MY2408-C

THE 19TH LAWASIA INTERNATIONAL MOOT COMPETITION

KUALA LUMPUR REGIONAL CENTRE FOR ARBITRATION

2024

BETWEEN

REPUBLIC OF PALMENNA

(CLAIMANT)

AND

CANSTONE FLY LIMITED

(RESPONDENT)

MEMORIAL FOR THE CLAIMANT

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Statement of Jurisdiction

By virtue of Article 12 of Bilateral Investment Treaty between the Federation of Palmenna and the Independent State of Kenweed, concluded on October 3, 2021, and in accordance with Article 1(1) of the AIAC Rules 2023, the Government of Palmenna ["**Palmenna**"] and Canstone Corporation ["**Canstone**"] have hereby referred to the Asian International Arbitration Centre [“**Tribunal**”] the dispute concerning the alleged breaches of the PK-BIT.

Questions Presented

1. Whether the Government of Palmenna can be held liable for negligence in relation to the health hazards caused by Canstone's operations under the provisions of the PK-BIT?

2. Whether the arbitration proceedings initiated by the Government of Palmenna against Canstone are precluded due to ongoing legal proceedings involving SZN?

3. Whether Canstone has breached its obligations under the PK-BIT, leading to respiratory tract infections among the citizens of Palmenna?

4. In the event that issue III is decided in the affirmative, what remedies, including declaratory relief and damages, are available to the Government of Palmenna?

STATEMENT OF FACTS

The Parties

The Government of Palmenna ("**Claimant**") is a sovereign state that has entered into a bilateral investment treaty with the State of Kenweed ("**Kenweed**").

Canstone Fly Limited ("**Respondent**") is a company incorporated under the laws of Palmenna, operating in the biofuel sector within Palmenna.

Background of the Investment

On 3 October 2021, the Palmenna-Kenweed Bilateral Investment Treaty (PK-BIT) was signed, aimed at promoting and protecting investments between the two nations.

Following the signing of the PK-BIT, Canstone was incorporated in Palmenna on 26 October 2021, with operations commencing in November 2021. The company focused on the production of biodiesel and secured two biodiesel plants located in Appam, the capital of Palmenna, and in Karheis, a northern city near the border with Kenweed.

Incident Overview

In early 2024, Palmenna experienced severe flooding, which led to respiratory tract infections among 39 citizens residing near Canstone's facility. This incident triggered public outrage and protests led by local activists, demanding accountability from both the Government of Palmenna and Canstone.

The flooding was attributed to a combination of heavy rainfall and alleged systemic failures in the drainage and ventilation systems in the affected areas. Activists argued that both the government and Canstone had neglected their responsibilities to ensure public safety.

Legal Proceedings

On 14 February 2024, the High Court of Palmenna ruled in favor of the activists, finding both the Government of Palmenna and Canstone jointly liable for negligence. The court ordered compensation to be paid to the victims of the flooding incident.

Following the High Court's ruling, both Government of Palmenna and Canstones appealed the decision, asserting that it bore no liability for the damages incurred, claiming that the flooding was an act of God and that it had taken all reasonable measures to protect its citizens, and the failure of the the drainage and ventilation systems, respectively.

Retaliatory Actions and Further Claims

In a bid to overturn the High Court's ruling, the Government of Palmenna enlisted the support of Jakey, a former employee, who signed a statutory declaration alleging that Canstone had engaged in bribery to cover up incidents related to oil spills.

Jakey further claimed that Alan, a key figure in Canstone, had been negligent in his duties, spending excessive time socializing rather than conducting proper assessments of the facilities. These allegations were presented as part of the Government's strategy to discredit Canstone and support its appeal.

Initiation of Arbitration Proceedings

On 6 March 2024, the Government of Palmenna commenced arbitration proceedings against Canstone under Article 12 of the PK-BIT. The Government claimed that Canstone’s actions or omissions constituted breaches of the treaty, seeking both declaratory relief and damages.

The Government's claim centered on allegations that Canstone's operations had directly contributed to the health issues experienced by the citizens, asserting that the company failed to adhere to environmental standards and regulations.

Further, the Government of Palmenna seeks a declaration that Canstone’s failure to comply with the terms of the PK-BIT resulted in health issues among the citizens, along with damages for the alleged breaches.

Canstone’s Response

In response to the Government's invocation of Article 12 of the PK-BIT, Canstone contended that the arbitration proceedings were invalid, arguing that similar legal proceedings had already been initiated against SZN, a related entity.

Canstone maintained that the Government of Palmenna had not complied with the pre-arbitration steps required under the PK-BIT, asserting that the arbitration was being used as a

tool to circumvent the High Court's ruling. Further, Canstone argues that the flooding was an unforeseeable event and that the Government's failure to maintain adequate infrastructure contributed to the situation. Canstone asserts that it acted within the bounds of the law and that the claims against it are unfounded.

SUMMARY OF PLEADINGS

I

The Government of Palmenna asserts that it is not required to comply with the pre-arbitration steps outlined in Article 12 of the PK-BIT before initiating arbitration against Canstone. These steps are procedural and not mandatory jurisdictional prerequisites. Furthermore, the Government contends that further attempts at negotiation would be futile, as the Respondent has not engaged meaningfully in discussions and that the time 90 days have already elapsed. Therefore, the Government requests that the Tribunal recognize its jurisdiction and allow the arbitration to proceed without fulfilling these steps.

