TELDERS INTERNATIONAL MOOT COURT COMPETITION

2018

The Plight of the Dandy Narwhals

(Alfania v. Barbarossa)

Written Memorial on behalf of Alfania

(Applicant)

Registration Number

21-I-A

(a) Table of Contents

(b) List of Abbreviations

Add.	*Addendum*
Art./ Arts.	Article/ Articles
AJIL	American Journal of International Law
APJEL	Asia Pacific Journal of Environmental Law
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
ass. ed.	assistant editor
BJIL	Brooklyn Journal of International Law
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
Corr.	*Corrigendum*
DADP	Draft Articles on Diplomatic Protection
DALT	Draft Articles on the Law of Treaties
DJILP	Denver Journal of International Law and Policy
DSR	Dispute Settlement Reports
EC	European Communities
ed./ eds.	editor/ editors
edn.	edition
EIA	Environmental Impact Assessment
EJIL	European Journal of International Law
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
Ibid.	*Ibidem*
ICJ	International Court of Justice
ICSID	International Center for Settlement of Investment Disputes

Id.	*Idem*
i.e.	*id est*
IJIL	Indonesian Journal of International Law
ILC	International Law Commission
ILO	International Labour Organization
JWIT	The Journal of World Investment & Trade
km	kilometers
NAFTA	North American Free Trade Agreement
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
No./ no.	number
OJ	Official Journal of the European Union
p./ pp.	page/ pages
para./ paras.	paragraph/ paragraphs
PCIJ	Permanent Court of International Justice
Res.	Resolution
rev.	revised
RHDI	The Revue Hellénique de Droit International
ser.	series
TACK Treaty	Treaty of Amity, Commerce and Kinship
TFEU	Treaty on the Functioning of the European Union
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
UNYB	Max Planck Yearbook of United Nations Law
UoB	University of Barbarossa
UPLR	University of Pennsylvania Law Review
US	The United States of America
v.	*versus*
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization
YBILC	Yearbook of the International Law Commission

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(d) Statement of Relevant Facts

1. Alfania and Barbarossa are two neighbouring countries separated by Lake Theth, which lies entrirely in Barbarossan territory. The border between the two countries is located on the Alfanian shoreline of the lake with a length of about 1000km.

2. In 1955, Alfania and Barbarossa concluded the Treaty of Amity. Commerce and Kinship, which refers to diplomacy, defence and commerce. Art. II of the Treaty provides for the prohibition of discriminatory measures against natural or legal persons of the other party that would impair their legally acquired rights and interests.

3. On 1 January 2009, Barbarossa provided tax incentives for firms operating within its jurisdiction to incorporate under Barbarossan law. Rocacorba, an Alfanian tourism firm that conducted trips in Lake Theth, decided to incorporate a local subsidiary, Sacalm Holidays. The boats that Sacalm Holidays owns, manages and operates previously belonged to Rocacorba.

4. The main tourist attraction in Barbarossa is the trip to the breeding grounds of Dandy Narwhals. They are listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora as an endangered species. Trips to the breeding grounds of Dandy Narwhals are conducted by Sacalm Holidays as well as local vessels. The former is the most popular, due to its high speed vessels and as a result Sacalm Holidays daily conducts ten trips. The catamarans operated by Sacalm Holidays emit *cafea calida*, a chemical banned in three countries and regulated in three other countries.

5. In 2014, the Barbarossan Government noticed a decline in Dandy Narwhal populations that heavily affected tourism numbers. Barbarossa contracted and funded the University of Barbarossa to enquire on the reasons of Dandy Narwhals' decline. The University of Barbarossa report was not delivered until 2016. It supported that the *cafea calida* emissions by Sacalm's vessels were fatal to Dandy Narwhal populations. It, moreover, suggested that

the continuance of the trips at the current rate for another two years would lead to their extinction.

6. In light of this report, and after public consultations, Barbarossa established the Lake Theth Protected Area, a non-navigation zone for *cafea calida* emitting vessels, around the breeding grounds of Dandy Narwhals. As a result, Sacalm Holidays could no longer operate and, thus, custom numbers of local vessels rose. It was for this reason that Alfania accused Barbarossa of breaching Art. II of the TACK Treaty.

7. In 2017, the Dandy Narwhal populations and tourist numbers gradually rose, with the latter, however, not yet having reached their pre-2013 levels. Nevertheless, Barbarossa made clear that it considered rendering the Lake Theth Protected Area permanent.

8. On 31 August 2017, the two States concluded a special agreement requesting the International Court of Justice to adjudicate whether Art. II of the TACK Treaty applies to measures imposed on Sacalm Holidays. They further requested the Court to adjudge whether Barbarossa had breached Art. II of the TACK Treaty, by establishing the Lake Theth Protected Area. Finally, they asked whether Barbarossa's conduct could be justified by necessity. The parties agreed that no question of exhaustion of local remedies arose.

(e) Issues

I. Does Art. II of the TACK Treaty apply to measures imposed on Sacalm Holidays, an enterprise incorporated in Barbarossa?

A. What is the nationality of Sacalm Holidays according to Art. II of the TACK Treaty?

1. How should the term "*legal persons of the other party*" in Art. II of the TACK Treaty be interpreted?

2. Are there relevant rules for the interpretation of Art. II of the TACK Treaty?

3. What is the nationality of Sacalm Holidays under Art. II of the TACK Treaty, if interpreted according to Art. XXVIII(m)(ii) of the GATS?

B. Does Art. II of the TACK Treaty protect Rocacorba's interests?

II. Has Barbarossa breached Art. II of the TACK Treaty through the establishment of the Lake Theth Protected Area?

A. Does the establishment of the Lake Theth Protected Area constitute a discriminatory measure in the sense of Art. II of the TACK Treaty?

1. Which is the proper interpretation of "*discrimination*" in Art. II of the TACK Treaty?

2. Has Barbarossa breached Art. II of the TACK Treaty by imposing measures on Sacalm Holidays?

3. Do the measures fall under Art. XIV of the GATS?

4. Can the CITES be considered as a relevant rule for the interpretation of Art. II of the TACK Treaty?

5. Are the customary rules on the protection of the marine environment and on international watercourses relevant for the interpretation of Art. II of the TACK Treaty?

