TEAM: MY2411

ASIAN INTERNATIONAL ARBITRATION CENTRE

A DISPUTE BEFORE

ASIAN INTERNATIONAL ARBITRATION CENTRE

KUALA LUMPUR, MALAYSIA

MEMORANDUM FOR RESPONDENT

In the arbitration proceeding between

THE FEDERATION OF PALMENNA
("CLAIMANT")
And

CANSTONE FLY LIMITED
("RESPONDENT")

August 16, 2024

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INDEX OF ABBREVIATIONS AND DEFINITIONS

§/§§	Section/Sections
¶/¶¶	Paragraph/Paragraphs
&	And
Arbitral Panel	The Arbitral Panel in Asian International Arbitration Centre Arbitration Rule
Art/Arts.	Article (s)
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)
id.	idem; the same (Latin)
Ltd	Limited
Mr.	Mister
Ms.	Miss
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
CISG	United Nations Convention on Contracts for the International Sale of Goods, entered into force 1 January 1988
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958
Kyoto Protocol	Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1998
UNEP	United Nations Environment Programme, 1998
UNIDROIT Principle	UNIDROIT Principles of international commercial contracts, 1994
ARSIWA	Article s on Responsibility of States for Internationally Wrongful Acts, 2001
VCLT	Vienna Convention on the Law of Treaties, 1969

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Ethyl v. Canada	Ethyl Corporation v. Government of Canada Final Award, 1998 Last accessed: June 12, 2024 Available at https://www.italaw.com/cases/409.
Lauder v. Czech	Ronald S. Lauder v. The Czech Republic, Award, June 8, 2009. Last accessed June 6, 2024 Available at: https://www.italaw.com/cases/610.
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BG Group Plc v. Republic of Argentina	BG Group PLC v. The Republic of Argentina. Final Award. 24 December 2007. Last accessed: June 13, 2024 Available at: https://jusmundi.com/fr/document/decision/en-bg-group-plc-v-the-republic-of-argentina-final-award-monday-24th-december-2007
Prime v. Emirates	Prime Mineral Exports Private Limited ("PMEPL") v. Emirates Trading Agency LLC ("ETA")
ICC Case No. 11490	Final Award 20 June 2003. Last accessed: Available at Jus Mundi: https://jusmundi.com/en/document/decision/en-icc-case-ndeg-11490-final-award-in-case-11490.
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	Available at https://jusmundi.com/en/document/decision/en-bayindir-insaat-turizm-ticaret-ve-sanayi-a-s-v-islamic-republic-of-pakistan-award-thursday-27th-august-2009 Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador, ICSID Case No. ARB/06/11, Award (Oct. 5, 2012), https://www.italaw.com/cases/409.
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Suez v. Argentina	Suez Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Argentina's Application for Annulment (December 14, 2018), Available at: https://jusmundi.com/en/document/decision/en-suez-sociedad-general-de-aguas-de-barcelona-s-a-and-interagua-servicios-integrales-de-agua-s-a-v-argentine-republic-decision-on-argentinas-application-for-annulment-friday-14th-december-2018.
Mobil and others v. Venezuela	Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation and others v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award (10 July 2023) Available at : https://jusmundi.com/en/document/decision/en-mobil-cerro-negro-holding-ltd-mobil-cerro-negro-ltd-mobil-corporation-and-others-v-bolivarian-republic-of-venezuela-resubmission-proceeding-wednesday-24th-october-2018

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S.K. Jain v. Haryana	**Supreme Court of India** S.K. Jain vs State of Haryana & Anr, (2009). 23 February, 2009 Retrieved from Indian Kanoon: https://indiankanoon.org/doc/1966455/
Municipal v. Rajesh	**Supreme Court of India** Municipal Corp., Jabalpur & Ors v. M/s Rajesh Construction Co., Retrieved from https://indiankanoon.org/doc/1761545/

Cited as:	**Singapore**
[2015] SGCA 57	**Court of Appeal** Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals. Civil Appeals Nos 123, 124 and 126 of 2014. Decision Date: 26 October 2015. Last accessed: June 15, 2024 Available at: https://www.elitigation.sg/gd/s/2015_SGCA_57.
[2019] SGHC 142.	High Court BNA v. BNB & BNC Originating Summons No 938 of 2017. Available at: https://www.elitigation.sg/gd/s/2019_SGHC_142

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	Pulp Mills on the River Uruguay (Argentina v. Uruguay) Hungary/Slovakia, Judgment, ICJ Reports 2004, Last accessed: Available at: https://www.icj-cij.org/case/92.

STATEMENT OF JURISDICTION

RESPONDENT respectfully submits that the Arbitral Panel lacks jurisdiction to adjudicate the present dispute and that the claims brought by CLAIMANT are inadmissible. RESPONDENT asserts that the panel lacks jurisdiction pursuant to Article s 16 and 36 of the UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL**"), as adopted in the Arbitration Act 2005 of Malaysia, and that the case is inadmissible due to the application of the doctrine of res judicata and public policy considerations.

RESPONDENT respectfully requests that the arbitral tribunal dismiss CLAIMANT's case in its entirety on the grounds that it lacks jurisdiction to hear the dispute, and alternatively, that the claims are inadmissible.

QUESTIONS PRESENTED

1. Whether the pre-arbitration steps under Article 12 PK-BIT must be complied before arbitration proceedings.

2. Whether CLAIMANT is precluded from initiating an arbitration against RESPONDENT.

3. Whether RESPONDENT breached its obligations under PK-BIT.

4. Whether CLAIMANT is entitled to an award of declaration and damages.

STATEMENT OF FACTS

RESPONDENT is an investment from the Independent State of Kenweed ("**Kenweed**"), in Palmenna, following the signing of Palmenna-Kenweed BIT ("**PK-BIT**"). Following, the signing of the Memorandum of Understanding between CLAIMANT and Kenweed with the goal to establish a framework for future cooperation between the two countries. Here, the agreement aims that RESPONDENT's would prioritize employing at least 70% Palmennian citizens, while addressing environmental concerns. In returned CLAIMANT shall allowed Kenweed's Investment in the country Biodiesel Production.

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

26 October 2021 RESPONDENT was established in Palmenna, managing and operate biodiesel plaints. Owning and operating two biofuel plants in Palmenna, which are the capital of Appam and another in Karheis, a city near Kenweed boarder. The company is a collaboration between Mestone Ltd which holds a majority stake 70%, and SZN Company Limited ("**SZN**") which owns the remaining 30%. Due to SZN's CEO, Luke Nathan's public presence made SZN the "face" and "operating force" of RESPONDENT cooperation.

Mid-February 2023 An anonymous note raised concerns at RESPONDENT 's Karheis facility. The note alleged leakage from a tank containing refined palm oil that had undergone a chemical process. Jakey Jake ("**Jakey**") the in-house expert of Karheis facility, then requested for an inspection by a foreign expert, Alan Becky ("**Alan**") whom is task to supervise the plaints and ensure adherence standards. Alan requested initial environmental assessments and machinery reports to be conducted every 4 months (April, August, December). Upon reviewing the facility's latest report, finding that no prior indications of a leak, Alan dismissed the note as a hoax. However, he did propose an environment impact assessment ("**EIA**") to the stakeholders.

Late-February 2023 News reported nearby farmers were hospitalized due to suspected contamination. Investigations followed the reports however, findings remained undisclosed. It's was later apparent that the victims were anonymously compensated to withdraw their complaints.

23 November 2023 Heavy rains in CLAIMANT's country led to flooding concerns. News reports warned of risks in Karheis, where RESPONDENT's facility is located. Alan, traveled there to monitor storage tanks. Neighboring factories in Appam proactively shut down operations. Meanwhile, at the unaffected Appam plant, Lee, the Senior Manager, attempted to contact Alan for instructions but could not reach him. Lee then decided to resume operations at the Appam plant as usual. Intense rainfall overwhelmed drainage systems in Appam, leading to a severe flash flood. The floodwaters receded quickly in most areas, but RESPONDENT's Appam facility remained submerged over days.

