

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**KLESCH GROUP HOLDINGS LIMITED & OTHERS**

**v.**

**EUROPEAN UNION**

**ICSID Case No. ARB(AF)/23/1**

**KLESCH GROUP HOLDINGS LIMITED, KLESCH REFINING DENMARK A/S AND  
KALUNDBORG REFINERY A/S**

**v.**

**KINGDOM OF DENMARK**

**ICSID Case No. ARB/23/48**

**KLESCH GROUP HOLDINGS LIMITED AND RAFFINERIE HEIDE GMBH**

**v.**

**FEDERAL REPUBLIC OF GERMANY**

**ICSID Case No. ARB/23/49**

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**PROCEDURAL ORDER NO. 5**

**On CAN Europe's Application to File a Written Submission as Non-Disputing Party**

***Members of the Tribunal***

Mr. Cavinder Bull SC, President of the Tribunal  
Judge O. Thomas Johnson, Jr., Arbitrator  
Professor Jorge E. Viñuales, Arbitrator

***Secretary of the Tribunal***

Ms. Aurélia Antonietti

***Assistant to the President of the Tribunal***

Ms. Elisabeth Liang

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18 December 2025

## I. PROCEDURAL BACKGROUND

1. On 31 July 2025, ICSID received an application from a Belgian non-profit organisation, the Climate Action Network Europe (“**CAN Europe**”), in ICSID Cases Nos. ARB(AF)/23/1 (“**EU Arbitration**”), ARB/23/48 (“**Denmark Arbitration**”), and ARB/23/49 (“**Germany Arbitration**”) (collectively, the “**Three Arbitrations**”), requesting that the Tribunal (a) authorise its filing of a written submission on the merits as a non-disputing party (“**NDP**”); (b) grant it access to the redacted Memorial and Counter-Memorial on the merits; and (c) make no order for costs against it (the “**Application**”).
2. On 1 August 2025, the Tribunal invited the Parties to agree on the dates for simultaneous submission of observations on the Application as envisaged in Rule 67(3) of the 2022 ICSID Arbitration Rules and Rule 77(3) of the 2022 ICSID Additional Facility Arbitration Rules.
3. Based on the Parties’ agreement of 5 August 2025, on 18 November 2025, the Parties filed their observations on the Application by simultaneous submission.<sup>1</sup> No further submissions were requested by the Tribunal or filed by the Parties or by CAN Europe.
4. Pursuant to Rule 67(5) of the 2022 ICSID Arbitration Rules and Rule 77(5) of the 2022 ICSID Additional Facility Arbitration Rules, the Tribunal shall issue a reasoned decision on whether to permit a non-disputing party submission within 30 days after the last written submission on the application, *i.e.* by 18 December 2025.
5. Recalling that the Parties have agreed to coordinate the proceedings in the Three Arbitrations to the extent possible,<sup>2</sup> and noting that the same procedure and timeline have been observed in the Three Arbitrations with respect to the Application, the Tribunal considers it reasonable and practical to issue a single Procedural order addressing CAN Europe’s Application in the Three Arbitrations.<sup>3</sup>

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<sup>1</sup> The Claimants submitted the Claimants’ Response to CAN Europe’s Petition to File a Written Submission as Non-Disputing Party dated 18 November 2025 with factual exhibits C-0543 through C-0554 and legal authorities CL-0554 through CL-0569, to serve as their response for ICSID Case No. ARB(AF)/23/1, ARB/23/48, and ARB/23/49 (“**Claimants’ Observations**”). The Respondents submitted the Respondents’ Observations on Petition to File a Written Submission as Non-Disputing Party of the same date, with reference to ICSID Case No. ARB(AF)/23/1, ARB/23/48, and ARB/23/49 (“**Respondents’ Observations**”).

<sup>2</sup> PO1 at §28.1.3.

<sup>3</sup> PO1 at §28.1.4.

## II. THE NON-DISPUTING PARTY'S APPLICATION

6. CAN Europe is seeking permission to file a written submission as NDP pursuant to Rule 67 of the 2022 ICSID Arbitration Rules and Rule 77 of the 2022 ICSID Additional Facility Arbitration Rules, both of which state:

Submission of Non-Disputing Parties

[...]

