MY2409-R

BEFORE ASIAN INTERNATIONAL ARBITRATION CENTRE

2024

GOVERNMENT OF PALMENNA

Versus

CANSTONE

MEMORIAL FOR RESPONDENT

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STATEMENT OF JURISDICTION

The Petitioners humbly submit this memorandum for against initiation of 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

The enforceability of pre-arbitration procedural requirements, such as negotiation or mediation, is critical in ensuring efficient and amicable dispute resolution. Article 12 of the PK-BIT mandates good faith negotiations and mandatory mediation before arbitration, indicating these steps are compulsory. National courts and arbitral tribunals uphold these pre-arbitration steps as mandatory when the parties' intent is clear, using terms like "shall" to denote obligatory compliance.

Canstone argues that Palmenna is precluded from initiating arbitration due to ongoing legal proceedings in the High Court against SZN, asserting principles like lis pendens to avoid parallel proceedings and duplicity. They emphasize the need to exhaust local remedies before international arbitration, citing the international law requirement to use all domestic avenues first.

Additionally, Canstone points to Article 12 of the PK-BIT, requiring pre-arbitration procedures, arguing Palmenna did not comply, thus invalidating its arbitration claim. They also argue that Palmenna’s actions violate the "fair and equitable" treatment principle and that initiating arbitration is an abuse of judicial process aimed at overturning an unfavorable high court decision. Furthermore, Canstone invokes principles of estoppel and res judicata, asserting that Palmenna's initial court filing implicitly acknowledged the court's finality, precluding further arbitration on the same issues.

Canstone has fulfilled its obligations under the BIT, conducting regular environmental impact assessments (EIAs) to ensure compliance with Article 4. Alan Becky, a qualified expert, and in-house experts conducted these assessments every four months, meeting the BIT's

requirements. Despite assurances from Palmenna's PM Akbar to accommodate delays, Canstone conducted multiple EIAs, but did not find urgent need to submit them due to expanding business operations.

Canstone has not breached Article 5, which prohibits harmful discharges into rivers. There is no conclusive evidence linking Canstone's factory to the infections, as doctors only speculated on possible causes. Trace amounts of biofuel found in samples could have come from other sources. A broken relief valve, quickly repaired, does not suffice as proof of Canstone's liability. The burden of proof lies with Palmenna, which failed to provide concrete evidence.

Allegations from Jakey against Canstone are questionable and lack credibility. Canstone has no breach of obligations under the BIT, thus Palmenna is not entitled to a declaratory award or damages. Compensation claims are unfounded without scientific evidence proving Canstone's responsibility. The tribunal should find Palmenna liable for any environmental damage, affirming Canstone's non-involvement in the pollution and infections.

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, such as negotiation or mediation, is critical in ensuring efficient and amicable dispute resolution. Article 12 of the PK-BIT exemplifies this by mandating good faith negotiations followed by mandatory mediation within a specified timeframe before resorting to arbitration, thus underscoring the mandatory nature of this tiered dispute resolution mechanism. This issue can be addressed through a three-pronged approach.
2. Firstly, the clarity of the parties' intent in making these pre-arbitration steps mandatory will be examined, highlighting the significance of specific language in indicating mandatory compliance. Secondly, the commercial significance of these procedural requirements will be discussed, emphasizing how provisions linked to commercial rights or obligations are more likely to be considered mandatory. Thirdly, the implications of mandatory compliance with these pre-arbitration steps will be considered, including the potential dismissal of arbitral proceedings for non-compliance and the benefits of resolving disputes amicably to avoid the expensive and time-consuming process of arbitration.
3. On the first prong, the enforceability of pre-arbitration requirements, such as negotiation or mediation, hinges significantly on the clarity of the parties' intent. National courts and arbitral tribunals have traditionally approached the issue of contractual pre-arbitration requirements, such as negotiation or mediation, with caution. Absent explicit language indicating mandatory compliance, they generally refrain from deeming such requirements obligatory.

