TELDERS INTERNATIONAL LAW MOOT COURT COMPETITION

2023

Before the International Court of Justice:

#BrackfishIsServed

(Astoriana v. Ravenshout)

Written Memorial on behalf of *Ravenshout.*

(Respondent)

Registration Number: 15

(a) Table of Contents

(b) List of Abbreviations

Adv. Op.	Advisory Opinion
ARSIWA	Articles on Responsibility of States for International Wrongful Acts
Art./Arts.	Article /Articles
Case	'The Case of Brackfish is Served'
Clarifications No.	Clarifications on 'The Case of Brackfish is Served'
CPW	Circumstance Precluding Wrongfulness
Diss. Op.	Dissenting Opinion
Dr.	Doctor
EIA	Environmental Impact Assessment
FAO	Food and Agriculture Organization
FIT	Fertiliser Import Treaty
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
IWA	International Wrongful Act
MPEPIL	Max Planck Encyclopedia of Public International law
No.	Number
p./pp.	Page/Pages
para./ paras.	Paragraph/Paragraphs
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice

PTSD	Peaceful Treaty for the Settlement of Dispute
PO2.	Procedural Order number 2
Sep. Op.	Separate Opinion
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
v.	Versus
VCLT	Vienna Convention on the Law of Treaties
VCSST	Vienna Convention on Succession of States in respect of Treaties
Vol.	Volume

(c) List of Sources

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(d) Statement of Relevant Facts

Historical background

The Principality of Ravenshout is a coastal state that is situated along the Hahrlim Sea. To its north, it is bounded by the People's Republic of Datmars and Astoriana, the two composite States of the former Confederacy of Datmars. Astoriana became an independent State when the Confederacy dissolved in 1979.

Ravenshout is a well-respected member of the international community, and has enjoyed long-standing, peaceful relations with both Datmars and Astoriana. It was a founding member of the UN and has demonstrated its respect for international human rights law by signing and ratifying the ICCPR, and the ICESCR. It is also a high contracting party to the 1982 UNCLOS and the 1907 Convention for the Pacific Settlement of International Disputes. In advancement of its peaceful relation with its neighbour, Ravenshout concluded the Peace Treaty for the Settlement of Disputes with the Confederacy of Datmars in 1922. In the absence of any dispute arising between the parties, the PTSD has remained a testimony of the bilateral cooperation between the States. Similarly, it ratified the Datmars-Ravenshout Investment Pact in 1965, which Ravenshout now considers to be applicable in its relationship with Astoriana.

Economic cooperation

Ravenshout is a developing country with a GDP of 5 billion USD and a burgeoning coastal population, and it has struggled to cope with a series of food crises. Options for development are limited as the arable "Cornucopia" (which is located along Ravenshout's inland border with Astoriana) is the protected homeland of Ravenshout's wild turkey population – a holy animal which holds great cultural significance within the State. In order to feed its people and develop its economy, the Ravenshouter Government increasingly turned to foreign investment. Such

investments included a deal concluded with an Astoriani corporation in 1991 to develop a gas field in the Scherpeiland region, located in a clearing of the Nassau Mountain range in the East of the country. The corporation expanded its operations in 2015 to employ techniques such as hydraulic fracturing. Further Astoriani economic cooperation came in the form of the Fertiliser Import Treaty, concluded in 2015, under which Ravenshout agreed to reserve 35% of its fertiliser stocks, which comes from the droppings of the Cornucopia Turkeys, for sale to Astoriana. The most monumental foreign investment, however, came from the development of the Brackfish project.

The Brackfish project

The Brackfish project was initiated to address growing food insecurity in Ravenshout. The project was launched by Prince Fritz IV, who championed the initiative as a cause célèbre amongst the international community. Ravenshout procured the world's foremost food scientists and genetic experts to make the State a world-leading advocate for genetically modified organisms. After intensive and careful study, the Brackfish organisms, an innovative and nearly boneless breed of fish, were deemed safe for human consumption. Following several studies and assessments of risks and alternatives, Ravenshout began construction and subsequent operation of this project in the brackish waters of the Élysée Estuary. The first shipments to markets arrived in 2015 with a government publicity campaign that included a hashtag and slogan ("#brackfish is served").

The events of June 2018

All was looking up for the people of Ravenshout, but disaster was yet to strike. On the morning of 16 June 2018, Ravenshout was struck by a devastating earthquake in the Nassau Mountain

region. While the epicentre was located in a sparsely populated area, the earthquake set in motion a chain of events that would fundamentally reshape the landscape of Ravenshout. The scale of the earthquake was so immense that an entire mountain side collapsed into the waters of Lake Taurendunum. This unleashed a tidal wave that would gain velocity as it ripped through the entire length of the Blozen River. The deadly wave was so powerful that it dislodged the entire Brackfish Aquaculture complex and released the erstwhile safely contained fish into the wild. The impact and destruction that the tidal wave unleashed on the people of Ravenshout was unprecedented.

As these events precipitated, the Ravenshouter Government was left in a state of shock and was left unable to respond to the magnitude of the events in time. Nor did the tidal wave stop neatly at the Ravenshout border. The tidal wave followed through into Astoriani territory, launching the newly liberated Brackfish in Astoriana's Himbeau Bay. Outside the control of Ravenshout's authorities, the fish stripped away the infrastructure of the Himbeau Bay, causing the unfortunate casualties in the popular tourist resort.

The aftermath

The natural disasters and the destruction of the Brackfish aquaculture in June 2018 exacerbated Ravenshout's economic crisis. The country plummeted into an unprecedented state of food insecurity. Furthermore, the sudden death of its Head of State significantly weakened the State internally, such that it could not address the damages caused by the natural disasters and other concerns raised on the international plane. The ensuing succession crisis ended with the ascension of Fritz V to the throne, who made radical changes to the country's economy. Ravenshout subsequently abandoned any Brackfish-related projects and instead promoted a

grain-based diet by massively investing in grain production. Prince Fritz V pioneered the regrowth of Ravenshout, heralding a new era for the Ravenshouter people.

The Turkey Day mass-slaughter

Despite these new measures, Ravenshout is still in an unstable situation due its sovereign debt and recurring food insecurity. Matters were made worse in the early hours of the 10th of October 2022, Ravenshout's religious celebration 'Turkey Day'. Under the cover of darkness, a militia of over 2,000 Astoriani nationals invaded the Cornucopia and targeted 75% of Ravenshout's turkey population. The mass-slaughter of the Turkeys attacked an essential element of Ravenshouter identity. The perpetrators were known as "the Convocation", a self-professed radical group who were known to have the support of high-ranking Astoriani authorities. Indeed, President Athena Green had installed the Convocation as an auxiliary police force in Astoriana and had authorised them to perform internal security operations.

Astoriana's mass slaughter of Ravenshouter turkeys was not only an act of symbolic violence, but the acts of the Convocation also severely impaired Ravenshout's ability to produce fertiliser. As a result of the slaughter, Ravenshout had no choice but to terminate the FIT and suspend its fertiliser shipment. As such, the remaining 25% of its fertiliser production must now – for obvious national security reasons – be reserved for its own domestic production of grains to protect its citizens from an impending food scarcity crisis.