(2) In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including:

- (a) whether the submission would address a matter within the scope of the dispute;
- (b) how the submission would assist the Tribunal to determine a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties;
- (c) whether the non-disputing party has a significant interest in the proceeding;
- (d) the identity, activities, organization and ownership of the non-disputing party, including any direct or indirect affiliation between the non-disputing party, a party or a non-disputing Treaty Party; and
- (e) whether any person or entity will provide the non-disputing party with financial or other assistance to file the submission.

[...]

(4) The Tribunal shall ensure that non-disputing party participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. To this end, the Tribunal may impose conditions on the non-disputing party, including with respect to the format, length, scope or publication of the written submission and the time limit to file the submission.

[...]

(6) The Tribunal shall provide the non-disputing party with relevant documents filed in the proceeding, unless either party objects.

7. CAN Europe contends that:<sup>4</sup>

*The Arbitrations raise several issues of vital concern to the climate movement and general public in the EU, including the Member States of Denmark and Germany. Faced with severe spikes in consumer prices due to the volatility caused in energy markets by supply disruption arising from the invasion of the Ukraine, the enactment of a windfall profits tax on the fossil fuel sector by the EU in 2022 was not only about support for European consumers and businesses and solidarity between EU Member States but also the fulfilment of the EU decarbonisation strategy with 'the ultimate goal of reaching climate neutrality by 2050.' Amidst ongoing debate concerning a permanent fossil fuel tax as an enabler towards energy transition goals, the public interest in the Arbitrations is plain.*

8. Therefore, CAN Europe seeks to file a written submission, “not ... to challenge arguments or evidence put forward by the Parties” but rather to “assist the Parties and Arbitral Tribunal with the potential relevance, scope and application of international climate law in the Arbitrations.”<sup>5</sup>

9. It submits that it has satisfied each of the criteria in Rule 67(2) of the 2022 ICSID Arbitration Rules and Rule 77(2) of the 2022 ICSID Additional Facility Arbitration Rules.

a. Rules 67(2)(a) and 77(2)(a): The “numerous references to “decarbonisation” (e.g. Article 17 and recitals n. 27 and 58) in Regulation (EU) 2022/1854 of 6 October 2022 [“**EU Regulation**”] ... raise the question of the role of international climate law, if any, in the construction of the investment rights in Part III of the Energy Charter Treaty [“**ECT**”]” in the Three Arbitrations.<sup>6</sup> Its proposed submission would address the role of international climate law as context for the interpretation of Part III of the ECT in light of the enactment and application of the EU Regulation,<sup>7</sup> which is within the scope of the Three Arbitrations.

b. Rules 67(2)(b) and 77(2)(b): It can provide “a unique or different perspective on a ... legal issue, different from the one provided by the parties, that assists the Tribunal in deciding the dispute”,<sup>8</sup> because it has undertaken “extensive research and analysis” not only on the EU Regulation but also the wider EU policy debate about the adoption of a potential tax on the profits of the fossil fuel sector.

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<sup>4</sup> Application at para. 3.

<sup>5</sup> Application at para. 4.

<sup>6</sup> Application at para. 5.

<sup>7</sup> Application at para. 6.

<sup>8</sup> Application at para. 7.

- c. Rules 67(2)(c) and 77(2)(c): It has a significant interest in the proceeding as the leading NGO in Europe concerning climate change research, policy development and campaigning, which has played a leading role in a call on the Council of the European Union to adopt a tax on the profits of the fossil fuel industry.<sup>9</sup>
  - d. Rules 67(2)(d) and 77(2)(d): It has no direct or indirect affiliation with the Parties, although counsel for CAN Europe (i) has worked with delegates of the Respondents in the UN General Assembly and UNCITRAL Working Group III; (ii) are members of the ASIL Task Force on Investment Arbitration & Climate Change alongside Professor Viñuales (although they have not communicated)<sup>10</sup>; and (iii) have appeared in the abovementioned ICJ advisory proceedings alongside the Respondents and Professor Viñuales.<sup>11</sup>
  - e. Rules 67(2)(e) and 77(2)(e): It confirms that no person or entity will provide it with financial or other assistance and it is not using the three grants awarded by the EU which it is currently implementing to finance its participation (including the Application).<sup>12</sup>
10. Accordingly, CAN Europe requests that the Tribunal:
- a. authorise the filing of a written submission on the merits as NDP. It asserts that authorising a written submission “*would accord with the general trend since Methanex in favour of such positions*”.<sup>13</sup> It is not seeking permission to make oral arguments in the hearings, and its submission would not comment upon jurisdiction or admissibility;<sup>14</sup>
  - b. grant access to the redacted Memorial and Counter-Memorial on the merits, to enable its written submission to “*add optimal value*” by focusing on relevant and concrete points while avoiding abstraction.<sup>15</sup> It undertakes to respect the confidentiality and data security of the pleadings. It further asserts that the default position is that pleadings are to be provided under Rule 67(6) of the 2022 ICSID Arbitration Rules unless a party objects in which case the Tribunal decides<sup>16</sup>; and

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<sup>9</sup> Application at para. 8.

