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ASIAN INTERNATIONAL ARBITRATION CENTRE

THE PALM ATTACK: OIL VS SPOIL

MEMORANDUM FOR THE RESPONDENT

CLAIMANT		RESPONDENT
THE REPUBLIC OF PALMENNA	V.	CANSTONE FLY LIMITED

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INDEX OF RULES, STATUTES AND TREATIES

Abbreviation	Citation
AIAC Rules	Asian International Arbitration Centre Rules
ARSIWA	Draft articles on Responsibility of States for Internationally Wrongful Acts
CBD	Convention on Biological Diversity
NYC	United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)
VCLT	Vienna Convention on the Law of Treaties 1969

STATEMENT OF JURISDICTION

The Republic of Palmenna ("**Palmenna**") submitted the dispute against Canston Fly Limited ("**Canstone**"), to the Asian Internation Arbitration Center ("**AIAC**") in Kualalumpur, Malaysia in accordance with Article 12 of the Palmenna-Kenweed Bilateral Investment Treaty ("**PK-BIT**"). However, Canstone contends that this Arbitral Tribunal (the "**Tribunal**") lacks jurisdiction over the present dispute.

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

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

2 With the need to strengthen its economy, Gan established the Ministry of Trade and Investment ("**MTI**"). MTI collaborated with KLT Company Limited ("**KLT**") to establish Mehstone Star Limited ("**Mehstone**") to produce biofuel.

The signing of PK-BIT and incorporation of Canstone

3 On 27 August 2021, Akbar and Gan signed the Memorandum of Understanding ("**MOU**"), highlighting both countries' future commitments. Gan told Akbar, who was concerned about setting up a company in Palmenna, that he would not rush the submission of the necessary papers.

4 On 3 October 2021, Palmenna and Kenweed (collectively, the "**Parties**") signed Palmenna-Kenweed Bilateral Investment Treaties ("**PK-BIT**"), underlining the purpose of enhancing friendships and economic collaboration between the two countries.

Conduct of an EIA report

5 After Canstone was incorporated in Palmenna, with the shares owned by Mehstone and SZN Company Limited ("**SZN**"), two biodiesel plants in Appam and Kaheis were secured. Alan Becky ("**Alan**"), the QC supervising the mentioned biodiesel plants, asked the in-house experts to conduct a brief environmental assessment note and report on the machinery and equipment condition ("**Report**") every four months (April, August, December).

6 Around mid-February 2023, Canstone's Karheis facility received an unsigned note, informing about the leaked palm oil from the storage tank, which was presumed to be sent by the vicinity facility. Alan denied the allegation, concluding that there was no leak.

7 Two weeks later, news reports emerged concerning nearby farmers being hospitalized due to suspected contamination. The cause for the hospitalization was unknown as findings from the investigation remained unpublished.

The worst flooding in the history

8 In November 2023, heavy rainfall in Palmenna raised water levels, prompting concerns about flooding in Karheis. On 23 November 2023, neighboring factories in Appam stopped their operation for the next three days and called for evacuation. However, Canstone continued its operations in Appam as normal.

9 On 26 November 2023, Appam experienced one of its worst severe flash floods, causing water accumulation around the plant facility. As there was no order to cease operation, Canstone continued to operate and stationed its employees to observe abnormalities.

10 After the flood subsided, two factories nearby were temporarily closed. "Under Maintenance" signs were posted at their entrances. Heavy tanks and machinery were observed entering and exiting the sites following the flood.

11 Residents who live around flood areas, including Canstone employees, were hospitalized due to respiratory problems possibly caused by inhaling irritant gasses or exposure to corrosive chemicals that had traveled through inland waters or river. Canstone investigated and found that floodwaters might compromise the pressure relief valves on the storage tanks.

12 Dr. Ragu who treated the affected employees found uncertainty whether the broken relief valves caused the infections. He stated that the possible cause was the flood water, which also carried other hazardous substances.

The Pending lawsuit in Palmenna

13 After the activists filed the lawsuit against the Government of Palmenna and SZN on 15 December 2023, they both objected to the claims providing various reasons that they should not be held liable. On 14 February 2024, The High Court of Palmenna held that Palmenna and SZN were mutually liable. Both appealed the decision to the Court of Appeal, maintaining their positions that the responsibility should be solely against the other party to the suit. The court has not given a decision regarding the issues.

The unsettled dispute

14 On 1 March 2024, Akbar held the conference joined by Tara Sharma ("**Tara**"), Alan, and Luke Nathan ("**Luke**"). The discussion was about political matters where they proposed the solution. No other conversation ensued after the discussion.

The Initiation of Arbitral Proceeding

15 On 6 March 2024, Palmenna initiated the arbitral proceedings against Canstone, invoking Article 12 of the PK-BIT. As Palmenna did not comply with the pre-arbitration steps, Canstone challenges the validity of the arbitration process. Palmenna also brought the case against Canstone, an investor, despite the pending proceeding in Palmenna's Court of Appeal. Palmenna asks this Arbitral Tribunal (the "**Tribunal**") to decide whether Canstone breached its obligations under the PK-BIT and whether Palmenna is entitled to awards of declaration and damages.

SUMMARY OF PLEADING

I. THE PRE-ARBITRATION STEPS UNDER ARTICLE 12 OF THE PK-BIT MUST BE COMPLIED BEFORE THE INITIATION OF ARBITRATION PROCEEDINGS

16 Palmenna must abide by the pre-arbitration requirements before initiating arbitration against Canstone as such requirements are mandatory and cannot be waived. As the PK-BIT is a treaty, its interpretation must be in line with the VCLT. Considering its ordinary meaning, context, and object and purpose, Article 12 of the PK-BIT shall be interpreted as a mandatory requirement. Moreover, as the treaty must be interpreted in good faith, Article 12 of the PK-BIT shall be interpreted in a way to give its effect. Thus, such pre-arbitration requirement cannot be waived on the ground of a possibility that the required negotiation and mediation may not be successful.

II. THE GOVERNMENT OF PALMENNA IS PRECLUDED FROM INITIATING AN ARBITRATION PROCEEDINGS AGAINST CANSTONE

17 Palmenna is precluded from initiating arbitration against Canstone as the Tribunal lacks jurisdiction. The Tribunal lacks material jurisdiction over the dispute between Canstone and Palmenna as the consent of the Parties only cover the dispute between Kenweed and Palmenna. The Tribunal lacks personal jurisdiction over Canstone as Canstone never consented to arbitrate under the PK-BIT to which it is not a Party. Additionally, if the Tribunal finds Canstone's conducts attributable to Kenweed, the claims should be brought against Kenweed, not Canstone. Furthermore, there is a pending legal proceeding of substantially same nature in the Court of Palmenna. Thus, the arbitration will constitute a parallel proceeding which is contrary to the *lis pendens* doctrine.

III. CANSTONE COMPLIED WITH OBLIGATIONS UNDER THE PK-BIT.

18 Canstone has complied with sustainability obligations under article 4 of the PK-BIT even though its activity is not considered to have significant environmental impact. Canstone has conducted an environmental impact assessment ("**EIA**") in accordance with the obligations laid out in Article 4 of the PK-BIT as it has appointed qualified personnel and reported the EIA to relevant ministries. Canstone has complied with Article 5 of the PK-BIT as the flood in Appam constitutes force majeure even if it did not cause biodiesel to enter the river.

