MY2409 -C

BEFORE ASIAN INTERNATIONAL ARBITRATION CENTRE.

2024

GOVERNMENT OF

PALMENNA

Versus

CANSTONE

MEMORIAL FOR CLAIMANT

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STATEMENT OF JURISDICTION

The Petitioners humbly submit this memorandum for the arbitration procedure initiated before the Asian International Arbitration Centre Vid Article 12 of PK-BIT. It sets forth the facts and the laws on which the claims are based.

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QUESTIONS PRESENTED

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

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

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

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

STATEMENT OF FACTS

Palmenna, a member of the Commonwealth of Nations, is renowned for its palm oil industry, which is a significant contributor to its economy. The country's capital, Appam, is a bustling metropolis, while its diverse geography includes coastal plains, mountain ranges, and tropical rainforests, making it suitable for palm oil cultivation. In 2020, Palmenna exported around 15 million metric tons of palm oil and palm-based products, valued at USD 35 billion, and this industry contributed approximately USD 10 billion to its GDP.

Kenweed, on the other hand, has a varied geography with mountainous regions, extensive plains, plateaus, and tropical beaches. Its economy is heavily reliant on tourism, which accounts for nearly 30% of its GDP and employment.. In response to these challenges, the newly elected Prime Minister Gan Ridhimajoo established the Ministry of Trade and Investment (MTI) to explore alternative revenue sources. He appointed himself as the Minister of MTI, a decision that sparked controversy and criticism from the opposition, leading to legal and political conflicts.

Prime Minister Gan quickly implemented strategies to boost Kenweed's economy, including setting up two wholly owned subsidiaries under MTI: Quick Tech Solutions Corporation and BRC Rubber Corp, specializing in IT and rubber manufacturing, respectively. These companies achieved significant profits within a year, earning praise for Gan's economic acumen. This success led to a meeting with the CEOs of some of Kenweed's largest conglomerates, where potential collaborations were discussed. Among these companies was SZN, a startup aiming to venture into sustainable energy, despite some public skepticism about its credentials.

During this meeting, Prime Minister Gan encouraged collaboration to ensure a steady government income. KLT's CEO, Tara Sharma, a prominent businesswoman previously rumored to have personal ties with Gan, proposed a business venture combining palm biodiesel with petroleum diesel. This proposal led to the establishment of Mehstone Star Limited (Mehstone Ltd) on May 16, 2021, with MTI holding a majority share and KLT gaining access to Kenweed's limited palm oil plantations.

Palmenna, meanwhile, faced political upheaval due to severe flooding exacerbated by climate change. The
incumbent Prime Minister Elsie was criticized for her inadequate response, leading to her ouster and the rise of opposition leader M Akbar. Akbar capitalized on public dissatisfaction and successfully campaigned for measures to prevent future disasters. Upon taking office on June 3, 2021, Akbar sought to boost Palmenna's economy through international cooperation, particularly with Kenweed.

Prime Minister Akbar initiated talks with Prime Minister Gan, proposing a Memorandum of Understanding (MOU) to attract investment. This led to several meetings involving Gan, Akbar, and CEO Tara Sharma, exploring the possibility of setting up a Mehstone Ltd subsidiary in Palmenna. Akbar emphasized the importance of sustainability, given the environmental challenges associated with palm oil production. He assured Gan of support and highlighted the need for environmentally sound business practices.

On August 27, 2021, the leaders formalized their agreement, signing an MOU outlining key principles and commitments. Despite significant media attention and public interest, there

was criticism and skepticism from certain factions, including former Prime Minister Elsie, who demanded transparency and accountability. Despite concerns, Akbar pushed forward with the agreement. Gan, however, warned against rushing the formalization process, fearing it could lead to compromised implementation of environmental standards. Akbar assured Gan that he would not expedite the process unnecessarily and promised to accommodate Kenweed's needs. This close cooperation culminated in the draft bilateral investment treaty (BIT) being presented to Akbar's cabinet on September 29, 2021. The draft incorporated modifications to address potential environmental challenges, securing cabinet approval.

On October 3, 2021, the Palmenna-Kenweed BIT (PK BIT) was signed, reinforcing traditional ties and aiming to facilitate business opportunities. The specifics of the agreement were not disclosed, leading to further public and political scrutiny. The creation of Canstone Fly Limited (Canstone) followed, with operations beginning in November 2021. Canstone, majority-owned by Mehstone Ltd and partially by SZN, faced immediate challenges, including a significant flood in November 2023 that caused environmental and public health crises.

On March 6, 2024, Palmenna initiated arbitration proceedings against Canstone under the PK-BIT, seeking
reliefs and damages for the alleged health impacts on its citizens. Canstone countered by challenging the arbitration's validity and accusing the government of bypassing pre-arbitration steps. The arbitration panel, constituted at the AIAC, was set to deliberate on multiple issues, including compliance with pre-arbitration steps and whether Canstone had breached its obligations under the BIT.

SUMMARY OF ARGUMENTS

Pre-arbitration steps under Article 12 of the PK-BIT are crucial but not absolute. The interpretation hinges on the balance between mandatory and discretionary language, the effectiveness of negotiation attempts, and multi-tiered dispute resolution clauses. While pre-arbitration clauses aim to encourage amicable settlements, they are often seen as advisory rather than obligatory. The futility of further negotiations, demonstrated by Tara Sharma's refusal to engage, justifies bypassing these steps. Legal precedents (e.g., ICC Case No. 11490) support the view that strict adherence to pre-arbitration procedures should not hinder efficient dispute resolution. Therefore, the Government of Palmenna can proceed with arbitration despite the breakdown in pre-arbitration negotiations.

