MY2404-C

19TH LAWASIA INTERNATIONAL MOOT COMPETITION : 2024
IN THE ASIAN INTERNATIONAL ARBITRATION CENTRE
KUALA LUMPUR, MALAYSIA

MEMORIAL FOR CLAIMANT

A CASE CONCERNING:

PALMENNA-KENWEED BILATERAL INVESTMENT TREATY

BETWEEN

FEDERATION OF PALMENNA … CLAIMANT

AND

CANSTONE FLY LIMITED …RESPONDENT

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STATEMENT OF JURISDICTION

The parties, Federation of Palmenna, the CLAIMANT and Canstone Fly Limited, the RESPONDENT have agreed to the following. First, the law governing the procedure of the arbitration shall be Malaysian law considering the *lex arbitri* is Malaysia. Second, the governing framework for the arbitration should be the Asian International Arbitration Centre (AIAC) Rules 2023.

QUESTIONS PRESENTED

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

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

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

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

STATEMENT OF FACTS

→ The Federation of Palmenna (hereinafter **"CLAIMANT"**) and Canstone Fly Limited (hereinafter **"RESPONDENT"**) are the **'PARTIES'** to this arbitration.

→ CLAIMANT is located in Southeast Asia and a Member State of the Commonwealth of Nations. It is known and characterised by diverse landscapes, including coastal plains, mountain ranges and tropical rainforests. This makes the CLAIMANT one of the world's leading producers of palm oil.

→ RESPONDENT is an investor incorporated in the CLAIMANT. It is owned by two shareholders from the Independent State of Kenweed (hereinafter **"Kenweed"**), with Mehstone Ltd owns 70% of Canstone whilst SZN owns 30%. The RESPONDENT secured biodiesel plants in Appam and Karheis.

→ The Palmenna-Kenweed Bilateral Investment Treaty (**"PK-BIT"**) was signed between the CLAIMANT and Kenweed on 3 October 2021 in order to reinforce the longstanding traditional ties of friendship and cooperation between both countries. Following the successful signing of the PK-BIT, the RESPONDENT was incorporated in the CLAIMANT and began its operation in both facilities.

26 October 2021	Canstone secured two biodiesel plants in Appam and Karheis with Fey Lin and Jakey Jake as the in-house experts in both facilities. Alan Becky, a foreign expert from the Republic of Sokiyasu was hired as the second layer of protection. At this stage, a brief environmental assessment note and a report on the condition of the machinery and equipment were conducted.

Mid-February 2023	An unsigned note was received by Karheis facility detailing a potential leak in one of the tanks used to store the refined palm oil. Jakey contacted Alan to request for an urgent examination and Alan arrived two days later. After examining the report prepared in December 2022 to confirm his findings, Alan later signed off a report concluding the report was a hoax. Two weeks following the incident, nearby farmers were hospitalised due to suspected contamination.
Early November 2023	Palmenna experienced heavy rainfall that lasted for several days and water levels in rivers and streams began to rise.
23 November 2023	Flooding risk in the rural parts of the city in Karheis. Upon hearing this, Alan travelled to Karheis to supervise the monitoring and control systems of the storage tanks. In the Appam facility, Lee ordered the operations to resume as normal although the neighbouring factories were shut down for 3 days.
26 November 2023	Appam encountered one of the worst flash floods and after it fully subsided, more than 129 people were affected with respiratory tract injuries while 39 individuals were hospitalised. The causes of such injuries were inhalation of irritant gases or exposure to corrosive chemicals.

	Following the event, Canstone initiated an independent investigation and found that its pressure relief valve was compromised.
15 December 2023	Local activists led by Kevin Malhotra initiated legal actions against the CLAIMANT and SZN on the grounds of negligence.
14 February 2024	The High Court of Palmenna ruled in favour of the activists with the CLAIMANT and SZN were found jointly liable for negligence and ordered for compensation.
1 March 2024	PM Akbar from the CLAIMANT convened a conference call with the higher management of the RESPONDENT but the matter was unresolved and the path forward uncertain.

→ **Initiation of AIAC Proceedings.**

Pursuant to Article 12 of the PK-BIT, the CLAIMANT commenced arbitration proceedings against the RESPONDENT. The CLAIMANT has paid the security deposits and necessary fees under the AIAC Rules 2023. As part of the claim, the CLAIMANT seeks from the Tribunal for declaratory relief and damages. The RESPONDENT contends that legal proceedings of a similar nature were already commenced against SZN in the High Court of Palmenna.

SUMMARY OF PLEADINGS

ISSUE I: THE PRE-ARBITRATION STEPS ARE NOT MANDATORY TO BE COMPLIED WITH BEFORE THE COMMENCEMENT OF ARBITRATION.

The pre-arbitration steps highlighted under Article 12 of the PK-BIT cannot be exhausted by the parties due to it being uncertain and the action of the RESPONDENT not wanting to communicate with the Claimant had caused the clause not to be able to be interpreted on the enforcement. Furthermore, non-compliance with the pre-arbitration steps is not a condition precedent and, therefore, would not affect the jurisdiction of the tribunal to hear the case.