4. Nevertheless, when the intent of the parties is unequivocally clear, courts and arbitral tribunals uphold these pre-arbitration steps as mandatory obligations. Tribunals have consistently upheld that pre-arbitration procedural requirements, such as cooling-off periods and domestic litigation prerequisites, must be adhered to if they are explicitly mandated in the applicable agreement or treaty. These requirements are deemed mandatory obligations, and failure to comply can lead to dismissal of arbitral proceedings. This approach ensures that parties exhaust all alternative dispute resolution methods before resorting to arbitration, thereby promoting efficiency and compliance with contractual obligations. The use of imperative terms such as "shall" or "must" is often construed as indicative of a mandatory obligation, whereas terms like "can," "may," or "should" are typically interpreted as non-mandatory.
5. In ICC Case No. 10256, which involved a three-tiered dispute resolution clause stipulating mutual discussions conducted in good faith, mediation, and subsequently, arbitration. The respondent argued that mediation was a condition precedent to arbitration and that the claimant was precluded from initiating arbitration until mediation had taken place.
6. However, the arbitral tribunal found that the reference to mediation was not mandatory due to the wording of the clause, which stated that "either party … may refer the dispute to an expert for consideration of the dispute." This phrasing was deemed non-compulsory.[1] A study of ICC arbitral awards supports the view that the use of terms expressing obligation, such as "shall," in relation to amicable dispute

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

resolution mechanisms, leads arbitrators to consider these provisions as binding and compulsory prior to assuming jurisdiction.[2]

7. Arbitrators have consistently placed paramount importance on the intention of the parties, interpreting the language of arbitration agreements within this context. For instance, a provision stipulating that dispute "be settled in an amicable way" does not establish a condition precedent to arbitration but rather underscores the parties' intention to avoid litigation in court.
8. In casu, Article 12 of the PK-BIT employs the term "shall," which has been interpreted by courts to mean mandatory compliance with the outlined pre-arbitration steps. Thus, these pre-arbitration procedures are compulsory. This construction has been deemed to be, by nature "necessarily fulfilled" in both national and international jurisdictions.[3]
9. A thorough analysis of the arbitration agreement's language reveals that the parties intended for the pre-arbitration steps to be mandatory. The sequential structure of the steps, coupled with the use of the word "if," implies that each subsequent step is contingent upon the exhaustion of the preceding step. This interpretation reflects the parties' deliberate intention to create a binding and clear framework for resolving disputes amicably before resorting to arbitration.

[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

[3] Demerara Distilleries Private Ltd & Anr. v. Demerara Distilleries Ltd., (2014) SCC OnLine SC 953

10. Furthermore, More generally, International Court of Justice authority also supports the mandatory (and jurisdictional) character of at least some treaty requirements to negotiate the resolution of disputes before commencing judicial proceedings. The International Court of Justice (ICJ) dismissed Georgia's application on jurisdictional grounds. The Court held that Georgia failed to satisfy the mandatory requirement to negotiate disputes prior to seeking judicial resolution. This decision reaffirms the ICJ's adherence to procedural prerequisites outlined in international conventions, emphasizing the necessity of attempting amicable settlement or negotiation before pursuing formal legal action.[4]
11. Secondly, specific and detailed procedural requirements, such as obligations to mediate for a specified period or to utilize a named mediation institution, are typically viewed as more likely to be mandatory compared to generalized provisions aiming to resolve disputes amicably. In ICC Case No 6276, the tribunal emphasized the importance of 'precise rules' and the 'detailed' nature of the procedure with 'precise time limits', leading to the conclusion that the procedure was mandatory.[5] Similarly, ICC Case No 9812 illustrated that obligations like requesting a price review due to economic changes must strictly adhere to the requirements specified in the contract's price review clause.[6] Similarly has been held in National Courts, as in the case of in Int'l Research Corp plc v Lufthansa Sys Asia Pac Pte Ltd, the Singapore High Court enforced a mediation clause that referred disputes through clearly defined committees,

[4] ICJ Judgment [2011] ICJ Rep 70

[5] *ICC Case No 6276* (n 4)

[6] *ICC Case No 9812*

noting that the entire mediation procedure in clause 37.2 was clear and unambiguous.[7] The court emphasized that adherence to such detailed procedures can be easily assessed based on the conduct of the parties, highlighting the importance of clarity and specificity in determining whether procedural requirements are mandatory.