IV. PALMENNA IS NOT ENTITLED TO THE AWARD OF DECLARATION AND DAMAGES.

19 Canstone is precluded from paying compensation as is not liable for damages because of *force majeure* as the situation in Appam is considered material impossibility and Palmenna has consented to Canstone to postpone the report when Akbar gave canstone an assurance. The Tribunal lacks power to order the award to Palmenna given the potential interference with Palmenna's sovereignty. Furthermore, awarding compensatory damages to Palmenna creates double recovery for the same underlying harm as the domestic court's decision has awarded the damages. The form of satisfaction sought by Palmenna does not consist of the correct form of satisfaction as it is disproportionate and causes humiliation to Canstone. Palmenna has contributed to the breach as it also has duty to provide full protection and security to the investment.

PLEADINGS

I. THE PRE-ARBITRATION STEPS UNDER ARTICLE 12 OF THE PK-BIT MUST BE COMPLIED BEFORE THE INITIATION OF ARBITRATION PROCEEDINGS

A. The pre-arbitration steps are valid and mandatory condition precedent to initiating arbitration

i. The pre-arbitration steps are mandatory condition precedent to initiating arbitration

20 Palmenna and Kenweed are parties to the VCLT.[1] The treaty interpretation rules of the VCLT apply to all provisions of the PK-BIT including the dispute resolution clause[2]. Furthermore, as the PK-BIT is a treaty, the VCLT is applicable to determine the Parties' consent to arbitration.[3]

21 According to Article 31(1) of the VCLT, the PK-BIT must be construed in good faith according to its ordinary meanings and the context and its object and purpose altogether.[4]

22 First, the language of Article 12 of the PK-BIT clearly illustrates its mandatory nature. Article 12 uses the word 'shall' and the conditional formulation using the word "if …". The use of such wordings and conditional formulation indicates that the pre-arbitration steps are obligatory.[5] Thus, the ordinary meaning of the wordings of Article 12 suggests that the pre-arbitration steps are mandatory and must be completed before initiating arbitration.

23 Second, regarding the context and the object and purpose of the PK-BIT, the pre-arbitration steps are mandatory. The object and purpose of the PK-BIT is reflected in its preamble

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[1] Corrections and Clarifications to the Moot Problem ("***Clarifications***"), ¶4.
[2] *National Grid plc v. The Argentine Republic*, ICSID Case No. ARB/01/3, ¶49; American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, ¶5.23; *Lanco International Inc. v. The Argentine Republic*, ICSID Case No. ARB/97/6, ¶¶42–44.
[3] Karl-heinz Böckstiegel, "Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012", *The Journal of the London Court of International Arbitration, Vol. 28 No. 4* (2012), ¶583.
[4] Yearbook of the International Law Commission 1966, Vol. II (A/CN.4/SER.A/1966/Add.l), p. 220.
[5] Dyalá Jiménez Figueres, "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration", *ICC International Court of Arbitration Bulletin, Vol. 14, No. 1* (2003), p. 72.

according to Article 31(2) of the VCLT.[6] The PK-BIT aims to reinforce the traditional ties of friendship and cooperation between Palmenna and Kenweed.[7]

24 The context of the treaty can also be found in its preamble according to Article 31(2) of the VCLT.[8] Additionally, the Parties expressed their intention to strengthen their longstanding friendship and for the PK-BIT to facilitate cooperation and utilization of the greater business opportunities between them.[9]

25 Pre-arbitration requirements provide the parties an opportunity to resolve disputes amicably and, therefore, avoid the substantial costs and delays of arbitration, reduce confrontation and preserves their relationships.[10] Interpreting that the non-compliance of such clause has no effect will disregard the object and the purpose of the PK-BIT, which is contrary to Article 31(1) of the VCLT.[11]

26 Furthermore, the tribunal in *Enron v Argentina* regards the pre-arbitration requirements as jurisdictional requirements and held that the failure to comply with such requirements would result in the tribunal lack of jurisdiction.[12]

ii. The pre-arbitration steps are not required to be meticulously detailed to be valid.

[6] VCLT, Art. 31(2).
[7] PK-BIT, Preamble.
[8] VCLT, Art. 31(2).
[9] Record, ¶20.
[10] Sophie Zhao Yue, "Pre-arbitration ADR Requirements: A Chinese Perspective", *Asian Dispute Review, HKIAC 2022, Vol. 24, Issue 2* (April 2022), ¶88.
[11] *Murphy Exploration and Production Company Int'l v. Republic of Ecuador*, ICSID Case No. ARB/08/4, ¶¶147–149.
[12] *Enron Corporation and Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3 ("***Enron v. Argentina***"), ¶88.

27 The pre-arbitration steps are not required to be complete or detailed to be valid and enforceable.[13] Its flexiblility encourages parties to explore amicable dispute resolution venues for settling their disputes before proceeding to arbitration.[14]

28 In *Tulip v. Turkey, Enron v. Argentina,* and *Salini v. Morocco,* the clause requiring the parties to seek to resolve the dispute by consultations and negotiations in good faith was held to be valid.[15] The claimant must wait for the required period of time for the pre-arbitration steps to elapse before commencing arbitration.[16]

29 The satisfaction of such requirements is the pre-condition of its jurisdiction over the dispute.[17] And, the explicit pre-arbitration requirements cannot be weakened into just aspirational statement.[18]

30 Article 12(1) of the PK-BIT requires the Parties to attempt to resolve the disputes through negotiation and mediation for at least 90 days from the commencement of mediation.[19] The Parties must attempt to resolve the disputes through negotiation and mediation and will be able to initiate arbitration only when 90-day period elapses.

31 However, the pre-arbitration requirements have not been satisfied. Akbar called for a conference including Tara, Alan and Luke on 1 March 2024.[20] As the discussion reached an impasse and tensions escalated, the call was ended with the problems unsolved.[21] Akbar

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[13] *Salini Costrutorri S.P.A and Italstrade S.P.A v. Kingdom of Morocco*, ICSID Case No. ARB/00/4 ("***Salini v. Morocco***"), ¶20.
[14] Carol Khouzami, "Harnessing the Power of Pre-Arbitration Clauses in International Investment Treaties: The Case for Introducing Mediation", Lexology, June 26, 2023, https://www.lexology.com/library/detail.aspx?g=1cadfd88-a9ce-4ebf-a6fd-2655419f4035.
[15] *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28 ("***Tulip v. Turkey***"), ¶84; *Enron v. Argentina*, ¶88; *Salini v. Morocco*, ¶27.
[16] *Tulip v. Turkey*, ¶72.
[17] *Ibid.*
[18] *Ibid.*
[19] PK-BIT, Art. 12(1)(c).
[20] Record, ¶49.
[21] Record, ¶51.

convening the conference is not an attempt to settle the dispute by amicable and good faith negotiation as there was no desire to resolve the dispute out-of-court.

