TELDERS INTERNATIONAL LAW MOOT COURT COMPETITION

2023

Brackfish is served

Written Memorial on behalf of Astoriana
(Applicant)

Registration number
12A

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(b) List of Abbreviations

ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts
Art.	Article/s
Datmars	People's Republic of Datmars
EIA	Environmental Impact Assessment
FIT	Fertilizer Import Treaty
Ibid.	Ibidem.
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
p.	page
pp.	pages
Para.	paragraph
PCA	Permanent Court of Arbitration
Problem	Brackfish is served case (Astoriana v. Ravenshout)
PST	Peace Settlement Treaty for International Disputes
UN	United Nations
UNCLOS	United Nations Convention on the Law of Sea
v.	versus
VCLT	Vienna Convention on the Law of Treaties

(c) List of sources

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Other:

Brackfish is served case (Astoriana v. Ravenshout), hereinafter cited as: **Problem**

Clarification Questions 2023; hereinafter cited as **Clarifications**

(d) Statement of Relevant Facts:

Astoriana and Ravenshout are neighboring states. Both of them have access to the Harlim Sea. The States also border the People's Republic of Datmars. Astoriana and Ravenshout are members of the United Nations. Astoriana achieved statehood in 1979, when a peaceful revolution led to the formal division of the Confederacy of Datmars into Astoriana and the People's Republic of Datmars. Both Astoriana and Ravenshout are parties to the UNCLOS, ICCPR, ICESCR and 1907 Hague Convention.

The States concluded the 2015 Fertilizer Import Treaty, under which Ravenshout agreed to keep 35% of its stock reserved for sale to Astoriana.

Due to food insecurity, in 2008 the State of Ravenshout undertook a development of a project to develop a new species, namely the brackfish, which is a large, protein-rich and nearly boneless fish. The first shipments of this product began in 2015.

On 16 June 2018 the brackfish entered the territorial waters of Astoriana and arrived in the Himbeau Bay. Within hours the brackfish completely destroyed the kelp, which Astoriana uses as a common food staple. Due to the violent attack of the fish, the wooden support beams of Himbeau's pleasure piers were destroyed, causing many boats, restaurants, iconic ferris wheel, and bungee jumping facility to collapse into the water. 270 people perished, including the local band Himbeau Party Patrol. Majority of the people, located in the area, drowned or experienced immeasurable horror from the attack. After completely ruining the country's most popular seaside resort town, the brackfish shifted to cannibalism. The horrific event ended on 18 June 2018 with a strong tide which flung the remaining brackfish population's bloated bodies across the beach and onto Himbeau's boardwalk promenade. On 19 June, the front page of the Himbeau Times showed

piles of brackfish, debris, and human bones piled against the famous 'The Seaweed Eater' sculpture.

In the hours following the arrival of the brackfish in Himbeau Bay, and again on 19 June 2018, Astoriani President Athena Green called Prince Fritz IV of Ravenshout to urgently request a meeting. She finally reached him on 19 June and they had a phone call during which Prince Fritz IV did not express any concerns that Ravenshout's project destroyed the Himbeau bay.

On 21 September 2018, Astoriana instituted arbitration proceedings against Ravenshout pursuant to Annex VII to UNCLOS. Astoriana requested the arbitral tribunal to rule that Ravenshout breached its obligations toward Astoriana under UNCLOS. On 22 September 2018, the government of Ravenshout declared that it would not participate in the arbitration.

A tribunal was constituted on 30 November 2018 in accordance with Article 3 of Annex VII to UNCLOS. Datmars requested to participate in the proceedings in February 2019. On 17 March 2019, the tribunal permitted Datmar's participation after seeking the parties' consent.

On 1 May 2022 the tribunal issued an award stating that Ravenshout was responsible for breaching articles of UNCLOS. After addressing damages in relation to life, property, and the marine environment - including an extensive tabulation of clean-up costs - the tribunal ordered Ravenshout to pay 3 billion USD.

On 11 October 2022 in a speech Prince Fritz V stated that Ravenshout had terminated the FIT and had suspended all fertilizer shipments to Astoriana. Additionally, he denounced the 1 May 2022 award. On 31 October 2022, Astoriana instituted proceedings against Ravenshout before the ICJ, concerning both the 1 May 2022 award and Ravenshout's 11 October 2022 cancellation of a series of scheduled fertilizer shipments under the FIT.

(e) Issues

I. Does the ICJ have jurisdiction to rule in the case and is the dispute before it is admissible?

A. Does The Court have jurisdiction to rule in the case?

1. Is Astoriana bound by the Treaty after the dissolution of the Confederacy?
2. Does the brackfish dispute fall under the fisheries reservation?
3. Does the ICJ have jurisdiction to rule upon the arbitral award's validity and binding force?
4. Does the Court have jurisdiction over the dispute concerning the alleged breach of the FIT?

B. Are all Astoriana's submissions admissible?

1. Is the dispute related to the brackfish admissible?
   a. Does the arbitral award dispute differ from the one on the merits related to UNCLOS?
   b. Is the claim related to UNCLOS relevant only if the arbitral award is found void?
   c. Is Datmars an indispensable third party?
2. Is the issue related to the Fertilizer import treaty admissible?

II. Is the May 2022 award valid and binding under international law and shall Ravenshout provide the compensation awarded to Astoriana therein?

A. Is the award of May 2022 valid and binding under international law?

1. Does the tribunal have jurisdiction to review the dispute between the States?
   a. Does Article 287 (5) of UNCLOS confer jurisdiction upon the tribunal?
      i. Is the arbitral tribunal's jurisdiction based on Article 287 UNCLOS?
      ii. Does UNCLOS' settlement procedure supersede the one in the PST?

b. Is the tribunal entitled to decide on the issue of its jurisdiction?

2. Is the award well founded in fact?

3. Is the award well founded in law?

4. Is Ravenshout bound by the tribunal's decision despite its non-appearance in the proceedings?

a. Was the arbitration necessary for the dispute resolution?

b. Does Ravenshout remain a party to the proceedings despite its refusal to participate?