26 November 2023	Following the Appam flood, people living nearby were hospitalized with respiratory problems. Doctors suspected inhalation of irritant gases or chemicals carried by floodwaters. Over 129 people were affected, with 39 requiring hospitalizations. Notably, 13 of the hospitalized were RESPONDENT employees working at the Appam facility. A flood near RESPONDENT's Appam plant, the only one operating during the disaster, sparked outrage as residents fell ill with respiratory problems. Former Prime Minister Elsie criticized the government for **prioritizing profits over public safety.** Her comments fueled public outrage and prompted local activists, led by Kelvin Malhotra ("**Activist**"), erupted. RESPONDENT defended their actions, noting that an investigation found flood damage to valves, potentially causing hazardous leaks. They fixed the valves and improved ventilation, but the illness cause remains unclear, with flood contamination a possibility.
15 December 2023	Activists sued the government and SZN after a flood caused respiratory illnesses near RESPONDENT's Appam plant. They claimed flawed drainage, poor ventilation, and lax enforcement of environmental regulations. CLAIMANT argued it was not liable and the heavy rain was unavoidable. SZN claimed they were wrongly included in the lawsuit.
14 February 2024	The High Court ruled in favor of the activists, finding CLAIMANT and SZN jointly responsible for the negligence. However, Jakey's claims were questioned as he might have been pressured by the government.
06 March 2024	After the court ruling, CLAIMANT initiated arbitration proceedings against RESPONDENT under PK-BIT, claiming that its actions caused respiratory illnesses and seek compensation. In respond RESPONDENT points out that CLAIMANT had bypassed the required to commence for arbitration outlined in Article 12 PK-BIT and is using arbitration to challenge the High Court decision.

SUMMARY OF PLEADINGS

Issue 1: CLAIMANT should be barred from proceeding with arbitration under Article 12 PK-BIT due to non-compliance with the mandatory pre-arbitration steps due to three reasons. First, CLAIMANT initiated arbitration on 6 March 2024, immediately following a conference call with RESPONDENT on 1 March 2024, without engaging in the required negotiation and mediation. Second, Article 12 PK-BIT explicitly mandates that parties must first attempt to resolve disputes through negotiation and mediation before arbitration. Third, CLAIMANT's failure to undertake these steps undermines the intent of Article 12 PK-BIT, failing to ensure that disputes are resolved amicably before resorting to arbitration.

Issue 2: CLAIMANT should be barred from initiating arbitration against RESPONDENT under the PK-BIT. The circumstances surrounding CLAIMANT's actions and the procedural irregularities raise justifiable doubts as to the appropriateness of initiating arbitration at this stage based on the following reasons. First, CLAIMANT has brought a claim against RESPONDENT in parallel proceedings, attempting to circumvent the judicial process. Second, even if the Arbitral Panel finds it appropriate to hear the case, CLAIMANT did not comply with necessary notice and request rules. Third, CLAIMANT's initiation of arbitration while appellate court proceedings are ongoing, and the absent of SZN, further complicate would further complicate the arbitration process.

Issue 3: RESPONDENT should not be found in breach of the PK-BIT obligations under the three reasons. First, RESPONDENT has fulfilled its procedural duties, despite CLAIMANT's actions that impeded the timely completion of necessary EIA. Second, any delays in compliance were a result of CLAIMANT's rush to proceed without proper environmental evaluations, not RESPONDENT inaction. Third, RESPONDENT's performance is in alignment with substantive obligations, and any alleged environmental impact cannot be solely attributed to RESPONDENT.

Issue 4: CLAIMANT should not be awarded any declaratory reliefs or damages due to the following reasons. First, CLAIMANT's assertion of a right to full compensation is based on the incorrect premise that RESPONDENT has violated its international obligations. Second, the Vienna Convention on the Law of Treaties ("**VCLT**"), UNIDROIT Principles on International Commercial Contracts, and the International Law Commission's Article s on the Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**"), which permit RESPONDENT's actions under the principle of *force majeure*. Third, even if RESPONDENT is found partially liable, the responsibility for the alleged damages is not solely attributable to RESPONDENT, but must be shared due to CLAIMANT's contributory negligence and state responsibility for environmental protection.

PLEADINGS

ISSUE 1: CLAIMANT MUST COMPLY STRICTLY WITH THE PRE-ARBITRATION STEPS REQUIRED UNDER ARTICLE 12 PK-BIT BEFORE INITIATING ARBITRATION PROCEEDING

1. RESPONDENT asserts that (**I**) First, Article 12 PK-BIT require strict compliance with pre-arbitration steps. (**II**) Second, CLAIMANT pursue arbitration without RESPONDENT's consent. (**III**) Third, non-compliance with Article 12 PK-BIT should result in dismissal of claims. (**IV**) Lastly, CLAIMANT cannot invoke Doctrine of Futility against RESPONDENT.

I. Article 12 PK-BIT requires strict compliance with pre-arbitration steps

2. Article 12 of the PK-BIT establishes a structured process that parties must follow before resorting to arbitration. This process includes negotiation, mediation, and finally, arbitration. [1] The use of the term "*shall*" within Article 12 PK-BIT reflects the parties' intention to make these pre-arbitration steps obligatory. [2] Thus, when a BIT uses clear and mandatory language, like "*shall*," the parties are strictly bound to fulfill these pre-arbitration requirements. Moreover, failure to comply with these steps, therefore, prevents the aggrieved party from initiating arbitration. [3] In the case of *Wintershall v. Argentina,* the tribunal in that case refused to allow arbitration due to non-compliance with mandatory pre-arbitration procedures.

3. In this case, CLAIMANT failed to comply to the mandatory pre-arbitration steps outlined in Article 12 PK-BIT. The provision explicitly requires the parties to first engage in negotiation, then mediation, before proceeding to arbitration. [4] The use of the word "*shall*" in the treaty imposes a strict obligation, making compliance with these steps a mandatory for arbitration.[5]

4. Therefore, the clear language of Article 12 PK-BIT mandate strict compliance with pre-arbitration steps.

II. CLAIMANT pursues the arbitration without RESPONDENT's consent

5. Arbitration relies on the mutual agreement of the parties to resolve their disputes through this method. Without such consent, the arbitral tribunal does not have the authority to hear or decide the case.[6] In the case of *Siemens A.G. v. Argentina,* Siemens' claim against Argentina for alleged breaches of the Argentina-Germany BIT. Siemens was required to exhaust local remedies before initiating arbitration, but Argentina argued Siemens had failed to meet this requirement. The tribunal found Siemens' non-compliance with the BIT's procedural steps affected the arbitration's validity. [7]

[1] Article12 PK-BIT, p. 11
[2] Gary Born and Marija Šćekić, Pre-Arbitration Procedural Requirements 'A Dismal Swamp', p. 228
[3] Gary Born and Marija Šćekić, Pre-Arbitration Procedural Requirements 'A Dismal Swamp', p. 236
[4] Article 12 PK-BIT, p. 11
[5] Andrew Newcombe and Lluís Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Wolters Kluwer 2009) 72
[6] Gary Born and Marija Šćekić, Pre-Arbitration Procedural Requirements 'A Dismal Swamp', p. 238
[7] Siemens v Argentina, ICSID Case No ARB/02/8, Award (17 January 2007)

6. In the current dispute, CLAIMANT pursued arbitration without obtaining RESPONDENT's consent and without fulfilling the pre-arbitration steps outlined in Article 12 PK-BIT. [8] The pre-arbitration steps are designed to ensure that both parties have made a good faith effort to resolve their disputes through alternative means before resorting to arbitration. [9] CLAIMANT's failure to comply to these mandatory pre-arbitration steps, including the getting RESPONDENT's consent.