The Annex VII tribunal proceedings

In 2018, Astoriana instituted proceedings with regards to the events of June 2018. Despite Ravenshout's strong objection to the Annex VII tribunal's jurisdiction, the tribunal decided to

rule on Astoriana's claims regardless. It admitted Datmars as a third party to the proceedings without the consent of Ravenshout and proceeded to base its finding on evidence brought by the latter. Notably, the tribunal relied solely on highly classified documents provided by a former Ravenshouter national, Dr Gene Probleem. In doing so, the tribunal relied on the fruit of the poisonous tree, as any evidence transferred by Dr. Probleem to Datmars has not been authorised *a priori*. Through the instrumentalization of nationality laws, Dr. Gene Probleem attempted to circumvent Ravenshout's national security laws when he defected to Datmars following the events of June 2018. Indeed, Ravenshout never authorised the release of classified documents, and the tribunal did not draw any inference from either the sensitive nature of the documents or the credibility of Dr. Gene Probleem's testimony. Furthermore, Dr. Probleem only came forward after the events of June 2018 to support Astoriana's claims after months of exhibiting questionable behaviours. Immune to Ravenshout's protestations, the tribunal rendered an award on the 1st of May 2022, which Ravenshout has not recognised. Affirming its previous objections, Ravenshout does not consider itself bound by the tribunal's findings.

The ICJ proceedings

On the 30th of October 2022, Astoriana instituted proceedings before the ICJ on the basis of the compromissory clause under the PTSD. Ravenshout concluded the Agreement with the Confederacy of Datmars in 1922, which it did not consent to apply to Astoriana. As such, Ravenshout strongly objects to the jurisdictional basis of these claims, and further considers the dispute inadmissible.

(e) Issues

In the case of *#BrackfishIsServed* between Astoriana and Ravenshout, Ravenshout requests this honourable Court to adjudge and declare whether:

I. Astoriana's claims fulfil the jurisdictional and admissibility requirements set forward by the ICJ.

A. Does the compromissory clause under article 1 of the PTSD constitute a valid compromissory clause for the ICJ's jurisdiction?

1. Did Astoriana succeed to the PTSD following the dissolution of the Confederacy of Datmars?
2. Is the dispute precluded by the exception under article 2 of the PTSD?

B. Is the Court seised of an admissible dispute?

1. Is it appropriate for the Court to adjudicate on the validity of an arbitral award decided by another tribunal?
2. Is it within the Court's judicial function to review the merits of an arbitral award decided by another tribunal?

II. The Arbitral Award of 1 May 2022 valid and binding under international law.

A. Did the tribunal fail to respect article 10 Annex VII UNCLOS?

B. Did the tribunal seriously violate fundamental procedural rules?

1. Was the procedural obligation to exchange views under article 283 UNCLOS fulfilled?
2. Does Datmars' intervention amount to a violation of Ravenshout's right to a fair and equal treatment?
3. Did the tribunal err by admitting and relying on highly classified documents as part of the proceedings?

III. Ravenshout is responsible for any breaches of UNCLOS or customary international law.

A. Has Ravenshout fulfilled its obligation to protect the marine environment under Part XII of UNCLOS?

1. Has Ravenshout taken all measures necessary within their capabilities to construct the Aquaculture lawfully under articles 192 and 194 UNCLOS?
2. Has Ravenshout fulfilled their obligation to carry out assessments under article 206 UNCLOS?
3. Has Ravenshout taken all measures necessary under article 196 UNCLOS?

B. In the alternative, are the wrongfulness of Ravenshout's actions precluded due to *force majeure*?

IV. Ravenshout lawfully terminated the Fertiliser Import Treaty.

A. Is Astoriana responsible for a material breach of the FIT?

1. Are the acts of the Convocation arrtibutable to Astoriana under article 5 ARSIWA?
2. If the Convocation acted in excess of their authority, are their acts still attributable to Astoriana under article 7 ARSIWA?
3. Has Ravenshout lawfully terminated the FIT within the meaning of article 60 VCLT?

B. Did Ravenshout lawfully terminate the FIT under article 62 VCLT?

(f) Summary of Arguments

In their first submission, Ravenshout objects to the jurisdiction of the Court and the admissibility of the dispute. Ravenshout raises the following objections:

1. The Court does not have jurisdiction by virtue of article 1 PTSD. Astoriana did not succeed to the PTSD, as it is precluded by the absence of consent of Ravenshout. In addition, the claims of Astoriana pursue an ulterior purpose which is expressly excluded from the scope of the compromissory clause.
2. The dispute submitted by Astoriana is inadmissible. The ICJ is not competent to review a claim of validity of an award rendered by an Annex VII tribunal under UNCLOS. In addition, the submissions of Astoriana go beyond the mere review of validity, it inquires into the merits of the award. As such, the ICJ is not an appellate court and should refrain from exercising such power.

In the alternative that the Court finds it has jurisdiction and the dispute is admissible, Ravenshout argues in its second submission that the award rendered by the Annex VII tribunal is invalid, and thus non-binding. The grounds for nullity of the awards raised by Ravenshout are based on the following arguments:

1. The award is invalid under the ground of lack or inadequacy of reasons. Indeed, the tribunal failed to comply with article 10 of Annex VII UNCLOS, which provides for the obligation to state the reasons upon which it bases its reasoning.
2. The award is invalid under the ground of serious violation of fundamental procedural rules. On the one hand, the institution of proceedings by Astoriana was precluded by the absence of exchange of views between the parties required under article 283 UNCLOS. On the other hand, the admission of Datmars to the proceedings as a third party is a manifest violation of equality between the parties. Last but not least, the

tribunal erred by relying exclusively on highly classified documents in violation of rules of admissibility of evidence.

In their third submission, Ravenshout submits that they are not responsible for any alleged breach of UNCLOS raised by Astoriana. In advancing this argument, Ravenshout contends that they:

1. Took all measures necessary within their capabilities to lawfully construct the Aquaculture complex under articles 192 and 194 UNCLOS. In this regard, they took all measures necessary to ensure that actions within their jurisdiction and control did not cause damage by pollution to other States, including Astoriana.
2. Fulfilled their obligation under article 206 UNCLOS to assess as far as practicable any effects that may cause significant pollution or cause significant and harmful damages to the marine environment.
3. Took all measures necessary to comply with article 196 UNCLOS. As such, Ravenshout took all measures necessary to prevent, control and reduce the pollution of the marine environment and prevent the introduction of new or alien species that may cause significant or harmful changes to the marine environment.

In the alternative, Ravenshout submits that any wrongfulness found is precluded due to the *force majeure* nature of the earthquake and the ensuing tsunami. As such, Ravenshout observes that the Tsunami is an irresistible and unforeseen circumstance that was beyond the control of the State, and it was the impact of the tsunami made performance of their obligations under UNCLOS materially impossible.