12. This essentially implies that, agreements that stipulate negotiations over a defined time frame (e.g., 20 days) or require mediation under specific conditions (e.g., using JAMS as the mediator) are commonly treated as binding obligations rather than mere expressions of intent to negotiate in good faith. This distinction arises because specific procedural requirements provide clarity and enforceability, guiding parties towards structured dispute resolution processes with measurable outcomes.
13. Moreover, the commercial significance attached to procedural requirements further influences their characterization as mandatory. Provisions linked directly to commercial rights or obligations, such as clauses requiring pre-arbitration negotiations on price or rent renegotiation, are more likely to be interpreted as mandatory. These requirements not only serve to safeguard commercial interests by ensuring disputes are addressed promptly and systematically but also reflect a contractual commitment to exhaust specified dispute resolution avenues before pursuing more formal legal actions.
14. Article 12 of the PK-BIT's Dispute Resolution clause provides a comprehensive framework for addressing disputes between the parties involved. This clause is structured to commence with negotiations conducted in good faith by senior management, followed by mandatory mediation if negotiations fail to resolve the dispute within a specified timeframe. Crucially, Article 12 stipulates that if mediation

[7] Int'l Research Corp plc v Lufthansa Sys Asia Pac Pte Ltd [2012] SGHC 226 para 97

does not succeed within 90 days from its commencement, the parties may proceed to arbitration administered by the Asian International Arbitration Centre (AIAC). The inclusion of a specific 90-day period for mediation is significant as it reflects the parties' intention to impose a structured and enforceable timeline on the dispute resolution process.

15. The specificity of the 90-day mediation period serves several important purposes. First and foremost, it promotes efficiency in resolving disputes. By setting a clear timeframe, Article 12 aims to prevent prolonged negotiations or delays that could potentially escalate tensions between the parties. This time limit encourages both parties to engage actively in the mediation process, with the understanding that a resolution must be sought within a reasonable period. Courts and arbitral tribunals often view such specific timeframes as indicative of mandatory requirements, as they demonstrate a deliberate commitment by the parties to adhere strictly to the prescribed dispute resolution procedures outlined in the BIT.
16. Furthermore, the mandatory nature of the 90-day mediation period underscores the BIT's objective to facilitate amicable resolutions before resorting to more formal and potentially costly arbitration proceedings. Mediation, as a non-adversarial method of dispute resolution, aligns with commercial interests in preserving relationships and minimizing disruptions to ongoing business operations. The structured approach outlined in Article 12 not only enhances predictability and clarity in dispute resolution but also emphasizes the parties' mutual agreement to exhaust all feasible options for amicable settlement before escalating to arbitration.
17. An agreement to negotiate or mediate, even if a binding contract, is not an agreement to negotiate successfully or to agree on any particular terms, but only an agreement to discuss a particular issue.

18. Thirdly, the dispute resolution clause outlined in Article 12 of the BIT requires the parties to engage in a tiered dispute resolution clause, before resorting to arbitration. The clause first mandates negotiations in good faith between senior management, followed by mediation if negotiations fail. Only if mediation does not resolve the dispute within 90 days may the parties proceed to arbitration administered by the Asian International Arbitration Centre (AIAC).
19. Given the detailed and specific nature of these procedural requirements, it is crucial to recognize their mandatory nature. As previously mentioned the parties' explicit agreement to these steps reflects an intention to exhaust all amicable and cost-effective options before embarking on arbitration, which is inherently more time-consuming and expensive.[8]
20. Mediation and conciliation are inherently consensual processes, allowing parties to control the resolution of their disputes. Courts have increasingly interpreted agreements to negotiate or mediate as imposing an obligation to engage in these processes genuinely and in good faith. For example, an Australian court and an English High Court decision both emphasized the enforceability of time-limited obligations to negotiate in good faith. These decisions highlight the importance of giving due consideration to these processes to avoid unnecessary arbitration.
21. In the context of this case, the commercial significance of the mediation clause cannot be overlooked. Arbitration, while effective, can be costly and time-consuming, potentially harming the commercial interests of both parties. By adhering to the mandatory mediation process, the parties have the opportunity to resolve their disputes efficiently and amicably, preserving their business relationship and

[8] *Emirates Trading Agency LLC v Prime Mineral Exports Private Ltd* (n 14) para 64.

minimizing disruptions to their operations.

22. Furthermore, pre-arbitration procedural requirements, especially those linked to commercial rights or obligations, are more likely to be deemed mandatory. The 90-day mediation period specified in Article 12 serves to encourage a timely resolution and underscores the importance of exploring all possible avenues for settlement before proceeding to arbitration. This approach not only aligns with judicial interpretations of similar clauses but also promotes a more efficient and less adversarial resolution process.

