ASIAN INTERNATIONAL ARBITRATION CENTRE

19th LAWASIA INTERNATIONAL MOOT COMPETITION 2024

(INTERNATIONAL ROUNDS)

THE FEDERATION OF PALMENNA…….....CLAIMANT

v.

CANSTONE FLY LIMITED…….....RESPONDENT

MEMORANDUM FOR RESPONDENT

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Rio Declaration	*Rio Declaration on Environment and Development*	54
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.* *United Nations Commission on International Trade Law Arbitration Rules, 2010*	48
VCLT	Vienna Convention on the Law of Treaties *Vienna Convention on the Law of Treaties* May 23, 1969, 1155 U.N.T.S. 331.	36, 37, 46, 48, 56, 58

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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 Claimant against Canstone;

II. Whether the Claimant 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 neighbor 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 travelled to Karheis to oversee the storage tank systems while the neighbouring 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 Claimant 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 Claimant 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 Claimant 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 SHOULD BE COMPLIED WITH BEFORE THE GOVT OF PALMENNA MAY COMMENCE ARBITRATION PROCEEDINGS.

The Respondent contends that Palmenna has not complied with the mandatory pre-arbitration steps outlined in Article 12 of the PK-BIT, which requires negotiation and mediation before initiating arbitration. The BIT's language, specifically the term "shall," emphasizes that compliance with these steps is not optional but obligatory. The Claimant's failure to pursue these preliminary steps constitutes a breach of the 'condition precedent' which in turn denies the tribunal jurisdiction over the dispute. Due to the Claimant's failure to meet these procedural prerequisites, the arbitration proceedings are premature and invalid, and the tribunal lacks jurisdiction to hear the case.

II. THE CLAIMANTIS PRECLUDED FROM INITIATING ARBITRATION PROCEEDINGS AGAINST CANSTONE.

The Claimant is precluded from initiating arbitration against Canstone Ltd. for two primary reasons. *Firstly*, the arbitration proceedings and the ongoing domestic Court of Appeal case are parallel, risking conflicting awards and undermining judicial finality, and violating *Res Judicata* and lis pendens principles. *Secondly*, the PK-BIT does not explicitly permit the host State to initiate arbitration, reflecting a common disparity where only foreign investors have unilateral arbitration rights. Furthermore, the lack of explicit consent from Canstone Ltd. for the arbitration under ambiguous agreements further precludes the Claimant from initiating proceedings.

III. CANSTONE HAS NOT BREACHED ANY OBLIGATIONS UNDER THE PK-BIT.

The Respondent asserts that Canstone has not breached its obligations under the PK-BIT. Regarding Article 4, Canstone has complied with EIA requirements by submitting reports within agreed timelines and incorporating robust risk management mechanisms, even amid limited production capacity. The Claimant has not demonstrated that Canstone's activities caused significant harm. Under Article 5, Canstone has adhered to standards by preventing harmful substance discharge and acted as a prudent operator. The severe flooding, acknowledged as an 'Act of God,' invoked force majeure, absolving Canstone from liability for resultant health issues as it was beyond Canstone's control. Canstone acted as a reasonable and prudent operator, and no conclusive evidence links its operations to the reported respiratory infections. The Respondent's adherence to international standards and precautionary measures underscores its compliance with the PK-BIT.

IV. PALMENNA IS NOT ENTITLED TO AN AWARD OF DECLARATION AND DAMAGES.

Palmenna is not entitled to an award of declaration or damages as the Respondent has not breached its obligations under the PK-BIT. Even assuming a breach occurred, the damages claimed are too remote and lack a direct causal link to the alleged breach. The force majeure event, namely severe floods, further excuses liability. Additionally, the Claimant are at fault due to their negligence in infrastructure planning and hasty industrial setup, which exacerbated the flooding. Moreover, the PK-BIT does not explicitly provide for compensation, indicating that the parties did not intend for such remedies. Tribunals require explicit treaty provisions for compensation, which are absent in the PK-BIT. Thus, the Claimant' request for damages is unfounded and should be denied.

PLEADINGS

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

1. It is submitted by the Respondent that the Claimant has failed to comply with the multi-tier dispute resolution steps as required pursuant to Article 12 of the PK-BIT. The compliance with the pre-arbitration steps stems from its mandatory nature depicting the bindingness, legal obligation, and enforceability of the procedural requirement[1]. Therefore, the pre-arbitral steps should be complied with before initiating the arbitration proceedings based on the grounds that:
[1.1] Enforceability of the Pre arbitration clause of Article 12 of the PK-BIT is Mandatory;
[1.2] The explicit reflection of party autonomy in the BIT underscores its mandatory nature;
[1.3] Non-compliance with the pre arbitral steps constitutes a violation of a condition precedent resulting in the lack of jurisdiction.

1.1. Enforceability of the Pre arbitration clause of Article 12 of the PK-BIT is Mandatory.

2. The inclusion of Article 12 in the PK-BIT indicates the parties' intention to resolve disputes amicably through a structured process involving good faith negotiation, mediation, and arbitration. When clauses specify a step-by-step mechanism, the parties must complete each step before proceeding to the next, reflecting their commitment to resolving disputes through this prescribed procedure[2]. Thus, the Claimant is bound to comply with the pre-arbitral steps

[1] GARY BORN AND MARIJA ŠĆEKIĆ, PRE-ARBITRATION PROCEDURAL REQUIREMENTS: 'A DISMAL SWAMP,' 227-263 (Oxford University Press, 2015).
[2] Katarina Tomic, Multi-tiered dispute resolution clauses; benefits and Drawbacks (Journal for legal and social studies in South-East Europe, 2017) 360.

because **[1.1.1]** The PK-BIT clearly defines the nature of the proceedings and **[1.1.2]** The pre-arbitral steps are characterized to be mandatory.

1.1.1. The PK-BIT clearly defines the nature of the proceedings.

3. The Respondent argues that pre-arbitration steps under the PK-BIT are mandatory, as Article 12 clearly mandates higher management negotiation and mediation before arbitration. This structured approach shows the parties' intent to prioritize amicable dispute resolution[3]. The treaty emphasizes resolving disputes through dialogue, negotiation, and non-confrontational means before resorting to arbitration[4].

