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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 RESPONDENT

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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, the Government of Palmenna 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.

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.

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.

Claims and Counterclaims

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.

Conversely, 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 is required to comply with the pre-arbitration steps as stipulated in Article 12 of the PK-BIT before initiating any arbitration proceedings against Canstone. These procedural requirements are not merely formalities; they are mandatory jurisdictional prerequisites. The failure to engage in the necessary negotiation and mediation processes prior to arbitration undermines the legitimacy of the claims and results in a lack of jurisdiction for the Tribunal. Therefore, any attempt by Palmenna to commence arbitration without fulfilling these steps should be dismissed outright.

II

The Government of Palmenna is further precluded from initiating arbitration against Canstone due to the existence of a prior ruling by the High Court of Palmenna. This ruling involves identical parties and subject matter, which creates a significant overlap in issues. The principle of res judicata applies here, preventing the same dispute from being litigated multiple times. As such, the Tribunal lacks jurisdiction to hear the case, and any claims brought forth by Palmenna should be considered inadmissible.

III

The Respondent, Canstone, asserts that it has not breached its obligations under the PK-BIT. The actions taken by Canstone were in full compliance with its legal commitments as outlined in the treaty. The Claimant's allegations of breach are unfounded and lack substantive evidence. Canstone has acted responsibly and within the framework of its obligations, and therefore, any claims suggesting otherwise should be dismissed. The Respondent maintains that its conduct does not constitute a violation of the PK-BIT, reinforcing the argument that the claims against it are unfounded.

IV

Even if the Tribunal were to find in favor of the Claimant regarding the alleged breach of obligations, the Government of Palmenna would still not be entitled to an award of declaration or damages. The claims made by Palmenna do not satisfy the necessary criteria for compensation under the PK-BIT. The Tribunal's jurisdiction is specifically limited to disputes arising from the investment context, and the Claimant's assertions do not meet these requirements. Consequently, any relief sought by Palmenna should be denied, as it lacks a legal foundation and does not align with the principles of international investment law

Pleadings

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

The arbitration agreement under Article 12 of the Bilateral Investment Treaty between the Federation of Palmenna and the Independent State of Kenweed ["**PK-BIT**"] gives rise for the parties to present the dispute at the arbitration if such dispute arising out from the BIT. However, the Claimant failed to comply with the pre-arbitral steps under the PK-BIT resulting in limitation of the Tribunal's competence.

In light of this failure, there are two main arguments to justify that the Tribunal cannot proceed to the present case **[1]** the sequential pre-arbitration requirements under the Article 12 of the PK-BIT are valid and mandatory; and **[2]** The pre-arbitral steps under the PK-BIT explicitly circumscribe the Claimant's consent to arbitrate. Below is the detailed analysis for the Respondent's position.

1. The sequential pre-arbitration requirements are valid and mandatory

The pre-arbitral steps laid down under Article 12 of the PK-BIT[1] constitutes a jurisdictional requirement whose non-compliance results in a lack of jurisdiction.[2] Article 12 of the PK-BIT was drafted to create a multi-tiered dispute settlement mechanism consisting of three requisite sequential steps; (i) the engagement of amicable and good faith *negotiation*; (ii) followed by *mediation* if the dispute is not resolved, and (iii) no settlement within 90 days via mediation, the *arbitration* is being the last resort.[3] The principle of *Pacta sunt servanda* makes all provisions binding upon the parties, and shall be performed in good faith.[4]

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[1] PK-BIT, Article 12.

[2] AIAC Rule, Rule 2(1)(b); Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶88.

[3] Bilateral Investment Treaty between the Federation of Palmenna and the Independent State of Kenweed, 3 October 2021, ["**PK-BIT**"], Article 12.

[4] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Article 26.

To be valid and mandatory, it depends in substantial part on the specific wording and structure of the relevant clause.[5] Article 31 of the Vienna Convention on the Law of Treaties demonstrates the mechanism of interpreting a treaty, "[...] with the *ordinary meaning* to be given to the terms of the treaty",[6] taking into account the object and purpose of the treaty. The object and purpose of this PK-BIT is enumerated under Article 1,[7] where the parties intend to have good relationships in nurturing mutual investment in compliance with environmentally sound and manner, and promoting their economic cooperation, partnership and growth.[8] Paragraph 2 of the provision, on the other hand, demonstrates that its objective is "to protect the interests of both Parties and their respective investor(s)."[9]

Overall, the object and purpose of the PK-BIT is to protect the interests of the investors, among others, if the disputes arise within this treaty, the parties must settle the disputes in a cooperative manner by following the formality and procedure as enshrined under Article 12 of the PK-BIT.[10] For these particular reasons, there are three observations indicating that the pre-arbitral requirements under Article 12 of the PK-BIT are mandatory in nature.

First, the word "shall" reflects an obligatory language of an agreement, therefore what is provided for is *legally* binding upon the parties.[11]

Second, by arranging the pre-arbitral steps orderly and imbuing a mandatory wording in the *chapeau*, reflects the parties' intention to follow them sequentially.[12]

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[5] Gary Born and Marija Šćekić, Pre-Arbitration Procedural Requirements 'A Dismal Swamp', OUP UNCORRECTED PROOF – FIRSTPROOFS, 20 August, 2015, NEWGEN, at p. 231.

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

[7] Oliver Dörr and Kirsten Schmalenbach, Vienna Convention on the Law of Treaties: A Commentary, A Commentary, Springer, 2012, p.546, ¶56.

[8] PK-BIT, Article 1(1).

[9] PK-BIT, Article 1(2).

[10] PK-BIT, Article 12; Facts, ¶20.