The Government of Palmenna's initiation of arbitration against Canstone is justified despite prior legal actions against SZN. The PK-BIT's arbitration clause, supported by principles of separability and pacta sunt servanda, ensures its validity independently of national court proceedings. Compliance with procedural requirements, including good faith negotiations and serving notices, reinforces this legitimacy. Arguments of estoppel and res judicata are countered by the distinct legal bases and separability of the arbitration clause. Denying arbitration would undermine Palmenna's rights under the PK-BIT, as highlighted in Methanex Corporation v. United States. Additionally, Article 3 of the PK-BIT and the Most Favoured Nation Treatment Clause (Article 9) ensure access to arbitration as a fair, transparent, and independent dispute resolution mechanism, supporting Palmenna's right to initiate arbitration against Canstone.

Canstone's negligence in following environmental protections mandated by the PK-BIT led to severe damage to both the environment and the local population. The BIT explicitly allows for counterclaims, as stated in Article 1, Clause 3, and the broad scope of Article 12's dispute resolution clause covers such disputes. Canstone's failure to conduct a proper Environmental Impact Assessment (EIA) violates Article 4 of the BIT. Despite the requirement for an EIA by a qualified person, Canstone only produced inadequate internal reports.

Article 5 of the BIT prohibits harmful discharges into water bodies. Canstone failed to address potential leaks and covered up incidents, including bribing victims' families and ignoring expert advice. Reports highlighted flaws in Canstone's drainage and ventilation systems, and testimonies confirmed bribery and incompetence.

Palmenna seeks both declaratory relief and compensatory damages. Citing international law principles, including the "polluter pays" principle, Palmenna argues for full restoration and compensation for environmental damage. The precedence from cases like Perenco v. Ecuador supports Palmenna's claims. Canstone's failure to exercise due diligence and the resultant environmental damage necessitate compensation, aligning with principles of fault-based liability and industry standards.

Palmenna thus contends that Canstone should bear full responsibility for environmental restoration and compensation for the harm caused.

PLEADINGS

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

1. The enforceability of pre-arbitration procedural requirements stands as a pivotal issue in contemporary commercial dispute resolution, particularly under international agreements like the Palmenna-Kish International Bilateral Investment Treaty (PK-BIT). This debate revolves around whether parties should be compelled to exhaust amicable settlement efforts, such as negotiation and mediation, before resorting to arbitration. In examining this issue, three distinct prongs emerge.
2. Firstly, the interpretation of pre-arbitration clauses under Article 12 of the PK-BIT emphasizes the balance between mandatory and aspirational language in contractual obligations, especially regarding mediation provisions that are discretionary despite mandatory language elsewhere. Secondly, the duration and effectiveness of negotiation efforts required before arbitration are crucial, analyzing whether specified negotiation periods adequately fulfill the obligation to seek an amicable resolution. Thirdly, the interpretation of multi-tiered dispute resolution clauses by judicial and arbitral authorities examines whether pre-arbitration procedural obligations function as conditions precedent barring arbitration upon breach or as contractual commitments allowing remedies for non-compliance.
3. The first prong, in addressing the scenario involving M Akbar, Tara Sharma, Alan, and Luke Nathan in Palmenna, the critical issue is whether the breakdown in negotiations during the conference call justifies bypassing further pre-arbitration

procedures and proceeding directly to arbitration. This argument explores the nature of clauses requiring efforts to reach an amicable settlement before arbitration, particularly in light of the fruitless outcome of negotiations.

4. The arbitral tribunal determined that the mention of mediation was not obligatory based on the language used in the clause, which stated that “either party … may refer the dispute to an expert for consideration of the dispute.” This wording indicated that mediation was optional.[1] ICC arbitral decisions reinforces this perspective, indicating that when terms like "shall" are used to describe amicable dispute resolution mechanisms, arbitrators tend to interpret these provisions as mandatory and enforceable before proceeding with jurisdiction. [2]
5. Pre-arbitration procedures are often seen as aspirational or advisory rather than obligatory. A party's non-compliance with these procedures typically does not cause significant harm to the other party. Agreements to negotiate or mediate do not guarantee successful outcomes; rather, they signify a commitment to engage in discussions aimed at resolving the issues at hand.
6. Therefore, clauses emphasizing attempts to settle disputes amicably before arbitration should be interpreted in a manner that promotes efficient and effective dispute resolution. They should not compel parties into fruitless negotiations but rather encourage meaningful dialogue that may lead to a resolution without the need for formal arbitration proceedings.
7. The conference call convened by M Akbar on March 1, 2024, reflected a genuine effort to resolve the political challenges in Palmenna through dialogue and

[1] *ICC Case No 10256*, Interim Award (12 August 2000) in Figueres (n 2) 87.

[2] See *ICC Case No 11490*, Final Award (2012) XXXVII YB Comm Arb 32; *ICC Case No 8445*, Final Award, (2001) XXVI YB Comm Arb 167

negotiation. Emotions ran high, and all parties engaged in vigorous debate, demonstrating a sincere attempt to reach a consensus on the best path forward.

