TEAM: MY2411

ASIAN INTERNATIONAL ARBITRATION CENTRE

A DISPUTE BEFORE

ASIAN INTERNATIONAL ARBITRATION CENTRE

KUALA LUMPUR, MALAYSIA

MEMORANDUM FOR CLAIMANT

In the arbitration proceeding between

THE FEDERATION OF PALMENNA

("CLAIMANT")

And

CANSTONE FLY LIMITED

("RESPONDENT")

August 16th, 2024

TABLE OF CONTENTS

INDEX OF ABBREVIATIONS AND DEFINITIONS

§/§§	Section/Sections
¶/¶¶	Paragraph/Paragraphs
&	and
Arbitral Panel(s)	The Arbitral Panel(s) in the present case
Art/Arts.	Article(s)
CIETAC	Chinese International Economic & Trade Arbitration Commission
CLAIMANT	The Federation of Palmenna
CLOUT	Case Law on UNCITRAL Texts
Doc.	Document
ed.	Edition
Ed./Eds.	Editor/Editors
et al.	et alia; and others (Latin)
etc.	et cetera; and so on (Latin)
i.e.	id est; that is (Latin)
ICC	International Chamber of Commerce
id.	idem; the same (Latin)
Ltd	Limited
No.	Number
p./pp.	Page/Pages
Party/Parties	Canstone Fly Ltd or Federation of Palmenna or both collectively

plc.	Public Limited Company
RESPONDENT	Canstone Fly Ltd
UN	United Nations
USD	United States Dollar
v.	versus
Vol.	Volume

INDEX OF LEGAL TEXTS

AIAC	Asian International Arbitration Centre Arbitration Rule, 2023
ARSIWA	Articles on Responsibility of States for Internationally Wrongful Acts, 2001
CISG	United Nations Convention on Contracts for the International Sale of Goods, entered into force 1 January 1988
Kyoto Protocol	Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1998
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
UNEP	United Nations Environment Programme, 1998
UNIDROIT Principle	UNIDROIT Principles of international commercial contracts, 1994
VCLT	Vienna Convention on the Law of Treaties, 1969

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STATEMENT OF JURISDICTION

CLAIMANT and RESPONDENT, a state-owned company, agreed to settle a dispute arising from, relating to or connection with PK-BIT administered by AIAC. According to Article 12 of PK-BIT, *"[…] (c) third, if the dispute is not resolved through mediation within 90 (ninety) days from the* ***commencement of the Asian International Arbitration Centre (AIAC)*** *in accordance with its prevailing arbitration rules at the time of the dispute: […]".*

Moreover, Article 23(1) AIAC Rule, Section 9 of the Malaysian Arbitration Act 2005 and Articles 7 and 16 of the UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL**") allow the Arbitral Panel to arbitrate the case.

Therefore, the Arbitral Panel has jurisdiction to arbitrate the current dispute between the Parties and the claims made by CLAIMANT are admissible.

STATEMENT OF FACTS

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

CLAIMANT is a Southeast Asian country known for its diverse landscape and palm oil production. Its tropical climate is ideal for palm oil cultivation. Its tropical climate is ideal for palm oil cultivation, making Palmenna the leading producer, contributing USD10 billion to the country GDP.

RESPONDENT is a foreign investment in Palmenna by Mehstone Star Limited ("**Mestone Ltd**") functioning under the Ministry of Trade and Investment producing biofuel using palm oil from the Independent State of Kenweed ("**Kenweed**").

03 October 2021 Palmenna and Kenweed signed a Memorandum of Understanding ("**MOU**") with the intention of promoting cooperation, including investment in biofuel production by RESPONDENT. The agreement aims that RESPONDENT's would prioritize employing at least 70% Palmennian citizens, while addressing environmental concerns.

26 October 2021 RESPONDENT was established and create two bio plaints in within Palmenna capitals, one within the capital of Appam and another in capital of Karhies which located near the border of Kenweed. The company comprised of Mestone Ltd hold majority of ownership amounted to 70%, whereas SZN Company Limited ("**SZN**") owning the remaining 30% share.

Mid-Friday 2023 Present of an Anonymous note alleges a leakage of refining oil at RESPONDENT's Karheis facility. By which Alan Becky ("**Alan**") the supervisor of the plaints upon checking the latest report on the tank conditions went on to dismiss the note as a hoax. However, agreed to conduct an environmental impact assessment ("**EIA**") through the request for Jakey Jake ("**Jakey**") the in-house expert of Karhies facility.

Late-February 2023 News reports of nearby farmers being hospitalized due to suspected contamination. Investigations are conducted, but findings are undisclosed. Victims are compensated to withdraw complaints, worrying about a possible connection to the oil leak, Jakey went to Appam to meet with the senior manager at the plaints ("**Lee**") and Alan. Confronting about the situation and his suspicions of a cover-up. An argument erupted and grew heated, with employees overhearing yelling but not understanding the specifics. Shortly after, Jakey was seen leaving the facility looking happy. That same evening, Lee called an urgent meeting to address speculation. He downplayed the Karheis incident as a misunderstanding.

23 November 2023 Heavy rain lash on RESPONDENT's facility where Karhies is located. Alan then traveled to the plaints in order to monitor storage tanks. Neighboring factories in Karheis proactively shut down operations.

26 November 2023 As weather improved in Karheis, weather in Appam became more worsen. Heavy rain pounded the city, causing water to gather on streets and low-lying areas. Appam, known as a heavily urbanized area with many roads, highways, and buildings, suffered from increased risk of flash floods due to the high percentage of impervious surfaces.

29 November 2023 A massive flash flood struck Appam, one of the worst in its history. Nearby factories at the Appam plant facility immediately shut down for the and evacuated their staff. Lee, unsure of the situation at Appam, tried to contact Alan for guidance. However, with no response from Alan, Lee decided to resume operations and instructed employees to work hard for their bonuses. The floodwaters receded quickly the next day, but the surrounding areas of Appam Plaint remained flooded for over 24 hours. Shortly after, people living near the plant were hospitalized with respiratory injuries. Doctors suspected exposure to irritant gases or chemicals carried by floodwaters, affecting over 129 people and hospitalizing 39. Notably, 13 of the hospitalized were RESPONDENT employees. The government was criticized for inaction, and locals

protested, suspecting profit prioritization over safety. Investigations revealed flood damage to valves, potentially causing leaks. RESPONDENT fixed the valves and improved ventilation, but the cause of illness remains unclear.

Legal battle in higher court

Activists sued CLAIMANT and SZN for negligence regarding drainage, ventilation, and environmental regulations. The High Court ruled in favor of the activists, finding both CLAIMANT and SZN negligent. Both parties appealed. Notwithstanding, Jakey accused RESPONDENT of bribery and lax oversight, but his claims were questioned.

Initiation of AIAC arbitration Proceeding

CLAIMANT initiated arbitration proceeding against RESPONDENT under the PK-BIT, claiming actions caused respiratory illnesses and seeking compensation. In response, RESPONDENT in respond argues that CLAIMANT had bypassed the pre-arbitration steps as outlined in Art. 12 PK-BIT and is using arbitration to challenge the High Court decision.

SUMMARY OF PLEADINGS

Issue 1: The Arbitral Panel shall reject RESPONDENT's objections and proceed with the arbitration. Firstly, the arbitration agreement allows the panel to decide through its own jurisdiction. Secondly, pre-arbitration steps are not mandatory, the wording of PK-BIT suggests such requirements are recommendations and not an obligation to followed through. Furthermore, CLAIMANT's good-faith in efforts to negotiate and mediate satisfy the spirit of the agreement.

