ASIAN INTERNATIONAL ARBITRATION CENTRE

19th LAWASIA INTERNATIONAL MOOT COMPETITION 2024

(INTERNATIONAL ROUNDS)

THE FEDERATION OF

PALMENNA.....……..…….....CLAIMANT

v.

CANSTONE FLY

LIMITED…….....RESPONDENT

MEMORANDUM FOR CLAIMANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

INDEX OF RULES, STATUTES & TREATIES

Rio Declaration	*Rio Declaration on Environment and Development*	51, 57
UNCITRAL	United Nations Commission on International Trade Law *'Possible Reform of Investor-state Dispute Settlement (ISDS)', Thirty-sixth session (Vienna, 2 November 2018) UN Doc No A/CN.9/WG.III/WP.149.*	56, 60
UNFCCC	United Nations Framework Convention on Climate Change	50, 55, 57,
UNCE	U.N. Conference on Environment and Development,	49, 51, 57
UNGP	*United Nations Guiding Principles on Business and Human Rights*	54
VCLT	*Vienna Convention on the Law of Treaties* Vienna Convention on the Law of Treaties May 23, 1969, 1155 U.N.T.S. 331.	34, 45, 59,

INDEX OF ICSID CASES

Mamidoil v. Albania	ICSID Case No. ARB/11/24, Award 30 March 2015 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albanias.*	53
MTD v. Chile	ICSID Case No. ARB/01/7, Award 25 May 2004 *MTD Equity Sdn, Bhd. and MTD Chile S.A. v. Chile.*	54
Niko Resources v. Petrobangla and Bapex	ICSID Case No. ARB/10/18, Award. 24 September 2021 *Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex).*	56
RSM v. Central African Republic	ICSID Case No. ARB/07/2 07 December 2010 *RSM Production Corporation v. Central African Republic, Decision on jurisdiction and liability.*	56

Sempra v. Argentina	ICSID Case No. ARB/02/16, Award 28 September 2007 *Sempra Energy International v. Argentine Republic*,	56
Urbaser v. Argentina	ICSID Case No. ARB/07/26, Award 08 December 2016 *Urbaser S.A. & Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic.*	52, 57, 61
World Duty Free v. Kenya	ICSID Case No. ARB/00/7, Award, 04 October 2006 *World Duty-Free Co Ltd v. The Republic of Kenya.*	54

INDEX OF ARBITRAL AWARDS

Huntington Ingalls Inc. v. Ministry of Defense of the Bolivarian Republic of Venezuela (II)	Ad Hoc UNCITRAL Arbitration February 19, 2018	56
Marion Unglaube v. Republic of Costa Rica	ICSID Case No ARB/08/1, Award. May 16, 2012	57
Perenco Ecuador Ltd. v. The Republic of Ecuador	ICSID Case No. Arb/08/6, Interim Decision on the Environmental Counterclaim. August 11, 2015	54, 59
S. D. Myers v. Government of Canada	UNCITRAL Arbitration Partial Award Nov. 13, 2000	61
X v. Y	ICC Case No 8445, Final Award, XXVI YB Comm Arb 167. 2001	41, 42

INDEX OF COURT DECISIONS

	Itex Shipping Pte. Ltd. v. China Ocean Shipping Co. [1989] 1 WLR 1170.	
Republic of Sierra Leone v. SL Mining Ltd.	**England Wales High Court** 2021 *Republic of Sierra Leone v. SL Mining Ltd.* [2021] EWHC 286.	38
NWA v. NVF	**England Wales High Court** 2021 NWA v. NVF [2021] EWHC 2666 (Comm) (English High Ct.).	38
Walford v. Miles	**House of Lords** 1992 Walford v. Miles [1992] 2 WLR 174.	36
HONG KONG		

C vs. D	**Court of Final Instance** 2021 C vs. D [2021] HKCFI 1474	37
T vs. B	**Court of First Instance** 2021 T vs. B [2021] HKCFI 3645	37
INDIA		
BSNL vs Nortel	**Supreme Court of India** 2021 BSNL vs Nortel 2021 SCC Online SCC 2017	37
Demerara Distilleries (P) Ltd v Demerara Distilleries Ltd	**Supreme Court of India** 2015	39, 40

	Demerara Distilleries (P) Ltd v Demerara Distilleries Ltd (2015) 13 SCC 610: (2014) 4 Arb LR 343 (SC).	
M/s. Sikand Construction Co. Vs. State Bank of India	**Delhi High Court** 1979 M/s. Sikand Construction Co. Vs. State Bank of India ILR 1979 DELHI 364.	36
Ravindra Kumar Verma vs. M/S. BPTP Ltd. & Anr.	**Delhi High Court** 2014 Ravindra Kumar Verma vs. M/S. BPTP Ltd. & Anr. 2014 SCC OnLine Del 6602.	36
Saraswati Construction Co. Vs. Cooperative Group Housing Society Ltd.	**Delhi High Court** 1994 Saraswati Construction Co. Vs. Cooperative Group Housing Society Ltd. 1994 SCC OnLine Del 563.	36

Stati v. Kazakhstan	**United States District Court for the District of Columbia** 2016 Stati v. Kazakhstan 199 Supp.3d 179, 189 (D.D.C. 2016).	36
Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee	**Supreme Court of India** 2014 Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee (2014) 6 SCC 677.	40
Visa International Ltd v Continental Resources (USA) Ltd	**Supreme Court of India** 2009 Visa International Ltd v Continental Resources (USA) Ltd (2009) 2 SCC 55: AIR 2009 SC 1366.	39

THE UNITED STATES OF AMERICA		
Brown v. Koulizakis	**Courts of Appeals of Virginia** 1985 Brown v. Koulizakis 229 Va. 524, 531, 331 S.E.2d 440, 445 (1985).	
Germany v. Poland	**United States District Court, D. Alaska.** 1928 Germany v. Poland 17 PCIJ 4 (SERIES A) at 21, Judgement-merits, (Sept, 1928).	58
Tyrrel v. Maskcara Indus	**District of Utah** 2020 Tyrrel v. Maskcara Indus., Inc., 438 F. Supp. 3d 1279, 1288 (D. Utah 2020).	40

INDEX OF JOURNAL & ARTICLES

Res Judicata: The Neglected Defense	Currie, "Res Judicata: The Neglected Defense," 45 University of Chicago Law Review 317 (1978).	46
Speculations on When and Why EIA is Effective	L Ortolano and B Jenkins et al, "Speculations on When and Why EIA is Effective," 7(4) Environmental Impact Assessment Review 285-292 (1987).	51
The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English Law	Krauss, Oliver, "The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English Law" (May 1, 2016). McGill Journal of Dispute Resolution, Vol. 2, No. 1, 2016.	35
The Valuation of Ecosystem Services in International Investment Arbitration	Emily Rebecca Hush, "The Valuation of Ecosystem Services in International Investment Arbitration," 30 Environmental Claims Journal 22 (2018).	61

INDEX OF BOOKS

The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital	Kate Miles, "The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital," 42 (2013).	58

INDEX OF OTHER AUTHORITIES

Abbreviation	**Citation**	**Page No.**
Costa Rica v. Nicaragua	Costa Rica v. Nicaragua (Certain activities case), Judgment-Merits, ¶160-161 (2015).	50
Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.	G.A. Res. 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (Jul. 14, 2014).	57
"Food, Energy, And Water the Chemistry Connection,"	K, Nikul Patel and N. Shailesh Shah, "Food, Energy, And Water The Chemistry Connection," Ch. 11-Biodiesel From Plant Oils ¶ 277-307 (2015).	54
IES Guidance	IES Guidance, Experience and qualifications to demonstrate competence in different EIA roles (Nov. 2019).	51

