MY2403-R

ASIAN INTERNATIONAL ARBITRATION CENTRE

MEMORIAL FOR RESPONDENT

BETWEEN:

THE FEDERATION OF PALMENNA

(CLAIMANT)

-AND-

THE CANSTONE FLY LIMITED

(RESPONDENT)

19th LAWASIA INTERNATIONAL MOOT, 2024

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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
EIA	Environment Impact Assessment
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
MNR&ES	Ministry of Natural Resource and Environmental Sustainability of the Palmenna
Model Clause	Model Arbitration Clause and Submission Agreement of the AIAC Rules

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
RSIWA	Draft Article on Responsibility of State for Internationally Wrongful Acts
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	Vienna Convention on the Law of the Treaties

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TREATIES AND CONVENTIONS:

Abbreviations	**Citations**	**Article**
AIAC Rules	AIAC Arbitration Rules 2023	**Rule 2, 20.**
Vienna Convention	Vienna Convention on the Law of Treaties	**Article 2, 7, 11, 12, 13, 14, 15, 16, 24, 31, 32**
Draft Articles of RSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts	**Article 5**
Argentina - Spain BIT	Agreement for the Promotion and Reciprocal Protection of Investments Between the Republic of Argentina and the Kingdom of Spain, 1991	Article X(1)
Vietnam - South Korea BIT	Agreement Between the Government of the Republic of Korea and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments	Chapter 2, part 1 and part 2
Model Arbitration Clause and Submission Agreement	Model Arbitration Clause and Submission Agreement of the AIAC Rules	

JUDICIAL DECISIONS:

Abbreviations	Citations	Page
Philip Morris v Uruguay (n 8)	Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)	¶140–1.
Silverstein Prop	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)	¶8
Ickale v Turkmenistan	İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24, Award	¶260
Haldiram. v. DLF	*Haldiram Mfg. Co. (P) Ltd. v. DLF Commercial Complexes Ltd*, SCC OnLine Del 2139, 2012,	¶20-22
Cable and Wireless v. IBM	Cable & Wireless Plc v IBM United Kingdom Ltd. [2002] APP.L.R. 10/11 Arbitration, Practice & Procedure Law Reports. JUDGMENT : Mr Justice Colman : Commercial Court. 11th October 2002	¶3-6
Barcelona Traction	Barcelona Traction, Light and Power Co., Ltd. (Belgium / Spain), (05.02.1970), (1970) ICJ Reports 1970	¶4, 52
Benvenuti & Bonfant v. Congo	Benvenuti et Bonfant s.r.l. v. People's Republic of the Congo, ICSID Case No. ARB/77/2, Award (Aug. 8, 1980), 21 I.L.M. 740 (1982)	¶ 35
Eudoro Armando Olguín v Republic of Paraguay	Eudoro Armando Olguín v Republic of Paraguay (Decision on Jurisdiction) (ICSID Case No ARB/98/5, 8 August 2000)	¶ 30
Société Nationale v. U.S	Société Nationale Industrielle Aérospatiale v. United States District Court, United States Supreme Court, 482 U.S. 522 (1987)	¶ 112
Daimler AG v. Bauman	Daimler AG v. Bauman, 571 U.S. 117, No. 11–965 (2014)	¶*552-3*
Occidental Petroleum v. Ecuador	Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11 (2012)	
Aven v Costa Rica	David R. Aven and Others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Award,	¶ 1207

Urbaser v Argentina	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award,	¶1189,1196-1197, 1206
Metal-Tech v. Uzbekistan	Metal-Tech Ltd. v. Republic of Uzbekistan, ICSID Case No. ARB/10/3, *Judgement*,	¶ 237
Crystallex v. Venezuela	Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Judgement	¶ *864*
Burlington v. Ecuador	Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, 7 February 2017 ("Burlington award"), CA-CC-60. The Burlington tribunal also issued on the same date a Decision on Counterclaims, CA-CC-59 ("Burlington Decision on Counterclaims")	¶ 35
Urbaser v. Argentina	Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award	¶ *1157*
Ambiente Ufficio SpA v Argentine Repu	Ambiente Ufficio SpA v Argentine Repub, ICSID Case No ARB/08/9, Decision on Jurisdiction and Admissibility (8 February 2013)	¶ *577–82.*
ILC Report	ILC Report 1966, YBILC 1966II 192, para. 1; AGO in the ILC, YBILC 1965I 34 f, paras. 60 and 62.	¶ 1,3, 60-62
Nuclear Tests Case	Nuclear Tests (Australia v. France), Judgment, 20 Dec 1974	¶ 46

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Abbreviations	Citations
Louise Barrington, Hong Kong	Louise Barrington, Hong Kong: ADR Clauses and a Duty to Negotiate in Good Faith, Hyundai Engineering and Construction Company Ltd. v. Vigour Ltd. (I), Judgment of the Court of First Instance of the High Court of Hong Kong HCCT 24/2008
Malgosia Fitzmaurice	*Malgosia Fitzmaurice, Third Parties and the Law of Treaties,* https://www.mpil.de/files/pdf1/mpunyb_fitzmaurice_6.pdf
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/
Regan, Donald H	Regan, Donald H. "Understanding What the Vienna Convention 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.
Yearbook of the International Law Commission 1978	Yearbook of the International Law Commission 1978. vol. II(1), https://legal.un.org/ilc/documentation/english/a_cn4_315.pdf

IISD, 23 April 2019	Mistura, Alessandra, 'Enhancing Environmental Protection in International Investment Law through the Integration of International Civil Liability Principles' (IISD, 23 April 2019) https://www.iisd.org/itn/en/2019/04/23/enhancing-environmental-protection-in-international-investment-law-through-the-integration-of-international-civil-liability-principles-alessandra-mistura/?fbclid=IwZXh0bgNhZW0CMTEAAR0gby1LgJFc6MhSDY68ignOwCmoKjFH5WG1ZeLA1ZDv85TiZ3AGpXie-n8_aem_PyNqgXKNtOQIYpZ9KK2gFg
Madhav Mallya, Cambridge University Press: 4 January 2024	Madhav Mallya, "11 - Bilateral invesmtnet treaties, investor obligations and customary international envrironmental law" from PArticle III - Interpreting Customary international rules, published online by Cambridge University Press: 4 January 2024