In their final submission, Ravenshout argues that they are not responsible for any alleged breaches of the Fertiliser Import Treaty. Indeed, it is Ravenshout's strongly held view that the

FIT was lawfully terminated, meaning that they no longer owed an international obligation to Astoriana in this regard. This argument is supported by the following observations:

1. Astoriana materially breached the FIT, thus allowing Ravenshout to lawfully terminate the treaty under article 60 VCLT. This argument is predicated on the basis that the "Convocation" illegally stole 75% of Ravenshout's turkey population. As the acts of the Convocation are directly attributable to Astoriana under articles 5 and 7 ARSIWA, it should be concluded that Astoriana committed a material breach of the FIT. As such, Ravenshout was entitled to terminate the FIT under article 60 VCLT.
2. The theft of Ravenshout's turkeys also amounts to a fundamental change of circumstances within the meaning of article 62 VCLT. In this regard, Ravenshout observes that there has been a radical transformation of the obligation to send 35% of its fertiliser stockpiles to Astoriana. Moreover, the theft of the turkeys has resulted in a dramatic increase in the burden of Ravenshout's obligations, as production cannot meet pre-10 October levels. Finally, Ravenshout observes that performance of the obligation has been rendered something essentially different to that originally entailed as the theft of the turkey constituted a violation of the object and purpose of the FIT.

For all these reasons, the Principality of Ravenshout respectfully requests the Court to adjudge that it has no jurisdiction and that it should dismiss The Republic of Astoriana's claim against them in its entirety.

(g) Jurisdiction of the Court

The Principality of Ravenshout submits that the Court is without jurisdiction in respect of the dispute brought before the Tribunal by the government of Astoriana. Ravenshout objects to this Court's jurisdiction on several grounds. It notes that Astoriana has not consented to the compromissory clause under article 1 of the PTSD, as it has not succeeded to the PTSD. In any case, Ravenshout finds that the dispute falls under the exception within article 2 of the PTSD, thus, the fisheries dispute is outside the scope of the Court's jurisdiction. In light of the foregoing, Ravenshout requests the Court to decline jurisdiction.

(h) Arguments

I. THE COURT MANIFESTLY LACKS JURISDICTION AND IS NOT SEISED OF AN ADMISSIBLE DISPUTE.

The Court cannot adjudicate on the dispute because [A] the compromissory clause in Art. 1 PTSD does not constitute a valid compromissory clause for the jurisdiction of the Court. [1] Astoriana did not succeed to the PTSD, and [2], in any case, the dispute is excluded from the scope of Art. 1 of the PTSD by virtue of Art. 2. Furthermore, [B] The Court is not seised of an admissible dispute because [1] it is outside the Court's judicial function to review the validity of an arbitral award, [2] as well as to review the merits of an award.

A. The compromissory clause under Art. 1 PTSD does not constitute a valid compromissory clause for the jurisdiction of the Court.

1. Astoriana did not succeed to the PTSD.

Consent from both parties is required to establish the Court's jurisdiction.[1] In the present case, Astoriana relies on the compromissory clause under the PTSD in accordance with the transfer of jurisdiction provision under Art. 37 ICJ Statute[2]. However, a treaty is only binding upon States that have ratified or acceded to it.[3]

a) *There is no legal rule for automatic succession to bilateral treaties.*

In the context of state dissolution, there is no customary rule in favour of automatic succession of new successor States to bilateral treaties previously concluded by the predecessor State.[4] The

[1] Art. 36 ICJ Statute.

[2] ICJ Handbook, p. 177.

[3] Art. 34 VCLT.

[4] Dumberry (2015) pp.21-22.

1996 VCSST may allow for the treaty between the successor States and the other party to remain in force.[5] However, in the absence of *opinio juris*, the VCSST provisions do not reflect customary international law.[6] Indeed, looking into the *travaux préparatoires*, not all States were in favour of the automatic succession rule under Part IV.[7] Further, State practice for automatic succession is limited to human rights treaties[8] and localised treaties,[9] by virtue of their specific nature.

The PTSD was ratified by Ravenshout and the Confederacy in 1922 before its dissolution in 1979, therefore it is subject to rules of State succession to treaties. However, neither Ravenshout nor Astoriana have ratified the VCSST;[10] additionally in the absence of customary character of the provisions, there is no international law basis for the automatic succession rule.

The automatic succession rule is not applicable to the PTSD in the absence of legal basis.

b) *Ravenshout did not consent to the succession of Astoriana to the PTSD.*

The rule of non-automatic succession applies to bilateral treaties. There is *opinio juris* in favour of both parties having to consent to the succession to the bilateral treaty. In light of the *travaux préparatoires* of the VCSST, States were in favour of distinguishing between multilateral and bilateral treaties. The application of the principle of non-automatic succession to bilateral treaties is justified as these are tailored to a specific bilateral relationship of States.[11] Notably

[5] Art.34 VCSST.

[6] Sep. Op. Judge ad hoc Kreca: *Bosnian Genocide* (ICJ) p. 779; Kamminga (2009) p. 106.

[7] ILC Report on State succession (1972) pp. 286-292.

[8] Zimmermann, Devaney (2019) para. 18.

[9] *Gabčíkovo-Nagymaros Project* (ICJ) p.72; Lester (1963) pp. 145-176.

[10] Clarification no. 47.

[11] ILC Report on State succession (1974) pp. 236-241.

the Badinter Commission resorted to individual agreements of parties for succession.[12] Further, State practice supports the distinction between succession to bilateral and multilateral treaties.[13] As such, States opted for negotiations or exchange of notes between the successor State and the other party,[14] notably in the case of the dissolution of the ex-Yugoslavia and ex-Czechoslovakia.[15] Thus, there is a customary international law requiring consent for succession to bilateral agreements.

In the present case, the PTSD is a bilateral treaty which provides for the settlement of disputes arising in the relation between Ravenshout and the Confederacy. By virtue of the non-automatic succession rule, Ravenshout and Astoriana are required to consent to be bound by the bilateral treaty. While Astoriana resorted to a general unilateral declaration and notes verbales regarding treaty succession, Ravenshout has not expressly consented to the accession of Astoriana to the PTSD. Astoriana cannot bind Ravenshout to this bilateral treaty through a unilateral declaration.[16] Further, it cannot be inferred from Ravenshout's silence that it has tacitly agreed to be bound, Ravenshout is intentional in its acknowledgment of succession. It formally declared it considered the Datmars-Ravenshout Investment Pact to apply to Astoriani investors,[17] therefore giving its consent to be bound. This is a testimony of Ravenshout's adherence to the non-automatic succession rule and the requirement of consent of parties for succession to a bilateral treaty.

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[12] Arbitration Commission of the Conference on Yugoslavia Opinion no. 11 (1993).

[13] Qerimi and Krasniqi (2013) p. 1659.

[14] ILA Conclusions of the Committee on Aspects of the Law of State Succession (2008).

[15] ILA Draft Final Report of the Committee on Aspects of the Law of State Succession (2008) p. 27 (Austria, Germany, Finland, France, Poland, China, Japan, Spain…).