Issue 2: Arbitration can proceed as the present of High Court proceeding would not restrict the proceeding continuing forward. Firstly, CLAIMANT fulfilled the requirements for arbitration under the AIAC rule which include the fees and the pre-existence of clause in case of dispute arising forward in-order to establishment of the AIAC Arbitral Panel. Secondly, pre-arbitration steps such as mediation were likely optional, and CLAIMANT's attempt to negotiate satisfied the agreement's spirit. Lastly, the High Court case involved different parties, legal issues, and desired outcomes and not in relation to the current arbitration proceeding and would prevent the application of the doctrine of "*res judicata*".

Issue 3: RESPONDENT action constitutes a breach of PK-BIT treaty, as firstly, the storage tanks leakage released harmful chemicals into rivers during a flood. This is a violation, as RESPONDENT is responsible for discharges from its property. Furthermore, the biofuel production creates toxic chemicals dangerous to public health, notwithstanding that they were released into the rivers. Secondly, RESPONDENT never properly assessed the environmental impact of its operations as required by PK-BIT, as RESPONDENT never hired a qualified professional to conduct an EIA. And given that the internal reports do not meet the requirements of a full EIA, as well as no report was ever submitted to the relevant to the ministry.

Issue 4: CLAIMANT is entitled to be compensated for the damages caused by RESPONDENT's violation of PK-BIT treaty. Firstly, PK-BIT itself does not mention compensation however, a well-established principle provides that breaches of international agreements require reparation resulting from the breaches. RESPONDENT's actions caused harm to public health. As such, compensations shall be derived for economic damages caused by the breach of the PK-BIT, or other countermeasures, such as financial compensation to the people who were affected, in response to non-material breaches. Furthermore, breaches of

international agreements like PK-BIT are considered "internationally wrongful acts" under ARSIWA.

PLEADINGS

ISSUE 1: CLAIMANT DOES NOT NEED TO STRICTLY COMPLY WITH PRE-ARBITRATION STEPS BEFORE COMMECING ARBITRATION PROCEEDINGS AGAINST RESPONDENT

1. CLAIMANT has made substantial efforts to resolve the dispute with RESPONDENT, through negotiations, as required under Article 12 PK-BIT.[1] Despite CLAIMANT's good faith attempts to engage in meaningful dialogue, RESPONDENT has remained uncooperative and obstructive, refusing to negotiate in earnest. [2] This behavior from RESPONDENT made further pre-arbitration steps, such as mediation, futile.[3] Given RESPONDENT's clear unwillingness to resolve the dispute amicably, strict compliance with the pre-arbitration procedures would have only served to delay justice for CLAIMANT, exacerbating the harm caused by RESPONDENT's actions.[4]

2. Therefore**,** CLAIMANT legally has the right to proceed to arbitration based on these following reasons, (**I**) First, Article 12 PK-BIT does not mandate strict compliance with pre-arbitration steps. (**II**) Second, non-compliance with the pre-arbitration steps should not rendered.

I. Article 12 of PK-BIT does not mandate strict compliance with pre-arbitration steps

3. Article 12 PK-BIT uses the term "shall" to suggest the Parties to attempt to resolve disputes through negotiation and mediation before initiating arbitration. [5] While the term "shall" which prima facie suggests a mandatory obligation to follow the requirement set out for the pre-arbitration steps. [6] However, it is not always interpreted as an absolute obligation to complete these steps before arbitration begin. [7] This term has been interpreted more flexibly, especially in the event that the compliance would be futile or when immediate arbitration is necessary to protect a party's interest.

4. In *Abaclat v. Argentina*, the tribunal ruled that even the when the term "shall" used in the BIT's dispute resolution clause, such steps are non-mandatory. Additionally, the tribunal also concluded that non-compliance with the pre-arbitration steps did not prevent arbitration even

[1] Moot Problem, para 54-55, p 18
[2] Moot Problem, para. 57, pp. 18-19
[3] Moot problem, para 51-52, pp. 17-18
[4] Moot Problem, para 51, p. 17-18
[5] Article 12 PK-BIT, p. 11
[6] Gary Born and Marija Šćekić, Pre-Arbitration Procedural Requirements 'A Dismal Swamp', p. 236
[7] Arbitrability: International & Comparative Perspectives, para. 3-24, p.55

if it isn't strictly followed.[8] In the present cases, the word "shall" must be interpreted within the context of Article 12 PK-BIT to encourage alternative dispute resolution rather than enforce it strictly. [9] Moreover, CLAIMANT's decision to proceed directly to arbitration should be considered valid as the absence of non-compliance indicates that these steps are not strict conditions.

5. Therefore, Article 12 should be interpreted as non-mandatory, allowing CLAIMANT to proceed with arbitration without strictly comply with the pre-arbitration steps.

A. The purpose of Article 12 PK-BIT has been fulfilled through negotiation attempts

6. The primary purpose of Article 12 PK-BIT is to encourage the amicable resolution of disputes through negotiation and mediation.[10] In *Lauder v. Czech Republic*, the Lauder (Claimant), brought an arbitration claim under the U.S.-Czech Republic BIT, alleging that the Czech Republic (Repondent) had breached the treaty. The Respondent argued that Claimant had not complied with the BIT's requirement to attempt to settle disputes through negotiation or mediation before initiating arbitration. However, the tribunal found that Claimant had made sufficient efforts to resolve the dispute amicably and that the purpose of the pre-arbitration steps had been fulfilled. The tribunal concluded that if a party has made a sincere effort to resolve the dispute, the absence of formal mediation should not prevent the case from proceeding to arbitration.[11]

7. Similarly, in the present case, CLAIMANT's active and good faith participation in negotiations aligns with the objective of Article 12 PK-BIT, which is to seek an amicable resolution before resorting to arbitration. [12] When a party has shown that it has made a genuine effort to resolve dispute in good faith, this shall deem to be fulfilled the purpose of Article 12, regardless whether formal mediation has been complied. Although formal mediation was not pursued,

[8] Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5 14 sept. 2006,
Available at https://jusmundi.com/fr/document/decision/en-abaclat-and-others-formerly-giovanna-a-beccara-and-others-v-argentine-republic-decision-on-the-proposal-to-disqualify-a-majority-of-the-tribunal-tuesday-4th-february-2014
[9] Article 12 PK-BIT, p. 11
[10] Article 12 PK-BIT, p. 11
[11] Ronald S. Lauder v. Czech Republic, Award, 3 Sept, 2001
Available at: https://jusmundi.com/en/document/decision/en-ronald-s-lauder-v-czech-republic-award-monday-3rd-september-2001
[12] Article 12(a) PK-BIT, p. 11; Moot Problem, paras 49-51, p. 17-18

these negotiations shown CLAIMANT's commitment to resolving the dispute peacefully, fulfilling the Article 12 PK-BIT's purpose.

8. Therefore, CLAIMANT's good faith negotiations fulfill the purpose of Article 12 PK-BIT, allowing the case to proceed to arbitration.