<sup>10</sup> Professor Viñuales withdrew from this academic group in May 2025.

<sup>11</sup> Application at para. 12.

<sup>12</sup> Application at para. 13.

<sup>13</sup> Application at para. 14.

<sup>14</sup> Application at para. 19.

<sup>15</sup> Application at para. 15.

<sup>16</sup> Application at para. 16.

- c. make no order for costs against CAN Europe. It claims that it would be unable to participate if its Application were approved with a costs order due to its limited resources.<sup>17</sup>
11. If its request at para. 10(a) above is allowed, CAN Europe proposes that its submission be limited to 40 pages and be filed within a time limit (such as 30 January 2026) so that the Parties can address the NDP submission in their second round of pleadings due on 16 April 2026 and 24 July 2026 rather than in separate responses.<sup>18</sup> It proposes to address the following questions in its submission:
- a. what is the status and role of international climate law, if any, in the interpretation of the rights and obligations in Part III of the ECT (the 'investment relationship');
- b. what is the scope of mitigation duties under international climate law (e.g. Article 4 Paris Agreement) in relation to the collective temperature goal in Article 2(1);
- c. what relevance, if any, is to be attributed to the references to 'decarbonisation' in the Regulation for the investment relationship under the ECT; and
- d. whether mitigation measures by a Paris Agreement Party affects the assessment of damages if a breach of investor rights under the ECT is caused?

### III. CLAIMANTS' OBSERVATIONS

12. The Claimants assert that "*there is no tenable reason*" for the Tribunal to grant CAN Europe leave to file a NDP submission in this case.<sup>19</sup> They submit that CAN Europe "*has not met the admissibility criteria prescribed by Rules 67(2) and 77(2)*".<sup>20</sup>
- a. Rules 67(2)(a) and 77(2)(a): CAN Europe's proposed submission on "*international climate law issues*" would not "*address a matter within the scope of the dispute*". Neither Party has put the interpretation or application of international climate law in issue for the purposes of ECT liability, nor argued that climate obligations determine the content of Part III of the ECT.<sup>21</sup> References to "decarbonisation" in the EU Regulation also "*do not transform [the Three Arbitrations] into an adjudication on international climate law.*"<sup>22</sup> Thus, the

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<sup>17</sup> Application at para. 13.

<sup>18</sup> Application at para. 18.

<sup>19</sup> Claimants' Observations at para. 2.

<sup>20</sup> Claimants' Observations at para. 4.

<sup>21</sup> Claimants' Observations at para. 13.

<sup>22</sup> Claimants' Observations at para. 15.

question of the role of international climate law on Part III of the ECT is “*entirely irrelevant*” to the dispute.<sup>23</sup>

- b. Rules 67(2)(b) and 77(2)(b): CAN Europe's proposed submission is presented as “*generalised context on climate treaties, decarbonisation policy, and systemic integration*” which would not assist the Tribunal in deciding the pleaded ECT claims concerning the adoption, legal basis, design and application of the EU Regulation as a purported emergency measure, nor the specific ECT standards that are in issue. The Claimants contend that “*CAN Europe has nothing to offer that is different from what the Parties already have submitted, and will submit, in terms of factual and legal issues regarding the solidarity contribution.*”<sup>24</sup>
  - c. Rules 67(2)(c) and 77(2)(c): CAN Europe does not have a “*significant interest in the proceeding*”.<sup>25</sup> The subject in which it claims to possess expertise – the interface between international climate and investment law – is not even within the scope of the dispute, much less at the centre of it.<sup>26</sup> Its rights or its constituent members' rights also would not be directly or indirectly impacted by the outcome of the Three Arbitrations.<sup>27</sup> Its interest can at best be characterised as a general public policy interest, not the requisite “*significant interest*”.<sup>28</sup>
  - d. Rules 67(2)(d) and 77(2)(d): The Claimants have “*serious doubts*” about CAN Europe's independence and neutrality, in light of the funding it receives from the European Commission and the German Government,<sup>29</sup> and the lobbying activities it was involved in funded by the LIFE Programme of the EU.<sup>30</sup>
  - e. Rules 67(2)(e) and 77(2)(e): The Claimants did not comment on this requirement.
13. Further, Rules 67(4) and 77(4) require that NDP participation does not disrupt the proceeding or unduly burden or unfairly prejudice either party. However, the Claimants contend that CAN Europe's participation would expand the scope and length of the second round of pleadings, compel

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<sup>23</sup> Claimants' Observations at para. 9.

