.
[68] R ¶14 and ¶16.
[69] R ¶16.
[70] R ¶16.
[71] R ¶16.
[72] ANILCA Section 803.

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

A. Astor's import ban does not violate the ARTA as it falls under the general exceptions under Article 20 of the ARTA

The import ban *prima facie* appears to be in breach of Article 11 of the ARTA, as it is a quantitative restriction on trade. However as the ban falls under the scope of exceptions (a) and (g), and satisfies the requirements laid out in the chapeau of Article 20, it would not be a breach of the ARTA.[73] This is because the ban is necessary to protect public morals, and relates to the conservation of exhaustible natural resources.

(1) The ban falls under the scope of exception (a)

The import ban does not violate the ARTA as it is necessary to protect the public morals of Astor's citizens.

(a) Trophy hunting of internationally protected animals offend Astor public morals

Public morals are defined as a "standard of right and wrong conduct maintained by or on behalf of community or nation".[74] This could "vary in time and space, depending upon a range of factors including prevailing social, cultural, ethical and religious values".[75]

This ban would protect Astor's public morals, as Astoris strongly oppose the trophy hunting of internationally protected animals such as the RM. Polling of public attitudes in Astor have found "consistent opposition" to trophy hunting, and according to the Survey, 90% of Astoris

[73] *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (November 10, 2004) [Hereinafter "*US Gambling*"], ¶6.449.
[74] *US Gambling*, ¶6.465.
[75] *US Gambling*, ¶6.461.

oppose the hunting of specifically internationally protected animals.[76] Additionally, there is a significant existence of NGOs in Astor, with multiple NGOs opposing trophy hunting in Astor, and the Astor Society for the Human Treatment of Animals being the largest with 12 million members.[77] States are given some scope in defining and applying the concepts of public morals in their respective territories.[78] By taking the above evidence as a whole, it is clear that trophy hunting of internationally protected animals offends the public morals of Astor.[79]

The protection of endangered species as a public moral is further bolstered by international agreements such as CITES, of which many States are parties to, including Astor and Rishmak. Within CITES' preamble, States have recognised the need to protect wild fauna and flora, affirming that it may be a public moral. It has been acknowledged that international agreements are useful in illustrating that certain issues may be a matter of morals for human beings in general.[80] Additionally, in *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, gambling was found to constitute a legitimate issue of public morality, primarily based on evidence that many countries in addition to the United States held the same view.[81]

(b) The ban is necessary to protect public morals

The import ban is necessary to protect public morals for three reasons, by applying the factors of the balancing test established in *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*.[82]

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[76] R¶28.
[77] R¶24.
[78] *US Gambling*, ¶6.461.
[79] *EC – Seal Products*, ¶7.409.
[80] *EC – Seal Products*, ¶7.409.
[81] *US Gambling*, ¶¶6.471-6.474.
[82] *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Report of the Appellate Body, WT/DS161/AB/R, WT/DS169/AB/R (December 11, 2000) [Hereinafter "*Korea Beef (AB)*"], ¶¶162-163.

First, as contemplated by the AB in *Korea Beef*, a ban would be considered necessary if the interests or values that the ban intended to protect were important.[83] It has been affirmed that the protection of public morals "ranks among the most important values or interests pursued" as a matter of public policy.[84] The Panel in *China Audiovisual* also noted that they did not consider it "simply accident" that the exception relating to public morals was the first exception identified in Article XX of GATT, similar to the order of the public morals exception in ARTA, concurring that the protection of public morals was a "highly important value or interest".[85]

Secondly, the ban would be considered necessary as it contributes to the protection of Astor's public morals to a large extent, as trophy hunting of RM has ceased following the ban.[86] As the horns and hide form a large motivation in trophy hunting, to the extent that hunters have requested refunds since they were no longer permitted to import hunting trophies, placing a ban on the importation of hunting trophies has contributed greatly to the prevention of trophy hunting of the RM. While previously Astori trophy hunters could take advantage of the auction process that allowed them to hunt RMs in Rishmak and import the trophies, the current ban has reduced trophy hunting of the RM, an internationally protected species, evident from the fact that the DG have been unable to auction off the rights to hunt the RM.[87]