32 Having been pressured by Elsie, the former Prime Minister, Akbar commenced the arbitration without the required negotiation and mediation.[22] The dispute was submitted to arbitration on 6 March 2024,[23] which is only 5 days after the conference. Thus, Palmenna did not comply with the mandatory pre-arbitration requirements under Article 12(1) of the PK-BIT before initiating arbitration against Canstone.

B. The pre-arbitration steps cannot be waived

33 As the pre-arbitration steps are valid and mandatory requirements, they cannot be waived. The Palmenna can initiate arbitration only when such requirements are satisfied.

34 The Parties must apply the PK-BIT in good faith according to its terms pursuant to Article 31 of the VCLT.[24] The good faith treaty interpretation is derived from *pacta sunt servanda.*[25]An interpretation of the PK-BIT in a way that declines what has been agreed is not in good faith.[26] Thus, even if the negotiations and mediation may be fruitless and end without contract ensuing, the parties must negotiate and mediate when there is an agreement to do so.[27]

35 The tribunal in *Tulip v. Turkey* did not accept the contention by the claimant that the pre-arbitration requirements under the under the Bilateral Investment Treaty ("**BIT**") can be

[22] Record, ¶52.
[23] Record, ¶54.
[24] Humphrey Waldock, "Third Report on The Law of Treaties, Yearbook of the International Law Commission", Vol. II (ILC 1964), p. 7.
[25] Richard Gardiner, "Part II Interpretation Applying the VCLT, The General Rule: The Treaty, its Terms, and their Ordinary Meaning", Treaty Interpretation (2nd edn, Oxford International Law Library 2015), p. 169.
[26] *Regina v. Immigration Officer at Prague Airport and another ex parte European Roma Rights Centre and others* [2004] UKHL 55, ¶19; *Cox v. Canada* (1994) UN Human Rights Committee, 114 ILR 347, ¶¶372–373.
[27] *Hillas & Co Ltd v. Arcos Ltd.* [1932] All ER Rep 494, HL, ¶¶ 503, 505, 515.

waived on the ground of futility.[28] It held that the jurisdiction of the tribunal under the BIT is from the state's waiver of its sovereignty.[29] Thus, the claimant must strictly comply with the conditions provided by the state before bringing claims to arbitration.[30]

36 Moreover, the mediation framework established in Palmenna has 70% successful rate over the past 5 years.[31] Therefore, if the Palmenna had followed such mediation framework, it is likely that their dispute would have been resolved before proceeding to arbitration.

37 Consequently, the pre-arbitration steps cannot be waived by the mere assumption that the compliance with such requirements may not lead to a successful result. Holding that the pre-arbitration requirements can be waived on such ground will neglect the rule of treaty interpretation in good faith.

II. THE GOVERNMENT OF PALMENNA IS PRECLUDED FROM INITIATING AN ARBITRATION PROCEEDING AGAINST CANSTONE

A. The claims fall outside the Tribunal's jurisdiction

38 The Tribunal's jurisdiction scope depends on the Parties' consent. [32] If the Tribunal decides a claim outside the Parties' consent, the award cannot be enforced.[33] Accordingly, it is important to determine whether the Parties' consent covers the claims brought by Palmenna.[34]

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[28] *Tulip v. Turkey*, ¶134.
[29] *Tulip v. Turkey*, ¶135.
[30] *Ibid.*
[31] *Clarifications*, ¶1.
[32] Pierre Lalive and Laura Halonen, "On the Availability of Counterclaims in Investment Treaty Arbitration", *Czech Yearbook of International Law, Vol. 2* (2011), pp. 141, 146; Atasanova, Matinez Neboit and Ostransky, "The Legal Framework for Counterclaims in Investment Treaty Arbitration", *Journal of international arbitration 31:3* (2014) ["***Atasanova***"], p. 365; Ina Popava and Fiona Poon, "From Perpetual Respondent to Aspiring Counterclaimants? State Counterclaimants in the New Wave of Investment Treaties", *BCDR International Arbitration Review 2, Issue 2* (December 2015), p. 227.
[33] NYC, Art. V(1)(c); ICSID Convention, Art. 34(2)(a)(iii); Art. 36(1)(a)(iii); Art. 52.
[34] Anne Hoffmann, "Counterclaims", Building International Investment Law – The First 50 Years of ICSID, (Kluwer Law International 2015), p. 509; *Atasanova*, p. 370.

i. The substance of the dispute is beyond the scope of the Parties' consent to arbitrate

39 In the investment arbitration, an offer of consent to arbitration made by state parties in the BIT confers the tribunal jurisdiction.[35] Article 12 of the PK-BIT gives rise to the Tribunal's jurisdiction over "any dispute between the Parties arising from relating to or in connection with this BIT".[36]

40 The dispute between Palmenna and Canstone is beyond the scope of the Parties' consent to the BIT in terms of the substance of the dispute. The wording of Article 12(1) merely covers any dispute arisen between the Parties. The obligations of the Parties are under Articles 2 to 3 and 7 to 10.[37] On the contrary, the clams submitted to arbitration concern the incidents in Appam alleged to have been caused by Canstone's failure to comply with its obligations under Articles 4 and 5.[38] The separation of those obligations demonstrates that the dispute between the Parties and investors is not within the scope of Article 12, which can be settled through arbitration.

41 Accordingly, The Tribunal lacks material jurisdiction over any dispute between Palmenna and Canstone as the Parties' consent only covers dispute between Palmenna and Kenweed, the Parties to the PK-BIT.

ii. The Tribunal lacks personal jurisdiction over Canstone

42 Palmenna cannot initiate arbitration against Canstone as Palmenna unilaterally consented to arbitration under the PK-BIT. However, Canstone, an investor, did not consent to such arbitration. Consequently, the Tribunal lacks personal jurisdiction over Canstone.

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[35] Christoph Schreuer "Jurisdiction and Applicable Law in Investment Treaty Arbitration", *McGill Journal of Dispute Resolution, Vol. 1, No. 1* (2014), p. 2.
[36] PK-BIT, Art. 12(1)
[37] PK-BIT, Art. 2; Art. 3; Art. 7; Art. 8; Art. 9; Art. 10.
[38] PK-BIT, Art. 4; Art. 5; *Clarifications*, ¶¶6, 41.