[16] *Nuclear Tests* (ICJ) para. 43.

[17] Case para. 3.

Therefore, Ravenshout has not consented to the succession of Astoriana to the PTSD. Henceforth, in the absence of Ravenshout's consent, Astoriana has not succeeded to the PTSD.

2. In any case, the dispute is excluded from the scope of art. 1 of the PTSD by virtue of art. 2.

The subject-matter of the ICJ's jurisdiction is determined by the compromissory clause conferring jurisdiction.[18] In addition, it is established practice that the international court and tribunals ought to characterise the subject-matter of the dispute[19] in order to assess whether it falls within the scope of the compromissory clause or whether the submitted claim has an ulterior purpose (i.e. implicates an outside dispute excluded by the compromissory clause).[20] The PTSD includes a general compromissory clause under Art. 1 conferring jurisdiction to the ICJ for 'all disputes' arising between the parties, but excludes 'fisheries' under its Art. 2. Further, considering aquaculture is becoming the main source of fish for human consumption, the meaning of the word 'fisheries' has evolved from solely referring to 'wild fisheries' to include aquaculture.[21]

In the present case, Astoriana is pursuing under Art. 1 of the PTSD an ulterior purpose which falls under the exception of Art. 2. This is clearly reflected in Astoriana's submissions 1 and 2 which relate to the Brackfish project previously adjudicated under the auspice of an Annex VII tribunal. The parties' disagreement regarding the FIT is only secondary to the dispute. Indeed, Astoriana is aware that the shipment of fertilisers has been impaired by the mass-slaughter of

[18] Art. 36 (1) ICJ Statute.

[19] *Fisheries Jurisdiction (Spain v. Canada)* (ICJ) para.29; *Chagos MPA* (PCA) para. 206.

[20] Harris (2020) pp. 279–299.

[21] FAO Code of Conduct (1995) Introduction; Roderburg (2011) p. 161.

turkeys committed by its own nationals. By virtue of *estoppel*, a general principle of law,[22] one cannot take advantage of their own wrongdoings. Thus, it is only instrumentalising the fertiliser dispute to re-introduce the impermissible review of the Annex VII tribunal arbitral award concerning the Brackfish "through the backdoor" in violation of the principle of *res judicata* (see below, I.B.2.). Properly characterised, the Brackfish, as an Aquaculture project, pertains to fisheries. Thus, Astoriana's claims fall outside the scope of the compromissory clause.

The Court does not have the jurisdiction to rule over this dispute as it pertain to fisheries, which is excluded by the compromissory clause under Art. 2 of the PTSD.

To conclude, the Court lacks jurisdiction to rule on this dispute, as Astoriana did not succeed to the compromissory clause under Art. 1 of the PTSD, additionally Astoriana's claims are specifically excluded from the Court's jurisdiction under Art. 2 PTSD.

B. The Court is not seised of an admissible dispute.

1. It is outside the Court's judicial function to review the validity of the arbitral award.

UNCLOS does not provide for the review of validity, as decisions are final by virtue of Art. 12 Annex VII and 296.[23] In addition, Part XV of UNCLOS is a self-contained regime, as it was intended for the Convention to have an 'integral' nature.[24] Subsequently, States must expressly opt-out to this compulsory dispute settlement mechanism,[25] in accordance with Art. 282, in order to submit their dispute to an external forum. This scenario is limited to *ad hoc* agreement

[22] Sep. Op. Judge Fouad Ammoun: *North Sea Continental Shelf* (ICJ) p.120 / Cottier, Müller (2021) para. 9.

[23] Art.296 UNCLOS.

[24] UNCLOS 185th Meeting (1983) para. 53.

[25] *The South China Sea Arbitration* (Preliminary Objections) (PCA) paras.223-225.

entered by States *ex post facto,*[26] thus excluding compromissory clauses. Accordingly, the jurisdiction of the ICJ is not exclusive, it takes into account other dispute settlement agreements in determining its jurisdiction, with a special emphasis on *lex specialis* and *lex posterior* principles[27].

Under the second submission, Astoriana asked the ICJ to review the validity of the 1st of May award rendered by an UNCLOS Annex VII tribunal. The parties have not agreed to refer to the ICJ the review of the award by virtue of Art. 12 Annex VII. The conferral of jurisdiction to the ICJ under Art. 1 PTSD is not exclusive 'unless the Parties have agreed otherwise'. Thus, the PTSD intended to allow for States to subscribe to other compulsory dispute settlement mechanisms *a posteriori*. Subsequently, as UNCLOS postdates the PTSD and is the more specific dispute settlement regime, it prevails over the conferral of jurisdiction under Art. 1 PTSD. If Astoriana seeks to have the validity of the award reviewed, it must submit its claim under the UNCLOS regime for dispute settlement. Finally, Ravenshout cannot be compelled to prove the invalidity and bear the burden of proof thereof, as it neither consented under UNCLOS nor the PTSD.

It is inappropriate for the ICJ to review the validity of an award rendered under the compulsory dispute settlement mechanism of UNCLOS.

2. It is outside the Court's judicial function to review the merits of an award.

By virtue of Art. 296 UNCLOS, an arbitral award is final, the dispute cannot be adjudicated through another dispute settlement mechanism. The *res judicata* principle further holds that a claim cannot be brought regarding the same parties and the same issues in front of an

[26] *Maritime Delimitation* (ICJ) para. 130; *Barbados v. Trinidad and Tobago* (PCA) para. 200.

[27] *Border and Transborder Armed Actions* (ICJ) para. 41.

international court if it has already been litigated.[28] Therefore, there is no appeal in front of the arbitral tribunal, and especially, another court, such as the ICJ, cannot re-litigate on the merits.[29]

The essence of Astoriana's claim is not limited to the procedural review of the award, but to the merits contained within it. As per its third submission, Astoriana is aiming to 'relitigate' the merits of the Annex VII tribunal award, meaning the same dispute, the same parties and the same UNCLOS provisions. However, the review of an award can only be a claim of nullity. There is no appellate procedure.[30]

Therefore, the review of the merits by the ICJ is outside the scope of its judicial function, as it contradicts the principle of *res judicata*.

To conclude, the dispute is inadmissible as it is outside the Court's judicial function to review the validity of an award and it is inappropriate for the Court to review the merits of the award as requested in the third submission.

II. THE ARBITRAL AWARD OF MAY 2022 IS INVALID AND NOT BINDING.

The award is invalid, [A] because the tribunal failed to comply with its obligation to state reasons under Arts. 9 and 10 of Annex VII UNCLOS. [B] There have been serious violations of fundamental procedural rules, [1] as Astoriana violated the procedural obligation to exchange views prior to the institution of proceedings under Art. 283 UNCLOS, [2] the intervention of Datmars violated Ravenshout's right to fair and equal treatment; [3] and, the tribunal violated principles of admissibility of evidence.

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[28] Reinisch (2004) pp.37-77; *Chagos Adv. Op.* (ICJ) para. 81.