ISSUE II: PROCEEDINGS IN THE HIGH COURT OF PALMENNA AND CURRENT PROCEEDINGS ARE DIFFERENT IN NATURE.

In order to raise an issue of preclusion, the RESPONDENT has the burden to prove that all the triple identity test which consists of similar cause of action, similar identity and similar object of claim which in current case, the claimant has established that both the proceedings are totally different in nature and initiated by different parties in contrast to the proceedings in the High Court of Palmenna.Thereby, the claimant is not precluded from initiating this arbitration proceeding as all the requirements under the triple identity test is not fulfilled.

ISSUE III: RESPONDENT HAD BREACHED THEIR OBLIGATIONS UNDER THE PK-BIT.

The Tribunal should decide on the fact that the RESPONDENT had acted against the maxim of "*Pacta Sunt Servanda*" by breaching the PK-BIT that both Parties have agreed on in particular and international law in general. In particular, RESPONDENT has breached the pertinent terms in the PK-BIT. Moreover, RESPONDENT has conducted a series of actions

that went against international human rights law whilst conflicting with the Palmennian's Environmental and Sustainable law.

ISSUE IV: CLAIMANT IS ENTITLED FOR THE AWARDS OF DECLARATION AND DAMAGES.

Claimant claims that we are entitled for an award of declaration and damages which arises due to the series of breach committed by the Respondent, in failing to comply with the terms enshrined in the PK-BIT. Firstly, there exists a clear nexus between the fundamental breaches and the subsequent results, which was the respiratory injuries suffered by Palmennian Citizens.

PLEADINGS

ISSUE I: THE PRE-ARBITRATION STEPS ARE NOT MANDATORY TO BE COMPLIED WITH BEFORE THE COMMENCEMENT OF ARBITRATION.

1. Article 12 of the PK-BIT stipulates the dispute resolution mechanism in the event of a dispute arising out of the PK-BIT between the parties ("**DR Clause**").[1] The DR Clause portrays three (3) distinct stages that are to be adopted by the parties in the settlement of any dispute arising out of the PK-BIT.

2. It entails three (3) separate dispute resolution mechanism stages whereby, in the spark of a dispute, parties to first initiate a negotiation process with the higher management of the parties, as stipulated in the first limb of the DR Clause[2]. Should the negotiation fail, the second limb is triggered whereby parties to then initiate a mediation process[3]. If the mediation process is not be resolved within ninety (90) days from the commencement of mediation, the dispute will then be referred to arbitration administered by the Asian International Arbitration Centre ("**AIAC**")[4] (collectively referred to as "**Pre-Arbitration Steps**").

3. At the outset, Article 12(1)(b) of the PK-BIT stipulates that "*if the dispute is not resolved via negotiation*" as stipulated in Article 12(1)(a) of the PK-BIT, either party to then initiate *"mediation*" for the resolution of any dispute ("**Purported Mediation Clause**" or "**PMC**"). It is pertinent to note that the PMC only signifies the term "mediation" without any governing framework mentioned.

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[1] Article 12 of the PK-BIT, Page 11
[2] Article 12(1)(a) of the PK-BIT, Page 11
[3] Article 12(1)(b) of the PK-BIT, Page 11
[4] Article 12(1)(c) of the PK-BIT, Page 11

4. Despite the challenge raised by the RESPONDENT on the validity of the commencement of the arbitration process[5], which is denied, it is the CLAIMANT's submission that the Pre-Arbitration Steps enshrined in the DR Clause are not mandatory to be complied with for three reasons. **(A)** Firstly, the Pre-Arbitration Steps are not a condition precedent to commence an arbitration proceeding. **(B)** Secondly, the PMC is ambiguous. **(C)** Lastly, the PMC is uncertain and thus unenforceable.

A. THE PRE-ARBITRATION STEPS ARE NOT A CONDITION PRECEDENT TO ARBITRATION

5. It is submitted that the non-compliance of the Pre-Arbitration Steps does not affect the jurisdiction of this Tribunal. Justice Andre Maniam in Singaporean High Court in *CZQ & Anor v CZS* [6] has affirmed that, as a general principle, "*clear words are necessary to create a condition precedent to the commencement of arbitration*". On this basis, the court had affirmed the tribunal's jurisdiction and held that the amicable settlement procedure was not a condition precedent to the commencement of arbitration.

6. Furthermore, it was held that by the time of the hearing on jurisdiction, neither party was interested in pursuing negotiations or settlement discussions along the lines contemplated by the agreement as there was "*almost no enthusiasm*"[7] for a meeting. It was also held that it was ironic that despite the respondents'

[5] Facts at Page 18 Para 56
[6] *CZQ and another v CZS* [2023] SGHC(I) 16, para 13
[7] *CZQ and another v CZS* [2023] SGHC(I) 16, para 48(a)

admitted lack of enthusiasm for the settlement procedure, they nevertheless relied on it to challenge the tribunal's jurisdiction.

