MY2401-C

19th ANNUAL LAWASIA

INTERNATIONAL MOOT COMPETITION

12 OCTOBER TO 15 OCTOBER 2024

ASIAN INTERNATIONAL ARBITRATION CENTRE

THE PALM ATTACK: OIL VS SPOIL

MEMORANDUM FOR THE CLAIMANT

CLAIMANT		RESPONDENT
THE REPUBLIC OF PALMENNA	v.	CANSTONE FLY LIMITED

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Final Report	Filip De Ly and Audley Sheppard, "ILA Final Report on Lis Pendens and Arbitration", *Arbitration International, Vol. 25, No. 1* (March 2009)	17
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Abbreviation	Citation
AIAC Rules	Asian International Arbitration Centre Arbitration Rules 2023
ARSIWA	Articles on the Responsibility of States on Internationally Wrongful Acts
CBD	Convention on the Biological Diversity
PK-BIT	Palmenna-Kenweed Bilateral Investment Treaty
VCLT	Vienna Convention on the Law of Treaties

STATEMENT OF JURISDICTION

The Federation of Palmenna ("**Palmenna**") has submitted the dispute against Canstone Fly Limited ("**Canstone**") to the Asian International Arbitration Centre ("**AIAC**") in Kuala Lumpur, Malaysia in accordance with Article 12 of the Palmenna-Kenweed Bilateral Investment Treaty ("**PK-BIT**").

QUESTIONS PRESENTED

I. Whether the pre-arbitration steps must be complied before arbitration proceedings may be commenced by the Government of Palmenna against Canstone;

II. Whether the Government of Palmenna is precluded from initiating an arbitration against Canstone;

III. Whether Canstone had breached its obligations under the PK-BIT; and

IV. If the answer to issue III is in the affirmative, whether Palmenna is entitled to an award of declaration and damages.

STATEMENT OF FACTS

The Parties and The PK-BIT

1 The Government of Palmenna and Canstone Fly Limited ("**Canstone**"), are parties to this arbitration. The Federation of Palmenna ("**Palmenna**"), led by Prime Minister M Akbar ("**Akbar**"), is a country known for its palm oil cultivation. The Independent State of Kenweed ("**Kenweed**"), is a politically insatiable country, with Gan Ridhimajoo ("**Gan**") as the prime minister.

2 To strengthen Kenweed's economy, Gan established the Ministry of Trade and Investment ("**MTI**") and appointed himself as the minister. The purpose of MTI is to gain revenue for Kenweed from internal and external investment. Gan collaborated with Tara Sharma ("**Tara**") and established Mehstone Star Limited ("**Mehstone**") to harvest, extract and refine palm oil to produce biofuel. MTI holds 60% of its shares.

3 Following several meetings discussing the setup of Mehstone's subsidiary between Akbar, Gan, and Tara, Palmenna and Kenweed (collectively "**the Parties**") signed the Palmenna-Kenweed Bilateral Investment Treaty ("**PK-BIT**") to promote economic cooperation between them on 3 October 2021. The treaty, apart from protecting the investment, focuses on the environmental protection and imposes environmental-related obligations towards investors.

4 Later, Canstone was incorporated in Palmenna as a subsidiary of Mehstone with the 70% of shares held by Mehstone. While the daily operation of Canstone is managed by the nominees of SZN Company Limited ("**SZN**"), its general policies are determined by Tara, Gan's close business partner.

The Conduct of EIA

5 By November 2021, Canstone established two biodiesel plants in Appam and Karheis. Alan Becky ("**Alan**"), the QC supervising the biodiesel plants, asked the in-house experts to conduct a brief environmental assessment note and report on the machinery and equipment condition ("**Report**") every April, August and December.

6 Around mid-February 2023, Canstone's Karheis facility received an unsigned note about the leaked palm oil from the storage tank. Alan, however, used the December 2022 report to conclude that there was no leak and dismissed Jakey Jake's request for a detailed investigation.

7 Two weeks later, farmers near the Karheis factory were hospitalized due to suspected contamination. There were investigations thereafter, but the findings remained unpublished. Compensation was allegedly paid to victims for not disclosing any information.

The Flood Incident and Oil Leak

8 In November 2023, heavy rainfall in Palmenna raised flooding concerns. On 23 November 2023, neighboring factories in Appam stopped their operation for the next three days and called for evacuation.

9 On 26 November 2023, Appam experienced a severe flash flood, causing prolonged water accumulation around the Appam facility. During that time, Canstone was the only factory with full operation.

10 After the flood subsided, residents near the facility, including Canstone employees, were hospitalized due to respiratory problems possibly caused by contact with

hazardous gases or chemicals that had traveled through inland water or river. Canstone initiated an investigation and found that pressure relief valves on storage tanks, which is crucial for the safe operations of ventilation systems, were compromised. Also, in Dr. Ragu's report, the sample floodwater contained various toxic chemicals including traces of biodiesel.

The Activists' Court Proceeding

11 The incident led to the protest, blaming the government's inaction to solve the problem. On 15 December 2023, the activists sued the Government of Palmenna and SZN. The case mainly focused on the quality of Canstone's drainage and ventilation systems and the government's negligence in imposing environmental laws and measures to address the problems. The activists also expressed the need for immediate intervention due to the possibility of future health risks.

12 On 14 February 2024, The High Court of Palmenna held that Palmenna and SZN were mutually liable. Both appealed against the decision, maintaining their positions that they were not the liable parties.

The Breaking Point

13 On 1 March 2024, Akbar held the conference with Tara, Alan, and Luke Nathan ("**Luke**"). Heat discussion ensued to find the right solution. At the end of the conference where the discussion reached a dead-end, Tara told Akbar "*We cannot admit to things we did not do… seems like there is no point talking to you anymore*".

The Initiation of Arbitral Proceeding

14 On 6 March 2024, Palmenna initiated the arbitral proceedings against Canstone, invoking Article 12 of the PK-BIT. Palmenna contends that it is not required to follow the pre-arbitration steps, and it can bring the case against Canstone under this BIT despite the pending legal proceedings in Palmenna's Court of Appeal. Palmenna asks this Tribunal to decide Canstone's breach of obligations under the PK-BIT and entitlement to awards of declaration and damages.

SUMMARY OF PLEADINGS

I. THE ARBITRATION PROCEEDING CAN BE INITIATED WITHOUT THE REQUIREMENT TO FULFILL THE PRE-ARBITRATIONAL STEPS UNDER ARTICLE 12 OF THE PK-BIT

15 Palmenna can commence arbitration without complying with the pre-arbitration steps. The pre-arbitration clause in Article 12 of the PK-BIT is invalid and does not constitute a condition precedent to arbitration as it is uncertain and lacks essential guidelines; thus, Palmenna is not obliged to follow. In addition, Palmenna is excused from abiding by this clause even if it is a valid condition precedent to arbitration. Compliance with such clause would be futile as there would not be any settlement of the dispute, and Palmenna can exert the Article 11(b) of the PK-BIT as the initiation of arbitration is a protection of Palmenna's environment and politics – Palmenna's essential security interests.