B. CLAIMANT can invoke Doctrine of Futility against RESPONDENT

9. The Doctrine of Futility permits parties to bypass required pre-arbitration steps, such as mediation, when further attempts at these steps are deemed unlikely to resolve the dispute. [13] The Doctrine of Futility is applied to prevent parties from engaging in unnecessary and unproductive procedures.[14] When prior negotiations or mediations have been unsuccessful, further attempts are unlikely to produce a different outcome, rendering additional steps unnecessary. [15]

10. In the case *Waste Management case*, the claimant argued that further negotiations with the respondent would be futile, as prior attempts had already failed to resolve the dispute. The tribunal agreed, applying the Doctrine of Futility and allowing the claimant to proceed directly to arbitration. The tribunal recognized that forcing the parties to engage in further pre-arbitration steps would only delay the proceedings without any likelihood of success. [16] Similarly, in *Abaclat and Others v. Argentine* Republic, the tribunal distinguished between procedural and jurisdictional requirements, emphasizing that procedural steps like waiting periods do not constitute jurisdictional barriers.[17]

11. In the present case, the parties have already engaged in negotiations, which failed to resolve the dispute. CLAIMANT's reasonable expectation that furthers mediation would be futile is based on RESPONDENT's shown lack of cooperation and the lack of progress during negotiations. The discussions ended abruptly, with Sharma expressing frustration by stating

[13] Biwater v. Tanzania Case; BILATERAL INVESTMENT TREATIES HISTORY, POLICY, AND INTERPRETATION KENNETH J. VANDEVELDE, Chapter 10: Due Process, Section 10.1 & 10.2.3.4.2 THE WAITING PERIOD
[14] *Apotex, Inc. v. United States, ICSID Case No. UNCT/10/2*
Apotex Inc. v. United States of America, ICSID Case No. UNCT/10/2 | italaw; Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Wolters Kluwer 2009) 72; Schreuer et al (n 2) 402–13
[15] Cambridge Compendium of International Commercial and Investment Arbitration, February 2023, Edited by Stefan Kröll, Rechsanwalt Kröll, Andrea K. Bjorklund, Franco Ferrari, pp. 740-402
[16] Waste Management Inc v Mexico, Award, ICSID Case No. ARB(AF)/00/3; IIC 270 (2004
[17] Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5,' (4 August 2011), [280]–[287]

that "*I can't believe you are being so unreasonable… we cannot admit to things we did not do… seems like there is no point in talking to you anymore*".[18] Base on this statement it indicates that the Parties had already made genuine efforts to resolve the dispute through negotiation, which is not effect. Although CLAIMANT skipped mediation, its efforts to negotiate show a genuine attempt to resolve the dispute as intended by the agreement. Additionally, the language of Article 12 does not explicitly state that mediation and the 90-day waiting period are conditions precedent to arbitration,[19] further supporting the argument that CLAIMANT is not barred from proceeding to arbitration due to non-compliance with these pre-arbitration steps.

12. Thus, further mediation would not only be unproductive but would also serve as a mere formality, delaying the resolution of the dispute without any real prospect of success.

C. CLAIMANT has already fulfilled the arbitration requirements

13. The AIAC Rules stipulate that a party initiating arbitration must pay the required registration fee and deposit an advance on costs, including a security deposit. These payments are essential for the formal commencement of arbitration proceedings and for securing the tribunal's jurisdiction over the dispute. Under the Rule 19 AIAC, the AIAC requires a provisional advance deposit to cover approximately 30% of the estimated costs of the arbitration. If the amount in dispute is unquantified, a fixed amount is applied.[20] The security deposit, along with the advance deposit, ensures that the arbitration process is properly funded and that the tribunal has the necessary resources to manage and resolve the dispute.[21] Rule 11.1 AIAC allows the tribunal to make a summary determination on points of law or fact if a claim or counterclaim is manifestly without legal merit or outside its jurisdiction, contingent upon the claimant fulfilling its financial obligations.[22] The payment of these fees, including the security deposit, confirms the commencement of arbitration and facilitates the constitution of the tribunal. The purpose of these payments is to ensure that the arbitration process is properly funded and that the tribunal has the necessary resources to manage and resolve the dispute. [23] Once these fees

[18] Moot Problem, para. 57, pp. 18-19
[19] Moot Problem, para
[20] AIAC Rules 2023, Rule 19 (1)
[21] Born, p. 957
[22] *Redfern & Hunter: Law and Practice of International Commercial Arbitration, 7th ed.*, p. 456-457
[23] Gaillard & Savage, p. 315`-317

are paid, the AIAC confirms the commencement of the arbitration and proceeds with the constitution of the tribunal.[24]

14. In the present case, CLAIMANT has dutifully complied with all the financial requirements under the AIAC Rules. CLAIMANT has paid the necessary registration fee and has deposited the required security.[25] These actions demonstrate CLAIMANT's commitment to fulfilling all procedural obligations and ensure that the arbitration can proceed without any procedural impediments. RESPONDENT cannot challenge the tribunal's jurisdiction on the grounds of non-compliance with fee and deposit requirements, as CLAIMANT has fully met these conditions, thereby activating the tribunal's authority to hear the case.

15. Therefore, the tribunal should proceed with the arbitration without any procedural objections from RESPONDENT. As CLAIMANT has fulfilled all arbitration requirements under the AIAC Rules by paying the necessary fee and security deposit.

II. Non-compliance with Article 12 PK-BIT should not result in dismissal of claims

16. Even if Article 12 of the PK-BIT is considered mandatory, failing to comply with its requirements should not invalidate the arbitration or result in the dismissal of claims. [26] The article does not specify dismissal as a consequence of non-compliance, and international arbitration principles prioritize resolving disputes based on their substantive merits rather than procedural. [27] The primary goal is to allow parties access to arbitration, ensuring that their claims are heard and adjudicated based on their substance. [28] Dismissing claims for procedural non-compliance, especially when the procedural steps do not affect the core issues of the case, would undermine justice and fairness.[29]

17. Thus, since Article 12 PK-BIT does not explicitly state that non-compliance should lead to the dismissal of claims. The Arbitral Panel should avoid dismissing cases purely on procedural grounds, particularly when such grounds do not compromise the integrity of the arbitration process.

[24] Hanotiau, p. 202-204
[25] Moot Problem, para 54, p. 18
[26] Article 12 PK-BIT, p.11
[27] Craig, Park, & Paulsson, p. 152, *Redfern & Hunter, 7th ed.*, p. 42
[28] Lim, Ho, & Paparinskis, p. 423
[29] Born, 3ed p. 1024

III. Nonetheless, CLAIMANT has duly complied with all required pre-arbitration steps as required under the Article 12 PK-BIT

18. In international arbitration, tribunals have the discretion to bypass pre-arbitration procedural steps when immediate arbitration is essential to prevent irreparable harm to a party's interests. [30] The principles of urgency and necessity are recognized under both the AIAC 2023 Rules and Malaysian Arbitration Act, which allow for expedited proceedings when delay would result in significant prejudice.[31] According to Article 18(1) of the Malaysian Arbitration Act states, "*The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement*," while Article 23(1) of the AIAC Rules provides, "*The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.*" Both articles grant arbitral tribunals the authority to decide on their own jurisdiction and the validity of the arbitration agreement independently of the main contract. This flexibility allows the tribunal to address urgent matters effectively, ensuring that delays do not cause significant prejudice to the parties involved.

19. In the case of *Burlington Resources Inc. v. Republic of Ecuador*, the tribunal found that delaying arbitration could exacerbate the claimant's losses and harm, thus justifying the need for expedited proceedings to mitigate ongoing damage. [32] Thus, the tribunal exercised its discretion to proceed with immediate arbitration due to the urgent nature of the dispute. [33] Similarly in the present case, CLAIMANT faces ongoing harm due to RESPONDENT's actions, which have significantly impacted CLAIMANT's operations. [34] Further delay in arbitration would not only exacerbate these damages but also risk diminishing CLAIMANT's ability to effectively pursue its claims.[35] The urgency of the situation necessitates immediate arbitration, as waiting for pre-arbitration procedures to be exhausted would risk damaging CLAIMANT's financial stability and reputation. [36] Therefore, immediate arbitration is sought to protect CLAIMANT due to RESPONDENT's uncooperative actions.

