MY2403-C

ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORIAL FOR CLAIMANT

BETWEEN:

THE FEDERATION OF PALMENNA

(CLAIMANT)

-AND-

THE CANSTONE FLY LIMITED

(RESPONDENT)

19th LAWASIA INTERNATIONAL MOOT, 2024

LIST OF ABBREVIATIONS

¶	paragraph
¶ ¶	paragraphs
ADR	Alternative dispute resolution
AIAC	Asian International Arbitration Centre
Art	Article
BIT	Palmenna - Kenweed Bilateral Investment Treaty
BoD	Board of Directors
CBD	Convention on Biological Diversity
EIA	Environment Impact Assessment
FITR	Fork in the road
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
MNR&ES	Ministry of Natural Resource and Environmental Sustainability of the Palmenna

MOU	Memorandum of Understanding
MP	19th LAWASIA Moot Problem 2024
MTI	Ministry of Trade and Investment of the Kenweed
No	Number
OECD Guidelines	OECD Guidelines for Multinational Enterprises on Responsible Business Conduct
PM	Prime Minister
UNCLOS	United Nations Convention on the Law of the Sea.
UNFCCC	United Nations Framework Convention on Climate Change
UNGPs	United Nations Guiding Principles on Business and Human Rights
v.	versus
Vienna Convention on the Law of Treaties	VCLT

INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS:

Abbreviations	Citations	Article
AIAC Rules	AIAC Arbitration Rules 2023	**Rule 2, 20.**
CBD	Convention on Biological Diversity	**Article 1, 6, 14.**
VCLT	Vienna Convention on the Law of Treaties	**Article 26, 31, 32**
Draft Articles on RSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts	**Article**

JUDICIAL DECISIONS:

Abbreviations	Citations	Para
Visa International Ltd. Continental Resources (USA) Ltd.	Visa International Limited v. Continental Resources (USA) Limited (2009)	**¶38**
Sikand Construction o. v. SBI	Sikand Construction Co. vs State Bank Of India on 27 October, 1978	**¶10**
Demerara Distillers (P) Ltd. v. Demerara Distillers Ltd.	Demerara Distilleries Private Limited v. Demerara Distillers Limited, (2015)	**¶5**

Rajiv Vyas v. Johnwin	Mr. Rajiv Vyas vs Johnwin Manavalan (2010)	**¶¶4-11, 12**
Silverstein Prop, Inc v Paine, Webber, Jackson & Curtis	Silverstein Prop, Inc v Paine, Webber, Jackson & Curtis, Inc, 480 NYS 2d 724, 725 (NY App Div 1984), aff'd, 65 NY 2d 785 (NY 1985)	**¶87**
Holloway v. Chancery Mead Ltd.	Holloway v Chancery Mead Ltd [2007] EWHC 2495 (TCC) (30 July 2007)	**¶¶66-85**
Acme Inc. v. Baker Corp	Acme Markets, Inc. (Acme) v. International Union of Bakery & Confectionery Workers (Bakery) , US District Court for the Eastern District of Pennsylvania - 470 F. Supp. 1136 (E.D. Pa. 1979), May 15, 1979	
Smith v. Acme General Corporation	Smith v. Acme General Corporation, 614 F.2d 1086 (6th Cir. 1980), p.57	
ICC Case No 11490	*ICC Case No 11490*, Final Award (2012) XXXVII YB Comm Arb 32 ('The provision in the arbitration clause that disputes "be settled in an amicable way" constituted no condition precedent to referral to arbitration but rather underlined the parties' intent not to litigate disputes in court'); *ICC Case No 8445*, Final Award, (2001) XXVI YB Comm Arb 167; *Licensor and Buyer v Manufacturer*, SCC, Interim Award (17 July 1992) (1997) XXII YB C *ICC Case No 11490*omm Arb 197.	
Barcelona Traction	Barcelona Traction, Light and Power Co., Ltd. (Belgium / Spain), (05.02.1970), (1970) ICJ Reports 1970, p. 70.	Page 70

JOURNALS:

Abbreviations	Citations
Emma Smith	Emma Smith, 'Relation vs Relationship: Difference and Comparison' (Ask Any Difference, 2023) <https://askanydifference.com/difference-between-relation-and-relationship/> accessed 8 August 2023
Aceris Law LLC	Aceris Law LLC, "Fair and Equitable Treatment in Investment Arbitration", (January 23, 2022) <https://www.acerislaw.com/fair-and-equitable-treatment-in-investment-arbitration/> accessed 15 August 2023
Cambridge University Press	Cambridge University Press, "Principles of fair and equitable treatment", (July 5, 2011) <https://www.cambridge.org/core/books/abs/fair-and-equitable-treatment-in-international-investment-law/principles-of-fair-and-equitable-treatment/70BC2B20DC2838BA9456CF0A2407C6DF> accessd 15 August 2023

Journal of Sustainable Development Law and Policy	Journal of Sustainable Development Law and Policy, "The doctrine of party autonomy in international commercial arbitration: myth or reality?" (Vol.6 No.1 2015) <https://www.ajol.info/index.php/jsdlp/article/view/128033> accessed 16 August 2023
Jus Mundi	Jus Mundi, "Right to Maintain the Status quo", (2023) <https://jusmundi.com/en/document/wiki/en-right-to-maintain-the-status-quo.> accessed 15 August 2023
Legal Developments	AN EXAMINATION OF TRIPLE IDENTITY TEST IN RESOLVING FORK-IN-THE-ROAD CLAUSE OBJECTIONS – Legal Developments' (Legal 500, 10 August 2023) https://www.legal500.com/developments/thought-leadership/an-examination-of-triple-identity-test-in-resolving-fork-in-the-road-clause-objections/

BOOKS:

Abbreviations	Citations	Page
Gary B. Born	Born, Gary, and Marija Šćekić, 'Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'', in David D. Caron, and others (eds), Practising Virtue: Inside International Arbitration (Oxford, 2015; online edn, Oxford Academic, 21 Jan. 2016), https://doi.org/10.1093/acprof:oso/9780198739807.003.0015, accessed 10 Aug. 2024.	**Page 227 - 263**
Lex Sportiva	Lex Sportiva: What is Sports Law? by Michael J. McGovern (2015).	**Page 192, 193**

Redfern and Hunter	Nigel Blackaby, Constantine Partasides, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (6th Edition), New York, Oxford University Press, 2015	**Page 347**
The Law of International	The Law of International Commercial Arbitration by Julian Lew, Loukas Mistelis, and Stefan Kröll (2022).	**Page 253**
Regan, Donald H.	Regan, Donald H. "Understanding What the VCLT Says About Identifying and Using 'Sources for Treaty Interpretation'." In The Oxford Handbook on The Sources of International Law, edited by S. Besson and J. D'Aspremont, 1047-65. Oxford: Oxford Univ. Press, 2017.	**Para 1047-65**

Commercial Arbitration		

MISCELLANEOUS:

Abbreviations	Citations
Charles University, Faculty of Social Sciences.	Framework for Transparency: A case study of Cambridge Analytica and Facebook, Charles University, Faculty of Social Sciences, Department of Security Studies https://www.academia.edu/45678779/Framework_for_Transparency_A_case_study_of_Cambridge_Analytica_and_Facebook
Cambridge Analytica Administrative Complaint	Cambridge Analytica Administrative Complaint, United States of America before the Federal Trade Commission, Docket No.9383 in the matter of Cambridge Analytica, LLC, a corporation.
Cambridge Dictionary	Cambridge Dictionary, Word Definition
Irreparable harm	Irreparable harm: Legal Information Institute, Cornell Law School (Wex Definitions Team) <https://www.law.cornell.edu/wex/irreparable_harm>

Judicial accountability and independence	Independence, Judicial accountability and independence, Courts and Tribunals Judiciary.
UNDP Capacity Development Resource 2006	Applying a human rights-based approach to development cooperation and programming: a UNDP Capacity Development Resource, Capacity for Development Group Bureau for Development Policy, 2006
Understanding the ICC Court	Understanding the ICC Court <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf>

STATEMENT OF JURISDICTION

By virtue of Article 12 of the Palmenna - Kenweed Bilateral Investment Treaty ("**BIT**"), concluded on 3rd October, 2021, and in accordance with Article 1(1) of the AIAC Arbitration Rules 2023, the Federation of Palmenna ("**Palmenna**") and the Canstone Fly Limited ("**Canstone**") have hereby referred to this Honourable Tribunal the dispute concerning the validity of the claims brought by Palmenna and the fulfillment of obligations of Canstone under the BIT.