Thirdly, the ban would be considered necessary as there are no WTO consistent alternatives that would be satisfactory.[88] As a starting point, the party challenging the trade restrictive measure bears the burden of proof to identify a "reasonably available alternative measure". This burden hence lies on Rishmak and it is not Astor's burden to show in the first instance,

[83] *Korea Beef (AB)*, ¶¶162-163.
[84] *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* [Hereinafter "*China Audiovisual*"], WT/DS363/R (August 12, 2009), ¶7.817.
[85] *China Audiovisual*, ¶7.817.
[86] *Korea Beef (AB)* , ¶¶162-163.
[87] R¶31.
[88] *Korea Beef (AB)*, ¶¶162-163.

that there are no reasonably available alternatives to achieve its objectives, as this would be an "impracticable and often impossible" burden.[89] However, upon the facts, no such alternative has been identified by Rishmak. Even if such an alternative has been identified, a ban would still be necessary as any other alternative, reasonably available in view of the interests and the values the ban pursues to protect and level of the protection desired, would not be satisfactory. As such, the ban would still be considered necessary.

(2) The ban falls under the scope of exception (g)

The import ban does not violate the ARTA as it relates to the conservation of exhaustible natural resources and is made effective in conjunction with restrictions on domestic production or consumption.[90]

(a) The ban primarily relates to the conservation of exhaustible natural resources

The ban must be primarily aimed at the conservation of the RM, an exhaustible natural resource,[91] to be considered as "relating to" conservation within the meaning of Article 20(g).[92]

There must be "a close and genuine relationship of ends and means" between the ban and the conservation objective.[93] A measure that is merely "incidentally" or "inadvertently" aimed at a conservation objective would hence not fall under the scope of exception (g).[94] The ban on the importation of hunting trophies has a close and genuine relationship with the conservation of the RMs as it has directly resulted in ceasing RM deaths through trophy hunting. This is

[89] *US Gambling*, Report of the Appellate Body, WT/DS285/AB/R (April 7, 2005), ¶¶309-310.
[90] ARTA Art 20(g).
[91] *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, WT/DS58/AB/R (October 12, 1998) [Hereinafter "*US Shrimp*"], ¶131.
[92] *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268 - 35S/98, (adopted March 22, 1988) [Hereinafter "*Canada Herring*"], ¶4.6.
[93] *Canada Herring*, ¶4.6.
[94] *China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum* [Hereinafter "*China Rare Earths*"], WT/DS431/R, WT/DS432/R, WT/DS433/R (March 26, 2014).

because the ban has prevented Astori trophy hunters from being able to import the RM hunting trophies back to Astor, and hence they no longer wish to hunt the RM. As the winning bidders of the auctions for the right to hunt RMs are almost exclusively Astori nationals, the DG community has been unable to auction off these rights after the ban. This has resulted in zero RMs being killed by Astoris through the trophy hunting process, hence the ban can be said to contribute to conservation of the RMs.

The ban on the importation of RM hunting trophies is similar to the United States' ban on importation of polar bear trophies in 2008, where the ban did not prohibit American citizens from hunting polar bears abroad, but only prohibited the importation of polar bear hunting trophies.[95] However, despite speculations that American hunters would continue to hunt polar bears for sport at similar rates despite the prohibition on importing trophies, the ban in fact resulted in a decrease of 41.7% of polar bears being killed. A further survey conducted on American polar bear hunters revealed that 80% of hunters completely lost interest in participating in trophy hunting when they were banned from bringing back the trophies to their home country.[96] The ban had therefore contributed to the conservation of polar bears by reducing overall demand.[97]