II

The Government of Palmenna is not precluded from initiating arbitration against Canstone, as the prior ruling by the High Court of Palmenna does not establish res judicata. This ruling is not final and binding, and the issues addressed in the national court differ significantly from those in the arbitration, which was not based on the PK-BIT. Consequently, the Tribunal has jurisdiction to hear the case, and the claims brought forth by Palmenna are valid and should be considered admissible.

III

The Claimant contends that Canstone has breached its obligations under the PK-BIT, particularly Articles 4 and 5, regarding environmental responsibilities. Evidence shows that Canstone failed to appoint a qualified individual for the required environmental impact assessment, leading to unaddressed potential leaks at its facilities. This negligence resulted in significant harm, including the hospitalization of nearby residents due to exposure to harmful substances. These actions constitute clear violations of the PK-BIT, supporting the claims against Canstone as valid and substantiated.

IV

The claimant, Palmenna asserts its entitlement to a declaration and damages due to the Respondent's breach of obligations under the PK-BIT. It argues that the BIT allows the host state to seek remedies for harm to its dignity and prestige. Citing the Quiborax v. Bolivia case, it emphasizes that declarations and satisfaction are valid forms of reparation when other remedies are insufficient. Therefore, the request is for the Tribunal to recognize this entitlement to relief, affirming that the claims are well-founded in international investment law.

Pleadings

I. The Claimant did not require to comply with the pre-arbitration steps before the arbitration proceeding may be commenced

The pre-arbitration step is widespread in suits concerning investment. It requires the claimant, where the claimant is an investor, of the suit to abstain for a specific period before initiating the arbitration proceeding against the respondent, where the respondent is a sovereign state.[1] The underlying reason is to allow the local authority to have a chance to remedy the dispute,[2] which is contrary to the current precedence case, where the Claimant as a State has seen fit that the State's best interest is to refer to an arbitral proceeding.[3]

In the same breath, it is best understood that the obligation to settle the dispute amicably is merely an obligation of conduct, not a result.[4] Due to this echoed reasoning, numerous tribunals have concluded that (1) the pre-arbitration step clause is a mere procedural requirement whose violation would not affect jurisdiction or admissibility.[5] (2) Even if the obligation is mandatory for establishing jurisdiction, there is an exception if it is futile. Thus, the claimant must not exhaust the pre-arbitration step stipulated under Article 12 of the PK-BIT.[6]

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[1] Ganesh, A., Cooling-Off Period (Investment Arbitration) in Max Planck Encyclopedia for International Procedural Law, Working Paper 7, 2017 citing Pohl, J., Mashigo, K. and Nohen, A., Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey, OECD Working Papers on International Investment 17 (2012).

[2] Teinver SA v Argentine Republic, ICSID Case No ARB/09/1, Decision on Jurisdiction (21 December 2012) ¶135; Philip Morris v Uruguay, ICSID Case No ARB/10/7, Decision on Jurisdiction (2 July 2013), ¶148.

[3] Fact, ¶52 & 53

[4] Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶581

[5] Ambiente Ufficio S.p.A. and others (formerly Giordano Alpi and others) v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, ¶581; Ethyl Corp. v. Canada, Award on Jurisdiction, 24 June 1998, ¶85; Salini Costruttori S.p.A, and Italstrate S.p.A. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001,¶74-88 and 187; UNCITRAL, Ronald S. Lauder v. Czech Republic, Final Award, 3 September 2001, ¶187; SGS Société Générale de Surveillance S.A. v. Pakistan, ICSID Case No. ARB/01/13, Decision on Jurisdiction, 6 August 2003, ¶184; Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, ¶100; see, however, the approach in Antoine Goetz and others v. Burundi, ICSID Case No. ARB/95/3, Award, 10 February 1999,¶90-93; Enron Corporation and Ponderosa Assets, L.P. v. Argentina, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004.

[6] PK-BIT, Article 12

1. The Claimant is not required to exhaust the pre-arbitration steps under Article 12 of PK-BIT.

The Claimant submits that the pre-arbitration steps under Article 12 of the PK-BIT does not need to be exhausted. Past tribunals understood that the pre-arbitration step clauses are procedural and directory rather than jurisdictional and mandatory.[7] The tribunals concluded that the underlying purpose of such a clause is to facilitate opportunities for an amicable settlement and not to impede or abstract arbitration proceedings, where such settlement is not possible.[8] This conclusion was made based on the interpretation in accordance with Article 31(1) of the VCLT, which refers to the object and purpose of the treaty, in this case, the PK-BIT.[9]

According to Westwater Resource v. Turkiye, the tribunal relied on Article 31(1) of the VCLT to interpret the object and purpose of the treaty to deduce the intention of the Article concerning the Pre-arbitration step.[10]. The tribunal used the same method provided in the case of Murphy v. Ecuador but it was concluded differently. The tribunal has concluded that in the Pre-arbitration step when reading in conjunction with the object and purpose of the BIT, the phrase "promote greater economic cooperation" was intended to produce procedural efficiency.[11] Thus, non-compliance with the Pre-arbitration does not bar the tribunal from having jurisdiction over the present case.[12]

Likewise, in the present case, the Claimant and the Respondent are state parties to the 1969 VCLT.[13] Relying on Article 31(1) of the VCLT, which refers to the object and purpose of the PK-BIT, the phrase "promote greater economic cooperation" shall be interpreted as the

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[7] Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶343; Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium, ICSID Case No. ARB/12/29, Award, 30 April 2015, ¶121

[8] Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶343

[9] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Article 31(1)

[10] *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Procedural Order No. 2, 28 April 2020, ¶32

[11] *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Procedural Order No. 2, 28 April 2020, ¶43

[12] *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Procedural Order No. 2, 28 April 2020, ¶44

[13] Clarification, ¶4

intention of the pre-arbitration step was to produce procedural efficiency. Therefore, non-compliance would not bar the tribunal from having jurisdiction.