QUESTIONS PRESENTED

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

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

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

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

STATEMENT OF FACTS

I. FACTS RELATING TO THE PARTIES

1. Parties to the Dispute

(i) Claimant: Palmenna

Palmenna is a country in Southeast Asia bodered by the Indipendent State of Kenweed in the north. Due to its tied history with the Britain, Palmenna is a Member State of the Commonwealth of Nations. Throughout the history, Palmenna is well-recognised as one of the world's leading producers of palm oil with USD15 million metric tons of palm oil exported in 2020. The capital of Palmenna, Appam is known as a vibrant metropolis. Since 2020, the rainfall in Palmenna became harsher, with the potential risk of flooding. Palmenna is a party to the United Nations Framework Convention on Climate Change ("**UNFCCC**"), Vienna Convention on the Law of Treaties ("**VCLT**") and World Trade Organisation ("**WTO**").

(ii) Respondent: Canstone

Canstone was incorporated in Palmenna on 26 October 2021 by Mehstone Star Limited ("**Mehstone Ltd**") and SZN respectively owning 70% and 30% shares of Canstone. Mehstone Ltd is a corporation held 40% by KLT - the Kenweed's largest energy company and 60% by the Ministry of Trade and Investment of Kenweed. Canstone began operations in November 2021, secured two biodiesel plants in Appam, and another in Karheis, near Kenweed. Canstone contributed 20% to the total production capacity of 2,722,000 tonnes in Palmenna in 2022.

II. FACTS RELATING TO THE DISPUTE

Time	Facts
3rd June, 2021	M Akbar was elected as the new Prime Minister of Palmenna.

Late July 2021	Prime Minister Akbar paid visit to Prime Minister Gan, discussing the potential collaborations between countries. Tara Sharma expressed the possibility of Mehstone Ltd to set up a subsidiary in Appam.
27th August 2021	The Signing Ceremony of a Memorandum of Understanding between Prime Minister Akbar and Prime Minster Gan.
6th September 2021	Palmennian Parliament discussion on disclosing the details of the MOU.
29th September 2021	The draft bilateral investment treaty was presented to Prime Minister Akbar's cabinet.
3rd October 2021	The Palmenna-Kenweed Bilateral investment Treaty ("**BIT**") was signed but lacked of the authority of the signatures.
26th October 2021	Canstone Fly Limited ("**Canstone**") is incorporated.
November 2021	Canstone began its operations.
By the end of 2022	Canstone contributed 20% to the total production capacity of 2,722,000 tonnes per year in Palmenna.
mid-February 2023	Canstone in Karheis received an unsigned note detailing a potential leak in one of the chemicals stored tanks. The in-house experts immediately reported to Mr. Alan, however, he only arrived 2 days later but rushly back to Appam after 3 hours of inspecting. The EIA report was firstly proposed to be conducted, after nearly a year half of operation.
2 weeks later	Nearby farmers were hospitalised due to suspected contamination. But the victims' families withdrew the reports after being compensated.
6th September 2023	The Board of Directors meeting was organised with the participation of senior management of Canstone, including Luke Nathan and Tara

	Sharma. The request for an EIA conductor was on hold due the lack of approvals from the stakeholders.
Early November 2023	Heavy rainfall that lasted for several days in Palmenna.
23rd November 2023	Flooding risk in the rural parts of the city in Karheis was alerted. Neighbouring factories of Canstone in Appam immediately shut down their operations for the next 3 days, ordered an emergency evacuation. Alan ordered to operate the plant as normal, all employees to continue working hard to get good bonuses.
26th November 2023	The worst flash flood expressed in Appam.
November - December 2023	Nearby occupiers was admitted to the hospital, 129 people were affected, 39 people, in which were Canstone's facility in Appam employees, were hospitalised. The cause was by the inhalation of irritant gases, exposure to corrosive chemicals which had travelled through the inland waters or river.
December 2023	Canstone realised that the pressure valves on its storage tanks, which control the pressure or hazardous fumes were compromised.
15th December 2023	Palmenian activists initiated legal actions against the Government of Palmenna and SZN on the grounds of negligence.
14th February 2024	The High Court of Palmenna found the Government of Palmenna and SZN jointly liable for negligence and ordered for compensation for the victims of the incident.
1st March 2024	On 1 March 2024, the conference call involving M Akbar, Tara Sharma, Alan and Luke Nathan was made but left the matter unresolved The negotiation was not made in good faith of Tara Sharma.
6th March 2024	The Government of Palmenna commenced the arbitration proceedings

against Canstone pursuant to Article 12 of the PK-BIT.

SUMMARY OF PLEADINGS

[1] JURISDICTION: THE PRE-ARBITRATION PROCEEDINGS MUST NOT BE COMPLIED.

The Tribunal should decide that the pre-arbitration proceedings must not be complied due to its inadmissibility proved by its ineffectiveness and empty formality. Moreover, the Respondent did not comply with this proceeding with good faith as stated in Article 12 of the BIT. Thus, the pre-arbitration proceedings must not be complied before the commencement of the arbitration proceedings.

[2] JURISDICTION: PALMENNA CAN INITIATE THE ARBITRATION AGAINST CANSTONE.

This case should be heard notwithstanding the trial proceedings in domestic courts of Palmenna, and the Arbitral Tribunal should sustain the arbitration proceedings. In specific, this dispute cannot be precluded because of the lack of the *"fork in the road"* clause in the BIT as well as the insufficiency of the *"triple identity"* test. Moreover, neither the BIT nor the AIAC Rules 2023 preclude the rights of Palmenna to bring the case against Canstone. Thus, the arbitration proceedings can be commenced by Palmenna.

[3] MERITS: CANSTONE DELIBERATELY BREACHED ITS OBLIGATIONs.

The Tribunal should decide on the fact that Canstone deliberately breach its obligations under the BIT that both Parties are bound. In particular, Canstone has breached several rules of sustainable obligations mentioned in the BIT as well as domestic law of Palmenna. Moreover, Canstone discharged and caused to enter into inland water which caused the respiratory infections for the innocent citizens.

[4] MERITS: PALMENNA IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES.

The Tribunal should decide that Palmenna is entitle to an award of declaration and damages even when the liability and causation clauses are not mentioned in the BIT. Firstly, Canstone has the environmental liability in accordance with international law when it discharge and cause to enter into water, regardless intentionally or accidentally. Secondly, under WTO Labour standards, Canstone has the human rights liability when 13 working employees were effected due to the incidents. Thus, Canstone is liable for the environmental damages as well as labour damages in Palmenna.

PLEADINGS

PART ONE: JURISDICTION

ISSUE ONE: THE PRE-ARBITRATION STEPS ARE NOT REQUIRED TO BE COMPLIED BEFORE ARBITRATION PROCEEDINGS BE COMMENCED BY THE GOVERNMENT OF PALMENNA AGAINST CANSTONE.

[1] Respondent contested the validity of the current arbitration proceedings, arguing that the pre-conditions to arbitration under Arrticle 12 of the BIT were not fulfilled.