II. PALMENNA CAN COMMENCE AN ARBITRATION PROCEEDING AGAINST CANSTONE

16 Palmenna can initiate this arbitral proceeding against Canstone. Canstone is a state organ of Kenweed; thus, it is "a Party" under the PK-BIT. Even though Canstone is not Kenweed's organ, considering the context and object and purpose of the PK-BIT, which impose obligation to the investors, Palmenna can file a claim against Canstone. In this case, the arbitral award against Canstone is more effective than the one against Kenweed. Additionally, the court proceeding pending in Palmenna's Court of Appeal does not prevent this Tribunal from proceeding as the principle of parallel proceeding does not apply in cases between court and arbitration, and the "triple identity test" is not met.

III. CANSTONE HAD BREACHED OBLIGATIONS IN THE PK-BIT

17 Canstone violated the obligation in Article 4 of the PK-BIT since Canstone did not submit the report to the relevant ministry, and the report was not an environmental impact assessment ("**EIA**") as it did not consist of appropriate forms of an EIA according to the Convention on the Biological Diversity ("**CBD**"). Additionally, Canstone had caused biodiesel which was detrimental to the public health into inland constituting the violation of Article 5(1)(a) and Article 5(1)(d) of the PK-BIT. As the presumption of liability lays upon Canstone according to Article 5(3) of the PK-BIT, the circumstances conclusively shows that the biodiesel caused by the action or omission of Canstone, violating Article 5 of the PK-BIT.

IV. PALMENNA IS ENTITLED TO THE AWARDS OF DECLARATION AND DAMAGES

18 Palmenna is entitled to an award of damages since Canstone's breach of the PK-BIT caused damage to Palmenna. Therefore, Canstone is obliged to compensate Palmenna as the form of reparation for its loss resulted from the breaches. Even if the compensation had been concluded to pay from the High court of Palmenna, granting an award of damages by the Tribunal does not cause the parallel proceeding as the reliefs and causes of action are not identical. Moreover, the declaration sought by Palmenna is proportionated and can satisfy Palmenna's reputation. Therefore, Palmenna can also invoke an award of declaration.

PLEADINGS

I. THE ARBITRATION PROCEEDING CAN BE INITIATED WITHOUT THE REQUIREMENT TO FULFILL THE PRE-ARBITRATIONAL STEPS UNDER ARTICLE 12 OF THE PK-BIT

A. The pre-arbitration clause under Article 12 of the PK-BIT is invalid and not a condition precedent to arbitration as it lacks clear procedural guidelines

19 Pre-arbitration requirements, as parts of the dispute resolution clause, are provisions that apply before arbitral process can be commenced.[1] Nonetheless, only the specific and well-defined provisions that courts and tribunals will give effect to.[2]

20 Article 31(1) of the Vienna Convention on the Law of Treaties ("**VCLT**") provides that the ordinary meaning of the terms shall be considered when interpretating the PK-BIT.[3] Thus, wordings in the provisions will indicate whether the pre-arbitration requirements are valid conditions precedent to arbitration, while the absent of such wordings will result in the contrary.[4] The court in *Holloway v. Chancery* provides some guidelines that the clause must identify the specific process or model process, without the need of further agreement, of what steps the parties shall at least undertake to comply with negotiation or mediation requirements.[5]

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[1] Klaus Peter Berger, "Law and Practice of Escalation Clauses", *Arbitration International, Vol. 22, No. 1* (March 2006), pp.1-2.
[2] Alexander Jolles, "Consequences of Multi-tier Arbitration Clauses: Issues of Enforcement*", Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Vol. 72, No. 4* (2006), p.336.
[3] VCLT, Art. 31(1).
[4] Michael Pryles, "Multi-Tiered Dispute Resolution Clauses", *Journal of International Arbitration, Vol.18, No.2* (2001) ("***Pryles***"), p.160; Gary Born, "International Commercial Arbitration", (3rd edn, Kluwer Law International 2021) ("***Born***"), p.991.
[5] *Holloway and another v. Chancery Mead Ltd* [2007] EWHC 2495 (English High Ct), ¶81.

21 Examining the negotiation clause, the court in *White v. Kampner* enforced the "mandatory negotiation clause" requiring the parties to negotiate in good faith for at least two sessions,[6] and in *Emirates Trading v. Prime Mineral*, the clause providing amicable discussions for four weeks prior to arbitration is enforceable since it contains essential terms.[7]

22 Article 12(1)(a) of the PK-BIT, nonetheless, simply requires the parties to negotiate,[8] without specifying the number of sessions or cooling-off periods, which is too ambiguous to be upheld.[9] Additionally, in *Halifax v. Intuitive Systems*, the mere provision requiring negotiation between the representatives of the parties, like the provision in Article 12(1)(a) of the PK-BIT, does not constitute a precondition to arbitration.[10]

23 Likewise, in *Sulamerica v. Enesa*, the enforceability of mediation clause is challenged as the Condition 11 of the parties' agreement lacks the determination of the intended mediators and the applied mediation rules or procedures.[11] In this case, despite the established mediation framework,[12] Article 12(1)(b) and (c) of the PK-BIT are silent on the selection of the mediators and the incorporation of such framework as an applicable method.[13] The provision does not obligate the parties to mediate in clear terms that there

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[6] *White v. Kampner* [1994] 641 A2d 1381 (Conn), ¶¶1382-1386.
[7] *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd* [2014] EWHC 2104 (Comm) ("***Emirates***"), ¶47.
[8] PK-BIT, Art. 12(1)(a).
[9] *Cable and Wireless Plc v. IBM United Kingdom Ltd.* [2002] EWHC 2059 (Comm), ¶25.
[10] *Halifax Financial Services Ltd v. Intuitive Systems Ltd* [1999] 1 All ER (Comm) 303, ¶307.
[11] *Sulamerica CIA Nacional de Seguros SA v. Enesa Engenharia SA* [2012] EWHC 42 (Comm) (English High Ct) ("***Sulamerica***"), ¶27. See also *Ohpen Operations UK Ltd v. Invesco Fund Managers Ltd* [2019] EWHC 2246 (Comm) (English High Ct.), [55]-[56]; *Int'l Research Corp. plc v. Lufthansa Sys. Asia Pac. Pte Lt*d [2012] SGHC 226 (Singapore High Ct.), ¶97.
[12] Clarification, ¶1.
[13] PK-BIT, Art. 12(1)(b); Art. 12(1)(c).

must be additional agreement on such details before mediation step can proceed; thus, it is unenforceable and cannot be a condition precedent to arbitration.[14]

24 Additionally, the court in *Courtney and Fairbairn v. Tolaini* indicated that for the enforceability of the pre-arbitration steps, the condition to proceed to next step after the precedent unsuccessful step must be determined.[15] However, mediation, as well as negotiation, results in a non-binding outcome, reflecting the uncertainty of the process.[16] Whether mediation is successful depends on the willingness of the parties, whose cooperation cannot be compelled.[17] Hence, even if the ninety-day period is stated in the mediation clause, it remains invalid and unenforceable due to its undeterminable nature.