Internationalization of EIA in a new marine biodiversity agreement under the Law of the Sea Convention	Kahlil Hassanali, "Internationalization of EIA in a new marine biodiversity agreement under the Law of the Sea Convention: A proposal for a tiered approach to review and decision-making," 87 Environmental Impact Assessment Review 106554 (1964).	51
Precautionary approach to marine pollution, including waste-dumping at sea	Nairobi, UNEP Governing council, Precautionary approach to marine pollution, including waste-dumping at sea, U.N. Doc. 15/27 (May 25, 1989).	57
The MOX Plant Case	The MOX Plant Case (Ireland v. United Kingdom), Case No. 10, Order of Dec. 3, 2001, ¶ 84, ITLOS Rep. 95.	49
The Noordwijk Declaration on Climate Change	Ministerial Conference on Atmospheric pollution and Climate Change, The Noordwijk Declaration on Climate Change: Atmospheric Pollution and Climatic Change: Ministerial Conference at Noordwijk, Doc. PB90-210196 (Nov. 06- 07,1989).	57

STATEMENT OF JURISDICTION

The Government of Palmenna (hereinafter referred to as the "**Claimant**") has approached the Honourable Tribunal regarding an alleged breach of the PK-BIT by Canstone Fly Limited (hereinafter referred to as the "**Respondent**"). This claim is made pursuant to Article 12 of the Palmenna-Kenweed Bilateral Investment Treaty ("**PK-BIT**") executed between the parties on October 03, 2021, in accordance with Rule 1(1) of the Asian International Arbitration Centre Arbitration Rules, 2023 ["**AIAC Rules**"].

QUESTIONS PRESENTED

I. Whether the pre-arbitration steps must be complied with 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 ("**Claimant**") and Canstone Fly Limited ("**Respondent**") are the parties involved in the present arbitration. Palmenna, a major palm oil producer in Southeast Asia, and its neighbour Kenweed, which relies heavily on tourism, have a complex relationship centered around biofuel production.

In response to economic and environmental needs, Kenweed's Prime Minister Gan Ridhimajoo established the Ministry of Trade and Investment ("**MTI**") to explore alternative revenue sources, leading to the formation of Mehstone ("**Mehstone**") for palm oil harvesting and refining. Mehstone is jointly owned by MTI (60%) and KLT (40%) of the shares.

SUBJECT	DATES	FACTS
Government-Corporate Relations	**June – July, 2021**	In response to environmental and public health concerns, political changes occurred in Kenweed, leading to M. Akbar ("**Akbar**") becoming the Prime Minister of Palmenna. Akbar proposed a Memorandum of Understanding ("**MoU**") with Kenweed to secure investments, focusing on biofuel production.
International Business Agreement	**August 27, 2021**	An MoU was signed, formalizing the agreement between Palmenna and Kenweed, establishing a subsidiary of Mehstone in Appam to leverage the

		extensive palm oil plantations for biofuel production.
Bilateral Investment Agreement	**September–October, 2021**	The MoU was developed into a Bilateral Investment Treaty ("**BIT**"), known as the Palmenna-Kenweed Bilateral Investment Treaty ("**PK-BIT**"), and came into effect in Appam.
Inception of Canstone	**October 26, 2021**	Canstone Fly Limited ("**Canstone**") was created in Palmenna with Mehstone holding a 70% share, and Kenweed's SZN owning 30%. Canstone secured two biodiesel plants: one in Appam, the capital city of Palmenna, and another in Karheis, near the northern border with Kenweed.
Functioning of Canstone	**October, 2021 onwards**	Canstone initially faced recruitment challenges while committing to hiring at least 70% local citizens. To attract young talent, Canstone used extensive and visually engaging advertisements. Alan Becky, an experienced professional from the Republic of Sokiyasu, ("**Alan**") was brought on board as the Quality Conductor ("**QC**") to oversee the biodiesel plants, maintain high standards, and conduct investigations. Despite these operational hurdles, Canstone became profitable by the end of 2022, significantly boosting Palmenna's biofuel production capacity.

Ecological and Health Incidents	**Mid – February, 2023**	Canstone faced a potential leak issue at its Karheis facility, reported through an anonymous note. Jakey Jake ("**Jake**"), the in-house expert contacted Alan, to conduct an urgent examination of the machinery and the equipment which was turned down by Alan due to monetary constraints who later proposed an environmental impact assessment ("**EIA**"). Reports of health issues among nearby farmers were linked to contamination, resulting in undisclosed compensation, when the investigations were initiated.
Operational Appraisal	**September 6, 2021**	During a Board of Directors meeting with Canstone's senior management, including Nathan and Tara Sharma, Nathan and Alan requested extra resources and measures to mitigate leakage risks. The Board deferred their requests pending stakeholder approval.
Flooding Crisis	**November, 2023**	Palmenna experienced intense rainfall, leading to flooding in the Karheis area. Alan traveled to Karheis to oversee the storage tank systems while the neighboring factories in Appam shut down their operations ordering an emergency evacuation. Lee, unable to contact Alan, instructed Appam facility employees to continue operations.

		After the flooding, many individuals, including Canstone employees, were hospitalized with respiratory injuries, likely caused by exposure to toxic chemicals carried by the floodwaters. Canstone's independent investigation found that the pressure relief valves on storage tanks were compromised, potentially due to the flood's impact.
Legal Proceedings	**December 15, 2023**	Activists sued the Government of Palmenna and SZN for negligence, in managing the drainage and ventilation systems, which exacerbated the health impacts from the flooding. SZN defended itself by attributing the flooding to natural causes stating that the extent of damage could not be fully assessed until after the monsoon season.
Joint Liability and Compensation	**February 14, 2024**	The High Court of Palmenna held the Government of Palmenna and SZN jointly liable for negligence, and ordered compensation for the victims.
Conflict Settlement	**March 1, 2024**	Akbar convened a conference call with Tara Sharma, Alan, and Luke Nathan to find a solution. However, as emotions ran high and frustration grew, a consensus could not be met leading to disagreements.
Dispute Resolution	**March 6, 2024 onwards**	The Government of Palmenna initiated arbitration against Canstone, alleging violations of the PK-BIT and seeking damages for respiratory infections

		among its citizens. Canstone contested the arbitration's validity, citing ongoing legal proceedings against SZN, non-compliance with pre-arbitration procedures, and misuse of arbitration to overturn a High Court decision. The Asian International Arbitration Centre ("**AIAC**") panel is set to review these issues and determine whether Palmenna is entitled to any relief.

SUMMARY OF PLEADINGS

I. PRE- ARBITRATION STEPS NEED NOT BE COMPLIED WITH BEFORE CLAIMANT COMMENCES ARBITRATION PROCEEDINGS.

The Claimant contends that the Government of Palmenna is justified in initiating an arbitration against Canstone Ltd. since pre-conditions are procedural and non-mandatory, and its non-compliance does not preclude the jurisdiction. The Claimant has made significant efforts to comply with the pre-arbitration requirements to resolve the dispute amicably. However, given the failure of these discussions and the lack of genuine willingness from Canstone to reach a settlement, further mediation would be deemed futile. The Claimant asserts that adhering to the pre-arbitration steps would cause undue delay. Due to the urgent nature of the situation, these steps are deemed impractical, making the dispute admissible without their completion.

II. CLAIMANT IS NOT PRECLUDED FROM INITIATING ARBITRATION AGAINST CANSTONE.

The Government of Palmenna is not precluded from initiating an arbitration against Canstone Ltd because Canstone and SZN are distinct legal entities with separate responsibilities. The High Court's ruling against SZN does not affect Canstone, which faces specific allegations related to environmental and safety violations under the PK-BIT. Additionally, the High Court proceedings and the arbitration involve different issues, parties, and legal entities. This arbitration is not an attempt to overturn the High Court's decision but is rather a separate proceeding to address the investor's breaches of the BIT. Moreover, it is Palmenna's sovereign duty to safeguard public interests supports the need for arbitration to address the alleged breaches affecting citizens' health and safety. Therefore, the Claimant can initiate arbitration proceedings against Canstone Ltd.