<sup>24</sup> Claimants' Observations at para. 20.

<sup>25</sup> Claimants' Observations at para. 24.

<sup>26</sup> Claimants' Observations at para. 29.

<sup>27</sup> Claimants' Observations at para. 30.

<sup>28</sup> Claimants' Observations at para. 31.

<sup>29</sup> Claimants' Observations at paras. 37 to 39.

<sup>30</sup> Claimants' Observations at para. 41.

rebuttal on “*highly politicised issues not raised by either Party*”, risk cascading changes to the procedural calendar, and “*increase pages, exhibits, work, time and costs in all three arbitrations*” when the record is already substantial.<sup>31</sup>

14. Thus, the Claimants request that the Tribunal:<sup>32</sup>
  - a. dismiss the Application, for the reasons summarised above;
  - b. refuse CAN Europe's request to be granted access to redacted versions of the Claimants' Memorials and Respondents' Counter-Memorial on the merits, as (i) the burdens and risks far outweigh any marginal utility; (ii) confidentiality risks are acute; and (iii) CAN Europe's asserted need for pleadings is unpersuasive.<sup>33</sup> The Claimants disagree with CAN Europe's interpretation of Rules 67(6) and 77(6) that “*pleadings are to be provided ... unless a party objects in which case the Arbitral Tribunal decides*”;<sup>34</sup> and
  - c. order CAN Europe to bear the entirety of the costs and expenses relating to the determination of the Application, including the Claimants' costs for legal representation and assistance, plus interest thereon.
15. If the Tribunal is minded to accept the Application, the Claimants request that CAN Europe only be permitted to file a written submission not exceeding 10 pages, limited to the issues specifically identified in the Application, within the time period prescribed by the Tribunal, subject to the provision by CAN Europe of security for costs or a written undertaking confirming its obligation to comply with any costs decision resulting from its intervention.<sup>35</sup> The Claimants also state that they will seek costs for responding to CAN Europe's allegations.<sup>36</sup>
16. The Claimants assert that an order for security of costs is warranted for the following reasons.<sup>37</sup>
  - a. The Tribunal's “*ultimate concern*” must be to preserve the Parties' rights and ensure that CAN Europe's participation does not disrupt the proceedings or unduly burden or unfairly

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<sup>31</sup> Claimants' Observations at para. 44.

<sup>32</sup> Claimants' Observations at para. 66.

<sup>33</sup> Claimants' Observations at paras. 51 to 53.

<sup>34</sup> See para. 10b above.

<sup>35</sup> Claimants' Observations at paras. 54, 64 and 67.

<sup>36</sup> Claimants' Observations at para. 56.

<sup>37</sup> Claimants' Observations at paras. 60 to 62.

prejudice either Party, per Rules 67(4) and 77(4). To do so in these proceedings, the Tribunal must impose security for costs.

- b. There is a material risk of non-payment of a cost award by CAN Europe. The Claimants note that CAN Europe “*has no means to bear any adverse ruling on costs*”. They argue that permitting CAN Europe to participate in such circumstances would amount to a direct violation of the Parties’ right to claim reimbursement of the respective costs they will have incurred to address the additional issues brought into the dispute by CAN Europe. An order for security for costs would preserve these rights.
- c. Permitting CAN Europe’s unsecured participation would also amount to a direct violation of the Parties’ right to have an enforceable award on costs. The Claimants note that any Award rendered by the Tribunal will not be binding on CAN Europe, as it is not a party to the arbitration agreement or the dispute, so “[*t*]he chances of enforcing any decision against [CAN Europe] are virtually nil.” Security for costs would provide “*further protection by the Tribunal [of] the Parties’ rights.*”