B. There are exceptions where Palmenna can commence an arbitral proceeding without compliance with all pre-arbitration requirements

i. Not every pre-arbitration step can be pursued because such efforts would have been futile

25 Negotiation and mediation are inherently consensual and aspirational.[18] Their purpose is to help resolve the dispute in a rapid and effective manner, where the parties accept the outcome of the processes.[19] Hence, even if the provisions are conditions precedent to arbitration, they must not act as a mere tool to prevent arbitration from proceeding if there would not be any solution thorough the exhaustion of such processes.[20]

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[14] *Sulamerica*, ¶¶27-28.
[15] *Courtney and Fairbairn Ltd v. Tolaini Bros. (Hotels)* Ltd [1975] 1 WLR 297 (English Ct. App.), ¶¶301-302.
[16] *Born*, p.987.
[17] *Halifax*, ¶¶307-311.
[18] *Pryle*s, p.161.
[19] *Pryle*s, p.160; *Born*, p.987.
[20] *Cumberland and York Distributors v. Coors Brewing Co* [2002] WL 193323 (D Me), ¶4.

26 There was a conference involving Akbar and Tara and Luke,[21] – the higher management of Palmenna and Canstone,[22] to solve the dispute regarding the Appam flood incident, which plagued Palmenna's politics.[23] Although the conversation reached a dead lock and ended abruptly without any solution,[24] it can be deemed that negotiation had been fulfilled.[25]

27 Additionally, whether or not the Tribunal finds that Palmenna had not engaged in a negotiation process with Canstone within the scope of Article 12(1)(a) of the PK-BIT, Palmenna did not need to negotiate or mediate as such efforts would be futile.[26] This is because the pre-arbitration clause must not be asserted to mandate Palmenna and Canstone to participate in what is going to be an unsuccessful negotiation or mediation attempt that would rather delay the settlement of the ongoing differences.[27]

28 After the lawsuit in the domestic court, Palmenna had strongly maintained its position that the accountability shall only fall to Canstone.[28] Akbar and Tara also expressed disagreements throughout the intense discussion which was ended by Tara, denying liability and saying there was no point talking to Akbar anymore.[29] These circumstances suggest that both parties were unwilling to change their stands and even if there was negotiation or mediation, no mutual agreement would have been reached.[30] Therefore, Palmenna had no obligation to carry out negotiation or mediation.

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[21] Record, ¶49.
[22] Record, ¶¶22, 33.
[23] Record, ¶¶36, 37, 50.
[24] Record, ¶51.
[25] *Mavrommatis Palestine Concessions Case (Greece v. Great Britain)* [1924] PCIJ Series A, No. 2, ¶13.
[26] *Teinver SA v. Argentine Republic*, ICSID Case No. ARB/09/1, ¶126.
[27] *Manufacturer v. Manufacturer,* ICC Case No. 8445 ("***Manufacturers***"), p.169.
[28] Record, ¶¶43, 47; Clarification, ¶2.
[29] Record, ¶¶50-51.
[30] *Manufacturers*, p.168.

ii. Palmenna can initially refer the dispute to this Tribunal due to the protection of security interests pursuant to Article 11(b) of the PK-BIT

29 Article 11(b) of the PK-BIT provides that this BIT shall not prevent Palmenna from carrying out any necessary action to protect its essential security interest.[31] The clause, containing the language "it considers necessary," is self-judging where Palmenna itself can determine whether referring the dispute to the Tribunal without following the pre-arbitration steps is necessary to protect its essential security interests.[32]

30 Regarding whether the measure to preserve the security of Palmenna is necessary, it must consider whether there exists an alternative measure to achieve the same objective with less compromising the international obligations.[33]

31 Palmennian citizens are facing with environmental and health hazard.[34] Furthermore, the government is confronted with the legal proceeding in Palmenna's domestic court which found SZN, the associate of Canstone, liable for the flood incident in Appam.[35] There was no other appropriate alternatives to solve the disputes with Canstone since waiting for the negotiation and mediation processes to complete might harm its population, environment and political landscape,[36] which will cause Palmenna to breach international obligation even more. The commencement of the arbitral proceedings is necessary and a better approach because the decision of the Tribunal is binding upon them,[37] which provide a more effective solution to the ongoing challenges.

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[31] PK-BIT, Art. 11(b).
[32] *Deutsche Telekom AG v. Republic of India*, PCA Case No. 2014-10 ("***Deutsche Telekom***"), ¶¶231, 235.
[33] *Deutsche Telekom,* ¶239.
[34] Record, ¶36.
[35] Record, ¶¶41, 45.
[36] Record, ¶44.
[37] AIAC Rules, Rule 17(4).

32 Article 11 of the PK-BIT does not define the scope of essential security interests. The *LG&E v. Argentina* tribunal concluded that essential security interests encompass any interest concerning the protection of the state from threats that would impair its internal or external situation.[38] In contemporary perspectives, interests concerning the physical security of the citizens, environment, and political issue are considered as the protection of Palmenna's essential security interests.[39]

33 In the present case, Canstone's operation potentially compromised water environment, affecting individuals in Palmenna.[40] In addition, the situation led to political instability in Palmenna.[41] As the initiation of arbitral proceeding was a countermeasure to protect its environment, population's safety and political stability, Palmenna can invoke Article 11(b) of the PK-BIT to commence arbitration without compliance with the pre-arbitration requirements.

II. THE GOVERNMENT OF PALMENNA CAN COMMENCE AN ARBITRATION PROCEEDING AGAINST CANSTONE

A. Palmenna can initiate the arbitration proceeding against Canstone pursuant to Article 12 of the PK-BIT

i. Canstone is a state organ of Kenweed; therefore, Canstone is subsumed within the definition of the term "the Parties"

[38] *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, ¶251.
[39] *Continental Casualty v. Argentina,* ICSID Case No. ARB/03/9, ¶175; See Jorge Viñuales, "Foreign Investment and the Environment in International Law", (Cambridge University Press, New York, USA 2012), p.387; Caroline Henckels, "Whither security? The concept of 'essential security interests' in investment treaties' security exceptions", *Journal of International Economic Law, Vol. 27, No. 1* (2024), p.116.
[40] Record, ¶36.
[41] Record, ¶¶50, 52.