7. Therefore, RESPONDENT asserts (**A**) the purpose of Article 12 PK-BIT cannot be fulfilled through a mere negotiation. (**B**) Under Article 12(b) PK-BIT, CLAIMANT failed to ensure that the PARTIES fulfils the pre-arbitration mediation step. (**C**) CLAIMANT has already fulfilled the arbitration requirements.

A. The purpose of Article 12 PK-BIT cannot be fulfilled through a mere negotiation

8. Article 12(a) of the PK-BIT requires parties to negotiate in good faith and seek an amicable settlement before proceeding to arbitration. Article 26 Vienna Convention on the Law of Treaties ("**VCLT**") which requires that treaties be performed in good faith. [10] In the case of *Ethyl Corp. v. Canada* case, Ethyl Corporation filed a claim under North American Free Trade Agreement ("**NAFTA**") against Canada, alleging breaches of the treaty. Canada objected, arguing that Ethyl had not complied with the NAFTA requirement to negotiate before initiating arbitration. The tribunal rejected Canada's objections but stressed that the negotiation requirement must be approached sincerely and in good faith. Additionally, the tribunal stressed on the necessity of genuine negotiation efforts before resorting to arbitration.[11]

9. In the present case, the parties did not negotiate in good faith and amicably to reach a settlement as required by Article 12(a) PK-BIT.[12] CLAIMANT may argue that its good faith participation in negotiations fulfills the purpose of Article 12 PK-BIT. [13] However, Article 12 PK-BIT requires not just negotiations but also formal mediation before arbitration. [14] CLAIMANT failed to conduct or initiate formal mediation, a distinct and mandatory step stated in Article 12 PK-BIT. [15] This non-compliance invalidates their claim that the requirements were satisfied.

10. Thus, the parties failed to negotiate in good faith and amicably to reach a settlement under Article 12(a) PK-BIT. Since CLAIMANT did not fulfill the mandatory formal mediation requirement under Article 12 PK-BIT, it cannot argue that mere negotiations sufficient.

B. Under Article 12(b) PK-BIT, CLAIMANT failed to ensure that the PARTIES fulfils the pre-arbitration mediation step

11. Article 12(b) PK-BIT, in the event negotiations fail, the parties must attempt to resolve their dispute through mediation before proceeding to arbitration. [16] This requirement is a binding

[8] Article 12 PK-BIT, p. 11
[9] Wah (aka Tang) v Grant Thornton Int'l Ltd [2012] EWHC 3198, para 57
[10] Article 12 (a) PK-BIT, p. 11
[11] Article26 VCLT
[12] Ethyl Corpn v Gov't of Canada, UNCITRAL (NAFTA), Award on Jurisdiction (24 June 1998) (1999) 38 ILM 708, paras 74–88
[13] Moot Problem, ¶50 p.17
[14] Article 12 PK-BIT, p.11
[15] Moot Problem, ¶56 p.18
[16] Article12 (b) PK-BIT, p.11

obligation under international law, Article 26 VCLT, principle of *Pacta Sunt Servanda* means "agreements must be kept. [17] This principle is mandating the strict compliance of treaty obligation. [18] As such, the requirement for mediation is a substantive obligation that both parties must uphold rather than just a procedural formality. [19]

12. In *ICC Case No. 11490,* a dispute arose between the parties over a commercial agreement that mandates pre-arbitration steps such as negotiation and mediation before initiating the arbitration. Claimant in that case commenced the arbitration without complying with the pre-arbitration steps, arguing that the steps would be futile. The issue at hand is whether the Claimant's failure to comply with the pre-arbitration steps constituted a breach of the arbitration agreement. The tribunal upheld the principle of *Pacta Sunt Servanda*, emphasizing that the parties were bound by the terms of their agreement, including the pre-arbitration steps. Moreover, the tribunal concluded that they pre-arbitration steps are necessity and had to be strictly comply. [20]

13. In the present case, CLAIMANT has failed to fulfill the mandatory pre-arbitration step of mediation as required by Article 12(b) PK-BIT. [21] Despite being aware of the necessity of mediation following unsuccessful negotiations, CLAIMANT either obstructed or neglected the mediation process. By doing so, CLAIMANT acted contrary to the principle of *Pacta Sunt Servanda*, which obliges parties to uphold their treaty commitments. CLAIMANT's failure to engage in good faith mediation or to make a genuine attempt at resolving the dispute through mediation constitutes a breach of Article 12(b) PK-BIT. [22]

14. Therefore, RESPONDENT contend that CLAIMANT's failure to comply with pre-arbitration mediation step under Article 12 (b) PK-BIT.

C. CLAIMANT has already not fulfilled the arbitration requirements

15. CLAIMANT's compliance with the AIAC Rules by paying the registration fee and security deposit does not conclusively establish the arbitration proceeding, as these payments can be withdrawn or adjusted. [23] Under Rule 19 of the AIAC Rules, a provisional advance deposit is required to cover a portion of the estimated arbitration costs. However, if circumstances change or if a party fails to maintain the necessary financial contributions, the AIAC can suspend or terminate the proceedings. [24] While the payment of fees and deposits initiates the arbitration process, it does not permanently secure the tribunal's jurisdiction. [25] AIAC Rules allow for the adjustment, withdrawal, or reallocation of deposits based on various factors, including changes in the scope of the dispute or the financial status of the parties. [26] If a security deposit is withdrawn or reduced, it could jeopardize the tribunal's ability to proceed, thereby affecting its jurisdiction and the viability of the arbitration. [27] Compliance with initial financial obligations

[17] Article26 VCLT
[18] Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty By Daniel Davison-Vecchione, Vol. 16 No. 05, pp 1164-1167
[19] World Arbitration & Mediation Review 6(3), 491-543 (2012)
[20] ICC Case No. 11490, Collection of ICC Arbitral Awards Vol. VII, 2019, p. 3.
[21] Article12 (b) PK-BIT
[22] Moot Problem, ¶57, pp 18-19
[23] AIAC 2023 Rule 18.8
[24] AIAC 2023 Rule 19
[25] AIAC 2023 Rule 11.1
[26] AIAC 2023 Rule 18.8
[27] Ibid

is necessary but not sufficient to ensure that the tribunal retains its authority throughout the arbitration.[28]

16. In the present case, CLAIMANT argues that its payment of the registration fee and security deposit under the AIAC Rules establishes the tribunal's jurisdiction and prevents any procedural objections. [29] However, the mere payment of these fees does not irrevocably secure the tribunal's jurisdiction.

III. Non-compliance with Article 12 PK-BIT should result in dismissal of claims

17. The doctrine of waiver of rights involves the intentional relinquishment of a known right.[30] In the context of international arbitration, a party may be deemed to have waived its right to enforce specific procedural requirements if it does not adhere to them itself. [31] The tribunals have ruled that a party's failure to follow pre-arbitration steps can constitute a waiver of the right to insist on the other party's compliance with those same steps.[32] In the case of *Lauder v. Czech Republic*, the tribunal found that non-compliance with procedural prerequisites by one party can prevent that party from later insisting on strict adherence by the other party. [33] Additionally, Prof. Gary Born has stated that waiver occurs when a party's conduct indicates an intention to relinquish a known right.[34]

18. In the present case, if CLAIMANT did not comply with the pre-arbitration steps outlined in Article 12(c) PK-BIT, such as mandatory negotiation or mediation, it cannot later insist that the opposing party adhere to these steps. [35] By failing to initiate or participate in the required pre-arbitration procedures, CLAIMANT has demonstrated a disregard for the procedural requirements set by the PK-BIT. This conduct is inconsistent with an intent to enforce Article 12(c) PK-BIT, thereby constituting a waiver of the right to insist on its compliance.

