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INTERNATIONAL MOOT COMPETITION

12 OCTOBER TO 15 OCTOBER 2024

ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORANDUM FOR THE RESPONDENT

CLAIMANT		RESPONDENT
THE FEDERATION OF PALMENNA	V.	CANSTONE FLY LIMITED

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STATEMENT OF JURISDICTION

The **Federation of Palmenna** ("**Palmenna**") and the **Independent State of Kenweed** ("**Kenweed**") have, pursuant to the Bilateral Investment Treaty ("PK-BIT") signed between them, agreed to submit any dispute arising between the countries or investors to arbitration administered in Kuala Lumpur, Malaysia in accordance with the Asian International Arbitration Centre Rules 2021 ("**AIAC Rules**")

QUESTIONS PRESENTED[1]

(a) Whether the Pre-Arbitration Steps laid out in Article 12 of the PK-BIT must be complied with before the Claimant can commence arbitration proceedings against the Respondent;

(b) Whether the Claimant is precluded from initiating arbitration proceedings against the Respondent due to similar legal proceedings previously commenced by activists in the Claimant against SZN, a 30% shareholder of the Respondent in the Claimant's domestic courts;

(c) Whether the Respondent has breached their obligations under the PK-BIT; and

(d) If the answer to issue (c) is decided in the affirmative, whether the Claimant is entitled to an award of declaration and damages.

[1] Pursuant to paragraph 58 of the 19th LAWASIA International Moot Problem 2024.

STATEMENT OF FACTS

1. In August 2021, the Claimant entered into a Memorandum of Understanding ("**MOU**") with its neighbouring state, Kenweed, to encourage investments between the two states.[2] Discussions had taken place earlier in July 2021 between M Akbar ("**PM Akbar**"); Prime Minister Gan Ridhimajoo of Kenweed ("**PM Gan**"); and Tara Sharma ("**CEO Tara**") (CEO of Kenweed's largest energy company, KLT Company Limited ("**KLT**")). The three parties discussed the possibility of Mehstone Star Limited ("**Mehstone**"), a company incorporated in Kenweed, setting up a subsidiary in the Claimant for the production of palm oil biofuel.[3]

2. During these discussions, PM Akbar assured PM Gan that "*as long as [he does] what it takes to ensure [his] business is environmentally sound, [PM Akbar] would help do whatever it takes for [his] company to set up in Palmenna*."[4] After these discussions, and the subsequent signing of the MOU, PM Akbar pushed for the materialisation of the agreement, telling PM Gan that he would not rush the timeline of submitting the necessary papers to the relevant Ministry.[5]

3. On 3 October 2021, the PK-BIT was officially signed between the Claimant and Kenweed.[6] Canstone Fly Limited ("**the Respondent**") was subsequently incorporated in the Claimant on 26 October 2021, and secured two plants in Appam and Karheis. 70% of the Respondent's shares are held by Mehstone, with the remaining 30% being held by SZN Company Limited ("**SZN**"); a company owned by Luke Nathan, CEO Tara's

[2] Record, [13].
[3] Record, [14].
[4] Record, [15].
[5] Record, [19].
[6] Record, [20].

fiancé.[7] Luke Nathan had been sighted at the signing ceremony of the MOU.[8] The Respondent operates two biodiesel plants - one in Appam, Palmenna's capital city and another in Karheis.[9]

4. At the outset, it was decided that the nominees of SZN would manage the day-to-day operations of Canstone while Tara Sharma, CEO of KLT, which owns 40% of the shares in Mehstone, would determine the general policies regarding Canstone. Notably, during the employment process and press statements, Luke Nathan (CEO of SZN) appeared as the face of Canstone in addressing the public.[10] Further, Canstone engaged Alan Becky as the QC, a seasoned professional in the biodiesel production industry, to supervise Canstone's two plants. After his employment, Alan ordered an environmental assessment note and a report on the condition of the machinery and equipment to be made. The report was conducted every four months and presented to the stakeholders.

5. In mid-February 2023, Canstone's Karheis facility received an unsigned note regarding a potential leak in one of the tanks used to store transesterified palm oil. A prompt inspection by Alan, however, led him to conclude that the note was a hoax and there was no such leak.

6. Through November 2023, Palmenna experienced heavy rainfall. Neighbouring factories at the Appam facility shut down their operations and evacuated. As Alan was uncontactable in Karheis, Lee, the manager of the Appam facility, ordered operations to

[7] Record, [9].
[8] Record, [16].
[9] Record, [21].
[10] Record, [23] and [27].

resume as normal. Presumably, Canstone's automated monitoring and control systems of the storage tanks continued to function as usual too.[11] On 26 November, water accumulated on streets and low-lying areas. Appam witnessed one of the worst flash floods it has ever experienced.

7. Shortly after the flood, nearby occupiers were admitted to the hospital due to respiratory tract injuries. The doctors found that the infection could have been caused by the inhalation of irritant gases or corrosive chemicals which had travelled through the inland waters or river.

8. Before formal investigations commenced, former Prime Minister Elsie took to Birdie to suggest that Canstone was responsible for the infections. Her comments gained traction and inspired activists to take to the streets in protest and initiate legal actions against the Claimant and SZN.

9. The local proceedings revolved around whether the drainage and ventilation systems of the biofuel facilities were inadequate, and whether the authorities and the Claimant were responsible for the consequent disaster. The Claimant defended themselves and, following an unfavourable decision by the High Court of Palmenna ("**the High Court**"), appealed against the said decision. The Court of Appeal of Palmenna (**"the Court of Appeal**") has not given any direction regarding the appeal.

10. Feeling frustrated about the dismal situation revolving around what was supposed to be his political medal, PM Akbar convened a conference call on 1 March 2024 involving

[11] Record, [34].

Tara Sharma, Alan and Luke Nathan. As the call commenced, emotions ran high and the call ended with vigorous debate and disagreement. Merely 5 days after the conference call, the Claimant commenced arbitral proceedings against the Respondent.

SUMMARY OF PLEADINGS

I. THE PRE-ARBITRATION STEPS MUST BE COMPLIED WITH BEFORE THE CLAIMANT CAN COMMENCE ARBITRAL PROCEEDINGS AGAINST THE RESPONDENT

1. Article 12 of the PK-BIT mandates that parties must attempt negotiation and mediation before commencing arbitral proceedings ("**Pre-Arbitration Steps**"). The Pre-Arbitration Steps must be complied with as they are sufficiently certain, mandatory and not futile. The Claimant failed to comply with the Pre-Arbitration Steps. Therefore, this Tribunal has no jurisdiction to hear this matter.

II. THE CLAIMANT IS PRECLUDED FROM INITIATING THIS ARBITRATION AGAINST THE RESPONDENT AS SIMILAR PROCEEDINGS HAVE ALREADY BEEN BROUGHT BEFORE THE COURT OF APPEAL

2. Regardless of the doctrine applied to address the issue of parallel proceedings, the underlying concern of conflicting decisions is the focus of the current issue and should preclude the present proceedings.

3. Alternatively, the doctrines of *res judicata*, *lis pendens* and abuse of process apply to prevent the same or related parties from relitigating the same or related issues. The doctrine of *res judicata* applies to preclude this arbitration as it is parallel to the issue decided in the High Court of Palmenna which is not on appeal and hence final and conclusive for the purpose of *res judicata*.

4. Further and in the alternative, if the decision on that specific issue in the domestic courts is not final and conclusive, the doctrines of *lis pendens* and abuse of process apply to preclude the arbitration, as the two proceedings ultimately concern the same dispute arising from the same circumstances and seeking the same relief.

III. THE RESPONDENT DID NOT BREACH THE PK-BIT

5. The Respondent does not have any obligations under Art 4 of the PK-BIT as its activity of biodiesel production does not fall under the definition of an activity that has "*significant environmental impact*" and is not included in the list of activities in Art 4(2). Further, the Claimant is estopped from claiming for the Respondent's breach of Art (4) due to their prior representations and conduct upon which the Respondent relied. In any event, the quarterly Reports submitted by the Respondent are sufficient to constitute an EIA.