Furthermore, other tribunals would go on to mention that by imposing such strict obligations to meet the pre-arbitration step and dismissing the claim in the current proceeding only to result in the claimant resubmitting its case and would be an unnecessary formality; this is an eminently sound approach.[14] It would also go against the principle of fair administration of international justice,[15] where the tribunal found that different proceedings can be commenced in parallel.[16]

Likewise, in the present case, the Respondent can still initiate further negotiation following the last negotiation on 1 March 2024, but they chose not to do so until now.[17] Therefore, imposing strict obligations to meet the pre-arbitration step is uneconomical.

2. And secondly, even if it is mandatory, the continuation is futile.

Unlike the above-mentioned case, rely on Article 31(1) of the VCLT to interpret the pre-arbitration step in conjunction with the object and purpose of the BIT.[18] The Respondent may rely solely on the niche approach of interrupting the Pre-arbitration clause, emphasizing the term "shall" present in Article 12 of the PK-BIT.[19] Where a strict interpretation was applied, it would mean as unmistakably mandatory and from the apparent intention of parties to the BIT that these procedures be complied with, not ignored.[20]

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[14] Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan, SCC Case No. 064/2008, Partial Award on Jurisdiction and Liability, 2 September 2009, ¶154; EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania, ICSID Case No. ARB/17/33, Award, 13 April 2022, ¶251

[15] Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, ¶337

[16] *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v. Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, ¶33

[17] Fact, ¶49

[18] *Westwater Resources, Inc. v. Republic of Türkiye*, ICSID Case No. ARB/18/46, Procedural Order No. 2, 28 April 2020, ¶32, *Murphy Exploration and Production Company International v. Republic of Ecuador (I)*, ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, ¶143.

[19] PK-BIT, Article 12; Wintershall v. Argentine Republic, ICSID Case No. ARB/04/14, Award (December 8, 2008) ¶119; Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶140

[20] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July 2, 2013), ¶140

The claimant submits that even if the tribunal were to uphold such strict interpretation concerning the pre-arbitration step, the tribunal still must uphold two prevailing lines of reasoning such as (i) the futility of the provision in the circumstances of the case and (ii) whether the period has in any event passed.[21]

Firstly, according to LDA v. India, the futility of the provision in this case is similar to the present case, where the terms "shall" and "if" were used in the same breath.[22] The Tribunal, in this case, concluded that the word "shall", when paired with the "if", produces a result requiring either the claimant or the respondent to make a specific action such as shall negotiate or shall mediate. Instead, such a formulation of these two words refers to a desired outcome for both parties to settle the dispute amicably.[23] And the Tribunal would go on to mention that both parties to a dispute are expected to seek amicable settlement if and to the extent that they consider such an outcome reasonably possible or not, where the term "reasonably possible" is justified when there is at least an attempt to settle the dispute amicably[24] and that amicable settlement requires two to tango or the effort of both parties.[25]

In the present case, Article 12 of the PK-BIT was constructed like the case mentioned above, encoding the words "shall" and "if" as conditional.[26] As such, it shall be interpreted in the same manner where it is required to examine both parties' actions to settle the dispute amicably, as it takes two to tango. The Claimant did indeed attempt to settle amicably, and President M Akbar convened a conference call involving Tara Sharma, Alan, and Luke Nathan.[27] But it was futile, as Tara Sharma said before leaving the call: "*...seems like there is no point in talking to you anymore.*"[28] Furthermore, since 1 March 2024, contrary to their position on the importance

[21] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶188; *Olin Holdings Limited v. State of Libya*, ICC Case No. 20355/MCP, Partial Award on Jurisdiction, 28 June 2016, ¶166

[22] *Louis Dreyfus Armateurs SAS v. The Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction, 22 December 2015, ¶78

[23] *Louis Dreyfus Armateurs SAS v. The Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction, 22 December 2015, ¶78

[24] *Louis Dreyfus Armateurs SAS v. The Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction, 22 December 2015, ¶79

[25] *Louis Dreyfus Armateurs SAS v. The Republic of India*, PCA Case No. 2014-26, Decision on Jurisdiction, 22 December 2015, ¶79

[26] PK-BIT, Article 12.

[27] Fact, ¶49

[28] Fact, ¶51

of pre-arbitration steps, the Respondent has never attempted to contact the Claimant for an amicable settlement. Therefore, the Claimant is not required to exhaust the pre-arbitration step, as it is futile.

Secondly, according to Daimler v. Argentina, the tribunal examined the second line of reasoning in simple terms concerning temporal scope, where the 18-month cooling-off period certainly has passed since the institution of the preceding, where the tribunal held that it was unnecessary to wait beyond such period.[29]

Likewise, in the present case, Article 12 of PK-BI, a 90-day cooling-off period, has long elapsed since the initiation of the proceedings, dated back to 6 March 2024.[30] Therefore, the pre-arbitration step is indeed futile.