[2] Claimant respectfully asserts that the arbitration at AIAC is valid, arguing that the steps detailed in paragraphs (a), (b), and (c) of Article 12 are not compulsory. The Claimant further contends that **[1]** the obligation to negotiate in good faith under Article 12.1(a) is not mandatory; and **[2]** the requirement to mediate under Article 12.1(b) of the BIT is unenforceable**.**

1. The obligation to negotiate in good faith under Article 12.1(a) is not mandatory.

[3] Firstly, the negotiation requirement is not a mandatory pre-condition for the dispute to be submitted to arbitration. In assessing the necessity of pre-arbitral proceedings, in the Sikand Construction Co. v. SBI case,1 the contract clause provided for the decision of the architect first, before reference to arbitration. The Court held that the clause was directory and not mandatory, and that disputes can be referred to arbitration without referring them to

[1] Sikand Construction Co. vs State Bank Of India,ILR1979DELHI364, 27 October, 1978

the architect first. The reasons given for arriving at this conclusion were as follows. Firstly, there was no indication of a judicial hearing by the architect. Secondly, consequences of not following the procedure have not been provided for. Furthermore, according to Article 12," Any dispute between the Parties arising from, relating to or in connection with this BIT shall be referred"2. There is no indication of a judicial hearing nor consequences of not following the procedure. Therefore, the pre-arbitration proceedings are not mandatory.

[4] Secondly, the negotiation and mediation process is not applicable if it is demonstrated to be merely empty and ineffective formalities. Indeed, the Supreme Court, in Visa International 3 and Demerara Distillers (P) Ltd. v. Demerara Distillers Ltd.4 has held that the requirement of mutual discussion to attempt an amicable settlement need not be complied with if it would be an empty formality and there is no scope for amicable settlement. However, an application was made without adhering to this requirement. The Court rejected the argument that the application was premature due to the absence of mutual discussion, reasoning that any discussion at that stage would be an empty formality. Similarly, the Court in Visa International Ltd. v. Continental Resources (USA) Ltd.5 explained that there was no scope for an amicable settlement since both parties had taken rigid positions. The Court opined that an amicable settlement need not be pursued if it's ineffective. Thus, the requirement was deemed non-mandatory. Likewise, in Rajiv Vyas v. Johnwin,6 the Court upheld that conciliation would be an "empty formality" given the respondent's stance.

[5] The Claimant claims that in this case, Art 12 in the BIT provides neither scope for an

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[2] Art 12, BIT, 2021

[3] Visa International Limited v. Continental Resources (USA) Limited (2009)

[4] Demerara Distilleries Private Limited v. Demerara Distillers Limited, (2015) 13 SCC 610, para 5

[5] Visa International Limited v. Continental Resources (USA) Limited (2009)

[6] RAJIV VYAS V. JOHNWIN MANAVALAN GROGE MANDAVALAN & ORS, 2010 SCC OnLine Bom 1321, paras 4-11, 12...

amicable settlement nor specifies any consequences for not negotiating amicably.[7] Therefore, insisting on mutual discussion would be futile. Furthermore, submitting a case to higher management is ineffective due to the risk of partial decision made by the Ministry of Trade and Investment, which manage the international investment of Kenweed, whose Minister is also the Prime Minister. This dual role exacerbates the potential for bias, as the decision-making authority is inherently tied to one of the parties. Consequently, submitting the case to higher management is merely a formality, devoid of practical effectiveness. Thus, the Claimant claims that such submission is uneffective.

[6] Thirdly, the negotiation requirement under Article 12.1(a) of the BIT lacks a time bar clause for it to be efficiently enforced. In the case Silverstein Prop, Inc v Paine, Webber, Jackson & Curtis, the pre-arbitration clause in question did not provide for a time limit within which the negotiation and mediation process was to be initiated was a strong indication against the binding nature of the pre-arbitral steps.8 In one tribunal's words, clauses requiring efforts to reach an amicable settlement without specific time period, before commencing arbitration, 'are primarily expression[s] of intention' and 'should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute' 9. Other awards are to the same effect.10 In this case, Art 12 did not provide specific time period required for negotiation, just rather "amicable and good faith negotiation"11, making it a general suggestion and not to be treated as a mandatory obligation.

[7] Even if the Respondent argues that Art 12(c) is treated as an indicator for the time period of 90 days required for mediation before Claimant commenced arbitration

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[7] Art 12.1.a, BIT, p.11, 2021

[8] Silverstein Prop, Inc v Paine, Webber, Jackson & Curtis (n 15) 87 (the fact that the clause in question did not provide for a time limit within which the mediation process was to be initiated was a strong indication against the binding nature of the pre-arbitral steps).

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

[10] *ICC Case No 11490*

[11] Art 12.1.a, BIT, 2021

proceedings. However, in *Holloway v. Chancery Mead Ltd.*[12], it was established that an ADR clause should meet three criteria to be enforceable: first, the process must be sufficiently certain; second, the administrative processes for selecting and compensating a person to resolve the dispute should be defined; and third, the process or model should be outlined. The judgment referenced authorities indicating that a bare agreement to negotiate lacks legal content. Applying this to the current case, the attempt at an amicable resolution did not meet any of these criteria. The process was inadequate, as both parties communicated through a conference call without good faith from the Respondent, leading to no one being chosen to resolve the dispute and no process being set out.

[8] Furthermore, the violations of pre-arbitration procedural requirements (such as periods or requirements to negotiate, mediate the resolution of disputes) are not violations of mandatory obligation, and that pre-arbitration procedures are, in significant part, aspirational, directional, or hortatory, and that a party's failure to comply with such procedures causes no material damage to its counterparty.[13] In cases such as *Acme Inc. v. Baker Corp*[14]; tribunal allowed the case to proceed even when parties did not fulfill the time limit required for the pre-arbitration proceeding. Therefore, Claimant can initiate arbitration proceedings.

[9] **The Claimant concludes** that the negotiation requirement under Art 12.1(a) of the BIT is not obligatory.

2. The requirement to mediate under Article 12.1(b) of the BIT is not enforceable

[10] The requirement to mediate under Article 12.1(b) of the BIT is not enforceable due to the absence of a clear procedure for selecting mediators between the parties. In *Holloway v. Chancery Mead Ltd.*[15], the Court states that due to the lack of those standards

[12] Holloway v Chancery Mead Ltd paras 66-85
[13] *Gary Born, page 234*
[14] Acme Inc. v. Baker Corp
[15] Holloway v Chancery Mead Ltd,paras 66-85

requirements, the requirement is not enforceable. This scenario is mirrored in the present case between the Claimant and Respondent, where there are neither elements nor guidelines for mediation. Therefore, mediation is not obligatory.

[11] Even if the pre-arbitration proceedings are mandatory, the procedure would not move to the mediation step because Respondent execute bad faith in negotiation. Therefore, Claimant can directly initiate the arbitration proceeding.

[12] In negotiation processes, parties are expected to engage in good faith efforts to reach a resolution. Good faith entails a willingness to communicate, consider opposing viewpoints, and make genuine attempts at compromise. Good faith is said to be a norm, a (very important) principle, a rule, a maxim, a duty, a rule or standard for conduct, a source of unwritten law, a general clause.[16] An early decision of the Permanent Court of International Justice declared that negociation is not compulsory[17]. Other authorities are to the same effect as in *ICC Case No 6276 (n4)*[18]: the Tribunal notes that the duty is only discharged when they arrive in good faith at the conviction that they have reached a persistent deadlock'.