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. *Principle of res Judicata is applicable to the current arbitration procedure.*

23. Canstone argues on the principle of Res Judicata. Canstone argue based upon the

principle of res judicata. Res Judicata having two main components namely claim preclusion and issue preclusion. Canstone argue on the basis of both the component that claim is already made to high court on same core issue. Hence, following the principle of res Judicata, Palmenna should not be allowed to initiate a arbitration process. If the High Court's ruling addressed the same facts and legal questions, then res judicata should preclude Palmenna from initiating arbitration on the same issues. This argument hinges on demonstrating that the High Court's decision is final and covers the same substantive issues as those raised in the arbitration.

24. The principle of res judicata applies to the present Arbitration proceedings since the facts and circumstances are identical to the initial proceedings. Canstone further argues that high Court decision on the issue of SZN and Government of Palmenna demonstrates the principle of finality and arbitration cannot be used for improper motives. These arguments can be substantiated by emphasizing on H& H Enterprises Investment Inc. v. Arab Republic of Egypt[9]. and CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award (Sept. 13, 2001)[10].Further it can be argued that the court and the arbitration tribunal for enforcing the right related to arbitration under BIT is rejected along with compensation for the breach due to fundamental basis.

B. Pre-arbitration procedure should be followed as per Article 12 of PK-BIT.

25. Relying on Salini v. Morocco[11], Article 12 clause a, b,c of the PK-BIT mandates certain pre-arbitration procedure such as settling the dispute first by amicable and god

[9] *H& H Enterprises Investment Inc. v. ArabRepublic of Egypt – ICSID Case NO ARB/ 09/15 Award – 6th May 2014.*

[10] *CME Czech Republic B.V. v. Czech Republic,UNCITRAL, Partial Award (Sept. 13, 2001).*

[11] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I], ICSID Case No. ARB/00/4

faith negotiations, then by mediation The court in the case underscored the importance of adhering to these procedural steps, emphasizing that failure to do so could preclude the initiation of arbitration. Canstone argues based upon the precedent set in the Salini v. Morocco, that Palmenna's non-compliance with the PK-BIT's pre-arbitration procedures invalidates its arbitration claim.

26. Article 12 of the PK-BIT mandates specific pre-arbitration steps, such as negotiations or consultations, aimed at amicable resolution. Canstone contends that Palmenna did not fulfil these prerequisites, thus barring the arbitration under the treaty's procedural framework. Canstone strongly contends that this pre-arbitration process vid article 12 were not followed and thus arbitration procedure should be void. Additionally, according to Clause C of article 12 requirements for notice period and timing of arbitration were not followed. Article 12 of PK-BIT requires a good faith negotiation and parties to act amicably. But Canstone argue that Palmenna acted opposite to what was required by article 12 of PK-BIT

27. It is argued that inability to provide timely notice put parties to disadvantage since they do not get adequate time to prepare their cases adequately and ensures that the proceedings are conducted fairly. Canstone argued that Palmenna did not adhere to notice periods and timing guidelines required for initiating arbitration process. Additionally, BITs typically specify procedural requirements that must be met before arbitration can commence, including the provision of notice to the respondent and adherence to specific timeframes.Canstone argues that Palmenna's initiation of arbitration, despite existing proceedings and without attempting genuine pre-arbitration negotiations, violates this principle. The VCLT Article 31 mandates

interpreting treaties in good faith. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) mandates that treaties should be interpreted in good faith in accordance with the ordinary meaning of their terms, in light of their context and purpose[12]. Relying on VCLT Canstone argue that Palmenna action were inconsistent with PK-BIT provision, specifically in relation to its pre-arbitration requirement. Article 12, reads about good faith negotiation. Article 12, clause a reads as follows:

" first to the higher management of the parties in an attempt to settle such dispute by amicable and good faith negotiations".