1.1.2. The pre-arbitral steps are characterized to be mandatory.

4. Courts and tribunals have frequently upheld the necessity of following specified dispute resolution procedures before arbitration[5]. In the case of ***Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania***[6], the Tribunal held that the Claimant must comply with the mandatory pre-arbitration steps stipulated in the contract, such as attempts to settle the dispute amicably before commencing arbitration emphasizing the importance of adhering to such dispute resolution procedures. In ***Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan***, the Tribunal found that the Claimant had failed to follow the mandated pre-arbitration procedures, wherein it ruled that strict adherence to these procedural requirements was essential and dismissed the claims due to non-compliance[7]. The Malaysian Federal Court determined that 'Parties are bound to follow tiered dispute resolution clauses

[3] Abaclat and Others v. Argentine Republic (ICSID Case No. ARB/07/5).
[4] Born, Gary, and Marija Šćekić, 'Pre-Arbitration Procedural Requirements: 'A Dismal Swamp'', in David D. Caron, and others (eds), Practising Virtue: Inside International Arbitration (Oxford, 2015; online edn, Oxford Academic, 21 Jan. 2016).

[5] Santiago Drummond v. Thailand CC Case No. 11110/MS/ARB.
[6] ICSID Case No. ARB/05/22.
[7] Kilic Insaat Ithalat Ihracat Sanayi ve Ticaret Anonim Sirketi v. Turkmenistan (ICSID Case No. ARB/10/1).

before resorting dispute to arbitration"[8] reinforcing the importance of following the pre-arbitration steps by the parties to the PK-BIT.

5. Furthermore, the Indian Courts have held that the pre-arbitral/preceding steps laid down in a contract to be followed before the initiation of arbitration proceedings are essential and mandatory in nature[9]. In the ***M.K. Shah Engineers And Contractors v. State of Madhya Pradesh***[10] case, the Supreme Court, giving effect to the text of the clause, held that such preconditions were "*essential*" and necessarily had to be observed and set aside the award as certain "*procedural pre-requisites*" were not achieved. Recently, in ***Oriental Insurance Company Ltd. v. M/s Narbheram Power and Steel Pvt. Ltd.***[11] and ***United India Insurance Co. Ltd. & Anr. v. Hyundai Engineering and Construction Co. Ltd. & Ors.***[12]**,** the SCI took the view that arbitration clauses must be construed "*strictly*", therefore requiring completion of the "*pre-conditions*" to arbitration. The Court found that the arbitration agreement was "*hedged with a conditionality*" and the non-fulfilment of the "pre-condition" rendered the dispute "*non-arbitrable*".

6. The rationale behind these judgments/ awards rendered by the courts/ tribunals is that when the parties "*voluntarily*" agree upon the procedure to a specific dispute resolution procedure in their contract, they are strictly bound to comply with the mode prescribed.

[8] Juara Serata Sdn Bhd v. Alpharich Sdn Bhd (2015) 6 MLJ 773.
[9] Abhishek Kumar, Aditi Tayal, Pre-Arbitral Steps/Preceding Steps: Whether Mandatory or Directory, Singhania and Partners, 25 Jan 2023.
[10] 1999 (2) SCC 594.
[11] 2018 (6) SCC 534.
[12] CIVIL APPEAL NO. 8146 OF 2018.

1.2. The explicit reflection of party autonomy in the BIT underscores its mandatory nature.

7. International arbitration offers significant flexibility to the parties in tailoring dispute resolution procedures through arbitration agreements. This includes the option to incorporate multi-tiered dispute resolution clauses, which require parties to follow a prescribed sequence of steps before initiating arbitration[13]. This structured approach allows for an organized and systematic attempt to resolve disputes amicably at various stages, potentially reducing the need for formal arbitration. Therefore, the Clause is obligatory since; **[1.2.1]** Language of the dispute resolution clause in the BIT is unequivocal; and **[1.2.2]** The interpretation of the provisions of the VCLT.

1.2.1. Language of the dispute resolution clause in the BIT is unequivocal.

8. The PK-BIT explicitly states, "Any dispute between the Parties arising from, relating to, or in connection with this BIT shall be referred……"[14]. The PK-BIT uses the term "shall" in its pre-arbitration clause[15]. The language of the Multi-Tiered Dispute Resolution (MDR) clause indicates whether the parties are required to follow the specified procedure before initiating arbitration[16]. The precise and explicit terms of the MDR clause in the BIT establish its mandatory nature, making the claim inadmissible if the required procedure is not adhered to[17].

9. The use of the word 'shall' raises a presumption that the particular provision is imperative[18]. The use of the word 'shall' strengthen the inference that these words have been used in their

[13] Milivoje Mitrovic, Dealing with the Consequences of Non-Compliance with Mandatory Pre-Arbitral Requirements in Multi-Tiered Dispute Resolution Clauses the Swiss Approach and a Look Across the Border, 37(3) ASA Bulletin, 559-579 (2019).
[14] Article 12, PK-BIT.
[15] Ibid.
[16] Natasha Peter, Escalation Clauses – Where Do They Leave the Counterclaimant? Kluwer Arbitration Blog, (Jul. 21, 2017).
[17] Gregory Travaini, Multi-tiered dispute resolution clauses, a friendly Miranda warning, Kluwer Arbitration Blog, Sep. 30, 2014).
[18] State of UP v. Manbodhan Lal Srivastava AIR 1961 SC 571, p. 765.

primary sense and that 'shall' should be construed as mandatory[19]. Imperative terms like "shall" or "must" are often interpreted as indicating a mandatory requirement. On the other hand, terms such as "can," "may," or "should" are typically seen as non-mandatory. A study of ICC arbitral awards concludes, 'when a word expressing obligation, such as "shall", is used in connection with amicable dispute resolution techniques, arbitrators have found that this makes the provision binding upon the parties' and 'compulsory, before taking jurisdiction'[20]. In ***Emirates Trading Agency LLC v. Prime Mineral Exports Pte Ltd***.[21], the Court ruled that the term "shall" in the dispute resolution clause rendered the precondition of engaging in "friendly discussion" before arbitration mandatory and enforceable, thus making it a condition precedent to initiating arbitration.

1.2.2. The interpretation of the provisions of the VCLT.

10. The interpretations of the provisions of the treaty are pivotal to ensure that the pre-arbitral steps are complied with as mandatory obligations to resolve disputes under international agreements. The same shall be proven by **[1.2.2.1]** Article 26 of the VCLT; and **[1.2.2.2]** General interpretation of Article 31 of the VCLT.