B. Are the measures discriminatory on Rocacorba?

III. Can Barbarossa's conduct be justified by necessity?

A. Are the requirements of customary law, as reflected in Art. 25 of the ARSIWA, satisfied?

1. Can Barbarossa invoke necessity for environmental and cultural reasons?

1.1 Do Barbarossa's environmental and cultural interests constitute an essential interest under grave and imminent peril?

1.2 Is the establishment of the Lake Theth Protected Area the "*only way*" for Barbarossa to safeguard her interests?

1.3 Has Barbarossa contributed to the state of necessity?

1.4 Has Barbarossa's state of necessity ceased to exist?

2. Can Barbarossa invoke a state of necessity on the basis of financial interests?

(f) Summary of Arguments

I. ART. II OF THE TACK TREATY APPLIES TO MEASURES IMPOSED ON SACALM HOLIDAYS, AN ENTERPRISE INCORPORATED IN BARBAROSSA.

A. According to Art. II of the TACK Treaty, Sacalm Holidays is of Alfanian nationality and it, thus, constitutes a "*legal person of the other party*".

1. The term "*legal persons of the other party*" in Art. II of the TACK Treaty must be interpreted broadly, according to the customary rule of interpretation, so as to correspond to contemporary trade relations. Art. XXVIII(m)(ii) of the GATS is the most appropriate rule for the interpretation of Art. II of the TACK Treaty, since it is almost identical to the latter, it provides for the nationality of legal persons in the context of trade and is in accordance with the object and purpose of the TACK Treaty.

2. In this sense, Sacalm Holidays is of Alfanian nationality, since it is a legal person supplying a service through commercial presence in the territory of another State and is owned by a legal person of Alfanian nationality.

B. Art. II of the TACK Treaty protects Rocacorba's interests, as it provides for the protection of "*legally acquired interests*" and Rocacorba is the sole shareholder of Sacalm Holidays.

II. BARBAROSSA, BY ESTABLISHING THE LAKE THETH PROTECTED AREA, HAS BREACHED ART. II OF THE TACK TREATY.

A. The establishment of the Lake Theth Protected Area is a discriminatory measure in the context of Art. II of the TACK Treaty.

1. The term "*discrimination*" in Art. II of the TACK Treaty must be interpreted according to the standard of national treatment, since Art. XVII of the GATS is a relevant rule binding upon the parties.

2. The measures imposed by Barbarossa breach Art. II of the TACK Treaty as they constitute *de facto* discrimination between like services and service suppliers.

3. The establishment of the Lake Theth Protected Area does not fall under the environmental exception of Art. XIV of the GATS, a relevant rule for the interpretation of Art. II of the TACK Treaty, since the measure is not necessary and also constitutes arbitrary and unjustifiable discrimination as well as a disguised restriction on international trade.

4. The CITES is not a relevant rule for the interpretation of Art. II of the TACK Treaty, since it provides for the protection of endangered animals from threats posed on them by trade.

5. The customary law on the protection of the marine environment and that on international watercourses are not relevant for the interpretation of Art. II of the TACK Treaty as the Lake Theth is neither a sea nor an international watercourse.

B. The measures were discriminatory against Rocacorba.

III. BARBAROSSA'S CONDUCT CANNOT BE JUSTIFIED BY NECESSITY.

A. The prerequisites for the plea of necessity under customary law, as reflected in Art. 25 of the ARSIWA, are not met.

1. Barbarossa cannot invoke necessity for environmental and cultural reasons.

1.1 The environmental and cultural interests of Barbarossa constitute an essential interest under grave and imminent peril as the decline in Dandy Narwhals is severe.

1.2 The establishment of the Lake Theth Protected Area is not the "*only way*" for Barbarossa to protect its interests, since there are alternative measures that could have been employed, such as the reduction of trips conducted by Sacalm Holidays in Lake Theth.

1.3 Barbarossa has contributed to the state of necessity through its lack of proper action at the proper time as well as through its failure to conduct an Environmental Impact Assessment and to cooperate with Alfania. Furthermore, the state of necessity has ceased to exist as the populations of Dandy Narwhals are on the rise.

2. Despite aiming to safeguard an essential interest that is under grave and imminent peril, Barbarossa cannot invoke a state of economic necessity, since the measures adopted are not the only way to protect its financial interests, Barbarossa has contributed to the state of necessity and the state of necessity has ceased to exist.

(g) Jurisdiction of the Court

Alfania and Barbarossa are both Members of the United Nations and parties to the Statute of the International Court Justice. In light of Art. 36(1) of the ICJ Statute, the parties to the dispute have concluded a special agreement on 31 August 2017 in order to file their dispute before the International Court of Justice. The jurisdiction of the International Court of Justice over the present case is, thus, founded on Art. 36(1) of the ICJ Statute.

(h) Argument

I. ART. II OF THE TACK TREATY APPLIES TO MEASURES IMPOSED ON SACALM HOLIDAYS, AN ENTERPRISE THAT IS INCORPORATED IN BARBAROSSA.

A. Introduction

It is the submission of Alfania that Art. II of the Treaty of Amity, Commerce and Kinship (hereinafter the TACK Treaty) applies to measures imposed on Sacalm Holidays. It is submitted that Sacalm Holidays falls within the ambit of Art. II of the TACK Treaty, should the term "*legal persons of the other party*" be interpreted broadly and in line with Art. XXVIII(m)(ii) of the General Agreement on Trade in Services (hereinafter the GATS). Finally, it is contended that Rocacorba's interests are protected by the TACK Treaty.

B. Sacalm Holidays is of Alfanian nationality and thus falls under the scope of Art. II of the TACK Treaty.

1. The term "*legal person of the other party*" in Art. II of the TACK Treaty should be interpreted broadly.

It is submitted that the term "*legal persons of the other party*" in Art. II of the TACK Treaty should be interpreted according to Art. 31 of the Vienna Convention on the Law of Treaties (hereinafter the VCLT).[1] Although the TACK Treaty was concluded prior to the entry into force of the VCLT, whose Art. 4 stipulates that the VCLT is not applicable to treaties concluded prior to its entry into force,[2] Art. 31 of the VCLT reflects customary international law.[3]

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[1] VCLT.