8. Despite the earnest efforts during the conference call, negotiations reached an impasse and tensions escalated. Tara Sharma's remark signals a clear breakdown in communication and a significant divergence in viewpoints. Continuing negotiations under such circumstances proves futile and could potentially exacerbate rather than resolve the dispute. Therefore, bypassing further pre-arbitration procedures, such as additional mediation or conciliation attempts, would not materially harm the counterparty in this case.
9. Pursuing arbitration under these circumstances aligns with the intention behind clauses requiring efforts to reach an amicable settlement—namely, to promote efficient and effective dispute resolution. Therefore, the pre-arbitration procedure elaborated under the Article 12 of the PK-BIT should not be afforded a mandatory character.
10. The second prong, a related concern is the duration of negotiation efforts necessary to meet pre-arbitration requirements for attempting amicable resolution. Some agreements specify a defined timeframe (e.g., thirty days or six months), which governs the parties' obligations—beyond which neither party is compelled to continue negotiating or refrain from commencing arbitration. In other cases where no specific timeframe is set, interpretation is required to determine the duration of negotiation efforts sufficient to fulfill the contractual requirement. The prevailing perspective, consistent with the nature of negotiation obligations, suggests that neither strict nor prolonged negotiation periods are mandated.
11. An early ruling from the Permanent Court of International Justice illustrated that negotiations do not invariably demand extensive exchanges or lengthy

correspondence. Initiating a discussion, even briefly, may suffice to meet the requirement, particularly when a deadlock is reached or when one party definitively declares an inability or refusal to concede, thereby indicating that diplomatic negotiations cannot resolve the dispute.[3]

12. Parties often contend that their obligations to engage in negotiations were either met or deemed unnecessary due to the perceived futility of such efforts. This argument asserts that negotiations would not have altered either party's position significantly, or that even if pursued, they would not have resulted in a meaningful agreement. This assertion of futility plays a crucial role in both national court decisions and arbitral tribunal rulings.
13. Firstly, in ICC Case No 11490,[4] the tribunal clarified that the mention of "amicable" settlement in the Consortium Agreement did not impose a mandatory precondition for arbitration. This decision underscores that parties are not necessarily obligated to exhaust all amicable avenues before initiating arbitration proceedings. Article 12 of the BIT illustrates that compliance with pre-arbitration steps, specifically negotiation and mediation, is structured as a recommended course of action rather than a strict precondition to arbitration. The provision outlines a sequential approach where parties are encouraged to first attempt amicable negotiation and, if necessary, mediation, before proceeding to arbitration. This framework suggests that while parties are expected to engage in these pre-arbitration processes in good faith, failure to reach resolution through negotiation or mediation does not act as a barrier to initiating arbitration proceedings. Therefore, the BIT emphasizes flexibility and efficiency in dispute resolution, recognizing that the effectiveness of these steps may vary depending on the circumstances and good faith efforts of the parties involved.

[3] *Mavrommatis Palestine Concessions Case* (n 88) 13.
[4] ICC Case No 11490

14. Secondly, ICC Case No 6276[5] emphasizes the absence of strict criteria defining when attempts at amicable settlement are deemed exhausted. The tribunal stressed that the determination hinges on the circumstances of each case and the good faith efforts of the parties to achieve resolution. Similarly, Article 12 doesn't stipulate the time periodfor completion of negotiations. In such circumstances, the negotiations cannot be deemed to go on ad infinitum.
15. Moreover, the case of Antoine Biloune, Marine Drive Complex Ltd v Ghana Invs Ctr,[6] highlights that fulfilling the obligation to attempt amicable settlement can be demonstrated even if one party actively invites negotiations while the other fails to respond. This illustrates that inaction by one party can fulfill the precondition necessary for moving forward with arbitration. In casu. M. Akbar tried to engage in meaningful negotiations, to resolve the escalating disputes within Palmenna's government. Despite his proactive efforts, Tara Sharma, a key participant in the discussions, exhibited non-compliance by adamantly refusing to pursue an amicable resolution. Her refusal to engage constructively in resolving the issues mirrored the scenario in Antoine Biloune, Marine Drive Complex Ltd v Ghana Invs Ctr, where one party's lack of response was deemed sufficient to fulfil the requirement for attempting amicable settlement.
16. Alan Berg's analysis on promises to negotiate in good faith further elaborates on the various responsibilities involved in negotiation processes.[7] It outlines obligations such as initiating negotiations, considering proposals in good faith, and maintaining openness throughout the discussion, providing a comprehensive framework for understanding what constitutes meaningful negotiation efforts.

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[5] ICC Case No 6276

[6] *Antoine Biloune, Marine Drive Complex Ltd v Ghana Invs Ctr, the Gov't of Ghana*, Award (27 October 1989) (1994) XIX YB Comm Arb 14, 1

[7] Alan Berg, 'Promises to Negotiate in Good Faith' (2003) LQR 357, 363

17. Lastly, ICC Case No 6149 [8]demonstrates that procedural requirements for arbitration, such as appointing an arbitrator and requesting the other party to do the same, can be fulfilled even if the other party fails to respond. This case underscores the principle that arbitration proceedings necessitate sincere cooperation from both parties, and procedural requirements should not be misused to delay the process. Tara Sharma's refusal to engage constructively and her dismissive attitude toward negotiation efforts deviate from the principles outlined by Berg. Her actions could be viewed as contrary to the obligation to negotiate in good faith, as she did not demonstrate a genuine willingness to consider alternatives or contribute positively to resolving the disputes

18. The final prong is regarding the nature of multi-tiered dispute resolution clauses as interpreted by various authorities. Several national court rulings have clarified that specific pre-arbitration procedural obligations, although mandatory under contract, do not necessarily act as conditions precedent that would bar arbitration if breached. These obligations are generally seen as contractual commitments entitling the aggrieved party to damages rather than precluding access to arbitration. The determination hinges on whether the provision explicitly labels a pre-arbitration step as a condition precedent or sets defined time frames.
19. Firstly, in ICC Case No 11490[9], the arbitral tribunal determined that the requirement for pre-arbitration mediation was not an absolute condition precedent to initiating arbitration under the contract in question. This decision underscored that while mediation was a contractual obligation, its failure did not automatically prohibit

[8] ICC Case No 6149
[9] ICC Case No 11490

parties from proceeding to arbitration.