[29] *King of Spain Arbitral Award* (ICJ) p.26; Art. 82 1907 Hague Convention (1907).

[30] *King of Spain Arbitral Award* (ICJ) p.26.

A. The tribunal failed to comply with its obligation to state the reasons under Art. 10 of Annex VII UNCLOS.

Art. 9 Annex VII UNCLOS provides for the non-frustration of proceedings in the event of the non-appearance of one party. In light of the principle of fair and equal treatment, the tribunal must observe the rights of the parties and state the reasons upon which the award is based by virtue of Art. 10 Annex VII. The lack or inadequacy of reasons in support of conclusions arrived at by arbitrators constitute a ground of nullity for arbitral award.[31] Accordingly, in the *South China Sea* arbitration, the tribunal requested further written arguments for jurisdiction from the Applicant, and it raised objections *proprio motu* based on China's statements as part of a preliminary objection judgment[32].

In the present case, there was a total lack of reasoning in the arbitral tribunal's acceptance of jurisdiction and admissibility of the case.[33] The tribunal negligently and inadequately addressed the plea of jurisdiction of Ravenshout in a mere non-exhaustive paragraph rather than raising preliminary objections. It also failed to substantively engage with whether the subject matter of the case actually fell within the ambit of the interpretation and application of UNCLOS (see above, I.A.2.). As such, it did not draw sufficient implications from the non-participation of Ravenshout to the proceedings, contrary to its established jurisprudence.[34] The total lack of reasons given by the tribunal for the acceptance of jurisdiction and admissibility of the case constitutes a 'convincing reason' for invalidity. [35]

[31] *King of Spain Arbitral Award* (ICJ) p.26; Oellers-Frahm (2019) para.7.

[32] *South China Sea* (Preliminary Objections) (PCA) para. 12.

[33] Case para. 20.

[34] *South China Sea* (Preliminary Objections) (PCA); *Arctic Sunrise* (ITLOS).

[35] *King of Spain Arbitral Award* (ICJ) p. 27.

The tribunal failed to state the reasons in its decision in violation of Art. 10 Annex VII.

B. The award is invalid because there have been serious violations of fundamental procedural rules.

1. Astoriana violated the obligation to exchange views prior to the institution of proceedings under article 283 UNCLOS.

A serious departure from a fundamental rule of procedure constitutes a ground for nullity[36] by virtue of a general principle of law.[37]

Art. 283 UNCLOS requires parties to exchange views on how to settle a dispute that has arisen, in order to provide for an opportunity to settle the dispute out of court. The tribunal proceeds to an objective assessment of the facts to determine whether there was awareness of 'clearly opposite views' to the dispute at the time of filing.[38] Accordingly, the tribunal must rely on the extent of the communications between both parties,[39] and the mention of one State' individual responsibility to determine there was awareness of the issue[40]. Furthermore, considering the difficulty of imposing the exhaustion of other remedies, a reasonable timeframe is required for the respondent to address the dispute before filling proceedings.[41]

The claims were brought to the tribunal following a single call between the Head of States of Atoriana and Ravenshout, which is insufficient to constitute an exchange of views under Art.

[36] Art.35(c) ILC Model Rules on Arbitral Procedure (1958).

[37] Lagrange (2022) para. 7.

[38] *Marshall Islands v. United Kingdom* (ICJ) para. 43.

[39] *South China Sea* (Preliminary Objections) (PCA) paras. 163-178.

[40] *Marshall Islands v. United Kingdom* (ICJ) para. 49.

[41] Peters, Anne (2003) p. 9.

283 UNCLOS. Ravenshout was not aware of the existence of a dispute following the 19th of June call, the Astoriani Head of State did not allude to the responsibility of Ravenshout for the events.[42] Furthermore, the timeframe between the interaction and the institution of proceedings is very constrained, from June to September 2018. The tribunal ought to consider the specific context during that time. Besides the ongoing economic and food insecurity crisis, Ravenshout was facing a succession crisis following the death of its Head of State[43], which inevitably impacted Ravenshout's ability to address the disaster and enter any form of peaceful means of settlement. Therefore, it cannot be drawn from these facts that Ravenshout refused to enter in dispute settlement discussions nor that it acted in bad faith.

Thus, the tribunal disregarded the obligation to exchange of views between the parties prior to the institution of proceedings under Art. 283 UNCLOS.

2. Datmars' intervention violated Ravenshout's right to fair and equal treatment.

In accordance with Art. 5 of Annex VII of UNCLOS, it is up to the tribunal to set out its own procedural rules in light of the principle of fair and equal treatment of parties, especially in the absence of one of the parties.[44] By virtue of a general principle of law, intervention in arbitral proceedings is only possible through consent of the parties. The alternative would be contrary to the importance of bilateralism in arbitral proceedings.[45]

In its PO2, the tribunal disregarded the absence of consent from Ravenshout to the intervention of Datmars. In the absence of Ravenshout, the intervention of Datmars supporting Astoriana's

[42] Case para. 11.

[43] Case para. 13.

[44] *Nicaragua* (ICJ) para. 31.

[45] Yee (2015) para. 21.

claims conflicts with the tribunal's obligation to maintain equality between the parties, and thus with the essence of arbitral proceedings. Notably, Datmars' intervention was essential for the findings of the tribunal which relied solely on its evidence.[46]

To conclude, PO2 was rendered in violation of Ravenshout's right to a fair and equal treatment.

3. The tribunal violated principles of admissibility of evidence.

In international proceedings, the rules of evidence tend to be that of free admissibility of evidence.[47] Thus, the Court has the responsibility to "determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate".[48] In doing so, international courts and tribunals must observe general principles of law, such as the principles of proper administration of justice, good faith and fair and equal opportunity for the parties.[49] Additionally, as per the principles of *estoppel* and *ex injuria non oritur jus*,[50] no party is allowed to take advantage of their own wrongdoing. Thus, States cannot rely on illegally obtained evidence in support of their claim in respect of the equality of arms.[51] Thus, the evidence obtained in violation of the law is inadmissible, as a general rule of evidence common to most legal systems.[52] Additionally, evidence raising concerns of authenticity could lead to non-compliance and claims of *excès de pouvoir* against the tribunal[53].In the absence of

[46] Clarification no. 1.

[47] Art. 27 PCA Rules 2012; Chen (2015) p.34.

[48] *Pulp Mills* (ICJ) para.168; Art.18 ILC Model Rules on Arbitral Procedure (1958).

[49] *Nicaragua* (ICJ) para. 31.

[50] Sep. Op. Judge Fouad Ammoun: *North Sea Continental Shelf* (ICJ) p.120.

[51] *Methanex* (UNCITRAL); Mansour Fallah (2020) p. 156.

[52] Wolfrum, Möldner (2013) para.60.