5. Is Datmars' intervention in accordance with the procedural requirements?

a. Was Datmars intervention necessary for the tribunal to obtain evidence?

b. Has the tribunal sought the parties' consent?

B. Shall Ravenshout provide the compensation awarded to Astoriana by the tribunal?

1. Is the award final and without appeal?

2. Consequently, shall Ravenshout pay the compensation provided in the award?

III. Did Ravenshout breach UNCLOS and does it owe reparations?

A. Has Ravenshout committed various breaches of due diligence provisions in UNCLOS?

1. Has Ravenshout failed to prevent and control pollution of the marine environment?

2. Has Ravenshout failed to assess the potential effects of its activities?

3. Has Ravenshout failed to prevent the pollution of the marine environment caused as a result of the brackfish's introduction?

4. Has Ravenshout caused transboundary harm to Astoriana by breaching the prohibition of land-based pollution?

5. Did Ravenshout notify Astoriana of imminent or actual damage?

B. Is there *force majeure* that could preclude Ravenshout's wrongfulness?

C. Shall ICJ order Ravenshout to pay full reparations?

IV. Did Ravenshout breach the Fertilizer Import Treaty and shall it pay reparations?

A. Is the FIT still in force?

1. Is the FIT terminated in accordance with customary law?

2. Is there material breach of the FIT caused by Astoriana?

a. Can the abduction of turkeys by the Convocation be attributed to Astoriana?

b. Has Astoriana breached provision with essential meaning to the accomplishment of the purpose of the treaty?

3. Is there a fundamental change of circumstances?

B. Has Ravenshout breached its obligations under the FIT?

1. Has Ravenshout breached the FIT?

2. Can Ravenshout's breach be justified by countermeasures?

C. Shall Ravenshout pay reparations to Astoriana?

(f) Summary of Arguments

I. The ICJ has jurisdiction to rule in the case and the dispute before it is admissible

A. The Court has jurisdiction to rule in the case

1. Astoriana is bound by the Treaty after the dissolution of the Confederacy
2. The brackfish dispute does not fall under the fisheries reservation
3. In any event, ICJ has jurisdiction to rule upon the arbitral award's validity and binding force
4. The Court has jurisdiction over the dispute concerning the alleged breach of the FIT

B. All of Astoriana's submissions are admissible

1. The dispute related to the brackfish is admissible
   a. The arbitral award dispute differs from the one on the merits related to UNCLOS
   b. The claim related to UNCLOS is relevant only if the arbitral award is found void
   c. Datmars is not an indispensable third party
2. The issue related to the Fertilizer import treaty is admissible

II. The May 2022 award is valid and binding under international law and Ravenshout must provide the compensation awarded to Astoriana therein

A. The award of May 2022 is valid and binding under international law

1. The tribunal has jurisdiction to review the dispute between the States
   a. Article 287 (5) of UNCLOS conferred jurisdiction upon the tribunal
      i. The arbitral tribunal's jurisdiction is based on Article 287 UNCLOS
      ii. UNCLOS' settlement procedure supersedes the one in the PST
   b. The tribunal is entitled to decide on the issue of its jurisdiction

2. The award is well founded in fact

3. The award is well founded in law

4. Despite its non-appearance in the proceedings, Ravenshout is bound by the tribunal's decision

a. The arbitration was necessary for the dispute resolution

b. Ravenshout remains a party to the proceedings despite its refusal to participate

5. Datmars' intervention is in accordance with the procedural requirements

a. Datmars intervention was necessary for the tribunal to obtain evidence

b. The tribunal has sought the parties' consent

B. Ravenshout must provide the compensation awarded to Astoriana by the tribunal

1. The award is final and without appeal

2. Consequently, Ravenshout must pay the compensation provided in the award

III. Ravenshout has breached UNCLOS and therefore owes reparations.

A. Ravenshout has committed various breaches of due diligence provisions in UNCLOS

1. Ravenshout failed to prevent and control pollution of the marine environment

2. Ravenshout failed to assess the potential effects of its activities

3. Ravenshout failed to prevent the pollution of the marine environment caused as a result of the brackfish's introduction

4. Ravenshout has caused transboundary harm to Astoriana by breaching the prohibition of land-based pollution

5. Ravenshout did not notify Astoriana of imminent or actual damage

B. There is no *force majeure* that could preclude Ravenshout's wrongfulness

C. Astoriana requests the ICJ to order Ravenshout to pay full reparations

IV. Ravenshout has breached the Fertilizer Import Treaty and shall pay reparations.

A. The FIT is still in force

1. The FIT is not terminated in accordance with customary law

2. There is no material breach of the FIT caused by Astoriana

a. The abduction of turkeys by the Convocation cannot be attributed to Astoriana

b. Astoriana has not breached provision with essential meaning to the accomplishment of the purpose of the treaty

3. There is no fundamental change of circumstances

B. Ravenshout has breached its obligations under the FIT

1. Ravenshout has breached the FIT

2. Ravenshout's breach cannot be justified by countermeasures

C. Ravenshout shall pay reparations to Astoriana

(g) Arguments

I. ICJ has jurisdiction to rule in the case and the dispute before it is admissible

A. The Court has jurisdiction to rule in the case

ICJ has jurisdiction under Art. 36 (1) and Art. 37 ICJ Statute in accordance with the PST. When a treaty or convention in force provides that a matter is referred to the PCIJ, ICJ has jurisdiction over the issue.[1] As the PST refers all disputes, which may arise between Astoriana and Ravenshout to this Court,[2] ICJ has jurisdiction over the present case.

1. Astoriana is bound by the PST after the dissolution of the Confederacy

In cases of dissolution,[3] successor states are bound by treaties which have been in force for the predecessor state.[4] Automatic succession is part of customary international law[5] as evident from abundant state practice, including that of SFRY, CSFR, Bosnia and Herzegovina, Gran Colombia, United Kingdom of Norway and Sweden, Austria-Hungary, Iceland-Denmark.[6] In all of these instances, the practice in question emanates from the belief that automatic succession has a legally binding character, thereby evidencing the existence of *opinio juris*[7] as well. Thus, Astoriana is bound by the PST after the dissolution of the Confederacy.