[11] 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;

(1) Mr Idris Yamantürk (2) Mr Tevfik Yamantürk (3) Mr Müsfik Hamdi Yamantürk (4) Güriş İnşaat ve Mühendislik Anonim Şirketi (Güris Construction and Engineering Inc) v. Syrian Arab Republic, ICC Case No. 21845/ZF/AYZ, Final Award, 31 August 2020, ¶¶214-216.

[12] Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶182.

Third and finally, the "if-then" structure of each pre-arbitral step suggests an exhaustive scenario before commencing an arbitration, i.e. without employing phrases such as "*inter alia"* or "in circumstances including, but not limited to the following".[13]

In the present case, Article 12 of the PK-BIT satisfies all three observations.[14] First, it uses the word "shall" in the *chapeau* of the dispute settlement clause, being mandatory in nature. Also, the structure of "*shall be* referred *to*" amounts to a legal obligation, and "NOT merely *consider* such referral" (which may change its obligatory nature).[15] Second, by structuring each pre-arbitral step consecutively, it presumes the intention of the parties to follow each one. And third, it is noted that with the "if-then" structure in each step, there is no indication that the provision provides the *non-exhaustive language* of other circumstances.

Thus, the pre-arbitral requirements under Article 12 of the PK-BIT are mandatory to both parties.

2. The pre-arbitral steps under the PK-BIT explicitly circumscribe the Claimant's consent to arbitrate

In considering the consent of the parties, particularly, the arbitration agreement, the Tribunal ought to examine the key term under the PK-BIT and its conditional requirements of how a consent is established, reading in conjunction with the genuine intention of the parties therein.

To establish the Respondent's argument, there are three pertinent points **[A]** the Respondent's consent was not unequivocally established. **[B]** The Claimant overlooked the cooling-off requirement; and **[C]** the Claimant would presumably justify the futility of mediation due to its nature.

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[13] Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶183.

[14] PK-BIT, Article 12.

[15] PQ Builders Pte Ltd v. Maxx Engineering Works Pte Ltd, Grounds of Decision of the High Court of Singapore [2023] SGHC 71, 27 March 2023, ¶¶13, 15.

A. The Respondent's consent was not established under the arbitration agreement

This Tribunal's power to adjudicate upon the instant dispute derives solely from the Parties' explicit consent,[16] as delimited in the dispute settlement clause,[17] *i.e.* Article 12 of the PK-BIT. That being said, the parties of the BIT shall respect the conditioned consent entirely. Non-compliance with Article 12 of the PK-BIT would jeopardize the object and purpose of the treaty,[18] when the treaty *per se* aims to reinforce the traditional ties of friendship and cooperation between the Kenweed and Palmena.[19]

"The only inherent jurisdiction held by an arbitral tribunal is its competence-competence power".[20] Without any proof of the parties' consent, the arbitral jurisdiction cannot be presumed. Accordingly, if the consent to arbitration is expressed in a *compromissory* clause or dispute settlement clause, any conditions included therein must constitute limits to the consent of the parties to arbitrate.[21] Defying such consensus requirements would render "an otherwise valid arbitral award to annulment or non-recognition".[22]

Here, Article 12 of the PK-BIT provides for the parties' standing-offer to arbitrate upon a dispute. If the offer is accepted, the consent will be established. However, the Claimant failed to abide by the condition of *mediation*,[23] and therefore, the Respondent's conditioned consent to resort to arbitration has not been established. Ruling otherwise would entail a likely annulment of the arbitral award.

B. The Claimant ignored to comply with the cooling-off requirement

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[16] Christoph Schreuer, Consent to Arbitration, edited by Peter Muchlinski, Federerico Ortino, Christoph Schreuer in The Oxford handbook of international investment law (2008), p. 831.

[17] United Nations Conference on Trade and Development, Dispute Settlement, Consent to Arbitration (2003), p. 31.

[18] Memorial for the Respondent, Section Pleadings I(1).

[19] PK-BIT, Preamble, Articles 1(1), 1(2).

[20] ICS Inspection and Control Services Limited v. The Argentine Republic (I), PCA Case No. 2010-09, Award on Jurisdiction, 10 February 2012, ¶255.

[21] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, ¶88.

[22] Gary Born and Marija Šćekić, Pre-Arbitration Procedural Requirements 'A Dismal Swamp', OUP UNCORRECTED PROOF – FIRSTPROOFS, Aug 20 August 2015, NEWGEN, at p. 234.

[23] Facts, ¶54.

The cooling-off condition featured under Article 12(1)(c) of the PK-BIT also requires the parties to abstain, for 90 days, from initiating arbitration proceedings against another party.[24] The cooling-off period reflects as a condition precedent to the availability of an arbitral forum which is based on the consent of the parties.[25]

One cannot argue that the cooling-off period requirement is not mandatory. Mandatory or obligatory nature depends on the text of the provision under the BIT.[26] However, the BIT in this instant case uses the word "shall" in its chapeau giving it all of the following conditions are mandatory.[27] Failure to comply with the cooling-off period, rendering the tribunal lacking its jurisdiction and the claims will become premature.[28]

In addition, by employing the term "within" 90 days, the parties are obligated to *wait for 90 days* before commencing to the next step of dispute resolution.[29] Based on the text under Article 12(1)(c) of the BIT, the cooling-off period is considered to kick-off unless there is an initiation of mediation. Due to the reason of the text of the provision outlines the "if-then" structure,[30] where each step would be followed by one to another, i.e. if not negotiation then mediation, if not resolved via mediation within 90 days, then arbitration. Here, not only did the Claimant fail to mediate, but it also ignored the cooling-off period specified under the BIT before the proceeding of arbitration could be initiated.[31] A question for consideration observed that "why would a BIT create a cooling-off period for nothing, when a party or both does / do not comply

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[24] PK-BIT, Article 12(1)(c).