[13] In the case of *Smith v. Acme Industries,* the parties' contract required 30 days of "good faith negotiations" before filing for arbitration. After attempts by one party to participate in negotiations, the other party refused to engage. The arbitral tribunal ruled that the non-participating party had effectively waived the pre-arbitration negotiation requirement, as their refusal to negotiate in good faith rendered the process a meaningless exercise.[19]

[14] In the present case, Claimant initiated negotiations during a conference call on 1

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[16] *Travaux de l'association Henri Capitant, Tome XLIII, année 1992. Journées louisianaises de Baton-Rouge et La Nouvelle Orléans, 'La bonne foi'*, Paris 1994, p. 338 (*règle*); Art. 1.106 PECL, Comment, A (*rule*).
[17] *Mavrommatis Palestine Concessions Case* (n 88) 13.
[18] ICC International Court of Arbitration Bulletin Vol. 14 No. 1, ICC Case No 6276 (n4)
[19] *Smith v. Acme General Corporation*, p.57

March, emphasizing the urgency of resolving ongoing political challenges in Palmenna.[20] Despite Claimant's efforts to negotiate, Respondent displayed reluctance to continue discussions and ultimately refused to communicate further to address the issue. This refusal was evidenced by Respondent's statement during the call expressing disbelief at Claimant's perceived unreasonableness and indicating a cessation of communication.[21]

[15] Furthermore, the standard of good faith basically means that a party should take the interest of the other party into account. However, Mr. Luke having great influence decided to post on Birdie, instead of direct communication. [22] This action not only failed to contribute constructively to resolving the matter but also demonstrated a lack of commitment to the negotiation process. Respondent's actions during negotiations indicate a failure to negotiate in good faith. By refusing to continue discussions, publicly expressing disdain for further communication, and opting for public discourse rather than private negotiation channels, Respondent has exhibited bad faith in the negotiation process.

[16] **In conclusion**, the requirement to mediate under Article 12.1(b) of the BIT is unenforceable due to the absence of defined procedural guidelines, such as a clear process for mediator selection and structured mediation steps.

CONCLUSION ISSUE ONE

[17] The Claimant respectfully submits that the pre-arbitration proceedings must not be complied with before the commencement of the arbitration as the prerequisites outlined in Article 12 of the BIT.

[20] MP, para 49, p.17
[21] MP, para 50-51, p.17,18
[22] Clarification, para 7, p.2

ISSUE TWO: CLAMANT IS NOT PRECLUDED FROM INITIATING AN ARBITRATION AGAINST RESPONDENT

[18] The Respondent has further challenged the validity of the arbitral proceedings initiated at AIAC by asserting that the dispute to be heard at AIAC is the same as the one adjudicated in domestic proceedings.

[19] The Claimant reaffirms that AIAC arbitration is a valid means of dispute settlement in this instance because the disputes in the domestic proceedings and at AIAC are different. The Claimant claims that **(1) Canstone has Kenweed nationality, (2) the failure of the triple identity tests constitutes the legal basis for Claimmant's claim.** and **(3) Claimant has the right to bring the case against Respondent.**

1. Canstone have Kenweed nationality

[20] The Claimant claims that Canstone has Kenweed nationality. The Claimant claims that the nationality of Canstone cannot be defined by the BIT as well as the ICSID Convention due to the lack of definition in the BIT and the binding force of the ICSID Convention.

[21] It is accepted that although there is "no absolute test of the 'genuine connection' has found general acceptance."[23] Most Courts define the nationality of an entity by the real and effective link between states and the entity, which is called the "control test". According to this test, a legal entity has the nationality of its controlling shareholders, as "an instance of "lifting the corporate veil".[24]

[22] Firstly, the Claimant claims that Canstone holds the nationality of the effective

[23]Barcelona Traction, p. 70.

[24] P. Muchlinski, "The Diplomatic Protection of Foreign Investors: a Tale of Judicial Caution", in C. Binder, U.Kriebaum, A.Reinisch, S.Wittich (eds), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer*, Oxford, University Press, 2009, p. 350.

controller which is Mehstone. Although Canstone is incorporated in Palmenna,[25] the Claimant claims that the "foreign control" is recognised widely in order to define the nationality of an entity. In this case, the Claimant claims that the nationality of the shareholders of Canstone is Kenweed due to the nationality of Mehstone holding 70% of shares of Canstone,[26] and Canstone is Mehstone's subsidiary.[27]

[23] Even if the Respondent argues that the nationality of SZN holding 30% of shares of Canstone is undefined,[28] the Claimant claims that SZN is not a controlling shareholder. In *Vacuum Salt v. Ghana Case,*[29] the Court denied the effectiveness of Greek nationality applied to the company, although he was one of the founders and held 20% of shares, due to the fact that he is more a technical than an administrative role in the company, not "capable of strongly influencing critical decisions on important corporate matters".[30] In this case, the Claimant claims that Mehstone is the effective controller holing 70% of shares[31] and administrate the general policies of Canstone.[32]

[24] In case the Respondent challenges the applicability of the "control test", that the "control test" has to be applied as an exception of Article 25.2.b of the ICSID Convention,[33] the Claimant claims that this application is protested in the *Tokios Tokelés Case.*[34] In this case, the Court rejected the claims requiring that "disregard the Claimant's state of incorporation and determine its nationality according to the nationality of its predominant

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[25] Moot problem, para 21, page 9.
[26] Moot problem, para 10, page 6
[27] See II.2.i below
[28] Moot problem, para 7, page 5.
[29] Vacuum Salt Products Ltd. v. Republic of Ghana, ICSID Case No.ARB/92/1, (1997), *9 ICSID Rev.—FILJ (ICSID Review – Foreign Investment Law Journal),* p. 73.
[30] Ibid, para 53.
[31] Moot problem, para 21, page 9.
[32] Ibid.
[33] O. E. García-Bolívar, "Comments on Some ICSID Decisions on Jurisdiction", (2004) *IBL (International Business Lawyer)*, August, p. 171. See also C. H. Schreuer, *The ICSID Convention: a Commentary*, Cambridge, University Press, 2001, p. 276.
[34] Tokios Tokelés v. Ukraine, ICSID Case No.ARB/02/18, Decision on Jurisdiction, (2005) *20 ICSID Rev.—FILJ (ICSID Review – Foreign Investment Law Journal),* pp. 245-258.

shareholders and managers".[35]

[25] **To conclude**, the Claimant claims that due to Respondent's Kenweed nationality, Claimant can initiate an arbitration against foreign investor as it aligns with the scope of the BIT.

2. Two disputes as alleged by Respondent are not identical

[26] The Claimant did not institute an arbitral proceeding to address the same claim twice, since this case does not satisfy the "triple identity" test, requiring that **(i) between the same parties, (ii) involving the same cause of action** and **(iii) the same dispute be submitted to the domestic courts of the host State prior to the choice of international arbitration**. The test requires strict satisfaction of the three elements in determining jurisdictional objection.[36]

(i) Identity of the Parties

[27] The Claimant claims that in these arbitration proceedings, the identity of the Parties differ from the domestic court proceeding. This element requires that the parties in both proceedings are respectively identical, that is, the parties in the dispute submitted in the domestic court proceeding are the same with the parties before the arbitral tribunal proceeding.[37]

[28] In the case *Adams v Cape Industries plc,* the court upheld the principle established that a subsidiary company has a separate legal personality from its parent. [38] It is clear that Canstone is a subsidiary company of Mehstone Star in Palmena [39], with Mehstone Ltd owns

[35] Ibid, para 22.
[36] Legal Developments
[37] Eudoro Armando Olguín v Republic of Paraguay (Decision on Jurisdiction) (ICSID Case No ARB/98/5, 8 August 2000) [30]
[38] *Adams and others v Cape Industries plc and others (1990), A.No2597*
[39] Moot problem, para 14

70% and SZN owns 30% of the Respondent [40]. This means that the Respondent is a separate legal entity from SZN. As a result, the parties involved in the two proceedings are not the same, and therefore, this element is unqualified.

(ii) Cause of action

[29] The Claimant claims that the cause of action elements is failed. This element requires the claim at the domestic proceeding is different from the one brought before the arbitral tribunal. In *CMS v. Argentina,* contractual claims are different from treaty claims and even if there had been or is a pending recourse to the domestic courts for breach of contract, it would not prevent submission of the treaty claims to an arbitral tribunal.[41] Thus, in this provision, the initial proceeding need not have been concluded in terms of ultimate resolution of the dispute.