1.2.2.1 Article 26 of the VCLT.

11. The principle enshrined in Article 26 of the Vienna Convention on the Law of Treaties[22] is "*Pacta Sunt Servanda*" which is a basic tenet of International law that states that every treaty in force is binding upon the parties and must be performed and honored by them in good faith. The principle of "pacta sunt servanda" emphasizes that once States voluntarily enter into a

[19] State of UP v. Babu Ram Upadhya AIR 1961 SC 1480, p. 1485.
[20] Philip Morris v. Uruguay, ICSID Case No. ARB/10/7, Decision on Jurisdiction (July, 2013) ¶140-1; Dyalé Jiménez Figueres, Multi-Tiered Dispute Resolution Clauses in ICC Arbitration,14(1) ICC Ct Bull, 82 (2003).
[21] (2015) 1 WLR 1145: 2014 EWHC 2104 (Comm).
[22] Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

treaty, they are legally bound to uphold their obligations as outlined[23]. The PK-BIT represents a binding international agreement, duly consented to and ratified by both parties, therefore the parties must perform the terms of the BIT in good faith. Neglecting the pre-arbitration procedures outlined in the BIT constitutes a breach of the treaty reflecting a failure to honor the agreed terms, potentially leading to accusations of bad faith against Palmenna, and reflects a disregard for the principle of "pacta sunt servanda".

1.2.2.2. General interpretation of Article 31 of the VCLT.

12. According to Article 31 of the Vienna Convention on the Law of Treaties (VCLT)[24], treaties should be interpreted in good faith, based on the ordinary meaning of their terms, within their context, and in light of their object and purpose. This principle requires that the dispute resolution clause in the PK-BIT be interpreted not only according to its literal wording but also considering the underlying intent of the parties. If the clause specifies steps such as negotiation and mediation before arbitration, interpreting it in good faith means recognizing these steps as integral to the dispute resolution process and requiring compliance before proceeding to arbitration.

13. In the present case, Article 12 of the PK-BIT stipulates that parties must engage in negotiation and mediation before arbitration can be initiated. However, the Claimant initiated arbitration without fully pursuing these pre-arbitration steps. This action disregards the ordinary meaning of the terms set out in Article 12. Disregarding the pre-arbitration steps would undermine the treaty's purpose and the good faith principle embedded in the VCLT wherein a non-compliant party may be seen as not acting in good faith, violating the treaty's object and purpose, and thus undermining the efficacy of the dispute resolution mechanism. Therefore,

[23] Malgosia Fitzmaurice, Third Parties and the Law of Treaties, 6 MAX PLANCK Y.B. U.N. L. 37 (2002).
[24] Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

the Claimant's actions in initiating arbitration without adhering to the pre-arbitration requirements outlined in Article 12 of the PK-BIT reflect a breach of Article 31 of the VCLT.

1.3. Non-compliance with the pre-arbitral steps constitutes a violation of a condition precedent resulting in the lack of jurisdiction.

14. The counsel for the Respondent humbly submits that Article 12 of the PK-BIT constitutes a "*condition precedent*" that has not been complied with by the Claimant. It is contended that violation of a 'condition precedent', as distinguished from non-compliance with a 'contractual obligation', results in either a jurisdictional or substantive bar to a party's claim. The non-compliance with the pre-arbitration procedures outlined in the PK-BIT is more than a mere contractual breach as it affects the tribunal's jurisdiction over the dispute.

15. The New York courts have repeatedly held that 'conditions precedent' to arbitration are '*prerequisites to the submission of any dispute to arbitration*', and 'a *precondition* to access to the arbitral forum'[25], and that a party's failure to comply with these preconditions '*forecloses*' access to arbitration[26]. The steps outlined under Article 12 of the PK-BIT are considered 'conditions precedent,' meaning they are prerequisite actions that must be fulfilled before any dispute can be submitted to arbitration.

16. Moreover, it is contested that a dispute resolution clause, which may be multi-tiered in nature, should be construed like any other commercial agreement. Therefore, until the condition precedent to the commencement of arbitration is fulfilled, neither party to the arbitration agreement is obliged to participate in the arbitration[27]. In the same vein, an arbitral

[25] Silverstein Prop, Inc v Paine, Webber, Jackson & Curtis, Inc, 65 NY2d 785, 787 (NY 1985); Lakeland Fire Dist v E Area Gen Contractors Inc, 791 NYS2d 594, 596 (NY App Div 2005); Sucher v 26 Realty Assocs, 554 NYS2d 717, 718 (NY App Div 1990).
[26] Consolidated Edison Co v Cruz Constr, 685 N.Y.S 2d 683.
[27] NWA & FSA v NVF & others [2021] EWHC 2666.

tribunal would not have jurisdiction before the condition precedent is fulfilled[28]. In the current dispute, as neither party to the PK-BIT has sought or attempted mediation, the Claimant's initiation of arbitration proceedings is deemed invalid, as the arbitration provision is not triggered until one of the parties requests mediation, reinforcing the BIT's structured dispute resolution process. The step providing for reference of disputes to arbitration is not triggered, unless either of the parties initiates and completes the pre-arbitral step[29].

[28] Int'l Research Corp. plc v. Lufthansa Sys. Asia Pac. Pte Ltd [2012] SGHC 226, ¶104.
[29] Didem Kayali, 'Enforceability of Multi-Tiered Dispute Resolution Clauses', (2010) 27(6) Journal of International Arbitration 551.

ISSUE 2: WHETHER THE CLAIMANT IS PRECLUDED FROM INITIATING AN ARBITRATION AGAINST CANSTONE?

17. It is submitted before this Tribunal that the Claimant is precluded from initiating an arbitration against Canstone Ltd. in the present matter, based on grounds that; **[2.1]** The arbitration proceedings and the proceedings in the Court of Appeal constitute parallel proceedings and **[2.2]** Disparity in investment arbitration.

2.1. The arbitration proceedings and the proceedings in the Court of Appeal constitute parallel proceedings.

18. Parallel proceedings in international arbitration occur when multiple arbitral tribunals simultaneously hear disputes involving the same parties, legal grounds, and similar or overlapping issues[30]. The Claimant is precluded from initiating an arbitration against Canstone in the present matter because simultaneous proceedings are already going on in the Court of Appealagainst SZN, which is considered to be the "*face*" and "*operating force*" of Canstone where the nominees of SZN were responsible for managing day-to-day operations. It is contended that Canstone Ltd.'s indirect involvement, due to the High Court's decision impacting its Appam Plant operations, underscores the interconnectedness of the legal matters, thus barring the Claimant from pursuing arbitration.