[30] Redfern & Hunter *7th ed.*, p. 629-633
[31] **Malaysian Arbitration Act 2005**, Article 18(1); **AIAC Rules 2023**, Rule 23(1).
[32] ICSID Case No. ARB/08/5, para 85
[33] Ibid paras85-88
[34] Moot problem, paras 42-43, pp. 15-16
[35] Moot problem para. 55, p.18
[36] Moot Problem para 47-48, pp 16-17

20. Thus, the Arbitral Panel should find that immediate commencement of arbitration is justified and necessary to prevent further detriment to CLAIMANT.

IV. RESPONDENT does not have the right to object to the Arbitral Panel's jurisdiction

21. Arbitration is founded on the principle of party autonomy, where the parties' mutual consent to arbitrate disputes binds them to the process. [37] When parties have explicitly agreed to submit disputes to arbitration, any objections to the tribunal's jurisdiction are generally unfounded unless there are clear and compelling reasons.[38] Furthermore, the term "arising from" in bilateral investment treaties (BITs) is broadly interpreted to cover a wide range of disputes, including those connected to or stemming from the investment relationship between the parties.[39] This term reflects the parties' mutual consent to arbitrate disputes that are linked, even indirectly, to the investment, ensuring comprehensive jurisdiction over related matters.[40]

22. The current dispute between the Parties clearly falls within the scope of "arising from" as specified in the BIT that the parties have agreed to submit to arbitration. [41] RESPONDENT may argue that it has right to object the Arbitral Panel's jurisdiction. However, it contradicts the broad and inclusive language of the BIT to which both parties have mutually consented. Since the term is intentionally broad, designed to include all disputes that have any connection with the investment, regardless of whether they arise directly from the contract or from related obligations. [42] By consenting to this language, RESPONDENT has agreed to arbitrate not only direct contractual disputes but also any issues that are connected to or arise in the context of the investment relationship. Furthermore, since RESPONDENT accepted that any dispute arising from or connected to the investment would be subject to arbitration, including the alleged violations of the BIT's protections and obligations.[43]

[37] Wintershall Aktiengesellschaft v Argentine Republic, ICSID Case No ARB/04/14, Award (8 December 2008) paras 115–19
[38] Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Wolters Kluwer 2009) 72; Schreuer et al (n 2) 402–13
[39] BILATERAL INVESTMENT TREATIES 1995–2006: TRENDS IN INVESTMENT RULEMAKING, p. 101, https://unctad.org/system/files/official-document/iteiia20065_en.pdf
[40] DISPUTE SETTLEMENT: INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES< 2.3 Consent to Arbitration. https://unctad.org/system/files/official-document/edmmisc232add2_en.pdf
[41] Article 12 (1) PK-BIT, p. 11
[42] Forum prorogatum, p. 551
[43] Moot Problem. Para 57, p. 18-19

23. Therefore, RESPONDENT cannot now selectively narrow the scope of jurisdiction after a dispute has arisen, especially when the issues at hand are precisely the type that the arbitration agreement was intended to address.

ISSUE 2: CLAIMANT IS NOT PRECLUDED FROM INITIATING AN ARBITRATION UNDER THE PK-BIT

24. Brought upon to the Tribunal, the case at hand shall be arbitrable as (**I**) CLAIMANT initiates arbitration in accordance with the arbitration agreement under the PK-BIT, which designates the AIAC as the seat of arbitration. **(II)** CLAIMANT complied with AIAC's requirements with initiation for arbitration. **(III)** no legal instruments preventing CLAIMANT from invoking arbitration.

I. CLAIMANT proceeds arbitration based on the arbitration agreement under PK-BIT which grant AIAC as the seat for arbitration

25. The Arbitral Penal are granted the authority and empowered to its own jurisdiction,[44] dealing with disputes that arise within the scope of PK-BIT.[45] Either disputing party is prevented from contesting the validity of such independent reinforcement. As treaty-based arbitration relies on an offer to arbitrate included within the treaty, providing offer and additional requirements to commenced the case.[46]

26. The disputes can involve interpreting the case deciding whether they fall under the treaty's protection and who has the right to bring the case to the competent authority.[47] Additionally, tribunals need to decide a forum selection clause, specify the location where legal disputes can be heard.[48] Upon vesting the power to AIAC, appointment of authority, shall streamlining the selection of suitable arbitrator to handle the case.[49] signified its authority to establish a legitimacy to preside over the issue.[50] Further, in accordance with principle of consent.[51] Disputing parties must have a clear, mutual agreement to arbitrate formalized within arbitration

[44] UNCITRAL Arbitration, Art. 23; Redfern/Hunter; *M.M.T.C. Limited v. Sterlite Industries* (India) Ltd.; CLOUT Case No. 177 (India, Supreme Ct., Nov. 18, 1996).
[45] Moot problem, ¶54.
[46] Williams.
[47] Yuliya; Williams.
[48] Williams.
[49] AIAC, Rule 3; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. arb/06/18.
[50] NYC, Art. II (1); Reinisch.
[51] Paulsson, Jan, *Arbitration in a Nutshell* (Juris Publishing, 2013), ISBN: 978-1933833921.

clause in the treaty.[52] These conditions ensure that arbitration can be invoked, allowing party to execute its rights provided by the treaty.[53]

27. Here, Article 12 PK-BIT outlined that disputing parties shall seek arbitration when dispute are in arisen. CLAIMANT in compliance with the treaty seek for arbitration, granting AIAC as the seat for arbitration. CLAIMANT did not opt for another dispute forum that is contrary from PK-BIT itself. PK-BIT had laid down a framework for dispute resolution between disputing parties.[54] Assessing the complexity of, environmental regulations, and treaty obligations determining its liability and damages. This showcase alignment to the present dispute as RESPONDENT, a qualified investor under the PK-BIT, has suffered damages due to a flooding incident that compromised by its own its facility's safety systems.[55] The incident, potentially involved the release of hazardous substances[56] which led to health issues among citizens and RESPONDENT's own employees.[57] Thus, CLAIMANT act of invoking arbitration is in accordance with the PK-BIT referral, designating AIAC as the seat for arbitration.

II. CLAIMANT complied with AIAC's requirements with initiation for arbitration

28. The Arbitral Panel shall conduct the proceeding which deem suitable and in an appropriate manner, guaranty cost efficiency and in avoidance of unnecessary finding.[58] Aligned with Rule 2 AIAC, provided that initiation for arbitration required for the initiating party to submit a request to AIAC which firstly, include a copy of the written arbitration agreement.[59] Secondly, confirmation that all existing pre-conditions had been satisfied,[60] as specific arbitration agreement include specific steps in-which parties take to be allegeable for arbitration.[61] However, if duty to mediate was present then such condition can be by-passed in accordance

[52] Storrs, C. W. W., "The Principle of Consent in International Arbitration," *Journal of International Arbitration*, vol. 28, no. 3, 2011, pp. 281-308.
[53] London Court of International Arbitration, *LCIA Arbitration Rules* (2020), available at: https://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx.
[54] Moot Problem, ¶¶ 39-41.
[55] Moot Problem, ¶¶ 39-41.
[56] Moot Problem, ¶¶ 39-41.
[57] Moot Problem, ¶¶ 39-41.
[58] AIAC Rule 1-6.
[59] AIAC Rule 1(a).
[60] AIAC Rule 2.
[61] AIAC, FAQs.

with its wording as such duty contained no enforceable in comparison to negotiation.[62] Lastly, proof of the filing fee being made, for administering the arbitration case must be provided by the initiating party.[63]In *Insurance case*, the tribunal affirmed its jurisdiction to decide on its own validity, emphasizing that minor issues or ambiguities in the arbitration agreement would not preclude arbitration if the agreement remains broadly enforceable.[64]

29. Herein, CLAIMANT undisputedly fulfilled with the first and last conditions for initiation of arbitration in accordance with Rule 2 AIAC. Firstly, Claimant has paid the necessary deposit fee made accordingly.[65] Secondly, PK-BIT employment for arbitration is in compliance to Article 12 PK-BIT, in regard to dealing with disputes that arise within the scope of the treaty,[66] and the expressed consent to AIAC.[67] Nevertheless, Pre-conditions cannot prevent Claimant from bringing the present case to arbitration. Thus, initiation for AIAC's arbitration is comply accordingly.