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[1] ICJ Statute, Art. 37.

[2] Problem, para. 25.

[3] Clarification No. 43.

[4] *Gabcikovo-Nagymaros Project*, para. 124.

[5] Crawford, p. 93-114.

[6] Council of Europe, 1997; ILC Yearbook 1974; Zimmermann, p. 516; Mullerson, p. 299.

[7] *North Sea Continental Shelf*, para. 77.

In the alternative, even if Astoriana is not automatically bound by the PST, Ravenshout has acquiesced to Astoriana's claim of succession. In cases of state succession, acceptance may not only be expressed explicitly, it can also be derived from the mere silence of a state,[8] especially if that state is specifically addressed.[9] Acquiescence postulates that the absence of an objection over an extensive period of time may be interpreted as consent.[10] In the present case, Ravenshout has not objected to Astoriana's statement made prior to the Confederacy's dissolution,[11] suggesting its satisfaction with the method of dispute settlement at the time of Astoriana's proclamation. Accordingly, Ravenshout has acquiesced to Astoriana's claim of succession.

2. The brackfish dispute does not fall under the fisheries reservation

Ravenshout might submit that the Court cannot review the dispute based on Article II PST, as all disputes related to fisheries shall not be referred to the ICJ.[12] While there is no explicit definition of the term "fisheries" under international law, the term is predominantly used by international courts in view of maritime delimitation, navigation and fishing activities.[13] In addition, under customary international law, the general rule of treaty interpretation is based on the principle of good faith, the intention of the parties which appears from the ordinary meaning of the words in their context and in the light of the treaty's object and purpose.[14]

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[8] Cavaglieri, pps. 190, 200.

[9] Combacau, p. 99.

[10] *Nicaragua Jurisdiction*, para. 47, 109.

[11] Problem, para. 1.

[12] *Ibid.*, para. 25.

[13] *Ghana v. Cote D'Ivoire*, para. 194; *Fisheries*, p.13; *Fisheries Jurisdiction*, p. 16.

[14] *Legality of Use of Force*, para. 100; *LaGrand*, para. 99; *Kasikili/Sedudu Island*, para. 18; *Guinea v. Senegal*, para. 48.

Furthermore, under the principle of contemporaneity, the terms of a treaty must be interpreted according to the meaning attributed to them at the time of conclusion of the treaty[15] to ascertain the original intent of the parties.[16] Here, it was impossible for both States to foresee the future invention of the brackfish as the needed technology was not developed yet. However, if Ravenshout alleges that a word must be given an unusual or an exceptional meaning, it lies within the Respondent to prove that.[17] Without clear subsequent practice,[18] it cannot be presumed that the parties were aware of the term's potential evolution.[19] Hence, the interpretation of the term "fisheries" is limited to its ordinary meaning and ICJ has jurisdiction to rule on the matter.

3. In any event, ICJ has jurisdiction to rule upon the arbitral award's validity and binding force

A refusal to act in accordance with an award issued by an arbitral tribunal constitutes a dispute,[20] unrelated to fisheries. Rather, the core of the present case is whether ICJ reaffirms the validity of the arbitral award by assessing the tribunal's jurisdiction and the compliance with the procedural requirements.[21] In view of that, ICJ has jurisdiction to reaffirm the award.

4. The Court has jurisdiction over the dispute concerning the alleged breach of the FIT

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[15] Fitzmaurice, p.212; *Island of Palmas*, p. 14.

[16] Simma and Kill, p. 694.

[17] *Eastern Greenland*, p. 49.

[18] *Kasikili/Sedudu Island*, para. 49.

[19] Arato, p. 443; *Certain Activities*, para. 66.

[20] *Guinea v. Senegal*, para. 24; *King of Spain Arbitral Award*, p. 214.

[21] *Guinea v. Senegal*, para. 24.

As argued, the PST refers all disputes between the two States to the ICJ. Thus, all disputes related to the FIT also fall in the scope of Article 37 ICJ Statute and ICJ has jurisdiction over this issue.

B. All of Astoriana's submissions are admissible

1. The dispute related to the brackfish is admissible

In the present case the *res judicata* principle was not violated as the Court is asked to reaffirm the award of another judicial body (a.) and there are no duplicative claims present (b.). In any event, Datmars is not an indispensable third party and its absence from the proceedings does not affect the admissibility of the case (c.).

a. The arbitral award dispute differs from the one on the merits related to UNCLOS

The *res judicata* principle of international law safeguards the final and binding effect of judicial decisions.[22] The Court is not asked to examine the dispute on the merits again, but rather to reaffirm the award of the arbitral tribunal.[23] Moreover, ICJ has recognised itself as competent to decide on issues concerning the meaning or the scope of a judgment of international tribunals.[24] As in the current case the award's validity and binding force are disputed, the case is admissible.

b. The claim related to UNCLOS is relevant only if the arbitral award is found void

The *res judicata* principle bans the relitigation of claims on which a jurisdiction has already issued a judgment.[25] Should ICJ reaffirm the arbitral award, Astoriana's submission related to UNCLOS will not be examined in substance. Thus, no duplicative claims are raised by the Applicant.

c. Datmars is not an indispensable third party

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[22] *Bosnian Genocide*, para. 116.

[23] *King of Spain Arbitral Award*, p. 26.

[24] *Cameroon v. Nigeria*, para. 12.

[25] *Effect of Awards of Compensation*, p. 53.

While it is true that the conduct of a State which forms "the very subject matter" of a case makes that State an indispensable third party to the case,[26] this is not the present situation. Datmars is an intervenor and not a party to the case before the arbitral tribunal and is not bound by its award.[27] Furthermore, Datmars' environment has not been harmed by the brackfish and and the FIT is a bilateral treaty only between Astoriana and Ravenshout. Hence, Datmars' intentions are limited to assisting ICJ in rendering a fair judgment but the role of the State cannot be deemed indispensable on any of the reviewed matters. Accordingly, Astoriana's submissions are admissible.