19. The Tribunal may choose to suspend its proceedings until a decision from another court is reached, ensuring efficiency and fairness in the administration of justice[31]. Multiple proceedings involving different entities within the same corporate group concerning the same

[30] Nadja Erk-Kubat, Parallel Proceedings in International Arbitration: A Comparative European Perspective, Int'l Arb. L Lib, 71-246, at 72, 107-119 (2014).
[31] Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB/84/3, Decision on Jurisdiction, (Nov. 27, 1985).

investment and State measure may arise. Despite varying forums and legal bases, these proceedings often seek similar relief for the same issue, potentially leading to multiple recoveries[32]. The Respondent submits that the arbitration proceedings initiated would lead to **[2.1.1]** Conflicting Awards and Duplicity of Claims; **[2.1.2]** Violation of the principle of *Res Judicata* and Collateral Estoppel, and **[2.1.3]** Violation of the doctrine of Lis pendens.

2.1.1. Present arbitral proceedings under PK-BIT and the legal proceedings under the Court of Appeal may lead to Conflicting Awards and Duplicity of Claims.

20. The Respondent submits that commencing arbitration while there is an ongoing domestic case that is up for an appeal could lead to contradictory rulings and render duplicate claims inadmissible. A system that allows for fundamentally opposed decisions to exist simultaneously disrupts the principles of law and fairness, challenging the stability and credibility of the legal order[33].

21. In the present matter, the domestic High Court has already ruled on the compensation owed to the victims, including the Claimant and SZN. Initiating parallel arbitration could lead to conflicting rulings on the same issues, creating legal uncertainty and undermining judicial finality. Given the High Court's decision, the arbitration tribunal should dismiss the claims to prevent conflicting awards and respect existing judgments. Therefore, the Government's strategy of pursuing both arbitration and domestic proceedings introduces uncertainty, delays resolution, and undermines predictability, impacting all parties involved.

[32] G.A. Res. A/CN.9/964, Possible reform of investor-State dispute settlement (ISDS) shareholder claims and reflective loss (Aug. 09, 2019).
[33] Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 FORDHAM L. REV. 1521, 1530-32 (2005).

2.1.2. The Claimant has violated the principle of Res Judicata and Collateral Estoppel by initiating the arbitration proceeding.

22. The principles of *Res Judicata* and Collateral Estoppel precludes the Claimant from initiating arbitration proceedings against Canstone Ltd. *Res judicata* prohibits re-litigating resolved disputes to avoid duplicative claims and conflicting decisions in investment arbitration[34]. The doctrine is not explicitly codified, however, it finds its applicability through Articles 59 and 60 of the ICJ Statute[35], as well as Article 53(1) of the ICSID Convention[36].

23. The principle of *Res Judicata* applies when the same parties are involved in subsequent proceedings concerning the same issues or subject matter[37]. This principle can also extend to situations where entities with closely related interests are involved, as long as the legal questions and subject matter remain fundamentally the same[38]. In the present case, the disputes involving SZN and Canstone are concerned with the same underlying facts and legal issues. Although different legal processes and the same group of companies are engaged, both the appeal and the arbitration focus on the alleged negligence leading to respiratory illnesses, which involves the same parties or their privies based on the same cause of action[39].

24. To elucidate that the cause of action in the arbitration proceedings mirrors that in the High Court case, the Respondent highlights that both proceedings involve similar allegations about deficiencies in Canstone Ltd.'s operations. The activists who initiated legal action in the High Court of Palmenna have highlighted significant "*inadequacies in Canstone Ltd.'s drainage and ventilation systems*" including flaws in the design, engineering defects, and negligent

[34] Currie, Res Judicata: The Neglected Defense, 45 University of Chicago Law Review 317 (1978).
[35] Arts. 59 & 60, United Nations, Statute of the International Court of Justice (18 April 1946).
[36] Art. 53(1), ICSID Convention, Regulations and Rules (Washington D.C, 2003).
[37] Gabrielle Kaufmann-Kohler, The Arbitration Agreement and Res Judicata: Law and Practice in International Arbitration, 16 ICCA Congress Series 233 (2011).
[38] Michael Reisman & Brian S. King's, Res Judicata in Investment Treaty Arbitration, 2 THE LAW & PRAC. OF INT'L CTS. & TRIBUNALS 351 (2003).
[39] Benjamin v. Traffic Executive Association Eastern Railways 869. F.2d 107 (2d Cir 1989) 114-16.

maintenance that led to environmental harm. These claims are grounded in the sustainability and environmental obligations outlined in the PK-BIT. The Government of Palmenna's arbitration claim aligns with these allegations, asserting that Canstone Ltd.'s actions or omissions have breached the PK-BIT provisions, resulting in respiratory issues among Palmennian citizens. This overlap in allegations between the High Court case and the arbitration proceedings demonstrates that the core issues are identical.

25. The statement made by M Akbar, PM of Palmenna on 5th March 2024, supports the contention that the cause of action in both the proceedings are essentially the same wherein he acknowledges that the issues being addressed in both the High Court proceedings and the arbitration proceedings involve compensation for victims and management issues related to Canstone Ltd.'s facilities. Akbar's commitment to "*do the necessary to overturn that decision*" indicates that the issues and grievances raised in the judicial context, particularly regarding Canstone Ltd.'s conduct and its impact, are directly pertinent to the arbitration proceedings as well. Akbar's Statement confirms that the arbitration proceedings aimed at overturning the decision of the High Court are based on the claims raised in arbitration which are essentially the same as those adjudicated by the national courts of Palmenna. This intent of the Claimant is evident where the arbitration proceedings are initiated under the garb of the ruling of the High Court in Palmenna even though the causes of action between the two legal processes are aligned.

26. In the case of ***Rachel Grynberg, Stephen Grynberg & Ors v. Grenada***[40], the tribunal was tasked with handling investment claims related to an oil exploration agreement where the claims were submitted to the ICSID under a specific BIT. The applied *Res Judicata* and precluded further claims by the Grynbergs and others. It determined that the investment claims

[40] Rachel Grynberg, Stephen Grynberg & Ors v. Grenada ICSID case no. ARB/10/6.

submitted to the ICSID were barred because similar issues had already been adjudicated. Further, ICSID tribunals also recognized these principles and held that - the applicability of the Judgement of the national court would operate acts as res-judicata in Arbitration proceedings[41]. In the ***H&H dispute***[42], the claimant sought to compel Egypt to take action through a domestic court. When the domestic court rejected this claim, H&H then initiated arbitration proceedings before an international tribunal. The arbitration was aimed at enforcing rights under the Bilateral Investment Treaty (BIT) and seeking compensation for alleged breaches. The tribunal concluded that the claims presented in the arbitration were fundamentally the same as those previously addressed in the domestic court, hence precluding the party from initiating the arbitration proceedings.