[53] Reisman and Freedman (1982) p. 741; Riddell (2013) p. 866.

one party to the proceedings the judge has to balance the interests at the core of its assessment of evidence, including the lack of cross-examination of witnesses and experts appointed by the non-appearing party.[54] Henceforth, the tribunal ought to take a more pro-active stance in order to establish the facts, such as requesting evidence, appointing experts,[55] notably for particularly technical and scientifical cases.[56]

Dr. Probleem handed highly classified documents belonging to the Ravenshout's government to Datmars.[57] The evidence provided technical information later submitted to the tribunal which went beyond the scope of what the tribunal could normally access. In addition, the evidence was used to find that Ravenshout had not conducted sufficient studies without further inquiry into potential documents withheld in the State. By the virtue of *estoppel* and general principles of law, the Court should not have admitted and relied solely on illegally obtained evidence submitted in favour of Astoriana. Furthermore, much consideration is to be given to the authenticity of the evidence. Dr Probleem illegally accessed and transmitted highly classified documents to Datmars upon its defection. Therefore, in assessing the admissibility of evidence, the Court should have taken into account the absence of Ravenshout to the proceedings. The tribunal had the powers *proprio motu* to appoint experts and seek further evidence in order to determine the facts on a highly technical issue which goes far beyond its expertise.

To conclude, the tribunal erred in its admission and assessment of the evidence brought by Dr. Probleem, rendering the award invalid.

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[54] *Nicaragua* (ICJ) p 67; Reisman and Freedman (1982) p. 738; Espenilla (2019) p. 21.

[55] Art. 62 ICJ Rules of Court; Art. 77 ITLOS Rules of the Tribunal; Art.18 ILC Model Rules on Arbitral Procedure (1958).

[56] Diss. Op. Judge Simma and Al-Khasawneh: *Pulp Mills* (ICJ) p.2.

[57] Case para.20.

Ravenshout maintains that the award of May 2022 was invalid and non-binding. The judge failed to state the reasons for its decision. In addition, the tribunal manifestly violated procedural rights by allowing the intervention of Datmars without the consent of Ravenshout and by admitting illegally obtained evidence.

III. RAVENSHOUT IS NOT RESPONSIBLE FOR ANY ALLEGED BREACH OF UNCLOS.

[A] Ravenshout did not breach the UNCLOS provisions raised by Astoriana since [1] the establishment of the Brackfish Aquaculture complex did not breach Art.s 192 and 194 UNCLOS, [2] Ravenshout carried out an adequate EIA under Art. 206 UNCLOS; and [3] Ravenshout took all measures to prevent the accidental introduction of the Brackfish into the marine environment. [B] In the alternative, the wrongfulness of the acts of Ravenshout is precluded due to *force majeure*.

A. Ravenshout did not breach the UNCLOS provisions raised therein.

1. Ravenshout took all necessary measures within their capabilities to construct the Aquaculture lawfully under Arts. 192 and 194 UNCLOS.

Art. 192 UNCLOS entails a general obligation to protect and preserve the marine environment. Art. 194 UNCLOS sets out the necessary steps to ensure that States comply with the obligation under Art. 192. Art. 194(2) specifically concerns the impact of pollution on other States and invariably requires States to (a) take all measures necessary to ensure that (b) activities within their jurisdiction or control (c) do not cause damage by pollution to other States.

(a) Ravenshout took all measures necessary to ensure…

The obligation to "take all measures necessary" is limited in application by Art. 194(1) so as not to overburden developing States.[58] The inclusion of the term necessary further implies the need for assessment on a case-by-case basis. Moreover, as Art. 194(2) is an obligation of conduct and not result,[59] it becomes clearer that pollution caused by events outside of a State's control does not come under the scope of Art. 194.

In the present case, Ravenshout is officially recognised as a developing country.[60] It would therefore not have had the same financial resources to carry out assessments to the same extent as more prosperous States. Despite their economic limitations, Ravenshout sought international funding and consulted with the world's foremost experts when initiating the Brackfish project, thus demonstrating their good faith, and commitment to the prevention of pollution of the marine environment. In this sense, it must be concluded that Ravenshout took all measures necessary to ensure that there was no pollution of the marine environment.

(b) … that activities within their jurisdiction and control …

Ravenshout does not dispute that the construction of the Aquaculture complex took place within its jurisdiction; there is no question of State attribution.[61]

(c) … to not cause damage by pollution to other States.

[58] Nordqvist, 64.
[59] *Pulp Mills* para. 187; *Activities in the Area* para. 110.

[60] Case no. 6.

[61] For these reasons, Ravenshout accepts that they are bound under art. 4 ARSIWA in this issue.

The final element of Art. 194(2) incorporates the customary law duty to prevent transboundary harm,[62] which is closely linked to obligations of due diligence,[63] resulting in three primary obligations.[64] In this regard, the State must first ascertain if there is a significant risk of transboundary harm. If there is such a risk, an EIA must be carried out with regard to the circumstances of the case. If the EIA carried out confirms the risk of transboundary harm, the State is under an obligation to notify all neighbouring States.[65] All these obligations must be read in light of the term "all measures necessary" above.[66]

From the inception of the Brackfish project to its execution, Ravenshout endeavoured to conduct due diligence assessments. They carried out several risk assessments and considered the physical integrity of the location as well as alternative locations.[67] The resulting Aquaculture complex operated safely for three years, and was only destroyed because of a devastatingly unforeseeable Tsunami. The obligation under Art. 194 pertains not to the strict liability for actual damage suffered, but rather to the steps taken to prevent said damage. Therefore, Ravenshout made its best efforts to minimise transboundary harm.

For these reasons, Ravenshout took all measures necessary within their capabilities to prevent, reduce and control the pollution of the marine environment under Arts. 192 and 194 UNCLOS.

2. Ravenshout fulfilled their obligation under Art. 206 UNCLOS.

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[62] *Trail Smelter*.

[63] *Pulp Mills*; *Activities in the Area*, para. 110.

[64] *Certain Activities*, para. 104.

[65] Ibid.

[66] See also ILC, Draft Arts. on Transboundary Harm, art. 3.

[67] Case no. 7; Clarification, 44.

The duty to carry out an EIA is also contained in Art. 206 UNCLOS. In this regard, the obligation is to carry out assessments on planned activities (a) as far as practicable where they (b) may cause significant pollution or cause significant and harmful changes to the marine environment.[68] While the duty to carry out an EIA is embodied in customary international law,[69] it is up to each State to determine the specific content required in each EIA.[70] Moreover, EIAs do not have to test every possible hypothesis or provide detailed solutions to problems that have been identified.[71] In this sense, Boyle has argued that international tribunals should only set aside EIAs where they are not "carried out in good faith" and are "demonstrably inaccurate."[72]

In the present case, Ravenshout carried out all EIAs reasonably expected of them. Indeed, Ravenshout's EIAs went beyond the minimum standard suggested by the ICJ in *Pulp Mills*. Whereas in *Pulp Mills* the Court rejected Argentina's argument that Uruguay's EIA was inadequate because it failed to consider alternative locations,[73] Ravenshout considered the risks associated with the project, and contemplated whether they could have moved the site of the Aquaculture complex.[74] Moreover, Ravenshout would not have reasonably been expected to consider the risk of an inland lake Tsunami, as this is an event so rare that it borders on the legendary.[75]

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[68] Art. 206 UNCLOS.