[2] Aust, 2013, p. 8; Abass, 2012, p. 80; Fitzmaurice, 2014, p. 167.

[3] *Kasikili/Sedudu* case, 1999, para. 18; Shaw, 2008, p. 933.

The starting point of interpretation is always the ordinary meaning of the terms.[4] The ordinary meaning of the term "*legal persons of the other party*" indicates that the treaty applies to legal persons that have the nationality of the other contracting party. However, the TACK Treaty is silent on how legal persons are granted the nationality of the respective State parties.

Under customary law, enshrined also in Art. 31(2) of the VCLT, the Preamble constitutes a part of a treaty's context.[5] It shall be taken into account together with the other means of interpretation. It also constitutes evidence of the treaty's object and purpose as well as of the parties' intention.[6]

The Preamble of the TACK Treaty calls for "*emphasizing the friendly relations […] between their peoples*" and "*closer economic intercourse generally between their peoples*". The emphasis is, thus, on the encouragement of bilateral trade relations rather than on the development of trade in general. In the contemporary international trade practice, many subjects operate through corporations incorporated in a State other than that of their nationality in order to facilitate their business planning. Under these circumstances, it stands to reason to assert that the investments made by their citizens in both countries, regardless of the place where they primarily operate, do fall under the scope of the Treaty.

2. Art. XXVIII(m)(ii) of the GATS is the relevant rule for the interpretation of Art. II of the TACK Treaty.

In the process of interpretation, relevant rules of international law binding upon the parties shall also be taken into account, according to the customary rule of interpretation, as

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[4] *Competence of the General Assembly for the Admission of a State* case, 1950, p. 8; DALT with commentaries, 1966, p. 220, paras. 9, 11; Villiger, 2009, p. 426.

[5] Aust, 2013, p. 230; Fitzmaurice, 2014, p. 179; Gardiner, 2012, p. 481.

[6] Bjorke, 2015, p. 200; Hulme, 2016, p. 1302.

codified in Art. 31(3)(c) of the VCLT.[7] It is submitted that the "*rules of international law*" in Art. 31(3)(c) include both custom and treaties.[8] A rule is considered relevant to the treaty under interpretation when it refers to the same subject-matter.[9] Another element to be taken into consideration, as regards recourse to other treaties, is terminological identity or similitude.[10]

There are two rules with effects in the relations between the parties that can be considered as relevant. On the one hand, it was held by the International Court of Justice (hereinafter the ICJ) in the *Barcelona Traction* case that the State in which the company is incorporated and has its registered office is the State of nationality of the company.[11] This rule reflects customary law and is also provided in Art. 9 of the International Law Commission (hereinafter the ILC) Draft Articles on Diplomatic Protection (hereinafter DADP).[12] This rule is also included in many investment agreements.[13] Furthermore, it is the contemporary practice that in order for a company to be incorporated in a State it must submit the

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[7] *Oil Platforms* case, 1996, para. 23; *Right of Passage* case, 1957, p. 142; *Territorial Dispute* case, 1994, para. 41; Aust, 2013, p. 207.

[8] Dörr and Schmalenbach, 2012, p. 567; Linderfalk, 2007, p. 177.

[9] Dörr and Schmalenbach, 2012, p. 565; Linderfalk, 2007, p. 178; Villiger, 2009, p. 433.

[10] *Maritime Delimitation in the Indian Ocean* case, 2017, paras. 90 – 91; Merkouris, 2015, p. 84.

[11] *Barcelona Traction* case, 1970, para. 70.

[12] Brownlie, 2003, pp. 466 – 467; Brownlie's Principles, 2012, p. 706; Crawford, 2013, p. 378; Dugard, Fourth Report, 2003, para. 29; Introductory Note, 2013, p. 7; Okowa, 2014, p. 488.

[13] Schokkaert and Heckscher, 2009, p. 717; Yannaca – Small, 2010, pp. 223, 227 – 229.

instruments of its foundation and be registered to the competent national authorities.[14] However, as both the ICJ and the ILC noted, this rule is only applicable for the purposes of diplomatic protection.[15]

On the other hand, Art. XXVIII(m)(ii) of the GATS, which both of the parties to the dispute have ratified, includes the possibility that a corporation may supply a service through commercial presence in another State. The nationality of legal persons is then determined according to the, wider than that of incorporation, control criterion. This article defines the "*legal person of the other [contracting] party*" in the specific context of trade. It is obvious that the two rules lead to conflicting interpretations of Art. II.

Should two or more relevant rules provide conflicting interpretations, the general principle *lex specialis derogat legi generali* is applicable for the determination of the proper interpretation.[16] While the customary rule for the nationality of legal persons generally refers to the protection of nationals abroad, the GATS rule addresses the issue of nationality of legal persons in the specific context of contemporary trade relations. Moreover, there is linguistic similitude between Art. XXVIII(m)(ii) of the GATS and Art. II of the TACK Treaty.

In the present case, the TACK Treaty contains provisions relating to commerce, diplomacy and defence.[17] Art. II of the TACK provides for the protection of investors in the territory of the other State. Since the TACK Treaty provides for the regulation of trade, it is the submission of Alfania that the GATS Art. XXVIII(m)(ii) constitutes the *lex specialis* in the present case rather than the customary rule of nationality of legal persons. This rule is in

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[14] Dugard, Fourth Report, 2003, p. 17, para. 58.

[15] *Ibid*., p. 6, para. 5; *Barcelona Traction* case, 1970, para. 70; DADP with commentaries, 2006, p. 53, paras. 1, 3.

[16] Merkouris, 2015, p. 214.

[17] Para. 2 of the Facts.

line with the object and purpose of the TACK Treaty as well, since it affords a wider protective spectrum. As a result, it is the "*relevant rule*" according to which the treaty will be interpreted.

3. In interpreting Art. II of the TACK Treaty according to Art. XXVIII(m)(ii) of the GATS, Sacalm Holidays is of Alfanian nationality.