2. The issue related to the FIT is admissible

The potential violation of the FIT has not been decided on by any judicial body by far. As the treaty concerns shipments to Astoriana,[28] direct rights of the State were violated and it has legal standing to bring this issue before the Court. Consequently, the dispute is admissible and shall be reviewed by ICJ in accordance with the PST regime.[29]

II. The May 2022 award is valid and binding under international law and Ravenshout must provide the compensation awarded to Astoriana therein.

A. The award of May 2022 is valid and binding under international law

In order to be valid and binding under international law,[30] an award must be rendered by a tribunal which has jurisdiction (1.), and that award must be well founded in fact (2.) as well as in law (3.).

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[26] *Monetary gold*, p. 33.

[27] *South China sea*, para. 637, 105.

[28] Problem, para. 5.

[29] See section A above.

[30] *Arctic sunrise*, p.35; UNCLOS, Art. 9; *South China sea Jurisdiction*, para. 15.

Moreover, there are insufficient grounds to invalidate the award on the basis of Ravenshout's refusal to participate (4.) or Datmars' intervention in the proceedings (5.).

1. The tribunal has jurisdiction to review the dispute between the States

In order to determine whether a tribunal has jurisdiction, there must be a dispute between two states concerning the interpretation or application of a treaty.[31] The present dispute is related to Ravenshout's breach of its obligations under UNCLOS.[32] As the current case concerns the application of UNCLOS, the tribunal's jurisdiction stems from the invoked provisions.

a. Article 287 (5) UNCLOS conferred jurisdiction upon the tribunal

i. The arbitral tribunal's jurisdiction is based on Article 287 UNCLOS

Since both States are parties to UNCLOS[33] and have not agreed to the same procedure of dispute settlement, the case must be referred to international arbitration under Annex VII of UNCLOS.[34] Arbitration is the default forum both for cases in which a declaration has not been made and for those in which the fora elected by the states involved in the dispute are not the same.[35] Due to the impossibility of determining the "same procedure", as the parties have chosen different fora for the settlement of the dispute, the arbitration tribunal is the only one with jurisdiction to review the case between Astoriana and Ravenshout.[36]

ii. UNCLOS' settlement procedure supersedes the one in the PST

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[31] Zou, p. 333.

[32] Problem. para, 14.

[33] *Ibid.*, para 1.

[34] UNCLOS, Art. 287; *Somalia v. Kenya,* para. 123.

[35] *Ibid.*

[36] UNCLOS, Art. 287, para. 5.

UNCLOS applies as *lex specialis* and *lex posterior* in relation to the PST, since it only concerns disputes related to the law of the sea.[37] In accordance with the customary *lex specialis* rule,[38] whenever two or more norms regulate the same matter, the more specific norm prevails over the general one.[39] In the case between Astoriana and Ravenshout, both UNCLOS and the PST are part of the same regime,[40] since they prescribe a dispute settlement procedure. However, the PST refers to all disputes in general, whereas UNCLOS only governs those related to the law of the sea. The essence of the instant dispute is the genetic engineering of a new species and its consequences, both falling in the scope of UNCLOS.[41] Accordingly, UNCLOS applies as *lex specialis* and therefore derogates the PST, which governs all issues not specifically regulated. In addition, UNCLOS was ratified after the PST entered into force,[42] thus it applies as *lex posterior.*

b. The tribunal is entitled to decide on the issue of its jurisdiction

ICJ has recognised a tribunal's right "*to decide as to its own jurisdiction*".[43] The arbitral tribunal in the current case has discussed the matter of its jurisdiction in the 1 May 2022 award and has found no reason to refrain from exercising it.[44] Thus, the tribunal was entitled to render a decision.

2. The award is well founded in fact

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[37] *Somalia v. Kenya*, para 114.

[38] Doc. A/CN/4/L.702, p. 8.

[39] Doc. A/CN.4/L.682, para. 56; Shaw, p.124; Hollis, p. 449.

[40] Doc. A/CN/4/L.702, para. 26.

[41] UNCLOS, Art. 297.

[42] Problem, paras. 1, 3.

[43] *Nottebohm*, para. 119.

[44] Problem, para. 19.

The arbitral proceedings comprise two indispensable stages – determining the disputed fact and applying the existing law.[45] In the *Corfu Channel* case, the ICJ held that "*it is sufficient for the court to convince itself by such methods as it considers suitable that the submissions are well founded*".[46] Similarly, a crucial step in the legal proceedings before an arbitral tribunal is that it verifies the facts on a sound basis.[47] Taking into consideration not only Astoriana's submissions, but also the evidence provided by Datmars,[48] in the case at hand the tribunal was satisfied that Ravenshout had breached the UNCLOS provisions invoked by Astoriana.[49]

3. The award is well founded in law

The tribunal's decision regarding Ravenshout's breach of Art. 192, 194, 196, 198, 206 and 207 UNCLOS must also be well founded in law.[50] As established in the ICJ's case-law, an award is valid and binding only if it is a reasoned one.[51] The Court has stated in the case of *Guinea v. Senegal,* that such reasoning is sufficient when it is possible without difficulty to determine why the tribunal has reached the conclusion at hand,[52] which has also been reaffirmed by international tribunals.[53] The tribunal in the present case gave sufficient reasons for its decision by estimating

[45] Discussion on Fact-Finding and Evidence, p. 105.

[46] *Corfu Channel Reparations*, p. 248; *Tehran Hostages*, para. 11.

[47] Discussion on Fact-Finding and Evidence, p. 100.

[48] Problem, para. 20.

[49] *Ibid*.

[50] Discussion on Fact-Finding and Evidence, p. 100.

[51] *Guinea v. Senegal*, para. 42.