#### **IV. RESPONDENTS’ OBSERVATIONS**

17. The Respondents take a similar position as the Claimants and likewise submit that the Tribunal should dismiss CAN Europe’s Application.
18. The Respondents focus their arguments on the first three admissibility criteria established in Rule 67(2) of the 2022 ICSID Arbitration Rules and Rule 77(2) of the 2022 ICSID Additional Facility Arbitration Rules.
  - a. Rules 67(2)(a) and 77(2)(a): The Claimants’ claims concern a purported violation of investment protection standards contained in Articles 10 and 13 of the ECT; they do not “*rel[y] upon or meaningfully engage[] with climate change or regulations adopted in this respect at international, EU or national level.*”<sup>38</sup> The Respondents have also explained in their Counter-Memorial that the objective of the solidarity contribution was to temporarily mitigate the economic effects of soaring energy prices on the budgets of public authorities, final customers and companies across the EU. Thus, the interpretation of the relevant substantive standards of protection in Part III of the ECT does not require a significant

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<sup>38</sup> Respondents’ Observations at para. 11.

engagement with international climate change law. CAN Europe has not demonstrated that its submission would address a matter within the scope of the disputes.

- b. Rules 67(2)(b) and 77(2)(b): The subject-matter of the disputes does not engage with international climate law. In any event, insofar as references to climate change law may become relevant in these disputes, the Respondents can make all relevant submissions to the Tribunal. CAN Europe has not shown any material added value which its proposed submission could have.<sup>39</sup>
  - c. Rules 67(2)(c) and 77(2)(c): The Respondents submit that issues of climate change and the relevance of international climate change law are, if at all, only tangentially relevant for the present cases. Even if CAN Europe were able to show that it had an interest in these proceedings, that interest cannot be regarded as a “significant” one.<sup>40</sup>
  - d. Rules 67(2)(d) and 77(2)(d) and Rules 67(2)(e) and 77(2)(e): The Respondents did not comment on these criteria.
19. Thus, the Respondents request that the Tribunal.<sup>41</sup>
- a. dismiss the Application, for the reasons summarised above; and
  - b. refuse CAN Europe's request to be granted access to redacted versions of the Claimants' Memorials and Respondents' Counter-Memorial on the merits because climate change law “*is only tangentially relevant for the disputes (if at all)*”.<sup>42</sup> Like the Claimants, the Respondents disagree with CAN Europe's interpretation of Rules 67(6) and 77(6).<sup>43</sup> The Respondents contend that Rules 67(6) and 77(6) “*clearly establish[] that the objection of either party means that access cannot be granted*”.<sup>44</sup>
20. The Respondents did not comment on the issue of costs.

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<sup>39</sup> Respondents' Observations at para. 19.

<sup>40</sup> Respondents' Observations at para. 22.

<sup>41</sup> Respondents' Observations at paras. 23, 27, and 28.

<sup>42</sup> Respondents' Observations at para. 27.

<sup>43</sup> See para. 10b above.

<sup>44</sup> Respondents' Observations at para. 26.

**V. TRIBUNAL'S ANALYSIS**

21. The Tribunal has carefully considered CAN Europe's Application and the Parties' Observations as summarised above, against Rule 67 of the 2022 ICSID Arbitration Rules and Rule 77 of the 2022 ICSID Additional Facility Arbitration Rules, even if it does not address each and every submission made by CAN Europe or the Parties.
22. For the reasons explained below, the Tribunal considers it appropriate to dismiss CAN Europe's Application with an order that CAN Europe and each Party shall bear their own costs.

**A. CAN EUROPE'S REQUEST TO FILE A WRITTEN SUBMISSION**

23. Rule 67(2) of the 2022 ICSID Arbitration Rules and Rule 77(2) of the 2022 ICSID Additional Facility Arbitration Rules require the Tribunal to "*consider all relevant circumstances*", including the criteria set out in Rules 67(2)(a) to (e), and 77(2)(a) to (e). The Tribunal finds that CAN Europe has not satisfied the first three criteria and declines to grant CAN Europe permission to file a proposed submission.
24. **First**, the Tribunal agrees with the Parties that CAN Europe's proposed submission would not "*address a matter within the scope of the dispute*" per Rules 67(2)(a) and 77(2)(a).
25. The Tribunal agrees that the scope of the Three Arbitrations is defined by the Parties' pleadings.<sup>45</sup> Both Parties have referred to their Memorials to submit that neither Party has put the applicability of international climate law in issue in the Three Arbitrations.<sup>46</sup> The Parties have not referred to any sources of international climate law, such as climate treaties or EU climate law, in the Three Arbitrations either. Instead, the focus of the Three Arbitrations is on the adoption and implementation of the EU Regulation establishing the "solidarity contribution".<sup>47</sup>
26. CAN Europe claims that considering the applicability of international climate law as "*external context*" to the construction of Part III of the ECT, would engage with "*systemic questions of general international law (e.g. the principle of systemic integration) concerning the harmonisation of host States' mitigation duties under international climate law with their duties owed to foreign investors under international investment law*", and would be a "*salient question for the*