III. CANSTONE HAS BREACHED ITS OBLIGATIONS UNDER THE PK-BIT.

Canstone has breached its obligations under the PK-BIT by failing to conduct a mandatory Environmental Impact Assessment (EIA) as required by Article 4, neglecting to address significant environmental risks, and appointing an unqualified person for this task. Additionally, under Article 5, Canstone has violated its environmental responsibilities by allowing hazardous substances to pollute inland waters, demonstrating negligence in preventing and mitigating harm. The company's poor management, delayed responses to leaks, and failure to implement preventive measures during floods further highlight its disregard for environmental protection and sustainability obligations under the PK-BIT.

IV. PALMENNA IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES.

Palmenna is entitled to an award of declaration and damages due to Canstone's breaches of the PK-BIT. Canstone failed to conduct a mandatory Environmental Impact Assessment (EIA) and violated both sustainability and environmental protection obligations. This negligence has led to significant environmental damage and health issues, including respiratory injuries among 129 individuals, 39 of whom were hospitalized. Under international law, including ARSIWA and VCLT, full reparation is required for harm caused by wrongful acts. The tribunal should award compensation for the environmental and health impacts, reflecting the principles of sustainability and human rights emphasized in the PK-BIT.

PLEADING

ISSUE 1: WHETHER THE PRE-ARBITRATION STEPS MUST BE COMPLIED BEFORE ARBITRATION PROCEEDINGS MAY BE COMMENCED BY THE GOVERNMENT OF PALMENNA AGAINST CANSTONE?

1. Pre-arbitral clauses are designed to encourage amicable dispute resolution before proceeding to arbitration[1], aiming to reduce costs and delays[2]. However, *if these steps become futile and delay justice, they can be deemed directory rather than mandatory.* The Claimant argues that bypassing these steps is justified in the current arbitration against Canstone Ltd. This is based on a three-fold argument, *Firstly,* directory nature of pre-arbitral procedures, *Secondly,* the compliance with pre-arbitral steps goes to the admissibility of the Claims, *Thirdly,* the Claimant has complied with the PK-BIT's pre-arbitration clause, and *lastly,* strict compliance is unnecessary if it fails to achieve the intended objectives of resolving the dispute.

1.1. Enforceability of the Pre arbitration clause is Directory and not mandatory in nature.

2. It is humbly submitted before this Hon'ble Tribunal that the Pre-arbitration clauses outlined in Article 12 of the PK-BIT are merely directory as the existence of a pre-condition to arbitration requiring the parties to amicably settle the matter via mutual discussions or mediation before resorting to arbitration cannot bar the Claimant from referring the matter to arbitration without ensuring compliance with the pre-arbitral requirements[3] as these

[1] Krauss, Oliver, The Enforceability of Escalation Clauses Providing for Negotiations in Good Faith Under English Law (May 1, 2016). McGill Journal of Dispute Resolution, Vol. 2, No. 1, 2016.
[2] Gary B Born, International Commercial Arbitration, 2nd edn, Wolters Kluwer, 70–93 (2014).
[3] Ravindra Kumar; Paul Smith.

requirements are ought to be construed only as directory/aspirational in nature and not mandatory[4].

3. Decisions by international commercial arbitral tribunals hold that violations of pre-arbitration procedural requirements are not violations of mandatory obligations as the pre-arbitral steps '*are primarily expressions of intention*'[5]. The typical rationale of these decisions is that pre-arbitration procedures are in, significant part, aspirational, directional, or hortatory and that a party's failure to comply with such procedures causes no material damage to its counter-party[6].
4. In an English Case, a clause requiring amicable settlement prior to arbitration, was held to be directory. The reason for so holding was that the clause was held to be not valid as it was a mere agreement to negotiate; it only expressed pious hope[7]. Clauses providing for amicable discussions or negotiations have been dismissed by the English courts as "a bare agreement to negotiate", which "has no legal content" and is, therefore, unenforceable[8].
5. In India, this Judicial Trend has been expressed in various cases. The Delhi High Court in the matter of ***Ravindra Kumar Verma vs. M/S. BPTP Ltd. & Anr***[9] while relying on its earlier decisions of ***M/s. Sikand Construction Co. Vs. State Bank of India***[10] and ***Saraswati Construction Co. Vs. Cooperative Group Housing Society Ltd***[11] held that pre-arbitral steps stated in a pre-arbitration clause are directory in nature and not mandatory. The Court further held that the existence of conciliation or mutual discussion should not be a bar in

[4] Compare Restatement of the U.S. Law of International Commercial and Investor-State Arbitration §2.19 Reporters' Note a (2019).
[5] Interim Award in ICC Case No. 10256, in Figueres, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, 14(1) ICC Ct. Bull. 82, 87 (2003).
[6] Chahat Chawla (SIAC), The Muddy Waters of Pre-Arbitration Procedures – Are they Enforceable? Answers from an Indian Perspective, Kluwer Arbitration Blog, June 9, 2019
[7] Itex Shipping Pte. Ltd. v. China Ocean Shipping Co., [1989] 1 WLR 1170].
[8] Walford v. Miles [1992] 2 WLR 174, Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd. [2014] EWHC 2104 (Comm).
[9] 2014 SCC OnLine Del 6602.
[10] ILR 1979 Delhi 364.
[11] 1994 SCC OnLine Del 563.

seeking to file proceedings for reference of the matter to arbitration if it is necessary to preserve the parties' rights[12]. The national courts have been reluctant to interpret the pre-arbitration steps as mandatory[13] since, they are in the nature of statements of aspiration or intention, and also the violations of such pre-arbitral agreements impose no material harm on the non-defaulting party.

1.2 <u>Pre-arbitral requirements are a question of admissibility and not jurisdiction.</u>

6. It is submitted by the Claimant that the Tribunal has the jurisdiction to conduct the arbitration proceedings under the provisions of PK-BIT as the mere failure of the Claimant to comply with the pre-arbitration steps does not bar the AIAC from conducting the proceedings. To better understand the nature of pre-arbitral steps, a test called the "*Tribunal versus Claims test"* has been developed by international courts and tribunals, which distinguishes between pre-arbitral steps based on their nature. If the challenge pertains to the tribunal's jurisdiction, the pre-arbitral step is considered mandatory. However, if the challenge concerns the admissibility of a claim, the tribunal has the discretion to decide, making the pre-arbitral step discretionary[14].
7. Recently, the Hong Kong Court of First Instance (HKCFI), in the case of ***T vs. B***[15], held that any matter concerning the compliance or non-compliance of Arbitral pre-conditions is a question of admissibility and not jurisdiction. This court affirmed and upheld the rationale in the case of ***C vs. D***[16] and stated that it is prudent to deem pre-conditions as a matter of admissibility rather than jurisdiction as the same would be in line with the general trend of judicial restraint in interfering with the Arbitration proceedings and would facilitate

[12] Aditi Tayal, Issue of Mandate of Pre-Arbitral Steps/Preceding Steps Before Invoking Arbitration, SCC Online, Jan 4, 2023.
[13] Stati v. Kazakhstan, 199 F.Supp.3d 179, 189 (D.D.C. 2016).
[14] BSNL vs Nortel [2021 SCC Online SCC 2017].
[15] [2021] HKCFI 3645.
[16] [2021] HKCFI 1474.

expeditious disposal of matters rather than annulling awards after a long and expensive process on non-fulfilment of pre-conditions[17].

8. Further, the English High Court in the case of ***Republic of Sierra Leone v. SL Mining Ltd.***[18] expressly stated that any alleged non-compliance of preconditions is to be treated as a matter of admissibility, despite the fact that the defendant in the instant case failed to comply with the preconditions to arbitration[19]. It also stated that the leading commentaries and authorities were all in favor of preconditions to arbitration being an issue of admissibility and not one of jurisdiction.
9. The courts sometimes view pre-arbitration procedural requirements as substantive contractual obligations rather than jurisdictional barriers. They may affect the process but do not necessarily impede a party's ability to initiate arbitration[20]. These conclusions are based on the understanding that obligations to negotiate or mediate are inherently imprecise and uncertain, with only minor effects on the parties' rights. Thus, these requirements often pertain to admissibility rather than jurisdiction, meaning the tribunal can address procedural issues without blocking arbitration entirely[21].