[52] *Ibid*., para. 43.

[53] *MINE v. Guinea*, p. 105.

the damages caused by Ravenshout related to life, property, and the marine environment and ordering the Respondent to pay full reparation to Astoriana.

4. Despite its non-appearance in the proceedings, Ravenshout is bound by the tribunal's decision

a. The arbitration was necessary for the dispute resolution

The Respondent may advance the argument that under UNCLOS parties shall exchange views and engage in a non-binding procedure of dispute settlement before having recourse to a tribunal.[54] In this regard, the President of Astoriana has proposed a high-level meeting.[55] However, the manner in which Prince Fritz IV has responded[56] suggests that Ravenshout would not willingly engage in a negotiation procedure. Therefore, Astoriana has validly seized the arbitral tribunal.[57]

b. Ravenshout remains a party to the proceedings despite its refusal to participate

The absence of a party in the proceedings does not constitute a bar to the proceedings, when it has nevertheless been given the opportunity to present its observations on the subject.[58] Similarly to the *Arctic Sunrise* and *South China Sea* arbitration cases,[59] the arbitral tribunal in the present case observed that Ravenshout refused to submit its views although it had been given sufficient opportunity to do so.[60] The fairness of the proceedings demanded that they continue despite the

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[54] UNCLOS, Art. 283, 286.

[55] Problem, para. 11.

[56] *Ibid.*, para. 11.

[57] *Ibid.*, para. 14.

[58] *Arctic Sunrise*, para. 48; Zhang and Chang, p. 407.

[59] *Arctic Sunrise*, para. 48; *South China sea Jurisdiction*, paras. 113, 114.

[60] Problem, para. 18.

Respondent's non-participation.[61] Equivalently, had the arbitral tribunal refused to render a decision due to Ravenshout's absence, Astoriana would have been at a disadvantage due to the impossibility of solving the dispute. However, the non-appearing State still has to assume its obligations,[62] and thus, Ravenshout has to comply with the award.

5. Datmars' intervention is in accordance with the procedural requirements

The intervention of a third party is well-known in arbitration.[63] Due to the increasing importance of the matter, some international instruments specify the role of an intervenor - it can present oral and written observations as well as provide evidence.[64] The 1907 Hague Convention, to which both States are parties,[65] allows a tribunal to obtain evidence through the government of a third state.[66] Hence, Datmars' intervention cannot invalidate the award.

a. Datmars intervention was necessary for the tribunal to obtain evidence

International arbitrators have broad discretion in the assessment of evidence,[67] which includes obtaining evidence through a third state.[68] In the present case, Datmars filed a request to intervene

[61] Sienho Yee, p. 98.

[62] *Arctic Sunrise*, para. 53.

[63] PCA Rules, Art. 17, para. 5.

[64] London Convention, Annex VII, Art. 6.

[65] Problem, para. 1.

[66]1907 Hague Convention, Art. 76.

[67] Discussion on Fact-Finding and Evidence, p. 103.

[68] 1907 Hague Convention, Art. 76.

in the proceedings and presented evidence which was key for the resolution of the dispute.[69] In accordance with ICJ's case-law,[70] Datmars' intervention in the arbitral proceedings was allowed.

b. The tribunal has sought the parties' consent

An Annex VII arbitral tribunal has no power to make, without the consent of the parties, any rule of procedure providing for intervention by a third State in an arbitral proceeding.[71] However, the tribunal has sought the approval of both parties before allowing Datmars to enter the proceedings.[72] Accordingly, Ravenshout could have expressed its disagreement with Datmars' intervention, however it has not exercised this right.[73] Due to the lack of response in over a month,[74] the tribunal had to decide on Datmars' intervention in the abscense of the Respondent's explicit consent.

B. Ravenshout must provide the compensation awarded to Astoriana by the tribunal

1. The award is final and without appeal

Arbitral awards under Annex VII of UNCLOS are final and without appeal unless the parties have agreed otherwise in advance.[75] If no such agreement is present, the *res judicata* principle dictates the binding force of the award.[76] Astoriana and Ravenshout have not made such an agreement and therefore, the award of the arbitral tribunal is binding for both States.

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[69] Problem, para. 20.

[70] *Monetary Gold*, p. 17.

[71] Sienho Yee, p. 91.

[72] Problem, para. 18.

[73] *Ibid*.

[74] *Ibid*.

[75] UNCLOS, Annex VII, Art. 11.

[76] *Societe Commerciale de Belgique*, p. 16.

2. Consequently, Ravenshout must pay the compensation provided in the award

Ravenshout must pay Astoriana the compensation provided in the arbitral tribunal's decision. The sum of 3 billion USD provided by the tribunal for the damages caused by Ravenshout's violation,[77] is to be considered fair compensation,[78] corresponding to the situation which would have existed, had Ravenshout not breached its obligations under UNCLOS.

III. Ravenshout has breached UNCLOS and therefore owes reparations

In the event that this Court deems the 1 May 2022 award not valid and binding, Ravenshout is nonetheless responsible for breaching Art. 192, 194, 196, 198, 206 and 207 UNCLOS (**A**.). Furthermore, Ravenshout cannot rely on *force majeure* to preclude its wrongful acts (**B**.). Therefore, Ravenshout owes Astoriana full reparations (**C.**).

A. Ravenshout committed various breaches of due diligence provisions in UNCLOS

Both Astoriana and Ravenshout are parties to UNCLOS[79] and shall comply with its provisions. Due diligence obligations, enshrined in Art. 192, 194, 196, 198, 206 and 207 UNCLOS, require states to inform themselves of the foreseeable factual and legal circumstances and to take appropriate measures to address them.[80] Such obligations impose an obligation of conduct that includes the obligation to adopt all applicable and necessary measures to prevent, reduce and

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[77] Problem, para. 20.

[78] *Factory at Chorzow*, p. 47.

[79] Problem, paras. 1, 2.