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<sup>45</sup> Claimants' Observations at para. 9.

<sup>46</sup> Claimants' Observations at paras. 11 to 16; Respondents' Observations at paras. 11 to 13.

<sup>47</sup> Claimants' Observations at paras. 10, 15; Respondents' Observations at para. 12.

*Arbitrations*” and a “*novel issue at the systemic level on which there has yet to be an award*”.<sup>48</sup> However, this is irrelevant to the issue of whether CAN Europe has satisfied the first of the criteria in Rules 67(2)(a) and 77(2)(a).

27. The Tribunal agrees with the Parties that “[i]ncidental references to “*decarbonisation*” in [the EU Regulation] do not expand the case’s scope”<sup>49</sup> and that, from the information in the record of the Three Arbitrations, the interpretation of the investment protection standards contained in Articles 10 and 13 of the ECT would not require “*a significant engagement with international climate change law*”<sup>50</sup> in these cases. The Tribunal finds the applicability of international climate law to be of limited relevance (if at all relevant) to the dispute. The Tribunal declines to allow the Application as this would “*lead to an inappropriate enlargement of the issues that the Tribunal would have to consider and to which the Parties have to respond.*”<sup>51</sup>
28. **Secondly**, the Tribunal is not persuaded that CAN Europe’s proposed submission would assist it “*determin[ing] a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the parties*” as required in Rules 67(2)(b) and 77(2)(b).
29. While CAN Europe may have conducted “*extensive research and analysis*” on the EU Regulation and wider EU policy debate about the adoption of a potential tax on the profits of the fossil fuel sector, the Tribunal agrees with the Claimants that CAN Europe does not possess case-specific expertise, or specialised technical knowledge beyond what is already available to the Parties, and all information and developments cited by CAN Europe are equally accessible to the Parties.<sup>52</sup>
30. The questions which CAN Europe proposes to address in its submission (see para. 11 above) pertain to “*generalised context on climate treaties, decarbonisation policy, and systemic integration*”.<sup>53</sup> They would not assist the Tribunal in analysing, amongst other things, the Claimants’ ECT claims based on Articles 10 and 13, the adoption and application of the EU Regulation as a purported emergency measure, and the factual and legal issues regarding the solidarity contribution,

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<sup>48</sup> Application at para. 6.

<sup>49</sup> Claimants’ Observations at para. 15.

<sup>50</sup> Respondents’ Observations, para. 13.

<sup>51</sup> Claimants’ Observations at para. 16.

<sup>52</sup> Claimants’ Observations at para. 22.

<sup>53</sup> Claimants’ Observations at para. 20.

especially when the Parties have already “*filed lengthy and detailed submissions and evidence regarding every aspect of the case.*”<sup>54</sup>

31. CAN Europe's submission that it is “*closely following*” the proceedings in Cases Nos. 7942, 8030, 8036 and 8040 before the Belgian Constitutional Court, and “*monitoring*” Case T-802/22 pending before the Court of Justice of the European Union (“**CJEU**”), which are related to the EU Regulation,<sup>55</sup> is also not persuasive. The Respondents highlight that the EU is itself engaged in those cases.<sup>56</sup> The EU Council is acting as defendant in Case T-802/2 and the Belgian Constitutional Court has lodged a preliminary reference with the CJEU. The EU institutions and Member States have the right to make written and oral submissions to the CJEU in the preliminary questions procedure. Thus, the Tribunal is not convinced that CAN Europe's efforts in “*closely track[ing]*” these cases would add additional value.
32. Similarly, CAN Europe contends that it is represented by counsel with experience in “*closely debating*” issues of the applicability of international climate law in international investment law, including broader questions of public international law such as the principle of systemic integration, in the *Obligations of States in respect of Climate Change* advisory proceedings in the International Court of Justice (“**ICJ**”).<sup>57</sup> It asserts that “[i]n addressing these questions in the specific context of the Arbitrations, [CAN Europe] would also provide an independent view on the wider implications for liability and damages questions in ISDS flowing from the advisory opinion and international climate law ... [and] its perspective would raise issues of pressing public concern that would add value to these proceedings.”<sup>58</sup>
33. However, the Respondents themselves had taken part in the ICJ proceedings by making written and oral submissions to the ICJ.<sup>59</sup> The Tribunal is not convinced that the mere involvement of CAN Europe's counsel in the ICJ proceedings would lead to CAN Europe's proposed submission providing a different perspective, particular knowledge, or insight, beyond that already available.
34. **Thirdly**, CAN Europe does not have a “*significant interest in the proceeding*” within the meaning of Rules 67(2)(c) and 77(2)(c).