As there is the presence of a domestic restriction on trophy hunting of the RMs, notably that the national laws of Astor strictly prohibit the taking of the RM, this would further support the assessment that the ban relates to conservation.[98]

[95] Congress. "Marine Mammal Protection Act of 1972". Government. U.S. Government Publishing Office, December 27, 2022. Sec 101.
[96] Steven H. Ferguson, M.M.R. Freeman and L. Foote (eds): Inuit, polar bears, and sustainable use: Local National and International Perspectives, 38 Human Ecology 463–465 (2010) at p 76.
[97] Killing for trophies: An analysis of global trophy hunting trade, International Fund for Animal Welfare, https://www.ifaw.org/resources/killing-for-trophies, at p 19.
[98] R¶14.

(b) The ban is made effective in conjunction with restrictions on domestic production or consumption

The terms "in conjunction" and "made effective" have been defined in that the restrictions on domestic production and consumption must already be in force, and must operate jointly with the ban towards a conservation objective.[99] In the present case, Astor has strictly prohibited the taking of the RMs since the species were added to the CITES Appendix I in 2009, which prevents domestic production and consumption.[100] Hence, the restriction on domestic production and consumption is real and presently in force. While Astoris were previously able to "take" RMs by bidding for the right to hunt in Rishmak, the ban on the importation of hunting trophies has put a stop to the trophy hunting of RMs in Rishmak by Astori nationals. Hence, as the ban has rendered effective the domestic restrictions on taking of the RM, the ban has been made effective in conjunction with restrictions on domestic production or consumption.[101]

(3) The ban satisfies the chapeau requirements

The chapeau requirements relate to the application of the ban and not examination of the ban itself, since the contents of the ban itself has already been examined under the exceptions in Article 20.[102]

(a) The ban is not arbitrary

The ban would not be arbitrary as it is a law that prohibits the importation of hunting trophies, and the law was passed by both chambers of Astor's legislature.[103] This is distinguishable from

[99] *China Rare Earths*, ¶5.92.
[100] R¶14.
[101] *Canada Herring*, ¶4.7.
[102] *United States - Imports of Certain Automotive Spring Assemblies*, L/5333 - 30S/107 (adopted May 26, 1983) [Hereinafter "*US Spring*"], ¶56.
[103] R¶29.

United States — Import Prohibition of Certain Shrimp and Shrimp Products, where the measure was concluded to be applied in a manner that was "arbitrary". This is because there was a lack of a transparent, predictable certification process carried out formally by the United States government.[104]

(b) The ban does not constitute a disguised restriction on international trade

The ban does not constitute a disguised restriction on international trade because it has not been applied in a manner that would be considered a "disguised" restriction. The term "disguise" suggests the intention to conceal something, as defined in *European Communities–Asbestos.*[105]

In the present case, the law prohibiting the importation of hunting trophies was enacted after passing both chambers of the national legislature of Astor, and Rishmak was aware of the enactment.[106] Similarly, in *United States - Imports of Certain Automotive Spring Assemblies*, notice of the exclusion order was openly published in the Federal Register and the order was enforced by the United States Customs at the border.[107] Hence it was concluded that the measure had not been applied in a manner which constituted a disguised restriction on international trade.

Additionally, upon reception of Rishmak's diplomatic note, Astor also immediately conceded that the ban would constitute a quantitative restriction that would breach Article 11 of ARTA, and there was no denial that it was a trade measure.[108] Similarly, the United States' prohibition on the importation of tuna products in *United States — Prohibition of Imports of Tuna and Tuna Products from Canada* was not considered to be a disguised restriction on international

[104] *US Shrimp*, ¶177.
[105] *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/R, (September 18, 2000).
[106] R¶¶29,32.
[107] *US Spring*, ¶56.
[108] R¶33.

trade, because in the course of consultations, the United States did not dispute that the trade measure was in violation of GATT. Hence their action was said to be "taken as a trade measure and announced as such".[109]

B. The ban does not violate any of the provisions under CITES

The obligations arising from ARTA should be interpreted in light of the provisions in CITES, as both parties were parties to CITES before ARTA was signed. This is further affirmed by ARTA's preamble which states that its provisions should be undertaken in a manner that is "consistent with environmental protection and conservation".[110] As a convention that relates to conservation of endangered species, CITES would have been considered and contemplated by the drafters of ARTA.