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E.M. Borchard	E.M. Borchard, *The diplomatic protection of citizens abroad or the law of international claims*, New York, The Banks Law Publishing Co., 1919	**Page 617**
C. H. Schreuer	C. H. Schreuer, *The ICSID Convention: a Commentary*, Cambridge, University Press, 2001	**Page 292**

Mark E. Villiger	Mark E. Villiger, Commentary on the 1969 Vienna Convetion on the Law of Treaties	**Page 137.**
Villiger, Mark Eugen	Villiger, Mark Eugen, Commentary on the 1969 Vienna Convention on the Law of Treaties (Brill 2009)	**Page 140**
Jan Paulsson and Georgios Petrochilos	Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration* (Kluwer Law International, 2018), at p.238.	**Page 238**
Peter Gailhofer, David Krebs, Alexander Proelss, Kirsten Schmalenbach, Roda Verheyen,	Peter Gailhofer, David Krebs, Alexander Proelss, Kirsten Schmalenbach, Roda Verheyen, *"Corporate Liability for Transboundary Environmental Harm. An International and Transnational Perspecive"*	Page 23, 235

MISCELLANEOUS:

Abbreviations	**Citations**
Cambridge Dic	Cambridge Dictionary, Word Definition

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

(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, thanks to the tropical climate with rainforest. Palmenna exported USD15 million metric tons of palm oil in 2020. The capital of Palmenna, Appam is known as a vibrant metropolis. Since 2021, Palmenna saw a significant political changes with the election of Prime Minister M Akbar. 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. After the creation, Canstone faced with many challenges with the pressure to be succeeded. However, 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
January 2021	The new Prime Minister Gan Ridhimajoo is appointed

16th May, 2021	Mehstone Star Limited ("**Mehstone Ltd**") is incorporated. The Ministry of Trade and Investment of Kenweed and the KLT respectively holds 60% and 40% of shares.
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.
29th September 2021	The draft bilateral investment treaty was presented to and accepted by thePrime Minister Akbar's cabinet.
3rd October 2021	The Palmenna-Kenweed Bilateral investment Treaty ("**BIT**") was signed in Appam.
26th October 2021	Canstone Fly Limited ("**Canstone**") is incorporated. CEO Tara Sharma determines the general policies of Canstone, while the nominees of SZN in Canstone manage the day-to-day operations.
November 2021	Canstone began its operations. Canstone faced with the shortage of employees Mr. Alan Becky and two in-house experts was hired to ensuring the operation of the in good working conditions. The brief environmental assessment note and a report on the condition of the machinery and equipment ("**Report**") is conducted by the in-house experts every 4 months.
By the end of 2022	Canstone contributed 20% to the total production capacity of 2,722,000 tonnes per year in Palmenna.

	SZN is deemed the "*face*" and "*operating force*" of Canstone in Palmenna. Canstone proposed to reward its employees with substantial bonuses of up to USD 10k each.
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 delayed no later than 15 December for the approvals of the skateholders.
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. The Canstone decided to normally operation, remained employees to respond to any emergency.
26th November 2023	The worst flash flood expressed in Appam.
November -	Nearby occupiers was admitted to the hospital, 129 people were

December 2023	affected, 39 people, in which one third 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 relief 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 to be paid to 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 and the path forward uncertain. The negotiation was not made to deal with the incident but the political protest against Prime Minister Akbar.
3rd March, 2024	A political meeting was held, the content of the meeting was confidential, but there is doubt that the meeting was to overthrow the government of M Akbar.
6th March 2024	The Government of Palmenna commenced the arbitration proceedings against Canstone to void the High Court ruling 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 proceddings 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 empoyees 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 MUST TO BE COMPLIED BEFORE ARBITRATION PROCEEDINGS BE COMMENCED BY THE GOVERNMENT OF PALMENNA AGAINST CANSTONE.

The Respondent argues that the pre-arbitration steps have to be complied with because (1) the pre-arbitration steps are mandatory obligations, (2) the pre-arbitration steps are enforceable and (3) The AIAC Rules require parties to fulfill all of the pre-arbitration steps before arbitration

(1) The pre-arbitration proceedings are mandatory requirements for the arbitration commencement by the Claimant

The Respondent argues that the pre-arbitration proceedings are mandatory. The interpretation of the BIT, in accordance with the Vienna Convention as well as the practice of arbitrations, leads to mandatory obligations.

Firstly, as parties to the Vienna Convention,1 the Respondent argues that the BIT has to be

[1] Clarification, para 4, page 2.

interpreted in accordance with Article 31 of the Vienna Convention.2 Accordingly, the word "shall" in Article 12 of the BIT3 is interpreted in the context of the dispute resolution clause. A study of ICC arbitral awards concludes, "when a word expressing obligation [, such as "shall",] is used in connection with amicable dispute resolution techniques, arbitrators have found that this makes the provision binding upon the parties" and "compulsory, before taking jurisdiction".4 That is apparent from the use of the term "shall" which is unmistakably mandatory, and from the obvious intention of the parties that these procedures must be complied with, not ignored.5

If dispute resolution clauses unequivocally provide that negotiations or other procedural steps are a mandatory obligation before the commencement of arbitration, some investment arbitration tribunals have given effect to such language and dismissed the arbitration, because of the claimant's failure to complete pre-arbitral dispute resolution steps.6

Secondly, the Respondent argues that the procedure is specific and detailed constituting a mandatory requirement. Article 12 provides specific and detailed procedural requirements, with the use of words "first, second and third"7, requiring a respective order of the dispute settlement. In addition, where the treaty contains explicitly mandatory language, these tribunals have held that cooling-off periods must be complied with.8 Therefore, a 90-day period for mediation has to be complied before the commencement of arbitration administered by the AIAC.9 Specific and detailed procedural requirements are accepted as mandatory

[2] Article 31, Vienna Convention, 1969
[3] Article 12, BIT, 2021.
[4] Born, Gary, and Marija Šćekić, p.238
[5] Philip Morris v Uruguay (n 8) paras 140–1.
[6] Born, Gary, and Marija Šćekić, p.236
[7] Article 12, BIT, 2021
[8] Ambiente Ufficio SpA v Argentine Repub,paras 577–82.
[9] Ibid.

requirements than as the case with generalized provisions.10 11

Even if the pre-arbitration proceedings are inadmissible, it is not a basis for the failure to comply with them. In the Ickale v Turkmenistan case, the Court states that the inadmissibility of the pre-arbitration proceedings does not give the chance to not comply with it. However, the Claimant has not even attempted to implement any pre-arbitration steps to be able to claim the futility of the pre-arbitration proceedings.12

Thus, the Respondent argues that the pre-arbitration proceedings are mandatory.