[25] Guaracachi America, Inc. and Rurelec PLC v. The Plurinational State of Bolivia, PCA Case No. 2011-17, Award, 31 January 2014, ¶389.

[26] El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶38; Pan American Energy LLC and BP Argentina Exploration Company v. Argentine Republic, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, ¶41.

[27] Memorial for the Respondent, Section Pleadings I(1).

[28] Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Decision on Jurisdiction, 14 January 2004, ¶88; Murphy Exploration and Production Company International v. Republic of Ecuador (I), ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, ¶157; Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶72.

[29] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 décembre 2012, ¶108; Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 mars 2013, ¶¶68–69.

[30] Memorial for the Respondent, Section Pleadings I(1).

[31] Facts, ¶54.

with it?".Therefore, the Claimant ignored to comply with the cooling-off requirement under the PK-BIT.

C. The Claimant cannot argue that mediation would be futile, when it manifestly disregarded these pre-arbitral requirements

The amicable settlement under Article 12 of the PK-BIT, sets an indispensable requirement for the Parties to at least engage in *negotiation* and *mediation* before commencing the arbitration. Although obligation to negotiate or mediation may be an obligation of means,[32] so long as the negotiation and mediation had not been initiated, it could not presumably be considered that such dispute settlement mechanism would ensue in futility.[33]

Here, both Palmenna and Kenweed have established domestic mediation frameworks, provided that there are precedents having their unwavering success of resolving disputes with the rate of 70% over the past 5 years.[34] By virtue of the previous precedents and failing to initiate the mediation, the Claimant cannot argue that the mediation would render futility of settling the dispute when it did not intend to mediate with the Respondent from the first place.

The case in itself becomes more intense and intricate because Prime Minister M Akbar was not willing to pursue a mediation due to its non-binding and non-enforceable nature against the court's decision.[35] As a matter of facts, Prime Minister M Akbar attempted to overturn the ruling of the High Court by enforcing an arbitral award rather than the mediation agreement.[36] This would lead the present case to become more of a political issue rather than a legal issue to the extent that the Claimant may prioritize its own political interest, and circumvent settling the dispute with the Respondent via the requirements under Article 12 of the PK-BIT.

Therefore, the Claimant disregarded the requirements under Article 12 of the PK-BIT.

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[32] Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Decision on Bifurcated Jurisdictional Issue, 5 March 2013, ¶124.

[33] Murphy Exploration and Production Company International v. Republic of Ecuador (I), ICSID Case No. ARB/08/4, Award on Jurisdiction, 15 December 2010, ¶¶135, 155.

[34] 1st Clarifications to the Moot Problem, Question No. 1.

[35] Francisco Orrego Vicuña, Mediation, Max Planck Encyclopedia of Public International Law, 2010, ¶4; Catharine Titi, Katia Fach Gómez, Mediation in International Commercial and Investment Disputes, Oxford Press Release, Jul 2019, p. 24.

[36] Facts, ¶53.

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

The Tribunal lacks jurisdiction when the instant dispute's parties and subject-matter are identical to those in the ruling of the High Court of Palmenna, a case between activists against the Government of Palmenna and SZN on the grounds of negligence.[37] **[1]** Consequently, this constitutes *res judicata*. **[2]** In any event, if the Tribunal ignores of ground of *res judicata,* it would at least entail the application of *collateral estoppel* doctrine.

1. *Res judicata* prevents the Claimant to relitigate against the Respondent

Before jumping into considering the principle of *res judicata*, **[A]** the Tribunal ought to interpret the principle itself in an entire approach. Once the determination of approach under this principle has been decided, **[B]** the Respondent is conclusively identical to the party in former decision as per case between Activists vs. Government of Palmenna and SZN. **[C]** Finally, the Claimant's claims have identical subject-matter to the Palmennan High Court's ruling.

A. *Res judicata* shall be interpreted holistically

Under general principle of international law,[38] *res judicata* is known for the principle to preclude the *parties* from relitigating the same claims ('negative effect or preclusive issue') and to ensure the legal security of a final award ('positive effect or conclusive issue'), aiming to prevent inconsistent decisions.[39]

To avert any potential conflict of laws and bypassing maneuvers among States, *res judicata* must be applied with attention of particularities of investment treaty arbitration. The '*triple identity test*', however, was derived from the civil law system[40] is not adapted to investment

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[37] Facts, ¶¶41, 45.

[38] Effect of Awards of Compensation Made by the United Nations Administrative Tribunal (Advisory Opinion) [1954] ICJ Rep 47, at p.53.

[39] GPF GP S.à.r.l v. Poland, SCC Case No. 2014/168, Final Award, 29 April 2020, ¶284.

[40] See e.g., French Civil Code, Article 1351; Brazil Civil Code, Article 301; Chile Civil Code, Article 177; Peru Civil Code, Article 123; Belgium Civil Code, Article 23.

treaty arbitration.[41] Due to its inflexible and rigid formalism, it ensues in a significant lack of uniformity in how each of the triple identity test is applied.[42] Consequently, it can prevent the law from addressing genuine abuses of investment protections.[43]

To prevent the deficiencies of the "*triple identity test*" merely for the purpose of *preclusive effect*, several tribunals turned to invoke the standard of embracing the intricacies of transnational investments.[44] Whereas some may consider to adopt an "economic or realistic approach" to party identity;[45] and others have merged the criteria of object and cause of action into the broader category of "subject-matter", so called "double identity test".[46]

In light of the reasons provided above, to prevent any attempts in a retrial through artificially fabricate new disputes, the Tribunal ought to adopt the "double identity test" which examines the identity of the parties and the subject-matter.