[80] DAPTH, p. 154.

control pollution.[81] Non-compliance could lead to harm caused in the territory of a state other than the state of origin, i.e transboundary harm.[82]

By breaching its due diligence obligations, Ravenshout caused transboundary harm to Astoriana. Ravenshout has violated its due diligence obligations under Art. 192 and 194 UNCLOS (**1**.). Additionally, Ravenshout has failed to assess the potential effects of its activities (**2.**). The Respondent has failed to take all measures necessary to prevent, reduce and control pollution of Astoriana's marine environment, resulting from the intentional introduction of the brackfish[83] (**3**.) and from its land-based sources (4.). Lastly, Ravenshout did not notify Astoriana of the imminent danger for its marine environment (5.).

1. Ravenshout failed to prevent and control the pollution of the marine environment

As a general principle of environmental law, states shall refrain from polluting other states' territory.[84] Under Art. 192 and 194 UNCLOS states have a positive duty to take all measures for preventing pollution of the marine environment and to ensure[85] that activities will not cause damage to other States.[86] This includes a due diligence obligation[87] closely related to the obligation

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[81] *Pulp Mills*, paras. 186–187.

[82] DAPTH, Art. 2 (c).

[83] Flemme, p. 19, 20; UNCLOS Art. 4, para. 1.

[84] *Trail Smelter* case, p. 1965.

[85] *South China Sea,* para. 941.

[86] UNCLOS, Art. 194.

[87] *South China Sea,* para. 959.

of transboundary harm prevention.[88] Contrary to the customary obligation of cooperation in good faith to take preventive or minimization measures,[89] Ravenshout never consulted with Astoriana nor initiated any communication between the two States.

2. Ravenshout failed to assess the potential effects of its activities

According to Art. 206 UNCLOS and customary international law,[90] states have the obligation to assess the potential effects of their activities on the marine environment and shall communicate reports of the results of such assessments.[91] In order to fulfil its obligations, Ravenshout must have prepared an EIA[92] and it must have also communicated it.[93] However, the Respondent failed to adequately evaluate serious threats to the marine environment.[94] The Respondent did not publish the findings of its risk assessments,[95] and breached its obligations to ensure monitoring and environmental assessment.[96] Ravenshout's studies were incomplete as they mainly focused on the alternatives to the complex, location selection, and physical integrity,[97] neglecting the protection of the environment. As the Respondent was aware of the eroded nature of the Nassau range and

[88] DAPTH, p. 154.

[89] *Ibid*.

[90] *Activities in the Area*, para. 145; *Pulp mills*, para. 205; *Costa Rica v. Nicaragua*, para. 157.

[91] UNCLOS, Art. 206.

[92] *Pulp mills*, para. 205; *Costa Rica* v. *Nicaragua*, para. 157.

[93] UNCLOS, Art. 206; *South China Sea,* para. 991; *Activities in the Area*, para. 145.

[94] Clarification No. 1.

[95] *Ibid*., No. 4.

[96] UNCLOS Art. 204, 205.

[97] Clarification No. 39.

its direct proximity to Lake Tauredunum,[98] and noting that landslides triggered by earthquakes can cause tsunamis,[99] Ravenshout should have done extra research and should have acted more cautiously when building the aqua complex.[100] Furthermore, Dr. Probleem, who participated in the assessments of the aqua complex, and the arbitral tribunal, concluded that Ravenshout had disregarded grave risks, which ultimately contributed to the disaster.[101] Accordingly, Ravenshout failed to comply with its obligations under Art. 206 UNCLOS.

3. Ravenshout failed to prevent the pollution of the marine environment caused as a result of the brackfish's introduction

In conformity with Art. 196 UNCLOS, states must take measures to prevent pollution from introduction of new species.[102] As the brackfish is genetically engineered organism,[103] it is a new species created intentionally falling under the scope of this provision. The creation of new species is a hazardous activity,[104] i.e an activity not prohibited by international law that produces physical transboundary effects and carries a risk of causing significant damage.[105] ILC defines the term "significant damage" as a damage which must lead to real detrimental effects.[106] This includes

[98] Clarification No. 1.

[99] National Weather Service.

[100] Clarification No. 1.

[101] Problem, para. 20; Clarification No. 27, 1.

[102] UNCLOS, Art. 196.

[103] Problem, para. 7.

[104] Discussion of Genetic Engineering.

[105] Allocation of Loss, p.62.

[106] *Ibid*., p.65.

negative impacts on the human health and life, the environment and property of other States.[107] The brackfish incident had catastrophic consequences for Astoriana resulting in damages caused to life, property, and the marine environment.[108]

In addition, genetically engineered fish and aquatic organisms can cause unpredictable environmental concerns even if they are let out by accident.[109] For instance, scientists have calculated that if genetically engineered salmon escaped into a native environment, it would take only 40 generations for the wild salmon to be completely wiped out.[110] In the present case, the behavior of the brackfish was not tested in the high sea,[111] and the accident has led to the aforementioned damages.[112] Thus, Ravenshout breached its obligations under Art. 196.

4. Ravenshout has caused transboundary harm to Astoriana by breaching the prohibition of land-based pollution

Under Art. 207 UNCLOS, states shall prevent and control pollution from land-based sources including rivers and structures.[113] The enforcement of the rules for complying with this provision remains within the states' discretion, however, the result shall be restrainment from pollution.[114]

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[107] Allocation of Loss, p. 65.

[108] Problem, paras. 9, 20.

[109] Van, p. 1.

[110] Discussion of Genetic Engineering.

[111] Clarification No. 42, 44.

[112] Problem, paras. 9, 20.

[113] UNCLOS. Art. 207.

[114] Vucas, p. 238.

Contrary to its obligation, Ravenshout did not adopt any laws or regulations for the protection of the marine environment from its activities in the estuary.[115]

Additionally, the brackfish is a substance, contributing to the *"pollution of the marine environment"* within the meaning of Art. 1, para. 1 (4) UNCLOS.[116] The brackfish entered the area of Himbeau Bay through the Blozen River after the dislodging of the aqua complex.[117] Therefore, this is a breach that falls within the scope of Article 207 UNCLOS.