43 The main purpose of the investment arbitration is to protect the investors' rights under the investment treaty.[39] Thus, the investment arbitration is inherently asymmetric in nature as it is concluded between states, not between a state and an investor.[40] Since the investment arbitration is arbitration without privity,[41] only when an investor accepts the state's open offer, a valid and binding agreement to arbitration is created between the investor and the state.[42]

44 The state's consent to arbitration is mostly given in the BIT, while the investor's consent is given at the time it chooses to initiate arbitration against the state.[43] The investor can initiate arbitration based on a unilateral consent given by the state, contained in the relevant investment treaty.[44] Nevertheless, the state cannot initiate the arbitration when the investor did not consent to the arbitration clause contained in the BIT.[45] As the investor is not a party to the BIT, the state can hardly bring a counterclaim against the investor through arbitration based on the treaty, not to mention a direct claim.[46]

45 In *East Kalimantan v. PT Kaltim*, the tribunal dismissed the case for lack of jurisdiction. The tribunal held that the ICSID Convention does not prevent a state from bringing claims against

[39] Hege Elisabeth Veenstra-Kjos, "Counter-claims by Host States in Investment Dispute Arbitration "without Privity"", Les aspects nouveaux du droit des investissements internationaux (Martinus Nijhoff Publishers 2007), pp. 597, 600, 614.
[40] Laurence Boisson De Chazournes, "Consent in Investment Arbitration: A Few Remarks", Kluwer Arbitration Blog, January 13, 2023, https://arbitrationblog.kluwerarbitration.com/2023/01/13/consent-in-investment-arbitration-a-few-remarks/ ["***Chazournes***"].
[41] Gutavo Laborde, "The Case for Host State Claims in Investment Arbitration", *Journal of International Dispute Settlement, Vol. 1 No. 1* (January 2010), p. 105.
[42] *Chazournes*.
[43] Mehmet Toral and Thomas Schultz, "The State, a Perpetual Respondent in Investment Arbitration? Some Unorthodox Considerations", The Backlash Against Investment Arbitration: Perceptions and Reality, (Kluwer Law International 2010), p. 579.
[44] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, ¶60.
[45] Jan Paulson, "Arbitration Without Privity", ICSID Review, *Foreign Investment Law Journal, Vol. 10, Issue 2*, (October 1995), p. 232.
[46] James Crawford, "Treaty and Contract in Investment Arbitration", *Arbitration International, Vol. 24 Issue 3* (September 2008), pp. 351, 364.

an investor based on contract. However, the ICSID Convention prevents a constituent subdivision of state party to bring an investment dispute against investor due to the lack of approval from the state party under Article 25 of ICSID.[47] Therefore, a form of consent such as approval is the integral part for investment tribunal such as ICSID to have jurisdiction over the case.

46 Here, as Canstone never initiated any claim against Palmenna, Canstone did not consent to arbitration under the PK-BIT. Therefore, if Palmenna wishes to initiate arbitration, it should bring the claims against Kenweed, the Party to the PK-BIT, which consented to arbitration under Article 12.

47 The Parties to the PK-BIT are Palmenna and Kenweed. Canstone is not a Party to the PK-BIT as Canstone is a separate entity from the Government of Kenweed. Canstone is neither a *de jure* nor *de facto* Kenweed's state organ. Further, the conducts alleged to have breached the PK-BIT are not attributable to Kenweed.

48 Canstone was incorporated in Palmenna with 70% and 30% of the shares held by Mehstone and SZN, respectively.[48] The state ownership of a company does not make all the conduct of that company attributable to the state,[49] nor does it turn such company, which is a separate legal entity, into a *de jure* state organ.[50] According to the ARSIWA commentaries, the company's conduct is attributable to the state only in the following circumstances[51]:

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[47] *The Government of the province of East Kalimantan v. PT Kaltim Prima Coal Rio and others*, ICSID Case No. ARB/07/3, ¶174.
[48] Record, ¶21.
[49] Marko Milanovic, "Special Rules of Attribution of Conduct in International Law", International Law Studies, Vol. 96 (June 2020) ["***Milanovic***"], p. 366.
[50] *Ibid.; Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, ¶75; *Schering Corporation v. The Islamic Republic of Iran*, IUSCT Case No. 38, p. 361; *ARSIWA commentaries*, p. 48.
[51] *Milanovic*, pp. 366–367; Jorge E. Viñuales, "Attribution of Conduct to States in Investment Arbitration", *ICSID Reports, Vol. 20* (July 2022), pp. 60–61.

(1) When it is completely dependent on and controlled by the state as it becomes a *de facto* state organ;[52]

(2) When it exercises elements of governmental authority as a *de jure* state organ;[53] or,

(3) When its specific conduct is done on the instruction, direction, or control of the state.[54]

49 Canstone is not Kenweed's *de facto* state organ as it is neither completely dependent on Kenweed nor controlled by Kenweed. [55] Its operation is under control of the SZN nominees and Tara.[56] It does not act on Kenweed's behalf,[57] in Kenweed's apparently official capacity, nor under Kenweed's color of authority.[58]

50 Canstone is not *de jure* Kenweed's state organ, as it is not empowered the governmental authority by the law of Kenweed to exercise public functions,[59] which are normally exercised by state organs.[60] Canstone is incorporated in Palmenna[61] only for increasing the palm oil percentage in Mehstone's production of biofuel.[62]

51 Canstone's alleged wrongful conducts were not under Kenweed's instruction nor did it act under Kenweed's direction nor control.[63] The state must use its ownership interest in or control of a corporation to achieve a particular result, for the act to be attributable to the state conduct.[64]

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[52] ARSIWA, Art. 4.
[53] ARSIWA, Art. 5.
[54] ARSIWA, Art. 8.
[55] *Milanovic*, p. 366.
[56] Record, ¶22.
[57] *ARSIWA commentaries*, p. 40.
[58] *ARSIWA commentaries*, p. 42.
[59] *Phillips Petroleum Company Iran v. The Islamic Republic of Iran, the National Iranian Oil Company*, IUSCT Case No. 39, p. 79; *Petrolane, Inc. and others v. Islamic Republic of Iran and others*, IUSCT Case No. 131, p. 92.
[60] *ARSIWA commentaries*, p. 43.
[61] Record, ¶21.
[62] Record, ¶14.
[63] *ARSIWA commentaries*, p. 47.
[64] *Tulip v. Turkey*, ¶306; *ARSIWA commentaries*, p. 48; *Foremost Tehran, Inc. and others v. The Government of the Islamic Republic of Iran and others*, IUSCT Case Nos. 37 and 231, p. 228; *American Bell International Inc. v. The Islamic Republic of Iran and others*, IUSCT Case No. 48, p. 170.

52 Palmenna alleged that Canstone breached its obligations under Articles 4 and 5 of the PK-BIT. However, whether to conduct the EIA is within the scope of Tara's decision-making.[65] Canstone's daily operation is run by the SZN nominees and and its general policies are determined by Tara who are independent from the Kenweed.[66] Accordingly, Canstone does not act under Kenweed's direction or control.

53 Moreover, the alleged leak of oil was not under the instruction of Kenweed as Lee, the Senior Manager at the Appam facility,[67] decided to run the operation of the Appam plant facility on the day the flash flood occurred.[68]

54 To conclude, Canstone's conduct is not attributable to Kenweed's conduct who is a Party to the PK-BIT. Hence, claims against Canstone cannot be brought to arbitration as Canstone is not a Party to the PK-BIT which consented to arbitrate under Article 12.