20. Similarly, the Hong Kong District Court's decision in Fai Tak Eng’g Co Ltd v Sui Chong Constr & Eng’g Co Ltd[10] underscored that while mediation was obligatory, its non-fulfilment did not bar parties from commencing arbitration proceedings. This ruling echoed the principle that mediation obligations did not impose an absolute bar to accessing arbitral remedies. The Hong Kong Court of First Instance in Hercules Data Comm Co Ltd v Koywa Commcns Ltd reiterated that mediation obligations were significant but did not preclude parties from pursuing arbitration in the event of non-compliance with mediation requirements.[11]

21. Lastly, in Astel-Peiniger Joint Venture v Argos Eng’g & Heavy Indus Co Ltd., the Hong Kong Court of First Instance upheld that failure to engage in mediation did not automatically prevent parties from resorting to arbitration. This case emphasized that while mediation obligations were mandatory, their breach did not serve as an absolute barrier to initiating arbitration proceedings.[12]

22. In casu, is evident that efforts to negotiate a settlement have proven futile due to Tara Sharma's refusal to engage constructively. This demonstrates the practical ineffectiveness of continuing with pre-arbitration steps, as further negotiations are unlikely to resolve the dispute. Insisting on strict adherence to these steps before allowing arbitration would unnecessarily restrict access to justice and prolong the resolution process, thereby increasing costs and delays.

23. Therefore, considering the inefficacy of prior negotiation attempts and the potential for escalating procedural burdens, M. Akbar is justified in pursuing arbitration to

[10] [2009] HKDC 141
[11] [2001] HKCFI 71
[12] [1994] HKCFI 276,

resolve the disputes in Palmenna. This approach balances upholding contractual commitments with ensuring that arbitration remains an accessible and efficient means of dispute resolution. It aligns with the overarching goal of facilitating timely and effective resolution of disputes, rather than imposing undue barriers that could hinder parties from seeking legitimate relief through arbitration.

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

Palmenna and Canstone are parties to the PK-BIT , which provides a detailed framework for resolving disputes arising from investment between contracting states. Canstone, a company incorporated in Kenweed, is accused by Palmenna of violating the PK-BIT. Prior to this arbitration, Palmenna had initiated legal proceedings against SZN, an entity related to Canstone, raising questions about the procedural legitimacy of subsequent arbitration. The issue at hand involves whether the government of Palmenna is barred from initiation a arbitration procedure against Canstone. The argument of Canstone will take into consideration PK-BIT signed Palmenna and Kenweed, pre-existing legal actions, compliance with pre-arbitration procedures, and the principle of good faith.

A. Initiation of arbitration process will not lead to duplicity and will delve deeper upon the issue at hand.

1.Palmenna government contends that the initial proceeding against SZN were based upon different circumstances and legal bases. The arbitration process required for specific

breaches of PK-BIT Canstone. Government also argued that both the party are separate legal entity and any legal proceeding against each one of them will be treated differently and will not be treated as proceedings of similar nature. Palmenna can argue that the arbitration does not duplicate the High Court proceedings but addresses distinct aspects of the dispute under the PK-BIT. The distinction between the subject matters that are part of the court and arbitration proceedings are crucial to establish the fact that there is no duplicity instead they both the proceedings are complementary.

2.It will be beneficial for both the parties to initiate a arbitration procedure since arbitration will delve into broader and deeper issues that may have been left out in court proceedings due to some reason such as jurisdictional reasons. It is contended that the court proceedings might not take into consideration all the provisions of PK-BIT, so approaching arbitration as alternative dispute resolution should be allowed via Article 12 of PK-BIT. The same was ascertained in Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic[13], where it was recognised that the scope of BIT can go beyond the ambit of national court proceedings. The government further argues that the arbitration clause in the PK-BIT is binding and enforceable, obligating both parties to resolve disputes through arbitration. Palmenna can argue that this clause remains valid and must be honoured, irrespective of parallel legal proceedings. Principle of pacta sunt servanda underpins the argument that the parties are bound by their mutual consent to arbitrate.

B. Government of Palmenna that Arbitration procedure can be imitated on the basis of existence of separate legal entity.

[13] Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4

Palmenna contends that SZN And Canstone are separate legal entity with their different sets of legal responsibilities, obligations and liabilities. Although SZN holds a 30% share in Canstone, the latter is a distinct entity with its own board of directors and management structure. The fact that SZN owns a minority stake in Canstone does not collapse their legal identities into one. Canstone was 70% owned by Mehstone which was majorly government owned company of Kenweed. SZN only had 30% of ownership in Canstone. However, they were liable for day-to-day operations of Canstone. The general policies that were blatantly violated by the Canstone authorities were made by CEO Tara Sharma, who was a shareholder in Mehstone ltd. In this situation, SZN and Canstone are different business entities, each liable forits own actions and omissions Different legal entities within the same corporate group, here SZN and Canstone can be subject to different legal proceedings since they have different legal responsibilities. This principle was laid down by Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex"), and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")[14]. This will make sure that responsibilities and breaches of each entity are properly addressed and adjudicated.

C. *Pre arbitration procedure to be followed in accordance to Article 12 for initiating a arbitration procedure.*

5.Government argues that it engaged in good faith negotiation by providing evidence of meeting and formal negotiation to discuss and to conclude the matter but inability to reach a conclusion government wants to initiate an arbitration proceeding. Palmenna argued that it adhered to the notice and time requirements stipulated in the PK-BIT. Detailed timelines and documentation of notice served to Canstone ensures procedural compliance.

[14] *Niko Resources (Bangladesh) Ltd. v.Bangladesh Petroleum Exploration & Production Company Limited (BAPEX) (ICSID Case No. ARB/10/18).*

6.Palmenna has served notice to Canstone in accordance with the timelines and procedures outlined in the PK-BIT. In the form of formal notice letters, delivery receipts, and records of communication.