(2) The pre-conditions to arbitration under Article 12 should not be deemed merely a procedural matter

The Claimant may claim that these conditions are nonmandatory because they are empty formalities due to a possible biased judgement from the higher management, the lack of scope for an amicable settlement and a time bar for the negotiation process. Additionally, a lack of procedure for choosing a mediator makes the conditions unenforceable.

However, the Respondent argues that the pre-arbitration steps are not an empty formality because: (i) The decision of higher management has no effect and (ii) Negotiation and mediation are admissible despite the lack of time bar and mediator choosing procedures.

[10] Silverstein Prop

[11] ICC Case No 6276 (n 4) (tribunal relied on 'precise rules' and 'detailed' nature of the procedure, 'within precise time limits', to conclude that the procedures was mandatory)

[12] İçkale v. Turkmenistan, page 85,86, para 260

(i) The decision of higher management has no effect.

The Respondent argues that the decision, if any, made by the higher management has no effect.

Article 12.1(a) of the BIT should not be overlooked on the grounds of doubts as to the impartiality of the Minister of the MTI. 13

The Respondent argues that the higher management is not involved in the disputes as well as has no authority of ruling the dispute. Moreover, this article does not require the Parties to settle the dispute by the higher management but the obligation to "refer",14 which requires Parties to inform the dispute to higher management, not to be the third parties to determine.

Therefore, the Respondent argues that the decision made by higher management has no effect.

(ii) Negotiation and mediation are enforceable despite the lack of time bar and mediator-choosing procedures.

Claimant may claim that in order to make the pre-arbitration steps mandatory, it requires a specific time limit for negotiation. However, the Respondent argues that a specific time limit for negotiation is not compulsory.

In Haldiram. v. DLF, the Court stated that the lack of an amicable negotiation time bar does not invalidate the requirements for pre-arbitration proceedings. The Court held that the word "shall" expressed a mandatory obligation. 15

[13] Article 12, BIT, 2021
[14] ibid
[15] *Haldiram v. DLF,* paras 20-22

In Cable and Wireless v. IBM, the contract clause required that ADRs should be followed before arbitration. This was held to be certain and enforceable, and therefore, mandatory. It was further held that even if no such identifiable procedure was mentioned, the clause may still be enforceable. 16

Article 12 of the BIT requires Parties to amicably negotiate.17 Therefore, the Respondent argues that negotiation is compulsory despite the lack of a time bar.

Secondly, in case the Claimant claims that mediation can not be commenced due to the lack of specific procedure to appoint mediators, the Respondent argues that the specific procedure to appoint mediators is not compulsory.

According to the Model Clause, there is no need for a specific procedure to appoint mediators and Article 12 has correctly followed the Model Arbitration Clause. 18 Therefore, even without a specific procedure to appoint mediators, requirements to mediate are still enforceable and mandatory.

Article 12 of the BIT expressly requires mediation.19 The effectiveness of mediation has been practically proven as the mediation frameworks established in Palmenna and Kenweed, yielded a successful mediation rate of 70% over the past 5 years.20 Moreover, it is clearly stated in the BIT that the period between mediation and arbitration is 90 days.21

[16] Cable & Wireless v IBM p.3-6
[17] Article 12, BIT, 2021
[18] Model Clause, AIAC Arbitration Rules 2023, p.3
[19] Article 12, BIT, 2021.
[20] The first correction and clarifications to the moot problem, para 1, page 1.
[21] Article 12.1(c), BIT, 2021

Thus, the Respondent argues that the mediation process still remains as an effective pre-arbitration proceedings that the Claimant has to comply with. In case of the failure of mediation, parties still have to comply with that period of time.

(3) Even if the pre-arbitration proceedings under the BIT are inadmissible, Parties have to comply with the pre-arbitration proceedings under AIAC Rules 2023.

The Respondent asserts that the AIAC Rules are applicable in this case because both Parties jointly agreed in the BIT.22 Article 12 of the BIT provides that arbitration will be conducted by the AIAC according to its current arbitration rules at the time the dispute arises.23

Under the AIAC Rules, parties must fully satisfy all pre-arbitration requirements before initiating arbitration. Article 2(b) of the AIAC Rules 2023 outlines that arbitration may commence only after the initiating party files a confirmation that all pre-conditions to arbitration have been satisfied.24 Furthermore, Article 20 specifies 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."25

In this case, the Claimant cannot provide the required confirmation that all pre-conditions to arbitration have been met, including: (i) the dispute between Parties has been sent to higher management of Parties in an attempt to settle such dispute by amicable and good faith negotiation; (ii) mediation is implemented after negotiation but failed; and (iii) more than 90

[22] Art 12.1.c, BIT, 2021
[23] ibid .
[24] Art 2(b), AIAC Rules 2023.
[25] Art 20, AIAC Rules 2023.

days have been taken for mediation between Parties from the commencement of the mediation to arbitration administered by the AIAC. However, all of the above conditions are not met since neither party engaged in good faith negotiations or mediation.

Even if the Claimant claims that the case can still be arbitrated despite the failed negotiation and non-mediation, however, the Respondent argues that there was no mutual agreement to proceed to arbitration under Article 20,26 and the Respondent did not initiate or agree to arbitration under the AIAC Arbitration Rules following the non-existence of mediation. Since the compulsory pre-arbitration steps, as stated in Article 12 of the BIT, Article 2 and Article 20 of the AIAC Rules, have not been fulfilled, the arbitration under the AIAC Rules cannot be commenced.