6. The Respondent also did not breach Art 5 of the PK-BIT. Mere circumstantial evidence is not sufficient to prove the origin of the contamination in the inland water, and such circumstantial evidence as a whole is not strong enough to demonstrate that the Respondent is a source of the contamination. Even if such pollution originates from the Respondent's facility, the floods, as a force majeure, exempts the Respondent from liability for their breach.

IV. NO AWARD OF DECLARATION OR DAMAGES IS APPLICABLE TO THE CLAIMANT

7. Even if the Respondent breached Articles 4 and 5 of the PK-BIT, the Claimant is not entitled to an award of declaration or damages. The declaratory relief sought by the Claimant should not be granted as the declaration sought is one of fact. Further, there is no real and existing conflict that puts the Claimant or the Respondent's legal position at risk and the declaration serves no practical purpose.

8. Further, the Claimant cannot recover damages for environmental harm as there is insufficient evidence to show more than nominal pure environmental damage and that causation is made out with regard to consequential environmental damage.

PLEADINGS

I. THE PRE-ARBITRATION STEPS MUST BE COMPLIED WITH BEFORE THE CLAIMANT CAN COMMENCE ARBITRATION AGAINST THE RESPONDENT

1. The Pre-Arbitration Steps outline parties' intentions to resolve disputes through alternative dispute resolution, before proceeding to arbitration. The Claimant has clearly disregarded these intentions, commencing arbitral proceedings on 6 March 2024, a mere five days after the last discussion between parties. In these circumstances, the Claimant is now, after clearly breaching the terms of Art 12, conveniently arguing that the Pre-Arbitration Steps are non-mandatory.

2. Dispute resolution clauses that the Parties covenanted to adhere to must be complied with.[12] Tribunals have only allowed for the non-compliance of Pre-Arbitration Steps in the rare event of futility, if there is hope in reaching a settlement through the Pre-Arbitration Steps.[13] However, compliance with the Pre-Arbitration Steps is not futile in the current case and the futility exception does not apply.

[12] Gary Born, Marija Scekic "Chapter 14: Pre-arbitration procedural requirements 'A Dismal Swamp'" ("**Gary Born, *'A Dismal Swamp'*")** in Practising Virtue Inside International Arbitration (David D. Caron ed) (Oxford University Press, 1st Ed, 2015) at p 246; see also Dyala Jimenez Figueres "Multi-Tiered Dispute Resolution Clauses in ICC Arbitration" in ICC International Court of Arbitration Bulletin Vol 14/No. 1 at p 72.
[13] Gary Born, *'A Dismal Swamp'* at pp 253 – 254.

A. The Pre-Arbitration Steps in Art 12 of the PK-BIT are mandatory, and were not complied with

3. The Pre-Arbitration Steps should be interpreted with regard to the "*plain and ordinary*" meaning of the words used, in light of the "*object and purpose*" of the treaty pursuant to Art 31 of the Vienna Convention on the Law of Treaties ("**VCLT**")[14] (which the parties are both signatories to).[15] Accordingly, such mandatory language in Art 12 of "*shall*", "*first ... then*" clearly indicates parties' intentions for disputes to be brought to arbitration only after negotiation and mediation were first exhausted as a mandatory obligation.

4. This is similar to *EcoDevelopment v Tanzania*, where the dispute resolution provision contained similar wording to the current case, stating that disputes "*shall*, if possible, be settled amicably".[16] The court held that the obligation was mandatory as the word "*shall*" was used and indicated that the obligation must be performed in good faith for the full waiting period before the arbitration clause may be invoked.[17] Therefore the use of "*shall*" in this case likewise indicates that the clause is a mandatory pre-condition that must be performed in full.

5. In contrast, in *ICC Case 10256*, the dispute resolution clause specified that if parties were unable to resolve a dispute through mediation, then they "*may*" refer it to an expert who would consider the dispute. Consequently, the tribunal held that the clause was non-binding because the term "*may*" suggested that compliance with the Pre-Arbitration Steps

[14] Vienna Convention on the Law of Treaties (1969), Article 31.
[15] Clarifications, 4.
[16] EcoDevelopment in Europe AB and EcoEnergy Africa AB v. United Republic of Tanzania, ("***EcoDevelopment v Tanzania***") ICSID Case No. ARB/17/33, Award (13 April 2022) at [256].
[17] *EcoDevelopment v Tanzania* at [257].

was permissive and not mandatory. Either party was thus free to refer the dispute to arbitration, whether or not the Pre-Arbitration Steps had been fulfilled.[18]

6. Despite this, the Claimant did not comply with any of the Pre-Arbitration Steps. Further, while the Claimant may suggest that the conference call was sufficient to fulfil "*good faith negotiation*", this would be sorely misconceived. Parties during the call evinced obstructive behaviour opposite of "*good faith*", commencing the conference call with "*emotions [running] high*",[19] with "*tensions escalating further*"[20] into the call, and then "*abruptly*"[21] ending the call. As such, the Claimant has not complied with the mandatory Pre-Arbitration Steps and cannot commence arbitration.

B. The Pre-Arbitration Steps in Art 12 of the PK-BIT are sufficiently certain

7. Aside from being mandatory, the Pre-Arbitration Steps are sufficiently certain to be complied with and enforced. This test of 'certainty' is determined by whether they are furnished with enough procedural details such that any need for further agreement on said details before proceeding is eliminated.[22]

[18] *ICC Case No 10256*, Interim Award (12 August 2000).
[19] Record, [49].
[20] Record, [51].
[21] Record, [51].
[22] *Holloway v Chancery Mead* at [81].

(1) The negotiation step in Art 12(1)(a) of the PK-BIT is sufficiently certain

8. While the claimant might take objection with the certainty of 'good faith' in Art 12(1)(a) of the PK-BIT, this would contradict increasingly common accepted understandings of 'good faith'. While 'good faith' may be difficult to define, in the context of performing treaty obligations, it is undoubtedly a general principle in law that is generally understood as "*carrying out the substance*" of the obligation "*honestly and loyally*".[23]. Treaty obligations that are to be performed in good faith are common and in fact Art 69(2)(b) of the VCLT refers to "*acts performed in good faith*" without further definition of the term.[24]

9. Multiple national courts have also enforced similar "good faith" obligations. In *HSBC v Toshin*,[25] the Singapore Court of Appeal held that "*good faith*" was enforceable since it simply referred to acting "*honestly*"[26] and "*observing the reasonable commercial standards of fair dealing*".[27] In coming to this conclusion, the court found support in the English High Court's definition of good faith as being "*faithful to the agreed common purpose*" of parties in *Compass Group*.[28] Therefore, it would be unreasonable to suggest that the Art 12(1)(a) of the Pre-Arbitration steps is too uncertain to be enforced.

10. In any event, Art 12(1)(a) merely mandates that parties "*attempt*" to negotiate in good faith. Therefore, the obligation is broader and requires less certainty. Tribunals have been

[23] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, (Cambridge University Press, 2006), at p 105-119.
[24] VCLT Art 69(2)(b).
[25] *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v Toshin Development Singapore Pte Ltd* ("***HSBC v Toshin***") [2012] SGCA 48.
[26] *HSBC v Toshin* at [45].
[27] *HSBC v Toshin* at [47] - [48].
[28] *Compass Group UK and Ireland Ltd (trading as Medirest) v Mid Essex Hospital Services NHS Trust* ("***Compass Group***" [2012] EWHC 781 at [97].

able to determine from the entirety of the Parties' actions whether the Parties took the necessary and appropriate steps in *attempting* to reaching a settlement.[29]

(2) The mediation step in Art 12(1)(b) of the PK-BIT is sufficiently certain

11. Article 12(1)(b) and Art 12(1)(c) of the PK-BIT states that the dispute will be referred *"to mediation*" if "*the dispute is not resolved via negotiation*" and then referred only to arbitration after "*90 days*" from the commencement of mediation (the "**Mediation Step**"). These are enough procedural details to make the steps sufficiently certain as where clauses contain provisions such as a limited duration of conciliation, like the 90 day cooling off period in the Mediation Step, they are more likely to be enforceable.[30]

12. While the Mediation Step does not state which mediation centre the dispute should be referred (whether in Palmenna or Kenweed),[31] this omission does not cause it to be uncertain. Instead, Art 12(1)(b) can interpreted, based on its "*plain and ordinary*" meaning,[32] to mean that that partiesshould attempt any form of "mediation" for a period of 90 days.