[30] Thus, this criteria requires that the claims have to be the same. Where the claims are not the same as explained above, the criterion of identity or cause of action is inapplicable. Where exhaustion of local remedy becomes a condition for activating consent of the host state, objection may not be taken for a Claimant's compliance with such conditionality.[42]

[31] In this case, the claims arose from separate violations. In the domestic proceeding submitted to the High Courts, the key allegations are: The drainage system in place exhibited flaws in its design and engineering; Despite previous instances of flooding, heavy rain and warnings from experts regarding the vulnerability of the drainage system, the authorities failed to take proactive measures to mitigate these risks; The ventilation systems were found to be lacking in functionality and compliance with safety standards. The

[40] Fact para 21, p.9
[41] CMS Gas Transmission Co. v. Republic of Arg., ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction (July 17, 2003), 7 ICSID Rep. 492 (2003)
[42] Legal Developments

ventilation systems suffered from neglect and insufficient maintenance[43]; while the case submit to AIAC is base on allegations of failure and omission of Canstone to abide by the terms of the BIT [44]. Therefore, the cause of action asserted in High courts is thus different from the cause of action submitted to arbitration, the first relating to issues of domestic law and the second to issues of BIT obligations.

(iii) **Identity of object**

[32] The Claimants claim that the identity of the object has failed to apply. This element requires that the reliefs or remedies sought by the Claimant in both proceedings must be the same for the jurisdictional objection to preclude a subsequent proceeding.[45] In *Olguin v. Paraguay*, the Respondent raised an objection on grounds that the Claimant had initiated proceedings in the Paraguayan courts, seeking an order declaring the bankruptcy of the finance company whose obligations were allegedly guaranteed by Paraguay. The ICSID arbitration tribunal rejected the jurisdiction objection on grounds that the relief requested by the claimant in the domestic proceedings was not identical to the relief sought in the ICSID arbitration proceeding.[46]

[33] In this case, the relief sought for in the tribunals is "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[47]."; while the relief sought for in the High courts are negligence and compensation to the victims of the incident.[48] It is clear that the objects in the domestic proceedings are not identical to the relief sought in the AIAC arbitration proceeding, one is a compensation in the domestic court while the other is a declaration of BIT violations in arbitration.

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[43] Facts, para 41 p.15
[44] Facts, para 55 p.18
[45] Legal Developments
[46] Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5
[47] Moot problem, para 55, p.18
[48] Moot problem, para 41, p.15

[34] **To conclude,** the triple identity test is not satisfied.

3. The Claimant has the right to bring the case against the Respondent

[35] The Claimant claims that they have the right to initiate legal action against Canstone because **(i) the BIT does not preclude the right to bring the claim against the Claimant** and **(ii) The AIAC Rule of Arbitration does not preclude the right of the Claimant to bring the case against the Respondent.**

(i) The BIT does not preclude the right of Claimant to initiate an arbitration against Canstone.

[36] The Claimant claims that the Claimant can initiate an arbitration against Canstone.

[37] Article 12 specifies that disputes between "Parties" shall follow the prescribed dispute resolution mechanism.[49] It does not expressly limit the right to bring claims to "Investors" only. Furthermore, Art 1.3 BIT clearly states that the obligations stated therein shall be enforceable by the investors of the Parties, against the investor(s) of the Parties or, between the Parties themselves as against one another.[50]

[38] Therefore, under the terms of the BIT, any Party to the agreement, including the Host country, can initiate arbitration against Investors from other Parties. This interpretation is supported by the use of the term "Parties" rather than "Investors" in the provision, suggesting a broader scope of applicability.

[39] **Consequently,** the Host State retains the right to bring claims against Investors from other Parties under Article 12 of the BIT.

(ii) The AIAC Rule of Arbitration does not preclude the right of the Claimant to bring the case against the Respondent.

[49] Art 12, BIT, 2021
[50] Art 1.3, BIT, 2021

[40] The Claimant claims that it has the right to bring the case against the Respondent according to AIAC Rules.

[41] The AIAC Rules 2023 govern the dispute resolution process between the Parties, due to the choosing in Article 12 of the BIT.[51] Importantly, it stipulates that arbitration shall be administered by the AIAC in accordance with its prevailing arbitration rules at the time of the dispute.

[42] The AIAC Rule of Arbitration does not preclude the right of the Claimant to bring the case against Respondent as it does not state any information about the consequences of non complying pre-arbitration procedures. Article 20 of AIAC rule stated that "If the Parties have referred their dispute to mediation under the AIAC Mediation Rules and they have failed to reach a settlement and/or the mediation has been terminated and thereafter decided to proceed to arbitration under the AIAC Arbitration Rules,…".[52]

[43] **Therefore,** even when the parties fail to mediate in the pre-arbitration proceeding, the Claimant can still initiate the arbitration.

CONCLUSION ISSUE 2:

[44] **In conclusion,** the Claimant is not precluded from initiating arbitration against the Respondent at AIAC.

[51] Article 12.1(c) AIAC Rules 2023.
[52] Art 20, AIAC Arbitration Rules 2023

PART TWO: MERITS

ISSUE THREE: THE RESPONDENT HAD BREACHED ITS OBLIGATIONS UNDER THE BIT

[45] The Claimant respectfully asserts that the Respondent has obligations under Article 4 and Article 5 of the BIT, and the Respondent had breached them. The Claimant claims that **(1) the Respondent did not fulfill its sustainability obligations under Article 4** and **(2) the Respondent has failed its environmental obligations according to Article 5.**

1. The Respondent did not fulfill its obligations under Article 4

[46] The Claimant claims that the failure to conduct the EIA report constitutes a breach of obligation under Article 4 of the BIT, because **(i) Activities of the Respondent falls on the scope of Article 4; (ii) The submission of the EIA report cannot be delayed;** and **(iii) The Respondent deliberately breach the obligations.**

(i) Activities of the Respondent fall on the scope of Article 4 of the BIT

[47] The Claimant claims that the activities of the Respondent are included in Article 4 of the BIT. It is clear that VCLT has the binding effect on Palmenna and Kenweed.[53] Therefore, the BIT shall be interpreted in according with Article 31 and Article 32 of the VCLT, of particular Art 4.2(e).

[48] According to Article 31 of the VCLT, the term "petrochemicals" should be interpreted in its context.[54] In addition, Article 32 says explicitly that supplementary means of interpretation may be resorted 'in order to confirm the meaning resulting from the

[53] Clarification, number 4.
[54] Regan, Donald H, p.1047-65.

application of Article 31' even if the application of Article 31 appears to produce a clear meaning[55]. Furthermore, the interpreter can, and should, consider any evidence which helps to establish the parties's intentions; the interpreter can consider this evidence in all cases, without meeting any threshold requirement that consideration under Article 31 fails to produce a clear and reasonable meaning.[56]

[49] Therefore, the term "petrochemicals" included in Article 4.2(e) of the BIT must be interpreted with the context and the circumstances of signing the BIT between the Parties. Regarding the context; the Preamble of the BIT, both Parties uphold the need to protect against the climate change and to safeguard the environment in line with the UNFCCC, CBD; along with Articles in the BIT, especially from Article 1 to Article 6, all indicate the protection of human rights and environment.[57]

[50] Thus, "Petrochemicals" must be interpreted not only as "producing any chemical substance obtained from petroleum or natural gas" but also as activities in which the product is the result of any chemical phenomenon that itself may have environmental impact or contains any substance that may cause environmental impact; or the result of storing any such substance.[58] Article 4 of the BIT expressingly states that the scope of this article is: "*Petrochemicals: Production capacity of each product or combined product of 50 tonnes or more per day.*"[59] Therefore, if production capacity of each product or combined product from the mentioned activities is 50 tonnes or more per day, that activity will fall on the scope of Article 4.2(e).