C. Initiation of arbitration procedure will be against "Fair and equitable" treatment pursuant to Article 10 of PK-BIT.

28. Article 10, clause 2 of PK-BIT iterates as follows :

" fair and equitable treatment requires each Party not to deny justice in any legal or administrative proceedings in accordance with the principle of due process embodied in the principal legal systems of the world"

Canstone argument focuses on respecting domestic judicial processes aligns with Canstone argument that arbitration should not be used to overturn a high court ruling. The lowen case was used further to argue on the basis of fair and equitable treatment . the judgment and so the Canstone argument focuses on procedural propriety and respect for domestic judgment. It is further argued that he Palmenna's initiation of arbitration must be procedurally sound and not conflict with established legal norms.

[12] 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

D. Government cannot initiate a arbitration procedure based upon absence of lis pendens.

29. 29.Lis pendens is a legal doctrine that addresses the issue of parallel litigation concerning the same matter between the same parties in different courts or tribunals.. When addressing the issue of lis pendens in arbitration, tribunals possess several options to manage parallel proceedings effectively. They can dismiss claims, stay proceedings, restrain parties from pursuing parallel actions, allow both claims to continue, or compel parties to choose a single forum. The decision to stay proceedings is a key tool, rooted in the tribunal's procedural authority and inherent jurisdiction. This power allows the tribunal to prevent duplicative litigation, ensuring judicial efficiency and consistency in outcomes.Staying proceedings is particularly appropriate when another competent forum is already addressing the same dispute. By doing so, the tribunal can avoid conflicting judgments and maintain the integrity of the arbitration process. In some cases, the tribunal may restrain parallel proceedings to ensure that the matter is resolved in the chosen forum, reducing the risk of inconsistent decisions.Alternatively, the tribunal might allow both proceedings to continue if the issues are not entirely identical, though this requires careful management to avoid conflicting outcomes. Ultimately, the tribunal’s authority to manage these situations underscores its role in ensuring that disputes are resolved efficiently, fairly, and without unnecessary duplication.

E. Principle of res Judicata and estoppel are violated in case of initiation of arbitration procedure.

30.Canstone argues on the principle of estoppel. Estoppel is grounded in equity, barring a party from making assertions or claims that contradict earlier statements or actions if those actions have been relied upon by others. In the context of international arbitration, estoppel can prevent a party from initiating arbitration on matters that have already been decided in another forum if they have previously acknowledged the finality of that forum's decision. Which Canstone argued that Palmenna has implicitly acknowledged the finality of court decision, since the government initially filled the case before the high court and accepted the jurisdiction. Thus, Canstone argues that government is estopped from initiating arbitration process.

30. High Court have already passed a judgment involving the claimant and SZN. Since the judgment and arbitration involved the same parties and issue, the initiation of arbitration procedure should be precluded. The arbitration tribunal should uphold the principles of **collateral estoppel** by recognizing the finality of the domestic court's judgment. These doctrines prevent the re-litigation of issues that have already been definitively resolved, ensuring consistency and judicial efficiency. By acknowledging the domestic court's ruling, the tribunal respects the legal principle that matters once decided should not be reopened. Therefore, relying on Southern Pacific Rail Road v. United States[13]

31. The BIT does not grant the government of Palmenna to initate the arbitration procedure.The absence of PK-BIT not having a explicit clause which would grant the Palmenna the right to initiate arbitration proceedings highlights significant systemic

[13] *Southern Pacific Rail Road v. United States, 168 U.S. 1, 48-49 (1897).*

imbalance.The imbalance underscores the principle of 'arbitartion without privity'.[14] This principle iterates despite being a party to the BIT,Palmenna, cannot initiate arbitration even in cases of investor misconduct or breaches of domestic law This provision reflects a one-sided approach, where foreign investors hold the unilateral power to bring claims against host states, while the states themselves lack an equivalent mechanism to protect their interests through arbitration. The current structure places Palmennas at a disadvantage, reinforcing the need to revisit and reform BITs to ensure that both investors and host states have equal opportunities to seek justice through arbitration.