7. In the present case, it is apparent that Tara Sharma's persistent refusal to discuss with the Claimant and abruptly terminating the call portrays "no enthusiasm" on the part of the Respondent to amicably settle the dispute.[8] It also shows that any subsequent negotiation, or even the commencement of a mediation process, would be futile for both parties. Even during the negotiation period, both of the parties objected to each other's opinions and suggestions to dissolve the dispute in good faith and amicably.[9]

8. Furthermore and on the basis of the above, it is submitted that the 90-day waiting period stipulated in Article 12(1)(c) of the PK-BIT can be bypassed. This is on the basis of the business efficacy interpretation of the clause and the inherent futility of the negotiation attempt.[10] This principle finds support in *Biwater Gauff v Tanzania*,[11] where the ICSID tribunal ruled that a six-month waiting period is procedural and directory in nature rather than jurisdictional and mandatory, particularly when further negotiations are fruitless.

9. The principle that the pre-arbitration steps are not a condition precedent to arbitration has been upheld in a few recent cases such as in the case of *Sierra Leone v SL Mining Ltd*,[12] where Sir Michael Burton Gbe in the English Commercial Court had decided that the non-compliance of the multi-tiered dispute resolution does not concern the jurisdiction of the tribunal. It is merely

[8] Facts at Page 18 Para 51
[9] Facts at Page 17 Para 50
[10] *NWA v NVF* [2021] EWHC 2666, para 27
[11] *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, para 343.
[12] *Republic of Sierra Leone v SL Mining Ltd* [2021] EWHC 286 (Comm)

an issue of admissibility which gives the tribunal the discretion of the tribunal to consider admitting the case to be heard or not before the tribunal.

10. There are a few factors that should be taken into consideration by the tribunal on the CLAIMANT's contention that the Pre-arbitration steps are unenforceable by the parties in this dispute. Firstly, the PMC is ambiguous, and second, the PMC is uncertain and thus unenforceable.

B. THE PRE-ARBITRATION STEPS ARE AMBIGUOUS

11. In the current case, it can be highlighted that the mediation clause is ambiguous as it does not define a specific mechanism to enforce the mediation clause. Furthermore, the RESPONDENT's higher management has refused to engage in any communication with the CLAIMANT,[13] and the CLAIMANT's efforts to initiate mediation in good faith have been rendered ineffective and impossible. It is futile to pursue mediation if the RESPONDENT declines to consent to such a process.

12. The RESPONDENT might contend that the dispute could have been resolved through direct negotiation between the parties. Nevertheless, the evidence compellingly demonstrates that the RESPONDENT has persistently and undoubtedly refused to engage in any form of communication with the CLAIMANT.

13. This refusal has affected the CLAIMANT's intention in an attempt to address

[13] Facts at Page 18 Para 51

and resolve the issue amicably, in alignment with the procedural and substantive expectations outlined in the PK-BIT. Nevertheless, the RESPONDENT's lack of cooperation has significantly obstructed the dispute resolution process, contrary to the principles of constructive engagement and dispute resolution envisioned by the BIT.

14. Moreover, even if the particular clause were to be interpreted in its ordinary meaning and good faith as enshrined in Article 31 of the VCLT[14] for example the PMC, it still cannot be derived to achieve and explain one important question to initiate the mediation proceeding which is the governing framework of the mediation.

15. The cornerstone of mediation is consent and if the mediation were to be initiated in any of the frameworks available in Kenweed or Palmenna[15] but not agreed upon and consented to by the RESPONDENT, it would be rendered futile.

16. Due to the lack of clarity in the mediation clause regarding its procedural mechanism, it cannot be effectively enforced.[16] This ambiguity will affect the ability of both parties to resolve the dispute which could be detrimental to both of the parties' interests.

C. THE MEDIATION CLAUSE IS UNCERTAIN AND THUS, UNENFORCEABLE.

[14] Article 31(1) of the Vienna Convention on Law of Treaties 1969
[15] Correction & Clarifications to the moot problem at Page 1 Clarification 1
[16] *Mileform Ltd v Interserve Security Ltd* [2013] EWHC 3386 (QB), para 97

17. Article 12(1)(b) of the PK-BIT, stipulates that "*if the dispute is not resolved via negotiation*", parties to initiate *"mediation*" to resolve any dispute should the negotiation fail. Nevertheless, It is submitted that the PMC lacks specific details on the mediation procedural process such as the stipulation of the applicable governing framework which renders it uncertain.

18. It is trite law that if a mediation clause lacks a defined mediation process or specifics regarding a mediation provider, it is deemed to be uncertain and, consequently, unenforceable as decided by Mr. Justice Cooke in the English Court of Appeal In Sulamerica Cia Nacional De Seguros S.A. V. Enesa Engenharia S.A[17] which the court held that " *the content of even such a limited obligation is so uncertain as to render it impossible of enforcement in the absence of some defined mediation process*" thus the mediation clause is incapable of giving rise to a binding obligation upon the parties.

19. It is crucial for a mediation clause to satisfy the certainty requirement for the PMC to be valid and enforceable such as the scope of the PMC and the procedure applied to the PMC[18].