[51] The Claimant claims that the production of the Respondent is biofuel. It is clear that

[55] Art 32, VCLT
[56] Ibid footnote 41.
[57] Moot Problem, para 15, page 7.
[58] Oxford Learner's Dictionaries
[59] Article 4.2(e), BIT, page 7

the production of Canstone is challenged due to the rarity of biofuel creation in Palmenna.[60] Moreover, it was desperate to make profits and was getting pressured by both the nations to be successful.[61] In addition, activities of the Respondent include transesterification in which palm oil is reacted with an alcohol and a catalyst, the oil mixture then is stored in tanks. After that, the biodiesel must be washed and purified.[62] In addition, the production capacity of the Respondent in 2022 is about 1492 tones per day, which satisfies the statistical requirement under Article 4.2(e)[63]. Therefore, they are activities that may have environmental impact under Article 4.2.

[52] **To conclude**, the Claimant claims that due to the production of biofuel, the activities of the Respondent falls on the governance of Article 4 of the BIT.

(ii) The submission of the EIA report cannot be delayed

[53] The Claimant claims that the EIA report cannot be delayed, because **(a) The conversation between Mr. Akbar and Mr. Gan does not conduct any obligation to the Claimant** and **(b) There is no practical obstacle to prevent the Respondent from submitting the EIA report.**

(a) The conversation between Mr. Akbar and Mr. Gan does not conduct any obligation to the Claimant.

[54] The Claimant claims that the conversation between Mr. Akbar and Mr. Gan does not conduct any obligation to the Claimant. Even if there is an expressed obligation, the Claimant claims that it is not applicable.

[60] Moot Problem, para 23, page 9.
[61] Moot Problem, para 23, page 10.
[62] Moot Problem, para 28, page 11.
[63] Article 4.2.e, BIT, 2021

[55] In the *Nuclear Tests Case,*[64] the Court expressingly stated that unilateral acts can create legal obligations for a State when the State recognizes the binding force of the declaration.[65]

[56] According to the Guiding Principles of ILC,[66] a declaration binds a State internationally only when it is made by an authority vested with the power to do so, including the Head of Government.

[57] Thus, the Claimant claims that the conversation of Mr. Akbar and Mr. Gan does not conduct any obligation to the Claimant but the rights of late submission for the Respondent, which is non-binding the Claimant at all.

[58] Additionally, the Claimant does not intend to be bound by the declaration of Mr. Akbar. Firstly, the cooperation is protested not only by the Palmennian parliament[67] but also the Palmennian citizens.[68] Although the position of Mr. Akbar is qualified to conduct a binding unilateral declaration,[69] the Claimant claims that the declaration is invalid, because of the objection of Palmennian citizens and the Palmennian parliament. Moreover, the conversation between Mr. Akbar and Mr. Gan[70] does not represent the position of the Heads of Governments but only friends, which clearly express that the conversation falls out of the scope of an unilateral action made by the Head of Government.

[59] Secondly, the declaration is kept confidential to the public, which cannot be considered as an unilateral binding of the State and can constitute the invalidity of a binding declaration. It is clear that the discussion only includes Mr. Akbar and Mr. Gan. Although the form of a unilateral declaration can be varies, the confidentiality of the declaration

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[64] Nuclear tests case, aus. France, 1972, page 46.
[65] Nuclear Tests Case, para 46.
[66] Guiding principles, 2006, point 4
[67] Moot Problem, para 18, page 8
[68] Moot Problem, para 17, page 8.
[69] Guiding principles, 2006, point 4
[70] Moot Problem, para 19, page 9.

before the parliament and the public[71] can void the international binding effect of the declaration.[72]

[60] Therefore, the Claimant claims that the conversation between Mr. Akbar and Mr. Gan does not give the Respondent the right to late or not submit the EIA.

[61] Even if the Respondent argues that the declaration of Mr, Akbar is binding, the Claimants claims that the Respondent did not require any delay for the submission. It is clear that in the state of Mr. Akbar, he said that he "*will remember to tweak certains things to your favours".*[73] The declaration of Mr. Akbar is applicable only when the order is made by Mr. Gan. In this case, there is no order for the delay of submission from Mr. Gan, thus, it seems that Mr. Gan accepted the timeline of submission.

[62] The tribunals in the *Urbaser* and *Aven* counterclaims ruled that 'it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law'.[7475] Furthermore, EIA is custom in a transboundary context, given the number of treaties and tribunal which stress its importance.[76] Article 4.1 of the BIT also mentions the EIA conduct if any activity may have environmental impact.[77] Therefore, the Respondent is required to conduct the EIA.

(b) There is no practical obstacle to prevent the Respondent from submitting the EIA report.

[63] The Claimant claims that there is no practical obstacle preventing the Respondent to submit the EIA report. According to Article 4.4 of the BIT, the submission of the EIA report

[71] Moot problem, para 19, page 9
[72] Guiding principles, 2006, point 6.
[73] Moot problem, para 19, page 9
[74] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, para 1195.
[75] Aven and Others v. Republic of Costa Rica, para 699.
[76] Convention on Environmental Impact Assessment in a Transboundary Context 1989 UNTS 309. *Case Concerning Pulp Mills, p204*
[77] Art 4.1, BIT, page 5

can be delayed due to the practical possibility.[78] In this case, the Claimant challenges the reasonableness of the delay.

[64] The Respondent is incorporated on 26 October 2021[79] and faced a shortage of employees right after the creation.[80] However, the Respondent rapidly overcame the problem and achieved a successful 2022 with the contribution of 20% to the total production capacity of Palmenna, but the Respondent did not promote to conduct any EIA report.[81] In mid-February 2023, the Respondent faced with a reported leak with an unsigned not, but it is soon after proved that there is a hoax[82] by an expert of the Respondent.[83] Moreover, he proposed for the conduction of an EIA report at that time. However, only on 6 September, 7 months after did he request the Board of the Directors to find the conductor of the EIA report.[84] Then, the decision is on hold until the end of 2023.[85] The Claimant claims that the delay of the Respondent is unreasonable during this time.

(iii) The Respondent had deliberately breached the obligations.

[65] The Claimant claims the Respondent is obliged to: (i) appoint a qualified person to conduct an EIA before the operation of any activity which may have significant environmental impact, and (ii) ensure the submission of the report thereof to the MNR & ES before the operation.[86]

[66] The Claimant claims the Respondent is obliged to: (i) appoint a qualified person to conduct an EIA before the operation of any activity which may have significant environmental impact, and (ii) ensure the submission of the report thereof to the MNR & ES

[78] Art 4.4, BIT, page 8
[79] Moot problem, para 21, page 9
[80] Moot problem, para 23, page 9.
[81] Moot problem, para 27, page 11
[82] Moot problem, para 29, page 11.
[83] Ibid.
[84] Moot Problem, para 33, page 13.
[85] Moot problem, para 33, page 13.
[86] Clarification, number 9.

before the operation.[87]

[67] Firstly, the Claimant claims that the Respondent did not appoint any qualified person. In accordance with Article 31.1 of the VCLT,[88] "Qualified" means having the standard of practical skill, knowledge, or ability that is necessary.[89] Since the postings of the adverts for recruitment of the Respondent, Alan Becky and two in-house experts are hired not to be responsible for the conduct and submission of the EIA to the MNR & ES before the operation,[90] but the technical condition.[91]

[68] Even if the Respondent challenges the binding effect of the BIT, The Claimant claims that not conducting and submitting the EIA report constitutes a breach of international custom. The ICJ in the In *Pulp Mills on the River Uruguay*,[92] the ICJ stated that recognises the obligation of conduct as an international custom. Although being recognised by the Court does not bind the third party who was not involved in the dispute, it is indisputable that the Court accepted that obligation as an international custom. Thus, the Claimant claims that conducting an EIA is mandatory.