1.3. <u>The Claimant has complied with the pre-arbitration dispute resolution procedure.</u>

10. Assuming that the pre-arbitration dispute resolution procedure is valid, mandatory, and a condition precedent to arbitration, the Claimant argues that it has complied with these requirements. The courts and tribunals in many jurisdictions have held that mere triggering of the pre-arbitral tier (amicable settlement) is sufficient, which can be indicated by inviting

[17] Hiroo Advani et al., Whether pre-conditions to arbitration are a matter of jurisdiction/admissibility? Advani Law, 4th Feb 2022.
[18] [2021] EWHC 286.
[19] 2022 SCC OnLine Blog Exp 10.
[20] Final Award in ICC Case No. 11490, XXXVII Y.B. Comm. Arb. 30 (2012); NWA v. NVF [2021] EWHC 2666 (Comm) (English High Ct.).
[21] BG Group plc v. Argentina, 572 U.S. 25 (U.S. S.Ct. 2014).

the other party to settle amicably. The Government initiated a conference call with the higher authorities of Canstone Ltd. on 1st March 2024 to resolve the dispute amicably and in good faith with the hope of settling the dispute amicably and finding a solution to the problem at the earliest. Despite these efforts, the discussions stalled and tensions rose, showing no real possibility of compromise and the tensions *escalated*[22].

11. If the correspondence or record of discussions show that there was no scope for amicable settlement due to the rigid and hard stands taken by the defaulting parties, arbitration may be invoked without complying with the pre-condition of amicable settlement of the dispute[23]. Moreover, the Courts have also held that when it is palpable that there is no scope for an amicable settlement, parties can directly proceed to arbitration.

1.4. Grounds for bypassing the Pre-arbitration procedural requirements.

12. The Claimant submits that pre-arbitral procedures, though designed to promote amicable dispute resolution, are not absolute prerequisites for arbitration. It is further submitted that under principles of *empty formality*, *urgency*, *futility of negotiations, no possibility of amicable settlement,* and *reaching of a breaking point*, the procedural requirements under Article 12 of the PK-BIT should not obstruct the initiation of arbitration proceedings.

1.4.1. If compliance with pre-arbitral steps turns out to be a mere Empty Formality.

13. Analysis of the validity of agreements to negotiate or conciliate, specific and detailed procedural requirements (e.g., obligations to mediate for a specified period before a named institution) are more likely to reflect mandatory requirements than is the case with generalized provisions (e.g., to attempt to resolve disputes amicably).[24] In ***Demerara***

[22] Ibid.
[23] Visa International Ltd v Continental Resources (USA) Ltd (2009) 2 SCC 55: AIR 2009 SC 1366; Demerara Distilleries (P) Ltd v Demerara Distilleries Ltd (2015) 13 SCC 610: (2014) 4 Arb LR 343 (SC).
[24]Tyrrel v. Maskcara Indus., Inc., 438 F.Supp.3d 1279, 1288 (D. Utah 2020).

Distilleries (P) Ltd. v. Demerara Distillers Ltd[25], the Supreme Court of India ruled that such procedures, including vague mutual discussions or mediation, do not necessarily prevent arbitration if they are merely formal and not designed for substantive resolution.

14. The courts in many cases have held that clauses requiring efforts to reach an amicable settlement, before commencing arbitration "should not be applied to oblige the parties to engage in fruitless negotiations or to delay an orderly resolution of the dispute"[26]. Courts have held that if an amicable settlement becomes an empty formality as implied from the correspondence, then parties can proceed to arbitration[27].

1.4.2. Urgency and the Ineffectiveness of Pre-Arbitral Requirements.

15. The pre-arbitral mediation requirement stipulated under the BIT should be deemed as merely directory due to the imminent risks and the inefficacy of delaying the arbitration proceedings. This contention is rooted in judicial precedents that acknowledge the futility of enforcing procedural requirements that lead only to unnecessary delays and inefficiencies. The Claimant further contends that adhering to the pre-arbitral mediation clause under these circumstances would be unjust, as it would exacerbate the harm suffered and waste valuable resources.
16. In ***Cumberland & York Distrib. v. Coors Brewing Co***.[28], the court observed that a party should not be allowed to delay arbitration by insisting on a mediation requirement that, reasonably construed, leads only to further delay.
17. In the present case, given that the Claimant initiated these arbitration proceedings on 1st March 2024, and mediation could take up to three months, the dispute would not be

[25] 2006 1 SLR 124.
[26] Interim Award in ICC Case No. 10256, in Figueres, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration, 14 (1) ICC Ct. Bull. 82, 87 (2003).
[27] Swiss Timing Limited v. Commonwealth Games 2010 Organising Committee (2014) 6 SCC 677.
[28] Docket No. 01-244-P-H (D. Me. Feb. 7, 2002).

resolved until June 2024. This delay is particularly concerning as it coincides with the onset of the monsoon season in Palmenna, which poses a significant risk of flooding and exacerbates the harm already suffered by those affected by respiratory tract injuries.

1.4.3. Futility of negotiations.

18. The principle of futility in pre-arbitration procedures allows parties to bypass mandatory negotiations or mediation if such efforts are deemed futile, especially if they contributed to the failure. This concept is supported by cases like ***BG Group plc v. Argentina***[29] and ***ICC Case No. 8445***[30], where tribunals recognized that procedural requirements can be excused if they would have been ineffectual. This principle in international arbitration ensures that parties are not obligated to engage in ineffective dispute resolution attempts before accessing arbitration or legal recourse.
19. A conference call was initiated on March 1, 2024 by Prime Minister Akbar. What started as a negotiation quickly fell apart, turning into a heated argument that ended abruptly when Tara Sharma admitted that there was no point in continuing the discussion due to the unreasonable stance of the other party. This failed attempt at resolving the dispute highlights a key principle found in both ***BG Group plc v. Argentina***[31] and the ***ICC Final Award in Case No. 8445***[32]: if previous efforts to resolve a dispute were clearly ineffective, then parties can skip further mediation attempts. The March 1st call is a perfect example of how continued efforts at mediation would have been pointless and would only delay in getting to a resolution.

[29] BG Group plc v. Argentina, Final Award in Ad Hoc Case of 24 December 2007, ¶140.
[30] ICC Case No 8445; Case of 4 May 1999.
[31] Supra Note at 25.
[32] Supra Note at 26.

1.4.4. <u>No scope for amicable settlement.</u>

20. The willingness and intent of the parties to a dispute to settle amicably is an essential pre-requisite for any successful negotiation or mediation, and without this willingness, efforts to resolve a dispute become futile. When there is no real prospect of reaching a settlement, insisting on following these requirements is often pointless and only adds unnecessary complications.
21. In the present case, despite initiating the conference call on March 1st, 2022 with Canstone Ltd. to resolve the dispute, the discussions reached an impasse with both parties maintaining rigid and opposing positions, demonstrating a lack of willingness to compromise. Furthermore, the negotiations exhibited a lack of genuine intent from both sides to find a resolution, undermining the effectiveness of the mediation process. This failed attempt at negotiation highlights a critical point: if the parties involved have no genuine intent to resolve their differences, any additional efforts at mediation are simply formalities without substance.
22. Furthermore, the previous correspondence can be referred to find whether the parties attempted to settle amicably in good faith. It is clear that prior attempts to engage in settlement discussions have shown no significant movement towards a resolution, reinforcing the argument that further mediation is futile. As the disputes have escalated rather than being resolved, and the core issues remain irreconcilable, it is evident that continuing with mediation serves no practical purpose. Courts have also held that when it is palpable that there is no scope for an amicable settlement, parties can directly proceed to arbitration by referring to the correspondence between the parties[33].

[33] Supra Note at 23.

ISSUE 2: WHETHER THE GOVERNMENT OF PALMENNA IS PRECLUDED FROM INITIATING AN ARBITRATION AGAINST CANSTONE?