13. This interpretation would provide for greater flexibility in the parties' choice of mediation frameworks and commercial sensibilities would likely provide sufficient certainty. For instance, in this case, the natural choice would be the Palmennian

[29] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco [I]*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001) at p 614.
[30] Gary Born, *'A Dismal Swamp'* at p 232 - 233, citing *Fluor Enters v Solutia*, 147 F Supp 2d 648 at p 5.
[31] Clarification, 1.
[32] VCLT, Art 31(1)

mediation centre as the parties are Palmennian and the incident took place in Palmenna as well. Hence, the Mediation Step remains sufficiently certain and enforceable.

C. The compliance with the Pre-Arbitration Steps in Art 12 of the PK-BIT is not futile

14. Notwithstanding the validity and mandatory nature of the Pre-Arbitration Steps, the Claimant may attempt to argue that since parties will not meaningfully change their stance, compliance with the Pre-Arbitration Steps is futile and should not be required.[33] However, such an assertion is unsubstantiated on the facts.

15. Pre-arbitration steps have only been held as futile in exceptional circumstances such as when parties have already attempted multiple and extensive rounds of conciliation, convincing the tribunal that their stances will not change. In *Teinver v Argentina*, for example, the parties were to attempt negotiation for six months before referring the dispute to the Argentine courts for a minimum of 18 months and then to the tribunal.[34] Despite failing to comply with the requirement to submit the dispute to the Argentine courts for minimally 18 months, the tribunal held the parties did not need to fulfil it since doing so would be futile.[35] This was because the parties' stances would not change after the year-long intense negotiation and three settlement agreements that they had attempted.[36]

16. In contrast, in the present case, parties had only communicated once in a virtual call before the Claimant commenced arbitration a mere five days later. Unlike *Teinver v*

[33] Gary Born, *'A Dismal Swamp'* at p 253 - 254
[34] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ("***Teinver v Argentina***") ICSID Case No. ARB/09/1, Decision on Jurisdiction (21 December 2012) at [74].
[35] *Teinver v Argentina* at p 25.
[36] *Teinver v Argentina* at p 14.

Argentina, there were no repeated attempts (failure of which could signal futility), between the parties, before the Claimant resorted to arbitration. As such, the Claimant's argument based on the futility exception to bypass the Pre-Arbitration Steps is unmeritorious and should also fail.

D. The lack of compliance with the Pre-Arbitration Steps goes to the jurisdiction of the Tribunal

17. On a final note, the Pre-Arbitration Steps are condition precedents to arbitration, non-compliance of which deprives this Tribunal of its jurisdiction to hear the case, Hence even if the Pre-Arbitration Steps are uncertain or futile, the tribunal does not have the jurisdiction to bypass them and hear the dispute.

18. This is the current position in Malaysian law, which is the law of the seat. This is relevant because the Tribunal's award may be set aside on the basis of non-compliance with the Pre-Arbitration Steps if it is a matter of jurisdiction under the law of the seat. In *Usahasama,* the Malaysian High Court held that pre-arbitration steps were conditions precedent to arbitration that had to be fulfilled before the Arbitrator could assume jurisdiction.[37] The court reasoned that the "*parties [had] agreed contractually to a pre-condition to be fulfilled before there [could] be a valid reference to Arbitration*" and that "*an arbitrator's jurisdiction is contractually agreed by both parties to an Arbitration Agreement*".[38] This is also the view taken by many tribunals. For instance, *Almazyria v*

[37] *Usahasama* at [18].
[38] *Usahasama* at [18].

Kuwait describes such steps as bring an "*integral part of the State's consent rather than a negligible formality*" which would go towards the tribunal's jurisdiction.[39]

19. Likewise, in the present case, the Pre-Arbitration Steps of negotiation and mediation are mandatory condition precedents to arbitration which have not been fulfilled. Accordingly, the agreement to arbitrate in Art 12(1)(c) cannot be invoked and the Tribunal does not have jurisdiction to hear the case.

II. THE DOMESTIC PROCEEDINGS PRECLUDE THE CLAIMANT FROM INITIATING ARBITRATION

20. The legal proceedings in Palmenna ("**Domestic Proceedings**") preclude the commencement of the present arbitration as both proceedings concern the very same dispute of whether a discharge had emanated from the Respondent's facilities and whether said alleged discharge resulted in the victims' respiratory tract infections. The Claimant should thus be precluded from getting a second bite of the cherry, under the concerns of conflicting findings of facts, as well as the doctrines of *res judicata*, *lis pendens*, and abuse of process.

21. Regardless of which doctrine should be applied to address the issue of parallel proceedings, the underlying concern of conflicting findings of fact is the focus of the current issue and should preclude the present proceedings. Further, the Respondent submits that the doctrine of *res judicata* is attracted as the domestic proceedings are final

[39] Almasryia for Operating & Maintaining Touristic Construction Co. L.L.C. v. State of Kuwait, ICSID Case No. ARB/18/2, Award on the Respondent Application under Rule 41(5) of the ICSID Arbitration Rules (1 November 2019) at [39].

and conclusive. Alternatively, the doctrine of *lis pendens*, which governs ongoing parallel proceedings, is applicable.

22. Under both doctrines, the key inquiry is whether the domestic proceedings and current arbitration are similar enough to be considered the same dispute. The test used to evaluate if the two competing proceedings are the same dispute should be the Fundamental Basis Test and not the Triple Identity Test. Finally, in the alternative, the doctrine of abuse of process applies to preclude the current arbitration.

A. Concerns about conflicting findings of fact should preclude the current proceedings

23. Regardless of the legal doctrines which the Claimant may adduce in favour of not precluding the current proceedings, the central focus of tribunals is whether previous facts which arose in the previous proceedings are central to the current proceeding.[40]

24. This was laid out in *Luchetti v Peru*, which held that "*whether the focus is on the 'real causes' of the dispute or on its 'subject matter,'*" the tribunal will "*have to determine whether or not the facts or considerations that gave rise to the earlier dispute continued to be central to the later dispute."* [41]

25. In *Luchetti v Peru*, the Peruvian municipality claimed that the Chilean claimant's plants were constructed without abiding to its applicable environmental laws.[42] In response, the claimant commenced domestic litigation and arbitration separately, alleging before the

[40] *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru* ("***Luchetti v Peru***"), ICSID Case No. ARB/03/4, Award (7 February 2005) at [50].
[41] *Luchetti v Peru*, at [50].
[42] *Luchetti v Peru*, at [18].

tribunal that the respondent had breached its obligations to protect investors under the Peru-Chile BIT.[43]

26. The tribunal, holding that both proceedings had the same origin and source declined to hear the merits of the case before it.[44] It decided that both proceedings arose from the same facts, that is, the Peruvian municipality's "*repeated efforts to compel Claimants to comply with the rules and regulations applicable to the construction of their factory*".[45] Despite the different legal bases for the claims and the argument that the claimant's rights and obligations under the BIT were only an issue in the arbitration, not the domestic dispute, the tribunal focused on the factual similarities[46] and noted that a domestic dispute "*can relate to the same subject matter*".[47] The arbitration was therefore precluded solely on the basis of factual similarities.[48]

27. Similarly, the Domestic Proceedings and the present dispute ultimately centre around the same finding of fact — whether there was or was not a discharge from the Respondent's factory. As demonstrated in *Luchetti v Peru*, it is irrelevant that this arbitration concerns a treaty claim, or that involves issues which are not identical to the domestic proceedings, since the concern is ultimately that the parallel proceedings centre around the same subject matter. As such, this tribunal has no jurisdiction to hear the current dispute.