By virtue of Arts. XXVIII(d)(i) and XXVIII(m)(ii) of the GATS, a juridical person constituted in a territory of a State through commercial presence and owned by another person shall be considered as a "*juridical person of another member*". Under Art. XXVIII(n)(i) of the GATS, a juridical person is owned by a person, either juridical or natural, when the latter owns more than 50 percent of its shares. Finally, by virtue of Art. XXVIII(m)(i) of the GATS, the owning person must be incorporated in that other State and engaged in substantive business operations in any member different to that in which its subsidiary is incorporated.

In addition, Art. XXVIII(d)(i) sets out that the commercial presence is fulfilled through "*the constitution, acquisition or maintenance of a juridical person […] for the purpose of supplying a service*". The presence of the juridical person must be commercial, i.e. directed to profit-making in relation to the supply of services rather than goods, and it must begin prior to the supply of services.[18]

In the present case, Sacalm Holidays is incorporated in Barbarossa. It is wholly owned by Rocacorba which is an Alfanian corporation. Sacalm Holidays was established for the purpose of supplying travel services, specifically conducting trips in Lake Theth for profit. Sacalm Holidays did not conduct any trips prior to its incorporation in Barbarossan jurisdiction. It is, thus, the submission of Alfania that Sacalm Holidays is a juridical person supplying a service through commercial presence in the territory of another State and owned by a juridical person of Alfanian nationality. Therefore, Sacalm Holidays is of Alfanian

[18] Feinäugle, 2008, p. 549.

nationality, under Art. II of the TACK Treaty, as interpreted according to Art. XXVIII of the GATS.

C. Rocacorba's interests are protected by Art. II of the TACK Treaty.

Art. II of the TACK Treaty does not only provide for the protection of the rights of natural and legal persons of the other party but also for the protection of "*legally acquired […] interests*". These interests are clearly distinguished from the shareholder's direct rights. The ICJ in the *Barcelona Traction* case referred to the direct rights of shareholders, the infringement of which generates an independent right of action.[19] Such rights are the right to dividends and the right to attend and vote at general meetings.[20] *A contrario* the term "*interests*" reflects all indirect rights the shareholder enjoys. Such interests are protected according to the ICJ when a special treaty regime is in force between the parties.[21] Notably, most investment treaties define investments as the ownership in shares or participation in a company.[22]

Rocacorba is the sole shareholder of Sacalm Holidays. As a shareholder it possesses direct rights inherent to its participation in the company, such as the right to dividends or the right to vote. It also possesses interests that can be enjoyed only through the financial well-being of the company. As a result, it is submitted that Art. II is also applicable as far as Rocacorba's interests are concerned.

D. Conclusion

[19] *Barcelona Traction* case, 1970, para. 47.

[20] *Id*.; Beygo, 1993, p. 53.

[21] *Barcelona Traction* case, 1970, para. 90.

[22] Dolzer and Schreuer, 2012, p. 57; Douglas, 2009, p. 180; Schlemmer, 2008, p. 83.

In light of the above, Alfania submits that Art. II of the TACK Treaty applies to measures imposed on Sacalm Holidays, regarding both Sacalm and Rocacorba which are corporations of Alfanian nationality.

II. BARBAROSSA, BY ESTABLISHING THE LAKE THETH PROTECTED AREA, HAS BREACHED ART. II OF THE TACK TREATY.

A. Introduction

Alfania submits that Barbarossa, by establishing the Lake Theth Protected Area, breached Art. II of the TACK Treaty. It is submitted that, if the term "*discriminatory measures*" is interpreted in accordance with the standard of national treatment, the measure is discriminatory against Sacalm Holidays. It is also submitted that the Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter the CITES) as well as customary international law on the protection of the marine environment and on international watercourses cannot be considered as relevant rules of international law for the purposes of interpretation in the present case. Moreover, it is submitted that the measure does not fall under the scope of the environmental exception of Article XIV of the GATS. Finally, it is contended that this measure is also discriminatory against Rocacorba.

B. The establishment of Lake Theth Protected Area is a discriminatory measure against Sacalm Holidays.

1. "*Discrimination*" in Art. II of the TACK Treaty includes the standard of "*national treatment*".

Art. II of the TACK Treaty prohibits the imposition of "*any discriminatory measures*" on natural or legal persons of the other party. For the purposes of interpreting treaties, such as the TACK Treaty, concluded prior to the entry into force of the VCLT, which, according to Art. 4, is not retroactive,[23] customary international law on interpretation, as codified in Art. 31 of the VCLT, is applicable.[24]

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[23] See *supra* no. 2.

[24] See *supra* no. 3.

The starting point of interpretation is the ordinary meaning of the terms.[25] According to the ordinary meaning of the term, discrimination means either "*the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of [...] nationality*" or "*differential treatment; especially, a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured*".[26] It is evident that the notion of non-discrimination requires a basis of comparison and is, thus, considered as a relative standard.[27]

In international law, there are two relative standards of treatment regarding discrimination; the National Treatment and the Most-Favoured-Nation rules.[28] These rules are included in many international instruments such as the Agreement Establishing the World Trade Organization (hereinafter the WTO Agreement), the North American Free Trade Agreement and the Treaty on the Functioning of the European Union.[29]

Alfania and Barbarossa are both parties to the WTO Agreement and all its Annexes, amongst them the General Agreement on Tariffs and Trade (hereinafter the GATT) and the GATS. Since both parties are bound by the WTO Agreement, its provisions are "*rules binding upon the parties*" in the context of Art. 31(3)(c) of the VCLT. Moreover, they are relevant to the TACK Treaty as they provide for non-discrimination in the specific context of trade and investor protection.

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[25] See *supra* no. 4.

[26] Black's Law Dictionary, 2009, p. 534.

[27] Dolzer and Schreuer, 2012, p. 196.

[28] Damrosch, Henkin, Murphy and Smit, 2009, pp. 1058 – 1059.

[29] Arts. II, XVII of the GATS; Arts. I, III(4) of the GATT; Arts 1102 and 1103 of the NAFTA; Arts 54, 62 of the TFEU.