[29] *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶189

[30] Fact, ¶49

II. The Government of Palmenna cannot be precluded from initiating an arbitration against Canstone;

In public international, the term "parallel proceeding" fits the nature of the current case; the International Law Association would define it as a proceeding pending before a national court or another arbitral tribunal in which the parties and one or more of the issues are the same or substantially the same as the one before the arbitral in the current Arbitration. [31]. A similar reasoning was also echoed by UNCITRAL, with the term "concurrent proceedings".[32] However, in the present case, the Claimant submitted the concurrent proceedings of both parties do not bar this tribunal's jurisdiction.

The Respondent claims that it is precluded from the present proceeding as a similar nature of legal proceedings has already commenced against the Respondent before the national court of the Claimant.[33]

Contrary to the respondent's contention, in the case of EDF and others v. Argentina, the tribunal concluded that the national court does not have *res judicata* effect, as binding effect lacks any binding effect upon the present tribunal.[34] Such understanding was also confirmed by the ILA, *res judicata* in international law, which relates only to the effect of a decision of one international tribunal on a subsequent international. And that International dispute settlement organs are not considered bound by the decisions of national courts or tribunals.[35] Therefore, the Claimant is not precluded from initiating an arbitration against the Respondent.

Alternatively, even if this tribunal were to consider the concurrent proceeding of the claimant's national court to the degree of binding effect of an international tribunal or court, that may give

[31] International Law Association, Resolution No.1/2006, Annex 1: International Law Association Recommendations on Lis Pendens and Arbitration, ¶1

[32] UNCITRAL, Concurrent Proceedings in Investment Arbitration – Note by the Secretariat, A/CN.9/848, 17 April 2015, ¶6

[33] Fact, 57

[34] *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Award, 11 June 2012, ¶1128

[35] Brownlie, Principles of Public International Law, 6 edn (Clarendon Press, Oxford, 2003) at 50; Maniruzzaman, A. F. M. (2015). ILA FINAL REPORT ON LIS PENDENS AND ARBITRATION (TORONTO, 2006). Port. https://www.academia.edu/18313070/ILA_FINAL_REPORT_ON_LIS_PENDENS_AND_ARBITRATION_TORONTO_2006_

rise to the issues of res judicata. The Claimant submitted that the negative effect of *res judicata* requirements is not established in the present case.

According to Apotex v. USA, the tribunal concluded that the doctrine of *res judicata* defines (i) the binding effect of a prior final determination made by a competent tribunal by citing Amco v. Indonesia as jurisprudence. Further, the tribunal would also cite additional elements required to establish the *res judicata* effect by citing Judge Anzilotti's triple identity test, which was coined in the PCIJ case of *Chorzow Factory;*[36] referred to identification of (ii) *persona,* (iii) *petitum* and (iv) *causa petendi.*[37]

1. **There was no binding effect of a prior final determination made by a competent tribunal**

According to Amco v. Indonesia, the widely recognized principle, affirmed in many cases, states that once a right, issue, or fact has been clearly presented and definitively decided by a court with proper authority as the basis for a decision, it cannot be contested.[38] Focusing on the final and binding determination of a competent authority, which concerns the Decision of the Ad Hoc Committee.[39]

Contrary to the present case, the High Court of Palmenna decided on the joint liability of the government of Palmenna and SZN;[40] concerning damage, injury, and infection that occurred to citizens of the Federation of Palmenna.[41] To which this decision is not final and binding, the matter was proceeded to the court of the Appeal for further determination.[42] Therefore, as there is no finding and binding judgment, *res judicata* is not established.

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[36] interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow, 1927 P.C.I.J, (ser. A) no. 13 (16 December 1927) (dissenting opinion of Judge Anzilotti) at p. 23

[37] interpretation of Judgments Nos. 7 & 8 Concerning the Case of the Factory at Chorzow, 1927 P.C.I.J, (ser. A) no. 13 (16 December 1927) (dissenting opinion of Judge Anzilotti) at p. 23

[38] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, 10 May 1988, ¶30

[39] *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction in Resubmitted Proceeding, 10 May 1988, ¶31

[40] Fact, ¶45

[41] Fact, ¶43

[42] Fact, ¶46 & 47

2. Identification of *Persona* is not met

According to Ampal-America and others v. Egypt, the doctrine of *res judicata* applies not only to the parties themselves but also to those in privity of interest.[43] The term "privity of interest" meant that there must be a sufficient degree of identification between the two to make it just hold that the decision to which one party should be binding in the proceeding to which the other is party.[44] And the tribunal further emphasized that identification of *persona* extends to cases where there is an identity of interest such that the claim of the two parties are in-dissociable[45]

According to RSM Production Corporation and others v. Grenada, this may occur when the stakeholders in the prior proceeding are the sole shareholders of the respondent in the current proceeding, in which case they are bound by the factual and other determinations regarding questions and rights arising out of or relating to the agreement of the prior proceeding.[46]

Contrary to the present case, the prior and pending proceedings in the Court of Palmenna are against SZN, which owns 30% of the Respondent.[47] While SZN, as a nominee, merely manages the day-to-day operations of Canstone or the Respondent,[48] Canstone's actions are determined by the general policies of CEO Tara Sharma.[49] The major Stakeholder is Mehstone Ltd, which holds 70% of Canstone and controls by the CEO Tara Sharma.[50]

Therefore, the privity of interest is not met; the prior and pending proceedings in the court of Palmenna are against the SNZ alone. Questions and rights arising out of or relating to the parallel proceeding differ.