To conclude, the Respondent argues that the pre-arbitration proceedings are mandatory.

CONCLUSION ISSUE ONE:

[1] Due to the mandate and the enforeceability of the pre-arbitration proceedings stated in the BIT between Parties, the Tribunal should reject the claims brought by the Claimant. Those pre-arbitration proceedings, are compulsory obligations and admissible according to the its wording as well as the practice of the use of the ADRs in between Parties.

[26] Ibid.

ISSUE TWO: THE CLAIMANT IS PRECLUDED FROM INITIATING AN ARBITRATION AGAINST THE RESPONDENT

(2) The triple identity test is satisfied

The Respondent argues that the “triple identity test”, which has been widely used in international tribunals and courts after the first application in Benvenuti & Bonfant v. Congo Case, is applicable in this case.41 The use of the "triple identity test” requires the satisfaction of all criteria: (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 criteria in determining jurisdictional objection.42

(i) Identity of the Parties

This criteria mandates that the parties involved in both proceedings must be identical, meaning the parties in the domestic court case are the same as those before the arbitral tribunal.43 In this case, the identities of the parties are identical.

Firstly, the Respondent argues that the Claimants are the same. It is clear that the “citizens” cannot present in any cases and need to be represented. The Government of Palmenna, which is the Claimant in this dispute, presenting in the case, is clearly elected44 and represents its citizens, to protect the rights of its citizens. On the other side, in the domestic court, it is clear that the activists were not the Claimant but represented the citizens to protect the rights of the citizens. Thus, the Respondent argues that the nature of claimants in the two cases are the same, the difference from the representatives does not void the identity of the parties.

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[41] *Benvenuti & Bonfant v. Congo Case, p.35*
[42] Legal Developments'
[43] Eudoro Armando Olguín v Republic of Paraguay , p.30
[44] Moot problem, para 12, page 6

Secondly, the Respondent argues that the respondents are the same. The legal status of the "company, although controlled either in particle or whole by the investor, does not constitute a separate legal entity under the laws of the host State."45 Although this expression does not bind, the Respondent argues that the practice, in this case, expressed that the Claimant considers SZN and Canstone as one entity. However, instead of initiating legal actions against Canstone, the Claimant's claims were against the action of SZN affirmed that SZN and Canstone is one legal entity.

Thus, the Respondent argues that the parties are identical between these two cases.

(ii) Cause of action:

This criterion requires that the claims in the domestic court must exactly mirror those submitted to the international arbitral tribunal. This criteria prevents a claim to be brought twice in domestic court as well as international tribunal.46

In the case of Société Nationale Industrielle Aérospatiale v. United States, The Supreme Court held that the triple identity test was met, as the cause of action in the French court proceedings was the same as the cause of action in the subsequent U.S. court proceedings as they were all about the discovery of documents located in France for use in a civil lawsuit in the United States.47

In Daimler AG v. Bauman, The Court found that the triple identity test was satisfied, as the cause of action in the Argentinian court proceedings was the same as the cause of action in the subsequent

[45]Legal Developments
[46] Legal Developments
[47] Société Nationale v. U.S, p. 112

U.S. court proceedings for human rights abuses committed by its Argentinian subsidiary, despite the parties not being completely identical.48

In this present case, the claims are arising from the same violations. Both the cases submitted to the High Courts and to the AIAC are about the incidents which led to the infection among the citizens of Palmena. Therefore, the cause of action asserted in the High Courts is thus identical to the cause of action submitted to the AIAC arbitration.

(iii) Identity of object

This criteria 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. 49

In the Occidental Petroleum v. Ecuador, the ICSID Tribunal found that the triple identity test was met because the claimants' prior administrative proceedings before Ecuadorian authorities and the subsequent ICSID Tribunal both concerned the same underlying object - the termination of an oil exploration and production contract.50

In the case of Palmena v. Canstone, Palmenna is seeking both declaratory reliefs and damages.51 In the domestic case, the sought declaration and relief is “liable for negligence and ordered for compensation to be paid.”52 These 2 declarations have the same identity as they both seek liability for damages of Palmena. It is clear that the objects in the domestic proceedings are identical to the relief sought in the AIAC arbitration proceeding.

[48] Daimler AG v. Bauman, 571 U.S. 117, No. 11–965 (2014)
[49] Legal Developments
[50] *Occidental Petroleum v. Ecuador,*
[51] MP, para 55, page 18
[52] Moot problem, para 45

In conclusion, the Respondent argues that the dispute was brought twice, under the "triple identity" test as the parties, the causes of action, and the identity of objects are identical. Since all three criteria are satisfied the arbitral tribunal has no jurisdiction to hear the case.

CONCLUSION ISSUE TWO:

[2] In light of the above, the arbitral tribunal has no jurisdiction to hear the case due to the fulfillment of the *"triple identity test"*, including all of three criteria (i) identity of the parites, (ii) the cause of action; and (iii) identity of the object. Therefore, the AIAC's proceedings should reject the claims of the Claimant.

PART TWO: MERITS

ISSUE THREE: THE CANSTONE HAD NOT BREACHED ITS OBLIGATION UNDER THE BIT

Respondent argues that the Respondent had not breached its obligations under the BIT because **(1) The BIT does not bind the Respondent due to its invalidity and unenforceability,** and **(2) even if the BIT is enforceable, Respondent had not breached any provision under the BIT**

(1) The BIT does not bind the Respondent due to its invalidity and unenforceability

I. (i) The BIT is invalid

The Respondent argues that the BIT is invalid because the signatories of the BIT does not satisfies Article 7 of the Vienna Convention requiring "full power" person to express consent to be bound by a treaty

According to Article 7 of the Vienna Convention, the signature is valid when the person who signed the treaty produces appropriate full powers.[53]

It is indisputable that the BIT is signed on 3 October, 2021.[54] The Prime Minister Gan of Kenweed attended the signing ceremony in Appam.[55] However, there is a lack of proof that Prime Minister

[53] Article 7.1, Vienna Convention, 1969.
[54] Moot problem, para 20, page 9.
[55] Ibidem.