3. Canstone has complied with the terms, and carried out its obligations in the BIT, as far as reasonably possible

32. The counsel for Canstone submits that Canstone has been entirely aware of its obligations under the BIT and has complied with all contractual and statutory obligations. The events that occurred, while regrettable can neither be attributed to Canstone's factory, and nor to their negligence. Flash floods of such a scale could neither be anticipated, nor prepared for, by the factories of Canstone.

a. Canstone has Conducted Regular EIAs, to ensure the Environmentally Sustainable nature of their Factories, in compliance with Article 4

[14]Jan Paulsson, 'Arbitration without privity'< https://academic.oup.com/icsidreview/article-abstract/10/2/232/657651?redirectedFrom=PDF>accessed 5 sep 2024

32. The CEO of SZN, one of the major stakeholders of Canstone, Ms Tara Sharma, has always been someone with an immaculate attention to detail and making sure all factories are upto standard in terms of quality and safety. To ensure that the plants were fully compliant, a foreign expert from Sukiyasu, Alan Becky, was appointed, along with the inhouse experts situated at each of the plants, in both Appam and Karheis. The same was done in order to ensure full and final compliance with any of its environmental obligations, such as under Article 4, which reads as follows:

a. "Article 4: Sustainability

33. 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.

34. 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.

...

1. 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."

35. Alan is an internationally renowned expert in the field, and is therefore a qualified person to conduct the EIA. Since there are no statutory requirements detailing the formal structure or components of the EIA, the reports which conduct brief environmental assessments, and reports on the conditions of the machinery and equipment, can be considered to be the relevant EIAs. The same are also utilized by the company, to "have a preliminary evaluation of the potential environmental risks associated with their operations and mitigate those risks." Therefore, the intent and purpose of an EIA, which is to assess environmental viability and possible damage, is wholly satisfied through such reports, which are conducted every 4 months, further highlighting Canstone's commitment to ensure environmental compliance. Such reports are also shared with relevant stakeholders to ensure a well-informed decision-making process. Considering that the above reports were not only conducted for the sole purpose of assessing the environmental impact and how to mitigate the same, but also were conducted by a qualified person and at relevant intervals, necessarily means that both the text and object of Article 4 of the BIT have been complied with. Finally, the fact that there is no prescribed statute based on which an EIA is to be conducted, necessitates that if such report complies with the requirements of the BIT, as it does in the current case, it must be considered a valid BIT.

36. Additionally, the fact that PM Akbar of Palmenna had understood and acknowledged the fact that an accelerated timeline would make certain compliances inconvenient, considering the initial costs and uncertainties of setting up, must also be considered. In his own words,

> *"he would assist in any way possible and would not rush the timeline of submitting the necessary papers to the relevant Ministry…you are my bro. I asked you to come and invest. What good am I 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".*

The term "as soon as practically possible", as mentioned in Clause 4 of Article 4, has to be interpreted in the above context. Canstone cannot be said to have been noncompliant with their obligations simply because of their non-submission of such report to the ministry. Even when such report could be submitted, the business was expanding, and it was not the intent of Canstone to submit a report which would mislead Palmenna as to the size and scope of their operations. As mentioned by the CEO, Luke Nathan, the timing of the flood, was extremely unexpected and inconvenient, but the same cannot be used to say that Canstone has failed to conduct an EIA, since it has conducted multiple, and only determined that submission of the document was not an urgent requirement based on the assurances of PM Akbar.

b. Canstone has made every effort to comply with its obligations, and has been Compliant with Article 5

37. Owing to the fact that Canstone is jointly owned in a 70:30 partnership, 70 percent being owned by the State run entities, i.e. the Ministry of Trade and Industry, and 30 percent by SZN, whose CEO is Tara Sharma, all the stakeholders have kept in mind the concerns of Palmenna. Even assurances such as the employees being 70% Palmennian citizens have been adopted by Canstone, despite it causing considerable inconvenience and delay to the business of Canstone. The same is only in furtherance of the mutual goals and benefits derived by one state from the other, and the cordial relations in between the two nations. The same urgency and seriousness has also been demonstrated while complying with the terms of the BIT, and to claim that Canstone is responsible for events which it had no control over, is placing an unfair burden on it, especially considering its paramount efforts in ensuring it made well on its promises and obligations.

38. The relevant article placing environmental obligations on Canstone is Article 5, and stands 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; …

(d) oil of any nature, used, waste or otherwise.