7.Government strongly believes that compliance with notice requirements is crucial for ensuring that both parties are adequately informed and have the opportunity to prepare for arbitration. The Vienna Convention on the Law of Treaties (VCLT) Article 31 mandates interpreting treaties in good faith. On the basis of the convention Palmenna argues that it has acted in good faith in initiating arbitration and that its actions are consistent with the PK-BIT's purpose and provisions[15].

As emphasized by article 12 of PK-BIT that dispute should be settle amicably an in good faith. Government further argues that it has followed Article 12 (1) (a) in same respect by ensuring transparency in the arbitration process, including sharing relevant information and engaging in open communication with Canstone.

Article 12 (1) (a) reads as follows:

"*first, to the higher management of Parties in an attempt to settle suc dispute by amicable and good faith negotiation*"

D. The AIAC have jurisdiction over the present arbitration.

Mere non-compliance with the procedural pre-arbitration condition such as requirement to engage in amicable negotiation does not bar the tribunal of its jurisdiction to initiate the arbitration procedure between Canstone and SZN since it is a matter of admissibility.

[15] Berger KP, 'Vienna Convention on the Law of Treaties of 1969' (*translex*, 25 May 2020) <https://www.trans-lex.org/500600/_/vienna-convention-on-the-law-of-treaties-of-1969/> accessed 17 June 2024

Although a step was taken by in pursuance of article 12 of PK-BIT, which can be evidenced by the fact that a conference call was imitated on 1st March 2024.Thus, it can be said that by the way of article 12(2) of PK-BIT both the parties have agreed to the jurisdiction of the tribunal. Relying on Vekoma B.V. v. Maran Coal Corporation[16], in this case it was said that if the parties have consented to the tribunal, then the tribunal have the authority and jurisdiction for admissibility of claims in the arbitration procedure.

E. Res Judicata as a principle fails to be pervasive value in the issue at the hand.

Countering Canstone claim of re judicata, government assert that these principles are not applicable in arbitration clause in the PK-BIT. Palmenna argues that Res judicata prohibits a second action on previously litigated matters as a whole and cause of actions/claims spawning from similar subject matter.Since, SZN and Canstone both are separate legal entity with separate legal responsibilities. The argument of former legal proceedings is still ongoing will not hold merit. Therefore, Current arbitration procedure against Canstone is valid.The principle that the parties involved in the subsequent legal proceedings must be identical, which is not in this case, was laid down in Germany v. Poland.[17] The court in this case further added that the necessaries for establishing res judicata involves identification of cause of action, subject matter and the issue litigated and similarity between them. Since the parties in subsequent proceedings is different making the arbitration procedure altogether different from former proceedings.

F. *Stopping Palmenna to initiate an arbitration procedure will infringe its fundamental right under PK-BIT.*

[16] *Vekoma' B.V. v. Maran Coal Corporation, 673 Rev. Suisse Droit Int. et Eur., (1995).*
[17] *Germany v. Poland P.C.I. J (1927) (ser A) no.13 at 23.*

Palmenna is entitled to arbitration as its fundamental right under PK-BIT. Palmenna strongly argues that denying its right to arbitration would undermine the protections and dispute resolution mechanisms established by the PK-BIT. The government argues this on the basis of Article1(3) of PK-BIT :

“ For the avoidance of doubt, the obligations stated therein shall be enforceable
by the investors) of the Parties, against the investors) of the Parties or,
between the Parties themselves as against one another.”

The clause clearly states that investors are included within the scope of PK BIT.

The government argues that denying arbitration will not only infringe fundamental right but also right to fair hearing and right to approach a independent forum for alternative resolution of dispute, if mutually consented . Furthermore arbitration provide a fair and equal chances to both the parties to present their case and adjudicate it appropriately.

G. Government can initiate a arbitration procedure based upon absence of lis pendens.

Relying upon Hochtief AG v Argentina[18], it can be argued that lis pendens does not affect the tribunals jurisdiction. The arbitartion procedure initated by canastone is not subject to principle of lis pendens considering that there are no similar parties and no similar claim.. Lis pendens should not bar the initiation of arbitration against SZN and Canstone because the parties and issues are distinct, the contractual obligation to arbitrate takes precedence, and the arbitration seeks unique remedies.

[18] *Hochtief AG v Argentina, ICSID Case No ARB/07/31, Jurisdiction Decision (24 October 2011).*

3.Canstone has violated various provisions of the PK-BIT, while also Disregarding the Spirit and Intent of The Agreement

1. The petitioner submits that the actions of Canstone have fallen short of the duty of care required as per the agreement, and in gross violation of the considerations made while the same was being drafted. Such negligence has led to irreversible and highly detrimental impacts on both the surrounding environment and the populace. The protection of the environment and the due diligence to be exercised in undertaking such activities is clearly outlined in the PK-BIT, and it is the very lack of such diligence which has led to a deeply regrettable series of events.

a) The PK-BIT explicitly provides for counterclaims from the side of Palmenna, as against Canstone

2. While it is common for investment treaties to be investor claim friendly, the PK BIT, specifically envisions the importance of the environment for Palmenna, and provides for counterclaims explicitly, as is evidenced by Article 1, Clause 3, which is as follows:

"For the avoidance of doubt, the obligations stated therein shall be enforceable
by the investors) of the Parties, against the investors) of the Parties or, between the Parties themselves as against one another."

Arbitral tribunals have previously found counterclaims admissible when there is such an explicit mention of Parties(member states), being able to enforce obligations against investors.[19]

[19] Maxi Scherer, Stuart Bruce, et al., 'Environmental Counterclaims in Investment Treaty Arbitration', in Meg Kinnear and Campbell McLachlan (eds), ICSID Review - Foreign Investment Law Journal, (© The Author(s); Oxford University Press 2021, Volume 36 Issue 2) pp. 413 – 440.