III. No legal instruments preventing CLAIMANT from invoking arbitration

30. CLAIMANT submit that (**A**) the appeal proceeding of the High Court is unrelated to and does not impact the arbitration proceeding. Accordingly, (**B**) the arbitration proceeding is independent and distinct from the High Court.

A. The appeal proceeding of the High Court is unrelated to and does not impact the arbitration proceeding

31. AIAC does not explicitly address the power of a tribunal to continue the proceeding in a situation where another proceeding exists before its referral. However, considerations of the Arbitral Panel have inherent powers in managing the arbitral process effectively is presented. This includes the authority to continue the proceedings in some circumstances to promote efficiency and avoid duplication of efforts.[68]

[62] Karl
[63] AIAC Rule 2; *Ibid.*
[64] **International Standard Insurance Co. v. Saudi Arabian Insurance Co. (ISID),** [1994] 1 Lloyd's Rep. 249 (C.A.) ("***Insurance case***"); **Gary B. Born,** *International Commercial Arbitration* **(3d ed. 2020)**.
[65] Moot Problem ¶54.
[66] Moot Problem ¶54.
[67] Moot Problem ¶54.
[68] UNCITRAL Arbitration, Art. 15(1).

32. RESPONDENT may try to raise the doctrine of *res judicata* in order to restrict the initiation to arbitration.[69] In definition served as a prevention of cases where once the competent jurisdiction had issued decision for the claim,[70] it shall no longer be subject to another proceeding. The doctrine ensures that the same case will not be repeatedly trial or litigated and upheld the finality in the judicial decision.[71]

33. To assess whether the claim is appropriate for the Tribunal to hear the case, a concept known as the Triple Identity Test must be satisfied.[72] The test requires three key elements to identity between the two proceedings.

34. Firstly, the initial court proceeding and the present arbitration are distinct.[73] In the initial case, a group of activists filed a lawsuit against CLAIMANT and SZN, RESPONDENT's parent company. Conversely, CLAIMANT initiated the present arbitration against RESPONDENT.[74]

35. Secondly, the legal frameworks governing these two disputes differ significantly. The Arbitral Panel's authority hinges upon the treaty violation. Whereases, the subject matter of the case present by Activist to the court is concerning neglect causing harm to citizens health and whereabout. The application of law even at domestic legal system, could not have the same application of law had been applied by Arbitral Panel.

36. Furthermore, Article 6 PK-BIT provided that "*This BIT shall apply to investments made in the territory of either Party in accordance with its laws, regulations or national policies by investors of the other Party […]*". Investor must conduct environmental impact assessments for large-scale projects like agriculture, construction, mining, and industry.[75]These assessments must be accurate and prohibited to pollutes any bodies of water.[76]

37. Lastly, the remedies available in national courts and under the treaty differ in purpose and solution. The court primality focused on compensating victims harmed by the alleged failure

[69] *Apotex Holdings Inc., Apotex Inc. v United States of America*, ICSID Case ARB(AF)/12/1, Award of 25 August 2014, para. 7.17.
[70] *Apotex Holdings Inc., Apotex Inc. v United States of America*, ICSID Case ARB(AF)/12/1, Award of 25 August 2014, para. 7.17.
[71] De Ly/Sheppard.
[72] Schaffstein, Silja.
[73] *Berschader v. Russian Federation*, ICSID Case No. ARB/05/30, Award (Apr. 21, 2006).
[74] Moot Problem ¶¶46-47.
[75] PK-BIT, Art. 4.
[76] PK-BIT, Art. 5.

to assess the *force majeure*.[77] In contrast, this arbitration addresses the RESPONDENT's omission that amounted to breach of the treaty regarding the EIA assessment and shall be order to pay for compensation to the damage incur.[78] Hence, the differences in parties, legal frameworks, and desired outcomes between the national court case and the arbitration prevent the application of *res judicata*.

B. The arbitration proceeding is independent and distinct from the High Court

38. Aligned with Rule 17 AIAC, referral to AIAC arbitration means that disputing parties are bound to accept the Arbitral Panel decision.[79] This signify intention to be bound through treaty referral.[80] Such as, *Hövrätt Svea Case* and *Sulamérica v. Enesa Case* which the courts held that parties are bound to the arbitration agreement where the explicit choice of forum it referred to.[81] Limitations are based within specific laws and any interference in the case to arbitration.[82] Meaning court decisions can have limited enforceability compared to arbitration awards. In a case where court decision already exists, it does not automatically block further proceedings due to its limited reach. Disputing parties choose arbitration specifically to get a wider enforcement scope for their desired outcome aiming for practical solutions, not just pronouncements on who's right. The enforceability of a prior decision should be considered. If a court decision's enforceability is weak compared to a potential arbitration award, the decision alone is not enough to prevent further legal action.[83]

39. Here, CLAIMANT explicitly refers the competent power to the Arbitral Panel, handling the cases that are in relation with PK-BIT. Evidenced by the drafting stage which stressed upon the utilization of events that may arise, in relation to environmental challenges.[84] Stipulated clearly that, such connections shall be settled and be brought upon the Arbitral Panel authority, and relied upon the AIAC Arbitration rule to authorized the proceeding. The jurisprudence

[77] Moot Problem ¶41.
[78] Moot Problem ¶55.
[79] AIAC Rule 17; UNCITRAL Arbitration, Art. 35.
[80] AIAC Rule 17; UNCITRAL Arbitration, Art. 35.
[81] *Svea Hövrätt (Court of Appeal Stockholm) (Coraline Limited v Walter Höft)* 19 December 2019 Case No. T 7929-17 Cited in: para. 156 ("***Hövrätt Svea Case****")*; *Sulamérica Cia Nacional de Seguros S.A. v Enesa Engenharia* S.A., [2012] EWCA Civ 638 (Eng. & Wales CA Civ Div, May 16, 2012). ("***Sulamérica v. Enesa Case****")*
[82] Desputeaux v. Éditions Chouette (1987) inc., 2003 SCC 17 ("***Desputeaux Case***") at paras 178, 1 S.C.R. 178 (Can.).
[83] Woolhouse
[84] Moot problem, ¶20.

from the court merely affected CLAIMANT and SZN's parent company to RESPONDENT.[85] The damages are the reparation to the victim which fall within the territorial scope of the domestic court.[86] Whereas, arbitration covers the narrow obligations and jurisdiction cover from PK-BIT itself.[87] Thus, the designated the arbitral panel as the competent authority for PK-BIT disputes, distinguishing this case from the national court's jurisdiction.

[85] Moot Problem, ¶45.
[86] Moot Problem, ¶¶45-48.
[87] Moot Problem, ¶¶17-20.

ISSUE 3: RESPONDENT HAS BREACHED ITS PK-BIT OBLIGATION

40. PK-BIT contains both the procedural and substantive obligations that bind the Parties and all who involves. Substantive breaches to tall violations that affect the core and the essence of the treaty's intent. Procedural breaches entail the breach of necessary precaution activities.[88] RESPONDENT have breached both the (**I**) procedural obligation and the (**II**) substantive obligation of the PK-BIT.