[43] *Luchetti v Peru*, at [23].
[44] *Luchetti v Peru*, at [53].
[45] *Luchetti v Peru*, at [53].
[46] *Luchetti v Peru*, at [54]-[55].
[47] *Luchetti v Peru*, at [59].
[48] *Luchetti v Peru*, at [59].

B. The doctrine of *res judicata*, or in the alternative, *lis pendens*, applies to preclude the Claimant from commencing arbitration

28. The doctrines of *res judicata* and *lis pendens* apply to preclude proceedings when there is either a concluded or ongoing parallel proceeding respectively. Under the doctrine of *res judicata*, if the subject-matter of a prior decision is an incidental matter in subsequent proceedings, the parties to said prior decision are prohibited from bringing the same legal action.[49] Besides the requirement that the prior decision must be final and conclusive, the requirements for similarity under the doctrine of *res judicata* and *lis pendens* are the same.

29. Consequently, the Respondent pleads that *res judicata* applies to preclude the Claimant from commencing arbitration as the decision of the High Court on the issue parallel to the current proceedings is final and conclusive and the proceedings are parallel according to the Fundamental Basis Test ("**FBT**"). Further and in the alternative, if the Tribunal does not find that the High Court decision is final and conclusive for the purposes of *res judicata*, the proceedings are still parallel and should be stayed under the doctrine of *lis pendens.*

(1) The prior decision of the High Court is final and conclusive

[49] *Ampal-American Israel Corp v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction (1 Feb 2016) at [255].

30. For a decision to be *res judicata*, it must be final and conclusive in the particular court in which it was pronounced.[50] If the decision is on appeal, as the Domestic Proceedings are, it usually cannot be considered final and conclusive.[51]

31. This principle applies to the issues of the Claimant's negligence and whether SZN was the wrong party to the suit, as they are the arguments made on appeal and hence not final and conclusive. It does not apply to the High Court's decision that SZN breached their duty of care because SZN only appealed on the ground that they were the wrong party to the suit or, in other words, whether they had owed a duty of care. Since SZN made no alternative arguments as to whether the duty of care was breached, which is the issue parallel to the current proceedings, the High Court's decision on this specific issue is final and conclusive.

(2) The Domestic Proceedings and the current arbitration are parallel for the purposes of the doctrines of res judicata*, or in the alternative,* lis pendens

32. The Domestic Proceedings and the current proceedings are parallel as they stem from the same normative source. In determining whether the doctrines of *res judicata* and *lis pendens* apply, the key question is whether the two proceedings concern the same dispute.

33. The Respondent submits that the test used to determine this should be the FBT since it more effectively addresses the concerns behind *res judicata* and *lis pendens* — namely,

[50] *Sang Cheol Woo v Charles Choi Spackman and others* [2022] SGHC 298 at [23], citing *Bellezza Club Japan Co Ltd v Matsumura Akihiko and others* [2010] 3 SLR 342 at [16].
[51] *Powercom Co, Ltd v Sunpower Semiconductor Limited* [2024] SGHC 89 at [13].

legal uncertainty, double recovery and the use of oppressive litigation tactics.[52] This is because the FBT focuses on the same subject matter and the underlying facts supporting the claims in competing proceedings, as compared to the Triple Identity Test, which necessitates that the proceedings must concern the same parties, subject matter and relief sought.

34. Tribunals have favoured the FBT over the Triple Identity Test due to its practicality as opposed to the latter's formalistic nature, [53] especially in circumstances where the parallel proceedings are between domestic and international fora. In *Costa Rica v Supervision*, when examining whether a domestic proceeding and the subsequent ICSID arbitration concerned the same dispute, the tribunal rejected the Triple Identity Test in favour of the FBT.[54]

35. There, the domestic proceedings concerned the claimant's subsidiary who sought to nullify the respondent's executive order, while the arbitration was commenced by the claimant who adduced facts from an entirely different time period and sought compensation based on a contract. Despite these differences, the tribunal nonetheless held that both proceedings *"[shared] a fundamental normative source and [pursued] ultimately the same purposes*" as they were all ultimately based on the claimant's violation of the contract and what the claimant was seeking could ultimately be "*attributed to the [Respondent's breach]*".[55] Lastly, the tribunal explicitly rejected the

[52] Filip De Ly, Audley Sheppard, "ILA Final Report on Lis Pendens and Arbitration" at [1.4].
[53] Markus A. Petsche "*The Fork In The Road Revisited: An Attempt To Overcome The Clash Between Formalistic and Pragmatic Approaches*" in Washington University Global Studies Law Review Vol. 18:39 ("**Markus A. Petsche, '*The Fork In The Road Revisited*'**") at p 422.
[54] *Supervision y Control S.A. v. Republic of Costa Rica* ("***Supervision v Costa Rica***"), ICSID Case No. ARB/12/4, Award (18 January 2017) at [313] – [330].
[55] *Supervision v Costa Rica* at [315] - [317].

application of the Triple Identity Test, as it "*remove[d] all legal effects from the fork in the road clause*" which, similar to the doctrines of *res judicata* and *lis pendens*, had the purpose of preventing the same dispute from being re-litigated.

36. Indeed, the FBT more appropriately addresses the question of whether two disputes involving investor-state arbitration and domestic proceedings are the same. Due to the strict and formalistic nature of the Triple Identity Test, parties may dress up the same dispute as different claims and seek different heads of damages to re-litigate the same issue before another fora, leaving the concerns behind the doctrines of *res judicata* and *lis pendens* unaddressed and depriving the doctrines of their practical effect.[56] The FBT, on the other hand, examines the dispute itself as opposed to the technicalities of the legal claims.[57] In this sense, the Fundamental Basis Test addresses the main problem of one dispute giving rise to more than one claim.[58]

37. Under the Fundamental Basis Test, if the claims in the Domestic Proceedings and the current arbitration have "*the same normative source*", are brought for the "*same [purpose]*",[59] and do not have an "*autonomous existence*", both proceedings will be treated as the same dispute and the doctrines of *res judicata* or *lis pendens* will be attracted to preclude or stay the current proceedings respectively.[60]

38. Similar to *Costa Rica v Supervision* , both proceedings in the current case stem from the same normative source or underlying events — that is, the flood, consequent leak and

[56] Markus A. Petsche, '*The Fork In The Road Revisited'* at p 423.
[57] Markus A. Petsche, '*The Fork In The Road Revisited'* at p 394.
[58] Markus A. Petsche, '*The Fork In The Road Revisited'* at p 422.
[59] *Supervision v Costa Rica* at [315]
[60] *Supervision v Costa Rica* at [309] citing *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ("***Pantechniki***") ICSID Case No. ARB/07/21 at [61].

infections in Appam. Further, the ultimate relief sought by the Claimant in both proceedings are identical - to rid itself of liability regarding the Appam incident. For instance, in the domestic courts they argued that they "*[bore] no liability in what transpired*",[61] in the context of the contamination and resultant injuries of their citizens.[62] This corresponds to the declaration sought, which attempts to push any liability for the injuries onto the Respondent by stating that the "*failure and/or omission of Canstone to abide by the terms of the BIT had resulted in respiratory tract infections amongst the citizens of Palmenna*".[63]

C. In the alternative, the Claimant is precluded from commencing arbitration on the ground of abuse of process

39. Even if neither *res judicata* nor *lis pendens* applies, the current arbitration is still precluded based on the doctrine of abuse of process, as this doctrine has been extended to apply in cases such as the present proceedings, where the parties involved and the legal basis is different but the circumstances and harm are the same.