19. Therefore, CLAIMANT's failure to comply with the pre-arbitration requirements under Article 12 PK-BIT, it should be deemed to have waived its right to insist on these procedures being followed by RESPONDENT.

IV. CLAIMANT cannot invoke Doctrine of Futility against RESPONDENT

20. The Doctrine of Futility exempts parties from completing pre-arbitration measures only limited in exceptional situations. [36] To apply this doctrine, CLAIMANT must provide strong proof that continuing with the required pre-arbitration steps would be entirely pointless or hopeless. In *Maffezini v. Spain*, the tribunal stated that "*the requirement to pursue local remedies before resorting to international arbitration can only be dispensed with in cases where it is shown that such remedies are obviously futile*". [37] Furthermore, the tribunal ruled that the Doctrine of

[28] AIAC 2023, Article36.
[29] Moot Problem, ¶54, p.18
[30] Montana Court Continues its Fostility to Mandatory Arbitration, ABA Dispute Res, J. 22 (Feb.—Apr. 2003).
[31] Special Concurrence by Nelson, at para. 55.
[32] Decision of *Desert Line Projects LLC v. Republic of Yemen; Lanco International Inc. v. The Argentine Republic*
[33] Ronald S. Lauder v. Czech Republic
[34] Born, 3rd ed, p 798-803
[35] Article12(c) PK-BIT
[36] Philip Morris v Uruguay (n 8) para 137
[37] Maffezini v Spain, ICSID Case No ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction (25 January 2000) para 35

Futility must be applied restrictively, requiring clear and compelling evidence that further pre-arbitration steps would have been futile.[38] The Claimant has failed to provide such evidence, thereby disqualifying the application of the Doctrine of Futility in that case.[39]

21. In this case, Article 12 PK-BIT mandates specific pre-arbitration procedures, including a 90-day waiting period after negotiations and before arbitration, as well as an obligation to engage in mediation. [40] CLAIMANT has blatantly disregarded these requirements by prematurely initiating arbitration proceedings without first attempting mediation or honoring the 90-day waiting period. CLAIMANT argues that RESPONDENT's lack of cooperation during negotiations is sufficient to invoke the doctrine, thereby excusing non-compliance with Article 12 PK-BIT.[41] By bypassing mediation, CLAIMANT effectively precluded any possibility of resolving the dispute amicably before arbitration.

22. Therefore, without having engaged in mediation, CLAIMANT cannot argue that the process would have been unproductive, as it never gave the process a chance to succeed.

ISSUE 2: CLAIMANT IS PRECLUDED FROM INITIATING AN ARBITRATION AGAINST RESPONDENT UNDER PK-BIT

23. RESPONDENT submits that CLAIMANT initiates an AIAC arbitration against RESPONDENT shall be restricted because (**I**) CLAIMANT brought a claim against RESPONDENT in two parallel proceedings and (**II**) Even if the Arbitral Panel found appropriate to hear the case, it shall not commence the arbitration as CLAIMANT did not comply with notice and request rules.

I. CLAIMANT brought a claim against RESPONDENT in two parallel proceedings

24. It is undisputed between the CLAIMANT and RESPONDENT that either parties, whether the host State or the investor might bring the dispute to the AIAC as it is clearly in Article 1 PK-BIT that the obligations states in the BIT shall be enforceable by investor(s) of the BIT's Parties, against the investor(s) of the Parties or, between the Parties themselves as against one another. Even if the Tribunal found that CLAIMANT complies with the pre-arbitration, the claim brought by CLAIMANT is inadmissible and shall be dismissed based on (**A**) the initiation for arbitration shall be dismissed as the claim brought to AIAC already delivered judgment at CLAIMANT's local court. (**B**)The arbitration process is flowed without SZN as a party.

A. The initiation for arbitration shall be dismissed as the claim brought to AIAC already delivered judgment at CLAIMANT's local court

i. High Court's decision already delivered and found CLAIMANT liable for its negligence

25. CLAIMANT only initiated arbitration proceeding after the Hight Court's verdict found CLAIMANT is co-liable with SZN. Notwithstanding, that CLAIMANT content to files for the

[38] Ibid
[39] Ibid
[40] Article12(c) PK-BIT
[41] Ibid

appeal motion against the Hight Court's decision. CLAIMANT initiated AIAC arbitration proceeding against RESPONDENT bases on the same course of actions. In *Parklane v. Shore, t*he court awarded remedies in favor of *Parklane*. However, *Shore* did not appeal, it filed a new lawsuit against *Parklane instead. The claim brought* over the same underlying fact. The court rejected its jurisdiction based on *res judicata* principle and empathized that the court is bar from relitigating a new lawsuit on claim of the same nature to first lawsuit.[42]

26. RESPONDENT requests the Tribunal to bar CLAIMANT from instituting claim with the same course of action to arbitration because the High Court addressed merit of the claim and held CLAIMANT and SZN jointly liable for the incident.[43] Thus, the court proceeding already addressed the issue in coming to AIAC arbitration.

ii. SZN is related to the court proceeding being a Parent's company of RESPONDENT

27. CLAIMANT may raise that the privity element of *res judicata* principle did not fulfill because SZN is the party in the dispute in the court proceeding and claimant is activities, while CLAIMANT was the respondent the same SZN. Determining which party bears responsibility for an omission presents a challenge.[44] *Res judicata*'s second element addresses this by extending its application to parties related to the original parties, known as *privity*, if they are involved in the underlying failure. In *Commissioner v. Celeste Textile Corp*, the dispute concerned tax deficiencies, and although *Mr. Wener was* not directly involved in the case. The court later held that he is also responsible as well, due to his close legal relationship as the sole shareholder with a personal guarantee for the company's tax obligations. Since the judgment against *Celeste* effectively determined the tax liability, *res judicata* applied to hold Mr. Wener responsible for paying the guaranteed taxes.[45]

28. *Privity* doctrine refers to direct contractual relationships but can extend to corporate structures' relationship between parent company and its subsidiary.[46] To establish a privity or control relationship defined as the degree of control exercised by the parent company.[47] The concept of piercing the corporate veil, has been invoked in investment arbitration to determine whether a corporation is a mere alter ego of its shareholder, particularly when the treaty requires the investor to be a distinct legal entity. As a supplementary to the concept of piercing veil the "*Brock test*" is employed to evaluate the company's separate legal personality. Such legal standard shall apply through the following standard, firstly being the separation of the legal entity, to assess whether the entity have a distinct legal existence separate from its parent company. Secondly, the identity of entity that exercise its ownership and control over the company operation and economic interest. Thirdly, the assessment on whether the entity possess its own liability and assets. Lastly, the entities discretion to its own management structure and decision-making processes.

29. A pivotal consideration is determining SZN's eligibility for inclusion as a party to the arbitration under the provisions of the PK-BIT. Firstly, SZN is a distinct legal entity from the

[42] *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). ("***Parklane v. Shore****")*
[43] Moot Problem, ¶45.
[44] Peter R. Barnett; Schaffstein, Silja
[45] *Commissioner v. Celeste Textile Corp.,* 78 T.C. 781 (1982). ("***Commissioner v. Celeste****")*
[46] *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award (Sept. 28, 2007).
[47] Vladimir K. Pustogarov, *Privity of Contract: Doctrine and Practice* (Sweet & Maxwell 2014); D. M. Gordon, *The Principle of Separate Legal Personality* (Cambridge University Press 2007).