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[43] *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 février 2017, par. 261

[44] Gleeson v. J. Wippell & Co. Ltd. [1977] 1 WLR 510, 515

[45] Drouot Assurances SA v Consolidated Metallurgical Industries [1998] ECR I-3075

[46] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 décembre 2010, ¶7.1.5

[47] Fact, ¶21

[48] Fact, ¶22

[49] Fact, ¶22

[50] Fact, ¶8 &9

3. Identification of *Petitum* is not met

According to Apotex v. USA, an identical *petitum* or object means the same type of relief is sought in different proceedings.[51] As affirmed by the tribunal in the case of Inceysa v. El Salvador on the basis that the Supreme Court of Justice merely examined the domestic law and did not examine the investment itself in any manner in those proceedings, the identity of the claim is not met.[52]

Likewise, in the present case, the prior and pending proceedings raised by the Respondent merely addressed the violation of domestic law, which does not concern the obligation enshrined in the BIT. The decision by the domestic court on the alleged negligence and the inadequacies of the drainage and ventilation system by SZN.[53] And the current proceeding examines the obligation enshrined under the PK-BIT, namely Article 4 on sustainability. Therefore, the relief sought is different, and the element of identification of *petitum* is not met.

4. Identification of *Causa Petendi* is not met

According to Apotex v. USA, an identical *causa petendi* or ground means that the same legal argument is relied upon in different proceedings.[54] As affirmed by the tribunal in the case of Iberdrola v. Guatemala (II), the tribunal examined *causa pretendi* by comparing the legal ground relied upon by the claimant in support of the relief sought.[55]

In Teco, the tribunal noted that:

> *"In the context of res judicata, the question is not whether findings relate to claims that emanate from the same breach, but whether there has been a clear determination by*

[51] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶7.14

[52] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, ¶216-217

[53] Fact, ¶41

[54] *Apotex Holdings Inc. and Apotex Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, ¶7.14

[55] *Iberdrola Energía, S.A. v. Republic of Guatemala (II)*, PCA Case No. 2017-41, Final Award, 24 August 2020, ¶283

the first tribunal of a specific cause of action pleaded in the case, and that same cause of action is again before the second tribunal."[56]

In Caratube v. Republic of Kazakhstan (II), the Tribunal found no identification of the cause of action. The fundamental basis invoked in the Caratube I arbitration was the BIT. This differs from the contract between CIOC and the Respondent and on the FIL. Accordingly, the legal foundations relied upon in the two sets of proceedings are entirely different, i.e. an international treaty entered into between two sovereign states, a contract concluded between a private company and a state authority, and domestic law adopted unilaterally by a state legislator, among all the provision contains are also different.[57]

Likewise, in the present case, the current proceeding before this tribunal, the Claimant's claim is invoked as the fundamental basis of the PK-BIT; namely, the Respondent's actions or omissions have breached the PK-BIT.[58] On the other hand, prior and pending proceedings before the Palmenna national court are based on domestic law on the grounds of lackadaisical in enforcing environmental.[59] Therefore, the cause of action is different, and the element of identification of *Causa Petendi* is not met.

[56] *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Award (Resubmission Proceeding), 13 May 2020, ¶82

[57] Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan (II), ICSID Case No. ARB/13/13, Award, 27 September 2017, ¶492.

[58] Fact, ¶55

[59] Fact, ¶41.4

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

The Claimant submits that the Respondent has breached its obligation under (1) Articles 4 of the PK-BIT,[60] which enshrined the substantiality obligation, and (2) Article 5 of the PK-BIT, which concerns environmental obligations.[61]

1. The Canstone have breached Article 4 of the PK-BIT.

According to the ICSD Tribunals, such as Metalpar v. Argentina,[62] Mathias Kruck and othrs v. Spain,[63] and Kilic v. Turkmenistan;[64] the legal doctrine in interpreting a treaty is following the legal principle of "plain meaning", which requires the tribunal to interpret the obligation that derived from the BIT following the rules of interpretation of the VCLT.[65]

As stipulated in the PK-BIT, Article 4(1) imposed an obligation on any investor who conducts (A) activities that may result in significant environmental impact to (B) appoint a qualified person to conduct an (C) environmental impact assessment and (D) submit a report thereof to the relevant ministry of the party.[66]

A. Canstone, as an investor in the BIT, has conducted activities that may result in significant environmental impact.

Article 4(2)(f)(i) of the PK-BIT cited the construction of oil refineries of any nature as activities that may result in significant environmental impact.[67] And with the help of Article 31(1) of the VCLT.[68]

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[60] PK-BIT, Article 4

[61] PK-BIT, Article 5

[62] *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic*, ICSID Case No. ARB/03/5, Award on the Merits, 6 June 2008, ¶115

[63] *Mathias Kruck, Frank Schumm, Joachim Kruck, Jürgen Reiss and others v. Kingdom of Spain*, ICSID Case No. ARB/15/23, Decision Dismissing the Respondent's Request for Reconsideration of the Tribunal's Decision on Jurisdiction and Admissibility, 6 December 2021, ¶45

[64] *Kılıç İnşaat İthalat İhracat Sanayi ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment, 14 July 2015, ¶113

[65] VCLT.

[66] PK-BIT, Article 4(1)

[67] PK-BIT, Article 4(2)(f)(i)

[68] VCLT, Article 31(1)

In the present case, in mid-February 2023, Canstone faced its first real challenge in its Karheis facility. Purportedly, a neighbouring factory received an unsigned note detailing a potential leak in one of the tanks used to store refined palm oil that had undergone transesterification.[69] Due to Canstone, activities involving refined palm oil would be considered activities that may result in significant environmental impact assessment.[70] Therefore, Canstone must comply with its obligation under article 4(1) of the PK-BIT.