34 The dispute resolution clause in Article 12 of the PK-BIT governs the differences between the Parties.[42] The rule of attribution in Article 4 of the Articles on the Responsibility of States on Internationally Wrongful Acts ("**ARSIWA**"), as a customary international law widely accepted and applied by international tribunals,[43] is a rule of international law applicable between Palmenna and Kenweed under Article 31(3)(c) of the VCLT,[44] which help interpret the term "the Parties". Article 4 concerns the rule of attribution to the state by a state organ where several courts and tribunals held that when an entity is a state organ, it constitutes as a part of the state.[45] Therefore, under the ordinary meaning of the term "the Parties", it refers to Palmenna, Kenweed and their organs.[46]

35 Regardless of its internal law status, the notion of state organs encompasses *de facto* state organs, any entity making up the organization of the state and exercising state functions by its practice.[47] In *Flemingo v. Poland*,[48] the tribunal accepted that when a state is directly or indirectly owned and/or controlled by a state, it gives rise to presumption that an entity is an organ of the state. In addition, the function performed by the entity is also an important factor to determine the identity of a state organ.

36 For the structural test, concerning the control over the entity, the tribunal considered the fact that the State Treasury of Poland had a level of control over PPL by providing

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[42] PK-BIT, Art. 12(1).
[43] International Law Commission, "Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries", UN Document No. A/56/10, *Yearbook of the International Law Commission, Vol. 2 Part two* (2001) ("***ARSIWA Commentaries***"), Art. 4, ¶6.
[44] VCLT, Art. 31(3)(c).
[45] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] I.C.J. Reports, ¶392; *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC Arbitral Award, p.31; *Dan Cake (Portugal) S.A. v. Hungary*, ICSID Case No. ARB/12/9, ¶143.
[46] VCLT, Art. 31(1).
[47] ARSIWA, Art. 4; *ARSIWA Commentaries*, Art. 4, ¶¶1, 11.
[48] *Flemingo Duty Free Shop Private Limited v. the Republic of Poland*, PCA Case No. 2014-11 ("***Flemingo***"), ¶426; *Emilio Agustin Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7 ("***Maffezini***"), ¶¶77-82.

approval to many of PPL's conducts.[49] Furthermore, PPL operates under the auspices of the Ministry of Transport.[50] In this case, it is implied that the conduct of Canstone, as a subsidiary of MTI, receive the support from and depend on the approval of Kenweed government.[51] Also, Tara, whom Gan referred to as his business partner,[52] is the person who determine the general policies of Canstone and is one of the board of directors.[53] The considerably close business connection between Gan and Tara implies that Gan and MTI also had the same control over Canstone, directly or indirectly. Kenweed's substantial control over Canstone leads to presumption that Canstone is Kenweed's organ.

37 Regarding functional test, the tribunal viewed PPL's compliance with state policy is one factor making PPL a state organ.[54] Also, the *Deutsche Bank v. Sri Lanka* tribunal mentioned the CPC's purpose of conducting Sri Lanka's oil policy in the national interest as evidence to conclude that CPC was a state organ.[55] Canstone's activities in the palm-oil sector align with the MTI's function and policy to stabilize the country's income via external investment.[56] Such conducts indicate that Canstone is functioning within the structure of the MTI and is, therefore, a state organ of Kenweed.

38 Apart from the structural and functional test, a *de facto* entity could be identified based on purely factual circumstances, such as a statement or representation by a government official.[57] In this case, Gan attended the meetings for discussing and concluding the

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[49] *Flemingo*, ¶427.
[50] *Flemingo*, ¶430.
[51] Record, ¶8.
[52] Record, ¶13.
[53] Record, ¶¶21, 33.
[54] *Flemingo*, ¶¶428-429.
[55] *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, ¶405.
[56] Record, ¶¶5, 8.
[57] *Flemingo*, ¶434; Csaba Kovács, "Attribution in International Investment Law", *International Arbitration Law Library, Vol. 45* (2018), p.60.

PK-BIT with Palmenna to particularly incorporate Canstone,[58] which is also referred to as Gan's business and a subsidiary of Mehstone.[59] Considering these situations, Canstone is a *de facto* state organ of Kenweed.

ii. Article 12 of the PK-BIT, together with Article 1(3) of the BIT, can be interpreted that Palmenna can initiate arbitration against Canstone even though it is a mere investor

39 In *Urbaser v. Argentina*, the tribunal observed that the arbitration clause which governs disputes "between the Parties" like in Article 12 of the PK-BIT is of symmetric nature because it does not specify the identity of the claimant or respondent, meaning that Palmenna can be the claimant initiating arbitration against Canstone.[60]

40 Although Article 12 of the PK-BIT governs the dispute between the Parties,[61] Articles 4 and 5 of the PK-BIT imposed the environmental obligations specifically on investors of the Parties.[62] In *Aven v. Costa Rica*, the tribunal supported the idea that there are no reasons to prevent a direct claim or counterclaim against the foreign investor for breaching environmental obligations imposed against it in the investment treaty.[63]

41 In this case, the dispute precisely concerns the violation of Articles 4 and 5 of the PK-BIT which are treaty-based environmental obligations owed by Canstone as an investor.[64] Article 1(3) provides that the obligation to safeguard the environment shall be enforceable against the investor(s) of the Parties.[65] Considering the ordinary

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[58] Record, ¶¶14-16.
[59] Record, ¶¶14-15.
[60] *Urbaser S.A. and Consorciode Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, ICSID Case No. ARB/07/26, ¶1143.
[61] PK-BIT, Art. 12.
[62] PK-BIT, Art. 4; Art. 5.
[63] *David R. Aven and Others v. Republic of Costa Rica*, ICSID Case No. UNCT/15/3 ("***Aven***"), ¶739.
[64] Maxi Scherer, Stuart Bruce and Juliane Reschke, "Environmental Counterclaims in Investment Treaty Arbitration", ICSID Review - Foreign Investment Law Journal, Vol. 36, No. 2 (2021), p.431.
[65] PK-BIT, Art. 1(3).

meaning of the term in Articles 1(3), 4, and 5 together with the object and purpose of the PK-BIT to protect the environment of the host state, Article 12 shall be interpreted to cover the disputes between the host state and the investor(s). Under this rational, Palmenna can pursue the enforcement of international commitments to environmental protection through investment arbitration against Canstone.[66]

iii. The arbitration against Canstone leads to the more effective enforcement of award than the one against Kenweed

42 Although Article 1(3) of the PK-BIT allows for enforcement against either Party, including Kenweed, the award from the arbitral proceeding against Canstone is likely to be more effectively enforced than the one against Kenweed. As Canstone was incorporated in Palmenna,[67] Canstone falls under the jurisdiction of Palmenna judicial bodies according to the law prevailing at the place of incorporation of the corporation.[68] The asset of Canstone, including its factories, is also located in Appam and Karheis in Palmmena. Since there exists no fact indicating whether Palmenna and Kenweed are the parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the enforcement of award depends on the law of forum of the enforcement.[69]

43 The policy of Palmenna concerns the environmental sustainability of the state.[70] It is certain that the domestic court of Palmenna will enforce the award against Canstone as it is not against its public policy.[71] Contrarily, if the claim was brought against Kenweed, the enforcement of the award is under the discretion of the court of Kenweed.