RESPONDENT, being one of a prominent company from Kenweed,[48] Secondly, SZN holds a significant 30% stake in the RESPONDENT's company and exercises control over its day-to-day operations.[49] This level of control is a strong indicator that SZN is considered to be a *de facto* controller. Thirdly, SZN, a startup with ambitious goals in the sustainable energy sector, is inherently equipped with assets and liabilities.[50] As an operational entity, it undoubtedly possesses assets such as intellectual property, equipment, or financial resources.[51] Conversely, liabilities, including debts, contractual obligations, or pending payments, are likely incurred in the pursuit of its business objectives.[52] While not explicitly stated, SZN's status as a company implies the existence of both assets and liabilities. Lastly, SZN's prominent role in RESPONDENT's operations is evident. Not only does SZN exert significant control over the company's management, but its leadership, particularly Nathan, has become synonymous with RESPONDENT's public image.[53] This suggests a deep integration between the two entities, raising questions about SZN's potential influence over RESPONDENT's business decisions and financial performance.

30. Although, arbitration under PK-BIT explicitly covers only the CLAIMANT and RESPONDENT, the absence of SZN significantly complicates the matter.[54] The core issues raised in the appeal directly implicated SZN's interests, yet the court has not rendered a definitive judgment on the merits of the appeal.[55] CLAIMANT's strategic decision to bypass the ongoing court proceedings in favor of arbitration introduces an additional layer of complexity to the joinder process, particularly in light of the potential inclusion of a accountable legal entity like SZN.[56] Thus, SZN's position enshrines the responsibility and control reflected as a privity to RESPONDENT.

iii. Same course of action suits is prevented

31. Present of previous court or arbitration decision typically prevents parties from re-litigating the same dispute. This is especially crucial to determine whether the claim shares common factual and legal elements.[57] In *Gu prípade,* a homeowner sued a construction company, regarding their work, but lost the case. Later, the homeowner tried to sue the second time alleging that the construction caused water damage. The court rejected the second lawsuit and stressed that although both claims are slightly different, it still stemmed from the same factual relation which is the construction work using *res judicata* function in preventing single cause of action into multiple proceedings.[58]

[48] Moot Problem, ¶7.
[49] Moot Problem, ¶21.
[50] Moot Problem, ¶7.
[51] Moot Problem, ¶¶ 7;21;23&42.
[52] Moot Problem, ¶¶ 7;21;23&42.
[53] Moot Problem, ¶¶ 21;23&42.
[54] Moor Problem, ¶¶ 46-57.
[55] Clarification, ¶3.
[56] Moot Problem, ¶¶ 21;42.
[57] BÄRTSCH PHILIPPE & PETTI ANGELINA M., Swiss Rules of International Arbitration Commentary (2d ed.) in ZUBERBÜHLER TOBIAS, MÜLLER CHRISTOPH & HABEGGER PHILIPP (Eds.), Zurich 2013, Article4. ("**PHILIPPE/ ANGELINA**").
[58] Hungarian Case Law Database (2010), *Gu prípade PK-62/2010*. ("***Gu prípade**"); Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award (Mar. 7, 2012).

32. To promote procedural efficiency,[59] the doctrine of *abuse of process*, grounded in public policy provided, parties shall resolve the dispute in a single proceeding.[60] *Abuse of process* precludes the admissibility of a case when a party initiates multiple proceedings based on identical claims the intent evades a prior unfavorable outcome rather than genuinely seek for a resolution.[61] Such conduct constitutes an improper use of legal process.[62] In *Phoenix Action, Ltd v. The Czech Republic*, the tribunal dismissed the claimant's claim on the grounds that the dispute was already subject to domestic court proceedings, and rendering to arbitration is inadmissible.[63]

33. By essence, requirements for an express intent to initiate arbitration must be made.[64] Such requirements shall then outline the general nature of the dispute on whether the competent jurisdiction is eligible for handling the case.[65] Upon the notice of arbitration, a certain period is reserved for parties to address potential issues arising or for parties to try and settle the dispute, by any means.[66]

34. In contrast, not only did CLAIMANT fail to resolve the case properly with the ongoing proceeding for appellant court.[67] It had skipped the reserved period for proper attempt of settlement, the conditions before reaching arbitration.[68] Bringing the claims to arbitration without properly assessing other competence authority to finish the proceedings outlined is faulty and may jeopardize the decision of the claims.

35. The same course of action in this case concerns CLAIMANT had failed to act, finding that the existing drainage system was poorly designed and engineered. The system cannot handle large amounts of water, leading to flooding when faced with heavy rain.[69] Even with prior incidents with floods and expert warnings,[70] CLAIMANT failed to appropriately enforce environmental regulations and take preventative measures against the foreseeable flash flood.[71] CLAIMANT initiates arbitration, alleging RESPONDENT breached of PK-BIT, referencing that CLAIMANT's own act of omission took place due to non-compliant of the EIA assessment that affected by unforeseeable circumstances.[72] CLAIMANT insisted on bringing in another proceeding dealing with environmental breaches overlap with the ongoing domestic court proceedings.[73] Thus, re-litigating these issues through arbitration, while the domestic court proceedings remain unresolved is unpractical and should be prevented.

B. The arbitration process is flowed without SZN as a party

[59] Landbrecht, Johannes. Teil-Sachentscheidungen und Ökonomie der Streitbeilegung 153-155 (2012). ("**Johannes**")
[60] Zuckerman, Adrian, *Zuckerman on Civil Procedure: Principles of Practice*, (2nd ed. 2006) para. 24.80. ("**Adrian**")
[61] Blackstone's Civil Practice 2009 (Stuart Sime and Derek French ed., 2008). para. 33.14.
[62] Johannes
[63] *Phoenix Action, Ltd v. The Czech Republic, ICSID Case No. ARB/06/5. ("**Phoenix v. Czech Republic**")*
[64] Born
[65] Lew/Mistelis/Kröll.
[66] Chernykh, Yuliya; Amicorum/Pryles.
[67] Clarification, ¶3.
[68] Moot Problem ¶¶57-58.
[69] Moot Problem, ¶¶ 41-41.4.
[70] Moot Problem, ¶¶ 41-41.4.
[71] Moot Problem, ¶¶ 41-41.4.
[72] Moot Problem, ¶¶ 29-33.
[73] Moot Problem, ¶57.

i. Procedural challenges may arise if the Tribunal decides to join SZN in the proceeding

36. CLAIMANT may argue that SZN is parent company and has control over day-to-day operation of RESPONDENT and apply Rule 9 AIAC Rules to request for the Tribunal to include additional parties, or joiners, in the proceeding.[74] Either of the original parties to the arbitration agreement can request this.[75] Including relevant parties can broaden the case and potentially lead to a single resolution, avoiding multiple proceedings.[76] However, adding a joinder to an ongoing arbitration can raise concerns about the equal treatment of all parties.[77] Although, AIAC emphasizes the importance of efficient and fair arbitration.[78] The Arbitral Panel must carefully consider when to allow a joinder during the proceedings.[79] Rule 6 of the AIAC Rules emphasizes efficiency and timeliness in arbitral proceedings. For the requesting party, arbitrating two disputes in a single proceeding, joinder is often more efficient. Nevertheless, for the opposing party, it can result in unnecessary delays as the joinder may raise additional issues.[80] In *Tshinvali v. Georgia*, the tribunal rejected the investor's attempt to claim on behalf of its shareholders. The tribunal emphasized that ICSID rules require each party to be explicitly named and that there's no provision allowing one party to represent others without their consent.

37. Here, the subsequent high court ruling against SZN underscores the critical nature of including all relevant parties in a legal dispute. This decision strongly implies that the CLAIMANT deliberately sought to avoid a comprehensive adjudication of the case, thereby undermining SZN's legitimate interests. Identified as an indispensable party to the high court proceedings, the CLAIMANT subsequently initiated an appeal.[81] Rather than patiently awaiting the outcome of this appellate process, the CLAIMANT abruptly severed ties with the court and initiated arbitration proceedings against RESPONDENT. Further, it is apparent that SZN prefers to resolve its dispute through the ongoing court proceedings.[82] CLAIMANT's attempt to vest away from these matters through arbitration appears to be a strategic maneuver to avoid the potential adverse consequences of the court proceedings.[83] Finally, the joinder of SZN would create significant procedural complexities. This would inevitably prolong the proceedings and increase costs for all parties. Thus, including SZN to the proceeding would affect both the financial incur as well as the delay of award being rendered.