[69] **In conclusion**, the Claimant claims that the Respondent had deliberately breached the sustainable obligation under the BIT.

2. The Respondent has violated environmental obligations under Article 5 of the BIT.

[70] The Claimant claims that the Respondent breached the environmental obligations under Article 5 of the BIT, because **(i) the Respondent failed to implement prevention measures against poisoning risks; (ii) the Respondent caused to enter into river contaminants;** and **(iii) The *force majeure* is inapplicable in this case.**

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[87] Clarification, number 9.
[88] Article 31.1 VCLT, 1969
[89] Oxford and Cambridge dictionary.
[90] Moot Problem; para 24, 25; page 10
[91] Moot problem, para 24, page 10
[92] *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Judgment 20 April 2010, para. 101.

(i) The Respondent failed to implement prevention measures against poisoning risk.

[71] The Claimant claims that the Respondent has the obligation to (a) implement prevention measures if there is a risk of contaminants discharge; and (b) shall not discharge or cause to enter into any river any contaminant.

[72] Article 5.1 of the BIT states that *"no investor(s) shall discharge, or cause to enter into any river"* any matter included in points a, b, c and d of the Article 5.1;[93] and it is included in Article 5.3 that *"Whenever any such entry or discharge has been made, the owner or occupier of the property from which such entry or discharge originates shall [...] be presumed to have discharged it or caused it to enter into such river."* [94]

[73] According to the interpretation under Article 31 and Article 32 of the VCLT, the Claimant claims that if the Respondent's property contributes to such discharge or entry, the Respondent shall be presumed to contaminate the river.

[74] Firstly, the Respondent failed to implement prevention measures. In the unsigned note incident, the Respondent was warned about the potential leak in one of the tanks used to store the refined palm oil containing contaminants, which is clearly a risk of contaminants discharge.[95] However, the Respondent had no response, Alan delayed the inspection for 2 days while he could immediately travel between cities. Furthermore, he refused Jakey's request for a detailed investigation and concluded the results improperly as he examined the Report prepared in December 2002 to confirm his findings. He even personally updated the relevant stakeholders on the unfounded allegation of a "leaked leak".[96] During the flood incident, only the Karheis was installed with automated monitoring and control systems. On the contrary, the plant in Appam, which suffered the worst flash flood in history, still

[93] Art 5.1, BIT, 2021
[94] Ibid, Art 5.3
[95] Moot Problem, para 28, page 11.
[96] Moot Problem, para 29; page 11,12.

operated while the neighboring factories decided to immediately shut down.[97] Therefore, the Respondent had breached the first obligation.

[75] Secondly, the Claimant claims that the Respondent's property contributes to the entry of contaminants into the river. Firstly, after the flooding event, the compromised pressure relief valves on the storage tanks were revealed, possibly due to the impact of the floodwaters. This equipment, if malfunctioned, can wrongly discharge fluids or gas at extremely high pressure and velocity.[98] Additionally, allegations about the Respondent's drainage and ventilation systems are not denied. The objection of SZN even proved the allegation when SZN argued that the volatile weather conditions during the monsoon made it challenging to accurately assess the extent of the damage.[99] SZN's silence formed the acquiescence[100]. The drainage system lacked the capacity to handle significant volumes of liquid, especially during periods of heavy rain and flooding; the ventilation systems were found to be lacking in functionality and compliance with safety standards, they suffered from neglect and insufficient maintenance.[101] Additionally, the plant in Appam witnessed one of the worst flash floods with these low-quality equipment, therefore, Canstone's property contributes to the discharge and entry of contaminants into river,[102] which means Canstone is presumed to implement that action, violating the second obligation.

[76] In conclusion, The Claimant claims that Respondent failed to implement prevention measures against poisoning risk under Arrticle 5 of thr BIT.

(ii) The *force majeure* is inapplicable in this case.

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[97] Moot Problem, para 34, 35; page 13,14.
[98] "What are the Common failures of safety relief valves?", John Valves.
[99] Moot Problem; para 41,42; page 15.
[100] In the *Gulf of Maine Case* the ICJ Chamber Court described the principle by stating that: "acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent"; "Acquiescence is hence a negative concept that is generally associated with a lack of reaction in a situation that calls for a positive response, such as an objection", Ian Mcgibbon, 'The Scope of Acquiescence in international law' (1954) 31 British Ybk Intl L 143, 143.
[101] Moot Problem, para 41, page 15.
[102] Article 5.2 of the BIT, "river" shall be deemed to include any inland waters.

[77] The Claimant claims that the force majeure principle is inapplicable in this case due to the **(a) absence of *force majeure* clause in the BIT**, and **(b) the Respondent failed the *force majeure* criteria.**

(a) The BIT does not have the *force majeure* clause.

[78] The Claimant claims that the absence of the *force majeure* clause in the BIT constitutes the invalidity of the application of this principle. The *force majeure* clause is not stated in the BIT, thus, the *force majeure* principle is inapplicable with the BIT.

(b) The Respondent failed the *force majeure* test

[79] Even if the Respondent argues that the *force majeure* principle is applicable under international customary law, the Claimant claims that the Respondent does not fulfill the *force majeure* test which requires the party invoking the test satisfies all 03 criteria: unforeseeability, uncontrollability, impossibility.[103] However, the Claimant claims that the Respondent does not satisfy 02 of them.

[80] Firstly, the Claimant claims that the flooding is foreseeable. It is clear that since 2020, Palmenna has to suffer harsher rainfall and heavy flooding.[104] In 2023, the heavy rain started from early November and lasted for several days,[105] on 26 November, the flood started in Appam.[106] This shows that it rained for nearly a month, thus, the flooding, which became harsher from 2020, is a foreseeable situation.

[81] Secondly, the Respondent was able to fulfill the obligation. It is clear that the neighboring factories at Appam decided to immediately shut down for the next 3 days and

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[103] *Force majeure and Fortuitous event as a circumstance precluding wrongfulness: Survey of State practice, international judicial decisions and doctrine - study prepared by the Secretariat",* Extract from the Yearbook of the International Law Commission 1978. vol. II(1), para 15, page 69
https://legal.un.org/ilc/documentation/english/a_cn4_315.pdf
[104] Moot problem, para 11, page 6.
[105] Moot problem, para 34, page 13.
[106] Moot problem, para 35, page 13

ordered an emergency evacuation.[107] Moreover, the plants in Karheis, under the monitoring of Mr. Alan, record no infection. However, in Appam, the flood was 3 days later but the in-house expert was unable to make any definite decisions but order to operate normally.[108] Thus, the impossibility of fulfilling obligation falls on the incompetence of the employee of the Respondent.

[82] **To conclude**, the Claimant claims that the *force majeure* principle is inapplicable in this case.

CONCLUSION ISSUE THREE:

[83] For all the mentioned reason, the Tribunal should decide that the Respondent had deliberately breached its sustainable obligation and the environmental obligation under the BIT.

[107] Moot problem, para 34, page 13.
[108] Moot problem, para 34, page 13.

ISSUE FOUR: PALMENNA IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES.

[84] The Respondent has challenged the entitlement of Palmenna to an award of declaration and damages, claiming that the Respondent did not breach its obligation in the BIT, even if it did, it had no liability.