[69] *Pulp Mills*, para. 204.

[70] Ibid. para. 205.

[71] Boyle (2011), 230.

[72] Ibid.

[73] *Pulp Mills*, para. 210.

[74] Case no. 18.

[75] Marshall (2012); Kremer (2012), 5.

Finally, EIAs may also include socio-economic considerations.[76] Most pressingly, Ravenshout was struggling to feed its burgeoning population. Further, as a State party to the ICESCR, Ravenshout is under an obligation to provide adequate food to its people.[77] The Brackfish project was seen as the solution to this problem. Therefore, it was imperative that the Brackfish project succeed. As such, Ravenshout carried out their EIA adequately and in good faith, thus fulfilling their obligation under Art. 206 UNCLOS.

3. Ravenshout took all measures necessary under Art. 196 UNCLOS.

Art. 196 UNCLOS represents both an obligation to (a) "prevent, reduce and control pollution of the marine environment" and (b) prevent the introduction of new or alien species that "may cause significant or harmful changes to the marine environment."[78]

(a) Ravenshout did not pollute the marine environment.

Pollution is defined as "the introduction … of substances or energy into the marine environment."[79] Brackfish therefore do not constitute pollution. They are a novel species, but they are neither "substances" or "energy" within the ordinary meaning of those terms.[80] As the Brackfish are not pollution, their release into the marine environment does not trigger the first obligation in Art. 196.

(b) Ravenshout took all measures necessary to prevent the introduction of new species into the marine environment.

[76] ILC, Draft Arts. on Transboundary Harm, art. 10(b).

[77] Art. 11, ICESCR.

[78] Art. 196(1) UNCLOS; Proelß (2017), 1319-1329.

[79] Art. 1(1)(4) UNCLOS.

[80] Treaty provisions are to be interpreted in their ordinary meaning, art. 31(1) VCLT.

Ravenshout accepts that the Brackfish are a new species. However, it contends that they took all measures necessary to prevent the accidental introduction of the Brackfish into the marine environment. In this regard, Ravenshout safely constructed the Aquaculture complex, and contends that the Brackfish were safely contained before the Tsunami. Studies suggest that some fish might escape the aquaculture from time to time, at an average around 0.5%.[81] As such, when considering any escape scenario, Ravenshouter scientists could not have been expected to consider figures far in excess of this rate. Furthermore, as the Aquaculture complex had been in operation for three years, it is not implausible that some Brackfish had already escaped the facility. In this regard, there has been no suggestion of deleterious effects on the marine environment before the Tsunami hit. Therefore, it must be concluded that Ravenshout took all measures necessary required of them under Art. 196 UNCLOS.

B. In the alternative, the wrongfulness of the acts of Ravenshout are precluded due to *force majeure*.

Force majeure arises as a CPW where an act or event was brought about by an irresistible or unforeseen circumstance that was beyond the control of the State, and the event has made performance of an international obligation materially impossible.[82] The condition of irresistibility has been applied strictly by international tribunals. Notably, the tribunal in *Rainbow Warrior* held that the test of "absolute and material impossibility".[83] The un-foreseeability element of the test is not as strict, but it is necessary to consider each case in light of their specific circumstances.[84] Finally, Art. 23(2) ARSIWA includes a notion of externality:

[81] Jensen et. al. (2010).

[82] Art. 23(1) ARSIWA.

[83] *Rainbow Warrior*, para. 77.

[84] Hentrei, Soley, *Force Majeure*.

a State may not rely on *force majeure* where they have contributed to the situation happening, or they have assumed the risk of that situation occurring.[85]

Earthquakes and Tsunamis constitute irresistible forces that are "unavoidable or impossible to overcome,"[86] thus rendering their occurrence beyond the control of Ravenshout. Moreover, the likelihood of this particular Tsunami occurring was wholly unforeseeable. Ordinarily Tsunamis originate from the sea and travel towards the land. In the present case, the Tsunami originated from Lake Taurendunum, and travelled towards the coast as it ripped through the Blozen River.

Nor has Ravenshout contributed to, or assumed the risk of the Tsunami occurring. Tsunamis are unavoidable and impossible to overcome, and it would be impossible for Ravenshout to have caused the earthquake. Furthermore, given the statistical improbability of lake Tsunamis occurring, it would have been unreasonable for Ravenshouter scientists factor in such events in this risk assessment. As such, the wrongfulness of the acts of Ravenshout are precluded due to the *force majeure* nature of the earthquake and subsequent Tsunami.

For all these reasons, taken individually and cumulatively, it should be concluded that Ravenshout did not breach the UNCLOS provisions raised. In any case, if there is such a breach, responsibility for that violation should be precluded due to the *force majeure* nature of the Taurendunum Tsunami. The Court should accordingly dismiss Astoriana's claims for reparations.

IV. THE FERTILISER IMPORT TREATY WAS LAWFULLY TERMINATED.

Ravenshout is accused of breaching the FIT by stopping its shipments of fertiliser to Astoriana. However, no such breach exists as Ravenshout lawfully terminated the FIT in October 2022.[87]

[85] Art. 23(2) ARSIWA.

[86] Hentrei, Soley, *Force Majeure*.
[87] Case no. 35; Clarification 29.

As such Ravenshout owed no obligation to Astoriana.[88] Therefore, there is no internationally wrongful act that engages its responsibility.[89] The termination of the FIT is lawful because the theft of the turkeys was [A] a [1] material breach of the FIT that is [2] attributable to Astoriana; and [B] amounted to a fundamental change of circumstances under Art. 62 VCLT.

A. Astoriana is responsible for materially breaching the FIT.

1. The acts of the Convocation are attributable to Astoriana under Art. 5 ARSIWA.

Art. 5 ARSIWA engages responsibility where entities are "empowered by the law of that State to exercise elements of the governmental authority."[90] Crawford interpreted governmental authority as: "if a private person can perform the function without the government's permission, it is not to be considered governmental."[91] Similarly, the ICJ has held that States will always be responsible for any case of governmental authority exercised "on its behalf".[92] Furthermore, responsibility arises even if the parastatal entity's action "involves an independent discretion or power to act."[93]

The Convocation is an entity that regularly serves as an "auxiliary force" performing "security and law enforcement actions under the orders of Astoriani police." [94] Such action was explicitly

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[88] Art. 2(b) ARSIWA.

[89] Art. 1 ARSIWA

[90] Art. 5 ARSIWA.

[91] Crawford, State Responsibility (2013), 130.

[92] *Armed Activities in the Congo,* para. 110.

[93] ARSIWA Commentary, p. 43.

[94] Case no. 22.

sanctioned by Astoriana's Head of State, Athena Green.[95] Moreover, President Green encouraged the Convocation to act in her press conference of 2 September 2022. In that press conference, she told her "best patriots" to "stand ready".[96] Such language is inflammatory and cannot be read any other way than as a call to arms for the Convocation, who are widely known to be influential and powerful supporters of Green. Further, the Convocation benefitted from training given to them by Astoriana law enforcement.[97] Such skills would have made their heist more effective, and Green would have known this. For these reasons, the Convocation exercised elements of governmental authority within Astoriana, and acted on the orders of their Head of State. The acts of the Convocation are therefore attributable to Astoriana under Art. 5 ARSIWA.