55 Even if the Tribunal finds such conducts attributable to Kenweed, the claims should be brought against Kenweed, the Party to the PK-BIT, which consented to arbitration under Article 12. Furthermore, ARSIWA only governs breach by states but does not apply to breach by non-state actors.[69] It is only applicable for determining the attribution to a state in investment dispute settlement.[70]

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[65] Record, ¶33.
[66] Record, ¶22.
[67] Record, ¶26.
[68] Record, ¶34.
[69] Meg Kinnear, "ARSIWA, ISDS, and the Process of Developing an Investor-State Jurisprudence", ICSID Reports, Vol. 20 (July 2022), p. 6.
[70] Esmé Shirlow and Kabir Duggal, "The ILC Articles on State Responsibility in Investment Treaty Arbitration", *ICSID Review - Foreign Investment Law Journal, Volume 37, Issue 1-2* (June 2022), pp. 382-383; *Masdar Solar and Wind Cooperatief UA v. Kingdom of Spain*, ICSID Case No ARB/14/1, ¶167; *Belenergia SA v Italian Republic*, ICSID Case No ARB/15/40, ¶552; James Crawford, "Investment Arbitration and the ILC Articles on State Responsibility", *ICSID Review, Vol. 25 Issue 1* (March 2010) pp. 127, 126–128; Kaj Hobér, "State Responsibility and Attribution", The Oxford Handbook of International Investment Law (Oxford University Press 2008), pp. 552–553.

56 According to Article 1 of ARSIWA, a state is internationally responsible when there is a failure to comply with the obligations under ARSIWA as they are imposed on states. [71] The rule of attribution in ARSIWA is for holding a state responsible for the acts of private entities whose conducts are attributable to it.[72] Thus, Palmenna should instead initiate arbitration against Kenweed as it is a Party to the PK-BIT, not Canstone.

B. The arbitration against Canstone is precluded as there is already a legal proceeding of a similar nature in the Court of Palmenna

57 Palmenna cannot commence arbitration against Canstone as there is a concurrent legal proceeding between parties with the same interest, concerning the claims based on the same facts. The arbitration will constitute a parallel proceeding.

58 *Lis pendens* doctrine prevents parties from brining a dispute before a tribunal, when there is a legal proceeding concerning the same dispute pending in another forum.[73] This doctrine applies to cases between the same parties on the substantially same issue and same cause of action.[74] The doctrine extends to cover disputes between different parties when their interests regarding the subject matter of the dispute are identical.[75]

59 Parallel proceedings increase the risk of "incompatible determinations of fact and liability."[76] Moreover, it can result in conflicting awards by different tribunals from the same facts and is unfair for respondents to be commenced legal proceedings against based on the same event

[71] Yearbook of the International Law Commission 1956, Vol. II (document A/CN.4/96), p. 225.
[72] *Milanovic*, p. 306.
[73] Yuval Shany, "The Competing Jurisdiction of International Courts and Tribunals" (Oxford University Press 2003), p. 245.
[74] *Id*. 230–255; Professor Filip de Ly and Audley Shepard, "ILA Final Report on Lis Pendens and Arbitration", *Arbitration International, Vol. 25 Issue 1* (March 2009) ["***Lis Pendens Report***"], ¶¶4.2, 5.6, 5.13.
[75] *Lis Pendens Report*, ¶¶2.40–2.43.
[76] John Collier and Vaughan Lowe, "The Settlement of Disputes in International Law, Institutions and Procedures", (Oxford University Press 2000), p. 262; Jean-Louis Devolvé, "Final Report on Multi-Party Arbitrations", ICC International Court of Arbitration Bulletin 24, Vol. 6, No. 1, (1995), ¶76.

and essentially the same claims.[77] *Lis pendens* doctrine also applies to parallel proceedings in a national court and an arbitral tribunal,[78] as both forums have an equal vocation.[79]

60 First, the parties in the case pending in the Court of Palmenna and arbitration are of the same interest concerning the subject matter of the dispute. The case pending in the Court of Palmenna is filed by the activists in Palmenna against the Government of Palmenna and SZN.[80] The arbitration was initiated by Palmenna against Canstone.

61 Canstone and SZN are closely connected in terms of ownership and operation. SZN holds 30% shares in Canstone[81] and SZN nominees run Canstone's daily operation.[82] Moreover, the claims filed against SZN in the Court of Palmenna cited the inadequacies of Canstone's drainage and ventilation systems.[83] If Canstone is ordered to be liable for the damage, SZN will also be affected. SZN will have to compensate twice for the damage caused by Canstone in the same events.

62 On the other hand, the activists and the Government of Palmenna have the same interest as they want SZN and Canstone to be liable and pay compensation for the damage caused by the same incidents.

63 Second, the arbitration and the case pending in the Court of Palmenna are both based on the same facts which are the alleged leak of oil from Canstone.

64 The legal proceeding pending in the Court of Palmenna concerns the SZN's liability for its negligence regarding the inadequacies of Canstone's systems which resulted in the leak of

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[77] Loukas A. Mistelis and Julian D.M. Lew, "Pervasive Problems in International Arbitration, International Arbitration Law Library", (Kluwer Law International 2006), p. 329.
[78] *Lis Pendens Report*, ¶¶4.2, 5.6, 5.13.
[79] *Fomento de Construcciones y Contrates SA v. Colon Container Terminal SA*, [2001] 4P.37/2001, ¶¶279, 286.
[80] Record, ¶54.
[81] Record, ¶21.
[82] Record, ¶22.
[83] Record, ¶41.

oil.[84] The arbitration is based on the allegations of the breach of the PK-BIT including the obligation of the investor not to discharge or cause oil of any nature to enter into any river[85] as occurred in Appam incident.[86]

III. CANSTONE COMPLIED WITH ITS OBLIGATIONS UNDER THE PK-BIT

A. Canstone had complied with its sustainability obligation under Article 4 of the PK-BIT

i. Canstone's operation is not an activity that has significant environmental impact; therefore, Canstone is not required to conduct an EIA

65 Article 4(1) of the PK-BIT requires an investor to appoint a qualified person to conduct an EIA on an activity causing significant environmental impact and shall submit a report to the relevant ministry of the Party.[87] However, Canstone's production of biodiesel[88] is not an activity which causes significant environmental impact under Article 4(2) of the PK-BIT.

66 First, Canstone's activities do not fall under Article 4(2)(e) as the production of biodiesel does not fit the criteria of production of petrochemicals due to key differences in feedstocks, production processes, and chemical compositions. While petrochemical diesel is refined from crude oil, a non-renewable fossil fuel,[89] biodiesel is produced from renewable biological sources like vegetable oils through a chemical process called transesterification.[90] In the present case, Canstone uses palm oil in the transesterification process.[91]

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[84] Record, ¶¶41, 41.1–41.3, 47.
[85] PK-BIT, Art. 5(1)(d)
[86] *Clarifications*, ¶6.
[87] PK-BIT, Art. 4(1)
[88] Record, ¶21.
[89] Ed de Jong and Gerfried Jungmeirer, "Biorefinery Concepts in Comparison to Petrochemical Refineries" (Elsevier B.V. 2015) ("***De Jong and Jungmeirer***"), pp.17–18.
[90] Record, ¶28.
[91] Ibid.