[85] The Claimant reaffirms the entitlement to an award of declaration and damages because Respondent breached its obligations under the BIT as stated above, and the Respondent does have the liability. The Claimant demonstrates that **(1) the Respondent has the strict liability; (2) the Respondent has the environmental liability;** and **(3) the Respondent has the human rights liability.**

1. The Respondent has the strict liability

[86] The Claimant claims that the Respondent has the strict liability. An entity's liability can result from the causation of damage as a consequence of behavior, which is in and of itself not prohibited by law. Under strict liability the party causing damage cannot defeat liability by either excuse or justification. Strict liability thus does not presuppose faulty or illegal behavior and is commonly stipulated for damage resulting from very hazardous activities.[109] Moreover, strict liability is typically applied in cases in which the defendant's activity was "ultrahazardous" or "abnormally dangerous".[110] An activity is abnormaly dangerous if it: (i) necessartily invovles a risk of serious harm to the person, land, or property of another which cannot be eliminated by the exercise of the utmost care; and (ii) is not a matter of common usage.[111] While the activity need not be rare, abnormally dangerous activities, by definition, are not commonly carried out by a majority of people on a regular

[109] Peter Gailhofer, David Krebs, Alexander Proelss, Kirsten Schmalenbach, Roda Verheyen, *"Corporate Liability for Transboundary Environmental Harm. An International and Transnational Perspecive",* para 38, page 23.
[110] *Green v. Ensign-Bickford Co.*
[111] 57A Am. Jur. 2d Negligence § 386; see also Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948).

basis.[112]

[87] Firstly, the creation of biofuel is still considered a rarity in Palmmena.[113] Secondly, activities of Canstone involve risks of serious to the person, land,... as stated by Prime Minister Akbar in the meeting with Prime Minister Akbar and CEO Tara Sharma.[114] Thirdly, because of the failure to conduct the EIA, the Respondent failed to implement appropriate measures, which led to all the consequences that Palmenna has suffered such as injured and hospitalized Palmennian and the spread of infection.[115] The Respondent directly caused damages to the Claimant, therefore, the Respondent cannot defeat its liability.

[88] In addition, Article 1.3 of the BIT also provides that *"the obligations stated therein shall be enforceable [...] against the investors [...]".* the BIT includes rights and obligations of the Respondent, the Respondent enjoys the protection of the BIT, therefore, it has the obligation to uphold its obligations and liability. In the *Urbaser v Argentina* case, the tribunal held that as investors are entitled to invoke rights resulting from the Spain-Argentina BIT's, the investor could also be held to comply with obligations under international law.[116]

2. The Respondent has the environmental liability

[89] The Claimant claims that the Respondent has the environmental liability even if the BIT has no inclusion. In *Ecuador v Perenco* case, the Tribunal unequivocally recognized the right for a State to claim environmental harm and the right to be compensated for such harm.[117] Moreover, that Tribunal said "*[...] The Tribunal agrees that if a legal relationship between an investor and the State permits the filing of a claim by the State for*

[112] Ibid.
[113] Moot Problem, para 23, page 9.
[114] Moot Problem, para 16, page 7.
[115] Moot Problem; para 36,40; page 14,15.
[116] *Urbaser v. Argentina*, para 1194.
[117] Perenco Ecuador Ltd, para 594, p.143

environmental damage caused by the investor's activities and such a claim is substantiated, the State is entitled to full reparation.[118] In the *Burlington v Ecuador* case, the host State was entitled to an award of damage based on the strict liability of the investor while the Ecuador-United States of America BIT had no inclusion of such provision. [119]

[90] Article 1.3 of the BIT provides the scope of BIT applies to investors,[120] which manifests that the BIT permits the filing of the Claimant. As proved above the Respondent breached its environmental obligations in the BIT.[121] Consequently, various toxic chemicals are discharged into the river, they are dispersed throughout the area and this contributes to the spread of the infection.[122] Thus, the Claimant is entitled to the restitution for the environmental damages in Palmenna.

3. The Respondent has the human rights liability.

[91] The Claimant claims that the Respondent has the human rights ability. Article 1.3 of the BIT provides that *"the obligations stated therein shall be enforceable against the investor(s) of the Parties"*.[123] Under Article 3.3, the duty to protect against business-related human right abuse. [124] The term "obligations stated" in Article 1.3 does not particularly aim at investor obligations, additionally, the BIT provisions are interpreted according to Article 31 and 32 of the VCLT. As a result, the Respondent is required to unser human rights under Article 3.3 of the BIT.

[92] In *Urbaser v Argentina case,*[125] the Tribunal found that the BIT cannot be construed as an isolated set of rules of international law for "the sole purpose of protecting investments

[118] ibid, para 451, p.149
[119] Burlington Resources Inc. v. Republic of Ecuador, p.59
[120] Art 3, BIT, 2021
[121] See claim III.
[122] Moot Problem, para 40, page 15.
[123] Art 1.3, BIT, p.4 2021
[124] Art 3.3, BIT, p.5, 2021
[125] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, para 1189

through rights exclusively granted to investors" and referred to some international treaties. Additionally, the Tribunal also derived the legal subjectivity of corporations drawing on Corporate social responsibility as a "standard of crucial importance", which "includes commitments to comply with human rights in the framework of those entities's operations conducted in countries other than the country of their seat or incorporation.

[93] Article 14 of the United Nations Guiding Principles on Business and Human Rights (UNGPs) provides that *"the responsibility of business enterprises to respect human rights applies to all enterprises [...]"*.[126] The responsibility to respect human rights applies fully and equally to all business enterprises. In the ruling of *Milieudefensive v Shell* case, the court had to interpret the unwritten standar of care in Dutch civil law and bases this on the UNGPs as an "authoritative and internationally endorsed 'soft law' instruments". "For this reason, the UNGPs are suitable as a guideline in the interpretation of the unwritten standard of care. Due to the universally endorsed content of the UNGP, it is irrelevant whether or not [Shell] has committed itself to the UNGP".[127]

[94] Moreover, under Article 19 of the UNGPs, where a business enterprise causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact; and where a business enterprise contributes or may contribute to an adverse human rights impact, it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact to the greatest extent possible.[128]

[95] The Respondent's breach of the sustainable and environmental obligations under Article 4 and 5 of the BIT resulted in the hospitalization of many Palmennian, including

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[126] Art 14, UNGPs, 2008
[127] District Court of the Hague *Milieudefensive v Shell* (2021) C/09/571932 / HA ZA 19-379 (English version) at 4.4.11.
[128] Commentary on Article 19, Implementing the United Nations "Protect, Respect and Remedy" Framework, Guiding principles on business and human rights.

employees of Appam facility.[129] Furthermore, the flood carrying various toxic chemicals even dispersed throughout the area and contributed to the spread of infection.[130] Therefore, the Respondent is required to implement measures for the Claimant.

[96] In addition, the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct provides that enterprises should maintain the highest standards of safety and health at work. It also encourages enterprises to respect workers' ability to remove themselves from a work situation when there is reasonable justification to believe that it presents an imminent and serious risk to health or safety.[131]

[97] The employees worked in the situation which caused serious risk to health. They were forced to work in a plant with low-quality equipment while the neighboring factories shut down immediately due to one of the worst flash flood in Palmenna's history. [132]After that, they were hospitalized due to respiratory tract injuries[133]. Thus, the Resopndent is required to compensate for the victims.

[98] Therefore, the Claimant is entitled to an award of declaration and damages that states that the Resspondent is liable for the incicdent.

CONCLUSION ISSUE FOUR:

[99] Even when the the answer to Issue Three is affrimative, the Tribunal should confirm that the claimant is entitled to an award of declaration and damages due to the liability falls on the respondent for not fulfilling its obligation under the BIT.

[129] Moot Problem, para 36, page 14.
[130] Moot Problem, para 40, page 15.
[131] OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, para 63, page 33.
[132] Moot Problem, para 34, page 13.
[133] Moot Problem, para 36, page 14.

PRAYER FOR RELIEF:

Claimant respectfully requests the Tribunal to:

[1]. **DECLARE** that the pre-arbitration proceedings are not required to be complied before arbitration proceedings be commenced by the Government of Palmenna against Canstone;

[2]. **CONFIRM** that the arbitration proceedings can be commenced by the Claimant against the Respondent;

[3]. **DECLARE** that the Respondent has breached its obligation under the BIT;

[4]. **CONFIRM** that the Respondent is liable for the incident.