23. It is humbly submitted that Government of Palmenna is not precluded from initiating an arbitration against Canstone Ltd. The Claimant's right to pursue arbitration is justified owing to its right to seek arbitration under the PK-BIT, and the same shall be proven on twofold grounds.

24. *Firstly,* Claimant is entitled to initiate an arbitration proceeding against Canstone Ltd, an investor entity for enforcement of obligations under the PK-BIT. *Secondly,* the nature of the issue adjudged upon in the High Court of Palmenna is fundamentally different from the present dispute before the Tribunal.

2.1. The Claimant is entitled to initiate an arbitration proceeding against Canstone Ltd.

25. It is humbly submitted that in the present case, Canstone Ltd., despite not being a signatory to the PK-BIT, is nonetheless bound by the obligations outlined within its provisions. Consequently, the Claimant, the Government of Palmenna, which is a party to the BIT, possesses the right to initiate arbitration proceedings against the investor for non-compliance with these obligations by Canstone Ltd. This assertion is substantiated on two grounds.

26. Firstly, Article 1(3) stipulates, "*for the avoidance of doubt, the obligations stated therein shall be enforceable by the investor(s) of the Parties against the investor(s) of the Parties or between the Parties themselves as against one another.*" Canstone Ltd., as an investor in this instance, is therefore bound by the obligations enumerated in the PK-BIT.

27. Specifically, Article 4 mandates that "***any investor****" undertaking activities with significant environmental impact must appoint a qualified individual to conduct an Environmental Impact Assessment and submit the report to the relevant ministry of the Party."*

Furthermore, Article 5 of PK-BIT prohibits ***"any investor"*** *from discharging or permitting the entry of poisonous, noxious, or polluting matter into any river.*

28. The explicit language of these provisions underscores that the obligations are to be adhered to by investors in all their activities related to the establishment of industries, aimed at enhancing the economic relations between the two countries. It is crucial to recognize that these obligations are enforceable by the Parties, which must be interpreted alongside Article 3(2) of the PK-BIT.
29. This article imposes a duty on the Parties (State) to protect against business-related human rights abuses, requiring them to ensure that affected parties have access to effective remedies through judicial, administrative, legislative, or other appropriate means when such abuses occur within their territory or jurisdiction.
30. According to Article 31 of the VCLT, which governs the general rule of interpretation for international treaties, *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*[34] Additionally, Article 32 of the VCLT[35] permits the use of supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion[36], to confirm the meaning derived from Article 31 or to resolve ambiguity or manifestly unreasonable results. In this case, a plain reading of Article 1(3) of the PK-BIT might suggest that the Parties cannot directly initiate arbitration against investors.
31. However, such a literal interpretation would yield a result that is manifestly absurd and unreasonable. Given that the State, as the custodian of its citizens' general welfare, must be

[34] Art. 31, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.
[35] Art. 32, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.
[36] Pentsov, D. (2018). Contractual Joint Ventures in International Investment Arbitration. Northwestern Journal of International Law & Business, 38(3), 391-448.

reasonably empowered to enforce the obligations imposed on investors under the PK-BIT, failing to allow such enforcement would be inequitable.

32. Therefore, the provisions must be interpreted in good faith and in light of the PK-BIT's objective and purpose. Consequently, it is essential to permit arbitral proceedings to be initiated against investors, as they are crucial in fulfilling the PK-BIT's preamble goal of promoting closer economic integration between the Parties.

33. Secondly, Article 12 of the PK-BIT provides that "*any dispute arising from, relating to or in connection with the PK-BIT… shall be referred to arbitration*." In this case, the issue pertains to the investors' failure to meet their obligations, resulting in significant harm. Thus, the dispute undeniably connects with the PK-BIT. Accordingly, the Claimant respectfully submit that they are not precluded from commencing arbitration proceedings against Canstone Ltd.

2.2. <u>The present Arbitration proceeding does not amount to parallel proceedings due to the difference in the nature of the suits.</u>

34. It is submitted that the legal proceedings commenced before the Palmenna High Court and the present arbitration proceedings before this Tribunal are not of similar nature. *Res judicata*, a core principle in international law, prohibits re-litigating resolved disputes to avoid duplicative claims and conflicting decisions in investment arbitration[37]. The principle of *res judicata* applies when the same parties are involved in subsequent proceedings concerning the same issues or subject matter.

35. This can be substantiated in a three-fold manner; *Firstly,* Parties in both proceedings are different, *Secondly,* the causes of action in both proceedings are different and *Thirdly,* SZN and Canstone Ltd. are distinct legal entities.

[37] Currie, Res Judicata: The Neglected Defense, 45 University of Chicago Law Review 317 (1978).

*2.2.1. **Parties in both proceedings are different.***

36. It is submitted that two disputes are said to be similar only if they involve the same parties. If the Claimant in a given arbitration proceeding differs from the Claimant in local courts, there will be no applicability of the '*fork-in-the-road clause*'[38]. In the ***Azurix case***[39], it was held that the parties in arbitration must also have participated in the proceedings of the local courts. The court herein held that, even if *Azurix* joined ABA as a plaintiff in those courts, it would not result in parties being considered as identical since Argentina was not party to the proceedings[40].
37. In the present case, the parties before the Palmenna High Court are different from the parties which are present before this Tribunal. The High Court proceedings were initiated by the activists against the Government of Palmenna and SZN on the grounds of negligence on 15 December 2023. Thus, not initiated by the Government of Palmenna who is the Claimant in the current proceedings.
38. Furthermore, before the Court, SZN, a company headed by Luke Nathan was impleaded as a party and not Canstone Ltd[41]. SZN is a part of Canstone but only owns thirty percent of it and mainly serves as the "face" of Canstone in Palmenna. They are distinct entities; the principle that companies are separate legal entities from their shareholders is a fundamental aspect of company law. Therefore, there is no overlap in party identity because Canstone is not involved in the court proceedings. Moreover, the current claim is directed solely at Canstone, while the High Court proceedings were focused on SZN and the Claimant.

[38] Enron Corp. & Ponderosa Assers L.P. v. Argentina, Decision on jurisdiction, ¶97-98, (2004).
[39] Azurix Corp. v. The Argentine Republic (I), ICSID Case No. ARB/01/12.
[40] Ibid.
[41] Ibid.

*2.2.2. **The causes of action in both proceedings are different.***

39. It is submitted that a claim for breach of obligations under a treaty and claims on grounds of negligence of parties is entirely and substantially different. Therefore, pursuing a claim for negligence in local courts does not preclude a party from submitting treaty related claims to arbitration. Similarly, court proceedings are not considered identical to arbitration proceedings if they do not pertain to the specific "investment dispute" which is at the heart of the current arbitration. Even if a court proceeding is initiated as a result of damages allegedly caused by a party to the investment treaty, it does not conclusively prove that the issues being addressed in both forums are identical and essentially the same.
40. The proceedings before the High Court of Palmena, which was initiated by the activists, are based on claims of negligence which resulted in inadequacies of Cantone's drainage and ventilation systems which has, in turn, caused significant harm to more than 129 people were affected in that area while 39 individuals were hospitalized. Among the 39 hospitalized, 13 of them were employees working at the Canstone plant facility in Appam.
41. Furthermore, a statement made by Prime Minister Akbar on 5th March 2024, "*There is already an agreement. If you do not follow the wording of the agreement, you are guilty."* serves as a testimony to the fact that the arbitration proceeding that was initiated subsequently was due to the breach of the obligations imposed under the PK-BIT.
42. The current arbitration initiated by the Claimant stems from Canstone's repeated breaches of the BIT, particularly evident in the incidents at Appam and Karheis. In Karheis, despite Jakey Jake's concerns about a potential leak, Alan dismissed the request for a detailed investigation and falsely labelled the unsigned report as a hoax. This negligence came to light when subsequent reports revealed local farmers being hospitalized due to suspected contamination, suggesting a cover-up involving undisclosed compensation to victims.