3. Article 12 of the BIT, which is the dispute resolution clause, also lays down the scope of dispute resolution, wide enough to encapsulate the current claim. The wording of the clause is as follows:

   "Any dispute between the Parties arising from, relating to or in connection with

   this BIT shall be referred:…"

   The current claim arises from a High Court decision holding SZN and Palmenna jointly liable for negligence and [20]ordering compensation, and the heart of the dispute boils down to Palmenna contending that Canstone is independently liable for the negligence. Such damage has occurred due to the leakage from the Canstone facility in Appam which was setup and functioning under the PKBIT. Therefore, liability arising from the leak is clearly a dispute which is based on the BIT, since no plant would be in existence in its absence.

b) The Absence of an EIA despite being Mandated by the BIT is a violation of Canstone's Obligations towards Palmenna, under Article 4

4. The idea of the BIT was floated in a meeting between PM Akbar and PM Gan, while they were discussing possibilities of harvesting palm oil from Palmenna, in a manner which could benefit both countries and the companies involved. In fact, their business relationship, along with the BIT, was predicated on certain principles, as can be seen from Paragraph 15 of the Moot Problem, which is as follows:

   "…Prime Minister Akbar welcomed the idea but emphasised the importance

of sustainability to his nation. Despite its economic importance, palm oil production in Palmenna faces sustainability challenges, including deforestation, biodiversity loss and environmental degradation. As such, M Akbar impressed the need to put in efforts to address these issues and implement sustainable practices. "As long as you do what it takes to ensure your business is environmentally sound…"

5. Considering the above, it is unsurprising how often Environmental concerns have found their way into the BIT, as they remain at the forefront of Palmenna's considerations, as can be seen from the preamble, along with other relevant clauses from the BIT, especially Article 4, which deals with Sustainability and EIAs:

"UPHOLDING the need to protect against climate change and to safeguard the environment in line with the UN Framework Convention on Climate Change (UNFCCC), and its Paris Agreement…

Article 4: Sustainability

1. *Any investor carrying out any activity in any of the Party which may have significant environmental impact shall appoint a qualified person to conduct an environmental impact assessment and to submit a report thereof to the relevant ministry of the Party.*
2. *For the avoidance of doubt, activities which may have significant environmental impact shall include the following:*

…

f) Petroleum

(i) Construction of oil refineries, of any nature.

(ii) Construction of gas refineries.

(iii) Construction of oil and gas refineries.

…

3. *The qualified person who submits the report shall:*

(a) be responsible for the environmental impact assessment and the recommendations of the environmental impact assessment;

(b) ensure that the report and the recommendation do not contain any false or misleading information;

(c) take professional indemnity insurance for any liability arising from the environmental impact assessment and the recommendations of the environmental impact assessment.

4. ***Any investor carrying out such activity shall submit the report to the relevant ministry as soon as practically possible**."*

6. A brief glance at the problem demonstrates how Canstone has failed to comply with the obligations that have been set out in the BIT. Article 4 of the BIT requires an EIA to be submitted by a qualified person to the relevant ministry, as soon as practically possible. The same has not been done even till date. While there has been a report generated, which contains a brief assessment note and a report on the condition of the machinery and equipment ("Report"), the same cannot be equated to an EIA. The same was only conducted for a preliminary analysis of the environmental impact such a plant could have, and even periodic reports have not been shared with the Palmenna's Ministry of Natural Resources and Environmental Sustainibility, which is the relevant ministry in the current case.

7. Such reports cannot be constituted to be a formal EIA which is recognised by the state party, especially since it is clear from the problem, and precedent, that such documents do not

constitute an EIA. When Canstone received word, in Feb 2023, that there might be a potential leak in one of the storage tanks in Karheis, and the factory inhouse expert Jakey Jake, reported the same to Alan, Alan assured Jake that he would propose an EIA to all the relevant stakeholders. Even at a board meeting on September 6th, 2023, wherein expansion of the business was being discussed, Alan requested a local consulting firm to be hired to conduct an EIA, for the following reasons:

"Alan explained the need to have a locally qualified person with the necessary expertise in environmental science, ecology, engineering and other relevant fields to ensure that ***Canstone is well insulated."***

8. Therefore, it is clear how the EIA, which was to be conducted by a qualified person, had not been undertaken until almost two years since the factory had been established, and it was proposed by Alan when expansion of the business was being discussed. The same also becomes more evident when Alan lists out the qualities required for a qualified individual, and the fact that such qualified individual has not been onboarded prior to the expansion of the business. The Board Members and everyone involved knew that an EIA, according to the BIT, had not been undertaken, and such measure was necessary for Canstone to be insulated from any legal claims, as is explicitly mentioned. The same awareness and knowledge is further evidenced by the fact that the Board stated that it would pursue relevant permissions for obtaining the EIA, and Alan suspending further reports until the same is undertaken. Such report was only for internal assessment by Canstone, and in no way can this be considered an EIA. A similar issue has also been deliberated upon in Cortec Mining v Kenya, wherein the Tribunal held that an EIA was a statutory document, and other documents, even in the form of governmental approvals for projects, could not be construed as a valid EIA, due to its special positioning in international law as one of the primary encapsulations of the

precautionary principle, and its vast scope and ambit in scrutinising the business from the lens of sustainable development.[21] Therefore, Canstone has willfully violated its obligation under Article 4 of the BIT.

c) Willful Apathy and Coverup of Potential Leakages in the Factories is a Violation of Article 5 of the BIT

9**.** Article 5 of the BIT provides for the Environmental Obligations which are placed on the investor, specifically interms of noxious discharges into water reserves, and reads as follows:

"Article 5: Environmental Obligations

1. Save as expressly authorized by the respective Party, no investor shall discharge, or cause to enter into any river:

(a) any poisonous, noxious or polluting matter that will render or is likely to render or contribute to rendering such river or part thereof harmful or detrimental or injurious to public health, safety or welfare, or to animal or vegetable life or health or to other beneficial uses of such river;…

2. For the purpose of this Article the word "river" shall be deemed to include:

(a) any inland waters;

(b) any subterranean water resources; and

(c) any water in an estuary or sea adjacent to the coast of the State.