20. At present, the mediation clause has failed to specify the procedure for initiating the mediation between the parties or the governing framework for such mediation which justifies the action of the CLAIMANT to initiate these arbitration proceedings expeditiously after the negotiation between the parties had failed to achieve solutions for the dispute at hand.[19]

[17] Sulamerica CIA Nacional De Seguros SA and others v Enesa Engenharia SA and others [2012] EWHC 42 (Comm), para 36.
[18] Salehijam, "Mediation clauses: Enforceability and impact," *Singapore Academy of Law Journal* 31 (2019): 598–636.
[19] Facts at Page 17 Para 50

21. Based on recent precedents that affirm that non-compliance with pre-arbitration steps does not impair the tribunal's jurisdiction, we affirm our first submission that the pre-arbitration is not mandatory to be complied before the arbitration can be commenced by the CLAIMANT against the RESPONDENT.

II. THE CLAIMANT IS NOT PRECLUDED FROM INITIATING THIS PROCEEDING AS THE PROCEEDINGS IN THE HIGH COURT OF PALMENNA AND CURRENT PROCEEDINGS ARE DIFFERENT IN NATURE.

22. According to the facts of the case, the RESPONDENT has contended that the CLAIMANT is precluded from initiating this arbitration proceeding as the matter of dispute on the negligence caused by the Respondent has been resolved and decided in the High Court of Palmenna.[20]

23. Nonetheless, it is CLAIMANT's submission that in resolving an issue preclusion, a thorough examination must analysed based on the principles established under the doctrine of res judicata.

24. Issue of preclusion or Res judicata is a doctrine that prevents the relitigation of a claim if it has already been adjudicated on its merits in a prior case. In civil cases, this principle applies when a claim arises from the same transaction or same operative facts as a previously decided case.[21] For the RESPONDENT to successfully raise the issue of preclusion, they must demonstrate that all

[20] Facts at Page 18, Para 57
[21] *Currier v Virginia*, 138 S. Ct. 2144, 2154 (2018).

elements of the triple identity test are met.

25. The triple identity test, as outlined in *Benvenuti & Bonfant v. Congo*,[22] requires three key conditions to be fulfilled by the party raising an issue of preclusion. First, the parties involved must be the same; second, the cause of action must be identical; and third, the object of the claim must be the same. This test has also been applied in *Czech Republic v CME*,[23] and is reflected in ILA Recommendation 3,[24] which addresses issues of preclusion.

26. It is the CLAIMANT's submission that these elements cannot be fulfilled by the Respondent as the facts clearly portrays differences of facts and claims made by the CLAIMANT in the current proceeding as compared to the proceeding in the High Court of Palmenna.

A. IDENTITY OF THE PARTIES IS NOT IDENTICAL

27. The dispute previously adjudicated in the High Court of Palmenna was initiated by the activist who filed a lawsuit against the Government of Palmenna and SZN due to their negligence in protecting the environment which had caused the citizens of Palmenna to suffered from respiratory tract infections.[25] In that case, the activist was challenging actions taken by the Government of Palmenna and SZN.

[22] *S.A.R.L. Benvenuti & Bonfant v People's Republic of the Congo*, ICSID Case No. ARB/77/2, Award (8 August 1980), para 1.14.
[23] *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL case, Final Award (14 March 2003), para 200.
[24] Filip De Ly and Audley Sheppard, "ILA Final Report on Res Judicata and Arbitration," *Arbitration International* 25, no. 1 (March 1, 2009): 67–82.
[25] Facts, page 15, para 41, line 2.

28. In contrast, the current arbitration proceedings involve different parties: the Government of Palmenna and Canstone.[26] Notably, SZN is not a party to this arbitration and is not named as part of the party in the current arbitration proceeding.

29. Despite the fact that SZN holds a 30% shareholding in Canstone, it is insufficient to establish that SZN and Canstone are the same parties or SZN have the controlling power over the decision made by Canstone. It is essential to note the existence of the doctrine of separate legal entity, which maintains that a legally incorporated company is distinct from its shareholders. This doctrine asserts that a company, as an independent legal entity, possesses its own rights and obligations separate from those of its shareholders or parent companies.[27]

30. Moreover, it cannot be asserted that the current arbitration involves the same parties as the case before the High Court of Palmenna as the proceedings in the High Court of Palmenna were initiated by an activist, who is not involved in the present arbitration.

31. Due to the aforementioned reason, the RESPONDENT and SZN are distinct legal entities, each with its own legal personality and capacity to sue or be sued independently. This separation highlights that the entities involved in the current arbitration are not identical to those in the previous litigation.

B. CAUSE OF ACTION IS NOT IDENTICAL.

[26] Facts, page 18, para 54, line 1.
[27] *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL).

32. The facts of the case demonstrate that the proceedings in the High Court of Palmenna addressed a distinct issue and cause of action as compared to the current arbitration proceedings. Specifically, the High Court case involved allegations of negligence within the realm of tort law.[28]

33. In contrast, the current arbitration concerns a different matter, namely the alleged breach of the PK-BIT, which is an international treaty between Palmenna and Kenweed, to distinct nations. The legal issues in this arbitration proceeding fall under the domain of contract law.[29]

34. To clarify further, the PK-BIT was never introduced as evidence in the proceedings initiated by the activist in the High Court of Palmenna. Thus, there is no direct connection between the issues adjudicated in the High Court and those being addressed in the present arbitration.