43. These disasters illustrate a pattern of failure by Canstone to uphold treaty obligations, as their negligence and inadequate response contributed to both environmental harm and public health issues. Therefore, while both incidents are related through their environmental impact, the arbitration is based on multiple breaches of the BIT, highlighting systemic issues rather than isolated events.

ISSUE 3: WHETHER CANSTONE HAS BREACHED ITS OBLIGATIONS UNDER THE PK-BIT?

44. It is humbly submitted that investors are required by the PK-BIT, to guarantee "*environmental protection against climate change*" and "*promote economic co-operation, partnership and growth of all parties.*"

45. In the present dispute, it is contended that the Respondent has violated its PK-BIT investor's obligations. The Respondent has committed **[3.1]** Breach of sustainability obligations under Article 4 of the PK-BIT and; **[3.2]** Breach of environmental obligations under Article 5 of the PK-BIT.

3.1. Canstone has breached its obligations under Article 4 of the PK-BIT.

3.1.1. There was a "significant environmental impact" with Canstone's operations.

46. Pursuant to Article 4(1) of PK-BIT, it is mandatory for an Environmental Impact Assessment (hereinafter referred to as EIA report) to be prepared by the investors prior to pursuing activities that may have a *"significant environmental impact."* The *"risk of causing significant harm"* encompasses both the occurrence of an accident and the severity of its potential impact.[42] Specifically, the term 'significant' is interpreted to mean something more than 'detectable.'[43]

47. In the present dispute, the *"unsigned note"* reporting a potential leak from one of the tanks containing purified palm oil at the Karheis facility was sufficient to necessitate an EIA. An

[42] Mb. Akehurst, Netherlands yearbook of international law: international liability for injurious consequences arising out of acts not prohibited by international law 16 (Cambridge university press, 2009).
[43] International Law Commission, Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, U.N. Doc. A/56/10 (2001).

EIA report is mandated even in situations where the risk of significant harm is minimal and uncertain.[44]

48. It is pertinent to note that the Respondent despite persistent requests from the in-house expert for a detailed investigation in light of the severity of harm likely to be caused have been lackadaisical in their approach and failed to pursue such requests stating financial burden as their reason. Additionally, Mr. Alan, the Quality Control expert made false assurances of updating the relevant stakeholders on the allegation of a "leaked leak" and that subsequently an EIA would be conducted. However, these promises were never fulfilled and thus in this regard, the Respondent have failed to assess the '*significant harm*' to mitigate the health hazards. This resulted in potential health hazards due to suspected contaminations.

3.1.2. Canstone has failed to conduct an EIA [No report was submitted to the appropriate Ministry].

49. Under the PK-BIT, Canstone was required to conduct and submit an EIA report to the Ministry of Natural Resources and Environmental Sustainability but failed to do so. With a production capacity exceeding 50 tonnes per day, Canstone's operations significantly impacted the environment, necessitating an EIA as per Article 4(1) of PK-BIT, further, it is also a requirement as per the United Nations Framework Convention of Climate Change ("**UNFCCC**"), and Convention on Biological Diversity ("**CBD**").

50. The EIA is crucial for environmental protection, requiring assessments of a project's nature, magnitude, and potential impact[45]. Its objective is to prioritize environmental considerations in decision-making and involves public participation. The continuous duty to conduct an EIA, as highlighted in the case of ***Certain Activities carried out by Nicaragua***

[44] The MOX Plant Case (Ireland v. United Kingdom), Case No. 10, Order of Dec. 3, 2001, ¶ 84, ITLOS Rep. 95.
[45] A. Gilpin, Environmental Impact Assessment- Cutting Edge for the Twenty First Century, Cambridge University Press, (1995).

in the Border Area (Costa Rica v. Nicaragua)[46], mandates ongoing monitoring of environmental impacts and future harm assessments.

51. In the present dispute, Canstone commenced operations in November 2021 without conducting an EIA, focusing only on machinery conditions in their December 2021 report. This report, neither addressed the potential environmental impacts of the project nor was the public consulted prior to preparing such a report, *thus not qualifying as a valid EIA.* Further, In February 2023, an unsigned note was received at the Karheis facility about a potential leak which was dismissed without a proper EIA, reflecting a lack of due diligence.
52. Jake's statutory declaration revealed Alan's negligence, with Alan only proposing an EIA in September 2023, seven months after the incident. This delay and inadequate initial assessments demonstrate Canstone's failure to meet its obligations under Article 4 of the PK-BIT.
53. Article 4(4) of the PK-BIT obligates investors to submit the EIA report to the relevant ministry for projects with significant potential for adverse environmental effects. The competent National Authority assesses the magnitude of these impacts[47]. In this dispute, the EIA report should have been submitted to the Ministry of Natural Resources and Environmental Sustainability. Canstone has failed to conduct and submit an EIA, thus violating its obligations.

3.1.3. <u>Negligence of the Expert QC to establish a breach of obligations (Canstone failed to appoint a "Qualified Person" to conduct an EIA).</u>

54. Article 4(1) of PK-BIT requires the appointment of a *qualified person* to conduct an EIA. The term *qualified person* is defined as someone with a relevant degree and professional

[46] Costa Rica v. Nicaragua (Certain activities case), Judgement-Merits, ¶160-161, (2015).
[47] Principle 17, U.N. Conference on Environment and Development, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.l (Vol. l) (Aug. 12, 1992).

membership[48]. Canstone appointed Alan, who supervised biodiesel plants at both facilities and did not qualify as a "qualified person" to conduct an EIA under the BIT. QC supervisor often serves as an incentive for project proponents to conduct EIA[49] or integrate environmental considerations into their planning and decision-making.[50]

55. Jake's statutory declaration revealed Alan's lack of scrutiny and unprofessional behaviour spending most of his time in the executive lounge. Alan's role was supervisory, and not for conducting proper EIA processes. Furthermore, the September 2023 board meeting confirmed that no qualified person was appointed for the EIA, with Alan's suggestion to hire a consultancy firm instead. Thus, Canstone failed to meet its obligation to appoint a qualified person under Article 4.
56. This failure highlights a lack of balance between economic and ecological development. Canstone's negligence to appoint a qualified person to conduct the EIA as a precautionary measure, failing to mitigate potential harm and adhere to treaty obligations.

3.2. Canstone has breached its environmental obligations under Article 5 of the PK-BIT.

57. Canstone failed to uphold its environmental obligations under Article 5 of the PK- BIT, thereby violating the treaty's objectives. The Right to water is a Fundamental human right[51], and tribunals recognize that investors have reciprocal obligations to the State. Corporations can be held liable for environmental harm without the need to prove the intent behind the action, and the burden of proof lies with the aggrieved party.

[48] IES Guidance, Experience and qualifications to demonstrate competence in different EIA roles (Nov. 2019); Kahlil Hassanali, Internationalization of EIA in a new marine biodiversity agreement under the Law of the Sea Convention: A proposal for a tiered approach to review and decision-making, 87 Enviro. Imp. Asses. Rev. 106554 (1964).
[49] L Ortolano and B Jenkins et al, Speculations on when and why EIA is effective, 7(4) Enviro. Imp. Asses. Rev., 85-292 (1987).
[50] L Ortolano, Controls on project proponents and environmental impact assessment effectiveness, 15(4) The Enviro. Prof., 352-363 (1993).
[51] Urbaser S.A. & Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶648, (2016).

58. Investment treaties, including the PK-BIT, are interpreted in light of their objectives, which often include environmental protection, as emphasized in the Paris Agreement and PK-BIT Preamble. PM Akbar stressed sustainability in initial discussions, modifying the draft PK-BIT to address environmental challenges. Despite this, Cantone's poor drainage system caused significant flooding, environmental damage, and health impacts after the Appam flood, affecting 129 people, including 13 hospitalized employees.
59. Investigations revealed compromised pressure relief valves due to neglect, leading to oil discharge into inland waters. Traces of biodiesel were found in internal reports. Given the foreseeability of climate change effects, Canstone cannot claim relief under force majeure and has thus breached its environmental obligations under the PK-BIT.