27. In cases such as ***CME Czech Republic BV v. The Czech Republic***[43], the tribunal employed a broader "economic approach" to assess the identity of the parties involved. This approach looks beyond formalistic distinctions to consider the economic relationships and realities between the entities. In the current dispute, SZN, which holds a 30% stake in Canstone, was prominently recognized as the "face of Canstone." Given these relationships, applying a similar economic approach suggests that Canstone and SZN should be regarded as essentially the same parties for the purposes of *Res Judicata* since both these entities are deeply embedded in the same operational and financial ecosystem.

[41] Inceysa Vallisoletana v. El Salvador ICSID Case no. ARB/03/26.
[42] H& H Enterprises Investment Inc. v. Arab Republic of Egypt – ICSID Case NO ARB/ 09/15 Award – 6th May 2014.
[43] CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award (Sept. 13, 2001).

2.1.3. The Claimant has violated the doctrine of Lis Pendens by initiating the arbitration proceeding.

28. Lis pendens states that if two courts are concurrently handling the same dispute, the court that was first seized of the case must continue to address the matter, while the second court must defer to it and suspend its proceedings[44]. This principle is based on the timing of the cases: the court first seized retains jurisdiction and continues its process, whereas the second court suspends its activities. For lis pendens to apply, three conditions must be met: the parties involved must be identical, the subject matter must be the same, and the legal grounds for the claims must match known as the triple identity test[45]. Essentially, if a dispute is already being considered by one court, any subsequent proceedings on the same issue in another forum should be put on hold until the initial court resolves the matter.

29. The High Court case involving the Claimant and SZN, a substantial shareholder of Canstone Ltd., was initiated before the commencement of the arbitration proceedings. This chronological precedence establishes that the High Court was the first forum to address the dispute. In this case, because the Court of Appeal has already been seized of the matter and is actively adjudicating the dispute involving the Claimant and SZN, the arbitration tribunal should respect this established procedural order.

[44] Gilles Cuniberti, Parallel Litigation and Foreign Investment Dispute Settlement, 21 ICSID Rev. Foreign Inv. L.J. 382 (2006).
[45] CAMPBELL MCLACHLAN, LIS PENDENS IN INTERNATIONAL LITIGATION, 117, (Martinus Nijhoff Publishers, 2009).

2.2. Disparity in investment arbitration does not allow the host State to initiate arbitration proceedings.

30. The Claimant is precluded from initiating arbitration proceedings under the PK-BIT since; **[2.2.1]** The PK BIT does not explicitly grant the host State the right to initiate arbitration **[2.2.2]** The Claimant has not exhausted the local remedies before initiating arbitration proceedings **[2.2.3]** Ambiguous arbitration agreements necessitate explicit investor consent for the host State to commence arbitration proceedings.

2.2.1. The PK BIT does not explicitly grant the host State the right to initiate arbitration.

31. The absence of a clear provision granting arbitration rights to the host State perpetuates an imbalance in investment arbitration where the Government cannot assert its interests on par with the foreign investors.

32. Investment arbitration exhibits a notable disparity where foreign investors possess the unilateral authority to initiate proceedings, contrasting sharply with host States that lack equivalent recourse[46]. This asymmetry is pervasive in many Bilateral Investment Treaties (BITs), which typically grant arbitration rights exclusively to foreign investors[47]. Jan Paulsson has coined this phenomenon as "arbitration without privity,"[48] underscoring the systemic imbalance that prevents host States from initiating arbitration. For example, under the Canada-South Africa BIT, while there is unconditional consent to arbitration, only foreign investors can instigate disputes[49].

[46] Gustavo Laborde, The Case for Host State Claims in Investment Arbitration, 1 J. Int'l Disp. Settlement 97 (2010).
[47] Ibid.
[48] Jan Paulsson, Arbitration Without Privity, 10 ICSID Rev. 232 (1995).
[49] Canada-South Africa BIT, Art. XIII (5).

33. The PK-BIT lacks a specific provision granting the host State the right to initiate arbitration, echoing the wider pattern observed in many BITs such as Canada's. This perpetuates the asymmetrical nature of investment arbitration, where foreign investors can unilaterally commence proceedings while host States remain without a comparable avenue. Therefore, due to the lack of an explicit clause mentioned in the PK-BIT, the Claimant cannot unilaterally initiate arbitration proceedings against the respondents.

34. Article 1(3) of the BIT[50] imposes obligations between the investors of the Parties or between the Parties themselves. Applying the interpretative principles under Article 31 of the VCLT[51], this BIT allows investors of one Party to enforce obligations against investors of another Party, or for the Parties themselves to impose obligations on one another. In the present dispute, the Claimant has initiated arbitration proceedings against Canstone Ltd., an investor of another Party. This action diverges from the intended application of the PK-BIT, which primarily facilitates disputes between the Parties to the agreement.

35. Furthermore, Article 12 of the PK-BIT expressly stipulates that "*any disputes between the parties*" arising from the BIT shall be resolved through arbitration administered by the AIAC. Importantly, this provision limits the scope of arbitration to disputes strictly between the Parties themselves. Therefore, by initiating arbitration against Canstone Ltd., which is not a Party to the PK-BIT, the Claimant has contravened the fundamental principles and specific provisions of the PK-BIT, hence the Claimant has precluded itself from participating in these arbitration proceedings.

[50] Art. 1(3), PK-BIT.
[51] Art 31, Vienna Convention on the Law of Treaties.

2.2.2. The Claimant has not exhausted the local remedies before initiating arbitration proceedings.

36. Further, the Claimant has not exhausted all the domestically available remedies before approaching the arbitral tribunal, hence the Claimant shall be precluded from initiating the arbitration proceedings. In ***Loewen Group, Inc. v. United*** **States**[52], where the court stressed the importance of exhausting local remedies before resorting to international arbitration. The case underscored that governments should utilize all domestic avenues for dispute resolution before pursuing claims internationally. The fact that the case involving the Claimant is still pending in the court of appeal indicates that local remedies have not been fully exhausted. Arbitral tribunals often assert that they lack jurisdiction over cases where local remedies have not been exhausted[53]. It is a requirement for the Claimant to complete all available domestic legal proceedings, particularly given that the case is still active in the court of appeal.