40. Abuse of process is a recognised principle of international law which prohibits the exercise of a procedural right in a manner contrary to the purpose for which the right was established.[64] This has been applied to combat misuses of the corporate structure to gain jurisdiction before an investment tribunal after s dispute has become foreseeable[65] as well

[61] Record, [43].
[62] Record, [45].
[63] Record, [55].
[64] Hervé Ascensio, *Abuse of Process in International Investment Arbitration*, Chinese J. Int'l L. 764–765 (2014)
[65] Branson, John David, *The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration*, "**Branson, John David, *The Abuse of Process Doctrine Extended***" Journal of International Arbitration 38, no. 2 (2021): 187–214 at p 188

as multiple proceedings involving the same dispute between different parties based on different legal claims, most notably in *Orascom v Algeria*.[66]

41. In *Orascom v Algeria*, the doctrine of *res judicata* did not apply as the settlement of the previous arbitration did not constitute a final and conclusive judgement.[67] Further, the parties were technically different as separate corporate entities despite being part of the same corporate structure, and the legal claims brought arose under separate BITs.[68] The tribunal recognised the potential for investors on multiple levels of the corporate chain to bring proceedings under different BITs. However, this does not necessarily allow them to make use of the arbitration clauses to "*assail the same measures and recover the same economic loss*" [69] and that while the "*legal basis for the claims [were] different, the dispute … [was] effectively one and the same*"[70] This is especially so where, as was the case in *Orascom v Algeria*, the relief given to one entity would remedy the harm dealt to others in the same corporate chain.[71]

42. Here, instead of the Respondent abusing the corporate structure, it is the Claimant host state which is taking advantage of the Respondent's corporate structure to circumvent the investment treaty system and the strict requirements of both *res judicata* and *lis pendens*, by claiming against the Respondent instead of SZN, its shareholder. This is all the more so given that in investment treaty cases, the correct party would indeed be the shareholder

[66] *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria*, ("***Orascom v Algeria***") ICSID Case No. ARB/12/ 35, Award, (31 May 2017)
[67] Branson, John David, *The Abuse of Process Doctrine Extended* at p 210.
[68] *Orascom v Algeria* at [485].
[69] *Orascom v Algeria* at [495].
[70] *Orascom v Algeria* at [488].
[71] *Orascom v Algeria* at [498].

investor such as SZN, instead of a subsidiary company that was incorporated in the host state's country itself.[72]

43. The Respondent is merely a subsidiary of the true investors, SZN and Mehstone. Furthermore, it was Tara Sharma and Luke Nathan, the CEOs of the main shareholders of the Respondent, who facilitated the investment, attended the signing ceremony of the BIT, and had control over the Respondent. Therefore, the proper party to this dispute would likely be SZN or Mehstone,

44. The disputes at hand in this case are, like in *Orascom v Algeria*, also "*one and the same*" as they "*concern the same ... events*", similar to what is discussed above at [38]. Furthermore, this is likely an abuse of process given the motive behind bringing the arbitration, which is an important factor in finding abuse of process.[73]

45. Similarly, the motive behind the initiation of this arbitration was clearly to "*overturn*"[74] or otherwise mitigate the effects of the unfavourable decision in the domestic courts. This is evident from PM Akbar's statements as well as the timing of the initiation of arbitral proceedings. The day before the initiation of proceedings,[75] PM Akbar explicitly stated that would do what is "*necessary to overturn [the High Court] decision*", before telling his supporters that they should "*await the big reveal tomorrow*".[76] This implies that the Claimant's initiation of these proceedings was primarily driven by the intention to take advantage of the potential for a conflicting decision in their favour to reduce the

[72] *Talsud, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/04/4, Award (16 June 2010) at 5.33.
[73] *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award (15 Apr. 2009) at [142].
[74] Record, [53]
[75] Record, [53] – [54]
[76] Record, [53]

unfavourable effect of the decision in the domestic courts and would hence contribute to a finding of abuse of process.

III. THE RESPONDENT DID NOT BREACH THE PK-BIT

46. The Respondent did not breach either Art 4 or Art 5 of the PK-BIT. The Respondent does not have any obligation under Art 4 of the PK-BIT, but even if it does, it has fulfilled its obligations. In any case, the Claimant is estopped from claiming a breach of Art 4 of the PK-BIT. The Respondent has not breached Art 5 of the PK-BIT and the Claimant is unable to discharge the burden of proof beyond reasonable doubt to prove otherwise.

A. The Respondent did not breach Art 4 of the PK-BIT

47. Article 4(1) of the PK-BIT states that "*any investor(s) 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.*" The

48. Since the Reports submitted by the Respondent are not explicitly labelled as an EIA, the Claimant may claim that the Respondent has failed to conduct an EIA, thereby breaching Art 4 of the PK-BIT.[77] However, there is no breach of the Art 4 of the PK-BIT, as:

[77] Clarification, 7.

(a) The Respondent does not have any obligation under Art 4 of the PK-BIT because the production of biodiesel is not an activity which may have "*significant environmental impact*";

(b) Even if the Respondent is under an obligation to submit an EIA, the quarterly Reports submitted by the Respondent are sufficient to constitute an EIA;

(c) In any event, the Claimant is estopped from requiring an EIA to be done due to representations made by PM Akbar.

*(1) The Respondent does not have any obligation under Art 4 because the production of biodiesel is not an activity that may have "*significant environmental impact*"*

49. The Respondent's activity is not one that may have "*significant environmental impact*" and hence is not within the ambit of Art 4 of the PK-BIT. To determine whether an activity may have "*significant environmental impact*" under Article 4(2) of the BK-BIT, this Tribunal must consider whether the activity fits the definition of "*significant environmental impact*". Since this is to be done with regard to the plain wording and the object and purpose of the treaty,[78] the Tribunal can determine this with reference to the circumstances surrounding the treaty as well as the listed examples under Art 4(2) of the PK-BIT ("**Listed Examples**").

50. The production of biodiesel is not in the Listed Examples despite the PK-BIT being drafted in the context of the proposed investment into biodiesel production.[79] This indicates that the Parties purposefully did not include the Respondent's activities in the list and that they did not intend for the Respondent to have an obligation under Art 4.

[78] VCLT Art 31(1).
[79] Record, [14]

This conclusion is bolstered by the fact that biodiesel production is not similar to the Listed Activities. The Listed Activities either make large-scale, permanent changes to the surrounding environment, such as in the case of Agriculture, or produce toxic by-products in the natural course of their business, as is the case for Waste treatment and disposal. This is unlike biodiesel production, as the process itself does not necessitate large-scale changes to the surrounding environment to the same extent as Agriculture, for example. Nor are the by-products of biodiesel production as toxic as those produced in the natural course of business from, for example, Waste treatment and disposal. Since the definition of "*significant environmental* impact" in Art 4 of the PK-BIT is likely intended to cover similar activities, which biodiesel production is not, biodiesel production is not covered under Art 4 of the PK-BIT.

(2) Even if the Respondent is under an obligation to submit an EIA, the quarterly Reports submitted by the Respondent are sufficient to constitute an EIA

51. While it is clear from Art 4 that an EIA must be conducted by a "*qualified person*" and submitted to the Claimant's Ministry of Natural Resources and Environmental Sustainability (the "**Claimant's Ministry**"),[80] what exactly constitutes an EIA or a "*qualified person*" was never specified. There are likewise no specific, agreed upon standard requirements in international law or in any of the treaties mentioned in the PK-BIT.[81]

[80] Clarification, 9.
[81] *Pulp Mills on the River Uruguay (Argentina v. Uruguay), ("**Pulp Mills**")* Judgment, I.C.J. Reports 2010 at [205].

52. However, several general principles which have been distilled from international jurisprudence can serve as guidance, namely that an EIA should assess future environmental risk and should be done before and during a project.[82] Despite the fact that the Respondent never explicitly labelled their Reports as an EIA, the Reports fulfil these requirements and were conducted by a "*qualified person*" before being submitted to the Claimant's Ministry.