B. By *privies* of interest, the Respondent should be deemed identical as a party in the High Court of Palmenna's ruling

The Respondent is considered as identical party to the Ruling of High Court of Palmenna as it is a controlling shareholder. The principle of *res judicata* applies not only to the parties of the previous proceeding, but also to their privies.[47] In the sense of investment arbitration, privies in interest are treated equivalent to "identical parties", as this formal equivalence in party tends to encourage multiple legal actions over the same issue.

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[41] Pedro J. Martinez-Fraga and Harout Jack Samra, The Role of Precedent in Defining Res Judicata in Investor–State Arbitration, Northwestern Journal of International Law & Business, Volume 32, Issue 3, 2012, p. 424.

[42] Pedro J. Martinez-Fraga and Harout Jack Samra, The Role of Precedent in Defining Res Judicata in Investor–State Arbitration, Northwestern Journal of International Law & Business, Volume 32, Issue 3, 2012, p. 424.

[43] B.M. Cremades – Introduction, in Parallel State and Arbitral Procedures in International Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 3, (ICC, 2005), p. 10.

[44] A. Reinisch – The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes, 3 The Law and Practice of International Courts and Tribunals, 37 (2004), pp. 56-72.

[45] C. Schreuer – Article 25 – Jurisdiction, in THE ICSID CONVENTION: A COMMENTARY (CUP, 2009), pp. 172-176, ¶¶320-329.

[46] C. Chainais – L'autorité de la chose jugée en procédure civile: perspectives de droit comparé, 1 REVUE DE L'ARBITRAGE 3 (2016), pp. 22-31 *[self-translated unofficially]*.

[47] 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 February 2017, ¶261.

Privity indicates the association between an entity who is a party in a lawsuit and another entity closely related to it but causing the latter to be bound by that legal proceeding,[48] i.e. investor / shareholder. By being bound to the legal proceeding, an analysis demonstrates that two different entities are legally liable for the same reliefs, given that the interests of the two entities is indissociable, i.e. one of whom may be in a position to influence the proceedings by bringing or defending a legal action.[49]

By virtue of this, the shareholders are regarded as privies in interest, having the same legal procedural rights as their company and are subject to the same defences applicable to the company, including estoppel due to prior proceeding.[50]

Here, there are two reasons indicating that there is an existence of identical party by way of privy in interest. First, SZN is a controlling shareholder of Canstone, which directly controls the operations of Canstone on a day-by-day basis and is solely responsible on behalf of the company.[51] Second, SZN is a party to the ruling of Palmenna's High Court, which the decision regarded SZN to be liable for negligence towards the victims who suffered from respiratory tract infections,[52] when the action or omission subjects to Canstone.[53]

Differentiating the two by their legal personalities would obscure the reality that they share identical economic interests and that one is subject to the other's control. Thus, the Respondent is considered as a privy in interest, as its shareholder share the same stakes in the outcome of the instant proceeding.

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[48] 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 February 2017, ¶261.

[49] Case C-351/96 Drouot Assurances SA v Consolidated Metallurgical Industries [1998] ECR I-3075, ¶19-23; 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 February 2017, ¶26.

[50] 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 February 2017, ¶260.

[51] Facts, ¶22.

[52] Facts, ¶45.

[53] Facts, ¶¶38-39.

C. The Claimant's claims relate to the same subject-matter as *activists vs. Palmenna and SZN*

The Claimant's claims ought to be precluded as the subject-matter is indistinguishable from that in the case between *activists vs. Palmenna and SZN*. The subject-matter comprises of the relief sought and the cause of action relied upon by the Claimant, which pertains to the facts that justify the relief, by embracing "all *claims arising from a* single *event and relying on the same evidence.*"[54]

In respect of the requested relief, in the *activists vs. Palmenna and SZN*, the ruling decided that Palmenna and SZN are jointly liable for negligence and ordered for compensation to be paid for the victims suffered from the respiratory tract infections.[55] Whilst in the present case, the Claimant made a relief sought for "*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*."[56] This is obviously the same reliefs sought whereby one made by the activists and the present one made by the Government of Palmenna.

Regarding the cause of action, in the *activists vs. Palmenna and SZN* case, the claims were made, among others, based on the facts that SZN's action or omission led to ventilation system's lacking in functionality and compliance with the safety standards, ultimately suffering from neglect and insufficient maintenance.[57] Further reference is made to the facts that SZN's delay in investigations and remedial actions until the monsoon season resulted in harm to the victims.[58] This is indistinguishable from the present case, where the Claimant argues that Canstone failed to abide by the obligations under the PK-BIT, as a result it caused the respiratory tract infections to the victims.[59]

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[54] . Reinisch – The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes, 3 The Law and Practice of International Courts and Tribunals, 37 (2004), ¶¶61-64; F. de Ly, A. Sheppard – ILA Interim Report on Res Judicata and Arbitration, 25(1) ARBITRATION INTERNATIONAL 35 (2009), p. 42.

[55] Facts, ¶45.

[56] Facts, ¶55.

[57] Facts, ¶41.

[58] Facts, ¶44.

[59] Facts, ¶55.

In relation to the legal basis, the fact in the present dispute concerns solely to the environmental obligations, failing to which would cause severe harm to public health. The safety standards in relation to the environmentally sound management involves any activities that require the stakeholders to take necessary measures that are designed to minimize negative impacts on the environment and promote sustainability.[60]

However, this is not necessary as the arbitral tribunals have enforced *res judicata* in cases where the claimants reintroduced a settled dispute on separate legal instruments.[61] If autonomous legal instruments are deemed to constitute the same legal foundation, it is even more evident when the provisions invoked stem from the same treaty.