Gan signed the BIT himself and with an authorised person of Palmenna. In the last page of the BIT, the signatures were not named and both Parties do not have evidence that the treaty was signed by an authorised person and/or by Prime Minister Gan.

Even if the BIT was signed by another person designated by the competent State authority, Article 7 of the Vienna Convention raises the matter of a representative producing full powers for the purpose of adopting or authenticating the text of a treaty or expressing the consent of a State to be bound by a treay.[56] According to Article 2.1(c) of the Vienna Convention, full powers means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting and authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty.[57] In addition, Article 7 of the Vienna Convention states the person who is required to produce an instrument of full power and who is presumed to possess authority without the production of full power.[58] Therefore, in case of another person signing the BIT, he must be designated by the competent State authority in writing and that person shall show the instrument of full powers. However, there was no information about a person satisfying these requirements, no instrument has been produced.

In case it falls into the Article 7.1(b) of the Vienna Convention, which offers States the option to dispense with full powers,[59] this requires active or implied conduct indicating a common intention that the States parties concerned regard the particular category of officials as authorised and not requiring full powers.[60] There has been no information stating such conduct between Palmenna and Kenweed. Thus, the Respondent argues that the BIT is invalid due to the lack of authorised persons signing the treaty.

[56] Mark E. Villiger, page 137.
[57] Ibid.
[58] ILC Report para. 1; 60 and 62.
[59] ILC Report, para. 3.
[60] Villiger, Mark Eugen, p.140

II. (ii) Even if the BIT is valid, it is not enforceable.

Even if the Claimant claims that the treaty is valid, the Respondent argues that the BIT is not now enforced according to Article 24.2 of the Vienna Convention.

Because the BIT does not provide the date of entering into force and the Parties do not negotiate about the entering into force date, thus, the date of entering into force is in accordance with Article 24.2 of the Vienna Convention.[61] As provided in Article 24.2, a treaty enters into force as soon as all of the contracting Parties consent to be bound by the treaty.[62]

According to Article 11 of the Vienna Convention, the means of expressing consent to a treaty are signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.[63] However, the means of expressing consent to a treaty have to be written in the treaty or agreed between contracting Parties through negotiation.[64] According to Article 12 of the Vienna Convention, the signature is a means of expressing consent to a treaty when (a) the treaty provides that the signature shall have that effect, (b) the contracting Parties agree that the signature shall have that effect, and (c) the intention of the State that the signature shall have that effect in the full power and/or during the negotiation process.[65] It is clear that neither Parties agreed in writing nor in verbal negotiation whether the signature is the means of expressing consent to the force of the treaty.

Thus, the Respondent argues that the BIT is not enforceable. Therefore, the Respondent is not bound by the treaty.

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[61] Article 24.2, Vienna Convention, 1969
[62] Ibid.
[63] Article 11, Vienna Convention, 1969
[64] Article 12 - 16, Vienna Convention, 1969.
[65] Article 13, Vienna Convention, 1969.

(2) Even if the BIT is enforceable, the Respondent argues that they had not breached any obligation under the BIT.

The Claimant claims that the Respondent had breached its obligations under Article 4 and Article 5 of the BIT because activities of Canstone are included in Article 4 and the Respodent failed the environmental obligations; and the Respodent has the obligations not to discharge any matter into river and has to implement measures in response to the risks.

(2.1) For Article 4, the Respondent asserts the opposite because **(i) Article 4 of the BIT does not govern the activity of the Respondent,** and **(ii) even if the Article 4 of the BIT does govern, the Respondent does not violate any provisions under Article 4 because the submission of the EIA report can be delayed.**

(2.2) For Article 5, the Respodent argues that it had not breached obligations because **(i) the environmental obligation cannot follow the interpretation of the Claimant, (ii) The Claimant failed the burden of proof,** and **(iii) even if the Claimant's interpretation is applied and the Claimant could prove the relied facts, it falls to a *force majeure***.

(2.1) The Respondent is neither governed by nor in breach of the environmental obligations under Article 4 of the BIT

The Respondent argues that **(i) Article 4 of the BIT does not govern the activity of the Respondent**, and **(ii) even if the Article 4 of the BIT does govern, the Respondent does not violate any provisions under Article 4.**

(i) Article 4 of the BIT does not govern the activities of the Respondent

The Claimant claims that activities of the Respondent fall under the scope of Article 4.2(e) of the BIT, particularly "petrochemicals".[66] The Respondent argues that the activities of Canstone are not under the governance of Article 4.2(e) of the BIT because (a) "Petrochemicals" is substance or production of substance obtained from petroleum or natural gas so palm oi and palm biodiesel falls out of scope of Article 4, and (b) the activities of Canstone does not fall into the scope Article 4.2(e) as the production is palm oil and palm biodiesel.

(a) "Petrochemicals" is substance or production of substance obtained from petroleum or natural gas so palm oi and palm biodiesel falls out of scope of Article 4

The Respondent argues that "Petrochemicals" term shall be interpreted as substance or production of substance obtained from petroleum or natural gas.

Firstly, the "Petrochemicals" term shall be interpreted under its ordinary meaning under Article 31.1 of the Vienna Convention.[67] According to Article 31, it is a commonplace that few words have a context-independent ordinary meaning.[68] Article 31.1 recognizes this explicitly when it speaks of the ordinary meaning 'to be given' to the terms in their context (and in light of the treaty's object and purpose).[69] Therefore, according to Oxford Learner's Dictionaries, "Petrochemicals" means *"any chemical substance obtained from petroleum oil or natural gas".*[70]

Additionally, if interpreting "petrochemical" in the context according to Article 31 of Vienna Convention,[71] considering the Preamble and Articles of the BIT under Article 32 of Vienna Convention,[72] especially Article 4.2 of the BIT regarding activities which may have significant

[66] Art 4.2(e), BIT, 2021, p.6
[67] Article 31, Vienna Convention, 1969.
[68] Ibid.
[69] Regan, Donald H, para.1047-65.
[70] Oxford Learner's Dictionaries.
[71] Article 31, Vienna Convention, 1969.
[72] Art 32, Vienna Convention, 1969.

environmental impact,[73] "Petrochemical" shall be interpreted as the production of substance obtained from petroleum or natural gas.