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[74] AIAC 2023 Rule 9.
[75] UNCITRAL Arbitration, Article17(5).
[76] PUST JONAS, How to Join Third Parties to Arbitration Proceedings in: GIRSBERGER DANIEL/MÜLLER CHRISTOPH (Eds.), Selected Papers on International Arbitration, Vol. 5, Berne 2020. ("**Pust**"); Hanotiau; CHOI DONGDOO, Joinder in International Commercial Arbitration, 35 ARBITRATIONS INT'L 29 (2019) ("**Choi**").
[77] Pust
[78] AIAC 2023 Rule 6; Article3(2) PK-BIT
[79] BAMFORTH, RICHARD & MAIDMENT, KATERINA, "All join in" or not? How well does international arbitration cater for disputes involving multiple parties or related claims? ASA Bulletin, Vol. 27, Alphen aan den Rijn 2009, pp. 3-25. ("**Richard/ Katerina**")
[80] Andrea Meier, Chapter 18, Part I: Multi-party Arbitrations, in Manuel Arroyo ed., Arbitration in Switzerland: The Practitioner's Guide (2d ed. Kluwer Law International 2018) ("**Meier**"); Gary B. Born, International Commercial Arbitration (2d ed. 2014) Kluwer Law International 2595 ("**Born**"); Jermini, Cesare & Castiglioni, Luca, Recent Developments in the Practice of the SCAI Arbitration Court, in Müller, Christoph, Besson, Sébastien & Rigozzi, Antonio (eds.), New Developments in International Commercial Arbitration 2018 (Stämpfli 2018). ("**Cesare/Luca**")
[81] Moot Problem, ¶57.
[82] Moot Problem, ¶46.
[83] Moot Problem, ¶47.

II. Even if the Arbitral Panel found appropriate to hear the case, it shall not commence the arbitration as CLAIMANT did not comply with notice and request rules

38. The Arbitral Panel shall be initiated for its formation to the specific claims being made.[84] The scope of the Arbitral Tribunal Jurisdiction falls in what had been defined within the arbitration agreement. Meaning it has the digression to decline a claim which failed to follow through with the requirements outlined within the contract.[85]

39. To initiate arbitration under the Rules 2 AIAC, a party must submit a request for commencement of arbitration, including a copy of the arbitration agreement and confirmation of fulfilling all pre-conditions.[86] These requirements ensure that the arbitration aligns with the parties' agreed-upon dispute resolution method and that all necessary steps have been taken.[87] Additionally, the initiating party must pay the required filing fee. Failure to comply with these prerequisites may hinder the formation of the arbitral tribunal and potentially delay the proceedings. In any cases, the Arbitral Panel may request the missing information from the initiating party.[88]

40. In this case, undisputedly the first and last conditions for initiation of arbitration were fulfilled accordingly, as Parties agreement within Article 12 PK-BIT had expressly given the method of dispute resolution by which parties agreed upon. Furthermore, the necessary deposit fee and arbitration under AIAC was appropriately made.[89] However, CLAIMANT in this regard failed did not give confirmation that all the pre-arbitrations conditions are being appropriately followed through. Providing that negotiation was made forward whereases mediation as well as the given settlement period were not followed through. Thus, Arbitral Panel shall not commence for arbitration as not all the condition are unfulfilled.

ISSUE 3: RESPONDENT DID NOT BREACHED ITS PK-BIT OBLIGATION

49. Notwithstanding that PK-BIT terms were agreed upon by two states, RESPONDENT as a foreign investor in CLAIMANT's territory did not breach the obligation within. RESPONDENT has fulfilled all its obligation under the PK-BIT or lack thereof. In *Pulp mills* case, the Court follows the parties' argument in deciphering the treaties. In order to decide whether Uruguay breached its 1975 Statute, the BIT with Argentina, the ICJ is tasked with the interpretation of the BIT. The parties mutually understood that a treaties obligation consist of procedural obligation and substantive obligation.[90] The Court established that fulfillment of procedural requirements is not enough to fulfill the main obligations, nor that breaking procedural rules automatically means the main obligations are violated.[91]

50. Likewise, atop of declaring that RESPONDENT has not breached the PK-BIT, RESPONDENT request the Arbitral Panel to adjudge and declare that (**I**) RESPONDENT has not breached its procedural obligation nor (**II**) substantive obligation.

[84] Andreas/ Waibel.
[85] AIAC Rule 2023, Rule 2.
[86] AIAC, FAQs.
[87] Kurkela, Matti.
[88] AIAC, FAQs.
[89] Moot Problem ¶54.
[90] *Pulp Mills (Argentina v. Uruguay)*, International Court of Justice ("ICJ"), Judgment, 2010, ¶¶71-73.
[91] *Pulp Mills (Argentina v. Uruguay)*, International Court of Justice ("ICJ"), Judgment, 2010, ¶78.

I. RESPONDENT did not breach its procedural obligation

51. RESPONDENT has not breached its procedural obligation within the PK-BIT. In *Pulp Mills* case, the ICJ emphasized that procedural obligations did include the conduct of EIA.[92] Though, the interpretation of Article 60 Vienna Convention on Law of Treaties ("**VCLT**") does underline the importance of *inadimplenti non est adimplendum* principle.[93] Under the principle *inadimplenti non est adimplendum*, a party cannot be held responsible for a breach, if the obligation was not honored by the other party.[94] The High Court of Palmenna has since confirmed the allegation that CLAIMANT have neglected their duty to enforce environmental law and disregard preventative measures in ensuring a proper drainage system.[95] In this case, RESPONDENT has not breached its procedural obligation, in contrast, the lack thereof was caused by CLAIMANT's negligence in its due diligence. RESPONDENT request the Arbitral Panel to adjudge and declare that the procedural obligation has not been breached as (**A**) CLAIMANT did not allocate timeframe for RESPONDENT to conduct an EIA and therefore (**B**) this delay does not constitute a breach.

A. CLAIMANT did not allow for time to conduct EIA

52. CLAIMANT "*pushed for the materialization of the agreement*" before a proper EIA can be conducted despite the warning from RESPONDENT.[96] Under Principle 1 read together with Principle 2 of the United Nations Environmental Programme ("**UNEP**"), the principles forbid a State to authorize any activities that might impact the environment until after a comprehensive Environmental Impact Assessment ("**EIA**") has be conducted.[97] In *Pulp Mills* case, Judge ad hoc Dugard based in a separate opinion on ITLOS Seabed Chamber's advisory opinion on *Activities in the Area*. The Judge stated that the host state has the due diligence to prevent environmental harm and take precautionary measures to 'prevent environmental degradation' as it is the "*integral part*" of a host state's obligation.[98]

53. In our case, RESPONDENT has previously informed CLAIMANT that said action would hinder the implementation of standard practices needed to ensure an environmentally sound business.[99] CLAIMANT is aware that they have the due diligence to enforce the measure to conduct the EIA before the establishment of RESPONDENT's company. Yet, CLAIMANT

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[92] 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/; International Tribunal for the Law of the Sea (ITLOS) (Seabed Chamber), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)*, ITLOS Case No. 17, ¶¶131-147, 1 February 2011

[93] Oxford University Press, *The Vienna Conventions on the Law of Treaties: A Commentary (Vol II)*, 2011, p.1353, ¶3.

[94] Oxford University Press, *The Vienna Conventions on the Law of Treaties: A Commentary (Vol II)*, 2011, p.1353, ¶3; *International Law Commission*, 2590th Meeting, A/CN.4/SR.2590 (1999), Agenda item 3, ¶41. Available at: https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr2590.pdf.