Consequently, the identity of subject-matter raises no doubt. In case the Tribunal were to proceed the instant case, it would doubly jeopardize the Respondent in two different proceedings with the same liability.

2. In any event, the doctrine of collateral estoppel at least applies to the present case

The doctrine of collateral estoppel precludes a party from re-litigating a *point of law or fact* that was decided by a previous tribunal and formed an essential element in deciding the dispute.[62] The doctrine of collateral estoppel has now become a well-established principle applicable to international tribunals.[63] It may be validly applied when the parties and the issues in different proceedings are the same or substantially the same, using substantive or transactional approach.[64]

The Tribunal usually considers the elements of collateral estoppel if the prior proceeds: (i) was distinctly put in issue; (ii) the court or tribunal actually decided it; (iii) the resolution of the

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[60] Alan Boyle and Catherine, Redgwell, Birnie, Boyle, and Redgwell's International Law and the Environment, Oxford University Press, 3th Edition, 2009, p. 218.

[61] 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 February 2017, ¶¶258-259; Southern Bluefin Tuna Case between Australia and Japan and between New Zealand and Japan, Decision, 4 August 2000, ¶54.

[62] Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada, ICSID Case No. ARB/10/6, Award, 10 December 2010, ¶7.1.1.

[63] Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada, ICSID Case No. ARB/10/6, Award, 10 December 2010, ¶7.1.2.

[64] Jose Magnaye and August Reinisch, Revisting Res Judicata and Lis Pendens in Investor-State Arbitration, The Law & Practice of International Courts and Tribunals, Sept. 22, 2016, at p. 16.

question was necessary to resolving the claims before that court or tribunal,[65] and (iv) the current case involves the same parties or privies.[66] Thereby, all conditions are satisfied in the present case.

Here, the collateral estoppel applies to the ruling of High Court of Palmenna in the case between *Activists vs. Government of Palmenna and SZN*, which the ruling on merit was concluded.[67] Despite of the appealing of the decision, it does not change the factual application and the merit stemmed from the decision, but the Appeal Court would or would not merely consider reversing the decision by examining the legal application.[68]

Regarding the privies, the Tribunal may take into consideration that SZN is the shareholder of Canstone, entailing that SZN would be liable for both proceedings, if the Tribunal were to decide the present dispute.[69]

In addition, the issue at hand was settled and decided by the High Court of Palemnna finding that SZN would be liable for the act of negligence in relation to environmental impact towards the citizens of Palmenna.[70]

Thus, the doctrine of collateral estoppel bars the Tribunal to proceed the present case.

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[65] *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award, 10 December 2010, ¶7.1.1-7.1.3.

[66] *Freeport-McMoRan Inc. v. Republic of Peru*, ICSID Case No. ARB/20/8, Award, 17 May 2024, ¶673.

[67] Facts, ¶45.

[68] Facts, ¶¶46-47.

[69] Memorial for the Respondent, Section Pleadings II(1)(B).

[70] Facts, ¶45.

III. Canstone did not breach its obligations under the PK-BIT

Assuming the Tribunal can exercise its competence in considering that the present case can be still proceeded.

The Respondent's conduct cannot be deemed as a breach of obligations under the PK-BIT. In respect of the sustanability and environmental obligations, the Respondent did not breach **[1]** Article 4, and **[2]** Article 5 of the PK-BIT.

1. The Respondent did not breach Article 4 of the PK-BIT

The Tribunal ought to interpret Article 4 of the PK-BIT based on the **[A]** doctrine of *Contra Proferentem*[71] supplementing the result of the objective and purpose of the Treaty.[72] **[B]** As a result of interpretation, Article 4 of the PK-BIT does not impose strict timeline of compliance regarding the environmentally sustainable obligations.

A. Article 4 of the PK-BIT should be interpreted based on the doctrine of *Contra Proferentem*

According to the doctrine of *contra proferentem*, in case the agreement drafted by one party which the condition of the agreement is ambiguous, the non-drafted party may interpret in its own favour.[73] According to Article 4(1) of the PK-BIT, "the investor(s) […] shall appoint a qualified person to conduct an environmental impact assessment and to submit a report thereof to the relevant ministry of the Party,"[74] given that the obligation is *ambiguous* in respect of conducting Environmental Impact Assessment ["**EIA**"]. Article 4 of the PK-BIT states no requirement of timeline to conduct a full EIA.[75]

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[71] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, Article 32.

[72] Memorial for the Respondent, Section Pleading I(1).

[73] Frank Varela v. Lamps Plus, Inc., Opinion of the Supreme Court of the United States No. 17-988, 24 April 2019, ¶26; Tam Wing Chuen v. Bank of Credit and Commerce Hong Kong [1996] 2 BCLC 69, 77; Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making?' (2001) 17 3 Arbitration International 59, pp. 67-68.

[74] PK-BIT, Article 4(1).

[75] PK-BIT, Articles 4(1), 4(3), 4(4).

The application of investment in the environmental sector applies accordingly to the laws or regulations, or policies of the Party.[76] Given that initial step of EIA may be required the Respondent to conduct thrice a year in April, Agust, and December.[77] However, no indication of facts express clearly in relation to the full EIA.

Furthermore, as Prime Minister Akbar stated clearly that "[…] I asked you to come and invest. What good am if I now make your life difficult. Take your time dear friend, do only what you are able to at the moment. I am sure we will accommodate. I will remember to tweak certain things to your favour".[78] This implies that Prime Minister Akbar adviced Prime Minister Gan that the sustanability obligation does not have a rigid timeline, allowing the entity to proceed its own pace. Thus, by interpreting in the investor's favour, the entity is entitled to follow any timeline policy which Palmenna's law allow in conducting full EIA.