3.2.1. Canstone did not exercise optimum due diligence in conducting its operations.

60. Article 5(1) of the PK-BIT mandates that investors must diligently prevent hazardous substances from entering inland waters, avoiding health hazards. Companies must conduct effective due diligence to mitigate adverse impacts on human rights[52]. In this case, Alan, failed to conduct proper internal investigations, showing a lack of due diligence. Further, failure to conduct due diligence cannot grant protection to the investor of the investment treaty.[53]
61. Upon receiving a note about a potential leak at the Karheis facility, only a preliminary inspection was conducted based on a December 2022 report, with no immediate thorough investigation or EIA to address the issue.

[52] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award (Mar. 30, 2015).
[53] Cube Infrastructure Fund SICAV and Ors. v. Kingdom of Spain, ICSID Case No. ARB/15/20, Award, ¶ 388-406 (Deb. 19, 2019); Antaris Solar GmbH and Dr. Michael Gode v. The Czech Republic, PCA Case No. 2014-01, Award, Dissenting Opinion of Mr Gary Born, ¶ 397-440 (May 02, 2018).

62. Nearby farmers were later tested for contamination, and allegations of bribery to conceal oil spills and Alan's incompetence were raised. In this regard, it is stated that the Respondent failed to conduct its business diligently to prevent the entry of hazardous substances into the inland waters and violated Article 5 of the PK-BIT.

3.2.2. Canstone was negligent in conducting its business operations.

63. Under Article 5(1) & (3) of PK-BIT, investor(s) shall be held liable if their activities introduce harmful pollutants into public water bodies. Liability arises from negligence, evidenced by a failure to exercise due care resulting in harm to persons or property, linked causally to the investor's actions[54].
64. In the current case, the Respondent's biofuel production via the transesterification process generates toxic contaminants[55]. Allegedly, the Respondent failed to implement reasonable precautions during incidents at Karheis and Appam, contributing to contamination. Additionally, allegations of mismanagement and corruption further implicate the Respondent[56].
65. Jakey's statutory declaration alleges cover-ups and misconduct, supported by claims of bribery and incompetence by Alan, a senior executive. Alan's reported negligence, prioritizing social activities over plant supervision, underscores the Respondent's unethical business practices.
66. During a severe flood at Appam, neighboring factories evacuated, yet the Respondent continued operations, potentially exposing nearby residents and employees to harmful

[54] Art. 39, International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc A/56/10 (Nov. 2001); MTD Chile S.A. v. Chile, ICSID Case No. ARB/01/7, Award (May 25, 2004).
[55] K, NIKUL PATEL AND N. SHAILESH SHAH, FOOD, ENERGY, AND WATER THE CHEMISTRY CONNECTION, CH. 11- BIODIESEL FROM PLANT OILS ¶ 277-307 (2015).
[56] Principles 21 & 22, Guiding Principles on Business, supra note 13, at 86; World Duty-Free Co Ltd v. The Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006).

chemicals. Reports of "*respiratory tract issues"* among residents and Respondent's own employees suggest a link to floodwater contaminants.

67. These facts establish a prima facie case of negligence by the Respondent, contributing to public harm and violating environmental responsibilities. The Respondent's actions indicate a disregard for safety and environmental welfare, warranting legal scrutiny and remedial action.

3.2.3. Canstone disregarded its obligation to mitigate environmental harm.

68. Article 5(3) of the PK-BIT imposes a presumption of responsibility on property owners for pollution in inland waters unless proven otherwise. This places the *burden of proof* on the Respondent to demonstrate adequate preventive measures against environmental impact. Economic operators are obligated to take precautionary and remedial actions to prevent, anticipate, or minimize environmental damage and its effects[57].
69. In this case, the Respondent's internal management failed to implement proactive measures to mitigate contaminants' impact on human health, violating their obligations. Specifically, they neglected to **[3.2.3.1]** anticipate flood-related damages and **[3.2.3.2]** undertake precautionary measures to mitigate these risks.
70. This failure reinforces environmental liability, as the activity's nature or execution is presumed to cause harm. The Respondent's lack of preventive action highlights their negligence in fulfilling environmental responsibilities and warrants scrutiny under legal frameworks.

[57] Art. 3(2), UNFCCC; Cartagena Protocol on Biosafety to the Convention on Biological Diversity: text and annexes. Montreal: Secretariat of the Convention on Biological Diversity, Art. 11(8), 2000.

*3.2.3.1. **Flood's foreseeability imposed a duty to prevent the resulting harm.***

71. Under general principles, liability for non-performance may be excused by supervening events that are unforeseeable[58], uncontrollable[59], and render performance impossible[60]. In Greenock[61], it was established that an exceptionally severe flood must be anticipated, necessitating proactive measures to prevent harm.
72. Similarly, in this case, the Respondent could foresee flood risks based on Palmenna's northwest monsoon season from November to February, the country's flooding history and recent heavy rainfall in November 2023, as well as ongoing flood alerts in news reports. Following the Karheis incident, *the Respondent was obligated to exercise greater caution to prevent further harm.*
73. During the Appam floods, the Respondent had viable options such as emergency evacuation and conducting prompt machinery assessments to safeguard against flood-related risks. It is contended that the Respondent should have anticipated these flood scenarios and taken necessary precautions.

*3.2.3.2. **Canstone failed to take ex-ante actions to prevent harm.***

74. Investors must adopt a preventive and precautionary approach to prevent environmental pollution that could harm humans or the environment, even without absolute scientific

[58] Niko Resources (Bangladesh) Ltd. v. Bangladesh Oil Gas and Mineral Corporation (Petrobangla), Bangladesh Petroleum Exploration and Production Company Limited (Bapex), ICSID Case No. ARB/10/18, Award, ¶ 72 (Sep. 24, 2021).
[59] Huntington Ingalls Inc. v. Ministry of Defense of the Bolivarian Republic of Venezuela (II), Ad Hoc UNCITRAL Arbitration ¶ 236 (Feb 19, 2018).
[60]RSM Production Corporation v. Central African Republic, ICSID Case No. ARB/07/2, Decision on jurisdiction and liability (Dec. 07, 2010); Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 246 (Sep. 28, 2007).
[61] Greenock Corp. v. Caledonian Railway Co. [1917] UKHL 3 ¶ 71.

certainty[62]. In *Urbaser*[63], the tribunal emphasized the investor(s) duty to comply with the host state's international obligations and BIT provisions.

75. In this case, the Respondent's actions constitute a breach of Article 5 of the PK-BIT, equivalent to non-compliance with Palmenna's international commitments under the UNFCCC[64]. Palmenna, as a UNFCCC party, implemented the Five-Fuel Diversification Policy in 2011 for sustainable resource utilization. However, the Respondent, as an investor, neglected to uphold this obligation and operated contrary to sustainable development principles. The Respondent's negligence and the failure to take appropriate anticipatory measures is further corroborated by the evidence from doctors' reports and independent investigations that establish a clear causal link between respiratory issues and chemicals leaked during the Respondent's operations.
76. It is reasonably inferred that the Respondent's actions violated Article 5 of the PK-BIT, introducing hazardous substances into inland waters and contributing to human health deterioration.

[62] Principle 15, Rio Declaration, supra note 16, at 82; Nairobi, UNEP Governing council, Precautionary approach to marine pollution, including waste-dumping at sea, U.N. Doc. 15/27 (May 25, 1989); Ministerial Conference on Atmospheric pollution and Climate Change, The Noordwijk Declaration on Climate Change: Atmospheric Pollution and Climatic Change: Ministerial Conference at Noordwijk, Doc. PB90-210196 (Nov. 06- 07,1989).
[63] G.A. Res. 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (Jul. 14, 2014); Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶ 1154 (Dec. 08, 2016).
[64] Marion Unglaube v. Republic of Costa Rica, ICSID Case No ARB/08/1, Award (May 16, 2012); Gold Reserve Inc v. Bolivarian Republic of Venezuela (I), ICSID Case No ARB(AF)/09/1, Award (Sep. 22, 2014); Bilcon of Delaware et al v. Government of Canada, PCA No. 2009-04 (Jan. 10, 2019).