3. Whenever any such entry or discharge has been made, ***the owner or occupier of the property from which such entry or discharge originates shall, unless the***

[21] CortecMiningvKenya

***contrary is proved, be presumed to have discharged it or caused it to enter into such river**.”*

Looking at Article 5, along with the preamble, which focuses on preserving the environment in accordance with the UNFCCC and the Paris Agreement, there exists a clear case of not just a wilful noncompliance with the explicit terms of the BIT, but also a mala fide intent involved in covering up reports of instances, which, if addressed at a prior instance, could have prevented a humanitarian disaster at such a large scale.

10. Such obligations are not a novel concept, and tribunals have previously found that corporations are subject to international law, and even international humanitarian law, if provisions for the same have been made in the relevant underlying contracts.[22] The sole mention of the UNFCCC, or the Paris Agreement, would cast a negative obligation on the investor not to undertake harmful actions which would lead to environmental damage.[23] The force of such obligations can also not be dissuaded by claims of due diligence or force majeure, since the importance given to the environment can vary from state to state, and the level of protection accorded is dependent on the regulatory criteria of the home state. Palmenna and the PM have emphasised on the importance of the environment and sustainability in the state, and the same is reflected in both the preagreement discussions and the wording of the agreement itself. The agreement explicitly provides that if a discharge of a poisonous, noxious matter has occurred, into any inland waters, as is the current case, where traces of biodiesel have been found in samples due to which infections have occurred, then

[22] Urbaser v Argentina
[23] Maxi Scherer and Clara Reichenbach, 'Chapter 5: Climate-Related Counterclaims in International Investment Arbitration', in Annette Magnusson and Anja Ipp (eds), Investment Arbitration and Climate Change, (© Kluwer Law International; Kluwer Law International 2023) pp. 105 – 138

the owner of the factory, Canstone, in the present scenario, shall be presumed to have discharged or caused it to enter such water body. There is no provision for a defence based on force majeure in the BIT at all. The same squarely shifts the burden of proof onto Canstone, to prove that such discharge has not occurred from their property, a burden which is impossible for them to discharge, considering the factual matrix of the present case.

11. The first report of there being a potential leakage was received at the Karheis facility, in md-February, 2023, following which Jakey Jake, the inhouse expert brought it to the attention of Alan, who examined the report prepared 1 and a half months ago, and concluded that no sign of a leak was present. Alan showed no desire to further investigate the same, and his assurances to Jake of an EIA were only empty promises. Two weeks after such report, nearby farmers were hospitalised suspecting contamination. Victims families conducted investigations, but were asked to withdraw such reports after being paid off, in exchange for withdrawing the same. Even after the occurrence of such irregular and suspicious circumstances, no steps were taken by Canstone, or, more specifically, Alan to investigate, despite repeated impleadings by the in-house expert who was appointed by Canstone themselves. There is also a high probability of the victims' families being paid off by Canstone, instead of letting such reports become public, which shows further disregard by Canstone towards their environmental obligations.

12. When Jakey raised such concerns again, he was provided with an envelope, after which he no longer seemed concerned, but in fact elated. Post the same, Alan spent an entire month in Karheis, which was highly irregular since he preferred spending a majority of his time in Appam, which his old friend and colleague, Fey Lin. If there was indeed no cause of concern resulting from such incident, and no involvement of Canstone or its factories which led to the pollution, there would be no reason Alan would have to spend a month in a facility he would

not visit for more than a few days at a time.

13. The current dispute arose after the events on the 26th of November, after the areas surrounding Appam suffered from devastating flash floods. The only factory functioning during that time was Canstone, even though it was shut for the 3 days preceding the event, due to high rainfall. Post the same, around 129 people were affected due to respiratory tract diseases, while 39 were hospitalised. Doctors surmised that such injury could've occurred due to the inhalation of irritant gases or exposure to corrosive chemicals which had travelled through the inland waters or river. Canstone's internal investigation revealed that the pressure valves had been compromised, and their internal doctor believes that the same could be one of the reasons for the infection.

14. Considering the fact that the factory was shut for 3 days prior, Lee should have exercised his judgement in determining that the factory should remain shut considering the vicious flash floods, especially if their systems would be vulnerable during such scenarios. Even in the lawsuit raised by the activists, which they successfully argued as against Canstone, concerning reports were disclosed, such as:

"41.1. 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.

41.2. 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.

41.3. The ventilation systems were found to be lacking in functionality and compliance with safety standards. The ventilation systems suffered from neglect and insufficient

maintenance."

Canstone's involvement in such willful negligence is also supported by Jakey's testimony, which is definitive proof of the fact that Canstone had been engaging in bribery to cover up damage and reports from earlier oil spills. He also confirms that Alan has not excercised due diligence while conducting site visits, and has spent most of his time leisurely in the Appam facility, and therefore, his month long stay at Karheis also becomes suspect. He attributes the damage caused by the flood due to his incompetence and lack of scrutiny.

15. Keeping in mind the above provisions of the BIT, the non-application for an EIA, by a competent authority, and various factors pointing to both willful negligence leading toi the environmental damage and a willful coverup of the same through bribery, Canstone's actions constitute an egregious violation of its obligations under the BIT.