Therefore, the "Petrochemicals" term is substance or production of substance obtained from petroleum or natural gas so palm oi and palm biodiesel falls out of scope of Article 4

(b) The activities of Canstone does not fall into the scope Article 4.2(e) as the production is palm oil and palm biodiesel.

It is factual that production of the Respondent is palm oil and palm biodiesel. Firstly, the role of palm biodiesel is to create biofuel through its combination with petroleum diesel. However, the percentage of palm biodiesel is capped due to the available supply and high costs of palm oil in Kenweed, which also was the reason for the establishment of Mehtone for the purposes of harvesting, extracting and refining palm oil to produce biofuel.[74] Moreover, Canstone is the subsidiary of Mehstone to stabilise the costs and revenue for the production of Mehstone's biofuel.[75] Thus, the purpose of Canstone's operation is only to stablise the costs and revenue for the production of Mehstone by providing more palm biodiesel, addressing the supply and high cost problems. In addition, palm biodiesel is produced through transesterification, storage and wash; the process contains no petroleum or natural gas. Thus, activities of the Respondent are neither governed by the BIT nor included in Article 4 of the BIT.

(ii) Even if the Article 4 of the BIT does govern, the Respondent does not violate any provisions under Article 4 because the submission of the EIA report can be delayed.

[73] Art 4.2, BIT, 2021.
[74] Moot Problem, para 10, page 6.
[75] Moot Problem; para 14,15; page 7.

The Respondent argues that the delay of the EIA report is agreed by the Claimant, and despite the delay allowance and difficulties, the Respondent did obey the environmental obligation in good faith.

Firstly, the delay is jointly agreed beforehand. It is clear that Prime Minister Akbar expressed that Kenweed and its investors could "take time" to submit the report.[76] The Respondent argues that in the *Nuclear Tests Case*,[77] the ICJ states that "*statements made by unilateral conduct relating to factual or legal situations that may have the effect of creating legal obligations.*"[78] Moreover, according to Article 5 of the Draft Article of RSIWA,[79] the acts of conduct of an authorised person shall be considered an act of the State under international law.[80] In this case, the unilateral act of Prime Minister Akbar conducted rights and obligations for Palmenna, which is binding Palmenna. Moreover, there is no time limit for the delay of submission. Thus, the Claimant cannot invoke Article 4 of the BIT for the delay of submission as a breach of obligation.

In addition, the Respondent argues that the EIA report can be delayed due to the practical obstacle. Article 4.4 of BIT provides that the investor can submit the report to the relevant ministry as soon as *"practically possible"*.[81] Thus, the Respondent is allowed to submit the report based on the practical situation and it has obeyed it in good faith. It is undisputable that the Respondent was incorporated at the end of October 2021,[82] by the active promotion of Prime Minister Akbar. However, the Respondent had to face a shortage of employees[83] and needed more time to settle the corporation in accordance with the commitment of hiring at least 70% Palmennian citizens.[84] Only until 2023 are the Respondent and its investor able to plan for the EIA report conducted by an

[76] Moot Problem, para 19, page 9.
[77] Nuclear Tests Case, para 46
[78] Ibid.
[79] Article 5, Draft Article on Responsibility of States for Internationally Wrongful Acts, 2001
[80] Ibid.
[81] Article 4.4, BIT, 2021.
[82] Moot Problem, para 21, page 9.
[83] Moot Problem, para 23, page 9
[84] Moot Problem, para 14, page 7.

independent consulting firm.[85] Furthermore, the Respondent had planned for an EIA report as soon as practically possible. In the situation that the Respondent is unable to conduct the EIA report submitted to the MNR & ES, the experts of the Respondent have to conduct internal reports involving environmental impact assessment every 4 months from 2021, submitting to the stakeholders of the Respondent for further decision making.[86] This further reflects the Respondent's serious and conscientious approach to environmental management.

(2.2) The Respondent had not breached the environmental obligations under Article 5 of the BIT

The Claimant claims that the Respondent not only has the obligations not to discharge or cause to enter into any river any matter included in Article 5.1 of the BIT ("**matter")** but also has the obligations to implement measures in response to risks, and the Respondent breached these obligations. The Respondent argues that it had not breached the environmental obligations under Article 5 of the BIT because **(i) The Respondent is only obliged not to discharge or cause to enter any matter into any river , (ii) The Claimant failed the burden of proof,** and **(iii) even if the Claimant's claim is applied and the Claimant could prove the relied facts, it falls to a force majeure.**

(i) The Respondent is only obliged not to discharge or cause to enter any matter into any river

The Respondent argues that it is only obliged not to discharge or cause to enter any matter into any river.

[85] Moot Problem, para 33, page 13.
[86] Moot Problem, para 25, page 10.

In *Aven v Costa Rica*, the Tribunal stated that investor obligations must be expressly mentioned in the BIT.[87] In *Urbaser v Argentina*, although 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 through rights exclusively granted to investors", looked at international conventions and referred to the Universal Declaration on Human Rights, the International Covenant on Economic, Social and Cultural Rights,... ; the tribunal was not able to construe a legal obligation on the investor because it could not find such obligation in the BIT.[88]

Article 5 of the BIT does not directly impose obligations to implement measures in response to risks on the investor. Instead, Article 5 only provides that *"no investor(s) shall discharge, or cause to enter into any river"*.[89]

Therefore, the Respondent only has the obligation not to discharge or cause to enter into any river any matter.

(ii) The Claimant failed the burden of proof to showcase that the allegions fall on the Respondent

The Claimant failed the burden of proof as Article 27 of UNCITRAL arbitrations rules states that *"Each party shall have the burden of proving the facts relied on to support its claim or defence".*[90]

In *Metal-Tech v. Uzbekistan*, the Tribunal indicated that each party bears the burden of proving the facts on which it relies.[91] In *Crystallex v. Venezuela* case, the tribunal held that the claimant bears the burden of proof "in relation to the fact and the amount of loss".[92] If a party fails to provide essential support for its allegations without a satisfactory explanation, the allegations will be

[87] *Aven v Costa Rica*, *para* [1207]
[88] *Urbaser v Argentina*, para 1189, 1196-1197, 1206
[89] Article 5, BIT, 2021.
[90] Article 27, UNCITRAL, [...]
[91] *Metal-Tech v. Uzbekistan, Judgement, para 237.*
[92] *Crystallex v. Venezuela, Judgement, para 864.*

unproved and, therefore, dismissed.[93] According to general principles, the claimant will have to prove that the conduct or the omission of the defendant has caused the respective damage.[94] Therefore, the Claimant had the obligation to prove the facts it relied on.