53. First, an EIA should assess future environmental risk, taking into account factors on a such as the nature and scale of the planned activities.[83] This was explicitly done in the environmental assessment note and Reports which Alan conducted soon after his appointment, as it is stated that these documents would allow the Respondent to evaluate the "*potential environmental risks*" of their operations.[84]

54. Second, States are required to conduct an EIA both before the commencement of a project and continuously throughout its duration.[85] This is fulfilled as the environmental assessment note and the first Report was done "*soon after*" Alan's appointment while the Respondent was still hiring employees. Further, they provided a "*preliminary evaluation*" of "*potential*" risks associated with the plants' operations, indicating that this was done before the commencement of the production operations.[86] Furthermore, the Respondent has also fulfilled their continuing obligation to submit an EIA as the Reports are consistently conducted every 4 months.[87]

[82] *Pulp Mills* at [205].
[83] *Pulp Mills* at [205].
[84] Record, [25].
[85] *Pulp Mills* at [205].
[86] Record, [25].
[87] Record, [25].

55. Third, while there is no guidance on what exactly constitutes a "*qualified person*", the Respondent's QC, Alan, is likely a qualified person, as he is one of the most "*seasoned professionals*" in the industry with 13 years of experience.[88]

56. Finally, while it is never explicitly stated that the Reports were submitted to the Claimant's Ministry, it is likely that they were presented to representatives of the Ministry. This is because the Reports are presented every 4 months to the relevant "stakeholders",[89] of which the Claimant's Ministry would naturally be one of, as the Ministry governing activities such as biofuel production.[90]

57. Therefore, even if the Respondent had an obligation under Art 4(2) to submit an EIA, the Reports submitted by the Respondent are sufficient to constitute EIAs.

(3) In any event, the Claimant is estopped from requiring an EIA to be done due to representations made by PM Akbar

58. In the alternative, the Claimant is estopped from claiming a breach under Article 4 since PM Akbar had represented to the Respondent that the latter need not submit an EIA.

[88] Record, [24].
[89] Record, [25]
[90] Clarification, 9

59. The doctrine of promissory estoppel prevents parties from "blowing hot and cold" or otherwise going back on their words.[91] It requires a clear and unambiguous representation as well as reliance on that statement by the other party.[92]

60. Conduct such as silence can amount to a representation as illustrated in *Temple of Preah Vihear*[93] where the Thai government's silence and lack of query about the map which outlined Preah Vihear as belonging to Cambodia had legal effect as a representation that they "*had accepted the frontier at Preah Vihear*".[94] Repetition of representations, or multiple representations and conduct together can also be indicative of the consistency and clarity of the representation.[95]

61. Presently, the requirement of a clear and unambiguous representation is satisfied through PM Akbar's statement that the Respondent would not need to rush submitting an the necessary papers, such as an EIA, to the relevant Ministry[96] coupled with the later silence on the topic of EIAs from the incorporation of the Respondent in 2021 until now. During this period of silence, the Reports were presented to stakeholders which likely included the Claimant's Ministry.[97] Despite this, the Claimant never contradicted their earlier representations by requesting an EIA.

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[91] *Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, (2 Oct 2006) at [475].
[92] *Canfor Corporation and others v. United States of America*, *UNCITRAL, Order of the Consolidation Tribunal, 7 September 2005*, at [168].
[93] *Temple of Preah Vihear (Cambodia v. Thailand),* Judgement, I.C.J. Reports 1962.
[94] *Ibid*, at 29.
[95] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)* (Judgement – Preliminary Objections) 1988 ICJ 275 at [57].
[96] Record, [19].
[97] Record, [25]

62. Further, reliance is present since the Respondent conducted Reports instead of explicitly labelled EIAs as they would have done if they had known of their obligation under Art 4 of the PK-BIT. As such, the Claimant cannot now turn around and penalise the Respondent for not submitting an EIA, when it had always represented to the Respondent that such a report was not necessary.

B. The Respondent did not breach Art 5 of the PK-BIT

63. Article 5(1)(a) and (d) of the PK-BIT mandates that an investor shall not "*make... or discharge ... any poisonous or polluting matter*" that could damage the beneficial use of a river; or be "*injurious… to public welfare*" or "*oil of any nature",* (collectively, the "**Discharge**"). Article 5(3) of the PK-BIT raises a presumption that where such Discharge occurs, the owner of the property from which it originates "*shall be presumed to have caused it, unless the contrary is proved*".

Therefore, for a breach of Art 5 of the PK-BIT, the Claimant must prove that the Discharge originated from the Respondent's facility. However, the Claimant has failed to do so beyond a reasonable doubt.

(1) The discharge found at Karheis and Appam did not come from the Respondent's facility

64. Crucially, there is absolutely no direct evidence showing that the Respondent created the Discharge that exited their facility. The Claimant had the authority to collect direct evidence from the Respondent's facility and the surrounding waters as the government of Palmenna, yet failed to conduct any investigation. The Claimant may contest that a

thorough investigation cannot be conducted until the end of monsoon season.[98] However, this argument fails to account for the fact that the monsoon season ended in February,[99] giving them ample time to conduct any investigation in the six months between now and the conclusion of monsoon season.

65. The Claimant has therefore resorted to circumstantial evidence to prove that the Respondent created the Discharge that exited their facility. However, the law on circumstantial evidence is clear: (i) an inference can only be drawn from circumstantial evidence if it leaves no room for reasonable doubt;[100] and (ii) where an alternative rational competing inference can be drawn from the facts, the Tribunal is not entitled to draw the first inference presented by the claimant.[101] When circumstantial evidence is used, an inference can only be drawn if it leaves no room for reasonable doubt[102] and where an alternative rational competing inference can be drawn, the Tribunal is not entitled to draw the first inference presented by the claimant.[103] This Tribunal cannot infer that the Discharge originated from the facility because the circumstantial evidence leaves room for reasonable doubt and an alternative rational competing inference can be drawn from the facts.This Tribunal cannot infer that the Discharge originated from the facility because the circumstantial evidence leaves room for reasonable doubt and an alternative rational competing inference can be drawn from.

66. It is clear from the circumstantial evidence surrounding the Karheis incident that there is insufficient evidence to establish a breach. The central evidence supporting the

[98] Record, [42].
[99] Record, [2].
[100] *Corfu Channel Case (United Kingdom v Albania)* 1949 ICJ 4 at 18.
[101] *Corfu Channel Case (United Kingdom v Albania)* 1949 ICJ 4 at 18.
[102] *Corfu Channel Case (United Kingdom v Albania)* 1949 ICJ 4 at 18.
[103] *Corfu Channel Case (United Kingdom v Albania)* 1949 ICJ 4 at 18.

allegations of a leak was an "*unsigned note from a neighbouring factory*",[104] which was disproved through the swift investigations carried out by the in-house expert at Karheis and Alan .[105] The central evidence supporting the allegations of a leak was an "*unsigned note from a neighbouring factory*", [106] which was disproved through the swift investigations carried out by the in-house expert at Karheis and Alan .[107] This introduces "reasonable doubt" into the Claimant's case.

67. Regarding the Appam incident, the Claimant has failed to prove beyond reasonable doubt that there was a Discharge from the Respondent's factory. First, the evidence of a broken pressure relief valve[108] by itself does not show that a leak of toxic chemicals from the tanks could have occurred. The contaminants could consist of "*other various toxic chemicals from other sources, dispersing them throughout the area and contributed to the spread of the infection*".[109] Further, only the Respondent's factory was in operation (though it was not the only factory in the area) which meant that the Respondent's employees were present. This naturally resulted in a third of the hospitalised victims being the Respondent's employees as consisted of most of the individuals present in the area during the flood in the first place.[110]

68. Evidence that the Respondent's facility is the only operating factory in Appam during the time of incident[111] does not prove beyond a reasonable doubt that the biodiesel leaks from the facility of the Respondent. Firstly, there are two neighbouring factories near the

[104] Record, [29].
[105] Record, [29].
[106] Record, [29].
[107] Record, [29].
[108] Record, [39].
[109] Record, [39].
[110] Record, [34].
[111] Record, [34].