35. Additionally, Article 10(2) of the PK-BIT explicitly states that a finding of breach under a separate international agreement or any other law does not automatically indicate a breach of the PK-BIT. In relation to that, the RESPONDENT cannot rely upon the High Court of Palmenna's decision to bar the CLAIMANT from initiating this arbitration proceeding. Therefore, the causes of action are not identical, as the proceedings involve different legal issues and facts.

C. THE IDENTITY OF THE OBJECT OF CLAIM IS NOT IDENTICAL

[28] Facts, page 15, para 41, line 2.
[29] Facts, page 18, para 55, line 1.

36. The claims presented in the High Court of Palmenna and those in the current arbitration are perspicuously distinct in both substance and legal basis.

37. In the High Court of Palmenna, the activist's claim was for monetary compensation to be awarded to the citizens of Palmenna. This compensation was sought due to respiratory tract infections suffered by the citizens of Palmenna which were alleged to have been caused by leakage from the RESPONDENT's biodiesel factory. The focus of this claim was for the benefit of the citizens.[30]

38. Nevertheless, the current arbitration concerns a claim brought by the CLAIMANT seeking declaratory relief and damages related to an alleged breach of the PK-BIT.[31] Unlike the High Court claim, this arbitration does not discuss on damages suffered by individual citizens but rather on broader economic and reputational harm to Palmenna's reputation as a renowned palm oil producer. The CLAIMANT is seeking for compensation for the financial losses and reputational damage sustained by Palmenna as a result of the RESPONDENT's breach of the PK-BIT.

39. Given that the triple identity test requirements are not satisfied in this case specifically, the identity of the parties, cause of action, and the object of the claims are not the same, it is highly improbable that the RESPONDENT can substantiate a claim of preclusion.

40. Therefore, the CLAIMANT submits that these arbitration proceedings are not

[30] Facts at Page 16 Para 45
[31] Facts at Page 18 Para 55

precluded. The proceedings are distinct from those in the High Court and do not constitute parallel or identical actions as suggested by the RESPONDENT.

III. THE RESPONDENT HAS BREACHED THEIR OBLIGATIONS UNDER THE PK-BIT.

A. RESPONDENT HAS BREACHED ARTICLE 5 OF THE PK-BIT PERTAINING TO ENVIRONMENTAL OBLIGATION.

41. Article 5 of the PK-BIT establishes stringent environmental obligations on investors, emphasising the protection of water bodies within Palmena's jurisdiction. It is submitted that this provision explicitly prohibits the discharge of any toxic, harmful, or polluting substances into rivers and other water bodies unless expressly authorised by the relevant parties to the PK-BIT.

42. It is essential to emphasize that the Republic of Palmenna is highly susceptible to natural disasters, with two monsoon seasons each year significantly affecting its environmental stability.[32] Since 2020, Palmenna has experienced increasingly severe rainfall, intensifying the challenges of disaster management.[33] These worsening conditions place an even greater responsibility on the RESPONDENT to rigorously implement measures that ensure full compliance with Palmenna’s environmental laws. Despite the adverse and unpredictable circumstances, the RESPONDENT remains obligated to protect public health, safety, and the natural environment, requiring a diligent and proactive approach to environmental governance.

[32] Facts, page 3, para 2, line 4.
[33] Facts, page 6, para 11, line 1.

43. Further, Article 5(2) of the PK-BIT states that the term "river" shall be interpreted to include any inland waters, subterranean water resources, and any water within an estuary or sea adjacent to the State's coastline.

44. The RESPONDENT may argue that a flash flood should not be included within the definition of "river" as outlined in Article 5(2) of the PK-BIT. However, the term "flash flood" is widely used in the media and in the context of our case, yet its precise meaning remains ambiguous. According to an article titled: An Introduction to Flooding terms by Miss Joanne Thomas, an Environmental Expert at JBA Risk Management,[34] a flash flood refers to the rapid onset and recession of floodwaters, without specifying the source of the flooding. In many instances, a flash flood is a combination of river and surface water flooding. This suggests that the term may encompass a broader range of water bodies, potentially including rivers, under certain circumstances.

45. To further substantiate the RESPONDENT's obligations under Article 5 of the PK-BIT, reference is made to Article 8(4) of the Paris Agreement, which the PK-BIT preamble recognizes as binding on Palmenna and Kenweed. Article 8(4) imposes two key duties on the RESPONDENT: first, to take all necessary measures to prevent pollution from biodiesel facilities in Karheis and Appam; second, to minimize the consequences of any pollution that does occur for human health and the environment. These duties reinforce the RESPONDENT's obligation to comply with international environmental standards in managing industrial activities that may affect public welfare and ecological integrity..[35]

[34] Thomas, "An Introduction to Flooding Terms," JBA Risk Management, August 15, 2022, accessed August 16, 2024, https://www.jbarisk.com/news-blogs/an-introduction-to-flooding-terms/.
[35] Article 8(4), Paris Agreement.

i. THE RESPONDENT HAD FAILED TO ENSURE THAT ALL NECESSARY MEASURES ARE TAKEN TO PREVENT POLLUTION RESULTING FROM THE MANAGEMENT OF BIODIESEL FACILITIES IN APPAM.