5. Ravenshout did not notify Astoriana of imminent or actual damage

According to Art. 198 UNCLOS, states have a duty to immediately notify other states if they might be affected by damage, arising from pollution.[118] The notification duty and response requirement thus assist States in assessing the situation better by taking the needed preventive measures.[119] Ravenshout should have taken precautionary measures, corresponding with its obligation to immediately notify Astoriana which was likely to be affected by such damage.[120] However, even when Astoriana's President urgently tried for three days to initiate a meeting with Prince Fritz IV, Ravenshout's representatives were unreachable prior to President Green's call on 19 June.[121] Thus, Ravenshout breached its obligations under Art. 198 UNCLOS.

B. There is no *force majeure* that could preclude Ravenshout's wrongfulness

[115] Clarification No. 32.

[116] UNCLOS, Art. 1 (4); New substances.

[117] Problem, para. 8.

[118] UNCLOS, Art. 198.

[119] Flemme, p. 17; Boyle, p. 370.

[120] UNCLOS, Art. 198.

[121] Problem, para. 11; Clarification No. 15.

The Respondent cannot justify its non-compliance with UNCLOS due to *force majeure*.[122] In order for *force majeure* to exist three cumulative conditions must be met: the act at hand must be brought about by an irresistible force or an unforeseen event, the act shall make it materially impossible in the circumstances to perform the obligation, and the act must be beyond the control of the state.[123] However, while the Applicant agrees that an earthquake can be an irresistible force beyond the control of the State, the earthquake itself did not make it materially impossible for Ravenshout to perform its obligations. Although the earthquake has caused the initial incident,[124] Ravenshout could still perform its obligations. Moreover, between the time of the earthquake's beginning and the end of the brackfish attack Ravenshout had enough time to notify Astoriana of the upcoming danger, which was clearly not the case.[125]

C. Astoriana requests the ICJ to order Ravenshout to pay full reparations

It is a well-established principle that a state which has suffered damage caused by another state, is entitled to reparations.[126] Reparation must wipe out all the consequences of the illegal act and re-establish the situation which would have existed if that act had not been committed.[127] In compliance also with the principle "the polluter pays", in order to compensate for the negative

[122] ARSIWA, Art. 23.

[123] DARSIWA, p. 76.

[124] Problem, para. 8.

[125] *Ibid.*, paras. 8, 9, 10, 11; Clarification No. 15.

[126] *M/V VIRGINIA*, para. 427.

[127] *Factory at Chorzów*, p. 47.

effects caused,[128] the responsible state is liable to pay compensation.[129] Therefore, ICJ shall order Ravenshout to pay full compensation to Astoriana for the loss of life and property and the environmental harm caused in the amount of 3 billion USD as awarded by the tribunal.[130]

IV. Ravenshout has breached the Fertilizer Import Treaty and shall pay reparations.

The FIT remains in force since Ravenshout has not terminated it in accordance with customary treaty law (A.). Furthermore, Ravenshout has breached its obligations, deriving from the FIT (B.) and therefore owes reparations to Astoriana (C.).

A. The FIT is still in force

The FIT is still applicable as Ravenshout has failed to terminate it (1.). Furthermore, there is no material breach on behalf of Astoriana (2.) or a fundamental change of circumstances (3.), which could justify the termination of the FIT.

1. The FIT is not terminated in accordance with customary law

In accordance with the customary rule, a treaty can be terminated in conformity with its provisions or by consent of all the parties.[131] As the FIT contains no compromissory clause,[132] the treaty could have been terminated only through the consent of both parties.[133] However, immediately after Ravenshout has announced that it terminates the Treaty with immediate effect,[134] Astoriana

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[128] Allocation of Loss, p. 74.

[129] UNCLOS, Art. 304, *M/V SAIGA* (No.2), paras. 167, 169.

[130] Problem, para. 20.

[131] VCLT, Art. 54; Villiger, p. 689.

[132] Clarification No. 2, 11.

[133] Material Breach, p. 11.

[134] Problem, para. 24.

dispatched a letter of objection to the termination.[135] It is clear that Astoriana did not consent to the FIT termination, nor was it consulted in relation to it. Hence, Ravenshout has not terminated the treaty and it remains in force.

2. There is no material breach of the FIT caused by Astoriana

As established by customary law, material breach entitles the other party to invoke the breach as a ground for terminating the treaty.[136] In order for a material breach to be invoked, there shall be a breach of a provision essential to the accomplishment of the object or purpose of the treaty[137] attributable to a State.[138] However, in the present case these elements are not present.

a. The abduction of turkeys by the Convocation cannot be attributed to Astoriana

A conduct of a group of persons can be regarded as an act of the state only if there were direct instructions by the latter.[139] This depends on the "degree of control" exercised which is essential in order to determine whether an act is attributable to the state.[140] As states can act only by and through their agents and representatives,[141] the Convocation's conduct would be attributable to Astoriana only if Astoriani representatives controlled the group's actions. While it is true that the Convocation is an organization consisting of Astoriani nationals,[142] no state representatives take

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[135] Clarification No. 40.

[136] *Gabčíkovo-Nagymaros Project*, para. 99; VCLT, Art. 60.

[137] VCLT, Art. 60, para. 3 (b).

[138] Simma, pps. 5-38.

[139] ARSIWA, Art. 8.

[140] *Nicaragua*, para. 86.

[141] *German Settlers in Poland*, para. 22.