I. RESPONDENT breached the procedural obligation

41. In *Pulp Mills* case, the ICJ engaged at length that procedural duties do include EIA requirement 'under general international law' which in turn prevents any transboundary harm.[89] In our case, RESPONDENT has the obligation to conduct and submit EIA reports as stipulated within PK-BIT to CLAIMANT.[90] A failure to comply with procedural requirements is a breach of the treaty.[91]

42. In *European Commission v Republic of Latvia* case, the action of a delayed report is considered as a persistent of non-compliance with the EU law and the UNFCCC Kyoto Protocol that can result in a fine in the form of a lump sum payment as a violation fee.[92] Thus, RESPONDENT has breached the PK-BIT through non-compliance by (**A**) omitting the obligation to conduct a proper EIA, (**B**) misinterpret the term "as soon as practically possible", and (**C**) failure to obtain a qualified person.

A. RESPONDENT has omitted the obligation to conduct EIA

43. In subsequence of Article 4(1) PK-BIT, RESPONDENT has the obligation to conduct and report EIA to CLAIMANT.[93] RESPONDENT has obligation under Vienna Convention Law

[88] Gardiner, R., *Treaty Interpretation (2nd ed.)*, Oxford: Oxford International Law Library, 2015, p.178; *Pulp Mills*, ¶¶267-282.
[89] *Pulp Mills*, ¶204; ESIL Reflection Procedure and Substance in International Environmental Law Confused at a Higher Level? [Online]. European Society of International Law, Vol.5, Issue 6. Available at: https://esil-sedi.eu/post_name-123/.
[90] PK-BIT, Article 4(1).
[91] Gardiner, R., *Treaty Interpretation (2nd ed.)*, Oxford: Oxford International Law Library, 2015, p.326; Sinclair, I., *The Vienna Convention on the Law of Treaties*, University Press: University of Manchester, 1973, p.131.
[92] *European Commission v. Republic of Latvia (EU v. Latvia)*, Court of Justice of the European Union: Ninth Chamber, Judgment, 2024, ¶58. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62022CJ0454.
[93] PK-BIT, Article 4(1); Clarification, ¶9; Moot Problem, ¶25.

of Treaties ("**VCLT**") to abide by the international law which includes the UNFCCC that binds CLAIMANT.[94]

44. Under the VCLT, a treaties' preamble and its context hold the purpose in the importance of a treaty's interpretation as a whole.[95] However, RESPONDENT disregarded the importance of an EIA even after Alan's suggestion to hire a third-party expert was raised in order to abide with the intent of upholding the PK-BIT and its preamble.[96]

45. Pursuant to Principle 4 of the United Nations Environmental Programme ("**UNEP**"), whose aim is to set a standard for EIA, stated that an EIA should include a minimum of 8 keys items.[97] This was made clear in *Pulp mills* case in front of the ICJ in 2010. Argentina accused Uruguay of non-compliance with the required notification and consultation procedures of environmental impacts outlined in their BIT.[98] The Court found that Uruguay had the obligation to conduct a full EIA following their obligation under the BIT with Argentina, as Uruguay failed to fulfill this obligation it is an equivalent of a breach of procedural obligation.[99]

46. In this case, RESPONDENT's report has been exclusively focused on the "*[…] condition of the machinery and equipment.*", which is inadequate and never been submitted to CLAIMANT.[100] Within Principle Number 4 of UNEP, an EIA require a description of the activity, details about the environment, an assessment of environmental impacts, mitigation measures, etc.[101] Thus, RESPONDENT has neglected and omitted their obligation of submitting and submission of EIA report under the PK-BIT and therefore breach the procedural obligation.

B. RESPONDENT misinterpreted the term "as soon as practically possible"

47. Although Article 4(4) PK-BIT apply the term "*as soon as practically possible*" for the deadline to submit EIA report, RESPONDENT heavily misinterpreted the term. As the Parties are

[94] Oxford University Press, *The Vienna Conventions on the Law of Treaties: A Commentary (Vol I)*, 2011, Article 27, p.704.
[95] Oxford University Press, *The Vienna Conventions on the Law of Treaties: A Commentary (Vol I)*, 2011, Article 31, p.838.
[96] Moot Problem, ¶29; PK-BIT, Preamble.
[97] *Pulp Mills*, ¶205; *Goals and Principles of Environmental Impact Assessment*, 16 Jan 1987, UNEP, Principle 4.
[98] *Pulp Mills*, p.32.
[99] *Pulp Mills*, ¶¶204-206.
[100] Moot Problem, ¶25.
[101] *Goals and Principles of Environmental Impact Assessment*, 16 Jan 1987, UNEP, Principle 4.

parties to the VCLT, the interpretation of the treaty terms has to follow the *law in force at the time when the treaty was drawn up*.[102] Under Article 31 VCLT the interpretation of a treaty term has to be done in good faith in the context of the parties' intentions which includes the preamble as well as relevant international rules in resembling case law precedent.[103]

48. In *Micula v. Romania* case, one of the disputes concerns the alleged untimely manner of Romania revocation of state aid policies. Though, the tribunal rejected Micula's claim as they find that Romania's interpretation of the EU regulation on immediate implementation as being reasonable.[104] Therefore, even if an obligation to fulfil a deadline is not set, through the intents of the party, it can be seen as immediate. In our case, the Parties acknowledged that RESPONDENT's business will undoubtedly face environmental challenges.[105] Moreover, CLAIMANT has emphasized on the importance of the country's environmental stability as CLAIMANT is a member state of both UNFCCC and Convention on Biological Diversity ("CBD") and henceforth require to abide with its obligation.[106] In addition, the fact that CLAIMANT's monsoon season starts on November that naturally brings heavy floods, RESPONDENT should have understood the importance of a properly conducted EIA.[107] Thus, by misinterpreting the need to conduct the EIA 'as soon as practically possible' and delaying and omitting the obligation, RESPONDENT has breached the PK-BIT obligation.

C. RESPONDENT failed to procure a qualified person

49. An EIA needed to be conducted by a qualified person in order to align with both the PK-BIT obligations and the CBD guideline. Pursuant to Art 4(3) PK-BIT, the responsibility of a qualified person is to conduct environment impact assessment, guarantee no false or misleading information.[108] At the same time, following CBD resolution guideline, expert judgment is a required for all initial and preliminary assessments for environmental

[102] Clarification, ¶4; Saluka Investments B.V v. The Czech Republic, Permanent Court of Arbitration ("PCA"), Award, 2004, ¶25.4.1; Draft Article on the Law of Treaties, 1949, Article 56; Oxford University Press, *The Vienna Conventions on the Law of Treaties: A Commentary (Vol I)*, 2011, p.813.
[103] Saluka Investments B.V v. The Czech Republic, Permanent Court of Arbitration ("PCA"), Award, 2004, ¶25.4.1; Oxford University Press, *The Vienna Conventions on the Law of Treaties: A Commentary (Vol I)*, 2011, p.808&818, ¶¶8-9&31.
[104] *Micula v. Romania*, International Centre for Settlement of Investment Disputes ("ICSID"), ICSID Case No. ARB/05/20, Award, 2013, ¶801.
[105] Moot Problem, ¶20.
[106] Moot Problem, ¶15; Convention on Biological Diversity ("CBD"), Article 5.
[107] Moot Problem, ¶¶2&11.
[108] PK-BIT, Art.4(3).

appraisal.[109] The 'expert judgement' would need to follow the CBD guidelines and/or under the guideline documents of the International Association for Impact Assessment ("**IAIA**") which covers a variety of impact assessment topical areas.[110] This clause has been engaged in the PK-BIT through the use of the phrase 'Qualified Person'.