(1) Article XIV allows States to adopt stricter domestic measures

Article XIV states that States' rights to adopt stricter domestic measures regarding the trade, taking, possession or transport, or the complete prohibition thereof, of specimens of species included in Appendix I should not be affected by the provisions of CITES. The ban is hence in line with Article XIV.

Resolution 6.7 of the Conference of the Parties to CITES recommends that a reasonable effort be made to notify affected Range States prior to the adoption of such a measure and consult with the States concerned.[111] Astor has complied with Resolution 6.7 by initiating an exchange of diplomatic notes, starting from 22 May 2022.[112] In fact, it was specifically articulated in the diplomatic note forwarded to Rishmak, that Astor wished to "open a dialogue" regarding

[109] *United States — Prohibition of Imports of Tuna and Tuna Products from Canada*, L/5198 - 29S/91 (adopted February 22, 1982), ¶4.8.
[110] R¶12.
[111] CITES Resolution Conf. 6.7.
[112] R¶19.

concerns about the taking of the RM.[113] An effort had also been made to consult Rishmak across the multiple diplomatic notes exchanged, where Astor had consistently emphasised concerns about Astori trophy hunters taking RMs.

Even if Resolution 6.7 has not been complied with, there is no obligation that Astor must comply with the concerns and wishes of Rishmak. Instead, States are the "best protector of their own wild fauna" and are given the discretion to adopt their own domestic measures, as recognised in CITES' preamble. As the RM can also be found naturally within Astor's territory, Astor remains free to exercise their discretion and adopt measures as they see fit.

(2) The ban is in line with the trade regulations outlined in Article III

Article III states that the trade of Appendix I species must be in accordance with its provisions, hence the requirements to grant an import and export permit must be met. The ban is in line with Article III because the requirements to grant an import permit under Article III(3) have not been met. As Astor has determined that the importation of hunting trophies are for purposes which are detrimental to the survival of the RMs, an import permit should not be granted.[114] Since the grant of an export permit is contingent on the grant of an import permit, accordingly, an export permit cannot be granted by Rishmak.[115]

While Resolution 2.11 of the Conference of the Parties to CITES recommends that the Scientific Authority of the importing country accept the findings of the exporting country, this recommendation does not apply as there is scientific data to indicate otherwise.[116] There has in fact been scientific data published by Proceedings of the Royal Society which indicates that trophy hunting and the subsequent importation of the hunting trophies would be detrimental to

[113] R¶19.
[114] CITES Art III(3)(a).
[115] CITES Art III(2)(d).
[116] CITES Resolution Conf. 2.11 (Rev.), ¶1(b).

the survival of the RM as a species, due to the presence of their horns which are a secondary sexual trait. As their horns are affected by condition dependence, trophy hunting would hence have negative implications on the rest of the population.[117]

Even if Resolution 2.11 applies, CITES Resolutions are only recommendations and are only intended to provide "guidance" to parties.[118] As such, they would not be binding on parties.[119]

[117] See (I)(E).

[118] Resolutions of the conference of the parties in effect after the 19th meeting | cites, https://cites.org/eng/res/index.php (last visited Nov 15, 2024).

[119] Stephen Hernick, Banning Imports of Hunting Trophies and Protecting Endangered Wildlife, 50 Denv. J. Int'l L. & Pol'y 1 (2021-2022), 4.

CONCLUSION

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

1. Rishmak's actions with respect to the auction process and the subsequent trophy hunting violates conventional international law, and
2. Astor's actions with respect to the ban on importations of RM hunting trophies complied with conventional international law.

Respectfully submitted,

AGENTS FOR THE APPLICANT