46. According to the judgement made by Judge Charles N. Brower in an ICSID case, in the year 2011, *Chevron Corporation and Texaco Petroleum Corporation v The Republic of Ecuador* (II).[36] The Tribunal's decision emphasized the importance of strict compliance with environmental obligations. It recognized that BITs do not absolve investors from complying with environmental laws and regulations of the host state. The case reinforced the principle that the RESPONDENT must respect environmental obligations in the PK-BIT as a condition of their investment protections under the BIT.

(i) Respondent Acknowledged The Defect In The Valve At Their Appam Facility.

47. In the present case, three key circumstances can be conclusively established to demonstrate the RESPONDENT's breach. Firstly, it has been confirmed that the RESPONDENT acknowledged the defect in the valve at their Appam facility, which was attributed to the impact of the flood. This acknowledgment substantiates the likelihood that the leakage originated from the Appam facility.

(ii) Appam Facility Is Proven To Be The Only Operating Facility During The Flash Flood.

[36] Para 4.5 in the Award, Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (2018).

48. Secondly, it is evident that Lee instructed the employees to continue operations at the Appam facility and encouraged them to work harder to earn bonuses. This indicates that the facility remained operational on the day of the flood, despite the defective valve. The decision to maintain operations during the flood, without ensuring that the valve was in proper working condition, constitutes a clear breach by the RESPONDENT. The RESPONDENT's failure to prioritize safety and environmental precautions during such a critical time underscores their breach in regards to the Environmental law of Palmenna.

(iii) Areas Surrounding Appam Facility Took Longer To Subside.

49. Lastly, it took more than a day for the floodwaters around the Appam facility to subside, which strongly suggests the presence of an oil leak. It is widely known that oil forms a film on the water's surface when it leaks, which would slow the receding of the water. This delay further supports the conclusion that the leakage from the Appam facility contributed to the prolonged subsidence of the water, thereby confirming the environmental impact of the RESPONDENT's breach.

(iv) Respondent Was Inconsistent In Its Mitigation Effort.

50. To further substantiate this argument, it is evident that the RESPONDENT acted inconsistently in their mitigation efforts. In a judgement delivered by Mr. Horacio A. Grigera Naón, in an ICSID case: *Copper Mesa Mining Corporation*

v Republic of Ecuador,[37] the Tribunal considers an investor's inconsistent compliance with environmental obligations when assessing claims under a BIT. Although the Tribunal did not completely dismiss the investor's claims, it recognized the importance of adhering to environmental regulations and the impact of non-compliance on the outcome of the arbitration.

51. At the Karheis facility, automated monitoring and control systems were promptly installed in the storage tanks as soon as the RESPONDENT became aware of the flooding risk. However, no such mitigation measures were taken at the Appam facility. This disparity in response highlights the RESPONDENT's negligence and lack of due diligence regarding the Appam facility.

52. Plus, RESPONDENT's decision to continue operations at the Appam facility during the flood, despite the known risks and the absence of adequate safety measures, suggests that their primary motive was driven by a desire to sustain their business at all costs, rather than to protect the environment or public safety. The RESPONDENT should have been fully aware of the risks involved in continuing operations during the flood and their failure to address these risks further underscores their breach of duty.

53. The Respondent may argue that this is merely circumstantial, and not conclusive. Nonetheless, Professor Gabrielle Kaufmann-Kohler in his judgement in *Bernhard von Pezold and Others v Republic of Zimbabwe*,[38] underscores the Tribunal's willingness to consider circumstantial evidence to

[37] Para 6.83 to 6.85 of Copper Mesa Mining Corporation v Republic of Ecuador, ICSID Case No. ARB/08/6.
[38] Para 591-594 of the Awards in Bernhard von Pezold and Others v Republic of Zimbabwe, ICSID Case No. ARB/10/15.

assess the motives and compliance of a state's regulatory actions concerning environmental matters.

54. Hence, through all of these series of incidents, it can be seen that the suffering of the 129 occupiers around the Appam facility due to inhalation of the irritant gases during the flood may be attributed to the RESPONDENT.

ii. THE RESPONDENT HAD FAILED TO MINIMIZE THE CONSEQUENCES FROM THE MANAGEMENT OF BIODIESEL FACILITIES IN KARHEIS FOR BOTH HUMAN HEALTH AND THE ENVIRONMENT.

55. Professor Gabrielle Kaufmann-Kohler in delivering his judgement in *Burlington Resources Inc. v Republic of Ecuador*,[39] emphasised that the obligation to minimize environmental impacts requires investors to take proactive measures to prevent harm and to remediate any damage caused. In this case, Burlington's neglect in addressing the environmental issues raised by its operations in Ecuador led to substantial and ongoing environmental damage, justifying the counterclaims for compensation.