B. Canstone did not appoint a qualified person in their company

Article 4(3)(b) of the PK-BIT gives criteria for a qualified person to be responsible for the environmental impact assessment and the recommendations and ensure that the report and the recommendation do not contain false or misleading information.[71] And with the help of Article 31(1) of the VCLT.[72]

In the present case, Canstone failed to appoint or hire a qualified person to conduct an environmental impact assessment. In February 2023, Canstone's Karhesi facility detailed a potential leak in one of the tanks that used to store the refined palm oil.[73] As a result, Jakey Jake, an in-house expert at Karheis facility, immediately phoned Alan and requested an urgent examination of the machinery and equipment at the facility.[74] Upon arrival, Alan didn't conduct a new report on what happened to the indecent leakage in February and instead examined a report dated back in December 2022 that was done after the detailing leakage report by the in-house expert.[75] As a result, using the misleading information, Alan concluded the incident was a hoax, and there was no sign of a leakage, as suggested in the unsigned note. He even tells Jakey that he would personally update the stakeholders and propose an environmental impact assessment based on those reports.[76] As affirmed by Alan's own words in proposing that Canstone should hire a consulting firm to conduct the Environmental impact

[69] Fact, ¶28

[70] Fact, ¶28

[71] PK-BIT, Article 4(3)

[72] VCLT, Article 31(1)

[73] Fact, ¶28

[74] Fact, ¶29

[75] Fact, ¶29

[76] Fact, ¶29

assessment instead, where the decision was pending at the stakeholder till 15 December 2023.[77] Therefore, Canstone failed to appoint or hire a qualified person to conduct the environmental impact assessment as required.

C. Canstone's report does not qualify as an environmental impact assessment

According to article 31(1) of VCLT, the treaty's terms are to be interpreted to their ordinary meaning in light of the treaty's object and purpose.[78] Both State parties of the PK-BIT are also parties to the VCLT.[79] And thus, the terms in Article 4 of the PK-BIT are to be interpreted to the term's ordinary meaning in light of the treaty's object and purpose.

In the present case, the object and purpose of the BIT are to protect against climate change and to safeguard the environment in line with the Convention on Biological Diversity.[80] As such, the terms that enshrined Article 4 of the PK-BIT are to be interpreted in the light of the Convention on Biological Diversity.[81] Thus, in light of the Convention on Biological Diversity, the term environmental impact assessment means evaluating the likely environmental impacts of a proposed project or development, considering inter-related socio-economic, cultural and human-health impacts, both beneficial and adverse.[82] And that the fundamental components of environmental impact assessment would necessarily involve the following stages:

> *(i) Screening to determine which projects or developments require a full or partial impact assessment study;*
>
> *(ii) Scoping to identify which potential impacts are relevant to assess and to derive terms of reference for the impact assessment;*
>
> *(iii) Impact assessment to predict and identify the likely environmental impacts of a proposed project or development considering inter-related consequences of the project proposal and the socio-economic impacts;*

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[77] Fact, ¶33

[78] VCLT, Article 31(1)

[79] Clarification, ¶4

[80] PK-BIT, Preamble

[81] PK-BIT, Article 4

[82] Handbook of the Convention on Biological Diversity including its Cartagena Protocol on Biosafety, 3rd Edition, UNEP, 2005, pp. 720-721

(iv)Identifying mitigation measures (including not proceeding with the development, finding alternative designs or sites which avoid the impacts, incorporating safeguards in the design of the project, or providing compensation for adverse impacts);

(v) Deciding whether to approve the project or not; and

(vi) Monitoring and evaluating the development activities, predicted impacts and proposed mitigation measures to ensure that unpredicted impacts or failed mitigation measures are identified and addressed in a timely fashion;"

In our present case, none of those necessary steps exist. To this day, Canstones has not conducted an environmental assessment. (i) The Canstone report merely examines the functioning and condition of all its machinery and equipment, and it does not determine which projects or developments require a full or partial impact assessment study.[83] (ii) Cantones merely examined in brief environmental assessment, but it did not identify which potential impacts are relevant to assess and to derive terms of reference for the impact assessment.[84] (iii) Canstones' report did not predict and identify the likely environmental impacts of a proposed project or development considering the interrelated consequences of the project proposal and the socio-economic impacts.[85] (iv) Canstones' report identifies mitigation measures that incorporate safeguards in the design of the project, and no design would safeguard the impact when there is malfunctioning of the facility[86] (v) Canstones' report lacks integrity by concluding new suspicion and possible indictment based on an old report done two months ago, which failed to determine whether it was right to approve the project.[87] (vi) Canstones's report did not mitigate or address the issues in a timely manner before affecting the people of Palmenna[88]

Therefore, the report done by in-house expert and signed off by Alan does not qualify as an environmental impact assessment.

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[83] Fact, ¶25

[84] Fact, ¶25

[85] Fact, ¶28-9

[86] Fact, ¶28-9

[87] Fact, ¶28-9

[88] Fact, ¶¶29, 26

D. Canstone did not submit the report to the relevant ministry of the party

According to Article 4(4) of the PK-BIT, investors are required to carry out activities that may result in significant environmental impact and submit an environmental impact assessment report as soon as practically possible to the relevant ministry.[89] And with the help of Article 31(1) of the VCLT.[90]

As affirmed by ICSID cases such as Marion Unglaube v. Costa Rica,[91] Veolia v. Egypt,[92] PSEG v. Turkey,[93] and Gold Reserve v. Venezuela (I) that concerning the obligation of the to carry out activities that may result in significant environmental impact the investor to submit the Environmental impact assessment to relevant ministries for the approval of activities in the form of a permit or license to operate.