67 Additionally, petrochemical diesel consists primarily of saturated hydrocarbons. On the other hand, the transesterification process converts the oil into fatty acid methyl esters, resulting in a fuel with different properties than the original feedstocks.[92]

68 Second, Canstone's biodiesel production does not fall within the definition "Construction of oil refineries, of any nature" under Article 4(2)(f)(i) since biodiesel production and traditional oil refining are two distinct processes for creating fuel. Traditional oil refining starts with distillation of crude oil to separate it into various components based on boiling points. Heavy fractions are then converted into lighter products through processes like cracking and reforming. Impurities are removed through treatment processes, and the resulting products are blended to meet specific quality standards before storage and distribution.[93]

69 In contrast, biodiesel production begins with feedstock preparation, where raw materials like palm oil are collected and pre-treated to remove impurities. The transesterification process is a chemical process where palm oil, an alcohol and a catalyst are combinded, coverting the triglycerides in the oil into biodiesel and glycerin.[94] After being separated from the glycerin, the biodiesel undergoes purification to remove residual catalysts and contaminants.[95]

70 As the two processes differ in their feedstocks, production methods, environmental impact, and chemical composition,[96] Canstone's activity is not a construction of oil refinery, of any nature.

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[92] *De Jong and Jungmeirer*, pp. 17-18.
[93] James H. Gary, Glenn E. Handwerk, Mark J. Kaiser, "Petroleum Refining: Technology ad Economics" (5th edn, CRC Press 2007), pp. 2-4.
[94] Record, ¶28.
[95] A. Demirbas, "Progress and Recent Trends in Biodiesel Fuels", Energy Conversion and Management, *Vol. 50, No. 1* (January 2009), pp. 14-34; Record, ¶28.
[96] *Ibid.*

71 Hence, Canstone's biodiesel production activity does not fall under the scope of Article 4(2) of the PK-BIT as it neither aligns with the criteria for the activities causing significant environmental impact under petrochemicals nor constitutes the construction of an oil refinery. Accordingly, *Canstone is not required to conduct an EIA*

ii. Even if Canstone's operation is considered to have significant environmental impact, Canstone had fulfilled its obligation to conduct an EIA

72 Even if the Tribunal decides that Canstone's activities fall under the activities causing significant environmental impact in Article 4(2) of the PK-BIT, Canstone had fulfilled its obligations under Article 4(1) of the BIT. Canstone appointed qualified personnel, Fey Lin and Jakey Jake as their in-house experts [97] to conduct a brief environmental assessment.[98]

73 Since the PK-BIT does not specify criteria for a qualified person to conduct an EIA, and given Canstone's employing expertise in the biodiesel industry, Alan's request for the two in-house experts means that they are qualified personnel as Alan is recognized as one of the most seasoned professionals in the industry.[99] These circumstances show Fey Lin and Jakey Jake were qualified experts in the field.

74 The PK-BIT does not provide specific guidelines on conducting an EIA for investors. In the *Pulp Mills* Case, the International Court of Justice observed that general international law does not specify the scope and content of an EIA.[100] The Court further relies on the domestic law of each state and the authorization of EIA by a national agency to determine the specific content and process of an EIA.[101] The PK-BIT further mandates the submission of reports to

[97] Record, ¶¶26, 28.
[98] Record, ¶ 25.
[99] Record, ¶24.
[100] *Pulp Mills on the River Uruguay (Uruguay v. Argentina)*, ¶205.
[101] Environmental Impact Assessment in Investment Disputes: Method, Governance and Jurisprudence, *Polish Yearbook of International Law, Vol. 30* (2010), pp. 169-204; *Pulp Mills on the River Uruguay (Uruguay v. Argentina)*, ¶205.

the relevant ministries as soon as practically possible in Article 4(4) of the PK-BIT. Canstone has complied with this requirement by submitting reports every four months and presenting them to stakeholders.[102] Since stakeholders can be inferred to include relevant ministries as stake holders mean persons or companies that are involved in a particular organization, project, oe system.[103] As, there is no evidence of objections from these ministries, under these circumstances, the EIA was conducted appropriately.

75 Hence, even though Canstone's activities fall under the criteria specified in Article 4(2) of the PK-BIT, it has fulfilled its obligations under Article 4(1) of the PK-BIT by appointing qualified personnel for the EIA and submitting reports to stakeholders in a timely manner. As the PK-BIT does not specify the content and procedure of an EIA. Canstone reliance on the domestic procedural requirement of Palmenna to conduct an EIA shows its fulfillment of obligation under Article 4(1).

B. Canstone had complied with environmental obligations under Article 5 of the PK-BIT

i. Canstone had not caused matter into the river

76 Article 5(1) of the PK-BIT imposes an obligation on investors to refrain from discharging or causing matter specified in Article 5(1)(a) to 5(1)(d) to enter the river unless authorized.[104] In this case, Canstone had complied with this obligation, as it is proven that the biodiesel leakage did not originate from the Appam factory.

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[102] Record, ¶25.
[103] Oxford University Press, *Oxford Learner's Dictionaries*, July 13, 2024, from https://www.oxfordlearnersdictionaries.com/definition/english/stakeholder?q=stakeholder.
[104] PK-BIT, Art. 5(1)(a)–(d).

77 The leakage of toxic chemicals in Dr. Ragu's report cannot be traced to Canstone's pressure relief valve as the report only stated the inconclusiveness of the cause of the infection but not strictly indicating that the broken relief valve caused the oil leak.[105]

78 Dr. Ragu's report identified other potential sources of chemicals, such as toxic chemicals from other sources travelling through the flood.[106] Additionally, two nearby factories were temporarily closed due to severe flooding, with "Under Maintenance" signs posted at their entrances, and heavy tanks and machinery were observed entering in and out the facilities prior to and after the flood.[107] The fact indicates that Canstone did not discharged or caused into river the matter specified in Article 5(1) of the PK-BIT as the two factories remain considerations for the originator of the matter. Hence, Canstone shall not be presumed to be responsible under Article 5(3) of the PK-BIT and the burden of prove shall fall on the Claimant.

79 Therefore, Canstone has complied with environmental obligation as there is no conclusive evidence linking the biodiesel leakage to the Appam factory and Dr. Ragu's report fails to definitively establish that the leakage originated from Canstone's facility.

ii. The responsibility shall not fall on Canstone due to force majeure

80 Even if Article 5(3) of the PK-BIT imposes the liability to Canstone under the principle of precautionary presumption, the circumstance of *force majeure* exempts Canstone from its responsibility under Article 5 of the PK-BIT.

[105] Record, ¶39.
[106] Record, ¶40.
[107] *Clarification*, ¶10.