[142] Problem, para. 22.

part in the decision-making process. Although the Convocation sometimes acts as an auxiliary force,[143] the decision to infiltrate Cornucopia was not taken or directed by the state authorities, which is necessary when discussing auxiliary force.[144] ICJ has previously elaborated that without clear evidence that a state has exercised certain degree of control, it cannot be concluded that an act by a person or a group can be attributed to that same state.[145]

In the instant case, Minister Mangan is the only one involved with the Convocation. However, his position is merely ceremonial, which does not necessarily mean that the State has control over the Convocation, as neither he, nor any other state representative is part of the group.[146] Despite the subsidies provided,[147] there is no clear evidence that Astoriana had actually exercised any degree of control.[148] A general situation of dependence and support is insufficient to justify attribution of the conduct to the State.[149] Thus, the Convocation's acts are not attributable to Astoriana.

b. Astoriana has not breached provision with essential meaning to the accomplishment of the purpose of the treaty

In order for a treaty to be terminated on the ground of material breach, the breach must be essential to the accomplishment of the object or purpose of the treaty.[150] In the current case, Ravenshout

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[143] *Ibid*.

[144] DARSIWA, p. 47.

[145] *Nicaragua*, paras. 109, 115.

[146] Problem, para. 22.

[147] *Ibid*.

[148] *Nicaragua*, paras. 109, 115.

[149] DARSIWA, pps. 47, 48.

[150] VCLT, Art. 60, para. 3 (b); *Gabčíkovo-Nagymaros Project*, para. 106.

cannot justify that the abduction of turkeys by the Convocation is a material breach of the FIT. The FIT's object and purpose are not the turkeys, but the friendly relations, commerce, and investment between the two States.[151] These are of essential meaning to the accomplishment of the FIT's purpose, namely that Astoriana receives 35% of Ravenshout's production. As Astoriana wishes to continue the agreement between the two States, there is no breach on behalf of the Applicant with regard to the essential purpose of the treaty.

3. There is no fundamental change of circumstances

Although a fundamental change of circumstances may justify a demand for the termination or revision of a treaty,[152] there are five strict conditions that must be present cumulatively:[153] there has to be fundamental change that affected the essential basis of the parties' consent to be bound by the treaty, which change was unforeseen and radically transformed the obligations still to be performed.[154] In the current case, however, there was no change that radically transformed Ravenshout's obligations. In order for radical transformation to exist the change must so considerably transform the originally undertaken obligations[155] that the state which undertook them can no longer be required to perform those obligations.[156] Even if the change affects Ravenshout economically, it cannot lead to the radical transformation required for fundamental

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[151] Problem, para. 5; Commercial Treaties, para. 6.

[152] DALT, p. 257.

[153] *Ibid.*, p. 259.

[154] VCLT Article 62; *Gabčíkovo-Nagymaros Project*, para. 104; Árnadóttir, p. 1.

[155] *U.K. v. Iceland,* para. 43.

[156] Dörr, Schmalenbach, p. 1089.

change to be invoked.[157] Although the remaining turkey population cannot meet pre-10 October production levels,[158] the reserved 35% are based on a percentage of the entire production. Since Ravenshout's obligation was not radically transformed, it cannot rely on a fundamental change of circumstances as a ground for the FIT's termination.

B. Ravenshout has breached its obligations under the FIT

1. Ravenshout has breached the FIT

The principle of *pacta sunt servanda* enshrines that treaties must be performed by the parties in good faith.[159] Under the FIT, Ravenshout has reserved 35% of its stock for Astoriana, however by canceling a series of scheduled fertilizer shipments,[160] it breached its obligations under the treaty.

2. Ravenshout's breach cannot be justified by countermeasures

Countermeasures must be taken in response to a previous internationally wrongful act of another State and must be directed against that State.[161] They have to be proportionate to the alleged breach[162] and shall be applied after notification to the responsible state.[163] However, these conditions are not met in the present case, as Astoriana has not committed any internationally wrongful act towards Ravenshout.[164] Moreover, Ravenshout's decision to deprive Astoriana from

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[157] *Brazilian Loans*, para. 66; *Serbian Loans*, para. 82; Dörr, Schmalenbach, p. 1080.

[158] Clarification No. 16.

[159] DALT, p. 211.

[160] Problem, paras. 5, 25.

[161] *Gabčíkovo-Nagymaros Project*, para. 83.

[162] DARSIWA, p. 134.

[163] *Air Service Agreement*, paras. 83, 85; DARSIWA, p. 136.

[164] See Section IV.A.2.a.

its reserved stock[165] seems to have a rather punitive effect in contrast to the purpose of countermeasures - to encourage the responsible State to comply with its obligations.[166] Additionally, Ravenshout must have notified Astoriana of its decision to take countermeasures and should have addressed Astoriana's specific conduct in order to cease the wrongful act before canceling the shipments.[167] Hence, Ravenshout's acts cannot be justified as countermeasures.

C. Ravenshout shall pay reparations to Astoriana

Reparation must wipe out all the consequences of the illegal act and re-establish the situation which would have existed if that act had not been committed.[168] Ravenshout must therefore compensate Astoriana for the damages caused to the Applicant by canceling the shipments before 31 October.[169] As compensation covers any financially assessable damage *"including loss of profits insofar as it is established"*,[170] compensation for the loss of future profits would put Astoriana back in the situation in which it would have been with regard to the fertilizer supplies,[171] had Ravenshout complied with its obligations. Therefore, Ravenshout shall pay compensation to Astoriana covering the lost profits for the remaining time in which the FIT would be in force.

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[165] Problem, para 24.

[166] DARSIWA, p. 135.

[167] ARSIWA, Art. 43.

[168] *Factory at Chorzów*, p. 47; *Corfu Channel Compensation*, p. 249; *Gabcikovo-Nagymaros Project,* para. 129, 152; *Bosnian Genocide* case, para 460.

[169] Clarification No. 29.

[170] ARSIWA, Art. 36 (2).

[171] *LETCO*, para. 119; *Crystallex*, para. 879.

(h) Submissions

Astoriana respectfully requests the Court to adjudge and declare that:

I. ICJ has jurisdiction to rule in the case and the dispute before it is admissible.

II. The May 2022 award is valid and binding under international law and Ravenshout must provide the compensation awarded to Astoriana therein.

III. Ravenshout has breached UNCLOS and therefore owes reparations.

IV. Ravenshout has breached the Fertilizer Import Treaty and shall pay reparations.