2.2.3. Ambiguous arbitration agreements necessitate explicit investor consent for the host State to commence arbitration proceedings.

37. It is submitted that the Respondent did not consent to the arbitration being initiated by the Claimant, who is thus, precluded from initiating an arbitration against Canstone.

38. In cases where the arbitration agreement is unclear or ambiguous, the uncertainty regarding the Host State's ability to initiate arbitration requires clear consent from the foreign investor to authorize such a right[54]. The requirement for explicit consent from the investor is crucial

[52] Loewen Group, Inc. and Raymond L. Loewen v. United States of America, ICSID Case No. ARB(AF)/98/3.
[53] CME Czech Republic BV v. Czech Republic, UNCITRAL Arbitration Proceedings, [2001].
[54] Supra Note at 23.

because, without it, the offer to arbitrate remains inactive, preventing the host State from commencing arbitration proceedings[55].

39. It is submitted that the Claimant has not abided by Rule 2 of the AIAC rules[56] which States that the party shall commence arbitration under the AIAC Arbitration Rules which shall be accompanied by confirmation that all existing pre-conditions to arbitration have been satisfied, which has not been satisfied by the Claimant. Moreover, Article 3 of the UNICITRAL Arbitration Rules[57] mandates that the Claimant must notify the Respondent in writing about the initiation of the arbitration proceedings and provide written communications for the same. Therefore, the Claimant has failed to comply with several procedural requirements concerning the consent of the investor under both, the UNICITRAL Arbitration Rules and the provisions of the AIAC Rules. Thus, the investor's lack of consent precludes the initiation of arbitration proceedings by the host State.

[55] CHRISTOPH H SCHREUER, THE ICSID CONVENTION: A COMMENTARY, 2 (Cambridge University Press, UK, 2001).
[56] Rule 2, AIAC Arbitration Rules, 2023.
[57] Art 3, UNICITRAL Arbitration Rules, 2010.

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

40. The PK-BIT is founded on the principles of good faith[58]. These principles require parties to *"deal honestly and fairly with each other and avoid taking unfair advantages."*[59] The treaty fosters a *"transparent business environment"*[60] and encourages *"mutually beneficial investment between the parties."*[61]

41. The Respondent submits that Canstone has committed no breach of obligations laid down under the PK-BIT. Canstone took all the necessary steps to ensure compliance with the law. It has been argued in a twofold manner, **[3.1]** Compliance with the EIA obligation under Article 4 of the PK-BIT and; **[3.2]** Meticulously abiding by its environmental obligations under Article 5 of the PK-BIT. Hence, not violating the PK-BIT for reasons acclaimed by the claimant.

3.1. Canstone has complied with its obligation outlined under Article 4 of PK-BIT.

42. It is submitted that the Respondent has complied with its sustainable obligation under Article 4 of PK-BIT owing to the following reasons: (**a)** Canstone was assured concession for the submission of necessary documents. **(b)** Proposition for the execution of the EIA was tendered immediately after gaining knowledge of the existence of risk. **(c)** Canstone has incorporated the robust investigation mechanism to ascertain the degree of risks.

[58] Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 169 (June 10, 2010).
[59] Arts. 26, 31 & 32, United Nations, Vienna Convention on the Law of Treaties, Treaty Series, 1155, 331 (1969); Photovoltaik Knopf Betriebs-GmbH v. The Czech Republic, PCA Case No. 2014-21, Award, ¶ 255 (May 15, 2019).

43. Under Article 4 of the PK-BIT, investors are required to conduct an Environmental Impact Assessment (EIA) for activities likely to cause significant environmental harm. The Respondent have met this obligation through the following measures:

44. Submission and Timing of EIA Report:

a. *Concessions Granted*: Canstone was granted concessions regarding the timing of submitting the EIA report.

b. *Timing Flexibility:* Article 4(4) of the PK-BIT stipulates that the EIA report should be submitted "as soon as possible," indicating a flexible timeline based on mutual agreement.

45. Agreement and Implementation:

a. *Government and Claimant Consensus*: The Respondent's government communicated that immediate signing of the PK-BIT would strain resources. The Claimant's Prime Minister agreed to support a flexible timeline for document submission, which was reflected in Article 4(4) of the PK-BIT. This consensus must be honoured before claiming a breach.

46. Threshold for Environmental Impact:

a. *Production Limits*: In *Los Vencedores*[62], the court determined that there is no harm if the permissible limit is not exceeded. According to Article 4(2)(e) of the PK-BIT, an EIA is required if production exceeds *'50 tonnes per day'*. Given that biofuel production in the Claimant's State was limited and the Respondent faced recruitment challenges, in fulfilling its commitment to boost the Claimant State's economy by hiring 70% Palmennian citizens. It was only by the end of 2022, the Respondent achieved profitability by contributing 20% to the total production capacity of the Palmenna. Therefore, the risk of significant environmental impact was minimal as the Respondent was not capable of producing much biofuel in its initial phases of operations.

[62] 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); The Convention on Biological Diversity, art. 14, June 05, 1992, 1760 U.N.T.S. 69; Perenco Ecuador Limited v. Republic of Ecuador, ICSID Case No. ARB/08/6.

47. Moreover, in *Costa Rica*,[63] the court has noted that for the EIA to be warranted, the existence of risk must be 'significant' meaning 'grave' and 'imminent,' otherwise it is unnecessary.

48. Internal Investigation and Risk Management:

a. *Robust Investigation Mechanism:* The Respondent implemented a thorough internal investigation mechanism to manage potential risks. Despite limited production capacity and challenges, the Respondent acted prudently.

b. *Proactive Measures:* Upon notification of a potential risk, Alan, a seasoned professional, was assigned to oversee the EIA process at Canstone's facilities, ensuring compliance with sustainable practices.

49. Burden of Proof:

a. *Claimant's Responsibility*: The Claimant has not proven that the Respondent's activities caused significant human health hazards or demonstrated inadequacies in the environmental assessments conducted. The Respondent's measures, including the appointment of Alan for quality control, were appropriate and diligent.

50. In conclusion, the Respondent has not breached its obligations under Article 4 of the PK-BIT and has diligently managed its operations to mitigate environmental risks.