56. Two consecutive breaches by the RESPONDENT in handling the leak have significantly contributed to the worsening conditions concerning the contamination at Karheis. In mid-February, the RESPONDENT received an unsigned note from a neighboring factory reporting a potential leak in one of the tanks used to store refined palm oil that had undergone transesterification. Transesterification is the process that converts palm oil into biodiesel.

[39] Para 405 *Burlington Resources Inc. v Republic of Ecuador*, ICSID Case No. ARB/08/5.

(i) Respondent Failed To Address The Leak Promptly.

57. At that point, the oil mixture in the tanks had not yet been separated from impurities, nor had it been washed to remove excess contaminants. It is crucial to highlight that the leaked oil was unpurified biodiesel, as it had not yet undergone the washing process. This indicates that the RESPONDENT's handling of the situation was flawed from the outset, exacerbating the contamination issues at Karheis. The failure to address the leak promptly and adequately, given the state of the oil, further illustrates the RESPONDENT's failure in managing the environmental impact of their operations.

(ii) Respondent Failed To Make A Detailed Investigation.

58. Additionally, Alan, the Quality Controller at the RESPONDENT's facility, rejected Jakey's request for a detailed investigation into the leak. Instead, Alan only reviewed a report prepared in December 2023, which is largely irrelevant given that it was conducted two months prior to the incident. This inadequate response to the emerging issue further demonstrates the RESPONDENT's failure to take timely and appropriate action to address the contamination problem.

59. According to the report prepared by the National Institute for Occupational Safety and Health. (2023): *NIOSH guide to chemical hazards*.[40] Methanol is a common contaminant in unpurified biodiesel and is highly toxic. It can be absorbed through inhalation, ingestion, or skin contact. Exposure to methanol

[40] National Institute for Occupational Safety and Health, "NIOSH Pocket Guide to Chemical Hazards" (NIOSH Publications, September 2007), accessed August 16, 2024.

can lead to symptoms such as headache, dizziness, and nausea. In severe cases, it can cause respiratory injuries or even be fatal.

60. Given the proven dangers associated with unpurified biodiesel leakage, it is evident that the RESPONDENT failed to mitigate the effects of the contamination. Two weeks after the leak, news reports emerged indicating that local farmers had been hospitalized due to suspected contamination from the incident. This outcome underscores the RESPONDENT's failure to address and minimize the harmful impact of the leak effectively.

61. Had the RESPONDENT taken the necessary steps upon discovering the leak, such as conducting a thorough investigation, the damage could have been mitigated. Prompt and comprehensive action might have enabled the identification of the leak's source and potentially reduced the number of farmers affected by contamination.

B. RESPONDENT HAS BREACHED THEIR SUSTAINABLE OBLIGATIONS UNDER THE ARTICLE 4 OF THE PK-BIT.

62. In the *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, B.V. v The Argentine Republic*,[41] the tribunal recognizes the investor's duty to conduct an Environmental Impact Assessment (hereinafter **"EIA"**) and to comply with environmental regulations is integral to the overall compliance with legal obligations in the host state. According to the Association of International Impact Asessment, EIA can be defined as the process of identifying the future

[41] Para 451 of the Awards in *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, B.V. v The Argentine Republic*, ICSID Case No. ARB/07/26.

consequences of a current or proposed action. The "impact" is the difference between what would happen with the action and what would happen without it.[42]

63. Article 4 of the PK-BIT outlines four essential steps that the RESPONDENT must follow to comply with their sustainable obligations under the BIT. Firstly, the appointment of a Qualified Person is required. Secondly, an EIA must be conducted. Thirdly, the EIA must be submitted to the Ministry of Natural Resources and Environmental Sustainability in Palmenna. Lastly, this submission must be made as soon as practically possible.

64. Only upon the completion of all these steps can the RESPONDENT be discharged from responsibility for any environmental impacts in Palmenna, such as those resulting from the flash flood.

(i) <u>The Respondent Had Failed To Conduct An EIA Report.</u>

65. While Alan, the Quality Controller, is undoubtedly a qualified person given his 13 years of experience in handling biodiesel facilities, there remains an issue concerning the RESPONDENT's adherence to the remaining steps outlined in Article 4 of the PK-BIT. Specifically, it can be demonstrated that the RESPONDENT failed to satisfy the second, third, and fourth steps: the EIA was never conducted. This omission is critical in confirming the RESPONDENT's liability, as the lack of an EIA and the subsequent failure to submit it to the Ministry of Natural Resources and Environmental Sustainability undermine

[42] International Association for Impact Assessment. (2020). *Guidelines for environmental impact assessment*. IAIA.

their compliance with the BIT's sustainable obligations.

(ii) Reports Were Prepared By Unqualified Persons.

66. Firstly, it should be noted that the report was prepared by in-house experts, not by Alan, who is the Qualified Person as defined under the PK-BIT. Due to operational pressures, the RESPONDENT did not require prior experience for employment, including for their in-house experts. This indicates that these experts were not suitably qualified to conduct an EIA.
67. Given these circumstances, it can be inferred that the report does not fulfill the requirements of an EIA, as it was not prepared by a qualified individual. Even if the report were considered a valid EIA, it was neither verified nor submitted by the RESPONDENT. There is no evidence to suggest that the RESPONDENT engaged a consulting firm to conduct an EIA on their behalf.