50. Despite so, Alan Becky with his lacks of expertise in accordance with the necessary guideline is hired by RESPONDENT.[111] Alan Becky is not an EIA expert and is only responsible for confirming and validating the findings of in-house experts and conducting investigation for the plants' operation as a 'Quality Control' supervisor for their end product.[112] Furthermore, Alan has expressed the necessity of a qualified person to RESPONDENT which was disregard.[113] Therefore, RESPONDENT has omitted the obligation to hire a qualified person in accordance to the PK BIT and thus breach its procedural obligation.

II. RESPONDENT has breached its PK-BIT substantive obligation

51. Substantive breaches may include the environmental damage breach that is a result of significant pollution or destruction of protected areas contrary to agreed conservation measures.[114] In this regard, Article 5 PK-BIT holds the preservation of the State's River to a high regard. Article 5 PK-BIT prohibit investors from causing or discharging dangerous substances into their river. Thus, RESPONDENT has breached their substantive obligation as (**A**) they have caused the chemical leak into the (**B**) river.

A. RESPONDENT is the cause of the leak

52. Pursuant to Article 5(1)(b) PK-BIT, "[…] *no investors shall discharge any matter in which chemical or biological content makes or contributes to making such river or part thereof a potential danger to public health safe or welfare* […]". In relation to that, under Article 5(3) PK-BIT the owner or occupier of the property of where an entry or discharge is made, shall be

[109] *CBD Guidelines for incorporating biodiversity related issues into environmental impact assessment legislation and/or processes and in strategic environmental assessment*, Ramsar COP8 Resolution VIII.9, 2002, Annex, p.8.
[110] *CBD Guidelines for incorporating biodiversity related issues into environmental impact assessment legislation and/or processes and in strategic environmental assessment*, Ramsar COP8 Resolution VIII.9, 2002, Annex, p.8; *Best Practice* [online], International Association for Impact Assessment ("**IAIA**"). Available at: https://www.iaia.org/best-practice.php.
[111] Moot Problem, ¶24.
[112] Moot Problem, ¶24.
[113] Moot Problem, ¶33.
[114] *Environmental Issues in ISDS* [online]. Jus Mundi, [Updated 27 May 2024], available at https://jusmundi.com/en/document/publication/en-environmental-issues-in-isds.

presumed to have discharged it or caused it. Notwithstanding RESPONDENT's previous situation of chemical leak that has caused farmers to be hospitalized from contamination, in this issue RESPONDENT's storage tank relieve valves were compromised following the flood. Moreover, RESPONDENT was the only factory in full operation during the entirety of the flood. Therefore, RESPONDENT is the originator of the leak and in clear violation of Article 5 PK-BIT obligation.

B. RESPONDENT has polluted the river with its leak

53. RESPONDENT produce biofuel with the usage of palm oil.[115] Under Article 4(2) PK-BIT the production of petrochemicals is equivalent to activities that cause significant environmental impact.[116] The alcohols used for the transesterification process is toxic for human bodies through respiration or direct skin contact.[117] Thus, RESPONDENT operation produce toxic chemical that is harmful to the public health.

54. Pursuant to Article 5(2) rivers are defined as any inland or subterranean water resources.[118] Inland waters can be formed as a result of intense rainfall that causes floods.[119] Before the hospital admission for the affected, RESPONDENT's factory was submerged in flood water for more than a day.[120] Furthermore, the doctors believed that the injuries and the effects of the patients could have occurred by irritant chemicals travelled through inland waters.[121]

55. As RESPONDENT was the only factory in operation of toxic chemicals that was flooded, RESPONDENT is responsible for the chemical discharge in accordance to Article 5 PK BIT. Due to the fact that Article 5 PK BIT is a substantive obligation, RESPONDENT can be concluded to have breached its substantive obligation.

[115] Moot Problem, ¶10.
[116] PK-BIT, Art.4(2).
[117] University of Idaho, "Safety Considerations for Biodiesel", National Biodiesel Education Program (2007), available at: https://biodieseleducation.org/Literature/TechNotes/TN08_Safety.pdf.
[118] PK-BIT, Art.5(2).
[119] *Inland water and mountain systems* [online]. GRID Arendal A United Nations Environment Programme Partner, [Published 2007], available at: https://www.grida.no/resources/6042.
[120] Moot Problem, ¶35.
[121] Moot Problem, ¶36, ¶40.

ISSUE 4: CLAIMANT IS ENTITLED TO THE AWARD OF DECLARATION AND DAMAGES CAUSED BY RESPONDENT

56. Compensation and damages are remedies to repair harm or loss sustained.[122] The term compensation and damages can be used interchangeably, and it can be referred to as the payment of a sum of money for breach of international obligation and responsibility stems from a treaty.[123] As discussed above, RESPONDENT has breached PK-BIT obligation, hence (**I**) CLAIMANT is entitled to the declaratory award and damages in the relief sought. Though, (**II**) if the Arbitral Panel found CLAIMANT to also be liable, the compensation payment still should be partial.

I. CLAIMANT is entitled to full compensation

60. According to the ICJ Statute, unlawful act of breaches that violates international law and obligation would also be borne upon by the consequences of compensation under (**a**) VCLT, and (**b**) UNIDROIT Principles on International Commercial Contracts.[124]

A. VCLT allows for retaliation for breaches of BIT

61. Even though Article 60 VCLT focuses on the material breach of a treaty,[125] it allows room for nonmaterial breach to be referred to with the use of countermeasure or retaliation.[126] Article 60 VCLT refers to the suspension of treaty, though suspension in response to parties' violation is not always desirable.[127] The use of reprisal, on the other hand is allowed, and can be seen applying in *Air Service Agreement* case, where the tribunal allows for retaliation for breach of

[122] Marboe, I., *Calculation of Compensation and Damages in International Investment Law (2nd ed.)*, Oxford: Oxford International Arbitration, 2017, ¶2.01.
[123] Marboe, I., *Calculation of Compensation and Damages in International Investment Law (2nd ed.)*, Oxford: Oxford International Arbitration, 2017, ¶2.05, ¶2.23, ¶2.32, ¶2.35.
[124] *Responsibility of States for Internationally Wrongful Acts*, 2001, Article 31 & 36; *Statute of the International Court of Justice*, 1945, Article 38; Marboe, I., *Calculation of Compensation and Damages in International Investment Law (2nd ed.)*, Oxford: Oxford International Arbitration, 2017, ¶2.07, ¶2.10, ¶2.35.
[125] VCLT (1969), Art.60.
[126] Kirgis, Frederic L. Jr. (1989) "Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties," Cornell International Law Journal: Vol. 22: Iss. 3, Article 14. Available at: http://scholarship.law.cornell.edu/cilj/vol22/iss3/14.
[127] Kirgis, Frederic L. Jr. (1989) "Some Lingering Questions about Article 60 of the Vienna Convention on the Law of Treaties," Cornell International Law Journal: Vol. 22: Iss. 3, Article 14, p.566. Available at: http://scholarship.law.cornell.edu/cilj/vol22/iss3/14.

agreement and/or treaty.[128] Though, the tribunal did state that the consideration for countermeasure or retaliation will also need to be in the moderation of proportionality.[129]

62. In the case of *Urbaser S.A. v. Argentine Republic* in 2016, Argentina as a host state has claimed against a Spanish investor for their failure in fulfilling its obligations under a concession agreement for water and sewage services, leading to environmental and health issues.[130] The tribunal ruled in favor of Argentina as the tribunal finds that Urbaser, the Spanish investor, is liable for not fulfilling its obligation and caused damage. In this case, RESPONDENT failed to perform its obligations under PK-BIT and is damaging the public health and is a result of environmental violation of the PK-BIT. Thus, RESPONDENT should be responsible for the damages occurred.