[95] Moot Problem, ¶41.

[96] Moot Problem, ¶19.

[97] *Goals and Principles of Environmental Impact Assessment*, 16 Jan 1987, United Nations Environmental Programme ("**UNEP**"), Principle 1-2.

[98] 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/; International Tribunal for the Law of the Sea (ITLOS) (Seabed Chamber), *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)*, ITLOS Case No. 17, ¶¶131-147, 1 February 2011

[99] Moot Problem, ¶19.

disregarded this measure and ensure RESPONDENT can operate its company before a thorough EIA has been conducted. Thus, RESPONDENT has not breached its PK-BIT procedural obligation following the *inadimplenti non est adimplendum* principle as CLAIMANT has disregarded this obligation in the first place.

B. A 'delay' cannot be considered a breach of its PK-BIT obligation

54. Under Article 4(4) PK-BIT**, "***Any investor(s) carrying out such activity shall submit the report to the relevant ministry as soon as practically possible.*". Given that the term 'as soon as practically possible' applies in this case, it is still does not constitute a breach of PK-BIT obligation from RESPONDENT. In *Joseph v. Ukraine* case in front of the International Centre for Settlement of Investment Disputes ("**ICSID**"), Joseph filed a complaint claiming that Ukraine has violated their BIT with 'late performance' in issuing business license. After the interpretation of the term and analyzation of the situation, the tribunal came to conclusion that the delay was not enforced upon by Ukraine and therefore does not constitute a breach of obligation.

55. In comparison to our case, the term 'as soon as practically possible' should be interpreted in conjunction with CLAIMANT's understanding and verbal agreement that RESPONDENT's activity will affect the environment. Yet, CLAIMANT did rushed RESPONDENT to move forward with the plans despite clear warnings. RESPONDENT intent was shown with the insistent of a full EIA. As the haste from CLAIMANT, in unison with the lack of reliable expertise, a standardized EIA is not yet be able to be conducted. As circumstances has presented itself, the delay of the conduct occurs. Therefore, this delay should not constitute to a breach of PK-BIT procedural obligation from RESPONDENT.

II. RESPONDENT did not breach its substantive obligation

56. Even if the Arbitral Panel found that there is a breach of procedural obligation, RESPONDENT still have not breached its substantive obligation. As a breach of procedural obligation does not constitute a breach of substantive obligation.[100] In *Pulp Mills* case, it was declared that substantive obligation exists in order to prevent significant transboundary harm.[101] In the event of a substantive dispute, the determination hinges on whether the environmental damage can be attributed to the RESPONDENT.[102] Hence, RESPONDENT claims that it has not breached its substantive obligation that may have contributed to the damage of public health as (**A**) the flood is a natural occurrence that could not be predicted, (**B**) the definition of 'river' within the PK-BIT does not include flood, and (**C**) RESPONDENT does not have the sole responsibility for the leak.

A. The flood is a *force majeure*

[100] Stoyanova, Vladislava, "Procedural Positive Obligation to Investigate", in *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries, 2023, Oxford Academic, p.127. Available at:* https://doi.org/10.1093/oso/9780192888044.003.0007.

[101] 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/

[102] 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/

57. RESPONDENT should not be held liable for breach of substantive obligation as flood is a natural disaster that shall falls under the principle of *force majeure*. Even if, Article 5 PK-BIT stated "*[…] no investor(s) shall discharge, or cause […]*", UNFCCC Kyoto Protocol states that the event of a flood is an unforeseeable circumstance that shall relieve a party from its obligation without liability.[103]. In *Fukushima NPP* case, based on the Act on Compensation for Nuclear Damage ("**the Compensation Act**"), the operator concerned may be exempted from liability when "*[…] the damage is caused by a grave natural disaster of an exceptional character […]* ".[104]

58. Moreover, in 2017, the Maebashi district court of Japan ruled that the Japanese government should be held liable for the damages arises from the disaster as it is the state's negligence and lack of governance which contributed to the magnitude of the disaster.[105] In accordance to this, CLAIMANT is a state that is fully aware of its frequent heavy flooding and yet avoiding EIA to pushed for materialization of RESPONDENT's company while preaching for environmental stability.[106] CLAIMANT have also admitted that the heavy rain is an act of God of which the outcome could not have been predicted.[107] Moreover, CLAIMANT did not predict flooding risk at the location of the leak.[108] Therefore, RESPONDENT has no reason to believe that the natural disaster may occur. Thus, RESPONDENT should not be held liable for the occurrence of a *force majeure*.

B. The flood is not considered a 'river'

59. In the case that the Arbitral Panel finds that a flood is not considered a *force majeure*, RESPONDENT is submitting there is a lack of interpretation for '*flood*' and '*river*' within the PK-BIT. Under Article 5 PK-BIT, a breach of substantive obligation can only occur if there is a leak discharged into the '*river*'. This Article also strictly interprets the inclusion of '*river*' as "*[…] shall be deemed to include […]*". Under the UNFCCC Kyoto Protocol, *force majeure* event is defined as any event beyond reasonable control of a person, which includes act of God, including flood.[109]

60. In *United Policyholders v. State Farm Fire & Casualty Co.* case, the parties' dispute focused on the interpretation of the damage between flood and wind. The United State Court of Appeals

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[103] Regina Durr, Beyond Control and Without Fault or Negligence: Why Japan Should Be Excused from Meeting Its Kyoto Protocol Obligations, 67 Hastings L.J. 499 (2016), p.525.
Available at: https://repository.uchastings.edu/hastings_law_journal/vol67/iss2/5

[104] Ximena Vásquez-Maignan, "Fukushima: Liability and Compensation", in NEA News, Facts and Opinions, 2011, p.10; *Japanese Act for Compensation for Nuclear Damage*, 1 January 2010, Chapter 1, Section 3.

[105] *Japanese government held liable for first time for negligence in Fukushima* [online]. The Guardian [Published 17 March 2017]. Available at: https://www.theguardian.com/world/2017/mar/17/japanese-government-liable-negligence-fukushima-daiichi-nuclear-disaster#:~:text=Japanese%20government%20held%20liable%20for%20first%20time%20for%20negligence%20in%20Fukushima,-This%20article%20is&text=A%20court%20in%20Japan%20has,awarded%20significant%20damages%20to%20evacuees.

[106] Moot Problem, ¶¶11-19-20.

[107] Moot Problem, ¶43.

[108] Moot Problem, ¶34.

[109] U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Tenth Session, held in Lima from 1 to 14 December 2014*, UN Doc. FCCC/KP/CMP/2014/9/Add.I, 2 Feb 2015; Regina Durr, *Beyond Control and Without Fault or Negligence: Why Japan Should Be Excused from Meeting Its Kyoto Protocol Obligations*, Vol 67, Issue 2, Hasting L.J. 499, 2016, p.525.

found that the interpretation and construed of the rules has to strictly follow the contractual term.[110] In our case, since the term 'river' has been clarified and identified within the PK-BIT, unless the same circumstances applied, there will be no violation. Therefore, the flood would not be considered a river following the explicit interpretation of the PK-BIT. Thus, RESPONDENT has not violated PK-BIT obligation as flood is not considered a river.