Respondent's facility, and despite being able to provide the information, the Claimant has not confirmed whether these factories are also biodiesel factories (and therefore, whether there are other possible sources of a biodiesel leak).[112]

69. Moreover, although the nearby factories declared an emergency evacuation, it is doubtful they could have shut down all equipment and de-contaminated their facilities amidst heavy storms and within merely three days.[113] Furthermore, heavy tanks and machinery were seen entering and leaving such facilities after the flood and were labelled with "*Under Maintenance*" signage[114] which indicates that they, too, were likely to be damaged or affected by the flood such that they could have been the source of the contaminants. Since there is a competing inference that both the nearby factories could be alternative sources of the contaminants, it is not proved that the Respondent's facility is a source of the Discharge beyond a reasonable doubt.

IV. NO AWARD OF DECLARATION OR DAMAGES IS APPLICABLE TO THE CLAIMANT

70. Even if the Respondent breached Articles 4 and 5 of the PK-BIT, the Claimant is only entitled to nominal damages, not an award of declaration **and** damages. The requirements for the award of either declaratory relief or damages are not fulfilled.

A. The requirements for an award of declaration are not met

[112] *Additional Clarifications*, Clarification 3.
[113] Clarification, 13.
[114] Clarification, 10.

71. The Claimant seeks damages alongside the following declaratory relief: "*A declaration that the failure and/or omission of Canstone to abide by the terms of the BIT had resulted in respiratory tract infections amongst the citizens of Palmenna*".[115]

72. This tribunal should only grant the Claimant's declaratory relief if three conjunctive requirements are fulfilled: (i) the declaration is not a statement of fact; (ii) there is a **real and existing conflict** which puts the legal positions of at least one of the parties at risk, and (ii) that the declaration **serves a practical purpose**.[116] All elements are not fulfilled.

(1) *The statement is one of fact*

73. First, this tribunal should not grant the Claimant's sought-after declaration because it is one of fact, which should not be allowed. This has been held across jurisdictions, primarily due to the concern that courts should not "*simply declare facts, detached from the rights of parties*".[117]

74. For example, in *Canada v Iris*,[118] the court refused to grant the Defendant's request for a declaration that a minister's audits were issued for the improper purpose of depriving the Federal Court of jurisdiction to hear the matter before it. This was because such a declaration was one of fact, rather than determining the legal rights of the parties.[119]

[115] Record, at [55].
[116] Beata Gessel-Kalinowska vel Kalisz, *The Legal, Real and Converged Interest in Declaratory Relief* at page 106-107 (citing anonymous ICC case labelled 3.2).
[117] *Canada (Attorney General) v. Iris Technologies Inc.* ("***Canada v Iris**")*2022 FCA 101.
[118] *Canada v Iris.*
[119] *Canada v. Iris Technologies Inc.* 2022 FCA 101, at [15] - [16].

75. Similarly, in Germanic systems, courts have held that mere facts cannot be established via declaratory relief, even if they are legally relevant.[120] For example, the German Federal Court of Justice refused to grant declaratory relief in a divorce case concerning calculations relating to matrimonial property, even though the party seeking such a declaration (one of the divorcing parties) had asserted that it had a "*legal interest*" in the calculation.[121]

(2) There is no real and existing conflict which puts the legal position of the Claimant and/or the Respondent at risk

76. Second, the Claimant should not be awarded declaratory relief is because there is no real and existing conflict putting the legal position of the Claimant at risk. Second, the Claimant should not be awarded declaratory relief because there is no real and existing conflict putting the legal position of the Claimant at risk.

77. However, this is merely a rumour and an ambiguous suspicion that does not fulfil the requirement of a "real and existing" conflict. For example, in a 2011 ICC Award (unreported) , the tribunal noted that: "*a party seeking a mere declaration as to the existence or inexistence of a claim must justify an 'actual interest' to do so.* Tribunals have defined "*real and existing*" conflict to mean that the claimant must have an "*actual*" or "*minimum*" interest in obtaining declaratory relief. For example, in a 2011 ICC Award (unreported) , the tribunal noted that: "*the party must establish that* ***it has***

[120] Alicja Zielińska-Eisen and Tobias Strecker, *'Annex II: Report on Main Features of Declarations in Germany', in Beata Gessel-Kalinowska vel Kalisz, The Legal, Real and Converged Interest in Declaratory Relief*', International Arbitration Law Library, Volume 48 (© Kluwer Law International; Wolters Kluwer Law & Business 2019), pp. 241, referring to *BGH, Judgement dated 3 May 1977* – VI ZR 36/74, NJW 1977, 1288, 1289.)

[121] BGH, Judgement dated 11 July 1979 – IV ZR 159/77, NJW 1979, 2099, 2101.

a specific and determined benefit from such declaration, and not a theoretical interest only."[122]

78. The Claimant may argue that they have an interest in vindicating themselves and proving their innocence to resolve their political concerns, since there are rumours that the opposition is plotting to overthrow the current government of Palmenna.[123] However, not only is their liability an issue to be determined in the Domestic Proceedings, but the political threat is merely a rumour and an ambiguous suspicion that does not constitute a "*specific and determined benefit*".

(3) *The declaration serves no practical purpose*

79. In any event, the tribunal should not grant *both* declaratory relief and damages, as the current declaration which Claimant seeks is merely a reiteration of the tribunal's findings if it were to grant damages, and therefore serves no practical purpose. For instance, in *Europe Cement v. Turkey*, the tribunal declined to make a specific declaration concerning the claimant's wrongdoing because the reasoning in the award would in any event "*provide […] a form of 'satisfaction'" to Turkey.*[124]

80. Likewise, if damages were awarded for the consequential environmental damage in the form of the injuries to the Claimant's citizens, the Tribunal's assessment of causation would entail a finding that the Respondent's failure or omission to abide by the PK-BIT

[122] ICC Award (unreported) by a three-member arbitral tribunal seated in Zurich (November 2009); see also ICC Final Award, Case No. 12502 in Yearbook Commercial Arbitration, 2009, p. 130.
[123] Record, [52].
[124] Europe Cement Investment & Trade S.A. v. Republic of Turkey, ("***Europe Cement v Turkey***") ICSID Case No. ARB(AF)/07/2.

resulted in the injuries of the citizens. In any event, the tribunal should not grant *both* declaratory relief and damages, as the current declaration which Claimant seeks is merely a reiteration of the tribunal's findings if it were to grant damages, and therefore serves no practical purpose. This rule was laid out in *Europe Cement v. Turkey*, where the tribunal declined to make a specific declaration concerning the claimant's wrongdoing, noting that the reasoning in the award would in any event "*provide […] a form of 'satisfaction'" to Turkey.*[125] In the present case, if damages were awarded for the consequential environmental damage in the form of the injuries to the Claimant's citizens, then the Tribunal's assessment of causation would entail a finding that the Respondent's failure or omission to abide by the PK-BIT resulted in the injuries of the citizens.

81. While the exact content of the Award may be confidential unless the parties expressly consent otherwise,[126] the success or failure of the Claimant's arbitration itself will be sufficient to provide an answer to this question.

B. The Claimant is not entitled to damages for environmental harm

82. The Claimant cannot recover damages for environmental harm as there is insufficient evidence to show more than nominal pure environmental damage and causation is not made out with regard to consequential environmental damage. Pure environmental damage refers to material damage to environmental resources, while consequential environmental damage deals with the resultant damage to people or property.[127]

[125] Europe Cement Investment & Trade S.A. v. Republic of Turkey, ("***Europe Cement v Turkey***") ICSID Case No. ARB(AF)/07/2.
[126] AIAC Rules, Rule 21.
[127] Philippe Sands, Jaqueline Peel, Principles of International Environmental Law (Cambridge University Press, 2018) at p 749.