The non-discrimination principle in these agreements is twofold. Arts. I of the GATT and II of the GATS refer to the standard of Most-Favoured-Nation, which prohibits differential treatment between alien investors in the territory of a State, while Arts. III(4) of the GATT and XVII of the GATS provide for the standard of National Treatment which introduces an obligation to accord equal treatment between national and alien investors. Under the GATT these provisions are binding in all circumstances; under the GATS, only the Most-Favoured-Nation rule is generally binding, whereas the National Treatment rule is binding only for services sectors for which a State has specifically consented.[30]

In this sense, taking into account the term "*any discriminatory measures*" as well as the WTO Agreement, Art. II of the TACK Treaty must be interpreted in accordance with the rules of National Treatment and the Most-Favoured-Nation. Nonetheless, it is submitted that Alfanian firms are faced with unequal treatment in comparison to Barbarossan nationals as regards the provision of tourism services. Thus, in the present case, Art. II of the TACK Treaty must be interpreted in accordance with the rule of National Treatment in Art. XVII of the GATS.

2. The measures taken by Barbarossa are in breach of Art. II of the TACK Treaty.

The rule of national treatment stipulates that States cannot treat like foreign and national services and service suppliers unequally.[31] This includes both *de jure* and *de facto* discriminatory measures.[32] In particular, as far as the supply of services is concerned,

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[30] Matsushita, Schoenbaum, Mavroidis and Hahn, 2015, pp. 567, 585.

[31] *Ibid*., p. 603; *Canada – Autos*, 2000, para. 167; *EC – Bananas III (US)*, 1997, para. 7.329; Bjorklund, 2010, p. 411; Delimatsis, 2007, p. 140.

[32] *Canada – Autos*, 2000, para. 78; Bjorklund, 2010, p. 418; Delimatsis, 2007, p. 141; Trebilcock and Howse, 1999, p. 133; UNCTAD, 1999, p. 12; Van den Bossche and Zdouc,

similarity of conditions is required. This is determined according to whether they belong to the same business sector and whether they are in a competitive relationship.[33]

In the present case, Barbarossa established the Protected Area and banned the entrance of vessels which emit *cafea calida* to the breeding grounds of the Dandy Narwhals. The measure did not distinguish between local and alien vessels. However, the only vessels that emitted *cafea calida* were the ones owned by Sacalm Holidays, an Alfanian corporation. It is, thus, manifest that the establishment of the Protected Area is a *de facto* discriminatory measure.

Moreover, it is true that both Sacalm and local vessels, the latter exclusively owned by Barbarossan firms, are offering the same service. More specifically, they both operate in the tourism industry providing trips to Lake Theth by boat. The similarity between the services is deduced as well from the fact that, as soon as Sacalm Holidays stopped conducting trips to Lake Theth, the local vessels experienced a "*surge in custom*".[34] The services are, thus, substitutable and in a competitive relationship.

It is, therefore, submitted that the establishment of the Lake Theth Protected Area breached Art. II of the TACK Treaty, since it constitutes *de facto* discrimination between like services.

3. In any event, the measures do not fall under the General Exceptions of Art. XIV of the GATS.

2013, pp. 353 – 354; Van den Bossche and Prévost, 2016, pp. 15 – 16, 42; Weiler, 2004, p. 165.

[33] *EC – Bananas III (US)*, 1997, para. 7.314; Mahfud, 2014, pp. 553 – 554; Van den Bossche and Zdouc, 2013, p. 404; Weiler, 2004, p. 168 – 169.

[34] Para. 18 of the Case.

The rule of national treatment is not absolute. According to Art. XIV(b) of the GATS, the protection of human, animal or plant life constitutes a ground allowing States to implement measures derogating from the general norm. This rule is also a "*relevant rule*" to be used for the interpretation of the TACK Treaty. According to that Article, the measure in question must aim to the protection of human, animal or plant life and it must be necessary[35] for the protection sought. Moreover, it must not constitute unjustifiable or arbitrary discrimination or a disguised restriction on international trade.[36] This prerequisite serves more as an "*abuse of right*" prohibitive clause;[37] its fulfillment is to be determined on a case-by-case basis.[38]

It is not disputed that in the present case the measure ostensibly aims to the protection of Dandy Narwhals. However, it is submitted that the second and the third prerequisites have not been met. According to the "*necessary*" criterion, a State may resort to an exceptional measure, if there are no other less restrictive measures available for the protection of the environment.[39] This determination is made through a process of "*weighing and balancing*" of

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[35] Matsushita, Schoenbaum, Mavroidis and Hahn, 2015, p. 727; Van den Bossche and Zdouc, 2013, p. 601.

[36] Van den Bossche and Zdouc, 2013, p. 602.

[37] *US – Gambling*, 2005, para. 339; Cottier, Delimatsis and Diebold, 2008, p. 321.

[38] *US – Shrimp*, 1998, para. 120.

[39] *US – Section 337*, 1989, para. 5.26; *Korea – Various Measures on Beef*, 2001, para. 166; *US – Gambling*, 2005, para. 307; *Thailand – Cigarettes (Philippines)*, 1990, para. 74; Birnie, Boyle and Redgwell, 2009, p. 761; Matsushita, Schoenbaum, Mavroidis and Hahn, 2015, p. 727.

the objective of the measure, the extent to which the measure serves this objective and its trade-restrictive impact.[40]

Due to the unreliable character of the University of Barbarossa (hereinafter the UoB) report, it has not been established that Dandy Narwhal populations diminish due to their exposure to *cafea calida*, a water-soluble substance.[41] In any case, the UoB report mentioned that it was the frequency of the emissions rather than the emissions themselves that affected Dandy Narwhal populations. Despite the fact that the measure aims towards the protection of animal health, it is not necessary, since the same end could be achieved through less trade-restrictive measures, such as reducing the permitted emissions.

Furthermore, it is submitted that it was the intention of Barbarossa to ban the operation of Sacalm's catamarans so as to empower the local tourist suppliers. The Association of Barbarossan Tourism Firms showed great support for the ban "*on Sacalm's catamarans*", instead of the chemical in general.[42] Additionally, the Barbarossan Minister of Environment spoke of protection of the Dandy Narwhals against "*Sacalm's actions*" instead of referring generally to the pollution of the Lake.[43] It is, therefore, clear that the measure targeted Sacalm Holidays. Nor did Barbarossa try to conduct negotiations with Alfania either before or after the imposition of the discriminatory measure. It is, thus, submitted that the measure at issue constitutes arbitrary and unjustifiable discrimination as well as a disguised restriction on international trade.