2. Even if the Convocation acted in excess of their authority, their acts are still attributable to Astoriana under Art. 7.

Even if there were no express instructions (*quod non*), Art. 7 ARSIWA confirms that *ultra vires* acts remain attributable to a State where entities act "in excess of authority or contrary to instructions."[98] The *Caire* claim held that responsibility for *ultra vires* acts will only arise where the entity in question used "powers or methods connected with their official capacity."[99] In essence, therefore, Art. 7 applies where groups carry out actions while cloaked with governmental authority".[100]

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[95] Ibid.

[96] Ibid.

[97] Ibid.

[98] Art. 7 ARSIWA.

[99] *Caire Claim.*

[100] *Petrolane*, p. 92.

The Convocation's actions were only made materially possible by the privileges they received as part of Astoriani law enforcement. Given that the Convocation had regularly trained alongside the Astoriani military, it is reasonably foreseeable that they would have appeared to an onlooker that they were acting as competent State officials. Therefore, even if they were in excess of their authority or contravened their instructions, the acts of the Convocation are still attributable to A under Art. 7 ARSIWA.

3. Ravenshout lawfully terminated the FIT within the meaning of Art. 60 VCLT.

Art. 60(1) VCLT allows injured parties to terminate a treaty where the other party has committed a "material breach."[101] A material breach includes "the violation of a provision essential to the accomplishment of the object and purpose of [a] treaty."[102] The tribunal in *Rainbow Warrior* further linked the notion of material breach to the failure to carry out obligations in good faith.[103] Furthermore, the breach must have taken place before the injured party can rely on it.[104]

In stealing and slaughtering the turkeys, the Convocation targeted an essential component of the FIT. Although the relevant provisions of the FIT are not available, the targeting of the turkeys nonetheless concerns the object and purpose of the FIT.[105] Without the turkeys, there is no fertiliser. [106] Moreover, it flows from the presumption of good faith[107] that States will

[101] Art. 60(1) VCLT.

[102] Art. 60(3) VCLT.

[103] *Rainbow Warrior*, para. 101.

[104] *Gabcikovo-Nagymaros Project*, para. 108.

[105] Art. 31(3) VCLT; Art. 60(3) VCLT.

[106] Case no. 5.

[107] Art. 26 VCLT.

endeavour not to illegally capture an essential component to the production of a product which they have contracted to import. The act of theft therefore constitutes a material breach of the FIT. As the acts of the Convocation are directly attributable to Astoriana, it must be concluded that Astoriana perpetrated a material breach of the FIT. For this reason, Ravenshout was entitled to lawfully terminate the FIT under Art. 60 VCLT.

B. Ravenshout lawfully terminated the FIT under Art. 62 VCLT.

Art. 62 VCLT stipulates that a fundamental change of circumstance may be invoked for terminating a treaty where the circumstances relied upon changed so as to radically transform the extent of obligations that must be performed. Ordinarily, termination of treaties that do not have a specific denunciation clause requires a notification period of three months.[108] However, it is generally recognised that a fundamental change in circumstance will fall under the "cases of special urgency" exception which allows parties to terminate the relevant treaty with immediate effect.[109]

There must be a radical change in the obligation for Art. 62 to apply.[110] The ICJ has held that if profitability diminishes to such an extent that the treaty obligations of the parties are radically transformed as a result, Art. 63 will apply.[111] Moreover, the notion of "fundamental change" is to be interpreted strictly, in that only those circumstances that would "imperil the existence or vital development of one of the parties" would engage Art. 62.[112] Further, the treaty must not

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[108] Art. 65(1) VCLT.

[109] Art. 65(2) VCLT; Restatement of the Law para. 336 comment f.

[110] *Fisheries Jurisdiction* (UK. V. Iceland), para. 36.

[111] *Gabcikovo-Nagymaros Project*, para. 104.

[112] *Fisheries Jurisdiction*, (UK. V. Iceland), para. 38.

provide for such a circumstance occurring.[113] The change in circumstances must also form an "essential basis of the consent of the parties to be bound by the treaty",[114] a condition that is linked to the object and purpose of the treaty.[115] Finally, the extent of the remaining obligation must have increased so that "rendering the performance [has become] something essentially different from that originally undertaken."[116]

The relevant obligation under the FIT is to ship 35% of Ravenshout's fertiliser supply to Astoriana. The acts of the Convocation resulted in the disappearance of approximately 75% of Ravenshout's turkey population.[117] This, in turn, has immediately diminished the profitability of the obligation to such an extent that fertiliser production cannot meet pre-10 October levels.[118] As such, the profitability of Ravenshout's obligation has been radically transformed.

Moreover, a 75% loss of Ravenshout's turkey population plainly amounts to an unjustifiable increase in the burden of the obligation as such a loss represents a major blow to Ravenshout's GDP, and raises serious concerns given the serious food security crisis ongoing in Ravenshout. This, in turn satisfies the ICJ's strict test that the change in circumstances would imperil the vital development of Ravenshout. There is no indication that the treaty anticipated any radical change in the obligation, and it should be noted that Ravenshout engaged in negotiations to try and resolve the situation.[119]

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[113] *Gabcikovo-Nagymaros Project* para. 104.

[114] Art. 62 VCLT.

[115] *Gabcikovo-Nagymaros Project*, para. 104.

[116] *Fisheries Jurisdiction,* (UK. V. Iceland), para. 43.

[117] Case no. 23.

[118] Clarification 16.

[119] Clarification 29.

The turkeys being able to produce fertiliser necessarily goes to the object and purpose of the FIT, meaning that a healthy and plentiful turkey population constitutes an essential basis for the production of fertiliser. Therefore, the theft and destruction of the turkeys has rendered performance something essentially different from the obligation originally envisaged.

As such, all of the conditions for fundamental change of circumstances laid out by the ICJ in the relevant caselaw are plainly met. Ravenshout was therefore entitled to terminate the FIT under Art. 62 VCLT with immediate effect.

For these reasons, taken individually and cumulatively, Ravenshout was entitled to terminate the FIT. As such there is no wrongfulness for their failure to continue shipments to Astoriana. The Court should accordingly dismiss Astoriana's claims for reparations.

(i) Submissions

For these reasons, Ravenshout respectfully requests the International Court of Justice to adjudge and declare that:

1. It lacks jurisdiction to rule in this case, or is not seised of an admissible dispute; or
2. The 1 May 2022 award is not valid and binding under international law, and dismiss Astoriana's request to affirm the compensation awarded therein;
3. Ravenshout is not responsible for any alleged breach of UNCLOS, and dismiss Astoriana's request to order reparations; and
4. Ravenshout is not responsible for any alleged breach of the Fertiliser Import Treaty, and dismiss Astoriana's request to order reparations.