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[66] *Aven*, ¶739.
[67] Record, ¶21.
[68] *Russian Reinsurance Co. v. Stoddard* [1925] 240 N.Y. 149, ¶153.
[69] *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, ¶¶103-104.
[70] Record, ¶15.
[71] *Soleimany v. Soleimany* [1999] 3 All ER 847, ¶863.

Additionally, the award, especially the damages, will be enforced against Kenweed's sovereign property which is shielded by the principle of sovereign immunity.[72] The enforcement of the arbitral award against Kenweed would be less effective; thus, Canstone is the appropriate party to this proceeding.

B. The arbitration against Canstone can proceed despite the ongoing legal proceedings in Palmenna's domestic court

i. The principle of lis pendens does not apply in the case between international arbitration proceeding and domestic court proceeding

44 The doctrine of *lis pendens* or "lawsuit pending" is the principle where multiple proceedings seized the same dispute at the same time.[73] Normally, one tribunal must stay its proceeding or defer to the other.[74] The principle applies when the cases are parallelly brought before various tribunals of the same legal order.[75] However, arbitrators and courts have different competence: their jurisdictions derive from the treaty and the national law respectively.[76]

45 When the parties agree to settle their disputes by arbitration via the valid arbitration agreement in Article 12(1)(c) of the PK-BIT, it automatically confers an exclusive jurisdiction to the selected arbitral tribunal.[77] Also, there is no effect on conflicting

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[72] Luigi Condorelli and Luigi Sbolci, "Measures against the Property of the Foreign States: Law and Practice in Italy", *Netherlands Yearbook of International Law, Vol. 10* (1979), p.220.
[73] August Reinisch, "The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes", *The Law and Practice of International Courts and Tribunals* (2004) ("***Reinisch***"), pp.43-44.
[74] Filip De Ly and Audley Sheppard, "ILA Final Report on Lis Pendens and Arbitration", *Arbitration International, Vol. 25, No. 1* (March 2009) ("***Final Report***"), ¶¶1.8-1.12.
[75] *Claimant v. Respondent*, ICC Case No. 5103, ¶¶1206-1215; *Reinisch*, pp.51-52.
[76] *Final Report*, ¶3.2; Harshad Pathak and Pratyush Panjwani, "Parallel Proceedings in Indian Arbitration Law: Invoking Lis Pendens", *Journal of International Arbitration, Vol. 34, No. 3* (2017), pp.539-540.
[77] *Final Report*, ¶¶4.3-4.4.

judgement because the domestic court proceedings are considered as a mere fact, not as comparable legal proceedings to the arbitral tribunal.[78]

46 In this present case, the parallel proceedings occurred in Palmenna's domestic court on one hand,[79] and the international arbitral tribunal administered by AIAC on the other hand.[80] These two proceedings are of the different forums. Hence, the lawsuit pending before the court in Palmenna would not prevent this Tribunal from proceeding.

ii. Even if the principle of lis pendens applies in the case between a domestic court and an international arbitration, the criteria are not met

47 To determine whether *lis pendens* can apply, the "triple identity" test must be taken into consideration, which includes the identity of the parties, the causes of action, and the objects or types of relief between the two proceedings.[81] The tribunal *in Benvenuti and Bonfant v. Congo* expressed that all requirements must be met; otherwise, *lis pendens* is inapplicable.[82]

48 The *SGS v. Pakistan* tribunal considered the case admissible although the parties and the requests in the two proceedings are the same, but the causes of action are different.[83] In this case, even though SZN and Canstone, the respective parties to the court and arbitration, may have legal connection, the causes of action and reliefs are not identical; therefore, *lis pendens* is inapplicable.

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[78] *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, ¶177.
[79] Record, ¶41.
[80] Record, ¶54.
[81] Bernado Cremades and Ignacio Madalena, "Parallel Proceedings in International Arbitration", *Arbitration International, Vol. 24, No. 4* (2008), p.510.
[82] *S.A.R.L. Benvenuti and Bonfant v. People's Republic of Congo,* ICSID Case No. ARB/77/2, ¶1.14.
[83] *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, ¶¶182, 190.

(1) The causes of action of the proceedings are different

49 The causes of action concern the legal basis on which the claim is based. Claims asserted in parallel proceedings must be invoked on the same legal causes or legal grounds for *lis pendens* to apply.[84] In *Alex Genin v. Estonia,* the tribunal addressed that the cause of action formerly brought before the Estonian Court, the only competent forum to deal with the dispute, was different from the cause of action in the dispute before ICSID, claiming the breached of the BIT.[85]

50 The claims before this Tribunal arose from breach of obligations in the PK-BIT, focusing on Canstone' responsibility from breaching such obligations.[86] Contrarily, the ones before the domestic court were based on grounds of negligence under domestic law,[87] concerning the government responsibility and the breach of obligation by not maintaining the effectiveness of Canstone's machinery under the care of SZN.[88] As the causes of action between these two cases were brought under different legal instrument and the underlined issues are completely separate, the domestic case does not prevent this arbitral from adjudicating the disputes.[89]

(2) The objects or types of relief of the proceedings are different

51 The objects of the proceedings are identical when the types of relief sought in both proceedings are the same.[90] The purpose of identifying the reliefs sought is to prevent "the same claimant" from seeking the same claim for relief by splitting claims based on

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[84] *Reinisch*, p.64.
[85] *Alex Genin, Eastern Credit Limited, Inc., and AS Baltoil v. Republic of Estonia,* ICSID Case No. ARB/99/2 ("***Genin***"), ¶¶331-332.
[86] Record, ¶55.
[87] Record, ¶41.
[88] Record, ¶¶41.1-41.4.
[89] *Genin,* ¶332.
[90] *Reinisch,* p.62.

different legal grounds, which is not allowed.[91] Hence, if the reliefs were granted to separate persons, the questions on this identity will not arise.[92]

52 The reliefs that the High Court of Palmenna granted were compensation to the injured victims who were third parties to this proceeding.[93] The reliefs sought in this arbitration are the awards of declaration and damages to Palmenna.[94] The declaratory relief is the new object raised before this proceeding. In addition, even if the compensation and damages are monetary, it cannot be considered the same as the reliefs sought would be granted to different parties. Consequently, *lis pendens* shall not apply and Palmenna can pursue this case against Canstone.