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<sup>54</sup> Exhibit CL-557 at para. 37.

<sup>55</sup> Application at para. 7.

<sup>56</sup> Respondents' Observations at para. 17.

<sup>57</sup> Application at para. 7a.

<sup>58</sup> Application at para. 7a.

<sup>59</sup> Respondents' Observations at para. 18.

35. CAN Europe claims that, as the leading NGO in Europe concerning climate change research, policy development and campaigning, “*the direct link between [CAN Europe’s] activity ... on the windfall tax under the [EU] Regulation – being the subject matter of the Arbitrations – in the context of international climate law alongside [its] work on the wider question of a fossil fuel sector tax*” makes its interest as significant as the petitioners in *Bear Creek Mining v. Peru*, ICSID Case No. ARB/14/21 (“**Bear Creek**”) and *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22 (“**Biwater Gauff**”).<sup>60</sup>
36. The Tribunal finds that CAN Europe’s interest in the Three Arbitrations is clearly different from that of the NDPs in *Bear Creek* and *Biwater Gauff*.
37. The NDPs in *Bear Creek* and *Biwater Gauff* had deep experience working with and representing local communities directly affected by the issues in the arbitration. The NDP in *Bear Creek*, which concerned mining concessions in Peru, was the Association of Human Rights and Environment of Puno, Peru, whose mission was the promotion and protection of human rights and the environment of indigenous peoples, some of whom were directly affected by the mining project central to the arbitration.<sup>61</sup> The NDPs in *Biwater Gauff*, which concerned the possible privatisation of water or other infrastructure services in Tanzania, were a collection of Tanzanian organisations which sought to ensure *inter alia* sound natural resource management, access to water, and protection of constitutional and environmental rights of the Tanzanian people.<sup>62</sup>
38. Whereas the Tribunal notes that CAN Europe is “*a unique coalition of more than 200 NGOs active in 40 European States that is dedicated to research, policy development and campaigning on climate change issues in Europe*”,<sup>63</sup> its members are not, for instance, poor households in the EU, Denmark or Germany which were supposed to benefit from the solidarity contribution.<sup>64</sup> The Tribunal is not persuaded that these NGOs’ interests nor CAN Europe’s interests would be affected by the outcome of the Three Arbitrations.
39. For the same reasons, the NDPs in *Bear Creek* and *Biwater Gauff* could clearly contribute new perspectives, from their familiarity with the situation on the ground, on matters at the centre of those arbitrations and thus had a significant interest in the proceedings. In contrast, CAN Europe’s

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<sup>60</sup> Application at paras. 8 and 9.

<sup>61</sup> Exhibit CL-561 at paras. 2, 40 to 44.

<sup>62</sup> Exhibit CL-562 at paras. 11 to 12.

<sup>63</sup> Application at para. 2.

<sup>64</sup> Claimants’ Observations at para. 30.

purported expertise in the interface between international climate law and international investment law is of a different nature and does not pertain to matters at the centre of the Three Arbitrations. The Tribunal is not persuaded that it would lead to CAN Europe having a “*significant interest*” in the proceedings.