ISSUE 4: IF THE ANSWER TO ISSUE 3 IS IN THE AFFIRMATIVE, WHETHER PALMENNA IS ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES?

77. The Claimant submits that the Respondent has breached its obligations under both **[4.1]** international law and **[4.2]** The provisions of the PK-BIT, entitling the Claimant to an award of declaratory reliefs and damages.

4.1. Claimant's Entitlement under International Law.

78. Under international law, the principle of full reparation for breaches of obligations is well-established[65]. In practice, compensation is the most prevalent form of reparation in investor-state arbitration[66]. The Permanent Court of International Justice (PCIJ) in the ***Chorzów Factory Case***[67], emphasized that compensation should aim to restore the injured party to the position it would have been in had the breach not occurred. This principle is foundational and is reflected in investor-state dispute contexts, as seen in ***CMS v. Argentina***[68] and ***Burlington v. Ecuador***[69], where tribunals awarded compensation for environmental harm caused by investors' violations.

79. The Claimant assert that investment protection is reciprocal. States have obligations to treat investors fairly, but investors must also meet obligations, including environmental responsibilities[70]. When investors breach these obligations, States should have the ability to bring counterclaims should be able to seek redress or damages from the investor in the

[65] Germany v. Poland, 17 PCIJ 4 (SERIES A) at 21, Judgement-merits, (Sept, 1928).
[66] I Marboe, Calculation of Compensation and Damages in International Investment Law, Second edition (Oxford University Press, 2017), Paragraph 2.03.
[67] Factory at Chorzów (Germany v. Poland), Series A No. 9 ICGJ, 247 (Perm. Ct. Intl. Jus. 1928).
[68] CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8 [2005].
[69] Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5 [2017].
[70] David Schneiderman, Kate Miles. The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital, European Journal of International Law, Volume 25, Issue 3, August 2014, Pages 942–945.

context of an investment dispute[71]. In *CMS v. Argentina* and *Burlington v. Ecuador*, tribunals upheld this principle, awarding damages for environmental damage caused by investors.

80. In the present case, the compensation sought by the Government of Palmenna covers both environmental damage and adverse health effects due to Canstone Ltd.'s breaches that align with international legal standards to fully rectify the harm caused.

*4.1.1. **There exists a causal link between the wrongful act and the injury.***

81. In international law, the principle of causation is crucial for determining the scope of reparation. Full reparation is owed only for injuries that are directly attributable to the wrongful act. It is therefore only where there is a causal link between the wrongful act and the injury that full reparation must be made[72]. The ***Perenco*** case[73], highlights that compensation is owed only for injuries directly attributable to the wrongful act.
82. In this dispute, the contamination and subsequent health issues in the Appam region, attributed to the failure of Canstone Ltd.'s plant, demonstrate this direct causation. The contamination affected over 129 individuals, with 39 requiring hospitalization including 13 who were employees of the Appam facility. Given that Canstone was the only operational plant in Appam during the floods, it is highly probable that a leak from this plant caused the contamination. The plant's operational issues, exacerbated by floods, point to systemic failures and a clear causal link between Canstone Ltd.'s actions and the health injuries suffered.

[71] Peter Muchlinski, "Caveat Investor"? The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard, 44 INT'L & COMPARATIVE L. Q. 527, 556 (2006).
[72] The Guide to Damages in International Arbitration, Third edition (Global Arbitration Review, 2018), p. 104.
[73] Perenco Ecuador Ltd v. Republic of Ecuador, ICSID Case ARB/08/6.

4.1.2. Application of Article 32 of the VCLT.

83. Article 32 of VCLT allows for the use of supplementary means to interpret a treaty when the primary rules of interpretation, set out in Article 31, are insufficient[74]. Article 31 of the VCLT does not cover supplementary materials or instruments related to treaty interpretation.[75] Therefore, understanding the broader context and the parties' intentions at the time of the treaty's conclusion[76] is crucial for interpreting matters not explicitly mentioned in the treaty.

84. In the current dispute, the PK-BIT lacks specific provisions on damages or relief but emphasizes "sustainability" and addresses "deforestation, biodiversity loss, and environmental degradation," along with prioritizing local employment. A Memorandum outlining "5 key principles and commitments" was also signed by both parties. The Claimant contends that compensation should be provided in light of these principles and international law to address public health damages applying the supplementary rules of Interpretation.

4.2. Claimant's Entitlement Under the PK-BIT.

85. In the current dispute, Canstone failed to conduct an EIA report which was crucial for evaluating the condition of its machinery, equipment, and potential environmental risks. This oversight led to the hospitalization of nearby farmers due to health issues caused by the company's operations. Canstone's negligence and non-compliance with Article 4 of the PK-BIT is evidenced by statutory declarations and health reports.

---

[74] Art. 32, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.
[75] Mark E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties 426-450 (Martinus Nijhoff Publishers 2009).
[76] UNCITRAL, 'Possible Reform of Investor-state Dispute Settlement (ISDS)', Thirty-sixth session (Vienna, 2 November 2018) UN Doc No A/CN.9/WG.III/WP.149.

86. Canstone has breached Article 5 of the PK-BIT by causing significant environmental damage. Evidence from doctors' reports and independent investigations reveals a direct link between the company's operations and respiratory tract infections among the local population, highlighting inadequate internal management and violations of environmental obligations.

87. Canstone violated Article 3(3) of the PK-BIT demonstrating a breach of human rights obligations. The Appam incident, where biodiesel was released into inland waters, severely impacted over 129 people and infringed on their fundamental human right to clean water. This contamination led to 39 hospitalizations with respiratory tract injuries due to Canstone's failure to fulfill its obligations, including 13 employees at the Appam facility who were forced to stay at the facility during the natural disaster, putting their health and safety at significant risk.

88. Recent international arbitration trends emphasize integrating environmental and human rights concerns interpreting BITs in light of these laws[77]. Tribunals, such as in recent investor-state disputes, award compensation for environmental damage, often using discretion due to the challenges in quantifying harm[78]. This discretion is invaluable in environmental cases since measuring the exact extent of environmental impact is insurmountable[79]. Further, Rule 6 of AIAC permits the tribunal to award compensation as their additional powers if they deem it appropriate[80].

89. The ecosystem services approach allows tribunals to award compensation reflecting the true extent of harm and property value[81]. Claimants propose using the restoration cost

[77] Urbaser S.A. & Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶648, (2016).
[78] S. D. Myers v. Government of Canada, Partial Award, ¶309 (Nov. 13, 2000).
[79] Emily Rebecca Hush, The Valuation of Ecosystem Services in International Investment Arbitration, 30 Environmental Claims Journal, at 22, (2018).
[80] Arbitration Rules 2023, Asian International Arbitration Centre, Rule 6, p. 11.
[81] Supra Note at 79.

method, which aligns with complete reparation principles by estimating the financial cost of restoring or replacing damaged ecosystem functions. This method ensures fair compensation for environmental damage[82].

[82] Yung En Chee, An Ecological Perspective on the Valuation of Ecosystem Services, 120 BIOLOGICAL CONSERVATION 549, 549 (2004).

PRAYER FOR RELIEF

In light of the above submissions, the Claimant humbly prays that this Honourable Tribunal may be pleased to declare that;

I. Claimant can invoke arbitration against Canstone in pursuant to Article 12 of the PK-BIT.

II. The Government of Palmenna is not precluded from initiating an arbitration against Canstone.

III. Canstone have breached its obligations under PK-BIT.

IV. Palmenna is entitled to an award of declaratory relief and damages.

And, pass any such order that this Tribunal may deem fit in the interest of equity, justice, and good conscience.

Reverently submitted,

Counsels for Claimant.