3.2. Canstone has not breached its obligations under Article 5 of PK-BIT.

51. Pursuant to Article 5 of the PK-BIT, investor(s) are prohibited from discharging harmful substances in inland waters which lead to adverse environmental impact. It is submitted that the Respondent has undertaken all precautionary measures to mitigate the harm

[63] UNEP, Environmental Impacts-A Global Review of Legislation, UN Doc. DEL/2144/NA, 31 (Jan. 03, 2018); Certain Activities carried out by Nicaragua in the Border Area, (Cstr. v. Nic.), Compensation owed by Nicaragua to Costa Rica, 2018, I.C.J. 150 (Feb. 02).

associated with the flood water and to ensure its compliance with the obligation outlined under Article 5 of the PK-BIT.

52. Therefore, the Respondent cannot be held responsible for respiratory tract infections incurred due to:

3.2.1. Invocation of Force Majeure Due to Unforeseeable Flood

53. In the case of *Sempra*[64], the tribunal recognized that harm resulting from unforeseeable and uncontrollable circumstances could invoke the *force majeure* defense. Force Majeure absolves liability for non-performance when extraordinary events make fulfilling obligations impossible[65].

54. In the current dispute, severe flooding since 2020 culminated in December 2023 with one of the '*worst flash floods'* on record in Appam, leading to emergency evacuations of neighboring factories. Despite this, the Respondent proactively installed an automated monitoring and control system in its storage tanks to detect leaks and irregularities and ensured that employees were stationed to manage any issues during the flood.

55. It is submitted that, despite taking all these ex-ante preventive measures, human health hazards have arisen due to the contamination of flood water. The Claimant has acknowledged the flood as an *'Act of God,'* highlighting that extensive mitigation investments cannot guarantee protection against such events. This situation was beyond the Respondent's control[66], making the performance of obligations impossible under these extreme conditions[67]. Therefore, the respiratory tract infections caused by floodwater contamination qualify the Respondent for the force majeure defense.

[64] Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application (June 29, 2010).
[65] Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay, ICSID Case No. ARB/07/9, Decision of Tribunal on Objections to Jurisdiction (May 29, 2009).
[66] Platinum Blackstone v. Maldives, SIAC Case No. ARB003 (Nov. 24, 2016); Sambiaggio Case, Opinion of Ralston, umpire, ¶ 513 (Jan 01, 1903).
[67] CMS¶ 356; Serbian Loans, Series A. No 20, ¶¶ 39, 40 (Perm. Ct. Intl. Jus. 1929).

3.2.2. Optimum Due Diligence by Canstone.

56. Under Article 5 of the PK-BIT, investors must avoid introducing hazardous substances into inland waters and exercise due diligence in their operations. Due diligence entails a reasonable and legally mandated standard of care.

3.2.2.1. Canstone's Compliance as a "Reasonable Prudent Operator".

57. In *Burlington Resources*[68], it was established that liability does not arise if an investor acts as a "reasonably prudent operator." The Respondent has demonstrated this through its Committment to sustainable investment practices, including producing biofuel from palm oil, a non-fossil fuel with lower sulfur and carbon content. Further, quarterly internal investigations to ensure machinery and equipment functionality have been conducted. Moreover, there has been a prompt addressal of environmental concerns, including suspected leaks and implementing preventive measures during floods.
58. There is no evidence linking the Respondent to contamination or respiratory infections. The Respondent has acted as a responsible operator, adhering to both PK-BIT obligations and industry standards.

3.2.2.2. Absence of Causation Between Operations and Harm.

59. The responsibility falls on the Claimant to demonstrate a connection between the Respondent's activities and the claimed environmental damage. The Claimant needs to present clear and convincing evidence to prove this link and the extent of the harm caused. The Claimant has not substantiated the connection between the Respondent's oil production activities and the respiratory infections reported. The report by Dr. Raghu indicates inconclusiveness regarding whether the infections were caused by compromised

[68] Burlington Resources, Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5.

relief valves. Without compelling evidence, the Respondent cannot be deemed liable for environmental obligations breaches.

3.3.2.3. Precautionary Actions Taken by Canstone.

60. The precautionary principle supports actions in the face of scientific uncertainty by ensuring a minimum standard of reasonable concern for potential harm[69].
61. The Respondent has undertaken robust preventive measures to minimize environmental and health risks by: A) Implementing a thorough internal investigation mechanism and an automated monitoring system for storage tanks. B) Stationing employees to manage flood-related risks proactively.
62. These measures demonstrate the Respondent's commitment to comply with Article 5 of the PK-BIT and international standards, acting in line with the expectations of a prudent operator under such circumstances. The Respondent has effectively mitigated the risks and addressed the flood situation in Appam. Hence, the Respondent's action aligns with the standards expected of a reasonable prudent operator under similar circumstances.

[69] Principle 15, Rio Declaration, 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) ¶ 9; MALCOLM MAC GARVIN, INTERPRETING THE PRECAUTIONARY PRINCIPLE, 733–774 (Tim & James eds, 1994).

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

64. It is submitted before this Hon'ble Tribunal that the Claimant is not entitled to an award of declaration and damages as the Respondent has not breached any of its obligations under the PK-BIT. This conclusion is based on three primary arguments: *Firstly*, **[4.1]** The damages are too remote. *Secondly*, **[4.2]** Claimant have a contributory fault to the damages. *Thirdly,* **[4.3]** No specific mention of compensation in the provisions of the PK-BIT.

4.1. The damages are too remote from the breach of obligations.

65. The Claimant is not entitled to seek compensation merely because damage has occurred, compensation is unjust if the injury is too remote from the alleged wrongful act[70]. In general, Tribunals require the parties to provide *reliable evidence* in order to establish damages[71]. Additionally, international law does not establish a general obligation to

66. The harm to Karheis farmers occurred two weeks after a leak, casting doubt on a direct link. No immediate evidence ties the contamination to the Appam plant. The breach was due to a force majeure event—severe floods—making compensation unlikely under international law.[72]

[70] MNSS B.V. and Recupero Credito Acciaio N.V v. Montenegro, ICSID Case No. ARB(AF)/12/8.
[71] S.D. Myers, Inc. v. Government of Canada, Second Partial Award (Damages), October 2002, ¶156.
[72] S.D. Myers, Inc. v. Government of Canada, Partial Award (Merits), November 2000, ¶316.

4.1.1. Canstone cannot be held liable due to force majeure.

67. Force Majeure is to be comprehensively understood as an unanticipated event that prevents a legal agreement from being conducted[73]. It excuses the liability of non-performance if the supervening event directly restrains one or both parties from performing[74].