Under Article 5.1 of the BIT, the Claimant has to prove that the Respodent intentionally discharge or cause to enter into river any matter, similarly, under Article 5(3) of the BIT, the Claimant is required to prove that such entry or discharge directly originated from the Respodent's property.

However, the Claimant failed to prove the facts relied on. In the flood incident, it was clear that the Respondent did not interntionally discharge any matter, instead, the Respondent responded quickly and carefully. Automated monitoring and control systems are installed in storage tanks to track inventory levels, monitor temperature and pressure, and detect any abnormalities or leaks in the storage tanks. This allows operators to maintain optimal conditions and respond quickly to any issues that arise.[95] Regarding Canstone's facilities, although the pressure relief valves on its storage tanks were compromised, it does not mean that they create any entry or discharge based on the system equipped for the tanks. Furthermore, Canstone initiated investigation immediately, swiftly repaired and enhanced its ventilation systems to minimise the impact of the incident.[96] Furthermore, Canstone's internal doctor stated that it was inconclusive whether the infection was caused by the broken relief valve.[97] In addition, the consequences may root from other neighboring factories.[98] Thus, the allegations shall be dismissed because the Claimant is not able to provide essential support for its allegations; the Respondent had not breached the environmental obligations under Article 5 of the BIT.

[93] Jan Paulsson and Georgios Petrochilos, p.238.
[94] Peter Gailhofer, David Krebs, Alexander Proelss, Kirsten Schmalenbach, Roda Verheyen, para 116, page 235.
[95] Moot problem, para 34, page 13.
[96] Moot problem, para 39.page 14,15.
[97] Moot problem, para 40 page 15.
[98] In the German forest damage (acid rain) case, the German Federal Court (BGH) found that the plaintiffs has not established a sufficient causal link because the defendant's emission contributions were mixed indistinguishably with those of other emitters and one emitter's pollution could not be traced to the damage incurred by a specific forest owner.

(iii) Even if the Claimant's claim is applied and the Claimant could prove the relied facts, it falls to a *force majeure*.

The applicability of *force majeure* does not depend on the clause of the BIT. The following requirements should be met for an "exception of force majeure": (i) the event must be beyond the control of the obligor and not self-in-duced; (ii) the event must be unforeseen or foreseen but inevitable or irresistible; (iii) the event must make it impossible for the obligor to perform his obligation; (iv) a casual effective connexion must exist between the event of *force majeure,* on the one hand, and the failure to fulfill the obligation, on the other.[99]

Regarding the first requirement, an event or occurrence constituting *force majeure* must be absolutely external to the person and the activities of the obligor; the essential element is the fact that such acts or omissions cannot be attributed to the obligor as a result of his own wilful behavior.[100] The Canstone's independent investigation into its facilities revealed that the pressure relief valves on its storage tanks were compromised, possibly due to the impact of the floodwaters.[101] Following the flooding event, Canstone initiated an independent investigation into its facilities, revealing that the pressure relief valves on its storage tanks were compromised; but it is impossible to force the Respondent to be liable for discharging or causing any matter or oil to enter into the river based on this information.[102] In addition, Canstone's internal doctor stated that it was inconclusive whether the infection was caused by the broken valves.[103] The worst flash floods, the compromised valves due to the impact of the floodwaters, the release of the storaged are obviously not a result of the Respodent's willful behavior.

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[99] *"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

[100] ibid.

[101] Moot problem, para 39, page 14.

[102] Moot problem, para 39, page 14.

[103] Moot problem, para 40, page 15.

On the second requirement, it is sufficient if either of the two conditions is met.[104] The extent of the flood is unforeseeable because it was the worst flash floods that Appam has ever experienced.[105] If it is foreseen, it is both inevitable and irresistible because Palmenna has been experiencing harsher rainfall and heavy flooding since 2020, and the extent of the flash flood.[106] Additionally, the fact that the pressure relief valves malfunctioned, which may lead to the cause of matter or oil entering into the river, both were unforeseen for the Respondent.

During such a flash flood - one of the worst in the history of Appam, it was impossibile for the Respondet to recognize, detect and repair the pressure relief valves which were compromised, due to the impact of the floodwaters.

Lastly, that causal connection referred to is not the result of behavior wilfully adopted by the obligor.[107] It is clear that the Respondent had not intentionally discharged matters, instead the Respondent installed factories with advanced systems for prevention.[108] Even if any substance had entered the river, it would have been due to compromised valves, which possibly had been damaged by floodwaters. Therefore, this issue was not a result of any deliberate action by the Respondent.[109]

Additionally, Respondent acted with seriousness, diligence, and good faith in addressing the aftermath of the flood. Respondent promptly took measures to mitigate the consequences, including conducting a thorough independent investigation. This investigation revealed malfunctioning valves, which the Respondent quickly repaired. Additionally, by upgrading the ventilation systems to prevent future issues, Respondent demonstrated commitments to minimizing risks and ensuring effective management of the situation.[110]

[104] ibid 31.
[105] Moot problem, para 35, page 14.
[106] Moot problem, para 11, page 6.
[107] Ibid 31.
[108] Moot Problem, para 31, page 13.
[109] Moot Problem, para 43, page 16.
[110] Moot Problem, para 39, page 14,15.

CONCLUSION ISSUE THREE:

[3] From the mentioned evidence above, the Tribunal should decide that the Respondent did not breach any obligation under the BIT.

ISSUE FOUR: PALMENNA IS NOT ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES.