III. CANSTONE HAD BREACHED OBLIGATIONS IN THE PK-BIT

A. Canstone had breached its sustainability obligation as Canstone did not conduct an appropriate EIA

i. Canstone has an obligation to conduct an EIA as it operates in the industry under Article 4(2) of the PK-BIT

53 Article 4(2)(f)(i) of the PK-BIT indicates that the investors operating the activities concerning construction oil of refineries, of any nature shall conduct an EIA.[95] Canstone is obliged to conduct an EIA since Canstone produce biodiesel which is the activities concerning the construction oil of refineries, of any nature.

54 Biodiesel production involves the process of refineries by using the tank to refine palm oil that has gone through the transesterification and involves the process of biodiesel

[91] *Reinisch*, pp.62-63.
[92] *Ibid.*
[93] Record, ¶45.
[94] Record, ¶55.
[95] PK-BIT, Art. 4(2)(f)(i).

purification,[96] which is the vital process of refineries.[97] Thus, Canstone is an investor operating in construction oil of refineries.

55 Furthermore, Canstone's operation also includes securing biodiesel plants.[98] Its conduct shall constitute as the construction of any nature considered an activity under Article 4(2)(f)(i) of the PK-BIT. Therefore, Canstone is obliged to conduct an EIA according to Article 4(1) of the PK-BIT.

ii. Canstone did not submit the report to the Ministry of Natural Resources and Environmental Sustainability

56 Article 4(1) of the PK-BIT provides that Canstone shall conduct an EIA and submit it to the relevant ministry of Palmenna,[99] which is Ministry of Natural Resources and Environmental Sustainability.[100] The brief report is conducted in order to present to the stakeholder for the transparency and decision-making.[101] Nonetheless, such report was only presented to the Board of Direction in the meeting for the situation in Karheis but not the Ministry of Natural Resources and Environmental Sustainability[102] as no fact clarifies that the stakeholder to whom such report was submitted includes the Ministry. Thus, Canstone did not submit the report to the relevant ministry, breaching Article 4(1) of the PK-BIT.

iii. Although Akbar allowed Canstone to submit the papers at any time, Canstone cannot postpone the submission of the report according to Article 1(4) of the PK-BIT

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[96] Record, ¶28.
[97] Jiri van Straelen et al., "CO2 Capture for Refineries, a Practical Approach" *Energy Procedia, Vol. 1, No. 1* (2009), pp.179-185.
[98] Record, ¶28.
[99] PK-BIT, Art. 4(1).
[100] Clarification, ¶9.
[101] Record, ¶25.
[102] Record, ¶33.

57 Although Akbar told Gan that it can delay the submission of the necessary papers,[103] Canstone cannot rely on that statement as Article 1(4) of the PK-BIT indicates that the consent of Akbar shall not bind as this fact took place before the PK-BIT entered into force.[104]

58 The PK-BIT was signed on 3 October 2021 and Canstone was incorporated on 26 October 2021.[105] It can be presumed that the PK-BIT entered into force between 3 October 2021 and 26 October 2021 as Canstone undertook investment under the PK-BIT. However, the statement from Akbar was made on 6 September 2021,[106] which was before the PK-BIT entered into force. Hence, Canstone shall submit an EIA to the relevant ministry as soon as possible according to Article 4(4) of the PK-BIT[107] since the consent to postpone the necessary papers shall not bind the Parties according to Article 1(4) of the PK-BIT.

iv. An EIA conducted by Canstone shall follow the guidelines of the CBD

59 Although there is no fact stating that either Palmenna or Canstone is the party to the CBD, the CBD shall be applied as guidelines to conduct an EIA. Article 31(1) of the VCLT indicates that the context and object and purpose of the treaty shall be taken into account to interpret the treaty.[108] Article 1(1)(e) of the PK-BIT and the Preamble both provide the phrase "upholding the need to safeguard the environment,"[109] with the Preamble further specifying that the protection shall be "in line with the CBD."[110] In this regard, the phrase in Article 1(1)(e) of the PK-BIT which is also found in the

[103] Record, ¶19.
[104] PK-BIT, Art. 1(4).
[105] Record, ¶¶20-21.
[106] Record, ¶¶18-19.
[107] PK-BIT, Art. 4(4).
[108] VCLT, Art. 31(1).
[109] PK-BIT, Preamble; Art. 1(1)(e).
[110] PK-BIT, Preamble.

Preamble cannot be read in isolation.[111] In *Argentina v. Chile*, the tribunal concluded that the preamble shall be considered as the manner which helps interpret its object and purpose.[112] Therefore, Preamble and Article 1(1)(e) of the PK-BIT altogether require Canstone to safeguard the environment in line with the CBD.

60 An EIA conducted by Canstone shall comply with the guidelines in the CBD as Article 1(3) of the PK-BIT indicates that the obligation herein shall enforce against Canstone. Thus, Canstone shall conduct an EIA follow the guidelines provided in the CBD, even if the criteria of an EIA are not provided in Article 4 of the BIT.

v. The brief report conducted by Canstone is not considered an EIA since it does not consist of the appropriate form of an EIA

61 Since Canstone carries out the biodiesel activity which has significant impacts on biological diversity,[113] an EIA shall be in line with the Article 14(1) of the CBD. In this case, however, a brief report conducted by Canstone shall not be deemed an EIA.

62 COP 6 Decision VI/7, detailing the standard of EIA in accordance with Article 14(1)(a) of the CBD, stipulates that the mitigation measures to prevent the negative impact of the project must be identified.[114] In this regard, the brief report conducted by two in-house experts of Canstone only consisted of machinery condition and brief environmental assessment.[115] Lack of mitigation measures for the harmful impacts to

[111] J. Romesh Weeramantry, "Treaty Interpretation in Investment Arbitration", (Oxford University Press 2012), p.58-65, 76-79; S.D. *Myers v. Canada*, Partial Award of 13 November 2000, ¶262.
[112] *Dispute between Argentina and Chile concerning the Beagle Channel* (*Argentina v. Chile)*, Award of 18 February 1977, ¶19.
[113] Jeswani K. et al., "Environmental sustainability of biofuels: a review", *Proceedings of the Royal Society A: Mathematical, Physical and Engineering Sciences, Vol. 476, No. 2243* (2020), pp.4-5.
[114] Convention on Biological Diversity, Conference of the Parties, "Decision VI/7: Identification, Monitoring, Indicators and Assessments", UN Document No. UNEP/CBD/COP/6/20 (7 May 2002) ("***Decision VI/7***"), ¶25.
[115] Record, ¶25.

the environment and the human health in the report contradicts the purpose of conducting an EIA according to Article 14(1)(a) of the CBD.[116]

63 In addition, there were the note concerning the oil leak from the storage tanks, and later the nearby farmers in Karheis were hospitalized due to the suspected contamination.[117] Alan, insofar, denied conducting the investigation.[118] In this regard, Canstone violates the stages of conducting an EIA as the report lack the monitoring and evaluating the predicted impacts.[119] This stage shall ensure that anticipated impacts are maintained within predicted levels, and unanticipated impacts are managed before they become a problem.[120] Thus, the brief report shall not constitute an EIA as it lacks the monitoring and evaluation process needed to ensure that environmental impacts are addressed in a timely fashion.