4. Following from the above, Palmenna is entitled to an Award of Declaration & Damages

16. An award of declaration is usually a normative, rather than a substantive determination of the dispute at hand, and only affirms the position of one of the parties, without there being any directions issued as a result of such determination. An award of damages is a compensatory award made directing one party to compensate the other for the breaches as determined by the arbitral tribunal. Palmenna submits that in the current dispute, they are entitled to both, an Award of Declaration and an Award of Damages, owing to the violations

of Canstone's obligations in the BIT, specifically Articles 4 & 5.

17. Following from the contentions in the previous section, the next question that arises is how this tribunal is to determine the matter of compensation, especially considering that the same claim is centered primarily on the wording of the BIT, and only slightly reliant on comprehensive domestic law or international standards, which have more exact systems or principles of determination.

18. Such a question, while not entirely novel, is not one on which much jurisprudence is in existence. For example, the first time a tribunal considered such a question was in 2018, in *Activities Carried out by Nicaragua in the Border Area*.[24] The tribunal held:

'the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation. In the context of environmental damage, full reparation entails 'active restoration measures ... to return the environment to its prior condition, in so far as that is possible.'

Through such determination, the tribunal confirmed that damage to the environment is compensable under international law.

19. Such claims for compensation do not necessarily have to be based on an explicit wording within the BIT providing for compensation if environmental damage occurs, but is merely a logical extension following from the fact that if preservation of the environment, in accordance with certain precautionary measures, and negative obligations barring investors from indulging in certain activities, is a core tenet of the BIT, and pollution has occurred in a

[24] Ylli Dautaj, 'Environmental Interests in Investment Arbitration: Challenges and Directions and Water Services Disputes in International Arbitration: Reconsidering the Nexus of Investment Protection, Environment, and Human Rights', in Meg Kinnear and Campbell McLachlan (eds), ICSID Review - Foreign Investment Law Journal, (© The Author(s); Oxford University Press 2021, Volume 36 Issue 1) pp. 226 – 235.

way which detrimentally impacts the environment, and consequentially, its dependents, then compensation must necessarily be the remedy which can make good such breach. There are four primary environmental principles which have been part of investor state arbitral jurisprudence:

"i) the 'polluter pays' principle (ie, that the polluter must pay for damage caused and do what it takes to restore the precedent equilibrium); (ii) the prevention principle (ie, an obligation to avoid causing damage to the environment); (iii) the precautionary principle (ie, taking preventive action; focusing on the polluter's activity; increase public participation in decision making etc), and the environmental impact assessment (EIA) principle (ie, the practice of regulatory authorities to require an environmental impact assessment prior to the start of operations, such as being approved through a license)."[25]

20. Of these, the polluter pays principle has been the most useful in determining the components and quantum of compensation to be considered. As held by the tribunal in *Perenco v Equador:*

"the need for and importance of environmental protection (in line with the 'polluter pays' principle) and placed it 'at the heart of the analysis ... send[ing] a warning to investors that they must act diligently at all stages of their investment'."

The above principle, when applied to the current case, would hold Canstone liable to pay damages based on the award from the High Court, as well as compensation which would reasonably be required to restore the environment and the surrounding ecology.

21. Such compensation is also affected based on the determination of whether a company has

[25] Flavia Marisi

complied with the due diligence it was required to, and tribunals, in cases like *Perenco,* have used this as an important determiner for the quantum of compensation. Maxi Scherer, in their article, postulate:

"Investor due diligence is also relevant to liability and compensation for counterclaims. The scope and content of an investor's due diligence obligations impact the extent to which it may bring primary claims under an IIA and its protection from counterclaims. In deciding compensation in Perenco v Ecuador, the Tribunal assessed Perenco's strict and fault-based liability for the environmental damage that it caused, the applicable standards, and its environmental practices and management. It found that the investor's duty of care is relevant in the context of fault-based liability and identified examples of negligence regarding Perenco's environmental practices. ***The Tribunal also identified different due diligence standards that the investor was expected to follow under domestic law and industry best practice, and found that 'Perenco's claims of strong environmental law compliance are not made out ... and do not paint a picture of a responsible environmental steward'.*** *On this basis, the Tribunal encouraged the parties to attempt to settle the matter, and,* ***when they did not, granted Ecuador's counterclaim****."*

The above scenario is strikingly similar to the factual matrix before the tribunal today, since Canstone has failed to observe any due diligence which was mentioned in the BIT. It has failed to gain an EIA clearance for an explicitly mentioned polluting industry, and it has caused a noxious substance to pollute a natural water body, leading to health concerns and even hospitalisations among the citizens of Palmenna. The counsel for Palmenna submits that Canstone could not have been any more environmentally negligent than it has been in the current case, and must therefore be held solely liable to pay compensation to the victims, as ordered by the High Court, along with restorative costs towards the water body.

PRAYER

WHEREFORE IN THE LIGHT OF FACTS PRESENTED, ISSUES RAISED, ARGUMENTS ADVANCED AND AUTHORITIES CITED, THE PETITIONER HUMBLY PRAYS BEFORE THIS HON'BLE TRIBUNAL THAT IT MAY BE PLEASED TO PASS APPROPRIATE ORDERS IN THE NATURE OF:

- Canstone has failed to honour its obligations under Article 4 & 5 of the BIT.
- The reports submitted by Alan cannot be considered to be valid EIAs, and they have not been presented before the relevant ministry.
- As a result of the damage to the pressure valve of Canstone, there has been a release of biofuel into the water supply, which has led to the respiratory tract infections.
- Canstone is to unilaterally make good the compensation ordered by the High Court, along with additional compensation required to restore the environment to its original state.

AND/OR

PASS ANY OTHER ORDER, DIRECTION, OR RELIEF THAT IT MAY DEEM FIT IN THE BEST INTERESTS OF JUSTICE, FAIRNESS, EQUITY AND GOOD CONSCIENCE.

FOR THIS ACT OF KINDNESS, THE PETITIONER SHALL DUTY BOUND FOREVER PRAY.