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

39. Before looking at the specific terms of the BIT itself, there needs to be certain consideration as regards the standards of proof and the findings required, before a party can be held liable for breaching certain obligations under international law. Tribunals generally progress in three steps: first, characterising the wrongful act (breach); second, ascertaining that the alleged injury was caused by that breach (causation); and third, determining the amount of compensation due for that injury (valuation).[15]

40. In the current factual matrix, there has been no breach at all, which can be considered while holding Canstone liable. Doctors have only surmised that such infections have been as a result of inhalation of irritant gases or exposure to corrosive chemicals which had travelled through the inland waters or river, and even Canstone's own doctor was impleaded to treat the affected, but neither of them have conclusively said that such infections have been as a result of toxic substances, which originated from Canstone's factories. Dr Ragu even surmised that such infection could be due to any other toxic discharge which was being carried along with the flood water. As assured by Luke

[15] Deutsche Telekom AG v. Republic of India, PCA Case No. 2014-10, Final Award, paras 117-133 (27 May 2020).

Nathan, Canstone was aware of the risks posed by floodwater, and had positioned their employees to ensure that any breach which occurred was quickly reported and addressed.

41. The only possible linkage between Canstone and the infections is the broken relief valve found, which was also quickly repaired and enhanced its ventilation systems inorder to minimize the impact of such damage on both the current crisis, and for futureproofing of the same, further reinforcing its commitment to ensuring that there is no damage to the environment or Palmena's citizens due to any oversight on their part. Only trace amounts of biofuel have been discovered in the samples taken, indicating that such damage could be attributable to any other noxious substance which was unfortunately present in the floodwaters. Additionally, it must also be noted that two other biofuel factories were under maintenance at that time, wherein movement of heavy vehicles and tanks was observed after the flooding. Such vehicles also use biofuel as their fuel source, so there is a possibility of such trace amounts entering the water through such vehicles stored in the factories.

42. Looking at the large amount of variables and suspect amount of conjecture to determine Canstone as the polluter, the counsel had suggested measures which would help in conclusively determining the events leading upto, and the responsibility for, such infections. The same is reiterated herein:

> *"a thorough investigation cannot be conducted until the conclusion of the monsoon season. It argued that the volatile weather conditions during the monsoon made it challenging to accurately assess the extent of the*

damage and identify the root causes of the ventilation system failures, and in extension, the infection."

43. There is also no question of the burden of proof being placed on Canstone, since Article 5 only covers scenarios wherein a discharge is known to have arisen from a certain property. The same has not been proved in the current scenario, since there exist only trace amounts of biofuel present in the sample, and the same could have arisen from an alternative source. Even under general standards of international law, such a reversal of burden of proof cannot be undertaken unless explicitly within the scope of, and under the conditions listed in the BIT. Commentators have argued:

"Costa Rica relied primarily on Article 109 of its Biodiversity Law, which requires that '[t]he burden of proof, of the absence of non- permitted contamination, degradation or damage, shall correspond to whom... is accused of having caused the environmental harm.' The ICJ, however, took the view in Pulp Mills that, as a matter of international law, the precautionary principle does not 'operate as a reversal of the burden of proof.'"[16]

The current factual matrix provides no backing to the claim that there has occurred a dsischarge from Canstone into the water body, and no such reversal of burden of proof can be admitted. Therefore, the evidence currently present is insufficient for Palmenna to demonstrate that it was indeed Canstone's factory, from where the nxious, infection causing chemicals originated.

[16] 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.

44. Finally, the veracity of Jakey's claims have to be called in question, since it is clear that there has been some surreptitious exchange between him and the Governemnt of Palmenna. If the allegations regarding Alan paying off victims of leaks is true, then it is extremely surprising that Jakey did not leave Canstone and publicise such allegations. Making such claims when tensions are high cannot be interpreted as anything but opportunistic. Alan is a well reputed expert in his field, and has the full confidence of everyone in Canstone, including Luke Nathan, Tara Sharma, and Fey Lin. Allegations of intimate relations with Fey Lin are merely hearsay, and his testimony cannot be disregarded on such flimsy and unsupported grounds.

iv) Palmenna is neither entitled to a declaratory award, or damages, since there has been no breach of any of the obligations in the BIT, by Canstone

45. 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. Following from the contentions made above, only Canstone is entitled to an award, holding the Government of Palmenna as solely liable for the damage to the environment and its citizens, and a declaratory award reaffirming the complete non-involvement of Canstone.