In the present case, Canstone's activities indeed fall under the category of activities that may result in significant environmental impact, and the term "as soon as practically possible," as mentioned in article 4(4) of the PK-BIT,[94] should be inferred, as the investors are required to submit the environmental impact assessment to the relevant ministry as soon as practically possible before their operation. This understanding was also encoded by Prime Minister Gan and Prime Minister Akbar, who said that the PK-BIT intends to ensure that a local company, namely Canstone, is as environmentally sound as possible. And that required the company to submit the paper to the relevant ministry.[95] Therefore, Canstone breached PK-BIT obligation by not submitting the Environmental impact assessment report as soon as possible.

2. The Canstone have breached Article 5 of the PK-BIT.

Article 5(1)(d) of the PK-BIT stipulated that no investor(s) shall discharge or clause to enter into any river of oil of any nature, used, wasted, or otherwise.[96] And PK-BIT would further go

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[89] PK-BIT, Article 4(4)

[90] VCLT, Article 31(1)

[91] *Marion Unglaube v. Republic of Costa Rica*, ICSID Case No. ARB/08/1, Award, 16 May 2012, ¶228

[92] *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15, Award, 25 May 2018, ¶24

[93] *PSEG Global Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶206

[94] PK-BIT, Article 4(4)

[95] Fact, ¶19

[96] PK-BIT, Article 5(1)(d)

on to mention that word "*river*" shall be deemed to include any inland waters.[97] And the term discharge or cause that has been made, the owner or occupier of the property from which entry or discharge originates is presumed to have been discharged or caused it to enter into such river.[98]

In the same line of reasoning, as cited in the case of Burlington v. Ecuador, the tribunal concluded that because of the harm caused to human health and the environment in the close proximity of the company's operation, it was due to the nature of the oil, and the company is liable for the damage.[99] And even if other facilities are not owned by third parties to the suit, the company are still considered liable for all the damage that occurs.[100]

In the present case, Canstone has caused two incidents. The First incident happened in the Karheis facility, where the in-house expert report cited a possible leakage.[101] And two weeks following Alan dismissing the report as a hoax by relying on a report conducted before the incident, there was a report that nearby farmers were being hospitalized due to suspected contamination.[102] This was later confirmed by automated monitoring and control systems installed in storage tanks to track inventory levels, monitor temperature and pressure, and detect any abnormalities or leaks in the storage tanks.[103] The second incident happened at Appam facilities, witnessing one of the worst flash floods it has experienced; nearly occupiers were admitted to the hospital due to respiratory tract injuries, where the doctor confirmed this was due to exposure to corrosive chemicals which had travelled through the inland water or *river.*[104]And following from the flooding event, Canstone themselves have confirmed that there was a failure in their pressure relief valves in their storage tanks.

[97] PK-BIT, Article 5(2)

[98] PK-BIT, Article 5(3)

[99] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017, ¶92

[100] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017, ¶92

[101] Fact, ¶29

[102] Fact, ¶30

[103] Fact, ¶34

[104] Fact, ¶36

Therefore, the incident mentioned above damaged human health and caused environmental harm in close proximity to the two Canstones facilities, which means that Canstone is liable for the damage and has breached Article 5 of the PK-BIT.

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

Contrary to what the Respondent may submit, the asymmetric nature of BIT means that this Treaty does not provide for any right of the host state and, correspondingly, does not impose any obligation upon the investor. The Claimant quotes CEO Tara Sharma as describing the allegations against Canstone as frivolous -

> "*They must be joking. What is clear to me is that they are not entitled to anything from Canstone. I am sure there is no basis to claim for any reliefs against us*."[105]

As affirmed by the ICSID tribunal in the case of Urbaser v. Argentine, while it is certain and undisputed that the BIT's claim and manifestly prevailing focus is on several standards of protection for the investor's rights and interests, which are retained to induce and protect foreign investment. Nevertheless, there is no provision stating that the investment's host state would not have any right under the BIT.[106]

Further, concerning environmental law or the obligation to protect the environment, as affirmed by the ICSID tribunal in the case of Aven and others v. Costa Rica, there are no substantive reasons to exempt foreign investors from the scope of claims for breaching obligation under the BIT, particularly in the field of environmental law.[107]

In the present case, the dispute concerns environmental law or the obligation to protect the environment as enshrined in Articles 4 and 5 of PK-BIT.[108] As the Claimant's third submission above, the Respondent breached the PK-BIT obligation.[109]

As affirmed by the ICSID tribunal in CMS v. Argentina, international law broadly accepts that there are three main standards of reparation for injury: restitution, compensation, and

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[105] Fact, ¶57

[106] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, ¶1183

[107] David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, Giacomo A. Buscemi, David A. Janney and Roger Raguso v. The Republic of Costa Rica, ICSID Case No. UNCT/15/3, Final Award, 18 September 2018, ¶739

[108] PK-BIT, Article 4 & 5

[109] Memorial for the Claimant, Section Pleadings III.

satisfaction.[110] Where the tribunal would go on to cite the Permanent Court of International Justice conclusion in the landmark *Chorzow Factory* case that "restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."[111]

Therefore, the Claimant submits that, as the Claimant's third submission, the Respondent breached the PK-BIT obligation. The Claimant is entitled to an award of (1) declaration and (2) damages.