B. Full compensation is a requirement under UNIDROIT Principle

63. CLAIMANT and RESPONDENT relationship can be considered a cross-border contract that UNIDROIT Principles on International Commercial Contracts ("**UNIDROIT**") even as an investment in a host country. As long as the investor is from one country and the host country is another, the investment agreement between them could be considered cross-border.[131] Moreover, in combination of the UNIDRIOT's preamble, Art 1.1 UNIDROIT, and Art 1.4 UNIDROIT, allows a broad applicability and interpretation of UNIDROIT to be a broad definition of *international commercial contracts*. The UNIDROIT is designed to govern international commercial relationships, which can include investment contracts, particularly when they have cross-border elements.[132]

64. Thus, under Article 7.4.2(1) UNIDROIT, '*The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance*' is applicable in this case.[133] This article has also been adopted into the Principles of European Contract Law as a form of an

[128] *Air Service Agreement Award (US v. France)*, US-France Air Arbitration, Award, 1978, ¶91.
[129] *Air Service Agreement Award (US v. France)*, US-France Air Arbitration, Award, 1978, ¶91; *Fifth Report on the Content, Forms and Degrees of International Responsibility*, 1984, U.N. Doc. A/CN.4/380(1984), Part 1.
[130] **Urbaser S.A. v. Argentine Republic**, ICSID Case No. ARB/07/26, Award, December 8, 2016.
[131] *United Nations Conference on Trade and Development (UNCTAD)*, "Investment Policy Framework for Sustainable Development," UNCTAD/DIAE/PCB/2015/5, United Nations, 2015.
[132] International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts*, 2016, pp.1-15.
[133] *UNIDROIT Principles of International Commercial Contracts*, 2016, Article 7.4.2; Marboe, I., *Calculation of Compensation and Damages in International Investment Law (2nd ed.)*, Oxford: Oxford International Arbitration, 2017, ¶2.08.

international practice that shall be practice as a customary international law.[134] In ICC Arbitration Case No. 9994 in 2001, the arbitral tribunal applied Article 7.4.2(1) UNIDROIT to determine the extent of the damages caused by respondent's non-performance. The tribunal awarded claimant full compensation for the harm suffered due to the respondent's failure to perform the contractual obligations.[135]

65. Similarly, in this case, the infection that may have been caused by RESPONDENT's broken relief valve, as a form of neglect, have resulted in the hospitalization of 39 out of 129 affected people.[136] This leak is an outcome derived from the integration of breaches of multiple articles under PK-BIT. Thus, CLAIMANT as an aggrieved party in this situation should be entitled to full compensation from RESPONDEN's reckless actions.

II. Even if the Arbitral Panel found CLAIMANT to be liable, the compensation should not be less than 75 percent

66. Provided that PK-BIT rely on the environmental consideration, the Arbitral Panel has the right to determine the amount of compensation to the quantum of damage caused.[137] If the host state does hold some liability, the concern then falls onto how much they may receive in compensation.[138] The precautionary principle has been recognized as a legal principle to apply to international law by the UNFCCC and the Biodiversity Convention since the 1990s.[139] Even though, the precautionary principle and the polluter pays principle only allows ground for 'partial' compensation to protect foreign investment, the Arbitral Panel should base this decision on the ground of (**A**) the principle of 'contributory negligence', (**B**) the conduct of the investor.[140]

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[134] *Principles of European Contract Law*, 2006, Article 9:501(1).
[135] ICC Arbitration Case No. 9994, ICC, Award, 2001, Excerpt in ICC International Court of Arbitration Bulletin, 2005 Special Supplement, pp. 79-80.
[136] Moot Problem, ¶36, ¶40, ¶44.
[137] Beharry, C., Kuritzky, M., "*Going Green: Managing the Environment Through International Investment Arbitration*", American University International Law Review, Vol.30 Issue 3 Article 2, 2015, p.403.
[138] Tomoka Ishikawa, "*The Role of International Environmental Principles in Investment Treaty Arbitration: Precautionary and Polluter Pays Principles and Partial Compensation*", in Francesca Romanin Jacur (ed. Et al.), Natural Resources Grabbing: An International Law Perspective, 2015, Martinus Nijhoff, pp.245-260.
[139] Tomoka Ishikawa, "*The Role of International Environmental Principles in Investment Treaty Arbitration: Precautionary and Polluter Pays Principles and Partial Compensation*", in Francesca Romanin Jacur (ed. Et al.), Natural Resources Grabbing: An International Law Perspective, 2015, Martinus Nijhoff, pp.257-258.
[140] Tomoko, I., "*The Role of the Precautionary and Polluter Pays Principles in Assessing Compensation*", The Research Institute of Economy, Trade and Industry (RIETI), RIETI Discussion Paper Series 15-E-107, 2015, pp.5-6; Tomoka Ishikawa, "*The Role of International Environmental Principles in Investment Treaty Arbitration: Precautionary and Polluter Pays Principles and Partial Compensation*", in Francesca Romanin

A. RESPONDENT contributed to the breach of treaty

67. The principle of contributory negligence exists under Article 39 ARSIWA under the phrasing of "[…] the injury by willful or negligent action or omission […]". The failure of an investors to assess risk during their investment is the responsibility that bears the consideration to be calculated during compensation calculation. As an investor, RESPONDENT shall be held liable for the contributions they made that amount to the breach of treaty. A fair and reasonable compensation for circumstances that is a result of material and significant wrongful act can result in the apportionment of 25% and 75%. In Yukos v. Russia case, the concept of contributory negligence only resulted in the reduction of 25%. As Russia took various illegal actions that resulted in the demise of Yukos, the tribunal found that Russia breach of their treaty caused Yukos to violate it more. Thus, Yukos was awarded the reduction to 25% of the damages. In our case, RESPONDENT non-performance in conducting of EIA result in the eventual leak into the river that affected the public health. Even if the Arbitral Panel were to find that CLAIMANT is responsible for the sewage error, RESPONDENT contributes the highest in this event. CLAIMANT also do not carry any responsibility nor obligation under the PK-BIT to guarantee the effectiveness of the sewer system more than it already is. Therefore, CLAIMANT request the Arbitral Panel to consider to adjudge and declare the reduction of damage in favor of CLAIMANT.

B. RESPONDENT as an investor has the duty to mitigate

68. Duty to mitigate damages is considered a part of the General Principles of Law and a well-established principle in investment arbitration. In EDFI v. Argentina case, claimant took no duty to mitigate which result in a 50/50 split in the award. The tribunal found that claimant has failed to comply with their duty to mitigate damages by taking reasonable steps, and thus shall subtract 50% as their action has participated in causing the damage. Likewise, PK-BIT exist as a form for investor to apply in order to be able to mitigate potential damages. Through RESPONDENT violation of PK-BIT, the leak happened. The leak resulted in the cases that could have been mitigated. Therefore, RESPONDENT should be held responsible for at least half of the compensation needed to repair the damage.

Jacur (ed. Et al.), Natural Resources Grabbing: An International Law Perspective, 2015, Martinus Nijhoff, p.250.

REQUEST FOR RELIEF

In light of the submissions above, CLAIMANT respectfully request the Arbitral Panel for the following order:

1. A declaration that RESPONDENT has breached its obligations under the PK-BIT by failing to comply with the mandatory pre-arbitration steps as stipulated in Article 12;

2. An award of damages to compensate for the respiratory tract infections suffered by the citizens of Palmenna as a result of RESPONDENT's alleged failures;

3. A ruling that holds RESPONDENT accountable for the harm caused to the community due to the alleged negligence in maintaining the drainage and ventilation systems; and

4. CLAIMANT shall be liable for any cost incurred by RESPONDENT in this proceeding including legal fee and arbitration costs.