The Respondent argues that it does not have the liability because **(1) There is no liability clause regulated in the BIT**, **(2) Even if the strict liability is applicable, Claimant is not entitled to such award because it is not able to prove causation, (3) The lack of Palmennian domestic law prevents the entitlement to an award of declaration and damages for the Claimant,** and **(4) the Claimant is jointly liable.**

(1) There is no liability clause regulated in the BIT

The non-existence of liability clause in the BIT refuses the Claimant's entitlement for an award of declaration and damages. In addition, the Respondent had proved at issue III that the obligations must be expressly mentioned and directly imposed on the investors in the BIT.[111] It is also a requirement for a State to incorporate the provisions of certain international civil liability conventions relating to the adoption of preventive or reinstatement measures with the IIA so that it could establish such liability on the investors.[112]

Thus, the inclusion of the investor liability in the BIT, or the existence of liability law, is required for the Claimant to be entitled an award of damages. The Morocco - Nigeria BIT includes investor liability in Article 20, *"investor shall be subject to civil actions for liability [...]"*.[113] In the *Burlington v. Ecuador* case, the Tribunal based on the strict liability regime under Ecuadorian law for an award of damage for the host State.[114] Additionally, in the *Urbaser v. Argentina* case, although

[111] See Issue Three.
[112] IISD, 23 April 2019
[113] Article 20, Morocco - Nigeria BIT, 2016.
[114] *Burlington v. Ecuador, p.*

mentioning articles in some human rights international treaties, the Tribunal could not impose any obligations upon the investors because the source of the human right in question was not the BIT. [115]

However, the BIT includes neither such liability clause nor the incorporation of any international civil liability for the corporations. Therefore, the Claimant is not entitled an award of damages.

On the other hand, if the Claimant claims that the Respondent has the liability under international law. The Respondent argues that general principles of international law do not recognise the international environmental liabilities of non-State actors.[116] The Respondent is a Palmmennian investor, clearly non-State actors, therefore, the Respondent has no liability.

(2) Even if the strict liability is applicable, Claimant is not entitled to such award because it is not able to prove causation

The Claimant claims the Respondent to have the strict liability. However, the Respondent argues that the Claimant is not able to prove the causation between the damages and the activities of Canstone. The strict liability requires the causation of damages as a consequence of the entity's behavior.[117] However, the Respondent had proved at issue III that the Claimant had not been able to prove that the Canstone's activities had done damages to the Palmmenna[118]. Therefore, the Claimant is not entitled to award of declaration and damages.

(3) The lack of Palmennian domestic law prevents the entitlement to an award of declaration and damages for the Claimant.

[115] *Urbaser v. Argentina*para, para 1157
[116] Madhav Mallya, Cambridge University Press: 4 January 2024
[117] Peter Gailhofer, David Krebs, Alexander Proelss, Kirsten Schmalenbach, Roda Verheyen, para 38, page 23.
[118] See Issue Three.

The Respondent argues that the lack of Palmennian domestic law prevents the entitlement to an award of declaration and damages for the Claimant. Even if a BIT does say that a foreign investor must conduct an EIA, the tribunal will be bound to decide in accordance with the domestic law of that State, rather than an absolute rule, even if that rule is embodied in the treaty. Even if the BIT states that the investor must operate the investment in accordance with the host State's international obligations, the application of such rule will happen in accordance with domestic law.[119]

In *Aven v Costa Rica,*[120] the Tribunal did not hold the claimant responsible in accordance with international law or the precautionary principle but rather in accordance with domestic law which incorporated the precautionary approach. The claimant had a duty under the domestic biodiversity law to advise the competent authority.[121]

In the absence of a domestic law, the investor obligations may be rendered nugatory. Moreover, even if the investor must act in accordance with the host State's international obligations, which may include the host State's recognised rules of CIL, it will be difficult for the investor to implement these rules in the absence of domestic law.[122]

If the Claimant states that the Respondent has the liability under the BIT, it is required to consider domestic law and it is important for the Claimant to proactively provide the Respondent with the domestic law. However, there was no information providing that the Claimant has proactively provided its domestic law for the Respondent; or the domestic law includes detailed provisions on the EIA conduct, environmental obligations or investor liabilities. Therefore, the liabilities may be rendered nugatory.

(4) The Claimant is jointly liable.

[119] *Supra* note 120.
[120] *Aven v. Costa Rica, para [552-3].*
[121] *Supra* note 120. .
[122] Ibid

Procedurally speaking, the host State will be bound to be transparent with the investor about environmental screening procedures. Moreover, if a host State alleges that an investor is responsible for environmental degradation, the host State cannot evade responsibility if proper procedures have not been followed or if a project has been approved even without environmental sanction. Therefore, the host State may share liability with a foreign investor for environmental degradation.[123]

In this case, there has been no information stating that the Claimant had proactively taken any action to provide the Respondent with its domestic law or that the Claimant had liability regulations in its domestic law. Similarly, although the Claimant acknowledges about the challenges of palm oil production, such as deforestation, biodiversity loss and environmental degradation,[124] the Claimant still approved the creation an operation of Canstone in Appam, the capital, as well as a vibrant metropolis,[125] which is an economical as well as politically important area. Thus, the Claimant loses the right to invoke the liability because it is jointly liable.

Thus, the Claimant is required to share the liability with the Respondent.

CONCLUSION ISSUE FOUR:

[4] Even if the Issue Three is an affirmative, the Claimant is not entitled to an award of declaration and damage. Due to the lack of the liability in the BIT, as well as the Pamennian domestic law, the Claimant cannot be entilted. Moreover, the Respondent arrgues that the Claimant is jointly

[123] Ibid
[124] MP, para 15, page 7
[125] MP, para 2 page 3.

liable for the incident in Appam.

PRAYER FOR RELIEF:

Claimant respectfully requests the Tribunal to:

[1]. **DECLARE** that the pre-arbitration proceedings are required to be complied before arbitration proceedings be commenced by the Government of Palmenna against Canstone;

[2]. **CONFIRM** that the arbitration proceedings cannot be commenced by the Claimant against the Respondent;

[3]. **DECLARE** that the Respondent has not breached its obligation under the BIT;

[4]. **CONFIRM** that the Respondent is not liable for the incident. Even if the Respondent is liable, the Claimant is jointly