B. By the Claimant's explicit statement, there is no stringent timeline in submitting a report to the relevant ministry

Based on Article 4(4) of the PK-BIT, it requires the investor to "submit a report to the relevant ministry as soon as practically *possible*".[79] The term "practically possible" should be interpreted by in a broad approach in order to avoid the inflexibility of legal from jurisdiction to another.

In the context of environmentally impact assessment, "practically possible" is deemed as any measures or actions taken that are feasible and can be realistically implemented given the instant resources, technologies, and circumstances, which is imposed by the entity itself.[80]

Here, there is no standard practice provided by the Government of Palmenna. Prior to the signing of PK-BIT from Kenweed, Prime Minister of Kenweed expressed his concern in

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[76] PK-BIT, Article 6.

[77] Facts, ¶25.

[78] Facts, ¶19.

[79] PK-BIT, Article 4(4).

[80] Emilio Agustín Maffezini v. The Kingdom of Spain, ICSID Case No. ARB/97/7, Award, 13 November 2000, ¶45; MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶164; Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7, ¶140-141.

relation to the business practice in complying with environmentally sound.[81] Given the extensive resources may be required, full EIA may be conducted only if the entity itself has completed the initial or preliminary EIA.[82]

By this reason, the Prime Minister Akbar said clearly that he would assure "Gan that [*the Government of Palmenna*] would assist in any way possible and would not *rush the timeline of submitting* the necessary papers to the relevant ministry."[83] This indicates that the Claimant did strictly require the Respondent to comply with Article 4 of the PK-BIT as earlier as possible, but as soon as practically possible.[84]

Therefore, it is not necessary for the Respondent rush conducting full EIA and submit the relevant documents to the relevant ministry, if the conduct could not be conducted as soon as practically possible.

2. In any event, the Respondent took its due diligence in conducting preliminary environmental assessment

Only if the Tribunal considers that the experts in-house in both facilities in Kaheir and Appam are qualified persons, the Respondent already exercised its due diligence in conducting preliminary EIA and provide recommendations, in accordance with Article 4(3) of the PK-BIT.[85] Due diligence in the context of environment and sustainability is the obligation of conduct, and not result.[86]

The EIA is a practice of evaluating the environmental impacts of a proposed project considering on the socio-economic, cultural, and human-health impacts prior to decision-

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[81] Facts, ¶19.

[82] Hussein Abaza and et al., Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, UNEP, 2004, p. 44.

[83] Facts, ¶19.

[84] Facts, ¶19; PK-BIT, Article 4(4).

[85] PK-BIT, Article 4(3).

[86] ITLOS, Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), no. 17, Advisory Opinion, 1 February 2011, ¶110; Alan Boyle and Catherine, Redgwell, Birnie, Boyle, and Redgwell's International Law and the Environment, Oxford University Press, 3th Edition, 2009, p. 218.

making.[87] It is applied by domestic legislation with different levels of development.[88] As such, the EIA practice may vary from jurisdiction to jurisdiction.

Here, the Report is "a brief environmental assessment note and a report on the condition of the machinery and equipment".[89] Such Report is deemed to be crucial, particularly for the biofuel plants, in preliminarily evaluating any potential environmental impacts associated to the operations and taking any necessary actions to mitigate the risks.[90] An analysis demonstrates that the Report is deemed to be a part of the EIA, which is a reference and recommendation for a qualified person taking into consideration.[91] In addition, the Report is typically conducted every 4 months (in April, August and December), which is subsequently used to present to stakeholders prior to any decision-making.[92]

Therefore, by taking necessary steps to produce the Report are regarded that the Respondent abide best efforts.

3. The Respondent did not breach Article 5 of the PK-BIT

Article 5 of the PK-BIT prevents the Respondent as a contributor in rendering the river or part thereof impact to public health, safety or welfare of humankinds and others.[93] It may presume that the Respondent may discharge or cause such impact, however, unless proven otherwise.[94]

In the present case, the Respondent did not breach Article 5 of the PK-BIT when **[A]** the impact was caused by unforeseeable event, and **[B]** the employees of Canstone were stationing at the site for quick response in case of any emergency, which would minimise any potential root cause of toxic chemical flowing into the inland river.

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[87] Handbook of the Convention on Biological Diversity including its Cartagena Protocol on Biosafety, 3rd Edition, UNEP, 2005, pp. 720-721; Guideline: Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, UNEP (2004), p. 17.

[88] Guideline: Environmental Impact Assessment and Strategic Environmental Assessment: Towards an Integrated Approach, UNEP (2004), pp. 17-18.

[89] Facts, ¶25.

[90] Facts, ¶25.

[91] Facts, ¶¶25, 33.

[92] Facts, ¶25.

[93] PK-BIT, Article 5(1).

[94] PK-BIT, Article 5(3).

Below are the details of each reason, which the Respondent did not violate its environmental obligations.

A. The respiratory tract injuries impact was caused by force majeure

The impact of irritant gases or exposure to corrosive chemicals which travelled through the inland waters or river[95] was caused by the natural disaster of heavy rainfall (known as force majeure).[96]

Force majeure is the situation-based doctrine under which a supervening event may excuse liability for non-performance, provided the supervening event is unforeseeable, uncontrollable, and makes the performance of an obligation impossible.[97] It is undisputable that even a State finds it difficult in performing its obligations when the situation is a force majeure,[98] and this applies also to a individual.[99]

As this instant case provides, the floodwater is obviously beyond the human's control.[100] Given that due to the repecussion of floodwater, the Respondent was unable to promply maintain the pressure relief valves on its storage tanks, rendering a timely response practically impossible.