40. The Tribunal in *Von Pezold v. Zimbabwe* also noted that the NDP's “interest” must be “*interpreted in light of the proceeding as constituted, not as the NDP would prefer the proceeding to be constituted.*”<sup>65</sup> Thus, the Tribunal is not persuaded by CAN Europe's submission that its purported expertise and activity both on the interpretation and application of the solidarity contribution in the EU Regulation and wider policy debate concerning a fossil fuel sector tax is a “*concrete interest*” and not a “*general interest that any environmental organisation may have*”.<sup>66</sup> CAN Europe's interest lies not in the solidarity contribution at the centre of the Three Arbitrations, but in the “*potential relevance, scope and application of international climate law*”, an issue that is of little, if any, relevance, since the Three Arbitrations are fundamentally not about environmental issues or international climate law.<sup>67</sup>
41. As the Claimants submit, CAN Europe's interest can at best be characterised as a general public policy interest.<sup>68</sup>
42. In light of the above, it is not necessary for the Tribunal to opine on whether CAN Europe has fulfilled the criteria in Rules 67(2)(d) and (e) of the 2022 ICSID Arbitration Rules and Rules 77(2)(d) and (e) of the 2022 ICSID Additional Facility Arbitration Rules (see para. 6 above).

## **B. CAN EUROPE'S REQUEST FOR ACCESS TO THE REDACTED MEMORIALS**

43. CAN Europe's request for access to the redacted Memorial and Counter-Memorial is moot since the Tribunal has declined to grant CAN Europe permission to file a written submission. In any event, even if CAN Europe had permission to file a written submission, the Tribunal would not grant it access to the redacted Memorial and Counter-Memorial since both the Claimants and Respondents have objected to the same.
44. The Tribunal disagrees with CAN Europe's suggestion that the use of the word “shall” in Rules 67(4) and 77(4) “*empowers the Tribunal ... to decide the issue in the face of objection*” and that

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<sup>65</sup> Exhibit CL-555 at para. 61.

<sup>66</sup> Application at para. 11; Exhibit CL-559 at para. 19.

<sup>67</sup> Claimants' Observations at para. 32; Respondents' Observations at para. 22.

<sup>68</sup> Claimants' Observations at para. 31.

*“the default position is that the pleadings are to be provided ... unless a party objects in which case the Arbitral Tribunal decides.”*<sup>69</sup> CAN Europe's interpretation clearly contradicts the plain meaning of the Rules. The Tribunal agrees with the Parties that *“where a disputing party objects to production, the tribunal is not at liberty to override that objection but is expected to decline the request”*<sup>70</sup> and *“the objection of either party means that access cannot be granted”*.<sup>71</sup>

### **C. CAN EUROPE'S REQUEST FOR NO ORDER FOR COSTS AGAINST IT**

45. Given the Tribunal's decision to deny CAN Europe permission to file a written submission, CAN Europe's submissions on costs, which are premised on the assumption that it is permitted to file a written submission, and the Claimants' submission on costs if the Application were permitted (including its request for security for costs), are moot.<sup>72</sup>
46. Nonetheless, the Tribunal has considered these submissions, and the Claimants' request for an order that CAN Europe bears the entirety of the costs and expenses relating to the determination of the Application, including the Claimants' costs for legal representation and assistance, plus interest thereon, if the Application is dismissed.
47. The Tribunal declines to make any order as to costs for the dismissal of CAN Europe's Application. In other words, CAN Europe and each Party shall bear their own costs.
48. As the Claimants themselves note in their arguments for security for costs, CAN Europe *“has informed the Tribunal that it has no means to bear any adverse ruling on costs”* and *“there is a material risk of non-payment of a cost award.”*<sup>73</sup> The Respondents have not sought an order for costs against CAN Europe either (see para. 20 above). The Tribunal also does not expect the Parties to have incurred significant costs for providing their comments on the Application, since the Application was only 10 pages, the Claimants' Observations were 22 pages, and the Respondents' Observations were 8 pages (including cover pages and indexes). In addition, there is no indication that CAN Europe's application was not made in good faith and for a purpose other than assisting the Tribunal. Thus, the Tribunal's view is that ordering CAN Europe to pay costs would be inappropriate. It would also likely be futile and would entail additional costs instead.

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<sup>69</sup> Application at para. 16.

<sup>70</sup> Claimants' Observations at para. 48.

<sup>71</sup> Respondents' Observations at para. 26.

<sup>72</sup> See paras. 10c, 15 and 16 above.

<sup>73</sup> Claimants' Observations at paras. 61 to 62.

**VI. DECISION**

49. In the premises, the Tribunal orders that:
- a. CAN Europe's Application is dismissed; and
  - b. CAN Europe and each Party shall bear their own costs.

On behalf of the Tribunal,

[signed]

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Mr. Cavinder Bull SC  
President of the Tribunal  
Date: 18 December 2025