46. The non-establishment of a breach will serve as an absolute bar to any claims for compensation put forth by Canstone, but in the highly limited possibility that there has been a minimal impact of such leak on the infections, established standards for

causation then have to be observed. Standards of proof in international law are often more stringent than those in domestic jurisdictions, as has been highlighted through such excerpt:

"How a tribunal characterises the breach thereby provides a baseline for the second step of proving its causal nexus with the alleged injury to the 'high standard off actual certainty' required by international law. That standard has been framed both positively by the PCIJ – that the injury was 'in all probability' caused by the breach– and negatively by the ICJ – that the injury would have been avoided with a 'sufficient degree of certainty'."[17]

Following from the above, there is no proof available which would be enough to prove such factual certainty as is required. There has been no evidence placed on the record to demonstrate that such injury was in all probability caused by a biodiesel leak, and neither is it possible to prove that in the absence of such leak, or damage to the valve, the injury could have been avoided to a certain degree of certainty.

47. To satisfy such standards, what is essential is a scientific study dileanating when the pressure valve was broken, whether such damage led to release of noxious chemicals into the water supply, and finally, that the chemicals originating from the Canstone factory are the sole ones responsible for causing such respiratory diseases. There is no solid evidence on either of these three factors, which is why any causal link between Canstone and the infections will be highly presumptuous and preliminary. The lack of the evidence, as required above, was also faced by the tribunal in the case of Aven v Costa Rica, wherein it held:

[17] liver Hailes, 'Chapter 6: Valuation of Compensation in Fossil Fuel Phase-Out Disputes', in Annette Magnusson and Anja Ipp (eds), Investment Arbitration and Climate Change, (© Kluwer Law International; Kluwer Law International 2023) pp. 139 -162.

"Instead, Costa Rica only made a general reference to environmental damage, 'without specifying clearly and precisely the facts to be proved within the counterclaim, particularly the evidence that the Claimants are the perpetrators of all environmental damage."[18]

48. The nature of environmental damage is such that there can be various contributors leading to one effect, and this reality has been recognized by tribunals and commentators alike. As one article stipulates:

"The International Court of Justice (ICJ) has acknowledged the difficulties of proving environmental harm, given that 'the damage may be due to several concurrent causes' and that 'the state of science regarding the causal link between the wrongful act and the damage may be uncertain.' (93) As a result, it might prove more challenging to establish factual connection in this type of counterclaim."[19]

It must also be kept in mind that neither the BIT, nor the domestic law in Palmenna, provides for compensation to be made in cases where environmental damage has occurred. Therefore, there is no basis on which Canstone can be asked to make good the compensation as ordered by the Court, since there is no way to determine the extent or the nature of such damage. The only recourse present with Palmenna, then lies within international law, and the polluter pays principle, however, the same have not been integrated into the BIT, which means that no claim

[18] Aven v Costa Rica

[19] Id at 2.

for compensations can be successfully claimed by Palmenna, since there is no remedy provided, even in arguendo that there has been a breach which has fallen short of Canstone's obligations as set out in the BIT.

49. Even under international law, as discussed, there is a higher burden of proof which is followed, and Palmenna's admitted evidence falls extremely short of fulfilling such burdens. A further look at international law and compensation, in environmental counterclaims, can help us look at other potential factors which can influence such a determination, and are as follows:

> *"Where this is not the case, quantitative (scale and/or irreversibility of damage) and qualitative (protected or endangered area status) indicators would likely temper the assessment of compensation."*[20]

50. In the current case, there exists no claim of there being in existence a large scale humanitarian disaster, or irreversible damage which is to be remedied at a cost to the state exchequer. The area in protection is also not specifically reserved, protected or endangered, requiring special care or consideration. Therefore, through the paragraphs above, we see that there is no causal relation, scientifically demonstrated, of Canstone to the damage based on which compensation is to be paid, there is no grounding in the BIT or domestic law for the calculation of compensation, and non-fulfillment of international standards of proof based on which Canstone can be held liable. All of the above necessitates, that this tribunal determine that the court ordered compensation be

[20] 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.

paid solely by the government, and that it declare Canstone completely uninvolved in the pollution and the infections.

PRAYER

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

- The quarter monthly report submitted by Alan is in the nature of a valid EIA, and Canstone has complied with Article 4 of the BIT.
- Canstone has acted in good faith, and the infections to the populace cannot be attributed to any fault on the part of Canstone.
- Canstone has fulfilled its obligations under Article 5 of the BIT.
- The High Court ordered compensation must be unilaterally borne by the Government of Palmenna.

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.