C. RESPONDENT should not hold the sole responsibility for the leak

61. RESPONDENT, alone, should not be proven to solely bear the responsibility of the leak. Under Article 5(1) PK-BIT the expressed term is "*[…] no investor(s) shall discharge, or cause […]*". In *Gabčíkovo-Nagymaros* case, the court observed that environmental damage needed to be jointly managed by all party concerned.[111] In this case, CLAIMANT, as a State, have been seen by the High Court of Palmenna to be susceptible to natural disaster that affects the vulnerable drainage system yet maintained '*lackadaisical*' towards the enforcement of environmental law.[112]

62. Atop of CLAIMANT's negligence, RESPONDENT is also not the only factory within the vicinity of the alleged leak. Inside the vicinity of the alleged leak, there are two other factories that even if under maintenance were without supervision.[113] Among all the factories, it is an established fact that RESPONDENT's system indeed possesses automated monitoring and control system in their storage tanks to combat leak.[114] Furthermore there is no expertise that were able to inconclusively determine the main source of the leak.[115] As there is no evidence of the leak, nor is RESPONDENT factory the only one in the alleged leaking area, it cannot be concluded as the source of the leak. As RESPONDENT cannot be determine as the cause to have discharged any chemical, the provision of Article 5 PK-BIT would not be applicable. Thus, RESPONDENT cannot be the bear the sole responsibility of obligation under Article 5 PK-BIT.

ISSUE 4: CLAIMANT IS NOT ENTITLED TO ANY AWARD OF DECLARATION OR ANY DAMAGES

63. CLAIMANT is arguing that they bear no responsibility.[116] Furthermore, CLAIMANT seeks declaratory reliefs and damages by denouncing RESPONDENT on omission and failure to abide by the PK-BIT.[117] On the contrary, RESPONDENT claims that CLAIMANT is not entitled to any award of damages as (**I**) CLAIMANT has no legal rights to a full compensation nor (**II**) should RESPONDENT bear the sole responsibility for environmental claims.

I. CLAIMANT is not entitled to a full compensation

[110] *United Policyholders v. State Farm Fire & Casualty Co.*, United States Court of Appeals, Eight Circuit, Decided, 2023, PArticleV. Available at: https://caselaw.findlaw.com/court/us-8th-circuit/2188093.html.
[111] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p.78, ¶¶140-141.
[112] Moot Problem, ¶41.
[113] Clarification Number one, ¶10.
[114] Moot Problem, ¶34.
[115] Moot Problem, ¶39.
[116] Moot Problem, ¶43.
[117] Moot Problem, ¶55.

A. REPONDENT has the right to invoke the impossibility of performing a treaty under Article 61 VCLT

64. The flood is a result of a *force majeure* which is the heavy rainfall that has befall the area of the alleged leak. As flood cannot be a result of RESPONDENT's infliction, the alleged leak cannot be place under the responsibility of RESPONDENT. Article 61 VCLT also acknowledge the effects of *force majeure* to a treaty's obligation.[118] The event can apply to exclude the wrongfulness of a state contrary to its treaty obligation.[119]

65. In *Gabčíkovo-Nagymaros* case, the principle of impossibility to perform reflected in Article 61 VCLT and was invoked as a declaratory of customary law.[120] The ICJ and ILC Second Report also suggested the possibility of excuse from treaty's obligation under the case of a *force majeure*.[121] Even if the Arbitral Panel were to find that the alleged leak were caused by RESPONDENT, the effect of *force majeure* under VCLT would barred RESPONDENT from having responsibility under PK-BIT nonetheless.

B. Article 7.1.7 UNIDROIT would excuse RESPONDENT's liability

66. RESPONDENT should not be held liable for the damages of the flood even though responsibility of a leak is an obligation under PK-BIT. Under Article 7.1.7(2), the act of non-performance can be excused from liability in damages given that the non-performance was due to an impediment beyond control.[122] In *ICC Case No.8817* in 1997, Claimant were not able to fulfill their obligation due to a flood. The tribunal sees the flood as a *force majeure* and an impediment beyond control that shall excuse Respondent from its liability.[123] In our case, RESPONDENT was not able to fulfill its obligation under the same circumstances, which is the unforeseen flood. Likewise, even if CLAIMANT raised obligation under UNIDROIT Principle, RESPONDENT will still not be liable to pay for the damages. Hence, RESPONDENT can be excused from liability following Article 7.1.7 UNIDROIT Principles.

II. Even if the Arbitral Panel find otherwise, RESPONDENT should not be solely held liable for environmental claims

67. Even if RESPONDENT has a certain liability for the claims, it is not the only one who should be held liable. The protection of a bilateral investment agreement should balance the interest of the investors as much as a State's environmental concern.[124] RESPONDENT request the Arbitral Panel to consider the balance of compensation base on (**A**) State's responsibility in environmental protection and (**B**) the principle of contributory negligence.

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[118] VCLT (1969), Article61; Oxford University Press, *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol.II, 2011, p.1384.
[119] Oxford University Press, *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol.II, 2011, p.1384.
[120] Oxford University Press, *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol.II, 2011, p.1385.
[121] Oxford University Press, *The Vienna Conventions on the Law of Treaties: A Commentary*, Vol.II, 2011, p.1385.
[122] *UNIDROIT Principles of International Commercial Contracts*, 2016, Article 7.1.7; International Institute for the Unification of Private Law (UNIDROIT), *Commentary on UNIDROIT Principles*, 2016, p.241.
[123] *Claimant v. Respondent (ICC Case No.8817)*, International Court of Arbitration, 1997, p.
[124] 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, p.4.

A. State has the responsibility to protect the environment

68. A State has the most responsibility and, in equivalent, the most liability in the issuance of a company that has the potential harm to the environment. In *Awas Tigni v. Nicaragua* case, State has the sole liability to pay compensation for damage to the environment as the court found that the State has the obligation to protect the environment of the country and the approval of the private company to conduct business.[125] While fully aware that the RESPONDENT's company has the potential to harm the environment, CLAIMANT pushed for the establishment of the company while neglecting the necessary obligation of EIA.[126] Moreover, as a State that is susceptible to natural disasters, CLAIMANT also neglects the importance of a properly well designed drainage system for its country.[127] Thus, the most liable for the alleged leak is CLAIMANT.

B. RESPONDENT circumstances are the result of contributory negligence from CLAIMANT

69. Even if the Arbitral Panel finds that RESPONDENT is at fault, this fault has to be traced back to the contributory negligence from CLAIMANT. The principle of contributory negligence is endorsed under Article 39 ARSIWA which stated that "In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligence action […]".128 A State holds a certain liability when it comes to environmental protection, public interests, and foreign investment, and shall therefore not be entitled to a full compensation but a compensation base on liability.129 A partial compensation is the way to balance the correct proportion to compensation.130 In Yukio v. Russia case in 2014, the Tribunal award partial compensation from Russia to the private investor. The Tribunal sound their judgement base on the fact that Russia have contributed to the downfall of the private investor and shall therefore also be liable for the damage that entails.131 In the present case, RESPONDENT and CLAIMANT both should be held liable for the recovery of the damages. In the case that the Arbitral Panel is holding RESPONDENT liable, the compensation should be shared with CLAIMANT and vice versa.

[125] THE CASE OF THE MAYAGNA (SUMO) AWAS TINGNI COMMUNITY V. NICARAGUA, INTER-AMERICAN COURT OF HUMAN RIGHTS, JUDGMENT, 31 AUG 2001, ¶167;
[126] Moot Problem, ¶¶19&20
[127] Moot Problem, ¶¶11&41
[128] *Responsibility of States for Internationally Wrongful Acts*, 2001, Article 29.
[129] 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, p.4.
[130] 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, p.5.
[131] *Yukos Universal Limited v. Russia*, Permanent Court of Arbitration, Case No. AA 227, Award, 2014, ¶¶1580-1585.

REQUEST FOR RELIEF

In light of the above, RESPONDENT respectfully requests the Arbitral Panel to declare as follows:

1. Dismissal of the arbitration proceedings initiated by CLAIMANT due to their failure to comply with the mandatory pre-arbitration steps as stipulated in Article 12 of PK-BIT.

2. RESPONDENT does not breach any obligations under PK-BIT.

3. RESPONDENT shall not be liable for damages that harmed public health.

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