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[40] *China – Publications and Audiovisual Products*, 2010, para. 242; *Brazil – Retreaded Tyres*, 2007, para. 178; *Korea – Various Measures on Beef*, 2001, para. 164; *US – Gambling*, 2005, paras. 305 – 308; Van den Bossche and Prévost, 2016, p. 90.

[41] See infra III.B.1.2.

[42] Para. 16 of the Case.

[43] Para. 17 of the Case.

Consequently, since the measure is not necessary and constitutes arbitrary and unjustifiable discrimination as well as a disguised restriction on international trade, the establishment of Lake Theth Protected Area does not qualify under this exception.

4. The CITES is not a relevant rule of international law to be taken account for the interpretation of the TACK Treaty.

It might be argued that the CITES, a multilateral treaty in force between the parties to the dispute, which refers to trade in endangered species, is a relevant rule to be taken into account for the purpose of interpreting the TACK Treaty in light of Art. 31(3)(c) of the VCLT. However, it regulates exclusively the trade in endangered animals, which includes import, export, re-export and introduction from the sea of animals or their specimens.[44] This indicates that the treaty does not provide for a general protective framework for the animals listed in its Appendices, but for the protection of endangered species from the threats posed by trade specifically.[45]

It is true that the Dandy Narwhals are included in Appendix I of the Convention. However, in the present case, no trade in Dandy Narwhals or parts thereof has taken place. Sacalm Holidays merely conducts trips to their breeding sight, which is a tourism service, not included in the definition of trade in Art. I of the CITES.

It is, thus, contended that the CITES does not constitute a relevant rule of international law in the sense of Art. 31(3)(c) and cannot be taken into account in interpreting Art. II of the TACK Treaty.

5. Customary international law on the protection of the marine environment as well as on international watercourses is not relevant for the interpretation of the TACK Treaty.

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[44] Art. I of the CITES.

[45] Hemmings, 2002, p. 110; McOmber, 2002, p. 679; Redgwell, 2014, p.717; Sand, 1997, p. 53.

A rule can be considered relevant in the context of Art. 31(3)(c) of the VCLT when it refers to the same subject-matter with the rule under interpretation.[46]

Customary rules on the protection of the marine environment, as reflected in Arts. 192 – 195 of the 1982 United Nations Convention on the Law of the Sea,[47] are only applicable as regards the sea and not bodies of water in general. The international Law of the Sea is also applicable to Enclosed and Semi-enclosed seas, which are bodies of water connected to another sea or the ocean.[48] Inland lakes, being under the exclusive jurisdiction of States and not connected to the ocean, do not fall under the scope of the Law of the Sea.[49]

Moreover, customary international law on international watercourses, as reflected in the Convention on the Law of the Non-navigational Uses of International Watercourses,[50] is only applicable on lakes or rivers whose parts are situated in different States.[51] As a consequence, watercourses that are under the exclusive jurisdiction of one state fall short of being included therein.[52]

In the present case, Lake Theth, which is located between Alfania and Barbarossa, lies entirely in Barbarossan territory. The border between Alfania and Barbarossa lies on the shoreline of Lake Theth for almost 1.000 km. Moreover, the Lake is not, in any way, connected to the ocean. As a result, it is a body of water under exclusive Barbarossan jurisdiction and does not qualify neither as a sea nor as an international watercourse.

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[46] See *supra* no. 10.

[47] UNCLOS; Birnie, Boyle and Redgwell, 2009, p. 387.

[48] Art. 122 of the UNCLOS.

[49] Rothwell and Stephens, 2010, p. 54; Tanaka, 2015, p. 78.

[50] Freestone and Salman, 2007, p. 360.

[51] Art. 2(b) of the Convention on International Watercourses.

[52] Querol, 2016, p. 9.

Hence, it is submitted that both the customary Law of the Sea and the Law of International Watercourses are not relevant rules for the purposes of interpretation.

C. The establishment of Lake Theth Protected Area is discriminatory against Rocacorba.

It has been submitted that Art. II of the TACK Treaty applies to measures imposed on Rocacorba.[53] Rocacorba is the sole shareholder of Sacalm Holidays and, thus, has interests that are protected by the TACK Treaty. The investors of local vessels are of Barbarossan nationality. Consequently, the establishment of the Lake Theth Protected Area is discriminatory against Rocacorba in comparison to Barbarossan investors of local vessels.

As a result, Alfania contends that, even if the Court comes to the conclusion that Art. II of the TACK Treaty does not apply to Sacalm, the establishment of Lake Theth Protected Area is also a prohibited act of discrimination against Rocacorba.

D. Conclusion

In concluding, it is submitted that the establishment of the Lake Theth Protected Area is not in accordance with the obligation to accord national treatment, as included in Art. II of the TACK Treaty and, thus, Barbarossa has breached its obligations arising from Art. II of the TACK Treaty.

[53] See *supra* I.C.

III. BARBAROSSA'S CONDUCT CANNOT BE JUSTIFIED BY NECESSITY.

A. Introduction

Alfania submits that the prerequisites for the invocation of necessity are not met in the present case. In the context of environmental and cultural necessity, the measures adopted were not the only available, while Barbarossa has contributed to the state of necessity. It is also submitted that the state of environmental and cultural necessity has ceased to exist. Finally, Barbarossa is not entitled to invoke necessity based on financial grounds.

B. The prerequisites of customary law, as reflected in Art. 25 of the ARSIWA, are not met.

1. Necessity cannot be invoked concerning environmental and cultural interests.

1.1. Environmental and cultural interests of Barbarossa are essential and under a grave and imminent peril.

Under international law, necessity constitutes a circumstance precluding the wrongfulness of an otherwise wrongful act. It is accepted that Art. 25 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter the ARSIWA) reflects customary law in this regard.[54] The negative wording of the Article suggests that necessity can only be invoked on an exceptional basis.[55] This exceptional nature of necessity denotes that the rule must be applied strictly.[56]

A successful invocation of necessity requires the existence of a grave and imminent peril jeopardizing an essential interest of a State. The measure taken to deal with this peril

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[54] *Gabčíkovo – Nagymaros* case, 1997, para. 51; *The Wall* case, 2004, para. 140; ARSIWA with commentaries, 2001, p. 82, para. 11; Crawford, 2002, pp. 181 – 182, para. 11; Crawford, 2013, p. 314; Kolb, 2017, p. 129.