68. In the current dispute, the Respondent asserts that the severe flash floods that occurred in December 2023 in Appam should be classified as a force majeure event in accordance with Article 61 of the Vienna Convention[75]. The Respondent acted prudently by taking steps to prevent and mitigate risks from its operations under these challenging circumstances, thus excusing them from liability for the breach caused by this event.

4.2.2. Lack of sufficient scientific evidence to establish Canstone's liability for declaratory relief and damages.

69. By the principle of onus probandi actori incumbit[76], parties are obliged to prove the facts relied on to substantiate their claim or defence[77]. Failure to provide evidential support for its allegations without a satisfactory explanation, will result in dismissal of said allegations due to being unproven[78].

70. The Claimant has not demonstrated that Canstone failed to conduct an EIA or that the harm was directly caused by Canstone's operations. The evidence does not conclusively link the

[73] Aucoven, Russian Claim for Interest on Indemnities (Russia v. Turkey), PCA Case No. 1910-02, Award, ¶ 443 (Nov. 11, 1912).
[74] Gould Marketing, Inc. v. Ministry of National Defense of Iran, IUSCT Award No. ITL 24/49/2, Interlocutory Award, ¶ 19 (Jul. 27, 1983).
[75] Art. 61, United Nations, Vienna Convention on the Law of Treaties (1969).
[76] NATHAN O'MALLEY, RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION, 210-11 (Informa Law from Routledge, 2nd ed., 2019).
[77] 9 JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION, 762 (Kluwer Law International BV, 2012).
[78] Factory at Chorzów (Germany v. Poland), Claim for Indemnity (Merits), Series A, No. 17 (Perm. Ct. Intl. Jus. 1928); JAN PAULSSON AND GEORGIOS PETROCHILOS, UNCITRAL ARBITRATION, 238 (Kluwer Law International BV, 2018).

damages to Canstone's activities, and the operations continued despite the temporary shutdown, suggesting other possible causes for the issues.

71. Moreover, the Respondent contends that, despite a declared temporary shutdown of two factories following the flood, these facilities were still operational. Evidence shows that heavy tanks and machinery continued to move in and out of these factories. This suggests that leaks or other issues could have arisen from these facilities due to compromised machinery, rather than solely from the Respondent's activities.

4.2. Contributory fault by the Claimant.

72. Contributory fault, recognized under international law,[79] can reduce the amount of compensation awarded[80]. In this case, the Government of Palmenna's negligence in implementing standard practices for local corporations in Appam and Karheis is evident.

73. The Claimant acted negligently by rushing the setup of industries and ignoring warnings about risks. The Claimant's decision to "tweak" the agreement in favor of Respondents, despite stakeholder warnings, reflects a lack of due care and negligence. This is consistent with the principle that contributory fault can mitigate compensation, as seen in ***CMS v. Argentina***[81] and ***Burlington v. Ecuador***[82]. This manifests a lack of due care and reflects negligence on behalf of the Claimant.

74. Further exacerbating the situation was inadequate infrastructure planning in Appam. The high proportion of impervious surfaces intensified runoff and increased flooding risks. Prime Minister Akbar's commitment to flood mitigation measures underscores the Claimant's failure to address these infrastructural issues, which worsened the flooding and

[79] S. RIPINSKY & K. WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW, 314 (2008).
[80] Copper Mesa Mining Corporation v. Republic of Ecuador, PCA Case No. 2012-02, Award (March 15, 2016) ¶ 6.100-6.102.
[81] Ibid.
[82] Ibid.

contributed to the problems with pressure values. This aligns with the principle that a party's failure to manage foreseeable risks can impact compensation claims, as reflected in cases like ***Vattenfall v. Germany***[83]**.**

4.3. No specific mention of compensation in the provisions of the PK-BIT.

75. The PK-BIT lacks provisions for compensation, indicating that the parties did not intend for it to be a remedy. Without specific standards for compensation, the Claimant's request exceeds the treaty's scope[84]. Rule 6 of the AIAC[85] allows awarding costs but not compensation. Article 60 of the VCLT[86] permits treaty termination for material breaches, not compensation. Thus, the Claimant's request for compensation is not permissible under the treaty.

76. In ***Lauder v. Czech Republic***[87], the tribunal emphasized the need for explicit compensation provisions in treaties. The PK-BIT's silence on this matter implies no entitlement to damages. Similarly, in ***Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina***[88], the necessity of explicit treaty provisions for claims of compensation was underscored. Applying this, Palmenna's claim lacks basis under the PK-BIT.

77. Tribunals have ruled that an MFN clause applies broadly only when it includes terms like "all matters."[89] In contrast, MFN clauses with more specific language cover only particular types of treatment[90]. Article 9 of the PK-BIT lists specific investment-related treatments

[83] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (I) (ICSID Case No. ARB/09/6).
[84] Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, ICSID Case No. ARB (AF)/04/5, Concurring Opinion of Arthur W. Rovine (Award) (November 21, 2007) ¶ 74.
[85] Rule 6, Arbitration Rules 2023, Asian International Arbitration Centre.
[86] Art. 60, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.
[87] Lauder v Czech Republic, Final Award, IIC 205 (2001), 3rd September 2001, Ad Hoc Tribunal (UNCITRAL).
[88] Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3.
[89] Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (August 22, 2012) ¶ 236.
[90] ICS Inspection and Control Services Limited v. The Argentine Republic (I), PCA Case No. 2010-09, Award on Jurisdiction (February 10, 2012).

but does not include compensation. Therefore, compensation is not covered by the MFN clause in the PK-BIT.

78. Even if compensation were a substantive obligation, the Tribunal should not import compensation standards from outside the PK-BIT[91], since the MFN clause does not specifically address compensation as established in ***İçkale***[92]. Since Article 9 enumerates specific treatments and does not include compensation, the MFN clause cannot be used to extend compensation obligations beyond the scope of the PK-BIT.

[91] Bartels, Lorand, 'Substantive Obligations Under Human Rights Clauses', Human Rights Conditionality in the EU's International Agreements, Oxford Studies in European Law (Oxford, 2005; online edn, Oxford Academic, 22 Mar. 2012).
[92] İçkale İnşaat Limited Şirketi v. Turkmenistan, ICSID Case No. ARB/10/24.

PRAYER FOR RELIEF

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

I. The pre-arbitration steps need to be complied before arbitration proceedings may be commenced by the Claimant against Canstone.

II. The Claimant is precluded from initiating an arbitration against Canstone.

III. Canstone had not breached its obligations under PK-BIT.

IV. Palmenna is not entitled to an award of declaration 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 Respondent.