81 *Force majeure* is applicable as a general legal principle.[108] Article 35(1) of the AIAC rules 2023 Part II provides that the tribunal has discretion to apply any law as it deems appropriate.[109] A situation of *force majeure* precluding wrongfulness arises where two main elements are met. First, the act in question must be brought about by an irresistible force or an unforeseen event.[110] Second, the act is beyond the control of the concerned party and it is materially impossible in such circumstances to perform the obligation.[111]

82 The unforeseeability, as in the case of *Libyan v. Burundi*, [112] the tribunal rejected the plea of *force majeure* because the alleged impossibility had not resulted from an irresistible force or an unforeseen external event beyond the control of Burundi, but rather from a unilateral decision of the invoking State.[113] as key criteria for *force majeure*. Considering the material impossibility, the tribunal in *Autopista v. Venezuela* states, "it suffices that by all reasonable judgment the event impedes the normal performance of the contract."[114]

83 First, the unforeseeability criteria has been satisfied. Even if there is a possibility of flooding during the monsoon from November to February[115] and Palmenna has been experiencing harsher rainfall and heavy flooding since 2020,[116] it is impossible to estimate the severity of the Flood. The flood was unforeseeable as it was one of the worst flash floods Palemna has ever experienced.[117] Although there were signs of floods from the Karheis facility, it was

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[108] G Ripert, "Les regles de droit civil applicables aux rapports internationaux" (1933) 44 Recueil des Cours de l'Acade mie de Droit International, pp. 569, 619–620.
[109] AIAC Rules, Art. 35(1).
[110] ARSIWA Commentaries, p.76.
[111] *Ibid.*
[112] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, ¶¶120–124.
[113] *Libyan Arab Foreign Investment Company v. Republic of Burundi*, ICSID Case No. ARB/87/3, ¶55.
[114] *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, ¶¶120–124.
[115] Record, ¶2.
[116] Record, ¶11.
[117] Record, ¶35.

much less severe since the Karheis facility was still functioning despite being affected by the flood as the facts indicates Alan travelled to Karheis to supervise the monitoring and control systems of the storage tanks.[118]

84 Furthermore, a situation of material impossibility has been met. A natural or physical occurrence, such as a flood, may be the cause of a material impossibility of performance that results in *force majeure*.[119] Canstone is aware of the risks posed by the flood, positioning its employees at the plants to maintain facilities and respond promptly to any emergencies that may arise.[120] However, even if it applied to due diligence, it was impossible for Canstone to follow its obligation under the PK-BIT as even if a drainage and pipeline with the highest quality were installed, it would not have prevented damage from occurring.[121] This would make the obligation material impossibility and beyond the control of Canstone, fulfilling the criteria required by the tribunals.

85 Hence, Canstone's situation meets the criteria for *force majeure* as the unprecedented severity of the flood constituted an irresistible and unforeseen event that was beyond Canstone's control. Therefore, it is materially impossible to fulfill its obligations under the PK-BIT.

IV. PALMENNA IS NOT ENTITLED TO THE AWARD OF DECLARATION AND DAMAGES

A. *Canstone is precluded from paying compensation*

i. Canstone is not liable for damages as force majeure is a circumstance precluding wrongfulness

[118] Record, ¶34.
[119] ARSIWA Commentaries, p.76.
[120] Record, ¶¶34, 38.
[121] Record, ¶43.

86 Since Canstone is precluded from wrongfulness as stated in III(B)(ii), Canstone shall not be liable for an arbitral award from the breach of Article 5 of the PK-BIT due to *force majeure*. As the *force majeure* criteria of irresistible force or unforeseen event beyond control making performance materially impossible are met, Canstone should be exempt from paying damages due to the *force majeure* event.[122]

ii. Palmenna gave consent to Canstone to postpone the submission of the report

87 The principle of consent precluding wrongfulness is based on the idea that a party can, through its consent, waive or limit its certain rights or claims, which will nullify any claims of wrongfulness regarding the specific act agreed upon. The principle is further adopted as the tribunal in *Hochtief v. Argentina* states that "there is no legal reason why effect should not be given to an agreement between an investor and a host State either to limit the rights of the investor or to oblige the investor not to pursue any remedies, including its BIT remedies, in certain circumstances." [123] The statement supports the principle that organizations involved in an investment agreement can mutually agree to restrict certain legal rights and remedies, and such agreements are legally valid and enforceable.

88 Canstone should not be liable for damages from breach of Article 4 of the PK-BIT since it is precluded from wrongfulness, even if Canstone had not complied with its obligation to conduct an EIA. It could be inferred that Canstone was given the consent to not comply its obligation to submit the EIA report as soon as possible as stated in Article 4(4) of the PK-BIT when Akbar has given Canstone the assurance that Canstone could take its time to submit the reports.[124] It is a valid consent conforming to general principles of law as the

[122] *French Company of Venezuelan Railroads (France v Venezuela)* 1888 (1904) 10 RIAA 285, ¶353.
[123] *Hochtief Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/07/31, ¶191.
[124] *Clarification*, ¶7.

prime minister is considered to be an authorized person to do so on behalf of the state.[125] Furthermore, there is no evidence that the consent was vitiated by error, fraud, corruption or coercion, therefore conforming to the requirements of a valid consent.[126]

89 To conclude, Akbar's assurance to Canstone that they could delay the submission of the EIA report constitutes a valid consent, effectively precluding Canstone's responsibility for any breach of Article 4 of the PK-BIT as the consent was not tainted by error, fraud, corruption, or coercion, and was granted by a competent authority.

iii. Palmenna had contributed to the breach; thus, Palmenna shall not be entitled to the award of damages

90 The calculation of responsibility and reparation shall exclude the degree to which the injured party has contributed to its own injury. If the injured party is found to have contributed significantly to the harm through their own actions or negligence, the amount of reparation they are entitled to may be excluded or at least reduced. A requirement for contributory negligence is that the negligence must be significant and material enough in order to reduce damages. As established in *MTD v. Chile,* the investor's fault must play a major role in the events leading to expropriation, particularly if there is a failure to mitigate foreseeable business risks.[127]

91 In this case, Palmenna contributed to the liability of Canstone's breaches of obligations for it failed to uphold its duty under Article 10(1)(a) and 10(1)(c) of the PK-BIT to ensure that investments are treated justly and safeguarded according to international norms.[128] Palmenna did not provide full protection and security, which includes ensuring the physical,

[125] ARSIWA art. 20 commentary, ¶4.
[126] ARSIWA art. 20 commentary, ¶6.
[127] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, ¶¶242-246.
[128] PK-BIT, Art. 10(1)(a); Art. 10(1)(c).

commercial, and legal stability of investments. This is supported by the *Biwater Gauff v. Tanzania* award, which extended the concept of "full security" beyond physical protection to a guarantee of stability in a secure environment.[129]

92 Palmenna neglected to take necessary measures to protect the Appam facility, failing to implement protocols to prevent flood damage, and did not inform Canstone about the severity of the flood or assist in mitigating damage. Thus, it failed to guarantee stability in a secure environment in the investment. This creates a necessary link in the chain of circumstances leading to the Canstone's omission.

93 To conclude, the principle of contributory negligence allows for reduction of reparations based on the injured party's own contribution to the harm. In this case, Palmenna's failure to provide fair and full protection under Articles 10(1)(a) and 10(1)(c) of the PK-BIT, including its negligence in preventing flood damage, significantly contributed to Canstone's harm, which supports reducing Palmenna's reparations claim.