[55] ARSIWA with commentaries, 2001, p. 80, para. 2.

[56] *Ibid*., p. 83, para. 14.

must be the only way to achieve this end. Moreover, this measure must not impair an essential interest of another State or the international community as a whole and the State should not have contributed to the state of necessity. Also, the invocation of necessity must not be precluded by the obligation whose breach is sought to be justified.[57] Finally, those prerequisites must be cumulatively satisfied.[58]

The notion of essential interest includes interests of the State, its people and the international community as a whole.[59] The concept of "*environmental necessity*" has been accepted as an essential interest in various cases.[60] It may also be argued that, since the protection of the traditions and cultural rights of indigenous persons is integrated in multiple international instruments,[61] the protection of the cultural interests of indigenous populations should be considered as an essential interest in the context of necessity.[62] In the present case, the Dandy Narwhals are an endangered species and an important part of the fauna of Lake Theth. Moreover, they are essential to the indigenous people of Barbarossa, since they are venerated as messengers of the gods.

Furthermore, according to Art. 25(1)(a) of the ARSIWA this essential interest of the State must be threatened by a grave and imminent peril. As far as gravity is concerned, the

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[57] Art. 25 of the ARSIWA.

[58] Agius, 2009, p. 99; Bjorklund, 2008, pp. 475, 520.

[59] ARSIWA with commentaries, 2001, p. 83, para. 15.

[60] Bellish, 2013, p. 144; Crawford, 2002, p. 184, para. 16; Heathcote, 2010, p. 496; ILC Report, 1980, p. 35, para. 3; Kolo and Wälde, 2008, p. 218.

[61] UNDRIP, 2007, Preamble, p. 2; UNGA Res. on Indigenous Peoples, 2015, Preamble; ILO Convention, 169, Preamble; Joseph and McBeth, 2010, pp. 492 – 493.

[62] Ryngaert, 2010, p. 92.

threat must not be merely possible but has to be established in an objective manner.[63] Imminence has been interpreted as "*proximity*" or "*immediacy*", which is a concept far greater than that of "*possibility*".[64] In the present case, the sightings of Dandy Narwhals became rare in 2014; this indicated a severe decline in their population. Since this species is considered endangered, this significant decline indicates that their extinction might occur, unless action was taken.

It is, thus, not disputed that environmental protection as well as the cultural interest in Dandy Narwhals are essential interests under a grave and imminent peril in the context of Art. 25(1)(a) of the ARSIWA.

1.2. The measure is not the only way to safeguard these interests.

The measures taken on behalf of the State must be the "*only way*" to safeguard the interest under threat.[65] The existence of other lawful means, despite being less convenient or more expensive, would render the plea of necessity inadmissible.[66] Due to the exceptional character of necessity, lawful or less disruptive measures must be chosen over unlawful or more disruptive ones.[67]

When Barbarossa was faced with the severe decline of Dandy Narwhal populations, it contracted the UoB, a Barbarossan university, to assess the situation. This assessment was wholly funded by the Government of Barbarossa. This report, according to which Dandy

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[63] Hoelck – Thjoernelund, 2009, p. 437.

[64] *Gabčíkovo – Nagymaros* case, 1997, para. 54.

[65] Crawford, 2002, p. 184; Hoelck – Thjoernelund, 2009, pp. 425 – 426.

[66] *CMS v. Argentina*, 2005, paras. 323 – 324; *Enron v. Argentina*, 2007, para. 309; Dolzer and Schreuer, 2012, p. 185.

[67] Anzilotti, Separate Opinion, (*Oscar Chinn* case), 1934, p. 114; Gazzini, Werner and Dekker, 2010, p. 4 – 5.

Narwhals would become extinct if the *cafea calida* emissions continued, is the only report concerning the decline in Dandy Narwhal populations. As a result, it is not established in a reliable manner that there is a correlation between *cafea calida* emissions and Dandy Narwhal populations decline. The ban on *cafea calida* has not, thus, proved to be an appropriate means to protect Dandy Narwhals.

In any case, it is submitted that less disruptive measures could have been employed. According to the UoB, Dandy Narwhals would become extinct only in case the *cafea calida* emissions continued "*at the current rate*". Most importantly, the report supported the existence of a correlation between the decline in animal populations and the rise in Sacalm Holidays' trips. The contributing factor is clearly the rise in emissions rather than the emissions themselves. *Cafea calida* is a water-soluble substance, and can, thus, be fully dissolved by water in low concentration. The report, therefore, implied that a decline in emissions would be an appropriate measure for the protection of the species.

It readily appears that the purpose of Dandy Narwhal protection would be less disruptively served through a decline in emissions of *cafea calida*. As a result, the full prohibition of the chemical is not "*the only way*" to safeguard Dandy Narwhals from extinction.

1.3. Barbarossa has contributed to the situation leading to the state of necessity.

According to Art. 25(2)(b), the State's contribution to the state of necessity leads to the denial of necessity as a circumstance precluding wrongfulness.[68] Accordingly, it is of no importance whether the contribution is the result of a negligent or deliberate act.[69]

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[68] *Gabčíkovo – Nagymaros* case, 1997, paras. 57 – 58; Bjorklund, 2008, p. 490; Crawford, 2002, p. 185.

[69] Agius, 2009, p. 110; Hoelck – Thjoernelund, 2009, pp. 425 – 426.

Under international environmental law, there is a well-established obligation of cooperation and consultation with neighbouring States.[70] This cooperation is essential in all cases of proper environmental planning.[71] In the same context, there is also an independent obligation for the conduct of an Environmental Impact Assessment (hereinafter EIA).[72] The EIA is required in all cases, prior to the launch of an activity with a significant and foreseeable risk of harm on the environment of other States.[73] Although the content of an EIA is in the discretion of each State, it must take into account the nature, magnitude and likely adverse effects on the environment.[74]

It is submitted that the negligence of Barbarossa has contributed to the state of necessity in two ways; first, by not conducting an EIA prior to the start of Rocacorba's trips in Lake Theth and, secondly, by not properly and timely assessing the situation after the severe decline in Dandy Narwhal populations. The boundary between Barbarossa and Alfania follows the shoreline of Lake Theth. *Cafea calida* is a chemical known for its harmful effects, banned in three and regulated in three more countries for environmental reasons. Rocacorba and Sacalm Holidays have always been conducting their trips using *cafea callida* emitting vessels. However, an EIA had not been conducted prior to the authorization of the service. Furthermore, there is no evidence that Barbarossa tried to cooperate with Alfania on the issue.