Disputed question may be raised, "how can the company do if the impact of floodwater is more severely intense than the quality of the storage tanks?, how can the company fight back?".[101] Therefore, the event of force majuere cannot regarded the Respondent to be liable.

B. The Respondent exercised its preventive measure in maintaining the facilities at Canstone's site

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[95] Facts, ¶¶35-36.

[96] Huntington Ingalls Inc. v. Ministry of Defense of the Bolivarian Republic of Venezuela (II), Final Award, 19 February 2018, ¶844.

[97] Huntington Ingalls Inc. v. Ministry of Defense of the Bolivarian Republic of Venezuela (II), Final Award, 19 February 2018, ¶844.

[98] Huntington Ingalls Inc. v. Ministry of Defense of the Bolivarian Republic of Venezuela (II), Final Award, 19 February 2018, ¶236.

[99] Southern Pacific Properties Limited v. Arab Republic of Egypt and Egyptian General Company for Tourism and Hotels, ICC Case No. YD/AS No. 3493, Award, 11 March 1983, ¶61; Phillips Petroleum Company Venezuela Limited, Conocophillips Petrozuata B.V. v. Petroleos De Venezuela, S.A., Corpoguanipa, S.A., PDVSA Petroleo, S.A., ICC Case No. 20549/ASM/JPA (C-20550/ASM), Final Award, 24 April 2018, ¶¶471-473.

[100] Facts, ¶39.

[101] Facts, ¶39.

Article 5(1) of the PK-BIT derived from the principle of prevention, which the action is required the investor to take all necessary means in order to minimize the cause of significant damage to the environment and impact to public health, safety or welfare of humankinds and animals.[102] This is the obligation of conduct, which the result cannot be guaranteed.[103]

Even if the circumstance apparently became difficult, Canstone had tried its best efforts in maintaining all the facilities at site. The fault allegation may be raised that "at the time of incident, Canstone was the only factory that was in full operation".[104]

Taking into account the positive way, Canstone was aware of the risk posed by the flood, provided the reason that Canstone's employees rather stayed at the site to ensure that in case of damage, the employees would take all necessary steps to minize the risks.[105]

If the Tribunal tends to consider the surrounding industrial area in Appam, there were many other factories shutting down their operations and evacuated.[106] This raises the doubt of "whether the unoperated factories can be damaged by this severe flood, if no employees were stations to swiftly respond any facilities during such circumstance?", and "supposed those factories were to be damaged by the flood, could the chemical components flow into the river nearby?".[107] Facts indicate that heavy tanks and machinery were seen entering and leaving the neigbouring factories after the flood.[108]

Thus, the Respondent did not breach Article 5(1) of the PK-BIT.

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[102] 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, ¶445; Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgement, ICJ Reports, (2010), ¶101.

[103] A.Ch. Kiss, Droit international de l'environnement, Paris, Pedone, 1989, p. 202; Separate opinion of Judge C. Trindade in the case of Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgement, ICJ Reports, (2010), ¶72.

[104] Facts, ¶36.

[105] Facts, ¶38.

[106] Facts, ¶34.

[107] Facts, ¶¶34, 40.

[108] 1st Clarification to the Moot Problem, Question No. 10.

IV. Even if the answer to issue III is in the affirmative, Palmenna is not entitled to an award of declaration and damages

Considering that the Respondent breached its obligations under the PK-BIT, the Claimant is not entitled to an award of "declaration" and "damages".

The Respondent would like to request the Tribunal to dismiss the reliefs sought by the Claimant when **[1]** there is no legal basis grant the Claimant's right to claim for such reliefs. **[2]** Even if the Tribunal finds that the Claimant has the right to claim for such reliefs, it would not be proportionate to the injury. **[3]** Alternatively, the Tribunal is limited in its competence in deciding the damages.

1. There is no legal basis for the Claimant to be entitled to the right claiming against the legal entity

The mechanism in seeking for reparation in the case of investment, is typically made by the investor. It is undeniable that full reparation entails wiping out all the consequences of the illegal act and reestablishing the situation which would, in all probability, have existed if that act had not been committed.[109]

In the most arbitral cases, the investors seek for reparation from the host State due to the fact that the States themselves are bound by the bilateral treaty obligation and customary international law, all of which render State to be responsible in case of breach.[110] Unless the bilateral treaty provides otherwise, customary international law is not binding to individuals.

The reliefs sought made by the Claimant are governed under international law.[111] In case of non-referral of any legal basis, the Tribunal ought to dismiss the reliefs from the Claimant, to

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[109] Factory at Chorzów (Merits), PCIJ Series A. No 17, Judgment, 13 September 1928, p. 47.

[110] PJSC DTEK Krymenergo v. Russian Federation, PCA Case No. 2018-41, Award, 1 November 2023, ¶840; Silver Ridge Power BV v. Italian Republic, ICSID Case No. ARB/15/37, Award, 26 February 2021, ¶513; Railroad Development Corporation (RDC) v. Republic of Guatemala, ICSID Case No. ARB/07/23, Award, 29 June 2012, ¶260; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶69.

[111] Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/56/10, YILC, 2001, vol. II, Part Two, Articles 36 and 37.

the extent that relying on customary international law would not bind the individual being a company in the present case.[112]

In addition, according to the 3rd question, the Claimant made clear that its allegation is "Whether Canstone had breached its obligations under the PK-BIT", given that the only obligations arising from the applicable legal instrument binding the Respondent is the PK-BIT.[113] However, the PK-BIT is silent regarding the liability of investors in case the breach has occurred arising out from the PK-BIT *per se*.