B. Canstone had breached its environmental obligations by causing the matter to enter into river

i. Although the situation is still inconclusive, Canstone is presumed to discharge matter into river according to Article 5(3) of the PK-BIT

64 According to Article 5(3) of the PK-BIT, it is presumable that Canstone violated the environmental obligation causing the oil of any nature and noxious matter enter into inland waters if the entry of discharge originated from Canstone's Facility.[121]

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[116] *Decision VI/7*, Annex (1).
[117] Record, ¶¶28, 30.
[118] Record, ¶29.
[119] *Decision VI/7*, Annex (1)(a)(vi).
[120] *Decision VI/7*, ¶32 .
[121] PK-BIT, Art. 5(3).

65 Canstone's facility in Appam carrying out the biodiesel construction activity was the only factory operating during the flood period.[122] Following the flood incident, nearby citizens were hospitalized with respiratory tract injuries.[123] Moreover, traces of biodiesel were found in the sample of nearby floodwater.[124] As the incidents indicate that biodiesel in the floodwater originated from the Appam facility, Canstone shall be presumed to have caused the oil of any nature and noxious matter, which is the matter in Article 5(1)(a) and (d) of the PK-BIT, to enter inland waters according to Article 5(3) of the PK-BIT.[125]

66 Additionally, Article 5(3) of the PK-BIT contains the precautionary measure as the *Nuclear tests* case noted that the provision as in Article 5(3) of the PK-BIT shifted the burden of proof to the party potentially originating the damages, which, in this case, is Canstone.[126] As the precautionary principle apply to this case, the burden of proof shall be shifted to Canstone, and this shall constitute as the *prima facie* evidence that the omission of Canstone led to the breach of Article 5(1) of the PK-BIT. Thus, pursuant to Article 5(3) of the PK-BIT, it shall be presumed that Canstone's omission amounts to a violation of Article 5 of the PK-BIT despite the absence of scientific certainty that Canstone actually breached such obligation.

67 Since the underlying evidence cannot be proved the contrary, Canstone shall be presumed to have violated Article 5(1) of the PK-BIT in accordance with Article 5(3) of the PK-BIT as Canstone was the only factory operating those activities.

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[122] Record, ¶¶34, 36.
[123] Record, ¶36.
[124] Clarification, ¶13.
[125] Nathan O'Malley, "Rules of Evidence in International Arbitration", (2nd edn, Routledge 2019) p. 222.
[126] *Nuclear Tests (New Zealand v. France)* [1974] I.C.J. Reports, ¶52.

ii. Canstone had caused oil of any nature to enter inland waters according to Article 5(1)(d) of the PK-BIT

68 Canstone has obligation not to discharge or cause the matter to enter inland water provided in Article 5(1) of the PK-BIT.[127] However, Canstone failed to perform the obligation due to its omission causing the oil of any nature enter into the inland waters.

69 During the flood disaster in Appam, the water accumulated on the low-lying areas.[128] In this regard, the flood potentially entered into inland waters after subsided. Since there are traces of biodiesel found in the sample of flood water,[129] the traces of biodiesel oil were likely to enter into inland waters as well.

70 Also, Canstone was the only factory operating with full capacity at that time and there had been the malfunction which happened to valves of its storage tanks in which contained biodiesel.[130] It is apparent that the traces of biodiesel in the floodwater originated from the Canstone's Appam facility. Hence, Canstone breached Article 5(1)(d) of the PK-BIT by causing oil of any nature enter into inland waters.

iii. Canstone had caused the noxious matter to enter into inland waters which is detrimental to the public health pursuant to Article 5(1)(a) of the PK-BIT

71 Canstone causing oil of any nature enter into inland waters can also be considered as a breach of Article 5(1)(a) of the PK-BIT since the biodiesel is detrimental to public health.

[127] PK-BIT, Art. 5(1).
[128] Record, ¶35.
[129] Clarification, ¶13.
[130] Record, ¶35.

72 The phrase "detrimental to public health" shall include the situation that the risk may potentially cause the danger to citizens' health. In *Azurix v. Argentina*, the tribunal concluded that the outbreak of algae in the water sources is considered as the risk to the public health.[131]

73 In this case, around the flood area, there were more than 129 affected people who similarly exhibited the symptoms of respiratory tracts infection presumably due to the contamination travelled through inland waters.[132] There is a scientific review from University of Technology Sydney's researchers showing that the biodiesel or biofuel from palm oil can potentially cause the respiratory tracts infection among the humans.[133] As Appam is the capital city of Palmenna,[134] the contamination can potentially risk the public health among the citizens in Appam. Thereby, Canstone violated the environmental obligation by causing the noxious matters enter into inland waters according to Article 5(1)(a) of the PK-BIT.

IV. PALMENNA IS ENTITLED TO THE AWARDS OF DECLARATION AND DAMAGES

A. Canstone is responsible for compensating Palmenna in accordance with the international standard on reparation

i. According to Article 35(1) of the AIAC Rules 2023 Part II, international standard on reparation is the appropriate law applicable to this case

[131] *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, ¶¶142, 442.
[132] Record, ¶36.
[133] Aljaafari Abdulelah et al., "Biodiesel Emissions: A State-of-the-Art Review on Health and Environmental Impacts", *Energies, Vol. 15 No. 18* (2022), pp.14-18.
[134] Record, ¶2.

74 Article 35(1) of the AIAC Rules 2023 Part II provides that the tribunal has discretion to apply any law which it deems appropriate when the PK-BIT itself does not indicate applicable law for the compensation when the investors breached the obligation.[135]

75 In this regard, the *Chorzów* standard which is the universally acknowledged standard shall be taken into consideration to compensate Palmenna.[136] This standard is commonly applied by many tribunals as a standard of reparation.[137] In *Lemire v. Ukraine*, tribunal cited the *Chorzów* standard as the standard for the reparation.[138] In *Burlington v. Ecuador*, the tribunal awarded Ecuador the sum of money in respect of its claims in order to compensate Ecuador due to the damage caused by Burlington.[139] Hence, the *Chorzów* standard shall be deemed as an appropriate law according to Article 35(1) of the AIAC rules 2023 Part II.

ii. Canstone is responsible for making the full compensation wiping out all the consequences of the damage due to the breach of the PK-BIT

76 Since the *Chorzów* standard is the appropriate law in order to apply in this case, Palmenna shall receive full compensation by Canstone as the reparation of the damage resulted from the breach of the PK-BIT.