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[70] Birnie, Boyle and Redgwell, 2009, pp. 176 – 177; Sands, Peel, Fabra and MacKenzie, 2012, p. 203.

[71] Articles on Transboundary Harm, 2001, p. 155, para. 1.

[72] *Pulp Mills* case, 2010, para. 204.

[73] *Costa Rica – Nicaragua* case, 2015, para. 104; Birnie, Boyle and Redgwell, 2009, p. 171, 174.

[74] *Costa Rica – Nicaragua* case, 2015, para.104; *Pulp Mills* case, 2010, para. 205.

The UoB report, being undertook years after the launch of trips of the service by no means does it constitute an EIA, in line with customary international law. If an EIA had taken place, the possible transboundary risks as well as the effects on the lake and its fauna and flora would have been known.

Moreover, the plummet in Dandy Narwhal populations became evident in 2014. The Government of Barbarossa voiced concern on January 14 of the same year. The report ordered to the UoB was not released until 2 years later, while the trips continued at the same rate. The Government neither asked for quicker results nor took provisional measures that would improve the conservation of Dandy Narwhals.

The lack of action on behalf of Barbarossa contributed significantly to the escalation of the state of necessity. Despite being aware of all necessary information, that is, the harmful effects of the chemical as well as its emission by Sacalm's boats, it failed to conduct an EIA, to take the appropriate measures at the appropriate time and to cooperate with Alfania. Having contributed to the state of necessity, Barbarossa cannot invoke necessity as a justification ground.

1.4. In any case, the circumstance of necessity has eventually ceased to exist.

Art. 27 of the ARSIWA provides that once a circumstance precluding wrongfulness ceases to exist, the State must resume the fulfillment of the obligation, whose breach has been, until then, justified.[75]

One year after the establishment of the Lake Theth Protected Area, the numbers of Dandy Narwhals rose. Simultaneously, the Government of Barbarossa announced that it considered rendering the measure permanent, without considering any alternative less

[75] *CMS v. Argentina*, 2005, para. 355; *Gabčíkovo – Nagymaros* case, 1997, paras. 48, 101; Alvarez, 2011, p. 405; Dolzer and Schreuer, 2012, p. 186; Sloane, 2012, p. 486.

restrictive measures that would take into account its international obligations, especially the non-discrimination clause of the TACK Treaty.

It is submitted that, since the state of necessity has ceased to exist after the rise in Dandy Narwhals, Barbarossa can no longer invoke necessity. Accordingly, it has the obligation to resume fulfilling its obligations under the TACK Treaty, to the extent that environmental conditions permit.

2. Art. 25 of the ARSIWA is not applicable for the protection of financial interests.

It is not disputed that a situation of economic distress can constitute an essential interest in grave and imminent peril under Art. 25 of the ARSIWA.[76] Even though international jurisprudence is not consistent as regards the necessary severity of an economic crisis such a claim is not considered inadmissible in principle.[77]

It is not disputed that Barbarossa is in a situation severely jeopardizing its economic stability. According to the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States, Barbarossa was in a situation of extreme financial distress. That is clear considering the fact that poverty has faced heavy growth and that tourism, the only developing financial sector of the country, has fallen to despair.

However, the measures adopted by Barbarossa do not constitute "*the only way*" to safeguard its interests. The establishment of the Lake Theth Protected Area, despite aiming to the revival of the tourism industry, led to its devastation. Tourists preferred the fast

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[76] *CMS v. Argentina*, 2005, para. 319; *LG&E v. Argentina*, 2006, para. 251; *The* "*Societé Commerciale de Belgique"*, Pleadings, 1939, pp. 208 – 209; ILC Report, 1980, p. 35, para. 3; Bellish, 2013, p. 142; Kolo and Wälde, 2008, p. 218; Qureshi, 2010, p. 101.

[77] *CMS v. Argentina*, 2005, para. 319; *Enron v. Argentina*, 2007, paras. 305 – 306; *LG&E v. Argentina*, 2006, para. 251; *Sempra v. Argentina*, 2007, paras. 347 – 348.

catamarans operated by Sacalm Holidays over the slow boats owned by Barbarossan nationals. As a result, very few tourists would still visit Lake Theth. A less disruptive scheme, allowing fewer trips for Sacalm's vessels, would have been more appropriate.

Moreover, it has already been argued that Barbarossa contributed to the decline of Dandy Narwhal populations.[78] This decline led to the drop of tourist numbers and, as a consequence, to the circumstance of economic distress of Barbarossa, since tourism was the most profitable sector in its economy. The lack of reinvestment in infrastructure on behalf of Barbarossa has also played a role in this situation. Finally, it is evident that, since the Barbarossan economy is gradually recovering, it is no longer in such a critical situation.

Alfania, therefore, submits that Barbarossa, despite aiming to protect an essential interest under grave and imminent peril, cannot invoke necessity since the measure adopted was not "*the only way*" to address the situation. It is also submitted that Barbarossa has contributed to the state of its economic necessity. In any case, it is the submission of Alfania that a state of necessity has ceased to exist.

C. Conclusion

In light of the above, Alfania submits that necessity cannot justify the breach of Art. II of the TACK Treaty on behalf of Barbarossa, neither in the context of environmental and cultural nor in the context of financial interests.

[78] See *supra* III.B.1.3.

(i) Submissions

In light of the above, Alfania respectfully requests the Court to adjudge and declare that:

I. Art. II of the TACK Treaty is applicable to measures imposed on Sacalm Holidays, an enterprise that is incorporated in Barbarossa.

II. Barbarossa, by establishing the Lake Theth Protected has breached Art. II of the TACK Treaty.

III. Barbarossa's conduct cannot be justified by necessity.

Respectfully submitted,

Agents of the Applicant