1. The Claimant is entitled to a declaration or satisfaction award in case of breach of the PK-BIT.

As affirmed by the ICSID tribunal in the case of Quiborax v. Bolivia, cited ILC Articles restate customary international law, and its rules on reparation have guided many tribunals in investor-state disputes.[112] The tribunal mentions that satisfaction "is not a standard form of reparation, it is an exceptional remedy available only "insofar as the injury cannot be made good by restitution or compensation.[113]

Within the same case of Quiborax v. Bolivia, the tribunal further affirmed that not to be prejudice, which was decided in the case of CMS v. Argentina, which held that satisfaction could be "ruled out at the outset because it was not dealing with a case of reparation due to an injured State, satisfaction could be " ruled out at the outset.[114] The tribunal held that some types of satisfaction are unavailable, but that does not mean that the Tribunal cannot make a declaratory judgment as a mean of satisfaction, if appropriate. Moreover, this is also a power inherent to the Tribunal's mandate to resolve the dispute. However, in cases where the party is

[110] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶399; Responsibility of States for Internationally Wrongful Acts, UNGA Resolution 56/83, January 28, 2002, Article 34.

[111] Permanent Court of International Justice, Chorzow Factory case, Merits, 1928, Series A No. 17, at 47

[112] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶ 555

[113] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶556

[114] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶559

within the authority of any tribunal, it is necessary to declare conduct by either party in a dispute unlawful as an inevitable step in the settlement of any legal dispute.[115] And the tribunal concluded that such declaration is permissible as long as it is not punitive.[116] The term punitive in the context of reparation refers to an extra amount of compensation in addition to the actual damage suffered that a state has to pay.

According to Gaetano Arangio-Ruiz, Special Rapporteur of the ILC, satisfaction or declaration is necessary for terms of remedies that clause to the State' notably consists of infringement of the State's right per se or the injury to the State's dignity, honor or prestige.[117]

In the present case, remedies in the form of a declaration make reparation for the State's dignity, honor and prestige as the wrongful act committed by the Respondent by not fulfilling its obligation. Evidently, after the breach, former prime minister Elsie of Palmenna cited that the incident was a result as a part of the current government governing, which led to widespread condemnation of the dignity of several activists. Notably, I quote "the government for its lack of action and hushed approach to resolving the issues"[118] Subsequently, the loss of prestige caused by the action the respondent breached also led to the initiation moment led by the former prime minister to overthrow the current government before its own standing members of the Parliament.[119]

Therefore, the declaration entitled by the Claimant is not punitive as the damage to the government's dignity, honour and prestige is evidenced by the unwarned movement by the Palmenna citizens and the members of the Parliament.

2. The Claimant is entitled to compensation for damage resulting from the breach of the PK-BIT caused by the respondent

According to the ICSID tribunal in Perenco v. Ecuador, the strict liability regime reflects the *polluter-payer principle*, defined by Ecuador as the proposition that "he who causes pollution

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[115] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶560

[116] *Quiborax S.A., Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, ¶561

[117] Gaetano Arangio-Ruiz, Special Rapporteur, Second Report on State Responsibility, Yearbook ILC, 1989, Vol II, part 1, ¶ 14

[118] Fact, ¶37

[119] Fact, ¶52

must, under all circumstances, assume the costs of repairing it.[120] And that the tribunal held that, if there is an evidence that there is a breach of obligation resulting in environmental harm, then the investor is liable to pay compensation to the State to the extent of remediation of the damage that was caused.[121] In its predecessor case of Burlington v. Ecuador, the tribunal held that, indeed, upon finding that there was damage caused by the investor on the environment that might result in the deaths of people in the field of oil contamination, the company is liable to compensate the company for it word doing.[122]

In the present case, remedies in the form of monetary compensation for the damage caused by the investor in the context of a breach of environmental protection obligations are entitled to the Claimant as the state. As proven above, there is a breach of environmental obligation as proven above in the Claimant's third submission.[123] Evidently, there was environmental harm in two different incidents, both in the Karheis facility, where nearly farmers were hospitalized due to the contamination;[124] and in the Appam facility, where it was found that more than 129 people were affected in that area while 39 individuals were hospitalized, and among 39 hospitalized, 13 were employees working at the Canstone plant facility in Appam.[125] The Appam facility incident was caused by inhaling irritant gases or exposure to corrosive chemicals that had travelled through the inland waters or rivers.[126]

[120] *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015, ¶36

[121] *Perenco Ecuador Limited v. Republic of Ecuador*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, 11 August 2015, ¶572

[122] *Burlington Resources, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Counterclaims, 7 February 2017, ¶889

[123] Memorial for the Claimant, Section Pleadings III.

[124] Fact, ¶30

[125] Fact, ¶36

[126] Fact, ¶36

Prayer for Reliefs

For the aforementioned legal grounds and reasons, the Claimant would like to request this Tribunal to decide as follows respectfully:

I. The pre-arbitration steps mandatory and do not consider is not a pre-condition before arbitration proceedings may be commenced by the Government of Palmenna against Canstone;

II. The Government of Palmenna is not precluded from initiating an arbitration against Canstone;

III. Canstone did breach its obligations under the PK-BIT; and

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

Respectfully submitted
16 August 2024
On behalf of the Claimant