(1) The Claimant cannot recover damages of pure environmental harm

83. Damages for pure environmental harm cannot be recovered because there is insufficient evidence to show significant pure environmental damage. A claim may only be brought in respect of environmental damage if it reaches a "*significant*" magnitude.[128] "*Significant*", as understood in the commentaries to the Draft Principles on the Allocation of Loss of Transboundary Harm, refers to something more than "*detectable*" but need not be at the level of "*serious*" or "*substantial*". It must lead to a "*real detrimental effect*" and be measurable by "*factual and objective standards*".[129]

84. This standard is not met in the present case. Pure environmental damage in this case would most likely constitute any long term or major detrimental effect to the river or land itself. However, there is no evidence as to the quantity of the contaminants in the river, nor any indication as to their effect in the long term. In fact, there is only a mention of mere "*traces*" of biodiesel, which in any case is widely known to be biodegradeable . Therefore, while contaminants may be "*detectable*", there is no indication of a "*real detrimental effect*" and no evidence or "*factual and objective standards*" by which it can be measured.

(2) The Claimant cannot recover for consequential environmental damages because it would result in double recovery

[128] Philippe Sands, Jaqueline Peel, Principles of International Environmental Law (Cambridge University Press, 2018) at p 749.
[129] ILC, Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with commentaries, 2001, *Yearbook of the International Law Commission* (2006-II), Part 2, Principle 2.

85. The Claimant should not be allowed to recover damages, as this would contravene the principle of double recovery. The widely recognised principle of double recovery seeks to avoid granting relief twice for what is essentially the same damage.[130] In this case, while the relief sought is being couched differently, they both seek to remedy the same damage — that of the respiratory tract injuries of the citizens of the Claimant. Notably, however, the High Court of Palmenna has already ordered for compensation to be paid to those injured by the incident,[131] and in the current proceedings (unless otherwise specified) it appears that the Claimant is claiming for the same — a loss suffered by its citizens. As a result, the Claimant should not be awarded damages in this case, when the domestic courts have already ordered the same.

(3) The breach of Art 4 and 5 of the PK-BIT did not cause consequential environmental damage because factual causation is not established

86. Additionally, the consequential environmental damage in the form of the respiratory tract infections was not caused by the Respondent's assumed breaches as both factual and legal causation are not made out. Factual causation requires the damage to have been actually caused by the act or breach in question, while legal causation is made out if the damage is sufficiently closely linked to the breach.[132]

87. Here, factual causation is not established. Factual causation is determined using the but-for test, which establishes factual causation if the consequence would not have occurred

[130] Factory at Chorzów (Merits), PCIJ Series A. No 17, Judgment, 13 September 1928 at [49].
[131] Record, [45].
[132] *Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session*, commentary to ARSWIWA's Art 31 at [10]; *Elliott Associates L.P. v. Republic of Korea,* ("***Elliott v. Korea***") PCA Case No. 2018-51, Award (20 June 2023) at [815].

but-for the conduct or breach in question.[133]This was applied in *Micula v. Romania*, where the tribunal rejected the claim for lost profits because the claimants failed to prove "*with sufficient certainty*" [134] that*,* "*but for Romania's breach of the BIT*"[135]*,* they "*would have earned profits they were allegedly deprived of.*" [136] Likewise, it is not certain that the Respondent's assumed discharge was the cause of the respiratory tract infections. [137] Likewise, it is not certain that the Respondent's assumed Discharge was the cause of the respiratory tract infections.

88. Instead, it remains likely that either or both of the other two factories were also a source of the "*irritant gases or … corrosive chemicals*",[138] as elaborated upon earlier at [68] – [69]. The assumption that the Respondent has breached Art 5 of the BK-BIT by does not preclude the possibility of other factories from being a source of the contaminants as well. Due to this, is not sufficiently certain that the injuries would not have happened but for the Respondent's Discharge.

89. While factual causation would still be established even if the other factories were concurrent causes, this principle would only apply where all of the causes were proved, with the requisite "sufficient certainty" to have contributed to the consequence. But this is not the case here, due to the fact that it is uncertain whether what chemicals even caused

[133] *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, ("***Mason Capital v Korea***") PCA Case No. 2018-55, Final Award (11 April 2024) at [807].
[134] Ioan Micula, Viorel Micula and others v. Romania (I), ("***Micula v Romania***") ICSID Case No. ARB/05/20, Final Award, 11 Dec 2013, at [1117].
[135] *Micula v Romania* at [948].
[136] *Micula v Romania* at [1117].
[137] *Micula v Romania* at [1117].
[138] Record, [36].

the discharge, beyond the vague fact that they are generally "*[irritants]*",[139] "*corrosive*", [140] or "*toxic*".[141]

(4) The breach of Art 4 and 5 of the PK-BIT did not cause consequential environmental damage because legal causation is not established due to an intervening event

90. Further and in the alternative, legal causation on the part of the Respondent is also not made out due to an intervening event in the form of the flood breaking the chain of causation. Legal causation determines whether the conduct in question should be recognised as a cause for legal purposes and turns on whether the damage caused was too remote or unforeseeable. [142] Remoteness and foreseeability can occur where the chain of causation is broken due to an unforeseeable intervening event which makes the original conduct too remote by causing or contributing to the damage. [143]

91. This was the case in *Nichols v Marsland*, where a freak rainfall resulting in a flood was held to be an Act of God which was not reasonably foreseeable, thereby breaking the chain of causation for the damage caused by an overflowing pond. Likewise, the extent of the flood in this case was not reasonably foreseeable and contributed to the injuries. The flood was "*one of the worst flash floods*" Appam has "*ever experienced*"[144] — and by the very nature of a flash flood, it would have occurred quickly with minimal warning. There was no warning of a flooding risk, unlike the situation in Karheis shortly before,[145]

[139] Record, [36].
[140] Record, [36].
[141] Record, [40].
[142] *Mason Capital v Korea* at [807].
[143] *Mason Capital v Korea* at [807].
[144] Record, [35].
[145] Record, [34].

and the "*situation worsened in Appam*" on the same day of the flood, giving no time for foresight and response. Furthermore, since the weather settled in Karheis despite the news of a flooding risk there[146], it was a reasonable conclusion that there would not be a flood in Appam.

92. While the other factories eventually evacuated, this does not mean that the exceptional magnitude of the flood was foreseeable, even if they had anticipated the possibility of a standard flood. This echoes the stance taken by the Claimant's own senior Federal Counsel that the flood was an "*Act of God*" and that there was "*no guarantee that what happened will not happen*" even if the "*highest quality*" pipelines were installed. .[147] A similar rationale was adopted in *Carslogie v Norwegian Government*, where the court noted that the storm was an intervening act in part because the storm damage was incidental and could have happened to any ship on any voyage.[148] Similarly, the magnitude of the flood likely did affect the other factories as well as the Respondent, despite the measures taken to prevent it such as the Respondent's sophisticated monitoring systems.[149]

The magnitude of the flood also contributed to the injuries. The intensity of the rainfall and the resultant "*long time*" taken for the floodwaters to recede would have resulted in an increased concentration of any contaminants in the water and would have provided more opportunity for the contaminants to affect more people over a wider area.The intensity of the rainfall and the resultant "*long time*"[150] taken for the floodwaters to recede

[146] Record, [35]
[149] Record, [34].
[149] Record, [34].
[149] Record, [34].
[150] Record, [35].

would have resulted in an increased concentration of any contaminants in the water and would have provided more opportunity for the contaminants to affect more people over a wider area.

93. Therefore, both factual and legal causation are not fulfilled with regard to consequential environmental damage and both pure and consequential environmental damages cannot be recovered.

V. CONCLUSION

94. In summary, the present proceedings are precluded due to either or both the non-compliance with the Pre-Arbitration Steps or the parallel Domestic Proceedings. Even if this arbitration is not precluded, the claim that the Respondent has breached Art 4 and Art 5 of the PK-BIT is not made out and the claimant is not entitled to declaratory relief and damages even if it is made out.