(iii) Reports Were Never Verified By Alan (The Quality Controller Of Canstone).

68. Furthermore, there is no indication that Alan verified the report, which appears to have been presented only to the stakeholders of Canstone, rather than the relevant Ministry in Palmenna. This lack of verification and proper submission underscores the RESPONDENT's failure to meet the requirements set forth in Article 4 of the PK-BIT.
69. These series of actions are sufficient to demonstrate the RESPONDENT's breach of their sustainable obligations, as they undermine the fundamental purpose of the EIA. The EIA is intended to allow the Ministry of Natural Resources and Environmental Sustainability in Palmenna to assess the potential

environmental impacts associated with the operation of biodiesel facilities. By failing to conduct a proper EIA, not engaging a qualified individual, and not submitting the report to the relevant ministry, the RESPONDENT has effectively thwarted the EIA's purpose and neglected their responsibilities under the PK-BIT.

A. THE RESPONDENT HAD FAILED TO SUBMIT THE REPORTS AS SOON AS PRACTICALLY POSSIBLE.

70. Article 4(3) of the PK-BIT, imposes a requirement for the Respondent to submit the EIA report as soon as practically possible . In the judgement made by Professor Brigitte Stern in *Cortec Mining Kenya Limited v Republic of Kenya*, the Kenyan government contended that Cortec Mining did not complete the required EIA process. Specifically, it was argued that Cortec did not obtain the necessary EIA approval from the National Environmental Management Authority (NEMA) before commencing its mining activities and the tribunal underlines the importance of the submission of EIA to the relevant ministries.

(i) Respondent Had Never Submitted The Report To The Ministry Of Natural Resources And Environmental Sustainability of Palmenna.

71. In the current case, it has already been 2 years and 1 month since the incorporation of Canstone, yet no EIA was ever submitted by the RESPONDENT. The necessary approval of EIA by the Relevant Ministry in Palmenna is crucial, and may render the report made to be invalid, due to non

compliance of procedures.[43]

72. The RESPONDENT may argue that the CLAIMANT had never inquire for the said EIA report in the span of 2 years and 1 month, but this was rendered unnecessary,

73. Therefore, the submission of the report is a substantial requirement in order to satisfy the Sustainable Obligation under the PK-BIT, and due to the non submission of the said report, Canstone had indeed breached their obligation.

IV. CLAIMANT IS ENTITLED FOR THE AWARD OF DECLARATION AND DAMAGES

A. THERE EXIST A CLEAR CHAIN OF CAUSATION BETWEEN THE BREACH COMMITTED BY THE RESPONDENT AND THE DAMAGES SUFFERED BY THE CLAIMANT.

74. Damages must be awarded to the CLAIMANT because there exist a clear chain of causation between the RESPONDENT's breach of BIT and the injury suffered by the Palmennian citizens. In the case of *Joseph Charles Lemire v Ukraine*. The tribunal underscores that in establishing causation link, the Claimant's burden of proof is, that the aggrieved party prove that an uninterrupted and proximate logical chain leads from the initial cause to the final effect which is the loss.[44]

(i) <u>Pressure Relief Valve In Respondent's Facility Was The Substantial Cause Of The Leakage.</u>

[43] Para 368 -370 of the Awards Cortec Mining Kenya Limited v. Republic of Kenya, ICSID Case No. ARB/15/29. (2020). International Centre for Settlement of Investment Disputes

[44] *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Award, para 167.

75. In the present circumstance, the pressure relief valves in RESPONDENT's storage tanks were found defective. This very circumstance had caused leakage in the storage tanks. Hence, it can be concluded that the ventilation system applied by Canstone was not able to withstand any unprecedented and extraordinary climate change.

76. The failure of the ventilation system was also an obvious proof to show that the RESPONDENT had failed to inspect and improve the system from time to time. Even so, the RESPONDENT contends that it was inconclusive on whether the infection suffered by the citizens were caused by the broken relief valve. However, that statement was made by Canstone's internal doctor, whose statement may be influenced by his position as an employee of Canstone, as he owed a fiduciary duty to protect his employer's interest.

77. The irreversible loss caused by the malfunctioned ventilation system can be substantiated where the doctors found that the injury could have been caused by the inhalation of irritant gases or exposure to corrosive chemicals which had travelled through the inland waters or rivers.

78. Therefore, the nearby occupiers would not suffer from respiratory tract injuries if not for the failure of the ventilation system in RESPONDENT's facility to perform properly. Hence, there is no break in the chain of causation between the RESPONDENT's breach and injuries suffered by the citizens.

PRAYERS FOR RELIEFS

In light of the submission above, counsel for the CLAIMANT respectfully invites the Tribunal to declare that:

I. The arbitration can be commenced even if the pre arbitration steps are not complied with.

II. The issue of preclusion could not be raised because the respondent did not fulfill the triple identity test.

III. The RESPONDENT had breached their Environmental and Sustainable Obligation.

IV. The Claimant is entitled to the Award of Declaration and Damages.