B. The Tribunal lacks power to order the declaratory award to Palmenna.

i. The Tribunal's award of compensatory damages to Palmenna risk creating double recovery for the same underlying harm

94 The Tribunal awarding Palmenna the damages risks creating double recovery. A creditor is entitled to only one compensation for a specific harm, a principle of "prohibition of double recovery for the same loss" is a well-established principle" recognized by several arbitral tribunals.[130] The main criteria are Multiple claims are brought to related parties in respect of

[129] *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, ¶729.
[130] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, ¶1083; *Perenco Ecuador Ltd. v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)*, ICSID Case No. ARB/08/6, [966].

the same underlying dispute, and the claims are based on overlapping grounds, legal frameworks, and evidence, even if the parties argue the claims are distinct.[131]

95 In this case, a claim was made against SZN, a stakeholder of Canstone, for negligence on 15 December 2023.[132] Additionally, the government of Palmenna is suing Canstone for failing to comply with the PK-BIT terms, which is essentially the same underlying dispute. On 14 February 2024, the High Court of Palmenna found the Government of Palmenna and SZN jointly liable for negligence and ordered compensation to be paid to the victims.[133] Since SZN, a shareholder of Canstone, has already been ordered to pay compensation, awarding further damages risks double recovery, effectively making Canstone pay the compensation twice for the same wrongdoing.

96 To conclude, the Tribunal's award of compensatory damages to Palmenna risks creating double recovery for the same underlying harm, as SZN, a stakeholder of Canstone, has already been ordered to pay compensation for related negligence. This could result in Canstone effectively paying twice for the same wrongdoing.

ii. If the declaratory award is granted as Palmenna requested, Palmenna risks breaching minimum standard of treatment in Article 10(1)(c) of the PK-BIT

97 Article 10 of the PK-BIT obligates the Parties to adhere to established principles of customary international law in their treatment of investments, ensuring full protection and security ("**FPS**"), with an emphasis on taking reasonable measures to safeguard these investments.[134] The act of the tribunal granting declaratory award risk Palmenna breaching the the obligation to provide FPS to Canstone's investment.

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[131] *Id*., ¶1081.
[132] Record, ¶41.
[133] Record, ¶55.
[134] PK-BIT, Art. 10(1)(c).

98 In *Eastern Sugar v. Czech Republic,* the Tribunal suggested that the standard protected investors against violence stemming from third parties. The tribunal held that the criterion in Art. 3(2) of the BIT concerns the obligation of the host state to protect the investor from third parties, such as mobs, insurgents, rented thugs and others, engaged in physical violence against the investor. Thus, where the host state fails to grant FPS, it fails to act to prevent actions by third parties, which the host state is required to prevent.[135]

99 The news of the incident at the Karheis facility followed by the comments made by former Prime Minister Elsie sparked outrage among the local activists in Appam.[136] The activists protested against the government for its lack of action and hushed approach to resolving the issues.[137]

100 If the the Tribunal were to declare as Palmenna sought: "A declaration that the failure and/or omission of Canstone to abide by the terms of the BIT had resulted in respiratory tract infections amongst the citizens of Palmenna."[138] The action of seeking this type of declaration would cause Palmenna to fail to protect the FPS of the investment as it could direct the attention of the activists solely on Canstone thus creating a situation where the investment could be at harm.

101 The wording of FPS clause suggests that the host State is obligated to take active measures to protect the investment from adverse effects. The adverse effects may stem from private parties such as the demonstrator like the Palmanian activists.[139] Therefore, the declaration would constitute Palmenna's breach of the FPS clause.

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[135] *Eastern Sugar v Czech Republic*, SCC Case NO. 099/2004, ¶ 203.
[136] Record, ¶36.
[137] Record, ¶37.
[138] Record, ¶55.
[139] Journal of International Dispute Settlement, Vol. 1, No. 2 (2010), ¶¶353–369.

iii. The declaration sought by Palmenna is disproportionate and beyond the scope of the breach

102 The declaration that Palmenna sought states "A declaration that the failure and/or omission of Canstone to abide by the terms of the PK-BIT had resulted in respiratory tract infections amongst the citizens of Palmenna."[140] is disproportionate. Moeover, such declaration fails to establish the causation between the breach of the PK-BIT and the damage caused.

103 In *Cervin Investissements v. Costa Rica*, the tribunal denied damages because the claimant failed to prove that the treaty breach—delayed issuance of an administrative decision on gas tariffs—caused any harm.[141] Similarly, Palmenna should not receive the requested declaratory relief since it does not correspond to any caused damage.

104 The claim that biodiesel leakage into water causes respiratory infections which Palmenna seeks lacks scientific support. Thus, there is no direct link between the leaked biodiesel and the respiratory infections.

105 Studies have shown that biodiesel exhaust can cause respiratory inflammation when inhaled,[142]but there is no evidence linking biodiesel water contamination to respiratory tract infections. Residential dampness and mold are associated with increased risk of respiratory infections, likely due to inhalation of mold spores.[143] Respiratory tract infections are typically caused by viruses, bacteria, or fungi that infect the upper or lower respiratory system.

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[140] Record, ¶55.

[141] *Cervin Investissements S.A. and Rhone Investissements S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/13/2, ¶¶698-703.

[142] Aljaafari, A., Fattah, I.M.R., Jahirul, M.I., Gu, Y., Mahlia, T.M.I., Islam, M.A., & Islam, M.S., "Biodiesel Emissions: A State-of-the-Art Review on Health and Environmental Impacts" *Energies, Vol. 15* (2022) ["***Aljaafari***"], ¶¶1-30; Health Canada, "Human Health Risk Assessment for Biodiesel Production, Distribution and Use in Canada", Ottawa: Health Canada, 2012; Toxicol Appl Pharmacol, "Human Health Risk Assessment for Biodiesel Production, Distribution and Use in Canada", *Toxicol Appl Pharmacol, Vol. 272, No. 2* (October 2013), ¶¶373-383.

[143] Fisk, W.J., Eliseeva, E.A. & Mendell, M.J., "Association of residential dampness and mold with respiratory tract infections and bronchitis: a meta-analysis", *Environmental Health, Vol. 9* (2010), ¶72.

Common causes include influenza virus, rhinovirus, Streptococcus pneumonia, and Haemophilus influenza.[144]

106 However, biodiesel leakage into water is a different exposure pathway that is not expected to lead to the same health outcomes. Moreover, Biodiesel degrades quickly in water, making it unlikely to cause health issues through ingestion or skin contact.[145]

107 To conclude, the declaration sought by Palmenna, which attributes respiratory tract infections to Canstone's alleged breaches of the PK-BIT, is disproportionate and does not correlate with the injury caused and, in this case, the claim lacks scientific support as biodiesel leakage is not a known cause of respiratory infections, thus failing to establish causation.

[144] Thomas M, Bomar PA, "Upper Respiratory Tract Infection", StatPearls. Treasure Island (FL): StatPearls Publishing, Jun 26, 2023, https://www.ncbi.nlm.nih.gov/books/NBK532961/.
[145] *Aljaafari*, ¶16.

PRAYERS OF RELIEF

The Respondent, Canstone Fly Limited, respectfully requests this Tribunal to adjudge and declare that:

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

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

III. Canstone had not breached its obligations under the PK-BIT; and

V. Even if the Canstone had breached its obligations under the PK-BIT, Palmenna is not entitled to an award of declaration and damages.

Respectfully Submitted,

Counsels for Respondent