77 This dispute concerns the breach of environmental obligations under the PK-BIT which entitles the injured Parties for compensation.[140] Canstone is responsible to make the

[135] AIAC Rules Part II, Art. 35(1).
[136] Karl P. Sauvant, "Yearbook on International Investment Law & Policy 2011-2012", (Oxford University Press 2013), p.90.
[137] *Chevron Corporation and Texaco Petroleum Company v. Ecuador*, PCA Case No. 2009-23, ¶308; *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, ¶254; *Impregilo S.p.A v. Argentina Republic*, ICSID Case No. ARB/07/17, ¶361; *Gemplus S.A. and Talsud S.A. v. Mexico*, ICSID Case No. ARB(AF)/04/3, ¶361; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15 ("***El Paso***"), ¶700.
[138] *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, ¶149.
[139] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, ¶1099.
[140] *Factory at Chorzów (Germany v. Poland)* [1928] PCIJ Series A, No. 17, ¶48.

reparation in accordance with the *Chorzów* standard. There are three main standards of reparation for injury: restitution, compensation and satisfaction.[141] The tribunal in *El Paso v. Argentina*, referring to the *Chorzów* standard, concluded that compensation is the appropriate standard of reparation for the injured party due to the breach of obligations.[142] Therefore, Canstone is under an obligation to compensate for any damages caused by the breach of the PK-BIT.[143]

78 Additionally, the *Chorzów* standard shall also be construed for damages valuation.[144] Accordingly, the compensation shall wipe out all the consequences resulting from Canstone's breach of obligations to restore Palmenna to the situation that would have existed if the breach had not been committed.[145] In *Sapphire International v. NIOC*, the Arbitral Tribunal awarded the full reparation of the actual and concrete damage incurred.[146] Hence, Canstone shall compensate Palmenna which can restore Palmenna back to the position which the incident did not occur.

iii. Although there was the prior decision of the domestic court to compensate the victims, Canstone is still obliged to make the reparation to Palmenna.

79 The principle of *lis pendens* is inapplicable in this case. Although the High Court of Palmenna decided that SZN and Palmenna were to jointly compensate the victims of the incidents, the cause of action and the types of reliefs between the court and tribunal proceedings are not the same. Therefore, these circumstances shall not constitute the

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[141] *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8 ("***CMS***"), ¶399.
[142] *El Paso*, ¶700.
[143] *OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain*, ICSID Case No. ARB/15/36, ¶¶717-720.
[144] *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, pp.111-114.
[145] *Factory at Chorzów,* ¶47.
[146] *Sapphire International Petroleums Ltd. v. National Iranian Oil Company*, Award of 28 September 1960, ¶¶11-15.

case of parallel proceeding and Palmenna can invoke the compensation as an award of damages.

B. Palmenna is also entitled to an award of declaration due to Canstone's violation of the PK-BIT

i. Palmenna can invoke an award of declaration as the breach damaged the Palmenna's reputation

80 Since the principle underlined in *Chorzów* indicates that the reparation shall wipe out all the consequences caused by the misconduct of Canstone, the declaration shall be granted to make the full reparation according to this standard.

81 To clarify, the breach of obligations by Canstone destabilized Palmenna political stability since it had caused the street protest affecting the public order[147] and destroyed the citizens' trust to the Government of Palmenna due to the dispute against Palmenna government of SZN in the domestic court.[148] Additionally, the Government of Palmenna was alleged to have cause the suffer among the citizens even though the damages were, in fact, due to the breach by Canstone.[149] In *Cementownia v. Turkey*, the tribunal decided to grant the declaratory relief to the state for the misconduct of Cementownia.[150] Hence, Palmenna is entitled to a declaratory award to stabilize and clarify Palmenna's legal position that Palmenna did not cause the respiratory tracts infection among the citizens.[151]

ii. The form of the declaratory award sought by Palmenna is proportionated

[147] Record, ¶37.
[148] Record, ¶41.
[149] Record, ¶46.
[150] *Cementownia Nowa Huta S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, ¶158.
[151] *CMS*, ¶399.

82 The declaratory award sought by Palmenna is clear and self-contained and will by definition not exceed the scope or limits of satisfaction.[152] In this regard, the declaration shall be granted to Palmenna as its request.

83 In *Corfu Channel*, the only form of declaration sought by Albania containing only the acknowledgement of the breach was granted as it is sufficient form.[153] In this case, the declaration sought by Palmenna detailing in the breach of Canstone of the PK-BIT shall be considered as the sufficient declaration. Hence, Palmenna can invoke such declaration as it is in an appropriate form of reparation.

C. The act of breach was not due to force majeure; therefore, Canstone is responsible for reparation

84 Even if the flood occurred during the alleged breach, this incident shall not constitute *force majeure* as it was predictable. Therefore, Canstone is not exempt from its responsibilities.

85 *Force majeure* shall be applied to preclude the responsibilities when the alleged breach in question is caused by an irresistible force or an unforeseen event which is beyond the control of the state concerned and which makes it materially impossible in the circumstances to perform the obligation.[154]

86 Although the neighboring factories had shut down their operation and evacuated their personnel, Canstone was still operating without any appropriate measures to prevent

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[152] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)* [1949] I.C.J. Reports ("***Corfu Channel***"), p.35
[153] *Corfu Channel*, p.35.
[154] International Law Commission, "Force majeure and Fortuitous event as circumstances precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine - study prepared by the Secretariat", UN Document No. A/CN.4/315", *Yearbook of the International Law Commission Vol. 2 Part One* (1978), p.61.

the flood which may affect its facility.[155] In this regard, Canstone's omission can be considered as the neglect action under this circumstance. Although the result may be unintended, the *force majeure* criteria were not met as the result is due to Canstone's negligence.[156] In *Enron v. Argentina and Sempra Energy v. Argentina*, the tribunals concluded that *force majeure* does not include circumstances in which performance of an obligation has only become more difficult but not impossible.[157]

87 In this case, *force majeure* cannot be asserted because the water levels started to accumulate due to the heavy rainfall since early November 2023;[158] thus, it is presumable that the flood may occur. The flood incident was not materially impossible to perform the obligation when the situation has real possibility of escaping its effects. Therefore, Canstone's responsibilities are not precluded.

[155] Record, ¶34.
[156] *ARSIWA Commentaries*, Art. 23, ¶3.
[157] *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, ¶217; *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, ¶246.
[158] Record, ¶34.

PRAYERS FOR RELIEF

The Claimant, the Federation of Palmenna, respectfully requests this Tribunal to adjudge and declare that:

I. Palmenna can commence an arbitration without complying with pre-arbitration requirements;

II. Palmenna can initiate an arbitration against Canstone;

III. Canstone had breached obligations in the PK-BIT; and

IV. Palmenna is entitled to an award of declaration and damages.

Respectfully Submitted,

Counsels for Claimant