Thus, the Claimant has no right to claim for the reliefs from the Respondent.

2. The Claimant's reliefs sought are not proportionate to the injury

The Claimant seeks two reliefs in the award: **[A]** the declaratory relief reads as "*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.*" And **[B]** the damages. All of which are disproportionate if the Tribunal were to decide in favour of the Claimant. Below are the details of the Respondent's grounds in requesting the Tribunal to dismiss such reliefs.

A. The Respondent is not obligated to provide satisfaction in respect of the declaratory relief

Declaratory relief of failure to abide obligations is regarded as a form of satisfaction under international law,[114] which is applicable in the case of non-material injury.[115] The impact of respiratory tract infections did not cause by the Respondent solely, but the negligence of the Government of Palmenna also involved as factors. Given that the declaration exceeds the proportion to the injury, the declaratory relief cannot be warranted.[116]

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[112] Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Award, 8 décembre 2016, ¶1220.

[113] Facts, ¶58.III.

[114] Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/56/10, YILC, 2001, vol. II, Part Two, Article 37(2).

[115] Book 25: Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER.B/25/Rev.1, 2nd edition, 2023, Article 37, ¶6.

[116] Pawlowski AG and Project Sever s.r.o. v. Czech Republic, ICSID Case No. ARB/17/11, Award, 1 November 2021, ¶738.

Here, the Claimant requests the Tribunal to grant the declaratory relief claiming that the Respondent failed to abide the PK-BIT, and ultimately citizens of Palmenna suffered from respiratory tract infections.[117] However, this assertion makes the Claimant's disproportionate to the injury of those victims,[118] when the Claimant *per se* failed to take all necessary measures to prevent the cause of flood.[119]

The activists listed down the inadequacies of drainage system in Appam, which was supposed to be developed by the Government of Palmenna. Speaking of which, the Government of Palmenna failed to maintain the welfare and public order in taking as a preventive measure before the disaster happened including as follows:[120]

- "The drainage system in place exhibited flaws in its design and engineering. It lacked the capacity to handle significant volumes of liquid, especially during periods of heavy rain and flooding;
- Despite previous instances of flooding, heavy rain and warnings from experts regarding the vulnerability of the drainage system, the authorities failed to take proactive measures to mitigate these risks;
- The Government of Palmenna was lackadaisical in enforcing environmental laws and taking preventative measures against the impending floods."

These factual failures of the Government of Palmenna were justified by the High Court of Palmenna in its ruling.[121]

Therefore, it is not proportionate for the Respondent to declare that the Respondent breached its obligation under the PK-BIT, and the Government of Palmenna is circumvented from the liability.

B. The Respondent is not obligated to pay for both material and moral damages to the Claimant

[117] Facts, ¶55.

[118] Facts, ¶36.

[119] Facts, ¶33.

[120] Facts, ¶41.

[121] Facts, ¶45.

Damages may be broad in the sense of investment, which is categorized into two types, one is material damages and another is moral damages.[122] The Respondent is not obligated to pay both types of damages.

Firstly, in relation to material damages (or environmental damages), it is not proportionate for the Respondent to pay for toxic chemical spread alone, when the expert's report observed that the components were involved in various types of toxic chemicals, dispering throughout the area and contributed to the spread of the infection.[123] Provided that other factories besides Canstone were left behind, (i.e. particularly those which were preserving to maintain), surely spread other types of toxic chemicals by the reason of the intensity of flood would have been damaged the factories' facilities[124] while the Respondent did its best in quickly respond on a certain surface of any damage that may have caused.[125]

Secondly, if the Claimant intends to claim for moral damages, Palemenna sufferred nothing besides the victims of Palmenna (this is different from the case between Claimant as an investor, and Respondent as a State).[126] The Tribunal ought to rely on a basis with reasonable confidence, estimate the extent of the loss.[127] Here, the Claimant is not an injured party which the citizens of Palmenna is not attributable to the Claimant. Furthermore, the Claimant failed to establish the *reasonable and actual estimate of loss* in any amount, which is ultimately different from diplomatic compensation between States (i.e. probably there is a separate approach).

Thus, it is not proportionate for the Respondent to pay to the Claimant for damages.

3. In any event, the Tribunal is limited its competence in awarding the moral damages to the Claimant

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[122] *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶916; *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, ¶745.

[123] Facts, ¶40.

[124] Facts, ¶34, 1st Clarification to the Moot Problem, Question No. 10.

[125] Facts, ¶¶34, 38, 39.

[126] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 décembre 2016, ¶1220.

[127] Joseph Charles Lemire v. Ukraine (II), ICSID Case No. ARB/06/18, Award, 28 mars 2011, ¶246.

The Tribunal only has jurisdiction over legal disputes that "arise from, relating to or in connection with the BIT".[128] The Claimant cannot seek for moral damages for the Respondent's actions by referring to the grounds that the Claimant is standing on behalf of the victims of Palemnna,[129] without concomitant effect on the investment.[130] The Claimant's damage did not stem from a dispute PK-BIT in connection of investment.

Thus, the Claimant has no right to claim for damages from the Respondent.

[128] PK-BIT, Article 12(1).

[129] Facts, ¶36.

[130] Hesham Talaat M. Al-Warraq v. The Republic of Indonesia, Final Award, 15 décembre 2014, ¶629.

Prayer for Reliefs

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

I. The pre-arbitration steps must be complied 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 did not breach its obligations under the PK-BIT; and

IV. Even if the answer to issue III is in the affirmative, Palmenna is not entitled to an award of declaration and damages.

Respectfully submitted

16 August 2024

On behalf for the Respondent